CYCLOPEDIA

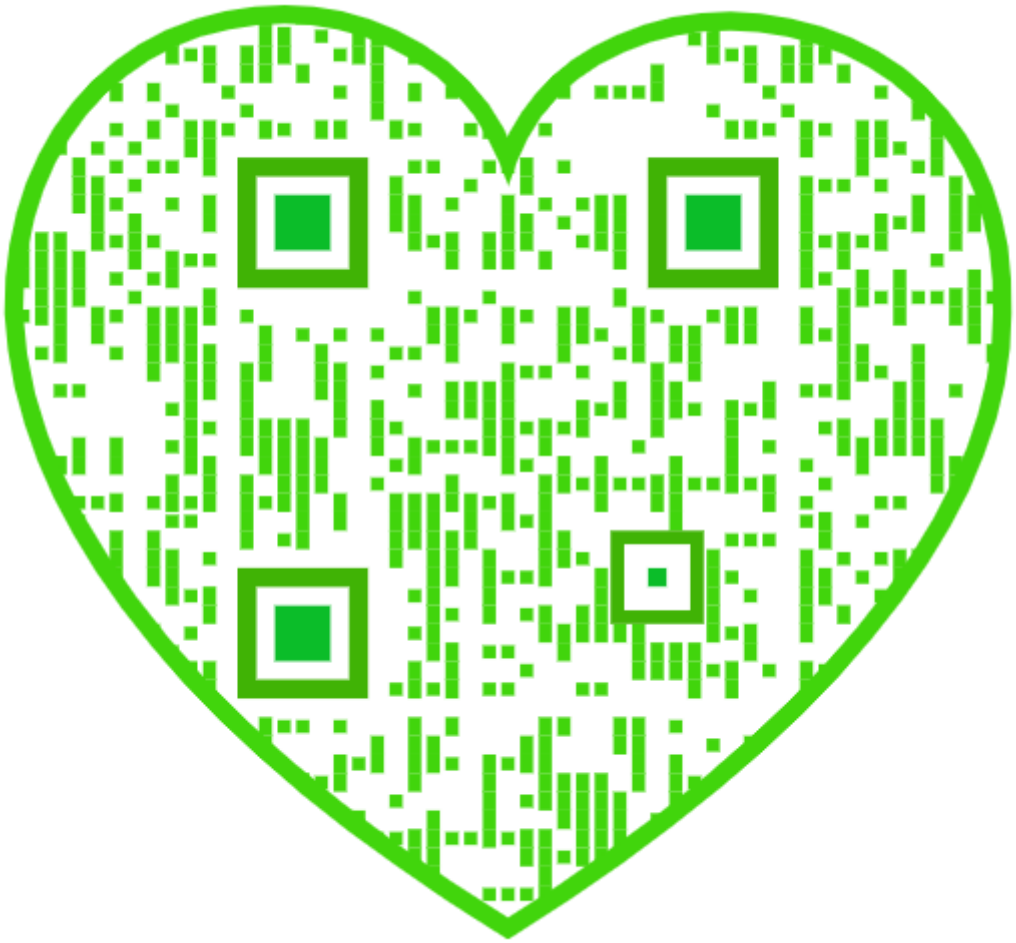
OF

LAW AND PROCEDURE

WILLIAM MACK, LL.D.
EDITOR-IN-CHIEF

VOLUME XXX

NEW YORK
THE AMERICAN LAW BOOK COMPANY
LONDON: BUTTERWORTH & CO., 12 BELL YARD
1908



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William Mack.

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PARTY-WALLS, 770	FRANK W. JONES
PATENTS, 803	CHARLES HOLLAND DUELL
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PAWNBROKERS, 1163	ERNEST G. CHILTON
PAYMENT, 1173	CLARK A. NICHOLS
PENALTIES, 1331	GEORGE SMITH HOLMESTED
PENSIONS, 1366	ERNEST G. CHILTON
PENT ROADS, 1379	ERNEST G. CHILTON
PEONAGE, 1382	LOUIS LOUGEE HAMMON
PERJURY, 1395	J. J. MACLAREN
PERPETUITIES, 1464	EDWARD H. WARREN
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CITE THIS VOLUME

30 Cyc.

FOLLOWED BY PAGE.

PARTIES

By Charles M. Hepburn
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I. Who May Be a Party Plaintiff, 21
A. *In General,* 21
B. *The Requisites Specifically Considered,* 21
1. *Requisite of Legal Entity,* 21
a. *Statement of Rule,* 21
b. *Different Forms of Legal Entity,* 21
(I) *In General,* 21
(II) *Natural Person as Plaintiff,* 22
(A) *Rule in General,* 22
(B) *Exception to Rule; Civil Death,* 22
(1) *In General,* 22
(2) *Convict as Plaintiff,* 22
(a) *Rule at Common Law,* 22
(b) *Civil Death as a Statutory Disability,* 23
(3) *Extraterritorial Effect,* 23
(III) *Artificial Person as Plaintiff,* 23
(A) *In General,* 23
(1) *Power to Sue in Corporate Name,* 23
(2) *No Power to Sue in Names of Individuals Composing,* 23
(3) *When Power to Appear as Plaintiff Is Lacking,* 23
(B) *Foreign Corporation as Plaintiff,* 24
(C) *Corporation as Plaintiff After Expiration of Charter,* 24
(1) *At Common Law,* 24
(2) *By Statute,* 25
(D) *De Facto Corporation as Plaintiff,* 25
(1) *In General,* 25
(2) *Limits of the Doctrine,* 25
(E) *Body Politic as Plaintiff,* 25
(IV) *Quasi-Artificial Person as Plaintiff,* 26
(A) *Origin of Doctrine,* 26
(B) *Scope of Doctrine,* 26
(1) *Partnerships Generally,* 26
(2) *Partnerships of a Designated Class,* 26
(3) *Unincorporated Clubs and Societies,* 27
c. *Effect if Plaintiff Is Without a Legal Entity,* 27
(I) *Legal Entity and Legal Capacity Distinguished,* 27
(II) *No Entity, No Action,* 27
(III) *Whether Defect Can Be Remedied by Amendment,* 27
(A) *In General,* 27
(B) *Misnomer and Lack of Legal Entity,* 28
(IV) *Fictitious Plaintiff,* 28
d. *Typical Instances of Lack of Legal Entity,* 28
(I) *In General,* 28

* Author of "Historical Development of Code Pleading in America and England;" "A Selection of Cases and Statutes on the Principles of Code Pleading;" and "Entry, Writ of," 15 Cyc. 1057.

(II) *Action in Trade-Name, or in Name of a Mere Business Interest*, 28
(III) *Action in Name of an Unincorporated Association Not Authorized by Statute to Sue*, 29
(IV) *Action in Name of an Artificial or Quasi-Artificial Person Attempted to Be Formed For an Unlawful Purpose*, 29
2. *Requisite of Remedial Interest*, 30
a. *Statement of Rule*, 30
b. *Nature of Remedial Interest*, 30
(I) *Distinguished From Beneficial Interest*, 30
(II) *Right of Action Essential*, 30
(III) *Right of Action and Cause of Action*, 31
(IV) *Right of Action and Capacity to Sue*, 31
(V) *Right of Action and Defect of Parties*, 31
c. *Effect if Remedial Interest Is Lacking*, 31
d. *Remedial Interest Under Different Systems of Procedure*, 32
(I) *In General*, 32
(II) *In Common-Law Pleading*, 32
(III) *In Equity Pleading*, 32
(IV) *In Code Pleading*, 32
e. *Different Aspects of Remedial Interest*, 33
(I) *Legal Owner as Plaintiff*, 33
(A) *At Common Law*, 33
(1) *In General*, 33
(a) *The Test*, 33
(b) *Legal Title Sufficient*, 33
(c) *Legal Title Necessary*, 33
(2) *In Case of a Separation Between Legal and Beneficial Ownership*, 34
(3) *In Case of Special Property*, 34
(B) *In Equity Pleading*, 34
(1) *In General*, 34
(2) *Legal Owner Suing With Beneficiary*, 35
(3) *Legal Owner Suing Alone in Equity*, 35
(4) *Legal Owner as a Real Party in Equity*, 35
(C) *In Code Pleading*, 36
(II) *Nominal and Use Plaintiffs*, 36
(A) *The Rule at Common Law*, 36
(B) *Its Evasion Through Device of Use Plaintiff*, 36
(C) *Nature and Aim of Device*, 37
(1) *Its Main Purpose*, 37
(2) *Designation of Beneficial Owner*, 37
(D) *Nominal Plaintiff as a Party*, 37
(1) *In General*, 37
(2) *As Respects the Record*, 37
(3) *Rights of a Nominal Plaintiff*, 38
(E) *Use Plaintiff as a Party*, 38
(1) *In General*, 38
(2) *Beneficial Owner as Master of the Suit*, 39
(a) *Use of Legal Owner's Name*, 39
(b) *Control of the Suit*, 40

(c) *No Discharge by Nominal Plaintiff*, 40
(3) *Rights of Defendant*, 41
(a) *In General*, 41
(b) *His Rights Against Beneficial Owner*, 41
(F) *Partial Survival of Device in Code Pleading*, 41
(1) *In General*, 41
(2) *Grantee Suing in Name of Grantor*, 42
(3) *When Statutory Rule Is Limited*, 42
(4) *In Assignments Pendente Lite*, 43
(a) *In General*, 43
(b) *In Case of Original Plaintiff's Death*, 44
(c) *Control of Representative Actions*, 44
(III) *The Real Party in Interest*, 44
(A) *In General*, 44
(B) *When Both Legal Title and Beneficial Ownership Are in One Person*, 45
(C) *Beneficial Ownership as a Sufficient Test of Remedial Interest*, 45
(1) *In General*, 45
(2) *The Equitable Assignee of a Chose in Action as Plaintiff*, 45
(a) *In Common-Law Pleading*, 45
(b) *In Equity Pleading*, 46
aa. *In General*, 46
bb. *Special Circumstances Necessary*, 46
(c) *In Code Pleading*, 47
aa. *Wide Scope of the Principle*, 47
bb. *Imperative Nature of the Rule*, 48
cc. *Assignor Not a Necessary Co-Plaintiff*, 49
dd. *Effect if Assignor Lacks Capacity to Sue*, 50
ee. *Assignment Must Be Valid as Against Defendant*, 50
(3) *Assignor Retaining a Beneficial Ownership as Plaintiff*, 51
(a) *In General*, 51
(b) *Application of the Principle*, 51
(4) *Undisclosed Principal as Plaintiff*, 52
(a) *In General*, 52
(b) *Rule in Common-Law Procedure*, 53
(c) *Limits of Common-Law Rule*, 56
aa. *In General*, 56
bb. *When Agent Appeared as a Party to a Contract Under Seal*, 56
cc. *When Agent Was Party to a Bill of Exchange*, 57

(d) *Limits of Rule in Code Pleading*, 57
aa. *In General*, 57
bb. *When Agent Appears as Party to a Contract Under Seal*, 57
cc. *When Agent Appears as Party to a Negotiable Instrument*, 58
(5) *Third Person Beneficiary as Plaintiff*, 59
(a) *In General*, 59
(b) *Rule at Common Law*, 60
aa. *In Actions For Breach of Covenant*, 60
bb. *In Actions For Breach of Parol Contract*, 60
cc. *Anomalous Doctrine in Assumpsit*, 60
dd. *Later Rule of the English Common Law*, 63
(c) *Survival of Later Common-Law Rule in England*, 63
(d) *Survival of Later Common-Law Rule in a Few American States*, 64
(e) *Prevailing Rule in America*, 65
aa. *In General*, 65
bb. *Twofold Nature of Doctrine*, 66
(6) *Creditor of Promisee as Plaintiff*, 67
(a) *In General*, 67
(b) *Not a Beneficiary*, 67
(c) *Basis of Creditor's Right as Plaintiff*, 68
(d) *Distinguished From Sole Beneficiary*, 68
(e) *Authority of Rule*, 69
(f) *Rule as a Device of Procedure*, 73
aa. *In General*, 73
bb. *In Actions at Common Law*, 74
cc. *In Actions in Equity and Under the Codes*, 74
(g) *Joining the Promisee as a Party*, 74
(h) *Promisee's Obligation to Third Person*, 75
(7) *Beneficial Owner in Other Respects as Plaintiff*, 76
(D) *Whether Legal Title, Without Beneficial Ownership, Is a Sufficient Test of Real Party in Interest*, 76
(1) *In General*, 76
(2) *Rule in Common-Law Pleading*, 77
(3) *Rule in Equity Pleading*, 77
(4) *Conflicting Rules in Code Pleading*, 77

(a) *Beneficial Ownership Necessary*, 77
(b) *Legal Title Sufficient*, 78
(E) *Double Aspect of Real Party in Interest*, 82
(F) *Final Test of Real Party in Interest*, 83
(1) *As Respects Right of Defendant*, 83
(2) *As Respects Right of Trial Court*, 84
(IV) *Trustee of an Express Trust*, 85
(A) *In General*, 85
(B) *Meaning of "Trustee of an Express Trust,"* 85
(1) *Its Original Meaning*, 85
(2) *Its Extension by Judicial Construction*, 85
(3) *Its Extension by Statute*, 85
(C) *Nature and Scope of Enactment*, 86
(1) *Its Permissive Character*, 86
(2) *Its Wide Scope*, 86
(a) *In General*, 86
(b) *Typical Instances*, 86
(D) *Test of a "Trustee of an Express Trust,"* 89
(1) *In General*, 89
(2) *A Legal Title Essential*, 90
(3) *Whether an "Express Trust" Must Be in Writing*, 91
(E) *"Trustee of an Express Trust" and "Real Party in Interest,"* 92
(V) *Executor or Administrator*, 93
(A) *At Common Law*, 93
(1) *In General*, 93
(2) *Representative Character*, 93
(B) *In Code Pleading*, 93
(1) *In General*, 93
(2) *Remedial Interest of Beneficiary*, 94
(VI) *Person Expressly Authorized by Statute*, 94
(A) *In General*, 94
(B) *Distinguishing Characteristic*, 95
(VII) *Guardian as Plaintiff*, 95
(A) *At Common Law*, 95
(B) *Under the Codes*, 95
3. *Requisite of Capacity to Sue*, 96
a. *Statement of Rule*, 96
b. *What Meant by Capacity to Sue*, 96
(I) *In General*, 96
(II) *Distinguished From Right of Action*, 96
(III) *Typical Instances*, 97
c. *When Rule Applies*, 98

II. WHO MAY BE A PARTY DEFENDANT, 98

A. *In General*, 98
B. *Requisites Specifically Considered*, 98
1. *Requisite of Legal Entity*, 98
a. *At Common Law*, 98
(I) *Distinguished From Legal Entity of Plaintiff*, 98
(II) *Typical Instances*, 99
b. *Statutory Modifications*, 100
(I) *In General*, 100
(II) *Express*, 101
(III) *Implied*, 102

2. *Infringement of Plaintiff's Right*, 102
a. *Nature of Rule*, 102
b. *Applications of Rule*, 103
(I) *In Actions on Contract*, 103
(II) *In Actions For Tort*, 103
3. *Amenable to Process of Trial Court*, 104
a. *Statement of Rule*, 104
b. *What Persons Are Exempt*, 104
c. *Consent to Process*, 104

III. JOINDER OF PLAINTIFFS, 105

A. *Remedial Interest*, 105
B. *In Common-Law Pleading*, 106
1. *Test of Joint or Several Interest*, 106
a. *In General*, 106
b. *In Assignments by Joint Owners*, 107
c. *Device When a Joint Owner Refuses to Join*, 107
d. *Severance of a Joint Interest*, 107
2. *In Actions Ex Contractu*, 107
a. *Persons With Whom Contract Was Made*, 107
(I) *In General*, 107
(II) *Special Features*, 108
b. *Characteristic of "Person With Whom Contract Was Made,"* 109
(I) *In Contracts Under Seal*, 109
(II) *In Simple Contracts*, 109
c. *Contracts Joint in Form, Several in Effect*, 110
d. *Contracts Several in Form, Joint in Effect*, 111
3. *In Actions Ex Delicto*, 111
a. *Flexibility of Common-Law Rule*, 111
b. *Tort to a Joint Interest*, 112
c. *Tort to a Several Interest With Joint Damage*, 112
d. *Tort to a Several Interest With Separate Damage*, 113
C. *In Code Pleading*, 113
1. *Terms of the Statute*, 113
2. *Scope of Code Provision*, 113
a. *When Plaintiffs Are United in Interest*, 113
b. *When Plaintiffs Have Separate Interests*, 114
(I) *Limited Liberty of Joining*, 114
(II) *Plaintiffs With Separate Rights and no Community of Interest*, 114
(III) *Plaintiffs With Separate Rights But With a Community of Interest*, 115
(A) *When Community of Interest Is Only in the Subject of Action*, 115
(B) *When Community of Interest Is in Both Subject of Action and Relief Demanded*, 115
(1) *Joinder Permitted*, 115
(2) *Origin of the Enactment*, 115
(3) *Its Permissive Character*, 116
(4) *Test of Permission*, 117
(5) *Extent of Permissive Joinder*, 117
(a) *In General*, 117
(b) *Includes Both Legal and Equitable Causes*, 117

(c) *Includes Interest of Different Degrees and Kinds*, 117
aa. *In General*, 117
bb. *Legal and Equitable Plaintiffs in One Action*, 118
cc. *Plaintiffs With Several and Distinct Ownerships*, 119
(c) *Community and Severalty of Interest*, 119

IV. JOINDER OF DEFENDANTS, 120

A. *General Principles*, 120
1. *Joinder and Substantive Obligation*, 120
2. *Entirety of Obligation in Contracts and in Torts*, 121
a. *Joinder in an Action Ex Contractu*, 121
(I) *In General*, 121
(II) *On Joint Contract*, 121
(III) *On Several Contract*, 121
(IV) *On Joint and Several Contract*, 121
b. *Joinder in an Action Ex Delicto*, 121
(I) *In General*, 121
(II) *On a Joint Tort*, 122
(III) *On a Several Tort*, 122
B. *Special Features*, 122
1. *Adverse Interests*, 122
a. *Rule at Common Law*, 122
(I) *Its Statement*, 122
(II) *Presumption From Identity of Name*, 123
(III) *Limits of Rule*, 124
b. *Doctrine Under the Codes*, 124
(I) *Statement of Rule*, 124
(II) *Defendants Without Interests Adverse to Plaintiff*, 124
(A) *Joint Interests*, 124
(B) *Plaintiff's Assignor as a Co-Defendant*, 125
2. *Responsibility of Interest*, 125
3. *Community of Responsibility*, 125
a. *Historic Principle*, 125
b. *In Common-Law Procedure*, 126
c. *In Code Pleading*, 126
(I) *Terms of the Codes*, 126
(II) *Leading Purpose of the Codes*, 127
(III) *Influence of Historic Principle*, 127
(IV) *Tendency to a Readier Joinder*, 127
(A) *Under American Codes*, 127
(B) *Under English Judicature Acts*, 128
(V) *Limits of Doctrine*, 129
4. *Joinder in the Alternative*, 131
a. *General Rule*, 131
b. *Statutory Innovation*, 131
c. *Limits of Innovation*, 132

V. PARTIES BY CLASS REPRESENTATION, 132

A. *Origin of the Doctrine*, 132
B. *Terms of Statutory Exception*, 133
C. *Nature and Purpose*, 133
1. *In General*, 133
2. *As a Cumulative Privilege*, 133

D. *Extent of Statutory Exception*, 134
1. *To Legal as Well as Equitable Causes*, 134
2. *Whether to Joint Interests*, 134
3. *Different Classes of Cases*, 134
a. *In General*, 134
b. "*Common or General Interest*," 135
(I) *Controlling Feature*, 135
(II) *Range of Application*, 135
c. *Impracticable Number of Parties*, 136
(I) *Controlling Feature*, 136
(II) *What Amounts to an Impracticable Number*, 136
(III) *Whether Community of Interest Is Necessary*, 137
(IV) *Nature of the Community of Interest*, 137
E. *Limits of Exception*, 137
1. *Interests Several Without Community*, 137
2. *Interest in Legal Question*, 137
3. *Test of Joinder*, 138
F. *Control of Suit and Responsibility*, 138
1. *Rights of Plaintiff*, 138
a. *Inchoate Parties*, 138
b. *Master of the Suit*, 139
c. *Limits of Sole Control*, 139
(I) *Effect of Intervention*, 139
(II) *Effect of a Judgment*, 139
2. *Responsibility of Defendants by Representation*, 140

VI. DEFECTS, OBJECTIONS, AND AMENDMENTS, 140

A. *Want of Capacity to Sue*, 140
B. *Misnomer*, 140
C. *Misjoinder or Non-Joinder of Parties*, 140
1. *Persons Entitled to Object*, 140
a. *As to Defendants*, 140
b. *As to Plaintiffs*, 141
2. *Action of Court Sua Sponte*, 141
3. *Operation and Effect*, 141
a. *At Common Law*, 141
(I) *Actions on Contract*, 141
(A) *Plaintiffs*, 141
(B) *Defendants*, 142
(II) *Actions of Tort*, 142
(A) *Plaintiffs*, 142
(B) *Defendants*, 143
b. *Under the Codes*, 143
D. *Amendments*, 144
E. *Waiver*, 144

CROSS-REFERENCES

For Matters Relating to:

Abatement of Action by Reason of:
Defect of Parties, see PLEADING.
Incapacity of Party to Sue or Be Sued, see PLEADING.
Misjoinder of Party, see PLEADING.
Misnomer of Party, see PLEADING.
Non-Joinder of Party, see PLEADING.
Adoption of State Practice by Federal Court, see COURTS.
Amicus Curiæ, see AMICUS CURIÆ.
Arrest of Judgment, see JUDGMENTS.
Dismissal or Nonsuit, see DISMISSAL AND NONSUIT.

For Matters Relating to — (*continued*)
Limitation of Action Affected by:
Amendment as to Party, see LIMITATIONS OF ACTIONS.
Bringing in New Party, see LIMITATIONS OF ACTIONS.
Defect in Parties, see LIMITATIONS OF ACTIONS.
Dismissal or Nonsuit For Defect in Parties, see LIMITATIONS OF ACTIONS.
Dropping Party, see LIMITATIONS OF ACTIONS.
Intervention, see LIMITATIONS OF ACTIONS.
Substitution of Party, see LIMITATIONS OF ACTIONS.
New Party, see PLEADING.
Party:
Absence or Disability of, as Ground For:
Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES.
New Trial, see NEW TRIAL.
Opening or Vacating Judgment, see JUDGMENTS.
Action By or Against:
Absentee, see ABSENTEES.
Adjoining Landowner, see ADJOINING LANDOWNERS.
Alien, see ALIENS.
Ambassador or Consul, see AMBASSADORS AND CONSULS.
Annuitant, see ANNUITIES.
Apprentice, see APPRENTICES.
Architect, see BUILDERS AND ARCHITECTS.
Assignee:
In General, see ASSIGNMENTS.
For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
In Bankruptcy, see BANKRUPTCY.
In Insolvency, see INSOLVENCY.
Association, see ASSOCIATIONS.
Attorney-General, see ATTORNEY-GENERAL.
Attorney or Client, see ATTORNEY AND CLIENT.
Auctioneer, see AUCTIONS AND AUCTIONEERS.
Automobilist, see MOTOR VEHICLES.
Bailor or Bailee, see BAILMENTS.
Bank, see BANKS AND BANKING.
Bank Officer, see BANKS AND BANKING.
Bankrupt, see BANKRUPTCY.
Beneficial Association, see MUTUAL BENEFIT INSURANCE.
Board of Health, see HEALTH.
Broker, see FACTORS AND BROKERS.
Builder, see BUILDERS AND ARCHITECTS.
Building and Loan Association, see BUILDING AND LOAN SOCIETIES.
Buyer, see SALES.
Carrier, see CARRIERS.
Cestui Que Trust, see TRUSTS.
Club, see CLUBS.
College or University, see COLLEGES AND UNIVERSITIES.
Conspirator, see CONSPIRACY.
Constable, see SHERIFFS AND CONSTABLES.
Contemnor, see CONTEMPT.
Convict, see CONVICTS.
Corporation, see CORPORATIONS; FOREIGN CORPORATIONS.
County, see COUNTIES.
Creditor:
Against Principal or Surety, see PRINCIPAL AND SURETY.
In Aid of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

For Matters Relating to — (*continued*)
Party — (*continued*)
Action By or Against — (*continued*)
Dentist, see PHYSICIANS AND SURGEONS.
Depositary, see BANKS AND BANKING; DEPOSITARIES.
Depositor, see BANKS AND BANKING; DEPOSITARIES.
Devisee, see WILLS.
Director, see CORPORATIONS.
Distributee, see DESCENT AND DISTRIBUTION.
District of Columbia, see DISTRICT OF COLUMBIA.
Druggist, see DRUGGISTS.
Exchange, see EXCHANGES.
Executor or Administrator For, see EXECUTORS AND ADMINISTRATORS.
Factor, see FACTORS AND BROKERS.
Firm, see PARTNERSHIP.
Guarantor, see GUARANTY.
Guardian:
Ad Litem, see INFANTS; INSANE PERSONS.
Of Drunkard, see DRUNKARDS.
Of Ward, see GUARDIAN AND WARD.
Heir, see DESCENT AND DISTRIBUTION.
Hirer, see ANIMALS; BAILMENTS; LIVERY-STABLE KEEPERS.
Husband and Wife, see HUSBAND AND WIFE.
Indemnitor, see INDEMNITY.
Indian, see INDIANS.
Infant, see INFANTS.
Insane Person:
In General, see INSANE PERSONS.
By Guardian Ad Litem, see INSANE PERSONS.
Joint Adventurer, see JOINT ADVENTURES.
Joint Stock Company, see JOINT STOCK COMPANIES.
Joint Tenant, see JOINT TENANCY.
Labor Union, see LABOR UNIONS.
Legatee, see WILLS.
Life-Tenant, see ESTATES.
Limited Partnership, see PARTNERSHIP.
Master of Vessels see SHIPPING.
Master or Servant, see MASTER AND SERVANT.
Mortgagor or Mortgagee, see CHATTEL MORTGAGES; MORTGAGES.
Municipal Corporation, see MUNICIPAL CORPORATIONS.
Owner of:
Animal, see ANIMALS.
Motor Vehicle, see MOTOR VEHICLES.
Parent or Child, see PARENT AND CHILD.
Partner, see PARTNERSHIP.
Partnership, see PARTNERSHIP.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Pledger or Pledgee, see PAWNBROKERS; PLEDGES.
Principal or Agent, see PRINCIPAL AND AGENT.
Principal or Surety, see PRINCIPAL AND SURETY.
Prison Officer, see PRISONS.
Proprietor of Common Lands, see COMMON LANDS.
Prosecuting Attorney, see PROSECUTING ATTORNEYS.
Public Officer, see OFFICERS.
Purchaser to Enforce Debt of Intestate, see DESCENT AND DISTRIBUTION.
Railroad, see RAILROADS.
Receiptor, see ATTACHMENT.

For Matters Relating to — (*continued*)
Party — (*continued*)
Action By or Against — (*continued*)
Receiver, see RECEIVERS.
Religious Society, see RELIGIOUS SOCIETIES.
Remainder-Man, see ESTATES.
Reversioner, see ESTATES.
Riparian Owner, see WATERS.
School-District, see SCHOOLS AND SCHOOL-DISTRICTS.
Seaman, see SEAMEN.
Seller, see SALES.
Sheriff, see SHERIFFS AND CONSTABLES.
Spendthrift, see SPENDTHRIFTS.
State, see STATES.
State Officer, see STATES.
Stock-Holder, see CORPORATIONS.
Street Railroad, see STREET RAILROADS.
Surety, see PRINCIPAL AND SURETY.
Surviving Spouse, see DESCENT AND DISTRIBUTION.
Tax-Collector, see TAXATION.
Taxpayer, see MUNICIPAL CORPORATIONS; TAXATION.
Teacher, see SCHOOLS AND SCHOOL-DISTRICTS.
Telegraph or Telephone Company, see TELEGRAPHS AND TELEPHONES.
Tenant by Curtesy, see CURTESY.
Tenant in Common, see TENANCY IN COMMON.
Territory, see TERRITORIES.
Toll-Road Company, see TOLL-ROADS.
Town, see TOWNS.
Trade Union, see LABOR UNIONS.
Trustee:
In General, see TRUSTS.
In Bankruptcy, see BANKRUPTCY.
Turnpike Company, see TOLL-ROADS.
United States Marshal, see UNITED STATES MARSHALS.
Vendor, see VENDOR AND PURCHASER.
Admission by, see EVIDENCE.
Affidavit By or For Use on Motion, see MOTIONS.
Against Whom Process May Issue, see PROCESS.
Alienage as Ground For Removal of Cause, see REMOVAL OF CAUSES.
Allegation, Relating to:
As Variance, see PLEADING.
In Affidavit:
In General, see AFFIDAVITS.
For Arrest, see ARREST.
For Attachment, see ATTACHMENT.
In Indictment or Information, see INDICTMENTS AND INFORMATIONS.
In Pleading, see ADMIRALTY; ATTACHMENT; BONDS; COMMERCIAL PAPER; CONTRACTS; COVENANTS; EJECTMENT; FALSE IMPRISONMENT; INJUNCTIONS; MECHANICS' LIENS; PLEADING.
Appeal or Error by, see APPEAL AND ERROR.
Appearance by, see APPEARANCES.
Arrest of, see ARREST.
As Necessary Element of Cause of Action, see ACTIONS.
As Witness, see WITNESSES.
Bill of Review by, see EQUITY.
Bound by:
Dismissal, see DISMISSAL AND NONSUIT.
Judgment, see JUDGMENTS.

For Matters Relating to — (*continued*)
Party — (*continued*)
Change of, see PLEADING.
Character of, Affecting:
Consolidation or Joinder, see CONSOLIDATION AND SEVERANCE OF ACTIONS; JOINDER AND SPLITTING OF ACTIONS.
Jurisdiction of Federal Court, see COURTS.
Severance of Actions, see CONSOLIDATION AND SEVERANCE OF ACTIONS.
Set-Off or Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.
Citizenship as Ground For Removal of Cause, see REMOVAL OF CAUSES.
Competency as Witness, see WITNESSES.
Conduct as Ground For:
New Trial, see NEW TRIAL.
Opening or Vacating Judgment, see JUDGMENTS.
Constitutional Guaranty to, see CONSTITUTIONAL LAW.
Constitutionality of Statute Relating to, see CONSTITUTIONAL LAW.
Death of:
As Affecting Right to Take Deposition, see DEPOSITIONS.
As Ground For:
Abatement, see ABATEMENT AND REVIVAL.
Arrest of Judgment, see JUDGMENTS.
Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES.
Rehearing on Appeal, see APPEAL AND ERROR.
Revival of Judgment, see JUDGMENTS.
Revocation or Submission to Arbitration, see ARBITRATION AND AWARD.
Before:
Issuance of Execution, see EXECUTIONS.
Judgment or Entry Thereof, see JUDGMENTS.
Pending:
Appeal, see APPEAL AND ERROR.
Reference, see REFERENCES.
Declaration of, as Evidence, see EVIDENCE.
Defect of, see PLEADING.
Deposition of, see DEPOSITIONS; DISCOVERY.
Description of in:
Chattel Mortgage, see CHATTEL MORTGAGES.
Deed, see DEEDS.
Execution, see EXECUTIONS.
Judgment, see JUDGMENTS.
Mortgage, see MORTGAGES.
Pleading, see PLEADING.
Will, see WILLS.
Diverse Citizenship as Ground For Federal Jurisdiction, see COURTS; REMOVAL OF CAUSES.
Domicile or Residence of, see VENUE.
Entitled to Object to Process, see PROCESS.
Evidence:
Of Identity of, see DEEDS; EVIDENCE.
Of Incapacity of, see EVIDENCE.
Otherwise Relating to, see EVIDENCE.
Examination of, as Witness, see DISCOVERY; WITNESSES.
Excusing Non-Joinder of, see PLEADING.
Identity of, see ABATEMENT AND REVIVAL; ELECTION OF REMEDIES; JUDGMENTS.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Admiralty, see ADMIRALTY.
In Court of Claims, see COURTS.
In Criminal Prosecution:
In General, see CRIMINAL LAW.
Conviction of, as Bar to Further Prosecution, see CRIMINAL LAW.
Designation of, in Verdict, see CRIMINAL LAW.
In Appeal Proceeding, see CRIMINAL LAW.
In Indictment or Information, see INDICTMENTS AND INFORMATIONS.
In Title to Plea of Former Jeopardy, see CRIMINAL LAW.
On Application For New Trial, see CRIMINAL LAW.
Prosecution For:
Abduction, see ABDUCTION.
Adulteration, see ADULTERATION.
Adultery, see ADULTERY.
Assault and Battery, see ASSAULT AND BATTERY.
Assault With Intent to Kill, see HOMICIDE.
Bastardy, see BASTARDS.
Conspiracy, see CONSPIRACY.
Contempt, see CONTEMPT.
Embezzlement, see EMBEZZLEMENT.
Embracery, see EMBRACERY.
Extortion, see EXTORTION.
Forgery, see FORGERY.
Fornication, see FORNICATION.
Gambling, see GAMING.
Kidnapping, see KIDNAPPING.
Larceny, see LARCENY.
Lewdness, see LEWDNESS.
Libel, see LIBEL AND SLANDER.
Lottery, see LOTTERIES.
Manslaughter, see HOMICIDE.
Mayhem, see MAYHEM.
Miscegenation, see MISCEGENATION.
Obstructing Justice, see OBSTRUCTING JUSTICE.
Offense Against Election Laws, see ELECTIONS.
Perjury, see PERJURY.
Rape, see RAPE.
Receiving Stolen Goods, see RECEIVING STOLEN GOODS.
Riot, see RIOTS.
Robbery, see ROBBERY.
Seduction, see SEDUCTION.
Slander, see LIBEL AND SLANDER.
Treason, see TREASON.
Trespass, see TRESPASS.
In Equity, see EQUITY.
In Justice's Court, see JUSTICES OF THE PEACE.
In Particular Action or Proceeding:
Adjusting Loss Under Policy, see FIRE INSURANCE, and Other Insurance Titles.
Administration Suit, see EXECUTORS AND ADMINISTRATORS.
Affidavit of Illegality, see EXECUTIONS.
Assault or Battery, see ASSAULT AND BATTERY.
Assumpsit, see ASSUMPSIT, ACTION OF.
Attachment, see ATTACHMENT.
Attachment For Rent, see LANDLORD AND TENANT.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
Audita Querela, see AUDITA QUERELA.
Bankruptcy Proceedings, see BANKRUPTCY.
Bastardy Proceedings, see BASTARDS.
Bill of Discovery, see DISCOVERY.
Boundary Proceedings, see BOUNDARIES.
Case, see CASE, ACTION ON.
Condemnation Proceeding, see EMINENT DOMAIN.
Contempt Proceeding, see CONTEMPT.
Contribution, see CONTRIBUTION.
Covenant, see COVENANT, ACTION OF.
Creditor's Suit, see CREDITORS' SUITS.
Debt, see DEBT, ACTION OF.
Detinue, see DETINUE.
Discovery, see DISCOVERY.
Distress Proceedings, see LANDLORD AND TENANT.
Divorce, see DIVORCE.
Ejectment, see EJECTMENT.
Election Contest, see ELECTIONS.
Enforcement of:
Forfeitures For Violation of Customs Laws, see CUSTOMS DUTIES.
Ground-Rents, see GROUND-RENTS.
Legacy Charged on Estates, see WILLS.
Pledge, see PLEDGES.
False Imprisonment, see FALSE IMPRISONMENT.
For Abatement of Liquor Nuisance, see INTOXICATING LIQUORS.
For Abuse of Process, see PROCESS.
For Account, see ACCOUNTS AND ACCOUNTING.
For Accounting by:
Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Guardian, see GUARDIAN AND WARD.
Partnership, see PARTNERSHIP.
Trustee, see TRUSTS.
For Alienation of Affections, see HUSBAND AND WIFE.
For Annulment of Marriage, see MARRIAGE.
For Appointment or Removal of:
Guardian, see GUARDIAN AND WARD.
Receiver, see RECEIVERS.
Trustee, see TRUSTS.
For Breach of:
Contract, see CONTRACTS.
Covenant, see COVENANTS.
Marriage Contract, see BREACH OF PROMISE TO MARRY.
For Bringing Pauper into Jurisdiction, see PAUPERS.
For Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS.
For Causing Death, see DEATH.
Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER.
For Collection of:
School Tax, see SCHOOLS AND SCHOOL-DISTRICTS.
Tax, Generally, see TAXATION.
Toll, see CANALS; TOLL-ROADS.
For Conspiracy, see CONSPIRACY.
For Contribution, see CONTRIBUTION.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
For Damages:
Against Telegraph or Telephone Companies, see TELEGRAPHS AND TELEPHONES.
For Collision, see COLLISION.
For Eviction, see LANDLORD AND TENANT.
For Deceit, see FRAUD.
For Deficiency on Foreclosure, see MORTGAGES.
For Discovery of Assets, see EXECUTORS AND ADMINISTRATORS.
For Dissolution of Partnership, see PARTNERSHIP.
For Distribution of:
Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Proceeds or Surplus on Foreclosure, see MORTGAGES.
For Dower, see DOWER.
For Duties, see CUSTOMS DUTIES.
For Enticing Away Child, see PARENT AND CHILD.
For Equitable Relief Against Judgment, see JUDGMENTS.
For Establishment of:
Drain, see DRAINS.
Private Road, see PRIVATE ROADS.
For Foreclosure of:
Mortgage, see CHATTEL MORTGAGES; MORTGAGES.
Railroad Mortgage or Lien, see RAILROADS.
For Fraud, see FRAUD.
For Infringement of:
Copyright, see COPYRIGHTS.
Patent, see PATENTS.
Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.
For Injunction, see INJUNCTIONS.
For Injuries:
By Railroad, see CARRIERS; RAILROADS.
By Servant, see MASTER AND SERVANT.
By Street Railroad, see STREET RAILROADS.
Caused by:
Defective Bridge, see BRIDGES.
Defect or Obstruction in:
Highway, see STREETS AND HIGHWAYS.
Street, see MUNICIPAL CORPORATIONS.
Fire, see MUNICIPAL CORPORATIONS; NEGLIGENCE; RAILROADS.
Flowage, see WATERS.
Motor Vehicle, see MOTOR VEHICLES.
Obstruction of Navigation, see NAVIGABLE WATERS.
To Animals, see ANIMALS.
To Crop, see CROPS.
To Easement, see EASEMENTS.
To Live-Stock, see ANIMALS; CARRIERS.
To Servant, see MASTER AND SERVANT.
For Insurance Benefits, see LIFE INSURANCE; MUTUAL BENEFIT INSURANCE; and Particular Insurance Titles.
For Malicious Attachment or Prosecution, see MALICIOUS PROSECUTION.
For Negligence, see NEGLIGENCE.
For Payment and Distribution of Estate, see EXECUTORS AND ADMINISTRATORS.
For Penalty, see PENALTIES.
For Reformation of Instrument, see REFORMATION OF INSTRUMENTS.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
For Rent, see LANDLORD AND TENANT.
For Rescission of Contract, see CONTRACTS; SALES; VENDOR AND PURCHASER.
For Reward, see REWARD.
For Sale of:
Estate, see EXECUTORS AND ADMINISTRATORS.
Land For:
Assessment, see MUNICIPAL CORPORATIONS.
Non-Payment of Tax, see TAXATION.
Trust Property, see TRUSTS.
Ward's Estate, see GUARDIAN AND WARD.
For Salvage, see SALVAGE.
For Separate Maintenance, see HUSBAND AND WIFE.
For Services or Earnings of Child, see PARENT AND CHILD.
For Slander of Title, see LIBEL AND SLANDER.
For Specific Performance, see SPECIFIC PERFORMANCE.
For Taking Property For Public Purposes, see EMINENT DOMAIN.
For Tort, in General, see TORTS.
For Trespass by Animals, see ANIMALS.
For Unfair Competition, see TRADE-MARKS AND TRADE-NAMES.
For Unlawful Detainer, see FORCIBLE ENTRY AND DETAINER.
For Violation of Usury Laws, see USURY.
For Wages, see MASTER AND SERVANT.
For Waste, see WASTE.
For Wharfage, see WHARVES.
For Work and Labor, see WORK AND LABOR.
For Wrongful:
Attachment, see ATTACHMENT.
Execution, see EXECUTIONS.
Garnishment:
In General, see GARNISHMENT.
Against Foreign Corporation, see FOREIGN CORPORATIONS.
Habeas Corpus, see HABEAS CORPUS.
In Admiralty, see ADMIRALTY.
In Aid of Execution, see EXECUTIONS.
In Equity:
Generally, see EQUITY.
To Enforce Judgment, see JUDGMENTS.
Inquisition of Insanity, see INSANE PERSONS.
Insolvency Proceeding, see INSOLVENCY.
Interpleader, see INTERPLEADER.
Libel or Slander, see LIBEL AND SLANDER.
Malicious Prosecution, see MALICIOUS PROSECUTION.
Mandamus, see MANDAMUS.
Money Lent, see MONEY LENT.
Money Paid, see MONEY PAID.
Money Received, see MONEY RECEIVED.
Motion, see MOTIONS; PLEADING.
Ne Exeat, see NE EXEAT.
Negligence, see NEGLIGENCE.
On Account Stated, see ACCOUNTS AND ACCOUNTING.
On Assigned Claim, see ASSIGNMENTS.
On Bill or Note, see COMMERCIAL PAPER.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
On Bond:
Generally, see Bonds.
Administration Bond, see Executors and Administrators.
Appeal-Bond, see Appeal and Error.
Arbitration Bond, see Arbitration and Award.
Assignees' Bonds, see Assignments For Benefit of Creditors.
Attachment Bond, see Attachment.
Bail Bond, see Bail.
Bond For Support, see Bastards.
Bond of Clerk of Court, see Clerks of Courts.
Bond of County Officer, see Counties.
Bond of Municipal Officer, see Municipal Corporations.
Bond of Public Officer, see Officers.
Bond of Sheriff or Constable, see Sheriffs and Constables.
Cost Bond, see Costs.
County Bond, see Counties.
Delivery Bond, see Executions.
Forthcoming Bond, see Executions.
Guardian's Bond, see Guardian and Ward.
Injunction Bond, see Injunctions.
Municipal Bond, see Municipal Corporations.
Replevin Bond, see Replevin.
On Book Account, see Accounts and Accounting.
On Book-Debt, see Accounts and Accounting.
On Contract:
For Sale, see Sales; Vendor and Purchaser.
Of Indemnity, see Indemnity.
Of Suretyship, see Principal and Surety.
On Guaranty, see Guaranty.
On Insurance Policy, see Fire Insurance; Life Insurance; Marine Insurance; and Particular Insurance Titles.
On Judgment, see Judgments.
On or Relating to Lost Instrument, see Lost Instruments.
On Recognizance, see Recognizances.
On Subscription, see Subscriptions.
On Undertaking, see Undertakings.
Partition, see Partition.
Probate Proceeding, see Wills.
Proceeding Under Civil Damage Laws, see Intoxicating Liquors.
Prohibition, see Prohibition.
Quieting Title, see Quieting Title.
Quo Warranto, see Quo Warranto.
Relating to:
Assignment For Creditors, see Assignments For Benefit of Creditors.
Carriage, see Carriers; Shipping.
Fixture, see Fixtures.
Gift, see Gifts.
Mining Claim, see Mines and Minerals.
Nuisance, see Nuisances.
Party-Wall, see Party-Walls.
Water-Rights, see Navigable Waters; Waters.
Wills, see Wills.
Replevin, see Replevin.
Review, see Review.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
Scire Facias:
Generally, see SCIRE FACIAS.
To Revive Judgment, see JUDGMENTS.
Seduction, see SEDUCTION.
Sequestration Proceeding, see SEQUESTRATION.
Supersedeas, see SUPERSEDEAS.
Supplementary Proceedings, see EXECUTIONS.
To Compel:
Erection of Partition Fence, see FENCES.
Release or Satisfaction of Mortgage, see MORTGAGES.
Satisfaction of Judgment, see JUDGMENTS.
Support of Child, see PARENT AND CHILD.
To Confirm or Try Tax Title, see TAXATION.
To Construe Will, see WILLS.
To Determine Custody of Child, see PARENT AND CHILD.
To Determine or Establish:
Priority:
Between Executions, see EXECUTIONS.
Of Judgment Lien, see JUDGMENTS.
Of Mortgage, see MORTGAGES.
Right to Office, see QUO WARRANTO.
To Enforce:
Assessment For Drain, see DRAINS.
Claim Against:
Estate, see EXECUTORS AND ADMINISTRATORS.
Homestead, see HOMESTEADS.
Forfeiture, see FORFEITURES.
Homestead Right, see HOMESTEADS.
Liability:
Against Wife's Separate Estate, see HUSBAND AND WIFE.
Stock-Holder's Liability, see CORPORATIONS.
Lien:
Agricultural Lien, see AGRICULTURE.
Attorney's Lien, see ATTORNEY AND CLIENT.
Landlord's Lien, see LANDLORD AND TENANT.
Lien on Logs, see LOGGING.
Maritime Lien, see MARITIME LIENS.
Mechanic's Lien, see MECHANICS' LIENS.
Payment of Subscription, see CORPORATIONS; SUBSCRIPTIONS.
Penalty in General, see PENALTIES.
Right of Subrogation, see SUBROGATION.
Rights of Parties to Gambling Contracts, see GAMING.
Trust, see CHARITIES; TRUSTS.
To Escheat Property, see ESCHEAT.
To Establish:
Alter, or Vacate Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.
Or Determine Claims by Third Persons, see ATTACHMENT; EXECUTIONS; GARNISHMENT.
Trust, see TRUSTS.
To Foreclose Mortgage, see MORTGAGES.
To Marshal Assets and Securities, see MARSHALING ASSETS AND SECURITIES.

For Matters Relating to — (*continued*)
Party — (*continued*)
In Particular Action or Proceeding — (*continued*)
To Open or Vacate:
Accounting and Settlement of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Mortgage Foreclosure, see MORTGAGES.
Sale by Order of Court, see EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES.
To Procure Removal of Cause, see REMOVAL OF CAUSES.
To Quash Process, see ATTACHMENT; EXECUTIONS; PROCESS.
To Recover:
Bank Deposit, see BANKS AND BANKING.
Compensation For Improvements, see IMPROVEMENTS.
Dividends, see CORPORATIONS.
For Support of Pauper, see PAUPERS.
Tax Paid, see INTERNAL REVENUE; TAXATION.
To Redeem From:
Execution Sale, see EXECUTIONS.
Foreclosure Sale, see CHATTEL MORTGAGES; MORTGAGES.
To Remove Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
To Restore Record, see RECORDS.
To Restrain:
Acts of Trade Union or Its Members, see CONSPIRACY; INJUNCTIONS; LABOR UNIONS.
Enforcement of Tax, see TAXATION.
Foreclosure, see MORTGAGES.
Nuisance, see NUISANCES.
Unlawful Combination, see MONOPOLIES.
To Set Aside:
Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Award, see ARBITRATION AND AWARD.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES.
Sale Under Power, see MORTGAGES.
To Vacate:
Assessment, see MUNICIPAL CORPORATIONS.
Execution Sale, see EXECUTIONS.
Trespass, see TRESPASS.
Trespass to Try Title, see TRESPASS TO TRY TITLE.
Trover, see TROVER AND CONVERSION.
Under Indian Depredation Act, see INDIANS.
Use and Occupation, see USE AND OCCUPATION.
Work and Labor, see WORK AND LABOR.
Writ of Assistance, see ASSISTANCE, WRIT OF.
Writ of Entry, see ENTRY, WRIT OF.
Intervening, see PLEADING.
Joint or Separate Plea or Answer by, see PLEADING.
Judgment and Relief in Favor Of or Against:
In General, see ATTACHMENT; CREDITORS' SUITS; EQUITY; EXECUTORS AND ADMINISTRATORS; JUDGMENTS; JUSTICES OF THE PEACE; MECHANICS' LIENS; MORTGAGES.
In Injunction Proceedings, see INJUNCTIONS.
On Appeal or Error, see APPEAL AND ERROR.
On Certiorari, see CERTIORARI.
On Habeas Corpus, see HABEAS CORPUS.
On Mandamus, see MANDAMUS.

For Matters Relating to — (*continued*)
Party — (*continued*)
Jurisdiction of, Affecting Lis Pendens, see Lis Pendens.
Liable For, or Entitled To, Exemplary Damages, see Damages.
New Trial as to One or More of Several, see New Trial.
On Application For:
Change of Venue, see Venue.
Dismissal, see Dismissal and Nonsuit.
Distribution of Money Deposited in Court, see Deposits in Court.
Motion, see Motions.
New Trial, see New Trial.
Order of Deposit, see Deposits in Court.
Opinion of Based on Conversation With, see Juries.
Political, see Elections.
Presence of, at Trial, see Trial.
Relationship of Juror to, see Juries.
Remedy For:
Defect of, see Pleading,
Misjoinder of, see Pleading.
Misnomer of, see Pleading.
Non-Joinder of, see Pleading.
Removal of Cause by One or More of Several, see Removal of Causes.
Review by, see Appeal and Error; Review.
Right of, to Confront Witness, see Criminal Law; Trial.
Right or Liability as to Costs, see Costs.
Service of Process on, see Courts; Process.
Stipulation by, see Courts; Stipulations.
Substitution of or Striking Out, see Pleading.
Testimony of, see Accounts and Accounting; Evidence.
To Particular Instrument or Transaction:
Accord and Satisfaction, see Accord and Satisfaction.
Account Stated, see Accounts and Accounting.
Agreement to Arbitrate, see Arbitration and Award.
Apprenticeship, see Apprentices.
Assignment, see Assignments.
Award, see Arbitration and Award.
Bet, see Gaming.
Bill or Note, see Commercial Paper.
Bond:
Generally, see Bonds.
Appeal-Bond, see Appeal and Error; Justices of the Peace.
Claim Bond, see Executions.
Delivery Bond, see Attachment.
Guardianship Bond, see Guardian and Ward.
Injunction Bond, see Injunctions.
Compromise and Settlement, see Compromise and Settlement.
Contract, see Contracts.
Contract of:
Agency, see Principal and Agent.
Indemnity, see Indemnity.
Instrument Altered, see Alterations of Instruments.
Insurance, see Fire Insurance; Life Insurance; Marine Insurance; and Particular Insurance Titles.
Marriage, see Marriage.
Sale, see Sales; Vendor and Purchaser.
Usurious Contract, see Usury.
Corporate Charter, see Corporations.

For Matters Relating to — (*continued*)
Party — (*continued*)
To Particular Instrument or Transaction — (*continued*)
Covenant, see COVENANTS.
Creation and Execution of Power, see POWERS.
Deed, see DEEDS.
Gambling Transaction, see GAMING.
Game, see GAMING.
Gift, see GIFTS.
Guaranty, see GUARANTY.
Lease, see LANDLORD AND TENANT.
Lien Claim of Mechanics, see MECHANICS' LIENS.
Mortgage, see CHATTEL MORTGAGES; MORTGAGES.
Pledge, see PLEDGES.
Release, see RELEASE.
Submission to Arbitration, see ARBITRATION AND AWARD.
Subscription, see SUBSCRIPTIONS.
Tax-Deed, see TAXATION.
Tender, see TENDER.
Trust, see TRUSTS.
Will, see WILLS.
To Whom Jurisdictional Amount Applies, see COURTS.
Transfer or Devolution of Right, Title, or Interest of, as Ground of Abatement, see ABATEMENT AND REVIVAL.
Verification of:
Account by, see ACCOUNTS AND ACCOUNTING.
Pleading by, see EQUITY; PLEADING.
Who May Submit Controversy, see SUBMISSION OF CONTROVERSY.

I. WHO MAY BE A PARTY PLAINTIFF.[1]

A. In General. It is a broad but classic statement in our books that "as the law grants redress for all injuries and gives a remedy for every kind of right, so it is open to all kinds of persons and none are excluded from bringing an action."[2] This general principle, however, is subject to important limitations. Three things in the main are requisite for a successful stand as party plaintiff in a litigated case: (1) The action must be brought in the name of one possessing a legal entity.[3] (2) The person appearing as plaintiff must have and show an existing remedial interest in the cause of action asserted.[4] (3) If the action shall be proof against a possible dilatory objection, plaintiff must have a legal capacity to sue.[5]

B. The Requisites Specifically Considered — 1. Requisite of Legal Entity — a. Statement of Rule. A civil action can be maintained only in the name of a person in law — an entity which the law of the forum can recognize as capable of possessing and asserting a right of action.[6]

b. Different Forms of Legal Entity — (I) *In General.* The common law

1. **In actions against particular classes of parties** see cross-references, *supra*, p. 8 *et seq.*
In particular actions or proceedings see cross-references, *supra*, p. 8 *et seq.*
2. Bacon Abr. "Actions," B.; Dicey Parties, Rule 1. See also Coke Litt. 128.
3. See *infra*, I, B, 1.
4. See *infra*, I, B, 2.
5. See *infra*, I, B, 3.
6. *Alabama.*— Moore *v.* Burns, 60 Ala. 269. *Compare* Simmons *v.* Titche, 102 Ala. 317, 14 So. 786, applying the rule as to parties in an action to enforce a claim in favor of a partnership.
Georgia.— Western, etc., R. Co. *v.* Dalton Marble Works, 122 Ga. 774, 50 S. E. 978.
Indiana.— Hughes *v.* Walker, 4 Blackf. 50.
Iowa.— The Pembinaw *v.* Wilson, 11 Iowa 479.
Michigan.— Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270.
Minnesota.— St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725; Columbus *v.* Monti, 6 Minn. 568.
Nevada.— Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40, 97 Am. Dec. 510.

knew only two kinds of persons in law, the natural person, and the artificial person or corporation.[7] Under modern statutes permitting an action to be brought in the name of an unincorporated association, a third class must be added, the class of the quasi-artificial person.[8] Unless the would-be plaintiff comes within one or the other of these three classes, the action as brought is a nullity.[9]

(II) *Natural Person as Plaintiff* — (A) *Rule in General.* As a rule every natural person has a legal entity, and as such may appear as party plaintiff. The rule holds whether the natural person is citizen or alien, sane or insane, adult or minor.[10] If an adult or a minor, or if a married woman under common-law disabilities, plaintiff may indeed be without capacity to sue; but lack of capacity to sue is essentially different from lack of legal entity. At most the lack of capacity is ground only for a dilatory objection at the threshold.[11]

(B) *Exception to Rule; Civil Death* — (1) In General. To the rule that every natural person has a legal entity as party plaintiff, there was, in the earlier common law, a notable exception, which still influences our legal doctrine. A person in natural life might yet, through the doctrine of civil death,[12] be deemed to be dead in law. When this occurred he had no longer an entity which the courts could recognize.[13] Of the different forms of civil death at common law — banishment from or abjuration of the realm, entering into religion and becoming a monk professed, conviction of felony[14] — only one now raises a possible question in the doctrine of parties to action: May a convict appear as party plaintiff?[15]

(2) Convict as Plaintiff — (a) Rule at Common Law. Lord Coke was clear that "besides men attainted in a *præmunire*, every person that is attainted of high-treason, petit-treason, or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted in law *civiliter mortuus*."[16] As late as 1820 Chancellor Kent was of the opinion that a similar rule prevailed in America.[17] When, however, the question came before him for decision, he held that a conviction of felony, even with a sentence to life imprisonment, did not of itself cause civil death at common law.[18] A felon's disability to appear as plaintiff was due rather to the forfeiture of his estate, resulting in a lack of a remedial interest in the cause of action.[19] It follows on principle, and it has been so held, that where there is no forfeiture of estate for felony, the felon can still appear as plaintiff in his own name, unless some statute forbids.[20]

7. "The orthodox doctrine of the common law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen." 15 Harv. L. Rev. 311.

8. Western, etc., R. Co. *v.* Dalton Marble Works, 122 Ga. 774, 775, 50 S. E. 978, where it is said: "The plaintiff or the defendant may be a natural or an artificial person, or a quasi-artificial person, such as a partnership."

9. See more fully *infra*, I, B, 1, c.

10. See Aliens, 2 Cyc. 107; Infants, 22 Cyc. 627; Insane Persons, 22 Cyc. 1222 *et seq.*

11. See *infra*, I, B, 3.

12. See Civil Death, 7 Cyc. 154.

13. Coke Litt. 130*a*. See Baltimore *v.* Chester, 53 Vt. 315, 319, 38 Am. Rep. 677, where Veazey, J., remarked: "The term civil death, as used in the books, seemed to involve, first, a total extinction of the civil rights and relations of the party. . . . Second, an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs." See farther Civil Death, 7 Cyc. 154, and cases there cited.

14. See Newsome *v.* Bowyer, 3 P. Wms. 37, 24 Eng. Reprint 959; 1 Blackstone Comm. 132; 1 Minor Inst. 35.

15. See *infra*, I, B, 1, b, (II), (B), (2).

16. Coke Litt. 130*a*. See also Convicts, 9 Cyc. 871; and 19 Cyc. 101.

17. Troup *v.* Sherwood, 4 Johns. Ch. (N. Y.) 228, 248.

18. Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118.

19. See *infra*, I, B, 2.

20. Willingham *v.* King, 23 Fla. 478, 2 So. 851; Dade Coal Co. *v.* Haslett, 83 Ga. 549, 550, 10 S. E. 435 (where Blandford, J., remarks: "We are aware that at the common law, when one was convicted of felony or treason, he forfeited all his rights of citizenship, and that he was deemed to be *civiliter mortuus*; but as these consequences do not follow in this State by conviction of felony, it would seem that he might maintain an action for the injuries he received, even though at the time of receiving the same he was a felon and in confinement"); Kenyon *v.* Saunders, 18 R. I. 590, 591, 30 Atl. 470, 26 L. R. A. 232 (where Stines, J., remarks: "Undoubtedly under the common law of England a person convicted of a felony could not

(b) Civil Death as a Statutory Disability. Although Lord Coke's doctrine[21] that a convict has no standing as party plaintiff has been generally rejected by American courts as a rule of our common law, it has had a partial survival in our statute law. Express enactments in several states declare that a person convicted of felony and sentenced to imprisonment for life shall be deemed and taken to be civilly dead.[22] One effect of such legislation, it would seem, is to disable the convict from appearing as plaintiff in the courts of the state having such a statute, and this, irrespective of the question whether the convict is in confinement or has escaped.[23]

(3) Extraterritorial Effect. Civil death, whether by common law or by statute, exists as a penal effect. On general principles the resulting disability is not recognized in the courts of another nation.[24] And the rule prevails, it has been held, as between the states of the Union.[25]

(iii) *Artificial Person as Plaintiff*—(a) *In General.*—(1) Power to Sue in Corporate Name. As a rule any existing corporation may come into court as party plaintiff in its corporate name.[26] This power, although often expressly declared by the charter of the corporation, by general statute, or by a state constitution,[27] exists as one of the incidental powers of a corporation at common law.[28] It is assimilated, in the main, to the ability of a natural person to appear as party plaintiff.[29]

(2) No Power to Sue in Names of Individuals Composing. As a person in law, the corporation is distinct from all the individuals composing it.[30] Not only may the corporation appear as plaintiff in the corporation name, but a cause of action belonging to the corporation cannot as a rule be asserted in any other name; if asserted in the names of all the stock-holders the action fails.[31]

(3) When Power to Appear as Plaintiff Is Lacking. A corporation, however, has only the powers which are granted it, expressly or by inference. It sometimes happens, although rarely, that the power to appear as a party plaintiff in the corporate name is not conferred on the corporation. This may arise either

maintain an action. This rule was founded upon the reason that as the conviction worked a forfeiture of goods to the crown, he had no longer any property to sue for. But under our law, R. I. Pub. St. c. 248, § 34, no conviction or sentence for any offence whatsoever works a forfeiture of estate. The reason for the common law rule does not here exist, and an enforcement of it might practically work a forfeiture of estate. . . . A convict is neither civilly dead, nor deprived of his rights of property; and, if this be so, he should be entitled to enforce such right when it is necessary to do so").

21. See *supra*, I, B, 1, b, (II), (B), (2), (a).

22. See Convicts, 9 Cyc. 872, and cases there cited.

23. Beck *v.* Beck, 36 Miss. 72. But the objection under such a statute has been deemed to be merely dilatory, in suspension of the convict's action until the disability is removed. See Beck *v.* Beck, *supra*.

24. "A criminal sentence of attainder in the courts of one sovereign, although it there creates a personal disability to sue does not carry the same disability with the person into other countries." Story Conflict Laws, § 620.

25. Wilson *v.* King, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802, where K, who had been convicted of a capital offense and sentenced to death in Tennessee, sued in his own name in Arkansas; and it was held even if the conviction and sentence in Tennessee worked a civil death there, that it did not affect K's right to sue and recover in Arkansas.

26. "In our authorities and practice the necessary marks of legal corporate existence are a recognized collective name (which however need not be expressly conferred at the outset), and capacity to sue, and to do other acts in the law in that name." Williston's Wald's Pollock Contr. 120. And see Corporations, 10 Cyc. 149.

27. See Corporations, 10 Cyc. 1332, 1333 *et seq.*, and cases there cited.

28. See Corporations, 10 Cyc. 1331, and cases there cited.

29. Since the days of Lord Coke the word "person" in a statute has been interpreted as including corporations aggregate when they come within the general reason and design of the statute. And see Corporations, 10 Cyc. 149, 1332–1333, and cases there cited; 6 Words & Phrases 5327. See also Person, *post*, p. 1526.

30. Cabot Bank *v.* Morton, 4 Gray (Mass.) 156, 159, where Shaw, C. J., says that it is a "maxim, too familiar to everybody to require being formally stated and explained, that a corporation is a person in law, distinct from all the members composing it."

31. Moore, etc., Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23; Gorham *v.* Gilson, 28 Cal. 479; Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E.

from the nature of the corporation itself,[32] or because the legislature has expressly or by necessary inference declared that as respects a given corporation the faculty to sue shall be exercised, not by the corporation but by or in the name of some other person, as by certain trustees.[33]

(B) *Foreign Corporation as Plaintiff.* Although a corporation is a mere creature of the law, the fact that a particular corporation claiming as plaintiff in the courts of a state has not been created by the laws of that state does not contravene its legal entity there. A foreign corporation may have a standing as plaintiff, very much as a natural person who is an alien.[34]

(C) *Corporation as Plaintiff After Expiration of Charter* — (1) AT COMMON LAW. At common law a corporation which has completed the period fixed by its charter or the general law, for its duration, or has been legally dissolved by judicial decree or otherwise, has no longer a legal entity which the court can recognize.[35] The effect of its dissolution is comparable to the effect of the death of a natural person.[36]

376, 36 N. E. 650; Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131. So, where the title to the real estate of an incorporated religious society is vested in the corporation, although under the control of the trustees, proceedings for forcible entry and detainer of the church edifice should be in the name of the corporation, and cannot be sustained in the individual names of the trustees. People *v.* Fulton, 11 N. Y. 94.

32. See CORPORATIONS, 10 Cyc. 1333, and cases there cited.

33. Marsh *v.* Astoria Lodge No. 112, I. O. O. F. 27 Ill. 421, 424, where Breese, J., remarks: "The Grand Lodge can sue by express grant, in their corporate name. The subordinate lodges cannot so sue. They must sue and be sued, in the name of the trustees, and in no other mode and by no other name. A corporation can have no faculty not given by the act creating it. The faculty of suing is a most important one, and has not been specially conferred, and since it has been directly conferred on the trustees by special grant, it cannot be claimed as incident to the corporation under the general power conferred. Had not the faculty to sue been conferred on the trustees, then indeed, would this corporation have had the right to sue under the grant, in the sixth section, of all the powers incident to corporations."

34. The point was directly raised in Massachusetts as late as 1813, in Portsmouth Livery Co. *v.* Watson, 10 Mass. 91. Here defendant, pleading in abatement, contended that as a corporation was entirely indebted to the law for its existence, "this corporation, not having been created by our law, can have no legal existence here," and therefore that the action should have been brought by the members of the corporation in their private capacities and names as individuals. The court ruled that the principle thus suggested was without foundation. The question was again raised in 1843, with reference to a corporation created by the laws of a foreign nation. See British American Land Co. *v.* Ames, 6 Metc. (Mass.) 391. See also Dutch West-India Co. *v.* Van Moses, Str. 612 (where the power of a foreign corporation to appear as plaintiff was affirmed, it appearing that plaintiffs "had never sued by this name before, or ever had any particular name given them by any act of the States; but upon the dissolution of an old West-India company, it was declared, that there should be still a general West-India company, the members of which should be privileged to trade to the West-Indies, and that all others should be prohibited"); Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532; and, generally, FOREIGN CORPORATIONS, 19 Cyc. 1314 *et seq.*, and cases there cited.

35. See CORPORATIONS, 10 Cyc. 1310, 1311, 1314 *et seq.*, and cases there cited. *Compare* 2 Kent Comm. 307 note; Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119, 125. See also Clark *v.* American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217 [*reversing* 35 Ind. App. 65, 72, 73 N. E. 727]; MacRae *v.* Kansas City Piano Co., 69 Kan. 457, 460, 77 Pac. 94; Thompson *v.* MacFarland, 29 Utah, 455, 82 Pac. 478.

36. MacRae *v.* Kansas City Piano Co., 69 Kan. 457, 460, 77 Pac. 94, where it is said: "The dissolution of a corporation operates, as to it, the same as the death of an individual; all its powers, prerogatives and authority — its life — ceased, and all legal proceedings then pending were at once suspended. At the common law this termination of corporate powers became so radical that a corporate debtor was entirely discharged of his obligation, and all actions by or against it were at once and forever abated."

Effect in equity see Kelly *v.* Rochelle, (Tex. Civ. App. 1906) 93 S. W. 164. Here a corporation had sued in equity upon an equitable cause of action which could survive the death of plaintiff. Pending the suit the corporation was dissolved. Thereafter judgment was rendered in its favor. The president and directors of the corporation, acting as trustees, then assigned this judgment and the original cause of action to a new corporation. It was held that as the suit was in equity and the cause asserted was one which survived, the original suit did not upon the dissolution of the corporation abate in the sense that it was destroyed and became absolutely dead, but that it was "only suspended for the want of a party plaintiff, subject to re-

(2) By Statute. But by statute in many states, and sometimes by the terms of its charter, a corporation may have an extension of legal entity, through a more or less limited time, for the purpose of winding up its affairs.[37] At the expiration of this period, however, the common-law rule, it has been held, comes again into effect, and the corporation is then without further standing in court for any purpose.[38] A like result follows, it has also been held, if there is a statute extending the time within which the defunct corporation may act but this statute, from whatever cause, is unconstitutional.[39]

(D) *De Facto Corporation as Plaintiff*—(1) In General. If a corporation exists *de facto*, although not *de jure*, the question of its legal entity can, as a rule, be raised only by the state.[40] It follows that a mere *de facto* corporation has still to a wide extent an entity as party plaintiff which the courts can recognize.[41]

(2) Limits of the Doctrine. If, however, a legal entity may be claimed by a corporation *de facto* it must be possible for this body to be a corporation *de jure*.[42] A further limitation is sometimes made. When the would-be plaintiff appears as a corporation possessing extraordinary power, as the power of eminent domain, some courts,[43] but not all,[44] have held that an existence *de jure* is essential to the maintenance of an action.

(E) *Body Politic as Plaintiff.* A nation, a state, a county, is a person in law, and as such may come within the cognizance of the courts as a party plain-

vival; and therefore the judgment rendered . . . was not void, but only voidable."

37. See Corporations, 10 Cyc. 1314, 1323, and cases there cited. *Compare* Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119.

38. Accordingly when a corporation was created in 1837 for a period of fifty years, and the statutes of the state allowed an extension of three years, the corporation, it was held, could not be recognized as plaintiff after the year 1890, not even as a *de facto* corporation. Clark *v.* American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217 [*reversing* 35 Ind. App. 65, 73 N. E. 727]. *Compare* Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119.

39. Clark *v.* American Cannel Coal Co., 165 Ind. 213, 216, 73 N. E. 1083, 112 Am. St. Rep. 217, where Monks, J., says: "It necessarily follows that there can not be a corporation *de facto* under an unconstitutional statute, for such a statute is void, and a void law is no law." And see, generally, Corporations, 10 Cyc. 1314.

40. See Corporations, 10 Cyc. 251 *et seq.*, 1334, 1357, and cases there cited. *Compare* Society Perun *v.* Cleveland, 43 Ohio St. 481, 490, 3 N. E. 357, where Owen, J., remarks: "The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation."

41. See, generally, Corporations, 10 Cyc. 251 *et seq.*, 1334, 1357; and in particular Cozzens *v.* Chicago Hydraulic-Press Brick Co., 166 Ill. 213, 215, 46 N. E. 788. In this case plaintiff sued as a foreign corporation. Under a plea of *nul tiel corporation*, defendant insisted that plaintiff had not proved its corporate existence. Said the court: "When this plea is interposed, the burden of proving corporate existence is cast on the plaintiff corporation (Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695). But this plea does not impose the burden upon the plaintiff of proving, that it was in all respects a perfectly legal corporation. It is sufficient, for a recovery upon the issue presented by that plea, to make proof that the plaintiff corporation had a *de facto* existence."

In actions for torts.—The doctrine is recognized not merely in the case of actions on contracts, but in torts as well. Thus in Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784, a *de facto* corporation sued successfully on a cause of action growing out of a nuisance.

42. See Corporations, 10 Cyc. 252, 255, 260 *et passim*, and cases there cited. And see Clark *v.* American Cannel Coal Co., 165 Ind. 213, 216, 73 N. E. 1083, 112 Am. St. Rep. 217, where Monks, J., remarks: "It is essential to the existence of a *de facto* corporation, however, that there be (1) a valid law under which a corporation with the powers assumed might be incorporated; (2) a *bona fide* attempt to organize a corporation under such law; (3) and an actual exercise of corporate powers. . . . If there is no law under which a corporation *de jure* might exist, its nonexistence may be set up even in a collateral proceeding." See Corporations, 10 Cyc. 253. *Compare* Huber *v.* Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. N. S. 653.

43. Orrick School Dist. *v.* Dorton, 125 Mo. 439, 28 S. W. 765; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

44. In McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348, and Reisner *v.* Strong, 24 Kan. 410, a *de facto* corporation maintained its standing as plaintiff in an action to condemn land.

tiff.[45] The principle extends to an action by a foreign nation or sovereign;[46] its standing before the court is that of "a person residing without the state"; nor has the foreign state or sovereign any special privilege as plaintiff.[47]

(IV) *Quasi-Artificial Person as Plaintiff*—(A) *Origin of Doctrine.* The common law recognized only the two forms of legal entity already noticed, that of the natural person and that of the artificial person or corporation.[48] A partnership or other unincorporated association had no legal entity distinct from that of its members. It was therefore accorded no recognition in the courts of the common law if it appeared as plaintiff in its association name.[49] Modern statutes, however, show a growing tendency to modify this common-law doctrine, and in greater or less degree to recognize a legal entity in unincorporated associations.[50]

(B) *Scope of Doctrine*—(1) Partnerships Generally. Thus it is now provided in a considerable number of states that an action may be brought by any partnership as such.[51]

(2) Partnerships of a Designated Class. In other states the strictness of the common-law rule has been moderated in favor of partnerships formed for the purpose of carrying on a trade or business in the state, or holding property there.[52]

45. See cases cited *infra*, this note.

A state of the Union is a "person" within the meaning of a statute declaring that "a person expressly authorized by statute" may sue in his own name without joining the beneficiary. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249. See also States.

A county may sue under a statute authorizing "any person" deeming himself aggrieved by the state auditor's refusal of a claim to commence a suit against the state. Lyman County *v.* State, 9 S. D. 413, 69 N. W. 601. And see Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711; and Counties, 11 Cyc. 607 *et seq.*

46. In King of Spain *v.* Hullet, 1 Cl. & F. 333, 6 Eng. Reprint 941, 1 Dow & Cl. 169, 6 Eng. Reprint 488, before the house of lords in 1828, defendant, Hullet, had demurred "because it has never been held that a foreign sovereign can sue in courts of equity in England." The demurrer was overruled in the court of chancery and in the house of lords the principle was settled in England that a foreign sovereign has a right to sue in equity as well as at law. See also South African Republic *v.* La Compagnie Franco-Belge, etc., [1897] 2 Ch. 487, 66 L. J. Ch. 747, 77 L. T. Rep. N. S. 241, 46 Wkly. Rep. 67; U. S. *v.* Wagner, L. R. 3 Eq. 724, 36 L. J. Ch. 624, 16 L. T. Rep. N. S. 86, 15 Wkly. Rep. 634 [*reversed* on other grounds in L. R. 2 Ch. 582, 36 L. J. Ch. 624, 16 L. T. Rep. N. S. 646, 15 Wkly. Rep. 1026].

Formal recognition not necessary.—On principle it is not essential that the foreign nation or state should have been formally recognized by the country in which the action is brought. See the remarks of Best, C. J., in Yrisarri *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 225, 12 E. C. L. 538, 4 L. J. C. P. O. S. 128, 11 Moore C. P. 308. "If a foreign state is recognized by this country, it is not necessary to prove, that it is an existing state; but if it is not so recognized, such proof becomes necessary. There are hundreds in India, and elsewhere, that are existing states, though they are not recognized. I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have Courts of Justice, that is evidence of their being a state." But see Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634.

47. Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642. Accordingly the foreign nation may be required to give security for costs. See the argument in Honduras *v.* Soto, *supra*. And see King of Spain *v.* Hullet, 1 Cl. & F. 333, 353, 6 Eng. Reprint 941, 1 Dow & Cl. 169, 6 Eng. Reprint 488, where the lord chancellor thus sums up the doctrine: "Though the King of Spain sues here as a sovereign prince, and is justly allowed so to sue, yet, beyond that, he brought with him no privileges that can displace the practice as applying to other suitors in our courts."

48. See *supra*, I, B, 1, b, (I).

49. See, generally, Associations, 4 Cyc. 312; and Partnership, *post*, pp. 560 *et seq.*, 580 *et seq.*, and cases there cited. See in particular St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

50. See *infra*, note 51 *et seq.*

51. See Partnership, *post*, pp. 560 *et seq.*, 580 *et seq.*; and the codes and statutes of the several states, especially of California, Iowa, Minnesota, and Nebraska.

The usual form of the enactment is as follows: "An action may be brought by or against a partnership, as such, or against all or either of the individual members thereof." See the statutes of the several states.

It will be observed that the enactment is permissive.—In other words, while a corporation must claim as a legal entity, the partnership may claim either as such, or through its individual members.

52. See Partnership, *post*, pp. 560, 580.

The Ohio enactment is typical here. Bates Rev. St. § 5011 reads: "A partnership formed for the purpose of carrying on a trade or

(3) UNINCORPORATED CLUBS AND SOCIETIES. This exception to the common-law doctrine has been occasionally extended to voluntary associations other than partnerships, as to unincorporated clubs and societies.[53] To claim this legal entity, the unincorporated association must bring itself within the scope of the statute.[54] Nor will the fact that a statute expressly authorizes an action against an unincorporated association in its association name warrant an action in this name by the association.[55]

c. Effect if Plaintiff Is Without a Legal Entity — (I) *LEGAL ENTITY AND LEGAL CAPACITY DISTINGUISHED.* There is a very material difference between the lack of legal entity and the lack of capacity to sue. In the latter case the defect does not go to merits; it is waived unless a specific objection is taken at the threshold.[56] But if there is a lack of legal entity the whole action fails.[57]

(II) *NO ENTITY, NO ACTION.* If an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record, and therefore no action before the court.[58] Nor, it has been held, will a statute providing that an action founded upon a written instrument may be brought by a party thereto in the name or description by which he is designated in the instrument authorize an action in the name of that which has no legal entity.[59]

(III) *WHETHER DEFECT CAN BE REMEDIED BY AMENDMENT* — (A) *In General.* In strictness of principle, if there is no legal entity in plaintiff, there is no foundation upon which to base an amendment. And this principle is definitely recognized and enforced in some cases.[60]

business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof."

So in Wyoming see Rev. St. (1899) § 3485.

For other statutes see Colo. Code, § 14; Conn. Gen. St. (1902) § 588; Utah Rev. St. (1898) § 2927.

53. See Mich. Comp. Laws (1897), § 10,025, which reads: "Whenever any unincorporated voluntary association, club or society, shall be formed in this state, composed of five members or more, having some distinguishing name, actions at law or in chancery may be brought by or against such association, club or society by the name by which it is known."

The legal entity thus created was given emphatic recognition in the case of Detroit Light Guard Band *v.* First Michigan Independent Infantry, 134 Mich. 598, 96 N. W. 934. Here "a voluntary association performed services under a contract for an agreed price. By agreement among its members, each was to receive an aliquot part of the agreed price as his compensation. The association brought suit on the contract, and certain members appeared by attorney in court, and stated that they were satisfied, and did not wish to pursue their claim. It was held that as the contract was with the association, and for its benefit, such action by the individual members could not affect the association's right to recover the full contract price of the services."

54. See ASSOCIATIONS, 4 Cyc. 313; JOINT STOCK COMPANIES, 23 Cyc. 477; PARTNERSHIP, *post*, p. 560 *et seq.* *Compare* Haskins *v.* Alcott, 13 Ohio St. 210.

55. St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 358, 102 N. W. 725, where it is said: "The statute does not provide that actions may be brought in the name of the association, but only that actions may be brought against it. . . . The common-law rule that the parties to an action must be either natural or artificial persons has been modified in this state, therefore, only as respects actions against unincorporated associations." And see Moore *v.* Burns, 60 Ala. 269. *Compare* The Pembinaw *v.* Wilson, 11 Iowa 479, holding that a statute which permits a suit against a steamboat in the name as such does not permit an action in the name of the steamboat as plaintiff.

56. See *infra*, I, B, 3.

57. See cases cited *infra*, note 58 *et seq.*

58. Western, etc., R. Co. *v.* Dalton Marble Works, 122 Ga. 774, 776, 50 S. E. 978, where Simmons, C. J., says: "'The Dalton Marble Works,' then, being neither a natural person, a corporation, nor a partnership, could not legally institute an action; or, in other words, there was no plaintiff to the action, and, there being none, the suit was a mere nullity." *Compare* Anderson *v.* Brumby, 115 Ga. 644, 42 S. E. 77.

"The very first step towards the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity." Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40, 44, 97 Am. Dec. 510, per Johnson, J. And generally on the necessity of a party plaintiff to the existence of an action see ACTIONS, 1 Cyc. 644, and cases there cited.

59. The Pembinaw *v.* Wilson, 11 Iowa 479.

60. Western, etc., R. Co. *v.* Dalton Marble

(B) *Misnomer and Lack of Legal Entity.* The principle referred to in the foregoing paragraph is, however, subject to a distinction which greatly moderates, if it does not destroy, its effect in the general run of cases. Although an action brought in the name of that which has no legal entity is a nullity, an action in which a legally existing plaintiff has been misnamed is still a true action, to which the court can give full effect, subject only to defendant's right to object at the threshold for misnomer.[61]

(IV) *Fictitious Plaintiff.* A further relaxation of the principle is found in the well-established rule that a plea that there never was any such person in existence as the alleged plaintiff was a plea in abatement and not in bar.[62]

d. Typical Instances of Lack of Legal Entity — (I) *In General.* The cases in which an action fails because of a want of a legal entity in plaintiff show several distinct classes. The following are the most important: (1) An action brought in a trade-name, or the name of a mere business interest;[63] (2) an action brought in the name of a partnership or unincorporated association, when not authorized by statute to sue;[64] (3) an action brought in the name of an artificial or quasi-artificial person formed for an illegal purpose.[65]

(II) *Action In Trade-Name, or in Name of a Mere Business Interest.* If it appears that the name in which the action is brought is merely a trade-name, or the name commonly applied to a mere business interest, or the name of an estate, not importing a corporation, there is an apparent lack of legal personality in the claimant, and the action is defective beyond hope of amendment.[66]

Works, 122 Ga. 774, 50 S. E. 978 (where the court held that as the suit was a nullity, being without a plaintiff, there was "nothing to amend by"); New York Mut. L. Ins. Co. *v.* Inman Park Presb. Church, 111 Ga. 677, 36 S. E. 880; Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40, 44, 97 Am. Dec. 510 (where it is said: "In this instance no person, natural or artificial, is named as plaintiff; and if an amendment were allowed to supply the omission the effect of such an amendment would necessarily be to make a plaintiff where there was none such at the inception of the action").

61. See the distinction recently drawn by the supreme court of Georgia between the case of the Western, etc., R. Co. *v.* Dalton Marble Works, 122 Ga. 774, 50 S. E. 978, where an amendment was refused, and such cases as Adas Yeshurun Soc. *v.* Fish, 117 Ga. 345, 43 S. E. 715; Smith *v.* Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735; St. Cecilia's Academy *v.* Hardin, 78 Ga. 39, 3 S. E. 305, where the amendment was permitted because the names used imported a legal entity. *Compare* Bijou Advertising Co. *v.* Dickenson, 27 Nova Scotia 443.

This distinction is often very far reaching. — See for instance Robinson *v.* Magarity, 28 Ill. 423, 426, where it is said: "There is no presumption of law or fact, that any firm name includes any number of persons more than one. . . . Where a defendant comes in voluntarily, or pleads by the name alleged by the plaintiff, he is estopped to allege anything against it. And the same is the rule if he does not deny the names in which a plaintiff sues. They are both equally in abatement." *Compare* McGruder *v.* Belt, 12 App. Cas. (D. C.) 15; Porter *v.* Cresson, 10 Serg. & R. (Pa.) 257, 258, where Duncan, J., remarks: "From the time of the year-books to this time, misnomer might be pleaded in abatement, when the plaintiff misnames himself, 22 Edw. III, c. 34, and we ought not to be more strict than in the days of the year-books; and in Brooke Misnomer 73, it is said, that in an action by a corporation, or a natural body, misnomer of the one or the other goes only to the writ. But if there was no such company as Cressou, Wistar & Co., then there could be no person *in rerum natura* to maintain the action; that would be in bar, for there could be no one to maintain the action by any name."

62. Doe *v.* Penfield, 19 Johns. (N. Y.) 308; Campbell *v.* Galbreath, 5 Watts (Pa.) 423, 428, where Kennedy, J., says: "In order to prevent all unnecessary delay in bringing a cause to trial on its merits . . . if an action be commenced in the name of a fictitious person, the defendant may plead in abatement that there never was any such person *in rerum natura*. . . . But then he will not be permitted to plead those matters after pleading in bar to the action, nor even after a general imparlance."

The same argument of convenience gave the fictitious "John Doe" a secure place even as against a plea in abatement at least within the local jurisdiction. See Doe *v.* Penfield, 19 Johns. (N. Y.) 308.

Nature of the plea of nul tiel corporation see CORPORATIONS, 10 Cyc. 1356 *et seq.*

63. See *infra*, I, B, 1, d, (II).

64. See *infra*, I, B, 1, d, (III).

65. See *infra*, I, B, 1, d, (IV).

66. Western, etc., R. Co. *v.* Dalton Marble Works, 122 Ga. 774, 776, 50 S. E. 978, where there was an attempt to sue in the name of "Dalton Marble Works, H. P. Colvard, proprietor." The phrase, said the court, "clearly

(III) *ACTION IN NAME OF AN UNINCORPORATED ASSOCIATION NOT AUTHORIZED BY STATUTE TO SUE.* However numerous a partnership or an unincorporated association may be, or however widespread its business, it cannot at common law claim recognition in the courts as plaintiff in its association name alone.[67] If the action is brought merely in the name of an unincorporated association, the fault, at common law, is in strictness not the misnomer of a party plaintiff but rather the omission of plaintiff. On principle, according to the doctrine of a number of cases, defendant's right to object in such a case is not waived by his failure to demur specially or to plead in abatement, but can be taken at any stage.[68] But the trend of authority has been to moderate this doctrine, through an application of the distinction, already noticed, between the misnomer of plaintiff and the omission of plaintiff.[69] Accordingly it has been held that the objection at common law to an action in the name of an unincorporated association is of a dilatory nature and is waived if not made *in limine*.[70]

(IV) *ACTION IN NAME OF AN ARTIFICIAL OR QUASI-ARTIFICIAL PERSON ATTEMPTED TO BE FORMED FOR AN UNLAWFUL PURPOSE.* Although apparently organized as a corporation, or apparently authorized to sue in an association name, a society or association formed for an unlawful purpose is unable, when that fact appears, to maintain its standing in court as a person in law.[71]

shows, if it be true, that the 'Dalton Marble Works' was neither a partnership nor a corporation, but merely the name of Colvard's property." It was held that the case must be dismissed. To the same effect see The Pembinaw *v.* Wilson, 11 Iowa 479; Columbus *v.* Monti, 6 Minn. 568.

67. See ASSOCIATIONS, 4 Cyc. 312; PARTNERSHIP, *post*, p. 560 *et seq.*; St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

For the effect of statutes giving unincorporated associations a legal entity as plaintiff see *supra*, I, B, 1, b (IV).

68. Pollock *v.* Dunning, 54 Ind. 115, where it is said that a complaint by an unincorporated company in its firm-name and style alone, not setting out the individual names of the members thereof, is bad, both on demurrer and on motion in arrest of judgment. See also Hughes *v.* Walker, 4 Blackf. (Ind.) 50: "If an unincorporated company sue in the name of the firm, the suit will be dismissed on motion."

An Indiana statute provided that an action at law for the recovery of a specific sum of money upon a promissory note could be instituted by filing the note, without a formal declaration. A note made payable in a firm-name was filed under this statute, and a writ of summons was issued in the same name without designating the individual members of the firm. It was held that the firm could not thus sue. "The statute," said the court, "dispenses with a formal declaration, but it does not dispense with the parties to the suit." Hays *v.* Lanier, 3 Blackf. (Ind.) 322, 323.

69. See *supra*, I, B, 1, c, (III), (B).

70. See ASSOCIATIONS, 4 Cyc. 312; PARTNERSHIP, *post*, p. 560 *et seq.*

For illustrations see in particular Morse *v.* Chase, 4 Watts (Pa.) 456, 458 (where Sergeant, J., says: "As to the objection that the suit is on its face erroneously brought by Joseph L. Chase & Co., and this may be taken advantage of in error; it is a sufficient answer, that after verdict the court will presume Joseph L. Chase & Co. to be the names of real persons, where the contrary does not appear"); Porter *v.* Cresson, 10 Serg. & R. (Pa.) 257 (which was an action in the name of Cresson, Wistor & Co. on a single bill; the plea was *non est factum*. On the trial it appeared that the plaintiff company was composed of four persons; defendant requested a charge that plaintiffs were not entitled to recover; it was held that the defense was too late); Bennett *v.* Child, 19 Wis. 362, 367, 88 Am. Dec. 692 (where Downer, J., says: "The position that 'Childs, Gould & Co.' is not a party known to the law, and that the judgment in their favor is void, is untenable. If the defendant in that suit desired to take advantage of that defect or irregularity, he should have appeared before the justice and made his objection before judgment"). And *compare* Moore *v.* Watts, 81 Ala. 261, 2 So. 278; Moore *v.* Burns, 60 Ala. 269; Robinson *v.* Magarity, 28 Ill. 423; Haskins *v.* Alcott, 13 Ohio St. 210; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

71. See cases cited *infra*, this note.

Association formed for an unlawful purpose appearing as a corporation.— Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270. In this case plaintiff declared "as a body corporate organized and existing under the laws of the State." It appeared in the record that its purpose was "by all lawful means to oppose the temperance law" passed by the last legislature. It was held that a society could not be incorporated to resist the enforcement of a law, and that judgment in favor of plaintiff must be reversed.

Partnerships formed for an unlawful purpose.— Jackson *v.* Akron Brick Assoc., 53 Ohio St. 303, 305, 41 N. E. 257, 53 Am. St. Rep. 638, 35 L. R. A. 287, where the action

2. Requisite of Remedial Interest — a. Statement of Rule. For a standing as party plaintiff it is necessary, not only that plaintiff be a person in law,[72] but also that this person have and show, in the cause of action asserted, an existing interest which the law of the forum can recognize and enforce.[73]

b. Nature of Remedial Interest — (i) *Distinguished From Beneficial Interest.* This remedial interest is commonly found in the person who has the beneficial ownership of the cause of action. But the one is not the test of the other. The remedial interest may be entirely separate from the beneficial ownership.[74]

(ii) *Right of Action Essential.* The remedial interest essential for the position of a party plaintiff is a technical rather than a merely beneficial interest. Its characteristic is that of a right of action, and this whether the question arises in common-law pleading,[75] in equity pleading,[76] or under the codes.[77] He who is vested with a right of action on a given cause of action may sue upon it in his own name, although the whole beneficial interest is in another.[78] On the other

was brought in the name of the Akron Brick Association, claiming as a partnership. By the terms of the Ohio statute "a partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known." Defendant answered that the alleged partnership was formed for the purpose of preventing fair competition in the brick trade, and to enhance prices. Said the court: "A partnership is an association with certain incidents recognized by law for the convenient transaction of legitimate trade and business; it cannot, therefore, be formed for an illegal purpose, or one contrary to public policy." And it was held that as it appeared that the Akron Brick Association "was organized for a purpose contrary to public policy" it had no right under the Ohio statute to sue by the name assumed in its business — "it is not a partnership within the meaning of the statute," per Minshall, C. J.

72. See *supra*, I, B, 1 *et seq.*

73. The doctrine, with its citations, will appear more fully in the topics immediately following. See *infra*, I, B, 2, b *et seq.*

For various instances of the lack of remedial interest see Lester *v.* Kinne, 37 Conn. 9; Mitchell *v.* Georgia, etc., R. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; Dix *v.* Mercantile Ins. Co., 22 Ill. 272; Shoemaker *v.* Grant County, 36 Ind. 175; McGovern *v.* Hern, 153 Mass. 308, 26 N. E. 861, 25 Am. St. Rep. 632, 10 L. R. A. 815; Van Doren *v.* Relfe, 20 Mo. 455; De Groot *v.* Clark, 51 N. Y. App. Div. 606, 64 N. Y. Suppl. 282; Brooks *v.* Holton, 136 N. C. 306, 48 S. E. 737; Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967; Ramseur *v.* Whelchel, 70 S. C. 145, 49 S. E. 228; Gulf, etc., R. Co. *v.* Bartlett, (Tex. Civ. App. 1903) 75 S. W. 56; Pelham *v.* Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

74. See cases cited *infra*, note 77 *et seq.*; and in particular Weidner *v.* Rankin, 26 Ohio St. 522; Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261.

75. "The general rule [in common law pleading] is, that the action should be brought in the name of the party whose legal right has been affected." 1 Chitty Pl. 1 *et seq.*

76. For the rule in equity pleading see Story Eq. Pl. §§ 72, 76*a*: "The general rule, in courts of equity, as to parties, is that all persons materially interested in the subject-matter, ought to be made parties to the suit." And see Crocker *v.* Higgins, 7 Conn. 342, 346, where Hosmer, C. J., remarks: "It [the word interest as defining the person entitled to sue in equity] implies a right in the subject of controversy, which a decree, more nearly or remotely, may affect." See also Carter *v.* Carter, 82 Va. 624.

77. As to code pleading see First Rep. N. Y. Com'rs Pr. and Pl. (1848) p. 124, where it is said: "The true rule undoubtedly is, that which prevails in the courts of equity, that he who has the right is the person to pursue the remedy. We have adopted that rule." *Compare* the remarks of Willes, J., in Gray *v.* Pearson, L. R. 5 C. P. 568, 574, 23 L. T. Rep. N. S. 416: "I am of opinion that this action cannot be maintained, and for the simple reason,— a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,— that the proper person to bring an action is the person whose right has been violated." See also Webb *v.* Hayden, 166 Mo. 39, 65 S. W. 760.

78. The distinction between the person having the right of action and the person having the beneficial interest is familiar enough in common-law pleading, and of settled importance wherever the administration of law and the administration of equity is through separate tribunals. See the remarks of Mitchell, J., in Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 214, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261. The distinction is also of force under the one form of action of code pleading. See Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319; Minnesota Thresher Mfg. Co. *v.* Heipler, 49 Minn. 395, 52 N. W. 33; McLean *v.* Dean, 66 Minn. 369, 69 N. W. 140; Willison *v.* Smith, 52 Mo. App. 133; Allen *v.* Brown, 44 N. Y. 228; Considerant *v.* Brisbane, 22 N. Y. 389; Brown *v.* Cherry,

hand, he who is without a right of action on a given cause of action cannot assert this cause in his own name, even when the whole beneficial interest is in him.[79]

(III) *RIGHT OF ACTION AND CAUSE OF ACTION.* The right of action is to be distinguished from the cause of action. In the ordinary run of cases, the distinction is in no way important, the two coexisting as a normal condition.[80] But they do not necessarily coexist. It happens now and again that plaintiff's first pleading sets up an unquestionable cause of action existing only in the right of one not a party to the suit.[81]

(IV) *RIGHT OF ACTION AND CAPACITY TO SUE.* The right of action is to be distinguished also from the capacity to sue. The former is of the essence, the latter is waived if not objected to on that specific ground.[82]

(V) *RIGHT OF ACTION AND DEFECT OF PARTIES.* By the same token, the want of a right of action is essentially different from a defect of parties plaintiff, and is not waived by a failure to demur on that ground.[83]

e. Effect if Remedial Interest Is Lacking. It follows that the effect of a want of remedial interest is far reaching. It is no less essential than the statement of the facts of a cause of action that plaintiff's first pleading show a cause of action in his favor. If it fails in this, although stating the facts of a complete cause of action in someone else, plaintiff cannot claim a judgment even if defendant has contested the case on its merits.[84] The defect is treated as analogous to a failure

56 Barb. (N. Y.) 635. The doctrines will be developed under different topics *infra*, I, B, 2, e. Such as "Different Aspects of the Remedial Interest," I, B, 2, e, and in particular "Trustee of an Express Trust," I, B, 2, e, (IV); "Person Expressly Authorized by Statute," I, B, 2, e; (VI).

79. Galpin *v.* Lamb, 29 Ohio St. 529. And see Weidner *v.* Rankin, 26 Ohio St. 522; Usher *v.* West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; Adams *v.* Adams, 4 Watts (Pa.) 160.

80. So frequent is this that the code demurrer upon the ground that the complaint or petition does not state facts sufficient to constitute a cause of action reaches two different kinds of defects: (1) When the complaint does not state facts sufficient to constitute a cause of action in any one; (2) when the complaint does state facts sufficient to constitute a cause of action, but this cause of action does not appear to exist in favor of plaintiff. See Ervin *v.* State, 150 Ind. 332, 48 N. E. 249; Farris *v.* Jones, 112 Ind. 498, 503, 14 N. E. 484 (where it is said: "A demurrer to a paragraph of complaint, for the alleged insufficiency of the facts stated therein, calls in question not only the sufficiency of the facts . . . to constitute a cause of action, but also the right or authority of the particular plaintiff to institute or maintain a suit"); State *v.* Karr, 37 Ind. App. 120, 76 N. E. 780. And see *infra*, I, B, 2, c.

81. See cases cited *infra*, this note.

Various instances of this separation between the right of action and the cause of action will be found in the cases following. There is of course no principle of classification, except the idiosyncrasy of the pleader. Collins Coal Co. *v.* Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; State *v.* Karr, 37 Ind. App. 120, 76 N. E. 780; Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650; Lytle *v.* Lytle, 2 Metc. (Ky.) 127; Webb *v.* Hayden, 166 Mo. 39, 65 S. W. 760; Van Doren *v.* Relfe, 20 Mo. 455; Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11; Galpin *v.* Lamb, 29 Ohio St. 529; Weidner *v.* Rankin, 26 Ohio St. 522; Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163. And see *infra*, I, B, 2, c. *Compare* ACTIONS, 1 Cyc. 642.

82. Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650. In Pence *v.* Aughe, 101 Ind. 317, 319, it is said: "It has often been decided by this court, that a demurrer to a complaint assigning as cause 'that the plaintiff has not legal capacity to sue,' has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact that the complaint fails to show a right of action in the plaintiff." And see *infra*, I, B, 3.

83. "The objection to the plaintiff's maintaining the action is not waived, as is claimed in argument, by the failure to demur, on the ground of a defect of parties plaintiff. The objection is not that there is a defect of parties, but that no right of action is shown to exist in the plaintiff." Galpin *v.* Lamb, 29 Ohio St. 529, 536. In Pelham *v.* Edelmeyer, 15 Fed. 262, 264, 21 Blatchf. 188, Wallace, J., remarks: "The objection is not that there is a defect of parties, but that the complainant has no interest in the subject of the controversy. As to all merely formal defects in the bill the objection must be taken by demurrer. So, also, when there is a defect of parties appearing upon the face of the bill, the defendant must resort to a demurrer or the court is at liberty to make a decree saving the rights of the absent parties. . . . The complainant has failed to show himself possessed of any legal or equitable interest in the letters patent on which the suit is founded. If the bill were perfect the court could not decree for complainant upon the proofs.

84. Lytle *v.* Lytle, 2 Metc. (Ky.) 127, 129

to state facts sufficient to constitute a cause of action. It may be reached therefore by general demurrer.[85] Or it will be searched out by plaintiff's demurrer to defendant's answer.[86] Or if there has been a trial with a verdict and judgment for plaintiff, the case may still be dismissed by the reviewing court.[87]

d. Remedial Interest Under Different Systems of Procedure — (I) *In General.* Although the three systems of common-law pleading, equity pleading, and code pleading agree in the general principle that the action must be brought in the name of the person whose right has been violated,[88] they are not at one on the proper test of this right.[89]

(II) *In Common-Law Pleading.* Common-law pleading looked to the entire legal interest, and did not directly recognize the beneficial interest or the equitable title.[90] The test which it applied was that of the strict legal title in its entirety. In the view of common-law procedure he who was clothed with this legal title had the exclusive right of action, although the entire beneficial interest, with the equitable title, was in someone else.[91]

(III) *In Equity Pleading.* The courts of equity looked rather to the beneficial ownership. The claimant must, it is true, be clothed with a title which the court could recognize,[92] but an equitable title was sufficient.[93]

(IV) *In Code Pleading.* Under the codes of civil procedure, the substitution of the one form of civil action for the action at law and the suit in equity rendered necessary a test of the remedial interest which would be applicable both to the legal and the equitable cause of action. The general principle that he who has the right should have the remedy was avowedly adopted by the framers of the first code.[94] But they did not expressly define this right either as a legal or as an equitable right. The earliest code, the New York code of 1848, provided merely that "every action must be prosecuted in the name of the real party in interest," except as otherwise specially provided,[95] and left it for the courts to determine who is "the real party in interest" within the scope of the one form of civil action. This vague and convenient enactment has been copied by the later codes without substantial variation or addition. The result for the code states, and some of the others, has been therefore that the primary test of the remedial interest sufficient for a standing as plaintiff is found in the judicial interpretation of the phrase "real party in interest."[96]

(where it is said: "As the petition itself disclosed the fact that the plaintiff was not entitled to the debt sued for, but that the right of action was in another, no valid judgment could have been rendered against the defendant"); Weidner *v.* Rankin, 26 Ohio St. 522, 525 (where it is said: "A good petition must contain a cause of action in favor of the plaintiff, and when it does not show such cause of action, the objection is not waived by the failure of the defendant to demur, although the facts stated may constitute a cause of action in favor of a person not a party to the suit").

85. Under the codes, the defect of a remedial interest lacking in the would-be plaintiff is customarily reached by a demurrer upon the ground that the complaint or petition does not state facts sufficient to constitute a cause of action. Farris *v.* Jones, 112 Ind. 498, 14 N. E. 484; Frazer *v.* State, 106 Ind. 471, 7 N. E. 203; Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114; Sinker *v.* Floyd, 104 Ind. 291, 4 N. E. 10; Wilson *v.* Galey, 103 Ind. 257, 2 N. E. 736; Pence *v.* Aughe, 101 Ind. 317; State *v.* Karr, 37 Ind. App. 120, 76 N. E. 780; Galpin *v.* Lamb, 29 Ohio St. 529.

86. Lytle *v.* Lytle, 2 Metc. (Ky.) 127.

87. Weidner *v.* Rankin, 26 Ohio St. 522.

Whether defect can be remedied by substituting proper plaintiff see PLEADING.

88. See *supra*, I, B, 2, b, (II).

89. See *infra*, I, B, 2, d, (II)–(IV).

90. 1 Chitty Pl. 1, 2.

91. 1 Chitty Pl. 2, 3.

92. "It is undeniably a fundamental rule that every bill in equity must clearly show on its face that the plaintiff is entitled to the relief demanded, or such an interest in the subject matter as clothes him with a right to institute and maintain a suit concerning it." Carter *v.* Carter, 82 Va. 624, 632, per Richardson, J. And see in this connection 1 Barton Ch. Pr. 349, 350; 1 Daniel Ch. Pr. 314.

93. See EQUITY, 16 Cyc. 196, and cases there cited.

94. First Rep. N. Y. Com'rs Pl. & Pr. (1848) p. 124.

95. N. Y. Code (1848), § 91.

In Connecticut, however, the phrase, "the real party in interest," has apparently been omitted from the latest enactment on the point. Gen. St. (1902) § 631.

96. See *infra*, I, B, 2, e; and in particular, I, B, 2, e, (III).

e. Different Aspects of Remedial Interest — (i) *Legal Owner as Plaintiff* — (A) *At Common Law* — (1) In General — (a) The Test. The test of remedial interest in a court of law, if there is no statute to the contrary, is the test of the legal title.[97]

(b) Legal Title Sufficient. If plaintiff, suing at law, has a legal title, in whatever form, to the cause of action which he has pleaded, he has a sufficient remedial interest.[98]

(c) Legal Title Necessary. On the other hand if a plaintiff in a court of law shows no legal title to the cause which he has pleaded, the fact that the entire

97. See cases cited *infra*, notes 98, 99.

An action at law upon a contract, whether the contract is express or implied, by parol or under seal, "must be brought in the name of the party in whom the legal interest in such contract was vested." 1 Chitty Pl. 2.

So, in a tort action, "the principle to be borne in mind is, that the person who must be made the plaintiff in the action is the person whose legal rights have been invaded." 1 Chitty Pl. 69; Dicey Parties 330.

98. *Alabama.*— Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Smith *v.* Wooding, 20 Ala. 324.

Connecticut.— Stoddard *v.* Mix, 14 Conn. 12.

District of Columbia.— U. S. *v.* O'Leary, 19 D. C. 118.

Georgia.— Schley *v.* Lyon, 6 Ga. 530.

Illinois.— Ridgely Nat. Bank *v.* Patton, 109 Ill. 479; Chadsey *v.* Lewis, 6 Ill. 153; Tarrant *v.* Burch, 102 Ill. App. 393.

Maine.— Penobscot R. Co. *v.* Mayo, 60 Me. 306.

Michigan.— Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

Mississippi.— Pearce *v.* Twichell, 41 Miss. 344.

Pennsylvania.— Bacon *v.* Sanders, 4 Whart. 148; Sentinel Printing Co. *v.* Long, 28 Pa. Super. Ct. 608, holding that in an action by one person to the use of another, defendant cannot allege that the equitable plaintiff has no right to recover the sum in controversy.

Vermont.— Heald *v.* Warren, 22 Vt. 409.

Virginia.— Calahan *v.* Depriest, 13 Gratt. 274.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 79, 23 S. E. 584.

See 37 Cent. Dig. tit. "Parties," § 9 *et seq.*

Recovery depends on proof of the legal plaintiff's claim, and the right to its fruits is a matter resting between the legal and equitable plaintiffs to be determined, if necessary, by the court; and this in no way concerns defendant. Sentinel Printing Co. *v.* Long, 28 Pa. Super. Ct. 608.

For the sufficiency of the legal title in code pleading see *infra*, I, B, 2, e, (I), (C).

The application of the doctrine in special cases — *Promisee not expressed.*—"Although it is not in this contract expressly stated to whom the promise is made, yet it appears, that the money, which constituted the consideration for the promise of the defendant's testator, was received by him of the plaintiff; and also, that it was money, the legal title to which was in the plaintiff. He, therefore, is to be considered the person to whom the promise is made, and the party to the contract in whom is vested the legal interest in it. Hence it results, that the alleged violation of it is an injury to his legal rights, for which he is the proper person to bring this suit." Treat *v.* Stanton, 14 Conn. 445, 452.

Owner for collection.— F, the owner of a promissory note, indorsed and delivered it to P, for collection. Before P collected the note, F died. Thereafter P sued upon the note in his own name. It was held as the indorsement and delivery for the purpose of collection passed the legal title in trust, and the trust was not terminated by the death of F, that the action might be brought in the name of P. Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844.

"Agent" for collection.— Defendant was summoned to answer A B, "agent of the Providence Hat-manufacturing Company" in assumpsit for that defendant "by his note of hand of that date, for value received of the Providence Hat-manufacturing Company, promised the said A. B., as agent thereof, to pay to him or order the sum," etc. After a verdict for A B, defendant objected that if any action lay on the promise, it must be brought in the name of the company, "whose agent only the plaintiff is, and from whom alone the consideration moved." It was held that as the contract was with the agent personally, he had the legal title and could sue in his own name. Buffum *v.* Chadwick, 8 Mass. 103. And see Lobdell *v.* Merchants', etc., Bank, 33 Mich. 408; Brigham *v.* Gurney, 1 Mich. 349.

Effect of a blank indorsement.—Assumpsit upon a promissory note payable to the order of B and indorsed by him in blank. The action was in the name of P, S and H, "Trustees of the Kensington Savings Institution." Defense, that P, S, and H are only some of the copartners trading under the name of the Kensington's Savings Institution, and that all the copartners are necessary. It was held that as the blank indorsement could be filled up with the names of the partners on the record, they had the legal title, and the names of the other partners were unnecessary. Bacon *v.* Sanders, 4 Whart. (Pa.) 148. And see Boyd *v.* Corbitt, 37 Mich. 52. *Compare* Kerrick *v.* Stevens, 58 Mich. 297, 25 N. W. 199, to the effect that where the payee of a note sues upon it in his own name, and it appears that the note is indorsed in blank by the payee, as the mere indorsement does not divest the payee of the legal title, he may sue in his own name.

beneficial ownership appears in him does not warrant an action at law in his name as plaintiff.[99]

(2) In Case of Separation Between Legal and Beneficial Ownership. In the view of a court of law, if plaintiff is vested with the legal title it is immaterial whether he is or is not the individual who would generally be considered most interested in maintaining the action.[1] A court of law "will not inquire whether the plaintiff sues for himself, or as trustee for some other person."[2]

(3) In Case of Special Property. Although a legal title is necessary for a standing as plaintiff in a court of law, it does not follow that the complete legal title is necessary. Thus, any person may sue for an interference with the possession if he has the right to the immediate possession as against defendant.[3]

(B) *In Equity Pleading*—(1) In General. It is sometimes said that a suit in equity not only may but must be brought in the name of the beneficial owner.[4] The underlying principle, however, is, not that equity refuses to recognize the legal owner, as courts of law refuse to recognize the equitable owner, but rather that courts of equity are not confined to the recognition of one kind of ownership.[5] Regularly an equitable interest is to be asserted by the equitable owner in his own name, and not in the name of the legal owner.[6] But there is a wide class

99. *Alabama.*— McNutt *v.* King, 59 Ala. 597; Skinner *v.* Bedell, 32 Ala. 44.

Arkansas.— Yell *v.* Snow, 24 Ark. 554.

Connecticut.— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112. In this case a deed containing covenants of seizin and against encumbrances was made to B as trustee of a corporation to be organized; after its organization B released to the corporation. There was an outstanding encumbrance at the time when the deed was delivered. It was conceded that the right of action thus arising did not run with the land. It was held that the corporation was not the proper party plaintiff in an action for breach of the covenants.

Illinois.— McLean County Coal Co. *v.* Long, 91 Ill. 617, 33 Am. Rep. 64, holding that the sole devisee of a deceased person cannot maintain an action in his own name for a conversion of the property of the testator in his lifetime, but the suit must be brought in the name of his executor or administrator. "Appellee [the sole devisee] has only an equitable title, and that never confers the right to sue at law."

Kentucky.— Com. *v.* Hughes, 8 B. Mon. 400, holding that one who sues as relator must have the legal right; a mere equitable right is not sufficient.

Maine.— Martel *v.* Desjardin, 93 Me. 413, 45 Atl. 522, holding that a *cestui que trust* of a mortgage of real estate cannot maintain a writ of entry for the possession of the mortgaged premises. "The plaintiff must hold the legal estate at the time he brings the action."

Massachusetts.— Young *v.* Miller, 6 Gray 152 (the indorsee of one of the notes secured by a mortgage which is not assigned to him cannot maintain a writ of entry in his own name to foreclose the mortgage); Somes *v.* Skinner, 16 Mass. 348 (in a real action for the recovery of several tracts of land, it appearing that, although plaintiff had a legal title to the other tracts, one was held by a trustee for him. It was held that plaintiff could not maintain his action for this tract).

Pennsylvania.— De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38.

See 37 Cent. Dig. tit. "Parties," § 10 *et seq.*

Survival of the rule in code pleading see *infra*, I, B, 2, e, (I), (C).

1. Dicey Parties 330. And see Fairmount, etc., St. Pass. R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; Manly *v.* Field, 7 C. B. N. S. 96, 6 Jur. N. S. 300, 29 L. J. C. P. 79, 97 E. C. L. 96; Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653.

The principle is developed under the topic "Nominal and Use Plaintiffs," *infra*, I, B, 2, e, (II).

2. Chadsey *v.* Lewis, 6 Ill. 153, 159. But see *infra*, I, B, 2, e, (II).

3. For instance, the essential point being the existence on the part of plaintiff in trover of a right, as against defendant, to the immediate possession of the goods, that action may be brought either by the owner, or by a bailee, or by a mere possessor without title of specific goods. Chitty Pl. (16th Am. ed.) 137, 167; Dicey Parties 347 *et seq.* See also Penobscot R. Co. *v.* Mayo, 30 Me. 306; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63, where P having in his possession goods belonging to S who had left them with P, requesting him to take care of them, and they having been stolen from P's possession and sold by the thief to D, trover was properly brought in the name of P. And see Bailments, 5 Cyc. 215.

The distinction is apparently ignored in Richardson *v.* Means, 22 Mo. 495.

4. See Smith *v.* Brittenham, 109 Ill. 540.

5. Olds *v.* Cummings 31 Ill. 188, 191, where Caton, C. J., said: "Courts of equity will not be confined to legal forms and legal titles, but look beyond these, to the substantial, equitable rights of parties."

6. Wolverton *v.* Taylor, 157 Ill. 485, 42 N. E. 49; Smith *v.* Brittenham, 109 Ill. 540; Olds *v.* Cummingss, 31 Ill. 188; Dixon *v.*

of cases in which the legal owner, without beneficial interest, has a claim of an equitable cognizance, in his right as legal owner, against some third person; in such cases a court of equity does not refuse admission to the legal title.[7]

(2) LEGAL OWNER SUING WITH BENEFICIARY. As a rule, when the legal owner sues in equity, his beneficiaries also must be parties to the suit.[8]

(3) LEGAL OWNER SUING ALONE IN EQUITY. But in some cases the legal owner may not only sue in equity but may sue there alone.[9] A trustee, for instance, may appear as complainant without joining his beneficiaries when the object of the suit is to recover the lost property or to reduce it to possession, and it in no wise affects his relation with the *cestui que trust*.[10]

(4) LEGAL OWNER AS A REAL PARTY IN EQUITY. In these cases the complainant, being vested with the legal title in trust for another, is looked upon by courts of equity not as a merely formal and nominal party but as a real litigant.[11]

Buell, 21 Ill. 203; Frye *v.* State Bank, 10 Ill. 332; Chisholm *v.* McDonald, 30 Ill. App. 176; Burlew *v.* Hillman, 16 N. J. Eq. 23; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; Field *v.* Maghee, 5 Paige (N. Y.) 539; Oakey *v.* Bend, 3 Edw. (N. Y.) 482. And see EQUITY, 16 Cyc. 196, 197.

7. Story Eq. Pl. § 510.

8. See EQUITY, 16 Cyc. 181; Story Equity Pl. § 207; and *infra*, III.

9. The general principle was well stated by Waite, C. J., in Kerrison *v.* Stewart, 93 U. S. 155, 160, 23 L. ed. 843, as follows: "It cannot be doubted, that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (Ashton *v.* Atlantic Bank, 3 Allen (Mass.) 217; Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368; Bifield *v.* Taylor, Beatty 23, 1 Molloy 193); or to one by a stranger against him to defeat it in whole or in part (Winslow *v.* Minnesota, etc., R. Co., 4 Minn. 313, 77 Am. Dec. 519; Wakeman *v.* Grover, 4 Paige (N. Y.) 23; Rogers *v.* Rogers, 3 Paige (N. Y.) 379; Campbell *v.* Watson, 8 Ohio 498). In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

10. See cases cited *infra*, this note.

The legal owner, without beneficial ownership, suing alone in equity.—Ashton *v.* Atlantic Bank, 3 Allen (Mass.) 217; Boyden *v.* Partridge, 2 Gray (Mass.) 190; Adams *v.* Bradley, 12 Mich. 346; Tavenner *v.* Barrett, 21 W. Va. 656 (where an agent for the purchase or sale of real estate has such a relation to the transaction as to make him a trustee, as where the bonds for the purchase-price are made payable to him, he may sue for the specific performance of the contract); Dodge *v.* Tulleys, 144 U. S. 451, 455, 12 S. Ct. 728, 36 L. ed. 50 (an action in a federal court to foreclose a trust deed, executed to Tulleys, trustee, to secure payment of a bond of ten thousand dollars to Hesse. It was objected that the citizenship of Hesse, the obligee in the bond, was not alleged. It was held that this was unnecessary. "The suit," said Brewer, J., "is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was, therefore, the proper party in whose name to bring suit for foreclosure. It happens in this case that there was but one party beneficiary under the trust deed; . . . But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on"); Carey *v.* Brown, 92 U. S. 171, 23 L. ed. 469; Hunter *v.* Robbins, 117 Fed. 920 (where complainant, as treasurer of a corporation, brought an action in his own name against his predecessor in office, for an accounting and to recover money of the corporation alleged to have been wrongfully withheld by defendant); Ross *v.* Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288; Smith *v.* Portland, 30 Fed. 734; Wescott *v.* Wayne Agricultural Works, 11 Fed. 298.

11. Accordingly diversity of citizenship between the legal owner suing alone in equity and defendant is sufficient for jurisdiction by a federal court, although the *cestui que trust* is a citizen of the same state as defendant. Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501; Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. (U. S.) 172, 20 L. ed. 179; Hunter *v.* Robbins, 117 Fed. 920; Pennington *v.* Smith, 78 Fed. 399, 24 C. C. A. 145; Griswold *v.* Bacheller, 75 Fed. 470; Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162.

Nor is the rule changed when the trustee refuses to sue and the beneficiary brings the suit making the trustee a defendant. If the trustee and defendant are citizens of the same state, a federal court is without jurisdiction from diversity of citizenship, although the complainant is a citizen of a different state, for the trustee, although a defendant, is really on the same side of the case as the beneficiary. Shipp *v.* Williams, 62 Fed. 4, 10 C. C. A. 247.

The rule here, however, is to be distinguished from that which applies when plaintiff is a "mere conduit through which the law affords a remedy to the parties aggrieved," as when, by some positive law, the litigant is compelled to use the name of the state or of some public officer, who has neither title to nor control over the cause asserted.[12]

(c) *In Code Pleading.* It is a fundamental doctrine of code pleading[13] that the distinctions between actions at law and suits in equity are abolished, that there shall be but one form of civil action, and that this one form of action must be brought, with a few exceptions, in the name of the real party in interest.[14] But this doctrine, as construed by the courts, does not eliminate the legal title as a test of remedial interest under the codes. To a wide extent it is still sufficient for the position of plaintiff in the civil action. The doctrine will be developed under the topics referred to in the note.[15]

(II) *Nominal and Use Plaintiffs*—(A) *The Rule at Common Law.* When one person held the legal title to tangible property or a chose in action and another person had the beneficial ownership of the same property, the common-law rule required that any action respecting the property should be in the name of the legal owner.[16] It might be that the beneficial ownership appeared on the face of the instrument creating the legal interest,[17] it might be that plaintiff's declaration expressly alleged that he was suing as trustee for another;[18] but in either case the historic rule of the common law was to look to the legal title and disregard the equitable ownership.[19]

(B) *Its Evasion Through Device of Use Plaintiff.* Notwithstanding a growing recognition of equitable rights by the substantive common law, this rule of the common-law procedure which excluded the beneficial owner from a place as plaintiff in the law courts,[20] continued unchanged, in point of form and theory, until a comparatively recent time.[21] In point of substance, however, the rule

12. Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; McNutt *v.* Bland, 2 How. (U. S.) 9, 11 L. ed. 159; Browne *v.* Strode, 3 Cranch (U. S.) 303, 3 L. ed. 108. And see the remarks of Field, J., in Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. (U. S.) 172, 177, 20 L. ed. 179, and of Lurton, J., in Shipp *v.* Williams, 62 Fed. 4, 6, 10 C. C. A. 247.

13. That is, of the statutory system of pleading which now prevails in Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming, and partially in some other jurisdictions.

14. The exceptions include the case of an executor and administrator, a trustee of an express trust, and a person expressly authorized by statute. See *infra*, I, B, 2, e, (IV)–(VI).

15. "Real Party in Interest" see I, B, 2, e, (III).

"Trustee of Express Trust" see I, B, 2, e, (IV).

"Executor or Administrator" see I, B, 2, e, (V).

16. See *supra*, I, B, 2, e, (I), (A), (2); and Dicey Parties 43 *et seq.*

17. Ridgely Nat. Bank *v.* Patton, 109 Ill. 479, where a check had been drawn on a bank payable to "Patton & Hamilton for account of Lewis Coleman," and it was held that the action was properly brought in the names of Patton and Hamilton.

18. Schley *v.* Lyon, 6 Ga. 530; Gibson *v.* Winter, 5 B. & Ad. 96, 102, 2 N. & M. 737, 27 E. C. L. 50, where Denman, C. J., said: "The plaintiff, though he sues as a trustee for another must in a court of law, be treated in all respects as the party in the cause." And see Smith *v.* Wooding, 20 Ala. 324.

19. Dicey Parties 44, where it is said: "The general principle of the courts of law is to disregard equitable interests."

20. See *supra*, I, B, 2, e, (I), (A), (1).

21. In Master *v.* Miller, 4 T. R. 320, 341, Buller, J., referring to the common-law rule which required the action to be in the name of the assignor of a chose in action, that is, of its legal owner, and not in the name of its assignee, had remarked: "I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases." Twenty-five years later, in Skinner *v.* Somes, 14 Mass. 107, 108, the assignee of a bond, made to the obligee, "his heirs, executors, administrators, or assigns," ventured to sue upon it in his own name, urging that "courts of law have become more liberal in later times in supporting and protecting the rights of assignees of choses in action." But it was held that notwithstanding the mention of "assigns" in the bond itself, the assignee could not sue in his own name. "This is the first attempt," said the court, "to maintain an action of debt by the assignee of a bond in his own name. . . . We have gone as far

was largely abrogated by the device of the use plaintiff. The beneficial owner, although denied the right to sue in his own name, was permitted to sue in the name of the legal owner, and to control the action as thus brought.[22] In most respects, but not in all, the equitable owner became in effect the master of the action at law.[23]

(c) *Nature and Aim of Device*—(1) Its Main Purpose. The doctrine of the use plaintiff came as a device of convenience, in an attempt to evade the spirit while preserving the letter of a hard and fast rule of procedure. Its purpose was to safeguard the substantial interests and the convenience of the beneficial owner.[24] In strictness its use was proper only when reasonably necessary to this end.[25]

(2) Designation of Beneficial Owner. When a common-law action is thus brought, in the name of one person for the benefit of another, it is usual, and the better practice, to show this fact explicitly, either in the body of the declaration or by indorsement on it, or on the writ of summons.[26] But this is not necessary. Even when the beneficial ownership is expressly alleged in the declaration, the allegation forms no material part of the pleading. Both the cause of action and the right of action are complete without it.[27]

(d) *Nominal Plaintiff as a Party*—(1) In General. The device worked no change in the formal record of the action as asserting a claim by a legal owner, and it caused no risk of loss to him.[28]

(2) As Respects the Record. Accordingly, when the question turned only on the record of the case, the court still looked to the legal, or nominal, plaintiff.[29]

in favor of assignments as the authorities or the reason of them would justify us. But to support the present action would be to disregard settled and established rules, founded on sound principles of law, and the highest reason." So it was remarked by the supreme court of Connecticut, as late as 1841: "No case has been cited, nor is it believed that any can be found, where, on a promise made to one sustaining the character of a trustee, the *cestuy que trust*, or person ultimately interested, has been permitted to bring an action upon it. In such case, the obligation and legal responsibility is exclusively to the trustee, and must be enforced by him in a court of law." Treat *v.* Stanton, 14 Conn. 445, 454, per Storrs, J.

Statutory alteration.—The rule has been greatly altered by statute here and there; see notably, the requirement of the codes that every action must be prosecuted in the name of the real party in interest. See *infra*, I, B, 2, e, (II), (F).

Prior to the codes there were various alterations of the rule by special statutes. See Chitty Pl. (10th Am. ed. 1847) 15, 16.

22. See cases cited *infra*, note 23 *et seq.*

23. Sumner *v.* Sleeth, 87 Ill. 500, 503, where it was said: "It has long been the practice of courts of law to look through the nominal parties, to the rights of the real parties in interest." And see Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584, 589, for another illustration of the court, in a cause at law, looking to the rights of the real parties.

24. "The words 'for the use, etc.,' are unnecessary for any purpose other than to protect the interest of the usee against the nominal plaintiff." Tedrick *v.* Wells, 152 Ill. 214, 217, 38 N. E. 625, per Baker, J. And see Hobson *v.* McCambridge, 130 Ill. 367, 22 N. E. 592; McCormick *v.* Fulton, 19 Ill. 570.

25. Shanks *v.* White, 36 Ga. 432; Fain *v.* Garthright, 5 Ga. 6; Dazey *v.* Mills, 10 Ill. 67.

The general principle was recognized in Hargraves *v.* Lewis, 6 Ga. 207, 211, a suit in equity, where Nisbet, J., said: "A man has no right to make another a party to his litigation capriciously, but where it is necessary to the assertion of his rights in a Court of Justice, he may do so upon indemnifying him for costs. . . . It must be necessary to the assertion of the party's rights, or else he cannot use the name of another against his consent."

26. See remarks of Moncure, J., in Clarksons *v.* Doddridge, 14 Gratt. (Va.) 42, 46: "And it is useful and convenient to do so, to give notice to the defendant of the rights of the substantial plaintiff, and to enable the court to protect them by its orders." And see Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

27. Clarksons *v.* Doddridge, 14 Gratt. (Va.) 42; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

Nomenclature of the device.—In the doctrine on the point, the beneficial owner is distinguished from the legal owner by various names—the "use plaintiff," the "beneficial plaintiff," the "equitable plaintiff," the "substantial plaintiff," the "real plaintiff," the "*cestui que use*," the "usee." The legal owner has been called the "legal plaintiff," the "nominal plaintiff," the "record plaintiff."

28. See cases cited *infra*, note 29 *et seq.*

29. "Courts of law can only recognize him [the nominal plaintiff] as the plaintiff, although in modern practice, as a matter of

He was a necessary party in every stage of the action;[30] for the purposes of the record, he alone had the right of action.[31] It was error to permit a declaration to be amended so as to show that the legal title was not in the nominal plaintiff but in the use plaintiff.[32] If the action was brought in the name of one for the use of another, it was irregular and erroneous to enter the judgment in favor of the beneficiary alone.[33] If a statute gave a right of appeal to "the plaintiff," the appeal must be prosecuted in the name of the nominal plaintiff.[34] In the absence of a statute to the contrary, the nominal plaintiff was as a rule liable for the costs taxed against plaintiff.[35]

(3) Rights of a Nominal Plaintiff. Again, the use plaintiff's control over the action does not go so far as to expose the nominal plaintiff to risk of loss.[36] To control the action at law the use plaintiff must have the entire beneficial ownership.[37] And in such case the nominal plaintiff may require indemnity against costs and possible damages,[38] or sue the use plaintiff, upon an implied assumpsit for reimbursement.[39]

(E) *Use Plaintiff As a Party*—(1) In General. Within the limits set by the established forms of procedure at law,[40] the tendency in the law courts has long been to recognize the rights of the beneficial owner, and to protect him

convenience, they will declare and protect the trust." McCormick *v.* Fulton, 19 Ill. 570, 571, per Walker, J.

Altered by statute.—Under Ala. Code (1896), § 29, "in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record." See Cowan *v.* Campbell, 131 Ala. 211, 31 So. 429; Reese *v.* Reaves, 131 Ala. 195, 31 So. 447. And see Fletcher *v.* Prestwood, (Ala. 1906) 43 So. 231.

30. Hobson *v.* McCambridge, 130 Ill. 367, 22 N. E. 823.

31. "Although Tedrick was only the nominal plaintiff, yet the legal right of action was in him, alone." Tedrick *v.* Wells, 152 Ill. 214, 216, 38 N. E. 625. And see U. S. *v.* O'Leary, 19 D. C. 118.

32. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676.

33. Hobson *v.* McCambridge, 130 Ill. 367, 22 N. E. 823. So the execution must be in favor of plaintiff in the judgment. Hobson *v.* McCambridge, *supra*.

34. "The beneficial plaintiff is not authorized to appeal in his own name, and every step taken must be in that of the nominal plaintiff. And when the defendant perfects his appeal, the nominal plaintiff becomes the appellee, and as such, must be served with a summons as in other cases; and until he is served or otherwise properly in court, it is error to proceed to render a judgment in the case." McCormick *v.* Fulton, 19 Ill. 570, 571, per Walker, J. So where an order allowed an appeal to the "plaintiff," the appeal-bond must be in the name of the nominal plaintiff; the usee cannot file the bond and perfect an appeal. Tedrick *v.* Wells, 152 Ill. 214, 38 N. E. 625.

35. See Costs, 11 Cyc. 90 *et seq.*, where the many statutory qualifications of the rule are referred to. See also the elaborate note in 62 L. R. A. 617 to Getchell, etc., Lumber Mfg. Co. *v.* Employers' Liability Assur. Corp., 117 Iowa 180, 90 N. W. 616. That the statutory liability of the usee for costs may be cumulative see Ruddell *v.* Green, 104 Md. 371, 65 Atl. 42.

36. "No man has the right to use the name of a citizen without his consent, in such a way as will subject him to loss or damage." Fain *v.* Garthright, 5 Ga. 6, 7, per Nisbet, J.

37. Chapman *v.* Shattuck, 8 Ill. 49, 53 (where Treat, J., said: "In the case before us, it is not pretended that there was an assignment of the entire cause of action. By the terms of the agreement, Burgess was only to receive a portion of the proceeds of the bond. This gave him no power over the suit"); Creighton *v.* Hyde Park, 6 Ill. App. 272; Coffin *v.* Adams, 131 Mass. 133, 136 (where Gray, C. J., says: "The only cases in which a third person has the exclusive right to the control of an action at law are where he has acquired the whole interest of the nominal plaintiff, either by his voluntary act, as in Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285, or by operation of law, as in Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

38. "In this Commonwealth, the assignee of a chose in action has an adequate and complete remedy at law, in the right to maintain an action thereon in the name of his assignor, or of his executor or administrator, without his consent, and even against his protest, at least upon giving him, if seasonably demanded, a bond of indemnity against costs." Walker *v.* Brooks, 125 Mass. 241, 247, per Gray, C. J.

39. Henderson *v.* Welch, 8 Ill. 340, 342, where Treat, J., said: "Henderson having the beneficial interest only had to sue in the name of Welch, who thereby became the plaintiff on the record, and as such, liable in the first instance for the costs. The action failing, the whole of the costs were adjudged against him. If he has paid them, he has a clear cause of action against Henderson for so much money paid for his use."

40. See *supra*, I, B, 2, e, (I).

as the substantial plaintiff, both against the naked legal interest and against merely technical defenses, whenever this can be done without impairing the substantial rights of defendant.[41]

(2) Beneficial Owner as Master of the Suit — (a) Use of Legal Owner's Name. When a sufficient indemnity for costs was tendered,[42] neither the legal owner nor his executor or administrator had the right to refuse the use of his name as plaintiff, to the beneficial owner.[43] And if the consent of the legal owner was not obtained at the outset of the action, his consent at a later stage related back to the commencement.[44]

41. Thus, as early as 1816, it was remarked by Mr. Justice Story, in Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 236, 4 L. ed. 79, that "courts of law, following in this respect the rules of equity, now take notice of assignment of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law." "It seems to be the tendency of modern decisions to recognize the rights of the beneficial party, and to protect him against the acts of the party possessing the naked legal interest, whenever it can be done without injuriously affecting the rights of the debtor; and subject to this qualification, we are inclined to adopt the rule in its fullest extent." Dacey *v.* Mills, 10 Ill. 67, 70, per Treat, C. J. See also State *v.* Layman, 46 Md. 190; Clarksons *v.* Doddridge, 14 Gratt. (Va.) 42, 46, where Moncure, J., said: "He [the beneficial owner] has a right to bring an action at law in the name of his assignor, and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights, and will not permit the nominal plaintiff to receive the money, nor to release the debt, nor to dismiss the action." *Compare* in the Louisiana procedure Dayton *v.* Commercial Bank, 6 Rob. (La.) 17; Davis *v.* Taylor, 4 Mart. N. S. (La.) 134.

42. See *supra*, I, B, 2, e, (II), (D), (3).

43. *Connecticut.*— Townsend Sav. Bank *v.* Todd, 47 Conn. 190, 212, where it is said: "It is a well settled rule that in any case where a bare legal title is held in trust, as where a grantor has conveyed to a grantee while the land was adversely held, the grantee may sue in law for the possession in the name of the grantor. He could of course go into a court of equity, if the case admitted of it, in his own name, but an action at law could be brought only in the name of the party holding the legal title; and the name of such party, the *cestui que trust* has a right to use."

Georgia.— Calhoun *v.* Tullass, 35 Ga. 119, 123 (where the purchasers of notes secured by mortgage were allowed to foreclose the mortgage at law by using the names of the mortgagees for his use, the court saying: "If the mortgagees object to such use of their names, the complainants may indemnify them against costs, &c., and use their names, even against their consent, in favor of the ends of justice"); English *v.* Register, 7 Ga. 387 (applying the principle to an action of ejectment); Hargraves *v.* Lewis, 6 Ga. 207; Fain *v.* Gartright, 5 Ga. 6.

Illinois.— Sumner *v.* Sleeth, 87 Ill. 500.

Massachusetts.— Fay *v.* Guynon, 131 Mass. 31; Walker *v.* Brooks, 125 Mass. 241; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Bates *v.* Kempton, 7 Gray 382 (where the donee *causa mortis* of a negotiable note, not indorsed, was allowed to maintain an action thereon in the name of the administrator of the donor, although such administrator, when the case comes on for trial, appears and protests against it); Rockwood *v.* Brown, 1 Gray 261, 262. See also Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319, S, in this case the payee of a note, having the same in his possession, said to B: "I will make a present of this to you, if you will accept [it]." B thereupon took the note, put it into his pocket, and said that he would accept it. Afterward, but at the same meeting, B handed the note back to S, saying, "You may keep [it] until I call for [it] or collect [it] for me." No assignment was made on the note, and it was found among the papers of S when he died. B took the note, and caused action to be brought upon it in the name of the administrator of S, but without the consent of the administrator. It was held that the action could be maintained as brought.

Missouri.—Alexander *v.* Schreiber, 13 Mo. 271. For the present doctrine in Missouri see *infra*, I, B, 2, e, (III), (C), (2), (c).

New Hampshire.— Pike *v.* Pike, 24 N. H. 384; Berry *v.* Gillis, 17 N. H. 9, 15, 43 Am. Dec. 584, 587, where Parker, C. J., said: "Where a demand is in a situation that the bankrupt could have instituted a suit in the name of a third person, the assignee may do the same."

Virginia.— Clarksons *v.* Doddridge, 14 Gratt. 42. In this case commissioners appointed by a court of equity to sell lands made the sale and took bonds for the purchase-money; the bonds were made payable to the commissioners. Before the bonds were paid the commissioners were removed, and others appointed. It was held that the new commissioners could maintain an action at law on the bonds in the names of the old commissioners to whom the bonds were made payable; for "the right of the new commissioners to receive the money, does not imply a right to bring an action therefor in their own names."

Survival of the rule in this respect under the codes see *infra*, I, B, 2, e, (II), (F).

44. Bowe *v.* Gress Lumber Co., 86 Ga. 17,

(b) Control of the Suit. Even when the nominal plaintiff is apparently the only plaintiff,[45] the practical control of the action, if he is secured against possible costs and damages, is still not with him but with the beneficial owner.[46] The latter's control, indeed, was so full and complete that a court of equity did not hesitate to recognize his relief as adequate at law.[47] A retraxit entered by the nominal plaintiff, or a dismissal of the suit by him, without the knowledge or consent of the beneficial owner, may be vacated within the term,[48] and is no bar to a subsequent action at law in the name of the same nominal plaintiff.[49] So a satisfaction of judgment entered of record by the nominal plaintiff may be vacated on motion in behalf of the equitable owner of the judgment.[50] For a like reason the declarations of a mere legal owner are not admissible to defeat the action.[51]

(c) No Discharge by Nominal Plaintiff. When the beneficial ownership is known to defendant, the nominal plaintiff cannot prejudice the equitable ownership by receiving payment from defendant or by giving him a formal discharge.[52] In

12 S. E. 177; Craig *v.* Twomey, 14 Gray (Mass.) 486, 487. The latter case was an action of contract by the indorsee against the maker of a promissory note. At the trial plaintiff on cross-examination testified that the action was not conducted for his benefit, and at his expense, but in his name for a third person, who in turn testified that he had nothing to do with it. Defendant thereupon moved to dismiss the action. Plaintiff's counsel then announced "that there might have been some misapprehension, but that the plaintiff now adopted the action as his own." It was held that the motion to dismiss was properly overruled. As plaintiff had a good legal title as indorsee and had declared by his attorney that he adopted the action, this "made him liable for costs and a good plaintiff."

45. See *supra*, I, B, 2, e, (II), (C), (2).

46. Cunningham *v.* Carpenter, 10 Ala. 109, 112, where Goldthwaite, J., said: "Courts of law are every day in the practice of giving effect to the assignment of choses in action, and will not permit a mere nominal plaintiff to dismiss a suit, or otherwise interfere with the just rights of the equitable owner."

47. Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 463, 464, where a bill in equity was filed by C as assignee of a policy of insurance issued to Gibbs and Titus, and it was held that the bill must be dismissed. "The demand," said Chancellor Kent, "is properly cognizable at law, and there is no good reason for coming into this Court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs and Titus, the original assured, in the suit at law; and the nominal plaintiff would not be permitted to defeat or prejudice the right of action."

48. Sloan *v.* Sommers, 14 N. J. L. 509. In this case Sommers, plaintiff, had entered a retraxit, without application to the court or leave. So soon as this was discovered, and within the term, the counsel for plaintiff suggested to the court that Thomas Astley was the assignee of the note in question, and the real plaintiff in the suit, and in his behalf moved for, and upon the facts then shown to the court, obtained a rule to show cause why the retraxit should not be expunged from the minutes, or otherwise vacated. It was held that the retraxit ought to be expunged and vacated, with the costs of the motion to be paid by Sommers.

49. Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79. In this case while an action under the title of Welch *v.* Mandeville was pending, Welch caused this entry to be made upon the record: "This suit is dismissed, agreed." In fact Welch was only a nominal plaintiff, the beneficial owner being Prior. This fact was known to defendant. The dismissal was without the authority, knowledge, or consent of Prior, and had been obtained through collusion between defendant and Welch. Prior did not discover the dismissal until after the adjournment of court. In these circumstances, Prior instituted another action in the name of Welch, for the use of Prior, against Mandeville. The latter pleaded the dismissal. Prior, in the replication, set up the facts of the dismissal as procured without his knowledge or consent and in fraud upon him as beneficial owner. On demurrer the replication was held good. And see Tate *v.* New York Bank, 96 Va. 765, 32 S. E. 476.

50. Wardell *v.* Eden, Col. Cas. (N. Y.) 137, 1 Johns. 531 and note, 2 Johns. Cas. 121.

51. "The party who has ceased to have any substantial interest in the subject matter of the action, and whose name is used as a matter of necessity to satisfy a technical rule of the law, ought not to be permitted by his acts or declarations to defeat or disparage the title of his innocent assignee." Dazey *v.* Mills, 10 Ill. 67, 71, per Treat, C. J.

52. Thus, in Andrews *v.* Beecker, 1 Johns. Cas. (N. Y.) 411, 3 Johns. 426 note, it was held that a release by the obligee of a bond after an assignment and notice of such assignment to the obligor was a nullity.

An officer who, after receiving an execution with notice that the claim on which the judgment had been recovered had been assigned to another person and was prosecuted at his cost, collects the amount of the execution and pays it to the nominal plaintiff, is liable in tort to the assignee for the amount of the costs in the action on the claim. Riley *v.* Taber, 9 Gray (Mass.) 372.

such a case, if defendant pleaded a payment to or a release by the nominal plaintiff, a court of law did not find it necessary, at least in some jurisdictions, to resort to extraordinary methods of setting aside the obnoxious plea, as to an interlocutory order on affidavits, but could entertain a replication setting up the matter in avoidance, and permit the action in the name of the nominal plaintiff to continue in that name against defendant who had paid him.[53]

(3) Rights of Defendant — (a) In General. The device of the use plaintiff was not permitted to impair any of the just rights of defendant in the cause,[54] nor to disturb him unnecessarily.[55]

(b) His Rights Against Beneficial Owner. At one time courts of law looked only to the relation between defendant and the nominal plaintiff; if there was a defense against him there was a defense against the beneficial owner using his name.[56] But while preserving the form of the ancient rule, courts of law early began both to protect the use plaintiff from defenses which were good only against the nominal plaintiff,[57] and, on the other hand, to permit defendant to avail himself of any defense which he might have set up against the beneficial owner if the action had been brought in his name.[58]

(F) *Partial Survival of Device in Code Pleading* — (1) In General. The fundamental provision of the codes that the civil action must be presented in the

53. Littlefield *v.* Storey, 3 Johns. (N. Y.) 425, which was an action of debt on an obligation under seal. Defendant pleaded payment to plaintiff. Plaintiff replied that before the commencement of the suit he sold and assigned the obligation to R, to have and receive the money due thereon to his own use, and did authorize him, in the name of him, plaintiff, to demand and receive the same to the use and benefit of him, the said R, of which defendant had notice, and plaintiff averred that this action was commenced for the sole use and benefit of the said R, for the purpose of enabling him to collect and receive the money due on the obligation. A general demurrer to this replication was overruled, with judgment for plaintiff. See the remarks of Taft, J., in Wagner *v.* National L. Ins. Co., 90 Fed. 395, 403, 33 C. C. A. 121, and cases there cited. See also the procedure in Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79, and in Lamb *v.* Vise, 8 Dowl. P. C. 360, 4 Jur. 341, 9 L. J. Exch. 177, 6 M. & W. 467, 55 Rev. Rep. 694.

54. Stone *v.* Hubbard, 7 Cush. (Mass.) 595, 597, where it was said: "The principle on which these decisions [permitting an action in the name of the nominal plaintiff by the beneficial owner] rest is, that the purchaser of the note has a right to recover all that is due upon it; that the rights of the promisor cannot be in any way prejudiced by a suit in the name of the payee, and if the latter does not interpose and object, the mode of enforcing the contract is wholly immaterial to the defendant, and constitutes no valid ground of defence."

55. Shanks *v.* White, 36 Ga. 432. *Compare* Berry *v.* Gillis, 17 N. H. 9, 17, 43 Am. Dec. 584, where it was said: "As the court has authority to protect the rights of the plaintiff in interest when the writ is in the name of a nominal plaintiff, so we may protect the defendant against a suit by one person in the name of another, where the plaintiff on the record has no interest, and the real plaintiff has no right," per Parker, C. J., holding that evidence on the point is admissible under the general issue.

56. "If the question that has been made in this case," said Lord Kenyon, in Bauerman *v.* Radenius, 2 Esp. 663, 7 T. R. 663, 668, "had arisen before Sir M. Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them sitting in a court of law, that they could have gone out of the record and considered third persons as parties in the cause." So in Gibson *v.* Winter, 5 B. & Ad. 96, 2 N. & M. 737, 27 E. C. L. 50, Lord Denman remarked: "The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the *cestui que trust* who uses his name."

57. Thus, the transferee by parol of a negotiable promissory note was permitted, as early as 1816, to sue in the name of the promisee, notwithstanding payments by the maker to the promisee after notice of the transfer. Jones *v.* Witter, 13 Mass. 304. And see Lamb *v.* Vice, 8 Dowl. P. C. 360, 4 Jur. 341, 9 L. J. Exch. 177, 6 M. & W. 467, 472, 55 Rev. Rep. 694, where Lord Abinger, C. B., said: "Nothing is more common than for a *cestui que trust* to sue on a bond in the name of his trustee. If the defendant has pleaded the bankruptcy of the plaintiff, it would have been a good replication that he was suing merely as trustee."

58. Merrill *v.* Randall, 22 Ill. 227; McHenry *v.* Ridgely, 3 Ill. 309, 310, 35 Am. Dec. 110, where Wilson, C. J., said: "That no injustice may result from this rule, it is also settled, that, when the plaintiff on the record is a mere trustee for another, the defendant may avail himself of any defence, which he might set up against the real owner of the instrument, provided the action had been brought in his name."

name of the real party in interest[59] has for the most part made a resort to nominal and use plaintiffs, in an action at the instance of the beneficial owner, both unnecessary and improper.[60] But there are a few classes of cases in which the historic device still holds a place under the codes.[61]

(2) Grantee Suing in Name of Grantor. It is a well-settled doctrine of the common law in some states, and recognized by statute in some, that a conveyance of land, although by the rightful owner, while it is in the adverse possession of another, is absolutely void as to the person in possession and his privies.[62] In such a case the grantee, having no title as against the adverse holder, cannot on principle bring an action in his own name to recover the land from the person thus in possession.[63] In states where the grant, although void as against the adverse holder, is valid as between the grantor and the grantee,[64] there is no difficulty, under the common-law doctrine of the use plaintiff, in permitting an action against the adverse possessor by the grantee in the name of the grantor;[65] but in code pleading it was early claimed that the provision requiring every action to be prosecuted in the name of the real party in interest[66] precluded the grantee from bringing the action in the name of the grantor.[67] The doubt was met in New York by an amendment authorizing the grantee of land held adversely to the grantor to sue in the name of the grantor.[68] The same result has been reached on principle in the few cases under the code in which the question has been carefully considered by the courts.[69]

(3) When Statutory Rule Is Limited. The statutes which establish the

59. See *infra*, I, B, 2, e, (III).

60. Lytle *v.* Lytle, 2 Metc., (Ky.) 127 (which was an action in the name of the assignor of a chose in action; in the caption as well as in the body of the complaint the name of the assignee was mentioned as the person for whose use the action was brought; the evidence showing the assignment, it was held that no right of action appeared in plaintiff, and therefore, under the general principles of the code, that a judgment in his favor was impossible); Weise *v.* Gerner, 42 Mo. 527; Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949. *Compare* Beebe *v.* Funkhouser, 2 Iowa 314, where the petition alleged that Beebe "sued for the use of Wright," defendant demurred, claiming that the petition showed that the action was not brought by the real party in interest, and it was held that the fact of an assignment by Beebe might be shown to defeat the action in the name of the assignor, but that in the absence of such showing an action in Beebe's name would not be defeated by the addition of the phrase "for the use and benefit of," etc.

61. See *infra*, I, B, 2, e, (II), (F), (2)–(4).

62. See Champerty and Maintenance, 6 Cyc. 867 *et seq.*

63. Steeple *v.* Downing, 60 Ind. 478; Schneller *v.* Plankinton, 12 N. D. 561, 98 N. W. 77. And see Burk *v.* Andis, 98 Ind. 59, where the defect was remedied by a substitution of plaintiffs. *Contra*, by statute in Indiana, in suits begun since 1881, and in North Carolina. See *infra*, note 69.

64. See Champerty and Maintenance, 6 Cyc. 889 *et seq.*

65. See *supra*, I, B, 2, e, (II), (B). And see in particular Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

66. See *infra*, I, B, 2, e, (III).

67. Steeple *v.* Downing, 60 Ind. 478; Hamilton *v.* Wright, 37 N. Y. 502.

68. N. Y. Laws (1866), c. 824, amending Code Proc. § 111. This amendment is discussed in Hamilton *v.* Wright, 37 N. Y. 502, and Steeple *v.* Downing, 60 Ind. 478, where it is treated as declaratory of the principle governing the question.

69. The point was argued on principle and authority in Steeple *v.* Downing, 60 Ind. 478, 490, the court reaching the conclusion "that, under our code, where land has been conveyed, which at the time was in the adverse possession of another, an action may be maintained to recover it from the party thus in possession, in the name of the grantor in such conveyance as plaintiff," notwithstanding the requirement of the real party in interest. See also Roszell *v.* Roszell, 105 Ind. 77, 4 N. E. 423; Burk *v.* Andis, 98 Ind. 59. *Compare* Hamilton *v.* Wright, 37 N. Y. 502; Smith *v.* Long, 12 Abb. N. Cas. (N. Y.) 113; Schneller *v.* Plankinton, 12 N. D. 561, 567, 98 N. W. 77, where Young, C. J., said: "The plaintiff's deed is void as to this defendant, and will not sustain his action. The interests of the defendant can be litigated and determined only in an action prosecuted in the name of the plaintiff's grantor."

Contra by statute.— By an amendment of the Indiana code in 1881, "any person having a right to recover the possession of real estate, or to quiet title thereto in the name of any other person or persons, shall have the right to recover possession or quiet title in his own name." Ind. Laws (1881), p. 60; Burns Rev. St. § 1085 (1073). Although permissive in terms, this provision is construed as requiring the action to be brought in the name of the grantee. Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313. So in

rule that an action must be brought in the name of the real party in interest[70] do not always give the rule its full range of application; where it ceases to apply, a court of law, if there is a separation of the legal and the beneficial ownership, will recur to the doctrine of a nominal plaintiff.[71]

(4) In Assignments Pendente Lite — (a) In General. If a chose in action is assigned while the action is pending, in a state where actions must be prosecuted in the name of real parties in interest, the assignee may be substituted as plaintiff;[72] but it is a common provision of the codes, and well established by the courts in these same states, that the action may continue in the name of the original plaintiff, under the control of the assignee, without change on the record.[73] As construed in the light of other provisions of the code, the rule "that every action must be prosecuted in the name of the real party in interest" has been held to mean that every action must be commenced in the name of the real party in interest, but that plaintiff's subsequent transfer *pendente lite* of his interest, wholly or in part, will not prevent the further prosecution of the action in his name, for the benefit of the assignee.[74] In these cases the assignee's control over the further prosecution of the action in the name of the original plaintiff is very complete; indeed, it may be said that the assignee's control over such further

North Carolina a special provision of the Code Civ. Proc. §§ 177, 179, permits the grantee of land held adversely to his grantor to bring the action in the grantee's own name.

70. See *infra*, I, B, 2, e, (III).

71. Key *v.* Continental Ins. Co., 101 Mo. App. 344, 352, 74 S. W. 162, where it is said: "The code only takes away the right of an assignee to sue at law in the name of the assignor in instances where the right is no longer useful because the assignee may sue in his own name."

So in Alabama.— Here the code required that "the party really interested whether he have the legal title or not" shall sue in his own name when the action is on a promissory note, bond, or other contract, "for the payment of money." It was held that the assignee of a penal bond conditioned to be void if the obligor should make title to certain lands could not sue on it in his own name. "So far as this contract imposed an obligation to make titles to the land . . . it was a contract for the performance of an act, not a contract for the payment of money, and, therefore, not susceptible of suit in the name of one destitute of the legal title." Skinner *v.* Bedell, 32 Ala. 44, 48. And see Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809, a judgment is not a contract for the payment of money. *Compare* McNutt *v.* King, 59 Ala. 597, action of trover.

72. See Pleading.

For a limitation of the power of substitution here so that a continuance in the name of the original plaintiff is necessary see Dundee Mortg. Inv. Co. *v.* Hughes, 89 Fed. 182.

73. *California.*— Sears *v.* Ackerman, 138 Cal. 583, 72 Pac. 171 (even an action for an injunction may thus continue in the name of the original plaintiff); Tuffree *v.* Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Walker *v.* Felt, 54 Cal. 386.

Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 650, 69 N. W. 1059, where plaintiff, while his action was pending, assigned his cause of action to his attorney and it was held to be "perfectly proper for the court to allow the case to proceed in the name of the original plaintiff."

Kansas.— McKnight *v.* Bertram Heating, etc., Co., 65 Kan. 859, 70 Pac. 345 (where while an action on a *quantum meruit* was pending plaintiff assigned a portion of his interest and it was held that this did not preclude the further prosecution of the action in the name of plaintiff to recover the whole demand); Douglas *v.* Muse, 62 Kan. 865, 61 Pac. 413.

Kentucky.— Cantrell *v.* Hewlett, 2 Bush 311; Western Bank *v.* Coldeway, 94 S. W. 1, 29 Ky. L. Rep. 651.

Minnesota.— Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri.— Ashby *v.* Winston, 26 Mo. 210.

Nebraska.— McCullough *v.* Dovey, 61 Nebr. 675, 85 N. W. 893; Parker *v.* Taylor, 3 Nebr. (Unoff.) 318, 91 N. W. 537.

New York.— Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 177, 51 N. E. 997, 46 L. R. A. 839, where Haight, J., said: "Section 756 of the Code of Civil Procedure provides that 'In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party, unless the court directs the person to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.' Under this provision of the code, it has been repeatedly held that the action may be maintained in the name of the original plaintiff, notwithstanding that he has, subsequent to the bringing of the action, assigned his claim to another party [that is, person]."

Oregon.— Dundee Mortg., etc., Co. *v.* Hughes, 89 Fed. 182. An action in the federal courts, the provision of the Oregon code applying because of the Practice Conformity Act.

74. Dundee Mortg., etc., Co. *v.* Hughes, 89 Fed. 182; Elliot *v.* Teal, 8 Fed. Cas. No. 4,389, 5 Sawy. 188.

prosecution of the action is closely analogous to the control exercised under the older procedure by the use plaintiff.[75]

(b) In Case of Original Plaintiff's Death. A question has arisen in some states whether the rule applies if plaintiff assignor dies after the assignment. At common law the beneficial owner had the right to use the name of the legal owner's representative,[76] but there is some authority under the code that the action cannot be continued by the assignee in the name of the assignor's personal representative.[77] In this contingency it has been thought that the action, notwithstanding the rule of the real party in interest, may continue even in the name of the deceased plaintiff.[78]

(c) Control of Representative Actions. The rule has been applied also when the original plaintiff is ostensibly suing in behalf of himself and others similarly situated. If such a plaintiff assigns his claim while the action is pending and before others join in, it may continue in the name of the original plaintiff, but the assignee is the master of the suit.[79]

(III) *The Real Party in Interest* — (A) *In General.* The phrase "the real party in interest" employed in referring to a party plaintiff belongs to the terminology both of equity pleading and of code pleading. It was current in the equity reports, before the enactment of the codes, to describe the proper party plaintiff in equity.[80] It has been given a wider scope in the most of the states of the Union, and notably in the code states,[81] by the statutory provision that "every action must be prosecuted in the name of the real party in interest,[82]

75. Walker *v.* Felt, 54 Cal. 386 (where plaintiff transferred his interest to others, whose attorneys thenceforth took charge of the case, but without any change of the title of the action, or of the attorney of record, and it was held that a stipulation signed by the original plaintiff and his attorney for the disimssal of the action was a flagrant breach of good faith, and that an order of dismissal entered upon such stipulation should have been promptly vacated on discovery of the fraud); Ashby *v.* Winston, 26 Mo. 210 (holding that defendant, having notice of the assignment *pendente lite*, has no right to compromise the suit without the consent of the assignee). In Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 177, 51 N. E. 997, 46 L. R. A. 839, it is said that when the action is continued in the name of the assignor, "he is deemed to act for and on behalf of his assignee, and to represent his interest in the litigation. In no case to which our attention has been called has the plaintiff been allowed to continue the action after he has assigned his cause of action in opposition to the wishes and interests of his assignee," per Haight, J., holding accordingly that the assignor, the original plaintiff, in whose name the action was continued, could not prevent its dismissal by his assignee. See *supra*, I, B, 2, e, (II), (2), (b).

76. Foss *v.* Lowell Five Cent Sav. Bank, 111 Mass. 285; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319. See *supra*, I, B, 2, e, (II), (E), (2), (a).

77. Reynolds *v.* Quaely, 18 Kan. 361. *Compare dictum* in Tuffree *v.* Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69.

78. Tuffree *v.* Stearns Ranchos Co., 124 Cal. 306, 308, 57 Pac. 69, where it is said: "If the original party be a mere nominal party, and the vendee is the real party in interest — if the nominal party has no right to conduct the litigation upon any particular lines as against the wishes of the real party in interest; if the real party in interest, the vendee, has the control of the litigation, and this is decided by the cases cited from the reports of this State — then it would seem to be wholly immaterial whether the original party to the action lives or dies." *Contra*, Taylor *v.* Elliott, 52 Ind. 588.

79. Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

80. Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583, 598 ("In this court the suit is properly brought in the names of the real parties in interest"); Field *v.* Maghee, 5 Paige (N. Y.) 539, 540 ("The complainants in this court must be the real parties in interest").

81. That is in the states and territories of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Indian Territory, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

82. So in N. Y. Code (1848), § 91, the terms of which have been closely followed in the codes of the other states named above. A similar enactment appears in several states which are not generally classed as code states.

This general provision of the code is overlapped, in a number of the states, by statutes which declare certain choses in action assignable, or expressly authorize an assignee to sue in his own name. See in general Assignments, 4 Cyc. 96 *et seq.* The code provision, however, is independent of these particular enactments and their disappearance from the statute book does not affect the rule of the

except as otherwise specially provided";[83] or a similar provision appearing in the statutes of some of the states not generally classed as code states.

(B) *When Both Legal Title and Beneficial Ownership Are in One Person.* In this, the normal case, plaintiff may of course be without capacity to sue;[84] but his remedial interest is not open to question, either in common-law pleading, in equity pleading, or under the codes. It is only when the legal title has been separated from the beneficial ownership, or equitable title, that difficulties as to the real party in interest have arisen.

(C) *Beneficial Ownership as a Sufficient Test of Remedial Interest*— (1) In General. It may happen, in a variety of ways, that one person is vested with a full legal title to the cause of action set up in the pleading, while another has the entire beneficial ownership. When this occurs, the selection of the proper party plaintiff raises various questions. The leading characteristic of the doctrine of the real party in interest is that it recognizes the beneficial ownership as *per se* a sufficient test of remedial interest.[85] In this respect it has to do chiefly with the questions whether a court can recognize as plaintiff in his own name, either the equitable assignee of a chose in action, or the assignor of a chose who has retained a beneficial ownership, or the third person beneficiary of a contract.[86]

(2) The Equitable Assignee of a Chose in Action as Plaintiff — (a) In Common-Law Pleading. Even after the substantive common law had attained to a recognition of the beneficial ownership of the assignee of a chose in action, the common-law procedure, reflecting the ancient theory that choses in action were not assignable, refused all direct recognition of the assignee's remedial interest.[87] Although the substantive law had changed, the rule of procedure kept its ancient form. If the chose in action was assignable but its assignment did not transfer the legal title, the assignee could indeed enforce his beneficial ownership, and to this end was given control of the action;[88] but he must sue as if the chose had not been assigned, and therefore in the name of the assignor.[89]

code as to the real party in interest. Long *v.* Heinrich, 46 Mo. 603.

83. The exceptions to the requirement of the real party in interest originally included only three classes of persons, who were permitted to sue "without joining with him the persons for whose benefit the suit is prosecuted" — an executor or administrator, a trustee of an express trust, and a person expressly authorized by statute. N. Y. Code (1848), § 93.

The terms of this provision reappear in the other code states named above. Later amendments or enactments, in all the code states, have added to the list "the person with whom or in whose name a contract is made for the benefit of another"; and in several states a guardian is now expressly included. See the statutes of Arkansas, Iowa, Kansas, Kentucky, Nebraska, Ohio, Oklahoma, Washington, and Wyoming.

84. Plaintiff's want of requisite capacity to sue is discussed. *infra*, I, B, 3.

85. The beneficial ownership is to be distinguished, not only from the mere legal title but also from the mere beneficial interest. See *supra*, I, B, 2, b, (I). It should also be noticed that while the beneficial ownership is recognized as a sufficient test, it is not necessarily an essential, test of the remedial interest. See *infra*, I, B, 2, e, (III), (D), (4), (b).

86. See *infra*, I, B, 2, e, (III), (C), (2)–(7).

87. See Gilray *v.* Metropolitan Nat. Bank, 113 Ill. App. 485; Tarrant *v.* Burch, 102 Ill. App. 393.

88. "The assignment itself, being made upon a sale and purchase, terms importing a sufficient consideration therefor, conferred upon the assignee a right to sue in the name of the assignor, which can neither be controlled by him, nor objected to by the maker of the note." Rockwood *v.* Brown, 1 Gray (Mass.) 261, 262, per Merrick, J. And see, generally, Assignments, 4 Cyc. 94; and *supra*, I, B, 2, e, (II).

89. Congress Constr. Co. *v.* Farson, etc., Co., 199 Ill. 398, 65 N. E. 357 [*affirming* 101 Ill. App. 279]. In this case a chose in action belonging to an insolvent was sold by his assignee for the benefit of creditors to W. Under an Illinois statute an assignee for the benefit of creditors had a right to sue and recover in his own name as fully as his assignor might have done if there had been no assignment. It was held that the statutory right did not extend further than to the assignee for the benefit of creditors, and therefore, under the common-law rule, that a suit by W must be, not in his name but in the name of the insolvent assignor. And see, generally, Assignments, 4 Cyc. 92; Dicey Parties, Rule 6.

(b) In Equity Pleading — aa. *In General.* The courts of equity, on the other hand, recognize both the substantive right of the assignee of an assignable chose in action and also his remedial interest. If he could sue in equity, the suit should be in his name;[90] he could not sue in the name of the assignor, either alone or to the use of the assignee.[91] But while the assignee of a non-negotiable chose in action was commonly described as an "equitable assignee" he was not recognized as plaintiff in equity upon the mere ground that he could not sue in his own name at law; for his right to use the name of his assignor gave him a remedy at law which, although indirect, was still in most cases complete and adequate.[92] To give a court of equity jurisdiction the nature of the relief asked must be equitable, even when the suit is based on an equitable title.[93]

bb. *Special Circumstances Necessary.* It followed that the equitable assignee could sue in his own name, under the older procedure, only upon a showing of special circumstances creating a right to equitable relief;[94] as when the assignee showed that notwithstanding the right which he had obtained to sue in the name of the assignor, the latter would interfere and prevent the exercise of this right;[95] or when the assignor was dead and there was no personal representative within the state;[96] or when the assignor was a corporation, and its charter had expired or been dis-

90. See, in general, Assignments, 4 Cyc. 96; and in particular Press *v.* Woodley, 160 Ill. 433, 43 N. E. 718; Marsh *v.* Wells, 89 Ill. App. 485.

91. Elder *v.* Jones, 85 Ill. 384; Kellam *v.* Sayer, 30 W. Va. 198, 199, 3 S. E. 589, where Johnson, P. J., says: "There is no such thing in equity as bringing a suit in the name of one party for the use of another. Equity deals with the real parties in interest."

Joining the assignor as plaintiff or defendant in the suit see, generally, Equity, 16 Cyc. 187.

92. "We have lately decided, after full consideration of the authorities [in the case of Hayward *v.* Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271] that an assignee of a chose in action on which a complete and adequate remedy exists at law cannot, merely because [as such assignee] his interest is an equitable one, bring a suit in equity for the recovery of the demand. He must bring an action at law in the name of the assignor to his own use." New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 214, 2 S. Ct. 279, 27 L. ed. 484 (per Bradley, J.), and cases there cited. See in addition Walker *v.* Brooks, 125 Mass. 241; Angell *v.* Stone, 110 Mass. 54; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 462; Glenn *v.* Marbury, 145 U. S. 499, 12 S. Ct. 914, 36 L. ed. 790; Hayward *v.* Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Knevals *v.* Florida Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410. *Compare* Waite *v.* O'Neil, 72 Fed. 348. See also Hammond *v.* Messenger, 2 Jur. 655, 7 L. J. Ch. 310, 9 Sim. 327, 332, 16 Eng. Ch. 327, 59 Eng. Reprint 383, where the vice-chancellor remarked as follows: "If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt."

A contrary view was expressed by Story, who was of opinion that in America "every assignee, who has an equitable assignment or right, may sue in his own name, and need not use the name of his assignor either at Law or in Equity, and this without any special circumstances whatsoever." Story Eq. Pl. § 153 and note. And see Story Eq. Jur. 1057*a*. Although rejected as a rule of equity pleading by the weight of authority in America (see Walker *v.* Brooks, 125 Mass. 241; New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484, and cases there cited), this doctrine has had the approval of some courts in this country (see Dixon *v.* Buell, 21 Ill. 203; Dobyns *v.* McGovern, 15 Mo. 662) and has been adopted as the rule under the codes (see *infra*, I, B, 2, e, (III), (C), (2), (c)).

93. Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73. And see cases cited *supra*, notes 90–92.

94. See the illustrations in Hayward *v.* Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271; Hammond *v.* Messenger, 2 Jur. 655, 7 L. J. Ch. 310, 9 Sim. 327, 16 Eng. Ch. 327, 59 Eng. Reprint 383.

95. See the illustration of the vice-chancellor in Hammond *v.* Messenger, 2 Jur. 655, 7 L. J. Ch. 310, 9 Sim. 327, 16 Eng. Ch. 327, 59 Eng. Reprint 383.

96. Cobb *v.* Thompson, 1 A. K. Marsh. (Ky.) 507, 508, where Owsley, J., delivering the opinion of the court, says: "He [the assignee of a judgment in favor of John Cobb] might, it is true, by administering upon the estate of John Cobb in this country, have been authorised, in the character of administrator, to sue at law upon the judgment, but being entitled to the equitable interest, no reason is perceived why he should be subjected to the burden and expense of an administration, merely to enable him to resort to a court of law instead of a court of equity."

solved;[97] or when the assignee had equitable rights existing independently of his rights as assignee.[98]

(c) In Code Pleading — aa. *Wide Scope of the Principle.* This restricted principle of equity procedure has been given the fullest effect by the provision of the codes as to the real party in interest. Under it the assignee of an assignable chose in action sues in his own name, not only when there are special grounds of equitable relief but also when he is the assignee of the mere legal title.[99] It obliterates, in the main, the procedural distinction between the legal and the equitable title of the assignee.[1] As a rule, whenever the assignment of a chose in action vests the assignee with the ownership of the claim, the action is to be brought in the name of the assignee, as the real party in interest, and this whether the title of the assignee be regarded as legal or equitable.[2] The question does not relate either to the formal sufficiency of the assignment or to the existence of equitable grounds. If the assignment is by mere delivery, with intent to pass the title, and this is sufficient in substantive law to transfer the title to the assignee, as against defendant, so that the latter is protected in case of a subsequent claim

97. Person *v.* Barlow, 35 Miss. 174, 72 Am. Dec. 21; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264.

98. Rogers *v.* Riessner, 30 Fed. 525. *Compare* Rutten *v.* Union Pac. R. Co., 17 Fed. 480.

99. Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522; Kelley *v.* Love, 35 Ind. 106; Younker *v.* Martin, 18 Iowa 143; Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373; and other cases cited, *infra,* note 1 *et seq.*

1. Whitman *v.* Keith, 18 Ohio St. 134; Allen *v.* Miller, 11 Ohio St. 374, 377, where Brinkerhoff, J., says: "By the provisions of the code, the assignee of an account is its legal holder; his title is not a mere equitable title, as before the adoption of the code, but a legal title."

But not entirely so.— Thus in Cushman *v.* Welsh, 19 Ohio St. 536, the legal title, as distinct from the equitable title, is still of vital importance under the Ohio code. *Compare* Clements *v.* Hull, 35 Ohio St. 141. And see *infra,* I, B, 2, e, (III), (D), (4), (b). See also the rule in Louisiana, where no distinction is made between the legal and the equitable title. Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 252; Martin *v.* Ihmsen, 21 How. (U. S.) 394, 16 L. ed. 134.

2. *Alabama.*— Brown *v.* Johnson, 135 Ala. 608, 33 So. 683; Kansas City, etc., R. Co. *v.* Cobb, 100 Ala. 228, 13 So. 938; Cobb *v.* Bryant, 86 Ala. 316, 5 So. 586; Taylor *v.* Perry, 48 Ala. 240, where plaintiff claimed upon the ground that "all right to all of said claims became vested in plaintiff by delivery," and it was held that plaintiff could sue as "the party really interested." But the statutory rule as to the real party in interest is arbitrarily limited in Alabama. See Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809.

Arkansas.— St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704; Heartman *v.* Franks, 36 Ark. 501.

California.— Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59; Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522.

Colorado.— Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481; Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135.

Indiana.— Kelley *v.* Love, 35 Ind. 106; Hancock *v.* Ritchie, 11 Ind. 48. And see Wilson *v.* Clark, 11 Ind. 385.

Iowa.— Neal *v.* Heying, (1904) 98 N. W. 603; Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182; Warnock *v.* Richardson, 50 Iowa 450; Green *v.* Marble, 37 Iowa 95 (oral assignment of a note and guaranty); Barthol *v.* Blakin, 34 Iowa 452 (an oral assignment of a note and mortgage); Pearson *v.* Cummings, 28 Iowa 344; McCormick *v.* Grundy County, 24 Iowa 382; Younker *v.* Martin, 18 Iowa 143; Conyngham *v.* Smith, 16 Iowa 471 (oral assignment of a bond); Allison *v.* Barrett, 16 Iowa 278.

Kansas.— Schnier *v.* Fay, 12 Kan. 184 (sale and delivery of a note payable in work); Williams *v.* Norton, 3 Kan. 295.

Kentucky.— Gill *v.* Johnson, 1 Metc. 649. *Compare* Hicks *v.* Doty, 4 Bush 420; Lytle *v.* Lytle, 2 Metc. 127.

Minnesota.— Cassidy *v.* Faribault First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Pease *v.* Rush, 2 Minn. 107.

Missouri.— Long *v.* Heinrich, 46 Mo. 603; Willard *v.* Moies, 30 Mo. 142 (oral assignment of a promissory note); Boeka *v.* Nuella, 28 Mo. 180; Walker *v.* Mauro, 18 Mo. 564.

Nebraska.— Linton *v.* Baker, 1 Nebr. (Unoff.) 896, 96 N. W. 251.

New York.— Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373 (transfer of a bill of lading without indorsement); Combs *v.* Bateman, 10 Barb. 573; Waters *v.* Spencer, 44 Misc. 15, 89 N. Y. Suppl. 693; Riker *v.* Curtis, 17 Misc. 134, 39 N. Y. Suppl. 340.

North Carolina.— Andrews *v.* McDaniel, 68 N. C. 385, assignment of an unindorsed note.

South Dakota.— Coughran *v.* Sundback, 9 S. D. 483, 70 N. W. 644.

Washington.— Seattle Nat. Bank *v.* Emmons, 16 Wash. 585, 48 Pac. 262.

Wisconsin.— Lane *v.* Duchac, 73 Wis. 646,

by the assignor, the assignee is the real party in interest under the codes, and the action must be in his name.[3]

bb. *Imperative Nature of the Rule.* The rule of the codes noticed above is not merely content with the beneficial ownership of the chose, but unlike the statutory rule now or formerly found in several states,[4] it demands the beneficial owner-

41 N. W. 962; Wooliscroft *v.* Norton, 15 Wis. 198.

See 37 Cent. Dig. tit. "Parties," § 6 *et seq.*; and cases cited *infra*, note 3.

3. See cases cited *infra*, this note.

Parol assignments.— Hoffman *v.* Smith, 94 Iowa 495, 498, 63 N. W. 182, where Kinne, J., remarked: "No particular form is necessary to constitute the assignment of a debt. All that need appear is an intent to effectuate the assignment of the debt, and that intent may appear from the writing, or it may be shown otherwise." And see Newby *v.* Hill, 2 Metc. (Ky.) 530. In Pease *v.* Rush, 2 Minn. 107, 111, a promissory note payable to order was transferred by mere delivery. The court said: "The only question under our practice is, in whom is the real substantial ownership and property of the note? In whomsoever it is found, there the cause [right] of action is also." So in Riker *v.* Curtis, 17 Misc. (N. Y.) 134, 136, 39 N. Y. Suppl. 340, McAdam, J., said: "No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties which indicates their intention to pass the beneficial interest in the right from one to the other is sufficient for that purpose. A debt or claim may be assigned by parol as well as by writing."

Illustrations.—P sued as assignee of a judgment. The assignment had not been made on the record of the judgment, as required by statute. It was held that P was the equitable owner of the judgment and therefore the real party in interest. Kelley *v.* Love, 35 Ind. 106. One to whom a bill of lading had been transferred by delivery without indorsement sued upon it in his own name. The court said: "We think the plaintiff's title was perfect and complete without such indorsement. . . . Bills of lading are choses in action, and no rule is better established than that instruments of this character may be transferred for a valuable consideration by delivery only." Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373, 379. S, the proprietor of a water-power, employed P to make repairs upon the dam and raceway. D held a portion of the power under S, and by the terms of the grant from S to D the latter was liable for his portion of the expense of said repairs. After the repairs had been made S put his account against D, for his share of the repairs, into the hands of P, with directions to collect the same. There was no formal assignment of the account to P. The court, finding that "it was in fact given to him with directions to collect and apply the money to the payment of his claim," held that the action was properly brought in the name of P as real party in interest. Wooliscroft *v.* Norton, 15 Wis. 198. A bank issued a certificate of deposit to C "payable to Jerry Cassidy or his order, upon the return of the certificate properly indorsed." The money deposited belonged to C's wife, who had handed it to C, for deposit in his or her name as he saw fit. Upon receiving the certificate C handed it to his wife. It was held that as the real owner of the debt evidenced by the certificate, the wife of C, could sue upon it, although it had never been indorsed to her. Cassidy *v.* Faribault First Nat. Bank, 30 Minn. 86, 14 N. W. 363. Promissory notes secured by collateral were placed in the hands of B, an attorney, for collection. He placed them in the hands of other attorneys for the same purpose. Afterward, by an oral contract, B purchased all his client's interest in the notes and took a written assignment of the collateral, but there was no indorsement of the notes, nor any further delivery of them in fact. It was held that as the oral contract vested B with the beneficial ownership of the notes, no other assignment or delivery of them was necessary, and B could sue as the real party in interest. Hancock *v.* Ritchie, 11 Ind. 48. Part of an entire demand was assigned to P without the assent of the debtor. P sued upon this assignment but the holders of the remainder of the demand were not made parties in his action. It was held that P as the beneficial owner of the portion assigned to him is the real party in interest, and while there was a defect of parties in that the holders of the remainder of the demand are not parties, this defect is waived by a demurrer for want of facts. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. S, a loan agent who owned and possessed a non-negotiable note secured by mortgage, charged the amount of the note to P, a client whose money, exceeding the amount of the note, was held by S with authority to invest it in his discretion. S also attempted to assign the mortgage to P but failed to execute the assignment properly. It was held that S had transferred the beneficial ownership of the note to P, that this transfer carried the mortgage with it as an incident of the debt, and therefore that an action to foreclose the mortgage was properly brought in the name of P. Nor did it affect the result that P knew nothing of the transfer until long after it had been made; for the relations between P and S were such that S "could lawfully make the transfer without consulting the plaintiff." Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

4. Where the assignee of a chose in action is or was permitted to sue in his own name see ASSIGNMENTS, 4 Cyc. 98, and cases there cited. See also Congress Constr. Co. *v.* Farson, 199 Ill. 398, 65 N. E. 357.

ship. The effect of the assignment being to divest the assignor of his ownership, an action on the chose can no longer be brought in his name, either alone or for the use of the assignee.[5] Nor is the rule affected by the fact that the assignor, in making the assignment, has expressly authorized an action in his name upon the assigned chose in action,[6] or has expressly stipulated that if an action is necessary he will bring it in his own name and turn over all the proceeds to the assignee.[7] Nor will the fact that the consideration for the assignment of the chose has failed permit an action in the name of the assignor, unless he has recovered the title.[8]

cc. *Assignor Not a Necessary Co-Plaintiff.* When the assignment did not pass the legal title but only the beneficial title, it was usual, in equity pleading, to make the assignor, holding the legal title, a party to the suit.[9] But it was not fatal if the assignor was not joined as plaintiff; the necessary plaintiff was the assignee, as being the beneficial owner.[10] This equity rule reappears, with various modifications, in several of the codes.[11] But an omission of the assignor as a party is

5. See cases cited *infra*, this note.

Action cannot be brought in the name of assignor.— Bartholomew County *v.* Jameson, 86 Ind. 154, 163. In consideration of the payment to him of the amount of his claim against a third person, J agreed to assign to an insurance company such judgment as J might receive in the claim. Said the court: "It seems to us that he thus divested himself of all beneficial interest in the claim, and vested it in the company. If he retained no substantial interest, then his assignee became the real party in interest, and, under our code, was the only proper plaintiff." See also Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 619, 40 N. E. 410 (where it is said: "There is no right of action shown in the appellant under any of the contracts . . . because the right of action, if any were shown, is alleged in the complaint to have been assigned as collateral security to Porter Skinner"); Lytle *v.* Lytle, 2 Metc. (Ky.) 127, 128 (where the action was in the name of the assignor, but the caption and the body of the complaint named the assignee as the person for whose aid the action was brought. Said the court: "He [the assignee] did not thereby become, either substantially or formally, a party to the action. Under the law, as it stood prior to the adoption of the Code, a different rule of practice prevailed, because no one but the legal owner of a chose in action could prosecute an action at law for its recovery; and in cases where another person was the equitable owner of the demand, the suit was usually and properly brought for the use of such equitable owner. This rule exists no longer, and the requirements of the Code, by which it has been superseded, are imperative, and must be pursued"). And see Carpenter *v.* Miles, 17 B. Mon. (Ky.) 598.

6. Van Doren *v.* Relfe, 20 Mo. 455. Here P had conveyed to trustees for the benefit of his creditors, and in the conveyance had appointed the trustees his "true and lawful attorneys irrevocable, in his name or otherwise, to ask, demand and recover and receive of and from all and every person or persons all goods, chattels, debts and demands, due, owing or belonging unto him, and in default of delivery or payment, to sue for the same." An action was accordingly brought in the name of P, and it was held that the action could not be sustained. *Compare* MacVeagh *v.* Continental Trust Co., 10 Misc. (N. Y.) 600, 32 N. Y. Suppl. 198.

But when plaintiff is in legal effect the real party in interest, he is not prevented from recovering in the action because it has been entitled in his name to the use of another. Key *v.* Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162.

7. Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 266, 58 N. E. 805. In this case after the destruction by fire of the insured property, and before suit brought the assured assigned to the H. B. Claflin Company all the assured's right, title, and interest to the money to be paid in satisfaction of the loss; but it was stipulated in the assignment that the assured "are to proceed to collect all said moneys in their name, but the same, when ready to be paid over, shall be paid directly to said The H. B. Claflin Company, or their authorized agent." The court, per Davis, J., said: "The stipulation . . . makes the Carnahans [the assured] agents of the Claflin Company for the purposes of mere collection; but it does not authorize suit to be brought in their name, although it so says; because the code is imperative that the action must be brought in the name of the real party in interest . . . and the Carnahans have reserved no substantial interest whatever in the money to be paid under the designated policies. . . . Under both of these assignments the H. B. Claflin Company became the real party in interest."

8. Storm *v.* Chestnut, 39 S. W. 54, 18 Ky. L. Rep. 1104.

9. Story Eq. Pl. § 153.

10. Story Eq. Pl. § 154; Movan *v.* Hays, 1 Johns. Ch. (N. Y.) 339.

11. See the codes of Arkansas, Indiana, Kentucky, and Oklahoma.

The rule varies.— In Kentucky, if the assignment is not authorized by statute, as in the case of bonds, bills, and notes for the direct payment of money or property, the assignor must be a party, as plaintiff or defendant. In Indiana, "when the action is brought by the assignee of a claim arising

ground only for a dilatory objection, the essential remedial interest being recognized as in the assignee.[12] Most of the codes are without this special provision, and the courts are clear that, in its absence, if the assignee is entitled to receive all the fruits of the action he alone is the real party in interest.[13]

dd. *Effect if Assignor Lacks Capacity to Sue.* For a like reason the fact that the assignor is without capacity to sue does not impair the assignee's capacity to sue; the question is rather whether the assignor had capacity under the substantive law to transfer his ownership and has transferred it.[14]

ee. *Assignment Must Be Valid as Against Defendant.* Ordinarily a transfer of title which is effective between the parties to the assignment is equally effective as against defendant. But it happens now and then, under a rule of the substantive common law, that an assignment of a chose in action is valid between the parties but invalid as against defendant.[15] In such cases it would seem that the assignee, having no title or ownership against the grantee, cannot appear as plaintiff in the claim; and this view has been adopted in a number of decisions, when no statute intervenes.[16] On the other hand it has been questioned whether the doctrine of the real party in interest does not preclude an action in the name of the assignor, since he has no beneficial interest.[17] The doubt has been settled in a number of jurisdictions by statutory amendments, which declare, in some states, that the grantee may sue in the name of the grantor,[18] and in some that the grantee may sue in his own name.[19] In the absence of express statutory declaration on the point, the courts, recurring to the familiar rule of the common law, have permitted the grantee to sue in the name of the grantor, and control the action thus brought.[20] The grantee having no title as against defendant, but hav-

out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment." Ind. Rev. St. § 277. But the courts construe this in effect as preserving the equity rule and permitting the assignor to be a co-plaintiff. Singleton *v.* O'Blenis, 125 Ind. 151, 153, 25 N. E. 154.

12. Carskaddon *v.* Pine, 154 Ind. 410, 56 N. E. 844. *Compare* Lytle *v.* Lytle, 2 Metc. (Ky.) 127, to the effect that the omission of the assignee as party plaintiff is fatal upon demurrer to the answer, although the action was in the name of the assignor for the use of the assignee.

13. Shamhaugh *v.* Current, 111 Iowa 121, 82 N. W. 497.

14. Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783. Action in this case was upon an instrument in writing given by defendant to Quan On Wing, and assigned to plaintiff before the commencement of the action. It was objected that Quan On Wing was the fictitious name of a partnership and did not show the person interested, that there was accordingly no capacity to sue in the assignor until a certificate showing the name of the partners had been filed, as required by statute, and that the assignee of the partnership had no better right than the assignor. It was held that there was nothing in the point.

For the reason see Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565; Cheney *v.* Newherry, 67 Cal. 125, 126, 7 Pac. 444, 445. See also Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

15. Thus the rule still holds in a considerable number of states that a grant of land which at the time is in the adverse occupancy of another is void as against the adverse occupant, but good as between the grantor and the grantee. See Galbraith *v.* Payne, 12 N. D. 164, 96 N. W. 258, and cases there cited. See also, generally, ASSIGNMENTS, 4 Cyc. 98.

16. Steeple *v.* Downing, 60 Ind. 478; McMahan *v.* Bowe, 114 Mass. 140, 19 Am. Rep. 321; Hamilton *v.* Wright, 37 N. Y. 502; Galbraith *v.* Payne, 12 N. D. 164, 96 N. W. 258.

17. See Hamilton *v.* Wright, 37 N. Y. 502.

18. Thus in New York, in 1866, by amendment of the general provision as to plaintiffs: "But an action may be maintained by a grantee of land in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision." N. Y. Laws (1866), p. 1836, § 111. That the grantee's right of action in the grantor's name, under this statute, is grounded on the grantor's title and fails with it see Dever *v.* Hagerty, 169 N. Y. 481, 62 N. E. 586 [*reversing* 43 N. Y. App. Div. 354, 60 N. Y. Suppl. 181]. And see S. C. Code Civ. Proc. § 132.

19. Ind. Rev. St. (1881) § 1073; N. C. Code (1883) § 179. In North Carolina the statute achieves the inconsistency of permitting the grantee to sue in his own name while recognizing as void the grant under which he claims.

20. See cases cited *infra*, this note.

ing a good title as against the grantor, the latter has been deemed to be the real party in interest, within the requirement of the code.[21]

(3) Assignor Retaining a Beneficial Ownership as Plaintiff — (a) In General. When the assignment of a chose has divested the assignor of his entire beneficial ownership, he cannot claim as a real party in interest even if the assignment does not vest the legal title in the assignee;[22] but when the assignor retains a portion of the beneficial ownership, the general principle of the real party in interest gives him a standing as plaintiff.[23] As a rule the assignee also should be a party to the suit, as co-plaintiff or as defendant.[24] His omission, however, is ground, under the codes, only for an objection because of defect of parties.[25]

(b) Application of the Principle. The principle applies not only when there has been an assignment of a portion of a chose in action[26] but also where the entire chose has been conditionally assigned as collateral security.[27] In the latter

Grantee may sue in the name of the grantor.— Such was the rule independently of the code requirement as to the real party in interest. McMahan *v.* Bowe, 114 Mass. 140, 145, 19 Am. Rep. 321 (where Morton, J., said: "It is now held that such deed is good against the grantor, and that it entitles the grantee to an action to recover the land, in the name of the grantor but to his own use, even against the disseisor"); Livingston *v.* Proseus, 2 Hill (N. Y.) 525, 529 (where Bronson, J., said: "As against the person holding adversely, the deed is utterly void — a mere nullity. There was an attempt to convey, but the parties failed to accomplish the object. The title still remains in the original proprietor, and he may — indeed, must — sue to recover the land. It is true that the recovery will inure to the benefit of the grantee in the deed; but that is a matter between him and the grantor, and with which the person holding adversely has nothing to do. It is enough for him that the deed does him no injury."

The same result has been reached under the codes, where no specific enactment intervenes. Galbraith *v.* Payne, 12 N. D. 164, 172, 96 N. W. 258, where Young, C. J., said: "While it is true that the grantee may not maintain an action in his own name against the adverse possessor unless expressly authorized by statute, for the reason that as to the latter the deed is void, yet an action may be maintained in the name of the grantor for his use." So on principle in Roszell *v.* Roszell, 105 Ind. 77, 4 N. E. 423; Burke *v.* Andis, 98 Ind. 59; Steeple *v.* Downing, 60 Ind. 478. But in 1881 the doctrine of Steele *v.* Downing, *supra*, was changed in Indiana by the statute referred to in the previous note. See Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313. Galbraith *v.* Payne, *supra*, and Steeple *v.* Downing, *supra*, are in line with the conclusions reached by the New York courts, independently of statute, in Hamilton *v.* Wright, 37 N. Y. 502.

21. See the reasoning in Steeple *v.* Downing, 60 Ind. 478; Galbraith *v.* Payne, 12 N. D. 164, 96 N. W. 258. But see Van Hoesen *v.* Benham, 15 Wend. (N. Y.) 164. Here the court, having held that the deed was void as against the adverse occupant but valid as between the grantor and the grantee, admitted the testimony of the former, because "if the deed operated to divest the title of the grantor, he had no legal interest in the event of the suit."

22. See *supra*, I, B, 2, e, (III), (C), (2).

23. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373. *Compare* Gradwohl *v.* Harris, 29 Cal. 150; Keys *v.* Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162; Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 236, 70 N. E. 783]. See also Fire Insurance, 19 Cyc. 913. And see the remark of Andrews, J., in Risley *v.* Phenix Bank, 83 N. Y. 318, 329, 38 Am. Rep. 421 [*affirmed* in 111 U. S. 125, 4 S. Ct. 322, 28 L. ed. 374]: "The objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action."

24. Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635. *Compare* Groves *v.* Ruby, 24 Ind. 418; Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Dean *v.* St. Paul, etc., R. Co., 53 Minn. 504, 55 N. W. 628. And see Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707.

25. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373.

26. See, generally, Assignments, 4 Cyc. 101, and cases there cited.

27. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373; Hawkins *v.* Mapes-Reeves Constr. Co., 82 N. Y. App. Div. 72, 80, 81 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 236, 70 N. E. 783], where Laughlin, J., remarks: "It is also contended that the plaintiffs are not the real parties in interest. This claim is based upon the fact that, prior to filing the lien, the plaintiffs assigned their contract as collateral security to the Phœnix Iron Company for materials to be furnished to them for use on this work. This was not an absolute sale of the interests of the plaintiffs, or an assignment of the contract, but a conditional transfer, the plaintiffs remain-

case the assignor, it has been held, may sue in his own name even when the face value of the assigned chose is not greater than the face of the debt for which the chose has been assigned as collateral.[28]

(4) Undisclosed Principal as Plaintiff — (a) In General. When one who is an agent enters into a contract for his principal but makes the contract in his own name without disclosing his principal, although the fact of his agency is disclosed, the agent, as will appear later,[29] may sue upon the contract in his own name alone. The same thing is true *a fortiori* when the agent has made the contract in his own name without disclosing even the fact of the agency, and the other party supposes that the agent is the principal.[30] As such, his right to sue in his own name is in general not open to question wherever the doctrine of the real party in interest prevails.[31] But in many states the rule here, instead of

ing the owners until some default by which the transfer was to become absolute, and this never occurred." *Compare* Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410, where the court was of the opinion that the assignment, although as collateral, was an absolute assignment and prevented the assignor from suing.

28. Graham *v.* Light, 4 Cal. App. 400, 402, 88 Pac. 373. Here the facts were as follows: P, the owner of a promissory note for five hundred dollars, assigned it as collateral security for five hundred dollars loaned P by a bank. Afterward, and before there had been a reassignment of the note to P, he sued upon it in his own name. It was objected that he had no right of action. The court, per Smith, J., said: "The plaintiff at the time of the commencement of the suit was still the owner of the note and had a substantial interest therein. The bank, indeed, held it in pledge, and might, therefore, have maintained an action to collect the same. (Civ. Code, § 3006.) Nor under the express provision of the code cited would it have been necessary to make the plaintiff party. But it does not follow that there was not also a right of action in the plaintiff to protect his rights or interest in the note. . . . It cannot be doubted that under the principles of equity the plaintiff was entitled to maintain an action to enforce his rights or protect his interests. Indeed, the right to maintain an action is given him by the provisions of section 367, Code of Civil Procedure [requiring actions to be prosecuted in the name of the real party in interest]."

29. See *infra*, I, B, 2, e, (III), (D).

30. St. Louis, etc., R. Co. *v.* Thacher, 13 Kan. 564; Erickson *v.* Compton, 6 How. Pr. (N. Y.) 471; Hall *v.* Plaine, 14 Ohio St. 417. And see cases cited *infra*, note 31.

31. St. Louis, etc., R. Co. *v.* Thacher, 13 Kan. 564, 567, where Valentine, J., said: "It is generally conceded that under our Code, as well as in equity, where a contract is made by an agent for the benefit of his principal, the principal may sue on the contract, even though the agent may also have the right to sue, and even when the contract is made in the name of the agent, and the principal's name is not disclosed. . . . The principal, in every such case, is 'the real party in interest,' and under our Code the rule is that 'every action must be prosecuted in the name of the real party in interest.' Code, § 26. Every action allowed to be prosecuted in any other manner constitutes an exception to a general rule." See also as applying the test of the real party in interest the following cases:

Alabama.— Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839; Western Union Tel. Co. *v.* Millsap, 135 Ala. 415, 33 So. 160 (where P requested his two brothers, who lived in another city, to find employment for him. One brother found the desired employment and told the other brother to telegraph P to come. The telegraph company failed to deliver the message. P sues, alleging that the sender of the message acted as the agent of P and it was held that P can maintain the action, although he did not pay for or specially direct the sending); McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640; Powell *v.* Wade, 100 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915; Bell *v.* Reynolds, 78 Ala. 511, 517, 56 Am. Rep. 52 (where it was said: "If Lee was acting for the partnership of Reynolds & Lee [the plaintiffs] at the time of the sale, and the plaintiffs were the real parties in interest, it would make no difference that this agency was unknown to defendant."

California.— Crosby *v.* Watkins, 12 Cal. 85; Rinz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

Colorado.— Best *v.* Rocky Mountain Nat. Bank, 37 Colo. 149, 85 Pac. 1124, 7 L. R. A. N. S. 1035; Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209.

Indiana.— Nave *v.* Hadley, 74 Ind. 155. *Compare* Erwin Lane Paper Co. *v.* Farmers' Nat. Bank, 130 Ind. 367, 30 N. E. 411, 30 Am. St. Rep. 246; Smelser *v.* Wayne, etc., Turnpike Co., 82 Ind. 417.

Iowa.— Young *v.* Lohr, 118 Iowa 624, 92 N. W. 684 [*distinguishing* District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621]; Darling *v.* Noyes, 32 Iowa 96.

Kansas.— Nutt *v.* Humphrey, 32 Kan. 100, 3 Pac. 787; Kansas City, etc., R. Co. *v.* Simpson, 30 Kan. 645, 649, 2 Pac. 821, 46 Am. Rep. 104 (where it was said: "Notwithstanding the fact that the railroad company contracted with Towne alone, and had no knowledge that Towne was acting merely as agent of Simpson, Simpson was in fact the real

standing on this ground, is treated as a survival of an anomalous rule of common-law procedure; and the remedial right of the undisclosed principal is recognized only under technical limitations which attached to the common-law rule.[32]

(b) Rule in Common-Law Procedure. That an undisclosed principal had a remedial interest in his own name, both when the fact of the agency was disclosed and when it was not, was strikingly recognized in common-law pleading.[33] As a rule a common-law action for breach of contract lay only in the name of the person to whom the promise was made.[34] When a contract was made by an agent in his own name, without disclosing either his principal or the fact of his agency, it would seem that in strictness the promise was made to the agent, and that the action, at common law, lay in his name, and not in the name of his principal.[35] That the agent in such cases could sue in his own name alone was abundantly established;[36] and in certain classes of cases the remedial interest here was definitely limited to him.[37] But for the most part the undisclosed principal also could sue on the contract, in his own name alone.[38] In theory this worked no

party in interest and could maintain an action for any loss sustained by him under the contract"); Carter *v.* George, 30 Kan. 45, 1 Pac. 58; Tracy *v.* Gunn, 29 Kan. 508; St. Louis, etc., R. Co. *v.* Thacher, 13 Kan. 564.

Kentucky.— Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33.

Minnesota.— Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412.

Missouri.— Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015, holding that when goods are shipped in the name of an agent, the principal may maintain an action against the carrier for damages to the shipment, under Code, § 540, providing that every action shall be prosecuted in the name of the real party in interest.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Nicoll *v.* Burke, 78 N. Y. 580; Silliman *v.* Tuttle, 45 Barb. 171; Wiehle *v.* Saffold, 27 Misc. 562, 58 N. Y. Suppl. 298; Johnson *v.* Doll, 11 Mich. 345, 32 N. Y. Suppl. 132; Erickson *v.* Compton, 6 How. Pr. 471.

North Carolina.— Barham *v.* Bell, 112 N. C. 131, 16 S. E. 903. *Compare* Helms *v.* Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831, 8 L. R. A. N. S. 249, and the dissenting opinion of Clark, C. J.

Ohio.— Hall *v.* Plaine, 14 Ohio St. 417.

Oregon.— Kitchen *v.* Holmes, 42 Oreg. 252, 70 Pac. 830; Barbre *v.* Goodale, 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378.

See 37 Cent. Dig. tit. "Parties," § 6 *et seq.*

32. See the cases and the distinctions *infra*, notes 33 *et seq.*

33. See Dicey Parties, Rule 17 *et seq.*

34. Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280, 1 Chitty Pl. 2. When the contract does not expressly show the person to whom the promise is made "the general principle is, that it is deemed to be made to the person from whom the consideration for the promise proceeded." Treat *v.* Stanton, 14 Conn. 445, 451.

35. See Principal and Agent.

36. See *infra*, I, B, 2, e, (III), (D); and Dicey Parties, Rule 17, exceptions 4, 5. See in particular Potter *v.* Yale College, 8 Conn. 52; Buffum *v.* Chadwick, 8 Mass. 103.

37. These limitations will be noticed later. See *infra*, note 47 *et seq.*; and Dicey Parties, Rule 17, exception 1, when the agent is contracted with by deed in his own name; exception 2, when the agent is named as a party to a bill of exchange, etc.; exception 3, when the right to sue on a contract is by the terms or circumstances of it expressly limited to the agent.

38. On the remedial interest of the undisclosed principal at common law see the cases cited in the notes following. It is to be remembered, however, that his action was open to all defenses that would have been valid against the agent. See Principal and Agent; and the following cases:

Connecticut.— Sullivan *v.* Shailor, 70 Conn. 733, 40 Atl. 1054; Sutton *v.* Mansfield, 47 Conn. 388. *Compare* the remarks of Storrs, J., in Treat *v.* Stanton, 14 Conn. 445, 451: "Not that the person to whom the promise is nominally made, is always to be considered as the real party to the contract; for if he is acting merely as an agent of another, or the promise is made to him as such, his principal is the person to whom the promise is deemed to be made, and therefore is the real party to the contract."

Georgia.— Propellor Tow-boat Co. *v.* Western Union Tel. Co., 124 Ga. 478, 52 S. E. 766; Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600; Woodruff *v.* McGehee, 30 Ga. 158.

Illinois.— Conklin *v.* Leeds, 58 Ill. 178; Saladin *v.* Mitchell, 45 Ill. 79; Warder *v.* White, 14 Ill. App. 50.

Maine.— Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712; Pitts *v.* Mower, 18 Me. 361, 36 Am. Dec. 727.

Maryland.— Noel Constr. Co. *v.* Atlas Portland Cement Co., 103 Md. 209, 63 Atl. 384; Baltimore Coal Tar, etc., Co. *v.* Fletcher, 61 Md. 288; Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417; Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts.— Foster *v.* Graham, 166

modification of the rule that only a party to a contract can sue for its breach; for the undisclosed principal was deemed, in point of law, to be a party to the contract.[39] In substantial effect it signified the partial adoption, in common-law procedure, of the modern principle of the real party in interest.[40] The rule as thus

Mass. 202, 44 N. E. 129; National L. Ins. Co. *v.* Allen, 116 Mass. 398; Barry *v.* Page, 10 Gray 398; Eastern R. Co. *v.* Benedict, 5 Gray 561, 66 Am. Dec. 384; Huntington *v.* Knox, 7 Cush. 371.

New Hampshire.— Usher *v.* Daniels, 73 N. H. 206, 60 Atl. 746, 69 L. R. A. 629; Bryant *v.* Wells, 56 N. H. 152; Chandler *v.* Coe, 54 N. H. 561.

Pennsylvania.— Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327.

Tennessee.— Foster *v.* Smith, 2 Coldw. 474, 88 Am. Dec. 604.

Vermont.— Edwards *v.* Golding, 20 Vt. 30.

Virginia.— Commonwealth Nat. Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826; Waddill *v.* Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766.

West Virginia.— Coulter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133; Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504; Darrow *v.* H. R. Horne Produce Co., 57 Fed. 463.

England.— Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508; Grissell *v.* Bristowe, L. R. 3 C. P. 112, 37 L. J. C. P. 89, 17 L. T. Rep. N. S. 564, 16 Wkly. Rep. 428; Skinner *v.* Stocks, 4 B. & Ald. 437, 23 Rev. Rep. 337, 6 E. C. L. 550; Cothay *v.* Fennell, 10 B. & C. 671, 8 L. J. K. B. O. S. 302, 34 Rev. Rep. 541, 21 E. C. L. 284; Garrett *v.* Handley, 4 B. & C. 664, 10 E. C. L. 748, 1 C. & P. 217, 483, 12 E. C. L. 132, 281, 7 D. & R. 144, 27 Rev. Rep. 405; Phelps *v.* Prothero, 16 C. B. 370, 394, 3 C. L. R. 906, 1 Jur. N. S. 1170, 24 L. J. C. P. 225, 81 E. C. L. 370, where Jarvis, C. J., remarks: "The declaration alleges that the agreement was entered into by Cartwright as agent and on behalf and for the benefit of Phelps. I think that the contract, being thus made by Cartwright for and on behalf and for the benefit of the plaintiff, may be enforced by the plaintiff, notwithstanding that the agent may for the purposes of the agreement, find and provide the money out of his own pocket."

See 37 Cent. Dig. tit. "Parties," § 11.

39. See cases cited *infra*, this note.

The undisclosed principal a party to the contract.—"If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made." Cothay *v.* Fennell, 10 B. & C. 671, 672, 8 L. J. K. B. O. S. 302, 34 Rev. Rep. 541, 21 E. C. L. 284. "As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal." Barry *v.* Page, 10 Gray (Mass.) 398, 399, per Bigelow, J.

40. See cases cited *infra*, this note.

Common-law recognition of the real party in interest see the remark of Lord Abinger, C. B., in Beckham *v.* Drake, 9 M. & W. 79, 92, 60 Rev. Rep. 678: "So it is in a vast variety of other cases which frequently occur, all establishing the principle, that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another." So in Skinner *v.* Stocks, 4 B. & Ald. 437, 23 Rev. Rep. 337, 6 E. C. L. 560. "The action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested." *Compare* Dicey Parties 136. "The agent can sue because he has been treated by the other party as the party to the contract. The principal can sue because he is the person really interested in the contract, for whose benefit it is made, and with whom the law considers it to be made; for though a person who has expressly contracted with A. can not treat the contract as not being with A. on the ground that another person, P., is really interested, yet when a contract is made expressly with A., either by word of mouth or in writing (provided the written instrument be not a deed), it is allowable for P., the person really interested, to show that the contract is, though on the face of it with A., yet in reality with him, and that he, therefore, has a right to sue upon it." And see Huntington *v.* Knox, 7 Cush. (Mass.) 371, 374: "He [the undisclosed principal] is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable. So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest." In Story's view (Agency, § 418) the governing principle in all such cases is that the undisclosed principal, "as the ultimate party in interest, is entitled against third persons, to all advantages and benefits of such acts and contracts of his agent," and therefore may sue in his own name. This explanation is adopted in terms in Dodd Grocery Co. *v.* Postal Tel. Cable Co., 112 Ga. 685, 689, 37 S. E. 981; and Warder *v.* White, 14 Ill. App. 50.

Illustration.—A written order was in these words: "Give Mr. D. A. Neale, president of

established at common law had a very wide application. Its authority was recognized when the agent's contract was in writing, but not under seal, as well as when it was merely by word of mouth;[41] when the agent's written contract was within the scope of the statute of frauds;[42] when the principal had contracted as agent, without naming or identifying any principal;[43] and when there was no agency in fact at the time of the making of the contract, but a profession of agency by the person contracting in his own name and a subsequent ratification by this unnamed principal.[44] It was long undecided whether the rule extended

the Eastern Railroad Company, stock in the Salem Gas Company, at par, to the amount of seven thousand dollars, and place the same to my account." On this, an action of contract was brought by the Eastern Railroad Company. Defendant objected that the action could not be maintained in the name of the Eastern Railroad Company, but only in the name of Neale, and that parol evidence was inadmissible to show a consideration for the order moving from the Railroad Company. It was held that "in a case like the present, of an instrument not negotiable, given in the form in which this is, the plaintiffs, the real parties in interest, may maintain an action thereon in their own name." Eastern R. Co. *v.* Benedict, 5 Gray (Mass.) 561, 566, 66 Am. Dec. 384.

41. See cases cited *infra*, this note.

Agent's contract in writing.— The point that the rule differed according as the contract was oral or in writing, but not under seal, was definitely raised in Beckham *v.* Drake, 9 M. & W. 79, 92, 60 Rev. Rep. 678, and denied. Said Lord Abinger, C. B., delivering the opinion: "The law makes no distinction in contracts, except between contracts which are and contracts which are not under seal. I recollect one of the most learned judges who ever sat upon this or any other bench being very angry when a distinction was attempted to be taken between parol and written contracts, and saying, 'they are all parol unless under seal.' . . . There is nothing affirmative on the face of the contract to show an intention to exclude everybody but themselves [the ostensible parties]. It is open to the defendant Drake to show such an intention, but unless it be shown, the objection does not arise." See also the cases cited in the notes immediately preceding and following.

Not affected by the rule against parol testimony.—"All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction. Barbre *v.* Goodale, 28 Oreg. 465, 471, 38 Pac. 67, 43 Pac. 378, per Wolverton, J. "It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal." Higgins *v.* Senior, 11 L. J. Exch. 199, 201, 8 M. & W. 834, 58 Rev. Rep. 884, per Parke, B. See also the cases in the preceding note, and in particular. Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; Eastern R. Co. *v.* Benedict, 5 Gray (Mass.) 561, 66 Am. Dec. 384; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446, 14 L. ed. 493. And see EVIDENCE, 17 Cyc. 709.

42. See cases cited *infra*, this note.

Not affected by the statute of frauds.— "The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and if a party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing." Kingsley *v.* Siebrecht, 92 Me. 23, 29, 42 Atl. 249, 69 Am. St. Rep. 486, per Savage, J. See also FRAUDS, STATUTE OF, 20 Cyc. 275; and in particular the following cases:

Massachusetts.— Lerned *v.* Johns, 9 Allen 419.

New Hampshire.— Usher *v.* Daniels, 73 N. H. 206, 60 Atl. 746, 69 L. R. A. 629.

Ohio.— Thayer *v.* Luce, 22 Ohio St. 62.

Pennsylvania.— Brodhead *v.* Reinhold, 200 Pa. St. 618, 50 Atl. 229, 86 Am. St. Rep. 735.

United States.— Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 455, 14 L. ed. 493.

England.— Bateman *v.* Phillips, 15 East 272; Wilson *v.* Hart, 7 Taunt. 295, 2 E. C. L. 370.

43. See cases cited *infra*, this note.

When the principal has contracted as agent. — If the professed agent was his own principal he could sue in his own name. Schmaltz *v.* Avery, 16 Q. B. 655, 658, 15 Jur. 291, 20 L. J. Q. B. 228, 83 Rev. Rep. 653, 71 E. C. L. 655. In this case the facts were as follows: A charter-party stated in terms that it was made by G. Schmaltz & Co., as "agents for the freighters"; it then stated the terms of the contract and concluded thus: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." Afterward G. Schmaltz & Co. sued upon the contract, as principals, the declaration taking no notice of the concluding memorandum; oral evidence was given showing that they were in truth the principals. It was held that notwithstanding the terms of the charter-party, plaintiffs might prove that they were the freighters, and their own principal. *Compare* Paine *v.* Loeb, 96 Fed. 164, 37 C. C. A. 434. And see PRINCIPAL AND AGENT.

44. See cases cited *infra*, this note.

to a case in which there was at the time of making the contract neither agency in fact nor profession of agency, but the person contracting in his own name intended to act for another who subsequently "ratified" the contract. The weight of authority and of principle is against such an extension of the rule.[45]

(c) Limits of Common-Law Rule — aa. *In General.* Extensive as was the right of an undisclosed principal to sue in his own name for a breach of a contract made in the name of his agent,[46] it was subject at common law to important limitations.[47] Some of these grew out of the substantive nature of the contract itself, as when the right to sue was by the terms or the nature of the contract, or the circumstance of its making, restricted to the agent.[48] Others held a prominent place among the technical rules of parties to actions, as in the two classes of cases which follow.[49]

bb. *When Agent Appeared as a Party to a Contract Under Seal.* It was an early doctrine of the common law that "no one can sue on a covenant in an indenture who is not mentioned among the parties to the indenture."[50] If therefore an agent, contracting with another under seal, executed the deed in his own name, although in reality he was acting as agent for someone else, an action on the deed, under

After ratification by an undisclosed principal see Foster *v.* Bates, 1 D. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88, 12 M. & W. 226, 67 Rev. Rep. 311. It was sometimes said that the principal, although unnamed at the time of the making of the contract, must be reasonably designated. *Compare* Watson *v.* Swann, 11 C. B. N. S. 756, 771, 31 L. J. C. P. 210, 103 E. C. L. 756, where it was said: "The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." But there was definite authority that the application of the rule was not limited by the fact that the actual person who afterward ratified as principal was unknown at the time of the contract to both the contracting parties; it was sufficient that the class to which he belonged was designated. In this aspect the facts of Foster *v.* Bates, 1 D. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88, 12 M. & W. 226, 67 Rev. Rep. 311, are of value. Here it appeared that goods which P had sent from England to Africa had been sold after P's death and before the grant of letters of administration, by A, who had been P's agent in Africa, and that A sold them avowedly on account of P's estate. After this sale letters of administration on P's estate were issued to F, who then brought assumpsit for goods sold and delivered by him as administrator. It was held that as the act of A was ratified by P after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent, and that the action was therefore maintainable. See Dicey Parties 133. And *compare* Hull *v.* Pickersgill, 1 B. & B. 282, 3 Moore C. P. 612, 21 Rev. Rep. 598, 5 E. C. L. 636; and, generally, on the substantive law applicable, Principal and Agent.

45. See cases cited *infra*, this note.

After ratification by an undisclosed principal when there was at first no agency in fact nor profession of agency see Dicey Parties 132; Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 64 Rev. Rep. 770, 46 E. C. L. 236; the dissenting opinion of Smith, L. J., in Durant *v.* Roberts, [1900] 1 Q. B. 629, 633, 69 L. J. Q. B. 382, 82 L. T. Rep. N. S. 217, 48 Wkly. Rep. 476, discussing the authorities, and Keighley *v.* Durant, [1901] A. C. 240, 70 L. J. K. B. 662, 84 L. T. Rep. N.S. 777. Even such an extension was, however, permitted by the late decision of the English court of appeal in Durant *v.* Roberts, [1900] 1 Q. B. 629, 631, 69 L. J. Q. B. 382, 82 L. T. Rep. N. S. 217, 48 Wkly. Rep. 476. Here it was held, although by a divided court, that "a contract made by a person intending to contract on behalf of another, but without his authority, may be ratified by that other, and so made his own, although the person who made the contract did not profess at the time of making it to be acting on behalf of a principal." But in this the court of appeal was reversed in the house of lords (Keighley *v.* Durant, [1901] A. C. 240, 70 L. J. K. B. 662, 84 L. T. Rep. N. S. 777), which held that "a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal."

46. See *supra*, I, B, 2, e, (III), (C), (4), (a), (b).

47. Dicey Parties 134 *et seq.* And see Principal and Agent.

48. Dicey Parties 135, 136.

For instances and illustrations see, in general, Principal and Agent; and in particular Moore *v.* Vulcanite Portland Cement Co., 121 N. Y. App. Div. 667, 106 N. Y. Suppl. 393.

49. See *infra*, I, B, 2, e, (III), (C), (4), (c), bb–cc.

50. Dicey Parties 103.

the common-law rule just referred to, lay in the name of the agent, but not in the name of his principal.[51]

cc. *When Agent Was Party to a Bill of Exchange.* A similar limitation was early imposed upon the doctrine of bills of exchange by the law merchant,[52] and from the law merchant was imported into the common-law doctrine of parties. It was long accepted on both sides of the Atlantic that "no person can claim upon a bill of exchange or promissory note except the parties named in the instrument."[53]

(d) Limits of Rule in Code Pleading — aa. *In General.* The affirmative applications of the common-law rule that an undisclosed principal may sue in his own name on his agent's contract are in point whenever the principle of the real party in interest prevails.[54] Whether those limitations of the rule which are rather technical than substantial[55] are still valid has been questioned.

bb. *When Agent Appears as Party to a Contract Under Seal.* The technical limitation of the common law here[56] has a ready explanation in the restrictions which the historic action to recover damages for the breach of a contract under seal, the action of covenant, imposed upon common-law procedure;[57] but it is of present-day significance that this same technical limitation is recognized and enforced in current cases even in states where the action of covenant, with the whole formulary system of common-law actions, has been abrogated, and the principles of one form of action and a real party in interest are required by express enactments.[58]

51. Dicey Parties 134; Beckham *v.* Drake, 9 M. & W. 79, 95, 60 Rev. Rep. 678, where it is said: "Those parties only can sue or be sued upon an indenture, who are named or described in it as parties." And see Southampton *v.* Brown, 6 B. & C. 718, 5 L. J. K. B. O. S. 253, 30 Rev. Rep. 511, 13 E. C. L. 322; Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 11 E. C. L. 495. The facts in the latter case are significant. An indenture of lease began in these words: "Agreed the 24th day of July, 1822, between James Simmonds, for and on behalf of W. F. Berkeley (the plaintiff), on the one part, and J. Hardy, of the other part, as follows: the said W. F. Berkeley agrees to let, and the said J. Hardy agrees to take, all those messuages, tenements, farms, and lands," etc. The reddendum was to Berkeley, plaintiff, the covenants were expressed to be made by Hardy to Berkeley, and by Berkeley to Hardy. The name of Simmonds did not occur in the lease, after the commencement given above, until the conclusion, which ran thus: "In witness whereof we have hereunto set our hands and seals the day and year above written. J. Simmonds (L. S.) J. Hardy (L. S.)." One of the covenants in the lease being broken by Hardy, an action of covenant was brought in the name of Berkeley. It was held that the strict technical rules of the common law of England "applicable to deeds under seal" had been "laid down and recognized in so many cases" that the court was bound to say that no action could be maintained by Berkeley upon the deed in question. On the survival of this technical rule in statutory pleading see *infra*, I, B, 2, e, (III), (C), (4), (D), bb.

52. See cases cited *infra*, this note.

"By the law merchant . . . each party who receives the bill is making a contract with the parties upon the face of it, and with no other." Beckham *v.* Drake, 9 M. & W. 79, 92, 60 Rev. Rep. 678, per Lord Abinger, C. B. And see Arlington *v.* Hinds, 1 D. Chipm. (Vt.) 431, 12 Am. Dec. 704, where, in a hard case, the supreme court of Vermont assumed that the law merchant was not adopted in that state in order to permit an undisclosed principal to sue. *Compare* Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622.

53. See Dicey Parties 134, where it is said: "Hence, though the party entitled upon such instrument be an agent, the action must be brought in his name, and can not be brought in the name of the principal, who is not a party." And see the remark of Metcalf, J., in Fuller *v.* Hooper, 3 Gray (Mass.) 334, 341: "The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument, can be shown by parol evidence. When an agent signs such an instrument, without disclosing his agency on its face, the holder must look to him alone. And when such an instrument, which is intended for the benefit of the principal, is given to the agent only, he only, or his indorsee, can sue on it. In other simple contracts the rule is different." *Compare* National L. Ins. Co. *v.* Allen, 116 Mass. 398. As to survival of this doctrine in modern procedure see *infra*, I, B, 2, e, (III), (C), (4), (D), cc.

54. For the reason that this common-law rule was in effect a partial adoption of the principle of the real party in interest see *supra*, note 40.

55. See *supra*, I, B, 2, e, (III), (C), (4), (B), (C).

56. See *supra*, I, B, 2, e, (III), (C), (4), (C), bb.

57. Dicey Parties 101 *et seq.*; Chitty Pl. 130 *et seq.* And see the partial amelioration of the doctrine by 32 Hen. VIII, c. 34.

58. "Where an instrument is under seal, no person can sue or be sued to enforce the

cc. *When Agent Appears as Party to a Negotiable Instrument.* The similar limitation which the law merchant imposed upon the doctrine of negotiable instruments already referred to [59] is less definitely marked in modern decisions.[60] The weight

covenants, therein contained, except those who are named as parties to the instrument and who signed and sealed the same." Henricus *v.* Englert, 137 N. Y. 488, 494, 33 N. E. 550, per Earl, J. The leading case is Schaefer *v.* Henkel, 75 N. Y. 378. See *infra*, this note, and the cases following. Anderson *v.* Connor, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449; McColgan *v.* Katz, 29 Misc. (N. Y.) 136, 60 N. Y. Suppl. 291, holding that when an agent executes in his own name as lessor a sealed lease of premises belonging to an estate and it does not appear from the lease who is the principal, the executrix of the estate cannot sue thereon, although the agent has appended the word "Agent" to his signature; for such words are *descriptio personæ*); Smith *v.* Pierce, 60 N. Y. Suppl. 1011. *Compare* Denike *v.* De Graaf, 87 Hun (N. Y.) 61, 33 N. Y. Suppl. 1015 [*affirmed* without opinion in 152 N. Y. 650, 47 N. E. 1106]; Kiersted *v.* Orange, etc., R. Co., 69 N. Y. 343, 345, 25 Am. Rep. 199, where it was said: "The covenants in a deed can only be enforced against the party who, upon the face of the instrument, is the covenantor, although it appears by extrinsic proof that he acted as the agent for another." And see Evidence, 17 Cyc. 709 *et seq.*

Whether real party in interest.— The point that the undisclosed principal may appear as plaintiff in these cases, because of the statutory requirement that a civil action must be brought in the name of the real party in interest, was distinctly raised in Schaefer *v.* Henkel, 75 N. Y. 378, 384. But the court was of opinion that "the parties whose signatures and seals are affixed to such an instrument, and who alone are named therein, are the real parties in interest, for they only are bound thereby." In this case plaiutiffs sought to recover for rent due under a lease executed by "J. Romaine Brown, agent." Brown was described as agent in the body of the lease. He signed it "J. Romaine Brown, agent." The lease was under seal, but a seal was not necessary to its validity. Plaintiffs did not sign the lease; their names did not appear in it; there was nothing in the instrument itself showing that they had anything to do with it, or that it was executed in their behalf. In fact, however, it could be established by parol that plaintiffs were the actual owners of the lease, that Brown had oral authority from them to make the lease, and that he had acted as their agent in the transaction. It was held that in an action on the lease Brown was the only real party in interest, for the reasons indicated above. For a distinction in the doctrine of Schaefer *v.* Henkel, *supra*, this note see Kernochan *v.* Wilkens, 3 N. Y. App. Div. 596, 38 N. Y. Suppl. 236. *Compare* Moore *v.* Granby Min., etc., Co., 80 Mo. 86. That the rule applies even when the instrument would have been good without a seal see also Van Dyke *v.* Van Dyke, 123 Ga. 686, 51 S. E. 582 (a promissory note under seal); Lenney *v.* Finley, 118 Ga. 718, 45 S. E. 593 (a lease for a term of less than two years, which under the law of Georgia would have been valid without any seal). *Contra*, Stowell *v.* Eldred, 39 Wis. 614. And *compare* Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907.

When private seals have been abrogated by statute the distinction does not apply. J. B. Streeter Co. *v.* Janu, 90 Minn. 393, 96 N. W. 1128. Here the contract was under a private seal, but a statute of Minnesota provided that the addition of a private seal to an instrument in writing "shall not affect its character in any respect." *Compare*, however, Sanger *v.* Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913.

59. See *supra*, I, B, 2, e, (III), (C), (4), (C), cc.

60. However, the analogous doctrine that in suits upon negotiable instruments no evidence is admissible to charge any person as a principal thereto unless his name is in some way disclosed in the instrument itself is widely recognized in this country. See, generally, Commercial Paper, 7 Cyc. 664 *et seq.*, 8 Cyc. 251 *et seq.*; Evidence, 17 Cyc. 589 *et seq.*; and in particular Sparks *v.* Despatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Ranger *v.* Thalmann, 84 N. Y. App. Div. 341, 82 N. Y. Suppl. 846 [*reversing* 39 Misc. 420, 80 N. Y. Suppl. 19, and *affirmed* without opinion in 178 N. Y. 574, 70 N. E. 1108]; Cragin *v.* Lovell, 109 U. S. 194, 3 S. Ct. 132, 27 L. ed. 903.

In some cases it seems to have been taken for granted that the right to charge an undisclosed principal applies as well to negotiable paper as to other simple contracts. Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 380; Raymond *v.* Mann, 45 Tex. 301; Sessums *v.* Henry, 38 Tex. 37; Edwards *v.* Ezell, 2 Tex. App. Civ. Cas. § 276.

But on the other hand there is a tendency to reaffirm the distinction, when the point is definitely made, on the ground that the limitation as to negotiable paper, although apparently technical, really "arises from the nature of such paper and the uses for which it is intended." See Richmond Locomotive, etc., Works *v.* Moragne, 119 Ala. 80, 24 So. 834; McGregor *v.* Hudson, (Tex. Civ. App. 1895) 30 S. W. 489.

A counter distinction is sometimes taken between an action on the note and an action against "an undisclosed principal upon the special facts of the case, making it inequitable and unjust for him to retain the money." See, in general, Principal and Agent; and in particular Harper *v.* Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97. *Compare* Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20. And see Pollock's remark: "Modern decisions

of authority, however, appears to be against it, recognizing the right of the undisclosed principal to maintain an action upon the instrument in his own name.[61]

(5) Third Person Beneficiary as Plaintiff — (a) In General. The statutory rule that an action must be brought in the name of the real party in interest has given new life to a question which held a prominent place in our earlier doctrine of parties plaintiff: Can one who, although neither an ostensible party to a contract nor privy to its consideration, is yet a beneficiary of the contract, sue upon it in his own name?[62] It is clear on principle, and established by the weight of authority, that when the benefit to a third person is merely incidental to the performance of a contract between others he has no remedial interest in it.[63] But there are two distinct classes of cases in which the third person is in closer touch with the contract than a mere incidental beneficiary. In the first class the promisee owes to the third person who will be benefited by the performance of the promise no legal or equitable obligation which the performance of the promise will discharge, but the whole benefit of the performance goes to the third person.[64] In the second class of cases, the sole promisee is under a distinct legal or equitable obligation to the third person, and the performance of the contract, while benefiting the third person, will also discharge the promisee from his obligation.[65] In both these classes of cases the American courts have reached results

seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signed not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand." Williston's Wald's Pollock Contr. 100.

61. Nave *v.* Hadley, 74 Ind. 155, 156, where it was said: "There is some conflict in the cases as to whether a principal may sue upon a promissory note, payable to the agent, which does not indicate or disclose the principal. The weight of authority is, however, pretty decidedly in favor of the doctrine, that the action may be maintained by the principal." And see McConnell *v.* East Point Land Co., 100 Ga. 129, 134, 28 S. E. 80, where the objection that the undisclosed principal of the payee of a promissory note could not sue in his own name is met by the court with "[the principle] that all civil contracts made by an agent in the execution of his agency, though made in his own name without disclosing his principal, may be enforced by the principal by appropriate action brought in his own name." As the agent who is named as the party to a negotiable instrument can transfer his right to the principal by assigning to him the bill or note, the distinction is rarely of consequence. Its possible importance as a practical question in pleading is, however, illustrated in Smelser *v.* Wayne, etc., Turnpike Co., 82 Ind. 417, 420: "It is no doubt true that the principal may sue upon a note in fact belonging to him, although written payable to the agent. Nave *v.* Hadley, *supra*. This rule avails the appellee nothing, for the reason that the complaint does not proceed upon the theory that the note belongs to the corporation because executed to its agent. On the contrary, the title is explicitly alleged to have been acquired by indorsement from a stranger, and this prohibits a recovery upon the ground that the appellee was, in fact, the real owner. A plaintiff cannot lay one species of title and recover upon an altogether different one."

62. The question arises, at least as a question of substantive right, in other systems of law than our own. See 15 Harv. L. Rev. 767; 16 Harv. L. Rev. 43 (articles on "Contracts for the Benefit of Third Persons" by Professor Williston). In our own legal system the problem has aspects which lie outside the range of procedure; on the other hand some of the aspects are distinctly procedural. See *infra*, I, B, 2, e, (III), (C), (5), (b) *et seq.*

63. See cases cited *infra*, this note.

Illustrations.— D contracted with C to furnish him such sums of money as might be necessary for C to meet his current expenses. D failed to do this and C became indebted to P for current expenses. It was held that P cannot sue D on his contract with C even in a state where it is unquestioned law that one for whose benefit a promise is made between others can maintain an action in his own name on the contract. Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541. See also Punta Gorda Bank *v.* State Bank, (Fla. 1907) 42 So. 846; Rodhouse *v.* Chicago, etc., R. Co., 219 Ill. 596, 76 N. E. 836; German State Bank *v.* Northwestern Water, etc., Co., 104 Iowa 717, 74 N. W. 685; Styles *v.* F. R. Long Co., 70 N. J. L. 301, 57 Atl. 448; Rowe *v.* Moon, 115 Wis. 566, 92 N. W. 263. And see, generally, Contracts, 9 Cyc. 380 note 10; and Guaranty, 20 Cyc. 392.

64. In other words the third person is the sole beneficiary of the contract.

The historic case on the point is Dutton *v.* Poole, 2 Lev. 210, 83 Eng. Reprint 523, 1 Vent. 318, 86 Eng. Reprint 205.

A typical instance is a contract of life insurance for the benefit of some one other than the assured and not his creditor.

65. Here the third person is conveniently designated as the creditor of the promisee.

which cannot be distinctly marked without reference to the earlier common-law doctrine.

(b) Rule at Common Law — aa. *In Actions For Breach of Covenant.* When the contract between A and B for the benefit of C was under seal and *inter partes*, it was unquestioned law that the third person beneficiary could not sue in his own name; the action of covenant lay only in the name of the covenantee.[66] So the action of debt did not lie in the name of the sole beneficiary of an indenture for the payment of a sum certain.[67]

bb. *In Actions For Breach of Parol Contract.* When the contract between A and B for the benefit of C was not under seal, an action for its breach — an action of assumpsit — was regularly brought in the name of one of the contracting parties.[68] But in the earlier development of assumpsit a doctrine which the later law of parties branded as very anomalous[69] became current[70] — that assumpsit lay also in the name of the beneficiary of a simple contract, although he was not a contracting party. "If one person," remarked an English judge in 1787, "makes a promise to another for the benefit of a third, that third person may maintain an action upon it."[71]

cc. *Anomalous Doctrine in Assumpsit.* This broad doctrine, now associated by a multitude of American cases with Lawrence *v.* Fox,[72] never obtained definite recognition in the settled law of parties in England.[73] Ultimately it was rejected by the English courts, and by some American courts, as an anomaly.[74] In its origin, however, the doctrine was not entirely anomalous; for the action of assumpsit, in its earlier development,[75] reached, and long retained, a wider scope than was possible for an action based exclusively on contract, in the modern sense of that term.[76] In this wider view the action included not only cases of actual

A typical instance is where A agrees with B on a consideration moving from B to pay to C a debt which B owes C. The historic case on the point is Lawrence *v.* Fox, 20 N. Y. 268.

66. See Dicey Parties, Rule 12, where it is said: "The person to bring an action for a breach of the covenant must be the covenantee. . . . A covenant, again, is not a covenant with any person except the covenantee. . . . Suppose an indenture to which the parties are A. of the one part and X. of the other part, and that this indenture contains a covenant by X. with M. to pay M. £20, M. cannot sue X. because M. is not a party to the indenture." *Compare* Southampton *v.* Brown, 6 B. & C. 718, 5 L. J. K. B. O. S. 253, 30 Rev. Rep. 511, 13 E. C. L. 322. See the application of this limitation in the case of contracts for an undisclosed principal *supra*, I, B, 2, e, (III), (C), (4).

67. Ross *v.* Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646 (where an indenture between S and R wherein R covenanted to pay a certain sum of money to M, a daughter of S, within two months after S's death; and it was held that M could not bring debt against R); Barford *v.* Stuckey, 2 B. & B. 333, 5 Moore C. P. 23, 6 E. C. L. 170 (where the facts were similar to those of Ross *v.* Milne, *supra*. The administrator of the beneficiary brought debt. It was admitted that the administrator of the promisee could sue, but it was urged that the burden of the suit should not be thrown on him, since "he had no interest for which to sue." But it was held that the action lay only in the name of the administrator of the promisee.

68. See Dicey Parties, Rule 10, where it is said: "No one can sue for the breach of a contract who is not a party to the contract. . . . In whatever words expressed it [the rule quoted] embodies the principle that 'rights founded on contract belong to the person who has stipulated for them' (Alton *v.* Midland R. Co., 19 C. B. N. S. 213, 11 Jur. N. S. 672, 34 L. J. C. P. 292, 12 L T. Rep. N. S. 703, 13 Wkly. Rep. 918, 115 E. C. L. 213), and to no other, and therefore, that no one can sue for the non-performance of an agreement to which he was not either directly or through his agent a party."

69. See Dicey Parties 84; and cases *infra*, notes 72–87.

70. The authorities for this older doctrine are given *infra*, note 78.

71. Marchington *v.* Vernon, 1 B. & P. 101 note, per Buller, J. See also Assumpsit, Action of; and *infra*, next section.

72. Lawrence *v.* Fox, 20 N. Y. 268. The facts of the cases and the cases following it will be given *infra*, notes 83, 85.

73. Dicey Parties 84, 85.

74. Dicey Parties 84. And see cases cited *infra*, notes 86, 87.

It is sometimes so regarded even by American courts which recognize the authority of the rule. Lehow *v.* Simonton, 3 Colo. 346.

75. That is, after Slade's Case, 4 Coke 91*a*, 76 Eng. Reprint 1072.

76. See 56 Am. L. Reg. 73 *et seq.* (article on "Limitations of the Action of Assumpsit" by Professor Henig); 2 Harv. L. Rev. 53 *et seq.* (article on "The History of Assumpsit" by Professor Ames).

privity between defendant and plaintiff but also cases of debt and accountability to plaintiff, without actual privity.[77] Whatever the cause, the so-called anomaly, by which the third person beneficiary could sue in assumpsit had the support of more than respectable opinion in England until a comparatively recent day.[78] And these opinions, with others, were all current in America, and very influential in shaping our common-law rule.[79] There was also definite authority in England, recognized there for more than a century, that assumpsit lay if plaintiff's beneficial interest was combined with a near relationship to a party to the contract.[80] In America early decisions, acting on the supposed authority of the English rule, but going farther than the English decisions had ventured to go,[81] although not farther than the current opinion in England had gone,[82] definitely permitted assumpsit to be brought by the third person beneficiary, whether he appeared as sole beneficiary or as creditor claiming under a promise to his debtor to discharge the debt.[83]

77. It will be remembered that a debt was "originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant." 2 Harv. L. Rev. 55. And see 56 Am. L. Reg. 78, 87. *Compare* the explanation of the wider reach of assumpsit as given by Crompton, J., in Tweddle *v.* Atkinson, 1 B. & S. 393, 398, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393. See also Dicey Parties 84, 85. In this view, the third person beneficiary of the contract was apparently deemed to be the person who sustained the injury arising because of the breach of the contract; and in a tort action the proper party plaintiff is "the person who sustains an injury." Dicey Parties 330.

78. See cases cited *infra*, this note.

Third person beneficiary as plaintiff, in the earlier English doctrine.—However anomalous in our present view, the doctrine referred to in the text was accepted, without modification or question, by Lord Chief Baron Comyns, whose opinion, even without decisions supporting it, was regarded, at the close of the eighteenth century, as "of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster Hall." Lord Kenyon in Pasley *v.* Freeman, 3 T. R. 51, 64, 1 Rev. Rep. 634. The doctrine which now prevails in most American states, the doctrine of Lawrence *v.* Fox, 20 N. Y. 268 (see *infra*, note 85), could be illustrated in both its aspects from the examples in Comyns Digest of the proper party plaintiff in actions of assumpsit. Thus, "An action upon assumpsit may be brought by him to whom the promise was made, though the benefit accrues to another." . . . "So, it may be brought by him likewise, to whom the benefit." "Upon a promise to the father to give so much with his daughter in marriage, the daughter may have the action; for she is the meritorious cause." . . . "Upon a promise to B to pay $20 to an infant at his full age, and to educate him in the meantime, the infant shall have the action." Comyns Dig. "Action upon the Case upon Assumpsit Ea, By Whom it Shall be Brought." So, in the earlier editions of Chitty on Pleading: "When a contract not under seal, is made with A, to pay B a sum of money, B may sustain an action in his own name." Chitty Pl. (4th Am. ed.) 4. See 1 Viner Abr. "Assumpsit" 333. See also the remark of Lord Holt in Yard *v.* Eland, 1 Ld. Raym. 368; and the remark of Buller, J., in Marchington *v.* Vernon, 1 B. & P. 101 note.

79. See *infra*, note 83.

80. Dutton *v.* Poole, 2 Lev. 210, 83 Eng. Reprint 523, 1 Vent. 318, 86 Eng. Reprint 205. See the case cited in Bourne *v.* Mason, 1 Vent. 6, 86 Eng. Reprint 5, to the effect that the daughter of a physician might maintain assumpsit upon a promise made to her father to give her a sum of money if he performed a certain case for "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." Considerable hesitation, however, was shown, by some of the judges in Dutton *v.* Poole, *supra*. But Lord Mansfield, a century later, approved its doctrine as hardly open to question. Martyn *v.* Hind, Cowp. 437. Although definitely discarded in England (see the case of Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393; Dicey Parties 84), the doctrine of Dutton *v.* Poole, *supra*, survives in a number of American cases (see *infra*, note 83; and in particular Pond *v.* New Rochelle Water Co., 183 N. Y. 330, 337, 76 N. E. 211, 1 L. R. A. N. S. 958). That Dutton *v.* Poole, *supra*, did not apply when the contract was under seal see Ross *v.* Milne, 12 Leigh (Va.) 205, 37 Am. Dec. 646.

81. In Feltmakers *v.* Davis, 1 B. & P. 98, 101, plaintiff's counsel urged upon the common pleas, that "if a promise be made to A. for the benefit of B., B. may maintain an action on that promise." But the court evaded the point, Eyre, J., expressing the opinion that in such a case "the promise must be laid as being made to B., and the promise actually made to A. may be given in evidence to support the declaration."

82. See *supra*, note 78.

83. See cases cited *infra*, this note.

Third person beneficiary as plaintiff, in early American decisions; origin of the prevailing American rule.— In Schemerhorn *v.* Vanderheyden, 1 Johns. (N. Y.) 139, 140, 3 Am. Dec. 304, the sole beneficiary was plaintiff, the court, on the authority of Dutton *v.*

These early American cases, reiterating in the broadest terms a doctrine which the best known English law-books in our courts presented as unquestioned law,[84] had a very great influence in shaping the permanent rule in many American states.[85] The later decisions in England[86] and to some extent in America[87] rejected this doctrine in both its aspects.

Poole, 2 Lev. 210, 83 Eng. Reprint 523, 1 Vent. 318, 86 Eng. Reprint 205, *supra*, was of the opinion that "where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise." In Felton *v.* Dickinson, 10 Mass. 287, 290, another case where the sole beneficiary was plaintiff, the court said: "When a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach. This principle was settled as early as Rolle's time, in a case quite analogous to the present; and, it being cited by Lord C. B. Comyns, in his Digest, without any question of its authority, it is to be presumed that it continues to be received as a sound principle." *Compare* Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229, 254, 8 Am. Dec. 492 (where Chancellor Kent laid it down as an established principle that "if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law on that promise"); Arnold *v.* Lyman, 17 Mass. 400, 405, 9 Am. Dec. 154 (where the creditor of promisee, sued on an express promise to pay the debts of the promisee and the court reaffirmed the doctrine of Comyns Digest that "he for whose interest a promise is made, may maintain an action upon it, although the promise be made to another and not to him"); Hall *v.* Marston, 17 Mass. 575, 579 (where the creditor of promisee sued on an implied promise and the court declared it to be well settled that "if A promises B for a valuable consideration, to pay to C, the latter may maintain assumpsit for the money. . . . The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received"). In Carnegie *v.* Morrison, 2 Metc. (Mass.) 381, 402, where the creditor of promisee was plaintiff, the court notices the doubt which had arisen in England as to the true common-law rule (see pages 404, 405 of the report), but reaffirms the right of the creditor to bring assumpsit on the promise to his debtor. In this case Shaw, C. J., said: "It seems to have been regarded as a settled point, ever since reports have been published in this State, rather than as an open question to be discussed and considered. The position is, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." In Brewer *v.* Dyer, 7 Cush. (Mass.) 337, 340, where the creditor of promisee was plaintiff, the court permitted plaintiff to sue in assumpsit "upon the principle of law, long recognized and clearly established in this commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." This rule, declares the court, "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate. Dutton *v.* Poole, 2 Rev. 210, 83 Eng. Reprint 523, 1 Vent. 318, 86 Eng. Reprint 205; 2 Walford on Parties 1144; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff; by Coleridge, J., in Lilly *v.* Hays, 5 A. & E. 548, 551, 2 Harr. & W. 338, 6 L. J. K. B. 5, 1 N. & P. 26, 31 E. C. L. 726; but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

84. See *supra*, note 83.

85. See for instance the following pioneer decisions, in each of which one or more of the early cases referred to above are given as authority for the accepted rule.

Illinois.— Bristow *v.* Lane, 21 Ill. 195; Eddy *v.* Roberts, 17 Ill. 505.

Indiana.— Hardy *v.* Blazer, 29 Ind. 226, 92 Am. Dec. 347.

Iowa.— Johnson *v.* Collins, 14 Iowa 63.

Kansas.— Anthony *v.* Herman, 14 Kan. 494.

Maine.— Dearborn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206.

Minnesota.— Sanders *v.* Clason, 13 Minn. 379.

Missouri.— State Bank *v.* Benoist, 10 Mo. 520.

New York.— Lawrence *v.* Fox, 20 N. Y. 268.

South Carolina.—Brown *v.* O'Brien, 1 Rich. 268, 44 Am. Dec. 254.

See 37 Cent. Dig. tit. "Parties," § 11.

Compare the remark of Denio, J., in Burr *v.* Beers, 24 N. Y. 178, 180, 80 Am. Dec. 327: "These cases [the earlier English and American cases], and also those referred to by Chancellor Kent, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others, the cases though presenting the point were decided upon other grounds. It cannot however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor for whose benefit the promise was made."

86. See *infra*, note 88 *et seq.*

87. See *infra*, note 97 *et seq.*

dd. *Later Rule of the English Common Law.* It was finally settled, at a comparatively recent day, as the common-law rule in the English courts that a third person beneficiary cannot sue, even in assumpsit, upon a contract made between others for his benefit,[88] that the fact of a near relationship on the part of the beneficiary to one of the contracting parties worked no modification of the rule,[89] and that an agreement between the contracting parties expressly authorizing an action in the name of the beneficiary was without effect.[90]

(c) SURVIVAL OF LATER COMMON-LAW RULE IN ENGLAND. This common-law rule, settled in England by 1861,[91] was not affected by the English Judicature Acts of 1873 and 1875,[92] and their assimilation of legal and equitable procedure.[93] Whatever its inconvenience in practice, the present English rule goes definitely to the point that the third person beneficiary cannot sue, either at law or in equity.[94] The rule is indeed subject to various limitations,[95] but its admitted range of

88. Price *v.* Easton, 4 B. & Ad. 433, 2 L. J. K. B. 51, 1 N. & M. 303, 24 E. C. L. 193. The declaration in this case stated that W P owed plaintiff £13, and that in consideration thereof, and that W P, at defendant's request, had promised defendant to work for him at certain wages, and also, in consideration of W P leaving the amount which might be earned by him in defendant's hands, he, defendant, undertook and promised to pay plaintiff the said sum of £13. Averment that W P performed his part of the agreement. There was a verdict for plaintiff, but judgment was arrested. "It is quite clear," said Patterson, J., "that the allegations in this declaration are not sufficient to shew a right of action in the plaintiff. There is no promise to the plaintiff alleged." The case is to be compared with the leading American case of Lawrence *v.* Fox, 20 N. Y. 268. And see Crow *v.* Rogers, Str. 592.

89. Tweddle *v.* Atkinson, 1 B. & S. 392, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393. See the facts set out *infra*, note 90. See Dicey Parties 84 *et seq.*

90. The last two points both appear in Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393. There the action was upon the following written but unsealed agreement: "Memorandum of an agreement made this day between William Guy . . . of the one part, and John Tweddle . . . of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of £100 to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified." After the 21st day of August, 1855, William Tweddle brought an action on this agreement, against the executor of William Guy, the declaration averring his relationship to the parties, and their intention to provide him with a marriage portion. It was held on demurrer, that plaintiff could not maintain the action.

91. Tweddle *v.* Atkinson, 1 B. & S. 392, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393.

92. St. 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77. See also 23 Cyc. 1612.

93. **In America, on the other hand,** the assimilation of legal and equitable procedure has been deemed sufficient to warrant a direct action by the third person. Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613. *Compare* Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210. And see *infra*, p. 65.

94. "An agreement between A. and B. that B. shall pay C., gives C. no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law, it is a mere question of contract." *In re* Rotherham Alum, etc., Co., 25 Ch. D. 103, 111, 53 L. J. Ch. 290, 50 L. T. Rep. N. S. 219, 32 Wkly. Rep. 131, per Lindley, L. J.

95. Thus, the third person beneficiary is to be distinguished from a principal claiming as such on a contract made by his agent, from a party claiming under a novation, from the *cestui que trust*, in whatever form. See PRINCIPAL AND AGENT; TRUSTS; and the like titles.

The distinction between the third person beneficiary and the *cestui que trust* is sometimes overlooked in England as in America. Thus, in Gandy *v.* Gandy, 30 Ch. D. 57, 66, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803, Cotton, J., remarks: "As a general rule, a contract cannot be enforced except by a party to the contract. . . . That rule, however, is subject to this exception: if the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract." The language is possibly broad enough to suggest that any clearly defined sole beneficiary of a contract may claim as a *cestui que trust*. The decision in the case, however, and other decisions, establish that a third person beneficiary and a *cestui que trust* stand on very different grounds. See in par-

application shuts out the beneficiary in many cases where most American courts admit him, without question, as the proper plaintiff.[96]

(d) Survival of Later Common-Law Rule in a Few American States. The settled common-law rule noticed above,[97] as distinguished from the so-called anomalous rule in the earlier development of assumpsit — above referred to, discussed, and explained[98] — is enforced, in both its branches,[99] by a few American courts. Thus, the third person beneficiary, whether as sole beneficiary of the contract, or as creditor claiming under a promise to his debtor to discharge the debt, is denied a standing as plaintiff in Connecticut,[1] in Georgia,[2] in Massachusetts,[3] in

ticular the distinction by Jessel, M. R., in *In re* Empress Engineering Co., 16 Ch. D. 125, 129, 43 L. T. Rep. N. S. 742, 29 Wkly. Rep. 342. It is remarked by the court in Touche *v.* Metropolitan R. Warehousing Co., L. R. 6 Ch. 671, 677, that "where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself"; but this remark ignores distinctions which later English decisions insist on as essential. It cannot be regarded as expressing the present English rule, however near it may be to expressing the prevailing American rule.

96. As where the contract between A and B was made for the sole benefit of C, for example, a contract of life insurance payable to some one other than the insured. In Cleaver *v.* Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147, 153, 56 J. P. 180, 61 L. J. Q. B. 128, 66 L. T. Rep. N. S. 220, 40 Wkly. Rep. 230, Lord Esher, M. R., remarks: "If the Married Women's Property Act had not been passed, or if the policy had made the money payable to some person other than the insured's wife or children, I should say that, on the true construction of the policy, the only persons who could claim under it, and give a valid receipt for the money insured, were the executors of the insured." And see *In re* Empress Engineering Co., 16 Ch. D. 125, 43 L. T. Rep. N. S. 742, 29 Wkly. Rep. 342; Eley *v.* Positive Government Security L. Assur. Co., 1 Ex. D. 88, 45 L. J. Exch. 451, 34 L. T. Rep. N. S. 190, 24 Wkly. Rep. 338. *Compare* Gandy *v.* Gandy, 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803. So also, when B has promised A to pay A's debt to C, as when the grantee of land subject to a mortgage promises the mortgagor to pay the mortgage debt. Under the English rule, the mortgagee cannot sue on this promise. Bonner *v.* Tottenham, etc., Permanent Invest. Bldg. Soc., [1899] 1 Q. B. 161, 68 L. J. Q. B. 114, 79 L. T. Rep. N. S. 611, 47 Wkly. Rep. 161. A similar doctrine prevails in Ireland (Barry *v.* Harding, 7 Ir. Eq. 313, 1 J. & L. 475); and in Canada (Frontenac Loan, etc., Soc. *v.* Hysop, 21 Ont. 577; Aldous *v.* Hicks, 21 Ont. 95). But the only American state "where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts." 15 Harv. L. Rev. 787.

97. See *supra*, p. 63.

98. See *supra*, p. 60 *et seq.*

99. See *infra*, text and notes 1–5.

1. See cases cited *infra*, this note.

Sole beneficiary cannot sue. Atwood *v.* Burpee, 77 Conn. 42, 58 Atl. 237; Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

Creditor of promisee cannot sue. Morgan *v.* Randolph, etc., Co., 73 Conn. 396, 397, 47 Atl. 658, 51 L. R. A. 653, where the court said: "It must now be regarded as the settled general rule in this State, that where A simply agrees with B upon a valid consideration, to assume and pay B's debts and save B harmless therefrom, C, a creditor of B, cannot maintain an action at law against A for his refusal to pay the debt due from B to C."

By express legislation, this rule is departed from in Connecticut, where a grantee in a deed conveying real estate subject to mortgage or lien agrees to assume and pay the encumbrance. Gen. St. § 983. And see Morgan *v.* Randolph, etc., Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653.

2. See cases cited *infra*, this note.

Sole beneficiary cannot sue. Cooper *v.* Claxton, 122 Ga. 596, 50 S. E. 399. The court follows Gunther *v.* Mooney, 72 Ga. 205, but here the contract was under seal. See also Fowler *v.* Athens City Water-Works Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313. *Compare* Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

Creditor of promisee cannot sue. Guthrie *v.* Atlantic Coast Line R. Co., 119 Ga. 663, 46 S. E. 824; Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82. But see Ford *v.* Finney, 35 Ga. 258.

3. See cases cited *infra*, this note.

Sole beneficiary cannot sue. Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303 (where the action was upon a policy of life insurance issued by defendant on the life of W and payable to his wife, and it was held that the wife could not sue. "The promise to pay the plaintiff was by intendment of law made with Alexander H. Wright, and his administrator was the proper party." The rule was changed by statute, in such cases, in 1894, as to policies thereafter issued. See Wright *v.* Vermont L. Ins. Co., *supra*. *Compare* McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254, 38 N. E. 435); in Marston Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43, it was held that a son could not recover, on the ground of relationship, upon a promise made for his benefit to his father, if the consideration for such promise moves wholly from the father.

Creditor of promisee cannot sue. Williamson *v.* McGrath, 180 Mass. 55, 61 N. E. 636; Borden *v.* Boardman, 157 Mass. 410, 32 N. E.

Michigan.[4] And it is noteworthy that in reaching this conclusion the courts of Connecticut and Massachusetts, like the courts of England, have reversed their earlier doctrine, which recognized a remedial interest in the third person beneficiary.[5]

(e) PREVAILING RULE IN AMERICA — aa. *In General.* Although now rejected by the courts from which its chief authority was supposed to come,[6] the anomalous doctrine that assumpsit lay in the name of the third person beneficiary has been accepted as sound law by a great majority of American courts.[7] And in a considerable number of our states, especially in the code states, which have the principle of one form of civil action, a remedial interest in the third person is recognized even when the contract is under seal.[8] In most jurisdictions the rule is the

469. This latter case was one of an agreement between two parties, upon sufficient consideration, it may be, between them, that one will pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this state that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1, per Morton, J. And see CONTRACTS, 9 Cyc. 375. The rule holds in Massachusetts even in the case of a promise by a grantee in a deed conveying real estate subject to mortgage to assume and pay the mortgage debt, at least when the action is at law. Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265; Prentice *v.* Brimhall, 123 Mass. 291. The grantee had expressly agreed to apply the money retained by him as a part of the consideration to the payment of the mortgage. It was held that no action lay by the mortgagee. *Compare* Clare *v.* Hatch, 180 Mass. 194, 62 N. E. 250.

4. See cases cited *infra*, this note.

Sole beneficiary cannot sue. Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004, where a son, on receiving property from his father, promised him that at his death four hundred dollars should be paid his daughter. "This," said the court, "created a chose in action . . . which belonged to the father. Though intended for plaintiff's benefit, it could not be enforced by her. . . . The father might, however, transfer it to her; and if so transferred, she could, as her assignee, enforce it." See also Linneman *v.* Moross, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Wheeler *v.* Stewart, 94 Mich. 445, 54 N. W. 172. *Compare* Pipp *v.* Reynolds, 20 Mich. 88.

Creditor of promisee cannot sue. Edwards *v.* Clement, 81 Mich. 513, 45 N. W. 1107. And see CONTRACTS, 9 Cyc. 375.

But the principle of these cases is confined in Michigan to actions at law.—"In a suit in equity a person for whose benefit a promise is made may enforce it in his own name." Palmer *v.* Bray, 136 Mich. 85, 88, 98 N. W. 849. See also Corning *v.* Burton, 102 Mich. 86, 62 N. W. 1040, per Carpenter, J.

5. As late as 1846 the supreme court of Connecticut regarded it as "now settled, that where a promise is made to one man for the benefit of another, the latter may sustain a suit upon that promise." Steene *v.* Aylesworth, 18 Conn. 244, 252, per Williams, C. J. In Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514, this doctrine is expressly rejected as unsound.

In Massachusetts the later decisions (see *supra*, note 3) overrule Brewer *v.* Dyer, 7 Cush. 337; Hall *v.* Marston, 17 Mass. 575; Felton *v.* Dickinson, 10 Mass. 287; and some kindred cases which were often cited in other states and are typical of the third person beneficiary. Thus in Felton *v.* Dickinson, *supra*, the facts were as follows: F had placed his son, P, in the service of D, upon D's promise to F that when D reached the age of twenty-one, D would pay him two hundred dollars. It was held that P could bring assumpsit upon D's promise to F, for "when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach." In Hall *v.* Marston, *supra*, and Brewer *v.* Dyer, *supra*, plaintiff claimed as creditor of the promisee, and was permitted to maintain assumpsit upon "the principle of law, long recognized and clearly established in this commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." Brewer *v.* Dyer, 7 Cush. 337, 340, per Bigelow, J. Although rejected at home these decisions have had no slight influence in shaping the doctrine of other states. See Lawrence *v.* Fox, 20 N. Y. 268.

6. Notably by the courts of England and Massachusetts. See *supra*, pp. 63, 64.

7. Ochs *v.* M. J. Carnahan Co., (Ind. App. 1907) 80 N. E. 163. "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." Hendrick *v.* Lindsay, 93 U. S. 143, 149, 23 L. ed. 855, per Davis, J. See "Creditor of the Promisee as Plaintiff," *infra*, I, B, 2, e, (III), (C), (6); and CONTRACTS, 9 Cyc. 378 note 7.

8. "This technical rule of the common law [that an action on a covenant will lie only in the name of the covenantee] does not prevail in states that have adopted the reform procedure. Under our code the action must be prosecuted in the name of the real party in interest; and certainly the beneficiary, or person for whose benefit the promise is made,

creation of the courts; but it now has statutory support, wholly, or in part, in the states mentioned in the note.[9]

bb. *Twofold Nature of Doctrine.* This so-called "American rule" is often asserted in the broadest possible terms.[10] In many instances it is apparent that the terms of the rule are much broader than the facts of the case require.[11] The courts indeed which recognize the authority of the rule are not agreed either as to its legal soundness, its extent, or the reasons for it.[12] Evidently, however, when the term "beneficiary" is taken in its broad and popular sense, the doctrine of the third person beneficiary embraces two distinct classes of cases. Where it rests upon decisions which permit an action in the name of the sole beneficiary of the contract, the doctrine is essentially one of substantive law with various applications under different aspects of the law of contracts.[13] In this aspect the doctrine

is the real party in interest, whether the promise is evidenced by a simple contract, or one under seal." Starbird *v.* Cranston, 24 Colo. 20, 27, 48 Pac. 652, per Goddard, J. But *compare* Schaefer *v.* Henkel, 75 N. Y. 378, *supra*, p. 58, note 61, for a different result when plaintiff claims as undisclosed principal. And see Williams *v.* Magee, 76 N. Y. App. Div. 512, 78 N. Y. Suppl. 550.

The common-law rule has been rejected or ignored in the following code states: Colorado, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, and Wisconsin. See CONTRACTS, 9 Cyc. 385. See also COVENANTS, 11 Cyc. 1138, 1139. See also South Side Planing Mill Assoc. *v.* Cutler, etc., Lumber Co., 64 Ind. 560; Brenner *v.* Luth, 28 Kan. 581; Anthony *v.* Herman, 14 Kan. 494; Central Trust Co. *v.* Berwind-White Coal Co., 95 Fed. 391.

In two common-law states, Illinois and New Jersey, the rule has been abrogated by statute. American Splane Co. *v.* Barber, 194 Ill. 171, 62 N. E. 597, 88 Am. St. Rep. 169; Styles *v.* F. R. Long Co., 70 N. J. L. 301, 57 Atl. 448.

In Virginia it has been changed by statute in the case of a sole beneficiary. See Newberry Land Co. *v.* Newberry, 95 Va. 111, 27 S. E. 897.

9. *California.*— Civ. Code, § 1559, which reads: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

Idaho.— Civ. Code, § 3840, as in California.

Louisiana.— Code Prac. art. 35. See Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650, 656.

Massachusetts.— St. (1894) c. 225, only as to beneficiary of a life insurance policy.

Montana.— Civ. Code, § 2103, as in California.

North Dakota.— Civ. Code, § 3840, as in California.

Virginia.— Code, § 2415.

West Virginia.— Code, c. 71, § 2.

10. For instance: "Whenever two persons make a contract for the benefit of a third, the third may maintain an action thereon for any breach thereof to his injury." Mumper *v.* Kelley, 43 Kan. 256, 259, 23 Pac. 558, per Valentine, J. In Smith *v.* Pfluger, 126 Wis. 253, 262, 105 N. W. 476, 110 Am. St. Rep. 911, 2 L. R. A. N. S. 783, before the supreme court of Wisconsin, in 1905, that tribunal, per Marshall, J., approved the following statement of the doctrine: "If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law regardless of his relations with the first person or whether he had any knowledge of the transaction between such person and such other at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action."

11. As notably in the leading case of Lawrence *v.* Fox, 20 N. Y. 268.

So in the long line of Illinois cases which recognize the rule of Lawrence *v.* Fox, 20 N. Y. 268. See cases cited *infra*, note 31.

12. The supreme court of Colorado has adopted the rule as "confessedly an anomaly," but "more convenient" and doing no harm. Lehow *v.* Simonton, 3 Colo. 346.

The confusion in the present doctrine is reflected in the opinion of Marshall, J., in Tweeddale *v.* Tweeddale, 116 Wis. 517, 522, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509: "It is useless to endeavor to review the authorities touching the subject before us [the party plaintiff on a contract for the benefit of a third person] with a view to harmonizing them upon any one single theory as to the principle upon which the liability to the third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned." And see 15 Harv. L. Rev. 767, where it is said: "In no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the answer to the question: Whether a right of action accrues to a third person from a contract made by others for his benefit? Nor is the strife ended; for if it be granted that the scale inclines in favor of practice, yet the advocates of this result are continually endeavoring to extend the territory which they have conquered and to apply the doctrine thereby established to cases which should be governed by other principles." Professor Williston, quoting from the German treatise by Busch, entitled "Doctrin and Praxis."

13. See CONTRACTS, 9 Cyc. 374 *et seq.*;

requires the recognition in some form of a primary contractual interest, on the part of the third person, in a contract between others.[14] But when the rule rests upon decisions which permit the creditor of the promisee to sue the promisor because of the latter's promise to pay the debt,[15] no such interest on the part of the third person, the creditor, is necessary. The creditor's right to sue the promisor[16] is not primary but derivative, not substantive but procedural.[17]

(6) Creditor of Promisee as Plaintiff — (a) In General. When A has agreed with B, on a consideration moving from B, to pay to C a debt which B owes C, the prevailing American doctrine permits C, if his debt is still unpaid, to bring an action in his own name against A, for the breach of A's contract with B.[18]

(b) Not a Beneficiary. The current explanation of the rule is that the creditor of the promisee, in such a case, is a third person beneficiary, and can sue as such.[19] Manifestly, however, the creditor cannot claim as sole beneficiary; in any normal case the promisee, whose debt will be discharged by the performance of the contract, is at least the primary beneficiary.[20] In strictness indeed there is no legal ground on which the creditor of the promisee, as such, can claim a standing before the courts as beneficiary under the promise to his debtor.[21] If a debt already exists from one person to another, a promise by a third person to pay this debt is for the benefit of the original debtor to whom it is made.[22] At the most

Life Insurance, 25 Cyc. 913; Mechanics' Liens, 27 Cyc. 1; Municipal Corporations, 28 Cyc. 55; Novation, 29 Cyc. 1129; Waters.

14. The ultimate question here is briefly: If there is a valid contract between A and B for the sole benefit of C, does the substantive law give C, although he is not in fact a party to the contract nor privy to its consideration, a right of action on this contract? *Compare* the stipulation *pour autrui* under the law of Louisiana, and the discussion of its nature in Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650. The right of the person was thus defined, in 1903, by the supreme court of Wisconsin: "Where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent." Tweeddale *v.* Tweeddale, 116 Wis. 517, 526, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509, per Marshall, J.

15. See *infra*, this page.

16. See *infra*, this page *et seq.*

17. Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667. And see *infra*, p. 73.

18. See cases cited *infra*, note 19 *et seq.* See also *supra*, note 10.

19. So in the leading case of Lawrence *v.* Fox, 20 N. Y. 268, and repeatedly in later cases.

20. Freeman *v.* Pennsylvania R. Co., 173 Pa. St. 274, 33 Atl. 1034, and *infra*, notes following.

21. Tiernan *v.* Martin, 2 Rob. (La.) 523 [as *approved* in Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650], where it is said that a stipulation that a certain sum shall be paid to a third person, toward the extinguishment of a debt due to him from one of the parties to the contract, is not properly a stipulation *pour autrui*. It is for the exclusive benefit of the stipulating party. And see cases cited *infra*, note 22.

22. Freeman *v.* Pennsylvania R. Co., 173 Pa. St. 274, 33 Atl. 1034 [*following* Blymire *v.* Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458, as establishing the distinction]. And see Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667; St. Louis Second Nat. Bank *v.* Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 75.

A typical illustration of the remedial interest of a creditor in the promise to his debtor is where a mortgagor selling the mortgaged property contracts with the purchaser that he shall assume and pay the mortgage debt. The courts repeatedly speak of this contract as one made for the benefit of the creditor, the mortgagor, as its object. See Eddy *v.* Roberts, 17 Ill. 505; Simson *v.* Brown, 68 N. Y. 355; Burr *v.* Beers, 24

the creditor of the promisee is but an incidental beneficiary under the promise to pay his debt, and on principle and the weight of authority the incidental beneficiary cannot claim as plaintiff.[23]

(c) Basis of Creditor's Right as Plaintiff. But although the creditor of the promisee cannot appear as a beneficiary, he can proceed against his debtor's promisor upon another ground. If the creditor can sue the promisee for his debt, and the promisee can sue the promisor for breach of his promise to pay this debt, it is evident that unless the procedure of the forum presents some obstacle there is no good reason why the creditor should not proceed directly against the promisor. The result is to accomplish through one action what would otherwise require two actions. But in this there is no need to assume a contractual interest in the creditor as against his debtor's promisor; the creditor of the promisee is "allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action."[24]

(d) Distinguished From Sole Beneficiary. The remedial interest of the creditor of a promisee, under a promise to pay the debt, is often treated as of the same nature as the remedial interest of the sole beneficiary.[25] The two interests, however, are essentially different;[26] nor is there any necessary connection between a rule that the sole beneficiary of a contract may sue upon it and a rule that the creditor of one to whom a promise has been made to pay his debt may sue the promisor.[27]

N. Y. 178, 80 Am. Dec. 327. Yet it is evident that the mortgagor's real purpose is his own benefit. So in Keller *v.* Ashford, 133 U. S. 610, 621, 10 S. Ct. 494, 33 L. ed. 667, where it was said, by Gray, J.: "In the case at bar, the promise of Ashford [the grantee] was to Thompson [the mortgagor] and not to the mortgagees, and there was no privity of contract betwen them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees, or other incumbrancers."

23. See *supra*, I, B, 2, b.

24. Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650, 656 [*quoted* and *followed* in Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667], per Depue, J.

25. Thus in Burr *v.* Beers, 24 N. Y. 178, 179, 80 Am. Dec. 327, a typical case of a mortgagee suing the grantee of the mortgagor upon the grantee's promise to the mortgagor to pay the mortgage debt, the court professes to place a judgment for plaintiff "upon the broad principle that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on the promise." The same inaccurate language appears in other cases, as defining the principle of Lawrence *v.* Fox, 20 N. Y. 268, cited *infra*, note 30.

26. See *supra*, I, B, 2, b, (I). And see the reasoning of the court in Blymire *v.* Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458.

27. Accordingly, the creditor of the promisee may sue, in some states, although the sole beneficiary may not sue; occasionally the sole beneficiary may sue, although the creditor may not.

Illinois.— The creditor of the promisee may sue (see *infra*, note 31); but the sole beneficiary theory is apparently not recognized. See 3 Mich. L. Rev. 508–511, 21 Harv. L. Rev. 109 note. In Lawrence *v.* Oglesby, 178 Ill. 122, 52 N. E. 945 [*affirming* 75 Ill. App. 669, 671], the sole beneficiary doctrine was apparently conceded, but the supreme court cited in its support only cases involving the right of the creditor of the promisee.

Louisiana.— The interest of the sole beneficiary, under a stipulation *pour autrui*, has statutory recognition. See Civ. Code, art. 1890; Code Pr. art. 35; Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650. Recent decisions tend to place the creditor of the promisee upon a very different basis. See Peoples' Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 982. And see Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650.

Minnesota.— The creditor of the promisee may sue (see cases *infra*, note 31); the sole beneficiary cannot sue. Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; Union R. Storage Co. *v.* McDermott, 53 Minn. 407, 55 N. W. 606.

New Hampshire.— The creditor may sue, at least in equity (see *infra*, note 31); but the sole beneficiary cannot sue. Curry *v.* Rogers, 21 N. H. 247.

New York.— The creditor of the promisee may sue (see *infra*, note 31), but the sole beneficiary cannot sue (Sullivan *v.* Sullivan, 161 N. Y. 554, 56 N. E. 116; Townsend *v.* Rackham, 143 N. Y. 516, 38 N. E. 731; Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49), except in special circumstances, not easy to define (Buchanan *v.* Tilden, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170. *Compare* Pond *v.* New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. N. S. 958 [*recognizing* Dutton *v.* Poole, 2 Lev. 210, 83 Eng. Reprint 523, 1 Vent. 318,

(e) Authority of Rule. As a working rule of procedure, the doctrine of the creditor of the promisee[28] is now abundantly established in most American states.[29] The leading case on the point is Lawrence *v.* Fox,[30] decided in 1859; and the general result reached in that case has been reached in many other cases,[31]

86 Eng. Reprint 205, cited *supra*, note 83, as good law in New York].

North Carolina.— The creditor of the promisee has been denied a standing as plaintiff (Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362; Peacock *v.* Williams, 98 N. C. 324, 4 S. E. 550; Morehead *v.* Wriston, 73 N. C. 398); but the sole beneficiary has been permitted to sue even in cases where the facts carry the doctrine to the extreme (Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 363, 42 S. E. 858; Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513). In Gastonia *v.* McEntee-Peterson Engineering Co., *supra*, it is expressly declared that the North Carolina cases cited above "have not been overruled." But they appear to be inconsistent with Shoaf *v.* Palatine Ins. Co., 127 N. C. 308, 310, 37 S. E. 451, 80 Am. St. Rep. 804, where the court adopts the principle that "if A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A." And *compare* Porter *v.* Richmond, etc., R. Co., 97 N. C. 46, 2 S. E. 374.

Rhode Island.— The creditor of the promisee may sue (see *infra*, note 31; and Bethlehem Iron Co. *v.* Hoadley, 152 Fed. 735), but the sole beneficiary cannot sue (Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497). But see Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

Washington.— The creditor of the promisee is permitted to sue. See the cases cited *infra*. The right of the sole beneficiary is apparently not established. It is significant that the first decision on the point by the state supreme court places the rule upon the doctrine of Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667.

United States.— The sole beneficiary may apparently sue in assumpsit. See St. Louis Second Nat. Bank *v.* Grand Lodge F. & A. M., 98 U. S. 123, 125, 25 L. ed. 75, where Strong, J., remarks: "Another exception [to the rule that privity of contract between the plaintiff and the defendant is necessary to the maintenance of an action of assumpsit] is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third." The creditor of the promisee cannot sue in assumpsit, nor otherwise at law. Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300. But in a jurisdiction having the common-law procedure, the creditor of the promisee may by a bill in equity avail himself of the right of the promisee against the promisor, "because in equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt." See the remark of Gray, J., in Willard *v.* Wood, 135 U. S. 309, 314, 10 S. Ct. 831, 34 L. ed. 210, and the decisions in Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667, and the cases following it. In jurisdictions having the statutory principle of one form of civil action, the creditor may pursue that remedy in the ordinary civil action. Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613. *Compare* Barker *v.* Pullman's Palace Car Co., 124 Fed. 555; Central Electric Co. *v.* Sprague Electric Co., 120 Fed. 925, 57 C. C. A. 197; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300.

28. See *supra*, p. 67.

29. See cases cited *infra*, note 30 *et seq.*

30. Lawrence *v.* Fox, 20 N. Y. 268. The facts were as follows: One Holly, at the request of the defendant, loaned him three hundred dollars, stating at the time that he, Holly, owed that sum to plaintiff for money borrowed of him, and had agreed to pay it to him the next day; defendant in consideration thereof, at the time he received the money, promised Holly to pay it to plaintiff the next day. Holly's creditor, not being paid, brought a civil action in his own name, without joining Holly, directly against Holly's promisor. It was held that the action could be maintained.

31. *Alabama.*— Moore *v.* Florence First Nat. Bank, 139 Ala. 595, 36 So. 777 (where it is said: "It is immaterial whether the plaintiff has relinquished his debt as against the promisee"); Potts *v.* Gadsden First Nat. Bank, 102 Ala. 286, 14 So. 663; North Alabama Development Co. *v.* Short, 101 Ala. 333, 13 So. 385; Henry *v.* Murphy, 54 Ala. 246; Mason *v.* Hall, 30 Ala. 599; Hoyt *v.* Murphy, 18 Ala. 316; Huckabee *v.* May, 14 Ala. 263. And see Orman *v.* North Alabama Development Co., 53 Fed. 469 [*affirmed* in 55 Fed. 18, 5 C. C. A. 22].

Arizona.— See Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613.

Arkansas.— Benjamin *v.* Birmingham, 50 Ark. 433, 8 S. W. 183; Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787; Hecht *v.* Caughron, 46 Ark. 132; Patton *v.* Adkins, 42 Ark. 197; Talbot *v.* Wilkins, 31 Ark. 411; Chamblee *v.* McKenzie, 31 Ark. 155. *Contra*, Hicks *v.* Wyatt, 23 Ark. 55. In Thomas Mfg. Co. *v.* Prather, 65 Ark. 27, 30, 44 S. W. 218 (a case of incidental beneficiary), the court remarks that "this doctrine [of the third person plaintiff] operates as an exception to the elementary rule of law that a stranger to a simple contract, from whom no consideration moves, cannot sue upon it. . . . Therefore it should be applied cautiously and

although not always on the same *ratio decidendi.* The authorities just given restricted to cases coming clearly within its compass."

California.— Washer *v.* Independent Min., etc., Co., 142 Cal. 702, 76 Pac. 654; Daniels *v.* Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; Whitney *v.* American Ins. Co., 127 Cal. 464, 59 Pac. 897; Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818; Tulare County Bank *v.* Madden, 109 Cal. 312, 41 Pac. 1092; Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27; Williams *v.* Naftzger, 103 Cal. 438, 37 Pac. 411; Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53; Malone *v.* Crescent City Mill, etc., Co., 77 Cal. 38, 18 Pac. 858; Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609; Morgan *v.* Overman Silver Min. Co., 37 Cal. 534; Wormouth *v.* Hatch, 33 Cal. 121; Lewis *v.* Covillaud, 21 Cal. 178; Peters *v.* George, 1 Cal. App. 239, 81 Pac. 1117 (where M, widow and sole heir of W, sold to D for four hundred and fifty dollars property which she inherited from W. Part of the four hundred and fifty dollars was paid to M; the remainder D agreed with M to pay to P, a creditor of W's estate, and it was held that P could sue D on this promise). The case of McLaren *v.* Hntchinson, 18 Cal. 80, which denied the creditor of the promisee a remedial interest in the promise, is overruled.

Colorado.— Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652 (discussing the principle); Green *v.* Morrison, 5 Colo. 18; Lehow *v.* Simonton, 3 Colo. 346 (adopting the rule as an anomaly, bnt convenient); Taylor *v.* Ingersoll, 18 Colo. App. 272, 71 Pac. 398; Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. 625; Wilson *v.* Lunt, 11 Colo. App. 56, 52 Pac. 296; Woods Inv. Co. *v.* Palmer, 8 Colo. App. 132, 45 Pac. 237. *Compare* Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648.

Florida.— Hunter *v.* Wilson, 21 Fla. 250. *Compare* Wright *v.* Terry, 23 Fla. 160, 2 So. 6, distinguishing the doctrine.

Illinois.— Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865; Cobb *v.* Heron, 180 Ill. 49, 54 N. E. 189; Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Commercial Nat. Bank *v.* Kirkwood, 172 Ill. 563, 50 N. E. 219; Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762; Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Shober, etc., Lith. Co. *v.* Kerting, 107 Ill. 344; Thompson *v.* Dearborn, 107 Ill. 87; Rogers *v.* Herron, 92 Ill. 583; Snell *v.* Ives, 85 Ill. 279; Steele *v.* Clark, 77 Ill. 471; Beasley *v.* Webster, 64 Ill. 458. *Compare* Cotes *v.* Bennett, 183 Ill. 82, 55 N. E. 661; Wilson *v.* Bevans, 58 Ill. 232; Rabbermann *v.* Wiskamp, 54 Ill. 179; Bristow *v.* Lane, 21 Ill. 194 (discussing the principle); Brown *v.* Strait, 19 Ill. 88; Eddy *v.* Roberts, 17 Ill. 505 (following early Massachusetts and English cases); Forster *v.* Gregory, 107 Ill. App. 437; Murray *v.* Emery, 85 Ill. App. 348 [*affirmed* in 187 Ill. 408, 58 N. E. 327]; Eggleston *v.* Morrison, 84 Ill. App. 625 [*affirmed* in 185 Ill. 577, 57 N. E. 775]; Boisot *v.* Chandler, 82 Ill. App. 261; Rothermel *v.* Bell, etc., Coal Co., 79 Ill. App. 667; Robinson *v.* Holmes, 75 Ill. App. 203; Ingram *v.* Ingram, 71 Ill. App. 497 [*affirmed* in 172 Ill. 287, 50 N. E. 198]; McCasland *v.* Doorley, 47 Ill. App. 513; Baer *v.* Knewitz, 39 Ill. App. 470; Williamson-Stewart Paper Co. *v.* Seaman, 29 Ill. App. 68 (not necessary to name the beneficiary); Boals *v.* Nixon, 26 Ill. App. 517; Struble *v.* Hake, 14 Ill. App. 546 [*affirmed* in 121 Ill. 321, 12 N. E. 676]; Mathers *v.* Carter, 7 Ill. App. 225. When the contract is under seal see Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Hillsboro Bldg., etc., Assoc. *v.* Simmering, 75 Ill. App. 647. *Compare* the limitation in Searles *v.* Flora, 225 Ill. 167, 80 N. E. 98 [*reversing* 127 Ill. App. 465], materialmen suing on contractor's bond to owner.

Indiana.— Ochs *v.* M. J. Carnahan Co., (App. 1907) 80 N. E. 163 (materialmen suing on contractor's bond to owner); Boruff *v.* Hudson, 138 Ind. 280, 37 N. E. 786; Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Lowe *v.* Hamilton, 132 Ind. 406, 31 N. E. 1117; Leake *v.* Ball, 116 Ind. 214, 17 N. E. 918; Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Warren *v.* Farmer, 100 Ind. 593; Berkshire L. Ins. Co. *v.* Hutchings, 100 Ind. 496; Carnahan *v.* Tousey, 93 Ind. 561; Rodenbarger *v.* Bramblett, 78 Ind. 213; Davis *v.* Hardy, 76 Ind. 272; Risk *v.* Hoffman, 69 Ind. 137; Fisher *v.* Wilmoth, 68 Ind. 449; Carter *v.* Zenblin, 68 Ind. 436; Smith *v.* Ostermeyer, 68 Ind. 432; Rhodes *v.* Matthews, 67 Ind. 131; South Side Planing Mill Assoc. *v.* Cntler, etc., Lumber Co., 64 Ind. 560; Hoffman *v.* Risk, 58 Ind. 113; Campbell *v.* Patterson, 58 Ind. 66; Josselyn *v.* Edwards, 57 Ind. 212; Haggerty *v.* Johnston, 48 Ind. 41; McDill *v.* Gunn, 43 Ind. 315; Davis *v.* Calloway, 30 Ind. 112, 114, 95 Am. Dec. 671 (the complaint can be regarded as a bill in chancery under the old practice); Hardy *v.* Blazer, 29 Ind. 226, 92 Am. Dec. 347 (following the earlier Massachusetts and other decisions); Cross *v.* Truesdale, 28 Ind. 44; Devoe *v.* McIntosh, 23 Ind. 529; Day *v.* Patterson, 18 Ind. 114. *Compare* Whicker *v.* Hushaw, 159 Ind. 1, 3, 64 N. E. 460; Harrison *v.* Wright, 100 Ind. 515, 58 Am. Rep. 805; Hendricks *v.* Frank, 86 Ind. 278 (that plaintiff's interest is in its nature equitable); Clodfelter *v.* Hnlett, 72 Ind. 137 (promise made by B to A to pay C may be pleaded by C as a defense); Loeb *v.* Weis, 64 Ind. 285. In a number of early Indiana cases, prior to the code of civil procedure, it was held that the creditor could not sue at law. Bird *v.* Lanius, 7 Ind. 615, 618, "The doctrine of this court has been, that at law, a promise by one to another for the benefit of a third party, could not be enforced by the latter." To this effect were Britzell *v.* Fryberger, 2 Ind. 176, and Farlow *v.* Kemp, 7 Blackf. 544. And see Salmon *v.* Brown, 6 Blackf. 347.

include generally the cases in which plaintiff was a creditor of the prom-

Iowa.— Runkle *v.* Kettering, 127 Iowa 6, 102 N. W. 142; Malanaphy *v.* Fuller, etc., Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. Rep. 332; Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555; Hawley *v.* Exchange State Bank, 97 Iowa 187, 66 N. W. 152 (cause at law); Pipestone First Nat. Bank *v.* Rowley, 92 Iowa 530, 61 N. W. 195; Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57; Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112; Luney *v.* Mead, 60 Iowa 469, 15 N. W. 290; Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223; Gilbert *v.* Sanderson, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103; Lamb *v.* Tucker, 42 Iowa 118; Blair Town Lot, etc., Co. *v.* Walker, 39 Iowa 406; Ross *v.* Kenniston, 38 Iowa 396; Bowen *v.* Kurtz, 37 Iowa 239; Johnson *v.* Knapp, 36 Iowa 616; Scott *v.* Gill, 19 Iowa 187; Thompson *v.* Bertram, 14 Iowa 476; Moses *v.* Clerk Dallas Dist. Ct., 12 Iowa 139. *Compare* Johnson *v.* Collins, 14 Iowa 63; Corbett *v.* Waterman, 11 Iowa 86. See the limitation of the doctrine in German State Bank *v.* Northwestern Water, etc., Co., 104 Iowa 717, 74 N. W. 685.

Kansas.— Hardesty *v.* Cox, 53 Kan. 618, 36 Pac. 985; Howell *v.* Hough, 46 Kan. 152, 26 Pac. 436; Mumper *v.* Kelley, 43 Kan. 256, 23 Pac. 558; Plano Mfg. Co. *v.* Burrows, 40 Kan. 361, 19 Pac. 809; West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Brenner *v.* Luth, 28 Kan. 581; Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 632; Floyd *v.* Ort, 20 Kan. 162; Kansas Pac. R. Co. *v.* Hopkins, 18 Kan. 494; Harrison *v.* Simpson, 17 Kan. 508; Anthony *v.* Herman, 14 Kan. 494 (relying on the earlier Massachusetts cases); Hume *v.* Atkinson, 8 Kan. App. 18, 54 Pac. 15.

Kentucky.— Hall *v.* Alford, 105 Ky. 664, 49 S. W. 444, 20 Ky. L. Rep. 1482; Dodge *v.* Moss, 82 Ky. 441; Garvin *v.* Mobley, 1 Bush 48; Ballard *v.* American Hemp Co., 100 S. W. 271, 30 Ky. L. Rep. 1080, an inferred promise to the debtor. And see Lexington Hydraulic, etc., Co. *v.* Oots, 119 Ky. 598, 84 S. W. 774, 86 S. W. 684, 27 Ky. L. Rep. 233, 797.

Louisiana.— Vinet *v.* Bres, 48 La. Ann. 1254, 20 So. 693; Marginy *v.* Remy, 3 Mart. N. S. 607, 15 Am. Dec. 172. But see Peoples' Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 892; Salmen Brick, etc., Co. *v.* Le Sassier, 106 La. 389, 31 So. 7. *Compare* Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650.

Maine.—Baldwin *v.* Emery, 89 Me. 496, 498, 36 Atl. 994; Coffin *v.* Bradbury, 89 Me. 476, 36 Atl. 988; Bohanan *v.* Pope, 42 Me. 93; Hinkley *v.* Fowler, 15 Me. 285; Dearborn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206.

Maryland.— Seigman *v.* Hoffacker, 57 Md. 321; Small *v.* Schaefer, 24 Md. 143.

Minnesota.— Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086; Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 315, 45 Am. St. Rep. 433; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Maxfield *v.* Schwartz, 43 Minn. 221, 45 N. W. 429; Sullivan *v.* Murphy, 23 Minn. 6; Jordon *v.* White, 20 Minn. 91; Hawley *v.* Wilkinson, 18 Minn. 525, 526; Sanders *v.* Clason, 13 Minn. 379, relying on the earlier Massachusetts rule.

Mississippi.— Sweatman *v.* Parker, 49 Miss. 19.

Missouri.— Devers *v.* Howard, 144 Mo. 671, 46 S. W. 625 (a materialman suing on a bond given the city; but the court assumed the existence of an obligation on the part of the city to the materialman); Porter *v.* Woods, 138 Mo. 539, 39 S. W. 794; Winn *v.* Lippincott Inv. Co., 125 Mo. 528, 28 S. W. 998, 1001; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; Green *v.* Estes, 82 Mo. 337; Mosman *v.* Bender, 80 Mo. 579; Schuster *v.* Kansas City, etc., R. Co., 60 Mo. 290; Rogers *v.* Gosnell, 58 Mo. 589; Rogers *v.* Gosnell, 51 Mo. 466; Flanagan *v.* Hutchinson, 47 Mo. 237. *Compare* Brown *v.* Brown, 47 Mo. 130, 4 Am. Rep. 320; Meyer *v.* Lowell, 44 Mo. 328; Corl *v.* Riggs, 12 Mo. 430; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; State Bank *v.* Benoist, 10 Mo. 520 (relying in part on the earlier Massachusetts doctrine); Van Meter *v.* Poole, 119 Mo. App. 296, 95 S. W. 960; Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015; Rothwell *v.* Skinker, 84 Mo. App. 169; Street *v.* Goodale, 77 Mo. App. 318; Tennant-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196; Nelson Distilling Co. *v.* Loe, 47 Mo. App. 31; Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214; Beardslee *v.* Morgner, 4 Mo. App. 139. The cases of Manny *v.* Frasier, 27 Mo. 419, and Page *v.* Becker, 31 Mo. 466, are overruled. See Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214. For limitations of the doctrine see Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. Rep. 654, 23 L. R. A. 146; State *v.* Loomis, 88 Mo. App. 500.

Nebraska.— Butler *v.* Bruce, 75 Nebr. 322, 106 N. W. 445; Meyer *v.* Shamp, 51 Nebr. 424, 71 N. W. 57; Tecumseh Nat. Bank *v.* Best, 50 Nebr. 518, 70 N. W. 41; Union Pac. R. Co. *v.* Metcalf, 50 Nebr. 452, 69 N. W. 961; Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050; Kaufman *v.* U. S. National Bank, 31 Nebr. 661, 48 N. W. 738 (the agreement was "to hold harmless"); Fonner *v.* Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510, 11 L. R. A. 528 (check-holder suing bank on its refusal to pay check); Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506; Dodd *v.* Skelton, 2 Nebr. (Unoff.) 475, 89 N. W. 297; Lincoln University *v.* Polk, 1 Nebr. 403, 95 N. W. 611. *Compare* Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707.

Nevada.— Miliani *v.* Tognini, 19 Nev. 133, 7 Pac. 279; Bishop *v.* Stewart, 13 Nev. 25; Alcalda *v.* Morales, 3 Nev. 132; Ruhling *v.* Hackett, 1 Nev. 360. *Compare* Painter *v.* Kaiser, 27 Nev. 421, 76 Pac. 747, 103 Am. St. Rep. 772, 65 L. R. A. 672.

New Jersey.— Joslin *v.* New Jersey Car

isee, and the promise was not to him but to his debtor to pay the debt; but

Spring Co., 36 N. J. L. 141; Berry *v.* Doremus, 30 N. J. L. 399 (M, who was in debt to R, sold land to D, who in consideration thereof promised M that he, D, would pay to R, as part of the consideration money, the sum of one hundred dollars per year after the death of M, as long as R should live. R survived M eight years. The administrator of R sued in assumpsit, and successfully withstood a motion for a nonsuit); Bennett *v.* Merchantville Bldg., etc., Assoc., 44 N. J. Eq. 116, 13 Atl. 852; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 12 Atl. 383; Price *v.* Trusdell, 28 N. J. Eq. 200; Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650. *Compare* Cocks *v.* Varney, 45 N. J. Eq. 72, contract under seal.

New York.— Flagg *v.* Fisk, 179 N. Y. 589, 72 N. E. 1141 [*affirming* 93 N. Y. App. Div. 169, 87 N. Y. Suppl. 530] (the widow of a deceased partner sold her interest to the surviving partner, part of the consideration being his payment of the firm debt due her mother, whose only heir and next of kin she was. It was held that the administrator of the mother could enforce the contract "within the rule of Lawrence *v.* Fox, 20 N. Y. 268"); Clark *v.* Howard, 150 N. Y. 232, 44 N. E. 695; Hannigan *v.* Allen, 127 N. Y. 639, 27 N. E. 402; Hallenbeck *v.* Kindred, 109 N. Y. 620, 15 N. E. 887 (one N sold and conveyed certain hotel property to D, by a deed containing a covenant on D's part to assume a certain contract between N and one A, and to fulfil and perform all its conditions. By this contract A assumed the management of the hotel and N agreed to pay all expenses. It was held that an action lay against D for supplies furnished the hotel); Schmid *v.* New York, etc., R. Co., 98 N. Y. 634 [*affirming* 32 Hun 335]; Arnold *v.* Nichols, 64 N. Y. 117; Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582; Claflin *v.* Ostrom, 54 N. Y. 581; Hutchings *v.* Miner, 46 N. Y. 456, 7 Am. Rep. 369; Coster *v.* Albany, 43 N. Y. 399 (here the creditor was not identified at the time of the promise; the promisee was the state, and not liable to action; the promise was under seal); Baker *v.* Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575; Lawrence *v.* Fox, 20 N. Y. 268 (discussing the earlier cases); Hurd *v.* Wing, 76 N. Y. App. Div. 506, 78 N. Y. Suppl. 574; Beemer *v.* Packard, 92 Hun 546, 38 N. Y. Suppl. 1045; Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Suppl. 432; Pulver *v.* Skinner, 42 Hun 322; Edick *v.* Green, 38 Hun 202; Kingshury *v.* Earle, 27 Hun 141; Cock *v.* Moore, 18 Hun 31; Brown *v.* Curran, 14 Hun 260; Adams *v.* Wadhams, 40 Barb. 225 (the promise was to assume the payment of a claim of three hundred and twelve dollars to the heirs of the vendor); Cook *v.* Berrott, 21 N. Y. Suppl. 358. *Compare* Warren *v.* Wilder, 114 N. Y. 209, 214, 21 N. E. 159. Before the code of 1848, in the following cases, arising under the New York common law procedure, the creditor of the promisee was permitted to sue in assumpsit. Delaware, etc., Canal Co. *v.* Westchester County Bank, 4 Den. 97; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726; Ellwodd *v.* Monk, 5 Wend. 235; Farley *v.* Cleveland, 4 Cow. 432, 15 Am. Dec. 387 [*affirmed* in 9 Cow. 639]; Gold *v.* Phillips, 10 Johns. 412. On the limitation of the rule when the promisee is under no legal or equitable obligation to the creditor see *infra*.

Ohio.— Emmitt *v.* Brophy, 42 Ohio St. 82 (agreement under seal, creditor not named); Trimble *v.* Strother, 25 Ohio St. 378; Bagaley *v.* Waters, 7 Ohio St. 359, 366; Crumbaugh *v.* Kuyler, 3 Ohio St. 544. *Compare* Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436. But see Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653, where the doctrine is arbitrarily limited when the creditor is a check-holder.

Oregon.— Feldman *v.* McGuire, 34 Oreg. 309, 55 Pac. 872. *Compare* Eugene First Nat. Bank *v.* Hovey, 34 Oreg. 162, 55 Pac. 535; Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466; Strong *v.* Kamm, 13 Oreg. 172, 9 Pac. 331; Schnider *v.* White, 12 Oreg. 503, 8 Pac. 652; Hughes *v.* Oregon R., etc., Co., 11 Oreg. 437, 5 Pac. 206; Baker *v.* Eglin, 11 Oreg. 333, 8 Pac. 280 and note. *Compare* Hoffman *v.* Habighorst, (1907) 89 Pac. 952; Washburn *v.* Interstate Inv. Co., 26 Oreg. 436, 36 Pac. 533, 38 Pac. 620.

Pennsylvania.— As a rule the creditor of the promisee cannot sue in Pennsylvania. Freeman *v.* Pennsylvania R. Co., 173 Pa. St. 274, 33 Atl. 1034; Adams *v.* Kuehn, 119 Pa. St. 76, 13 Atl. 184; Kountz *v.* Holthouse, 85 Pa. St. 235; Robertson *v.* Reed, 47 Pa. St. 115; Campbell *v.* Lacock, 40 Pa. St. 448; Ramsdale *v.* Horton, 3 Pa. St. 330; Blymire *v.* Boistle, 6 Watts 182, 31 Am. Dec. 458. This, the leading case on the point in Pennsylvania, is parallel in its facts with Lawrence *v.* Fox, 20 N. Y. 268. Boistle had a judgment against Gladstone. In a conversation between one Blymire and Gladstone, the former, in consideration that Gladstone would convey a lot of ground to him, promised Gladstone to pay to Boistle the judgment which Gladstone owed him. Gladstone conveyed the lot, but Blymire did not pay the judgment. An action was brought in the name of Boistle against Blymire upon his promise. The lower court permitted a judgment for plaintiff; the supreme court reversed this, holding that where a debt already exists from one person to another, a promise by a third person to pay that debt is for the benefit of the promisee, and that the action upon the promise must be in his name. But to this rule the Pennsylvania courts have made important exceptions, as when the promise to pay the debt of the third person "rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also when one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the

they do not include cases in which plaintiff was the sole beneficiary of the promise.[32]

(f) Rule as a Device of Procedure — aa. *In General.* The procedural nature of the creditor's right to sue upon a promise made, not to him but to his debtor,

debts of his vendor." Adams *v.* Kuehn, 119 Pa. St. 76, 85, 13 Atl. 184, per Williams, J. On this principle the creditor of the promisee was permitted to sue in the following cases: Cox *v.* Philadelphia Pottery Co., 214 Pa. St. 373, 63 Atl. 749 (a debtor assigned all his property and business to a corporation under an agreement that it will pay his debts. It was held that one of his creditors may sue the corporation); Delph *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 15 Atl. 871; White *v.* Thielens, 106 Pa. St. 173; Townsend *v.* Long, 77 Pa. St. 143, 18 Am. Rep. 438; Torrens *v.* Campbell, 74 Pa. St. 470; Bellas *v.* Fagely, 19 Pa. St. 273; Vincent *v.* Watson, 18 Pa. St. 96; Beers *v.* Robinson, 9 Pa. St. 229; Commercial Bank *v.* Wood, 7 Watts & S. 89; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107.

Rhode Island.— Kehoe *v.* Patton, 23 R. I. 360, 50 Atl. 655; Wood *v.* Moriarity, 15 R. I. 518, 9 Atl. 427.

South Carolina.— Redfearn *v.* Craig, 57 S. C. 534, 35 S. E. 1024; Brown *v.* O'Brien, 1 Rich. 268, 44 Am. Dec. 254. And see McBride *v.* Floyd, 2 Bailey 209.

Tennessee.— Ruohs *v.* Traders' F. Ins. Co., 111 Tenn. 405, 421, 78 S. W. 85, 102 Am. St. Rep. 790 (on a contract of reinsurance); O'Conner *v.* O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33; Lookout Mountain R. Co. *v.* Houston, 85 Tenn. 224, 2 S. W. 36; Moore *v.* Stovall, 2 Lea 543. But see McAlister *v.* Marberry, 4 Humphr. 426; Campbell *v.* Findley, 3 Humphr. 330. The latter case is overruled in Moore *v.* Stovall, *supra.*

Texas.— Spann *v.* Cochran, 63 Tex. 240; Bartley *v.* Conn, 4 Tex. Civ. App. 299, 23 S. W. 382, (Civ. App. 1895) 33 S. W. 604.

Utah.— Brown *v.* Markland, 16 Utah 360, 53 Pac. 597, 67 Am. St. Rep. 629. *Compare* Smith *v.* Bowman, (1907) 88 Pac. 687, 9 L. R. A. N. S. 889.

Vermont.— Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332 (permitting the creditor to sue in equity); Hubbardton Cong. Soc. *v.* Flagg, 72 Vt. 248, 47 Atl. 782; Chapman *v.* Mears, 56 Vt. 389.

Washington.— Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123; Nordby *v.* Winsor, 24 Wash. 535, 64 Pac. 726; Dimmick *v.* Collins, 24 Wash. 78, 63 Pac. 1101; Gilmore *v.* Skookum Box Factory, 20 Wash. 703, 56 Pac. 934; Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; Don Yook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. 964; Solicitors' L. & T. Co. *v.* Robbins, 14 Wash. 507, 45 Pac. 39 (basing the rule on Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667); Silsby *v.* Frost, 3 Wash. Terr. 388, 17 Pac. 887.

Wisconsin.— Smith *v.* Pfluger, 126 Wis. 253, 105 N. W. 476, 110 Am. St. Rep. 911, 2 L. R. A. N. S. 783; Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607 (a railway company purchased another road in full operation. The deed recited as the consideration the "assumption" of the grantor's debts, liabilities, and obligations. It was held that a claimant against the grantor could sue the grantee, for the word "assumption," although broader than a promise to pay, included a promise to pay); New York L. Ins. Co. *v.* Hamlin, 100 Wis. 17, 75 N. W. 421; Fulmer *v.* Weightman, 87 Wis. 573, 58 N. W. 1106; Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 55, 27 N. W. 414, 57 Am. Rep. 249 (action by a policy-holder against a reinsuring company); Winninghoff *v.* Wittig, 64 Wis. 180, 24 N. W. 912; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322; Bassett *v.* Hughes, 43 Wis. 319; McDowell *v.* Laev, 35 Wis. 171 (extending the rule to instruments under seal); Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459 (recognizing the rule in the case of simple contracts); Kimball *v.* Noyes, 17 Wis. 695 (recognizing the earlier Massachusetts doctrine when the contract was not under seal). See the limitation of the doctrine in Rowe *v.* Moon, 115 Wis. 566, 92 N. W. 263. *Compare* Gilbert Paper Co. *v.* Whiting Paper Co., 123 Wis. 472, 102 N. W. 20; Peterson *v.* Chicago, etc., R. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. Rep. 879; Tweeddale *v.* Tweeddale, 116 Wis. 517, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509, a case of the sole beneficiary.

United States.— Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613 (complaint, under the Arizona code, by creditor against promisor of the debtor); Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667 (bill in equity); Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855; Bethlehem Iron Co. *v.* Hoadley, 152 Fed. 735 (declaration under the Rhode Island procedure); Barker *v.* Pullman's Palace Car Co., 124 Fed. 555 [*affirmed* in 134 Fed. 70, 67 C. C. A. 196] (bill in equity). For the limitation of the doctrine in the federal courts see Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210. And see Bethlehem Iron Works *v.* Hoadley, 152 Fed. 735.

See 37 Cent. Dig. tit. "Parties," § 6.

When a grantee of land subject to a mortgage agrees with his grantor, the mortgagor, to assume and pay the mortgage debt, the general principle of the doctrine permits the mortgagee to sue the grantee on his promise to the mortgagor. The cases on this point, however, have been separately grouped in Contracts, 9 Cyc. 383, note 14, and as a rule are not included in the list *supra*, this note.

32. See *supra*, note 30; and Contracts, 9 Cyc. 378 note 7.

to pay the debt was not distinctly recognized in the case which has given its name to the doctrine in our later law;[33] and in the cases which follow it the doctrine is often placed very vaguely, or is put on the erroneous ground that the contract is for the benefit of the creditor.[34] That the rule exists as a short cut in procedure has, however, been distinctly marked in a number of jurisdictions.[35]

bb. *In Actions at Common Law.* As the rule in question concerns the distinct interests of three parties — the creditor, the promisee, and the promisor — it is properly excluded, because of its very nature, from courts which follow the hard and fast procedure of common-law actions.[36]

cc. *In Actions in Equity and Under the Codes.* No such limitation affects the procedure in equity,[37] nor under codes which assimilate legal and equitable procedure.[38]

(g) JOINING PROMISEE AS A PARTY. It follows from the nature of the rule, and because the obligation of the promisee to the creditor and of the promisor to the promisee remain distinct,[39] that the promisee should be joined as a party in the action

33. The doctrine of Lawrence *v.* Fox, 20 N. Y. 268, *supra*, note 30. See also 21 Harv. L. Rev. 109 note.

34. See *supra*, note 31.

35. *Colorado.*— Lehow *v.* Simonton, 3 Colo. 346, where it is said that the rule "avoids multiplicity of actions."

Georgia.— Ford *v.* Finney, 35 Ga. 258, 261, where it is said that the original creditor may sue his debtor's promisor in equity "in order to prevent circuity of action, and to bring all the parties at interest before the Court, so that full and complete justice may be done."

Minnesota.— Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 42, 57 N. W. 314, 45 Am. St. Rep. 438, where it is said to be "an equitable rule, adopted for convenience, and to avoid circuity of action."

Missouri.— Ellis *v.* Harrison, 104 Mo. 270, 277, 16 S. W. 198, Where Barclay, J., said that the rule "has been accepted here, as in most of the American states, because it is supposed to furnish a useful rule in practice, tending to simplify litigation."

Nebraska.— Barnett *v.* Pratt, 37 Nebr. 349, 351, 55 N. W. 1050, where Irvine, C., said: "The purpose of the American rule seems to have been largely to avoid circuity of action."

Vermont.— Green *v.* McDonald, 75 Vt. 93, 97, 53 Atl. 332, where it is said that the rights of the creditor of the promisee "do not arise from the contract of assumption, but result from an application of the doctrine of subrogation."

United States.— Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667.

36. For the common-law doctrine of parties contemplated only two sides to a case, and could not safeguard the promisee in an action by the creditor against the promisor. This aspect of the rule, although often ignored in later cases, was clearly pointed out in Blymire *v.* Boistle, 6 Watts (Pa.) 182, 184, 31 Am. Dec. 458, where Sergeant, J., remarked: "When a debt already exists from one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice. . . . The equity of the case would be, and chancery would decree, that Blymire [the promisor] should pay but once, and that the money should go to Boistle [the creditor] on his releasing Gladstone [the debtor of Boistle and promisee of Blymire]. But in two common-law suits against Blymire it might be difficult to effect this equity."

37. See Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667.

38. Johns *v.* Wilson, 180 U. S. 440, 448, 21 S. Ct. 445, 45 L. ed. 613, where it is said, per Brown, J.: "As, however, under the Arizona code, there is no distinction between suits at law and in equity, we see no reason to doubt that this action [begun by a complaint under the Arizona code] will lie."

39. So it is optional with the creditor to proceed against either the original debtor or the promisor. Winninghoff *v.* Wittig, 64 Wis. 180, 24 N. W. 912. And see the following cases:

California.— Hopkins *v.* Warner, 109 Cal. 133, 137, 41 Pac. 868, where it is said: "The mortgagee, in his action to foreclose the mortgage, may proceed against the mortgagor alone for any deficiency in the proceeds of sale, or he may avail himself of his right to proceed against the mortgagor and his grantee [who has assumed the debt] in the same action."

Illinois.— Wickham *v.* Hyde Park Bldg., etc., Assoc., 80 Ill. App. 523; Rothermel *v.* Bell, etc., Coal Co., 79 Ill. App. 667.

Indiana.— Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Rodenbarger *v.* Bramblett, 78 Ind. 213; Davis *v.* Hardy, 76 Ind. 272.

Kansas.— Rouse *v.* Bartholomew, 51 Kan. 425, 32 Pac. 1088.

Nebraska.— Davis *v.* National Bank of Commerce, 45 Nebr. 589, 63 N. W. 852.

New York.— Fisher *v.* Hope Mut. L. Ins. Co., 69 N. Y. 161.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

by the creditor against the promisor.[40] Failure to join him results, however, only in a defect of parties, the objection to which is waived if not made in due season on that ground.[41]

(h) Promisee's Obligation to Third Person. The rule assumes that the promisee owes to the third person some duty which the law can recognize, and which the third person, although not in privity with the promisor, can make the basis of a claim against him.[42] If this "essential relation of debtor and creditor" between the promisee and the third person seeking to enforce the promise[43] is lacking, the rule in question fails,[44] and the plaintiff, on principle, should not be permitted to sue.[45] This principle of the rule has, however, been ignored in a number of cases,[46]

Oregon.— Feldman *v.* McGuire, 34 Oreg. 309, 55 Pac. 872.

Washington.— Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123.

40. See Hardy *v.* Blazer, 29 Ind. 226, 92 Am. Dec. 347; Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086.

41. In Keller *v.* Ashford, 133 U. S. 610, 626, 10 S. Ct. 494, 33 L. ed. 667, the promisee was not made a party; the court said: "Although the mortgagor (the promisee) might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his or any right of either party to that suit, it affords no ground for refusing relief." In Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086, defendant, in consideration of the conveyance to it of certain real estate, had covenanted with the grantors to pay their debts not exceeding in the aggregate one hundred and thirty thousand dollars. It was held that even if the aggregate of the debts exceeded one hundred and thirty thousand dollars, a creditor of the grantors could sue on the promise and recover his *pro rata* share; that the company was entitled to have all creditors made parties; that a failure to join all the creditors was a defect of parties, and not available under a demurrer for lack of facts. See also Pruden *v.* Williams, 26 N. J. Eq. 210.

42. "Judges have differed as to the principle upon which Lawrence *v.* Fox, 20 N. Y. 268, and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." Vrooman *v.* Turner, 69 N. Y. 280, 285, 25 Am. Rep. 195, per Allen, J.

43. See Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49.

44. To bring a case within the doctrine of Lawrence *v.* Fox, 20 N. Y. 268, "there must be a legal or equitable obligation or duty on the part of the promisee to the third party for whose benefit the promise was made." Haefelin *v.* McDonald, 96 N. Y. App. Div. 213, 222, 89 N. Y. Suppl. 395, per Ingraham, J. And see the cases cited *infra*, note following.

45. This result has been reached in the following cases:

California.— Ward *v.* De Oca, 120 Cal. 102, 52 Pac. 130. And see Biddel *v.* Brizzolara, 64 Cal. 354, 361, 30 Pac. 609, where McKinstry, J., says: "Even where the rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage in order to render the grantee liable upon his covenant to the holder of the mortgage assumed."

Kansas.— Morris *v.* Mix, 4 Kan. App. 654, 46 Pac. 58, discussing the rule in various states.

Minnesota.— Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; Union R. Storage Co. *v.* McDermott, 53 Minn. 407, 55 N. W. 606; Nelson *v.* Rogers, 47 Minn. 103, 49 N. W. 526; Brown *v.* Stillman, 43 Minn. 126, 45 N. W. 2.

Missouri.— Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146. *Compare* St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 834, 54 Am. St. Rep. 695.

New Jersey.— Eakin *v.* Shultz, 61 N. J. Eq. 156, 47 Atl. 274; Mount *v.* Van Ness, 33 N. J. Eq. 262; Norwood *v.* De Hart, 30 N. J. Eq. 412; Wise *v.* Fuller, 29 N. J. Eq. 257, 266, where it is said: "It is well settled, to make a promise of this nature effective, it must be made to a person personally liable, legally or equitably, for the mortgage debt, and if there is a break anywhere in the chain of liability, all the subsequent promises are without obligation." See also Crowell *v.* Currier, 27 N. J. Eq. 152.

New York.— Sullivan *v.* Sullivan, 161 N. Y. 554, 56 N. E. 116; Embler *v.* Hartford Steam Boiler Inspection, etc., Co., 158 N. Y. 431, 52 N. E. 212, 44 L. R. A. 512; Townsend *v.* Rackham, 143 N. Y. 516, 38 N. E. 731; Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49; Lorillard *v.* Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; Dunning *v.* Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Trotter *v.* Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Bogardus *v.* Young, 64 Hun 398, 19 N. Y. Suppl. 885; King *v.* Whitely, 10 Paige 465.

Oregon.— Portland Y. M. C. A. *v.* Croft, 34 Oreg. 106, 55 Pac. 439, 75 Am. St. Rep. 568; Portland Trust Co. *v.* Nunn, 34 Oreg. 166, 55 Pac. 441.

46. *Colorado.*— Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. 625.

Illinois.— Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467.

Iowa.— Marble Sav. Bank *v.* Mesarvey, 101 Iowa 285, 70 N. W. 198.

apparently through a failure to discriminate between the doctrine of the sole beneficiary and that of the creditor of the promisee.[47]

(7) Beneficial Owner in Other Respects as Plaintiff. The short principle which underlies the test of beneficial ownership in the aspects of the rule already considered[48] is that plaintiff, although without a legal title to the cause of action asserted, does have a claim to it under the substantive principles of equity.[49] The principle excludes those cases in which plaintiff has an actual interest in the result of the suit but is without any title, either legal or equitable, in the cause asserted.[50] On the other hand the principle includes a numerous body of cases in which plaintiff shows a beneficial ownership of a different aspect from any of those which have been noticed.[51] The scope of the underlying principle of these cases includes the general field of primary rights recognized by courts of equity. Its final test is in the question, Does the substantive law of equity recognize the plaintiff as owner of the cause of action pleaded?

(D) *Whether Legal Title, Without Beneficial Ownership, Is a Sufficient Test of Real Party in Interest* — (1) In General. Granted that beneficial ownership is sufficient for a standing as real party in interest,[52] there is still a frequent question whether beneficial ownership is essential under the statutory rule that an action must be prosecuted in the name of the real party in interest; or is it

Missouri.— Crone *v.* Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907.

Nebraska.— Hare *v.* Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851.

Utah.— McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

Wisconsin.—Enos *v.* Sanger, 96 Wis. 150, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862.

47. See *supra*, I, B, 2, e, (III), (C), (6).

48. See *supra*, I, B, 2, e, (III), (C), (1), (2), (3), (4).

49. "The equitable plaintiff is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for." U. S. *v.* Henderlong, 102 Fed. 2, 4, per Baker, J.

50. See *supra*, I, B, 2, b, (I); and *infra*, I, B, 2, e, (III), (F).

51. As, in particular, when plaintiff is an equitable assignee of a chose in action, or the third person beneficiary of a contract, etc. See *supra*, pp. 45, 59.

Other aspects of beneficial ownership.— These cases, too varied for exact classification in a general article, will be illustrated in this note.

Arkansas.— St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083, where plaintiff had a special property in the chattel destroyed by defendant, but was not then vested with a full legal title. And see St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

California.— Page *v.* Garver, 146 Cal. 577, 80 Pac. 860. In this case H, a widower, was induced by fraud and through undue influence to convey his land to D. Three years later he married again, and died in six months, his second wife surviving. The widow may sue as real party in interest for a cancellation of his conveyance to D; for when H died he was the equitable owner of the property with a right to assert his interest and attack his conveyance to D; and as H died intestate his widow succeeded, under the substantive law of California (Civ. Code, § 1386, 2, 7) to an interest in his equitable estate. And see Trubody *v.* Trubody, 137 Cal. 172, 69 Pac. 968.

Iowa.— Des Moines *v.* Polk County, 107 Iowa 525, 78 N. W. 249, holding that when the fees earned by a salaried officer of a city are to be paid into the city treasury, the city, under the general principles of the code, is the real party in interest in a suit to recover the fees from a county owing them. In Phillips *v.* Bush, 15 Iowa 64, where D, in selling certain lands to P, made fraudulent representations as to the lands, and where at P's request the title was conveyed by D to C, who by agreement with P was to hold the lands as security for a debt due from P to C, it was held that P is the real party in interest in an action against D for damages because of his fraudulent representations.

Kentucky.— Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 24 Ky. L. Rep. 1766, 102 Am. St. Rep. 316, 60 L. R. A. 846, holding that a traveling salesman of a wholesale house, although not the owner of the goods which he checks as his baggage, may sue the railway company as carrier for their loss if the damage will in effect fall on him.

Missouri.— Union Nat. Bank *v.* Hill, 148 Mo. 380, 394, 49 S. W. 1012, 71 Am. St. Rep. 615, where it is said: "If the assignee [of an insolvent bank] refuse to sue, the stockholders, who are the real parties in interest, may maintain an action in their own names, making the corporation a defendant." In Dodson *v.* Lomax, 113 Mo. 555, 21 S. W. 25, a sheriff, by mistake, inserted a wrong description in his deed for land sold by him under a mortgage foreclosure. It was held that as the sheriff would be liable in damages for the consequence of the mistake, he might sue to have the deed corrected.

52. See *supra*, I, B, 2, e, (III), (C).

enough if plaintiff, although without beneficial ownership, is clothed with the full legal title to the cause of action set up in the pleading?

(2) Rule in Common-Law Pleading. As the action at law, whether in contract or in tort, was regularly brought in the name of the person whose legal right had been affected,[53] it was no defense that the beneficial ownership was in another, or that plaintiff, if he recovered, would be bound to account for the entire proceeds.[54]

(3) The Rule in Equity Pleading. While equity did not ignore the legal title, the chancellor had regard primarily to the beneficial ownership, and the question of complete justice.[55]

(4) Conflicting Rules in Code Pleading — (a) Beneficial Ownership Necessary. A number of cases in the code states,[56] following a natural inference from the phraseology of the rule in question,[57] have expressed the opinion, and sometimes have held that, although a plaintiff is vested with the entire legal title to the cause of action set up in the pleading, he cannot on this ground claim recognition as the real party in interest, but must show a beneficial ownership in the cause.[58] The framers of the code, it is urged, having adopted the equity rule as to

53. Chitty Pl. 1, 2, 69.

54. See the remarks of Chief Justice Shaw in Fairfield *v.* Adams, 16 Pick. (Mass.) 381, 383. Here a bill of exchange to the order of S had been indorsed by him to "F., Cashier." It was held that as the indorsement vested the legal title in F, he could sue in his own name, although bound to account for the proceeds. So in Buffum *v.* Chadwick, 8 Mass. 103, where the action was upon a promissory note to the order of A B, "as agent of the Providence Hat-manufacturing Company," and it was held that A B had the legal title and could sue upon the note in his own name. A different aspect of the same principle appears in Treat *v.* Stanton, 14 Conn. 445. And see Illinois Steel Co. *v.* Preble Mach. Works Co., 116 Ill. App. 268, 270 [*affirmed* in 219 Ill. 403, 76 N. E. 574], where Baker, J., said: "If the interest of the Preble Company [the plaintiff] in the contract in question had been expressly sold by the receiver, such sale at most would have amounted to an equitable assignment of such interest. An action for the breach of the contract must even in that case have been brought in the name of the Preble Company."

So in tort for injury to property, the action at law lay regularly in the name of the person "who was legally interested in the property at the time the injury thereto was committed; for he is impliedly the party injured by the tort." 1 Chitty Pl. (16th ed.) 69.

55. Story Eq. Pl. 86, 90, 91. See *supra*, I, B, 2, d, (III).

On the beneficial ownership as distinct from mere incidental interest see *supra*, I, B, 2, d, (II). And see Carter *v.* Carter, 82 Va. 624.

56. **Enumeration of the code states** see *supra*, p. 36, note 13.

57. It will be observed that the rule not only requires that the action shall be brought in the name of the real party in interest, but expressly distinguishes between the party in interest and the trustee of an express trust.

58. This doctrine has found expression, although not always in decisions, in the following cases:

Indiana.— Deuel *v.* Newlin, 131 Ind. 40, 30 N. E. 795; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Gillispie *v.* Ft. Wayne, etc., R. Co., 12 Ind. 398; Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

Kansas.— Stewart *v.* Price, 64 Kan. 191, 199, 67 Pac. 553, 64 L. R. A. 581 and note. The majority of the court in this case would define the real party in interest as "the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal or technical interest in it or connection with it." But see the dissenting opinion and the decision in Manley *v.* Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, rejecting this definition as unsound.

Nebraska.— Hoagland *v.* Van Etten, 23 Nebr. 462, 36 N. W. 755, 22 Nebr. 681, 35 N. W. 869. *Compare* Hoagland *v.* Van Etten, 31 Nebr. 292, 47 N. W. 920. See *infra*, note 66.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

North Carolina.— Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967, *dictum*.

Ohio.— Brown *v.* Ginn, 66 Ohio St. 316, 321, 64 N. E. 123, where the ruling on the point was, however, not necessary to the result. In this case the court, per Spear, J., remarked: "We are aware that the tendency of some courts has been to uphold actions brought upon negotiable instruments, transferred for collection only, on the ground that the plaintiff is the real party in interest . . . it may be admitted that the trend in some of the code states is in that direction. But we have found no case which goes to the extent of holding that an assignment of an open account for the mere purpose of collection, one which gives the assignee a contingent interest only, constitutes him the real party in interest within the meaning of the statute."

Wisconsin.— Robbins *v.* Deverill, 20 Wis. 142, *dictum*. For the later doctrine in Wisconsin see *infra*, note 66.

United States.— Lawyer *v.* Post, 109 Fed. 512, 47 C. C. A. 491, *dictum*.

the party plaintiff thereby required the action to be brought in the name of the real party in interest — the party entitled to the fruits of the action, the beneficial claimant.[59] This doctrine is open to serious question. In point of principle it would seem that, however far reaching the rule of the codes requiring the action to be brought in the name of the real party in interest, it cannot properly be construed so as to destroy a substantive legal title.[60] In point of authority this doctrine is discredited by a growing array of decisions.[61]

(b) Legal Title Sufficient. After some vacillation,[62] the courts of the code states have very generally rejected or refused to adopt the doctrine that beneficial ownership is necessary for a standing as real party in interest. Without denying that beneficial ownership is sufficient, in connection with the corresponding cause of action,[63] the prevailing view now entertained by these courts recognizes the legal title also as sufficient.[64] The sounder view is rather that it is enough to entitle plaintiff to maintain the action, as real party in interest, if he has the legal title to the demand, and defendants will be protected in a payment to or recovery by him.[65] A third person, not a party to the action, may, it is true, be entitled to claim from plaintiff a portion of the fruits of the action, or all its fruits, as the case may be; but as against the defendant a plaintiff is the real party in interest if he has and shows the complete legal title to the cause of action asserted, so that he can legally discharge the defendant from his obligation.[66]

59. Hoagland *v.* Van Etten, 23 Nebr. 462, 463, 36 N. W. 755, per Maxwell, C. J. But see *infra*, note 60.

The same view is responsible for a current definition of the real party in interest. See for instance Dennison *v.* Soper, 33 Iowa 183, 185, where Miller, J., remarks: "The 'real party in interest' is the party having the beneficial interest; the party having the beneficial ownership."

60. See the outcome of Hoagland *v.* Van Etten, in its third appearance before the supreme court of Nebraska, 31 Nebr. 292, 47 N. W. 920, where the court was in effect forced to recognize the legal title of plaintiff, after every effort to ignore it. See also Alexander *v.* Overton, 36 Nebr. 503, 54 N. W. 825. It is to be noted also that the theory that the codes have adopted the equity rule of parties and therefore require the action to be in the name of the beneficial owner ignores the fact that equity did not disregard the legal title but as a rule assumed that the legal title could find protection in the courts of law.

61. See *infra*, I, B, 2, (III), (D), (4), (b).

62. See the change of judicial opinion on the point in Knadler *v.* Sharp, 36 Iowa 232, 236, where the court, per Cole, J., remarked that the provision of the Iowa code as to the real party in interest was "first construed . . . to mean the party having the legal title or interest. Farwell *v.* Tyler, 5 Iowa 535. But, afterward, it was held to mean the party having the beneficial interest, as contradistinguished from the mere holder of the legal title. Conyngham *v.* Smith, 16 Iowa 471. And subsequently it was held that the party holding the legal title of a note or instrument may sue on it though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but he is open in such cases to any defense which exists against the party beneficially interested; or, the party beneficially interested, though he may not have the legal title, may sue in his own name." The doctrine of Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372, that the legal title is sufficient, was rejected, by a divided court, in Stewart *v.* Price, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581, in favor of the doctrine that the beneficial ownership is necessary. The latter doctrine was in turn rejected, by a unanimous court, in Manley *v.* Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, and the earlier doctrine restored to favor. In Killmore *v.* Culver, 24 Barb. (N. Y.) 656, it was held that plaintiff, who had the legal title, could not maintain the action, "[because] not the real party in interest." The same doctrine appears in Clark *v.* Phillips, 21 How. Pr. (N. Y.) 87, and has the approval of the supreme court in Eaton *v.* Alger, 57 Barb. (N. Y.) 179. It is rejected in Allen *v.* Brown, 44 N. Y. 228, in Eaton *v.* Alger, 47 N. Y. 345, and in other New York cases, in favor of the doctrine that a legal title is sufficient.

63. When the beneficial owner sets up a mere legal cause of action, the objection is in strictness not that the beneficial owner cannot sue, but that, in the case as brought, he has set up a cause to which he has no title. Richardson *v.* Means, 22 Mo. 495.

64. See cases cited *infra*, note 66.

65. See Hunter *v.* Allen, 106 N. Y. App. Div. 557, 94 N. Y. Suppl. 880, where the sole contention before the court was that plaintiff was not the real party in interest.

66. *Alabama.*—Carpenter *v.* Greene County, 130 Ala. 613, 29 So. 194; Rice *v.* Rice, 106 Ala. 636, 637, 17 So. 628 (an action upon a promissory note, which, as appeared from the note, was payable to plaintiff as trustee for others; Code, § 2594 (2523) required that "actions on promissory notes . . . must be prosecuted in the name of the party really interested." Plaintiff sued in his in-

If plaintiff's legal title to the demand or the cause of action asserted appears, it

dividual capacity; it was objected that he was not the real party in interest; but said the court, reiterating the doctrine of earlier cases, 'This section . . . has caused much perplexity in practice. But whenever a party has the legal title, if he is a party to whom payment can be legally made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use"); Bibb *v.* Hall, 101 Ala. 79, 14 So. 98. *Compare* Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802; Hirschfelder *v.* Mitchell, 54 Ala. 419; Yerby *v.* Sexton, 48 Ala. 311.

Arizona.— Sroufe *v.* Soto, (1896) 43 Pac. 221, which was an action upon an account assigned to plaintiff for the purpose of collection. It was held that, although it was in fact understood by the parties that the beneficial interests to pass by the assignment were limited, still plaintiff, as holder of the legal title of said accounts, could sue for and recover the whole amount.

California.—Los Robles Water Co. *v.* Stoneman, 146 Cal. 203, 79 Pac. 880; Cortelyou *v.* Jones, 132 Cal. 131, 64 Pac. 119 (where notes and mortgages were assigned to P "to be collected, and the proceeds to be held in trust" for certain purposes; P brought a foreclosure suit in his own name individually; defendant objected that P could sue only in his representative capacity, as trustee of an express trust; that he should have set up in his complaint the fact creating the trust, and that he was not entitled to a judgment in his favor individually, and it was held that this objection could not be sustained, for the reason that a legal title was vested in P, and payment to him or satisfaction of a judgment in his favor would exonerate defendant); Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611; Ingham *v.* Weed, (1897) 48 Pac. 319; Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8; Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 497, 33 Pac. 550 (where it was said: "A trustee to whom a chose in action had been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name"); O'Connor *v.* Irvine, 74 Cal. 435, 440, 16 Pac. 236 (where it was said: "Plaintiff is the real party in interest. . . . It is sufficient, under the code, if he holds the legal title to the demand"); Anson *v.* Townsend, 73 Cal. 415, 419, 15 Pac. 49 (where it was said: "As the plaintiff had the legal title, it did not concern the defendant whether he [the plaintiff] held it in trust for Mrs. Townsend or not. So far as concerned the defendant, he was the real party in interest, and might sue in his own name"); Walker *v.* McCusker, 71 Cal. 594, 12 Pac. 723; Ginocchio *v.* Amador Canal, etc., Co., 67 Cal. 493, 8 Pac. 29; McPherson *v.* Weston, 64 Cal. 275, 30 Pac. 842; Wetmore *v.* San Francisco, 44 Cal. 294; Gradwohl *v.* Harris, 29 Cal. 150 (which case marks the further point that intervention by the beneficial owner is permissible but not necessary); White *v.* The Mary Ann, 6 Cal. 462, 471, 65 Am. Dec. 523 (where it is said: "The insurance company may have the equitable right to the proceeds, or a part of them, but the legal right to bring the action remains with the plaintiff, and this constitutes him in the view of the law as much the real party in interest as if he were entitled to the proceeds").

Colorado.— Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788 (where it is said: "The 'real party in interest' is held to mean the person in whom the legal title to the claim in suit is vested"); Bassett *v.* Inman, 7 Colo. 270, 273, 3 Pac. 383 (where it is said: "The plaintiff, as assignee of the note and account sued upon, was the 'real party in interest,' within the meaning of the Code of Civil Procedure, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee"); Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355, 356 (where it is said: "It is no infraction of this statute [the provision of the code that every action must be prosecuted in the name of the real party in interest] to bring the suit in the name of the person to whom the claim has been assigned, whether it be an open account or otherwise, although there may be annexed to the transfer the condition that, when the sum is collected, the whole or some part of it must be paid over to the assignor").

Indiana.— Hardin *v.* Helton, 50 Ind. 319; Robbins *v.* Cheek, 32 Ind. 328, 2 Am. Rep. 348; Robbins *v.* Dishon, 19 Ind. 204. *Compare* Butler *v.* Sturges, 6 Blackf. 186, giving the rule prior to the code. But see Indiana cases *contra*, cited *supra*, note 58.

Iowa.— Dorr Cattle Co. *v.* Jewett, 116 Iowa 93, 89 N. W. 109 (where P had sold property to D upon his promise to P to credit the price upon the note of Y, which was held by D); Abell Note Brokerage, etc., Co. *v.* Hurd, 85 Iowa 559, 52 N. W. 488; Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708 (where a judgment had been assigned to P for the benefit of S, and it was held that as P had the legal title to the judgment, "the law regards him as the real party in interest to prosecute this suit to enforce the collection of the judgment"); Cassidy *v.* Woodward, 77 Iowa 354, 357, 42 N. W. 319 (where S bought land and had it conveyed to P who was the servant of S, and at the time had no knowledge of the conveyance; the beneficial ownership continues in S, but an action to recover the land lies in the name of P, and said the court: "The party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name"); Knadler *v.* Sharp, 36 Iowa 232 (where open accounts had been assigned to plaintiff upon his agreement

does not affect this question between him and defendant, that plaintiff's interest

to pay over the net proceeds, and it was held that plaintiff, having the legal title, could sue as real party in interest); Cottle *v.* Cole, 20 Iowa 481, 486 (where Dillon, J., said: "Holding, as the plaintiff did, the legal title to the judgment, by assignment, he could sue upon it; and his right to recover could not be defeated by simply showing that Cluff was the party beneficially interested in the action."

Kansas.— Greene *v.* McAuley, 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308; Manley *v.* Park, 68 Kan. 400, 401, 815, 75 Pac. 557, 1134, 66 L. R. A. 967, 971, where it was said: "When the owner of a note, for reasons satisfactory to himself, assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest. The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it." This case expressly overrules Stewart *v.* Price, 64 Kan. 191, 211, 67 Pac. 553, 64 L. R. A. 581, where a divided court held that beneficial ownership is essential for the real party in interest under the code. In the dissenting opinion of Stewart *v.* Price, *supra*, concurred in by two other judges, Greene, J., after reviewing the authorities, stated their result thus: "The principle running through and controlling in all of the foregoing decisions is that the person in possession and holding the legal title to the evidence of indebtedness sued on is the real party in interest, within the meaning of the code, notwithstanding the entire beneficial interest is in another." This dissent is recognized as sound law by a unanimous court in Manley *v.* Park, *supra*. The cases of Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372, and Linney *v.* Thompson, 3 Kan. App. 718, 45 Pac. 456, which were overruled by Stewart *v.* Price, *supra*, have apparently been restored to favor by Manley *v.* Park, *supra*.

Kentucky.— McBrayer *v.* Dean, 100 Ky. 398, 38 S. W. 508, 18 Ky. L. Rep. 847.

Minnesota.— Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930 (and see "Trustee of Express Trust," *infra*, I, B, 2, e, (IV)); Minnesota Thresher Mfg. Co. *v.* Heipler, 49 Minn. 395, 52 N. W. 33 ("The plaintiff held the legal title to the demand, and was the real party in interest"); Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777; Elmquist *v.* Markoe, 45 Minn. 305, 47 N. W. 970; Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555; Castner *v.* Sumner, 2 Minn. 44.

Missouri.— Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132 (holding that when the assignment of the chose in action vests the entire apparent legal title in the assignee, he is the real party in interest, and it is immaterial what arrangements have been made between him and the assignor in respect to the proceeds); Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Ely *v.* Porter, 58 Mo. 158. In Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586, five distinct claims, by as many laborers, against a railway company were assigned to P, that he might collect them, either by suit in his own name, or otherwise; for his services P was to receive one fourth of the amount collected; the remainder he was to pay over to his assignors. P was to pay all costs and charges which might accrue in the collections of the claims, or in their attempted collection. It was held that P can sue in his own name. In Webb *v.* Morgan, 14 Mo. 428, the action was in the name of the assignee of promissory notes. On the trial plaintiff admitted that he "had no interest in the notes" and was acting "merely as agent" of the promisee. It was held that plaintiff could sue in his own name, the assignment having passed to him the legal title to the note. Here plaintiff was not, in the eye of the law, a mere agent, but an agent clothed with a title. That the naked agent cannot sue see "The Limits of Remedial Interest," *infra*, I, B, 2, e. In Willison *v.* Smith, 52 Mo. App. 133, P sued in replevin under a chattel mortgage securing a note to order of M, who, through an agent, had indorsed and delivered the note to P, for purposes of collection. It was held that P, having legal title to the note, had legal title also to the mortgage, and therefore could sue in his own name. *Compare* Buddington *v.* Mastbrook, 17 Mo. App. 577.

Nebraska.— Huddleson *v.* Polk, 70 Nebr. 483, 97 N. W. 624 (where plaintiff an attorney, to whom numerous creditors of defendant had assigned their claims, and who was to receive one half the amount recovered, sued in his own name alone); Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38; Meeker *v.* Waldron, 62 Nebr. 689, 87 N. W. 539; Alexander *v.* Overton, 36 Nebr. 503, 504, 54 N. W. 825 (where Maxwell, C. J., remarks: "Suppose a brother should take the title to a tract of land in the name of his sister — the deed being made to her, would it be seriously contended that an action of ejectment could not be maintained in her name to recover the possession? In law, she would hold the legal title and would be the real party in interest"); McWilliams *v.* Bridges, 7 Nebr. 419; Commercial State Bank *v.* Rowley, 2 Nebr. (Unoff.) 645, 89 N. W. 765 (where as indorsee of a check plaintiff had the legal title to it, and sued in his own name).

Nevada.— Smith *v.* Logan, 18 Nev. 149, 1 Pac. 678. Here in an action to determine water-rights, it appeared that, although the lands had been conveyed to P, he had agreed orally to reconvey the land to his grantors upon the termination of the action. It was held that P, having the legal title, is the real party in interest.

New York.— St. James Co. *v.* Security Trust, etc., Co., 178 N. Y. 560, 70 N. E. 1108 [*affirming* 82 N. Y. App. Div. 242, 81 N. Y. Suppl. 739]; Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24; Thompson

is merely colorable,[67] that the third person's beneficial ownership appears upon the

v. Whitmarsh, 100 N. Y. 35, 39, 2 N. E. 273 ("Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt, he, as an individual, is the real party in interest, for the contract is made with him, and the promise to pay runs to him, and he is personally accountable for the assets which he has sold"); Sheridan *v.* New York, 68 N. Y. 30, 32 ("A plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further"); Eaton *v.* Alger, 47 N. Y. 345 [*overruling* Eaton *v.* Alger, 57 Barb. 179]; Meeker *v.* Claghorn, 44 N. Y. 349; Allen *v.* Brown, 44 N. Y. 228; Cummings *v.* Morris, 25 N. Y. 625; Hunter *v.* Allen, 106 N. Y. App. Div. 557, 94 N. Y. Suppl. 880 ("It is enough, to entitle the plaintiff to maintain the action, that he has the legal right to the demand and that the defendants would be protected in a payment to or recovery by him"); Linden *v.* Brustein, 23 Misc. 655, 52 N. Y. Suppl. 120. *Compare* Welsh *v.* Rheinhardt, 21 Misc. 22, 46 N. Y. Suppl. 866. In Friedman *v.* Schulman, 46 Misc. 572, 92 N. Y. Suppl. 801, plaintiff sued as assignee of a claim for breach of contract of employment; the assignor testified that he was a non-resident, that he did not know the plaintiff personally, and that he expected to receive the entire recovery if plaintiff succeeded. It was held that as plaintiff had a valid transfer as against his assignor and held the legal title, he could sue in his own name. "While the transaction as between the parties appears to have been merely colorable, yet that would constitute no defense on the ground that the assignee was not the real party in interest." In Brown *v.* Powers, 53 N. Y. App. Div. 251, 65 N. Y. Suppl. 733, P sued as assignee of a judgment; the defense was that while the judgment had been in form assigned to P, it was nevertheless in fact owned by the assignor, a bank, and it was held that P, under the assignment, "was the legal owner of it [the judgment] and, therefore, was the real party in interest."

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859; Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682.

Ohio.— See Kent *v.* Dana, 100 Fed. 56, 64, 40 C. C. A. 281; White *v.* Stanley, 29 Ohio St. 423. *Compare* Nichols *v.* Gross, 26 Ohio St. 425. But see *supra*, note 58.

Oregon.— Falconio *v.* Larsen, 31 Oreg. 137, 48 Pac. 703, 37 L. R. A. 254, where plaintiff was assignee of a claim for wages, assigned for collection only.

South Carolina.— Wylie *v.* Ohio River, etc., R. Co., 48 S. C. 405, 26 S. E. 676. Here the owner of a cow mortgaged her to P, with other chattels, to secure a note for fifty dollars. After the maturity of the mortgage debt, the cow, while still in the possession of the mortgagor, was killed, through the negligence of the defendant railway. It was held that P may bring the action against the railway company, because "upon breach of the conditions of a chattel mortgage, the mortgagee becomes the legal owner of the mortgaged property."

South Dakota.— Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

Utah.— Wines *v.* Rio Grande & Western R. Co., 9 Utah 228, 33 Pac. 1042, where P, being the assignee of various distinct claims for cattle, belonging to different owners, which had been killed through the negligence of the defendant railway, it was held that it was immaterial whether any consideration was paid for the assignment, or whether or not the assignment was merely for the purpose of the suit.

Washington.— Riddell *v.* Prichard, 12 Wash. 601, 41 Pac. 905 (holding that an attorney to whom a note is assigned, for a nominal consideration and the purpose of collection, may sue in his own name); McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209 (where the point is covered in part by a specific provision in the code to the effect that the assignee of a chose in action may, by virtue of the assignment thereof, in writing, maintain an action in his own name, "notwithstanding the assignor may have an interest in the thing assigned," provided defendant may assert any counter-claims or offsets against the original owner).

Wisconsin.—Brossard *v.* Williams, 114 Wis. 89, 89 N. W. 832; Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548; Anderson *v.* Johnson, 106 Wis. 218, 82 N. W. 177; Crowns *v.* Forest Land Co., 99 Wis. 103, 105, 74 N. W. 546, per Bardeen, J. In the last case plaintiff, as mortgagee, was "vested with and held the legal ownership of the demand sued upon. The appellant [defendant] had no legal interest to inquire whether the respondent's interest was actual or colorable, or whether a consideration was paid therefor or not."

67. See cases cited *infra*, this note.

The "colorable" transfer of title.— In Sheridan *v.* New York, 68 N. Y. 30, 32, per Church, C. J., the court had charged the jury that if they believed that the assignment to plaintiff was a "sham transaction" they should find for defendant. It was held to be error, for it appeared that the assignment had conveyed the legal title to plaintiff, and even if "the circumstances were such as to justify the jury in finding that it was colorable as between the parties, yet that would constitute no defence on the ground that the plaintiff was not the real party in interest." And see the remark of Judge Severens in Kent *v.* Dana, 100 Fed. 56, 64, 40 C. C. A. 281: "Where, as in Ohio, the code of procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to

face of plaintiff's claim,[68] that the beneficial owner has agreed to meet the costs of the suit,[69] or that the vesting of the legal title in plaintiff gives him a procedural right which the beneficial owner would not have been able to claim if suit had been brought in his name.[70] But on a possible limitation in such cases because of a right in the trial court to go behind the legal title of plaintiff, in order to protect the process or the rulings of the court, see a following topic.[71]

(E) *Double Aspect of Real Party in Interest.* Under the prevailing doctrine noticed above,[72] it is clear that the phrase "real party in interest" has acquired a double meaning. In states which administer law and equity through the one form of civil action the phrase may mean the person having the beneficial ownership;[73] but it may also mean a person who, although without the beneficial ownership, is clothed with the entire legal title.[74] This result is the natural outcome of the adoption of one form of civil action for the administration of distinct substantive rights at law and in equity.[75] As the historic legal cause of action and the historic equitable cause of action remain unchanged by the codes and either may be asserted, without a merely procedural distinction, in the complaint or petition,[76] so both the historic plaintiffs in our doctrine of parties, the "legal plaintiff" and the "equitable plaintiff,"[77] come within the scope of the phrase "real party in interest."[78] The effect of this ambiguity, however, is minimized

show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor." See also Friedman *v.* Schulman, 46 Misc. (N. Y.) 572, 92 N. Y. Suppl. 801; Crowns *v.* Forest Land Co., 99 Wis. 103, 74 N. W. 546.

68. In Minnesota Thresher Mfg. Co. *v.* Heipler, 49 Minn. 395, 396, 52 N. W. 33, plaintiff sued upon an accepted draft containing this clause: "It is hereby expressly understood and agreed that the Minnesota Thresher Manufacturing Company takes this order for collection only; the net proceeds of such collection to be applied on the indebtedness of the drawer of said order to the said Minnesota Thresher Manufacturing Company." The court said, per Mitchell, J.: "Clearly the plaintiff held the legal title to the demand, and was the real party in interest."

69. Allen *v.* Brown, 44 N. Y. 228, where A, B, and C, having each a distinct claim against D, assigned them to P; there was no consideration for the assignment; the proceeds of the contemplated suit were to be paid over to A, B, and C. It was further agreed that if P lost the suit "it should not trouble or cost him anything." It was held that as the assignment had transferred the legal title of the claims to P, he was the real party in interest.

70. In Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9, it appeared that a claim for a personal injury, assignable under the *lex loci*, had been assigned in due form to plaintiff, a citizen of the same state as defendant railway, in order to prevent a removal of the action into the federal courts. It farther appeared that the assignor was to receive all but fifty dollars of the expected recovery. It was held that as plaintiff held the legal title to the claim he could sue upon it in his own name. And see Citizen's Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891, where a non-resident corporation, which was not entitled to sue in South Dakota, because it had failed to file its articles and appoint a resident agent, transferred its claim to P, by an assignment absolute on its face; there was no consideration for the assignment, and it was understood that the assignee should collect and pay the net proceeds to the corporation. It was held that P, having the legal title, can sue in his own name as real party in interest.

71. See *infra*, I, B, 2, e, (III), (F), (2).

72. See *supra*, I, B, 2, e, (III), (D), (3), (A), (B).

73. See *supra*, I, B, 2, e, (III), (D), (3), (a). And see Rice *v.* Savery, 22 Iowa 470; Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877.

74. See *supra*, I, B, 2, e, (III), (D), (3), (b). And see remarks of Dillon, J., in Cottle *v.* Cole, 20 Iowa 481, 485.

75. "Although the distinction between actions at law and suits in equity is abolished, the distinguishing features of the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is essential to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors." Chipman *v.* Montgomery, 63 N. Y. 221, 230, per Allen, J.

76. See, generally, PLEADING.

77. See Judge Baker's classification of plaintiffs in U. S. *v.* Henderlong, 102 Fed. 2, 4, as follows: "The legal plaintiff is he in whom the legal title or right of action is vested. The equitable plaintiff is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for."

78. As a further result, the "legal plaintiff" may often claim either as "real party

by the principle that a plaintiff must always show a right of action in the very cause of action which he asserts.[79] The ambiguity is relieved also by the fact that, under either aspect of the phrase, the final test of "the real party in interest" is substantially the same — the practical test which is found in the question whether a judgment for or against a plaintiff will safeguard the defendant in the event of any other claim on the same cause.[80]

(F) *Final Test of Real Party in Interest* — (1) As Respects Right of Defendant. The statutory principle of the real party in interest is imperative;[81] defendant has the right to require that the action against him, if not in name of a plaintiff within one of the express exceptions,[82] must be brought in the name of the real party in interest.[83] Even when a plaintiff shows a *prima facie* title, defendant has the right to show, if he can, that plaintiff is not "the real party in interest."[84] But defendant's right to object is limited by the purpose of the statute;[85] and its evident purpose is not to allow defendant to demand the adjudication of equities which exist wholly between plaintiff and third persons.[86] So far as defendant is concerned, the purpose of the statute is fully attained if, in the suit as brought, defendant is not shut out from his proper defenses and counterclaims and will be fully protected by the judgment, whether for or against plaintiff, in the event of any other claim on the same cause.[87] In all such cases there

in interest" or as "trustee of an express trust." See *infra*, I, B, 2, e, (IV).

79. See *supra*, I, B, 2, b, (II).

On principle the action fails if plaintiff, having only a beneficial ownership, sets up merely the naked legal cause of action existing in the right of his trustee. Richardson *v.* Means, 22 Mo. 495. In this case a chattel had been conveyed to T in trust for P. The chattel is converted by D. Thereupon P sued to recover the chattel setting up only the legal title and without joining T. It was held that P "had stated [himself] out of court."

80. The doctrine will be developed *infra*, I, B, 2, e, (III), (F).

81. "The act is emphatic; it uses the Saxon word 'must,' (a verb which has not yet been twisted by judicial construction, like the words 'may' and 'shall,' into meaning something else) to place beyond doubt or cavil, what it intended." Eaton *v.* Alger, 57 Barb. (N. Y.) 179, 190, per James, J. See also Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548.

82. See *infra*, I, B, 2, e, (IV)–(VII).

83. Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8; Bamberger *v.* American Surety Co., 48 Misc. (N. Y.) 221, 223, 96 N. Y. Suppl. 665 [*affirmed* in 109 N. Y. App. Div. 917, 96 N. Y. Suppl. 665], where it is said: "Plaintiff being the real party in interest is bound to sue in his own name."

84. In Eaton *v.* Alger, 57 Barb. (N. Y.) 179, this right of defendant was recognized, and he was permitted to show, if he could, that plaintiff, although having a *prima facie* right of action, was not the real party in interest. Defendant failed in his effort, because it appeared that plaintiff did have a legal title. See the second appearance of Eaton *v.* Alger, 47 N. Y. 345. In Hays *v.* Hathorn, 74 N. Y. 486. this right of defendant was again recognized and enforced, because the scope of defendant's offer was to show that plaintiff, although appearing with a *prima facie* title, had in fact no title either legal or equitable. A similar offer was successfully carried through by defendant in Bell *v.* Tilden, 16 Hun (N. Y.) 346, where the *prima facie* title arising from plaintiff's possession was completely rebutted by evidence that plaintiff had "no legal title to the paper in suit, and no interest whatever therein." And see MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428, 75 Pac. 89.

85. "The purpose of the statute is readily discernible, and the right [of the defendant to have a cause of action against him prosecuted by the real party in interest] is limited to its purpose." Giselman *v.* Starr, 106 Cal. 651, 657, 40 Pac. 8, per Henshaw, J.

86. See for instance Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8; Elmquist *v.* Markoe, 45 Minn. 305, 47 N. W. 970; Allen *v.* Brown, 44 N. Y. 228; and cases cited *infra*.

87. *California.*— Los Robles Water Co. *v.* Stoneman, 146 Cal. 203, 210, 79 Pac. 880 ("In this case a judgment in favor of plaintiff would protect the defendants from further suits by the owners of the lots as to the same matter. This is all that defendants are entitled to, or that they have a right to expect"); White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523 ("It is beyond question that a recovery will bar another action for the same cause, and whenever a defendant is thus protected, he has no right to make the objection which is here set up" that the action is not brought by the real party in interest).

Kansas.— Greene *v.* McAuley, 70 Kan. 601, 607, 79 Pac. 133, 68 L. R. A. 308, where Mason, J., remarks: "This suggests what we conceive to be the true rule, of general, if not of universal, application, that so far as affects the question of the right of the plaintiff to maintain the action the only inquiry open to the defendant is whether the plaintiff has such title to the note that a payment made to him would be a complete protection to defendant from any further liability."

is an end of defendant's concern, and with it of his right to object.[88] So far as he is interested, the action is being prosecuted in the name of the real party in interest.[89] It follows that the test of the real party in interest, as respects defendant, is not found in the question whether plaintiff is the person who is actually and substantially interested in the subject-matter of the action, but rather in the question whether a payment to or a recovery by the plaintiff will fully protect defendant in the event of another action upon the same cause.[90]

(2) As Respects Right of Trial Court. But while defendant is not concerned with a simulated interest on the part of plaintiff, if his title is in fact legally sufficient to protect defendant in any other action upon the same cause, and defendant's subsisting counter-claims and defenses are available, it sometimes

Minnesota.— Elmquist *v.* Markoe, 45 Minn. 305, 307, 47 N. W. 970, where Mitchell, J., remarks: "A recovery by plaintiff will fully protect the defendants, and they have no interest in the equities between him and his assignor, unless an inquiry into the subject had become material upon the right of interposing some defence or counterclaim against the assignor."

Missouri.— Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877, holding that an action by the assignee of the beneficiaries on a cause accruing to a trustee is brought by the real party in interest so far as defendant is concerned, because a judgment on the merits in their suit or that of their assignee would bar an action by the trustee.

New York.— Hays *v.* Hathorn, 74 N. Y. 486 (holding that plaintiff's ownership "must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor"); Hunter *v.* Allen, 106 N. Y. App. Div. 557, 559, 94 N. Y. Suppl. 880 (where it is said: "This transfer [to the plaintiff] being valid, and the plaintiff holding the legal right to the demand, the defendants have legally no interest to inquire further, as a payment to or recovery by the plaintiff, occupying this position, would protect them against any other claim based on the notes that might be made either by the bank or by another party"). And see the test applied in Moppar *v.* Wiltchik, 56 Misc. 676, 677, 107 N. Y. Suppl. 594. The question arose upon an objection for defect of parties; the court said: "The rule is well settled that to maintain an action it must appear that the plaintiff is the only person possessed of any ownership or interest in the demand; so that, on a recovery and subsequent payment, all rights of action in respect thereto will be barred as against the defendants."

North Dakota.— Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 467, 67 N. W. 682, where it is said: "All that the debtor is interested in is protection against a second action on the same claim."

Oregon.— Sturgis *v.* Baker, 43 Oreg. 236, 241, 72 Pac. 744, where it is said: "The statute requiring that every action shall be prosecuted in the name of the real party in interest was enacted for the benefit of a party defendant, to protect him from being harassed for the same cause. But if not cut off from any just offset or counter-claim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. This is the test as to whether such a defense is properly interposed."

Wisconsin.— Chase *v.* Dodge, 111 Wis. 70, 72, 86 N. W. 548, where Bardeen, J., says: "The rule that every action must be prosecuted in the name of the real party in interest . . . is imperative, but is satisfied when it is shown that the party suing is the one who has the right to control and receive the recovery."

88. "Where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object." Giselman *v.* Starr, 106 Cal. 651, 658, 40 Pac. 8, per Henshaw, J.

89. See Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8.

90. "The defense sought to be proved would not, if established, be available, because payment of the judgment to the plaintiff will fully protect the defendant against claims by third parties. This, under the authorities, is the test as to whether or not the plaintiff is the real party in interest." St. James Co. *v.* Security Trust, etc., Co., 82 N. Y. App. Div. 242, 246, 81 N. Y. Suppl. 739 [*affirmed* in 178 N. Y. 560, 70 N. E. 1108], per O'Brien, J. In Gross *v.* Heckert, 120 Wis. 314, 320, 97 N. W. 952, it was remarked by Marshall, J., "[that] the test of whether one is the real party in interest within the meaning of the statute is, Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?" The action here was successfully maintained by the beneficial owner. The further remark of the court that the real party in interest is one who is "actually and substantially interested in the subject-matter" is evidently sound as a description of plaintiff in the case at bar, but the court does not decide that one who is not actually and substantially interested in the subject-matter is not a real party in interest. That the legal title is sufficient in Wisconsin see *supra*, I, B, 2, e, (III), (D), (4), (b) [p. 81 text and note 66].

happens, although rarely, that the court, on its own account, will go behind plaintiff's legal title and investigate the question of his beneficial ownership.[91]

(IV) *Trustee of an Express Trust*—(A) *In General.* The prominence of the trustee of an express trust in our present doctrine of parties is due to the codes of civil procedure. In the earlier systems a trustee of an express trust had no distinctive place as plaintiff;[92] he could regularly sue in his own name as holder of the legal title.[93] But in code pleading, since the year 1848, the "trustee of an express trust" has stood in all the codes as one of the few express exceptions to the rule that a civil action must be brought in the name of the real party in interest.[94] This provision has given rise to an extensive and important doctrine in code pleading.[95]

(B) *Meaning of "Trustee of an Express Trust"*—(1) Its Original Meaning. In expressly permitting the civil action to be brought in the name of a "trustee of an express trust" the codes did not attempt to define the meaning of the term. In other connections, however, it had acquired a narrow and technical meaning.[96] It was commonly defined as a trust created by the direct and positive act of the parties by some writing, or deed, or will.[97] As an existing statutory term, it was limited in some states to trusts of land.[98]

(2) Its Extension by Judicial Construction. A similar narrow construction was urged upon the courts when they were first called upon to define the phrase as a term in the codes of procedure.[99] But the practical inconvenience of thus restricting the remedial interest of the legal owner was so apparent that the courts at an early day rejected this narrow meaning of the phrase, so far as the doctrine of parties to actions was concerned, and held that the phrase "trustee of an express trust" as a term of code pleading is capable of a more extensive signification, so as to include all contracts in which one person acts in trust for or in behalf of another.[1]

(3) Its Extension by Statute. This extension of the term was speedily adopted by the legislature. The statute took two forms. In a large number of states[2] the technical term "trustee of an express trust" was declared, as a term

91. In Philbrook *v.* San Francisco Super. Ct., 111 Cal. 31, 35, 43 Pac. 402, a claim had been assigned to one who had been disbarred by the supreme court from practising as an attorney; the court said: "It matters not to the defendant whether in truth the transfer be genuine or simulated, so long as in law it is sufficient to protect him. But the concern of the trial court, under the circumstances, is quite different. It is bound to give due effect to the judgments of this tribunal [disbarring the assignee]. Its duty, therefore, is not alone to determine whether or not the transfer is such as will protect the defendant, but equally to determine whether the transfer be genuine, or simulated to evade the judgment of the court. To a genuine transfer, as has been said, the judgment of this court has no application."

92. Thus, Chitty and Dicey, in treating of parties to actions, have no such distinctive topic.

93. See *supra*, I, B, 2.

94. By the terms of N. Y. Code Proc. (1848) § 93, these exceptions were three in number: (1) A trustee of an express trust; (2) an executor or administrator; and (3) a person expressly authorized by statute. The same exceptions reappear in the terms of the other codes (see *supra*, p. 36, note 13, for the "code states"), but with some expansion, here and there.

95. See *infra*, I, B, 2, e, (IV), (B)–(E).

96. See the remarks of Wright, J., in Considerant *v.* Brisbane, 22 N. Y. 389, 394.

97. Weaver *v.* Wabash, etc., Canal, 28 Ind. 112, 119; Considerant *v.* Brisbane, 22 N. Y. 389.

98. Considerant *v.* Brisbane, 22 N. Y. 389, 394.

99. In New York it was generally supposed, at first, that the words "express trust," in this section of the code, referred "to trusts of land authorized by the Revised Statutes, and which are in the statutes themselves termed 'express trusts,' and to them alone." Grinnell *v.* Schmidt, 2 Sandf. (N. Y.) 706, 709, per Mason, J.

1. Grinnell *v.* Schmidt, 2 Sandf. (N. Y.) 706, 710, where it was said: "Mercantile agents and factors who, according to the usage and custom of merchants, do business in their own names, but for other parties, are trustees in the strict sense of the term. They are so in fact, and they have always been held liable as such, to account in a court of equity. The trust, though not created by a formal deed or instrument, yet appears upon the face of every order contained in the correspondence of their principals, in pursuance of which they act, and may therefore well enough be called an 'express trust.'"

2. See the codes of California, Colorado, Idaho, Indiana, Kansas, Minnesota, Missouri, Montana, Nevada, New York, New Mexico,

of pleading, "to include a person with whom, or in whose name, a contract is made for the benefit of another."[3] In other states the technical term "trustee of an express trust" was left untouched, but there was added to the provision of the code, as a coördinate clause, "the person with whom or in whose name a contract is made for the benefit of another."[4]

(c) *Nature and Scope of Enactment* — (1) Its Permissive Character. The enactment in question stands as a permissive exception to the general rule that the civil action must be brought in the name of the real party in interest. The trustee of an express trust or the person with whom or in whose name a contract is made for the benefit of another may sue in his own name alone,[5] or he may sue with the beneficiary as a party;[6] or the beneficiary may sue in his own name as real party in interest.[7] In the last case, however, it does not follow that the mere legal cause which exists in the right of the trustee, and could have supported an action in his name, will alone support an action in the name of the beneficiary; the complaint must show the equitable cause existing in the right of plaintiff as beneficial owner.

(2) Its Wide Scope — (a) In General. Although an exception to a fundamental rule, the enactment has been most liberally interpreted by the courts. Its terms evidently include others than those who in equity are regarded as technical trustees,[8] and the courts construing the provision have in the main given it a free field.[9] The guiding principle is not often defined, the courts in most instances holding merely that the case at bar does or does not come within the exception permitted by the statute.[10] But when one case is compared with another, it is evident that the courts under the code, acting in behalf of a more convenient administration of justice,[11] have in the main sought to preserve measurably the common-law rule that he who has the legal right is a proper plaintiff.[12]

(b) Typical Instances. The general result is a numerous and varied class of cases in which a person without direct beneficial interest in the cause of action asserted, and sometimes ostensibly so, is permitted to sue in his own name, notwithstanding the rule as to the real party in interest.[13] The permission of the statute evidently reaches the case of one to whom the title to tangible property

North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Utah, and Wisconsin.

3. This appears first as an amendment to N. Y. Code Proc. (1852) § 113, whence it was copied into the codes of the states named above. See Considerant *v.* Brisbane, 22 N. Y. 389.

4. See the forms of the enactment in the codes of Arkansas, Iowa, Kentucky, Ohio, Washington, and Wyoming.

The distinction here made, whatever its importance in the law of trusts, has been without practical consequence in the law of parties to actions. The two forms of the enactment appear to have had precisely the same effect. They may be considered together, and under the head of "the trustee of an express trust," as a new, composite, statutory term describing one aspect of the remedial interest recognized in code pleading. See *infra*, I, B, 2, e, (IV), (D)-(E).

5. Hecker *v.* Cook, 20 Colo. App. 282, 78 Pac. 311; Lancaster *v.* Connecticut Mut. L. Ins. Co., 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739; Pace *v.* Pierce, 49 Mo. 393.

6. See Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

7. Rice *v.* Savery, 22 Iowa 470; Chouteau *v.* Boughton, 100 Mo. 406, 411, 13 S. W. 877, where Black, J., says: "It does not follow because the trustee could maintain this suit that the beneficiaries in the deed of trust cannot. . . . Either may sue."

8. See the remark of Strong, J., in Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663.

9. "It is intended, manifestly, to embrace, not only formal trusts, declared by deed *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of or for the benefit of, another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name, a contract is made for the benefit of another." Considerant *v.* Brisbane, 22 N. Y. 389, 396, per Wright, J. *Compare* Waterman *v.* Webster, 108 N. Y. 157, 163, 15 N. E. 380, where Danforth, J., reaffirms and distinguishes this view.

10. Illustration will be found *infra*.

11. See remarks of Wright, J., in Considerant *v.* Brisbane, 22 N. Y. 389.

12. Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663.

13. See cases cited *infra*, following sections.

or a chose in action has been conveyed in trust for another,[14] and this, whether or not the trust is formally declared in the instrument in suit or in some instrument not present in the case,[15] or whether or not the transferee of the title is also a promisee.[16] It evidently reaches also the case of one to whom the promise is made, in a contract ostensibly for the benefit of a third person, or group of persons, not a party to the contract[17]— as when a contract of life insurance is payable to the "assured, his executors, administrators and assigns" for the benefit of a designated third person;[18] when a promissory note or a subscription paper is payable to a named person for a designated use, on behalf of another person or an incorporated association;[19] when a building contract which discloses the owner and the fact that it is on the owner's behalf is actually made in the name of the architect;[20] when a bond is made "to the trustees" of an incorporated association;[21] when, in separation articles between a husband and a wife and a third party, the husband has promised the third party to pay to him a certain

14. Bates *v.* B. B. Richards Lumber Co., 56 Minn. 14, 57 N. W. 218; Hitch *v.* Stonebraker, 125 Mo. 128, 28 S. W. 443 (where on the death of the trustee of a fund devised to a college, the court appointed a trustee, who gave a bond to the curators of the college; afterward the court passed an order revoking this appointment, and appointing H, and it was held that H as a trustee of an express trust could sue in his own name on the bond of his predecessor given to the curators); Bergesch *v.* Keevil, 19 Mo. 127; Kingsland, etc., Mfg. Co. *v.* Board, 60 Mo. App. 662; Wetmore *v.* Hegeman, 88 N. Y. 69 (where a claim which belonged to A was at his request assigned to B who held it in trust for A. B died without transferring the claim; his administratrix, at A's request, assigned the claim to C, who took expressly in trust for A; and it was held that C is a trustee of an express trust, and may sue in his own name without joining A); Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668; Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580; Sandmeyer *v.* Dakota F. & M. Ins. Co., 2 S. D. 346, 50 N. W. 353; Goodrich *v.* Milwaukee, 24 Wis. 422; Kimball *v.* Spicer, 12 Wis. 668.

15. Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330, 336. And see Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319; Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231.

16. Hitch *v.* Stonebraker, 125 Mo. 128, 138, 28 S. W. 443, where it was said: "While the contract in question was not made with the plaintiff, or in his name or for his benefit, yet he was in fact the trustee of the fund sought to be recovered. He is the trustee of an express trust."

17. For the general discussion of the doctrine see *supra*, I, B, 2, e, (III), (C), (5).

The limitation.— Throughout the doctrine on this point it is important to keep in mind the distinction between the person with whom and the person by whom, but not with whom or in whose name, the contract is made. See Thompson *v.* Fargo, 49 N. Y. 188, 10 Am. Rep. 342.

18. In such a case, on the death of the assured, his personal representative becomes the trustee of an express trust for the beneficiary. In Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430, 434, by the policy defendant undertook to pay to the assured, his executors and administrators, the sum of three thousand dollars ninety days after notice and proof of the death of the assured, two thousand dollars of this sum being for the express benefit of the wife, and one thousand dollars for the mother, of the assured. The court said: "This was a contract made by the assured for the benefit of his wife and mother. The undertaking of the company, in effect, was to pay to the personal representatives of the assured the sum specified in the policy for the benefit of his wife and mother. This constituted such representatives the trustees of an express trust within the meaning of section 113 of the Code."

19. Musselman *v.* Cravens, 47 Ind. 1, 4, where a note was made payable to seven persons, or their order, "for the purpose of erecting and endowing an institution of learning in the city of Logansport or its vicinity," and it was held that the persons named were trustees of an express trust, and they, or the survivors, in case of the death of one of them, were proper plaintiffs in an action on the note. And see Ridgely Nat. Bank *v.* Patton, 109 Ill. 479 (where P, an attorney, held C's claim against K for one thousand dollars and K signed and delivered to P a check which read, "Pay to Patton & Hamilton, for account of Lewis Coleman & Co., or order, ten hundred eighteen and 23-100 dollars," and it was held that this was sufficient to constitute P a trustee of an express trust for C); Dix *v.* Akera, 30 Ind. 431; Hutchins *v.* Smith, 46 Barb. (N. Y.) 235; Hudson *v.* Archer, 4 S. D. 128, 55 N. W. 1099.

20. Faust *v.* Goodnow, 4 Colo. App. 352, 36 Pac. 71.

21. Hecker *v.* Cook, 20 Colo. App. 282, 78 Pac. 311. Here the bond was simply "unto the trustees of the Great Council of Colorado." The trustees were not named in the bond. The beneficiary was an incorporated association, which was afterward incorporated under another name. It was held that the individuals who were the trustees of the association at the time when the action was brought could sue in their own names as trustees of an express trust.

sum for the support of the wife;[22] when the state takes a bond from its contractor in behalf of those employed by or furnishing material to the contractor;[23] when a city, in behalf of its citizens, has entered into a contract with a gas company to furnish gas to the citizens at certain rates, in which case an action to restrain the gas company from violating the contract may be brought in the name of the city as the trustee of an express trust;[24] when a public officer contracts on behalf of his deputies or persons assisting him;[25] or when an employer contracts in his own name for the insurance of his employees.[26] The reason for the exception readily reaches also the case of an agent contracting in his own name for an undisclosed principal.[27] And leading cases under the code, going in this respect further than some courts of law had been willing to go,[28] have recognized as a trustee of an express trust even the ostensible agent, contracting in his own name as agent in behalf of a principal named as such in the contract itself, and solely for his benefit.[29] Nor does it affect the doctrine of these cases that the agent who con-

22. Clark *v.* Fosdick, 118 N. Y. 7, 12, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132, where it is said: "By the express terms of the agreement of separation the defendant . . . agrees to pay the plaintiff for and towards the support and maintenance of his [defendant's] wife, the said Jennie P. Fosdick and their children, the yearly sum of two thousand five hundred dollars for and during the period of her natural life unless she remarries, etc., and the plaintiff and the said Jennie agree that said sum so paid shall be in full satisfaction of the support and maintenance of said Jennie P. Fosdick and children and all alimony whatsoever. This clearly constitutes the plaintiff the trustee of an express trust."

23. D entered into a contract with the United States to do certain work, and executed to the United States as obligee a bond conditioned that D would promptly pay all persons supplying him with materials for the work. Subsequently S supplied D with materials for the work. An action on the bond, in behalf of S, can be maintained in the name of the United States, as trustee of an express trust. U. S. *v.* McCann, 40 Oreg. 13, 66 Pac. 274. To same effect see U. S. *v.* Rundle, 27 Wash. 7, 67 Pac. 395. In the latter case the caption formally recited for whose use and benefit the action was brought, and it was held that if this could be deemed improper in any case, it would be disregarded as mere surplusage.

24. Muncie Natural Gas Co. *v.* Muncie, 160 Ind. 97, 112, 66 N. E. 436, 60 L. R. A. 822.

25. Stillwell *v.* Hurlbert, 18 N. Y. 374, 375. In this case a deputy sheriff, holding an execution, took a bond in the name of the sheriff, conditioned that defendant should indemnify the sheriff and "all and every person and persons aiding and assisting him in the premises." The deputy having been sued for the conversion of a wagon sold under the execution, an action on the bond was brought in the name of the sheriff. It was held that the action was properly brought. "In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust."

26. Fidelity, etc., Co. *v.* Ballard, 105 Ky. 253, 48 S. W. 1074, 20 Ky. L. Rep. 1169, where P, an employer, made two contracts of insurance, one for his own benefit, the other for the benefit of his operatives. S, an operative, was injured within the scope of the latter policy, and it was held that the action on S's claim against the insurance company could be brought in the name of P, as a trustee of an express trust.

27. *Arkansas.*— Shelby *v.* Burrow, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. N. S. 303.

California.— Tustin Fruit Assoc. *v.* Earl Fruit Co., (1898) 53 Pac. 693.

Iowa.— Brown *v.* Sharkey, 93 Iowa 157, 61 N. W. 364; Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319.

Nebraska.— Stoll *v.* Sheldon, 13 Nebr. 207, 13 N. W. 201.

New York.— Melcher *v.* Kreiser, 28 N. Y. App. Div. 362, 364, 51 N. Y. Suppl. 249, where in an action for rent, plaintiff sued "as attorney and agent for the owners," the lease being thus signed, and it was held that "if it can fairly be inferred from this paper [the lease] that Melcher made this contract for the benefit of other persons, still he is a person with whom or in whose name a contract is made for the benefit of another, and, therefore, is a trustee of an expressed trust."

Ohio.— Davis *v.* Harness, 38 Ohio St. 397.

Wisconsin.— Waterman *v.* Chicago, etc., R. Co., 61 Wis. 464, 21 N. W. 611, 50 Am. Rep. 145. In this case a common carrier agreed with P to transport a carload of goods, described as the property of P, and consigned to P. In fact the goods were the property of N, for whom P was acting, and who paid a certain overcharge in the freight. It was held in an action to recover this overcharge that P could sue as a trustee of an express trust for N.

See 37 Cent. Dig. tit. "PARTIES," § 10 *et seq.*; and also PRINCIPAL AND AGENT.

Agent claiming as real party in interest in such cases see *supra*, I, B, 2, e, (III), (D), (4), (b); *infra*, I, B, 2, e, (IV), (E). On the principle at common law see *supra*, I, B, 2, e, (I).

28. See *infra*, at the close of note 29.

29. The leading case on the point is Considerant *v.* Brisbane, 22 N. Y. 389. The facts were as follows: Brisbane had signed and delivered to Considerant certain promissory

tracts in his own name in behalf of the named principal is apparently not personally bound for the performance of the contract.[30]

(D) *Test of a "Trustee of an Express Trust"*—(1) IN GENERAL. In the prevailing doctrine of parties plaintiff under the codes the test of the relation described by the composite term "trustee of an express trust and person with whom or in whose name a contract is made for the benefit of another" is appar-

notes payable to Considerant "as executive agent" of a foreign corporation named in the notes. There was no assignment to Considerant of the corporation's interest in the notes. Upon their maturity, Considerant sued upon the notes in his own name alone. His complaint alleged that the notes had been issued upon defendant's application to plaintiff "acting as the executive agent" of the corporation, for certain shares of stock in the corporation; that plaintiff was authorized to receive subscriptions for this stock, and had been ready and willing to deliver the certificates to defendant, and on the maturity of the notes had tendered him the certificates. Defendant demurred, contending that an action on the notes could not be brought in the name of Considerant. It was held by a majority of the court that Considerant could sue as a trustee of an express trust. See also Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667. Here the petition was entitled, "S. M. Leach, Cashier," as plaintiff, and showed that the check in suit was purchased by Leach as cashier of a certain bank, with its funds, and for the bank, and that whatever was due on the causes of action belonged to the bank. It was held that as plaintiff's authority as cashier of this bank was undisputed, he held the claim as trustee of an express trust for the bank, and could sue in his representative capacity as cashier without joining the bank. In Albany, etc., Iron, etc., Co. *v.* Lundberg, 121 U. S. 451, 454, 7 S. Ct. 958, 30 L. ed. 982, Lundberg entered into a contract in his own name with the Albany Iron Company, but in the body of the contract Lundberg described himself as "agent for N. M. Hoglund's Sons and Co. of Stockholm." For a breach of this contract, Lundberg sued in his own name alone. It was contended that the action could not be maintained in his name, but should be brought in the name of Hoglund Sons and Co. The court said, per Mr. Justice Gray: "If . . . the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent, and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an action may be brought in his name." *Contra*, It was a current doctrine in common-law procedure, but not beyond dispute there, that an agent "with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon." Chitty Pl. (16th Am. ed.) 8, and cases there cited. The *ratio decidendi* was that in such a case the contract, notwithstanding its terms, is in legal effect, not with the agent but with the principal. The point was urged upon the court both in Considerant *v.* Brisbane, *supra*, and Albany Iron Co. *v.* Lundberg, *supra*. See the dissenting opinion in the former case, where Denio, J., remarks that "where it appears that the duty which the instrument acknowledges is due to a corporation, whose agent or officer is by the contract appointed to receive the thing promised, and nothing appears to show that he has any interest apart from his principal, or that there was any motive for interposing the agent as a contracting party betwen the promisors and the party equitably entitled, it ought to be held, that the promise was made to the latter." Such a construction, if adopted in Considerant *v.* Brisbane, *supra*, or Albany Iron Co. *v.* Lundberg, *supra*, would have excluded the agent as one with whom the contract was made. It is significant that the construction was rejected in both these leading cases.

30. Considerant *v.* Brisbane, 22 N. Y. 389, the court pointing out that the facts stated in the complaint showed that plaintiff who made the contract had no beneficial interest in it, was not bound by it, and furnished no part of the consideration for it.

Scope of the principle.—The very wide effect of the principle in the case is shown in the following passage from the majority opinion: "It is conceded, as it must be, that the complaint states a cause of action in the corporation, for whom the plaintiff acted as executive agent, against the defendant. . . . The company, and not the plaintiff, was the party beneficially interested, and the duty or obligation, to issue the stock (which was the sole consideration for the defendant's agreement and promise) rested upon, and could only be performed by, such company. Had the corporation, on the first day of July, or the 1st of September [when the notes matured], refused to issue the stock, no action could have been maintained by anybody on the instruments . . . set out in the complaint. On the other hand, the defendant's remedy would be against the corporation, and not against the person professedly acting as its agent. Thus, the corporation had the exclusive beneficial interest in the subject of the defendant's promises. The plaintiff was not personally bound by the contract; and the corporation was bound, unless the contract was a *nudum pactum*," per Wright, J. Nevertheless, it was held, by five judges, that the action could be prosecuted in the name of plaintiff. Considerant *v.* Brisbane, 22 N. Y. 389, 391.

ently twofold. The trustee must have a legal title to the cause which he asserts;[31] the relation must be "express."[32]

(2) A Legal Title Essential. A few cases, disregarding alike the significance of the term "trust,"[33] and the legal effect of making a contract with a person, or in his name, have apparently deemed it unnecessary that a plaintiff standing on this provision of the codes should be vested with a legal title.[34] But the weight of authority, and the test of principle require that if plaintiff sues as a trustee of an express trust or as one with whom or in whose name a contract is made for the benefit of another, he must have title to the cause which he asserts.[35] A trustee of an express trust may sue in his own name, but then the legal title, and, where possession is in controversy, the right of possession, if any, are in him, and not in the beneficiaries of the trust.[36] Accordingly it has been held that an action cannot be brought in his own name, as trustee of an express trust, by the person by whom, but not with whom, the contract in suit was made;[37] or by the mere custodian of a chattel, when the cause does not turn upon the right of possession;[38] or by a curator or guardian, unless expressly authorized by statute, as respects the property of the ward;[39] or by a receiver standing merely on the order

31. See *infra*, I, B, 2, e, (IV), (D), (2).

32. See *infra*, I, B, 2, e, (IV), (D), (3).

33. "A trust implies two estates or interests — one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest." Hospes *v.* Northwestern Mfg., etc., Co. 48 Minn. 174, 192, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470, per Mitchell, J. "A trust is where the legal estate is in one, and the equitable estate in another." Goodwin *v.* McMinn, 193 Pa. St. 646, 649, 44 Atl. 1094, 74 Am. St. Rep. 703, per Dean, J. And see 8 Words & Phrases 7119; and Trusts.

34. See cases cited *infra*, this note.

Legal title unnecessary.— The most notable instance of this erroneous doctrine is found in the view that a receiver, standing only on an order of a court authorizing him to sue, may sue in his own name in another state — for reasons of comity. See Iowa, etc., Land Co. *v.* Hoag, 132 Cal. 627, 64 Pac. 1073. In Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132, an action pending in Illinois, P was, by order of the Illinois court, appointed receiver with authority "to collect the outstanding debts." P sues in his own name in Minnesota to collect one of these debts. There is no statute in either Illinois or Minnesota authorizing a receiver to sue in his own name. It was held that P has a standing in the Minnesota court as trustee of an express trust. For *contra* doctrine see the following note. See also Receivers.

Trustee for the sole purpose of suit see Weaver *v.* Wabash, etc., Canal, 28 Ind. 112. Here a number of persons mutually promised to pay severally a certain sum for a designated purpose, the payment to be made to a committee of an association. It was further agreed that if any of the contracting parties failed to pay, an action on the agreement might be brought by P, who was not one of the contracting parties, nor a member of the association. In short, P was a third person empowered to sue for the convenience of the parties. It was held that P could sue as a trustee of an express trust. But see the later doctrine of the Indiana courts in Campbell *v.* Fichter, 168 Ind. 645, 81 N. E. 661. See, however, the remarks of Pollock (Williston Wald Pollock Contr. 216): "It is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract by a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights, but have always failed when attention was called to them. This has happened in the case of actions brought by the chairman for the time being of the directors of a company, by the directors for the time being of a company, by the purser for the time being of a cost-book company, and by the managers of a mutual marine insurance society."

35. See cases cited *infra*, note 36 *et seq.*

36. Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210, per Thompson, J. *Compare* Sweeney *v.* Waterhouse, 39 Wash. 507, 81 Pac. 1005.

37. Ferguson *v.* McMahon, 52 Ark. 433, 12 S. W. 1070; Swift *v.* Swift, 46 Cal. 266; Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210.

38. Mitchell *v.* St. Mary, 148 Ind. 111, 115, 47 N. E. 224, holding that the treasurer of an association, to whom a note indorsed in blank had been transferred as a mere custodian of the paper, without the intention of vesting him with title to the note, cannot maintain his case as trustee of an express trust. *Compare* State *v.* Karr, 37 Ind. App. 120, 76 N. E. 780.

39. Dennison *v.* Willcut, 3 Ida. 793, 35 Pac. 698; Anderson *v.* Watson, 3 Metc. (Ky.) 509. In Dixon *v.* Cardozo, 106 Cal. 506, 507, 39 Pac. 857, H D, a plaintiff, became insane after the commencement of the action; his guardian, J D, was substituted as plaintiff, in an amended complaint entitled, "John R. Dixon, as guardian of the person and estate of H. S. Dixon, an insane person." It was held that the complaint was open to demurrer,

of a foreign court.[40] And in the last case the rule is not affected by the fact that the receiver is expressly authorized, by the order of the foreign court appointing him, to sue outside the state of his appointment, has express leave from the local court to institute the suit, and alleges in his bill that there are no local creditors.[41]

(3) WHETHER AN "EXPRESS TRUST" MUST BE IN WRITING. It is occasionally suggested in the cases that the "express trust" of the code of civil procedure, even in its wider signification, as including the person with whom or in whose name a contract is made for the benefit of another, must be declared in writing.[42] But in permitting an action to be brought in the name of one "with whom a contract is made for the benefit of another," the codes do not in terms, or by reasonable intendment, require that the contract shall be in writing. On principle there appears to be no good reason for such a limitation in the law of parties to

for plaintiff's appointment as guardian "did not vest the cause of action in him," and "it is not sufficient that the complaint states facts showing a cause of action in somebody; it must show a cause of action in the plaintiff, or a general demurrer will lie." In Campbell *v.* Fichter, 168 Ind. 645, 649, 81 N. E. 661, it was said: "It is clear, however, that the mere existence of the relationship of guardian and ward does not constitute the guardian of an infant the trustee of an express trust," per Gillett, J., reviewing the authorities. The reason for this, as pointed out by the court, is that "the title to the property of the ward does not pass to the guardian. He has its care and management only. His possession is that of an agent or attorney, not that of an assignee or trustee." In Webb *v.* Hayden, 166 Mo. 39, 50, 65 S. W. 760, Valliant, J., remarks: "A curator can not, in his own name as such, maintain a suit to recover money or property due or belonging to his ward. In this respect a curator differs from an administrator . . . for the purposes of administration, and by force of that title he may maintain a suit to recover assets of the estate. But no title vests in a curator, he has only the care and management of his ward's property; the title is in the ward."

Limitation.— The rule reaches its limitation when the guardian has title to the general property of the ward (see discussion in Perkins *v.* Stimmel, 114 N. Y. 359, 363, 21 N. E. 729, 11 Am. St. Rep. 659) or to the particular cause which the guardian is asserting. Thus, a guardian may sue in his own name on a note payable to himself, although the consideration paid for it was funds of the ward and the note was purchased by the guardian for the benefit of the ward. McLean *v.* Dean, 66 Minn. 369, 69 N. W. 140. And see Schieder *v.* Dexter, 114 N. Y. App. Div. 417, 99 N. Y. Suppl. 1000; Mebane *v.* Mebane, 66 N. C. 334; and GUARDIAN AND WARD, 21 Cyc. 202 *et seq.*

40. Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 576, 25 S. Ct. 770, 49 L. ed. 1163; Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276. For the ordinary chancery receiver "is clothed with no estate in the property, but is a mere custodian of it for the court." See Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 98, 12 S. Ct. 787, 36 L. ed. 632, 637. *Contra*, for a different view prevailing in some cases see *supra*, note 34. See also RECEIVERS.

Limitation.— The reason for the rule ceases when the receiver, by statute or assignment, is clothed with a title. Bernheimer *v.* Converse, 206 U. S. 516, 534, 27 S. Ct. 755, where it is said: "In this case the statute confers the right upon the receiver, as a quasi assignee, and representative of the creditors."

41. Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276. Here, in an action pending in the circuit court of the United States for the southern district of Iowa, F was appointed receiver and, by the order of the court appointing him, was authorized to institute and prosecute outside of the southern district of Iowa, in other courts of competent jurisdiction, such action or actions at law or suit or suits in equity as in the judgment of said receiver might be necessary or expedient to institute or prosecute in order to collect and reduce to his possession all such rights, debts, equitable interests, property and assets of said corporation so that the proceeds of the same might be applied to the payment of the debts of the said corporation. Thereafter, this receiver, upon leave granted, brought suit in the United States circuit court for the District of Colorado, alleging in his bill that there were no creditors in the jurisdiction of the forum. It was held that the receiver could not maintain his suit in Colorado. And see Hayward *v.* Leeson, 176 Mass. 310, 324, 57 N. E. 656, 49 L. R. A. 725. Here the the forum. It was held that the receiver appointed by that court to sue in the courts of Massachusetts "either in his own name as receiver or in the name of" his corporation. It was held that as this order did not operate as an assignment of the choses in action to the receiver he could not sue in his own name in Massachusetts. But see Hale *v.* Tyler, 104 Fed. 757.

42. See the definitions given in Weaver *v.* Wabash, etc., Canal, 28 Ind. 112, and Considerant *v.* Brisbane, 22 N. Y. 389, 395. In State *v.* Hawes, 177 Mo. 360, 381, 76 S. W. 653, 657, the supreme court of Missouri applies directly to this provision of the code (Rev. St. (1899) §§ 540, 541) the provision of the Missouri Revised Statutes (Rev. St. (1899) § 3416) that "all declarations or creations of trust shall be manifested and

actions, however important it may be in the law of trusts;[43] there is also good authority against the doctrine.[44]

(E) *"Trustee of an Express Trust" and "Real Party in Interest."* In a number of code states the legal title has been recognized by the courts as a sufficient, although not the necessary, test of the "real party in interest."[45] With the further recognition of the legal title as the test of a trustee of an express trust,[46] it follows that a person who is clothed with the full legal title to a given cause of action has a twofold character, in the doctrine of parties plaintiff under the codes; he is both the real party in interest and the trustee of an express trust.[47] It is possible that this result was not anticipated in the earlier doctrine of the codes;[48] but it may be more reasonable to interpret their provision permitting the trustee of an express trust to sue, as meaning that the legal owner may sue even when another's beneficial ownership is apparent on the face of the claim.[49] In this view the term "trustee of an express trust" would properly

proved by some writing signed by the party who is, or shall be, by law enabled to declare such trusts, or by his last will, in writing, or else they shall be void."

43. See TRUSTS.

44. See cases cited *infra*, this note.

Express trusts by parol.— See the remarks of Sherwood, J., in Snider *v.* Adams Express Co., 77 Mo. 523, 526: "It is claimed by counsel for defendant that there is no express trust in this case, because such trust . . . cannot be proved by parol, and can only be manifested or proved by some writing. Whatever of truth there may be in this position regarding trusts as to realty, it is not true regarding personal property; for such property is not within the terms of the statute, and such trusts, consequently, may be declared and proved by parol." And see Fidelity, etc., Co. *v.* Ballard, 105 Ky. 253, 48 S. W. 1074, 20 Ky. L. Rep. 1169 (where the contract sued upon by the trustee in his own name alone was a parol contract for the insurance of the workmen employed by the contracting party); Brown *v.* Cherry, 56 Barb. (N. Y.) 635; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330, 336 (where the court, however, evades the doctrine in part, through the suggestion that, although it did not affirmatively appear on the face of the notes or mortgage in suit that plaintiff was a trustee for the holders of the notes still it did not appear that he was not such trustee, or that "some other instrument in writing, properly executed, did not fully evidence the appointment of the trustee and define his duties"); Arcade Hotel Co. *v.* Wiatt, 1 Ohio Cir. Ct. 55, 57, 1 Ohio Cir. Dec. 34. In the last case a guest at a hotel deposited with the clerk a sum of money for safekeeping. The clerk fled with the money. On the hotel's refusal to reimburse the guest he sued in his own name for the whole sum. It appeared that the money was in his possession as trustee, and not in his own right. It was held that the action was properly brought in the name of the guest. The court said: "It is claimed . . . that to constitute an express trust, there must be an instrument in writing declaring the trust. But this is not required in this state."

45. See *supra*, I, B, 2, e, (III), (D), (3), (h).

46. See *supra*, I, B, 2, e, (IV), (D), (1).

47. Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132, per Gantt, P. J.

Illustrations.— A non-resident corporation, which was not entitled to sue in South Dakota, because of a failure to file its articles of incorporation and appoint a resident agent, transferred its claim to P, by an assignment which was absolute on its face, but with the understanding that the assignee should collect the claim and pay the net proceeds to the corporation. It was held that the assignee was not only "the real party in interest" but entitled to sue as a "trustee of an express trust." Citizens Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1058, 62 Am. St. Rep. 891. See also Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550; Minnesota Thresher Mfg. Co. *v.* Heipler, 49 Minn. 395, 52 N. W. 33; Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132 (holding that the fact that such assignee is the trustee of an express trust, and is to account to the assignor for the proceeds of the judgment, makes him none the less the "real party in interest"); Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Snider *v.* Adams Express Co., 77 Mo. 523; Beattie *v.* Lett, 28 Mo. 596; Webb *v.* Morgan, 14 Mo. 428; Howe *v.* Mittelberg, 96 Mo. App. 490, 70 S. W. 396 (holding that a person to whom a chose in action has been assigned for collection is the "trustee of an express trust").

48. See *supra*, I, B, 2, e, (III), (D), (4).

49. McLaughlin *v.* Deadwood First Nat. Bank, 6 Dak. 406, 43 N. W. 715. Here an agent of a corporation had deposited money with a bank in his own name as "agent." In holding that he could sue the bank in his own name for a balance alleged to be due on this account, the court, per Spencer, J., remarked: "Whether the word 'agent' is to be considered as mere description of the person, or as indicating that he is acting in a representative capacity for another, his right to maintain the action is not defeated. In the former instance, the promise was to him individually; and in the latter, the promise was to him, and with him, for the benefit of another, and necessarily involves a trust, and

apply only to those cases in which the beneficial ownership is thus disclosed.[50] In other cases the person vested with the legal title can conveniently be classed as a "real party in interest."[51]

(v) *Executor or Administrator*—(a) *At Common Law*—(1) In General. Vested with the title to so much of the deceased's personal estate as survived his death,[52] an executor or administrator held the only remedial interest in respect to that estate which a court of law would recognize.[53] His right of action could not be transferred to another by any terms, however express, in the contract or obligation in suit.[54]

(2) Representative Character. The remedial interest of an executor or administrator did not always require that his pleading make a showing of his representative character. Such a showing, it is true, was imperative when his action was on a cause which had accrued wholly or in part in the lifetime of the deceased.[55] But when the cause of action arose wholly after the death of his decedent, the executor or administrator in suing for the assets of the estate might claim either in his representative character or in his personal character.[56]

(b) *In Code Pleading*—(1) In General. By the terms of the codes of civil procedure an executor or administrator is classed with the trustee of an express trust as a permissive or representative plaintiff, "who may sue without joining with him the person for whose benefit the suit is prosecuted."[57] The suggestion of the statute is that the beneficiary also may sue.[58] But in the main the result under the provisions of the code is very close to that reached at common law. The title to the surviving personal estate of the decedent is in his personal representative, and the action as a rule not only may, but must, be brought in his name.[59] As at common law also the personal representative must sue in his repre-

brings him within the purview of the statute. . . . The object of the legislature, by the enactment of these provisions, was evidently to preserve the right of action in all cases of express trusts; and this, whether the trust was declared in the instrument, or was necessarily to be inferred from it."

50. Considerant *v.* Brisbane, 22 N. Y. 389. It is to be noticed, however, that even in such cases the courts sometimes class plaintiff as "the real party in interest." See Minnesota Thresher Mfg. Co. *v.* Heisler, 49 Minn. 395, 52 N. W. 33.

51. see *supra*, I, B, 2, e, (III), (D), (4), (b).

Accordingly, when one holds the legal title for the benefit of others, but his representative character does not appear in the evidence of his legal title, he may sue without alleging the trust. Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 407, 31 N. E. 231. Or if he adds the suffix "trustee" to his name in the pleadings, it may be treated as a mere *descriptio personæ*. Marion Bond Co. *v.* Mexican Coffee, etc., Co., 160 Ind. 558, 65 N. E. 748.

52. See Executors and Administrators, 18 Cyc. 206.

53. See Dicey Parties 205 *et seq.*; Chitty Pl. (16th Am. ed.) 22 *et seq.*, and the common-law illustrations there given.

54. "If X binds himself to M to pay a certain sum of money to M or his heirs, M's executors or administrators, and not his heirs, have a right to the money, and should sue for it." Dicey Parties 207. So, when a promise was made to the deceased for the exclusive benefit of a third person, the action upon it, under the settled common law in England, lay in the name of the executor or administrator of the promisee. See Dicey Parties 208.

55. Dicey Parties 216 *et seq.* So, if the contract was made with the deceased, whether broken before or after his death, the executor or administrator could sue only in his representative character. Dicey Parties 217.

56. "When a contract is made with an executor, he may sue either in his own name personally (as being the party contracted with), or in his representative character, if the money to be recovered would be assets of the estate; and this he may do not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor." Dicey Parties 217.

57. See the statutes in the code states enumerated *supra*, p. 36, note 13.

The other representative plaintiff, in the original code, besides "the trustee of an express trust" is "the person expressly authorized by statute." See *infra*, I, B, 2, e, (v).

58. As is recognized in the case of a trustee of an express trust see *supra*, I, B, 2, e, (IV).

59. Ives *v.* Mutual L. Ins. Co., 129 N. C. 28, 39 S. E. 631; and cases cited *infra*, under the following topic.

The remedial interest of the personal representative may extend to the realty of the deceased, as when he has devised land to the executor in trust, or when a statute gives an executor or administrator a right to the possession of the decedent's real estate as part of the assets. In the former case the personal representative is properly classed as a

sentative character on causes which arose in the lifetime of his decedent, but may sue either in his representative or in his personal character on causes accruing since the death.[60]

(2) Remedial Interest of Beneficiary. Pleaders in code states have sometimes brought the action in the names of the beneficiaries of a decedent's personal estate, on the theory that they are the real parties in interest in getting in the assets of the estate, and therefore the proper plaintiffs under the code.[61] As a rule, however, the courts have refused to recognize these beneficiaries as real parties in interest within the meaning of the code.[62] However material his interest, the beneficiary of the personal estate has, in a normal case, no title which the court can recognize; at the most he is but an inchoate real party in interest.[63] Until his interest accrues he has no right of action.[64] But the rule is subject to this limitation: If, in the special circumstances of a case, the beneficiaries of the personal estate show an equitable title to a cause which normally belongs to the personal representative the courts of a code state may recognize them as real parties in interest.[65] The grounds for the exception are substantially those which have been established in equity procedure.[66] And in the civil action of the code, as in the suit in equity, if the beneficiaries sue instead of the personal representative, the facts which take the case out of the rule must appear in the complaint or petition, and all the beneficiaries must be parties.[67]

(vi) *Person Expressly Authorized by Statute*—(a) *In General.* With the "trustee of an express trust" and the "executor or administrator," the codes of civil procedure place also, as a third class of representative plaintiffs, "the person expressly authorized by statute" to sue.[68] Neither the codes nor the cases define the limits of this class. It includes evidently those public officers who, as such, are authorized by some statute to sue in their own names and official characters.[69] It may include also the holder of a private office, as the president or treasurer of a private association, whether incorporated or not, and whether formed for business or pleasure, who as such is authorized by statute, in the exercise of

trustee of an express trust. See *supra*, I, B, 2, e, (iv). In the latter case he is rather "a person expressly authorized by statute to sue." See *infra*, I, B, 2, e, (vi). See also Meeks *v.* Hahn, 20 Cal. 620; Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632; Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239.

60. The distinction is illustrated in the pleading, under the code, in Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11. See also Oliver *v.* Townsend, 16 Iowa 430; Lawrence *v.* Vilas, 20 Wis. 381; Knox *v.* Bigelow, 15 Wis. 415.

61. See the argument of counsel in Haynes *v.* Harris, 33 Iowa 516.

62. Haynes *v.* Harris, 33 Iowa 516; Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483; Ives *v.* New York Mut. L. Ins. Co., 129 N. C. 28, 39 S. E. 631; Davis *v.* Corwine, 25 Ohio St. 668.

63. See the reasoning of the court in Haynes *v.* Harris, 33 Iowa 516, and Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

64. Accordingly the objection to an action in his name is not dilatory but peremptory; if the defect appears on the face of the complaint it can be reached by a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483. And see Ives *v.* New York Mut. L. Ins. Co., 129 N. C. 28, 39 S. E. 631.

65. Thus the heirs have been permitted to sue when they show that there are no debts of the estate, and no personal representative, and that the time for appointing a personal representative has passed. Begien *v.* Freeman, 75 Ind. 398; Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157. And see the remarks of Norval, J., in Cox *v.* Yeazel, 49 Nebr. 343, 349, 68 N. W. 483. But *compare* Davis *v.* Corwine, 25 Ohio St. 668.

So when the estate has been settled except for a claim in the interest of one of the heirs, and there is a showing that the action of the administrator is prejudicial to this outstanding interest. Tecumseh Nat. Bank *v.* McGee, 61 Nebr. 709, 85 N. W. 949, where the outstanding heir was substituted for the administrator.

So again, when the administrator has refused to bring the action, the heirs may sue. Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239.

66. See the remarks of Chancellor Kent in Long *v.* Majestre, 1 Johns. Ch. (N. Y.) 305, 307. And *compare* Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239. See also Van Dyke *v.* Van Dyke, 31 N. J. Eq. 176.

67. Manifold *v.* Jones, 117 Ind. 212, 20 N. E. 124.

68. So does the New York code of 1848, and the many codes which have followed it. For the names of the code states see *supra*, p. 36, note 13.

69. The official character must appear by distinct allegation in the pleading. Atkinson

his personal authority, to sue in his own name.[70] A private citizen, as a taxpayer, may sometimes sue by virtue of the enactment;[71] and sometimes the state may appear as plaintiff in a civil action, suing for the benefit of a private citizen.[72]

(B) *Distinguishing Characteristic.* The "person expressly authorized by statute" differs from other plaintiffs, and in particular from "trustees of an express trust" and executors or administrators, in that he needs no title under the substantive law to the cause of action which he sets up;[73] his right of action arises directly out of the remedial statute, and exists by virtue of it.[74]

(VII) *GUARDIAN AS PLAINTIFF*—(A) *At Common Law.* At common law a guardian, having no title to his ward's property, could not sue in respect to it in his own name alone, either individually or as guardian.[75]

(B) *Under the Codes.* Under the codes there has been a tendency in some courts to treat a guardian as a trustee of an express trust,[76] but the position is

v. Cawley, 112 Ga. 485, 37 S. E. 715; Gould *v.* Glass, 19 Barb. (N. Y.) 179.

70. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919; Peters *v.* Foster, 56 Hun (N. Y.) 607, 10 N. Y. Suppl. 389; Tibbetts *v.* Blood, 21 Barb. (N. Y.) 650; Platt *v.* Colvin, 50 Ohio St. 703, 704, 36 N. E. 735, where the complaint alleged that "by the laws of the state of New York, under which said express company was organized and now exists, it is authorized and empowered to sue in the name of the president, who is said Thomas C. Platt," etc.

71. Metzger *v.* Attica, etc., R. Co., 79 N. Y. 171; Ayers *v.* Lawrence, 59 N. Y. 192; Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610.

72. As when a statute authorized an action in the name of the state, to recover money lost at gaming, for the benefit of the wife of the user. Ervin *v.* State, 150 Ind. 332, 337, 48 N. E. 249, where McCabe, C. J., said: "We hold that the code does not require the action to be brought in the name of the real party in interest, where, as here, a person, the State, is expressly authorized by statute to sue without joining the person for whose benefit the action is prosecuted."

73. See *supra*, I, B, 2, e, (IV), (V).

74. Illustration.—A New York statute provided that "any joint stock company or association, consisting of seven or more shareholders, or associates, may sue and be sued in the name of the president or treasurer for the time being." It was held that when a complaint alleged that the Forestville Division No. 411, Sons of Temperance, was an association composed of seven persons and upward, that the note in suit was given for the benefit of the association, that it was the property of the members of the association, and owned by them in common, the statement was sufficient to authorize an action in the name of the treasurer of the association for the time being, without making the associated parties or even naming them in the complaint. Tibbetts *v.* Blood, 21 Barb. (N. Y.) 650, 654.

75. "At common law there was no warrant, nor authority for a suit by a guardian in his own name for the benefit of the infant, although he might disclose his fiduciary character and purpose. . . . At law the action must have been brought in the name of the party having the legal right. The guardian could of course sue upon contracts made with himself; but not generally, for property or money of the infant." Turner *v.* Alexander, 41 Ark. 254, 257, per Eakin, J. "A guardian can not sue at law or in chancery as plaintiff or complainant, in his own name alone, to recover the ward's estate from either an administrator or executor, or from a former guardian who may be removed from office, or from any other person who may have adverse possession of the ward's real or personal estate; the suit must be in the name of the infant entitled, by his guardian or *prochein ami*." McChord *v.* Fisher, 13 B. Mon. (Ky.) 193, 194, per Hise, J. And see Hoare *v.* Harris, 11 Ill. 24; Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229; Lombard *v.* Morse, 155 Mass. 136, 137, 29 N. E. 205, 14 L. R. A. 273, where it is said: "The title to the property of the ward does not pass to the guardian. He has its care and management only. His position is that of an agent or attorney, not that of an assignee or trustee. . . . There is, therefore, no good reason for making a general exception allowing a guardian to sue in his own name, to avoid the deed of his insane ward; and there is the grave objection that, the ward not being a party, the decree would not bind him, should he recover his reason, nor those who would succeed to his estate upon his death."

That this common-law rule survives in the code states unless the guardian is expressly vested by statute with title or is expressly authorized by statute to sue in his own name see Campbell *v.* Fichter, 168 Ind. 645, 81 N. E. 661; Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022.

76. Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; Schlieder *v.* Dexter, 114 N. Y. App. Div. 417, 99 N. Y. Suppl. 1000; Coakley *v.* Mahar, 36 Hun (N. Y.) 157; Thomas *v.* Bennett, 56 Barb. (N. Y.) 197; Bayer *v.* Phillips, 17 Abb. N. Cas. (N. Y.) 425; Buermann *v.* Buermann, 17 Abb. N. Cas. (N. Y.) 391; Hauenstein *v.* Kull, 59 How. Pr. (N. Y.) 24. *Compare* Person *v.* Warren, 14 Barb. (N. Y.) 488, discussing the analogous question whether a committee of a lunatic is a trustee of an express trust. The doctrine proceeds in part upon the supposition that the committee ac-

untenable in principle, except when the guardian has been vested with some title or estate in the ward's property.[77] The decisions are not at one on what constitutes this title or interest in a general guardian.[78] A considerable number of the codes, however, expressly class the guardian with "trustees of an express trust," executors or administrators, and "persons expressly authorized by statute" as a representative plaintiff who may sue in his own name without joining his beneficiary.[79] The apparent legal effect of this is to permit the guardian to sue as a person expressly authorized by statute.[80]

3. REQUISITE OF CAPACITY TO SUE — a. Statement of Rule. In addition to a showing of legal entity,[81] and of remedial interest,[82] a plaintiff, to maintain his standing against a possible dilatory objection, must have a legal capacity to sue.[83]

b. What Meant by Capacity to Sue — (I) *IN GENERAL.* Although sometimes confused with the question of plaintiff's right of action,[84] the rule requiring a capacity to sue is of an essentially different nature.[85] Irrespective of the question whether plaintiff has title to a valid cause of action, it raises the question whether plaintiff, even if he has a right to relief in court, is under any personal disability — as insanity, infancy, coverture, or the like — which in legal effect impairs his right to come into court and there demand, in his own name alone, the presence of defendant.[86]

(II) *DISTINGUISHED FROM RIGHT OF ACTION.* It is sometimes said that the test of capacity to sue involves not only the question of personal disability in plaintiff but also the question of plaintiff's "title to the character in which he sues."[87] This, however, has no proper application to any question of plaintiff's right of action.[88] A plaintiff having a right of action may yet be without a

quired some right to the ward's estate. See the remarks of Barker, J., in Lombard *v.* Morse, 155 Mass. 136, 137, 29 N. E. 205, 14 L. R. A. 273.

77. See *supra*, I, B, 2, e, (IV); and I, B, 2, e, (IV), (D), (1). And see Campbell *v.* Fichter, 168 Ind. 645, 81 N. E. 661. *Compare* Schlieder *v.* Dexter, 114 N. Y. App. Div. 417, 418, 99 N. Y. Suppl. 1000, where Patterson, J., remarks: "It is undoubtedly the rule that where a cause of action exists directly in favor of an infant, the action should be brought through a guardian *ad litem*; but there are cases, and this we think is one of them, in which the general guardian may sue as the trustee of an express trust."

78. Under a statute declaring that it shall be the duty of the guardian of a minor "to collect all debts due such ward," it has been held that a guardian may bring suit in his own name to collect such debts. Kinsley *v.* Kinsley, 150 Ind. 67, 70, 49 N. E. 819. But see Campbell *v.* Fichter, 168 Ind. 645, 81 N. E. 661.

On the other hand it has been held that a statute requiring every guardian to "demand, sue for, and receive all debts due his ward" does not permit an action in the name of the guardian. Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022. The statute, declared the court, is "merely a re-enactment of the common-law rule that a suit by an infant must be brought by his guardian. The statute does not say that the guardian shall bring suit in his own name." And see GUARDIAN AND WARD, 21 Cyc. 202.

79. See the codes of Arkansas, Iowa, Kansas, Kentucky, Nebraska, Ohio, Oklahoma, Utah, Washington, and Wyoming.

80. See *supra*, I, B, 2, e, (VI).

81. See *supra*, I, B, 1.

82. See *supra*, I, B, 2.

83. See cases cited *infra*, note 86 *et seq.*

84. See *supra*, I, B, 2, b, (IV).

85. See *infra*, I, B, 3, b, (II).

86. Meeks *v.* Vassault, 16 Fed. Cas. No. 9,393, 3 Sawy. 206, 213 [*approved* in Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565], where Sawyer, J., said: "The disability is something pertaining to the person of the party — a personal incapacity — and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue." And see Ward *v.* Petrie, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790, defining capacity to sue as "the right to come into court," and distinguishing it from the "right to relief in court."

87. Coddington *v.* Canaday, 157 Ind. 243, 252, 61 N. E. 567 (*dictum*); Bliss Code Pl. (2d ed.) § 407; Moak Van Santvoord 668. See the illustration in Haskins *v.* Alcott, 13 Ohio St. 210.

88. See cases cited *infra*, this note.

Illustrations.— P, administrator of B, sued D upon his promissory note to B. Defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and sought to sustain this demurrer by the objection that the complaint did not directly aver that B was dead or that P had been appointed her administrator. In support of his complaint P insisted that an objection that plaintiff sued in a personal capacity when he should have sued in a representative capacity was available only under a demurrer challenging his

capacity to sue;[89] a plaintiff with capacity to sue may have no right of action.[90] The two things are essentially different in their natures, and in their results; the right of action is of the substance, the capacity to sue is necessary only as against a dilatory objection.[91] For the same reason an objection that plaintiff is not the real party in interest does not amount to an objection that plaintiff has not legal capacity to sue.[92] So, when the objection to plaintiff's legal capacity is properly made and sustained, a judgment dismissing the case on that ground is not a judgment upon the merits, and will not bar a future action.[93]

(III) *Typical Instances.* That plaintiff is without capacity to sue is a proper objection when an action is brought in his own name alone by an insane

legal capacity to sue. But the court was clear that if it appeared that plaintiff sued in his personal capacity to collect a debt due an estate, then the complaint "does not show a right of action in him, but in an administrator of such estate," and that this question was properly presented by a demurrer for want of facts. Toner *v.* Wagner, 158 Ind. 447, 449, 63 N. E. 859. A quo warranto was brought on the relation of B against M claiming as mayor. Under the procedure of the *lex fori*, quo warranto could be maintained either by the prosecuting attorney or by the person claiming the office. B was not the prosecuting attorney but was the previous incumbent of the office. On a rehearing it was objected that B could not hold over until his successor was qualified, and therefore could not bring quo warranto as claiming the office. B, however, insisted that if valid at all the objection was now too late, since it went to the question of his legal capacity to sue, and therefore should have been raised at the outset. It was held that a failure to state a cause of action in his own favor goes to the sufficiency in substance of the petition and not to plaintiff's legal capacity, and therefore could be raised at any stage. "The right of the relator to maintain the action depends upon his own right to the office. The statement of that right is essential to the statement of a cause of action." State *v.* Moores, 58 Nebr. 285, 288, 78 N. W. 529, per Irvine, C. See also the cases cited *infra*, note 89 *et seq.* And *compare* Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659.

89. Ward *v.* Petrie, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790, where Vann, J., said: "An infant has no capacity to sue, and, hence, could not lawfully cause the defendants to be brought into court even if he had a good cause of action against them." And see Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. N. S. 961.

90. Ward *v.* Petrie, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790, where Vann, J., said: "Plaintiff was duly appointed receiver and has a legal capacity to sue as such, and, hence, could bring the defendants into court by the service of a summons upon them even if he had no cause of action against them."

91. *California.*— Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675.

Indiana.— Toner *v.* Wagner, 158 Ind. 447, 63 N. E. 859; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Campbell *v.* Campbell, 121 Ind. 178, 23 N. E. 81; Tipton County *v.* Kimberlin, 108 Ind. 449, 9 N. E. 407; Pence *v.* Aughe, 101 Ind. 317; Traylor *v.* Dykins, 91 Ind. 229; Nave *v.* Hadley, 74 Ind. 155; Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

Kansas.— Winfield Town Co. *v.* Maris, 11 Kan. 128.

Missouri.— Jones *v.* Steele, 36 Mo. 324.

Montana.— Berkin *v.* Marsh, 18 Mont. 152, 159, 44 Pac. 528, 56 Am. St. Rep. 565, where plaintiff contended that at a given date he was under a legal disability to sue, "for the reason that the cause of action had not yet arisen." The court said: "Is this a legal disability in the plaintiff? We think that it is not. A legal disability to sue pertains to the person desiring to sue. . . . The accruing of the cause of action is not personal to the plaintiff proposing to sue. It is not a disability on his part."

Nebraska.— State *v.* Moores, 58 Nebr. 285, 78 N. W. 529; Rodgers *v.* Levy, 36 Nebr. 601, 54 N. W. 1080; Farrell *v.* Cook, 16 Nebr. 483, 20 N. W. 720, 49 Am. Rep. 721.

New York.— Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; Nanz *v.* Oakley, 122 N. Y. 631, 25 N. E. 263; Perkins *v.* Stimmel, 114 N. Y. 359, 365, 368, 369, 21 N. E. 729, 11 Am. St. Rep. 659; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648; Palmer *v.* Davis, 28 N. Y. 242, 250; Van Zandt *v.* Grant, 67 N. Y. App. Div. 70, 73 N. Y. Suppl. 600.

Ohio.— Buckingham *v.* Buckingham, 36 Ohio St. 68.

Oregon.— Owings *v.* Turner, 48 Oreg. 462, 87 Pac. 160.

Wisconsin.— Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. N. S. 961; Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657.

See also, generally, PLEADING.

92. Van Zandt *v.* Grant, 67 N. Y. App. 70, 73 N. Y. Suppl. 600; Buckingham *v.* Buckingham, 36 Ohio St. 68, 78, where it is said that the objection that the cause of action for which plaintiff sues was assigned before the commencement of the action does not relate to the capacity of plaintiff to sue, but to the fact that the right of action sought to be enforced is not in plaintiff.

93. Rodgers *v.* Levy, 36 Nebr. 601, 54 N. W. 1080.

person,[94] or by an infant,[95] or, in some states still, by a married woman.[96] These classes are sometimes referred to as if they included all instances of disabilities to sue;[97] but the principle has been recognized in other connections,[98] as when a partnership sues in a collective name, under a permissive statute, without alleging compliance with certain statutory conditions;[99] when a foreign corporation sues upon a domestic cause of action, without alleging compliance with a statute prescribing the conditions upon which foreign corporations may do business within the state;[1] or when the action is brought in the name of an alien enemy.[2]

c. When Rule Applies. From the nature of legal capacity to sue, it is evident that the rule requiring it, unlike the rules requiring legal entity and remedial interest in plaintiff, is not a rule of the first instance. Plaintiff need make no affirmative showing of his legal capacity at the threshold of the case.[3] If in fact the capacity is lacking, the defect must be insisted upon, through proper pleading in due season, by defendant.[4]

II. WHO MAY BE A PARTY DEFENDANT.[5]

A. In General. That a court may recognize and hold a party as a defendant in a personal action, three things in the main are requisite: (1) The party defendant must have an entity which the court can recognize;[6] (2) defendant, in the eye of the law, must have infringed the right of action set up by plaintiff;[7] and (3) defendant must be amenable to the process of the trial court.[8]

B. Requisites Specifically Considered — 1. Requisite of Legal Entity — a. At Common Law — (I) *Distinguished From Legal Entity of Plaintiff.* For the most part the legal entity required for defendant is the same as the legal entity required for plaintiff.[9] Whether plaintiff or defendant, a party to a suit must be a person in law — a natural person, an artificial person, or a quasi-artificial person.[10] But the limits of the rule are less strictly drawn when the question con-

94. Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. N. S. 961. And see INSANE PERSONS, 22 Cyc. 1104.

95. Parkins *v.* Alexander, 105 Iowa 74, 76, 74 N. W. 769 (where Robinson, J., said: "It is the theory of the law that a minor is not competent to maintain and protect his own interests in court"); Jones *v.* Steele, 36 Mo. 324. And see INFANTS, 22 Cyc. 503.

96. Lindsay *v.* Oregon Short Line R. Co., 13 Ida. 477, 90 Pac. 984, 12 L. R. A. N. S. 184. And see HUSBAND AND WIFE, 21 Cyc. 1513, 1514 *et seq.*

97. Campbell *v.* Campbell, 121 Ind. 178, 23 N. E. 81; Winfield Town Co. *v.* Maris, 11 Kan. 128.

98. See the varied grounds for a common-law plea in abatement to the disability of the party suing. 1 Chitty Pl. 464.

Capacity of state to sue.— The supreme court of Indiana has recently suggested that a defendant may, by demurrer upon that ground, question the capacity of the state to sue; but it is added: "The courts of the State and United States are open to the State, both in its sovereign capacity and by virtue of its corporate rights." State *v.* Ohio Oil Co., 150 Ind. 21, 27, 49 N. E. 809, 47 L. R. A. 627, per McCabe, J.

99. As that it is "doing business within the state." Haskins *v.* Alcott, 13 Ohio St. 210, 216.

So, when the partnership sues in a "fictitious" name, but does not allege, as the statute requires, that the fictitious name has been registered in the proper office. Phillips *v.* Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924.

1. Northrup *v.* A. G. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879; American Hand-Sewed Shoe Co. *v.* O'Rourke, 23 Mont. 530, 59 Pac. 910; Zion Co-operative Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915; Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440; Acme Mercantile Agency *v.* Rochford, 10 S. D. 203, 72 N. W. 466, 66 Am. St. Rep. 714. And see FOREIGN CORPORATIONS, 19 Cyc. 1195.

2. McNair *v.* Toler, 21 Minn. 175; Burnside *v.* Matthews, 54 N. Y. 78. See also WAR.

3. Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675; Northrup *v.* A. G. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879; Phœnix Bank *v.* Donnell, 40 N. Y. 410; Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. N. S. 961.

4. See, generally, PLEADING.

5. In actions against particular classes of parties see cross-references *supra*, p. 8.

In particular actions or proceedings see cross-references *supra*, p. 8.

6. See *infra*, II, B, 1.

7. See *infra*, II, B, 2.

8. See *infra*, II, B, 3.

9. See *supra*, I, B, 1.

10. Western, etc., R. Co. *v.* Dalton Marble

cerns the party defendant than in the case of the party plaintiff. A firm or unincorporated association may sometimes be sued in its collective name, although it has no standing as plaintiff in this name.[11] So, while the civil death which attaches to a person as an incident of his conviction of an infamous crime destroys his right to sue,[12] it does not destroy the right of others to prosecute suits against him.[13] And while an action cannot be brought in the name of an inanimate thing as plaintiff,[14] it may sometimes be brought against an inanimate thing as a defendant.[15]

(II) *Typical Instances.* The principle has an important application in actions against partnerships, societies, clubs, and other unincorporated associations. In the absence of a specific statute to the contrary, the rule stands, at common law and under the codes, that an unincorporated association is not recognized as having a legal existence apart from its members.[16] The action lies against the members individually,[17] but not against the unincorporated association in its collective capacity and name.[18] There is no such entity known to the law as an

Works, 122 Ga. 774, 50 S. E. 978; Barbour *v.* Albany Lodge No. 24, F. & A. M., 73 Ga. 474, 476. The action must be against some person, either natural or artificial. Accordingly, when suit was brought against "Albany Lodge, No. 24, Free and Accepted Masons," and "Albany Chapter, No. 15, Royal Arch Masons," without alleging either that defendants were corporations or that the members were partners, so as to be sued as such, it was held that there was no party defendant, no case in court, and nothing to amend by. Barbour *v.* Albany Lodge No. 24, F. & A. M., *supra*. See also *supra*, I, B, 1, b, (I), (II), (III).

11. Moore *v.* Burns, 60 Ala. 269; Gilman *v.* Cosgrove, 22 Cal. 356; St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725; Mayer *v.* Journeymen Stone Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

12. See *supra*, I, B, 1, b, (II), (B).

13. Smith *v.* McGlasson, 7 J. J. Marsh. (Ky.) 154; Gray *v.* Gray, 104 Mo. App. 520, 79 S. W. 505.

14. As in the name of a steamboat see The Pembinaw *v.* Wilson, 11 Iowa 479; The Steamboat M. Burns *v.* Reynolds, 9 Wall. (U. S.) 237, 19 L. ed. 620. See also *supra*, I, B, 1, d, (II).

15. The Pembinaw *v.* Wilson, 11 Iowa 479, 480, where Baldwin, J., said: "There is a special provision of our statute under which suits may be brought against boats by their name when a lien is sought to be enforced." "It is said that the statute of Missouri allows the steamboat to be sued by name, and allows a defense to be made by the owner in the name of the vessel. But the States cannot in this manner confer on an inanimate object, without sense, or reason, or legal capacity, the right to prosecute legal proceedings in the Federal courts." The Steamboat M. Burns *v.* Reynolds, 9 Wall. (U. S.) 237, 239, 19 L. ed. 620, per Miller, J.

16. Dicey Parties, Rule 55. In Karges Furniture Co. *v.* Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 423, 75 N. E. 877, 2 L. R. A. N. S. 788, it is said: "In the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized at common law as having any legal existence distinct from their members."

17. Pickett *v.* Walsh, 192 Mass. 572, 589, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1067, where Loring, J., says: "At law, if the objection is properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of members may be made parties defendant as representatives of the class." See also Dicey Parties, Rule 55.

18. *Georgia.*— Barbour *v.* Albany Lodge No. 24, F. & A. M., 73 Ga. 474.

Indiana.— Karges Furniture Co. *v.* Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. N. S. 788.

Kentucky.— Soper *v.* Clay City Lumber Co., 53 S. W. 267, 21 Ky. L. Rep. 933, where Paynter, J., said: "The appellee not being a corporation, it had no such existence in fact and in law as would enable the plaintiff to sue it in the name of Clay City Lumber Co. and take judgment against it. Such judgment is void."

Massachusetts.— Pickett *v.* Walsh, 192 Mass. 572, 589, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1067 (where Loring, J., said: "Plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. . . . A trade union was made a party defendant in Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722, and the anomaly seems to have escaped attention"); Edwards *v.* Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791.

Minnesota.— St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

Nebraska.— Cleland *v.* Anderson, 66 Nebr. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. N. S. 136.

New York.— Hanke *v.* Cigar Makers' Inter-

unincorporated association, and consequently it cannot be made a party defendant.[19] Nor is the court bound to recognize an unincorporated association as a legal entity capable of being sued, merely because the statute of another state permits it to be sued in the association name,[20] or because, under the *lex fori*, an action may be brought against an officer of the association as such;[21] or because the members of the association, or some of its officers, are made parties along with the association.[22]

b. Statutory Modifications — (i) *In General.* The common-law rule noticed above,[23] as to the proper party defendant in actions against unincorporated associations, was too rigid for practical purposes in the conditions of modern life.[24] To prevent a failure of justice the courts of equity adopted a modified doctrine, which permitted a suit to be brought against some of the members of a numerous unincorporated association as representative of themselves and all others having the same interest.[25] The later tendency has been to relax the rule through specific statutory enactments which either expressly or impliedly impose upon unincorporated associations, or some of them, a liability to be sued in a collective name.[26]

national Union, 27 Misc. 529, 58 N. Y. Suppl. 412.

Texas.— Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409; Standard Light, etc., Co. *v.* Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931.

Utah.— Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307.

United States.— American Steel, etc., Co. *v.* Wire Drawers, etc., Unions Nos. 1 & 3, 90 Fed. 598.

See also Associations, 4 Cyc. 299; Clubs, 7 Cyc. 258; Joint Stock Companies, 23 Cyc. 466; Labor Unions, 24 Cyc. 815; Partnership, *post*, p. 560 *et seq.*

19. Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1067, per Loring, J.

20. Edwards *v.* Warren Linoline, etc., Works, 168 Mass. 564, 569, 47 N. E. 502, 38 L. R. A. 791 (where Lathrop, J., says: "Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect"); Saunders *v.* Adams Express Co., 71 N. J. L. 270, 273, 57 Atl. 899, 900 (where Swayze, J., says: "The question of the party to be sued is one of procedure, and is regulated by the *lex fori*. . . . Our statute has provided a method of suing unincorporated associations by their recognized names, and we are not bound, even though it is permissible by way of comity, to follow one of the methods of procedure sanctioned by the New York statute, to the exclusion of the method of procedure provided by our own statute").

21. Hanke *v.* Cigar Makers' International Union, 27 Misc. (N. Y.) 529, 58 N. Y. Suppl. 412, holding that an action against a voluntary unincorporated association should be dismissed where it does not appear to have been brought under Code Civ. Proc. § 1919, against the president or treasurer, when it has such officers, or under section 1923 against all the members.

22. In Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1067, the plaintiffs undertook to make defendants both the officers of three unincorporated associations and the associations themselves. It was held that the three associations must be stricken from the bill as parties defendant. And see American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 3, 90 Fed. 598, where it was said: "Voluntary Associations can not be sued as such, and a bill against such associations by name which also joins with them as defendants in its caption a large number of individuals, but which contains no allegations showing that such individuals compose, or are members of such associations, is entirely defective as against the associations."

23. See *supra*, text and note 10.

24. See remarks of Lord Lindley in Taff Vale R. Co. *v.* Amalgamated R. Servants Soc., [1901] A. C. 426, 442, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44.

25. See the historical presentation of this doctrine in Meux *v.* Malthy, 2 Swanst. 277, 36 Eng. Reprint 621.

26. See the cases *infra*, this and notes 27–30. See also Associations, 4 Cyc. 314, 315; Partnership, *post*, p. 560 *et seq.*

Power to enact and validity.—Although the natural person and the corporation are the only entities known to the common law who can be sued, it is competent to the legislature to give to an association of individuals, which is neither a corporation nor an individual, a quasi-personality, and with it to impose a liability of being sued as if the unincorporated association were a person. See the reasoning of Farwell, J., in Taff Vale R. Co. *v.* Amalgamated R. Servants Soc., [1901] 1 K. B. 170, 175, 70 L. J. K. B. 219, 83 L. T. Rep. N. S. 474, 49 Wkly. Rep. 101 [*approved* in 1901] A. C. 426, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44]. That a statute providing for actions against unincorporated bodies in their collective names is unconstitutional was pointedly urged upon the court in U. S.

(II) *Express.* For the most part, where this statutory modification of the common-law rule exists at all it is found in the form of a specific enactment permitting a suit to be brought against an unincorporated association in its firm or association name.[27] The scope of the enactment varies greatly. It may be so wide as to reach nearly every instance of the unincorporated association.[28] It may reach only unincorporated associations engaged in business enterprises.[29] It

Heater Co. *v.* Iron Molders' Union of North America, 129 Mich. 354, 362, 88 N. W. 889. A Michigan statute of 1897 provided "that whenever any unincorporated voluntary association, club, or society shall be formed in this State, composed of five members or more, having some distinguishing name, actions at law or in chancery may be brought by or against such association, club, or society by the name by which it is known: Provided, that this act shall not take away the right of the litigant to proceed against all the members of such association, club, or society, if such litigant shall so elect to proceed." In an action against a labor union in its collective name, it was contended by defendant that this statute was beyond the constitutional limits of legislation. Can the law-making power, it was asked by defendant, "authorize suits to be maintained against nothing?" "This law," it was claimed, "does not give these associations, clubs, or societies any legal standing, nor make them persons or legal entities." The court held the act constitutional. "The law," said Moore, J., delivering the opinion, "deals with conditions as they exist. It recognized that there may be unincorporated voluntary associations, clubs, and societies in this State which do or may do things which make it desirable for them to have the right to bring actions at law or in chancery, and also that it may be necessary or desirable to make them defendants in an action at law or a proceeding in chancery. . . . Any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation," referring to Cooley Const. Lim. (6th ed.) 442.

27. See the statutes of the states named below, and the following cases:

Alabama.— Moore *v.* Burns, 60 Ala. 269.

California.— Goodlett *v.* St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505; Swift *v.* San Francisco Stock, etc., Board, 67 Cal. 567, 8 Pac. 94; King *v.* Randlett, 33 Cal. 318; Welsh *v.* Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85; Gilman *v.* Cosgrove, 22 Cal. 356. *Compare* Davidson *v.* Knox, 67 Cal. 143, 7 Pac. 413.

Colorado.— Endowment Rank O. K. P. *v.* Powell, 25 Colo. 154, 53 Pac. 285.

Connecticut.— Fox *v.* Naramore, 36 Conn. 376, holding that a military company formed by voluntary enlistment under the laws of the state and known by a distinctive name was within the permission of the Connecticut statute. *Compare* Huth *v.* Humboldt Stamm No. 153, 61 Conn. 227, 23 Atl. 1084 (holding that the Connecticut statute does not permit a suit by a member of an association to bring an action at law against it); Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40 (holding that the statute leaves it optional with a creditor to sue the association as such or the individuals composing it, with this difference that in the former case he can levy only on the property of the association).

Maryland.— Littleton *v.* Wells, etc., Council, No. 14 J. O. U. A. M., 98 Md. 453, 56 Atl. 798.

Minnesota.— Taylor *v.* Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684; Cornfield *v.* Order Brith Abraham, 64 Minn. 261, 66 N. W. 970; Gale *v.* Townsend, 45 Minn. 357, 47 N. W. 1064. *Compare* St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

Nebraska.—Rosenbaum *v.* Hayden, 22 Nebr. 744, 36 N. W. 147; Leach *v.* Milburn Wagon Co., 14 Nebr. 106, 15 N. W. 232; Burlington, etc., R. Co. *v.* Dick, 7 Nebr. 242.

New Jersey.— Saunders *v.* Adams Express Co., 71 N. J. L. 520, 58 Atl. 1101; Camden, etc., R. Co. *v.* Pennsylvania Guarantors, 59 N. J. L. 328, 35 Atl. 796; Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

Pennsylvania.— MacGeorge *v.* Harrison Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671 (where plaintiff, a member of the association, maintained his case upon the theory that he was not suing as a member but as a creditor); Sheble *v.* Strong, 128 Pa. St. 315, 18 Atl. 397.

Vermont.— F. R. Patch Mfg. Co. *v.* Capeless, 79 Vt. 1, 63 Atl. 938.

28. See cases cited *infra*, this note.

In Connecticut the permission of the statute reaches "any number of persons associated together in a voluntary association, not having corporate powers, but known by some distinguishing name." Huth *v.* Humboldt Stamm No. 153, 61 Conn. 227, 23 Atl. 1084; Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40.

In Michigan it reaches any unincorporated voluntary association, club, or society formed in this state, composed of five members or more, having some distinguishing name. See U. S. Heater Co. *v.* Iron Molders' Union of North America, 129 Mich. 354, 362, 88 N. W. 889.

29. See the statutes of the several states.

In California, Colorado, and Minnesota the statute in terms applies "when two or more persons associate in any business, transacting that business under a common name, whether it includes the names of such persons or not." See St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 358, 102 N. W. 725.

may apply to partnerships or associations "formed for the purpose of carrying on a trade or business in this state, or holding property therein." [30] Although these statutes do not convert an unincorporated association into a corporation,[31] they have the effect, to the extent to which they apply, of enabling the court to recognize the unincorporated association as a legal person, distinct from its members.[32] But it is only as the association comes within the scope of the statute that it can be so recognized.[33] And in some American cases it has been held that this statutory permission is in derogation of the common law, and must be strictly construed.[34]

(III) *Implied.* The common-law rule that natural persons and corporations are the only entities known to the law as capable of being sued can be modified not only by express enactment,[35] but also by statutory implication.[36] What suffices for this modification by implication is a more difficult question, which has given rise to some conflict of judicial opinion.[37] "If the Legislature," it has been shortly said, "has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken . . . to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement." [38]

2. Infringement of Plaintiff's Right — a. Nature of Rule. As no person can maintain a standing as plaintiff in an action unless he has a remedial interest,[39] so no person can be held as sole defendant,[40] in a personal action,[41] unless he has

30. So in Ohio, where the enactment, in its present form, applies only to partnerships. Ohio Rev. St. § 5011.

31. F. R. Patch Mfg. Co. *v.* Capeless, 79 Vt. 1, 63 Atl. 938. And see the terms of the statutes in some of the states.

32. Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409; F. R. Patch Mfg. Co. *v.* Capeless, 79 Vt. 1, 63 Atl. 938.

33. St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725; Haskins *v.* Alcott, 13 Ohio St. 210.

34. King *v.* Randlett, 33 Cal. 318; Meyer *v.* Omaha Furniture, etc., Co. (Nebr. 1906) 107 N. W. 767; Burlington, etc., R. Co. *v.* Dick, 7 Nebr. 242.

35. See *supra*, II, B, 1, b, (II).

36. Taff Vale R. Co. *v.* Amalgamated R. Servants Soc., [1901] A. C. 426, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44. The decision of the court of appeal, [1901] 1 K. B. 170, 175, 70 L. J. K. B. 219, 83 L. T. Rep. N. S. 474, 49 Wkly. Rep. 101, although reversed, does not deny this proposition. See the remark of the master of the rolls that "when once one gets an entity not known to the law, and therefore incapable of being sued . . . an enactment must be found either express or implied enabling this to be done."

37. See the elaborate judgment of Farwell, J., in Taff Vale R. Co. *v.* Amalgamated R. Servants Soc., given in [1901] A. C. 426, 427–433, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44; the overruling judgment of the court of appeal, in [1901] 1 K. B. 170, 173, 70 L. J. K. B. 219, 83 L. T. Rep. N. S. 474, 49 Wkly. Rep. 101, and the concurring judgments in the house of lords, reversing the decision of the court of appeal, and restoring the decision of Farwell, J., in [1901] A. C. 426, 436–445, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44. The question was whether a registered trade union, which was not a corporation, could be sued in its registered name. The king's bench and the house of lords held that it could be thus sued.

38. So said the Earl of Halsbury, L. C., in Taff Vale R. Co. *v.* Amalgamated R. Servants Soc., [1901] A. C. 426, 436, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44. See the remark of Lord Shand, in the same case, page 441: "A registered trade union has an exclusive right to the name in which it is registered, a right to hold a limited amount of real estate and unlimited personal estate for its own use and benefit and the benefit of its members, the power of acting by its agents and trustees, and is liable to be sued for penalties, as it appears to me, in the society's name. I am clearly of opinion that these and the provisions generally of the statutes imply a liability on the society to be sued in its trade union name, and a privilege of thus suing." *Compare* Karges Furniture Co. *v.* Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. N. S. 788; Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1067, both denying the legal entity of a labor union. And see, generally, Labor Unions, 24 Cyc. 817, 829.

39. See *supra*, I, B, 2.

40. When the question concerns the joinder of defendants the rule is subject to various modifications. See *infra*, IV.

41. Pollock Contr. 198 note, where it is said: "Contracts for the sale of land are enforceable in equity by and against the heirs and devisees of the parties. But here the obligation is treated as attached to the particular party."

"infringed upon the right in respect of which the action is brought."[42] The form which this infringement may take is as varied as the body of substantive obligations at law and in equity.[43]

b. Applications of Rule — (I) *In Actions on Contract.* If the action is based upon a contract, whether plaintiff seeks damages for its breach or sues for its specific performance, the only proper sole defendant is the person who, in the eye of the law, is the promisor, or his representatives.[44] The test is not the existence of an interest in the subject-matter of the contract, but of a contractual obligation.[45]

(II) *In Actions For Tort.* In an action based on a tort defendant is the person who, in the eye of the law, is the cause of the grievance complained of by plaintiff.[46]

42. Dicey Parties, Rule 7.

"As the ground of an action is always an interference with some right of the person aggrieved, every plaintiff must, in order to support his case, prove that his rights have been interfered with, by showing that the defendant has by his acts or omissions either broken a contract made with the plaintiff, i. e. violated a right which the plaintiff had acquired by an agreement with the defendant, or interfered with some right of the plaintiff, existing independently of any contract." Dicey Parties 30.

43. It follows that the application of the principle in the selection of the party defendant, turning as it does upon distinctions of substantive law, yields only the most general rules of procedure.

44. When an obligation is founded upon a real contract, the assent to be bound "is at the root of the matter and indispensable." "No person can be sued for a breach of contract who is not a party to the contract." Dicey Parties 223.

In the case of a contract under seal, the "party to the contract" was the covenantor. See the illustrations in Dicey Parties 229, 230.

In simple contracts the "party to the contract" is "the person who promises or who allows credit to be given to him." Dicey Parties 225.

Implied contract.—In legal theory the term includes also the person upon whom the law imposes the obligation of an "implied contract." "Difficulties frequently occur in deciding who should be made defendant in an action upon a promise created or implied by law from a particular state of facts. In this case it must be ascertained who is the party subject to the legal liability; for he is the person who should be sued." Chitty Pl. 39.

45. At one time there was some authority in equity procedure for holding as defendant a person interested in the subject-matter of an award but a stranger to its promise. Govett *v.* Richmond, 7 Sim. 1, 40 Rev. Rep. 56, 8 Eng. Ch. 1, 58 Eng. Reprint 737. But the doctrine is discarded in later decisions, which refuse to recognize such a person as a proper party defendant. See Tasker *v.* Small, 5 L. J. Ch. 321, 3 Myl. & C. 63, 68, 14 Eng. Ch. 63, 40 Eng. Reprint 848, 6 Sim. 625, 9 Eng. Ch. 625, 58 Eng. Reprint 728, 45 Rev. Rep. 212, 215, where the principle was thus stated by Lord Chancellor Cottenham: "It is not disputed, that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

Stranger procuring breach of contract.—In some jurisdictions an action may be brought against a stranger to a contract, for procuring its breach, but the action is a tort. See Lumley *v.* Gye, 2 E. & B. 216, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216, and the development of its doctrine in America. See also Injunctions, 22 Cyc. 852 text and note 64; Torts.

46. "Any person who causes an injury to another is liable to be sued by the person injured." Dicey Parties, Rule 97 *et seq.*

"In personal or mixed actions, in form ex delicto, the person committing the injury, either by himself or his agent, is in general to be made the defendant." Chitty Pl. 86 *et seq.*

Not limited to principal or agent.—The person causing the injury is not always limited strictly to the principal or his agent. See the doctrine as to the liability of the lessor in Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675; and such cases as Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71; Chicago, etc., R. Co. *v.* Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75; Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24

3. Amenable to Process of Trial Court — a. Statement of Rule. As a rule any one who is a person in law[47] may be made a defendant in a civil action.[48]

b. What Persons Are Exempt. To this rule, however, there is an important class of exceptions, of no less consequence now than formerly.[49] A foreign sovereign cannot be made a defendant against his will;[50] a state cannot be sued in its own courts, either directly or indirectly, without its consent.[51] The rule has a wide and liberal application. Not only are the direct representatives of the state or foreign sovereign, as ambassadors, ministers, and other public officers, included;[52] but the state or foreign sovereign cannot be held as defendant through indirection, by process against property,[53] even when the property has the aspect of a corporation.[54]

c. Consent to Process. This immunity, however, may be waived;[55] but the

N. E. 559; McCabe *v.* Maysville, etc., R. R. Co., 112 Ky. 861, 66 S. W. 1054, 23 Ky. L. Rep. 2328; Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

47. See *supra*, I, B, 1.

48. Dicey Parties 1. So, although "felons, outlaws, and alien enemies can not sue," they may be sued. Dicey Parties 2, 4.

49. Dicey Parties 4, where it is said: "The sovereign, foreign sovereigns, and ambassadors can not be sued." *Compare* Hollingsworth *v.* Virginia, 3 Dall. (U. S.) 378, 1 L. ed. 644.

50. Mason *v.* Intercolonial R. Co., (Mass. 1908) 83 N. E. 876; Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149, 58 J. P. 244, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 64, 9 Reports 444; The Parlement Belge, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642; Wadsworth *v.* Queen of Spain, 17 Q. B. 171, 16 Jur. 164, 20 L. J. Q. B. 488, 85 Rev. Rep. 398, although the action was not, in form, brought against the queen as sovereign, it appearing sufficiently in the proceedings that she was charged with liability in that character.

51. Wilson *v.* Louisiana Purchase Exposition Commission, 133 Iowa 586, 588, 110 N. W. 1045 (where Sherwin, J., says: "It is fundamental that a State cannot be sued in its own courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the State to enforce satisfaction for claims"); State *v.* Appleton, 73 Kan. 160, 164, 84 Pac. 753 (where Johnston, C. J., says: "A prerogative of sovereignty which belongs to a state is that it cannot be brought into court to answer claims made against it unless express consent to that end has been given. The power to give consent rests in the legislature, and plaintiff has not called our attention to any statute authorizing a suit against the state") Hodgdon *v.* Haverhill, 193 Mass. 406, 79 N. E. 830; Seitz *v.* Messerschmitt, 117 N. Y. App. Div. 401, 102 N. Y. Suppl. 732. And see States.

52. See the reasoning of the court in the Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 5 Jur. N. S. 1260, 28 L. J. Q. B. 310, 7 Wkly. Rep. 598, 105 E. C. L. 94, where it was held that a public minister of a foreign state duly accredited and received cannot be sued here against his will, in a civil action, although the cause of action has arisen out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit. See also Seitz *v.* Messerschmitt, 117 N. Y. App. Div. 401, 102 N. Y. Suppl. 732; Producers' Oil Co. *v.* Stephens, (Tex. Civ. App. 1907) 99 S. W. 157.

53. Alabama Industrial School *v.* Addler, 144 Ala. 555, 42 So. 116, 113 Am. St. Rep. 58; The Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; The Parlement Belge, 5 P. D. 197, 220, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642, holding that one objection which was fatal to the attempt to bring the sovereign into the admiralty court by means of seizing a vessel, belonging to the sovereign and partly engaged in trade, was that it was "an indirect mode of exercising the authority of the Court against the owner of the property." And see the elaborate discussion of the exemption of public property from the process of the courts of its own sovereign in Young *v.* The Scotia, [1903] A. C. 501, 9 Aspin. 485, 72 L. J. P. C. 115, 89 L. T. Rep. N. S. 374, where the property seized was a ferry-boat used to connect two parts of a railway owned by the government of Canada. See also The Jassy, [1906] P. 270, 10 Aspin. 278, 75 L. J. P. D. & Adm. 93, 95 L. T. Rep. N. S. 363, where the principle was applied to the process of the English courts against a vessel belonging to the king of Roumania.

54. Mason *v.* Intercolonial R. Co., (Mass. 1908) 83 N. E. 876. In this case M, being injured in Canada through the alleged negligence of the Intercolonial Railway of Canada, sued in Massachusetts, by trustee process, to recover damages for this personal injury. Defendant on the record was the Intercolonial Railway of Canada. Defendant made no appearance, but a member of the Massachusetts bar, as *amicus curiæ*, suggested the dismissal of the action. It being shown to the court that the so-called defendant was the property of the king of England, and not a corporation, and was operated through his government for the public purposes of Canada, it was held that the action must be dismissed.

55. See remarks of Kay, L. J., in Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149, 162.

courts construe any alleged waiver with some strictness.[56] The fact that the foreign sovereign was personally living within the jurisdiction of the court, ostensibly in the capacity and with the name of a private individual, does not *per se* waive his exemption.[57] In a claim against a state the mere presence of a constitutional provision declaring that suits may be brought against the state in such manner and in such courts as the legislature may by law direct is not a sufficient warrant for making the state or its public officer a defendant.[58] And when the state, through proper legislative enactment, has consented to be sued in certain courts, or in a certain manner, it cannot be made a defendant by a suit filed in another court or in a different manner.[59]

III. JOINDER OF PLAINTIFFS.[60]

A. Remedial Interest. As the sole plaintiff must have and show a remedial interest in the cause of action which he asserts,[61] so also it is a primary rule in the joinder of plaintiffs that each co-plaintiff must have an interest which the trial court can recognize and enforce,[62] and must disclose this interest in the record.[63] The test here, as in the case of the sole plaintiff, is ultimately one of a right of

58 J. P. 244, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 64, 9 Reports 447. For recent instances of consent to be a defendant see Nash *v.* Com., 174 Mass. 335, 54 N. E. 865; Nussbaum *v.* State, 119 N. Y. App. Div. 755, 104 N. Y. Suppl. 527.

56. Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149, 163, 58 J. P. 244, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 64, 9 Reports 447, where Kay, L. J., said: "The foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actually elects to waive his privilege and to submit to the jurisdiction." And see Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684.

57. In Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149, 157, 58 J. P. 244, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 64, 9 Reports 447, the action was for a breach of promise. "For the purposes of my judgment," said Lord Esher, M. R., "I must assume that the Sultan of Johore came to this country and took the name of Albert Baker, and that the plaintiff believed that his name was Albert Baker, and I will go so far as to assume for the present purpose that he deceived her by pretending to be Albert Baker, and then promised to marry her, and that he broke his promise." It was held by the court of appeal that "the Courts of this country have no jurisdiction over an independent foreign sovereign, unless he submits to jurisdiction," that "such submission cannot take place until the jurisdiction is invoked," and therefore that "the fact that a foreign sovereign has been residing in this country, and has entered into a contract here, under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract."

58. General Oil Co. *v.* Crain, 117 Tenn. 82, 95 S. W. 824. And see STATES.

59. *Ex p.* Greene, 29 Ala. 52; Owen *v.* The State, 7 Nebr. 108. See also STATES.

60. **In actions against particular classes of parties** see cross-references *supra*, p. 8.

In particular actions or proceedings see cross-references *supra*, p. 8.

Costs of joint plaintiffs see COSTS.

Dismissal as to co-plaintiff see DISMISSAL AND NONSUIT.

Diversity of citizenship as ground for removal of cause see REMOVAL OF CAUSES.

Excusing non-joinder see PLEADING.

Misjoinder of complainants in equity see EQUITY.

Multifariousness see EQUITY.

61. See *supra*, I, B, 2.

62. Scott *v.* Patton, 1 A. K. Marsh. (Ky.) 441 (where the covenant is with A and P; an action in the names of A, P, and Q cannot be sustained); Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64, 74 (where it is said: "In any form of action a stranger who has not title to sue cannot be joined with others who may have"). And see the arguments in King of Spain *v.* Machado, 6 L. J. Ch. O. S. 61, 4 Russ. 225, 28 Rev. Rep. 56, 4 Eng. Ch. 225, 38 Eng. Reprint 790.

As well in equity as at law, it is improper for a party to be joined in a suit who has neither legal or beneficial interest in its subject-matter." 1 Chitty Pl. tit. "Plaintiffs," § 11.

To him or them whose right has been violated, or is withheld, the remedy or redress which the law affords in any given case, for the violation or deprivation of a legal right, belongs exclusively. Gould Pl. c. 4, § 52.

63. Auten *v.* Townsend, 3 N. J. L. 744, 746, where it was said: "It is probable that the persons joined with Townsend in the action below, were his partners. . But the court cannot go on conjecture; it is better to have no state of demand at all, than to have one that does not disclose a right of action in those who sue."

Where, from all that is shown by the record, it appears that plaintiff is the only person interested in the subject of the action, the court will not entertain the objection that other persons who had been associated with him ought to sue. Salmon *v.* Hoffman, 2 Cal. 138, 56 Am. Dec. 322.

action — of a title, in some form, to the cause of action asserted,[64] and not one of mere beneficial interest in the outcome of the suit.[65] The rule holds at common law, in equity, and under the codes, but with material distinctions in its application, according as the question arises under one system or the other.[66]

B. In Common-Law Pleading — 1. Test of Joint or Several Interest — a. In General. The rule governing the joinder of plaintiffs in a common-law action turned on the distinction between joint and several interest.[67] Whether the action arose from a contract or from a tort, if defendant was legally answerable to two or more jointly they should all, at common law, join as plaintiffs in the action,[68] unless a valid excuse for the non-joinder appears on the face of the pleading.[69] The interest, being joint, existed as an entirety; and one person ought not to be allowed to sue alone for the whole of that of which he is entitled only to a part.[70] The right of action was in the promisees collectively, and only so;[71] no agreement between the promisees enabled them to sue separately.[72] On the other hand, when the interests were several, there could as a rule be no joinder, even when the rights of all the plaintiffs had been violated by one and the same wrongful act on the part of defendant,[73] or had arisen *ex contractu* out of one and the same transaction with defendant.[74]

64. See *supra*, I, B, 2, b.

65. Curtis *v.* Sprague, 51 Cal. 239; Potter *v.* Yale College, 8 Conn. 52; Brown *v.* King, 1 Bibb (Ky.) 462; Morrison *v.* Winn, Hard. (Ky.) 480; Chandler *v.* Howland, 7 Gray (Mass.) 348, 351, 66 Am. Dec. 487 (where P, the owner of a mill, employed B as his miller, under an agreement that B should have one half of the earnings of the mill for tending the same, P can sue alone to recover for an injury to the mill; for "an agreement, by which the laborer is to receive a certain share of the profits in lieu of wages, does not necessarily constitute him a joint owner or partner"); Grozier *v.* Atwood, 4 Pick. (Mass.) 234; Baxter *v.* Rodman, 3 Pick. (Mass.) 435; Osburn *v.* Farr, 42 Mich. 134, 3 N. W. 299 (where defendant made a contract with an infant and an adult; and money having been earned under the contract, the father of the infant joined the adult in suing upon the contract; but it was held that the action could not be maintained; for there was never any contract relation between defendant and the father; the infant should have been plaintiff and not his father.

Death of a joint obligee. The principle had a striking application in the case of the death of a joint obligee. In the absence of an enabling statute, his personal representative cannot join with the survivor, but the latter must sue alone; for at common law the remedial interest rests exclusively in the survivor. "The remedy survives in favor of the surviving obligees in all cases, notwithstanding the right to the thing recovered may descend *pro rata* to the representatives of the decedents or deceased." Brown *v.* King, 1 Bibb (Ky.) 462; Morrison *v.* Winn, Hard. (Ky.) 480; Walker *v.* Maxwell, 1 Mass. 104, 112. See also Gould Pl. c. 4, § 61.

66. For the rules of joinder at common law, and under the codes see *infra*, III, B, C. And see *supra*, I, B, 2, d.

For equity joinder see Equity, 16 Cyc. 1.

67. See Capen *v.* Barrows, 1 Gray (Mass.) 376; and cases cited *infra*, notes 81, 83.

68. See *infra*, III, B, 2, 3.

On the difference in the stringency of the rule according as the action was in contract or for a tort see *infra*, III, B, 3. And see Dicey Parties 11, 502, 504.

69. 1 Chitty Pl. 16, where it is said: "If there be a legal ground for omitting to use the name of one of several covenantees . . . it is necessary to show such excuse for the non-joinder in the declaration, and to declare as surviving partner."

Thus the death of one of the joint owners will excuse his non-joinder for on his death his interest survives to the others. See *supra*, III, A.

But a refusal by one joint owner to join as plaintiff will not excuse, at common law; for his name can be used by the other joint owners. See Sweigart *v.* Berk, 8 Serg. & R. (Pa.) 308.

70. Gould Pl. c. 6, § 56.

71. Scott *v.* Godwin, 1 B. & P. 67, where the reasons for the rule were elaborately discussed by Chief Justice Eyre.

72. Peters *v.* Davis, 7 Mass. 257; Austin *v.* Walsh, 2 Mass. 401. So an action to recover damages for an injury to personal property which at the time belonged to A and B jointly must be brought in the names of both, although after the injury an arrangement was made whereby one becomes sole owner. Gallatin, etc., Turnpike Co. *v.* Fry, 88 Tenn. 296, 12 S. W. 720.

73. "As, if the same slanderous words are spoken by one and the same person at the same time and place, and in the same sentence, of A and B, or if the persons of A and B are both injured, or their several interests violated, by one and the same tortious act." Gould Pl. c. 4, tit. "Joinder of Parties" 53. See also Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

74. For example, H, a wagoner, engaged S and T to assist him with their horses. Each had three horses, and six drew the wagon. S and T were to give in their accounts separately. They join in an action

b. In Assignments by Joint Owners. As a chose in action, in the theory of common-law procedure, was not assignable, the fact that a joint promisee or joint owner had transferred his interest did not affect the rule of joinder; the action must still be brought in the name of all, even when the transfer was to one of their number.[75]

c. Device When a Joint Owner Refused to Join. If one of the several owners of a joint interest refused to join as a plaintiff, the common-law procedure, reverting to the device of "nominal and use plaintiffs,"[76] permitted the other owners to use his name as a co-plaintiff.[77]

d. Severance of a Joint Interest. An interest which exists at first in two or more jointly may be severed, either through the concurring act of all the parties,[78] or through the act of defendant in settling *pro rata* with one of the joint owners or joint promisees.[79] When this occurs, the fact will serve, at least in some jurisdictions, as a valid excuse for a non-joinder.[80]

2. In Actions Ex Contractu — a. Persons With Whom Contract Was Made — (i) *In General.* At common law an action to recover damages for the breach of a contract must be brought in the name of all those with whom, in the eye of the law, the contract in suit was made,[81] unless it appears that the omitted prom-

of assumpsit against H. It was held that the contracts were separate; and plaintiffs were accordingly nonsuited. Smith *v.* Hunt, 2 Chit. 142, 18 E. C. L. 553. And see Brand *v.* Boulcott, 3 B. & P. 235.

75. Jarman *v.* Howard, 3 A. K. Marsh. (Ky.) 383. In this case a promise was made to three; one transferred his interest to the other two; defendant had complete knowledge of the fact and promised to pay the two, who thereafter sued in their own names alone upon the original promise. It was held that the action on their promise was maintainable only in the names of the three promisees. See also Assignments, 4 Cyc. 1.

The principle continues under the code if the right is not assignable. See Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551, where one partner assigned to the other members of the firm his right of action for damages caused by a false and fraudulent representation of the solvency of a vendee. On the theory that this right is not assignable under the code, it was held that the assigning partner was a necessary party to the action.

76. See *supra*, I, B, 2, e, (II).

77. Sweigart *v.* Berk, 8 Serg. & R. (Pa.) 308, 311 (where Tilghman, C. J., said: "It appears . . . that the bond was given to ten obligees jointly, all of whom are living, and the action is brought by only seven of them. I am at a loss to conceive, on what principle the action can be supported. . . . It was objected that those who had been paid might refuse to join in the action, or might release the obligor. But the court would permit those who were unpaid to make use of the names of the other obligees, against their consent; neither would their release be suffered to be set up in bar of the action"); Gray *v.* Wilson, Meigs (Tenn.) 394, 397 (where Green, J., said: "The $100 deposited with Wilson, the stakeholder, belonged jointly to Gray, Davis, and Wilson, the original plaintiffs; there could, therefore, be no recovery except in the name of all these parties. Wilson had no right to compromise the suit, and dismiss it, without the consent of his co-plaintiffs. If he had received satisfaction for his part of the amount claimed, still the other plaintiffs had a right to prosecute the suits in the name of all three for their use"). And see Darling *v.* Simpson, 15 Me. 175.

78. As in Powis *v.* Smith, 5 B. & Ald. 850, 1 D. & R. 490, 24 Rev. Rep. 587, 7 E. C. L. 462.

79. Beach *v.* Hotchkiss, 2 Conn. 697, 699, where Swift, C. J., said: "Where there is a joint interest, or a joint cause of action, all the parties in interest must join in a suit to recover it; but when a severance is made, by the party liable to the claim, by paying to one or more, his or their proportion of the debt or interest, there the others may bring their separate actions against him; for he has, by his own act, severed the claim." And see Parker *v.* Elder, 11 Humphr. (Tenn.) 546.

80. See the discussion of the principle in Boston, etc., R. Co. *v.* Portland, etc., R. Co., 119 Mass. 498, 499, 20 Am. Rep. 338. See also Beach *v.* Hotchkiss, 2 Conn. 697. In Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162, plaintiff sued alone; defendant pleaded in abatement that the promise was made to plaintiff jointly with one B, and not to the plaintiff alone; plaintiff replied that B had sued defendant for the damage sustained by B and recovered a judgment. On demurrer it was held that defendant in permitting B to proceed alone had agreed to a severance and could not now object to P suing alone.

81. Scott *v.* Godwin, 1 B. & P. 67, 73, where Eyre, C. J., said: "I take it to have been solemnly adjudged in several cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone." And see remark of Bowen, L. J., in Hannay *v.* Smurthwaite, [1893] 2 Q. B. 412, 422, 63 L. J. Q. B. 41, 69 L. T. Rep. N. S. 677, 42

isee is dead or that there has been a valid severance.[82] And at common law a contract could not be so framed as in legal effect to be made with the same persons both jointly and severally.[83] The contract was either a contract with all the promisees or covenantees collectively, or it was with each of them separately.[84]

(II) *Special Features.* It was not decisive of the question of joinder if the contract in suit was in fact made by one of those with whom, in point of law, it was deemed to be made;[85] or that one of the covenantees had not in fact signed the contract.[86] Nor was it material that the whole benefit of the contract would

Wkly. Rep. 133. "The rule was that, in the case of contract, all persons with whom the contract sued on was made had to join as plaintiffs, and no person could join himself as plaintiff in an action for breach of a contract made by the defendant with another person."

Illustrations.—A bond was executed to "Miers Reynolds & Son." In an action by Miers Reynolds evidence of the bond was objected to because the action was not in the name of "Miers Reynolds & Son." The objection was sustained and plaintiff took a nonsuit. Reynolds *v.* Grier, 7 Houst. (Del.) 329, 32 Atl. 172. P, a partner of a manufacturing house in Scotland and their agent for exporting goods to America, consigned carpets to a commission merchant in Boston, by whom they were sold to D. An action in the name of P alone was brought to recover the price. The court, under the general issue, ordered a nonsuit, because of the nonjoinder of the other owners of the goods, observing that the action should have been in the names of all the owners or in the name of the agent who made the contract. Halliday *v.* Doggett, 6 Pick. (Mass.) 359. Part-owners of a ship cannot sue separately for their respective shares of the proceeds of the sale of the whole vessel, or for freight in the hands of a third person. Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681. *Compare* Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361. Whatever the number of coparceners, they constitute, in legal effect, but one heir and must all join in an assumpsit for the use and occupation of the ancestor's estate. Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480; Hoffer *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Decharms *v.* Horwood, 10 Bing. 526, 3 L. J. C. P. 198, 4 Moore & S. 400, 25 E. C. L. 251. And see Holyoke *v.* Loud, 69 Me. 59; Marys *v.* Anderson, 2 Grant (Pa.) 446; Sweigart *v.* Berk, 8 Serg. & R. (Pa.) 308; Sims *v.* Tyre, 3 Brev. (S. C.) 249.

82. See *supra*, I, B, 2, e, (III), (A).

83. Dicey Parties 110.

84. "It being fully established . . . that one and the same covenant cannot be made both joint and several with the covenantees." Bradburne *v.* Botfield, 14 L. J. Exch. 330, 14 M. & W. 559, 573, per Parke, B. But "it may well be that what would appear to an ordinary reader but one covenant, is in fact two covenants; e. g., first, a joint covenant with A. and B., and next a separate covenant with A. and B., separately." Dicey Parties 111.

Contrasted with rule as to promisors.—The rule as to promisees is to be contrasted with the rule as to promisors. The latter, by one and the same contract, could make themselves both jointly and severally liable, but they could not by the same contract give the promisees both joint and several rights of action. "Thus, X. and Y. may covenant with A., so as to enable A. on the same covenant to sue either X. and Y. jointly, or X. and Y. separately. But X. can not covenant with A. and B. so as to enable them to bring on the same covenant, at choice, either a joint action in the names of A. and B., or separate actions in the name of A. or of B." Dicey Parties 112, and illustrations there given.

85. For example, L, a member of an orchestra, signed the following proposal: "The gentlemen of the orchestra . . . are willing, and hereby pledge themselves, to continue their services . . . provided Mr. Beale will guaranty the payment of the thirteen nights due on the 15th ultimo (Signed, on behalf of the gentlemen of the orchestra)." B accepted the proposal, as "made by Mr. Lucas on behalf of the gentlemen of the orchestra." It was held that the contract, although actually made by L alone, was not in legal effect with L alone, but with L and the other members of the orchestra, and therefore that all the members must join in an action for the breach of the contract. Lucas *v.* Beale, 10 C. B. 739, 20 L. J. C. P. 134, 70 E. C. L. 739. See also Cottingham *v.* Owens, 71 Ill. 397.

86. Petrie *v.* Bury, 3 B. & C. 353, 5 D. & R. 152, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165, where in covenant against the executors of A B, plaintiff declared that A B covenanted with him and two others that his executors, etc., should pay to them an annuity for the use of a third person, and averred that the other two never sealed the deed, and it was held, on demurrer, that it was a general rule that all joint covenantees or obligees must sue, and that as it did not appear that any of the covenantees had not assented to the deed, although they did not seal it, the declaration was bad. In Smith *v.* Kerr, 3 N. Y. 144, 148, Jewett, C. J., said: "The defendants covenanted with the three plaintiffs, and if it was admitted that one of them, Abner Potter, did not sign or seal the instrument, the law would not convert it into a covenant with the other two. All the covenantees must sue, although they did not all sign and seal the agreement. . . .

go to some only of those with whom the contract was made;[87] that the payment required by the contract was to be made to one of the expressed promisees;[88] that after the contract was made but before it was formally signed one of the contracting parties had parted with his interest in it to the other;[89] or that a contract made with two jointly contemplated an ultimate severance in the results, as between the promisees.[90] If the promise was in legal effect a promise made with two or more, one of them could not sue alone without showing some special title.[91]

b. Characteristic of "Person With Whom Contract Was Made" — (i) *In Contracts Under Seal.* If the contract sued upon is a covenant, the persons with whom, in the eye of the law, it was made are those, and only those, with whom the contract is expressed by the deed to be made.[92] But to be expressed in the deed as a party, it was not necessary as a rule that one appear as formally signing or sealing the instrument.[93] Nor is it necessary, at least in the later view of the common law,[94] that a party be designated by name among the covenantees; it is enough if the class to which he belongs is clearly described as among the parties.[95]

(ii) *In Simple Contracts.* If the contract in suit was not under seal, the earlier technical rule at common law looked to those from whom the consideration proceeded, and to them alone, as the persons with whom the contract was made.[96] To this rule, however, there were several admitted exemptions at common

The omission of the name of Abner Potter as a co-plaintiff would have been fatal."

87. Thus, all with whom a covenant was expressly made should unite in the action, although only one of them would be benefited. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Smith *v.* Mutual L. & T. Co., 102 Ala. 282, 14 So. 625; Masterson *v.* Phinizy, 56 Ala. 336; Potter *v.* Yale College, 8 Conn. 52; Bird *v.* Washburn, 10 Pick. (Mass.) 223.

88. Moore *v.* Chesley, 17 N. H. 151.

89. Brewer *v.* Stone, 11 Gray (Mass.) 228. And see Barstow *v.* Gray, 3 Me. 409.

90. Archer *v.* Dunn, 2 Watts & S. (Pa.) 327, 360. In this case A, B, and C agreed with D and with each other that they would enter into the Chinese trade, A, B, and C furnishing the capital to send two ships a year, and D furnishing his services in selling the goods in China, and investing the proceeds in return cargoes. The proceeds from sales in China were to be divided there and the share of each partner, estimated in proportion to his share without regard to the existing state of the partnership accounts, was to be invested for him on separate account, in Chinese goods, separately invoiced and consigned to him. It was held that A, B, and C could join in a suit against D to recover money had and received by him to their use. "It is clear," said Gibson, C. J., "that several actions could not be maintained on the special contract, as it was made with the plaintiffs jointly . . . what matters it, then, that the proceeds were to be divided at Canton, and the share of each partner separately consigned to him without waiting for a settlement of the partnership accounts? That arrangement was a matter betwixt the partners themselves, and for their private convenience." In the case of Vaux *v.* Draper, Style 203, 82 Eng. Reprint 646, it appeared that defendant, in consideration of £10 paid by plaintiffs to defendant had promised plaintiffs to procure certain cattle of plaintiffs which had been taken from them by a third person to be redelivered to plaintiffs by such a time. In an action for a breach of this promise, defendant objected that "[the plaintiffs] ought to have brought two several actions, in regard that the promise upon which the action was founded was not an entire promise, but was a several promise made to each of the plaintiffs." It was held, by a divided court, that the action could be maintained as brought. And see Vaux *v.* Steward, Style 156, 82 Eng. Reprint 607.

91. Petrie *v.* Bury, 3 B. & C. 353, 5 D. & R. 152, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165.

92. Dicey Parties 101, for "a covenant, again, is not a covenant with any person except the covenantee."

93. For they are parties, although they "did not execute, and parties to an indenture may sue, though strangers cannot; and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee." Pitman *v.* Woodbury, 3 Exch. 4, 11.

94. See the discussion in McLaren *v.* Baxter, L. R. 2 C. P. 559, 36 L. J. C. P. 247, 16 L. T. Rep. N. S. 521, 15 Wkly. Rep. 1017.

95. McLaren *v.* Baxter, L. R. 2 C. P. 559, 36 L. J. C. P. 247, 16 L. T. Rep. N. S. 521, 15 Wkly. Rep. 1017; Isaacs *v.* Green, L. R. 2 Exch. 352, 36 L. J. Exch. 253, 16 L. T. Rep. N. S. 633.

96. See Dicey Parties, Rule 11: "The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves," and illustrations there given.

law;[97] and in some jurisdictions the general principle was largely qualified in favor of permitting the action in the names of the promisees as such, irrespective of any question whether the consideration moved from them.[98] On the other hand, if the promisees are not expressed, by name or sufficient class description, the law, reverting to the older technical rule, declares that the promise is made to the persons from whom the consideration proceeded.[99]

c. Contracts Joint in Form, Several in Effect. It does not follow that because defendant has contracted at one time and in one instrument with two or more, he has contracted with them jointly; although the terms are joint, the legal effect of the transaction may be a several contract with each.[1] The rule of joinder follows

97. As in an action brought by the agent with whom the contract was made, or in some action for money had and received. See Dicey Parties 90, 91. So in actions by persons appointed by statute to sue on behalf of others. Dicey Parties 90.

98. Williamson *v.* Yager, 91 Ky. 282, 15 S. W. 660, 13 Ky. L. Rep. 273, 34 Am. St. Rep. 184; Palmer Sav. Bank *v.* Insurance Co. of North America, 166 Mass. 189, 195, 44 N. E. 211, 55 Am. St. Rep. 387, 32 L. R. A. 615 (where Field, C. J., remarks: "While, in this Commonwealth the rule is held strictly that no one can sue or be sued on a simple contract who is not a party to it, either disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor, in the ordinary sense of those words"); Van Eman *v.* Stanchfield, 10 Minn. 255, 260 (where the court concurs in the opinion that "it may be questioned whether, apart from the decision of Edmundson *v.* Penny, 11 Pa. St. 334, any authority can be found on this side of the Atlantic in support of the naked proposition that the consideration must necessarily have moved from the party who brings the action"); St. Mark's Church *v.* Teed, 120 N. Y. 583, 24 N. E. 1014. And see the remarks of Lord Alvanley, C. J., in Pigott *v.* Thompson, 3 B. & P. 147, 149. *Compare* Bell *v.* Sappington, 111 Ga. 391, 393, 36 S. E. 780, where it was said: "If there is a valid consideration for the promise, it matters not from whom it moved; the promisee may sustain his action, though a stranger to the consideration," per Cobb, J., referring to Ga. Civ. Code, § 3664.

Illustration.— In Cabot *v.* Haskins, 3 Pick. (Mass.) 83, 91, the promise was to A, B, and C, upon a consideration moving from them and D, who, however, was no party to the promise. It was held that the action could be maintained by A, B, and C, without joining D. "We think it immaterial," said the court, "from whom the consideration, if it be a sufficient foundation for a valid promise, passed."

99. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Edmundson *v.* Penny, 1 Pa. St. 334, 44 Am. Dec. 137. This case is sometimes treated as if the promisee was expressed; in fact only the beneficiary was expressed. So the "implied promise, being altogether ideal, and raised out of the consideration only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be." Boggs *v.* Curtin, 10 Serg. & R. (Pa.) 211, 213, per Gibson, J.

1. See cases cited *infra*, this note.

Illustrations.— In Ford *v.* Bronaugh, 11 B. Mon. (Ky.) 14, 15, F and S covenanted with D to build him a house, consisting of a front building and an ell, on the completion of which D bound himself to pay to F and S seven hundred and fifty dollars, "it being the sum agreed on by the parties for the above named work, four hundred and fifty dollars due to the said Ford when the work of the front is complete, and the rest due to Shanklin when the work of the ell is complete." Upon this contract F sued in his own name alone, for the four hundred and fifty dollars due him on completion of the front of the building. It was held that the action was properly brought. "If the provision for payment," said the court, "had stopped with the stipulation to pay $750 on completion of the work as previously described, the necessary construction would have been that the covenant was to pay the entire sum to both builders jointly and only upon completion of the entire work. They must have therefore sued jointly for the price, and must have averred and proved the completion of both parts of the building. But this general covenant to pay $750 on completion of the whole work, is explained and materially qualified by the words immediately following, which divide the work and the price, and create or show a separate interest in the covenantees in the different parts of the price. Instead, therefore, of there being one entire debt or duty due to both jointly, or only one entire duty due to one of the builders, there are two distinct duties or payments, one of which is due upon a certain condition to one of them, and the other upon a different condition to the other. In such a case the rule or the exception to a more general rule is expressly and well settled, 'that although the covenant be in its terms joint (as with A and B to pay them £10 each), yet the distinct interest of each in a separate subject matter shall attract to each covenantee, an exclusive right of action in regard to his own particular damage.'" Per Marshall, C. J., *citing* 1 Chitty Pl. (ed. 1833) 11. In Carter *v.* Carter, 14 Pick. (Mass.) 424, 431, H and G signed the same subscription paper, by the terms of which they agreed to pay

the nature of the interest; where the interest of the covenantees is several they may maintain separate actions, although the language of the covenant be joint.[2] But when a covenant is in its terms expressly and positively joint, the tendency is to regard the interest as joint so far as defendant is concerned, and to require that the covenantees join in the action, although, as between themselves, their interest is several.[3]

d. Contracts Several in Form, Joint in Effect. By the same showing, when the contract is in terms several, or joint and several, but its legal effect is to create a joint interest in the promisees, they must all, if living, join in the action.[4]

3. In Actions Ex Delicto — a. Flexibility of Common-Law Rule. When the action sounded in tort, the common-law rule as to the joinder of plaintiffs was less rigid than in actions on contract.[5] For a contract with A and B jointly was, in the theory of the common law, a different thing from a contract with A alone;[6] but a tort to A was no less an injury to him because it was an injury to A and B jointly.[7] Where a tort has been done, the tort is a separate tort to each

D the sums written opposite their names, provided he would cause a normal school to be established in a certain town. H and G paid D the amounts of their subscriptions, each in the sum of two hundred dollars, and D gave a receipt which set forth that the four hundred dollars was received of H and G in payment of a subscription made by them to encourage the establishment of a seminary. D failed to establish the school, and H brought assumpsit to recover the two hundred dollars which he had paid. It was objected that G should have joined in the suit. It was held that the action was properly brought. The court said, per Shaw, C. J.: "Had this payment been made on account of a joint debt, this [objection] would have been a good ground of defence. But the nature and effect of this payment must be ascertained, by those of the debt. The payment is on account of their subscriptions, which were several. . . . We are therefore of opinion, that the payment must be taken to have been made for account of each separately, and therefore that the plaintiff may maintain his action severally, to recover the amount paid for his account." In Woodward *v.* Sherman, 52 N. H. 131, A, B, and C intrusted a horse dealer with one horse each, belonging to them individually. The horse dealer sold the three horses together to D, on credit, for six hundred and fifty dollars, no separate price being made for either horse in the trade. A, B, and C afterward joined in an assumpsit against D. It was held that the action could not be maintained. In Gray *v.* Johnson, 14 N. H. 414, it is held that if a lessee covenants with several lessors jointly that he will pay to each lessor severally a specified proportion of the rent, although the covenant be in terms joint, the interest of each lessor will be several and each may maintain a separate action for his part of the rent. See also Gridley *v.* Starr, 1 Root (Conn.) 281; Geer *v.* Richmond Tenth School Dist., 6 Vt. 76.

2. Withers *v.* Bircham, 3 B. & C. 254, 256, 5 D. & R. 106, 3 L. J. K. B. O. S. 30, 27 Rev. Rep. 350, 10 E. C. L. 123, where the court further remarks: "Looking only to the language of the covenant in this case, it would appear to be a joint covenant; but the interest of the covenantees is several, each of them having a distinct interest in the annuity payable to him."

3. See the opinion of Metcalf, J., in Capen *v.* Barrows, 1 Gray (Mass.) 376, 379; Chitty Pl. 11.

4. Capen *v.* Barrows, 1 Gray (Mass.) 376, 379, where Metcalf, J., said: "It is a settled rule of construction, that when the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may, in its terms, be several or joint and several." "If A conveys land to B and C jointly, and covenants with both and each of them, thus making the covenant joint and several, that he is well seised, etc., B and C must join in an action on the covenant. For when the interest of the covenantees is joint, the right of recovery is so." Gould Pl. c. 4, § 108.

5. Dicey Parties 11, where it is said: "In an action on contract, all the persons with whom the contract is (in the eye of the law) made, should join as plaintiffs, since A. cannot recover damages for the breach of a contract made with A. and B. In an action for tort, on the other hand, it is frequently a matter of choice whether the persons injured should sue separately or jointly, and in any case the non-joinder of a plaintiff is a matter of comparatively small importance. For if, in such an action, where A. and B. ought to sue jointly, A. sues alone, he may, it is true, be forced (by a plea in abatement) to join B. with him. But if the non-joinder of B. is not objected to at the proper stage of the proceedings before the trial, A., though it may appear that B. ought to have been joined, will recover damages in proportion to the injury which he himself has suffered, and no objection can be taken to the subsequent action by B. alone for the injury which B. has sustained."

6. "It is an answer to an action by A. that the contract sued upon was a contract, not with A., but with A. and B." Dicey Parties 11. Hence in an action on contract, a non-joinder of plaintiffs was, unless amended, a fatal error. Dicey Parties 502.

7. "If A. sues alone for an injury, e. g.,

man who complains,[8] whether the injury be to a joint interest or to a several interest of the complainant.

b. Tort to a Joint Interest. If the injury was to the joint interest of two or more, all were bound, at least as against a dilatory objection, to join as plaintiffs.[9] It was not necessary that the interest of each plaintiff should be of the same degree or kind in order to permit a joinder.[10]

c. Tort to a Several Interest With Joint Damage. It was early established at common law, by decisions, the modern bearing of which has been distinctly recognized,[11] that persons with separate interests, and who therefore might sue severally, may join in an action *ex delicto* if they have sustained a joint damage.[12] And so, although tenants in common could not join in real actions or in ejectment, yet in personal actions, in which damages only are recoverable,[13] they might join because, although their estates are several, yet the damages survive to all, and it would be unreasonable when the damage is thus entire to bring several actions for a single trespass.[14]

to the joint property of A. and B. (though it may be possible by proper pleading to compel A. to join B. with him as plaintiff), it is no answer to the action by A. for the injury to him that the tort committed was a tort against A. and B. jointly." Dicey Parties 11. Hence in an action for tort a nonjoinder of plaintiffs gave rise only to a plea in abatement. Dicey Parties 507.

8. Booth *v.* Briscoe, 2 Q. B. D. 496, 497, 25 Wkly. Rep. 838, per Bramwell, L. J.

9. See cases cited *infra*, this note.

Thus partners generally and the joint owners of a chattel could join in an action for an injury to their common property. Dicey Parties 382.

When two joint owners of a sum of money, traveling together on the highway, were robbed of the money, they were permitted to join in an action against the hundred. Coryton *v.* Lithebye, 2 Saund. 112. And see Glover *v.* Austin, 6 Pick. (Mass.) 209.

Accordingly, although a slander of two or more does not ordinarily warrant a joint action at common law (see the following note), yet when the defamatory words were spoken of two partners respecting their trade, they might join in an action to recover their joint damage because of the slander. Cooke *v.* Batchelor, 3 B. & P. 150. And see Booth *v.* Briscoe, 2 Q. B. D. 496, 25 Wkly. Rep. 838.

10. Russell *v.* Stocking, 8 Conn. 237, where several persons joined in an action of trespass for entering upon their fishery; it appearing that some of the plaintiffs had an absolute title to the fishery and others were in possession under a parol agreement, defendants insisted that the latter could not join in the suit and it was held that the action was properly brought; for possession, even of incorporeal property is sufficient title against a wrong-doer.

11. See the opinion of Powers, J., in Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 1043, 11 L. R. A. N. S. 693. See also the opinion of Bowen, L. J., in Hannay *v.* Smurthwaite, [1893] 2 Q. B. 412, 422, 63 L. J. Q. B. 41, 69 L. T. Rep. N. S. 677, 42 Wkly. Rep. 133.

12. Thus, in the elaborately argued case of Weller *v.* Baker, 2 Wils. C. P. 414, 423, the case of the dippers at Tunbridge Wells, it was held that all the dippers, and their husbands, might join in trespass on the case, against one who exercised the office of dipper without being duly appointed; "for although the dippers are severally entitled to receive for their own several use such voluntary gratuities as the nobility and gentry are pleased to give them respectively, yet with regard to a stranger's disturbing them in their employment, they are all jointly concerned. . . . It is a tort as done to them all." See also Hunt *v.* Holton, 13 Pick. (Mass.) 216.

So in the earlier case of Coryton *v.* Lithebye, 2 Saund. 112, 116, C and H, two several owners of certain mills, sued a tenant of the manor, who, as such, must grind at these mills or one of them, because he had ground elsewhere, whereby plaintiffs had lost certain tolls. Defendant demurred "because both the plaintiffs had joined in an action. But Chief Justice Hale and all the court were "of opinion, that they might well join in the action, for though their interests are several, yet the not grinding at any of their mills is an entire joint damage to both the plaintiffs for which they shall have their joint action." See also on this point the note to this case in 2 Saund. 116*a* note 2.

13. As in trespass *quare clausum fregit* or in case for a nuisance to their land, and in all actions for injuries to personal chattels. Gould Pl. c. 4, § 57.

14. 1 Chitty Pl. 75. In the case of Daniels *v.* Daniels, 7 Mass. 135, 137, Parsons, C. J., remarks: "In personal actions tenants in common must join, and also parceners, when damages are to be recovered for a tort done to their lands, although the estate in the lands be several. Co. Lit. 198. The rule by which joinders in actions are governed is stated in the case of Weller *v.* Baker, 2 Wils. C. P. 414, as extending to all cases where the damages to be recovered are joint. The same rule is also laid down in the case of Coryton *v.* Lithebye, 2 Saund. 112. Thus tenants in common must join in trespass, and also in nuisance [That the joinder is

d. Tort to a Several Interest With Separate Damage. But if two or more persons had several interests and sustained separate damage from defendant's violation of these rights, they could not at common law join as plaintiffs.[15]

C. In Code Pleading — 1. Terms of the Statute. The provisions of the New York code of 1848 relating to the joinder of plaintiffs were copied in many other codes, with little change in the language and none in the substance. After the lapse of more than sixty years the words of the original statute still stand as the accepted form of the enactment in most of the states.[16]

2. Scope of Code Provision — a. When Plaintiffs Are United in Interest. When, under the substantive law of a code state, two or more are united in interest as joint promisees in a contract or as joint owners of property, real or personal, the theory of code procedure follows, in the main, the theory of common-law procedure; the joint interest is looked upon as a unit and can be asserted only in the names of all its owners, as parties to the action.[17]

permissible see 1 Chitty Pl. 75]. But they cannot join in an action for forging false deeds, for that concerns the inheritance, which is several." It was held that tenants in common had properly joined in an action in the case for the destruction of the title deeds. So, while tenants in common could not join in a real action of waste to recover the place wasted, they could join in a personal action of tort in the nature of waste to recover the damages. Bullock *v.* Hayward, 10 Allen (Mass.) 460. And see Decker *v.* Livingston, 15 Johns. (N. Y.) 479; Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376 (marking the distinction in the rule when tenants in common brought debt for rent against their tenant, and when they were joined in an avowry for the rent, since "the avowry savors of the realty"); Porter *v.* Bleiler, 17 Barb. (N. Y.) 149.

15. "For an assault, false imprisonment, and generally for all injuries to the person, each person injured must sue separately." Dicey Parties 381. So, "if a man says to two persons, 'you have murdered J. S.' . . . they cannot join in one action against him for speaking these words, but each of them must bring a separate action, for the wrong done to one is no wrong done to the other." Sergeant Williams Note to Coryton *v.* Lithebye, 2 Saund. 112, 117.

The common-law doctrine is illustrated by the remarks of Lord Bramwell, delivering the judgment of the court of appeal in Booth *v.* Briscoe, 2 Q. B. D. 496, 497, 25 Wkly. Rep. 838. Plaintiffs, the eight trustees of certain charities, joined in an action for libel contained in a letter, written and published by defendant, commenting on the improper management of the charities by "the trustees." The question being raised whether these eight plaintiffs could join in an action, Bramwell, L. J., remarked: "If indeed there were a joint tort, for instance, slander of several persons in partnership, the persons injured, would have joined and maintained the action, but could have maintained the action for the joint damage only. Here there is no joint damage. Each man's character, if there is a libel, has been separately libelled. There is no doubt, therefore, that prior to the Judicature Act this proceeding would have been erroneous."

Summary.— In Hannay *v.* Smurthwaite, [1893] 2 Q. B. 412, 422, 63 L. J. Q. B. 41, 69 L. T. Rep. N. S. 677, 42 Wkly. Rep. 133, Bowen, L. J., summed up the older doctrine thus: "With regards to torts, I think the law may be properly summed up as follows: persons who had a joint interest were bound to sue jointly, while persons who had several interests were bound to sue separately; but where persons, although they might have several interests, had sustained joint damage, they might sue jointly also."

16. N. Y. Code Proc. (1848) §§ 97, 99. Section 97 reads as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." Section 99 reads as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." The codes which adopted and still have the enactment in this form, or with immaterial changes, are those of Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Washington, Wisconsin, and Wyoming.

The English statutory rule, designed for a system based, like code pleading, upon the principle of one form of action, provides that "all persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or of fact would arise." Order XVI, rule 1. And see Stroud *v.* Lawson, [1898] 2 Q. B. 44, 50, 67 L. J. Q. B. 718, 78 L. T. Rep. N. S. 729, 46 Wkly. Rep. 626.

17. See cases cited *infra*, this note.

Thus, when several persons mutually agreed to contribute money to buy land to

b. When Plaintiffs Have Separate Interests — (I) *Limited Liberty of Joining.* When plaintiffs are not united in interest but stand on separate rights of action, the tendency of the code is to require a separate suit by each plaintiff.[18] It is only when peculiar facts exist, and are shown in the pleading, that the convenience of a joint action is permitted to plaintiffs who are without a joint interest.[19] The cases present the question in three distinct aspects, according as the several rights of action are attended with a community of interest in the subject of the action and in the relief demanded.[20]

(II) *Plaintiffs With Separate Rights and No Community of Interest.* In this, the ordinary case of different plaintiffs with separate rights, a joinder of parties is not permitted.[21] That defendants combined in the wrong against several plaintiffs, and caused their loss only through a conspiracy, will not of itself warrant a joinder by plaintiffs.[22] Although in most code states all causes of action which have arisen out of the same transaction and exist in the right of one plaintiff may be joined in one action,[23] the fact that the separate rights of different plaintiffs have all arisen simultaneously or out of one act of defendant will not *per se* warrant a joinder of parties.[24] The rule holds even when the con-

be held in trust for them and to pay such sums as should be needed for the future payments on the land, they were, in the eye of the law, "united in interest," and must join as plaintiffs. George *v.* Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963. So, when D contracted with S and W to deliver to them certain pieces of furniture, an action against D for failure to deliver cannot be brought by S alone, but W must be joined as a party. Lemon *v.* Wheeler, 96 Mo. App. 651, 70 S. W. 924. So, when a number of persons have jointly contributed to procure a right of way for a railroad through a city, in consideration of the company's agreement to give certain rates, an action to rescind the contract for failure by the company to comply must be brought in the names of all the contributors. Clark *v.* Great Northern R. Co., 81 Fed. 282.

18. The reason for the rule is exemplified in Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320.

19. "Persons having distinct and independent claims to relief cannot, unless the case is a peculiar one, join in the prosecution of one action." Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 600, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320, per Daniels, J.

So the English statutory rule of joinder (see *supra*, note 16), liberal as it is, confers only "a limited liberty of joining plaintiffs with separate causes of action." Stroud *v.* Lawson, [1898] 2 Q. B. 44, 52, 67 L. J. Q. B. 718, 78 L. T. Rep. N. S. 729, 46 Wkly. Rep. 626.

20. See *infra*, III, C, 2, b, (II), (III).

21. *California.*— Tell *v.* Gibson, 66 Cal. 247, 5 Pac. 223.

Colorado.— No. 5 Min. Co. *v.* Bruce, 4 Colo. 293.

Indiana.— McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Brownell *v.* Irwin, 25 Ind. App. 395, 58 N. E. 263.

Iowa.— Faivre *v.* Gillman, 84 Iowa 573, 51 N. W. 46; Bort *v.* Yaw, 46 Iowa 323; Hinkle *v.* Davenport, 38 Iowa 355 (two plaintiffs cannot join in an action for slander); Rhoads *v.* Booth, 14 Iowa 575 (two or more persons cannot maintain a joint action for personal damages for malicious prosecution).

Kentucky.— Pelly *v.* Bowyer, 7 Bush 513.

New York.— Cobb *v.* Monjo, 90 N. Y. App. Div. 85, 85 N. Y. Suppl. 597; Sherman *v.* Rothschild, 48 Hun 620, 1 N. Y. Suppl. 302, 14 N. Y. Civ. Proc. 328 [*affirmed* in 112 N. Y. 669, 19 N. E. 847]; Gray *v.* Rothschild, 48 Hun 596, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320. where the claims of the several plaintiffs had been reduced to judgments before the joint action was begun.

Texas.— Murchison *v.* Western Union Tel. Co., (App. 1890) 15 S. W. 416.

Utah.— Salt Lake County *v.* Golding, 2 Utah 319.

Compare Hubbard *v.* Burrell, 41 Wis. 365, 372. The complaint showed that defendant held a certain sum of money in trust for plaintiff and another person, and that each of these *cestuis que trustent* was entitled to an aliquot part of the amount. It was held that plaintiff could sue alone, the fact of the trust not being denied. "If the trust should be denied, there would be strong grounds for claiming that J [the other *cestui que trust*] should be made a party," per Cole, J.

22. Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320. In this case seven different firms who had sold goods at different times to defendants, four in number, join in an action to recover the damages arising to plaintiffs through the joint wrong of defendants. The complaint alleged that the goods had been obtained by means of false representations by defendants, that they had entered into a conspiracy under which the goods were to be purchased on credit by one of defendants and disposed of, and that this conspiracy had been carried into effect. It was held that the joint action could not be maintained.

23. Joinder of causes see PLEADING.

24. No. 5 Min. Co. *v.* Bruce, 4 Colo. 293,

tract as to each plaintiff is evidenced in the same instrument.[25] Nor is the rule modified by an agreement between the different plaintiffs that they will sue their common debtor at their joint expense and divide the recovery.[26]

(III) *Plaintiffs With Separate Rights, But With a Community of Interest* — (A) *When Community of Interest Is Only in the Subject of Action.* When plaintiffs, although not united in interest, have a community of interest in the general subject of action, so that the evidence for any one of plaintiffs will be, in the main, the evidence for all, the codes do not, on this ground alone, permit plaintiffs to join in one action.[27] There must be also a community of interest in the relief demanded.[28] The rule has a ready application when one and the same tort invades simultaneously the rights of several.[29]

(B) *When Community of Interest Is in Both Subject of Action and Relief Demanded* — (1) Joinder Permitted. In this case, and in this case only, among plaintiffs who are not united in interest, a joinder in an action is permitted by the codes.[30]

(2) Origin of the Enactment. Both in its origin and in its present application, this provision of the codes is closely related to the older procedure.[31] There

302 (where it was said: "The simultaneous hiring of two or more persons to work by the day, each at a stipulated price per day, and each to be paid for the number of days he works, constitutes a several contract with each"); Bort *v.* Yaw, 46 Iowa 323 (where two plaintiffs sued to recover damages sustained by the fraudulent representation of defendant, whereby each plaintiff was induced to part with a certain sum of money in the purchase of worthless notes; neither plaintiff had any interest in the property of the other, but defendant's representations were made at the same time, and it was held that the representations were in legal effect wholly distinct, and gave plaintiffs no right to join in their actions).

25. McIntosh *v.* Zaring, 150 Ind. 300, 49 N. E. 164, where three firms of attorneys, F & G, Z & H, and C & E, entered into a written contract with D, which recited that D had employed them as counsel to contest the will of De P, that if the will was set aside and D declared entitled to share in the estate, the total fee should be twenty-five per cent of the value of D's share; and that D "agreed to pay said fee as follows: One-third to Friedley & Giles, one-third to Zaring & Hottel, and one-third to C. L. & H. E. Jewett." The court said that the legal effect of the written contract was the same as if there had been three several and separate written contracts in favor of each of the three several firms or groups of attorneys. But see another aspect of this case in the following note.

26. See Freer *v.* Cowles, 44 Ala. 314.

27. *Indiana.*— Brownell *v.* Irwin, 25 Ind. App. 395, 58 N. E. 263.

Iowa.— Lewis *v.* Eshleman, 57 Iowa 633, 11 N. W. 617.

Kansas.— Central State Bank *v.* Walker, 7 Kan. App. 748, 53 Pac. 379.

Missouri.— State *v.* Beasley, 57 Mo. App. 570. And see Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359.

Nebraska.— Shull *v.* Barton, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698.

New York.—Hynes *v.* Farmers' L. & T. Co., 9 N. Y. Suppl. 260.

Washington.— Utterback *v.* Meeker, 16 Wash. 185, 47 Pac. 428.

United States.— Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493; Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359.

Compare Read *v.* Chambers, (Tex. Civ. App. 1898) 45 S. W. 742.

28. See cases cited *supra*, note 27.

Illustration.—A policy of life insurance for ten thousand dollars, provided in terms for the payment of two thousand dollars to A, one thousand dollars to B, and so on. All the different beneficiaries joined in the action. The court said, per Brewer, J.: "Of course, there may be a unity of interest in the subject-matter of the action, but there is no unity of interest in the relief desired. If, for instance, one of these beneficiaries is paid, the others have no interest in and are not prejudiced by that payment; and he has no interest in the money which is due the other beneficiaries. Each one has a separate interest in the money which by the terms of the policy is payable to him or to her." It was held therefore that there was a misjoinder under the Missouri code. Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359, 360.

29. As when the owner of an elevator converted the wheat which had been stored there by different owners through several bailments. Central State Bank *v.* Walker, 7 Kan. App. 748, 53 Pac. 379. In an action to recover because of injuries resulting to two plaintiffs from one and the same act of defendant in polluting a well, the complaint claimed damages for one plaintiff in the sum of two hundred dollars and for the other in the sum of five hundred dollars. It was held that there was a misjoinder. Brownell *v.* Irwin, 25 Ind. App. 395, 58 N. E. 263.

30. See the terms of the statute, *supra*, note 16.

On the wide effect given the enactment see *infra*, III, C, 2, b, (III), (B), (5).

31. See *infra*, note 32 *et seq.*; *supra*, note 11.

was a partial precedent for it even in the law courts, where several plaintiffs in actions *ex delicto* might join, although not united in interest, if their damage was joint.[32] But the precedent which has been chiefly followed by the codes is the liberal doctrine of joinder that prevailed in courts of equity. These tribunals had no hard and fast rule on the subject.[33] Much was left to the discretion of the court.[34] In general a joinder was permitted, in the case of separate complainants having separate interests, if they would all be affected by the decree,[35] and under the doctrine of formal parties complainants who were but indirectly affected might join.[36] But even equity tended to refuse a joinder to complainants having separate interests, unless a common object was to be secured in the decree.[37] The historic provision of the codes noticed above,[38] in permitting a joinder of plaintiffs who have "an interest in the subject of the action and in obtaining the relief demanded," apparently adopted, in a more precise form, the current doctrine of the courts of equity;[39] and the courts construing this enactment have repeatedly recognized equity decisions in the joinder of complaints as of high persuasive authority under the code.[40]

(3) Its Permissive Character. Unlike the rule of the code in the case of plaintiffs with a joint interest,[41] the provision in question is entirely permissive.[42] The interests being several, the separate plaintiffs may sue separately,[43] maintain-

32. See Coryton *v.* Lithebye, 2 Saund. 112; Weller *v.* Baker, 2 Wils. C. P. 414. The facts in these cases are given *supra*, note 12. That both cases are available in applying the rule to-day see Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693.

33. Thus Story remarks that the general rule in equity in relation to the joinder of complainants "does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test." Story Eq. Pl. § 76c. And see Goodnight *v.* Goar, 30 Ind. 418; Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773.

34. Story Eq. Pl. § 77.

35. See Equity, 16 Cyc. 183.

36. See Equity, 16 Cyc. 193.

37. See the discussion of the equity rule in Cadigan *v.* Brown, 120 Mass. 493 (joinder permitted); Ballou *v.* Hopkinton, 4 Gray (Mass.) 324 (joinder permitted); Scofield *v.* Lansing, 17 Mich. 437 (illustrating the flexible nature of the equity rule); Kerr *v.* Lansing, 17 Mich. 34 (joinder refused in equity, notwithstanding "a similitude of grievances"); Marselis *v.* Morris Canal, etc., Co., 1 N. J. Eq. 31 (refusing the joinder); Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773 (discussing the doctrine generally and permitting the joinder, because the relief sought was the same as to all the complainants); Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218 (discussing the doctrine generally and permitting the joinder).

38. See *supra*, III, C, 1, text and note 16.

39. The two features of the code provision, its community of interest in the subject of the action and in the relief demanded, are both apparent in the test which Chief Justice Shaw applies, under the rules of equity, in Ballou *v.* Hopkinton, 4 Gray (Mass.) 324, 328, where he says: "Although the plaintiffs are several owners of separate and distinct mills, injured by the alleged stoppage, diversion and waste of the water of Mill River, and to recover damages for which each owner must bring his several action at law to obtain a remedy for his particular injury, yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased, and a joint interest in the remedy, which equity alone can afford."

40. Home Ins. Co. *v.* Gilman, 112 Ind. 7, 9, 13 N. E. 118, where the court, per Mitchell, J., remarks that the effect of the provisions in the code "is, substantially, to adopt the equitable rules of the chancery courts in regard to these subjects [the joinder of parties], and they require the application of those rules to each case as it arises, whether it be of a legal or equitable character." And see Goodnight *v.* Goar, 30 Ind. 418 (holding that as plaintiffs could not formerly have joined in chancery, they could not properly join under the code); Trompen *v.* Yates, 66 Nebr. 525, 530, 92 N. W. 647 (where it is said: "The truth seems to be that the equity practice of taking into the action everybody who claims an interest in its subject-matter, was the object aimed at in these Code provisions, and this court seems to have carried them out according to their letter and spirit"); Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320 [*affirmed* in 112 N. Y. 668, 19 N. E. 847]; Loomis *v.* Brown, 16 Barb. (N. Y.) 325.

41. See *supra*, III, C, 2, a.

42. See the language of the statute *supra*, note 16. In one or two states, however, the enactment has been changed so as to read "shall be joined," etc. See Burns Rev. St. Ind. (1908) § 263. This change, however, is apparently without effect on the permissive nature of the provision.

43. Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 75 Wis. 385, 44 N. W. 638.

ing separate actions, or they all may join,[44] in one action or some may sue without joining the others in the action.[45]

(4) Test of Permission. Under the terms of the enactment, and as construed by most courts, the test of the statutory permission for the joinder of plaintiffs is twofold; plaintiffs must all have an interest both in the subject of the action and in the relief demanded.[46] The rule is a rule of convenience, and the tests which it requires are those dictated by practical convenience in the trial of cases.[47]

(5) Extent of Permissive Joinder — (a) In General. Although the joinder of separate plaintiffs having separate interests is an exception to the rule,[48] and notwithstanding the specific limitations indicated above,[49] the permissive joinder under the codes has a very wide range of application.

(b) Includes Both Legal and Equitable Causes. Less flexible than the equity doctrine of joinder,[50] the code provision, on the other hand, reaches somewhat further. Under the principle of the one form of action, the permission of the statute applies, in most states, not only to actions which were formerly classed as "equitable," but also to actions which were formerly classed as "legal," including those for the recovery of money only or for specific property.[51] On principle it is clear that the rule in code states is free from the limitation which some courts of equity have insisted upon, namely, that community of interest in both subject of action and relief demanded will not suffice unless the questions involved are of equitable cognizance.[52]

(c) Includes Interests of Different Degrees and Kinds — aa. *In General.* At common law it was essential that those who appeared on the record as plaintiffs should have an interest in the whole of the recovery, so that a judgment *in*

44. Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861. And cases cited *infra,* note 45.

45. Grand Rapids Water-Power Co. *v.* Bensley, 75 Wis. 399, 44 N. W. 640, where in an action by riparian owners to enjoin defendants from taking water from the river for the use of a mill it appeared on the face of the complaint "that there are other persons interested in the relief sought who are not joined as plaintiffs or defendants." Defendant demurred for defect of parties, and it was held that the demurrer was properly overruled. See also Lamar *v.* Croft, 73 S. C. 407, 53 S. E. 540.

46. See the terms of the statute *supra,* note 16; and the previous topic.

47. Its underlying reason is that which lay at the foundation of the equity doctrine of multifariousness, "the inconvenience of mixing up distinct matters, which may require very different proceedings or decrees by the court, and embarrass the defendant in equity in his proper defence against each." Story Eq. Pl. § 280. And see Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218, 228, where, on a question of the joinder of complainants, Thompson, C. J., remarked: "A bill is not to be treated as multifarious because it joins the causes of complaint growing out of the same transaction, when all the defendants are interested in the same right, and where the relief sought is of the same general nature. The best authorities concur in the test, that the reason a bill is multifarious is in consequence of the joinder of distinct, independent and separate causes of complaint requiring different defences and different decrees." This reason loses nothing of its force when the equity rule of joinder is extended by the codes to cases involving jury trials. Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 600, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320 [*affirmed* in 112 N. Y. 668, 19 N. E. 847], where Daniels, J., remarked: "In all the cases containing any reference whatever to separate and distinct claims for damages, the decisions have been guarded by the conclusion previously stated, that a joint action by several and distinct parties claiming several and distinct damages, cannot be maintained. Any other rule would be attended with so much perplexity, intricacy and confusion at the trial, as to render the jury before which the action must necessarily be tried next to incapable of deciding and disposing of it."

48. Hynes *v.* Farmers' L. & T. Co., 9 N. Y. Suppl. 260. And *supra,* III, C, 2, b, (I).

49. See *supra,* III, C, 2, b, (III).

50. See *supra,* note 33.

51. Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788; Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Trompen *v.* Yates, 66 Nebr. 525, 92 N. W. 647; Earle *v.* Burch, 21 Nebr. 702, 33 N. W. 254; Loomis *v.* Brown, 16 Barb. (N. Y.) 325; Schiffer *v.* Eau Claire, 51 Wis. 385, 8 N. W. 253.

Contra, in Oregon, where the code in terms authorizes this permission only in equitable actions. See Oreg. St. § 380.

52. See Tribette *v.* Illinois Cent. R. Co., 70 Miss. 182, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660.

In equity pleading for a discussion of the question see Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693.

solido could be rendered in favor of all the plaintiffs.[53] But in the one form of action required by the codes and under their elastic judgment, it is not essential that the interests of the separate plaintiffs should be of the same degree,[54] or of one kind.[55] It is sufficient if all the plaintiffs have some common interest in respect to the subject-matter of the suit and each is interested in the same relief asked by the other or some part of it.[56]

bb. *Legal and Equitable Plaintiffs in One Action.* Under the general principle noticed above it is well established in code pleading that a plaintiff vested with the full legal title, although able to assert the entire claim in his own name,[57] may join the beneficial owner with him as plaintiff.[58]

53. Dicey Parties 11, 104, 380; Chitty Pl. 9, 10–12; Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118.

54. Fairbanks *v.* San Francisco, etc., R. Co., 115 Cal. 579, 47 Pac. 450, holding that the owner of a building and an insurance company which has paid a loss on the building may join in an action against one who negligently set fire to the building, although the two plaintiffs sue to recover not only the value of the building in excess of the insurance but the damage to the owner's business proximately caused by defendant's negligence.

55. Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 275, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788 (where the court adopts the language of Professor Pomeroy (Remedies and Remedial Rights, § 199): "The extent of the interest is not the criterion, nor the source, nor origin. If the persons have any interest — whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit or arising from the stipulations of the agreement — the language applies, without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal"); Loomis *v.* Brown, 16 Barb. (N. Y.) 325, 332 (where it was said: "It is not said to be a joint or an equal or even a common interest, but simply an interest in the subject of the action, with the view of doing full justice and settling the rights of all parties in interest, in one suit"). And see Strobel *v.* Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687; Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693.

56. *California.*— Fairbanks *v.* San Francisco, etc., R. Co., 115 Cal. 579, 47 Pac. 450; Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104; Daley *v.* Cunningham, 60 Cal. 530.

Colorado.— United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

Indiana.— Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26; McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Carmien *v.* Cornell, 148 Ind. 83, 47 N. E. 216; Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Mt. Vernon First Nat. Bank *v.* Sarlis, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Larsen *v.* Groeschel, 98 Ind. 160; Tate *v.* Ohio, etc., R. Co., 10 Ind. 174, 71 Am. Dec. 309; American Plate Glass Co. *v.* Nicoson, 34 Ind. App. 643, 73 N. E. 625.

Iowa.— McMurray *v.* Van Gilder, 56 Iowa 605, 9 N. W. 903.

Kansas.— Hays *v.* Farwell, 53 Kan. 78, 35 Pac. 794.

Kentucky.— Dean *v.* English, 18 B. Mon. 132.

Minnesota.— Grant *v.* Schmidt, 22 Minn. 1.

New York.— Strobel *v.* Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687; Cassidy *v.* Sauer, 114 N. Y. App. Div. 673, 99 N. Y. Suppl. 1026 [*affirmed* in 187 N. Y. 540, 80 N. E. 625]; Gillespie *v.* Forrest, 18 Hun 110; Peck *v.* Richardson, 12 Misc. 310, 33 N. Y. Suppl. 1107; Union Ins. Co. *v.* Central Trust Co., 13 N. Y. Suppl. 17; Tuers *v.* Tuers, 16 Abb. N. Cas. 464.

Oregon.— Firemen's Ins. Co. *v.* Oregon R. Co., 45 Oreg. 53, 76 Pac. 1075, 67 L. R. A. 161.

South Carolina.— Wagner *v.* Sanders, 49 S. C. 192, 27 S. E. 68.

Texas.— St. Louis Southwestern R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139.

Vermont.— Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693. This case considers the question as a case in equity pleading, but follows the principles recognized under the codes.

United States.— Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441.

England.— See Stroud *v.* Lawson, [1898] 2 Q. B. 44, 52, 67 L. J. Q. B. 718, 78 L. T. Rep. N. S. 729, 46 Wkly. Rep. 626 (applying the English statutory rule of joinder, and holding it necessary for a joinder "that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law"); Walters *v.* Green, [1899] 2 Ch. 696, 702, 63 J. P. 742, 68 L. J. Ch. 730, 81 L. T. Rep. N. S. 151, 48 Wkly. Rep. 23; Ellis *v.* Bedford, [1899] 1 Ch. 494, 68 L. J. Ch. 289, 80 L. T. Rep. N. S. 332, 47 Wkly. Rep. 385.

57. See *supra*, I, B, 2, e, (III), (D), (4), (b).

58. Hecker *v.* Cook, 20 Colo. App. 282, 78 Pac. 311 ("The trustee may, at his option, sue in his own name, or may join his *cestui que trust*"); Wright *v.* Tinsley, 30 Minn. 389; Hawke *v.* Banning, 3 Minn. 67 (remark of the court that the joinder here was necessary is open to question); Cassidy *v.* Sauer, 114 N. Y. App. Div. 673, 99 N. Y. Suppl. 1026 [*affirmed* in 187 N. Y. 540, 80 N. E. 625].

cc. *Plaintiffs With Several and Distinct Ownerships.* That several persons have each a separate and distinct ownership, with no property interests in common, will not necessarily prevent their joining in one action; they may still have the requisite community of interest in the subject of action and in the relief demanded.[59] This community of interest has been often recognized in joint actions by different owners of distinct tracts of land, to abate or enjoin a nuisance which affects them all, whether in the same degree or in different degrees,[60] as in an action by different owners of distinct parcels of riparian land, to restrain a defendant from diverting or polluting the water, or flooding the lands;[61] or in an action by owners of separate and distinct tenements to enjoin the construction, in their common locality, of a wooden building, contrary to an ordinance establishing fire limits;[62] or in an action by the owners of lots of various widths and locations abutting on a street, to enjoin the unlawful construction or operation of a railway along this street;[63] or in a similar action when the track has been unlawfully or improperly constructed, to require its removal, or its alteration.[64] It is evident that the underlying principle in all these cases has a wider application. In general, it applies whenever separate owners of distinct property rights have, in the circumstances of a given case, a common interest that will be fully protected by a decree in favor of one or all.[65] Throughout its applications, the doctrine of the codes on this point is a very complete survival of the equitable doctrine as to the joinder of complainants.[66]

(c) *Community and Severalty of Interest.* The decisions which permit and those which deny the joinder of plaintiffs often turn on states of fact which have much in common.[67] The same case, and especially under the codes, may call for

Compare Opper *v.* Hirsh, 33 Misc. (N. Y.) 560, 68 N. Y. Suppl. 879.

59. See the cases cited *infra*, note 60 *et seq.*

60. Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 20, 87 N. W. 861, where it is said: "It is well settled in this state that, 'where the erection of a nuisance will cause private and special damage to each of several persons, they have a common right to prevent its erection, and may join as complainants in a bill for that purpose.'"

61. Strobel *v.* Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687. The action was by fourteen plaintiffs owning various mills on a certain stream. Foreman *v.* Boyle, 88 Cal. 290, 26 Pac. 94. And see under equity pleading Turner *v.* Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929; Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693.

62. Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 204, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481, where it is said: "There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorize them to join in the action."

63. Atchison St. R. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861; Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1. And see in equity pleading Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763.

64. Tate *v.* Ohio, etc., R. Co., 10 Ind. 174, 71 Am. Dec. 309; Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861.

65. "Generally, when several persons have a common interest in the subject matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs." Cadigan *v.* Brown, 120 Mass. 493, 494, per Morton, J. T and H, the separate owners of two mineral springs, situated some distance apart, had each used for many years, without objection from the other, a certain appropriate trade-mark to designate the water of these springs. It was held that T and H may unite in an action to enjoin a third person from using this trade-mark. Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21, 19 Ky. L. Rep. 483. So, where the several owners of distinct tracts of land contract with a third person for the removal by the latter of certain timber from the lands, the owners may join in an action to restrain the removal of timber not embraced in the contract. Elliott *v.* Bloyd, 40 Oreg. 326, 67 Pac. 202.

66. Such equity decisions as the following are well in point in code states. Cadigan *v.* Brown, 120 Mass. 493; Turner *v.* Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929; Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693.

67. Story Eq. Pl. §§ 207, 207*a*. And cases cited *infra*, note 68 *et seq.*

a direct decision on both sides of the doctrine.[68] The characteristic difference is found, not in the existence of a common occurrence, but in the existence of the community of interest, already noticed.[69] Although several owners of separate tracts cannot join to recover their individual damages caused by a nuisance created by one and the same act of defendant,[70] yet they may join to abate the nuisance.[71] Several plaintiffs may not join to recover their individual damages arising from one conspiracy on the part of defendants;[72] but these plaintiffs may join to set aside a release obtained from them through the fraud of defendants.[73] A and B, entitled each to an aliquot part of an ascertained and definite fund in the hands of a common debtor, cannot join in an action to recover their respective shares;[74] but they may join in an action for an accounting from this debtor.[75] Three persons, not partners, who have contracted with defendant, in a written instrument signed by them all, to serve defendant for a sum certain, each to receive one third from defendant, cannot join in an action to recover their respective thirds;[76] but they may join to avoid a settlement obtained from them through the fraudulent representation of defendant.[77] So, while the separate owners of distinct personal properties cannot join in an action against one who has converted the property,[78] yet when the mortgagees of two chattel mortgages, executed, delivered, and filed simultaneously upon the same personal property, agree that the liens thereof shall be concurrent, the mortgagees may join in an action for the conversion of the property.[79]

IV. JOINDER OF DEFENDANTS.[80]

A. General Principles — 1. Joinder and Substantive Obligation. In the established doctrine of the common law, the rules for the joinder of defendants were cast in the mold of the substantive obligation which plaintiff sought to enforce. If that obligation, as defined by the substantive law, was several, the common law permitted no joinder of defendants; for there was no entirety of obligation as against the several contractors or the several tort-feasors. In all such cases plaintiff's claim against each defendant was in the nature of a separate

68. See Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861. See also cases cited *infra*, note 69 *et seq.*

69. The difficulty in defining this community of interest is well illustrated in the elaborate discussion in Ellis *v.* Bedford, [1899] 1 Ch. 494, 503, 514 *et seq.*, 519 *et seq.*, 521 *et seq.*, 68 L. J. Ch. 289, 80 L. T. Rep. N. S. 332, 47 Wkly. Rep. 385. The facts were as follows: Six plaintiffs, growers of fruit, flowers, vegetables, roots, and herbs, within the meaning of a statute regulating a certain market, sue to enforce certain preferential rights to stands in the market. And see the cases in the following notes.

70. Foreman *v.* Boyle, 88 Cal. 290, 26 Pac. 94; Brownell *v.* Irwin, 25 Ind. App. 395, 58 N. E. 263; Grant *v.* Schmidt, 22 Minn. 1; Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861.

71. Foreman *v.* Boyle, 88 Cal. 290, 26 Pac. 94; Grant *v.* Schmidt, 22 Minn. 1; Younkin *v.* Milwaukee Light, etc., Co., 112 Wis. 15, 87 N. W. 861.

72. Gray *v.* Rothschild, 48 Hun (N. Y.) 596, 1 N. Y. Suppl. 299, 14 N. Y. Civ. Proc. 320 [*affirmed* in 112 N. Y. 668, 19 N. E. 847].

73. Smith *v.* Schulting, 14 Hun (N. Y.) 52.

74. Hubbard *v.* Burrell, 41 Wis. 365; Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359; Story Eq. Pl. § 207*a*.

75. Petree *v.* Lansing, 66 Barb. (N. Y.) 357; Eldredge *v.* Putnam, 46 Wis. 205, 50 N. W. 595.

So creditors may join in an action against a common debtor, although the debts are several and separate, when the complaint seeks to set aside a fraudulent mortgage on the debtor's property. Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421. And see Flanders *v.* Wood, 83 Tex. 277, 18 S. W. 572; Schiffer *v.* Eau Claire, 51 Wis. 385, 8 N. W. 253; Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441.

76. McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164.

77. McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164.

78. Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735.

79. Hays *v.* Farwell, 53 Kan. 78, 35 Pac. 794; Welch *v.* Sackett, 12 Wis. 243, 281, where the reasoning of the court suggests that the joinder is imperative rather than permissive.

80. In actions against particular classes of parties see cross-references *supra*, p. 8.

In particular actions or proceedings see cross-references *supra*, p. 8.

Cost of joint defendants see Costs.

Dismissal as to co-defendant see Dismissal and Nonsuit.

Excusing non-joinder see Pleading.

claim.[81] If the obligation was defined by the substantive law as "joint," plaintiff might bring one action against all the living obligors, and in contract cases could not maintain his action in another form.[82]

2. Entirety of Obligation in Contracts and in Torts — a. Joinder in an Action Ex Contractu — (I) *In General.* The nature of a joint obligation in the common-law theory of contracts was essentially different from its nature in the theory of torts,[83] the result being a marked difference in the rules of joinder at common law, according as plaintiff sued *ex contractu* or *ex delicto.* Three distinct forms of obligation were recognized in the common-law theory of contracts, the joint,[84] the several,[85] and the joint and several[86] obligation.[87]

(II) *On Joint Contract.* If the contractual obligation was defined as joint, it could be treated in procedure only as an entirety; plaintiff was bound to bring his action against all the living obligors.[88] If any joint contractor was dead, the action lay only against the survivor or survivors.[89]

(III) *On Several Contract.* If the obligation was defined as several, there could be no action against the obligors, or any of them, collectively, but plaintiff must proceed as if he had a separate claim against each.[90]

(IV) *On Joint and Several Contract.* If the obligation was defined as "joint and several,"[91] the rules of joinder treated it accordingly. Being jointly bound, the obligors could all be sued collectively;[92] being severally bound, each obligor could be sued separately.[93] But as there was no partial entirety, there could be no joinder of a less number than all.[94]

b. Joinder in an Action Ex Delicto — (I) *In General.* The entirety of obligation which existed in the law of contracts was not recognized in torts. The tort might be joint[95] or several,[96] but the joint tort was very different from the joint contract.

Diversity of citizenship as ground for removal of cause see Removal of Causes.

Joint or separate answers or pleas of co-defendants see Pleading.

81. And "nobody would ever have dreamt of joining in the same action two defendants against whom he made separate claims for damages." Sadler *v.* Great Western R. Co., [1896] A. C. 450, 455, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51, per Lord Herschell.

82. Gould Pl. c. 4. See *infra*, IV, A, 2, a; IV, A, 2, b.

83. Dicey Parties 431 *et seq.* See also subtopics which immediately follow.

84. See *infra*, IV, A, 2, a, (II).

85. See *infra*, IV, A, 2, a, (III).

86. See *infra*, IV, A, 2, a, (IV).

87. See Contracts, 9 Cyc. 651.

88. Page *v.* Brant, 18 Ill. 37; Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136; Higdon *v.* Gardner, 2 Ohio Cir. Ct. 340, 1 Ohio Cir. Dec. 519; McCall *v.* Price, 1 McCord (S. C.) 82, even though one of the joint contractors be out of the state and it be so alleged in the declaration of the answer returned *non est inventus* as to him. See Contracts, 9 Cyc. 652 *et seq.*, 702 *et seq.*

Exceptions.— But the rule was subject to a number of exceptions, as that the omitted co-contractor was a bankrupt, or resident out of the jurisdiction, or the dormant partner of the other defendants, or an infant, or a married woman. Dicey Parties 231, 233. And see Contracts, 9 Cyc. 655, 705; Husband and Wife, 21 Cyc. 1119; Infants, 22 Cyc. 503; Partnership, *post*, p. 560 *et seq.*

89. "For joint liabilities survive entire, against survivors, as do joint rights in their favor. And therefore, the personal representative of the deceased party is not liable at law, either as a co-defendant with the survivor, or in a separate action." Gould Pl. c. 4, § 69. See Contracts, 9 Cyc. 652 *et seq.*, 702 *et seq.*

90. "Where the covenant or promise is so framed that it does not confer upon the plaintiff a remedy against the contractors jointly, but each is only separately responsible for his own act, it is essential to sue them distinctly." Chitty Pl. 50. And see Contracts, 9 Cyc. 652.

91. Although obligees have no joint and several right, obligors may have a joint and several obligation. See Contracts, 9 Cyc. 652.

92. Dicey Parties 234. See Contracts, 9 Cyc. 652 *et seq.*, 702 *et seq.*

93. "For the liability, considered as several, is virtually the same as if it had been created by two several and distinct contracts for the performance of one and the same duty. The plaintiff is ultimately entitled, however, to only one satisfaction in the whole." Gould Pl. c. 4, § 69. See Contracts, 9 Cyc. 652 *et seq.*, 702 *et seq.*

94. "The plaintiff must treat the contract as altogether joint, or altogether several, an action partly joint and partly several, *quoad* the parties liable, being unknown in the law." Gould Pl. c. 4, § 70. And see Chitty Pl. 51; Contracts, 9 Cyc. 657.

95. See *infra*, IV, A, 2, b, (II).

96. See *infra*, IV, A, 2, b, (III).

(II) *On a Joint Tort.* If the tort was classed as joint,[97] plaintiff had the option of joining all the tort-feasors in an action,[98] but he was not bound to join them.[99] Neither was he bound to treat the obligation as "joint and several" in the contractual sense, and either sue all jointly or proceed against them severally.[1] The fundamental rule of joinder in the case of a joint tort was that plaintiff might join one, or any, or all, of several joint wrong-doers.[2]

(III) *On a Several Tort.* Unless the tort as pleaded was a joint tort, in the sense above explained,[3] the tort-feasors, however many and although acting simultaneously, could not be joined in one suit.[4]

B. Special Features — 1. Adverse Interests — a. Rule at Common Law — (I) *Its Statement.* It was a primary principle of the common-law doctrine of parties that one person could not, in one and the same action, hold the position both of plaintiff and defendant.[5] The rule held not only in the anomalous case of the same

97. "The great majority of wrongs can be committed by two or more persons jointly, and further, all persons who aid, counsel, direct, or join in a trespass can be sued together. Hence, every one who takes part in a trespass, e. g., X., at whose command Y. trespasses on A.'s land, and Z., who joins with Y. in trespassing, can all be sued as joint wrong-doers." Dicey Parties 432.

Illustrations of rule see Assault and Battery, 3 Cyc. 1080; Death, 13 Cyc. 334; False Imprisonment, 19 Cyc. 326; Libel and Slander, 25 Cyc. 434; Malicious Prosecution, 26 Cyc. 68; Negligence, 29 Cyc. 565; Trespass; Trover and Conversion; Waste: and other Tort Titles.

Nature of joint tort see Torts.

98. Dicey Parties 430. See also Negligence, 29 Cyc. 565.

99. Dicey Parties 431. See also Negligence, 29 Cyc. 565.

1. Dicey Parties 430. See also Negligence, 29 Cyc. 565.

2. Dicey Parties, Rule 98, which reads: "Every person who joins in committing a tort is separately liable for it, and can not escape liability by showing that another person is liable also, nor can one of several wrong-doers compel the plaintiff to sue him together with the persons with whom he has joined in committing the wrong." See also the following cases:

Illinois.— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683.

Kentucky.— Hill *v.* Harris, 4 Bush 450; Buckles *v.* Lambert, 4 Metc. 330.

Maine.— Turner *v.* Whitehouse, 68 Me. 221.

Massachusetts.— Sumner *v.* Tileston, 4 Pick. 308.

Minnesota.— Hurlburt *v.* Schulenburg, 17 Minn. 22.

New Jersey.— Stockton *v.* Anderson, 40 N. J. Eq. 486, 4 Atl. 642.

New York.— Holsapple *v.* Rome, etc., R. Co., 86 N. Y. 275; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Orange County Bank *v.* Brown, 3 Wend. 158; Low *v.* Mumford, 14 Johns. 426, 7 Am. Dec. 469.

North Carolina.— Gudger *v.* Western North Carolina R. Co., 87 N. C. 325.

Pennsylvania.— Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187.

See 37 Cent. Dig. tit. "Parties," § 46.

Illustrations of rule see Assault and Battery, 3 Cyc. 1080; Death, 13 Cyc. 334; False Imprisonment, 19 Cyc. 326; Libel and Slander, 25 Cyc. 434; Malicious Prosecution, 26 Cyc. 68; Negligence, 29 Cyc. 565; and other Tort Titles.

3. See *supra*, IV, A, 2, b, (II).

4. See *infra*, IV, B, 3, c, (V). See also Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040; Newbery *v.* Garland, 31 Barb. (N. Y.) 121.

Illustrations of rule see Assault and Battery, 3 Cyc. 1080; Death, 13 Cyc. 334; False Imprisonment, 19 Cyc. 326; Libel and Slander, 25 Cyc. 434; Malicious Prosecution, 26 Cyc. 68; Negligence, 29 Cyc. 565; and other Tort Titles.

5. "It is a first principle, that in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself." Eastman *v.* Wright, 6 Pick. (Mass.) 316, 321, per Martin, J. See cases cited in Actions, 1 Cyc. 644 note 9. See also Byrne *v.* Byrne, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196; Thomas *v.* Thomas, 3 Litt. (Ky.) 8; Saunders *v.* Saunders, 2 Litt. (Ky.) 314; Griffith *v.* Chew, 8 Serg. & R. (Pa.) 17, 11 Am. Dec. 556; Swearingen *v.* Steers, 49 W. Va. 312, 38 S. E. 510; Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Moffatt *v.* Van Mulligen, 2 Chit. 539, 18 E. C. L. 776; Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771. *Compare* Oliver *v.* Oliver, 179 Ill. 9, 53 N. E. 304; Allen *v.* Gray, 1 T. B. Mon. (Ky.) 98, 99, where the replication alleged that after the action was commenced and before defendants appeared, S, the party appearing on both sides, had died and the action as to him had abated. It was held, however, that the action was "erroneous in the origin," because of the presence of S as both plaintiff and defendant, and that the error was not cured by the replication.

The theory of the common law on the point is clearly put by Henderson, J., in Pearson *v.* Nesbit, 12 N. C. 315, 316, 17 Am. Dec. 569, where he says: "A suit at law,

person appearing in the same capacity as sole plaintiff and sole defendant,[6] but even when he was one of several plaintiffs or of several defendants,[7] as in the claim of co-trustees against a fellow trustee in relation to the trust property,[8] or in the claim of a partner against his firm,[9] or of a firm against one of its members and other defendants,[10] or of one firm against another firm when each had a common member,[11] or in an action by one heir against all the heirs, to revive a judgment owned by plaintiff against the common ancestor and subject the land to it.[12] Nor did it affect the rule that the appearance of the party on one side of the record was in a personal character and on the other in an official character.[13]

(II) *Presumption From Identity of Name.* The rule noticed above[14] has been recognized and enforced in a recent case on a mere showing of identity of name between a plaintiff and one of defendants.[15]

is a contest between two parties in a court of justice; the one seeking, and the other withholding, the thing in contest. The same individual cannot be, at the same time, both the person seeking, and the person withholding. For it involves an absurdity, that a person could seek from himself, or withhold from himself. Between a corporation and the individuals composing it, this identity does not exist, and the absurdity above stated is avoided; but where the same person is both plaintiff and defendant, in different rights, as for himself on the one side, and as executor on the other, this absurdity is involved. When adversary rights, as creditor and executor, or debtor and executor, meet in the same individual, the law considers the contest as settled — at least as long as the union exists. As soon therefore, as it appears to the court, that the same individual is both plaintiff and defendant, any judgment entered up in the cause is, to say the least, erroneous, and should be reversed."

6. See cases cited *infra*, note 7 *et seq.*

7. Warren *v.* Stearns, 19 Pick. (Mass.) 73; Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352.

8. First Soc. Pultney M. E. Church *v.* Stewart, 27 Barb. (N. Y.) 553, 554, which was an action in the names of the trustees of a church to recover possession of certain Sunday school books taken from the house of worship by defendants. Among defendants was one of the trustees. It was held that a judgment for plaintiff must be reversed, the court saying: "A party can have no right of action against himself, either as debtor or tort-feasor."

9. Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33. In this case a number of persons formed an association and subscribed money for the purpose of securing the building of a railway. P, one of the subscribers, was employed by the association as surveyor, P sued for his services thus rendered. It was held that the subscribers were partners in the undertaking, and that "it is perfectly clear that one partner cannot maintain an action against his copartners for work and labor performed, and money expended on account of the partnership." And see PARTNERSHIP, *post*, p. 560 *et seq.*

10. Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352, where the action was in the name of the state of West Virginia "for the use of L. A. Sweetland and J. S. Sweetland, partners as Sweetland Bros., against J. D. Porter, J. S. Sweetland," and others.

11. Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771, where it was said that the partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in plaintiff's house is also a member, for transactions which took place while he was partner in both houses. And that, whether the action be brought in the lifetime of the common partner, or after his decease.

For unsuccessful attempts to evade the rule see Peunock *v.* Swayne, 6 Watts & S. (Pa.) 239; Bank *v.* Mitchell, 8 Yerg. (Tenn.) 111, 29 Am. Dec. 104. *Compare* Crosby *v.* Timolat, 50 Minn. 171, 52 N. W. 526.

12. See Oliver *v.* Oliver, 179 Ill. 9, 53 N. W. 304.

13. McElhanon *v.* McElhanon, 63 Ill. 457, where P gave his bond to H with S as security. P became H's assignee in bankruptcy and as such brought debt against himself and S, and it was held that the action could not be maintained. In Pearson *v.* Nesbit, 12 N. C. 315, 17 Am. Dec. 569, P was a member of the firm of Nesbit & Co., which brought an action against P and another as executors of R. It was held that a judgment in favor of the firm must be reversed.

14. See *supra*, IV, B, 1, a, (I).

15. Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352. In an action by a partnership one of plaintiffs was named in the writ as "J. S. Sweetland," and in the declaration as "John S. Sweetland"; one of defendants was named in both writ and declaration as "J. S. Sweetland." It was held on demurrer to the declaration that in the absence of proof to the contrary the presumption must be that defendant J. S. Sweetland is identical with plaintiff J. S. Sweetland. The demurrer was accordingly sustained.

Contra.— In the earlier case of Wilson *v.* Benedict, 90 Mo. 208, 213, 2 S. W. 283, however, it was held that "the rule that, from identity of name identity of person may be presumed, has no application to this case, and cannot be extended so far as to uphold as an inference that when a plaintiff sues a

(III) *Limits of Rule.* The rule under consideration applied to actions on joint obligations;[16] and in these cases it cannot be successfully evaded by the omission of plaintiff's name from the list of defendants; for under another rule of joinder[17] all joint obligors must be made defendants.[18] But the rule could be evaded whenever the obligation of defendants was several, or joint and several.[19]

b. Doctrine Under the Codes — (I) *Statement of Rule.* In code pleading, as at common law, the primary test for the joinder of defendants is found in the existence of an interest adverse to plaintiff.[20] But the codes, following the lead of equity procedure,[21] have modified this principle in favor of the general rule that it is sufficient if all the parties interested in the subject of the action are before the court either as plaintiffs or defendants.[22]

(II) *Defendants Without Interests Adverse to Plaintiff* — (A) *Joint Interests.* In the assertion of a joint interest, the codes expressly provide that if the consent of one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint or petition.[23] It follows that the rule in hand can readily be evaded in the class of cases where it is most frequently applied, that is, when the same person is at once a joint obligor and a joint obligee.[24] But in jurisdictions which retain the doctrine of joint contracts in its strictness,[25] this rule of the common law,

defendant having the same name as that of plaintiff, that both persons are one and the same person."

16. See illustrations *supra*, preceding notes.

17. See *supra*, IV, A, 2, a, (II).

18. Illustration.— A promissory note read thus: "On demand, for value received, we promise to pay D. C. Y. Moore, or order, two hundred fourteen dollars, and seventy-five cents, with interest."

(signed) D. C. Y. Moore,
Wm. J. Denslow,
Oliver Tillotson.

It was held that Moore could not sue Denslow and Tillotson because the obligation was joint; neither could Moore sue all the joint obligees, because of the rule in question. Moore *v.* Denslow, 14 Conn. 235. P, B, and C were members of a partnership. After the dissolution of the partnership, B and C were sued by creditors of the company and retained P, who was an attorney, to defend the actions. In the course of making this defense, a bill of costs was incurred. P now sues B and C to recover the amount of this bill. It was held that the action cannot be maintained, for P, as a member of the company, was jointly liable to contribute to the expense of the defense. Milburn *v.* Codd, 7 B. & C. 419, 1 M. & R. 238, 14 E. C. L. 191. See also Partnership, *post*, p. 560 *et seq.*

19. See the discussion of the doctrine in Faulkner *v.* Faulkner, 73 Mo. 327, 339, where Sherwood, C. J., remarked: "A party bound in a contract with others, whereby he becomes both obligor and obligee, cannot maintain on such contract an action at law. . . . This principle, however, does not apply, even at common law, except where the contract is joint, and not where it is (as are all contracts in this State) both joint and several."

Illustration.— A promissory note contained these words: "On demand we jointly and severally promise to pay to William Pain Beecham and Richard Smith, or order, the sum of 1000£, for value received."

(signed) Henry Smith,
Tilson Smith,
Richard Smith.

An action was brought upon the note by Beecham and Richard Smith against Henry Smith, no other defendant being joined. Defendant insisted that the action could not be maintained in this form. The court said: "As a joint contract, this note undoubtedly, would not be enforceable at law. But the plaintiffs are at liberty to sue on it as a several note by any of the makers. The defendant who is so sued is not at liberty to claim to have the note treated as a joint note." Beecham *v.* Smith, E. B. & E. 442, 445, 4 Jur. N. S. 1018, 27 L. J. Q. B. 257, 6 Wkly. Rep. 627, 96 E. C. L. 442.

20. Thus the general enactment in the code states declares that any person may be made a defendant who has or claims an interest in the controversy "adverse to the plaintiff." See the statutes of states named *infra*. And see Allen *v.* Miller, 11 Ohio St. 374, 378, where the court, construing these enactments, remarked: "It seems to us, that the words 'defendant' and 'defendants' as employed in those sections of the code to which reference has been made, in so far as they affect the question of jurisdiction, must be held to mean not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought."

21. See Equity, 16 Cyc. 196.

22. See Davis *v.* Vandiver, 143 Ala. 202, 38 So. 850. And see *infra*, IV, B, 1, b, (II).

23. See the statutes of the states named *supra*, p. 36, note 13.

24. As in a claim by one partnership against another, when each has a common member. See Cole *v.* Reynolds, 18 N. Y. 74.

25. See Willis *v.* Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673.

however technical, has been recognized as still in force under the codes, unless the excepting provision is followed.[26]

(B) *Plaintiff's Assignor as a Co-Defendant.* When an assignee of a non-negotiable chose in action sues in his own name as a real party in interest,[27] the general rule of the codes is that an assignor who has parted with all his interest should not be made a party, either as co-plaintiff or as co-defendant;[28] but a few codes expressly require or permit the assignor, in such a case, to be joined as a defendant.[29]

2. Responsibility of Interest. It is not a sufficient reason for joining a person as a defendant that the adjudication of the case at bar may determine points of law adversely to his interest.[30] As a rule the record must show a responsible interest in every defendant.[31]

3. Community of Responsibility — a. Historic Principle. In order that a plaintiff may join two or more persons as defendants in an action, it is not sufficient for him to show a valid cause of action against each defendant,[32] or even to show a union of consequences from wrongful acts pleaded as committed at the same time by all defendants,[33] or to show a liability in the alternative as between two defendants,[34]

26. Baron *v.* Lakow, 121 N. Y. App. Div. 544, 106 N. Y. Suppl. 243, where the facts were as follows: B, a member of the firm of B & Co., sued G and L for the return of partnership money which G had wrongfully taken and delivered to L. G was the other member of the firm of B & Co. He was made a defendant but the record showed no reason why he was not joined as plaintiff. It was held that a judgment for plaintiff must be reversed.

27. See *supra*, I, B, 2, e, (III).

28. Allen *v.* Miller, 11 Ohio St. 374, where as collateral security for a debt, H assigned to P an account due H from M. P brought suit against H and M, and it was held that H had been improperly made a defendant under the code. And see Cole *v.* Merchants' Bank, 60 Ind. 350; Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497; Allen *v.* Smith, 16 N. Y. 415; Grant *v.* Ludlow, 8 Ohio St. 1; Van Horne *v.* Watrous, 10 Wash. 525, 39 Pac. 136; Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750. See further Assignments, 4 Cyc. 100.

29. **In Arkansas and in Kentucky,** if the assignment is one which is not authorized by statute, the assignor must be a party, plaintiff or defendant. Kirby Dig. § 6000; Ky. Code, § 19. And see Collier *v.* Trice, 79 Ark. 414, 96 S. W. 174; Gill *v.* Johnson, 1 Metc. (Ky.) 649, 651.

In Indiana, "when any action is brought by the assignee of a claim arising out of a contract, and not assigned by an indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action." Rev. St. (1881) § 276; 1 Burns St. (1908) § 277; Carskaddon *v.* Pine, 154 Ind. 410, 56 N. E. 844; Chicago, etc., R. Co. *v.* Higgins, 150 Ind. 329, 50 N. E. 32. See also Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 488; Gordon *v.* Carter, 79 Ind. 386, holding that a complaint on a written contract assigned in writing but not by indorsement is bad on demurrer for defect of parties unless the assignor is made a defendant.

30. See the elaborate discussion in Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552. And *compare* Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648.

31. Bagwell *v.* Johnson, 116 Ga. 464, 42 S. W. 732; Conklin *v.* Thurston, 18 Ind. 290; Stull *v.* Powell, 70 Nebr. 152, 97 N. W. 249; Oliver *v.* Jersey City, 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412; Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708.

32. Van Dyke *v.* Van Dyke, 120 Ga. 984, 48 S. E. 380; Straus *v.* Hoadley, 23 N. Y. App. Div. 360, 48 N. Y. Suppl. 239; Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159; Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446; Sadler *v.* Great Western R. Co., [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51.

33. Miller *v.* Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344; Swain *v.* Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93, holding that where two corporations, each engaged in the reduction of copper, maintained plants in the same neighborhood and each of the plants contributed to the pollution of the air surrounding them, but these corporations were entirely independent of each other, without any communication of interest, concert of action, or common design, they could not be joined in one action for damages thus caused to adjoining property. *Compare* West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; and *infra*, this and following sections.

34. So that if one of two is not liable the other is. Kadish *v.* Bullen, 10 Ill. App. 566; Sanders *v.* Clason, 13 Minn. 379. In Langhorne *v.* Richmond R. Co., 91 Va. 369, 376, 22 S. E. 159, P sued the Richmond R. Co. and the Richmond Railway and Electric Co. to recover for an injury caused by the former company. The declaration alleged "consolidation" of the two companies, by virtue of which the latter company became responsible for the liabilities of the former. It was held

or to show a liability in each defendant as respects the same subject-matter.[35] But plaintiff must show, as against all whom he makes co-defendants, some community of responsibility.[36] The principle, with important modifications, holds not only at common law,[37] but in equity procedure,[38] and under the codes.[39] It is materially modified, however, by broad distinctions between the cause in contract and the cause in tort;[40] and its application is affected by the restrictions imposed through the rules as to the joinder of causes.[41]

b. In Common-Law Procedure. The only community of responsibility which the common law recognized as sufficient for a joinder of defendants was that which arose from a joint tort or from the breach of a joint or a joint and several contract.[42] If the contract was joint and several, plaintiff might join all, or sue severally; he could not join less than all.[43] If the contract or the tort was several, there could be no joinder.[44]

c. In Code Pleading — (i) *Terms of the Codes.* The terms of the New York code of 1849 as to the joinder of defendants[45] were copied by the framers of most of the other codes, and still endure as the standard form of the statutory provision on this point in a majority of the American states.[46] This approved enactment provides for a permissive joinder, at the option of plaintiff, in certain wide classes of cases, and for a required joinder when the defendants "are united in interest."[47] By the terms of the statute "any person may be made a defendant, who has or claims an interest in the controversy, adverse to plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."[48] It is further enacted that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff."[49]

that while plaintiff might have sued either company, he could not sue both in the same action at law. "They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings."

35. Patterson *v.* Kellogg, 53 Conn. 38, 22 Atl. 1096, holding that where P is entitled to an income from certain property, in the possession of D until a given date and then in possession of D's grantee, P cannot join D and her grantee.

36. For most purposes the phrase "community of wrong-doing" is sufficiently exact, even under the liberal doctrines of the code.

The rule in code states is subject to the modification noticed above (see *supra*, note 22), by which one without an adverse interest to plaintiff may be placed among defendants.

37. See *infra*, IV, B, 3, b.

38. Van Hise *v.* Van Hise, 61 N. J. Eq. 37, 47 Atl. 803. But see on the flexible nature of this equity rule the remarks of Depue, J., in Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706, 758.

39. See *infra*, IV, B, 3, c.

40. See *infra*, IV, B, 3, b, c.

41. Straus *v.* Hoadley, 23 N. Y. App. Div. 360, 48 N. Y. Suppl. 239; Sauer *v.* New York, 10 N. Y. App. Div. 267, 41 N. Y. Suppl. 957; Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055; Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446; Gower *v.* Couldridge, [1898] 1 Q. B. 348, 67 L. J. Q. B. 251, 77 L. T. Rep. N. S. 707, 46 Wkly. Rep. 214.

42. See Dicey Parties 230, 233, 431.

"Where an action is brought against several defendants it is essential that the wrong complained of be joint. . . . Where, therefore, trover lies against a succession of wrong-doers, as where X. takes A.'s goods and sells them to Y., who re-sells them to Z., who refuses to give them up to A., the successive wrong-doers can not be sued together, because they are each guilty of a different act of conversion, i. e., of a different tort." Dicey Parties 432.

43. Dicey Parties 234.

44. Strawbridge *v.* Stern, 112 Mich. 16, 70 N. W. 331; Dicey Parties 431.

45. N. Y. Code (1849), §§ 118, 120.

46. See states named *infra*, note 48.

47. The latter phase of the doctrine will be noticed *infra*, note 49 *et seq.*

48. N. Y. Code (1849), § 118. In this form the enactment copies the corresponding provision of the original code (N. Y. Code (1848), § 98), but with the addition of the words "or claims," and of the concluding clause.

Same provision in other states.— The enactment is now found, with slight modifications in phraseology in a few states, in the codes of Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

49. N. Y. Code (1849), § 120. The provision was an exact copy, without addition,

(II) *Leading Purpose of the Codes.* In permitting plaintiff to join as defendant, any person who has or claims an adverse interest "in the controversy," the codes evidently design a less restrictive rule for the joinder of defendants than for the joinder of plaintiffs.[50] The purpose of the enactment, as declared by courts construing the codes, is to prevent multiplicity of suits about the same subject-matter, and when practicable, to settle complicated controversies in one action.[51]

(III) *Influence of Historic Principle.* On the other hand the restrictive effect of the historic principle already noticed[52] has been distinctly recognized and enforced under these liberal provisions of the codes.[53]

(IV) *Tendency to a Readier Joinder* — (A) *Under American Codes.* In other cases, however, and notably in recent cases, these enactments have been interpreted as permitting a very full joinder of defendants.[54] This tendency is especially marked in actions seeking equitable relief.[55] The provisions of the code, it is declared, adopt the rule of equity joinder in its most liberal form.[56]

of the terms of the original N. Y. Code (1848), § 100.

In other states.— The provision reappears, with some variations, in the present enactment of Arizona (but in different form), California, Colorado, Idaho, Indiana, Kansas, Minnesota, Missouri (in somewhat different form), Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming (in different form).

A still more liberal rule of permissive joinder is found in the codes of Iowa and Kentucky.

50. The rule for the joinder of plaintiffs requires an interest "in the subject of the action and in obtaining the relief demanded." See *supra*, III.

51. See the remarks of the court in Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 427, 59 Atl. 513; Brady *v.* Linehan, 5 Ida. 732, 739, 51 Pac. 761; Demarest *v.* Holdeman, 157 Ind. 467, 473, 62 N. E. 17.

52. See *supra*, IV, B, 3, a.

53. Trowbridge *v.* Forepaugh, 14 Minn. 133 (where it appearing that D, the owner of a city lot, caused an excavation to be made under the sidewalk in front of the lot, and that P fell into the excavation and was injured, it was held that, although D and the city, under its charter, may each be liable to P, yet he cannot sue them jointly); Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055 (where P, a passenger on a steamboat, belonging to R, injured by a rock thrown up by an explosion caused by S in blasting, brought his action against both R and S, claiming that R was negligent in having the boat in a dangerous position while the blasting was in progress, and that S was negligent in exploding the blast when the steamboat was so near, and this was held to be a misjoinder of parties defendant). But see Van Wagenen *v.* Kemp, 7 Hun (N. Y.) 328.

"The test to determine whether two parties can be joined as defendants [declares a New York court in a recent case], is, whether they have one connected interest centering in the point in issue, or one common point of litigation." Harris *v.* Elliott, 29 N. Y. App. Div. 568, 573, 51 N. Y. Suppl. 1012.

It is to be noted, however, that the restriction is frequently due rather to the rules for the joinder of causes. Straus *v.* Hoadley, 23 N. Y. App. Div. 360, 48 N. Y. Suppl. 239; Sauer *v.* New York, 10 N. Y. App. Div. 267, 41 N. Y. Suppl. 957; Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055; Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446, construing the Iowa Code.

"Torts or contracts," declares the supreme court of Nebraska, "to give rise to a joinder of defendants, must themselves be, at least, so far joint as to give to all the parties rights in the same subject matter." Stull *v.* Powell, 70 Nebr. 152, 157, 97 N. W. 249, per Hastings, C.

54. Hillman *v.* Newington, 57 Cal. 56; Faivre *v.* Mandercheid, 117 Iowa 724, 90 N. W. 76, holding that when a wife claims damages resulting from a "particular intoxication" of her husband, and not from a generally besotten condition, she may join in an action the several persons who contributed to this particular intoxication, although they were conducting separate saloons when the liquor was sold to the husband, and did not act in concert. But see *infra*, p. 129.

55. See the cases cited *infra*, notes 56 *et seq.*, and especially Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 59 Atl. 513; Demarest *v.* Holdeman, 157 Ind. 467, 473, 62 N. E. 17, where it is remarked that the rule of joinder in the codes "apply to all suits at law as well as in equity." See West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; Draper *v.* Brown, 115 Wis. 361, 91 N. W. 1001, where the reasons for the difference are very elaborately discussed.

56. The difference between the strict rule of the old equity practice and the more liberal rule of its present practice is pointed out as decisive of the question under the code in Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 59 Atl. 513.

That the code follows the modern equity rule is the basis of the decision also in

A community of interest among defendants is necessary, but it is a community of interest in something wider than a precise "subject of action" between plaintiff and each defendant — it is a community of interest "in the controversy."[57] There is a noticeable tendency under the code, as in equity pleading,[58] to treat the rule, not as an inflexible rule of practice or procedure, but as a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand or drawing suitors into needless and unnecessary expenses on the other.[59]

(B) *Under English Judicature Acts.* A similar liberty of joinder has recently been established under the English judicature acts.[60] Notwithstanding the rule that claims for damages against two or more defendants in respect to their several liability for separate torts cannot be joined,[61] the court of appeal has permitted a joinder of two or more defendants against each of whom "a different species of relief" was demanded on distinct claims, which, however, all arose out of one "grievance."[62] Apparently the "grievance" of the

Demarest *v.* Holdeman, 157 Ind. 467, 62 N. E. 17.

57. "The word 'controversy' is exceedingly broad and comprehensive, and for that reason not easily susceptible of any precise general definition." Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 428, 59 Atl. 513, per Torrance, C. J. For its application in this case see *infra*, this note.

It is not essential, in this doctrine, that defendants, as between themselves, have a "joint" or "mutual" interest in the claim of each against plaintiff or in the claim of plaintiff against each, or that they have a "common title," or a "community of interest in the subject matter of the action"; it is sufficient if the complaint or petition shows that defendants have a community of interest in the questions of law and fact involved in the general controversy. See the opinion of the court in Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 430, 59 Atl. 513. The facts were these: In an action by a town against several banks, the complaint alleged that the selectmen of the town without authority borrowed money from defendant S, giving therefor at different times twenty negotiable notes; that these notes were all paid in full; that S agreed to cancel the notes and deliver them to plaintiff, but failed to do so; that the other defendants claimed to be *bona fide* holders of some of these notes by transfer from S. The prayer was for a decree determining what right if any the several defendants had in the notes claimed by them, that the notes be canceled and delivered to plaintiff, and that plaintiff recover of S, the amount paid on the unauthorized notes. Defendant demurred for misjoinder of parties, insisting that the complaint showed no such joint or mutual interest between defendants as warranted their joinder in one action. A judgment of the trial court sustaining the demurrer was unanimously reversed on appeal, because "the respective rights which the defendants claim against the plaintiff, under the notes held by each, depend substantially and for all practical purposes upon the decision of the same questions of law and of fact; and no good reason appears why these rights cannot be protected and enforced in one comprehensive proceeding." See also Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353.

58. See the remarks of Depue, J., in Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706, 708, and the remarks of Bardeen, J., in Draper *v.* Brown, 115 Wis. 361, 366, 91 N. W. 1001.

59. Following the lead of equity procedure, the supreme court of Indiana has recently remarked that "where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity [and therefore the code] permits the joinder of all those so related to the controversy, and who have a common interest in some one or more branches of it." Demarest *v.* Holdeman, 157 Ind. 467, 473, 62 N. E. 17, per Dowling, J. The court had previously held that the code had adopted the equity rule of joinder (see same case, page 473). *Compare* the opinion of Clark, C. J., in Oyster *v.* Iola Min. Co., 140 N. C. 135, 52 S. E. 198. See also *infra*, IV, B, 4.

60. Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347.

Judicature Acts see 28 Cyc. 1612.

61. Sadler *v.* Great Western R. Co., [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51; Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347; Gower *v.* Coulridge, [1898] 1 Q. B. 348, 67 L. J. Q. B. 251, 77 L. T. Rep. N. S. 707, 46 Wkly. Rep. 214. And see *infra*, IV, B, 3, c, (v).

62. Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 508, 69 L. J.

English doctrine is synonymous with the "controversy" of the American codes.[63]

(v) *Limits of Doctrine.* However wide this liberty of joinder,[64] it does not annul the general principle that when a plaintiff asserts claims against two or more persons in respect of their several liabilities for separate wrongs, he cannot sue these persons as co-defendants.[65] The distinction is marked in the difference between an action for an injunction and an action for pecuniary damages when both actions turn upon an injury arising out of the acts of different defendants between whom there has been no common design or concert of action, but whose independent acts have in fact united, as their common result, in an invasion of plaintiff's rights. When plaintiff seeks an injunction against the continuance of this common result, he may join all the defendants in one action.[66] But when he sues to recover his damages because of his injury from these separate, independent wrong-doers, he cannot join them as defendants in one action.[67] In the

Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347. The facts were as follows: P, the holder of one hundred shares in a certain company, sued the company and its directors in one action. As against the company, P claimed the cancellation of his allotment of shares and the return of the £1000 which he had paid for them. As against the directors P claimed £1000 damages. An objection for misjoinder on the part of the directors was sustained by the trial court and the case dismissed as to them. On appeal the ruling below was disapproved. "If these orders [dismissing the action] were to stand," said Lindley, M. R., for the court of appeal, "substantial justice would be sacrificed to a wretched technicality."

63. See the remark of Lindley, M. R., in Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 509, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347. "In substance, the shareholder has one grievance, call it a cause of action or what you like; and in substance he has one complaint, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of that one thing which they have done, namely, the issuing of a prospectus. . . . The whole case turns upon the issue of the prospectus, and there is nothing more than a complaint against a number of people who have done the plaintiff one wrong by issuing a prospectus which they had no right in point of law to issue."

64. See *supra*, IV, B, 3, e, (IV).

65. Strawbridge *v.* Stern, 112 Mich. 16, 19, 70 N. W. 331, where it is said: "The cases permitting joinder of defendants are limited by the rule that such a joint action cannot be maintained against different defendants, where separate and distinct trespasses are relied upon, in which the parties are not jointly concerned." See Chitty Pl. 86, and cases cited *infra*, note 66 *et seq.*

Special statutory modifications.— The rule, however, has been modified by the enactment, noted in the text, as to joining "persons severally liable upon the same obligation or instrument" (see *supra*, pp. 127, 128). It is modified also in a number of other special cases by enactments which vary in the different codes — as in actions against the owners or occupants of land, suits to quiet title, foreclosure suits, partition suits, etc.

66. *California.*— Montecito Valley Water Co. *v.* Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

Connecticut.— Fairfield *v.* Southport Nat. Bank, 77 Conn. 423, 59 Atl. 513.

Indiana.— West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 24, 72 N. E. 879, where the court allowed the joinder in an injunction suit and remarked: "It is probably true that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tort-feasors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequences to produce the damage in question."

Wisconsin.— Draper *v.* Brown, 115 Wis. 361, 91 N. W. 1001. This was an action to restrain the lowering of the level of a lake. Plaintiffs joined as defendants the persons who owned a dam at the outlet of the lake and two other persons, one of whom, by means of a lock in a river running into the lake, diminished the flow into it, while the other, by means of a dam at the outlet of a tributary lake, obstructed the flow from it. It was held that the joinder was permissible, for the only right sought to be enforced was the right to have the water level of the lake maintained, and defendants, although acting independently, all contributed to the impairment of this right.

United States.— Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628.

England.— Thorpe *v.* Brumfitt, L. R. 8 Ch. 650. *Compare* Sadler *v.* Great Western R. Co., [1895] 2 Q. B. 688, 65 L. J. Q. B. 26, 73 L. T. Rep. N. S. 385, 44 Wkly. Rep. 50. But see the remarks in the same case on appeal [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51.

67. *California.*— Miller *v.* Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254 (several tort feasors, not acting in concert or by unity of design, are not liable to

absence of a common design and concert of action on the part of defendants, the claim for the pecuniary damages sustained by plaintiffs cannot be deemed to be an entirety.[68] Each defendant is responsible for his own acts and the damage resulting; but he is in no degree responsible for the acts of the other defendants, or the damage caused by them.[69] There is no community of responsibility. It is well established also that the rule, in this latter respect, is not changed by the fact that plaintiff's damage has arisen because the acts of the independent defendants were simultaneous and concurring.[70] Nor is it decisive, in the view of some

joint action for damages, although the consequences of the several torts have united to produce an injury to plaintiff); Miller *v.* Curry, 53 Cal. 665 (an action to enjoin the sale of land levied on under two executions, issued one upon a judgment in favor of defendant A, the other upon a judgment in favor of defendant B, to which a demurrer upon the ground that defendants were not jointly affected by the two judgments was sustained).

Indiana.— West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 24, 72 N. E. 879, where the rule is recognized as probably established on authority.

Iowa.— Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344, where creditors of a debtor employed the same attorney and caused separate attachments to be levied at the same time on the debtor's property, and it was held that this is not sufficient to render them jointly liable. See also Eddy *v.* Howard, 23 Iowa 175.

New York.— Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Lexington, etc., R. Co. *v.* Goodman, 25 Barb. 469.

Oregon.— Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055; Cooper *v.* Blair, 14 Oreg. 255, 12 Pac. 370.

Rhode Island.— Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, 45 Atl. 546. The case is instructive as applying the principle under a statute which permits a joinder in the alternative. See *infra*, IV, B, 4.

Tennessee.— Swain *v.* Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93.

United States.— Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446, construing the Iowa code.

England.— Sadler *v.* Great Western R. Co., [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51 [*affirming* [1895] 2 Q. B. 688, 65 L. J. Q. B. 26, 73 L. T. Rep. N. S. 385, 44 Wkly. Rep. 50]; Thompson *v.* London County Council, [1899] 1 Q. B. 840, 68 L. J. Q. B. 625, 80 L. T. Rep. N. S. 512, 47 Wkly. Rep. 433; Gower *v.* Couldridge, [1898] 1 Q. B. 348, 67 L. J. Q. B. 251, 77 L. T. Rep. N. S. 707, 46 Wkly. Rep. 214. *Compare* Smurthwaite *v.* Hannay, [1894] A. C. 494, 7 Aspin. 485, 63 L. J. Q. B. 737, 71 L. T. Rep. N. S. 157, 6 Reports 299, 43 Wkly. Rep. 113. And see Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347.

The limitation is the more notable in England because of the wide terms of the rule as to joinder. By the terms of Order XVI, rule 4, under the Judicature Acts, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative."

68. Chipman *v.* Palmer, 77 N. Y. 51, 56, 33 Am. Rep. 566.

69. See the reasoning of A. L. Smith, L. J., in Sadler *v.* Great Western R. Co., [1895] 2 Q. B. 688, 690, 65 L. J. Q. B. 26, 73 L. T. Rep. N. S. 385, 44 Wkly. Rep. 50, and of Lord Shand, in the same case, [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51.

70. This point was elaborately argued, under the liberal terms of the English Judicature Acts, in the recent case of Sadler *v.* Great Western R. Co., before the court of appeal in [1895] 2 Q. B. 688, 65 L. J. Q. B. 26, 73 L. T. Rep. N. S. 385, 44 Wkly. Rep. 50, and before the house of lords in [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51. The facts of the case were as follows: Plaintiff, a dealer in cycles, occupied a shop on a public street. A railway company occupied the premises immediately adjoining plaintiff's shop on the north; another railway company occupied the premises immediately adjoining the shop on the south. Each company used its premises as a receiving office for parcels and goods. The two companies were separate and independent, carrying on separate and independent businesses. Each company brought its own carts opposite its own premises, for the purposes of its own business. Neither company had any control over the other. Plaintiff, claiming damages and an injunction, name of the other company as defendant. The statement of claim specifically alleged that each defendant frequently caused access to plaintiff's shops to be blocked by vans and carts while access to the shop was blocked on the other side by the vans and carts of the other defendant, and that "by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle." One of the companies obtained an order staying the action unless the claim was amended by striking out the name of the other company as defendant. The court of appeal divided on the question whether this order was right. The house of lords, without dissent, sustained the order, and held that the case, as pleaded, presented "not only a claim for an injunction, but a claim for damages against each of two several defendants," and therefore, that the two companies were improperly joined. Whether

authorities, if in determining whether one defendant has wronged plaintiff it becomes necessary to take into consideration the acts of the other defendant.[71] The test which has been followed in these cases, the test of sole responsibility,[72] is not always of easy application.[73] There is a tendency to find a community of responsibility whenever plaintiff's injury has arisen wholly because of the concurrence of the independent acts of several defendants.[74]

4. JOINDER IN THE ALTERNATIVE — a. General Rule. Neither in common-law procedure nor in equity was a plaintiff permitted to join two or more as defendants upon the ground that one of them was liable to him upon the several cause which he had pleaded but he was in doubt which one was liable.[75] It was necessary for him to bring one action against one, another action against the other, and to run the risk of the jury taking a contrary view of the evidence in the two cases.[76] And such is still the rule under the codes generally.[77]

b. Statutory Innovation. A departure from this historic restriction in our procedure was made in 1873, under the English judicature acts, by a provision that when a plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with a view to ascertaining which is liable.[78] And the same or a similar change has been made by statute

the action could have been maintained if an injunction only had been demanded was questioned (see [1896] A. C. 450, 455, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51), but not decided.

71. Of the acts of the two defendants in Sadler *v.* Great Western R. Co., [1895] 2 Q. B. 688, 693, 65 L. J. Q. B. 26, 73 L. T. Rep. N. S. 385, 44 Wkly. Rep. 50 [*affirmed* in [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51 (see *supra*, note 70) Smith, L. J., remarked: "These two torts, if they are torts, are independent torts by the different companies, although as I have already stated, the acts of each company can be taken into account in considering the acts of one company and deciding whether they amount to a nuisance or not. The acts of the other company must be taken into account because it may be that the one company ought not to be doing what it was when the other company was doing what it did. But that does not make these two causes of action a joint cause of action, or give any right to join one company with the other in one action."

72. That "each of the defendants is [from the nature of the cause as pleaded] called upon to answer for his own acts, and for his own acts only." Sadler *v.* Great Western R. Co., [1896] A. C. 450, 455, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51, per Lord Shand.

73. "The reports are bristling with precedents of varying degrees of strictness [on this question of joinder] and it is a matter of no inconsiderable difficulty to discover a right of way through them." Draper *v.* Brown, 115 Wis. 361, 368, 91 N. W. 1001, per Bardeen, J.

Story found the same difficulty with the equity rule.— Story Equity Pl. § 76c.

74. Hillman *v.* Newington, 57 Cal. 56, 64. Here P, who was entitled to use a certain quantity of water flowing in Willow creek, brought an action against eight separate property-owners to recover damages for an alleged diversion of the water. An injunction also was asked. It was objected that there was a misjoinder of defendants, because they did not act jointly or in concert in diverting the water. It was held that the joinder was proper. "Each of [the defendants]," said the court, "diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly." *Compare* Sellick *v.* Hall, 47 Conn. 260.

75. See cases cited *infra*, note 82.

In equity, however, there was some authority to the effect that a bill may be framed in the alternative, asking relief against A if he has authorized B to collect money due by judgment and against B if he had collected without authority. Thomason *v.* Smithson, 7 Port. (Ala.) 144. See also Fletcher Eq. Pl. § 77.

76. See the remark of Mellish, L. J., in Honduras Inter-Oceanic R. Co. *v.* Lefevre, 2 Ex. D. 301, 306, 46 L. J. Exch. 391, 36 L. T. Rep. N. S. 46, 25 Wkly. Rep. 310.

77. See *infra*, IV, B, 4, b, c.

78. Order XVI, rule 7, which reads: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed in any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." A joinder was permitted under this provision by the court of appeal in Bennetts *v.* McIlwraith, [1896] 2 Q. B. 464, 8 Aspin. 176, 65 L. J. Q. B. 632, 75 L. T. Rep. N. S. 145, 45 Wkly. Rep. 17. This was an action for breach of warranty of authority. It ap-

in at least two states in this country, namely, the states of Rhode Island and Connecticut.[79]

c. Limits of Innovation. The tendency is to a liberal construction of these rules of joinder in the alternative, as embodying a device of convenience;[80] but as applied by the courts, the device is subject to the fundamental limitation already noticed,[81] that there can be no joinder of defendants when plaintiff is asserting a separate cause against each.[82]

V. PARTIES BY CLASS REPRESENTATION.[83]

A. Origin of the Doctrine. The rule at common law and in equity required that all the parties to an action should appear in it, as plaintiff or defendants, and by their individual names.[84] From this rule equity procedure, in the interest of convenience, permitted a number of deviations, and among them the two following: One or more persons might sue or defend for all "where the question is one of a common or general interest," or when "the parties are very numerous . . . and it is impracticable to bring them all before the court."[85] This exemption, in

peared that defendants had assumed to act as agents in entering into a charter-party for loading plaintiff's vessel with a cargo which was not supplied. Plaintiffs being in doubt as to whether defendants had or had not authority applied to add the alleged principals as defendants. It was held that plaintiffs were entitled to do this. And see Massey *v.* Heynes, 21 Q. B. D. 330, 57 L. J. Q. B. 521, 36 Wkly. Rep. 834; Child *v.* Stenning, 5 Ch. D. 695, 46 L. J. Ch. 523, 36 L. T. Rep. N. S. 426, 25 Wkly. Rep. 519 (landlord and tenant); Honduras Inter-Oceanic R. Co. *v.* Lefevre, 2 Ex. D. 301, 46 L. J. Exch. 391, 36 L. T. Rep. N. S. 46, 25 Wkly. Rep. 310.

79. In Rhode Island in 1876 the English provision was substantially copied. Pub. Laws (1876), c. 563. See Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, 557, 45 Atl. 546. In this case, decided in 1900, the court expressed the opinion that "apparently this is the only State which has adopted the provision of joining defendants in case of doubt."

But see the Connecticut Rev. Rules (1890), § 3, which reads: "Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other." Found in 58 Conn. 561.

80. "The rules ought to be interpreted fairly to carry out the intention of the legislature in making them. There can be no question that the intention of the legislature was that it should not be necessary for a plaintiff to bring an action first against A., and then against B., and to run the risk of the jury taking a contrary view of the evidence in the two cases, but that he should have both defendants before the Court at once, and try it out between them." Honduras Inter-Oceanic R. Co. *v.* Lefevre, 2 Ex. D. 301, 306, 46 L. J. Exch. 391, 36 L. T. Rep. N. S. 46, 25 Wkly. Rep. 310, per Mellish, J.

81. See *supra*, IV, B, 3, c, (v).

82. In Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, 45 Atl. 546, in an action against A and B plaintiff set up in one count a cause against A for goods sold and in another count a cause against B on the ground that he had assumed the payment of the debt. It was held that the joinder was not authorized by the Rhode Island statute permitting joinder in the alternative. In Thompson *v.* London County Council, [1899] 1 Q. B. 840, 68 L. J. Q. B. 625, 80 L. T. Rep. N. S. 512, 47 Wkly. Rep. 433, P sued D for negligently excavating near P's house and thereby damaging it. D in his pleading denied liability and attributed the damage to the negligence of S in leaving a water main open. P applied to add S as a defendant in the alternative. It was held that the permission of the statute did not apply.

Illustration.—The principle was thus illustrated by Romer, L. J., of the court of appeal, in Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 512, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347: "If you have suffered a wrong it may be that A is the person who has committed it, but perhaps you are not certain that it may not be B who has committed it, and if so, B is liable. As between A and B they are strangers to each other in the matter." In such a case there can be no joinder of A and B, for the causes are separate and distinct.

83. Suit by one assignee for all see ASSIGNMENTS, 4 Cyc. 1.

Suit in equity: Generally see EQUITY. For injunction see INJUNCTIONS, 22 Cyc. 724. To set aside fraudulent conveyance see FRAUDULENT CONVEYANCES, 20 Cyc. 323.

84. Kirk *v.* Young, 2 Abb. Pr. (N. Y.) 453, Story Eq. Pl. § 72. And see EQUITY, 16 Cyc. 191.

"It is the rule of a Court of equity that all persons who are interested in a question which is litigated . . . must, either in the shape of plaintiffs or defendants, be brought before the Court." Small *v.* Attwood, Younge 407, 457, per Lord Chief Baron Lyndhurst.

85. Story Eq. Pl. § 97. And see Platt *v.* Colvin, 50 Ohio St. 703, 708, 36 N. E. 735.

its current terms in the equity reports, was carried bodily into the New York code of 1848, and there added to the general rule for the joinder of those "united in interest." [86] The provision now appears, with little or no material change, in almost every code state.[87]

B. Terms of Statutory Exception. As enacted in 1848 and copied in the other codes this statutory exception to the rule of joinder declares "that when the question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." [88]

C. Nature and Purpose — 1. In General. The enactment has been judicially recognized as an adoption into code procedure of a characteristic device of equity procedure, "in its breadth and substance," [89] and as permitting code pleaders, when considering the extent of the exception, to rely upon the decisions of courts of equity.[90] The purpose of the statute is, not only to prevent a practical failure of justice in extreme cases,[91] but to avoid as far as may be a multiplicity of suits, and settle in one the rights of all parties having a common or general interest.[92]

2. As a Cumulative Privilege. The privilege granted by the statute is not conditioned upon an inability of the many to sue collectively by means of a trustee;[93] nor is its exercise dependent upon the previous granting of an order of court,

86. N. Y. Code (1848), § 99. The exception was not expressly recognized in the original code, as first reported, but was added by the legislature. See for a history of the enactment McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108.

87. See the statutes of Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

It has of course a still wider range, as an historic exception in equity procedure.

88. N. Y. Code (1848), § 99. And see the codes in the states referred to in the preceding note.

Under the English Judicature Acts, it is declared (in Order XVI, rule 9) that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

89. See the discussion in Platt *v.* Colvin, 50 Ohio St. 703, 708, 711, 36 N. E. 735. See also McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516, 518 (where Harris, J., remarks: "In making the great changes contemplated by the adoption of the code, it [the New York Legislature of 1848] was careful to preserve this convenient practice of the court of chancery . . . thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court, which then prevailed in the court of chancery"); Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108; Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798; Day *v.* Buckingham, 87 Wis. 215, 58 N. W. 254.

90. Com. *v.* Scott, 112 Ky. 252, 65 S. W. 596, 23 Ky. L. Rep. 1488; McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516 (as quoted in the previous note); Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735; Tobin *v.* Portland Mills Co., 41 Oreg. 269, 276, 68 Pac. 743, 1108, where it is said: "The statute [as quoted in the text], instead of amending the exceptions to the rules of equity in respect of parties is a legislative recognition thereof. The decisions of the courts of equity must be examined to determine when these statutory exemptions are applicable." See also Equity, 16 Cyc. 191.

91. See the remarks of Lord Chief Baron Lyndhurst in Small *v.* Attwood, Younge 407, and of Nelson, J., in Smith *v.* Swormstedt, 16 How. (U. S.) 288, 303, 14 L. ed. 942. See also Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735; Faber *v.* Faber, 76 S. C. 156, 56 S. E. 677.

92. McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558. But see *infra*, V, E.

93. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841, where an incorporated church was divided, by the proper ecclesiastical authority, into two organizations, the Central church and the Westminster church, both unincorporated. Two members of the Central church brought an action for themselves and all other members of the Central church, to compel a division of the funds of the corporation. It was objected that the board of trustees of the Central church was the proper party to inaugurate the proceedings. It was held that even if there was a board of trustees authorized to sue, the action was properly inaugurated, because of the statute permitting one to sue for many. So, when there is a question as to the legal title of the trustees as such, they may sue under the privilege of the statute, if the question is one of common or general interest of many persons, and they are members of this general body. Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135. *Compare* Shepard *v.* Meridian Bank, 149 Ind.

even when an order is apparently contemplated by the statute or some rule of court.[94]

D. Extent of Statutory Exception — 1. To Legal as Well as Equitable Causes. It has been urged under the code, in recent as in early cases,[95] that as the statute has merely copied the equitable provision without addition in terms, the exception can have no greater extent under the codes than it had in equity procedure.[96] But the terms of the enactment and its context suggest no such restriction, and the weight of authority adopts the exception as applicable, under the code, to actions of a legal as well as to those of an equitable nature.[97]

2. Whether to Joint Interests. The language of the court in a recent opinion under the code and in some earlier equity cases suggests that this exception extends even to joint interests.[98] But this construction is in the teeth of the express requirement of the codes that persons who are "united in interest must be joined as plaintiffs or defendants."[99]

3. Different Classes of Cases — a. In General. The statute permits one or

532, 48 N. E. 346; Clay *v.* Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141.

94. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642, where it was held that under the Colorado code which provided that "when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended," the provision as to order was not mandatory.

95. See for instance Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735; McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Habicht *v.* Pemberton, 4 Sandf. (N. Y.) 657.

96. See the argument in Platt *v.* Colvin, 50 Ohio St. 703, 711, 36 N. E. 735.

97. *California.*— Florence *v.* Helms, 136 Cal. 613, 69 Pac. 429, action for a conversion.

North Carolina.— Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692, action in the nature of ejectment.

Ohio.— Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735, action to recover a certain sum of money stolen.

Wisconsin.— Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726, action to recover a subscription.

United States.— Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135, action for a trespass to land, the federal court proceeding at law under the Arkansas code, because of the Practice Conformity Act.

See 37 Cent. Dig. tit. "Parties," § 12.

98. According to the language of the court in Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108, cases in which persons have a "joint and indivisible interest" are within the scope of the exceptions. "So where some of the partners in a very numerous company (500 and more) filed a bill on behalf of themselves and all the other partners to rescind a contract entered into on behalf of the partnership, where it was manifest, from the circumstances of the case, that it could be for the benefit of all the partners that the contract should be rescinded, it was held by the court, upon an objection for want of parties, that the bill was maintainable." Story Eq. Pl. § 115; Small *v.* Attwood, Younge 407, 408.

99. See *supra*, III, C, 2, a. It is to be observed also that in the original code of 1848, and in its standard form to-day, the statutory exception forms part of this enactment requiring a joinder of persons who are "united in interest." And there is, in recent decisions under the code, direct authority that "joint" interests are not within the scope of the exception, at least as against an objection for defect of parties. George *v.* Benjamin, 100 Wis. 622, 630, 76 N. W. 619, 69 Am. St. Rep. 963, where the court, on a demurrer for defect of plaintiffs, refused to permit one to sue for many, because it appeared from the complaint that there was a "joint" interest, and therefore no "common or general" interest, among the associates, Bardeen, J., saying: "The fact that all the parties to the contract are united in interest affords a sufficient reason for holding that they are necessary parties to the action." And see Day *v.* Buckingham, 87 Wis. 215, 58 N. W. 254, permitting one to sue for many, because the interests were "common or general" and not "joint." *Compare* McMahon *v.* Rauhr, 47 N. Y. 67. In Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735, the president of a joint stock association organized under the laws of New York and consisting, as alleged in the petition, of about one thousand shareholders, "all of whom have a joint interest and ownership in the cause of action set forth," was permitted to sue in Ohio, in behalf of all the shareholders; but defendant had demurred upon the ground that plaintiff was without capacity to sue, there was apparently no demurrer, as in the Wisconsin case, *supra*, this note, for "defect of parties." So Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106], has been distinguished from Bear *v.* American Rapid Tel. Co., 36 Hun (N. Y.) 400, upon the ground that the former involved a case of commou, but not joint, interest and the latter was a case of a joint agreement. See Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 103 N. Y. Suppl. 822. *Compare* in this connection Foster *v.* Gulf, etc., R. Co., 91 Tex. 631, 45 S. W. 376, opinion delivered by Brown, A. J.

more to sue or defend for all in two classes of cases:[1] (1) When the question is one of common or general interest to many persons;[2] and (2) when the parties are very numerous and it is impracticable to bring them all before the court.[3] Although often overlapping, these two classes are theoretically and sometimes actually distinct.[4]

b. "Common or General Interest" — (I) *CONTROLLING FEATURE.* When the question is one of common or general interest to many the controlling feature is not the number of the persons interested but the quality of the interest.[5] In this class the requirement of "many persons" is so easily satisfied that one person has been permitted to sue for four,[6] or even for three.[7] The test is substantially the convenient test of a community of interest, which permits but does not require the owners to join as plaintiffs.[8]

(II) *RANGE OF APPLICATION.* The "question of general or common interest to many" which will permit one or more to sue or defend for all appears in a great variety of cases.[9] No definite limits have been set to the permission of the statute. It has been recognized in the case of claims on behalf of unincorporated associations and societies of widely different kinds,[10] on behalf of creditors, in

1. See Hawarden *v.* Youghiogheny, etc., Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

2. See *infra*, V, D, 3, b.

3. See *infra*, V, D, 3, c.

4. See cases cited *infra*, this note.

The distinction between the two classes was of marked and material importance in such cases on the one side as McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 103 N. Y. Suppl. 822; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140; Hawarden *v.* Youghiogheny, etc., Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828, where the question was one of common or general interest to many; and on the other side as Kirk *v.* Young, 2 Abb. Pr. (N. Y.) 453; Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726; George *v.* Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963, where the question was one of numerous parties.

For the nature of the distinction see immediately *infra*, this section.

5. Farnam *v.* Barnum, 2 How. Pr. N. S. (N. Y.) 396, 404, where it is said: "It is the character of the interest which controls, rather than the number of persons." And see McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 103 N. Y. Suppl. 822; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106].

6. Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 155, 103 N. Y. Suppl. 822, where it appeared that plaintiff was suing for himself and "others." From allegations by defendant which the court felt free to consider, it appeared also that the "others" numbered three. The court said: "Although it would seem at first sight that a condition requiring 'many' persons is hardly satisfied by three, nevertheless, in respect to this particular section that interpretation seems to be settled."

7. Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140, where one of three holders of receivers' certificates sued for all, to have the certificates declared a first lien. The court said: "The question presented is whether or not this is a common interest of 'many persons.' . . . It would be a proper use of the term within these definitions, for instance, to ask: How many persons are similarly situated with the plaintiff? and correct to answer, two besides the plaintiff." A similar result was reached in the leading case of McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516.

8. Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 103 N. Y. Suppl. 822. In Hawarden *v.* Youghiogheny, etc., Coal Co., 111 Wis. 545, 551, 87 N. W. 472, 55 L. R. A. 828, the court remarks: "We have, therefore, before us an unlawful conspiracy directed against a large number of persons, which has already resulted in driving out of business a considerable number of such persons, and which the defendants threaten to continue indefinitely against the whole class. . . . The question as to the legality of this conspiracy is certainly one of common and general interest to all persons against whom it was directed and is being enforced."

9. See cases cited *infra*, note 10 *et seq.*

10. **Unincorporated associations, churches, etc.** — *California.* — Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841 (on behalf of the members of an unincorporated church); Gieske *v.* Anderson, 77 Cal. 247, 19 Pac. 421 (on behalf of an unincorporated fire company).

Georgia. — Bates *v.* Houston, 66 Ga. 198.

Illinois. — Guilfoil *v.* Arthur, 158 Ill. 600, 41 N. E. 1009.

Ohio. — Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735, on behalf of an unincorporated joint stock company, there being no demurrer for defect of parties.

Virginia. — Perkins *v.* Scigfried, 97 Va. 444, 34 S. E. 64.

United States. — Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135; Mc-

whatever way, who have a common interest in the questions of law and fact involved in the general controversy,[11] on behalf of heirs or legatees with reference to an alleged claim or liability affecting the property,[12] and on behalf of taxpayers from whom a tax has been illegally collected.[13] The permission holds even when the claims are several in their nature if there appear in the case special circumstances creating a community of interest in both the law and the facts of the controversy, as when creditors with claims in severalty have an insolvent corporation for their common debtor and seek, on behalf of themselves and others, to enforce the statutory liability of its stock-holders,[14] or policemen have several claims against the municipality for compensation for the time they were illegally suspended under a void order,[15] or owners in severalty of water rights in a certain stream demand the restoration of a dam, the wrongful removal of which has cut off their common source of supply.[16]

c. Impracticable Number of Parties — (i) *Controlling Feature.* In the second class of cases within the statute permitting one to sue or defend for all,[17] the controlling feature is not the community of interest but the number of persons who, by the general rules of joinder, should appear as parties.[18] If the record shows not only that these persons are numerous but also that it is impracticable to bring them all before the court,[19] the code permits one or more to sue or defend for the benefit of the whole.

(ii) *What Amounts to an Impracticable Number.* The test of what amounts to an impracticable number, permitting one to sue for all, varies with the circumstances of each case. In the absence of a showing of difficulty in bringing them all before the court, the mere fact that there are many parties is not sufficient; an able court has declined to recognize the exception in the case of two hundred and fifty persons.[20] On the other hand, the same court has

Intosh *v.* Pittsburg, 112 Fed. 705. *Compare* American Steel, etc., Co. *v.* Wire Drawers, etc., Unions, Nos. 1 & 3, 90 Fed. 598, where leaders of an organized strike were sued as fairly representing the organization, without regard to their official connection with it.

See 37 Cent. Dig. tit. "Parties," § 12. See also Associations, 4 Cyc. 299; Clubs, 7 Cyc. 258; Joint Stock Companies, 23 Cyc. 466; Labor Unions, 24 Cyc. 815; Mutual Benefit Insurance, 29 Cyc. 1.

11. Creditors.—*Colorado.*— Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

Illinois.— Carter *v.* Rodewald, 108 Ill. 351.

Indiana.— Blair *v.* Shelby County Agricultural, etc., Assoc., 28 Ind. 175.

Kentucky.— Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989; McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558, holding that one or more of a large number of persons who have paid street assessments under the same mistake of law may sue for all to determine their rights to recover.

New York.— Gibson *v.* American L. & T. Co., 58 Hun 443, 12 N. Y. Suppl. 444; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. 338, 57 N. Y. Suppl. 140.

Washington.— Clay *v.* Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141.

See 37 Cent. Dig. tit. "Parties," § 12. See also Fraudulent Conveyances, 20 Cyc. 323.

12. Heirs and legatees.— McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Clarke *v.* Clarke, 8 Misc. (N. Y.) 339, 29 N. Y. Suppl. 338. See also Descent and Distribution, 14 Cyc. 1; Wills.

13. Com. *v.* Scott, 112 Ky. 252, 65 S. W. 596, 23 Ky. L. Rep. 1488, 55 L. R. A. 597, holding further that the principle is not affected by the fact that plaintiff is a nonresident of the county, and those for whom he sues are residents. And see Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798. See also Taxation.

14. Day *v.* Buckingham, 87 Wis. 215, 58 N. W. 254.

15. Gorley *v.* Louisville, 65 S. W. 844, 23 Ky. L. Rep. 1782, where the action was brought by ten plaintiffs, suing for the benefit of themselves and the other members of the police force of the city of Louisville. The action as brought was sustained on the authority of McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558.

16. Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. (N. Y.) 152, 103 N. Y. Suppl. 822.

17. See *supra*, V, D, 3.

18. See cases cited *infra*, note 19 *et seq.*

19. See Castle *v.* Madison, 113 Wis. 346, 89 N. W. 156.

20. Castle *v.* Madison, 113 Wis. 346, 356, 89 N. W. 156, where Bardeen, J., says: "It is argued that it is impracticable to bring in all the riparian owners [some two hundred and fifty-six persons] and that all interests are represented in the suit as it is. This contention cannot be sustained. It is not shown that it is impracticable to bring all the owners into the suit. We shall not assume that it is because they are numerous."

For other cases holding or suggesting that the parties were not impracticably numerous see Bird *v.* Lanphear, 11 N. Y. App. Div. 613,

recognized seventy-five persons as a sufficiently impracticable number in the circumstances of another case.[21]

(III) *Whether Community of Interest Is Necessary.* The statute makes no mention of any community of interest as a requisite to a suit by or against one for all, but the same facts of the cases which recognize and apply the exception all show some interest in common among the parties represented.[22] The established doctrine in equity recognized it as essential that there should be at least "a common interest, or a common right . . . or a general claim or privilege;"[23] and the fundamental tenets of sound procedure require it.[24]

(IV) *Nature of the Community of Interest.* The cases, however, have not defined this community of interest. It may be very general, as in an action by a few citizens of a town, suing in behalf of themselves and all their fellow citizens, to compel a railway company to comply with provisions of its charter which affect the town as a whole.[25] But, however general, the interest must be common to all with reference to some distinguishable subject-matter of action.[26]

E. Limits of Exception — 1. Interests Several Without Community. Although the interests of those who may be represented as plaintiffs or defendants under the exception noticed above are several and not joint interests,[27] the permission of the exemption is not available if the grounds of action or defense are entirely distinct and unconnected.[28] It must appear that the parties represented are in the same class with the representing party.[29]

2. Interest in Legal Question. Nor is it sufficient that this class interest is

42 N. Y. Suppl. 623 (the associates were forty in number); Brainerd *v.* Bertram, 5 Abb. N. Cas. (N. Y.) 102 (forty in number); Kirk *v.* Young, 2 Abb. Pr. N. S. (N. Y.) 453 (thirty-five in number).

21. "Seventy-five persons is surely a very large and unwieldy number of persons to join in an action when it is practicable for a few to settle the controversy for the benefit of all. A line must be drawn somewhere, and, while it may be difficult to draw it at any precise number we hold that seventy-five is a sufficient number, in a case like the present, to justify the court in allowing one or more to sue for all." Hodges *v.* Nalty, 104 Wis. 464, 468, 80 N. W. 726, per Winslow, J.

22. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Shepard *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346; Quinlan *v.* Myers, 29 Ohio St. 500; Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726; and cases cited *infra*, note 23 *et seq.*

23. "In this class of cases [where the parties are very numerous and it is impracticable to bring them all before the court], there is usually a privity of interest between the parties; but such a privity is not the foundation of the exception. On the contrary, it is sustained in some cases, where no such privity exists: However, in all of them there always exists a common interest, or a common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away." Story Eq. Pl. § 120. The case of Ayers *v.* Carver, 17 How. (U. S.) 591, 15 L. ed. 179, "furnishes an instructive illustration of the case where the parties, no matter how numerous, cannot find representation by a few, and where this practice is not applicable." American Steel, etc., Co. *v.* Wire Drawers, etc., Unions Nos. 1 & 3, 90 Fed. 598, 607, per Hammond, J.

24. See *infra*, V, E.

25. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 23, 11 S. E. 442, 21 Am. St. Rep. 135, where Buckley, J., said: "A further question is whether some of the citizens of Thomaston, suing in behalf of themselves and all their fellow-citizens of the town, will be sufficient as parties plaintiff in this proceeding, or whether all the citizens must join as such plaintiffs. The interest being common to all as a community, and the citizens being numerous (of which fact we can take judicial notice from public statistics), we think the case is provided for by a well-recognized rule which has long prevailed in equity, and that some, as representatives of the class, may sue for all."

26. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648. And see *infra*, V, E.

27. See *supra*, V, D, 2.

28. Quinlan *v.* Myers, 29 Ohio St. 500; Douglas County *v.* Walbridge, 38 Wis. 179.

29. "It is plain that the suit was brought on the idea that the two classes were interested in common, and on this ground Myers assumed to represent 200 of them, without distinction; and the final decree of the court shows that he was permitted to represent both classes. It is shown above that the two classes did not necessarily have a common interest in the subject-matter of the suit; and in the absence of a statement of facts showing that there existed some other ground for permitting one to sue in his own name . . in this case, in behalf of himself and others of his own class." Quinlan *v.* Myers, 29 Ohio St. 500, 508, per Gilmore, J.

in the question of law before the court; the community of interest must exist in the subject-matter of the suit,[30] or in the questions of law and fact involved in the general controversy.[31]

3. TEST OF JOINDER. As the exception in question was interpreted by the courts of equity, the limit of the right to sue or defend as representative of a class was fixed by the limit of the right of joinder of parties;[32] and there is nothing under the code to change this historic test.[33] In permitting the exception, however, the court will exercise care that the record parties represent the interest of the others sufficiently for an honest and fair trial.[34]

F. Control of Suit and Responsibility — 1. RIGHTS OF PLAINTIFF — a. Inchoate Parties. When a plaintiff sues for himself and all others who are similarly situated, the action in possible effect is the same as if all had joined as plaintiffs.[35] They are inchoate parties, in the sense that with the bringing of the original action they acquire rights which may indeed fail but may also be perfected by the decree.[36] According to some authorities they are so far virtually parties from the beginning that as respects the amount in controversy and the question of jurisdiction the court will look to the aggregate sum sued for and not merely to the amount of plaintiff's individual claim;[37] and as respects the statute of limitations the court will treat the action as if originally brought in the names of all those who subsequently come in.[38]

30. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648; Baker *v.* Portland, 2 Fed. Cas. No. 777, 8 Reporter 392, 5 Sawy. 566 (holding that any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with a city are not therefore a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole); Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259. And see Quinlan *v.* Myers, 29 Ohio St. 500.

31. See the discussion in Turner *v.* Mobile, 135 Ala. 73, 33 So. 132; Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. N. S. 693, both with reference to the analogous question of joinder.

32. See the remarks of Nelson, J., in Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259, 261, approved and adopted by Shiras, J., in Scott *v.* Donald, 165 U. S. 107, 116, 17 S. Ct. 262, 41 L. ed. 648, "[On the nature of] the interest that will allow parties to join in a bill of complaint, or that will enable the Court to dispense with the presence of all the parties, when numerous, except a determinate number."

33. The rudimentary nature of the test is illustrated in the remark of Ingraham, J., in O'Brien *v.* Fitzgerald, 6 N. Y. App. Div. 509, 514, 39 N. Y. Suppl. 707, where he said: "A man having 100 promissory notes, made by different individuals might as well ask to sue all of them in one action, because if he had to bring the 100 actions against the 100 individuals he would be required to bring and maintain a multiplicity of suits."

34. Smith *v.* Swormstedt, 16 How. (U. S.) 288, 303, 14 L. ed. 942, where Nelson, J., said: "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."

35. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 481, 51 Pac. 841 (where it is said: "The plaintiffs bring the action for the benefit of all the members of the Central Presbyterian Church. In effect, each member is a party plaintiff"); Com. *v.* Scott, 112 Ky. 252, 65 S. W. 596, 23 Ky. L. Rep. 1488, 55 L. R. A. 597; McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663; Whiting *v.* Elmira Industrial Assoc., 45 N. Y. App. Div. 349, 350, 61 N. Y. Suppl. 27 (where it is said: "The plaintiff has brought this action in behalf of himself and all others who are similarly situated. . . . It is, in effect, the same as if all had joined as plaintiffs"); Manning *v.* Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Suppl. 168.

36. Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712; Woodgate *v.* Field, 2 Hare 211, 6 Jur. 871, 11 L. J. Ch. 321, 24 Eng. Ch. 211, 67 Eng. Reprint 88; Sterndale *v.* Hankinson, 1 Sim. 393, 27 Rev. Rep. 210, 2 Eng. Ch. 393, 57 Eng. Reprint 625.

37. Com. *v.* Scott, 112 Ky. 252, 65 S. W. 596, 23 Ky. L. Rep. 1488, 55 L. R. A. 597; McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558.

38. Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663 (where the action was begun by B in 1880 in behalf of himself and all others similarly interested in a cause which accrued in 1876; in 1883 eight other plaintiffs came in; it was contended that they were not within the six years' limit of the statute; but it was held that all are deemed to have been plaintiffs in 1880); Dunne *v.* Portland St. R. Co., 40 Oreg. 295, 65 Pac. 1052; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30

b. Master of the Suit. But until an inchoate plaintiff has come into the record, or a judgment has been reached, the control of the action remains with the active plaintiff;[39] he may at pleasure continue, compromise, abandon, or dismiss the action.[40] If he fails in the action those whom he represents will also fail, for their rights rise no higher than his.[41]

c. Limits of Sole Control — (I) *Effect of Intervention.* On the other hand, as soon as a person similarly situated with the original plaintiff has come into the record in some proper way as a party plaintiff, he becomes vested with an interest in the subject-matter of the action, and thereafter nothing can be done by the original plaintiff in derogation of the rights and interests of the added co-plaintiff.[42] The original plaintiff still has the right to prosecute the action in good faith, but he cannot, without the consent of his added co-plaintiff, abandon or discontinue it, or unreasonably delay its prosecution.[43]

(II) *Effect of a Judgment.* The record plaintiff's right of control ceases when he has prosecuted his action to a judgment, whether interlocutory or final, which declares the rights and liabilities of the various parties interested.[44]

L. ed. 864; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439; Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712. *Compare* MacArdell *v.* Olcott, 62 N. Y. App. Div. 127, 70 N. Y. Suppl. 930.

A different doctrine appears in some creditors' suits see CREDITORS' SUITS, 12 Cyc. 43 and note 78.

39. In some cases the active plaintiff is not necessarily the record plaintiff, as when the original plaintiff of record has transferred his entire cause of action after action begun and before judgment. Here the action may go on in the name of the original plaintiff but under the control of his assignee. Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

40. Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Beadleston *v.* Alley, 4 Silv. Sup. (N. Y.) 595, 7 N. Y. Suppl. 747. See the remarks of the court in McDougald *v.* Dougherty, 11 Ga. 570, 588, where it is said: "Up to the time of the decree, it is a suit only between party and party, and the plaintiff is *dominus litis*, or master of his own case. He may dismiss or compromise it, or make any other disposition of it which he sees fit; and as a correlative right to this, the defendant may tender satisfaction, and compel him to accept it." And see Piedmont, etc., L. Ins. Co. *v.* Maury, 75 Va. 508, 513. In this case it is said: "It is conceded, so far as the petitioners are concerned, that up to the very instant of the application to be made parties, Maury [the original plaintiff] had the indubitable right to dismiss his bill. When they made their application to come into the cause, Maury at once announced his purpose to dismiss, and asked liberty to do so." It was held that this liberty was properly granted.

Limitations on the doctrine see Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480; Manning *v.* Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Suppl. 168; Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 336. Effect of intervention see *infra*, V, F, 1, c, (I). Effect of judgment see *infra*, V, F, 1, c, (I).

Rule in the more limited range of creditors' suits see CREDITORS' SUITS, 12 Cyc. 47, and cases cited in note 14.

41. Quinlan *v.* Myers, 29 Ohio St. 500, 510, where Gilmore, J., says: "Upon general principles, if the party named as plaintiff, who sues in behalf of himself and others, fails in his suit, those whom he represents must also fail, for the rights of those represented can not rise higher than those of the party named as plaintiff."

42. Manning *v.* Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Suppl. 168; Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 336 (where a motion by another creditor to come in was pending at the time of the original plaintiff's motion to dismiss); Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480, 492 (where the language of the court is broadly that "the original complainants have no power to discontinue, any more than a petitioning creditor could discontinue the proceedings under a commission of bankruptcy," but there had been an interlocutory judgment.

43. Manning *v.* Mercantile Trust Co., 37 Misc. (N. Y.) 215, 217, 75 N. Y. Suppl. 168, where Scott, J., said: "Where, as in the present case, he [the original plaintiff] has unreasonably delayed its prosecution, and indicates that he has no present intention of continuing its prosecution, without any assigned cause or reason except a mere disinclination to proceed, a proper case is presented for committing the conduct of the action to the coplaintiff who has come in upon the original plaintiff's invitation." But the intervening plaintiff on being made *dominus litis* may be required to give bond to the original plaintiff to secure him against his liability for costs. Manning *v.* Mercantile Trust Co., *supra*.

44. Salisbury *v.* Binghamton Pub. Co., 85 Hun (N. Y.) 99, 32 N. Y. Suppl. 652. See Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194, 1 N. E. 663, where the court remarks: "If he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, be-

2. Responsibility of Defendants by Representation. When those who are made defendants by representation all stand in the same situation as members of one class and are in fact fairly represented by the parties on the record, it is within the power of the court to make its judgment effective not merely upon the individuals in the record, but also upon the class represented by them.[45]

VI. Defects, Objections, and Amendments.

A. Want of Capacity to Sue. Where it appears from the face of the complaint that plaintiff has no legal capacity to sue, the objection may be taken by demurrer; otherwise it must be taken by way of answer or a plea in abatement.[46] It cannot ordinarily be taken advantage of under the general issue.[47] As a general rule want of capacity to sue is not ground for dismissal or nonsuit.[48]

B. Misnomer. As a general rule a misnomer or misdescription of a party must be raised by a plea in abatement and not by a demurrer,[49] or motion to dismiss or for a nonsuit.[50] It cannot be taken advantage of in arrest of judgment,[51] or as a ground for new trial.[52] In some cases it may be taken advantage of as a variance.[53]

C. Misjoinder or Non-Joinder of Parties — 1. Persons Entitled to Object. — a. As to Defendants. Under the codes and practice acts of the several states the rule generally prevalent is that an objection for misjoinder of defendants may be made only by a defendant asserting that he is improperly joined.[54] Under the

cause the rights of the other stockholders would at once have attached thereto." And see Collins *v.* Taylor, 4 N. J. Eq. 163.

45. Wallace *v.* Adams, 204 U. S. 415, 27 S. Ct. 363, 51 L. ed. 547, holding that in a test case against ten persons who had been admitted to citizenship and enrolment by the United States court in the Indian Territory, and who were sued as representatives of the separate rights of three thousand persons, a decree vacating, for certain irregularities, the judgment of those courts is binding on a person belonging to the class thus represented who has had an opportunity to come into court and has taken no action. *Compare* Flint *v.* Spurr, 17 B. Mon. (Ky.) 499.

46. See Pleading, IV.

47. See Pleading, XIII.

48. See Dismissal and Nonsuit, 14 Cyc. 438.

49. See Pleading, VI.

50. See Dismissal and Nonsuit, 14 Cyc. 438.

51. State *v.* Knowlton, 70 Me. 200. See, generally, Judgments, 23 Cyc. 827.

52. Washington Camp *v.* Funeral Ben. Assoc., 8 Pa. Dist. 198. See, generally, New Trial, 29 Cyc. 760.

53. See Pleading, XIII.

54. *Alabama.*— Rensford *v.* Magnus, (1907) 43 So. 853; Worthington *v.* Miller, 134 Ala. 420, 32 So. 748; Teal *v.* Chancellor, 117 Ala. 612, 23 So. 651; Pate *v.* Hinson, 104 Ala. 599, 16 So. 527; Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Horton *v.* Sledge, 29 Ala. 478; Erwin *v.* Fergson, 5 Ala. 158.

California.— Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777; Pfister *v.* Dascey, 65 Cal. 403, 4 Pac. 393.

Colorado.— People *v.* Stoddard, 34 Colo. 200, 86 Pac. 251, holding that the objection that there is a misjoinder cannot be raised by joint demurrer.

Iowa.— Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

Kansas.— Gregg *v.* Berkshire, (App. 1900) 62 Pac. 550.

Michigan.— Walker *v.* Casgrain, 101 Mich. 604, 60 N. W. 291.

Minnesota.— Mitchell *v.* St. Paul Bank, 7 Minn. 252; Nichols *v.* Randall, 5 Minn. 304; Lewis *v.* Williams, 3 Minn. 151.

Mississippi.— Hopson *v.* Harrell, 56 Miss. 202.

Missouri.— Ashby *v.* Winston, 26 Mo. 210; T. A. Miller Lumber Co. *v.* Oliver, 65 Mo. App. 435.

Nebraska.— Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

New York.— McCrea *v.* Chahoon, 54 Hun 577, 8 N. Y. Suppl. 88; Richtmyer *v.* Richtmyer, 50 Barb. 55; Adams *v.* Slingerland, 39 Misc. 638, 80 N. Y. Suppl. 635; Boston Base Ball Assoc. *v.* Brooklyn Base Ball Club, 37 Misc. 521, 75 N. Y. Suppl. 1076; Reno Oil Co. *v.* Culver, 33 Misc. 717, 68 N. Y. Suppl. 303 [*reversed* on other grounds in 60 N. Y. App. Div. 129, 69 N. Y. Suppl. 969].

Ohio.— Gutridge *v.* Vanatta, 27 Ohio St. 366; Powers *v.* Bumcratz, 12 Ohio St. 273; Niven *v.* Smith, 2 Ohio Dec. (Reprint) 337, 2 West. L. Month. 465.

Texas.— Portier *v.* Fernandez, 35 Tex. 534; Key *v.* Fouts, (Civ. App. 1906) 99 S. W. 448; Woodhouse *v.* Cocke, (Civ. App. 1897) 39 S. W. 948, holding that failure of plaintiff to state a cause of action as against some defendants as to whom it is dismissed will not authorize a dismissal for misjoinder as to defendants against whom it is sufficient. But *compare* Johnson *v.* Davis, 7 Tex. 173.

Wisconsin.— North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 86 Wis. 292, 56 N. W. 870; Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697; Bronson *v.* Markey, 53 Wis. 98, 10 N. W. 166.

common law, however, where it appears from the face of the complaint that there is a misjoinder of defendants, in an action *ex contractu* any of them may urge the misjoinder.[55] Plaintiff is not entitled to urge that defendants are not proper parties after his own act in joining them.[56] In case there is an improper joinder of causes of action[57] as well as of parties, either of the defendants may take advantage of the misjoinder.[58] But where defendants have agreed that a joint action may be brought against them, they cannot afterward question the regularity of such a proceeding.[59] Under the codes a demurrer for non-joinder of parties will not be sustained unless it appears that the demurrant has an interest in having the omitted party made defendant, or is in some way prejudiced by the omission.[60] So a nominal party against whom no personal judgment is sought cannot set up as a defense the non-joinder of necessary parties.[61] Defendants cannot object to the non-joinder of other defendants where they have secured the dismissal of the action,[62] or have consented to a discontinuance as to them.[63] Nor can they object where they have resisted an application to make the persons in question defendants,[64] or where, having been applied to, they have not correctly informed plaintiff as to the parties.[65]

b. As to Plaintiffs. As a general rule, under the codes a defendant is not entitled to object to the joinder of too many parties plaintiff unless he shows that he has been prejudiced thereby.[66]

2. Action of Court Sua Sponte. Where it appears that a necessary party has been omitted, the court should of its own motion require the omission to be corrected before proceeding farther.[67] The court, however, will not refuse to try an issue between parties because other unknown persons may be interested.[68]

3. Operation and Effect — a. At Common Law — (1) *Actions on Contract* — (A) *Plaintiffs.* The non-joinder of plaintiffs in actions on contract is fatal,[69]

See 37 Cent. Dig. tit. "Parties," § 149.

55. Cunningham *v.* Orange, 74 Vt. 115, 52 Atl. 269.

56. Gleason *v.* Hawkins, 32 Wash. 464, 73 Pac. 533, holding that where a mortgagee had joined the mortgagor's heirs in an action on foreclosure, he could not assert that, not being proper parties, they were not entitled to defend upon the ground of limitations.

57. See Joinder and Splitting of Actions, 23 Cyc. 376.

58. Livermore *v.* Norfolk County, 186 Mass. 133, 71 N. E. 305.

59. Chicago, etc., R. Co. *v.* Chicago, 83 Ill. App. 233 [*affirmed* in 183 Ill. 341, 55 N. E. 648].

60. Anderton *v.* Wolf, 41 Hun (N. Y.) 571; Newbould *v.* Warrin, 14 Abb. Pr. (N. Y.) 80; Stockwell *v.* Wager, 30 How. Pr. (N. Y.) 271; Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245. See also Summers *v.* Moore, 115 N. C. 700, 20 S. E. 714.

61. Chaffe *v.* Elliott, 37 La. Ann. 184.

62. Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196 [*affirming* 74 Ill. App. 475]; Post *v.* Miles, 7 N. M. 317, 34 Pac. 586. See also Gutheil Part Inv. Co. *v.* Montclair, 32 Colo. 420, 76 Pac. 1050.

63. Murphy *v.* Dobben, 137 Mich. 565, 100 N. W. 891; Callum *v.* Barnes, 44 Mich. 593, 7 N. W. 198.

64. James *v.* Leport, (Nev. 1884) 4 Pac. 1184.

65. Edwards *v.* Farmers' F. Ins., etc., Co., 21 Wend. (N. Y.) 467 [*affirmed* in 26 Wend. 541].

66. Strong *v.* Taylor School Tp., 79 Ind. 208 (holding that defendant could not object to the joinder of plaintiff unitedly interested in an action to set aside fraudulent conveyances); Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, 22 S. W. 474; Cinfel *v.* Malena, 67 Nebr. 95, 93 N. W. 165 (holding that where a joint owner of personalty was, without being consulted by the other owners, made a plaintiff with them jointly in an action of replevin to recover such personalty, defendant could not object to the use of his name in the prosecution of the suit). See Gleason *v.* Tacoma Hotel Co., 16 Wash. 412, 47 Pac. 894, holding that an objection to the misjoinder of parties seeking to have their labor claims preferred to an execution claim could be taken only by the execution debtor.

67. Wynn *v.* Fitzwater, (Ala. 1907) 44 So. 97; Knopf *v.* Chicago Real Estate Bd., 173 Ill. 196, 50 N. E. 658; Blum *v.* Wyly, 111 La. 1092, 36 So. 202; Donovan *v.* Twist, 105 N. Y. App. Div. 171, 93 N. Y. Suppl. 990. But see Alderson *v.* Henderson, 5 W. Va. 182, holding that where a bill was brought in the firm-name and process served upon defendants, some of whom answered, there was no sufficient ground to dismiss the bill at its own instance because the individual members of the firm were not named.

68. State *v.* Judge New Orleans Commercial Ct., 4 Rob. (La.) 227.

69. *Illinois.*— Connolly *v.* Cottle, 1 Ill. 364.

Maine.— Holyoke *v.* Loud, 69 Me. 59.

Massachusetts.— Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

and in case the error is apparent from the face of the pleading it may be urged upon demurrer,[70] in arrest of judgment,[71] or on error.[72] In case the objection does not appear upon the face of the pleadings it may be urged as a ground for a plea in abatement,[73] or at the trial by a motion for a nonsuit,[74] or as a variance,[75] under the general issue. A misjoinder is likewise fatal,[76] and may be likewise availed of under the general issue.[77] The burden is on defendant to show that too many persons are joined as plaintiffs, and this cannot be shown by cross-examination of plaintiff's witnesses.[78]

(B) *Defendants.* A misjoinder of defendants in an action *ex contractu* is fatal,[79] unless otherwise provided by statute.[80] In case of misjoinder of defendants the defect, if it is apparent upon the face of the pleadings, is ground for demurrer;[81] for a motion in arrest of judgment,[82] or in case the question is properly presented in error.[83] Where the objection does not appear upon the pleadings it may be taken advantage of by motion for a nonsuit,[84] or under the general issue.[85] A non-joinder of defendants jointly liable is likewise fatal.[86] The non-joinder of a joint obligor, where it appears on the face of the record, may be taken advantage of at any stage of the case,[87] by demurrer,[88] by motion in arrest of judgment,[89] or on error.[90] In case non-joinder does not appear from the face of the record it must be pleaded in abatement,[91] and it cannot be urged at the trial as a variance[92] or by motion for nonsuit.[93]

(II) *Actions of Tort*—(A) *Plaintiffs.* A misjoinder of plaintiffs in an action of tort will defeat a recovery.[94] The objection, if apparent upon the record, may be taken advantage of by demurrer,[95] or by motion in arrest of judgment.[96] And in case the objection does not appear upon the face of the pleadings it is a ground of nonsuit upon the trial.[97] The omission of a party plaintiff must be taken advantage of by plea in abatement,[98] but it is not a ground for demurrer[99]

New Jersey.— McIntosh *v.* Long, 2 N. J. L. 274.

Pennsylvania.— Morse *v.* Chase, 4 Watts 456; Sweigart *v.* Berk, 8 Serg. & R. 308.

Vermont.— Hall *v.* Adams, 1 Aik. 166.

70. See PLEADING, VI.

71. See JUDGMENTS, 23 Cyc. 827.

72. See APPEAL AND ERROR, 2 Cyc. 687.

73. See PLEADING, IV.

74. See DISMISSAL AND NONSUIT, 14 Cyc. 438.

75. See PLEADING, XIII.

76. *Alabama.*— Bell *v.* Allen, 53 Ala. 125.

Maine.— Ulmer *v.* Cunningham, 2 Me. 117.

New Jersey.— Robinson *v.* Scull, 3 N. J. L. 817.

New York.— Doremus *v.* Selden, 19 Johns. 213.

Ohio.— Waldsmith *v.* Waldsmith, 2 Ohio 156.

See 37 Cent. Dig. tit. "Parties," § 143.

77. See PLEADING, XIII.

78. McKone *v.* Williams, 37 Ill. App. 591.

79. *Connecticut.*— Walcott *v.* Canfield, 3 Conn. 194.

Illinois.— Eggleston *v.* Buck, 31 Ill. 254; Kimmel *v.* Shultz, 1 Ill. 169.

Kentucky.— Erwin *v.* Devine, 2 T. B. Mon. 124.

Maine.— Bangor Bank *v.* Treat, 6 Me. 207, 19 Am. Dec. 210.

Pennsylvania.— Lang *v.* Jenkins, 12 Pa. Co. Ct. 634.

West Virginia.— See Urton *v.* Hunter, 2 W. Va. 83.

Wisconsin.— Wooster *v.* Northrup, 5 Wis. 245.

See 37 Cent. Dig. tit. "Parties," § 148.

80. See the statutes of the several states. And see Durgin *v.* Smith, 115 Mich. 239, 73 N. W. 361; Toronto Bank *v.* Manufacturers', etc., Fire Assoc., 63 N. J. L. 5, 42 Atl. 761; Smith *v.* Cassell, 70 Wis. 567, 36 N. W. 386.

81. See PLEADING, VI.

82. See JUDGMENTS, 23 Cyc. 827.

83. Necessity that objection be taken below see APPEAL AND ERROR, 2 Cyc. 688.

84. See DISMISSAL AND NONSUIT, 14 Cyc. 438.

85. See PLEADING, XIII.

86. Page *v.* Brant, 18 Ill. 37; Rivers *v.* Fame Lodge No. 16 K. P., 11 Pa. Co. Ct. 241. See also Thomas *v.* Farmers' Bank, 46 Md. 43.

87. Newell *v.* Wood, 1 Munf. (Va.) 555; Leftwich *v.* Berkeley, 1 Hen. & M. (Va.) 61; Berkley *v.* Cook, 3 Call (Va.) 378.

88. See PLEADING, VI.

89. See JUDGMENTS, 23 Cyc. 827.

90. See APPEAL AND ERROR, 2 Cyc. 687.

91. See PLEADING, VI.

92. See PLEADING, XIII.

93. See DISMISSAL AND NONSUIT, 14 Cyc. 439.

94. Patton *v.* Crow, 26 Ala. 426; Gerry *v.* Gerry, 11 Gray (Mass.) 381; Rogers *v.* Raynor, 102 Mich. 473, 60 N. W. 980; Murray *v.* Webster, 5 N. H. 391.

95. See PLEADING, VI.

96. See JUDGMENTS, 23 Cyc. 827.

97. See DISMISSAL AND NONSUIT, 14 Cyc. 438.

98. See PLEADING, IV.

99. See PLEADING, VI.

or motion in arrest of judgment. Upon the trial the objection can only be urged to secure an apportionment of damages.[1]

(B) *Defendants.* Misjoinder of defendants will not as a rule defeat an action *ex delicto*,[2] and the error cannot be reached by demurrer,[3] or plea in abatement,[4] unless it appears from the face of the complaint that the tort could not be joint, in which case a demurrer will lie;[5] but the error may be cured by the fact that plaintiff takes a verdict against one only,[6] or enters a *nolle prosequi*.[7] A nonjoinder of defendants is not fatal,[8] and cannot be pleaded in abatement or in bar, or given in evidence under the general issue;[9] nor is it ground for demurrer.[10] A distinction is, however, made in the case of a cotenant sued in respect to the joint estate.[11]

b. Under the Codes.[12] Under the codes a misjoinder of plaintiffs[13] or defendants[14] is not as a rule material and, although in some cases it may be presented by answer[15] or demurrer[16] or by motion,[17] it will not prevent the rendition of a judgment according to the merits for or against those parties properly joined.[18] A misjoinder of plaintiffs cannot be reached by demurrer to the evidence.[19] A defect of parties is, however, usually a ground for demurrer,[20] or, where not apparent

1. *Connecticut.*— White *v.* Webb, 15 Conn. 302.

Kentucky.— Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83; Frazier *v.* Spear, 2 Bibb 385.

Maine.— Jones *v.* Lowell, 35 Me. 538; Holmes *v.* Sprowl, 31 Me. 73.

Maryland.— Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558.

Massachusetts.— Sherman *v.* Fall River Iron Works Co., 2 Allen 524, 79 Am. Dec. 799; Thompson *v.* Hoskins, 11 Mass. 419.

Michigan.— Achey *v.* Hull, 7 Mich. 423.

Missouri.— Smoot *v.* Wathen, 8 Mo. 522.

New Hampshire.— True *v.* Congdon, 44 N. H. 48; Webber *v.* Merrill, 34 N. H. 202; Wilson *v.* Gamble, 9 N. H. 74.

New York.— Gilbert *v.* Dickerson, 7 Wend. 449, 22 Am. Dec. 592; Penfield *v.* Rich, 1 Wend. 380; Bradish *v.* Schenck, 8 Johns. 151; Brotherson *v.* Hodges, 6 Johns. 108; Wheelwright *v.* Depeyster, 1 Johns. 471, 3 Am. Dec. 345.

North Carolina.— Weare *v.* Burge, 32 N. C. 169; Graham *v.* Houston, 15 N. C. 232.

Pennsylvania.— Reading R. Co. *v.* Boyer, 13 Pa. St. 497.

Tennessee.— Winters *v.* McGhee, 3 Sneed 128.

Texas.— Lee *v.* Turner, 71 Tex. 264, 9 S. W. 149; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658.

Vermont.— Briggs *v.* Taylor, 35 Vt. 57; Hall *v.* Adams, 1 Aik. 166.

See 37 Cent. Dig. tit. "Parties," § 123.

2. Frink *v.* Potter, 17 Ill. 406; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Keer *v.* Oliver, 61 N. J. L. 154, 38 Atl. 693.

3. See PLEADING, VI.

4. See PLEADING, IV.

5. See PLEADING, VI.

6. See PLEADING, XIV.

7. See DISMISSAL AND NONSUIT, 14 Cyc. 411.

8. Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Milford *v.* Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; McDonald *v.* McAdams, 151 Fed. 781. See also Wheeler *v.* Worcester, 10 Allen (Mass.) 591, holding that, in an action for injury to plaintiff's watercourse, defendant cannot avail himself of the fact that the action of other parties, who are not joined as defendants, has contributed to the injury, except on the question of damages.

9. See PLEADING, IV.

10. See PLEADING, VI.

11. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

12. Failure to join parties as affecting conclusiveness of judgment upon parties joined see JUDGMENTS, 23 Cyc. 1240 text and note 97.

13. State *v.* Holt, 163 Ind. 198, 71 N. E. 653; Tennent Shoe Co. *v.* Birdseye, 105 Mo. App. 696, 78 S. W. 1036; Pettingill *v.* Jones, 21 Mo. App. 210; McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845; Green *v.* Green, 69 N. C. 294; Rowland *v.* Gardner, 69 N. C. 53; Gulf, etc., R. Co. *v.* Younger, 10 Tex. Civ. App. 141, 29 S. W. 948.

14. *Alabama.*— Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

California.— Heinlen *v.* Heilbron, 71 Cal. 557, 12 Pac. 673; Rowe *v.* Chandler, 1 Cal. 167.

Idaho.— Bloomingdale *v.* Du Rell, 1 Ida. 33.

Iowa.— Boswell *v.* Gates, 56 Iowa 143, 8 N. W. 809 [*distinguishing* Barnes *v.* Ennenga, 53 Iowa 497, 5 N. W. 597].

New York.— Strauss *v.* Trotter, 6 Misc. 77, 26 N. Y. Suppl. 20.

North Carolina.— Sullivan *v.* Field, 118 N. C. 358, 24 S. E. 735; Burns *v.* Ashworth, 72 N. C. 496; Green *v.* Green, 69 N. C. 294; Rowland *v.* Gardner, 69 N. C. 53.

Oregon.— Warner *v.* De Armond, (1907) 89 Pac. 373, 90 Pac. 1113.

See 37 Cent. Dig. tit. "Parties," § 148.

15. See PLEADING, IV.

16. See PLEADING, VI.

17. See PLEADING, XII.

18. See JUDGMENTS, 23 Cyc. 803 *et seq.*

19. Groenmiller *v.* Kaub, 67 Kan. 844, 73 Pac. 100.

20. See PLEADING, VI.

from the face of the complaint, available by answer.[21] It cannot be urged by motion for a new trial.[22] A misjoinder of plaintiffs under the codes is ground for dismissal only with respect to plaintiffs improperly joined, and in some jurisdictions a misjoinder of defendants is not a ground for nonsuit. A defect in parties likewise in some jurisdictions cannot be urged as a ground for dismissal or nonsuit.[23]

D. Amendments. Under the codes and practice acts of the several states much latitude is now permitted with regard to amendments affecting parties, and it is usual that the court be permitted, on motion of either party at any time, in furtherance of justice, and on such terms as may be proper to permit an amendment adding or striking out the name of a party, or correcting a mistake in the name of a party, or changing the character in which he is sued.[24] Under the strict rules of common law, however, amendments were rarely permitted, except in merely formal matters.

E. Waiver. As a general rule a defect in the pleading with reference to the parties is waived unless urged at the time and in the manner first available.[25] For example it cannot first be taken advantage of upon appeal.[26] The rules as to waiver do not, however, apply to indispensable parties.[27]

PARTIES LITIGANT. A term which has been construed to mean the antagonistic sides of a controversy.[1] (See, generally, PARTIES.)

21. See PLEADING, IV.
22. See NEW TRIAL, 29 Cyc. 760.
23. See DISMISSAL AND NONSUIT, 14 Cyc. 438 *et seq.*
24. See PLEADING, VII.
25. See PLEADING, XIV.
26. See APPEAL AND ERROR, 2 Cyc. 684 *et seq.*
27. See APPEAL AND ERROR, 2 Cyc. 687, 784; PLEADING, XIV.
1. Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267, 270 [*quoted* in Pendly *v.* Illinois Cent. R. Co., 92 S. W. 1, 28 Ky. L. Rep. 1324].

PARTITION

By A. C. Freeman

Editor of the "American State Reports," and of the "American Decisions" *

I. Definition and Classification, 152

II. By the Act of the Parties, 153

A. *Of What Property May Be Made,* 153
B. *Devices For Making the Allotment,* 154
C. *Persons Who May Make and Be Bound by a Partition,* 155
1. *Generally,* 155
2. *Incompetents and Persons Under Disability,* 155
a. *Married Women,* 155
b. *Infants,* 156
c. *Lunatics,* 156
3. *Persons Having Liens and Inchoate Estates Dependent on the Interests of a Cotenant,* 156
a. *Lien-Holders,* 156
b. *Wife's Inchoate Right of Dower,* 157
D. *The Binding of Cotenants by Their Agents and Other Representatives,* 158
1. *By the Action of Arbitrators or Commissioners,* 158
2. *By the Acts of Other Agents,* 159
3. *By the Act of Persons Other Than Their Agents,* 159
E. *Evidence of the Partition,* 160
1. *Parol,* 160
a. *Legal Estates,* 160
b. *Trust or Equitable Estates,* 161
c. *Aiding Parol Partition in Equity,* 161
2. *Written,* 162
a. *Agreements,* 162
b. *Mutual Conveyances,* 163
c. *Conveyances to Strangers,* 163
d. *Location Made Pursuant to a Conveyance,* 163
e. *Partition by Proprietors,* 163
F. *The Presumption of Partition,* 164
G. *Ratification and Estoppel,* 164
H. *Partition Void as to Some of the Parties or Some of the Property,* 165
I. *The Effect of the Partition by Act of the Parties,* 165
1. *The Parties Who May Be Considered as Bound Thereby,* 165
2. *Upon the Title and the Liens Thereon,* 166
3. *In the Event of a Failure of Title,* 167
4. *As Dependent on Conveyances,* 168
J. *Vacating or Rescinding,* 169

III. By Suit or Action, 169

A. *Jurisdiction,* 169
1. *In England,* 169
a. *At Law,* 169
b. *In Chancery,* 170
2. *In the United States,* 170
a. *Of the National Courts,* 170

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b. *Of the State Chancery Courts*, 170
c. *The Discretion of Courts of Chancery to Refuse to Act*, 171
d. *Of Probate and Orphans' Courts*, 171
e. *Of the State Courts of Law Generally*, 171
f. *State Courts Designated by Statutes*, 171
3. *Territorial Limits of*, 172
4. *Limitation of by the Assumption of Jurisdiction by Another Court*, 174
5. *Waiver of Objections to*, 174

B. *Property Subject to Partition*, 174
1. *The General Rule*, 174
2. *Real Property*, 174
3. *Standing Timber*, 175
4. *Incorporeal Hereditaments*, 175
5. *Personal Property*, 175
6. *Whether Should Include All the Property of the Cotenancy*, 176
7. *Difficulty, Inconvenience, or Pecuniary Loss Does Not Limit*, 177
8. *Property, the Partition of Which Is Against Public Policy, or Will Outrage the Public Sense of Propriety and Decency*, 178

C. *Estates Subject to Partition*, 178
1. *None But Estates Held in Cotenancy*, 178
2. *The Combined Estates Must Equal an Estate in Severalty*, 180
3. *Estates in Severalty Paramount to the Estate Held in Cotenancy*, 180
a. *Dower Rights in the Whole Property*, 180
b. *Other Rights in Severalty*, 180
4. *Estates in Possession*, 181
a. *The General Rule*, 181
b. *Estates Held in Joint Tenancy*, 181
c. *Estates Held by Tenancy by the Entireties*, 181
d. *Community Property*, 181
e. *Estates in Possession Less Than in Fee*, 181
5. *Estates Not in Possession*, 182

D. *Property and Estates Subject to Trusts and Agreements*, 184
1. *Property Held in Partnership*, 184
2. *Property Held Under Express or Implied Trust*, 185
3. *Homesteads*, 186
4. *Property Subject to Agreements Not to Partition*, 187

E. *Who May Maintain Suits For Partition*, 188
1. *The General Rule Includes Cotenants of Every Class*, 188
2. *Preliminary Demands and Other Acts*, 189
3. *Only Cotenants Entitled to Possession*, 190
4. *Laches and the Statute of Limitations as Affecting the Right*, 190
5. *Cotenants Entitled to Possession But in Fact Disseized*, 191
a. *Of Real Property*, 191
b. *Of Personal Property*, 193
c. *Where Equity Otherwise Has Jurisdiction and Proceeds to Grant Complete Relief*, 194
6. *Cotenants Holding Legal Titles Only*, 194
a. *The General Rule*, 194
b. *Mortgagees*, 194
c. *Holders of Conveyances Taken as Security*, 194
d. *Trustees*, 194
7. *Cotenants Holding an Equitable Title Only*, 195
a. *General Rule*, 195

b. *Mortgagors*, 195
c. *Cestuis Que Trustent*, 196
8. *Persons Under Disability*, 196
a. *Married Women*, 196
b. *Infants*, 196
c. *Lunatics*, 197
9. *Executors and Administrators*, 197
10. *Heirs and Devisees During Pendency of Admininistration*, 198
11. *Tenants For Life or Years*, 199
12. *Tenants by the Curtesy*, 200
13. *Widows of Deceased Cotenants*, 200
14. *Aliens*, 200
15. *Holders of Contingent and Uncertain Interests*, 200
16. *Joinder of Applicants*, 201
F. *Of Parties Defendant, and the Persons Bound by the Partition*, 201
1. *The Effect of Omitting a Necessary Party*, 201
2. *The General Rule as to Parties Defendant*, 202
3. *Persons Interested in the Property in Different Capacities*, 202
4. *The Limitation of the Parties Defendant to the Estate Sought to Be Partitioned*, 203
a. *The General Rule*, 203
b. *Trustees and Beneficiaries*, 203
5. *Adverse Claimants*, 204
6. *Disseizors*, 204
7. *Owners of Estates Not in Possession*, 204
8. *Persons Not in Being*, 205
9. *Unknown Owners*, 206
10. *Persons Whose Title or Right Is Dependent on That of a Cotenant*, 206
a. *Grantees*, 206
b. *Heirs*, 207
c. *Husband or Wife of Cotenant*, 207
d. *Encumbrancers*, 208
e. *Executors, Administrators, and Creditors*, 210
f. *Lessees*, 211
g. *Purchasers or Encumbrancers Pendente Lite*, 211
h. *Holders of Easements*, 212
11. *Persons Incompetent or Under Disability*, 212
a. *Married Women*, 212
b. *Infants*, 212
c. *Lunatics*, 213
12. *Remedy For Defect of Parties*, 214
G. *The Applicant's Pleadings*, 214
1. *General Rules Respecting*, 214
2. *In Chancery*, 214
3. *The Parties*, 214
4. *The Allegation as to Holding Togther and Undivided*, 215
5. *The Allegation of Title Held in Cotenancy and of the Moieties of the Parties*, 215
6. *The Deraignment of Title*, 216
7. *Exhibits*, 217
8. *Adverse Claims*, 217
9. *As Against Unknown Owners*, 218
10. *Describing the Property*, 218
11. *Claims For Incidental Relief*, 218
12. *Preliminary Matters or Conditions Precedent*, 219

13. *Variance Between the Complaint and the Evidence*, 219
14. *Prayer For Relief*, 219
15. *Bill of Particulars*, 220
16. *Signature and Verification*, 220
17. *Amendments*, 220
18. *Supplemental Complaints*, 220
19. *Responding to Defendant's Pleadings*, 221

H. *Process*, 221
1. *Necessity For*, 221
2. *The Form and Contents of the Process*, 221
3. *By Whom May Be Served*, 222
4. *Mode of Service*, 222
a. *Generally*, 222
b. *By Publication*, 222
5. *Against Unknown Owners*, 223
6. *Against Incompetent Persons*, 223
a. *Minors*, 223
b. *Lunatics*, 224
7. *Amendments*, 224
8. *Collateral Attacks*, 224

I. *Defendant's Pleadings*, 224
1. *The General Rule*, 224
2. *The Demurrer*, 224
3. *Pleas in Abatement*, 225
4. *The General Issue*, 225
5. *Defenses Allowable in the United States*, 226
6. *Setting Out Defendant's Claims*, 227
a. *His Title*, 227
b. *His Equities*, 227
7. *Cross Bills and Cross Complaints*, 228
8. *Amendments*, 229
9. *Supplemental Answers*, 229
10. *Bills of Particulars*, 229

J. *Intervention*, 229

K. *Relief Granted in Connection With, and as Incidental To, Partition*, 230
1. *General Adjustment of Equities*, 230
2. *Limitations Upon the Power to Adjust Equities*, 230
3. *Accounting*, 231
4. *Accounting For Rents and Profits, and Use and Occupation*, 232
5. *Respecting Improvements*, 233
a. *Awarding the Property on Which They Stand to the Person Making Them*, 233
b. *Allowing Their Value to Offset or Otherwise Diminish a Demand in Favor of Another Cotenant*, 234
c. *Allowing Compensation Out of the Proceeds of Sale*, 234
d. *Charging the Value of the Improvements Against the Respective Allotments*, 235
6. *Because of Waste*, 236
7. *Imposing Liens*, 237
8. *Adjudicating and Enforcing Preëxisting Liens*, 237
9. *Declaring and Perfecting the Title of a Party*, 238
10. *Equalizing the Partition by Granting and Enforcing Owelty*, 238
11. *Partial Partition*, 240
12. *Proceedings to Preserve the Property*, 241
a. *By Injunction*, 241

b. *By Receivers*, 241
13. *Limitations*, 241
L. *The Trial*, 242
1. *The Issues*, 242
a. *Their Restriction by the Pleadings*, 242
b. *Their Expansion to Correspond to the Pleadings*, 242
2. *Issues Requiring a Resort to Other Tribunals*, 242
a. *Disseizin of Plaintiff*, 242
b. *Disputed or Doubtful Title*, 243
3. *The Evidence*, 244
a. *Burden of Proof*, 244
b. *Evidence of Title*, 245
c. *Variance*, 246
d. *Respecting the Necessity For a Sale*, 246
4. *Before Whom the Trial May Take Place; Jury Trial or Reference*, 247
5. *Dismissal Without Trial*, 248
6. *The Findings*, 248
M. *The Interlocutory Judgment or Decree*, 249
1. *The Purpose and Substance of*, 249
2. *Necessity For*, 251
3. *At What Time May Be Entered*, 251
4. *Must Conform to the Pleadings and Findings or Verdict*, 252
5. *Construing*, 252
6. *Amending*, 252
7. *Vacating*, 253
8. *Conclusiveness of*, 253
N. *The Commissioners or Referees*, 253
1. *Their Appointment*, 253
2. *The Necessity For Their Appointment*, 254
3. *The Appointment of New Commissioners*, 255
4. *The Qualifications For Appointment*, 255
5. *The Writ or Commission*, 255
6. *The Oath of Office*, 256
7. *Number of, and the Number Who Must Act*, 256
8. *Their Powers and Their Termination*, 256
9. *Equities Which May Be Recognized in Making Allotments*, 257
10. *Their Duties*, 258
a. *Are Not Judicial*, 258
b. *Notice to Be Given by*, 258
c. *Making Inventories and Appraisements*, 259
d. *Going Upon the Land*, 259
e. *Making a Report*, 259
f. *Amending or Correcting Their Report*, 260
11. *Methods of Allotment*, 260
a. *Without Designating the Allottees*, 260
b. *Where Property Is Indivisible*, 261
c. *Making Partial Partition Only*, 261
d. *Making Allotments Equal in Value and Herein of Owelty*, 261
e. *Where the Property Consists of Different Parcels or of a Large Tract Which Must Be Divided Into Many Parcels*, 262
f. *Creating Easements and Servitudes*, 263
g. *Of Mineral Lands*, 263
h. *Avoiding Unnecessary Injury*, 263
i. *Designating the Allotments*, 263

12. *Assailing the Action of the Commissioners*, 264
a. *Waiver of Right to*, 264
b. *Objections to Report, When, How, and by Whom Must Be Made*, 264
c. *Grounds of Objection*, 265
d. *Trial of Exceptions or Objections*, 265
13. *Action Which May Be Taken on the Report of the Commissioners*, 266
14. *Confirmation of Their Report*, 266
15. *Compensating*, 267
O. *Partition by Sale*, 267
1. *Power to Require Is Statutory*, 267
2. *The Grounds For the Sale*, 267
a. *Under the English Statutes*, 267
b. *Under American Stututes*, 268
3. *Proceedings to Procure Order For*, 270
4. *For and Against Whom a Sale May Be Ordered*, 272
5. *Proceedings After Ordering the Sale*, 273
a. *Appraisement to Prevent Sale*, 273
b. *Inquiry Respecting Liens*, 274
c. *Proceedings Preparatory For, and in Making the Sale*, 274
6. *The Report*, 276
7. *Proceedings to Vacate the Report and Sale*, 276
a. *By the Parties to the Suit*, 276
b. *By the Purchaser*, 279
c. *Because the Sale Was Made to, or in the Interest of, One Not Entitled to Bid*, 281
8. *Proceedings to Collect the Bid*, 282
a. *Making the Proper Entry of the Bid*, 282
b. *Taking Security*, 282
c. *Obtaining Confirmation*, 282
9. *The Effect of Confirmation*, 283
a. *As Res Judicata*, 283
b. *Upon Further Motions to Set Aside and Upon Suits in Equity For Relief*, 283
10. *Notice of Proceedings to Confirm or Set Aside*, 284
11. *Resale to Charge the Purchaser*, 284
12. *Remedies to Compel the Payment of the Bid, or of the Deficiency Resulting From a Resale*, 285
a. *By Action*, 285
b. *By Summary Proceedings*, 285
c. *Defenses to Proceedings to Compel Payment*, 286
13. *Payment, Necessity For, and What Amounts to*, 286
14. *The Conveyance*, 287
a. *Its Execution*, 287
b. *Its Effect*, 287
c. *Collateral Attack Upon*, 288
d. *Its Protection to Innocent Purchasers*, 289
15. *Remedies of the Purchaser*, 290
16. *Remedies Against the Purchaser*, 290
17. *Effect of the Sale as a Conversion*, 290
18. *Collecting the Proceeds From the Selling Officers*, 290
19. *The Distribution of the Proceeds*, 291
P. *Costs and Attorney's Fees*, 294
1. *General Right to*, 294
2. *Items Allowable as*, 294

3. *Limiting the Right to Costs to Those Incurred After the Hearing or Arising From a Trial*, 295
4. *General Rules as to Allowance of*, 296
a. *Where a Party Has Been the Cause of or to Blame For*, 296
b. *The Discretion of the Court*, 296
c. *Apportioning the Costs According to the Moieties of the Parties*, 296
5. *Mode of Compelling Payment of*, 297
a. *By Personal Judgment and Execution*, 297
b. *By Sale of the Property Partitioned or Retention Out of Proceeds of Sale*, 297
c. *By Pursuing Purchasers Pendente Lite*, 298
6. *For and Against Whom Costs May Be Awarded*, 298
7. *Attorney's Fees*, 298
a. *The Right to Must Be Specially Conferred*, 298
b. *The Allowance of by Statute*, 299
c. *The Class of Services For Which Allowable*, 299
d. *The Amount of the Allowance*, 300
e. *Where an Attorney Is Complainant*, 301
f. *The Allowance Must Be in Favor of a Party — Not of His Attorney*, 301
8. *In Which Judgment the Provision For Must Be Made*, 301

Q. *The Final Judgment*, 301
1. *Necessity For*, 301
2. *When May Be Rendered*, 302
3. *The Form and Substance of the Judgment*, 302
4. *Modes of Enforcing*, 304
5. *Relief From*, 304
6. *Collateral Attack Upon*, 306
7. *Ratification and Estoppel*, 308
8. *The Effect of the Partition*, 308
a. *Is Only the Possession Bound*, 308
b. *All Issues Involved and Determined Become Res Judicata*, 309
c. *The Title Is Concluded Under Modern Statutes*, 310
d. *On the Right to Rents and Profits and to Growing Crops*, 311
e. *On the Running of the Statute of Limitations*, 311
9. *Implied Warranty and the Right to Contribution*, 311
10. *Effect on Subsequently Acquired Title*, 312

IV. PARTITION AS PART OF THE SETTLEMENT AND DISTRIBUTION OF THE ESTATES OF DECEDENTS, 312

A. *The Subject-Matter of the Jurisdiction*, 312
B. *Time When May Be Petitioned For*, 314
C. *Who May Petition For*, 316
D. *The Petition*, 316
E. *The Parties*, 317
F. *Jurisdiction Over the Person — How Acquired*, 317
G. *The Commissioners*, 317
1. *Their Appointment*, 317
2. *Their Qualification*, 318
3. *Notice To Be Given by*, 318
4. *Their Duties Generally*, 318
5. *Their Duties When the Property Cannot Be Divided Into Equal Allotments*, 319
6. *Their Report*, 320

7. *Vacating or Confirming Their Report*, 320
H. *The Effect of the Partition*, 321
I. *Sale Instead of Allotment*, 322

V. APPELLATE PROCEEDINGS, 324
A. *Classification of*, 324
B. *Certiorari*, 224
C. *Writs of Error*, 324
D. *Appeal*, 324
E. *What Is Appealable or Reviewable*, 325
1. *Generally Only a Decision Designated by Statute*, 325
2. *Final Judgment or Decree Is Generally Required*, 325
3. *What Judgments or Decrees Are Final*, 326
4. *Statutes Granting Appeals From Interlocutory Judgments*, 327
F. *Who May Appeal*, 328
G. *Notice of Appeal*, 328
H. *General Principles Applicable to Appellate Proceedings*, 328
1. *Error Must Be Affirmatively Shown*, 328
2. *A Party Cannot Urge an Error Caused or Consented to by Himself*, 329
3. *The Error Must Be Prejudicial*, 329
4. *The Error Must Affect the Appellant*, 329
5. *The Right of Appeal May Be Waived*, 329
I. *Manner of Preserving or Taking Advantage of Errors*, 329
J. *The Judgments or Orders Reviewable on an Appeal*, 331
K. *The Effect of an Appeal*, 331
L. *Judgment or Order Which May Be Entered Upon*, 332
M. *The Effect of the Reversal*, 332
N. *The Effect of the Affirmance*, 333

CROSS-REFERENCES

For Matters Relating to:
Distribution of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS.
Joint Tenants, see JOINT TENANCY.
Partition of:
Homestead, see HOMESTEADS.
Indian Lands, see INDIANS.
Submerged Lands, see NAVIGABLE WATERS.
Sale by Executor or Administrator to Pay Distributive Shares, see EXECUTORS AND ADMINISTRATORS.
Tenants in Common, see TENANCY IN COMMON.

I. DEFINITION AND CLASSIFICATION.

Anciently the word "partition" was employed only with reference to a division of lands by parceners or coheirs which had descended to them by common law or by custom.[1] The word has long ceased to be used in this restricted sense. Herein it is intended to include every means by which property held by two or more persons in cotenancy is converted into estates in severalty and thereby divided among them, either by assigning parts to be held in severalty or by making a sale of the whole and awarding to each his share of the proceeds.[2] It is true that partition

1. Freeman Coten. & P. § 393.
2. "The object of the action of partition," said the supreme court of Iowa, "is to effect a division of real property among several joint owners, so that each may hold his respective share in severalty." Clark *v.* Richardson, 32 Iowa 399, 401. It is, however, by no means essential that each shall take his share in severalty, for by consent one may be given his share in severalty and the others continue to hold in cotenancy. As applied to homesteads, the word "'partition' is evi-

may be made without either selling the property or dividing it into specific parts, as where, being indivisible, the cotenants agree to possess the whole of it in turn for a specified period,[3] but this mode of partition is so rare as not to require extended consideration. Partition is accomplished either (1) by the act of the parties, as where the cotenants in person or by their agents agree upon the property to be awarded to each, or select persons to make partition for them,[4] or (2) by the courts on their interposition being sought by one or more of the cotenants.[5]

II. BY THE ACT OF THE PARTIES.

A. Of What Property May Be Made. It is difficult to conceive of any one class or item of property susceptible of being held in cotenancy which may not be divided by the cotenants. It may be of personal property,[6] as well as of real estate; of several parcels as well as of a single parcel, and on non-contiguous as well as of adjacent tracts;[7] or of part only of the lands of the cotenants as well as of the whole.[8] With respect to a single tract, the land may be divided and some interest left therein to be held in cotenancy, as when, on partitioning a tract, riparian rights,[9] or the right to mine,[10] are allowed to remain undivided. If there is any property which is not subject to partition by the act of the parties, it must be of the same class as is not subject to partition by the courts, namely: "Those things the division of which would be against the public right or policy, or would tend to impair some paramount right existing in a stranger to the cotenancy, or would outrage the public sense of propriety or good morals." Nor is the character of the estate held by the cotenancy material unless it is one which some statute forbids to be partitioned. Thus, it may be an estate in possession, whether in fee or in tail,[11] or for life,[12] or for years or any other conceivable period; and doubtless of estates not in possession,[13] and especially where, as in some of the states, partition of such estates can be compelled by resort to the courts. It is always essential to a partition that the property be held in cotenancy, and, although a parol partition is valid under the laws of the state, it cannot be operative where the property was owned in severalty so as to vest title in an allottee who, before the partition, held no title to the allotment in cotenancy or otherwise.[14]

dently used in the Constitution in its legal sense, and means the act or proceeding through which two or more co-owners cause the thing to be partitioned to be divided into as many shares as there are owners, and which vests in each of such persons a specific part with the right to possess it free from a like right in other persons who before partition had an equal right to possess." Hudgins *v.* Sansom, 72 Tex. 229, 231, 10 S. W. 104. A partition "is a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interests, so that they may enjoy and possess the same in severalty." Meacham *v.* Meacham, 91 Tenn. 532, 535, 19 S. W. 757. It always implies an interest in different persons in the property to be divided. Brady *v.* McCosker, 1 N. Y. 214. Very strangely it was said in a recent case "the object of partition is a division of the estate between the legal owners of it regardless of equitable claims." Longley *v.* Longley, 92 Me. 395, 398, 42 Atl. 798 [*citing* Tilton *v.* Palmer, 31 Me. 486]. Doubtless that was the effect of a partition at law; but in equity, and under the American statutes equitable claims and titles may be considered and are generally controlling. See *infra*, III, E, 7; III, K, 1–10.

3. Freeman Coten. & P. § 393.
4. See *infra*, II.
5. See *infra*, III.
6. Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.
7. Pipes *v.* Buckner, 51 Miss. 848.
8. Tewksbury *v.* Provizzo, 12 Cal. 20.
9. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Bailey *v.* Rust, 15 Me. 440.
10. Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641; Darvill *v.* Roper, 3 Drew. 294, 3 Eq. Rep. 1004, 24 L. J. Ch. 779, 3 Wkly. Rep. 467, 61 Eng. Reprint 915.
11. Buxton *v.* Bowen, 4 Fed. Cas. No. 2,260, 2 Woodb. & M. 365; Oakley *v.* Smith, Ambl. 368, 27 Eng. Reprint 245, 1 Eden 261, 28 Eng. Reprint 684; Thomas *v.* Gyles, 2 Vern. Ch. 232, 23 Eng. Reprint 750.
12. Ryerss *v.* Wheeler, 25 Wend. (N. Y.) 434, 37 Am. Dec. 243; Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227.
13. McCullough *v.* Finley, 69 Kan. 705, 77 Pac. 696; Guild *v.* Young, (Tenn. Ch. App. 1901) 62 S. W. 404.
14. Smith *v.* Hollenback, 46 Ill. 252;

B. Devices For Making the Allotment. As partition by act of the parties rests on their agreement, it is obvious that they may resort to any method which to them seems best, and that it must be impossible to specify all the methods that may be resorted to, for human ingenuity may devise ways not hitherto employed and which nevertheless satisfy all the interested parties. When partition was spoken of only as an act of the parceners, it was said that they might effect it: (1) By an agreement to which all were parties designating the parcel to be held in severalty; (2) by appointing someone to divide the lands in equal parts which the sisters had the right of selecting in the order of their seniority; (3) by having the elder sister make division in equal parts, in which event, she must choose last for her part; and (4) by dividing the lands into as many tracts as there were parceners and putting the name or other designation of each tract in a scroll covered with wax and then requiring these scrolls to be drawn by the sisters in the order of their seniority.[15] The parties may, instead of dividing the property in specie, provide for its sale and the division among them of the proceeds,[16] or they may agree upon the value of a moiety and make payment therefor to a consenting cotenant in any manner acceptable to him, dividing the balance among the remaining cotenants,[17] or may provide that specified sums shall be paid by the persons receiving the more valuable allotments, and that, until paid, such sums shall be secured by a lien thereon.[18] The partition may also result from the adoption by the parties of an invalid judicial proceeding.[19] The authorities may not always agree as to whether a transaction by which lands theretofore held in cotenancy came to be held in severalty is a partition or a sale. If the cotenants execute conveyances the result of which is that each of them becomes seized in severalty of a part of the property and ceases to have an undivided interest in every other part, the transaction may safely be regarded as a partition.[20] A contract by which one cotenant takes all the common property at a stipulated price has also been said not to amount to a partition,[21] but to a transfer by one cotenant of all his interest in the common property to another,[22] or of all the interests of the several cotenants to a third person is usually regarded merely as a sale.[23] As hereinbefore stated, a partition need not include the whole property. If it is of personal property or slaves, it may result from a sale of a part only, which may be regarded as a severance from the cotenancy of the portion sold.[24] If lands contain minerals, the partition may be restricted to the surface, leaving the rights to the minerals unaffected, the presumption being, however, until the contrary is shown, that the partition included the minerals as well as the surface.[25] There can, however, be no partition which leaves all the cotenants interested in every part of the common property. By their partition some one of them must cease to be a cotenant in some part of such property.[26]

Gallupville Reformed Church *v.* Schoolcraft, 5 Lans. (N. Y.) 206 [*reversed* on other grounds in 65 N. Y. 134]; Hoffer *v.* Miller, 53 Pa. St. 156; Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520.

15. 2 Cruise Real Prop. 394; Littleton, §§ 244, 245.

16. Tippett *v.* Jett, 3 Rob. (La.) 313; Porter *v.* Depeyster, 18 La. 351; Bray *v.* Bray, 16 La. 352; Westover *v.* Aime, 11 Mart. (La.) 443; Carey's Estate, 10 Kulp (Pa.) 227.

17. Sutton *v.* Porter, 119 Mo. 100, 24 S. W. 760, 41 Am. St. Rep. 645; Hebner *v.* Shirk, 2 Walk. (Pa.) 165.

18. Guild *v.* Young, (Tenn. Ch. App. 1901) 62 S. W. 404.

19. Thus, if there is a partition suit void against a wife because she was not a party thereto, and because her share was allotted to her husband, yet, if he and she take and hold possession of the allotment made to him, this may amount to a parol partition, assigning to him her share in severalty. Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604.

20. Dawson *v.* Lawrence, 13 Ohio 543, 42 Am. Dec. 210; Taylor *v.* Birmingham, 29 Pa. St. 306.

21. Duplantier *v.* St. Pé, 3 Mart. (La.) 127.

22. Goodwin *v.* Chesneau, 3 Mart. N. S. (La.) 409; Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109.

23. Daquin *v.* Coiron, 3 La. 404.

24. Seay *v.* White, 5 Dana (Ky.) 555; Freeman Coten. & P. § 252.

25. Byers *v.* Byers, 183 Pa. St. 509, 38 Atl. 1027, 63 Am. St. Rep. 765, 39 L. R. A. 537.

26. Savage *v.* Lee, 101 Ind. 514.

C. Persons Who May Make and Be Bound by a Partition — 1. Generally. If partition was ever restricted to coparceners, such has long ceased to be the case, and every cotenant, other than by the entireties, may be a party to, and bound by, a partition effected by the act of the parties. It is not necessary that he should have been one of the cotenants at the creation of the cotenancy, for each cotenant may transfer his interest, and when he does so, he can no longer effectively join in a voluntary partition,[27] and such partition, to be effective, must be concurred in by his grantee.[28] None but cotenants can make partition. Although owners in severalty of different parcels of land might by an agreement operating as a conveyance set off to one another different parcels of land and thus give to each grantee a tract in which he before had no interest, the transaction would not be a partition.[29]

2. Incompetents and Persons Under Disability — a. Married Women. Where the rule is maintained that partition by act of the parties must be consummated by conveyances, it follows that an incompetent person cannot be bound by such partition at all, and that a person under disability can be bound only by conveyances executed in such manner as would be sufficient to transfer a title in severalty. A married woman may be a cotenant or the wife of a cotenant, and therefore a partition may be sought to be asserted against her either as one of the owners or for the purpose of preventing her assertion of any right of dower in the parcels not set off to her husband. In those states where parol partitions are sustainable, a married woman may be bound by a partition, although she does not undertake to execute any conveyance pursuant thereto, or attempting to make such a conveyance, does not acknowledge it in the manner required to make it operate against a married woman.[30] And where by law a wife is by statute incompetent to convey certain of her lands, she may join in and be bound by a deed of partition, because if she does not consent to partition, she may be compelled to do so by suit.[31] When a husband and wife are cotenants of the same parcel of land, it is doubtful whether they may directly partition it otherwise than

27. McGowan *v.* Smith, 22 Wash. 625, 61 Pac. 713; Patterson *v.* Martin, 33 W. Va. 494, 10 S. E. 817.

28. Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630; Hall *v.* Morris, 13 Bush (Ky.) 322.

29. Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520. See *supra*, II, A.

30. *Indiana.*— Mickels *v.* Ellsesser, 149 Ind. 415, 49 N. E. 373.

Maryland.— Hardy *v.* Summers, 10 Gill & J. 316, 32 Am. Dec. 167.

Missouri.— Gulick *v.* Huntley, 144 Mo. 241, 46 S. W. 154; Sutton *v.* Porter, 119 Mo. 100, 24 S. W. 760, 41 Am. St. Rep. 645.

Pennsylvania.— McConnell *v.* Carey, 48 Pa. St. 345; Calhoun *v.* Hays, 8 Watts & S. 127, 42 Am. Dec. 275.

Texas.— Aycock *v.* Kimbrough, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; Wardlow *v.* Miller, 69 Tex. 395, 6 S. W. 292; Stuart *v.* Baker, 17 Tex. 417.

Virginia.— Brooks *v.* Hubble, (1897) 27 S. E. 585.

West Virginia.— Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 359.

See 38 Cent. Dig. tit. "Partition," § 3.

In Ohio the voluntary partition of lands of which a married woman was a cotenant was valid if assented to by her husband, during the continuance of his estate by the curtesy, but was not binding on her or her heirs after the termination of that estate. Foster *v.* Dennison, 9 Ohio 121; Doe *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432; Seawell *v.* Berry, 55 Fed. 731.

So in North Carolina it is said that a parol partition cannot be sustained where there are interested in the land a *feme covert* and infants incapable of making the partition. Camp Mfg. Co. *v.* Liverman, 123 N. C. 7, 31 S. E. 346.

In making partition of real property of which a married woman was a cotenant, both courts and conveyancers were often careless, and their carelessness frequently resulted in allotments or conveyances to her husband, or to him and her, which should have been to her only. The courts go very far in construing both allotments and conveyances as if they had been made to her, and treat both her interest and her husband's in the property precisely the same as it was in the moiety before the allotment or conveyance. Foster *v.* Hobson, 131 Iowa 58, 107 N. W. 1101; Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604; Brown *v.* Humphrey, (Tex. Civ. App. 1906) 95 S. W. 23. The last case cited *supra* involved and sustained a partition by a husband assuming to act for and on behalf of his wife.

31. Mickels *v.* Ellsesser, 149 Ind. 415, 49 N. E. 373; Bumgardner *v.* Edwards, 85 Ind. 117.

by the intervention of the courts, unless the common law has been so abrogated as to permit each of them to convey to the other.[32] Probably, however, they may join in a conveyance to a third person for the purpose of having him execute conveyances which will vest a distinct parcel in each, to be held in severalty. The usual mode of effecting a partition by which married women are sought to be bound is by the execution of appropriate conveyances in which they and their husbands join executed in the mode prescribed for conveyances in severalty. Sometimes for want of due care in drafting such conveyances, both husband and wife are named as grantees of the parcel assigned to her. Generally the conveyance will nevertheless be construed merely as a deed in partition creating no title and only as vesting in her an estate in severalty corresponding in value to the estate before held by her in cotenancy and as conferring no additional title on her husband.[33] If, by mistake, he is named as the sole grantee, a court of equity will correct the mistake so as to protect the interest of the wife and her heirs.[34]

b. Infants. An infant may be compelled to make a partition, and hence it has been inferred that he may do so voluntarily and be, to some extent at least, bound by the partition.[35] We think, however, that the utmost that can be affirmed of a partition as against a minor cotenant is that he cannot avoid or disregard it capriciously and without reason, nor can he apparently affirm it for some time after reaching his majority and subsequently escape from it. While partition may be made on behalf of a minor by his *prochein ami*,[36] or his regularly appointed guardian, its effect is not generally any greater than if made by the minor personally, and may be avoided for inequality.[37] In truth, guardians are rarely, if ever, authorized to make partition on behalf of their wards, and general language in a statute purporting to authorize guardians to transact business appertaining to minors will not be construed as including partitions by act of the parties.[38] Of course, in those states wherein partitions by parol are not recognized, it is obviously impossible for a minor acting either by or without a guardian to become bound by a voluntary partition in the absence of some statute authorizing his guardian or some other person to act for him in executing the conveyance essential to the transfer of his title.

c. Lunatics. While we have not discovered any judicial consideration of the matter, we think it may be safely affirmed that if one of the cotenants is a lunatic, a partition by act of the parties must have the same and no greater effect against him than if he were an infant, and, even when he is represented by his committee or guardian, that the resulting partition may be avoided if not fair and equitable, and especially when the consent of the committee was induced by the false representations of the other cotenants.[39]

3. Persons Having Liens and Inchoate Estates Dependent on the Interests of a Cotenant — a. Lien-Holders. On a partition by the act of the parties, the parcel

32. Frissell *v.* Rozier, 19 Mo. 448.

33. Whitsett *v.* Wamack, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; Harrington *v.* Rawls, 131 N. C. 39, 42 S. E. 461, 136 N. C. 65, 48 S. E. 571; Carson *v.* Carson, 122 N. C. 645, 30 S. E. 4; Cottrell *v.* Griffiths, 108 Tenn. 191, 65 S. W. 397, 91 Am. St. Rep. 748, 57 L. R. A. 332; Yancey *v.* Radford, 86 Va. 638, 10 S. E. 972.

34. Schellinger *v.* Selover, (N. J. Ch. 1900) 46 Atl. 1058.

35. Hunt *v.* Robitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219; Williard *v.* Williard, 56 Pa. St. 119; Hemmich *v.* High, 2 Watts (Pa.) 159, 27 Am. Dec. 295; Bavington *v.* Clarke, 2 Penr. & W. (Pa.) 115, 21 Am. Dec. 432; Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265; Doe *v.* Harris, 7 N. Brunsw. 42.

36. Allnat Partition 29; 2 Rolle Abr. 256; Viner Abr. tit. "Partition (E)."

37. Thompson *v.* Strickland, 52 Miss. 574; McLarty *v.* Broom, 67 N. C. 311.

In Louisiana partition, to be valid against a minor, must be in conformity to or confirmed by an order of court. Richardson *v.* Richardson, 52 La. Ann. 1402, 27 So. 890; Ware *v.* Vignes, 35 La. Ann. 288; Story's Succession, 5 La. Ann. 208. But it may nevertheless be enforced against the adults without such order. Devereux's Succession, 13 La. Ann. 33.

38. Schumpert *v.* Smith, 18 S. C. 358.

39. McNally *v.* Fitzsimons, 70 N. Y. App. Div. 179, 75 N. Y. Suppl. 331.

assigned to each becomes at once subject to all liens existing against his moiety preceding the partition.[40] This would be the result of a partition by the courts, and it is fairly inferable that the parties have the right to do what the courts would do for them and the encumbrancers, namely: Make partition, to be followed by a transfer of all liens existing against their respective moieties to the parcels set apart to each in severalty. Hence, generally speaking, it may be said that a lien-holder is bound by the partition made by the cotenants,[41] although this rule has been denied in at least one state.[42] It is probable that a lien-holder will not be allowed to disturb and avoid a partition to which he was not a party merely because he chooses to do so and without any reference to whether it is, as against him, equitable or inequitable, and it is certain that such a partition will not be permitted to disturb his lien or seriously impair its value. On being informed that a partition is about to be made which will imperil his lien, the lien-holder may resort to equity and thereby prevent the threatened injury.[43] If he holds a judgment or attachment lien, he may proceed to enforce it by appropriate process notwithstanding the partition.[44] If the interest of the cotenant has been sold under execution, a subsequent partition to which he is not a party cannot prejudice his rights.[45] Where three cotenants orally agreed to partition their lands, and that a particular lot should be assigned to R, and conveyances were accordingly made to the other two cotenants, but no deed to R, and it appeared that he had never become entitled to a conveyance because he failed to perform the provisions of the agreement for equality of partition, and that there had been no acts of exclusive ownership by him of the lot in question, it was held that he had at most only an equitable interest in the shares of his cotenants, and that a sale of his interest under execution passed title to an undivided one-third only as against the grantee of the other two cotenants.[46] As the result of an agreement for a partition certain charges may be imposed against one or more of the parties on the tract assigned to him in the nature of owelty, in which event such charge constitutes a lien enforceable against the purchaser with notice at an execution sale.[47]

b. Wife's Inchoate Right of Dower. Upon the making of a partition, if any one of the cotenants was a married man, his wife's inchoate right of dower attaches to the parcel assigned to him and is released as to the parcel assigned to the other cotenants. Hence it is generally held that she need not join in a proceeding for partition nor in any conveyance necessary to consummate it.[48] She is bound by the partition if it is fair and equitable, for if this be conceded respecting it, it does not and cannot operate to her prejudice. Probably actual fraud on the part of the husband would enable his wife to avoid or disregard the partition as against persons holding the property with notice thereof.[49] If the property is not

40. Torrey *v.* Cook, 116 Mass. 163; Bradley *v.* Fuller, 23 Pick. (Mass.) 1; Webb *v.* Rowe, 35 Mich. 58; Port *v.* Parfit, 4 Wash. 369, 30 Pac. 328.

41. Manly *v.* Pettee, 38 Ill. 128; Williams College *v.* Mallett, 12 Me. 398; Long's Appeal, 77 Pa. St. 151.

42. Emson *v.* Polhemus, 28 N. J. Eq. 439.

43. Williams *v.* Harlan, 88 Md. 1, 41 Atl. 51, 71 Am. St. Rep. 394; Hall *v.* Piddock, 21 N. J. Eq. 311.

44. Bienvenu *v.* Factors', etc., Ins. Co., 33 La. Ann. 213; McMechan *v.* Griffing, 9 Pick. (Mass.) 537; Boice *v.* Conover, 69 N. J. Eq. 580, 61 Atl. 159; Hill *v.* Myers, 46 Ohio St. 183, 19 N. E. 593.

45. Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218.

In New Jersey he may be brought into equity for a partition of the entire land, and, if equitable, may be required to receive the lands allotted to his judgment debtor on the voluntary partition. Boice *v.* Conover, 69 N. J. Eq. 580, 61 Atl. 159.

46. Whiteman *v.* Hyland, 16 N. Y. Suppl. 8.

47. Long *v.* Long, 1 Watts (Pa.) 265.

48. *Kentucky.*— Napper *v.* Mutual L. Ins. Co., 107 Ky. 134, 53 S. W. 28, 21 Ky. L. Rep. 791, 92 Am. St. Rep. 340.

Massachusetts.— Potter *v.* Wheeler, 13 Mass. 504.

Missouri.— Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262.

New Jersey.— Lloyd *v.* Conover, 25 N. J. L. 47.

New York.— Jackson *v.* Edwards, 22 Wend. 498; Wilkinson *v.* Parish, 3 Paige 653; Totten *v.* Stuyvesant, 3 Edw. 500.

49. Potter *v.* Wheeler, 13 Mass. 504.

divided into equal parts, but, on the contrary, the parcel assigned to the husband is of less value than that assigned to his cotenant, and on account of this inequality the latter pays the former a sum of money, the wife's right of dower is not restricted to the parcel conveyed to her husband, and she may, after his death, maintain a proceeding to recover her dower in the parcel conveyed by him to his cotenant.[50] If a husband makes a conveyance of his moiety and his grantee and the other cotenants subsequently partition the property, assigning a parcel in severalty to each grantee, this proceeding appears to have no effect on the wife and leaves her at liberty, after her husband's death, to have her dower assigned out of the whole tract.[51]

D. The Binding of Cotenants by Their Agents and Other Representatives — 1. By the Action of Arbitrators or Commissioners. Where the cotenants are unable to agree upon a partition, they sometimes select one or more persons to make it for them, and when the persons so selected, whether styled commissioners or arbitrators, make the partition, it has the same effect as a partition made by the parties themselves.[52] Whether a statute providing that no submission to arbitration shall be made respecting the claim of any person to any estate in fee or for life of real estate forbids partition by arbitrators seems to be doubtful, one decision apparently holding the affirmative,[53] and another and more carefully considered decision the negative.[54] The award, if by arbitrators, may be set aside on grounds applicable to other arbitrations and awards.[55] The award or division made by the arbitrators probably does not of itself transfer title, unless, as is sometimes the case, some statute has been enacted on the subject recognizing the proceeding, directing what shall be done as evidence of the award, and apparently attaching conclusive effect to it.[56] Otherwise conveyances should be executed by the cotenants conforming to the award,[57] and, if they refuse, equity may compel them to do so.[58] A submission to arbitration may be in the form of a deed executed by the cotenants mutually releasing and conveying to each other the parts which shall be allotted to each, in which event, on the happening of the conditions prescribed, the conveyance takes effect as a deed of partition and release vesting in each of the cotenants the premises allotted to him.[59] Any irregularity in the action of the arbitrators necessarily becomes immaterial if the cotenants, by a proper conveyance, confirm the award made.[60] Although the person appointed to make a partition does not give his personal attention thereto, but, by agreement with one of the cotenants, submits the partition to disinterested persons, whose arbitrament he confirms by executing the necessary indenture, there is no valid objection to the partition.[61]

50. Mosher *v.* Mosher, 32 Me. 412.

51. Rank *v.* Hanna, 6 Ind. 20.

52. *Connecticut.*— Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550.

Illinois.— Lavelle *v.* Strobel, 89 Ill. 370.

Indiana.— Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563.

New York.— Conkling *v.* New York El. R. Co., 76 Hun 420, 27 N. Y. Suppl. 1098.

North Carolina.— Cheatham *v.* Crews, 83 N. C. 313.

United States.— Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855.

See 38 Cent. Dig. tit. "Partition," § 4.

A partition by arbitration is binding on adult parties who submitted thereto in writing and their mutual agreement for such submission is based upon a sufficient consideration where all are cotenants of estates of like character, but if one of them is a widow having a life-estate only, this will not support a partition giving her a fee. Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291.

If one of the parties to the submission is a minor and disaffirms it and the partition, on coming of age, the other is entitled to maintain a suit for equalization of the loss under the statute of Kentucky. Brownlee *v.* Bunnell, 103 S. W. 284, 31 Ky. L. Rep. 669.

53. Wiles *v.* Peck, 26 N. Y. 42.

54. Frankfurth *v.* Steinmeyer, 113 Wis. 195, 89 N. W. 148.

55. Frankfurth *v.* Steinmeyer, 113 Wis. 195, 89 N. W. 148.

56. Hood *v.* Mathers, 2 A. K. Marsh. (Ky.) 553.

57. Johnson *v.* Wilson, Willes 248.

58. Knight *v.* Burton, 6 Mod. 231.

59. Tewksbury *v.* Provizzo, 12 Cal. 20.

60. Kempner *v.* Beaumont Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. 412.

61. Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855.

2. By the Acts of Other Agents. The title to property may be vested in trustees or even in executors under such circumstances or by such an express delegation of authority as to warrant their making partition thereof among the persons who become entitled thereto or joining in a partition with other cotenants when the interest over which the authority is given is that of a cotenant only.[62] There can be no doubt that a cotenant having power to join in a partition by act of the parties may delegate his power to an agent selected for that purpose, and that such agent may bind his principal as to all matters falling within such delegation. Furthermore, although a professed agent had not authority at the time he purported to act for his principal, the latter may ratify the action and bind himself by it.[63] A delegation of authority to sell property does not authorize the agent to join in a partition of land of which his principal is a cotenant;[64] but if the agent is authorized to exchange, or sell and exchange, or to dispose of property and invest the proceeds, he is authorized to join in a partition in behalf of his principal.[65]

3. By the Act of Persons Other Than Their Agents. In England it has been held that a tenant in tail may make a partition and that it will bind the issue.[66] It may be that this position is sustainable, but if it is, it constitutes, we believe, the only exception to the general rule that those who join in a partition cannot prejudice others having independent estates and not parties thereto. The courts of the United States, so far as they have spoken on the subject, dissent from the English decision and maintain that an heir in tail may, upon the death of the tenant in tail, refuse to recognize the partition and claim all the rights to which he would have been entitled had no partition been made.[67] As a general rule no person who is not a party to a partition is affected thereby unless he subsequently ratifies it.[68] If partition can be made in any case by an act of the legislature, the effect of such act cannot extend to one who had no agency in procuring and is not mentioned in it.[69] Although the cotenants joining in the partition hold the whole legal title, yet if one of them has previously agreed to convey to a third person, the latter cannot be deprived of the benefit of his agreement by the partition.[70] The rule that a cotenant not joining in a partition is not affected thereby has an apparent exception in the case of "personal property, severable in its nature, and existing in common bulk and being of the same quality throughout." In the United States, "as to all property of which the share of each cotenant can be ascertained by weight or measurement without the assistance or consent of the others," either may take any portion thereof not beyond his share, and this is regarded as a lawful severance or partition giving him title in severalty to the part thus taken by him and extinguishing or diminishing his interest in the remainder.[71] Whenever a cotenant is authorized to make such severance or

62. Knevals *v.* Henry, 10 N. Y. Suppl. 676; McBroom *v.* Whitefield, 108 Tenn. 422, 67 S. W. 794; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855.

63. Jackson *v.* Richtmyer, 13 Johns. (N. Y.) 367 [*affirmed* in 16 Johns. 314].

64. Forel *v.* Rollins, 30 Cal. 408; Carr, Petitioner, 16 R. I. 645, 19 Atl. 145, 27 Am. St. Rep. 773; Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763, 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613.

65. Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855; *In re* Frith, 3 Ch. D. 618, 45 L. J. Ch. 780, 35 L. T. Rep. N. S. 146, 24 Wkly. Rep. 1061; Abel *v.* Heathcote, 4 Bro. Ch. 278, 29 Eng. Reprint 891, 2 Ves. Jr. 100, 30 Eng. Reprint 542, 2 Rev. Rep. 171; Bradshaw *v.* Fane, 3 Drew. 534, 2 Jur. N. S. 247, 25 L. J. Ch. 413, 4 Wkly. Rep. 422, 61 Eng. Reprint 1006. *Contra*, Atty.-Gen. *v.* Hamilton, 1 Madd. Ch. Pr. 122; McQueen *v.* Farquhar, 11 Ves. Jr. 467, 8 Rev. Rep. 212, 32 Eng. Reprint 1168.

66. Thomas *v.* Gyles, 2 Vern. Ch. 232, 23 Eng. Reprint 750.

67. Buxton *v.* Bowen, 4 Fed. Cas. No. 2,260, 2 Woodb. & M. 365.

68. Milligan *v.* Masden, 74 S. W. 1049, 25 Ky. L. Rep. 144; Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227; McGowan *v.* Smith, 22 Wash. 625, 61 Pac. 713.

69. May *v.* Fenton, 7 J. J. Marsh. (Ky.) 306.

70. Peterson *v.* Sloss, 39 Wash. 207, 81 Pac. 744.

71. Freeman Coten. & P. § 252; Erwin *v.* Clark, 13 Mich. 10; Fiquet *v.* Allison, 12

partition, his creditors, acting under an execution or attachment against him, may lawfully seize and sever his share, and thereby in effect accomplish a partition thereof.[72]

E. Evidence of the Partition — 1. Parol — a. Legal Estates. At the common law, joint tenants, except when their estate was for years only, could not make partition otherwise than by deed, but tenants in common or parceners could partition by parol, which in the case of a tenant in common must have been accompanied by livery of seizin.[73] The courts have never been able to agree whether this rule of the common law is wholly abrogated by the statute of frauds. A large minority of the authorities, however, maintains the affirmative. Under them a parol partition, even when followed by possession taken under and in harmony with it, does not vest title in severalty.[74] On the other hand, in the United States a majority of the authorities, constantly increasing, practically disregards the statute of frauds when a parol partition has not only been directly agreed upon by the parties in interest, but further, been consummated by taking possession in accordance with it. Probably it may not be affirmed that such partition is generally deemed operative as a transfer of the legal title, but, whether so regarded or not, it protects all persons holding under it in their right of possession and assures to them every other right of beneficial ownership.[75] Even in Kentucky,

Mich. 328, 86 Am. Dec. 54; Clark *v.* Griffith, 24 N. Y. 595; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Channon *v.* Lusk, 2 Lans. (N. Y.) 211; Fobes *v.* Shattuck, 22 Barb. (N. Y.) 568; Tripp *v.* Riley, 15 Barb. (N. Y.) 333 [not *followed* in Rice *v.* Hollenbeck, 19 Barb. (N. Y.) 664]; Lobdell *v.* Stowell, 37 How. Pr. (N. Y.) 88 [*affirmed* in 51 N. Y. 70]; Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616.

72. Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616.

73. Brooks *v.* Hubble, (Va. 1897) 27 S. E. 585; Yancey *v.* Radford, 86 Va. 638, 10 S. E. 972; Bolling *v.* Teel, 76 Va. 487; Coles *v.* Wooding, 2 Patt. & H. (Va.) 189; Paine *v.* Ryder, 24 Beav. 151, 53 Eng. Reprint 314; Thomas *v.* Gyles, 2 Vern. Ch. 232, 23 Eng. Reprint 750; Freeman Coten. & P. § 396.

74. *Alabama.*— Yarborough *v.* Avant, 66 Ala. 526.

California.— Gates *v.* Salmon, 46 Cal. 361.

Florida.— Simmons *v.* Spratt, (1887) 1 So. 860.

Kentucky.—Duncan *v.* Duncan, 93 Ky. 37, 18 S. W. 1022, 13 Ky. L. Rep. 917, 40 Am. St. Rep. 159; White *v.* O'Bannon, 86 Ky. 93 5 S. W. 346, 9 Ky. L. Rep. 334; Craig *v.* Taylor, 6 B. Mon. 457; Lacy *v.* Overton, 2 A. K. Marsh. 440.

Louisiana.— Wright *v.* Cane, 18 La. Ann. 579; Bach *v.* Ballard, 13 La. Ann. 487.

Maine.— John *v.* Sabattis, 69 Me. 473; Chenery *v.* Dole, 39 Me. 162; Duncan *v.* Sylvester, 16 Me. 388.

Massachusetts.— Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22; Porter *v.* Perkins, 5 Mass. 233, 4 Am. Dec. 52.

New Hampshire.—Ballou *v.* Hale, 47 N. H. 347, 93 Am. Dec. 438; Wood *v.* Griffin, 46 N. H. 230; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Jersey.— Lloyd *v.* Conover, 25 N. J. L. 47; Woodhull *v.* Longstreet, 18 N. J. L. 405.

North Carolina.— Melvin *v.* Bullard, 82 N. C. 33; Medlin *v.* Steele, 75 N. C. 154; McPherson *v.* Seguine, 14 N. C. 153; Anders *v.* Anders, 13 N. C. 529.

South Carolina.— Jones *v.* Reeves, 6 Rich. 132; Goodhue *v.* Barnwell, Rice Eq. 198.

Texas.— Gibbons *v.* Bell, 45 Tex. 417; Martin *v.* Harris, (Civ. App. 1894) 26 S. W. 91.

Wisconsin.— Buzzell *v.* Gallagher, 28 Wis. 678.

England.— Ireland *v.* Rittle, 1 Atk. 541, 26 Eng. Reprint 340; Whalley *v.* Dawson, 2 Sch. & Lef. 367; Johnson *v.* Wilson, Willes 248.

Canada.— Morley *v.* Davison, 20 Grant Ch. (U. C.) 96.

See 38 Cent. Dig. tit. "Partition," § 13 *et seq.*

75. *California.*— Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806.

Georgia.— Adams *v.* Spivey, 94 Ga. 676, 20 S. E. 422; Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Illinois.— Sontag *v.* Bigelow, 142 Ill. 143, 31 N. E. 674, 31 L. R. A. 326; Gage *v.* Bissell, 119 Ill. 298, 10 N. E. 238.

Indiana.—Tate *v.* Foshee, 117 Ind. 322, 20 N. E. 241; Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563; Hauk *v.* McComas, 98 Ind. 460.

Mississippi.— Pipes *v.* Buckner, 51 Miss. 848; Natchez *v.* Vandervelde, 31 Miss. 706, 66 Am. Dec. 581; Wildey *v.* Bonney, 31 Miss. 644.

Missouri.— Edwards *v.* Latimer, 183 Mo. 610, 82 S. W. 109; Sutton *v.* Porter, 119 Mo. 100, 24 S. W. 760, 41 Am. St. Rep. 645; Nave *v.* Smith, 95 Mo. 596, 8 S. W. 796, 6 Am. St. Rep. 79; Hazen *v.* Barnett, 50 Mo. 506; Bompart *v.* Roderman, 24 Mo. 385.

Montana.— Mathes *v.* Nissler, 17 Mont. 177, 42 Pac. 763.

New York.— Wood *v.* Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Conkling *v.* Brown, 57

where "it is a well-settled principle under repeated adjudications that a verbal division of land is invalid, under the statute of frauds, and invests the purchaser with no title whatever," if followed by fifteen years' continuous and exclusive possession, it ripens into a title which will entitle the holder to possession if illegally dispossessed.[76] In New Jersey, where it is denied that parol partition accompanied by possession thereunder of less than twenty years can be effective, it is conceded that there may be circumstances under which "co-tenants may be estopped by their acts from asserting that there was no partition, although there is no technical estoppel by record or any written conveyance."[77] Where the rule prevails that partition may be by parol, it necessarily follows that it may be established by any evidence, whether oral or not, which satisfies the court or jury that the cotenants actually agreed upon a partition or assented to a partition made by others,[78] and it is not indispensable that any corporeal boundaries be marked or established if the agreement proved furnishes all the data requisite for establishing them.[79]

b. Trust or Equitable Estates. Where an estate is so far exempt from the operation of the statute of frauds that it may be created by parol, it may be divided among the coöwners in like manner. Therefore property held in trust where no writing is necessary to create the trust or to show the rights of the *cestui que trust* may, when held in cotenancy, be divided by parol by the persons interested as beneficiaries.[80]

c. Aiding Parol Partition in Equity. In equity a parol partition followed by possession in accordance therewith has always been regarded as vesting the several allottees with the title in severalty to their respective allotments. The result of this is not only that they are entitled to be treated in equity as the owners thereof, but further that they may there obtain such relief as is necessary for their protection, including specific performance of the agreement for partition, or, in other words, the conveyance to them of the legal title, for, notwithstanding the

Barb. 265; Otis *v.* Cusack, 43 Barb. 546; Ryerss *v.* Wheeler, 25 Wend. 434, 37 Am. Dec. 243; Corbin *v.* Jackson, 14 Wend. 619, 28 Am. Dec. 550; Jackson *v.* Livingston, 7 Wend. 136; Jackson *v.* Christman, 4 Wend. 277; Jackson *v.* Vosburgh, 9 Johns. 270, 6 Am. Dec. 276; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262.

Ohio.— Docktermann *v.* Elder, 11 Ohio Dec. (Reprint) 506, 27 Cinc. L. Bul. 195.

Pennsylvania.— Byers *v.* Byers, 183 Pa. St. 509, 38 Atl. 1027, 63 Am. St. Rep. 765, 39 L. R. A. 537; McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036; Mellon *v.* Reed, 114 Pa. St. 647, 8 Atl. 227; Maul *v.* Rider, 51 Pa. St. 377; McConnell *v.* Carey, 48 Pa. St. 345; Rider *v.* Maul, 46 Pa. St. 376; McMahan *v.* McMahan, 13 Pa. St. 376, 53 Am. Dec. 481; Calhoun *v.* Hays, 8 Watts & S. 127, 42 Am. Dec. 275; Higgs *v.* Stimmel, 3 Penr. & W. 115.

South Carolina.— Rountree *v.* Lane, 32 S. C. 160, 10 S. E. 941; Kennemore *v.* Kennemore, 26 S. C. 251, 1 S. E. 881; Haughabaugh *v.* Honald, 3 Brev. 97, 5 Am. Dec. 548; Goodhue *v.* Barnwell, Rice Eq. 198.

Tennessee.— Meacham *v.* Meacham, 91 Tenn. 532, 19 S. W. 757; Hale *v.* Morgan, (Ch. App. 1900) 63 S. W. 506.

Texas.— Murrell *v.* Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777; Aycock *v.* Kimbrough, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; Stuart *v.* Baker, 17 Tex. 417; George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612; Houston *v.* Sneed, 15 Tex. 307; Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468; Linnartz *v.* McCulloch, (Civ. App. 1893) 27 S. W. 279; High *v.* Tarver, (Civ. App. 1894) 25 S. W. 1098.

West Virginia.— Patterson *v.* Martin, 33 W. Va. 494, 10 S. E. 817.

United States.— Allen *v.* Seawell, 70 Fed. 561, 17 C. C. A. 217; Berry *v.* Seawall, 65 Fed. 742, 13 C. C. A. 101.

See 38 Cent. Dig. tit. "Partition," § 13 *et seq.*

The courts of Virginia inclined toward parol partitions, but such a partition if of an estate of more than five years is within the present statute of frauds. Brooks *v.* Hubble, (1897) 27 S. E. 585.

76. Blackburn *v.* Hall, 97 S. W. 399, 30 Ky. L. Rep. 134; Slone *v.* Grider, 44 S. W. 384, 19 Ky. L. Rep. 1698.

77. Wescoat *v.* Wilson, 62 N. J. Eq. 177, 49 Atl. 1112 [*affirmed* in 64 N. J. Eq. 795, 53 Atl. 1125].

78. Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544; Latham *v.* Harby, 50 S. C. 428, 27 S. E. 862. In Justice *v.* Lawson, 46 W. Va. 163, 33 S. E 102, it is said that a voluntary partition not evidenced by a writing must be clearly proven.

79. Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

80. Strode *v.* Churchill, 2 Litt. (Ky.) 75; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

partition, it may still be regarded as not vested in harmony therewith.[81] It is essential to warrant the interposition of equity that the partition should have been completed. Hence, if three cotenants agree to divide their property into three parcels, one of which is taken possession of by one of their number with the consent of the others, and all agree respecting the other elements and details of the partition, except as to which of the others shall take either of the remaining parcels, and, before this latter is agreed to, one of them dies, the partition remains incomplete at his death, and equity cannot decree the conveyance of the parcel of which possession had been taken.[82]

2. WRITTEN — a. Agreements. An agreement in writing for a partition has little, if any, greater effect than a parol agreement, except that it is more easily proved and, if properly executed, cannot be affected by the plea of the statute of frauds. If it does not contain words purporting to convey, transfer, or release to the respective cotenants the parts allotted to them, it is probably not good at law as a transfer of the legal title, but is respected in equity. An agreement will there be recognized as a complete partition and will preclude the assertion of claims founded on any previous agreement.[83] Agreements for partition will be liberally construed.[84] But the fact that a mother and son join in the execution of a conveyance, the purchase-money of which was paid to him, will not of itself establish a partition.[85] One who refuses to abide by an agreement for partition cannot afterward obtain the benefit of it.[86] An agreement declaring that the owners of a farm agree to any division which the majority in interest shall decide upon as just and equitable refers to the manner of partition only, and does not authorize such majority to set off to any cotenant a portion of the land to which he does not assent.[87] If an agreement provides that one of the parties shall erect and maintain a fence at his own expense, the obligee cannot require the giving of a mortgage to secure the performance of the agreement, but only the recording of the covenant.[88] If there are five cotenants, and the agreement declares that the lands cannot be divided into as many parts as there are cotenants, and that three of them shall take specified parcels at stated prices, and the lands or proceeds shall be divided among the five so as to equalize their respective portions, it has been held to be an agreement for a sale and not for partition.[89]

81. *Alabama.*— Yarborough *v.* Avant, 66 Ala. 526.

Arkansas.— Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544.

California.— Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806; Lanterman *v.* Williams, 55 Cal. 60; Long *v.* Dollarhide, 24 Cal. 218, opinion of the court by Sanderson, C. J.

Georgia.— Adams *v.* Spivey, 94 Ga. 676, 20 S. E. 422; Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Illinois.— Vasey *v.* Washington County Tp. 1, 59 Ill. 188; Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

Indiana.— Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563.

Mississippi.—Van Eaton *v.* Hamlin, (1895) 16 So. 594.

Missouri.— Gulick *v.* Huntley, 144 Mo. 241, 46 S. W. 154; Hazen *v.* Barnett, 50 Mo. 506.

Montana.— Mathes *v.* Nissler, 17 Mont. 177, 92 Pac. 763.

North Carolina.— Keener *v.* Den, 73 N. C. 132.

Pennsylvania.— Kennedy *v.* Kennedy, 43 Pa. St. 413, 82 Am. Dec. 574; Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641.

Vermont.— Pope *v.* Henry, 24 Vt. 560.

Washington.—Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

West Virginia.— Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Patterson *v.* Martin, 33 W. Va. 494, 10 S. E. 817.

Wisconsin.— Buzzell *v.* Gallagher, 28 Wis. 678; Eaton *v.* Tallmadge, 24 Wis. 217.

England.— Ireland *v.* Riddle, 1 Atk. 541, 26 Eng. Reprint 340; Bolton *v.* Ward, 4 Hare 530, 9 Jur. 591, 14 L. J. Ch. 361, 30 Eng. Ch. 530, 67 Eng. Reprint 758; Whaley *v.* Dawson, 2 Sch. & Lef. 367; Knollys *v.* Alcock, 5 Ves. Jr. 648, 31 Eng. Reprint 785.

Canada.— Graham *v.* Graham, 6 Grant Ch. (U. C.) 372.

See 38 Cent. Dig. tit. "Partition," § 14.

82. Phelps *v.* Foot, 13 Gray (Mass.) 423.

83. Metcalfe *v.* Alter, 31 La. Ann. 389; Masterson *v.* Finnigan, 2 R. I. 316; McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338.

84. Moore *v.* Eagles, 5 N. C. 302.

85. James *v.* James, (Tenn. Ch. App. 1901) 62 S. W. 184.

86. Johnston *v.* Clark, 70 Ark. 249, 67 S. W. 396.

87. Harkness *v.* Remington, 7 R. I. 154.

88. Thayer *v.* Smith, 7 R. I. 164.

89. Moody *v.* McCown, 39 Ala. 586.

b. Mutual Conveyances. In England cotenants desiring to make a partition usually joined in conveying the entire property to a trustee and his heirs, and on this seizin transmitted the use of each particular allotment to the party for whom it was intended.[90] In America partition is usually made either by a single writing in which all the parties join, and containing apt words to vest the title in the persons to whom the respective allotments have been made,[91] or by separate conveyances in which each of the cotenants, other than the grantee, unite. When the latter method is adopted, all the writings must be regarded as a single instrument.[92] A partition need not include all the lands of the cotenancy.[93] Conveyances by two tenants in common respectively by which the one conveys to the other the north half and the latter to the former the south half of the tract operate as a complete partition.[94] It has even been held that if each of the conveyances specifies as a boundary "land this day deeded" by the grantor to the grantee, that the deeds are not void for uncertainty, and that the boundary between them thus referred to may be established by parol evidence.[95] A partition between the widow and children of a decedent may convey to one child an allotment excepting the life claim of the widow, in which case it reserves to her a life-estate with remainder in fee to such grantee.[96]

c. Conveyances to Strangers. If each of the cotenants conveys to a stranger in severalty a tract designated as being equal in amount to the moiety of the grantor, as where, there being two cotenants, one conveys the north half of the tract to A, and the other the south half to B, these conveyances probably operate as a complete partition,[97] or as evidence of a partition made by the parties before their execution.[98]

d. Location Made Pursuant to a Conveyance. If an owner of a tract of land conveys a designated number of acres therein and by his conveyance gives his grantee the right to locate the part which he shall choose to take, the grantor and grantee are thereby made tenants in common, with a power on the part of the latter to locate his part to be held by him in severalty, and his location pursuant to this power operates as a complete partition between him and his grantor.[99]

e. Partition by Proprietors. In the New England colonies, and also in New York, proprietors of large grants of land exercised the power of partition by vote or ballots, whereby at a meeting of such proprietors, the share of one of them was set off to him to be held in severalty.[1] It was not material that the allottee was misnamed if, from all the proceedings, he could be identified.[2] In New York the proprietors had, under the colonial act of 1762, the power of appointing commissioners to proceed to make partition and put on file their proceedings, which, it was declared, should be good evidence of the partition. It

90. Allnat Partition 131, 132.

91. Center *v.* Davis, 113 Cal. 307, 45 Pac. 468, 54 Am. St. Rep. 352; Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630.

92. *Maine.*— Mitchell *v.* Smith, 67 Me. 338.

Massachusetts.— King *v.* King, 7 Mass. 496.

Michigan.— Norris *v.* Hill, 1 Mich. 202.

Missouri.— Whitsett *v.* Wamack, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339.

Ohio.— Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757.

Wisconsin.— Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518.

See 38 Cent. Dig. tit. "Partition," § 19 *et seq.*

93. Robnett *v.* Howard, (Tenn. Ch. App. 1901) 61 S. W. 1082.

94. Eaton *v.* Tallmadge, 24 Wis. 217, Paine, J., delivering the opinion of the court.

95. Crafts *v.* Hibbard, 4 Metc. (Mass.) 438.

96. Senterfeit *v.* Shealey, 71 S. C. 259, 51 S. E. 142.

97. Eaton *v.* Tallmadge, 24 Wis. 217. *Contra*, Duncan *v.* Sylvester, 16 Me. 388.

98. Markoe *v.* Wakeman, 107 Ill. 251.

99. Corbin *v.* Jackson, 14 Wend. (N. Y.) 619, 28 Am. Dec. 550; Jackson *v.* Livingston, 7 Wend. (N. Y.) 136.

1. Folger *v.* Mitchell, 3 Pick. (Mass.) 396; Springfield *v.* Miller, 12 Mass. 415; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Corbett *v.* Norcross, 35 N. H. 99; Atkinson *v.* Bemis, 11 N. H. 44; Coburn *v.* Ellenwood, 4 N. H. 99; Jackson *v.* Richtmyer, 13 Johns. (N. Y.) 367 [*affirmed* in 16 Johns. 314]; Jackson *v.* Vedder, 3 Johns. (N. Y.) 8.

2. Society for Propagating Gospel *v.* Young, 2 N. H. 310.

was held, however, that the recital in these proceedings that certain members, styled proprietors, appointed such commissioners was not evidence of their lawful appointment, and until such appointment was otherwise proved, the validity of the partition was not established.[3]

F. The Presumption of Partition. Rarely, if ever, can the court find, as a proposition of law, that a partition has been made in the absence of direct evidence of that fact, and the difficulty will be greater in those states which insist that an agreement for partition is within the statute of frauds than in those which concede the validity of parol partition.[4] But even if a conveyance in writing, duly executed, be regarded as necessary to a complete partition, it is evident that such conveyance may, after being made, be lost, and hence it cannot be said that partition cannot be inferred in the absence of the deed. Whether a partition has been made is a question of fact for the decision of the jury, or of the court when it is authorized to discharge the functions of a jury. A partition may be established by circumstantial as well as by direct evidence, and whenever there has been separate and distinct possession in severalty, maintained for a considerable time, with conveyances or a claim of title in severalty, the fact of such possession and the attendant circumstances are admissible in evidence and may justify the jury in presuming a partition, although there is no direct evidence on the subject, and perhaps even where the evidence shows an attempted partition which on its face, as a matter of law, must be declared insufficient and void.[5]

G. Ratification and Estoppel. Although a partition is for some reason not binding on all the parties essential to its complete operation, it may become fully effective at some subsequent period, as where all the parties enter upon and occupy the parts severally set aside to them, or otherwise claim the benefit of the partition, or assume a position relative thereto from which they cannot equitably be permitted to recede. In all of such cases the partition may become complete through the operation of the doctrine of ratification or estoppel.[6] Therefore, upon the

3. Munro *v.* Merchant, 26 Barb. (N. Y.) 383 [*reversed* on other grounds in 28 N. Y. 9].

4. Porter *v.* Perkins, 5 Mass. 233, 4 Am. Dec. 52.

5. *Alabama.*— Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

Arkansas.— McGuire *v.* Ramsey, 9 Ark. 518.

California.— Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806; Gordon *v.* San Diego, 108 Cal. 264, 41 Pac. 301.

Florida.— Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Georgia.— Hamilton *v.* Phillips, 83 Ga. 293, 9 S. E. 606.

Illinois.— Markoe *v.* Wakeman, 107 Ill. 251; Lavelle *v.* Strobel, 89 Ill. 370; Vasey *v.* Washington County Tp. 1, 59 Ill. 188; Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

Kentucky.— Russell *v.* Mark, 3 Metc. 37; Drane *v.* Gregory, 3 B. Mon. 619; Adie *v.* Cornwell, 3 T. B. Mon. 276.

Maryland.— Lloyd *v.* Gordon, 2 Harr. & M. 254.

Massachusetts.—White *v.* Loring, 24 Pick. 319.

Michigan.— Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563.

Missouri.— Edwards *v.* Latimer, 183 Mo. 610, 82 S. W. 109; Kash *v.* Coleman, 145 Mo. 645, 47 S. W. 503.

New Jersey.— Wescoat *v.* Wilson, 62 N. J. Eq. 177, 49 Atl. 1112 [*affirmed* in 64 N. J. Eq. 795, 53 Atl. 1125].

New York.— Mount *v.* Morton, 20 Barb. 123; Jackson *v.* Miller, 6 Wend. 228, 21 Am. Dec. 316; Jackson *v.* Moore, 13 Johns. 513, 7 Am. Dec. 398.

North Carolina.— Slade *v.* Green, 1 N. C. 66.

Pennsylvania.— Merritt *v.* Whitlock, 200 Pa. St. 50, 49 Atl. 786; Mellon *v.* Reed, 123 Pa. St. 1, 15 Atl. 906; Duncan *v.* Clark, 7 Watts 217.

South Carolina.— Walker *v.* Frazier, 2 Rich. Eq. 99.

Life-estate.— And where a partition has been made it will be presumed to have been of the life-estate which the parties then had and could divide, rather than of an estate in remainder not divisible until the death of a life-tenant. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68.

6. *Arkansas.*— Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544.

California.— Tewksbury *v.* O'Connell, 21 Cal. 60.

Connecticut.— Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550.

Florida.— Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Georgia.— Thomas *v.* Payton, 78 Ga. 459, 3 S. E. 630; Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Indiana.— Coon *v.* Crouk, 131 Ind. 44, 30 N. E. 882.

question whether a partition has been made, any evidence is admissible which tends to show either the ratification of the partition, or conduct from which the party seeking to disregard it must be held to be estopped from so doing. Although acts are proved tending to show ratification, this evidence may be rebutted by declarations of the party at the time of doing them, as where it appears he erected a division fence corresponding to the line of the partition, evidence is admissible that he at the same time notified the other party in interest of an intention to commence a suit for partition.[7]

H. Partition Void as to Some of the Parties or Some of the Property. The object of partition being to terminate the cotenancy and vest in severalty the several parcels assigned to the respective cotenants, if it fails in this object, the consideration for it fails, and it does not operate at all or to any extent. Although it is made by deed, if it appears that some of the persons intended to be bound did not execute the deed, and hence are not bound by the partition, those executing the deed are not affected by it and hold their moieties as before its execution was attempted;[8] and it is said that the same result must follow when the parties undertake to partition more land than they own, and the title to some of the allotments must therefore fail.[9] There is no doubt that a cotenant who did not join in a partition may generally ratify or adopt it,[10] but we apprehend that he must do so while all the other parties treat it as valid, for he surely is not at liberty to remain free from the obligation of a partition until his pleasure or interest moves him to adopt it and then bind them by his adoption.

I. The Effect of the Partition by Act of the Parties — 1. The Parties Who May Be Considered as Bound Thereby. It seems almost superfluous to state that the parties to a partition are bound thereby as well as by any conveyance or other writing which they may execute in connection therewith and cannot afterward assert, with success, that partition should not have been made,[11]

Louisiana.— Faure *v.* Faure, 117 La. 204, 41 So. 494; Bacon *v.* Shultz, 35 La. Ann. 1059.

Mississippi.— Robinson *v.* Jones, 68 Miss. 794, 10 So. 79.

New Hampshire.— Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Jersey.— Wescoat *v.* Wilson, 62 N. J. Eq. 177, 49 Atl. 1112 [*affirmed* in 64 N. J. Eq. 795, 53 Atl. 1125].

New York.— Baker *v.* Lorillard, 4 N. Y. 257; Jackson *v.* Richtmyer, 13 Johns. 367 [*affirmed* in 16 Johns. 314]; Totten *v.* Stuyvesant, 3 Edw. 500.

Pennsylvania.— Walter *v.* Walter, 1 Whart. 292.

South Carolina.— Gibson *v.* Fuller, 74 S. C. 535, 54 S. E. 778.

Texas.— Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019; Glasscock *v.* Hughes, 55 Tex. 461; Hunter *v.* Morse, 49 Tex. 219; Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688; Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

Washington.— Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

United States.—Hepburn *v.* Auld, 5 Cranch 262, 3 L. ed. 96; Allen *v.* Seawell, 70 Fed. 561, 17 C. C. A. 217; McDonald *v.* Donaldson, 47 Fed. 765.

7. Sowles *v.* Rugg, 65 Vt. 142, 26 Atl. 111.

8. *California.*— Center *v.* Davis, 113 Cal. 307, 45 Pac. 468, 54 Am. St. Rep. 352; Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Hill *v.* Den, 54 Cal. 6; Gates *v.* Salmon, 46 Cal. 361; Tewksbury *v.* O'Connell, 21 Cal. 60.

Massachusetts.— Williams *v.* Thompson, 13 Pick. 298.

Pennsylvania.— McConnell *v.* Carey, 48 Pa. St. 345.

Tennessee.— Douglass *v.* Harrison, 2 Sneed 382; Morris *v.* Richardson, 11 Humpr. 389.

United States.—Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522.

Canada.— Wood *v.* Wood, 16 Grant Ch. (U. C.) 471.

9. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Hathaway *v.* De Soto, 21 Cal. 191; Hayne *v.* Gould, 54 Fed. 963. But upon this subject decisions cited *infra*, II, I, 3, maintain that, upon failure of title to any allotment, the allottee or his successors in interest must suffer the loss, and this result is inconsistent with the view that the partition is void.

10. Sutton *v.* Porter, 119 Mo. 100, 24 S. W. 760, 41 Am. St. Rep. 645; High *v.* Tarver, (Tex. Civ. App. 1894) 25 S. W. 1098. Hence, if there is a partition by agreement among the surviving children of a decedent, an administrator of a deceased child cannot, after the lapse of many years, avoid the partition, because, in the absence of creditors, he can only take in trust for the next of kin, and they, by retaining the allotments, have ratified and bound themselves by the partition. Love *v.* Love, 38 N. C. 104.

11. Morris *v.* Harrell, 14 La. Ann. 185; Walton *v.* Ambler, 29 Nebr. 626, 45 N. W. 931.

because it violated some trust,[12] or that the will upon which the title of the cotenants depended, although probated in another state, had not been probated in the state where the partition was made,[13] or that the interest of one of the cotenants was embraced in an interest set apart prior to the partition and not yet terminated,[14] or that the part set off to one to be held in severalty was worthless,[15] or that the partition was unjust,[16] or the survey on which the partition was based was incorrect.[17] A *bona fide* purchaser from one of the allottees is protected by the partition as against any claim of the other parties.[18] The effect of the registration laws upon parol partitions is not well settled. In one case they were said not to apply to such partitions,[19] while in another it was held that a purchaser at an execution sale was not bound by a partition of which he had no notice.[20] A cotenant not a party to a partition is not bound thereby.[21] If there exists any exception to this rule, it arises in the case of personal property, like grain, severable in its nature, existing in common bulk and being of the same quality throughout, in which event, as we have heretofore shown, a coöwner or his creditors, acting under the authority of a writ of execution or attachment, may take from the common mass a quantity not in excess of his moiety and thereby vest in him title in severalty thereto.[22] Lien-holders and the wives of cotenants, as we have heretofore shown, although not parties to a partition, are to a qualified extent bound thereby,[23] and so are persons under disability who participate therein in person or by their guardians.[24]

2. Upon the Title and the Liens Thereon. A partition by act of the parties does not create any new, additional, or different title, nor remove any restrictions or burdens thereon.[25] Each of the allottees is deemed to hold the same title which he held before the partition, the undivided interest which he held in the whole tract being by the partition severed from the interests of his cotenants and concentrated in the parcel set apart to him, and their interests being excluded therefrom and his parcel becoming subject to all liens which existed against his moiety and freed from all liens existing against the moieties of his cotenants.[26] If one of the allottees has before the partition conveyed a part of the lands allotted to him, he acquires no new title thereto, and hence cannot disturb his grantee.[27] If the grantees of an allotment are husband and wife and his interest before the partition

12. Baker *v.* Baker, (Cal. 1892) 31 Pac. 355.

13. Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

14. Blacker *v.* Dunlop, 93 Ga. 819, 21 S. E. 135.

15. Smith *v.* Tewalt, 9 Ind. App. 646, 37 N. E. 294.

16. Fleming *v.* Kerr, 10 Watts (Pa.) 444; Jones *v.* Carter, 4 Hen. & M. (Va.) 184.

17. Jackson *v.* Hasbrouck, 3 Johns. (N. Y.) 331.

A subsequent purchaser with notice of the partition is also bound thereby. Dutton *v.* Wright, (Tex. Civ. App. 1905) 85 S. W. 1025.

18. Woolverton *v.* Stevenson, 52 La. Ann. 1147, 27 So. 674; Walker *v.* Frazier, 2 Rich. Eq. (S. C.) 99.

19. Meacham *v.* Meacham, 91 Tenn. 532, 19 S. W. 757.

20. Allday *v.* Whitaker, 66 Tex 669, 1 S. W. 794.

21. Savage *v.* Lee, 101 Ind. 514; Wright *v.* Cane, 18 La. Ann. 579; Helms *v.* Mynatt, 6 Coldw. (Tenn.) 215.

22. See *supra*, II, D, 3.

23. See *supra*, II, C, 3, a, b.

24. See *supra*, II, C, 2, a, b, c.

25. *California.*— Wade *v.* Deray, 50 Cal. 376.

Indiana.— Mickels *v.* Ellsesser, 149 Ind. 415, 49 N. E. 373.

Iowa.— Foster *v.* Hobson, 131 Iowa 58, 107 N. W. 1101.

Maryland.— Hoffman *v.* Smith, 1 Md. 475.

Missouri.— Richards *v.* Stewart, 185 Mo. 533, 84 S. W. 1181; Sharp *v.* Stewart, 185 Mo. 518, 84 S. W. 963; Snyder *v.* Elliott, 171 Mo. 362, 71 S. W. 826; Palmer *v.* Alexander, 162 Mo. 127, 62 S. W. 691; Whitsett *v.* Wamack, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339.

North Carolina.— Harrison *v.* Ray, 108 N. C. 215, 12 S. E. 993, 23 Am. St. Rep. 57, 11 L. R. A. 722.

Pennsylvania.— *In re* Coates St., 2 Ashm. 12.

Tennessee.— Cottrell *v.* Griffiths, 108 Tenn. 191, 65 S. W. 397, 91 Am. St. Rep. 748, 57 L. R. A. 332.

Texas.— Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520; Davis *v.* Agnew, 67 Tex. 206, 2 S. W. 43, 376.

See 38 Cent. Dig. tit. "Partition," § 20.

26. See *supra*, II, C, 3, a.

27. Wade *v.* Deray, 50 Cal. 376; Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

that of a tenant by the curtesy, it remains of the same character afterward.[28] If the title to a moiety was taken and held by descent, its character is not changed in this respect by the partition, and, on the death of the allottee, the title will be distributed among his heirs in the mode provided for title acquired by descent rather than in the manner applicable to title acquired by purchase.[29] So, it is said, if some of the parties to a partition own moieties in fee and others lesser estates, the latter acquire no new title by the partition to the portion assigned to them in severalty and will hold such portion only by the limited title under which they held their moieties.[30]

3. In the Event of a Failure of Title. At the common law, as we have hereinbefore shown, as cotenants could be compelled to make partition, it was held that they ought not to lose anything thereby, and hence, upon the failure of title to the part allotted to one of them, he was entitled to relief as against his late cotenants. In other words, in partition by the courts there is an implied warranty which, on the failure of title, must be made good by the other cotenants. With respect to partition by act of the parties, as it is not compulsory, it has been claimed, with some reason, that the warranty implied in the case of partition by the courts does not exist, and hence that there is no such warranty, and that, on failure of title to an allotment, the allottee is not entitled to redress unless his right thereto can be supported by the express covenants of his deed.[31] At the common law, however, an implied warranty existed on a voluntary partition between coparceners.[32] There is in the United States a tendency to extend this rule to all cotenants, and especially to those claiming title by descent,[33] and to hold that, on the failure of title to his allotment, the allottee is entitled to a new partition.[34] Where partition is by deed, it may well be held to be an affirmance of title on the part of the grantors, estopping them from denying that their respective grantees were invested with title in fee and in severalty in the parts allotted to them.[35] Whether a deed amounts to an affirmance of title or not, on the failure of title to any part, there may be a new partition in which all the parties in interest may be brought before the court, which will at least do all in its power to protect the title of the party whose allotment has failed against the party to the original partition, the defect in whose title has caused the failure.[36] If the deed of partition does not contain words adequate for the transfer of the fee, its effect may be limited to the lines of the allottees, and hence the heirs of one of them may not be able to rely upon a warranty expressed or implied therein.[37] Where

28. Snyder *v.* Elliott, 171 Mo. 362, 71 S. W. 826; Palmer *v.* Alexander, 162 Mo. 127, 62 S. W. 691; Cottrell *v.* Griffiths, 108 Tenn. 191, 65 S. W. 397, 91 Am. St. Rep. 748, 57 L. R. A. 332.

The same rule appears to apply where a conveyance is made to a husband alone when it should have been to his wife. Foster *v.* Hobson, 131 Iowa 58, 107 N. W. 1101.

29. Conkling *v.* Brown, 57 Barb. (N. Y.) 265, 8 Abb. Pr. N. S. 345; Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 737.

30. Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520.

But the decisions on this subject, if not positively conflicting, are at least confusing. Buxton *v.* Uxbridge, 10 Metc. (Mass.) 87; Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

31. Davidson *v.* Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584; Weiser *v.* Weiser, 5 Watts (Pa.) 279, 30 Am. Dec. 313; Sawyers *v.* Cator, 8 Humphr. (Tenn.) 256, 47 Am. Dec. 608; Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518.

32. Morris *v.* Harris, 9 Gill (Md.) 19; Dugan *v.* Hollins, 4 Md. Ch. 139.

33. Venable *v.* Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74; Rogers *v.* Turley, 4 Bibb (Ky.) 355; Strohecker *v.* Housel, 3 Pa. L. J. Rep. 379.

34. Feather *v.* Strohoecker, 3 Penr. & W. (Pa.) 505, 24 Am. Dec. 342.

35. *California.*— Tewksbury *v.* Provizzo, 12 Cal. 20.

Illinois.— Byrne *v.* Morehouse, 22 Ill. 602.

Maryland.— Dugan *v.* Hollins, 4 Md. Ch. 139.

Missouri.— Picot *v.* Page, 26 Mo. 398; Rector *v.* Waugh, 17 Mo. 13, 57 Am. Dec. 251.

Nebraska.— Hagensick *v.* Caster, 53 Nebr. 495, 73 N. W. 932.

Texas.— Johnson *v.* Johnson, 65 Tex. 87; James *v.* Adams, 64 Tex. 193.

See 38 Cent. Dig. tit. "Partition," § 28.

36. Dawson *v.* Lawrence, 13 Ohio 543, 42 Am. Dec. 210.

37. Rector *v.* Waugh, 17 Mo. 13, 57 Am. Dec. 251.

by statute or otherwise a warranty is implied in partition, it is not broken until eviction, and the statute of limitations does not, prior to that time, run against the person damaged by the breach of the warranty.[38] A vendee of a cotenant, on being evicted, is restricted to an action against his vendor and cannot insist that the deficiency in his title be made good out of lands of the vendee of another of the original cotenants.[39] If the parties making partition are tenants for life only, it may well be held that, on one of them acquiring an additional title, it will not pass to the other allottees by virtue of the partition,[40] and this rule has been held applicable in ordinary cases;[41] but this holding seems inconsistent with the authorities already cited in this subdivision.

4. As Dependent on Conveyances. Probably the estoppel arising from receiving a deed exists when its object is to partition property. It has hence been held that the grantee is estopped from denying that he took title thereunder.[42] Where the partition of property has been accomplished by conveyance, its effect may be dependent on the special provisions or covenants therein and, to some extent, on the covenants, which, although not specially expressed, are necessarily implied, for we apprehend that the construction of the conveyance and the covenants implied from it are the same as of other conveyances, except in so far as they are modified by the circumstances of the case and the purposes for which the deed is executed. Here, as in the case of other conveyances, although the consideration may not be disputed for the purpose of avoiding the conveyance, its true nature may be shown in opposition to the language of the deed. Thus, although the conveyance purports to be for a consideration in money, extrinsic evidence is admissible, whether parol or written, to show that it was in fact a deed in partition, and, when this is shown, the deed is to be given the same effect, at least when it will not prejudice *bona fide* purchasers, as if its purpose had been declared on its face.[43] A husband joining in a deed of partition with his wife and named with her as a grantee of the part assigned to her is not thereby estopped from denying that no title passed to her and showing that he held title from an independent source.[44] As a general rule, however, if the deed of partition contains covenants or admissions, the parties are bound thereby and precluded from denying the truth of the admission,[45] or claiming title contrary to their warranty.[46] Where a deed of partition contains express covenants, they supersede all implied covenants or warranties.[47] Questions of construction or interpretation arise under partition as well as under other deeds, but they are to be resolved by considering the

38. Jones *v.* Bigstaff, 95 Ky. 395, 25 S. W. 889, 15 Ky. L. Rep. 821, 44 Am. St. Rep. 245.

39. Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

40. Carpenter *v.* Schermerhorn, 2 Barb. Ch. (N. Y.) 314.

41. *Hawaii.* — Manaku *v.* Moanauli, 8 Hawaii 381.

Massachusetts.— Doane *v.* Willcutt, 5 Gray 328, 66 Am. Dec. 369.

North Carolina.— Carson *v.* Carson, 122 N. C. 645, 30 S. E. 4.

Texas.— Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520.

Virginia.— Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958.

42. Simmons *v.* Hendrickson, 3 Harr. (Del.) 103; Simmons *v.* Logan, 1 Harr. (Del.) 110.

43. Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757; Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

44. Harrison *v.* Ray, 108 N. C. 215, 12 S. E. 993, 23 Am. St. Rep. 57, 11 L. R. A. 722; Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974; Yancey *v.* Radford, 86 Va. 638, 10 S. E. 972. But see Simmons *v.* Logan, 1 Harr. (Del.) 110.

45. Watson *v.* Barber, 105 La. 456, 29 So. 949.

46. Hargis *v.* Ditmore, 86 Ky. 653, 7 S. W. 141, 9 Ky. L. Rep. 783.

47. *Louisiana.*— Lahauve's Estate, 39 La. Ann. 388, 1 So. 830.

Maryland.— Morris *v.* Harris, 9 Gill 19.

Pennsylvania.— Strohecker *v.* Housel, 5 Pa. L. J. 327.

Texas.— James *v.* Adams, 64 Tex. 193.

Wisconsin.— Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518.

See 38 Cent. Dig. tit. "Partition," § 28.

But if the deed merely contains covenants for the quiet enjoyment by each of the part assigned to him, and has no conveying clause, it is said not to vest title to the allotments nor to estop one of the parties from denying that the others have any interest in the lands allotted to him. Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958.

peculiar terms of each conveyance and the rules of construction applicable to all conveyances.[48]

J. Vacating or Rescinding. Under the civil law prevailing in Louisiana a partition could be rescinded for lesion or inequality beyond one fourth,[49] but the parties might by agreement provide that their partition should be irrevocable, in which event it could not be avoided for lesion in the absence of fraud.[50] An eviction subsequent to partition did not constitute any ground for rescinding it.[51] Where the partition was of certain bills receivable, constituting the whole of an estate, and bad notes were allotted to one of the parties, he had a right to maintain a subsequent proceeding to ratably apportion the deficiency among the others.[52] Under the common law, both as prevailing in England and as it is understood and administered in the United States, we think there is no ground for rescinding a partition or for relief therefrom in equity which would not be equally effective in rescinding or obtaining relief from any other agreement or conveyance;[53] and, on the other hand, that causes which were adequate to obtain relief from other agreements and conveyances are equally sufficient to warrant relief from partition.[54] The failure of one of the parties to pay a sum agreed by him to be paid to equalize the partition appears not to be a sufficient ground for setting it aside.[55]

III. By Suit or Action.

A. Jurisdiction — 1. In England — a. At Law. Although the courts of law in England from a date as early as the thirteenth century entertained actions to partition estates held in coparcenary, their jurisdiction over estates held in joint tenancy and by tenancy in common did not exist until conferred by the statutes of 31 Henry VIII, c. 1, and of 32 Henry VIII, c. 32, the former extending to estates of inheritance, and the latter for terms of life or years.[56] By comparatively recent statutes the jurisdiction of the courts of law over partition was withdrawn and confined exclusively to chancery.[57]

48. Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291; Massie *v.* Hiatt, 6 Ky. L. Rep. 176; Jones *v.* De Lassus, 84 Mo. 541; Furguson *v.* Tweedy, 56 Barb. (N. Y.) 168 [*affirmed* in 43 N. Y. 543]; Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863. See also Baker *v.* Talbott, 6 T. B. Mon. (Ky.) 179; Mitchell *v.* Smith, 67 Me. 338; Bailey *v.* Rust, 15 Me. 440; Vickerie *v.* Buswell, 13 Me. 289; Clark *v.* Debaugh, 67 Md. 430, 10 Atl. 241; Macomber *v.* Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Morgan *v.* Moore, 3 Gray (Mass.) 319 (relating to passageways); Cheshire *v.* Shutesbury, 7 Metc. (Mass.) 566 (showing that the title to buildings passes); Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; King *v.* King, 7 Mass. 496; Mandeville *v.* Comstock, 9 Mich. 536; Van Winkle *v.* Van Winkle, 184 N. Y. 193, 77 N. E. 33; Blackman *v.* Striker, 21 N. Y. Suppl. 563, 29 Abb. N. Cas. 467 [*affirmed* in 142 N. Y. 555, 37 N. E. 484]; Matteson *v.* Wilbur, 11 R. I. 545; High *v.* Tarver, (Tex. Civ. App. 1894) 25 S. W. 1098 (referring to boundaries); Mason *v.* Horton, 67 Vt. 266, 31 Atl. 291, 48 Am. St. Rep. 817; Rogers *v.* Bancroft, 20 Vt. 250 (relating to water rights or mill privileges).

Failure to name married woman as grantor. —As it is the actual partition and occupation pursuant thereto which binds the parties, it is not fatal that a deed of partition intended to bind a married woman did not name her as a grantor. Brown *v.* Humphrey, (Tex. Civ. App. 1906) 95 S. W. 23.

49. Williamson *v.* Amilton, 13 La. Ann. 387; Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

50. Morris *v.* Harrell, 14 La. Ann. 185.

51. Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

52. Lacour *v.* Lacour, 13 La. Ann. 463.

53. *Indiana.*— Smith *v.* Tewalt, 9 Ind. App. 646, 37 N. E. 294.

North Carolina.— Cheatham *v.* Crews, 83 N. C. 313.

Tennessee.— Graves *v.* Clapp, 2 Coldw. 138.

Texas.— Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921.

Virginia.— Jones *v.* Carter, 4 Hen. & M. 184.

See 38 Cent. Dig. tit. "Partition," § 25.

54. Lofgren *v.* Peterson, 54 Minn. 343, 56 N. W. 44.

55. Schnorbus *v.* Winkel, 15 S. W. 861, 12 Ky. L. Rep. 902; *In re* Null, 2 Fed. 71.

56. Freeman Coten. & P. § 421; Hanson *v.* Willard, 12 Me. 142, 28 Am. Dec. 162; Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641; Weiser *v.* Weiser, 5 Watts (Pa.) 279, 30 Am. Dec. 313; Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644; Miller *v.* Warmington, 1 Jac. & W. 484, 21 Rev. Rep. 217, 37 Eng. Reprint 452; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

57. St. 3 & 4 Wm. IV, c. 27, § 36; 36 & 37 Vict. c. 66, § 34; Mayfair Property Co. *v.*

b. In Chancery. Possibly even before, but certainly soon after, the enactment of the statutes of 31 and of 32 Henry VIII, referred to above, the English courts of chancery commenced to entertain suits for partition.[58] Not until the assumption of jurisdiction by chancery was it possible to compel the partition of personal property. The jurisdiction so assumed was exclusive. Therefore, both in England and in the United States, chancery will partition personal property and courts of law will not, unless authorized by statute.[59]

2. In the United States — a. Of the National Courts. Such of the courts of the United States as possess general equity powers have jurisdiction over suits for partition. Hence the circuit courts of the United States may entertain suits in equity for that purpose.[60] These courts in civil actions, other than suits in equity and admiralty proceedings, are controlled by the rules of practice applicable to the courts of the state in which they sit, and when by statute or otherwise jurisdiction over actions in partition is vested in the courts of the state, it is also vested in such circuit courts.[61]

b. Of the State Chancery Courts. The several state courts possessing general equity or chancery powers have jurisdiction of suits for partition unless their authority has been abrogated or restricted by statute, and a statute or other law merely authorizing some other court to act will be construed as creating a concurrent jurisdiction, and not as interfering with the powers or modes of action of courts of equity.[62] In Georgia, however, resort may be had to equity when the

Johnston, [1894] 1 Ch. 508, 63 L. J. Ch. 329, 70 L. T. Rep. N. S. 485, 8 Reports 781.

58. Freeman Coten. & P. § 432; Greer *v.* Henderson, 37 Ga. 1; Paddock *v.* Shields, 57 Miss. 340; Parker *v.* Gerard, Ambl. 236, 27 Eng. Reprint 157; Manaton *v.* Squire, 2 Ch. Cas. 237, 22 Eng. Reprint 925, Freem. 26, 22 Eng. Reprint 1036; Drury *v.* Drury, 1 Ch. Rep. 49, 21 Eng. Reprint 504; Manners *v.* Charlesworth, Coop. t. Brough 52, 47 Eng. Reprint 19, 1 Myl. & K. 330, 7 Eng. Ch. 330, 39 Eng. Reprint 706; Norse *v.* Ludlow, Toth. 155, 21 Eng. Reprint 153; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206.

59. *Alabama.*— Marshall *v.* Crow, 29 Ala. 278; Smith *v.* Dunn, 27 Ala. 315.

Indiana.—Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417.

Iowa.— Conover *v.* Earl, 26 Iowa 167.

Maryland.— Crapster *v.* Griffith, 2 Bland 5.

Michigan.— Godfrey *v.* White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537.

Minnesota.—Swain *v.* Knapp, 32 Minn. 429, 21 N. W. 414.

New York.— Tinney *v.* Stebbins, 28 Barb. 290; Fobes *v.* Shattuck, 22 Barb. 568; Tripp *v.* Riley, 15 Barb. 333.

North Carolina.— Billups *v.* Riddick, 53 N. C. 163; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Edwards *v.* Bennett, 32 N. C. 361.

Virginia.— Smith *v.* Smith, 4 Rand. 95.

See 38 Cent. Dig. tit. "Partition," § 91 *et seq.*

60. Klever *v.* Seawell, 65 Fed. 393, 12 C. C. A. 661; Daniels *v.* Benedict, 50 Fed. 347; Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220; Shaw *v.* Shaw, 21 Fed. Cas. No. 12,724, 4 Cranch C. C. 715.

61. *Ex p.* Biddle, 3 Fed. Cas. No. 1,391, 2 Mason 472.

62. *Alabama.*— Bozone *v.* Daniel, (1905) 39 So. 774; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; Berry *v.* Webb, 77 Ala. 507; Wilkinson *v.* Stuart, 74 Ala. 198.

Arkansas.— Patton *v.* Wagner, 19 Ark. 233.

Connecticut.— Isham *v.* Gilbert, 3 Conn. 166.

Delaware.— Bradford *v.* Robinson, 7 Houst. 29, 30 Atl. 670.

Illinois.— Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056; McDowell *v.* McDowell, 114 Ill. 255, 2 N. E. 56; Labadie *v.* Hewitt, 85 Ill. 341; Hess *v.* Voss, 52 Ill. 472; Greenup *v.* Sewell, 18 Ill. 53; Howey *v.* Goings, 13 Ill. 95, 46 Am. Dec. 427.

Iowa.— Wright *v.* Marsh, 2 Greene 94.

Kentucky.— Haggin *v.* Haggin, 2 B. Mon. 317; Parmers *v.* Respass, 5 T. B. Mon. 562; Beeler *v.* Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161.

Maine.— Nash *v.* Simpson, 78 Me. 142, 3 Atl. 53.

Maryland.—Lawes *v.* Lumpkin, 18 Md. 334; Phelps *v.* Stewart, 17 Md. 231; *In re* Hewitt, 3 Bland 184.

Michigan.— Hoffman *v.* Beard, 22 Mich. 59; Thayer *v.* Lane, Harr. 247.

Mississippi.— Paddock *v.* Shields, 57 Miss. 340.

Missouri.— Reed *v.* Robertson, 45 Mo. 580; Spitts *v.* Wells, 18 Mo. 468; Beck *v.* Kallmeyer, 42 Mo. App. 563.

New Hampshire.— Hale *v.* Jaques, 69 N. H. 411, 43 Atl. 121; Whitten *v.* Whitten, 36 N. H. 326.

New Jersey.— Bryan *v.* Bryan, 61 N. J. Eq. 45, 48 Atl. 341; Hay *v.* Estell, 18 N. J. Eq. 251; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Jenkins *v.* Van Schaak, 3 Paige 242.

Ohio.— Doane *v.* Fleming, Wright 168.

statutory or legal remedy is inadequate, but not otherwise;[63] and in Massachusetts probably the jurisdiction of equity over partition has been entirely withdrawn.[64]

c. The Discretion of Courts of Chancery to Refuse to Act. Some doubt was created in England as to whether a court of chancery had not a discretion to refuse partition based on the legal title.[65] This doubt no longer exists, and in the United States it was never entertained.[66]

d. Of Probate and Orphans' Courts. In a number of the states courts having jurisdiction of the settlement and distribution of the estates of decedents have, in connection therewith, been given power to make partition. It is not material, for our present purpose, whether these tribunals are styled orphan or probate courts, or given some other name. Their partition is a part of the settlement and final disposition of the estates committed to their care, and, when it is such, will be treated elsewhere in this article.[67] The power to partition, as ancillary to the disposition of estates, may, constitutionally, be conferred on probate and like courts.[68] This jurisdiction is usually concurrent, and, when so, does not preclude resort to other courts.[69]

e. Of the State Courts of Law Generally. In the states which have adopted the common law, it must follow that those of their courts, irrespective of the names by which they are called, which are given general common-law jurisdiction have, in the absence of constitutional or legislative provision to the contrary, jurisdiction of actions for partition.

f. State Courts Designated by Statutes. In many of the states what is commonly known as the reformed procedure has been adopted, committing jurisdiction of what were formerly actions at law and what were formerly suits in equity to the same judicial tribunals. In other states statutes have been enacted confiding jurisdiction of partition to the courts designated therein, but such statutes, as we have already shown, are generally construed as not withdrawing the authority otherwise vested in courts of chancery.[70]

Pennsylvania.— Mercur *v.* Jackson, 3 Pa. Co. Ct. 387.

Rhode Island.— Calland *v.* Conway, 14 R. I. 9; Bailey *v.* Sisson, 1 R. I. 233.

South Carolina.— Latham *v.* Harby, 50 S. C. 428, 27 S. E. 862; Charleston, etc., R. Co. *v.* Leech, 35 S. C. 146, 14 S. E. 730; Dorn *v.* Beasley, 7 Rich. Eq. 84; Rabb *v.* Aiken, 2 McCord Eq. 118; Dinckle *v.* Timrod, 1 Desauss. Eq. 109.

Tennessee.— Hopper *v.* Fisher, 2 Head 253.

Texas.— Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309; Ellis *v.* Rhone, 17 Tex. 131; Blagge *v.* Shaw, (Civ. App. 1897) 41 S. W. 756.

Virginia.— Davis *v.* Tebbs, 81 Va. 600; Castleman *v.* Veitch, 3 Rand. 598.

See 38 Cent. Dig. tit. "Partition," § 91 *et seq.*

63. Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30; Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562; Lowe *v.* Burke, 79 Ga. 164, 3 S. E. 449; Greer *v.* Henderson, 37 Ga. 1; Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655; Royston *v.* Royston, 13 Ga. 425.

64. Husband *v.* Aldrich, 135 Mass. 317; Whiting *v.* Whiting, 15 Gray (Mass.) 503.

65. Cartwright *v.* Pultney, 2 Atk. 380, 26 Eng. Reprint 630.

66. *Alabama.*— McMath *v.* De Bardelaben, 75 Ala. 68; Deloney *v.* Walker, 9 Port. 497.

Illinois.— Miller *v.* Lanning, 211 Ill. 620, 71 N. E. 1115; Hill *v.* Reno, 112 Ill. 154, 54 Am. Rep. 222.

New Jersey.— Lucas *v.* King, 10 N. J. Eq. 277.

New York.— Smith *v.* Smith, 10 Paige 470.

North Carolina.— Donnell *v.* Mateer, 42 N. C. 94.

Virginia.— Straughan *v.* Wright, 4 Rand. 493; Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712.

United States.— Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644; Vint *v.* King, 28 Fed. Cas. No. 16,950.

England.— Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

67. See *infra*, IV.

68. Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415.

69. Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920.

70. See *supra*, III, A, 2, b. The name of a court by no means constitutes an index to its character or jurisdiction. The following list shows the courts which in most of the states exercise jurisdiction over partition, not including the jurisdiction employed as incident to making distribution and division of the estates of deceased persons:

Alabama.—The probate court, but its jurisdiction does not prevent a resort to any other legal mode of obtaining partition.

3. Territorial Limits of. As the authority of the courts of each state and nation is restricted to the real property within its limits, it must follow that no court can partition lands situate outside of the state, if it is a state court, nor out-

Rev. Code (1907), §§ 5203, 5221. The authority of the probate court is very restricted (Matthews *v.* Matthews, 104 Ala. 303, 16 So. 91; Ballard *v.* Johns, 84 Ala. 70, 4 So. 24; Ward *v.* Corbett, 72 Ala. 438; Terrell *v.* Cunningham, 70 Ala. 100; Whitman *v.* Reese, 59 Ala. 532), rendering resort to the court of chancery frequently necessary (Caperton *v.* Hall, 118 Ala. 265, 24 So. 122; Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; Terrell *v.* Cunningham, *supra*).

Arkansas.— The circuit court and court in chancery. Sanders & H. Dig. (1894) 5415; Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913; Patton *v.* Wagner, 19 Ark. 233.

California.— The superior court (Ryer *v.* Fletcher Ryer Co., 126 Cal. 482, 58 Pac. 908), but formerly district court (Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227).

Colorado.—The district court. Mills Annot. St. § 3346.

Connecticut.— Courts of equity. Gen St. (1902) § 1031.

Delaware.— The superior court or the chancellor of the state. Rev. Code (1893), p. 606, §§ 3, 8.

Florida.— The circuit courts acting as courts of chancery. Gen. St. (1906) § 1939.

Georgia.—The superior court. Code (1895), §§ 3146, 4783, 4786; Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30; Hamby Mountain Gold Mines *v.* Calhoun Land, etc., Co., 83 Ga. 311, 9 S. E. 831; Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562.

Idaho.—The district court. Code Civ. Proc. (1901) § 2995.

Illinois.— The circuit court, or the superior court of Cook county. Starr & C. Annot. St. (1896) p. 2912; Riggs *v.* Dickinson, 3 Ill. 437, 35 Am. Dec. 113.

Indiana.— The circuit or probate court; also the superior court of Allen county. Burns Annot. St. (1908) §§ 309, 1244; Romy *v.* State, 32 Ind. App. 146, 67 N. E. 998.

Iowa.— By equitable proceedings. Code (1897), § 4240; Wright *v.* Marsh, 2 Greene 94.

Kansas.— The district courts. Dassler Gen. St. (1905) §§ 153, 2010; Raynsford *v.* Holman, 68 Kan. 813, 74 Pac. 1128; Ott *v.* Sprague, 27 Kan. 620; Blauw *v.* Love, 9 Kan. App. 55, 57 Pac. 258.

Kentucky.— The county and the circuit courts. Carroll St. (1903) § 966; Hopkins *v.* Crouch, 86 Ky. 281, 5 S. W. 557, 9 Ky. L. Rep. 554; Gaithers *v.* Brown, 7 B. Mon. 90; Chamberlain *v.* Ballinger, 13 S. W. 429, 11 Ky. L. Rep. 966.

Louisiana.— The parish district courts. Wolff Rev. Laws (1904), §§ 2662, 2663; Carrollton Land, etc., Co. *v.* Eureka Homestead Soc., 119 La. 692, 44 So. 434; Crawford *v.* Binion, 46 La. Ann. 1261, 15 So. 693; Levy *v.* Hitsche, 40 La. Ann. 500, 4 So. 472; Buddecke *v.* Buddecke, 31 La. Ann. 572; Woolfolk *v.* Woolfolk, 30 La. Ann. 139; Diamond *v.* Diamond, 27 La. Ann. 125; Malone *v.* Casey, 25 La. Ann. 466; Pennisson *v.* Pennisson, 22 La. Ann. 131; Anderson *v.* Stille, 12 La. Ann. 669.

Maine.— The supreme judicial court of the county. Rev. St. (1903) p. 787, § 2; Bailey *v.* Knapp, 79 Me. 205, 9 Atl. 356.

Maryland.— Courts of equity. Pub. Gen. Laws (1904), p. 417, § 129; Phelps *v.* Stewart, 17 Md. 231.

Massachusetts.—The superior court, or the supreme judicial court held in the county, and the probate courts when the shares of the claimants are not in dispute or uncertain. Rev. Law (1902), p. 1629, § 2, and p. 1634, § 31.

Michigan.— The circuit courts. Comp. Laws (1897), § 11014; Hoffman *v.* Beard, 22 Mich. 59.

Minnesota.—The district courts. Rev. Laws (1905), § 90; Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805; Swain *v.* Knapp, 32 Minn. 429, 21 N. W. 414.

Mississippi.— The chancery courts. Code (1906), § 3520.

Missouri.— The circuit courts and Sturgeon court of common pleas. Annot. St. (1906) § 4374, and p. 4968, § 19; Johnson *v.* Detrick, 152 Mo. 243, 53 S. W. 891; Green *v.* Walker, 99 Mo. 68, 12 S. W. 353; Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Rolf *v.* Timmermeister, 15 Mo. App. 249.

Nebraska.— The district court. Code Civ. Proc. §§ 51, 802; Comp. St. (1906) §§ 2716, 7310.

Nevada.— The district court. Cutting Comp. Laws, §§ 117, 2520

New Hampshire.—The chancery courts and also a statutory proceeding in the supreme court of the county, and if there is no dispute about the title, the judge of probate. Pub. St. (1901) p. 645, § 1; p. 667, § 4; Hale *v.* Jaques, 69 N. H. 411, 43 Atl. 121; Crowell *v.* Woodbury, 52 N. H. 613.

New Jersey.— Chancery, also any justice of the supreme court or any judge of the circuit court or court of common pleas of the county. Gen. St. (1895) p. 2420, §§ 1, 39.

New York.— The supreme court and the county courts. Bliss Annot. Code, § 340; Howell *v.* Mills, 56 N. Y. 226; Blakeley *v.* Calder, 15 N. Y. 617; Monarque *v.* Monarque, 19 Hun 332 [*reversed* on other grounds in 80 N. Y. 320]; Hewlett *v.* Wood, 3 Hun 736; Canfield *v.* Ford, 28 Barb. 336; Bell *v.* Gittere, 9 N. Y. Suppl. 400.

North Carolina.— The superior courts. Revisal (1905), § 2487; Foreman *v.* Hough, 98 N. C. 386, 3 S. E. 912; Capps *v.* Capps, 85 N. C. 408.

North Dakota.— The district court. Rev. Codes (1905), § 6761.

side of the district if it is a court of the United States.[71] This is clearly so where the proceeding is *in rem* or at law. If, however, the suit is in equity and the court has authority to complete the partition by decreeing conveyances, there is some reason for insisting that it may partition lands in another state where all the parties are in court,[72] but the only authorities we have discovered hold otherwise.[73] What are the territorial limits, within the state, of the respective state courts must be ascertained by examining the state constitutions and statutes. Ordinarily the action of the court is restricted to lands within the county,[74] but if they are situated in two or more counties, the proceeding can generally be maintained in either.[75] In a few of the states partition cannot include any land lying beyond

Ohio.— The court of common pleas and the probate courts of Cochoston, Defiance, Henry, Licking, Perry, and Peckanay counties. Bates Annot. St. §§ 456, 525–1; McRoberts *v.* Lockwood, 49 Ohio St. 374, 34 N. E. 734.

Oregon.— The circuit courts. Hanner *v.* Silver, 2 Oreg. 336.

Pennsylvania.— The supreme court, the county courts, and the courts of common pleas. Armstrong *v.* Walker, 150 Pa. St. 585, 25 Atl. 53; Stewart *v.* Allegheny Nat. Bank, 101 Pa. St. 342; Dana *v.* Jackson, 6 Pa. St. 234.

Rhode Island.— Common pleas division of supreme court. Gen. Laws (1896), pp. 760–762.

South Carolina.— The courts of common pleas. Charleston, etc., R. Co. *v.* Leech, 35 S. C. 146, 14 S. E. 730; Woodward *v.* Elliott, 27 S. C. 368, 3 S. E. 477.

Tennessee.— The county, chancery, or circuit courts. Shannon Code (1895), § 5014; Queener *v.* Trew, 6 Heisk. 59; Dean *v.* Snelling, 2 Heisk. 484; Young *v.* Thompson, 2 Coldw. 596; Henry *v.* Henry, 1 Tenn. Ch. App. 240.

Texas.— The district courts (Sayles Civ. St. (1897) § 3607; Wooten *v.* Dunlap, 20 Tex. 183; Ellis *v.* Rhone, 17 Tex. 131; Blagge *v.* Shaw, (Civ. App. 1897) 41 S. W. 756; Robb *v.* Robb, (Civ. App. 1897) 41 S. W. 92; Moore *v.* Blagge, (Civ. App. 1896) 34 S. W. 311; Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532); except that until the administration of an estate is closed the county court has exclusive jurisdiction to partition an estate among heirs when the title is clear and there is no adverse claim by any third person (Branch *v.* Hanrick, 70 Tex. 731, 8 S. W. 539).

Utah.— The district court. Comp Laws (1907), § 670.

Vermont.— The county court. Rev. St. (1894) § 1517; Gourley *v.* Woodbury, 43 Vt. 89; Collamer *v.* Hutchins, 27 Vt. 733.

Virginia.— The court of equity of the county. Code (1904), § 2562.

West Virginia.—The circuit courts. Warth Code (1899), p. 714, §§ 1, 6; Le Sage *v.* Le Sage, 52 W. Va. 323, 43 S. E. 137.

Wisconsin.— The circuit courts. Sanborn & B. St. (1898) p. 106, § 8; p. 1742, § 2420.

Wyoming.—The district courts. Const. art. 5, § 10; Field *v.* Leiter, (Wyo. 1907) 90 Pac. 378.

Proceeding whether legal or equitable.— Where the proceeding has been made statutory, the question arises whether it is at law or in equity. In some of the states it has been regarded as at law merely. Hopkins *v.* Medley, 97 Ill. 402; Greenup *v.* Sewell, 18 Ill. 53; Wilbridge *v.* Case, 2 Ind. 36. The better view, however, especially when the court authorized to act has chancery powers, is that the proceeding is in equity or at least of an equitable nature. Metcalf *v.* Hoopingardner, 45 Iowa 510; Wright *v.* Marsh, 2 Greene (Iowa) 94; McClure *v.* McClure, 1 Phila. (Pa.) 195; Deery *v.* McClintock, 31 Wis. 195.

71. Schick *v.* Whitcomb, 68 Nebr. 784, 94 N. W. 1023; Johnson *v.* Kimbro, 3 Head (Tenn.) 557, 75 Am. Dec. 781.

72. Page *v.* McKee, 3 Bush (Ky.) 135, 90 Am. Dec. 201.

73. Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Wimer *v.* Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126; Cartwright *v.* Pettus, 2 Ch. Cas. 214, 22 Eng. Reprint 916; Kennedy *v.* Cassillis, 2 Swanst. 323, 36 Eng. Reprint 635.

74. *Alabama.*— Turnipseed *v.* Fitzpatrick, 75 Ala. 297.

Indiana.—Romy *v.* State, 32 Ind. App. 146, 67 N. E. 998.

Kentucky.— Boon *v.* Nelson, 2 Dana 391.

Massachusetts.— Mitchell *v.* Starbuck, 10 Mass. 5.

Mississippi.— Nugent *v.* Powell, 63 Miss. 99.

South Carolina.— Brown *v.* McMullen, 1 Nott & M. 252.

Texas.— Coryell *v.* Linthecum, (1889) 11 S. W. 1092; Peterson *v.* Fowler, 73 Tex. 524, 11 S. W. 534; Grant *v.* Reavis, (Civ. App. 1896) 34 S. W. 132.

See 38 Cent. Dig. tit. "Partition," § 107 *et seq.*

75. *Alabama.*— Bozone *v.* Daniel, (1905) 39 So. 774.

Arkansas.—Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913.

California.—Murphy *v.* Los Angeles County Super. Ct., 138 Cal. 69, 70 Pac. 1070.

Georgia.— Royston *v.* Royston, 21 Ga. 161.

Indiana.— Shull *v.* Kennon, 12 Ind. 34.

Kentucky.— Perkins *v.* McCarley, 97 Ky. 43, 29 S. W. 867, 16 Ky. L. Rep. 801.

Missouri.— Yount *v.* Yount, 15 Mo. 383.

North Carolina.— *In re* Skinner, 22 N. C. 63.

Pennsylvania.— White's Estate, 3 Pa. Dist. 697, 14 Pa. Co. Ct. 249.

the county where the petition is filed,[76] although in Maine, if the proceeding is in the supreme judicial court, it may be instituted in any county, but, when an issue of fact is formed, the cause must be remitted for trial to the county where the lands lie.[77]

4. Limitation of by the Assumption of Jurisdiction by Another Court. If two or more courts in the same state have concurrent jurisdiction of a proceeding for partition, the one in which the proceeding is first commenced acquires exclusive jurisdiction which cannot be withdrawn or destroyed by any action subsequently instituted in another court.[78]

5. Waiver of Objections to. If a court has not jurisdiction of the subject-matter, consent cannot confer it. Failure to object will not impart force to its judgment.[79] But in the absence of want of jurisdiction over the subject-matter, a partition cannot be avoided because of some proceeding to which a party had the right to object, which he failed to exercise.[80]

B. Property Subject to Partition — 1. The General Rule. Subject to the possible exceptions hereinafter noted respecting property which cannot be partitioned without violating public policy or offending the public sense of decency or propriety, every species of property may be partitioned by suit or action.

2. Real Property. Every species of real property may be the subject of a compulsory partition. Hence, partition may be made of a house,[81] or manor,[82] or of mines or mining claims,[83] or of lands on which quarries exist and are operated;[84] or of mill sites and the water and appurtenances used in connection therewith,[85] or

Texas.— Osborn *v.* Osborn, 62 Tex. 495.

United States.— Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

See 38 Cent. Dig. tit. "Partition," § 107 *et seq.*

In Missouri, if the lands lie in two or more counties, the action must be commenced in the circuit court of the county in which any portion of the premises is situate and a majority of the parties entitled thereto reside; but if a majority does not reside in such county, or all are non-residents of the state, the partition must be in that county in which an equal or the greater part of the premises may be. Johnson *v.* Detrick, 152 Mo. 243, 53 S. W. 891.

76. *In re* Bonner, 4 Mass. 122; Brown *v.* McMullen, 1 Nott & M. (S. C.) 252.

77. Sewall *v.* Ridlon, 5 Me. 458.

78. Note to Plume, etc., Mfg. Co. *v.* Caldwell, 29 Am. St. Rep. 310; Wagstaff *v.* Marcy, 25 Misc. (N. Y.) 121, 54 N. Y. Suppl. 1021.

79. Bompart *v.* Roderman, 24 Mo. 385.

80. Sewall *v.* Ridlon, 5 Me. 458; Ela *v.* McConihe, 35 N. H. 279; Johnson *v.* Murray, 12 Lea (Tenn.) 109; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251.

81. Turner *v.* Morgan, 8 Ves. Jr. 143, 32 Eng. Reprint 307.

82. Hanbury *v.* Hussey, 14 Beav. 152, 15 Jur. 596, 20 L. J. Ch. 557, 51 Eng. Reprint 244; Sparrow *v.* Fiend, Dick. 348, 21 Eng. Reprint 303.

Fixtures.— Personal property placed in a building for permanent use therein, as looms and machinery in a factory, although capable of removal without injury to the freehold, become a part thereof, and must be so treated in making a partition. Parsons *v.* Copeland, 38 Me. 537.

83. *California.*— Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164; Nisbet *v.* Nash, 52 Cal. 540; Hughes *v.* Devlin, 23 Cal. 501.

Connecticut.— Richardson *v.* Monson, 23 Conn. 94.

Illinois.—McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

Nevada.— Dall *v.* Confidence Silver-Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

New York.— Canfield *v.* Ford, 28 Barb. 336 [*affirming* 16 How. Pr. 473].

Pennsylvania.— Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641; Robbins *v.* Penn Gas Coal Co., 28 Pa. Co. Ct. 49.

United States.—Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220.

England.— Heaton *v.* Dearden, 16 Beav. 147, 51 Eng. Reprint 733.

The difficulty of making partition of a mine at law, where a sale could not be ordered, might well justify the refusal to act, accompanied by suggesting a resort to chancery. Maffet's Estate, 8 Kulp (Pa.) 184; Conant *v.* Smith, 1 Aik. (Vt.) 67, 15 Am. Dec. 669.

A mere license to mine on the lands of another is said not to be subject to partition. Smith *v.* Cooley, 65 Cal. 46, 2 Pac. 880; Hughes *v.* Devlin, 23 Cal. 501.

A grant by one cotenant to a stranger of the right to dig ores will not entitle him to a partition as against the other cotenants. Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

So the land may be divided and the mineral rights left in severalty, in which case the reservation is not of an easement, but of the entire ownership of the ore in place under the land divided. Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344.

84. Weise *v.* Welsh, 30 N. J. Eq. 431; McCabe *v.* McCabe, 13 Hun (N. Y.) 153.

85. Cooper *v.* Cedar Rapids Water Power

of waters or a mill-dam and waters.[86] While doubtless a cotenant of the right to take oil and gas from beneath a tract of land may compel partition of his right, such partition should be by sale, and it has been held that a partition by metes and bounds is void.[87]

3. Standing Timber. If two or more persons, as cotenants, own the timber standing on a parcel of land, no reason is perceived why any of them may not compel a partition. If an owner in severalty of land grants a moiety of the timber thereon, he may maintain a suit against his grantee for its partition.[88] If, however, one of the cotenants grants to a third person the timber on his moiety, the grant cannot, as against the cotenants of the grantor, create a cotenancy in the timber distinct from that in the land which will require them to submit to partition of the former not including the latter. The grantee therefore cannot maintain a suit for the partition of the timber only.[89] He nevertheless has the right to the timber on such part of the land as may be set apart to his grantor, and for the maintenance of this right must be allowed to prosecute a suit against the grantor and the other cotenants, or in case of their conveyance to a third person, then against such person, to compel the segregation of a parcel from which he may take timber.[90]

4. Incorporeal Hereditaments. Incorporeal hereditaments of every character,[91] if subject to voluntary transfer, are proper subjects of partition by suit, unless perhaps when such partition must prejudice the rights of third persons.[92] Hence it is said that reasonable estovers, corodies uncertain, piscaries uncertain, and a common *sans nombre* cannot be partitioned, because their division would increase the persons entitled to participate therein and make more grievous the burden imposed thereby,[93] which reasons, it must be admitted, do not seem valid as against a partition by sale.

5. Personal Property. In England courts of chancery entertained exclusive jurisdiction of the partition of personal property. In the United States the same rule must prevail in those states, if any there be, which have not given their courts of law jurisdiction over the subject. Without stopping to inquire to which class of courts jurisdiction has been confided, it suffices our present purpose to state that personal property of every class may be subjected to compulsory partition.[94] Rents are not real estate, and, if subject to partition at all, it must

Co., 42 Iowa 398; Hanson *v.* Willard, 12 Me. 142, 28 Am. Dec. 162; De Witt *v.* Harvey, 4 Gray (Mass.) 486; Morrill *v.* Morrill, 5 N. H. 134.

But where a water power or right is connected with mill property, it will not be partitioned apart from the property with which it is so connected. Miller *v.* Miller, 13 Pick. (Mass.) 237.

86. *Iowa.*— Brown *v.* Cooper, 98 Iowa 444, 67 N. W. 378, 60 Am. St. Rep. 190, 33 L. R. A. 61; Doan *v.* Metcalf, 46 Iowa 120.

Maine.— Warren *v.* Westbrook Mfg. Co., 88 Me. 58, 33 Atl. 665, 51 Am. St. Rep. 372, 35 L. R. A. 388.

New Hampshire.— Roberts *v.* Claremont R., etc., Co., 74 N. H. 217, 66 Atl. 485.

New York.— Smith *v.* Smith, 10 Paige 470.

Vermont.— Hooker *v.* McLeod, 70 Vt. 327, 41 Atl. 234.

Wisconsin.— Spensley *v.* Janesville, Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574; Janesville Cotton Mfg. Co. *v.* Ford, 55 Wis. 197, 12 N. W. 377.

See 38 Cent. Dig. tit. "Partition," § 39.

87. Hall *v.* Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791.

88. Steedman *v.* Weeks, 2 Strobh. Eq. (S. C.) 145, 49 Am. Dec. 660.

89. Benedict *v.* Torrent, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278; Morris *v.* Morrison, 20 Pa. Co. Ct. 295.

90. Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641.

91. Bailey *v.* Sisson, 1 R. I. 233.

92. Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587; Johnstone *v.* Baber, 22 Beav. 562, 52 Eng. Reprint 1225, 6 De G. M. & G. 439, 55 Eng. Ch. 343, 43 Eng. Reprint 1304, 2 Jur. N. S. 1053, 25 L. J. Ch. 899, 4 Wkly. Rep. 827; Matthews *v.* Bath, Dick. 652, 21 Eng. Reprint 425; Bodicoate *v.* Steers, Dick. 69, 21 Eng. Reprint 193; Gibson *v.* Montfort, 1 Ves. 485, 27 Eng. Reprint 1157; Buller *v.* Exeter, 1 Ves. 340, 27 Eng. Reprint 1069.

93. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592; Allnatt Partition 8; Coke Litt. 165*a*.

94. See *supra*, III, A, 1, b, and the following cases:

Alabama.— Colbey-Hinkley Co. *v.* Jordan, 146 Ala. 634, 41 So. 962; Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247; Marshall *v.* Crow, 29 Ala. 278.

be as personal property.[95] The right to partition patents has been denied in Pennsylvania.[96]

6. WHETHER SHOULD INCLUDE ALL THE PROPERTY OF THE COTENANCY. Strangely, and apparently irrelevantly, it has been said that there is nothing in the law requiring the whole of a Mexican grant to be included in a partition suit brought by the claimants thereof,[97] from which, as there is nothing in the fact that title rests on a Mexican grant to exempt it from the law of partition, the inference might well be indulged that a cotenant might maintain as many suits to partition the property as his caprice dictated. Such surely is not the law, although it is doubtless true that a suit to partition any part of the lands of a cotenancy would confer jurisdiction on a court, and require such of the parties in interest as were before it to object to any partition which would not determine and make due provision for the rights of all the cotenants.[97a] It is now practically settled that a cotenant may convey to a third person an interest in a specific part of the common property, whether it consists of two or more separate parcels or of a single tract only, but that such a conveyance will not operate to the prejudice of the cotenants not joining therein, and that the grantee may lose his title if the parcel so conveyed to him should not be set off to him or his grantor on partition. There is, it must be admitted, a decision to the effect that if one cotenant conveys in severalty distinct parts of the common property to different persons, the other cotenant cannot obtain partition by a single suit against all such grantees.[98] The reverse of this is true, for a cotenant may include in one suit all the lands of the cotenancy, although grants in severalty of specific parts thereof have been made by his cotenant;[99] and a grantee in severalty of a cotenant cannot maintain a suit in partition embracing only the parcel conveyed to him.[1] In truth, where two or more persons become cotenants either of a single or of several distinct tracts of land, each of them is entitled to partition of all of their common property, within the jurisdiction of the court, by a single proceeding, and cannot be deprived of this right by any act or conveyance of any of his cotenants, and if any of such cotenants makes any conveyance in severalty, his grantee also has a right to a partition of the whole property, for thereby his rights are more likely to be respected. Every suit in partition should bring before the court all persons having any right or equity in the property.[2] Therefore such suit should include all the lands of the original cotenancy, and if it does not do so, any party, whether his interest extends throughout all such lands, or is restricted to some specific part thereof, may insist that the omitted land or lands be included in the suit, and that all per-

Indiana.— Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417.

Iowa.— Conover *v.* Earl, 26 Iowa 167.

Massachusetts.—Haven *v.* Haven, 181 Mass. 573, 64 N. E. 410.

Michigan.—Godfrey *v.* White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537.

Minnesota.— Swain *v.* Knapp, 32 Minn. 429, 21 N. W. 414.

Mississippi.— Porter *v.* Stone, 70 Miss. 291, 12 So. 208.

New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

New Jersey.— Terry *v.* Smith, 42 N. J. Eq. 504, 8 Atl. 886.

New York.— Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Suppl. 1010.

South Carolina.— Steedman *v.* Weeks, 2 Strobh. Eq. 145, 49 Am. Dec. 660.

Wisconsin.— Reynolds *v.* Nielson, 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000, opinion of the court by Marshall, J.

See 38 Cent. Dig. tit. "Partition," § 39.

While slavery continued to exist slaves were subject to partition by suit. Kerley *v.* Clay, 4 Bibb (Ky.) 241.

95. Thomas *v.* Hamill, 106 Ill. App. 524.

96. Simmonds Mfg. Co. *v.* Power, 32 Pittsb. Leg. J. N. S. (Pa.) 435.

97. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712, (1902) 69 Pac. 228; Sandiford *v.* Hempstead, 97 N. Y. App. Div. 163, 90 N. Y. Suppl. 76 [*affirmed* in 186 N. Y. 554, 79 N. E. 1115].

97a. Field *v.* Leither, (Wyo. 1907) 90 Pac. 378, 92 Pac. 622.

98. *In re* Prentiss, 7 Ohio, Pt. II, 129. 30 Am. Dec. 203.

99. Parker *v.* Harrison, 63 Miss. 225; Grady *v.* Maloso, 92 Wis. 666, 66 N. W. 808.

1. Sutter *v.* San Francisco, 36 Cal. 112; Hazen *v.* Webb, 65 Kan. 38, 68 Pac. 1096. 93 Am. St. Rep. 276; Bigelow *v.* Littlefield, 52 Me. 24, 83 Am. Dec. 484.

2. Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755.

sons be made parties thereto whose presence is necessary to a partition with such lands included.[3]

7. Difficulty, Inconvenience, or Pecuniary Loss Does Not Limit. When the remedy by partition was less ample and varied than at present, it was occasionally denied on the ground that the character of the property was such that it could not be divided into parcels without so far impairing its usefulness or value as to amount to a substantial destruction of the property interests of the parties,[4] and, when the application was at law, the courts sometimes declined to act, because the complainant, by resorting to chancery, could obtain relief less destructible and therefore more equitable.[5] In those states where separate courts of law and of chancery still exist and have concurrent jurisdiction of partition, we doubt not that either might refuse to proceed if its powers were so restricted that its proceeding must result in serious loss, from which a proceeding in a tribunal of the other class would be exempt. But the right to partition in some tribunal is ordinarily absolute, and not to be denied because it will result in great loss or inconvenience to some, or even to all, of the parties. This has always been the rule in England.[6] There can be no objection to it in the United States, where there can be no real difficulty in making partition, for the reason that if the value of the property is seriously diminished by its separation into as many parcels as there are moieties, the court may order a sale or sales. Partition will not therefore be denied either because of any supposed difficulty, nor on the suggestion that the

3. *Alabama.*— Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67; Wilkinson *v.* Stuart, 74 Ala. 198.

Kansas.— Hazen *v.* Webb, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276.

Louisiana.— Maguire *v.* Fluker, 112 La. 76, 36 So. 231.

Massachusetts.— Barnes *v.* Lynch, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470.

New York.— Beetson *v.* Stoops, 91 N. Y. App. Div. 185, 86 N. Y. Suppl. 332.

Ohio.— *In re* Prentiss, 7 Ohio, Pt. II, 129, 30 Am. Dec. 203.

Pennsylvania.— Stickles *v.* Oviatt, 212 Pa. St. 219, 61 Atl. 908; Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426; Deshong *v.* Deshong, 186 Pa. St. 227, 40 Atl. 402, 65 Am. St. Rep. 855.

Texas.— Battle *v.* John, 49 Tex. 202.

Wisconsin.— Grady *v.* Maloso, 92 Wis. 666, 66 N. W. 808.

Separate mortgages to different parcels.— In Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75, it was held that if the complainants seeking partition had executed separate mortgages to different parcels, each parcel should be partitioned separately and independently of the others, but this referred merely to the action of the commissioners, and was not intended to require separate suits.

The joining of two or more parcels in partition, we must admit, was formerly looked upon as exceptional and doubtful, and, in some instances, expressly restricted to cases in which the same persons were cotenants of all the parcels. Inman *v.* Prout, 90 Ala. 362, 7 So. 842; Kitchen *v.* Sheets, 1 Ind. 138, Smith 27; Mavor *v.* Armant, 14 La. Ann. 181; Rechefus *v.* Lyon, 69 Md. 589, 16 Atl. 233, 530; Hunnewell *v.* Taylor, 3 Gray (Mass.) 111; Allen *v.* Hoyt, 5 Metc. (Mass.) 324; Pankey *v.* Howard, 47 Miss. 83; Jackson *v.* Myers, 14 Johns. (N. Y.) 354; Simpson *v.* Wallace, 83 N. C. 477; Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552; Smith *v.* Pratt, 13 Ohio 548; Brownell *v.* Bradley, 16 Vt. 105, 42 Am. Dec. 498. The better view, however, is that the omission of any parcel belonging to the cotenancy should be regarded as exceptional and presumptively erroneous, and not to be tolerated unless it clearly appears that partition, omitting such parcel, cannot prejudice any one in the assertion of any right he may have, whether legal or equitable. In addition to the authorities cited above at the beginning of this foot-note see Dumestre's Succession, 45 La. Ann. 200, 12 So. 123; Bigelow *v.* Littlefield, 52 Me. 24, 83 Am. Dec. 484; Duncan *v.* Sylvester, 16 Me. 388; Jackson *v.* Beach, (N. J. Ch. 1885) 2 Atl. 22; Everhart *v.* Shoemaker, 2 Walk. (Pa.) 158; Woodward *v.* Santee River Cypress Lumber Co., 73 S. C. 31, 52 S. E. 733, 114 Am. St. Rep. 76, and note.

The joinder of real and personal property seems not to be favored (Keith *v.* Keith, 143 Mass. 262, 9 N. E. 560), although sometimes permitted (*In re* Naglee, 52 Pa. St. 154).

Parcels situate in different counties see Nichol *v.* Allenby, 17 Ont. 275; Clark *v.* Clark, 8 Ont. Pr. 156; Reg. *v.* Smith, 7 Ont. Pr. 429.

4. Brown *v.* Turner, 1 Aik. (Vt.) 350, 15 Am. Dec. 696.

5. Conant *v.* Smith, 1 Aik. (Vt.) 67, 15 Am. Dec. 669.

6. Warner *v.* Baynes, Ambl. 589, 27 Eng. Reprint 384; Parker *v.* Gerard, Ambl. 236, 27 Eng. Reprint 157; Norris *v.* Le Neve, 3 Atk. 82, 26 Eng. Reprint 850; North *v.* Guinan, Beatty 342; Abel *v.* Heathcote, 4 Bro. Ch. 278, 29 Eng. Reprint 891, 2 Ves. Jr. 100, 30 Eng. Reprint 542, 2 Rev. Rep. 171; Manaton *v.* Squire, 2 Ch. Cas. 237, 22 Eng. Reprint

interest of the cotenants will be promoted by refusing the application or temporarily postponing action to secure the advantages to result from a raise in market values.[7]

8. PROPERTY, THE PARTITION OF WHICH IS AGAINST PUBLIC POLICY, OR WILL OUTRAGE THE PUBLIC SENSE OF PROPRIETY AND DECENCY. Partition may be denied on the ground that well-established public policy will not permit it. The instance which Lord Coke suggested, of a castle used for the necessary defense of the realm, although it would seem not subject to partition, in kind, could apparently be partitioned by sale. Railroads are sometimes, although rarely, owned in cotenancy. Public policy clearly forbids their partition otherwise than by sale. Their sale is also often forbidden by public policy, and where such is the case it cannot be brought about by an action or suit in partition.[8] The only instance in which partition has been denied on the ground that it would outrage the public sense of propriety and decency arose where two religious corporations had, as cotenants, procured and held land on part of which they had erected a church, and the remainder they used as a cemetery. The court refused to divide the property into parcels, or to put it up for sale.[9]

C. Estates Subject to Partition — 1. NONE BUT ESTATES HELD IN COTENANCY. It is always indispensable that the property sought to be partitioned be held in cotenancy. A parcel of land may be so held that it would require a conveyance

925, Freem. 26, 22 Eng. Reprint 1036; Clarendon *v.* Hornby, 1 P. Wms. 446, 24 Eng. Reprint 465; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206.

7. *Alabama.*— Mylin *v.* King, 139 Ala. 319, 35 So. 998; Cates *v.* Johnson, 109 Ala. 126, 19 So. 416; Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778.

Connecticut.— Scovil *v.* Kennedy, 14 Conn. 349.

Georgia.— Royston *v.* Royston, 13 Ga. 425.

Illinois.— Finch *v.* Green, 225 Ill. 304, 80 N. E. 318; Hartmann *v.* Hartmann, 59 Ill. 103.

Iowa.— Cooper *v.* Cedar Rapids Water Power Co., 42 Iowa 398.

Louisiana.— Glancey's Succession, 108 La. 414, 32 So. 356; Land *v.* Smith, 44 La. Ann. 931, 11 So. 577.

Maine.— Wood *v.* Little, 35 Me. 107; Hanson *v.* Willard, 12 Me. 142, 28 Am. Dec. 162.

Maryland.— Brendel *v.* Klopp, 69 Md. 1, 13 Atl. 589.

Mississippi.— Higginbottom *v.* Short, 25 Miss. 160, 57 Am. Dec. 198.

Nebraska.— Oliver *v.* Lansing, 50 Nebr. 828, 70 N. W. 369.

New Hampshire.— Allard *v.* Carleton, 64 N. H. 24, 3 Atl. 313.

New Jersey.— Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Craighead *v.* Pike, 58 N. J. Eq. 15, 43 Atl. 424 [*affirmed* in 60 N. J. Eq. 443, 45 Atl. 1091].

New York.— Danvers *v.* Dorrity, 14 Abb. Pr. 206; Smith *v.* Smith, 10 Paige 470.

North Carolina.— Holmes *v.* Holmes, 55 N. C. 334; Donnell *v.* Mateer, 42 N. C. 94; Ledbetter *v.* Gash, 30 N. C. 462.

Pennsylvania.— Caldwell *v.* Snyder, 178 Pa. St. 420, 35 Atl. 996, 35 L. R. A. 198.

Rhode Island.— Updike *v.* Adams, 22 R. I. 432, 48 Atl. 384.

South Carolina.— Crompton *v.* Ulmer, 2 Nott & M. 429; Steedman *v.* Weeks, 2 Strobh. Eq. 145, 49 Am. Dec. 660.

Tennessee.— Helm *v.* Franklin, 5 Humphr. 404.

United States.— Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644.

See 38 Cent. Dig. tit. "Partition," § 76.

In some of the states statutes have been enacted limiting the right to coerce partition when it will work great prejudice to the owners. Kemble *v.* Kemble, 44 N. J. Eq. 454, 11 Atl. 733. In New York, although a tenant in common of a vested remainder or reversion may, by Code Civ. Proc. § 1533, maintain an action for partition, the property cannot be sold, and if it appears that partition cannot be made without great prejudice to the owners, the complaint must be dismissed. Scheu *v.* Lehning, 31 Hun (N. Y.) 183, 66 How. Pr. 231. See also Hopkins *v.* Crouch, 86 Ky. 281, 5 S. W. 557, 9 Ky. L. Rep. 554. Although, in the absence of such a statute the right to partition may be absolute, the court may grant reasonable delays in the proceeding for the purpose of making partition less disastrous. Becnel's Succession, 117 La. 744, 42 So. 256.

8. Railway Co. *v.* Railroad Co., 38 Ohio St. 614. In this case the judgment of the court was somewhat affected by the consideration that the statute under which the sale of the moiety of the property had been made, and a cotenancy created, purported to authorize such sale "if the same could be done without impairing the usefulness thereof."

9. Brown *v.* Lutheran Church, 23 Pa. St. 495.

There are also statutes forbidding the partition of cemeteries. Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451.

Crown lands are not subject to partition, nor is the right of a squatter thereon. Abell *v.* Weir, 24 Grant Ch. (U. C.) 464; Jenkins

from many persons to vest an estate in fee in the whole thereof in any one,[10] and one or more of the persons having interests in the property may be anxious to separate that interest and turn it into an estate which he can transmit and enjoy free from the conditions and paramount rights to which his present estate or right is subject, as where one person owns the ground and the other the buildings or other improvements thereon, or one owns the lower and the other the upper story of a house, or one owns the property and the other is entitled to an easement or other right therein. In all such cases there can be no compulsory separation. To any judicial proceeding seeking such separation, it is a sufficient answer, although several estates exist and are vested in many persons, none of such estates is held in cotenancy.[11] Plaintiff in the proceeding must fail, no matter what his interest in the property may be, if that interest is not the interest of a cotenant.[12] On the other hand he must succeed irrespective of the interests of defendants in so far as he is a cotenant of the property,[13] although

v. Martin, 20 Grant Ch. (U. C.) 613. The interest of the crown is not subject to partition because it is not held in cotenancy; but as to any other interest in the land there seems to be no sufficient reason to deny any partition not inconsistent with the rights of the crown. Pride *v.* Rodger, 27 Ont. 320.

10. Freeman Coten. & P. § 87.

11. *Alabama.*— Russell *v.* Beasley, 72 Ala. 190; Arnett *v.* Bailey, 60 Ala. 435.

Illinois.— Brand *v.* Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849; McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Stevenson *v.* Bachrach, 170 Ill. 253, 48 N. E. 327; McConnel *v.* Kibbe, 43 Ill. 12, 92 Am. Dec. 93.

Indiana.—Anderson School Tp. *v.* Milroy Lodge F. & A. M. No. 139, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206.

Iowa.— Johnson *v.* Moser, 72 Iowa 523, 34 N. W. 314.

Kentucky.—Sneed *v.* Atherton, 6 Dana 276, 32 Am. Dec. 70; Kelly *v.* Muir, 30 S. W. 653, 17 Ky. L. Rep. 167.

Louisiana.— Baltimore *v.* New Orleans, 45 La. Ann. 526, 12 So. 878.

Maine.— Soutter *v.* Atwood, 34 Me. 153, 56 Am. Dec. 647.

Massachusetts.— Rice *v.* Osgood, 9 Mass. 38; Swett *v.* Bussey, 7 Mass. 503.

Michigan.— Metcalfe *v.* Miller, 96 Mich. 459, 56 N. W. 16, 35 Am. St. Rep. 617; Benedict *v.* Torrent, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278.

Mississippi.— White *v.* Lefoldt, 78 Miss. 173, 28 So. 818; Belew *v.* Jones, 56 Miss. 342.

Nebraska.— Phillips *v.* Dorris, 56 Nebr. 293, 76 N. W. 555; Barr *v.* Lamaster, 48 Nebr. 114, 66 N. W. 1110, 32 L. R. A. 451.

New Jersey.— State *v.* Rickey, 8 N. J. L. 50.

New York.— Strong *v.* Harris, 84 Hun 314, 36 N. Y. Suppl. 349; Boyd *v.* Dowie, 65 Barb. 237.

North Carolina.— Corbitt *v.* Corbitt, 54 N. C. 114.

Ohio.— Lockwood *v.* Mills, 3 Ohio 21; Burbeck *v.* Spollen, 6 Ohio Dec. (Reprint) 1118, 10 Am. L. Rec. 491.

Pennsylvania.— Seiders *v.* Giles, 141 Pa. St. 93, 21 Atl. 514; McGrillis' Estate, 13 Pa. Dist. 413; Kerner's Estate, 12 Pa. Dist. 718; Bellas *v.* Graham, 3 Am. L. J. 64.

Washington.— Houghton *v.* Callahan, 3 Wash. 158, 28 Pac. 377.

Canada.— Fiskin *v.* Ife, 28 Ont. 595.

See 38 Cent. Dig. tit. "Partition," § 39 *et seq.*

12. *Illinois.*— McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952; Marseilles Land, etc., Co. *v.* Aldrich, 86 Ill. 504.

Iowa.— Johnson *v.* Moser, 72 Iowa 523, 34 N. W. 314.

Kansas.— Love *v.* Blau, 61 Kan. 496, 59 Pac. 1059, 78 Am. St. Rep. 334, 48 L. R. A. 257.

Missouri.— King *v.* Howard, 27 Mo. 21.

New Jersey.— Bouvier *v.* Baltimore, etc., R. Co., 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750.

Pennsylvania.— Owens *v.* Naughton, 23 Pa. Super. Ct. 639.

Tennessee.—Barton *v.* Cannon, 7 Baxt. 398.

See 38 Cent. Dig. tit. "Partition," § 36.

Hence, a widow entitled to dower in her husband's real estate, and also a tenant for life of the whole thereof, cannot maintain an action for partition against the remaindermen. Purdy *v.* Purdy, 18 N. Y. App. Div. 310, 46 N. Y. Suppl. 215.

13. *Iowa.*— De Tar *v.* Wyatt, (1900) 82 N. W. 484.

Maryland.— Shipley *v.* Jacob Tome Inst., 99 Md. 520, 58 Atl. 200.

Massachusetts.— O'Brien *v.* Mahoney, 179 Mass. 200, 60 N. E. 493, 88 Am. St. Rep. 371; Mitchell *v.* Starbuck, 10 Mass. 5.

Missouri.— Doerner *v.* Doerner, 161 Mo. 399, 61 S. W. 801.

Nebraska.— Phillips *v.* Dorris, 56 Nebr. 293, 76 N. W. 555.

New Jersey.— Kennedy *v.* Armstrong, 20 N. J. L. 693.

New York.— O'Donoghue *v.* Smith, 85 N. Y. App. Div. 324, 83 N. Y. Suppl. 398 [*affirmed* in 184 N. Y. 365, 77 N. E. 621]; Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717; Cross *v.* Birch, 27 Misc. 295, 58 N. Y. Suppl. 438.

Pennsylvania.— Carey *v.* Schaller, 16 Pa. Super. Ct. 350.

none of them is interested in all the lands in which plaintiff is interested as a cotenant.[14]

2. The Combined Estates Must Equal an Estate in Severalty. There can be no partition of an undivided interest. The estate sought to be partitioned must be such that, if a parcel is assigned to any party, his estate therein will be an estate in severalty, and, if a sale is directed, its effect must be to transfer to the purchaser a like estate.[15]

3. Estates in Severalty Paramount to the Estate Held in Cotenancy — a. Dower Rights in the Whole Property. Although there is an estate held in cotenancy, there may also be an estate in severalty in the same property, as where, when a husband owned the whole, his wife's inchoate right of dower attached thereto, and by his subsequent conveyance or death the property vested in cotenancy subject to her right. Her interest, whether before or after his death, and, after his death, whether before or after the assignment of dower, is not an estate in cotenancy. She cannot compel partition, nor can partition be compelled against her. The cotenants may proceed to partition the estate held by them.[16] To this partition she is not a necessary nor a proper party,[17] and therefore, on principle, she should be held unaffected by it,[18] although a *dictum* asserts that, if she does not have her dower assigned prior to such petition, she must accept separate assignments out of the parcels set aside to the respective cotenants.[19]

b. Other Rights in Severalty. In every instance in which there is an estate in severalty, it must be exempt from partition unless the right has been expressly conferred by statute, although there are other estates in the same property held in cotenancy and subject to compulsory partition.[20] Thus, if the whole lands are subject to oil leases, the court will refuse to partition the oil under the land;[21] the heirs of a deceased wife cannot have partition of her realty as against her surviving husband in possession and entitled thereto as tenant by the curtesy,[22] nor can she, in the lifetime of her husband, maintain partition against his grantee;[23] nor

Canada.— Doane *v.* McKenny, 2 Nova Scotia 328.

14. Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

15. Ware *v.* Vignes, 35 La. Ann. 288; Sweeny *v.* Meany, 1 Miles (Pa.) 167.

16. *Iowa.*— Clark *v.* Richardson, 32 Iowa 399.

Maine.— Leonard *v.* Motley, 75 Me. 418; Blaisdell *v.* Pray, 68 Me. 269; Blanchard *v.* Blanchard, 48 Me. 174.

Massachusetts.— Ward *v.* Gardner, 112 Mass. 42; Motley *v.* Blake, 12 Mass. 280.

Michigan.— Persinger *v.* Jubb, 52 Mich. 304, 17 N. W. 851.

Minnesota.— Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692; Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

Mississippi.— Davis *v.* Patty, 76 Miss. 753, 25 So. 662; Wood *v.* Bryant, 68 Miss. 198, 8 So. 518; Hill *v.* Gregory, 56 Miss. 341.

New York.— Fowler *v.* Griffin, 3 Sandf. 385; Bradshaw *v.* Callaghan, 5 Johns. 80 [*reversed* on other grounds in 8 Johns. 558]; Wood *v.* Clute, 1 Sandf. Ch. 199.

Virginia.— White *v.* White, 16 Gratt. 264, 80 Am. Dec. 706.

West Virginia.—Casto *v.* Kintzel, 27 W. Va. 750.

See 38 Cent. Dig. tit. "Partition," § 47.

Statutory modifications.— The rule here stated is subject to statutory modification in some of the states. See Schwartz *v.* Ritter, 186 Ill. 209, 57 N. E. 887; Atkinson *v.* Brady, 114 Mo. 200, 21 S. W. 480, 35 Am. St. Rep. 744; Toledo Loan Co. *v.* Larkin, 25 Ohio Cir. Ct. 209; Steel's Appeal, 86 Pa. St. 222; Bishop's Appeal, 7 Watts & S. (Pa.) 251; Bradford *v.* Stone, 20 R. I. 53, 37 Atl. 532; Clift *v.* Clift, 87 Tenn. 17, 9 S. W. 360; Read *v.* Franklin, (Tenn. Ch. App. 1900) 60 S. W. 215.

In Mississippi a widow entitled to lands held in severalty by her husband may resist partition so long only as she continues to occupy or use them. Middleton *v.* Claughton, 77 Miss. 131, 24 So. 963, construing the provisions of Code (1892), § 1553.

If dower has been assigned to a widow by giving her one third of the net profits of an estate, the heirs become entitled to partition. Hassell *v.* Mizell, 41 N. C. 392.

17. Fowler *v.* Griffin, 3 Sandf. (N. Y.) 385.

18. Hanson *v.* Ingwoldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692; Wood *v.* Bryant, 68 Miss. 198, 8 So. 518; Bradshaw *v.* Callaghan, 5 Johns. (N. Y.) 80 [*reversed* on other grounds in 8 Johns. 558].

19. Leonard *v.* Motley, 75 Me. 418.

20. Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

21. Hanna *v.* Clark, 204 Pa. St. 149, 53 Atl. 758.

22. Barrett *v.* Byrne, 21 D. C. 274.

23. Merritt *v.* Hughes, 36 W. Va. 396, 15 S. E. 56.

can a husband surviving his wife have partition against her heirs, for they are remainder-men, and he as tenant by the curtesy is entitled to exclusive possession for life.[24] The rule here considered cannot defeat the right of a cotenant to the partition of an estate in possession, although he owns the remainder or reversion in fee. In such case the estate in possession is paramount and will be partitioned without considering or in any manner affecting the estate not in possession.[25]

4. Estates in Possession — a. The General Rule. The English statutes on the subject of partition first restricted the right to estates of inheritance, and subsequently extended it to estates for life or years.[26] Equity, while assuming general jurisdiction over the subject of partition, did not, it seems, extend that jurisdiction, as to real property, over estates not subject to partition at law, except that it always recognized equitable titles, and it was by statute 4 & 5 Vict. c. 35, § 85, granted jurisdiction over copyhold estates. The general rule is that all estates in possession are subject to partition, with the exception of copyholds or mere estates at will. These neither the law nor the chancery courts undertook to partition unless expressly authorized by statute.[27]

b. Estates Held in Joint Tenancy. The statutes of 31 and of 32 Henry VIII extended the right of partition to joint tenants as well as to tenants in common. We believe that in every part of the United States estates held in joint tenancy are subject to compulsory partition, and that it is not a sufficient objection to such partition that it destroys the right of survivorship.[28]

c. Estates Held by Tenancy by the Entireties. An estate held by a husband and wife as tenants by the entireties is regarded as in severalty rather than in cotenancy, and not subject to partition.[29] Its partition may probably be compelled as part of the relief grantable in a suit for divorce.[30] If, however, a divorce is granted, the unity of the parties is thereby destroyed. As a consequence the tenancy by entireties is changed into a tenancy in common, either cotenant of which may sustain a suit for partition.[31]

d. Community Property. During the continuance of the legal relation of husband and wife, there can be no compulsory partition of the community property. After the death of either husband or wife, if the law does not vest the whole property in the survivor, either of two or more persons who become cotenants thereof may compel partition.[32] In a suit for divorce the court may make proper division of the common property and thereby convert husband and wife into cotenants, or set aside to each a share to be held in severalty.[33] If no action is taken in the court granting the divorce, it is probable that either of the late spouses may subsequently maintain a suit for partition.[34]

e. Estates in Possession Less Than in Fee. If the estate is one in possession

24. Seiders *v.* Giles, 141 Pa. St. 93, 21 Atl. 514.

25. Allen *v.* Libbey, 140 Mass. 82, 2 N. E. 791.

26. North *v.* Guinan, Beatty 342; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

27. Jope *v.* Morshead, 6 Beav. 213, 12 L. J. Ch. 190, 49 Eng. Reprint 807; Scott *v.* Fawcett, Dick. 299, 21 Eng. Reprint 284; Horncastle *v.* Charlesworth, 4 Jur. 1179, 10 L. J. Ch. 35, 11 Sim. 315, 34 Eng. Ch. 315, 59 Eng. Reprint 895.

28. Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717; Baldwin *v.* Baldwin, 74 Hun (N. Y.) 415, 26 N. Y. Suppl. 579; Cross *v.* Birch, 27 Misc. (N. Y.) 295, 58 N. Y. Suppl. 438.

29. Merritt *v.* Whitlock, 6 Lack. Leg. N. (Pa.) 76; Ketchum *v.* Walsworth, 5 Wis. 95, 68 Am. Dec. 49.

30. Harrer *v.* Wallner, 80 Ill. 197.

31. Joerger *v.* Joerger, 193 Mo. 133, 91 S. W. 918; Russell *v.* Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Buttlar *v.* Buttlar, 67 N. J. Eq. 136, 56 Atl. 722.

32. Hill *v.* Young, 7 Wash. 33, 34 Pac. 144.

33. Gimmy *v.* Gimmy, 22 Cal. 633; Kashaw *v.* Kashaw, 3 Cal. 312.

34. Biggi *v.* Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; De Godey *v.* Godey, 39 Cal. 157; Weiss *v.* Bethel, 8 Oreg. 522.

This is on the assumption of some of the above cases and of McLeran *v.* Benton, 31 Cal. 29, that, upon the granting of a divorce, the late husband and wife became tenants in common. This result is apparently not reconcilable with the conclusion reached in Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497, that the interest of a wife in the community property is that of an heir only.

and held in cotenancy, the right to partition may be affirmed in the absence of some paramount trust or agreement.[35]

5. Estates Not in Possession. It was the rule both at common law and in chancery that none but estates in possession were subject to compulsory partition.[36] This rule prevails in the United States except where it has been abrogated or modified by statute. The rule may be considered: (1) When an estate in remainder or reversion is sought to be partitioned without affecting the estate in possession; (2) when a reversioner or remainder-man seeks a partition which will also include the estate in possession; (3) when a cotenant of an estate in possession seeks partition which will include both it and the estate in reversion or remainder; and (4) when a cotenant of the fee seeks partition which will include all other estates whether in possession or not. In cases of the first class, neither actions nor suits for partition can be sustained,[37] except in a few states where the

35. See cases cited *infra*, this note.

Equitable estates.—At law none but legal estates could be recognized. Hence equitable estates could not there be partitioned. Coale *v.* Barney, 1 Gill & J. (Md.) 324; Hopkins *v.* Toel, 4 Humphr. (Tenn.) 46. The rule was otherwise in chancery, which, having before it all the parties equitably interested, proceeded to make partition between them. Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; Foust *v.* Moorman, 2 Ind. 17; Welch *v.* Anderson, 28 Mo. 293; Terry *v.* Smith, 42 N. J. Eq. 504, 8 Atl. 886; Wetmore *v.* Zabriskie, 29 N. J. Eq. 62; Herbert *v.* Smith, 6 Lans. (N. Y.) 493; Hosford *v.* Merwin, 5 Barb. (N. Y.) 51; Selden *v.* Vermilya, 2 Sandf. (N. Y.) 568; Coxe *v.* Smith, 4 Johns. Ch. (N. Y.) 271; Hitchcock *v.* Skinner, Hoffm. (N. Y.) 21; Owens *v.* Owens, 25 S. C. 155; Leverton *v.* Waters, 7 Coldw. (Tenn.) 20; Almony *v.* Hicks, 3 Head (Tenn.) 39; Carter *v.* Taylor, 3 Head (Tenn.) 30; Cartwright *v.* Pultney, 2 Atk. 380, 26 Eng. Reprint 630; Swan *v.* Swan, 8 Price 518, 22 Rev. Rep. 770.

Estates held by fee conditional are subject to partition. Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665; Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271.

Estates for life.—Gayle *v.* Johnson, 80 Ala. 388; Hawkins *v.* McDougal, 125 Ind. 597, 25 N. E. 807; Shaw *v.* Beers, 84 Ind. 528; Kinkead *v.* Maxwell, 75 Kan. 50, 88 Pac. 523; Morris *v.* Morris, (Tex. Civ. App. 1907) 99 S. W. 872; Plano Mfg. Co. *v.* Kindschi, 131 Wis. 590, 111 N. W. 680; Field *v.* Leiter, (Wyo. 1907) 90 Pac. 378, 92 Pac. 622; Gaskell *v.* Gaskell, 6 Sim. 643, 9 Eng. Ch. 643, 58 Eng. Reprint 735. Also an estate for life determinable on marriage. Hobson *v.* Sherwood, 4 Beav. 184, 49 Eng. Reprint 309.

Estates for the life of another.—A cotenant of an estate *per autre vie* in present possession may sue for partition. Brevoort *v.* Brevoort, 70 N. Y. 136; Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426.

Estates for years.—Cowden *v.* Cairns, 28 Mo. 471; Duke *v.* Hague, 107 Pa. St. 57; North *v.* Guinan, Beatty 342; Heaton *v.* Dearden, 16 Beav. 147, 51 Eng. Reprint 733; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

Lands subject to existing leases do not thereby cease to be held by an estate in possession, where the cotenants are entitled to the rents reserved in the lease. Either of such cotenants may therefore compel partition, subject to the rights of the lessee. Thruston *v.* Minke, 32 Md. 571; Cook *v.* Webb, 19 Minn. 167; Oliver *v.* Lansing, 50 Nebr. 828, 70 N. W. 369; Hunt *v.* Hazelton, 5 N. H. 216, 20 Am. Dec. 575; Woodworth *v.* Campbell, 5 Paige (N. Y.) 518; Werner *v.* Glass, 9 Ohio Dec. (Reprint) 686, 16 Cinc. L. Bul. 354; Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644; Wilkinson *v.* Joberns, L. R. 16 Eq. 14, 42 L. J. Ch. 663, 28 L. T. Rep. N. S. 724, 21 Wkly. Rep. 644; Fitzpatrick *v.* Wilson, 12 Grant Ch. (U. C.) 440.

Lands held subject to an easement are nevertheless subject to compulsory partition. Crocker *v.* Cotting, 170 Mass. 68, 48 N. E. 1023, 64 Am. St. Rep. 278, 39 L. R. A. 215. But see *contra*, Putnam *v.* Putnam, 77 N. Y. App. Div. 554, 78 N. Y. Suppl. 987.

Mineral rights in lands may be partitioned by suit, as where the minerals in or beneath lands have been granted to, or have otherwise become vested in, cotenants. Hughes *v.* Devlin, 23 Cal. 501; Merritt *v.* Judd, 14 Cal. 59; McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

Oyster beds.—Under a statute giving the right to partition an estate of inheritance or for life or years, it was held that one of two or more persons having the right to the exclusive use and occupation of real property for the purpose of laying down and planting oysters and taking up and carrying off the same under an act of the legislature of the state was not entitled to partition on the ground that his estate was at will only or, more probably, a mere personal license. Darhee, etc., Oyster, etc., Co. *v.* Pacific Oyster Co., 150 Cal. 392, 88 Pac. 1090, 119 Am. St. Rep. 227.

Possessory interests.—Parties in possession as cotenants and claiming as such have been denied partition, where they could show no title. Ross *v.* Cobb, 78 Ill. 111. From this conclusion we must dissent. Porter *v.* Gordon, 5 Yerg. (Tenn.) 100.

36. Evans *v.* Bagshaw, L. R. 5 Ch. 340, 39 L. J. Ch. 145, 18 Wkly. Rep. 657.

37. *Connecticut.*—Culver *v.* Culver, 2 Root 278.

rule has been changed by statute allowing partition among remainder-men and reversioners subject to the preceding estate in possession.[38] The right, although created by statute in Illinois, cannot be exercised if the interest of the parties cannot be ascertained until after the death of the life-tenant.[39] In New York the right of a remainder-man to partition, first affirmed,[40] and subsequently denied,[41] was by statute extended to cotenants of vested reversions or remainders.[42] We believe no statute has yet conferred on a cotenant of an estate not in possession the right to compel a partition which will include and affect the estate in possession or any cotenant thereof.[43] A cotenant of an estate in possession less than in fee, although entitled to partition, cannot by his partition affect estates in reversion or remainder unless authorized to do so by statute.[44] Such right has been

District of Columbia.— Moore *v.* Shannon, 6 Mackey 157.

Indiana.— Fry *v.* Hare, 166 Ind. 415, 77 N. E. 803; Stout *v.* Dunning, 72 Ind. 343; Schori *v.* Stephens, 62 Ind. 441.

Kentucky.— Berry *v.* Lewis, 118 Ky. 652, 82 S. W. 252, 84 S. W. 526, 26 Ky. L. Rep. 530, 27 Ky. L. Rep. 109.

Massachusetts.— Hunnewell *v.* Taylor, 6 Cush. 472; Packard *v.* Packard, 16 Pick. 191.

Mississippi.— Lawson *v.* Bonner, 88 Miss. 235, 40 So. 488, 117 Am. St. Rep. 738.

Nevada.— Conter *v.* Herschel, 24 Nev. 152, 50 Pac. 851.

New Hampshire.— Brown *v.* Brown, 8 N. H. 93.

New Jersey.— Maxwell *v.* Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; *In re* Burroughs, 13 N. J. L. 284; Stevens *v.* Enders, 13 N. J. L. 271; Reeves *v.* Reeves, 6 N. J. Eq. 156.

New York.— Sullivan *v.* Sullivan, 66 N. Y. 37; Hughes *v.* Hughes, 30 Hun 349 [*affirming* 2 N. Y. Civ. Proc. 139, 11 Abb. N. Cas. 37, 63 How. Pr. 408].

Ohio.— Tabler *v.* Wiseman, 2 Ohio St. 207; Elrod *v.* Bass, 1 Ohio Cir. Ct. 38, 1 Ohio Cir. Dec. 23; Burbeck *v.* Spollen, 6 Ohio Dec. (Reprint) 1118, 10 Am. L. Rec. 491.

Oregon.— Savage *v.* Savage, 19 Oreg. 112, 23 Pac. 890, 20 Am. St. Rep. 795.

Pennsylvania.— Ziegler *v.* Grim, 6 Watts 106.

Tennessee.— Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799; Robertson *v.* Robertson, 2 Swan 197; Norment *v.* Wilson, 5 Humphr. 310.

Vermont.— Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

West Virginia.—Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56.

Wisconsin.— Pabst Brewing Co. *v.* Melms, 105 Wis. 441, 81 N. W. 882, 76 Am. St. Rep. 921.

Canada.— Murcar *v.* Bolton, 5 Ont. 164.

See 38 Cent. Dig. tit. "Partition," § 60 *et seq.*

38. *Alabama.*— Fitts *v.* Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53.

Illinois.— Miller *v.* Lanning, 211 Ill. 620, 71 N. E. 1115; Drake *v.* Merkle, 153 Ill. 318, 38 N. E. 654; Hilliard *v.* Scoville, 52 Ill. 449; Scoville *v.* Hilliard, 48 Ill. 453.

Minnesota.— Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352; Cook *v.* Webb, 19 Minn. 167.

Missouri.— Hayes *v.* McReynolds, 144 Mo. 348, 46 S. W. 161; Preston *v.* Brant, 96 Mo. 552, 10 S. W. 78.

New Jersey.— Roarty *v.* Smith, 53 N. J. Eq. 253, 31 Atl. 1031; Smith *v.* Gaines, 38 N. J. Eq. 65 [*reversed* on other grounds in 39 N. J. Eq. 545].

North Carolina.—Aydlett *v.* Pendleton, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776.

Pennsylvania.— Kerner's Estate, 12 Pa. Dist. 718; *In re* Stevenson, 33 Pittsb. Leg. J. N. S. 419.

South Carolina.— Witherspoon *v.* Dunlap, 1 McCord 546.

See 38 Cent. Dig. tit. "Partition," § 48.

39. Seymour *v.* Bowles, 172 Ill. 521, 50 N. E. 122.

40. Blakeley *v.* Calder, 15 N. Y. 617 [*affirming* 13 How. Pr. 476]; McGlone *v.* Goodwin, 3 Daly (N. Y.) 185; Bradshaw *v.* Callaghan, 8 Johns. (N. Y.) 558; Woodworth *v.* Campbell, 5 Paige (N. Y.) 518.

41. Sullivan *v.* Sullivan, 66 N. Y. 37; Hughes *v.* Hughes, 30 Hun (N. Y.) 349 [*affirming* 2 N. Y. Civ. Proc. 139, 11 Abb. N. Cas. 37, 63 How. Pr. 408].

42. Havey *v.* Kelleher, 36 N. Y. App. Div. 201, 56 N. Y. Suppl. 889; Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 52 N. Y. Suppl. 260; Harding *v.* Craft, 21 N. Y. App. Div. 139, 47 N. Y. Suppl. 450; Prior *v.* Hall, 13 N. Y. Civ. Proc. 83. The interest in remainder must be vested. Otherwise partition cannot be maintained during the continuance of a life-estate. Green *v.* Head, 54 Misc. (N. Y.) 454, 104 N. Y. Suppl. 383.

Vested remainders are also now subject to partition in Tennessee. Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799; Bierce *v.* James, 87 Tenn. 538, 11 S. W. 788; Smith *v.* Smith, (Tenn. Ch. App. 1900) 57 S. W. 198; Muldoon *v.* Trewhitt, (Tenn. Ch. App. 1896) 38 S. W. 109; Henry *v.* Henry, 1 Tenn. Ch. App. 240.

As to Kentucky and New Jersey see Stine *v.* Goodman, 92 S. W. 612, 29 Ky. L. Rep. 221; Campbell *v.* Cole, (N. J. Ch. 1906) 64 Atl. 461.

43. Alexander *v.* Alexander, 26 Nebr. 68, 41 N. W. 1065.

44. *Iowa.*— Smith *v.* Runnels, 97 Iowa 55, 65 N. W. 1002.

Kansas.— Johnson *v.* Brown, 74 Kan. 346,

created in some of the states and therein a tenant for life in possession may compel a partition binding all interests, whether in possession, reversion, or remainder.[45] If several persons are cotenants of the fee, each therefore having the right to compel partition, it would be unreasonable to hold that any of his cotenants by creating an estate in reversion or remainder could defeat the right to a complete partition which would vest a title in fee. The more difficult question is, where there are two cotenancies, one of an estate in possession and the other of an estate in remainder or reversion, whether a cotenant of either by acquiring a moiety of the other, and thus becoming an owner of a moiety in fee, may compel partition of both estates and thus acquire title in fee and in severalty. In some of the states he can.[46] His right to do so is manifestly statutory, and, in the absence of statutes creating it, does not exist.[47] Of course partition may be made by suit where all the parties consent, although some of them might, from the nature of their estate, resist with success.[48]

D. Property and Estates Subject to Trusts and Agreements — 1. Property Held in Partnership. In personal property belonging to a partnership neither of the partners can be said to have any interest as a cotenant — the interest of each being only his share of the property which may remain after the settlement of the partnership affairs and the satisfaction of its obligations. Doubtless therefore such personal property is not subject to a suit for partition. Real estate, although acquired for partnership purposes and with partnership funds, is held in cotenancy where the title is taken in the names of the partners. It is nevertheless in equity regarded for some purposes as partnership property, and in England is very properly held not subject to partition.[49] We have met with no American decision denying the right to partition partnership real estate. In one case such partition was decreed, although the real property involved seemed to constitute the whole of the assets of an active partnership, and the partition must therefore have resulted in its dissolution.[50] Whether in any case partition may be denied because the realty involved is in equity partnership assets has not yet been determined in this country; but it seems quite certain there will be no such denial unless it can be shown that the property is required to satisfy partnership obligations.[51] If one has an interest merely entitling him

86 Pac. 503; Love *v.* Blauw, 61 Kan. 496, 59 Pac. 1059, 78 Am. St. Rep. 334, 48 L. R. A. 257.

North Carolina.— Simpson *v.* Wallace, 83 N. C. 477; Williams *v.* Hassell, 74 N. C. 434.

Vermont.—Austin *v.* Rutland R. Co., 45 Vt. 215.

Virginia.— Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318.

See 38 Cent. Dig. tit. "Partition," § 48.

45. *Alabama.*— Fitts *v.* Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863; Gayle *v.* Johnston, 80 Ala. 395.

Indiana.— Moody *v.* West, 12 Ind. 399.

Missouri.— Sikemeier *v.* Galvin, 124 Mo. 367, 37 S. W. 551.

Pennsylvania.— Palethorp *v.* Palethorp, 194 Pa. St. 408, 45 Atl. 332.

Virginia.— Carneal *v.* Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819.

See 38 Cent. Dig. tit. "Partition," §§ 47, 48.

46. Hill *v.* Reno, 112 Ill. 154, 54 Am. Rep. 222; Elrod *v.* Bass, 1 Ohio Cir. Ct. 38, 1 Ohio Cir. Dec. 23; Aylesworth *v.* Crocker, 21 R. I. 436, 44 Atl. 308; Freeman *v.* Freeman, 9 Heisk. (Tenn.) 301.

47. *Massachusetts.*— Johnson *v.* Johnson, 7 Allen 196, 83 Am. Dec. 676; *In re* Hodgkinson, 12 Pick. 374.

Michigan.— Metcalfe *v.* Miller, 96 Mich. 459, 56 N. W. 16, 35 Am. St. Rep. 617.

Mississippi.— Below *v.* Jones, 56 Miss. 342.

Missouri.— Simmons *v.* MacAdaras, 6 Mo. App. 297.

New York.— Harding *v.* Craft, 21 N. Y. App. Div. 139, 47 N. Y. Suppl. 450.

Vermont.— Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

Wisconsin.— Pabst Brewing Co. *v.* Melms, 105 Wis. 441, 81 N. W. 882, 76 Am. St. Rep. 921.

See 38 Cent. Dig. tit. "Partition," § 48.

48. Brillhart *v.* Mish, 99 Md. 447, 58 Atl. 28; Biddle *v.* Biddle, 117 Mich. 28, 75 N. W. 91; Helmig *v.* Meyer, 10 Ohio S. & C. Pl. Dec. 308, 8 Ohio N. P. 31; Bice *v.* Nixon, 34 W. Va. 107, 11 S. E. 1004.

49. Wild *v.* Milne, 26 Beav. 504, 53 Eng. Reprint 993; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 61 Eng. Reprint 992, 4 Wkly. Rep. 413; Crawshay *v.* Maule, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 79, 18 Rev. Rep. 126.

50. Hughes *v.* Devlin, 23 Cal. 501.

51. Jackson *v.* Deese, 35 Ga. 84; Patterson

to share in the profits of a transaction in real estate, he is not a cotenant thereof, nor entitled to partition.[52]

2. Property Held Under Express or Implied Trust. It may be stated as a general rule that whenever an estate is subject to a valid trust, the purpose of which would be defeated by its partition, then all applications for the partition of the trust property must be denied.[53] There may, although there is no direction for the sale of property, be a valid prohibition of its partition, either express or implied, in a will or other instrument creating the cotenancy, although no trust is created.[54] Where, however a trust is created, by the terms of which the division

v. Blake, 12 Ind. 436; Roberts *v.* McCarty, 9 Ind. 16, 68 Am. Dec. 604; Craighead *v.* Pike, 58 N. J. Eq. 15, 43 Atl. 424 [*affirmed* in 60 N. J. Eq. 443, 45 Atl. 1091]; Danvers *v.* Dorrity, 14 Abb. Pr. (N. Y.) 206. But in Holton *v.* Guinn, 65 Fed. 450, where a surviving partner was in possession, it was held that the heirs of the deceased partner could not maintain partition against him pending his administration.

52. Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609.

53. Fischer *v.* Butz, 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160; Gerard *v.* Buckley, 137 Mass. 475; Sharp *v.* Sharp, 148 Mich. 278, 111 N. W. 767; Outcalt *v.* Appleby, 36 N. J. Eq. 73; Underwood *v.* Curtis, 127 N. Y. 523, 28 N. E. 585; Sicker *v.* Sicker, 23 Misc. (N. Y.) 737, 53 N. Y. Suppl. 106; Peirson *v.* Van Bergen, 23 Misc. (N. Y.) 547, 52 N. Y. Suppl. 890; Biggs *v.* Peacock, 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 31 Wkly. Rep. 148; Taylor *v.* Grange, 15 Ch. D. 165, 49 L J. Ch. 794, 43 L. T. Rep. N. S. 233, 28 Wkly. Rep. 93.

Lands directed to be sold by the provisions of a will or conveyance, or by any other method by which a valid direction can be given, are thereby converted into personalty, and although, but for this direction, two or more persons would be cotenants of such lands, and although when the direction is carried out, they or other persons are entitled to have the proceeds divided among them, no suit for partition can be maintained. Ukiah Bank *v.* Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Horsfield *v* Black, 40 N. Y. App. Div. 264, 57 N. Y. Suppl. 1006; McGowan *v.* Tifft, 35 Misc. (N. Y.) 603, 72 N. Y. Suppl. 132; Fritz *v.* Fritz, 17 N. Y. Suppl. 800; Severns' Estate, 13 Pa. Dist. 192; *In re* Keim, 10 Pa. Dist. 252; *In re* Leyrer, 4 Pa. Dist. 693, 17 Pa. Co. Ct. 132; *In re* Ruffell, 11 Phila. (Pa.) 46; Reid *v.* Clendenning, 29 Pittsb. Leg. J. N. S. (Pa.) 396; Bennett *v.* Gallaher, 115 Tenn. 568, 92 S. W. 66; Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Barton *v.* Cannon, 7 Baxt. (Tenn.) 398; Biggs *v.* Peacock, 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 31 Wkly. Rep. 148; Downey *v.* Dennis, 14 Ont. 267; Murphy *v.* Mason, 22 Grant Ch. (U. C.) 405; Cronk *v.* Cronk, 6 U. C. Q. B. O. S. 332. Nor can any court where a testator has fixed the period for distribution anticipate that period by directing a sale in partition at the request of the persons equitably entitled to the property. Swaine *v.* Denby, 14 Ch. D. 326, 49 L. J. Ch. 734, 28 Wkly. Rep. 622. Heirs or persons otherwise entitled to the property and to participate in the proceeds in the event of its sale may elect to treat it as real estate, in which event it is reconverted into realty and subject to partition as such. Ukiah Bank *v.* Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Wagstaff *v.* Marcy, 25 Misc. (N. Y.) 121, 54 N. Y. Suppl. 1021. The direction to sell must, however, be absolute to work a conversion. If it is discretionary merely, the land, until the power is exercised, remains real estate and subject to partition as such. Wood *v.* Hubbard, 31 N. Y. App. Div. 635, 53 N. Y. Suppl. 1119; Wood *v.* Huhhard, 29 N. Y. App. Div. 166, 51 N. Y. Suppl. 526; Miller *v.* Miller, 22 Misc. (N. Y.) 582, 49 N. Y. Suppl. 407; Horner *v.* Meyers, 4 Ohio S. & C. Pl. Dec. 404, 1 Ohio N. P. 314; Caldwell *v.* Snyder, 178 Pa. St. 420, 35 Atl. 996, 35 L. R. A. 198; Stark's Estate, 9 Kulp (Pa.) 525; Reid *v.* Clendenning, 29 Pittsb. Leg. J. N. S. (Pa.) 396; Green *v.* Davidson, 4 Baxt. (Tenn.) 488. If the direction is that the property be sold and the proceeds above a designated sum paid to specified persons, they cannot have partition until all prior charges are paid, for, until such payment, it cannot be known what interest, if any, they have. Dodd's Estate, 13 Montg. Co. Rep. (Pa.) 78. If the time within which the power of sale can be exercised expires, the obstacle to partition terminates. Walsh *v.* Dunn, (N. J. Ch. 1900) 46 Atl. 592. But for cases apparently not altogether reconcilable with the rule that the direction to sell in a will, and other directions apparently inconsistent with the sale or division of the property, constitute an insuperable obstacle to its partition see Hunter *v.* Stoneburner, 92 Ill. 75; Alpena Lumber Co. *v.* Fletcher, 48 Mich. 555, 12 N. W. 849; Palmer *v.* Marshall, 81 Hun (N. Y.) 15, 30 N. Y. Suppl. 567; Underhill *v.* Underhill, 4 N. Y. St. 858; Rawle's Appeal, 119 Pa. St. 100, 12 Atl. 809; Brownfield's Estate, 30 Pa. Co. Ct. 40; Hiscott *v.* Berringer, 4 Grant Ch. (U. C.) 296.

54. See cases cited *infra*, this note.

Express and implied prohibitions of partition.— If a testator by his will gives property to his wife for her use and to receive the rents and profits during life or widowhood, and after her decease to be divided among his children, no trust is created, but a valid condition against partition prior to the extinguishment of her estate is imposed.

of the property is postponed to some future date, or, where, although there is no express direction for such postponement, the objects of the trust must be made impossible or difficult of accomplishment by a partition, such partition, if applied for, must be denied.[55] Where the trust is merely to secure the payment of loans or other debts, a partition is not subversive of it, and need not be denied.[56]

3. HOMESTEADS. Lands occupied as a homestead may well be regarded as subject to a trust imposed by law, which would necessarily be defeated by their partition. It must therefore be denied, although the title is vested in two or more persons as cotenants, as long as they or any of them remain entitled to occupy the

"Equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims." Dee *v.* Dee, 212 Ill. 338, 72 N. E. 429; Brown *v.* Brown, 43 Ind. 474; Sharp *v.* Sharp, 148 Mich. 278, 111 N. W. 767; Gulick *v.* Huntley, 144 Mo. 241, 46 S. W. 154; Baldwin *v.* Humphrey, 44 N. Y. 609; Seibel *v.* Rapp, 85 Va. 28, 6 S. E. 478. The right to partition may be waived by implication, as where one purchases an undivided interest in realty for a sum to be repaid within a time specified from the rents and profits and the sale of iron ore therefrom. Roberts *v.* Wallace, 100 Minn. 359, 111 N. W. 289, 117 Am. St. Rep. 701. General provisions authorizing property to be partitioned do not justify a court in disregarding a provision in a deed under which the property is held that it shall not be sold until the youngest grantee arrives at maturity (Young *v.* Young, 49 S. W. 1074, 20 Ky. L. Rep. 1741), nor any other valid provision by which the property is not to be sold until some future date, although the proceeds are then to be divided among testator's children (Hill *v.* Jones, 65 Ala. 214; Fischer *v.* Butz, 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160; Cubbage *v.* Franklin, 62 Mo. 364; Serena *v.* Moore, 69 N. J. Eq. 687, 60 Atl. 953; Cahill *v.* Cahill, 62 N. J. Eq. 157, 49 Atl. 809; Outcalt *v.* Appleby, 36 N. J. Eq. 73; Blake *v.* Blake, 118 N. C. 575, 24 S. E. 424; *In re* Severn, 211 Pa. St. 65, 60 Atl. 492; Owens *v.* Naughton, 23 Pa. Super. Ct. 639; Cole *v.* Creyon, 1 Hill Eq. (S. C.) 311, 26 Am. Dec. 208; Wells *v.* Houston, (Tex. Civ. App. 1900) 56 S. W. 233). The principle has obtained statutory expression and sanction in Missouri, by a declaration of Rev. St. (1899) § 4383, providing that no partition of lands can be had contrary to the terms of a will thereof. McQueen *v.* Lilly, 131 Mo. 9, 31 S. W. 1043; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. 113. This statutory rule cannot be avoided on the ground that the will was executed in another state (Stevens *v.* Larwill, *supra*), nor on the suggestion that partition will relieve the beneficiaries against an unfortunate condition not foreseen by the testator (Stevens *v.* De la Vaulx, 166 Mo. 20, 65 S. W. 1003). But a provision in a devise to testator's daughter and her children that the property is to be kept for the sole use of herself and children free from all debts and control of her husband is construed merely as excluding his interest and control and not as limiting the right of partition. Gordon *v.* McLeroy, 115 Ga. 768, 42 S. E. 68. If heirs, contrary to the terms of a will, voluntarily partition the property devised to them thereby, the partition is valid, and on one of them becoming bankrupt, his trustee cannot compel a new partition. Rapier *v.* O'Donnell, 106 La. 98, 30 So. 256. We doubt not that the delegation by a testator to his executors of the power to make partition may operate as an exclusion of the power of the court and prevent his heirs from maintaining an independent suit for partition, unless the executors unreasonably and capriciously refuse to exercise their power (Fischer *v.* Butz, 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160), but the courts are apparently loath to construe directions made by a testator respecting the division of his property as intended to be exclusive (Marshall *v.* Rench, 3 Del. Ch. 239; Chouteau *v.* Paul, 3 Mo. 260). So the conferring of an irrevocable power of sale excludes the right to partition. Selden *v.* Vermilya, 2 Sandf. (N. Y.) 568. The exclusion of the right to partition, whether contained in a will or a conveyance, may be implied as well as express, and is implied by any valid direction for the use or disposition of the property which must be thwarted if a partition is permitted. Springer *v.* Savage, 143 Ill. 301, 32 N. E. 520; Kepley *v.* Overton, 74 Ind. 448; Outcalt *v.* Applehy, 36 N. J. Eq. 73; Blake *v.* Blake, 118 N. C. 575, 24 S. E. 424; Dickson *v.* Dickson, 70 N. C. 487; Steinman *v.* Steinman, 27 Ohio Cir. Ct. 460. On the other hand, if the direction can be carried out, notwithstanding partition, then the former does not prevent the latter. Richardson *v.* Merrill, 21 Me. 47; Whitney *v.* Kendall, 63 N. H. 200; Sawyer *v.* Sawyer, 61 N. H. 50.

55. Gerard *v.* Buckley, 137 Mass. 475; Underwood *v.* Curtis, 127 N. Y. 523, 28 N. E. 585; Morse *v.* Morse, 85 N. Y. 53; Peirson *v.* Van Bergen, 23 Misc. (N. Y.) 547, 52 N. Y. Suppl. 890; Striker *v.* Mott, 2 Paige (N. Y.) 387, 22 Am. Dec. 646; Latshaw's Appeal, 122 Pa. St. 142, 15 Atl. 676, 9 Am. St. Rep. 76; Biggs *v.* Peacock, 20 Ch. D. 200, 51 L. J. Ch. 555, 46 L. T. Rep. N. S. 582, 30 Wkly. Rep. 605 [*affirmed* in 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 31 Wkly. Rep. 148]; Taylor *v.* Grange, 15 Ch. D. 165, 49 L. J. Ch. 794, 43 L. T. Rep. N. S. 233, 28 Wkly. Rep. 93.

56. Gardiner *v.* Cord, 145 Cal. 157, 78 Pac. 544; Fitch *v.* Miller, 200 Ill. 170, 65

property as a homestead.[57] A judgment directing a partition by sale is not, however, void, and the purchaser, all parties interested being before the court and making no contest except as to the distribution of the proceeds of the sale, is not entitled to have it set aside.[58] The statute of limitations does not run against the right of children to partition a homestead during the time the surviving widow is entitled to occupy it, nor is laches imputable to them for not seeking partition within such time.[59] In Illinois a statute has conferred the right to partition a homestead by setting off a parcel to each of the cotenants in severalty, but it remains subject to the homestead estate,[60] and a sale cannot be made except subject to such estate unless consented to in writing.[61] In Texas, by statute, the homestead is declared not subject to partition among the heirs of the decedent during the lifetime of the widow, or so long as she may elect to use or occupy it, or so long as the guardian of the minor children may be permitted to use and occupy it under order of court. Adult children, although living on the homestead after the death of the widow, therefore, cannot prevent its partition.[62] It often happens that the persons entitled to a homestead do not own the whole of the land, as where it exceeds in value the amount which they can hold as a homestead, or their interest extends to a moiety only, leaving a moiety in some other person and not subject to the homestead claim. In the case first supposed, a proceeding may, in some of the states, be maintained to segregate from the whole property a parcel which will not exceed in value the amount the claimants are entitled to hold as a homestead.[63] In the other supposed case there can be no doubt that the owner of a moiety of real property may compel its partition, although a homestead right or estate exists in the other moiety.[64]

4. Property Subject to Agreements Not to Partition. We incline to the opinion that an agreement never to partition lands may be denied effect as unreasonable.[65] There is not, however, any doubt that cotenants may agree to postpone partition, or to hold the property without partition for some reasonable purpose, or until it can be sold to advantage, and that a party joining in such agreement and his successors in interest with notice thereof will be denied partition.[66] The agreement may be implied as well as express, and is implied when

N. E. 650; Budde *v.* Rebenack, 137 Mo. 179, 38 S. W. 910.

57. *Alabama.*— Smally *v.* Chisenhall, 108 Ala. 683, 18 So. 739.

Arkansas.— Hoback *v.* Hoback, 33 Ark. 399; Trotter *v.* Trotter, 31 Ark. 145.

Illinois.— Walker *v.* Walker, 195 Ill. 409, 63 N. E. 271.

Iowa.— Shupe *v.* Bartlett, 106 Iowa 654, 77 N. W. 455; Nicholas *v.* Purczell, 21 Iowa 265, 89 Am. Dec. 572.

Kansas.— Rowe *v.* Rowe, (1900) 60 Pac. 1049; Hafer *v.* Hafer, 33 Kan. 449, 6 Pac. 537.

Missouri.— Simpson *v.* Scroggins, 182 Mo. 560, 81 S. W. 1129.

South Dakota.— Wells *v.* Sweeney, 16 S. D. 489, 94 N. W. 394, 102 Am. St. Rep. 713.

Tennessee.— White *v.* Sharpe, 98 Tenn. 33, 39 S. W. 1051; Simpson *v.* Poe, 1 Lea 701.

Texas.— McAnulty *v.* Ellison, (Civ. App. 1903) 71 S. W. 670.

Vermont.— Keyes *v.* Hill, 30 Vt. 759.

Wisconsin.— Ullrich *v.* Ullrich, 123 Wis. 176, 101 N. W. 376; Voelz *v.* Voelz, 88 Wis. 461, 60 N. W. 707.

But in a few of the states the homestead right is a mere exemption from forced sale for the payment of debts, and the property is subject to partition. Robinson *v.* Baker, 47 Mich. 619, 11 N. W. 410; Saunders *v.* Strobel, 64 S. C. 489, 42 S. E. 429; *Ex p.* Worley, 54 S. C. 208, 32 S. E. 307, 71 Am. St. Rep. 783.

The homestead of a decedent may be partitioned in Iowa. Hild *v.* Hild, 129 Iowa 649, 106 N. W. 159, 113 Am. St. Rep. 500.

58. Bishop *v.* Pettingill, 115 Wis. 162, 91 N. W. 118, 653.

59. McAnulty *v.* Ellison, (Tex. Civ. App. 1903) 71 S. W. 670.

60. Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220; Turnage *v.* Craig, 203 Ill. 167, 67 N. E. 762.

61. Joest *v.* Adel, 209 Ill. 432, 70 N. E. 638.

62. White *v.* Small, 22 Tex. Civ. App. 318, 54 S. W. 915.

63. Wilson *v.* Illinois Trust, etc., Bank, 166 Ill. 9, 46 N. E. 740; Becker *v.* McLinn, 107 Mo. 277, 17 S. W. 819.

64. Ferguson *v.* Reed, 45 Tex. 574; King *v.* Summerville, (Tex. Civ. App. 1904) 80 S. W. 1050 [*affirmed* in 98 Tex. 332, 83 S. W. 680].

65. Mitchell *v.* Starbuck, 10 Mass. 5; Haeussler *v.* Missouri Iron Co., 110 Mo. 188, 19 S. W. 75, 33 Am. St. Rep. 431, 16 L. R. A. 220.

66. *Illinois.*— Martin *v.* Martin, 170 Ill.

the purpose for which the property was acquired must be defeated by its partition.[67] The agreement may be canceled by the parties thereto,[68] and ceases to be operative when the purposes for which it was made become impossible of accomplishment.[69] An agreement not to partition is not presumed from the fact that proceedings in partition were once instituted, but did not result in partition.[70]

E. Who May Maintain Suits For Partition — 1. The General Rule Includes Cotenants of Every Class. Subject to the limitations already stated respecting the estates which may be partitioned, suits therefor may be maintained by cotenants of every class, to wit: by coparceners, tenants in common and joint tenants,[71] but not by tenants by the entireties, nor by a husband or wife as to their community property, for with respect to property of either of the two tenancies last designated, although two persons may have equal interests in it, it is by fiction of law held in severalty, and furthermore the tenancy must continue unchanged until the marital relation terminates.[72] The fact of the cotenancy is essential; the mode of its creation immaterial.[73] The complainant's title may be

639, 48 N. E. 924, 62 Am. St. Rep. 411; Hill *v.* Reno, 112 Ill. 154, 54 Am. Rep. 222.

Michigan.— Eberts *v.* Fisher, 54 Mich. 294, 20 N. W. 80; Avery *v.* Payne, 12 Mich. 540.

Minnesota.—Roberts *v.* Wallace, 100 Minn. 359, 111 N. W. 289, 117 Am. St. Rep. 701.

New Hampshire.—Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451.

New Jersey.— Yglesias *v.* Dewey, 60 N. J. Eq. 62, 47 Atl. 59.

New York.— Brown *v.* Coddington, 72 Hun 147, 25 N. Y. Suppl. 649.

Ohio.— Jacob *v.* Fisher, 7 Ohio S. & C. Pl. Dec. 423, 5 Ohio N. P. 419.

Pennsylvania.— Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641; Breneman's Estate, 1 Lanc. L. Rev. 53.

England.— Peck *v.* Cardwell, 2 Beav. 137, 17 Eng. Ch. 137, 48 Eng. Reprint 1131.

67. Eberts *v.* Fisher, 54 Mich. 294, 20 N. W. 80; Baldwin *v.* Humphrey, 44 N. Y. 609; Latshaw's Appeal, 122 Pa. St. 142, 15 Atl. 676, 9 Am. St. Rep. 76; Brown *v.* Lutheran Church, 23 Pa. St. 495; Swoyer *v.* Schaeffer, 2 Pa. Dist. 749, 13 Pa. Co. Ct. 346; Cannon *v.* Lomax, 29 S. C. 369, 7 S. E. 529, 13 Am. St. Rep. 739, 1 L. R. A. 637.

68. Mylin *v.* King, 139 Ala. 319, 35 So. 998.

69. Bissell *v.* Peirce, 184 Ill. 60, 56 N. E. 374.

70. Miller *v.* Lanning, 211 Ill. 620, 71 N. E. 1115.

71. See *supra*, III, C, 4, b; Lester *v.* Kirtley, 83 Ark. 554, 104 S. W. 213; Noecker *v.* Wallingford, 133 Iowa 605, 111 N. W. 37; Kinkead *v.* Maxwell, 75 Kan. 50, 88 Pac. 523; Becnel's Succession, 117 La. 744, 42 So. 206; Haven *v.* Haven, 181 Mass. 573, 64 N. E. 410; Obecny *v.* Goetz, 116 N. Y. App. Div. 807, 102 N. Y. Suppl. 232; Eisner *v.* Curiel, 20 Misc. (N. Y.) 245, 45 N. Y. Suppl. 1010; Updike *v.* Adams, 22 R. I. 432, 48 Atl. 384; Le Sage *v.* Le Sage, 52 W. Va. 323, 43 S. E. 137; Bradshaw *v.* Fane, 3 Drew. 534, 2 Jur. N. S. 247, 25 L. J. Ch. 413, 4 Wkly. Rep. 422, 61 Eng. Reprint 1006

72. See *supra*, III, C, 4, c, d.

73. *Alabama.*— Trawick *v.* Davis, 85 Ala. 342, 5 So. 83.

Georgia.—Gordon *v.* McLeroy, 115 Ga. 768, 42 S. E. 68; Duncan *v.* Pope, 47 Ga. 445.

Kansas.— Sample *v.* Sample, 34 Kan. 73, 8 Pac. 248.

Louisiana.— Ingrem *v.* Ingrem, 3 Mart. N. S. 369.

Maine.— Longley *v.* Longley, 92 Me. 395, 42 Atl. 798.

Maryland.— Shipley *v.* Jacob Tome Inst., 99 Md. 520, 58 Atl. 200.

Minnesota.—Keith *v.* Mellenthin, 92 Minn. 527, 100 N. W. 366, 104 Am. St. Rep. 679.

Missouri.— Doerner *v.* Doerner, 161 Mo. 399, 61 S. W. 801.

New Jersey.— White *v.* Smith, (Ch. 1905) 60 Atl. 399; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694.

New York.— Selden *v.* Vermilya, 3 N. Y. 525.

Ohio.— Weiland *v.* Muntz, 25 Ohio Cir. Ct. 185.

Pennsylvania.— Palethorp *v.* Paletborp, 8 Pa. Dist. 135, 22 Pa. Co. Ct. 622.

South Carolina.— Charleston, etc., R. Co. *v.* Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667.

England.— O'Sullivan *v.* McSweeny, 2 C. & L. 486, 1 Drury 213.

See 38 Cent. Dig. tit. "Partition," § 83 *et seq.*

Thus plaintiff may be a woman who has acquired her moiety from her husband by descent (Longley *v.* Longley, 92 Me. 395, 42 Atl. 798); or by a decree of divorce (Keith *v.* Mellenthin, 92 Minn. 527, 100 N. W. 366, 104 Am. St. Rep. 679); or a man whose title rests on a decree for specific performance (White *v.* Smith, (N. J. Ch. 1905) 60 Atl. 399); or on a statute changing an estate tail to an estate in fee (Palethorp *v.* Palethorp, 8 Pa. Dist. 135, 22 Pa. Co. Ct. 622); or giving an after-born child not provided for in a will the same share of an estate as if the testator had died intestate (Weiland *v.* Muntz, 25 Ohio Cir. Ct. 185); or on a mortgage executed by a tenant for life and a

founded on disseizin or a purchase at a tax-sale,[74] or he may be a grantee of one of the original cotenants.[75]

2. Preliminary Demands and Other Acts. The right to partition is absolute, and dependent on the part of plaintiff only on his being a cotenant entitled to possession as such of the land sued for. Under an early Kentucky statute, a request that the other cotenants make partition and its refusal were conditions precedent to the right to sue for partition.[76] Certainly, in the absence of a statute requiring it, neither such demand or refusal is necessary.[77] If plaintiff is in sole possession, he need not surrender it nor submit to an ouster.[78] If the other cotenants have liens against the common property or his moiety, he need not first discharge them,[79] nor await the termination of a pending suit for an accounting between the cotenants.[80] What is here said does not apply to acts neeessary to ereate or complete plaintiff's title as a cotenant.[81]

reversioner, the foreclosure of which has vested plaintiff with an estate in fee (Toledo Loan Co. *v.* Larkin, 25 Ohio Cir. Ct. 209).

74. A cotenant by disseizin or tax title may of course compel partition. Ross *v.* Cobb, 48 Ill. 111; Jockheck *v.* Davies, 45 Kan. 630, 26 Pac. 36; Saco Water Power Co. *v.* Goldthwaite, 35 Me. 456.

75. See cases cited *infra*, this note.

A grantee of a cotenant.— A cotenant conveying his whole moiety terminates his right to compel partition (King *v.* Howard, 27 Mo. 21), and such right vests in his grantee (Hill *v.* Jones, 65 Ala. 214; Tindal *v.* Drake, 51 Ala. 574; Hamby Mountain Gold Mines *v.* Calhoun Land, etc., Co., 83 Ga. 311, 9 S. E. 831; Rawle's Appeal, 119 Pa. St. 100, 12 Atl. 809; Stewart's Appeal, 56 Pa. St. 241; *In re* Ragan, 7 Watts (Pa.) 438; Lockhart *v.* Power, 2 Watts (Pa.) 371; Collamer *v.* Hutchins, 27 Vt. 733). This was not true at the common law as to coparceners. Partition could be compelled against, but not by, the grantee of a coparcener. Allnatt Partition, 54, 55; Coke Litt. 174*b*, 175*a*. If, however, a parcener or her husband purchased the moiety of another parcener, partition could be enforced against the remaining parceners. Call *v.* Barker, 12 Me. 320; Colton *v.* Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375; Wotten *v.* Copeland, 7 Johns. Ch. (N. Y.) 140.

An assignee for the benefit of creditors, if his title is absolute and gives him a present right of possession, is entitled to partition if his assignor would be but for the assignment. Van Arsdale *v.* Drake, 2 Barb. (N. Y.) 599; Hortsman *v.* Ritter, 9 Ohio S. & C. Pl. Dec. 413, 6 Ohio N. P. 470.

A purchaser at an execution or judicial sale of the moiety of a cotenant must, as soon as he acquires his deed if his title is indefeasible, be entitled to partition. In some of the states such purchaser acquires a present right of possession and perhaps the legal title subject to its being divested on a redemption made by the judgment debtor. Probably during the time his title and right of possession are subject to being destroyed by such redemption, the purchaser cannot sustain partition. Newton Bank *v.* Hull, 10 Allen (Mass.) 144; Phelps *v.* Palmer, 15 Gray (Mass.) 499, 77 Am. Dec. 378.

A grantee of a specific parcel.— A conveyance by a cotenant of a specific part of the common property vests in the grantee the moiety of his grantor in the property conveyed, and entitles the grantee to such property should it be set off to him or his grantor on partition. But may the grantee himself maintain a suit for partition? As against the cotenants of the grantor, the grantee cannot compel them to submit to a partition including only the parcel in which the grantee has an interest. Sutter *v.* San Francisco, 36 Cal. 112; Markoe *v.* Wakeman, 107 Ill. 251; Duncan *v.* Sylvester, 16 Me. 388. If the decision in Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641, is maintainable, and we are not inclined to assail it, although made by a divided court, it would appear that such grantee may in equity proceed against all the cotenants and compel them to make partition of all the realty subject to the cotenancy, and in which, if otherwise equitable, the share of his grantor may be so assigned as to make good the conveyance executed by him.

76. Railey *v.* Railey, 5 B. Mon. (Ky.) 110.

77. Willard *v.* Willard, 6 Mackey (D. C.) 559; McCracken *v.* Kuhn, 73 Ind. 149; Lake *v.* Jarrett, 12 Ind. 395; Penny *v.* Weston, 4 Rob. (La.) 165.

78. Sherer *v.* Garrison, 111 Ala. 228, 19 So. 988.

79. Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Wettlaufer *v.* Ames, 133 Mich. 201, 94 N. W. 950, 103 Am. St. Rep. 449.

80. Pomeroy *v.* Pomeroy, 55 N. J. Eq. 568, 37 Atl. 754.

81. Thus the right to enter for condition broken, although it relates to a moiety only of the property, is not equivalent to a title as cotenant and will not support a suit for partition. Robbins *v.* Gleason, 47 Me. 259; Whitten *v.* Whitten, 36 N. H. 326; Bouvier *v.* Baltimore, etc., R. Co., 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750; O'Dougherty *v.* Aldrich, 5 Den. (N. Y.) 385.

The right to redeem when the title is vested in another who is entitled to possession until the redemption is made has been held not to sustain a suit for partition (Kissel *v.* Eaton, 64 Ind. 248; Reed *v.* Reed, 122 Mich. 77, 80 N. W. 996, 80 Am. St. Rep.

3. Only Cotenants Entitled to Possession. We have already shown that, except when authorized by statute, estates not in possession are not subject to partition.[82] Therefore plaintiff must show that he is a tenant in common of an estate in possession.[83] It is fatal to his suit that his interest is monetary merely, entitling him on the sale of the property to share in its proceeds,[84] or that the conveyance to him reserved the right of his grantor to remain in possession during life.[85] If plaintiff's estate is that of a trustee, he may maintain his suit if the trust gives him a right of possession.[86]

4. Laches and the Statute of Limitations as Affecting the Right. Adverse possession maintained by one cotenant against the other may create title by prescription in favor of the former and thus end the right of the latter to partition;[87] but until such prescriptive title is created, neither laches nor the statute

541), and certainly will not if the right to redeem is barred by laches (Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650).

Vendor's suit against vendee.— If one cotenant agrees to sell his moiety to the other and receives notes for the purchase-price, he must tender a deed and demand payment of the notes, and, if payment is refused, must cancel the notes before he can maintain a suit for partition. In other words, must do equity before he can obtain relief in equity. King *v.* Cooper, 134 Ill. 183, 24 N. E. 768.

82. See *supra*, III, C, 5. But if plaintiff has an estate in possession it is no longer necessary, in most of the states, that he be in actual possession, nor fatal to his suit that he is disseized. Wallace *v.* McEchron, 176 N. Y. 424, 68 N. E. 663; Weston *v.* Stoddard, 137 N. Y. 119, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624; Leidenthal *v.* Leidenthal, 121 N. Y. App. Div. 269, 105 N. Y. Suppl. 807. And see *infra*, III, E, 5.

83. *Illinois.*— Goodrich *v.* Goodrich, 219 Ill. 426, 76 N. E. 575; McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

Indiana.— Fry *v.* Hare, 166 Ind. 415, 77 N. E. 803; Schori *v.* Stephens, 62 Ind. 441.

New Hampshire.— Whitten *v.* Whitten, 36 N. H. 326.

New York.— Sullivan *v.* Sullivan, 66 N. Y. 37; Side *v.* Brenneman, 7 N. Y. App. Div. 273, 40 N. Y. Suppl. 3; Brownell *v.* Brownell, 19 Wend. 367; Striker *v.* Mott, 2 Paige 387, 22 Am. Dec. 646.

North Carolina.— Hoyle *v.* Huson, 12 N. C. 348.

Pennsylvania.— Keim's Estate, 10 Pa. Dist. 252; Sylvius' Estate, 18 Lanc. L. Rev. 92.

South Carolina.— Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885.

84. Horsfield *v.* Black, 40 N. Y. App. Div. 264, 57 N. Y. Suppl. 1006; Harris *v.* Larkins, 22 Hun (N. Y.) 488; Johnson *v.* Kite, 9 Pa. Dist. 584; Ruffell's Estate, 11 Phila. (Pa.) 46; Barton *v.* Cannon, 7 Baxt. (Tenn.) 398.

85. Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699.

86. Sis *v.* Boarman, 11 App. Cas. (D. C.) 116; Noecker *v.* Noecker, 66 Kan. 347, 71 Pac. 815; Gallie *v.* Eagle, 65 Barb. (N. Y.) 583, 1 Thomps. & C. 124.

Lessor cotenants having a right both in the reversion and in the rents reserved by the lease are usually regarded as cotenants in possession and as entitled to compel partition (Cook *v.* Webb, 19 Minn. 167; Oliver *v.* Lansing, 50 Nebr. 828, 70 N. W. 369; Woodworth *v.* Campbell, 5 Paige (N. Y.) 518; and *supra*, III, C, 5); some doubt having, however, been entertained in the case of one cotenant who has leased his moiety to another, Hunt *v.* Hazelton, 5 N. H. 216, 20 Am. Dec. 575, maintaining that he can, and Hunnewell *v.* Taylor, 6 Cush. (Mass.) 472, that he cannot sue for partition during the continuance of the lease.

Right to possession acquired pendente lite. — To the maintenance of his action it is indispensable that plaintiff's cause be perfect when he begins his suit. If a reversioner files his bill and subsequently becomes the owner of the estate in possession, or if by any means a plaintiff not entitled to possession when he commences his action acquires the right to possession during its pendency, or if, having a defeasible estate, it becomes indefeasible before the hearing, in all these cases he must fail and seek his remedy by a new action. Bannon *v.* Comegys, 69 Md. 411, 16 Atl. 129; Phelps *v.* Palmer, 15 Gray (Mass.) 499, 77 Am. Dec. 378; Hunnewell *v.* Taylor, 6 Cush. (Mass.) 472; Evans *v.* Bagshaw, L. R. 5 Ch. 340, 39 L. J. Ch. 145, 18 Wkly. Rep. 657; Atty.-Gen. *v.* Avon, 9 Jur. N. S. 1117, 2 New Rep. 564, 11 Wkly. Rep. 1050. In Vermont it is sufficient that plaintiff's title becomes perfect and indefeasible before process is served (Hawley *v.* Soper, 18 Vt. 320), and in South Carolina where the bill was prematurely filed the rights of the parties were declared with leave to them to apply for partition at a subsequent date (Cole *v.* Creyon, 1 Hill Eq. (S. C.) 311, 26 Am. Dec. 208).

87. See note to Joyce *v.* Dyer, 109 Am. St. Rep. 609; and the following cases:

Illinois.— Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Johnson *v.* Filson, 118 Ill. 219, 8 N. E. 318.

Indiana.— Waymire *v.* Waymire, 144 Ind. 329, 43 N. E. 267.

Louisiana.— Rhodes *v.* Cooper, 118 La. 299, 42 So. 943; Rhodes *v.* Cooper, 113 La. 600, 37 So. 527; Watson *v.* Barber, 105 La. 456, 29 So. 949; Rankin *v.* Bell, 2 La. Ann. 486.

Maine.— Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180; Mitchell *v.* Persons Unknown, 59

of limitations will prevent the maintenance of proceedings to compel partition.[88] When, as authorized by the laws of California, an action of partition is brought for the benefit of all persons interested in the estate, all are actors from its commencement, and limitations do not run as to any of them thereafter.[89]

5. Cotenants Entitled to Possession but in Fact Disseized — a. Of Real Property. It was never indispensable that plaintiff should be in the actual occupation of the property at the commencement of his suit or action. In contemplation of law, the possession of one cotenant is the possession of all, unless in fact held adversely, and if no one was in possession it was constructively imputed to those holding the legal title. Therefore it was never any answer to a demand for partition that the property was not in fact occupied by any person, or was occupied by a third person, or exclusively by defendants, neither having been guilty of an actual or constructive ouster of plaintiff.[90] But neither an action at law nor a suit

Me. 448; Brackett *v.* Persons Unknown, 53 Me. 228.

Massachusetts.— Rickard *v.* Rickard, 13 Pick. 251.

Mississippi.— Thames *v.* Mangum, 87 Miss. 575, 40 So. 327.

New York.— Clapp *v.* Bromagham, 9 Cow. 530.

North Carolina.— Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Virginia.— Stranghan *v.* Wright, 4 Rand. 493.

88. *Alabama.*— Jellerson *v.* Pettus, 132 Ala. 671, 32 So. 663.

California.—Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

Illinois.— Brumback *v.* Brumback, 198 Ill. 66, 64 N. E. 741.

Indiana.— Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; English *v.* Powell, 119 Ind. 93, 21 N. E. 458; Jenkins *v.* Dalton, 27 Ind. 78.

Iowa.— Stern *v.* Selleck, (1907) 111 N. W. 451; Zunkel *v.* Colson, 109 Iowa 695, 81 N. W. 175.

Kansas.— Hamilton *v.* Redden, 44 Kan. 193, 24 Pac. 76.

Maryland.— Lloyd *v.* Gordon, 2 Harr. & M. 254.

Mississippi.—Millsaps *v.* Shotwell, 76 Miss. 923, 25 So. 359.

New York.— Collins *v.* Collins, 131 N. Y. 648, 30 N. E. 863; Dresser *v.* Travis, 39 Misc. 358, 79 N. Y. Suppl. 924 [*affirmed* in 87 N. Y. App. Div. 632, 84 N. Y. Suppl. 1124].

Pennsylvania.— Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

West Virginia.— Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

See 38 Cent. Dig. tit. "Partition," § 111 *et seq.*

There are, we must admit, some recent decisions that seem not in harmony with our text, and to maintain that a suit in partition may be defeated by the plaintiff's laches. Lester *v.* Kirtley, 83 Ark. 554, 104 S. W. 213; Warner *v.* Hamill, 134 Iowa 279, 111 N. W. 939.

The statute of limitations, of course, can neither be creating title by prescription nor operating against the right to sue for partition while the cotenant's right to possess the property or maintain the action is for some reason suspended, as where by its devise he was required to become a temperate and prudent man, and so remain for five years. Millsaps *v.* Shotwell, 76 Miss. 923, 25 So. 359.

The statute applicable is that relating to suits for the recovery of real property; and where complainant's title is dependent on a patent, the statute does not run until the patent issues. The section of the code barring actions "for relief not otherwise provided for" after the lapse of four years does not apply to suits for partition. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

But in Illinois, where a complainant claimed to be a cotenant on the ground that a will giving the land to defendant was obtained by fraud and undue influence, it was held that the statute relating to bills in chancery to contest wills controlled, and that the application for partition must be within three years after the probate of the will. Keister *v.* Keister, 178 Ill. 103, 52 N. E. 946.

89. Adams *v.* Hopkins, (Cal. 1902) 69 Pac. 228.

90. *Arkansas.*— London *v.* Overby, 40 Ark. 155; Byers *v.* Danley, 27 Ark. 77.

California.— Noce *v.* Daveggio, (1884) 4 Pac. 495.

Indiana.— Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Foust *v.* Moorman, 2 Ind. 17.

Kentucky.— Hughes *v.* Bent, 118 Ky. 609, 81 S. W. 931, 26 Ky. L. Rep. 453; Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440, 19 Ky. L. Rep. 59; Talbott *v.* Owen, 93 S. W. 658, 29 Ky. L. Rep. 550.

Massachusetts.— Wood *v.* Le Baron, 8 Cush. 471; Fisher *v.* Dewerson, 3 Metc. 544; Liscomb *v.* Root, 8 Pick. 376.

Michigan.— Hoffman *v.* Beard, 22 Mich. 59.

Missouri.— O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8; Wommack *v.* Whitmore, 58 Mo. 448; Lambert *v.* Blumenthal, 26 Mo. 471.

New Hampshire.— Miller *v.* Dennett, 6 N. H. 109.

New York.— Beebee *v.* Griffing, 14 N. Y. 235; Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269 [*affirmed* in

in equity for partition was intended as a substitute for ejectment, and plaintiff, in the absence of some statute to the contrary, must fail if shown to be disseized, irrespective of whether the adverse possession is that of another cotenant,[91] or of an entire stranger to the cotenancy.[92] The common-law and chancery rule upon this subject is gradually disappearing under the influence of the state statutes controlling the subject and the code system committing jurisdiction of actions at law and suits in equity to the same court. Hence, in many of the states, all issues respecting title and possession may be tried and determined in the same proceeding for partition, and therefore, if plaintiff has a right of possession, he may suc-

166 N. Y. 590, 59 N. E. 1118]; Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794; Howell *v.* Mills, 7 Lans. 193 [*affirmed* in 56 N. Y. 226].

Pennsylvania.— Bellas *v.* Graham, 3 Am. L. J. 64.

Vermont.— Hawley *v.* Soper, 18 Vt. 320.

Wisconsin.— Morgan *v.* Mueller, 107 Wis. 241, 83 N. W. 313; Morse *v.* Stockman, 65 Wis. 36, 26 N. W. 176.

United States.—Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63; Lamb *v.* Starr, 14 Fed. Cas. No. 8,021, Deady 350.

See 38 Cent. Dig. tit. "Partition," § 63.

One may be estopped to resist partition on the ground that he is in adverse possession of property, as where he acquired title under a will purporting to give him title to the whole property, but which, because of statutory provisions, vests him with title to a moiety only, in which event he cannot claim any further right than that which the will gave him.

91. See *infra*, III, L, 2; and the following cases:

Arkansas.— Criscoe *v.* Hambrick, 47 Ark. 235, 1 S. W. 150; London *v.* Overby, 40 Ark. 155.

Connecticut.— Harrison *v.* International Silver Co., 78 Conn. 417, 62 Atl. 342; Adam *v.* Ames Iron Co., 24 Conn. 230.

Kansas.— Denton *v.* Fyfe, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272.

Maine.— Pierce *v.* Rollins, 83 Me. 172, 22 Atl. 110.

Missouri.— Chamberlain *v.* Waples, 193 Mo. 96, 91 S. W. 934; Forder *v.* Davis, 38 Mo. 107; Rozier *v.* Johnson, 35 Mo. 326; Gravier *v.* Ivory, 34 Mo. 522.

New York.— Van Schuyver *v.* Mulford, 59 N. Y. 426; Florence *v.* Hopkins, 46 N. Y. 182; Howarth *v.* Howarth, 67 N. Y. App. Div. 354, 73 N. Y. Suppl. 785; Burhans *v.* Burhans, 2 Barb. Ch. 398.

North Carolina.— Ramsay *v.* Bell, 38 N. C. 209, 42 Am. Dec. 163; Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Pennsylvania.— McMasters *v.* Carothers, 1 Pa. St. 324; Wall's Estate, 24 Pa. Co. Ct. 560; Carey *v.* Schaller, 10 Kulp 71.

South Carolina.—Albergottie *v.* Chaplin, 10 Rich. Eq. 428.

Vermont.— Brock *v.* Eastman, 28 Vt. 658, 67 Am. Dec. 733.

United States.— Carlson *v.* Sullivan, 146 Fed. 476, 77 C. C. A. 32; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225.

England.— Moore *v.* Kempston, 18 Wkly. Rep. 803.

Canada.— Hopkins *v.* Hopkins, 9 Ont. Pr. 71.

See 38 Cent. Dig. tit. "Partition," § 64 *et seq.*

But in Kansas one cotenant disseized by another may file a complaint containing two counts, one in the nature of ejectment, and the other for partition, and recover judgment on both counts and for both classes of relief. Denton *v.* Fyfe, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272.

92. *Arkansas.*— Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672; Eagle *v.* Franklin, 71 Ark. 544, 75 S. W. 1093; Head *v.* Phillips, 70 Ark. 432, 68 S. W. 878; Moore *v.* Gordon, 44 Ark. 334; Byers *v.* Danley, 27 Ark. 77.

Florida.— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Mattair *v.* Payne, 15 Fla. 682.

Kansas.— Chandler *v.* Richardson, 65 Kan. 152, 69 Pac. 168.

Maryland.— Savary *v.* Da Camara, 60 Md. 139.

Massachusetts.— Barnard *v.* Pope, 14 Mass. 434, 7 Am. Dec. 225; Bonner *v.* Proprietors Kennebeck Purchase, 7 Mass. 475.

Michigan.— Fenton *v.* Mackinac Cir. Judge, 76 Mich. 405, 43 N. W. 437; Hoffman *v.* Beard, 22 Mich. 59.

Mississippi.— Spight *v.* Waldron, 51 Miss. 356; Price *v.* Crone, 44 Miss. 571; Shearer *v.* Winston, 33 Miss. 149.

Missouri.— Chamberlain *v.* Waples, 193 Mo. 96, 91 S. W. 934; Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886.

Nebraska.— McMurtry *v.* Keifner, 36 Nebr. 522, 54 N. W. 844; Seymour *v.* Ricketts, 21 Nebr. 240, 31 N. W. 781.

New Jersey.— Ellis *v.* Feist, 65 N. J. Eq. 548, 56 Atl. 369.

New York.— Holder *v.* Holder, 40 N. Y. App. Div. 255, 59 N. Y. Suppl. 204; Satterlee *v.* Kobbe, 39 N. Y. App. Div. 420, 57 N. Y. Suppl. 341; Mersereau *v.* Camp, 42 Misc. 253, 86 N. Y. Suppl. 568 [*affirmed* in 92 N. Y. App. Div. 616, 86 N. Y. Suppl. 1141]; Damron *v.* Campion, 24 Misc. 234, 53 N. Y. Suppl. 543; O'Dougherty *v.* Aldrich, 5 Den. 385; Matthewson *v.* Johnson, Hoffm. 559.

Oregon.— Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741; Windsor *v.* Simpkins, 19 Oreg. 117, 23 Pac. 669.

Pennsylvania.— Carey *v.* Schaller, 10 Kulp 71.

South Carolina.— Witherspoon *v.* Dunlap,

ceed notwithstanding he was disseized when he began his suit.[93] In Kansas he must insert two counts in his complaint, in one of which he must disclose the adverse possession.[94] In West Virginia, and apparently in Alabama, he may proceed against his cotenants in adverse possession and everyone acquiring possession under them, but cannot bring before the court one in possession claiming adversely and in severalty and whose claim and possession cannot be in any way connected with any of the cotenants nor with the title owned in common.[95]

b. Of Personal Property. No action lies by one cotenant against another to recover possession of the personal property of the cotenancy. Hence the cotenant

Harp. 390; Albergottie *v.* Chaplin, 10 Rich. Eq. 428.

South Dakota.— Wells *v.* Sweeney, 16 S. D. 489, 94 N. W. 394, 102 Am. St. Rep. 713.

Tennessee.— Dean *v.* Snelling, 2 Heisk. 484; Trayner *v.* Brooks, 4 Hayw. 295.

Virginia.— Preston *v.* Virginia Min. Co., (1907) 57 S. E. 651.

United States.— Bearden *v.* Benner, 120 Fed. 690; Sanders *v.* Devereux, 60 Fed. 311, 8 C. C. A. 629.

93. *Alabama.*— Brown *v.* Hunter, 121 Ala. 210, 25 So. 924; Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67.

California.— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268; Martin *v.* Walker, 58 Cal. 590; Bollo *v.* Navarro, 33 Cal. 459; Morenhout *v.* Higuera, 32 Cal. 289.

Florida.— Girtman *v.* Starbuck, 48 Fla. 265, 37 So. 731; Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Street *v.* Benner, 20 Fla. 700.

Illinois.— Glos *v.* Carlin, 207 Ill. 192, 69 N. E. 928; Mott *v.* Danville Seminary, 129 Ill. 403, 21 N. E. 927; Gage *v.* Reid, 104 Ill. 509; Gage *v.* Lightburn, 93 Ill. 248; Howey *v.* Goings, 13 Ill. 95, 54 Am. Dec. 427.

Indiana.— Millikan *v.* Patterson, 91 Ind. 515; Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Foust *v.* Moorman, 2 Ind. 17; Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865.

Kansas.— Chandler *v.* Richardson, 65 Kan. 152, 69 Pac. 168; Denton *v.* Fyfe, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272; Scarborough *v.* Smith, 18 Kan. 399.

Kentucky.— Overton *v.* Woolfolk, 6 Dana 371; Shackelford *v.* Williams, 51 S. W. 614, 21 Ky. L. Rep. 422; Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544.

Maine.— Call *v.* Barker, 12 Me. 320; Baylies *v.* Bussey, 5 Me. 153.

Massachusetts.—Wood *v.* Le Baron, 8 Cush. 471; Marshall *v.* Crehore, 13 Metc. 462.

Minnesota.— Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805; Cook *v.* Webb, 19 Minn. 167.

Mississippi.— Claughton *v.* Claughton, 70 Miss. 384, 12 So. 340.

Missouri.— Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630; Hart *v.* Steedman, 98 Mo. 452, 11 S. W. 993.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Phillips *v.* Dorris, 56 Nebr. 293, 76 N. W. 555.

New Hampshire.—Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 413; Miller *v.* Dennett, 6 N. H. 109.

New York.— Wallace *v.* McEchron, 176 N. Y. 424, 68 N. E. 663; Weston *v.* Stoddard, 137 N. Y. 119, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624; Leidenthal *v.* Leidenthal, 121 N. Y. App. Div. 269, 105 N. Y. Suppl. 807; Place *v.* Kennedy, 89 N. Y. App. Div. 167, 85 N. Y. Suppl. 766 [*affirmed* in 188 N. Y. 590, 81 N. E. 1173]; Drake *v.* Drake, 61 N. Y. App. Div. 1, 70 N. Y. Suppl. 163; Wallace *v.* Curtis, 29 Misc. 415, 61 N. Y. Suppl. 994 [*reversed* on other grounds in 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543].

North Carolina.— Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Cox *v.* Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381; Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Harris *v.* Wright, 118 N. C. 422, 24 S. E. 751; Goodman *v.* Sapp, 102 N. C. 477, 9 S. E. 483; Purvis *v.* Wilson, 50 N. C. 22, 69 Am. Dec. 773.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Perry *v.* Richardson, 27 Ohio St. 110; Tabler *v.* Wiseman, 2 Ohio St. 207.

South Carolina.— Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298; Carrigan *v.* Evans, 31 S. C. 262, 9 S. E. 852.

Virginia.— Moon *v.* Highland Development Co., 104 Va. 551, 52 S. E. 209; Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Fry *v.* Payne, 82 Va. 759, 1 S. E. 197; Davis *v.* Tebbs, 81 Va. 600.

Washington.— Chapman *v.* Allen, 11 Wash. 627, 40 Pac. 219; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144.

West Virginia.— Smith *v.* Vineyard, 58 W. Va. 98, 51 S. E. 871; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216; Davis *v.* Seattle, 43 W. Va. 17, 26 S. E. 557; Moore *v.* Harper, 27 W. Va. 362; Hudson *v.* Putney, 14 W. Va. 561.

Wisconsin.— O'Hearn *v.* O'Hearn, 114 Wis. 428, 90 N. W. 450, 58 L. R. A. 105; Tobin *v.* Tobin, 45 Wis. 298.

See 38 Cent. Dig. tit. "Partition," § 63.

94. Chandler *v.* Richardson, 65 Kan. 152, 69 Pac. 168.

95. Harrison *v.* Taylor, 111 Ala. 317, 19 So. 986; Davis *v.* Bingham, 111 Ala. 292, 18 So. 660; Sherer *v.* Garrison, 111 Ala. 228, 19 So. 988; Hillens *v.* Brinsfield, 108 Ala. 605, 18 So. 604; Kilgore *v.* Kilgore, 103 Ala. 614, 15 So. 897; Bullock *v.* Knox, 96 Ala. 195, 11 So. 339; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863; Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694.

against whom possession is held, although adversely, has always been permitted to maintain a suit against his cotenant for partition.[96] When the property was held adversely by a stranger to the cotenancy, it was probably necessary for the cotenants to recover possession before either could maintain partition.[97]

c. Where Equity Otherwise Has Jurisdiction and Proceeds to Grant Complete Relief. When jurisdiction in equity once attaches, it will be made effectual for the purposes of complete relief. Therefore, if a complainant goes into equity and there establishes an equitable cause of action entitling him to relief, and it further appears that he and defendant are cotenants of the property respecting which the relief is established, the court may proceed to partition the same, although the party demanding the partition was disseized at the commencement of the suit.[98] Hence, where complainant relies on an equitable title, and it would therefore be impossible for him to recover in ejectment, his suit in chancery will be sustained, although he was disseized when it was begun.[99]

6. Cotenants Holding Legal Titles Only — a. The General Rule. Where a cotenant holds a legal title merely, the equitable ownership being wholly in another, the right of the former to partition depends on whether he has a present right of possession. If so, he may maintain an action or suit for partition.

b. Mortgagees. By the common law, mortgagees were vested with the legal title, but not with a right of immediate possession. The right of mortgagees to maintain partition may be considered with reference: (1) To those cases in which two or more persons are mortgagees and undertake to compel a partition which will affect only their interest as mortgagees; and (2) to those cases in which, a cotenant having executed a mortgage, his mortgagee undertakes to compel a partition which will include an estate equivalent to that held by the mortgagor before the mortgage. In the case first supposed, the partition must be denied, if for no other reason, because, as against the mortgagor, the indebtedness to secure which the mortgage was given cannot be split into fragments, nor can his right of redemption be thus divided.[1] In cases of the second class partition has been ordered;[2] but it is believed that this position, if ever maintainable, has been judicially abandoned.[3]

c. Holders of Conveyances Taken as Security. A conveyance absolute on its face, but taken to secure the payment of a debt or the performance of some other obligation, is a mortgage merely, and hence the persons named as grantees are not entitled to partition.[4]

d. Trustees. A trustee holding a moiety of lands as such may sue for and compel partition if he holds an estate in possession and the partition will not be in contravention of the trust.[5] It is not essential that the *cestuis que trustent*

96. Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247; Smith *v.* Dunn, 27 Ala. 315; Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417; Godfrey *v.* White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Edwards *v.* Bennett, 32 N. C. 361.

97. Drew *v.* Clemmons, 55 N. C. 312; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358. See apparently *contra*, Edwards *v.* Bennett, 32 N. C. 361.

98. James *v.* Groff, 157 Mo. 402, 57 S. W. 1081; Dameron *v.* Jameson, 71 Mo. 97; Rozier *v.* Griffith, 31 Mo. 171; Bacon *v.* Fay, 63 N. J. Eq. 411, 51 Atl. 797; Scott *v.* Guernsey, 60 Barb. (N. Y.) 163 [*affirmed* in 48 N. Y. 106]; Hosford *v.* Merwin, 5 Barb. (N. Y.) 51.

99. McMath *v.* De Bardelaben, 75 Ala. 68; Hankins *v.* Layne, 48 Ark. 544, 3 S. W. 821; Overton *v.* Woolfolk, 6 Dana (Ky.) 371; Dameron *v.* Jameson, 71 Mo. 97; Hosford *v.* Merwin, 5 Barb. (N. Y.) 51.

1. Ewer *v.* Hobbs, 5 Metc. (Mass.) 1, where there were three mortgagees, and entry had been made for condition broken.

2. Rich *v.* Lord, 18 Pick. (Mass.) 322; Munroe *v.* Walbridge, 2 Aik. (Vt.) 410.

3. Norcross *v.* Norcross, 105 Mass. 265; Mulligan *v.* Hendershott, 17 Ont. Pr. 227.

4. Marx *v.* La Rocque, 27 Oreg. 45, 39 Pac. 401.

It has been suggested in Georgia that the holder of such a deed may compel partition with the concurrence of the grantor, but not in opposition to the latter's wishes. Welch *v.* Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380.

5. Phelps *v.* Townsley, 10 Allen (Mass.) 554; Smith *v.* Gaines, 38 N. J. Eq. 65 [*reversed* on other grounds in 39 N. J. Eq. 545]; Gallie *v.* Eagle, 65 Barb. (N. Y.) 583,

be made parties to the proceeding.[6] There are, however, many trusts which do not give the trustee such an absolute right or present interest as entitles him to compel partition. The common practice of conveying property to a trustee as security for the payment of a debt or the performance of some other obligation equitably puts him in the position of a mortgagee, and neither confers on him, nor on him and the creditor combined, the power to compel partition;[7] but if the trust relates to personal property only, the trustee may, after condition broken, maintain a proceeding for partition.[8]

7. Cotenants Holding an Equitable Title Only — a. General Rule. At law the insuperable difficulty to granting a partition to the holder of an equitable title lies in the fact that courts of law, for most purposes, refuse to recognize or consider any but the legal title. In courts of chancery this difficulty does not exist, nor does it interpose any sufficient objection to the proceeding authorized by statute in most of the states. The true test for determining whether the holder of an equitable title may compel partition should, and we think does, depend on whether he has a present right of possession. If he has, he may maintain partition.[9] A claimant relying on an equitable title should allege its true character and not rely upon a purely legal interest.[10]

b. Mortgagors. Even at law a mortgagor, at least before entry for condition broken, is regarded as the owner and entitled to the possession of the property. He may therefore compel partition thereof if he is a cotenant.[11] In those states where a mortgage conveys the legal title and is held by a cotenant of the mortgagor, the right of the latter to partition against the former has generally been denied.[12] If a mortgagee has entered for condition broken, the mortgagor ceases to have either possession or the immediate right to possession, and cannot compel partition.[13]

1 Thomps. & C. 124; Paine *v.* Sackett, 27 R. I. 300, 61 Atl. 753.

6. Simpson *v.* Denny, 10 Ch. D. 28, 27 Wkly. Rep. 280; Stace *v.* Gage, 8 Ch. D. 451, 47 L. J. Ch. 608, 38 L. T. Rep. N. S. 843, 26 Wkly. Rep. 605.

7. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Keefer *v.* McKay, 29 Grant Ch. (U. C.) 162.

Where a trust deed was given to secure a debt, the trustee was held to be a necessary party in Conrad *v.* Fuller, 98 Va. 16, 34 S. E. 893.

8. Porter *v.* Stone, 70 Miss. 291, 12 So. 208.

9. *Alabama.*— Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

California.— Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082; Watson *v.* Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

Illinois.— Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; Bissell *v.* Peirce, 184 Ill. 60, 56 N. E. 374.

Maine.— Call *v.* Barker, 12 Me. 320.

Missouri.— Welch *v.* Anderson, 28 Mo. 293.

Nevada.— Crosier *v.* McLaughlin, 1 Nev. 348.

New Jersey.— Sailer *v.* Sailer, 41 N. J. Eq. 398, 5 Atl. 319.

New York.— Herbert *v.* Smith, 6 Lans. 493; Hitchcock *v.* Skinner, Hoffm. 21.

Ohio.— Byers *v.* Wackman, 16 Ohio St. 440.

Pennsylvania.— Hanna *v.* Clark, 189 Pa. St. 321, 41 Atl. 981; Hayes' Appeal, 123 Pa. St. 110, 16 Atl. 600; Longwell *v.* Bentley, 23 Pa. St. 99; Willing *v.* Brown, 7 Serg & R. 467.

Tennessee.— Burks *v.* Burks, 7 Baxt. 353.

United States.— Royston *v.* Miller, 76 Fed. 50.

10. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

If the proceeding is strictly at law, it cannot of course be maintained on an equitable title. Williams *v.* Wiggand, 53 Ill. 233; Coale *v.* Barney, 1 Gill & J. (Md.) 324; Morrison *v.* Balkins, 6 Ohio Dec. (Reprint) 882, 8 Am. L. Rec. 577; Hopkins *v.* Toel, 4 Humphr. (Tenn.) 46; Miller *v.* Warmington, 1 Jac. & W. 484, 21 Rev. Rep. 217, 37 Eng. Reprint 452. But see Swan *v.* Swan, 8 Price 518, 22 Rev. Rep. 770.

11. *Louisiana.*— Bienvenu *v.* Factors', etc., Ins. Co., 33 La. Ann. 209.

Maine.— Upham *v.* Bradley, 17 Me. 423; Call *v.* Barker, 12 Me. 320.

Massachusetts.— Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375.

New York.— Reid *v.* Gardner, 65 N. Y. 578; Wotten *v.* Copeland, 7 Johns. Ch. 140.

Rhode Island.— Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466.

12. Blodgett *v.* Hildreth, 8 Allen (Mass.) 186; Bradley *v.* Fuller, 23 Pick. (Mass.) 1; Yglesias *v.* Dewey, 60 N. J. Eq. 62, 47 Atl. 59; Gibbs *v.* Haydon, 47 L. T. Rep. N. S. 184, 30 Wkly. Rep. 726.

13. Call *v.* Barker, 12 Me. 320; O'Brien *v.* Bailey, 163 Mass. 325, 39 N. E. 1109.

The later decisions in England leave doubt upon the right of mortgagors to partition.

c. Cestuis Que Trustent. We have already shown that partition may be compelled by one holding an equitable title only. From this it follows that one who is a *cestui que trust* in the sense that the legal title is held for his benefit, so that he is entitled to a conveyance thereof, or, without such conveyance, is entitled to possession as though he were the owner of the legal as well as the equitable title, may compel partition. But the fact that one is a beneficiary under a trust, although it relates to a moiety of realty only, or is one of several persons equally entitled to share in the advantages of a trust under which real property is held in severalty, by no means entitles him to a partition. He cannot, by suing for partition, put an end to an active trust or otherwise thwart its lawful purposes, nor usurp the functions of the trustee, nor control a discretion vested in him by the terms of the trust or necessarily implied therefrom.[14]

8. Persons Under Disability — a. Married Women. At law a married woman who was a cotenant with her husband could not sue him for partition.[15] She probably can under the married women's acts in this country, especially if the proceeding is in equity.[16] Where she is a cotenant with others, she may sue for partition. Usually her husband should be joined with her, because the statutes in many of the states require such joinder or give him an interest in the property which would make ineffectual, or at least imperfect, any partition to which he was not a party.[17] In England, if a suit in behalf of a married woman seeks a sale of the property, a request for a sale made by her counsel is not sufficient. It must be made in writing, signed by her, and probably it must appear that she was separately examined.[18]

b. Infants. A minor cotenant must, upon principle, be regarded as entitled to partition under the same circumstances as an adult; but, because of his minority, he may be regarded as incompetent to determine whether he desires a partition, and if a suit is brought on his behalf, it must necessarily be by his next friend or guardian, as in other cases. It was once decided in Missouri that a suit for partition on behalf of an infant would not be entertained,[19] but the decision was soon overruled.[20] There is, we believe, now no denial of the right of an infant coten-

In Watkins *v.* Williams, 21 L. J. Ch. 601, it was held that tenants in common who were plaintiffs in a suit to redeem were not entitled in such suit against the will of the mortgagee, to a partition. In Waite *v.* Bingley, 21 Ch. D. 674, 51 L. J. Ch. 651, 30 Wkly. Rep. 698, it was said that a tenant in common of realty subject to a mortgage in fee could not by obtaining an assignment of such mortgage and taking possession under it take away the right of the cotenant to a decree for sale, subject to the encumbrance. But in Sinclair *v.* James, [1894] 3 Ch. 554, 63 L. J. Ch. 873, 71 L. T. Rep. N. S. 483, 8 Reports 637, it was determined that a mortgagor cotenant cannot maintain a suit for partition against his cotenants, until he has redeemed the encumbrance or his share. In this case, however, the mortgage appears to have been of the entirety and hence, on partition, it could not have attached separately to the different allotments, but must have been enforceable in the same manner as if partition had not been attempted.

14. Mason *v.* Mason, 219 Ill. 609, 76 N. E. 692; Story *v.* Palmer, 46 N. J. Eq. 1, 18 Atl. 363; Harris *v.* Larkins, 22 Hun (N. Y.) 488; McLean *v.* McLean, 21 N. Y. Suppl. 326; Thebaud *v.* Schermerhorn, 10 Abb. N. Cas. (N. Y.) 72; Kirchner's Estate, 24 Pittsb. Leg. J. N. S. (Pa.) 469.

15. Howe *v.* Blanden, 21 Vt. 315.

But after divorce she may sue her late husband to partition land, a moiety of which she acquired from him. Keith *v.* Mellenthin, 92 Minn. 527, 100 N. W. 366, 104 Am. St. Rep. 679.

16. Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466.

17. Spring *v.* Sandford, 7 Paige (N. Y.) 550.

18. Grange *v.* White, 18 Ch. D. 612, 50 L. J. Ch. 620, 45 L. T. Rep. N. S. 128, 29 Wkly. Rep. 713; Leigh *v.* Edwards, 42 L. J. Ch. 892. These decisions overrule Crookes *v.* Whitworth, 10 Ch. D. 289, 39 L. T. Rep. N. S. 348, 27 Wkly. Rep. 149.

19. Johnson *v.* Noble, 24 Mo. 252.

Similar views were expressed in Davidson *v.* Bowden, 5 Sneed (Tenn.) 129, but the question was not necessarily involved.

In New York it was also declared at an early day that all petitioners for partition must be adults (Postley *v.* Kain, 4 Sandf. Ch. 508), and that proceedings in the name of a minor were *coram non judice* and void (Gallatian *v.* Cunningham, 8 Cow. 361), although it was said an adult husband might file a bill in chancery for partition of his wife's lands in her name, although she was an infant (Sears *v.* Hyer, 1 Paige 483).

20. Thornton *v.* Thornton, 27 Mo. 302, 72 Am. Dec. 266.

ant to sue for and compel partition.[21] The suit, if the infant has no guardian, may be instituted on his behalf by his next friend,[22] or by a guardian *ad litem*.[23] If he has a guardian of his estate, the institution of the suit falls within the duties and powers of guardianship;[24] but an infant cannot appear in such suit as plaintiff by attorney.[25] In Indiana the action may be brought by the guardian in his own name.[26] Doubtless a court may refuse to grant partition on application made by, or on behalf of, an infant, because not, in the judgment of the court, for his best interest.[27] In New York the commencement of the suit must first be authorized in writing by the surrogate, who is forbidden to grant such authority "unless satisfied by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action."[28] Probably the commencement of an action by a disqualified guardian,[29] or without first obtaining an order from the court, is not fatal to the action, if a qualified guardian is appointed, or a proper order of court procured during the pendency of the action.[30] At chancery it was necessary to the vesting of a complete legal title that conveyances should be executed by the several cotenants conforming to the partition decreed. Such conveyance an infant party could not make. The difficulty was met by decreeing that the title of the parties be quieted to their respective allotments, and that the conveyances be respected until plaintiff came of age,[31] or by declaring the minors trustees of the portions not allotted to them,[32] or, in the event of partition by sale, by declaring the minors to be trustees for the purchaser and appointing a next friend to convey their shares to such purchaser.[33]

c. **Lunatics.** Proceedings by lunatics to compel partition have been infrequent. There is no reason, however, for not applying the rules applicable to infants,[34] and permitting such action to be brought by a next friend when no guardian has been appointed, and by the guardian after his appointment.[35] Where a husband signed his own and his wife's name to a petition for a partition by sale, without disclosing the fact of her insanity, it was held that the proceedings and sale resulting therefrom were void as against her.[36]

9. **Executors and Administrators.** By the common law executors and administrators acquired a qualified title to the personal property of the decedent, and,

21. Shull *v.* Kennon, 12 Ind. 34; Hooke *v.* Hooke, 6 La. 472; Burks *v.* Burks, 7 Baxt. (Tenn.) 353; Davis *v.* Ingram, [1897] 1 Ch. 477, 66 L. J. Ch. 386, 45 Wkly. Rep. 459. But see Brown *v.* Brown, 9 Ont. Pr. 245.

22. Freeman *v.* Freeman, 9 Heisk. (Tenn.) 301.

23. Towsey *v.* Harrison, 25 How. Pr. (N. Y.) 266.

24. *Indiana.*—Pulse *v.* Osborn, (App. 1901) 60 N. E. 374.

Kentucky.— Richardson *v.* Parrott, 7 B. Mon. 379.

Mississippi.— Tate *v.* Bush, 62 Miss. 145.

Ohio.— Goudy *v.* Shank, 8 Ohio 415.

Virginia.— Zirkle *v.* McCue, 26 Gratt. 517. See 38 Cent. Dig. tit. "Partition," § 85.

25. Thornton *v.* Thornton, 27 Mo. 302, 72 Am. Dec. 266.

26. Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Pulse *v.* Osborn, (Ind. App. 1901) 60 N. E. 473.

27. Miller *v.* Lanning, 211 Ill. 620, 71 N. E. 1115; Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Hartmann *v.* Hartmann, 59 Ill. 103; Tomkins *v.* Miller, (N. J. Ch. 1893) 27 Atl. 484; Pitman *v.* England, (Tenn. Ch. App. 1898) 46 S. W. 464.

28. N. Y. Code Civ. Proc. § 1534; Thompson *v.* Hart, 169 N. Y. 571, 61 N. E. 1135; Clark *v.* Clark, 14 Abb. Pr. (N. Y.) 299, 21 How. Pr. 479; Struppman *v.* Muller, 52 How. Pr. (N. Y.) 211. It is said in Struppman *v.* Muller, *supra*, that prior to the enactment of the statute of 1852, an infant could not maintain an action for partition at all in that state.

29. Weiland *v.* Muntz, 25 Ohio Cir. Ct. 185.

30. Pearsall *v.* Rosebrook, 42 Misc. (N. Y.) 10, 85 N. Y. Suppl. 526.

31. Brook *v.* Hertford, 2 P. Wms. 518, 24 Eng. Reprint 843.

32. St. Leger *v.* Ferguson, 10 Ir. Ch. 488.

33. Davis *v.* Ingram, [1897] 1 Ch. 477, 66 L. J. Ch. 386, 45 Wkly. Rep. 459.

34. Hollingworth *v.* Sidebottom, 7 L. J. Ch. 2, 8 Sim. 620, 8 Eng. Ch. 620, 59 Eng. Reprint 246.

35. West *v.* West, 90 Ala. 458, 7 So. 830; Tate *v.* Bush, 62 Miss. 145; Porter *v.* Porter, 37 Ch. D. 420, 58 L. T. Rep. N. S. 688, 26 Wkly. Rep. 580 [*distinguishing*, if not *overruling*, Halfhide *v.* Robinson, L. R. 9 Ch. 373, 43 L. J. Ch. 398, 30 L. T. Rep. N. S. 216, 22 Wkly. Rep. 448]; Watt *v.* Leach, 26 Wkly. Rep. 475.

36. Stephens *v.* Porter, 11 Heisk. (Tenn.) 341.

when his interest therein was that of a cotenant, must have been authorized to compel partition. As to real property, neither at the common law nor under any statute does an executor or administrator take any title, although in many of the states they are entitled to possession during the pendency of the administration. Neither can compel partition,[37] in the absence of a statute authorizing it. But in Louisiana, if the deceased was in community or partnership with any one who has survived him, it is the duty of the administrator to compel partition.[38] In New Jersey executors vested with a power of sale are by statute given the right to maintain suits for partition, but the right is lost if the power of sale terminates before the suit is brought.[39]

10. Heirs and Devisees During Pendency of Administration. Both at common law and, so far as we are aware, under the various American statutes, the real property of a decedent vests at his death in his heirs and devisees, who ordinarily become cotenants thereof. It is nevertheless subject to be taken to satisfy his debts if necessary, and sometimes the executor is entitled to possession and to the rents and profits during the pendency of the administration, or at least until it can be known that the realty will not be required for any of the purposes of administration. Heirs or devisees may seek partition: (1) When the decedent was an owner in severalty and the cotenancy commenced with and resulted from his death; or (2) when the decedent was in his lifetime the owner of a moiety only, and defendants in the suit, or some of them, do not claim title under him. If partition can be maintained in either of these cases, it is clearly subject to the contingency of the destruction or impairment of the purchaser's title if the property is found to be required to satisfy the decedent's debts or the expenses of administration. Furthermore, any court assuming jurisdiction of the proceeding for partition must undertake to determine to whom the estate of the decedent has passed either by inheritance or devise, and this is a question jurisdiction over which is confided in some of the states only to the court having jurisdiction of his estate, and is not to be exercised until that estate is fully settled, and the time has expired within which a contest of his will may be made. It must be confessed that these considerations have not been sufficiently potent, in most of the states, to overcome what is often spoken of as the absolute right of a cotenant to partition.[40] In a few of the states the settlement of the estate of the decedent seems to be a

37. Whitlock *v.* Willard, 18 Fla. 156; Nason *v.* Willard, 2 Mass. 478; Wood *v.* Bryant, 68 Miss. 198, 8 So. 518; Phillips *v.* Dorris, 56 Nebr. 293, 76 N. W. 555.

But it is said that an administrator, where he has authority to lease real estate, may join with the heir in a petition for partition. Harkins *v.* Pope, 10 Ala. 493.

38. Wilson *v.* Wilson, 107 La. 139, 31 So. 643; Dumestre's Succession, 42 La. Ann. 411, 7 So. 624.

39. Walsh *v.* Dunn, (N. J. Ch. 1900) 46 Atl. 592.

40. *Illinois.*— Fischer *v.* Butz, 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160; Watke *v.* Stine, 214 Ill. 563, 73 N. E. 793; Hall *v.* Gabbert, 213 Ill. 208, 72 N. E. 806 [*explaining* Wachter *v.* Doerr, 210 Ill. 242, 71 N. E. 401].

Iowa.— Smith *v.* Smith, 132 Iowa 700, 109 N. W. 194, 119 Am. St. Rep. 581.

Kansas.— O'Keefe *v.* Behrens, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. N. S. 354; Raynsford *v.* Holman, 68 Kan. 813, 74 Pac. 1128; Sample *v.* Sample, 34 Kan. 73, 8 Pac. 248.

Kentucky.— Wise *v.* Wolf, 120 Ky. 263, 85 S. W. 1191, 27 Ky. L. Rep. 610.

Louisiana.— Carrollton Land, etc., Co. *v.* Eureka Homestead Soc., 119 La. 692, 44 So. 434.

Maine.— Longley *v.* Longley, 92 Me. 395, 42 Atl. 798; Chenery *v.* Dole, 39 Me. 162.

Massachusetts.— O'Brien *v.* Mahoney, 179 Mass. 200, 60 N. E. 493, 88 Am. St. Rep. 371.

Michigan.— Campau *v.* Campau, 19 Mich. 116.

Mississippi.— Garrett *v.* Colvin, 77 Miss. 408, 26 So. 963.

Missouri.— Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Robertson *v.* Brown, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485; Spratt *v.* Lawson, 176 Mo. 175, 75 S. W. 642; O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8; Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920; Wommack *v.* Whitmore, 58 Mo. 448; Rhorer *v.* Brockhage, 15 Mo. App. 16.

New Hampshire.— Kelly *v.* Kelly, 41 N. H. 501.

New Jersey.— Simpson *v.* Straughen, (Ch. 1890) 19 Atl. 667.

New York.— Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234; Fischer *v.* Langlotz, 114 N. Y. App. Div. 903, 100 N. Y. Suppl. 578; Hayden *v.* Sugden, 48 Misc. 108, 96 N. Y. Suppl. 681; Reubel *v.* Reubel, 47 Misc.

condition precedent to its partition,[41] while in others the application for partition can only be made within a time specified after the death of the decedent or after the grant of letters testamentary or of administration.[42] In several others, while it cannot be said that the pendency of administration and the possibility of the property being required to pay the debts of the decedent constitute a bar to partition, still the right is not so absolute that the court may not delay its final action,[43] or take other proceedings necessary to safeguard the rights of parties or of purchasers.[44]

11. TENANTS FOR LIFE OR YEARS. We have already shown that an estate for life or for years, if it entitles the cotenants thereof to possession, is the subject of compulsory partition.[45] It follows therefore that a tenant either for life or for years may compel a partition.[46] In the absence of some statute to the contrary, the partition does not include any estate greater than the complainant's. Thus, he may have an estate for life or years, and defendants, or some of them, may have an estate in fee, in which case, while he is entitled to partition against them,[47] it does not affect their estate beyond the term of life or years belonging to plaintiff.[48] In some of the states, however, a tenant for life may, in proceedings for partition, bring the remainder-men, reversioners, and all parties having any interest in the premises before the court, and if partition cannot be made without great prejudice otherwise than by sale, he is entitled to a decree of sale under which the purchaser will become an owner in fee as well as in severalty.[49] The estate

474, 95 N. Y. Suppl. 966; Waring *v.* Waring, 7 Abb. Pr. 472.

Pennsylvania.— *In re* Reifsnyder, 214 Pa. St. 637, 63 Atl. 1075; Yeany *v.* Sheedy, 11 Pa. Dist. 747; Breen's Estate, 11 Pa. Dist. 745; Casa's Estate, 7 Pa. Dist. 678, 21 Pa. Co. Ct. 600; Myer's Estate, 25 Pa. Co. Ct. 235, 15 York Leg. Rec. 59.

Wisconsin.— Hinman *v.* Hinman, 126 Wis. 191, 105 N. W. 788.

Wyoming.— Field *v.* Leiter, (1907) 90 Pac. 378, 92 Pac. 622.

41. *Connecticut.*— Beecher *v.* Beecher, 43 Conn. 556.

Iowa.— Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693.

Louisiana.— Landry's Succession, 117 La. 193, 41 So. 490; Clark's Succession, 30 La. Ann. 801.

Nebraska.— Alexander *v.* Alexander, 26 Nebr. 68, 41 N. W. 1065.

New Jersey.— Adams *v.* Beideman, 33 N. J. Eq. 77.

South Carolina.— Williams *v.* Mallory, 33 S. C. 601, 11 S. E. 1068.

42. Fryman *v.* Fryman, 9 Ohio Cir. Ct. 91, 6 Ohio Cir. Dec. 377; Schneider *v.* Cordesman, 10 Ohio S. & C. Pl. Dec. 571, 8 Ohio N. P. 99; Smith *v.* Montag, 1 Ohio S. & C. Pl. Dec. 224, 32 Cinc. L. Bul. 153; *In re* Keim, 201 Pa. St. 609, 51 Atl. 337; Theilacker's Estate, 12 Pa. Dist. 230, 28 Pa. Co. Ct. 368; Breen's Estate, 11 Pa. Dist. 745; Darlington's Estate, 9 Del. Co. 583; Marcy's Estate, 9 Kulp (Pa.) 128; *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949; Williams *v.* Mallory, 33 S. C. 601, 11 S. E. 1068; Grant *v.* Grant, 9 Ont. Pr. 211.

43. Clarity *v.* Sheridan, 91 Iowa 304, 59 N. W. 52; Snyder *v.* Snyder, 75 Iowa 255, 39 N. W. 297; Garrison *v.* Cox, 99 N. C. 478, 6 S. E. 124.

44. *Nebraska.*— Schick *v.* Whitcomb, 68 Nebr. 784, 94 N. W. 1023; Reckewey *v.* Waltemath, 28 Nebr. 492, 44 N. W. 659.

New York.— Jouffret *v.* Loppin, 20 N. Y. App. Div. 455, 46 N. Y. Suppl. 810; Matter of Dusenbury, 34 Misc. 666, 70 N. Y. Suppl. 725.

Ohio.— Schneider *v.* Cordesman, 10 Ohio S. & C. Pl. Dec. 571, 8 Ohio N. P. 99.

Rhode Island.— Trowbridge *v.* Caulkins, 17 R. I. 580, 23 Atl. 1102; Hendry *v.* Hollingdrake, 16 R. I. 477, 17 Atl. 50.

Texas.— Hyatt *v.* Venters, 41 Tex. 285; Robb *v.* Robb, (Civ. App. 1897) 41 S. W. 92; Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532.

45. See *supra*, III, C, 4, e.

46. *Indiana.*— Hawkins *v.* McDougal, 125 Ind. 597, 25 N. E. 807.

Missouri.— Cowden *v.* Cairns, 28 Mo. 471.

New York.— Tilton *v.* Vail, 42 Hun 638; Ackley *v.* Dygert, 33 Barb. 176; Van Arsdale *v.* Drake, 2 Barb. 599.

Pennsylvania.—Himelspark's Estate, 8 Pa. Dist. 183; Caughey *v.* Harrar, 21 Lanc. L. Rev. 353.

England.— Gaskell *v.* Gaskell, 6 Sim. 643, 9 Eng. Ch. 643, 58 Eng. Reprint 735; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

Canada.— Lalor *v.* Lalor, 9 Ont. Pr. 455.

See 38 Cent. Dig. tit. "Partition," § 46 *et seq.*

47. Mussey *v.* Sanborn, 15 Mass. 155; McEachern *v.* Gilchrist, 75 N. C. 196; Palethorp *v.* Palethorp, 194 Pa. St. 408, 45 Atl. 322; Caldwell *v.* Snyder, 178 Pa. St. 420, 35 Atl. 996, 35 L. R. A. 198; Duke *v.* Hague, 107 Pa. St. 57; Tieman *v.* Baker, 63 Tex. 641.

48. Malone *v* Conn, 95 Ky. 93, 23 S. W. 677, 15 Ky. L. Rep. 421; Black *v.* Washington, 65 Miss. 60, 3 So. 140.

49. Fitts *v.* Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; McQueen *v.* Turner,

for life need not be for the life of the complainant. It may be for the life of another,[50] or so long as the complainant may remain a widow or unmarried.[51]

12. Tenants by the Curtesy. A tenant by the curtesy, either initiate or consummate, of a moiety of lands necessarily falls within the rule that partition may be compelled by a tenant for life.[52] N. Y. Code Civ. Proc. § 1538, declares that "no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action." The obscurity in the report and opinion in Reed v. Reed,[53] warranted the conclusion that it had been conceded in that case that a tenant by the curtesy was neither a joint tenant nor a tenant in common, and hence could not be plaintiff in partition; but it is probable in that case that plaintiff, instead of being a tenant of a moiety, was a tenant in severalty, in which event there could be no doubt of his inability to compel partition.[54]

13. Widows of Deceased Cotenants. Where the common-law rule prevails entitling the widow to dower in lands of which her husband was seized during the marriage, she appears not to be entitled to maintain a suit for partition after his death, irrespective of whether he was a tenant in severalty or of a moiety only.[55] If a widow is by statute given a moiety in the lands of her deceased husband, although "in lieu of dower," or he devises a moiety to her, she becomes on his death a tenant in common with his other heirs, and, as such entitled to partition.[56] Although she is by statute prohibited during a subsequent coverture from alienating lands inherited from her former husband, she may enforce partition thereof.[57]

14. Aliens. An alien cotenant may maintain a suit for partition, although, because of his alienage, he is not entitled to hold real property should the state object,[58] or his interest therein will terminate unless within three years he exercises his power to sell it.[59]

15. Holders of Contingent and Uncertain Interests. In North Carolina, although plaintiff is in possession and entitled to the possession of a moiety of the property, he will be denied partition if his estate is held subject to contingencies to occur in the future rendering it impossible for the court to determine who may become entitled after plaintiff's death or after some other future event.[60] These considerations may doubtless influence the action of the court in its final judg-

91 Ala. 273, 8 So. 863; Gayle *v.* Johnson, 80 Ala. 395; Shaw *v.* Beers, 84 Ind. 528; Jenkins *v.* Fahey, 73 N. Y. 355; O'Toole *v.* O'Toole, 39 N. Y. App. Div. 302, 56 N. Y. Suppl. 963.

50. Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426.

51. Gillespie *v.* Allison, 115 N. C. 542, 20 S. E. 627; Hobson *v.* Sherwood, 4 Beav. 184, 49 Eng. Reprint 309.

A sole tenant for life cannot compel partition against remainder-men who hold their estate in cotenancy. Fiskin *v.* Ife, 28 Ont. 595.

52. Weise *v.* Welsh, 30 N. J. Eq. 431; Tilton *v.* Vail, 42 Hun (N. Y.) 638; Bender *v.* Van Allen, 28 Misc. (N. Y.) 304, 59 N. Y. Suppl. 885; Riker *v.* Darke, 4 Edw. (N. Y.) 668; Otley *v.* McAlpine, 2 Gratt. (Va.) 340.

53. Reed *v.* Reed, 107 N. Y. 545, 14 N. E. 442, 28 N. Y. Wkly. Dig. 26 [*affirming* 46 Hun 212, 13 N. Y. Civ. Proc. 109, 27 N. Y. Wkly. Dig. 244].

54. Tilton *v.* Vail, 53 Hun (N. Y.) 324, 6 N. Y. Suppl. 146.

55. See *supra*, III, C, 3, a; and the following cases:

Delaware.— *Ex p.* Burgess, 1 Del. Ch. 233.

Indiana.— Kissel *v.* Eaton, 64 Ind. 248.

Nebraska.— Hurste *v.* Hotaling, 20 Nebr. 178, 29 N. W. 299.

New Jersey.— Bleecker *v.* Hennion, 23 N. J. Eq. 123.

New York.— Coles *v.* Coles, 15 Johns. 159, 8 Am. Dec. 231; Wood *v.* Clute, 1 Sandf. Ch. 199.

England.— Hobson *v.* Sherwood, 4 Beav. 184, 49 Eng. Reprint 309.

Canada.— Fram *v.* Fram, 12 Ont. Pr. 185; Devereux *v.* Kearns, 11 Ont. Pr. 452.

The obscure opinion in Palethorp *v.* Palethorp, 168 Pa. St. 102, 31 Atl. 917, leaves us in doubt whether it was intended to affirm that a dowress might maintain proceedings for partition in Pennsylvania.

56. Sears *v.* Sears, 121 Mass. 267; Chouteau *v.* Paul, 3 Mo. 260; Steel's Appeal, 86 Pa. St. 222.

57. Mickels *v.* Ellsesser, 149 Ind. 415, 49 N. E. 373.

58. Hall *v.* Hall, 13 Hun (N. Y.) 306 [*affirmed* in 81 N. Y. 130]; Nolan *v.* Command, 11 N. Y. Civ. Proc. 295.

59. Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90.

60. Simpson *v.* Wallace, 83 N. C. 477; Justice *v.* Guion, 76 N. C. 442; Williams *v.* Has-

ment or decree, but we believe they do not justify it in refusing to entertain the proceeding nor in denying such relief as may seem proper under the circumstances.[61]

16. Joinder of Applicants. There is no doubt that two or more persons, each of whom might separately maintain a proceeding for partition, may properly be joined as plaintiffs therein.[62] Nor do we see any impropriety in joining with a plaintiff entitled by himself to maintain the action other persons who, although they could not by themselves compel a partition, are necessary or proper parties defendant because they have some interest or lien which may be affected by the final judgment, and their presence in court is necessary to vest a complete title in the purchaser or allottees.[63] It is true there are courts wherein this view does not prevail and which will not permit the joining as plaintiff of one who could not by himself have maintained the action,[64] and especially object to the joinder of persons whose interests may be adverse or conflicting.[65] If several persons entitled to compel partition may join as complainants, why may not all such persons? It is true this proceeding might result in the anomaly of a suit or action in which there was no defendant, and this has been thought a sufficient reason for refusing to entertain it.[66] The reason, being purely technical, seems unworthy of serious consideration, and has been overruled whenever recently presented for judicial consideration.[67]

F. Of Parties Defendant, and the Persons Bound by the Partition — 1. The Effect of Omitting a Necessary Party. It is of the utmost importance that plaintiff make parties defendant all persons necessary to a complete and final partition of the estate or interest sought to be partitioned. If he does not do so, the court, whenever its attention is called to the defect, will either refuse plaintiff relief, or suspend the proceedings until the necessary parties are brought in.[68] If it does not do so and the non-joinder appears by the record, so that an appellate court may take cognizance of it, it will reverse the judgment, whether the atten-

sell, 73 N. C. 174, 74 N. C. 434; Grissom *v.* Parish, 62 N. C. 330; Watson *v.* Watson, 56 N. C. 400.

61. Patterson *v.* Earhart, 6 Ohio S. & C. Pl. Dec. 16, 29 Cinc. L. Bul. 313; Sill *v.* Blaney, 159 Pa. St. 264, 28 Atl. 251.

62. Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; Upham *v.* Bradley, 17 Me. 423; Chouteau *v.* Paul, 3 Mo. 260; Ladd *v.* Perley, 18 N. H. 395.

63. Thus an administrator may be joined with an heir (Harkins *v.* Pope, 10 Ala. 493), an executor with a devisee (Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446), a widow with an heir (Chouteau *v.* Paul, 3 Mo. 260), a remainder-man with a life-tenant (Sikemeier *v.* Galvin, 124 Mo. 367, 27 S. W. 551), or a wife having an inchoate right of dower with her husband (Foster *v.* Foster, 38 Hun (N. Y.) 365; Ripple *v.* Gilborn, 8 How. Pr. (N. Y.) 456).

64. Wood *v.* Bryant, 68 Miss. 198, 8 So. 518; Mark *v.* Mark, 9 Watts (Pa.) 410; Lockhart *v.* Power, 2 Watts (Pa.) 371.

65. Struppman *v.* Muller, 52 How. Pr. (N. Y.) 211.

66. Winthrop *v.* Minot, 9 Cush. (Mass.) 405; Swett *v.* Bussey, 7 Mass. 503; Bompart *v.* Roderman, 24 Mo. 385; *Ex p.* Robinson, (Mich. T. 2 Vict.) R. & J. Dig. 2656; *In re* Usher, 1 U. C. Q. B. 527; *In re* Eastwood, 1 U. C. Q. B. 3.

67. Waugh *v.* Blumenthal, 28 Mo. 462; Geer *v.* Geer, 109 N. C. 679, 14 S. E. 297; Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Blagge *v.* Shaw, (Tex. Civ. App. 1897) 41 S. W. 756.

68. *Delaware.*— Candy *v.* Stradley, 1 Del. Ch. 113.

Kentucky.— Kendrick *v.* Kendrick, 4 J. J. Marsh. 241.

Louisiana.— Miguez *v.* Delahoussaye, 25 La. Ann. 531; Rightor *v.* De Lizardi, 4 La. Ann. 260; Willey *v.* Carter, 4 La. Ann. 56.

Maine.— Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180.

Michigan.—Benedict *v.* Beurmann, 90 Mich. 396, 51 N. W. 461.

Missouri.— Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; Hiles *v.* Rule, 121 Mo. 248, 25 S. W. 959; Estes *v.* Nell, 108 Mo. 172, 18 S. W. 1006.

New York.— Burhans *v.* Burhans, 2 Barb. Ch. 398.

Ohio.— Barr *v.* Chapman, 5 Ohio Cir. Ct. 69, 3 Ohio Cir. Dec. 36.

Texas.— Black *v.* Black, 95 Tex. 627, 69 S. W. 65; McKinney *v.* Moore, 73 Tex. 470, 11 S. W. 493; De la Vega *v.* League, 64 Tex. 205; Franklin *v.* Moss, (Civ. App. 1901) 64 S. W. 786; Curtis *v.* Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129; Davis *v.* Loessin, (Civ. App. 1894) 26 S. W. 923.

United States.— Barney *v.* Baltimore, 6 Wall. 280, 18 L. ed. 825; Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330.

England.— Dodds *v.* Gronow, 20 L. T. Rep. N. S. 104, 17 Wkly. Rep. 511.

See 38 Cent. Dig. tit. "Partition," § 137.

tion of the trial court was called to the defect or not;[69] and the judgment, although never reversed or otherwise vacated, cannot affect the title of any party omitted therefrom, and he, notwithstanding the attempted partition, may assert his title or interest against any allottee or purchaser.[70]

2. The General Rule as to Parties Defendant. A suit for partition is but a compulsory method of acquiring title in severalty to the property subject thereto, which, without such suit, might have been acquired by voluntary conveyances and releases. The only safe course for plaintiff to pursue is to ascertain from what persons he would desire conveyances and releases, if he were not proceeding by suit, and, having so ascertained, to make them all parties defendant.[71] And if relief in addition to partition is sought, it may be necessary to include the parties required to make that relief effective, even though no conveyance or release from them is essential to vesting an unencumbered title in fee in the allottee or purchaser.[72]

3. Persons Interested in the Property in Different Capacities. A person may hold interests in the same realty in two or more capacities, in which event a judgment against him in one capacity does not bind him in the other. If, holding under distinct trusts in favor of different persons, he is made a defendant, one only of the trusts being disclosed by the pleadings, he is not affected by the judgment in so far as the other trust is involved.[73] Therefore, if any party is inter-

69. Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Wachter *v.* Doerr, 210 Ill. 242, 71 N. E. 401; Holloway *v.* McIlhenny Co., 77 Tex. 657, 14 S. W. 240.

70. *Alabama.*— Caperton *v.* Hall, 118 Ala. 265, 24 So. 122; Gayle *v.* Johnston, 80 Ala. 395.

Iowa.— Parkhill *v.* Doggett, (1907) 112 N. W. 189; Furenes *v.* Severtson, 102 Iowa 322, 71 N. W. 196.

New York.— Moore *v.* Appleby, 108 N. Y. 237, 15 N. E. 377 [*affirming* 36 Hun 368]; Skillin *v.* Central Trust Co., 80 N. Y. App. Div. 206, 80 N. Y. Suppl. 188; Campbell *v.* Stokes, 66 Hun 381, 21 N. Y. Suppl. 493 [*affirmed* in 142 N. Y. 23, 36 N. E. 811]; O'Connor *v.* McMahon, 54 Hun 66, 7 N. Y. Suppl. 225.

North Carolina.— Hall *v.* Want, 61 N. C. 502.

Pennsylvania.— Perrine *v.* Kohr, 205 Pa. St. 602, 55 Atl. 790.

Tennessee.— Glasscock *v.* Tate, 107 Tenn. 486, 64 S. W. 715.

Texas.— Black *v.* Black, 95 Tex. 627, 69 S. W. 65.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

England.— Atkinson *v.* Holtby, 10 H. L. Cas. 313, 11 Eng. Reprint 1047.

Canada.— Hurtubsie *v.* Stamford, 5 Quebec Pr. 151.

71. *Alabama.*— Ferris *v.* Montgomery Land, etc., Co., 94 Ala. 557, 1 So. 607, 33 Am. St. Rep. 146.

Florida.— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

Georgia.— Vason *v.* Clanton, 102 Ga. 540, 29 S. E. 456; Jones *v.* Napier, 93 Ga. 582, 20 S. E. 41.

Illinois.— Kester *v.* Stark, 19 Ill. 328.

Indiana.— Milligan *v.* Poole, 35 Ind. 64.

Kentucky.— Borah *v.* Archers, 7 Dana 176.

Louisiana.— Gibbs *v.* Jackson, 47 La. Ann. 766, 17 So. 291; Ware *v.* Vignes, 35 La. Ann. 288; Rightor *v.* De Lizardi, 4 La. Ann. 260.

Maine.— Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180; Tilton *v.* Palmer, 31 Me. 486.

Mississippi.— Moore *v.* Summerville, 80 Miss. 323, 31 So. 793, 32 So. 294; Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167.

Missouri.— McGregor *v.* Hampton, 70 Mo. App. 98.

New York.— Campbell *v.* Stokes, 142 N. Y. 23, 36 N. E. 811 [*affirming* 66 Hun 381, 21 N. Y. Suppl. 493]; Skillin *v.* Central Trust Co., 80 N. Y. App. Div. 206, 80 N. Y. Suppl. 188; Booth *v.* Fordham, 73 N. Y. App. Div. 109, 76 N. Y. Suppl. 664; Schwencke *v.* Haffner, 18 N. Y. App. Div. 182, 45 N. Y. Suppl. 937; Letson *v.* Evans, 33 Misc. 437, 68 N. Y. Suppl. 421.

Pennsylvania.— Stickles *v.* Oviatt, 212 Pa. St. 219, 61 Atl. 908.

Texas.— Smith *v.* Brown, 66 Tex. 543, 1 S. W. 573; Stark *v.* Carroll, 66 Tex. 393, 1 S. W. 188; Johns *v.* Northcutt, 49 Tex. 444; Buffalo Bayou Ship Channel Co. *v.* Bruly, 45 Tex. 6; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694; Keith *v.* Keith, (Civ. App. 1905) 87 S. W. 384; Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

West Virginia.— Oneal *v.* Stimson, 61 W. Va. 551, 56 S. E. 889.

Wisconsin.— Morse *v.* Stockman, 65 Wis. 36, 26 N. W. 176.

The fact that a defendant is an alien who has not declared his intention to become a citizen will not prevent the maintenance of the action against him. Nolan *v.* Command, 11 N. Y. Civ. Proc. 295.

72. Wilson *v.* Holt, 85 Ala. 95, 4 So. 625; Datt's Estate, 17 Pittsb. Leg. J. N. S. 349; Portis *v.* Hill, 14 Tex. 69. 65 Am. Dec. 99; Monro *v.* Toronto R. Co., 5 Ont. L. Rep. 483.

73. Numsen *v.* Lyon, 87 Md. 31, 39 Atl. 533.

ested in different capacities, he must be made a party in each capacity; but this is probably accomplished when he is merely once named as a party in the caption of the complaint, if it fully discloses the title to the property and its allegations therefore show fully every capacity in which he holds or is interested.[74]

4. The Limitations of the Parties Defendant to the Estate Sought to Be Partitioned — a. The General Rule. If the estate sought to be partitioned is less than the fee, it is of course not necessary to make any person a party defendant whose title or interest does not relate to such estate.[75] An exception to this rule has been held to exist when the owners of the equitable title seek partition thereof, in which event, it was said, they must make the holders of the legal title parties defendant.[76]

b. Trustees and Beneficiaries. If any estate or interest in the property sought to be partitioned is held by one person in trust for another, there is no doubt that both are proper parties defendant.[77] There are apparently exceptional circumstances in which the one or the other, while a proper, is not a necessary, party.[78] If trustees who have never acted as such put in a disclaimer, it is said that the court may proceed, where the beneficiaries are already before it, to make the partition without first appointing new trustees.[79] But as a general rule, if there is any case in which a trustee or his *cestui que trust* may safely be omitted as a party, it must be one where he has no substantial interest in, or control over, the property, and to hold him bound by the judgment could not deprive him of any substantial right, or by any possibility thwart any purpose of the trust. In a court of equity "the *cestui que trust* is regarded as the owner of the property, and his own representative in reference thereto. He is there separate and distinct from the trustee, and, in a sense, the adversary of the latter. He prosecutes and defends his own interests, and shapes, through the decrees of the court, the conduct of the trustee. Hence, unless there be something special in the terms of the trust, which confers upon the trustee the power and duty to represent in courts of equity the beneficial interest; unless a power of attorney, so to speak, is conferred upon him to represent these interests, in those forums, a decree in equity affecting the trust estate, rendered against the trustee, in the absence of the *cestui que trust*, is not binding on the latter."[80] These general principles relating to the law of judgments seem equally applicable to judgments and decrees in partition,[81] unless it can be truly affirmed that the alleged *cestui que trust* has no interest in the property,[82] or unless the proceeding is purely at law, where the equitable title of the beneficiary cannot be recognized, in which event, although he cannot be made a party, he is not bound by the judgment, unless in the exceptional case described above, when the trustee must be deemed to have power to represent both. It is not essential that one be designated as a trustee in the proceedings, if he is made a party and his interest correctly disclosed therein.[83]

74. Diehl *v.* Lambart, 9 N. Y. Civ. Proc. 267.

75. Canfield *v.* Ford, 28 Barb. (N. Y.) 336.

76. Hunter *v.* Brown, 7 B. Mon. (Ky.) 283.

77. *Georgia.*— Welch *v.* Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380.
Maryland.— Numsen *v.* Lyon, 87 Md. 31, 39 Atl. 533.
Missouri.— Reinhardt *v.* Wendeck, 40 Mo. 577.
New Jersey.— Mackey *v.* Mackey, (Ch. 1906) 63 Atl. 984.
New York.— Evans *v.* Ogsbury, 2 N. Y. App. Div. 556, 37 N. Y. Suppl. 1104.
Pennsylvania.— Reid *v.* Clendenning, 193 Pa. St. 406, 44 Atl. 500.

78. Welch *v.* Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380; Braker *v.* Devereaux, 8 Paige (N. Y.) 513; Stace *v.* Gage, 8 Ch. D. 451, 47 L. J. Ch. 608, 38 L. T. Rep. N. S. 843, 26 Wkly. Rep. 605.

79. King *v.* Donnelly, 5 Paige (N. Y.) 46.

80. Lebeck *v.* Ft. Payne Bank, 115 Ala. 447, 22 So. 75, 67 Am. St. Rep. 51, opinion of the court by Head, J.

81. Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265; Numsen *v.* Lyon, 87 Md. 31, 39 Atl. 533; Miller *v.* Wright, 109 N. Y. 194, 16 N. E. 205.

82. Eisner *v.* Curiel, 2 N. Y. App. Div. 522, 37 N. Y. Suppl. 1119.

83. Reid *v.* Clendenning, 29 Pittsb. Leg. J. N. S. (Pa.) 396.

5. Adverse Claimants. Independently of some statute authorizing it, a person claiming adversely to plaintiff and the cotenancy is not a proper party defendant,[84] nor can he intervene in the proceeding.[85] But the statutes of many of the states permit plaintiff to make a party defendant any one who claims any interest, whether adversely to plaintiff or not, and the proceeding, in addition to partitioning the property, operates to quiet the title against all the parties thereto.[86] Such claimants are not, however, necessary parties. If omitted, they are not bound by the judgment, but a defendant cannot insist with success that the proceeding is defective for want of necessary parties and must hence be stayed until they are brought in.[87] Therefore it is never a sufficient answer to a suit in partition that one not a party thereto claims an interest in the property, unless it further appears that such claim is well founded,[88] although the claimant is in possession as a trespasser,[89] or has a *prima facie* title which it is necessary to rebut by proving fraud in the conveyance to him.[90] But an outstanding adverse title, if paramount, defeats the partition, if held by one not a party to the suit, although the allegations of the complaint and answer unite in averring title in plaintiff and defendant.

6. Disseizors. The remarks made in the preceding section are equally applicable to persons holding adverse possession of the property, but in fact having otherwise no right therein. They may in many of the states be made parties defendant and compelled to present and litigate their claim. In such states they are proper, but not necessary, parties defendant unless their possession has ripened into title by prescription.[92]

7. Owners of Estates Not in Possession. Ordinarily estates not in possession are not subject to partition, but this rule has been changed in some of the states, and whenever the purpose of the proceeding is to affect estates in reversion or remainder, and such purpose is susceptible of accomplishment under the statutes of the state, all persons interested in the reversion or remainder must be made parties.[93] Where the interest is contingent or uncertain, there are decisions indicating that the holder thereof need not be made a party defendant;[94] but we apprehend that this position is not maintainable.[95]

84. Tilton *v.* Palmer, 31 Me. 486; Nugent *v.* Powell, 63 Miss. 99.

85. Hillens *v.* Brinsfield, 113 Ala. 304, 21 So. 208.

86. Morenhout *v.* Higuera, 32 Cal. 289; McIntire *v.* McIntire, 82 Ky. 502; Townsend *v.* Bogert, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835; Lawrence *v.* Norton, 116 N. Y. App. Div. 896, 102 N. Y. Suppl. 481; Wallace *v.* Curtis, 29 Misc. (N. Y.) 415, 61 N. Y. Suppl. 994 [*reversed* on other grounds in 53 N. Y. App. Div. 41]; Spliess *v.* Meyer, 13 N. Y. Suppl. 70; and *supra*, III, E, 5, a, b; *infra*, III, L, 2, b.

87. Dresser *v.* Travis, 177 N. Y. 371, 69 N. E. 734; Quinn *v.* Fidelity Title, etc., Co., 31 Pittsb. Leg. J. N. S. (Pa.) 85; Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164; Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

88. Reed *v.* Reed, 80 S. W. 520, 25 Ky. L. Rep. 2324; Monarque *v.* Monarque, 19 Hun (N. Y.) 332 [*reversed* on other grounds in 80 N. Y. 320]; Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164; Cooper *v.* Hepburn, 15 Gratt. (Va.) 551.

89. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

90. Hawley *v.* Soper, 18 Vt. 320.

91. Goldman *v.* Millay, 7 Ariz. 285, 64 Pac. 433.

Whether an adverse claimant may, in those states where he is a proper party defendant, but has been omitted, have himself brought before the court in any way and thereby compel a determination of his claim is doubtful. That he can is denied in McIntire *v.* McIntire, 82 Ky. 502, and affirmed in De la Vega *v.* League, 64 Tex. 205. It may be, however, that he is, in contemplation of law, a party under the general designation of unknown owners. If so he has the absolute right to appear and defend. Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552. It is perhaps superfluous to state that an adverse claimant not made a party is not affected by the judgment. Hall *v.* Caperton, 87 Ala. 285, 6 So. 388.

92. Tilton *v.* Palmer, 31 Me. 486.

93. *Alabama.*— Ramey *v.* Green, 18 Ala. 771.

Indiana.— Tower *v.* Tower, 141 Ind. 223, 40 N. E. 747.

New York.— Jenkins *v.* Fahey, 73 N. Y. 355; Levy *v.* Levy, 79 Hun 290, 29 N. Y. Suppl. 384; Moore *v.* Appleby, 36 Hun 368 [*affirmed* in 108 N. Y. 237, 15 N. E. 377].

North Carolina.— Bell *v.* Adams, 81 N. C. 118.

England.— Kelly *v.* Shelton, 1 Jones Exch. 555, 2 Jones Exch. 351.

94. Collins *v.* Crawford, (Mo. 1907) 103 S. W. 537; Smith's Estate, 2 Del. Co. (Pa.) 423; Thomas *v.* Poole, 19 S. C. 323.

95. Paget *v.* Melcher, 42 N. Y. App. Div.

8. PERSONS NOT IN BEING. Persons not in being when the suit is brought, of course, cannot be named as parties defendant, and, in so far as they can be bound by the judgment, it must be because someone before the court may be regarded as representing them. Who may be so regarded is a question in dispute. Unquestionably if some person is brought before the court having an estate of inheritance, he may be representative not only of his own interests, but further of the interests of all who may claim after his death. If, however, there is no such person, then the tenant for life may be brought before the court and treated as the representative of all persons who may, by their subsequent birth, acquire interests in the estate.[96] On the other hand are decisions in effect denying that the life-tenant represents persons not yet *in esse*, and making partition impossible when none but the life-tenants are before the court,[97] for unless the person entitled to represent the interest of persons not *in esse* is a party to the suit, the judgment, confessedly, cannot bind them when they do come into being.[98] In England, if the person otherwise to be regarded as representing persons not in being has a seizin liable to be defeated by a conditional limitation or an executory devise, he cannot be deemed their representative.[99] This exception has been repudiated in New York.[1] In that state, however, it is essential in addition to the person not *in esse* being represented by the holder of the requisite antecedent estate that the court shall by its decree recognize and make some order for the protection of the interests of the person not in being.[2] This in effect makes jurisdiction depend on the action of the court rather than upon its having acquired power to act. Whether a child *en ventre sa mere* can be regarded as not *in esse*, so as to come within the foregoing rules, must be regarded as subject to serious doubt. The decisions of the state courts, while perhaps they have not agreed upon the grounds on which their conclusions rested, have uniformly, so far as we are aware, maintained that a child *en ventre sa mere* when an action was begun or a judgment pronounced was not bound by such judgment on its subsequent birth alive. If so, a judgment in partition to which an heir *en ventre sa mere* is not a party cannot be affected by such judgment.[3] On the other hand the supreme court of the United States, in the only case decided by it bearing directly upon the subject, sustained a partition sale as against a child *en ventre sa mere*, on the ground that it was represented by its mother and sisters, who were parties to the action.[4] But a recent case in North Carolina dissents from this view, on the ground that the mother, brothers, and sisters are necessarily adverse parties, and therefore incom-

76, 58 N. Y. Suppl. 913; Donahue *v.* Fackler, 21 W. Va. 124; Plano Mfg. Co. *v.* Kindschi, 131 Wis. 590, 111 N. W. 680.

96. *Georgia.*— Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562.

Missouri.— Sparks *v.* Clay, 185 Mo. 393, 84 S. W. 40; Reinders *v.* Koppelmann, 68 Mo. 482, 30 Am. Rep. 802.

New York.—Brevoort *v.* Brevoort, 70 N. Y. 136; Clemens *v.* Clemens, 37 N. Y. 59; Mead *v.* Mitchell, 17 N. Y. 210, 72 Am. Dec. 455 [*affirming* 5 Abb. Pr. 92]; Cheeseman *v.* Thorne, 1 Edw. 629.

Tennessee.— Freeman *v.* Freeman, 9 Heisk. 301.

Virginia.— Carneal *v.* Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819; Faulkner *v.* Davis, 18 Gratt. 651, 98 Am. Dec. 698; Baylor *v.* Dejarnette, 13 Gratt. 152.

England.— Giffard *v.* Hort, 1 Sch. & Lef. 407; Leonard *v.* Sussex, 2 Vern. Ch. 526, 23 Eng. Reprint 940; Finch *v.* Finch, 2 Ves. 492, 28 Eng. Reprint 315; Wills *v.* Slade, 6 Ves. Jr. 498, 31 Eng. Reprint 1163.

97. Downin *v.* Sprecher, 35 Md. 474; Overman *v.* Sims, 96 N. C. 451, 2 S. E. 372; *Ex p.* Miller, 90 N. C. 625; *In re* Dodd, 62 N. C. 97; Read *v.* Fite, 8 Humphr. (Tenn.) 328.

98. Whitesides *v.* Cooper, 115 N. C. 570, 20 S. E. 295.

99. Goodess *v.* Williams, 7 Jur. 1123, 2 Y. & Coll. 595, 21 Eng. Ch. 595, 63 Eng. Reprint 266.

1. Mead *v.* Mitchell, 17 N. Y. 210, 72 Am. Dec. 455.

2. Monarque *v.* Monarque, 80 N. Y. 320; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Casey *v.* Casey, 19 N. Y. App. Div. 219, 45 N. Y. Suppl. 877; Barnes *v.* Luther, 77 Hun (N. Y.) 234, 28 N. Y. Suppl. 400.

3. Breit *v.* Yeaton, 101 Ill. 242; Botsford *v.* O'Conner, 57 Ill. 72; McConnel *v.* Smith, 39 Ill. 279; Detrick *v.* Migatt, 19 Ill. 146, 68 Am. Dec. 584; Giles *v.* Solomon, 10 Abb. Pr. N. S. (N. Y.) 97; Deal *v.* Sexton, 144 N. C. 157, 56 S. E. 691; Pearson *v.* Carlton, 18 S. C. 47.

4. Knotts *v.* Stearns, 91 U. S. 638, 23 L. ed. 252.

petent to represent a child *en ventre sa mere*.[5] If it can be said that there is any one who might properly have been made a party to an action, but was not, and if made a party, he might, although acting in a representative character, have been regarded as a representative of the child *en ventre sa mere*, the failure to make such person a party, makes the judgment, as against such child, unquestionably void.[6]

9. Unknown Owners. In many of the states a complainant in partition may make unknown owners parties defendant, and thus convert the proceeding into one *in rem*, and thereby bind persons not named as parties.[7] Safe practice therefore requires him to consider carefully whether by any possibility any one whom he cannot name has under any contingency any interest in the property, and if so, to make him a party under the general designation of unknown owners, and to insert in the pleadings such allegations as may be necessary to support such designation, and to follow this by such proceedings as may be required to obtain jurisdiction over all unnamed persons.

10. Persons Whose Title or Right Is Dependent on That of a Cotenant — a. Grantees. The grantees of a cotenant, if their grant is coextensive with the the cotenancy, become cotenants, and as such, must be made parties defendant in place of their grantor, if his grant divested him of all interest in the property.[8] Otherwise both he and they must be made parties. In no case does the grantor represent the grantee so as to give effect against the latter to a judgment to which he was not, although his grantor was, a party.[9] A conveyance made by a cotenant may assume to dispose of some specific part of the property or some right in severalty therein. Whether such grantee must be made a defendant depends on whether the grant to him is valid as against the other cotenants. If it is of a mere easement, they need not respect it and may partition without making the grantee a party.[10] If, on the other hand, it is of a specific parcel of the land itself, the grantee acquires an interest which his cotenants cannot ignore. He is entitled to have his conveyance considered by any court which is called upon to partition the whole property,[11] although he cannot, to their prejudice, require the court to set aside to himself or his grantee the part so conveyed.[12] Courts have proceeded without requiring such a grantee to be made a party.[13] Of course, if all the cotenants have made conveyances in severalty to the same parcel, it has ceased to be held in cotenancy, and the grantee is not a proper party to any suit to partition the residue of the property.[14] The same result may be reached by the cotenants ratifying a conveyance in severalty made by one of their number.[15] Where the

5. Deal *v.* Sexton, 144 N. C. 157, 56 S. E. 691, 119 Am. St. Rep. 943.

6. McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015.

7. *Indiana.*— Waltz *v.* Barroway, 25 Ind. 380.

Kentucky.—Hynes *v.* Oldham, 3 T. B. Mon. 266.

Maine.— Foxcroft *v.* Barnes, 29 Me. 128; Baylies *v.* Bussey, 5 Me. 153.

Massachusetts.— Foster *v.* Abbot, 8 Metc. 596; Cook *v.* Allen, 2 Mass. 462.

New York.— Paget *v.* Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Suppl. 913; Denning *v.* Corwin, 11 Wend. 647; Cole *v.* Hall, 2 Hill 625.

Ohio.— Rogers *v.* Tucker, 7 Ohio St. 417.

Wisconsin.—Kane *v.* Rock River Canal Co., 15 Wis. 179; Marvin *v.* Titsworth, 10 Wis. 320; Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678.

8. McNish *v.* Guerard, 4 Strobh. Eq. (S. C.) 66.

9. Gravier *v.* Livingston, 6 Mart. (La.) 281; Maloney *v.* Cronin, 7 N. Y. St. 700; Jackson *v.* Brown, 3 Johns. (N. Y.) 459; Pitzer's Estate, 24 Pa. Co. Ct. 359.

For a very unique case in which the court proceeded without bringing the grantees before the court on the ground that they were represented by their grantors on the latter's covenants of warranty see Bryan *v.* Bryan, 61 N. J. Eq. 45, 48 Atl. 341.

10. Pfeiffer *v.* State University, 74 Cal. 156, 15 Pac. 622.

11. Story *v.* Johnson, 2 Y. & C. Exch. 586; Freeman Coten. & P. §§ 195–206.

12. Cooper *v.* Fisher, 10 L. J. Ch. 221.

13. Barnes *v.* Lynch, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470; Blossom *v.* Brightman, 21 Pick. (Mass.) 283; Broughton *v.* Howe, 6 Vt. 266.

14. Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227.

15. Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206.

conveyance made in severalty by one cotenant has not been ratified by or otherwise become binding on the others, both the grantor and the grantee are proper parties defendant to a suit for partition.[16] Indeed, notwithstanding the decisions hereinbefore cited to the contrary, we must regard both as necessary parties, because while neither has an interest extending to all the lands of the cotenancy, each has a vital interest in their partition and a right to insist that, in so far as this may be done without inequitably prejudicing the interests of the other cotenants, the allotments made shall operate to make effective the conveyances of the specific parts.[17]

b. Heirs. A living cotenant has no heirs. Hence, those who will become his heirs on his death need not be made defendants.[18] After the death of a cotenant, his heirs become cotenants in his place and must be made parties.[19] Although an heir is missing and has long been unheard of, he should be made a party. Certainly, if living, he cannot be bound by proceedings in which nothing has been done to obtain jurisdiction over him;[20] but if he still remains absent under such circumstances that his death is presumed, perhaps a purchaser at a sale in partition will not be released from his bid because the absentee was not made a defendant.[21] A child born after his father's death is nevertheless one of his heirs, and therefore must be made a party to any subsequent suit for partition.[22] If one of the cotenants dies during the pendency of the suit, it cannot proceed so as to bind his heirs or devisees unless and until they are made parties. The executor or administrator does not represent them, and the revivor or continuance of the suit against him will not bind them.[23] If, however, the status of a case at the death of a party justifies the entry of judgment *nunc pro tunc* as of a date preceding such death, it, when entered, binds his heirs.[24] If a cotenant dies apparently testate, devising his real property so as to exclude some or all his heirs therefrom, and the suit is begun during the time within which the will may be contested, the heirs, as well as the devisees, should be made defendants, for, although a suit brought within such time cannot be successfully resisted as premature,[25] no judgment which may be rendered therein can be binding against any one not a party thereto who successfully contests the will.[26]

c. Husband or Wife of Cotenant. If a cotenant has a husband who, as such, is entitled as a tenant by the curtesy, he must, like any other tenant for life, be made a party.[27] The relation of husband and wife and his interest in her real property have been so modified by statute in some of the states that he is not

16. Blair *v.* Dwyer, 110 La. 332, 34 So. 464; Harris *v.* Harris, 75 N. Y. App. Div. 216, 77 N. Y. Suppl. 985.

17. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Sutter *v.* San Francisco, 36 Cal. 112; Gates *v.* Salmon, 35 Cal. 576, 95 Am. Dec. 139.

Mississippi.— Parker *v.* Harrison, 63 Miss. 225.

Missouri.— Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

Pennsylvania.— Harlan *v.* Langham, 69 Pa. St. 235.

Texas.— Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360.

18. Hughey *v.* Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395.

19. Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265; Chalon *v.* Walker, 7 La. Ann. 477; Van Williams *v.* Elias, 106 N. Y. App. Div. 288, 94 N. Y. Supp. 611; Vanderwerker *v.* Vanderwerker, 7 Barb. (N. Y.) 221; Huckabee *v.* Newton, 23 S. C. 291.

20. Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748.

21. Tobin *v.* U. S. Safe Deposit, etc., Bank, 115 La. 366, 39 So. 33; Martinez *v.* Wall, 107 La. 737, 31 So. 1023; Welch's Appeal, 126 Pa. St. 297, 17 Atl. 623.

22. Weiland *v.* Muntz, 25 Ohio Cir. Ct. 185.

23. Ewald *v.* Corbett, 32 Cal. 493; Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265; Requa *v.* Holmes, 16 N. Y. 193, 26 N. Y. 338.

24. Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755; Molineaux *v.* Raynolds, 55 N. J. Eq. 187, 36 Atl. 276.

25. Robertson *v.* Brown, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485.

26. Robertson *v.* Brown, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485; Hughes *v.* Burriss, 85 Mo. 660; Tapley *v.* McPike, 50 Mo. 589.

27. Weise *v.* Welsh, 30 N. J. Eq. 431; Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269 [*affirmed* in 166 N. Y. 590, 59 N. E. 1118]; Bender *v.* Van Allen, 28 Misc. (N. Y.) 304, 59 N. Y. Suppl. 885;

therein a necessary,[28] although perhaps he is a proper, party defendant.[29] After the death of a female cotenant, her husband may acquire an interest in her property as heir, and, if so, must be made a party defendant.[30] The interest of the wife of a cotenant may consist: (1) Of her right to dower in the event of his death before her; (2) of her interest in their homestead; and (3) of her interest as his widow when by his death she has become entitled to have dower assigned to her, or has acquired an interest analogous to that of an heir. In cases of the first class she need not be made a defendant.[31] In those of the second class she has such a present interest under most of the statutes that her presence as a defendant is indispensable.[32] In cases of the third class, if her interest is merely that of a dowress before her assignment, she need not be made a party defendant,[33] unless a sale is sought, in which case she is at least a proper party.[34] If a widow of a deceased cotenant has any interest in the property other, or in addition to, that of the right to have dower assigned out of it, she must be made a defendant to reach such other interest.[35]

d. Encumbrancers. The existence of an encumbrance against the moiety of a

Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427; Foster *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432; Walton *v.* Willis, 1 Dall. (Pa.) 351, 1 L. ed. 171.

28. Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Barnes *v.* Blake, 59 Hun (N. Y.) 371, 13 N. Y. Suppl. 77.

29. Hill *v.* Alexander, 77 Mo. 296; Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269 [*affirmed* in 166 N. Y. 590, 59 N. E. 1118].

30. Ballard *v.* Johns, 80 Ala. 32; Bogert *v.* Bogert, 1 Silv. Sup. (N. Y.) 436, 5 N. Y. Suppl. 893, 2 Silv. Sup. 22, 6 N. Y. Suppl. 299.

31. Davis *v.* Lang, 153 Ill. 175, 38 N. E. 635; Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Motley *v.* Blake, 12 Mass. 280; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653; Matthews *v.* Matthews, 1 Edw. (N. Y.) 565.

32. De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640. *Contra*, Hill *v.* Jackson, (Tex. Civ. App. 1899) 51 S. W. 357.

33. *Alabama.*— Francis *v.* Sandlin, (1907) 43 So. 829.

Maine.— Leonard *v.* Motley, 75 Me. 418.

Mississippi.— Wood *v.* Bryant, 68 Miss. 198, 8 So. 518.

New Hampshire.— Miller *v.* Dennett, 6 N. H. 109.

New York.— Tanner *v.* Niles, 1 Barh. 560; Bradshaw *v.* Callaghan, 5 Johns. 80 [*reversed* on other grounds in 8 Johns. 558].

Pennsylvania.— Fink's Appeal, 130 Pa. St. 256, 18 Atl. 621; Power *v.* Power, 7 Watts 205; Martin's Estate, 1 Chest. Co. Rep. 512.

Rhode Island.— Hoxsie *v.* Ellis, 4 R. I. 123.

Virginia.— McClintic *v.* Manns, 4 Munf. 328.

But a later case apparently adopts a contrary view, and insists that the widow should be made a party and her dower assigned. Custis *v.* Snead, 12 Gratt. (Va.) 260. See also Green *v.* Putnam, 1 Barb. (N. Y.) 500; Ripple *v.* Gilborn, 8 How. Pr. (N. Y.) 456; Barclay *v.* Kerr, 110 Pa. St. 130, 1 Atl. 220.

In New York it is said that a wife of a tenant in common is a proper party defendant. Coles *v.* Coles, 15 Johns. 319.

34. *In re* Sipperly, 44 Barb. (N. Y.) 370; Tanner *v.* Niles, 1 Barb. (N. Y.) 560; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405.

Partition by sale.— By statute, in Kentucky, every woman having either a vested or contingent dower in land sought to be sold in partition must be made a party. Reed *v.* Reed, 80 S. W. 520, 25 Ky. L. Rep. 2324. The omission of a wife as a party defendant where the partition is by allotment cannot ordinarily operate to her prejudice, because her right, such as it is, is extended over the whole of the allotment made to the husband. If, however, as must frequently be the case, the property must be sold and his interest therein converted into personalty, her right is completely terminated, and she would seem, upon constitutional principle, to be entitled to be heard, both respecting the necessity of the sale and the disposition to be made of the proceeds. The weight of authority, however, maintains that she need not be made a defendant, and nevertheless that she is bound by the partition. Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Warren *v.* Twilley, 10 Md. 39; Sire *v.* St. Louis, 22 Mo. 206; Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262; Jackson *v.* Edwards, 7 Paige (N. Y.) 386 [*affirmed* in 22 Wend. 498]; Van Gelder *v.* Post, 2 Edw. (N. Y.) 577; Matthews *v.* Matthews, 1 Edw. (N. Y.) 565; Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Nelan *v.* Nelan, 30 Pa. Co. Ct. 71; Bradford *v.* Stone, 20 R. I. 53, 37 Atl. 532. A contrary view is asserted in a few cases. Green *v.* Putnam, 1 Barb. (N. Y.) 500; Jackson *v.* Edwards, 7 Paige (N. Y.) 386 [*affirmed* in 22 Wend. 498]; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653. The wives of bankrupts whose interests have been sold should be made parties. *In re* Stevenson, 33 Pittsb. Leg. J. N. S. (Pa.) 419.

35. Hurley *v.* O'Neill, 31 Mont. 595, 79 Pac. 242; Letson *v.* Evans, 33 Misc. (N. Y.) 437, 68 N. Y. Suppl. 421; Franklin *v.* Moss, (Tex. Civ. App. 1901) 64 S. W. 786; Ellis *v.* Stewart, (Tex. Civ. App. 1893) 24 S. W. 585.

cotenant does not affect the right to partition.[36] Theoretically a mortgagee or other encumbrancer has no interest in the partition, because his encumbrance, on partition, fastens upon the allotment of his mortgagor;[37] hence the many decisions maintaining that the lien-holder need not be made a party to a suit for partition.[38] There are decisions not in harmony with this rule, and some affirming that a lien-holder is a necessary party,[39] or is at least entitled to notice when the property has been ordered sold and the proceeds are to be distributed.[40] Although the holder of a lien on the whole property need not be made a party defendant, yet if he is brought before the court, it may determine the amount and validity of his lien,[41] but cannot change its terms nor compel him to accept land in place of it.[42] Because plaintiff cannot always determine whether a sale may not be found necessary to accomplish an equitable partition in which a distribution of the proceeds must follow and the extent and validity of alleged liens be drawn in question, it is certainly the safer practice to make all lien-holders parties defendant, although, in the absence of statutes requiring this to done, it cannot be affirmed that they are necessary parties.[43] If the holder of a lien is a party to

36. *Indiana.*— Cravens *v.* Kitts, 64 Ind. 581.

Kentucky.— Hall *v.* Morris, 13 Bush 322.

Louisiana.— Gilmore *v.* Menard, 9 La. Ann. 212; Jones *v.* Crocker, 4 La. Ann. 8.

Maine.— Jewett *v.* Persons Unknown, 61 Me. 408.

Massachusetts.— McCarty *v.* Patterson, 186 Mass. 1, 71 N. E. 112; Taylor *v.* Blake, 109 Mass. 513.

Pennsylvania.— Bavington *v.* Clarke, 2 Penr. & W. 115, 21 Am. Dec. 432; Myers' Estate, 25 Pa. Co. Ct. 235, 15 York Leg. Rec. 59.

Rhode Island.— Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466.

South Carolina.—Atkinson *v.* Jackson, 24 S. C. 594.

Vermont.— Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

Virginia.— Wright *v.* Strother, 76 Va. 857.

37. Rochester Loan, etc., Co. *v.* Morse, 181 Ill. 64, 54 N. E. 628; Macgregor *v.* Malarkey, 96 Ill. App. 421; Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563.

38. *Alabama.*— Inman *v.* Prout, 90 Ala. 362, 7 So. 842; Fennell *v.* Tucker, 49 Ala. 453.

Indiana.— Green *v.* Brown, 146 Ind. 1, 44 N. E. 805.

Kentucky.— Barry *v.* Baker, 93 S. W. 1061, 29 Ky. L. Rep. 573; Talbott *v.* Campbell, 67 S. W. 53, 23 Ky. L. Rep. 2198.

Maryland.— Thruston *v.* Minke, 32 Md. 571.

Michigan.— Eberts *v.* Fisher, 44 Mich. 551, 7 N. W. 211.

New Jersey.— Pomeroy *v.* Pomeroy, 55 N. J. Eq. 568, 37 Atl. 754; Becker *v.* Carey, (Ch. 1897) 36 Atl. 770; Low *v.* Holmes, 17 N. J. Eq. 148; Speer *v.* Speer, 14 N. J. Eq. 240.

New York.—Flamm *v.* Parry, 78 N. Y. App. Div. 603, 80 N. Y. Suppl. 125; Sebring *v.* Mersereau, 9 Cow. 344 [*affirming* Hopk. 501]; Harwood *v.* Kirby, 1 Paige 469; Wotten *v.* Copeland, 7 Johns. Ch. 140.

Pennsylvania.— Stewart *v.* Allegheny Nat. Bank, 101 Pa. St. 342; Wright *v.* Vickers, 81 Pa. St. 122; Long's Appeal, 77 Pa. St. 151; Bavington *v.* Clarke, 2 Penr. & W. 115, 21 Am. Dec. 432; Com. *v.* Rodgers, 6 Pa. Dist. 453.

Rhode Island.— Updike *v.* Adams, 22 R. I. 432, 48 Atl. 384.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Childers *v.* Loudin, 51 W. Va. 559, 42 S. E. 637.

United States.— East Coast Cedar Co. *v.* People's Bank, 111 Fed. 446, 49 C. C. A. 422.

England.— Swan *v.* Swan, 8 Price 518, 22 Rev. Rep. 770; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

See 38 Cent. Dig. tit. "Partition," § 119 *et seq.*

But it was held in McDougall *v.* McDougall, 14 Grant Ch. (U. C.) 267, that a mortgagee of plaintiff must be made a party. See also Robson *v.* Robson, 10 Ont. Pr. 324.

39. *Illinois.*— Loomis *v.* Riley, 24 Ill. 307; Macgregor *v.* Malarkey, 96 Ill. App. 421.

Iowa.— Rider *v.* Clark, 54 Iowa 292, 6 N. W. 271; Metcalf *v.* Hoopingardner, 45 Iowa 510.

Massachusetts.— Bradley *v.* Fuller, 23 Pick. 1; Munroe *v.* Luke, 19 Pick. 39; Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375.

Michigan.— Eberts *v.* Fisher, 44 Mich. 551, 7 N. W. 211.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

Virginia.— Conrad *v.* Fuller, 98 Va. 16, 34 S. E. 893.

Canada.— McDougall *v.* McDougall, 14 Grant Ch. (U. C.) 267.

See 38 Cent. Dig. tit. "Partition," § 119 *et seq.*

40. Krug *v.* Keller, 8 Pa. Super. Ct. 78, 42 Wkly. Notes Cas. 431.

41. Townshend *v.* Townshend, 1 Abb. N. Cas. (N. Y.) 81.

42. Aylesworth *v.* Crocker, 21 R. I. 436, 44 Atl. 308; Barber *v.* McAliley, 4 S. C. 49.

43. Thruston *v.* Minke, 32 Md. 571; Owsley

the suit, he cannot, after a partition sale, proceed to enforce his lien;[44] but if he is not, he must ordinarily be deemed exempt from the operation of the judgment and the purchaser's title must be subordinate to the lien,[45] unless it is paid out of the proceeds of the sale. To these proceeds the lien is transferred, at least to the extent of entitling the lien-holder to payment therefrom;[46] and in some of the states a partition sale necessarily frees the land from all preëxisting liens, and deprives the lien-holder of all remedy save that of seeking payment out of such proceeds.[47]

e. Executors, Administrators, and Creditors. By the common law real estate descended to the heirs or devisees, and in no case to the executor or administrator; and hence it was often said that he was neither a necessary nor a proper party defendant in a suit for partition.[48] It has ever been held, and still is true, that an executor or administrator does not represent the heir or devisee so as to bind the one by a judgment to which only the other was a party.[49] Whether an executor or administrator is a proper or necessary party defendant depends on whether he represents rights or interests to be affected by the judgment. If so, they cannot be affected in his absence. He may, under the statutes of the state, be entitled to the possession of the property or to its rents and profits either until the close of the administration or for some other period, or the relief sought may include an accounting, or may otherwise establish a claim against the decedent, and thereby affect the interests of creditors or of others of whom the executor or administrator must be deemed the representative. If so, he is both a proper and

v. Smith, 14 Mo. 153; *In re* Harding, 25 N. C. 320.

They are, however, proper parties in many if not in all of the states. Wettlaufer *v.* Ames, 133 Mich. 201, 94 N. W. 950, 103 Am. St. Rep. 449; O'Connor *v.* Keenan, 132 Mich. 646, 94 N. W. 186; Burnes *v.* Porter, 82 Mo. App. 66; Smith *v.* Siblich, 12 N. Y. Suppl. 905; Gardner *v.* Luke, 12 Wend. (N. Y.) 269.

And a mortgagee may, as such, acquire other liens and rights making him a necessary party. Burnes *v.* Porter, 82 Mo. App. 66.

For agreements amounting to equitable mortgages and entitling plaintiff to make their holders parties defendant see Caldwell *v.* Wright, 88 Mo. App. 604.

44. Thompson *v.* Frew, 107 Ill. 478; Curry *v.* Fisher, 91 Ill. App. 120; Dunham *v.* Minard, 4 Paige (N. Y.) 441. It is said that one made a defendant because he is a cotenant is not affected by the judgment as to any lien held by him, but not placed in issue by the pleadings. McCormick *v.* McCormick, 104 Md. 325, 65 Atl. 54.

45. Wood *v.* Winings, 58 Ind. 322; Jeanerette Bank *v.* Stansbury, 110 La. 301, 34 So. 452; Hill *v.* Hickin, [1897] 2 Ch. 579, 66 L. J. Ch. 717, 77 L. T. Rep. N. S. 127, 46 Wkly. Rep. 137.

46. *Illinois.*— Loomis *v.* Riley, 24 Ill. 307.
Louisiana.— Diamond *v.* Diamond, 27 La. Ann. 125.
New York.— Church *v.* Church, 3 Sandf. Ch. 434; Westervelt *v.* Haft, 2 Sandf. Ch. 98.
Ohio.— Cradlebaugh *v.* Pritchett, 8 Ohio St. 646, 72 Am. Dec. 610.
Pennsylvania.—Kerr's Estate, 4 Phila. 182.

Some statutes expressly direct the interlocutory judgment to require the officer making the sale to pay into court the moneys necessary to discharge liens. Kelly *v.* Werner, 34 N. Y. App. Div. 68, 53 N. Y. Suppl. 1067.

47. Morris *v.* Lalaurie, 39 La. Ann. 47, 1 So. 659; Beltran *v.* Gauthreaux, 38 La. Ann. 106; Bayhi *v.* Bayhi, 35 La. Ann. 527; Borde *v.* Erskine, 33 La. Ann. 873; Finley *v.* Babin, 12 La. Ann. 236; Steen *v.* Clayton, 32 N. J. Eq. 121; Wright *v.* Vickers, 81 Pa. St. 122; Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388.

48. *Alabama.*— Tindal *v.* Drake, 51 Ala. 574.
Louisiana.— Hewes *v.* Baxter, 46 La. Ann. 1281, 16 So. 196.
Mississippi.— Foster *v.* Newton, 46 Miss. 661.
Missouri.—Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843; Harbison *v.* Sanford, 90 Mo. 477, 3 S. W. 20.
New Jersey.— Speer *v.* Speer, 14 N. J. Eq. 240.
North Carolina.— Garrison *v.* Cox, 99 N. C. 478, 6 S. E. 124.
South Carolina.— McCreary *v.* Burns, 17 S. C. 45.
Texas.— Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.
See 38 Cent. Dig. tit. "Partition," § 123.

49. *Alabama.*— Stevenson *v.* Anderson, 87 Ala. 228, 6 So. 285; Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475.
Florida.— Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265.
Indiana.— Green *v.* Brown, 146 Ind. 1, 44 N. E. 805; Lyon *v.* Register, 36 Fla. 273, 18 So. 589.
Louisiana.— Union Nat. Bank *v.* Choppin, 46 La. Ann. 629, 15 So. 304.
South Carolina.— Jones *v.* Smith, 31 S. C. 527, 10 S. E. 340.
See 38 Cent. Dig. tit. "Partition," § 123.

a necessary party defendant.[50] Otherwise he is not even a proper party.[51] General creditors of a deceased cotenant are, however, so far represented by his administrator or executor that they are neither proper nor necessary parties.[52] One who becomes an administrator *pendente lite* cannot complain of his not being made a party, if he made no application to have this done;[53] and if an error is made in substituting an executor in place of a deceased party, this is cured by an amendment substituting the heirs.[54] If an heir at law is also the administrator, and being sued in his personal, answers in his representative, capacity, he thereby makes himself a party defendant as administrator.[55]

f. Lessees. A lessee of a cotenant obtains for the term of the lease the same right of possession that his lessor had. The cotenants may, if they choose, proceed to partition without making such lessee a party.[56] In this sense a lessee is not a necessary party defendant.[57] If the partition is made by allotment, doubtless his right is transferred to the assignment made to his lessor, although it is easy to conceive instances in which the lessee would be prejudiced by, and hence unwilling to accept such assignment, and it is scarcely possible to maintain that he is bound by a judgment which he had no opportunity to resist. Furthermore, a partition by sale may result which, if enforceable against him, must sweep away his interests, leaving him to seek indemnity out of the proceeds. Hence we judge that a lessee of any of the cotenants is both a proper and a necessary party, in the sense that the cotenant of his lessor is not obliged to proceed without him.[58] Any plea, however, intending to raise the question of defect of parties due to the omission of a lessee must show, not merely that a lease has been made, but, in addition, disclose enough of its terms to support the inference that it still continues, and therefore that the title or right of possession of an allottee or purchaser may be impaired by the lease.[59] In exceptional circumstances the lease may prevent the partition, as where, although made by one only of the cotenants, it is of the whole property and the other cotenants have accepted rent under it, and the object of the proceeding is apparently to prejudice and defraud the lessee.[60]

g. Purchasers or Encumbrancers Pendente Lite. Purchasers or encumbrancers *pendente lite* are bound by the judgment in partition to the same extent as are purchasers in any other proceeding affecting, or transferring title to, property of like character, and hence none of such purchasers need be made parties defend-

50. *Alabama.*—Davis *v.* Bingham, 111 Ala. 292, 18 So. 660; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863.

Kentucky.— Kendrick *v.* Kendrick, 4 J. J. Marsh. 241.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Missouri.— Budde *v.* Rebenack, 137 Mo. 179, 38 S. W. 910; Perkins *v.* Goddin, 111 Mo. App. 429, 85 S. W. 936, Norton, J., delivering the opinion of the court.

New York.—Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Suppl. 269 [*affirmed* in 166 N. Y. 590, 59 N. E. 1118]; Underhill *v.* Underhill, 6 N. Y. App. Div. 78, 39 N. Y. Suppl. 468.

South Carolina.— *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

See 38 Cent. Dig. tit. "Partition," § 123.

51. Mertens *v.* Cook, 135 Mich. 35, 97 N. W. 47.

52. Gregory *v.* High, 29 Ind. 527; Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245; Speer *v.* Speer, 14 N. J. Eq. 240.

53. Jespersen *v.* Mech, 213 Ill. 488, 72 N. E. 1114.

54. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

55. Parks *v.* Van Dergriff, (Tenn. Ch. App. 1900) 57 S. W. 177.

It is easy to conceive of cases where an administrator or a creditor is both a proper and a necessary party, as where, through an accounting or otherwise, a personal liability is sought to be established against his intestate (Caughey *v.* Harrar, 21 Lanc. L. Rev. (Pa.) 356), or where creditors are entitled to be satisfied out of the property or out of the proceeds of its sale (Latimer *v.* Hansom, 1 Bland (Md.) 51; *In re* Simmins, 7 Pa. L. J. 360; Beynon's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 381. *Contra,* Waring *v.* Waring, 3 Abb. Pr. (N. Y.) 246).

56. Pleak *v.* Chambers, 7 B. Mon. (Ky.) 565.

57. Pleak *v.* Chambers, 7 B. Mon. (Ky.) 565; Brendel *v.* Klopp, 69 Md. 1, 13 Atl. 589; O'Reilly *v.* Vincent, 2 Molloy 330.

58. Thruston *v.* Minke, 32 Md. 571; Cornish *v.* Gest, 2 Cox Ch. 27, 30 Eng. Reprint 13; Fitzpatrick *v.* Wilson, 12 Grant Ch. (U. C.) 440.

59. Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460.

60. Byles *v.* Jacob, 34 Pittsb. Leg. J. N. S. (Pa.) 47.

ant.[61] Statutes in some of the states expressly permit such purchasers and encumbrancers to be made defendants.[62] Purchasers *pendente lite* may, in partition, as in other suits, be relieved from the operation of the judgment, by laches in the prosecution of the cause.[63] Although a mortgage is executed *pendente lite* and the mortgagee is therefore bound by the judgment, his rights are not necessarily destroyed, for he may still seek and be entitled to payment out of the proceeds of the judgment if the property is sold,[64] or may assert his lien against the allotment made to his mortgagor.

h. Holders of Easements. Holders of easements or persons exercising rights of way over the lands of a cotenancy are not ordinarily either necessary or proper parties to suits for its partition.[65] The rule must be otherwise if the object of the suit is to challenge the right to the easement or transfer title paramount to it.

11. Persons Incompetent or Under Disability — a. Married Women. A married woman may be a cotenant, and therefore a proper and necessary party defendant in partition whenever thereby it is sought to affect her interest as such cotenant. That a judgment in partition to which she is a party binds her admits of no doubt.[66] Her husband is also usually a necessary party defendant because of his estate as tenant by the curtesy,[67] and further, because the statutes of many of the states require a husband to be joined as defendant with his wife when the action relates to her separate real property.

b. Infants. The fact that one of the cotenants is an infant does not deprive the others of the right to compel partition.[68] He may hence be made a party defendant and bound by the judgment, whatsoever be the mode of partition adopted,[69] and partition will not be ordered until he is made such party.[70] In

61. *Alabama.*— Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

Illinois.— Macgregor *v.* Malarkey, 96 Ill. App. 421.

Indiana.— Edwards *v.* Dykeman, 95 Ind. 509; Arnold *v.* Butterbaugh, 92 Ind. 403.

Maine.— Partridge *v.* Luce, 36 Me. 16.

Missouri.— Becker *v.* Stroeher, 167 Mo. 306, 66 S. W. 1083.

New York.— Wagstaff *v.* Marcy, 25 Misc. 121, 54 N. Y. Suppl. 1021; Sears *v.* Hyer, 1 Paige 483.

North Carolina.— Coble *v.* Clapp, 54 N. C. 173.

Pennsylvania.— Baird *v.* Corwin, 17 Pa. St. 462; Welty *v.* Ruffner, 9 Pa. St. 224.

This rule has been applied to heirs born *pendente lite.* Sparks *v.* Clay, 185 Mo. 393, 84 S. W. 40. But as shown *supra*, III, F, 10, b, heirs must be made parties if they succeed to the estate of their ancestor during the pendency of the suit.

62. O'Connor *v.* Keenan, 132 Mich. 646, 94 N. W. 186; Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164.

63. Hawes *v.* Orr, 10 Bush (Ky.) 431; Bybee *v.* Summers, 4 Oreg. 354.

64. Westervelt *v.* Haff, 2 Sandf. Ch. (N. Y.) 98.

65. Weston *v.* Foster, 7 Metc. (Mass.) 297; Hooper *v.* McAllister, 115 Mich. 174, 73 N. W. 133; Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772.

66. Doe *v.* Prettyman, 1 Houst. (Del.) 334; Disbrow *v.* Folger, 5 Abb. Pr. (N. Y.) 53; Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427.

For instances where, for special reasons, judgments in partition against married women have been held not binding on them see Freeman Coten. & P. § 466; Horsfall *v.* Ford, 5 Bush (Ky.) 642; Crenshaw *v.* Creek, 52 Mo. 98; Thompson *v.* Renoe, 12 Mo. 157; Walker *v.* Hall, 15 Ohio St. 355, 86 Am. Dec. 482.

67. See *supra*, III, F, 10, c.

68. Freeman Coten. & P. § 467; Hooke *v.* Hooke, 6 La. 472; Rogers *v.* McLean, 34 N. Y. 536; Hoyle *v.* Huson, 12 N. C. 348; House *v.* Falconer, 4 Desauss. Eq. (S. C.) 86; Freeman *v.* Freeman, 9 Heisk. (Tenn.) 301.

69. *Alabama.*— Coker *v.* Pitts, 37 Ala. 692.

Illinois.— Campbell *v.* Campbell, 63 Ill. 462; Hickenbotham *v.* Blacklege, 54 Ill. 316.

Kentucky.— Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887.

Louisiana.— Carrollton Land, etc., Co. *v.* Eureka Homestead Soc., 119 La. 692, 44 So. 434; Sallier's Succession, 115 La. 97, 38 So. 929; Savage *v.* Williams, 15 La. Ann. 250; Shaffet *v.* Jackson, 14 La. Ann. 154.

Mississippi.— Cocks *v.* Simmons, 57 Miss. 183; Albright *v.* Flowers, 52 Miss. 246.

Missouri.— Shaw *v.* Gregoire, 41 Mo. 407.

New York.— O'Donoghue *v.* Smith, 85 N. Y. App. Div. 324, 83 N. Y. Suppl. 398 [*affirmed* in 184 N. Y. 365, 77 N. E. 621].

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

Tennessee.— Winchester *v.* Winchester, 1 Head 460.

See 38 Cent. Dig. tit. "Partition," § 124½.

70. Girty *v.* Logan, 6 Bush (Ky.) 8; Kentucky Union Land Co. *v.* Elliott, 15 S. W. 518, 12 Ky. L. Rep. 812; Savage *v.* Williams, 15 La. Ann. 250; Tryon *v.* Peer, 13 Grant Ch. (U. C.) 311. In Blue *v.* Waters, 114 Ky.

Louisiana and Maine it appears that absent minors need not be made defendants and served with process, but may be represented by guardians.[71] Doubtless it is always the duty of the court, especially in chancery, to look after the interests of infants;[72] but this, in our judgment, does not dispense with the necessity of making them parties defendant and serving process on them as such. Where they have a guardian, the latter is sometimes said to also be a proper party defendant,[73] and a proceeding after his death was held void.[74] Whether a guardian may be a party or not, the process should be served on him when the statute so directs. Any irregularity in the appointment of, or the service of process upon, a guardian may be waived by the receipt of the proceeds of a sale in partition after the infants have reached their majority.[75] Although an infant has a guardian, the former must be made a party.[76] Any mere irregularity in appointing a guardian *ad litem* does not deprive the court of jurisdiction, nor make void its partition.[77] The failure to obtain jurisdiction by the service of process on an infant is not a mere irregularity, but is a condition precedent to appointing a guardian *ad litem* or exercising any other authority over him.[78] The fact that a defendant was an infant when a partition was made, while it does not *ipso facto* entitle him to a new partition, inclines any court to which he may apply to give him relief from any advantage taken of him in making such partition.[79]

c. Lunatics. Cotenants who are insane or of weak mind may also be compelled to make partition.[80] Hence they must be made parties defendant.[81] An attempt to set aside partition because of the insanity of a party, if otherwise grantable, must fail if the insanity is not established by a preponderance of the evidence.[82] When the proceeding was in chancery and a conveyance of the legal title was necessary, the lunatic or minor defendant not being able to execute such conveyance, the courts adopted a number of expedients to complete the partition, such as decreeing the lunatic to hold in trust for the purchaser or the respective allottees, or authorizing his committee to convey,[83] or, in the case of a minor, respiting the various conveyances until he became of full age.[84]

659, 71 S. W. 889, 24 Ky. L. Rep. 1481, where infants were omitted by plaintiff, but were made parties by a cross petition, and their guardian filed an answer alleging the partition to be advantageous to them, the chancellor approved it.

71. McCullough *v.* Minor, 2 La. Ann. 466; Penny *v.* Christmas, 7 Rob. (La.) 481; Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826.

72. Braker *v.* Devereaux, 8 Paige (N. Y.) 513.

73. Budde *v.* Rebenack, 137 Mo. 179, 38 S. W. 910.

74. Korn's Estate, 6 Pa. Dist. 435.

75. Bogart *v.* Bogart, 138 Mo. 419, 40 S. W. 91.

76. Lowe *v.* Maurer, 4 Ohio Dec. (Reprint) 243, 1 Clev. L. Rep. 157. See *infra*, III, H, 6, a.

But probably the guardian may appear for the infant. Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

77. O'Donoghue *v.* Smith, 85 N. Y. App. Div. 324, 83 N. Y. Suppl. 398 [*affirmed* in 184 N. Y. 365, 77 N. E. 621].

78. Chambers *v.* Jones, 72 Ill. 275.

79. *Kentucky.* — Taylor *v.* Webber, 83 S. W. 567, 26 Ky. L. Rep. 1199.

Louisiana.— Rhodes *v.* Cooper, 113 La. 600, 37 So. 527.

Mississippi.—Armistead *v.* Barber, 82 Miss. 788, 35 So. 199.

New York.— Safford *v.* Safford, 7 Paige 259, 32 Am. Dec. 633.

Ohio.— Long *v.* Mulford, 17 Ohio St. 484, 93 Am. Dec. 638.

Canada.— Merritt *v.* Shaw, 15 Grant Ch. (U. C.) 321.

See 38 Cent. Dig. tit. "Partition," § 124½.

80. *Alabama.*— Bryant *v.* Stearns, 16 Ala. 302.

Kentucky.— Murdock *v.* Loeser, 87 S. W. 808, 27 Ky. L. Rep. 1057.

Louisiana.— Sallier *v.* Rosteet, 108 La. 378, 32 So. 383.

Pennsylvania.— Dean *v.* Brown, 7 Lack. Leg. N. 208.

England.— Hollingworth *v.* Sidebottom, 7 L. J. Ch. 2, 8 Sim. 620, 8 Eng. Ch. 620, 59 Eng. Reprint 246.

81. Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24.

82. Butters *v.* Comyns, 81 Ill. App. 418.

83. *In re* Pares, 12 Ch. D. 333, 41 L. T. Rep. N. S. 574, 28 Wkly. Rep. 193; Matter of Molyneux, 4 De G. F. & J. 365, 10 Wkly. Rep. 512, 65 Eng. Ch. 283, 45 Eng. Reprint 1225; Matter of Bloomer, 2 De G. & J. 88, 4 Jur. N. S. 546, 27 L. J. Ch. 173, 6 Wkly. Rep. 178, 59 Eng. Ch. 70, 44 Eng. Reprint 921; Matter of Sherard, 1 De G. J. & S. 421, 66 Eng. Ch. 326, 46 Eng. Rprint 167.

84. Tuckfield *v.* Buller, Ambl. 197, 27 Eng. Reprint 133; Atty.-Gen. *v.* Hamilton, 1 Madd. 214, 16 Rev. Rep. 208, 56 Eng. Reprint 80.

12. REMEDY FOR DEFECT OF PARTIES. If someone who is not a party to the action ought to have been such, and this fact appears by the complaint, the remedy of an objecting cotenant or other interested party is by demurrer for such defect of parties; but if the defect does not appear by the complaint, relief must be sought by pleading that fact in the answer. Whenever, during the progress of the cause, it appears, whether by the complaint, the answer, or the evidence, that the presence of some party not before the court is essential to a complete determination of the action and the granting of the relief necessary thereto, the court should and will require such person to be added as a defendant.[85]

G. The Applicant's Pleadings — 1. GENERAL RULES RESPECTING. In those states which have adopted the reformed codes, a proceeding for partition, whether provided for therein or by some independent statute, must be regarded as an action governed by the rules of proceeding applicable to other actions.[86] Whether the proceeding is at law or in chancery, or under the code or some special statute, it is not conceivable that it can be maintained except upon some pleading amounting to a complaint,[87] whether it be so styled or called a bill or petition, or that relief can be granted thereunder against any person,[88] or for any cause or respecting any property not designated therein.[89] A statute specifying what the complaint or petition must contain is mandatory, and a petition stating a different cause of action, as to quiet title, cannot support a judgment in partition.[90]

2. IN CHANCERY. The contents of a bill for partition, except where some special relief is sought, are substantially the same as those of a complaint at law seeking the same purpose.[91]

3. THE PARTIES. A complaint, petition, or bill for partition must make parties thereto and name as such all persons whose presence in court is essential to confer authority on it to grant the relief sought. The names of the parties seeking the partition must be stated,[92] and also the names of defendants against whom partition is sought. Some statutes also require their address and place of residence to be disclosed.[93] Not only must the plaintiff's pleading name the parties defendant, but its allegations must make it clear that the parties so named, with plaintiff, are all the parties whose presence is necessary to enable the court to make the partition and to grant the other relief sought,[94] and failing to show this,

85. Estes *v.* Nell, 108 Mo. 172, 18 S. W. 1006; Hall *v.* Campbell, 77 Hun (N. Y.) 567, 28 N. Y. Suppl. 1031; Cowan's Appeal, (Pa. 1888) 16 Atl. 28; Wickersham *v.* Young, 1 Miles (Pa.) 395; Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554; Field *v.* Leiter, (Wyo. 1907) 90 Pac. 378, 92 Pac. 622.

86. McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333; Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83, 2 Code Rep. 13; Backus *v.* Stilwell, 3 How. Pr. (N. Y.) 318, 1 Code Rep. 70.

But it was said in Traver *v.* Traver, 3 How. Pr. (N. Y.) 351, 1 Code Rep. 112, that a proceeding for partition is not necessarily governed by the section of the code requiring actions to be commenced by complaints, and that such proceeding may be commenced by petition under the Revised Statutes, as formerly.

87. Larkin *v.* Mann, 2 Paige (N. Y.) 27; Rabb *v.* Aiken, 2 McCord Eq. (S. C.) 118; O'Leary *v.* Durant, 70 Tex. 409, 11 S. W. 116.

88. Young *v.* Wright, 8 Ont. Pr. 198.

89. McKinstry *v.* Carter, 48 Kan. 428, 29 Pac. 597; Corwithe *v.* Griffing, 21 Barb. (N. Y.) 9; Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720.

90. Darr *v.* Darr, 102 Iowa 453, 71 N. W. 419.

91. Larkin *v.* Mann, 2 Paige (N. Y.) 27; Freeman Coten. & P. § 484.

92. Rice *v.* Rice, 10 B. Mon. (Ky.) 420; Reid *v.* Clendenning, 193 Pa. St. 406, 44 Atl. 500; Mushrush's Estate, 23 Pa. Co. Ct. 629.

A bill in equity for partition is in analogy to the proceeding at law and should be so framed that there should be a party substantially interested, plaintiff and defendant. Lowe *v.* Franks, 1 Molloy 137.

93. Ballard *v.* Johns, 80 Ala. 32; Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Mushrush's Estate, 23 Pa. Co. Ct. 629. But see Griel *v.* Randolph, 108 Ala. 601, 18 So. 609, which says that a petition for the sale of lands for division need not state the residence of the petitioners. This statute is sufficiently complied with by an allegation that the name and place of residence of defendant "is as follows: Camp Phosphate Company, which is a Florida corporation." Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

94. Thornton *v.* Houtze, 91 Ill. 199; Hughes' Case, 1 Bland (Md.) 46; Lilly *v.*

the complaint must be defective.[95] Therefore, if the complaint shows that a cotenant has died, it must proceed farther and state who are his heirs and make them parties defendant.[96] If the complaint shows that there are other cotenants of the property, plaintiff cannot excuse himself from making them parties on the ground that he does not know who they are and it would take an immense amount of time and labor to ascertain.[97] On the other hand a complaint which states all the facts necessary to authorize a partition and shows that all the persons necessary thereto are made parties thereby must be sustained.[98]

4. THE ALLEGATION AS TO HOLDING TOGETHER AND UNDIVIDED. Complaints in partition always contained the allegation that plaintiff and defendants held together and undivided. This allegation may be considered as an affirmance: (1) That plaintiff and defendant are cotenants; and (2) that as such they are in possession of the property. Both were formerly essential. It is still everywhere true that there can be no partition where there is no cotenancy;[99] but we have already shown that in many of the states proceedings may be sustained to partition property adversely held. Where this rule does not prevail, the fact that plaintiff is disseized is fatal to his suit,[1] and the complaint should negative his disseizin.[2] This it may do by employing the averment that he and the defendant "hold" the property,[3] or are seized in common,[4] or are seized and possessed.[5] If persons dispossessed of property are entitled to sue for partition in special circumstances only, such circumstances must be alleged.[6] In some of the states the absence of disseizin will be presumed from the allegation of ownership. In truth the weight of authority favors the position, at the present time, that the possession of the parties alleged to be the owners in cotenancy will be presumed and need not be alleged;[7] and furthermore that the allegations of the complaint will not be construed as disclosing the disseizin of plaintiff unless no other inference can be drawn therefrom.[8]

5. THE ALLEGATION OF TITLE HELD IN COTENANCY AND OF THE MOIETIES OF THE PARTIES. As there can be no partition except of property which is owned in undivided moieties, the complaint must show that the parties, at the institution of the suit, own such property, or some partitionable estate therein, as cotenants, and allegations which do not directly affirm this or disclose facts from which it necessarily

Menke, 126 Mo. 190, 28 S. W. 643, 994; Fink's Appeal, 130 Pa. St. 256, 18 Atl. 621; Dawson *v.* Lancaster, 12 Pa. Dist. 501; Johnson *v.* Kite, 9 Pa. Dist. 584; Purcell *v.* Purcell, 9 Pa. Dist. 188, 23 Pa. Co. Ct. 330; Kantner's Estate, 24 Pa. Co. Ct. 310, 16 Montg. Co. Rep. 215.

95. Gillespie *v.* Nabors, 59 Ala. 441, 31 Am. Rep. 20.

96. Ballard *v.* Johns, 80 Ala. 32.

97. Salyer *v.* Elkhorn Land Imp. Co., 77 S. W. 370, 26 Ky. L. Rep. 1210.

98. Sullivan *v.* Lumsden, 118 Cal. 664, 50 Pac. 777; Lenehan *v.* St. Francis Xavier College, 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868 [*affirming* 30 Misc. 378, 63 N. Y. Suppl. 1033]; Bender *v.* Van Allen, 28 Misc. (N. Y.) 304, 59 N. Y. Suppl. 885; Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742.

99. Russelville School Corp. *v.* Russelville Lodge No. 141 F. & A. M., 140 Ind. 422, 39 N. E. 549; Alsbrook *v.* Reid, 89 N. C. 151.

1. Adam *v.* Ames Iron Co., 24 Conn. 230; Maxwell *v.* Maxwell, 43 N. C. 25.

2. Doane *v.* Mercantile Trust Co., 24 Misc. (N. Y.) 502, 53 N. Y. Suppl. 902 [*affirmed* in 39 N. Y. App. Div. 639, 57 N. Y. Suppl. 1137 (*affirmed* in 160 N. Y. 494, 55 N. E. 296)]; Stewart *v.* Munroe, 56 How. Pr. (N. Y.) 193; Maxwell *v.* Maxwell, 43 N. C. 25; Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741.

3. Biddle *v.* Starr, 9 Pa. St. 461.

4. Keil *v.* West, 21 Fla. 508.

5. Balen *v.* Jacquelin, 67 Hun (N. Y.) 311, 22 N. Y. Suppl. 193; Hunt *v.* Crowell, 2 Edm. Sel. Cas. (N. Y.) 385; Calland *v.* Conway, 14 R. I. 9; Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

6. Holder *v.* Holder, 40 N. Y. App. Div. 255, 59 N. Y. Suppl. 204.

7. Hayes *v.* McReynolds, 144 Mo. 348, 46 S. W. 161; Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234; Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Epley *v.* Epley, 111 N. C. 505, 16 S. E. 321; McGill *v.* Buie, 106 N. C. 242, 11 S. E. 284; Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770; Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

8. Gravier *v.* Ivory, 34 Mo. 522; Howarth *v.* Howarth, 67 N. Y. App. Div. 354, 73 N. Y. Suppl. 785; Balen *v.* Jacquelin, 67 Hun (N. Y.) 311, 22 N. Y. Suppl. 193 [*affirming* 20 N. Y. Suppl. 657]; McCracken *v.* Love, 60 N. C. 641; Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741. *Contra*, Sanders *v.* Devereux, 60 Fed. 311, 8 C. C. A. 629.

follows are insufficient.[9] The complaint may, however, either directly affirm the cotenancy, and state the moieties of the several cotenants, or it may allege that at a time specified some designated person was the owner or seized of the property, and that by his death or otherwise his title has become vested in others who are named as parties to the suit.[10] But the complaint must, in addition to the cotenancy, allege the moieties of the respective parties. It is not sufficient for plaintiff to disclose his own moiety, leaving defendants in the pleading to disclose theirs.[11] While the complaint may also disclose circumstances excusing plaintiff from making a definite allegation respecting the moiety or interest of a defendant, such cannot be the case as to his own moiety. He must always allege precisely what it is.[12] A misstatement of a defendant's interest cannot defeat plaintiff's right to partition.[13]

6. The Deraignment of Title. At the common law, if plaintiff claimed as a coparcener or joint tenant, it seems to have been necessary for him to show how the joint tenancy or tenancy in coparcenary arose, and this was done by alleging the ownership in severalty of the property by the common grantor or ancestor and its grant by or descent from him. Otherwise no deraignment of the title was necessary. Many of the statutes relating to partition expressly require the complainant to set forth the title of all the parties. Whether proceeding under statutes of this character or not, we believe it is entirely unnecessary to set out in the

9. *California.*— Bradley *v.* Harkness, 26 Cal. 69.

Indiana.— Brown *v.* Brown, 133 Ind. 476, 32 N. E. 1128, 33 N. E. 615; Gowdy *v.* Gordon, 122 Ind. 533, 24 N. E. 226.

New York.— Doane *v.* Mercantile Trust Co., 24 Misc. 502, 53 N. Y. Suppl. 902 [*affirmed* in 39 N. Y. App. Div. 639, 57 N. E. 1137 (*affirmed* in 160 N. Y. 494, 55 N. E. 296)].

Pennsylvania.— Carey *v.* Schaller, 16 Pa. Super. Ct. 350; Mercur *v.* Jackson, 2 Lanc. L. Rev. 267.

South Carolina.— Harvey *v.* Hackney, 35 S. C. 361, 14 S. E. 822.

Tennessee.— Smith *v.* Quarles, (Ch. App. 1897) 46 S. W. 1035.

Texas.— Bartell *v.* Kelsey, (Civ. App. 1900) 59 S. W. 631.

Virginia.— Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

See 38 Cent. Dig. tit. "Partition," § 149 *et seq.*

10. *Alabama.*— Foster *v.* Baltimore, 126 Ala. 393, 28 So. 529; McQueen *v.* Turner, 91 Ala. 273, 8 So. 863; Morgan *v.* Farned, 83 Ala. 367, 3 So. 798.

Florida.— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

Illinois.— Schwartz *v.* Ritter, 186 Ill. 209, 57 N. E. 887.

Indiana.— Dye *v.* Davis, 65 Ind. 474.

Missouri.— Tuppery *v.* Hertung, 46 Mo. 135.

New York.— Bender *v.* Van Allen, 28 Misc. 304, 59 N. Y. Suppl. 885.

South Carolina.— Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770.

Tennessee.— Smith *v.* Quarles, (Ch. App. 1897) 46 S. W. 1035.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

See 38 Cent. Dig. tit. "Partition," § 149 *et seq.*

11. *California.*— Miller *v.* Sharp, 48 Cal. 394; Senter *v.* De Bernal, 38 Cal. 637; Morenhout *v.* Higuera, 32 Cal. 289.

Connecticut.— Champion *v.* Spencer, 1 Root 147.

Indiana.— Pipes *v.* Hobbs, 83 Ind. 43.

Michigan.— Thayer *v.* Lane, Walk. 200.

Missouri.— Rogers *v.* Miller, 48 Mo. 378; Millington *v.* Millington, 7 Mo. 446.

New York.— Van Cortlandt *v.* Beekman, 6 Paige 492.

North Carolina.— Ramsay *v.* Bell, 38 N. C. 209, 42 Am. Dec. 163.

Oregon.— Hanner *v.* Silver, 2 Oreg. 336.

Pennsylvania.— Johnson *v.* Kite, 9 Pa. Dist. 584.

Texas.— Buffalo Bayou Ship Channel Co. *v.* Bruly, 45 Tex. 6.

See 38 Cent. Dig. tit. "Partition," § 149 *et seq.*

12. Champion *v.* Spencer, 1 Root (Conn.) 147; Tibbs *v.* Allen, 27 Ill. 119; Wintermute *v.* Reese, 84 Ind. 308; Lease *v.* Carr, 5 Blackf. (Ind.) 353; Savery *v.* Taylor, 102 Mass. 509.

Plaintiff's allegation should refer to his moiety or aliquot part, and not to the number of acres to which he deems himself entitled. Coply *v.* Crane, 1 Root (Conn.) 69.

13. De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81. A complaint or bill for partition, instead of employing the formal averment that the parties hold together and undivided may allege other facts from which the holding must be inferred, as where it states ownership in their ancestor, his death intestate, and that the parties are his heirs at law. Richmond *v.* Richmond, 62 W. Va. 206, 57 S. E. 736. In adopting this form of pleading the allegation used must make it certain that the complainant has an interest in the property and that it continued up to the time

complaint any deraignment of the title, or any deeds or other matters constituting the evidence of such title, and that it is not only good, but the best, pleading to allege in general terms that the parties are cotenants of the property, and to state in like general terms the share or moiety of each.[14] The complaint is therefore not to be held bad for omitting to state some fact in the chain of title.[15] And generally allegations of evidentiary facts, if made, may be disregarded.[16] But if plaintiff undertakes to state all the facts upon which his title rests, and his statement omits some indispensable fact, his complaint must be held insufficient.[17] A like result may follow his statement of some fact necessarily contradicting, or inconsistent with, his general allegations of title.[18]

7. Exhibits. Exhibits may be filed in connection with, or as a part of, plaintiff's pleading. The filing of them is generally unnecessary,[19] and does not make their consideration proper in determining the sufficiency of the complaint.[20] But if they show trusts affecting plaintiff's title, his complaint is not subject to the objection that it ignores such trusts.[21] In some of the states the petitioner must file with his complaint or petition the written evidences of his title or copies thereof.[22]

8. Adverse Claims. Where, as in many of the states, all persons claiming any interest in the property, whether in possession or not, may be made parties defendant and required to present their claims, it is the duty of plaintiff to allege the nature of such claim if known to him, and he obviously cannot state it if unknown, no matter what may be the statutory requirement. An averment that certain defendants, naming them, "have, or claim to have, some interest in the land the character and extent of which is unknown to plaintiff" is sufficient to bring such claims before the court and to make its judgment conclusive of any title or interest held by such defendants.[23] The fact that plaintiff misconceives

of commencing the proceeding. Chaney *v.* Bevins, 96 S. W. 1129, 29 Ky. L. Rep. 149.

14. *Alabama.*— Whitlow *v.* Echols, 78 Ala. 206.

California.— Spader *v.* McNell, 130 Cal. 500, 62 Pac. 828.

Florida.— Keil *v.* West, 21 Fla. 508.

Georgia.— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Indiana.— Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865.

Maine.— Jewett *v.* Persons Unknown, 61 Me. 408.

Michigan.— Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446.

Missouri.— Reed *v.* Robertson, 45 Mo. 580.

New York.— Bradshaw *v.* Callaghan, 8 Johns. 558.

Washington.— Kroner *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

West Virginia.—Ransom *v.* High, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67.

Wisconsin.— Sprague *v.* Maxcy, 122 Wis. 502, 100 N. W. 832; Spensley *v.* Janesville Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574.

See 38 Cent. Dig. tit. "Partition," § 154.

In Kentucky the applicant for partition must file with his petition "the written evidence of the title to the land or copies thereof if there be any," but this requirement does not impose on plaintiff the duty of filing written evidence of defendant's title. Salyer *v.* Elkhorn Land Imp. Co., 77 S. W. 370, 25 Ky. L. Rep. 1210.

If the coöwners admit the title of each other by leases between them, the derivation of title need not be stated. Kelley *v.* Greenleaf, 14 Fed. Cas. No. 7,657, 3 Story 93.

When the proceeding is one maintainable only between parties claiming by descent from an ancestor dying in possession, these facts must be alleged. Holder *v.* Holder, 40 N. Y. App. Div. 255, 59 N. Y. Suppl. 204.

15. Bower *v.* Bowen, 139 Ind. 31, 38 N. E. 326; McCarthy *v.* McCarthy, 66 Ind. 128; Abrams *v.* Moseley, 7 S. C. 150.

16. Sauer *v.* Schenck, 159 Ind. 373, 64 N. E. 84; Sample *v.* Sample, 34 Kan. 73, 8 Pac. 248; McGill *v.* Buie, 106 N. C. 242, 11 S. E. 284.

17. Bell *v.* Dangerfield, 26 Minn. 307, 3 N. W. 698.

18. Chapman *v.* Allen, 11 Wash. 627, 40 Pac. 219.

19. Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685.

20. Smith *v.* King, 81 Ind. 217.

21. Shipley *v.* Jacob Tome Inst., 99 Md. 520, 58 Atl. 200.

22. Salyer *v.* Elkhorn Land Imp. Co., 77 S. W. 370, 25 Ky. L. Rep. 1210.

23. Morenhout *v.* Higuera, 32 Cal. 289; Thompson *v.* Holder, 117 Mo. 118, 22 S. W. 905; Townsend *v.* Bogert, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835.

The nature of an adverse claim must be stated, if known. Therefore, a complaint stating that certain of the defendants have or claim some interest in the property is defective if the pleader does not undertake to state the nature of such interest, nor show that it is unknown. Gage *v.* Reid, 104 Ill. 509; Satterlee *v.* Kobbe, 39 N. Y. App. Div. 420, 57 N. Y. Suppl. 341.

Plaintiff is not excused from stating the number of the cotenants by his allegations

the nature and effect of a trust cannot make his complaint insufficient if the facts relating thereto are correctly stated.[24]

9. As Against Unknown Owners. There are numerous decisions showing that, under statutes authorizing the proceeding to be against unknown owners, persons not named in the pleadings and not appearing in the suit may be bound by the judgment, if it purports to determine the claims of unknown as well as of known owners, and the steps prescribed by the statute for acquiring jurisdiction over unknown owners have been taken.[25] Unless the statute authorizes in every case some notice addressed to all persons, or otherwise makes the proceeding one *in rem*, it is evident that when the pleader wishes to reach persons unknown, his complaint must contain some averment showing the desire and necessity of proceeding against persons not named in the complaint. Upon this subject we have been unable to discover any decision considering what must be the form or substance of such averment, and can refer only to those cases in which the complaint has been held sufficient, although the question was not specially discussed.[26]

10. Describing the Property. It is obviously essential that the complaint so describe the property sought to be partitioned as to show that it is within the jurisdiction of the court,[27] and also as to enable the commissioners appointed for that purpose to make partition thereof.[28] We know of no reason why any less or greater effect should be accorded to descriptive words in a complaint in partition than if employed elsewhere with respect to property of like character.[29] It is certain that the court is without authority to partition property not described in the pleadings.[30] There is indeed authority for the position that the description in a complaint in partition may properly be less precise than elsewhere.[31]

11. Claims For Incidental Relief. As we shall hereafter show, plaintiff may, as an incident to the proceeding for partition, seek and obtain relief in addition to that obtainable in a partition at law and necessary to a complete adjustment of

that it would take an immense amount of time and labor to ascertain them. Salyer *v.* Elkhorn Land Imp. Co., 77 S. W. 370, 25 Ky. L. Rep. 1210.

24. Gale *v.* Harby, 20 Fla. 171.

25. *Maine.*— Foxcroft *v.* Barnes, 29 Me. 128; Baylies *v.* Bussey, 5 Me. 153.

Massachusetts.— Foster *v.* Abbot, 8 Metc. 596; Cook *v.* Allen, 2 Mass. 462.

New York.— Cole *v.* Hall, 2 Hill 625.

Ohio.— Rogers *v.* Tucker, 7 Ohio St. 417.

Wisconsin.— Kane *v.* Rock River Canal Co., 15 Wis. 179; Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678.

26. Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678 (where the allegation was "that divers of said defendants have, by deeds, respectively, conveyed portions of their interests to persons unknown to your orators; . . . that such portions of the tract as do not belong to the defendants, and to your orators, belong to unknown owners"); Kane *v.* Rock River Canal Co., 15 Wis. 179 (where the complaint named B and A as defendants, and specified the moiety of each, and alleged that the remaining interest did belong to one P F, who has died, leaving divers persons his heirs, whose names were to plaintiffs unknown, and that if said B and A and P F did not own the interests mentioned as belonging to them respectively, such interests belonged to unknown owners, whose names, as also the names of said heirs, plaintiffs were unable to ascertain). In Cole *v.* Hall, 2 Hill (N. Y.) 625, plaintiff alleged himself to be seized in fee of the undivided half of the property, and "that he was ignorant of the names, rights or title of the other persons interested as tenants in common."

27. Hughes' Case, 1 Bland (Md.) 46.

But it has been held in Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448, that the petition need not show in what county the lands lie, in order to give the circuit court jurisdiction.

28. Strange *v.* Gunn, 56 Ala. 611; Hanner *v.* Silver, 2 Oreg. 336.

29. See cases cited *infra*, this note.

For insufficient descriptions see Stein *v.* McGrath, 116 Ala. 593, 22 So. 861; Strange *v.* Gunn, 56 Ala. 611; Swanton *v.* Crooker, 52 Me. 415; Miller *v.* Miller, 16 Pick. (Mass.) 215; Barnes *v.* Taylor, 30 N. J. Eq. 7.

For sufficient descriptions see Home Security Bldg., etc., Assoc. *v.* Western Land, etc., Co., 145 Cal. 217, 78 Pac. 626; Rose *v.* Mesmer, 142 Cal. 322, 75 Pac. 905; Sullivan *v.* Lumsden, 118 Cal. 664, 50 Pac. 777; Sewall *v.* Ridlon, 5 Me. 458; Wright *v.* McCormick, 67 N. C. 27; Taffinder *v.* Merrell, (Tex. Civ. App. 1901) 61 S. W. 936 [*affirmed* in 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814].

And for construction of descriptions see Partridge *v.* Luce, 36 Me. 16.

30. Dondero *v.* Van Sickle, 11 Nev. 389; Sandiford *v.* Hempstead, 97 N. Y. App. Div. 163, 90 N. Y. Suppl. 76 [*affirmed* in 186 N. Y. 554, 79 N. E. 1115]; Alsbrook *v.* Reid, 89 N. C. 151; Hanner *v.* Silver, 2 Oreg. 336.

31. Thruston *v.* Minke, 32 Md. 571.

all matters arising out of the cotenancy, such as an accounting for moneys paid for improvements or received by defendants as rents and profits, or the ascertainment and satisfaction of liens, or the assertion of some equity not recognizable or not enforceable at law.[32] It is sufficient for our present purpose to say that for whatsoever relief plaintiff seeks other than that of the partitioning of the property, he must in his complaint make the allegations necessary to sustain it.[33] If no allegation is made, no relief can be granted, and if an allegation is made, it must fail unless it would be sufficient if it were employed in an independent action.[34] Although there is a decision indicating that the claim for relief may not be entertained if it is against one only of defendants,[35] this position appears wholly indefensible if the character of the claim is such that the court must have entertained it and all defendant cotenants are liable thereto.[36] Whatsoever claims to relief a party may be entitled to assert as an incident to the partition he may join in a single pleading.[37]

12. **Preliminary Matters or Conditions Precedent.** If there is any preliminary matter or condition essential to plaintiff's right to partition, it should be alleged.[38] It was formerly customary to allege that plaintiff had demanded, and defendants had refused to make, partition. No demand appears, however, to be required.[39] All allegations respecting it must hence be superfluous. Nor need plaintiff allege an offer on his part to pay for his use and occupation of the property, or the doing of any other act not requisite to completing his right to any particular character of relief demanded by him.[40]

13. **Variance Between the Complaint and the Evidence.** The sufficiency of the complaint does not depend on the evidence offered at the trial. It is not fatal to plaintiff that the interest proved by him differs from that alleged, if it still shows him to be a cotenant and as such entitled to partition.[41]

14. **Prayer For Relief.** Whatever be the name given by the plaintiff to the paper by which he commences his proceeding, it should contain a demand or prayer for relief.[42] Although the suit is for the sale of the property, it has been said that the prayer should be for the partition as well the sale,[43] but the position is absurd and cannot be maintained where the allegations show that a division by allotment is impracticable.[44] Plaintiff's relief, at least when the judgment is not by default, is not restricted by his prayer. Thus, although he prays for partition by

32. Hudson *v.* Hudson, 119 Ga. 637, 46 S. E. 874; Prather *v.* Prather, 139 Ind. 570, 39 N. E. 310; Budde *v.* Rebenack, 137 Mo. 179, 38 S. W. 910.

33. Cox *v.* Kyle, 75 Miss. 667, 23 So. 518.

34. Lansdale *v.* Brown, 49 Ga. 278; Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; Macmunn *v.* Haverkamp, 8 Pa. Dist. 680, 23 Pa. Co. Ct. 309.

35. Crane *v.* Waggoner, 27 Ind. 52, 89 Am. Dec. 493.

36. Ellerson *v.* Westcott, 88 Hun (N. Y.) 389, 34 N. Y. Suppl. 813, 2 N. Y. Annot. Cas. 118 [*reversed* on other grounds in 148 N. Y. 149, 42 N. E. 540].

37. Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475; Obert *v.* Obert, 10 N. J. Eq. 98 [*affirmed* in 12 N. J. Eq. 423]; Buchanan *v.* Buchanan, 38 S. C. 410, 17 S. E. 218.

This very obvious rule was apparently denied in Belt *v.* Bowie, 65 Md. 350, 4 Atl. 295, declaring that a proceeding to partition, and, as incident thereto, to enforce a mortgage, could not be joined.

38. However the courts, where the facts which usually establish the right to partition are alleged, are not inclined to require the complaint to negative possible defenses. Minear *v.* Hogg, 94 Iowa 641, 63 N. W. 444; Diehl *v.* Lambart, 9 N. Y. Civ. Proc. 267.

39. Robinson *v.* Dickey, 143 Ind. 206, 42 N. E. 679, 52 Am. St. Rep. 417; Wilson *v.* Green, 63 Md. 547; McGowan *v.* Morrow, 3 Code Rep. (N. Y.) 9.

But in Maryland it was formerly necessary in a bill for the sale or partition of the realty of an intestate to state that the heirs could not agree on a partition. Chaney *v.* Tipton, 11 Gill & J. 253.

40. Wilkinson *v.* Stuart, 74 Ala. 198.

41. Thompson *v.* Wheeler, 15 Wend. (N. Y.) 340; Ferris *v.* Smith, 17 Johns. (N. Y.) 221; Bartell *v.* Kelsey, (Tex. Civ. App. 1900) 59 S. W. 631. *Contra*, Allnatt Partition 73 [*citing* Becket *v.* Bromley, Noy 107, 74 Eng. Reprint 1073].

42. Hawley *v.* Castle, Kirby (Conn.) 218.

43. Dyer *v.* Vinton, 10 R. I. 517; Holland *v.* Holland, L. R. 13 Eq. 406, 41 L. J. Ch. 220, 26 L. T. Rep. N. S. 17, 20 Wkly. Rep. 290; Teall *v.* Watts, L. R. 11 Eq. 213, 40 L. J. Ch. 176, 23 L. T. Rep. N. S. 884, 19 Wkly. Rep. 317.

44. Lorenz *v.* Jacobs, 59 Cal. 262.

allotment, it may be made by sale;[45] and generally the court may grant any relief proper on the facts alleged and established, whether or not it be other, or in addition to, the relief in fact prayed for in the complaint.[46] If the complaint shows an agreement entitling plaintiff to a conveyance of a moiety, the prayer, it is said, should be for specific performance, to be followed by a partition.[47]

15. BILL OF PARTICULARS. In New York plaintiff may be required to furnish a bill of particulars respecting some fact which, owing to the generality of the pleadings, may result in the surprise of defendant, if he has not the benefit of such bill;[48] but plaintiff cannot by such a bill be required to disclose on what ground he claims a devise to one of defendants to be void.[49]

16. SIGNATURE AND VERIFICATION. We know of nothing making either the signature or the verification to a complaint in partition subject to any rule not applicable to other suits or actions. If plaintiff is a married woman, it is said a bill for partition on her behalf must be signed by her, or she must have signed a warrant of attorney for the special purpose of authorizing the suit.[50] In the absence of a statute expressly requiring it, the complaint need not be verified.[51] The failure to sign the complaint by plaintiff or his attorney, as required by statute, is not a matter of substance, and does not avoid the judgment.[52] Nor does the fact that the complaint purports to be signed by plaintiff "as administratrix" where it alleges her claim as widow, and prays for partition between herself and the children.[53]

17. AMENDMENTS. Cases are conceivable where the insufficiency of the complaint may justify a judgment for defendant dismissing the action.[54] This can, however, rarely be so. For, irrespective of the character of the defect, it may generally be removed by amendment, and leave to amend, if sought, should be granted[55] at any stage of the proceedings prior to the entry of the final judgment within the discretion of the court.[56]

18. SUPPLEMENTAL COMPLAINTS. Whenever any fact occurs during the pendency

45. Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Aston *v.* Meredith, L. R. 11 Eq. 601, 40 L. J. Ch. 241, 24 L. T. Rep. N. S. 128.

46. King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. L. Rep. 1859; Townsend *v.* Bogert, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835; Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63; Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918. But in Tibbs *v.* Allen, 27 Ill. 119, it was held that dower could not be assigned to a widow in partition, although the bill contained allegations warranting such assignment, there being, however, no prayer therefor. And in Jewett *v.* Nash, 4 Vt. 517, it was thought proper to dismiss a petition, although it averred all the facts entitling plaintiff to partition, because the mode of partitioning for which he prayed was not authorized by law.

47. Ellis *v.* Hill, 162 Ill. 557, 44 N. E. 858.

48. Drake *v.* Drake, 31 Misc. (N. Y.) 8, 64 N. Y. Suppl. 581.

49. Bennett *v.* Wardell, 43 Hun (N. Y.) 452.

50. Graydon *v.* Graydon, McMull. Eq. (S. C.) 63.

51. Hall *v.* Snipes, 9 S. W. 388, 10 Ky. L. Rep. 435; Martin *v.* Porter, 4 Heisk. (Tenn.) 407.

Although a verification is required, its absence is waived by failure to object and letting the cause proceed to judgment and sale. Dunning *v.* Dunning, 37 Ill. 306.

52. Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6.

53. Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415.

54. Crippen *v.* White, 28 Colo. 298, 64 Pac. 184.

55. *Alabama.*—Sherer *v.* Garrison, 111 Ala. 228, 19 So. 988.

Georgia.— Hudson *v.* Hudson, 119 Ga. 637, 46 S. E. 874.

Louisiana.— Fix *v.* Koepke, 44 La. Ann. 745, 11 So. 39.

North Carolina.— Simmons *v.* Jones, 118 N. C. 472, 24 S. E. 114; Godwin *v.* Early, 114 N. C. 11, 18 S. E. 973.

Pennsylvania.—Cowan's Appeal, (1888) 16 Atl. 28; Drum's Estate, 8 Pa. Dist. 407; Schweitzer's Estate, 4 Lanc. L. Rev. 369.

See 38 Cent. Dig. tit. "Partition," § 166 *et seq.*

56. *Indiana.*— Bower *v.* Bowen, 139 Ind. 31, 38 N. E. 326; Randles *v.* Randles, 63 Ind. 93.

Maine.— Swanton *v.* Crooker, 52 Me. 415.

Maryland.— Claude *v.* Handy, 83 Md. 225, 34 Atl. 532.

Massachusetts.— Fay *v.* Fay, 1 Cush. 93; Loud *v.* Penniman, 19 Pick. 539.

Pennsylvania.— Marcy's Estate, 9 Kulp 128.

of the action, perfecting or otherwise affecting plaintiff's cause of action, and of which he desires to avail himself at the trial, or perhaps at any time before final judgment, he should assert it by a supplemental complaint.[57]

19. Responding to Defendant's Pleadings. Plaintiff may challenge defendant's answer by demurring thereto either for insufficiency of the facts pleaded to constitute a defense, or for any other defect therein which may be urged as a cause of demurrer.[58] In many of the states, although the answer is sufficient both in form and substance, plaintiff may file a replication thereto denying such allegations as he may choose to controvert.[59] In Indiana plaintiff may file a reply to the answer, which itself is subject to demurrer if it purports to be a reply to the whole answer when it is but a partial reply.[60] A demurrer to an answer is waived by proceeding with the partition without asking for any hearing on the demurrer.[61] If defendant files a cross bill, cross complaint, or counter-claim, plaintiff may demur thereto on the same grounds as if it were the original pleading in the action; but an answer denying the allegations of plaintiff's complaint, or some of them, is not a counter-claim, and a demurrer thereto on the ground that it does not state facts sufficient to constitute a cause of action is bad.[62] Plaintiff cannot file a cross complaint, and if he does so, it may be struck out on motion, or a demurrer may be sustained thereto.[63]

H. Process — 1. Necessity For. There can be no doubt that in a proceeding for partition, jurisdiction over defendants can be acquired only by the issuing of process against and its service upon them, and that a judgment rendered without such issuing and service must be void, unless defendants have in some way voluntarily submitted themselves to the jurisdiction of the court.[64] There is indeed a decision from which the inference might well be drawn that a voluntary consent to partition is not sufficient to support a partition based thereon,[65] and in another case it was held that a paper signed by a defendant and filed in the cause, stating that he wished to waive notice of the division of the real estate, could not be considered either as a service on or appearance by him.[66] Nevertheless, there can be no serious doubt that defendants may voluntarily appear in a proceeding for partition as well as in any other suit or action, and that the acts amounting to an appearance in the one do not differ in substance from those amounting to an appearance in the other.[67]

2. The Form and Contents of the Process. The form and contents of the process are usually prescribed by statute, and, except in so far as controlled by special statutory directions, should be the same as in other cases relating to real

See 38 Cent. Dig. tit. "Partition," § 166 *et seq.*

57. Nolan *v.* Command, 11 N. Y. Civ. Proc. 295; Diehl *v.* Lambert, 9 N. Y. Civ. Proc. 347.

58. Miller *v.* Smith, 98 Ind. 226; Schafer *v.* Schafer, 68 Ind. 374; Sanford *v.* Tucker, 54 Ind. 219; Pulse *v.* Osborn, (Ind. App. 1901) 60 N. E. 374; Flagg *v.* Thurston, 11 Pick. (Mass.) 431; Black *v.* Tyler, 1 Pick. (Mass.) 150; Jewell *v.* McQuesten, 68 N. H. 233, 34 Atl. 742.

59. Loring *v.* Gay, 9 Pick. (Mass.) 66; Freeman Coten. & P. § 492.

60. Duncan *v.* Henry, 125 Ind. 10, 24 N. E. 506.

61. McNeile's Estate, 15 Pa. Dist. 341.

62. Evans *v.* Ogsbury, 2 N. Y. App. Div. 556, 37 N. Y. Suppl. 1104.

63. Russell *v.* Russell, 48 Ind. 456.

64. *Arkansas.*— Harris *v.* Preston, 10 Ark. 201.

Kentucky.— Railey *v.* Railey, 5 B. Mon. 110; Craig *v.* Barker, 4 Dana 600; Palmer *v.* Palmer, 2 Dana 390.

Louisiana.— State *v.* St. Landry Parish Judge, 31 La. Ann. 802.

Mississippi.— Cotton *v.* Cash, 85 Miss. 29, 37 So. 459; Tindall *v.* Tindall, (1888) 3 So. 581.

New York.— Larkin *v.* Mann, 2 Paige 27.

Pennsylvania.— Morrow *v.* Morrow, 152 Pa. St. 516, 25 Atl. 1107; Klingensmith's Estate, 130 Pa. St. 516, 18 Atl. 1064; Hanbest's Estate, 11 Phila. 10.

South Carolina.— Sligh *v.* Sligh, 1 Brev. 176.

But if the petition for partition is by the guardian of all the heirs, no process of an adversary character is necessary. Goudy *v.* Shank, 8 Ohio 415.

65. Candy *v.* Stradley, 1 Del. Ch. 113.

66. Anderson *v.* Anderson, 23 Mo. 379.

67. Dunning *v.* Dunning, 37 Ill. 306; Reid *v.* Clendenning, 193 Pa. St. 406, 44 Atl. 500; Tallman *v.* McCarty, 11 Wis. 401.

property. In Florida, if in chancery, the subpœna need not contain a description of the premises.[68] In New York the notice of the presenting of the petition and of a motion to appoint commissioners need not mention the place where the court will be held, and if it does, and mentions a wrong place, this may be regarded as surplusage.[69] In Massachusetts the court formerly might prescribe the notice to be given.[70] Although the statute declares that the summons shall be addressed by name to all the owners and lien-holders who are known, "and generally to all persons unknown, having or claiming an interest in the property," it is sufficient that the writ be addressed to the persons named in the complaint, where it does not appear that any one except they and plaintiff has any interest in the property.[71]

3. By Whom May Be Served. The service of process in partition must be by a person authorized to make such service in a civil action, and if not so served, jurisdiction is not acquired, and the judgment based on the service may be reversed,[72] unless defendant has voluntarily appeared or otherwise waived the irregularity.[73]

4. Mode of Service — a. Generally. The mode of serving process may be specially prescribed by the statute relating to partition, and, where not so specially prescribed, is doubtless controlled by the rules applicable to other civil cases, and may hence be by leaving a copy of the writ at the residence of defendant where that mode is authorized in other civil actions.[74]

b. By Publication. Any statute providing for partition and omitting to authorize the service of summons by publication as against non-residents would be so lamentably defective that it would not long be allowed to remain in that imperfect condition. As a matter of fact, in every state, we believe, service of the summons by publication is specially authorized in the statute relating to partition, or by other statutes so comprehensive in their terms that they must be deemed to include proceedings in partition.[75] The publication must generally, if not invariably, be preceded by an affidavit showing the facts relied upon to justify the publication,[76] and an order of the court or judge based on such affidavit directing the publication to be made. The general tendency is to exact a strict compliance in partition proceedings with statutes requiring notices to be given,[77] and especially is this true of the service of process by publication and the steps necessary to support it.[78]

68. Keil *v.* West, 21 Fla. 508.

69. William *v.* Brown, 5 Cow. (N. Y.) 281.

70. Vaughan *v.* Noble, 6 Mass. 252.

71. Martin *v.* Parker, 14 Minn. 13, 100 Am. Dec. 188.

72. Kyle *v.* Kyle, 55 Ind. 387.

73. Upson *v.* Horn, 3 Strobh. (S. C.) 108, 49 Am. Dec. 633.

74. Wilcox *v.* Monday, 83 Ind. 335.

75. *Florida.*— Keil *v.* West, 21 Fla. 508.

Georgia.— Hamby Mountain Gold Mines *v.* Calhoun Land, etc., Co., 83 Ga. 311, 9 S. E. 831; Patton *v.* Childs, 78 Ga. 352.

Illinois.— Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

Iowa.— Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287; Mason *v.* Messenger, 17 Iowa 261.

Michigan.— Platt *v.* Stewart, 10 Mich. 260.

Nebraska.— McCormick *v.* Paddock, 20 Nebr. 486, 30 N. W. 602.

New York.— Volz *v.* Steiner, 67 N. Y. App. Div. 504, 73 N. Y. Suppl. 1006.

Ohio.— Rogers *v.* Tucker, 7 Ohio St. 417; Tahler *v.* Wiseman, 1 Ohio Dec. (Reprint) 497, 9 West L. J. 207.

Pennsylvania.— Sankey's Appeal, 55 Pa. St. 491; Kantner's Estate, 24 Pa. Co. Ct. 310, 16 Montg. Co. Rep. 215.

Tennessee.— Robertson *v.* Robertson, 2 Swan 197.

Texas.— Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191.

Wisconsin.— Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; Foster *v.* Hammond, 37 Wis. 185.

76. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

77. Cox *v.* Matthews, 17 Ind. 367; Newby *v.* Perkins, 1 Dana (Ky.) 440, 25 Am. Dec. 160; Bowler *v.* Ennis, 46 N. Y. App. Div. 309, 61 N. Y. Suppl. 686; *In re* Loney, 10 U. C. Q. B. 305.

78. Dineen *v.* Hall, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392, 23 Ky. L. Rep. 1615; Savary *v.* Da Camara, 60 Md. 139; Ashley *v.* Brightman, 21 Pick. (Mass.) 285; Platt *v.* Stewart, 10 Mich. 260.

A personal judgment against a non-resident cannot of course be sustained if based on publication only. Foote *v.* Sewall, 81 Tex. 659, 17 S. W. 373; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191; Gillon *v.* Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014.

5. Against Unknown Owners. The statutes authorizing a proceeding in partition to be against unknown owners must intend,[79] if they do not expressly provide, that process shall be served on them in some manner, and, as they are not known, this must be by publication; and the publication, if made, must be supported by such affidavits on the part of plaintiff and such orders of the court or judge as the statute may prescribe.[80]

6. Against Incompetent Persons — a. Minors. The service of process upon minors, or other incompetent persons, is as indispensable in suits in partition as in other judicial proceedings, and must be made in the same manner, in the absence of some statute providing otherwise. A minor, notwithstanding his minority, must ordinarily be served personally,[81] and such additional service must be made as the statute prescribes, as where it, in addition to requiring service on the infant, provides for service on one of his parents, or on his guardian, if he has any, or on the person with whom the infant resides.[82] If such guardian is plaintiff, a service on the infant alone is sufficient.[83] If the person on whom service is to be made is also a party defendant with the infant, it is sufficient that the infant and his guardian each be personally served, and not indispensable that the guardian further be served as such.[84] If the minor has a general guardian, process should be served on him.[85] Many decisions hold such service to be sufficient, although the infant is not served.[86] As in the absence of a general guardian, a guardian *ad litem* should be appointed for a minor defendant, the misapprehension has often arisen that this appointment of itself gave the court jurisdiction over such defendant, and decrees and judgments have been sustained where a guardian *ad litem* had been appointed, although no service of process had been made on the infant.[87] But this is a mistaken view. The authority to appoint a guardian *ad litem* depends on the previous acquisition of jurisdiction over the infant, and if that jurisdiction has not been previously acquired, the appointment is void and can impart no validity to a judgment founded upon it.[88] Probably the general guardian of an infant may appear for him without first requiring the service of process on him, and thereby subject him to the jurisdiction of the court.[89] We think this

Personal service of a defendant beyond the state may be authorized as a substitute for publication and having the like effect. O'Donaghue *v.* Smith, 184 N. Y. 365, 77 N. E. 621 [*affirming* 85 N. Y. App. Div. 324, 83 N. Y. Suppl. 398].

79. Savage *v.* Gray, 96 Me. 557, 53 Atl. 61.

80. *Illinois.*— Thornton *v.* Houtze, 91 Ill. 199.

Massachusetts.— Ashley *v.* Brightman, 21 Pick. 285.

New York.— Sanford *v.* White, 1 Thomps. & C. 647, 46 How. Pr. 265 [*affirmed* in 56 N. Y. 359, 47 How. Pr. 96]; Denning *v.* Corwin, 11 Wend. 647; Allen *v.* Allen, 11 How. Pr. 277.

Texas.— Foote *v.* Sewall, 81 Tex. 659, 17 S. W. 373; Pool *v.* Lamon, (Civ. App. 1894) 28 S. W. 363.

Wisconsin.— Mecklem *v.* Blake, 19 Wis. 397; Kane *v.* Rock River Canal Co., 15 Wis. 179.

81. *Florida.*— Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94.

Illinois.— Nichols *v.* Mitchell, 70 Ill. 258; Campbell *v.* Campbell, 63 Ill. 462.

Kentucky.— Girty *v.* Logan, 6 Bush 8; Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887.

Maryland.— Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117.

Missouri.— Smith *v.* Davis, 27 Mo. 298.

New York.— Pinckney *v.* Smith, 26 Hun 524.

Pennsylvania.— Graham's Estate, 14 Wkly. Notes Cas. 31.

Texas.— Taylor *v.* Whitfield, 33 Tex. 181; Ellis *v.* Stewart, (Civ. App. 1893) 24 S. W. 585.

82. Morrison *v.* Garrott, 22 S. W. 320, 15 Ky. L. Rep. 305.

83. Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

84. Cheatham *v.* Whitman, 86 Ky. 614, 6 S. W. 595, 9 Ky. L. Rep. 761; Lawrence *v.* Connor, 14 S. W. 77, 12 Ky. L. Rep. 86.

85. Gayle *v.* Johnston, 80 Ala. 395.

86. Dampier *v.* McCall, 78 Ga. 607, 3 S. E. 563; Richards *v.* Richards, 17 Ind. 636; Cheney *v.* Richards, 43 Kan. 492, 23 Pac. 624; Havens *v.* Drake, 43 Kan. 484, 23 Pac. 621; Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298; Weatherhead *v.* Weatherhead, 9 Ont. Pr. 96.

87. Robb *v.* Irwin, 15 Ohio 689; Walker *v.* Veno, 6 S. C. 459.

88. Chambers *v.* Jones, 72 Ill. 275; McMurtry *v.* Fairley, 194 Mo. 502, 91 S. W. 902; Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933; Shaw *v.* Gregoire, 41 Mo. 407; Tederall *v.* Bonknight, 25 S. C. 275.

89. Payne *v.* Masek, 114 Mo. 631, 21 S. W. 751; Hite *v.* Thompson, 18 Mo. 461.

rule must be restricted to those cases in which the general guardian is not himself a party to the action, representing claims hostile to his ward.[90]

b. Lunatics. The rules applicable to minors are equally so to lunatics, including the power of their committee or general guardian to appear for them and thereby render the service of process unnecessary.[91]

7. Amendments. The rules and statutory provisions respecting the amendment of process and of the returns thereof apply to proceedings in partition.[92]

8. Collateral Attacks. Notwithstanding a few authorities apparently to the contrary,[93] the better view is that judgments and decrees in partition are supported by the same jurisdictional presumptions and entitled to the same immunity from collateral attack on jurisdictional grounds as are other judgments and decrees of courts of general jurisdiction.[94]

I. Defendant's Pleadings — 1. The General Rule. In the absence of any statute to the contrary, the general rule applicable to pleadings on behalf of defendants must be equally applicable to proceedings for partition.[95] The pleadings on the part of defendant ordinarily may therefore: (1) Call in question the sufficiency of the complaint; (2) assert matter in abatement of the action; (3) deny the right of the complainant to partition, or to some other redress sought by him; or (4) aver facts entitling defendant to some special relief other than, or in addition to, that allotting him his share of the property to be held in severalty.

2. The Demurrer. Defects in the complaint, unless they involve the jurisdiction of the court or the right to maintain the action at all on the facts stated are waived if an answer is filed without in any manner urging them.[96] Such defects should therefore, where there is no intention of waiving them, be suggested by demurrer. As in other cases, the ground of demurrer must appear on the face of the complaint,[97] and every matter of defense not apparent on the face of the complaint must be presented by the answer, and if not so presented is waived.[98] On the other hand defendant has the right to demur to the complaint,[99] and if the facts alleged do not entitle plaintiff to any relief, a general demurrer, if interposed, must be sustained.[1] The rule is otherwise if such facts entitle plaintiff to some relief, although less than, or different from, that sought.[2] Grounds of demurrer other than that the complaint fails to state facts sufficient to constitute a cause of action, or to show that the court has jurisdiction of the cause, must be specially stated, and where the objection to the complaint consists of its uncertainty in description or in any other matter, the remedy of defendant in some of the states is by motion to make the complaint more certain,[3] but in others by demurrer for indefiniteness.[4] The pendency of a prior suit for partition may be urged under a special demurrer,[5] but not when the second suit covers the matters

90. Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686.

91. Finzer *v.* Nevin, 18 S. W. 367, 13 Ky. L. Rep. 773; Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440 [*affirmed* in 34 N. Y. 536, 31 How. Pr. 279].

92. Dewar *v.* Spence, 2 Whart. (Pa.) 211, 30 Am. Dec. 241.

93. Denning *v.* Corwin, 11 Wend. (N. Y.) 647.

94. Cocks *v.* Simmons, 57 Miss. 183; Richards *v.* Rote, 68 Pa. St. 248. See also *infra*, III, Q, 6.

95. Jennings *v.* Jennings, 2 Abb. Pr. (N. Y.) 6; Reed *v.* Child, 4 How. Pr. (N. Y.) 125.

96. Broad *v.* Broad, 40 Cal. 493; White *v.* Smith, (N. J. Ch. 1905) 60 Atl. 399.

97. Hoffman *v.* Ross, 25 Mich. 175; Love *v.* Robinson, 213 Pa. St. 480, 62 Atl. 1065; Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426; Turrentine *v.* Watson, 3 Tenn. Ch. 307.

98. Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720.

99. Cronk *v.* Cronk, 1 U. C. Q. B. 471.

1. Thus if the bill shows that the title has been acquired by a defendant under a tax-sale, which the bill seeks to avoid, and the grounds for avoidance as stated are insufficient, a demurrer to the bill for want of equity should be sustained. Woglom *v.* Kant, 69 N. J. Eq. 489, 61 Atl. 9.

2. Brokaw *v.* McDougall, 20 Fla. 212; Carter *v.* Kerr, 8 Blackf. (Ind.) 373; Rogers *v.* Gillett, 56 Iowa 266, 9 N. W. 204.

3. Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Moffatt *v.* McLaughlin, 13 Hun (N. Y.) 449.

4. Garnett Smelting, etc., Co. *v.* Watts, 140 Ala. 449, 37 So. 201; Rice *v.* Donald, 97 Md. 396, 55 Atl. 620; Rogers *v.* Miller, 48 Mo. 378.

5. Lowe *v.* Maurer, 4 Ohio Dec. (Reprint) 243, 1 Clev. L. Rep. 157.

in dispute more completely and adds other and proper parties.[6] Where tenants are made parties defendant, it is said that allegations respecting their rights cannot be the grounds of demurrer by any of the parties other than such tenants when they only can be affected by the allegation.[7]

3. PLEAS IN ABATEMENT. By the statute 8 & 9 Wm. III, c. 31, the right to interpose a plea in abatement in partition was denied, and the declaration was made that no suit in partition should be abated by the death of any tenant. This statute was reënacted in Illinois.[8] Elsewhere in the United States it does not prevail, and the death of a party so abates the action that his heirs must be made parties and brought before the court.[9] The right to have the action continued after the death of plaintiff seems to depend upon statutes, which have been somewhat strictly construed. Thus, where the statute purported to give the right to an heir of plaintiff, it was denied his devisee.[10] It has been held that after the entry of the interlocutory judgment, the death of plaintiff does not abate the action.[11] If one of the parties alienates his interest during the pendency of the suit, his alienee, by virtue of the law of *lis pendens*, is bound by the judgment. There is no abatement of the proceeding. It may go on without taking any notice of the transferee,[12] or the alienee may be substituted as a party in place of his grantor.[13] Any objection which in effect concedes that partition is maintainable but for some impediment which is temporary or may be removed should be made by plea in abatement, such as, that the attorney or other person instituting the action in behalf of plaintiff had no authority to do so;[14] that one made a defendant is not a proper party;[15] that certain necessary parties have not been made defendants;[16] that plaintiff has not capacity to sue; that there is another action pending between the same parties to partition the same property;[17] or that the application for partition is premature.[18]

4. THE GENERAL ISSUE. The plea of *non tenent insimul* constituted the general issue in actions of partition at common law.[19] Every allowable plea which could be interposed amounted to *non tenent insimul*.[20] This plea put in issue all the material allegations of the complaint, and seems to have been so adequate as to authorize defendant to place in evidence every conceivable fact which, if proved,

6. Aylesworth *v.* Crocker, 21 R. I. 436, 44 Atl. 308.

7. Eberts *v.* Fisher, 44 Mich. 551, 7 N. W. 211.

8. Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Monroe *v.* Millizen, 113 Ill. App. 157.

9. *Florida.*— Lyon *v.* Register, 36 Fla. 273, 18 So. 589.

Maine.— Dwinal *v.* Holmes, 37 Me. 97.

Massachusetts.— Mitchell *v.* Starbuck, 10 Mass. 5; Thomas *v.* Smith, 2 Mass. 479.

New Hampshire.— Osgood *v.* Taggard, 18 N. H. 318.

New York.— Requa *v.* Holmes, 16 N. Y. 193; Reed *v.* Child, 4 How. Pr. 125; Reynolds *v.* Reynolds, 5 Paige 161.

10. Brown *v.* Wells, 12 Metc. (Mass.) 501.

11. Frohock *v.* Gustine, 8 Watts (Pa.) 121.

12. Griel *v.* Randolph, 108 Ala. 601, 18 So. 609. See *supra*, III, F, 10, g.

13. Spring *v.* Sandford, 7 Paige (N. Y.) 550; McClure *v.* McClure, 1 Phila. (Pa.) 117.

14. Upham *v.* Bradley, 17 Me. 423.

15. Loomis *v.* Riley, 24 Ill. 307.

16. Cates *v.* Johnson, 109 Ala. 126, 19 So. 416; Jewett *v.* Persons Unknown, 61 Me. 408; Hoxsie *v.* Ellis, 4 R. I. 123.

17. Hornfager *v.* Hornfager, 6 How. Pr. (N. Y.) 279.

The pendency of a suit in ejectment is no obstacle to proceeding with the partition. Place *v.* Rogers, 101 N. Y. App. Div. 193, 91 N. Y. Suppl. 912.

18. Wilson *v.* Anderson, 13 Montg. Co. Rep. (Pa.) 44.

19. The following is the plea of *non tenent insimul*, as shown in Tillinghast Forms 625: "And the said C. D. by G. H., his attorney, comes and says that he did not hold the premises in said petition of the said A. B. set forth, together with the said A. B. at the time of the commencement of the proceedings in this cause, as alleged in said petition of the said A. B.; and of this he the said C. D. puts himself upon the country; and the said A. B. doth the like, etc. G. H., Attorney for Defendant C. D." In Hunt *v.* Hazelton, 5 N. H. 216, 20 Am. Dec. 575, it is said that the general issue in partition is "that the respondents do not hold, nor on the day of the exhibition of the petition in this behalf, nor ever afterwards, did hold the said premises, nor any part or parcel thereof, together and undivided with the petitioner, as he, in his said petition, has supposed." But not now sufficient in New Hampshire see Morrill *v.* Foster, 25 N. H. 333.

20. 2 Sellon Pr. 218.

would prevent plaintiff's recovery.[21] Under the code rules of pleading, the general issue is made by a general denial. Therefore such a denial or any form either of allegation or of denial which necessarily negatives the idea that plaintiff and defendant were cotenants at the commencement of the action must be sufficient where the only object of the pleader is to defeat plaintiff's claim to partition;[22] and anything less than this must be insufficient.[23] Of course defendant may, without tendering the general issue, deny some allegation of the complaint upon which plaintiff bases a claim for special relief, as for instance that the premises are not partible,[24] or that plaintiff is entitled to an accounting for rents and profits.[25]

5. DEFENSES ALLOWABLE IN THE UNITED STATES. So far as we are aware there is no rule prevailing in the United States to prevent defendant from urging any matter which will defeat plaintiff's demand for partition. In hereinbefore treating of the estates and property subject to, and the persons entitled to, demand, partition, we have necessarily shown what property and estates are not subject to partition and what persons are not entitled to demand it; and whatsoever denial or allegation necessarily asserts facts from which it follows either that the property sought to be partitioned is not subject thereto, or that plaintiff has no right to a partition, must be permissible and sufficient as an answer where its sole purpose is to prevent any partition,[26] and no matter which does not negative or undermine plaintiff's claim can be sufficient.[27] If the proceeding is at law, or

21. McKee *v.* Strauh, 2 Binn. (Pa.) 1; Bates *v.* McCrory, 3 Yeates (Pa.) 192; Bethel *v.* Lloyd, 1 Dall. (Pa.) 2, 1 L. ed. 11.

22. Simms *v.* Simms, 88 Ky. 642, 11 S. W. 665, 11 Ky. L. Rep. 131; Whitney *v.* Whitney, 171 N. Y. 176, 63 N. E. 834.

23. Shaffer *v.* Shaffer, 90 Ind. 472; Marshall *v.* Stewart, 80 Ind. 189; Crosier *v.* McLaughlin, 1 Nev. 348; Morrill *v.* Foster, 25 N. H. 333; Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

24. Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

25. Doerner *v.* Doerner, 161 Mo. 407, 61 S. W. 802.

26. Thus the answer may show that complainant's ancestor sold the property to defendant (Woolley *v.* Schrader, 116 Ill. 29, 4 N. E. 658; Nichols *v.* Padfield, 77 Ill. 253; Daggy *v.* Ash, 23 Ind. 338); that defendant is an owner of the property in severalty (Schafer *v.* Schafer, 68 Ind. 374); that partition of property has already been made and remains in force (Dufau *v.* Latour, 8 La. 552; Kash *v.* Coleman, 145 Mo. 645, 47 S. W. 503; *In re* Bestford, 5 Lack. Jur. (Pa.) 13); that the complainant's father, being then the owner in severalty, gave the property to defendants, and they took possession under the gift and made valuable improvements (Haines *v.* Haines, 4 Md. Ch. 133); facts showing that a deed under which one of the parties claimed is void (Hamilton *v.* McLean, 169 Mo. 51, 68 S. W. 930), or generally any fact showing that plaintiff has no title or interest in the land (Wallace *v.* International Paper Co., 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543; Reed *v.* Child, 4 How. Pr. (N. Y.) 125); that the whole title to the land is in a third person not a party to the action (Pooler *v.* Smith, 73 S. C. 102, 52 S. E. 967); any matter operating as an estoppel against plaintiff (Cook *v.* International, etc., R. Co., 3 Tex. Civ. App. 125, 22 S. W. 1012); that the property, having belonged to plaintiff's ancestor, plaintiff was excluded from all interest therein by such ancestor's will (Ackermann *v.* Ackermann, 22 Tex. Civ. App. 612, 55 S. W. 801); or that the title of plaintiff is dependent on a levy under execution, which, for some reason disclosed by the answer, is void (French *v.* Eaton, 15 N. H. 337).

That defendant may set up title in a third person under whom defendant does not claim, unless he asks such third person to be made a party, is denied in Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Walker *v.* Howard, 34 Tex. 478; Burleson *v.* Burleson, 28 Tex. 383.

27. *Alabama.*— Mylin *v.* King, 139 Ala. 319, 35 So. 998; Sibley *v.* Alba, 95 Ala. 191, 10 So. 831; Wilkinson *v.* Stuart, 74 Ala. 198.

Illinois.— Torrence *v.* Shedd, 112 Ill. 466.

Louisiana.— Glancey's Succession, 108 La. 414, 32 So. 356.

Maine.— Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826.

Maryland.— Claude *v.* Handy, 83 Md. 225, 34 Atl. 532; Chaney *v.* Tipton, 3 Gill 327.

Massachusetts.— Barnes *v.* Boardman, 157 Mass. 479, 32 N. E. 670.

New York.— Spring *v.* Sandford, 7 Paige 550; Matthews *v.* Matthews, 1 Edw. 565.

North Carolina.—Atkinson *v.* McIntyre, 90 N. C. 147.

Pennsylvania.— Sill *v.* Blaney, 159 Pa. St. 264, 28 Atl. 251; Mitchell *v.* Harris, 2 Pa. L. J. Rep. 443.

Rhode Island.— Bailey *v.* Sisson, 1 R. I. 233.

Hence defendant's plea must traverse the seizin of plaintiff, for if plaintiff was in possession when his action was brought, he may hold an estate which is subject to partition. Flagg *v.* Thurston, 11 Pick. (Mass.) 431.

where for any reason an equitable title is not available, an equity disclosed by the answer cannot be considered.[28]

6. Setting Out Defendant's Claims—a. His Title. The statutes regulating partition, especially in the states which have adopted a reformed code of procedure, generally require defendant in his answer to set out his title as fully as plaintiff is required to set out his in the complaint.[29] It is usually assumed that defendant must answer, and therein must plead his title as fully as if he were plaintiff seeking partition, and yet if the complaint states the defendant's title correctly and fully, we can think of no reason for his answering, for his default admits only the facts alleged by plaintiff and cannot warrant his taking any judgment inconsistent therewith. If defendant claims any title different from that conceded to him by the complaint, he must certainly fully disclose it by his answer.[30] Under a denial of plaintiff's title or an averment of title in himself, defendant is entitled to produce any evidence responsive to the issue, and may therefore, to disprove plaintiff's title, where plaintiff claims as heir, prove an unprobated will of his ancestor devising the property so as to exclude plaintiff.[31] If defendant avers himself to be the owner, he may, in support of the averment, show title by adverse possession.[32] It is said that a plea which simply avers title in defendant is bad as argumentative.[33] However this may be, it must be that an answer setting out defendant's title in a manner sufficient for a complaint in partition must be sufficient in an answer. If a will is relied upon, its substance, so far as material, is all that need be stated.[34] An answer asserting a claim of title may admit facts so inconsistent with the claim as to demonstrate that the answer is bad.[35] If an agreement is pleaded in bar of a partition, the answer must allege facts sufficient to establish the validity of such agreement.[36] Defenses not pleaded before the entry of the interlocutory judgment will be considered as waived.[37] An answer presenting an issue respecting plaintiff's title does not call in question the advisability of partition, should this title be established, on account of the pendency of an appeal in another suit involving complainant's title.[38]

b. His Equities. In hereinafter considering the relief which may be granted in connection with, and as incidental to, a suit for partition, we shall show that in such a suit issues may be formed and determined involving every matter relating to the common property on account of which any of the cotenants may equitably demand anything of the other, whether consisting of an adjustment of their accounts, or the enforcement of their liens, or the assertion of equities to control, or require the transfer of, the legal title. These equities, irrespective of their character, although formerly proper subjects for cross bills, may now generally be asserted in the answer;[39] and when attempted to be so asserted, must be so stated that they would support a cross bill, or an original bill seeking like

28. Bailey *v.* Knapp, 79 Me. 205, 9 Atl. 356; Polhemus *v.* Hodson, 19 N. J. Eq. 63; Wiseley *v.* Findlay, 3 Rand. (Va.) 361, 15 Am. Dec. 712.

In Alabama defendant may incorporate all matters of defense in his answer, and is not required to plead specially in any case. Mylin *v.* King, 139 Ala. 319, 35 So. 998.

29. Morenhout *v.* Higuera, 32 Cal. 289.

30. Lucas *v.* King, 10 N. J. Eq. 277; McClaskey *v.* Barr, 40 Fed. 559.

31. Whitney *v.* Whitney, 171 N. Y. 176, 63 N. E. 834.

32. McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333.

33. Black *v.* Richards, 95 Ind. 184.

34. Eisner *v.* Eisner, 89 Hun (N. Y.) 480, 35 N. Suppl. 393.

35. Caldwell *v.* Drummond, 127 Iowa 134, 102 N. W. 842.

36. Jacob *v.* Fisher, 7 Ohio S. & C. Pl. Dec. 423, 5 Ohio N. P. 419.

37. Wright *v.* McCormick, 69 N. C. 14.

38. White *v.* Smith, (N. J. Ch. 1905) 60 Atl. 399.

39. Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Stafford *v.* Nutt, 35 Ind. 93.

As to accounting see Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220.

As to advancements see Duncan *v.* Henry, 125 Ind. 10, 24 N. E. 506; Nicholson *v.* Caress, 59 Ind. 39; White *v.* White, 41 Kan. 556, 21 Pac. 604.

As to equities controlling the legal title see Haines *v.* Haines, 6 Md. 435; Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234; German *v.* Machin, 6 Paige (N. Y.) 288; Courter *v.* Courter, 7 Ohio S. & C. Pl. Dec. 527, 7 Ohio N. P. 154.

relief.[40] An equity in favor of defendant, not disclosed by his pleadings, cannot be considered.[41] Answers seeking relief against co-defendants must be served on them.[42]

7. Cross Bills and Cross Complaints. If defendant wishes to assert some matter, not for the purpose either of defeating plaintiff's demand for partition, or of procuring the allotment to defendant of his moiety of the property, but to enforce some equity in favor of defendant or to obtain some other affirmative relief, he should, where the suit is in chancery, resort to a cross bill, or if the proceeding is controlled by the code system of procedure, to a cross complaint.[43] Cross complaints have also been sustained whose sole purpose was the asserting of title in severalty in favor of defendants,[44] but this is entirely unnecessary,[45] and not within the usually understood functions of a cross complaint. It is necessary whenever one defendant seeks relief against another.[46] There is no necessity for filing a cross bill to obtain relief obtainable under an answer, and a cross bill filed for such a purpose is usually treated as an answer.[47] The complaint may assert matters which, if not so asserted, would constitute proper subjects for a cross bill in favor of defendants. If so, there appears to be no necessity of their resorting to a cross bill to obtain such relief as may properly be awarded against plaintiff under the allegations of the original bill or complaint,[48] and this rule seems applicable to a co-defendant.[49] A cross bill is not abandoned by a statement in the answer that the cross bill will not be insisted upon if defendant can obtain the same relief under the original bill.[50] A cross bill is not permissible to obtain relief which defendant can procure by insisting on the filing of a proper original bill and specifically answering it,[51] nor can it be filed after the dismissal of the original bill.[51a] It is said in Indiana that no single pleading can perform the functions both of an answer and a cross bill.[52] The matters attempted to be introduced by a cross bill must be germane to the relief asked in the original bill;[53] and the allegations of the cross bill must be such as would entitle defendant to

40. Jordan *v.* Jordan, (Ala. 1905) 39 So. 992; Younglove *v.* Frank, 37 Ind. 543; Reeves *v.* Morgan, 100 S. W. 836, 30 Ky. L. Rep. 1158.

41. Mehan *v.* Mehan, 203 Ill. 180, 67 N. E. 770; Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630; Cosgray *v.* Core, 2 W. Va. 353.

42. Willes *v.* Loomis, 94 N. Y. App. Div. 67, 87 N. Y. Suppl. 1086.

43. Ferris *v.* Reed, 87 Ind. 123; Union Trust Co. *v.* Whittaker, 32 Pittsb. Leg. J. N. S. (Pa.) 443; Chalmers *v.* Trent, 11 Utah 88, 39 Pac. 488. As where compensation is sought for improvements (Mahoney *v.* Mahoney, 65 Ill. 406; Stafford *v.* Nutt, 35 Ind. 93; McClaskey *v.* Barr, 48 Fed. 130); or the assignment of dower is to be controlled to prevent a multiplicity of suits (Longshore *v.* Longshore, 200 Ill. 470, 65 N. E. 1081); or defendant seeks to set aside a deed under which plaintiff claims (Cox *v.* Spurgin, 210 Ill. 398, 71 N. E. 456); or to compel specific performance of a contract to sell and convey an interest in the property (McFerran *v.* McFerran, 69 Ind. 29; Donnell *v.* Mateer, 42 N. C. 94); or to present the question of advancements (Harness *v.* Harness, 63 Ind. 1); or to establish a claim against the estate of the deceased ancestor of the parties and have the land sold in satisfaction thereof (Parks *v.* Van Dergriff, (Tenn. Ch. App. 1900) 57 S. W. 177; Apple *v.* Owens, 1 Tenn. Ch. App. 135); or to review and correct a preëxisting decree of partition (Smith *v.* Smith, (Tenn. Ch. App. 1900) 57 S. W. 198); or to compel an accounting of rents and profits (Casper *v.* Walker, 33 N. J. Eq. 35); or to bring in necessary parties omitted by plaintiff (Chalmers *v.* Trent, *supra*); but generally relief may be obtained in the way of accounting for taxes and improvements under appropriate averments in the answer without filing a cross bill (Harrison *v.* Harrison, 56 Miss. 174; McClaskey *v.* Barr, 62 Fed. 209).

44. Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935.

45. German *v.* Machin, 6 Paige (N. Y.) 288.

46. Barret *v.* Coburn, 3 Metc. (Ky.) 510.

47. McClaskey *v.* Barr, 48 Fed. 130.

48. Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Labadie *v.* Hewitt, 85 Ill. 341; McKaig *v.* McKaig, 50 N. J. Eq. 325, 25 Atl. 181.

49. Kern *v.* Zink, 55 Ill. 449.

50. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

51. Prichard *v.* Littlejohn, 128 Ill. 123, 21 N. E. 10.

51a. Howison *v.* Ruprecht, 121 Ill. App. 5.

52. Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300.

53. Deuter *v.* Deuter, 214 Ill. 308, 73 N. E. 453; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Bearinger *v.* Pelton, 78 Mich. 109, 43 N. W. 1042.

relief if asserted by him in an original bill.[54] Sometimes it has been held that the right and claim for partition may first be disclosed by a cross bill filed in a suit brought for entirely different relief, as where, in a suit to set aside a deed, defendant by cross petition seeks partition of the premises and an assignment of the widow's dower,[55] but we know not how to reconcile the holding with the rule recognized by the court that the cross bill must be germane to the original bill.

8. AMENDMENTS. Defendant is entitled to amend the pleadings to the same extent as are defendants in other proceedings, and an abuse of discretion on the part of the trial court in refusing leave to amend may be corrected by appeal.[56]

9. SUPPLEMENTAL ANSWERS. Matters occurring after the filing of the original answer the court should permit to be made available to defendant by supplemental answer.[57]

10. BILLS OF PARTICULARS. In New York, where the practice prevails in proceedings for partition of requiring a bill of particulars as to matters so alleged in a pleading as to leave the adverse party without sufficient knowledge of the matter intended to be relied upon, a defendant, notwithstanding he has answered, may be required to file a bill of particulars.[58]

J. Intervention. The general rules controlling intervention apply to proceedings for partition. Persons interested in the property and not made parties may apply to the court, obtain leave to intervene, and thereupon, by appropriate pleadings, assert their claims, resist those of plaintiff, and obtain relief to the same extent as if originally made parties.[59] Perhaps a distinction must be drawn between those who were necessary, and those who were only proper, parties defendant. Thus, persons claiming liens against the cotenants, or some of them, and persons holding or claiming in hostility to plaintiff are not necessary parties defendant. The partition might be made and such lien-holders or adverse claimants be left unaffected by it. Therefore they probably have no right to intervene where the relief prayed for might be granted without prejudicing them. One claiming all the property adversely to plaintiff and defendant may properly be refused leave to intervene.[60] If, however, the judgment in partition will operate as a cloud on his title, he may intervene.[61] Lien-holders may intervene when necessary for the protection of their liens or to their obtaining adequate remedies for their enforcement.[62] It is otherwise as to creditors having no liens.[63] Interveners ordinarily will not be permitted to set up title adverse to that held by plaintiff and the persons whom he has made defendants;[64] but if they wish to assert a paramount adverse title, they must do so by an independent proceeding.[65] The application for leave to intervene should be made before final judgment, and at all events at a date so early that the intervention will not prejudice the rights

54. Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266.

55. Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079.

56. Warfield *v.* Warfield, 5 Harr. & J. (Md.) 459.

And the right to amend may be denied for laches and because the applicant has pursued another and different remedy. Fread *v.* Fread, 165 Ill. 228, 46 N. E. 268 [*affirming* 61 Ill. App. 586].

57. Hieatt *v.* Black, 14 Ohio Cir. Ct. 194, 8 Ohio Cir. Dec. 173.

58. Crossman *v.* Wyckoff, 32 N. Y. App. Div. 32, 52 N. Y. Suppl. 314; Bender *v.* Van Allen, 28 Misc. (N. Y.) 304, 59 N. Y. Suppl. 885; Lewis *v.* Joiner, 5 N. Y. St. 301.

59. *California.*— Towle Bros. Co. *v.* Quinn, 141 Cal. 382, 74 Pac. 1046.

Kentucky.— Logan *v.* Catron, 43 S. W. 213, 19 Ky. L. Rep. 1200.

Louisiana.— Woolfolk *v.* Woolfolk, 30 La. Ann. 139.

Maine.— Huntress *v.* Tiney, 46 Me. 83; Field *v.* Persons Unknown, 34 Me. 35, at the discretion of the court.

United States.— West *v.* East Coast Cedar Co., 101 Fed. 615, 41 C. C. A. 528.

See 38 Cent. Dig. tit. "Partition," § 130 *et seq.*

60. Baker *v.* Riley, 16 Ind. 479.

61. Clark *v.* Roller, 199 U. S. 541, 26 S. Ct. 141, 50 L. ed. 300.

62. Rout *v.* King, 103 Ind. 555, 3 N. E. 249.

63. Rice *v.* Donald, 97 Md. 396, 55 Atl. 620.

64. Rice *v.* Donald, 97 Md. 396, 55 Atl. 620; *Ex p.* Crawford, 27 S. C. 159, 3 S. E. 75.

65. West *v.* East Coast Cedar Co., 101 Fed. 615, 41 C. C. A. 528.

of any persons who have regularly appeared in the action.[66] If a purchaser *pendente lite* may at any time intervene, it must be only when he shows some special equity entitling him to be exempted from the effect of the proceedings.[67] As to the extent and character of the issues he may tender and the relief he may seek in a partition suit, an intervener is no more restricted than any other party to the action.[68]

K. Relief Granted in Connection With, and as Incidental To, Partition — **1. General Adjustment of Equities.** As the final result of partition is to terminate the cotenancy theretofore existing, it ought not to leave any of the cotenants under the necessity of prosecuting any further proceedings either to perfect the title to his allotment, or to compel any of his late cotenants to perform any act the performance of which is due because of the cotenancy and the obligations resting on them as cotenants. Hence "when a suit for partition is in a court of equity, or in a court authorized to proceed with powers as ample as those exercised by courts of equity, it may be employed to adjust all the equities existing between the parties and arising out of their relation to the property to be divided."[69]

2. Limitations Upon the Power to Adjust Equities. Every party to a proceeding for partition may be regarded as seeking some relief therein, and therefore as an actor maintaining a suit in equity, and as such subject to the general rule that he who seeks equity must do equity.[70] This rule does not, however, impose the obligation to do equity with respect to every conceivable transaction or matter, but only with respect to the subject-matter before the court. Therefore none of the cotenants can be required to do equity with respect to any matter, or to satisfy any demand disconnected from the property of the cotenancy.[71] But the disclosure in the complaint of an equitable or any other cause of action which cannot be entertained in partition does not entitle defendants to a dismissal nor otherwise preclude plaintiff from securing such relief as his other allegations warrant.[72]

66. Kester *v.* Stark, 19 Ill. 328; Woolfolk *v.* Woolfolk, 30 La. Ann. 139; Elwell *v.* Sylvester, 27 Me. 536; Parkinson *v.* Caplinger, 65 Mo. 290.

67. Griffin *v.* Wilson, 39 Tex. 213.

68. Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63.

69. Freeman Coten. & P. § 505; and the following cases:

Arkansas.— Lester *v.* Kirtley, 83 Ark. 554, 104 S. W. 213.

Colorado.— Packard *v.* King, 3 Colo. 211.

Illinois.— Longshore *v.* Longshore, 200 Ill. 470, 65 N. E. 1081; Rhodes *v.* Rhodes, 78 Ill. App. 117.

Indiana.— Cravens *v.* Kitts, 64 Ind. 581; Milligan *v.* Poole, 35 Ind. 64.

Mississippi.— Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

Missouri.— Rozier *v.* Griffith, 31 Mo. 171; Coffman *v.* Gates, 110 Mo. App. 475, 85 S. W. 657; Caldwell *v.* Wright, 88 Mo. App. 604.

New York.— Warfield *v.* Crane, 4 Abb. Dec. 525, 4 Keyes 448; Kaiser *v.* Adami, 37 Misc. 204, 75 N. Y. Suppl. 195; Matter of Howe, 1 Paige 124, 19 Am. Dec. 395.

Ohio.— Miller *v.* Peters, 25 Ohio St. 270.

South Carolina.— Green *v.* Cannady, 77 S. C. 193, 57 S. E. 832; McCreary *v.* Burns, 17 S. C. 45.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*affirming* in part and *reversing* in part (Civ. App. 1899) 48 S. W. 994].

Virginia.— McCoy *v.* McCoy, 105 Va. 829, 54 S. E. 995.

See 38 Cent. Dig. tit. "Partition," § 228.

It has even been held that the failure to present such a claim in the suit for partition was a waiver of it. Rhodes *v.* Rhodes, 78 Ill. App. 117.

70. Barrell *v.* Barrell, 25 N. J. Eq. 173.

71. *Illinois.*— Crane *v.* Stafford, 217 Ill. 21, 75 N. E. 424; Jeffers *v.* Jeffers, 139 Ill. 368, 28 N. E. 913.

Indiana.— Stout *v.* Dunning, 72 Ind. 343.

Louisiana.— Faure *v.* Faure, 117 La. 204, 41 So. 494; Baltimore *v.* New Orleans, 45 La. Ann. 526, 12 So. 878.

New Jersey.— White *v.* Smith, 70 N. J. Eq. 418, 62 Atl. 560; Cole *v.* Cole, 69 N. J. Eq. 3, 59 Atl. 895; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177.

New York.— Palmer *v.* Palmer, 3 N. Y. App. Div. 213, 38 N. Y. Suppl. 195.

Tennessee.— Johnson *v.* Johnson, (Ch. App. 1899) 53 S. W. 226.

Virginia.— Stuart *v.* Coalter, 4 Rand. 74, 15 Am. Dec. 731.

See 38 Cent. Dig. tit. "Partition," § 228.

The principle referred to above was probably overlooked in a Texas case holding that an heir might be entitled to contribution for moneys paid by him for the benefit of himself and all the other heirs, although it did not relate to the lands in question. Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*affirming* in part and *reversing* in part (Civ. App. 1899) 48 S. W. 994].

72. Hoffman *v.* Ross, 25 Mich. 175.

3. Accounting. The consideration of the subject of partition does not require, or even entitle, us to treat of the liability of one cotenant to another, nor to disclose the precise circumstances under which one may with success demand an accounting with and a contribution from the other. It is sufficient for our present purpose to state that when the liability to an accounting or contribution exists arising out of the property of the cotenancy, it may be enforced in a suit for partition if the facts upon which the claim is founded are properly alleged in his pleading by the party making the claim.[73] Advances made by any of the cotenants for the care or benefit of the common property or the protection of the title thereto may be asserted and contribution therefor obtained from the other cotenants.[74] This rule is especially applicable to payments made to discharge liens for taxes,[75] or assessments,[76] but not for water rates, where they could not have added to the salable value of the property and were chargeable against the tenant pay-

73. *Michigan.*— Godfrey *v.* White, 60 Mich. 443, 27 N. W. 592, 1 Am. St. Rep. 537.

Mississippi.— Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

Missouri.— Caldwell *v.* Wright, 88 Mo. App. 604.

Nebraska.—Baldridge *v.* Coffman, 71 Nebr. 286, 98 N. W. 811; Mills *v.* Miller, 3 Nebr. 87; Hanson *v.* Hanson, 4 Nebr. (Unoff.) 880, 97 N. W. 23.

Nevada.— Dall *v.* Confidence Silver-Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

New Jersey.— Obert *v.* Obert, 10 N. J. Eq. 98 [*affirmed* in 12 N. J. Eq. 423].

Pennsylvania.— Harris' Appeal, 6 Pa. Cas. 530, 10 Atl. 135.

England.— Tuckfield *v.* Buller, Dick. 241, 21 Eng. Reprint 260; Wills *v.* Slade, 6 Ves. Jr. 498, 31 Eng. Reprint 1163.

74. *Alabama.*— Bozone *v.* Daniel, (1905) 39 So. 774; Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475.

Colorado.— Packard *v.* King, 3 Colo. 211.

Illinois.— Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056; Carter *v.* Penn, 99 Ill. 390; Pigg *v.* Carroll, 89 Ill. 205; Haberstich *v.* Elliott, 91 Ill. App. 662.

Indiana.— Green *v.* Brown, 146 Ind. 1, 44 N. E. 805; Kepler *v.* Kepler, 2 Ind. 363.

Iowa.— Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Kentucky.— Sneed *v.* Atherton, 6 Dana 276, 32 Am. Dec. 70.

Maryland.— Warfield *v.* Banks, 11 Gill & J. 98; Warfield *v.* Warfield, 5 Harr. & J. 459.

Mississippi.— Walker *v.* Williams, 84 Miss. 392, 36 So. 450; Saxon *v.* Ames, 47 Miss. 565.

Missouri.— Coffman *v.* Gates, 110 Mo. App. 475, 85 S. W. 657; Herchenroeder *v.* Herchenroeder, 75 Mo. App. 283.

Nebraska.— Schick *v.* Whitcomb, 68 Nebr. 784, 94 N. W. 1023; Hanson *v.* Hanson, 4 Nebr. (Unoff.) 880, 97 N. W. 23.

New York.— Bogardus *v.* Parker, 7 How. Pr. 305.

Ohio.— Wachenheimer *v.* Standart, 19 Ohio Cir. Ct. 693, 8 Ohio Cir. Dec. 328; Courter *v.* Courter, 7 Ohio S. & C. Pl. Dec. 527, 7 Ohio N. P. 154; Boyer *v.* Boyer, 7 Ohio S. & C. Pl. Dec. 525, 7 Ohio N. P. 153.

Tennessee.— Evans *v.* Evans, 1 Heisk. 577.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*affirming* in part and *reversing* in part (Civ. App. 1899) 48 S. W. 994]; Moore *v.* Moore, 89 Tex. 29, 33 S. W. 217; Haley *v.* Gatewood, 74 Tex. 281, 12 S. W. 25; Gray *v.* King, 39 Tex. 616; Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692; Simpson *v.* Texas Tram, etc., Co., 24 Tex. Civ. App. 362, 59 S. W. 811; Shiner *v.* Shiner, 14 Tex. Civ. App. 489, 40 S. W. 439; Albrecht *v.* Albrecht, (Civ. App. 1896) 35 S. W. 1076.

Wisconsin.— Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

United States.— McClintock *v.* Fontaine, 119 Fed. 448; Hayne *v.* Gould, 54 Fed. 951.

Canada.— Filman *v.* Filman, 15 Grant Ch. (U. C.) 643.

Possibly Harvey *v.* Kelleher, 36 N. Y. App. Div. 201, 56 N. Y. Suppl. 889, and Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439, do not properly respect the rule stated in the text.

75. *Illinois.*— Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315; Rhodes *v.* Rhodes, 78 Ill. App. 117; Taylor *v.* Dawson, 65 Ill. App. 232.

Indiana.—Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441.

Kentucky.— Talbot *v.* Todd, 7 J. J. Marsh. 456.

Louisiana.— Sharp *v.* Zeller, 114 La. 549, 38 So. 449.

Minnesota.— Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

Mississippi.— Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

New Jersey.— White *v.* Smith, 70 N. J. Eq. 418, 62 Atl. 560; Flynn *v.* O'Malley, (Ch. 1895) 33 Atl. 402.

South Carolina.— Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Kalteyer *v.* Wipff, (Civ. App. 1901) 65 S. W. 207; Simpson *v.* Texas Tram, etc., Co., 24 Tex. Civ. App. 362, 59 S. W. 811.

United States.—McCloskey *v.* Barr, 62 Fed. 209.

See 38 Cent. Dig. tit. "Partition," § 253.

76. Glos *v.* Clark, 97 Ill. App. 609 [*reversed* on other grounds in 199 Ill. 147, 65 N. E. 135]; Ward *v.* Ward, 9 Ohio Cir. Ct. 454, 6 Ohio Cir. Dec. 444.

ing them.[77] So while doubtless one cotenant may be required to recompense another for insurance procured for the benefit of all, this principle cannot apply in favor of a cotenant procuring insurance only for his own benefit.[78] The accounting in favor of a cotenant may include interest,[79] but generally the rule is otherwise.[80] If a sale has been made and distribution of the moneys ordered, it is too late to apply to be reimbursed for taxes paid, as the petition cannot be allowed without conflicting with the previous order.[81]

4. Accounting For Rents and Profits, and Use and Occupation. The liability of a cotenant who has received more than his share of the rents and profits to account therefor to the others has never been questioned, nor is there any doubt that his liability to so account may be enforced in a suit for partition.[82] Where, however, a cotenant has not received the rents of the property, but has been in exclusive possession of more than his share thereof, there has always been doubt whether he was liable to his cotenants because thereof, many of the authorities claiming that no liability existed in such circumstances, and others contending that he must account for any profits realized or for the value of his use and occupation in excess of his share.[83] This difference of judicial opinion must affect suits for partition. The right of recovery is maintained in several states,[84] especially where the possession has been exclusive,[85] or preceded by an ouster of the

77. Clapp *v.* Hunter, 52 N. Y. App. Div. 253, 65 N. Y. Suppl. 411.

78. Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Clapp *v.* Hunter, 52 N. Y. App. Div. 253, 65 N. Y. Suppl. 411.

79. Clapp *v.* Hunter, 52 N. Y. App. Div. 253, 65 N. Y. Suppl. 411; Hayne *v.* Gould, 54 Fed. 951.

80. Talbot *v.* Todd, 7 J. J. Marsh. (Ky.) 456; Platt *v.* Platt, 42 Hun (N. Y.) 592.

81. *Ex p.* Lewis, 42 N. C. 4.

82. *Alabama.*— Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

Arkansas.— Cocke *v.* Clausen, 67 Ark. 455, 55 S. W. 846.

Illinois.— Thomas *v.* Hamill, 106 Ill. App. 524; Glos *v.* Clark, 97 Ill. App. 609 [*reversed* on other grounds in 199 Ill. 147, 65 N. E. 135]; Rhodes *v.* Rhodes, 78 Ill. App. 117; Scott *v.* Bassett, 71 Ill. App. 641.

Indiana.— Barnett *v.* Thomas, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385.

Iowa.— *In re* Smith, 133 Iowa 142, 109 N. W. 196.

Kentucky.— Bridgford *v.* Barbour, 80 Ky. 529; Ostermeyer *v.* Ostermeyer, 39 S. W. 22, 18 Ky. L. Rep. 1024.

Michigan.— Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Hunt *v.* Hunt, 109 Mich. 399, 67 N. W. 510.

Mississippi.— Bowles *v.* Wood, (1907) 44 So. 169; Robinson *v.* Jones, 68 Miss. 794, 10 So. 79; Hardy *v.* Gregg, (1887) 2 So. 358.

Missouri.— Doerner *v.* Doerner, 161 Mo. 407, 61 S. W. 802; Rozier *v.* Griffith, 31 Mo. 171.

Nebraska.— Miller *v.* Mills, 4 Nebr. 362.

New Jersey.— Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177.

New York.— Brown *v.* Mount, 54 N. Y. App. Div. 604, 66 N. Y. Suppl. 1000; Walther *v.* Regnault, 56 Hun 560, 9 N. Y. Suppl. 849; McCabe *v.* McCabe, 18 Hun 153; Levine *v.* Goldsmith, 34 Misc. 7, 69 N. Y. Suppl. 446 [*reversed* on other grounds in 71 N. Y. App. Div. 204, 75 N. Y. Suppl. 706].

Ohio.— Perry *v.* Richardson, 27 Ohio St. 110.

South Carolina.— McCants *v.* McCants, 51 S. C. 503, 29 S. C. 387.

Washington.— Blackwell *v.* McLean, 9 Wash. 301, 37 Pac. 317.

England.— Teasdale *v.* Sanderson, 33 Beav. 534, 55 Eng. Reprint 476; Pascoe *v.* Swan, 5 Jur. N. S. 1235, 29 L. J. Ch. 159, 1 L. T. Rep. N. S. 17, 8 Wkly. Rep. 130; Lorimer *v.* Lorimer, 5 Madd. 363, 56 Eng. Reprint 934; Turner *v.* Morgan, 8 Ves. Jr. 143, 32 Eng. Reprint 307.

See 38 Cent. Dig. tit. "Partition," § 247 *et seq.*

83. Freeman Coten. & P. §§ 264–276.

84. *Alabama.*— Sanders *v.* Robertson, 57 Ala. 465; Ormond *v.* Martin, 37 Ala. 598, in both of which cases the right of recovery is limited to one year preceding the commencement of the suit.

Arkansas.— Clark *v.* Hershy, 52 Ark. 473, 12 S. W. 1077.

California.— Bradley *v.* Harkness, 26 Cal. 69; Goodenow *v.* Ewer, 16 Cal. 461, 76 Am. Dec. 540.

Illinois.— Mahoney *v.* Mahoney, 65 Ill. 406.

Indiana.— Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

Iowa.— Plant *v.* Fate, 114 Iowa 283, 86 N. W. 276; Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201.

Mississippi.— Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

Nebraska.— Mills *v.* Miller, 3 Nebr. 87; Hanson *v.* Hanson, 4 Nebr. (Unoff.) 880, 97 N. W. 23.

Pennsylvania.— Marvin *v.* Pittsburgh, etc., R. Co., 34 Pittsb. Leg. J. N. S. 280.

Tennessee.— Johnson *v.* Johnson, (Ch. App. 1899) 53 S. W. 226.

Virginia.— Carter *v.* Carter, 5 Munf. 108.

See 38 Cent. Dig. tit. "Partition," § 247 *et seq.*

85. Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Cole *v.* Cole, 69 N. J. Eq. 3, 59

cotenants.[86] In others it is denied when the exclusive possession has been taken and held in good faith.[87] The better view, we think, in the absence of any statute to the contrary, is, that a cotenant cannot be called to account in partition where he has neither ousted his cotenants, nor denied their right or title to any part of the premises.[88] The right to an accounting may be lost by the statute of limitations,[89] or waived expressly or impliedly by the parties,[90] and when a claim is made therefor it must be supported by appropriate pleadings and adequate evidence.[91] The right to recover terminates with the judgment in partition, for, as the result of that judgment, it passes to the purchaser, if the property is sold,[92] and otherwise as to the respective allotments to the several allotees thereof.[93] The right to an accounting is not restricted to rents and profits, the value of the use and occupation, or expenditures made for the improvement of the property, but may extend, apparently, to all matters for which a cotenant is equitably under the duty of accounting, and arising out of, or connected with, the property of the cotenancy, as for advancements,[93a] or for the use made of the waters of a stream,[93b] or for moneys used in the payment of taxes.[93c]

5. Respecting Improvements — a. Awarding the Property on Which They Stand to the Person Making Them. Where improvements have been made by a cotenant on some portion of the property of the cotenancy, the court will if possible avoid the question of compensating him therefor by allotting to him the lands on which they stand, if such land, independently of the improvements, does not exceed in value the moiety to which he is entitled and no other circumstance makes this mode of allotment inequitable.[94] Nevertheless it may be mentioned

Atl. 895; Davidson *v.* Thompson, 22 N. J. Eq. 83.

86. *Kansas.*— Saville *v.* Saville, 63 Kan. 861, 66 Pac. 1043.

Michigan.— Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

New York.— Willes *v.* Loomis, 94 N. Y. App. Div. 67, 87 N. Y. Suppl. 1086; Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Hitchcock *v.* Skinner, Hoffm. 21.

Texas.— Ford *v.* Boone, 32 Tex. Civ. App. 550, 75 S. W. 353; Kalteyer *v.* Wipff, (Civ. App. 1901) 65 S. W. 207.

West Virginia.— Rust *v.* Rust, 17 W. Va. 901.

87. Sarbach *v.* Newell, 28 Kan. 642.

88. *Massachusetts.*— Chandler *v.* Simmons, 105 Mass. 412.

Mississippi.— Medford *v.* Frazier, 58 Miss. 241.

Missouri.— Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994.

New Jersey.— White *v.* Smith, 70 N. J. Eq. 418, 62 Atl. 560.

New York.— Rich *v.* Rich, 50 Hun 199, 2 N. Y. Suppl. 770.

Texas.— Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

See 38 Cent. Dig. tit. "Partition," § 247 *et seq.*

The following decisions appear to wholly deny the right to an accounting in partition against a cotenant for rents and profits. Mattair *v.* Payne, 15 Fla. 682; Lawes *v.* Lumpkin, 18 Md. 334; Weise *v.* Welsh, 30 N. J. Eq. 431; Burhans *v.* Burhans, 2 Barb. Ch. (N. Y.) 398.

89. Jevons *v.* Kline, 9 Kulp (Pa.) 305.

90. Rhodes *v.* Rhodes, 78 Ill. App. 117; Ostermeyer *v.* Ostermeyer, 39 S. W. 22, 18 Ky. L. Rep. 1024; *In re* Hagan, 33 Pittsb. Leg. J. N. S. (Pa.) 280.

91. Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481; Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616; Bice *v.* Nixon, 34 W. Va. 107, 11 S. E. 1004.

92. Jones *v.* Massey, 14 S. C. 292.

93. Carr's Estate, 24 Pittsb. Leg. J. N. S. (Pa.) 140; Keener *v.* Moss, 66 Tex. 181, 18 S. W. 447.

93a. Sheppard *v.* Fisher, 206 Mo. 208, 103 S. W. 989.

93b. Roberts *v.* Claremont R., etc., Co., 74 N. H. 217, 66 Atl. 485.

93c. Mateer *v.* Jones, (Tex. Civ. App. 1907) 102 S. W. 734.

94. *Alabama.*—Ferris *v.* Montgomery Land, etc., Co., 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; Wilkinson *v.* Stuart, 74 Ala. 198.

Arizona.— Pesqueira *v.* Kellogg, 8 Ariz. 266, 71 Pac. 915.

Arkansas.— Drennen *v.* Walker, 21 Ark. 539.

California.— Seale *v.* Soto, 35 Cal. 102.

Florida.— Boley *v.* Skinner, 38 Fla. 291, 20 So. 1017.

Illinois.— Noble *v.* Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. N. S. 645; Mahoney *v.* Mahoney, 65 Ill. 406; Kurtz *v.* Hibner, 55 Ill. 514, 8 Am. Rep. 665; Dean *v.* O'Meara, 47 Ill. 120; Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161.

Indiana.— Carver *v.* Coffman, 109 Ind. 547, 10 N. E. 567; Elrod *v.* Keller, 89 Ind. 382.

Kansas.— Sarbach *v.* Newell, 28 Kan. 642.

Kentucky.— Borah *v.* Archers, 7 Dana 176; Sneed *v.* Atherton, 6 Dana 276, 32 Am. Dec. 70; Nelson *v.* Clay, 7 J. J. Marsh. 138, 23

in this connection that there are a few cases in which the courts very strangely appear to disapprove the rule just stated.[95]

b. Allowing Their Value to Offset or Otherwise Diminish a Demand in Favor of Another Cotenant. If a cotenant is sought to be made accountable for rents received by him, or for the value of the use and occupation of the property, it is so manifestly inequitable that his liability should be increased by improvement in the condition of the property due to him and to which the other cotenants have not contributed, that no court will require him to account for a sum greater than that which the property would have yielded if his acts had not increased its rental value.[96] The next step beyond this is to allow the value of improvements as a set-off against a claim for rents, and this, we believe, is nowhere denied.[97]

c. Allowing Compensation Out of the Proceeds of Sale. If the property is found to be of a character requiring its partition to be accomplished by a sale thereof and the distribution of the proceeds, such proceeds must probably, if not inevitably, be augmented by improvements if they have been placed upon the property by one of the cotenants. As his title to his improvements as well as to his moiety must be divested by the sale, it is clearly inequitable that such part of the purchase-price as represents the enhanced value of the property should be added to the fund to be divided among the non-contributing cotenants. In the

Am. Dec. 387; Withers *v.* Thompson, 4 T. B. Mon. 323; Milligan *v.* Masden, 74 S. W. 1049, 25 Ky. L. Rep. 144; Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488; Dehoney *v.* Bell, 30 S. W. 400, 17 Ky. L. Rep. 76; Ward *v.* Ward, 25 S. W. 112, 15 Ky. L. Rep. 706.

Louisiana.— Jones *v.* Crocker, 4 La. Ann. 8.

Maine.— Parsons *v.* Copeland, 38 Me. 537 [*distinguished* in Allen *v.* Hall, 50 Me. 253].

Maryland.— Dugan *v.* Baltimore, 70 Md. 1, 16 Atl. 501; Young *v.* Frost, 1 Md. 377.

Massachusetts.— Fair *v.* Fair, 121 Mass. 559; Crafts *v.* Crafts, 13 Gray 360.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Missouri.— Burford *v.* Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New Hampshire.— Leavitt *v.* Locke, 68 N. H. 17, 40 Atl. 395.

New Jersey.— Booraem *v.* Wells, 19 N. J. Eq. 87; Brookfield *v.* Williams, 2 N. J. Eq. 341.

New York.— Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Granville *v.* Needham, 3 Paige 545, 24 Am. Dec. 246; St. Felix *v.* Rankin, 3 Edw. 323.

North Carolina.— Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697; Cox *v.* Ward, 107 N. C. 507, 12 S. E. 379; Collett *v.* Henderson, 80 N. C. 337; Pope *v.* Whitehead, 68 N. C. 191.

Ohio.— Cincinnati Sav. Soc. *v.* Thompson, 6 Ohio Dec. (Reprint) 1198, 12 Am. L. Rec. 310.

Pennsylvania.— Kelsey's Appeal, 113 Pa. St. 119, 5 Atl. 447, 57 Am. Rep. 444.

South Carolina.— Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864; Johnson *v.* Pelot, 24 S. C. 255, 58 Am. Rep. 253; Buck *v.* Martin, 21 S. C. 590, 53 Am. Rep. 702; Annley *v.* De Saussure, 17 S. C. 389; Williman *v.* Holmes, 4 Rich. Eq. 475.

Tennessee.— Polk *v.* Gunther, 107 Tenn. 16, 64 S. W. 25; Simpson *v.* Sparkman, 12 Lea 360; Reeves *v.* Reeves, 11 Heisk. 669.

Texas.— Osborn *v.* Osborn, 62 Tex. 495; Williams *v.* Wethered, 37 Tex. 130; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480; Olschewske *v.* Summerville, (Civ. App. 1906) 95 S. W. 1; Spicer *v.* Henderson, (Civ. App. 1897) 43 S. W. 27.

Virginia.— Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

Canada.— Biehn *v.* Biehn, 18 Grant Ch. (U. C.) 497; Wood *v.* Wood, 16 Grant Ch. (U. C.) 471.

See 38 Cent. Dig. tit. "Partition," § 236 *et seq.*

95. Allen *v.* Hall, 50 Me. 253 [*distinguishing* Parsons *v.* Copeland, 38 Me. 537] (construing Laws (1855), c. 157); Yancy *v.* Batte, 48 Tex. 46; Bull *v.* Nichols, 15 Vt. 329.

96. Worthington *v.* Hiss, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026; Rice *v.* Freeland, 12 Cush. (Mass.) 170; Johnson *v.* Pelot, 24 S. C. 255, 58 Am. Rep. 253; Jacobs *v.* Bush, 17 S. C. 594; Annely *v.* De Saussure, 17 S. C. 389.

97. *Alabama.*—Ferris *v.* Montgomery Land, etc., Co., 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146; Sanders *v.* Robertson, 57 Ala. 465; Ormond *v.* Martin, 37 Ala. 598.

Arkansas.— Cocke *v.* Clausen, 67 Ark. 455, 55 S. W. 846.

Illinois.— Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Roberts *v.* Beckwith, 79 Ill. 246.

Iowa.— Bergman *v.* Kammlade, 109 Iowa 305, 80 N. W. 418.

Michigan.— Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

Nebraska.— Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563.

New York.— Clapp *v.* Hunter, 52 N. Y. App. Div. 253, 65 N. Y. Suppl. 411.

South Carolina.— Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19.

attempt to do equity, however, the obstacle to be met is the difficulty of ascertaining what portion of the proceeds represents the value of the property without the improvements, and what portion the enhancement of the proceeds due to the improvement. Generally this difficulty does not deter the courts from adopting some means, either by appraisement or otherwise, of fixing the value of the improvements, and, when they have been so fixed, from directing that it be paid to the cotenant, and that the balance only be distributed among all the cotenants.[98]

d. Charging the Value of the Improvements Against the Respective Allotments. In many cases no sale of the property is proper, no demand exists against the cotenant making the improvements which can be set off against their value, and no allotment can be made under which the land on which the improvements are can be set off to him and thus permit him to enjoy their value and thereby excuse his cotenants from contributing therefor. In these contingencies either the non-contributing cotenants must be allowed to receive and retain the improvements without making any compensation therefor, or the cotenant who made them must be compensated either by making an allotment in his favor of greater value than his moiety of the property, or by ascertaining how much the improvements enhance the value of the property and imposing in his favor a charge on the respective allotments equitably corresponding to their *pro rata* of such enhancement. The subject is one of great difficulty, but we believe a majority of the courts will now require compensation to be made in some of these modes,[99] unless

Washington.— Leake *v.* Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

West Virginia.— Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

See 38 Cent. Dig. tit. "Partition," § 236 *et seq.*

98. *Illinois.*— Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Dean *v.* O'Meara, 47 Ill. 120; Lonvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Eury *v.* Merrill, 42 Ill. App. 193.

Kansas.— Sarbach *v.* Newell, 28 Kan. 642.

Michigan.— Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New Jersey.— See Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694.

New York.— Clapp *v.* Nichols, 31 N. Y. App. Div. 531, 52 N. Y. Suppl. 128, 32 N. Y. App. Div. 628, 53 N. Y. Suppl. 1101; Eakin *v.* Knabe, 31 Misc. 221, 64 N. Y. Suppl. 103.

Pennsylvania.— Jevons *v.* Kline, 9 Kulp 305.

Rhode Island.— Moore *v.* Thorp, 16 R. I. 655, 19 Atl. 321, 7 L. R. A. 731.

South Carolina.— Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19.

West Virginia.— Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

England.— *In re* Jones, [1893] 2 Ch. 461, 62 L. J. Ch. 996, 69 L. T. Rep. N. S. 45, 3 Reports 498; Watson *v.* Gass, 51 L. J. Ch. 480, 45 L. T. Rep. N. S. 582, 30 Wkly. Rep. 286. See also Swan *v.* Swan, 8 Price 518, 22 Rev. Rep. 770; Kenrick *v.* Mountsteven, 48 Wkly. Rep. 141, affirming the right to compensation.

The court will not make any special direction where a party has laid out money on property in which he has no right. Heath *v.* Bostock, 5 L. J. Exch. 20.

99. *Illinois.*— Noble *v.* Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. N. S. 645; Baird *v.* Jackson, 98 Ill. 78; Kurtz *v.* Hibner, 55 Ill. 514, 8 Am. Rep. 665; Dean *v.* O'Meara, 47 Ill. 120.

Indiana.— Parish *v.* Camplin, 139 Ind. 1, 37 N. E. 607; Carver *v.* Coffman, 109 Ind. 547, 10 N. E. 567; Martindale *v.* Alexander, 26 Ind. 104, 89 Am. Dec. 458; Pulse *v.* Osborn, 30 Ind. App. 631, 64 N. E. 59.

Iowa.—Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481; Killmer *v.* Wuchmer, 79 Iowa 722, 45 N. W. 299, 18 Am. St. Rep. 392, 8 L. R. A. 289.

Kansas.— Sarbach *v.* Newell, 30 Kan. 102, 1 Pac. 30.

Kentucky.— Respass *v.* Breckenridge, 2 A. K. Marsh. 581.

Louisiana.— D'Armand *v.* Pullin, 16 La. Ann. 243; Davis *v.* Wilcoxon, 10 La. Ann. 640.

Maine.— Reed *v.* Reed, 68 Me. 568; Allen *v.* Hall, 50 Me. 253; Tilton *v.* Palmer, 31 Me. 486.

Maryland.— Gittings *v.* Worthington, 67 Md. 139, 9 Atl. 228.

Massachusetts.— Rice *v.* Freeland, 12 Cush. 170.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

Nebraska.— Hanson *v.* Hanson, 4 Nebr. (Unoff.) 880, 97 N. W. 23.

Nevada.— Dall *v.* Confidence Silver Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

New Jersey.— Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Jenkins *v.* Jenkins, (Ch. 1886) 5 Atl. 134; Atha *v.* Jewell, 33 N. J. Eq. 417; Hall *v.* Piddock, 21 N. J. Eq. 311; Doughaday *v.* Crowell, 11 N. J. Eq. 201.

New York.— Cosgriff *v.* Foss, 152 N. Y. 104, 46 N. E. 307, 57 Am. St. Rep. 500, 36

the circumstances under which the improvements were made clearly prejudice their maker in the eyes of a court of equity by indicating a purpose on his part to oppress, or obtain some inequitable advantage of, his cotenants.[1] Against this immense array of authorities, there is a persistent, although feeble, opposition, either wholly denying the right to compensate the tenant making the improvements,[2] or restricting it to very exceptional circumstances.[3] One cotenant who prefers so to do always has the right to pay in money his share of the value of the improvements made by another, rather than to suffer any diminution of his interest in the property.[4]

6. Because of Waste. If one of the cotenants has been guilty of acts amounting to waste, as where he has cut, removed, and sold timber, he may be required, in partition, to account for the proceeds;[5] or decreed to compensate his cotenants for any deterioration resulting from waste or cultivation;[6] or the portion wasted by him may be allotted to him without taking into consideration the diminution in its value due to such waste.[7] Preventive relief is also available in a suit in partition, and thereby further waste may be enjoined.[8] The court will not, however,

L. R. A. 753; Ford *v.* Knapp, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782; Lyons Nat. Bank *v.* Schuler, 115 N. Y. App. Div. 859, 101 N. Y. Suppl. 62; Green *v.* Putnam, 1 Barb. 500; Hitchcock *v.* Skinner, Hoffm. 21; Conklin *v.* Conklin, 3 Sandf. Ch. 64.

Ohio.— Youngs *v.* Heffner, 36 Ohio St. 232.

Pennsylvania.— Jevons *v.* Kline, 9 Kulp 305.

South Carolina.— Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864; Jacobs *v.* Bush, 17 S. C. 594; Annely *v.* De Saussure, 17 S. C. 389; Moore *v.* Williamson, 10 Rich. Eq. 323, 73 Am. Dec. 93.

Tennessee.— Broyles *v.* Waddel, 11 Heisk. 32.

Texas.— Lewis *v.* Sellick, 69 Tex. 379, 7 S. W. 673; Bond *v.* Hill, 37 Tex. 626; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480; Hanrick *v.* Gurley, (Civ. App. 1899) 48 S. W. 994 [*affirmed* in part and *reversed* in part in 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330]; Spicer *v.* Henderson, (Civ. App. 1897) 43 S. W. 27.

Virginia.— Chinn *v.* Murray, 4 Gratt. 348.

Washington.— Legg *v.* Legg, 34 Wash. 132, 75 Pac. 130; Leake *v.* Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

West Virginia.— Ogle *v.* Adams, 12 W. Va. 213.

United States.— McClaskey *v.* Barr, 62 Fed. 209; Hayne *v.* Gould, 54 Fed. 951.

England.— Williams *v.* Williams, 68 L. J. Ch. 528, 81 L. T. Rep. N. S. 163; Swan *v.* Swan, 8 Price 518, 22 Rev. Rep. 770; Kenrick *v.* Mountsteven, 48 Wkly. Rep. 141.

Canada.— Foster *v.* Emerson, 5 Grant Ch. (U. C.) 135.

1. Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; Hall *v.* Piddock, 21 N. J. Eq. 311; Green *v.* Putnam, 1 Barb. (N. Y.) 500; Hancock *v.* Day, McMull. Eq. (S. C.) 69, 36 Am. Dec. 293; Dangerfield *v.* Caldwell, 151 Fed. 554, 81 C. C. A. 400.

2. *Alabama.*— Ferris *v.* Montgomery Land, etc., Co., 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146; Ormond *v.* Martin, 37 Ala. 598; Horton *v.* Sledge, 29 Ala. 478.

Arkansas.— Jones *v.* Johnson, 28 Ark. 211.

Indiana.— Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441.

Maine.— Thornton *v.* York Bank, 45 Me. 158.

Massachusetts.— Husband *v.* Aldrich, 135 Mass. 317; Aldrich *v.* Husland, 131 Mass. 480; Marshall *v.* Crehore, 13 Metc. 462; Liscomb *v.* Root, 8 Pick. 376.

Texas.—Taylor *v.* Taylor, (Civ. App. 1894) 26 S. W. 889.

3. *Illinois.*— Rowan *v.* Reed, 19 Ill. 21.

Indiana.— Elrod *v.* Keller, 89 Ind. 382. See also Pulse *v.* Osborn, (App. 1901) 60 N. E. 374.

Michigan.— Porter *v.* Osmun, 135 Mich. 361, 97 N. W. 756, 98 N. W. 859.

New York.— Scott *v.* Guernsey, 48 N. Y. 106 [*affirming* 60 Barb. 163]; Train *v.* Davis, 49 Misc. 162, 98 N. Y. Suppl. 816 [*affirmed* in 114 N. Y. App. Div. 903, 100 N. Y. Suppl. 1146]; Hulse *v.* Hulse, 5 N. Y. Suppl. 747, 17 N. Y. Civ. Proc. 92.

North Dakota.— Gjerstadengen *v.* Hartzell, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575.

Pennsylvania.— Fulton *v.* Miller, 192 Pa. St. 60, 43 Atl. 409; Meyers' Estate, 179 Pa. St. 157, 36 Atl. 239.

South Carolina.— Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864.

Texas.— Calhoun *v.* Stark, 13 Tex. Civ. App. 60, 35 S. W. 410, denying the right as against minors.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

Washington.— Leake *v.* Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

4. Stafford *v.* Nutt, 35 Ind. 93.

5. Thomas *v.* Turner, 35 S. W. 1035, 18 Ky. L. Rep. 209. And this regardless of the statute of limitations. Jackson *v.* Beach, (N. J. Ch. 1886) 3 Atl. 375; and *infra*, III, K, 12.

6. Backler *v.* Farrow, 2 Hill Eq. (S. C.) 111.

7. Polhemus *v.* Emson, 30 N. J. Eq. 405 [*affirmed* in 32 N. J. Eq. 827].

8. *New Jersey.*— Weise *v.* Welsh, 30 N. J. Eq. 431; Coffin *v.* Loper, 25 N. J. Eq. 443; Obert *v.* Obert, 5 N. J. Eq. 397.

in opposition to the tenant in possession, order the sale of standing grass and the payment of the proceeds into court unless it is necessary for the interest of all the cotenants.[9]

7. Imposing Liens. The right to compel an accounting in a suit for partition is of little value unless the judgment or decree finding the amount equitably due to the cotenant may direct its payment out of the proceeds in the event that the property is ordered sold, or, in case the partition is otherwise made, may impose on each allotment a lien for the share equitably due from it. If the advancement on account of which the allowance was made was for the discharge of a lien, as where one cotenant has paid more than his just proportion of the taxes on the common property, or in satisfaction of a mortgage thereon, we think there can be no difficulty, in effect, of subrogating the one making such payment to the lien he has removed, and hence of declaring a lien in his favor against the parts which have not made contribution.[10] On the other hand, the amount found to be due may be for rents and profits, or for moneys expended in constructing improvements, making repairs, or for some other expenditure, which, however meritorious and worthy to be recompensed, did not remove any preëxisting liens. That a lien may be created and enforced in partition in such cases has been denied by some courts,[11] but affirmed by others.[12] We judge the rule as maintained by the former is the more reasonable, especially when applied against purchasers and encumbrancers without notice. If a sale of the property is ordered, and it is found to the interest of all the parties, in order to bring about such sale, to purchase certain outstanding leaseholds, the amount expended for such purchase may be made a lien on, and directed to be paid out of, the proceeds of the sale, but not the commissions paid real estate agents for negotiating the sale.[13] If improvements are made during the pendency of the suit, no lien will be imposed to recompense their maker.[14] Where one cotenant under an oral contract for the purchase of the interest of another paid him on account of the purchase-price, but the contract was not enforceable because of the statute of frauds, the court, in partition, decreed that the amount so paid should be regarded as secured by a lien on the moiety of the cotenant receiving it.[15]

8. Adjudicating and Enforcing Preëxisting Liens. Under statutes which permit the holders of liens to be made parties defendant, they must, if brought before the court, disclose their liens, and with respect to such liens and also as to any lien alleged by any of the cotenants, the court has ample jurisdiction to deter-

New York.— Hawley *v.* Clowes, 2 Johns. Ch. 122.

North Carolina.— Thompson *v.* Silverthorne, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727.

United States.— Rainey *v.* H. C. Frick Coke Co., 73 Fed. 389.

England.— Bailey *v.* Hobson, L. R. 5 Ch. 180, 39 L. J. Ch. 270, 22 L. T. Rep. N. S. 594, 18 Wkly. Rep. 124.

9. Smith *v.* Smith, 1 N. Brunsw. Eq. 320.

10. Packard *v.* King, 3 Colo. 211; Cramer *v.* Wilson, 202 Ill. 83, 66 N. E. 869; Rider *v.* Clark, 54 Iowa 292, 6 N. W. 271; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Obecny *v.* Goetz, 116 N. Y. App. Div. 807, 102 N. Y. Suppl. 232.

11. *Arkansas.*— Clark *v.* Hershy, 52 Ark. 473, 12 S. W. 1077.

Illinois.— Haberstich *v.* Elliott, 189 Ill. 70, 59 N. E. 557 [*reversing* 91 Ill. App. 662].

New York.— Bulen *v.* Burdell, 11 Abb. Pr. 381.

Pennsylvania.— Devlin's Estate, 4 Pa. Dist. 751.

Tennessee.— Omohundro *v.* Elkins, 109 Tenn. 711, 71 S. W. 590.

England.— Hill *v.* Hickin, [1897] 2 Ch. 579, 66 L. J. Ch. 717, 77 L. T. Rep. N. S. 127, 46 Wkly. Rep. 137.

12. *Georgia.*— Arnett *v.* Munnerlyn, 71 Ga. 14; Hines *v.* Munnerlyn, 57 Ga. 32.

Minnesota.— Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Nebraska.— Lynch *v.* Lynch, 18 Nebr. 586, 26 N. W. 390.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*affirming* in part and *reversing* in part (Civ. App. 1899) 48 S. W. 994]; Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63; Wipff *v.* Heder, (Civ. App. 1897) 41 S. W. 164.

13. Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799.

14. Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42.

15. Campbell *v.* Campbell, 11 N. J. Eq. 268.

mine its extent and validity, and thereupon to make such order as will respect the lien, if established, and give to the holder all the remedy to which he is equitably entitled.[16]

9. Declaring and Perfecting the Title of a Party. Under the modern system of partition, the court may determine every issue respecting the title presented by the pleadings.[17] It may further grant any relief respecting or perfecting his title which any of the parties might obtain by an independent suit, such as the correcting or reforming of a deed or other muniment of title,[18] the specific performance of a contract to convey,[19] the setting aside of a deed,[20] the annulling of a sale,[21] declaring a deed absolute in form to have been intended and received as a mortgage,[22] correcting a preëxisting decree,[23] declaring a resulting trust,[24] adjudging that a mortgage was forged and ordering the recorder to expunge it from the records,[25] or finding a will void.[26] If, however, the complainant cannot sustain his bill for partition, he cannot obtain the relief which might have been awarded as an incident, had the bill been sustainable,[27] nor can he in any case obtain relief where the necessary parties are not before the court.[28]

10. Equalizing the Partition by Granting and Enforcing Owelty. Sometimes where the property is not susceptible of partition by allotments representing the moieties of the several cotenants, their interests may nevertheless not be capable of promotion by its sale, and resort must be had to a partition which will give some of them an allotment whose value is in excess of his moiety, and justice may be done to the others by requiring the payment to them of a sum by the one receiving the more valuable allotment. The amount thus directed to be paid to equalize the partition is called owelty. There is no doubt of the power of the courts to award it,[29] although formerly the power was possessed by courts of

16. *California.*— Bradley *v.* Harkness, 26 Cal. 69.

Illinois.— Kingsbury *v.* Buckner, 70 Ill. 514; Macgregor *v.* Malarkey, 96 Ill. App. 421; Curry *v.* Fisher, 91 Ill. App. 120.

Maryland.— Ridgely *v.* Iglehart, 6 Gill & J. 49, 25 Am. Dec. 322.

Missouri.— Stevens *v.* Stevens, 172 Mo. 28, 72 S. W. 542.

New Jersey.— Adams *v.* Beideman, 33 N. J. Eq. 77.

New York.— Hughes *v.* Golden, 44 Misc. 128, 89 N. Y. Suppl. 765; Smith *v.* Smith, 1 N. Y. Suppl. 835; Walker *v.* Walker, 3 Abb. N. Cas. 12; Teal *v.* Woodworth, 3 Paige 470.

South Carolina.— Kennedy *v.* Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838.

Tennessee.— Savage *v.* Gaut, (Ch. App. 1900) 57 S. W. 170.

See 38 Cent. Dig. tit. "Partition," § 254.

But see apparent exceptions to the rule. Greene *v.* Brown, (Ind. 1894) 38 N. E. 519; Belt *v.* Bowie, 65 Md. 350, 4 Atl. 295; Cole *v.* Cole, 69 N. J. Eq. 3, 59 Atl. 895.

17. English *v.* English, 53 Kan. 173, 35 Pac. 1107; Drake *v.* Drake, 61 N. Y. App. Div. 1, 70 N. Y. Suppl. 163.

18. Rann *v.* Rann, 95 Ill. 433; Goodnough *v.* Webber, 75 Kan. 209, 88 Pac. 879; Leidenthal *v.* Leidenthal, 121 N. Y. App. Div. 269, 105 N. Y. Suppl. 807; Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556; Cartmell *v.* Chambers, (Tex. Civ. App. 1899) 54 S. W. 362.

19. Ellis *v.* Hill, 162 Ill. 557, 44 N. E. 858; Noecker *v.* Wallingford, 133 Iowa 605, 111 N. W. 37; Heyman *v.* Swift, 91 N. Y. App. Div. 352, 86 N. Y. Suppl. 584.

20. Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Metheny *v.* Bohn, 74 Ill. App. 377.

21. Walker *v.* Williams, 84 Miss. 392, 36 So. 450; McClintic *v.* Manns, 4 Munf. (Va.) 328.

22. Savage *v.* Gaut, (Tenn. Ch. App. 1900) 57 S. W. 170.

23. Smith *v.* Smith, (Tenn. Ch. App. 1900) 57 S. W. 198.

24. Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Buchanan *v.* Buchanan, 38 S. C. 410, 17 S. E. 218.

25. Raeyling's Estate, 13 Pa. Dist. 63.

26. Wagstaff *v.* Marcy, 25 Misc. (N. Y.) 121, 54 N. Y. Suppl. 1021.

27. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Brown *v.* Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

28. Wamesit Power Co. *v.* Sterling Mills, 158 Mass. 435, 33 N. E. 503; Doyle *v.* Brundred, 189 Pa. St. 113, 41 Atl. 1107.

29. *Alabama.*— Terrell *v.* Cunningham, 70 Ala. 100; Norman *v.* Harrington, 62 Ala. 107.

Georgia.— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Illinois.— Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Field *v.* Leiter, 117 Ill. 341, 7 N. E. 279; Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388.

Kentucky.— Mitchell *v.* Owings, 3 A. K. Marsh. 312.

Massachusetts.— Nichols *v.* Nichols, 181 Mass. 490, 63 N. E. 1072; King *v.* Reed, 11 Gray 490; Codman *v.* Tinkham, 15 Pick. 364.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Calhoun *v.* Rail, 26 Miss. 414.

equity only, and the necessity for awarding owelty was a reason for resorting to those courts rather than to the tribunals of the law.[30] When owelty is ordered, its amount may be regarded as in the nature of a sum due to the vendor of land from his vendee, and therefore as secured by a lien in the nature of a vendor's lien, for the satisfaction of which the allotment on account of which the owelty is awarded stands as security.[31] This lien may be enforced by proceedings in the suit. In North Carolina a writ of venditioni exponas issues for its enforcement.[32] Where a cotenant is a minor, the courts are disinclined to subject his share to the payment of owelty,[33] and equally disinclined to compel him to accept less than his moiety on being compensated therefor by the payment of owelty.[34] In Maine and New Hampshire a cotenant cannot be compelled to accept his allotment subject to a charge for owelty,[35] nor in Tennessee, except in a case of necessity.[36] If a party in whose favor owelty is awarded has encumbered his moiety, payment should be made to the encumbrancer so far as may be necessary

Nebraska.— Lynch *v.* Lynch, 18 Nebr. 586, 26 N. W. 390.

New York.— Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Suppl. 1010; Smith *v.* Smith, 10 Paige 470.

North Carolina.— Dobbin *v.* Rex, 106 N. C. 444, 11 S. E. 260; Cheatham *v.* Crews, 88 N. C. 38; Sutton *v.* Edwards, 40 N. C. 425; Jones *v.* Sherrard, 22 N. C. 179; Wynne *v.* Tunstall, 16 N. C. 23.

Pennsylvania.— Neel's Appeal, 88 Pa. St. 94; *In re* Darlington, 13 Pa. St. 430; Davis *v.* Norris, 8 Pa. St. 122; Long *v.* Long, 1 Watts 265; Kletzly *v.* Marks, 22 Pa. Co. Ct. 71; Donaldson's Estate, 23 Pittsb. Leg. J. N. S. 260 [*affirmed* in 158 Pa. St. 292, 27 Atl. 959].

Rhode Island.— Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992; Updike *v.* Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711.

South Carolina.— Covington *v.* Covington, 47 S. C. 263, 25 S. E. 193; Graydon *v.* Graydon, McMull. Eq. 63.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810; Cox *v.* McMullin, 14 Gratt. 82; Fitzhugh *v.* Foote, 3 Call 13.

See 38 Cent. Dig. tit. "Partition," § 230 *et seq.*

The power to award owelty was denied in Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655; Robertson *v.* Robertson, 2 Swan (Tenn.) 197; Mole *v.* Mansfield, 15 Sim. 41, 38 Eng. Ch. 41, 60 Eng. Reprint 531. It was awarded because of the mistake of surveyors in Dacre *v.* Gorges, 4 L. J. Ch. O. S. 50, 2 Sim. & St. 454, 25 Rev. Rep. 246, 1 Eng. Ch. 454, 57 Eng. Reprint 420.

30. Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

31. *Illinois.*— Lacy *v.* Gard, 60 Ill. App. 72.

Indiana.— Applegate *v.* Edwards, 45 Ind. 329.

Louisiana.— Walsh *v.* McNutt, 7 Mart. N. S. 311.

Maryland.— Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99; Thomas *v.* Farmers' Bank, 32 Md. 57.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Missouri.—Caldwell *v.* Wright, 88 Mo. App. 604.

Nebraska.— Lynch *v.* Lynch, 18 Nebr. 586, 26 N. W. 390; Hanson *v.* Hanson, 4 Nebr. (Unoff.) 880, 97 N. W. 23.

New York.— Ford *v.* Belmont, 7 Rob. 508.

North Carolina.— Meyers *v.* Rice, 107 N. C. 24, 12 S. E. 66; Dobbin *v.* Rex, 106 N. C. 444, 11 S. E. 260; Sutton *v.* Edwards, 40 N. C. 425; Jones *v.* Sherrard, 22 N. C. 179; Wynne *v.* Tunstall, 16 N. C. 23.

Pennsylvania.— Stewart *v.* Allegheny Nat. Bank, 101 Pa. St. 342; Allegheny Nat. Bank's Appeal, 99 Pa. St. 148; McCandless' Appeal, 98 Pa. St. 489; *In re* Darlington, 13 Pa. St. 430.

Rhode Island.— Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992; Updike *v.* Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711.

South Carolina.— Brown *v.* Coney, 12 S. C. 144.

Virginia.— Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; Cox *v.* McMullin, 14 Gratt. 82.

See 38 Cent. Dig. tit. "Partition," § 230 *et seq.*

32. *In re* Ausborn, 122 N. C. 42, 29 S. E. 56; Pardue *v.* Givens, 108 N. C. 413, 13 S. E. 112; Herman *v.* Watts, 107 N. C. 646, 12 S. E. 437; Turpin *v.* Kelly, 85 N. C. 399; Halso *v.* Cole, 82 N. C. 161. See also *Ex p.* Smith, 134 N. C. 495, 47 S. E. 16; Powell *v.* Weathington, 124 N. C. 40, 32 S. E. 380; Waring *v.* Wadsworth, 80 N. C. 345; Young *v.* Davidson College, 62 N. C. 261.

As to proceedings in Pennsylvania see Davis *v.* Norris, 8 Pa. St. 122; Monroe *v.* Monroe, 26 Pa. Super. Ct. 47; Deckard's Estate, 10 Pa. Dist. 377, 25 Pa. Co. Ct. 187; Allum *v.* Horn, 30 Pa. Co. Ct. 194; Oviatt's Estate, 14 Pa. Co. Ct. 611; Kerlin *v.* Davidheiser, 20 Montg. Co. Rep. 184.

In South Carolina scire facias may issue and be enforced against other land. Burris *v.* Gooch, 5 Rich. 1.

33. Milligan's Appeal, 82 Pa. St. 389; Powell *v.* Weathington, 124 N. C. 40, 32 S. E. 380; Jones *v.* Cameron, 81 N. C. 154.

34. Gooch *v.* Green, 102 Ill. 507.

35. Wilson *v.* European, etc., R. Co., 62 Me. 112; Whitney *v.* Parker, 63 N. H. 416.

36. Burdett *v.* Norwood, 15 Lea (Tenn.) 491.

to satisfy his lien.[37] In Kentucky the statute providing for the sale of property when it cannot be divided without materially impairing its value has been construed as taking away the power of courts to provide for and to compel the acceptance and payment of owelty.[38] Whether this extreme view is maintainable or not, the existence of statutes of this character must much diminish the necessity for awarding owelty, and disincline the courts to making such awards against reluctant cotenants. Although one is not a party to the suit in which owelty is awarded, he may accept the terms of the decree awarding it, and thereupon become entitled to enforce the lien.[39] Owelty does not impose nor create a personal liability, and its enforcement is restricted to the property against which it is awarded.[40] If property is awarded to a cotenant on his paying a specified sum of money, its payment is a condition precedent to the vesting of title in him.[41] As against a demand for owelty, a cotenant may set up by way of counter-claim damages suffered by his eviction from the land awarded to him.[42]

11. PARTIAL PARTITION. A partial partition cannot be compelled against cotenants who do not consent thereto.[43] But if some of the cotenants desire to continue holding their moieties together and undivided, the court may permit them to do so, and, instead of making a separate allotment to each, set apart to all who desire such action an allotment to be held by them as tenants in common.[44] If it appears, however, that all the defendants have already received all that is equitably due them, the whole remaining may be allotted to plaintiff.[45] This is not partial, but complete, partition.

37. Seaton *v.* Barry, 4 Watts & S. (Pa.) 183; Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466.

38. Wrenn *v.* Gibson, 90 Ky. 189, 13 S. W. 766, 12 Ky. L. Rep. 26.

39. Stone *v.* McGregor, (Tex. Civ. App. 1904) 84 S. W. 399.

As to subrogation to the right to enforce the lien of owelty see Cooke *v.* Moore, 2 S. C. 52; Stone *v.* McGregor, (Tex. Civ. App. 1905) 87 S. W. 334.

40. Waring *v.* Wordsworth, 80 N. C. 345; Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692; Stone *v.* McGregor, (Tex. Civ. App. 1905) 87 S. W. 334.

41. Harlan *v.* Langham, 69 Pa. St. 235; Butler Tp. *v.* Morgan, 1 Leg. Rec. (Pa.) 173.

42. Huntley *v.* Cline, 93 N. C. 458; McKibben *v.* Salinas, 36 S. C. 279, 15 S. E. 208, 343; Burris *v.* Gooch, 5 Rich. (S. C.) 1. Apparently *contra*, see Archer *v.* Munday, 17 S. C. 84.

43. *California.*— Sutter *v.* San Francisco, 36 Cal. 112.

Maine.— Duncan *v.* Sylvester, 16 Me. 388; Hanson *v.* Willard, 12 Me. 142, 27 Am. Dec. 162.

Massachusetts.— Miller *v.* Miller, 13 Pick. 237.

Pennsylvania.— Sweeny *v.* Meany, 1 Miles 167.

West Virginia.— Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

Canada.— Mount *v.* Farrell, 21 Quebec Super. Ct. 231.

See 38 Cent. Dig. tit. "Partition," § 703.

44. *Alabama.*— Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778.

Idaho.— Richardson *v.* Ruddy, 10 Ida. 151, 77 Pac. 972.

Indiana.— Brown *v.* Brown, 43 Ind. 474; Shull *v.* Kennon, 12 Ind. 34.

Maine.— Upham *v.* Bradley, 17 Me. 423.

Massachusetts.— Allen *v.* Hoyt, 5 Metc. 324; Symonds *v.* Kimball, 3 Mass. 299.

Michigan.— Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446.

Minnesota.— Howe *v.* Spalding, 50 Minn. 157, 52 N. W. 527.

Mississippi.— Paddock *v.* Shields, 57 Miss. 340.

Missouri.— Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451.

New Hampshire.— Abbott *v.* Perry, 46 N. H. 369; Ladd *v.* Perley, 18 N. H. 395.

New York.— Northrop *v.* Anderson, 8 How. Pr. 351; Murray *v.* Wooden, 17 Wend. 531; McWhorter *v.* Gibson, 2 Wend. 443.

North Carolina.— Carland *v.* Jones, 45 N. C. 235.

Pennsylvania.— Union Trust Co. *v.* Whittaker, 32 Pittsb. Leg. J. N. S. 443.

Texas.— Glasscock *v.* Hughes, 55 Tex. 461; Battle *v.* John, 49 Tex. 202; Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

Virginia.— Cox *v.* McMullin, 14 Gratt. 82.

West Virginia.— Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Casto *v.* Kintzel, 27 W. Va. 750.

England.— Hobson *v.* Sherwood, 4 Beav. 184, 49 Eng. Reprint 309; Clarendon *v.* Hornby, 1 P. Wms. 446, 24 Eng. Reprint 465.

The right to make partial partition was denied *in toto* in Handy *v.* Leavitt, 3 Edw. (N. Y.) 229; Robertson *v.* Robertson, 2 Swan (Tenn.) 197. See also Arms *v.* Lyman, 5 Pick. (Mass.) 210; Kerr *v.* Hooks, Wright (Ohio) 609; Custis *v.* Snead, 12 Gratt. (Va.) 260.

45. Arnold *v.* Hurd, 1 Ch. Chamb. (U. C.) 252.

12. Proceedings to Preserve the Property — a. By Injunction. In the event of waste, in progress or threatened, the court may by injunction prevent further injury during the pendency of the suit in partition.[46] If by proceeding with a partition at law, equities which the legal tribunals cannot recognize will be sacrificed, a court of equity may, in addition to entertaining a suit for partition, enjoin all proceedings for partition at law which must, if persisted in, operate to the substantial prejudice of some of the parties to the suit in equity, either because the court at law cannot recognize and protect equitable titles, or because its remedies are not adequate to the accomplishing of substantial justice, as where it has no power to order a sale of the property.[47] So, after final judgment in partition, the court may aid any allottee thereunder by enjoining any other party to the suit from interfering with or molesting him in the possession of his allotment.[48]

b. By Receivers. Of the power of a court in a partition suit to appoint a receiver there is no doubt.[49] Although courts have been somewhat reluctant to make such appointments, there is no reason to believe that a receiver will be denied in a partition suit when the circumstances are such as, according to the rules of equity practice, would justify the appointment of a receiver in any suit in equity. The mere fact that one of the cotenants is in exclusive possession of the property, or in the exclusive receipt of the rents, will not generally be regarded as requiring the appointment of a receiver, where there is no suggestion of insolvency.[50] The rule is otherwise when the property of which partition is sought is a mine. A receiver may be appointed and authorized to take possession of and to work the mine.[51]

13. Limitations. Although the authorities cannot be said to be unanimous upon the subject, the majority inclines to the view that, as to claims of which cognizance can be taken, and on account of which relief may be given, in suits for partition, the statute of limitations does not constitute any obstacle. Hence the

46. Hughes *v.* D'Arcy, Ir. R. 8 Eq. 71. See *supra*, III, K, 6.

47. *Alabama.*— Wilkinson *v.* Stuart, 74 Ala. 198.

New Jersey.— Hall *v.* Piddock, 21 N. J. Eq. 311.

North Carolina.— Donnell *v.* Mateer, 42 N. C. 94; Gash *v.* Ledbetter, 41 N. C. 183.

Ohio.— McMasters *v.* Smith, 2 Ohio Dec. (Reprint) 723, 5 West. L. Month. 25.

South Carolina.— Muir *v.* Thomson, 28 S. C. 499, 6 S. E. 309.

Vermont.— Piper *v.* Farr, 47 Vt. 721.

See 38 Cent. Dig. tit. "Partition," § 146.

As to when equity will not interfere see Greenup *v.* Sewell, 18 Ill. 50; Rapier *v.* O'Donnell, 106 La. 98, 30 So. 256; Monroe *v.* Monroe, 26 Pa. Super. Ct. 47.

48. King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

Injunction will not issue where the remedy at law is adequate (Hopkins *v.* Medley, 99 Ill. 509); but on the other hand, in aid of the jurisdiction to partition, injunction may issue against proceedings at law where there is no redress other than by resort to equity (Gash *v.* Ledbetter, 41 N. C. 183; Monroe *v.* Monroe, 26 Pa. Super. Ct. 51).

49. *California.*— Mesnager *v.* De Leonis, 140 Cal. 402, 73 Pac. 1052; Woodward *v.* Superior Court, 95 Cal. 272, 30 Pac. 535; Goodale *v.* Fifteenth Dist. Ct., 56 Cal. 26.

Georgia.— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Illinois.— Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110.

Indiana.— Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68.

Kentucky.— Jackson *v.* Macey, Hard. 582.

Massachusetts.— McCarty *v.* Patterson, 186 Mass. 1, 71 N. E. 112.

Michigan.— Duncan *v.* Campau, 15 Mich. 415.

New Jersey.— Weise *v.* Welsh, 30 N. J. Eq. 431; Low *v.* Holmes, 17 N. J. Eq. 148.

New York.— Weiher *v.* Simon, 41 Misc. 202, 83 N. Y. Suppl. 927; Smith *v.* Lavelle, 13 Misc. 528, 34 N. Y. Suppl. 695; Goldberg *v.* Richards, 5 Misc. 419, 26 N. Y. Suppl. 335; Bowers *v.* Durant, 2 N. Y. St. 127; Weeks *v.* Cornwall, 19 Abb. N. Cas. 356; Patterson *v.* McCunn, 46 How. Pr. 182.

Texas.— Campbell *v.* Ruiz, (Civ. App. 1895) 30 S. W. 837.

United States.— Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63.

England.— Holmes *v.* Bell, 2 Beav. 298, 9 L. J. Ch. 217, 17 Eng. Ch. 298, 48 Eng. Reprint 1195; Porter *v.* Lopes, 7 Ch. D. 358, 37 L. T. Rep. N. S. 824; Fall *v.* Elkins, 9 Wkly. Rep. 861.

See 38 Cent. Dig. tit. "Partition," § 147.

50. Varnum *v.* Leek, 65 Iowa 751, 23 N. W. 151; Bathmann *v.* Bathmann, 79 Hun (N. Y.) 477, 29 N. Y. Suppl. 959; Cassetty *v.* Capps, 3 Tenn. Ch. 524; Spratt *v.* Ahearne, 1 Jones Exch. 50. *Contra*, Low *v.* Holmes, 17 N. J. Eq. 148; Porter *v.* Lopes, 7 Ch. D. 358, 37 L. T. Rep. N. S. 824.

51. Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63.

right to contribution for improvements made and to an account for rent received may be enforced regardless of the lapse of time.[52] So an award of owelty was formerly not within the statute of limitations, and could hence be enforced at any time after it was made;[53] but we apprehend the rule is now generally otherwise.[54] One occupying premises and making a claim for improvements during a specified period cannot successfully assert the statute of limitations against a claim for rents during the same period.[55]

L. The Trial — 1. The Issues — a. Their Restriction by the Pleadings. There is little, if anything, peculiar to the trial of actions and other proceedings for partition. The subject-matter of the trial, as in that of all other proceedings in which written pleadings are required, is limited to and by those pleadings. Plaintiff hence, in the first instance, has no right to offer evidence of any title or matter not alleged in his complaint, nor defendant evidence of any title or matter not put in issue by his denials, or specially pleaded as an affirmative defense or ground for relief, and plaintiff in rebuttal must be restricted to meeting the evidence thus offered by defendant.[56]

b. Their Expansion to Correspond to the Pleadings. In what we have hereinbefore written we have shown the extent of the jurisdiction of courts in partition, both with respect to the subject-matters of jurisdiction, and the variety of relief which may be granted. It seems almost superfluous to state that, as the result of the trial, the court may be required to determine every variety of issue which may be material to consider in reaching its conclusion whether to order a partition or to grant any relief in connection with it, and hence that the only limitation of the issues in the modern proceeding for partition must be sought in the pleadings. Whatever may be pleaded as a ground either of action or defense may, if pleaded, become a triable issue in the cause.[57]

2. Issues Requiring a Resort to Other Tribunals — a. Disseizin of Plaintiff. Neither at law nor in equity was partition intended as a substitute for ejectment.

52. Jackson *v.* Beach, (N. J. Ch. 1886) 3 Atl. 375; Jevons *v.* Kline, 9 Kulp (Pa.) 305; Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

53. *In re* Ausborn, 122 N. C. 42, 29 S. E. 56; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

54. *Ex p.* Smith, 134 N. C. 495, 47 S. E. 16; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

55. Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

56. Mehan *v.* Mehan, 203 Ill. 180, 67 N. E. 770; Jennings *v.* Borton, (Tex. Civ. App. 1906) 98 S. W. 445; Laufer *v.* Powell, 30 Tex. Civ. App. 604, 71 S. W. 549; Freeman *v.* Preston, (Tex. Civ. App. 1895) 29 S. W. 495.

But where both sides proceed and offer evidence upon a subject as though it were within the pleadings, it should be considered. Roberts *v.* Beckwith, 79 Ill. 246.

57. *California.*— Miller *v.* Sharp, 48 Cal. 394; De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81.

Georgia.— Griffin *v.* Griffin, 33 Ga. 107.

Indiana.— Sauer *v.* Schenck, 159 Ind. 373, 64 N. E. 84; Green *v.* Brown, 146 Ind. 1, 44 N. E. 805.

Iowa.— Metcalf *v.* Hoopingardner, 45 Iowa 510.

Kentucky.— Shackelford *v.* Williams, 51 S. W. 614, 21 Ky. L. Rep. 422.

Louisiana.— Lanphier's Succession, 104 La. 384, 29 So. 122. See also Rhodes *v.* Rhodes, 10 La. 85.

Missouri.—Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 948.

Nebraska.— Schick *v.* Whitcomb, 68 Nebr. 784, 94 N. W. 1023; Lynch *v.* Lynch, 18 Nebr. 586, 26 N. W. 390.

New Jersey.— Kennedy *v.* Armstrong, 20 N. J. L. 693; Bryan *v.* Bryan, 61 N. J. Eq. 45, 48 Atl. 341; Burk *v.* Hand, 45 N. J. Eq. 166, 16 Atl. 693.

New York.— Leidenthal *v.* Leidenthal, 121 N. Y. App. Div. 269, 105 N. Y. Suppl. 807; Dwight *v.* Lawrence, 99 N. Y. App. Div. 278, 90 N. Y. Suppl. 970; Hughes *v.* Golden, 44 Misc. 128, 89 N. Y. Suppl. 765 (per Maddox, J.); Wagstaff *v.* Marcy, 25 Misc. 121, 54 N. Y. Suppl. 1021 (per McAdam, J.); Maloney *v.* Cronin, 7 N. Y. St. 700; McKeon *v.* Kearney, 57 How. Pr. 349; Coster *v.* Clarke, 3 Edw. 428.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Pennsylvania.— Stockham *v.* Stockham, 185 Pa. St. 337, 39 Atl. 950.

Texas.— Ford *v.* Boone, 32 Tex. Civ. App. 550, 75 S. W. 353.

United States.— Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63; McClaskey *v.* Barr, 42 Fed. 609; Vint *v.* King, 28 Fed. Cas. No. 16,950.

See 38 Cent. Dig. tit. "Partition," § 178 *et seq.*

Hence if defendant denied that he and plaintiff held as cotenants and pleaded sole seizin in himself, the only issue that could be tried in the first instance related to plaintiff's disseizin, and, if this issue was found against plaintiff, no further trial was necessary or proper at least until he recovered possession.[58] But in the United States, and especially in the states which have adopted reformed codes of procedure, a disseized cotenant may in one suit obtain possession and compel the partition of the property of the cotenancy.[59]

b. Disputed or Doubtful Title. If the suit for partition is in chancery and the complainant's title is denied, the issue is triable to the extent of determining whether the title is doubtful, and if found to be so, proceedings will be suspended and the complainant left to establish his title at law, if it is of legal cognizance. Equity will not exercise jurisdiction where the legal title is doubtful.[60] It should

58. See *supra*, III, E, 5, a; and the following cases:

Arkansas.— Eagle *v.* Franklin, 71 Ark. 544, 75 S. W. 1093; Moore *v.* Gordon, 44 Ark. 334; London *v.* Overby, 40 Ark. 155.

Florida.— Mattair *v.* Payne, 15 Fla. 682.

Kentucky.— Parmers *v.* Respass, 5 T. B. Mon. 562.

Michigan.— Fenton *v.* Mackinac Cir. Judge, 76 Mich. 405, 43 N. W. 437; Hoffman *v.* Beard, 22 Mich. 59.

Missouri.— Sheppard *v.* Fisher, 206 Mo. 208, 103 S. W. 989.

New Jersey.— Ellis *v.* Feist, 65 N. J. Eq. 548, 56 Atl. 369.

New York.— Lansing *v.* Pine, 4 Paige 639; Jenkins *v.* Van Schaak, 3 Paige 242.

North Carolina.— Drew *v.* Clemmons, 55 N. C. 312; Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Ohio.— Harman *v.* Kelley, 14 Ohio 502, 46 Am Dec. 552.

Pennsylvania.— Lee *v.* Lee, 12 Pa. Dist. 450, 28 Pa. Co. Ct. 604; Kelly *v.* Thomas, 2 Lack. Leg. N. 37; Mercur *v.* Jackson, 2 Lanc. L. Rev. 267; Flaherty's Estate, 5 Phila. 477.

South Carolina.— Martin *v.* Smith, Harp. Eq. 106.

Tennessee.— Trayner *v.* Brooks, 4 Hayw. 295.

Vermont.— Brock *v.* Eastman, 28 Vt. 658, 67 Am. Dec. 733.

England.— Giffard *v.* Williams, L. R. 5 Ch. 546, 39 L. J. Ch. 735, 21 L. T. Rep. N. S. 575, 18 Wkly. Rep. 776.

59. See *supra*, III, E, 5, a, b.

60. *Alabama.*— Harrison *v.* Taylor, 111 Ala. 317, 19 So. 986; Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67; Ormond *v.* Martin, 37 Ala. 598; Horton *v.* Sledge, 29 Ala. 478.

Arkansas.— Byers *v.* Danley, 27 Ark. 77.

District of Columbia.— Roller *v.* Clarke, 19 App. Cas. 539; Smith *v.* Butler, 15 App. Cas. 345; Walker *v.* Lyon, 6 App. Cas. 484.

Illinois.— Chicago, etc., R. Co. *v.* Vaughn, 206 Ill. 234, 69 N. E. 113; Walker *v.* Laflin, 26 Ill. 472.

Indiana.— Foust *v.* Moorman, 2 Ind. 17.

Kentucky.— Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544.

Maine.— Pierce *v.* Rollins, 83 Me. 172, 22 Atl. 110; Nash *v.* Simpson, 78 Me. 142, 3 Atl. 53.

Maryland.— Boone *v.* Boone, 3 Md. Ch. 497.

Michigan.— Mertens *v.* Cook, 135 Mich. 35, 97 N. W. 47; Hooper *v.* De Vries, 115 Mich. 231, 73 N. W. 132; Hoffman *v.* Beard, 22 Mich. 59.

Mississippi.— Hassam *v.* Day, 39 Miss. 392, 77 Am. Dec. 684; Shearer *v.* Winston, 33 Miss. 149.

Missouri.— Rozier *v.* Griffith, 31 Mo. 171.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Phillips *v.* Dorris, 56 Nebr. 293, 76 N. W. 555; Seymour *v.* Ricketts, 21 Nebr. 240, 31 N. W. 781.

New Jersey.— Van Riper *v.* Berdan, 14 N. J. L. 132; Roll *v.* Everett, (Ch. 1907) 65 Atl. 732; White *v.* Smith, (Ch. 1905) 60 Atl. 399; Ellis *v.* Feist, 65 N. J. Eq. 548, 56 Atl. 369; Hanneman *v.* Richter, 62 N. J. Eq. 365, 50 Atl. 904 [*affirmed* in 63 N. J. Eq. 802, 52 Atl. 1131]; Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755; Egner *v.* Meis, (Ch. 1897) 36 Atl. 943; Slockbower *v.* Kanouse, 50 N. J. Eq. 481, 26 Atl. 333; Read *v.* Huff, 40 N. J. Eq. 229; Hoyt *v.* Tuers, 35 N. J. Eq. 360; Riverview Cemetery Co. *v.* Turner, 24 N. J. Eq. 18; Hay *v.* Estell, 18 N. J. Eq. 251; Dewitt *v.* Ackerman, 17 N. J. Eq. 215; Lucas *v.* King, 10 N. J. Eq. 277; Obert *v.* Obert, 10 N. J. Eq. 98 [*affirmed* in 12 N. J. Eq. 423]; Manners *v.* Manners, 2 N. J. Eq. 384, 35 Am. Dec. 512.

New York.— O'Dougherty *v.* Aldrich, 5 Den. 385; Matthewson *v.* Johnson, Hoffm. 559.

North Carolina.— Maxwell *v.* Maxwell, 43 N. C. 25.

Ohio.— Delaney *v.* McFadden, 8 Ohio Dec. (Reprint) 381, 7 Cinc. L. Bul. 267.

Pennsylvania.— *In re* McMahon, 211 Pa. St. 292, 60 Atl. 787; *In re* Bishop, 200 Pa. St. 598, 50 Atl. 156; Lee *v.* Lee, 12 Pa. Dist. 450, 28 Pa. Co. Ct. 604; Matter of Mealy, 1 Ashm. 363; Adelman's Estate, 6 Kulp 382.

South Carolina.— Carrigan *v.* Evans, 31 S. C. 262, 9 S. E. 852.

Tennessee.— Carter *v.* Taylor, 3 Head 30; Whillock *v.* Hale, 10 Humphr. 64; Nicely *v.* Boyles, 4 Humphr. 177, 40 Am. Dec. 638; Butler *v.* King, 2 Yerg. 115; Apple *v.* Owens, 1 Tenn. Ch. App. 135.

Virginia.— Currin *v.* Spraull, 10 Gratt. 145; Straughan *v.* Wright, 4 Rand. 493;

be observed that we do not say that equity will not determine a disputed title. The dispute may not be in good faith. If it is not and the court of equity sees this and that there is no real doubt, it will often proceed without requiring plaintiff to try the title at law.[61] The court may also proceed to determine the legal title on the ground that none of the parties objected to its exercise of this jurisdiction.[62] If the doubt or controversy concerns the equitable title, a court of chancery will determine it.[63] If it relates to the title of some only of the parties, the shares not in dispute may be allotted and the parties disputant be left to determine at law the controversy existing between them.[64] In many of the states the courts given jurisdiction over the subject of partition have powers so ample that there is no necessity for recourse to any other tribunal to try any issue which may be presented in a partition. If the complainant is disseized, he may be put in possession; if his title is equitable only, it may sustain his recovery and the award to him of such relief as in equity is due him; and, whether legal or equitable, the court may try and determine any and every question which may be presented concerning it.[65]

3. The Evidence — a. Burden of Proof. The rule with respect to the burden of proof is the same as in other legal proceedings, to wit: plaintiff must establish every essential allegation of the complaint which is denied by defendant, whether it relates to the deraignment of his title or to any other material matter.[66] So as

Stuart *v.* Coalter, 4 Rand. 74, 15 Am. Dec. 731.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

Wisconsin.— Morgan *v.* Mueller, 107 Wis. 241, 83 N. W. 313; Hardy *v.* Mills, 35 Wis. 141.

United States.— Clark *v.* Roller, 199 U. S. 541, 26 S. Ct. 141, 50 L. ed. 300; McCall *v.* Carpenter, 18 How. 297, 15 L. ed. 389; Bearden *v.* Benner, 120 Fed. 690; West *v.* East Coast Cedar Co., 101 Fed. 615, 41 C. C. A. 528; Brown *v.* Cranberry Iron, etc., Co., 40 Fed. 849; Barney *v.* Baltimore, 2 Fed. Cas. No. 1,029, 1 Hughes 118; Lamb *v.* Starr, 14 Fed. Cas. No. 8,021, Deady 350.

England.— Giffard *v.* Williams, L. R. 5 Ch. 546, 39 L. J. Ch. 735, 21 L. T. Rep. N. S. 575, 18 Wkly. Rep. 776; Bolton *v.* Bolton, L. R. 7 Eq. 298 note, 19 L. T. Rep. N. S. 298; Slade *v.* Barlow, L. R. 7 Eq. 296, 28 L. J. Ch. 369, 20 L. T. Rep. N. S. 10, 17 Wkly. Rep. 366; Ward *v.* Ward, 21 L. T. Rep. N. S. 699, 18 Wkly. Rep. 87; Blynman *v.* Brown, 2 Vern. Ch. 232, 23 Eng. Reprint 749; Moore *v.* Kempston, 18 Wkly. Rep. 803.

Canada.— Macdonell *v.* McGillis, 8 Ont. Pr. 339; Bennetto *v.* Bennetto, 6 Ont. Pr. 145.

61. *Alabama.*— Hillens *v.* Brinsfield, 108 Ala. 605, 18 So. 604; Ballard *v.* Johns, 80 Ala. 32; Horton *v.* Sledge, 29 Ala. 478.

District of Columbia.— Smith *v.* Butler, 15 App. Cas. 345.

Florida.— Keil *v.* West, 21 Fla. 508.

Kentucky.—Phillips *v.* Johnson, 14 B. Mon. 172; Overton *v.* Woolfolk, 6 Dana 371.

Missouri.— Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Reed *v.* Robertson, 45 Mo. 580.

New Jersey.— Hay *v.* Estell, 18 N. J. Eq. 251; Lucas *v.* King, 10 N. J. Eq. 277.

New York.— Hulse *v.* Hulse, 5 N. Y. Suppl. 747, 17 N. Y. Civ. Proc. 92.

Pennsylvania.— Wistar's Appeal, 115 Pa. St. 241, 8 Atl. 797; Galbraith *v.* Bowen, 5 Pa. Dist. 352.

Wisconsin.— O'Hearn *v.* O'Hearn, 114 Wis. 428, 90 N. W. 450, 58 L. R. A. 105.

United States.— Forderer *v.* Schmidt, 146 Fed. 480, 77 C. C. A. 36; Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63; Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3,523, 1 Abb 169.

England.— Backhouse *v.* Paddon, 13 L. T. Rep. N. S. 625, 14 Wkly. Rep. 273.

Canada.— Wood *v.* Wood, 16 Grant Ch. (U. C.) 471.

62. Burt *v.* Hellyar, L. R. 14 Eq. 160, 41 L. J. Ch. 430, 26 L. T. Rep. N. S. 833.

63. *Iowa.*— Miller *v.* Chittenden, 2 Iowa 315.

Maryland.— Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339.

New Jersey.— Woglom *v.* Kant, 69 N. J. Eq. 489, 61 Atl. 9.

Pennsylvania.— Hayes' Appeal, 123 Pa. St. 110, 16 Atl. 600.

United States.— Lamb *v.* Burbank, 14 Fed. Cas. No. 8,012, 1 Sayw. 227; Lamb *v.* Starr, 14 Fed. Cas. No. 8,021, Deady 350.

64. Phelps *v.* Green, 3 Johns. Ch. (N. Y.) 302. *Contra*, Mercur *v.* Jackson, 3 Pa. Co. Ct. 387.

65. See *supra*, III, E, 5, a; Dunn *v.* Dunn, 51 Misc. (N. Y.) 302, 100 N. Y. Suppl. 1061.

66. *Alabama.*— Gassenheimer *v.* Huguley, 64 Ala. 83.

Illinois.— Glos *v.* Carlin, 207 Ill. 192, 69 N. E. 928; Scott *v.* Scott, 191 Ill. 628, 61 N. E. 415; Walton *v.* Walton, 70 Ill. 142.

Louisiana.— Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 So. 800.

Maine.— Gilman *v.* Stetson, 16 Me. 124.

Massachusetts.— Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603.

Mississippi.— Ingram *v.* War, 5 Sm. & M. 746.

to any matter in avoidance pleaded by defendant, and every matter asserted by him as a ground for affirmative relief, he must assume the burden of proving it.[67]

b. Evidence of Title. Every issue respecting the title must, by the party on whom the burden of proof rests, be met by evidence of the same character which would be required in an action of ejectment, or any other action involving the title or the right to the possession of the property.[68] A patent or some other source of title must be shown, together with each subsequent act necessary to establish the transmission of the title from such original source to the person relying upon it.[69] If a party relies on an agreement which appears to be illegal, he must fail.[70] If two deeds made by the same grantor for the same property are put in evidence, the one bearing the later date may be disregarded in the absence of any evidence of the invalidity of the conveyance first executed.[71] One who in his pleadings admits the title of his adversary, or any other material fact, is not entitled to call for evidence thereof.[72] If, from the pleadings or the evidence, it appears that there is a common source of title, or in other words, a grantor or ancestor under whom all the parties claim, it is sufficient to prove title from or under him and not at all necessary to show the source of his title.[73] In the absence of any allegation in the pleadings specially referring to equities or to an

South Carolina.— Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516; Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947; Brock *v.* Nelson, 29 S. C. 49, 6 S. E. 899.

Texas.— Laferiere *v.* Richards, 28 Tex. Civ. App. 3, 67 S. W. 125.

Virginia.— Wharton *v.* Campbell, (1899) 34 S. E. 47.

Washington.— Hyde *v.* Britton, 41 Wash. 277, 83 Pac. 307.

See 38 Cent. Dig. tit. "Partition," § 183.

67. *Iowa.*— Parker *v.* Stewart, Morris 419.

Louisiana.—Mandal *v.* Mandal, 28 La. Ann. 556.

Michigan.— Hooper *v.* De Vries, 115 Mich. 231, 73 N. W. 132.

Missouri.— Millington *v.* Millington, 7 Mo. 446.

Montana.— Hurley *v.* O'Neill, 31 Mont. 595, 79 Pac. 242.

New York.— Heyman *v.* Swift, 91 N. Y. App. Div. 352, 86 N. Y. Suppl. 584.

Pennsylvania.— *In re* Naglee, 52 Pa. St. 154.

Virginia.— Brooks *v.* Hubble, (1897) 27 S. E. 585.

See 38 Cent. Dig. tit. "Partition," § 183.

68. *California.*— Harrington *v.* Goldsmith, 136 Cal. 168, 68 Pac. 594.

Georgia.— Chastain *v.* Higdon, 84 Ga. 111, 10 S. E. 587.

Illinois.— Clos *v.* Carlin, 207 Ill. 192, 69 N. E. 928.

Kansas.— Jockheck *v.* Davies, 45 Kan. 630, 26 Pac. 36.

Louisiana.—Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 So. 800.

Massachusetts.—Wood *v.* Le Baron, 8 Cush. 471.

Minnesota.— McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333.

New Jersey.— Obert *v.* Obert, 12 N. J. Eq. 423.

New York.— Griggs *v.* Beckham, 3 Wend. 436; Larkin *v.* Mann, 2 Paige 27.

North Carolina.— Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232.

Ohio.— Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552.

South Carolina.— Gibson *v.* Brown, 1 Nott & M. 326.

Texas.— Laferiere *v.* Richards, 28 Tex. Civ. App. 63, 67 S. W. 125.

Vermont.— Hawley *v.* Soper, 18 Vt. 320.

69. *Massachusetts.*— Savery *v.* Taylor, 102 Mass. 509.

New York.— Whitney *v.* Whitney, 171 N. Y. 176, 63 N. E. 834; Harris *v.* Harris, 26 N. Y. 433; Hamilton *v.* Morris, 7 Paige 39.

South Carolina.— Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516.

Texas.— Powell *v.* Thompson, 66 Tex. 230, 18 S. W. 504; Johns *v.* Northcutt, 49 Tex. 444.

Vermont.— Hawley *v.* Soper, 18 Vt. 320.

70. Milhous *v.* Sally, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834.

71. Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

72. Reinhart *v.* Lugo, 75 Cal. 639, 18 Pac. 112; McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516.

73. *Illinois.*— Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; O'Melia *v.* Mullarky, 124 Ill. 506, 17 N. E. 36.

Iowa.— Truth Lodge No. 213 A. F. & A. M. *v.* Barton, 119 Iowa 230, 93 N. W. 106, 97 Am. St. Rep. 303.

Kentucky.— Heard *v.* Cherry, 92 S. W. 551, 29 Ky. L. Rep. 106.

Maryland.— Calwell *v.* Boyer, 8 Gill & J. 136.

North Carolina.— Graves *v.* Barrett, 126 N. C. 267, 35 S. E. 539; Trice *v.* Pratt, 21 N. C. 626.

South Carolina.— McGowan *v.* Reid, 33 S. C. 169, 11 S. E. 685.

Texas.— Hughey *v.* Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395; Smith *v.* Davis, 18 Tex. Civ. App. 563, 47 S. W. 101.

Virginia.— McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516; Hannon *v.* Hannah, 9 Gratt. 146.

See 38 Cent. Dig. tit. "Partition," § 185.

equitable title, it must be assumed that only the legal title is in issue, and that it, when established, must prevail.[74] Under the general issue at common law, and the general denial under the codes, defendant is entitled to offer and have received any evidence tending to show that he and plaintiff did not hold as cotenants when the suit was brought,[75] but not evidence of any matter occurring after the filing of his answer unless pleaded by a supplemental answer.[76] Although the presumption that a tenant in common in possession of the common property holds for his cotenants as well as for himself makes it difficult for him to establish title by prescription,[77] yet there is no doubt he may do so under proper and sufficient evidence,[78] and that such evidence is admissible under a general allegation or denial of title without specially referring to the statute of limitations.[79] Although defendants are in default and the title of plaintiff stands confessed thereby, courts seem to require the same evidence as to title on the part of plaintiff as if he were maintaining a contested action of ejectment.[80]

c. Variance. Evidence offered by any of the parties may, as in other cases, be rejected because of variance between it and the pleadings;[81] but not where the variance is immaterial,[82] or merely tends to show that the interest of the party, although entitling him to relief, is less than that claimed.[83]

d. Respecting the Necessity For a Sale. Although the complaint where plaintiff seeks a partition by sale usually tenders an issue upon that subject which is often denied by the answer, and this authorizes the reception of evidence by the court responsive to the issue, describing the situation of the property and giving the opinion of the witnesses,[84] still the question is generally submitted, in the first instance, to the referees who report thereon after inspecting the property,[85] and the propriety of their action is litigated upon some motion to set aside their report or their sale made in pursuance of it.

74. *Connecticut.*— Kelley *v.* Madden, 40 Conn. 274.

Illinois.— McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

Indiana.— Johnson *v.* Pontious, 118 Ind. 270, 20 N. E. 792.

South Carolina.— Kimbrell *v.* Page, 70 S. C. 217, 49 S. E. 477.

Texas.— Wiedner *v.* Hell, (Civ. App. 1894) 26 S. W. 781.

United States.— Lee *v.* Wysong, 128 Fed. 833, 63 C. C. A. 483.

75. Hawkins *v.* Taylor, 128 Ind. 431, 27 N. E. 1117; Luntz *v.* Greve, 102 Ind. 173, 26 N. E. 128; Ross *v.* Pleasants, 11 Pa. St. 353; Bates *v.* McCrory, 3 Yeates (Pa.) 192; Bethel *v.* Lloyd, 1 Dall. (Pa.) 25, 1 L. ed. 11; Love *v.* Overholt, 33 Leg. Int. (Pa.) 24; Smith *v.* Butler, 85 Tex. 126, 19 S. W. 1083.

76. Upham *v.* Bradley, 17 Me. 423; Williams *v.* Hernon, 16 Abb. Pr. (N. Y.) 173.

77. La Tourette *v.* Decker, 18 N. Y. Suppl. 840; Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

78. *California.*— Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658.

Georgia.— Hamby Mountain Gold Mines *v.* Calhoun Land, etc., Co., 83 Ga. 311, 9 S. E. 831.

Illinois.— Cramer *v.* Wilson, 202 Ill. 83, 66 N. E. 869.

Indiana.— Kent *v.* Parks, 67 Ind. 53.

Kentucky.— Wise *v.* Wolfe, 85 S. W. 1191, 27 Ky. L. Rep. 610.

Massachusetts.— *In re* Butrick, 185 Mass. 107, 69 N. E. 1044.

Minnesota.— McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333.

Ohio.— Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552.

South Carolina.— Brock *v.* Nelson, 29 S. C. 49, 6 S. E. 899.

See 38 Cent. Dig. tit. "Partition," § 183 *et seq.*

79. Kent *v.* Parks, 67 Ind. 53; McArthur *v.* Clark, 86 Minn. 165, 80 N. W. 369, 91 Am. St. Rep. 333; Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552.

80. Shaw *v.* Parker, 6 Blackf. (Ind.) 345; Lease *v.* Carr, 5 Blackf. (Ind.) 353; Griggs *v.* Peckham, 3 Wend. (N. Y.) 436.

81. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

82. Holman *v.* Gill, 107 Ill. 467; Burghardt *v.* Van Deusen, 4 Allen (Mass.) 374; Wright *v.* McCormick, 67 N. C. 27.

83. Holman *v.* Gill, 107 Ill. 467; Ferris *v.* Smith, 17 Johns. (N. Y.) 221; Windham *v.* Howell, 68 S. C. 478, 47 S. E. 715; Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

84. *California.*— Bartlett *v.* Mackey, 130 Cal. 181, 62 Pac. 482.

Kentucky.— Gill *v.* Lane, 80 S. W. 1176, 26 Ky. L. Rep. 267.

Louisiana.— Soniat *v.* Supple, 49 La. Ann. 41, 21 So. 165.

South Carolina.— Hiers *v.* Risher, 54 S. C. 405, 32 S. E. 509.

Tennessee.— Davidson *v.* Bowden, 5 Sneed 129.

Virginia.— Wharton *v.* Campbell, (1899) 34 S. E. 47.

85. Johnson *v.* Hoover, 75 Md. 486, 23 Atl.

4. Before Whom the Trial May Take Place; Jury Trial or Reference. If the suit is in chancery, the manner of taking the evidence may be the same as in other chancery proceedings, and this is generally by depositions and papers offered before an examiner or master in chancery.[86] In many of the states the first trial or taking of evidence is of a ministerial rather than judicial character, sometimes taking place before a notary,[87] auditor,[88] or clerk.[89] Where an issue of title is presented by the pleadings which the court is incompetent to try, it may refer the trial to a jury to take place before a court of law.[90] Under the modern system some of the issues presented in a suit for partition are proper to be tried before a jury only, as, for instance, those relating to the title and right of possession of the property, and cannot be referred for trial except by consent of all the parties.[91] A trial by jury may be waived by not demanding

903; Underhill *v.* Underhill, 4 N. Y. St. 858; Tieman *v.* Baker, 63 Tex. 641.

86. *Illinois.*— Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053.

New Jersey.— Buzby *v.* Roberts, 53 N. J. Eq. 566, 32 Atl. 9.

New York.— Dwight *v.* Lawrence, 99 N. Y. App. Div. 278, 90 N. Y. Suppl. 970; Manwaring *v.* Lippincott, 34 Misc. 123, 69 N. Y. Suppl. 461; Braker *v.* Devereaux, 8 Paige 513; Safford *v.* Safford, 7 Paige 259, 32 Am. Dec. 633; Hamilton *v.* Morris, 7 Paige 39; Larkin *v.* Mann, 2 Paige 27.

North Carolina.— Wooten *v.* Pope, 22 N. C. 306.

Pennsylvania.— Lancaster *v.* Flowers, 9 Pa. Dist. 241, 23 Pa. Co. Ct. 613.

West Virginia.— Bland *v.* Stewart, 35 W. Va. 518, 14 S. E. 215.

Canada.— McKay *v.* Keefer, 12 Ont. Pr. 256; *Re* Rogers, 11 Ont. Pr. 90; *Re* Arnott, 8 Ont. Pr. 39.

See 38 Cent. Dig. tit. "Partition," § 188 *et seq.*

As to practice in England see Senoir *v.* Hereford, 4 Ch. D. 494, 25 Wkly. Rep. 223; Jope *v.* Morshead, 6 Beav. 213, 12 L. J. Ch. 190, 49 Eng. Reprint 807; Meers *v.* Stourton, Dick. 21, 21 Eng. Reprint 174; Hawkins *v.* Herbert, 60 L. T. Rep. N. S. 142, 37 Wkly. Rep. 300.

87. Lanphier's Succession, 104 La. 384, 29 So. 122.

The duty of the notary, however, seems merely to be to make partition as directed by the court or judge. Harrell's Succession, 12 La. Ann. 337.

88. *In re* Butrick, 185 Mass. 107, 69 N. E. 1044.

89. Ledbetter *v.* Pinner, 120 N. C. 455, 27 S. E. 123; Hill *v.* Hickin, [1897] 2 Ch. 579, 66 L. J. Ch. 717, 77 L. T. Rep. N. S. 127, 46 Wkly. Rep. 137.

90. Hewlett *v.* Wood, 62 N. Y. 75; Larkin *v.* Mann, 2 Paige (N. Y.) 27; Kates' Estate, 9 Pa. Co. Ct. 569; Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298.

91. *California.*— Hastings *v.* Cunningham, 35 Cal. 549.

Georgia.— Brown *v.* Mooney, 108 Ga. 331, 33 S. E. 942.

Maine.—Allen *v.* Hall, 50 Me. 253.

Missouri.— Benoist *v.* Thomas, 121 Mo. 660, 27 S. W. 609.

New York.— Fairweather *v.* Burling, 181 N. Y. 117, 73 N. E. 565 [*affirming* 98 N. Y. App. Div. 267, 90 N. Y. Suppl. 516]; Southack *v.* Central Trust Co., 62 N. Y. App. Div. 260, 70 N. Y. Suppl. 1122; Tracy *v.* Dolan, 51 N. Y. App. Div. 588, 65 N. Y. Suppl. 207 [*affirming* 31 Misc. 6, 64 N. Y. Suppl. 651].

Pennsylvania.— Swayze *v.* Ormsby, 2 Watts 494; Macmunn *v.* Haverkamp, 8 Pa. Dist. 680, 23 Pa. Co. Ct. 309.

South Carolina.— Glover *v.* Gasque, 67 S. C. 18, 45 S. E. 113; Sumner *v.* Harrison, 54 S. C. 353, 32 S. E. 572; Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885; Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298.

Texas.— Kuteman *v.* Carroll, (Civ. App. 1902) 70 S. W. 563.

Wisconsin.— Williams *v.* Williams, 82 Wis. 393, 52 N. W. 429.

See 38 Cent. Dig. tit. "Partition," § 188 *et seq.*

As to jury trial.— Whether a party is, under the modern suit or action for partition, entitled to a jury trial, is a question which has received very little attention, and in some of the cases bearing upon it, it is difficult to ascertain whether the decision of the court was not merely by the way of construing some statute. If the right to the partition is conceded and the only question is whether it should be by sale or by allotment, we apprehend neither party is entitled to trial by jury. Brown *v.* Mooney, 108 Ga. 331, 33 S. E. 942. Among the cases affirming in general terms, without showing whether the court was controlled by some statute, that upon all questions of title the parties are entitled to trial by jury are: Allen *v.* Hall, 50 Me. 253; Covington *v.* Covington, 73 N. C. 168; Swayze *v.* Ormsby, 2 Watts (Pa.) 494; Glover *v.* Gasque, 67 S. C. 18, 45 S. E. 113; Sumner *v.* Harrison, 54 S. C. 353, 32 S. E. 572; Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885; Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298; Kuteman *v.* Carroll, (Tex. Civ. App. 1902) 70 S. W. 563. On the other hand, the cases cited above from Missouri, New York, and Wisconsin were controlled by statutes expressly requiring trials by jury. All that can be affirmed, therefore, with any confidence, is that in nearly every state in the Union it is, for some reason, deemed erroneous not to submit all

it.[92] If there is a default by defendant, or the answer filed by him does not controvert plaintiff's title, the remaining questions may be tried by the court,[93] or sent by it to a referee for trial before him.[94] The reference authorized by the statutes of Pennsylvania does not take effect until after the trial and relates wholly to the carrying out of the decree directing partition,[95] while that authorized in New York is restricted to cases where defendant is in default or is an infant.[96]

5. DISMISSAL WITHOUT TRIAL. Nothing which defendant can plead in his answer entitles him to a dismissal of the action without a trial,[97] provided the complaint is sufficient; but if the complaint is wholly insufficient, the action may be dismissed on demurrer, or even without any pleading by defendant.[98] This course will rarely be pursued, for by amendment the alleged defect may be supplied.[99] Hence a petition will not be dismissed because of the death of some of the parties.[1] It may, however, be dismissed as to some of the parties who have ceased to be interested,[2] or who were never proper parties,[3] or as to one of the tracts described in the petition as to which it appears that plaintiff and defendants are not cotenants.[4] Plaintiff has the right, as in other actions, to voluntarily dismiss his suit at any time prior to the submission of the cause for decision;[5] but it has been held that the court has a discretion to refuse leave to dismiss after the evidence has been taken, although defendant has not filed a cross bill.[6]

6. THE FINDINGS. The findings in actions or other proceedings for partition need not extend beyond the ultimate facts, and may omit all probative facts involved in the finding respecting the ultimate facts.[7] A finding that two of the parties have an equal interest in the property is not an adjudication that one of them has not mortgaged his interest.[8] The findings must dispose of all the issues, and there is no authority to enter the interlocutory judgment without such findings[9]

issues relating to title to a jury if requested. In Virginia a statute exists dispensing with a jury trial in partition, and its constitutionality has been affirmed on the ground that, at the adoption of the present constitutional provision affirming the right to trial by jury, this mode of trial was not required in that state in partition proceedings. Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804. While in Ohio it is asserted, although by a *dictum*, that in no case is a party entitled to a jury trial in partition. McRoberts *v.* Lockwood, 49 Ohio St. 374, 34 N. E. 734.

92. Schimpf *v.* Rhodewald, 62 Nebr. 105, 86 N. W. 908; Ledhetter *v.* Pinner, 120 N. C. 455, 27 S. E. 123.

93. Rodgers *v.* Price, 105 Ga. 67, 31 S. E. 126; Brown *v.* Mooney, 108 Ga. 331, 33 S. E. 942.

94. Caldwell *v.* Wright, 88 Mo. App. 604; Levine *v.* Goldsmith, 71 N. Y. App. Div. 204, 75 N. Y. Suppl. 706 [*reversing* 34 Misc. 7, 69 N. Y. Suppl. 446]; Nolan *v.* Skelly, 62 How. Pr. (N. Y.) 102.

95. Macmunn *v.* Haverkamp, 8 Pa. Dist. 680, 23 Pa. Co. Ct. 309; Hasson *v.* Hasson, 8 Pa. Dist. 297; Lyons *v.* Lyons, 7 Lack. Leg. N. (Pa.) 91. But see Lancaster *v.* Flower, 9 Pa. Dist. 241, 23 Pa. Co. Ct. 613.

96. Levine *v.* Goldsmith, 71 N. Y. App. Div. 204, 75 N. Y. Suppl. 706 [*reversing* 34 Misc. 7, 69 N. Y. Suppl. 446].

97. Bullock *v.* Knox, 96 Ala. 195, 11 So. 339; De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Tobin *v.* Tobin, 45 Wis. 298.

But the rule is said to be otherwise where defendant makes an absolute disclaimer and is not shown to be in possession. Urban *v.* Hopkins, 17 Iowa 105. See also Lyle *v.* Smith, 13 How. Pr. (N. Y.) 104.

98. Crippen *v.* White, 28 Colo. 298, 64 Pac. 184.

99. Upham *v.* Bradley, 17 Me. 423.

1. Mitchell *v.* Starbuck, 10 Mass. 5; Thomas *v.* Smith, 2 Mass. 479.

2. McClure *v.* McClure, 1 Phila. (Pa.) 117.

3. Stevens *v.* McCormick, 90 Va. 735, 19 S. E. 742.

4. Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755.

5. Ivory *v.* Delore, 26 Mo. 505; Furman *v.* Furman, 12 Hun (N. Y.) 441; Rainey *v.* H. C. Frick Coke Co., 8 Pa. Dist. 144, 21 Pa. Co. Ct. 482.

6. Reilly *v.* Reilly, (Ill. 1891) 26 N. E. 604.

7. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Mayer *v.* Mayer, 118 Cal. 510, 50 Pac. 650; Glos *v.* Carlin, 207 Ill. 192, 69 N. E. 928; Miller *v.* McMannis, 104 Ill. 421; Bayha *v.* Kessler, 79 Mo. 555; Ackermann *v.* Ackermann, 22 Tex. Civ. App. 612, 55 S. W. 801.

8. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

9. Tibbs *v.* Allen, 27 Ill. 119; Adams *v.* Bristol, 108 N. Y. App. Div. 303, 95 N. Y. Suppl. 628; Levine *v.* Goldsmith, 71 N. Y. App. Div. 204, 75 N. Y. Suppl. 706 [*reversing* 34 Misc. 7, 69 N. Y. Suppl. 446].

Amending special verdicts or findings in partition see Barclay *v.* Kerr, 110 Pa. St. 130, 1 Atl. 220.

except when a decree *pro confesso* is properly entered in the action or proceeding.[10]

M. The Interlocutory Judgment or Decree — 1. The Purpose and Substance of. At common law the first, or interlocutory, judgment in partition determined the moieties of the parties, directed that partition be made between them, and commanded that the sheriff go upon the premises and make such partition in the presence of the parties "if they be willing to be present after being first forewarned" by the oath of good and lawful men of the county, etc.[11] The interlocutory decree in chancery differed from the like judgment at law: (1) In appointing commissioners and directing them to make the partition; (2) in requiring all writings, surveys, and muniments of title to be produced before such commissioners; (3) in authorizing them to examine witnesses; (4) in directing the parties to execute conveyances to each other respectively; and (5) frequently a direction in reference to title deeds, and another as to costs.[12] Under the more modern practice by virtue of which the issues in partition are greatly varied and enlarged, the interlocutory judgment is correspondingly varied and enlarged. It must necessarily determine the moieties of the respective parties,[13] and all other questions within the issues and relating to the title to the property,[14] although in equity, in this determination, the services of a master in chancery may be employed.[15] As to lien-holders not made parties to the suit, or if made parties, not served with process, this judgment can make no adjudication,[16] and they must, as to the enforcement of their lien, pursue the property set off to the person against whom the lien was operative.[17] It is not indispensable to declare that the parties take subject to a mortgage or other lien.[18] The modern practice permits lien-holders who have been made parties defendant to present their claims and to insist upon a determination by the interlocutory judgment of the existence, validity, and amount of their liens.[19] Respecting every other question presented by the issues, and upon which any of the parties becomes entitled to relief, the interlocutory judgment must contain the provision and direction essential to the appropriate relief, such as directing an accounting for rents and profits,[20] deducting lands sold for taxes from the shares of the cotenants guilty of delinquency in payment,[21] directing a specific performance,[22] canceling a conveyance,[23] declaring

10. Interlocutory decree pro confesso in partition proceedings see *infra*, III, M, 3.

11. Booth Real Actions 244, 245; 3 Chitty Pl. 1392; Freeman Coten. & P. § 516.

12. Daniel Ch. Pr. (4th ed.) 2254; Freeman Coten. & P. § 516; Seaton Forms 184.

13. Henricksen *v.* Hodgen, 67 Ill. 179; Ham *v.* Ham, 39 Me. 216; Phelps *v.* Green, 3 Johns. Ch. (N. Y.) 303; Ledbetter *v.* Gash, 30 N. C. 462.

14. Scott *v.* Bassett, 71 Ill. App. 641; Lease *v.* Carr, 5 Blackf. (Ind.) 353; Pittsburgh Cent. Bank *v.* Earley, 10 Pa. Cas. 526, 14 Atl. 427; Rice's Estate, 33 Pittsh. Leg. J. N. S. (Pa.) 412.

15. Phelps *v.* Green, 3 Johns. Ch. (N. Y.) 303; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206; Calmady *v.* Calmady, 2 Ves. Jr. 568, 30 Eng. Reprint 780.

16. Jackman *v.* Beck, 37 Ark. 125; Loomis *v.* Riley, 24 Ill. 307; Stephenson *v.* Cotter, 5 N. Y. Suppl. 749.

17. *Indiana.*— Milligan *v.* Poole, 35 Ind. 64.
Maine.— Randell *v.* Mallett, 14 Me. 51.
Missouri.—Watson *v.* Priest, 9 Mo. App. 263.
Nebraska.— Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 196, 91 N. W. 573.
New York.— Evarts *v.* Woods, 6 N. Y. Suppl. 200; Harwood *v.* Kirby, 1 Paige 469; Jackson *v.* Pierce, 10 Johns. 414; Westervelt *v.* Haff, 2 Sandf. Ch. 98.
Pennsylvania.— Wright *v.* Vickers, 81 Pa. St. 122 [*affirming* 10 Phila. 381]; Long's Appeal, 77 Pa. St. 151.
Virginia.— Wright *v.* Strother, 76 Va. 857.

18. Quick *v.* Brenner, 101 Ind. 230.
As to other cases involving the subject of liens against the property and provisions in interlocutory decrees therefor see Martin *v.* Kennedy, 83 Ky. 335; Reid *v.* Gardner, 65 N. Y. 578; Winfield *v.* Stacom, 40 N. Y. App. Div. 95, 57 N. Y. Suppl. 563; Kelly *v.* Werner, 34 N. Y. App. Div. 68, 53 N. Y. Suppl. 1067; Shouffler *v.* Coover, 1 Watts & S. (Pa.) 400; Horne's Estate, 10 Pa. Dist. 226; Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466; Good *v.* Coombs, 28 Tex. 34; Moore *v.* Moore, (Tex. Civ. App. 1895) 31 S. W. 532.

19. Winfield *v.* Stacom, 40 N. Y. App. Div. 95, 57 N. Y. Suppl. 563.

20. Hosford *v.* Merwin, 5 Barb. (N. Y.) 51; Brownson *v.* Gifford, 8 How. Pr. (N. Y.) 389.

21. Braker *v.* Devereaux, 8 Paige (N. Y.) 513.

22. Gray *v.* King, 39 Tex. 616.

23. Bell *v.* Gittere, 9 N. Y. Suppl. 400 [*affirmed* in 134 N. Y. 616, 32 N. E. 649].

a deed absolute in form to be a mortgage and the amount due thereon,[24] finding the amount of taxes paid by one of the parties with interest and fixing a period within which such amount must be repaid,[25] or fixing the amount chargeable against one of the cotenants as an advancement, and, on account thereof, making the proper deduction from his share.[26] As all questions involving the title of the parties and their right to any relief within the issues are necessarily judicial in character, and must be determined by the court, such determination must ordinarily be made by the court and incorporated in the interlocutory decree before any partition is made or directed.[27] This judgment should contain a description of the property to be partitioned, either in such terms as to render unnecessary a resort to any extrinsic writings, or by reference to the pleadings in the cause, or to other writings and records, or maps and plats, so that there can be no doubt as to what property is subject to the judgment and is, by the commissioners or referees, to be assigned to the parties to be held in severalty. The rules respecting the construction of descriptive words is doubtless the same as in other writings.[28] In two states the power of the court to make partition directly and without the aid of commissioners has been affirmed,[29] and in another that the court may direct the mode of partition.[30] These decisions stand alone. The general rule is to the contrary. Therefore the interlocutory decree can neither partition the property, nor designate the manner in which partition must be made,[31] further than to declare the rule of law necessarily implied, whether stated in the decree or not, that each party must be assigned a parcel equivalent in value to his interest as stated in the judgment.[32] Under the modern practice, issues may be presented beyond those relating to the

24. Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579 [*affirming* 35 Ill. App. 654].

25. Cramer *v.* Wilson, 202 Ill. 83, 66 N. E. 869.

26. Scott *v.* Harris, 127 Ind. 520, 27 N. E. 150.

As to other special matters see Simmons *v.* Jones, 118 N. C. 472, 24 S. E. 114; Jarrell *v.* Crow, 30 Tex. Civ. App. 629, 71 S. W. 397.

27. *California.*— Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Florida.— Street *v.* Benner, 20 Fla. 700.

Illinois.— Kilgour *v.* Crawford, 51 Ill. 249; Tibbs *v.* Allen, 27 Ill. 119; Greenup *v.* Sewell, 18 Ill. 53.

Indiana.— Milligan *v.* Poole, 35 Ind. 64; Aldridge *v.* Montgomery, 9 Ind. 302; Shaw *v.* Parker, 6 Blackf. 345.

Louisiana.— Harrell's Succession, 12 La. Ann. 337.

North Carolina.— Ledbetter *v.* Gash, 30 N. C. 462.

Texas.—Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Parker *v.* Cockrell, (Civ. App. 1895) 31 S. W. 221.

Virginia.— Stevens *v.* McCormick, 90 Va. 735, 19 S. E. 742.

Wyoming.— Field *v.* Leiter, (1907) 90 Pac. 378, 92 Pac. 622.

See 38 Cent. Dig. tit. "Partition," § 196 *et seq.*

There are exceptional circumstances where partition may properly be directed reserving some question for further and future consideration. Regan *v.* McMahon, 41 Cal. 679; Lycan *v.* Miller, 112 Mo. 548, 20 S. W. 36, 700.

28. Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Turner *v.* Dixon, 150 Mo. 416, 51 S. W. 725; Calloway *v.* Henderson, 130 Mo. 77, 32 S. W. 34; Morrison *v.* Laughter, 47 N. C. 354.

The statutes of Texas and the decisions construing them require the description in the decree to be so definite as to enable the commissioners to distinguish the land to be divided from other real estate. Black *v.* Black, 95 Tex. 627, 69 S. W. 65 [*reversing* (Civ. App. 1902) 67 S. W. 928].

29. Elk Valley Coal, etc., Co. *v.* Douglass, (Tenn. Ch. App. 1898) 48 S. W. 365; Hanrick *v.* Hanrick, 98 Tex. 269, 83 S. W. 181 [*affirming* (Civ. App. 1904) 81 S. W. 795]; Black *v.* Black, 95 Tex. 627, 69 S. W. 65; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309.

30. Harrell *v.* Harrell, 12 La. Ann. 549; Harrell's Succession, 12 La. Ann. 337; McCollum *v.* Palmer, 1 Rob. (La.) 512.

31. *Illinois.*— Coffin *v.* Argo, 134 Ill. 276, 24 N. E. 1068; Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

Mississippi.— Lawson *v.* Bonner, 88 Miss. 235, 40 So. 488, 117 Am. St. Rep. 758.

Nevada.— Dondero *v.* Van Sickle, 11 Nev. 389.

Pennsylvania.— Rice's Estate, 33 Pittsb. Leg. J. N. S. 412.

Texas.— Keener *v.* Moss, 66 Tex. 181, 18 S. W. 447; Freeman *v.* Preston, (Civ. App. 1895) 29 S. W. 495.

See 38 Cent. Dig. tit. "Partition," § 196 *et seq.*

32. Shaw *v.* Parker, 6 Blackf. (Ind.) 345.

But it is never necessary to insert in a judgment any provision of statute, for without such insertion the statute is binding on

right to partition and to the moieties of the several parties, and where such issues are proper to be determined and they are determined before, or contemporaneously with, the entry of the interlocutory judgment, the determination may be a part thereof. Thus, an issue may be presented as to whether the property should be partitioned in kind, or by a sale thereof and a division of the proceeds, and where the propriety of the latter mode is conceded by all parties, or found by the court after a trial of the issue, the sale may be directed by the interlocutory judgment.[33] The more usual course, however, is to await the determination of the commissioners on this subject, and a direction to them to make partition is never regarded as an adjudication that partition is to be made in kind only.[34] One who goes into possession under a deed made by a life-tenant cannot, by an interlocutory judgment in a suit between the remainder-men after the death of the life-tenant, be required to surrender possession. The court, not having required in advance that the possession should be surrendered, must await the commissioners' report,[35] although the interlocutory decree is conclusive of the matters determined by it, if not appealed from nor set aside, it is not until after the partition has been made and confirmed that title vests under it.[35a]

2. Necessity For. As the interlocutory judgment, and it only, authorizes the partition, such judgment is indispensable, and no proceeding toward the partition should be made in advance of such judgment.[36] Still it is not indispensable that the judgment contain all the several elements hereinbefore referred to as constituting parts thereof. Probably in extreme cases it need only appoint the commissioners,[37] and these being agreed upon by the parties, it has been held that the whole purpose of the judgment was accomplished,[38] if no issue is presented by the pleadings and remains undetermined. At all events, a judgment or decree making partition directly and without the aid of commissioners is not for that reason void, and cannot be avoided collaterally.[39]

3. At What Time May Be Entered. When defendants have been served with process and their time to plead has expired, and they are in default for not appearing or answering, interlocutory judgment may be entered against them.[40] Prior to this time the entry of the judgment is unauthorized.[41] Where the chancery practice still prevails, a decree *pro confesso* must be entered.[42] To authorize any species of judgment by default, a return or other proof of the service of process must have been made.[43] A judgment by default is never proper when a plea has been filed on behalf of the person against whom the judgment is entered and remains undisposed of,[44] unless, as in the case of a cross

the commissioners, and must be pursued by them. Ellis *v.* Hicks, 9 Ohio Dec. (Reprint) 240, 11 Cinc. L. Bul. 263; Trammell *v.* Trammell, 57 S. C. 89, 35 S. E. 533; Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885. An insertion in the judgment of directions of the statute therefore cannot be regarded as a modification of such judgment (Houston *v.* Blythe, 71 Tex. 719, 10 S. W. 520), nor as a ground for setting it aside (Yates *v.* Gridley, 16 S. C. 496).

33. Irvin *v.* Divine, 7 T. B. Mon. (Ky.) 246; Earle *v.* Turton, 26 Md. 23; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245.

34. Roach *v.* Baker, 130 Ind. 362, 30 N. E. 310; Brown *v.* Cooper, 98 Iowa 444, 67 N. W. 378, 60 Am. St. Rep. 190, 33 L. R. A. 61.

35. Chicago, etc., R. Co. *v.* Vaughn, 206 Ill. 234, 69 N. E. 113.

35a. Haden *v.* Sims, 127 Ga. 717, 56 S. E. 989.

36. See *infra*, III, N, 2; Rainey *v.* H. C. Frick Coke Co., 8 Pa. Dist. 144, 21 Pa. Co. Ct. 482; Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Code *v.* Sewell, 15 Sim. 284, 38 Eng. Ch. 284, 60 Eng. Reprint 627.

37. Sewall *v.* Ridlon, 5 Me. 458; Akers *v.* Hobbs, 105 Mo. 127, 16 S. W. 682.

38. Symonds *v.* Kimball, 3 Mass. 299. But a court cannot rightfully make a partition without the aid of commissioners. Eakins *v.* Eakins, 112 Ky. 347, 65 S. W. 811, 23 Ky. L. Rep. 1637.

39. Jack *v.* Cassin, 9 Tex. Civ. App. 228, 28 S. W. 832.

40. Neilson *v.* Cox, 1 Cai. (N. Y.) 121.

41. Ropes *v.* McCabe, 40 Fla. 388, 25 So. 273; Benner *v.* Street, 32 Fla. 274, 13 So. 407.

42. Ropes *v.* McCabe, 40 Fla. 388, 25 So. 273; Benner *v.* Street, 32 Fla. 274, 13 So. 407.

43. Cost *v.* Rose, 17 Ill. 276; Anderson *v.* Anderson, 23 Mo. 379.

44. Davis *v.* Brady, Morr. (Iowa) 101.

bill to recover for improvements, it concedes the right to partition and the claim attempted to be asserted by it may be determined and proper relief granted at a subsequent stage of the proceedings.[45] Plaintiff is not entitled to judgment until after he has offered evidence establishing his right to partition, and although there is a decree *pro confesso* against some of the defendants or their default has been otherwise regularly entered, yet plaintiff's complaint will be dismissed if there is no evidence upon which a decree in his favor can be predicated.[46] Of course the entry of an interlocutory decree, as it directs a partition, cannot properly be made in any case where the facts as disclosed do not entitle any party to partition. The decree proper in such case is one of dismissal and is hence not an interlocutory but a final decree.[47]

4. Must Conform to the Pleadings and the Findings or Verdict. The judgment must conform to the pleadings and not extend beyond them. It must not extend to property not designated in them,[48] nor grant relief not warranted by them.[49] If the answer admits certain allegations of the complaint they must be taken as true, and the court is not warranted in granting or refusing relief inconsistent with such admissions.[50] The same rule applies to allegations in an answer or cross complaint.[51] If there has been a trial and a verdict or finding has resulted, the judgment must conform thereto.[52]

5. Construing. A judgment in partition should be read and construed as a whole and in connection with the allegations of the pleadings, and errors and contradictions thereby reconciled.[53] If the aggregate length of the several allotments as stated in the decree exceeds the actual length of the tract partitioned, *pro rata* deductions must be made from the several allotments.[54] A decree setting apart a strip of land as a passageway to be held in common and undivided "by the parties, abutters thereon, their heirs and assigns," gives the fee in the soil or the strip opposite each allotment to the owner of the lot.[55] An allotment giving the parties the right to maintain branch railroads for a certain coal road will be construed to be merely for the purposes of removing coal and not as appurtenant to the land in general, and, if the coal becomes exhausted, the right to construct or maintain the railroad terminates.[56]

6. Amending. Because the judgment is interlocutory, it must, in the absence of any statute expressly or impliedly changing the rule, be regarded "as in the breast of the judge" until final judgment is entered, and therefore subject to amendment.[57] In many of the states the first judgment in partition has been made so far final as to authorize an appeal without waiting for the final judgment.[58] The question then arising is, does this make the judgment final so as to

45. Howey *v.* Goings, 13 Ill. 95, 54 Am. Dec. 427.

46. Baker *v.* Baker, 159 Ill. 394, 42 N. E. 867.

47. Tomkins *v.* Miller, (N. J. Ch. 1893) 27 Atl. 484; Lindsay *v.* Jaffray, 55 Tex. 626.

48. Corwithe *v.* Griffing, 21 Barb. (N. Y.) 9.

49. McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619.

50. Reinhart *v.* Lugo, 75 Cal. 639, 18 Pac. 112; Prichard *v.* Littlejohn, 128 Ill. 123, 21 N. E. 10; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

51. Harness *v.* Harness, 63 Ind. 1.

And if a cross bill is filed, and the court renders judgment in disregard of such bill and without making any finding or reference to the allegations therein, the judgment must be reversed. Metheny *v.* Bohn, 74 Ill. App. 377.

52. Allen *v.* Hall, 50 Me. 253.

53. Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320, (1892) 29 N. E. 896; Covas *v.* Bertoulin, 44 La. Ann. 683, 11 So. 143.

54. McAlpine *v.* Reicheneker, 27 Kan. 257.

55. Clark *v.* Parker, 106 Mass. 554.

56. Republic Iron-Works *v.* Burgwin, 139 Pa. St. 439, 21 Atl. 386.

For other cases construing judgments in partition see Moy *v.* Moy, 89 Iowa 511, 56 N. W. 668; Kille *v.* Ege, 79 Pa. St. 15; Williams *v.* Mallory, 33 S. C. 601, 11 S. E. 1068; Lee *v.* Henderson, 75 Tex. 190, 12 S. W. 981; High *v.* Tarver, (Tex. Civ. App. 1894) 25 S. W. 1098.

57. Randles *v.* Randles, 63 Ind. 93; Aull *v.* Day, 133 Mo. 337, 34 S. W. 578; Warren *v.* Williams, 25 Mo. App. 22; Mingay *v.* Lackey, 142 N. Y. 449, 37 N. E. 471 [*affirming* 74 Hun 89, 26 N. Y. Suppl. 161]; Schweitzer's Estate, 4 Lanc. L. Rev. (Pa.) 369; Zittle's Estate, 4 Lanc. L. Rev. (Pa.) 163.

58. Cal. Code Civ. Proc. § 939, subd. 3;

restrict the power of amendment. The only decision we have discovered bearing on the subject maintains that, until an appeal is taken, the judgment remains within the control of the trial court and may be amended or modified, although after the close of the term at which it was entered.[59] We doubt this decision, and believe that in partition where the parties have a right of appeal from an interlocutory judgment, such judgment cannot be purged of any error, except by appeal or motion for a new trial,[60] unless the amendment would be permissible for like cause if applied to a final judgment in other cases.

7. Vacating. The principles applicable to the amendment of an interlocutory judgment in partition must, we think, be equally applicable to motions or proceedings to set it aside,[61] but it should not be set aside because of a mistake or error which might be cured by a motion to amend.[62]

8. Conclusiveness of. Subject to the power to amend or vacate hereinbefore referred to, an interlocutory judgment in partition must be regarded as an adjudication fixing the rights of the parties, and until vacated or amended, as conclusive upon them as to every matter adjudicated therein, and the court should not take any action or make any inquiry at variance therewith.[63] The judgment concludes the rights of all the parties before the court, although the judge in directing its entry declares that the rights of a party claiming an exclusive title shall not be affected.[64] But persons not made parties, or not served with process, are not bound.[65] So, it is said, that where two or more parties are in default and a judgment is entered in favor of each according as his interests are alleged in the complaint, such judgment is not conclusive as between them respecting their titles.[66]

N. The Commissioners or Referees — 1. Their Appointment. The persons authorized by the court to make the partition are sometimes called referees, sometimes commissioners, and yet more rarely partitioners. In speaking of them hereinafter we shall employ the term "commissioners." They must be appointed by the court.[67] The parties to the suit have no right to designate the commissioners nor to insist that the partition be made by persons chosen by such parties,

Randles *v.* Randles, 63 Ind. 93; Shepherd *v.* Rice, 38 Mich. 556; Aull *v.* Day, 133 Mo. 337, 34 S. W. 578.

59. Aull *v.* Day, 133 Mo. 337, 34 S. W. 578.

60. Regan *v.* McMahon, 43 Cal. 625; Randles *v.* Randles, 67 Ind. 434; Shepherd *v.* Rice, 38 Mich. 556.

61. King *v.* King, 15 Ill. 187; Counce *v.* Studley, 75 Me. 47; Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231; Prior *v.* Hall, 13 N. Y. Civ. Proc. 83.

62. Schweitzer's Estate, 4 Lanc. L. Rev. (Pa.) 369.

63. *Florida.*— Keil *v.* West, 21 Fla. 508.

Indiana.— Irvin *v.* Buckles, 148 Ind. 389, 47 N. E. 822.

Iowa.— Janes *v.* Brown, 48 Iowa 568.

Louisiana.— Traverso *v.* Row, 11 La. 494.

Maine.— Allen *v.* Hall, 50 Me. 253; Ham *v.* Ham, 39 Me. 216; Partridge *v.* Luce, 36 Me. 16.

Maryland.— Slingluff *v.* Stanley, 66 Md. 220, 7 Atl. 261; Pfeltz *v.* Pfeltz, 1 Md. Ch. 455.

Massachusetts.— Mt. Hope Iron Co. *v.* Dearden, 140 Mass. 430, 4 N. E. 803; Burghardt *v.* Van Deusen, 4 Allen 374; Brown *v.* Bulkley, 11 Cush. 168.

Mississippi.— Foster *v.* Jones, (1894) 17 So. 893.

Missouri.— Hinds *v.* Stevens, 45 Mo. 209.

New York.— Rockwell *v.* Decker, 5 N. Y. Civ. Proc. 62.

North Carolina.— Grimes *v.* Taft, 98 N. C. 193, 3 S. E. 674.

Pennsylvania.—Clemen's Appeal, 8 Pa. Cas. 321, 11 Atl. 559.

Tennessee.— Johnson *v.* Murray, 12 Lea 109.

Texas.— Petrucio *v.* Seardon, 76 Tex. 639, 13 S. W. 560.

See 38 Cent. Dig. tit. "Partition," § 196 *et seq.*

Contra.— Bybee *v.* Summers, 4 Oreg. 354.

64. Gates *v.* Irick, 2 Rich. (S. C.) 593. But a direction that a reference be had to state the accounts of defendant for rents and profits and for improvements, and the master's report, are not such an adjudication as to preclude the court from subsequently dealing with the same question. Johnson *v.* Pelot, 24 S. C. 255, 58 Am. Rep. 253.

65. Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801; Furenes *v.* Severtson, 102 Iowa 322, 71 N. W. 196; Judkins *v.* Judkins, 109 Mass. 181; Munroe *v.* Luke, 19 Pick. (Mass.) 39.

66. Finley *v.* Cathcart, 149 Ind. 470, 48 N. E. 586, 63 Am. St. Rep. 292.

67. See *supra*, III, M, 1; Medford *v.* Harrell, 10 N. C. 41.

In chancery proceedings in Illinois for partition, the court may follow the method in appointing commissioners set out on the pub-

although all concur.[68] In some of the states, however, by statute, plaintiff and defendant respectively are authorized to nominate an equal number of commissioners, and the court must designate the remainder,[69] the result naturally being that where the appointees of the parties disagree, the vote of the appointee of the court must determine all disputed questions. In England, it is said, that the usual course, where the parties do not agree, is for each side to name a certain number, generally two, and for a portion of them to be struck out by the opposite side, and, if necessary to secure an uneven number, for one commissioner to be appointed by the court.[70] Any irregularity in the appointment of a commissioner to which no objection is made is waived.[71]

2. THE NECESSITY FOR THEIR APPOINTMENT. At the common law, as we have already shown, the duty of making the partition was by the interlocutory judgment committed to the sheriff, but in chancery it was delegated to commissioners.[72] Under the equity practice, the duties ordinarily performed by commissioners are sometimes assigned to masters in chancery,[73] and by statutes in some of the states are occasionally imposed on other officers, as, for instance, notaries public and clerks of court. The name given to the officer is not material, but whether at the common law or in chancery, or under modern statutes, the general rule seems to be established that partition shall not be directly made by the court, but, in the first instance, must be made or recommended by commissioners or other persons having analogous powers, and the function of the court is restricted to confirming or refusing to confirm the partition as made or recommended.[74] Although the appointment of commissioners is usually part of, or contemporaneous with, the interlocutory judgment, yet it may be delayed when so delaying will aid the partition. Thus, if the property to be divided is part of the estate of a deceased person, the appointment of commissioners may be suspended until the writ of dower is terminated, in order that the partition, when made, may not be subject to disturbance by a subsequent assignment of dower.[75]

lic statute. Schulz *v.* Haase, 129 Ill. App. 193 [*affirmed* in 227 Ill. 156, 81 N. E. 50].

68. Bellas *v.* Dewart, 17 Pa. St. 85.

69. Charleston, etc., R. Co. *v.* Leech, 35 S. C. 146, 14 S. E. 730.

70. Howard *v.* Barnwell, 2 New Rep. 414.

71. Wilkinson *v.* Stuart, 74 Ala. 198.

But an objection made in due time cannot be deemed waived or overruled because the court postpones its consideration until after the commissioners' report. Hood *v.* Montgomery, 73 N. H. 405, 62 Atl. 651.

72. See *supra*, III, M, 1; Bowles *v.* Rump, 9 Wkly. Rep. 370. In Clarke *v.* Clayton, 2 Giffard 333, 6 Jur. N. S. 1238, 3 L. T. Rep. N. S. 176, 66 Eng. Reprint 139, it is said that the court will not, in general, direct a commission, but will declare that the estate ought to be divided, with liberty to the parties to bring before the judge at chambers proposals for a partition.

73. Ellis *v.* Ellis, 8 Pa. Dist. 722, 22 Pa. Co. Ct. 476; Hasson *v.* Hasson, 8 Pa. Dist. 297; Lyons *v.* Lyons, 7 Lack. Leg. N. (Pa.) 91.

74. See *supra*, III, M, 1; and the following cases:

Illinois.— Coffin *v.* Argo, 134 Ill. 276, 24 N. E. 1068; Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587.

Iowa.— Doan *v.* Metcalf, 46 Iowa 120.

Kentucky.— Eakins *v.* Eakins, 112 Ky. 347, 65 S. W. 811, 23 Ky. L. Rep. 1637; Garth *v.* Thompson, 110 Ky. 984, 63 S. W. 40, 23 Ky. L. Rep. 403.

Missouri.— George *v.* Murphy, 1 Mo. 777; Murphy *v.* Murphy, 1 Mo. 741.

Nevada.— Dondero *v.* Van Sickle, 11 Nev. 389.

North Carolina.— Harvey *v.* Harvey, 72 N. C. 570.

Texas.— Reed *v.* Howard, 71 Tex. 204, 9 S. W. 109.

See 38 Cent. Dig. tit. "Partition," § 353 *et seq.*

But this rule does not prevent the court from giving proper directions to the commissioners respecting the discharge of their duties and the matters proper to be considered by them; but such directions will not be given at the instance of a stranger to the cotenancy, nor for the purpose of aiding dealings between a stranger and a cotenant. Dillin *v.* Coppin, 6 Beav. 217 note, 3 L. J. Ch. 201, 49 Eng. Reprint 809; Wright *v.* Vernon, 1 Dr. & Sm. 231, 62 Eng. Reprint 367.

In England the courts of chancery sometimes make partition directly and without the aid of commissioners, as where all the parties competent to act consent thereto and where, one of the parties being an infant, the affidavit of surveyors or other evidence shows that the proposed partition is just and not prejudicial to the infant. Stanley *v.* Wrigley, 3 Eq. Rep. 448, 1 Jur. N. S. 695, 24 L. J. Ch. 176, 3 Smale & G. 18, 3 Wkly. Rep. 202, 65 Eng. Reprint 544; Bull *v.* Bull, 18 L. T. Rep. N. S. 870.

75. Hoxsie *v.* Ellis, 4 R. I. 123.

3. The Appointment of New Commissioners. The appointment of the commissioners is but a part of an interlocutory judgment or order, not binding on any one as an adjudication, nor giving any right to any of the parties to insist that the partition shall be made only by the persons so appointed, nor depriving the court of the power to revoke the appointment.[76] If a person named as commissioner dies or refuses to act, or his appointment is revoked, or any other cause arises which, in the opinion of the court, makes such action proper, it may appoint a new commissioner.[77] So, if there are an even number of commissioners, one half of which make a report and the other half a different and inconsistent report, the court, instead of acting on either report, may appoint a new commission.[78]

4. The Qualifications For Appointment. The statutes of some of the states contain a provision whose object is the disqualification from appointment as commissioner of any person who has any bias or prejudice for or against any of the parties, or any interest which might improperly affect his action.[79] Probably this disqualification is implied where not expressed. If an objection to the appointment of a person exists, it should be interposed before the appointment is made, if notice of the intention to make it is given; but it is said that a mere objection is not sufficient, but such objection must be judicially considered and determined, and that a refusal to appoint a designated person, or a setting aside his appointment already made, is not warranted merely because of the objection, there being nothing to show whether the objection was well founded or that the court considered that question.[80] The fact that a person has examined the land for the purpose of qualifying him as a witness does not make him incompetent to subsequently act as commissioner,[81] nor does his previously acting as an appraiser of the same property.[82]

5. The Writ or Commission. Independently of any statute, the persons appointed to make partition do not proceed until the issuing to them of some writ or other equivalent authorization. At law, it was the writ partitione facienda issued to the sheriff.[83] In chancery, it was a commission stating the names and respective interests of the persons entitled to allotments, authorizing the summoning and examining of witnesses on oath, and commanding a certificate or return of the proceedings by and before the commissioners, together with the interrogatories and examinations, "and also this writ closed up under the seals of you, any three or two of you."[84] In some of the states commissions must still issue containing directions provided by statute and referring to the manner of performing their duties,[85] and, when the lands to be divided are situated in several districts, separate writs properly issue to each district.[86]

76. Hood *v.* Montgomery, 73 N. H. 405, 62 Atl. 651. But see Oram *v.* Young, 18 N. J. L. 54. *Contra*, Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460, holding that it may also be made as an objection to confirming the report.

77. Schulz *v.* Haase, 129 Ill. App. 193 [*affirmed* in 227 Ill. 156, 81 N. E. 50]; Coggeshall *v.* State, 112 Ind. 561, 14 N. E. 555; Parsons *v.* Copeland, 38 Me. 537; Pickering *v.* Pickering, 20 N. H. 541; Oram *v.* Young, 18 N. J. L. 54.

Removal of commissioners for cause see Donaldson *v.* Duncan, 199 Ill. 167, 65 N. E. 146.

78. Corbet *v.* Davenant, 2 Bro. Ch. 252, 29 Eng. Reprint 140; Watson *v.* Northumberland, 11 Ves. Jr. 153, 32 Eng. Reprint 1046.

79. Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460.

In Maine they need not be inhabitants of the county in which lands lie. Sewall *v.* Ridlon, 5 Me. 458.

In New York they must be "reputable and disinterested freeholders." Code Civ. Proc. § 1549.

In Colorado "not connected with any of the parties either by consanguinity or affinity and entirely disinterested." Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460.

80. Oram *v.* Young, 18 N. J. L. 54. *Contra*, Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460, holding that it may also be made as an objection to confirming the report.

81. Garth *v.* Thompson, 72 S. W. 782, 24 Ky. L. Rep. 1961.

82. Jones *v.* Crocker, 4 La. Ann. 8.

83. Freeman Coten. & P. § 520.

84. Freeman Coten. & P. § 521; Cecil *v.* Dorsey, 1 Md. Ch. 223.

85. Stallings *v.* Stallings, 22 Md. 41; Barnes *v.* Rogers, 54 S. C. 115, 31 S. E. 885.

86. Daniels *v.* Moses, 12 S. C. 130.

6. THE OATH OF OFFICE. The commissioners are usually required, before entering upon the discharge of their duties, to take their oath of office;[87] and where the statute prescribes the form of the oath, it must be substantially complied with,[88] and the record must show such compliance.[89] But the fact that the commissioners, or some of them, enter upon the performance of their duties before taking their oath, does not disqualify them from subsequently taking it and further performing their duties and reaching a final conclusion,[90] and it is probably sufficient that the oath is taken at any time before making their final report.[91] The failure of the commissioners to take their official oath would seem to require the setting aside, or the refusal to confirm, their report.[92] A misapprehension respecting the officer before whom the oath should be taken does not seem to be material, provided he was in law authorized to administer oaths.[93] The fact that the oath and the report of the commissioners bear date prior to that of the decree appointing them, although their action is confirmed by the court, requires the reversal of its judgment.[94]

7. NUMBER OF, AND THE NUMBER WHO MUST ACT. The number of the commissioners is regulated by statute in the several states, and is generally three,[95] but sometimes five.[96] The court is by some statutes authorized to appoint a less number or even a single commissioner. If so, the guardian of a minor may consent to the appointment of the lesser number.[97] In general, although all need not concur in the final result,[98] yet all must join in the deliberation;[99] and a report which shows that less than the whole number joined in the deliberation, or that it was shared with a stranger not authorized to act as one of the commissioners, should be set aside.[1] But the proceedings are not invalidated if one of them is not present at a view of the property or at some conference relating thereto, there being no improper motive, and all being present at the conference when the report was agreed upon.[2]

8. THEIR POWERS AND THEIR TERMINATION. The commissioners have power to

In New Jersey commissioners under the act of Nov. 11, 1789, could not be authorized in the same commission to subdivide a part of the land among the heirs of the original tenants in common. Oram *v.* Young, 18 N. J. L. 54.

87. Williamson *v.* Swindle, McMull. Eq. (S. C.) 67.

88. Tibbs *v.* Allen, 27 Ill. 119.

89. Smith *v.* Moore, 6 Dana (Ky.) 417; Williamson *v.* Swindle, McMull. Eq. (S. C.) 67. *Contra,* Wilcox *v.* Cannon, 1 Coldw. (Tenn.) 369.

But parol evidence in the record on appeal may be sufficient to show that the directors were sworn. Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488.

90. McClanahan *v.* McClanahan, 14 S. W. 496, 12 Ky. L. Rep. 440.

91. Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460.

92. Massey *v.* Massey, 4 Harr. & J. (Md.) 141; Ela *v.* McConihe, 35 N. H. 279. *Contra,* Wilcox *v.* Cannon, 1 Coldw. (Tenn.) 369; Bledsoe *v.* Wiley, 7 Humphr. (Tenn.) 507.

93. Claude *v.* Handy, 83 Md. 225, 34 Atl. 532; McMullin *v.* Doughty, 63 N. J. Eq. 800, 52 Atl. 1132.

94. Sullivan *v.* Sullivan, 42 Ill. 315.

95. Railey *v.* Railey, 5 B. Mon. (Ky.) 110; Yates *v.* Gridley, 16 S. C. 496.

But an error in naming four commissioners when only three are provided for becomes immaterial when one dies before any action is taken. Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488.

96. Zinn *v.* Prior, 1 Brev. (S. C.) 482.

97. Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227.

98. Simpson *v.* Simpson, 59 Mich. 71, 26 N. W. 285; Thompson *v.* Shemwell, 93 N. C. 222; Townsend *v.* Hazard, 9 R. I. 436; Kane *v.* Parker, 4 Wis. 123.

99. *Michigan.*— Simpson *v.* Simpson, 59 Mich. 71, 26 N. W. 285.

New Hampshire.— Odiorne *v.* Seavey, 4 N. H. 53.

New York.— Schuyler *v.* Marsh, 37 Barb. 350.

Rhode Island.— Townsend *v.* Hazard, 9 R. I. 436.

Virginia.— Custis *v.* Snead, 12 Gratt. 260.

1. Loyd *v.* Malone, 23 Ill. 43, 76 Am. Dec. 179; Railey *v.* Railey, 5 B. Mon. (Ky.) 110.

Where the report is signed by less than the whole number of commissioners, it is said that a presumption will be indulged that all met and deliberated. Cole *v.* Hall, 2 Hill (N. Y.) 625. On the contrary it has been held that where some of the commissioners do not sign, the reason for the omission of their signature should be stated, and the fact that all met and deliberated should be affirmed. Underhill *v.* Jackson, 1 Barb. Ch. (N. Y.) 73.

2. Townsend *v.* Hazard, 9 R. I. 436.

perform all the duties hereinbefore or hereinafter specified, and also such other acts as, although not duties in all cases, may be necessary or incidental to the performance of their duties, such as obtaining possession of the property to be partitioned when such possession is necessary to enable them to perform their duties,[3] determining the location and boundaries of the estate to be divided and distinguishing personal property from real estate,[4] appointing surveyors to make surveys and maps and plats thereof,[5] and examining witnesses brought before them.[6] In a general sense, it may be said that the powers of the commissioners terminate with the filing of their report.[7] This probably means no more than that they have no power to set it aside and make a new partition, but if for any reason not amounting to misconduct on the part of the commissioners, or indicating a disqualification to act, the partition is not complete or valid, they may supply the omission or correct the error, and thereby complete or validate the partition, and hence it cannot correctly be said that they are *functus officio*.[8]

9. Equities Which May Be Recognized in Making Allotments. Various equities may exist in favor of a cotenant which are not so absolute in character that they can be enforced against the other cotenants to the prejudice of their rights, but which the commissioners are at liberty to consider and protect. Indeed, we may now regard them as under the duty of so doing unless their action in favor of one cotenant must operate inequitably to another. Among these are allotting parts to cotenants in possession thereof or who have erected improvements thereon,[9] making allotments in such mode as to render effective conveyances purporting to be in severalty, but when made, operating to convey undivided interests only, because the grantors held only such interests,[10] or giving a cotenant a parcel adjoin-

3. Stewart *v.* Pickard, 1 Rob. (La.) 415.

4. Allen *v.* Hall, 50 Me. 253.

5. *Connecticut.*— Coply *v.* Crane, 1 Root 69.

Illinois.— See Warren *v.* Sheldon, 173 Ill. 340, 50 N. E. 1065, holding that if the commissioners can make an equitable partition without establishing building lines, neither they nor the court has power to establish such lines, on the sole ground that the best interests of the property will be conserved thereby.

Indiana.— Lewis *v.* Cincinnati Central Ins. Co., 23 Ind. 445.

Kentucky.— Hunter *v.* Brown, 7 B. Mon. 283.

Maine.— Field *v.* Hanscomb, 15 Me. 365.

Massachusetts.— Buck *v.* Wolcott, 15 Gray 502; Mitchell *v.* Starbuck, 10 Mass. 5.

New Jersey.— See Barnes *v.* Taylor, 30 N. J. Eq. 467, holding that a survey will not be ordered unless clearly shown to be necessary.

South Carolina.— Ervin *v.* Epps, 15 Rich. 223; Witherspoon *v.* Dunlap, 1 McCord 546.

See 38 Cent. Dig. tit. "Partition," § 278 *et seq.*

6. Meers *v.* Stourton, Dick. 21, 21 Eng. Reprint 174.

The commissioners' powers may also be, to some extent, enlarged or limited by the direction of the court. Thus they may by it be directed to fix a valuation upon the land, or upon the improvements. McCutchen *v.* McCutchen, 77 S. C. 129, 56 S. E. 678, 12 L. R. A. N. S. 1140.

7. Clinard *v.* Brummell, 130 N. C. 547, 41 S. E. 675; Nichols *v.* Balser, 1 Ohio Cir. Ct. 47, 1 Ohio Cir. Dec. 29.

8. Jordan *v.* McNulty, 14 Colo. 280, 23 Pac. 460; Partridge *v.* Luce, 36 Me. 16, holding that the court may always recommit the report to the commissioners for any further necessary action, when they have not been guilty of misconduct.

9. *Florida.*— Boley *v.* Skinner, 38 Fla. 291, 20 So. 1017.

Kentucky.— Ward *v.* Ward, 25 S. W. 112, 15 Ky. L. Rep. 706.

Mississippi.— Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

Nevada.— Dondero *v.* Van Sickle, 11 Nev. 389.

10. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Gates *v.* Salmon, 46 Cal. 361.

Maine.— Webber *v.* Mallett, 16 Me. 88.

Massachusetts.— Barnes *v.* Lynch, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470.

Michigan.— Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

Mississippi.— Paddock *v.* Shields, 57 Miss. 340.

New Hampshire.—Great Falls Co. *v.* Worster, 15 N. H. 412.

New Jersey.— Doremus *v.* Doremus, 8 N. J. Eq. 556.

South Carolina.— Young *v.* Edwards, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55.

Tennessee.— Estell *v.* University of South, 12 Lea 476.

Texas.— Grigsby *v.* Peak, 68 Tex. 235, 4 S. W. 474, 2 Am. St. Rep. 487; Furrh *v.* Winston, 66 Tex. 521, 1 S. W. 527; Arnold

ing lands already owned by him in severalty,[11] or allowing the depreciation due to waste to fall wholly on the cotenant or the successors in interest of the cotenant to whom it was due,[12] or protecting the interests of mortgagees,[13] or confirming or rendering effective a preëxisting voluntary partition.[14]

10. Their Duties — a. Are Not Judicial. The sole duty of the commissioners is restricted to obeying the law and the interlocutory judgment by making partition as directed thereby. They cannot determine title and hence their functions are usually declared not to be judicial.[15] Nor have they the right to surrender their own judgment for the purpose, in effect, of carrying out a family settlement.[16]

b. Notice to Be Given By. In England the proceedings before the commissioners are to some extent analogous to a trial, the question at issue being the mode of the allotments, upon which all the parties are entitled to be heard and to offer evidence.[17] Such trial necessarily involves notice to the parties and an opportunity to present their evidence, and the duty of the giving of notice by the commissioners is said to be implied when not expressed in the statute.[18] It is, however, usually expressed.[19] If the notice can be given by mail, it must be mailed a sufficient length of time to allow a reasonable period of time before the hearing, taking into consideration the distance between the place of hearing and that to which the notice is directed.[20] There is no doubt that the failure to give notice is a serious irregularity, entitling the party not notified, if not represented before the commissioners, to an order setting aside the subsequent action of the commissioners.[21] In truth, such notice has been held jurisdictional when the proceeding

v. Cauble, 49 Tex. 527; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480; Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692.

Virginia.— McKee *v.* Barley, 11 Gratt. 340.

West Virginia.— Boggess *v.* Meredith, 16 W. Va. 1.

For circumstances under which conveyances in severalty may be disregarded in making partition see Bryant *v.* Stearns, 16 Ala. 302; Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Charleston, etc., R. Co. *v.* Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667, 39 S. C. 446, 17 S. E. 994; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366; Lamb *v.* Starr, 14 Fed. Cas. No. 8,022, Deady 447; Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251.

11. Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992; Cochran *v.* Shoenberger, 33 Fed. 397; Story *v.* Johnson, 5 L. J. Exch. 9, 1 Y. & C. Exch. 538. See Mackbee *v.* Fields, (Ky. 1886) 1 S. W. 485 (holding that this need not be done when thereby the allotments of other cotenants would be rendered unshapely and without uniformity); Bridwell *v.* Bridwell, 53 S. W. 1050, 21 Ky. L. Rep. 1025 (where perhaps the right was intended to be denied altogether).

12. Polhemus *v.* Emson, 30 N. J. Eq. 405 [*affirmed* in 32 N. J. Eq. 827]; McDonald *v.* Donaldson, 47 Fed. 765.

13. Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75; Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466; Kennedy *v.* Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838.

14. Campau *v.* Campau, 19 Mich. 116; McDonald *v.* Donaldson, 47 Fed. 765.

15. *California.*— Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227.

Kentucky.— Loughbridge *v.* Cawood, 64 S. W. 854, 23 Ky. L. Rep. 1127.

Louisiana.— Traverso *v.* Row, 11 La. 494.

Maine.— Allen *v.* Hall, 50 Me. 253; Ham *v.* Ham, 39 Me. 216.

Massachusetts.— Brown *v.* Bulkley, 11 Cush. 168.

Mississippi.— Wildy *v.* Bonney, 28 Miss. 710.

New Jersey.— Van Riper *v.* Berdan, 14 N. J. L. 132.

16. Burdett *v.* Norwood, 15 Lea (Tenn.) 491.

17. Freeman Coten. & P. § 522; Cecil *v.* Dorsey, 1 Md. Ch. 223.

18. Simpson *v.* Simpson, 59 Mich. 71, 26 N. W. 285; Doubleday *v.* Newton, 9 How. Pr. (N. Y.) 71; Wamsley *v.* Mill Creek Coal, etc., Co., 56 W. Va. 296, 49 S. E. 141. But the rule as stated above is denied in McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516.

19. *Georgia.*—Ralph *v.* Ward, 109 Ga. 363, 34 S. E. 610.

Maine.— Ware *v.* Hunnewell, 20 Me. 291.

Maryland.— Stallings *v.* Stallings, 22 Md. 41; Cecil *v.* Dorsey, 1 Md. Ch. 223.

Michigan.— Simpson *v.* Simpson, 59 Mich. 71, 26 N. W. 285; McLaughlin *v.* Wayne Cir. Judge, 57 Mich. 35, 23 N. W. 472.

New Hampshire.— Gage *v.* Gage, 64 N. H. 543, 14 Atl. 869; Brown *v.* Sceggell, 22 N. H. 548.

Pennsylvania.—Morrow *v.* Morrow, 152 Pa. St. 516, 25 Atl. 1107; Biddle *v.* Starr, 9 Pa. St. 461.

Vermont.— Corliss *v.* Corliss, 8 Vt. 373.

Unless the statute so requires, the notice need not be in writing. Ralph *v.* Ward, 109 Ga. 366, 34 S. E. 610.

20. Ware *v.* Hunnewell, 20 Me. 291.

21. Simpson *v.* Simpson, 59 Mich. 71, 26 N. W. 285; McLaughlin *v.* Wayne Cir. Judge, 57 Mich. 35, 23 N. W. 472; Gage *v.* Gage,

was in probate and the decree entered in its absence void;[22] but this, to us, seems an extreme and unsustainable view.

c. Making Inventories and Appraisements. In Louisiana the persons who make the partition must also make an inventory and appraisement of the property divided,[23] unless it consists of a single tract.[24] In other states, while there is a duty to appraise, it is restricted to special circumstances in which the appraisement would seem to be of some value either in aiding the commissioners to better discharge their duties, or the court in determining whether the partition as made is fair and impartial.[25]

d. Going Upon the Land. Ordinarily it is the duty of the commissioners to go upon, and examine, the land to be partitioned, whether or not they are commanded to do so by the statute or the writ or commission issued to authorize and require them to act. But this requirement is obviously for the purpose of better qualifying the commissioners to perform their duties, and if, at the time of forming their judgment and concurring in the return, they have in fact made themselves fully acquainted with the character and value of the land, their report will not be set aside because they did not, after their appointment, actually go upon such land.[26]

e. Making a Report. The statutes universally, as we believe, impose on the commissioners the duty of making a written report of their proceedings.[27] In considering what must be set forth in this report, we may distinguish between that part of it which shows their ultimate action, and that part which merely discloses the several steps prior thereto. As to the first, namely, the several allotments, it is of course indispensable that they be set out in writing showing their several boundaries and the persons to whom the allotments were made.[28] As to the preceding steps, whether they must be disclosed in the report or not depends on whether, in the absence of any disclosure, the court will presume that the commissioners have performed their duty in the absence of evidence to the contrary. Generally the presumption is indulged that official duty has been regularly performed, and there is no reason why this presumption should not be applied to commissioners in partition.[29] We fear this principle has often been overlooked, and we know that the failure to disclose acts necessary to be done by the commissioners has been held fatal when objections were timely interposed.[30] Generally, when such commissioners are required to report on any subject, the courts have not been satisfied by a general report of their conclusion, but have insisted on the setting forth of the facts on which it was based.[31] Usually, if the commissioners

64 N. H. 543, 14 Atl. 869; Morrow *v.* Morrow, 152 Pa. St. 516, 25 Atl. 1107.

22. Brown *v.* Sceggell, 22 N. H. 548.

23. Barnett *v.* Bernstein, 22 La. Ann. 394; Millaudon *v.* Percy, 5 Mart. N. S. (La.) 551; Nott *v.* Dannoy, 2 Mart. N. S. (La.) 1.

24. Paul *v.* Lamothe, 36 La. Ann. 318.

25. Toomer *v.* Toomer, 5 N. C. 93; Whitman *v.* O'Connor, 145 Pa. St. 642, 23 Atl. 234; Wistar's Appeal, 105 Pa. St. 390; Wetherill *v.* Keim, 1 Watts (Pa.) 320; Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

26. Yates *v.* Gridley, 16 S. C. 496; Robb *v.* Robb, (Tex. Civ. App. 1901) 62 S. W. 125.

27. Freeman Coten. & P. § 523.

28. Mansfield *v.* Olsen, (Miss. 1888) 4 So. 545; Christy's Appeal, 110 Pa. St. 538, 5 Atl. 205; Wetherill *v.* Keim, 1 Watts (Pa.) 320; Harrington *v.* Barton, 11 Vt. 31.

29. Bryant *v.* Stearns, 16 Ala. 302.

This presumption applies generally when the proceedings of the commissioners are assailed after final judgment. Tibbs *v.* Allen, 27 Ill. 119; Lucas *v.* Peters, 45 Ind. 313; Caudill *v.* Caudill, 7 S. W. 545, 9 Ky. L. Rep. 904; Crouch *v.* Smith, 1 Md. Ch. 401; Warren *v.* Greenwood, 121 Mass. 112; Nicelar *v.* Barbrick, 18 N. C. 257; Welch's Appeal, 126 Pa. St. 297, 17 Atl. 623; Geer *v.* Wind, 4 Desauss. Eq. (S. C.) 85.

30. Brokaw *v.* McDougall, 20 Fla. 212; Knapp *v.* Gass, 63 Ill. 492; Stallings *v.* Stallings, 22 Md. 41; Massey *v.* Massey, 4 Harr. & J. (Md.) 141; Cecil *v.* Dorsey, 1 Md. Ch. 223. It has even been held that it was the duty of the court to inquire whether that part of the report showing the giving of notice was in fact true. Hathaway *v.* Persons Unknown, 32 Me. 136.

31. *Arkansas.*— McGee *v.* Russell, 49 Ark. 104, 4 S. W. 284.

Illinois.— Knapp *v.* Gass, 63 Ill. 492.

Indiana.— Lake *v.* Jarrett, 12 Ind. 395.

Maine.— Hathaway *v.* Persons Unknown, 32 Me. 136.

New Jersey.— Van Riper *v.* Berdan, 14 N. J. L. 132.

take and act upon testimony, they must make it a part of their return.[32] In addition to the facts specially designated in the statute, it is always proper, and sometimes essential, for the commissioners to report other facts contributing to control their action, or to aid the court in determining whether such action should be approved or set aside.[33] Like every other writing, a report may require construing, and many cases are evidence of this fact, but they do not seem to have resulted in rules different from those applicable to other writings.[34]

f. Amending or Correcting Their Report. It is often claimed that the commissioners, on filing their report, become *functus officio*, and, if so, they cannot subsequently amend or correct such report.[35] We doubt their power to do so except by permission of the court, but permission being granted, their power to act is not seriously disputed.[36]

11. Methods of Allotment — a. Without Designating the Allottees. Formerly in making partition the duty of the commissioners, in the first instance, was to divide the land into parcels corresponding in their judgment, in value, to the several moieties as designated in the interlocutory judgment, leaving the persons to whom each allotment should ultimately be assigned to be determined by further proceedings. The principal of these are: (1) An assignment to the eldest son, where the partition is among heirs, of the allotment which he may prefer, and, in the event of his death, or the other termination of his interest, to his heirs;[37] (2) giving a preference to the cotenant whose title has priority in date;[38] and (3) requiring the cotenants to draw lots and thereby determine, or enable them to choose, their respective allotments.[39] Where the commissioners were unable to make allotments, in their judgment of equal value, among the parties entitled thereto, they were formerly, and perhaps in some of the states still are, allowed or required to fix a valuation upon the several parts allotted, and thereupon the heirs or other cotenants made bids for the privilege of accepting allotments at the valuation so fixed.[40] So, if the property was in the opinion of the commissioners

North Carolina.— Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697.

Tennessee.— Hardin *v.* Cogswell, 5 Heisk. 549.

Texas.— Hensel *v.* Sturn, (Civ. App. 1894) 25 S. W. 817.

32. Brokaw *v.* McDougall, 20 Fla. 212; Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697.

33. *Illinois.*— Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

Missouri.— Caldwell *v.* Layton, 44 Mo. 220.

New York.— Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Suppl. 1010; Jones *v.* Carroll, 3 Hun 556.

Ohio.— Biggins *v.* Jones, 39 Ohio St. 95.

Texas.— Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

34. Munroe *v.* Stickney, 48 Me. 458; Munroe *v.* Gates, 42 Me. 178.

35. Bates *v.* Thornberry, 5 Dana (Ky.) 9.

36. Clinard *v.* Brummell, 130 N. C. 547, 41 S. E. 675.

37. Johnson *v.* Hoover, 75 Md. 486, 23 Atl. 903; Klohs *v.* Reifsnyder, 61 Pa. St. 240; *In re* Ragan, 7 Watts (Pa.) 438; Hersha *v.* Brenneman, 6 Serg. & R. (Pa.) 2; Walton *v.* Willis, 1 Dall. (Pa.) 351, 1 L. ed. 171; Cochran *v.* Shoenberger, 33 Fed. 397.

Allotments of this character should be made in the name of the original cotenants, but if any has died or has sold or conveyed, the heir or purchaser is entitled to the share so allotted. Kennedy *v.* Armstrong, 20 N. J. L. 693.

Where the cotenants are coheiresses, the eldest has no right of choice, and the commissioners must exercise their own discretion as to whether in allotting they will take eldership into account, and should not resort to the drawing of lots unless they find themselves otherwise unable to make an allotment. Canning *v.* Canning, 2 Drew. 434, 2 Eq. Rep. 1147, 18 Jur. 640, 23 L. J. Ch. 879, 2 Wkly. Rep. 661, 61 Eng. Reprint 788.

38. Dana *v.* Jackson, 6 Pa. St. 234.

39. *Louisiana.*— Rhodes *v.* Cooper, 118 La. 299, 42 So. 943; Moore *v.* McKiernan, 4 La. Ann. 226; Jones *v.* Crocker, 4 La. Ann. 8.

Maryland.— Cecil *v.* Dorsey, 1 Md. Ch. 223.

Mississippi.— Paddock *v.* Shields, 57 Miss. 340.

Texas.— Houston *v.* Blythe, 71 Tex. 719, 10 S. W. 520.

Virginia.— Cox *v.* McMullin, 14 Gratt. 82.

England.— Ames *v.* Comyns, 17 L. T. Rep. N. S. 163, 16 Wkly. Rep. 74.

40. Timon *v.* Moran, 54 N. H. 441; Whitman *v.* O'Connor, 145 Pa. St. 642, 23 Atl. 234; Eyerman *v.* Detwiller, 136 Pa. St. 285, 20 Atl. 511; Sutton's Appeal, 112 Pa. St. 598, 4 Atl. 6; Klohs *v.* Reifsnyder, 61 Pa. St. 240; Woods *v.* Woods, 11 Kulp (Pa.) 69.

In making allotments to be bid for, the commissioners were not required to divide the land into the same number of purparts

not susceptible of partition without great prejudice, they might make an appraisement of the whole and permit the ones entitled to precedence to take it at the valuation so fixed, or if the law did not entitle any one of them to precedence, that right might be acquired by the highest bidder therefor.[41]

b. Where Property Is Indivisible. Its partition might formerly have been accomplished by assigning to the parties the right to use and occupy it for alternating periods of time;[42] but this method of allotment is probably now obsolete,[43] or the whole property might be decreed to one of them at a valuation.[44] The remedy now existing of ordering a sale of the property and the distribution and application of its proceeds as the parties are entitled under the interlocutory judgment has made unnecessary the devices formerly resorted to when the property was incapable of being divided so as to correspond with the interests of the respective parties.

c. Making Partial Partition Only. If two or more of the parties entitled to allotments wish to remain cotenants, the commissioners may respect the wish by allotting to them, to hold together and undivided, a parcel equivalent in value to the aggregate of their moieties.[45] This right has very strangely been wholly denied in a few instances,[46] and cannot be recognized by the commissioners in opposition to the terms of the interlocutory judgment, nor where the parties claiming it, being infants, have not capacity to make their election to remain cotenants.[47] Sometimes partition may be made partly by the sale of property and partly by a partition of the balance in kind.[48]

d. Making Allotments Equal in Value and Herein of Owelty. It is not essential and in truth it can rarely be proper, even where the interests of two or more parties are equal, to allot each an equal area. The duty of the commissioners to consider quantity and quality is but a step in their ultimate duty, which is to make a partition so that each allotment shall bear the same proportion to the aggregate value of the whole property partitioned that the moiety of its allottee bears to the whole property.[49] The allotment of shares in the property to be

as there were heirs or other persons entitled to the property. Darrah's Appeal, 10 Pa. St. 210. This bidding must be in writing. Eyerman *v.* Detwiller, 136 Pa. St. 285, 20 Atl. 511; Bartholomew's Appeal, 71 Pa. St. 291. Each party is allowed but one bid (Klohs *v.* Reifsnyder, 61 Pa. St. 240), which, when made, cannot be withdrawn (Emerick's Estate, 11 Phila. (Pa.) 74), and all the bids are sealed or are handed to the court at the same time (Bartholomew's Appeal, *supra*; Klohs *v.* Reifsnyder, *supra*). But the statute of 1885 contains no provision requiring the bidding on purparts. Hanna *v.* Clark, 204 Pa. St. 149, 53 Atl. 758.

41. Johnson *v.* Hoover, 75 Md. 486, 23 Atl. 903; Catlin *v.* Catlin, 60 Md. 573; Wilhelm *v.* Wilhelm, 4 Md. Ch. 330.

Although a testator, in his will, provides for a method of allotment, yet if the devisees neglect for eight years to resort to that method, during which time conditions and values change, the court will substitute the statutory method. *In re* King, 216 Pa. St. 483, 65 Atl. 942.

42. *Georgia.*— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Maine.— Hanson *v.* Willard, 12 Me. 142, 28 Am. Dec. 162.

Massachusetts.— Adam *v.* Briggs Iron Co., 7 Cush. 361.

New Hampshire.— Morrill *v.* Morrill, 5 N. H. 134.

Vermont.— Conant *v.* Smith, 1 Aik. 67, 15 Am. Dec. 669.

43. Crowell *v.* Woodbury, 52 N. H. 613. Unless when applied to the partition of water or water rights. Smith *v.* Smith, 10 Paige (N. Y.) 470.

44. Dewar *v.* Spence, 2 Whart. (Pa.) 211, 30 Am. Dec. 241.

45. *Indiana.*— Shull *v.* Kennon, 12 Ind. 34.

Maine.— Upham *v.* Bradley, 17 Me. 423.

Massachusetts.— Allen *v.* Hoyt, 5 Metc. 324.

Michigan.— Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446.

Mississippi.— Paddock *v.* Shields, 57 Miss. 340.

New Hampshire.—Abbott *v.* Berry, 46 N. H. 369.

New York.— Northrop *v.* Anderson, 8 How. Pr. 351; Murray *v.* Wooden, 17 Wend. 531; McWhorter *v.* Gibson, 2 Wend. 443.

Texas.— Glasscock *v.* Hughes, 55 Tex. 461; Battle *v.* John, 49 Tex. 202.

46. Marmaduke *v.* Tennant, 4 B. Mon. (Ky.) 210; Handy *v.* Leavitt, 3 Edw. (N. Y.) 229; Robertson *v.* Robertson, 2 Swan (Tenn.) 197.

47. Custis *v.* Snead, 12 Gratt (Va.) 260.

48. Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

49. *Kentucky.*— Hunter *v.* Brown, 7 B. Mon. 283.

partitioned of equal value may, in the judgment of the commissioners, be impossible, and yet the circumstances or the character of the property may not be such as that the interests of the parties will be promoted by its sale. Then the usual course is to make the allotments as nearly equal in value as is practicable, and require compensation to be made by every party receiving an allotment whose value is in excess of his share, and to be paid to every party the value of whose allotment is less than that of his share. The amount so to be paid or received is called owelty. Of the power of the court to award it there is no doubt,[50] but the functions of the commissioners are left in doubt. Of course every recommendation they may make, like everything else they do, must for its final effect depend on the subsequent judgment of the court. We apprehend, however, it is within their province, whenever they find themselves unable to make allotments corresponding in value to the interests of the respective allottees, to reach that result as nearly as may be, and to suggest what contributions in money ought to be made by the parties favored by their allotments and the persons to whom it should be paid.[51]

e. Where the Property Consists of Different Parcels or of a Large Tract Which Must Be Divided Into Many Parcels. Where there are several separate tracts, no duty is imposed by law on the commissioners to make as many partitions as there are tracts. They may therefore make an allotment restricted to one tract only, if the allotment corresponds in value to the interest of the allottee in the whole property subject to the partition.[52] If there is any presumption on the subject, it is that the interest of an allottee will be promoted by restricting his allotment to one parcel rather than by extending it over two or more parcels. This is certainly true when the property consists of a single large tract.[53] If the property consists both of personal and of real estate, the court may order the different classes of property to be partitioned separately,[54] and the commissioners may doubtless pursue the same mode unless it appears that by so doing they have greatly prejudiced the owners.[55] Where, however, the lands to be partitioned were acquired partly from the father of the cotenants and partly from their mother, and some or all of such parties were infants, and, in the event of an infant dying under age, a particular course of descent is prescribed, and inconvenience might result from blending the lands in partition, an allotment which so blends them by assigning the whole of an allotment to one of the parties out of the lands

Maine.— Dyer *v.* Lowell, 30 Me. 217; Field *v.* Hanscomb, 15 Me. 365.

Nevada.— Dondero *v.* Van Sickle, 11 Nev. 389.

North Carolina.— McClure *v.* Taylor, 109 N. C. 641, 14 S. E. 42.

Pennsylvania.— Kline's Estate, 1 Leg. Gaz. 428.

Rhode Island.— Richardson *v.* Armington, 10 R. I. 339.

The object which must be sought by the commissioners is the assigning to each party an allotment equivalent to his share in value, and if this is done, the area or character of the respective allotments is rarely, or never, material. Grimes *v.* Little, 56 Ga. 649; Downes *v.* Scott, 3 Rob. (La.) 84; La Motte *v.* Mohr, 78 Minn. 127, 80 N. W. 850; McMullin *v.* Doughty, 63 N. J. Eq. 800, 52 Atl. 1132 [*affirming* 62 N. J. Eq. 252, 49 Atl. 914].

Destruction of building.— The commissioners are not, for the purpose of making an equal partition, authorized to direct the destruction, or partial destruction, of a building on one of their allotments. Vail *v.* Vail, 52 Hun (N. Y.) 520, 5 N. Y. Suppl. 872, 17 N. Y. Civ. Proc. 38.

50. Freeman Coten. & P. § 507.

51. Nichols *v.* Nichols, 181 Mass. 490, 63 N. E. 1072; Post *v.* Post, 65 Barb. (N. Y.) 192; Eisner *v.* Curiel, 20 Misc. (N. Y.) 245, 45 N. Y. Suppl. 1010; Graydon *v.* Graydon, McMull. Eq. (S. C.) 63; Buckler *v.* Farrow, Rich. Eq. Cas. (S. C.) 178.

52. *Connecticut.*— Stannard *v.* Sperry, 56 Conn. 541, 16 Atl. 261.

Georgia.— Lancaster *v.* Morgan, 54 Ga. 76.

Indiana.— Hanlon *v.* Waterbury, 31 Ind. 168.

Maryland.— Claude *v.* Handy, 83 Md. 225, 34 Atl. 532.

Massachusetts.— Buck *v.* Wolcott, 15 Gray 502; Hagar *v.* Wiswall, 10 Pick. 152.

New Jersey.— Hay *v.* Estell, 19 N. J. Eq. 133.

Ohio.— Smith *v.* Barber, 7 Ohio, Pt. II, 118.

53. Richardson *v.* Armington, 10 R. I. 339.

54. Woodward *v.* Raum, (Cal. 1893) 31 Pac. 930.

55. Calhoun *v.* Rail, 26 Miss. 414.

acquired from his father only, or from his mother only, cannot be sustained, unless it is shown to the court that the mode adopted will promote the interest of the parties, and this, although the statute of the state expressly provides that partition may be made of several parcels of land, although such title may be derived from different sources, "by allotment of part in each parcel or of parts in one or more parcels, or of one or more undivided parts, with or without the addition of a part or parts of other parcels, as shall be most for the interest of the parties in general." On the other hand, if the tract is a large one out of which many allotments must be made, the commissioners, in making allotments, are not obliged to give any allottee a single parcel only, or even contiguous parcels, but may, to satisfy his interests, assign him non-contiguous parcels.[56]

f. Creating Easements and Servitudes. The commissioners, if in their judgment necessary to the accomplishment of an equitable partition, may create an easement in favor of, or impose a servitude upon, one or more of the allotments.[57]

g. Of Mineral Lands. If the land to be partitioned is underlaid with minerals, the ownership of the surface may, by the court, be separated from the mineral, and the mineral given to one cotenant to hold in severalty and the surface to another.[58] In the partition of oil land demised by a lease reserving a royalty, the oil severed must be treated as income and the oil in place as real estate.[59] If a defendant is the owner of the right to mine on lands owned by plaintiffs in common with third parties, which right is appurtenant to defendant's undivided interest in the land, such right must be taken into consideration in the partition proceedings and will pass with his interest.[60]

h. Avoiding Unnecessary Injury. We have heretofore shown that the commissioners may respect equities existing in favor of one of the parties by assigning him property of which he is already in possession, or upon which he has erected improvements, and may promote his interest even by taking into consideration his ownership of property adjacent to that to be divided and make him an allotment to adjoin his land not subject to the partition.[61] The principle applicable to these cases goes somewhat farther and requires the commissioners in their allotment to seek to avoid inflicting any and every hardship to the parties or any of them which may be avoided and an allotment of parcels of equivalent value be made. Thus, if some of the parties are infants, an allotment should not be made to them of lands encumbered by the widow's dower and from which, during her life, they can acquire nothing for their support.[62]

i. Designating the Allotments. The allotments, in addition to being described in the report, should contain references to known public monuments or surveys, where these either constitute boundaries to an allotment, or will point out its location, and the existence of such monuments or surveys may excuse the commissioners from erecting monuments, although the statute provides therefor, for such statute may be construed as directory only.[63] Where such public surveys

56. Houston *v.* Blythe, 71 Tex. 719, 10 S. W. 520.

57. *Massachusetts.*— Mount Hope Iron Co. *v.* Dearden, 140 Mass. 430, 4 N. E. 803.

New Hampshire.— Merrill *v.* Durrell, 67 N. H. 108, 36 Atl. 613; Cheswell *v.* Chapman, 38 N. H. 14, 75 Am. Dec. 158.

New York.— Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Suppl. 1010.

Rhode Island.— Richardson *v.* Armington, 10 R. I. 339.

England.— Lister *v.* Lister, 3 Y. & C. Exch. 540.

The right to lay out streets is, however, denied to commissioners in New Albany *v.* Williams, 126 Ind. 1, 25 N. E. 187; Kitchen *v.* Sheets, 1 Ind. 138.

The right to impose a servitude for the hauling or driving of lumber across one allotment in favor of another is denied in Dyer *v.* Lowell, 30 Me. 217.

Whether existing ways should be interfered with see Morris *v.* Timmins, 1 Beav. 411, 71 Eng. Ch. 411, 48 Eng. Reprint 999.

58. Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592.

59. Clever's Estate, 23 Pittsb. Leg. J. N. S. (Pa.) 358.

60. Grubb *v.* Grubb, 74 Pa. St. 25.

61. See *supra*, III, N, 9.

62. Wilhelm *v.* Wilhelm, 4 Md. Ch. 330; Morrill *v.* Morrill, 5 N. H. 329.

63. Marvin *v.* Titsworth, 10 Wis. 320.

and monuments do not exist, the commissioners should by stones or monuments attest their several allotments.[64] If one of the cotenants is a married woman, the allotment should be so made as to recognize and preserve her interest, and not in such a manner as to leave doubt whether the allotment is to her husband or to her and him as cotenants.[65] If two or more of the cotenants are infants, their share may be set off to be held together and undivided by direction of the court or of their guardian,[66] and in some states by direction of the statute if there is no prayer for an allotment in severalty.[67]

12. Assailing the Action of the Commissioners — a. Waiver of Right to. If there is any irregularity in the action of the commissioners, or the result reached by them is deemed partial and prejudicial to any of the parties, he must, if not content to abide by their allotment or other action, take some measure to prevent its becoming unassailable by being approved by the court, and ratified by its final judgment. Before such judgment, he must except to or move to vacate or set aside the report. Otherwise he waives all right to assail it.[68] Where no objection is made to a report, it will be held sufficient.[69] Irregularities in the proceedings of the commissioners must be corrected, or their consequence avoided, by opposition in some form to the confirmation of their report.[70] But the right to avoid a report may be waived or lost before it is presented to the court, as where a party causes the action of which he complains to be taken, or, knowing that it has been or is about to be taken, acquiesces therein or seeks to acquire rights thereunder and thereby causes further action to be taken, or expenses to be incurred.[71]

b. Objections to Report, When, How, and By Whom Must Be Made. We have already shown that objections to the report or to the action of the commissioners may be waived by acquiescence. It is therefore advisable that one knowing of any unfairness or irregularity in the action of the commissioners should at once object to or protest against it, or at all events, should give no ground for the contention that he consented to or had the intention of acquiescing in it. In Louisiana the code provides for an officer to make a "process verbal of the objections and declarations of the parties,"[72] but usually neither the commissioners nor any other officer is charged with the duty of making objections or of preserving evidence of those made. The party aggrieved may file exceptions to the report or move to quash, vacate, or set it aside, or to suppress the return,[73] or appear in opposition to a motion for its confirmation.[74] Sometimes, as in North Carolina, the time within which exceptions may be filed is limited by statute,[75] and if not filed within that time they are waived, and it is the duty of the court to hear and act upon the report, and the parties must take notice of such orders and decrees as may be made.[75a] It is perhaps rarely material by what name the paper disclosing objections is called, provided it informs the court that an interested party

64. Kane *v.* Parker, 4 Wis. 123.

65. Cost *v.* Rose, 17 Ill. 276.

66. Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

67. Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451.

68. Leverett *v.* Stevenson, 81 Ga. 701, 8 S. E. 72; McCracken *v.* Droit, 108 Ill. 428. So if matters are by the court submitted to the commissioners which they have no authority to decide, exceptions thereto cannot be taken at a subsequent term. Allen *v.* Hall, 50 Me. 253.

69. Lake *v.* Jarrett, 12 Ind. 395.

70. Stewart *v.* Pickard, 1 Rob. (La.) 415.

71. *Maryland.*— Godwin *v.* Banks, 89 Md. 679, 43 Atl. 863.

North Carolina.—*Ex p.* Pittinger, 142 N. C. 85, 54 S. E. 845; Simmons *v.* Foscue, 81 N. C. 86.

Pennsylvania.— Sutton's Appeal, 112 Pa. St. 598, 4 Atl. 6.

Rhode Island.— Walker *v.* Walker, (1901) 47 Atl. 1091.

Tennessee.—Gass *v.* Waterhouse, (Ch. App. 1900) 61 S. W. 450.

72. Jones *v.* Crocker, 4 La. Ann. 8.

73. Shumate *v.* Chenault, 108 Ga. 438, 33 S. E. 991; Hay *v.* Estell, 19 N. J. Eq. 133.

74. Hall *v.* Hall, 152 Mass. 136, 25 N. E. 84; Bentley *v.* Long Dock Co., 14 N. J. Eq. 480; Horne's Estate, 10 Pa. Dist. 226, 8 Del. Co. 146.

75. Roberts *v.* Roberts, 143 N. C. 309, 55 S. E. 721; Floyd *v.* Rook, 128 N. C. 10, 38 S. E. 33.

75a. Roberts *v.* Roberts, 143 N. C. 309, 55 S. E. 721, where no special notice of confirmation was given defendant or his counsel.

objects to the proceedings and wishes denial of their confirmation,[76] and also points out the ground on which his objection rests.[77] If a report is set aside and a new partition made, any party deeming that he has good cause therefor may object or except to it as if it were the first or original report.[78]

c. Grounds of Objection. By whatever mode interposed, the objection to the report must be either irregularity in the proceedings of the commissioners,[79] undertaking to dispose of questions not submitted to them,[80] error in the conclusions reached by them and disclosed by the report or otherwise,[81] or partiality or unfairness.[82] But whatsoever be the ground of the objection, it must be one which at least might have operated to the prejudice of the objector,[83] and was not consented to by him.[84] In North Carolina, to prevent the confirmation of the report of commissioners, a motion, based upon the professed ground of newly discovered evidence, was made and granted, and plaintiff permitted to amend his complaint. On examination, the proceeding will be found, in substance, to have been one to vacate the interlocutory judgment.[85] Defects in the report itself may be ground for vacating it, unless the defect can be cured by amendment, as that the report is uncertain.[86]

d. Trial of Exceptions or Objections. The exceptions or objections may be supported or overthrown by the report itself,[87] or by other writings in the case, in which event an issue of law only is presented to be determined by the court. As to issues of fact, the parties are not entitled to trial before a jury.[88] The court may doubtless proceed with their trial as upon the trial of an issue of fact presented upon any other motion, which is usually upon affidavits, although sometimes by the oral examination of witnesses in open court. Upon the trial the party objecting or excepting must be regarded as plaintiff and bound to assume

76. Bentley *v.* Long Dock Co., 14 N. J. Eq. 480.

77. Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

78. Lancaster *v.* Morgan, 54 Ga. 76.

79. As that the parties had no notice and hence did not attend (Doubleday *v.* Newton, 9 How. Pr. (N. Y.) 71), or the commissioners failed to report the evidence when required to do so (Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697), but not for failure to report values or as to other facts not required by statute (McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516; Wamsley *v.* Mill Creek Coal, etc., Co., 56 W. Va. 296, 49 S. E. 141).

80. As by assuming to determine questions of title. Ham *v.* Ham, 39 Me. 216; Gass *v.* Waterhouse, (Tenn. Ch. App. 1900) 61 S. W. 450.

81. Proceeding on a false basis or mistaken principles (Sever *v.* Sever, 8 Mass. 132; Haulenbeck *v.* Cronkright, 26 N. J. Eq. 159; *In re* Hogg, 206 Pa. St. 415, 50 Atl. 1057; Ransom *v.* High, 37 W. Va. 838, 17 S. E. 413, 28 Am. St. Rep. 67); not following the directions of the court (Richardson *v.* Ruddy, 11 Ida. 561, 83 Pac. 606), or omitting to partition part of the property directed to be partitioned (Allen *v.* Hall, 50 Me. 253; Partridge *v.* Luce, 36 Me. 16).

82. The partiality referred to and urged as a ground for setting aside the report may be (1) in a course of conduct from which bias or prejudice is inferable, or (2) in reaching a conclusion which is unjust to the parties, or some of them, by which one of them is allotted property of less and another of greater value than his moiety. Gooch *v.* Green, 102 Ill. 507; Riggs *v.* Dickinson, 3 Ill. 437, 35 Am. Dec. 113.

In England, apparently, the alleged injustice will be considered only when fraud or intentional misconduct can be attributed to the commissioners therefrom (Jones *v.* ——, 5 L. J. Ch. O. S. 105, 1 Sim. 136, 2 Eng. Ch. 136, 57 Eng. Reprint 529; Lister *v.* Lister, 3 Y. & C. Exch. 540), or at least a failure to honestly exercise their judgment (Peers *v.* Needham, 19 Beav. 316, 2 Wkly. Rep. 514, 52 Eng. Reprint 371).

83. *Illinois.*— Koehler *v.* Klein, 128 Ill. 393, 21 N. E. 574.

Indiana.—Winship *v.* Crothers, 20 Ind. 455.

Kentucky.— Loughbridge *v.* Cawood, 64 S. W. 854, 23 Ky. L. Rep. 1127.

Massachusetts.— Hall *v.* Hall, 152 Mass. 136, 25 N. E. 84.

New Jersey.— McMullin *v.* Doughty, 63 N. J. Eq. 800, 52 Atl. 1132; *In re* Thompson, 3 N. J. Eq. 637.

North Carolina.— Skinner *v.* Carter, 108 N. C. 106, 12 S. E. 908.

See 38 Cent. Dig. tit. "Partition," § 357 *et seq.*

84. Walker *v.* Walker, (R. I. 1901) 47 Atl. 1091.

85. Faison *v.* Williams, 121 N. C. 152, 28 S. E. 188.

86. Hogg's Estate, 20 Lanc. L. Rev. (Pa.) 14.

87. Richardson *v.* Ruddy, 11 Ida. 561, 83 Pac. 606.

88. Dillman *v.* Cox, 23 Ind. 440.

In Georgia the rule is apparently different. Lancaster *v.* Morgan, 54 Ga. 76.

the burden of proof.[89] It is not sufficient, however, that the preponderance of evidence is in his favor. The proceeding is somewhat analogous to a motion for a new trial, in which the report of the commissioners is treated as if it were the verdict of a jury, and rarely set aside if there is any evidence to sustain it.[90] Furthermore, every reasonable presumption is indulged in favor of the fairness of the commissioners.[91] Nevertheless the report will be set aside if inequality in the allotments is very great, although neither fraud, partiality, nor gross error of judgment is shown.[92]

13. Action Which May Be Taken on the Report of the Commissioners. When the report of the commissioners comes on for hearing before the court, whether objected to or excepted to or not, the court may, (1) set aside the report *in toto*, or modify it, and as modified, confirm it and make the partition final, or (2) confirm it and thus make it final, without modification. The idea that the court may modify or correct the report appears to be inconsistent with the other rule that the court cannot directly make the partition. Nevertheless, if the proceeding is in equity, or of an equitable nature, the court may probably modify the partition as reported;[93] but we doubt the existence of the power unless restricted to the correction of errors and mistakes obvious from an inspection of the whole proceedings and where it is clear that the modification as directed by the court will only make the final judgment express what the commissioners intended. If the report is set aside, partition remains to be made and the duty of making it may be recommitted to the original commissioners, or a new commission may issue to other commissioners selected by the court.

14. Confirmation of Their Report. In Canada the report of commissioners in partition is not required to be specially confirmed by the court, but before it will be acted upon it will be examined by the court to see whether there is manifest error therein.[94] We do not know whether this means that the report of the commissioners may of itself operate as a partition. If so the rule is entirely different elsewhere. The report is in no sense a final or judicial action, and does not become such until confirmed by the court.[95] Its confirmation may be denied because of any irregularity in the proceedings.[95a]

89. Van Buskirk *v.* Stover, 162 Ind. 448, 70 N. E. 520; Patterson *v.* Blake, 12 Ind. 436; Hancock *v.* Craddock, 2 B. Mon. (Ky.) 389; Morris *v.* Harrell, 14 La. Ann. 185; McClanahan *v.* Hockman, 96 Va. 392, 31 S. E. 516.

90. *Connecticut.*— Stannard *v.* Sperry, 56 Conn. 541, 16 Atl. 261.

Kentucky.— Garth *v.* Thompson, 72 S. W. 782, 24 Ky. L. Rep. 1961; Lang *v.* Constance, 46 S. W. 693, 20 Ky. L. Rep. 502.

Maryland.— Crouch *v.* Smith, 1 Md. Ch. 401.

New Jersey.— McMullin *v.* Doughty, 63 N. J. Eq. 800, 52 Atl. 1132.

New York.—Livingston *v.* Clarkson, 4 Edw. 596.

South Carolina.—Aldrich *v.* Aldrich, 75 S. C. 369, 55 S. E. 887, 117 Am. St. Rep. 909.

Wyoming.— Field *v.* Leiter, (1907) 90 Pac. 378, 92 Pac. 622.

Canada.— Lecain *v.* Hosterman, 3 Nova Scotia Dec. 178.

Among other decisions on the subject in which it was not necessary to go as far as stated in the text see Godwin *v.* Banks, 89 Md. 679, 43 Atl. 863; Wilhelm *v.* Wilhelm, 4 Md. Ch. 330; McMullin *v.* Doughty, 63 N. J. Eq. 800, 52 Atl. 1132; Wright *v.* McCormick, 69 N. C. 14; Moore *v.* Williamson, 10 Rich. Eq. (S. C.) 323, 73 Am. Dec. 93; Hensel *v.* Sturn, (Tex. Civ. App. 1894) 25 S. W. 817.

91. Hay *v.* Estell, 19 N. J. Eq. 133; Bentley *v.* Long Dock Co., 14 N. J. Eq. 480; Cross *v.* Cross, 56 W. Va. 185, 49 S. E. 129.

92. Borah *v.* Archers, 7 Dana (Ky.) 176; Jewett *v.* Scott, 19 Tex. 567.

For cases setting aside reports on objections involving questions of fact see Shumate *v.* Chenault, 108 Ga. 438, 33 S. E. 991; Phillips *v.* Phillips, 185 Ill. 629, 57 N. E. 796; Miller *v.* Rouse, 2 Ohio S. & C. Pl. Dec. 358, 7 Ohio N. P. 300; Horne's Estate, 10 Pa. Dist. 226, 8 Del. Co. 146.

93. Shearer *v.* Shearer, 125 Iowa 394, 101 N. W. 175; Wright *v.* Marsh, 2 Greene (Iowa) 94.

94. Dunn *v.* Dowling, 1 Ch. Chamb. (U. C.) 365.

Perhaps this is the rule in Louisiana (Cooney *v.* Clark, 7 La. 156), and in Maine, if the report is accepted by the court and recorded as the statute requires (Southgate *v.* Burnham, 1 Me. 369), and also in probate proceedings in Texas (Fishback *v.* Young, 19 Tex. 515).

95. Calhoun *v.* Rail, 26 Miss. 414.

95a. Godfrey *v.* Cunningham, (Nebr. 1906) 109 N. W. 765.

15. Compensating. The commissioners are entitled to be compensated for their services, and some courts have undertaken to specify a *per diem* beyond which the compensation should not go.[96] But we apprehend that, in the absence of any controlling statute, it must be impossible to fix any *per diem* or other rate of compensation applicable to all cases, and that the court must be left in each case in its discretion to make such allowance as it may deem reasonable,[97] and, in advance of such allowance, no suit or other proceeding to collect for the commissioners' services can be maintained.[98] The fact that their report was not accepted does not deprive them of their right to compensation if they acted with fidelity and impartiality.[99]

O. Partition by Sale — 1. Power to Require Is Statutory. The power to direct the partition of property by sale and a division of the proceeds is statutory, and the circumstances under which it can be exercised depend upon the statutes in force in England,[1] and the different states of the United States.[2] The constitutionality of the American statutes upon this subject has not been very seriously questioned, and, so far as questioned, has been affirmed, and we doubt not correctly.[3]

2. The Grounds For the Sale — a. Under the English Statutes. We shall not enter into any detailed description of the English statutes, nor point out, except in a few particulars, the important differences between them and the American statutes. There is a preliminary inquiry as to who are the parties interested in the property and whether they are within the jurisdiction of the court,[4] although

96. Campbell *v.* Campbell, 48 How. Pr. (N. Y.) 255; Cabell *v.* Cabell, 4 Hen. & M. (Va.) 436, the one fixing the *per diem* at two dollars and the other at five dollars.

In New York a referee selling property in partition is entitled to the same compensation as a sheriff for like services. Duffy *v.* Muller, 52 Misc. (N. Y.) 11, 102 N. Y. Suppl. 296; Keim *v.* Keim, 43 N. Y. App. Div. 88, 59 N. Y. Suppl. 366.

97. Cronkright *v.* Haulenbeck, 35 N. J. Eq. 279.

98. Smyth *v.* Bradstreet, 5 Cow. (N. Y.) 213.

99. Potter *v.* Hazard, 11 Allen (Mass.) 187.

Money had and received.— A commissioner, it has been held, cannot maintain an action, as for money had and received, against a cotenant, on the ground that the latter has collected the charges allowed by the court for the services of the commissioners. Langdon *v.* Palmer, 133 Mass. 413.

1. Pemberton *v.* Barnes, L. R. 6 Ch. 685, 40 L. J. Ch. 675, 25 L. T. Rep. N. S. 577, 19 Wkly. Rep. 988; Roebuck *v.* Chadebet, L. R. 8 Eq. 127, 38 L. J. Ch. 488, 20 L. T. Rep. N. S. 940; Warner *v.* Baynes, Ambl. 589, 27 Eng. Reprint 384; Parker *v.* Gerard, Ambl. 236, 27 Eng. Reprint 157; *In re* Dyer, 54 L. J. Ch. 1133, 53 L. T. Rep. N. S. 744, 33 Wkly. Rep. 806; Allen *v.* Allen, 42 L. J. Ch. 839, 21 Wkly. Rep. 842; Willis *v.* Willis, 61 L. T. Rep. N. S. 610, 38 Wkly. Rep. 7; Miles *v.* Jarvis, 50 L. T. Rep. N. S. 48; Griffies *v.* Griffies, 8 L. T. Rep. N. S. 758, 11 Wkly. Rep. 943; Turner *v.* Morgan, 8 Ves. Jr. 143, 32 Eng. Reprint 307.

2. *Alabama.*— Johnson *v.* Kelly, 80 Ala. 135; Wilkinson *v.* Stuart, 74 Ala. 198; Oliver *v.* Jernigan, 46 Ala. 41; Harkins *v.* Pope, 10 Ala. 493; Deloney *v.* Walker, 9 Port. 497.

Arkansas.— Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913.

Colorado.— Brown *v.* Challis, 23 Colo. 145, 46 Pac. 679.

Georgia.— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Kentucky.—Prather *v.* Davis, 13 Bush 372; Stump *v.* Martin, 9 Bush 285; Horsfall *v.* Ford, 5 Bush 642; Burgess *v.* Eastham, 3 Bush 476; Pettit *v.* Johnson, 1 Bush 607.

Maryland.— Johnson *v.* Johnson, 52 Md. 668; Lawes *v.* Lumpkin, 18 Md. 334.

Mississippi.— Wilson *v.* Duncan, 44 Miss. 642.

New York.— Hughes *v.* Hughes, 30 Hun 349; Matthews *v.* Matthews, 1 Edw. 565.

North Carolina.— Strudwick *v.* Ashe, 7 N. C. 207.

South Carolina.— Pell *v.* Ball, 1 Rich. Eq. 361; Pell *v.* Ball, Speers Eq. 518.

West Virginia.—Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

See 38 Cent. Dig. tit. "Partition," § 329 *et seq.*

In a few of the states the right to partition by sale has been insisted upon, independently of any statute specially authorizing it. Holley *v.* Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883, 16 L. R. A. 776; Dinckle *v.* Timrod, 1 Desauss. Eq. (S. C.) 109; Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Blagge *v.* Shaw, (Tex. Civ. App. 1897) 41 S. W. 756.

3. Richardson *v.* Monson, 23 Conn. 94; Metcalf *v.* Hoopingardner, 45 Iowa 510.

4. Powell *v.* Powell, L. R. 10 Ch. 130, 44 L. J. Ch. 122, 31 L. T. Rep. N. S. 737, 23 Wkly. Rep. 201; Wood *v.* Gregory, 43 Ch. D. 82, 59 L. J. Ch. 232, 62 L. T. Rep. N. S. 179, 38 Wkly. Rep. 226; Sykes *v.* Schofield, 14 Ch. D. 629, 49 L. J. Ch. 833, 42 L. T. Rep. N. S. 822, 29 Wkly. Rep. 68; Senior *v.* Here-

under some circumstances such inquiry may be omitted.[5] If persons owning more than one half of the property unite in a demand therefor, the sale must be ordered unless the court sees "good reason to the contrary."[6] Persons owning less than one half of the property may also demand its sale, and the court has a discretion to grant or deny the demand, provided the demand must not be granted "unless it appears more beneficial to the parties interested than a partition."[7] In some cases the persons dissenting from the sale may prevent it by executing an undertaking, as provided in the statutes, to purchase the shares of the others.[8]

b. Under American Statutes. The American statutes antedate those of England on this subject. Under all of them, we believe, the presumption prevails that partition in kind should be made, and it is incumbent on any person seeking partition by sale to show some cause therefor justifying it under the statute of his state.[9] These causes, although expressed in different language in the various statutes, are very similar, and all, or nearly all, sanction a partition by sale when proceeding otherwise must substantially prejudice the parties. Among the causes designated why partition should be made by sale are that partition by allotment will operate to the "great prejudice of the owners";[10] that the property

ford, 4 Ch. D. 494, 25 Wkly. Rep. 223; Silver *v.* Udall, L. R. 9 Eq. 227, 39 L. J. Ch. 118, 21 L. T. Rep. N. S. 660, 18 Wkly. Rep. 665; Buckingham *v.* Sellick, 22 L. T. Rep. N. S. 370.

5. Lees *v.* Coulton, L. R. 20 Eq. 20, 44 L. J. Ch. 556, 23 Wkly. Rep. 544.

6. Pemberton *v.* Barnes, L. R. 6 Ch. 685, 40 L. J. Ch. 675, 25 L. T. Rep. N. S. 577, 19 Wkly. Rep. 988; *In re* Langdale, Ir. R. 5 Eq. 572.

What is good reason to the contrary see Rowe *v.* Gray, 5 Ch. D. 263, 46 L. J. Ch. 279, 25 Wkly. Rep. 250; Saxton *v.* Bartley, 48 L. J. Ch. 519, 27 Wkly. Rep. 615.

What is not good reason to the contrary see Porter *v.* Lopes, 7 Ch. D. 358, 37 L. T. Rep. N. S. 824; Wilkinson *v.* Joberns, L. R. 16 Eq. 14, 42 L. J. Ch. 663, 28 L. T. Rep. N. S. 724, 21 Wkly. Rep. 644; *In re* Whitwell, L. R. 19 Ir. 45; Roughton *v.* Gibson, 46 L. J. Ch. 366, 36 L. T. Rep. N. S. 93, 25 Wkly. Rep. 269.

7. Freeman Coten. & P. § 536; Allen *v.* Allen, 42 L. J. Ch. 839, 21 Wkly. Rep. 842; Rickards *v.* Rickards, 36 L. J. Ch. 176, 16 L. T. Rep. N. S. 562, 15 Wkly. Rep. 380.

8. Williams *v.* Games, L. R. 10 Ch. 204, 44 L. J. Ch. 245, 32 L. T. Rep. N. S. 414, 23 Wkly. Rep. 779; Drinkwater *v.* Ratcliffe, L. R. 20 Eq. 528, 44 L. J. Ch. 605, 33 L. T. Rep. N. S. 417, 24 Wkly. Rep. 25; Roughton *v.* Gibson, 46 L. J. Ch. 366, 36 L. T. Rep. N. S. 93, 25 Wkly. Rep. 269.

For other decisions construing the English statutes see Pitt *v.* Jones, 5 App. Cas. 651, 49 L. J. Ch. 795, 43 L. T. Rep. N. S. 385, 29 Wkly. Rep. 33; Pryor *v.* Pryor, L. R. 10 Ch. 469, 44 L. J. Ch. 535, 32 L. T. Rep. N. S. 713, 23 Wkly. Rep. 738; Taylor *v.* Grange, 15 Ch. D. 165, 49 L. J. Ch. 794, 43 L. T. Rep. N. S. 233, 28 Wkly. Rep. 93; Mildmay *v.* Quicke, L. R. 20 Eq. 537, 46 L. J. Ch. 667; Lys *v.* Lys, L. R. 7 Eq. 126, 19 L. T. Rep. N. S. 409, 17 Wkly. Rep. 394; Hubbard *v.* Hubbard, 2 Hem. & M. 38, 9 L. T. Rep. N. S. 606, 71 Eng. Reprint 373; Thompson *v.* Richardson, Ir. R. 6 Eq. 596; Evans *v.* Evans, 52 L. J. Ch. 304, 48 L. T. Rep. N. S. 567, 31 Wkly. Rep. 495; Harper *v.* Bird, 32 L. T. Rep. N. S. 428, 23 Wkly. Rep. 646; Cass *v.* Wood, 30 L. T. Rep. N. S. 670; Groves *v.* Carbert, 29 L. T. Rep. N. S. 129; Underwood *v.* Stewardson, 26 L. T. Rep. N. S. 688, 20 Wkly. Rep. 668; Jackson *v.* Lomas, 23 Wkly. Rep. 744.

9. *Arkansas.*— Rankin *v.* Schofield, 81 Ark. 440, 98 S. W. 674.

Connecticut.—Johnson *v.* Olmsted, 49 Conn. 509.

Illinois.— Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220.

Louisiana.— Coach *v.* Hake, 49 La. Ann. 458, 21 So. 640.

North Carolina.— Gregory *v.* Gregory, 69 N. C. 522; Windley *v.* Barrow, 55 N. C. 66; Davis *v.* Davis, 37 N. C. 607.

Tennessee.— Reeves *v.* Reeves, 11 Heisk. 669.

West Virginia.— Oneal *v.* Stimson, 61 W. Va. 551, 56 S. E. 889.

United States.— Royston *v.* Miller, 76 Fed. 50.

10. *Alaska.*— Boone *v.* Manley, 2 Alaska 502.

California.— Code Civ. Proc. § 763.

Indiana.— Klinesmith *v.* Socwell, 100 Ind. 589.

Michigan.— Gilman *v.* Boden, 136 Mich. 125, 98 N. W. 982, 112 Am. St. Rep. 356.

Montana.— Hurley *v.* O'Neill, 31 Mont. 595, 79 Pac. 242.

Nevada.— Dall *v.* Confidence Silver-Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

New Jersey.— White *v.* Smith, 70 N. J. Eq. 418, 62 Atl. 560; Bentley *v.* Long Dock Co., 14 N. J. Eq. 480.

New York.— Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Fleet *v.* Dorland, 11 How. Pr. 489; Smith *v.* Smith, 10 Paige 470.

North Carolina.— Gregory *v.* Gregory, 69 N. C. 522; Windley *v.* Barrow, 55 N. C. 66.

Pennsylvania.—Palethorp *v.* Palethorp, 198 Pa. St. 395, 48 Atl. 269.

Utah.— Ryan *v.* Egan, 26 Utah 241, 72 Pac. 933.

"cannot be conveniently used by the parties in interest together, and a sale will better promote the interests of the owners";[11] that it will "be depreciated in value,"[12] or the interests of the owners will be prejudiced,[13] or the property "cannot be equitably divided,"[14] or its division "will materially impair its value,"[15] or result in "loss or injury to the parties interested,"[16] or that the lands "cannot be advantageously divided,"[17] or a sale will best promote the interests of the parties,[18] or is manifestly for their interest,[19] or a partition in kind cannot be made without great inconvenience,[20] or "the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject."[21] In the District of Columbia a sale may be ordered "if it satisfactorily appears that the estate cannot be divided without loss or injury to the parties interested."[22] We shall not consider in detail the decisions made by the courts of the respective states under the various statutes.[23] Whether property is subject to partition by sale is

11. Contaldi *v.* Errichetti, 79 Conn. 276, 64 Atl. 219; Johnson *v.* Olmsted, 49 Conn. 509.

12. Tucker *v.* Parks, 70 Ga. 414; Royston *v.* Royston, 13 Ga. 425.

13. Kloss *v.* Wylezalek, 207 Ill. 328, 60 N. E. 863, 99 Am. St. Rep. 220; Tibbs *v.* Allen, 27 Ill. 119.

14. Branscomb *v.* Gillian, 55 Iowa 235, 7 N. W. 523.

15. Burgess *v.* Eastham, 3 Bush (Ky.) 476; Craddock *v.* Smythe, 99 S. W. 216, 30 Ky. L. Rep. 455; Atherton *v.* Warren, 85 S. W. 1100, 27 Ky. L. Rep. 632; Talbott *v.* Campbell, 67 S. W. 53, 23 Ky. L. Rep. 2198; Smith *v.* Upton, 13 S. W. 721, 12 Ky. L. Rep. 27; Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073.

16. Ballantyne *v.* Rusk, 84 Md. 649, 36 Atl. 361; Thruston *v.* Minke, 32 Md. 571.

17. Ramsey *v.* Humphrey, 162 Mass. 385, 38 N. E. 975; Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799.

18. Pankey *v.* Howard, 47 Miss. 83; Wilson *v.* Duncan, 44 Miss. 642.

19. Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799; Wilson *v.* Bogle, 95 Tenn. 290, 32 S. W. 386, 49 Am. St. Rep. 929; Ross *v.* Ramsey, 3 Head (Tenn.) 15; Davidson *v.* Bowden, 5 Sneed (Tenn.) 129; Helm *v.* Franklin, 5 Humphr. (Tenn.) 404.

20. Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

21. Wilson *v.* Smith, 22 Gratt. (Va.) 493; Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

22. Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644, Gray, J., delivering the opinion of the court.

On the other hand partition in kind should be ordered when it appears that land cannot be sold without great loss. Craighead *v.* Pike, 58 N. J. Eq. 15, 43 Atl. 424 [*affirmed* in 60 N. J. Eq. 443, 45 Atl. 1091]. The established test of whether a partition in kind would result in "great prejudice to the owners" is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole. Idema *v.* Comstock, 131 Wis. 16, 110 N. W. 786.

23. Those desiring to consult these decisions in detail will find the following material:

California.— Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164; McGillivray *v.* Evans, 27 Cal. 92.

Colorado.— Waterbury *v.* Fisher, 23 Colo. 256, 47 Pac. 277; Brown *v.* Challis, 23 Colo. 145, 46 Pac. 679.

Connecticut.— Contaldi *v.* Errichetti, 79 Conn. 276, 64 Atl. 219; Johnson *v.* Olmsted, 49 Conn. 509; Ford *v.* Kirk, 41 Conn. 9; Wilson *v.* Peck, 39 Conn. 54.

District of Columbia.— Walker *v.* Lyon, 6 App. Cas. 484.

Georgia.— Gordon *v.* McLeroy, 115 Ga. 768, 42 S. E. 68; Tucker *v.* Parks, 70 Ga. 414; Grimes *v.* Little, 56 Ga. 649; Coleman *v.* Lane, 26 Ga. 515.

Illinois.— Watke *v.* Stine, 214 Ill. 563, 73 N. E. 793; Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220; Donaldson *v.* Duncan, 199 Ill. 167, 65 N. E. 146; Wilson *v.* Illinois Trust, etc., Bank, 166 Ill. 9, 46 N. E. 740; Hartmann *v.* Hartmann, 59 Ill. 103; Francisco *v.* Hendricks, 28 Ill. 64; Tibbs *v.* Allen, 27 Ill. 119; Greenup *v.* Sewell, 18 Ill. 50.

Indiana.—Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441; Klinesmith *v.* Socwell, 100 Ind. 589; Lucas *v.* Peters, 45 Ind. 313.

Iowa.— Shearer *v.* Shearer, 125 Iowa 394, 101 N. W. 175; Brown *v.* Cooper, 98 Iowa 444, 67 N. W. 378, 60 Am. St. Rep. 190, 33 L. R. A. 61; Branscomb *v.* Gillian, 55 Iowa 235, 7 N. W. 523.

Kentucky.— Gray *v.* Cornwall, 95 Ky. 566, 26 S. W. 1018, 16 Ky. L. Rep. 228; Graham *v.* Graham, 8 Bush 334; Goodman *v.* Boren, 1 Duv. 187; Irvin *v.* Divine, 7 T. B. Mon. 246; Jackson *v.* Macey, Hard. 582; Wormald *v.* Heinze, 90 S. W. 1064, 28 Ky. L. Rep. 1022; Atherton *v.* Warren, 85 S. W. 1100, 27 Ky. L. Rep. 632; Larrabee *v.* Larrabee, 71 S. W. 645, 24 Ky. L. Rep. 1423; Bell *v.* Smith, 71 S. W. 433, 24 Ky. L. Rep. 1328; Talbott *v.* Campbell, 67 S. W. 53, 23 Ky. L. Rep. 2198; Conner *v.* Cox, 22 S. W. 605, 15 Ky. L. Rep. 140; Power *v.* Power, 15 S. W. 523, 12 Ky. L. Rep. 793; Smith *v.* Upton, 13 S. W. 721, 12 Ky. L. Rep. 27.

ordinarily, and perhaps always, a question of fact only,[24] although there are classes of cases in which the propriety of partition by sale appears so obvious that, on a request for partition in that mode, the resistant may well be deemed to be called upon to assume the burden of proof, such, for instance, as cases calling for the partition of a single house and lot in a city,[25] of a factory,[26] or of a water right,[27] although such right is sometimes partitionable otherwise than by sale.[28] If a tract of land is valuable chiefly for oil, or gas, or both, beneath its surface its partition must be by a sale and a division of the proceeds.[28a]

3. PROCEEDINGS TO PROCURE ORDER FOR. The proceedings up to the point of

Louisiana.— Friedrich *v.* Friedrich, 111 La. 26, 35 So. 371; Coach *v.* Hake, 49 La. Ann. 458, 21 So. 640; Soniat *v.* Supple, 48 La. Ann. 296, 19 So. 128; Dumestre's Succession, 40 La. Ann. 571, 4 So. 328; Cazes *v.* Gassie, 40 La. Ann. 360, 3 So. 840; Blakemore *v.* Blakemore, 39 La. Ann. 804, 2 So. 565; Holliday *v.* Holliday, 38 La. Ann. 175; Meyer *v.* Pargoud, 34 La. Ann. 969; Keller *v.* Judson, 18 La. Ann. 282; Placencia *v.* Placencia, 8 La. 573.

Maine.— Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073; Wood *v.* Little, 35 Me. 107.

Maryland.— Ballantyne *v.* Rusk, 84 Md. 649, 36 Atl. 361; Brendel *v.* Klopp, 69 Md. 1, 13 Atl. 589; Savary *v.* Da Camara, 60 Md. 139; Thruston *v.* Minke, 32 Md. 571; Billingslea *v.* Baldwin, 23 Md. 85; Calwell *v.* Boyer, 8 Gill & J. 136.

Massachusetts.— Heald *v.* Kennard, 180 Mass. 521, 63 N. E. 4; Ramsey *v.* Humphrey, 162 Mass. 385, 38 N. E. 975.

Michigan.— Gilman *v.* Boden, 136 Mich. 125, 98 N. W. 982, 112 Am. St. Rep. 356; Claxton *v.* Claxton, 56 Mich. 557, 23 N. W. 310.

Mississippi.— Higginbottom *v.* Short, 25 Miss. 160, 57 Am. Dec. 198.

Missouri.— Joerger *v.* Joerger, 193 Mo. 133, 91 S. W. 918; Carpenter *v.* Coats, 183 Mo. 52, 81 S. W. 1089.

Montana.—Hurley *v.* O'Neill, 31 Mont. 595, 79 Pac. 242.

Nevada.— Dall *v.* Confidence Silver-Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

New Hampshire.—Allard *v.* Carleton, 64 N. H. 24, 3 Atl. 313; Barney *v.* Leeds, 54 N. H. 128.

New Jersey.— White *v.* Smith, 70 N. J. Eq. 418, 62 Atl. 560; Craighead *v.* Pike, 60 N. J. Eq. 443, 45 Atl. 1091; Kemble *v.* Kemble, 44 N. J. Eq. 454, 11 Atl. 733; Jackson *v.* Beach, (Ch. 1885) 2 Atl. 22; Davidson *v.* Thompson, 22 N. J. Eq. 83.

New York.— Brooks *v.* Davey, 109 N. Y. 495, 17 N. E. 412; Smith *v.* Brookhaven, 36 N. Y. App. Div. 386, 55 N. Y. Suppl. 370; Chittenden *v.* Gates, 18 N. Y. App. Div. 169, 45 N. Y. Suppl. 768; Haywood *v.* Judson, 4 Barb. 228; Van Arsdale *v.* Drake, 2 Barb. 599; Dresser *v.* Travis, 39 Misc. 358, 79 N. Y. Suppl. 924 [*affirmed* in 87 N. Y. App. Div. 632, 84 N. Y. Suppl. 1124]; Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Suppl. 1010; Coster *v.* Coster, 21 N. Y. Suppl. 203; David *v.* David, 9 N. Y. Suppl. 256; Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Hulse *v.* Hulse, 5 N. Y. Suppl. 747, 17 N. Y. Civ. Proc. 92; Tucker *v.* Tucker, 19 Wend. 226; Smith *v.* Smith, 10 Paige 470; Clason *v.* Clason, 6 Paige 541 [*affirmed* in 18 Wend. 369]; Smith *v.* Smith, Hoffm. 506.

North Carolina.— Foreman *v.* Hough, 98 N. C. 386, 3 S. E. 912; Bragg *v.* Lyon, 93 N. C. 151; Trull *v.* Rice, 85 N. C. 327; Gregory *v.* Gregory, 69 N. C. 522; McKay *v.* McNeill, 59 N. C. 258; Windley *v.* Barrow, 55 N. C. 66; Davis *v.* Davis, 37 N. C. 607.

Pennsylvania.— Black *v.* Black, 206 Pa. St. 116, 55 Atl. 847; Palethorp *v.* Palethorp, 198 Pa. St. 395, 48 Atl. 269; Davis' Estate, 3 Leg. Gaz. 77.

South Carolina.— Steedman *v.* Weeks, 2 Strobh. Eq. 145, 49 Am. Dec. 660.

Tennessee.— Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799; Wilson *v.* Bogle, 95 Tenn. 290, 32 S. W. 386, 49 Am. St. Rep. 929; Reeves *v.* Reeves, 11 Heisk. 669; Ross *v.* Ramsey, 3 Head 15; Helm *v.* Franklin, 5 Humphr. 404.

Utah.— Ryan *v.* Egan, 26 Utah, 241, 72 Pac. 933.

Vermont.— Baldwin *v.* Aldrich, 34 Vt. 526, 80 Am. Dec. 695.

Virginia.— Beckham *v.* Duncan, (1888) 5 S. E. 690; Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262; Parker *v.* McCoy, 10 Gratt. 594.

West Virginia.— Herold *v.* Craig, 59 W. Va. 353, 53 S. E. 466; Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482; Casto *v.* Kintzel, 27 W. Va. 750.

Wisconsin.— Vesper *v.* Farnsworth, 40 Wis. 357.

United States.— Briges *v.* Sperry, 95 U. S. 401, 24 L. ed. 390; East Coast Cedar Co. *v.* People's Bank, 111 Fed. 446, 49 C. C. A. 422; Hayne *v.* Gould, 54 Fed. 963; Hayne *v.* Gould, 54 Fed. 951.

24. Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164.

25. Bell *v.* Smith, 71 S. W. 433, 24 Ky. L. Rep. 1328; Williams *v.* Coombs, 88 Me. 183, 33 Atl. 1073; Gilman *v.* Boden, 136 Mich. 125, 98 N. W. 982, 112 Am. St. Rep. 356.

26. Wood *v.* Little, 35 Me. 107.

27. McGillivray *v.* Evans, 27 Cal. 92; Brown *v.* Cooper, 98 Iowa 444, 67 N. W. 378, 60 Am. St. Rep. 190, 33 L. R. A. 61; Blasdell *v.* Baldwin, 3 Ont. App. 6.

28. Smith *v.* Smith, Hoffm. (N. Y.) 506.

28a. Hall *v.* Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791; Dangerfield *v.* Caldwell, 151 Fed. 554, 81 C. C. A. 400.

procuring the order of sale are ordinarily the same as when partition by allotment is sought, for many of the statutes, especially in the code states, do not require any allegation in the pleadings respecting the mode of partition,[29] but this is not universally true.[30] When the complaint undertakes to make an allegation on this subject, it seems sufficient to allege the ultimate fact substantially in the language of the statute, without going into details by disclosing the evidentiary facts from which the pleader draws his conclusion.[31] When any of the parties in his pleading makes the allegation necessary to require a sale, this tenders an issue, which, unless confessed by the other parties in interest, requires a trial before the court. In the absence of any tender of an issue of this character, the court must enter its interlocutory judgment declaring the interests of the respective parties and appointing commissioners to make partition in accordance therewith. In other words, the sale may be ordered on the allegation of one party and the admission of the other either in express terms or by his failure to deny,[32] and it is said in one case that the matter of procedure is left to the discretion of the court.[33] Whether there shall be partition by sale or by allotment is doubtless a judicial question to be ultimately determined by the court,[34] in solving which, in the absence of express or controlling statutory provisions, it may pursue any method of inquiry appropriate to judicial proceedings. Thus if it is, strictly speaking, a court of chancery, it may pursue the chancery practice and refer the inquiry to a master in chancery,[35] or, at least in Louisiana, may appoint experts to examine the property and make reports embodying the conclusions reached by them.[36] But whether a reference is made before the appointment of commissioners or they are left to undertake the partition and subsequently report that they cannot do so, the court must pass on the question, and either by its interlocutory judgment or by some order subsequently entered, authorize the sale,[37] and the entry of a formal order after a sale is not sufficient to validate it.[38] The master, commissioner, referee, or

29. Bartlett *v.* Mackey, 130 Cal. 181, 62 Pac. 482; Segur *v.* Sorel, 11 La. 439; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144; Field *v.* Leiter, (Wyo. 1907) 90 Pac. 378, 92 Pac. 622; Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644.

30. Keaton *v.* Terry, 93 Ala. 85, 9 So. 524; McEvoy *v.* Leonard, 89 Ala. 455, 8 So. 40; Snedicor *v.* Mobley, 47 Ala. 517; Bacon *v.* Bills, 6 Ky. L. Rep. 218; Slingluff *v.* Stanley, 66 Md. 220, 7 Atl. 261; Meshaw *v.* Meshaw, 2 Md. Ch. 12; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

31. De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Wickes *v.* Wickes, 98 Md. 307, 56 Atl. 1017; Hayes *v.* McReynolds, 144 Mo. 348, 46 S. W. 161; Allen *v.* Chappell, 78 N. C. 238.

32. Burnell *v.* Burnell, 11 Ch. D. 213, 48 L. J. Ch. 412, 27 Wkly. Rep. 749; Greenwood *v.* Percy, 26 Beav. 572, 53 Eng. Reprint 1019; Thompson *v.* Richardson, Ir. R. 6 Eq. 596.

33. Stevens *v.* McCormick, 90 Va. 735, 19 S. E. 742.

34. Irvin *v.* Divine, 7 T. B. Mon. (Ky.) 246.

And, unless restrained by statute, the court may determine the question for itself, on evidence adduced before it, and without calling to its aid any master, expert, or commissioner (Green *v.* Cannady, 77 S. E. 193, 57 S. E. 832; Bennett *v.* Bennett, 8 Grant Ch. (U. C.) 446), or "real representative," this being the name given in a certain province to the person to whom a reference is made when the court does not try the question directly (*In re* Foster, 1 Ch. Chamb. (U. C.) 103).

Although default is made by defendant commissioners must be appointed in Arkansas. Moore *v.* Willey, 77 Ark. 317, 91 S. W. 184, 113 Am. St. Rep. 151.

35. Fisk *v.* Grosvenor, (N. J. Ch. 1890) 20 Atl. 261; Enyard *v.* Nevius, (N. J. Ch. 1889) 18 Atl. 192; Waln *v.* Meirs, 27 N. J. Eq. 351; Thompson *v.* Hardman, 6 Johns. Ch. (N. Y.) 436; Steven *v.* Hunter, 14 Grant Ch. (U. C.) 541; O'Lone *v.* O'Lone, 2 Grant Ch. (U. C.) 642.

The court sometimes proceeds directly on the evidence without making any reference or requiring any report on the question (Saunders *v.* Saunders, (Tex. Civ. App. 1901) 62 S. W. 797), and so too the court sometimes disregards the report of the master to whom the inquiry has been referred (Barnes *v.* Taylor, 30 N. J. Eq. 7).

36. Cameron *v.* Lane, 36 La. Ann. 716.

But it is not absolutely necessary to resort to experts. The court may determine the question without their aid and for this purpose receive any competent evidence. Loyd *v.* Loyd, 23 La. Ann. 231; Florance *v.* Hills, 11 La. Ann. 388; Kohn *v.* Marsh, 3 Rob. (La.) 48.

37. McLain *v.* Van Winkle, 46 Ill. 406; Pratt *v.* Bentley, 4 Rich. (S. C.) 19.

38. Denning *v.* Clark, 59 Ill. 218; McLain *v.* Van Winkle, 46 Ill. 406.

other person charged with the duty of inquiring and reporting must, in his report, state the facts on which his conclusion is founded,[39] and whether the question is presented on or in connection with a report, the evidence should establish the necessity for a sale to warrant or support an order directing it.[40] Quite frequently, when the question is presented to the court before the appointment of commissioners is made, even though a master has reported upon it, and the evidence does not remove doubt, commissioners are appointed and directed to make partition, but this is rather a step in the inquiry than a determination that a sale shall not be resorted to.[41] Although the interlocutory judgment is often entered in advance of any inquiry as to the mode of partition, we believe it is never the practice to direct a sale, unless as a part of such judgment, until after its entry, the theory being that the first judicial inquiry must relate to and result in declaring the rights of the parties in the property.[42] The commissioners, although appointed to make partition, having reported their inability to do so otherwise than by sale, any party interested in their further action may by appropriate motion present the question to the court, which, if it agrees with the conclusion of the commissioners, will direct them to make a sale either of the whole property or of such part as they have declared their inability to otherwise partition.[43] Although the report of the commissioners is not conclusive,[44] but may be contested, in which event it may be regarded, where the facts disclosed as requiring a sale sustain that conclusion, as *prima facie* establishing the necessity for a sale and as requiring those resisting the sale to assume the burden of proof.[45] Not only is the action of the court required in all cases, but some of the decisions place so much emphasis on such action and the necessity of evidence to support it as to warrant the conclusion that the order of sale may at a remote time be assailed on account of the absence or insufficiency of the evidence.[46]

4. For and Against Whom a Sale May Be Ordered. Any cotenant is obviously entitled to ask for a sale unless under some disability. It is therefore no objection that he holds as a trustee,[47] nor, in England, that he is a mortgagee only.[48] The request for a sale may be by a married woman.[49] Application for a sale may also be made by, or on behalf of, an infant; but the court will doubtless take more care than in the case of an adult to ascertain whether his interests will be

39. *Indiana.*— Lake *v.* Jarrett, 12 Ind. 395.

Louisiana.—Lecarpentier *v.* Lecarpentier, 5 La. Ann. 497; Nott *v.* Daunoy, 2 Mart. N. S. 1.

New York.— Tucker *v.* Tucker, 19 Wend. 226.

Pennsylvania.— Vidal *v.* Girard, 1 Miles 322.

South Carolina.— Steedman *v.* Weeks, 2 Strobh. Eq. 145, 49 Am. Dec. 660.

West Virginia.— Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

40. Mackin *v.* Wilds, 106 La. 1, 30 So. 257; Fisk *v.* Grosvenor, (N. J. Ch. 1890) 20 Atl. 261.

The return of the commissioners is not conclusive, but may be contested by any party. McCann *v.* Brown, 43 Ga. 386.

41. Waln *v.* Meirs, 27 N. J. Eq. 77; Reynolds *v.* Reynolds, 5 Paige (N. Y.) 161.

42. Brendel *v.* Klopp, 69 Md. 1, 13 Atl. 589; Northrop *v.* Anderson, 8 How. Pr. (N. Y.) 351; Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223; Childers *v.* Loudin, 51 W. Va. 559, 42 S. E. 637.

43. Ramsey *v.* Humphrey, 162 Mass. 385, 38 N. E. 975; Southack *v.* Central Trust Co., 62 N. Y. App. Div. 260, 70 N. Y. Suppl. 1122; Smith *v.* Brookhaven, 36 N. Y. App. Div. 386, 55 N. Y. Suppl. 370; Eisner *v.* Curiel, 20 Misc. (N. Y.) 245, 45 N. Y. Suppl. 1010.

44. McCann *v.* Brown, 43 Ga. 386.

45. Watke *v.* Stine, 214 Ill. 563, 73 N. E. 793.

46. *Illinois.*— McLain *v.* Van Winkle, 46 Ill. 406.

Louisiana.— Gernon *v.* Bestick, 15 La. Ann. 697.

Maryland.— Earle *v.* Turton, 26 Md. 23.

Mississippi.— Tindall *v.* Tindall, (1888) 3 So. 581.

New York.— Gallatian *v.* Cunningham, 8 Cow. 361.

47. Simpson *v.* Denny, 10 Ch. D. 28, 27 Wkly. Rep. 280; Stace *v.* Gage, 8 Ch. D. 451, 47 L. J. Ch. 608, 38 L. T. Rep. N. S. 843, 26 Wkly. Rep. 605.

48. Davenport *v.* King, 49 L. T. Rep. N. S. 92, 31 Wkly. Rep. 911.

49. Higgs *v.* Dorkis, L. R. 13 Eq. 280, 41 L. J. Ch. 150, 25 L. T. Rep. N. S. 903, 20 Wkly. Rep. 279.

promoted by a sale.[50] It is said that a life-tenant of an undivided one fourth of the property is not entitled to an order for its sale,[51] but no reason is given for so saying, and probably none can be given. For the sale is but a mode of partition, and when a party is entitled to partition, he, if the other facts require it, is to the extent of his estate, entitled to partition by sale;[52] and, on the other hand, where he cannot maintain the proceeding for partition, a sale on his demand cannot be supported.[53] As to the persons against whom an order of sale may be granted, we apprehend there can be no limit, provided they are, in the proceeding before the court, compellable to make partition, although as to infants and other incompetents and persons under disability, the court will take special care to protect their interests,[54] and in some of the states statutes are in force intended to specially safeguard such interests.[55] The existence of mortgages or other liens does not prevent the sale,[56] nor do outstanding leases.[57] In North Carolina a sale will not be authorized against a tenant by the curtesy.[58] Usually an estate in possession cannot be sold at the instance of a remainder-man.[59] The court may, however, when that course seems equitable, except certain estates or interests from the sale.[60] Except in so far as the English statutes may have given their courts a discretion,[61] and in so far as the American courts interpose on behalf of minors,[62] the right of a party entitled to a partition to have it made by sale seems to be absolute, and not to yield to considerations of special hardship operating, or which may properly operate, against another party, and which his peculiar circumstances may render him unable to avoid.[63] No prohibition or condition imposed by one of the cotenants can impair the right as to the others.[64]

5. Proceedings After Ordering the Sale — a. Appraisement to Prevent Sale. In a few of the states, before proceeding to sell, the commissioners must make an appraisement of the property which, being returned to court, any of the parties willing to do so may take the property by paying such appraised value, and if no offer to so take it is made, the sale must proceed, and, in some of the states, must realize a specified portion of the appraisement;[65] but generally no appraisement

50. Coker *v.* Pitts, 37 Ala. 692; Grove *v.* Comyn, L. R. 18 Eq. 387, 22 Wkly. Rep. 723; Davey *v.* Wietlisbach, L. R. 15 Eq. 269.

The consent may be given by the infant's next friend or guardian *ad litem.* Rimington *v.* Hartley, 14 Ch. D. 630, 43 L. T. Rep. N. S. 15, 29 Wkly. Rep. 42; Platt *v.* Platt, 28 Wkly. Rep. 533.

51. *In re* Rudy, 185 Pa. St. 359, 39 Atl. 968, 64 Am. St. Rep. 654.

52. Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

53. Pankey *v.* Howard, 47 Miss. 83; Scheu *v.* Lehning, 31 Hun (N. Y.) 183, 66 How. Pr. 231; Lee's Estate, 13 Phila. (Pa.) 291.

54. Coker *v.* Pitts, 37 Ala. 692; Grove *v.* Comyn, L. R. 18 Eq. 387, 22 Wkly. Rep. 723; Davey *v.* Wietlisbach, L. R. 15 Eq. 269. The consent may be given by the infant's next friend or guardian *ad litem.* Gernon *v.* Bestick, 15 La. Ann. 697; Albright *v.* Flowers, 52 Miss. 246; Walker *v.* Walker, 3 Abb. N. Cas. (N. Y.) 12; Jones *v.* Douglass, 1 Tenn. Ch. 357; Rimington *v.* Hartley, 14 Ch. D. 630, 43 L. T. Rep. N. S. 15, 29 Wkly. Rep. 42; Platt *v.* Platt, 28 Wkly. Rep. 533. A cotenant cannot prevent a sale by conveying to a minor. Kean *v.* Tilford, 81 Ky. 600. Thus a sale may be ordered against a cotenant who has an estate for years only (Mason *v.* Keays, 78 L. T. Rep. N. S. 33), or against a married woman who is interested for her separate use without power of anticipation (Fleming *v.* Armstrong, 34 Beav. 109, 11 L. T. Rep. N. S. 470, 5 New Rep. 181, 55 Eng. Reprint 575).

55. Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811.

56. Walker *v.* Walker, 3 Abb. N. Cas. (N. Y.) 12.

57. Woodworth *v.* Campbell, 5 Paige (N. Y.) 518.

58. Bragg *v.* Lyon, 93 N. C. 151; Parks *v.* Siler, 76 N. C. 191.

59. Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268; Berry *v.* Lewis, 118 Ky. 652, 82 S. W. 252, 84 S. W. 526, 26 Ky. L. Rep. 530, 27 Ky. L. Rep. 109.

60. Fight *v.* Holt, 80 Ill. 84 (excepting a widow's dower); Hilliard *v.* Scoville, 52 Ill. 449 (excepting a life-estate); Moody *v.* West, 12 Ind. 399 (excepting a widow's dower).

61. Richardson *v.* Feary, 39 Ch. D. 45, 57 L. J. Ch. 1049, 59 L. T. Rep. N. S. 165, 36 Wkly. Rep. 807; *In re* Dyer, 54 L. J. Ch. 1133, 53 L. T. Rep. N. S. 744, 33 Wkly. Rep. 806; Miles *v.* Jarvis, 50 L. T. Rep. N. S. 48.

62. Hartmann *v.* Hartmann, 59 Ill. 103.

63. Johnson *v.* Olmsted, 49 Conn. 509; Bentley *v.* Long Dock Co., 14 N. J. Eq. 480.

Hence injunction will not issue to prevent such sale. Morrison *v.* Morrison, 105 Ala. 637, 17 So. 109.

64. Kean *v.* Tilford, 81 Ky. 600.

65. Freeman Coten. & P. § 541; Knapp *v.* Gass, 63 Ill. 492; Morris *v.* Tracy, 58 Kan.

is required to precede a sale in partition, and, if such appraisement exists, the property may be sold regardless of it.[66]

b. Inquiry Respecting Liens. Under the practice now generally prevailing, especially in the states which have adopted codes of procedure, plaintiff takes care to make lien-holders parties to his suit and to have the nature and amounts of their liens declared by the interlocutory judgment, thus relieving the commissioners or other persons making the sale from all duty in respect thereto other than of satisfying such liens as so declared or as may be required by the final judgment. Still, some of the statutes require a reference to ascertain and report liens held by persons not parties to the suit,[67] and the omission of the referee to give, as to such persons, the notice required by statute leaves them unaffected by the proceeding.[68]

c. Proceedings Preparatory For, and in Making the Sale. The statutory provisions in the several states relating to sales in partition of estates held in cotenancy are too numerous and varied to warrant us either in attempting to disclose them in detail, or in undertaking a general *résumé* of them. It may safely be assumed that these proceedings are subject to the general rules controlling judicial sales, and should be preceded by an order or judgment commanding, or at least authorizing them,[69] a fixing of the terms of sale either by the judgment or order directing it, or by law,[70] the exposing of the property for sale by a duly authorized commissioner or other officer,[71] a giving of notice of the sale in the mode prescribed by law, or the order of sale,[72] the offering of the property at public

137, 48 Pac. 571; Dyer *v.* Lowell, 30 Me. 217; King *v.* Reed, 11 Gray (Mass.) 490.

66. Columbia Finance, etc., Co. *v.* Bates, 74 S. W. 248, 24 Ky. L. Rep. 2412; Southwick *v.* Greuzenbach, 13 S. W. 918, 12 Ky. L. Rep. 263; Sallier *v.* Rosteet, 108 La. 378, 32 So. 383; Bayhi *v.* Bayhi, 35 La. Ann. 527; Life Assoc. of America *v.* Hall, 33 La. Ann. 49; Ventress *v.* Brown, 30 La. Ann. 1012; Shaffet *v.* Jackson, 14 La. Ann. 154; Jacobs *v.* Lewis, 8 La. 177; Bonin *v.* Eyssaline, 12 Mart. (La.) 185; Schick *v.* Whitcomb, 68 Nebr. 784, 94 N. W. 1023; Parker *v.* McCoy, 10 Gratt. (Va.) 594.

67. Thruston *v.* Minke, 32 Md. 571; Horton *v.* Buskirk, 1 Barb. (N. Y.) 421; Connor *v* Connor, 13 N. Y. Suppl. 402, 20 N. Y. Civ. Proc. 308; Hall *v.* Partridge, 10 How. Pr. (N. Y.) 188; Hummel's Appeal, 1 Pa. Cas. 410, 5 Atl. 669. But the order of same may be made without such reference. Gardner *v.* Luke, 12 Wend. (N. Y.) 269.

68. O'Grady *v.* O'Grady, 55 Hun (N. Y.) 40, 8 N. Y. Suppl. 278.

69. Hence a sale of parcels not directed by the decree to be sold is void. Hickenbotham *v.* Blacklege, 54 Ill. 316.

70. See cases cited *infra*, this note.

Terms of the sale.— These should be fixed by the court and not left to be filled in by the master or clerk (McLain *v.* Van Winkle, 46 Ill. 406), and the officers making the sale have no power to change them (Eshelman *v.* Witmer, 2 Watts (Pa.) 263; Murphy *v.* Bedford, 35 Leg. Int. (Pa.) 262). But see Rosenkrans *v.* Snover, 19 N. J. Eq. 420, 97 Am. Dec. 668, where they were allowed to create easements and servitudes. Although minors are interested, there is no necessity for a family meeting to fix the terms of the sale. Shaffet *v.* Jackson, 14 La. Ann. 154. In Louisiana, although adult heirs had an absolute right to sales for cash (Dickson *v.* Dickson, 33 La. Ann. 1370), minors by their tutor might assent to a sale on credit, and upon the advice of a family meeting (Morgan's Succession, 12 La. Ann. 153). A judgment creditor has no power to dictate the terms of a sale. Stern *v.* Epstin, 14 Rich. Eq. (S. C.) 5. Good reason must be shown for directing a sale on credit (Saunders *v.* Saunders, (Tex. Civ. App. 1901) 62 S. W. 797), or for selling as two lots property used as one (Kiernan *v.* Lynch, 112 La. 555, 36 So. 588).

71. See cases cited *infra*, this note.

Who may make the sale.—Although the officer authorized to make the sale is usually the commissioner, or one of them, or the sheriff, yet the court may commit this authority to another (Gauthreaux *v.* Girardey, McGloin (La.) 5; Phelps *v.* Stewart, 17 Md. 231); but it is said if the proceeding is in the orphans' court the administrator must be appointed (Arble's Estate, 161 Pa. St. 373, 29 Atl. 32), and in some cases the administrator *de bonis non* (Rawle's Appeal, 119 Pa. St. 100, 12 Atl. 809). In the event of the death or removal of the commissioner, the court may fill the vacancy, and thereupon a successor may make the sale. Coggeshall *v.* State, 112 Ind. 561, 14 N. E. 555. In appointing a trustee to execute an order of sale, the person representing a largely preponderating interest will be preferred. Hanbest's Estate, 12 Pa. Dist. 114, 28 Pa. Co. Ct. 191.

72. See cases cited *infra*, this note.

Notice.— In England the first step toward notice is serving the decree directing the sale. Teall *v.* Watts, L. R. 11 Eq. 213, 40 L. J. Ch. 176, 23 L. T. Rep. N. S. 884, 18 Wkly. Rep. 317; Hurry *v.* Hurry, L. R. 10 Eq. 346, 39 L. J. Ch. 824, 22 L. T. Rep. N. S. 577, 18 Wkly. Rep. 829; Peters *v.* Bacon, L. R. 8 Eq.

auction,[73] in the mode most attractive to purchasers,[74] free from any unfair practice,[75] and from all interference from any person not authorized to act in its conduct,[76] the taking place of the sale at a time,[77] and place sanctioned by law or the order of the court,[78] the permission of all persons to bid who are not forbidden by law,[79]

125, 38 L. J. Ch. 571, 20 L. T. Rep. N. S. 729, 17 Wkly. Rep. 782; Phillips *v.* Andrews, 56 L. T. Rep. N. S. 108, 35 Wkly. Rep. 266.

Sufficiency of notices see Harlan *v.* Stout, 22 Ind. 488; Brillhart *v.* Mish, 99 Md. 447, 58 Atl. 28; Rudderow *v.* Dudley, 41 N. J. Eq. 611, 7 Atl. 477, 891 [*affirmed* in 42 N. J. Eq. 370, 7 Atl. 891]; Doremus *v.* Doremus, 66 Hun (N. Y.) 111, 21 N. Y. Suppl. 13; Connor *v.* Connor, 13 N. Y. Suppl. 402, 20 N. Y. Civ. Proc. 308; Thwing *v.* Thwing, 9 Abb. Pr. (N. Y.) 323, 18 How. Pr. 458; Romaine *v.* McMillen, 5 How. Pr. (N. Y.) 318; Spring *v.* Sandford, 7 Paige (N. Y.) 550.

Defects in notices must be urged for setting aside or refusing to confirm the sale, and rarely, or never, avoid it on collateral attack. Goodwin *v.* Crooks, 58 N. Y. App. Div. 464, 69 N. Y. Suppl. 578 [*affirming* 33 Misc. 39, 68 N. Y. Suppl. 219]; Le Fevre *v.* Laraway, 22 Barb. (N. Y.) 167; Kromer *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

The giving of notices should be proved by some evidence in addition to the assertion in the report of the sale. Tibbs *v.* Allen, 29 Ill. 535.

73. Gernon *v.* Bestick, 15 La. Ann. 697; Hache *v.* Ayraud, 14 La. Ann. 178; Blackwell *v.* McLean, 9 Wash. 301, 37 Pac. 317.

Private sale.— Under certain circumstances, however, some statutes authorize a private sale. Bruhn *v.* Firemen's Bldg. Assoc., 42 La. Ann. 481, 7 So. 556; Conrad *v.* Fuller, 98 Va. 16, 34 S. E. 893.

74. See cases cited *infra*, this note.

Sales in parcels or en masse.— The presumption is that a sale in parcels will be the more likely to produce the best price and hence that mode should be resorted to (Meeker *v.* Evans, 25 Ill. 322; Loyd *v.* Loyd, 23 La. Ann. 231), but if resorted to without success the property may then be offered *en masse* (Ward *v.* Ward, 174 Ill. 432, 51 N. E. 806), and even without a preliminary offering in parcels a sale *en masse* may be proper, and, with evidence to support it, entitled to confirmation (Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887; *In re* Westervelt, 10 Can. L. J. 15). If one of the cotenants owns the improvements in severalty, they and the realty must be sold separately. White *v.* Lefoldt, 78 Miss. 173, 28 So. 818. A sale where the property was divided into parcels, and at which the auctioneer announced that he would offer one lot first, and that the purchaser might have the privilege of taking the others at the same price, and the sale was made accordingly, is not a compliance with the law requiring the property to be sold in separate parcels. Borde *v.* Erskine, 33 La. Ann. 873.

75. See cases cited *infra*, this note.

Agreements and devices to suppress the biddings of every character are against public policy, irrespective of the parties who participate in them, and entitle any person whose property is sold to avoid the sale. Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682; Fleming *v.* Hutchinson, 36 Iowa 519; Wagner *v.* Phillips, 51 Mo. 117; Wooton *v.* Hinkle, 20 Mo. 290.

In exceptional circumstances agreements of persons to unite in a purchase or that one may purchase for both are sustainable. Ventress *v.* Brown, 34 La. Ann. 448; Allen *v.* Martin, 61 Miss. 78.

Puffing at partition sale is also forbidden. Fisher *v.* Hersey, 17 Hun (N. Y.) 370.

76. Dean *v.* Wilson, 10 Ch. D. 136, 48 L. J. Ch. 148, 27 Wkly. Rep. 377.

77. Hughes *v.* Hughes, 72 Mo. 136.

Time of sale.— The time for the sale must obviously be the time stated in the notice or some other time to which the sale has been regularly adjourned. It must also be at a time when the order to sell remains in force, and if the life of such order is restricted to the term at which it issues, the sale cannot take place afterward. Hughes *v.* Hughes, 72 Mo. 136.

78. See cases cited *infra*, this note.

Place of sale.— The notice of sale must designate the place where it is to take place. In England this is ordinarily in court (Strugnell *v.* Strugnell, 27 Ch. D. 258, 52 L. J. Ch. 1167, 51 L. T. Rep. N. S. 512, 33 Wkly. Rep. 30), but it may by the court be directed to take place elsewhere (Hayward *v.* Smith, 20 L. T. Rep. N. S. 70), in which case the reserved bid and the auctioneer's commission should first be fixed (Pitt *v.* White, 57 L. T. Rep. N. S. 650). In the United States unless the statute declares otherwise, we apprehend that the place for a sale in partition is the same as that of an execution or judicial sale of property of like location and character. Morris *v.* Wayne Cir. Judge, 130 Mich. 336, 89 N. W. 963.

79. See cases cited *infra*, this note.

Who may bid at the sale — *Generally.*— The cases considering this question are chiefly those in which the claim was made either that the purchaser was not entitled to bid at all, or, if accepted as a bidder, he must be declared to hold as a trustee of some person to whom he stood in a fiduciary relation. Under the practice prevailing in England the court may by its decree allow a party to bid. Pennington *v.* Dalbiac, 18 Wkly. Rep. 684. In truth, unless those interested in the sale are allowed to bid, their property might often be sacrificed when they were willing and able to protect it. Hence we apprehend that all the parties and all persons beneficially interested are entitled and should be allowed to bid, and that too for their own exclusive benefit. Thompson *v.* Frew, 107 Ill. 478; Bayhi *v.* Bayhi, 35 La. Ann. 527; Porter *v.* Depeyster, 18 La. 351; Hopper *v.* Hopper, 79 Md. 400, 29 Atl.

and finally, the proceedings, including the sale, may be discontinued and the property withdrawn at any time prior to the final acceptance of the bid;[80] but as long as any of the cotenants wishes the sale to be made, the commissioner may properly proceed with it, although the other cotenants wish it stopped.[81]

6. The Report. The officer or officers conducting the sale are required to make a return or report thereof, and generally to file it with the clerk of the court in which the partition suit is pending. If the sale was made by a sheriff, he is not, in Missouri, compellable to sell and make the return at a specified term.[82] In California the referees must report the sale "with a description of the different parcels sold to each purchaser; the name of the purchaser, the price paid or secured, the terms and conditions of the sale and the securities taken, if any."[83] The report need not be under seal.[84] This language does not appear to exact any history of the proceedings anterior to the sale, but the practice generally prevailing is to give such history so fully that, if the report is not assailed, the court may determine therefrom whether to set aside or confirm the sale. In some states the tendency is to regard the report somewhat strictly and not to sustain the sale when the report omits any fact necessary to its support, and as to some facts, such as the giving of the notice of sale, to require extrinsic evidence in confirmation of the report.[85]

7. Proceedings to Vacate the Report and Sale — a. By the Parties to the Suit. The report having been made and filed, the question whether it shall be set aside or confirmed next presents itself. There is no doubt of the general power of the court to vacate or refuse confirmation of the sale whether the parties be infants or adults.[86] The application to set it aside may come either from the parties to the suit or some of them, or from the purchaser seeking to be released from his bid. We have hereinbefore considered the proceedings preparatory for, and in making the sale; and we may safely state that each of the matters there

611; Carpenter *v.* Carpenter, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569; English *v.* Monypeny, 6 Ohio Cir. Ct. 554, 3 Ohio Cir. Dec. 582.

Attorneys, administrators and executors, and guardians of interested persons are not allowed to bid and hold the property adversely to the interest represented by them, unless they have interests of their own which they are entitled to protect. See as to attorneys (Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682; Johnstone *v.* O'Connor, 21 N. Y. App. Div. 77, 47 N. Y. Suppl. 425 [*affirmed* in 162 N. Y. 639, 57 N. E. 1113]; Newcomb *v.* Brooks, 16 W. Va. 32); as to administrators (Porter *v.* Depeyster, 18 La. 351; Rogers *v.* Rogers, (Tenn. Ch. App. 1896) 42 S. W. 70), and as to guardians (Larrabee *v.* Larrabee, 71 S. W. 645, 24 Ky. L. Rep. 1423; Munsell *v.* Munsell, 33 Misc. (N. Y.) 185, 68 N. Y. Suppl. 329; Jones' Estate, 179 Pa. St. 36, 36 Atl. 175).

A husband of a party was held not entitled to bid in O'Donoghue *v.* Boies, 159 N. Y. 87, 53 N. E. 537 [*affirming* 92 Hun 3, 37 N. Y. Suppl. 961].

An agent may bid for his principal and the latter, on exceptions by the agent, may be substituted. *In re* Lowries, 29 Pittsb. Leg. J. N. S. (Pa.) 74.

A mother and tutrix may in Louisiana bid for her son, and her want of authority is not a ground for refusing to carry out the terms of the purchase. Chevalley *v.* Pettit, 115 La. 407, 39 So. 113.

A tenant for life was held to have no right to bid in Rankin's Appeal, 95 Pa. St. 358.

The officer or officers whose duty it is to conduct the sale cannot become purchasers thereat, either directly or indirectly. Howery *v.* Helms, 20 Gratt. (Va.) 1.

80. Bellerjeau *v.* Ely, 8 N. J. L. 273; Miller *v.* Law, 10 Rich. Eq. (S. C.) 320, 73 Am. Dec. 92.

81. Boston, etc., R. Co. *v.* Langdon, 68 N. H. 467, 44 Atl. 603.

82. Patton *v.* Hanna, 46 Mo. 314.

83. Cal. Code Civ. Proc. § 784.

84. Sullivan *v.* Sullivan, 42 Ill. 315.

85. Tibbs *v.* Allen, 29 Ill. 535.

86. *Ex p.* Bost, 56 N. C. 482.

But there must always be good reason for the action of the court. Boston, etc., R. Co. *v.* Langdon, 68 N. H. 467, 44 Atl. 603; Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245. And parties having notice of the sale and the proceedings anterior thereto as they occur are not entitled to relief under a section of the code authorizing the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Estoppel to seek the vacation of a sale see Gruenwald *v.* Neu, 215 Ill. 132, 74 N. E. 101; Miller *v.* Wright, 109 N. Y. 194, 16 N. E. 205; Hays' Appeal, 51 Pa. St. 58; Woodward *v.* Elliott, 27 S. C. 368, 3 S. E. 477; Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245.

stated to be irregular or improper may, if promptly asserted by a person interested in the property sold, constitute a sufficient reason for vacating or denying confirmation of the sale.[87] Thus the sale may be vacated for want of proper notice or because made at an improper time,[88] or for misconduct of the officer making it,[89] or because made *en masse*,[90] or to a commissioner or other officer conducting the sale,[91] or because of devices to suppress bidding,[92] or the sale was made contrary to the terms of the decree.[93] A sale may be set aside because of any fraud practised on a party and operating to his prejudice.[94] We have elsewhere said, "the grounds upon which a motion to vacate a sale may properly be granted are so various as to defy complete enumeration."[95] We apprehend that the only ground which here needs special consideration is that of the inadequacy of the price realized at the sale. There are many judicial declarations that judicial sales will not be vacated for mere inadequacy of price.[96] Strictly speaking, there is no sale, but only a proposal or offer for one, until it is confirmed, and the majority of courts will refuse to confirm a sale as against the objections of parties whose property must be divested thereby, if the price realized is seriously and undoubtedly inadequate,[97] and when an advance bid of ten per cent or more has

87. See *supra*, III, O, 5, c.

The form in which the objection or exception is made is not material, provided it discloses to the court who is the objector and what is the ground of his objection. Thus, it may be in the form of a telegram addressed to, and filed by, the clerk of the court (Compton *v.* McCaffree, 220 Ill. 137, 77 N. E. 129), and may be interposed by, or on behalf of, an infant (Kiebel *v.* Leick, 216 Ill. 474, 75 N. E. 187).

88. Freeman Ex. §§ 287, 308; Thomason *v.* Craighead, 32 Ark. 391; White *v.* Jones, 67 Tex. 638, 4 S. W. 161.

89. Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682; Conover *v.* Walling, 15 N. J. Eq. 173.

90. Freeman Ex. § 296. But not if it clearly appears that this mode of sale was proper and did not operate to the injury of any one. Ward *v.* Ward, 174 Ill. 432, 51 N. E. 806.

Waiver.—Any party in interest knowing any fact entitling him to avoid a sale may elect not to do so, and his election may become irrevocable. Cuyler *v.* Wayne, 64 Ga. 78; Gruenewald *v.* Neu, 215 Ill. 132, 74 N. E. 101; Noble *v.* Cromwell, 3 Abb. Dec. (N. Y.) 382, 27 How. Pr. 289 [*affirming* 26 Barb. 475, 6 Abb. Pr. 59]; Foster *v.* Roche, 2 Silv. Sup. (N. Y.) 197, 5 N. Y. Suppl. 605; Parisen *v.* Parisen, 1 Thomps. & C. (N. Y.) 642, 46 How. Pr. 385; Baggott *v.* Sawyer, 25 S. C. 405; Finney *v.* Edwards, 75 Va. 44. As where all the parties ask that the sheriff may deed to each party as his portion the lands bid in by him, and the deeds are accordingly made and for years acquiesced in. Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465.

91. Howery *v.* Helms, 20 Gratt. (Va.) 1.

92. Freeman Ex. § 297; Coffey *v.* Coffey, 16 Ill. 141, asserting a claim to the property and threatening litigation.

Absence of injury.— When it clearly appears, or must be presumed, that the matter complained of cannot have operated prejudicially, the sale will not be set aside because of it. Harlan *v.* Stout, 22 Ind. 488; Wise *v.* Wolf, 120 Ky. 263, 85 S. W. 1191, 27 Ky. L. Rep. 610; Hopper *v.* Hopper, 79 Md. 400, 29 Atl. 611.

93. Blue *v.* Blue, 79 N. C. 69.

94. Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361. As where the suit was commenced in his name by an attorney without his authority or knowledge. Hurste *v.* Hotaling, 20 Nebr. 178, 29 N. W. 299.

Excess in the amount sold.— Where it appeared that the tract contained twenty acres more than both parties supposed, the court ordered the sale set aside unless the purchaser would pay for such surplus. Horn *v.* Denton, 2 Sneed (Tenn.) 125.

Increase of estate sold.— Where the estate sold was in remainder after a life-estate and the purchaser evaded the payment of his bid until after the death of the life-tenant, the sale was set aside. Billingslea *v.* Baldwin, 23 Md. 85.

Disposition of purchase-money.— The disposition of the purchase-money must ultimately be determined by the court. Hence the confirmation of the sale cannot be successfully resisted because of any action taken by the commissioners in misapplying such money to the discharge of liens. Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245.

95. Freeman Ex. § 308, to which the reader is referred, as the grounds there considered are generally, if not universally, applicable to sales in partition.

96. Freeman Ex. § 309; Simon *v.* Simon, 1 Miles (Pa.) 404; Carver *v.* Spence, 67 Vt. 563, 32 Atl. 493.

The inadequacy must in all cases be at least satisfactorily established, which, in the absence of an advance bid, may be difficult. Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83.

Negligence or inattention.— The sale will not be set aside merely to protect a party from the consequence of his negligence and inattention. Abbott *v.* Beebe, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257.

97. Freeman Coten. & P. § 545; Matter of Bost, 56 N. C. 482.

been offered, or it satisfactorily appears that such a bid can be obtained, if a resale is ordered.[98] It is true that in some jurisdictions a mere offer of an advance bid, standing alone, does not justify the vacating of a sale.[99] But generally extreme inadequacy of itself entitles the parties prejudiced thereby to resist the confirmation of a sale.[1] This is sometimes put upon the ground that such inadequacy of itself is sufficient evidence of fraud or misconduct.[2] In the majority of the cases in which the confirmation of a sale is resisted on account of alleged inadequacy of price, the parties are able to point to some irregularity in the proceedings, or some accident or other cause preventing a fair attendance at the sale, or otherwise probably diminishing by the bidding, and, where such is the case, any considerable inadequacy will result in an order for a resale rather than a confirmation.[3] If a resale is ordered and a second sale made, the court will not vacate that sale when the inadequacy does not exceed fifteen per cent.[4] The burden of proof must always be assumed by the person seeking to vacate the sale for partition purposes or seeking to have its confirmation refused,[5] and where the ground for vacation or for refusal of confirmation is inadequacy of price the courts will generally sustain the report of the commissioners unless a very clear or extreme case is made

98. Trull *v.* Rice, 92 N. C. 572; Glenn *v.* Glenn, 7 Heisk. (Tenn.) 367. Although the offer of an advance bid is, when made, conditional, it is sufficient if made absolute before the court orders the sale set aside. Kiebel *v.* Leick, 216 Ill. 474, 75 N. E. 187. The offer of an advance bid is the best evidence that the price theretofore bid was inadequate. Cockrill *v.* Coleman, 55 Ala. 583. As to evidence admissible as tending to prove inadequacy (see Ladd *v.* Ladd, 127 Ala. 573, 29 So. 14; Rowland *v.* Munck, 15 App. Cas. (D. C.) 403), or to show other cause for vacating a sale (see Goode *v.* Crow, 51 Mo. 212).

99. Abbott *v.* Beebe, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257; Compton *v.* McCaffree, 220 Ill. 137, 77 N. E. 129; Columbia Finance, etc., Co. *v.* Bates, 74 S. W. 248, 24 Ky. L. Rep. 2412; Allen *v.* Martin, 61 Miss. 78.

An offer of an advance bid of five hundred dollars when the property was sold originally for nine thousand five hundred dollars is properly denied, although real estate agents testify it is worth from eleven thousand dollars to sixteen thousand five hundred dollars. Bethea *v.* Bethea, 136 Ala. 584, 34 So. 28.

The bid may be declined if no money is tendered in court, nor any obligation to secure payment. De Ford *v.* Taylor, (Tenn. Ch. App. 1898) 51 S. W. 999.

1. *Illinois.*— Barnes *v.* Henshaw, 226 Ill. 605, 80 N. E. 1076; Abbott *v.* Beebe, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257; Heberer *v.* Heberer, 67 Ill. 253.

Iowa.— Loyd *v.* Loyd, 61 Iowa 243, 16 N. W. 117.

Minnesota.— Johnson *v.* Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529; Johnson *v.* Avery, 56 Minn. 12, 57 N. W. 217.

Mississippi.— Kirkland *v.* Texas Express Co., 57 Miss. 316.

Missouri.— Goode *v.* Crow, 51 Mo. 212.

Pennsylvania.— Tripp *v.* Silkman, 29 Leg. Int. 29, 1 Luz. Leg. Reg. 175; Allen's Estate, 11 Phila. 48.

Tennessee.—Donaldson *v.* Young, 7 Humphr. 266.

See 38 Cent. Dig. tit. "Partition," § 362 *et seq.*

2. Freeman Ex. § 309.

The inadequacy must relate to the time of the sale.— It has been held that it is not material that the property sold for partition purposes was worth more at a date anterior to that of the sale. Dunn *v.* Dunn, 137 Cal. 51, 69 Pac. 847.

3. *Kentucky.*— Lipp *v.* Allphin, 77 S. W. 1105, 25 Ky. L. Rep. 1382; Columbia Finance, etc., Co. *v.* Bates, 74 S. W. 248, 24 Ky. L. Rep. 2412; Ingram *v.* Wilson, 44 S. W. 420, 19 Ky. L. Rep. 1797.

Mississippi.— Kirkland *v.* Texas Express Co., 57 Miss. 316.

Missouri.— Wauchope *v.* McCormick, 158 Mo. 660, 59 S. W. 970.

New Jersey.— Conover *v.* Walling, 15 N. J. Eq. 167.

Wisconsin.— Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

See 38 Cent. Dig. tit. "Partition," § 362 *et seq.*; and Freeman Ex. § 309.

For insufficient grounds see Allen *v.* Martin, 61 Miss. 78. A mere irregularity not prejudicial to a party does not require the vacating of the sale, no inadequacy being shown. Dineen *v.* Hall, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392, 23 Ky. L. Rep. 1615; Johnson *v.* Barkley, 47 La. Ann. 98, 16 So. 659; Covas *v.* Bertoulin, 44 La. Ann. 683, 11 So. 143; Peyroux *v.* Peyroux, 24 La. Ann. 175; Gernon *v.* Bestick, 15 La. Ann. 697.

4. Collins *v.* Wood, 88 Tenn. 779, 14 S. W. 221.

Infants.— Because of their presumed inability to understand and protect their own interests, courts are inclined to set aside sales of property in which infants are interested. Allen *v.* Martin, 61 Miss. 78; Bell *v.* Fulmer, 1 Phila. (Pa.) 42.

5. Van Buskirk *v.* Stover, 162 Ind. 448, 70 N. E. 520; Sonn *v.* Kennedy, 51 Misc. (N. Y.) 234, 100 N. Y. Suppl. 885.

out, from which there can be no doubt that, although the case has been regular, it is inequitable to carry it into effect.[5a]

b. By the Purchaser. The purchaser may also move to vacate the sale, or may resist its confirmation, but obviously upon grounds somewhat different from those available to the parties. The grounds available to him must relate to some misapprehension or misconduct at or connected with the sale, whereby he was induced to make a bid which otherwise he would not have made,[6] or to some defect in the proceedings, the result of which is that he cannot obtain the title sought to be affected by the partition,[7] or that some delay or other intervening cause

5a. Mead *v.* Mead, 101 S. W. 330, 31 Ky. L. Rep. 70; Lang *v.* Constance, 46 S. W. 693, 20 Ky. L. Rep. 502; Chamberlain *v.* Ballinger, 13 S. W. 429, 11 Ky. L. Rep. 966; Aldrich *v.* Aldrich, 75 S. C. 369, 55 S. E. 887, 117 Am. St. Rep. 909.

6. Fitzgerald *v.* Fitzgerald, 7 D. C. 240; Brillhart *v.* Mish, 99 Md. 447, 58 Atl. 28. But if a purchaser knows of a device employed against him, as for instance puffing, and allows the sale to be confirmed without objection, his right to seek a release from his bid is gone. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

7. *Louisiana.*— MacRae *v.* Smith, 112 La. 715, 36 So. 659; Abraham *v.* Lob, 35 La. Ann. 377.

Maryland.— Earle *v.* Turton, 26 Md. 23.

New York.— Monarque *v.* Monarque, 80 N. Y. 320, 8 Abb. N. Cas. 102; Jordan *v.* Poillon, 77 N. Y. 518; Sandford *v.* White, 56 N. Y. 359, 47 How. Pr. 96 [*affirming* 1 Thomps. & C. 647, 46 How. Pr. 205]; Harris *v.* Larkins, 22 Hun 488; *In re* Cavanaugh, 37 Barb. 22, 14 Abb. Pr. 258, 23 How. Pr. 358; Waring *v.* Waring, 7 Abb. Pr. 472; Hall *v.* Partridge, 10 How. Pr. 188; Spring *v.* Sandford, 7 Paige 550.

North Carolina.— Smith *v.* Brittain, 38 N. C. 347, 42 Am. Dec. 175.

England.— Powell *v.* Powell, 31 L. T. Rep. N. S. 467, 23 Wkly. Rep. 70. But if all the parties are before the court and can make title independently of the partition act, the purchaser must accept it. Rawlinson *v.* Miller, 1 Ch. D. 52, 46 L. J. Ch. 252.

See 38 Cent. Dig. tit. "Partition," § 362 *et seq.*

Where a necessary party is omitted.— Harlan *v.* Stout, 22 Ind. 488; Handy *v.* Waxter, 75 Md. 517, 23 Atl. 1035; Toole *v.* Toole, 112 N. Y. 333, 19 N. E. 682, 8 Am. St. Rep. 750, 2 L. R. A. 465; Kopp *v.* Kopp, 48 Hun (N. Y.) 532, 1 N. Y. Suppl. 261; Bernhardt *v.* Kurz, 38 N. Y. Suppl. 103, 2 N. Y. Annot. Cas. 112.

Where the property is not subject to partition.— Dineen *v.* Hall, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392, 23 Ky. L. Rep. 1615.

Where one named as a party was not so served with process as to give the court jurisdiction. Bowler *v.* Ennis, 46 N. Y. App. Div. 309, 61 N. Y. Suppl. 686.

Doubtful proceedings.— If the result of the proceedings taken is that whether they are sufficient to transfer the title remains in serious doubt, the purchaser will not be compelled to take the title and pay his bid. Monarque *v.* Monarque, 80 N. Y. 320, 8 Abb. N. Cas. 102; O'Toole *v.* O'Toole, 39 N. Y. App. Div. 302, 56 N. Y. Suppl. 963; Recor *v.* Blackburn, 71 Hun (N. Y.) 54, 24 N. Y. Suppl. 692; McKenna *v.* Duffy, 64 Hun (N. Y.) 597, 19 N. Y. Suppl. 248, 22 N. Y. Civ. Proc. 366; Kopp *v.* Kopp, 48 Hun (N. Y.) 532, 1 N. Y. Suppl. 261; *In re* Cavanaugh, 37 Barb. (N. Y.) 22. But a mere possibility does not raise a doubt so serious as to relieve the purchaser. Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. 907; Ferry *v.* Sampson, 112 N. Y. 415, 20 N. E. 387; Goodwin *v.* Crooks, 58 N. Y. App. Div. 464, 69 N. Y. Suppl. 578 [*affirming* 33 Misc. 39, 68 N. Y. Suppl. 219]; McNulty *v.* Mitchell, 41 Misc. (N. Y.) 293, 84 N. Y. Suppl. 89.

Defects constituting or creating a cloud on the title were said to entitle the purchaser to be released from his bid. Gassen *v.* Palfrey, 9 La. Ann. 560. But if the claimant of an adverse interest is made a party and served with process, his claim can no longer constitute a cloud. Dresser *v.* Travis, 177 N. Y. 376, 69 N. E. 736.

If anything remains to be done to completely divest the title, the purchaser may insist that it be done, and it has been held that he may be released from his bid if such thing is not done. Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472.

If the property is that of a decedent, the purchaser has the right to withdraw from the sale unless such proceedings are taken as insure him from the loss of the property by its being taken to pay the debts of the decedent. Disbrow *v.* Folger, 5 Abb. Pr. (N. Y.) 53; Spring *v.* Sandford, 7 Paige (N. Y.) 550. But there must appear to be some reason for fearing that the property may be required to discharge the debts of the decedent. Goodwin *v.* Crooks, 58 N. Y. App. Div. 464, 69 N. Y. Suppl. 578; Bogert *v.* Bogert, 45 Barb. (N. Y.) 121.

If a decree of sale is subject to impeachment by infants when they come of age, for want of proof of some fact the purchaser need not accept the title (Earle *v.* Turton, 26 Md. 23), or because a guardian *ad litem* had not been appointed (Crouter *v.* Crouter, 133 N. Y. 55, 30 N. E. 726 [*affirming* 17 N. Y. Suppl. 758]). But a mere irregularity in appointing as a guardian *ad litem* a person connected in business with the attorneys of the life-tenants does not avoid the sale. Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298.

equitably requires him to be released from his bid,[8] but the delay necessarily resulting from the filing of exceptions and the time required to hear and determine them does not entitle the purchaser to a release.[9] If the proceedings are adequate to transfer title to the purchaser, irregularities which do not impair his title cannot entitle him to a release from his bid.[10] Nor can he successfully complain of matters known to him at the time of his purchase and which thereby he must be deemed to have waived,[11] or which could remain unknown to him only through his extreme negligence or inattention to his business.[12] On the setting aside of a sale at the instance of the purchaser, he must be allowed all moneys paid by him on account thereof, to which, in England, must be added interest thereon from the time it was advanced until it is restored to him, and his costs.[13] The failure of title in whole or in part, or the existence of encumbrances held by persons not parties to the suit, constitutes one of the most familiar grounds upon which to resist the confirmation of a sale, or to move that the sale be set aside. Of course, if the bid was made in ignorance of the true title and the making of it resulted from any misrepresentation of the parties or of the officer making the sale, we apprehend that no court of equity would hesitate to refuse confirmation.[14] There is no doubt generally speaking that there is no warranty, and that the rule of *caveat emptor* applies at execution and judicial sales, including those made in partition,[15] and there are general expressions in the opinions indicating that it may control, and result in the denial of, requests that such sales be set aside or denied confirmation. "The better opinion is, that the rule of *caveat emptor* will not be applied in chancery sales while the court retains control of the proceedings; and that the purchaser will be released, and any payments made by him and remaining within the control of the court will be returned if the condition of the title is such that he would not be required to accept it were the contract between him and a private individual. The court is the vendor, and will not enforce a contract in its own favor of which it would refuse to decree the execution if the vendor were a private person."[16] This rule applies not only where there is a

Mere irregularities, however, do not render the proceedings void and hence do not entitle the purchaser to be released from his bid. Dunning *v.* Dunning, 37 Ill. 306; Brackenridge *v.* Dawson, 7 Ind. 383; Bell *v.* Smith, 71 S. W. 433, 24 Ky. L. Rep. 1328; Friddle *v.* Kohn, 20 S. W. 274, 14 Ky. L. Rep. 312; Southwick *v.* Greuzenbach, 13 S. W. 918, 12 Ky. L. Rep. 263; Martinez *v.* Wall, 107 La. 737, 31 So. 1023; Young's Succession, 23 La. Ann. 386; Dennerlein *v.* Dennerlein, 111 N. Y. 518, 19 N. E. 85; Reed *v.* Reed, 107 N. Y. 545, 14 N. E. 442; Woodhull *v.* Little, 102 N. Y. 165, 6 N. E. 266; Rogers *v.* McLean, 34 N. Y. 536, 31 How. Pr. 279; Croghan *v.* Livingston, 17 N. Y. 218; Mead *v.* Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Noble *v.* Cromwell, 3 Abb. Dec. (N. Y.) 382, 27 How. Pr. 289 [*affirming* 26 Barb. 475, 16 Abb. Pr. 59]; Rockwell *v.* Decker, 33 Hun (N. Y.) 343; Herbert *v.* Smith, 6 Lans. (N. Y.) 493; Blackwell *v.* McLean, 9 Wash. 301, 37 Pac. 317.

Mistake at the time of bidding as to the dimensions of the property or some other fact materially affecting the value may induce the court to release the purchaser. Fairchild *v.* Fairchild, 59 How. Pr. (N. Y.) 351.

8. Rice *v.* Barrett, 99 N. Y. 403, 2 N. E. 43; Jackson *v.* Edwards, 22 Wend. (N. Y.) 498 [*affirming* 7 Paige 386].

9. Black *v.* Black, 10 Del. Co. (Pa.) 21.

10. Murdock *v.* Loeser, 87 S. W. 808, 27 Ky. L. Rep. 1057; Young *v.* Cade, 50 La. Ann. 12, 23 So. 506. Apparently *contra*, O'Toole *v.* O'Toole, 39 N. Y. App. Div. 302, 56 N. Y. Suppl. 963.

11. Bethea *v.* Bethea, 136 Ala. 584, 34 So. 28; Brackenridge *v.* Dawson, 7 Ind. 383.

12. Dennerlein *v.* Dennerlein, 111 N. Y. 518, 19 N. E. 85.

13. Powell *v.* Powell, L. R. 19 Eq. 422, 44 L. J. Ch. 311, 32 L. T. Rep. N. S. 148, 28 Wkly. Rep. 482.

14. Freeman Ex. § 304*i*.

15. Freeman Ex. § 304*k*; Stephens *v.* Ells, 65 Mo. 456; Cashion *v.* Faina, 47 Mo. 133; Schwartz *v.* Dryden, 25 Mo. 572; Owsley *v.* Smith, 14 Mo. 153; McMichael *v.* McMichael, 51 S. C. 555, 29 S. E. 403; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714; Rogers *v.* Horn, 6 Rich. (S. C.) 361; Evans *v.* Dendy, 2 Speers (S. C.) 9, 42 Am. Dec. 356; Fuller *v.* Fowler, 1 Bailey (S. C.) 75; Equity Com'rs *v.* Thompson, 4 McCord (S. C.) 434; Buetell *v.* Courand, 9 Tex. Civ. App. 564, 29 S. W. 1146.

If the doubt is one involved in the issues in the case and determined by the judgment, it is thereby extinguished, or set at rest, and the sale cannot be attacked because of it. Sebring *v.* Mersereau, 9 Cow. (N. Y.) 344.

16. Freeman Ex. § 304*k*; Wanser *v.* De Nyse, 188 N. Y. 378, 80 N. E. 1088, 117 Am. St. Rep. 871; Shriver *v.* Shriver, 86 N. Y.

complete failure of title, but also when it is partial and when the property is in a condition making it less valuable, as where it is subject to an adverse claim or is adversely possessed,[17] or the purchaser bids under a mistake as to its identity,[18] or is subject to some servitude diminishing its value,[19] or is of less area than was supposed at the time of the sale, or is subject to encumbrance not removed thereby,[20] the purchaser is entitled to be released or to a diminution in the purchase-price. If of two lots purchased, the title to one is unmarketable, the purchaser cannot be compelled to take the other if both are necessary to the use for which he designed them.[21] If the condition of the title or the existence of a servitude, or a deficiency in the area, is known to the purchaser at the time of the sale, it will be presumed to have been irrevocably waived by him,[22] and his knowledge may sometimes be presumed from the general notoriety of the fact or its being obvious to any one examining or giving any attention to the property.[23] The confirmation of the sale is in effect an adjudication that the purchaser ought to comply with his bid. Hence any action, motion, or defense thereafter sought to be maintained on the ground of failure of title or any other ground which was presented, or ought to have been presented, in opposition to the confirmation should fail because the question is *res judicata*.[24]

c. Because the Sale Was Made to, or in the Interest of, One Not Entitled to Bid. This cause is rarely, if ever, asserted by the purchaser. Nevertheless, if he should, through an error of law, become the purchaser at the sale, we see no reason why he may not withdraw therefrom by making his disqualification known to the court. In the event of his doing so, and the parties in interest seeking to hold him as purchaser, and the court refusing to release him, his disqualification would doubtless be waived, and the parties would become estopped from subsequently urging it.[25] The parties, other than the purchaser, may always resist the confirmation of the sale on the ground that it was made to or in the interest of the officer conducting it, or of any other person whom the law or public policy forbids acquiring title thereby.[26] But a party entitled to object to a sale on the ground here under consideration cannot retain the benefits of it for a considerable time, knowing of the ground for objection, and afterward avoid it.[27]

575; Jordan *v.* Poillon, 77 N. Y. 518; Blakeley *v.* Calder, 15 N. Y. 617 [*affirming* 13 How. Pr. 476]; Ouvrier *v.* Mahon, 117 N. Y. App. Div. 749, 102 N. Y. Suppl. 981; Darrow *v.* Horton, 6 N. Y. St. 718; Bolivar *v.* Zeigler, 9 S. C. 287.

17. Herring *v.* Berrian, 55 N. Y. Super. Ct. 110, 8 N. Y. St. 124; Ferry *v.* Sampson, 1 N. Y. Suppl. 872; McGown *v.* Wilkins, 1 Paige (N. Y.) 120.

18. Vingut *v.* Vingut, 17 N. Y. Suppl. 159.

19. Conlen *v.* Rizer, 109 N. Y. App. Div. 537, 96 N. Y. Suppl. 566; Darrow *v.* Horton, 6 N. Y. St. 718.

20. Metzger *v.* Martin, 87 N. Y. App. Div. 572, 84 N. Y. Suppl. 494 [*affirmed* in 177 N. Y. 561, 69 N. E. 1126]; Mead *v.* Mead, 1 Silv. Sup. (N. Y.) 368, 5 N. Y. Suppl. 302.

21. Shriver *v.* Shriver, 86 N. Y. 575.

22. Cromwell *v.* Hull, 97 N. Y. 209; Hubbard *v.* Housley, 43 N. Y. App. Div. 129, 59 N. Y. Suppl. 392 [*affirmed* in 160 N. Y. 688, 55 N. E. 1096, and *affirming* 27 Misc. 276, 58 N. Y. Suppl. 432]; Koepke *v.* Bradley, 3 N. Y. App. Div. 391, 38 N. Y. Suppl. 707 [*affirmed* in 151 N. Y. 622, 45 N. E. 1132].

23. Metzger *v.* Martin, 87 N. Y. App. Div. 572, 84 N. Y. Suppl. 494 [*affirmed* in 177 N. Y. 561, 69 N. E. 1126]; Oakley *v.* Briggs, 17 N. Y. Suppl. 751.

24. *Kentucky.*— Lampton *v.* Usher, 7 B. Mon. 57.

New York.— Kirk *v.* Kirk, 137 N. Y. 510, 33 N. E. 552 [*affirming* 12 N. Y. Suppl. 326].

North Carolina.— Overman *v.* Tate, 114 N. C. 571, 19 S. E. 706.

Pennsylvania.— Landreth *v.* Howell, 24 Pa. Super. Ct. 210; Scheible's Estate, 5 Pa. Co. Ct. 601.

South Carolina.— Smith *v.* Winn, 38 S. C. 188, 17 S. E. 717, 751; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714; Thompson *v.* Wofford, 13 S. C. 216.

See 38 Cent. Dig. tit. "Partition," § 362 *et seq.*

25. Larrabee *v.* Larrabee, 71 S. W. 645, 24 Ky. L. Rep. 1423.

26. Freeman Ex. § 292; Le Fevre *v.* Laraway, 22 Barb. (N. Y.) 167; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361; Jackson *v.* Woolsey, 11 Johns. (N. Y.) 446; Bohart *v.* Atkinson, 14 Ohio 228; Armstrong *v.* Huston, 8 Ohio 552; Howery *v.* Helms, 20 Gratt. (Va.) 1.

27. Johnstone *v.* O'Connor, 21 N. Y. App. Div. 77, 47 N. Y. Suppl. 425 [*affirmed* in 162 N. Y. 639, 57 N. E. 1113].

8. Proceedings to Collect the Bid — a. Making the Proper Entry of the Bid. There is doubt whether a judicial sale is within the statute of frauds.[28] Therefore, the first step toward collecting the bid is either to require it to be made in writing signed by the bidder, or to make such a memorandum as will satisfy the statute of frauds.

b. Taking Security. Formerly, and to some extent at present, statutes relating to partition permitted or required persons making partition sales to take security for the fulfilment of the bid.[29] Where statutes of this character exist, the next step after making a proper memorandum of the sale is to exact the security authorized by the statute. If by agreement between all interested, some of the heirs take part of the land after an appraisement and others do not, and so much is left that it is supposed that on final settlement all will get equal value, but, owing to a decline in the real estate before the sale, such proves not to be the case, interest cannot be recovered on the recognizances, none having been expressly stipulated for therein.[30] The statute requiring the execution of a refunding bond before judgment against a defendant constructively served does not apply to proceedings in partition.[31]

c. Obtaining Confirmation. Payment of the bid made at a judicial sale does not become due until it is confirmed.[32] Prior to that time the sale in contemplation of law has not been made. Therefore such confirmation is indispensable to sustain proceedings to compel the payment of the bid or to authorize the execution of a conveyance to the purchaser.[33] In the absence of any objection, the sale will be confirmed.[34] Although no formal order is entered, confirmation may sufficiently appear from the whole record.[35] Confirmation will be refused only with a just regard to the rights of all concerned,[36] and for some substantial reason, involving either a whole or partial failure of title, because the requisite parties

28. Freeman Ex. § 299; Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Bozza *v.* Rowe, 30 Ill. 198, 83 Am. Dec. 184.

29. *Kentucky.*— Stump *v.* Martin, 9 Bush 285; Worthington *v.* Crabtree, 1 Metc. 478.

Maryland.— Stem *v.* Cox, 16 Md. 533.

New York.— Fisher *v.* Hersey, 85 N. Y. 633.

Ohio.— Preston *v.* Compton, 30 Ohio St. 299; Swihart *v.* Swihart, 7 Ohio Cir. Ct. 338, 4 Ohio Cir. Dec. 624.

Pennsylvania.— Snively's Appeal, 129 Pa. St. 250, 18 Atl. 124; Leibert's Appeal, 119 Pa. St. 517, 13 Atl. 461; Holman's Appeal, 106 Pa. St. 502; Bailey *v.* Com., 41 Pa. St. 473; Riddle's Appeal, 37 Pa. St. 177; Custer *v.* Com., 25 Pa. St. 375; Hartman's Appeal, 21 Pa. St. 488; Kidd *v.* Com., 16 Pa. St. 426; Ebbs *v.* Com., 11 Pa. St. 374; Com. *v.* Haffey, 6 Pa. St. 348; Carter *v.* Com., 1 Grant 216; Com. *v.* Lightner, 9 Watts & S. 117; Shelly *v.* Shelly, 8 Watts & S. 153; Mentzer *v.* Menor, 8 Watts 296; Good *v.* Dood, 7 Watts 195; Kean *v.* Franklin, 5 Serg. & R. 147; Gabler's Appeal, 3 Pa. Cas. 450, 6 Atl. 449; Oviatt's Estate, 3 Pa. Dist. 620; Guido's Estate, 10 Kulp 150.

South Carolina.—Griffin *v.* Addison, 3 S. C. 105.

See 38 Cent. Dig. tit. "Partition," § 351.

30. Meyers' Estate, 179 Pa. St. 157, 36 Atl. 239. As to enforcing a mortgage taken without direction from the court see Burhans *v.* Beam, 37 N. J. Eq. 593.

31. Hogue *v.* Yeager, 107 Ky. 582, 54 S. W. 961, 21 Ky. L. Rep. 1299.

32. *Alabama.*—Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297.

Illinois.— Hart *v.* Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371.

Iowa.— Loyd *v.* Loyd, 61 Iowa 243, 16 N. W. 117.

North Carolina.—Miller *v.* Feezor, 82 N. C. 192.

Pennsylvania.— *In re* Hamilton, 51 Pa. St. 58.

Tennessee.— Walker *v.* Walker, 4 Coldw. 300.

See 38 Cent. Dig. tit. "Partition," § 353 *et seq.*

33. Freeman Ex. § 304*a*; Stout *v.* McPheeters, 84 Ind. 585; Clark *v.* Sires, 193 Mo. 502, 92 S. W. 224; Burden *v.* Taylor, 124 Mo. 12, 27 S. W. 349.

34. Cates *v.* Johnson, 109 Ala. 126, 19 So. 416. Even though there is some wrongful act or omission for which the person guilty thereof may be liable to suit or damages. Prior *v.* Prior, 49 Hun (N. Y.) 502, 2 N. Y. Suppl. 523, 15 N. Y. Civ. Proc. 436.

35. Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913; Hess *v.* Voss, 52 Ill. 472; Redus *v.* Hayden, 43 Miss. 614.

36. Dunn *v.* Dunn, 137 Cal. 51, 69 Pac. 847.

Discretion of court.— Whether a sale shall be confirmed or rejected is said to rest largely in the discretion of the court. Pomeroy *v.* Allen, 60 Mo. 530; Moran *v.* Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66.

Confirmation by act of the parties when

were not brought before the court, or title was not vested in them, or because of some unfairness on account of which the confirmation must operate inequitably, but not for mere irregularity of proceeding, nor because of any defect which may yet be remedied before the final judgment is entered.[37]

9. The Effect of Confirmation — a. As Res Judicata. Upon principle, an order confirming a judicial sale must be regarded as a judicial affirmance that no reason exists why it should not be carried out, and therefore, as a final adjudication binding alike on the purchaser and all the parties in interest within the jurisdiction of the court, estopping the former from refusing to pay his bid and otherwise carry out the terms of the sale as confirmed, and the latter from resisting such further steps as may remain to be taken to vest him with the title.[38] To this rule, as we shall hereafter show, an exception exists, where the proceeding is strictly speaking in chancery and application is there made for relief. The confirmation of the sale, although the officer making it reports that he has paid the purchase-price to those entitled thereto, does not establish such payment, for this is not one of the issues involved in the proceeding for confirmation.[39]

b. Upon Further Motions to Set Aside and Upon Suits in Equity For Relief. "The court of chancery seems to have proceeded upon the principle that the parties and the purchaser, having been brought within its jurisdiction, remained and were subject to such orders as it saw proper to make, though after a great lapse of time. The sale may have been confirmed, the money paid, and the property conveyed to the purchaser. Nevertheless, a petition may be filed suggesting some fraud, mistake, misapprehension, surprise, or other adequate ground for equitable relief; the purchaser brought before the court by some appropriate notice; and, if the facts asserted in the petition are established by evidence satisfactory to the court, the sale may be vacated."[40] This practice, if it prevails at all in the United States, does so to a very limited extent. Grounds for avoiding the sale must be urged before confirmation,[41] unless circumstances exist warranting an independent suit in equity for relief,[42] in which case relief can be secured by such a suit.[43] If, however, there was no authority for the sale, as where the court had not acquired

not made out see Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850.

37. Wise *v.* Wolf, 120 Ky. 263, 85 S. W. 1191, 27 Ky. L. Rep. 610; Donahoe *v.* Fackler, 8 W. Va. 249.

38. *Alabama.*—Kellam *v.* Richards, 56 Ala. 238.

Arkansas.— State Nat. Bank *v.* Neel, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185.

California.— Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Kentucky.— Kincaid *v.* Tutt, 88 Ky. 392, 11 S. W. 297, 10 Ky. L. Rep. 1006; Dawson *v.* Litsey, 10 Bush 408; Todd *v.* Dowd, 1 Metc. 281.

Louisiana.— Ventress *v.* Brown, 30 La. Ann. 1012.

Maryland.— Brown *v.* Gilmor, 8 Md. 322; Brown *v.* Wallace, 4 Gill & J. 479.

Nebraska.— Watson *v.* Tromble, 33 Nebr. 450, 50 N. W. 331, 29 Am. St. Rep. 492.

Virginia.— Allison *v.* Allison, 88 Va. 328, 13 S. E. 549; Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431; Thomas *v.* Davidson, 76 Va. 338; Berlin *v.* Melhorn, 75 Va. 639.

United States.— Boyle *v.* Boyle, 114 Fed. 517.

See 38 Cent. Dig. tit. "Partition," § 353 *et seq.*; and Freeman Ex. § 304*l*.

39. Messervey *v.* Barelli, Riley Eq. (S. C.) 138, 2 Hill Eq. 567.

40. Freeman Ex. § 304*l*; Patterson *v.* Preston, 51 Md. 190.

Usually the confirmation of the sale and the execution of a conveyance pursuant thereto exhaust the jurisdiction of the court, so that its subsequent order of resale and all sales made thereunder are void. Gulf Coast Canning Co. *v.* Foster, (Miss. 1895) 17 So. 683.

41. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

In the case of a mistake as to boundary, the sale may be set aside and the mistake corrected in Kentucky by an amended petition. Johnson *v.* Johnson, 88 Ky. 275, 11 S. W. 5, 10 Ky. L. Rep. 860.

42. Young *v.* Shumate, 3 Sneed (Tenn.) 369; Young *v.* Thompson, 2 Coldw. (Tenn.) 596.

In Pennsylvania decrees of orphans' courts confirming partition are not final until the purchase-money is paid. McRee's Estate, 6 Phila. 75.

43. Schwaman *v.* Truax, 179 N. Y. 35, 71 N. E. 464, 103 Am. St. Rep. 832; Smith *v.* Brittain, 38 N. C. 347, 42 Am. Dec. 175.

Reviewing merits of decree directing sale. —A suit in equity for relief from a partition sale cannot review on the merits the decree directing it. Slingluff *v.* Stanley, 66 Md. 220, 7 Atl. 261.

jurisdiction, or its judgment or order did not include the property sold, or did not authorize any sale at all, the order of confirmation cannot impart any validity to the sale and it may be assailed collaterally, or by motion to vacate it, regardless of the lapse of time.[44] Infants are, in Kentucky, entitled within one year after coming of age to avoid a partition sale on doing equity with respect to the share of the purchase-money received by them.[45]

10. Notice of Proceedings to Confirm or Set Aside. By his bid and its acceptance the purchaser becomes a party to the suit and is placed within the jurisdiction of the court, which may proceed to determine all questions which come before it in the ordinary progress of the cause and bind him by its determination without giving him any further notice, unless when expressly required by statute. He must anticipate that the court will be called upon to confirm or to set aside the sale when the report thereof is made, and he, as well as other parties to the action, is bound by whatsoever action the court may take without being given any special notice of the hearing, or any notice whatever unless the statute requires one to be given.[46]

11. Resale to Charge the Purchaser. If the decree directs the sale to be for cash, the officer making it may demand that payment be then made, and upon the refusal or inability to comply with the demand, may then resell, and the sale may be confirmed to the second bidder.[47] In such a case, however, no proceedings can be taken against the purchaser, for, in contemplation of law, there is no sale until it is confirmed by the court. Where a resale at the risk of the purchaser is sought, it is not necessary to first tender him a conveyance;[48] but the order may be procured by a motion for such resale, notice of which should be served on such purchaser.[49] The purchaser may appear in response to such notice and urge any matter occurring since the confirmation of the sale showing that he ought not to be held answerable.[50] Upon the resale being ordered, the property must then be exposed for sale on the same terms as before, for if the

44. Bethel *v.* Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655; Lamaster *v.* Keeler, 123 U. S. 376, 8 S. Ct. 197, 31 L. ed. 238; Minnesota Co. *v.* St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172.

45. Taylor *v.* Webber, 83 S. W. 567, 26 Ky. L. Rep. 1199.

Miss. Code, § 3118, also provides a method for the relief of cotenants absent from the state when partition was made by an application made within a year after such partition, but this remedy does not extend to partition by sale. Moore *v.* Summerville, 80 Miss. 323, 31 So. 793, 32 So. 294.

46. Wise *v.* Wolf, 120 Ky. 263, 85 S. W. 1191, 27 Ky. L. Rep. 610; Welch *v.* Marks, 39 Minn. 481, 40 N. W. 611; Burden *v.* Taylor, 124 Mo. 12, 27 S. W. 349; Neiman *v.* Early, 28 Mo. 475. *Contra*, That the purchaser must be given notice see Dunning *v.* Dunning, 37 Ill. 306; Louisiana Bank *v.* Delery, 2 La. Ann. 648.

47. Dazet *v.* Landry, 21 Nev. 291, 30 Pac. 1064; Chase *v.* Chase, 15 Abb. N. Cas. (N. Y.) 91.

48. Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297.

49. Freeman Ex. § 313*d*; and the following cases:

Alabama.— Griel *v.* Randolph, 108 Ala. 601, 18 So. 609.

California.— Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Illinois.— Harbison *v.* Timmons, 139 Ill. 167, 28 N. E. 982; Hill *v.* Hill, 58 Ill. 239.

Indiana.— Rout *v.* King, 103 Ind. 555, 3 N. E. 249.

North Carolina.— *Ex p.* White, 82 N. C. 377; Council *v.* Rivers, 65 N. C. 54.

Tennessee.— Chase *v.* Joiner, 88 Tenn. 761, 14 S. W. 331.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

United States.— Stuart *v.* Gay, 127 U. S. 518, 8 S. Ct. 1279, 32 L. ed. 191.

England.— Harding *v.* Harding, 3 Jur. 1164, 9 L. J. Ch. 124, 4 Myl. & C. 514, 18 Eng. Ch. 514, 41 Eng. Reprint 198.

See 38 Cent. Dig. tit. "Partition," § 349.

50. *California.*— Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

New Jersey.—Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636.

New York.— Riggs *v.* Pursell, 74 N. Y. 370.

Pennsylvania.— Connell *v.* Shyrock, 167 Pa. St. 483, 31 Atl. 731; Ramsay *v.* Hersher, 153 Pa. St. 480, 26 Atl. 433.

See 38 Cent. Dig. tit. "Partition," § 349.

An assignee of the purchaser may also become answerable for a deficiency. Archer *v.* Archer, 84 Hun (N. Y.) 297, 32 N. Y. Suppl.

terms are different, there can be no recovery of the deficiency resulting from the resale.[51]

12. Remedies to Compel the Payment of the Bid, or of the Deficiency Resulting From a Resale — a. By Action. If notes, bonds, or other evidences of indebtedness have been given on account of a judicial sale, they may be enforced by actions at law.[52] Even in the absence of the giving of such evidences of indebtedness, the purchaser is personally liable, and an action may be sustained against him in the nature of a suit for specific performance or to recover a judgment for the amount for which he remains liable, whether it be on his original bid, or for the deficiency resulting from a resale.[53] Before any action can be sustained against the purchaser, every proceeding should be taken requisite to putting him in default. Hence a conveyance should be tendered to, and payment of the purchase-money demanded of, him.[54] The action is usually in the name of the officer or officers who made the sale, although it is said to be maintainable by the parties.[55] In several of the states a lien exists for the unpaid portion of the bid at a partition sale. Such lien, whether resting on the statute only, or reserved in some writing expressly providing for it, is generally enforceable by an independent suit.[56]

b. By Summary Proceedings. The remedy more usually resorted to is by summary proceedings in the court under whose order the sale was made, by motion or rule against the purchaser requiring him to show cause why he should not comply with his bid, or pay the amount remaining due after a resale. On the hearing of the motion, the court may require payment to be made, and enforce its order either by execution or by proceedings for contempt.[57]

410 [*affirmed* in 155 N. Y. 415, 50 N. E. 55, 63 Am. St. Rep. 688].

51. Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Setting aside the resale see Fay *v.* Fay, 69 Hun (N. Y.) 149, 23 N. Y. Suppl. 409.

If the purchaser is one of the cotenants, a deficiency developed by a resale may be deducted from his share, but the deposit paid by him at the time of the sale will not be forfeited, although the terms of the sale provided for a forfeiture. Bailey *v.* Dalrymple, 47 N. J. Eq. 81, 19 Atl. 840.

52. Freeman Ex. § 313*f*; Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Blair *v.* Core, 29 W. Va. 477, 2 S. E. 326.

53. Freeman Ex. § 313*f*; and the following cases:

Alabama.—Griel *v.* Randolph, 108 Ala. 601, 18 So. 609.

California.— Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Illinois.— Davies *v.* Gibbs, 174 Ill. 272, 51 N. E. 220.

Louisiana.— Sauton *v.* Sauton, 45 La. Ann. 919, 13 So. 203; Young's Succession, 23 La. Ann. 386; Jennings *v.* Hodges, 16 La. Ann. 321.

Missouri.— Hewitt *v.* Lally, 51 Mo. 93.

Tennessee.— Young *v.* Thompson, 2 Coldw. 596.

See 38 Cent. Dig. tit. "Partition," § 351.

54. *New Jersey.*— Michener *v.* Lloyd, 16 N. J. Eq. 38.

New York.— Latourette *v.* Latourette, 25 N. Y. App. Div. 145, 48 N. Y. Suppl. 1076.

Pennsylvania.—Hore's Estate, 11 Phila. 63.

Rhode Island.— Cowell *v.* Lippitt, 3 R. I. 92.

United States.— Shaw *v.* Shaw, 21 Fed. Cas. No. 12,724, 4 Cranch C. C. 715.

See 38 Cent. Dig. tit. "Partition," § 351.

The tender of a deed was held unnecessary in Swain *v.* Morberly, 17 Ind. 99.

55. Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Wiley *v.* Robert, 27 Mo. 388.

Where the bid is made by one person as the agent of others as to proceedings see Zeigenfuss *v.* Moore, (N. J. Ch. 1905) 60 Atl. 520.

Minor who has become of age.— If among the persons interested in the sale was a minor who appeared by attorney only and has since become of age, the court may take measures to ascertain whether or not such minor will acquiesce in the partition judgment. Fulbright *v.* Cannefox, 30 Mo. 425.

56. *Indiana.*— West *v.* Thornburgh, 6 Blackf. 542.

Maryland.— Ridgely *v.* Iglehart, 3 Bland 540; Iglehart *v.* Armiger, 1 Bland 519.

North Carolina.—Walke *v.* Moody, 65 N. C. 599.

Ohio.— Cameron *v.* Holenshade, 1 Cinc. Super. Ct. 83.

South Carolina.—Daniels *v.* Moses, 12 S. C. 130; Messervey *v.* Barelli, Riley Eq. 138.

Tennessee.— Vaughn *v.* Vaughn, 12 Heisk. 472.

See 38 Cent. Dig. tit. "Partition," § 351.

57. Freeman Ex. § 313*f*; and the following cases:

Arkansas.— Black *v.* Walton, 32 Ark. 321.

California.— Hammond *v.* Cailleaud, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

Louisiana.— Decuir *v.* Decuir, 117 La. 249, 41 So. 563.

c. Defenses to Proceedings to Compel Payment. If the purchaser has been brought before the court on motion or rule to show cause, and after being heard or given an opportunity for a hearing, an order has been made directing a resale on his account, or at his risk, such order must be conceded effect as *res judicata* and must exclude all matters of defense except those arising after its entry, and the want of jurisdiction of the court in directing the sale, and in all other cases must exclude all matters arising anterior to the confirmation and which might have been urged in opposition thereto.[58] In apparent forgetfulness of these principles, the defenses of unsoundness of a slave at the time of the sale,[59] and of a lease of real property executed during the pendency of the suit,[60] have been entertained.

13. Payment, Necessity For, and What Amounts to. There is no doubt that the payment of his bid either in money, or in some mode sanctioned by the order of court, is indispensable to entitle the purchaser to a conveyance or to vest in him any title in the property, equitable or otherwise;[61] but a sale will not be set aside because the payment was not all made at the day fixed therefor if it was afterward consummated when the deed was executed.[62] Both at execution and chancery sales the bid must be paid in money,[63] except when the parties in interest waive that mode of payment,[64] or the statute controlling provides for the giving of credit,[65] or the purchase is by a party entitled to share in the proceeds, in which event he is usually entitled to have his share regarded as paid on account of his bid,[66] but he must pay the residue the same as any other purchaser.[67] The payment is due whether the purchaser gets, or can get, immediate possession. He is presumed to regulate his bidding with a view to the known powers and rules of the court as to delivering possession.[68] An order of court obtained by a purchaser and authorizing him to make payment to a receiver, to be invested in bonds, is void as against parties who had no notice of the proceedings resulting in such order.[69] If, under a statute authorizing a sheriff to take securities for deferred payments, he takes such securities in his own name and receives payment thereof, this does not bind the parties, nor release the purchaser. He remains liable for the unpaid amount of his bid upon the securities executed

Minnesota.— Barron *v.* Mullin, 21 Minn. 374.

Ohio.— Dreshach *v.* Stein, 41 Ohio St. 70; Mechanics' Sav., etc., Loan Assoc. *v.* O'Conner, 29 Ohio St. 651.

Pennsylvania.— Sackett *v.* Twining, 18 Pa. St. 199, 57 Am. Dec. 599; Cooper *v.* Borrall, 10 Pa. St. 491.

Virginia.— Long *v.* Weller, 29 Gratt. 347; Young *v.* McClung, 9 Gratt. 336; Threlkelds *v.* Campbell, 2 Gratt. 198, 44 Am. Dec. 384.

58. See cases cited *supra*, note 57.

The sheriff or other officer making the sale cannot release the purchaser. Stewart *v.* Garvin, 33 Mo. 103.

So it is said that the false and fraudulent representations of one of the cotenants made at the sale to influence a purchaser constitute no defense when not shown to be authorized by the other cotenants. Matlock *v.* Bigbee, 34 Mo. 354.

59. Equity Com'r *v.* Smith, 9 Rich. (S. C.) 515.

60. Winfrey *v.* Work, 75 Mo. 55.

61. Liverman *v.* Lee, 86 Miss. 370, 38 So. 658; Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616; Williams *v.* Davis, 56 Tex. 250.

Payment should be made within the life of the writ commanding the sale. Packard *v.* King, 3 Colo. 211.

62. Yates *v.* Gridley, 16 S. C. 496.

63. Freeman Ex. § 301; Walke *v.* Moody, 65 N. C. 599; Rice *v.* Hunt, 12 Heisk. (Tenn.) 344.

64. Wiggins *v.* Howard, 83 N. Y. 613 [*affirming* 22 Hun 126].

65. Kendall *v.* Briggs, 81 Ky. 119; Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443.

66. Wade *v.* Murray, 35 La. Ann. 546; Bayhi *v.* Bayhi, 35 La. Ann. 527; Hollier *v.* Gonor, 13 La. Ann. 591; Glemser *v.* Glemser, 5 Ohio S. & C. Pl. Dec. 267, 5 Ohio N. P. 170; Bloodgood's Estate, 8 Pa. Co. Ct. 545.

If an officer is directed to take notes for the purchase, without anything being said as to who must be named as payees, the notes should be to the several parties interested. Preston *v.* Compton, 30 Ohio St. 299.

If the order directs the money to be paid to heirs, it is doubtful whether a payment to the administrator will be operative. Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391; Hise *v.* Geiger, 7 Watts & S. (Pa.) 273.

67. People's Bank *v.* David, 49 La. Ann. 136, 21 So. 174.

68. Brown *v.* Wallace, 4 Gill & J. (Md.) 479.

69. Beery *v.* Irick, 22 Gratt. (Va.) 614.

by him.[70] But if a master in chancery forges a portion of the decree and thereby it purports to authorize him to sell notes received in part payment, the parties to the suit are chargeable with notice of such forgery; and if they receive a portion of the money realized by a sale of notes, they are estopped from recovering any balance remaining due thereon which has been received and embezzled by such master.[71]

14. The Conveyance — a. Its Execution. Upon the payment of the purchase-price, and not before, the purchaser becomes entitled to a conveyance.[72] And this right appears to continue indefinitely, no presumption of its abandonment arising from lapse of time.[73] Its execution is indispensable to transmit the legal title;[74] but even prior thereto the purchaser may be regarded as vested with the equitable title, and therefore enabled to defend in ejectment,[75] and to recover under a policy insuring the property against destruction by fire.[76] The conveyance may be executed by the officer or officers who made the sale,[77] and in the event of their death, resignation, or other termination of their office, may be executed by their successor in office,[78] or by such ex-officers.[79] The decree or order of confirmation of sale need not contain any formal direction or authorization to the selling officer to execute the conveyance;[80] and it has been held to be delivered, in contemplation of law, from such confirmation, although he retains manual possession of it.[81]

b. Its Effect. If the court has jurisdiction of the subject-matter and of the parties to the suit, the conveyance must be regarded as their deed and having as great an effect as if executed by all of them personally;[82] and where they represent other persons, such persons, although then unborn, may be regarded as parties to, and bound by, the conveyance.[83] To confer this effect on the conveyance, it must have been authorized under the judgment or order on which it purports to rest. If it purports to convey land or some interest therein, the sale of such land or interest must have been authorized by the court,[84] and confirmed by it after being made.[85] Being in law the conveyance of all the parties, it vests in the grantee the same title and rights as would their conveyance equally comprehensive in terms,[86] in which is necessarily included the right to the possession of the property

70. Preston *v.* Compton, 30 Ohio St. 299; Welsh *v.* Freeman, 21 Ohio St. 402; Bradt *v.* Skillen, 2 Ohio Dec. (Reprint) 727, 5 West. L. Month. 72.

71. Oglesby *v.* Foley, 153 Ill. 19, 38 N. E. 557 [*affirming* 46 Ill. App. 119].

72. Deputy *v.* Mooney, 97 Ind. 463; Swain *v.* Morberly, 17 Ind. 99; Tate *v.* Bush, 62 Miss. 145; Barnes *v.* Morris, 39 N. C. 22.

Payment in Confederate money.—But probably a sale and conveyance are not subject to impeachment on the ground that the payment was in Confederate notes. Tilsen *v.* Haine, 27 La. Ann. 228.

73. Farmer *v.* Daniel, 82 N. C. 152.

74. Freeman Ex. § 324; Stout *v.* McPheeters, 84 Ind. 585; Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

75. Farmer *v.* Daniel, 82 N. C. 152.

76. Gates *v.* Smith, 4 Edw. (N. Y.) 702.

77. Young *v.* Teague, Bailey Eq. (S. C.) 13.

78. Gallitzin Bldg., etc., Assoc. *v.* Steigers, 28 Pa. Super. Ct. 336.

79. Freeman Ex. § 327; Fortune *v.* Fife, 105 Mo. 433, 16 S. W. 687.

80. Latta *v.* Vickers, 82 N. C. 501.

81. Cocks *v.* Simmons, 57 Miss. 183.

82. *Illinois.*— Macgregor *v.* Malarkey, 96 Ill. App. 421.

Indiana.— Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384.

Missouri.— Pentz *v.* Kuester, 41 Mo. 447.

New Jersey.— Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772.

New York.— Jackson *v.* Edwards, 7 Paige 386 [*affirmed* in 22 Wend. 498].

Pennsylvania.— Com. *v.* Cashman, 32 Pa. Super. Ct. 459.

Texas.— Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974.

And if there is any person or interest not represented in the partition suit the conveyance does not affect him on it. Flagler *v.* Devlin, 109 N. Y. App. Div. 904, 95 N. Y. Suppl. 801 [*affirmed* in 186 N. Y. 589, 79 N. E. 1105]; Duke *v.* Hague, 107 Pa. St. 57; Tinsley *v.* Magnolia Park Co., (Tex. Civ. App. 1900) 59 S. W. 629.

83. Dwight *v.* Lawrence, 111 N. Y. App. Div. 616, 98 N. Y. Suppl. 76; Basnett *v.* Moxon, L. R. 20 Eq. 182, 44 L. J. Ch. 557, 23 Wkly. Rep. 945.

84. Hickenbotham *v.* Blacklege, 54 Ill. 316; Brakely *v.* Sharp, 9 N. J. Eq. 9; Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527.

Hence the sale of a homestead is void if not authorized by the decree. Joest *v.* Adel, 209 Ill. 432, 70 N. E. 638; White *v.* Sharpe, 98 Tenn. 33, 39 S. W. 1051.

85. Burnham *v.* Hitt, 143 Mo. 414, 45 S. W. 368.

86. *Indiana.*— Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384.

if the parties, or any of them, had such right, and to recover the value of the use and occupation during the time such possession is wrongfully withheld,[87] and if withheld through and by the aid of an undertaking on appeal, to recover upon such undertaking.[88] The construction of the conveyance must be in favor of the purchaser and for the purpose of accomplishing the manifest purpose of the suit and other proceedings.[89] The purchaser's rights are limited by the terms of his deed, and he is bound by restrictions therein, although not mentioned at the sale.[90] If, however, a reservation is made at the sale, it has been held to control, although not mentioned in the deed.[91] The decree of sale may provide that it and the sale shall not affect the mineral rights, in which event none of the minerals pass to the purchaser.[92] Growing crops pass to the purchaser when not reserved in the order of sale or the conveyance.[93] The title of the purchaser is paramount to any lien held by any party to the suit, or acquired by any party during its pendency,[94] but may be subject to the lien, if any exists, for unpaid purchase-money.[95] Taxes accruing after the sale are *prima facie* chargeable against the purchaser.[96] He is entitled to subsequently accruing rents.[97]

c. Collateral Attack Upon. As a partition sale is a judicial sale, an attack upon it is governed by the same principles as an attack upon any other judicial proceeding, among which are: (1) The court must have had jurisdiction of the subject-matter and of the parties, with power to grant the relief granted;[98] the proceedings being usually those of courts of general jurisdiction, all presumptions in favor of them are indulged not absolutely inconsistent with the record;[99] (3) where jurisdiction exists, no irregularity in its exercise,[1] and no erroneous

Louisiana.— Bereaux *v.* Carmouche, 15 La. Ann. 588.

Missouri.— Bobb *v.* Gilmore, (1888) 7 S. W. 5; Bobb *v.* Graham, 89 Mo. 200, 1 S. W. 90; Stevenson *v.* Hancock, 72 Mo. 612; Allen *v.* McDonald, 63 Mo. App. 574.

New Jersey.— Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772.

New York.— Fisher *v.* Hersey, 85 N. Y. 633.

Texas.— Schultz *v.* Spreeain, 2 Tex. Unrep. Cas. 206, 1 Tex. App. Civ. Cas. § 916.

87. Bethea *v.* Bethea, 139 Ala. 505, 35 So. 1014; Bonnell *v.* Pack, 79 Mo. App. 496; Burns *v.* Cooper, 31 Pa. St. 426.

88. Place *v.* Rogers, 101 N. Y. App. Div. 193, 91 N. Y. Suppl. 912.

89. Goodwin *v.* Crooks, 58 N. Y. App. Div. 464, 69 N. Y. Suppl. 578 [*affirming* 33 Misc. 39, 68 N. Y. Suppl. 219]; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974.

90. Rosenkrans *v.* Snover, 19 N. J. Eq. 420, 97 Am. Dec. 668; Black *v.* George, 26 Ohio St. 629.

91. Tenk *v.* Lock, 26 Ill. App. 216; Banta *v.* Merchant, 45 N. Y. App. Div. 141, 61 N. Y. Suppl. 218 [*reversed* on the facts in 173 N. Y. 292, 66 N. E. 13]. On the other hand it was held that where the parties desired and the court directed the fee in one half of a road-bed to be sold, it passed by the conveyance, although it described the land as bounded by the road (Matter of Jerome Ave., 120 N. Y. App. Div. 297, 105 N. Y. Suppl. 319); and that where the intention was to sell the entire real estate of a succession, all will be deemed conveyed, although part has been omitted from the description (Chaffe *v.* Minden Lumber Co., 118 La. 753, 43 So. 397).

92. Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344.

93. Vaughn *v.* Newman, 221 Ill. 576, 77 N. E. 1106, 112 Am. St. Rep. 203; Hancock *v.* Caskey, 8 S. C. 282.

But the right to rents accruing prior to the conveyance is not affected by it. Lyons *v.* Dorf, 49 Misc. (N. Y.) 652, 98 N. Y. Suppl. 843.

94. Macgregor *v.* Malarkey, 96 Ill. App. 421; Harting *v.* Milward, 90 S. W. 260, 28 Ky. L. Rep. 776; Maloy *v.* Terhorst, 18 Pa. Co. Ct. 368; *In re* Sneathen, 32 Pittsb. Leg. J. N. S. (Pa.) 197.

95. Vaughn *v.* Vaughn, 12 Heisk. (Tenn.) 472.

96. Arnold *v.* Carter, 19 App. Cas. (D. C.) 259.

97. Bonnell *v.* Pack, 79 Mo. App. 496.

98. *Alabama.*— Johnson *v.* Ray, 67 Ala. 603.

Arkansas.— Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913.

Louisiana.— Poree's Succession, 27 La. Ann. 463.

New York.— Kohler *v.* Kohler, 2 Edw. 69.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

99. Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231; Kansas City *v.* Scarritt, 169 Mo. 471, 69 S. W. 283; Stokes *v.* Middleton, 28 N. J. L. 32; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157, 7 L. ed. 381.

1. *Alabama.*— Morring *v.* Tipton, 126 Ala. 350, 28 So. 562.

Illinois.— Hedges *v.* Mace, 72 Ill. 472.

Kentucky.— Todd *v.* Dowd, 1 Metc. 281; Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674.

conclusion or action on the part of the court exercising it, can deprive the judgment of its conclusive effect;[2] and (4) that the effect of any order or judgment cannot be avoided or mitigated by showing that some question ought to have been decided differently.[3]

d. Its Protection to Innocent Purchasers. A purchaser at a partition sale may be entitled to the protection due to an innocent purchaser,[4] and as such entitled to rely on the record in the case. On the other hand, he is bound by such record and chargeable with notice of its condition and of all the facts disclosed thereby, and is justly treated as though he had actual knowledge of such facts.[5] The purchaser is not bound to see to the proper application of the purchase-money, and his title cannot be impaired by proving that an officer, or other agent of the law to whom the money was properly paid, misappropriated it.[6]

Louisiana.— Johnson *v.* Barkley, 47 La. Ann. 98, 16 So. 659; Covas *v.* Bertoulin, 44 La. Ann. 683, 11 So. 143.

Maryland.— Schley *v.* Baltimore, 29 Md. 34.

Missouri.— Akers *v.* Hobbs, 105 Mo. 127, 16 S. W. 682; Patton *v.* Hanna, 46 Mo. 314.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388; Welty *v.* Ruffner, 9 Pa. St. 224; Beeson *v.* McNabb, 2 Watts 106.

South Carolina.—Smith *v.* Smith, Rice 232.

United States.— Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415.

See 38 Cent. Dig. tit. "Partition," § 421.

We cannot reconcile with this rule the decision in Bogart *v.* Bogart, 138 Mo. 419, 40 S. W. 91, holding proceedings void against infants because they were not represented by a guardian or curator, nor that in Casey *v.* Casey, 19 N. Y. App. Div. 219, 45 N. Y. Suppl. 877, where the court failed to provide for the rights of unknown heirs.

2. *Alabama.*— Calloway *v.* Kirkland, 57 Ala. 476; Kellam *v.* Richards, 56 Ala. 238.

Illinois.— Hunter *v.* Stoneburner, 92 Ill. 75.

Indiana.— McLead *v.* Applegate, 127 Ind. 349, 26 N. E. 830.

Kentucky.— Perkins *v.* McCarley, 97 Ky. 43, 29 S. W. 867, 16 Ky. L. Rep. 801; Todd *v.* Dowd, 1 Metc. 281; Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674.

Louisiana.— Friedrich *v.* Friedrich, 111 La. 26, 35 So. 371; Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666; Beltran *v.* Gauthreaux, 38 La. Ann. 106; Pinniger's Succession, 25 La. Ann. 53; Porter *v.* Depeyster, 18 La. 351.

Maryland.— Dungan *v.* Vondersmith, 49 Md. 249.

Massachusetts.—Tobin *v.* Larkin, 187 Mass. 279, 72 N. E. 985.

Missouri.— Sparks *v.* Clay, 185 Mo. 393, 84 S. W. 40; Pentz *v.* Kuester, 41 Mo. 447.

New Jersey.— Stokes *v.* Middleton, 28 N. J. L. 32.

New York.— Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298; Cromwell *v.* Hull, 97 N. Y. 209; Noble *v.* Cromwell, 26 Barb. 475, 6 Abb. Pr. 59 [*affirmed* in 3 Abb. Dec. 382, 27 How. Pr. 289]; Le Fevre *v.* Laraway, 22 Barb. 167; Disbrow *v.* Folger, 5 Abb. Pr. 53.

Ohio.— Rogers *v.* Tucker, 7 Ohio St. 417; Bohart *v.* Atkinson, 14 Ohio 228; Goudy *v.* Shank, 8 Ohio 415.

South Carolina.— Tederall *v.* Bouknight, 25 S. C. 275.

Texas.— Alston *v.* Emmerson, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639.

West Virginia.— Childers *v.* Loudin, 51 W. Va. 559, 42 S. E. 637.

See 38 Cent. Dig. tit. "Partition," § 421 *et seq.*

3. *Maryland.*—Dugan *v.* Baltimore, 70 Md. 1, 16 Atl. 501.

Mississippi.— Wilson *v.* Duncan, 44 Miss. 642.

New York.— Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298; Blakeley *v.* Calder, 15 N. Y. 617 [*affirming* 13 How. Pr. 476].

South Carolina.— Norwood *v.* Gregg, 67 S. C. 224, 45 S. E. 163.

Tennessee.—Ward *v.* West, (Ch. App. 1895) 35 S. W. 563.

Texas.—Abbott *v.* Foster, (Civ. App. 1901) 62 S. W. 121.

United States.— Thompson *v.* Tolmie, 2 Pet. 157, 7 L. ed. 381.

See 38 Cent. Dig. tit. "Partition," § 421 *et seq.*

4. *Illinois.*— Allison *v.* Drake, 145 Ill. 500, 32 N. E. 537.

Iowa.— Telford *v.* Barney, 1 Greene 575.

Louisiana.— Scovell *v.* Levy, 106 La. 118, 30 So. 322; McCullough *v.* Minor, 2 La. Ann. 466.

Massachusetts.— Tobin *v.* Larkin, 187 Mass. 279, 72 N. E. 985.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

5. Smith *v.* Secor, 157 N. Y. 402, 52 N. E. 179 [*affirming* 31 N. Y. App. Div. 103, 52 N. Y. Suppl. 562]; Kelly *v.* Werner, 34 N. Y. App. Div. 68, 53 N. Y. Suppl. 1067; Swan *v.* Finney, 4 Baxt. (Tenn.) 26; Gray *v.* Cockrell, 20 Tex. Civ. App. 324, 49 S. W. 247; Bellenot *v.* Laube, 104 Va. 842, 52 S. E. 698.

Thus, if the property sold belongs to the estate of a decedent, the purchaser must know of its liability to be appropriated, by means of sale, to the payment of debts, Trimmier *v.* Winsmith, 41 S. C. 109, 19 S. E. 283.

6. Murdock *v.* Loeser, 87 S. W. 808, 27 Ky. L. Rep. 1057; Goudy *v.* Shank, 8 Ohio 415; Blagge *v.* Shaw. (Tex. Civ. App. 1897) 41 S. W. 756.

15. Remedies of the Purchaser. As the purchaser acquires the title and rights of the parties to the action, there is no reason why he should not be entitled to avail himself of each and every remedy to which they would have been entitled had no sale been made.[7] When the proceeding is in equity, he may doubtless call on the court for relief when entitled thereto either against a party or against an officer making the sale,[8] or against a party or a stranger for a writ of assistance to be placed in possession.[9] As the rule of *caveat emptor* applies to judicial sales, the circumstances must be very exceptional, if they can exist at all, when the purchaser can sustain an action to recover for a defect in the title, or for any act or omission on account of which his title is destroyed or diminished.[10]

16. Remedies Against the Purchaser. For the enforcement of his bid the remedies against a purchaser are by motion or action, as hereinbefore stated. In no other case now occurring to us is there any occasion to seek any remedy against a purchaser except where, for some reason, he is sought to be held as trustee of another, or the sale to him is void, and he is therefore called upon to surrender possession and to pay for the value of the use and occupation, or to account for rents received.[11] He is said not to be entitled to the protection of the law providing that a person recovering land must pay the value of improvements placed thereon by defendant.[12] After the execution of the deed, it constitutes color of title,[13] and the purchaser and those acquiring and possessing under him may be protected by the general statute of limitations, or those statutes devised expressly for the protection of persons whose rights are founded on judicial sales.[14] The purchaser may also, although the sale was void, be protected by the principles of estoppel, as where those whose title was intended to be divested by the sale brought it about, or participated in its benefit, or otherwise permitted themselves to assume an attitude toward it, in consideration of which they cannot equitably be allowed to deny its validity.[15]

17. Effect of the Sale as a Conversion. Although real property is sold in partition and the title of the parties therein is thereby divested and transferred to the purchaser, and the parties become respectively entitled to their distributive shares thereof, such shares are said to retain their character of realty, and not to be converted into personalty, and therefore, on the death of the persons entitled thereto, to descend and be subject to distribution according to the law controlling real property.[16]

18. Collecting the Proceeds From the Selling Officers. The referees or other officers by whom the sale is made are usually required to give bonds for the performance of their duties, among which is that of paying over all moneys received by them; and they and their sureties, if such moneys are not so paid over within a reasonable time, are subject to actions to enforce such payment.[17] They are also liable for any unauthorized acts, such as surrendering securities or evidences of indebtedness without receiving lawful money in payment,[18] or being guilty of

7. Jennings *v.* Jennings, 94 Ill. App. 26; Bonnell *v.* Pack, 79 Mo. App. 496.

8. Weseman *v.* Wingrove, 85 N. Y. 353.

9. Freeman Ex. § 37*d*.

10. Bassett *v.* Lockard, 60 Ill. 164; Weakley *v.* Conradt, 56 Ind. 430; Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Farrar *v.* Comfort, 33 Mo. 44.

11. Taylor *v.* Conner, 7 Ind. 115.

12. Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913.

13. Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913.

14. Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913; Bradley *v.* Villere, 66 Miss. 399, 6 So. 208.

15. Freeman Ex. §§ 351*a*, 352*a*; Gerke *v.* Cameron, (Cal. 1897) 50 Pac. 434; Garnar *v.* Bird, 57 Barb. (N. Y.) 277; Wood *v.* Mather, 38 Barb. (N. Y.) 473 [*affirmed* in 44 N. Y. 249].

16. Black *v.* Black, 10 Del. Co. (Pa.) 25; *In re* Norton, [1900] 1 Ch. 101, 69 L. J. Ch. 31, 81 L. T. Rep. N. S. 724, 48 Wkly. Rep. 140; *In re* Barker, 17 Ch. D. 241, 50 L. J. Ch. 334, 44 L. T. Rep. N. S. 33, 29 Wkly. Rep. 873. See *infra*, III, O, 18; Thompson *v.* McCaffrey, 6 Ont. Pr. 193.

17. Owen *v.* State, 25 Ind. 107; Brown *v.* Wallace, 4 Gill & J. (Md.) 479; State *v.* Jones, 26 Mo. App. 190; Hall *v.* Higgins, 15 N. J. L. 58.

18. Omohundro *v.* Omohundro, 27 Gratt. (Va.) 824.

a negligent act resulting in the loss of a mortgage which had been discharged by the sale.[19] A mistake made by a commissioner in charging himself with a sum greater than that received may be corrected by the court or its auditor.[20] If he is by the court directed to make payments, he is protected in so doing as long as the order of the court remains unvacated and unreversed.[21]

19. THE DISTRIBUTION OF THE PROCEEDS. Out of the proceeds of the sale must first be paid the costs of the action, including such attorney's fees as have been allowed by the court.[22] The balance is the sum remaining for division. Its distribution is usually a very simple matter, for the interlocutory decree must, when possible, fix the moieties of the respective cotenants, and the liens or charges existing against each, or against the whole property, and the priority of the different liens, when there is any conflict between them. The final judgment or order distributing the proceeds of the sale therefore follows, and gives effect to, and is controlled by, the interlocutory judgment; that is to say, to each cotenant must be given a sum corresponding to his moiety, if it is free from liens,[23] and diminished by the amount of such liens if any exist.[24] This right to distribution does not vest at the sale, but only when such proceedings have been taken as result in ascertaining its net proceeds, or, more properly speaking, the fund remaining for distribution.[25] For the court having jurisdiction may deem that the interest of all the parties will be promoted by extinguishing claims against the whole property, as where a lease of the whole is outstanding and must greatly diminish its market value, in which event the acquisition of the leasehold may be brought about and the amount expended in such acquisition be deducted from the amount to be distributed.[26] There are questions, however, which sometimes cannot be determined in the interlocutory decree. Thus, there may be estates in the property which, although declared in such judgment, it can furnish no absolute test for fixing the value of, as where the fee is sold and some of the parties have estates less than in fee, as for life or years, or in remainder or reversion, in which case the court must, in disposing of the proceeds, either fix the value of each estate less than in fee, or keep control of the proceeds so that a due proportion shall be paid to each claimant when his estate becomes absolute and in posses-

Liability for loss resulting from insolvency of a surety for the payment of a bid see Pritchard *v.* Oldham, 53 N. C. 439.

19. Com. *v.* Rodgers, 6 Pa. Dist. 453.

20. Yoder's Appeal, 45 Pa. St. 394.

21. Roy *v.* Townsend, 78 Pa. St. 329.

An action by the assignee of a recognizance is subject to all the defenses existing against the assignor. Burton *v.* Willin, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363.

The action may, in Indiana, be brought within twenty years after the cause of action accrues, as it is not deemed an action brought by a public officer. Owen *v.* State, 25 Ind. 107.

The commissioner and his sureties are liable for interest from the time he should have paid over the money (Ferguson *v.* State, 90 Ind. 38), but not for rents or profits accruing after the sale (Stanton *v.* State, 74 Ind. 503).

In an action against the officer and his sureties, it is sufficient to allege his appointment at a certain term of court, the giving and approval of the bond, his entry on the discharge of his duties, and his making of his final report showing a specified sum of money in his hands as plaintiff's distributive share and the failure to pay it over. Coggeshall *v.* State, 112 Ind. 561, 14 N. E. 555.

22. Sarbach *v.* Newell, 35 Kan. 180, 10 Pac. 529; Lucas Bank *v.* King, 73 Mo. 590; Shivers *v.* Hand, 50 N. J. Eq. 231, 24 Atl. 911; Lewis *v.* Moore, 21 N. Y. App. Div. 628, 47 N. Y. Suppl. 303.

23. Huffman *v.* Darling, 153 Ind. 22, 53 N. E. 939; Bacon *v.* Fay, 63 N. J. Eq. 411, 51 Atl. 797; Treacy *v.* Ellis, 45 N. Y. App. Div. 492, 61 N. Y. Suppl. 600; Matter of Grand Central Bank, 27 Misc. (N. Y.) 116, 57 N. Y. Suppl. 418.

24. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203; Steen *v.* Clayton, 32 N. J. Eq. 121; Grove *v.* Grove, 100 Va. 556, 42 S. E. 312.

Where the whole property is subject to a mortgage, a direction that it be sold subject to such lien is not an adjudication against another mortgage executed by one only of the cotenants, so as to prevent the deduction of this mortgage from his share. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

25. Turbeville *v.* Flowers, 27 S. C. 331, 3 S. E. 542.

Where the property belonged to a decedent, the surrogate must, in New York, make a certificate showing that the time within which proceedings can be brought in his court for its sale has expired. Matter of Dusenbury, 34 Misc. (N. Y.) 666, 70 N. Y. Suppl. 725.

26. Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799.

sion.[27] So one or more of the parties may have substantially added to the amount realized at the sale by placing improvements on the property, and the court may make him an equitable allowance therefor out of the proceeds.[28] All these and kindred questions the court may inquire into and determine either directly or by aid of referees,[29] but if a method of inquiry is provided by statute, that method must be pursued.[30] Thus of the many equities which one cotenant may assert against another, all, if susceptible of measurement and compensation in money, may be presented to the court and provided for in its order making distribution of the proceeds of a sale.[31] It has even been held that equities between a party and the purchaser may be thus adjusted, as where after the sale a party enters and removes fixtures, in which case he may be required to compensate the purchaser out of the wrong-doer's share of the purchase-price,[32] or when the sale to him is void, he may be repaid out of the proceeds of a subsequent sale.[33] But the equities so recognized and provided for must appear by the pleadings or be supported by the papers or other evidence upon some motion the court is authorized to consider, and the relief granted must be within the powers of the court.[34] Sometimes the necessity for the present distribution either of the whole of the moneys or of some share therein is postponed by directing payment to be made into court, or the money to be otherwise retained within its control.[35] Liens not finally provided for by the interlocutory order may be against the whole property, as when for taxes or assessments, or against the share of some of the parties only. Tax and assessment liens cannot be affected by the sale, and the purchasers must accept the

27. *Alabama.*— Kelly *v.* Deegan, 111 Ala. 152, 20 So. 378.

Indiana.— Russell *v.* Russell, 48 Ind. 456; Pulse *v.* Osborn, (App. 1901) 60 N. E. 374.

Iowa.— Truth Lodge No. 213 A. F. & A. M. *v.* Barton, 119 Iowa 230, 93 N. W. 106, 97 Am. St. Rep. 303.

Maryland.— Gambril *v.* Gambril, 3 Md. Ch. 259.

New York.— Wood *v.* Powell, 3 N. Y. App. Div. 318, 38 N. Y. Suppl. 196; Noble *v.* Cromwell, 26 Barb. 475, 6 Abb. Pr. 59 [*affirmed* in 3 Abb. Dec. 382, 27 How. Pr. 289]; Matter of Gedney, 33 Misc. 160, 68 N. Y. Suppl. 627.

North Carolina.— Gillespie *v.* Allison, 117 N. C. 512, 23 S. E. 438; *Ex p.* Winstead, 92 N. C. 703.

Pennsylvania.— Fink's Appeal, 130 Pa. St. 256, 18 Atl. 621.

United States.— Martin *v.* People's Bank, 115 Fed. 226.

England.— Langmead *v.* Cockerton, 25 Wkly. Rep. 315.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

28. Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441; Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Clapp *v.* Nichols, 31 N. Y. App. Div. 531, 52 N. Y. Suppl. 128.

29. Halsted *v.* Halsted, 55 N. Y. 442.

But a master in chancery cannot fix or determine liens in the absence of any finding of the court in regard thereto. Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682.

30. Carter *v.* Com., 1 Grant (Pa.) 216.

31. *Illinois.*— Labadie *v.* Hewitt, 85 Ill. 341.

Indiana.— Barnett *v.* Thomas, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385.

Kentucky.— Lancaster *v.* Wolff, 110 Ky. 768, 62 S. W. 717, 23 Ky. L. Rep. 233.

Maryland.— Warfield *v.* Banks, 11 Gill & J. 98.

Michigan.— Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502.

New Jersey.— Vass *v.* Hill, (Ch. 1891) 21 Atl. 585 [*following* Bailey *v.* Dalrymple, 47 N. J. Eq. 81, 19 Atl. 840]; *In re* Coomb, 8 N. J. Eq. 78.

South Carolina.— Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

32. Oliver *v.* Lansing, 59 Nebr. 219, 80 N. W. 829.

33. Liverman *v.* Lee, 86 Miss. 370, 38 So. 658.

34. Cox *v.* Kyle, 75 Miss. 667, 23 So. 518; Fulton *v.* Miller, 192 Pa. St. 60, 43 Atl. 409.

35. *Indiana.*— Chisham *v.* Way, 73 Ind. 362.

Iowa.— Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514.

New Jersey.— Morgan *v.* Morgan, (Ch. 1906) 64 Atl. 155.

New York.— People *v.* Ryder, 124 N. Y. 500, 26 N. E. 1040; Matter of Gedney, 30 Misc. 18, 62 N. Y. Suppl. 1023.

Pennsylvania.— Himmelspark's Estate, 8 Pa. Dist. 698; Wilson's Estate, 2 Chest. Co. Rep. 217.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

Thus, if there is a deceased cotenant, the rights of persons claiming under him may properly be left for adjudication in the probate court having jurisdiction of his estate. Grant *v.* Murphy, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

property subject thereto, or the officer making the sale be directed to pay them from the proceeds.[36] In some of the states execution and judicial sales pass the title to the property free of all liens.[37] When this rule prevails and also when all the lien-holders are parties to the suit and bound by the decree, the effect of a partition sale is to remove all liens from the property and attach them to the proceeds of the sale.[38] In determining how these liens shall be enforced, it is sometimes material to consider whether such proceeds, although in money, are to be treated as personal or as real property. Although for some purposes they have been deemed personalty,[39] we apprehend the better view is that with respect to all questions relating to their distribution, and especially to the enforcement of liens against them, they remain real estate.[40] It was formerly said that, on partition, the right of encumbrancers would not be settled,[41] and more recently that a motion asking that the proceeds of the sale of the interest of a cotenant be paid to one not a party to the suit cannot be sustained.[42] Neither proposition is now true. Persons having claims or liens against the property sold may present them to the court and have their payment

36. Weseman *v.* Wingrove, 85 N. Y. 353; Sneathen's Estate, 22 Pa. Super. Ct. 45; Maloy *v.* Terhorst, 18 Pa. Co. Ct. 368.

37. Freeman Ex. § 338.

38. *Alabama.*— Hunter *v.* Law, 68 Ala. 365.

Illinois.— Macgregor *v.* Malarkey, 96 Ill. App. 421.

Indiana.— Porter *v.* Jackson, 95 Ind. 210, 48 Am. Rep. 704; Fouty *v.* Morrison, 73 Ind. 333.

Louisiana.— Viard's Succession, 106 La. 73, 30 So. 246; Koehl *v.* Solari, 47 La. Ann. 890, 17 So. 464.

Mississippi.— Johnston *v.* Tennessee Union Bank, 37 Miss. 526.

Missouri.— Turpin *v.* Turpin, 88 Mo. 337.

New Jersey.— Wright *v.* Wright, 70 N. J. Eq. 407, 62 Atl. 487; McKinley *v.* Coe, 66 N. J. Eq. 70, 57 Atl. 1030; Green *v.* Hathaway, 36 N. J. Eq. 471.

New York.— Lythgoe *v.* Smith, 140 N. Y. 442, 35 N. E. 646; Warfield *v.* Crane, 4 Abb. Dec. 525.

Ohio.— Comer *v.* Dodson, 22 Ohio St. 615; Furgeson *v.* Cackler, 6 Ohio S. & C. Pl. Dec. 419, 4 Ohio N. P. 392.

Pennsylvania.— Wright *v.* Vickers, 81 Pa. St. 122 [*affirming* 10 Phila. 381].

Canada.— Bruneau *v.* Banque Jacques Cartier, 10 Quebec Q. B. 525.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

But as to persons not parties to the action, the sale must be deemed subject to any lien held by them. Wood *v.* Winings, 58 Ind. 322. This is true even when the lien is acquired *pendente lite*, to the extent of entitling the lien-holder to payment out of the proceeds of the sale. Aplington *v.* Nash, 80 Iowa 488, 45 N. W. 905.

39. *Arkansas.*— *In re* Simmons, 55 Ark. 485, 18 S. W. 933.

New Jersey.— Jacobus *v.* Jacobus, 36 N. J. Eq. 248 [*affirmed* in 36 N. J. Eq. 317].

New York.— Robinson *v.* McGregor, 16 Barb. 531.

Pennsylvania.— Scott's Estate, 137 Pa. St. 454, 20 Atl. 623; Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875; Gutshall *v.* Goodyear, 107 Pa. St. 123; Wright *v.* Vickers, 81 Pa. St. 122 [*affirming* 10 Phila. 381]; *In re* Kann, 69 Pa. St. 219; Ebbs *v.* Comm., 11 Pa. St. 374.

England.— *In re* Morgan, [1900] 2 Ch. 474, 69 L. J. Ch. 735, 48 Wkly. Rep. 670; *In re* Smith, 40 Ch. D. 386, 58 L. J. Ch. 108, 60 L. T. Rep. N. S. 77, 37 Wkly. Rep. 199; *In re* Hobson, 7 Ch. D. 708, 47 L. J. Ch. 310, 38 L. T. Rep. N. S. 365, 26 Wkly. Rep. 470; Steed *v.* Preece, L. R. 18 Eq. 192, 43 L. J. Ch. 687, 22 Wkly. Rep. 432; *Re* Pickard, 58 L. T. Rep. N. S. 293.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

40. *Louisiana.*— Breaux *v.* Lauve, 24 La. Ann. 179; Hooke *v.* Hooke, 14 La. 22.

Maryland.— Jenkins *v.* Simms, 45 Md. 532.

New Jersey.—Oberly *v.* Lerch, 18 N. J. Eq. 346 [*affirmed* in 18 N. J. Eq. 575].

New York.— Horton *v.* McCoy, 47 N. Y. 21.

Pennsylvania.— McCune's Appeal, 65 Pa. St. 450; Eberts *v.* Eberts, 55 Pa. St. 110; Devlin's Estate, 4 Pa. Dist. 751.

England.— *In re* Norton, [1900] 1 Ch. 101, 69 L. J. Ch. 31, 81 L. T. Rep. N. S. 724, 48 Wkly. Rep. 140.

Canada.— Campbell *v.* Campbell, 19 Grant Ch. (U. C.) 254.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

41. Sebring *v.* Mersereau, 9 Cow. (N. Y.) 344.

As to the present law of New York on this subject see Treacy *v.* Ellis, 45 N. Y. App. Div. 492, 61 N. Y. Suppl. 600 [*affirming* 27 Misc. 116, 57 N. Y. Suppl. 418]; Jackson *v.* Bradhurst, 16 Misc. (N. Y.) 149, 37 N. Y. Suppl. 1068, 25 N. Y. Civ. Proc. 228.

In New Jersey it is said that mortgaged land cannot be sold on partition free from the mortgage, and the same paid from the proceeds of the sale. Becker *v.* Carey, (Ch. 1897) 36 Atl. 770.

42. Wise *v.* Lisa, 34 Mo. 505; Reynolds *v.* Hempstead, 74 Mo. App. 646.

provided for out of the proceeds of the sale.[43] The commissioner or other officer having the moneys in his hand should distribute them as directed by the court and has no authority to pay them over to some person other than the distributee.[44] If the persons entitled to distribution are married women, some special order may be necessary, owing to that fact, for the better protection of their interests as between them and their husbands.[45] In the event of the death of a party, care must also be taken, as between his heirs and executors or administrators, so as not to imperil the rights of either.[46] The distribution of the proceeds of land sold in partition is controlled by the law of the state where it is situate.[47] The order distributing the proceeds of the sale is the final judgment in the proceeding and, as such, conclusive on the rights of the parties, and cannot be modified except by some appellate or revisory proceeding.[48] It may include securities taken as well as moneys actually paid,[49] and is a complete protection to the commissioner in paying over the moneys as therein directed.[50]

P. Costs and Attorney's Fees — 1. General Right to. Independently of any statute upon the subject, the rule respecting costs in partition must be the same as in other cases, namely, a party plaintiff establishing his claim must recover his costs as an incident to his judgment,[51] and the same must be true as to a defendant who either maintains his demand for affirmative relief,[52] or shows that no relief should be awarded against him in the proceeding.[53] Statutes have been enacted limiting the right to costs in partition. They are somewhat strictly construed and are not applied, although the right to partition exists, unless the proceeding is one in partition.[54]

2. Items Allowable as. Doubtless the rules applicable to the items of expense allowable as costs in other cases of an equitable nature are equally applicable to suits and other judicial proceedings for partition.[55] Many things are necessary in a suit for partition for which expense must be incurred which can rarely or never arise in other suits or actions, and when necessary they may be procured and paid for, and the amount so paid be allowed to the party making payment, such, for instance, as the drawing of the commissioners' return and the making of all books

43. McKinley *v.* Coe, 66 N. J. Eq. 70, 57 Atl. 1030; Schwarz *v.* McKenzie, 7 Misc. (N. Y.) 565, 28 N. Y. Suppl. 87; Platt *v.* Platt, 3 N. Y. St. 179; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472; Sears *v.* Hyer, 1 Paige (N. Y.) 483; *In re* Harding, 25 N. C. 320.

As to unrecorded mortgages of which all the parties were ignorant see Buttron *v.* Tibbitts, 10 Abb. N. Cas. (N. Y.) 41.

44. State *v.* Cummiskey, 34 Mo. App. 189.

45. *Kentucky.*— Stump *v.* Martin, 9 Bush 285; Reed *v.* Reed, 80 S. W. 520, 25 Ky. L. Rep. 2324.

New Jersey.—Osborne *v.* Edwards, 11 N. J. Eq. 73; Anonymous, 10 N. J. L. J. 339.

New York.— Sears *v.* Hyer, 1 Paige 483.

Pennsylvania.— Com. *v.* Reesor, 3 Pa. L. J. 110.

Virginia.— James *v.* Gibbs, 1 Patt. & H. 277.

England.— Aston *v.* Meredith, L. R. 13 Eq. 492, 26 L. T. Rep. N. S. 281.

See 38 Cent. Dig. tit. "Partition," § 401 *et seq.*

The share of a married woman may be paid to her husband if he and she elect, in open court, to take the moneys as personal estate. Standering *v.* Hall, 11 Ch. D. 652, 48 L. J. Ch. 382, 27 Wkly. Rep. 749.

46. McCarthy *v.* McCarthy, 57 N. J. Eq. 587, 42 Atl. 332; *Ex p.* Foster, Rice Eq. (S. C.) 19.

47. Oberly *v.* Lerch, 18 N. J. Eq. 346 [*affirmed* in 18 N. J. Eq. 575].

48. Fredericks *v.* Davis, 6 Mont. 460, 13 Pac. 125; Fannon *v.* McNally, 33 N. Y. App. Div. 609, 53 N. Y. Suppl. 1032; Matter of Gedney, 30 Misc. (N. Y.) 18, 62 N. Y. Suppl. 1023.

49. Baggott *v.* Sawyer, 25 S. C. 405.

50. Carrington *v.* Didier, 8 Gratt. (Va.) 260.

51. Wood *v.* Hubbard, 29 N. Y. App. Div. 166, 51 N. Y. Suppl. 526, 53 N. Y. Suppl. 1119; Van Osdell *v.* Champion, 89 Wis. 661, 62 N. W. 539, 46 Am. St. Rep. 864, 27 L. R. A. 773.

52. Catton *v.* Banks, [1893] 2 Ch. 221, 62 L. J. Ch. 600, 68 L. T. Rep. N. S. 245, 3 Reports 413, 41 Wkly. Rep. 429; Belcher *v.* Williams, 45 Ch. D. 510, 63 L. T. Rep. N. S. 673, 39 Wkly. Rep. 266; *Re* Vase, 84 L. T. Rep. N. S. 761.

53. Hixon *v.* Eastwood, 17 L. T. Rep. N. S. 489.

54. Williams *v.* Washington, 43 S. C. 355, 21 S. E. 259.

55. Wood *v.* Hubbard, 29 N. Y. App. Div. 166, 51 N. Y. Suppl. 526; Davis *v.* Davis, 3 N. Y. St. 163; Bryan *v.* Ream, 59 S. C. 340, 37 S. E. 921; Strong *v.* Hobbs, 20 Vt. 192.

and plats required as a part thereof or in connection therewith,[56] the expenses of procuring the services of neeessary surveyors and the making of surveys,[57] of giving notice of and conducting sales,[58] of the services of the commissioners or referees, which, however, must be restricted to the amount specified by statute, where the statute has undertaken to control the subject,[59] of procuring the attendanee of witnesses,[60] or the services of auctioneers,[61] or of guardians *ad litem*.[62] Where it was advisable, before offering property for sale, to purchase outstanding leasehold interests, the amount required for and expended on such purchase was allowed as costs.[63] We cannot see that the principles controlling the allowance of costs are, or ought to be, different when partition is by sale than when it is by allotment. Nevertheless some statutes have been enacted applying specially to sales, in effect giving the court a discretion as to the charges which it may order paid out of the proceeds,[64] and specially including both defendants and plaintiffs within the benefit of the statute.[65] Those who agree to the doing of acts in connection with a partition sale not required by law, such as giving extra notice thereof, estop themselves from resisting an allowance therefor.[66]

3. Limiting the Right to Costs to Those Incurred After the Hearing or Arising From a Trial. In England the rule formerly prevailed in partition that each party paid his own costs up to the hearing and perhaps up to the issuing of the commission,[67] but this rule has apparently been abrogated by the Partition Act.[68] Even before that enactment the courts seem to have imposed costs on a party who resisted the partition or otherwise caused the incurring of an expenditure in establishing a title or making some other inquiry.[69] In Massachusetts plaintiff's right to costs was denied in partition unless an issue had been joined and tried,[70] while in Maine it excluded all costs incurred after the interlocutory judgment.[71]

56. Coles *v.* Coles, 13 N. J. Eq. 365.

Hence if a complainant without the knowledge of the other parties prematurely prosecutes a proceeding against the purchaser to compel payment, he is not entitled to be repaid the cost thereof. Roarty *v.* McDermott, 89 Hun (N. Y.) 511, 35 N. Y. Suppl. 308.

57. Meserole *v.* Furman, 38 Hun (N. Y.) 355.

58. Keim *v.* Keim, 43 N. Y. App. Div. 88, 59 N. Y. Suppl. 366; Flynn *v.* Kennedy, 62 Hun (N. Y.) 26, 16 N. Y. Suppl. 361.

Payment for notices.— Notices of sale in addition to those required by law must be paid for by, or out of the share of, the party who authorized such notices. Stewart *v.* Paton, 29 N. Y. Suppl. 770, 23 N. Y. Civ. Proc. 286.

59. Ray *v.* Banks, 120 N. C. 389, 27 S. E. 28.

60. St. Peter's Church *v.* Zion Church, 2 Pa. L. J. Rep. 349, 4 Pa. L. J. 134.

61. Salin's Estate, 10 Pa. Dist. 97.

62. Huhlein *v.* Huhlein, 87 Ky. 247, 8 S. W. 260, 18 Ky. L. Rep. 107; Whitsett *v.* Wamack, 95 Mo. App. 296, 69 S. W. 24.

63. Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799. In this case the court refused to allow as costs the expenses of the services of real estate agents in negotiating a sale, but this is, we think, a narrow and mistaken view.

64. Flynn *v.* Kennedy, 62 Hun (N. Y.) 26, 16 N. Y. Suppl. 361; Schierloh *v.* Schierloh, 14 Hun (N. Y.) 572.

65. Flynn *v.* Kennedy, 62 Hun (N. Y.) 26, 16 N. Y. Suppl. 361; Shannon *v.* Pickell, 15 N. Y. Suppl. 949.

66. Von Hoven's Succession, 48 La. Ann. 620, 19 So. 766.

67. Mildmay *v.* Quicke, L. R. 20 Eq. 537, 46 L. J. Ch. 667; Miller *v.* Marriott, L. R. 7 Eq. 1, 19 L. T. Rep. N. S. 304, 17 Wkly. Rep. 41; Landell *v.* Baker, L. R. 6 Eq. 268; Nevis *v.* Levene, Ambl. 237, 27 Eng. Reprint 158; Cornish *v.* Gest, Cox Ch. 27, 30 Eng. Reprint 13; McBride *v.* Malcomson, 2 Dr. & Wal. 700; Brunker *v.* Stein, 1 Hayes & J. 410; Leslie *v.* Dungannon, 12 Ir. Ch. 205; Knox *v.* May, 11 Ir. Ch. 265; Hills *v.* Archer, 91 L. T. Rep. N. S. 166; Baring *v.* Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206; Anonymous, 6 Vin. Abr. 332.

68. Simpson *v.* Ritchie, L. R. 16 Eq. 103, 42 L. J. Ch. 543, 28 L. T. Rep. N. S. 548, 21 Wkly. Rep. 666.

69. Lyne *v.* Lyne, 21 Beav. 318, 52 Eng. Reprint 882; Morris *v.* Timmins, 1 Beav. 411, 17 Eng. Ch. 411, 48 Eng. Reprint 999; Hill *v.* Fulbrook, Jac. 574, 4 Eng. Ch. 574, 37 Eng. Reprint 967; Wilkinson *v.* Castle, 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501; Cortwright *v.* Diehl, 13 Grant Ch. (U. C.) 360.

70. Powell *v.* Jenny, 11 Allen (Mass.) 104; Dudley *v.* Adams, 5 Allen (Mass.) 96; Peabody *v.* Minot, 24 Pick. (Mass.) 329; Loud *v.* Penniman, 19 Pick. (Mass.) 539; Paine *v.* Ward, 4 Pick. (Mass.) 346; Reed *v.* Reed, 9 Mass. 372; Swett *v.* Bussey, 7 Mass. 503; Symonds *v.* Kimball, 3 Mass. 299.

Same rule in Vermont see Conant *v.* Smith, 1 Aik. 67, 15 Am. Dec. 669.

71. Ham *v.* Ham, 43 Me. 285. And in this state it has been said that a petition for par-

4. General Rules as to Allowance of — a. **Where a Party Has Been the Cause Of or to Blame For.** The costs which are incurred in the course of a proceeding in partition may be considered with reference: (1) To those which take place in the assertion of the common title and are necessary to complete the partition in conformity with the interlocutory decree; and (2) those involved in undertaking to assert some claim or defense which proves not to be maintainable and which therefore cannot be said to be in aid of the common title, and to the payment of which none of the holders of that title can equitably be called to contribute. On the contrary, so far as they have been required to make expenditures to meet such claim or defense, they ought to be indemnified by the party who has wrongfully or mistakenly asserted it. Hence, as a general rule, he who in partition makes an unfounded claim not only cannot recover his costs in so doing, but is further liable for the costs which his adversaries have reasonably incurred in resisting his claim.[72] Therefore, if the complainant is shown to have no interest in the property, he must pay all the costs.[73]

b. The Discretion of the Court. When the proceeding is in equity, or of an equitable nature, the court in which it takes place has a discretion to allow, or to refuse the allowance of, costs, and when allowed, to apportion them as it may deem equitable.[74] This discretion is not arbitrary and unreviewable. Hence the amount allowed may be reduced on appeal.[75]

c. Apportioning the Costs According to the Moieties of the Parties. Ordinarily a proceeding for partition should be regarded as in the interest of all the cotenants and each required to contribute to the expense thereof accordingly. Therefore the costs allowed will, unless special circumstances render this rule inequitable, and therefore inapplicable, if the property is sold, be deducted from the proceeds of the sale before making any division thereof, and if no sale takes place will be charged against the allotment of each allottee in the proportion which his moiety bears to the whole property.[76] If certain improvements are

tition is not an action within the meaning of the statute providing that in all actions the prevailing party shall recover costs. Counce *v.* Persons Unknown, 76 Me. 548.

72. *Illinois.*— Le Moyne *v.* Harding, 132 Ill. 23, 23 N. E. 414.

Kentucky.—Stansberry *v.* Simmons, 1 Dana 413.

Maine.— Fisk *v.* Keene, 46 Me. 225.

Missouri.— Appleman *v.* Appleman, 140 Mo. 309, 41 S. W. 794, 62 Am. St. Rep. 732; Neal *v.* Smith, 22 Mo. 349.

New Jersey.— McMullin *v.* Doughty, 69 N. J. Eq. 649, 61 Atl. 265.

New York.— Goebbles *v.* Morrisey, 53 Misc. 421, 103 N. Y. Suppl. 386; Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Hamersley *v.* Hamersley, 7 N. Y. Leg. Obs. 127; Christy *v.* Christy, 6 Paige 170; Crandall *v.* Hoysradt, 1 Sandf. Ch. 40.

South Carolina.— Williams *v.* Jones, 74 S. C. 258, 54 S. E. 558.

Texas.— Keener *v.* Moss, 66 Tex. 181, 18 S. W. 447; Johns *v.* Northcutt, 49 Tex. 444; Powell *v.* Naylor, 32 Tex. Civ. App. 340, 74 S. W. 338; Johnson *v.* Johnson, (Civ. App. 1896) 35 S. W. 952.

See 38 Cent. Dig. tit. "Partition," § 440 *et seq.*

73. Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701.

74. *Illinois.*— Warren *v.* Sheldon, 173 Ill. 340, 50 N. E. 1065.

Indiana.— Merrill *v.* Shirk, 128 Ind. 503, 28 N. E. 95; Wilcox *v.* Monday, 83 Ind. 335; Jenkins *v.* Dalton, 27 Ind. 78.

Kentucky.— Williamson *v.* Williamson, 1 Metc. 303.

New York.— Weston *v.* Stoddard, 16 N. Y. Suppl. 605, 22 N. Y. Civ. Proc. 51; Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417.

South Carolina.— McCarter *v.* Caldwell, 58 S. C. 65, 36 S. E. 507; Young *v.* Edwards, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55.

England.— *Re* Vase, 84 L. T. Rep. N. S. 761.

Canada.— Cartwright *v.* Diehl, 13 Grant Ch. (U. C.) 360.

See 38 Cent. Dig. tit. "Partition," § 440 *et seq.*

75. Clapp *v.* Hunter, 52 N. Y. App. Div. 253, 65 N. Y. Suppl. 411.

76. *Illinois.*— Searl *v.* Searl, 122 Ill. App. 129.

Iowa.— McGuire *v.* Luckey, 129 Iowa 559, 105 N. W. 1004; Duncan *v.* Duncan, 63 Iowa 150, 18 N. W. 858.

Kentucky.— Cooper *v.* Trout, 102 S. W. 798, 31 Ky. L. Rep. 444; Mead *v.* Mead, 101 S. W. 330, 31 Ky. L. Rep. 70.

Missouri.— Cooper *v.* Garesche, 21 Mo. 151.

Nebraska.— Johnson *v.* Emerick, (1905) 104 N. W. 169.

New Jersey.— Coles *v.* Coles, 13 N. J. Eq. 365.

New York.— Davis *v.* Davis, 3 N. Y. St.

part of the property partitioned by sale, their value must be taken into consideration in apportioning the costs, and such improvements must be charged with their share.[77] If there are two or more parcels sold in partition, no part of the proceeds of the sale of one can be appropriated to pay the costs of proceedings for the partition of the other.[78]

5. Mode of Compelling Payment of — a. By Personal Judgment and Execution. Although this course is not the one usually pursued, there may be circumstances justifying a judgment *in personam* for costs in partition against a party thereto and its enforcement by execution against him,[79] but this can only be when he is within the jurisdiction of the court and has been served with process therein.[80] An order taxing a certain part of the costs against each of the parties, and directing that execution issue in default of payment, does not authorize a single writ against all the parties.[81]

b. By Sale of the Property Partitioned or Retention Out of Proceeds of Sale. Usually the costs allowed in partition are by the final judgment apportioned against the different allottees and their allotments, and in effect constitute a charge or lien against the latter,[82] which lien may be enforced by taking out an execution or order of sale against the allottee and selling his allotment thereunder;[83] but in some of the states a special motion is requisite to obtain this writ and relief,[84] and in Virginia the proceeding must be by bill in equity as in case of other judgment liens.[85] Where the property, instead of being partitioned by allotment, is sold, and the net proceeds divided, it is proper, in the final judgment, which is the one disposing of the moneys, to make provision for the payment of all allowable costs, including attorney's fees, where such fees are allowable;[86] but such

163; Smith *v.* Smith, 10 Paige 470; Tibbits *v.* Tibbits, 7 Paige 204.

Pennsylvania.— Boyer's Estate, 8 Pa. Co. Ct. 423; Boyer's Estate, 8 Pa. Co. Ct. 177.

South Carolina.— Gibson *v.* Brown, 1 McCord 162; Wallace *v.* Gill, Rich. Eq. Cas. 141.

Texas.—Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Collins *v.* Bryan, (Civ. App. 1905) 88 S. W. 432.

England.— Ball *v.* Kemp-Welch, 14 Ch. D. 512, 49 L. J. Ch. 528, 43 L. T. Rep. N. S. 116; Cannon *v.* Johnson, L. R. 11 Eq. 90, 40 L. J. Ch. 46, 23 L. T. Rep. N. S. 583, 19 Wkly. Rep. 175; Elton *v.* Elton, 27 Beav. 632, 6 Jur. N. S. 136, 54 Eng. Reprint 251; Calmady *v.* Calmady, 2 Ves. Jr. 568, 30 Eng. Reprint 780; Bowes *v.* Bute, 27 Wkly. Rep. 750.

See 38 Cent. Dig. tit. "Partition," § 442 *et seq.*

77. Sarbach *v.* Newell, 35 Kan. 180, 10 Pac. 529.

78. Dale *v.* Dale, 88 Mo. 462; Liberty Sav. Assoc. *v.* Commercial Sav. Bank, 87 Mo. 225.

Rule in England where an infant is a party see Davey *v.* Wietlisbach, L. R. 15 Eq. 269; France *v.* France, L. R. 13 Eq. 173, 41 L. J. Ch. 150, 25 L. T. Rep. N. S. 785, 20 Wkly. Rep. 230; Osborn *v.* Osborn, L. R. 6 Eq. 338, 37 L. J. Ch. 656, 18 L. T. Rep. N. S. 678; Coventry *v.* Coventry, 34 Beav. 572, 55 Eng. Reprint 756; Davis *v.* Turvey, 32 Beav. 554, 9 Jur. N. S. 954, 2 New Rep. 151, 8 L. T. Rep. N. S. 378, 11 Wkly. Rep. 679, 55 Eng. Reprint 217; Thompson *v.* Richardson, Ir. R. 6 Eq. 596; Singleton *v.* Hopkins, 1 Jur. N. S. 1199, 25 L. J. Ch. 50, 4 Wkly. Rep. 107; Cox *v.* Cox, 3 Kay & J. 554, 69 Eng. Reprint 1229; Smith *v.* Birch, 18 L. T. Rep. N. S. 174; Capewell *v.* Lawrence, 8 L. T. Rep. N. S. 603; Thackeray *v.* Parker, 8 L. T. Rep. N. S. 602, 1 New Rep. 567; Harkness *v.* Conway, 12 Grant Ch. (U. C.) 449.

79. Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046; Keeney *v.* Henning, (N. J. Ch. 1903) 55 Atl. 88; *In re* Cavanagh, 37 Barb. (N. Y.) 22, 14 Abb. Pr. 258, 23 How. Pr. 358; Tibbits *v.* Tibbits, 7 Paige (N. Y.) 204.

80. Watson *v.* McClane, 18 Tex. Civ. App. 212, 45 S. W. 176.

81. Brown *v.* Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545.

82. Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046.

83. Habberton *v.* Habberton, 156 Ill. 444, 41 N. E. 222; Hinnant *v.* Wilder, 122 N. C. 149, 29 S. E. 221; Strong *v.* Hobbs, 20 Vt. 192.

84. Roberts *v.* St. Louis Merchants' Land Imp. Co., 126 Mo. 460, 29 S. W. 584.

85. Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661, 49 S. E. 984.

Lien for fees of commissioners and of attorneys in England see Lloyd *v.* Jones, 40 L. T. Rep. N. S. 514, 27 Wkly. Rep. 655; Young *v.* Sutton, 2 Ves. & B. 365, 35 Eng. Reprint 358.

86. Arnold *v.* Carter, 19 App. Cas. (D. C.) 259; Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901 [*affirming* 27 Misc. 595, 59 N. Y. Suppl. 86]; Davis *v.* Turvey, 32 Beav. 554, 8 L. T. Rep. N. S. 378, 2 New Rep. 151, 11 Wkly. Rep. 679, 55 Eng. Reprint 217; Graham *v.* Clinton, 81 L. T. Rep. N. S. 717; Smith *v.* Birch, 18 L. T. Rep. N. S. 174; Leach *v.* Westall, 17 Wkly. Rep. 313.

allowance should not interfere with, or displace mortgage and other liens on the property.[87]

c. By Pursuing Purchasers Pendente Lite. One who during the pendency of a suit for partition buys and receives a conveyance of the interest of a cotenant thereby so far makes himself a party to the suit that he can be held personally liable for costs previously incurred therein,[88] although there are circumstances in which the grantee may be held to acquire his interest in the pending suit, "*cum onere*, entitled to the benefit and subject to the liabilities incurred in the action by the assignor."[89]

6. For and Against Whom Costs May Be Awarded. Any party to a partition suit may recover his costs incurred therein either for the benefit of the common property, or in meeting any issue tendered to him and which he is thereby compelled either to confess or meet; and, on the other hand, may be subject to costs incurred for the benefit of the common estate when he is found to be an owner therein, or in meeting some issue which he has tendered and been unable to maintain. If he has been improperly made a party and is not bound to appear and plead, he is not liable for costs,[90] and a like result follows when, although properly a party, he is not entitled to and does not claim any relief.[91] When a sale is made in partition, the purchaser becomes thereby a party to the suit and may institute and be subjected to motions and other proceedings relating to his bid, and may thereby recover or be subjected to costs as if originally a party.[92] In New York a guardian *ad litem* of infant plaintiffs has been held liable for costs.[93] Very strangely, it was determined in Pennsylvania that if defendants prevail under the plea of "*non tenent insimul*" and thereby wholly defeat plaintiff, they cannot recover their costs.[94] Where plaintiff died after the judgment had been rendered, and the case continued on the question of costs, it was held that his administrator, although erroneously permitted to prosecute, could not recover costs.[95]

7. Attorney's Fees — a. The Right to Must Be Specially Conferred. In the United States, attorney's fees are not ordinarily recoverable as costs. Therefore in suits for partition they cannot be recovered unless their recovery is specially and clearly authorized. General expressions in statutes authorizing the allowance of costs, or of costs and expenses, are not sufficient to support an allowance to any of the parties on account of necessary disbursements to obtain the services of attorneys.[96] From this position it must be admitted that there is strong judicial dissent.[97]

87. Beller *v.* Antisdel, 84 Hun (N. Y.) 252, 32 N. Y. Suppl. 575.

And if a partition sale is void for want of compliance with the terms of the decree, the costs thereof cannot be required to be paid out of the proceeds of a valid sale under a decree in a subsequent suit. Liverman *v.* Lee, 86 Miss. 370, 38 So. 658.

88. Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

89. Wickersham *v.* Denman, 68 Cal. 383, 9 Pac. 723. The right to enforce a lien for attorney's compensation against a purchaser *pendente lite* is apparently denied in Elser *v.* Heinzer, 37 Ill. App. 298.

90. Bradshaw *v.* Callaghan, 5 Johns. (N. Y.) 80 [*reversed* on other grounds in 8 Johns. 558].

91. Tanner *v.* Niles, 1 Barb. (N. Y.) 560. See also Walker *v.* Porter, 21 N. Y. Suppl. 723.

92. Matter of Cavanagh, 37 Barb. (N. Y.) 22, 14 Abb. Pr. 258, 23 How. Pr. 358; Muller *v.* Struppman, 6 Abb. N. Cas. (N. Y.) 343.

93. Muller *v.* Struppman, 6 Abb. N. Cas. (N. Y.) 343. This is quite proper where the suit was unnecessary. Carroll *v.* Carroll, 23 Grant Ch. (U. C.) 438.

94. Shaw *v.* Irwin, 25 Pa. St. 347.

95. Richards *v.* Richards, 136 Mass. 126.

96. *Alabama.*— Jordon *v.* Farrow, 130 Ala. 428, 30 So. 338.

Indiana.— Hutts *v.* Martin, 134 Ind. 587, 33 N. E. 676.

Kansas.— Swartzel *v.* Rogers, 3 Kan. 380.

Kentucky.— Lang *v.* Constance, 46 S. W. 693, 20 Ky. L. Rep. 502.

New Jersey.— Coles *v.* Coles, 13 N. J. Eq. 365.

South Carolina.— Butler *v.* Butler, 73 S. C. 402, 53 S. E. 646.

United States.— Legg *v.* Legg, 34 Wash. 132, 75 Pac. 130.

See 38 Cent. Dig. tit. "Partition," § 447.

97. *Michigan.*— Greusel *v.* Smith, 85 Mich. 574, 48 N. W. 616.

Minnesota.— Hanson *v.* Ingwaldson, 84 Minn. 346, 87 N. W. 915.

b. The Allowance of by Statute. In a very great majority of the states attorney's fees are now proper subjects for consideration and allowance in suits for partition as part of the costs thereof.[98] If a statute provides that there shall be taxed in favor of plaintiff, as costs in the case, an attorney's fee, it is error for a court to order that each party pay his own attorney.[99] Such a statute is constitutional.[1]

c. The Class of Services For Which Allowable. The general principle underlying the statutes authorizing allowances to be made in partition suits for the services of attorneys is that, irrespective of the person in fact employing the attorney, his services were necessary to the conduct of the proceeding and therefore were beneficial to all the parties; and, so far as they were such, are equitably chargeable against all. This is ordinarily true of the services of plaintiff's attorney who, in bringing the action and in his antecedent investigations and in every step he takes, unless it be in the trial of contested issues as to title, works for the benefit of all the parties. If a defendant has, or in good faith believes he has, a good and substantial defense to the action and employs an attorney to present it, such defendant is not answerable for any part of the fees of complainant's attorney.[2] Generally one litigating any issue is not chargeable for the services of any attorney who acted in hostility to him.[3] The result of this is that the services of attorneys in litigating disputed titles are not proper subjects for compensation in partition,[4]

Nebraska.— Johnson *v.* Emerick, (1905) 104 N. W. 169.

Ohio.— Lowe *v.* Phillips, 21 Ohio St. 657.

Rhode Island.— Redecker *v.* Bowen, 15 R. I. 52, 23 Atl. 62.

See 38 Cent. Dig. tit. "Partition," § 447.

98. *California.*— Watson *v.* Sutro, 103 Cal. 169, 37 Pac. 201.

Florida.—Girtman *v.* Starbuck, 48 Fla. 265, 37 So. 731.

Illinois.— Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056; Tatro *v.* Tatro, 74 Ill. App. 189.

Indiana.— St. Clair *v.* Marquell, 161 Ind. 56, 67 N. E. 693; Bell *v.* Shaffer, 154 Ind. 413, 56 N. E. 217.

Iowa.— *In re* Smith, 133 Iowa 142, 109 N. W. 196; McClain *v.* McClain, 52 Iowa 272, 3 N. W. 60.

Kentucky.— Fristoe *v.* Gillen, 80 S. W. 823, 26 Ky. L. Rep. 149.

Maine.— Thornton *v.* York Bank, 45 Me. 158.

Minnesota.— Hanson *v.* Ingwaldson, 84 Minn. 346, 87 N. W. 915.

Mississippi.— Hoffman *v.* Smith, 61 Miss. 544.

Missouri.— Padgett *v.* Smith, 206 Mo. 303, 103 S. W. 943; Lucas Bank *v.* King, 73 Mo. 590; Draper *v.* Draper, 29 Mo. 13; Forsee *v.* McGuire, 109 Mo. App. 701, 83 S. W. 548.

Montana.— Murray *v.* Conlon, 19 Mont. 389, 48 Pac. 743.

Nebraska.— Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

New Jersey.— Keeney *v.* Henning, (Ch. 1903) 55 Atl. 88.

New York.— Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901 [*affirming* 27 Misc. 595, 59 N. Y. Suppl. 86]; Wells *v.* Vanderwerker, 45 N. Y. App. Div. 155, 60 N. Y. Suppl. 1089, 7 N. Y. Annot. Cas. 73.

Ohio.— Young *v.* Stone, 55 Ohio St. 125, 45 N. E. 57.

Pennsylvania.— Grubb's Appeal, 82 Pa. St. 23; Bell *v.* Reel, 8 Pa. Dist. 346.

Rhode Island.— Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992.

Tennessee.— Pate *v.* Maples, (Ch. App. 1897) 43 S. W. 740.

See 38 Cent. Dig. tit. "Partition," § 447.

To entitle complainant to recover on account of the services of his attorney, the bill must correctly set out the interests of the parties, and no substantial defense must have been interposed. Jespersen *v.* Mech, 213 Ill. 488, 72 N. E. 1114.

99. Plant *v.* Fate, 114 Iowa 283, 86 N. W. 276.

1. Buttlar *v.* Buttlar, 67 N. J. Eq. 729, 64 Atl. 110.

2. Wachter *v.* Doerr, 210 Ill. 242, 71 N. E. 401; Joest *v.* Adel, 209 Ill. 432, 70 N. E. 638; Bliss *v.* Seeley, 191 Ill. 461, 61 N. E. 524; Dunn *v.* Berkshire, 175 Ill. 243, 51 N. E. 770; Metheny *v.* Bohn, 164 Ill. 495, 45 N. E. 1011; Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Stempel *v.* Thomas, 89 Ill. 146; Lilly *v.* Shaw, 59 Ill. 72; Berger *v.* Neville, 117 Ill. App. 72; Case *v.* Case, 103 Ill. App. 177; Loveland *v.* Loveland, 96 Ill. App. 488; Gilbert *v.* Wielert, 87 Ill. App. 290.

3. Stunz *v.* Stunz, 131 Ill. 210, 23 N. E. 407; St. Clair *v.* Marquell, 161 Ind. 56, 67 N. E. 693; Osborne *v.* Eslinger, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; Bell *v.* Shaffer, 154 Ind. 413, 56 N. E. 217; Hemingray *v.* Hemingray, 96 S. W. 574, 29 Ky. L. Rep. 879.

4. *Iowa.*— Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; Everett *v.* Croskrey, 101 Iowa 17, 69 N. W. 1125; Duncan *v.* Duncan, 63 Iowa 150, 18 N. W. 858; McClain *v.* McClain, 52 Iowa 272, 3 N. W. 60.

Kentucky.— Fristoe *v.* Gillen, 80 S. W.

except in New York.[5] Where it was necessary for two or more, or for all, of the parties to employ counsel, the court refused to undertake to determine, as between them, whose counsel most promoted the general welfare, but left each party to settle with his own counsel and did not grant any allowance in favor of either, except that as the attorney of plaintiff necessarily performed services preliminary to the suit, in examining the title, and also in preparing the pleadings and bringing the case to trial, an allowance was made for his services up to the time when, because the parties were represented each by his own attorney, the attorney of plaintiff could no longer be regarded as acting for all.[6] The language of some of the statutes is sufficiently comprehensive to warrant the allowance of compensation for the services of the attorneys of a defendant,[7] but we know of no reported case in which such allowance was made. In fact, the question can rarely arise, for the employment of counsel by defendant implies a litigated case, and in cases of that class, as we have already shown, the courts do not award counsel fees, even though counsel has appeared as an actor by filing a cross complaint;[8] but if defendant succeeds on his cross complaint, it may relieve him from liability to contribute to the payment of complainant's counsel.[9] Certainly the mere fact that a defendant appeared by an attorney and paid, or became answerable for, his fees does not require an allowance to be made therefor where the partition was not opposed and the services of the attorney were merely in disclosing and thereby protecting his client's interest, which, however, was not assailed by any of the parties.[10]

d. The Amount of the Allowance. What is a reasonable sum to be allowed for counsel fees is a question of fact, but not necessarily determinable solely on evidence adduced before the court, for the judge from his presiding at the trial and other proceedings may have a better conception of the amount and character of the services than can result merely from the hearing of testimony descriptive of them. Doubtless the elements to be considered are the same as in any other cause presenting the issue of the proper compensation for the services of an attorney, namely, the skill, experience, and standing of the lawyer, the nature of the controversy, the amount involved, etc.[11] The compensation should be accord-

823, 26 Ky. L. Rep. 149; Lang *v.* Constance, 46 S. W. 693, 20 Ky. L. Rep. 502.

Minnesota.— Hanson *v.* Ingwaldson, 84 Minn. 346, 87 N. W. 915.

Mississippi.— Mansfield *v.* Olsen, (1888) 4 So. 545; Hoffman *v.* Smith, 61 Miss. 544.

Nebraska.—Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

Ohio.— Young *v.* Stone, 55 Ohio St. 125, 45 N. E. 57.

Pennsylvania.— Grubb's Appeal, 82 Pa. St. 23; Worthington *v.* Wortbington, 10 Kulp 466.

Rule in South Carolina see McCarter *v.* Caldwell, 58 S. C. 65, 36 S. E. 507; Westmoreland *v.* Martin, 24 S. C. 238.

5. Defendorf *v.* Defendorf, 42 N. Y. App. Div. 166, 59 N. Y. Suppl. 163 [*affirming* 26 Misc. 677, 57 N. Y. Suppl. 843].

6. Liles *v.* Liles, 116 Mo. App. 413, 91 S. W. 983; Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992. Generally the fact that a defendant necessarily employed counsel will exonerate him from contributing to the payment of complainant's counsel. Wachter *v.* Doerr, 210 Ill. 242, 71 N. E. 401; Bell *v.* Shaffer, 154 Ind. 413, 56 N. E. 217.

7. Cal. Code Civ. Proc. § 796 (which provides for "the costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit"); N. Y. Code Civ. Proc. § 3253; Defendorf *v.* Defendorf, 26 Misc. (N. Y.) 677, 57 N. Y. Suppl. 843 [*affirmed* in 42 N. Y. App. Div. 166, 59 N. Y. Suppl. 163]; Crossman *v.* Wyckoff, 64 N. Y. App. Div. 554, 72 N. Y. Suppl. 337. But only where the partition is by sale. Sprague *v.* Engelbrecht, 29 Misc. (N. Y.) 464, 61 N. Y. Suppl. 952.

8. Gehrke *v.* Gehrke, 190 Ill. 166, 60 N. E. 59; Potts *v.* Gray, 60 Miss. 57.

9. Johnson *v.* Johnson, (Tenn. Ch. App. 1899) 53 S. W. 226.

10. Biles' Appeal, 119 Pa. St. 105, 12 Atl. 833; Pate *v.* Maples, (Tenn. Ch. App. 1897) 43 S. W. 740.

11. McMullen *v.* Reynolds, 105 Ill. App. 386 [*reversed* on other grounds in 209 Ill. 504]; McMullen *v.* Doughty, (N. J. Ch. 1903) 55 Atl. 115; Heft's Estate, 9 Kulp (Pa.) 337; *In re* Miller, 29 Pittsb. Leg. J. N. S. (Pa.) 9; Gray *v.* King, 39 Tex. 616.

Where there was no evidence respecting the value of petitioner's counsel fees, it was held not to be error to refuse to apportion and allow them. Mehan *v.* Mehan, 203 Ill. 180, 67 N. E. 770. This we beg to doubt, for we think the court should take judicial notice that they were of some value.

ing to the services performed, and not as a commission on the fund in court.[12] If there is a fee bill fixing the amount of attorney's fees, the allowance should be restricted to the amounts so fixed.[13]

e. Where an Attorney Is Complainant. If plaintiff cotenant is an attorney at law and performs in the suit the services usually required of a complainant's attorney, no allowance can be made for such services and enforced as part of the costs of the suit.[14] He is not, however, bound to act as attorney in the cause. He may, to the same extent as if he were not competent to act for himself, employ counsel to commence and conduct the proceeding. Nor is it fatal to his claim for an allowance for their services that they are his partners.[15]

f. The Allowance Must Be in Favor of a Party — Not of His Attorney. The allowance for attorney's fees is to indemnify a party for an expense incurred in the action. It does not warrant the introducing of a new party therein and the entry of a judgment in his favor. The allowance therefore should not be in favor of the attorney, but of the party who has paid, or is liable to pay, his compensation.[16]

8. In Which Judgment the Provision For Must Be Made. The fixing of the amount of the costs and of the sum to be allowed for attorney's fees and the imposition and assessment of these charges upon the persons and property subject thereto are matters not for the interlocutory but for the final judgment, and any proceeding undertaking to allow either attorney's fees or costs prior to such final judgment is unauthorized.[17] If, however, the final judgment omits any provision on these subjects, the matter may, in Vermont, be brought up at a subsequent time by petition.[18] In Illinois the court directed the master to pay the complainants' solicitor a reasonable fee, without fixing the amount. The master thereafter made payment to such solicitor, and in his report stated the fact of payment and its amount. The court subsequently approved the report, and this was held to be a sufficient fixing of the amount.[19] It is safe to say that not until the costs are fixed by the court has any referee or other officer into whose possession the proceeds of a sale have come the right to pay them over to any party or other person on the assumption that he is entitled thereto as costs or attorney's fees.[20]

Q. The Final Judgment — 1. Necessity For. To the termination of an action or proceeding in partition the final judgment is indispensable. It is true, if the partition has been by sale, the title of the parties may be divested from them and vested in the purchaser, although no final judgment has been given distributing the proceeds. But if the partition is by allotment, the parties remain

12. Luzerne Bldg., etc., Assoc. *v.* People's Bank, 142 Pa. St. 121, 21 Atl. 806.

13. Whittimore *v.* Whittimore, 7 Paige (N. Y.) 38.

In New York the court may award any party a sum not exceeding five per cent of the value of the property partitioned. Doremus *v.* Crosby, 66 Hun 125, 20 N. Y. Suppl. 906.

There need not be any agreement between complainant and his attorney undertaking to fix the amount of the latter's fee. Liles *v.* Liles, 116 Mo. App. 413, 91 S. W. 983.

14. Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75; Girtman *v.* Starbuck, 48 Fla. 265, 37 So. 731; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694.

15. Thomas *v.* Hamill, 106 Ill. App. 524.

16. McMullen *v.* Reynolds, 209 Ill. 504, 70 N. E. 1041; Lilly *v.* Shaw, 59 Ill. 72.

But in New York if property is sold, the statute appears to contemplate that in the order distributing the proceeds the referee shall be required to make payment to the attorney, rather than to the party. McKenna *v.* Duffy, 64 Hun 597, 19 N. Y. Suppl. 248, 22 N. Y. Civ. Proc. 366.

17. Harrington *v.* Goldsmith, 136 Cal. 168, 68 Pac. 594; Wells *v.* Vanderwerker, 45 N. Y. App. Div. 155, 60 N. Y. Suppl. 1089, 7 N. Y. Annot. Cas. 73; Weeks *v.* Cornwell, 38 Hun (N. Y.) 577; Saffron *v.* Saffron, 11 N. Y. St. 471. But see Johnson *v.* Weir, 36 Misc. (N. Y.) 737, 74 N. Y. Suppl. 358 [*affirmed* in 72 N. Y. App. Div. 325, 76 N. Y. Suppl. 76].

18. Strong *v.* Hobbs, 20 Vt. 192.

But it is doubtful whether an order respecting the costs made after the entry of the final judgment can make a lien on the property partitioned. Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046.

19. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

20. Arnold *v.* Carter, 19 App. Cas. (D. C.) 259; Clark's Appeal, 93 Pa. St. 369.

cotenants until the final judgment confirming and making effective the allotments.[21] The direct evidence of such final judgment is not, however, always capable of being produced; and in the absence of such evidence, the judgment may be presumed from possession taken and long held in severalty.[22]

2. When May Be Rendered. Obviously the final judgment ordinarily should not be rendered until all the issues involved in the proceeding have been determined, nor until the court can finally dispose of all the matters before it by directing the proper disposition of the fund, if any has been realized from a sale of property, or by vesting the title in severalty to each allotment in the respective allottees and making all provisions that are to be made concerning charges in favor of or against any allottee;[23] but, under exceptional circumstances, where some right cannot be determined or provided for until the happening of some future event, the court may enter a judgment final as to all other matters, but leaving in abeyance the matters which cannot be determined, or properly provided for until some future time.[24] If there is a failure to enter judgment in partition due to the delay of the court, or to any cause which in a case of another class would justify the entry of judgment *nunc pro tunc*, it will equally justify such an entry in an action or suit for partition.[25]

3. The Form and Substance of the Judgment. If the partition is not in kind, but is by a sale of the property, the final judgment disposes of the proceeds of such sale by directing the payment of the costs or ratifying payments already made, and distributing the residue to and among the parties entitled thereto. If the proceeding is at law, the final judgment refers to the report of the commissioners, and orders and adjudges "that the said report stand, in all respects, ratified and confirmed, and that the partition so made be firm and effectual forever," and it also contains an adjudication respecting the costs and a direction that execution issue therefor.[26] If the proceeding is in chancery, strictly speaking, the final decree, as it does not of itself affect the title, should further provide for and direct the execution by the requisite parties of such conveyances as are necessary to vest in severalty in each allottee the title to his allotment.[27] In England, under the recent equity practice, especially when the shares of the parties are minute and complicated, the court may declare each of the parties trustees as to the shares allotted to them, and then vest the whole trust estate in a single new trustee, with directions to him to convey to the respective parties their several allotments.[28] In various other emergencies the court also appoints a trustee and directs him to execute the conveyance necessary to consummate the partition.[29] If a party is a minor, and therefore not competent to execute a conveyance, the final decree may declare him to be a trustee of the parts allotted in severalty to the other parties.[30] In the United States the necessity for conveyances to vest

21. Gulick *v.* Huntley, 144 Mo. 241, 46 S. W. 154; *In re* Ausborn, 122 N. C. 42, 29 S. E. 56.

22. Gillespie *v.* Johnston, Wright (Ohio) 231.

23. Seay *v.* White, 5 Dana (Ky.) 555; Kennedy *v.* Kennedy, 43 Pa. St. 413, 82 Am. Dec. 574; Billups *v.* Riddick, 53 N. C. 163.

24. Grant *v.* Murphy, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188; Howe *v.* Spaulding, 50 Minn. 157, 52 N. W. 527; Poundstone *v.* Everly, 31 Pa. St. 11.

25. Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755; Molineaux *v.* Raynolds, 56 N. J. Eq. 187, 36 Atl. 276.

26. Freeman Coten. & P. § 527; Seale *v.* Soto, 35 Cal. 102.

27. *Alabama.*— Deloney *v.* Walker, 9 Port. 497.

Arkansas.— Harris *v.* Preston, 10 Ark. 201.

Illinois.— Chickering *v.* Failes, 29 Ill. 294.

Kentucky.— Smith *v.* Moore, 6 Dana 417.

Virginia.— Bolling *v.* Teel, 76 Va. 487; Christian *v.* Christian, 6 Munf. 534.

United States.— Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256.

England.— Whaley *v.* Dawson, 2 Sch. & Lef. 372.

See 38 Cent. Dig. tit. "Partition," § 304.

28. Shepherd *v.* Churchill, 25 Beav. 21, 53 Eng. Reprint 543.

29. Beckett *v.* Sutton, 19 Ch. D. 646, 51 L. J. Ch. 432, 46 L. T. Rep. N. S. 481, 30 Wkly. Rep. 490; Basnett *v.* Moxon, L. R. 20 Eq. 182, 44 L. J. Ch. 557, 23 Wkly. Rep. 945.

30. Bowra *v.* Wright, 4 De G. & Sm. 265, 15 Jur. 981, 20 L. J. Ch. 216, 64 Eng. Reprint 825.

the title in harmony with the partition has generally been dispensed with.[31] In some of the states, it is, however, essential that the decree on its face show that the title is to be vested without any precedent conveyance, and, where the decree is silent, a conveyance must be made.[32] In various parts of this article we have shown how by the modern practice, and especially under the reformed codes of procedure, the action of partition has been broadened until thereby almost every conceivable question of title may be determined, and every equity of any of the parties may be presented and recognized and due provision made for its enforcement. From this it follows that the final judgment may contain, in addition to the mere confirmation of the partition, such other and further provisions as may be requisite to clearly express all adjudications which the court has made and all the directions which it intends to have carried into effect. Thus, if equities have been established, due provision may be made for their enforcement;[33] if owelty is found to be due from one party to another, that fact may be stated and liens imposed and means authorized for their enforcement;[34] if the sale of the property or some part thereof is necessary on account of some lien, such sale may be ordered,[35] although generally one holding a lien will be left to enforce it by his ordinary remedies;[36] if the due protection of the parties, or of any of them, requires some provision respecting the deposit or custody of the title deeds, such provision should be inserted in the judgment;[37] if some of them are liable to others for rents received or for any other matter connected with the common property, the liability should be declared and its enforcement provided for.[38] The final judgment is in a sense based upon the interlocutory judgment, and the former may aid in the construction of the latter; and if the latter is inconsistent with it there is generally a pre-

31. Street *v.* McConnell, 16 Ill. 125; Young *v.* Frost, 1 Md. 377; Young *v.* Cooper, 3 Johns. Ch. (N. Y.) 295; Griffith *v.* Phillips, 3 Grant (Pa.) 381.

32. Smith *v.* Crawford, 81 Ill. 296.

33. King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. L. Rep. 1859; Herchenroeder *v.* Herchenroeder, 75 Mo. App. 283.

34. Jones *v.* Crocker, 4 La. Ann. 8; Kletzly *v.* Marks, 22 Pa. Co. Ct. 71; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

35. Hazen *v.* Webb, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276.

36. Talbott *v.* Campbell, 67 S. W. 53, 23 Ky. L. Rep. 2198.

37. Elton *v.* Elton, 27 Beav. 632, 6 Jur. N. S. 136, 54 Eng. Reprint 251; Jones *v.* Robinson, 3 De G. M. & G. 910, 52 Eng. Ch. 910, 43 Eng. Reprint 356.

38. Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

Setting apart "to the estate of."— Although the judgment should show to whom property is allotted, yet where the heirs and representatives of a deceased petition that his interest in an estate be set off to them as an entirety, a judgment setting apart such interest "to the estate of," naming the decedent, is not void for uncertainty. Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227.

Under a statute authorizing a formal divestiture of title in and by a decree, this authorization must be regarded as directory merely, and failure to formally divest the interests of two of the parties does not make the decree any the less binding on them. Johnson *v.* Britt, 9 Heisk. (Tenn.) 756. While this is not necessary, there is nothing improper in a decree declaring that if either of the parties is legally evicted from any part of his land, the other shall reconvey a proportionate quantity. Devour *v.* Johnson, 3 Bibb (Ky.) 409.

The provision of the statute of New York that if the persons entitled to any estate be unknown, the court shall make such order for the protection of their rights as if they were known and had appeared, has no application to unknown or after-born persons adjudged to have no interest. Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292.

Insertion of findings of fact.— While it is unusual to insert in the final judgment or decree a finding of facts, yet when persons not in possession have established their title to a certain interest in lands by proving their heirship to a remote owner, the court may permit the findings as to their pedigree to be recited in the decree, when this course may probably prevent further questioning as to the rights of the parties, and this, although a rule of court declares that neither any part of the pleadings, nor the report of any master, nor any prior proceeding shall be recited or stated in the decree. McClaskey *v.* Barr, 48 Fed. 130.

Other affirmative relief.— When a party seeks and shows himself entitled to affirmative relief independent of that of the partition, such, for instance, as the annulling of a conveyance described in the pleadings, no doubt the judgment ought to specifically declare the annulment or cancellation of such conveyance, but a finding of facts by the court necessary for such annulment may, it is said, accomplish the same purpose. Sullivan *v.* Lumsden, 118 Cal. 664, 50 Pac. 777.

sumption of error sufficient to support an appeal.[39] If the final judgment purports to confirm a partition of land, described differently from that described in the interlocutory judgment, it will be assumed that a clerical error has been committed which the court has power to correct.[40] Although the final judgment may, by referring to and approving the commissioners' report on file, practically make it a part of such judgment, as if it were formally copied therein, and hence it cannot be said to be necessary that the judgment contain the matters set out in such report, yet it is the safer practice, because the judgment is more apt than the report to be preserved and recorded, to insert in the judgment a complete description of each allotment and a designation of the person to whom it is made, so that by referring to the judgment alone one may ascertain each parcel, the person to whom it has been assigned, the liabilities and burdens to which it is subject, and the easements and other rights to which its allottee and his successors are entitled. The descriptive words in a final judgment in partition, like those in every other writing, may require construction, but we are not aware that the principles applying to and controlling such construction differ from those applicable to other writings.[41]

4. Modes of Enforcing. If a party entitled to an allotment is not in possession thereof, and the proceeding is in chancery or in a court exercising the powers of a court of chancery, he is entitled to a writ of assistance.[42] He may also, where that remedy will prove efficient, procure an injunction against any of the parties proposing to intermeddle with, or obstruct the enjoyment of, his rights.[43] If a party refuses to do something which the judgment requires of him, he may be coerced by attachment for contempt.[44] A person holding title under the final judgment may also enforce his rights by appropriate actions at law,[45] and suits in equity.[46]

5. Relief From. After the final judgment has been entered, it may be found unjust to some of the parties, who may then seek relief therefrom. This relief they may seek by appeal or motion to vacate under substantially the same circumstances and for substantially the same causes as if the judgment related to some other matter.[47] Relief may also be sought and secured by an independent suit in

39. White *v.* Mitchell, 60 Tex. 164.

40. Loring *v.* Groomer, 110 Mo. 632, 19 S. W. 950.

41. *California.*— Rose *v.* Mesmer, 142 Cal. 322, 75 Pac. 905, as to whether and when riparian rights are cut off by a decree.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149, as to the mode of adjusting losses in the areas intended to be partitioned.

Missouri.— Turner *v.* Dixon, 150 Mo. 416, 51 S. W. 725, as to aiding description by parol evidence.

New York.— Mott *v.* Eno, 97 N. Y. App. Div. 580, 90 N. Y. Suppl. 608 [*reversed* in 181 N. Y. 346, 74 N. E. 229], as to when the fee in lands in abutting streets will be deemed partitioned.

Tennessee.— Bigley *v.* Watson, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 679 (or an estate in remainder terminated); Smith *v.* Smith, (Ch. 1900) 57 S. W. 198 (as to whether a life-estate has been divested by partition).

Texas.— Drew *v.* Morris (Civ. App. 1904) 82 S. W. 321; Scales *v.* Marshall, (Civ. App. 1900) 60 S. W. 336; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974, all as to the effect on the separate lands of married women.

42. Keil *v.* West, 21 Fla. 508; Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205; Church's Appeal, 10 Pa. Cas. 230, 13 Atl. 756; Kelsey *v.* Church, 4 C. Pl. (Pa.) 105.

43. King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394; Mulferger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

44. Edwards *v.* Dykeman, 95 Ind. 509.

45. Jennings *v.* Jennings, 94 Ill. App. 26; Robnett *v.* Howard, (Tenn. Ch. App. 1901) 61 S. W. 1082.

46. Devour *v.* Johnson, 3 Bibb (Ky.) 409; Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661, 49 S. E. 984.

47. See cases cited *infra*, this note.

Granting relief on motion see Pulse *v.* Osborn, 30 Ind. App. 631, 64 N. E. 59; Bridges *v.* Howard, 18 Iowa 116; Daleschal *v.* Geiser, 36 Kan. 374, 13 Pac. 595; Bull *v.* Pyle, 41 Md. 419; Evans' Estate, 150 Pa. St. 528, 24 Atl. 739; Lauer's Estate, 16 York Leg. Rec. (Pa.) 153.

By appeal or by suit in equity.— The practising of vacating or modifying judgments after they have become final, and after the lapse of the term, unless they are shown to be void by the record, is a dangerous one, and not less so in suits for partition than in other proceedings, and a party deeming himself entitled to relief should be required to seek it by appeal or by a suit in equity. Schwaman *v.* Truax, 76 N. Y. App. Div. 194, 78 N. Y.

equity, for any cause justifying relief in equity from any other judgment affecting the title or the right to the possession of real property,[48] such as mistake,[49] or fraud resulting in inequitable allotment.[50] The right to relief in equity is subject to the same limitations as in other cases where relief is sought from judgments, namely, the party seeking relief must not have been guilty of carelessness and inattention to his business,[51] nor of acquiescence in the judgment complained of or of laches in seeking relief from it,[52] nor must the suit for relief be a mere attempt to relitigate matters which are *res judicata*,[53] nor attempt to urge errors or irregularities which ought to have been urged in the original suit.[54] Neither will relief be awarded against an innocent purchaser,[55] but one is not an innocent purchaser with respect to matters which he must have ascertained by reading the recorded conveyances through which he claims title or the pleadings and other records in the partition suit.[56]

Suppl. 374 [*reversed* on other grounds in 179 N. Y. 35, 71 N. E. 464, 103 Am. St. Rep. 832]; Marvin *v.* Marvin, 1 Abb. N. Cas. (N. Y.) 372, 52 How. Pr. 97; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405; Glemser *v.* Glemser, 5 Ohio S. & C. Pl. Dec. 267, 5 Ohio N. P. 170; Totten's Appeal, 46 Pa. St. 301; Silvius' Estate, 18 Lanc. L. Rev. (Pa.) 92; De Ford *v.* Taylor, (Tenn. Ch. App. 1898) 51 S. W. 999; Kane *v.* Parker, 4 Wis. 123.

48. See cases cited *infra*, this note.

Causes justifying such relief: Inadvertently partitioning lands not referred to in the complaint or findings. Sullivan *v.* Lumsden, 118 Cal. 664, 50 Pac. 777. Conducting partition proceedings in the name of minors without any authority and in fraud of their rights. Rhodes *v.* Cooper, 113 La. 600, 37 So. 527. Mistakingly assigning to a cotenant more than his share (Wilbur *v.* Dyer, 39 Me. 169; Adair *v.* Cummin, 48 Mich. 375, 12 N. W. 495; Harris *v.* Hicks, (Tex. Civ. App. 1898) 49 S. W. 110); or inserting one figure in a report of partition when another was intended (Pulliam *v.* Wilkerson, 7 Baxt. (Tenn.) 611). Fraud see *infra*, III, Q, 5, text and note 50. Mistake see *infra*, III, Q, 5, text and note 49. Especially are courts of equity inclined to interfere on behalf of minors who have been injured by partition. Merritt *v.* Shaw, 15 Grant Ch. (U. C.) 321.

49. *California.*— Guedici *v.* Boots, 42 Cal. 452.

Illinois.—De Witt *v.* Hawkins, 107 Ill. 109.

Indiana.— Boyd *v.* Doty, 8 Ind. 370.

Iowa.— Manning *v.* Horr, 18 Iowa 117.

New Jersey.— Mackie *v.* Mackie, 29 N. J. Eq. 81.

New York.—Douglass *v.* Viele, 3 Sandf. Ch. 439.

Pennsylvania.— George's Appeal, 12 Pa. St. 260.

Tennessee.— Pardue *v.* West, 1 Lea 729.

See 38 Cent. Dig. tit. "Partition," § 306.

Parties.— The suit, it is said, may be maintained by the alienee of the party prejudiced. Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426. All the parties in the original partition are necessary parties defendant. Wheat *v.* Burgess, 21 Kan. 407. While it is reasonable, as a general rule, to restrict the right to bring suits for relief against partition to those who were parties to the action (Henderson *v.* Wallace, 72 N. C. 451), the rule must be different as to persons who, although not such parties, were interested in the property when the partition was made and are necessarily prejudiced if it is not relieved against (Wright *v.* Strother, 76 Va. 857).

50. *Iowa.*— Young *v.* Tucker, 39 Iowa 596; De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491.

Michigan.—Adair *v.* Cummin, 48 Mich. 375, 12 N. W. 495.

Missouri.— Lillibridge *v.* Ross, 59 Mo. 217.

New York.—Schwaman *v.* Truax, 179 N. Y. 35, 71 N. E. 464, 103 Am. St. Rep. 832; Fisher *v.* Hersey, 78 N. Y. 387.

Wisconsin.— Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

Allegation of fraud.— The charge of fraud must be direct. Harn *v.* Phelps, 65 Tex. 592. And a mere general allegation that the wrong complained of resulted from "the error or fraud of a surveyor appointed in partition proceedings" is not sufficient. Woodhouse *v.* Cocke, (Tex. Civ. App. 1897) 39 S. W. 948.

Effect of invalidating titles.— The fact that to declare a partition proceeding void will invalidate many titles furnishes no sufficient ground for refusing this relief. Prince *v.* Clark, 81 Mich. 167, 45 N. W. 663.

51. Winn *v.* Dickson, 15 La. Ann. 273.

52. *North Carolina.*— Thompson *v.* Shamwell, 89 N. C. 283.

Ohio.— Piatt *v.* Hubbell, 5 Ohio 243.

Pennsylvania.— Osborne's Estate, 149 Pa. St. 412, 24 Atl. 312; Leibert's Appeal, 119 Pa. St. 525, 13 Atl. 327.

Texas.— Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465.

England.— Burley *v.* Moore, 5 L. J. Ch. O. S. 120.

53. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

54. Ward *v.* Ward, 174 Ill. 432, 51 N. E. 806; Winchester *v.* Winchester, 1 Head (Tenn.) 460.

55. Scovell *v.* Levy, 106 La. 118, 30 So. 322.

56. Estes *v.* Nell, 163 Mo. 387, 63 S. W. 724; Lockhart *v.* Vandyke, 97 Va. 356, 33 S. E. 613.

The recital in decree of partition that it is made without prejudice to the rights of plain-

6. Collateral Attack Upon. The rule with respect to collateral attacks upon judgments and decrees in partition must, upon principle, be precisely the same as that controlling collateral attacks upon other judgments and decrees, which is, that they are impregnable to such an attack unless they can be assailed for want of jurisdiction of the subject-matter, or the person of a party, or the court has granted some relief not within its power to grant. No alleged fraud,[57] no mere irregularity or error in the proceedings, or in any action taken by the court, can on a collateral attack, impair its judgment or the partition authorized or confirmed thereby.[58] Decisions may be found inconsistent with this rule and which are

tiff puts on inquiry one who receives a mortgage from one of the persons among whom the property is partitioned. Gray *v.* Cockrell, 20 Tex. Civ. App. 324, 49 S. W. 247.

57. Brace *v.* Reid, 3 Greene (Iowa) 422; Gaines *v.* Johnston, 15 S. W. 246, 12 Ky. L. Rep. 779; Bayhi *v.* Bayhi, 35 La. Ann. 527; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309.

58. *Alabama.*— Morring *v.* Tipton, 126 Ala. 350, 28 So. 562.

Georgia.— King *v.* Dillon, 66 Ga. 131.

Illinois.— Thompson *v.* Frew, 107 Ill. 478; Lang *v.* Clemens, 107 Ill. 133; Thornton *v.* Houtze, 91 Ill. 199; Murphy *v.* Williamson, 85 Ill. 149; Nichols *v.* Mitchell, 70 Ill. 258; Lane *v.* Bommelmann, 17 Ill. 95.

Indiana.— Irvin *v.* Buckles, 148 Ind. 389, 47 N. E. 822; State *v.* Rogers, 131 Ind. 458, 31 N. E. 199; Eller *v.* Evans, 128 Ind. 156, 27 N. E. 418; Schee *v.* McQuilken, 59 Ind. 269; Waltz *v.* Borroway, 25 Ind. 380; Doe *v.* Smith, 1 Ind. 451.

Iowa.— Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287; Wright *v.* Marsh, 2 Greene 94.

Kansas.— Havens *v.* Drake, 43 Kan. 484, 23 Pac. 621; Blauw *v.* Love, 9 Kan. App. 55, 57 Pac. 258.

Kentucky.— Smith *v.* Norment, 94 Ky. 624, 23 S. W. 370, 24 S. W. 433; Blackburn *v.* Blackburn, 11 S. W. 712, 11 Ky. L. Rep. 161.

Louisiana.— Friedrich *v.* Friedrich, 111 La. 26, 35 So. 371; Scovell *v.* Levy, 106 La. 18, 30 So. 322; Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666; Paul *v.* Lamothe, 36 La. Ann. 318; Bayhi *v.* Bayhi, 35 La. Ann. 527; Ventress *v.* Brown, 30 La. Ann. 1012; Fowler *v.* Gordon, 24 La. Ann. 270; *In re* Routon, 11 La. Ann. 621.

Massachusetts.— Foster *v.* Abbot, 8 Metc. 596; Austin *v.* Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497.

Michigan.—Persinger *v.* Jubb, 52 Mich. 304, 17 N. W. 851.

Mississippi.— Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231.

Missouri.— Sparks *v.* Clay, 185 Mo. 393, 84 S. W. 40; Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Yates *v.* Johnson, 87 Mo. 213; Latrielle *v.* Dorleque, 35 Mo. 233.

New York.— Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298; Croghan *v.* Livingston, 17 N. Y. 218; Lenehan *v.* St. Francis Xavier College, 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Herbert *v.* Smith, 6 Lans. 493; Braker *v.* Devereaux, 8 Paige 513.

North Carolina.— Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811.

Ohio.— Bohart *v.* Atkinson, 14 Ohio 228; Wilson *v.* Bull, 10 Ohio 250; Foster *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432; Tabler *v.* Wiseman, 1 Ohio Dec. (Reprint) 497, 10 West. L. J. 207.

Oregon.— Morrill *v.* Morrill, 20 Oreg. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155.

Pennsylvania.— Reid *v.* Clendenning, 193 Pa. St. 406, 44 Atl. 500; Vensel's Appeal, 77 Pa. St. 71; Lair *v.* Hunsicker, 28 Pa. St. 115; Snevily *v.* Wagner, 8 Pa. St. 396; Ewing *v.* Houston, 4 Dall. 67, 1 L. ed. 744; Simon *v.* Kessler, 12 Pa. Dist. 781; Moorhead *v.* Com., 1 Grant 214; Dean *v.* Brown, 7 Lack. Leg. N. 208; Reid *v.* Clendenning, 29 Pittsb. Leg. J. N. S. 396.

South Carolina.— Woodward *v.* Elliott, 27 S. C. 368, 3 S. E. 477.

Tennessee.—Bigley *v.* Watson, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 679; Bledsoe *v.* Wiley, 7 Humphr. 507; Robnett *v.* Howard, (Ch. App. 1901) 61 S. W. 1082; Elk Valley Coal, etc., Co. *v.* Douglass, (Ch. App. 1898) 48 S. W. 365.

Texas.— Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Davis *v.* Wells, 37 Tex. 606; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Blagge *v.* Shaw, (Civ. App. 1897) 41 S. W. 756; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Williams *v.* Howard, 10 Tex. Civ. App. 527, 31 S. W. 835.

Virginia.—Wilson *v.* Smith, 22 Gratt. 493; Carter *v.* Carter, 5 Munf. 108.

United States.— Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83.

Canada.— Jenking *v.* Jenking, 11 Ont. App. 92.

Want of space excludes all analysis of these decisions for the purpose of showing what, within the meaning of the rule above stated, may be classed as errors and irregularities. It is safe to state, in a general way, that the former term includes all incorrect conclusions expressly or impliedly reached by a court on some question it had authority to decide, and the latter term the omission of some act prescribed by law, or the doing of it at a different time or place, or in a different manner or by a different person, or a greater or less number of persons than required by law. See cases cited *supra*, this note.

worthy of being cited only as phenomenal instances of error or forgetfulness.[59] Instances of judgments in partition subject to collateral attack, although the court had jurisdiction of the subject-matter and the parties, because the court had no jurisdiction to give the relief which it assumed to grant, must be rare.[60] Possibly the decreeing of a sale for costs when only a partition in kind was prayed for,[61] or allowing an attorney's fee where the court had no power to do so,[62] or in undertaking to vest in strangers to the suit, as trustees, the title to a portion of the land, with power to bring ejectment and enforce compromises,[63] may serve as illustrations. As to when a judgment may be collaterally assailed for want of jurisdiction by the court over a party is a question upon which the courts are at variance, but whatever rule prevails in any state as to other judgments is equally applicable to judgments and decrees in partition. If the record shows the manner in which process was served, another, different, and better service will not be presumed.[64] On the other hand, if the record is silent respecting some jurisdictional step, that it was taken and in a manner entitling the court to act as it did will be conclusively presumed,[65] and recitals or statements of jurisdictional matters are equally unassailable.[66] The presumption of regularity is not, on collateral attack, rendered less applicable by the fact that the proceeding is under a special statute instead of being under the common law.[67] The fact that defendant was incorrectly named

59. Guyton *v.* Shane, 7 Dana (Ky.) 498; Craig *v.* Barker, 4 Dana (Ky.) 600; Clay *v.* Moseley, 1 A. K. Marsh. (Ky.) 360.

For example: Treating as void a judgment because the record did not show whether one of the commissioners was sworn (Smith *v.* Moore, 6 Dana (Ky.) 417); or whether, although sworn, he acted with the others (Schuyler *v.* Marsh, 37 Barb. (N. Y.) 350); or because the return did not show that the commission directed the commissioners to divide the lands as required by section 8 of the controlling statute, and to ascertain the value of the several parts in case it was incapable of division (Stallings *v.* Stallings, 22 Md. 41). Declaring that an erroneous order of a probate court in partition need not be appealed from, but may safely be disregarded. Jenks *v.* Howland, 3 Gray (Mass.) 536; Thayer *v.* Thayer, 7 Pick. (Mass.) 209; Newhall *v.* Sadler, 16 Mass. 122. Disregarding a partition on the ground that the parties thereto were not tenants in common of all the lands partitioned. Jackson *v.* Myers, 14 Johns. (N. Y.) 354. Holding that the failure to give a recognizance was fatal. Dornblaser's Estate, 22 Pa. Co. Ct. 379, 15 Montg. Co. Rep. 134.

Possibly Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241, disregarding a partition because to "B's representatives," without naming them, is sustainable.

60. Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065.

61. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

62. Hutts *v.* Martin, 134 Ind. 587, 33 N. E. 676.

63. Walter *v.* Slater, 5 App. Cas. (D. C.) 357.

Of course a judgment purporting to affect the interest of parties not before the court must be ineffective, but this is for want of jurisdiction of their person. Gerke *v.* Cameron, (Cal. 1897) 50 Pac. 434; Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801; Crane *v.* Kimmer, 77 Ind. 215.

64. Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

65. *Georgia.*— Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562.

Illinois.— Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Nichols *v.* Mitchell, 70 Ill. 258.

Indiana.— Crane *v.* Kimmer, 77 Ind. 215.

North Carolina.— Wood *v.* Sugg, 91 N. C. 93, 49 Am. Rep. 639.

Pennsylvania.— Perrine *v.* Kohr, 20 Pa. Super. Ct. 36.

Tennessee.— Wilcox *v.* Cannon, 1 Coldw. 369.

Texas.— Davis *v.* Wells, 37 Tex. 606.

See 38 Cent. Dig. tit. "Partition," § 313 *et seq.*

66. *Maine.*— Blaisdell *v.* Pray, 68 Me. 269.

Missouri.— Brawley *v.* Ranney, 67 Mo. 280.

North Carolina.— Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901.

Pennsylvania.— Vensel's Appeal, 77 Pa. St. 71.

Texas.— Gillon *v.* Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014.

United States.—Hall *v.* Law, 102 U. S. 461, 26 L. ed. 217.

See 38 Cent. Dig. tit. "Partition," § 313 *et seq.*

A mere recital "now at this day come the said parties, by their respective attorneys," following the title of a cause in which the name of a defendant appears with others will not, it has been held, support the judgment on collateral attack if the record does not show the acquisition of jurisdiction over him either by summons or by publication. Bell *v.* Brinkmann, 123 Mo. 270, 27 S. W. 374.

Long acquiescence may support and perhaps give rise to a presumption of jurisdiction. Baker *v.* Prewitt, 64 Ala. 551; Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219.

67. Vensel's Appeal, 77 Pa. St. 71; Falkner *v.* Guild, 10 Wis. 563.

in the proceedings and judgment does not deprive the court of jurisdiction or lessen the effect of the judgment if he was duly cited.[68]

7. Ratification and Estoppel. We have hereinbefore shown in section II not only that the cotenants may make partition without the aid of any court; but furthermore that this may be by parol followed by possession taken and held under it, and that where such parol partition and the possession under it were not recognized as affecting the legal title, they yet were conceded to vest in the allottees a paramount equity entitling them to control such legal title and require its transfer to them if needed to fully consummate the partition. If proceedings taken in court to partition property go so far that allotments are made and possession is taken and held under them, any party so taking and holding possession or otherwise knowingly receiving the benefit of the partition thereby ratifies it and becomes estopped to assail it or to deny its validity.[69] An exception to this rule must be allowed in favor of minors and other persons who are incompetent to act.[70]

8. The Effect of the Partition — a. Is Only the Possession Bound? No doubt partition at law was a mere possessory action, and hence the judgment confirming it merely placed each allottee in possession of his allotment to hold in severalty by the same title which he had before held in cotenancy. The cases affirming this are numerous.[71] Many of them are misleading, in that they reiterate statements which, although undoubtedly true at the common law, are entirely false where made because the statutes of the state controlling the courts making

68. Corrigan's Succession, 42 La. Ann. 65, 7 So. 74.

69. *Georgia.*—Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Illinois.— Rann *v.* McTiernan, 187 Ill. 193, 58 N. E. 390.

Indiana.— Eller *v.* Evans, 128 Ind. 156, 27 N. E. 418; Brackenridge *v.* Dawson, 7 Ind. 383.

Iowa.— Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604; McGregor *v.* Reynolds, 19 Iowa 228.

Kentucky.— Blue *v.* Waters, 114 Ky. 659, 71 S. W. 889, 24 Ky. L. Rep. 1481; Durrett *v.* Durrett, 89 S. W. 210, 28 Ky. L. Rep. 275.

Louisiana.— Bruhn *v.* Firemen's Bldg. Assoc., 42 La. Ann. 481, 7 So. 556; Sevier *v.* Sargent, 25 La. Ann. 220; Baham *v.* Baham, 11 La. 510.

Maine.— Robbins *v.* Gleason, 47 Me. 259. *Contra,* Cogswell *v.* Reed, 12 Me. 198.

Maryland.— Brillhart *v.* Mish, 99 Md. 447, 58 Atl. 28.

Massachusetts.— White *v.* Clapp, 8 Metc. 365; Rice *v.* Smith, 14 Mass. 431; Pond *v.* Pond, 14 Mass. 403.

Missouri.— McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674.

Nebraska.— Clark *v.* Charles, 55 Nebr. 202, 75 N. W. 563.

New York.— Requa *v.* Holmes, 26 N. Y. 338; Paget *v.* Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Suppl. 913; Jackson *v.* Richtmyer, 13 Johns. 367 [*affirmed* in 16 Johns. 314].

North Carolina.— Dawkins *v.* Dawkins, 104 N. C. 301, 10 S. E. 307. *Contra,* Anders *v.* Anders, 13 N. C. 529.

Ohio.— Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298; Piatt *v.* Hubbell, 5 Ohio 243.

Pennsylvania.—Perrine *v.* Kohr, 20 Pa. Super. Ct. 36; Simon *v.* Kessler, 12 Pa. Dist. 781.

South Carolina.— Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720; McQueen *v.* Fletcher, 4 Rich. Eq. 153; Craig *v.* Craig, Bailey Eq. 102.

Texas.— Millican *v.* Millican, 24 Tex. 426; Robb *v.* Robb, (Civ. App. 1901) 62 S. W. 125.

West Virginia.— Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335.

Contra.— Matter of Park, 24 U. C. Q. B. 459.

70. Underwood *v.* Deckard, 34 Ind. App. 198, 70 N. E. 383; Kemp *v.* Kemp, 15 La. 517.

71. *Alabama.*—Kennedy *v.* Rainey, 145 Ala. 572, 39 So. 813.

California.— McBrown *v.* Dalton, 70 Cal. 89, 11 Pac. 583; Christy *v.* Spring Valley Water-Works, 68 Cal. 73, 8 Pac. 849; Mound City Land, etc., Assoc. *v.* Philip, 64 Cal. 493, 2 Pac. 270; Wade *v.* Deray, 50 Cal. 376.

Indiana.—Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Fleenor *v.* Driskill, 97 Ind. 27; Kenney *v.* Phillipy, 91 Ind. 511; Utterback *v.* Terhune, 75 Ind. 363; Avery *v.* Akins, 74 Ind. 283; Fordice *v.* Lloyd, 27 Ind. App. 414, 60 N. E. 367.

Massachusetts.— Nash *v.* Cutler, 16 Pick. 491; Pierce *v.* Oliver, 13 Mass. 211.

Michigan.—Haddon *v.* Hemingway, 39 Mich. 615.

Missouri.— Whittsett *v.* Wamack, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339.

New Jersey. — Richman *v.* Baldwin, 21 N. J. L. 395; Pomeroy *v.* Pomeroy, 55 N. J. Eq. 568, 37 Atl. 754.

Ohio.— McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478.

Pennsylvania.— Harlan *v.* Langham, 69 Pa. St. 235; McClure *v.* McClure, 14 Pa. St. 134; Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

Tennessee.— Cottrell *v.* Griffiths, 108 Tenn.

them have changed the character of the action and sanctioned the interposition of issues therein which not merely authorize, but necessarily require, the determination of questions of title. But where no statute of this character has been enacted, the partition does not involve questions of title and leaves any party thereto at liberty to assert any title he may have had, and which he did not hold in cotenancy with the other parties,[72] and even at liberty to establish that an allottee had no interest in the property before partition and therefore could have none after it in the parcel allotted to him.[73]

b. All Issues Involved and Determined Become Res Judicata. In chancery the effect of the partition upon the title was dependent on the conveyances required by the court and executed in obedience to its requirement,[74] while at law its effect was limited by the fact that the only issue tendered by the complaint was that the parties were in possession as cotenants, and perhaps what were the moieties of each in their possessory title. But it has never been susceptible of successful affirmance that the decision of the court on any issue tried and triable before it, whether proceeding at law or in equity, was any less conclusive in partition than in any other judicial proceeding.[75] Hence, if on an accounting in partition an alleged liability is established or disproved,[76] or a partition is made awarding owelty to any party,[77] or granting him compensation for improvements,[78] the judgment or decree is conclusive that he is entitled to any sum which is awarded him and not entitled to any sum for which no award is made. A judgment or decree giving a party a right of way from a part of the premises allotted to him to a public road is conclusive against his claim of a right of way by necessity to pass over another tract assigned to another party.[79] But, on the other hand, the judgment or decree cannot be conclusive upon any issue not involved within the pleadings,[80] nor as to any issue not determined, as for example where the court, being unable to determine some matter, reserves its determination for some future time,[81]

191, 65 S. W. 397, 91 Am. St. Rep. 748, 57 L. R. A. 332; Whillock *v.* Hale, 10 Humphr. 64; Wade *v.* Johnson, 5 Humphr. 117, 42 Am. Dec. 422; Nicely *v.* Boyles, 4 Humphr. 177, 40 Am. Dec. 638.

Virginia.— Bolling *v.* Teel, 76 Va. 487.

United States.— Traver *v.* Baker, 15 Fed. 186, 8 Sawy. 535; Mallett *v.* Foxcroft, 16 Fed. Cas. No. 8,989, 1 Story 474.

72. Finley *v.* Cathcart, 149 Ind. 470, 48 N. E. 586, 63 Am. St. Rep. 292; Fleenor *v.* Driskill, 97 Ind. 27; Bradshaw *v.* Callaghan, 5 Johns. (N. Y.) 80 [*reversed* on other grounds in 8 Johns. 558]; Wade *v.* Johnson, 5 Humphr. (Tenn.) 117, 42 Am. Dec. 422.

73. Bolling *v.* Teel, 76 Va. 487.

74. Anderson *v.* Hughes, 5 Strobh. (S. C.) 74; Whaley *v.* Dawson, 2 Sch. & Lef. 372.

Conveyances made by commissioners and other officers.— Sometimes, where a conveyance is still deemed necessary in partition, commissioners or other officers acting under authority of the court are directed to make them. Where such is the case, the effect of the conveyances and of the recitals therein is limited by the order or decree of the court. McCall *v.* Carpenter, 18 How. (U. S.) 297, 15 L. ed. 389. On the other hand, it has been said by the same court, that if one entitled to the fee is by the decree allotted only a life-estate, but the conveyance to him does not limit the estate, he takes a fee. Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256. No direction should be given to the commissioners to convey until their partition has been reported to and confirmed by the court. Rice *v.* Rice, 10 B. Mon. (Ky.) 420. A conveyance supported by the previous order of the court does not need its subsequent confirmation. Street *v.* McConnell, 16 Ill. 125. The making of a conveyance by commissioners pursuant to an order of court is sometimes presumed. Jackson *v.* Woolsey, 11 Johns. (N. Y.) 446.

75. *Maine.*— Foxcroft *v.* Barnes, 29 Me. 128.

Massachusetts.— Burghardt *v.* Van Deusen, 4 Allen 374; Flagg *v.* Thurston, 11 Pick. 431.

New York.— Greenleaf *v.* Brooklyn, etc., R. Co., 37 Hun 435.

North Carolina.— Dixson *v.* Warters, 54 N. C. 449.

Pennsylvania.— Ihmsen *v.* Ormsby, 32 Pa. St. 198; Herr *v.* Herr, 5 Pa. St. 428, 47 Am. Dec. 416.

South Carolina.— Rabb *v.* Aiken, 2 McCord Eq. 118.

See 38 Cent. Dig. tit. "Partition," § 312 *et seq.*

76. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

77. Burger *v.* Beste, 98 Mich. 156, 57 N. W. 99.

78. Spitts *v.* Wells, 18 Mo. 468.

79. Carey *v.* Rae, 58 Cal. 159.

80. Austin *v.* Bean, 101 Ala. 133, 16 So. 41; Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203; Gregory *v.* High, 29 Ind. 527.

81. Richardson *v.* Ruddy, 10 Ida. 151, 77 Pac. 972.

or commits it to some other court which alone is the tribunal competent to determine it.[82]

c. The Title Is Concluded Under Modern Statutes. We have hereinbefore shown that in many of the states title may be put in issue and determined in suits for partition. We may assume that, even in those states, the title is not put in issue merely by the allegations necessary for a declaration in partition at common law,[83] and that where nothing is known about the pleadings in such a suit, it will be presumed that title was not put in issue by them, nor determined in any judgment based on them.[84] We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would be upon a like issue in any other action. "The truth is, that a judgment in partition is as conclusive as any other. It does not create nor manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment; and it divests all titles held by any of the parties at the institution of the suit."[85] The allottee may justly be regarded as if he had received a conveyance of his allotment and of the easements, incidents, and appurtenances thereto belonging from all the parties to the suit, but without any covenants for title.[86] It seems almost superfluous to state that the final judgment and other proceedings in partition are not conclusive against, and do not affect the title of, persons who are not parties to the suit, either because they are not named as such, or, being named, have not been served with process or appeared therein, or

82. Grant *v.* Murphy, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

83. Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266; Luntz *v.* Greve, 102 Ind. 173, 26 N. E. 128; Fleenor *v.* Driskill, 97 Ind. 27; Miller *v.* Noble, 86 Ind. 527.

84. Green *v.* Brown, 146 Ind. 1, 44 N. E. 805.

85. Freeman Coten. & P. § 5311; and the following cases:

California.— McBrown *v.* Dalton, 70 Cal. 89, 11 Pac. 583; Martin *v.* Walker, 58 Cal. 590; Morenhout *v.* Higuera, 32 Cal. 289.

Illinois.— Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065; Lang *v.* Clemens, 107 Ill. 133; Wright *v.* Dunning, 46 Ill. 271, 92 Am. Dec. 257.

Indiana.— Irvin *v.* Buckles, 148 Ind. 389, 47 N. E. 822; Cooter *v.* Baston, 89 Ind. 185; Crane *v.* Kimmer, 77 Ind. 215.

Iowa.— Janes *v.* Brown, 48 Iowa 568; Oliver *v.* Montgomery, 39 Iowa 601; Telford *v.* Barney, 1 Greene 575.

Missouri.— Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630; Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368; Bobb *v.* Graham, 89 Mo. 200, 1 S. W. 90; Forder *v.* Davis, 38 Mo. 107.

New Hampshire.— Sanborn *v.* Clough, 40 N. H. 316; Hatch *v.* Partridge, 35 N. H. 148; Whittemore *v.* Shaw, 8 N. H. 393.

New York.— Lamb *v.* Lamb, 131 N. Y. 227, 30 N. E. 133 [*affirming* 60 Hun 577, 14 N. Y. Suppl. 206]; Howell *v.* Mills, 56 N. Y. 226; Butler *v.* Butler, 41 N. Y. App. Div. 477, 58 N. Y. Suppl. 1094; Greenleaf *v.* Brooklyn, etc., R. Co., 37 Hun 435; Jordan *v.* Van Epps, 19 Hun 526 [*affirmed* in 85 N. Y. 427]; Sears *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 201, 13 N. Y. Suppl. 886; Cole *v.* Hall, 2 Hill 625; Sharp *v.* Pratt, 15 Wend. 610.

Pennsylvania.— Dutch's Appeal, 57 Pa. St. 461; Peck *v.* Peck, 5 Lack. Leg. N. 145.

South Carolina.— Norwood *v.* Gregg, 67 S. C. 224, 45 S. E. 163; Reese *v.* Holmes, 5 Rich. Eq. 531; Muse *v.* Edgerton, Dudley Eq. 179.

Texas.— Box *v.* Word, 65 Tex. 159; Word *v.* Drouthett, 44 Tex. 365.

Washington.— Kromer *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

Wisconsin.— Tallman *v.* McCarty, 11 Wis. 401; Marvin *v.* Titsworth, 10 Wis. 320.

See 38 Cent. Dig. tit. "Partition," § 312 *et seq.*

A statute may, as in Missouri, provide for the allotment of lands to which there are adverse claims "subject to the claims of parties against each other," in which event the allotment and its confirmation do not determine their claims of title. Martin *v.* Trail, 142 Mo. 85, 43 S. W. 655.

So a decree may merely dismiss a bill as to one of the parties, and such dismissal may not be final, because neither a sale nor an allotment has been made, in which event the dismissal is not a final determination of the title. Roller *v.* Clark, 19 App. Cas. (D. C.) 539.

86. Munroe *v.* Stickney, 48 Me. 458; Plumer *v.* Plumer, 30 N. H. 558; Hills *v.* Dey, 14 Wend. (N. Y.) 204.

if served or appearing, they have been served in one capacity and the judgment is sought to be used against them in another capacity.[87]

d. On the Right to Rents and Profits and to Growing Crops. The right to rents and profits is affected by the partition so far only as to give each allottee the right to such as may subsequently accrue for or upon his allotment. If by the terms of a lease executed prior to the commencement of the suit, rent becomes due to a cotenant prior to the entry of the decree, he still continues entitled to collect such rent notwithstanding the property subject to the lien may have been allotted to another.[88] But as to emblements, or crops growing on the land, they pass with it to the allottee, although planted and cultivated by another.[89]

e. On the Running of the Statute of Limitations. Until the entry of the final judgment it cannot be known to whom any particular parcel of land will fall, and hence there cannot be any adverse holding of such parcel by any party to the action against any other party thereto. Therefore, during the pendency of the action the statute of limitations cannot be running for or against either of them.[90]

9. Implied Warranty and the Right to Contribution. After partition, it may be found that some person not a party to the action, and therefore not bound by the judgment, had an interest in, or a lien upon, some part of the property which had been enforced or remains capable of enforcement against one or more of the allotments, or that some allotment either did not exist at all, or was of less area than supposed. In all of these cases and of every other practical failure of title the rule seems to be to let the partition stand, but to sustain such a proceeding of an equitable character as will compel the other parties to the partition to contribute in some manner to the one injured, and thereby indemnify him for his loss.[91] The implied warranty in compulsory partition and the consequent right to contribution have been held to be available by a party against an alienee,[92] but probably do not extend to, nor operate in favor of, purchasers from

87. *Illinois.*— Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801.

Indiana.— Green *v.* Brown, 146 Ind. 1, 44 N. E. 805.

Louisiana.— Hemken *v.* Brittain, 12 Barb. 46.

Maine.— Tilton *v.* Palmer, 31 Me. 486.

Massachusetts.— Procter *v.* Newhall, 17 Mass. 81.

Nebraska.— Sock *v.* Suba, 31 Nebr. 228, 47 N. W. 859.

Ohio.— McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478.

Pennsylvania.—Richards *v.* Rote, 68 Pa. St. 248; Perrine *v.* Kohr, 20 Pa. Super. Ct. 36.

South Carolina.— Pearson *v.* Carlton, 18 S. C. 47.

Texas.— Grigsby *v.* Peak, 68 Tex. 235, 4 S. W. 474, 2 Am. St. Rep. 487; Caruth *v.* Grigsby, 57 Tex. 259; Tinsley *v.* Magnolia Park Co., (Civ. App. 1900) 59 S. W. 629; Cole *v.* Grigsby, (Civ. App. 1894) 35 S. W. 680.

Vermont.— Strong *v.* Hunt, 20 Vt. 614.

See 38 Cent. Dig. tit. "Partition," § 314.

88. Mahoney *v.* Alviso, 51 Cal. 440.

89. Calhoun *v.* Curtis, 4 Metc. (Mass.) 413, 38 Am. Dec. 380.

90. Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110.

91. *Alabama.*— Eck *v.* Tate, (1907) 44 So. 384.

Illinois.— Vogle *v.* Brown, 120 Ill. 338, 11 N. E. 327, 12 N. E. 252.

Kentucky.— Loughbridge *v.* Cawood, 64 S. W. 854, 23 Ky. L. Rep. 1127.

Maryland.— Gittings *v.* Worthington, 67 Md. 139, 9 Atl. 228; Dugan *v.* Hollins, 4 Md. Ch. 139.

Mississippi.—Gribble *v.* Lang, (1892) 11 So. 6.

New York.— Marvin *v.* Marvin, 1 Abb. N. Cas. 372, 52 How. Pr. 97.

North Carolina.—Nixon *v.* Lindsay, 55 N. C. 230.

Ohio.— Walker *v.* Hall, 15 Ohio St. 355, 86 Am. Dec. 482.

South Carolina.— Ketchin *v.* Patrick, 32 S. C. 443, 11 S. E. 301.

Tennessee.— Sawyers *v.* Cator, 8 Humphr. 256, 47 Am. Dec. 608.

Texas.— Grigsby *v.* Peak, 68 Tex. 235, 4 S. W. 474, 2 Am. St. Rep. 487; Ross *v.* Armstrong, 25 Tex. Suppl. 354, 78 Am. Dec. 574; Harris *v.* Hicks, (Civ. App. 1898) 49 S. W. 110.

West Virginia.— Dingess *v.* Marcum, 41 W. Va. 757, 24 S. E. 624.

United States.— Western *v.* Skiles, 35 Fed. 674.

Right in Louisiana before the old code see Laralde *v.* Derbigny, 1 La. 85.

Some of the decisions, however, indicate that the whole partition may be set aside rather than contribution decreed. Ross *v.* Armstrong, 25 Tex. Suppl. 354, 76 Am. Dec. 574.

92. Sawyers *v.* Cator, 8 Humphr. (Tenn.) 256, 47 Am. Dec. 608.

the original parties to a partition.[93] Precisely the opposite of contribution is called for when it is found that the tract partitioned is of greater area than supposed, and the allotments may be fully satisfied and a parcel remain undisposed of. The partition in such a case must, it seems, stand, leaving such surplus to be subsequently partitioned among the parties.[94] The allottees are not entitled to a decree reforming the partition by adding the surplus to their respective allotments.[95]

10. Effect on Subsequently Acquired Title. The effect of a judgment usually relates to the commencement of the action and is conclusive against any title which a party then had, but leaves him free to assert any title subsequently acquired. We think the same rule must apply in partition; that nothing is divided therein except the present title of the parties; that no allottee is in any better position than if he had received a conveyance by quitclaim from all the parties to the suit at the moment it was commenced, and possibly also of any interest acquired by them *pendente lite*. If this be true, any of them is at liberty to subsequently acquire, and, on acquiring, to assert, a paramount title.[96] But, as we have already shown, the failure of title in whole or in part to an allotment entitled the allottee to contribution from the other parties. Hence the question may be presented, if one of the others acquires the adverse paramount title, may he assert it, while subject to liability for contribution should he do so. We think not.[97] But we suppose the liability to contribution depends upon the complainant having lost something through the partition. If none of the parties at the time of the partition had any title to the property, or if they all had some title which has since terminated, then none has lost anything on account of which he can call for contribution. Still, even then, because of the supposed cotenancy, none of the parties may have been at liberty to acquire and assert a paramount adverse claim, and, if so, his incompetency should continue after the partition.

IV. Partition as Part of the Settlement and Distribution of the Estates of Decedents.

A. The Subject-Matter of the Jurisdiction. The courts of a majority of the states, in addition to the administration and settlement of the estates of decedents and the disposition of their personal property, have jurisdiction also over realty to the extent of determining who have succeeded thereto as heirs, devisees, or otherwise, and of making a distribution accordingly, and, as an incident of this jurisdiction, when it is found that property has vested in two or more persons as cotenants, of partitioning such property by allotting to each coöwner some specific part to be held in severalty, and if such allotment cannot be made without prejudice to their interests, then of directing a sale and dividing the proceeds. It is of such partition of the estates of decedents that we wish here to speak. The courts to which jurisdiction of it is confided are sometimes styled probate, sometimes surrogate, and at other times orphans' courts. In the absence of some constitutional limitation either of these courts might be given jurisdiction of partition in other cases, which has doubtless been done in several of the states; and in many instances the opinions of the courts are so vague that it is difficult

93. Jones *v.* Bigstaff, 95 Ky. 395, 25 S. W. 889, 15 Ky. L. Rep. 821, 44 Am. St. Rep. 245; Ketchin *v.* Patrick, 32 S. C. 443, 11 S. E. 301.

94. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 6 L. R. A. N. S. 162 (reappearance of submerged land after partition); Witham *v.* Cutts, 4 Me. 31.

95. Boyd *v.* Doty, 8 Ind. 370.

96. *California.*— Mound City Land, etc., Assoc. *v.* Philip, 64 Cal. 493, 2 Pac. 270.
Indiana.—Avery *v.* Akins, 74 Ind. 283.
Massachusetts.— Richardson *v.* Cambridge, 2 Allen 118, 79 Am. Dec. 767.
Missouri.— Tapley *v.* McPike, 50 Mo. 589.
Ohio.— Woodbridge *v.* Banning, 14 Ohio St. 328.

97. Doe *v.* Prettyman, 1 Houst. (Del.) 334; Venable *v.* Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74; Carter *v.* White, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853; Mills *v.* Witherington, 19 N. C. 433; Walker *v.* Hall, 15 Ohio St. 355, 86 Am. Dec. 482.

and often impossible to determine whether the proceeding is a part of the settlement and distribution of the estate of a decedent, or one not connected with such settlement or distribution, although taking place in a court having jurisdiction of the estates of decedents. In either case the jurisdiction of the court is more limited than that of a court of chancery, or of any other court having general jurisdiction of the subject of partition.[98] The first essential to the jurisdiction now being considered is that the property belong to the estate of the decedent. The authority of the court is restricted to that estate, and it can hence partition nothing which does not belong to it; nothing to which a decree of distribution entered in the estate might not give a distributee a title in severalty.[99]

98. The following decisions illustrate the limited jurisdiction of these courts:

Alabama.— Caperton *v.* Hall, 118 Ala. 265, 24 So. 122; Ballard *v.* Johns, 84 Ala. 70, 4 So. 24; Caperton *v.* Hall, 83 Ala. 171, 3 So. 234; Ward *v.* Corbett, 72 Ala. 438; Whitman *v.* Reese, 59 Ala. 532; Todd *v.* Flournoy, 56 Ala. 99, 28 Am. St. Rep. 758; Guilford *v.* Madden, 45 Ala. 290; Wimberly *v.* Wimberly, 38 Ala. 40; Bryant *v.* Stearns, 16 Ala. 302.

California.— Schoonover *v.* Birnbaum, 150 Cal. 734, 89 Pac. 1108; Buckley *v.* San Francisco Super. Ct., 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; De Castro *v.* Barry, 18 Cal. 96; Code Civ. Proc. §§ 1675–1686. See also Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415.

Connecticut.— Staples' Appeal, 52 Conn. 421.

Georgia.— Code, §§ 2579–2583.

Indiana.— Haine *v.* Smith, Smith 381.

Louisiana.— Sickman *v.* Diamond, 34 La. Ann. 1218; Buddecke *v.* Buddecke, 31 La. Ann. 572; Freret *v.* Freret, 31 La. Ann. 506; Benedict *v.* Florat, 30 La. Ann. 1337; Baily *v.* Becnel, 30 La. Ann. 1032; Boutte *v.* Boutte, 30 La. Ann. 177; Pierce *v.* Pierce, 2 La. Ann. 329; Craighead *v.* Hynes, 2 La. Ann. 150; Kemp *v.* Kemp, 15 La. 517; Hooke *v.* Hooke, 6 La. 420; Gosselin *v.* Gosselin, 7 Mart. N. S. 469.

Maine.— Earl *v.* Rowe, 35 Me. 414, 58 Am. Dec. 714.

Massachusetts.— McCarty *v.* Patterson, 186 Mass. 1, 71 N. E. 112; Marsh *v.* French, 159 Mass. 469, 34 N. E. 693; Dearborn *v.* Preston, 7 Allen 192; Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248; Wainwright *v.* Dorr, 13 Pick. 333; Arms *v.* Lyman, 5 Pick. 210; Cook *v.* Davenport, 17 Mass. 345; Pond *v.* Pond, 13 Mass. 413; Sumner *v.* Parker, 7 Mass. 79.

Michigan.— Haddon *v.* Hemingway, 39 Mich. 615.

Minnesota.— Hurley *v.* Hamilton, 37 Minn. 160, 33 N. W. 912.

Mississippi.— Rail *v.* Dotson, 14 Sm. & M. 176.

Missouri.— Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920.

New Hampshire.— Pickering *v.* Pickering, 21 N. H. 537.

New Jersey.— Styled orphans' courts. Watson *v.* Kelty, 16 N. J. L. 517; State *v.* Parker, 9 N. J. L. 242.

North Carolina.— Wahab *v.* Smith, 82 N. C. 229.

Pennsylvania.—Orphans' courts. Chambers *v.* Reinhold, 33 Pa. Super. Ct. 266; *In re* Bishop, 200 Pa. St. 598, 50 Atl. 156; Small's Appeal, (1888) 15 Atl. 767; Vowinckel *v.* Patterson, 114 Pa. St. 21, 6 Atl. 470; Snyder's Appeal, 36 Pa. St. 166, 78 Am. Dec. 372; Waln's Appeal, 4 Pa. St. 502; Selfridge's Appeal, 9 Watts & S. 55; Romig's Appeal, 8 Watts 415; Vowinckel *v.* Patterson, 7 Pa. Cas. 165, 10 Atl. 3; Hanbest's Estate, 6 Pa. Dist. 681; Sampson's Estate, 4 Pa. Dist. 204; Brenneman's Estate, 27 Pa. Co. Ct. 478; Lowrie's Estate, 19 Pa. Co. Ct. 600; Phillips' Estate, 6 Pa. Co. Ct. 449, 23 Wkly. Notes Cas. 518; Scheible's Estate, 5 Pa. Co. Ct. 601; McIntosh's Estate, 4 Pa. Co. Ct. 593; Rankin's Estate, 2 Pa. Co. Ct. 264; Mealy's Estate, 1 Ashm. 363; Deckard's Estate, 4 Dauph. Co. Rep. 75; Smith's Estate, 2 Del. Co. 423; Guido's Estate, 10 Kulp 150; Silvius' Estate, 18 Lanc. L. Rev. 92; Graham's Estate, 1 Lanc. L. Rev. 378; Matter of Snyder, 4 Phila. 184; Whitaker's Estate, 31 Pittsb. Leg. J. N. S. 210.

South Carolina.—Allen *v.* Allen, 76 S. C. 494, 57 S. E. 549; Tederall *v.* Bouknight, 25 S. C. 275; Davenport *v.* Caldwell, 10 S. C. 317; Faust *v.* Bailey, 5 Rich. 107; Brennan *v.* Hill, Dudley 342; Dillard *v.* Crocker, Speers Eq. 20.

Tennessee.—Apple *v.* Owens, 1 Tenn. Ch. App. 135.

Texas.— Branch *v.* Hanrick, 70 Tex. 731, 8 S. W. 539; Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349; Case *v.* Penn, (Civ. App. 1901) 62 S. W. 801; League *v.* Henecke, (Civ. App. 1894) 26 S. W. 729.

Vermont.— Cox *v.* Ingleston, 30 Vt. 258; Bull *v.* Nichols, 15 Vt. 329.

99. Buckley *v.* San Francisco Super. Ct., 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; Snyder's Appeal, 36 Pa. St. 166, 78 Am. Dec. 372; Keisel's Appeal, 7 Pa. St. 462.

The result of these decisions is that if the title to property was vested in two or more persons, it cannot be partitioned in the estate of either. This rule has been abrogated by statute in Pennsylvania (Sander's Estate, 16 Montg. Co. Rep. (Pa.) 190), and overlooked in Texas, although there does not appear to be any special statutory provision on the subject (Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349). But the Pennsylvania statute does not authorize the partition in one proceeding in the orphans' court of a tract of land in which some of the parties have an interest in one part and some in another, and

B. Time When May Be Petitioned For. Whenever partition is made as a part of the jurisdiction of the court over the estate of a decedent, it is obvious, in the absence of some statutory direction to the contrary, that the petition must be filed while the court has power to exercise its jurisdiction over the estate, and hence cannot

the partition is said to be void, even as to the land in which all are interested. Sander's Estate, 16 Montg. Co. Rep. (Pa.) 190.

The questions which may be litigated and determined are restricted by the limited jurisdiction of the court, and, in some of the states, by the manifest fear that the jurisdiction cannot be safely exercised in any but the most simple cases. In the first place, the jurisdiction of a court of probate is necessarily confined to the estate of a decedent, and while it may be authorized to determine who has succeeded to such estate as heirs, devisees, or otherwise, it has no authority to consider or determine adverse claims to the property made by persons whose title was not acquired from or under the decedent. *In re* Walker, 136 N. Y. 20, 32 N. E. 633; Stewart *v.* Lohr, 1 Wash. 341, 21 Pac. 457, 22 Am. St. Rep. 150. This rule remains applicable, although the court having jurisdiction over the estate of the decedent is also possessed of general common law and equity jurisdiction, for, while acting in a probate proceeding, it is not exercising, and cannot exercise, its general jurisdiction either as a court of chancery or of common law. Haas' Estate, 97 Cal. 232, 31 Pac. 893; Smith *v.* Westerfeld, 88 Cal. 374, 26 Pac. 206; *In re* Allgier, 65 Cal. 228, 3 Pac. 849; Theller *v.* Such, 57 Cal. 447. In some of the states, if the decedent was a cotenant with others, the court is given authority to set off his share from that of the living cotenants (Mass. St. (1882) § 60, p. 1035; Vt. St. (1880) § 2259; *In re* Parson, 64 Vt. 193, 23 Atl. 519), and in others the court may proceed to make complete partition between a deceased and surviving cotenant (Stewart *v.* Alleghany Nat. Bank, 101 Pa. St. 342; Brightly's Purdon Dig. § 152, p. 538; Tex. St. (1879) § 2132). Sometimes the court is authorized to act only when the shares or interests of the parties are not in dispute, and do not seem uncertain. Me. St. (1883) §§ 8, 9, p. 550; Mass. St. (1882) § 59, p. 1035; Kelly *v.* Kelly, 41 N. H. 501; Gage *v.* Gage, 29 N. H. 533.

In such cases the jurisdiction of the court is not ousted or suspended by the mere claim of one of the parties that there is a dispute or uncertainty. "To deprive the probate court of its jurisdiction in a matter of this kind in any particular case, it must be made to appear that there is a real doubt and uncertainty in relation to the legal rights of the parties. The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or proportions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal competent to decide it. If the facts in reference to which the alleged dispute or uncertainty arises are all known to and expressly admitted by the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is a dispute and controversy concerning their relative shares and proportions of the estate." Ballard *v.* Johns, 80 Ala. 32; Marsh *v.* French, 159 Mass. 469, 34 N. E. 693; Dearborn *v.* Preston, 7 Allen (Mass.) 192; Blackwell *v.* Blackwell, 86 Tex. 207, 24 S. W. 389. If, after the court has assumed jurisdiction and appointed commissioners, there arises a dispute or uncertainty, the court will proceed with the partition. Potter *v.* Hazard, 11 Allen (Mass.) 187. The fact that the decedent did not die seized of the lands sought to be partitioned sometimes ousts the court of its jurisdiction. McMasters *v.* Carothers, 1 Pa. St. 324; Law *v.* Patterson, 1 Watts & S. (Pa.) 184; Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85. In Pennsylvania a partition can be made only when the course of descent has not been altered by the provisions of the last will and testament of the decedent. Hence, if he devises all of his property to a portion of his heirs, thereby excluding others from their inheritance, no partition in probate can be made, although such of the heirs as are not excluded from the will hold the estate in cotenancy in equal moieties. Vowinckel *v.* Patterson, 114 Pa. St. 21, 6 Atl. 470. As the proceeding is merely ancillary to the settlement of the estate of the decedent, it cannot involve any title not held by him at the time of his death (Dresher *v.* Allentown Water Co., 52 Pa. St. 225, 91 Am. Dec. 150), nor determine the title of one of the heirs who claims to be the sole owner of the property (Eell's Estate, 6 Pa. St. 457). Generally, questions of title, so far as they can arise in probate proceedings, are disposed of before the commissioners are appointed to make the partition by a decree of distribution conclusively fixing the share of each heir or devisee in the estate of his ancestor or testator (Freeman *v.* Rahm, 58 Cal. 111; Garraud's Estate, 36 Cal. 277), and the office of the proceedings for partition is merely to segregate the shares so fixed from one another, and to transform them from undivided interests to estates in severalty. The title which is within the jurisdiction of the court is the legal title only, and partition may be made in accordance with such title without affecting or prejudicing equitable rights or titles dependent thereon, except where sales are made in pursuance of

precede the valid appointment of an executor or administrator,[1] nor be after the closing of the estate by the formal discharge of the executor or administrator,[2] nor after the entry of the final decree of distribution.[3] In Maine and Pennsylvania, however, the petition may be filed, although after the distribution and the discharge of the executor or administrator, irrespective of the lapse of time, and is not barred unless the applicant's title has been lost by prescription.[4] The jurisdiction here under consideration is not exclusive, but is concurrent with that of courts having general jurisdiction of partition,[5] and when one of such courts acquires jurisdiction, it becomes exclusive and bars the right to institute proceed-

such partition to *bona fide* purchasers having no notice of any equitable right or interest attaching to the legal estate. Caperton *v.* Hall, 83 Ala. 171, 3 So. 234. From the proposition hereinbefore asserted, that the jurisdiction of the court is confined to the estate of the decedent, it results, in the absence of express statutory provision to the contrary, that partition cannot be made except when he held an estate in severalty. Therefore, if he was merely a cotenant with others, there cannot be any partition in probate between him and them, and such attempted partition, even though made with the acquiescence or consent of all the parties in interest, must necessarily be void, because the court is without jurisdiction over the subject-matter (Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227; Dresher *v.* Allentown Water Co., 52 Pa. St. 225, 91 Am. Dec. 150; Snyder's Appeal, 36 Pa. St. 166, 78 Am. Dec. 372; Eell's Estate, 6 Pa. St. 457; Romig's Appeal, 8 Watts (Pa.) 415; Feather *v.* Strohoecker, 3 Penr. & W. (Pa.) 505, 24 Am. Dec. 342); nor can any exception to this rule be maintained by showing that one of the heirs of a decedent was a cotenant with him in his lifetime, and therefore he and the other heirs of the decedent own the entire property sought to be partitioned. As to interests which he did not acquire as heir or devisee of the decedent, he is not a party before the court, and the court has no jurisdiction to make any inquiry or determination respecting, or any disposition of, such interests (Buckley *v.* San Francisco Super. Ct., 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. The case of Brannan *v.* Hill, decided in 1838 by the court of appeals of South Carolina, the opinion in which is printed by way of note to Gates *v.* Irick, 2 Rich. (S. C.) 593, has been cited as in opposition to the views here expressed. The language of the statute in question was, however, essentially different from that usually employed in statutes authorizing proceedings in partition in connection with the settlement and distribution of the estates of decedents. The orphans' court of South Carolina was apparently vested with authority to act independently of there being any proceeding before it respecting the administration of an estate. A statute, enacted in 1824, purported to give the court "full power and authority, upon the application of any person or persons interested therein, to make sale or division of the real estate of any person or persons who may have died or who shall hereafter die intestate or leaving a will." The purpose of this act was apparently to have a sale of lands made in all cases where they belonged to a decedent and could not be divided, and therefore the appellate court in the case cited sustained a sale of the interest of a decedent consisting of a moiety only of the property. In other words, the orphans' court was given general authority to sell the property in which a decedent had an interest, upon the application of any person interested therein, and this jurisdiction was not a part of its special jurisdiction to administer upon and settle the estates of decedents. If the statute under which the proceedings are conducted authorizes the commissioners to segregate the interests of a deceased tenant in common, and to then make partition thereof, and they, at the suggestion or with the consent of the other cotenants, undertake to partition the whole property, and the court, upon the report of their proceedings, undertakes to confirm them, such confirmation is absolutely void, because it cannot, even by their consent, exercise jurisdiction over the estates or interests of the cotenants of the decedent. Parson's Estate, 64 Vt. 193, 23 Atl. 519. In some of the states the authority of the court is limited to lands within the county in which it is held, and where such is the law, any attempted partition of lands outside of that county is absolutely void. Turnipseed *v.* Fitzpatrick, 75 Ala. 297. But the power of a court to do an act involves and includes the authority to decide all questions essential to the exercise of the power (King's Estate, 215 Pa. St. 59, 64 Atl. 324), and the making of all orders necessary to make its exercise effective (Gatewood *v.* Toomer, 14 Rich. Eq. (S. C.) 139).

1. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

2. Cox *v.* Ingleston, 30 Vt. 258; Collamer *v.* Hutchins, 27 Vt. 733.

3. Buckley *v.* San Francisco Super. Ct., 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; Hurley *v.* Hamilton, 37 Minn. 160, 33 N. W. 912.

4. Earl *v.* Rowe, 35 Me. 414, 58 Am. Dec. 714; Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

5. Bozone *v.* Daniel, (Ala. 1905) 39 So. 774; Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778 (in which case the opinion of the court was by Somerville, J.); Wilkinson *v.* Stuart, 74 Ala. 198; Silvius' Estate, 18 Lanc. L. Rev. (Pa.) 92.

ings in the probate or orphans' courts.[6] On the other hand, if the latter courts acquire and assume jurisdiction, it becomes exclusive and no other court will interfere.[7]

C. Who May Petition For. The petition may be filed by any person entitled to a partition. If a minor, he may appear by his guardian; if a married woman, her husband may petition in her right.[8] If a conveyance has been made by any of the heirs, his grantee is usually entitled to make application for partition.[9] In Pennsylvania the application may be made by a widow of an heir who has an estate in remainder after the life of his mother who died before the petition was filed,[10] and may probably also be by a tenant for life.[11] In Alabama the personal representative of a deceased tenant in common may maintain the proceeding in the probate court for the partition of the property of the decedent.[12] As an interest in the property and a right to have a partition are indispensable elements of the applicant's claim, the fact that the court has found that he is not an heir of the decedent, nor otherwise entitled to an interest in the estate, is conclusive against his claim for this relief.[13]

D. The Petition. A petition or application in writing is essential, and a partition will be adjudged void unless such written petition is established, except when the proceedings are questioned after so great a lapse of time that the court may reasonably presume that such petition has existed in due form, but has been lost.[14] In the majority of the states the statutes are either wholly silent or else speak in general or vague terms respecting the contents of the petition for partition. When any such petition is required, it seems to be obvious that it ought to at least set forth the facts upon which the court is called to act sufficiently to inform the court of the names of the interested parties so far as known;[15] the respective moieties and interests of each, and the property sought to be divided among them. These proceedings are viewed with strictness by the courts, and there is a general tendency to exact at least a substantial compliance with every requirement of the statute upon the subject, and, in the absence of such compliance, to avoid them, even when collaterally assailed. Thus, in Alabama, among the other requirements of the petition, is that it state the names and residences of the persons interested in the estate. The failure to disclose the names of the heirs is fatal to the proceeding.[16] This rule was applied where the petition had been filed by the personal representative of a deceased tenant in common, as authorized by the statute, but it failed to disclose who were the heirs or other successors in interest of such decedent.[17] The omission to state the place of residence of interested parties, although their names were disclosed, has also been held fatal to the proceeding.[18] The petition may be amended, and by amendment made to include property originally omitted therefrom, and such amendment, it has been held, may be made even after the return of the inquest, to conform therewith.[19] The failure to set forth the interest of each owner, when required by statute, is fatal.[20] The real property, it has been held, need not be described in the petition, if the law requires the executor or administrator to file in court an inventory thereof.[21] If the court can exercise jurisdiction only in the event of some of the coöwners being minors, the petition must name them and allege their minority.[22] In Penn-

6. Hanbest's Estate, 6 Pa. Dist. 681.
7. Wilkinson *v.* Stuart, 74 Ala. 198.
8. Eckert *v.* Yous, 2 Rawle (Pa.) 136.
9. De Castro *v.* Barry, 18 Cal. 96; Stewart's Appeal, 56 Pa. St. 241; Mealy's Estate, 1 Ashm. (Pa.) 363.
10. Cote's Appeal, 79 Pa. St. 235.
11. Rankin's Appeal, 95 Pa. St. 358.
12. McCorkle *v.* Rhea, 75 Ala. 214.
13. Kate's Estate, 148 Pa. St. 471, 24 Atl. 77.
14. Brown *v.* Sceggell, 22 N. H. 548.
15. Richards *v.* Rote, 68 Pa. St. 248; Ragan's Estate, 7 Watts (Pa.) 438.
16. Johnson *v.* Ray, 67 Ala. 603; Whitman *v.* Reese, 59 Ala. 532.
17. McCorkle *v.* Rhea, 75 Ala. 213.
18. Ballard *v.* Johns, 80 Ala. 32.
19. Landmesser's Estate, 9 Kulp (Pa.) 524.
20. Wolffe *v.* Loeb, 98 Ala. 426, 13 So. 744.
21. Marsh *v.* French, 159 Mass. 469, 34 N. E. 693.
22. Curtis *v.* Jenkins, 20 N. J. L. 679.

sylvania the petition must show the heirs of decedent, their relation to him, and their last known place of residence.[23] If decedent owned but two lots in a certain town, and they were commonly known as her lots, the description of them in the petition as "two lots in" such town, designating it, is sufficient.[24]

E. The Parties. The parties to the proceeding must include all persons having any interest in the property derived from and under the decedent, and if any of such persons are not made parties, whether infants or adults, their interests cannot be affected by the partition.[25] By property derived from and under a decedent we mean such only as was acquired from him by descent, devise, or bequest, for if he, in his lifetime, conveyed the property, or any part thereof, the part so conveyed constitutes no part of his estate in probate, and cannot be there partitioned.[26] If any of his heirs or devisees has conveyed his share, the conveyance must be recognized and protected, and the part conveyed set off to his grantee.[27] A conveyance made during the pendency of the proceedings does not impair the effect of the partition.[28] A known vendee must be made a party or the proceedings cannot affect his interest.[29] It is not necessary, to entitle a person to be made a party to the proceeding for partition in probate, that his estate be one in fee. Hence, if he or she has a life-estate by reason of being the surviving husband or wife of a deceased cotenant, his or her interest as such cannot be affected, unless he or she is made a party to the proceeding.[30]

F. Jurisdiction Over the Person — How Acquired. Probably the legislature might have provided for the partition of the property of a decedent without the giving of any notice other than that required to authorize the appointment of an executor or administrator and the assumption of general jurisdiction over the estate, but it has not so provided. We believe that some special notice of the proposed partition is everywhere required. It may doubtless be presumed where the court is of general jurisdiction and the presumption is not inconsistent with the facts otherwise shown.[31] But if it appears that, as to any person interested in the property, the notice required by statute was not given, and that he did not appear or otherwise waive it, the proceeding is, as against him, void.[32]

G. The Commissioners — 1. Their Appointment. Jurisdiction having been acquired over the parties interested, the court may proceed to appoint persons to make the partition. The number to be appointed differs in the different states.

23. Lauer's Estate, 16 York Leg. Rec. (Pa.) 153.

24. Taffinder *v.* Merrell, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814 [*affirming* (Civ. App. 1901) 61 S. W. 936].

25. Whitman *v.* Reese, 59 Ala. 532.

26. Dresher *v.* Allentown Water Co., 52 Pa. St. 225, 91 Am. Dec. 150.

27. De Castro *v.* Barry, 18 Cal. 96; Howell St. Mich. § 5970; Vt. St. (1880) § 2257; Wis. Rev. St. § 3945.

28. Cook *v.* Davenport, 17 Mass. 345.

29. Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218; Thompson *v.* Stitt, 56 Pa. St. 156.

30. Ballard *v.* Johns, 80 Ala. 32; Barclay *v.* Kerr, 110 Pa. St. 130, 1 Atl. 220.

Often, as in California, there is no independent action in which parties are designated, but upon a petition being filed, notice must be given to all persons interested who reside in the state, or to their guardians and to the agents, attorneys, or guardians, if any, in the state, of such as reside out of the state, either personally or by public notice as the court may direct. Cal. Code Civ. Proc. § 1676. Under such a section doubtless a general notice without undertaking to name the parties interested would be sufficient if directed by the court and published as directed.

31. Vensel's Appeal, 77 Pa. St. 71; Richards *v.* Rote, 68 Pa. St. 248; Rye *v.* J. M. Guffey Petroleum Co., (Tex. Civ. App. 1906) 95 S. W. 622.

32. *Maine.*— Dean *v.* Hooper, 31 Me. 107.
Massachusetts.— Procter *v.* Newhall, 17 Mass. 81; Smith *v.* Rice, 11 Mass. 507.
Minnesota.— Wood *v.* Myrick, 16 Minn. 494.
New Hampshire.— Brown *v.* Sceggell, 22 N. H. 548.
Pennsylvania.— Richards *v.* Rote, 68 Pa. St. 248.
Texas.— Cryer *v.* Andrews, 11 Tex. 170.
Wisconsin.— Ruth *v.* Oberbrunner, 40 Wis. 238; Bresee *v.* Stiles, 22 Wis. 120.
England.— Biggar *v.* Biggar, 8 Ont. Pr. 488.

The Pennsylvania decisions, we must confess, appear to us contradictory and confusing. *In re* Horam, 59 Pa. St. 152; Pitzer's Estate, 24 Pa. Co. Ct. 359; Kantner's Estate, 24 Pa. Co. Ct. 310, 16 Montg. Co. Rep. 215; Landmesser's Estate, 9 Kulp (Pa.) 524; Vensel *v.* Colner, 31 Leg. Int. (Pa.) 373; Bauer's Estate, 14 Phila. (Pa.) 264.

When appointed, they are generally known as commissioners;[33] but are sometimes styled distributers,[34] appraisers, or partitioners.[35] When the estate of the decedent consists of real property situate in different parts of the state, one set of commissioners may generally be appointed for each county. Where the estate consists solely of money, no distributers need be appointed.[36] In some of the states they may be appointed by the testator in his will.[37] Otherwise the power to appoint is vested exclusively in the court having jurisdiction to settle the estate of the decedent.[38]

2. THEIR QUALIFICATION. In most of the states the appointment of commissioners is preceded by a decree of distribution, wherein the property to be divided among the heirs and devisees is described, and the respective shares or moieties of each is designated. This corresponds to the interlocutory judgment or decree of partition in other cases. A certified copy of this decree, and of the order appointing the commissioners, is issued by the clerk of the court as their warrant, and they are required to take and have indorsed on such warrant their oath that they will faithfully discharge the duties of their office.[39] Upon taking and indorsing such oath, they are qualified and may enter upon the discharge of their duties.

3. NOTICE TO BE GIVEN BY. Before the commissioners make the partition, "notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition."[40]

4. THEIR DUTIES GENERALLY. The duties of commissioners are rarely, if ever, distinctly specified in a statute, and are to be inferred from the purpose for which they are appointed and the means obviously essential to fully and equitably accomplish that purpose.[41]

33. Ala. Code (1876), §§ 2496–2503; Cal. Code Civ. Proc. § 1675; Md. St. (1883) § 10, p. 550; Md. Code (1878), §§ 32–70, pp. 407–415; Mass. St. (1882) § 49, p. 1034; Howell St. Mich. §§ 5967, 5968; Tex. St. (1879) p. 2109; Vt. St. (1880) § 2352; Wis. St. § 2942.

34. Conn. St. (1875) §§ 16, 17, p. 371.

35. Ga. Code, § 2585.

36. Davenport *v.* Richards, 16 Conn. 310.

37. Strong *v.* Strong, 8 Conn. 408.

38. Clement *v.* Brainard, 46 Conn. 174.

39. Cal. Code Civ. Proc. § 1675.

40. Cal. Code Civ. Proc. § 1683; *In re* Ragan, 7 Watts (Pa.) 438. We know of no decision determining the effect of an omission of this notice. It occurs to us, however, that this notice is not jurisdictional, because the parties in interest have already been brought into court by the notice required to be given when the application is made for the appointment of commissioners. The failure to give this notice is unquestionably a very grave irregularity, justifying, or even requiring, that confirmation of the partition be refused, and that the commissioners be directed to begin *de novo*, by giving the proper notices. While the statutes require notice to be given to "all persons interested," we think these words are here used, and must be understood, in a qualified sense. The decree of distribution is the warrant of the commissioners and the order of their appointment. This decree is their sole guide. They have no authority to set off property to any person not named in such decree, nor in proportions variant from the shares or moieties there described. The persons named in the decree ought therefore to be deemed "all the persons interested in the partition," and a notice to them sufficient to sustain the subsequent proceedings of the commissioners. By establishing this rule the commissioners know, from consulting their warrant, to whom notice must be given, and persons called to examine the title may readily ascertain whether all the persons have received notice who are entitled thereto. By construing the words "all persons interested in the partition" in their literal sense, the commissioners are required to assume the judicial function of ascertaining who are persons interested, a function which we think belongs exclusively to the court. If the commissioners must make this investigation, the means at their command are so inadequate that the conclusions reached by them must often be tainted with some error of law or fact, and their proceedings rendered nugatory from failure to give notice to parties who do not appear by the record to have any interest in the transaction. Whether the commissioners may rely upon the decree for information with respect to parties entitled to notice or not, it seems to be certain that they need not give notice to persons not in possession, and whose claim of title does not appear from the county records. Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

41. There are decisions treating the proceeding very strictly and holding to the letter, rather than to the spirit, of the statute, such as one holding that while the petitioner might

5. Their Duties When the Property Cannot Be Divided Into Equal Allotments. The commissioners are not required to make a division of the property into equal shares when it cannot be divided without prejudice to the owners, or when, although susceptible of some division, it cannot be conveniently divided into as many parts as there are shares without making such parts of unequal value. In the latter case the commissioners are sometimes authorized to divide the estate into unequal parts, and to appraise each part, and "award that one or more purparts or shares shall be subject to the payment of such sum or sums as shall be necessary to equalize the value of the said purparts, according to the said appraisement thereof, which sum or sums shall be paid, or secured to be paid, by the several persons accepting purparts."[42] If the real estate cannot be divided, "without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein who will accept it." This action of the court must, however, be based on the report of the commissioners showing that the estate cannot be divided, and appraising its value. The person who accepts it must pay the amount of the appraisement.[43] When two or more

be subject to the payment of owelty, it could not be imposed on any other cotenant (Pickering *v.* Pickering, 20 N. H. 541); and another declaring that the shares of two cotenants could not be set off to them to hold together and undivided, although they had so agreed (*In re* Parson, 64 Vt. 193, 23 Atl. 519).

The duties and powers of the commissioners are probably coextensive with those of commissioners in an ordinary suit for partition. They "may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them." Cal. Code Civ. Proc. § 1683. We find no decision or statute directly adopting for the guidance of the commissioners, or of the court, the principles regulating partition in other proceedings, yet we apprehend that these principles are necessarily involved in the grant of power to make partition. The partition authorized is evidently one conducted according to the equitable rules long recognized in like proceedings in other courts. Thus, some of the heirs may have conveyed portions of the common property, or enhanced their value by permanent and costly improvements. If partitions were enforced at law or in equity, it would be the duty of the commissioners and of the court, as far as might be done without prejudice to the interests of the other heirs, to set apart to the heir thus conveying or improving some part of the common property, the part so conveyed or improved. We think the same duty arises under like circumstances when the partition is merely ancillary to the settlement and distribution of the estate of a deceased person. To hold otherwise would be to make the proceeding grossly inequitable, and render the rights of the parties dependent upon the court which happened first to acquire jurisdiction, rather than upon the established principles of jurisprudence. In making partition, it is often necessary, to preserve equality in value, or to afford some convenient mode of ingress and egress to and from some of the allotments over the others. The power to charge one of the allotments with this burden in favor of another exists when the partition is made in the distribution of the estate of a decedent. "The authority to give such rights and privileges . . . is believed to have been long and generally exercised by courts of probate in this State; and we think the authority is necessarily implied in the grant of jurisdiction to make partition and division of estates; because, in numerous cases, a judicious and convenient partition could not be made without it. In other jurisdictions the power to create such rights and privileges, on partition, by legal proceedings, has been often recognized. . . . We are, therefore, of opinion that the probate court, upon division of a deceased person's estate, may, in a case where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares." Cheswell *v.* Chapman, 38 N. H. 14, 17, 75 Am. Dec. 158.

Where the aid of chancery was sought on the allegation that one of the heirs of a decedent, being insolvent and deeply indebted to the estate, had conveyed his share, by which means his debt to the estate would be lost unless there was some interference by a court of equity, the court held that the remedy in probate was ample, because that court could distribute to the heir as his share of the estate his own debt thereto. Bailey *v.* Strong, 8 Conn. 278.

Questions of advancements may be presented to the court and taken into consideration, and when ascertained and established, must be taken into account in making a final partition of the property of the estate. Cal. Code Civ. Proc. § 1686; Conn. St. (1875) § 6, p. 372; Ga. Code, §§ 2579–2583; Howell St. Mich. § 5978; Wis. Rev. St. § 3958; Sims *v.* Sims, 39 Ga. 108, 99 Am. Dec. 450.

All the commissioners must act, but a majority may decide and report. Odiorne *v.* Seavey, 4 N. H. 53.

42. Cal. Code Civ. Proc. § 1681; Brightly's Purdon Dig. § 163, p. 541.

43. Cal. Code Civ. Proc. § 1680; Me. Rev. St. (1883) § 12, p. 550; Robbins *v.* Gleason, 47 Me. 259; Mass. St. (1882) §§ 56, 57, p.

persons elect to take the same parcel of land when it is assigned in several unequal parts, or to take the whole even when the property is found to be indivisible, the elder heirs are given a preference over the younger, and males over females.[44] In Pennsylvania any one or more of the heirs may, in writing, offer a sum in excess of the appraised value as fixed by the commissioners, and the one offering the highest price above such valuation is entitled to have the property allotted to him.[45] This preference given to the eldest heir seems on his dying or conveying to vest in his heir or alienee.[46] A guardian may accept an allotment for his ward, and give a recognizance binding on the ward for the amount awarded to make the partition equal.[47] The right of an heir to accept an allotment is waived by his not appearing and making his election known on the day fixed by the court for the heirs to refuse or accept the allotments.[48]

6. THEIR REPORT. The commissioners must report their proceedings to the court by which they were appointed.[49] When they find in favor of a partition by sale, they must report that fact to the court, and must generally set forth the facts from which their conclusion has been drawn, in order that the court may judge of its correctness and determine whether to assent thereto. If, on the other hand, they make an actual division of the property, their report ought to describe, with as much particularity as in other partition proceedings, the allotments made to the respective parties among whom they were directed to make partition. In Texas the report must be signed by the commissioners, or a majority of them, and have attached their sworn statement that the partition "made by them as set out in their report is just and fair to the best of their knowledge and information; that they have no interest in said partition, and that they are not of kin to any of the parties to the partition."[50] In construing the report, the plain intent of the commissioners, although appearing only by recital, will be given effect, especially if the parties have acquiesced.[51]

7. VACATING OR CONFIRMING THEIR REPORT. When the commissioners have made their report, it is next brought before the court for final action. It may, for any proper reason, be set aside and the partition recommitted to the same or other commissioners. Notice of the motion to set aside the sale should be given the purchaser.[51a] The grounds for moving to set aside the report necessarily resolve themselves into two classes, namely, for irregularities in the proceedings, or because the partition or other action of the commissioners is unequal or unjust. Thus, the partition may be set aside because the commissioners were not sworn as required by law,[52] and doubtless because of any other substantial departure from the requirements of the statute.[52a] The court will rarely interfere with the action of the commissioners where there is no accusation of intentional misconduct, because it prefers to rely on their judgment as practical men who have been selected on account of their ability and experience, and who have, upon personal inspection, made themselves acquainted with the property in question. Nevertheless the court will refuse to confirm their action whenever satisfied of its unjustness or partiality,[53] as where the price realized is grossly, and perhaps even where it is substantially, inadequate.[53a] "Where an estate is manifestly and

1035; Howell St. Mich. §§ 5972, 5973; Tex. St. (1879) § 2115; Wis. St. §§ 3949–3951.

44. See *supra*, note 43; and Conn. St. (1875) § 6, p. 372; Vt. St. (1880) §§ 2261, 2262.

45. Brightly's Purdon Dig. § 169, p. 542.

46. Hersha *v.* Brenneman, 6 Serg. & R. (Pa.) 2; *In re* Ragan, 7 Watts (Pa.) 438.

47. Gelbach's Appeal, 8 Serg. & R. (Pa.) 205.

48. Wentz's Appeal, 7 Pa. St. 151.

49. Cal. Code Civ. Proc. § 1684; Ga. Code, § 2586.

50. Herndon *v.* Crawford, 41 Tex. 267.

51. Blake *v.* Clark, 6 Me. 436, where it appears that the parties did acquiesce.

51a. Schulz *v.* Haase, 129 Ill. App. 193 [*affirmed* in 227 Ill. 156, 81 N. E. 50].

52. Ela *v.* McConihe, 35 N. H. 279.

52a. Schulz *v.* Haase, 129 Ill. App. 193 [*affirmed* in 227 Ill. 156, 81 N. E. 50].

53. Webster *v.* Merriam, 9 Conn. 225; Young *v.* Bickel, 1 Serg. & R. (Pa.) 467.

53a. Schulz *v.* Haase, 227 Ill. 156, 81 N. E. 50; Abbott *v.* Beebe, 226 Ill. 417, 80 N. E. 991.

greatly undervalued, I have no doubt but it is the duty of the court to set aside the inquest. But it ought to be a clear case. The jury are intrusted by law with the valuation, and they act upon oath. Besides, it is generally to be supposed that they are better judges of this matter than the court. Great regard should therefore be paid to their opinion."[54] "An inquest may be set aside where the jury has made a plain mistake of fact or law, or where fraudulent acts have been practiced by an interested party to procure such a report as he desires. A valuation of land at a grossly inadequate price may be evidence of mistake or fraud."[55] "The orphans' courts proceed on chancery principles; and if it appears that the inquest acted on erroneous principles, or if it appeared that there was a great inequality in the division or valuation, their powers are sufficiently extensive to afford relief."[56] If, for any cause, the proceedings are vacated and there has been any charge of misconduct on the part of the commissioners, the general practice is to appoint new commissioners instead of recommitting the partition to those first appointed.[57] If no sufficient cause is shown for setting aside the report, the court makes an order confirming or approving it, and thereupon the partition becomes final, and the parties are invested with title in severalty to their respective allotments. If the partition has been consummated and long acquiesced in, it is difficult to conceive of any irregularity requiring it to be set aside when not absolutely void.[58]

H. The Effect of the Partition. When land has been awarded to one of the heirs on payment of a sum of money, the payment must be made or secured in the manner designated by statute, before the title vests in such heir.[59] In Pennsylvania the security must be "by recognizance or otherwise to the satisfaction of the court." When security by recognizance is taken, it operates as a lien on the lands.[60] "The persons to whom, or for whose use, payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same."[61] Proceedings for partition in connection with the settlement of the estates of deceased persons must, upon principle, be regarded as binding and conclusive to the same extent as other legal proceedings. When the court has jurisdiction of the subject-matter, and of the persons of its owners, its final judgment operates to vest the title to the several allotments in the persons to whom they were respectively allotted.[62]

54. Rex *v.* Rex, 3 Serg. & R. (Pa.) 533.

55. *In re* Kreider, 18 Pa. St. 374.

56. Rex *v.* Rex, 3 Serg. & R. (Pa.) 533.

57. Pickering *v.* Pickering, 20 N. H. 541; Stark's Estate, 9 Kulp (Pa.) 525.

58. Silvius' Estate, 18 Lanc. L. Rev. (Pa.) 92.

59. Thayer *v.* Thayer, 7 Pick. (Mass.) 209; Jenks *v.* Howland, 3 Gray (Mass.) 536; Smith *v.* Scudder, 11 Serg. & R. (Pa.) 325; Bellas *v.* Evans, 3 Penr. & W. (Pa.) 479; Bavington *v.* Clarke, 2 Penr. & W. (Pa.) 115, 21 Am. Dec. 432.

60. Riddle's Appeal, 37 Pa. St. 177; Cubbage *v.* Nesmith, 3 Watts (Pa.) 314; Share *v.* Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421; Kean *v.* Franklin, 5 Serg. & R. (Pa.) 147.

61. Brightly's Purdon Dig. § 162, p. 541; Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

62. *Alabama.*— Morgan *v.* Farned, 83 Ala. 367, 3 So. 798.

Massachusetts.— White *v.* Clapp, 8 Metc. 365.

Michigan.— Parkinson *v.* Parkinson, 139 Mich. 530, 102 N. W. 1002, 69 L. R. A. 505.

North Carolina.—Wahab *v.* Smith, 82 N. C. 229.

Pennsylvania.— Dewart *v.* Purdy, 29 Pa. St. 113; Fromberger *v.* Greiner, 5 Whart. 350; Lusch's Estate, 10 Pa. Dist. 224; Com. *v.* Rodgers, 41 Wkly. Notes Cas. 467.

Conclusiveness of decree.—"There is no reason why a decree of partition in the probate court should be any less conclusive upon the parties to it than a judgment in a real action. To permit one claiming under a party to such partition again to litigate the title would manifestly violate the maxim which declares that public interest requires an end to litigation." Carpenter *v.* Green, 11 Allen (Mass.) 26, 28; Mass. St. (1882) § 63, p. 1036; Howell St. Mich. § 5980.

All the incidents and appurtenances of each allotment vest in the person to whom it is assigned. "Unless there be some reservation or order made by the committee, the buildings, fences, trees, stone, manure, &c., that are upon one part, go to him to whom that part is assigned" (Plumer *v.* Plumer, 30

I. Sale Instead of an Allotment. When proceeding in probate, as well as when proceeding in courts of general jurisdiction, it may be found that partition by allotment is impractical, or, at least, that partition by sale and the division of the proceeds should be preferred. We believe the statutes upon the subject generally, if not universally, authorize a sale under the same, or substantially the same circumstances and conditions which authorize sales in suits for partition.[63] The appointment of commissioners is usually required who report to the court either that they have made a partition by allotment or that it cannot be equitably made in that manner nor otherwise than by a sale.[64] Upon the hearing of this report, an order of sale may be made. Whether the property should be sold is a judicial question, and to support its sale an order of court is indispensable.[65] The statutes authorizing and controlling these sales are vague and the decisions thereunder infrequent. It may, however, we think, be safely affirmed that the general rules hereinbefore stated respecting sales in partition apply[66] to sales in partition

N. H. 558); and his title is paramount to any conveyance made by any of the coheirs (Holcomb *v.* Sherwood, 29 Conn. 418; Steel's Appeal, 86 Pa. St. 222).

The partition is binding on minors, and cannot be disaffirmed by them on attaining their majority. Gelbach's Appeal, 8 Serg. & R. (Pa.) 205.

It may be impeached for fraud.— Thus, in Mitchell *v.* Kintzer, 5 Pa. St. 216, 217, 47 Am. Dec. 408, in determining that evidence ought to have been received to impeach a partition for fraud, it was said: "The evidence so offered by defendant was rejected by the court below, and the learned counsel for Kintzer contended here that the court below were right, because the proceedings and decree of the Orphan's Court could not be impeached by parol, or for any cause, but imported absolute verity, and vested the title in James Mitchell and his heirs, irrespective of, and beyond all the circumstances which might have attended the transaction. But in the eye of the law, fraud spoils every thing it touches. The broad seal of the Commonwealth is crumbled into dust, as against the interest designed to be defrauded. Every transaction of life between individuals, in which it mingles, is corrupted by its contagion. Why then, should it find shelter in the decrees of courts? There is the last place on earth where it ought to find refuge. But it is not protected by record, judgment, or decree; whenever and wherever it is detected, its disguises fall from around it, and the lurking spirit of mischief, as if touched by the spear of Ithuriel, stands exposed to the rebuke and condemnation of the law."

Legal title only, not equitable rights considered.— If, as we have hereinbefore stated the rule to be, the probate court considers the legal title only, a decree of partition cannot affect equitable rights or interests, nor defeat their subsequent assertion against parties whose legal titles were subject thereto before the partition was made. Caperton *v.* Hall, 83 Ala. 171, 3 So. 234.

Effect of lapse of time, etc., upon void proceedings.— There may perhaps be cases in which, although the proceedings for partition were in themselves absolutely void, the title of parties taking and holding possession thereunder cannot be assailed because great lapse of time or other circumstances may indicate that all the parties in interest either agreed upon, or acquiesced in, the partition made for them. Such partition may therefore be treated as of equal dignity and force with a partition by parol, which, it is well known, will not be disturbed if the parties have taken and long held possession pursuant thereto. Obermiller *v.* Wylie, 36 Fed. 641.

63. Finch *v.* Smith, 146 Ala. 644, 41 So. 819; Bozone *v.* Daniel, (Ala. 1905) 39 So. 774; Edwards *v.* Edwards, (Ala. 1904) 39 So. 82; Cal. Code Civ. Proc. § 1682; McCall's Appeal, 56 Pa. St. 363; Brightly's Purdon Dig. (Pa.) § 84, p. 545; Tex. St. (1879) § 2120; Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415.

64. Cal. Code Civ. Proc. § 1682.

65. Bland *v.* Bowie, 53 Ala. 152.

66. As to such rules see *supra*, III, O, 19.

Time to apply for order to sell.— The application for the order to sell may be made at any time after filing the report of the commissioners recommending it. If the statute declares the application may be made at any regular term, it may be made at a special day expressly ordered by the court sometime previously to be a day of court for all purposes. Guido's Estate, 10 Kulp (Pa.) 150.

Taking property at appraised valuation.— In some of the states valuations or appraisements of the property are made, and the heirs, or certain of them, given the right to prevent a sale by taking the property at its appraised valuation. Cal. Code Civ. Proc. § 1680; Corrothers *v.* Jolliffe, 32 W. Va. 562, 9 S. E. 889, 25 Am. St. Rep. 836; Kline *v.* Grayson, 4 Binn. (Pa.) 225; Walton *v.* Willis, 1 Dall. (Pa.) 351, 1 L. ed. 171. To cause them to exercise the right, a notice or a rule to show cause is served on them, and if they do not within the time allowed elect to take the property, their right to do so terminates. Welty *v.* Ruffner, 9 Pa. St. 224; Wentz's Appeal, 7 Pa. St. 151; McNeile's Estate, 15 Pa. Dist. 105, 32 Pa. Co. Ct. 527. Grantees not in possession and whose deeds are not on record are not entitled to notice. Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634. The notice or rule to show cause may be served by any person. Vensel *v.*

as part of and for the purpose of the settlement and distribution of estates of decedents.

Colner, 31 Leg. Int. (Pa.) 373. Although an heir has lost his right, the court may revoke the order to sell and give him another opportunity. Rasley's Estate, 13 Lanc. Bar (Pa.) 160. The husband of a cotenant has not any right to take the property at the appraised value or to bid on it in competition with his wife and the other heirs. Eby's Estate, 5 Pa. Co. Ct. 434. The court may refuse, as coming too late, an offer made only three hours before the time fixed for the sale of a party to take the property at a valuation. Wistar's Appeal, 10 Pa. Cas. 182, 13 Atl. 550.

Person designated or appointed to make sale.— More usually than otherwise the sale, when ordered, is directed to be made by the executor or administrator, although it may generally be by a commissioner or other person appointed by the court for that purpose. Cal. Code Civ. Proc. § 1682; Arble's Estate, 161 Pa. St. 373, 29 Atl. 32; Rawle's Appeal, 119 Pa. St. 100, 12 Atl. 809.

Terms, time, place, and manner of sale.— The person designated or appointed to sell has no power to change the terms of the sale. Eshelman *v.* Witmer, 2 Watts (Pa.) 263; Schneider's Estate, 11 Kulp (Pa.) 201. The land may be divided into purparts for the purpose of selling, although it had been reported indivisible. Schneider's Estate, *supra*. The officer conducting the sale may avail himself of the services of an auctioneer. Guido's Estate, 10 Kulp (Pa.) 150. The time for the sale lies in the discretion of the court. *In re* Neel, 28 Pittsb. Leg. J. N. S. (Pa.) 395. A sale made at a place different from that designated by the statute, as where it is at the court-house of the county wherein administration was granted, when it should have been at that wherein the land is situated, is not void. Calloway *v.* Kirkland, 57 Ala. 476. Payment of his bid by the purchaser is indispensable, but if he is an heir, he may retain, or be credited with, a sum equivalent to his share. Townsend *v.* Rees, 2 Harr. (Del.) 324; Bayhi *v.* Bayhi, 35 La. Ann. 527; Hollier *v.* Gonor, 13 La. Ann. 591; McRee's Estate, 6 Phila. (Pa.) 75.

If a wife is a cotenant and the sale is to her husband or the bid is transferred to him, and all the heirs are paid but her, her heirs cannot require a new partition. It will be presumed that the non-payment of her share by her husband was with her consent. Hurt *v.* Jones, 75 Va. 341.

Confirmation or setting aside of sale.— The sale must be reported to the court, which must act upon it either to confirm or set it aside. It will be set aside for any irregularity in the proceedings actually or presumptively prejudicial, as for failure to give a security required by statute to be given (Guido's Estate, 10 Kulp (Pa.) 150), or an unfair valuation of lands in their appraisement (Horne's Estate, 10 Pa. Dist. 226, 8 Del. Co. 146; Stark's Estate, 9 Kulp (Pa.) 525); but not for any irregularity in which the objecting party acquiesced and with knowledge of it permitted the sale to be confirmed (Backentoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592), nor on account of an advance bid, unless the additional value was inherent in the property at the time of the sale (McRee's Estate, 6 Phila. (Pa.) 75). Notice should be given interested persons of proceedings to vacate a sale (Louisiana Bank *v.* Delery, 2 La. Ann. 648); but one who bids at a second or resale cannot afterward object that he had no notice of the proceedings to set aside the first sale (*In re* Hamilton, 51 Pa. St. 58). Confirmation is not absolute until the money is paid and the deed delivered. McRee's Estate, *supra*. While confirmation is indispensable, it must be presumed, although not otherwise evidenced, from an order of court distributing the proceeds of the sale. Rye *v.* J. M. McGuffey Petroleum Co., (Tex. Civ. App. 1906) 95 S. W. 622.

Refusal to comply with bid.— If the purchaser refuses to comply with his bid, the same remedies exist as in other cases of partition sales, namely, by suit for specific performance (Hore's Estate, 11 Phila. (Pa.) 63), and by resale and actions for the deficiency (Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297), and the order for resale must be in writing (Pratt *v.* Bentley, 4 Rich. (S. C.) 19).

Effect upon existing liens.— Whether the property sold remains subject to liens existing against it must be ascertained by consulting the local law. As to liens against the decedent, in some of the states, they are still enforceable against the land if the sale is made within two years after his death or after the issuing of letters of administration, and the purchaser cannot require their payment by the administrator nor out of the assets of the estate. McArtan *v.* McLaughlin, 88 N. C. 391; Wilson's Appeal, 45 Pa. St. 435; Henry *v.* Horstick, 9 Watts (Pa.) 412; Bricker's Estate, 22 Pa. Super. Ct. 12. As the sale must sweep away the title of the heirs, all liens against them personally must be transferred to, and become payable out of, their shares of the proceeds. When the proceeds of the sale are paid to the officer making it, they come within the control of the court and must be distributed by it, or otherwise disposed of, according to the rights and equities of the heirs and of persons having liens or claims against them or against the estate. The administrator, or person making the sale, cannot decide this question and is not authorized to make payment until, nor otherwise than as, directed by the court. Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758; Jouffret *v.* Loppin, 20 N. Y. App. Div. 455, 46 N. Y. Suppl. 810; Matter of Dusenberry, 34 Misc. (N. Y.) 666, 70 N. Y. Suppl. 725; Culver's Estate, 7 Kulp (Pa.) 219; Com. *v.* Rodgers, 41 Wkly. Notes Cas. (Pa.) 467.

As between the heirs claiming their shares of the proceeds as such, the court may ascertain their respective interests and determine

V. APPELLATE PROCEEDINGS.[67]

A. Classification of. The appellate proceedings resorted to in suits and actions for partition are certiorari,[68] writ of error,[69] and appeal.[70]

B. Certiorari.[71] There is no doubt that certiorari has been successfully employed in partition as an appellate remedy.[72] The functions of this writ differ much in the different states.[73] Doubtless they are neither more nor less active or comprehensive in partition than in other judicial proceedings. Generally certiorari lies only when a court has acted without jurisdiction and this appears by the record. Hence it is rarely available as an appellate proceeding, and, when available, can do no more than to annul the judgment.

C. Writs of Error.[74] In the absence of some statute limiting the functions of this writ or creating some other remedy, the writ of error is an appropriate, and in the absence of statutes creating cumulative remedies, the only proceeding to review, and to obtain the reversal or modification of judgments at law in partition.[75] Although the action was commenced as the result of a suit in partition and an order therein entered directing the parties to have a disputed legal title settled by a legal tribunal, its judgment must be reviewed on writ of error.[76]

D. Appeal.[77] The term "appeal" was not originally applicable to the tribunals

questions of advancements, but not a claim made by one heir against another arising out of the latter's failure to comply with his bid for realty descended from the decedent and exposed for sale by the court in partition proceedings. Matter of Landis, 2 Phila. (Pa.) 217. Persons may also appear and show that they have succeeded to the interest of an heir and are entitled to his share of the proceeds. *In re* Coombs, 8 N. J. Eq. 78.

The purchaser obtains all the title and interest of the decedent in the property (Ward *v.* West, (Tenn. Ch. App. 1895) 35 S. W. 563; Guilford *v.* Love, 49 Tex. 715), which, unless there is a reservation, includes growing crops (Burns *v.* Cooper, 31 Pa. St. 426; Hancock *v.* Caskey, 8 S. C. 282); and his title is as free from collateral attacks as are other titles based on judicial proceedings. If there is any heir, however, over whom the court did not acquire jurisdiction, his title is not divested, and he cannot be required before recovering his property to repay the purchase-money of the void sale (Perrine *v.* Kohr, 20 Pa. Super. Ct. 36).

The cost of the proceeding must be borne by the estate. Phelps *v.* Stewart, 17 Md. 231.

67. **Bills of review.**— These proceedings are often spoken of as revisory. Whether they are ever properly so spoken of need not be here considered. The functions of these bills are considered in the note to Brewer *v.* Bowman, 3 J. J. Marsh. (Ky.) 492, 20 Am. Dec. 160, and they are doubtless as applicable to partition as to other suits in equity. They are not, however, appellate proceedings, but take place in courts of the same rank as that whose decree is reviewed, and generally in the same court. The relief formerly obtained by them is by the more modern practice obtainable by a simple suit in equity, such as is within the decisions hereinbefore cited in *supra*, III, Q, 5. In some of the states these bills are specially provided for by statutes giving the right to persons not personally served with process and to minors and incompetents whose guardians did not properly defend for them to appear within a time stated and obtain a review of the partition. The bill or other mode of applying for such review does not, however, institute an appellate proceeding. Bundy *v.* Hall, 60 Ind. 177; Armistead *v.* Barber, 82 Miss. 788, 35 So. 199; Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368.

68. See *infra*, V, B.

69. See *infra*, V, C.

70. See *infra*, V, D.

71. **Certiorari** generally see CERTIORARI, 6 Cyc. 730.

72. Bryant *v.* Stearns, 16 Ala. 302 (where it was declared to be the only remedy under the act of 1803, then in question, while in a Maine case it was said to be a proper remedy, and the question whether any other remedy existed was expressly reserved); Dyer *v.* Lowell, 30 Me. 217; Cozens *v.* Dickinson, 3 N. J. L. 507.

73. Note to Wulzen *v.* San Francisco, 40 Am. St. Rep. 29; and, generally, CERTIORARI, 6 Cyc. 730.

74. **Writ of error** generally see APPEAL AND ERROR, 2 Cyc. 474.

75. Cooper *v.* Armstrong, 3 Greene (Iowa) 120; Smith *v.* Rice, 11 Mass. 507 (where a writ of error was held to be the proper remedy to review a partition in probate, although an appeal might have been prosecuted had the party aggrieved not been out of the state and thereby prevented from being heard); Robinson *v.* Baruff, 6 Ohio Dec. (Reprint) 1107, 10 Am. L. Rec. 485; Jordan *v.* Jordan, 8 Ohio Cir. Ct. 431, 4 Ohio Cir. Dec. 290; Laird *v.* Walkinshaw, (Pa. 1888) 15 Atl. 898.

76. Brown *v.* Cranberry Iron, etc., Co., 72 Fed. 96, 18 C. C. A. 444.

77. **Appeal** generally see APPEAL AND ERROR, 2 Cyc. 274.

of the law, but was always applicable in chancery, and there meant the removal of the cause to a higher revisory tribunal for the purpose of obtaining the judgment of the latter therein, notwithstanding any judgment which might have been entered in the subordinate court. Therefore, where the partition is in chancery, strictly speaking, the appellate remedy is by appeal only. But in the greater part of the United States the remedy by appeal has, by statute, been extended so as to include a variety of proceedings, and often so as to supplant that by writ of error. Wherever statutes of this character are in force, the appellate remedy in partition is by appeal.

E. What Is Appealable or Reviewable — 1. Generally Only a Decision Designated by Statute. By the English law, the right to appeal, or in other words, to prosecute any appellate proceeding is purely statutory, and except in the cases where the right is given by statute, every litigant must content himself with the decision of the tribunal having original jurisdiction of his cause.[78] The same rule must prevail in the United States, except where the constitution of the state has created appellate tribunals and given them jurisdiction of causes. Therefore, to ascertain what decisions in partition are subject to review, one must consult the constitution and statutes of the state in which the question is presented, for, if the right of appeal has not been created by the one or the other, it does not exist.[79]

2. Final Judgment or Decree Is Generally Required. Both at law and in equity, whether the proceeding was by writ of error or by appeal, and also under statutes where the latter remedy practically included all that had formerly been obtainable by both, there was an approach to unanimity in withholding the remedy until there had been a final judgment or decree. Probably this had its foundation in the theory that, until a final decision in the trial court, the higher tribunal could not know but the lower would, either on its own motion or at the suggestion of a party, correct the error complained of and thus make resort to the appellate tribunal unnecessary. Whatever be the reason, it may be regarded as settled in partition, in the absence of some statute to the contrary, that no appellate proceeding can be maintained, whatsoever its name or character, anterior to the final judgment or decree.[80]

78. Atty.-Gen. *v.* Sillem, 10 H. L. Cas. 704, 10 Jur. N. S. 446, 10 L. T. Rep. N. S. 434, 4 New Rep. 29, 12 Wkly. Rep. 641, 11 Eng. Reprint 1200; Rex *v.* Cashionbury, 3 D. & R. 35, 26 Rev. Rep. 604, 16 E. C. L. 132; Von Stentz *v.* Comyn, 12 Ir. Eq. 622.

79. Hoy *v.* Hites, 11 Ohio 254; Doane *v.* Fleming, Wright (Ohio) 168.

Applicability of general statutes.—Although proceedings in partition are not specially named in the statutes providing for appeals, they may fall within some class designated therein, and whether they do so is sometimes a question of contention and doubt. Thus, in Ohio, the right of appeal having been allowed in all civil cases, the court was first of the opinion that this included statutory proceedings in partition (Mack *v.* Bonner, 3 Ohio St. 366); next that it did not (Barger *v.* Cochran, 15 Ohio St. 460); and finally that it did (McRoberts *v.* Lockwood, 49 Ohio St. 374, 34 N. E. 734; Elstner *v.* Fisher, 12 Ohio Cir. Ct. 517, 5 Ohio Cir. Dec. 597; Swihart *v.* Swihart, 7 Ohio Cir. Ct. 338, 4 Ohio Cir. Dec. 624; Stone *v.* Doster, 7 Ohio Cir. Ct. 8, 3 Ohio Cir. Dec. 637).

Amount in controversy.— Often the jurisdiction of a court to exercise appellate jurisdiction is made dependent on the amount in controversy. When such is the case and the proceeding is in partition, such amount is not measured by the value of the whole property, but only by the value of that in dispute. Hence, if the dispute respects one moiety only, jurisdiction cannot be entertained if the value of such moiety is not shown to equal or exceed the amount fixed as essential. McCarthy *v.* Provost, 103 U. S. 673, 26 L. ed. 337; Green *v.* Fisk, 103 U. S. 518, 26 L. ed. 485.

80. *California.*— Gates *v.* Salmon, 28 Cal. 320.

Florida.— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

Georgia.— Berryman *v.* Haden, 112 Ga. 752, 38 S. E. 53.

Indiana.— Davis *v.* Davis, 36 Ind. 160.

Kentucky.— Talbot *v.* Todd, 7 J. J. Marsh. 456.

Mississippi.— Gilleylen *v.* Martin, 73 Miss. 695, 19 So. 482.

Missouri.— Pipkin *v.* Allen, 29 Mo. 229; Ivory *v.* Delore, 26 Mo. 505; Stephens *v.* Hume, 25 Mo. 349.

Nebraska.— Atwood *v.* Atwood, 45 Nebr. 201, 63 N. W. 362.

New York.— Beebe *v.* Griffing, 6 N. Y. 465.

3. WHAT JUDGMENTS OR DECREES ARE FINAL. The first or interlocutory judgment was the one declaring the parties to hold the property as cotenants, stating the moieties of each, and directing partition to be made accordingly. It was not final, and hence not directly reviewable by either appeal therefrom or writ of error thereto.[81] This view, although supported by the weight of authority, has not passed unchallenged. The minority insists that when a judgment is entered declaring the interests of the parties and directing partition to be made accordingly, nothing remains to be done except to carry out such judgment, and therefore that it is final and appealable.[82] Let us suppose that the interlocutory

North Carolina.— Albemarle Steam Nav. Co. *v.* Worrell, 133 N. C. 93, 45 S. E. 466; Medford *v.* Harrell, 10 N. C. 41.

Oregon.—Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741.

United States.— Green *v.* Fisk, 103 U. S. 518, 26 L. ed. 485 [*followed* in Green *v.* Fisk, 154 U. S. 668, 14 S. Ct. 1193, 26 L. ed. 486].

See 38 Cent. Dig. tit. "Partition," § 425; and APPEAL AND ERROR, 2 Cyc. 538 *et seq.*

Order confirming report.— Therefore the appeal or writ of error is usually from the order confirming the report of the commissioners making the partition. Bull *v.* Pyle, 41 Md. 419. This is also the order usually appealed from when the proceeding is in the orphans' court or elsewhere as a part of the settlement and distribution of the estate of a decedent. Earl *v.* Rowe, 35 Me. 414, 58 Am. Dec. 714; Cozens *v.* Dickinson, 3 N. J. L. 507.

Under the modern or statutory proceeding for partition many questions are determinable in addition to what are the moieties of the parties, and what allotments fairly and impartially correspond to them, and whenever the determination of one of such questions so establishes and declares the liability of a party that it may be enforced by the sale of specific property or by an execution leviable on his property generally, the judgment is so far final against him as to sustain his appeal therefrom. Taylor *v.* Dawson, 65 Ill. App. 232; Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Fredericks *v.* Davis, 6 Mont. 457, 13 Pac. 124.

Orders entered after final judgment.— The statutes controlling appeals, in most of the states, expressly specify, as subjects of appeal, orders made after final judgment; and perhaps, even in the absence of such statutes, many of such orders are appealable when they are in the nature of final judgments because enforceable against a party, and their enforcement must deprive him of property or of its possession, or subject him to personal liability. Hence an appeal may be prosecuted from an order setting aside a sale (Comstock *v.* Purple, 49 Ill. 158; Hollett *v.* Evans, 28 Ind. 61), or from an order allowing an attorney's fee (Draper *v.* Draper, 29 Mo. 13). No appeal can, however, be sustained to review or reverse an order made after final judgment, if it is merely obeying or carrying into effect an order of the appellate court in a prior appeal. Murphy *v.* Murphy, 45 La. Ann. 1482, 14 So. 212; McMahon's Estate, 215 Pa. St. 10, 64 Atl. 321.

81. *California.*— Peck *v.* Vandenberg, 30 Cal. 11; Gates *v.* Salmon, 28 Cal. 320.

Florida.— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; Putnam *v.* Lewis, 1 Fla. 455.

Georgia.— Berryman *v.* Haden, 112 Ga. 752, 38 S. E. 53.

Indiana.— Kern *v.* Maginniss, 41 Ind. 398; Davis *v.* Davis, 36 Ind. 160.

Kentucky.— Talbot *v.* Todd, 7 J. J. Marsh. 456; Beatty *v.* Beatty, 5 S. W. 711, 10 Ky. L. Rep. 72.

Mississippi.— Gilleylen *v.* Martin, 73 Miss. 695, 19 So. 482.

Missouri.— Buller *v.* Linzee, 100 Mo. 95, 13 S. W. 344; Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Gudgell *v.* Mead, 8 Mo. 53, 40 Am. Dec. 120.

Nebraska.—Atwood *v.* Atwood, 45 Nebr. 201, 63 N. W. 362.

New York.— Tilton *v.* Vail, 117 N. Y. 520, 23 N. E. 120; Beebe *v.* Griffing, 6 N. Y. 465.

North Carolina.—Albemarle Steam Nav. Co. *v.* Worrell, 133 N. C. 93, 45 S. E. 466; Medford *v.* Harrell, 10 N. C. 41.

Pennsylvania.— Wistar's Appeal, 115 Pa. St. 241, 8 Atl. 797; Christy's Appeal, 110 Pa. St. 538, 5 Atl. 205; Gesell's Appeal, 84 Pa. St. 238.

Texas.— White *v.* Mitchell, 60 Tex. 164.

United States.— Clark *v.* Roller, 199 U. S. 541, 26 S. Ct. 141, 50 L. ed. 300; Green *v.* Fisk, 154 U. S. 668, 14 S. Ct. 1193, 26 L. ed. 486 [*following* Green *v.* Fisk, 103 U. S. 518, 26 L. ed. 485].

See 38 Cent. Dig. tit. "Partition," § 425.

82. *Illinois.*—Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Allison *v.* Drake, 145 Ill. 500, 32 N. E. 537.

Indiana.— See Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42.

Iowa.— Williams *v.* Wells, 62 Iowa 740, 16 N. W. 513; Ramsay *v.* Abrams, 58 Iowa 512, 12 N. W. 555.

Louisiana.— Ruthenberg *v.* Helberg, 43 La. Ann. 410, 9 So. 99; Blanchard *v.* Blanchard, 7 La. Ann. 529; McCollum *v.* Palmer, 1 Rob. 512.

Michigan.— Damouth *v.* Klock, 28 Mich. 163.

Ohio.— McRoberts *v.* Lockwood, 49 Ohio St. 374, 34 N. E. 734.

In Indiana a middle or compromise position is maintained. It is that where the action is primarily for partition, "an appeal will not lie from the interlocutory order of the court appointing commissioners to make partition

judgment, in addition to fixing the moieties of the parties, directs a sale of the property, or that, commissioners having been appointed, they have reported that partition shall be made by sale, and the court has directed accordingly. We here reach the point where, not only is no further determination required to fix the rights of the parties, but the judgment, if executed, must divest them of their property. There is therefore still more reason for declaring it appealable, and it has been so declared,[83] but from this reasonable declaration there is dissent.[84]

4. STATUTES GRANTING APPEALS FROM INTERLOCUTORY JUDGMENTS. A very obvious inconvenience attending the rule that the judgment declaring the rights of the parties and directing partition accordingly is not so final as to support an appeal is, that, although there is serious doubt of the freedom of the judgment from error, the parties must proceed to have the allotments made and the whole partition consummated, and suffer great delay and expense subject to the risk of having all their labor undone and their expense rendered profitless by an appeal, which, although succeeding the final judgment, must, upon a reversal, set aside the interlocutory judgment also. Hence enactments in a few of the states expressly granting the right of appeal from judgments or decrees in partition.[85] Under these statutes the judgments declaring the moieties of the parties and appointing commissioners to make partition are interlocutory and subject to appeal,[86] and the failure to appeal from interlocutory judgments precludes the party from reviewing them, notwithstanding his subsequent appeal from the final judgment.[87] A like result must follow in those states where the courts hold that the final judgment, for the purposes of appeal, is the one declaring the interests of the parties,

between the parties," but if there is real litigation as to the title or any other right or matter, its decision is a sufficient foundation for an appeal, although the court has proceeded no further than to appoint commissioners. Jackson *v.* Myers, 120 Ind. 504, 22 N. E. 90, 23 N. E. 86.

Error that will prejudice appellant at trial. — For a general statement of when an interlocutory judgment may be appealable because of "some error of law that will prejudice the appellant in his trial, and which error of law goes to the root of the matter" see Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711.

83. *Florida.*— Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

Georgia.—Lochrane *v.* Equitable Loan, etc., Co., 122 Ga. 433, 50 S. E. 372.

Indiana.— Kreitline *v.* Franz, 106 Ind. 359, 6 N. E. 912; Fleenor *v.* Driskill, 97 Ind. 27; Benefiel *v.* Aughe, 93 Ind. 401; Hunter *v.* Miller, 17 Ind. 88.

Louisiana.— Hewes *v.* Baxter, 45 La. Ann. 1059, 13 So. 821; Hewes *v.* Baxter, 45 La. Ann. 1049, 13 So. 817.

Missouri.— Durham *v.* Darby, 34 Mo. 447.

Virginia.— Stevens *v.* McCormick, 90 Va. 735, 19 S. E. 742.

Wisconsin.— Vesper *v.* Farnsworth, 40 Wis. 357.

United States.— East Coast Cedar Co. *v.* People's Bank, 111 Fed. 446, 49 C. C. A. 422.

See 38 Cent. Dig. tit. "Partition," § 425.

Discretion of court.— Whether an appeal shall be allowed appears to rest in the discretion of the court. Lowd *v.* Brigham, 154 Mass. 107, 26 N. E. 1004.

84. Lee *v.* Pindle, 11 Gill & J. (Md.) 362; Buller *v.* Linzee, 100 Mo. 95, 13 S. W. 344; Turpin *v.* Turpin, 88 Mo. 337; Murray *v.* Yates, 73 Mo. 13; Parkinson *v.* Caplinger, 65 Mo. 290; Cawthon *v.* Searcy, 12 Lea (Tenn.) 649; Thruston *v.* Belote, 12 Heisk. (Tenn.) 249; Meek *v.* Mathis, 1 Heisk. (Tenn.) 534.

To illustrate the rule that an appeal does not lie from an interlocutory order or judgment, we may mention that in Louisiana all rulings of court and orders before the notary are interlocutory (Marionneaux *v.* Marionneaux, 28 La. Ann. 392), that the same ruling applies to orders of court refusing to confirm a partition made by commissioners (Boyce *v.* Wheeler, 133 Mass. 554), refusing to set it aside, there being no order of confirmation (Papin *v.* Blumenthal, 41 Mo. 439), stating the opinion of the court on the nature of the estate created and as to the rights of the parties, ordering the taking of testimony on the question of adverse possession and reserving the right to determine therein and as to the relief to which a tenant in tail might be entitled (Wickes *v.* Wickes, 98 Md. 307, 56 Atl. 1017), confirming a commissioner's report, where the plan adopted is dependent on a sale of part of the property which has not taken place (Clark *v.* Roller, 199 U. S. 541, 26 S. Ct. 141, 50 L. ed. 300), or allowing counsel fees subject to the usual exceptions (Johnson *v.* Hoover, 75 Md. 486, 23 Atl. 903).

85. Cal. Code Civ. Proc. § 963, subd. 2; Bloom *v.* Gordan, 150 Cal. 762, 90 Pac. 115.

This statute does not apply to judgments entered before its passage. Peck *v.* Courtis, 31 Cal. 207; Gates *v.* Salmon, 28 Cal. 320.

86. Dore *v.* Klumpke, 140 Cal. 356, 73 Pac. 1064; Watson *v.* Sutro, 77 Cal. 609, 20 Pac. 88; Barry *v.* Barry, 56 Cal. 10.

87. Barry *v.* Barry, 56 Cal. 10; Regan *v.* McMahon, 43 Cal. 625.

in which case an appeal from the final judgment confirming the partition made by the commissioners will not enable the appellant to question the correctness of the prior judgment.[88]

F. Who May Appeal. In partition, as in other cases, the right of appeal exists in favor of any person prejudicially affected by the judgment or order appealed from.[89] On the other hand, one not beneficially interested cannot appeal.[90] If a party has accepted the benefit of the judgment, as by selling the parcel allotted to him on partition, he waives and loses his right to appeal.[91] He may by his express agreement, or by his gross laches, or by any course of conduct creating an estoppel against himself, lose his right of appeal.[92] When a sale in partition has been made and the question subsequently arising is whether it shall be confirmed or set aside, the order entered thereon, if appealable, may be appealed from by either party or by the purchaser.[93]

G. Notice of Appeal. The appeal or writ of error institutes a new proceeding for the maintenance of which it is necessary that a notice or writ be served to give the appellate court jurisdiction. The appellant, or plaintiff in error, must cause this service to be made upon every other party who might be prejudiced by the reversal or modification of the judgment.[94] Otherwise the appeal will be dismissed. If, however, the appellate proceeding is directed against specific parts of the judgment only, it is sufficient to make service only on the parties interested in those parts.[95] The notice of appeal must not precede the order or judgment from which the appeal is taken,[96] but must be filed within the time thereafter designated by the statute.[97]

H. General Principles Applicable to Appellate Proceedings — 1. ERROR MUST BE AFFIRMATIVELY SHOWN. Whether the proceeding is by appeal or writ of error, the presumption will be indulged that the action of the lower court was free from error or irregularity, and he who assails it must show affirmatively what was the action taken, and that such action was erroneous or irregular. Error will not be presumed.[98] In applying this principle to a discretionary action of

88. Austin *v.* Austin, 132 Mich. 453, 93 N. W. 1045; Shepherd *v.* Rice, 38 Mich. 556.

89. Younger *v.* Santa Cruz County Super. Ct., 136 Cal. 682, 69 Pac. 485; Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220; Maguire *v.* Fluker, 112 La. 76, 36 So. 231; Conover *v.* Walling, 15 N. J. Eq. 167.

90. Lurman *v.* Huhner, 75 Md. 268, 23 Atl. 646; Raleigh *v.* Rogers, 25 N. J. Eq. 506.

91. McGrew *v.* Grayston, 144 Ind. 165, 41 N. E. 1027; Pockman *v.* Meatt, 49 Mo. 345.

92. Rochester Loan, etc., Co. *v.* Morse, 181 Ill. 64, 54 N. E. 628; Chinn *v.* Murray, 4 Gratt. (Va.) 348.

93. Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

94. Hunt *v.* Hawley, 70 Iowa 183, 30 N. W. 477; Gay *v.* Marionneaux, 20 La. Ann. 358; Farrar *v.* Newport, 17 La. 346.

95. Miller *v.* Thomas, 71 Cal. 406, 12 Pac. 432; Miller *v.* Rea, 71 Cal. 405, 12 Pac. 431.

96. McDade *v.* McDade, 56 Ala. 598; Regan *v.* McMahon, 43 Cal. 625.

97. Kern *v.* Maginniss, 41 Ind. 398; Griffin *v.* Griffin, 10 Ind. 170; Holderman *v.* Holderman, 5 B. Mon. (Ky.) 384.

Persons under disability.— Under many statutes the time within which an appeal may be taken or a writ of error sued out does not run against persons under disability, such as infants, incompetents, and married women. To the application of the rule it is essential that the person having the right of appeal be at the time it accrues under disability. If he is not, and the time having commenced to run against him, he dies, and the right passes from him to persons under disability, they are not protected thereby, but must take their appeal or sue out their writ of error within the time which would have been available to him had he not died. Hinde *v.* Whitney, 31 Ohio St. 53.

98. *Arkansas.*— Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672.

California.— Mesnager *v.* De Leonis, 140 Cal. 402, 73 Pac. 1052; Adams *v.* Hopkins, (1902) 69 Pac. 228.

Indiana.—Amory *v.* Carpenter, 8 Blackf. 280.

Iowa.— Snyder *v.* Snyder, 75 Iowa 255, 39 N. W. 297.

Louisiana.— Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941.

Missouri.— Wauchope *v.* McCormick, 158 Mo. 660, 59 S. W. 970; Bayha *v.* Kessler, 79 Mo. 555; Perkins *v.* Goddin, 111 Mo. App. 429, 85 S. W. 936.

New York.— Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234.

Pennsylvania.— Neeld's Appeal, 70 Pa. St. 113; O'Donnell *v.* Clements, 23 Pa. Super. Ct. 447.

See 38 Cent. Dig. tit. "Partition," § 425 *et seq.*

the lower court, the assumption must be indulged that the discretion was not abused.[99]

2. A Party Cannot Urge an Error Caused or Consented to by Himself. One who induces a court to pursue any mode of proceeding, to make any order, or to render any judgment, cannot afterward assail it for error or irregularity.[1]

3. The Error Must Be Prejudicial. Although an error may have been, or indubitably was, committed, it will not warrant any action by the appellate court if it did not injuriously affect any one. Whether and when prejudice will be presumed from error, we shall not consider. It suffices our present purpose to state that when, notwithstanding an error, it appears that no substantial right has been denied, the judgment must be affirmed.[2] Error, although prejudicial, may be so insignificant in its consequences as not to require a reversal.[3] But if partition is denied on the erroneous conclusion that an infant plaintiff had no such interest in the property as entitled him to a partition, reversal will not be denied on the ground that the trial court might have denied the partition for the reason that it was not for the best interest of plaintiff.[4]

4. The Error Must Affect the Appellant. We have shown that the error assigned must, to support the appeal or writ of error, have been prejudicial. To this must be added that it must have been prejudicial to the party complaining of it. It is not sufficient that it operated prejudicially to another person, who does not complain of it, nor assign it as error.[5]

5. The Right of Appeal May Be Waived. This may result from an express waiver, from a consent to or acceptance of the benefits of the judgment, or from failing to take some action within the time allowed by law necessary to inaugurate or to sustain the appeal,[6] and in every other mode in which the right to appeal may be waived in actions of any other class. But where the waiver is by failure to do some act necessary to obtain jurisdiction over the respondent, he may, in turn, waive such implied waiver by appearing at the hearing without interposing any motion to dismiss.[7]

I. Manner of Preserving or Taking Advantage of Errors. Although the trial judge cannot, strictly speaking, be deemed to have any personal interest in a judicial proceeding taking place before him, nor in the subsequent reversal or affirmance of his action therein, there is a feeling that he ought to have a fair opportunity to act advisedly and to escape the danger of inadvertent error, and, to this end, that a party present in court should object, or in other words, call the attention of the court to any action which he deems prejudicial to his interests and which he thinks ought not to be taken. Failing to so object, it may be assumed that he consents. Partly from these reasons has arisen the general rule that an objection not interposed or a privilege not sought may be deemed waived; and, at all events, that it cannot be interposed for the first time on the appeal.[8]

99. Ligon *v.* Taylor, 2 B. Mon. (Ky.) 498; Greusel *v.* Smith, 85 Mich. 574, 48 N. W. 616; Anderson *v.* Ragan, 105 Mo. 406, 16 S. W. 946; Laird *v.* Walkinshaw, (Pa. 1888) 15 Atl. 898.

1. Reynolds *v.* Reynolds, 43 La. Ann. 1118, 10 So. 303; Oteri *v.* Oteri, 38 La. Ann. 408.

2. Gallagher *v.* Bell, 82 Iowa 722, 74 N. W. 897; Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563; Henderson *v.* Scott, 43 Hun (N. Y.) 22; Monroe *v.* Monroe, 26 Pa. Super. Ct. 47.

3. Douglass *v.* Douglass, 74 S. W. 233, 24 Ky. L. Rep. 2398.

4. Thompson *v.* Hart, 169 N. Y. 571, 61 N. E. 1135 [*affirming* 58 N. Y. App. Div. 439, 69 N. Y. Suppl. 223].

5. *Alabama.*— Christian *v.* Christian, 119 Ala. 521, 24 So. 844.

Indiana.— Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725.

Louisiana.— Friedrich *v.* Friedrich, 111 La. 26, 35 So. 371; Benton *v.* Sentell, 50 La. Ann. 869, 24 So. 297.

Maine.— Elwell *v.* Sylvester, 27 Me. 536.

Michigan.— Wettlaufer *v.* Ames, 133 Mich. 201, 94 N. W. 950, 103 Am. St. Rep. 449.

Missouri.— Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

Texas.— Shelburn *v.* McCrocklin, (Civ. App. 1897) 42 S. W. 329.

See 38 Cent. Dig. tit. "Partition," § 424 *et seq.*

6. Van Buskirk *v.* Stover, 162 Ind. 448, 70 N. E. 520.

7. Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

8. *Illinois.*—Jespersen *v.* Mech, 213 Ill. 488,

Therefore, at every stage of the proceeding, due attention must be given to it, and objection interposed to every act to which the party does not assent and which may be erroneous or irregular. Commencing with the complaint, every objection thereto should be made promptly, unless the statute expressly provides that the failure to make it is not a waiver. In truth, there is an inclination, even when an objection going to the sufficiency of the complaint is one not waived by failing to demur, not to consider it on appeal when it does not appear to have been insisted on in the trial court.[9] When the issues are formed and the court proceeds with the trial of the cause, the same measures should be taken as in other cases to prevent the introduction of incompetent and the rejection of competent evidence, and for an error in either respect, or in a finding or a verdict not sustained by the evidence, there is generally redress by a motion for a new trial and by an appeal from any order denying it, and the failure to pursue this mode of redress generally prevents the assertion of these matters on appeal.[10] Newly discovered evidence and other grounds allowable in other cases are equally potent in obtaining new trials in actions for partition.[11] At least when the proceeding is at law, the appellate court will not undertake to determine as between conflicting evidence, but will affirm the judgment or order denying the new trial, unless upon some material issue the verdict or finding is not supported by any evidence, or is against all of the evidence.[12] So in the proceedings subsequent to the interlocutory judgment, objections should be made and exceptions taken to all acts deemed prejudicial. If the appointment of a referee is proposed to which a party has objection, he should, if he has opportunity, make the objection known; and on the other hand, if a party has the right to suggest and wishes to insist upon the appointment of a person as referee, his name should be presented to the court, and in either event the action of the court should be excepted to if in erroneous denial of a right. When the commissioners present the report of their proceedings, any party not satisfied therewith may file exceptions thereto, assailing it either for inequality or other error of judgment in making the allotments, or for any other error or irregularity in the proceedings, bring such exceptions on for hearing, support them with such evidence as may be available, and except to any action of the court thereon which he deems both erroneous and prejudicial, and then only may he hope for redress by appeal.[13] For in the absence of evidence to the contrary, it must

72 N. E. 1114; Ward *v.* Ward, 174 Ill. 432, 51 N. E. 806.

Iowa.— Ruby *v.* Downs, 113 Iowa 574, 85 N. W. 808.

Maryland.— Godwin *v.* Banks, 89 Md. 679, 43 Atl. 863.

Missouri.— Hiles *v.* Rule, 121 Mo. 248, 25 S. W. 959.

Pennsylvania.— Mason's Appeal, 41 Pa. St. 74.

See 38 Cent. Dig. tit. "Partition," § 427.

9. Howell *v.* Mills, 7 Lans. (N. Y.) 193 [*affirmed* in 56 N. Y. 226]; Epley *v.* Epley, 111 N. C. 505, 16 S. E. 321.

10. *California.*— San Fernando Farm Homestead Assoc. *v.* Porter, 58 Cal. 81; Regan *v.* McMahon, 43 Cal. 625.

Indiana.— Van Buskirk *v.* Stover, 162 Ind. 448, 70 N. E. 520; Jones *v.* Jones, 91 Ind. 72; Griffin *v.* Lynch, 10 Ind. 217.

Missouri.— Goode *v.* Lewis, 118 Mo. 357, 24 S. W. 61.

Nebraska.— Burke *v.* Cunningham, 42 Nebr. 645, 60 N. W. 903.

New York.— Bowen *v.* Sweeney, 143 N. Y. 349, 38 N. E. 271.

Texas.— McFarlin *v.* Leaman, (Civ. App. 1895) 29 S. W. 44.

United States.— Brown *v.* Cranberry Iron, etc., Co., 72 Fed. 96, 18 C. C. A. 444.

See 38 Cent. Dig. tit. "Partition," § 427.

11. Covington *v.* Covington, 47 S. C. 263, 25 S. E. 193.

12. Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164; Griffy *v.* Enders, 60 Ind. 23.

13. *Illinois.*— Miller *v.* Lanning, 211 Ill. 620, 71 N. E. 1115; Ward *v.* Ward, 174 Ill. 432, 51 N. E. 806; Anderson *v.* Smith, 159 Ill. 93, 42 N. E. 306.

Indiana.— Quick *v.* Brenner, 101 Ind. 230.

Kentucky.— Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488.

Maryland.— Claude *v.* Handy, 83 Md. 225, 34 Atl. 532; Stallings *v.* Stallings, 22 Md. 41.

Pennsylvania.— Black *v.* Black, 206 Pa. St. 116, 55 Atl. 847.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

West Virginia.— Rust *v.* Rust, 17 W. Va. 901.

Thus if the partition is made by a sale of the property, due objection must be interposed to any irregular or erroneous action of the commissioner or officer making it, and supported by competent evidence, and exception taken and error assigned to any errone-

be presumed, both in the lower court and on appeal, that the action of the commissioners was fair and proper,[14] and in the presence of conflicting evidence, the trial court will be sustained,[15] nor will it be reversed for established or confessed error of such slight consequence as to not substantially injure any party.[16]

J. The Judgments or Orders Reviewable on an Appeal. This question depends for its answer upon the statute or rule of practice allowing appeals in the state wherein it is presented for decision. As a general rule, if the statute allows appeals at different stages of the proceeding, there must be presented under each appeal the questions pertinent to it, and the failure to so present them, or to take any appeal at all, irrevocably waives them. If the interlocutory judgment is appealable, and such appeal has not been taken, or the judgment appears to have been consented to, it cannot be assailed for error under any subsequent appeal.[17] On the other hand, if an appeal or writ of error is allowed only from the final judgment, it, when prosecuted, brings up for review with such final judgment every antecedent order or judgment respecting which an appropriate objection has been made and exception taken, and an error in any of them may require the reversal of such final judgment, unless it appears that such judgment must have resulted had the error not been committed.[18] If the suit is in equity, strictly speaking, the appeal brings up the whole case to be tried anew upon the same evidence and record as in the trial court, and this without the necessity of any exceptions there.[19] Otherwise it brings up for review only matters and questions of law appearing on the face of the record.[20]

K. The Effect of an Appeal. The effect of an appeal, prior to any action thereupon by the appellate court, is in many respects a question of very serious doubt, and there is no reason to believe that there is anything in the law of the subject giving it an exceptional or peculiar character or operation in the case of proceedings in partition. The appeal so far removes the case from the lower or trial court that it no longer has power to proceed therewith or to make any order therein,[21] unless the appeal merely assails the judgment upon some point permitting of its enforcement without impairing the appellant's right, should he succeed in his appeal.[22] So far as the judgment is for costs or is for other relief enforceable by fieri facias, the appeal, followed by the requisite security, stays the execution.[23] It also deprives the trial court of the power to compel a party to

ous action of the court either in vacating or refusing to vacate the sale. Black *v.* Black, 206 Pa. St. 116, 55 Atl. 847. So where the objection was that the judgment allotted land to one of the parties, without stating to whom the balance was assigned, it was said that a motion must be made in the trial court for a modification of the judgment. Vandevender *v.* Moore, 146 Ind. 44, 44 N. E. 3.

14. Godwin *v.* Banks, 89 Md. 679, 43 Atl. 863; King *v.* Reed, 11 Gray (Mass.) 490; Aldrich *v.* Aldrich, 75 S. C. 369, 55 S. E. 887, 117 Am. St. Rep. 909; Riley *v.* Gaines, 14 S. C. 454.

15. Garth *v.* Thompson, 72 S. W. 777, 24 Ky. L. Rep. 1963.

16. Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451.

17. Haines *v.* Hewitt, 129 Ill. 347, 21 N. E. 930; Holderman *v.* Graham, 61 Ill. 359; Pierce *v.* Oliver, 13 Mass. 211; Austin *v.* Austin, 132 Mich. 453, 93 N. W. 1045; Hunt *v.* Hunt, 109 Mich. 399, 67 N. W. 510.

18. *Maryland.*— Bull *v.* Pyle, 41 Md. 419.

Massachusetts.— Sever *v.* Sever, 8 Mass. 132.

Minnesota.— Dobberstein *v.* Murphy, 44 Minn. 526, 47 N. W. 171.

Oregon.— Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741.

Pennsylvania.— Christy's Appeal, 110 Pa. St. 538, 5 Atl. 205; *In re* Bierly, 81* Pa. St. 419.

Texas.— Scheiner *v.* Proband, 73 Tex. 532, 11 S. W. 538.

In New York, although the appeal is not sustainable until after the rendition of the final judgment, the appeal may then, however, bring up for review all preceding orders, but the statute appears to require that interlocutory judgments sought to be reviewed be specified in the notice of appeal. Freiot *v.* Le Fountaine, 16 Misc. 153, 38 N. Y. Suppl. 832.

19. The rule of equity that on appeal in partition the trial is *de novo* prevails under the statutes of Washington. James *v.* James, 35 Wash. 650, 77 Pac. 1080.

20. Buck *v.* Wolcott, 13 Gray (Mass.) 268.

21. Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711.

22. Fallon *v.* Brittan, 84 Cal. 511, 24 Pac. 381.

23. Randles *v.* Randles, 67 Ind. 434; Bromagham *v.* Clapp, 6 Cow. (N. Y.) 611.

make an election or to do any other act required of him by the judgment appealed from;[24] but it probably does not deprive him of his right to rely on the judgment as a muniment of title in any proceeding to recover thereunder.[25] If the appeal is from some non-appealable order or judgment, it is ineffective to stay any subsequent proceeding.[26]

L. The Judgment or Order Which May Be Entered Upon. So far as the question of allotment is concerned, the only judgment of the appellate court must be of affirmance or reversal, for if it finds the allotment unfair or unequal, or that it must be set aside for some error or irregularity, it cannot equalize the allotment either by imposing some charge against one allotment in favor of another, or by making new allotments, but must, after declaring the principles controlling, remit the cause to the trial court, which must proceed with the aid of commissioners as in the first instance.[27] But the appellate court may, when such action would have been proper on the part of the trial court, give the commissioners directions, or at least indicate what directions to them will be proper respecting their mode of proceeding.[28] The higher court may also act with reference to any charge which the trial court erred in imposing, or refusing to impose, upon any parcel of land, and instead of entering a general reversal direct such modification of the judgment as it deems proper.[29] If the judgment is erroneous because of a clerical mistake in the description of land, it may be reformed and affirmed.[30] If the judgment is erroneous as to one defendant, it must generally be reversed as to all.[31]

M. The Effect of the Reversal. The effect of the reversal of the judgment is doubtless the same as of other judgments involving the title to real estate, namely, as to the parties to the action, it ceases to exist, and places them, in a legal sense, where they were before the error causing the reversal was committed.[32] Third parties, on the other hand, are protected in acts done under the judgment while it remained in force.[33] If, because of the failure to give a stay bond, a sale is made under the judgment, the title of the purchaser is not divested by its subsequent reversal.[34] As to the general effect of reversals on purchasers from a party to a suit, we have expressed the principle elsewhere that if the purchase is made during the pendency of an appeal or writ of error, the purchaser accepts title subject to the pending proceeding and liable to be swept away if it results in a reversal, and that the same result ought to follow even where the purchase is made prior to the taking of the appeal or writ of error, but that, with respect to the latter proposition, the weight of authority is the other way.[35] With respect to partition, the decided tendency is to exempt from the annulling operation of a reversal any title acquired by an innocent purchaser prior to the taking of the appeal or the suing out of the writ of error.[36] Whether this be conceded or not, if upon a new partition following a reversal, any parcel is allotted to the same person as on the former partition, his grantee under a purchase preceding such reversal is entitled to a confirmatory deed from his vendor.[37] If the reversal

24. Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693.

25. Randles *v.* Randles, 67 Ind. 434.

26. Wistar's Appeal, 115 Pa. St. 241, 8 Atl. 797.

Upon the subject of supersedeas generally see note to State *v.* Seattle Bd. of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

27. Lucas *v.* Peters, 45 Ind. 313.

28. Logan *v.* McChord, 5 Litt. (Ky.) 159.

29. Gass *v.* Waterhouse, (Tenn. Ch. App. 1900) 61 S. W. 450; Pierson *v.* Glass, (Tex. Civ. App. 1904) 84 S. W. 272.

30. Hanrick *v.* Hanrick, (Tex. Civ. App. 1904) 81 S. W. 795.

31. Kremer *v.* Haynie, 67 Tex. 450, 3 S. W. 676.

32. See the note to Cowdery *v.* London, etc., Bank, 96 Am. St. Rep. 128.

33. Dabney *v.* Manning, 3 Ohio 321, 17 Am. Dec. 597.

34. Feaster *v.* Fleming, 56 Ill. 457; Brendel *v.* Baltimore Zion Church, 71 Md. 83, 17 Atl. 936.

35. Effect of the reversal of a judgment see the note to Cowdery *v.* London, etc., Bank, 96 Am. St. Rep. 128.

36. Ure *v.* Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336; Herbin *v.* Wagoner, 118 N. C. 656, 24 S. E. 490.

37. Estabrook *v.* Savage, 21 Hun (N. Y.) 145.

expressly or impliedly directs a new trial, the same liberality of proceeding applies as in other cases, namely, each party is at liberty to proceed as if no trial had ever taken place, except in so far as he may be restricted by the rule of *stare decisis*. He may move to amend his pleadings to enable him to give evidence of some fact not admissible under his pleading prior to the amendment,[38] or to supply a defect of parties.[39]

N. The Effect of the Affirmance. By the affirmance of the judgment or decree, its effect is in no respect changed, except that whatever stay or suspension attended the appeal or writ of error is terminated, and obligations by their terms dependent on the affirmance become unconditionally obligatory and enforceable.[40] Thus, if a bond or undertaking on appeal has been given, the respondent, or defendant in error, may pursue such remedies as are expressly or impliedly within its stipulations. The sureties become liable for the costs accruing after the appeal, but for none other,[41] unless the bond or undertaking was for the staying of execution upon the money judgment, in which case the sureties are liable for the amount of such judgment, whether made up from costs or from some other charge, or from both. If such bond or undertaking included the stay of any part of the judgment entitling respondent to demand or take possession of the land, the sureties are answerable for the rents and profits or the value of the use and occupation of the land after the giving of the bond,[42] provided the effect of the appeal and the security given thereon prevented the respondent from maintaining proceedings to be let into possession.[43]

PARTITION FENCE. Any structure, hedge, or ditch in the nature of a fence, used for the purpose of inclosure, such as good husbandmen generally keep, and as shall on the testimony of skillful men appear to be sufficient;[1] a fence on the land between two proprietors, where there is no road, alley, or something else which would prevent the erection of such fence.[2] (See, generally, FENCES.)

PARTITION IN KIND. A transfer of the interest of the co-owners to one of the co-owners.[3] (See, generally, PARTITION.)

PARTITION OF SUCCESSION. The division of the effects of which the succession is composed among all the coheirs according to their respective rights.[4]

PARTITION WALL. See PARTY-WALLS.

PARTLY. In PART, *q. v.*; in some part, measure, or degree.[5] (See PART.)

38. Foster *v.* Roche, 4 N. Y. Suppl. 605.

39. Armistead *v.* Barber, 82 Miss. 788, 35 So. 199.

40. Davis *v.* Patrick, 57 Fed. 909, 6 C. C. A. 632.

41. Anonymous, 31 Me. 590.

42. Armstrong *v.* Bryant, 16 S. W. 463, 13 Ky. L. Rep. 128; Lynch *v.* Lynch, 150 Pa. St. 336, 24 Atl. 625.

43. Stockwell *v.* Sargent, 37 Vt. 16.

1. Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056, 1057.

2. Hewit *v.* Jewell, 59 Iowa 37, 38, 12 N. W. 738.

Under a statute relating to "partition fences" it is held that a fence of one smooth wire and two barbed wires, or of five smooth wires, constitutes a legal partition fence. Oxborough *v.* Boesser, 30 Minn. 1, 3, 13 N. W. 906.

3. Maguire *v.* Fluker, 112 La. 76, 98, 36 So. 231.

4. La. Civ. Code (1900), art. 1293.

5. Century Dict.

Used with other words.—"Partly built road" see McCandless' Appeal, 70 Pa. St. 210, 217. "Partly graded" see Lindholm *v.* St. Paul, 19 Minn. 245. "Partly heard" see Dunn *v.* Reg., 4 Can. Exch. 68, 70. "Partly opened" see Lindholm *v.* St. Paul, 19 Minn. 245. "Wearing apparel partly made up" see *In re* Mills, 56 Fed. 820, 821.

PARTNERSHIP

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I. **Definition**, 349

II. **History**, 350

III. **The Relation**, 352

A. *Between the Parties*, 352

1. *Contract of Partnership*, 352

a. *Necessity For Contract*, 352

b. *Form and Requisites of Contract*, 353

c. *Capacity of Parties*, 353

d. *Subject-Matter and Purpose*, 354

(I) *Legal*, 354

(II) *Illegal*, 356

e. *Assent of Parties*, 357

f. *Consideration*, 358

g. *Executory Agreements*, 358

(I) *In General*, 358

(II) *Remedy For Breach*, 359

h. *Intention of Parties and Construction of Contract*, 360

i. *Modification of Contract*, 363

j. *Effect of Mistake, Misrepresentation, or Fraud in Contract*, 364

2. *Community of Interest*, 366

a. *General Principles*, 366

b. *Application of General Principles*, 367

c. *Sharing Profits*, 369

(I) *Presumption From Sharing Profits*, 369

(II) *Existence of Business*, 370

(III) *Sharing as Principals*, 371

(IV) *Sharing Profits of a Common Business as Coöwners*, 371

(V) *Sharing Profits in a Single Transaction*, 372

(VI) *Sharing Profits as Interest*, 372

(A) *In Lieu of Interest*, 372

(B) *In Addition to Interest*, 373

(C) *Option to Receive Profits or Interest*, 374

(VII) *Sharing Profits as Consideration For Sale of Property*, 374

(VIII) *Sharing Profits as or in Addition to Rent*, 374

(IX) *Sharing Profits as Compensation For Services*, 376

(X) *Sharing Gross Receipts*, 378

(XI) *Sharing Profits and Losses*, 379

(A) *Sharing Both Profits and Losses*, 379

(B) *Sharing Profits Only*, 380

(C) *Sharing Losses Only*, 381

3. *Estoppel to Allege or Deny Partnership*, 381

4. *Subpartnership*, 381

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B. *As to Third Persons*, 382
1. *Contract of Partnership*, 382
a. *In General*, 382
b. *Construction*, 383
c. *Modification*, 384
2. *Partnership by Construction of Law*, 384
3. *Community of Interest*, 385
a. *In General*, 385
b. *Sharing Profits*, 385
(I) *In General*, 385
(II) *Sharing Profits in Lieu of Interest*, 386
(III) *Sharing Profits in Addition to Interest*, 387
(IV) *Sharing Profits in Lieu of Rent*, 387
(V) *Sharing Profits in Lieu of or in Addition to Compensation For Services*, 388
(VI) *Sharing Gross Receipts*, 389
(VII) *Sharing Losses Only*, 390
(VIII) *Sharing Profits Only*, 390
(IX) *Sharing Both Profits and Loss*, 390
4. *Estoppel by Holding Out as Partner*, 390
a. *In General*, 390
b. *What Amounts to Holding Out*, 392
c. *Assent of the Party Held Out*, 393
d. *Knowledge and Reliance of Third Person*, 394
e. *Operation and Effect of Holding Out*, 395
5. *Subpartnership*, 396
6. *Dormant or Secret Partners*, 397
a. *Who Are*, 397
b. *Necessity For Contract*, 397
c. *Liability*, 397
d. *Escaping Liability by Retirement*, 397
7. *Associations, Defective Corporations, and Promoters*, 397
a. *Associations*, 397
b. *Defective Corporations*, 399
c. *Continuance of Business After Expiration of Charter*, 400
d. *Promoters*, 400
8. *What Law Governs*, 401
9. *Estoppel of Persons Dealing With a Partnership*, 401
10. *Individuals Doing Business in a Firm-Name*, 402
C. *Evidence of Partnership*, 402
1. *Burden of Proof and Presumptions*, 402
a. *In General*, 402
b. *As Between Partners*, 403
c. *As Against Third Persons*, 403
d. *As Against Partners*, 403
2. *Admissibility of Evidence*, 404
a. *In General*, 404
b. *As Between Partners*, 405
c. *As Against Third Persons*, 405
d. *As Against Partners*, 406
(I) *In General*, 406
(II) *General Reputation*, 407
(III) *Admissions*, 408
(A) *In General*, 408
(B) *Against a Copartner*, 409
(C) *To Show Non-Existence of a Partnership*, 410
(IV) *Partnership Agreements*, 411

(v) *Books, Papers, Accounts, and Similar Writings*, 411
e. *As to Dormant Partners*, 412
3. *Weight and Sufficiency of Evidence*, 412
a. *In General*, 412
b. *As Between Partners*, 413
c. *As Against Third Persons*, 414
d. *As Against Partners*, 415
D. *Commencement and Duration*, 417
1. *Time When Partnership Begins*, 417
2. *Term Fixed by Agreement*, 417
3. *Extension or Renewal*, 418
4. *Continuation After Term*, 418
5. *Evidence*, 419

IV. THE FIRM, ITS NAME, POWERS, AND PROPERTY, 419
A. *Firm-Name*, 419
1. *In General*, 419
2. *Statutory Provisions as to Firm-Name*, 420
3. *Changing Name*, 421
4. *Right to Use of Name*, 421
B. *Scope and Extent of Partnership*, 422
1. *Universal Partnership*, 422
2. *Determining the Scope of Partnership*, 422
3. *The Firm as an Entity*, 422
4. *Construction of Agreement*, 423
C. *Powers of Firm as a Body*, 424
D. *What Is Firm Property*, 424
1. *In General*, 424
2. *Personalty Held by a Partner*, 426
3. *Intent of Parties*, 426
4. *Property Acquired or Improved With Firm Funds*, 426
5. *Use of Property*, 427
6. *Construction of Agreement or Conveyance*, 427
E. *Partnership Real Estate*, 427
1. *In General*, 427
2. *Title in One Partner*, 428
3. *Realty Purchased With Firm Funds*, 428
4. *Conveyance to Members of the Firm*, 430
5. *Conveyance to Firm by Name*, 431
6. *Intent of the Partners*, 432
7. *Effect of Use or Occupation*, 433
8. *Firm Real Estate as Personalty*, 434
a. *English and Canadian Rule*, 434
b. *American Rule*, 434
(I) *In General*, 434
(II) *Out and Out Conversion by Agreement*, 435
F. *Evidence as to Ownership of Property*, 435
1. *Presumptions and Burden of Proof*, 435
2. *Admissibility*, 436
3. *Weight and Sufficiency*, 436
G. *Conversion of Firm Into Individual Property*, 436
1. *Power to Convert*, 436
a. *In General*, 436
b. *When the Firm Is Insolvent*, 437
2. *What Amounts to a Conversion*, 437

V. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS, 438
A. *Firm Business and Property*, 438
1. *Nature of Obligation Between Partners*, 438

2. *Construction of Partnership Articles*, 439
3. *Forfeiture of Interest and Recovery of Bonus*, 439
4. *Capital of the Firm*, 440
5. *Assumption by Firm of a Partner's Debts*, 440
6. *Advances and Loans by Partners to the Firm*, 441
7. *Interest on Accounts*, 441
   a. *In General*, 441
   b. *Interest on Balances*, 442
   c. *Interest on a Partner's Indebtedness to the Firm*, 442
8. *Interest on Capital*, 443
9. *Interest on Advances*, 444
10. *Interest of Partners in Firm Property*, 444
11. *Possession of Firm Property*, 445
12. *Misappropriation of Firm Property*, 446
13. *Control and Conduct of Firm Business*, 446
14. *Books of Account*, 447
15. *Statements of Account During the Continuance of the Partnership*, 448
16. *Arbitration of Differences*, 448
17. *Services and Compensation*, 448
18. *Reimbursement of Expenses and Losses*, 450
19. *Interest of Partner in Profits*, 451
20. *Liability of Partner For Expenses and Losses*, 452
21. *Liability of Partner For Misconduct*, 453
22. *Lien of Partner on Firm Property*, 453

B. *Individual Transactions*, 454
   1. *Conflict of Partnership and Individual Interests*, 454
   2. *Dealings Between a Partner and His Firm*, 455
   3. *Dealings Between Copartners*, 456
      a. *In General*, 456
      b. *Purchase of Copartner's Interest in Firm*, 456
   4. *Transfer of a Partner's Interest to a Third Person*, 458
   5. *Acquiring Title or Interest Adverse to Firm or Copartners*, 458
      a. *During the Existence of the Firm*, 458
      b. *After the Dissolution of the Partnership*, 459
   6. *Prohibited Transactions*, 459
   7. *Engaging in Other Business*, 461

C. *Actions Between Partners*, 461
   1. *Grounds of Action, Form of Remedy, and Defenses*, 461
      a. *In General*, 461
      b. *Necessity For Previous Accounting*, 462
         (I) *In General*, 462
         (II) *Effect of Dissolution or Sale of Interest*, 464
         (III) *Effect of Accounting*, 464
         (IV) *Breach of Contract For a Settlement*, 465
      c. *Breach of Partnership Agreement*, 465
      d. *Compensation For Services*, 466
      e. *Partnership Transactions Not Involving an Account*, 466
      f. *Transactions Independent of Partnership*, 467
      g. *Partition of Firm Property*, 468
      h. *Tort Actions Between Partners*, 468
      i. *Assumpsit*, 469
      j. *Demand Before Action*, 470
      k. *Defenses*, 470
      l. *Set-Off and Counter-Claim*, 470
   2. *Proceedings in Actions*, 471
      a. *Venue*, 471

b. *Time to Sue, Limitations, and Laches*, 471
c. *Parties*, 472
d. *Arrest of Partner by Copartner*, 472
e. *Attachment*, 472
f. *Injunction*, 473
g. *Receiver*, 473
h. *Pleading*, 474
(I) *In General*, 474
(II) *Issues, Proof, and Variance*, 475
i. *Evidence*, 475
(I) *Presumptions and Burden of Proof*, 475
(II) *Admissibility, and Weight and Sufficiency*, 475
j. *Trial*, 476
(I) *In General*, 476
(II) *Functions of the Court and Jury*, 476
(III) *Instructions*, 476
k. *Damages*, 476
l. *Judgment and Execution*, 477

VI. RIGHTS AND LIABILITIES AS TO THIRD PERSONS, 477
A. *Representation of Firm by Partner*, 477
1. *Power and Authority of Partners Generally*, 477
a. *Nature and Foundation*, 477
b. *Commercial Character of the Partnership*, 478
c. *Scope of Firm Business*, 479
d. *Majority and Minority of Firm*, 481
e. *Restrictions on Partner's Authority*, 481
f. *Firms With Common Partners*, 482
g. *Individual Contracts and Firm Liability*, 483
h. *Use of Firm-Name*, 485
i. *Use of Individual Name*, 485
j. *Use of Seal*, 486
2. *Authority to Contract*, 487
a. *In General*, 487
b. *Hiring and Leasing Property*, 490
c. *Contracts of Employment*, 490
d. *Alteration or Rescission of Contract*, 491
3. *Authority as to Agents*, 491
4. *Purchases, Sales, and Warranties*, 492
a. *Purchases*, 492
(I) *In General*, 492
(II) *Purchases of Real Estate*, 493
b. *Sales*, 493
(I) *In General*, 493
(II) *Sale and Conveyance of Real Estate*, 494
(III) *Assigning Choses in Action*, 494
(IV) *Disposing of Entire Property*, 495
c. *Warranties*, 496
5. *Mortgages and Pledges*, 496
a. *Of Real Estate*, 496
b. *Chattel Mortgages*, 496
c. *Pledges and Assignments*, 497
6. *Collections, Payments, Settlements, and Releases*, 498
a. *Payment to One Partner*, 498
b. *Payment of Firm Debts by Individual*, 498
c. *Transferring Firm Property to Pay Firm Debts*, 499
d. *Application of Payments*, 499

e. *Settlements, Compromises, and Releases*, 500
7. *Payment of Individual Debts*, 501
a. *In General*, 501
b. *Setting Off Individual Debt Against Debt of Firm*, 502
8. *Borrowing Money*, 503
9. *Negotiable Instruments*, 504
a. *Authority of Partner in General*, 504
b. *Appointment of Agent to Execute*, 508
c. *Partnership or Individual Transactions*, 508
d. *Form and Requisites*, 509
e. *Sealed Bills and Notes*, 509
f. *Paper in Individual Name For Firm Use*, 510
g. *Paper in Firm-Name For Individual Use*, 510
h. *Alteration of Negotiable Paper*, 511
i. *Transfer of Negotiable Paper*, 512
j. *Payees Without Notice and Bona Fide Holders*, 513
k. *Renewals*, 515
l. *Demand, Dishonor, and Waiver*, 515
10. *Guaranty and Suretyship*, 515
a. *In General*, 515
b. *Accommodation Acceptance or Indorsement*, 517
11. *Submission to Arbitration*, 517
12. *Judgment by Confession or Consent*, 518
a. *In General*, 518
b. *Who May Attack Validity*, 519
c. *Non-Consenting Partner's Remedy*, 520
d. *Effect of Judgment*, 520
13. *Assignment For the Benefit of Creditors*, 520
a. *In General*, 520
b. *Ratification*, 522
14. *Representations and Admissions*, 522
15. *Wrongful Acts*, 523
a. *In General*, 523
b. *Conversion*, 525
c. *Fraud*, 526
(I) *In General*, 526
(II) *Fraudulent Representations and Deceit*, 527
16. *Estoppel*, 527
a. *To Deny Liability on Firm Contracts*, 527
b. *To Deny Liability For Partner's Conduct*, 528
c. *To Deny Title Made by a Partner*, 528
17. *Ratification*, 528
a. *What May Be Ratified*, 528
b. *Knowledge or Notice*, 528
c. *What Amounts to Ratification*, 529
d. *Effect of Ratification*, 529
18. *Rights Acquired by Firm*, 530
19. *Notice and Demand*, 530
a. *Notice to a Partner*, 530
b. *Notice to Firm of Acts of a Partner*, 531
c. *Demand Upon One Partner*, 531
20. *Individual Liability Arising From Individual Acts or Interests*, 531
21. *Undisclosed Partnership and Dormant Partners*, 532
a. *General Rule as to Liability*, 532
b. *Property of a Dormant Partnership*, 532
c. *Rights of the Undisclosed Partnership*, 533

d. *Rights of Dormant Partner*, 533
B. *Nature and Extent of Firm Liabilities*, 533
1. *Liability Upon Contract*, 533
2. *Liability in Tort*, 535
3. *Criminal Responsibility*, 535
4. *Liability For Acts of Agents and Servants*, 536
C. *Application of Assets to Liabilities*, 536
1. *Marshaling Firm and Individual Assets*, 536
a. *In General*, 536
b. *Partner Surety For Firm Debt*, 537
2. *Assets of Firm*, 537
a. *General Rules as to Rights of Creditors*, 537
b. *Rights of Creditors in Firm Realty*, 540
c. *Rights of Individual Creditors*, 541
d. *Rights and Liens of Partners as Creditors of the Firm*, 542
3. *Transactions of Partners Affecting Firm Creditors*, 543
a. *Diversion of Firm Assets*, 543
b. *Assumption by Firm of Individual Debts*, 543
c. *Assignments For Firm Creditors*, 543
(I) *In General*, 543
(II) *Fraud in Assignments*, 544
d. *Transfers to Third Persons*, 545
e. *Transfer of Firm Assets to Partner or New Firm*, 545
f. *Dividing Firm Assets Among Partners*, 548
g. *Mortgaging Firm Property For Firm Debts*, 548
h. *Mortgage of Partner's Interest or Share*, 548
i. *Mortgage Between Partners*, 549
j. *Mortgage or Assignment by Firm For Individual Debts*, 550
k. *Confession of Judgment*, 551
4. *Assets of Individual Partners*, 551
a. *What Are*, 551
b. *Right of Individual Creditors to Individual Assets*, 551
c. *Right of Firm Creditors to Share Individual Assets*, 552
d. *Rights of Firm or of Copartners as Creditors*, 553
e. *Transactions By or Between Partners Affecting Rights of Creditors*, 554
5. *Partners in Different Firms*, 555
6. *Retirement or Admission of Partners*, 555
D. *Actions By or Against Firms or Partners*, 556
1. *In General*, 556
a. *Capacity to Sue and Be Sued*, 556
b. *Authority of Partner to Institute and Defend Actions*, 556
c. *Rights of Action and Defenses*, 556
d. *Assignee of Obligation Between Firm and Partner or Copartner*, 557
e. *Joinder of Causes of Action*, 558
f. *Nature and Form of Remedy*, 558
g. *Jurisdiction and Venue*, 559
h. *Limitations and Laches*, 559
i. *Arrest of Partners*, 560
2. *Parties*, 560
a. *Use of Firm-Name*, 560
b. *Firms or Partners as Plaintiffs*, 561
(I) *In General*, 561
(II) *In Actions or Transactions in Partner's Name*, 563
(III) *In Actions For a Partner's Share of Firm Claim*, 563

(IV) *One Partner Suing as Assignee of Firm*, 564
(V) *Dormant Partners as Plaintiffs*, 564
(VI) *Using Names of Copartners as Plaintiffs*, 565
c. *Firms or Partners as Defendants*, 565
d. *Making a Partner Defendant Who Refuses to Be a Plaintiff*, 566
e. *Firms With Common Members*, 567
f. *Intervention*, 567
g. *New Parties and Change of Parties*, 567
h. *Change or Dissolution of Firm Pending Suit*, 568
i. *Miscellaneous*, 569
3. *Process, Appearance, Discontinuance, and Dismissal*, 569
a. *Form of Process*, 569
b. *Service of Process in General*, 569
c. *Service by Publication*, 570
d. *Acknowledgment and Proof of Service*, 570
e. *Appearance*, 571
f. *Discontinuance or Dismissal*, 571
4. *Attachment or Garnishment*, 572
a. *Right and Liability of Firm or Partners*, 572
b. *Grounds For Proceeding and Property Subject*, 572
c. *Proceedings, Levy, Lien, Custody, and Disposition*, 575
d. *Quashing or Vacating and Wrongful Attachment*, 579
5. *Injunction and Receiver*, 579
6. *Pleading*, 580
a. *In General*, 580
b. *Denial of Partnership*, 583
c. *Separate Pleadings by Partners*, 584
d. *Defenses*, 585
e. *Demurrer*, 585
f. *Issues, Proof, and Variance*, 586
7. *Evidence*, 587
a. *Presumptions and Burden of Proof*, 587
b. *Admissibility and Weight and Sufficiency*, 589
8. *Trial*, 592
a. *Instructions and Questions For Court and Jury*, 592
b. *Verdict and Findings*, 594
9. *Judgment*, 594
a. *Requisites and Validity in General*, 594
b. *Joint and Several Liability on Judgments*, 596
c. *Partners Not Served With Process*, 596
d. *Property Bound by Judgment*, 597
e. *Default Judgment*, 598
f. *Relief Against Judgment and Collateral Attack*, 598
g. *Dormant Partners*, 599
10. *Execution and Enforcement of Judgment*, 599
a. *In General*, 599
b. *Execution Against Firm Property on Judgment Against Partner For Individual Debt*, 599
c. *Levy and Enforcement of Individual Execution*, 600
d. *Title and Rights of Purchaser*, 601
e. *Disposition of Proceeds*, 602
f. *Priorities of Executions*, 603
11. *Appeal and Error*, 603

VII. RETIREMENT AND ADMISSION OF PARTNERS, 603
A. *Change of Membership of Firm*, 603
1. *In General*, 603

2. *Transfer of Partner's Interest to a Copartner*, 604
3. *Transfer of Partner's Interest to Third Person*, 605
4. *Continued Use of Firm-Name*, 606
5. *Good-Will of Old Firm*, 606
6. *Competition of Retiring Partner With New Firm*, 607
7. *Interest of Retiring Partner in Firm Assets*, 608
8. *Liabilities of Retiring Partner For Obligations of New Firm*, 608

B. *Assets of Old Firm*, 610
1. *Rights of Retiring Partner*, 610
2. *Rights of Continuing and Incoming Partners or New Firm*, 611
3. *Debts Due by Partners to Firm or Copartners*, 611

C. *Obligations of Old Firm*, 612
1. *Retiring Partner's Liabilities*, 612
2. *Retiring Partner as Surety For Firm Debts*, 612
3. *Indemnity of Retiring Partner Against Firm Debts*, 613
4. *Liabilities of Continuing Partners or New Firm*, 614
5. *Liability of Incoming Partners*, 614
6. *Novation*, 615
7. *Appropriation of Payments*, 616
8. *Assumption of Old Firm Obligations*, 617
9. *Effect of Assumption on Rights of Creditors*, 618
10. *Liability to Retiring Partner on Agreement to Assume Firm Debts*, 618

D. *Actions After Change in Membership*, 619
1. *To Enforce Claims of the Old Firm*, 619
2. *To Enforce Claims Against the Old Firm*, 619
3. *Actions Between Partners on Contracts of Dissolution*, 619
4. *Actions by Creditors on Contracts Between Partners*, 620

VIII. DEATH OF PARTNER, AND SURVIVING PARTNERS, 620

A. *Effect of Death of Partner*, 620
1. *In General*, 620
2. *Right and Duty to Liquidate Firm Affairs*, 621

B. *Collection and Disposition of Assets*, 622
1. *Right to Possess and Collect*, 622
2. *Disposition of Assets in General*, 623
3. *Mortgaging Firm Property*, 624
4. *Assignment For Benefit of Creditors*, 624
5. *Application of Payments to or by Survivor*, 624
6. *Payment of Individual Debts*, 625

C. *Real Property of Firm*, 625
1. *Title in Individual*, 625
2. *Title, Possession, and Control of Survivor*, 625
3. *Sale and Conveyance*, 626
4. *Subjection to Payment of Firm Debts*, 626
5. *Rights of Heirs, Devisees, and Widow*, 627
6. *Rights Between Heirs and Personal Representatives*, 627

D. *Obligations of the Firm*, 628
1. *Liability of Surviving Partner*, 628
2. *Liability of Deceased Partner's Estate*, 628

E. *Rights and Liabilities of Survivor as to Estate of Deceased*, 629
1. *Rights in General*, 629
2. *Recovery by Survivor For Improvements*, 629
3. *Recovering Funds Misapplied by Deceased or His Representatives*, 629

4. *Recovery of Debts Due Firm by Deceased Partner*, 630
5. *Reimbursement For Payments*, 630
6. *Survivor's Liabilities*, 630

F. *Survivor as Executor or Administrator of Deceased Partner*, 631
1. *Collection and Management of Estate*, 631
2. *Contracts Between Survivor and Executor*, 631
3. *Allowance to Widow*, 632
4. *Accounting and Settlement*, 632

G. *Statutory Partnership Administrators*, 633
1. *In General*, 633
2. *Collection and Allowance of Claims and Accounting*, 633

H. *Bond of Surviving Partner or of Statutory Partnership Administrator*, 634

I. *Rights and Liabilities Incident to Winding Up Business*, 634
1. *Obligations Incurred*, 634
2. *Compensation For Winding Up Business*, 635
3. *Purchase by Survivor of Deceased Partner's Interest*, 635

J. *Continuance of Business of Firm*, 636
1. *Right to Continue Business*, 636
2. *Rights and Liabilities of Survivors*, 637
3. *Rights and Liabilities of Executors and Administrators*, 638
4. *Rights and Liabilities of Heirs, Devisees, and Legatees*, 639
5. *Liabilities of Decedent's Estate For Survivor's Acts*, 639
6. *Accounting and Settlement by Survivor*, 640
7. *Rights of Firm Creditors*, 641

K. *Name and Good-Will of Firm*, 641
1. *Continued Use of Firm-Name*, 641
2. *Good-Will of Firm*, 641

L. *Actions*, 642
1. *Actions By or Against Survivors or Deceased Partner's Representatives*, 642
a. *Actions at Law By Survivors*, 642
b. *Actions at Law Against Survivors*, 643
c. *Liability of Decedent's Estate*, 644
d. *Jurisdiction of Actions*, 645
e. *Limitations of Actions*, 645
f. *Receiver and Attachment*, 645
g. *Pleadings and Issues*, 646
(I) *Declaration or Complaint*, 646
(II) *Subsequent Pleadings*, 646
(III) *Issues and Variance*, 646
h. *Evidence*, 647
i. *Instructions and Questions For Jury*, 647
j. *Judgment*, 647
k. *Execution*, 648
2. *Actions Between Survivor and Deceased's Representatives*, 648
a. *By Survivor*, 648
b. *By Deceased Partner's Representative*, 649

IX. DISSOLUTION, SETTLEMENT, AND ACCOUNTING, 650

A. *Causes of Dissolution*, 650
1. *Power of Partner to Dissolve*, 650
a. *Partnership at Will*, 650
b. *Partnership For Fixed Term*, 651
2. *Form and Requisites*, 651
3. *Dissolution by Mutual Consent*, 651
a. *Shown by Agreement*, 651

b. *Shown by Conduct*, 652
4. *Withdrawal of Partner or Sale of Partner's Share or of Whole Property Without Consent*, 653
5. *By Operation of Law*, 653
a. *Death of Partner*, 653
b. *Disability of Partner*, 654
c. *Bankruptcy or Insolvency of Partner or Firm*, 654
d. *Marriage*, 655
e. *War or Illegality of Partnership*, 655
f. *Misconduct of Partner*, 655
g. *Attachment or Execution*, 655
h. *Loss of Entire Capital*, 656
6. *Dissolution by Judicial Decree*, 656
a. *In General*, 656
b. *Because of Partner's Incapacity*, 656
c. *Because Business Can Only Be Carried on at a Loss*, 656
d. *Because of Partner's Misconduct*, 656
e. *Because of Dissensions*, 658
f. *Because a Dissolution Is Just and Equitable*, 658
7. *Time of Taking Effect*, 658
B. *Rights, Powers, and Disabilities After Dissolution*, 659
1. *Status of Firm After Dissolution*, 659
2. *Effect of Dissolution on Powers of Partners*, 659
a. *In General*, 659
b. *Power to Administer Firm Affairs*, 660
c. *As Affected by Agreements For Dissolution*, 660
d. *Right to Use Firm-Name*, 661
e. *Power and Duty to Perform Contracts*, 661
f. *Admissions and Representations*, 662
g. *Power to Confess Judgment*, 662
h. *Power to Assign For Benefit of Creditors*, 663
i. *Power to Compromise and Release*, 663
j. *Power to Revive Debts*, 663
k. *Liability For Wrongful Acts*, 664
3. *Control and Disposition of Firm Property*, 664
a. *In General*, 664
b. *Assigning or Transferring Firm Property to Creditors*, 665
c. *Real Estate of Firm*, 665
4. *Collections and Payments*, 666
5. *Contracting New Obligations*, 667
a. *In General*, 667
b. *Negotiable Paper*, 668
6. *Notice of Dissolution*, 670
a. *In General*, 670
b. *In Case of Dormant Partner*, 671
c. *Persons Entitled to Notice and Sufficiency of Notice*, 671
d. *Transactions Without Notice*, 675
e. *Operation and Effect of Notice*, 675
f. *Evidence of Notice*, 676
g. *Functions of Court and Jury*, 677
7. *Holding Out as Partner After Dissolution*, 677
8. *Actions After Dissolution*, 678
a. *Against Partners on Old Obligations*, 678
b. *On Obligations Subsequent to Dissolution Without Notice*, 679

c. *On Such Obligations With Notice, or on Individual Obligation*, 679
d. *Service of Process and Appearance*, 679
e. *Actions by Partners*, 679
f. *Attachment and Garnishment*, 680
g. *Judgment*, 680
C. *Distribution and Settlement Between Partners and Their Representatives*, 681
1. *In General*, 681
a. *Necessity of and Right to Settlement or Accounting*, 681
b. *Who Entitled to Require an Accounting*, 682
c. *Who May Be Compelled to Account*, 684
2. *Property and Transactions to Be Included*, 684
a. *In General*, 684
b. *Premiums For Admission Into the Partnership*, 686
c. *Partial Accounting*, 687
d. *Good-Will of Firm*, 687
e. *Claims Between Partners and Firm and Between Copartners*, 688
f. *Transactions Subsequent to Dissolution*, 688
g. *Matters Connected With Previous Partnerships*, 689
3. *Determination and Disposition of Share of Partners*, 689
a. *Inventory and Valuation of Assets*, 689
b. *Discharge of Firm Obligations*, 690
c. *Apportionment of Losses*, 690
d. *Repayment of Capital*, 691
e. *Contribution Between Partners*, 692
f. *Division of Personal Assets*, 693
g. *Division of Firm Realty*, 694
h. *Ascertainment and Division of Profits*, 694
i. *Compensation For Services in Winding Up*, 696
j. *Allowance For Expenses in Winding Up*, 697
k. *Right to Firm-Name, Good-Will, and Books of Account*, 697
4. *Interest*, 698
a. *On Capital*, 698
b. *On Advances and Overdrafts*, 699
c. *On Balances*, 699
5. *Lien of a Partner*, 700
6. *Private Accounting and Settlement*, 701
a. *Validity and Construction*, 701
b. *When Conclusive*, 703
c. *Laches in Disputing Settlement*, 705
d. *Mistake or Fraud in Settlement*, 705
e. *Assumption of and Indemnity Against Firm Debts*, 707
f. *The Promisee Partner as Surety For Firm Debts*, 708
7. *Arbitration and Award*, 708
a. *Submission and Agreements Therefor*, 708
b. *Proceedings of Arbitrators*, 709
c. *The Award*, 709
D. *Actions For Dissolution and Accounting*, 710
1. *In General*, 710
a. *Nature and Scope of Remedy*, 710
b. *Joinder of Causes of Action*, 711
2. *Grounds of Action and Defenses*, 712
a. *For Dissolution*, 712
b. *For an Accounting After Dissolution*, 712

c. *For an Accounting Without Dissolution*, 713
d. *Conditions Precedent to an Accounting*, 713
e. *Defenses*, 713
f. *Set-Off and Counter-Claim*, 714
3. *Form of Remedy*, 715
a. *Generally by Bill in Equity*, 715
b. *Common-Law Action of Account*, 715
c. *Action of Assumpsit*, 716
4. *Jurisdiction and Venue*, 716
a. *Jurisdiction*, 716
b. *Venue*, 717
5. *Time to Sue*, 717
a. *In General*, 717
b. *Statute of Limitations*, 718
(I) *Its Application*, 718
(II) *Running of Statute*, 718
c. *Laches*, 721
6. *Parties, Process, and Appearance*, 722
a. *The Partners*, 722
b. *Transferees of a Partner*, 723
c. *Personal Representatives of a Deceased Partner*, 723
d. *Heirs*, 724
e. *Creditors*, 724
f. *Fraudulent Grantee or Confederate*, 724
g. *Process and Appearance*, 724
7. *Provisional Remedies*, 724
a. *Attachment*, 724
b. *Injunction*, 725
c. *Receivers*, 726
(I) *The Appointment of*, 726
(II) *Effect of Appointment and Receiver's Title*, 730
(III) *Authority of Receiver*, 730
(IV) *Actions By and Against Receiver*, 731
(V) *Accounting of Receiver*, 731
8. *Effect of Bringing Action*, 731
9. *Pleading*, 732
a. *Bill, Petition, or Complaint*, 732
b. *Answer and Cross Complaint and Intervention*, 733
c. *Reply*, 734
d. *Construction of Pleadings and Amended and Supplemental Pleadings*, 734
e. *Issues, Proof, and Variance*, 734
10. *Evidence and Trial*, 735
a. *Presumptions and Burden of Proof*, 735
b. *Admissibility and Weight and Sufficiency*, 736
c. *Proceedings Upon Trial*, 738
11. *Other Proceedings on Accounting*, 738
12. *Charges and Credits*, 740
a. *In General*, 740
b. *Effect of Partnership Agreements and Settlements*, 741
c. *Firm Assets and Contributions*, 741
d. *Debts, Losses, and Expenses*, 742
e. *Duty to Keep Accounts*, 742
f. *Partnership Books and Statements*, 743
13. *Conversion of Assets Into Money and Allowance of Claims*, 744
a. *Collections*, 744
b. *Sale of Firm Property*, 744

c. *Presentation and Allowance of Claims*, 746
14. *Decision, Findings, or Report on an Accounting*, 746
a. *What Should Be Included*, 746
b. *Objections, Exceptions, and Recommittal*, 746
15. *Final Judgment or Decree*, 747
a. *Its General Character*, 747
b. *Determination as to All Parties*, 748
c. *Joint or Several Judgment*, 748
d. *Conformity to Pleadings and Findings*, 748
16. *Appeal and Review*, 749
17. *Costs*, 749
18. *Effect of a Judicial Accounting*, 751
a. *Its Conclusiveness*, 751
b. *Opening or Setting Aside*, 751

X. LIMITED PARTNERSHIP, 751
A. *The Relation*, 751
1. *History of Limited Partnership*, 751
2. *A Species of Partnership*, 752
3. *What Law Governs*, 753
4. *Construction of Statutes*, 753
5. *General Requisites to Creation*, 754
6. *Particular Requisites*, 754
a. *Certificate*, 754
b. *The Contribution by the Special Partner*, 755
c. *Affidavit as to Contribution*, 757
d. *Acknowledging, Filing, and Publishing the Certificate*, 757
e. *Firm-Name and Sign*, 758
B. *Duration*, 758
1. *The Original Term*, 758
2. *Continuance or Renewal*, 759
C. *Mutual Rights, Duties, and Liabilities of Partners*, 759
D. *Rights and Liabilities of Partners to Third Persons*, 760
1. *Failure to Comply With Statute*, 760
2. *Alteration in Members or Business*, 761
3. *Withdrawal of Capital or Profits*, 761
4. *Estoppel*, 762
5. *Rights and Liabilities of Special Partners*, 762
6. *Insolvent Limited Partnerships*, 763
7. *Application of Assets to Liabilities*, 764
E. *Actions By or Against Firms or Partners*, 764
1. *In General*, 764
2. *Injunction and Receiver*, 765
3. *Pleadings*, 765
4. *Trial and Judgment*, 765
F. *Dissolution, Settlement, and Accounting*, 766
1. *Causes and Manner of Dissolution*, 766
2. *Rights, Powers, and Liabilities of Partners*, 767
3. *Distribution and Settlement Between Partners*, 767
4. *Actions For Dissolution and Accounting*, 767

CROSS-REFERENCES

For Matters Relating to :
Acknowledgment by Partnership, see ACKNOWLEDGMENTS.
Action or Claim For Indian Depredations, see INDIANS.
Admiralty Jurisdiction of Contract of Partnership, see ADMIRALTY.
Affidavits on Behalf of Firm, see AFFIDAVITS.

For Matters Relating to — (*continued*)
Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS.
Annexation of Chattels to Mortgaged Premises, see FIXTURES.
Association, see ASSOCIATIONS.
Banking Transactions, see BANKS AND BANKING.
Bankruptcy of Firm or Partner, see BANKRUPTCY.
Bonds Executed by Partnership, see BONDS.
Citizenship Determining Federal Jurisdiction, see COURTS.
Connecting Carriers as Partners, see CARRIERS.
Construction of Deeds in Firm-Name, see DEEDS.
Contempt of Court by Partner, see CONTEMPT; INJUNCTIONS.
Contract of Employment as Affected by Formation or Dissolution of Partnership, see MASTER AND SERVANT.
Copyright, see COPYRIGHT.
Corporation, see CORPORATIONS.
Criminal Liability of Persons Sharing in Profits of Gaming, see GAMING.
Disbarment of Partner of Attorney Guilty of Misconduct, see ATTORNEY AND CLIENT.
Dower Interest in Partnership Property, see DOWER.
Embezzlement by Partner, see EMBEZZLEMENT.
Exchange, see EXCHANGES.
Guaranty Directed to or Acted on by Partnership, see GUARANTY.
Homestead Right in Partnership Property, see HOMESTEADS.
Illegal Sale of Liquor by Partners, see INTOXICATING LIQUORS.
Indictments, see INDICTMENTS AND INFORMATIONS.
Infants as Partners, see INFANTS.
Insolvency Laws and Proceedings, see INSOLVENCY.
Insurance of Partnership Property, see FIRE INSURANCE.
Joint Adventure, see JOINT ADVENTURES.
Joint Stock Company, see JOINT STOCK COMPANIES.
Joint Tenants, see JOINT TENANCY.
Larceny by Partner, see LARCENY.
Lease and Partnership Agreement Distinguished, see LANDLORD AND TENANT.
Liabilities Covered by Contract of Indemnity, see INDEMNITY.
Libel by or of Partnership, see LIBEL AND SLANDER.
Malicious Prosecution By or Against Partners, see MALICIOUS PROSECUTION.
Married Women as Partners, see HUSBAND AND WIFE.
Mechanic's Lien in Favor of Partnership, see MECHANICS' LIENS.
Mining Partnerships, see MINES AND MINERALS.
Mortgage by Partnership, see CHATTEL MORTGAGES; MORTGAGES.
Partnership as:
  Guardian, see GUARDIAN AND WARD.
  Surety on:
    Appeal-Bond, see APPEAL AND ERROR.
    Attachment Bond, see ATTACHMENT.
Partnership Between:
  Attorneys, see ATTORNEY AND CLIENT.
  Corporations or Corporation and Individuals, see CORPORATIONS.
  Husband and Wife, see HUSBAND AND WIFE.
  Physicians and Surgeons, see PHYSICIANS AND SURGEONS.
Partners Under Liquor License, see INTOXICATING LIQUORS.
Part-Owners of Shipping, see SHIPPING.
Rights of Execution Purchaser of Partnership Property, see EXECUTIONS.
Statute of Frauds, see FRAUDS, STATUTE OF.
Taxation of Partnership Property, see TAXATION.
Tenancy and Partnership Distinguished, see LANDLORD AND TENANT.

For Matters Relating to — (*continued*)
Tenants in Common, see TENANCY IN COMMON.
Traffic Agreements Between Railroad Companies, see RAILROADS.
Usury in Partnership Transactions, see USURY.

I. DEFINITION.

The definition of a partnership which seems to be most accurate and comprehensive is that of Chancellor Kent, as follows: "A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions."[1]

1. 3 Kent Comm. [*approved* in Goldsmith *v.* Eichold, 94 Ala. 116, 119, 10 So. 80, 33 Am. St. Rep. 97; Omaha, etc., Smelting, etc., Co. *v.* Rucker, 6 Colo. App. 334, 40 Pac. 853, 854; Danforth *v.* Hertel, 3 Pennew. (Del.) 57, 60, 49 Atl. 168; Richardson *v.* Carlton, 109 Iowa 515, 521, 80 N. W. 532; Winter *v.* Pipher, 96 Iowa 17, 21, 64 N. W. 663; Munson *v.* Sears, 12 Iowa 172, 177; Bearce *v.* Washburn, 43 Me. 564, 565; Vail *v.* Winterstein, 94 Mich. 230, 233, 53 N. W. 932, 34 Am. St. Rep. 334, 18 L. R. A. 515; Artman *v.* Ferguson, 73 Mich. 146, 149, 40 N. W. 907, 16 Am. St. Rep. 572, 2 L. R. A. 343; Hirbour *v.* Reeding, 3 Mont. 15, 25; Lushton State Bank *v.* O. S. Kelley Co., 47 Nebr. 678, 682, 66 N. W. 619; Waggoner *v.* Creighton First Nat. Bank, 43 Nebr. 84, 94, 61 N. W. 112; Strader *v.* White, 2 Nebr. 348, 362; Farmers' Ins. Co. *v.* Ross, 29 Ohio St. 429, 431; Wheeler *v.* Lack, 37 Oreg. 238, 244, 61 Pac. 849; Kelley *v.* Bourne, 15 Oreg. 476, 481, 16 Pac. 40; Cogswell *v.* Wilson, 11 Oreg. 371, 374, 4 Pac. 1130; Stevens *v.* McKibbin, 68 Fed. 406, 411, 15 C. C. A. 498 [*criticized* in Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162]. See also Howze *v.* Patterson, 53 Ala. 205, 25 Am. Rep. 607; Bucknam *v.* Barnum, 15 Conn. 67; Beecham *v.* Dodd, 3 Harr. (Del.) 485; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Hanthorn *v.* Quinn, 42 Oreg. 1, 69 Pac. 817; Willis *v.* Crawford, 38 Oreg. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149; McClung *v.* Hughes, 5 Rand. (Va.) 453.

Sir Frederick Pollock says of this definition: "I still think it was substantially accurate, and might well have been accepted by Parliament with more or less verbal condensation and amendment." Pollock Dig. Partn. (5th ed.) 3.

Story's definition is: "A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." Story Partn. § 2 [*approved* in Allen *v.* Davis, 13 Ark. 28, 31; Huguley *v.* Morris, 65 Ga. 666, 671; Bishop *v.* Everett, 6 Hawaii 157, 158; Waihee Plantation *v.* Kalapu, 3 Hawaii 760, 761; Parchen *v.* Anderson, 5 Mont. 438, 448, 5 Pac. 588, 51 Am. Rep. 65; Strader *v.* White, 2 Nebr. 348, 362; Wild *v.* Davenport, 48 N. J. L. 129, 131, 7 Atl. 295, 57 Am. Rep. 552; Potter *v.* Morris, etc., Dredging Co., 59 N. J. Eq. 422, 425, 46 Atl. 537; Kelley *v.* Bourne, 15 Oreg. 476, 481, 16 Pac. 40; *In re* Gibbs, 157 Pa. St. 59, 70, 27 Atl. 383, 22 L. R. A. 276; Eshbach *v.* Slonaker, 1 Pa. Dist. 32, 33; Carter *v.* McClure, 98 Tenn. 109, 114, 38 S. W. 585, 60 Am. St. Rep. 842, 36 L. R. A. 282; Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 601, 8 S. W. 396; Woods *v.* Ward, 48 W. Va. 652, 664, 37 S. E. 520; Setzer *v.* Beale, 19 W. Va. 274, 287; McMahon *v.* McClernan, 10 W. Va. 419, 460; Berthold *v.* Goldsmith, 24 How. (U. S.) 536, 541, 16 L. ed. 762; Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28, 32]. See also Allen *v.* Davis, 13 Ark. 28; Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124; Ward *v.* Thompson, 22 How. (U. S.) 330, 16 L. ed. 249.

Parsons' definition is: "A combination by two or more persons of capital, or labor or skill, for the purpose of business for their common benefit." Parsons Partn. p. 6 [*quoted* in Morse *v.* Pacific R. Co., 191 Ill. 356, 365, 61 N. E. 104; Evans *v.* Warner, 20 N. Y. App. Div. 230, 235, 47 N. Y. Suppl. 16; Eshbach *v.* Slonaker, 1 Pa. Dist. 32, 33.

Other definitions are: "An exhaustive definition of partnership is not easy. So far as the facts in the case present the question of partnership it is sufficiently accurate to say that there is a partnership between two or more persons whenever such a relation exists between them that each is as to all the others, in respect to some business, both principal and agent. If such a relation exists they are partners; otherwise not." Morgan *v* Farrel, 58 Conn. 413, 421, 20 Atl. 614, 18 Am. St. Rep. 282. See also Brotherton *v.* Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. Rep. 397; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

"A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartner." Karrick *v.* Hannaman, 168 U. S. 328, 334, 18 S. Ct. 135, 42 L. ed. 484.

"A partnership is a voluntary association,

II. HISTORY.

The type of partnership, above defined, originated during the middle ages, in the trading communities of Italy, and was developed by mercantile usage and

by which, in all the affairs connected with the business, an authority is impliedly given to every member to dispose of the partnership property as if it were his own personal effects." Holmes *v.* Gilman, 64 Hun (N. Y.) 227, 232, 19 N. Y. Suppl. 151 [*reversed* on other grounds in 138 N. Y. 369, 34 N. E. 205, 34 Am. St. Rep. 463, 20 L. R. A. 566].

"In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than . . . that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions." Meehan *v.* Valentine, 145 U. S. 611, 623, 12 S. Ct. 972, 36 L. ed. 835 [*quoted* in Price *v.* Middleton, 75 S. C. 105, 55 S. E. 156]. See also McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358; Ryder *v.* Wilcox, 103 Mass. 24.

"The accepted definition of a partnership is 'the voluntary association of two or more persons in sharing the profits and bearing the losses of a general trade, or a specific adventure.'" O'Donohue *v.* Bruce, 92 Fed. 858, 860, 35 C. C. A. 52.

"To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common." Mellwo *v.* Court of Wards, L. R. 4 P. C. 419, 436. See also Stone *v.* Boone, 24 Kan. 337.

"A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business, as principals, for the purpose of joint profit." Van Housen *v.* Copeland, 180 Ill. 74, 82, 54 N. E. 169; Spaulding *v.* Stubbings, 86 Wis. 255, 262, 56 N. W. 469, 39 Am. St. Rep. 888 [*quoting* Bates Partn. § 1].

"A partnership is a joint understanding to share in the profit and loss." Eastman *v.* Clark, 53 N. H. 276, 311, 16 Am. Rep. 192 [*citing* Saville *v.* Robertson, 4 T. R. 720, 727, 728]. See also Bishop *v.* Everett, 6 Hawaii 157, 158; Waihee Plantation *v.* Kalapu, 3 Hawaii 760, 761.

"A partnership agreement is, where two or more persons join together their money, goods, labor and skill, or either, or all of them, for the purpose of advancing a fair trade and of dividing the profits and losses arising proportionably or otherwise, between them." Munson *v.* Sears, 12 Iowa 172 [*quoting* Bouvier L. Dict.]. See also Beecham *v.* Dodd, 3 Harr. (Del.) 485; McMahon *v.* McClernan, 10 W. Va. 419.

"If one person advances funds and another furnishes his personal services or skill in carrying on a trade, and is to share in the profits it amounts to a partnership." Bearce *v.* Washburn, 43 Me. 564, 565.

"A partnership is an association of persons united in a common object, business or pursuit." Osborne *v.* Holland, 1 Tex. App. Civ. Cas. §§ 1087, 1088.

"To constitute a partnership in a particular purchase, as in a single concern, there must either be a joint undertaking to pay, or an agreement to share in the profit and loss." Cumpston *v.* McNair, 1 Wend. (N. Y.) 457, 463 [*quoted* in Porter *v.* McClure, 15 Wend. (N. Y.) 187, 193; Post *v.* Kimberly, 9 Johns. (N. Y.) 470, 496]. See also Bostwick *v.* Champion, 11 Wend. (N. Y.) 571.

Statutory definitions are: "The relation which subsists between persons carrying on a business in common with a view of profit." English Partn. Act. (1890) (53 & 54 Vict. c. 39), § 1 (1).

"The association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Cal. Civ. Code, § 2395; Mont. Civ. Code, § 3180; N. D. Civ. Code, § 4370; S. D. Civ. Code, § 4027. See Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309; Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689; Beasley *v.* Berry, 33 Mont. 477, 84 Pac. 791; Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881.

"A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." Ga. Civ. Code, § 2629. Losses as here used means something more than the mere failure to realize profits, and means the actual deficits sustained by such partnership. South Carolina, etc., R. Co. *v.* Augusta Southern R. Co., 107 Ga. 164, 33 S. E. 36.

"Partnership is a synallagamatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry, furnished in determined proportions by the parties." La. Civ. Code, art. 2801.

"As between the members thereof, the association, not incorporated, of two or more persons who have agreed to combine their labor, property and skill, or some of them, for the purpose of engaging in any lawful trade or business, and sharing the profits and losses, as such, between them." Partn. Law, N. Y. Laws (1897), c. 420, § 2.

"A contract by which two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing the profits among themselves." Pastor *v.* Gaspar, 2 Philippine 592; Fernandez *v.* De la Rosa, 1 Philippine 671, 675, construing Phil. Civ Code, art. 1665.

"A mining partnership exists when two or more persons who own or acquire a mining

Italian statutes, before it received judicial recognition by the ordinary tribunals

claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Ida. Rev. St. § 3300. See Haskins *v.* Curran, 4 Ida. 573, 43 Pac. 559. See MINES AND MINERALS, 27 Cyc. 755.

An agreement that something shall be shared by the parties to the agreement is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term." Lindley Partn. (Introd. Ch.) § 1.

"The ordinary elements of a partnership are a common stock, an intention to prosecute, unitedly, one or more branches of industry, and authority, power, mutually interchanged or specially delegated, to manage and control the common stock for the common benefit. The last named feature may be regarded as the leading characteristic of a partnership." Rose *v.* Izard, 7 S. C. 442, 467. See also Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756.

In Louisiana it has been said: "Partnership is defined as being a contract creating a distinct person from those who compose it, 'a moral being;' 'a civil person.' Partners, under our law, are not tenants in common." Stothart *v.* Hardie, 110 La. 696, 700, 34 So. 740.

A partnership exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business. Johnson *v.* J. J. Douglass Co., 8 Okla. 594, 58 Pac. 743.

"To constitute a partnership as to the partners themselves it is only necessary that each of them contribute either capital, labor, credit or skill and care or two or more of these, and that all the contributions are put together into a common stock or common enterprise to be used for the purpose of carrying on business for the common benefit." Swannell *v.* Byers, 123 Ill. App. 545, 549.

Partnership a relation or status.— A partnership, while often called a contract, is rather a relation, a status, somewhat as marriage is a relation or status. Haggett *v.* Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362.

General and special partnerships.— Partnerships are divided into general and special or limited. Dwinel *v.* Stone, 30 Me. 384; Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28. "General partnerships are properly such where the parties carry on all their trade and business for the joint benefit and profit, and it is not material whether the capital stock be limited or not, or the contributions of the parties be equal or unequal." Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28, 32. See *infra*, X.

Non-trading partnership.— There is no accurate definition of what is or is not a trading or non-trading or commercial or non-commercial partnership. A non-trading partnership is one engaged in the prosecution of some occupation or calling not of a commercial character. A partnership may be engaged in manufacture, and at the same time may be engaged in buying and selling manufactured articles not produced by themselves. As to the business exclusively relating to manufacture, the law as to the non-trading partnership will apply, while, as to business of buying or selling the manufactures of others, the law of commercial or trading partnership will apply. McNeal *v.* Gossard, 6 Okla. 363, 50 Pac. 159. Non-trading partnerships are those not engaged in trade, such as those engaged in farming (Ulery *v.* Ginrich, 57 Ill. 531; Benton *v.* Roberts, 4 La. Ann. 216; Prince *v.* Crawford, 50 Miss. 344; Beardorf *v.* Thacher, 78 Mo. 128, 47 Am. Rep. 95; Greensland *v.* Dower, 7 B. & C. 635, 6 L. J. K. B. O. S. 155, 1 M. & R. 640, 31 Rev. Rep. 272, 14 E. C. L. 286), mining (Bult *v.* Morrell, 12 A. & E. 745, 10 L. J. Q. B. 52, 40 E. C. L. 369; Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Ricketts *v.* Bennett, 4 C. B. 686, 11 Jur. 1062, 17 L. J. C. P. 17, 56 E. C. L. 686. See also Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757), carrying on a laundry (Neale *v.* Turton, 4 Bing. N. Cas. 149, 13 E. C. L. 442), digging tunnels (Gray *v.* Ward, 18 Ill. 32), establishing and carrying on waterworks (Broughton *v.* Manchester, etc., Water Works, 3 B. & Ald. 1, 21 Rev. Rep. 278, 5 E. C. L. 11) or gas works (Bramah *v.* Roberts, 3 Bing N. Cas. 963, 32 E. C. L. 441), keeping a store and rope-walk (Wagnon *v.* Clay, 1 A. K. Marsh. (Ky.) 257), keeping a tavern (Cocke *v.* Mobile Branch Bank, 3 Ala. 175), milling (Graves *v.* Kellenberger, 51 Ind. 66; Lanier *v.* McCabe, 2 Fla. 32, 48 Am. Rep. 173), owning a ship (Williams *v.* Thomas, 6 Esp. 18), practising medicine or surgery (Crosthwait *v.* Ross, 1 Humphr. (Tenn.) 23, 34 Am. Dec. 613; Lewis *v.* Reilly, 1 Q. B. 349, 5 Jur. 98, 10 L. J. Q. B. 135, 4 P. & D. 629, 41 E. C. L. 572), publishing (Pooley *v.* Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733), practising law (Breckinridge *v.* Shrieve, 4 Dana (Ky.) 375; Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757; Hedley *v.* Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 6 Jur. 853, 11 L. J. Q. B. 293, 43 E. C. L. 752; Garland *v.* Jacomb, L. R. 8 Exch. 216, 28 L. T. Rep. N. S. 877, 21 Wkly. Rep. 868; Levy *v.* Pyne, C. & M. 453, 41 E. C. L. 249), or sugar refining (Livingston *v.* Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273).

Secret partnership.— The common meaning of secret partnership is a partnership where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Deering *v.* Flanders, 49 N. H. 225. See also Harbeck *v.* Pupin, 145 N. Y. 70, 39 N. E. 722.

Company and partnership distinguished.— "A company . . . is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members, and to-morrow consisting of some only

of England.[2] The earliest cases relating to partnership found in the English law reports deal with a partner's right to an account,[3] and with the maxim "*Jus accrescendi inter mercatores locum non habet.*"[4] In deciding these cases the courts of common law and of equity take judicial notice of the law merchant, and apply its rules to the questions before them.[5] The fact that but few cases involving partnership law are recorded in the reports prior to the seventeenth century is due to the existence of staple courts and kindred tribunals, in which the controversies between merchants were tried expeditiously and in accordance with the rules of the law merchant.[6] Upon the decay of these courts, during the latter part of the sixteenth and the early part of the seventeenth centuries, partnership disputes came more and more frequently before the English courts of common law and of chancery for determination.[7] Not until the close of the eighteenth century, however, did any one attempt the publication of a legal treatise on partnership.[8]

III. THE RELATION.

A. Between the Parties — 1. CONTRACT OF PARTNERSHIP — a. Necessity For Contract. Our law has always treated the partnership relation as founded in voluntary contract.[9] It does not surprise parties into a partnership against their will,[10] although it does not require an express agreement between them,[11] nor is it bound by their statements of intention in associating themselves together for business transactions.[12] It will regard their conduct rather than their language

of those members along with others who have come in. An ordinary partnership is a partnership composed of definite individuals bound together by contract to continue combined for some joint object, either during pleasure, or during a limited time, and is essentially composed of the persons originally entering into the contract." Morrison *v.* Earls, 5 Ont. 434.

A firm is defined as the name, title, or style under which a company transacts business; a partnership of two or more persons; a commercial house. People *v.* Strauss, 97 Ill. App. 47 [*quoting* Webster Dict.]. Firm is synonymous with partnership. Bolckow *v.* Foster, 25 Grant Ch. (U. C.) 476.

Agency distinguished see PRINCIPAL AND AGENT.

2. Mitchell L. Merch. 129–136.

3. Y. B. 30 Edw. I, Account 127; Y. B. 38 Edw. III, Account 7; Fitzherbert Nat. Brev. Account 267 (D).

4. Hamond *v.* Jethro, 2 Brownl. & G. 97, 99 note ("It was agreed by all the Justices, that by the Law of Merchants, if two Merchants joyn in Trade, that of the increase of that, if one dye, the other shall not have the benefit by survivor"); Jeffereys *v.* Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424 ("The custom of merchants is extended to all traders, to exclude survivorship").

5. Bellasis *v.* Hester, 1 Ld. Raym. 280, 281 (*Jus accrescendi*, etc., is a maxim of *lex mercatoria*, of which the courts will take notice, without its being specially pleaded); Brown *v.* Chancellor, 61 Tex. 437 ("The law merchant remains in force in Texas except as modified or changed by statute"); Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208 (the liability of partners is determined by the law merchant, in the absence of proof of a special law, in the state of its origin).

6. Zouch Juris. Adm. 89 [*quoting* Davies Impos.].

7. What Is the Law Merchant, 2 Columbia L. Rev. 470–485 (article by F. M. Burdick).

8. Watson Partn.

9. *Louisiana.*— Pickerell *v.* Fisk, 11 La. Ann. 277.

New Jersey.— McCabe *v.* Sinclair, 66 N. J. Eq. 24, 58 Atl. 412; Wilson *v.* Cobb, 28 N. J. Eq. 177 [*reversed* on other grounds in 29 N. J. Eq. 361].

New York.— Holmes *v.* United Ins. Co., 2 Johns. Cas. 329.

Oregon.— North. Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890; Hackett *v.* Multnomah R. Co., 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327.

West Virginia.— Crockett *v.* Burleson, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. N. S. 263.

United States.— London Assur. Corp. *v.* Drennen, 116 U. S. 461, 6 S. Ct. 442, 29 L. ed. 688.

England.— Jacobsen *v.* Hennekenius, 5 Bro. P. C. 482, 2 Eng. Reprint 811.

10. Phillips *v.* Phillips, 49 Ill. 437.

11. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Evans *v.* Warner, 20 N. Y. App. Div. 230, 47 N. Y. Suppl. 16. The absence of express agreement is a material fact, however, indicating that there is not a partnership. Hallenback *v.* Rogers, 58 N. J. Eq. 580, 43 Atl. 1098; Ratzer *v.* Ratzer, 28 N. J. Eq. 137; *In re* Swift, 118 Fed. 348; Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 42 Wkly. Rep. 312. See also Jones *v.* Purnell, 5 Pennew. (Del.) 444, 62 Atl. 149.

12. Rose *v.* Buscher, 80 Md. 225, 30 Atl. 637; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Nightingale *v.* Milwaukee Furniture Co., 71 Fed. 234.

in determining whether their voluntary association in a business enterprise amounts to a partnership or not.[13]

b. Form and Requisites of Contract. At common law no particular form of contract is necessary to the creation of a valid partnership. It can be oral or written, and it can result from the conduct of the parties or from the verbal communications between them.[14] In some jurisdictions, however, statutes require a writing, duly executed and recorded.[15] And as has been stated elsewhere in this work the statute of frauds has also modified the common-law rule as to partnership contracts in two important particulars.[16]

c. Capacity of Parties. The capacity of particular persons, natural and artificial, such as married women,[17] infants,[18] alien enemies,[19] corporations,[20]

13. Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022. In this case seven persons associated themselves together to manufacture cheese at a factory owned by three of them, who received a certain sum for the use of the factory. The association adopted no name, and was known by several different names. The expenses and also the losses, if any, were to be first paid, and then the net profits were to be divided among the seven persons, each to receive his proportionate share. This, the court held, was a partnership within all the authorities.

14. *Louisiana.*— See Poignand *v.* Livermore, 5 Mart. N. S. 324.

Maine.— Buffum *v.* Buffum, 49 Me. 108, 109, 77 Am. Dec. 249, "It does not appear that articles of co-partnership were made in writing between A. C. & C. Buffum, and it was not necessary that it should be so, to constitute it a partnership in all its incidents."

Montana.—Hirbour *v.* Reeding, 3 Mont. 15.

New York.— Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979.

Pennsylvania.— Everhart *v.* Everhart, 4 Luz. Leg. Reg. 259.

Philippines.— See Fernandez *v.* De la Rosa, 1 Philippine 671.

See 38 Cent. Dig. tit. "Partnership," § 1.

15. See the statutes of the different states. And see Murrell *v.* Murrell, 33 La. Ann. 1233 (construing Civ. Code, art. 2834); Benton *v.* Roberts, 4 La. Ann. 216.

In Pennsylvania it is provided by statute that a loan of money by one to another, upon an agreement to receive a share of the profits of the borrower's business, does not make the lender a partner of the borrower, if the agreement is in writing. Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247; Poundstone *v.* Hamburger, 139 Pa. St. 319, 20 Atl. 1054.

Effect of failure to file declaration of partnership as required in Canada by Partn. Act, §§ 74–76, see Smith *v.* Finch, 12 Brit. Col. 186.

Action for penalty for failure to register partnership under Ont. Rev. St. c. 123, § 11, see Chaput *v.* Robert, 14 Ont. App. 354.

16. See FRAUDS, STATUTE OF, 20 Cyc. 204, 236.

17. See HUSBAND AND WIFE, 21 Cyc. 1341. And see the following cases:

Alabama.— Schlapback *v.* Long, 90 Ala. 525, 8 So. 113.

Georgia.— Burney *v.* Savannah Grocery Co., 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 342.

Indiana.— Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607.

Iowa.— Dupuy *v.* Sheak, 57 Iowa 361, 10 N. W. 731.

Maine.— Haggett *v.* Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362.

Massachusetts.— Lord *v.* Parker, 3 Allen 127.

Michigan.— Artman *v.* Ferguson, 73 Mich. 146, 40 N. W. 907, 16 Am. St. Rep. 572, 2 L. R. A. 343; Bassett *v.* Shepardson, 52 Mich. 3, 17 N. W. 217.

Missouri.— Weil *v.* Simmons, 66 Mo. 617.

New York.— Suau *v.* Caffee, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593.

Ohio.— Payne *v.* Thompson, 44 Ohio St. 192, 5 N. E. 654.

Texas.— Miller *v.* Marx, 65 Tex. 131; Wallace *v.* Finberg, 46 Tex. 35.

Washington.— Seattle Bd. of Trade *v.* Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530.

Wisconsin.— Fuller, etc., Co. *v.* McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

England.— Marshall *v.* Rutton, 8 T. R. 545.

18. See INFANTS, 22 Cyc. 585. And see the following cases:

Maine.— Conary *v.* Sawyer, 92 Me. 463, 43 Atl. 27, 69 Am. St. Rep. 525.

Massachusetts.— Pelletier *v.* Couture, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229.

Michigan.— McGunn *v.* Hanlin, 29 Mich. 476.

New York.— Yates *v.* Lyon, 61 N. Y. 344.

Pennsylvania.— Bixler *v.* Kresze, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. Rep. 920.

United States.— *In re* Dunnigan, 95 Fed. 428.

England.— Lovell *v.* Beauchamp, [1894] A. C. 607, 63 L. J. Q. B. 802, 71 L. T. Rep. N. S. 587, 1 Manson 467, 43 Wkly. Rep. 129; Lempriere *v.* Lange, 12 Ch. D. 675, 41 L. T. Rep. N. S. 378, 27 Wkly. Rep. 879; Corpe *v.* Overton, 10 Bing. 252, 3 L. J. C. P. 24, 3 Moore & S. 738, 25 E. C. L. 123.

19. See WAR.

20. See CORPORATIONS, 10 Cyc. 1142 *et seq.* And see the following cases:

California.— Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106, (1903) 72 Pac. 832.

Minnesota.— French *v.* Donohue, 29 Minn. 111, 12 N. W. 354.

and attorneys[21] to form partnerships is fully discussed under other titles in this work.

d. Subject-Matter and Purpose — (i) *Legal.* A partnership contract has for its subject-matter the association of parties in carrying on a trade or adventure for their common benefit, with their mutual contributions of property and services.[22] An association of persons to preserve the property of others from destruction by fire is not a partnership;[23] nor is any other association organized for charitable, philanthropic, or social purposes and not existing as a common business enterprise for pecuniary profit.[24] A partnership may be organized for the prosecution of a single adventure as well as for the conduct of a continuous business.[25] When parties agree to purchase certain real estate, fit it up for certain purposes and sell it, courts are not inclined to treat the contract as creating a partnership, unless the enterprise contemplated by the contract is of such a character and purpose that it cannot result in a successful issue, if the parties are treated as tenants in common,[26] or unless they have clearly

New York.— People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33.

Ohio.— Geurinck *v.* Alcott, 66 Ohio St. 94, 63 N. E. 714.

Oregon.— Hackett *v.* Multnomah R. Co., 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327.

Pennsylvania.— Boyd *v.* American Carbon Block Co., 182 Pa. St. 206, 37 Atl. 937; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

Tennessee.— Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396.

West Virginia.— Wilson *v.* Carter Oil Co., 46 W. Va. 469, 33 S. E. 249.

United States.— Fechteler *v.* Palm, 133 Fed. 462, 66 C. C. A. 336.

England.— *In re* European Soc. Arbitration Acts, 8 Ch. D. 679, 704, 48 L. J. Ch. 118, 39 L. T. Rep. N. S. 136, 27 Wkly. Rep. 88.

21. See Attorney and Client, 4 Cyc. 925. And see Justice *v.* Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405; Gilfillan *v.* Henderson, 2 Cl. & F. 1, 6 Eng. Reprint 1057.

22. *Colorado.*— Lawrence *v.* Rohinson, 4 Colo. 567.

Louisiana.— McAuley *v.* Barnes, 15 La. 427 (an ordinary partnership to press cotton and to cultivate a sugar estate); McGehee *v.* McCord, 14 La. 362 (an ordinary partnership to construct a railway); Vigers *v.* Sainet, 13 La. 300 (company organized for buying steamers, and transporting passengers and freight); Slocum *v.* Sibley, 5 Mart. 682 (tavern-keeping and managing stables).

New York.— Jones *v.* Walker, 51 Misc. 624, 101 N. Y. Suppl. 22, agreement to put up an equal amount of margin for speculative transactions and to divide the profits equally.

Pennsylvania.— Gwinn *v.* Lee, 6 Pa. Super. Ct. 646, 42 Wkly. Notes Cas. 124, an unincorporated association, with transferable capital stock.

Washington.— Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355.

United States.— Meehan *v.* Valentine, 145 U. S. 611, 618, 12 S. Ct. 972, 36 L. ed. 835; Donald *v.* Guy, 127 Fed. 228, holding that the Virginia Pilot Association, which is an unincorporated association of pilots formed for the purpose of controlling and regulating the business of its members, and through which they in effect act by joint coöperation in performing their duties as pilots, and which elects officers, leases offices, owns property, including the pilot boats used, assigns its members to service in turn, and collects all pilotage fees earned by them, which are paid into bank to its credit, and divided between the members after payment of the expenses of the association, is a partnership.

23. Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98.

24. *California.*—Wilson *v.* Henderson, 123 Cal. 258, 55 Pac. 986.

Connecticut.— Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40.

New Hampshire.— Danbury Cornet Band *v.* Bean, 54 N. H. 524, a musical club.

New York.— McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204 (an association to enforce excise laws); Lafond *v.* Diems, 81 N. Y. 507, 8 Abb. N. Cas. 344.

Pennsylvania.— Pain *v.* Sample, 158 Pa. St. 428, 27 Atl. 1107 (a grand army post); Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818 (a masonic lodge); Eichhaum *v.* Irons, 6 Watts & S. 67, 40 Am. Dec. 540.

England.— Caldicott *v.* Griffiths, 1 C. L. R. 715, 8 Exch. 898, 23 L. J. Exch. 54 ("The Midland Counties Guardian Society for the Protection of Trade"); Flemyng *v.* Hector, 2 Gale 180, 6 L. J. Exch. 43, 2 M. & W. 172 (Westminster Reform Club); Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351.

25. Jones *v.* Davies, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354; Spencer *v.* Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870; Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124.

26. Winslow *v.* Young, 94 Me. 145, 160, 47 Atl. 149 ("It is undoubtedly true that the purchase was speculative, and that the proprietors expected their profits to arise from sales of the land. They did not con-

evinced their intent to become partners.[27] The presumption is against the existence of a partnership in lands, but this presumption may be overcome by the terms of the partnership contract, or by the purposes for which the land is acquired, or the manner in which it is employed.[28] It is not overcome by an agreement between a real estate agent and another that the latter shall have a dollar an acre for assisting in the sale of a farm.[29] Contracts for farming on shares rarely have for their object the creation of a partnership between the landowner and the cultivator,[30] although the terms of the contract and the conduct of the parties under it may warrant the conclusion that a partnership exists between them.[31] Agreements between the creditors of a failing debtor on the one side, and the debtor or his general assignee on the other, for the conduct of the business with a view to paying the debts, will constitute such creditors partners, if they become thereby the proprietors of the business;[32] but not if they become only the mortgagees, or the agents of the debtor or his assignee.[33] Arrangements between a number of persons, firms, and corporations engaged in the same line of business, having for their object the maintenance of a uniform scale of prices, and an equitable distribution of business patronage,[34] or the pooling of profits, or the division of earnings in agreed proportions,[35] do not create a partnership between the contracting parties if they retain the several ownership of their properties, and there is no common plant or fund which they own and manage jointly. Cotenancy in a vessel is the general relation between ship-owners, and partnership the exception. Hence one who alleges that ship-owners are partners must establish this relationship by clear evidence.[36] In the absence of evidence showing an intention to become partners, that relationship does not exist between the owner

template building upon it or making other improvements, but simply to hold it for sale at advanced prices, which it was supposed would be obtained within a short time. There was therefore no necessity for a partnership to accomplish this end. Ownership as tenants in common was equally effective. The elements which justify a court in finding a partnership to result from the character of the business to be done are wanting"); Pillsbury *v.* Pillsbury, 20 N. H. 90; Farrand *v.* Gleason, 56 Vt. 633; Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157.

27. Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678; Gray *v.* Palmer, 9 Cal. 616; Phillips *v.* Purington, 15 Me. 425; Sauntry *v.* Dunlap, 12 Wis. 364.

28. *Illinois.*— State Nat. Bank *v.* Butler, 149 Ill. 575, 36 N. E. 1000.

Iowa.— Heard *v.* Wilder, 81 Iowa 421, 46 N. W. 1075.

Minnesota.— Baremore *v.* Selouer, 100 Minn. 23, 110 N. W. 66.

Montana.— Hirbour *v.* Reeding, 3 Mont. 15.

England.— Waterer *v.* Waterer, L. R. 15 Eq. 402, 21 Wkly. Rep. 508, land used for nursery purposes.

29. Allen *v.* Hudson, 78 Ill. App. 376.

30. Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Donnell *v.* Harshe, 67 Mo. 170; Cedarberg *v.* Guernsey, 12 S. D. 77, 80 N. W. 159.

31. Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657; Thornton *v.* Barber, 48 N. Y. App. Div. 298, 62 N. Y. Suppl. 527; Everhart *v.* Everhart, 4 Luz. Leg. Reg. (Pa.) 259; Overton Bank *v.* Thompson, 118 Fed. 798, 56 C. C. A. 554.

32. Purvis *v.* Butler, 87 Mich. 248, 49 N. W. 564; Webb *v.* Hicks, 123 N. C. 244, 248, 31 S. E. 479 ("The creditors had the right to have the property sold by the assignee at once and the proceeds applied to their debts, but for the expressed purpose of gain and enhancement of the value, and to avoid loss and sacrifice by sale, they agreed to have the business continued and thereby obtain a profit, and they were to reap the profit, if any, and must bear the loss and expense, if any"); Righter *v.* Farrel, 134 Pa. St. 482, 19 Atl. 687.

33. Fewell *v.* American Surety Co., 80 Miss. 782, 28 So. 755, 92 Am. St. Rep. 625; Mollwo *v.* Court of Wards, L. R. 4 P. C. 419; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754.

34. Potter *v.* Morris, etc., Dredging Co., 59 N. J. Eq. 422, 46 Atl. 537.

35. Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679.

36. Harding *v.* Foxcroft, 6 Me. 76; Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513; Jackson *v.* Robinson, 13 Fed. Cas. No. 7,144, 3 Mason 138.

Evidence sufficient to establish partnership relation see Doddington *v.* Hallet, 1 Ves. 497, 27 Eng. Reprint 1165; Phillips *v.* Purington, 15 Me. 425.

and master of a vessel who share its gross earnings,[37] or who share in the profits and loss of the voyage,[38] or between seamen in such a venture as the mackerel fishery.[39]

(II) *Illegal.* If a partnership is formed for the prosecution of an illegal business, or for the conduct of a lawful business in an illegal manner, the courts will refuse to recognize its existence, either by enforcing its claims against others, or by compelling either partner to account to the others for capital or profits in his hands, or by forcing either to contribute his share of the losses to the others.[40] Even though the illegality of the partnership contract is not set up as a defense, the court may inquire into its nature, and if its illegality appears may refuse to adjudicate upon alleged rights which are dependent upon it. Parties cannot compel a court of justice to enforce a contract, appearing by evidence to be illegal, by the simple device or inadvertence of omitting from their pleadings the charge of such illegality.[41] It has been held that it is not illegal for the assignee of a partnership for the benefit of creditors to agree to pay off the creditors and

37. Dry *v.* Boswell, 1 Campb. 329.

38. Mair *v.* Glennie, 4 M. & S. 240, 16 Rev. Rep. 445.

39. Lewis *v.* Chadbourne, 54 Me. 484, 92 Am. Dec. 558.

40. *Georgia.*— Marine, etc., Ins. Bank *v.* Megar, Dudley 83.

Illinois.— Shaffner *v.* Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624, a partnership for book-making on horse-races.

Kentucky.— Smith *v.* Richmond, 114 Ky. 303, 70 S. W. 846, 24 Ky. L. Rep. 1117, 102 Am. St. Rep. 283 (partnership for an illegal lottery); Central Trust, etc., Co. *v.* Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 99 Am. St. Rep. 317, 56 L. R. A. 479 (a partnership for book-making on horse-races).

Maryland.— Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268, partnership for book-making on horse-races.

Montana.— Morrison *v.* Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158, partnership for dishonest and immoral horse-racing.

New Jersey.— Watson *v.* Murray, 23 N. J. Eq. 257, partnership for an illegal lottery.

North Carolina.— King *v.* Winants, 71 N. C. 469, 17 Am. Rep. 11, partnership for securing contracts for public works by stifling competition.

Ohio.— Jackson *v.* Akron Brick Assoc., 53 Ohio St. 303, 41 N. E. 257, 53 Am. St. Rep. 638, 35 L. R. A. 287, partnership to enhance the price of articles manufactured and dealt in by its members.

South Carolina.— Providence Mach. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117.

Texas.— Wiggins *v.* Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837, partnership to enhance the price of beer and stifle competition in its sale.

Virginia.— Watson *v.* Fletcher, 7 Gratt. 1, partnership in the operation of a faro bank.

United States.— McMullen *v.* Hoffman, 174 U. S. 639, 19 S. Ct. 839, 43 L. ed. 1117, a partnership in the performance of a contract for a public work, illegally procured.

England.— Harris *v.* Amery, L. R. 1 C. P. 148, Harr. & R. 294, 12 Jur. N. S. 165, 35 L. J. C. P. 89, 13 L. T. Rep. N. S. 504, 14 Wkly. Rep. 199 (a non-registered partnership for farming, in violation of statute); Gordon *v.* Howden, 12 Cl. & F. 237, 8 Eng. Reprint 1395 (secret partnership for pawnbroking in violation of statute); Armstrong *v.* Lewis, 2 Cromp. & M. 274, 3 L. J. Exch. 359, 4 Moore & S. 1, 30 E. C. L. 539; Everet *v.* Williams, 1 European Mag. 360, 9 Law Quar. Rev. 197 (where one highwayman attempted to compel his copartner in the business of dealing on Houndslow Heath "with gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things to the value of £200 and upwards," to account for plaintiff's share of the plunder, only to have his bill condemned and thrown out for scandal and impertinence, his solicitors fined for reflecting upon the honor and dignity of the court, and himself and his copartner hanged at Tyburn and Maidstone respectively); Whitmore *v.* Mason, 2 Johns. & H. 204, 8 Jur. N. S. 278, 31 L. J. Ch. 433, 5 L. T. Rep. N. S. 631, 10 Wkly. Rep. 168, 70 Eng. Reprint 1031; Blundell *v.* Winsor, 1 Jur. 589, 6 L. J. Ch. 364, 8 Sim. 601, 8 Eng. Ch. 601, 59 Eng. Reprint 238; Ewing *v.* Osbaldiston, 1 Jur. 50, 6 L. J. Ch. 161, 2 Myl. & C. 53, 14 Eng. Ch. 53, 40 Eng. Reprint 561; Biggs *v.* Lawrence, 3 T. R. 454, 1 Rev. Rep. 740 (partnership for smuggling). But *compare* Thwaites *v.* Couthwaite, [1896] 1 Ch. 496, 60 J. P. 218, 65 L. J. Ch. 238, 74 L. T. Rep. N. S. 164, 44 Wkly. Rep. 295; Sterry *v.* Clifton, 9 C. B. 110, 14 Jur. 312, 19 L. J. C. P. 237, 67 E. C. L. 110; Aubin *v.* Holt, 2 Kay & J. 66, 25 L. J. Ch. 36, 4 Wkly. Rep. 112, 69 Eng. Reprint 696; Mason *v.* Watkins, 10 L. T. Rep. N. S. 453.

Canada.— Collins *v.* Swindle, 6 Grant Ch. (U. C.) 282. But *compare* Stevenson *v.* Boyd, 5 Brit. Col. 626.

Gambling partnerships see GAMING, 20 Cyc. 935.

Public work.— An agreement whereby a partnership provides for the distribution among themselves of money to be received in the performance of public work is not void. Thurston *v.* Fairman, 9 Hun (N. Y.) 584.

41. Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39.

form a partnership with the members of the assigning firm,[42] nor for a son to accept an option to succeed his deceased father as a partner, although concealing this fact from the other legatees of the father,[43] nor for partners to contract not to carry on the same trade for their private benefit.[44]

e. Assent of Parties. The mutual assent, required of parties to every enforceable contract, is necessary to the formation of a partnership. Hence if the so-called articles of partnership are vague and indefinite with respect to such important matters as the amount of capital to be furnished, the extent of business to be transacted, the duties of the several partners, and the manner in which it is to be carried on, the articles will not be enforced by a court.[45] Nor is a partnership created by an offer by one party which is not accepted according to its terms by the other;[46] nor by an acceptance on behalf of that other by an unauthorized agent.[47] In the latter case, if such acceptance is thereafter ratified, the partnership contract dates from the original acceptance.[48] As between the parties themselves, the one who alleges a partnership must show not only his own voluntary assent to the relation, but the like assent of every other alleged partner.[49] It is not enough that he proves an agreement in which they call themselves partners. The term may have been used in a popular rather than a legal sense, or as a matter of business convenience, and hence no partnership may have been intended by the parties.[50] On the other hand they may not have intended to take upon themselves the liability of partners, and yet they may have created a partnership.[51]

42. Jung *v.* Weyand, 9 Ohio Dec. (Reprint) 485, 14 Cinc. L. Bul. 143.

43. *In re* Kalbfell, 29 Pitts. Leg. J. N. S. (Pa.) 52.

44. Morris *v.* Colman, 18 Ves. Jr. 438, 11 Rev. Rep. 230, 34 Eng. Reprint 382.

45. Savannah Rail, etc., Co. *v.* Sabel, 145 Ala. 681, 40 So. 88 [*following* Sabel *v.* Savannah Rail, etc., Co., 135 Ala. 380, 38 So. 663] (agreement must be definite, on a sufficient consideration, and mutual); Morris *v.* Peckham, 51 Conn. 128; *In re* Vince, [1892] 2 Q. B. 478, 61 L. J. Q. B. 836, 67 L. T. Rep. N. S. 70, 9 Morr. Bankr. Cas. 222, 41 Wkly. Rep. 138. *Compare* Goldsmith *v.* Sachs, 17 Fed. 726, 8 Sawy. 110, holding that where the contract provides that "the business of the partnership shall be buying, selling, and dealing in dry goods and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty.

46. Metcalf *v.* Redmon, 43 Ill. 264; Bennett *v.* Pulliam, 3 Ill. App. 185; Farrow *v.* Bresler, 108 Mich. 564, 66 N. W. 492.

47. Miles *v.* Wann, 27 Minn. 56, 6 N. W. 417.

48. Williams *v.* Butler, 35 Ill. 544, holding that such ratification may cut off intervening rights, which rest on an inferior equity to that of the principal.

49. *Illinois.*— Phillips *v.* Phillips, 49 Ill. 437, 439, "The intention or even belief of one party alone, cannot create a partnership without the assent of the others."

Mississippi.— Atwood *v.* Meredith, 37 Miss. 635, holding that, although the wife furnished means for an interest in a firm, and it was received from her husband as her agent by the other members of the firm, they regarding her as partner, this does not make her a partner, as it does not thereby appear that she assented to the contract of partnership.

Missouri.— Freeman *v.* Bloomfield, 43 Mo. 391, 392, a man cannot be made a partner against his will, by accident, or the conduct of persons for whom he is not accountable.

New York.— Magovern *v.* Robertson, 14 N. Y. Suppl. 114.

Ohio.— Channel *v.* Fassit, 16 Ohio 166.

Pennsylvania.— Hedge's Appeal, 63 Pa. St. 273; Fenner *v.* Rhoad, 8 North. Co. Rep. 121.

Texas.— Faver *v.* Bowers, (Civ. App. 1895) 33 S. W. 131, plaintiff's assent was induced by defendant's "undue influence," and the partnership was rescinded by the court.

West Virginia.— Setzer *v.* Beale, 19 W. Va. 274, a person does not become a member of a firm by an agreement to share the profits and loss with one of its members, the other members not assenting to his membership in the firm.

See 38 Cent. Dig. tit. "Partnership," § 4.

50. Gulf City Shingle Mfg. Co. *v.* Boyles, 129 Ala. 192, 29 So. 800; Oliver *v.* Gray, 4 Ark. 425; Sailors *v.* Nixon-Jones Printing Co., 20 Ill. App. 509; Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573.

51. Lansing City Nat. Bank *v.* Stone, 131 Mich. 588, 92 N. W. 99. See also *infra*, III, A, 1, h; III, C, 3, d.

Statement of rule.— "It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners." Beecher *v.* Bush, 45 Mich. 188, 193, 7 N. W. 785, 40 Am. Rep. 465.

Attempt to organize corporation.— The most frequent cases of this sort grow out of ineffectual attempts to organize corpora-

f. Consideration. The consideration of the contract of partnership consists in the mutual covenants and promises of the copartners; each engaging to contribute capital, or services, or credit, and to subject himself to the duties and liabilities of a partner, in consideration of the like engagements of his copartners.[52] Accordingly if the partnership agreement provides simply that one of the parties is to give and the other is to receive a half interest in the profits of an enterprise started by the former, without anything being promised by the latter toward the accomplishment of its object, no enforceable contract exists.[53] But if the latter takes part in carrying on the enterprise, and thus subjects himself to partnership liability to outsiders, he furnishes a sufficient consideration for the former's promise, and acquires all the rights of a copartner.[54] Moreover the assumption of a partner's liability for the debts of the firm, or the continuance of that liability beyond the originally stipulated period, is ample consideration for special provisions in the partnership contract securing to such partner unusual advantages or exemptions, as regards his copartners.[55]

g. Executory Agreements — (1) *In General.* Persons who have entered into a contract to become partners at some future time, or upon the happening of some future contingency, do not become partners until the agreed time has arrived or the contingency has happened. Whether a partnership exists is determined by ascertaining from the terms of the agreement whether any time has to elapse or any act remains to be done before the right to share profits accrues; for the parties will not be partners until such time has elapsed, or the act has been performed.[56] The mere agreement to form a partnership does not of itself create a partnership; nor does the advancement by one party of his

tions. See Mt. Carmel Tel. Co. *v.* Mt. Carmel, etc., Tel. Co., 119 Ky. 461, 84 S. W. 515, 27 Ky. L. Rep. 30; Cincinnati Cooperage Co. *v.* Bate, 96 Ky. 356, 26 S. W. 538, 16 Ky. L. Rep. 626, 49 Am. St. Rep. 300. See generally, CORPORATIONS.

52. *Missouri.*— Byrd *v.* Fox, 8 Mo. 574.

New York.— Coleman *v.* Eyre, 45 N. Y. 38. See also Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259].

Ohio.— Breslin *v.* Brown, 24 Ohio St. 565, 15 Am. Rep. 627.

Pennsylvania.— Rush Centre Creamery Co. *v.* Hillis, 3 Pa. Super. Ct. 527.

South Carolina.— See Belcher *v.* Conner, 1 S. C. 88.

West Virginia.— Kimmins *v.* Wilson, 8 W. Va. 584.

England.— *In re* Wedgwood Coal, etc., Co., 7 Ch. D. 75, 47 L. J. Ch. 273, 37 L. T. Rep. N. S. 560, 26 Wkly. Rep. 442; Dale *v.* Hamilton, 5 Hare 369, 393, 11 Jur. 163, 16 L. J. Ch. 126, 26 Eng. Ch. 369, 67 Eng. Reprint 955; The Herkimer, Stew. (Nova Scotia) 17.

53. Trayes *v.* Johns, 11 Colo. App. 219, 52 Pac. 1113; Mitchell *v.* O'Neale, 4 Nev. 504.

54. Emery *v.* Wilson, 79 N. Y. 78; Guccione *v.* Scott, 21 Misc. (N. Y.) 410, 47 N. Y. Suppl. 475 [*affirmed* in 33 N. Y. App. Div. 214, 53 N. Y. Suppl. 462]; Geddes *v.* Wallace, 2 Bligh 270, 4 Eng. Reprint 328; Heyhoe *v.* Burge, 9 C. B. 431, 19 L. J. C. P. 243, 67 E. C. L. 431. See also Melville *v.* Kruse, 69 N. Y. App. Div. 211, 74 N. Y. Suppl. 826 [*affirmed* in 174 N. Y. 306, 66 N. E. 965], holding that the surrender by one partner of his right to withdraw from the firm and his continuance therein is a good consideration for the promise of his copartners that he should have one half of the net assets of the firm on its dissolution in addition to one half of the profits during its continuance, as provided for in the original agreement.

55. Lyle *v.* Howard, 64 S. W. 144, 24 Ky. L. Rep. 143 (securing one partner a half interest in a firm, although he paid but one sixth of the capital); Clift *v.* Barrow, 108 N. Y. 187, 15 N. E. 327 (the managing partner indemnified the other against loss, and guaranteed the latter ten per cent on all his deposits with the firm); McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530 [*reversing* 46 Fed. 713] (all the interest of one partner to pass to the other, upon the former's death).

56. *Alabama.*— Savannah Rail, etc., Co. *v.* Sabel, 145 Ala. 681, 40 So. 88; Sabel *v.* Savannah Rail, etc., Co., 135 Ala. 380, 33 So. 663; Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601; Huckabee *v.* Nelson, 54 Ala. 12.

Colorado.— Meagher *v.* Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455.

Connecticut.— Reboul *v.* Chalker, 27 Conn. 114.

Florida.— Johnston *v.* Eichelberger, 13 Fla. 230.

Idaho.— Wilson *v.* Wilson, 6 Ida. 597, 57 Pac. 708.

Louisiana.— Avery *v.* Lauve, 1 La. Ann. 457.

Massachusetts.— Haskins *v.* Burr, 106 Mass. 48.

Michigan.— Bird *v.* Hamilton, Walk. 361.

agreed share of the capital. The entire agreement and all the attending circumstances are to be taken into consideration, in determining whether a partnership has been actually launched.[57] Undoubtedly the performance of a condition precedent by either party to an executory agreement for a partnership may be waived by the other; but a waiver is not to be presumed.[58] Although, as between the parties, the agreement is executory, and no partnership exists, their conduct may amount to a "holding out" as partners; and if it does they will be liable in that capacity to those who have been induced by such conduct to deal with them as a partnership.[59] The death of either party to an executory agreement for partnership prevents the formation of a firm, as such agreement is based upon the continuance of the life of each.[60]

(II) *Remedy For Breach.* While the wrongful breach of a valid execu-

Minnesota.— Dow *v.* Sleepy Eye State Bank, 88 Minn. 355, 93 N. W. 121.

New Hampshire.— Atkins *v.* Hunt, 14 N. H. 205.

New York.— Matter of Hoagland, 51 N. Y. App. Div. 347, 64 N. Y. Suppl. 920 [*affirmed* in 164 N. Y. 573, 58 N. E. 1088].

Ohio.— Mosier *v.* Parry, 60 Ohio St. 388, 54 N. E. 364.

Pennsylvania.— Irwin *v.* Bidwell, 72 Pa. St. 244; Rice *v.* Shuman, 43 Pa. St. 37; Fitch *v.* Conklin, 16 Leg. Int. 77.

Texas.— Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

Washington.— State *v.* Mendenhall, 24 Wash. 12, 63 Pac. 1109; Cantara *v.* Blackwell, 14 Wash. 294, 44 Pac. 657.

Wisconsin.— Hoile *v.* York, 27 Wis. 209.

Wyoming.—Holgate *v.* Downer, 8 Wyo. 334, 57 Pac. 918, 11 Wyo. 261, 71 Pac. 1135.

United States.— Davis *v.* Key, 123 U. S. 79, 8 S. Ct. 55, 31 L. ed. 112; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34.

England.— Smith *v.* Mundy, 3 E. & E. 22, 6 Jur. N. S. 977, 29 L. J. Q. B. 172, 2 L. T. Rep. N. S. 373, 8 Wkly. Rep. 561, 107 E. C. L. 22; *Ex p.* Turquand, 6 Jur. 67, 11 L. J. Bankr. 1, 2 Mont. D. & De G. 339; Harris *v.* Petherick, 39 L. T. Rep. N. S. 543; Ellis *v.* Ward, 21 Wkly. Rep. 100.

Canada.— Whimbey *v.* Clark, 22 Quebec Super. Ct. 453.

See 38 Cent. Dig. tit. "Partnership," § 6. And see *infra*, III, D, 1.

57. *Illinois.*— Doyle *v.* Bailey, 75 Ill. 418; Wilson *v.* Campbell, 10 Ill. 383. But *compare* Arnold *v.* Conklin, 96 Ill. App. 373, holding that a definite understanding and arrangement to unite, and a union for the prosecution of a joint undertaking, and to share its profits, may constitute a partnership.

Indiana.— Hubbell *v.* Woolf, 15 Ind. 204, advancing money in anticipation of a partnership does not create.

Massachusetts.— Morrill *v.* Spurr, 143 Mass. 257, 9 N. E. 580, advancing money, with option to lender to become partner, does not create.

Michigan.— Bird *v.* Hamilton, Walk. 361, one clause of the agreement indicated a present partnership, but the whole contract disclosed an intent to form a partnership in the future.

Nebraska.— Norton *v.* Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. N. S. 945.

New York.— White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971 (written instrument signed as preliminary only to a complete contract which was never executed); McLeod *v.* Miner, 38 N. Y. App. Div. 115, 56 N. Y. Suppl. 714.

Pennsylvania.— Martin *v.* Baird, 175 Pa. St. 540, 34 Atl. 809, parties could not agree upon terms when they came to draw up formal articles, although partnership books had been opened, and various preliminary steps taken.

Wisconsin.— See Clinton Bridge, etc., Works *v.* Darlington First Nat. Bank, 103 Wis. 117, 79 N. W. 47.

United States.— Mattocks *v.* Lovering, 16 Fed. Cas. No. 9,299.

England.— *In re* Young, [1896] 2 Q. B. 484, 65 L. J. Q. B. 681, 75 L. T. Rep. N. S. 278, 3 Manson 213, 45 Wkly. Rep. 96; Frost *v.* Moulton, 21 Beav. 596, 52 Eng. Reprint 990; *Ex p.* Davis, 4 De G. J. & S. 523, 8 Jur. N. S. 859, 32 L. J. Bankr. 68, 8 L. T. Rep. N. S. 745, 69 Eng. Ch. 402, 46 Eng. Reprint 1022 (a power to name oneself or another a partner does not create a partnership; nor does a covenant to admit such nominee); Osborne *v.* Jullison, 3 Drew. 596, 26 L. J. Ch. 6, 4 Wkly. Rep. 767, 61 Eng. Reprint 1031 (agreement merely for an experiment).

See 38 Cent. Dig. tit. "Partnership," § 6.

Compare Mobbs *v.* Stotts, (Ark. 1906) 94 S. W. 918.

58. Johnston *v.* Eichelberger, 13 Fla. 230 (acts of common courtesy should not be deemed a waiver of necessary conditions precedent); Bird *v.* Hamilton, Walk. (Mich.) 361 (carrying on business in the name of the firm for a short time, while waiting for the other party to supply his agreed contribution of capital, is not a waiver); McGraw *v.* Pulling, Freem. (Miss.) 357; Meyer *v.* Schacher, 38 L. T. Rep. N. S. 97.

59. Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Mattocks *v.* Rogers, 16 Fed. Cas. No. 9,300, 1 Hask. 547. And see *infra*, III, D, 1.

60. Cline *v.* Wilson, 26 Ark. 154; Dow *v.* Sleepy Eye State Bank, 88 Minn. 355, 93 N. W. 121.

tory contract for a partnership will sustain an action for damages,[61] a court of equity will rarely decree the specific performance of such a contract,[62] although it will not hesitate to require the execution of a deed, or similar instrument, when the refusal to execute it would operate as a fraud upon the other party.[63]

h. Intention of Parties and Construction of Contract. When a court is called upon to determine whether a particular contract constitutes a partnership between the parties thereto, its controlling purpose is to ascertain their intention as that is disclosed by the entire transaction.[64] But the intention which controls in determining the existence of a partnership is the legal intention deducible from the acts of the parties, and, if they intend to do a thing which in law constitutes a partnership, they are partners, although their purpose was to avoid the creation of

61. Hobbs *v.* Ray, 96 S. W. 589, 29 Ky. L. Rep. 999; Owen *v.* Meroney, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952; Hill *v.* Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; Scott *v.* Rayment, L. R. 7 Eq. 112, 38 L. J. Ch. 48. See *infra*, V, C, 1, c.

62. *California.*— Thomason *v.* De Greayer, (1892) 31 Pac. 567; Powell v. Maguire, 43 Cal. 11.

Connecticut.— Morris *v.* Peckham, 51 Conn. 128.

Illinois.— Clark *v.* Truitt, 183 Ill. 239, 55 N. E. 683; Werden *v.* Graham, 107 Ill. 169.

Michigan.— Buck *v.* Smith, 29 Mich. 166, 18 Am. Rep. 84.

South Carolina.— Lane *v.* Roche, Riley Eq. 215.

United States.—Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

England.— Syers *v.* Syers, 1 App. Cas. 174, 35 L. T. Rep. N. S. 101, 24 Wkly. Rep. 970; Scott *v.* Rayment, L. R. 7 Eq. 112, 38 L. J. Ch. 48; Cowell *v.* Watts, 2 Hall & T. 224, 19 L. J. Ch. 455, 47 Eng. Reprint 1665; Milliken *v.* Milliken, 8 Ir. Eq. 16; Bagnell *v.* Edwards, Ir. R. 10 Eq. 215; Ord *v.* Johnstone, 1 Jur. N. S. 1063, 4 Wkly. Rep. 37.

See, generally, SPECIFIC PERFORMANCE.

63. Somerby *v.* Buntin, 118 Mass. 279, 19 Am. Rep. 459; Whitworth *v.* Harris, 40 Miss. 483; Birchett *v.* Bolling, 5 Munf. (Va.) 442; England *v.* Curling, 8 Beav. 129, 50 Eng. Reprint 51.

64. *Arkansas.*— Johnson *v.* Rothschilds, 63 Ark. 518, 41 S. W. 996.

California.— Chapman *v.* Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Rucker, 6 Colo. App. 334, 40 Pac. 853.

Florida.— Webster *v.* Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217 and note, 27 L. R. A. 126.

Georgia.— Morrison *v.* Dickey, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87.

Illinois.— Grinton *v.* Strong, 148 Ill. 587, 36 N. E. 559; Furber *v.* Page, 143 Ill. 622, 32 N. E. 444; Niehoff *v.* Dudley, 49 Ill. 406; Stevens *v.* Faucet, 24 Ill. 483; Pierpont *v.* Lanphere, 104 Ill. App. 232; Butler *v.* Merrick, 24 Ill. App. 628.

Michigan.— Scholtz *v.* Freud, 128 Mich. 72, 87 N. W. 130; Gray *v.* Gibson, 6 Mich. 300.

Missouri.— Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465; Torbert *v.* Jeffrey, 161 Mo. 645, 61 S. W. 823; Clifton *v.* Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594; McDonald *v.* Matney, 82 Mo. 358; Glore *v.* Dawson, 106 Mo. App. 107, 80 S. W. 55; Hazell *v.* Clark, 89 Mo. App. 78; Osceola Bank *v.* Outhwaite, 50 Mo. App. 124.

Montana.— Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65.

Nebraska.— Garrett *v.* Republican Pub. Co., 61 Nebr. 541, 85 N. W. 537.

New York.— Salter *v.* Ham, 31 N. Y. 321; Heye *v.* Tilford, 2 N. Y. App. Div. 346, 37 N. Y. Suppl. 751; Whittingham *v.* Darrin, 45 Misc. 478, 92 N. Y. Suppl. 752; Schultz *v.* Brackett Bridge Co., 35 Misc. 595, 72 N. Y. Suppl. 160. See also Clift *v.* Barrow, 108 N. Y. 187, 15 N. E. 327.

Oregon.— Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149.

Pennsylvania.— Krall *v.* Forney, 182 Pa. St. 6, 37 Atl. 846; Bunyea *v.* Robinson, 9 Del. Co. 12; Ditsche *v.* Becker, 6 Phila. 176; McGee *v.* McDermott, 34 Pittsb. Leg. J. N. S. 41.

Texas.— Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499; Markowitz *v.* Greenwall Theatrical Circuit Co., (Civ. App. 1903) 75 S. W. 74; Cleveland *v.* Anderson, 2 Tex. App. Civ. Cas. § 146.

West Virginia.— Deering *v.* Coberly, 44 W. Va. 606, 29 S. E. 512.

United States.— London Assur. Corp. *v.* Drennen, 116 U. S. 461, 6 S. Ct. 442, 29 L. ed. 688; Drennen *v.* London Assur. Corp., 113 U. S. 51, 5 S. Ct. 341, 28 L. ed. 919 [*reversing* 20 Fed. 657]; Fourchy *v.* Ellis, 140 Fed. 149; Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263; Moore *v.* Hammond, 110 Fed. 897 [*affirmed* in 121 Fed. 759, 58 C. C. A. 35]; Bancroft *v.* Hambly, 94 Fed. 975, 36 C. C. A. 595; Hazard *v.* Hazard, 11 Fed. Cas. No. 6,279, 1 Story 371.

England.— Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 745; *Re* Whiteley, 67 L. T. Rep. N. S. 69; Balmain *v.* Shore, 9 Ves. Jr. 500, 32 Eng. Reprint 696.

Canada.— Lawton Saw Co. *v.* Machum, 2 N. Brunsw. Eq. 112; Morrison *v.* Earls, 5 Ont. 434; Northern R. Co. *v.* Patton, 15 U. C. C. P. 332; Maulson *v.* Peck, 18 U. C. Q. B. 113; Tobin *v.* Merritt, 2 U. C. Q. B. 1.

See 38 Cent. Dig. tit. "Partnership," § 3.

such relation.[65] Particular clauses in the contract, or even express statements that it does or does not constitute a partnership, are not conclusive upon the subject.[66] If the entire agreement between the parties has been committed to writing, every clause is to be considered, and effect given to each, if possible. If the agreement is partly in writing, partly oral, and partly evidenced only by conduct, then all the steps taken by the parties in connection with the enterprise are to be considered, for whatever was done by the parties in furtherance of the common purpose, understanding, and agreement must be treated as a part of one continuous transaction.[67] If the contract is wholly written and unambiguous, or, although the contract is partly oral, if the whole evidence warrants but one inference as to the intention of the parties, the question of partnership or no partnership is one for the court.[68] In determining this question the court, in addition to the considerations above set forth, will bear in mind the confidential relations which partners sustain to each other, and the power which each possesses to subject the others to

65. Breinig *v.* Sparrow, 39 Ind. App. 455, 80 N. E. 37; Monson *v.* Ray, 123 Mo. App. 1, 99 S. W. 475. See *supra*, III, A, 1, e; *infra*, III, C, 3, d.

66. Bestor *v.* Barker, 106 Ala. 240, 17 So. 389; Beecher *v.* Bush, 45 Mich. 189, 7 N. W. 785, 40 Am. Rep. 465; McDonald *v.* Matney, 82 Mo. 358; Hazell *v.* Clark, 89 Mo. App. 78.

67. *Florida.*— Webster *v.* Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217 and note, 27 L. R. A. 126.

Massachusetts.— Gunnison *v.* Langley, 3 Allen 337, an instruction that, although the parties might say they were not partners, it did not depend on what they said; and that, while the jury might take that fact into consideration, it was for them to decide the matter on the whole evidence, is proper.

Nebraska.— Gould *v.* Kendall, 15 Nebr. 549, 19 N. W. 483.

Nevada.— Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

Tennessee.— Polk *v.* Buchanan, 5 Sneed 721.

Texas.— Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499.

West Virginia.— Deering *v.* Coberly, 44 W. Va. 606, 29 S. E. 512.

United States.— Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263.

England.— Coventry *v.* Barclay, 33 Beav. 1, 2 New Rep. 375, 11 Wkly. Rep. 892, 55 Eng. Reprint 266; Morison *v.* Moat, 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 492.

See 38 Cent. Dig. tit. "Partnership," §§ 3, 7.

68. *Arkansas.*— Pierce *v.* Scott, 37 Ark. 308, agreement creating a partnership in a newspaper enterprise.

Delaware.— Plunkett *v.* Dillon, 4 Houst. 338, agreement constituting *prima facie* a partnership in the purchase and sale of land.

Georgia.— Byne *v.* Wood, 73 Ga. 129, holding that an instrument reciting that "this writing is to show that G. M. Byne buys half interest in T. K. Mishow's turpentine interest . . . and to become a partner in the business for the term of five years, or longer, if congenial, and the above mentioned parties agree to make the firm responsible for the debts of the same," and signed by G. M. Byne and T. K. Mishow creates a partnership.

Iowa.—Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850 (neither the adoption of a firm-name, nor the use of the term "partnership" in the contract is necessary to constitute a partnership); Illinois Malleable Iron Co. *v.* Reed, 102 Iowa 538, 71 N. W. 423 (a partnership between the owner of a patent and a capitalist).

Kansas.— Rider *v.* Hammell, 63 Kan. 733, 66 Pac. 1026, the written agreement being plain and unambiguous, the existence of a partnership is a question of law.

Kentucky.— Meador *v.* Hughes, 14 Bush 652, a partnership between two firms in buying hogs and packing pork, but the two firms not consolidated. See also Green *v.* Hart, 87 S. W. 315, 27 Ky. L. Rep. 970.

Louisiana.— Brower *v.* His Creditors, 11 La. Ann. 117.

Massachusetts.—Goddard *v.* Pratt, 16 Pick. 412.

Michigan.— Hemenway *v.* Burnham, 90 Mich. 227, 51 N. W. 276.

Minnesota.— Bidwell *v.* Madison, 10 Minn. 13.

New York.— Vagen *v.* Birngruber, 9 N. Y. St. 729.

Oregon.— Kelley *v.* Bourne, 15 Oreg. 476, 16 Pac. 40, a partnership in real estate business.

West Virginia.— Cole *v.* Moxley, 12 W. Va. 730, a partnership in mail-carrying contract.

United States.— Moore *v.* Hammond, 110 Fed. 897 [*affirmed* in 121 Fed. 759]; Bancroft *v.* Hambly, 94 Fed. 975, 36 C. C. A. 595, a partnership in book publishing.

England.— Burnand *v.* Nerot, 2 Bligh N. S. 215, 4 Eng. Reprint 1112, 6 L. J. Ch. O. S. 81, 4 Russ. 247, 4 Eng. Ch. 247, 38 Eng. Reprint 798; Boulter *v.* Peplow, 9 C. B. 493, 19 L. J. C. P. 190, 14 Jur. 248, 67 E. C. L. 493; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754 (no partnership created by the written agreement between creditors and assigning debtor); Coates *v.* Williams, 7 Exch. 205, 21 L. J. Exch. 116; Price *v.* Groom, 2 Exch. 542, 17 L. J. Exch. 346; Bryant *v.* Wardell,

unlimited financial liability.[69] It will not construe arrangements, entered into by members of a family for domestic or coöperative purposes, as partnerships, without clear proof that the parties intended to form such business relations.[70] Nor will the joint ownership and control of property of itself be held to create a partnership between the owners. There must be evidence that the property was acquired and is used as a part of a common business carried on by the owners with a view of profit.[71] Again, where no partnership is intended, the mere agreement to assist or serve another and to receive a share of the profits of the business as

2 Exch. 479; *Re* English, etc., Church, etc., Assur. Soc., 1 Hem. & M. 85, 8 L. T. Rep. N. S. 724, 2 New Rep. 107, 11 Wkly. Rep. 681, 71 Eng. Reprint 38; Wilson *v.* Whitehead, 12 L. J. Exch. 43, 10 M. & W. 503; Crawshay *v.* Maule, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 79, 18 Rev. Rep. 126 (a partnership between legatee and executors under a will); Balmain *v.* Shore, 9 Ves. Jr. 500, 32 Eng. Reprint 696; Ellis *v.* Ward, 21 Wkly. Rep. 100.

See 38 Cent. Dig. tit. "Partnership," §§ 3, 7.

69. Drennen *v.* London Assur. Co., 113 U. S. 51, 57, 5 S. Ct. 341, 28 L. ed. 919 [*reversing* 20 Fed. 657] ("It may be," said the court, "that Drennen, Starr & Everett were unwilling to establish the confidential relations of partner with Arndt, but were willing to unite their property with his money, to be owned by a corporation in which all would become stockholders, according to the amounts respectively contributed to its capital stock"); Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 309, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 745 ("One of the creditors I see is the Midland Railway Company, which is a creditor for a sum only of £39, and to suppose that the directors could imagine that they were making themselves partners is absurd").

70. Howe *v.* Howe, 99 Mass. 71; Chase *v.* Barrett, 4 Paige (N. Y.) 148; Connally *v.* Lyons, 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935.

71. *Alabama.*— Cowles *v.* Garrett, 30 Ala. 341, a tenancy in common not a partnership.

Colorado.— Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803, real estate brokers not partners in a mine, which they had attempted to sell.

Illinois.— Keeley *v.* O'Brien, 66 Ill. 358.

Maine.— Bridges *v.* Sprague, 57 Me. 543, 99 Am. Dec. 788 (master and owner of vessel not partners); Gilmore *v.* Black, 11 Me. 485 (joint grantees of land not partners).

Massachusetts.— Hawes *v.* Tillinghast, 1 Gray 289.

Michigan.— Dutcher *v.* Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776 (a partnership exists between the owner of land and logger therefrom, where there is a common business for joint profit); Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609; Runnels *v.* Moffat, 73 Mich. 188, 202, 41 N. W. 224 (the fact that two persons own and run boats together, paying expenses out of the earnings, and dividing the profits proportionately, does not create a partnership, as between themselves, where there is no partnership name, and there is no understanding between the parties that such relation exists).

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227, joint owners of plantation may be partners in the business transacted thereon.

Missouri.— Ashby *v.* Shaw, 82 Mo. 76 (joint transaction in cattle not a partnership); Pomeroy *v.* Sigerson, 22 Mo. 177 (no partnership between commission houses, one of which forwarded goods to the other, and commissions on sales divided).

Nevada.— Mears *v.* James, 2 Nev. 342, no partnership between owner of quartz mill and his tenants for whom he crushed ore.

New Jersey.— Voorhees *v.* Jones, 29 N. J. L. 270; Volney *v.* Nixon, 67 N. J. Eq. 457, 58 Atl. 75; Hallenback *v.* Rogers, 57 N. J. Eq. 199, 40 Atl. 576 [*affirmed* in 58 N. J. Eq. 580, 43 Atl. 1098]; Oscillating Carousal Co. *v.* McCool, (N. J. Ch. 1896) 35 Atl. 585 (no partnership between the owner of a scenic railway and the owner of a wheel used for amusement in connection with the railway); Wilson *v.* Cobb, 28 N. J. Eq. 177 [*reversed* on other grounds in 29 N. J. Eq. 361] (no partnership between plaintiffs who jointly prosecuted a lawsuit to determine their several rights).

New York.— Wakeman *v.* Somarindyck, 73 N. Y. App. Div. 601, 76 N. Y. Suppl. 815; Ogden *v.* Astor, 4 Sandf. 311; Torres *v.* Rogers, 28 Misc. 176, 58 N. Y. Suppl. 1104; Auten *v.* Ellingwood, 51 How. Pr. 359, no partnership in the property of a newspaper plant, although the owners were partners in the business carried on with it.

North Carolina.— Cox *v.* Delano, 14 N. C. 89, a partnership existed between the owner and captain of a vessel, where the freight earned was the joint property of both, and the captain had power to invest it on joint account.

Ohio.— Farmers Ins. Co. *v.* Ross, 29 Ohio St. 429; Wood *v.* Vallette, 7 Ohio St. 172.

Oregon.— Willis *v.* Crawford, 38 Oreg. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904, no partnership between attorneys who jointly conducted a litigation for a client.

Pennsylvania.— Dunham *v.* Loverock, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. Rep. 838, no partnership between lessor of oil land and tenants thereof; nor between the various tenants, there being no distinct agreement between the latter changing their relation of tenants in common.

South Carolina.— Simpson *v.* Feltz, 1 McCord Eq. 213, 16 Am. Dec. 602.

Vermont.— Farrand *v.* Gleason, 56 Vt. 633,

compensation for services does not constitute a partnership.[72] The same is true of an honest agreement to share profits for the use of money loaned to the business owner,[73] or of property leased to him,[74] even though the agreement secures to the lender or the landowner extensive powers of control over the debtor's business.[75] Oftentimes the partnership contract contains peculiar provisions, imposing upon one or more of the partners obligations differing from those which the law ordinarily infers from the partnership relation, or conferring unusual rights and powers. In all such cases the courts will strive to construe these provisions so as to effectuate the honest intentions of the parties, as shown by the language of the contract and their conduct under it.[76]

i. Modification of Contract. The contract under which a partnership is organized may be varied at any time by the consent of all the partners, and such consent may be proved, either by express agreement, or by the conduct of the parties.[77] If the change is limited to business methods and practices, or, in other

joint purchasers of land who erected a sawmill, and who were to share equally in the expense and profits, whether by sale or leasing, were tenants in common, not partners.

Wisconsin.— White *v.* Fitzgerald, 19 Wis. 480, holding that joint purchasers of land were not partners.

England.— Alfaro *v.* De la Torre, 34 L. T. Rep. N. S. 122, 24 Wkly. Rep. 510.

Canada.— Gillies *v.* Colton, 22 Grant Ch. (U. C.) 123; Hawley *v.* Dixon, 7 U. C. Q. B. 218.

See 38 Cent. Dig. tit. "Partnership," § 7.

72. Olmstead *v.* Hill, 2 Ark. 346; National Surety Co. *v.* T. B. Townsend Brick, etc., Co., 176 Ill. 156, 52 N. E. 938 [*affirming* 74 Ill. App. 312]; Wright *v.* Taylor, 9 Wend. (N. Y.) 538; Martin *v.* Riehl, 27 Misc. (N. Y.) 112, 58 N. Y. Suppl. 141; Haberkorn *v.* Hill, 2 N. Y. Suppl. 243; Ditsche *v.* Becker, 6 Phila. (Pa.) 176.

73. *Georgia.*— Slade *v.* Paschal, 67 Ga. 541.

Illinois.— Freese *v.* Ideson, 49 Ill. 191.

Maryland.— Conklin *v.* Washington University, 2 Md. Ch. 497.

Minnesota.— Delaney *v.* Timberlake, 23 Minn. 383.

Pennsylvania.— Krall *v.* Forney, 182 Pa. St. 6, 37 Atl. 846.

South Carolina.— Drake *v.* Ramey, 3 Rich. 37.

Vermont.— Stearns *v.* Haven, 16 Vt. 87.

West Virginia.— Dils *v.* Bridge, 23 W. Va. 20.

England.— *Ex p.* Mills, L. R. 8 Ch. 569, 28 L. T. Rep. N. S. 606, 21 Wkly. Rep. 557; *In re* Stone, 33 Ch. D. 541, 55 L. J. Ch. 795, 55 L. T. Rep. N. S. 256, 35 Wkly. Rep. 54; *Ex p.* Taylor, 12 Ch. D. 366, 41 L. T. Rep. N. S. 6, 28 Wkly. Rep. 205; Northern R. Co. *v.* Patton, 15 U. C. C. P. 332.

See 38 Cent. Dig. tit. "Partnership," § 7.

74. Holmes *v.* Old Colony R. Corp., 5 Gray (Mass.) 58; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Austin *v.* Neil, 62 N. J. L. 462, 41 Atl. 834; Perrine *v.* Hawkinson, 11 N. J. L. 181; Munson *v.* Hall, 10 Grant Ch. (U. C.) 61; Haydon *v.* Crawford, 3 U. C. Q. B. O. S. 583.

75. *Illinois.*— Foote *v.* Off, 45 Ill. App. 516.

Kentucky.— Hartford F. Ins. Co. *v.* McClain, 85 S. W. 699, 27 Ky. L. Rep. 461.

New Jersey.— Austin *v.* Neil, 62 N. J. L. 462, 41 Atl. 834; Brundred *v.* Muzzy, 25 N. J. L. 268 [*affirmed* in 25 N. J. L. 674].

Oregon.— Klosterman *v.* Hayes, 17 Oreg. 325, 20 Pac. 426.

Vermont.— Stearns *v.* Haven, 16 Vt. 87.

England.— Mollwo *v.* Court of Wards, L. R. 4 P. C. 419.

See 38 Cent. Dig. tit. "Partnership," § 7.

76. *Georgia.*— Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759.

Kansas.— Sexton *v.* Lamb, 27 Kan. 426.

Massachusetts.— McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358.

England.— Syers *v.* Syers, 1 App. Cas. 174, 35 L. T. Rep. N. S. 101, 24 Wkly. Rep. 970; Homfray *v.* Fothergill, L. R. 1 Eq. 567, 14 L. T. Rep. N. S. 49; Byrne *v.* Reid, [1902] 2 Ch. 735, 71 L. J. Ch. 830, 87 L. T. Rep. N. S. 507, 51 Wkly. Rep. 52; Coventry *v.* Barclay, 33 Beav. 1, 2 New Rep. 375, 11 Wkly. Rep. 892, 55 Eng. Reprint 266; Smith *v.* Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Warner *v.* Smith, 1 De G. J. & S. 337, 32 L. J. Ch. 573, 8 L. T. Rep. N. S. 221, 11 Wkly. Rep. 392, 66 Eng. Ch. 261, 46 Eng. Reprint 135; Tatam *v.* Williams, 3 Hare 347, 25 Eng. Ch. 346, 67 Eng. Reprint 415; Pilsworth *v.* Mosse, 14 Ir. Ch. 163; Lovegrove *v.* Nelson, 3 L. J. Ch. 108, 3 Myl. & K. 1, 10 Eng. Ch. 1, 40 Eng. Reprint 1.

Canada.— Hibben *v.* Collister, 30 Can. Sup. Ct. 459; Wells *v.* Petty, 5 Brit. Col. 353; Goold *v.* Stockton, 31 N. Brunsw. 57; Lawton Saw Co. *v.* Machum, 2 N. Brunsw. Eq. 112; Martin *v.* Martin, 1 N. Brunsw. Eq. 515; O'Lone *v.* O'Lone, 2 Grant Ch. (U. C.) 125.

77. Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

Variations evidenced by conduct.—"Partners may make constant variations in the terms of their partnership agreement which may be evidenced not only by writing but by their conduct." England *v.* Curling, 8 Beav. 129, 50 Eng. Reprint 51.

Partners may modify, alter, or dissolve the copartnership contract, as between themselves, either in whole or in part, pro-

words, to the collateral, as distinguished from the fundamental, provisions of the contract, it may be made by a majority of the partners; otherwise unanimity is required.[78] While even the most important articles may be waived by a partner, his waiver is not to be presumed from the mere disregard of such articles by a copartner; his conduct must be such as to show a habitual assent to the copartner's violation of the original provisions, and to the substitution of new terms therefor.[79] When the rights of third persons are involved, the conduct of the waiving partner to be considered is that which is displayed to them; not the private dealings and conversations between the partners themselves.[80] In some cases the terms of a partnership may be varied by judicial decree.[81]

j. Effect of Mistake, Misrepresentation, or Fraud in Contract. Parties, when treating for a contract of partnership, are bound to exercise the utmost good faith toward each other. They are contemplating a relation, in the highest degree confidential, and which puts each party at the mercy of the other. The contract is often spoken of as *uberrimæ fidei*.[82] And to sustain an action for rescission of

vided they do not violate any principle of law or public policy, and this may be done by written or oral agreement, or by conduct which shows consent to the change. Solomon *v.* Solomon, 2 Ga. 18.

Nature of changes.— The change may relate to the nature of the partnership enterprise (Boisgerard *v.* Wall, Sm. & M. Ch. (Miss.) 404; Roberts' Appeal, 92 Pa. St. 407; Jennings' Appeal, (Pa. 1888) 16 Atl. 19), to the share of either partner in the proceeds or the profits of the business (Askew *v.* Springer, 111 Ill. 662; Robbins *v.* Laswell, 27 Ill. 365; *Ex p.* Thompson, 8 Jur. 633, 13 L. J. Ch 354; Pilling *v.* Pilling, 3 De G. J. & S. 162, 68 Eng. Ch. 124, 46 Eng. Reprint 599. *Compare* Lawes *v.* Lawes, 9 Ch. D. 98, 38 L. T. Rep. N. S. 709, 27 Wkly. Rep. 186); or the powers to be exercised by the respective members (McRae *v.* Campbell, 101 Ga. 662, 28 S. E. 920; Monongahela Valley Bank *v.* Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547).

78. Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Markle *v.* Wilbur, 200 Pa. St. 457, 50 Atl. 204; Clarke *v.* State Valley R. Co., 136 Pa. St. 408, 414, 20 Atl. 562, 10 L. R. A. 238 ("Where a firm consists of more than two persons, the majority, acting fairly and in good faith, may direct the conduct of its affairs as long as they keep within the purposes and scope of the partnership").

Statement of rule.— The articles agreed on to regulate a partnership cannot be altered without the consent of all the partners; but the continuance or discontinuance of a practice not stipulated for, nor made the subject of covenant, must be decided by the majority of the partners. The negative of the minority, in such cases, is of no avail, if they have had a proper opportunity of considering the matter. Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

79. Thomas *v.* Lines, 83 N. C. 191; Austen *v.* Boys, 2 De G. & J. 626, 4 Jur. N. S. 719, 27 L. J. Ch. 714, 6 Wkly. Rep. 429, 59 Eng. Ch. 492, 44 Eng. Reprint 1133; Matter of Vale of Neath, etc., Brewery Co., 3 De G. M. & G. 272, 52 Eng. Ch. 213, 43 Eng. Reprint 107; Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

Substitution of new terms.— The original terms of a partnership may be waived or tacitly changed by the conduct of the partners, so as to substitute new terms and conditions. . . . But before the terms of the original agreement can be considered as waived . . . it must appear that some new terms have been agreed upon as a substitute. McGraw *v.* Pulling, Freem. (Miss.) 357, 371.

80. Monongahela Valley Bank *v.* Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547, "Failure of the other members of a partnership to stop their co-member from indorsing the firm name for the accommodation of third parties, or to give notice of his want of authority so to do, after repeated offenses constituting a systematic and persistent course of conduct, known to the other members and privately objected to by them, constitutes evidence of acquiescence and ratification which raises a question of fact as to their good faith and as to an implied authority to make the indorsements, even in the case of a holder who had received from the maker notes so indorsed."

81. Martindale *v.* Martindale, 1 Jur. N. S. 932, a case where the terms were unduly onerous to the surviving partner, and the change asked for was also beneficial to infants who were interested in the estate of the deceased partner.

82. Helmore *v.* Smith, 35 Ch. D. 436, 56 L. T. Rep. N. S. 535, 36 Wkly. Rep. 3.

Fraud need not be wilful.— Accordingly it may be rescinded and the partnership dissolved, not only for wilful fraud, or deliberate overreaching, or intentional falsehood, practised by one partner upon his copartner (Fogg *v.* Johnston, 27 Ala. 432, 62 Am. Dec. 771; White *v.* Smith, 63 Ark. 513, 39 S. W. 555; Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376; Hynes *v.* Stewart, 10 B. Mon. Ky. 429; Maddeford *v.* Austwick, 1 Sim. 89, 2 Eng. Ch. 89, 57 Eng. Reprint 512 [*affirmed* in 2 Myl. & K. 279, 27 Rev. Rep. 167, 7 Eng. Ch. 279, 39 Eng. Reprint 950]), but even for innocent misrepresentation, which would not sustain a common-law action for deceit, or justify the rescission of a contract

such a contract plaintiff need not show that he has suffered pecuniary damage. He is entitled to be released from the hazardous tie of partnership relations with one who has failed to observe the highest standard of honor in their confidential association.[83] The fact that defendant has been guilty of fraudulent conduct toward other persons will not, however, entitle plaintiff to be released from partnership connection with him.[84] Even when a partner has a right to rescind the partnership agreement, he may lose it by ratifying the transaction with full knowledge of the facts,[85] or he may waive it and sue for such damages as he can show

of purchase and sale between persons whose relations are not confidential (Powell *v.* Cash, 54 N. J. Eq. 218, 34 Atl. 1131 [*affirmed* in 55 N. J. Eq. 826, 41 Atl. 1115]; Rawlins *v.* Wickham, 1 Giffard 355, 4 Jur. N. S. 999, 6 Wkly. Rep. 509, 65 Eng. Reprint 954 [*affirmed* in 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237, 44 Eng. Reprint 1285], where the party making the misrepresentation did not know it to be untrue).

83. *Alabama.*— Fogg *v.* Johnston, 27 Ala. 432, 62 Am. Dec. 771.

Arkansas.— Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376.

Indiana.— Cohoon *v.* Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; St. John *v.* Hendrickson, 81 Ind. 350.

Kentucky.— Hynes *v.* Stewart, 10 B. Mon. 429.

Michigan.— Rambo *v.* Patterson, 133 Mich. 655, 95 N. W. 772.

New Jersey.— Powell *v.* Cash, 54 N. J. Eq. 218, 34 Atl. 131 [*affirmed* in 55 N. J. Eq. 826, 41 Atl. 1115].

New York.—Harlow *v.* La Brum, 151 N. Y. 278, 45 N. E. 859 [*affirming* 82 Hun 292, 31 N. Y. Suppl. 487].

Pennsylvania.— Craig *v.* Huber, 3 Pittsb. Leg. J. 108.

Rhode Island.— Fuller *v.* Atwood, 13 R. I. 316.

Texas.— Caplen *v.* Cox, (Civ. App. 1906) 92 S. W. 1048.

West Virginia.— Kimmins *v.* Wilson, 8 W. Va. 584. In this case a partner was deceived by one of several copartners, without complicity on the part of the others; and it was held that plaintiff's only relief was an action for damages against the deceiver.

England.— Adam *v.* Newbigging, 13 App. Cas. 308, 57 L. J. Ch. 1066, 59 L. T. Rep. N. S. 267, 37 Wkly. Rep. 97 [*affirming* 34 Ch. D. 582]; Bagot *v.* Eastern, 7 Ch. D. 1, 47 L. J. Ch. 225, 37 L. T. Rep. N. S. 369, 26 Wkly. Rep. 66; Charlesworth *v.* Jennings, 34 Beav. 96, 11 L. T. Rep. N. S. 439, 55 Eng. Reprint 569; Jauncey *v.* Knowles, 29 L. J. Ch. 95, 1 L. T. Rep. N. S. 116, 8 Wkly. Rep. 69; Maddeford *v.* Austwick, 1 Sim. 89, 2 Eng. Ch. 89, 57 Eng. Reprint 512 [*affirmed* in 2 Myl. & K. 279, 27 Rev. Rep. 167, 7 Eng. Ch. 279, 39 Eng. Reprint 950]. *Compare* McLure *v.* Ripley, 2 Macn. & G. 274, 48 Eng. Ch. 211, 42 Eng. Reprint 105, holding that the non-communication to plaintiff of letters received by defendant, relating to a partnership venture in which they had agreed to engage, was not ground for impeaching the arrangement finally made between them.

Canada.— Morrison *v.* Earls, 5 Ont. 434; Mallon *v.* Craig, 3 Ont. 541.

See 38 Cent. Dig. tit. "Partnership," § 11.

Lien on assets.— The defrauded partner, upon securing a decree of rescission, is entitled to a lien on, or right of detention of, the surplus of the partnership assets, after satisfying partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and to stand in the place of the creditors of the firm for any payments made by him, in respect of the partnership liabilities. Brit. Partn. Act (1890), § 41 (a), (b). And see Mycock *v.* Beatson, 13 Ch. D. 384, 49 L. J. Ch. 127, 42 L. T. Rep. N. S. 141, 28 Wkly. Rep. 319.

Right of indemnity.— The defrauded partner is entitled to be indemnified by the defrauding partner or partners against all the debts and liabilities of the firm. Brit. Partn. Act (1890), § 41, (c). See also Hynes *v.* Stewart, 10 B. Mon. (Ky.) 429; Adam *v.* Newbigging, 13 App. Cas. 308, 57 L. J. Ch. 1066, 59 L. T. Rep. N. S. 267, 37 Wkly. Rep. 97; Merchants Bank *v.* Thompson, 3 Ont. 541.

Rights of creditors.—When a person has been induced by fraud to become a partner of another, and to agree that the firm shall assume the debts of the business, he may rescind the partnership contract; and if he does his liability to the creditors of the old business is also annulled. Craig *v.* Huber, 3 Pittsb. Leg. J. (Pa.) 108, holding that the consideration of defendant's agreement to become a debtor to the old creditors had failed. He cannot escape liability, however, for the debts contracted by the partnership, while he continues a member of it. Hynes *v.* Stewart, 10 B. Mon. (Ky.) 429, 433 ("The injured party, except so far as the interests of the creditors of the firm may be concerned, should not be regarded as a partner"); *Ex p.* Broome, 1 Rose 69 (the defrauded party has an equity as against his associate, to say that he never was a partner of the defrauding party, but he has no such equity against the firm creditors).

84. Andrewes *v.* Garstin, 10 C. B. N. S. 444, 7 Jur. N. S. 1124, 31 L. J. C. P. 15, 4 L. T. Rep. N. S. 580, 9 Wkly. Rep. 782, 100 E. C. L. 444.

85. St. John *v.* Hendrickson, 81 Ind. 350; Fuller *v.* Atwood, 13 R. I. 316; Riddel *v.* Smith, 10 L. T. Rep. N. S. 561, 12 Wkly. Rep. 899. *Compare* Rambo *v.* Patterson, 133 Mich. 655, 95 N. W. 722, showing that this right is not easily lost.

he has sustained by defendant's misrepresentations.[86] The duty of a partner to observe the utmost good faith toward his associates, and his liability for innocent misrepresentations which are relied on by them to their harm, extend to all agreements between partners, during the existence of the firm, including agreements for the sale or purchase of a copartner's share in the business.[87]

2. COMMUNITY OF INTEREST — a. General Principles. Mere community of interest, even as owners of specific property, or of the profits from a particular adventure or business, does not necessarily constitute the coöwners partners.[88] The community of interest must be such as to show that the coöwners have bound themselves together as a single association, by a contract which is joint as between themselves, which renders them jointly liable to persons dealing with the association, which entitles them jointly to maintain actions against debtors, and which creates a joint fund for division among them.[89]

86. Cohoon *v.* Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Rice *v.* Culver, 32 N. J. Eq. 601.

87. Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662; Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; Sexton *v.* Sexton, 9 Gratt. (Va.) 204; Maddeford *v.* Austwick, 1 Sim. 89, 2 Eng. Ch. 89, 57 Eng. Reprint 512 [*affirmed* in 2 Myl. & K. 279, 27 Rev. Rep. 169, 7 Eng. Ch. 279, 39 Eng. Reprint 950].

88. *California.*— Hanna *v.* Flint, 14 Cal. 73.

Louisiana.— Breard *v.* Blanks, 51 La. Ann. 1507, 26 So. 618, joint purchasers of property not partners.

Michigan.— Marsh *v.* Mueller, 96 Mich. 488, 56 N. W. 71 (coöwners of a bond and mortgage and of an interest in a firm, not partners); Morrison *v.* Cole, 30 Mich. 102.

Missouri.— Ryan *v.* Riddle, 109 Mo. App. 115, 82 S. W. 1117, community of interest in the profits, but no partnership, the relation of parties being that of debtor and creditor.

Nebraska.— Lushton State Bank *v.* O. S. Kelley Co., 47 Nebr. 678, 66 N. W. 619.

New Hampshire.— Gibson *v.* Stevens, 7 N. H. 352, community of interest between trustee and a beneficiary not a partnership.

New Jersey.—Potter *v.* Morris, etc., Dredging Co., 59 N. J. Eq. 422, 46 Atl. 537, an association to maintain uniform prices and to secure an equitable distribution of work between business competitors not a partnership.

New York.— Rockwell *v.* Peck, 13 N. Y. App. Div. 621, 43 N. Y. Suppl. 196 (transferees under a bill of sale not partners); Hawley *v.* Keeler, 62 Barb. 231 [*affirmed* in 53 N. Y. 114] (patrons of a cheese factory not partners); Peltier *v.* Sewell, 3 Wend. 269 (common interest in a shipment of cotton, but no partnership).

Ohio.— Bell *v.* Pistorius, 18 Ohio Cir. Ct. 73, 9 Ohio Cir. Dec. 869 (no partnership between three families who jointly hired a coachman); Merchants' Nat. Bank *v.* Standard Wagon Co., 10 Ohio S. & C. Pl. Dec. 81, 7 Ohio N. P. 539 (an association between buggy manufacturers not a partnership).

Philippines.— Pastor *v.* Gaspar, 2 Philippine 592.

South Carolina.— Lowry *v.* Brooks, 2 McCord 421, a mere contract for hire to carry goods to a certain place, and bring back a return load for half of the net proceeds of the two loads, does not constitute a partnership.

Vermont.— Hawkins *v.* McIntyre, 45 Vt. 496, a partnership does not exist between employer and employee, although they are to divide the net price of the job.

Virginia.— Bowyer *v.* Anderson, 2 Leigh 550, no partnership between lessor and lessee of ferry, who are to share the profits.

West Virginia.—Setzer *v.* Beale, 19 W. Va. 274; Chapline *v.* Conand, 3 W. Va. 507, 100 Am. Dec. 766.

Canada.—Archbald *v.* deLisle, 25 Can. Sup. Ct. 1; Mendelssohn Piano Co. *v.* Graham, 19 Ont. 83 [*affirmed* in 17 Ont. App. 378].

See 38 Cent. Dig. tit. "Partnership," § 13.

Compare Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Rogers *v.* Waltz, 12 Montg. Co. Rep. (Pa.) 160.

Statement of rule.—"In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them and also an agreement to share the profits and losses arising therefrom." Sodiker *v.* Applegate, 24 W. Va. 411, 415, 49 Am. Rep. 252.

Illustrations.— An agreement by several persons to unite in procuring a sale of property, each one to receive a specified part of the commission earned, does not constitute a partnership. Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588. Where a person advances money to the owners of a vessel and cargo, who promise to pay him a share of the proceeds of the voyage in proportion to the sum advanced by him, he does not thereby become a partner. Gallop *v.* Newman, 7 Pick. (Mass.) 282. Mere joint ownership in a patent does not constitute a partnership. Boeklen *v.* Hardenbergh, 60 N. Y. 8.

89. *Colorado.*— McDonald *v.* McLeod, 3 Colo. App. 344, 33 Pac. 285.

Indiana.— Bond *v.* May, 38 Ind. App. 396, 78 N. E. 260.

Minnesota.— Stern *v.* Harris, 40 Minn. 209, 41 N. W. 1036.

Missouri.— Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465.

b. Application of General Principles. When two persons, by a contract in writing, become associates in a mercantile business, one contributing cash, and the other contributing labor to the joint stock, and stipulating that all the net profits shall be equally divided among them, there can be no doubt that a partnership exists between them.[90] But little if any doubt can arise as to the existence of a partnership when builders jointly contract for the construction of a house, or when persons contract to manufacture chattels, or to engage in the purchase and sale of lands as a speculation, or when they own and run a sawmill jointly, or a gristmill, with a view of dividing between them the profits realized from such transactions.[91] Ordinarily the owners of a ship are not partners;[92] but when it is

New York.— Smith *v.* Small, 54 Barb. 223; Vassar *v.* Camp, 14 Barb. 341 [*affirmed* in 11 N. Y. 441]; Porter *v.* McClure, 15 Wend. 187; Chase *v.* Barrett, 4 Paige 148.

Oregon.—Cogswell *v.* Wilson, 11 Oreg. 371, 4 Pac. 1130.

Pennsylvania.— Williams *v.* Morgan, 26 Pa. Co. Ct. 81; Walsh *v.* Langan, 5 Lack. Jur. 303.

Texas.— See American Refrigerator Transit Co. *v.* Chandler, (Civ. App. 1906) 93 S. W. 243.

Vermont.— Brigham *v.* Dana, 29 Vt. 1; Griffith *v.* Buffum, 22 Vt. 181, 54 Am. Dec. 64, where it is held that if it be agreed between the parties that one shall furnish, on his own account, a portion of stone to be used in the business; yet, if, when purchased, it becomes the subject of labor and skill, and in its altered state is to be sold for the common benefit, it constitutes a partnership business.

United States.— Buckingham *v.* Chicago First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498; H. B. Claflin Co. *v.* Gross, 112 Fed. 386, 50 C. C. A. 300; McElroy *v.* Swope, 47 Fed. 380.

Canada.—Trustees *v.* Oland, 35 Nova Scotia 409.

See 38 Cent. Dig. tit. "Partnership," § 13.

Community of interest and mutual agency. — Partnership involves community of interest in some lawful commerce or business for the conduct of which the parties are mutually agents for each other — but with general powers within the scope of the business, which powers they can restrict by agreement to the extent of making one the sole agent of the rest of the business. Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. See also Brotherton *v.* Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. Rep. 397; Dutcher *v.* Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; American Refrigerator Transit Co. *v.* Chandler, (Tex. Civ. App. 1906) 93 S. W. 243; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 745. But see Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162.

90. Lapp, etc., Co. *v.* Clark, 85 S. W. 717, 27 Ky. L. Rep. 452; Buckingham *v.* Chicago First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498. See also Simpson *v.* Feltz, 1 McCord Eq. (S. C.) 213, 16 Am. Dec. 602.

91. *Colorado.*— McDonald *v.* McLeod, 3 Colo. App. 344, 33 Pac. 285, the entering into a joint contract by two persons for the construction of a house on the land of another, and the joint reaping of the benefits and profits therefrom, constitute them partners as to such undertaking. They jointly contracted, were jointly responsible, jointly reaped the results, and were copartners, although for a single adventure.

Georgia.— Camp *v.* Montgomery, 75 Ga. 795, joint owners of a sawmill, who divided the net profits.

Iowa.— Heard *v.* Wilder, 81 Iowa 421, 46 N. W. 1075 [*distinguishing* Ruddick *v.* Otis, 33 Iowa 402; Iliff *v.* Brazill, 27 Iowa 131, 99 Am. Dec. 645, joint speculation in town lots].

Kansas.— Jones *v.* Davies, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354, real estate speculation.

Kentucky.— Tanner *v.* Hughes, 50 S. W. 1099, 21 Ky. L. Rep. 77, the business of buying and clearing timber lands, including sale of the lumber.

Maine.— Woodward *v.* Cowing, 41 Me. 9, 66 Am. Dec. 211; Barrett *v.* Swann, 17 Me. 180, manufacturing paper. If several persons subscribe the amount necessary to construct a building, to be owned by them in common, they are not partners, necessarily.

Maryland.— Morgart *v.* Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, buying and selling land and dividing profits.

Pennsylvania.—Simpson *v.* Summerville, 30 Pa. Super. Ct. 17, purchasing and selling leaseholds and dividing profits.

South Carolina.— Benson *v.* McBee, 2 McMull. 91, carrying on the common business of milling and selling grain.

United States.— McElroy *v.* Swope, 47 Fed. 380 (dealing in lands affected with tax-titles); Thrall *v.* Crampton, 23 Fed. Cas. No. 14,008, 9 Ben. 218 (buying, improving, and selling land).

England.— *Re* Hulton, 62 L. T. Rep. N. S. 200 (joint speculation in lands); Noakes *v.* Barlow, 26 L. T. Rep. N. S. 136, 20 Wkly. Rep. 386 (business of building houses).

See 38 Cent. Dig. tit. "Partnership," §§ 13, 14.

92. French *v.* Price, 24 Pick. (Mass.) 13; Williams *v.* Sheppard, 13 N. J. L. 76; Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513; Macy *v.* De Wolf, 16 Fed. Cas. No.

built under a special agreement, whereby one of the owners is to be master and the other to be ship's husband, and the vessel is to be employed on joint account as a regular packet between certain stations, it is a partnership affair, both as to ship and freight.[93] When a business, together with the real estate, implements, mechanism, and fixtures used therein, is bequeathed to two persons, who continue the business, they become partners, without any formal agreement upon the subject, and the property is partnership capital.[94] The loan of money to be invested in trade, the lender to have one-half the net proceeds therefor, does not make the lender and the borrower partners.[95] Joint purchasers of real or personal property, who do not acquire it for the purpose of carrying on a common business with it, or as incidental to such a business, are not partners simply because of their community of interest.[96] Indeed the presumption is against a partnership in such

8,933, 3 Woodb. & M. 193; Montell *v.* The William H. Rutan, 17 Fed. Cas. No. 9,724; Baker *v.* Casey, 19 Grant Ch. (U. C.) 537.

93. Sprowl *v.* Kellar, 4 Stew. & P. (Ala.) 382; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Dunham *v.* Jarvis, 8 Barb. (N. Y.) 88, 2 Edm. Sel. Cas. 145; Green *v.* Briggs, 6 Hare 395, 12 Jur. 326, 17 L. J. Ch. 323, 31 Eng. Ch. 395, 67 Eng. Reprint 1219; Doddington *v.* Hallet, 1 Ves. 497, 27 Eng. Reprint 1165, partnership limited to the earnings of the vessel.

94. MacFarlane *v.* MacFarlane, 82 Hun (N. Y.) 238, 31 N. Y. Suppl. 272; Pepper *v.* Robinson, 32 Wkly. Notes Cas. (Pa.) 200.

95. Culley *v.* Edwards, 44 Ark. 423, 51 Am. Rep. 614. But *compare* Hackett *v.* Stanley, 14 Daly (N. Y.) 210, 218, 2 N. Y. St. 266 [*affirmed* in 115 N. Y. 625, 22 N. E. 745], holding that where one lends money to another "expressly for use in" a certain business, "and for no other use whatsoever," and that other is to make regular statements of the condition of the business, the two dividing equally the yearly net profits, they are partners.

96. *Alabama.*—Abernathy *v.* Smith, 57 Ala. 359, 363, "the land was not bought for sale again as merchandise."

Arkansas.— Oliver *v.* Gray, 4 Ark. 425, joint purchase of a horse, which was to be kept by one party for a certain time at a certain price.

Colorado.— Lee *v.* Cravens, 9 Colo. App. 272, 48 Pac. 159.

District of Columbia.— Slater *v.* Van der Hoogt, 23 App. Cas. 417.

Georgia.— Augusta Nat. Bank *v.* Bones, 75 Ga. 246.

Illinois.— Furber *v.* Page, 143 Ill. 622, 32 N. E. 444; Sailors *v.* Nixon-Jones Printing Co., 20 Ill. App. 509.

Iowa.— Loetscher *v.* Dillon, 119 Iowa 202, 93 N. W. 98; Iliff *v.* Brazill, 27 Iowa 131, 99 Am. Dec. 645; Munson *v.* Sears, 12 Iowa 172.

Kansas.— Tate *v.* Crooks, 64 Kan. 887, 68 Pac. 74.

Louisiana.—Labit *v.* Francioni, 25 La. Ann. 488.

Maine.— Winslow *v.* Young, 94 Me. 145, 47 Atl. 149; Chapman *v.* Eames, 67 Me. 452; Woodward *v.* Cowing, 41 Me. 9, 66 Am. Dec. 211.

Maryland.— Treiher *v.* Lanahan, 23 Md. 116.

Massachusetts.— Thurston *v.* Horton, 16 Gray 274; Sikes *v.* Work, 6 Gray 433.

Michigan.— Monroe *v.* Greenhoe, 54 Mich. 9, 19 N. W. 569.

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227.

Missouri.— Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465; Musser *v.* Brink, 68 Mo. 242, 80 Mo. 350; Deyerle *v.* Hunt, 50 Mo. App. 541; Hedges *v.* Wear, 28 Mo. App. 575; Ward *v.* Bodeman, 1 Mo. App. 272.

New Jersey.— Marsh *v.* Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 Atl. 481, joint owners of a patent right, not partners, in the absence of special agreement for that relation.

New Mexico.— Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748 (joint payees of a note given for price of stock sold by them as individuals are not partners); Wormser *v.* Lindauer, 9 N. M. 23, 49 Pac. 896.

New York.— Walker *v.* Spencer, 86 N. Y. 162; Baldwin *v.* Burrows, 47 N. Y. 199; Irvine *v.* Forbes, 11 Barb. 587; Boeklen *v.* Hardenburgh, 37 N. Y. Super. Ct. 110; Ward *v.* Gaunt, 6 Duer 257; Dart *v.* Walker, 3 Daly 136; Putnam *v.* Wise, 1 Hill 234, 37 Am. Dec. 309; Peltier *v.* Sewell, 3 Wend. 269; Holmes *v.* United Ins. Co., 2 Johns. Cas. 329 (joint owners of a cargo not partners). See also Levine *v.* Goldsmith, 34 Misc. 7, 9, 69 N. Y. Suppl. 446 [*reversed* on other grounds in 71 N. Y. App. Div. 204, 75 N. Y. Suppl. 706], holding that the fact that property owned in common is used in and for the partnership is not in itself sufficient to make it partnership property.

Pennsylvania.— Taylor *v.* Fried, 161 Pa. St. 53, 28 Atl. 993; Butler Sav. Bank *v.* Osborne, 159 Pa. St. 10, 28 Atl. 163, 39 Am. St. Rep. 665; Coursin's Appeal, 79 Pa. St. 220; Brady *v.* Colhoun, 1 Penr. & W. 140, joint purchasers of land, without an agreement of partnership, are not partners.

Texas.— Worsham *v.* Vignal, 14 Tex. Civ. App. 324, 37 S. W. 17, a single joint purchase of cattle, with no agreement about selling or holding them, is not a partnership.

Vermont.— Fish *v.* Thompson, 68 Vt. 273, 35 Atl. 174; Penniman *v.* Munson, 26 Vt. 164.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

United States.— Fechteler *v.* Palm, 133

cases, especially if the transaction relates to agricultural lands,[97] animals and crops,[98] or to property acquired and held by religious and social organizations,[99] or by families,[1] for mutual benefit, but not for trade profits. So too arrangements for farming on shares are presumed not to create partnerships.[2] The same presumption has been applied to leases of fishery grounds,[3] and to agreements for dividing the reward offered for the apprehension of criminals.[4] Organizations for the maintenance of savings funds of depositors, or mutual insurance, are not partnerships, although the members have a community of interest.[5]

c. Sharing Profits — (i) *Presumption From Sharing Profits.* While the sharing of the profits of a business, which appears to be carried on by the participants as coöwners, raises a presumption that they are partners,[6] it is not conclusive evidence of a partnership. It may be, and often is, rebutted by other facts and circumstances.[7]

Fed. 462, 66 C. C. A. 336; Holton *v.* Guinn, 76 Fed. 96.

England.— Kay *v.* Johnston, 21 Beav. 536, 52 Eng. Reprint 967; Heap *v.* Dobson, 15 C. B. N. S. 460, 109 E. C. L. 460; Hoare *v.* Dawes, Dougl. (3d ed.) 371; Hamilton *v.* Smith, 5 Jur. N. S. 32, 28 L. J. Ch. 404, 7 Wkly. Rep. 173 (promoters of a syndidate, which becomes abortive, are not partners in property purchased by them for the projected syndidate); *Ex p.* Macmillan, 24 L. T. Rep. N. S. 143; McInroy *v.* Hargrove, 16 L. T. Rep. N. S. 509, 15 Wkly. Rep. 777.

Canada.— Archbald *v.* deLisle, 25 Can Sup. Ct. 1.

See 38 Cent. Dig. tit. "Partnership," §§ 13, 14.

Where the members of a partnership convey realty to a copartner, under an agreement that he shall hold it as partnership property, to be improved by their equal contributions, and shall reconvey the undivided shares of such property to them on request, such agreement does not constitute the parties copartners in the real estate so conveyed, since to constitute a partnership there must be some joint adventure, and an agreement to share in the profits and loss of the undertaking. This agreement simply provided for joint ownership, improvement and the reconveyance by the holder of the legal title to each cotenant of his share. Bird *v.* Morrison, 12 Wis. 138.

97. Musser *v.* Brink, 80 Mo. 350; Osceola Bank *v.* Outhwaite, 50 Mo. App. 124.

98. Beckwith *v.* Talbot, 2 Colo. 639; Ashby *v.* Shaw, 82 Mo. 76; Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033.

99. Teed *v.* Parsons, 202 Ill. 455, 66 N. E. 1044 [*reversing* 100 Ill. App. 342] (an organization for religious and social purposes, whose members put all their property into a common fund, but do not carry on a business for profit, is not a partnership); Woodward *v.* Cowing, 41 Me. 9, 66 Am. Dec. 211 (church buildings).

1. Price *v.* Grice, 10 Ida. 443, 79 Pac. 387.

2. *Alabama.*— Randle *v.* State, 49 Ala. 14.

Arizona.— Romero *v.* Dalton, 2 Ariz. 210, 11 Pac. 863.

Georgia.— Smith *v.* Summerlin, 48 Ga. 425; Holloway *v.* Brinkley, 42 Ga. 226.

Indiana.— Shrum *v.* Simpson, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792.

Maryland.— Rose *v.* Buscher, 80 Md. 225, 30 Atl. 637.

Missouri.— Donnell *v.* Harshe, 67 Mo. 170.

Pennsylvania.— Brown *v.* Jaquette, 2 Del. Co. 245.

But *compare* Allen *v.* Davis, 13 Ark. 28; Bailey *v.* Ferguson, 39 Ill. App. 91.

3. Hanthorn *v.* Quinn, 42 Oreg. 1, 69 Pac. 817.

4. Dawson *v.* Gurley, 22 Ark. 381.

5. Makin *v.* Portland Sav. Inst., 23 Me. 350, 41 Am. Dec. 389; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522; *In re* Security L. Ins., etc., Co., 11 Hun (N. Y.) 96; Bewley *v.* Equitable L. Assur. Soc., 61 How. Pr. (N. Y.) 344; Leffham *v.* Flanigan, 5 Phila. (Pa.) 155; *Re* English, etc., Church, etc., Assur. Soc., 1 Hem. & M. 85, 8 L. T. Rep. N. S. 724, 2 New Rep. 107, 11 Wkly. Rep. 681, 71 Eng. Reprint 38.

Persons insuring in a mutual insurance company, under a statute declaring every person insured a member of the company, are associates in the nature of limited or special partners. Krugh *v.* Lycoming F. Ins. Co., 77 Pa. St. 15.

6. *Illinois.*— Niehoff *v.* Dudley, 40 Ill. 406; Illingworth *v.* Parker, 62 Ill. App. 650 ("Where no statute interferes, an agreement to share profits is *prima facie* an agreement for a partnership"); Griffen *v.* Cooper, 50 Ill. App. 257.

Minnesota.— McDonald *v.* Campbell, 96 Minn. 87, 104 N. W. 760.

New York.—Lefevre *v.* Silo, 112 N. Y. App. Div. 464, 98 N. Y. Suppl. 321.

North Carolina.— Kootz *v.* Tuvian, 118 N. C. 393, 24 S. E. 776.

Philippines.— See Fernandez *v.* De la Rosa, 1 Philippine 671.

England.— Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 43 Wkly. Rep. 312; Walker *v.* Hirsch, 27 Ch. D. 460, 54 L. J. Ch. 315, 51 L. T. Rep. N. S. 581, 32 Wkly. Rep. 992, both construing English Partn. Act (1890), § 2, (3).

See also *infra*, III, C, 3, a.

7. *Illinois.*— Pierpont *v.* Lanphere, 104 Ill. App. 232.

Kansas.— Beard *v.* Rowland, 71 Kan. 873, 81 Pac. 188.

Massachusetts.— Meserve *v.* Andrews, 104 Mass. 360; Rice *v.* Austin, 17 Mass. 197.

(II) *Existence of Business.* The partnership relation was first instituted by and between merchants for their convenience and profit in carrying on a trade adventure.[8] It is still confined by our law to persons who are co-principals in a business. Hence, if persons are associated in an enterprise, not as co-principals of a business, but as tenants in common of certain property; or, if it appears that the business is owned by one of the associates only, the fact that the associates share in the profits does not raise even the presumption of a partnership between them.[9] The individual rights, property interests, and powers of the associates, so far as the enterprise in question is involved, must be merged in a common business association.[10]

Oregon.— Willis *v.* Crawford, 38 Oreg. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

West Virginia.— Clark *v.* Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. N. S. 503.

England.— *Ex p.* Tennant, 6 Ch. D. 303, 37 L. T. Rep. N. S. 284, 25 Wkly. Rep. 854; Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep. N. S. 72, 14 Wkly. Rep. 338. See Walker *v.* Hirsch, 27 Ch. D. 460, 54 L. J. Ch. 315, 51 L. T. Rep. N. S. 581, 32 Wkly. Rep. 992; Pawsey *v.* Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 Wkly. Rep. 469.

Canada.— *In re* Randolph, 1 Ont. App. 315. See also Merchants Bank *v.* Thompson, 3 Ont. 541.

See 38 Cent. Dig. tit. "Partnership," § 15. And see *infra*, III, C, 3, a.

The tendency of the more modern authorities is toward the doctrine that the sharing of profits is evidence that he who shares them is a partner, but not conclusive evidence; the true test being whether there is such a participation in or sharing of the profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business. The intention of the parties must control. The relation of partners is formed by contract, or by the acts of the parties which amount to a contract. If there is no partnership *inter se*, there can be none as to third parties, unless a party by his acts has put himself in such a position that he is estopped from denying that he is a partner. Johnson *v.* Rothschilds, 63 Ark. 518, 41 S. W. 996, 997; Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 590, 51 Am. Rep. 65.

8. See *supra*, II.

9. *Alabama.*—Pulliam *v.* Schimpf, 100 Ala. 362, 14 So. 488; Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497, 85 Ala. 19, 4 So. 639, associates in sale of fertilizers not partners, when the only interest one of them has in the business is the right to have such quantities as he desires for his own use at a discount.

Arkansas.— Harris *v.* Umsted, 79 Ark. 499, 96 S. W. 146.

California.— Quackenbush *v.* Sawyer, 54 Cal. 439 (parties tenants in common of a circus outfit); Wheeler *v.* Farmer, 38 Cal. 203.

Colorado.— Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947 (purchasers were to have a credit of one-half of the profits, but this did not make them partners of the sellers); Omaha, etc., Smelting, etc., Co. *v.* Rucker, 6 Colo. App. 334, 40 Pac. 853.

Louisiana.— Bower *v.* Johnson, 28 La. Ann. 9.

Maine.— Knowlton *v.* Reed, 38 Me. 246, a tenancy in common, among members of a company, and not a partnership.

Minnesota.— Moody *v.* Rathburn, 7 Minn. 89, tenants in common of certain mills which were never run.

Missouri.— Maclay *v.* Freeman, 48 Mo. 234.

New Hampshire.— Clement *v.* Hadlock, 13 N. H. 185, no partnership between a dealer in hides and leather and a tanner, although the latter was to have a share of the profits from the sale of the leather, each party's business being distinct from that of the other.

New Jersey.— Warwick *v.* Stockton, 55 N. J. Eq. 61, 36 Atl. 488.

Pennsylvania.— *In re* Haines, 176 Pa. St. 354, 35 Atl. 237.

South Dakota.— Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881, no partnership where the business was that of defendant only.

United States.— Manson *v.* Williams, 153 Fed. 525, 82 C. C. A. 475; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108, "Lay or share in the proceeds or catchings of a whaling voyage does not create a partnership in the profits of the voyage."

England.— Badeley *v.* Consolidated Bank, 38 Ch. D. 238, 57 L. J. Ch. 468, 59 L. T. Rep. N. S. 419, 36 Wkly. Rep. 745; Kilshaw *v.* Jukes, 3 B. & S. 847, 9 Jur. N. S. 1231, 32 L. J. Q. B. 217, 8 L. T. Rep. N. S. 387, 11 Wkly. Rep. 690, 113 E. C. L. 847; *Re* English, etc., Church., etc., Assur. Soc., 1 Hem. & M. 85, 8 L. T. Rep. N. S. 724, 2 New Rep. 107, 11 Wkly. Rep. 681, 71 Eng. Reprint 38.

Canada.— McCallum *v.* Buffalo, etc., R. Co., 19 U. C. C. P. 117; Great Western R. Co. *v.* Preston, etc., R. Co., 17 U. C. Q. B. 477.

See 38 Cent. Dig. tit. "Partnership," § 15.

Two persons buying shares of stock, where each own one half of it, are tenants in common, rather than partners, since it is purely an investment, and not an engagement in a business venture, which is the element of a partnership. Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104.

10. *Alabama.*— Lee *v.* Ryan, 104 Ala. 125,

(III) *Sharing as Principals.* Not only must a common business exist, as distinguished from a pooling of several individual interests in an enterprise, but the sharing of profits by the associated persons must be in their capacity as co-principals in that common business, or a *prima facie* case of partnership is not made out.[11]

(IV) *Sharing Profits of a Common Business as Coöwners.* When, however, it is shown that business associates are sharing the profits of a business, of which they are the joint owners, and which they are carrying on pursuant to a contract between them, they are partners, however adroitly they may have attempted to escape from the partnership relation.[12]

16 So. 2, each party to an agreement for sawing and marketing lumber "had an interest in all the moneys to be collected and disbursed"; and, hence, they were partners.

California.— San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839 (no partnership when no common business carried on by the parties); Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678 (an agreement for the joint business of improving and leasing land for mutual profit is a partnership).

Florida.— Webster *v.* Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217, 27 L. R. A. 126.

Illinois.— Griffen *v.* Cooper, 50 Ill. App. 257.

Louisiana.— Leonard *v.* Sparks, 109 La. 543, 33 So. 594; Hallet *v.* Desban, 14 La. Ann. 529; Marks *v.* Stein, 11 La. Ann. 509; Pickerell *v.* Fisk, 11 La. Ann. 277; Tennessee Bank *v.* McKeage, 11 Rob. 130.

Massachusetts.— Meserve *v.* Andrews, 104 Mass. 360; Rice *v.* Austin, 17 Mass. 197.

Missouri.— Campbell *v.* Dent, 54 Mo. 325; McCauley *v.* Cleveland, 21 Mo. 438.

New York.— Beudell *v.* Hettrick, 35 N. Y. Super. Ct. 405, 45 How. Pr. 198; Heimstreet *v.* Howland, 5 Den. 68.

Texas.— American Refrigerator Transit Co. *v.* Chandler, (Civ. App. 1906) 93 S. W. 243.

Vermont.— Mason *v.* Potter, 26 Vt. 722.

West Virginia.— Logie *v.* Black, 24 W. Va. 1.

See 38 Cent. Dig. tit. "Partnership," § 15.

11. Hallet *v.* Desban, 14 La. Ann. 529; Campbell *v.* Dent, 54 Mo. 325; Beudel *v.* Hettrick, 35 N. Y. Super. Ct. 405, 45 How. Pr. 198; Heimstreet *v.* Howland, 5 Den. (N. Y.) 68. And see cases in next preceding note.

"The proper test of liability as a partner is not whether the party sought to be charged has stipulated for a participation in profits as such, but whether the person by whom the trade was actually carried on carried it on in the capacity of agent for him." Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754.

In England it is provided that "a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such." Holme *v.* Hammond, L. R. 7 Exch. 218, 41 L. J. Exch. 157, 20 Wkly. Rep. 747, construing Partn. Act (1890), § 2 (3), (c); Partn. Act (1865), c. 86, § 3.

12. *California.*— Chapin *v.* Brown, 101 Cal. 500, 35 Pac. 1051; Quinn *v.* Quinn, 81 Cal. 14, 22 Pac. 264, profits were to be divided as profits, and not as rent or as compensation for services, hence there was a partnership under Civ. Code, § 2395.

Illinois.— Hilman *v.* Roney, 78 Ill. App. 412, partners in the purchase, operation, and sale of an electric light plant, although title taken in the name of one of the parties.

Maryland.— Heise *v.* Barth, 40 Md. 259; Wadsworth *v.* Manning, 4 Md. 59, partnership between the owner of a zinc mine, and one who provided buildings and machinery to convert the zinc ore into paint, a part of the profits being used to pay for the buildings and machinery.

Minnesota.— King *v.* Remington, 36 Minn. 15, 29 N. W. 352.

New Jersey.— Ruckman *v.* Decker, 23 N. J. Eq. 283 [*reversed* on other grounds in 28 N. J. Eq. 614].

New York.— Mitchell *v.* Tonkin, 109 N. Y. App. Div. 165, 95 N. Y. Suppl. 669; Cushman *v.* Bailey, 1 Hill 526.

Ohio.— Hulett *v.* Fairbanks, 40 Ohio St. 233; Ludlow *v.* Cooper, 4 Ohio St. 1.

Oregon.— Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149.

Pennsylvania.— Simpson *v.* Summerville, 30 Pa. Super. Ct. 17 [*citing* Bradly *v.* Jennings, 201 Pa. St. 473, 51 Atl. 343]; Rogers *v.* Waltz, 5 Pa. Dist. 645, 18 Pa. Co. Ct. 95, 12 Montg. Co. Rep. 160.

Tennessee.— Colyar *v.* Sax, 92 Tenn. 236, 21 S. W. 659.

Vermont.— Tyler *v.* Scott, 45 Vt. 261.

Wisconsin.— Briere *v.* Taylor, 126 Wis. 347, 105 N. W. 817; Spaulding *v.* Stubbings, 86 Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888; Sprout *v.* Crowley, 30 Wis. 187; Wood *v.* Beath, 23 Wis. 254.

United States.— Miller *v.* O'Boyle, 89 Fed. 140; Bigelow *v.* Elliot, 13 Fed. Cas. No. 1,399, 1 Cliff. 28.

England.— Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162; Russell *v.* Austwick, 1 Sim. 52, 27 Rev. Rep. 157, 2 Eng. Ch. 52, 57 Eng. Reprint 498.

(v) *Sharing Profits in a Single Transaction.* The courts have agreed that there may be a partnership between persons who contemplate but a single business transaction, such as the shipment and sale of but one lot of goods, or the joint purchase and sale of but one chattel, or of one piece of land.[13] When the common business is limited to a single venture, however, pretty clear evidence of an intent by all of the associates to create the partnership relation is required. If the parties have not expressly provided for a partnership, it becomes important to inquire whether they have contributed to a common fund with which the purchase is made, or the transaction is carried forward; or whether, on the other hand, their contributions have been for the purchase of several interests, as tenants in common, or pursuant to some special agreement as individuals. In the former case a partnership will be inferred;[14] in the latter case no such inference will be drawn.[15] Clearly there is no ground for holding a partnership to exist between persons who jointly undertake to sell a piece of land and to divide the excess received over the price the owner has agreed to take.[16]

(vi) *Sharing Profits as Interest*—(a) *In Lieu of Interest.* An agreement between the proprietor of a business and his creditor that the latter shall have a share of the business profits in lieu of interest on the debt is radically different from the agreement for a partnership. It is founded upon the assumption of opposition of interests, while a partnership agreement is based upon the assumption of community of benefit and of loss.[17] The creditor is not a proprietor of the business, and his claim upon the profits is not in the capacity of owner. Although he is interested in having the business successful, the business

Canada.—Pinkerton *v.* Ross, 33 U. C. Q. B. 508.

See 38 Cent. Dig. tit. "Partnership," § 15.

Illustrations.— An agreement between several persons to cut and pack for sale a quantity of ice, the profits to be divided equally among them, is a contract of partnership. Staples *v.* Sprague, 75 Me. 458. An agreement between two persons by which one advances the capital and the other performs the services necessary to carry on a business, the capital to be paid out of partnership stock, and the balance after paying expenses to be divided equally constitutes them partners. Southern Fertilizer Co. *v.* Reams, 105 N. C. 283, 11 S. E. 467. Where one agrees to erect a sawmill on the land of another, and to run it at his own cost, and the landowner agrees to deliver at the mill, at his cost, all the timber on certain of his land, and the profits are to be divided between them, they are partners. Jones *v.* McMichael, 12 Rich. (S. C.) 176.

13. *California.*— Soule *v.* Hayward, 1 Cal. 345, a single shipment.

Colorado.— Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803.

Illinois.— Reynolds *v.* Radke, 112 Ill. App. 575.

Louisiana.— Robertson *v.* De Lizardi, 4 Rob. 300; Hagan *v.* Fowler, 6 La. 311; Purdy *v.* Hood, 5 Mart. N. S. 626.

Pennsylvania.— Com. *v.* Arnheim, 3 Pa. Super. Ct. 104.

United States.— Two Hundred and Sixty Hogsheads of Molasses, 24 Fed. Cas. No. 14,296, 1 Hask. 241; *In re* Warren, 29 Fed. Cas. No. 17,191, 2 Ware 322, 5 N. Y. Leg. Obs. 327.

England.— De Berkom *v.* Smith, 1 Esp. 29.

See 38 Cent. Dig. tit. "Partnership," § 16.

14. Guibert *v.* Saunders, 10 N. Y. St. 43; Ludlow *v.* Cooper, 4 Ohio St. 1; Flower *v.* Barnekoff, 20 Oreg 132, 25 Pac. 370, 11 L. R. A. 149; Canada *v.* Barksdale, 76 Va. 899.

15. *Illinois.*— Hurley *v.* Walton, 63 Ill. 260, a single haul of fish, to be equally divided.

Michigan.— Murphy *v.* Craig, 76 Mich. 155, 42 N. W. 1097; Wells *v.* Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575.

New York.— McPhillips *v.* Fitzgerald, 76 N. Y. App. Div. 15, 78 N. Y. Suppl. 631 [*affirmed* in 177 N. Y. 543, 69 N. E. 1126]; Demarest *v.* Koch, 58 N. Y. Super. Ct. 583, 9 N. Y. Suppl. 726 [*affirmed* in 129 N. Y. 218, 29 N. E. 296].

Pennsylvania.— Galbreath *v.* Moore, 2 Watts 86.

United States.—Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157.

See 38 Cent. Dig. tit. "Partnership," § 16.

Consignment of goods.—"The term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants." Belden *v.* Read, 27 La. Ann. 103.

16. Gottschalk *v.* Smith, 156 Ill. 377, 40 N. E. 937 [*affirming* 54 Ill. App. 341]; Bruce *v.* Hastings, 41 Vt. 380, 98 Am. Dec. 592.

17. Mollwo *v.* Court of Wards, L. R. 4 P. C. 419. See also Wisotzkey *v.* Niagara F. Ins. Co., 112 N. Y. App. Div. 599, 98 N. Y. Suppl. 760 [*affirmed* in 189 N. Y. 532, 82 N. E. 1134].

is not carried on in his behalf. Even when the agreement secures to him considerable powers of supervision and control, the stipulation is demanded and accorded as additional security for the debt owing by one party to the other. It would be wholly unnecessary if they intended the relationship of partners.[18]

(B) *In Addition to Interest.* An agreement that the lender shall receive a share of the borrower's profits in addition to the statutory rate of interest on the loan does not make them partners.[19]

18. *Arkansas.*— Haycock *v.* Williams, 54 Ark. 384, 16 S. W. 3 (the one advancing money to a brick-kiln owner and to have half the product remaining after repayment of his advance not a partner); Culley *v.* Edwards, 44 Ark. 423, 51 Am. Rep. 614 (lender of money to be invested in the borrower's trade for one-half the net profits, not a partner).

California.— Cadenasso *v.* Antonelle, 127 Cal. 382, 59 Pac. 765.

Colorado.— Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250, a lender who took an assignment of a half interest in the lease of a mine as security for the repayment of the loan by the lessee not a partner.

Delaware.— Plunkett *v.* Dillon, 4 Del. Ch. 198.

Illinois.— Williams *v.* Fletcher, 129 Ill. 356, 21 N. E. 783 [*affirming* 30 Ill. App. 219] (the business remained that of the borrower, although the lender had the right to draw an agreed percentage of the earnings quarterly); Lintner *v.* Millikin, 47 Ill. 178.

Iowa.— Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850.

Massachusetts.— Emmons *v.* Westfield Bank, 97 Mass. 230; Gallop *v.* Newman, 7 Pick. 282; Rice *v.* Austin, 17 Mass. 197.

Missouri.— Gille Hardware, etc., Co. *v.* McCleverty, 89 Mo. App. 154; Hazell *v.* Clark, 89 Mo. App. 78.

Montana.— Hunter *v.* Conrad, 18 Mont. 177, 44 Pac. 523, the fact that the owners of the business gave their note to the lender for the loan was considered a strong circumstance going to show that the parties considered the five thousand dollars a loan and not a contribution to the capital of a firm in which all were to be members.

New Jersey.— Clayton *v.* Davett, (Ch. 1897) 38 Atl. 308.

New York.— Eager *v.* Crawford, 76 N. Y. 97; Richardson *v.* Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Johnston *v.* Ferris, 14 Daly 302, 12 N. Y. St. 666; Kirkwood *v.* Smith, 47 Misc. 301, 95 N. Y. Suppl. 926 [*affirmed* in 111 N. Y. App. Div. 923, 96 N. Y. Suppl. 1132]; Trask *v.* Hazazer, 4 N. Y. Suppl. 635.

Pennsylvania.— Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638 (although the lender was to exercise supervision over the borrower's affairs, and give counsel and advice, and was to receive a share of the proceeds of the business, he was not a partner); Dale *v.* Pierce, 85 Pa. St. 474.

Texas.— Altgelt *v.* Elmendorf, (Civ. App. 1905) 86 S. W. 41.

United States.— Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835 [*affirming* 29 Fed. 276]; Stevens *v.* McKibbin, 68 Fed. 406, 15 C. C. A. 498; *In re* Ward, 29 Fed. Cas. No. 17,144, 2 Flipp. 462.

England.— *Ex p.* Briggs, 3 Deac. & C. 367, 1 Mont. & A. 46. See Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234 [*affirming* 10 Jur. N. S. 908, 12 Wkly. Rep. 1125]; Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep N. S. 72, 14 Wkly. Rep. 338; Kilshaw *v.* Jukes, 3 B. & S. 847, 9 Jur. N. S. 1231, 32 L. J. Q. B. 217, 8 L. T. Rep. N. S. 387, 11 Wkly. Rep. 690, 113 E. C. L. 847; Dean *v.* Harris, 33 L. T. Rep. N. S. 639.

See 38 Cent. Dig. tit. "Partnership," § 17.

The question is whether there is a joint business carried on in behalf of all the parties, or whether the transaction is one of loan between debtor and creditor, the loan or interest on the loan to be paid by an amount equal to a certain share of the profits. Thillman *v.* Benton, 82 Md. 64, 33 Atl. 485.

The intention of the parties, as disclosed by the whole transaction, determines whether an agreement, which purports to be one of loan and security, is that, or whether it is one of partnership. *Ex p.* Delhasse, 7 Ch. D. 511, 38 L. T. Rep. N. S. 106, 26 Wkly. Rep. 338; King *v.* Whichelow, 64 L. J. Q. B. 801.

Written agreement.— In some jurisdictions agreements for the loan of money which entitle the lender to receive a rate of interest varying with the profits, or to receive a share of the profits, must be in writing and signed by or on behalf of the parties; or they make the lender and borrower partners. See the statutes of the different jurisdictions. And see Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247; Poundstone *v.* Hamburger, 139 Pa. St. 319, 20 Atl. 1054; Syers *v.* Syers, 1 App. Cas. 174, 35 L. T. Rep. N. S. 101, 24 Wkly. Rep. 970; *In re* Fort, [1897] 2 Q. B. 495, 66 L. J. Q. B. 824, 77 L. T. Rep. N. S. 274, 4 Manson 234, 46 Wkly. Rep. 147; *In re* Young, [1896] 2 Q. B. 484, 65 L. J. Q. B. 681, 75 L. T. Rep. N. S. 278, 3 Manson 213, 45 Wkly. Rep. 96; *In re* Hildesheim, [1893] 2 Q. B. 357, 69 L. T. Rep. N. S. 550, 10 Morr. Bankr. Cas. 238, 4 Reports 543, 42 Wkly. Rep. 138; *Ex p.* Mills, L. R. 8 Ch. 569, 28 L. T. Rep. N. S. 606, 21 Wkly. Rep. 557; Mollwo *v.* Court of Wards, L. R. 4 P. C. 419; *Ex p.* Taylor, 12 Ch. D. 366, 41 L. T. Rep. N. S. 6, 28 Wkly. Rep. 205; Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162; *Ex p.* Sheil, 4 Ch. D. 789, 46 L. J. Bankr. 62, 36 L. T. Rep. N. S. 270, 25 Wkly. Rep. 420; *Ex p.* Macarthur, 40 L. J. Bankr. 86, 19 Wkly. Rep. 821.

19. *Alabama.*— Smith *v.* Garth, 32 Ala.

(c) *Option to Receive Profits or Interest.* An agreement which secures to the lender the option to receive a share of the borrower's net profits, or to receive interest on the loan, never operates as a contract of partnership. At most it can be but an executory contract for a partnership, until the lender exercises the option of sharing the profits.[20]

(vii) *Sharing Profits as Consideration For Sale of Property.* A person who is to receive a share of the profits as a part of the purchase-price of property sold to the proprietor of a business is not a partner in the business,[21] and persons who are to share the profits resulting from the sale of property effected by their several efforts are not partners.[22]

(viii) *Sharing Profits as or in Addition to Rent.* Agreements, whereby one party leases to another real or personal property, and is to receive as rent, or as an addition to a specified rent, a share of the profits gained by the lessee from a business in which the property is used, do not make the contracting parties partners.[23] Transactions of this sort are to be carefully scrutinized, however; and, if

368, lender to have legal interest and one half of the profits.

Illinois.— Adams *v.* Funk, 53 Ill. 219, lender to have five per cent interest and half of the profits.

Iowa.— See Richards *v.* Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727, holding that the parties were partners, because they had agreed that they "should have equal interest, and shares in the common venture," which was conducted with money advanced by plaintiff, after his investment with interest was repaid.

Michigan.— Wells *v.* Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575, holding that the agreement was a partnership because what purported to be an advance was a contribution to the capital of a business belonging to both parties to the agreement. See Corey *v.* Cadwell, 86 Mich. 570, 49 N. W. 611.

New York.—Gibson *v.* Stone, 43 Barb. 285, 28 How. Pr. 468, no partnership, although lender was to have seven per cent interest on loan and one per cent on the amount of gross sales.

North Carolina.— Southern Fertilizer Co. *v.* Reames, 105 N. C. 283, 11 S. E. 467.

Ohio.— Johnson *v.* Miller, 16 Ohio 431.

Pennsylvania.— Lord *v.* Proctor, 7 Phila. 630. But see Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247.

United States.— Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835 [*affirming* 29 Fed. 276]; Blair *v.* Shaeffer, 33 Fed. 218, lender to have interest and advances and sixty per cent of residue of proceeds, yet no partnership.

England.— Mollwo *v.* Court of Wards, L. R. 4 P. C. 419; Walker *v.* Hirsch, 27 Ch. D. 460, 54 L. J. Ch. 315, 51 L. T. Rep. N. S. 581, 32 Wkly. Rep. 992; *Ex p.* Tennant, 6 Ch. D. 303, 37 L. T. Rep. N. S. 284, 25 Wkly. Rep. 854. *Compare In re* Young, [1896] 2 Q. B. 484, 65 L. J. Q. B. 681, 75 L. T. Rep. N. S. 278, 3 Manson 213, 45 Wkly. Rep. 96; Hollom *v.* Whichelow, 64 L. J. Q. B. 170 (the lender was to receive five per cent interest and a further sum equal to one half of the profits, yet no partnership); Frowde *v.* Williams, 56 L. J. Q. B. 62, 56 L. T. Rep. N. S. 441 (holding that a partnership existed, as the agreement gave the lender a proprietary interest in the business). But see Bloxam *v.* Pell [*cited* in Grace *v.* S ith, W. Bl. 998].

See 38 Cent. Dig. tit. "Partnership," § 18.

See, however, Plunkett *v.* Dillon, 3 Del. Ch. 496, 4 Houst. 338.

Where usury laws exist, a loan upon such terms is undoubtedly usurious. Flower *v.* Milaudon, 6 La. 697; Arnold *v.* Angell, 62 N. Y. 508.

20. *Iowa.*— Williams *v.* Soutter, 7 Iowa 435.

Mississippi.— Brinson *v.* Berry, (1890) 7 So. 322.

United States.— Moore *v.* Walton, 17 Fed. Cas. No. 9,779.

England.— *Ex p.* Harris, De Gex 165, 9 Jur. 497, 14 L. J. Bankr. 26.

Canada.— Hill *v.* Bellhouse, 10 U. C. C. P. 122; Darling *v.* Bellhouse, 19 U. C. Q. B. 268.

See 38 Cent. Dig. tit. "Partnership," § 19.

21. A. N. Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 591; Rawlinson *v.* Clarke, 15 L. J. Exch. 171, 15 M. & W. 292; *In re* Randolph, 1 Ont. App. 315. See also Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754 [*overruling* Barry *v* Nesham, 3 C. B. 641, 10 Jur. 1010, 16 L. J. C. P. 21, 54 E. C. L. 641].

22. Hanna *v.* Flint, 14 Cal. 73; Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588; Canton Bridge Co. *v.* Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Stevens *v.* McKibbin, 68 Fed. 406, 15 C. C. A. 498; Heap *v.* Dobson, 15 C. B. N. S. 460, 109 E. C. L. 460; Andrews *v.* Pugh, 24 L. J. Ch. 58, 3 Wkly. Rep. 50.

However, if persons make the sale of property a business, which they conduct as joint principals, they are partners, although the business is confined to a single piece of property. Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803; Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777.

23. *Alabama.*— McDonnell *v.* Battle House Co., 67 Ala. 90, 42 Am. Rep. 99; Dillard *v.* Scruggs, 36 Ala. 670.

the entire arrangement is found to be one wherein the parties are the proprietors of a business which is conducted on behalf of all for their mutual pecuniary benefit, it will be treated by the courts as a partnership, although the parties may have called it a lease of property.[24]

Arkansas.— Paris Mercantile Co. *v.* Hunter, 74 Ark. 615, 86 S. W. 808.

Georgia.— Smith *v.* Summerlin, 48 Ga. 425; Holloway *v.* Brinkley, 42 Ga. 226.

Iowa.— Randall *v.* Ditch, 123 Iowa 582, 99 N. W. 190.

Kansas.— Rider *v.* Hammell, 63 Kan. 733, 66 Pac. 1026.

Louisiana.— McIlvaine *v.* Armfield, 5 La. Ann. 302.

Massachusetts.— Holmes *v.* Old Colony R. Corp., 5 Gray 58, holding that where the lessee of a hotel was to pay a certain sum to the lessor, and half the net proceeds arising from the hotel business, they were not partners.

Michigan.— Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240, where owner of a farm rented it and stock and furnished half of the seed grain, for half of the profits made by the lessee, they were not partners.

Nebraska.— Garrett *v.* Republican Pub. Co., 61 Nebr. 541, 85 N. W. 537, newspaper property rented for a share of the profits.

New Jersey.— Austin *v.* Neil, 62 N. J. L. 462, 41 Atl. 834 (holding that where a hotel was leased for a portion of the receipts, and the agreement contained several provisions the apparent object of which was to secure to the lessor the stipulated rent, there was no partnership); Perrine *v.* Hankinson, 11 N. J. L. 181.

New York.— Dake *v.* Butler, 7 Misc. 302, 28 N. Y. Suppl. 134 [*affirmed* in 80 Hun 602, 29 N. Y. Suppl. 1142] (lease of a hotel for a certain sum, and such additional amount as should equal one half of the profits); W. D. Wilson Printing-Ink Co. *v.* Bowker, 15 N. Y. Suppl. 293, 27 Abb. N. Cas. 153 (printing presses rented for a per cent on their cost and half of the profits).

Oregon.— Hanthorn *v.* Quinn, 42 Oreg. 1, 69 Pac. 817.

Pennsylvania.— Dunham *v.* Rogers, 1 Pa. St. 255 (rent of storehouse for a share of lessee's commissions on sales); Woodward *v.* Frailey, 21 Lanc. L. Rev. 276 (share of profits for use of an invention).

Tennessee.— England *v.* England, 1 Baxt. 108, still and tubs rented for a percentage of the profits.

Texas.— Emberson *v.* McKenna, (App. 1890) 16 S. W. 419.

Vermont.— Tobias *v.* Blin, 21 Vt. 544, rent of a sloop for one half of the gross receipts, the owner to make repairs.

Virginia.— Bowyer *v.* Anderson, 2 Leigh 550, ferry rented for a sum varying with the profits.

Washington.— Z. C. Miles Co. *v.* Gordon, 8 Wash. 442, 36 Pac. 265, rent of property for one half of the profits above designated expenses.

United States.— May *v.* International L. & T. Co., 92 Fed. 445, 34 C. C. A. 448; Bigelow *v.* Elliot, 1 Cliff. 28, 3 Fed. Cas. No. 1,399.

England.— Wish *v.* Small, 1 Campb. 331 note, owner of land to receive one half of the net profits from cattle which he pastured.

Canada.— Denis *v.* Hudson Bay Co., 8 Quebec Q. B. 236 (the owner to receive a share of the profits of a business conducted upon his property); Reid *v.* McFarlane, 2 Quebec Q. B. 130.

See 38 Cent. Dig. tit. "Partnership," §§ 21, 22.

Sharing crops.—A partnership is not created by an agreement between one having no interest in land and the owner thereof whereby the former is to work the land for a share of the crops. Romero *v.* Dalton, 2 Ariz. 210, 11 Pac. 863. No partnership exists where there was no trading, no risks, no contingent profits, but simply an arrangement for joint tillage, and a division of the produce of the farm in kind. Gurr *v.* Martin, 73 Ga. 528. An agreement between two parties that one shall furnish a farm with a certain amount of teams and labor and the other shall manage the farm and give certain labor, the crops to be divided, does not constitute a partnership. Blue *v.* Leathers, 15 Ill. 31. In North Carolina it is expressly provided by statute that a landlord and his tenant shall not be regarded as partners because of an agreement under which the landlord is to have a share of the crop. Day *v.* Stevens, 88 N. C. 83, 43 Am. Rep. 732, construing Code (1883), § 1744.

Profits of a saloon.— Where the owner of a building rents it for saloon purposes, agreeing to take weekly as his rent one half of the profits of the saloon, a partnership is not created between the owner and the saloonkeeper and any rent unpaid may be recovered by such owner. Thayer *v.* Augustine, 55 Mich. 187, 20 N. W. 898, 54 Am. Rep. 361.

24. *Georgia.*— Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243, construing Code, § 2629.

New Hampshire.— Mason *v.* Gibson, 73 N. H. 190, 60 Atl. 96, holding that where plaintiff was to contribute to the business the use of his hotel, with its furnishings, make certain specified outside repairs, and pay taxes and insurance, and defendant was to manage the business, pay for the water, ice, and electric lights, and put in certain furnishings, and make certain inside repairs, the net profits of the business to be divided between them, there was a partnership.

New Mexico.— Willey *v.* Renner, 8 N. M. 641, 45 Pac. 1132.

Pennsylvania.— Merrall *v.* Dobbins, 169 Pa. St. 480, 32 Atl. 578.

Texas.— Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

United States.— Leavitt *v.* Windsor Land,

(IX) *Sharing Profits as Compensation For Services.* A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business.[25] In such a case there is no community of interest in the capital stock; the agent or servant does not act as, and is not a principal, trader; he is

etc., Co., 54 Fed. 439, 4 C. C. A. 425, where the owner of a theater building was to receive a fixed sum and one half of the net annual profits as rent, and was to bear one half of the losses, there was a partnership.

See 38 Cent. Dig. tit. "Partnership," §§ 21, 22.

25. *Alabama.*— Zuber *v.* Roberts, 147 Ala. 512, 40 So. 319; Stafford *v.* Sibley, 106 Ala. 189, 17 So. 324; Lee *v.* Wimberly, 102 Ala. 539, 15 So. 444; Tayloe *v.* Bush, 75 Ala. 432; Randle *v.* State, 49 Ala. 14; Moore *v.* Smith, 19 Ala. 774.

Arkansas.— Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667; Gardenhire *v.* Smith, 39 Ark. 280; Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223; Olmstead *v.* Hill, 2 Ark. 346.

California.— Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147; Stone *v.* Bancroft, 112 Cal. 652, 44 Pac. 1069; Smith *v.* Moynihan, 44 Cal. 53; Phillips *v.* Mires, 2 Cal. App. 274.

Georgia.— Dawson Nat. Bank *v.* Ward, 120 Ga. 861, 48 S. E. 313; Padgett *v.* Ford, 117 Ga. 508, 43 S. E. 1002; Thornton *v.* McDonald, 108 Ga. 3, 33 S. E. 680; Cherry *v.* Strong, 96 Ga. 183, 22 S. E. 707.

Illinois.— Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906 [*reversing* 108 Ill. App. 145]; Southworth *v.* People, 183 Ill. 621, 56 N. E. 407 [*affirming* 85 Ill. App. 289]; Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418; National Surety Co. *v.* T. B. Townsend Brick, etc., Co., 176 Ill. 156, 52 N. E. 938; Stevens *v.* Faucet, 24 Ill. 483; Pierpont *v.* Lanphere, 104 Ill. App. 232; Eibenschutz *v.* Wetten, 64 Ill. App. 617.

Indiana.— Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217; Boyce *v.* Brady, 61 Ind. 432; Ellsworth *v.* Pomeroy, 26 Ind. 158.

Iowa.— Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850; Porter *v.* Curtis, 96 Iowa 539, 65 N. W. 824; Clark *v.* Barnes, 72 Iowa 563, 34 N. W. 419; Holbrook *v.* Oberne, 56 Iowa 324, 9 N. W. 291; Reed *v.* Murphy, 2 Greene 574; Price *v.* Alexander, 2 Greene 427, 52 Am. Dec. 526.

Kansas.— Durkee *v.* Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300, 41 Kan. 503, 21 Pac. 1054.

Kentucky.— Fuqua *v.* Massie, 95 Ky. 387, 25 S. W. 875, 15 Ky. L. Rep. 849; Donley *v.* Hall, 5 Bush 549; Heran *v.* Hall, 1 B. Mon. 159, 35 Am. Dec. 178.

Louisiana.— Leonard *v.* Sparks, 109 La. 543, 33 So. 594; McWilliams *v.* Elder, 52 La. Ann. 995, 27 So. 352; Collom *v.* Bruning, 49 La. Ann. 1257, 22 So. 744; Greend *v.* Kummel, 41 La. Ann. 65, 5 So. 555; Maunsell *v.* Willett, 36 La. Ann. 322; Halliday *v.* Bridewell, 36 La. Ann. 238; Chaffraix *v.* Price, 29 La. Ann. 176; Miller *v.* Chandler, 29 La. Ann. 88; Lalanne *v.* McKinney, 28 La. Ann. 642; Belden *v.* Read, 27 La. Ann. 103; St. Victor *v.* Daubert, 9 La. 314, 29 Am. Dec. 447; Cline *v.* Caldwell, 4 La. 137; Bulloc *v.* Pailhos, 8 Mart. N. S. 172.

Maine.— Holden *v.* French, 68 Me. 241; Braley *v.* Goddard, 49 Me. 115.

Maryland.— Hall *v.* Waggaman, (1894) 29 Atl. 585; Sangston *v.* Hack, 52 Md. 173; Benson *v.* Ketchum, 14 Md. 331; Bull *v.* Schnberth, 2 Md. 38; Kerr *v.* Potter, 6 Gill 404.

Massachusetts.— Hitchings *v.* Ellis, 12 Gray 449; Blanchard *v.* Coolidge, 22 Pick. 151; Baxter *v.* Rodman, 3 Pick. 435.

Michigan.— Morrow *v.* Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; Stockman *v.* Michell, 109 Mich. 348, 67 N. W. 336.

Mississippi.— Bacot *v.* Hazlehurst Lumber Co., (1898) 23 So. 481; Harris *v.* Threefoot, (1892) 12 So. 335.

Missouri.— Mackie *v.* Mott, 146 Mo. 230, 47 S. W. 897; Darling *v.* Potts, 118 Mo. 506, 24 S. W. 461; Bremen Sav. Bank *v.* Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Mulholland *v.* Rapp, 50 Mo. 42; Gille Hardware, etc., Co. *v.* McCleverty, 89 Mo. App. 154; State *v.* Donnelly, 9 Mo. App. 519.

Nebraska.— Agnew *v.* Montgomery, 72 Nebr. 9, 99 N. W. 820; Whitney *v.* Gretna State Bank, 50 Nebr. 438, 69 N. W. 933; Aetna Ins. Co. *v.* Wilcox Bank, 48 Nebr. 544, 67 N. W. 449; Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351.

Nevada.— Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151.

New Hampshire.— Atherton *v.* Tilton, 44 N. H. 452; Newman *v.* Bean, 21 N. H. 93.

New Jersey.— Stone *v.* West Jersey Ice Mfg. Co., 65 N. J. L. 20, 46 Atl. 696; Perry *v.* Smith, 29 N. J. L. 74; Cornell *v.* Redrow, 60 N. J. Eq. 251, 47 Atl. 56; Jernee *v.* Simonson, 58 N. J. Eq. 282, 43 Atl. 370; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Nutting *v.* Colt, 7 N. J. Eq. 539.

New York.— Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542; Smith *v.* Bodine, 74 N. Y. 30; Merchants' Nat. Bank *v.* Barnes, 32 N. Y. App. Div. 92, 52 N. Y. Suppl. 786; Wright *v.* Delaware, etc., Canal Co., 40 Hun 343; Lewis *v.* Greider, 49 Barb. 606 [*affirmed* in 51 N. Y. 231]; Osbrey *v.* Reimer, 49 Barb. 265; Brockway *v.* Burnap, 16 Barb. 309; Hotchkiss *v.* English, 6 Thomps. & C. 658; Strong *v.* Place, 4 Rob. 385 [*reversed* on other grounds in 51 N. Y. 627]; Merwin *v.* Playford, 3 Rob. 702; Smith *v.* Dunn, 44 Misc. 288, 89 N. Y. Suppl. 881; Hunt *v.* McCabe, 40 Misc. 461, 82 N. Y. Suppl. 661; Schultz *v.* Brackett Bridge Co., 35 Misc. 595, 72 N. Y. Suppl. 160; Delise *v.* Palladino, 16 Misc. 74, 37 N. Y. Suppl. 705; Hayward *v.* Barron, 19 N. Y. Suppl. 383; W. D. Wilson Printing-Ink Co. *v.* Bowker, 15 N. Y. Suppl. 293; Edwards *v.* Dooley, 13 N. Y. St. 596; De Cordova *v.* Powter, 8 N. Y. St. 431; Smith *v.* Wright, 1 Abb. Pr. 243; Demuth *v.* Sternheimer, 1 N. Y. City Ct. 443.

not clothed with the usual powers, rights, or duties of a partner, but is subject to the orders of the owner of the business, and he has nothing to do with the losses, except as they affect the amount of his remuneration.[26] A stipulation in the contract, however, that one party is to receive a share of the profits, not as partner, but in lieu of wages, is not conclusive proof that a partnership does not exist. If the entire transaction discloses an arrangement by which the parties are co-principals in a business carried on for their mutual profit, they are partners therein.[27]

North Carolina.— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

Ohio.— Merchants' Nat. Bank *v.* Standard Wagon Co., 9 Ohio S. & C. Pl. Dec. 380, 6 Ohio N. P. 264; *In re* Dair, 2 Ohio S. & C. Pl. Dec. 362, 7 Ohio N. P. 309.

Oregon.— Cogswell *v.* Wilson, 11 Oreg. 371, 4 Pac. 1130.

Pennsylvania.— Ryder *v.* Jacobs, 182 Pa. St. 624, 38 Atl. 471; Kifer *v.* Smyers, (1888) 15 Atl. 904; Edwards *v.* Tracy, 62 Pa. St. 374; Dunham *v.* Rogers, 1 Pa. St. 255; Miller *v.* Bartlett, 15 Serg. & R. 137; Page *v.* Koons, 32 Pa. Co. Ct. 496; Walter's Appeal, 1 Chest. Co. Rep. 278; Graybill *v.* Hildebrand, 23 Lanc. L. Rev. 238.

Rhode Island.— State *v.* Hunt, 25 R. I. 75, 54 Atl. 773, 937; Potter *v.* Moses, 1 R. I. 430.

South Carolina.— State *v.* Sanders, 52 S. C. 580, 30 S. E. 616; Huff *v.* Watkins, 18 S. C. 510.

Tennessee.— Bell *v.* Hare, 12 Heisk. 615; Southworth *v.* Thompson, 10 Heisk. 10; Mann *v.* Taylor, 5 Heisk. 267; Norment *v.* Hull, 1 Humphr. 320.

Texas.— Altgeldt *v.* Alamo Nat. Bank, 98 Tex. 252, 83 S. W. 6 [*reversing* (Civ. App. 1904) 79 S. W. 582]; Cothran *v.* Marmaduke, 60 Tex. 370; Goode *v.* McCartney, 10 Tex. 193; Bauer *v.* Wilson, (Civ. App. 1904) 79 S. W. 364; Texas, etc., R. Co. *v.* Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42; Shute *v.* McVitie, (Civ. App. 1903) 72 S. W. 433; Heidenheimer *v.* Walthew, 2 Tex. Civ. App. 501, 21 S. W. 981.

Vermont.— Deavitt *v.* Hooker, 73 Vt. 143, 50 Atl. 800; Clark *v.* Smith, 52 Vt. 529; Morgan *v.* Stearns, 41 Vt. 398.

Virginia.— Artrip *v.* Rasnake, 96 Va. 277, 31 S. E. 4; Wilkinson *v.* Jett, 7 Leigh 115, 30 Am. Dec. 493.

West Virginia.— Sodiker *v.* Applegate, 24 W. Va. 411, 49 Am. Rep. 252.

Wisconsin.— Sohns *v.* Sloteman, 85 Wis. 113, 55 N. W. 158; La Flex *v.* Burss, 77 Wis. 538, 46 N. W. 801; Sargent *v.* Downey, 45 Wis. 498.

United States.— Gentry *v.* Singleton, 128 Fed. 679, 63 C. C. A. 231 [*affirming* 4 Indian Terr. 346, 69 S. W. 898]; McKinley *v.* Lloyd, 128 Fed. 519; Hambly *v.* Bancroft, 83 Fed. 444; Brown *v.* Hicks, 24 Fed. 811; Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28; *In re* Blumenthal, 3 Fed. Cas. No. 1,575, 18 Nat. Bankr. Reg. 555; Hazard *v.* Hazard, 11 Fed. Cas. No. 6,279, 1 Story 371; *In re* Pierson, 19 Fed. Cas. No. 11,153.

England.— Ross *v.* Parkyns, L. R. 20 Eq. 331, 44 L. J. Ch. 610, 30 L. T. Rep. N. S. 331, 24 Wkly. Rep. 5; Pott *v.* Eyton, 3 C. B. 32, 15 L. J. C. P. 257, 54 E. C. L. 32; *Ex p.* Hickin, 3 De G. & Sm. 662, 14 Jur. 405, 19 L. J. Bankr. 8, 64 Eng. Reprint 651; Reg. *v.* Wortley, 2 Den. C. C. 333, 15 Jur. 1137, 21 L. J. M. C. 44; Stocker *v.* Brockelbank, 15 Jur. 591, 20 L. J. Ch. 401, 3 Macn. & G. 250, 49 Eng. Ch. 189, 42 Eng. Reprint 257; Burnell *v.* Hunt, 5 Jur. 650; Edmanson *v.* Thompson, 8 Jur. N. S. 235, 31 L. J. Exch. 207, 5 L. T. Rep. N. S. 428, 10 Wkly. Rep. 300; Harrington *v.* Churchward, 6 Jur. N. S. 576, 29 L. J. Ch. 521, 2 L. T. Rep. N. S. 114, 8 Wkly. Rep. 302; Holme's Case, 2 Lew. C. C. 256; Perrott *v.* Bryant, 6 L. J. Exch. 26, 2 Y. & C. Exch. 61; Meyer *v.* Sharpe, 2 Rose 124, 5 Taunt. 74, 1 E. C. L. 49.

See 38 Cent. Dig. tit. "Partnership," § 23.

Purpose of agreement.— A share of the profits is given to quicken diligence and secure increased exertion. Olmstead *v.* Hill, 2 Ark. 346.

Where a real estate agent has a written contract with the owner of land to put upon the market, advertise, and sell the same, having for his interest a share in the profits from the sale of the land, the contract is one of agency, and not of partnership. Durkee *v.* Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300, 41 Kan. 503, 21 Pac. 1054.

26. Burckle *v.* Eckart, 1 Den. (N. Y.) 337 [*affirmed* in 3 N. Y. 132]; Brown *v.* Watson, 72 Tex. 216, 10 S. W. 395.

27. *Colorado.*—Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018.

Georgia.— Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759.

Illinois.— Fougner *v.* Chicago First Nat. Bank, 141 Ill. 124, 30 N. E. 442 [*reversing* 41 Ill. App. 202]; Robbins *v.* Laswell, 27 Ill. 365; Hyman *v.* Peters, 30 Ill. App. 134.

Iowa.— Knhn *v.* Newman, 49 Iowa 424.

Kansas.— Simpson *v.* Tenney, 41 Kan. 561, 21 Pac. 634.

Maine.— Bearce *v.* Washburn, 43 Me. 564, holding that an agreement whereby one person furnishes money and another gives his personal services in carrying on the lumbering business is a partnership.

Massachusetts.— Ryder *v.* Wilcox, 103 Mass. 24; Julio *v.* Ingalls, 1 Allen 41.

Michigan.— Hunt *v.* Erikson, 57 Mich. 330, 23 N. W. 832; Hamper's Appeal, 51 Mich. 71, 16 N. W. 236.

Missouri.— Plummer *v.* Trost, 81 Mo. 425 (an agreement by A and his wife with B to work on the latter's farm, all sharing jointly in the profits of the joint labor, is a partnership); Lengle *v.* Smith, 48 Mo. 276.

(x) *Sharing Gross Receipts.* A stipulation, for sharing gross receipts, or gross profits, as a general rule discloses an intention not to carry on a partnership business, for the reason that an ordinary partnership has for its ultimate object the division between the partners of net profits. Before such profits can be ascertained, the expenses and losses must be paid out of the gross receipts.[28] But while a stipulation for sharing commissions, or the gross proceeds of a venture or business, is so inconsistent with the usages of ordinary partnerships as to indicate an absence of intent to enter that relation, this presumption may be overcome by other provisions of the contract, or by the conduct of the parties, showing that they are carrying on a common business for profit. In such event the courts will not hesitate to declare the sharers to be partners, although their contract may provide for a division of the proceeds before the stage of net profits has been reached.[29]

Nebraska.— Gates *v.* Johnson, 56 Nebr. 508, 77 N. W. 407.

Ohio.— Wehrman *v.* McFarlan, 9 Ohio S. & C. Pl. Dec. 400, 6 Ohio N. P. 333.

Pennsylvania.— Frazer *v.* Linton, 183 Pa. St. 186, 38 Atl. 589.

South Carolina.— Price *v.* Middleton, 75 S. C. 105, 55 S. E. 156.

United States.— *In re* Beckwith, 130 Fed. 475 [*reversed* on the facts in 138 Fed. 986, 71 C. C. A. 240]; Woolworth *v.* McPherson, 55 Fed. 558.

England.— Heyhoe *v.* Burge, 9 C. B. 431, 19 L. J. C. P. 243, 67 E. C. L. 431; Katsch *v.* Schenck, 13 Jur. 668, 18 L. J. Ch. 386.

Canada.— Hallett *v.* Robinson, 31 Nova Scotia 303; Townshend *v.* Adams, 26 Nova Scotia 78.

See 38 Cent. Dig. tit. "Partnership," §§ 23, 24.

28. *Alabama.*— See also Nelms *v.* McGraw, 93 Ala. 245, 9 So. 719 (where it was agreed that the proceeds of lumber, sawed by defendant from plaintiff's logs, should be divided equally between them after certain expenses by each as individuals had been reimbursed); Fail *v.* McRee, 36 Ala. 61; Moore *v.* Smith, 19 Ala. 774.

Georgia.— Hodges *v.* Rogers, 115 Ga. 951, 42 S. E. 251; Thornton *v.* George, 108 Ga. 9, 33 S. E. 633.

Indiana.— Shrum *v.* Simpson, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792.

Kansas.— Concannon *v.* Rose, 9 Kan. App. 791, 59 Pac. 729.

Maryland.— Rose *v.* Buscher, 80 Md. 225, 30 Atl. 637, sharing the proceeds of a farm.

Massachusetts.— Lawrence *v.* Snow, 156 Mass. 412, 31 N. E. 486, plaintiff was to have a share of the gross price of melons, for selling them. See also La Mont *v.* Fullam, 133 Mass. 583.

Minnesota.— Wass *v.* Atwater, 33 Minn. 83, 22 N. W. 8, parties were to share the commissions upon a sale of land.

Missouri.— Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430 (gross earnings to be pooled, and divided in agreed proportions); Stoallings *v.* Baker, 15 Mo. 481 (lumber to be equally divided between owner of a sawmill and the owner of logs sawed).

New York.— Pattison *v.* Blanchard, 5 N. Y. 186 [*reversing* 6 Barb. 537], fares from passengers to be divided between connecting carriers, in proportion to the distance traversed by each carrier.

Oregon.— Willis *v.* Crawford, 38 Oreg. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904 (two lawyers to share the fees of a litigation, all costs and expenses to be defrayed by their client); Wheeler *v.* Lack, 37 Oreg. 238, 61 Pac. 849 (commissions upon sales of mining property to be shared).

South Carolina.— Murray *v.* Stevens, Rich. Eq. Cas. 205. See also Chapman *v.* Lipscomb, 18 S. C. 222.

South Dakota.— Cedarberg *v.* Guernsey, 12 S. D. 77, 80 N. W. 159, cropping contract.

Vermont.— Tobias *v.* Blin, 21 Vt. 544 (the gross receipts from a vessel to be divided equally between the owner and the master); Ambler *v.* Bradley, 6 Vt. 119 (owner of a mill and operator to share the gross earnings).

Wisconsin.— Gilbank *v.* Stephenson, 31 Wis. 592.

England.— Wish *v.* Small, 1 Campb. 331 note; Dry *v.* Boswell, 1 Campb. 329; Heyhoe *v.* Burge, 9 C. B. 431, 19 L. J. C. P. 243, 67 E. C. L. 431; Wilkinson *v.* Frasier, 4 Esp. 182; Benjamin *v.* Porteus, 2 H. Bl. 590; Mair *v.* Glennie, 4 M. & S. 240, 16 Rev. Rep. 445.

See 38 Cent. Dig. tit. "Partnership," § 25.

29. *Alabama.*— Autrey *v.* Frieze, 59 Ala. 587.

Arkansas.— Allen *v.* Davis, 13 Ark. 28.

Georgia.— Holifield *v.* White, 52 Ga. 567 [*distinguishing* Smith *v.* Summerlin, 48 Ga. 425; Holloway *v.* Brinkley, 42 Ga. 226].

Illinois.— Bailey *v.* Ferguson, 39 Ill. App. 91.

Louisiana.— Breard *v.* Blanks, 51 La. Ann. 1507, 26 So. 618, operating a mill on shares.

Massachusetts.— See Denny *v.* Cabot, 6 Metc. 82, holding that a contract which stipulates for a share of the profits, whether gross or net, so as to entitle the parties to an account, and to a specific lien upon the firm assets, should be construed as creating a partnership.

New York.—Musier *v.* Trumpbour, 5 Wend. 274.

North Carolina.— Curtis *v.* Cash, 84 N. C. 41; Lewis *v.* Wilkins, 62 N. C. 303.

(xi) *Sharing Profits and Losses* — (a) *Sharing Both Profits and Losses.* Persons who are associated in business, but between whom there is no community of interest in the profits or the losses, are not partners.[30] But if persons who are associated as principals in a common business share both profits and losses they are generally partners.[31] If they are not so associated, but the stipulation is part of

Wisconsin.— Gilbank *v.* Stephenson, 31 Wis. 592, the equal owners of a shelling machine agreed that each should furnish one horse, that one of them do all the work in shelling corn with the machine, that the other pay all the expenses, and that they should divide the earnings and share the expenses equally, and it was held that this constituted a partnership.

See 38 Cent. Dig. tit. "Partnership," § 25.

30. Howze *v.* Patterson, 53 Ala. 205, 25 Am. Rep. 607; Jones *v.* Call, 93 N. C. 170; Chapman *v.* Liscomb, 18 S. C. 222.

31. *Alabama.*— Stafford *v.* Sibley, 113 Ala. 447, 21 So. 459; Couch *v.* Woodruff, 63 Ala. 466; Meaher *v.* Cox, 37 Ala. 201; Scott *v.* Campbell, 30 Ala. 728; Emanuel *v.* Draughn, 14 Ala. 303.

Alaska.— Miners' Co-operative Assoc. *v.* The Monarch, 2 Alaska 383.

California.— Hendy *v.* March, 75 Cal. 566, 17 Pac. 702.

Colorado.— Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034 [*reversing* 7 Colo. App. 378, 43 Pac. 462]; Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; Ashenfelter *v.* Williams, 7 Colo. 332, 43 Pac. 664; Robinson *v.* Compher, 13 Colo. App. 343, 57 Pac. 754.

Delaware.— Jones *v.* Purnell, 5 Pennew. 444, 62 Atl. 149; Beecham *v.* Dodd, 3 Harr. 485.

District of Columbia.— Robinson *v.* Parker, 11 App. Cas. 132.

Florida.— Price *v.* Drew, 18 Fla. 670.

Illinois.— Mudd *v.* Bates, 73 Ill. App. 576.

Indian Territory.— Hart *v.* Hiatt, 2 Indian Terr. 245, 48 S. W. 1038.

Iowa.— Aultman *v.* Fuller, 53 Iowa 60, 4 N. W. 809, holding that where two persons bought a threshing-machine, giving their joint notes therefor under an agreement that they were to do a threshing-machine business, each furnishing half of the work and dividing the profits and losses equally, they were partners.

Kentucky.— Bloom *v.* Farmers' Bank, 97 S. W. 756, 30 Ky. L. Rep. 159; Sharpe *v.* McCreery, 47 S. W. 1075, 20 Ky. L. Rep. 911.

Massachusetts.— Bulfinch *v.* Winchenbach, 3 Allen 161, persons prosecuting a voyage in a vessel jointly and sharing profits and losses are partners.

Michigan.— Bellows *v.* Crane Lumber Co., 131 Mich. 630, 92 N. W. 286; Kingsbury *v.* Tharp, 61 Mich. 216, 28 N. W. 74; Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783, holding that an agreement purporting to be a copartnership agreement and providing that the parties share equally in expenses, losses, and gains cannot be treated as a mere contract of employment.

Minnesota.— Baldwin *v.* Eddy, 64 Minn. 425, 67 N. W. 349; Bohrer *v.* Drake, 33 Minn. 408, 23 N. W. 840.

Missouri.— Priest *v.* Chouteau, 85 Mo. 398, 55 Am. Rep. 373 [*affirming* 12 Mo. App. 252]; McNealy *v.* Bartlett, 123 Mo. App. 58, 99 S. W. 767.

Montana.— Morrison *v.* Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158.

New Hampshire.— Belknap *v.* Wendell, 21 N. H. 175; Brown *v.* Cook, 3 N. H. 64.

New York.— Marsh *v.* Russell, 66 N. Y. 288; Marcus *v.* Segeal, 94 N. Y. App. Div. 326, 88 N. Y. Suppl. 64; Moulton *v.* Ætna F. Ins. Co., 25 N. Y. App. Div. 275, 49 N. Y. Suppl. 570; Hayes *v.* Vogel, 14 Daly 486, 15 N. Y. St. 351; Wolf *v.* Lawrence, 33 Misc. 481, 67 N. Y. Suppl. 900; Leber *v.* Dietz, 22 Misc. 524, 49 N. Y. Suppl. 1002; Smith *v.* Wright, 1 Abb. Pr. 243; Wills *v.* Simmonds, 51 How. Pr. 48; Gregory *v.* Dodge, 14 Wend. 593; Cumpston *v.* McNair, 1 Wend. 457.

North Carolina.— Day *v.* Stevens, 88 N. C. 83, 43 Am. Rep. 732; Manney *v.* Coit, 86 N. C. 463; Falkner *v.* Hunt, 73 N. C. 571.

Pennsylvania.— See Baltz *v.* Cressman, 31 Pa. Co. Ct. 652, 13 Luz. Leg. Reg. 13.

Tennessee.— Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396.

Vermont.— Duryea *v.* Whitcomb, 31 Vt. 395, a partnership, although the parties to the contract may not have been aware that such was its effect.

Virginia.— Lynchburg Commercial Bank *v.* Miller, 96 Va. 357, 31 S. E. 812.

Wisconsin.— Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

United States.— U. S. *v.* Guerber, 124 Fed. 823; Overton Bank *v.* Thompson, 118 Fed. 798, 56 C. C. A. 554; Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 593; Fleming *v.* Lay, 109 Fed. 952, 48 C. C. A. 748.

England.— Pawsey *v.* Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 Wkly. Rep. 469; Moore *v.* Davis, 11 Ch. D. 261, 39 L. T. Rep. N. S. 60, 27 Wkly. Rep. 335; Green *v.* Beesley, 2 Bing. N. Cas. 108, 1 Hodges 199, 4 L. J. C. P. 299, 2 Scott 164, 29 E. C. L. 459; Gouthwaite *v.* Duckworth, 12 East 421; Brett *v.* Beckwith, 3 Jur. N. S. 31, 26 L. J. Ch. 130, 5 Wkly. Rep. 112; Alfaro *v.* De la Torre, 34 L. T. Rep. N. S. 122, 24 Wkly. Rep. 510.

See 38 Cent. Dig. tit. "Partnership," § 27.

A joint adventure in which the parties purchase jointly, agreeing to share the profits and losses, is a copartnership as to the adventure. Solomon *v.* Solomon, 2 Ga. 18.

Contribution of capital unnecessary.—A person may become a member of a partnership without contributing equally to the capital or even without advancing any portion thereof. If he agrees to furnish his labor to the management of the business and shares in the profits and losses this is sufficient to

an arrangement to avoid competition, or to conduct a litigation in the results of which they are severally interested, or to secure greater activity or skill on the part of a servant or agent, or to accomplish some similar purpose, the mere sharing of profits and losses will not make them partners.[32]

(B) *Sharing Profits Only.* Ordinarily partners share the losses as well as the profits of the partnership. If the contract contains no provision on the subject, each partner is entitled to a share of the profits and is bound to bear a share of the losses.[33] And it has been decided in a number of cases that to constitute a partnership *inter sese* there must be a community of losses as well as of profits.[34]

make him a partner. Tibbatts *v.* Tibbatts, 23 Fed. Cas. No. 14,020, 6 McLean 80.

A joint undertaking to share in the profit and losses is necessary to constitute a partnership in a single concern. Pattison *v.* Blanchard, 5 N. Y. 186.

Express stipulation unnecessary.— When persons are engaged in working a mining claim purchased by them and share profits and losses, they are partners, although there is no express stipulation for such sharing of profit and loss. Duryea *v.* Burt, 28 Cal. 569.

Denial of partnership.— Persons associated in the conduct of a business, under an agreement to share profits and losses, are partners; and it is unavailing that they deny the partnership on the witness stand, or declare that neither had the power to bind the other. Trustees *v.* Oland, 35 Nova Scotia 409.

32. *California.*— Baldwin *v.* Hart, 136 Cal. 222, 68 Pac. 698.

Illinois.— Snell *v.* De Land, 43 Ill. 323; Stevens *v.* Faucet, 24 Ill. 483; National Surety Co. *v.* T. B. Townsend Brick, etc., Co., 74 Ill. App. 312 [*affirmed* in 176 Ill. 156, 52 N. E. 938]; Carter *v.* Carter, 28 Ill. App. 340, agreement between persons having similar causes of action against a village, to share the costs of a test case, not a partnership.

Indiana.— Bradley *v.* Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251, a lessee may be made liable for a share of certain losses to secure carefulness on his part without a partnership arising.

Kentucky.— O'Connor *v.* Sherley, 107 Ky. 70, 52 S. W. 1056, 21 Ky. L. Rep. 735.

Louisiana.— Greend *v.* Kummel, 41 La. Ann. 65, 5 So. 555.

Maine.— Dwinel *v.* Stone, 30 Me. 384, 386, "There may be also business transactions, from which the persons concerned may receive profits and be subjected to losses; and yet there may be no partnership."

Michigan.— Canton Bridge Co. *v.* Eaton Rapids, 107 Mich. 613, 65 N. W. 761.

Minnesota.— Fay *v.* Davidson, 13 Minn. 523.

Missouri.— Houssels *v.* Jacobs, 178 Mo 579, 77 S. W. 857; Mackie *v.* Mott, 146 Mo. 230, 47 S. W. 897; Clifton *v.* Howard, 88 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Newberger *v.* Friede, 23 Mo. App. 631.

New York.— McPhillips *v.* Fitzgerald, 171 N. Y. 543, 69 N. E. 1126 [*affirming* 76 N. Y. App. Div. 15, 78 N. Y. Suppl. 631]; Pattison *v.* Blanchard, 5 N. Y. 186; Clark *v.* Rumsey, 59 N. Y. App. Div. 435, 69 N. Y. Suppl. 102 [*reversing* 52 N. Y. Suppl. 417]; Ross *v.* Drinker, 2 Hall 415; Orvis *v.* Curtiss, 12 Misc. 434, 33 N. Y. Suppl. 589 [*reversed* on other grounds in 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810].

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

Vermont.— Noyes *v.* Cushman, 25 Vt. 390.

England.— Smith *v.* Watson, 2 B. & C. 401, 3 D. & R. 751, 2 L. J. K. B. O. S. 63, 9 E. C. L. 180.

See 38 Cent. Dig. tit. "Partnership," § 27.

A mere agreement to share profits and losses does not constitute persons partners *inter se.* McDonald *v.* Matney, 82 Mo. 358.

33. *California.*— Duryea *v.* Burt, 28 Cal. 569.

Illinois.— Briggs *v.* James H. Rice Co., 83 Ill. App. 618; Straus *v.* Kohn, 83 Ill. App. 497; Wilcox *v.* Dodge, 12 Ill. App. 517.

Michigan.— Loveland *v.* Peter, 108 Mich. 154, 65 N. W. 748.

Missouri.— Torbert *v.* Jeffrey, 161 Mo. 645, 61 S. W. 823.

Oregon.— Bloomfield *v.* Buchanan, 13 Oreg. 108, 8 Pac. 912.

Virginia.— Jones *v.* Murphy, 93 Va. 214, 24 S. E. 825.

Wisconsin.— Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

England.— Syers *v.* Syers, 1 App. Cas. 174, 35 L. T. Rep. N. S. 101, 24 Wkly. Rep. 970; Lowe *v.* Dixon, 16 Q. B. D. 455, 34 Wkly. Rep. 441; Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162; *Ex p.* Hodgkinson, Coop. 99, 10 Eng. Ch. 99, 35 Eng. Reprint 492, 19 Ves. Jr. 291, 34 Eng. Reprint 525, 13 Rev. Rep. 199.

Canada.— Lawton Saw Co. *v.* Machum, 2 N. Brunsw. Eq. 112.

See 38 Cent. Dig. tit. "Partnership," § 26.

34. *Alabama.*— Mayrant *v.* Marston, 67 Ala. 453; Meaher *v.* Cox, 37 Ala. 201; Smith *v.* Garth, 32 Ala. 368. See also Gulf City Shingle Mfg. Co. *v.* Bayles, 129 Ala. 192, 29 So. 800.

Delaware.— Beecham *v.* Dodd, 3 Harr. 485.

Iowa.— Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850; McBride *v.* Ricketts, 98 Iowa 539, 67 N. W. 410; Winter *v.* Pipher, 96 Iowa 17, 64 N. W. 663 (a contract which fails to provide for a sharing of the losses, does not constitute a partnership *inter se*); Ruddick *v.* Otis, 33 Iowa 402.

Missouri.— Gill *v.* Ferris, 82 Mo. 156 [*cit-*

(c) *Sharing Losses Only.* Agreements between partners that they shall share the losses of a business, but not the profits, are made occasionally;[35] but an arrangement of this kind between business associates generally indicates that they are not partners.[36]

3. Estoppel to Allege or Deny Partnership. The doctrine of estoppel is not invoked as frequently in litigations between partners, as in suits by outsiders against the apparent members of partnerships. It will be applied, however, against a plaintiff who alleges a partnership with defendant, whenever such plaintiff has repudiated the relationship and has thus forced or induced defendant to so change his position that a partnership would now operate as a fraud upon him.[37] It will also be applied against one who has availed himself of all the advantages arising from an apparent partnership relation, including the services and contributions of the one whom he now denies to have been a partner.[38]

4. Subpartnership. When a partner contracts with a person outside the firm to share with such person the profits and losses of his own interest in the firm, their relationship is often described as that of subpartnership.[39] This, however, does not seem to be an accurate or desirable term; for such joint owners are not engaged in carrying on a business in common with a view of profit. Their actual

ing Campbell *v.* Dent, 54 Mo. 325; Wiggins *v.* Graham, 51 Mo. 17]; Whitehall *v.* Shickle, 43 Mo. 537.

New York.— Cummings *v.* Mills, 1 Daly 520; Orvis *v.* Curtiss, 12 Misc. 434, 33 N. Y. Suppl. 589 [*reversed* on other grounds in 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810].

Vermont.— Flint *v.* Eureka Marble Co., 53 Vt. 669; Brigham *v.* Dana, 29 Vt. 1.

England.— Grace *v.* Smith, 2 W. Bl. 998.

See 38 Cent. Dig. tit. "Partnership," § 26.

Compare Newbrau *v.* Snider, 1 W. Va. 153, 88 Am. Dec. 667.

Contra.— Robbins *v.* Laswell, 27 Ill. 365; Leeds *v.* Townsend, 89 Ill. App. 646, sharing of losses is not essential to a partnership, but only a sharing of profits as profits. See also Fougner *v.* Chicago First Nat. Bank, 141 Ill. 124, 30 N. E. 442.

Share in losses limited.— To constitute a partnership it is not essential that all the parties should be liable to share indefinitely in the losses. If they participate in the profits and are liable to be affected by the losses only to a limited extent it will be sufficient. Brigham *v.* Dana, 29 Vt. 1.

A communion of profits implies a communion of losses. Whitehill *v.* Shickle, 43 Mo. 537. See also Fay *v.* Waldron, 3 N. Y. Suppl. 894; Sims *v.* Vyse, 13 N. Y. St. 355.

Exemption from losses showing no partnership.— "The doctrine that persons cannot be partners as between each other, unless they agree to participate in the losses, is founded on the language of the judges in many cases, and in some is the apparent ground of the decision. . . . But the result of all the cases and the modern doctrine seems to be, that the exemption from losses is a fact which, though not conclusive, is strong evidence that the party thus exempted is not an actual partner; and, taken in conjunction with other circumstances, may clearly show that fact." Munro *v.* Whitman, 8 Hun (N. Y.) 553, 555 [*citing* Burckle *v.* Eckhart, 3 N. Y. 132 (*affirming* 1 Den. 337); Vanderburgh *v.* Hull, 20 Wend. (N. Y.) 70; *Ex p.* Langdale, 18 Ves. Jr. 300, 11 Rev. Rep. 196, 34 Eng. Reprint 331; Parsons Partn. c. 5, p. 41, note a].

35. Hendricks *v.* Gunn, 35 Ga. 234; Vagen *v.* Birngruber, 9 N. Y. St. 729.

36. *Illinois.*— Carter *v.* Carter, 28 Ill. App. 340.

Louisiana.— Greend *v.* Kummel, 41 La. Ann. 65, 5 So. 555.

New York.— Moss *v.* Jerome, 10 Bosw. 220.

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

Vermont.— Noyes *v.* Cushman, 25 Vt. 390.

37. Miller *v.* Chambers, 73 Iowa 236, 34 N. W. 830, 5 Am. St. Rep. 675; Cantara *v.* Blackwell, 14 Wash. 294, 44 Pac. 657. *Compare* Bailey *v.* Weed, 36 N. Y. App. Div. 611, 55 N. Y. Suppl. 253.

38. *Alabama.*— Pierce *v.* Whitley, 39 Ala. 172, after receiving the services of one as a partner and recognizing him as such for several years, it is too late to set up either the non-payment of his portion of the capital stock, or the non-execution of articles of partnership, as proof that no partnership existed.

Missouri.— Hunter *v.* Whitehead, 42 Mo. 524.

Nebraska.— Shriver *v.* McCloud, 20 Nebr. 474, 30 N. W. 534, neither partner can avail himself, as against the other, of the failure to record the certificate of partnership as required by local law.

New York.— McStea *v.* Matthews, 50 N. Y. 166.

Wisconsin.— Gibbs *v.* Humphrey, 91 Wis. 111, 64 N. W. 750, holding that one who has made himself liable as a partner by "holding out" was estopped from coming in as a general creditor of the real owner of the business.

See 38 Cent. Dig. tit. "Partnership," § 10.

39. Henry *v.* Evans, 95 Iowa 244, 63 N. W. 687; Frost *v.* Moulton, 21 Beav. 596, 52 Eng. Reprint 990. See also Cantara *v.* Blackwell, 14 Wash. 294, 44 Pac. 657.

relations are generally those of creditor and debtor. It follows from the doctrine already stated[40] that a partnership cannot be created between persons without their voluntary assent that a subpartner is not a member of the firm.[41] Even the knowledge of one partner that his copartner has agreed to share his share with an outsider, and his assent to such arrangement, does not introduce such outsider into the firm.[42] The fact that a subpartner takes a portion of the firm's profits has never been held enough to render him liable for the firm's debts; for he has no joint proprietorship with all the partners in the profits before division, he has no right to an account as a partner, and he has no lien on the partnership assets to secure his claim to a "share of a share" of the profits.[43] His claim is against the individual partner who has contracted with him. So his liability is limited to such individual, and to that individual's separate creditors; unless indeed he has held himself out as a member of the firm, and induced persons to give credit to the firm on the strength of such holding out.[44] While a subpartner has no right to an account as a partner, he may be entitled to maintain an equity action against all the members of the firm, in order to have determined his share in the interest of the partner who contracted with him.[45] But such an action does not operate to force plaintiff into the firm as a member thereof. On the other hand it subjects plaintiff to all the defenses, set-offs, and counter-claims available against the partner whose interest he seeks to share.[46]

B. As to Third Persons — 1. Contract of Partnership — a. In General. Persons who are associated in business pursuant to a contract which makes them partners *inter se* are partners as to third persons, even though they have attempted to prevent, or to conceal, the existence of a partnership.[47]

40. See *supra*, III, A, 1, e.

41. *Georgia.*— Morrison *v.* Dickey, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87.

Illinois.— Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495.

Indiana.— Reynolds *v.* Hicks, 19 Ind. 173.

New York.— Burnett *v.* Snyder, 43 N. Y. Super. Ct. 238 [*affirmed* in 76 N. Y. 344].

Pennsylvania.— Keystone Nat. Bank *v.* Randle, 1 Pa. Co. Ct. 354.

West Virginia.— Setzer *v.* Beale, 19 W. Va. 274.

United States.— Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176.

England.— *Ex p.* Barrow, 2 Rose 252.

See 38 Cent. Dig. tit. "Partnership," § 9.

The partner of my partner is not my partner, unless I contract for that relationship with him. Hazard *v.* Boyd, 4 Mart. N. S. (La.) 347. See also Boimare *v.* St. Geme, 113 La. 898, 37 So. 869.

42. Rockafellow *v.* Miller, 107 N. Y. 507, 14 N. E. 433; Burnett *v.* Snyder, 81 N. Y. 550, 37 Am. Rep. 527; Zeisler *v.* Steinmann, 53 N. Y. Super. Ct. 184; Newland *v.* Tate, 38 N. C. 226.

43. Reynolds *v.* Hicks, 19 Ind. 113; Burnett *v.* Snyder, 81 N. Y. 550, 37 Am. Rep. 527; Riedeburg *v.* Schmitt, 71 Wis. 644, 38 N. W. 336.

44. Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562; McStea *v.* Matthews, 50 N. Y. 166. See *infra*, III, B, 4.

45. Henry *v.* Evans, 95 Iowa 244, 63 N. W. 687; Nirdlinger *v.* Bernheimer, 133 N. Y. 45, 30 N. E. 561 [*reversing* 11 N. Y. Suppl. 609].

46. Nirdlinger *v.* Bernheimer, 133 N. Y. 45, 30 N. E. 561.

Counter-claim for services.—In a suit brought by a subpartner a partner is bound by the terms of the partnership articles not to claim compensation for services, and hence cannot set up a counter-claim for such services, against the subpartner. Eckert *v.* Clark, 14 Misc. (N. Y.) 18, 35 N. Y. Suppl. 118.

47. *Iowa.*— Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850, where the purpose of forming a partnership is clear, all subterfuges with a view to escaping partnership liability will be disregarded.

Kansas.— Atchison, etc., R. Co. *v.* Hucklebridge, 62 Kan. 506, 64 Pac. 58; Jones *v.* Davies, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354.

Kentucky.— Tanner *v.* Hughes, 50 S. W. 1099, 21 Ky. L. Rep. 77.

Missouri.— Simmons *v.* Ingram, 78 Mo. App. 603.

New York.— Central City Sav. Bank *v.* Walker, 66 N. Y. 424.

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890.

England.— *Re* Stanton Iron Co., 21 Beav. 164, 2 Jur. N. S. 130, 25 L. J. Ch. 142, 4 Wkly. Rep. 159, 52 Eng. Reprint 821, "If they be partners between themselves, they are undoubtedly partners in respect of the public."

Persons who are not partners may become jointly liable to perform any valid contract entered into on their behalf by their common agents, and to contribute ratably to losses which have been borne by one or more of their number, precisely as though they were partners. Hunter *v.* Martin, 57 Cal. 365; Stettauer *v.* Carney, 20 Kan. 474; Hawley *v.*

b. Construction. When third persons have not been misled by the language or conduct of parties to an agreement, the question whether such agreement constitutes a partnership ought to be determined by the intention of the contracting parties, as that is disclosed by all of the terms of the agreement and the parties' conduct.[48] When, however, the conduct of those who participated in the management of a business shows that they consider themselves partners, it is unnec-

Keeler, 53 N. Y. 114 [*affirming* 62 Barb. 231]; Briggs *v.* Briggs, 20 Barb. (N. Y.) 477 [*affirmed* in 15 N. Y. 471]; Wilson *v.* Henry, 44 Vt. 470.

48. *Louisiana.*— Chaffraix *v.* Lafitte, 30 La. Ann. 631, holding that defendants were not partners even as to third parties, because they had not held themselves out as such, nor intended to form a partnership.

New York.— Demarest *v.* Koch, 129 N. Y. 218, 29 N. E. 296 [*affirming* 58 N. Y. Super. Ct. 583, 9 N. Y. Suppl. 726]; Jersey City First Nat. Bank *v.* Staples, 126 N. Y. 699, 27 N. E. 854; Hotchkiss *v.* English, 4 Hun 369, 6 Thomps. & C. 658; Eldridge *v.* Troost, 6 Rob. 518, 3 Abb. Pr. N. S. 20; Post *v.* Kimberly, 9 Johns. 470. See, however, Smith *v.* Wright, 4 Abb. Dec. 274, 1 Abb. Pr. 243; Hull *v.* Barth, 37 N. Y. App. Div. 359, 55 N. Y. Suppl. 1103.

Ohio.— Lape *v.* Parvin, 2 Disn. 560. See, however, Wood *v.* Vallette, 7 Ohio St. 172; Toledo Second Nat. Bank *v.* Second Nat. Bank, 13 Ohio Cir. Dec. 561.

Pennsylvania.— Taylor *v.* Fried, 161 Pa. St. 53, 28 Atl. 993; Walker *v.* Tupper, 152 Pa. St. 1, 25 Atl. 172, holding that while the division of the product of an oil well in specie does not necessarily negative the idea of partnership, it raises a presumption against it, to overcome which an actual intent to become partners must clearly appear.

Rhode Island.— Bisbee *v.* Taft, 11 R. I. 307.

South Dakota.— Dillaway *v.* Peterson, 11 S. D. 210, 76 N. W. 925.

Tennessee.— Polk *v.* Buchanan, 5 Sneed 721.

Wisconsin.— Upton *v.* Johnston, 84 Wis. 8, 54 N. W. 266; Miller *v.* Stone, 69 Wis. 617, 34 N. W. 907.

United States.— Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

England.— Kilshaw *v.* Jukes, 3 B. & S. 847, 9 Jur. N. S. 123, 32 L. J. Q. B. 217, 8 L. T. Rep. N. S. 387, 11 Wkly. Rep. 690, 113 E. C. L. 847; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754; Kelley *v.* Scotto, 49 L. J. Ch. 383, 42 L. T. Rep. N. S. 827.

Canada.— Hallett *v.* Robinson, 31 Nova Scotia 303; Clark *v.* McKellar, 12 U. C. C. P. 562.

See 38 Cent. Dig. tit. "Partnership," §§ 30, 31.

What intention necessary.— Even when the intention of the parties is treated as the test of partnership, it is not the specific intention to incur partnership obligations that is required. All that is necessary is the intention to organize an association, which the law regards as a partnership. Wells *v.* Gates, 18 Barb. (N. Y.) 554, 557. "It is very probable, indeed, that many of the defendants [subscribers to the stock of a newspaper association] did not, at the time, realize the consequences of their act, and the extent of the responsibility which they incurred. The want of forethought and circumspection, especially on occasions of this kind, is very common; but although the result is to be regretted, the law will not allow it to be escaped."

Applications of rule.— A contract by which B and C bind themselves jointly as parties of the second part to pay to D as party of the first a share of the profits of a transaction to be managed by B and C indicate that B and C are partners in the particular transaction, and that D is not a partner but a creditor. Drake *v.* Reed, 4 Stew. & P. (Ala.) 192. On the other hand, if the three agree to buy goods "for sale, on joint account" and to divide the proceeds among themselves in proportion to each one's outlay, their agreement indicates a partnership between them. Howze *v.* Patterson, 53 Ala. 205, 25 Am. Rep. 607; Bacon *v.* Cannon, 2 Houst. (Del.) 47; Milwaukee Harvester Co. *v.* Finnegan, 43 Minn. 183, 45 N. W. 9; Tyson *v.* Pollock, 1 Penr. & W. (Pa.) 375. The intention to form a partnership is still more pronounced, where the joint venture necessarily requires expense, which under the agreement is to be a joint charge. Gray *v.* Blasingame, 110 Ga. 343, 35 S. E. 653; Stettauer *v.* Carney, 20 Kan. 474; Brownlee *v.* Allen, 21 Mo. 123; Smith *v.* Wright, 4 Abb. Dec. (N. Y.) 274 [*reversing* 5 Sandf. 113]; Cotter *v.* Bettner, 1 Bosw. (N. Y.) 490; Sawyer *v.* Elizabeth City First Nat. Bank, 114 N. C. 13, 18 S. E. 949. But when the agreement as carried out by the parties creates no community of interests in the business carried on, and no division of profits of a joint concern, there is no basis for the inference of a partnership. Dazey *v.* Field, 112 Ill. App. 371; Newlin *v.* Bailey, 15 Ill. App. 199; Mayo *v.* Moritz, 151 Mass. 481, 24 N. E. 1083; St. Denis *v.* Saunders, 36 Mich. 369; Jones *v.* O'Farrel, 1 Nev. 354; *In re* Baldwin, 170 N. Y. 156, 63 N. E. 62 [*modifying* 57 N. Y. App. Div. 621, 67 N. Y. Suppl. 1128]; Angell *v.* Cook, 2 Thomps. & C. (N. Y.) 175; Mohawk, etc., R. Co. *v.* Niles, 3 Hill (N. Y.) 162; Ballou *v.* Spencer, 4 Cow. (N. Y.) 163; Noblit *v.* Bonnaffon, 81 Pa. St. 15; Given *v.* Albert, 5 Watts & S. (Pa.) 333; Moore *v.* Williams, 31 Tex. Civ. App. 287, 72 S. W. 222; Swann *v.* Sanborn

essary for a court to examine and construe the contract between them.[49] If their conduct is equivocal, their agreement may be so clear as to leave no doubt upon the question whether they are partners or not.[50]

c. Modification. If a contract creates a partnership, and this is known to third persons, any modification of its terms must be notified to such persons, or they will not be affected by the change.[51]

2. PARTNERSHIP BY CONSTRUCTION OF LAW. Following the doctrine of certain early English cases,[52] it has been held in a number of American cases that a partnership may be created by construction of law, as to third persons, although neither intended nor actually existing between the parties themselves.[53] The

23 Fed. Cas. No. 13,675, 4 Woods 625; *In re* Warner, 29 Fed. Cas. No. 17,178, 7 Nat. Bankr. Reg. 47.

49. Cook *v.* Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Stearns *v.* Haven, 14 Vt. 540.

50. *Alabama.*—Merchants', etc., Nat. Bank *v.* Rice, 89 Ala. 201, 7 So. 647 (no partnership between the widow of a deceased merchant, and a clerk who received a share of the profits as compensation for his services in closing up the business); Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749 (no partnership between connecting lines of common carriers).

Georgia.— Flournoy *v.* Williams, 68 Ga. 707, no partnership between an agent and his subagent.

Indiana.— Love *v.* Blair, 72 Ind. 281, defendants regarded as partners because they conducted a joint business under a firm-name.

Kentucky.— Safety Bldg., etc., Assoc. *v.* O'Meara, 58 S. W. 775, 22 Ky. L. Rep. 895.

Maine.— Doak *v.* Swann, 8 Me. 170, 22 Am. Dec. 233, holding that tenants in common of a paper mill were partners, because they united in the prosecution of a joint business, and were sharers in a common fund.

Massachusetts.— Turner *v.* Bissell, 14 Pick. 192, no partnership between B and R, the latter having a share of the proceeds of the business as compensation for services.

Michigan.— Purvis *v.* Butler, 87 Mich. 248, 49 N. W. 564, holding that a partnership existed between the creditors of an insolvent debtor who took over his business and carried it on through a common agent for their common profit.

New York.— Hull *v.* Barth, 48 N. Y. App. Div. 590, 62 N. Y. Suppl. 946; Hawkins *v.* Campbell, 48 N. Y. App. Div. 43, 62 N. Y. Suppl. 678; Johnson *v.* Alexander, 46 N. Y. App. Div. 6, 61 N. Y. Suppl. 351; Briggs *v.* Briggs, 20 Barb. 477 [*affirmed* in 15 N. Y. 471]; St. Nicholas Nat. Bank *v.* King, 10 N. Y. St. 70; Bostwick *v.* Champion, 11 Wend. 571 [*affirmed* in 18 Wend. 175, 31 Am. Dec. 376].

Pennsylvania.— Ihmsen *v.* Lathrop, 104 Pa. St. 365 (no partnership exists between a general manager of a business and the firm which owns it); Beeson *v.* Lang, 85 Pa. St. 197 (holding that the members of a committee of creditors of a corporation were not partners, as they did not agree to be partners, did not receive any part of the profits, and did not hold themselves out as partners, but were managers of the corporation business, the profits of which had been temporarily pledged to the creditors).

Tennessee.— Fowler *v.* Stone's River Nat. Bank, (Ch. App. 1899) 57 S. W. 209.

Wisconsin.— Appleton *v.* Smith, 24 Wis. 331.

See 38 Cent. Dig. tit. "Partnership," § 35.

In case both the conduct and the agreement are equivocal, the existence or nonexistence of a partnership may become a question of fact for the jury. Bacon *v.* Cannon, 2 Houst. (Del.) 47; Croarkin *v.* Hutchinson, 167 Ill. 633, 58 N. E. 678 [*reversing* 87 Ill. App. 557]; Reynolds *v.* Radke, 112 Ill. App. 575.

51. Devin *v.* Harris, 3 Greene (Iowa) 186; Walters *v.* Smith, 55 S. W. 904, 21 Ky. L. Rep. 1635; Boisgerard *v.* Wall, Sm. & M. Ch. (Miss.) 404. See also Estabrook *v.* Woods, 192 Mass. 499, 78 N. E. 538.

52. Waugh *v.* Carver, 2 H. Bl. 235, 247 ("He who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise"); Grace *v.* Smith, 1 W. Bl. 998.

53. *Georgia.*— Gray *v.* Blasingame, 110 Ga. 343, 35 S. E. 653, construing Code, § 2629.

Illinois.— Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569 [*affirming* 89 Ill. App. 544], perhaps the court meant to affirm only the doctrine of estoppel *in pais*; but its language seems to commit it to the view stated in the text.

Iowa.— Stanchfield *v.* Palmer, 4 Greene 23.

Louisiana.—Baldey *v.* Brackenridge, 39 La. Ann. 660, 2 So. 410; New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Robertson *v.* De Lizardi, 4 Rob. 300.

New Hampshire.— Bromley *v.* Elliot, 38 N. H. 287, 75 Am. Dec. 182.

Pennsylvania.— Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247; Gill *v.* Kuhn, 6 Serg. & R. 333; Lord *v.* Proctor, 7 Phila. 630.

South Carolina.— Osborne *v.* Brennan, 2 Nott & M. 427, 10 Am. Dec. 614.

Texas.— Cothran *v.* Marmaduke, 60 Tex. 370; Fouke *v.* Brengle, (Civ. App. 1899) 51 S. W. 519; Buchanan *v.* Edwards, (Civ. App. 1899) 51 S. W. 33; Dilley *v.* Abright, 19 Tex. Civ. App. 487, 48 S. W. 548; Cleveland *v.* Anderson, 2 Tex. App. Civ. Cas. § 146.

Vermont.— Kellogg *v.* Griswold, 12 Vt. 291.

United States.— Einstein *v.* Gourdin, 8 Fed. Cas. No. 4,320, 4 Woods 415.

See 38 Cent. Dig. tit. "Partnership," § 29.

view that a partnership may be created by construction of law has been repudiated in England.[54] And, in order that persons between whom there is no actual partnership be held liable as partners to third persons, a case of estoppel must be made out against them. If they have held themselves out as partners, and have thereby misled third persons, they are liable as partners to such persons,[55] and to no others.[56] This modern rule has been acted upon in a number of cases decided in the United States[57] and in Canada.[58]

3. Community of Interest[59] — a. In General. The joint ownership of property by several parties, or their community of interest in it, will not of itself make them partners, or warrant third persons in believing that a partnership exists.[60] If, however, two or more persons become the joint owners of property and thereafter employ it in carrying on a joint business for their mutual profit, they render themselves liable as partners to those dealing with them in the business.[61]

b. Sharing Profits — (i) *In General.* According to the rule now generally prevailing both in England and in America, when there is no partnership in fact, merely sharing the profits of a venture does not create one as to third persons, who have not been legitimately led to believe that one exists.[62] The older English

54. Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep. N. S. 72, 14 Wkly. Rep. 338.

55. Scarf *v.* Jardine, 7 App. Cas. 345, 51 L. J. Q. B. 612, 47 L. T. Rep. N. S. 258, 30 Wkly. Rep. 893; Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

56. Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep. N. S. 72, 14 Wkly. Rep. 338; Pott *v.* Eyton, 3 C. B. 32, 15 L. J. C. P. 257, 54 E. C. L. 32; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754.

57. *California.*— Reid *v.* F. W. Kreling's Sons' Co., 125 Cal. 117, 57 Pac. 773.

Delaware.— Ellison *v.* Stuart, 2 Pennew. 179, 43 Atl. 836.

Indiana.— Spaulding *v.* Nathan, 21 Ind. App. 122, 51 N. E. 742.

Kentucky.—Stone *v.* Turfmen's Supply Co., 103 Ky. 318, 45 S. W. 78, 19 Ky. L. Rep. 2025; Harlan *v.* Treasy, 62 S. W. 266, 23 Ky. L. Rep. 188.

Maryland.— Lightiser *v.* Allison, 100 Md. 103, 59 Atl. 182.

Minnesota.— Tyler *v.* Omeis, 76 Minn. 537, 79 N. W. 528.

Missouri.— Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928; Gamble *v.* Grether, 108 Mo. App. 340, 83 S. W. 306; Lamwersick *v.* Boehmer, 77 Mo. App. 136.

Ohio.— Russell *v.* Fenner, 21 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 754.

Tennessee.— Gore *v.* Benedict, (Ch. App. 1901) 61 S. W. 1054.

Wyoming.— Downer *v.* Holgate, 11 Wyo. 261, 71 Pac. 1135, 8 Wyo. 334, 57 Pac. 918.

United States.— Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507; Earle *v.* Art Library Pub. Co., 95 Fed. 544; Randle *v.* Barnard, 81 Fed. 682, 26 C. C. A. 568.

58. McPherson *v.* Hoskins, 3 N. Brunsw. 430.

59. As to community of interest between the parties see *supra*, III, A, 2.

60. *Maine.*— Harding *v.* Foxcroft, 6 Me. 76, joint owners of a vessel were but tenants in common of her, and of a cargo which was bought by them severally.

Massachusetts.— Judson *v.* Adams, 8 Cush. 556.

Missouri.— Maclay *v.* Freeman, 48 Mo. 234.

Pennsylvania.— Fulton *v.* Dessin, 3 Pa. Co. Ct. 318; Brown *v.* Jaquette, 2 Del. Co. 245.

Washington.—Willamette Casket Co. *v.* McGoldrick, 10 Wash. 229, 38 Pac. 1021.

See 38 Cent. Dig. tit. "Partnership," § 38.

61. Burnley *v.* Rice, 18 Tex. 481; London Gaslight, etc., Co. *v.* Nicholls, 2 C. & P. 365, 12 E. C. L. 620; Noakes *v.* Barlow, 26 L. T. Rep. N. S. 136, 20 Wkly. Rep. 386.

62. *Illinois.*— Donnan *v.* Gross, 3 Ill. App. 409.

Indiana.— Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103.

Maine.— Dwinel *v.* Stone, 30 Me. 384.

Michigan.— Colwell *v.* Britton, 59 Mich. 350, 26 N. W. 538.

Minnesota.— Fay *v.* Davidson, 13 Minn. 523. *Compare* McDonald *v.* Campbell, 96 Minn. 87, 104 N. W. 760; Warner *v.* Myrick, 16 Minn. 91, holding that an agreement to share the profits of a business, nothing being said about the losses, will constitute a partnership as to third persons.

Mississippi.— See Dale *v.* Harrahan, 85 Miss. 49, 37 So. 458, construing Code (1892), § 4234.

Missouri.— Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465; Kelly *v.* Gaines, 24 Mo. App. 506. *Compare* Tamblyn *v.* Scott, 111 Mo. App. 46, 85 S. W. 918.

Montana.— Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65.

Nebraska.— Garrett *v.* Republican Pub.

doctrine[63] has been applied, however, in some American decisions; and he who takes a part of the profits indefinitely is, by operation of law, liable for losses as a partner, on the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the security for the payment of their debts.[64] In all jurisdictions the fact that a person shares the profits of a business tends to show that he is a partner therein.[65]

(II) *Sharing Profits in Lieu of Interest.* One who makes a *bona fide* loan of money or credit to the owner of a business, in consideration of a share of its profits in lieu of interest, does not thereby become liable to the creditors of the business, in England,[66] or in most of the American jurisdictions.[67] It has been

Co., 61 Nebr. 541, 85 N. W. 537; Waggoner *v.* Creighton First Nat. Bank, 43 Nebr. 84, 61 N. W. 112.

Nevada.— Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

New Hampshire.— Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192. See, however, Atherton *v.* Tilton, 44 N. H. 452; Bromley *v.* Elliot, 38 N. H. 287, 75 Am. Dec. 182.

New Jersey.— Seabury *v.* Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136 [*affirmed* in 52 N. J. L. 413, 21 Atl. 952]; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552. See, however, Sheridan *v.* Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464.

West Virginia.— Chapline *v.* Conant, 3 W. Va. 507, 100 Am. Dec. 766.

United States.— Wilson *v.* Edmonds, 130 U. S. 472, 9 S. Ct. 563, 32 L. ed. 1025; Berthold *v.* Goldsmith, 24 How. 536, 16 L. ed. 762. See, however, Oppenheimer *v.* Clemmons, 18 Fed. 886; Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28; Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21.

England.— Pooley *v.* Driver, 5 Ch. D. 458, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 745 [substantially *overruling* Waugh *v.* Carver, 2 H. Bl. 235].

See 38 Cent. Dig. tit. "Partnership," § 39.

63. Pott *v.* Eyton, 3 C. B. 32, 15 L. J. C. P. 257, 54 E. C. L. 32; Hesketh *v.* Blanchard, 4 East 144, 3 L. J. C. P. O. S. 151; Waugh *v.* Carver, 2 H. Bl. 235.

64. *Alabama.*— Pollard *v.* Stanton, 7 Ala. 761.

Louisiana.— Cooley *v.* Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Robertson *v.* De Lizardi, 4 Rob. 300.

Massachusetts.— Bailey *v.* Clark, 6 Pick. 372. But see Holmes *v.* Old Colony R. Corp., 5 Gray 58.

New York.— Leggett *v.* Hyde, 58 N. Y. 272, 17 Am. Rep. 244 [*affirming* 1 Thomps. & C. 418]; Palliser *v.* Erhardt, 46 N. Y. App. Div. 222, 61 N. Y. Suppl. 191; Farr *v.* Morrill, 53 Hun 31, 5 N. Y. Suppl. 720; Haas *v.* Roat, 16 Hun 526; Williams *v.* Gillies, 13 Hun 422 [*affirming* 53 How. Pr. 429, and *reversed* on other grounds in 75 N. Y. 197]; Catskill Bank *v.* Gray, 14 Barb. 471; Oakley *v.* Aspinwall, 2 Sandf. 7 [*reversed* on other grounds in 4 N. Y. 513]; Hackett *v.* Stanley, 6 N. Y. St. 265 [*affirmed* in 115 N. Y. 625, 22 N. E. 745]; Cushman *v.* Bailey, 1 Hill 526. See also Johnson *v.* Alexander, 46 N. Y. App. Div. 6, 61 N. Y. Suppl. 351 [*affirmed* without opinion in 167 N. Y. 605, 60 N. E. 1113].

North Carolina.— Motley *v.* Jones, 38 N. C. 144.

Ohio.— Wood *v.* Vallette, 7 Ohio St. 172; Circleville First Nat. Bank *v.* Ballard, 19 Ohio Cir. Ct. 63, 10 Ohio Cir. Dec. 298. But see Harvey *v.* Childs, 28 Ohio St. 319, 22 Am. Rep. 387.

Pennsylvania.— Caldwell *v.* Miller, 127 Pa. St. 442, 17 Atl. 983; Edwards *v.* Tracy, 62 Pa. St. 374. See, however, *In re* Gibbs, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Heckert *v.* Fegely, 6 Watts & S. 139.

Texas.— Rahl *v.* Parlin, etc., Co., 27 Tex. Civ. App. 72, 64 S. W. 1007.

See 38 Cent. Dig. tit. "Partnership," § 39.

Exceptions to rule.—The sharing of profits by a mere servant (Burckle *v.* Eckhart, 3 N. Y. 132 [*affirming* 1 Den. 337]), or by an insured person in a mutual insurance company (People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198), does not make the sharer a partner.

65. *California.*—Kennedy, etc., Lumber Co. *v.* Taylor, (1892) 31 Pac. 1122, construing Civ. Code, § 2395.

Massachusetts.— Pratt *v.* Langdon, 12 Allen 544.

Minnesota.— Delaney *v.* Dutcher, 23 Minn. 373.

New Hampshire.— Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192; Atkins *v.* Hunt, 14 N. H. 205.

North Dakota.— Braithwaite *v.* Power, 1 N. D. 455, 48 N. W. 354.

Ohio.— Miller *v.* Sullivan, 1 Cinc. Super. Ct. 271.

Wisconsin.— Whitney *v.* Ludington, 17 Wis. 140, 84 Am. Dec. 734.

United States.— Sun Mut. Ins. Co. *v.* Kountz Line, 122 U. S. 583, 7 S. Ct. 1278, 30 L. ed. 1137; Santiago *v.* Morgan, 21 Fed. Cas. No. 12,331, Hoffm. Land Cas. 447. See also *In re* Neasmith, 147 Fed. 160, 77 C. C. A. 402.

See 38 Cent. Dig. tit. "Partnership," § 39.

66. *Ex p.* Tennant, 6 Ch. D. 303, 37 L. T. Rep. N. S. 284, 25 Wkly. Rep. 854; Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep. N. S. 72, 14 Wkly. Rep. 338.

67. *Florida.*— Dubos *v.* Jones, 34 Fla. 539, 16 So. 392.

held in a number of cases, however, that if the loan is a contribution to the capital of the business, or if the profits are to be shared as profits, and not as a measure of compensation for the loan, the contracting parties are partners as to third persons, although their contract denies such relationship.[68]

(III) *SHARING PROFITS IN ADDITION TO INTEREST.* Where in addition to receiving interest one who furnishes money for a business is to share in the profits he is, as to third persons, to be regarded as a partner.[69]

(IV) *SHARING PROFITS IN LIEU OF RENT.* An agreement between the lessor of property and the lessee that the former shall receive for its use a share of the profits of the lessee's business, in which it is used, does not constitute them partners, even as to third persons.[70] If, however, the entire agreement between

Illinois.—Williams *v.* Fletcher, 129 Ill. 356, 21 N. E. 783.

Iowa.— Clark *v.* Barnes, 72 Iowa 563, 34 N. W. 419.

Maryland.— Thillman *v.* Benton, 82 Md. 64, 33 Atl. 485.

New York.— Cassidy *v.* Hall, 97 N. Y. 159; Atchison-Ely *v.* Thomas, 104 N. Y. App. Div. 368, 93 N. Y. Suppl. 693; Keogh *v.* Minrath, 8 N. Y. Suppl. 816 [*affirmed* in 130 N. Y. 677, 29 N. E. 1035].

Pennsylvania.—Waverly Nat. Bank *v.* Hall, 150 Pa. St. 466, 24 Atl. 665, 30 Am. St. Rep. 823.

Rhode Island.— Boston, etc., Smelting Co. *v.* Smith, 13 R. I. 27, 43 Am. Rep. 3.

Tennessee.— Polk *v.* Buchanan, 5 Sneed 721, holding that the mere fact that one is to receive a certain portion of the net profits of a firm in consideration of his acceptance of certain drafts will not make him liable as a partner, if there was no holding out as such and his name has not been used as a partner.

Wisconsin.— Ford *v.* Smith, 27 Wis. 261.

United States.— Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835 [*affirming* 29 Fed. 276].

See 38 Cent. Dig. tit. "Partnership," § 40.

Written contract necessary.— It is sometimes required that such a contract shall be in writing, in order to exempt the lender from partnership liability to third persons. Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247; Poundstone *v.* Hamburger, 139 Pa. St. 319, 20 Atl. 1054; Hart *v.* Kelley, 83 Pa. St. 286.

Loan absolutely refunded.— Where it is agreed that money loaned for the benefit of a business shall be absolutely refunded, without regard to the profits, the lender is not rendered liable to creditors, or a partner, merely because he is to receive a share of the profits. Eager *v.* Crawford, 76 N. Y. 97.

68. *Connecticut.*— Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Parker *v.* Canfield, 37 Conn. 250, 9 Am. Rep. 317.

Louisiana.— Dennistoun *v.* Debuys, 6 Mart. N. S. 48, holding that one furnishing another with capital, for which the latter is to pay interest proportioned to his profits, is liable as a partner to third persons.

Maryland.— Rowland *v.* Long, 45 Md. 439.

New York.— Magovern *v.* Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589 [*reversing* 40 Hun 166]; Leggett *v.* Hyde, 58 N. Y. 272, 17 Am. Rep. 244 [*affirming* 1 Thomps. & C. 418]; Haas *v.* Roat, 26 Hun 632; Hackett *v.* Stanley, 14 Daly 210, 2 N. Y. St. 266 [*affirmed* in 115 N. Y. 625, 22 N. E. 745].

Texas.— Cleveland *v.* Anderson, 2 Tex. App. Civ. Cas. § 146.

Wisconsin.— Rosenfield *v.* Haight, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770.

See 38 Cent. Dig. tit. "Partnership," § 40.

One who contributes a sum to the use and business of a partnership, on condition that he is to receive a part of the profits of the business, is a partner as to third persons dealing with the firm. Leggett *v.* Henneberger, 1 Thomps. & C. (N. Y.) 418 [*affirmed* in 26 N. Y. 272, 17 Am. Rep. 244].

69. *New Jersey.*— Sheridan *v.* Medora, 10 N. J. Eq. 469, 64 Am. Dec. 464, money loaned at six per cent with an agreement that in case the debtor succeeded twenty-five per cent was to be paid.

New York.— Hackett *v.* Stanley, 115 N. Y. 625, 22 N. E. 745. But see Curry *v.* Fowler, 87 N. Y. 33, 41 Am. Rep. 343 [*affirming* 46 N. Y. Super. Ct. 195]; Richardson *v.* Hughitt, 76 N. Y. 55, 32 Am. Rep. 267.

Pennsylvania.— Wessels *v.* Weiss, 166 Pa. St. 490, 31 Atl. 247.

South Carolina.— Pierson *v.* Steinmyer, 4 Rich. 309.

Texas.— Kelley Island Lime, etc., Co. *v.* Masterson, (1906) 93 S. W. 427; Dilley *v.* Abright, 19 Tex. Civ. App. 487, 48 S. W. 548.

Wisconsin.— Miller *v.* Price, 20 Wis. 117.

See 38 Cent. Dig. tit. "Partnership," § 41.

Contra.— Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835 [*affirming* 29 Fed. 276].

70. *Illinois.*—Parker *v.* Fergus, 43 Ill. 437, part of a building was rented for opera, for one-half the net proceeds of the business.

Maine.— Thompson *v.* Snow, 4 Me. 264, 16 Am. Dec. 263.

Massachusetts.— Holmes *v.* Old Colony R. Corp., 5 Gray 58; Cutler *v.* Winsor, 6 Pick. 335, 17 Am. Dec. 385.

New Jersey.— Austin *v.* Neil, 62 N. J. L. 462, 41 Atl. 834 [*discrediting* Sheridan *v.* Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464]; Perrine *v.* Hankinson, 11 N. J. L. 181.

New York.—Heimstreet *v.* Howland, 5 Den. 68.

the parties, including the lease provision, shows that they intended to become proprietors of a common business, for their mutual profit, they will be liable as partners to creditors of the business, although they expressly declare that they are not in partnership.[71]

(v) *Sharing Profits in Lieu of or in Addition to Compensation For Services.* According to the weight of authority one who, without any interest in the business property, is, by agreement, to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits of the business or a stipulated sum, together with a certain proportion of the profits, and is neither held out to the world as a partner nor through the negligence of the owner of the business permitted to hold himself out as a partner, is not a partner either as to the owner or third persons.[72] If, however, the services of one party are his contribution to the capital of the concern, and he is entitled to share in the

Pennsylvania.— Dunham *v.* Rogers, 1 Pa. St. 255.

Texas.— Friedlander *v.* Hillcoat, (1890) 14 S. W. 786.

See 38 Cent. Dig. tit. "Partnership," § 42.

Illustrations.— A contract between the lessor and lessee of a hotel that the former should receive one tenth of the gross receipts for rent does not create a partnership as to third persons. McDonnell *v.* Battle House Co., 67 Ala. 90, 42 Am. Rep. 99. A partnership does not exist as to third persons by reason of an agreement between the owner of a lot of mules and a railroad contractor that the latter is to pay the former half of the profits of work on which the mules are used by the latter. Emberson *v.* McKenna, (Tex. App. 1899) 16 S. W. 419.

71. Merrall *v.* Dobbins, 169 Pa. St. 480, 32 Atl. 578; Brown *v.* Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618.

In Georgia the rule is as follows: "Though an agreement between two parties concerning a particular business, in which real estate belonging to one of them is to be used, be denominated 'a lease,' and the fruit to accrue to the owner of such estate be called 'rent,' yet if it appear that such fruit is to come only from the 'nett profits' of the business, and is not to exceed a certain proportion of them, the parties will in law be regarded as partners." Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243 [*quoted* in Powell *v.* Moore 79 Ga. 524, 4 S. E. 383]. See also Dalton City Co. *v.* Hawes, 37 Ga. 115; Buckner *v.* Lee, 8 Ga. 285.

72. *Alabama.*— Hodges *v.* Dawes, 6 Ala. 215; Shropshire *v.* Shepperd, 3 Ala. 733.

Colorado.— Le Fevre *v.* Castagnio, 5 Colo. 564.

Connecticut.— Pond *v.* Cummins, 50 Conn. 372; Loomis *v.* Marshall, 12 Conn. 69, 30 Am. Dec. 596 [*distinguished* in Bucknam *v.* Barnum, 15 Conn. 67].

Illinois.— Burton *v.* Goodspeed, 69 Ill. 237; Smith *v.* Vanderburg, 46 Ill. 34; Parker *v.* Fergus, 43 Ill. 437.

Iowa.— Holbrook *v.* O'Berne, 56 Iowa 324, 9 N. W. 291.

Kansas.— Shepard *v.* Pratt, 16 Kan. 209.

Louisiana.— Hallet *v.* Desban, 14 La. Ann. 529; Taylor *v.* De Sotolingo, 6 La. Ann. 154.

Maryland.—Reddington *v.* Lanahan, 59 Md. 429; Crawford *v.* Austin, 34 Md. 49; Kerr *v.* Potter, 6 Gill 404 [*overruling* Taylor *v.* Terme, 3 Harr. & J. 505].

Massachusetts.— Partridge *v.* Kingman, 130 Mass. 476; Com. *v.* Bennett, 118 Mass. 443; Bradley *v.* White, 10 Metc. 303, 43 Am. Dec. 435; Denny *v.* Cabot, 6 Metc. 82. See also Estabrook *v.* Woods, 192 Mass. 499, 78 N. E. 538.

Mississippi.— Fairly *v.* Nash, 70 Miss. 193, 199, 12 So. 149, "The question is whether the profits are taken as in a distribution of a joint estate . . . or . . as compensation for services as agent."

Missouri.— Webb *v.* Liggett, 6 Mo. App. 345.

Nebraska.— Waggoner *v.* Creighton First Nat. Bank, 43 Nebr. 84, 61 N. W. 112. See, however, Roggenkamp *v.* Hargreaves, 39 Nebr. 540, 58 N. W. 162; Strader *v.* White, 2 Nebr. 348.

Nevada.— Mason *v.* Hackett, 4 Nev. 420.

New Hampshire.— Bromley *v.* Elliot, 38 N. H. 287, 75 Am. Dec. 182.

New Jersey.—Voorhees *v.* Jones, 29 N. J. L. 270; Perry *v.* Smith, 29 N. J. L. 74.

New York.— Lewis *v.* Greider, 51 N. Y. 231; Burckle *v.* Eckhart, 3 N. Y. 132 [*affirming* 1 Den. 337]; Butler *v.* Finck, 21 Hun 210; Lamb *v.* Grover, 47 Barb. 317; Conklin *v.* Barton, 43 Barb. 435; Clark *v.* Gilbert, 32 Barb. 576 [*reversed* on other grounds in 26 N. Y. 279, 84 Am. Dec. 189]; Hodgman *v.* Smith, 13 Barb. 302; Beudel *v.* Hettrick, 35 N. Y. Super. Ct. 405, 45 How. Pr. 198; Ogden *v.* Astor, 4 Sandf. 311; Ludowieg *v.* Talcott, 47 Misc. 77, 93 N. Y. Suppl. 621; Winne *v.* Brundage, 40 N. Y. Suppl. 225; Muzzy *v.* Whitney, 10 Johns. 226. See, however, Greenwood *v.* Brink, 1 Hun 227; Fitch *v.* Hall, 16 How. Pr. 175; Everett *v.* Coe, 5 Den. 180; Dob *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293.

South Carolina.— Bartlett *v.* Levy, 2 Strobh. 471, 49 Am. Dec. 606.

Texas.— Cherry *v.* Owsley, (1888) 10 S. W. 519; Missouri Pac. R. Co. *v.* Johnson, (1888) 7 S. W. 838; Buzard *v.* Greenville Bank, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7; Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499; Murray Ginning System Co. *v.* Denton Exch. Nat. Bank, (Civ. App. 1901) 61 S. W. 508.

Virginia.— Jackson *v.* Haynie, 106 Va. 365, 56 S. E. 148.

Wisconsin.— Nicholaus *v.* Thielges, 50 Wis.

profits as a proprietor in the business, having a lien upon them and upon the stock as against the private creditors of the other proprietors, he is a partner;[73] and so far as third persons are concerned, it does not matter that he does not intend to become a partner, nor that his associates in the business have contracted for his exemption from partnership liability.[74]

(VI) *Sharing Gross Receipts.* The general rule is that an agreement between persons to share the gross receipts of a business, or to divide the products of an enterprise in gross, will render them liable as partners to third persons,[75] whenever it constitutes them partners *inter se*;[76] but only in such cases, unless they hold themselves out as partners.[77]

491, 7 N. W. 341. But *compare* Upham *v.* Hewitt, 42 Wis. 85.

United States.— Berthold *v.* Goldsmith, 24 How. 536, 16 L. ed. 762; Brown *v.* Hicks, 24 Fed. 811; Einstein *v.* Gourdin, 8 Fed. Cas. No. 4,320, 4 Woods 415.

England.— Ross *v.* Parkyns, L. R. 20 Eq. 331, 44 L. J. Ch. 610, 30 L. T. Rep. N. S. 331, 24 Wkly. Rep. 5.

See 38 Cent. Dig. tit. "Partnership," §§ 43, 44.

But see Warner *v.* Myrick, 16 Minn. 91; Wright *v.* Davidson, 13 Minn. 449; Curtis *v.* Cash, 84 N. C. 41; Reynolds *v.* Pool, 84 N. C. 37, 37 Am. Rep. 607; Purviance *v.* McClintee, 6 Serg. & R. (Pa.) 259.

No proprietary interest or lien on the profits.—A stipulation that the compensation for the services of an agent or servant shall be proportioned to the profits of a business, without giving him a proprietary interest in, or specific lien upon, the profits, has never been held to constitute him a partner. Lee *v.* Wimberly, 102 Ala. 539, 15 So. 444; Brockway *v.* Burnap, 16 Barb. (N. Y.) 309; Cothran *v.* Marmaduke, 60 Tex. 370; Goode *v.* McCartney, 10 Tex. 193; Stocker *v.* Brockelbank, 15 Jur. 591, 20 L. J. Ch. 401, 3 Macn. & G. 250, 49 Eng. Ch. 189, 42 Eng. Reprint 257; Mair *v.* Glennie, 4 M. & S. 240, 16 Rev. Rep. 445.

Form of stipulation.— For a time it was thought important for the stipulation to provide that the compensation should be "a sum equal to a certain share of the profits" and not that it should be "a certain share"; for, if the latter form of expression were used, it was deemed to convert the agent into a partner, as to third persons, however clear was the intent of the parties that he should have no proprietary interest in or control over the business. Catskill Bank *v.* Gray, 14 Barh. (N. Y.) 471; Ditsche *v.* Becker, 6 Phila. (Pa.) 176; *Ex p.* Digby, 1 Deac. 341, 2 Mont. & A. 735, 38 E. C. L. 665; *Ex p.* Rowlandson, 1 Rose 89; *Ex p.* Hamper, 17 Ves. Jr. 403, 11 Rev. Rep. 115, 34 Eng. Reprint 156. This view has, however, been discarded. Parker *v.* Canfield, 37 Conn. 250, 267, 9 Am. Rep. 317 ("The mere use of the expression 'a sum equal to the profits' in lieu of the word 'profits' does not change the nature of the contract"); Beecher *v.* Bush, 45 Mich. 188, 195, 7 N. W. 785, 40 Am. Rep. 465 ("The intent in this case is too manifest to be put aside by any mere ingenuity in the use of words"); Bullen *v.* Sharp, L. R. 1 C. P. 86, Harr. & R. 117, 12 Jur. N. S. 247, 35 L. J. C. P. 105, 14 L. T. Rep. N. S. 72, 14 Wkly. Rep. 338.

In Georgia the rule is "that if one is to receive a certain proportion of the profits, as one third or one half, as profits, he is a partner. If a certain sum is agreed to be paid out of profits, and the party does not look to that alone for payment, he is not a partner; but if the sum to be paid is not fixed, but may be increased or diminished by the amount or accidents of the business, then the receiver is a partner." Buckner *v.* Lee, 8 Ga. 285, 289 [*quoted* in Brandon *v.* Conner, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260]. See also Adams *v.* Carter, 53 Ga. 160; Perry *v.* Butt, 14 Ga. 699. And this is so, although it is provided by statute (Ga. Civ. Code, § 2629) that "a joint interest in the partnership property, or a joint interest in the profits and losses constitutes a partnership as to third persons." A common interest in profits alone does not. Sankey *v.* Columbus Iron Works, 44 Ga. 228. See also Brandon *v.* Conner, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260.

73. Illingworth *v.* Parker, 62 Ill. App. 650; Dame *v.* Kempster, 146 Mass. 454, 458, 15 N. E. 927 ("Each defendant is entitled to a share of the profits as profits, and he has a lien upon them and upon the stock as against the private creditors of either of the others. . . . This, according to all the authorities, made them partners"); Dutcher *v.* Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; Eastman *v.* Clark, 53 N. H. 276, 278, 16 Am. Rep. 192 (there must be a common interest in the profits as a principal trader, as distinguished from a right to share them as compensation). See also Pettee *v.* Appleton, 114 Mass. 114; Getchell *v.* Foster, 106 Mass. 42; Brigham *v.* Clark, 100 Mass. 430.

74. Pettee *v.* Appleton, 114 Mass. 114; Dutcher *v.* Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152, 34 N. W. 556.

75. Adams *v.* Carter, 53 Ga. 160; Lynch *v.* Thompson, 61 Miss. 354; Farmers' Ins. Co. *v.* Ross, 29 Ohio St. 429.

76. See *supra*, III, A, 2, c, (X).

77. *Alabama.*—McDonnell *v.* Battle House Co., 67 Ala. 90, 42 Am. Rep. 99.

Indiana.— Heshion *v.* Julian, 82 Ind. 576.

Massachusetts.— La Mont *v.* Fullam, 133 Mass. 583; Bishop *v.* Shepherd, 23 Pick. 492.

Michigan.— Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

(VII) *SHARING LOSSES ONLY.* Agreements by which persons, interested in an enterprise, bind themselves to share its losses, but not its profits, cannot constitute a true partnership; for they do not provide for the conduct of a common business with a view of profit.[78] Still the parties will be liable as partners to third persons, who are induced to deal with them by their representations that they are in partnership.[79]

(VIII) *SHARING PROFITS ONLY.* It has been held that to constitute one a partner, as to third persons, it is not necessary that he should agree to share in the losses of the business; sharing in the profits is sufficient.[80]

(IX) *SHARING BOTH PROFITS AND LOSS.* The normal partnership divides its profits and its losses between all of its members. Accordingly an agreement between business associates that they shall share ratably in the profits and loss of an adventure indicates that they are partners therein; and will make out a case of partnership against them, in behalf of third persons, unless they show that they shared the profits and loss in some other capacity than that of partners.[81]

4. ESTOPPEL BY HOLDING OUT AS PARTNER — a. In General. When persons hold themselves out as partners, in a particular business, and thereby induce others to deal with them in that capacity, it is no defense to actions brought against them

Montana.—Michener *v.* Fransham, 33 Mont. 108, 81 Pac. 953.

Vermont.— Bowman *v.* Bailey, 10 Vt. 170, where one person furnishes a boat and another sails it, an agreement to divide the gross earnings does not constitute a partnership.

England.— Dry *v.* Boswell, 1 Campb. 329; Heyhoe *v.* Burge, 9 C. B. 431, 19 L. J. C. P. 243, 67 E. C. L. 431; Wilkinson *v.* Frasier, 4 Esp. 182; Benjamin *v.* Porteus, 2 H. Bl. 590.

See 38 Cent. Dig. tit. "Partnership," § 45.

But *compare* Cotter *v.* Bettner, 1 Bosw. (N. Y.) 490.

78. Austin *v.* Thomson, 45 N. H. 113, an arrangement between two persons for coöperative housekeeping is not a partnership.

79. Moss *v.* Jerome, 10 Bosw. (N. Y.) 220.

80. Sager *v.* Tupper, 38 Mich. 258; Manhattan Brass, etc., Co. *v.* Sears, 45 N. Y. 797, 6 Am. Rep. 177; Cleveland *v.* Anderson, 2 Tex. App. Civ. Cas. § 146; Geddes *v.* Wallace, 2 Bligh 270, 4 Eng. Reprint 328; Brown *v.* Tappscott, 9 L. J. Exch. 139, 6 M. & W. 119; Bond *v.* Pittard, 7 L. J. Exch. 78, 3 M. & W. 357. See also Ontario Bank *v.* Hennessey, 48 N. Y. 545; Wood *v.* Vallette, 7 Ohio St. 172.

81. *Alabama.*— McCrary *v.* Slaughter, 58 Ala. 230.

Georgia.— Brandon *v.* Conner, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Martin *v.* Tidwell, 36 Ga. 332.

Kentucky.— Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Massachusetts.— Baring *v.* Crafts, 9 Metc. 380.

Minnesota.— McKasy *v.* Huber, 65 Minn. 9, 67 N. W. 650.

Missouri.— Martin *v.* Cropp, 61 Mo. App. 607. But *compare* Clifton *v.* Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97.

New York.— Galwey *v.* Nordlinger, 121 N. Y. 699, 24 N. E. 1100 [*affirming* 4 N. Y. Suppl. 649]; Mason *v.* Partridge, 66 N. Y. 633; Smith *v.* Wright, 4 Abb. Dec. 274, 1 Abb. Pr. 243 [*affirming* 5 Sandf. 113]; Zabriskie *v.* Coates, 41 N. Y. App. Div. 316, 58 N. Y. Suppl. 523; Mohawk Nat. Bank *v.* Van Slyck, 29 Hun 188; Fitch *v.* Hall, 25 Barb. 13; Arguimbo *v.* Hillier, 49 N. Y. Super. Ct. 253; Porter *v.* Lobach, 2 Bosw. 188; Richardson *v.* Case, 3 N. Y. Civ. Proc. 295; Walden *v.* Sherburne, 15 Johns. 409.

Pennsylvania.— Sims *v.* Willing, 8 Serg. & R. 103.

South Carolina.— Bivingsville Cotton Mfg. Co. *v.* Bobo, 11 Rich. 386.

Texas.—Edwards *v.* Buchanan, 14 Tex. Civ. App. 268, 36 S. W. 1022, (Civ. App. 1899) 51 S. W. 33; Stratton *v.* O'Connor, (Civ. App. 1896) 34 S. W. 158.

Vermont.— Noyes *v.* Cushman, 25 Vt. 390.

United States.— Beauregard *v.* Case, 91 U. S. 134, 23 L. ed. 263; Felichy *v.* Hamilton, 8 Fed. Cas. No. 4,719, 1 Wash. 491; Marsh *v.* Northwestern Nat. Ins. Co., 16 Fed. Cas. No. 9,118, 3 Biss. 351.

See 38 Cent. Dig. tit. "Partnership," § 47.

Net profits.— A partnership as to third persons is a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses. Chapman *v.* Devereux, 32 Vt. 616.

Owners of the freight and cargo of a vessel who share profits and losses are partners, and the assignee of one of them takes his share subject to an account of the voyage. Nicoll *v.* Mumford, 4 Johns. Ch. (N. Y.) 522 [*reversed* on other grounds in 20 Johns. 611].

Where persons agree to combine property or labor or both in a common undertaking, sharing profit and loss, they are partners as to third persons. Perry *v.* Butt, 14 Ga. 699.

Proving real agreement.— Participation in the profits and losses of a firm does not necessarily make one's interest the firm property such as to subject it to execution for his individual debts. Any presumption from such participation may be rebutted by proof of the real agreement. State *v.* Finn, 11 Mo. App. 546.

by such others that there is no partnership between them.[82] And one who holds out another as his partner will be liable as such for the acts of the other in the name and on account of the firm, if within the scope of the firm's business, although he was not consulted in the matter.[83] And one who knowingly permits

82. *Arkansas.*— Pike *v.* Douglass, 28 Ark. 59.

Delaware.— Deputy *v.* Harris, 1 Marv. 100, 40 Atl. 714.

Florida.— Dubos *v.* Jones, 34 Fla. 539, 16 So. 392.

Georgia.— Barnett Line of Steamers *v.* Blackmar, 53 Ga. 98; Perry *v.* Butt, 14 Ga. 699.

Illinois.— Smith *v.* Knight, 71 Ill. 148, 22 Am. Rep. 94; Neihoff *v.* Dudley, 40 Ill. 406; Wilson *v.* Roelofs, 88 Ill. App. 480.

Indiana.— Stephenson *v.* Cornell, 10 Ind. 475.

Iowa.— Winter *v.* Pipher, 96 Iowa 17, 64 N. W. 663; Ruddick *v.* Otis, 33 Iowa 402.

Louisiana.— Lee *v.* Bullard, 3 La. Ann. 462. See also Fearn *v.* Tiernan, 4 Rob. 367. But *compare* Buford *v.* Sontheimer, 116 La. 500, 40 So. 851.

Massachusetts.— Getchell *v.* Foster, 106 Mass. 42; Pratt *v.* Langdon, 97 Mass. 97; Rice *v.* Austin, 17 Mass. 197.

Michigan.— Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182 (holding that where persons hold themselves out as partners, the liability of one of them to persons dealing with the firm is not affected by the fact that he was induced to join the firm by the other's misrepresentations); Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870; Bishop *v.* Austin, 66 Mich. 515, 33 N. W. 525.

Minnesota.— McCarthy *v.* Nash, 14 Minn. 127.

Mississippi.— Boisgerard *v.* Wall, Sm. & M. Ch. 404, "To third persons, these articles [of partnership] may be qualified, superseded, or waived, by the conduct of the partners."

Missouri.— Young *v.* Smith, 25 Mo. 341; Schultze *v.* Steele, 69 Mo. App. 614.

Montana.— Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65.

Nevada.— See Sargent *v.* Collins, 3 Nev. 260.

New York.— Johanning *v.* Wilson, 86 N. Y. Suppl. 7 (that defendants attempted the fraudulent organization of a partnership is no defense to action by third persons); Burckle *v.* Eckart, 1 Den. 337.

Ohio.— Johnson *v.* Morrison, 8 Ohio Dec. (Reprint) 597, 9 Cinc. L. Bul. 51.

Oklahoma.— Johnson *v.* J. J. Douglass Co., 8 Okla. 594, 58 Pac. 743.

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890.

Pennsylvania.— Shafer *v.* Randolph, 99 Pa. St. 250 (persons holding themselves out to third parties as partners will be bound to such third persons as partners, even though *inter sese* they are not partners); Dixon *v.* Wood, 22 Pa. Co. Ct. 634.

South Carolina.— Beall *v.* Lowndes, 4 S. C. 258, holding that two firms which hold out to a third person that they constitute only one firm incur as to him a joint liability to the same extent as if they were in fact but one firm.

Texas.— Turner *v.* Douglass, 77 Tex. 619, 14 S. W. 221; Brown *v.* Watson, 72 Tex. 216, 10 S. W. 395; Baylor County *v.* Craig, 69 Tex. 330, 6 S. W. 305; Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499; Cothran *v.* Marmaduke, 60 Tex. 370; Murray Ginning System Co. *v.* Exchange Nat. Bank, (Civ. App. 1901) 61 S. W. 508 (holding that the principle of estoppel cannot be invoked against a private corporation in favor of a bank seeking to hold it liable for having held a third party out to it as its partner, since the bank was bound to know that such a corporation could not form a partnership); Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302 (connecting carriers, who have held themselves out as partners, cannot defend on the ground that such a partnership is *ultra vires*).

Vermont.— Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536; Cottrill *v.* Vanduzen, 22 Vt. 511; Stearns *v.* Haven, 14 Vt. 540; Kellogg *v.* Griswold, 12 Vt. 291.

Wyoming.— Rainsford *v.* Massengale, 5 Wyo. 1, 35 Pac. 774.

United States.— Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507; Mattocks *v.* Rogers, 16 Fed. Cas. No. 9,300, 1 Hask. 547.

England.—Mollwo *v.* Court of Wards, L. R. 4 P. C. 419; De Berkom *v.* Smith, 1 Esp. 29. See 38 Cent. Dig. tit. "Partnership," § 49.

Reason for rule.— "The theory upon which such a liability arises is that persons who hold themselves out to the world as partners by dealing in such a manner as to create the appearance of partnership to the injury of innocent third parties, are estopped from denying that their actual relation is not what their acts would seem to indicate it to be." Clark *v.* Rumsey, 59 N. Y. App. Div. 435, 439, 69 N. Y. Suppl. 102 [*reversing* 52 N. Y. Suppl. 417].

83. *Illinois.*— Hess *v.* Ferris, 57 Ill. App. 37.

Iowa.— Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850 (holding that where plaintiff extended credit to a supposed firm in reliance on representations of an employee that one of the defendants was a member thereof, since, if there was in fact no partnership, the employee was not authorized to act for such defendant, defendant was not estopped to deny the partnership); Sherrod *v.* Langdon, 21 Iowa 518.

Massachusetts.—Adams Bank *v.* Rice, 2 Allen 480.

Michigan.— Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870.

himself to be held out as a partner is also liable to those who deal with the concern, in the belief that the representation is true, as fully as if he were a partner in fact.[84] Negligently permitting one's self to be held out as a partner may operate as an estoppel.[85]

b. What Amounts to Holding Out. Any conduct on the part of a person reasonably calculated to lead others to suppose that he is a partner in a particular business amounts to a holding out on his part; for by such conduct he lends his credit to the concern.[86] A frequent method of holding out consists in the use of

Missouri.— Schultze *v.* Steele, 69 Mo. App. 614.

Texas.— Grabenheimer *v.* Rindskoff, 64 Tex. 49, if A holds out to B a third person as his partner, A is liable to B for debts contracted by such person in the course of the business of the supposed partnership.

Canada.—Cameron *v.* Cameron, 3 Manitoba 308.

See 38 Cent. Dig. tit. "Partnership," § 49.

Introducing as partner.— In an action against persons as copartners, they are not estopped to deny the partnership by the fact that one of them introduced the other as a partner to a third person who subsequently told the plaintiff of the partnership. Armstrong *v.* Porter, 103 Mich. 409, 61 N. W. 657.

84. *Colorado.*— Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834.

Indiana.— Strecker *v.* Conn, 90 Ind. 469, plaintiff need not show that he gave special credit to the financial ability of the one so held out.

Iowa.— Maxwell *v.* Gibbs, 32 Iowa 32.

Louisiana.— Gumbel *v.* Abrams, 20 La. Ann. 568, 96 Am. Dec. 426.

Massachusetts.— Plumer *v.* Lord, 9 Allen 455, 85 Am. Dec. 773; Fitch *v.* Harrington, 13 Gray 468, 74 Am. Dec. 641.

Minnesota.— Brown *v.* Grant, 39 Minn. 404, 40 N. W. 268.

Missouri.— Huyssen *v.* Lawson, 90 Mo. App. 82.

Nevada.— See Sargent *v.* Collins, 3 Nev. 260.

New York.— Marks *v.* Samuels, 54 N. Y. App. Div. 249, 66 N. Y. Suppl. 552.

Pennsylvania.— Daniel *v.* Lance, 21 Pa. Super. Ct. 474.

Tennessee.— Parker *v.* Oakley, (Ch. App. 1900) 57 S. W. 426.

See 38 Cent. Dig. tit. "Partnership," § 49.

Representations of the agent of a firm cannot estop one to deny that he is a member of such firm. Plumer *v.* Lord, 9 Allen (Mass.) 455, 85 Am. Dec. 773.

85. *Georgia.*—Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573, the negligence may consist in the failure to give proper notice of one's withdrawal from a firm.

Kansas.— Rider *v.* Hammell, 63 Kan. 733, 66 Pac. 1026.

Louisiana.— Grieff *v.* Boudousquie, 18 La. Ann. 631, 89 Am. Dec. 698.

Missouri.— Kelm *v.* Rathbun, 36 Mo. App. 199.

New York.— Paine *v.* Ronan, 6 N. Y. St. 420. *Compare* Gaines *v.* Leslie, 25 Misc. 20, 54 N. Y. Suppl. 421.

Vermont.— Carlton *v.* Coffin, 28 Vt. 504.

86. *Delaware.*— Ellison *v.* Stuart, 2 Pennew. 179, 43 Atl. 836; Deputy *v.* Harris, 1 Marv. 100, 40 Atl. 714.

Georgia.— Carmichael *v.* Greer, 55 Ga. 116, credit extended to a firm on the faith of representations by a person that he is interested in the firm will create a debt against such person as a partner.

Illinois.— Dooley *v.* Vance, 97 Ill. App. 42.

Indiana.— Booe *v.* Caldwell, 12 Ind. 12, holding that where A and B held themselves out as partners by advertisements, and plaintiff sold goods on the strength of these representations, B was liable as a partner, although the particular purchase was negotiated by A for his sole benefit.

Indian Territory.— Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486.

Iowa.— Wallerich *v.* Smith, 97 Iowa 308, 66 N. W. 184, the intention with which words are spoken holding the speaker out as a member of a partnership is immaterial. Such statements are obligatory, in favor of one who acts on their reasonable import.

Louisiana.— Johnson *v.* Levy, 109 La. 1036, 34 So. 68; Fearn *v.* Tiernan, 4 Rob. 367.

Maine.— Wood *v.* Pennell, 51 Me. 52.

Michigan.— Swift *v.* Mead, 62 Mich. 313, 28 N. W. 844.

Minnesota.— Cirkel *v.* Croswell, 36 Minn. 323, 31 N. W. 513, holding out may be by words spoken or written, or by conduct leading to the belief that they are partners.

New Hampshire.—Farr *v.* Wheeler, 20 N. H. 569, the false declarations must warrant the inference that the declarant is a partner. It is not enough that they induce one to believe that the proprietor of the business is to inherit the declarant's property.

Pennsylvania.— Craig *v.* Warner, 3 Phila. 298.

South Carolina.— Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703.

Texas.— Harris *v.* Crary, 67 Tex. 383, 3 S. W. 316.

Wisconsin.— Evens, etc., Fire Brick Co. *v.* Hadfield, 93 Wis. 665, 68 N. W. 468.

United States.— McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575, 7 S. Ct. 1315, 30 L. ed. 1027, holding that a partnership existed where it was shown that defendants held themselves out to plaintiff's agents as a partnership, had been partners up to a short time previous to the making of the contract in suit, had signed what purported to be a firm-name to a portion of the correspondence out of which the contract had arisen, and that plaintiff had dealt with them under the belief that they were part-

one's name as a part of the firm style. Such use is a virtual representation that the person thus named is a member of the firm.[87] The addition of "& Co." to the name of an individual does not indicate that any particular person is designated by those words.[88] Still a person may be held out as a partner, without having his name appear in the firm style, or being disclosed in any way.[89]

c. Assent of the Party Held Out. In order to render one liable as a partner who is not a partner in fact, it must appear that the alleged act of holding out was done by him or with his assent express or implied.[90] But undoubtedly, if a person learns that his name is being used as that of a member of a firm, he is

ners, and without knowledge or notice of the transformation of defendant's business from a partnership into a corporation.

See 38 Cent. Dig. tit. "Partnership," § 50.

Intention immaterial.— The intention with which words holding out the speaker as a partnership are spoken is immaterial. Such statements are obligatory in favor of persons acting on the reasonable import. Wallerich *v.* Smith, 97 Iowa 308, 66 N. W. 184.

Signing receipts.— Where a father and son hold themselves out as partners by signing receipts indiscriminately and speaking of their business as a common one, they are partners as to third persons, although in fact they are not partners. Mershon *v.* Hobensack, 22 N. J. L. 372 [*affirmed* in 23 N. J. L. 580].

Accepting draft.— Where one has acted as a partner and has accepted a draft in the firm-name, he is estopped in a suit on such draft to deny the existence of the firm. McStea *v.* Matthews, 3 Daly (N. Y.) 349 [*affirmed* in 50 N. Y. 166].

Securing extension of time.— One who, although not really a member of a partnership, secures an extension of time on notes executed in the partnership name by representing himself as a member, renders himself liable. Craig *v.* Warner, 3 Phila. (Pa.) 298.

Executors of a deceased partner are not estopped from showing that they are not partners, by the continued use of their testator's name. Frazier *v.* Murphy, 133 Cal. 91, 65 Pac. 326.

Conduct amounting to holding out see Lewis *v.* Post, 1 Ala. 65; Dooley *v.* Vance, 97 Ill. App. 42; Davenport Woolen Mills Co. *v.* Neinstedt, 81 Iowa 226, 46 N. W. 1085; Eye *v.* Tasker, 77 Iowa 48, 41 N. W. 561; Nichols *v.* James, 130 Mass. 589; Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870; Kritzer *v.* Sweet, 57 Mich. 617, 24 N. W. 764; Rosenbaum *v.* Hayden, 22 Nebr. 744, 36 N. W. 147; Adams *v.* Albert, 155 N. Y. 356, 49 N. E. 929, 63 Am. St. Rep. 675 [*reversing* 87 Hun 471, 34 N. Y. Suppl. 328]; Taylor *v.* Meyer, 47 N. Y. App. Div. 455, 62 N. Y. Suppl. 301; Ludowieg *v.* Talcott, 47 Misc. (N. Y.) 77, 93 N. Y. Suppl. 621; Payn *v.* Ronan, 14 N. Y. St. 339; Noblit *v.* Bonnaffon, 81 Pa. St. 15; Cottrill *v.* Vanduzen, 22 Vt. 511; Wausau First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215; Lake *v.* Argyll, 6 Q. B. 477, 51 E. C. L. 477; Wood *v.* Argyle, 13 L. J. C. P. 96, 6 M. & G. 928, 7 Scott N. R. 885, 46 E. C. L. 928.

Conduct not amounting to holding out see Morgan *v.* Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; Danforth *v.* Adams, 29 Conn. 107; Lighthiser *v.* Allison, 100 Md. 103, 59 Atl. 182; Partridge *v.* Kingman, 130 Mass. 476; Wall *v.* Balcom, 9 Gray (Mass.) 92.

87. *Iowa.*—Iowa Leather, etc., Co. *v.* Hathaway, (1899) 78 N. W. 193.

Massachusetts.— Bartlett *v.* Raymond, 139 Mass. 275, 30 N. E. 91, the name of defendant appeared in the firm-name, although he was in fact only a clerk.

Missouri.— Hahlo *v.* Mayer, 102 Mo. 93, 13 S. W. 804, 15 S. W. 750, 22 Am. St. Rep. 753, the firm-name was "M. & Son," although the son had no interest in the business.

New York.— McStea *v.* Matthews, 3 Daly 349 [*affirmed* in 50 N. Y. 166].

Ohio.— Speer *v.* Bishop, 24 Ohio St. 598 [*affirming* 5 Ohio Dec. (Reprint) 128, 3 Am. L. Rec. 91] (the use of an individual's name in the partnership name is a declaration that he is a member of the firm); Johnson *v.* Morrison, 8 Ohio Dec. (Reprint) 597, 9 Cinc. L. Bul. 51.

Pennsylvania.— Entwisle *v.* Mulligan, 9 Pa. Cas. 417, 12 Atl. 766.

Vermont.— Smith *v.* Hill, 45 Vt. 90, 12 Am. Rep. 189.

See 38 Cent. Dig. tit. "Partnership," § 50.

The mere fact that a note is payable to two persons jointly does not warrant the inference that they are partners. Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130.

88. Jordan *v.* Patrick, 207 Pa. St. 245, 56 Atl. 538.

89. Martyn *v.* Gray, 14 C. B. N. S. 824, 108 E. C. L. 824.

Advertised as partner.—A case is not made out against one by the evidence only that a newspaper advertisement, or trade item, stated that he was a partner. Gainesville First Nat. Bank *v.* Cody, 93 Ga. 127, 146, 19 S. E. 831 ("It would be a dangerous doctrine to hold that a person could be held liable upon alleged partnership contracts by simply proving, without more, he had been advertised as a partner"); Munton *v.* Rutherford, 121 Mich. 418, 80 N. W. 112.

90. *Georgia.*— Slade *v.* Paschal, 67 Ga. 541, if A told B that he was a partner of C and B informed C of the statement to which C made no reply, C would be liable as partner.

Kentucky.— Craig *v.* Alverson, 6 J. J. Marsh. 609.

under a duty to prohibit such use, and it is the general rule that when one knows that he is held out as a partner in a particular business he is bound to take such steps as an ordinarily prudent person would take in the circumstances to notify the public as well as individuals to whom he knows the holding out has been given that he is not a partner.[91]

d. Knowledge and Reliance of Third Person. It has been held on the ground of public policy that a person who holds himself out as a partner becomes, as against all the rest of the world, a partner, and that the fact that a person who is seeking to establish a partnership had no knowledge of or did not rely upon such holding out is immaterial.[92] But the rule now generally recognized is that, although one holds himself out or permits himself to be held out to be the partner of another, that does not make him so in fact or render him liable as such, except as to those who are misled by such holding out and who have extended credit on the strength of the supposed relation.[93] But it is to be borne in mind

Michigan.— Hinman *v.* Littell, 23 Mich. 484.

Missouri.— Crook *v.* Davis, 28 Mo. 94; Cole *v.* Butler, 24 Mo. App. 76.

New Jersey.— Seabury *v.* Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136 [*affirmed* in 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136].

New York.— Adams *v.* Albert, 87 Hun 471, 34 N. Y. Suppl. 328 [*reversed* on other grounds in 155 N. Y. 356, 49 N. E. 929, 63 Am. St. Rep. 675].

Ohio.— Speer *v.* Bishop, 24 Ohio St. 598 [*affirming* 5 Ohio Dec. Reprint 128, 3 Am. L. Rec. 91].

Vermont.— Smith *v.* Hill, 45 Vt. 90, 12 Am. Rep. 189.

Wisconsin.— See Powers *v.* Large, 75 Wis. 494, 43 N. W. 1120, 17 Am. St. Rep. 195.

United States.— *In re* De Metz, 7 Fed. Cas. No. 3,781.

See 38 Cent. Dig. tit. "Partnership," § 51.

A secret or unauthorized holding out by others will not affect one unless he ratifies it. Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250; Bishop *v.* Georgeson, 60 Ill. 484.

91. Tanner, etc., Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; Rittenhouse *v.* Leigh, 57 Miss. 697.

Diligence in ascertaining and correcting the report is not required of one who is held out as a member of a partnership without his knowledge. Campbell *v.* Hastings, 29 Ark. 512.

92. Poillon *v.* Secor, 61 N. Y. 456. See also Bartlett *v.* Raymond, 139 Mass. 275, 30 N. E. 91; Smith *v.* Smith, 27 N. H. 244.

93. *Alabama.*— Tillis *v.* McKinna, 114 Ala. 311, 21 So. 465; Alexander *v.* Handley, 96 Ala. 220, 11 So. 390; Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Wright *v.* Powell, 8 Ala. 560.

Arkansas.— Kahn Co. *v.* Bowden, 80 Ark. 23, 96 S. W. 126; Brugman *v.* McGuire, 32 Ark. 733; Campbell *v.* Hastings, 29 Ark. 512.

California.— Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425.

Florida.— Webster *v.* Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217, 27 L. R. A. 126.

Georgia.— Bowie *v.* Maddox, 29 Ga. 285, 74 Am. Dec. 61.

Illinois.— State Nat. Bank *v.* Butler, 149 Ill. 575, 36 N. E. 1000; Hefner *v.* Palmer, 67 Ill. 161; Poole *v.* Fisher, 62 Ill. 181; Fisher *v.* Bowles, 20 Ill. 396; Mellor *v.* Carithers, 63 Ill. App. 579; Krans *v.* Luthy, 56 Ill. App. 506; Wiley *v.* Deering, 34 Ill. App. 169; Butler *v.* Merrick, 24 Ill. App. 628.

Indiana.— Breinig *v.* Sparrow, 39 Ind. App. 455, 80 N. E. 37.

Iowa.— Iowa Leather, etc., Co. *v.* Hatbaway, (1899) 78 N. W. 193; Winter *v.* Pipher, 96 Iowa 17, 64 N. W. 663; Hancock *v.* Hintrager, 60 Iowa 374, 14 N. W. 725; Maxwell *v.* Gibbs, 32 Iowa 32.

Kansas.— Woodward *v.* Clark, 30 Kan. 78, 2 Pac. 106.

Kentucky.— Walrath *v.* Viley, 2 Bush 478; Markham *v.* Jones, 7 B. Mon. 456; Howe *v.* Dupoyster, 7 S. W. 627, 9 Ky. L. Rep. 958.

Louisiana.— Dodd *v.* Bishop, 30 La. Ann. 1178; Richardson *v.* Debuys, 4 Mart. N. S. 127.

Maine.— Wood *v.* Pennell, 51 Me. 52.

Maryland.— Thomas *v.* Green, 30 Md. 1; Kerr *v.* Potter, 6 Gill 404.

Massachusetts.— Rice *v.* Barrett, 116 Mass. 312.

Michigan.— Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. See also Adrian Knitting Co. *v.* Wabash R. Co., 145 Mich. 323, 108 N. W. 706.

Minnesota.— Brown *v.* Grant, 39 Minn. 404, 40 N. W. 268; Delaney *v.* Dutcher, 23 Minn. 373.

Missouri.— Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928; Hahlo *v.* Mayer, 102 Mo. 93, 13 S. W. 804, 15 S. W. 750, 22 Am. St. Rep. 753.

Montana.— Lomme *v.* Kintzing, 1 Mont. 290.

Nevada.— Sargent *v.* Collins, 3 Nev. 260.

New Hampshire.— Howes *v.* Fisk, 67 N. H. 289, 30 Atl. 351.

New York.— Cassidy *v.* Hall, 97 N. Y. 159; Vibbard *v.* Roderick, 51 Barb. 616; Irvin *v.* Conklin, 36 Barb. 64; Pringle *v.* Leverich, 48 N. Y. Super. Ct. 90; Rives *v.* Michaels, 16 Misc. 57, 37 N. Y. Suppl. 644; Payn *v.* Ronan, 14 N. Y. St. 339.

Ohio.— Sohn *v.* Freiberg, 6 Ohio Dec. (Re-

that there may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the parties knew it and relied upon it, without direct testimony to that effect.[94]

e. Operation and Effect of Holding Out. When persons have held themselves out to the public as partners, others are entitled to act upon the presumption that this relationship continues, until notice is given of its discontinuance[95] precisely as in the case of an actual partnership.[96] While one who holds himself out as a partner or permits himself to be so held out cannot escape the personal liability of a partner,[97] on the other hand an estoppel arising from such holding out cannot be used by the creditor as a means of perpetrating a tort or wrongful act.[98] Although there is some conflict as to whether the property of a holding-out firm

print) 1175, 11 Am. L. Rec. 736, 9 Cinc. L. Bul. 290 [*reversing* 8 Ohio Dec. (Reprint) 674, 9 Cinc. L. Bul. 183].

Pennsylvania.— Lancaster County Nat. Bank *v.* Boffenmyer, 162 Pa. St. 559, 29 Atl. 855; Denithorne *v.* Hook, 112 Pa. St. 240, 3 Atl. 777; Kirk *v.* Hartman, 63 Pa. St. 97; Chidsey *v.* Porter, 21 Pa. St. 390; Given *v.* Albert, 5 Watts & S. 333.

Tennessee.— Furber *v.* Carter, 11 Humphr. 271.

Texas.— Walker *v.* Brown, 66 Tex. 556, 1 S. W. 797; Cushing *v.* Smith, 43 Tex. 261; Wallis *v.* Wood, (1888) 7 S. W. 852; Crozier *v.* Kirker, 4 Tex. 252, 51 Am. Dec. 724; Altgelt *v.* Sullivan, (Civ. App. 1903) 79 S. W. 333; Burrows *v.* Grover Irr. Co., (Civ. App. 1897) 41 S. W. 822; Southern Agricultural Works *v.* Sims, (Civ. App. 1894) 26 S. W. 514; Lewis *v.* Wade, 1 Tex. App. Civ. Cas. § 697.

Vermont.— Hicks *v.* Cram, 17 Vt. 449.

West Virginia.— Waldron *v.* Hughes, 44 W. Va. 126, 29 S. E. 505; Moore *v.* Harper, 42 W. Va. 39, 24 S. E. 633.

United States.— Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507; Berthold *v.* Goldsmith, 24 How. 536, 16 L. ed. 762; Willis *v.* Rector, 50 Fed. 684, 1 C. C. A. 611; Benedict *v.* Davis, 3 Fed. Cas. No. 1,293, 2 McLean 347; Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,087, 3 McLean 364, 4 Fed. Cas. No. 2,089, 3 McLean 549; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34; *In re* Jewett, 13 Fed. Cas. No. 7,306, 7 Biss. 328; *In re* Krueger, 14 Fed. Cas. No. 7,941, 2 Lowell 66.

England.— Scarf *v.* Jardine, 7 App. Cas. 345, 51 L. J. Q. B. 612, 47 L. T. Rep. N. S. 258, 30 Wkly. Rep. 893; Dickinson *v.* Valpy, 10 B. & C. 128, 140, 8 L. J. Q. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63 (condemning the phrase "holding himself out to the world" as a loose expression); Vice *v.* Anson, 7 B. & C. 409, 14 E. C. L. 187, 3 C. & P. 19, 14 E. C. L. 428, 6 L. J. K. B. O. S. 24, M. & M. 97, 1 M. & R. 113; Guidon *v.* Robson, 2 Campb. 302, 10 Rev. Rep. 713; Martyn *v.* Gray, 14 C. B. N. S. 824, 108 E. C. L. 824; Stables *v.* Eley, 1 C. & P. 614, 12 E. C. L. 348; McIver *v.* Humble, 16 East 169; Young *v.* Axtell [*cited* in Waugh *v.* Carver, 2 H. Bl. 235, 242]; Ford *v.* Whitmarsh, Hurl. & W. 53, 58 Rev. Rep. 895 (plaintiff must show that he had given credit, under the belief that the holding-out representation was true); Edmanson *v.* Thompson, 8 Jur. N. S. 235, 31 L. J. Exch. 207, 5 L. T. Rep. N. S. 428, 10 Wkly. Rep. 300.

See 38 Cent. Dig. tit. "Partnership," § 52.

The principle on which a liability as a partner is fastened on one who is in fact not a partner is analogous to that of an estoppel *in pais*; and where one is not misled to his prejudice, either positively or tacitly, by the party whom he seeks to hold liable, there can be no such estoppel. Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507.

What belief necessary.— The question of liability does not depend upon what a reasonable and prudent man may have cause to believe; but whether plaintiff had a right to believe and did believe from defendant's conduct that he was a partner. Fisher *v.* A. Y. McDonald Co., 85 Ill. App. 653.

94. Vinson *v.* Beveridge, 3 MacArthur (D. C.) 597, 36 Am. Rep. 113; Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507; Ford *v.* Whitmarsh, Hurl. & W. 53, 58 Rev. Rep. 895.

95. Tudor *v.* White, 27 Tex. 584.

96. Reybold *v.* Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401; Watters *v.* McGreavy, 111 Iowa 538, 82 N. W. 949; Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Benjamin *v.* Covert, 47 Wis. 375, 2 N. W. 625.

97. *Kentucky.*— Fennell *v.* Myers, 76 S. W. 136, 25 Ky. L. Rep. 589.

Louisiana.— Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208; Elbert *v.* Wallace, 26 La. Ann. 705.

Michigan.— Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870.

Ohio.— Sohn *v.* Freiberg, 6 Ohio Dec. (Reprint) 1175, 11 Am. L. Rec. 736.

Texas.—White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101.

United States.—Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

98. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845, that a third person so acted as to estop him from denying that he was a partner of one C, doing business under the name of C & Co., as against persons giving credit to C, does not prevent C alone from recovering on an attachment bond payable to C & Co., for wrongfully suing out the attachment.

should be administered as partnership estate or as the individual property of the true owner, the view which seems to be sustained by the weight of authority is that, as there is no true partnership in such case there is no partnership estate.[99] Of course, if the owner has held out his individual property as belonging to the firm, he will be estopped, as against the firm creditors, from taking advantage of the provisions of an exemption statute, by asserting that it is individual property.[1] It has been decided that a holding out, or nominal, partner can be adjudged a bankrupt as a member of the firm.[2]

5. SUBPARTNERSHIP. One who is not in fact a member of a firm and who has not held himself out as a member does not become liable for the firm's debts, by reason of a contract which entitles him to divide with one of the partners the latter's share of the firm profits.[3] One who holds himself out as a partner and who has signed the partnership articles as a member of the firm cannot escape liability for firm debts by showing that he has acted as a mere dummy for another;[4] but such a transaction should not be dealt with as one of partnership. It is clear that not even a subpartnership exists where one loans money to a firm and acts as agent for it in consideration of receiving one third of its gross profits;[5] nor, where two persons by a written contract agree to carry on a particular busi-

99. *Illinois.*—Newlin *v.* Bailey, 15 Ill. App. 199, in this case H, a certain creditor of the firm, held himself out to a few of the other creditors as a partner, but was not held out as such to the others. The court declared the equities could be adjusted, by first making a dividend of the principal fund among the creditors of the business, including H; and then if it should appear that H had made himself responsible for any of its debts, his share of the principal fund, so far as necessary for that purpose, could be distributed *pro rata* among such creditors, until they were paid in full.

Maine.— Allen *v.* Dunn, 15 Me. 292, 33 Am. Dec. 614, a private creditor of the holding out partner cannot enforce his claim against the business assets, for such nominal partner has no property interest therein.

Maryland.— Kerr *v.* Potter, 6 Gill 404.

New Hampshire.— Taylor *v.* Wilson, 58 N. H. 465.

Tennessee.— Whitworth *v.* Patterson, 6 Lea 119; Hillman *v.* Moore, 3 Tenn. Ch. 454.

United States.— *In re* Gorham, 10 Fed. Cas. No. 5,624, 9 Biss. 231.

See 38 Cent. Dig. tit. "Partnership," § 53.

Rights of partnership creditors and creditors of alleged partner.— In a contest between the partnership creditors of an alleged partnership and the individual creditors of one of the alleged partners, if it appears that no partnership actually existed between the parties, although they held themselves out to the world as partners, there is no equity to support the claims of the partnership execution creditors as against the prior execution creditors of the individual partner who is the real owner of the assets. Bixler *v.* Kresge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. Rep. 920.

Property in hands of actual partnership not bound.— "Where a person is ostensibly, but not actually, a member of a partnership, and is therefore under a personal estoppel to deny his liability, it follows that a creditor who by reason of this estoppel can maintain a personal action against him cannot extend this estoppel so as to bind the property which was in the possession and use of the actual partners. The ostensible partner himself has no equity to have this property applied to the payment of the claims upon which he is liable; and therefore the creditors holding those claims, who are merely subrogated to his rights and equities, have no such equity." Broadway Nat. Bank *v.* Wood, 165 Mass. 312, 316, 43 N. E. 100; Kelly *v.* Scott, 49 N. Y. 595; Thayer *v.* Humphreys, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549; *Ex p.* Hayman, 8 Ch. D. 11, 47 L. J. Bankr. 54, 38 L. T. Rep. N. S. 238, 26 Wkly. Rep. 597. *Contra*, Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182.

1. Green *v.* Taylor, 98 Ky. 330, 32 S. W. 945, 17 Ky. L. Rep. 897, 56 Am. St. Rep. 375. See also Jones *v.* Gilbert, 168 Ill. 627, 48 N. E. 177 [*affirming* 68 Ill. App. 611].

2. *In re* Krueger, 14 Fed. Cas. No. 7,941, 2 Lowell 66, 5 Nat. Bankr. Reg. 439; *Ex p.* Matthews, 3 Ves. & B. 125, 35 Eng. Reprint 426. *Contra*, Hanson *v.* Paige, 3 Gray (Mass.) 239.

The present United States bankruptcy statute does not permit a nominal partner to be adjudged a bankrupt as a member of the firm, nor does it treat the assets of such business as firm assets, if in fact they are owned by an individual. *In re* Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353, construing U. S. Bankr. Act (1898), § 5.

3. Burnett *v.* Snyder, 81 N. Y. 550, 37 Am. Rep. 527 [*reversing* 45 N. Y. Super. Ct. 577]. And see *supra*, III, A, 4. But *compare* Fitch *v.* Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; Baring *v.* Crafts, 9 Metc. (Mass.) 380.

4. Voorhees *v.* Jones, 29 N. J. L. 270, holding that such person might show his retirement from the firm, and the substitution of his principal in his stead.

5. Jersey City First Nat. Bank *v.* Staples, 126 N. Y. 669, 27 N. E. 854 [*affirming* 11

ness, and in the same instrument one of them and a third person agree to carry on a distinct business.[6]

6. Dormant or Secret Partners — a. Who Are. According to one line of authorities a dormant or secret partner is one who is not known to be a partner, although he may be an active participant in the firm's affairs, and his connection with the business may have contributed to its credit.[7] According to the other line of authorities, a dormant partner is one who takes no part in the business, and whose connection with it is unknown. Both secrecy and inactivity are implied by the term.[8]

b. Necessity For Contract. One cannot be charged as a dormant partner who has not entered into an agreement for that relationship,[9] unless his conduct estops him from showing the absence of a valid contract.[10]

c. Liability. As a dormant partner is one of the proprietors of the business, he is liable to any creditor of the firm, for an obligation incurred during his connection with it, being subject to the rule governing undisclosed principals.[11]

d. Escaping Liability by Retirement. A dormant partner does not need to give notice of his retirement from the firm to escape liability for its obligations thereafter incurred. As his connection with the partnership has never been known, there is no basis for the presumption that the public will be misled by his omission to give notice of his withdrawal.[12]

7. Associations, Defective Corporations, and Promoters — a. Associations. Business associates who have not attempted to become incorporated are partners, if they are the common proprietors of a business carried on by them for profit,

N. Y. Suppl. 809], the lender and agent did not acquire any proprietary interest in the firm, but was its creditor only.

6. Elderkin *v.* Winne, 2 Pinn. (Wis.) 95, 1 Chandl. 27, simply a case of two firms with a member common to both.

7. *Alabama.*— St. Marys Bank *v.* St. John, 25 Ala. 566.

Louisiana.—Tennessee Bank *v.* McKeage, 11 Rob. 130; McDonald *v.* Millaudon, 5 La. 403.

Maryland.— Mitchell *v.* Dall, 2 Harr. & G. 159, "In the strict legal acceptation of the term . . . every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms, as the name of one of the firm and company."

New Hampshire.— Deering *v.* Flanders, 49 N. H. 225.

Texas.— Harris *v.* Crary, 67 Tex. 383, 3 S. W. 316.

Vermont.— Waite *v.* Dodge, 34 Vt. 181.

United States.— Oppenheimer *v.* Clemmons, 18 Fed. 886; Metcalf *v.* Officer, 2 Fed. 640, 1 McCrary 325; Bigelow *v.* Elliott, 3 Fed. Cas. No. 1,399, 1 Cliff. 28.

England.— Heath *v.* Sansom, 4 B. & Ad. 172, 2 L. J. K. B. 25, 1 N. & M. 104, 24 E. C. L. 83; Carter *v.* Whalley, 1 B. & Ad. 11, 8 L. J. K. B. O. S. 340, 20 E. C. L. 377.

See 38 Cent Dig. tit. "Partnership," § 54.

In Georgia it is provided by statute (Civ. Code, § 2628) that "an ostensible partner is one whose name appears to the world as such, and he is bound, though he have no interest in the firm. A dormant or secret partner is one whose connection with the firm is really or professedly concealed from the world." See Phillips *v.* Nash, 47 Ga. 218.

8. Rich *v.* Davis, 6 Cal. 163; Elkinton *v.* Booth, 143 Mich. 479, 10 N. E. 460; Elmira Iron, etc., Rolling-Mill Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; Salem Nat. Bank *v.* Thomas, 47 N. Y. 15; North *v.* Bloss, 30 N. Y. 374; Bouker Contracting Co. *v.* Scribner, 52 N. Y. App. Div. 505, 65 N. Y. Suppl. 444; Burchell *v.* Voght, 35 N. Y. App. Div. 190, 55 N. Y. Suppl. 80 [*affirmed* in 164 N. Y. 602, 58 N. E. 1085]; Thomas *v.* Haight, 2 Edm. Sel. Cas. (N. Y.) 25; Niagara County *v.* People, 7 Hill (N. Y.) 504; Shamburg *v.* Ruggles, 83 Pa. St. 148; Deford *v.* Reynolds, 36 Pa. St. 325.

9. Watson *v.* Lovelace, 49 Iowa 558; Cochran *v.* Anderson County Nat. Bank, 83 Ky. 36; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Ryan *v.* Hardy, 26 Hun (N. Y. 176; Oakley *v.* Aspinwall, 2 Sandf. (N. Y.) 7 [*reversed* on other grounds in 4 N. Y. 513].

10. Willard *v.* Bullen, 41 Oreg. 25, 67 Pac. 924, 68 Pac. 422; Mason *v.* Connell, 1 Whart. (Pa.) 381.

11. Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703; Winship *v.* U. S. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216 [*affirming* 28 Fed. Cas. No. 16,791, 5 Mason 176]; *Ex p.* Geller, 2 Madd. 262, 1 Rose 297, 17 Rev. Rep. 219, 56 Eng. Reprint 331.

12. Kelley *v.* Hurlburt, 5 Cow. (N. Y.) 534. See *infra*, IX, B, 6, b.

Necessity for notice when dormant partner has been active in firm's affairs see Elkinton *v.* Booth, 143 Mass. 479, 10 N. E. 460; Elmira Iron, etc., Rolling-Mill Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; Shamburg *v.* Ruggles, 83 Pa. St. 148; Heath *v.* Sansom, 4 B. & Ad. 172, 2 L. J. K. B. 25, 1 N. & M. 104, 24 E. C. L. 83; Carter *v.* Whalley, 1 B. & Ad. 11, 8 L. J. K. B. O. S. 340, 20 E. C. L. 377.

for the law knows no intermediate form of business organization between a corporation and a partnership.[13] But a voluntary association, unincorporated, formed for public, social, or charitable purposes and not for trade or profit, is not a partnership.[14]

13. *Alabama.*— Grady *v.* Robinson, 28 Ala. 289.

Georgia.— Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759.

Illinois.— Robbins *v.* Butler, 24 Ill. 387.

Indiana.— Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928.

Iowa.— Pipe *v.* Bateman, 1 Iowa 369, unincorporated voluntary associations, except those for charitable purposes, whatever may be the number of their members, and of whatever nature and extent the object undertaken, are nothing more than partnerships.

Kentucky.— Adams Express Co. *v.* Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. Rep. 1120; Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.

Massachusetts.— Ricker *v.* American L. & T. Co., 140 Mass. 346, 5 N. E. 284; Hoadley *v.* Essex County Comrs., 105 Mass. 519.

Michigan.— Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Willson *v.* Owen, 30 Mich. 474.

Mississippi.— Boisgerard *v.* Wall, Sm. & M. Ch. 404, an association for the business of banking is a partnership.

New Hampshire.— Farnum *v.* Patch, 60 N. H. 294, 49 Am. Rep. 313; Atkins *v.* Hunt, 14 N. H. 205.

New York.— Wells *v.* Gates, 18 Barb. 554; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286 [*reversing* 5 Johns. Ch. 351], a joint stock manufacturing association is a partnership.

Ohio.— McFadden *v.* Leeka, 48 Ohio St. 513, 28 N. E. 874.

Pennsylvania.— Babb *v.* Reed, 5 Rawle 151, 28 Am. Dec. 650.

Tennessee.— Carter *v.* McClure, 98 Tenn. 109, 38 S. W. 585, 60 Am. St. Rep. 842, 36 L. R. A. 282.

Vermont.— McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316.

United States.— Johnson *v.* Potomac Bldg. Assoc., 13 Fed. Cas. No. 7,406; The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

England.— *In re* Agriculturalist Cattle Ins. Co., L. R. 5 Ch. 725, 23 L. T. Rep. N. S. 424, 18 Wkly. Rep. 1094; Smith *v.* Anderson, 15 Ch. D. 247, 50 L. J. Ch. 39, 43 L. T. Rep. N. S. 329, 29 Wkly. Rep. 21; Greenwood's Case, 3 De G. M. & G. 459, 18 Jur. 387, 23 L. J. Ch. 966, 2 Wkly. Rep. 322, 52 Eng. Ch. 358, 43 Eng. Reprint 180; Rex *v.* Dodd, 9 East 516.

Canada.— Seiffert *v.* Irving, 15 Ont. 173, "If they failed to be a corporation, they must necessarily be a partnership."

See 38 Cent. Dig. tit. "Partnership," § 56. And see ASSOCIATIONS, 4 Cyc. 310.

Illustrations.— Where an agreement forming an association stated that it was formed for the mutual benefit and profit of the parties, that the business should be buying, selling, renting, leasing, and mortgaging real estate, and that each of the parties thereto should have a specified interest therein, the legal effect of the agreement was to constitute the parties partners. Kelley *v.* Bourne, 15 Oreg. 476, 16 Pac. 40. A partnership includes an association of separate owners of several steamboats into a joint concern to run their boats and collect and receive the earnings in a common fund, out of which expenses of all the boats are to be paid. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

Joint stock companies are generally treated as, and have all the attributes of, a common partnership, yet a mere joint ownership or community of interest in property does not necessarily constitute a partnership, although the income from it is divided. Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74, 76. A partnership association commonly but inaccurately called a "joint stock company" is the creation of the statutes, and, while it is assimilated in some respects to a corporation, it is nevertheless essentially a partnership. Carter *v.* Producers' Oil Co., 200 Pa. St. 579, 50 Atl. 167.

How distinguished from partnerships.—A "voluntary unincorporated association," composed of a great number of persons whose interests are evidenced by certificates of stock, and which transacts its business and manages its affairs through named trustees with prescribed powers, is uniformly held to be a partnership, subject to be sued as such, and governed by the laws fixing partnership responsibility. Such associations are distinguishable from "partnerships," as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and stock can be bought and sold without affecting the integrity of the concern. Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875.

14. Pipe *v.* Bateman, 1 Iowa 369; Burt *v.* Lathrop, 52 Mich. 106, 17 N. W. 716; White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318 [*affirmed* in 2 Daly 329, 4 Abb. Pr. N. S. 318]; Local Union No. 1 Textile Workers *v.* Barrett, 19 R. I. 663, 36 Atl. 5. And see *supra*, III, A, 1, d.

Public purpose necessary.—An unincorporated association of individuals formed for a public purpose, who received money from the public as a gift, is not a partnership as between themselves, whatever may be its relation as to third persons; but where the association is for private and individual profit or pleasure, with no public object, it is a copartnership, and where the association is for private emoluments or for benevolence, confined exclusively to the association, and in which none others participate, it is then, as between the members, a partnership. Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98.

b. Defective Corporations.[15] According to one line of decisions, if business associates attempt, but fail, to incorporate themselves, their association is a partnership, although it professes to be a corporation and deals with persons as such,[16] unless they expressly stipulate that they will be liable only as a corporation.[17] Another line of decisions holds that if persons make a *bona fide* attempt to incorporate under a constitutional statute, and assume and exercise the powers which the pretended corporation was authorized to exercise, and do this unchallenged by the state, they are not liable as partners to those dealing with them as a corporation.[18]

15. See CORPORATIONS, 10 Cyc. 667.

16. *Arkansas.*— Forbes *v.* Whittemore, 62 Ark. 229, 35 S. W. 223; Garnett *v.* Richardson, 35 Ark. 144.

Georgia.— Wilkins *v.* St. Mark's Protestant Episcopal Church, 52 Ga. 351, 353, "Our law furnishes so simple a method by which societies such as these may be incorporated and acquire the right to contract . . . and it is so easy for any one to know what is the truth of the case, that if men will make business transactions of the character disclosed by this record, they must take the consequences."

Illinois.— Loverin *v.* McLaughlin, 161 Ill. 417, 44 N. E. 99; Flagg *v.* Stowe, 85 Ill. 164; Bigelow *v.* Gregory, 73 Ill. 197. See, however, Hoyt *v.* McCallum, 102 Ill. App. 287.

Iowa.— Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

Kentucky.— Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.

Louisiana.— Louisiana Nat. Bank *v.* Henderson, 116 La. 413, 40 So. 779; Provident Bank, etc., Co. *v.* Saxon, 116 La. 408, 40 So. 778; Lehman *v.* Knapp, 48 La. Ann. 1148, 20 So. 674. See also Campbell *v.* J. I. Campbell Co., 117 La. 402, 418, 41 So. 696, 702.

Missouri.— Smith *v.* Warden, 86 Mo. 382; Sexton *v.* Snyder, 119 Mo. App. 668, 94 S. W. 562; Simmons *v.* Ingram, 78 Mo. App. 603.

New York.— See Worthington *v.* Griesser, 77 N. Y. App. Div. 203, 79 N. Y. Suppl. 52.

Ohio.— Ridenour *v.* Mayo, 40 Ohio St. 9.

Canada.— Seiffert *v.* Irving, 15 Ont. 173; Gildersleeve *v.* Balfour, 15 Ont. Pr. 293, holding that in case of a nominal corporation, which has no legal status as such, the ostensible corporators are partners.

See 38 Cent. Dig. tit. "Partnership," § 58.

Attempt to change name of corporation.— If the stock-holders of a corporation change its name without complying with the formalities required by law, and continue the business under a new name, they become liable as partners, regardless of whether they intended to become such or not; and in such case it is entirely immaterial that the credit extended to them was to a corporation rather than to a partnership. Robinson *v.* Marietta First Nat. Bank, (Tex. Civ. App. 1904) 79 S. W. 103.

17. Weir Furnace Co. *v.* Bodwell, 73 Mo. App. 389. And see Imperial Shale Brick Co. *v.* Jewett, 169 N. Y. 143, 62 N. E. 167 [*reversing* 42 N. Y. App. Div. 588, 60 N. Y. Suppl. 35], holding that a notice in a contract which limits liability must be so plain and fair that the party to be charged with it either receives it or it is his own fault if he does not.

Failure to pay for stock.— Where persons have complied with statutory provisions as to chartering a corporation, their failure to pay for the amount of stock named in the articles, and the failure of some of them to acknowledge the articles, does not render them liable as copartners to creditors of the corporation. Deadwood First Nat. Bank *v.* Rockefeller, 195 Mo. 15, 93 S. W. 761; Wilson *v.* Rockefeller, (Mo. 1906) 93 S. W. 779; Winslow *v.* Rockefeller, Mo. 1906) 93 S. W. 778. See also Webb *v.* Rockefeller, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. N. S. 872.

18. *Alabama.*— Owensboro Wagon Co. *v.* Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515.

California.— Blanchard *v.* Kaull, 44 Cal. 440.

Colorado.— Humphreys *v.* Mooney, 5 Colo. 282.

Connecticut.— Stafford Nat. Bank *v.* Palmer, 47 Conn. 443.

Indiana.— Doty *v.* Patterson, 155 Ind. 60, 56 N. E. 668 [*distinguishing* Coleman *v.* Coleman, 78 Ind. 344], and declaring that the rule established hy the great weight of authority is that the stock-holders in a *de facto* corporation cannot be held liable as partners, although there have been irregularities, omissions, and mistakes in incorporating the company. See, however, Manning *v.* Gasharie, 27 Ind. 399.

Michigan.— American Mirror, etc., Co. *v.* Bulkley, 107 Mich. 447, 65 N. W. 291. But see Whipple *v.* Parker, 29 Mich. 369.

Minnesota.— Johnson *v.* Okerstrom, 70 Minn. 303, 73 N. W. 147 [*citing* Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778, and *distinguishing* Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799].

New Hampshire.— Larned *v.* Beal, 65 N. H. 184, 23 Atl. 149; Haynes *v.* Brown, 36 N. H. 545.

Oregon.— Rutherford *v.* Hill, 22 Oreg. 218, 29 Pac. 546, 29 Am. St. Rep. 596, 17 L. R. A. 549.

Pennsylvania.— *In re* Gibbs, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Hallstead *v.* Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370 [*reversing* 10 Pa. Co. Ct. 434]; Bond *v.* Stoughton, 26 Pa. Super. Ct. 483. See, however, Matter of Fry, 4 Phila. 129.

South Dakota.— Mason *v.* Stevens, 16 S. D. 320, 92 N. W. 424.

If, however, the statute under which the incorporation is attempted is unconstitutional,[19] if there is an assumption of powers which a constitutional statute does not confer upon the particular association,[20] if the pretended corporation is a fraud upon the law,[21] or if the defects in the incorporation proceedings are very great[22] there is but little hesitation, even on the part of courts, whose decisions generally are in this second line, to hold those who are associated as such pretending incorporators and stock-holders liable as partners. Still a third class of decisions holds that persons who have united to form a corporation and believe that they have accomplished their purpose, and who thereafter do business as a corporation, are not to be held liable as partners, even though there is no corporate liability, because they never intended to enter into that relation.[23] As between themselves the rights of the stock-holders in a defectively incorporated association should be governed by the supposed charter and the laws of the state relating thereto.[24]

c. Continuance of Business After Expiration of Charter. Stock-holders who carry on the business in the corporate name after the charter has expired are partners if this is done with knowledge that the corporation has ceased to exist, and pursuant to a new agreement between them.[25]

d. Promoters. Persons who act together in organizing corporations, or in conducting the negotiations preliminary to the launching of business associations,

Wisconsin.— Slocum *v.* Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

See 38 Cent. Dig. tit. "Partnership," § 58.

Reason for rule.— Allowing suits against the stock-holders of defective corporations as partners "involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation as a distinct entity recognized by the law, acquiesced in by the State; defeats the corporate character of the contract, changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract, effects the imposition of an enlarged liability, which they did not assume, but intended to avoid; so understood by the creditor, when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle that the corporation and the share-holder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing the contract. He repudiates the party — the corporation — with which he made the contract, and seeks its enforcement against parties who never entered into contractual relation with him." Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 233, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515.

19. Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562; Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

20. Henry *v.* Simanton, 64 N. J. Eq. 572, 577, 54 Atl. 153 ("The business conducted by the members of the organization was so entirely aside from the power conferred upon the grange by the statute under which the incorporation was effected that the business must be regarded as a partnership, and not corporate"); Ridenour *v.* Mayo, 40 Ohio St. 9; Empire Mills *v.* Alston Grocery Co., 4 Tex. App. Civ. Cas. § 221, 15 S. W. 200, 505, 12 L. R. A. 366.

21. Montgomery *v.* Forbes, 148 Mass. 249, 19 N. E. 342; Hill *v.* Beach, 12 N. J. Eq. 31, an attempt was made to incorporate in New York, and the statute was complied with in matters of form, but the court declared that the attempt was a clear fraud on the law of New York, and hence the association was to be treated as a partnership. See also Humphreys *v.* Mooney, 5 Colo. 282; Stafford Nat. Bank *v.* Palmer, 47 Conn. 443.

22. Bergeron *v.* Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85.

In Pennsylvania the failure to record a certificate of incorporation in the county where the association's chief operations are to be carried on, as required by statute, makes the incorporators liable as partners to persons who deal with them without knowledge of the incorporation. New York Nat. Exch. Bank *v.* Crowell, 177 Pa. St. 313, 35 Atl. 613; Guckert *v.* Hacke, 159 Pa. St. 303, 28 Atl. 249.

23. Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83 (holding that the directors and managers who profess to make contracts on behalf of the corporation are liable on implied warranty of their authority); Fay *v.* Noble, 7 Cush. (Mass.) 188.

24. Cannon *v.* Brush Electric Co., 96 Md. 446, 54 Atl. 121, 94 Am. St. Rep. 584.

Purchaser for stock-holder.— One who bought stock in a company, which both he and the seller believed to be incorporated, and who demanded a rescission of the sale upon learning that it was not incorporated, is not to be treated as a partner of the seller. Bolton *v.* Prather, 35 Tex. Civ. App. 295, 80 S. W. 666.

25. National Union Bank *v.* Landon, 45 N. Y. 410 [*affirming* 66 Barb. 189].

Ignorance of charter's expiration.— It has been held that stock-holders are not partners, if the business is continued as that of the

are not to be treated as partners, for they are not the proprietors of a common business.[26] Of course they may render themselves liable as partners by holding themselves out as such, during this period, and they may even become true partners, by actually carrying on a common business before incorporating.[27] But the fact that some of them carry on the business, intending to turn it over to the corporation when it is formed, does not create a partnership between all the subscribers for stock, in case a corporation is never organized.[28]

8. What Law Governs. What constitutes a partnership, not only as between the parties, but as to third persons, is a question of law,[29] which is to be determined by the legal rules of the jurisdiction where the business association involved is organized;[30] but any contract made by such a firm and performable in another jurisdiction will be construed and enforced by the legal rules there prevailing.[31] Whether a person has held himself out as a partner is a question to be decided by the law of the place where the acts alleged to constitute the holding out were done.[32]

9. Estoppel of Persons Dealing With a Partnership. One who has dealt with and become indebted to an association, as a partnership, upon being sued therefor, cannot defend upon the ground that the association is not a partnership. Such a defense would operate as a fraud upon them and would enable him to escape the payment of a just obligation.[33] And the maker of a negotiable prom-

corporation, in actual ignorance of the charter's expiration. Central City Sav. Bank *v.* Walker, 66 N. Y. 424.

26. Arnold *v.* Conklin, 96 Ill. App. 373; Shibley *v.* Angle, 37 N. Y. 626; Hudson *v.* Spaulding, 3 Silv. Sup. (N. Y.) 434, 6 N. Y. Suppl. 877; West Point Foundry Assoc. *v.* Brown, 3 Edw. (N. Y.) 284; Shields *v.* Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509; Batard *v.* Hawes, 3 C. & K. 277, 2 E. & B. 287, 17 Jur. 1154, 22 L. J. Q. B. 443, 1 Wkly. Rep. 387, 75 E. C. L. 287; Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351 [*overruling* Holmes *v.* Huggins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Lucas *v.* Beach, 4 Jur. 631, 1 M. & G. 417, 1 Scott N. R. 350, 39 E. C. L. 831]. See Corporations, 10 Cyc. 271.

27. *Connecticut.*— Citizens' Nat. Bank *v.* Hine, 49 Conn. 236.

Illinois.— Seeberger *v.* McCormick, 178 Ill. 404, 53 N. E. 340 [*affirming* 73 Ill. App. 87]; Loverin *v.* McLaughlin, 161 Ill. 417, 44 N. E. 99; Janes *v.* Bergevin, 83 Ill. App. 607.

Kentucky.— Friedman *v.* Janssen, 66 S. W. 752, 23 Ky. L. Rep. 2151.

Missouri.— Queen City Furniture, etc., Co. *v.* Crawford, 127 Mo. 356, 30 S. W. 163; Martin *v.* Fewell, 79 Mo. 401; Richardson *v.* Pitts, 71 Mo. 128; Hurt *v.* Salisbury, 55 Mo. 310.

United States.— Ryland *v.* Hollinger, 117 Fed. 216, 54 C. C. A. 248.

Canada.— Seiffert *v.* Irving, 15 Ont. 173.

28. Ward *v.* Brigham, 127 Mass. 24 (holding that those who carried on the business acted at their own risk, and could not treat the other subscribers as copartners); Gorman *v.* Davis, etc., Co., 118 N. C. 370, 24 S. E. 770 (holding that persons who subscribed to the stock of a proposed corporation, and on failure of the company to take any steps to incorporate, withdrew, and received back the money so paid, were at most dormant partners, and are not liable for debts contracted after their withdrawal).

29. Jones *v.* Purnell, 5 Pennew. (Del.) 444, 62 Atl. 149; Deputy *v.* Harris, 1 Marv. (Del.) 100, 40 Atl. 714; Davis *v.* White, 1 Houst. (Del.) 228; Gilpin *v.* Temple, 4 Harr. (Del.) 190.

30. Waverly Nat. Bank *v.* Hall, 150 Pa. St. 466, 24 Atl. 665, 30 Am. St. Rep. 823 (holding that where a contract for the loan of money by one of the defendants to the others, in consideration of a share of the profits of the business of those others, was made in Pennsylvania, but was to be performed in New York, whether a partnership existed was determinable by the law of the latter state); Hastings *v.* Hopkinson, 28 Vt. 108; Cutler *v.* Thomas, 25 Vt. 73.

Illustration.— If a limited partnership has been organized in Cuba, its validity and the liability of the special partner are determined by the law of Cuba. King *v.* Sarria, 69 N. Y. 24, 25 Am. Rep. 128.

31. Baldwin *v.* Gray, 4 Mart. N. S. (La.) 192, 16 Am. Dec. 169; King *v.* Sarria, 69 N. Y. 24, 25 Am. Rep. 128.

32. Wait *v.* Brewster, 31 Vt. 516.

33. *California.*— Yancy *v.* Morton, 94 Cal. 558, 29 Pac. 1111; Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204.

Iowa.— Gordon *v.* Janney, Morr. 182.

Louisiana.— Pharr *v.* McHugh, 32 La. Ann. 1280 (one who signed a partnership note as surety was held estopped to deny the firm's existence); Millaudon *v.* Sylvestre, 8 La. 262 (the purchasers of firm property from a partner in fraud of a copartner cannot set up as a defense the omission to record the act of partnership as required by statute).

Minnesota.— French *v.* Donohue, 29 Minn. 111, 12 N. W. 354.

New York.—Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562.

See 38 Cent. Dig. tit. "Partnership," § 37.

issory note payable to the order of a firm is estopped from denying to a holder in due course the existence of the payee firm; and the accepter of a bill of exchange is estopped from denying to such a holder the existence of a partnership drawer.[34] By estoppel too a creditor of a firm may lose his right against a retired partner. This result will ensue whenever the creditor induces the retired partner to settle with the continuing partner, on the basis that the creditor has accepted the continuing partner, as his sole debtor, or otherwise misleads the retired partner to his injury.[35]

10. Individuals Doing Business in a Firm-Name. At common law a person may do business in his true name, or under the title of a firm containing his individual name, or under a designation purely fanciful. In either of these cases he may sue, or be sued, upon an obligation connected with the business, in his individual name.[36] In jurisdictions where statutes permit suits by and against a partnership in the firm-name an action will lie against the reputed firm, although but one person is interested in the business.[37] Again, as against creditors such a reputed firm has no claims to recognition. The assets are to be treated as those of the individual proprietor, and the creditors of the business and the creditors of the individual outside the business form but a single class.[38] One who engages in business in a firm-name must give notice of his retirement therefrom, in the same manner in which he would notify his withdrawal from an actual firm, or he will be estopped from denying liability for the debts of his successor.[39]

C. Evidence of Partnership — 1. Burden of Proof and Presumptions — a. In General. The burden of proving a partnership is upon him who alleges its existence.[40] If a person is shown to have been a servant of a firm, the presumption is that such relationship continues, and clear evidence is needed to establish the claim that he has become a partner.[41] A presumption of partnership arises from

34. Gordon *v.* Janney, Morr. (Iowa) 182; Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Robinson *v.* Yarrow, 1 Moore C. P. 150, 7 Taunt. 455, 18 Rev. Rep. 537, 2 E. C. L. 445.

35. See Davison *v.* Donaldson, 9 Q. B. D. 623, 4 Aspin. 601, 47 L. T. Rep. N. S. 564, 31 Wkly. Rep. 277.

36. *Alabama.*— Giddens *v.* Bolling, 93 Ala. 92, 9 So. 427.

Illinois.— Jones *v.* Goodrich, 17 Ill. 380.

Indiana.— Elverson *v.* Leeds, 97 Ind. 336, 49 Am. Rep. 458.

Michigan.— Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235; Brennan *v.* Partridge, 67 Mich. 449, 35 N. W. 85.

Missouri.— Wallhormfechtel *v.* Dobyns, 32 Mo. 310.

New York.— Sinnott *v.* German-American Bank, 164 N. Y. 386, 58 N. E. 286; Gay *v.* Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Doyle *v.* Shuttleworth, 41 Misc. 42, 83 N. Y. Suppl. 609; Hoyt *v.* Allen, 2 Hill 322.

England.— Bonfield *v.* Smith, 13 L. J. Exch. 105, 12 M. & W. 405.

See 38 Cent. Dig. tit. "Partnership," § 60.

Statutory provisions.—In some jurisdictions statutes have been passed prohibiting the use of fictitious or assumed partnership names, or requiring their registration. They have been construed with much strictness by the courts, and have not proved to be very useful. See the statutes of the different states. And see Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406; Sinnott *v.* German-American Bank, 164 N. Y. 386, 58 N. E. 286; Gay *v.* Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Zimmerman *v.* Erhard, 83 N. Y. 74, 38 Am. Rep. 396; Wood *v.* Erie R. Co., 72 N. Y. 196, 28 Am. Rep. 125; McArdle *v.* Thames Iron Works, 96 N. Y. App. Div. 139, 89 N. Y. Suppl. 485; Vandegrift *v.* Bertron, 83 N. Y. App. Div. 548, 82 N. Y. Suppl. 153; Loeb *v.* Firemen's Ins. Co., 78 N. Y. App. Div. 113, 79 N. Y. Suppl. 510; Taylor *v.* Bell, etc., Soap Co., 18 N. Y. App. Div. 175, 45 N. Y. Suppl. 939; Kennedy *v.* Budd, 5 N. Y. App. Div. 140, 39 N. Y. Suppl. 81; Barron *v.* Yost, 16 Daly (N. Y.) 441, 12 N. Y. Suppl. 455; Adee *v.* Crow, 7 Misc. (N. Y.) 256, 27 N. Y. Suppl. 973; Hoyt *v.* Allen, 2 Hill (N. Y.) 322.

37. Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45 (construing Code, § 2605); Stirling *v.* Heintzman, 42 Mich. 449, 4 N. W. 165 (construing Comp. Laws, § 5307); O'Brien *v.* Foglesong, 3 Wyo. 57, 31 Pac. 1047 (construing Comp. Laws (1876), § 639).

38. Miller *v.* His Creditors, 37 La. Ann. 604; Kent *v.* Majonier, 36 La. Ann. 259; Bremen Sav. Bank *v.* Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Scull's Appeal, 115 Pa. St. 141, 7 Atl. 588.

39. Elverson *v.* Leeds, 97 Ind. 336, 49 Am. Rep. 458; Davenport Gas, etc., Co. *v.* Reimers, (Iowa 1903) 96 N. W. 1084; Henry C. Werner Co. *v.* Calhoun, 55 W. Va. 246, 46 S. E. 1024; Evens, etc., Fire Brick Co. *v.* Hadfield, 93 Wis. 665, 68 N. W. 468.

40. Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94; Clifton *v.* Royse Cotton Oil Co., (Tex. Civ. App. 1905) 87 S. W. 182.

41. Pawsey *v.* Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 Wkly. Rep. 469.

the use of a name such as is commonly employed when a partnership exists, as "C. & Co.," or "A. & Son";[42] but the presumption is not very strong, unless there is other evidence that these terms designate certain persons who are known to give personal attention to the business or to be financially interested in it.[43] Certainly the presumption from the use of such a style is not necessary and conclusive.[44] The fact that persons are coöwners of property, or that they make a joint contract, does not warrant the infereuce of their partnership.[45] When a partnership is shown to exist, the presumption is that it continues until dissolution is proved.[46]

b. As Between Partners. The burden of proof is on the complainant to establish the existence of a partnership between himself and another.[47] If an agreement for a partnership to be entered upon at once is proved, it will be presumed that acts of the parties relating to the business thus agreed upon are acts done in the prosecution of the partnership; and their rights and duties will be treated as those of partners under such agreement.[48]

c. As Against Third Persons. Persons who sue in the capacity of partners have the burden of proving that they are in fact partners; especially if their right of action is upon commercial paper, of which their partnership is payee or indorsee.[49] If, however, joint plaintiffs establish a cause of action against defendant, without proving a partnership between them, an allegation that they are partners may be treated as surplusage.[50]

d. As Against Partners. While the burden of proving a partnership rests upon a plaintiff, who sues defendants as partners, the partnership relation or liability being denied by any of defendants,[51] he is not bound to do more than make

42. Haug *v.* Haug, 90 Ill. App. 604; Ferguson *v.* King, 5 La. Ann. 642; Charman *v.* Henshaw, 15 Gray (Mass.) 293.

In New York a statute requires "& Co.," in a business name, to represent an actual partner. Whitlock *v.* McKechnie, 1 Bosw. 427.

43. Haug *v.* Haug, 90 Ill. App. 604 (holding that where the firm style was "A. Haug & Son," and there was evidence that both father and son personally gave attention to the business, there was a strong presumption that the son was a partner); McDonald *v.* Gilbert, 16 Can. Sup. Ct. 700 (holding that where plaintiff had received letters written by one of the alleged partners on paper, on which the names of both were printed as constituting the firm, a *prima facie* case of partnership was made out.

44. Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106, (1903) 72 Pac. 832; Brennan *v.* Pardridge, 67 Mich. 449, 35 N. W. 85; Altgelt *v.* Alamo Nat. Bank, (Tex. Civ. App. 1904) 79 S. W. 582 [*reversed* on other grounds in 98 Tex. 252, 83 S. W. 6].

45. Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130 (joint makers of a note); Hopkins *v.* Smith, 11 Johns. (N. Y.) 161 (joint makers of a note); Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992 (coöwners of oil lands); Levy *v.* McDowell, 45 Tex. 220.

46. Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878; Buck *v.* Smith, 2 Colo. 500.

47. Gatewood *v.* Bolton, 48 Mo. 78; Pawsey *v.* Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 Wkly. Rep. 469.

Prima facie case.— If, however, he shows that he and defendant jointly engaged in carrying on a common business for profit, he makes out a *prima facie* case, although the business be confined to a particular transaction or adventure. Miller *v.* Hale, 96 Mo. App. 427, 70 S. W. 258 (two persons jointly engaged to act as architects in erecting a building); Robinson *v.* Anderson, 20 Beav. 98, 52 Eng. Reprint 539 [*affirmed* in 7 De G. M. & G. 239, 56 Eng. Ch. 185, 44 Eng. Reprint 94]; McGregor *v.* Bainbridge, 7 Hare 164 note, 27 Eng. Ch. 164 note, 68 Eng. Reprint 67 note (both cases where solicitors acted jointly for a client).

48. Guice *v.* Thornton, 76 Ala. 466; Perkins *v.* Perkins, 3 Gratt. (Va.) 364.

49. Boswell *v.* Dunning, 5 Harr. (Del.) 231; Campbell *v.* Hood, 6 Mo. 211; Dempsey *v.* Harrison, 4 Mo. 267; McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475.

50. Woodward *v.* Sutton, 30 Fed. Cas. No. 18,009, 1 Cranch C. C. 351.

51. *Illinois.*— Smith *v.* Knight, 71 Ill. 148, 22 Am. Rep. 94.

Iowa.— Dupuy *v.* Sheak, 57 Iowa 361, 10 N. W. 731; Byington *v.* Woodward, 9 Iowa 360.

Louisiana.— Meeker *v.* Cummings, 22 La. Ann. 317; Atwater *v.* Colton, 18 La. Ann. 226.

Maryland.— Beall *v.* Poole, 27 Md. 645.

Massachusetts.— Howe *v.* Thayer, 17 Pick. 91.

Nebraska.— McDonald *v.* Jenkins, 44 Nebr. 163, 62 N. W. 444.

Pennsylvania.— Hallstead *v.* Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370, holding that, in an action to charge stockholders in a bank as partners, the burden is not on defendants to show that the bank was incorporated, or was a limited partnership,

out a *prima facie* case against them.[52] The burden is then cast upon them of showing that there is no partnership and that they have not held themselves out as partners.[53]

2. ADMISSIBILITY OF EVIDENCE — a. In General. The existence of a partnership may be established by oral evidence.[54] If, however, the partnership contract has been reduced to writing, such writing is the best evidence of the contract provisions.[55] Evidence as to the understanding which business associates have of their oral contract is admissible whenever it tends to show that they did not intend to become partners.[56] The business intimacy between persons, and their conduct in connection with a particular enterprise, may be admissible as tending to prove a partnership between them, although each item of such evidence may have lent but slight weight, when separately considered.[57] A belief on plaintiff's part that

but is on plaintiff to show that it was a partnership, as alleged in his complaint.

United States.— Eichel *v.* Sawyer, 44 Fed. 845.

See 38 Cent. Dig. tit. "Partnership," § 62½.

Holding out.— Undoubtedly the burden of proof is on him who alleges a holding out by one who is not a partner in fact (Vinson *v.* Beveridge, 3 MacArthur (D. C.) 597, 36 Am. Rep. 113; McLewee *v.* Hall, 103 N. Y. 639, 8 N. E. 486; Irvin *v.* Conklin, 36 Barb. (N. Y.) 64; Johnston's Appeal, (Pa. 1887) 9 Atl. 76; Scull's Appeal, 115 Pa. St. 141, 7 Atl. 588); but he may make out a *prima facie* case by evidence of general notoriety in the community (Wood *v.* Pennell, 51 Me. 52, holding that in a suit to hold one as a partner, the dealings of the person sought to be held are admissible to show, not only that he held himself out as a partner, but that the fact has been one of such general notoriety in the community, that plaintiff may be presumed to have given the credit on the strength of such holdings out; Mershon *v.* Hobensack, 22 N. J. L. 372 [*affirmed* in 23 N. J. L. 580]; Adams *v.* Morrison, 113 N. Y. 152, 28 N. E. 829; Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507).

52. Bell *v.* Massey, 14 La. Ann. 831 (holding that where a note, made payable to the order of a firm, is indorsed by each member of the firm separately, in the absence of proof to the contrary, the payees will be presumed to be commercial partners, and each bound by his indorsement for the whole amount of the note); Mary *v.* Lampré, 6 Rob. (La.) 314 (holding that one whose name forms part of a firm-name is presumed to be a partner); Campbell *v.* Hood, 6 Mo. 211; Knott *v.* Knott, 6 Oreg. 142 (holding that there is no presumption that persons who sign jointly a promissory note are partners).

53. Clark *v.* Jones, 87 Ala. 474, 6 So. 362; Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701; Howe *v.* Thayer, 17 Pick. (Mass.) 91.

54. *Arkansas.*— Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667.

Delaware.— Jones *v.* Purnell, 5 Pennew. 444, 63 Atl. 149, holding that a partnership may be proved by direct evidence, or by the evidence of the acts, conduct, and declarations of the partners.

Illinois.— Van Housen *v.* Copeland, 180 Ill. 74, 54 N. E. 169 [*affirming* 79 Ill. App. 139]; Speyer *v.* Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; Frankenstein *v.* North, 79 Ill. App. 669.

Missouri.— Tamblyn *v.* Scott, 111 Mo. App. 46, 85 S. W. 918.

Nebraska.—Schneider *v.* Patterson, 38 Nebr. 680, 57 N. W. 398, holding that oral evidence was admissible to prove a partnership, notwithstanding the fact that a statute (Comp. St. c. 65, § 28) made the record of a certificate of a partnership *prima facie* evidence of its existence.

United States.— Benedict *v.* Davis, 3 Fed. Cas. No. 1,293, 2 McLean 347, holding that proof of a parol contract is admissible to rebut declarations of one as to the membership of the firm.

See 38 Cent. Dig. tit. "Partnership," § 64.

55. Chisholm *v.* Cowles, 42 Ala. 179.

56. Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103; Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465; Griffin *v.* Carr, 165 N. Y. 621, 59 N. E. 1123 [*affirming* 21 N. Y. App. Div. 51, 47 N. Y. Suppl. 323]; Willis *v.* Crawford, 38 Oreg. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

57. *Alabama.*— McGrew *v.* Walker, 17 Ala. 824, the intimacy of defendants may be a slight circumstance, and by itself of little value, but connected with other evidence of a partnership is admissible.

Georgia.— Fleshman *v.* Collier, 47 Ga. 253 (evidence that defendants were in partnership three months after the date in question is admissible); Perry *v.* Butt, 14 Ga. 699 (conduct of one of defendants in selling goods is admissible).

Maryland.— Green *v.* Caulk, 16 Md. 556, evidence of joint contracts by defendants in 1856 not admissible to prove them partners in 1854.

New York.— Matter of Dusenbery, 106 N. Y. App. Div. 235, 94 N. Y. Suppl. 107; Peyser *v.* Myers, 18 N. Y. Suppl. 736 [*affirmed* in 135 N. Y. 599, 32 N. E. 699], holding that dealings between defendants, their dealings with and statements to the public, as well as their books, were all competent evidence as to whether a particular person was a member of the firm at a given time.

Texas.— Davis *v.* Bingham, (Civ. App. 1898) 46 S. W. 840; Reliance Lumber Co. *v.* White, (Civ. App. 1896) 38 S. W. 391; Wood *v.* Samuels, 1 Tex App. Civ. Cas. § 922.

defendants were partners is inadmissible, unless such belief has a reasonable foundation in defendants' conduct.[58] Nor is hearsay evidence as to the existence of a firm admissible.[59] A judgment duly taken by default against certain persons as partners may be given in evidence against the same persons, when sued by another plaintiff, as an admission of the partnership by them, although an explainable admission.[60] On an issue as to the existence of a partnership, one of the partners is competent to prove that a partnership existed.[61]

b. As Between Partners. Persons may make themselves liable as partners to those who deal with the business without being partners in fact. On the other hand they may be partners in fact, while concealing their true relationship from the world. In either case, when the issue of partnership is raised in a suit between such business associates, evidence is admissible which tends to show that one of the parties was the sole proprietor of the business, while the other was a mere employee,[62] that while title was taken in the name of one, the property was owned by them as partners;[63] or that their conduct of the business was such as to indicate that they were, or that they were not, partners.[64] The answer of a defendant cannot be read as evidence on the question of partnership between him and a deceased person, whose personal representative is a co-defendant.[65] The fact that one who after severance of his business relations with another, on being sued as an individual by a third person, made an affidavit of defense individually is not admissible in a suit between them as to whether they were partners.[66]

c. As Against Third Persons. Persons who sue in the capacity of partners are not compelled to show a written contract of partnership, even when their business consists in buying and selling land;[67] but the articles of partnership, disclosing an agreement for the transaction of a lawful business, each partner sharing in the profits and losses, are admissible as showing a partnership.[68] They may establish the existence of the partnership by the evidence of those who have done business with the firm as such.[69] On the other hand when persons are sued as partners they may show that the partnership had ceased to exist before plaintiff had any dealings with the business.[70] But declarations of one sued as a partner that he was never a member of the firm are inadmissible in his behalf against plaintiff,[71]

United States.— *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34.

See 38 Cent. Dig. tit. "Partnership," § 64.

58. Deputy *v.* Harris, 1 Marv. (Del.) 100, 40 Atl. 714.

59. Bailey *v.* Fritz, 75 Ark. 463, 88 S. W. 569; Gilroy *v.* Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. Suppl. 138 [*affirming* 20 Misc. 724, 45 N. Y. Suppl. 1141, and *affirmed* in 22 Misc. 105, 48 N. Y. Suppl. 532]; Providence Mach. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117; Moore *v.* Williams, 31 Tex. Civ. App. 287, 72 S. W. 222.

A person who is not a member of the firm may testify as to its existence, if he speaks from personal knowledge and not from hearsay. Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

60. Parks *v.* Mosher, 71 Me. 304; Brooklyn City Bank *v.* Dearborn, 20 N. Y. 244; Millard *v.* Adams, 1 Misc. (N. Y.) 431, 21 N. Y. Suppl. 424; Marks *v.* Sigler, 3 Ohio St. 358; Whatley *v.* Menheim, 2 Esp. 608. This doctrine was not accepted in Collier *v.* Cross, 20 Ga. 1, holding that this rule does not apply where the judgment was obtained several years before defendant's alleged withdrawal from the firm. But *compare* Norwood *v.* Francis, 25 App. Cas. (D. C.) 463.

61. Franklin *v.* Hoadley, 115 N. Y. App. Div. 538, 101 N. Y. Suppl. 374.

62. Mocquot *v.* Meadows, 97 Ky. 543, 31 S. W. 129, 17 Ky. L. Rep. 371; Neefus *v.* Eccles, 85 N. Y. Suppl. 635.

63. Short *v.* Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508, plaintiff was allowed to show that property was owned by the firm, although title was taken in his name, while notes and trust deed were given by him to defendant, to conceal the latter's connection with the firm.

64. McDonald *v.* Campbell, 96 Minn. 87, 104 N. W. 760; Healy *v.* Clark, 120 N. Y. 642, 24 N. E. 316.

65. Earle *v.* Art Library Pub. Co., 95 Fed. 544.

66. Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667.

67. *In re* Warren, 29 Fed. Cas. No. 17,191, 2 Ware 322, 5 N. Y. Leg. Obs. 327.

68. Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557.

69. Gilbert *v.* Whidden, 20 Me. 367.

70. Mullins *v.* Gilligan, 12 Colo. App. 13, 54 Pac. 1106.

71. Bowie *v.* Maddox, 29 Ga. 285, 74 Am. Dec. 61; Marks *v.* Hardy, 117 Ky. 663, 78 S. W. 864, 1105, 25 Ky. L. Rep. 1770; Halde-

unless brought to the latter's knowledge before he became a creditor.[72] A person cannot escape partnership liability by showing that he has never received a share of the profits, if his contract entitled him to such a share.[73]

d. As Against Partners — (i) *In General.* The existence or non-existence of a partnership is not to be established by the opinions or the belief of parties to a litigation or of their witnesses.[74] It is competent, however, to ask a witness whether defendants were associated together for a described purpose;[75] and also whether they had entered into a described agreement, and were carrying on a business under it.[76] That persons were associated as partners when dealing with others may also be shown by statements or conduct on their part which fairly warrant the inference of their partnership.[77] The fact that persons are partners

man *v.* Middletown Bank, 28 Pa. St. 440, 70 Am. Dec. 142.

72. Parshall *v.* Fisher, 43 Mich. 529, 5 N. W. 1049.

73. Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703. See also O'Donohue *v.* Bruce, 92 Fed. 858, 35 C. C. A. 52, holding that evidence was inadmissible, as against third persons, respecting the accounts between alleged partners which related to a time subsequent to that when the rights of such third persons accrued.

74. Anderson *v.* Snow, 9 Ala. 247; Danforth *v.* Carter, 4 Iowa 230; Cordova *v.* Powter, 1 N. Y. Suppl. 147; Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190.

75. Anderson *v.* Snow, 9 Ala. 247.

76. *Alabama.*— Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882, holding that the date of partnership articles is not conclusive against third parties, as to the time when the partnership began, but that its commencement at an earlier date may be shown by defendant's acts, declarations, and dealings.

Connecticut.— Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Florida.— Barwick *v.* Alderman, 46 Fla. 433, 35 So. 13, evidence is admissible that one defendant in the presence of the other gave instructions that a partnership agreement between them be drawn, and that after this they carried on business together.

Georgia.— Thornton *v.* McDonald, 108 Ga. 3, 33 S. E. 680.

Mississippi.— Perry *v.* Randolph, 6 Sm. & M. 335.

New York.— Smith *v.* Wright, 4 Abb. Dec. 274, 1 Abb. Pr. 243 [*reversing* 5 Sandf. 113]; Adee *v.* Cornell, 25 Hun 78 [*affirmed* in 93 N. Y. 572]; Quincey *v.* Young, 5 Daly 327.

Pennsylvania.— Wray *v.* Spence, 145 Pa. St. 399, 22 Atl. 693; Given *v.* Albert, 5 Watts & S. 333; Wood *v.* Connell, 2 Whart. 542.

South Carolina.—Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703.

United States.— O'Donohue *v.* Bruce, 92 Fed. 858, 35 C. C. A. 52.

England.— Ruppell *v.* Roberts, 4 N. & M. 31, 30 E. C. L. 574.

See 38 Cent. Dig. tit. "Partnership," § 67.

77. *Delaware.*—Jones *v.* Purnell, 5 Pennew. 444, 62 Atl. 149.

Georgia.— Dodds *v.* Everett-Ridley-Ragan Co., 110 Ga. 303, 34 S. E. 1004.

Louisiana.— Houston River Canal Co. *v.* Kopke, 106 La. 609, 31 So. 156.

Massachusetts.— Dutton *v.* Woodman, 9 Cush. 255, 57 Am. Dec. 46; Butts *v.* Tiffany, 21 Pick. 95.

Michigan.— Webb *v.* Johnson, 95 Mich. 325, 54 N. W. 947; Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870.

Missouri.—Huyssen *v.* Lawson, 90 Mo. App. 82.

New York.— Nichols *v.* White, 41 Hun 152 [*affirmed* in 114 N. Y. 639, 21 N. E. 1120].

Oregon.— Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190, letter heads and sacks, on which defendant's name was printed as that of a partner, are admissible.

Pennsylvania.— Reed *v.* Kremer, 111 Pa. St. 482, 487, 5 Atl. 237, 56 Am. Rep. 295; Brown *v.* Clark, 14 Pa. St. 469; Welsh *v.* Speakman, 8 Watts & S. 257, oral admissions, bills of goods, and books of business receivable to show that defendant was a partner.

Texas.— Robinson *v.* Marietta First Nat. Bank, 98 Tex. 184, 82 S. W. 505 [*reversing* (Civ. App. 1904) 79 S. W. 103], the fact that a short time prior to the creation of an alleged partnership one of the partners in question transferred his property to his wife and sister in payment of debts due them is without probative force on the issue of partnership.

Vermont.— Callender *v.* Sweat, 14 Vt. 160, oral admissions of one alleged partner, the course and circumstances of the business, and the joint use of property indicate a partnership.

Virginia.— Chapman *v.* Wilson, 1 Rob. 267.

See 38 Cent. Dig. tit. "Partnership," § 67.

And see *infra*, III, C, 2, d, (III).

Posting hand-bills.— The fact that printed hand-bills with the name of the firm signed thereto were posted at various places in the town where defendant was residing, and that one of them was posted on the door of the house where he boarded, is competent evidence to be submitted to the jury in determining the fact whether or not a partnership existed. Tumlin *v.* Goldsmith, 40 Ga. 221.

Newspaper article.—A person having knowledge of a newspaper article asserting that he is a member of a partnership, published after an interview with him, who fails to publish a denial must be regarded as holding himself out as a partner and the article is admissible on the issue of his membership in the firm. Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834.

Letter written before debt created.— A let-

in one place or in one line of business does not tend to prove them partners elsewhere, or in a distinct trade or venture.[78] A defendant is a competent witness to deny a partnership or to explain circumstances indicating that he is a member in a particular firm.[79]

(II) *General Reputation.* Evidence of general reputation is inadmissible to prove a partnership,[80] except in connection with evidence that such report was known to the persons sought to be charged.[81] Evidence that a particular person has the general reputation of being a partner in a specified firm may be admissible, however, in connection with duly established facts, to show that he has per-

ter to plaintiff from the attorneys of defendant written before the debt was created and without reference to crediting him as a partner is inadmissible on the question of partnership. Phillips *v.* Trowbridge Furniture Co., 92 Ga. 596, 20 S. E. 4.

Acts and declarations not shown to have been known to plaintiff when he became a creditor are inadmissible. Zabriskie *v.* Coates, 41 N. Y. App. Div. 316, 58 N. Y. Suppl. 523.

78. Kimball *v.* Longstreet, 174 Mass. 487, 55 N. E. 177; Schollenberger *v.* Seldonridge, 49 Pa. St. 83. But *compare* Martin *v.* Ehrenfels, 24 Ill. 187, holding that, on the question whether defendants are partners here, evidence that they were partners in Europe is not so entirely irrelevant that its admission vitiates the verdict.

79. Chambers *v.* Grout, 63 Iowa 342, 19 N. W. 209; Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355; Tracy *v.* McManus, 58 N. Y. 257; Alpaugh *v.* Hulse, 72 N. Y. App. Div. 438, 76 N. Y. Suppl. 571; Newberger *v.* Heintze, 3 Tex. Civ. App. 259, 22 S. W. 867.

80. *Alabama.*— Knard *v.* Hill, 102 Ala. 570, 15 So. 345; Tanner, etc., Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584 (excluded as pure hearsay evidence); Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Carter *v.* Douglass, 2 Ala. 499; Lewis *v.* Post, 1 Ala. 65.

Arkansas.— Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. 404.

California.— Turner *v.* McIlhaney, 8 Cal. 575 (not admissible except in corroboration or to show knowledge by plaintiff); Sinclair *v.* Wood, 3 Cal. 98.

Connecticut.— Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330; Brown *v.* Crandall, 11 Conn. 92.

Delaware.— Grier *v.* Deputy, 1 Marv. 19, 40 Atl. 716 [*reversing* 1 Marv. 100, 40 Atl. 714, and substantially *overruling* Gilpin *v.* Temple, 4 Harr. 190].

Georgia.— Tumlin *v.* Goldsmith, 40 Ga. 221.

Illinois.— Bowen *v.* Rutherford, 60 Ill. 41, 14 Am. Rep. 25; Joseph *v.* Fisher, 4 Ill. 137.

Indiana.— Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103; Earl *v.* Hurd, 5 Blackf. 248.

Iowa.— Brown *v.* Rains, 53 Iowa 81, 4 N. W. 867; Southwick *v.* McGovern, 28 Iowa 533. *Compare* Grey *v.* Callan, 133 Iowa 500, 110 N. W. 909.

Kentucky.— Bell *v.* Daugherty, 99 S. W. 922, 30 Ky. L. Rep. 853.

Maine.— Scott *v.* Blood, 16 Me. 192.

Massachusetts.— Goddard *v.* Pratt, 16 Pick. 412.

Michigan.— Sager *v.* Tupper, 38 Mich. 258.

Missouri.— Lockridge *v.* Wilson, 7 Mo. 560.

New Hampshire.— Hersom *v.* Henderson, 23 N. H. 498; Grafton Bank *v.* Moore, 13 N. H. 99, 38 Am. Dec. 478.

New Jersey.— Taylor *v.* Webster, 39 N. J. L. 102.

New York.— Adams *v.* Morrison, 113 N. Y. 152, 20 N. E. 829; McGuire *v.* O'Hallaran, Lalor 85; Smith *v.* Griffith, 3 Hill 333, 38 Am. Dec. 639; Halliday *v.* McDougall, 20 Wend. 81 [*reversed* on other grounds in 22 Wend. 264].

Ohio.— Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430.

Oregon.— Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190.

Texas.—Holman *v.* Herscher, (Sup. 1891) 16 S. W. 984; Wallis *v.* Wood, (Sup. 1888) 7 S. W. 852; Buzard *v.* Jolly, (Sup. 1887) 6 S. W. 422; Emberson *v.* McKenna, (App. 1890) 16 S. W. 419; Cleveland *v.* Duggan, 2 Tex. App. Civ. Cas. § 82; White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101.

Vermont.— Carlton *v.* Coffin, 27 Vt. 496; Hicks *v.* Cram, 17 Vt. 449.

United States.— Metcalfe *v.* Officer, 2 Fed. 640, 1 McCrary 325; Wilson *v.* Colman, 30 Fed. Cas. No. 17,798, 1 Cranch C. C. 408.

See 38 Cent. Dig. tit. "Partnership," § 68.

Reason for rule.— To admit such evidence would be to open a door to fraud; for a trader in poor credit would be tempted to circulate the rumor that a man of wealth was a member of his firm in order to help his credit, and his creditors would be tempted to further it, so that they might collect their debts. Brown *v.* Crandall, 11 Conn. 92. Moreover, whether a particular contract between business associates creates a partnership is often a difficult legal question, and one certainly upon which common rumor is most untrustworthy. Halliday *v.* McDougall, 20 Wend. (N. Y.) 81 [*reversed* on other grounds in 22 Wend. 264].

The reports of a commercial agency are not admissible to prove a partnership, unless knowledge or means of knowledge of them is brought home to the party attempted to be charged. Campbell *v.* Hastings, 29 Ark. 512.

Evidence that it was not generally known, in the place of the partnership, that defendant was a partner of a certain house is admissible, where the question is whether plaintiff knew that defendant was a partner in order to make him liable. Bernard *v.* Torrance, 5 Gill & J. (Md.) 383.

81. Gaffney *v.* Hoyt, 2 Ida. (Hasb.) 199, 10 Pac. 34; Gay *v.* Fretwell, 9 Wis. 186.

mitted himself to be held out as a partner, and that such holding out induced plaintiff to become a creditor of the firm.[82]

(III) *Admissions*—(A) *In General.* An admission of the existence of an alleged partnership is always a relevant fact against the one by whom it was made;[83] and the several admissions of the persons sued as partners are equivalent to a joint statement by all that they are in partnership.[84] The conduct of a party in connection with a particular business may amount to an admission of his part-

82. *Alabama.*— Tanner, etc., Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584.

Arkansas.— Campbell *v.* Hastings, 29 Ark. 512.

California.— Turner *v.* McIlhaney, 8 Cal. 575.

Idaho.— Gaffney *v.* Hoyt, 2 Ida. (Hasb.) 199, 10 Pac. 34.

Kansas.— Rizer *v.* James, 26 Kan. 221.

Michigan.— Parshall *v.* Fisher, 43 Mich. 529, 5 N. W. 1049, where it is said in substance that the whole state of facts relating to the way in which business was done was relevant, and that testimony of persons residing in the place where the firm did business, as to their understanding regarding the persons who composed the firm, bore not only on the parties who as to these outside persons might be treated as partners, but also upon the fact of a partnership itself.

Oregon.— Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190.

Texas.— Frank *v.* J. S. Brown Hardware Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

Wisconsin.— Benjamin *v.* Covert, 47 Wis. 375, 2 N. W. 625.

See 38 Cent. Dig. tit. "Partnership," § 68.

83. *Colorado.*— Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034.

Georgia.— Ford *v.* Kennedy, 64 Ga. 537.

Indiana.— Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526; Uhl *v.* Harvey, 78 Ind. 26; Bennett *v.* Holmes, 32 Ind. 108; Bisel *v.* Hobbs, 6 Blackf. 479.

Iowa.— Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140; Fleming *v.* Stearns, 79 Iowa 256, 44 N. W. 376 (admissions made to others than plaintiff are receivable); Barcroft *v.* Haworth, 29 Iowa 462; Wallace *v.* Berger, 14 Iowa 183; Cleghorn *v.* Johnson, 11 Iowa 292.

Maine.— Palmer *v.* Pinkham, 33 Me. 32, 37 Me. 252.

Massachusetts.— Smith *v.* Collins, 115 Mass. 388.

Michigan.—Chamberlin *v.* Fisher, 117 Mich. 428, 75 N. W. 931.

Minnesota.—Sullivan *v.* Murphy 23 Minn. 6.

Missouri.— Clark *v.* Huffaker, 26 Mo. 264.

New Hampshire.— Grafton Bank *v.* Moore, 14 N. H. 142, 13 N. H. 99, 38 Am. Dec. 478.

New Jersey.— Seabury *v.* Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136 [*affirmed* in 52 N. J. L. 413, 21 Atl. 952].

New York.— Elliott *v.* Vallaro, 16 N. Y. App. Div. 630, 44 N. Y. Suppl. 1072; Greenwood *v.* Sias, 21 Hun 391; Kirby *v.* Hewitt, 26 Barb. 607; Fenn *v.* Timpson, 4 E. D. Smith 276; Kipper *v.* Sizer, 2 N. Y. St. 386 (the evidence of an admission "ought to be clear, positive, unequivocal and entirely consistent with the acts and conduct of the members of the co-partnership"); McCall *v.* Moschcowitz, 10 N. Y. Civ. Proc. 107; McPherson *v.* Rathbone, 7 Wend. 216.

Pennsylvania.— Batdorff *v.* Farmers' Nat. Bank, 61 Pa. St. 179; Drennen *v.* House, 41 Pa. St. 30; McClelland *v.* Lindsay, 1 Watts & S. 360; Taylor *v.* Henderson, 17 Serg. & R. 453; Entwisle *v.* Mulligan, 9 Pa. Cas. 417, 12 Atl. 766, where, in an action against partners, plaintiff testified that one of them admitted to him that he was a partner, the city directory, in which his name appeared as a partner, is admissible in evidence); McNeilan's Estate, 4 Pa. Dist. 45, 16 Pa. Co. Ct. 46 [*affirmed* in 167 Pa. St. 473, 31 Atl. 727].

South Carolina.— McCorkle *v.* Doby, 1 Strobh. 396, 47 Am. Dec. 560.

Texas.— Wallis *v.* Wood, (Sup. 1888) 7 S. W. 852; White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101.

Vermont.— Cottrill *v.* Vanduzen, 22 Vt. 511.

Washington.— Willamette Casket Co. *v.* McGoldrick, 10 Wash. 229, 38 Pac. 1021.

Wyoming.— Carr *v.* Wright, 1 Wyo. 157.

United States.— Thomas *v.* Wolcott, 23 Fed. Cas. No. 13,915, 4 McLean 365.

Canada.— Lee *v.* Macdonald, 6 U. C. Q. B. O. S. 130.

See 38 Cent. Dig. tit. "Partnership," § 69.

Unauthorized admission.—An admission made by one acting without authority as attorney for one charged with being a partner is inadmissible. Munton *v.* Rutherford, 121 Mich. 418, 80 N. W. 112.

Existence of partnership articles.—Partnership may be proved by the admissions of parties, whether there are articles of partnership or not. Widdifield *v.* Widdifield, 2 Binn. (Pa.) 245; Cutler *v.* Thomas, 25 Vt. 73. A partnership may be proved by parol evidence that the alleged partners severally admitted the fact, or held themselves out as such, although it appears on the trial that there was a written agreement, and no notice to produce it is proved. Gilbert *v.* Whidden, 20 Me. 267; Bryer *v.* Weston, 16 Me. 261; Dixon *v.* Hood, 7 Mo. 414, 38 Am. Dec. 461; King *v.* Ham, 4 Mo. 275; Anderson *v.* Levan, 1 Watts & S. (Pa.) 334. But see Thornton *v.* Kerr, 6 Ala. 823.

84. Barcroft *v.* Haworth, 29 Iowa 462; Byington *v.* Woodward, 9 Iowa 360 (existence of a partnership may be proved by the separate admissions of all the partners, by the acts, declarations, and conduct of the parties, or by the act of one, declaration of another, and acknowledgment or contract of a third); Welsh *v.* Speakman, 8 Watts & S. (Pa.) 257; Haughey *v.* Strickler, 2 Watts

nership therein.[85] Ordinarily an admission is not conclusive evidence of a partnership, even against the person making it;[86] but if it is contained in a written instrument executed by him he will not be allowed to contradict it by oral evidence;[87] nor can he disprove an admission by a declaration of a contrary character.[88] While admissions are receivable against a person making them, they are not available in his behalf,[89] nor in behalf of one set of creditors against another.[90]

(B) *Against a Copartner.* Admissions of a partnership's existence by one partner cannot be given in evidence against an alleged copartner unless made in the latter's presence or unless the latter authorized or assented to the admission, or has adopted or ratified it.[91]

& S. (Pa.) 411; Wallis *v.* Wood, (Tex. 1888) 7 S. W. 852.

85. *Alabama.*— McCaskey *v.* Pollock, 82 Ala. 174, 2 So. 674, conduct in connection with a suit brought against one as a partner.

Georgia.— Scranton *v.* Rentfrow, 29 Ga. 341.

Indiana.— Henshaw *v.* Root, 60 Ind. 220, permitting a dishonored check drawn in firm-name to be given in evidence without objection is an admission of a firm's existence.

Maine.— Gilbert *v.* Whidden, 20 Me. 367.

Pennsylvania.— Widdifield *v.* Widdifield, 2 Binn. 245.

South Carolina.— Pierson *v.* Steinmyer, 4 Rich. 309.

Texas.— White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101.

Vermont.— Cutler *v.* Thomas, 25 Vt. 73.

See 38 Cent. Dig. tit. "Partnership," § 69.

Illustrations.— The fact that one person introduced another as his partner is evidence of their partnership. Armstrong *v.* Potter, 103 Mich. 409, 61 N. W. 657. On an issue whether defendant was a partner in running a hotel to which plaintiff furnished the supplies in suit, evidence that defendant paid for supplies furnished by a third person is admissible. Couch *v.* Steele, 63 Minn. 504, 65 N. W. 946.

86. Elliott *v.* Vallaro, 16 N. Y. App. Div. 630, 44 N. Y. Suppl. 1072; Willamette Casket Co. *v.* McGoldrick, 10 Wash. 229, 38 Pac. 1021.

87. Sawyer *v.* Grandy, 113 N. C. 42, 18 S. E. 79.

88. Clark *v.* Huffaker, 26 Mo. 264.

89. Brown *v.* Mailler, 12 N. Y. 118; Pirie *v.* Gillitt, 2 N. D. 255, 50 N. W. 710. And see *infra*, III, C, 2, d, (III), (C). But see Woods *v.* Quarles, 10 Mo. 170.

90. Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Clinton Lumber Co. *v.* Mitchell, 61 Iowa 132, 16 N. W. 52.

91. *Alabama.*— Owensboro Wagon Co. *v.* Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195; Humes *v.* O'Bryan, 74 Ala. 64; Cross *v.* Langley, 50 Ala. 8.

Arkansas.— Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. 404.

California.— Salinas City Bank *v.* De Witt, 97 Cal. 78, 31 Pac. 744; Vanderhurst *v.* De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595.

Connecticut.— Strong *v.* Smith, 62 Conn. 39, 25 Atl. 395; Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Georgia.— Smith *v.* Ferrario, 113 Ga. 872, 39 S. E. 428; Thompson *v.* Mallory, 108 Ga. 797, 33 S. E. 986; Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; Flournoy *v.* Williams, 68 Ga. 707; Ford *v.* Kennedy, 64 Ga. 537; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738, ratification by conduct.

Illinois.— Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720 [*affirming* 70 Ill. App. 318]; Gregory *v.* Martin, 78 Ill. 38; Gordon *v.* Bankard, 37 Ill. 147; Conley *v.* Jennings, 22 Ill. App. 547; Sailors *v.* Nixon-Jones Printing Co., 20 Ill. App. 509.

Indiana.— King *v.* Barbour, 70 Ind. 35; Pierce *v.* McConnell, 7 Blackf. 170.

Iowa.— Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510 (admission assented to by defendant, when repeated to him); Brown *v.* Rains, 53 Iowa 81, 4 N. W. 867; Danforth *v.* Carter, 4 Iowa 230; Evans *v.* Corriell, 1 Greene 25. *Compare* Grey *v.* Callan, 133 Iowa 500, 110 N. W. 909.

Kansas.— Howard *v.* Woodward, 52 Kan. 106, 34 Pac. 348; Johnston *v.* Clements, 25 Kan. 376.

Kentucky.— Arkenburg *v.* Bonnie, 30 S. W. 965, 17 Ky. L. Rep. 225.

Maine.— McLellan *v.* Pennell, 52 Me. 402.

Maryland.— Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355, where defendant knew that a newspaper advertisement published him as a partner, and he did not publish a denial, the advertisement was admissible against him.

Massachusetts.— Winchester *v.* Whitney, 138 Mass. 549; Abbott *v.* Pearson, 130 Mass. 191; Ruhe *v.* Burnell, 121 Mass. 450; Currier *v.* Silloway, 1 Allen 19; Dutton *v.* Woodman, 9 Cush. 255, 57 Am. Dec. 46.

Michigan.— Armstrong *v.* Potter, 103 Mich. 409, 61 N. W. 657. But *compare* Parshall *v.* Fisher, 43 Mich. 529, 5 N. W. 1049.

Minnesota.— Boosalis *v.* Stevenson, 62 Minn. 193, 64 N. W. 380; McNamara *v.* Eustis, 46 Minn. 311, 48 N. W. 1123.

Mississippi.— Lea *v.* Guice, 13 Sm. & M. 656.

Missouri.— Filley *v.* McHenry, 71 Mo. 417; Dixon *v.* Hood, 7 Mo. 414, 38 Am. Dec. 461; Huyssen *v.* Lawson, 90 Mo. App. 82; Osceola Bank *v.* Outhwaite, 50 Mo. App. 124.

Nebraska.— Weir *v.* Illinois Nat. Bank, 48 Nebr. 791, 67 N. W. 792; Weeks *v.* Palmer Deposit Bank, 44 Nebr. 684, 62 N. W. 874;

(c) *To Show Non-Existence of a Partnership* While the statements of an alleged partner are not admissible in his favor against creditors, to show that he is not a partner,[92] they are admissible against him, although they may have the effect of defeating an action brought by his alleged copartners, by establishing a misjoinder of plaintiffs.[93] Again, statements as to the persons composing a firm, made by a member before any dispute on the subject has arisen, are admissible in behalf of one who is sued as a partner, but who denies the relationship,[94] unless

McCann *v.* McDonald, 7 Nebr. 305; Converse *v.* Shambaugh, 4 Nebr. 376.

Nevada.— Mears *v.* James, 2 Nev. 342.

New Hampshire.— Johnson *v.* Gallivan, 52 N. H. 143; Grafton Bank *v.* Moore, 13 N. H. 99, 38 Am. Dec. 478.

New Jersey.— Carey *v.* Marshall, 67 N. J. L. 236, 51 Atl. 698; Flanagin *v.* Champion, 2 N. J. Eq. 51.

New York.— Rogers *v.* Murray, 110 N. Y. 658, 18 N. E. 261; Franklin *v.* Hoadley, 115 N. Y. App. Div. 538, 101 N. Y. Suppl. 374; Mathiasen *v.* Barkin, 62 N. Y. App. Div. 614, 70 N. Y. Suppl. 770; Whitney *v.* Wardell, 59 Hun 95, 13 N. Y. Suppl. 110; Kirby *v.* Hewitt, 26 Barb. 607; Lyon *v.* Fitch, 61 N. Y. Super. Ct. 74, 18 N. Y. Suppl. 867; Pretzfelder *v.* Strobel, 17 Misc. 152, 39 N. Y. Suppl. 333; Rives *v.* Michaels, 16 Misc. 57, 37 N. Y. Suppl. 644; Sheehan *v.* Fleetham, 21 N. Y. Suppl. 128; Garofalo *v.* Errico, 7 N. Y. St. 425; McPherson *v.* Rathbone, 7 Wend. 216.

North Dakota.— Pirie *v.* Gillitt, 2 N. D. 255, 50 N. W. 710.

Ohio.— Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Cowan *v.* Kinney, 33 Ohio St. 422.

Pennsylvania.— Nelson *v.* Lloyd, 9 Watts 22; Martin *v.* Kaffroth, 16 Serg. & R. 120; Miller *v.* McClenachan, 1 Yeates 144; Richardson *v.* Aldrich, 6 Phila. 534.

South Carolina.— McCorkle *v.* Doby, 1 Strobh. 396, 47 Am. Dec. 560.

Tennessee.— Yancey *v.* Marriott, 1 Sneed 28.

Texas.— Wallis *v.* Wood, (1888) 7 S. W. 852; Buzard *v.* Jolly, (1887) 6 S. W. 422; Newherger *v.* Heintze, 3 Tex. Civ. App. 259, 22 S. W. 867; Emberson *v.* McKenna, (App. 1890) 16 S. W. 419; Cleveland *v.* Duggan, 2 Tex. App. Civ. Cas. § 82.

Vermont.— Bundy *v.* Bruce, 61 Vt. 619, 17 Atl. 796; Noyes *v.* Cushman, 25 Vt. 390.

Virginia.— Chapman *v.* Wilson, 1 Rob. 267.

Washington.— Snohomish First Nat. Bank *v.* Loggie, 14 Wash. 699, 45 Pac. 644.

Wisconsin.— Wausau First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215; Carlyle *v.* Plumer, 11 Wis. 96; Gay *v.* Fretwell, 9 Wis. 186.

United States.— Corps *v.* Robinson, 6 Fed. Cas. No. 3,252, 2 Wash. 388.

Canada.— Carfrae *v.* Vanbuskirk, 1 Grant Ch. (U. C.) 539.

See 38 Cent. Dig. tit. "Partnership," § 70.

Declarations made in absence of partner.— Where there is evidence tending to show the existence of a partnership, declarations of one of the alleged partners as to the partnership are admissible, although made in the absence of the other partner. Caraway *v.* Citizens' Nat. Bank, (Tex. Civ. App. 1895) 29 S. W. 506.

A letter of one partner admitting the existence of the partnership is not admissible in evidence against another alleged partner. Porter *v.* Wilson, 13 Pa. St. 641.

Declarations of person not served.— In a suit against a firm the declarations of a partner who was not served are not admissible against the others on the question of partnership. Rimel *v.* Hayes, 83 Mo. 200. See also Smith *v.* Hulett, 65 Ill. 495.

An application for a revenue license, made by one of the firm, and purporting to set out the names of all the partners, is not admissible against those who denied their membership. Boyd *v.* Ricketts, 60 Miss. 62.

Declarations not a part of the res gestæ are not admissible to prove that another person was the partner of the person making them. Chambers *v.* Grout, 63 Iowa 342, 19 N. W. 209.

Knowledge of acts.— The acts of one member of an alleged firm are inadmissible to establish the partnership, as against another who is not shown to have knowledge, or the means of knowing and of contradicting them. Campbell *v.* Hastings, 29 Ark. 512.

Admission after dissolution.— The declaration of a partner, after a dissolution of the firm, that his co-defendant was a copartner, and jointly bound with him is inadmissible. Barringer *v.* Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74.

92. McNamara *v.* Dratt, 33 Iowa 385; Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Gilroy *v.* Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. Suppl. 138 [*affirming* 20 Misc. 724, 45 N. Y. Suppl. 1141]; England *v.* Burt, 4 Humphr. (Tenn.) 399.

93. Starke *v.* Kenan, 11 Ala. 818, the general rule admitting the declarations of a party to the record applies to all cases where the party has any interest in the suit, whether others are joint parties on the same side or not. But *compare* Wiggin *v.* Fine, 17 Mont. 575, 44 Pac. 75, holding that a declaration by one not a party to the suit is inadmissible against defendant to show that he and the declarant are not partners.

94. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483 (where the question at issue is whether a woman or her husband was a member of a certain firm, conversations between her and the other members of the firm in regard to the management of the business are admissible as a part of the *res gestæ*); Williams *v.* Soutter, 7 Iowa 435; Danforth *v.* Carter, 4 Iowa 230; Clark *v.* Huffaker, 26 Mo. 264; Young *v.* Smith, 25 Mo. 341; Daw-

the suit proceeds upon the theory that subsequent to such statements he held himself out as a partner.[95]

(IV) *Partnership Agreements.* Agreements entered into by persons alleged to be partners are admissible upon the issue of partnership.[96]

(V) *Books, Papers, Accounts, and Similar Writings.* For the purpose of showing a partnership between persons who are described or referred to therein as partners, books, papers, accounts and similar writings are admissible provided the party against whom they are offered is shown to have authorized them, or to have ratified them, or in any way to have been legally responsible for them.[97] And such writings are sometimes admissible in behalf of an alleged

son *v.* Pogue, 18 Oreg. 94, 22 Pac. 637, 6 L. R. A. 176.

95. Reed *v.* Kremer, 111 Pa. St. 482, 5 Atl. 237, 56 Am. Rep. 295; Edwards *v.* Tracy, 62 Pa. St. 374.

96. *Arizona.*— Tweed *v.* Lowe, 1 Ariz. 488, 2 Pac. 757, an unsigned written draft of a partnership agreement is not admissible to show the terms and provisions of the partnership.

Georgia.— Pursley *v.* Ramsey, 31 Ga. 403.

Indiana.— Strecker *v.* Conn, 90 Ind. 469, partnership articles are admissible against one who became a partner after their original execution.

Iowa.— Williams *v.* Soutter, 7 Iowa 435.

Maryland.— Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355; Beall *v.* Poole, 27 Md. 645, an unsigned writing admissible against the writer.

Massachusetts.— Currier *v.* Silloway, 1 Allen 19.

Michigan.— Doty *v.* Gillett, 43 Mich. 203, 5 N. W. 89.

New York.— Tannenbaum *v.* Armeny, 81 Hun 581, 31 N. Y. Suppl. 55; Beach *v.* Vandewater, 1 Sandf. 265; Mitchell *v.* Roulstone, 2 Hall 379.

North Carolina.— Sawyer *v.* Grandy, 113 N. C. 42, 18 S. E. 79; Hunn *v.* McKee, 26 N. C. 475, the original articles of copartnership were admitted to show that defendant was a member of the firm.

Pennsylvania.—See Denithorne *v.* Hook, 112 Pa. St. 240, 3 Atl. 777.

See 38 Cent. Dig. tit. "Partnership," § 72.

But *compare* De Temple *v.* Mitchell, 15 Colo. App. 127, 61 Pac. 434, holding that an unsigned partnership contract, drawn by defendant, was irrelevant.

Refusal to produce a partnership agreement is evidence from which a jury may reasonably infer that if it were produced, it would show that A was a partner of defendant as alleged by plaintiff. Whitney *v.* Sterling, 14 Johns. (N. Y.) 215.

Partnership certificate.— A certified copy of a certificate of partnership is competent evidence of the existence thereof. Mortimer *v.* Marder, 93 Cal. 172, 28 Pac. 814. But the record of such a certificate is not the only evidence by which the existence of a partnership may be established. It may be proved by any method permissible before the passage of the statute requiring such certificate. Houfek *v.* Held, 75 Nebr. 210, 106 N. W. 171.

97. *Alabama.*— Leinkauff *v.* Frenkle, 80 Ala. 136; McNeill *v.* Reynolds, 9 Ala. 313; Lewis *v.* Post, 1 Ala. 65.

California.— Hale *v.* Brennan, 23 Cal. 511 (books were kept subject to the inspection of each defendant); Hudson *v.* Simon, 6 Cal. 453.

Illinois.— Yocum *v.* Benson, 45 Ill. 435 (paper excluded, because there was no proof that defendants knew of its existence, or were responsible for it); McFarland *v.* Lewis, 3 Ill. 344.

Indiana.— Ehrman *v.* Kramer, 30 Ind. 26.

Iowa.— Davenport Woolen Mills Co. *v.* Neinstedt, 81 Iowa 226, 46 N. W. 1085; McNamara *v.* Dratt, 40 Iowa 413.

Maine.— Prentiss *v.* Kelley, 41 Me. 436.

Maryland.— Beall *v.* Poole, 27 Md. 645; Green *v.* Caulk, 16 Md. 556.

Massachusetts.—Ruhe *v.* Burnell, 121 Mass. 450 (the writing offered was executed after the alleged date of partnership, and hence was inadmissible); Robins *v.* Warde, 111 Mass. 244; Currier *v.* Silloway, 1 Allen 19; Farnum *v.* Farnum, 13 Gray 508; Potter *v.* Greene, 9 Gray 309, 69 Am. Dec. 290.

Minnesota.— Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823; Brackett *v.* Cunningham, 44 Minn. 498, 47 N. W. 157.

Missouri.— Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928.

Nebraska.— Milligan *v.* Butcher, 23 Nebr. 683, 37 N. W. 596, certificate of partnership, as shown by county records, is admissible.

New Hampshire.— Blodgett *v.* Jackson, 40 N. H. 21, a note made payable to a firm is admissible to show the existence of such a firm.

New York.— Gottschalk *v.* Schock, 36 N. Y. App. Div. 638, 56 N. Y. Suppl. 138 (a liquor-tax certificate displayed in a saloon is admissible to show parties therein named to be partners); Conklin *v.* Barton, 43 Barb. 435; McCall *v.* Moschowitz, 14 Daly 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Barth *v.* Paul, 50 Misc. 600, 99 N. Y. Suppl. 425 (letters from alleged firm admissible); Cordova *v.* Powter, 1 N. Y. Suppl. 147; Hopkins *v.* Smith, 11 Johns. 161 (that two parties signed a note jointly is no evidence that they are partners).

North Carolina.— Zachary *v.* Phillips, 101 N. C. 571, 8 S. E. 359.

Ohio.— Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

Pennsylvania.— Frick *v.* Barbour, 64 Pa. St. 120; Chidsey *v.* Porter, 21 Pa. St. 390; Brown *v.* Clark, 14 Pa. St. 469; Allen *v.*

partner to disprove a partnership.[98] And it has been held that in a suit by a partnership against an indorser, the ledger of a firm is evidence of the partnership.[99]

e. As to Dormant Partners. If the existence of the firm is proved, evidence of general reputation is competent on the issue whether a particular member was a dormant partner.[1] Evidence that one has entered into a conspiracy with others to defraud the creditors of a firm does not tend to show that he is a dormant partner;[2] nor is an admission by one person that he is a secret partner of another evidence of a partnership as against the latter.[3]

3. Weight and Sufficiency of Evidence — a. In General. Although the existence of a partnership is a fact, to be proved by him who alleges it, and not to be established by mere surmise or innuendo,[4] it may be proved by one witness,[5] and it may be inferred from indirect evidence.[6] When the party alleging the partnership claims to have been a partner, he is in a position to establish its existence by direct evidence, and is generally required to furnish such proof,[7] while a third person is not under such a duty.[8] Even third persons, however, are bound to do more than show that the alleged partners were jointly interested in certain property,[9]

Rostain, 11 Serg. & R. 362; Moyes *v.* Brumaux, 3 Yeates 30 (the books of a firm may be given in evidence to fortify or discredit a witness who swears to the partnership); Daniel *v.* Lance, 29 Pa. Super. Ct. 454.

Texas.—Bush *v.* Chas. P. Kellogg Co., (Civ. App. 1896) 34 S. W. 1056.

Wisconsin.— Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

Wyoming.— Lellman *v.* Mills, 15 Wyo. 149, 87 Pac. 985.

United States.— Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day (Conn.) 303; Corps *v.* Robinson, 2 Wash. 388, 6 Fed. Cas. No. 3,252.

England.— *Ex p.* Matthews, 3 Ves. & B. 125, 35 Eng. Reprint 426.

See 38 Cent. Dig. tit. "Partnership," § 72.

Entries in partnership books.— The fact that a person sought to be held liable as a partner was such cannot be proved by entries in the partnership books. Abbott *v.* Pearson, 130 Mass. 191.

Notes signed in the firm-name, given to parties having dealings with the firm, are evidence of the partnership. Cook *v.* Frederick, 77 Ind. 406.

Partnership books alone are not competent evidence to prove a partnership, but in connection with other evidence tending to prove it, and access to and knowledge of the books, they are competent. Bryce *v.* Joynd, 63 Cal. 375, 49 Am. Rep. 94.

Evidence of the contents of conveyances is not competent to prove a partnership. Carlton *v.* Coffin, 27 Vt. 496.

98. Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330 (letter heads indicating that the business was that of a corporation and not of a partnership were admitted against plaintiffs who alleged that defendants were partners); Knight *v.* Richter, 11 Mont. 74, 27 Pac. 392 (firm bill head on which name of alleged partner did not appear admissible); Richardson *v.* Aldrich, 6 Phila. (Pa.) 534, 535 ("When, however, the [book] entry or declaration which it is proposed to read is a fact, or qualifies a fact at issue in and relevant to the cause, it cannot be rejected without shutting out the best, and perhaps the only means of ascertaining the truth"). See, however, Rabby *v.* O'Grady, 33 Ala. 255, holding that one sued as a member of a firm cannot, to show that he is not a member, put in bills made out to him for goods sold by the firm and receipted by the firm.

99. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

1. Park *v.* Wooten, 35 Ala. 242; Lingenfelser *v.* Simon, 49 Ind. 82; Metcalf *v.* Officer, 2 Fed. 640, 1 McCrary 325.

2. Douglass *v.* Frame, Lalor (N. Y.) 45.

3. Whitney *v.* Ferris, 10 Johns. (N. Y.) 66.

4. Hudson *v.* Simon, 6 Cal. 453; Morgan *v.* Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; Groves *v.* Tallman, 8 Nev. 178; Reisman *v.* Silver, 48 Misc. (N. Y.) 399, 95 N. Y. Suppl. 483. And see *supra*, III, C, 1, a.

The sufficiency of proof of partnership may vary according to the nature of the demand and the residence of the parties. Pollok *v.* Cunard, 4 N. Brunsw. 291.

5. Pierce *v.* McConnell, 7 Blackf. (Ind.) 170; Rankin *v.* Harley, 12 N. Brunsw. 271.

6. Loucks *v.* Paden, 63 Ill. App. 545; Henshaw *v.* Root, 60 Ind. 220; McMullan *v.* Mackenzie, 2 Greene (Iowa) 368; Forbes *v.* Davison, 11 Vt. 660; Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin *v.* Bennett, 51 Fed. 693.

7. Arnold *v.* Conklin, 96 Ill. App. 373; Banchor *v.* Cilley, 38 Me. 553; Ruckman *v.* Bergholz, 38 N. J. L. 531; Matter of Muller, 96 N. Y. App. Div. 619, 88 N. Y. Suppl. 673; Kelly *v.* Devlin, 47 N. Y. Super. Ct. 555 [*affirmed* in 94 N. Y. 643].

8. McMullan *v.* Mackenzie, 2 Greene (Iowa) 368.

9. Van Winkle *v.* Van Winkle, 200 Ill. 136, 65 N. E. 633; Arnold *v.* Northwestern Tel. Co., 199 Ill. 201, 65 N. E. 224; Morton *v.* Nelson, 145 Ill. 586, 32 N. E. 916, (1892) 31 N. E. 168; Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Lushton State Bank *v.*

or that they have made an executory contract for a partnership.[10] Whether the evidence produced in a given case warrants the inference of a partnership is to be determined by the jury,[11] unless, in the opinion of the court, but one inference can be drawn by reasonable men.[12] Sharing the profits of a business is *prima facie* evidence of a partnership between the sharers,[13] but is not conclusive, even in behalf of third persons, save in a few jurisdictions.[14]

b. As Between Partners. In the absence of a written agreement, a person who alleges a partnership between himself and another is bound to establish its existence by clear proof,[15] especially if the other party to the agreement is

O. S. Kelley Co., 47 Nebr. 678, 66 N. W. 619; St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Levy *v.* McDowell, 45 Tex. 220.

10. Beckford *v.* Hill, 124 Mass. 588; Brink *v.* New Amsterdam F. Ins. Co., 5 Rob. (N. Y.) 104.

11. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50, 17 S. W. 1043; Brannin *v.* Wear-Boogher Dry-Goods Co., (Tex. Civ. App. 1894) 30 S. W. 572.

12. *Connecticut.*— Morgan *v.* Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282.

Illinois.— Churchill *v.* Thompson Electric Co., 119 Ill. App. 430.

Kentucky.—Arkenburg *v.* Bonnie, 30 S. W. 965, 17 Ky. L. Rep. 225; Thomas *v.* Winchester Bank, 28 S. W. 774, 31 S. W. 732, 17 Ky. L. Rep. 194.

Michigan.— Gray *v.* Gibson, 6 Mich. 300.

New York.— Matter of Muller, 96 N. Y. App. Div. 619, 88 N. Y. Suppl. 673; Peyser *v.* Myers, 18 N. Y. Suppl. 736 [*affirmed* in 135 N. Y. 599, 32 N. E. 699].

Pennsylvania.—Mason *v.* Smith, 200 Pa. St. 270, 49 Atl. 642.

See 38 Cent. Dig. tit. "Partnership," § 75.

13. Lockwood *v.* Doane, 107 Ill. 235; Berry *v.* Pelneault, 188 Mass. 413, 74 N. E. 917; Philips *v.* Samuel, 76 Mo. 657; Meehan *v.* Valentine, 29 Fed. 276 [*affirmed* in 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835]; *In re* Francis, 9 Fed. Cas. No. 5,031, 2 Sawy. 286; *In re* Ward, 29 Fed. Cas. No. 17,144, 2 Flipp. 462. And see Glore *v.* Dawson, 106 Mo. App. 107, 80 S. W. 55. See also *supra*, III, A, 2 c, (I).

14. Cossack *v.* Burgwyn, 112 N. C. 304, 16 S. E. 900 [*following* Waugh *v.* Carver, 2 H. Bl. 235]. And see *supra*, III, A, 2, c, (I).

15. *Iowa.*— Stillman *v.* Lefferts, (1900) 82 N. W. 491.

Louisiana.—Abadie *v.* Frechede, 22 La. Ann. 423, evidence must be certain and not merely probable.

Maryland.— Gover *v.* Hall, 3 Harr. & J. 43.

Michigan.— Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611; Pulford *v.* Morton, 62 Mich. 25, 28 N. W. 716.

Missouri.— Boon *v.* Turner, 96 Mo. App. 635, 70 S. W. 916.

Montana.— Arnold *v.* Sinclair, 12 Mont. 248, 29 Pac. 1124.

Nebraska.— Osborne *v.* Fitzgerald, 26 Nebr. 514, 42 N. W. 418.

Nevada.— Sargent *v.* Collins, 3 Nev. 260.

New York.— Burkardt *v.* Walsh, 49 N. Y. App. Div. 634, 64 N. Y. Suppl. 779; Evans *v.* Warner, 20 N. Y. App. Div. 230, 47 N. Y. Suppl. 16; Van de Linda *v.* Stevens, 9 N. Y. App. Div. 179, 41 N. Y. Suppl. 126; Smith *v.* Wood, 12 N. Y. Suppl. 724.

United States.— Black *v.* Henry G. Allen Co., 56 Fed. 764 (the existence of a partnership sufficiently proved by the testimony of one partner); Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

England.—Radcliffe *v.* Rushworth, 33 Beav. 484, 55 Eng. Reprint 456; Smith *v.* Sherwood, 10 Jur. 214.

Canada.— Stuart *v.* Mott, 14 Can. Sup. Ct. 734; Brown *v.* Grady, 6 Brit. Col. 190.

See 38 Cent. Dig. tit. "Partnership," § 76.

Use of name in articles of agreement.— The fact that defendant's husband used her name in articles of agreement and partnership business between himself and plaintiff is insufficient to show that plaintiff and defendant were partners, where defendant was in fact a stranger to the agreement. Metcalf *v.* Bockoven, 42 Nebr. 590, 60 N. W. 901.

Evidence sufficient.—As to evidence sufficient to show the existence of a partnership as between partners see Irwin *v.* Cooper, 111 Iowa 728, 82 N. W. 757; Heard *v.* Wilder, 81 Iowa 421, 46 N. W. 1075; Scribner *v.* Starbuck, 52 Iowa 714, 2 N. W. 1014; Duncan Coal Co. *v.* Duncan, 97 S. W. 43, 29 Ky. L. Rep. 1249; Headly *v.* Rice, 96 S. W. 903, 29 Ky. L. Rep. 1102; Gay *v.* Ray, 189 Mass. 112, 75 N. E. 138; Chase *v.* Angell, 148 Mich. 1, 108 N. W. 1105; Bush *v.* Bush, 89 Mo. 360, 14 S. W. 560; Boon *v.* Turner, 96 Mo. App. 635, 70 S. W. 916; Norton *v.* Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. N. S. 945; Burkardt *v.* Walsh, 49 N. Y. App. Div. 634, 64 N. Y. Suppl. 779; Vernon *v.* Simmons, 15 Daly (N. Y.) 399, 7 N. Y. Suppl. 649; Bernstein *v.* Cohen, 48 Misc. (N. Y.) 639, 96 N. Y. Suppl. 209; Pell *v.* Baur, 16 N. Y. Suppl. 258; Lawrence *v.* Halverson, 41 Wash. 534, 83 Pac. 889.

Evidence insufficient.—As to evidence insufficient to show the existence of a partnership as between partners see Wallace *v.* Buckingham, 34 Ill. App. 38; Davenport *v.* Brown, (Iowa 1903) 93 N. W. 578; Adamson *v.* Guild, 177 Mass. 331, 58 N. E. 1081; Smith *v.* Barclay, 49 Minn. 365, 51 N. W. 1166; Arnold *v.* Sinclair, 12 Mont. 248, 29 Pac. 1124; Hillock *v.* Grape, 111 N. Y. App. Div. 720, 97 N. Y. Suppl. 823; Wilcox *v.* Williams, 19 N. Y. App. Div. 438, 46 N. Y. Suppl. 593;

dead.[16] Parties who have admitted that they are in partnership, either by express statement or by conduct, will be held to that admission,[17] in the absence of fraud or mistake.[18] An agreement for a partnership, so long as it remains executory, is not evidence of a partnership.[19] Nor is an agreement which provides simply for joint ownership of property,[20] or joint interest in a contract or venture.[21] But if the agreement relates to a going business enterprise, to which the parties mutually contribute capital or service or both, and in the profits of which they are mutually to share, it makes out at least a *prima facie* case of partnership.[22] The fact that persons are not partners may be proved by the introduction of a written agreement in which it is expressly stated that such relation does not exist between them.[23] The use of the word "partnership" by a person, in his testimony in describing the arrangement between himself and another, is not conclusive against him of the existence of a partnership; but he may show that he used it as a popular and not as a technical term.[24]

c. As Against Third Persons. When a suit is brought by a partnership, or where a defense is based on the fact that the obligation sued upon is that of a firm and not of the individual defendant, the partnership relation must be established by such evidence as is generally sufficient to prove material allegations in civil actions.[25] A *prima facie* case of partnership is established by evidence that

Holler *v.* Apa, 17 N. Y. Suppl. 504; Ehrlich *v.* Bruckner, 121 Wis. 495, 99 N. W. 213.

16. Gray *v.* Palmer, 9 Cal. 616; Pepper *v.* Pepper, 115 Ky. 520, 74 S. W. 253, 24 Ky. L. Rep. 2403; Heye *v.* Tilford, 2 N. Y. App. Div. 346, 37 N. Y. Suppl. 751 [*affirmed* in 154 N. Y. 757, 49 N. E. 1098]; Kearney *v.* Morris, 18 N. Y. Suppl. 346; Radcliffe *v.* Rushworth, 33 Beav. 484, 5 Eng. Reprint 456.

17. Russell *v.* White, 63 Mich. 409, 29 N. W. 865 (admission was in the form of an order of court entered by consent, on a bill for dissolution of a partnership); Glore *v.* Dawson, 106 Mo. App. 107, 80 S. W. 55 (conduct of the parties in sharing profits makes out a *prima facie* case of partnership); Creath *v.* Nelson Distilling Co., 70 Mo. App. 296 (admission was made in another proceeding for dissolution of the partnership).

18. Metcalf *v.* Bockoven, 42 Nebr. 590, 60 N. W. 901.

19. Sabel *v.* Savannah Rail, etc., Co., 135 Ala. 380, 33 So. 663; Chandler *v.* Brainard, 14 Pick. (Mass.) 285; Clark *v.* Reed, 11 Pick. (Mass.) 446; Bush *v.* Bush, 89 Mo. 360, 14 S. W. 560; Solomons *v.* Ruppert, 34 N. Y. App. Div. 230, 54 N. Y. Suppl. 729.

20. Chisholm *v.* Cowles, 42 Ala. 179; Smith *v.* Lennon, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 259, 260; Breckenridge's Appeal, 127 Pa. St. 81, 85, 17 Atl. 874; Rainey *v.* Rainey, (Tenn. Ch. App. 1899) 54 S. W. 663.

21. Waring *v.* Baltimore Nat. Mar. Bank, 74 Md. 278, 22 Atl. 140; Osborne *v.* Fitzgerald, 26 Nebr. 514, 42 N. W. 418; Sargent *v.* Collins, 3 Nev. 260; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448.

22. *Florida.*— Dubos *v.* Hoover, 25 Fla. 720, 6 So. 788.

Maryland.— Whiting *v.* Leakin, 66 Md. 255, 7 Atl. 688.

Massachusetts.— McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358 (plaintiff, who had been an employee of a firm, was thereafter to receive at least two thousand four hundred dollars, and probably enough to make the sum of five thousand dollars, as his share for one year. He then ceased to work on a salary and drew two hundred dollars a month. It was held that there was sufficient evidence to support a finding of the trial judge that a partnership existed); Howe *v.* Howe, 99 Mass. 71.

Nebraska.— Gibson *v.* Smith, 31 Nebr. 354, 47 N. W. 1052.

New Jersey.— Jones *v.* Beekman, (Ch. 1900) 47 Atl. 71.

New York.— Haynes *v.* Foley, 82 N. Y. App. Div. 629, 81 N. Y. Suppl. 446; Leeds *v.* Ward, 38 Misc. 674, 78 N. Y. Suppl. 239.

See 38 Cent. Dig. tit. "Partnership," § 76.

23. Wallace *v.* Marion, 23 La. Ann. 738; Kerr *v.* Potter, 6 Gill (Md.) 404.

24. Corotinsky *v.* Maimin, 37 Misc. (N. Y.) 777, 76 N. Y. Suppl. 924 [*affirming* 36 Misc. 871, 74 N. Y. Suppl. 1123].

25. *California.*— Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

Colorado.— Mullins *v.* Gilligan, 12 Colo. App. 13, 54 Pac. 1106.

Delaware.— Davis *v.* White, 1 Houst. 228.

Nebraska.— Agnew *v.* Omaha Nat. Bank, 67 Nebr. 654, 96 N. W. 189.

New York.— North *v.* Bloss, 30 N. Y. 374.

South Carolina.— Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393.

Vermont.— Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

England.— *Ex p.* Benfield, 5 Ves. Jr. 424, 31 Eng. Reprint 663.

See 38 Cent. Dig. tit. "Partnership," § 77.

And see, generally, EVIDENCE.

Evidence as to universal partnership.— The evidence to support the existence of a universal partnership alleged by a surviving partner must be very clear. Gray *v.* Palmer, 9 Cal. 616.

Evidence that legal services were rendered in the joint names of an attorney at law and another person is not sufficient to prove a

the members of the alleged firm held themselves out as partners,[26] or that the other party to the suit contracted with them as a firm.[27]

d. As Against Partners. In determining whether as against partners a partnership exists the general rules as to the weight and sufficiency of evidence[28] are applicable. A *prima facie* case of partnership is made out against persons, associated in carrying on a particular business, by evidence that they are sharing its profits pursuant to an agreement between them,[29] by evidence that they have

partnership between them and thus defeat an action for such services brought by the attorney alone. Bishop *v.* Hall, 9 Gray (Mass.) 430.

26. *Minnesota.*— McCarthy *v.* Nash, 14 Minn. 127.

New Hampshire.—Ripley *v.* Colby, 23 N. H. 438.

New York.— Sullivan *v.* Warren, 43 How. Pr. 188.

Texas.— Reed *v.* Brewer, (Civ. App. 1896) 36 S. W. 99.

Wisconsin.— Voshmik *v.* Urquhart, 91 Wis. 513, 65 N. W. 60.

See 38 Cent. Dig. tit. "Partnership," § 77.

27. Maret *v.* Wood, 16 Fed. Cas. No. 9,067, 3 Cranch C. C. 2.

28. See, generally, EVIDENCE.

Evidence sufficient.—As to evidence sufficient to show the existence of a partnership as against partners see Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24; McDonald *v.* Clough, 10 Colo. 59, 14 Pac. 121; Fruin *v.* Chatzianoff, 79 Conn. 65, 63 Atl. 782; Haug *v.* Haug, 193 Ill. 645, 61 N. E. 1053 [*affirming* 90 Ill. App. 604]; Janes *v.* Bergevin, 83 Ill. App. 607; Norris *v.* Anthony, 193 Mass. 225, 79 N. E. 258; Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44; Griffiths *v.* Copeland, 183 Mass. 548, 67 N. E. 652; Peninsular Sav. Bank *v.* Currie, 123 Mich. 666, 82 N. W. 511; Dawson *v.* Iron Range, etc., R. Co., 97 Mich. 33, 56 N. W. 106; Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928; Goddard-Peck Grocer Co. *v.* Berry, 58 Mo. App. 665; Atwood *v.* Kennard, 22 Nebr. 246, 34 N. W. 381; Atwood *v.* Peregoy, 22 Nebr. 238, 34 N. W. 378; Wallace *v.* Flierschman, 22 Nebr. 203, 34 N. W. 372; Wyckoff *v.* Luse, 67 N. J. L. 218, 54 Atl. 100; Rogers *v.* Murray, 110 N. Y. 658, 18 N. E. 261; Hallenbeck *v.* Smith, 51 N. Y. App. Div. 344, 64 N. Y. Suppl. 957; Swift *v.* MacNamara, 25 Misc. (N. Y.) 789, 54 N. Y. Suppl. 569; Clark *v.* Clergue, 1 N. Y. Suppl. 892; Dobson *v.* Chambers, 78 N. C. 334; Baker *v.* Brennan, 12 Ohio Cir. Dec. 211; Guyer *v.* Port, 155 Pa. St. 322, 26 Atl. 545; Bartleson *v.* Feidler, 149 Fed. 299.

Evidence insufficient.—As to evidence insufficient to show the existence of a partnership as against partners see Knard *v.* Hill, 102 Ala. 570, 15 So. 345; Mullins *v.* Gilligan, 12 Colo. App. 13, 54 Pac. 1106; Barwick *v.* Alderman, 46 Fla. 433, 35 So. 13; Hess *v.* Keiser, 39 Ill. App. 493; Fargo *v.* Peterson, 75 Iowa 768, 39 N. W. 891; Byington *v.* Woodward, 9 Iowa 360 (proof of the existence of a partnership subsequent to the execution of a note is not sufficient to establish its existence at the date of the note, for while the presumption is that a partnership continues, its existence being once shown, no presumption obtains of a prior existence); Cavanaugh *v.* Riley, 19 S. W. 745, 14 Ky. L. Rep. 263; John Bird Co. *v.* Hurley, 87 Me. 579, 33 Atl. 164; Smith *v.* Edwards, 2 Harr. & G. (Md.) 411; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554; Marschall *v.* Aiken, 170 Mass. 3, 48 N. E. 845; Hill *v.* Mallory, 112 Mich. 387, 70 N. W. 1016; Campbell *v.* Sherman, 49 Mich. 534, 14 N. W. 484; Daugherty *v.* Burgess, 118 Mo. App. 557, 94 S. W. 594; Ingals *v.* Ferguson, 59 Mo. App. 299 [*affirmed* in 138 Mo. 358, 39 S. W. 801]; Agnew *v.* Omaha Nat. Bank, 69 Nebr. 654, 96 N. W. 189; McDonald *v.* Jenkins, 44 Nebr. 163, 62 N. W. 444; Coyne *v.* Sayre, 54 N. J. Eq. 702, 36 Atl. 96; Merchants' Nat. Bank *v.* Barnes, 32 N. Y. App. Div. 92, 52 N. Y. Suppl. 786; Sipfle *v.* Isham, 46 Hun (N. Y.) 366; Wolf *v.* Strahl, 3 Silv. Sup. (N. Y.) 552, 7 N. Y. Suppl. 593; Demarest *v.* Flack, 16 Daly (N. Y.) 337, 11 N. Y. Suppl. 83; Pennsylvania Steel Co. *v.* Title Guarantee, etc., Co., 50 Misc. (N. Y.) 51, 100 N. Y. Suppl. 299 [*affirmed* in 120 N. Y. App. Div. 879, 105 N. Y. Suppl. 1135]; Pritz *v.* Smyth, 49 Misc. (N. Y.) 549, 97 N. Y. Suppl. 1003; Schultz *v.* Berger, 31 Misc. (N. Y.) 764, 64 N. Y. Suppl. 686; Gulke *v.* Uhlig, 55 How. Pr. (N. Y.) 434; Bryan *v.* Bullock, 119 N. C. 193, 25 S. E. 865; Geurinck *v.* Alcott, 66 Ohio St. 94, 63 N. E. 714; Russell *v.* Fenner, 21 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 754; Scranton Traction Co. *v.* Schlichter, 202 Pa. St. 6, 51 Atl. 353; Hallstead *v.* Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370; Eshleman *v.* Harnish, 76 Pa. St. 97; Lincoln *v.* Craig, 16 R. I. 564, 18 Atl. 175; Wagner *v.* Sanders, 62 S. C. 73, 39 S. E. 950; Lowenstein *v.* Keller, (Tex. Civ. App. 1898) 46 S. W. 878; Stannard *v.* Smith, 40 Vt. 513; Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225; Ottison *v.* Edmonds, 15 Wash. 362, 46 Pac. 398; Miller *v.* Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458; Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181; Schœffler *v.* Schwarting, 17 Wis. 320; Pleasants *v.* Fant, 22 Wall. (U. S.) 116, 22 L. ed. 780; Jones *v.* Burnham, 138 Fed. 986, 71 C. C. A. 240 [*reversing* 130 Fed. 475]; Lott *v.* Young, 109 Fed. 798, 48 C. C. A. 654; The Daniel Kaine, 35 Fed. 785; *In re* De Metz, 7 Fed. Cas. No. 3,781; British Columbia Iron Works *v.* Buse, 4 Brit. Col. 419; Sculthope *v.* Bates, 5 U. C. Q. B. 318.

29. Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309; St. Louis Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; Gill *v.* Ferris, 82 Mo. 156; Philips *v.* Samuel, 76 Mo. 657; Lucas *v.* Cole, 57 Mo. 143 (a busi-

described themselves as partners, in any writing executed or authorized by them,[30] or by evidence indicating that they are the common proprietors of a business conducted for their mutual profit.[31] But such evidence may be explained or rebutted by defendants or either of them.[32] On the other hand plaintiff may reinforce his case, or may establish a case in chief by evidence of representations, conduct, and circumstances which are naturally calculated to beget the belief that defendants were partners.[33] Whether a person, in entering into a particular business arrangement with another, had the specific intention of becoming a partner is immaterial;[34] but it must be shown by satisfactory evidence that the arrangement makes him a

ness must be entered upon, before a partnership exists, although a valid contract for sharing profits has been made); Botham *v.* Keefer, 2 Ont. App. 595.

30. *Alabama.*— Leinkauff *v.* Frenkle, 80 Ala. 136, bill of sale.

Georgia.— Hendricks *v.* Gunn, 35 Ga. 234.

Kansas.— Manspeaker *v.* Thomas, (1896) 44 Pac. 683, that the books of a partnership show a person to be a partner is not conclusive of the fact against such person.

Kentucky.— Rhodes *v.* Lowry, 78 S. W. 459, 883, 25 Ky. L. Rep. 1708, 1822.

Maine.— Holmes *v.* Porter, 39 Me. 157, contract, bill for work and receipts.

Maryland.— Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

Missouri.— Simmons *v.* Ingram, 78 Mo. App. 603.

New York.— Parker *v.* Paine, 37 Misc. 768, 76 N. Y. Suppl. 942; Schroth *v.* Gedney, 30 Misc. 808, 61 N. Y. Suppl. 923.

Pennsylvania.— Drennen *v.* House, 41 Pa. St. 30 notes.

Wisconsin.— Moore *v.* Dickson, 121 Wis. 591, 99 N. W. 322.

United States.— *In re* Grant, 106 Fed. 496.

Canada.— Wigle *v.* Williams, 24 Can. Sup. Ct. 713; Jordan *v.* Smith, 17 U. C. Q. B. 590.

See 38 Cent. Dig. tit. "Partnership," § 78.

31. *Georgia.*— Chaffee *v.* Rentfroe, 32 Ga. 477.

Illinois.— Winstanley *v.* Gleyre, 146 Ill. 27, 34 N. E. 628; Field *v.* Eilers, 103 Ill. App. 374; Creighton *v.* Garcia, 41 Ill. App. 429.

Iowa.— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

Louisiana.— Schmidt *v.* Ittman, 46 La. Ann. 888, 15 So. 310.

Massachusetts.— Case *v.* Baldwin, 136 Mass. 90.

Michigan.— Webb *v.* Johnson, 95 Mich. 325, 54 N. W. 947.

Missouri.— Meyers *v.* Boyd, 44 Mo. App. 378.

New Hampshire.— Farr *v.* Wheeler, 20 N. H. 569.

North Carolina.— Clements *v.* Mitchell, 59 N. C. 171; Holt *v.* Kernodle, 23 N. C. 199.

Pennsylvania.— Rowland *v.* Estes, 190 Pa. St. 111, 42 Atl. 528.

South Carolina.— Wagner *v.* Sanders, 62 S. C. 73, 39 S. E. 950.

Vermont.— Brigham *v.* Dana, 29 Vt. 1.

Wisconsin.— Wipperman *v.* Stacy, 80 Wis. 345, 50 N. W. 336.

See 38 Cent. Dig. tit. "Partnership." § 78.

Illustrations.— Evidence that a person was frequently in the store conducted by another, that he bought and sold goods there, had access to the books and made charges therein, and bought goods for the store in another city is sufficient to show that he was a partner; having formerly been a partner and the old sign of the firm still remaining on the place of business. State *v.* Wiggin, 20 N. H. 449. Evidence that a person owns the horses, trucks, and utensils used in a business, and that the bills of the concern have been paid by him, justifies a finding that he was a partner. Pilwisky *v.* Cattaberry, 9 N. Y. Suppl. 636.

32. *Alabama.*— Gulf City Shingle Mfg. Co. *v.* Boyles, 129 Ala. 192, 29 So. 800, the designation of the parties as a firm was merely to identify a particular business transaction and for convenience in keeping accounts.

Kansas.— Manspeaker *v.* Thomas, (1896) 44 Pac. 683.

Michigan.— Munton *v.* Rutherford, 121 Mich. 418, 80 N. W. 112.

Missouri.— Herbert *v.* Callahan, 35 Mo. App. 498; Roper *v.* Schaefer, 35 Mo. App. 30.

New York.— Parker *v.* Paine, 37 Misc. 768, 76 N. Y. Suppl. 942; Galway *v.* Nordlinger, 4 N. Y. Suppl. 649.

Wisconsin.— Moore *v.* Dickson, 121 Wis. 591, 99 N. W. 322.

See 38 Cent. Dig. tit. "Partnership," § 78.

33. *Minnesota.*— Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823.

Vermont.— Mathews *v.* Felch, 25 Vt. 536; Hicks *v.* Cram, 17 Vt. 449.

United States.— Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326 [*affirming* 51 Fed. 693].

England.— Kirkwood *v.* Cheetham, 2 F. & F. 798, 10 Wkly. Rep. 670.

Canada.— McLean *v.* Clark, 20 Ont. App. 660 [*reversing* on other grounds 21 Ont. 683]; Jordan *v.* Smith, 17 U. C. Q. B. 590.

Compare Winslow *v.* Chiffelle, Harp. Eq. (S. C.) 25.

34. Griffin *v.* Carr, 21 N. Y. App. Div. 51, 47 N. Y. Suppl. 323 [*affirmed* in 165 N. Y. 621, 59 N. E. 1123], holding that on the question whether a partnership existed between defendants as to third parties, testimony of one of them that he did not intend to become such a partner, or as to what his purpose was in the business relations he had with his co-defendant, is immaterial, except as it relates to specific acts or conduct, and then only so far as such acts or conduct, as qualified by the motive or intent, affect the credibility of his denial that he was interested with his co-defendant. See also *supra*, III, A, 1, e, h.

common proprietor with his associate of a business which they carry on for mutual profit.[35]

D. Commencement and Duration[36] — **1. Time When Partnership Begins.** So long as a mere agreement to form a partnership exists between parties the partnership itself has not commenced,[37] although the conduct of the parties may be such as to estop them from denying that it has begun.[38] When the agreement between the parties provides for a present partnership and contemplates an immediate commencement of a firm business, the relationship is presumed to arise at the time of the execution of the agreement,[39] although some matters of detail are thereafter to be adjusted.[40] This is especially true when capital has been paid in and expended preparatory to the prosecution of the partnership enterprise.[41] When, however, the agreement provides for a partnership at a fixed date, in the future, or upon the performance of certain conditions precedent by any of the parties, the partnership will not commence, until that time arrives,[42] or until the conditions are performed or waived.[43]

2. Term Fixed by Agreement. When the parties have clearly expressed their intention that their partnership shall last for a definite period, no question of difficulty can arise as to the term for which it is organized;[44] and a stipulation is valid which calls for the continuance of the firm during a specified term, even though one of the partners dies.[45] Oftentimes, however, the parties do not state their intentions explicitly. In such event the term of the partnership is a matter of inference from the contract provisions and surrounding circumstances. If the

35. Kelleher *v.* Tisdale, 23 Ill. 405.

36. **Classification as to duration.**—"Partnerships for general purposes are of different kinds, in respect to their duration. They may be limited in time and expire by their own limitation, or they may be unlimited in time and become destroyed by various acts or events that produce a disruption of the connection, such as death, bankruptcy, felony, lunacy, war, mutual consent, or the will of one party." Petrikin *v.* Collier, 1 Pa. St. 247, 250.

Dissolution see *infra*, IX, A.

37. *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34. See *supra*, III, A, 1, g, (I).

38. Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 16 So. 882. And see *supra*, III, A, 1, g, (I).

Time of knowledge of holding out.— Where one's liability as a member of the firm is caused by his holding himself out as a partner, he is liable for goods sold to the firm only from the time knowledge of such holding out came to the sellers. Carey *v.* Marshall, 67 N. J. L. 236, 51 Atl. 698.

39. Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494 (the agreement provided that "the said copartnership is to be and continue for the full term of five years from and after the date of these presents," and it was held that the firm began at once, although one of the parties failed to pay in his contribution as agreed); Petrakion *v.* Arbelly, 26 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183; Austin *v.* Williams, 2 Ohio 61; Aspinwall *v.* Williams, 1 Ohio 84; Williams *v.* Jones, 5 B. & C. 108, 7 D. & R. 549, 29 Rev. Rep. 181, 11 E. C. L. 388.

40. Phillips *v.* Nash, 47 Ga. 218 (holding that the taking an account of stock, after the execution of the contract, was only a matter of detail and not a condition of the contract taking effect); Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494.

41. Kerrick *v.* Stevens, 55 Mich. 167, 168, 20 N. W. 888 ("It would be an anomaly to have capital paid in and expended, without any partnership existing. . . . The purpose must be derived from the nature of the agreement, and not from the technical meaning of words as present or future, standing alone"); Hartman *v.* Woehr, 18 N. J. Eq. 383; Rogers *v.* Nichols, 20 Tex. 719; Gooderham *v.* Upper Canada Bank, 9 Grant Ch. (U. C.) 39.

42. Hall *v.* Edson, 40 Mich. 651; Gabriel *v.* Evill, C. & M. 358, 11 L. J. Exch. 371, 9 M. & W. 297, 41 E. C. L. 198; *In re* Hall, 15 Ir. Ch. 287; Wilson *v.* Lewis, 2 M. & G. 197, 40 E. C. L. 559; Battley *v.* Lewis, 4 Jur. 537, 1 M. & G. 155, 1 Scott N. S. 143, 39 E. C. L. 694; *Ex p.* Turquand, 2 Mont. D. & De G. 339.

43. Valentine *v.* Hickle, 39 Ohio St. 19, before cattle bought by the parties should become partnership property each purchase was to be approved by all.

44. Wantling *v.* Howarth, 65 Ill. App. 598; Morrill *v.* Weeks, 70 N. H. 178, 46 Atl. 32, a partnership for five years terminated at the expiration of that period, although there was a provision that, if either party withdrew, he was to offer his interest for sale to the other.

Termination by consent.— And a partnership for a definite period may be sooner terminated by mutual consent. Wantling *v.* Howarth, 65 Ill. App. 598. See *infra*, IX, A, 3.

45. Brew *v.* Hastings, 196 Pa. St. 222, 46 Atl. 257, 79 Am. St. Rep. 706; Alexander *v.* Lewis, 47 Tex. 481. See *infra*, VIII, A, 1; IX, A, 5, a.

partnership has for its object the completion of a specified piece of work,[46] or the conduct of a business which ordinarily continues through a particular season,[47] it will be presumed that the parties intended the relation should continue until the object has been accomplished.[48] The mere fact, however, that a firm has taken a lease of property for a period of years, or has contracted debts payable at the end of a period of years, does not warrant the inference that the partnership has been formed for that period.[49] When no term is fixed by the parties, the partnership is deemed one at will, and any partner may determine the partnership at any time by giving notice of his intention so to do to all the other partners.[50]

3. EXTENSION OR RENEWAL. A partnership under written articles may be renewed by an oral agreement of the parties.[51] An extension or renewal of a partnership beyond its original term, although binding upon the partners, is not, however, binding upon their sureties, unless assented to by the latter.[52]

4. CONTINUATION AFTER TERM. In case a partnership for a fixed term is continued thereafter, without any new agreement between the parties, the original partnership contract remains in force,[53] so far as its provisions are consistent with the incidents of a partnership at will.[54] If a partnership is continued as a going business, after the term for which it was organized, it is not to be treated as resting on the daily reiterated consent of the parties, but as a continuing partnership, subject to termination only after notice and under the rules of law relating

46. Gates *v.* Fraser, 6 Ill. App. 229; Baxter *v.* Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. Rep. 432; Richards *v.* Baurman, 65 N. C. 162; Pearce *v.* Ham, 113 U. S. 585, 5 S. Ct. 676, 28 L. ed. 1067.

47. Baxter *v.* Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. Rep. 432; Walker *v.* Whipple, 58 Mich. 476, 25 N. W. 472; Potter *v.* Moses, 1 R. I. 430.

48. Cole *v.* Moxley, 12 W. Va. 730.

A partnership to make use of a patent is one for a reasonable time, that is, a time sufficiently long to show whether the patent could be successfully used. Morris *v.* Peckham, 51 Conn. 128.

49. King *v.* Accumulative L. Fund, etc., Assur. Co., 3 C. B. N. S. 151, 3 Jur. N. S. 1264, 27 L. J. C. P. 57, 6 Wkly. Rep. 12, 91 E. C. L. 151; Crawshay *v.* Maule, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 79, 18 Rev. Rep. 126; Alcock *v.* Taylor, Taml. 506, 38 Eng. Reprint 201; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115.

50. Fletcher *v.* Reed, 131 Mass. 312; Stitt *v.* Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Whipple *v.* Stuart, 26 Mont. 219, 66 Pac. 941; Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979 [*reversing* 91 Hun 599, 36 N. Y. Suppl. 653]; Loorya *v.* Kupperman, 25 Misc. (N. Y.) 518, 54 N. Y. Suppl. 1005. See *infra*, IX, A, 1, a.

Until proof of dissolution.— Where an agreement does not limit the duration of the partnership, it will be presumed to continue, until there is competent proof of its dissolution. Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404.

51. Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75; Dickinson *v.* Bold, 3 Desauss. Eq. (S. C.) 501.

52. Small *v.* Currie, 2 Eq. Rep. 638, 18 Jur. 731, 23 L. J. Ch. 746.

53. *Florida.*— Stephens *v.* Orman, 10 Fla. 9, 97.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Maryland.— Sangston *v.* Hack, 52 Md. 173, continuation provided for by partnership articles.

Pennsylvania.— Mifflin *v.* Smith, 17 Serg. & R. 165; Waring *v.* Cram, 1 Pars. Eq. Cas. 516.

Vermont.— Bradley *v.* Chamberlin, 16 Vt. 613.

United States.— Robertson *v.* Miller, 20 Fed. Cas. No. 11,926, 1 Brock. 466 (articles binding where the business is carried on without any change in the circumstances); U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176.

See 38 Cent. Dig. tit. "Partnership," § 85.

54. Neilson *v.* Mossend Iron Co., 1 App. Cas. 298; Daw *v.* Herring, [1892] 1 Ch. 284, 61 L. J. Ch. 5, 65 L. T. Rep. N. S. 782, 40 Wkly. Rep. 61; Beamish *v.* Beamish, Ir. R. 4 Eq. 120; Cox *v.* Willoughby, 13 Ch. D. 863, 49 L. J. Ch. 237, 42 L. T. Rep. N. S. 125, 28 Wkly. Rep. 503; Essex *v.* Essex, 20 Beav. 442, 52 Eng. Reprint 674; Stewart *v.* Gladstone, 47 L. J. Ch. 423, 38 L. T. Rep. N. S. 557, 26 Wkly. Rep. 657; Brooks *v.* Brooks, 85 L. T. Rep. N. S. 453. See also Clark *v.* Leach, 32 Beav. 14, 55 Eng. Reprint 163 [*affirmed* in 1 De G. J. & S. 409, 9 Jur. N. S. 610, 32 L. J. Ch. 290, 8 L. T. Rep. N. S. 40, 11 Wkly. Rep. 351, 66 Eng. Ch. 317, 46 Eng. Reprint 163]; Cope *v.* Cope, 52 L. T. Rep. N. S. 607.

Inconsistent provisions.— But provisions in the original contract which are inconsistent with a partnership at will do not remain in force. Woods *v.* Lamb, 35 L. J. Ch. 309; Hogg *v.* Hogg, 35 L. T. Rep. N. S. 792; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115. A provision that a partner, wishing to retire, should give notice of his intention a certain

to the dissolution of partnerships.[55] Whether a partnership is continued after the expiration of the prescribed term, or whether the parties are engaged in settling up the firm business only, is a question to be determined by the conduct of the parties.[56] Generally speaking the articles of partnership do not operate to introduce the executors of a deceased partner into the firm, or to secure to his estate the benefits of the partnership relation after his death, without express provision therefor;[57] and a trade duly continued by surviving partners to wind up the business is not the partnership trade, but in the nature of a trust.[58]

5. Evidence. The burden of proving that a partnership was organized for a definite term is upon him who alleges it.[59] In case, however, a partnership is shown to exist, there is a presumption of its continuance, until notice of its dissolution is given to those dealing with it.[60] Even as between the partners, there is a presumption that the partnership continues to exist, until the object for which it was organized has been accomplished.[61] When the partners continue to act after the agreed term as though the partnership relation continued, they will ordinarily be bound by such appearances.[62] On the other hand, if their conduct indicates that a dissolution has taken place, they will be treated as though the dissolution were actual.[63] The declarations of a partner that the relation has been dissolved, or that it still continues, are admissible against himself, but not against his copartner, unless the latter has acquiesced therein.[64]

IV. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

A. Firm-Name — 1. In General. At common law a partnership may be validly organized, without any provision in the agreement as to the name under which it is to do business.[65] When a firm-name is fixed upon, it may be the full individual name of any partner;[66] the surnames of all the partners;[67] or the surname of one or more of the members with the addition of "& Co.";[68] or it may consist of individual names, wholly distinct from the names of any of the members;[69] or it may be a name purely fanciful.[70] But whatever the firm-name may

time in advance is inconsistent with a partnership at will.

55. Jurgens *v.* Ittman, 47 La. Ann. 367, 16 So. 952; Parsons *v.* Hayward, 4 De G. F. & J. 474, 8 Jur. N. S. 924, 31 L. J. Ch. 666, 6 L. T. Rep. N. S. 628, 10 Wkly. Rep. 654, 65 Eng. Ch. 368, 45 Eng. Reprint 1267, holding that a business carried on after the expiration of the term is for the benefit of a sleeping partner, as well as for that of an active partner. See *infra*, IX.

56. McGill *v.* Dowdle, 33 Ark. 311; Metz *v.* Columbia Commercial Bank, 45 S. C. 216, 23 S. E. 13; Spencer *v.* Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870 [*reversing* (Civ. App. 1898) 47 S. W. 29, 665]; King *v.* Chuck, 17 Beav. 325, 51 Eng. Reprint 1059.

57. Pearce *v.* Chamberlain, 2 Ves. 33, 28 Eng. Reprint 23. See *infra*, VIII.

58. Booth *v.* Parks, 1 Molloy 465. See *infra*, VIII.

59. Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098.

60. Mankato First Nat. Bank *v.* Grignon, 7 Ida. 646, 65 Pac. 365. See *infra*, IX, B, 6.

61. Teas *v.* Woodruff, (N. J. Ch. 1887) 10 Atl. 392; Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75; Burnley *v.* Rice, 18 Tex. 481.

62. Duckworth *v.* Hisle, 19 S. W. 843, 20 S. W. 218, 14 Ky. L. Rep. 220; Potter *v.* Moses, 1 R. I. 430; Burnley *v.* Rice, 18 Tex. 481.

63. Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39 [*affirming* 64 Ill. App. 453]; Rice *v.* Maddock, 16 Daly (N. Y.) 156, 9 N. Y. Suppl. 524.

64. Nichols *v.* White, 41 Hun (N. Y.) 152 [*affirmed* in 114 N. Y. 639, 21 N. E. 1120]; Fick *v.* Mulholland, 48 Wis. 413, 4 N. W. 346.

65. Pursley *v.* Ramsey, 31 Ga. 403; Getchell *v.* Foster, 106 Mass. 42; Wright *v.* Hooker, 10 N. Y. 51; Le Roy *v.* Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

66. Theilen *v.* Hann, 27 Kan. 778; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; Yorkshire Banking Co. *v.* Beatson, 5 C. P. D. 109, 49 L. J. C. P. 380, 42 L. T. Rep. N. S. 455, 28 Wkly. Rep. 879.

67. Mick *v.* Howard, 1 Ind. 250; West *v.* Valley Bank, 6 Ohio St. 168; Le Roy *v.* Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

68. Haskins *v.* D'Este, 133 Mass. 356; Ripley *v.* Colby, 23 N. H. 434; Aspinwall *v.* Williams, 1 Ohio 84; Messner *v.* Lewis, 20 Tex. 221; Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64.

69. Shain *v.* Du Jardin, (Cal. 1894) 38 Pac. 529; Ward *v.* Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352.

70. Kahn *v.* Thomson, 113 Ga. 957, 39

be, it is simply a convenient abbreviation of the individual names of the partners; and hence the signature of the firm-name is in law the signature of the several partners' names;[71] and the several signatures of the partners to a firm contract has the same legal effect as the signature of the firm-name thereto.[72] Partnership contracts are perfectly valid when made in the firm-name, even though such name does not contain the names of any of the partners.[73] A bill of sale, or a mortgage of personal property, to or by a partnership in its firm style is as valid and effective as though made to or by an individual in his proper name.[74]

2. STATUTORY PROVISIONS AS TO FIRM-NAME. In some jurisdictions by statute it is made an offense to transact business in the name of a partner not interested in the firm, or to use the designation "and Company" or "& Co." when it does not represent an actual partner.[75] Other statutes provide that every partnership transacting business under a fictitious or assumed name, or a designation not showing the names of the persons interested as partners in such business, must file in a designated clerk's office a certificate stating the names in full of all the partners, and publish the same in a prescribed manner.[76] Still other statutes require designated kinds of partnership associations to register and publish either a certificate of the partnership, or a declaration of the names of the members.[77] These statutes differ in the consequences attached to their violation.[78] As a rule

S. E. 322; Crawford *v.* Collins, 45 Barb. (N. Y.) 269; Maugham *v.* Sharpe, 17 C. B. N. S. 443, 10 Jur. N. S. 989, 34 L. J. C. P. 19, 10 L. T. Rep. N. S. 870, 12 Wkly. Rep. 1057, 112 E. C. L. 443.

71. Haskins *v.* D'Este, 133 Mass. 356; Messner *v.* Lewis, 20 Tex. 221, Lewis, Garthwaite, and Grant traded in New York in the firm-name of Lewis, Garthwaite & Co., and in New Orleans in the name of Grant, Lewis & Co.; and were allowed to bring a single action in their individual names on three notes, one of which was payable to the order of the New York firm-name, and two of which were payable to the order of the New Orleans firm-name.

72. Dreyfus *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535, 31 Am. Rep. 488.

73. Haskins *v.* D'Este, 133 Mass. 356; Beakes *v.* Da Cunha, 12 N. Y. Suppl. 351; Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

74. Hendren *v.* Wing, 60 Ark. 561, 31 S. W. 149, 46 Am. St. Rep. 218; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Maugham *v.* Sharpe, 17 C. B. N. S. 443, 10 Jur. N. S. 989, 34 L. J. C. P. 19, 10 L. T. Rep. N. S. 870, 12 Wkly. Rep. 1057, 112 E. C. L. 443.

75. See the statutes of the different states. And see Castle *v.* Graham, 180 N. Y. 553, 73 N. E. 1120 [*affirming* 87 N. Y. App. Div. 97, 84 N. Y. Suppl. 120].

Construction.—Such statutes have been construed as intended to prevent a firm from obtaining a false credit on the strength of an unauthorized name, but not to prevent the firm from giving credit, nor to furnish a debtor of the offending firm with a defense. Wolfe *v.* Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Kent *v.* Mojonier, 36 La. Ann. 259; Sinnott *v.* German-American Bank, 164 N. Y. 386, 58 N. E. 286 [*affirming* 78 N. Y. App. Div. 224, 79 N. Y. Suppl. 510]; Gay *v.* Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Zimmerman *v.* Erhard, 83 N. Y. 74, 38 Am. Rep. 396 [*affirming* 8 Daly 311, 53 How. Pr. 11]; Wood *v.* Erie R. Co., 72 N. Y. 196, 28 Am. Rep. 125 [*affirming* 9 Hun 648]; Pollard *v.* Brady, 48 N. Y. Super. Ct. 476; Baumann *v.* De Logerot, 26 N. Y. Suppl. 986.

76. See the statutes of the different states. And see Walker *v.* Stimmel, 15 N. D. 484, 107 N. W. 1081; Virginia Nat. Bank *v.* Cringan, 91 Va. 347, 21 S. E. 820. A firm-name showing the surnames only of the partners is not "a fictitious name," nor "a designation not showing the names of the partners," within Cal. Civ. Code, § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. Pendleton *v.* Cline, 85 Cal. 142, 24 Pac. 659.

77. See the statutes of the different states. And see Lunt *v.* Lunt, 8 Abb. N. Cas. (N. Y.) 76; Kaufman *v.* Carter, 67 S. C. 312, 45 S. E. 211; Cassidy *v.* Henry, 31 U. C. Q. B. 345.

78. Violation a misdemeanor see the statutes of the different states.

No right to sue.— Persons doing business as partners contrary to statutory provisions cannot maintain any action on a partnership contract or transaction until the required certificate has been filed and published. See the statutes of the different states. And see Cohble *v.* Farmers' Bank, 63 Ohio St. 528, 59 N. E. 221.

Actions for penalties against the violating partners are sometimes provided. See the statutes of the different jurisdictions. And see Chaput *v.* Robert, 14 Ont. App. 354; Toronto Bank *v.* Nixon, 4 Ont. App. 346 [*reversing* 43 U. C. Q. B. 447]; Pinkerton *v.* Ross, 33 U. C. Q. B. 508; Cassidy *v.* Henry, 31 U. C. Q. B. 345; Ridgeway *v.* Collier, 21 Quebec Super. Ct. 473.

Firm property treated as individual property.—It is sometimes provided that the property used in the partnership business shall be treated as the individual property of the one

these statutes are strictly construed in favor of the partners, especially those which are highly penal.[79] These statutes are generally held not to apply to partnerships which are organized and have their principal place of business outside of the enacting jurisdiction.[80]

3. Changing Name. The mere change in the name of a firm does not affect its rights or liabilities.[81] When a firm-name has been agreed upon it cannot be changed without the consent of all the partners.[82] If no name has been fixed by agreement, the partner charged with the duty or clothed with the authority to sign contracts for the firm may bind all the members by such signature as he may choose to employ.[83]

4. Right to Use of Name.[84] Persons upon organizing a partnership have the absolute right to use their names honestly as a firm style, although other persons of like names are carrying on a partnership in the same style, and the new firm will thus incidentally interfere with and injure the business of the older partner-

whose name appears in the firm style. See the statutes of the different states. And see Brister *v.* Joseph Bowling Co., (Miss. 1901) 29 So. 830; Loeb *v.* Morton, 63 Miss. 280; Quin *v.* Myles, 59 Miss. 375; Gumbel *v.* Koon, 59 Miss. 264; Virginia Nat. Bank *v.* Cringan, 91 Va. 347, 21 S. E. 820.

79. *California.*— Meads *v.* Lasar, 92 Cal. 221, 28 Pac. 935 (a certificate which gives the initials of the christian names of the members satisfies the statute); McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596; Carlock *v.* Cagnacci, 88 Cal. 600, 26 Pac. 597; Pendleton *v.* Cline, 85 Cal. 142, 24 Pac. 659 (holding that a firm-name showing the surnames only of the partners is not a fictitious name, within Cal. Civ. Code, § 2466); Coldtree *v.* Swinford, 74 Cal. 586, 16 Pac. 493. But *compare* North *v.* Moore, 135 Cal. 621, 67 Pac. 1037.

Louisiana.— Wolfe *v.* Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772.

Mississippi.— Yale *v.* Taylor Mfg. Co., 63 Miss. 598. *Compare* Quin *v.* Myles, 59 Miss. 375; Gumbel *v.* Koon, 59 Miss. 264.

Montana.— Guiterman *v.* Wishon, 21 Mont. 458, 54 Pac. 566, where the surname of all the members of the firm is Guiterman, a firm-name of "Guiterman Brothers" is not a fictitious name, nor one not showing the names of the partners, within Civ. Code, § 3280.

New York.— Zimmerman *v.* Erhard, 83 N. Y. 74, 38 Am. Rep. 396 [*affirming* 8 Daly 311, 58 How. Pr. 11]; Castle *v.* Graham, 87 N. Y. App. Div. 97, 84 N. Y. Suppl. 120 [*affirmed* in 180 N. Y. 553, 73 N. E. 1120] (the name "Castle Brothers" is not an assumed name, nor one "other than the real name or names of the individual or individuals conducting or transacting" the firm business, under Pen. Code, § 363*b*); Loeb *v.* Firemen's Ins. Co., 78 N. Y. App. Div. 113, 79 N. Y. Suppl. 510, 12 N. Y. Annot. Cas. 343 [*affirming* 38 Misc. 107, 77 N. Y. Suppl. 106]; Cahn *v.* Gottschalk, 14 Daly 542, 2 N. Y. Suppl. 13; Lauferty *v.* Wheeler, 11 Daly 194; Rosenheim *v.* Rosenfield, 13 N. Y. Suppl. 720.

Ohio.— Czatt *v.* Case, 61 Ohio St. 392, 55 N. E. 1004 (a firm-name which contains the surnames of all the partners is not a fictitious name, nor a designation not showing the names of the persons who constitute the firm, within meaning of Ohio Laws (1892), p. 25); Clark *v.* Doe, 8 Ohio S. & C. Pl. Dec. 685, 7 Ohio N. P. 613; Cochran *v.* Hirsch, 6 Ohio S. & C. Pl. Dec. 41, 4 Ohio N. P. 34; Kinsey *v.* Ohio Southern R. Co., 3 Ohio S. & C. Pl. Dec. 249, 2 Ohio N. P. 175.

Virginia.— National Bank *v.* Cringan, 91 Va. 347, 21 S. E. 820.

Canada.— Ridgeway *v.* Collier, 21 Quebec Super. Ct. 473.

See 38 Cent. Dig. tit. "Partnership," §§ 88, 89.

80. Bofenschen's Succession, 29 La. Ann. 711; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924; Ridgeway *v.* Collier, 21 Quebec Super. Ct. 473.

81. Gill *v.* Ferris, 82 Mo. 156.

An agency conferred on partners is not annulled by a change in the firm-name. Billingsley *v.* Dawson, 27 Iowa 210.

82. Markham *v.* Hazen, 48 Ga. 570; Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Faith *v.* Richmond, 11 A. & E. 339, 9 L. J. Q. B. 97, 3 P. & D. 187, 39 E. C. L. 197; Kirk *v.* Blurton, 12 L. J. Exch. 117, 9 M. & W. 284.

Consent inferred.— The consent of all the partners to a change in the firm-name may be inferred from their conduct. Jemison *v.* Minor, 34 Ala. 33; Ripley *v.* Colby, 23 N. H. 438; Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165; Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64.

Whether a particular change is material or is so slight an alteration from the agreed style as not to affect the rights and liabilities of the non-consenting partners is generally a question of fact. Kinsman *v.* Dallam, 5 T. B. Mon. (Ky.) 382; Tilford *v.* Ramsey, 37 Mo. 563; Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505; Norton *v.* Seymour, 3 C. B. 792, 11 Jur. 312, 16 L. J. C. P. 100, 54 E. C. L. 792.

83. Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599; Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64.

84. See, generally, Trade-Marks and Trade-Names.

ship.[85] The law does not permit persons to monopolize the use of their names in any business.[86] At the same time the law does protect a firm against the dishonest use of its firm style, even by persons of like name. Such a use is made of the firm style, where that had come to indicate the source of manufacture of particular goods, and it is employed by the new firm in such a way as to pass off its own goods as those of the old firm.[87]

B. Scope and Extent of Partnership — 1. Universal Partnership. Doubt has been expressed as to the existence of a partnership which is strictly universal.[88] A partnership not embracing all the property of each partner is not a universal partnership.[89] The relation of husband and wife, under Mexican law, is said to be that of partnership.[90]

2. Determining the Scope of Partnership. It may be said in general terms that the scope of a partnership is determined by the language of the partnership agreement, and the ordinary usages of the business in which the firm is engaged.[91]

3. The Firm as an Entity. While it has been stated broadly that a partnership

85. Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78; Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118.

86. Robinson *v.* Storm, 103 Tenn. 40, 52 S. W. 880; Stuart *v.* F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Pillsbury *v.* Pillsbury-Washburn Flour-Mills Co., 64 Fed. 841, 12 C. C. A. 432; Holloway *v.* Holloway, 13 Beav. 209, 51 Eng. Reprint 81.

87. American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 72 Am. St. Rep. 263, 43 L. R. A. 826; Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. 357; Wyckoff *v.* Howe Scale Co., 110 Fed. 520; Lee *v.* Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. Rep. N. S. 251, 18 Wkly. Rep. 242.

88. U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176, 183, where Story, J., said: "There is, probably, no such thing as a universal partnership, if, by the terms, we are to understand, that every thing done, bought, or sold, is to be deemed on partnership account." *Compare* Gray v. Palmer, 9 Cal. 616.

89. Murrell *v.* Murrell, 33 La. Ann. 1233.

90. Fuller *v.* Ferguson, 26 Cal. 546.

91. *Alabama.*—Kelly *v.* Browning, 113 Ala. 420, 21 So. 928, 124 Ala. 645, 27 So. 391 (changing the gauge of a railroad and operating it as thus changed are beyond the scope of a partnership, created to reorganize the company); Humes *v.* O'Bryan, 74 Ala. 64 (carrying on a store is not within the scope of a farming partnership); Hogan *v.* Reynolds, 8 Ala. 59 (collecting notes for others is not within the scope of a partnership for buying and selling merchandise).

Connecticut.—Walcott *v.* Canfield, 3 Conn. 194, a contract to carry a person a certain distance within a certain time is not within the scope of a partnership for carrying passengers and their baggage over a fixed route.

Georgia.—Davis *v.* Dodson, 95 Ga. 718, 22 S. E. 645, 51 Am. St. Rep. 108, 29 L. R. A. 496, it is not within the scope of a partnership of lawyers for one of the partners to render the legal services of the firm gratuitously.

Maryland.—Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

Missouri.—Sedalia Nat. Bank *v.* Cassidy Bros. Live Stock Commission Co., 109 Mo. App. 249, 84 S. W. 142, mortgaging firm property by one partner to secure his individual debt is not within the scope of the partnership.

New York.—Parker *v.* Day, 12 Misc. 510, 33 N. Y. Suppl. 676 [*reversing* 9 Misc. 298, 30 N. Y. Suppl. 267, and *reversed* on other grounds in 155 N. Y. 383, 49 N. E. 1046], services rendered by a lawyer at the request of his partner, to an estate of which the partner is executor, are performed for the benefit of the firm.

Rhode Island.—Sweet *v.* Wood, 18 R. I. 386, 28 Atl. 335, the hiring, by one partner, of a horse, which is necessary for carrying on the firm business, is within the scope of the partnership.

Wisconsin.—Moore *v.* May, 117 Wis. 192, 94 N. W. 45, borrowing money for the firm is within the scope of the partnership, although the business is not being conducted as prescribed in the articles.

United States.—Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

England.—Aas *v.* Benham, [1891] 2 Ch. 244, 65 L. T. Rep. N. S. 25 [*explaining* Dean *v.* MacDowell, 8 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. Rep. N. S. 862, 26 Wkly. Rep. 486 (a covenant, in the partnership articles, not to engage in any business except on account of the partnership, does not entitle the other partners to the benefits of a business carried on in violation of the covenant; for such business is not within the scope of the partnership); Collins *v.* Jackson, 31 Beav. 645, 54 Eng. Reprint 1289.

Canada.—O'Regan *v.* Williams, 24 Nova Scotia 165 (selling gravel is outside the scope of a partnership for carrying on the roofing business); Drouin *v.* Ganthier, 12 Quebec K. B. 442 (it is not within the scope of a partnership of lawyers for one to give a note in the firm-name).

See 38 Cent. Dig. tit. "Partnership," § 92.

is but a relation and is not a legal being distinct from the members who compose it,[92] still the law does take note on a wide scale of partnership as a legal entity and regards it as a unit both of rights and obligations,[93] and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts.[94] It is the scheme of the United States Bankruptcy Act[95] to treat partnership as an entity, which may be adjudged a bankrupt, irrespective of any adjudication of the individual partners as bankrupts.[96]

4. CONSTRUCTION OF AGREEMENT. In determining what acts are within the scope of the partnership business, a court will first examine the articles of agreement with a view of discovering the objects which the partners have declared they wished to attain by the partnership. If these declarations are open to different interpretations, the court will treat the language of the agreement as having been used in the sense in which it is generally understood by those engaged in like business.[97] If the language is unequivocal, the court will act in accordance with

92. Harris *v.* Visscher, 57 Ga. 229; Chambers *v.* Sloan, 19 Ga. 84; Schreiner *v.* U. S., 6 Ct. Cl. 359; Demazar *v.* Pybus, 4 Ves. Jr. 644, 31 Eng. Reprint 332.

93. Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; Menagh *v.* Whitwell, 52 N. Y. 146, 162, 11 Am. Rep. 683 ("A partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership, is derived from the acknowledgment that a partnership is a body by itself."

Residence or domicile.—A "partnership" is a legal entity, known and recognized by the law, and for judicial purposes it may be considered as having a residence in every county in which it does business, although neither partner resides in such county. Fitzgerald *v.* Grimmell, 64 Iowa 261, 20 N. W. 179. Under Iowa Code, § 2585, providing that when a corporation, company, or individual has an office or agency in any county for the transaction of business any suits connected with such office or agency may be brought in such county, an attachment may be sued out against a partnership in any county in which it does business, on the ground that it is about to permanently remove therefrom, although none of the partners reside in such county. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153. A partnership is not a legal entity, having a domicile, although for the purposes of taxation and for other purposes it may be treated by statutes as having a locality. Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846.

94. *Georgia.*— Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, citing Parsons Partn. 449.

Indiana.— Pennville Natural Gas, etc., Co. *v.* Thomas, 21 Ind. App. 1, 51 N. E. 351.

Iowa.— Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978.

Louisiana.— Stothart *v.* Hardie, 110 La. 696, 34 So. 740; Newman *v.* Eldridge, 107 La. 315, 31 So. 688 ("Two firms are separate legal entities, though one firm has grown out of the other by the admission of a new member"); Sherwood *v.* His Creditors, 42 La. Ann. 103, 7 So. 79 ("As soon as the partnership between Sherwood and Martin was formed, their . . . individual interests or shares in the factory were vested in the ideal being known as the partnership").

Missouri.— Kelley *v.* London Guarantee, etc., Co., 97 Mo. App. 623, 71 S. W. 711; Clarke *v.* Laird, 60 Mo. App. 289.

Nebraska.— Richardson *v.* Leveille, 44 Nebr. 38, 62 N. W. 304; Roop *v.* Herron, 15 Nebr. 73, 17 N. W. 353.

New Jersey.— Hollingshead *v.* Curtis, 14 N. J. L. 402.

New York.— Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853.

South Carolina.— Allen *v.* Davids, 70 S. C. 260, 49 S. C. 846; Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83.

Canada.— Montreal *v.* Gagnon, 25 Quebec Super. St. 178; Crépeau *v.* Boisvert, 13 Quebec Super. Ct. 405, "A partnership is a moral entity, having an existence distinct from the personality of its members."

Partners solvent and firm insolvent.—Although partners as individuals may be perfectly solvent, the firm as such may be insolvent. Ransom *v.* Wardlaw, 99 Ga. 540, 27 S. E. 158.

95. U. S. Bankr. L. (1898) § 5.

96. *In re* Farley, 115 Fed. 359; *In re* Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 385; *In re* Mayer, 98 Fed. 976, 39 C. C. A. 368. See, generally, BANKRUPTCY.

97. Davis *v.* Darling, 80 Hun (N. Y.) 299, 30 N. Y. Suppl. 321 (the agreement recited that the partnership was to carry on the "regular real estate business," and this was construed not to include speculation in real estate); Freeman *v.* Carpenter, 17 Wis. 126 ("The general business of land agents and money and commission brokers" includes dealing in money, keeping on hand a cash capital, and making loans from it); Latta *v.* Kilbourn, 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169 (the use by a partnership of the words "real estate and note brokers" on their letter heads and office sign and in the city directory implies that they are engaged in the sale and

it,[98] unless such action would operate to defraud or unfairly oppress one or more of the partners,[99] or unless the acts of the parties disclose that they understand the language in a different sense from that which it seems to bear, or that they have modified the provision in question.[1]

C. Powers of Firm as a Body. While, as we have seen,[2] the law does not recognize the firm as a legal entity, it does deem it capable of exercising powers as a body, and gives effect to contracts made in the firm-name, and to transactions entered into by the firm in its partnership capacity.[3] A partnership is so far a distinct entity that it may as such become a member of another firm,[4] and a partnership as a body may act as agent for other persons.[5]

D. What Is Firm Property — 1. In General. Everything which is contributed by any partner to the capital stock of the firm, either upon its organization or thereafter, becomes firm property;[6] and so do the profits of the business as well

purchase of real property for the account of others rather than in buying and selling for the firm, and affords a presumptive limitation on the scope of the firm business); Alston *v.* Sims, 3 Eq. Rep. 334, 1 Jur. N. S. 438, 24 L. J. Ch. 553, 3 Wkly. Rep. 451 (the emoluments received by one member of a firm of solicitors, who is steward of a manor and receiver of rents, are not the profits of a "trade or business," and thus within the scope of firm affairs); Proudfoot *v.* Bush, 7 Grant Ch. (U. C.) 518 (a partnership for joint speculation in lands secures to each partner a share in the profits of the speculation).

98. Smith *v.* Jeyes, 4 Beav. 503, 505, 49 Eng. Reprint 433, "The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends, and continues in force."

99. Blisset *v.* Daniel, 1 Eq. Rep. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478, 68 Eng. Reprint 1022; Chapple *v.* Cadell, Jac. 537, 23 Rev. Rep. 138, 4 Eng. Ch. 537, 37 Eng. Reprint 953.

1. Cayton *v.* Hardy, 27 Mo. 536; Thomas *v.* Lines, 83 N. C. 191; Henry *v.* Jackson, 37 Vt. 431; England *v.* Curling, 8 Beav. 129, 50 Eng. Reprint 51; Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

2. See *supra*, IV, B, 3.

3. *California.*— Cheney *v.* Newberry, 67 Cal. 125, 126, 7 Pac. 444, 445.

Minnesota.— Schoregge *v.* Gordon, 29 Minn. 367, 13 N. W. 194, holding valid an undertaking in the firm-name to indemnify a sheriff on the levy of an execution.

Nebraska.— Tessier *v.* Crowley, 17 Nebr. 207, 22 N. W. 422, holding that a partnership may become surety on an attachment undertaking.

South Carolina.— Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272, the firm signature to an attachment undertaking is valid.

Tennessee.— Allen *v.* Morgan, 5 Humphr. 624, a firm may bind itself to pay the debts of another, and mortgage its property to secure the promise.

Texas.— See McCulloch County Land, etc., Co. *v.* Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042. But *compare* Drake *v.* Brander, 8 Tex. 351.

See 38 Cent. Dig. tit. "Partnership," § 94.

But *compare* Gaddis *v.* Durashy, 13 N. J. L. 324, holding that a partnership cannot make an affidavit.

4. Willson *v.* Morse, 117 Iowa 581, 91 N. W. 823; McLaughlin *v.* Mulloy, 14 Utah 490, 47 Pac. 1031; Warner *v.* Smith, 1 De G. J. & S. 337, 32 L. J. Ch. 573, 8 L. T. Rep. 221, 1 New Rep. 191, 11 Wkly. Rep. 392, 66 Eng. Ch. 261, 46 Eng. Reprint 135.

5. Jackson *v.* Porter, 8 Mart. N. S. (La.) 200 (holding that a partnership may be appointed agent to perform any act within the object for which the partnership was formed, and one of them may execute it in the partnership name); Deakin *v.* Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827; McCulloch County Land, etc., Co. *v.* Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042.

6. *California.*— Lamb *v.* Hall, 147 Cal. 44, 81 Pac. 288; Quinn *v.* Quinn, 81 Cal. 14, 22 Pac. 264 (a lease of a quarry, personal property used in it, and stone already quarried); Hill *v.* Miller, 78 Cal. 149, 20 Pac. 304 (one partner put in an invention as a part of the capital stock, and thereafter took out a patent in his name; the patent was firm property).

Massachusetts.— Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432, property contributed by one partner as capital became firm property, although the contributing partner was insolvent and made the transfer to defraud his individual creditors.

Missouri.— Clinton First Nat. Bank *v.* Brenneisen, 97 Mo. 145, 10 S. W. 884.

New York.— Cram *v.* Union Bank, 1 Abb. Dec. 461, 4 Keyes 558 [*affirming* 42 Barb. 426] (a bank deposit was a part of the contribution of one partner, under his agreement to "put in all the property he acquired from M," although he was ignorant of the deposit when he made the agreement); Spears *v.* Willis, 69 Hun 408, 23 N. Y. Suppl. 549 (a patent); Morton *v.* Ostrom, 33 Barb. 256 (a lease of premises on which partnership business carried on); Stoughton *v.* Lynch, 2 Johns. Ch. 209 (the premiums on bills of exchange drawn for a part of the capital contributed by one partner is firm property).

England.— Hills *v.* Parker, 7 Jur. N. S. 833, 4 L. T. Rep. N. S. 746 (a lease of salt works); Kenny's Patent Button-Holeing Co.

as all things acquired with partnership funds or credit, or in the exercise of partnership rights,[7] including the good-will of the partnership business.[8] But a person, by becoming a member of a firm, does not vest the firm with ownership of his knowledge or information,[9] or with the ownership of his inventive

v. Somervell, 38 L. T. Rep. N. S. 878, 26 Wkly. Rep. 786 (a partnership formed to work an invention is the owner of the patent for such invention, although it was taken out in the name of one partner).

See 38 Cent. Dig. tit. "Partnership," § 95.

7. *California.*— Collins *v.* Butler, 14 Cal. 223, a judgment for trespass to firm property is firm property.

Colorado.— Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803, a sum paid to a firm of real estate brokers, to be forfeited if the purchaser failed to pay the balance of the purchase-price, is a part of the firm's assets.

Illinois.— Richards *v.* Maynard, 166 Ill. 466, 46 N. E. 1138 [*affirming* 61 Ill. App. 336] (damages recovered for a breach of contract, accruing before the death of a partner, are firm assets, although the recovery was obtained after death); Scutt *v.* Robertson, 127 Ill. 135, 19 N. E. 851 (the license to manufacture a patented article is firm property); Leeds *v.* Townsend, 89 Ill. App. 646 (all the profits accruing from building an electric road and marketing its stocks and bonds are partnership assets).

Louisiana.— Gillisse *v.* Gibson, 6 La. Ann. 125, a note payable to a partner, but given for a debt due the firm, is an asset of the firm.

Maryland.— George *v.* Morison, 93 Md. 132, 48 Atl. 744, a debt due from a partner to the firm is firm property.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162, a debt due the firm from a partner may be sold by the firm, and an action brought thereon by the assignee.

Montana.— Whipple *v.* Stuart, 26 Mont. 219, 66 Pac. 941, the hay on land staked off by one partner, while a member of a firm engaged in cattle-raising, belongs to the firm, and not to such partner.

New Hampshire.—Parker *v.* Gregg, 23 N. H. 416, when the members of a partnership are sureties for the debt of another, and one partner is compelled by the creditor to pay the debt, he is entitled to be credited in the firm account for such payment; and accordingly the claim against the principal debtor is an asset of the firm.

New Jersey.— Wilson *v.* Cobb, 29 N. J. Eq. 361, bonds bought by a partner to protect the firm's holdings are partnership property.

New York.— Lowber *v.* Le Roy, 2 Sandf. 202; Day *v.* Perkins, 2 Sandf. Ch. 359.

North Carolina.— Allison *v.* Davidson, 17 N. C. 79, a bond given to one partner for a debt due the firm is a firm asset.

Ohio.— Kreis *v.* Gorton, 23 Ohio St. 468.

Pennsylvania.— Williams' Appeal, 122 Pa. St. 472, 15 Atl. 912; McCormick's Appeal, 55 Pa. St. 252 (when the partners are severally indebted to the firm, it is only the balance owing by each, after the adjustment between them all, that can be considered as a firm asset, as against the separate creditors of each partner); Brown *v.* McFarland, 41 Pa. St. 129, 80 Am. Dec. 598 (where one of two partners executes his note to the firm for an indebtedness of another firm in which he is concerned, the note belongs to the partners jointly); Baily *v.* Brownfield, 20 Pa. St. 41 (money borrowed for partnership business belongs to the firm, although the partners may give their individual obligations for its repayment).

Texas.— Williams *v.* Meyer, (Civ. App. 1901) 64 S. W. 66, land purchased for firm business with firm money is firm property.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11, a legacy given to one partner, but contributed by him to the firm capital, becomes firm property, certainly after the lapse of many years.

England.— Partn. Act (1890), §§ 20, 21; *Ex p.* Leaf, 4 Deac. 287, 9 L. J. Bankr. 9, Mont. & C. 662; Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098 (a lease acquired for partnership purposes is firm property; but the owner of a lease does not contribute it to the firm capital, when he admits another to be his partner in a part only of the leased property); *Ex p.* Free, 2 Glyn & J. 250; *Ex p.* Thompson, 8 Jur. 633, 13 L. J. Ch. 354 (trade fixtures in leasehold premises, after they are mortgaged by the firm, are not within the order and disposition of the partners, under the English Bankruptcy Act).

See 38 Cent. Dig. tit. "Partnership," § 95.

Goods captured by enemy.— When goods which are captured by an alien enemy are returned "in specie," they are firm property (Thompson *v.* Ryan, 2 Swanst. 565 note, 19 Rev. Rep. 127); but an award to individual partners for damages sustained by the capture is not firm property (Campbell *v.* Mullett, 2 Swanst. 553, 19 Rev. Rep. 127, 36 Eng. Reprint 727).

8. Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; Spiess *v.* Rosswog, 63 How. Pr. (N. Y.) 401 [*affirmed* in 96 N. Y. 651]; Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510; Williams *v.* Wilson, 4 Sandf. Ch. (N. Y.) 379. *Compare* Smith *v.* Smith, 51 La. Ann. 72, 24 So. 618, holding that the good-will of a dissolved partnership carrying on an insurance business as agents is not a property right.

9. Jennings *v.* Rickard, 10 Colo. 395, 15 Pac. 677 (a member of a partnership for locating mining claims discovered, some years before entering the firm, some "float" on a mountain side and stuck a stake there. After the dissolution of the firm the discoverer returned to the spot and located a valuable mine. The firm acquired no interest in the

genius.[10] A clear engagement on his part for such a result must be shown.[11] The fact that one partner sells property, or interest therein, to his copartner, or mortgages it to secure his individual debt to his copartner, or becomes indebted to his copartner, does not make the purchase-price, or the mortgage or the debt a firm asset.[12] If the firm is solvent, firm property may be used, with the consent of all the partners, to pay the individual debts of a partner.[13]

2. PERSONALTY HELD BY A PARTNER. Whether personal property, which is owned by one of the partners when the partnership is formed and which is used thereafter for firm purposes, has been contributed to the firm capital, and has thus become firm property, or remains the individual property of the said partner, is to be determined by the partnership agreement and the conduct of the parties thereunder.[14] Personalty, purchased with partnership funds, or upon which partnership money or service has been expended, even where taken in the name of one partner, will be presumed to belong to the firm,[15] although such presumption may be rebutted.[16]

3. INTENT OF PARTIES. In the absence of a statutory provision regulating the title, or of a fraudulent purpose in taking title in a particular manner, the intention of the parties, if clearly disclosed, will determine whether property connected with a partnership business is owned by the firm, or by its individual members.[17]

4. PROPERTY ACQUIRED OR IMPROVED WITH FIRM FUNDS. Where property has

mine); Aas *v.* Benham, [1891] 2 Ch. 244, 65 L. T. Rep. N. S. 25.

10. Belcher *v.* Whittemore, 134 Mass. 330; Burr *v.* De la Vergne, 102 N. Y. 415, 7 N. E. 366.

11. Hill *v.* Miller, 78 Cal. 149, 20 Pac. 304; Blood *v.* Ludlow Carbon Black Co., 150 Pa. St. 1, 24 Atl. 348.

12. Ball *v.* Farley, 81 Ala. 288, 1 So. 253; Elder *v.* Hood, 38 Ill. 533; Locke *v.* Locke, 166 Mass. 435, 44 N. E. 346; Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557.

13. Hanover Nat. Bank *v.* Klein, 64 Miss. 141, 8 So. 208, 60 Am. Rep. 47 [*explained* in Jackson Bank *v.* Durfey, 72 Miss. 971, 18 So. 456, 48 Am. St. Rep. 596, 31 L. R. A. 470].

14. *Iowa.*— Baxter *v.* Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. Rep. 432.

New York.— Penny *v.* Black, 9 Bosw. 310.

Pennsylvania.— *In re* Bailey, 187 Pa. St. 381, 41 Atl. 293.

United States.— Buckingham *v.* Chicago First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; *In re* Swift, 114 Fed. 947, 118 Fed. 348, 9 Am. Bankr. Rep. 237 (holding that seats in exchanges, owned by one partner at formation of firm and thereafter continued in his name, were firm property); Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440 (a trade-mark, owned by one partner, became property of a firm, formed to manufacture and sell an article under such trade-mark).

England.— Kenny's Patent Button-Holeing Co. *v.* Somervell, 38 L. T. Rep. N. S. 878, 26 Wkly. Rep. 786.

See 38 Cent. Dig. tit. "Partnership," § 96.

15. *New York.*— Robinson *v.* Gilfillan, 15 Hun 267; Wolf *v.* Selling, 25 N. Y. Suppl. 963 (a liquor license paid for with firm funds is firm property); Wilde *v.* Jenkins, 4 Paige 481.

Pennsylvania.— Clark's Appeal, 72 Pa. St. 142.

Rhode Island.— Potter *v.* Moses, 1 R. I. 430.

United States.— Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737.

England.— *Ex p.* Connell, 3 Deac. 201, 7 L. J. Bankr. 44, 3 Mont. & A. 581; *Ex p.* Hinds, 3 De G. & Sm. 613, 14 Jur. 286, 64 Eng. Reprint 629. See also Hughes *v.* Sutherland, 7 Q. B. D. 160, 4 Aspin. 459, 46 J. P. 6, 50 L. J. Q. B. 567, 45 L. T. Rep. N. S. 287, 29 Wkly. Rep. 867. *Compare* Curtis *v.* Perry, 6 Ves. Jr. 739, 6 Rev. Rep. 28, 31 Eng. Reprint 1285.

16. Ricketts *v.* Murray, 73 Fed. 690, 19 C. C. A. 648; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419; Walton *v.* Butler, 29 Beav. 428, 54 Eng. Reprint 693; Smith *v.* Smith, 5 Ves. Jr. 189, 5 Rev. Rep. 22, 31 Eng. Reprint 539.

17. *Iowa.*— Indianola First Nat. Bank *v.* Brubaker, 128 Iowa 587, 105 N. W. 116, 2 L. R. A. N. S. 256, property conveyed by a third person to a partner's father, in exchange for firm property, does not become firm property.

Louisiana.— Thompson *v.* Mylne, 6 La. Ann. 80.

Maryland.— Rust *v.* Chisolm, 57 Md. 376, intent may be disclosed by the declarations of both partners that the property belonged to the firm.

Massachusetts.— Taber-Prang Art Co. *v.* Durant, 189 Mass. 173, 75 N. E. 221.

United States.— *In re* Swift, 114 Fed. 947, 118 Fed. 348, 9 Am. Bankr. Rep. 237 (there being no evidence of an agreement or a definite intention as to the ownership of seats in exchanges, the court must hold the property to be partnership or separate estate as best accords with the general intention of the

been purchased with firm funds, or the firm has expended labor or money in improving it, or in putting it into its present condition, especially if the property is useful to the firm in its ordinary operations and is employed therein, it is generally to be regarded as partnership property.[18]

5. Use of Property. When a partner puts into the partnership only the use of certain property, its ownership is not vested in the firm;[19] but if the firm has or exercises the right of using the property up in the ordinary course of the partnership, or of disposing of it and using its proceeds, there is ample evidence of an intent that it shall become firm property.[20]

6. Construction of Agreement or Conveyance. Whether particular property belongs to the firm, or to the partners individually, is often a question of construction of the partnership agreement, or of the instrument conveying or transferring the property.[21]

E. Partnership Real Estate — 1. In General. It is now well settled that real estate contributed by one of the partners or purchased by the firm may constitute the substratum, either in whole or in part, of a partnership.[22]

parties); Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

England.— Robinson *v.* Ashton, L. R. 20 Eq. 25, 44 L. J. Ch. 542, 33 L. T. Rep. N. S. 88, 23 Wkly. Rep. 674.

Canada.— Worthington *v.* Macdonald, 9 Can. Sup. Ct. 327 [*modifying* 7 Ont. App. 531].

18. *California.*— Collins *v.* Butler, 14 Cal. 223; Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678.

Iowa.— Fairfield *v.* Phillips, 83 Iowa 571, 49 N. W. 1025.

Maine.— Lane *v.* Tyler, 49 Me. 252, improvements on land owned by partners as tenants in common, made with partnership funds, are firm property.

Missouri.— Carlisle *v.* Mulhern, 19 Mo. 56.

New Jersey.— Partridge *v.* Wells, 30 N. J. Eq. 176 [*affirmed* in 31 N. J. Eq. 362], property fraudulently purchased by a partner with firm funds is firm property, although title is taken in such partner's wife's name.

New York.— Davies *v.* New York Concert Co., 128 N. Y. 635, 29 N. E. 147 [*affirming* 13 N. Y. Suppl. 739]; Burr *v.* De la Vergne, 102 N. Y. 415, 7 N. E. 366, where experiments in perfecting an invention are paid for out of partnership funds, the patent is firm property. *Compare* Bartlett *v.* Goodrich, 36 N. Y. Suppl. 770 [*affirming* 11 Misc. 653, 33 N. Y. Suppl. 444, and *affirmed* in 153 N. Y. 421, 47 N. E. 794].

West Virginia.— Snyder *v.* Lunsford, 9 W. Va. 223.

United States.— *In re* Minor, 11 Fed. 406; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

See 38 Cent. Dig. tit. "Partnership," §§ 97, 98.

Compare Stumph *v.* Bauer, 76 Ind. 157; Brown *v.* O'Brien, 4 Nebr. 195; Shafer's Appeal, 106 Pa. St. 49; Maybin *v.* Moorman, 21 S. C. 346; Walton *v.* Butler, 29 Beav. 428, 54 Eng. Rep. 693.

19. Stumph *v.* Bauer, 76 Ind. 157; Taber-Prang Art Co. *v.* Durant, 189 Mass. 173, 75 N. E. 221; Van Voorhis *v.* Webster, 85 Hun (N. Y.) 591, 33 N. Y. Suppl. 121; Penny *v.* Black, 9 Bosw. (N. Y.) 310; Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

20. Taber-Prang Art Co. *v.* Durand, 189 Mass. 173, 75 N. E. 221; Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067; Person *v.* Wilson, 25 Minn. 189; *In re* Miner, 11 Fed. 406; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

21. *Florida.*—Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Illinois.— Winstanley *v.* Gleyre, 146 Ill. 27, 34 N. E. 628; Scutt *v.* Robertson, 127 Ill. 135, 19 N. E. 851 [*affirming* 26 Ill. App. 80]; Taft *v.* Schwamb, 80 Ill. 289; Evans *v.* Hanson, 42 Ill. 234.

Louisiana.— Thompson *v.* Mylne, 6 La. Ann. 80.

Massachusetts.— Currier *v.* Hallowell, 158 Mass. 254, 33 N. E. 497; Livingston *v.* Blanchard, 130 Mass. 341, where persons enter into a partnership agreement whereby one of them is to contribute the whole capital, and the profits, after the payment of the expenses, interest on the capital and the annual salary of the other person, are to be divided equally between them, the capital becomes partnership property.

New Jersey.— Bowker *v.* Gleason, (Ch. 1887) 7 Atl. 885.

New York.— Robinson *v.* Gilfillan, 15 Hun 267; Greenwood *v.* Marvin, 11 N. Y. St. 235.

Pennsylvania.— Harris *v.* Rosenberg, 161 Pa. St. 367, 29 Atl. 44; Hepworth *v.* Henshall, 153 Pa. St. 592, 25 Atl. 1103; McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962.

Texas.— Beaumont Pasture Co. *v.* Sabine, etc., R. Co., (Civ. App. 1897) 41 S. W. 543.

Washington.— Murray *v.* Briggs, 29 Wash. 245, 69 Pac. 765.

Wisconsin.— Strong *v.* Hoskin, 85 Wis. 497, 55 N. W. 852.

England.— Hamilton *v.* Fawcett, 9 Ir. Ch. 397; Clark *v.* Richards, 4 L. J. Exch. 49, 1 Y. & C. Exch. 351; *Ex p.* Kemp, 10 Morr. Bankr. Cas. 76.

See 38 Cent. Dig. tit. "Partnership," § 100.

22. *Illinois.*— Rainey *v.* Nance, 54 Ill. 29.

2. Title in One Partner. Where title to real property, acquired by or for a partnership, is taken in the name of one of the partners, there is a resulting trust in favor of the partnership, which may be established by parol evidence, so that the land may be charged with the interest of the partnership.[23] But where land is purchased in the name of one partner and not used for partnership purposes,[24] or is purchased by one partner in his own name and leased to the partnership,[25] or where a lease taken by a member of a partnership is not taken by him expressly for the firm, but demises the premises to him individually,[26] the partnership has no interest in the land so purchased or leased. And it has been held that, as between a partnership and individual creditors, a deed to one only of several partners confers on him both equitable and legal title, although it may be established by his admissions that the title was taken for the partnership.[27]

3. Realty Purchased With Firm Funds. Whether real estate purchased with partnership funds was purchased as partnership or individual property depends upon the intention of the parties as manifested by all the surrounding circum-

Massachusetts.— Fall River Whaling Co. *v.* Borden, 10 Cush. 458.

Nevada.— Hogle *v.* Lowe, 12 Nev. 286; Whitmore *v.* Shiverick, 3 Nev. 288.

Pennsylvania.— Clarke's Appeal, 72 Pa. St. 142; Patterson *v.* Silliman, 28 Pa. St. 304; Roberts *v.* Dunham, 1 C. Pl. 136.

Tennessee.— Boyers *v.* Elliott, 7 Humphr. 204.

Wisconsin.— Riedeburg *v.* Schmitt, 71 Wis. 644, 38 N. W. 336.

United States.— Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

England.— Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 42 Wkly. Rep. 312; Robinson *v.* Ashton, L. R. 20 Eq. 25, 44 L. J. Ch. 542, 33 L. T. Rep. N. S. 88, 23 Wkly. Rep. 674.

Compare Fordyce *v.* Hicks, 80 Iowa 272, 45 N. W. 750.

But see Blake *v.* Nutter, 19 Me. 16; Coles *v.* Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231.

The intention of joint owners to throw their real estate into a fund as partnership stock must be distinctly manifested. Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

Necessity for written contract.— It is generally held that an agreement for the conversion of real estate, owned by partners as individuals, into firm property must be in writing, as it amounts to a transfer of an interest in land. Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803; Goldstein *v.* Nathan, 158 Ill. 641, 42 N. E. 72; Dodson *v.* Dodson, 26 Oreg. 349, 37 Pac. 542; Lefevre's Appeal, 69 Pa. St. 122; Harding *v.* Devitt, 11 Phila. (Pa.) 95; Bird *v.* Morrison, 12 Wis. 138. But see Richards *v.* Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Dale *v.* Hamilton, 5 Hare 369, 11 Jur. 163, 16 L. J. Ch. 126, 26 Eng. Ch. 369, 67 Eng. Reprint 955. Whether an oral contract of sale of a partner's interest in a firm to one who takes his place in the partnership passes to the purchaser the seller's title to firm real estate is a question upon which the authorities are divided. Black *v.* Black, 15 Ga. 445 (holding an oral contract ineffective); Marsh *v.* Davis, 33 Kan. 326, 6 Pac. 612; Collner *v.* Greig, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. Rep. 899 (both holding that the purchaser becomes the owner of the seller's share in all the firm property; and that the seller has at most but a bare legal title to a share in the realty, which a court of equity will compel him to transfer to the purchaser).

Estoppel.— The surviving partner of a firm, which had executed a mortgage on land occupied by them as tenants in common, is estopped from asserting that it is individual property. Roberts *v.* Oliver, 46 Ga. 547.

In Louisiana commercial partnerships are confined by statute to personal property. Hence if they buy immovable property they become joint owners of, not partners in, it. Guilbeau *v.* Melancon, 28 La. Ann. 627; Thomas *v.* Scott, 3 Rob. 256; Bernard *v.* Dufour, 17 La. 596; Baca *v.* Ramos, 10 La. 417, 29 Am. Dec. 463; Skillman *v.* Purnell, 3 La. 494.

23. *Illinois.*— Faulds *v.* Yates, 57 Ill. 416, 11 Am. Rep. 24.

Indiana.— Barkley *v.* Tapp, 87 Ind. 25.

Iowa.— Kringle *v.* Rhomberg, 120 Iowa 472, 94 N. W. 1115.

Kansas.— Winkfield *v.* Brinkman, 21 Kan. 682.

Kentucky.— Seiler *v.* Brenner, (1887) 3 S. W. 796, 8 Ky. L. Rep. 868.

Texas.— Eakin *v.* Shumaker, 12 Tex. 51.

See 38 Cent. Dig. tit. "Partnership," § 102.

Trust in favor of members of partnership. — Where money is advanced by one partner out of his individual funds, to be invested with other moneys belonging to the partnership in the purchase of real estate for the joint benefit of all the partners and the purchase is made by another partner, who takes the legal title in his own name, a trust is created in favor of the individual members of the firm. Owens *v.* Collins, 23 Ala. 837.

24. Cox *v.* McBurney, 2 Sandf. (N. Y.) 561.

25. Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255.

26. Otis *v.* Sill, 8 Barh. (N. Y.) 102.

27. Black *v.* Seipt, 12 Phila. (Pa.) 360.

stances and the use to be made of it.[28] Where real estate is bought with partnership funds[29] for partnership purposes[30] and is appropriated to partnership uses,[31]

28. Jenkins *v.* Jenkins, 81 Ark. 68, 98 S. W. 685; Bosworth *v.* Hopkins, 85 Wis. 50, 55 N. W. 424.

29. *Alabama.*— Mathews *v.* Sheldon, 53 Ala. 136.

Georgia.— Cottle *v.* Harrold, 72 Ga. 830.

Illinois.— King *v.* Hamilton, 16 Ill. 190.

Indiana.— Barkley *v.* Tapp, 87 Ind. 25.

Louisiana.— McKee *v.* Griffin, 23 La. Ann. 417, while immovable property in this state cannot be acquired by a commercial partnership, if it is bought by a partner with firm funds, its value at the time of the purchase belongs to the firm. See also Calder *v.* Creditors, 47 La. Ann. 346, 16 So. 852.

Maine.— Collins *v.* Decker, 70 Me. 23.

Michigan.— Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166; Merritt *v.* Dickey, 38 Mich. 41.

Nebraska.— Smith *v.* Jones, 18 Nebr. 481, 25 N. W. 624.

New Hampshire.— Jarvis *v.* Brooks, 27 N. H. 37, 59 Am. Dec. 359.

New York.— Dawson *v.* Parsons, 10 Misc. 428, 31 N. Y. Suppl. 78.

Pennsylvania.— Hayes *v.* Treat, 178 Pa. St. 310, 35 Atl. 987; Erwin's Appeal, 39 Pa. St. 535, 80 Am. Dec. 542; Lacy *v.* Hall, 37 Pa. St. 360.

Wisconsin.—Daniels *v.* McCormick, 87 Wis. 255, 58 N. W. 406; Bergeron *v.* Richardott, 55 Wis. 129, 12 N. W. 384.

England.— Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098.

See 38 Cent. Dig. tit. "Partnership," § 103.

Funds used without copartners' consent.— Where a partner withdraws the funds of the firm, and applies them to the purchase of realty, taking title in his own name and for his own benefit, without the consent of his copartners, such realty will be deemed in equity partnership property for the payment of the debts of the partnership. Hunt *v.* Benson, 2 Humphr. (Tenn.) 459.

Partnership profits invested.— Where one of two partners who have agreed to invest firm profits in real estate takes the conveyance in his own name, a trust results in favor of the other to the extent of his interest in the funds invested. McCully *v.* McCully, 78 Va. 159. See also Deming *v.* Colt, 3 Sandf. (N. Y.) 284.

30. *Alabama.*— Mathews *v.* Sheldon, 53 Ala. 136; Little *v.* Snedecor, 52 Ala. 167; Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533, 17 Ala. 145; Owens *v.* Collins, 23 Ala. 837.

Connecticut.— Tillotson *v.* Tillotson, 34 Conn. 335; Sigourney *v.* Munn, 7 Conn. 11.

Florida.— Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

Indiana.— Matlock *v.* Matlock 5 Ind. 403.

Kentucky.— Spalding *v.* Wilson, 80 Ky. 589; Cornwall *v.* Cornwall, 6 Bush 369; Farmer *v.* Samuel, 4 Litt. 187, 14 Am. Dec. 106, the fact that one partner paid more than his half of the purchase-price does not entitle him to a conveyance of a proportional part of the land.

Massachusetts.— Howard *v.* Priest, 5 Metc. 582; Dyer *v.* Clark, 5 Metc. 562, 39 Am. Dec. 697.

Michigan.— Thayer *v.* Lane, Walk. 200.

New Hampshire.— Messer *v.* Messer, 59 N. H. 375.

New Jersey.—Jones *v.* Beekman, (Ch. 1900) 47 Atl. 71.

New York.—Fairchild *v.* Fairchild, 64 N. Y. 471; Barney *v.* Pike, 94 N. Y. App. Div. 199, 87 N. Y. Suppl. 1038; Cox *v.* McBurney, 2 Sandf. 561; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305.

Oregon.— Dodson *v.* Dodson, 26 Oreg. 349, 37 Pac. 542.

South Carolina.— Winslow *v.* Chiffelle, Harp. Eq. 25.

Tennessee.— Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Ch. App. 1896) 37 S. W. 1004.

England.— Davies *v.* Games, 12 Ch. D. 813, 28 Wkly. Rep. 16; *Ex p.* Neale, 3 De G. F. & J. 645, 7 Jur. N. S. 715, 30 L. J. Bankr. 25, 4 L. T. Rep. N. S. 601, 9 Wkly. Rep. 892, 64 Eng. Ch. 505, 45 Eng. Reprint 1029; Morris *v.* Barrett, 3 Y. & J. 384. *Compare* Hay's Appeal, 91 Pa. St. 265; Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 42 Wkly. Rep. 312.

See 38 Cent. Dig. tit. "Partnership," § 101.

31. *Arkansas.*— McGuire *v.* Ramsey, 9 Ark. 518.

Delaware.— Rice *v.* Pennypacker, 5 Houst. 279.

Illinois.— Robinson Bank *v.* Miller, 153 Ill. 244, 35 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Smith *v.* Ramsey, 6 Ill. 373.

Indiana.— Indiana Pottery Co. *v.* Bates, 14 Ind. 8.

Iowa.—Pennybacker *v.* Leary, 65 Iowa 220, 21 N. W. 515.

Kansas.— Tenney *v.* Simpson, 37 Kan. 353, 15 Pac. 187; Johnson *v.* Clark, 18 Kan. 157; Scruggs *v.* Russell, McCahon 39.

Michigan.— Bennett *v.* Hough, 141 Mich. 162, 104 N. W. 414, title taken in one partner to expedite sale of partnership lands.

Minnesota.— Hardin *v.* Jamison, 60 Minn. 348, 62 N. W. 394.

Missouri.— Evans *v.* Gibson, 29 Mo. 223, 77 Am. Dec. 565.

Montana.— Quinn *v.* Quinn, 22 Mont. 403, 56 Pac. 824.

New Jersey.— Deveny *v.* Mahoney, 23 N. J. Eq. 247; Baldwin *v.* Johnson, 1 N. J. Eq. 441.

New York.—Fairchild *v.* Fairchild, 64 N. Y. 471 [*affirming* 5 Hun 407].

North Carolina.— King *v.* Weeks, 70 N. C. 372.

Oregon.— Knott *v.* Knott, 6 Oreg. 142.

Pennsylvania.— Coder *v.* Huling, 27 Pa. St. 84.

or entered and carried in the assets of the firm as partnership assets,[32] equity regards it as partnership property without regard to the name in which the legal title is taken, but the legal title is left undisturbed, except so far as may be necessary to protect the equitable rights of the respective parties.[33] Realty will also be treated as partnership property, when it is taken in payment of debts due the firm.[34] If it appears, however, that the real estate was acquired by a partner, as his individual property, and the firm funds used by him in purchasing it were charged to his individual account with the assent of his partners, such real estate will not be regarded as partnership assets.[35] Real estate which is not necessary for partnership purposes may still be firm property; and it will generally be treated as such by the courts, when it has been bought for the firm with firm funds, and its profits have been enjoyed by the firm.[36]

4. Conveyance to Members of the Firm. Where partners purchase realty as individuals they hold as tenants in common,[37] and a deed of realty to two partners individually, if unexplained, vests in them an equal undivided interest as tenants in common;[38] but when real estate is purchased by partners, with partnership funds, for partnership use, although it is conveyed by such a deed as in other cases would make them tenants in common, it will be treated in equity as held in trust for the use of the firm[39] in the absence of an express agreement, or of

Tennessee.— Boyers *v.* Elliott, 7 Humphr. 204; Johnson *v.* Rankin, (Ch. App. 1900) 59 S. W. 638.

Vermont.— Dewey *v.* Dewey, 35 Vt. 555.

Virginia.— McCully *v.* McCully, 78 Va. 159.

United States.— Shanks *v.* Klein, 104 U. S. 18, 26 L. ed. 635.

England.— Burnand *v.* Nerot, 2 Bligh N. S. 215, 4 Eng. Reprint 1112, 6 L. J. Ch. O. S. 81, 4 Russ. 247, 4 Eng. Ch. 247, 38 Eng. Reprint 798; Shaw *v.* Standish, 2 Vern. Ch. 326, 23 Eng. Reprint 811.

Canada.— Newton *v.* Doran, 3 Grant Ch. (U. C.) 353.

See 38 Cent. Dig. tit. "Partnership," § 103.

32. Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Bergeron *v.* Richardott, 55 Wis. 129, 12 N. W. 384.

33. Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533; Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305.

34. Robarts *v.* Haley, 65 Cal. 397, 4 Pac. 385; Whitney *v.* Cotten, 53 Miss. 689; Anstice *v.* Brown, 6 Paige (N. Y.) 448. See also Bright *v.* Land, etc., Imp. Co., 42 Fed. 479.

35. *Delaware.*— Harvey *v.* Pennypacker, 4 Del. Ch. 445.

Kentucky.— Louisville Trust Co. *v.* Columbia Finance, etc., Co., 59 S. W. 867, 60 S. W. 1, 22 Ky. L. Rep. 1385.

Massachusetts.— Goodwin *v.* Richardson, 11 Mass. 469; Pitts *v.* Waugh, 4 Mass. 424.

Missouri.— American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771.

Pennsylvania.— Hayes *v.* Treat, 178 Pa. St. 310, 35 Atl. 987. See also Coder *v.* Huling, 27 Pa. St. 84.

See 38 Cent. Dig. tit. "Partnership," § 103.

Where a firm is indebted to one of the partners who bought real estate, and paid for it with money withdrawn from the partnership on account of the debt to him, and there was no objection at the time, the other partners cannot claim an interest in the real estate so purchased. Higgins *v.* Higgins, 216 Pa. St. 397, 65 Atl. 804.

36. Southwestern Georgia Bank *v.* McGarrah, 120 Ga. 944, 48 S. E. 393; Spalding *v.* Wilson, 80 Ky. 589; Foster *v.* Sargent, 72 N. H. 170, 55 Atl. 423; Erwin's Appeal, 39 Pa. St. 535, 80 Am. Dec. 542.

37. Johnson *v.* Rankin, (Tenn. Ch. App. 1900) 59 S. W. 638.

38. *Alabama.*— Caldwell *v.* Parmer, 56 Ala. 405.

California.— La Societe Francaise, etc. *v.* Weidmann, 97 Cal. 507, 32 Pac. 583; Hardenbergh *v.* Bacon, 33 Cal. 356.

Illinois.— Alkire *v.* Kahle, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540.

Missouri.— Allen *v.* Logan, 96 Mo. 591, 10 S. W. 149.

Montana.— Rockefeller *v.* Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. Rep. 613.

Pennsylvania.— Schaeffer *v.* Fowler, 111 Pa. St. 451, 2 Atl. 558; Holt's Appeal, 98 Pa. St. 257; Eshleman *v.* Eshleman, 10 Lanc. Bar 77; Connelly *v.* Withers, 9 Lanc. Bar 117; Black *v.* Seipt, 12 Phila. 360.

Virginia.— Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654; Forde *v.* Herron, 4 Munf. 316.

See 38 Cent. Dig. tit. "Partnership," § 104.

39. *Alabama.*— Hatchett *v.* Blanton, 72 Ala. 423.

California.— Chapman *v.* Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109 (where partners contributed to the partnership, lands standing in their individual names, but agreed that the legal title should remain as before, such lands were firm property); McCauley *v.* Fulton, 44 Cal. 355.

Florida.— Robertson *v.* Baker, 11 Fla. 192.

Georgia.— Hartnett *v.* Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. Rep. 151; Jackson *v.* Stanford, 19 Ga. 14.

Illinois.— Pepper *v.* Pepper, 24 Ill. App. 316, after firm debts are paid, the land be-

circumstances showing an intent that such real estate should be held for the separate use of the partners.[40] The fact that two persons bought land together, and that they afterward planted it in partnership, does not render the land partnership property. They are joint owners.[41]

5. Conveyance to Firm by Name. A deed to a partnership in its firm-name is not void,[42] for while a partnership as such cannot be the grantee at law in a deed, or hold real estate because it is not a person either in fact or in law, and while therefore a conveyance of real estate to a partnership in its firm-name fails to

longs to the partners as tenants in common, with all the incidents of such tenancy.

Indiana.— Morgan *v.* Olvey, 53 Ind. 6.

Iowa.— Paige *v.* Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799.

Kentucky.— Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122; Galbraith *v.* Gedge, 16 B. Mon. 631.

Louisiana.— May *v.* New Orleans, etc., R. Co., 44 La. Ann. 444, 10 So. 769.

Maine.— Buffum *v.* Buffum, 49 Me. 108, 77 Am. Dec. 249. *Compare* Blake *v.* Nutter, 19 Me. 16.

Massachusetts.— Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Dyer *v.* Clark, 5 Metc. 562, 39 Am. Dec. 697; Burnside *v.* Merrick, 4 Metc. 537; Goodwin *v.* Richardson, 11 Mass. 469. *Compare* Ensign *v.* Briggs, 6 Gray 329.

Missouri.— Matthews *v.* Hunter, 67 Mo. 293; Willet *v.* Brown, 65 Mo. 138, 27 Am. Rep. 265.

Montana.— Quinn *v.* Quinn, 22 Mont. 403, 56 Pac. 824.

New Hampshire.— Cilley *v.* Huse, 40 N. H. 358.

New Jersey.— Harney *v.* Jersey City First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Matlack *v.* James, 13 N. J. Eq. 126.

New York.— Smith *v.* Tarlton, 2 Barb. Ch. 336. See also Struthers *v.* Pearce, 51 N. Y. 357; Smith *v.* Danvers, 5 Sandf. 669. *Compare* Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Coles *v.* Coles, 15 Johns. 159, 8 Am. Dec. 231; Smith *v.* Jackson, 2 Edw. 28.

North Carolina.— Ross *v.* Henderson, 77 N. C. 170.

Ohio.— Page *v.* Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Miller *v.* Proctor, 20 Ohio St. 442.

Rhode Island.— Lime Rock Bank *v.* Phetteplace, 8 R. I. 56; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

South Carolina.—Boyse *v.* Coster, 4 Strobh. Eq. 25; Winslow *v.* Chiffelle, Harp. Eq. 25.

Vermont.— Willis *v.* Freeman, 35 Vt. 44, 82 Am. Dec. 619.

Virginia.— Forde *v.* Herron, 4 Munf. 316.

United States.— Thompson *v.* Bowman, 6 Wall. 316, 18 L. ed. 736; Ames *v.* Ames, 37 Fed. 30.

England.— *Ex p.* Neale, 3 De G. F. & J. 645, 7 Jur. N. S. 715, 30 L. J. Bankr. 25, 4 L. T. Rep. N. S. 601, 9 Wkly. Rep. 892, 64 Eng. Ch. 505, 45 Eng. Reprint 1029.

See 38 Cent. Dig. tit. "Partnership," § 104.

In **Pennsylvania** the general rule is "that in order to affect the title or possession of land it is not competent to show by parol that a deed to two persons as tenants in common was purchased and paid for by them as partners and was partnership property. Purchasers and creditors alike may rely upon the title to real estate as shown by the record, and having done so the law will not permit their rights acquired on the faith of the title as thus disclosed to be defeated by parol evidence. When parties take title to land as tenants in common and place it upon record, the act, so far as it may affect purchasers and creditors without notice, must be considered as a declaration by the owners of the character in which they intend to hold the property." Cundey *v.* Hall, 208 Pa. St. 335, 339, 57 Atl. 761, 101 Am. St. Rep. 938; Titusville Second Nat. Bank's Appeal, 83 Pa. St. 203; Jones' Appeal, 70 Pa. St. 179; Ebbert's Appeal, 70 Pa. St. 79; Grubb's Appeal, 66 Pa. St. 117; Hale *v.* Henrie, 2 Watts 143, 27 Am. Dec. 289; Connelly *v.* Withers, 9 Lanc. Bar 117. As between partners themselves, however, real estate purchased with partnership funds for partnership purposes is partnership property and may be shown to be such, notwithstanding the deed was made to the individuals composing the firm as tenants in common. Cundey *v.* Hall, *supra*; Abbott's Appeal, 50 Pa. St. 234. See also Collner *v.* Greig, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. Rep. 899; Warriner *v.* Mitchell, 128 Pa. St. 153, 18 Atl. 337; Lefevre's Appeal, 69 Pa. St. 122.

Not purchased for partnership purposes.— Where land is purchased by partners with partnership funds, but not for the use and convenience of partnership business or in the legitimate line of their business, they become invested with the title as tenants in common. Price *v.* Hicks, 14 Fla. 565.

Conveyed as realty.— Land so purchased, although regarded in equity as a part of the assets of the concern and as such subject to some of the incidents of personalty is nevertheless realty, and can only be conveyed as such. Miller *v.* Proctor, 20 Ohio St. 442.

40. Robertson *v.* Baker, 11 Fla. 192.

41. Pecot *v.* Armelin, 21 La. Ann. 667.

42. Walker *v.* Miller, 139 N. C. 448, 52 S. C. 125, 111 Am. St. Rep. 805, 1 L. R. A. N. S. 157; Murray *v.* Blackledge, 71 N. C. 492; Kelley *v.* Bourne, 15 Oreg. 476, 16 Pac. 40; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252; Wray *v.* Wray, [1905] 2 Ch. 349, 79 L. J. Ch. 687, 93 L. T. Rep. N. S. 304, 54 Wkly. Rep. 136; Maugham *v.* Sharpe, 17 C. P. N. S. 443, 10 Jur. N. S. 989, 34 L. J. C. P. 19, 10 L. T. Rep. N. S. 870, 12 Wkly. Rep. 1057, 112 E. C. L. 443.

carry the legal title to the land, such a conveyance does vest an equitable estate in the firm.[43] When the firm style contains the surnames of all the partners, a conveyance to the partnership in such style is generally held to pass the legal title to the individuals for the firm.[44] If, however, the firm style contains the surname of one, or more, but not of all the partners, it has been held that a conveyance to the partnership in such style vests the legal title in the partner or partners, whose names appear, but in trust for the firm; and such named partners can convey a valid title to the property.[45]

6. INTENT OF THE PARTNERS. In determining whether particular real estate is firm property, or belongs to the partners as individuals, the courts seek to give effect to the intent of the partners, unless such a result would work a fraud upon third persons. That intent may be disclosed either by their conduct,[46] or by their agreements either express or implied.[47] As a rule courts are not inclined

43. *Arkansas.*— Percifull *v.* Platt, 36 Ark. 456, 464.

California.— Woodward *v.* McAdam, 101 Cal. 438, 35 Pac. 1016.

Minnesota.— Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

Missouri.— Riffel *v.* Ozark Land, etc., Co., 81 Mo. App. 177.

Nebraska.— Barber *v.* Crowell, 55 Nebr. 371, 75 N. W. 1109, holding that a partnership may acquire in its firm-name a lien on real estate to secure an indebtedness.

Ohio.— New Vienna Bank *v.* Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614.

Texas.— Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

United States.— Riddle *v.* Whitehill, 135 U. S. 621, 10 S. Ct. 924, 34 L. ed. 283.

See 38 Cent. Dig. tit. "Partnership," § 105.

Compare Davis *v.* Davis, 60 Miss. 615; Sherry *v.* Gilmore, 58 Wis. 324, 332, 17 N. W. 252, "A firm name is always held sufficient to designate the true name of all the persons composing the firm, and is always used in the transaction of the business of the firm. There does not seem to be any reason for holding that a partnership, in making a purchase of real estate for the benefit of the firm, may not do so in the same manner that they make their other purchases, viz., in their firm name."

44. *Alabama.*— Blanchard *v.* Floyd, 93 Ala. 53, 9 So. 418; Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760.

Arkansas.— Cole *v.* Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945, deed to Metee & Kanner.

California.— McCauley *v.* Fulton, 44 Cal. 355.

Maine.— Beaman *v.* Whitney, 20 Me. 413.

Pennsylvania.— Shields *v.* Shields, 1 Chest. Co. Rep. 430.

South Carolina.—Hunter *v.* Martin, 2 Rich. 541.

Virginia.— Jones *v.* Neale, 2 Patt. & H. 339.

United States.— Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

See 38 Cent. Dig. tit. "Partnership," § 105.

45. *Arkansas.*— Gossett *v.* Kent, 19 Ark. 602.

California.— Woodward *v.* McAdam, 101 Cal. 438, 35 Pac. 1016; Ketchum *v.* Barber, (1886) 12 Pac. 251; Winter *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57.

Georgia.— Taylor *v.* McLaughlin, 120 Ga. 703, 707, 48 S. E. 203; McRae *v.* Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513.

Minnesota.—Dwyer Pine Land Co. *v.* Whiteman, 92 Minn. 55, 99 N. W. 362; Gille *v.* Hunt, 35 Minn. 357, 29 N. W. 2.

Mississippi.— See Schumpert *v.* Dillard, 55 Miss. 348.

Missouri.— Arthur *v.* Weston, 22 Mo. 378; Riffel *v.* Ozark Land, etc., Co., 81 Mo. App. 177.

Tennessee.— Holmes *v.* Jarrett, 7 Heisk. 506, 507 ("If then it had appeared in proof in the present case, that the deed on which plaintiffs relied conveyed the title to Jarrett, Moon & Co., and if it also appeared that Jarrett, Moon & Co. was a partnership, composed of Jarrett and Moon, and others not named or proven, it would follow that the legal title vested in Jarrett and Moon as trustees for the partnership, unless the fact that the given names of Jarrett and Moon were not proven rendered the deed void for uncertainty. We know of no authority for holding that a deed is void if the given name of the grantee is omitted. An ambiguity of that kind may be explained by parol proof, and the parties intended to be designated as grantees thus made certain"); Moreau *v.* Saffarans, 3 Sneed 595, 67 Am. Dec. 582.

United States.— Riddle *v.* Whitehill, 135 U. S. 621, 10 S. Ct. 924, 34 L. ed. 283 (deed to J. M. Whitehill & Co.); Dunlap *v.* Green, 60 Fed. 242, 8 C. C. A. 600. *Compare* Hoffman *v.* Porter, 12 Fed. Cas. No. 6,577, 2 Brock. 156.

See 38 Cent. Dig. tit. "Partnership," § 105.

46. Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54; Tarbel *v.* Bradley, 7 Abb. N. Cas. (N. Y.) 273 [*affirmed* in 86 N. Y. 280]; Clark's Appeal, 72 Pa. St. 142; Providence *v.* Bullock, 14 R. I. 353; *Ex p.* Murton, 4 Jur. 894, 1 Mont. D. & De G. 252.

47. *Connecticut.*— Sigourney *v.* Munn, 7 Conn. 11.

Illinois.— Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Taft *v.* Schwamb, 80 Ill. 289.

Kentucky.— Holmes *v.* Self, 79 Ky. 297 (the use to which land bought by a copartnership is put does not determine the ques-

to imply a partnership where the subject-matter is real estate alone,[48] nor to treat real estate as part of the partnership stock, unless it is clear from the agreement of the parties that they intend it shall be so treated.[49]

7. Effect of Use or Occupation. The mere fact that a partnership business is carried on upon premises owned by the partners does not disclose an intent to make it firm property.[50] If, however, the land becomes involved in the partnership dealings,[51] and especially if it is paid for with firm moneys, assessed for taxa-

tion of whether it shall be treated as real or personal estate. The test is the intention with which the purchase was made); Archer *v.* Barry, 62 S. W. 485, 28 Ky. L. Rep. 12.

Michigan.— Killefer *v.* McLain, 70 Mich. 508, 38 N. W. 455.

Minnesota.—Arnold *v.* Wainwright, 6 Minn. 358, 80 Am. Dec. 448, whether land is to be deemed part of the firm stock depends on the agreement, express or implied, of the partners.

Mississippi.— Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739; Berry *v.* Folkes, 60 Miss. 576; Alexander *v.* Kimbro, 49 Miss. 529.

Missouri.— Thompson *v.* Holden, 117 Mo. 118, 22 S. W. 905.

New York.— Cox *v.* McBurney, 2 Sandf. 561; Bernheimer *v.* Schmid, 36 Misc. 456, 73 N. Y. Suppl. 767 [*affirmed* in 71 N. Y. App. Div. 244, 611, 75 N. Y. Suppl. 899, 1121].

Ohio.— Sumner *v.* Hampson, 8 Ohio 328, 32 Am. Dec. 722.

Pennsylvania.— Patterson *v.* Silliman, 28 Pa. St. 304; Lancaster Bank *v.* Myley, 13 Pa. St. 544.

Texas.— Spencer *v.* Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870 [*reversing* (Civ. App. 1898) 47 S. W. 29, 665]; Murrell *v.* Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

Washington.— Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014.

Wisconsin.— Fowler *v.* Bailley, 14 Wis. 125.

United States.— McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530 [*reversing* 46 Fed. 713].

England.— *In re* Wilson, [1893] 2 Ch. 340, 62 L. J. Ch. 781, 68 L. T. Rep. N. S. 785, 3 Reports 525, 41 Wkly. Rep. 684; Robinson *v.* Ashton, L. R. 20 Eq. 25, 44 L. J. Ch. 542, 33 L. T. Rep. N. S. 88, 23 Wkly. Rep. 674; Baxter *v.* Brown, 7 M. & G. 198, 8 Scott N. R. 1019, 49 E. C. L. 198.

See 38 Cent. Dig. tit. "Partnership," §§ 105½, 106.

48. Farrand *v.* Gleason, 56 Vt. 633; Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157.

49. *Illinois.*— Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449.

Iowa.— Munson *v.* Sears, 12 Iowa 172.

Maine.— Jordan *v.* Soule, 79 Me. 590, 12 Atl. 786.

Massachusetts.— Harris *v.* Harris, 153 Mass. 439, 26 N. E. 1117.

Missouri.— Thompson *v.* Holden, 117 Mo. 118, 22 S. W. 905.

New Jersey.— Harris *v.* Des Raismes, (Ch. 1897) 38 Atl. 637.

New York.— Smith *v.* Jackson, 2 Edw. 28.

Pennsylvania.— Calkitt *v.* Thomas, 1 Phila. 463, a provision that neither of the parties shall use the premises nor make disposition thereof otherwise than as the property of the partnership clearly discloses their intention that the land shall be a part of the firm stock.

Virginia.— Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

United States.—McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530 [*reversing* 46 Fed. 713].

England.— *In re* Wilson, [1893] 2 Ch. 340, 62 L. J. Ch. 781, 68 L. T. Rep. N. S. 785, 3 Reports 525, 41 Wkly. Rep. 684; Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 42 Wkly. Rep. 312.

See 38 Cent. Dig. tit. "Partnership," § 106.

50. *Alabama.*— Humes *v.* Higman, 145 Ala. 215, 40 So. 128; Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672.

Connecticut.— Frink *v.* Branch, 16 Conn. 260.

Illinois.— Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449.

Louisiana.— Theriot *v.* Michel, 28 La. Ann. 107.

Michigan.—Gordon *v.* Gordon, 49 Mich. 501, 13 N. W. 834; Reynolds *v.* Ruckman, 35 Mich. 80.

New York.— Dexter *v.* Dexter, 43 N. Y. App. Div. 268, 60 N. Y. Suppl. 371.

England.— Davis *v.* Davis, [1894] 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. Rep. N. S. 265, 8 Reports 133, 42 Wkly. Rep. 312.

See 38 Cent. Dig. tit. "Partnership," § 106½.

Presumption when title in one partner.— Where a firm occupies land, the record title to which is in one of the partners, the presumption is that the firm's occupation is subordinate to such partner's title, and a mortgage given by such partner upon real and personal property occupied by the firm and which the firm accepts the benefit of without questioning the right of the partner and record owner to execute it, may be enforced against the property of the firm embraced therein. Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753.

51. King *v.* Wilcomb, 7 Barb. (N. Y.) 263 (holding that the nursery stock on the land of one partner was firm property); Waterer *v.* Waterer, L. R. 15 Eq. 402, 21 Wkly. Rep. 508 (holding that where the partners used their premises as nursery gardeners, the land became, necessarily from the nature of the business, a part of the firm stock).

tion in the firm's name, as well as used for firm purposes, the intention of the parties to make it firm property becomes clear.[52] On the other hand, if the land is used by the partners for their individual benefit and enjoyment, such use will indicate their intention not to make it firm property, although there may be apparent confusion of their interests.[53]

8. FIRM REAL ESTATE AS PERSONALTY — a. English and Canadian Rule. In England the rule as laid down in a number of cases[54] that partnership realty is to be considered as converted into personalty for all purposes has been enacted into a statute,[55] and the doctrine of the English cases has been approved in Canada.[56]

b. American Rule — (I) *IN GENERAL.* The rule prevailing in this country is that partnership real estate, unless it is otherwise expressly or impliedly agreed, retains its character as realty between the partners themselves and also between a surviving partner and the personal representatives of a deceased partner, except to the extent that it may be required to pay partnership obligations or to pay any balance due from one partner to another; but that, to the extent that partnership real estate is required for these purposes, the share of each partner is embraced in a trust implied by law, which equity in enforcing treats as converted into personalty.[57]

52. *California.*— Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16.

Maryland.— National Union Bank *v.* National Mechanics' Bank, 80 Md. 371, 30 Atl. 913, 45 Am. St. Rep. 350, 27 L. R. A. 476.

Michigan.— Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166; Merritt *v.* Dickey, 38 Mich. 41.

North Carolina.—Hanff *v.* Howard, 56 N. C. 440.

Texas.— Murrell *v.* Mandelhaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

United States.— Wiegand *v.* Copeland, 14 Fed. 118, 7 Sawy. 442.

See 38 Cent. Dig. tit. "Partnership," §§ 106½, 107.

53. National Union Bank *v.* National Mechanics' Bank, 80 Md. 371, 30 Atl. 913, 45 Am. St. Rep. 350, 27 L. R. A. 476; Fall River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458; Frey *v.* Eisenhardt, 116 Mich. 160, 74 N. W. 501.

54. Waterer *v.* Waterer, L. R. 15 Eq. 402, 21 Wkly. Rep. 508; Essex *v.* Essex, 20 Beav. 442, 52 Eng. Reprint 674; Thornton *v.* Dixon, 3 Bro. Ch. 199, 29 Eng. Reprint 488; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 271, 4 Wkly. Rep. 413, 61 Eng. Reprint 992; Holroyd *v.* Holroyd, 28 L. J. Ch. 902, 7 Wkly. Rep. 426; Phillips *v.* Phillips, 1 L. J. Ch. 214, 1 Myl. & K. 649, 7 Eng. Ch. 649, 39 Eng. Reprint 826; Bligh *v.* Brent, 6 L. J. Exch. 58, 2 Y. & C. Exch. 268; Kirkpatrick *v.* Sime, 5 Paton App. Cas. 525; Jackson *v.* Jackson, 9 Ves. Jr. 593, 32 Eng. Reprint 732; *In re* Cooper, 26 Wkly. Rep. 785; Morris *v.* Kearsley, 2 Y. & C. Exch. 139. But *compare* Cookson *v.* Cookson, 1 Jur. 621, 6 L. J. Ch. 337, 8 Sim. 529, 8 Eng. Ch. 529, 59 Eng. Reprint 210; Randall *v.* Randall, 4 L. J. Ch. 187, 7 Sim. 271, 8 Eng. Ch. 271, 58 Eng. Reprint 841; Bell *v.* Phyn, 7 Ves. Jr. 453, 6 Rev. Rep. 148, 32 Eng. Reprint 183.

55. Brit. Partn. Act (1890), § 22.

56. *Re* Fulton, 7 Ont. L. Rep. 445.

57. *Alabama.*— Brewer *v.* Browne, 68 Ala. 210 (land bought with partnership funds for partnership purposes will in equity be treated as personalty until the purposes of the partnership have been accomplished, then, as realty, with the attributes of a tenancy in common); Causler *v.* Wharton, 62 Ala. 358; Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533.

Arkansas.— Percifull *v.* Platt, 36 Ark. 456.

Illinois.— Morrill *v.* Colehour, 82 Ill. 618 (a partner can make a valid oral release of his interest in land, bought by a firm to sell at a profit, because equity regards it as personal property); Mauck *v.* Mauck, 54 Ill. 281; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311.

Indiana.— Dickey *v.* Shirk, 128 Ind. 278, 27 N. E. 733.

Iowa.— Hewitt *v.* Rankin, 41 Iowa 35, realty held by a partnership is, with respect to creditors, to be regarded as the firm property; and a member of the firm is to be considered as holding only an interest in the stock or capital which is personal property.

Kentucky.— Flanagan *v.* Shuck, 82 Ky. 617. *Compare* Cornwall *v.* Cornwall, 6 Bush 369; Galbraith *v.* Gedge, 16 B. Mon. 631.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107; Howard *v.* Priest, 5 Metc. 582; Dyer *v.* Clark, 5 Metc. 562, 39 Am. Dec. 697.

Michigan.— Comstock *v.* McDonald, 126 Mich. 142, 85 N. W. 579, after the debts of a partnership have been paid, the land belonging to the partnership is considered realty, and not personalty, for purposes of distribution or dissolution, so that the heirs of a deceased partner are entitled to partition.

Minnesota.— Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 59 N. W. 1010, 49 Am. St. Rep. 503, 27 L. R. A. 340; Arnold *v.* Wainwright, 6 Minn. 358, 80 Am. Dec. 448.

Mississippi.— Whitney *v.* Cotten, 53 Miss. 689; Scruggs *v.* Blair, 44 Miss. 406.

Missouri.— Priest *v.* Chouteau, 85 Mo. 398, 55 Am. Rep. 373.

New Jersey.— Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Campbell *v.* Campbell, 30 N. J. Eq. 415; Hill *v.* Beach, 12 N. J. Eq. 31; Smith *v.* Wood, 1 N. J. Eq. 74.

(II) *Out and Out Conversion by Agreement.* Even in this country the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the parties themselves; and where by such agreement it appears that it was the intention of the partners that land should be treated and administered as personalty for all purposes, effect will be given thereto.[58]

F. Evidence as to Ownership of Property — 1. Presumptions and Burden of Proof. If land is deeded to one member of a partnership, or to the several members, without any statement in the deed that such grantee or grantees hold the land as the property of the firm, the law presumes that the ownership is in the individual grantee or grantees.[59] Nor is this presumption rebutted by evidence that the land is used by the firm.[60] It is rebutted, however, by evidence that it was bought with firm moneys, and treated in the firm accounts as firm property,[61]

New York.— Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299 [*affirming* 6 N. Y. App. Div. 28, 39 N. Y. Suppl. 527]; Collumb *v.* Read, 24 N. Y. 505; Buckley *v.* Doig, 115 N. Y. App. Div. 413, 100 N. Y. Suppl. 869 [*affirmed* in 188 N. Y. 238, 80 N. E. 913]; Hauptmann *v.* Hauptmann, 91 N. Y. App. Div. 197, 86 N. Y. Suppl. 427; Bernheimer *v.* Schmid, 73 N. Y. App. Div. 434, 77 N. Y. Suppl. 138 [*affirming* 71 N. Y. App. Div. 244, 75 N. Y. Suppl. 899]; Buckley *v.* Buckley, 11 Barb. 43; Rank *v.* Grote, 50 N. Y. Super. Ct. 275; Greenwood *v.* Marvin, 11 N. Y. St. 235; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273 [*affirmed* in 86 N. Y. 280]; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305.

Ohio.— Rammelsberg *v.* Mitchell, 29 Ohio St. 22; Ludlow *v.* Cooper, 4 Ohio St. 1.

Pennsylvania.— Moore *v.* Wood, 171 Pa. St. 365, 33 Atl. 63; Brown *v.* Beecher, 120 Pa. St. 590, 15 Atl. 608, (1888) 12 Atl. 68; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Meily *v.* Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Moderwell *v.* Mullison, 21 Pa. St. 257; *In re* Welles, 4 Lack. Leg. N. 135.

South Carolina.— Boyce *v.* Coster, 4 Strobh. Eq. 25.

Virginia.— Digg *v.* Brown, 78 Va. 292; Davis *v.* Christian, 15 Gratt. 11 *quære.* But see Pierce *v.* Trigg, 10 Leigh 406.

United States.— Shanks *v.* Klein, 104 U. S. 18, 26 L. ed. 635 [*affirming* 14 Fed. Cas. No. 7,870, 15 Alb. L. J. (N. Y.) 16]; *In re* Codding, 9 Fed. 849; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11; Marrett *v.* Murphy, 16 Fed. Cas. No. 9,103, 11 Nat. Bankr. Reg. 131. In Hiscock *v.* Jaycox, 12 Fed. Cas. No. 6,531, 12 Nat. Bankr. Reg. 507, where a party alleges that real estate impressed with the character of personalty has lost that character, the onus is on him to show, not only that the partnership creditors have been paid, but that, as between themselves, the accounts of the partners have been adjusted.

See 38 Cent. Dig. tit. "Partnership," § 108.

Power to dispose of firm realty.— Where land is partnership stock, it never becomes personalty, even during the continuance of the firm, so as to give one partner power to dispose of the firm interest in it. Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

Except as to conveyance under the statute of frauds, where real estate is made partnership property, the effect for all partnership purposes is to change it into personalty. Foster *v.* Barnes, 81 Pa. St. 377.

58. *Alabama.*— Davis *v.* Smith, 82 Ala. 198, 2 So. 897.

Illinois.— Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311.

New Jersey.— Maddock *v.* Astbury, 32 N. J. Eq. 181.

New York.— Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299; Barney *v.* Pike, 94 N. Y. App. Div. 199, 87 N. Y. Suppl. 1038.

Ohio.— Ludlow *v.* Cooper, 4 Ohio St. 1.

Pennsylvania.— Leaf's Appeal, 105 Pa. St. 505.

Virginia.— Davis *v.* Christian, 15 Gratt. 11; Pierce *v.* Trigg, 10 Leigh 406.

United States.— Hiscock *v.* Jaycox, 12 Fed. Cas. No. 6,531, 12 Nat. Bankr. Reg. 507.

See 38 Cent. Dig. tit. "Partnership," § 108.

59. Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271; Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753; Hayes *v.* Treat, 178 Pa. St. 310, 35 Atl. 987; Bosworth *v.* Hopkins, 85 Wis. 50, 55 N. W. 424.

60. Chamberlin *v.* Chamberlin, 44 N. Y. Super. Ct. 116; Goepper *v.* Kinsinger, 39 Ohio St. 429; Steward *v.* Blakeway, L. R. 4 Ch. 603 [*affirming* L. R. 6 Eq. 479]; Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098.

61. *Michigan.*— Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271 (while the fact that funds of the copartnership have been used in paying for the lands, when originally purchased or subsequently, is not conclusive of this intent, yet it is persuasive evidence; and when, as in this case, it is accompanied by the entry of the transaction on the firm books as a copartnership transaction, under circumstances which import a daily declaration that it was so regarded, is convincing); Williams *v.* Shelden, 61 Mich. 311, 28 N. W. 115; Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167; Merritt *v.* Dickey, 38 Mich. 41.

although undoubtedly the burden of proof is upon him who alleges that the ownership does not accord with the legal title.[62]

2. ADMISSIBILITY. Parol evidence is admissible to show that land, which has been deeded to one or more of the partners, as individuals, is partnership property, when the question of ownership arises between the partners, or their heirs and personal representatives,[63] and such evidence is generally held to be admissible in controversies between the creditors of the title holding partners and other persons.[64]

3. WEIGHT AND SUFFICIENCY. The weight and sufficiency of evidence offered to show that particular property is owned by the firm or by a partner or partners as individuals is to be determined by the general rules on the subject.[65]

G. Conversion of Firm Into Individual Property — 1. POWER TO CONVERT — a. In General. There can be no doubt that members of a partnership have the power to convert the joint property of the firm into separate property of one or more of the individual partners; and that such conversion, unless fraudulent, will bind not only themselves but all other persons, whether creditors or purchasers.[66] But this power does not belong to any one member nor to any number

Minnesota.— Hardin *v.* Jamison, 60 Minn. 348, 62 N. W. 394.

New York.—Fairchild *v.* Fairchild, 64 N. Y. 471.

Pennsylvania.— Hayes *v.* Treat, 178 Pa. St. 310, 35 Atl. 987; Collner *v.* Greig, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. Rep. 899; Warriner *v.* Mitchell, 128 Pa. St. 153, 18 Atl. 337.

United States.— Hammond *v.* Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. ed. 134.

England.—*Ex p.* Neale, 3 De G. F. & J. 645, 7 Jur. N. S. 715, 30 L. J. Bankr. 25, 4 L. T. Rep. N. S. 601, 9 Wkly. Rep. 892, 64 Eng. Ch. 505, 45 Eng. Reprint 1029.

See 38 Cent. Dig. tit. "Partnership," § 109.

62. Lindsay *v.* Race, 103 Mich. 28, 36, 61 N. W. 271 ("While, in view of the subsequent entries in the books, it is not altogether clear that the parties did not intend this as a firm transaction, yet, as the burden of proof rests upon the complainant to remove the strong presumption which arises from the form of the written instruments,— if, indeed, they are not sufficiently specific to be conclusive,— we hold that these lands should not be treated as copartnership property"); Hayes *v.* Treat, 178 Pa. St. 310, 323, 35 Atl. 987 ("The importance to be given to the fact that the property had been bought for some partnership purpose is illustrated by Coder *v.* Huling, 27 Pa. 84, where it was held that if the property had not been purchased for the use of the firm the payment of the purchase money, standing alone, would not rebut the presumption arising from a deed made to the individual partners").

63. Hayes *v.* Treat, 178 Pa. St. 310, 35 Atl. 987.

64. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Fairchild *v.* Fairchild, 64 N. Y. 471; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465; Bird *v.* Morrison, 12 Wis. 138. *Compare* Otis *v.* Sill, 8 Barb. (N. Y.) 102.

In Pennsylvania it has been held that, as against such creditors, an intention to bring real estate into partnership must be manifested by deed or writing placed on record; that parol evidence is inadmissible to show that real estate conveyed to two persons as tenants in common was purchased and paid for by them as partners and was partnership property. Holt's Appeal, 98 Pa. St. 257; Titusville Second Nat. Bank's Appeal, 83 Pa. St. 203; Ebbert's Appeal, 70 Pa. St. 79; Lefevre's Appeal, 69 Pa. St. 122; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; Hale *v.* Henrie, 2 Watts 143, 27 Am. Dec. 289.

65. See, generally, EVIDENCE. And see Rovelsky *v.* Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. Rep. 83; Booher *v.* Perrill, 140 Ind. 529, 40 N. E. 36; Lucas *v.* Cooper, 23 S. W. 959, 15 Ky. L. Rep. 642; Hake *v.* Coach, 107 Mich. 197, 65 N. W. 209; Russell *v.* Miller, 26 Mich. 1; Wolf *v.* Kahn, 62 Miss. 814.

Joint purchase, ownership, and use.— If the evidence discloses only the fact that two or more persons have jointly purchased, owned, and used the property in question, firm ownership is not established. Lushton State Bank *v.* O. S. Kelly Co., 47 Nebr. 678, 66 N. W. 619; Harris *v.* De Raismes, (N. J. Ch. 1897) 38 Atl. 637.

Purchase by a firm for firm purposes.— Undisputed evidence that the property in question was purchased by a firm for firm purposes establishes that it is firm property. Heald *v.* Macgowan, 14 N. Y. Suppl. 280.

When the evidence is conflicting, or the inference to be drawn from it as to ownership is uncertain, a verdict of the jury either for or against firm ownership will be sustained, on appeal. Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271; Williams *v.* Sheldon, 61 Mich. 311, 28 N. W. 115.

66. *Florida.*— West *v.* Chasten, 12 Fla. 315.

Georgia.— Upson *v.* Arnold, 19 Ga. 190, 63 Am. Dec. 302.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Kentucky.— Jones *v.* Lusk, 2 Metc. 356, the right of the partners unitedly to dispose of the firm property is the same in all respects as the right which an individual has to control and dispose of his property.

Massachusetts.— Richards *v.* Manson, 101 Mass. 482.

of members less than all, unless it has been delegated by all. Hence a partner does not work a conversion of firm into individual property by transferring his interest to an outsider,[67] or even to one of several copartners,[68] nor is such a conversion wrought by the several transfers of each partner's interest; it requires a joint act of all the partners.[69] It follows that an individual partner has no right to demand a portion of firm property.[70]

b. When the Firm Is Insolvent. The voluntary conversion of the firm estate into the separate estate of a partner when the firm is insolvent is generally held invalid, as a transfer intended to hinder, delay, and defraud firm creditors.[71] Moreover such a transfer is deemed voluntary, when the only consideration therefor is the insolvent transferee's promise to pay the firm debts.[72] Some courts, however, decline to treat a voluntary conversion as invalid against firm creditors, on the ground that such creditors have no claim, until judgment and execution, upon firm assets, except a derivative one through the partners; and if the partners surrender their lien or right to have firm assets first applied to firm debts, such surrender destroys the very foundation of the creditors' claim, and leaves them remediless. The only exception to the rule, according to these courts, is when the transfer is actually fraudulent.[73]

2. What Amounts to a Conversion. No writing is necessary, nor is any particular form of contract required, in order to effect a conversion of the firm into

Montana.— Meadowcraft *v.* Walsh, 15 Mont. 544, 39 Pac. 914; Lindley *v.* Davis, 7 Mont. 206, 14 Pac. 717.

New York.— Crosby *v.* Nichols, 3 Bosw. 450.

Oregon.— McKinney *v.* Baker, 9 Oreg. 74, when, upon the dissolution of a firm, it is agreed that one partner shall take title to the assets and pay the debts, "this is a sale by the firm, upon a sufficient consideration, and . . . all the title which the firm had in the property passes to the individual partner and becomes his individual property."

Rhode Island.— Beckwith *v.* Manton, 12 R. I. 442.

Tennessee.— Hickerson *v.* McFaddin, 1 Swan 258.

Vermont.—Allen *v.* Thrall, 10 Vt. 234.

Wisconsin.— Fisher *v.* Vaughan, 75 Wis. 609, 44 N. W. 831, 833.

United States.— Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971; *In re* Great Western Tel. Co., 10 Fed. Cas. No. 5,740, 5 Biss. 363.

England.— Bolton *v.* Puller, 1 B. & P. 539, 4 Rev. Rep. 723; *Ex p.* Walker, 4 De G. F. & J. 509, 6 L. T. Rep. N. S. 631, 10 Wkly. Rep. 656, 65 Eng. Ch. 396, 45 Eng. Reprint 1281; Campbell *v.* Mullett, 2 Swanst. 551, 19 Rev. Rep. 127, 36 Eng. Reprint 727; *Ex p.* Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970.

See 38 Cent. Dig. tit. "Partnership," §§ 112, 113.

67. Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

68. *Ex p.* Burnaby, 1 Cook Bankr. L. (4th ed.) 253. *Compare* Doner *v.* Stauffer, 1 Penr. & W. (Pa.) 198, 21 Am. Dec. 370, holding that the successive sales of each partner's interest in firm property had the same result as though the property had been sold on an execution against both.

69. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Upson *v.* Arnold, 19 Ga. 190, 63 Am. Dec. 302; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; *Ex p.* Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970.

When an outgoing partner sells all his interest in the firm to an incoming partner, with the consent of the partners, the title of the old firm is converted into the title of the new firm, and the outgoing partner has no longer any interest which he can convey. Collner *v.* Greig, 137 Pa. St. 606, 20 Atl. 983, 21 Am. St. Rep. 899.

70. Pennybacker *v.* Leary, 65 Iowa 220, 21 N. W. 575; Craighead *v.* Pike, (N. J. Ch. 1897) 38 Atl. 296; Mendenhall *v.* Benbow, 84 N. C. 646; Wild *v.* Milne, 26 Beav. 504, 53 Eng. Reprint 993.

Partition.— After firm creditors have been paid, either partner may maintain an action for partition. Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536.

71. Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538; Jackson Bank *v.* Durfey, 72 Miss. 971, 18 So. 456, 48 Am. St. Rep. 596, 31 L. R. A. 470; Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066; *In re* Kemptner, L. R. 8 Eq. 286, 21 L. T. Rep. N. S. 223, 17 Wkly. Rep. 818.

Under the present Federal Bankruptcy Act, which treats a partnership as an entity, it has been held that after a firm is insolvent a partner cannot, by a transfer of his interests to his copartners, convert the firm assets into the separate estate of the copartners. Earle *v.* Art Library Pub. Co., 95 Fed. 544.

72. *Ex p.* Mayou, 4 De G. J. & S. 664, 11 Jur. N. S. 433, 34 L. J. Bankr. 25, 12 L. T. Rep. N. S. 254, 13 Wkly. Rep. 629, 69 Eng. Ch. 508, 46 Eng. Reprint 1076.

73. Purple *v.* Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Werner *v.* Iler, 54 Nebr. 576, 74 N. W. 833; Huiskamp *v.*

separate property.[74] Such a conversion is not accomplished, however, by an executory agreement merely. So long as the transferee has not performed a condition imposed upon him by the contract the property remains that of the firm.[75] It is well settled that a partner cannot convert firm property into his individual property by using it to pay his separate debts, without the consent of his copartners.[76] If he does so use it, however, there are serious difficulties in the way of a legal action by the firm or by his defrauded associates.[77] But equity will afford relief by requiring the separate creditors to restore the property or to pay its value.[78]

V. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

A. Firm Business and Property — 1. Nature of Obligation Between Partners. While partnership articles generally contain a provision that each partner will be true and just in his partnership dealings, such a clause is unnecessary, for the very relation of partnership imposes upon the members of the firm the obligation of acting with the utmost good faith toward each other.[79] This obligation rests upon partners not only during the life of the partnership, but extends to their statements and dealings, while negotiating for the formation of the partnership, as well as for the purchase or sale of a partner's share and matters incident to winding up firm affairs.[80]

Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971.

74. West *v.* Chasten, 12 Fla. 315; Frederick *v.* Cooper, 3 Iowa 171; *In re* Great Western Tel. Co., 10 Fed. Cas. No. 5,740, 5 Biss. 363; Pilling *v.* Pilling, 3 De G. J. & S. 162, 68 Eng. Ch. 124, 46 Eng. Reprint 599.

75. Fitzgerald *v.* Christi, 20 N. J. Eq. 90; Koningsburg *v.* Launitz, 1 E. D. Smith (N. Y.) 215; *Ex p.* Wheeler, Buck 25.

76. Brickett *v.* Downs, 163 Mass. 70, 39 N. E. 776; Rogers *v.* Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063.

77. Church *v.* Chicago First Nat. Bank, 87 Ill. 68; Homer *v.* Wood, 11 Cush. (Mass.) 62; Craig *v.* Hulschizer, 34 N. J. L. 363; Calkins *v.* Smith, 48 N. Y. 614, 8 Am. Rep. 575; Felter *v.* Maddock, 11 Misc. (N. Y.) 297, 32 N. Y. Suppl. 292, 1 N. Y. Annot. Cas. 92; Jones *v.* Yates, 9 B. & C. 532, 7 L. J. K. B. O. S. 217, 4 M. & R. 613, 17 E. C. L. 241, in which Lord Tenterden asserts that a person has never been allowed as a plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person, even though the defrauded person was obliged to join plaintiff with himself in the action, because of their joint title to the property fraudulently transferred.

Transfers void.— The courts of some states have treated such transfers as void, and have permitted actions at law to recover the property thus transferred. Thomas *v.* Pennrich, 28 Ohio St. 55; Purdy *v.* Powers, 6 Pa. St. 492; Viles *v.* Bangs, 36 Wis. 131.

78. Morrison *v.* Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225 [*reversing* 113 Ill. App. 651]; Church *v.* Chicago First Nat. Bank, 87 Ill. 68; Piercy *v.* Fynney, L. R. 12 Eq. 69, 40 L. J. Ch. 404, 19 Wkly. Rep. 710; Midland R. Co. *v.* Taylor, 8 H. L. Cas. 751, 8 Jur. N. S. 419, 31 L. J. Ch. 336, 6 L. T. Rep. N. S. 73, 10 Wkly. Rep. 382, 11 Eng. Reprint 624.

79. Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113; Bloom *v.* Lofgren, 64 Minn. 1, 65 N. W. 960; Mitchell *v.* Reed, 61 N. Y. 123, 19 Am. Rep. 252. See also Rutan *v.* Huck, 30 Utah 217, 83 Pac. 833.

The obligation is especially stringent upon a partner who is managing the business in the absence of his associates, or whose position has enabled him to acquire a more thorough knowledge of partnership interests than his copartners possess. Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620; Brooks *v.* Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732.

80. *Arkansas.*— Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376.

California.— Richards *v.* Fraser, 122 Cal. 456, 55 Pac. 246; Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662.

Colorado.— Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

Illinois.— Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777.

Minnesota.— Bloom *v.* Lofgren, 64 Minn. 1, 65 N. W. 960, in their dealings with each other, partners occupy positions of trust, and are required to exercise the most scrupulous good faith toward each other. Nor is this requirement confined to persons who are actually copartners, but it extends to those negotiating for a partnership not yet formed.

New Jersey.— Powell *v.* Cash, 54 N. J. Eq. 218, 34 Atl. 131.

New York.— Butler *v.* Prentiss, 158 N. Y. 49, 52 N. E. 652; Harlow *v.* La Brum, 151 N. Y. 278, 45 N. E. 859.

Pennsylvania.— Bast's Appeal, 70 Pa. St. 301; Lacy *v.* Hall, 37 Pa. St. 360; Portsmouth *v.* Donaldson, 32 Pa. St. 202, 72 Am. Dec. 782.

South Dakota.— Davenport *v.* Buchanan, 6 S. D. 376, 61 N. W. 47.

2. Construction of Partnership Articles. Partnership articles are subject to the same general rules of construction as are other written agreements.[81] If their provisions are explicit and unequivocal and do not violate the duty of good faith which each partner owes his associates, it is unnecessary to invoke rules of construction.[82] When the meaning of the articles is not perfectly clear, the court will strive to so construe them as to carry out the intention of the parties.[83] Generally all prior negotiations will be deemed merged in the written contract.[84] If the parties have put a particular construction upon the articles, this will be enforced by the courts, even though it results in modifying or even in canceling certain express stipulations.[85]

3. Forfeiture of Interest and Recovery of Bonus. The law does not favor forfeitures, and it does not treat the mere failure of one partner to pay his share of capital, or of firm expenses, or of firm debts, or to charge himself on the firm's books with moneys received on behalf of the firm, as a cause for forfeiting his interest in the firm property.[86] Such a failure may bar him from a specific performance of certain provisions of the partnership contract;[87] but it will not justify his copartners in exercising the powers of a court of equity and ejecting him from the partnership.[88] It is not infrequent for a partner to pay a premium or bonus for admission to a partnership. In such a case, if a partnership is dissolved before the expiration of the term for which it is formed, otherwise than by death, the English statute authorizes the court to order the repayment of the premium,

Virginia.— Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

United States.— Williamson *v.* Monroe, 101 Fed. 322; Miller *v.* O'Boyle, 89 Fed. 140.

England.— Burton *v.* Wookey, 6 Madd. 367, 23 Rev. Rep. 249, 56 Eng. Reprint 1131; Fawcet *v.* Whitehouse, 1 Russ. & M. 132, 4 L. J. Ch. O. S. 64, 8 L. J. Ch. O. S. 50, 5 Eng. Ch. 132, 39 Eng. Reprint 51; Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115.

See also *supra*, III, A, 1, j; *infra*, VII; IX.

81. See, generally, Contracts. And see Bird *v.* Hamilton, Walk. (Mich.) 361; Bevan *v.* Webb, [1901] 2 Ch. 59, 70 L. J. Ch. 536, 84 L. T. Rep. N. S. 609, 49 Wkly. Rep. 548.

82. Lingen *v.* Simpson, 1 Sim. & St. 600, 24 Rev. Rep. 249, 1 Eng. Ch. 600, 57 Eng. Reprint 236; Akhurst *v.* Jackson, 1 Swanst. 85, 36 Eng. Reprint 308, 1 Wils. Ch. 47, 37 Eng. Reprint 22.

83. *Colorado.*— Black *v.* Ostrander, 1 Colo. App. 272, 28 Pac. 723.

Illinois.— Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609; Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850.

Louisiana.— Louisiana Nat. Bank *v.* Scott, 42 La. Ann. 785, 7 So. 720.

Massachusetts.— Funck *v.* Haskell, 132 Mass. 580; Grant *v.* Bryant, 101 Mass. 567.

New Jersey.— Dunnell *v.* Henderson, 23 N. J. Eq. 174.

New York.— Stoughton *v.* Lynch, 1 Johns. Ch. 467.

Ohio.— Hayes *v.* Fish, 36 Ohio St. 498.

Pennsylvania.— Smith *v.* Ewing, 151 Pa. St. 256, 25 Atl. 62; Herman *v.* Potamkin, 24 Pa. Super. Ct. 11.

Wisconsin.— White *v.* Magann, 65 Wis. 86, 26 N. W. 260.

United States.— Simonton *v.* Sibley, 122 U. S. 220, 7 S. Ct. 1351, 30 L. ed. 1225.

England.— Walker *v.* Harris, Anstr. 245; Cooke *v.* Benbow, 3 De G. J. & S. 1, 6 New Rep. 135, 68 Eng. Ch. 1, 46 Eng. Reprint 538.

Canada.— Wilson *v.* McCarty, 25 Grant Ch. (U. C.) 152.

See 38 Cent. Dig. tit. "Partnership," § 115.

84. Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Boardman *v.* Close, 44 Iowa 428.

85. Boyd *v.* Mynatt, 4 Ala. 79 (stipulations in the articles not acted on by the parties are to be treated as if they were entirely omitted); Rathbun *v.* McConnell, 27 Nebr. 239, 42 N. W. 1042 (the construction put upon ambiguous terms by the parties will control); Spears *v.* Willis, 151 N. Y. 443, 45 N. E. 849 [*affirming* 28 N. Y. Suppl. 1118] (holding that the conduct of the parties showed that the business carried on was that contemplated by the articles); Snyder *v.* Seaman, 2 N. Y. App. Div. 258, 37 N. Y. Suppl. 696; Southmayd's Appeal, 5 Pa. Cas. 1, 8 Atl. 72 ("Alterations or constructions made or put on their partnership transactions, and acquiesced in by all of them for many years, should have great weight in ascertaining the equities between them").

86. Kimball *v.* Gearhart, 12 Cal. 27; Kemp *v.* Smith, 88 Iowa 725, 55 N. W. 36 (in this case it was agreed that if one partner wished to withdraw at the end of a year the other would repay the sum paid by the first for his interest in the firm; and this agreement was enforced); Patterson *v.* Silliman, 28 Pa. St. 304; Piatt *v.* Oliver, 19 Fed. Cas. No. 11,116, 3 McLean 27 [*affirmed* in 3 How. (U. S.) 333, 11 L. ed. 622].

87. Stevenson *v.* Dunlap, 7 T. B. Mon. (Ky.) 134.

88. Campbell *v.* Sherman, 4 Silv. Sup. (N. Y.) 6, 8 N. Y. Suppl. 630.

or of such part as it thinks just.[89] In this country there is but little judicial authority upon the subject, but the intimations are opposed to a return of the premium, or any part thereof, except in the case of fraud.[90]

4. CAPITAL OF THE FIRM. Partnership may exist without the contribution of tangible property of any kind as capital stock. The contract may provide for the "partners mutual exertion of influence in each other's favor,"[91] or in the use of property owned by one or more of the partners as individuals[92] or in the rendition of personal services by one or all of the partners.[93] Whatever is contributed by the members of a firm as capital stock becomes firm property, and ceases to be owned by the contributor as an individual.[94] It is therefore quite important that the partnership agreement should clearly disclose the contribution to capital made by each partner, and whether that contribution consists in the transfer of title to the particular property or in its use only.[95]

5. ASSUMPTION BY FIRM OF A PARTNER'S DEBTS. The individual debts of partners, whether contracted in establishing the partnership, or during its existence, may be converted into the firm debts, by the mutual consent of the partners, if the firm is solvent.[96] The creditor, claiming the benefit of such an assumption,

89. Brit. Partn. Act (1890), § 40. And see Wilson *v.* Johnstone, L. R. 16 Eq. 606, 42 L. J. Ch. 668, 29 L. T. Rep. N. S. 93; Rooke *v.* Nisbet, 50 L. J. Ch. 588, 29 Wkly. Rep. 842; Hamil *v.* Stokes, 4 Price 161, 18 Rev. Rep. 730; Bond *v.* Milbourn, 20 Wkly. Rep. 197. See also *infra*, IX, C, 2, h.

90. Carlton *v.* Cummins, 51 Ind. 478; Swift *v.* Ward, 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302; Boughner *v.* Black, 83 Ky. 521, 4 Am. St. Rep. 174; Richards *v.* Todd, 127 Mass. 167. See also *infra*, IX, C, 2, b.

91. Cheap *v.* Cramond, 4 B. & Ald. 663, 6 E. C. L. 645; Walden *v.* Sherburne, 15 Johns. 409.

92. *Alabama.*— Rapier *v.* Gulf City Paper Co., 64 Ala. 330.

Arkansas.— Rushing *v.* Peoples, 42 Ark. 390.

Georgia.— Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243.

Indiana.— Stumph *v.* Bauer, 76 Ind. 157.

Minnesota.— Hankey *v.* Becht, 25 Minn. 212.

Nebraska.— Murphy *v.* Warren, 55 Nebr. 215, 75 N. W. 573.

New York.— Champion *v.* Bostwick, 18 Wend. 175, 31 Am. Dec. 376, the capital stock may consist in the mere use of property owned by the individual partners separately.

Wisconsin.— Wood *v.* Beath, 23 Wis. 254.

93. *Kentucky.*— Heran *v.* Hall, 1 B. Mon. 159, 35 Am. Dec. 178.

Massachusetts.— Taft *v.* Buffum, 14 Pick. 322.

New York.— Dob *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293.

North Carolina.— Holt *v.* Kernodle, 23 N. C. 199.

England.— Reid *v.* Hollinshead, 4 B. & C. 867, 7 D. & R. 444, 10 E. C. L. 836; Meyer *v.* Sharpe, 2 Rose 124, 5 Taunt. 74, 1 E. C. L. 49.

94. Bradbury *v.* Smith, 21 Me. 117; Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536 (a part of the yearly profits was added to the capital); Proctor *v.* Proctor, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 44; Buckingham *v.* Chicago First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; The Herkimer, Stew. (Nova Scotia) 17 (a license to trade was contributed as capital).

95. *Iowa.*— Frederick *v.* Cooper, 3 Iowa 171.

New York.— Guccione *v.* Scott, 21 Misc. 410, 47 N. Y. Suppl. 475 [*affirmed* in 33 N. Y. App. Div. 214, 53 N. Y. Suppl. 462], one party's failure to contribute his entire share of capital does not affect his right to withdraw what he did contribute as provided by the contract.

Ohio.— Proctor *v.* Proctor, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 44.

Pennsylvania.— Delp *v.* Edlis, 190 Pa. St. 25, 42 Atl. 462; Mathers *v.* Patterson, 33 Pa. St. 485.

Tennessee.— Boyers *v.* Elliott, 7 Humphr. 204, the amount of capital furnished by each partner in a firm, and the manner of paying it in, may be proved by other evidence than the articles of copartnership.

See 38 Cent. Dig. tit. "Partnership," § 117.

96. *Alabama.*— Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538, individual debts contracted in establishing the partnership.

California.— Kennedy, etc., Lumber Co. *v.* Taylor, (1892) 31 Pac. 1122, materials bought by the partners before the partnership was formed but used by the firm.

Iowa.— *In re* Stewart, 62 Iowa 614, 17 N. W. 897, firm notes given to take up individual notes of a partner.

Louisiana.— Wild *v.* Erath, 27 La. Ann. 171 (firm notes given for price of property bought by one partner and turned over to the firm); Dowd *v.* Elstner, 23 La. Ann. 656; Mousseau *v.* Thebens, 19 La. Ann. 516.

Michigan.— Osborn *v.* Osborn, 36 Mich. 48.

Missouri.— Mueller *v.* Wiebracht, 47 Mo. 468.

Nebraska.— Bartlett *v.* Smith, 1 Nebr. (Unoff.) 328, 95 N. W. 661.

New York.— Larbig *v.* Peck, 174 N. Y. 513, 66 N. E. 1111 [*affirming* 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602]; Bate *v.* McDowell,

has the burden of showing the mutual consent of the partners,[97] and a valid consideration for the firm's promise to discharge the debt.[98] If he establishes these facts and the further fact of novation, that is, that the obligation of the firm has been accepted by him in satisfaction of his claim against the partner individually, there is no doubt that he can enforce the new obligation,[99] and according to some of the decisions even without such novation he can enforce it.[1]

6. ADVANCES AND LOANS BY PARTNERS TO THE FIRM. When there is an express agreement for advances by one or more of the partners, it will determine the rights and duties of the firm and its members in respect of such advances.[2] In the absence of such agreement, each partner becomes a creditor of the firm and entitled to reimbursement therefrom for all moneys advanced and personal obligations incurred, in the ordinary and proper conduct of the firm affairs, or in the preservation of its business or property.[3]

7. INTEREST ON ACCOUNTS — a. In General. Interest is not allowed upon partnership accounts generally, until after a balance has been struck on a settlement

49 N. Y. Super. Ct. 106; Hutchinson *v.* Smith, 7 Paige 26.

Tennessee.— Gordon *v.* Joslin, 4 Hayw. 115.

Wisconsin.— Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422; Haben *v.* Harshaw, 49 Wis. 379, 5 N. W. 872.

See 38 Cent. Dig. tit. "Partnership," § 118.

97. Dowd *v.* Elstner, 23 La. Ann. 656; Mousseau *v.* Thebens, 19 La. Ann. 516; Kroll *v.* Union Trust Co., 133 Mich. 638, 95 N. W. 735.

98. Goodenow *v.* Jones, 75 Ill. 48; George *v.* Wamsley, 64 Iowa 175, 20 N. W. 1 (consideration was the agreement to remain in the firm, by a partner with special experience, who wished to retire); Siegel *v.* Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; Huston *v.* Heyer, 3 Pa. Dist. 533; Merchants' Bank *v.* Thomas, 121 Fed. 306, 57 C. C. A. 374 (consideration was the transfer of assets of a business to the firm).

99. *Massachusetts.*— Wild *v.* Dean, 3 Allen 579, without novation the creditor of the partner cannot avail himself of the contract of assumption by the firm.

Michigan.— Osborn *v.* Osborn, 36 Mich. 48, the creditor accepted the new firm as her debtor in place of the old firm.

Nebraska.— Bartlett *v.* Smith, 1 Nebr. (Unoff.) 328, 95 N. W. 661.

Wisconsin.— Rice *v.* Wolff, 65 Wis. 1, 26 N. W. 181.

United States.—Merchants' Bank *v.* Thomas, 121 Fed. 306, 57 C. C. A. 374.

England.— *Ex p.* Sandham, 4 Deac. & C. 812.

See 38 Cent. Dig. tit. "Partnership," § 118.

1. Case *v.* Ellis, 4 Ind. App. 224, 30 N. E. 907 (it is well settled that a promise upon good consideration made for the benefit of a third party may be taken advantage of and enforced by such third party in his own name); Arnold *v.* Nichols, 64 N. Y. 117; Colt *v.* Wilder, 1 Edw. (N. Y.) 484; Zell's Appeal, 111 Pa. St. 532, 6 Atl. 107; Jones *v.* Bartlett, 50 Wis. 589, 7 N. W. 655.

2. Von Schmidt *v.* Von Schmidt, 115 Cal. 239, 46 Pac. 1056 (one partner was to advance the expenses of cultivating certain lands, but nothing more); Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263; McFadden *v.* Leeka, 48 Ohio St. 513, 28 N. E. 874; Magilton *v.* Stevenson, 173 Pa. St. 560, 34 Atl. 235 (it was agreed that M should in no event be put to a loss of more than one thousand two hundred dollars, hence all advances by him above that sum had to be borne by his copartners); Evans *v.* Weatherhead, 24 R. I. 394, 53 Atl. 286 (a memorandum of the partnership agreement fixed the amount of one partner's advance).

3. *Arkansas.*— Nichol *v.* Stewart, 36 Ark. 612, advance by a partner to buy supplies and tools which a copartner agreed to furnish.

California.— Silveira *v.* Reese, (1903) 71 Pac. 515.

Georgia.— Keaton *v.* Mayo, 71 Ga. 649.

Illinois.— Topping *v.* Paddock, 92 Ill. 92.

Maine.— Stevens *v.* Lunt, 19 Me. 70.

Massachusetts.— Williams *v.* Henshaw, 12 Pick. 378, 23 Am. Dec. 614.

Michigan.— Harrison *v.* Dewey, 46 Mich. 173, 9 N. W. 152.

Mississippi.— Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690.

Missouri.— Finney *v.* Brant, 19 Mo. 42.

Nebraska.— Murphy *v.* Warren, 55 Nebr. 215, 75 N. W. 573, the partner making the advances does not acquire thereby a lien on his copartner's individual property.

New York.— Sells *v.* Hubbell, 2 Johns. Ch. 394.

Pennsylvania.— Sattler *v.* Sauer, 28 Pittsb. Leg. J. N. S. 143, expenditures not authorized and hence not recoverable.

South Carolina.— Wilson *v.* Wilson, 74 S. C. 30, 54 S. E. 227.

Wisconsin.— Green *v.* Stacy, 90 Wis. 46, 62 N. W. 627.

England.— Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1090 [*affirming* 3 Giffard 412, 8 Jur. N. S. 412, 5 L. T. Rep. N. S. 573, 66 Eng. Reprint 470]; Matter of German Min. Co., 4 De G. M. & G. 19, 18 Jur. 710, 2 Wkly. Rep. 543, 53 Eng. Ch. 16, 43 Eng. Reprint 415; Wright *v.* Hunter, 5 Ves. Jr. 792, 31 Eng. Reprint 861.

See 38 Cent. Dig. tit. "Partnership," § 119.

between the partners, unless the parties have otherwise agreed or acted in their partnership concerns.[4]

b. Interest on Balances. Even when a balance appears on the books of the firm in favor of one or more of the partners, interest thereon does not run in favor of the creditor partner, without an agreement therefor or an assent thereto on the part of all members of the firm.[5]

c. Interest on a Partner's Indebtedness to the Firm. If a partner becomes indebted to the firm with the consent of his associates, the indebtedness will not bear interest until a demand for payment is made and refused,[6] unless there is an express or implied agreement for interest.[7] If the indebtedness arises from a wrongful misappropriation of firm property, interest may be allowed.[8]

4. *Alabama.*— Colgin *v.* Cummins, 1 Port. 148, annual rests will not be allowed on the individual accounts of partners, with a view of charging interest on balances of the largest account, unless it appears that the partner having such balances has made a profit by retaining them.

Georgia.— Solomon *v.* Solomon, 2 Ga. 18.

Illinois.— Moss *v.* McCall, 75 Ill. 190 (it is not proper in taking an account to charge each partner with interest on his individual account and to credit each one with his interest on moneys paid in, where the original articles of copartnership contained no such provisions and no subsequent agreement to that effect is proved); King *v.* Hamilton, 16 Ill. 190.

Louisiana.— Bayly *v.* Becnel, 36 La. Ann. 496.

Michigan.—Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127.

Nebraska.— Clark *v.* Worden, 10 Nebr. 87, 4 N. W. 413; McCormick *v.* McCormick, 7 Nebr. 440.

New Jersey.— Buckingham *v.* Ludlum, 29 N. J. Eq. 345.

Pennsylvania.— Kelley *v.* Shay, 206 Pa. St. 215, 55 Atl. 927.

Wisconsin.— Gilman *v.* Vaughan, 44 Wis. 646.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284.

England.— Boddam *v.* Ryley, 1 Bro. Ch. 239, 28 Eng. Reprint 1104, 2 Bro. Ch. 2, 29 Eng. Reprint 1.

See 38 Cent. Dig. tit. "Partnership," § 120. And see *infra*, IX, C, 4.

5. *Idaho.*— Taylor *v.* Peterson, 1 Ida. 513.

Illinois.— McCall *v.* Moss, 112 Ill. 493; Gage *v.* Parmelee, 87 Ill. 329.

Iowa.— Smith *v.* Knight, 88 Iowa 257, 55 N. W. 189 (a promise by one partner to pay interest on monthly balances already accrued would be no consideration for a like promise by the other since, there being no provision in the original partnership agreement to pay such interest, there would be no legal obligation to do so; and the agreement to pay interest, where, by the law, no interest could be charged, would be in effect a gift of one partner to the other. The bargain in this case, the court said, was then to take chances upon what a competition in correction of the accounts would disclose, with gain or loss to each partner, as the result should be in favor of or against his judgment. Every gambling enterprise is supported by the same consideration); Wendling *v.* Jennisch, 85 Iowa 392, 52 N. W. 341; Kemmerer *v.* Kemmerer, 85 Iowa 193, 52 N. W. 194 (the fact that the parties had simply looked over the books to see how they stood does not constitute such a settlement of the partnership affairs as the law contemplates shall be made before interest can be charged).

Louisiana.— Pratt *v.* McHatton, 11 La. Ann. 260.

Massachusetts.—Miller *v.* Lord, 11 Pick. 11.

Michigan.— Near *v.* Lowe, 56 Mich. 632, 23 N. W. 448, interest having been charged on his monthly balances to an overdrawing partner, and acquiesced in by him, he was not entitled to relief therefrom on a final accounting.

New York.— Matter of Laney, 50 Hun 15, 2 N. Y. Suppl. 443; Beacham *v.* Eckford, 2 Sandf. Ch. 116.

Ohio.— Jung *v.* Weyand, 9 Ohio Dec. (Reprint) 485, 14 Cinc. L. Bul. 143.

Pennsylvania.— Goodwill *v.* Heim, 212 Pa. St. 595, 62 Atl. 24; Brown's Estate, 11 Phila. 127.

Texas.— McKay *v.* Overton, 65 Tex. 82.

Vermont.— Atherton *v.* Whitcomb, 66 Vt. 447, 29 Atl. 674.

England.— Meymott *v.* Meymott, 31 Beav. 445, 9 Jur. N. S. 426, 32 L. J. Ch. 218, 54 Eng. Reprint 1211; Cooke *v.* Benbow, 3 De G. J. & S. 1, 6 New Rep. 135, 68 Eng. Ch. 1, 46 Eng. Reprint 538; Rhodes *v.* Rhodes, Johns. 653, 6 Jur. N. S. 600, 29 L. J. Ch. 418, 8 Wkly. Rep. 204, 70 Eng. Reprint 581.

See 38 Cent. Dig. tit. "Partnership," § 122. And see *infra*, IX, C, 4, c.

6. Solomon *v.* Solomon, 2 Ga. 18, when a partner draws out firm funds for his personal use, with the assent of his copartner, but refuses to repay the sum upon demand, his retention is a misapplication of the funds, which will subject him to the payment of interest.

7. Near *v.* Lowe, 56 Mich. 632, 23 N. W. 448; Jung *v.* Weyand, 9 Ohio Dec. (Reprint) 485, 14 Cinc. L. Bul. 143; Brown's Estate, 11 Phila. (Pa.) 127; Wilson *v.* McCarty, 25 Grant Ch. (U. C.) 152.

8. *Kansas.*— Krapp *v.* Aderholt, 42 Kan. 247, 21 Pac. 1063, the failure of one partner to furnish his share of the capital was treated as sufficiently wrongful to subject him to interest thereon.

8. Interest on Capital. In the absence of an express stipulation between the parties, a partner's contributions to the firm's capital do not bear interest in his favor. He must rely upon the profits of the business to compensate him for his investment.[9] When the contributions of the partners are unequal, and there is no stipulation that the excess shall draw interest, the law presumes that the labor, skill, and reputation of the smaller contributor are worth to the firm as much as the excess of capital.[10] Even the failure of a partner to pay in his agreed contribution does not entitle the copartner to interest on his own contribution. He must still look to the profits for compensation for his investment.[11] It is often agreed between partners that interest shall be allowed, either on the entire capital contributed by each, or on that contributed by one, or the excess of contribution.[12] The tendency of the courts is to require strict proof of such agreement by the one in whose favor it is invoked.[13] Even when an agreement for the interest exists, interest is not recoverable after the dissolution of the firm unless there is a special stipulation that it shall be; for upon the dissolution the capital ceases to earn profits.[14] But the withdrawal of a part of the capital during the life of the

Kentucky.— Masonic Sav. Bank *v.* Bangs, 10 S. W. 633, 10 Ky. L. Rep. 743.

Louisiana.— Hilligsberg *v.* Burthe, 6 La. Ann. 170.

Massachusetts.— Crabtree *v.* Randall, 133 Mass. 552.

New York.— Stoughton *v.* Lynch, 2 Johns. Ch. 209.

Pennsylvania.— Kelley *v.* Shay, 206 Pa. St. 215, 55 Atl. 927.

Tennessee.— Shepard *v.* Akers, 2 Tenn. Ch. 627.

Vermont.— Atherton *v.* Whitcomb, 66 Vt. 447, 29 Atl. 674.

Wisconsin.—Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

England.— Evans *v.* Coventry, 8 De G. M. & G. 835, 3 Jur. N. S. 1225, 26 L. J. Ch. 400, 5 Wkly. Rep. 436, 57 Eng. Ch. 645, 44 Eng. Reprint 612; Hutcheson *v.* Smith, 5 Ir. Eq. 117.

See 38 Cent. Dig. tit. "Partnership," § 123.

9. *Alabama.*— Desha *v.* Smith, 20 Ala. 747.

California.— Carpenter *v.* Hathaway, 87 Cal. 434, 25 Pac. 549; Tirrell *v.* Jones, 39 Cal. 655.

Georgia.— Tutt *v.* Land, 50 Ga. 339.

Illinois.— Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609; Topping *v.* Paddock, 92 Ill. 92.

Michigan.— Thompson *v.* Noble, 108 Mich. 19, 65 N. W. 563.

New York.— Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342 [*reversing* 15 N. Y. App. Div. 561, 44 N. Y. Suppl. 516]; *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774; Johnson *v.* Hartshorne, 52 N. Y. 173; Sanford *v.* Barney, 50 Hun 108, 4 N. Y. Suppl. 500; Lewis *v.* Whitehall Lumber Co., 14 N. Y. St. 302.

North Carolina.— Jones *v.* Jones, 36 N. C. 332.

England.— Dinham *v.* Bradford, L. R. 5 Ch. 519; Hill *v.* King, 3 De G. J. & S. 418, 9 Jur. N. S. 527, 8 L. T. Rep. N. S. 220, 1 New Rep. 341, 68 Eng. Ch. 316, 46 Eng. Reprint 697; Cooke *v.* Benbow, 3 De G. J. & S. 1, 6 New Rep. 135, 68 Eng. Ch. 1, 46 Eng. Reprint 538; Stevens *v.* Cook, 5 Jur. N. S. 1415.

See 38 Cent. Dig. tit. "Partnership," § 121.

10. Desha *v.* Smith, 20 Ala. 747; Osborn *v.* Gheen, 5 Mackey (D. C.) 189; Sanford *v.* Barney, 50 Hun (N. Y.) 108, 4 N. Y. Suppl. 500; Jackson *v.* Johnson, 11 Hun (N. Y.) 509 [*affirmed* in 74 N. Y. 607].

11. Stokes *v.* Hodges, 11 Rich. Eq. (S. C.) 135; Hill *v.* King, 3 De G. J. & S. 418, 9 Jur. N. S. 527, 8 L. T. Rep. N. S. 220, 1 New Rep. 341, 68 Eng. Ch. 316, 46 Eng. Reprint 697; Wilson *v.* McCarty, 25 Grant Ch. (U. C.) 152.

12. Construction and effect of such agreements see the following cases:

Alabama.— Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640.

Illinois.— Taft *v.* Schwamb, 80 Ill. 289.

Nevada.— Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

New York.— Oppe *v.* Webensdorfer, 7 N. Y. St. 283.

Ohio.— Wayne *v.* Hinkle, 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282.

Wisconsin.—Daniels *v.* McCormick, 87 Wis. 255, 58 N. W. 406.

England.— Millar *v.* Craig, 6 Beav. 433, 49 Eng. Reprint 893; Pilling *v.* Pilling, 3 De G. J. & S. 162, 68 Eng. Ch. 124, 46 Eng. Reprint 599.

See 38 Cent. Dig. tit. "Partnership," § 121.

13. *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774; Jones *v.* Jones, 36 N. C. 332; Daniels *v.* McCormick, 87 Wis. 255, 58 N. W. 406.

14. Bradley *v.* Brigham, 137 Mass. 545; Johnson *v.* Hartshorne, 52 N. Y. 173; Wayne *v.* Hinkle, 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282; Harfield *v.* Loughborough, L. R. 8 Ch. 1, 42 L. J. Ch. 179, 27 L. T. Rep. N. S. 499, 21 Wkly. Rep. 86; Watney *v.* Wells, L. R. 2 Ch. 250 [*overruling* Pilling *v.* Pilling, 3 De G. J. & S. 162, 68 Eng. Ch. 124, 46 Eng. Reprint 599]. See also *infra*, IX, C, 4, a.

firm does not deprive the partner of his stipulated interest unless the withdrawal is clearly inequitable.[15]

9. INTEREST ON ADVANCES. Whether money advanced by a partner to the firm as a loan, and not as a contribution to its capital, bears interest in the absence of an express agreement therefor, is a question upon which the courts have differed. Formerly it did not bear interest in England,[16] unless a mercantile usage for interest was shown.[17] And this rule has been adopted in a few decisions in this country.[18] The modern rule, however, both in England and in America, is that a partner who makes for the purpose of the partnership any actual payment or advance beyond the capital which he has agreed to contribute is entitled to interest at the customary legal rate without any express agreement with his copartners therefor.[19]

10. INTEREST OF PARTNERS IN FIRM PROPERTY. The interest of a partner in the firm assets is not that of a tenant in common, or of a joint tenant, at common law. It is the share to which he is entitled under the partnership contract, after the firm debts are paid and the partner's equities are adjusted.[20] It is susceptible

15. Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640.

16. Collyer Partn. (5th Am. ed.) § 338; Lindley Partn. (5th Eng. ed. with Am. notes) *389–391.

17. Omichund *v.* Barker, Ridgt. Hardw. 285, 27 Eng. Reprint 831.

18. Prentice *v.* Elliott, 72 Ga. 154 (construing Code, § 2885); Seibert *v.* Ragsdale, 103 Ky. 206, 44 S. W. 653, 19 Ky. L. Rep. 1869; Lee *v.* Lashbrooke, 8 Dana (Ky.) 214; Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514.

19. *Alabama.*— Reynolds *v.* Mardis, 17 Ala. 32; Turnipseed *v.* Goodwin, 9 Ala. 372.

Illinois.— McMillan *v.* James, 105 Ill. 194.

Iowa.— Coldren *v.* Clark, 93 Iowa 352, 61 N. W. 1045.

Louisiana.— Millaudon *v.* Sylvestre, 8 La. 262.

Massachusetts.—Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Baker *v.* Mayo, 129 Mass. 517.

Mississippi.— Lamh *v.* Rowan, 83 Miss. 45, 35 So. 427, 690; Berry *v.* Folkes, 60 Miss. 576.

Nebraska.— Warren *v.* Rahen, 33 Nebr. 380, 50 N. W. 257.

Nevada.— Folsom *v.* Marlette, 23 Nev. 459, 49 Pac. 39.

New Jersey.— Coddington *v.* Idell, 29 N. J. Eq. 504; Morris *v.* Allen, 14 N. J. Eq. 44.

New York.— Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342; Grant *v.* Smith, 70 N. Y. App. Div. 301, 75 N. Y. Suppl. 82; Lloyd *v.* Carrier, 2 Lans. 364.

Ohio.— Wayne *v.* Hinkle, 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282.

Pennsylvania.— Duffy *v.* Gilmore, 7 Lack. Leg. N. 114.

Rhode Island.— Evans *v.* Weatherhead, 24 R. I. 394, 53 Atl. 286.

Vermont.— Hodges *v.* Parker, 17 Vt. 242, 44 Am. Dec. 331.

England.— Matter of German Min. Co., 4 De G. M. & G. 19, 18 Jur. 710, 2 Wkly. Rep. 543, 53 Eng. Ch. 16, 43 Eng. Reprint 415.

See 38 Cent. Dig. tit. "Partnership," § 121. And see *infra*, IX, C, 4, b.

No interest when agreement to contrary.— Lockwood *v.* Roberts, 171 Mass. 109, 50 N. E. 517; C. D. Smith Drug Co. *v.* Saunders, 70 Mo. App. 221; Hayne *v.* Sealy, 71 N. Y. App. Div. 418, 75 N. Y. Suppl. 907; Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

20. *Connecticut.*— Stevens *v.* Stevens, 39 Conn. 474; Filley *v.* Phelps, 18 Conn. 294.

Illinois.— Morrison *v.* Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225; Trowbridge *v.* Cross, 117 Ill. 109, 7 N. E. 347; Taylor *v.* Farmer, (1886) 4 N. E. 370; Taft *v.* Schwamb, 80 Ill. 289.

Indiana.— Johnson *v.* Shirley, 152 Ind. 453, 53 N. E. 459; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Henry *v.* Anderson, 77 Ind. 361; Meridian Nat. Bank *v.* Brandt, 51 Ind. 56; Matlock *v.* Matlock, 5 Ind. 403.

Iowa.— Mayer *v.* Garber, 53 Iowa 689, 6 N. W. 63; Hewitt *v.* Rankin, 41 Iowa 35, holding that where, on winding up of a partnership business, there are no equities in favor of the third parties, the partners or their representatives hold a direct interest in the partnership realty, which is subject to all rules applicable thereto.

Louisiana.— Stothart *v.* Hardie, 110 La. 696, 34 So. 740; Thompson *v.* Mylne, 6 La. Ann. 80; Millaudon *v.* New Orleans, etc., R. Co., 3 Rob. 488; Claiborne *v.* His Creditors, 18 La. 501; U. S. *v.* Baulos, 5 Mart. N. S. 567; Ward *v.* Brandt, 11 Mart. 331, 13 Am. Dec. 352.

Maine.— Douglas *v.* Winslow, 20 Me. 89.

Massachusetts.— Pratt *v.* McGuinness, 173 Mass. 170, 53 N. E. 380.

Minnesota.—Arnold *v.* Wainwright, 6 Minn. 358, 80 Am. Dec. 448; Schalck *v.* Harmon, 6 Minn. 265.

Missouri.— Ritchie *v.* Kinney, 46 Mo. 298.

Nevada.—Whitmore *v.* Shiverick, 3 Nev. 288.

New York.— Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77; Staats *v.* Bristow, 73 N. Y. 264; Geortner *v.* Canajoharie, 2 Barb. 625; Nicoll *v.* Mumford, 4 Johns. Ch. 522.

of being seized under legal process,[21] as well as of being sold and assigned by its owner.[22] In the absence of any evidence to the contrary, partners are presumed to have equal interests in the firm.[23] Their shares may be fixed at unequal amounts by agreement; and the partnership contract generally regulates this matter.[24]

11. Possession of Firm Property. As firm property is not owned by the partners in severalty, but belongs to the partnership, it follows that neither partner is entitled to exclusive possession of the firm estate, or of any item of property composing it.[25] If a partner wrongfully asserts such exclusive possession the

North Carolina.—Allison *v.* Davidson, 17 N. C. 79; Taylor *v.* Taylor, 6 N. C. 70.

Ohio.— Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Place *v.* Sweetzer, 16 Ohio 142.

Pennsylvania.— Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752; Graham's Estate, 1 Del. Co. 393.

South Carolina.— Boyce *v.* Coster, 4 Strobh. Eq. 25.

Vermont.— Warren *v.* Wheelock, 21 Vt. 323.

West Virginia.— Kenneweg *v.* Schilansky, 45 W. Va. 521, 31 S. E. 949. In McKinley *v.* Lynch, 58 W. Va. 44, 51 S. E. 4, it is said that all the effects of a partnership are held in trust, and each partner is a trustee and also a beneficiary.

England.— Garbett *v.* Veale, 5 Q. B. 408, Dav. & M. 458, 8 Jur. 336, 13 L. J. Q. B. 99, 48 E. C. L. 408.

See 38 Cent. Dig. tit. "Partnership," § 124.

Interest in realty.— Where a partnership is the owner in fee of realty situated in the state each member of the firm is possessed of a freehold interest in such realty. Tattersal *v.* Nevels, (Nebr. 1906) 110 N. W. 708.

21. Staats *v.* Bristow, 73 N. Y. 264; Berry *v.* Kelly, 4 Rob. (N. Y.) 106 (upon a judgment against one partner for individual debt sheriff can sell that interest of the judgment debtor in firm goods, although not the entire property in the goods themselves); Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Place *v.* Sweetzer, 16 Ohio 142; Mayhew *v.* Herrick, 7 C. B. 229, 13 Jur. 1078, 18 L. J. C. P. 179, 62 E. C. L. 229; Johnson *v.* Evans, 8 Jur. 341, 13 L. J. C. P. 117, 7 M. & G. 240, 7 Scott N. R. 1035, 49 E. C. L. 240.

22. Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787; Meridian Nat. Bank *v.* Brandt, 51 Ind. 56; Barber *v.* Palmer, 70 Hun (N. Y.) 498, 24 N. Y. Suppl. 451; American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323; Vandike's Appeal, 57 Pa. St. 9.

23. *Alabama.*— Stein *v.* Robertson, 30 Ala. 286.

Illinois.— Farr *v.* Johnson, 25 Ill. 522; Roach *v.* Perry, 16 Ill. 37.

Iowa.— Moore *v.* Bare, 11 Iowa 198.

Kentucky.— Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Louisiana.— Delamour *v.* Rogers, 7 La. Ann. 152; Allen *v.* Brown, 1 Mart. N. S. 344.

Maine.— Crabtree *v.* Clapham, 67 Me. 326.

Maryland.— Safe Deposit, etc., Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023.

Mississippi.— Randle *v.* Richardson, 53 Miss. 176; Quine *v.* Quine, 9 Sm. & M. 155.

New York.— Bissell *v.* Harrington, 18 Hun 81; Ryder *v.* Gilbert, 16 Hun 163.

North Carolina.— Worthy *v.* Brower, 93 N. C. 344.

Pennsylvania.— Richard's Estate, 1 Woodw. 362.

Wisconsin.— Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713.

See 38 Cent. Dig. tit. "Partnership," § 124.

24. *Georgia.*— Wallace *v.* Hull, 28 Ga. 68.

Illinois.— Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609; Truman *v.* Duerselen, 37 Ill. App. 555.

Louisiana.— Allen *v.* Brown, 1 Mart. N. S. 344.

Missouri.— Robertson *v.* Winslow, 99 Mo. App. 546, 74 S. W. 442.

Nebraska.— Haas *v.* Rothschild, 33 Nebr. 206, 49 N. W. 1124.

New Jersey.— Shroser *v.* Isaacs, 28 N. J. Eq. 320.

New York.— Mallett *v.* Kellar, 181 N. Y. 543, 73 N. E. 1126 [*affirming* 91 N. Y. App. Div. 502, 86 N. Y. Suppl. 917]; Drexel *v.* Pease, 129 N. Y. 96, 29 N. E. 241 [*affirming* 13 N. Y. Suppl. 774]; Moore *v.* Huntington, 7 Hun 425; Conroy *v.* Campbell, 45 N. Y. Super. Ct. 326; Stettheimer *v.* Stettheimer, 2 N. Y. St. 358.

Oregon.— Moore *v.* Knott, 12 Oreg. 260, 7 Pac. 57.

Tennessee.— Knight *v.* Ogden, 2 Tenn. Ch. 473.

United States.— Paul *v.* Cullum, 132 U. S. 539, 10 S. Ct. 151, 33 L. ed. 430; Denning *v.* Bray, 61 Fed. 651, 10 C. C. A. 6.

See 38 Cent. Dig. tit. "Partnership," § 124.

25. *Alabama.*— Dugger *v.* Tutwiler, 129 Ala. 258, 30 So. 91; Crosswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684, when one partner stores firm goods in a warehouse as his own, either of the other partners may receive the goods, and discharge the bailee.

California.— Buckley *v.* Carlisle, 2 Cal. 420.

Georgia.— Carithers *v.* Jarrell, 20 Ga. 842.

Louisiana.— Stewart *v.* Millsaps, (1898) 23 So. 887; Johnson *v.* Brandt, 10 Mart. 638, partners are joint owners of the property belonging to the partnership and have an equal right to possession.

New York.— Moubray *v.* Moubray, 157 N. Y. 712, 53 N. E. 1128 [*affirming* 3 N. Y. App. Div. 227, 38 N. Y. Suppl. 459]; MacRae *v.* Graham, 17 N. Y. App. Div. 631, 45 N. Y. Suppl. 244; Robinson *v.* Gilfillan, 15 Hun

other partners may obtain relief in equity,[26] but they cannot maintain a purely possessory action at common law.[27]

12. MISAPPROPRIATION OF FIRM PROPERTY. It is not misappropriation of the firm property for one partner to take it, under an agreement with his associates to pay a firm debt greater in amount than its value;[28] nor is it misappropriation, at least as against his copartners, for him to mortgage or sell it to secure or pay his individual debts, if they assent thereto.[29] But if he employs it for his personal advantage without their consent, he is guilty of a misappropriation.[30]

13. CONTROL AND CONDUCT OF FIRM BUSINESS. In the absence of any special stipulation between the partners on the subject, every partner is entitled to take part in the management of the business;[31] and in case of difference of opinion

267; Azel *v.* Betz, 2 E. D. Smith 188; Boynton *v.* Page, 13 Wend. 425, if one partner absconds, the copartner may take exclusive possession for the purpose of winding up the firm's affairs.

Pennsylvania.— Browning *v.* Cover, 108 Pa. St. 595.

England.— Johnson *v.* Aston, 1 Sim. & St. 73, 1 Eng. Ch. 73, 57 Eng. Reprint 29, the possession of one partner is the possession of each.

Canada.— Reg. *v.* Mason, 28 Ont. 495; Reg. *v.* Bennett, 27 Ont. 314, when the partnership is in occupation of the firm property this is to be deemed actual occupation by each partner.

See 38 Cent. Dig. tit. "Partnership," § 125.

The possession of one partner is the possession of all until it becomes adverse. Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Van Valkenburg *v.* Huff, 1 Nev. 142.

26. Adams *v.* Kable, 6 B. Mon. (Ky.) 384, 44 Am. Dec. 772 (the exclusive possessor is liable to pay the value of the use of the property wrongfully enjoyed by him); Comstock *v.* McDonald, 126 Mich. 142, 85 N. W. 579 (the partner withdrawing property is accountable therefor on the dissolution of the firm); Burgess *v.* Deierling, 113 Mo. App. 383, 88 S. W. 770; Moubray *v.* Mouhray, 157 N. Y. 712, 53 N. E. 1128 [*affirming* 3 N. Y. App. Div. 227, 38 N. Y. Suppl. 459]; Blisset *v.* Daniel, 1 Eq. Rep. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478, 68 Eng. Reprint 1022.

27. Buckley *v.* Carlisle, 2 Cal. 420; Robinson *v.* Gilfillan, 15 Hun (N. Y.) 267; Azel *v.* Betz, 2 E. D. Smith (N. Y.) 188; Fox *v.* Hanbury, Cowp. 445; Smith *v.* Stokes, 1 East 363; Smith *v.* Book, 5 U. C. Q. B. O. S. 556.

28. Randolph *v.* Inman, 172 Ill. 575, 50 N. E. 104 [*affirming* 71 Ill. App. 176] (if the partner taking firm assets pays the debt, as he agreed, he should not be charged with the goods, in the firm account); Barber *v.* Stroub, 111 Mo. App. 57, 85 S. W. 915.

29. Johnston *v.* Rohnek, 104 Iowa 523, 73 N. W. 1062; Currier *v.* Bates, 62 Iowa 527, 17 N. W. 759, is bound to account to the firm for its value.

30. *Illinois.*— Crone *v.* Crone, 180 Ill. 599, 54 N. E. 605 (where one partner buys land with partnership funds, and takes the title in his own name, a trust results in the lands in favor of the other partner to the extent of his interest in the moneys paid for lands); Commercial Nat. Bank *v.* Proctor, 98 Ill. 558.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506, if one partner applies funds to the acquisition of property foreign to the object of the partnership, without the consent of the other, on discovery, he may be compelled to take such property and account for half of the purchase-money.

Montana.— Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621, the misappropriating partner is compelled to account for the value of the property on firm settlement.

Nebraska.— Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150.

New York.— Mumford *v.* Murray, 6 Johns. Ch. 452, misappropriating partner is compelled to account for the value of the property.

North Dakota.— Lay *v.* Emery, 8 N. D. 515, 79 N. W. 1053.

Pennsylvania.— Kutz *v.* Naugle, 7 Pa. Super. Ct. 179.

Vermont.— Pierce *v.* Daniel, 25 Vt. 624, the diverter of the firm funds is chargeable with all the detriment suffered by the firm from such diversion.

England.— Read *v.* Bailey, 3 App. Cas. 94, 17 L. J. Ch. 161, 37 L. T. Rep. N. S. 510, 26 Wkly. Rep. 223 (when there has been a fraudulent conversion of the firm property by a partner to his own use, and the firm and its members have become bankrupt, the firm estate may prove against the defrauding partner's estate for the property thus misappropriated); Hichens *v.* Congreve, 4 Sim. 420, 6 Eng. Ch. 420, 58 Eng. Reprint 157 (the wrong-doing partner should refund and such partner having become bankrupt after paying the sum into the court, his copartner may receive this sum, and is not put to prove his demand in bankruptcy).

See 38 Cent. Dig. tit. "Partnership," § 126.

31. *Alabama.*— Crosswell *v.* Lehman, 54 Ala. 363, 25 Am. Rep. 684; Patterson *v.* Ware, 10 Ala. 444.

Louisiana.— Caugot *v.* Rodriguez, 1 La. 508.

Maryland.— Katz *v.* Brewington, 71 Md. 79, 20 Atl. 139.

New York.— Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091 [*affirming* 52 Hun 340, 5 N. Y. Suppl. 361], a partner does not lose his right to a voice in the management of firm affairs, by pledging his share in the business to secure an individual debt.

as to such management, the majority govern.[32] These rules may be modified, however, by the partnership contract, or by the subsequent agreement or conduct of the partners. Thus the control of one part of the business may be committed to one member of the firm, while that of a different part is turned over to another partner.[33] It may be stipulated too that in case of difference of opinion the decision of a single partner may be final.[34]

14. Books of Account. In the absence of an agreement on the subject, the duty of keeping full and accurate accounts in proper books rests equally upon each partner.[35] The books should be kept at the firm's place of business,[36] as each partner is entitled to have free access to them.[37] When the duty of keeping books of account for the firm is assumed by a partner, the entries will generally be treated as conclusive against him.[38] And if he has culpably neglected his duty, the maxim, "*Omnia præsumunter contra spoliatorem*," will be applied.[39] In case all the partners have had free access to the books the entries therein will be deemed accurate, and the presumption will arise that they were known to each partner.[40] These presumptions may of course be rebutted.[41] The correctness of

Pennsylvania.— Duffy *v.* Gilmore, 7 Lack. Leg. N. 114.

United States.— Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

See 38 Cent. Dig. tit. "Partnership," § 127.

32. *Alabama.*— Johnston *v.* Dutton, 27 Ala. 245.

California.— Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116.

Illinois.— Chicago, etc., R. Co. *v.* Hoyt, 1 Ill. 374.

Iowa.— Western Stage Co. *v.* Walker, 2 Iowa 504, 65 Am. Dec. 789.

New York.— Livingston *v.* Lynch, 4 Johns. Ch. 573.

Pennsylvania.— Markle *v.* Wilbur, 200 Pa. St. 457, 50 Atl. 204; Peacock *v.* Cummings, 46 Pa. St. 434, 5 Phila. 253.

England.— Const *v.* Harris, 2 Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

Change in nature or location of business.— A majority cannot change the nature or location of the partnership business. Abbott *v.* Johnson, 32 N. H. 9; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Jenning's Appeal, 2 Mona. (Pa.) 184, 16 Atl. 19.

33. Haller *v.* Willamowicz, 23 Ark. 566 (one partner was to superintend the firm's tanyard exclusively and the other to have control of the books and finances); Richard *v.* Mouton, 109 La. 465, 33 So. 563 (one partner had authority to make sales and disburse all the funds); Greend *v.* Kummel, 41 La. Ann. 65, 5 So. 555; Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611; Chapin *v.* Streeter, 124 U. S. 360, 8 S. Ct. 529, 31 L. ed. 475.

34. Gill *v.* Crosby, 63 Ill. 190 (one partner to have entire control of purchases and sales); Greend *v.* Kummel, 41 La. Ann. 65, 5 So. 555 (one partner to take charge and superintendence of the business); Groth *v.* Payment, 79 Mich. 220, 44 N. W. 611 (one partner stipulated in the contract as controlling).

35. *Florida.*— Chandler *v.* Sherman, 16 Fla. 99.

Iowa.— Morris *v.* Griffin, 83 Iowa 327, 49 N. W. 846.

Kentucky.— Funk *v.* Leachman, 4 Dana 24.

Louisiana.— Richardson *v.* Pumphrey, 2 La. Ann. 448. *Compare* Theall *v.* Lacey, 5 La. Ann. 548, holding that the keeping of regular books of account is not to be expected, in a partnership orally contracted between mother and son for conducting a plantation.

Michigan.— Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243.

Wisconsin.— Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

See 38 Cent. Dig. tit. "Partnership," § 128.

36. Greatrex *v.* Greatrex, 1 De G. & S. 692, 11 Jur. 1052, 63 Eng. Reprint 1254; Goodman *v.* Whitecomb, 1 Jac. & W. 589, 37 Eng. Reprint 492.

37. Saunders *v.* Duval, 19 Tex. 467; Taylor *v.* Rundell, 5 Jur. 1129, 1 Y. & Coll. 128, 20 Eng. Ch. 128, 62 Eng. Reprint 821 [*affirmed* in 7 Jur. 1073, 13 L. J. Ch. 20, 1 Phil. 222, 19 Eng. Ch. 222, 41 Eng. Reprint 616].

38. Caswell *v.* Hazard, 19 N. Y. Suppl. 721; Stidger *v.* Reynolds, 10 Ohio 351; Rohr *v.* Pearson, 16 Oreg. 325, 14 Pac. 297; Lewis *v.* Loper, 54 Fed. 237. See also *infra*, IX, D, 12, f.

39. Richardson *v.* Pumphrey, 2 La. Ann. 448; Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

40. *Colorado.*— Hottel *v.* Mason, 16 Colo. 43, 26 Pac. 335.

Illinois.— Albee *v.* Wachter, 74 Ill. 173; Stuart *v.* McKichan, 74 Ill. 122.

New York.— Allen *v.* Coit, 6 Hill 318.

North Carolina.— Philips *v.* Turner, 22 N. C. 123.

Ohio.— Keys *v.* Baldwin, 10 Ohio Dec. (Reprint) 268, 19 Cinc. L. Bul. 375.

See 38 Cent. Dig. tit. "Partnership," § 128. And see *infra*, IX, D, 12, f.

41. Tallmadge *v.* Penoyer, 35 Barb. (N. Y.) 120; Garretson *v.* Brown, 185 Pa. St. 447,

the bookkeeping of one partner can be questioned by a copartner who is not *in pari delicto*,[42] and who is not chargeable with laches.[43] A solvent partner is entitled to retain the firm books as against the trustee in bankruptcy of a copartner.[44] A partner who has no share in the good-will of the business is not entitled during the partnership to extract from the books of the firm the names and addresses of customers for the purpose of soliciting such customers on his own behalf after the termination of the partnership.[45]

15. Statements of Account During the Continuance of the Partnership. Statements of account, whether taking the form of periodical balances on the firm's books,[46] or of formal documents interchanged among the partners,[47] are generally conclusive upon the partners, unless impeachable because of fraud or mutual mistake.[48] It is the duty of each partner to examine such accountings and complain promptly of any mistakes therein. Failure to do this and consequent acquiescence in the correctness of the statements operate ordinarily as a bar to any subsequent claim inconsistent with them.[49]

16. Arbitration of Differences. Partnership articles often contain a provision that questions in dispute between partners shall be submitted to the decision of arbitrators to be selected in an agreed manner. The courts are not inclined to enforce such a stipulation either directly by decree for specific performance, or by a refusal to entertain an action for dissolution and settlement by a partner who refuses to act in accordance with the stipulation.[50] If, however, the partners have lawfully submitted their differences to arbitration and an award has been regularly made, the courts will recognize and enforce it.[51]

17. Services and Compensation. As it is the legal duty of each member of a firm in the absence of an exemption therefrom by contract to devote his entire time and business energies to partnership affairs, it follows that a partner is not entitled to compensation for his services, however valuable to the firm they may be, unless there is a contract therefor.[52] Such contract may be express or it may

40 Atl. 293; Ferguson *v.* Wright, 61 Pa. St. 258 [*reversing* 7 Phila. 92].

42. Carpenter *v.* Camp, 39 La. Ann. 1024, 30 So. 269.

43. Lewis *v.* Loper, 54 Fed. 237. *Compare* Shoemaker *v.* Shoemaker, 92 S. W. 546, 29 Ky. L. Rep. 134.

44. *Ex p.* Freeman, 4 Deac. & C. 404; *Ex p.* Finch, 1 Deac. & C. 274.

45. Trego *v.* Hunt, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. N. S. 514, 44 Wkly. Rep. 225.

46. Meguiar *v.* Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. Rep. 757 (where partners have construed the contract of partnership by monthly entries on the books for a period of seven years they will not be allowed to open the accounts and have a readjustment of balances that contradicts such construction); Lewis *v.* Loper, 54 Fed. 237.

47. Stretch *v.* Talmadge, 65 Cal. 510, 4 Pac. 513.

48. Gage *v.* Parmelee, 87 Ill. 329; Broderick *v.* Beaupre, 40 Minn. 379, 42 N. W. 83; Dobbins *v.* Tatem, (N. J. Ch. 1892) 25 Atl. 544. See also *infra*, IX, D, 12, f.

49. Broderick *v.* Beaupre, 40 Minn. 379, 42 N. W. 83 (annual accountings were made simply to ascertain the net profits, and were not inconsistent with a provision in the partnership articles by which one partner guaranteed that the other's share of the profits should amount to a fixed sum); Heartt *v.* Corning, 3 Paige (N. Y.) 566; Atwater *v.* Fowler, 1 Edw. (N. Y.) 417 (no objections made for thirteen years and statement held conclusive); Lynch *v.* Bitting, 59 N. C. 238 (occasional calculations of interest and summing up of results are not statements of an account); Keys *v.* Baldwin, 10 Ohio Dec. (Reprint) 271, 19 Cinc. L. Bul. 376.

50. Meaher *v.* Cox, 37 Ala. 21; Page *v.* Vankirk, 1 Brewst. (Pa.) 282, 6 Phila. 264; Dawson *v.* Fitzgerald, 1 Ex. D. 257, 45 L. J. Exch. 893, 35 L. T. Rep. N. S. 220, 24 Wkly. Rep. 773; Agar *v.* Macklew, 4 L. J. Ch. O. S. 16, 2 Sim. & St. 418, 1 Eng. Ch. 418, 57 Eng. Reprint 405.

51. *California.*— Fulmore *v.* McGeorge, 91 Cal. 611, 28 Pac. 92.

Delaware.— Du Pusey *v.* Du Pont, 1 Del. Ch. 82, the award must be strictly confined to the matters agreed to be arbitrated.

New Hampshire.— Gibson *v.* Moore, 6 N. H. 547.

Tennessee.— Piper *v.* Smith, 1 Head 93.

Vermont.—Lamphire *v.* Cowan, 39 Vt. 420.

England.— Lingood *v.* Eade, 2 Atk. 501, 26 Eng. Reprint 702; Hutchinson *v.* Whitfield, Hayes 78; Green *v.* Waring, W. Bl. 475. If the award has proceeded upon a mistake, an account may be directed by the court, notwithstanding all matters of difference were expressly submitted to the arbitrators. Spencer *v.* Spencer, 2 Y. & J. 249, 31 Rev. Rep. 583.

See also *infra*, IX, C, 7, c.

52. *Alabama.*— Zimmerman *v.* Huber, 29 Ala. 379.

be implied from the conduct of the parties and the circumstances of the particular partnership.[53] Even when a contract for extra compensation exists, the

Arkansas.—Haller *v.* Willamowicz, 23 Ark. 566.

California.— Moynihan *v.* Drobag, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46.

Delaware.— Reybold *v.* Dodd, 1 Harr. 401, 26 Am. Dec. 401.

District of Columbia.— Baker *v.* Cummings, 8 App. Cas. 515.

Illinois.— Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Ligare *v.* Peacock, 109 Ill. 94; King *v.* Hamilton, 16 Ill. 190; Roach *v.* Perry, 16 Ill. 37; Heckard *v.* Fay, 57 Ill. App. 20; Cook *v.* Phillips, 16 Ill. App. 446; Gerard *v.* Gateau, 15 Ill. App. 520.

Indiana.— McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358.

Iowa.— Dupuy *v.* Sheak, 57 Iowa 361, 10 N. W. 731 (rule applied to the husband of one partner who simply represented her in the firm business); Boardman *v.* Close, 44 Iowa 428; Levi *v.* Karrick, 13 Iowa 344.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

Kentucky.— Lee *v.* Lashbrooke, 8 Dana 214; Chamberlain *v.* Sawyers, 32 S. W. 475, 17 Ky. L. Rep. 716.

Louisiana.— Taylor *v.* Ragland, 42 La. Ann. 1020, 8 So. 467; Mills *v.* Fellows, 30 La. Ann. 824.

Maryland.— Bevans *v.* Sullivan, 4 Gill 383.

Michigan.— Pierce *v.* Pierce, 89 Mich. 233, 50 N. W. 851; Major *v.* Todd, 84 Mich. 85, 47 N. W. 841; Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862; Heath *v.* Waters, 40 Mich. 457, the sickness of a partner is one of the risks incidental to partnership business, and does not give another partner any claim for personal services in conducting the entire business, if the partnership articles do not provide for any.

Mississippi.— Randle *v.* Richardson, 53 Miss. 176.

Missouri.— Gaston *v.* Kellogg, 90 Mo. 104, 3 S. W. 589; Reily *v.* Russell, 34 Mo. 524; Inglis *v.* Floyd, 33 Mo. App. 565.

Montana.— Galigher *v.* Lockhart, 11 Mont. 109, 27 Pac. 446, construing Rev. Civ. Code, § 3203.

Nebraska.—Warren *v.* Raben, 33 Nebr. 380, 50 N. W. 257; Lamb *v.* Wilson, 3 Nebr. (Unoff.) 505, 97 N. W. 325.

Nevada.— Folsom *v.* Marlette, 23 Nev. 459, 49 Pac. 39.

New Jersey.— Coddington *v.* Idell, 29 N. J. Eq. 504.

New York.— Evans *v.* Warner, 20 N. Y. App. Div. 230, 47 N. Y. Suppl. 16; Gilhooley *v.* Hart, 8 Daly 176; Caldwell *v.* Leiber, 7 Paige 483; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Franklin *v.* Robinson, 1 Johns. Ch. 157; Dougherty *v.* Van Nostrand, Hoffm. 68.

North Carolina.— Butner *v.* Lemly, 58 N. C. 148; Anderson *v.* Taylor, 37 N. C. 420, 38 Am. Dec. 689; Philips *v.* Turner, 22 N. C. 123; Buford *v.* Neely, 17 N. C. 481.

North Dakota.— Wisner *v.* Field, 11 N. D. 257, 91 N. W. 67, construing Rev. Civ. Code, § 4382.

Ohio.— Shumard *v.* Gano, 18 Ohio Cir. Ct. 871, 8 Ohio Cir. Dec. 370; Lyghtel *v.* Collins, 11 Ohio Dec. (Reprint) 161, 25 Cinc. L. Bul. 125; Myers *v.* Kirby, 9 Ohio Dec. (Reprint) 297, 12 Cinc. L. Bul. 78.

Oregon.—Mann *v.* Flanagan, 9 Oreg. 425.

Pennsylvania.— Delp *v.* Edlis, 190 Pa. St. 25, 42 Atl. 462; Lindsey *v.* Stranahan, 129 Pa. St. 635, 18 Atl. 524; Matter of Fry, 4 Phila. 129.

Tennessee.— Murray *v.* Johnson, 1 Head. 353; Piper *v.* Smith, 1 Head 93.

Utah.— Hannaman *v.* Karrick, 9 Utah 236, 33 Pac. 1039.

Vermont.— Cheeny *v.* Clark, 3 Vt. 431, 23 Am. Dec. 219.

Virginia.— Scott *v.* Boyd, 101 Va. 28, 42 S. E. 918; Frazier *v.* Frazier, 77 Va. 775; Forrer *v.* Forrer, 29 Gratt. 134.

West Virginia.— Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Taylor *v.* Dorr, 43 W. Va. 351, 27 S. E. 317; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

Wisconsin.— Drew *v.* Ferson, 22 Wis. 651.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

See 38 Cent. Dig. tit. "Partnership," § 131. And see *infra*, VIII, I, 2; IX, C, 3, i.

Partnership contract rescinded for fraud.— On rescission of a contract of partnership because of one being induced by fraud to enter into it, he may recover, not only the value of what he put into the business, with interest, but the value of his services in attending to the business; he accounting for what he has drawn out of the business, with interest, from the time of the dissolution of the partnership to the judgment, on the amount he has drawn out in excess of what he was entitled to for his services, the time when he drew it out not appearing more definitely than that it was during the continuance of the business. Caplen *v.* Cox, (Tex. Civ. App. 1906) 92 S. W. 1048.

53. *Alabama.*—Adams *v.* Warren, (1892) 11 So. 754.

California.— Nevills *v.* Moore Min. Co., 135 Cal. 561, 67 Pac. 1054.

Georgia.— Gray *v.* Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72.

Illinois.— Van Housen *v.* Copeland, 180 Ill. 74, 54 N. E. 169 [*affirming* 79 Ill. App. 139]; Askew *v.* Springer, 111 Ill. 662; Lewis *v.* Moffett, 11 Ill. 392; Cook *v.* Phillips, 16 Ill. App. 446; Gerard *v.* Gateau, 15 Ill. App. 520.

Indiana.— Parsons *v.* Tilman, 95 Ind. 452.

Iowa.— Smith *v.* Knight, 88 Iowa 257, 55 N. W. 189; Levi *v.* Karrick, 13 Iowa 344.

Kentucky.— Bales *v.* Ferrell, 49 S. W. 759, 20 Ky. L. Rep. 1564.

Massachusetts.— Hoag *v.* Alderman, 184

partner may lose his claim by his failure to perform the contract obligations.[54] A partner's violation of his duty to render services may subject him to liability to the firm therefor;[55] and some courts have treated such a violation, especially when culpable, as justifying a claim for extra compensation by the other copartner.[56] The rule denying compensation to a partner for his services does not apply to personal service rendered by one partner to another outside of firm affairs;[57] nor to services rendered to the firm by a partner's children;[58] nor to compensation for the use of a partner's individual property by the firm.[59]

18. Reimbursement of Expenses and Losses. Each member of a partnership is entitled to reimbursement or indemnity therefrom for everything that he properly expends for the benefit thereof,[60] and also for risks which he necessarily incurs

Mass. 217, 68 N. E. 199; Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

Michigan.— Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243.

Missouri.— Cramer *v.* Bachman, 68 Mo. 310; Miller *v.* Hale, 96 Mo. App. 427, 70 S. W. 258.

New York.— Luce *v.* Hartshorn, 56 N. Y. 621 [*affirming* 7 Lans. 331]; Hagenbuchle *v.* Schultz, 69 Hun 183, 23 N. Y. Suppl. 611; Hasbrouck *v.* Childs, 3 Bosw. 105; Bradford *v.* Kimberly, 3 Johns. Ch. 431.

North Carolina.— Weaver *v.* Upton, 29 N. C. 458.

Pennsylvania.— McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962; Shirk's Appeal, 3 Brewst. 119.

Texas.— Gresham *v.* Harcourt, (Civ. App. 1899) 50 S. W. 1058.

Virginia.— Bissell *v.* Hood, 101 Va. 452, 44 S. E. 715; Garrett *v.* Bradford, 28 Gratt. 609.

See 38 Cent. Dig. tit. "Partnership," § 131.

54. *Arkansas.*— Weeks *v.* McClintock, 50 Ark. 193, 6 S. W. 734.

Kentucky.— Stone *v.* Mattingly, 19 S. W. 402, 14 Ky. L. Rep. 113.

Massachusetts.— Kinney *v.* Maher, 156 Mass. 252, 30 N. E. 818.

Michigan.— Comstock *v.* McDonald, 126 Mich. 142, 85 N. W. 579.

Minnesota.— Brandt *v.* Edwards, 91 Minn. 505, 98 N. W. 647.

Mississippi.— Gullich *v.* Alford, 61 Miss. 224.

Vermont.— Bradley *v.* Chamberlin, 16 Vt. 613.

United States.— Shaeffer *v.* Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721 [*reversing* 33 Fed. 218].

See 38 Cent. Dig. tit. "Partnership," § 131.

55. Parsons *v.* Jennings, 71 Conn. 494, 42 Atl. 630; Brandt *v.* Edwards, 91 Minn. 505, 98 N. W. 647; Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206.

56. Morris *v.* Griffin, 83 Iowa 327, 49 N. W. 846; Mattingly *v.* Stone, 35 S. W. 921, 18 Ky. L. Rep. 187; Emerson *v.* Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593; Airey *v.* Borham, 29 Beav. 620, 4 L. T. Rep. N. S. 391, 54 Eng. Reprint 768.

57. Lell *v.* Hardesty, 66 S. W. 643, 23 Ky. L. Rep. 2073; Cunliff *v.* Dyerville Mfg. Co., 7 R. I. 325.

58. Zimmerman *v.* Huber, 29 Ala. 379; Taylor *v.* Ragland, 42 La. Ann. 1020, 8 So. 467.

59. Jordan *v.* Wilson, 64 Ill. App. 665; Edelen *v.* Walker, 53 S. W. 38, 21 Ky. L. Rep. 839; Nodine *v.* Shirley, 24 Oreg. 250, 33 Pac. 379.

60. *Connecticut.*— Pond *v.* Clark, 24 Conn. 370.

Illinois.— Stuart *v.* McKichan, 74 Ill. 122; King *v.* Hamilton, 16 Ill. 190; Roach *v.* Perry, 16 Ill. 37.

Louisiana.— Harris' Succession, 39 La. Ann. 443, 2 So. 39, 4 Am. St. Rep. 269; Doaue *v.* Adams, 15 La. Ann. 350; Pratt *v.* McHatton, 11 La. Ann. 260; Reynaud *v.* Peytavin, 13 La. 121 ("In a universal partnership under the Spanish law, the partners' person and household expenses, however unequal in amount, are chargeable to the firm"); Day *v.* Morte, 2 Mart. N. S. 90 (holding that a firm was bound to bear the prison expenses of a partner, under an execution against his body on a judgment against the firm).

Michigan.— Bates *v.* Lane, 62 Mich. 132, 28 N. W. 753; Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127.

Missouri.— Roberts *v.* Herryford, 54 Mo. App. 365; Inglis *v.* Floyd, 33 Mo. App. 565.

New Hampshire.— Mason *v.* Gibson, 73 N. H. 190, 60 Atl. 96; Hayes *v.* Hayes, 66 N. H. 134, 19 Atl. 571.

New Jersey.— Onderdonk *v.* Hutchinson, 6 N. J. Eq. 632.

New York.— Mumford *v.* Nicoll, 20 Johns. 611, firm liable for expense of repairs on partnership vessel during a voyage.

North Carolina.— Wilson *v.* Lineberger, 83 N. C. 524.

Pennsylvania.— Gordon *v.* Moore, 134 Pa. St. 486, 19 Atl. 753 (expenses not allowed, when incurred against the protest of the copartner); Patterson *v.* Lytle, 11 Pa. St. 53.

Texas.— Carhart *v.* Brown, 86 Tex. 425, 25 S. W. 415 [*reversing* (Civ. App. 1893) 25 S. W. 331].

Vermont.— Brigham *v.* Dana, 29 Vt. 1.

United States.— Withers *v.* Withers, 8 Pet. 355, 8 L. ed. 972, a partner was allowed all his personal expenses while away from home on firm business, although the partnership contract bound each partner to pay his own individual expenses; that contract provision being construed to apply only to expenses when the parties were at home.

England.— Partn. Act (1890), § 24 (2);

on its behalf.[61] This right to reimbursement or to indemnity may be contracted away.[62]

19. Interest of Partner in Profits. The profits of a partnership are to be divided equally between the partners, however unequal may be their contributions of capital or of services, in the absence of an agreement express or implied to the contrary, or unless some fact or circumstance exists from which it may be inferred that the partners intended that the profits should be divided in unequal proportions.[63]

In re Court Grange Silver-Lead Min. Co., 2 Jur. N. S. 949; Burden *v.* Burden, 1 Ves. & B. 170, 12 Rev. Rep. 210, 35 Eng. Reprint 67. A partner will not be allowed expenses for which he refuses to give an account, such as secret service payments, or lump sum expenditures. York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 51 Eng. Reprint 866; East India Co. *v.* Blake, Rep. t. Finch 117.

See 38 Cent. Dig. tit. "Partnership," § 132. And see *infra*, IX, C, 3, e.

Expenditures must be beneficial.— On a partnership accounting, a partner is not entitled to credit for expenditures made by him which he deemed necessary and proper, unless it is shown that they related to the common undertaking and were in some way beneficial to the partnership. Van Tine *v.* Hilands, 142 Fed. 613.

61. Butler *v.* Butler, 164 Ill. 171, 45 N. E. 426 [*affirming* 61 Ill. App. 51]; Stone *v.* Wendover, 2 Mo. App. 247; Erben *v.* Heston, 202 Pa. St. 406, 51 Atl. 1025; Wright *v.* Hunter, 5 Ves. Jr. 792, 31 Eng. Reprint 861.

62. Consolidated Bank *v.* State, 5 La. Ann. 44; Fairfield *v.* Day, 71 N. H. 63, 51 Atl. 263; Sibley *v.* Stalkweather, 6 N. Y. Suppl. 81; Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

63. *Alabama.*— Dumont *v.* Ruepprecht, 38 Ala. 175; Desha *v.* Smith, 20 Ala. 747 (holding that partners may enter into such stipulations respecting the division of the profits, or the advantage which each is to derive therefrom, as they may see fit, unless their pretended contract is a mere device or cover for usury; and that such contract being legal, will form the rule by which the rights of each, in the settlement of their joint affairs, will be ascertained and adjusted); Donelson *v.* Posey, 13 Ala. 752; Turnipseed *v.* Goodwin, 9 Ala. 372.

California.— Gorham *v.* Heiman, 90 Cal. 346, 27 Pac. 289; Carpenter *v.* Hathaway, 87 Cal. 434, 25 Pac. 549; Griggs *v.* Clark, 23 Cal. 427.

Connecticut.— Pond *v.* Clark, 24 Conn. 370.

Delaware.— Plunkett *v.* Dillon, 4 Houst. 338.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Georgia.— Parnell *v.* Robinson, 58 Ga. 26.

Illinois.— Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850.

Iowa.— Helmer *v.* Yetzer, 92 Iowa 627, 61 N. W. 206.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506 (partners under a parol contract are entitled to an equal share of the profits); Stuart *v.* Harmon, 72 S. W. 365, 24 Ky. L. Rep. 1829, 75 S. W. 257, 25 Ky. L. Rep. 439; Avritt *v.* Russell, 58 S. W. 811, 22 Ky. L. Rep. 752; Atherton *v.* Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. Rep. 185.

Louisiana.— Wolfe *v.* Gilmer, 7 La. Ann. 583; Zacharie *v.* Blandin, 6 La. 193.

Maryland.— Fleischmann *v.* Gottschalk, 70 Md. 523, 17 Atl. 384; Welsh *v.* Canfield, 60 Md. 469.

Massachusetts.— Harris *v.* Carter, 147 Mass. 313, 17 N. E. 649; Meserve *v.* Andrews, 106 Mass. 419; Fuller *v.* Miller, 105 Mass. 103.

Michigan.— Snyder *v.* O'Beirne, 132 Mich. 340, 93 N. W. 872; Houghton *v.* Bradley, 113 Mich. 599, 71 N. W. 1112; Wingarden *v.* Verhage, 68 Mich. 14, 35 N. W. 801.

Mississippi.— Clark *v.* Clark, (1895) 17 So. 510.

Missouri.— Miller *v.* Hale, 96 Mo. App. 427, 70 S. W. 258.

Montana.— Murphy *v.* Patterson, 24 Mont. 575, 63 Pac. 375.

Nebraska.— Warren *v.* Raben, 33 Nebr. 380, 50 N. W. 257.

New Jersey.— Ratzer *v.* Ratzer, 28 N. J. Eq. 136.

New York.— Evans *v.* Warner, 20 N. Y. App. Div. 230, 47 N. Y. Suppl. 16; Caldwell *v.* Leiber, 7 Paige 483.

North Carolina.— Jones *v.* Jones, 36 N. C. 332; Taylor *v.* Taylor, 6 N. C. 70.

Ohio.— Gill *v.* Geyer, 15 Ohio St. 399; Keys *v.* Baldwin, 10 Ohio Dec. (Reprint) 268, 19 Cinc. L. Bul. 375.

Pennsylvania.— Frazer *v.* Linton, 183 Pa. St. 186, 38 Atl. 589; Fulmer's Appeal, 90 Pa. St. 143; McIntire's Appeal, 18 Pa. St. 421, 11 Atl. 784.

Vermont.— Broadfoot *v.* Fraser, 73 Vt. 313, 50 Atl. 1054.

Virginia.— Towner *v.* Lane, 9 Leigh 262, *quære*.

United States.— Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Pearce *v.* Ham, 113 U. S. 585, 5 S. Ct. 676, 28 L. ed. 1067; Foster *v.* Goddard, 1 Black 506, 17 L. ed. 228; Van Tine *v.* Hilands, 142 Fed. 613; Duden *v.* Maloy, 63 Fed. 183, 11 C. C. A. 119.

England.— Brown *v.* Dale, 9 Ch. D. 78, 27 Wkly. Rep. 149; Collins *v.* Jackson, 31 Beav. 645, 54 Eng. Reprint 1289; Robinson *v.* Anderson, 20 Beav. 98, 52 Eng. Reprint 539 [*affirmed* in 7 De G. M. & G. 239, 56 Eng. Ch. 185, 44 Eng. Reprint 94]; Robley *v.* Brooke, 7 Bligh N. S. 90, 5 Eng. Reprint 705; Webster *v.* Bray, 7 Hare 159, 27 Eng. Ch. 159, 68 Eng. Reprint 65; Stewart *v.*

20. Liability of Partner For Expenses and Losses. The expenses and losses of a partnership are to be borne by the partners in the same proportion as they are to share the profits,[64] unless they contract for a different proportion.[65] Even when a partnership loss is occasioned by the conduct of one partner, without the participation of the others, it will not be charged to him, but will be borne by the firm, in the absence of fraud, culpable negligence, or bad faith on his part.[66]

Forbes, 13 Jur. 523, 1 Macn. & G. 137, 47 Eng. Ch. 110, 41 Eng. Reprint 1215 [*affirming* 12 Jur. 968, 16 Sim. 433, 39 Eng. Ch. 433, 60 Eng. Reprint 942]; Crawshay *v.* Collins, 2 Russ. 325, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358, 1 Jac. & W. 267, 21 Rev. Rep. 168, 37 Eng. Reprint 377; Peacock *v.* Peacock, 16 Ves. Jr. 49, 10 Rev. Rep. 138, 33 Eng. Reprint 902. In Stewart *v.* Forbes, 13 Jur. 523, 1 Macn. & G. 137, 47 Eng. Ch. 110, 41 Eng. Reprint 1215, an agreement for inequality of interests may be inferred from the dealings of the partners and the entries on their books.

See 38 Cent. Dig. tit. "Partnership," § 134. And see *infra*, IX, C, 3, h.

64. *California.*— Bates *v.* Coronado Beach Co., 109 Cal. 160, 41 Pac. 855.

Colorado.— Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018.

Illinois.— Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3 [*affirming* 29 Ill. App. 358]; Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Taft *v.* Schwamb, 80 Ill. 289; Campbell *v.* Stewart, 34 Ill. 151; Griffen *v.* Cooper, 50 Ill. App. 257; Savery *v.* Thurston, 4 Ill. App. 55.

Indiana.— Carlisle *v.* Tenbrook, 57 Ind. 529.

Kentucky.— Meguiar *v.* Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. Rep. 751; Miller *v.* Hughes, 1 A. K. Marsh. 181, 10 Am. Dec. 719; Atherton *v.* Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. Rep. 185.

Louisiana.— Lallande *v.* McRae, 16 La. Ann. 193; Buard *v.* Lemee, 12 Rob. 243; Griffin *v.* His Creditors, 6 Rob. 216; Dumartrait *v.* Gay, 1 Rob. 62. See also Stark *v.* Howcott, 118 La. 489, 43 So. 61.

Massachusetts.—Whitcomb *v.* Converse, 119 Mass. 38, 20 Am. Rep. 311.

Mississippi.— Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690.

Nebraska.— Warren *v.* Raben, 33 Nebr. 380, 50 N. W. 257.

New York.— Mumford *v.* Murray, 6 Johns. Ch. 1, expenses of a partner for individual, as distinct from firm affairs, are not chargeable to the firm. See also Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

Oregon.— Conn *v.* Conn, 22 Oreg. 452, 30 Pac. 230.

Texas.— Cheeves *v.* Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685; Miller *v.* Marx, 65 Tex. 131.

United States.— Lewis *v.* Loper, 54 Fed. 237; Oppenheimer *v.* Clemmons, 18 Fed. 886, as community of profits is essential to a complete partnership, when there is no express stipulation to the contrary, it will be presumed that the losses are to be shared in proportion to the profits.

England.— McOwen *v.* Hunter, Dr. & Wal. 347.

Canada.— Storm *v.* Cumberland, 18 Grant Ch. (U. C.) 245.

See 38 Cent. Dig. tit. "Partnership," § 135. And see *infra*, IX, C, 3, c; IX, D, 12, d.

65. *California.*— Boskowitz *v.* Nickel, 97 Cal. 19, 31 Pac. 732, by agreement, the interest on certain moneys of the firm was chargeable to one partner.

Illinois.— Flagg *v.* Stowe, 85 Ill. 164; Maher *v.* Bull, 44 Ill. 97.

Kentucky.— Meadows *v.* Mocquot, 110 Ky. 220, 61 S. W. 28, 22 Ky. L. Rep. 1646; Heran *v.* Hall, 1 B. Mon. 159, 35 Am. Dec. 178.

Louisiana.— Brodnax *v.* Steinhardt, 48 La. Ann. 682, 19 So. 572.

Minnesota.— Cole *v.* Aune, 46 Minn. 378, 49 N. W. 195.

New York.— Mallett *v.* Kellar, 181 N. Y. 543, 73 N. E. 1126 [*affirming* 91 N. Y. App. Div. 502, 86 N. Y. Suppl. 917]; Hart *v.* Myers, 128 N. Y. 578, 28 N. E. 250 [*affirming* 59 Hun 420, 13 N. Y. Suppl. 388, 12 N. Y. Suppl. 140, 25 Abb. N. Cas. 478]; Manley *v.* Taylor, 50 N. Y. Super. Ct. 26; Goedecke *v.* Schwerin, 14 N. Y. Suppl. 780; Walden *v.* Sherburne, 15 Johns. 409.

North Carolina.— Brown *v.* Haynes, 59 N. C. 49.

Ohio.— Hayes *v.* Fish, 36 Ohio St. 498.

Pennsylvania.— Magilton *v.* Stevenson, 173 Pa. St. 560, 34 Atl. 235 (stipulation that one partner's share of losses should not exceed one thousand two hundred and fifty dollars); Plumly *v.* Plumly, 6 Pa. Co. Ct. 72; Zaepfel *v.* Baumgardner, 6 Lanc. Bar 141; Early *v.* Durborow, 1 Leg. Gaz. 127.

South Carolina.— Cameron *v.* Watson, 10 Rich. Eq. 64, where by articles of copartnership, A contributes money, and B his personal services, in the event that there are no profits, and the capital furnished by A is lost, B cannot, in the absence of any agreement to the contrary, be called on to bear any proportion of the loss of the capital.

Wisconsin.— Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

England.— Geddes *v.* Wallace, 2 Bligh 270, 4 Eng. Reprint 328; Gillan *v.* Morrison, 1 De G. & Sm. 421, 11 Jur. 861, 63 Eng. Reprint 1131.

See 38 Cent. Dig. tit. "Partnership," § 135.

66. *Arkansas.*— Hall *v.* Sannoner, 44 Ark. 34.

California.— Chalmers *v.* Chalmers, 81 Cal. 81, 22 Pac. 395.

21. LIABILITY OF PARTNER FOR MISCONDUCT. While losses which are attributable to mere errors of judgment of a partner as distinguished from recklessness or bad faith are to be borne by the firm and not exclusively by him, as just stated,[67] yet, when losses are caused by a partner's acts, which amount to a breach of the partnership stipulation,[68] or which are beyond the scope of the firm business and not assented to or ratified by his copartners,[69] or which are characterized by bad faith toward them,[70] the losses must be borne by him alone. The same rule is ordinarily applied to losses from adventures embarked in by a partner against his copartners' protests,[71] as well as to those due to his positive misconduct.[72]

22. LIEN OF PARTNER ON FIRM PROPERTY. A partner's lien on firm property is not a legal or possessory lien,[73] but an equitable lien; that is, a right to insist that

Illinois.— Morrison *v.* Smith, 81 Ill. 221.

Iowa.— Leon Exch. Bank *v.* Gardner, 104 Iowa 176, 73 N. W. 591; Charlton *v.* Sloan, 76 Iowa 288, 41 N. W. 303.

Kentucky.— Mattingly *v.* Moore, 30 S. W. 870, 17 Ky. L. Rep. 220.

Louisiana.— Aiken *v.* Ogilvie, 12 La. Ann. 353; Mercier *v.* Sarpy, 1 Mart. 71, a consignee of goods to be sold on joint account, it will be presumed, has used and so will not be bound to prove due diligence in his sales, the losses on which the partners must share.

New Jersey.— Jessup *v.* Cook, 6 N. J. L. 434; Morris *v.* Allen, 14 N. J. Eq. 44.

New York.— Caldwell *v.* Leiber, 7 Paige 483.

Pennsylvania.— Knipe *v.* Livingston, 209 Pa. St. 49, 57 Atl. 1130; Lyons *v.* Lyons, 207 Pa. St. 7, 56 Atl. 54, 99 Am. St. Rep. 779.

Tennessee.— Blair *v.* Johnston, 1 Head 13.

Vermont.— Soules *v.* Burton, 36 Vt. 652.

United States.— U. S. *v.* Guerber, 124 Fed. 823.

England.— *In re* Protestant Assur. Assoc., 26 L. J. Ch. 455, 5 Wkly. Rep. 397; Cragg *v.* Ford, 1 Y. & Coll. Cas. 280, 20 Eng. Ch. 280, 62 Eng. Reprint 889.

See 38 Cent. Dig. tit. "Partnership," § 135.

Illustrations.— Where a partner goes away to attend to private business, and also to purchase merchandise for the firm, with the firm's money which he takes with him, and neither he nor the money is ever heard of, the loss of the money, in the absence of evidence showing fraud, negligence, or misconduct, must fall on the partnership. Jenkins *v.* Peckinpaugh, 40 Ind. 133. Where a loss occurs through securities taken by one partner proving worthless, such partner is not liable for the loss, where the securities were taken in good faith and without negligence. Pierce *v.* Bucklin, 7 Allen (Mass.) 261. See also Mayson *v.* Beazley, 27 Miss. 106. A partner who, without negligence, sold property of the firm to the Confederate government, from whom he could collect nothing, is not liable to his copartners. Peters *v.* McWilliams, 78 Va. 567.

A managing partner is not liable to his copartners for firm property lost without any wilful disregard of duty on his part. Snell *v.* De Land, 136 Ill. 533, 27 N. E. 183. See also McCrae *v.* Robeson, 6 N. C. 127.

Liability for ordinary negligence.— The obligation of one partner to another, in the management of the partnership business, is the exercise of good faith, and of ordinary care and prudence; and, if loss happens through the ordinary negligence of a partner, he must bear the loss. Carlin *v.* Donegan, 15 Kan. 495. And see Houston *v.* Polk, 124 Ga. 103, 52 S. E. 83; Bohrer *v.* Drake, 33 Minn. 408, 23 N. W. 840; Gordon *v.* Moore, 134 Pa. St. 486, 19 Atl. 753.

67. See *supra*, V, A, 20.

68. *Illinois.*— Flagg *v.* Stowe, 85 Ill. 164.

Louisiana.— Murphy *v.* Crafts, 13 La. Ann. 519, 71 Am. Dec. 519.

Missouri.— Baldwin *v.* Walser, 41 Mo. App. 243.

Tennessee.— Looney *v.* Gillenwaters, 11 Heisk. 133; Morris *v.* Wood, (Ch. 1896) 35 S. W. 1013.

Texas.— Gill *v.* Wilson, 2 Tex. App. Civ. Cas. § 380.

United States.— Denver *v.* Roane, 99 U. S. 355, 25 L. ed. 476.

See 38 Cent. Dig. tit. "Partnership," § 136.

69. Tutt *v.* Cloney, 62 Mo. 116; Halsted *v.* Schmelzel, 17 Johns. (N. Y.) 80; Smith *v.* Loring, 2 Ohio 440. *Compare* Cragg *v.* Ford, 1 Y. & Coll. Cas. 280, 20 Eng. Ch. 280, 62 Eng. Reprint 889.

70. Ball *v.* Lewin, 48 La. Ann. 359, 19 So. 118; Richardson *v.* Pumphrey, 2 La. Ann. 448; Yorks *v.* Tozer, 59 Minn. 78, 60 N. W. 846, 50 Am. St. Rep. 395, 28 L. R. A. 86; Gordon *v.* Moore, 134 Pa. St. 486, 19 Atl. 753; Lefever *v.* Underwood, 41 Pa. St. 505; Crawford *v.* Spotz, 11 Phila. (Pa.) 255; Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334.

71. Tomlinson *v.* Ward, 2 Conn. 396; Warren *v.* Raben, 33 Nebr. 380, 50 N. W. 257; Gordon *v.* Moore, 8 Pa. Co. Ct. 289.

72. Maher *v.* Bull, 44 Ill. 97; Walpole *v.* Renfroe, 16 La. Ann. 92; Pierce *v.* Daniels, 25 Vt. 624; Thomas *v.* Atherton, 10 Ch. D. 185, 48 L. J. Ch. 370, 40 L. T. Rep. N. S. 77; Campbell *v.* Campbell, 7 Cl. & F. 166, 7 Eng. Reprint 1030, Macl. & R. 387, 9 Eng. Reprint 142; Robertson *v.* Southgate, 6 Hare 536, 31 Eng. Ch. 536, 67 Eng. Reprint 1276; Mycock *v.* Beatson, 13 Ch. D. 384, 49 L. J. Ch. 127, 42 L. T. Rep. N. S. 141, 28 Wkly. Rep. 319.

73. Engles *v.* Engles, 4 Ark. 286, 38 Am. Dec. 37; Fordice *v.* Hardesty, 36 Ind. 23; Hodges *v.* Holeman, 1 Dana (Ky.) 50.

The transfer of the legal title to the firm property to a purchaser for value and without notice of the firm's interests therein dis-

the partnership effects shall be applied to the payment of partnership debts so that he may be exonerated from personal liability therefor.[74] This right or lien does not entitle the partner to compel a judgment creditor of the firm to have recourse to firm property before collecting the judgment from his individual property.[75] Indeed its principal function is performed in preventing the diversion of the firm assets from firm creditors, and after these are paid, in securing an equitable distribution of the balance among the parties. Accordingly, after firm debts are paid to outside creditors, this lien secures to each partner his share in the balance of the firm assets, as that share is ascertained on the final accounting between the partners.[76] The lien extends, however, only to firm assets,[77] and exists in favor only of claims growing out of partnership transactions.[78]

B. Individual Transactions — 1. Conflict of Partnership and Individual Interests. The duty which the law imposes upon a partner of acting with the utmost good faith toward his copartners, of devoting all his time and energies to the firm's business, and of accounting faithfully for all firm property coming to his hands,[79] makes it hazardous for him to engage in transactions in which his personal interests will be antagonistic to those of his firm. The courts will scrutinize such transactions very closely, and will compel the partner engaging in them to account to the firm for all profits arising therefrom,[80] or to hold for the firm's benefit the property thereby acquired,[81] unless the other partners assented to the transaction,[82] or unless it was entirely free from unfairness on his part.[83] The foregoing principles do not prevent a partner from acting as an agent for a third person in dealings with the firm where the firm is not harmed;[84] nor do they

charges all equitable interests of the firm. McNeil *v.* First Cong. Soc., 66 Cal. 105, 4 Pac. 1096; Duryea *v.* Burt, 28 Cal. 569.

74. Pearl *v.* Pearl, 1 Tenn. Ch. 206; Wiggins *v.* Blackshear, 86 Tex. 665, 26 S. W. 939; Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940; Payne *v.* Hornby, 25 Beav. 280, 53 Eng. Reprint 643; Skipp *v.* Harwood, 2 Swanst. 586, 36 Eng. Reprint 739; West *v.* Skip, 1 Ves. 239, 27 Eng. Reprint 1006. And see *infra*, IX, C, 5.

75. Hamsmith *v.* Espy, 13 Iowa 439; Villa *v.* Jonte, 17 La. Ann. 9; Nicholson *v.* Janeway, 16 N. J. Eq. 285; Barrett *v.* Furnish, 21 Oreg. 17, 26 Pac. 861; Herries *v.* Jamieson, 5 T. R. 556; Abbot *v.* Smith, W. Bl. 947.

76. *Alabama.*— Warren *v.* Taylor, 60 Ala. 218.

District of Columbia.— U. S. *v.* Groome, 13 App. Cas. 460.

Illinois.— Flagg *v.* Stowe, 85 Ill. 164.

Iowa.— Pierce *v.* Wilson, 2 Iowa 20.

Kentucky.— Holmes *v.* Stix, 104 Ky. 351, 47 S. W. 243, 20 Ky. L. Rep. 593; Hodges *v.* Holeman, 1 Dana 50; Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.

Louisiana.— Millaudon *v.* New Orleans, etc., R. Co., 3 Rob. 488.

Michigan.— Wilcox *v.* Matthews, 44 Mich. 192, 6 N. W. 215.

New York.— Ketchum *v.* Durkee, Hoffm. 538.

North Carolina.— Evans *v.* Bryan, 95 N. C. 174, 59 Am. Rep. 233.

Tennessee.— Williams *v.* Love, 2 Head 80, 73 Am. Dec. 191.

Texas.— Mansfield *v.* Neese, 21 Tex. Civ. App. 584, 54 S. W. 370.

England.— Stocken *v.* Dawson, 9 Beav. 239, 50 Eng. Reprint 335 [*affirmed* in 17 L. J. Ch. 282].

See 38 Cent. Dig. tit. "Partnership," § 137.

77. Brown *v.* Kennedy, 12 Colo. 235, 20 Pac. 696; Mann *v.* Higgins, 7 Gill (Md.) 265; Mosteller *v.* Bost, 42 N. C. 39; Payne *v.* Hornby, 25 Beav. 280, 53 Eng. Reprint 643.

78. Lewis *v.* Harrison, 81 Ind. 278; Uhler *v.* Semple, 20 N. J. Eq. 288; Evans *v.* Bryan, 95 N. C. 174, 59 Am. Rep. 233; Ryall *v.* Rolle, 1 Atk. 165, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074.

79. See *supra*, V, A, 1.

80. *Arkansas.*— Rutherford *v.* McDonnell, 66 Ark. 448, 51 S. W. 1060.

Kentucky.— Columbia Finance, etc., Co. *v.* Louisville First Nat. Bank, 116 Ky. 364, 76 S. W. 156, 25 Ky. L. Rep. 561.

Minnesota.— Bloom *v.* Lofgren, 64 Minn. 1, 65 N. W. 960.

South Carolina.— Whitman *v.* Bowden, 27 S. C. 53, 2 S. E. 630.

West Virginia.— McKinley *v.* Lynch, 58 W. Va. 44, 51 S. E. 4.

England.— Hichens *v.* Congreve, 1 Russ. & M. 150 note, 39 Eng. Reprint 58.

See 38 Cent. Dig. tit. "Partnership," § 139.

81. Lee *v.* Lashbrooke, 8 Dana (Ky.) 214; Walsh *v.* Braxton, 78 Tex. 563, 14 S. W. 573; Clegg *v.* Edmondson, 8 De G. M. & G. 787, 3 Jur. N. S. 299, 26 L. J. Ch. 673, 57 Eng. Ch. 608, 44 Eng. Reprint 593.

82. Peters *v.* Horbach, 4 Pa. St. 134.

83. Gilmour *v.* Kerr, 25 S. W. 270, 18 Ky. L. Rep. 400; Phillips *v.* Reeder, 18 N. J. Eq. 95; Wright *v.* Hooker, 10 N. Y. 51; Rhea *v.* Vannoy, 54 N. C. 282.

84. Randolph Bank *v.* Armstrong, 11 Iowa

operate to make the other partners parties to a contract which a third person has entered into with one partner as an individual.[85]

2. DEALINGS BETWEEN A PARTNER AND HIS FIRM. While a partner is bound to give all his time and energies to the partnership business, unless exempted therefrom by his copartners,[86] it is quite common for partners to buy property from the firm, or to rent or sell property to the firm,[87] to lend it money or to borrow from it,[88] and in many other ways to deal with it as though it were an artificial person. While such transactions are not considered as creating strictly legal obligations, between the partner on the one side and the firm on the other, courts of equity have always enforced such obligations and, under the reformed procedure both in England and in this country, they are enforceable in appropriate actions.[89] The law merchant adopted the civil law conception of a firm as a legal entity, and permitted the indorsement of negotiable paper, which was made by a firm to a partner or by a partner to his firm with the same effect as though the parties to the paper were strangers.[90] In jurisdictions where an assignee of a chose in action may sue in his own name, an action by the assignee of a partner's claim against his firm, or of the firm's claim against a partner, provided such claim is not a mere item in the partnership account, is maintainable.[91]

515; Westcott *v.* Tyson, 38 Pa. St. 389; Baring *v.* Lyman, 2 Fed. Cas. No. 983, 1 Story 396, a partner in a firm may be the agent of a third person in drawing bills in favor of the firm, for advances made to such third person, under an express authority.

85. Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 30 So. 528.

86. See *supra*, V, B, 1.

87. Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425 (a partner, who sells sand and lime to his firm, which is engaged in making mortar, is entitled to the fair market price of such materials, and is not bound to furnish them at cost price); Allen *v.* Anderson, 13 Ill. App. 451 (property leased by partner to the firm for its use); Henry *v.* Anderson, 77 Ind. 361 (land sold by a partner to his firm); Huffman Farm Co. *v.* Rush, 173 Pa. St. 264, 33 Atl. 1013.

88. *Illinois.*—McCall *v.* Moss, 112 Ill. 493; Leihy *v.* Briggs, 33 Ill. App. 534.

Kentucky.— Wilson *v.* Soper, 13 B. Mon. 411, 56 Am. Dec. 573, indebtedness was treated as an item in the firm account, rather than a distinct debt from the partner to the firm.

Louisiana.— Armistead *v.* Spring, 1 Rob. 567.

New York.— Brown *v.* Spohr, 87 N. Y. App. Div. 522, 84 N. Y. Suppl. 995; Heavenrich *v.* Heavenrich, 37 N. Y. App. Div. 450, 56 N. Y. Suppl. 45; Iddings *v.* Bruen, 4 Sandf. Ch. 223.

North Carolina.— Lassiter *v.* Stainback, 119 N. C. 103, 25 S. E. 726.

Virginia.— Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33, in order to constitute a loan to the firm, the transaction must be assented to by the other partners.

89. *Illinois.*— Hall *v.* Kimball, 77 Ill. 161; Haven *v.* Wakefield, 39 Ill. 509.

Minnesota.— Crosby *v.* Timolat, 50 Minn. 171, 52 N. W. 526.

Mississippi.— Chapman *v.* Evans, 44 Miss. 113; Calvit *v.* Markham, 3 How. 343.

New Jersey.— Galway *v.* Fullerton, 17 N. J. Eq. 389, a *bona fide* mortgage, given by a member of the firm to the firm, is valid, and in no sense a mortgage to the grantor himself.

New York.— Cole *v.* Reynolds, 18 N. Y. 74; Hayes *v.* Bement, 3 Sandf. 394.

Wisconsin.— Lathrop *v.* Knapp, 37 Wis. 307.

United States.— *In re* Buckhause, 4 Fed. Cas. No. 2,086, 2 Lowell 331, 10 Nat. Bankr. Reg. 206.

England.— Piercy *v.* Fynney, L. R. 12 Eq. 69, 40 L. J. Ch. 404, 19 Wkly. Rep. 710; De Tastet *v.* Shaw, 1 B. & Ald. 664; Richardson *v.* Bank of England, 2 Jur. 911, 8 L. J. Ch. 1, 4 Myl. & C. 165, 18 Eng. Ch. 165, 41 Eng. Reprint 65; Midland R. Co. *v.* Taylor, 8 H. L. Cas. 751, 8 Jur. N. S. 419, 31 L. J. Ch. 336, 6 L. T. Rep. N. S. 73, 10 Wkly. Rep. 382, 11 Eng. Reprint 624 [*affirmed* in 28 Beav. 287, 6 Jur. N. S. 595, 29 L. J. Ch. 731, 8 Wkly. Rep. 401, 54 Eng. Reprint 376].

See 38 Cent. Dig. tit. "Partnership," § 140.

90. *Maine.*— Woodman *v.* Boothby, 66 Me. 389.

Maryland.— Buchanan *v.* Mechanics' Loan, etc., Inst., 84 Md. 430, 35 Atl. 1099.

Massachusetts.— Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839 (the indorsee not being a *bona fide* holder was subject to the defenses against the payee partner); Parker *v.* Macomber, 18 Pick. 505.

Missouri.— Knaus *v.* Givens, 110 Mo. 58, 19 S. W. 535; Caldwell *v.* Dismukes, 111 Mo. App. 570, 86 S. W. 270.

North Carolina.—Blake *v.* Wheaton, 1 N. C. 49.

Tennessee.— Condon *v.* Callahan, 115 Tenn. 285, 89 S. W. 400, 112 Am. St. Rep. 833, 1 L. R. A. N. S. 643.

United States.— Smyth *v.* Strader, 4 How. 404, 11 L. ed. 1031; Baring *v.* Lyman, 2 Fed. Cas. No. 983, 1 Story 396.

See 38 Cent. Dig. tit. "Partnership," § 140.

91. Pike *v.* Hart, 30 La. Ann. 868; Campbell *v.* Bane, 119 Mich. 40, 77 N. W. 322; Sterling *v.* Chapin, 185 N. Y. 395, 78 N. E.

3. Dealings Between Copartners — a. In General. The fact that certain persons are copartners does not disqualify them from entering into contracts with each other as individuals. Their rights and liabilities under such contract will be the same ordinarily as though they were not partners,[92] even though these have relation to partnership property or interests, provided such contracts operate to lawfully convert firm property into the separate property of the individuals, and to take all matters connected with the transactions out of the partnership accounts.[93]

b. Purchase of Copartner's Interest in Firm. Purchases by one partner of his copartner's interest in the firm are of frequent occurrence, and when made in good faith operate to vest the ownership of firm property in the purchasing partner,[94]

158 [*reversing* 111 N. Y. App. Div. 912, 96 N. Y. Suppl. 1147, which *followed* Sterling *v.* Chapin, 102 N. Y. App. Div. 589, 92 N. Y. Suppl. 904]; Bank of British-North America *v.* Delafield, 126 N. Y. 410, 27 N. E. 797 [*affirming* 12 N. Y. Suppl. 440]; *Ex p.* Todd, De Gex 87.

92. *Alabama.*— Paine *v.* Moore, 6 Ala. 129.

Illinois.— Volk *v.* Roche, 70 Ill. 297 (authority given a partner by his copartner to pay debts for him is as valid and binding if given before as though given after a dissolution of the firm); Berry *v.* De Bruyn, 77 Ill. App. 359.

Michigan.— Bates *v.* Lane, 62 Mich. 132, 28 N. W. 753, money loaned by one partner to another, to enable the latter to meet his obligations to the firm, creates a personal claim by the lender against the borrower.

Missouri.— Matthews *v.* Perdue, 79 Mo. App. 149; Coggeshall *v.* Munger, 54 Mo. App. 420.

New Hampshire.— Herbert *v.* Odlin, 40 N. H. 267.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31, a partner who lends money to his copartner becomes the individual creditor of his copartner for the amount of the loan, although the amount so loaned is to be advanced by him as his share of the partnership assets.

North Carolina.— Mosteller *v.* Bost, 42 N. C. 39, if copartners give a bond to third persons, as between themselves, equity considers each a surety for the other, and, as such, regards him as a creditor, and entitled to all the privileges of one.

Pennsylvania.— McCoy *v.* McCoy, 202 Pa. St. 497, 52 Atl. 180; Jarecki *v.* Hays, 161 Pa. St. 613, 29 Atl. 118.

Tennessee.— Williams *v.* Love, 2 Head 80, 73 Am. Dec. 191.

Vermont.— Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797; Hatch *v.* Foster, 27 Vt. 515.

Wisconsin.— Bright *v.* Carter, 117 Wis. 631, 94 N. W. 645.

United States.— *In re* Waite, 28 Fed. Cas. No. 17,044, 1 Lowell 207, 1 Nat. Bankr. Reg. 373, a note given by the active partner, in whose name the business is carried on to the silent partner, for the amount of capital contributed by him is the separate note of the active partner.

England.— Want *v.* Reece, 1 Bing. 18, 8 E. C. L. 381; Bedford *v.* Brutton, 1 Bing. N. Cas. 399, 4 L. J. C. P. 97, 1 Scott 245, 27 E. C. L. 692; *Ex p.* Richardson, 3 Deac. & C. 244.

See 38 Cent. Dig. tit. "Partnership," § 141.

93. *Georgia.*— McDougald *v.* Banks, 13 Ga. 451, firm property may be rented, and each partner by agreement may collect and discharge his share of the rent.

Iowa.— Jones *v.* Fields, 57 Iowa 317, 10 N. W. 747.

Kentucky.— Morrison *v.* Stockwell, 9 Dana 172 (where the name of a firm is signed by one of two partners to a note payable to the other, it is in effect merely the note of the former to the latter, and the payee may be sued thereon); Fry *v.* Scott, 11 S. W. 426, 10 Ky. L. Rep. 1013.

Louisiana.— Thomson *v.* Mylne, 11 Rob. 349.

Massachusetts.— Shurtleff *v.* Willard, 19 Pick. 202.

Michigan.— Hoskins *v.* Dickinson, 124 Mich. 11, 82 N. W. 660; Bullard *v.* Hascall, 25 Mich. 132.

Minnesota.— Hardin *v.* Jamison, 60 Minn. 348, 62 N. W. 394, where there are more than two partners, one of them cannot convey or lease to another partner firm property without the consent of the other members of the firm.

Missouri.— Coggeshall *v.* Munger, 54 Mo. App. 420; Love *v.* Van Every, 18 Mo. App. 196, a partner may purchase his copartner's interest in a contract which is not for the joint personal services of the two copartners.

New York.— Howard *v.* France, 43 N. Y. 593.

Texas.— Ford *v.* McBryde, 45 Tex. 498.

Wisconsin.— Bright *v.* Carter, 117 Wis. 631, 94 N. W. 645; Davies *v.* Skinner, 58 Wis. 638, 17 N. W. 427, 46 Am. Rep. 665.

See 38 Cent. Dig. tit. "Partnership," § 141.

94. *California.*— Taylor *v.* Ford, 131 Cal. 440, 63 Pac. 770; Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142.

Florida.— Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33, the covenant of the purchasing partner to pay the firm debts is ample consideration for the transfer of the firm title to the purchasing partner.

Illinois.— Durham *v.* Lathrop, 95 Ill. App. 429.

Iowa.— Lantz *v.* Ryman, 102 Iowa 348, 71 N. W. 212.

Missouri.—Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, 70 Mo. App. 301.

and the right to the purchase-price in the selling partner.[95] Appropriate relief may be had by either party, in case of a mutual mistake of fact involved in the contract.[96] When a partner transfers his interest in the firm to his copartner, not by way of any absolute sale, but as security only for a debt, such transfer does not dissolve the firm, nor vest sole ownership in the transferee.[97] Even a transaction intended as an absolute sale may be avoided by either party for actual fraud,[98] or for the violation of that high degree of good faith and fair dealing which the law requires of the partners in their transactions with each other,[99] or for the nonperformance of a condition imposed by the contract.[1] Ordinarily the sale to a copartner of all the right, title, and interest of the selling partner in a firm carries with it to the purchaser all claims which the seller has against the firm, whether such claims be for capital, advances, or accumulated profits, and it also relieves the seller from all liabilities to the firm for over-drafts or similar indebtedness.[2]

New Jersey.— Frank *v.* Morehead, (Ch. 1895) 31 Atl. 1016; Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, such a transfer cannot be rescinded on the ground that the purchaser turns out to be unable to fulfil promises which he honestly made during the negotiations.

Pennsylvania.— Clark *v.* Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Wiley *v.* Brundred, 158 Pa. St. 579, 28 Atl. 173, 180; Keyes' Appeal, 65 Pa. St. 196.

Tennessee.—Cook *v.* Beech, 10 Humphr. 412.

Texas.— Murchison *v.* Warren, 50 Tex. 27; Texas Produce Co. *v.* Turner, 7 Tex. Civ. App. 208, 26 S. W. 917.

Virginia.— Sexton *v.* Sexton, 9 Gratt. 204.

United States.— Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 866, 37 L. ed. 790 [*reversing* 36 Fed. 138]; Routh *v.* Boyd, 51 Fed. 821.

England.— *Ex p.* Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970.

See 38 Cent. Dig. tit. "Partnership," § 142; and *infra*, VII, A, 2.

95. Taylor *v.* Ford, 131 Cal. 440, 63 Pac. 770; Mentzer *v.* Robinson, 32 Ill. App. 151; Neal *v.* Berry, 86 Me. 193, 29 Atl. 987; Klase *v.* Bright, 71 Pa. St. 186; Wood *v.* Johnson, 13 Vt. 191.

96. Mussetter *v.* Timmerman, 11 Colo. 201, 17 Pac. 504 (by mutual mistake, certain debts of the firm were omitted from the schedule of the debts to be paid by the purchaser; the seller paid these debts and was allowed to recover one half of the amount from the purchaser); Maxfield *v.* Seabury, 75 Minn. 93, 77 N. W. 555; Plaut *v.* Marks, 11 Ohio Cir. Ct. 199, 5 Ohio Cir. Dec. 317; Waldheim *v.* Shane, 9 Ohio Dec. (Reprint) 560, 15 Cinc. L. Bul. 84 [*affirmed* in 24 Cinc. L. Bul. 428].

97. Monroe *v.* Hamilton, 60 Ala. 226; Warren *v.* Taylor, 60 Ala. 218; Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619.

98. Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; Muir *v.* Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. L. Rep. 14; Pomeroy *v.* Benton, 57 Mo. 531; Getty *v.* Donelly, 9 Hun (N. Y.) 603.

99. *California.*— Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662.

District of Columbia.— Baker *v.* Cummings, 4 App. Cas. 230.

Illinois.— Hopkins *v.* Watt, 13 Ill. 298.

New Jersey.— Powell *v.* Cash, 54 N. J. Eq. 218, 34 Atl. 131 [*affirmed* in 55 N. J. Eq. 826, 41 Atl. 1115]. But *compare* Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712.

New York.— Butler *v.* Prentiss, 158 N. Y. 49, 52 N. E. 652 [*reversing* 36 N. Y. Suppl. 301]; Hasberg *v.* McCarty, 14 Daly 414, 14 N. Y. St. 697 [*affirmed* in 127 N. Y. 655, 27 N. E. 817].

North Dakota.— Lay *v.* Emery, 8 N. D. 515, 79 N. W. 1053.

Pennsylvania.— Heebner *v.* Trumbower, 15 Montg. Co. Rep. 97. But *compare* Vittenbender *v.* Bittenbender, 3 Lack. Leg. N. 218.

Virginia.— Sexton *v.* Sexton, 9 Gratt. 204.

West Virginia.— McKinley *v.* Lynch, 58 W. Va. 44, 51 S. E. 4.

See 38 Cent. Dig. tit. "Partnership," § 142.

But see Pierce *v.* Ten Eyck, 9 Mont. 349, 23 Pac. 423.

Third persons.— Where one partner, unknown to the other, enters into a combination with third persons, whereby the value of the partnership assets is increased, and then purchases the interest of such partner, without revealing the facts, the third persons are not guilty of fraud as against the retiring partner. Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662.

1. Fitzgerald *v.* Christl, 20 N. J. Eq. 90; Brown *v.* Dennison, 28 N. Y. App. Div. 535, 51 N. Y. Suppl. 300 [*reversing* 22 Misc. 59, 49 N. Y. Suppl. 420]; Mathewson *v.* Allen, 10 R. I. 156; Crump *v.* Ligon, 37 Tex. Civ. App. 172, 84 S. W. 250; *In re* Kemptner, L. R. 8 Eq. 286, 21 L. T. Rep. N. S. 223, 17 Wkly. Rep. 818; *Ex p.* Wheeler, Buck 25. *Compare* Eggleston *v.* Wagner, 46 Mich. 610, 10 N. W. 37.

2. *Connecticut.*— Beckley *v.* Munson, 22 Conn. 299.

Illinois.— Kimball *v.* Walker, 30 Ill. 482; Taylor *v.* Coffing, 23 Ill. 273 [*overruling* Taylor *v.* Coffing, 18 Ill. 422; Coffing *v.* Taylor, 16 Ill. 457]; Hattenhauer *v.* Adamick, 70 Ill. App. 602.

Indiana.— Headley *v.* Shelton, 51 Ind. 388; Smith *v.* Evans, 37 Ind. 526.

Montana.— Pierce *v.* Ten Eyck, 9 Mont. 349, 23 Pac. 423.

This rule may of course be varied by the particular terms of the contract of sale.[3]

4. Transfer of a Partner's Interest to a Third Person. Purchasers of the share of an individual partner can only take his interest. That interest and not a share of the partnership effects is sold, and it consists of the vendor's share of the surplus which remains after the payment of the partnership debts and the settlement of accounts between the partners.[4] Such share is subject to the fluctuations of the firm's business, including firm debts subsequently contracted; and if, upon the winding up of the firm, the transferring partner's interest has no pecuniary value, the transferee takes nothing by his transfer.[5] In England such transferee acquires no right to interfere in the management of the firm affairs, or to an accounting by the other partners, or to an inspection of the firm books, but only to receive the share of the profits belonging to the transferring partner.[6] But in this country it has been held that a subpartner of one engaged with others in a joint enterprise is entitled to an accounting in reference thereto, although the other partners had no knowledge of the subpartnership.[7] And it has also been held that when a partner has assigned a definite portion of his share of the profits of the partnership, the assignee is entitled to maintain a bill in equity for an accounting and the ascertainment of the profits assigned.[8]

5. Acquiring Title or Interest Adverse to Firm or Copartners — a. During the Existence of the Firm. While the partnership relation continues, the law imposes upon each partner the duty of acting with the utmost good faith toward his copartners. It treats him as their confidential agent in all partnership transactions, and subjects him to the inability of such an agent to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member.[9] Accordingly, if he purchases property for his individual benefit,[10] or takes

New Jersey.— Fielder *v.* Beekman, (Ch. 1903) 54 Atl. 156.

New York.— Albright *v.* Voorhies, 36 Hun 437; Finley *v.* Fay, 17 Hun 67; Van Scoter *v.* Lefferts, 11 Barb. 140; Flynn *v.* Fish, 7 Lans. 117.

United States.— New York Fourth Nat. Bank *v.* New Orleans, etc., R. Co., 11 Wall. 624, 20 L. ed. 82; Bray *v.* Denning, 56 Fed. 1019 [*affirmed* in 61 Fed. 651, 10 C. C. A. 6]; Parker *v.* Muggridge, 18 Fed. Cas. No. 10,743, 2 Story 334.

See 38 Cent. Dig. tit. "Partnership," § 142.

Compare Kintrea *v.* Charles, 12 Grant Ch. (U. C.) 117, holding that where the indebtedness of the selling partner to the firm had been concealed by him, and did not appear on the books, the purchasing partner could call upon him to account for the moneys not appearing on the books.

3. *Indiana.*— Evans *v.* Bradford, 35 Ind. 527 (sale subject to tax lien); Garnier *v.* Gebhard, 33 Ind. 225.

Louisiana.— Morgan *v.* Davenport, 3 La. 184.

New Jersey.— Fielder *v.* Beekman, (Ch. 1903) 54 Atl. 156.

New York.— Finley *v.* Fay, 96 N. Y. 663; Deering *v.* Metcalf, 74 N. Y. 501.

Pennsylvania.— Blackiston's Appeal, 81* Pa. St. 339.

United States.— Levy *v.* Dattlebaum, 63 Fed. 992; Gunn *v.* Black, 60 Fed. 151, 8 C. C. A. 534.

See 38 Cent. Dig. tit. "Partnership," § 142.

4. Glynn *v.* Phetteplace, 26 Mich. 383; Lovejoy *v.* Bowers, 11 N. H. 404; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Tarbel *v.* Bradley, 7 Abb. N. Cas. (N. Y.) 273; Ross *v.* Henderson, 77 N. C. 170. See also Sloan *v.* Wilson, 117 Ala. 583, 23 So. 145; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Whitmore *v.* Shiverick, 3 Nev. 288. See also *infra*, VII, A, 3.

5. Daniel *v.* Crowell, 125 N. C. 519, 34 S. E. 684; State Bank *v.* Fowle, 57 N. C. 8; Cavender *v.* Bulteel, L. R. 9 Ch. 79, 43 L. J. Ch. 370, 29 L. T. Rep. N. S. 710, 22 Wkly. Rep. 177; Fereday *v.* Wightwick, 1 Russ. & M. 45, 5 Eng. Ch. 45, 39 Eng. Reprint 18, Taml. 250, 48 Eng. Reprint 100, 31 Rev. Rep. 93; Rennie *v.* Quebec Bank, 3 Ont. L. Rep. 541 [*affirming* 1 Ont. L. Rep. 303].

6. *In re* Garwood, [1903] 1 Ch. 236, 72 L. J. Ch. 208, 51 Wkly. Rep. 185, applying § 31 of Partn. Act (1890).

7. Nirdlinger *v.* Bernheimer, 133 N. Y. 45, 30 N. E. 561.

8. Bruns *v.* Spalding, 90 Md. 349, 45 Atl. 194.

9. Tebbetts *v.* Dearborn, 74 Me. 392; Mitchell *v.* Reed, 61 N. Y. 123, 19 Am. Rep. 252; Lacy *v.* Hall, 37 Pa. St. 360; Latta *v.* Kilbourn, 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169.

10. *Alabama.*— Zimmerman *v.* Huber, 29 Ala. 379, the purchase by one of a firm, at auction sale on account of the insurers of damaged property of the firm, must be regarded as made for the firm's benefit.

California.— Warren *v.* Schainwald, 62 Cal. 56.

a lease of it when the firm is entitled to the advantage of such purchase or lease,[11] or secures a valuable contract for himself, which it was his duty to obtain for the firm,[12] he will be treated as a trustee thereof for the firm and be compelled to account to the firm for the profits of the transaction, unless such a purchase or transaction is assented to by his copartners.[13] The same result will follow any attempt by one partner to appropriate firm property to his individual benefit, without the consent of his copartners.[14] Interests adverse to a copartner may, however, be lawfully acquired by a partner, when these are outside of the partnership affairs, for in such transactions they are in no sense confidential agents or trustees for each other.[15]

b. After the Dissolution of the Partnership. With the dissolution of the firm, the confidential relationship of the partners ceases, so far as new transactions are concerned and the former partners are at liberty to compete with each other, in buying property, in taking leases, or in making contracts precisely as though they had never been partners.[16]

6. Prohibited Transactions. One member of the firm cannot, without the

Kentucky.— Farmer *v.* Samuel, 4 Litt. 187, 14 Am. Dec. 106, where partnership land is sold on execution on a judgment against both the partners, a purchase by one of them does not extinguish the right of the other.

Massachusetts.— Jones *v.* Dexter, 130 Mass. 380, 39 Am. Rep. 459.

Michigan.— Gordon *v.* Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713, neither the partners nor their heirs can acquire any interest in partnership property, real or personal, adverse to the trust imposed upon it by law for the payment of the partnership debts.

Missouri.— Freeman *v.* Moffitt, 119 Mo. 280, 25 S. W. 87, where a partnership buys land, assuming a mortgage thereon, and allows it to be foreclosed for non-payment, a purchase by one of the partners under the mortgage sale does not entitle him to a deed of the land.

New York.— Swift *v.* Dean, 6 Johns. 523.

Pennsylvania.— Blaylock's Appeal, 73 Pa. St. 146; Coder *v.* Huling, 27 Pa. St. 84; Seibert *v.* Seibert, 1 Brewst. 531.

Texas.— Buford *v.* Ashcroft, 72 Tex. 104, 10 S. W. 346.

Vermont.— Pierce *v.* Daniels, 25 Vt. 624.

Virginia.— Forrer *v.* Forrer, 29 Gratt. 134.

United States.— Gaddie *v.* Mann, 147 Fed. 960 [*reversed* on other grounds in 158 Fed. 42]; Gunn *v.* Black, 60 Fed. 151, 8 C. C. A. 534.

England.— Dunne *v.* English, L. R. 18 Eq. 524, 31 L. T. Rep. N. S. 75.

See 38 Cent. Dig. tit. "Partnership," § 144.

11. *Arkansas.*—Sneed *v.* Deal, 53 Ark. 152, 13 S. W. 703.

Massachusetts.— Leach *v.* Leach, 18 Pick. 68, where one partner, during the partnership, takes a lease of the building in which the firm did business, for a term extending beyond the partnership, he is accountable to the representative of his copartner for the profits of the lease.

New York.— Mitchell *v.* Read, 84 N. Y. 556 [*affirming* 19 Hun 418], 61 N. Y. 123, 19 Am. Rep. 252 [*reversing* 61 Barb. 310].

Pennsylvania.— Johnson's Appeal, 115 Pa. St. 129, 8 Atl. 36, 2 Am. St. Rep. 539.

England.— Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115.

See 38 Cent. Dig. tit. "Partnership," § 144.

12. Comstock *v.* Buchanan, 57 Barb. (N. Y.) 127 [*affirmed* in 57 Barb. 146]; Weston *v.* Ketcham, 39 N. Y. Super. Ct. 54; Lacy *v.* Hall, 37 Pa. St. 360; Williamson *v.* Monroe, 101 Fed. 322; Miller *v.* O'Boyle, 89 Fed. 140; Lock *v.* Lynam, 4 Ir. Ch. 188; Russell *v.* Austwick, 1 Sim. 52, 27 Rev. Rep. 157, 2 Eng. Ch. 52, 57 Eng. Reprint 498; Mitchell *v.* Lister, 21 Ont. 318, plaintiff's remedy is by injunction or by an action for damages.

13. Blachley *v.* Coles, 6 Colo. 349; Boozer *v.* Webb, 25 S. C. 82.

14. *Illinois.*— Stearnes *v.* Joy, 41 Ill. App. 157.

Iowa.— Vetter *v.* Lentzinger, 31 Iowa 182; Saylor *v.* Mockbie, 9 Iowa 209.

Kentucky.— Bourne *v.* Wooldridge, 10 B. Mon. 492.

Mississippi.— Stegall *v.* Coney, 49 Miss. 761.

New York.— Comstock *v.* Buchanan, 57 Barb. 127; Cheeseman *v.* Sturges, 6 Bosw. 520. But *compare* Anderson *v.* Lemon, 8 N. Y. 236 [*reversing* 4 Sandf. 552].

See 38 Cent. Dig. tit. "Partnership," § 144.

But *compare* Batchelor *v.* Whitaker, 88 N. C. 350; Wheeler *v.* Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646.

15. McKenzie *v.* Dickinson, 43 Cal. 119; Bradbury *v.* Barnes, 19 Cal. 120; Rouquette *v.* Ryan, 8 S. W. 702, 10 Ky. L. Rep. 503.

16. Kayser *v.* Maugham, 8 Colo. 232, 339, 6 Pac. 803, 7 Pac. 286; Kennedy *v.* Porter, 109 N. Y. 526, 17 N. E. 426; American Bank Note Co. *v.* Edson, 1 Lans. (N. Y.) 388, 56 Barb. 84; Lafferty *v.* Lafferty, 174 Pa. St. 536, 34 Atl. 203, 205; Westcott *v.* Tyson, 38 Pa. St. 389; Capecci *v.* Alladio, 8 Wash. 637, 36 Pac. 692.

consent of all his copartners, use firm funds to pay individual debts,[17] or gain secret profits from firm business,[18] or use firm property for individual profit or benefit;[19] nor can a member of a firm engage in any transaction which is fraudulent toward the firm or a copartner.[20]

17. Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Noble *v.* Miley, 20 Mo. App. 360; Fisher *v.* Linton, 28 Ont. 322; Brunskill *v.* Chumasero, 5 U. C. Q. B. 474.

18. *California.*— Mattern *v.* Canavan, 3 Cal. App. 493, 86 Pac. 618.

District of Columbia.— Grafton *v.* Paine, 7 App. Cas. 255.

Georgia.— Solomon *v.* Solomon, 2 Ga. 18.

Kentucky.— Anderson *v.* Whitlock, 2 Bush 398, 92 Am. Dec. 489.

Louisiana.— Lowry *v.* Cobb, 9 La. Ann. 592.

Massachusetts.— Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

Missouri.— Dale *v.* Hogan, 39 Mo. App. 646.

New Jersey.— Rafferty *v.* Todd, 34 N. J. Eq. 552 [*affirming* 30 N. J. Eq. 254].

New York.—Herrick *v.* Ames, 8 Bosw. 115; Dunlop *v.* Richards, 2 E. D. Smith 181.

Texas.— Gill *v.* Wilson, 2 Tex. App. Civ. Cas. § 380.

West Virginia.— McMahon *v.* McClernan, 10 W. Va. 419.

United States.— Rogers *v.* Riessner, 30 Fed. 525.

England.— Fawcett *v.* Whitehouse, 4 L. J. Ch. O. S. 64, 8 L. J. Ch. O. S. 50, 1 Russ. & M. 132, 5 Eng. Ch. 132, 39 Eng. Reprint 51.

See 38 Cent. Dig. tit. "Partnership," §§ 149, 150.

19. *Arkansas.*— Roberts *v.* Totten, 13 Ark. 609.

Colorado.— Deaner *v.* O'Hara, 36 Colo. 476, 85 Pac. 1123.

Indiana.— Love *v.* Carpenter, 30 Ind. 284.

Iowa.— Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113.

Kansas.— Scruggs *v.* Russell, McCahon 39.

Kentucky.— Edelen *v.* Hagan, 7 S. W. 251, 9 Ky. L. Rep. 862.

Michigan.— Pierce *v.* Pierce, 89 Mich. 233, 50 N. W. 851.

Mississippi.— Stegall *v.* Coney, 49 Miss. 761; Cabaniss *v.* Clark, 31 Miss. 423.

Missouri.— American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771.

Nebraska.— Catron *v.* Shepherd, 8 Nebr. 308, 1 N. W. 204.

North Carolina.— Eason *v.* Cherry, 59 N. C. 261.

Ohio.— Reis *v.* Hellman, 25 Ohio St. 180 [*affirming* 1 Cinc. Super. Ct. 30].

Pennsylvania.— Coursin's Appeal, 79 Pa. St. 220; Waring *v.* Cram, 1 Pars. Eq. Cas. 516.

Tennessee.— Hunt *v.* Benson, 2 Humphr. 459; Morris *v.* Wood, (Ch. App. 1896) 35 S. W. 1013.

Texas.— Henson *v.* Byrne, (Civ. App. 1897) 41 S. W. 494.

United States.— Warren *v.* Burnham, 32 Fed. 579; Kelley *v.* Greenleaf, 14 Fed. Cas. No. 7,657, 3 Story 93.

See 38 Cent. Dig. tit. "Partnership," § 150.

Illustration.— Where a partnership was formed for the purpose of organizing a theatrical company and employing a particular actor, and a contract theretofore entered into between one of the partners and the actor was assigned to such theatrical company, which had assumed the liabilities and was entitled to the profits resulting from the transaction, one of the partners could not retain royalties, on the ground that he assisted in the writing of one of the plays used by the company, although the royalties to authors of plays were under the partnership agreement chargeable as an item of general expense. David Belasco Co. *v.* Klaw, 48 Misc. (N. Y.) 597, 97 N. Y. Suppl. 712.

Proportionate share of profits.—A partner who has withdrawn assets and invested them in a new enterprise without his copartner's consent is chargeable only with their proportionate share of the profits. Brown *v.* Schackelford, 53 Mo. 122.

Interest.— If one partner uses partnership funds in his own private business, he must account, not only for interest on the money withdrawn, but for the profits of the business. If he makes no profits he is chargeable only with simple interest; otherwise with compound. Stoughton *v.* Lynch, 1 Johns. Ch. (N. Y.) 467, 2 Johns. Ch. 209.

20. *Alabama.*— Bestor *v.* Barker, 106 Ala. 240, 17 So. 389.

Colorado.— Jennings *v.* Rickard, 10 Colo. 395, 15 Pac. 677.

Illinois.— Winstanley *v.* Gleyre, 146 Ill. 27, 34 N. E. 628.

Indiana.— Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446, holding that it is not fraudulent for a creditor partner to sell firm stock and apply the proceeds to his claim.

New York.— Esmond *v.* Seeley, 28 N. Y. App. Div. 292, 51 N. Y. Suppl. 36; Patterson *v.* Hare, 4 N. Y. App. Div. 319, 38 N. Y. Suppl. 565; Baumgarten *v.* Nichols, 69 Hun 216, 23 N. Y. Suppl. 592; Parsons *v.* Hughes, 9 Paige 592, defrauded partner defeated because he had executed a release.

Pennsylvania.— Zahn *v.* McMillin, 179 Pa. St. 146, 36 Atl. 188; Geddes' Appeal, 80 Pa. St. 442 (no fraud in the last case); Neil *v.* Neil, 25 Pa. Super. Ct. 605.

Texas.— Butler *v.* Edwards, (Civ. App. 1899) 50 S. W. 1045; Henson *v.* Byrne, (Civ. App. 1897) 41 S. W. 494.

Utah.— Rutan *v.* Huck, 30 Utah 217, 83 Pac. 833.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769.

United States.— Huiskamp *v.* West, 47

7. Engaging in Other Business. The law does not permit a partner, without the consent of his copartners, to carry on a business of the same nature and competing with that of the firm.[21] If he violates the rule, equity may enjoin him from carrying on such business,[22] and may compel him to account for and pay over to the firm all profits made therein.[23] But beyond the line of the trade or business in which the firm is engaged, there is no restraint upon the right of a partner to traffic for his own profit,[24] in the absence of an express agreement to the contrary;[25] and even if a partner has agreed not to carry on a separate business, his partners have no right to the profits he makes thereby,[26] although it may subject him to an injunction,[27] or to a claim for damages.[28]

C. Actions Between Partners — 1. Grounds of Action, Form of Remedy, and Defenses — a. In General. As a rule an action at law by one partner against his copartners will not lie on a claim growing out of the partnership transactions, until the business is wound up and the accounts finally settled.[29] It follows that

Fed. 236; Askew *v.* Odenheimer, 2 Fed. Cas. No. 587, Baldw. 380.

See 38 Cent. Dig. tit. "Partnership," § 152.

21. *Alabama.*— Christian, etc., Grocery Co. *v.* Hill, 122 Ala. 490, 26 So. 149.

District of Columbia.— Grafton *v.* Paine, 7 App. Cas. 255.

Illinois.— Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Metcalfe *v.* Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478 [*affirming* 43 Ill. App. 286].

Michigan.— Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

New York.—American Bank Note Co. *v.* Edson, 1 Lans. 388, 56 Barb. 84.

England.— Dean *v.* MacDowell, 8 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. Rep. N. S. 862, 26 Wkly. Rep. 486.

See 38 Cent. Dig. tit. "Partnership," § 153.

But *compare* Parnell *v.* Robinson, 58 Ga. 26; Kelley *v.* Shay, 206 Pa. St. 215, 55 Atl. 927.

22. Marshall *v.* Johnson, 33 Ga. 500.

23. Van Deusen *v.* Crispell, 114 N. Y. App. Div. 361, 99 N. Y. Suppl. 874; Manufacturers' Nat. Bank *v.* Cox, 2 Hun (N. Y.) 572 [*affirmed* in 59 N. Y. 659]; Herrick *v.* Ames, 8 Bosw. (N. Y.) 115; Moritz *v.* Peebles, 4 E. D. Smith (N. Y.) 135.

24. *California.*— McKenzie *v.* Dickinson, 43 Cal. 119.

Illinois.— Northrup *v.* Phillips, 99 Ill. 449.

Iowa.— Taylor *v.* Lovett, 87 Iowa 177, 54 N. W. 234.

Louisiana.— See Wartelle *v.* Le Blanc, 10 La. 556.

Pennsylvania.— Waring *v.* Cram, 1 Pars. Eq. Cas. 516. See also Freck *v.* Blakiston, 83 Pa. St. 474.

United States.— Wheeler *v.* Sage, 1 Wall. 518, 17 L. ed. 646.

See 38 Cent. Dig. tit. "Partnership," § 153.

25. Starr *v.* Case, 59 Iowa 491, 13 N. W. 645; Latta *v.* Kilbourn, 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169 [*reversing* 5 Mackey (D. C.) 304, 60 Am. Rep. 373].

26. Metcalfe *v.* Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478 [*affirming* 43 Ill. App. 286]; Murrell *v.* Murrell, 33 La. Ann. 1233; Latta *v.* Kilbourn, 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169 [*reversing* 5 Mackey (D. C.) 304, 60 Am. Rep. 373]; Aas *v.* Benham, [1891] 2 Ch. 244, 65 L. T. Rep. N. S. 25.

27. Levine *v.* Michel, 35 La. Ann. 1121.

28. Lessig *v.* Langton, Brightly (Pa.) 191; Dean *v.* MacDowell, 8 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. Rep. N. S. 862, 26 Wkly. Rep. 486; Lindley Partn. (7th ed.) 353.

29. *Alabama.*— Stowe *v.* Sewall, 3 Stew. & P. 67, the absconding of a partner gives no additional remedy at law against him.

Arkansas.— King *v.* Moore, 72 Ark. 469, 82 S. W. 494.

Connecticut.— Cole *v.* Fowler, 68 Conn. 450, 36 Atl. 807.

Indiana.— Bond *v.* May, 38 Ind. App. 396, 78 N. E. 260.

Kentucky.— Coulson *v.* Ferree, 85 S. W. 686, 27 Ky. L. Rep. 451; Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.

Maine.— Perry *v.* Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389.

Massachusetts.— Hill *v.* Clarke, 7 Allen 414.

Missouri.— McGinty *v.* Orr, 110 Mo. App. 336, 85 S. W. 955.

Montana.— Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625.

New Hampshire.— Perley *v.* Brown, 12 N. H. 493.

New York.— Mitchell *v.* Tonkin, 109 N. Y. App. Div. 165, 95 N. Y. Suppl. 669; Hollister *v.* Simonson, 36 N. Y. App. Div. 63, 55 N. Y. Suppl. 372; Leber *v.* Dietz, 22 Misc. 524, 49 N. Y. Suppl. 1002.

Pennsylvania.— Hall *v.* Logan, 34 Pa. St. 331; McFadden *v.* Hunt, 5 Watts & S. 468; Whelen *v.* Watmough, 15 Serg. & R. 153.

Wisconsin.— Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

England.— Wood *v.* Woad, L. R. 9 Exch. 190, 43 L. J. Exch. 153, 30 L. T. Rep. N. S. 815, 22 Wkly. Rep. 709; Chadwick *v.* Clarke, 1 C. B. 700, 9 Jur. 539, 14 L. J. C. P. 233, 50 E. C. L. 700.

Canada.— Mitchell *v.* Gormley, 9 Ont. 139 [*affirmed* in 14 Ont. App. 55]; McDowell *v.* Wilcock, 28 Quebec Super. Ct. 226.

See 38 Cent. Dig. tit. "Partnership," § 156.

a partner cannot sue a copartner on a contract between himself and the firm,[30] in the absence of legislation permitting it;[31] nor can he maintain trespass or replevin against his copartner for any part of the firm property.[32] The remedy of the complaining partner in such cases is to be sought ordinarily in an equity action for an accounting and settlement of the partnership affairs.[33]

b. Necessity For Previous Accounting — (i) *In General.* The principal reasons for requiring an accounting and settlement between copartners, as a condition precedent to an action at law by one against another upon partnership claims and transactions,[34] are these: (1) A dispute of this nature ordinarily

Mandamus.— The rule that one cannot bring an action at law against a partnership does not apply to a proceeding by mandamus. Cooper *v.* Nelson, 38 Iowa 440.

Price of firm realty.— Where partners join in a sale of realty held by the firm for partnership purposes, and one receives the purchase-money, the other partner may maintain an action against him for his proportion thereof. Coles *v.* Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231.

30. Tipton *v.* Nance, 4 Ala. 194; Tindal *v.* Bright, Minor (Ala.) 103; Davis *v.* Merrill, 51 Mich. 480, 16 N. W. 864; Wescott *v.* Price, Wright (Ohio) 220, a partner cannot sue his copartners as makers of a note.

The holder of an accepted bill of exchange cannot sue a firm of which he is a member on their acceptance. Wescott *v.* Price, Wright (Ohio) 220.

31. See the statutes of the different states. And see Heavilon *v.* Heavilon, 29 Ind. 509; Shalter *v.* Caldwell, 27 Ind. 376; Cooper *v.* Nelson, 38 Iowa 440; Morrison *v.* Stockwell, 9 Dana (Ky.) 172; Johnson *v.* Brandt, 10 Mart. (La.) 638; Willis *v.* Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673.

32. Mason *v.* Tipton, 4 Cal. 276; Buckley *v.* Carlisle, 2 Cal. 420; Whitesides *v.* Collier, 7 Dana (Ky.) 283; Clay *v.* Grubbs, 1 Litt. (Ky.) 222.

33. *California.*— Pico *v.* Cuyas, 47 Cal. 174; Nugent *v.* Locke, 4 Cal. 318; Stone *v.* Fouse, 3 Cal. 292.

Colorado.— Maloney *v.* Crow, 11 Colo. App. 518, 53 Pac. 828.

Georgia.— Miller *v.* Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504.

Illinois.— Mudd *v.* Bates, 73 Ill. App. 576; Wright *v.* Cudahy, 64 Ill. App. 453, bill in equity dismissed, because brought by a partner for the benefit of creditors, who did not seek relief and were not parties to the proceedings.

Iowa.— McReynolds *v.* McReynolds, 74 Iowa 89, 36 N. W. 903.

Louisiana.— Seelye *v.* Taylor, 32 La. Ann. 1115, a partner's only remedy to recover from a copartner a specific indebtedness alleged to result from the partnership is an action for the settlement of the partnership affairs.

Maryland.— Morgart *v.* Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367.

Massachusetts.— Ferry *v.* Henry, 4 Pick. 75.

Missouri.— Powell Hardware Co. *v.* Mayer, 110 Mo. App. 14, 83 S. W. 1008; Creath *v.* Nelson Distilling Co., 70 Mo. App. 296.

Nebraska.— Carroll *v.* Cunningham, 73 Nebr. 295, 102 N. W. 608.

New York.— Jones *v.* Walker, 51 Misc. 624, 101 N. Y. Suppl. 22; Niven *v.* Spickerman, 12 Johns. 401.

Pennsylvania.— Crow *v.* Green, 111 Pa. St. 637, 5 Atl. 23.

England.— Stewart *v.* Stuart, 1 L. J. Ch. O. S. 61.

Canada.— London, etc., Loan Co. *v.* Morphy, 14 Ont. App. 577; Honsinger *v.* Love, 16 Ont. 170.

See 38 Cent. Dig. tit. "Partnership," § 156.

A suit for a specific sum cannot be considered a suit for a settlement, even where there is a prayer for general relief. Mead *v.* Curry, 8 Mart. N. S. (La.) 280.

34. *Alabama.*— Philips *v.* Lockhart, 1 Ala. 521.

Arkansas.— Houston *v.* Brown, 23 Ark. 333.

California.— Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657; Ross *v.* Cornell, 45 Cal. 133; Wilson *v.* Lassen, 5 Cal. 114; Russell *v.* Ford, 2 Cal. 86.

Colorado.— Robinson *v.* Compher, 13 Colo. App. 343, 57 Pac. 754.

Connecticut.— Beach *v.* Hotchkiss, 2 Conn. 425; Dewit *v.* Staniford, 1 Root 270.

Delaware.— Robinson *v.* Green, 5 Harr. 115.

Florida.— White *v.* Ross, 35 Fla. 377, 17 So. 640; Price *v.* Drew, 18 Fla. 670.

Georgia.— Miller *v.* Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504.

Illinois.— Milligan *v.* Mackinlay, 209 Ill. 358, 70 N. E. 685 [*affirming* 108 Ill. App. 609]; Bowzer *v.* Stoughton, 119 Ill. 47, 9 N. E. 208; Smith *v.* Riddell, 87 Ill. 165; Purvines *v.* Champion, 67 Ill. 459; Burns *v.* Nottingham, 60 Ill. 531; Chadsey *v.* Harrison, 11 Ill. 151; Wright *v.* Hutchinson, 54 Ill. App. 535.

Indiana.— Lang *v.* Oppenheim, 96 Ind. 47; Meredith *v.* Ewing, 85 Ind. 410; Briggs *v.* Daugherty, 48 Ind. 247; Page *v.* Thompson, 33 Ind. 137; Wilt *v.* Bird, 7 Blackf. 258.

Iowa.— Stanberry *v.* Cattell, 55 Iowa 617, 8 N. W. 478.

Kentucky.— Lawrence *v.* Clark, 9 Dana 257, 35 Am. Dec. 133; Shearer *v.* Francis, 5 S. W. 559, 9 Ky. L. Rep. 556.

Louisiana.— Reddick *v.* White, 46 La. Ann. 1198, 15 So. 487; Radovich *v.* Frigerio, 27 La. Ann. 68; Connolly *v.* Adams, 4 La. Ann. 354; McMicken *v.* Ficklin, 11 La. 310.

involves the taking of a partnership account; for, until that is taken, it cannot be known but that plaintiff may be liable to refund even more than he claims in the particular suit.[35] (2) In partnership transactions a partner does not as a rule become the creditor or the debtor of a copartner, but of the firm.[36] Such a settlement may be agreed upon by the partners without an action for an accounting;[37]

Maine.— Farrar *v.* Pearson, 59 Me. 561, 8 Am. Rep. 439; Lane *v.* Tyler, 49 Me. 252; Chase *v.* Garvin, 19 Me. 211.

Maryland.— McSherry *v.* Brooks, 46 Md. 103.

Massachusetts.— Remington *v.* Allen, 109 Mass. 47; Gomersall *v.* Gomersall, 14 Allen 60; Shattuck *v.* Lawson, 10 Gray 405; Capen *v.* Barrows, 1 Gray 376; Williams *v.* Henshaw, 12 Pick. 378, 23 Am. Dec. 614.

Mississippi.— Evans *v.* White, (1902) 31 So. 833; Ivy *v.* Walker, 58 Miss. 253; Murdock *v.* Martin, 12 Sm. & M. 660.

Missouri.— Bambrick *v.* Simms, 102 Mo. 158, 14 S. W. 935; Scott *v.* Caruth, 50 Mo. 120; Johnson *v.* Ewald, 82 Mo. App. 276; Bender *v.* Markle, 37 Mo. App. 234; Mulhall *v.* Cheatham, 1 Mo. App. 476.

Montana.— McMahon *v.* Thornton, 4 Mont. 46, 1 Pac. 724.

Nebraska.— Lord *v.* Peaks, 41 Nebr. 891, 60 N. W. 353.

New Hampshire.— Treadwell *v.* Brown, 41 N. H. 12; Towle *v.* Meserve, 38 N. H. 9; Wright *v.* Cobleigh, 21 N. H. 339; Burley *v.* Harris, 8 N. H. 233, 29 Am. Dec. 650.

New Jersey.— Young *v.* Brick, 3 N. J. L. 663; Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172.

New Mexico.— Gillett *v.* Chavez, 12 N. M. 353, 78 Pac. 68; Willey *v.* Renner, 8 N. M. 641, 45 Pac. 1132.

New York.— Belanger *v.* Dana, 52 Hun 39, 4 N. Y. Suppl. 776; Buell *v.* Cole, 54 Barb. 353; Pattison *v.* Blanchard, 6 Barb. 537 [*affirmed* in 5 N. Y. 186]; Bloss *v.* Chittenden, 2 Thomps. & C. 11; Sheldon *v.* Stevens, 32 Misc. 314, 66 N. Y. Suppl. 796 [*affirmed* in 57 N. Y. App. Div. 630, 68 N. Y. Suppl. 1148]; Muller *v.* Cox, 15 N. Y. St. 393; Murry *v.* Boyert, 14 Johns. 318, 7 Am. Dec. 466.

North Dakota.— Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701.

Pennsylvania.— Elmer *v.* Hall, 148 Pa. St. 345, 23 Atl. 971; McFadden *v.* Sallada, 6 Pa. St. 283; Andrews *v.* Allen, 9 Serg. & R. 241; Harris *v.* Hall, 11 Pa. Co. Ct. 53.

Rhode Island.— Saillant *v.* Densereau, 24 R. I. 255, 52 Atl. 1085; Dowling *v.* Clarke, 13 R. I. 134.

South Carolina.— Course *v.* Prince, 1 Mill 413.

Tennessee.— Haskell *v.* Vaughn, 5 Sneed 618.

Texas.— Worley *v.* Smith, 26 Tex. Civ. App. 270, 63 S. W. 903.

Vermont.— Spear *v.* Newell, 13 Vt. 288; Estes *v.* Whipple, 12 Vt. 373; Judd *v.* Wilson, 6 Vt. 185.

Washington.— Stevens *v.* Baker, 1 Wash. Terr. 315.

Wisconsin.— Rose *v.* Bradley, 91 Wis. 619, 65 N. W. 509; Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679; Lower *v.* Denton, 9 Wis. 268.

United States.— Goldborough *v.* McWilliams, 10 Fed. Cas. No. 5,518, 2 Cranch C. C. 401; Halderman *v.* Halderman, 11 Fed. Cas. No. 5,909, Hempst. 559; Lamalere *v.* Caze, 14 Fed. Cas. No. 8,003, 1 Wash. 435; Pote *v.* Philips, 19 Fed. Cas. No. 11,316, 5 Cranch C. C. 154.

England.— Sadler *v.* Nixon, 5 B. & Ad. 936, 27 E. C. L. 394.

Canada.— Campbell *v.* Peden, 3 Can. L. J. 68; Heffernan *v.* Sheridan, 11 Quebec K. B. 3; Allan *v.* Garven, 4 U. C. Q. B. 242; Burgess *v.* Fanning, 4 U. C. Q. B. O. S. 188.

See 38 Cent. Dig. tit. "Partnership," § 157.

An action of debt will not lie between partners on an unsettled partnership account. Young *v.* Brick, 3 N. J. L. 663.

Recovery of money furnished.— Where the partnership agreement provides that one partner is to furnish all the money for the partnership enterprise and his copartner furnishes money, he can recover it in an action against his partner, without an accounting. Bates *v.* Lane, 62 Mich. 132, 28 N. W. 753.

Where real estate was purchased for partnership purposes, and was improved from partnership funds, but by agreement title was taken in one partner only, the other partner cannot recover his one-half interest in such realty without an accounting between the partners. Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679.

Remedy against dormant partner.— A bill in equity is the only remedy to sell the copartnership business and recover a balance due to an active from a dormant partner, where the latter has been in receipt of none of the assets of the partnership, but owes a balance to the active partner on account of firm losses. Spear *v.* Newell, 13 Vt. 288.

Right to assail judgment.— Where a partner by suing his copartner, and obtaining judgment, elects to treat the partnership matters as settled, he cannot deny the right of his copartner to bring an action against him to assail the judgment which was wrongfully obtained. Douthit *v.* Douthit, 133 Ind. 26, 32 N. E. 715.

35. Mattingly *v.* Stone, 35 S. W. 921, 18 Ky. L. Rep. 187; Ryder *v.* Wilcox, 103 Mass. 24; Sadler *v.* Nixon, 5 B. & Ad. 936, 27 E. C. L. 394.

36. Warring *v.* Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. Rep. 605; Ryder *v.* Wilcox, 103 Mass. 24; Ives *v.* Miller, 19 Barb. (N. Y.) 196; Estes *v.* Whipple, 12 Vt. 373; Blakely *v.* Smock, 96 Wis. 611, 71 N. W. 1052.

37. *Georgia.*— Benton *v.* Hunter, 119 Ga. 381, 46 S. E. 414.

but in order that it may form the basis of an action at law, it must show that the partners have agreed upon the sum which each owes to the other.[38] And when the partnership is limited to a single venture, not involving a partnership account, or when but a single item remains unadjusted, or when the parties have partitioned the firm property among them, an action at law will lie, and an accounting in equity is unnecessary.[39]

(II) *Effect of Dissolution or Sale of Interest.* As a partnership continues after its dissolution for the purpose of collecting its claims, paying its debts, and adjusting its affairs,[40] an action at law cannot be brought by one partner against another for money alleged to be due him on account of partnership transactions, until after a settlement, even though the partnership has been dissolved.[41] But a partner may sell his interest to his copartners, and recover the purchase-price in an action at law, and it is immaterial whether such interest is encumbered or not by the terms of the partnership, or whether its amount is fixed or the price agreed on.[42]

(III) *Effect of Accounting.* When an accounting and settlement have been had, an action at law will lie for the balance thus ascertained to be due,[43] and the creditor partner cannot maintain a bill in equity for relief,[44] unless he

Indiana.— Dale *v.* Thomas, 67 Ind. 570.
Louisiana.— Shulsinger *v.* Maloney, 114 La. 846, 38 So. 581.
Massachusetts.— Sikes *v.* Work, 6 Gray 433; Brinley *v.* Kupfer, 6 Pick. 179.
Mississippi.— Hunt *v.* Morris, 44 Miss. 314; Sturges *v.* Swift, 32 Miss. 239.
New Hampshire.— Dakin *v.* Graves, 48 N. H. 45.
New York.— Casola *v.* Vasquez, 164 N. Y. 608, 58 N. E. 1085 [*affirming* 33 N. Y. App. Div. 428, 54 N. Y. Suppl. 89]; Blanchard *v.* Jefferson, 162 N. Y. 630, 57 N. E. 1104 [*affirming* 13 N. Y. App. Div. 314, 43 N. Y. Suppl. 152]; Ferguson *v.* Baker, 5 N. Y. St. 842; Clark *v.* Dibble, 16 Wend. 601.
Ohio.— Goodin *v.* Armstrong, 19 Ohio 44.
Pennsylvania.— Farrell *v.* Young, 26 Pa. Super. Ct. 135.
Wisconsin.— Rose *v.* Bradley, 91 Wis. 619, 65 N. W. 509.
England.— Wray *v.* Milestone, 5 M. & W. 21.
Canada.— McNicol *v.* McEwen, 3 U. C. Q. B. O. S. 485.
See 38 Cent. Dig. tit. "Partnership," §§ 157, 160.

38. De Jarnette *v.* McQueen, 31 Ala. 230, 68 Am. Dec. 164; Morrow *v.* Riley, 15 Ala. 710; Ross *v.* Cornell, 45 Cal. 133; Beach *v.* Hotchkiss, 2 Conn. 425; Arnold *v.* Arnold, 90 N. Y. 380; Rose *v.* Bradley, 91 Wis. 619, 65 N. W. 509.

39. *Colorado.*— Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588.
Kansas.— Pettingill *v.* Jones, 28 Kan. 749.
Louisiana.— Jenkins *v.* Howard, 21 La. Ann. 597.
Missouri.— Whelstone *v.* Shaw, 70 Mo. 575; Buckner *v.* Ries, 34 Mo. 357; McNealy *v.* Bartlett, 123 Mo. App. 58, 99 S. W. 767; Feurt *v.* Brown, 23 Mo. App. 332.
Nebraska.— Dorwart *v.* Ball, 71 Nebr. 173, 98 N. W. 652.
New York.— Speck *v.* Fielding, 34 Misc. 177, 68 N. Y. Suppl. 841; Burleigh *v.* Bevin, 22 Misc. 38, 48 N. Y. Suppl. 120.
Utah.— Coffin *v.* McIntosh, 9 Utah 315, 34 Pac. 247.
England.— Hesketh *v.* Blanchard, 4 East 144, 3 L. J. C. P. O. S. 151.
See 38 Cent. Dig. tit. "Partnership," § 157.

40. Bender *v.* Markle, 37 Mo. App. 234.

41. Long *v.* Oppenheim, 96 Ind. 47; Bender *v.* Markle, 37 Mo. App. 234; Haskell *v.* Vaughan, 5 Sneed (Tenn.) 618. *Compare* Fowle *v.* Kirkland, 18 Pick. (Mass.) 299.

42. Baker *v.* Robinson, 55 Mo. App. 171. See also Howe *v.* Bristow, 65 Mo. App. 624.

43. *Alabama.*— McColl *v.* Oliver, 1 Stew. 510.
Delaware.— Martin *v.* Solomon, 5 Harr. 344.
Indiana.— McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789.
Iowa.— Thompson *v.* Smith, 82 Iowa 598, 48 N. W. 988; Wycoff *v.* Purnell, 10 Iowa 332.
Kentucky.— Hey *v.* Harding, 53 S. W. 33, 21 Ky. L. Rep. 771.
Maine.— Lane *v.* Taylor, 49 Me. 252.
New Hampshire.— Nims *v.* Bigelow, 44 N. H. 376.
New Jersey.— Gulick *v.* Gulick, 14 N. J. L. 578.
New York.— Crosby *v.* Nichols, 3 Bosw. 450; Koehler *v.* Brown, 31 How. Pr. 235.
Wisconsin.— Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891; Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.
United States.— Halderman *v.* Halderman, 11 Fed. Cas. No. 5,909, Hempst. 559.
See 38 Cent. Dig. tit. "Partnership," § 159.

44. McGehee *v.* Dougherty, 10 Ala. 863; Jackson *v.* Powell, 110 Mo. App. 249, 84 S. W. 1132. *Compare* Still *v.* Holland, 1 Ohio Dec. (Reprint) 584, 10 West. L. J. 481, holding that where a partner, after dissolution of the partnership, has paid his portion of the partnership debt, he may, as a surety to his copartner, file a bill against such copartner and a judgment creditor to compel such copartner to pay the judgment.

can show fraud or mutual mistake in the settlement.[45] If the fraud consists in false representations as to the state of the firm accounts, or in dishonest appropriation of firm property by defendant partner, an action at law for damages will lie against him.[46]

(IV) *Breach of Contract For a Settlement.* If the copartners enter into a contract for a settlement to be made at a subsequent date on certain terms, and one of them fails to fulfil his contract, the other may maintain an action at common law for damages for the breach.[47] An action at law may also be maintained for the breach of an engagement in a contract of settlement, provided plaintiff shows that he has duly performed his part of such contract.[48]

c. Breach of Partnership Agreement. While, as we have seen, an action at law will not lie ordinarily for a breach of the partnership agreement, until a partnership settlement has been had,[49] yet it will lie for the breach of an agreement to enter into a partnership;[50] or of an agreement to furnish capital or property, or to do some act antecedent to the formation of the partnership, and which forms no part of the firm's affairs.[51] It will lie also for the breach of individual stipu-

45. Hanks *v.* Baber, 53 Ill. 292; Holyoke *v.* Mayo, 50 Me. 385; Chase *v.* Garvin, 19 Me. 211; West *v.* Benjamin, 29 Can. Sup. Ct. 282.

46. Farnsworth *v.* Whitney, 74 Me. 370; McAuley *v.* Cooley, 45 Nebr. 582, 63 N. W. 871; Glade *v.* White, 42 Nebr. 336, 60 N. W. 556; Binney *v.* Delmar, 17 N. Y. Suppl. 524.

47. Holyoke *v.* Mayo, 50 Me. 385. See, however, McPherson *v.* Robertson, 82 Ala. 459, 2 So. 333, holding that such an action would not lie, because it would throw upon a jury and common-law court the necessity of taking an account of the partnership affairs, which they are not competent to do.

48. *Georgia.*— Geise *v.* Ragan, 80 Ga. 732, 6 S. E. 697.

Indiana.— Meredith *v.* Ewing, 85 Ind. 410.

Maryland.— See Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545.

New York.— Ferguson *v.* Baker, 116 N. Y. 257, 22 N. E. 400.

Pennsylvania.— Lippincott *v.* Low, 68 Pa. St. 314; Bartley *v.* Williams, 66 Pa. St. 329.

Wisconsin.— Jewell *v.* Ketchum, 63 Wis. 628, 23 N. W. 709, a partner who, on the dissolution of the firm, agrees to pay the firm debts, is liable to an action at law by his copartner which the latter is compelled to pay.

England.— Thornbury *v.* Bevill, 6 Jur. 407, 1 Y. & Coll. 554, 20 Eng. Ch. 554, 62 Eng. Reprint 1014.

See 38 Cent. Dig. tit. "Partnership," §§ 165, 166.

49. See *supra*, V, C, 1, a.

50. *Alabama.*— Stone *v.* Dennis, 3 Port. 231, where parties enter into covenants which contemplate a future copartnership, an action may be maintained at law by either of the parties for a breach committed by the other before the copartnership commenced.

California.— Powell *v.* Maguire, 43 Cal. 11.

Connecticut.— Reboul *v.* Chalker, 27 Conn. 114.

Georgia.— Mann *v.* Bowen, 85 Ga. 616, 11 S. E. 862.

Illinois.— Buckmaster *v.* Gowen, 81 Ill. 153; Wilson *v.* Campbell, 10 Ill. 383; Madison *v.* Henderson, 86 Ill. App. 113.

Michigan.— Cook *v.* Canny, 96 Mich. 398, 55 N. W. 987.

Minnesota.— Hill *v.* Webb, 43 Minn. 545, 45 N. W. 1133.

Missouri.— Byrd *v.* Fox, 8 Mo. 574.

New York.— Glover *v.* Tuck, 24 Wend. 153.

Ohio.— Vance *v.* Blair, 18 Ohio 532, 51 Am. Dec. 467.

Wisconsin.— Hill *v.* Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703.

United States.— Goldsmith *v.* Sachs, 17 Fed. 726, 8 Sawy. 110.

England.— Walker *v.* Harris, Anstr. 245; Sichel *v.* Mosenthal, 30 Beav. 371, 31 L. J. Ch. 386, 8 Jur. N. S. 275, 5 L. T. Rep. N. S. 784, 10 Wkly. Rep. 283; McNeill *v.* Reid, 9 Bing. 68, 1 L. J. C. P. 162, 2 Moore & S. 89, 23 E. C. L. 489; Figes *v.* Cutler, 3 Stark. 139, 3 E. C. L. 627; Gale *v.* Leckie, 2 Stark. 107, 19 Rev. Rep. 692, 3 E. C. L. 337.

See 38 Cent. Dig. tit. "Partnership," § 168.

51. *Arkansas.*— Bailey *v.* Starke, 6 Ark. 191.

Indiana.— Ellison *v.* Chapman, 7 Blackf. 224.

Kansas.— Truitt *v.* Baird, 12 Kan. 420.

Kentucky.— Tevis *v.* Carter, 111 Ky. 938, 65 S. W. 17, 23 Ky. L. Rep. 1270.

Mississippi.— Morgan *v.* Nunes, 54 Miss. 308.

New Hampshire.— Currier *v.* Webster, 45 N. H. 226.

New York.— Butler *v.* Dinan, 19 N. Y. Suppl. 950.

Texas.— Hunt *v.* Reilly, 50 Tex. 99.

See 38 Cent. Dig. tit. "Partnership," § 168.

Failure to furnish money.—If, by an agreement between two persons, one agrees to furnish a specified sum of money to carry on a certain business, and afterward fails to furnish the money, he is liable to the other at law for such breach of contract. Ellison *v.* Chapman, 7 Blackf. (Ind.) 224. See also Morgan *v.* Nunes, 54 Miss. 308. But a bill in equity is the only remedy for a partner's refusal to furnish money in the

lations between the partners, although these may be contained in the partnership articles.[52] In this country it will lie also for the wrongful ouster of a party from the firm,[53] or for the wrongful dissolution of the firm, before the expiration of the agreed term of its existence.[54] It will lie too for fraudulently inducing one to become a member of the firm.[55]

d. Compensation For Services. Even when the partnership contract provides that a partner shall receive a fixed compensation for his services, unless the other partner or partners have bound themselves as individuals to pay it[56] he cannot maintain an action therefor. If there is no such obligation his claim is only an item in the firm account, and a settlement must be had, before he can recover any specific sum.[57]

e. Partnership Transactions Not Involving an Account. Where the cause of action is not connected with partnership accounts and their consideration is not

business as agreed, thereby causing a great loss of profits. Buckmaster *v.* Gowen, 81 Ill. 153.

Failure to furnish materials.— If one enters into a partnership contract and agrees to furnish the materials for the partnership business, he will be liable in damages to his copartner for failure to do so, even though he has once furnished them, and they have been seized under process of law in a suit against him by a third person. Hunt *v.* Reilly, 50 Tex. 99.

52. *Mississippi.*— Sturges *v.* Swift, 32 Miss. 239; Terry *v.* Carter, 25 Miss. 168.

Missouri.— Stone *v.* Wendover, 2 Mo. App. 247.

New York.— Madge *v.* Puig, 12 Hun 15 [*reversed* on other grounds in 71 N. Y. 608]; Wills *v.* Simmonds, 8 Hun 189, 51 How. Pr. 48; Paine *v.* Thacker, 25 Wend. 450.

Oregon.— Wilson *v.* Wilson, 26 Oreg. 251, 38 Pac. 185.

Pennsylvania.— Addams *v.* Tutton, 39 Pa. St. 447.

South Carolina.— Kinloch *v.* Hamlin, 2 Hill Eq. 19, 27 Am. Dec. 441.

England.— Want *v.* Reece, 1 Bing. 18, 8 E. C. L. 381; Bedford *v.* Brutton, 1 Bing. N. Cas. 399, 4 L. J. C. P. 97, 1 Scott 245, 27 E. C. L. 692; Brown *v.* Topscott, 9 L. J. Exch. 139, 6 M. & W. 119.

See 38 Cent. Dig. tit. "Partnership," § 168.

Remedy at law exclusive.— Partners may sue each other for the breach of distinct stipulations in the partnership contract, binding on one of them only. In such cases the necessity of an account of the partnership transactions not being involved, the remedy at law is generally exclusive. Robinson *v.* Bullock, 58 Ala. 618.

53. Newsom *v.* Pitman, 98 Ala. 526, 12 So. 412; Hunter *v.* Land, 81* Pa. St. 296; Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

In England the remedy of a partner in such circumstances is by an action in equity for reinstatement. Wood *v.* Wood, L. R. 9 Exch. 190, 43 L. J. Exch. 153, 30 L. T. Rep. N. S. 815, 22 Wkly. Rep. 709; Partn. Act (1890), § 24.

54. *Massachusetts.*— Dunham *v.* Gillis, 8 Mass. 462.

New York.—Hagenaers *v.* Herbst, 164 N. Y. 603, 58 N. E. 1088 [*affirming* 30 N. Y. App. Div. 546, 52 N. Y. Suppl. 360]; Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756.

North Carolina.— Ross *v.* Henderson, 77 N. C. 170.

Pennsylvania.— McCollum *v.* Carlucci, 206 Pa. St. 312, 55 Atl. 979, 98 Am. St. Rep. 780.

United States.— Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

See 38 Cent. Dig. tit. "Partnership," § 168.

55. Hale *v.* Wilson, 112 Mass. 444; Houghtailing *v.* Brinckle, 7 Pa. Dist. 518.

56. *Colorado.*— Waugh *v.* Eden, 12 Colo. App. 158, 54 Pac. 853.

Delaware.—Robinson *v.* Green, 5 Harr. 115.

Indiana.— Lassiter *v.* Jackman, 88 Ind. 118.

Kentucky.— Whitney *v.* Whitney, 88 S. W. 311, 27 Ky. L. Rep. 1197.

New York.— Travis *v.* Stewart, 29 Misc. 606, 61 N. Y. Suppl. 492; Paine *v.* Thacher, 25 Wend. 450.

South Carolina.— Bowen *v.* Day, 71 S. C. 492, 51 S. E. 274.

See 38 Cent. Dig. tit. "Partnership," § 169.

57. *California.*—Dukes *v.* Kellogg, 127 Cal. 563, 60 Pac. 44.

Illinois.—Askew *v.* Springer, 111 Ill. 662.

Kansas.— O'Brien *v.* Smith, 42 Kan. 49, 21 Pac. 784.

Kentucky.— Stone *v.* Mattingly, 19 S. W. 402, 14 Ky. L. Rep. 113.

Maine.— Wright *v.* Troop, 70 Me. 346.

Minnesota.— Wood *v.* Cullen, 13 Minn. 394.

New Mexico.— Gillett *v.* Chavez, 12 N. M. 353, 78 Pac. 68.

United States.— Taylor *v.* Smith, 23 Fed. Cas. No. 13,806, 3 Cranch C. C. 241.

England.— Bury *v.* Allen, 1 Coll. 589, 28 Eng. Ch. 589, 63 Eng. Reprint 556; Goddard *v.* Hodges, 1 Cromp. & M. 33, 2 L. J. Exch. 20, 3 Tyrw. 209.

See 38 Cent. Dig. tit. "Partnership," § 169.

Compare Alexander *v.* Alexander, 12 La. Ann. 588, holding that a partner who is also a clerk for the firm may, where his duties as clerk are distinct, sue for his salary as clerk, without a suit for settlement of the firm affairs.

involved one partner may sue another at law.[58] Such an action may be brought on a note or other obligation, given by one partner to another for a valid consideration, although the transaction may inure to the benefit of the firm,[59] or for fraudulent misconduct by one partner toward another.[60]

f. Transactions Independent of Partnership. Partners can sue each other at law upon claims growing out of transactions which are not connected with the partnership business, just as though they were strangers to the partnership relation.[61]

58. Lane *v.* Tyler, 49 Me. 252; Russell *v.* Grimes, 46 Mo. 410 (partners are not forbidden to sue each other at law merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of partnership accounts. In this case defendant had collected firm claims and failed to account therefor); Wicks *v.* Lippman, 13 Nev. 499; Seligman *v.* Hahn, 7 Misc. (N. Y.) 65, 27 N. Y. Suppl. 405. *Compare* Sawyer *v.* Proctor, 2 Vt. 580.

Illustration.—An action may be maintained on the promise of one partner to pay the other a sum certain for his share in the business (Brown *v.* Burnum, 99 Ala. 114, 12 So. 606; Wells *v.* Carpenter, 65 Ill. 447; Draper *v.* Hollings, 163 Mass. 127, 39 N. E. 793); or where one partner has been forced to discharge a share of the firm indebtedness which the other partner promised and failed to pay (Esdaile *v.* Wuytack, 11 N. Y. Suppl. 421, 25 Abb. N. Cas. 474); or where one partner fails to pay over to the other his share of the profits or proceeds of certain transactions (Wadley *v.* Jones, 55 Ga. 329; Hayes *v.* Vogel, 14 Daly (N. Y.) 486, 15 N. Y. St. 351; Coles *v.* Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; Neil *v.* Greenleaf, 26 Ohio St. 567); or fails to discharge a particular claim, which the partners have withdrawn from the partnership account (Douthit *v.* Douthit, 133 Ind. 26, 32 N. E. 715; Kunneke *v.* Mapel, 60 Ohio St. 1, 53 N. E. 259; Collamer *v.* Foster, 26 Vt. 754; Burhans *v.* Jefferson, 76 Fed. 25, 22 C. C. A. 25).

59. *Alabama.*— Scott *v.* Campbell, 30 Ala. 728; Grigsby *v.* Nance, 3 Ala. 347.

Idaho.— Haskins *v.* Curran, 4 Ida. 573, 43 Pac. 559.

Illinois.—Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Kistner *v.* Tejcek, 88 Ill. App. 188.

Indiana.— Jemison *v.* Walsh, 30 Ind. 167.

Kentucky.— Hey *v.* Harding, 53 S. W. 33, 21 Ky. L. Rep. 771.

Louisiana.— Powell *v.* Graves, 9 La. Ann. 435; Moran *v.* Le Blanc, 6 La. Ann. 113; Mulhollan *v.* Eaton, 11 La. 291; Rondeau *v.* Pedesclaux, 3 La. 510, 23 Am. Dec. 463.

Massachusetts.— Chamberlain *v.* Walker, 10 Allen 429; Currier *v.* Hale, 5 Allen 561; Hitchings *v.* Ellis, 12 Gray 449.

Michigan.— Carpenter *v.* Greenop, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241; Bates *v.* Lane, 62 Mich. 132, 28 N. W. 753; Mitchell *v.* Wells, 54 Mich. 127, 19 N. W. 777.

Mississippi.— Anderson *v.* Robertson, 32 Miss. 241, if one partner makes a note payable to his copartner, for the use of the partnership, the latter may recover in an action at law in his own name. See also Bonnaffe *v.* Fenner, 6 Sm. & M. 212, 45 Am. Dec. 278.

Nebraska.— Halleck *v.* Streeter, 52 Nebr. 827, 73 N. W. 219.

New Hampshire.— Currier *v.* Rowe, 46 N. H. 72, a suit at law can be maintained by one partner against another, for money advanced to him to launch the partnership.

New York.— Crater *v.* Bininger, 45 N. Y. 545; Gridley *v.* Dole, 4 N. Y. 486 (if one partner gives to the other his individual note or acceptance for value received on the partnership account, an action will lie on the note or acceptance); Farmer *v.* Putnam, 35 Misc. 32, 70 N. Y. Suppl. 179; Guccione *v.* Scott, 21 Misc. 410, 47 N. Y. Suppl. 475 [*affirmed* in 33 N. Y. App. Div. 214, 53 N. Y. Suppl. 462]; Veriscope Co. *v.* Brady, 77 N. Y. Suppl. 159; Barbeau *v.* Picotte, 13 N. Y. Suppl. 132.

North Carolina.— Owen *v.* Meroney, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952; Bethell *v.* Wilson, 21 N. C. 610.

Oregon.— Wilson *v.* Wilson, 26 Oreg. 251, 38 Pac. 185, an action at law is maintainable by one partner against another on a note executed by the one to the other, involving particular items or transactions of the partnership business.

Pennsylvania.— Rush Centre Creamery Co. *v.* Hillis, 3 Pa. Super. Ct. 527; Ridgway *v.* Kleinert, 15 Leg. Int. 117.

Utah.— Jennings *v.* Pratt, 19 Utah 129, 56 Pac. 951.

Virginia.— Wright *v.* Michie, 6 Gratt. 354.

West Virginia.— Newman *v.* Ruby, 54 W. Va. 381, 46 S. E. 172.

United States.— Van Ness *v.* Forrest, 8 Cranch 30, 3 L. ed. 478.

England.— Coffee *v.* Brain, 3 Bing. 54, 3 L. J. C. P. O. S. 151, 10 Moore C. P. 341, 11 E. C. L. 35; French *v.* Styring, 2 C. B. N. S. 357, 3 Jur. N. S. 670, 26 L. J. C. P. 181, 5 Wkly. Rep. 561, 89 E. C. L. 357; Venning *v.* Leckie, 13 East 7, 12 Rev. Rep. 292.

Canada.—Westhaver *v.* Broussard, 25 Nova Scotia 323; Comer *v.* Thompson, 4 U. C. Q. B. O. S. 256.

See 38 Cent. Dig. tit. "Partnership," § 170.

60. Bowman *v.* Sedgwick, (Iowa 1900) 82 N. W. 491; Lonergan *v.* Lonergan, 60 Kan. 855, 55 Pac. 851; Crockett *v.* Burleson, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. N. S. 263; Ferries *v.* Vathakos, 6 Quebec Pr. 388.

61. *Alabama.*— Rowland *v.* Boozer, 10 Ala. 690.

Illinois.— Caswell *v.* Cooper, 18 Ill. 532.

g. Partition of Firm Property. A partner cannot bring an action for the partition of partnership real estate against his copartner, until after the creditors of the partnership have been paid and the interests of the partners adjusted.[62]

h. Tort Actions Between Partners. For actionable wrongs to the person, or to the individual property of one partner, inflicted by a copartner, an action at law will lie.[63] Ordinarily such an action will not lie for the sale and forcible removal of firm property, or for its use, in violation of the wishes of a copartner.[64] But for the tortious destruction of firm property,[65] for its detention and use under claim of sole ownership,[66] for the wrongful ouster of a copartner from firm premises,[67] or for the wrongful and secret appropriation of firm property to the use of one partner the appropriate action at law is maintainable.[68]

Iowa.— Newberry *v.* Gibson, 125 Iowa 575, 101 N. W. 428; Mullany *v.* Keenan, 10 Iowa 224, a partner may sue his copartners on an independent contract made by them as a firm with him before the partnership was formed.

Louisiana.—Alexander *v.* Alexander, 12 La. Ann. 588; Battaille *v.* Battaille, 6 La. Ann. 682 (a partner who, with funds not shown to belong to the partnership, pays for a plantation purchased by his copartner for his private account, can sue the latter before a settlement); Boyd *v.* Brown, 2 La. Ann. 218.

Michigan.—McIntosh *v.* McIntosh, 79 Mich. 198, 44 N. W. 592.

Missouri.— Seaman *v.* Johnson, 46 Mo. 111 (one partner may bring an action at law against his copartner for money received by the latter as agent of the former in a matter not connected with the firm's affairs); Biernan *v.* Braches, 14 Mo. 24.

Nevada.— Foulks *v.* Rhodes, 12 Nev. 225.

New Jersey.— Moran *v.* Green, 21 N. J. L. 562.

Pennsylvania.— Krall *v.* Forney, 182 Pa. St. 6, 37 Atl. 846.

Texas.— Crump *v.* Ligon, 37 Tex. Civ. App. 172, 84 S. W. 250.

Wisconsin.— George *v.* Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963.

England.— Simpson *v.* Rackham, 7 Bing. 617, 5 M. & P. 612, 20 E. C. L. 276; Cross *v.* Cheshire, 7 Exch. 43, 15 Jur. 993, 21 L. J. Exch. 3; Lucas *v.* Beach, 4 Jur. 631; 1 M. & G. 417, 1 Scott N. R. 350, 39 E. C. L. 831; Smith *v.* Barrow, 2 T. R. 476.

See 38 Cent. Dig. tit. "Partnership," § 172.

62. *California.*— Hughes *v.* Devlin, 23 Cal. 501.

Georgia.— See Jackson *v.* Deese, 35 Ga. 84, construing Code, §§ 3015, 3906.

Indiana.— Patterson *v.* Blake, 12 Ind. 436.

Iowa.— See Pennybacker *v.* Leary, 65 Iowa 220, 21 N. W. 575.

Louisiana.— See King *v.* Wartelle, 14 La. Ann. 740.

Michigan.— Chase *v.* Angell, 148 Mich. 1, 108 N. W. 1105, after dissolution land held by a partnership may be divided by compulsory partition, when not required for the payment of firm debts.

Missouri.— See Holmes *v.* McGee, 27 Mo. 597. *Compare* Thompson *v.* Holden, 117 Mo. 118, 22 S. W. 905.

New Jersey.— Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 562, 35 Atl. 536, "Out of this equity of each partner to have the firm property applied to the payment of firm debts in order that he may be discharged from personal liability, has emerged the rule that the partition of the real property of a firm will not be decreed so long as debts of the partnership remain unliquidated."

New York.— Eisner *v.* Eisner, 5 N. Y. App. Div. 117, 38 N. Y. Suppl. 671; McFarlane *v.* McFarlane, 82 Hun 238, 31 N. Y. Suppl. 272.

North Carolina.— Baird *v.* Baird, 21 N. C. 524, 31 Am. Dec. 399. But see Collins *v.* Dickinson, 2 N. C. 240.

Pennsylvania.— Baldes *v.* Henniges, 7 Kulp 143.

South Carolina.— Jones *v.* Smith, 31 S. C. 527, 10 S. E. 340.

See 38 Cent. Dig. tit. "Partnership," § 162.

In England it seems that an action for the partition of firm realty cannot be maintained by a partner, in the absence of a special agreement in the partnership contract therefor, or of the consent of his copartners. Wild *v.* Milne, 26 Beav. 504, 53 Eng. Reprint 9 ; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413, 61 Eng. Reprint 992; Burdon *v.* Barkus, 3 Giff. 412, 8 Jur. N. S. 130, 5 L. T. Rep. N. S. 573, 66 Eng. Reprint 470 [*affirmed* in 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 45 Eng. Reprint 1098].

63. Haller *v.* Willamowicz, 23 Ark. 566; Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367.

64. Montjoys *v.* Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Doupe *v.* Stewart, 28 U. C. Q. B. 192; Strathy *v.* Crooks, 2 U. C. Q. B. 51; Smith *v.* Book, 5 U. C. Q. B. O. S. 556.

65. Mountjoys *v.* Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Taylor *v.* Brown, 17 U. C. C. P. 387; Rathwell *v.* Rathwell, 26 U. C. Q. B. 179.

66. Rathwell *v.* Rathwell, 26 U. C. Q. B. 179.

67. Peaceable *v.* Read, 1 East 568; Doe *v.* Horn, 1 H. & H. 75, 7 L. J. Exch. 98, 3 M. & W. 333, 9 L. J. Exch. 129, 5 M. & W. 564.

68. Fuller *v.* Percival, 126 Mass. 381; Weirich *v.* Dodge, 101 Wis. 621, 77 N. W.

1. **Assumpsit.** As a general rule assumpsit will not lie by one partner against his copartner, in respect to any matters connected with the partnership transactions, or which would involve the consideration of their partnership dealings.[69] But there are cases in which one partner may maintain this action against another.[70] Thus where a partnership has been dissolved and a balance has been struck and agreed upon by the partners, assumpsit may be brought by one partner against another[71] upon an implied promise.[72] And where on a dissolution and closing of accounts, one partner, by mistake, pays another more than is due, he may recover it back in an action of assumpsit.[73] A partner who has sold his interest in the firm may also bring assumpsit for an amount due him as salary, where there has been an express promise to pay.[74] And where one partner sells to another all his interest in the firm, in consideration of the vendee's agreement to pay all the firm debts, the vendor may maintain this action against the vendee to recover a debt due by the firm to the vendor.[75] When by an express agreement partners separate a distinct matter from the partnership dealings and one expressly agrees to pay the other a specified sum for that matter, assumpsit will lie on the agreement

906; *Ex p.* Smith, 1 Glyn & J. 74, 6 Madd. 2, 22 Rev. Rep. 224, 56 Eng. Reprint 988; Fox *v.* Rose, 10 U. C. Q. B. 16.

69. Russell *v.* Minnesota Outfit, 1 Minn. 162; Beede *v.* Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; Collamer *v.* Foster, 26 Vt. 754. See also Miller *v.* Knauff, 3 Pa. L. J. 225, 2 Pa. L. J. Rep. 11. *Compare* Howard *v.* France, 3 Alb. L. J. (N. Y.) 305.

Money due under articles of agreement between partners and the firm cannot be recovered in assumpsit. Schnutterly *v.* Crow, 2 Lanc. L. Rev. (Pa.) 127.

70. Manufacturing, etc., Co. *v.* Schoolly, Tapp. (Ohio) 271; Hamilton *v.* Hamilton, 18 Pa. St. 20, 55 Am. Dec. 585; Gray *v.* Williams, 9 Humphr. (Tenn.) 503.

71. *Alabama.*— Pope *v.* Randolph, 13 Ala. 214.

Illinois.— Adams *v.* Funk, 53 Ill. 219; Davenport *v.* Gear, 3 Ill. 495.

Maine.— Holyoke *v.* Mayo, 50 Me. 385, holding that assumpsit cannot be maintained, unless for a specific sum found due on a settlement.

Maryland.— See Riarl *v.* Wilhelm, 3 Gill 356.

Massachusetts.— Wheeler *v.* Wheeler, 111 Mass. 247; Dickinson *v.* Granger, 18 Pick. 315; Williams *v.* Henshaw, 11 Pick. 79, 22 Am. Dec. 366; Fanning *v.* Chadwick, 3 Pick. 420, 12 Am. Dec. 233; Wilby *v.* Phinney, 15 Mass. 116.

Missouri.— See Byrd *v.* Fox, 8 Mo. 574, holding that where, in a settlement between partners, there is but one item, and that is adjusted by an express promise to pay the amount, assumpsit will lie.

New Hampshire.—Gibson *v.* Moore, 6 N. H. 547.

Vermont.— Beede *v.* Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; Warren *v.* Wheelock, 21 Vt. 323; Spear *v.* Newell, 13 Vt. 288.

England.—Morley *v.* Baker, 3 F. & F. 146; Rackstraw *v.* Imber, Holt N. P. 368, 3 E. C. L. 149.

Canada.— McNicol *v.* McEwen, 3 U. C. Q. B. O. S. 485.

See 38 Cent. Dig. tit. "Partnership," § 164.

Notes given in settlement.— A partner may maintain assumpsit on notes given to him by his copartner for the balance of their accounts. Van Amringe *v.* Ellmaker, 4 Pa. St. 281.

Unliquidated balance.— One partner cannot maintain assumpsit against another to recover an unliquidated balance due on partnership transactions. Collamer *v.* Foster, 26 Vt. 754; Spear *v.* Newell, 13 Vt. 288.

Failure of arbitrators to agree.— Where partners agree to dissolve and one is to buy out the other at a price to be determined by arbitration, and pending the arbitration the latter executes a bill of sale to the former, subject to the arbitration, on failure of the arbitrators to agree, assumpsit cannot be brought for the value of the property. Norton *v.* Hayden, 109 Mich. 682, 67 N. W. 909.

72. Dickinson *v.* Granger, 18 Pick. (Mass.) 315; Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Bond *v.* Hays, 12 Mass. 34; Beede *v.* Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; Splor *v.* Newell, 13 Vt. 288. See also Van Amringe *v.* Ellmaker, 4 Pa. St. 281.

Express promise necessary.—According to some of the decisions there must be an express promise to pay to support an action of assumpsit. Davenport *v.* Gear, 3 Ill. 495; Killam *v.* Preston, 4 Watts & S. (Pa.) 14. See also Adams *v.* Funk, 53 Ill. 219; Westerlo *v.* Evertson, 1 Wend. (N. Y.) 532; Halsted *v.* Schmelzel, 17 Johns. (N. Y.) 80; Casey *v.* Brush, 2 Cai. (N. Y.) 293; Course *v.* Prince, 1 Mill (S. C.) 416, 12 Am. Dec. 649; Pote *v.* Philips, 19 Fed. Cas. No. 11,316, 5 Cranch C. C. 154.

73. Chase *v.* Garvin, 19 Me. 211; Bond *v.* Hays, 12 Mass. 34; Townsend *v.* Crowdy, 8 C. B. N. S. 477, 7 Jur. N. S. 71, 29 L. J. C. P. 300, 2 L. T. Rep. N. S. 537, 98 E. C. L. 477.

74. Lawrence *v.* Mangold, 1 Walk. (Pa.) 202.

75. Beale *v.* Jennings, 129 Pa. St. 619, 18 Atl. 550.

although the matter arose from the partnership dealings.[76] The action is also maintainable, during the existence of a partnership, for the recovery by one partner of money contributed by him to the firm, which the other partner was bound to contribute.[77]

j. Demand Before Action. Whether a demand must be made before an action at law can be properly brought by one partner against another depends upon the cause of action. If it rests upon an express promise which has been broken, or upon defendant's conversion to his own use of property belonging to plaintiff, no prior demand is necessary.[78] If, however, it consists in a claim for money received by defendant as a partner, and which is involved in the partnership accounts, or for defendant's share of debts paid by plaintiff to firm creditors, a prior demand must be shown.[79]

k. Defenses. In an action between partners, it is a valid defense that, since the obligation sued on was contracted, its subject-matter has become involved in the partnership business;[80] that the obligation has been legally satisfied,[81] or has been barred by a settlement;[82] or that it is unenforceable, because of a failure of consideration;[83] or because of fraud or mistake, or of defendant's failure to perform a condition precedent;[84] or because of illegality.[85] But after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract.[86] And it is no defense to an action by one partner against another for contribution,[87] or for the conversion of partnership property,[88] that the firm was unlawfully engaged in selling intoxicating liquors.

l. Set-Off and Counter-Claim. In an action at law properly brought by one partner against his copartner, defendant is allowed to set off or counterclaim an obligation of plaintiff to defendant as an individual,[89] but not an obligation to the firm, nor any alleged balance against plaintiff on an unsettled partner-

76. Beede *v.* Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; Collamer *v.* Foster, 26 Vt. 754.

77. Wright *v.* Eastman, 44 Me. 220; Brown *v.* Tapscott, 9 L. J. Exch. 139, 6 M. & W. 119.

78. Douthit *v.* Douthit, 133 Ind. 26, 32 N. E. 715.

79. Allen *v.* Davis, 13 Ark. 28; Dakin *v.* Graves, 48 N. H. 45; Hawkins *v.* Brown, 30 Barb. (N. Y.) 206.

80. Pico *v.* Cuyas, 47 Cal. 180, the lessee of a hotel entered into partnership with the lessor in keeping the hotel.

81. Frink *v.* Ryan, 4 Ill. 322; Griffith *v.* Hill, 7 Blackf. (Ind.) 324.

Illustration.— Where a partner executes a note in the firm-name to raise his share of the capital stock, a suit by the other partner, after the payment of such notes, can be defeated by proof that defendant has paid his proportion of the debts of the firm. Fletcher *v.* Brown, 7 Humphr. (Tenn.) 385.

82. Madison *v.* Henderson, 86 Ill. App. 113 (a settlement by arbitration is a bar to an action for breach of the partnership agreement); Shields *v.* Fuller, 4 Wis. 102, 65 Am. Dec. 293 (a dissolution of the firm and division of its property between the partners, which vests in each partner absolute ownership of his share, is a bar).

83. Durham *v.* Lathrop, 95 Ill. App. 429; Mullendore *v.* Scott, 45 Ind. 113; Coffin *v.* Mitchell, 34 Ind. 293; Rogers *v.* Rogers, 1 Hall (N. Y.) 434; Halliday *v.* Carnan, 6 Daly (N. Y.) 422; Welch *v.* Miller, 210 Pa. St. 204, 59 Atl. 1065; Lee *v.* Longbottom, 173 Pa. St. 408, 34 Atl. 436; Hubbard *v.* Wheeler, 17 Pa. St. 425.

84. Powell *v.* Graves, 9 La. Ann. 435; Gridley *v.* Dole, 4 N. Y. 486; Rosboro *v.* Peck, 48 Barb. (N. Y.) 92; Hoile *v.* York, 27 Wis. 209.

85. Lane *v.* Thomas, 37 Tex. 157.

86. Pfluffer *v.* Maltby, 54 Tex. 454, 38 Am. Rep. 631, 38 Tex. 523; De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101; Brooks *v.* Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Wann *v.* Kelley, 5 Fed. 584, 2 McCrary 628. *Compare* Wallis *v.* Wheelock, 26 La. Ann. 246. But see Barrow *v.* Pike, 21 La. Ann. 14.

87. McGunn *v.* Hanlin, 29 Mich. 476.

88. Howe *v.* Jolly, 68 Miss. 323, 8 So. 513.

89. *Iowa.*— Farwell *v.* Tyler, 5 Iowa 535.

Kentucky.— Stuart *v.* Harmon, 72 S. W. 365, 24 Ky. L. Rep. 1829.

Michigan.— Kinney *v.* Robison, 52 Mich. 389, 18 N. W. 120. See also Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326.

New York.— Merrill *v.* Green, 55 N. Y. 270 [*affirming* 66 Barb. 582].

Wisconsin.— Sprout *v.* Crowley, 30 Wis. 187.

See 38 Cent. Dig. tit. "Partnership," § 175.

ship account.[90] Nor can defendant recoup a claim for damages growing out of partnership business.[91] There can be no liability from one partner to another by virtue simply of the partnership relation, which can be made the subject of set-off or counter-claim until there has been a settlement.[92]

2. Proceedings in Actions — a. Venue. The proper place for bringing an action between partners is to be determined by the rules applicable to personal actions, in the jurisdiction where the suit is brought,[93] even though it may involve the sale and conveyance of partnership lands.[94]

b. Time to Sue, Limitations, and Laches. A right of action between partners based on a partnership transaction does not accrue until the partnership is dissolved.[95] Within what time a suit must be brought upon such a cause of action is determined ordinarily by statute.[96] Even in the absence of statute plaintiff's suit may be barred by his laches.[97] When an action is brought upon the individual obligation of a partner, its provisions will determine the time when the cause of action accrues.[98] A partner who, after dissolution, buys a certain claim against the firm for the purpose of setting it off against a personal claim of his copartner

90. *Arkansas.*— Houston *v.* Brown, 23 Ark. 333.

Indiana.—Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476.

Maine.— Wiggin *v.* Goodwin, 63 Me. 389.

Massachusetts.— Lesure *v.* Norris, 11 Cush. 328.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162.

Mississippi.— Anderson *v.* Robertson, 32 Miss. 241; Sturges *v.* Swift, 32 Miss. 239.

Missouri.— Willis *v.* Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673; Pool *v.* Delaney, 11 Mo. 570; Finney *v.* Turner, 10 Mo. 207.

Nevada.— See Foulks *v.* Rhodes, 12 Nev. 225.

New Hampshire.— Benson *v.* Tilton, 54 N. H. 174; Ordiorne *v.* Woodman, 39 N. H. 541, as no action can be brought by one partner against his copartners on any partnership transaction, unless there has been a settlement of the whole concern or of the claim in question, and a promise of payment, the unsettled dealings of either partner with the firm cannot be set off, in an action at law by one partner against the other.

New York.— Ives *v.* Miller, 19 Barb. 196; Lobenthal *v.* Keller, 2 N. Y. City Ct. 304.

Pennsylvania.— Roberts *v.* Fitler, 13 Pa. St. 265; Appleby *v.* Barrett, 28 Pa. Super. Ct. 349; Riley *v.* Eigo, 1 Pa. Super. Ct. 139, 37 Wkly. Notes Cas. 470; Ridgway *v.* Kleinert, 15 Leg. Int. 117; Saxton *v.* Lewis, 1 Phila. 75.

United States.— Chapin *v.* Streeter, 124 U. S. 360, 8 S. Ct. 529, 31 L. ed. 475; Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,648, 1 Cranch C. C. 2.

See 38 Cent. Dig. tit. "Partnership," § 175.

Agreed balance.—A balance due from one partner to another, on a settlement of partnership transactions, is a good set-off provided the partners have agreed on that balance. Dana *v.* Barrett, 3 J. J. Marsh. (Ky.) 6.

91. Taylor *v.* Hardin, 38 Ga. 577. *Compare* Durham *v.* Lathrop, 95 Ill. App. 429, in which recoupment was allowed for damages caused to the firm business by plaintiff's misconduct, in a suit brought for the price which defendant had agreed to pay for plaintiff's interest, such misconduct having caused a partial failure of consideration for defendant's obligation.

92. Leabo *v.* Renshaw, 61 Mo. 292. *Compare* Baremore *v.* Selover, 100 Minn. 23, 110 N. W. 66.

93. Jones *v.* Fletcher, 42 Ark. 422; Wells *v.* Collins, 11 Lea (Tenn.) 213.

94. Black *v.* Black, 27 Ga. 40; Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

95. Cole *v.* Fowler, 68 Conn. 450, 36 Atl. 807; Harris *v.* Mathews, 107 Ga. 46, 32 S. E. 203; Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Storm *v.* Cumberland, 18 Grant Ch. (U. C.) 245.

96. See the statutes of the different states. And see the following cases:

Kentucky.— Patterson *v.* Brown, 6 T. B. Mon. 10.

Louisiana.— Parker's Succession, 17 La. Ann. 28.

Massachusetts.— Forward *v.* Forward, 6 Allen 494.

New York.— Clute *v.* Potter, 37 Barb. 199.

Wisconsin.— Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713.

See 38 Cent. Dig. tit. "Partnership," § 177.

97. Wood *v.* Fox, 1 A. K. Marsh. (Ky.) 451; Stuart *v.* Harmon, 72 S. W. 365, 24 Ky. L. Rep. 1829; Compton *v.* Thorn, 90 Va. 653, 19 S. E. 451; Haggart *v.* Allan, 2 Grant Ch. (U. C.) 407.

98. Cole *v.* Fowler, 68 Conn. 450, 36 Atl. 807 (holding that where one partner advanced money to another to be repaid from certain accounts owned by the firm, his cause of action against the borrower did not accrue, until it was ascertained how much would be realized from such accounts); Wells *v.* Carpenter, 65 Ill. 447 (holding that where one partner sold his interest to the other, the latter to pay the former "as soon as he can do so without inconveniences," a suit

steps into the shoes of his assignor, and the statute of limitations runs against him as it would against the assignor. Had he paid the claim as a partner, his right of action for contribution would not have been subject to the statute of limitations, until a final settlement of firm affairs.[99]

c. Parties. Where one partner has an individual and personal claim against his partner or partners his remedy is by an action at law brought by him as plaintiff against the partner or partners from whom he seeks relief as defendants.[1] If one partner's obligation is to the firm, and not to his copartner individually, an equity action for an accounting is necessary, to which all persons having property rights in the partnership, or whose presence is necessary to a final disposition of the controversy, must be parties, either as plaintiffs or defendants.[2] Where a subpartner brings suit he may make all the members of the firm defendants in order to compel a discovery and settlement of its business.[3]

d. Arrest of Partner by Copartner. One partner cannot obtain an order of arrest for his copartner in an action involving partnership transactions.[4] But he may obtain and enforce such an order for fraud in inducing him to enter the partnership, or for other misconduct toward him as an individual.[5]

e. Attachment. Ordinarily, in an action between partners, plaintiff is not entitled to an attachment against his copartner's interest in the partnership;[6] nor, if his action grows out of partnership transactions, can he attach or garnish his copartner's individual property.[7] However, the right to an attachment or gar-

may be brought for the price after the lapse of a year).

99. Ahl *v.* Ahl, 186 Pa. St. 99, 40 Atl. 405.

1. *Alabama.*— Tillis *v.* Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31; Robinson *v.* Bullock, 58 Ala. 618; Penn *v.* Stone, 10 Ala. 209.

California.— Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Indiana.— Way *v.* Fravel, 61 Ind. 162, where a partnership has been dissolved on an agreement by one member to pay off the partnership debts, another may maintain an action against him for violation thereof, and for services rendered in settling the business without making the other members parties.

Kentucky.— Thomas *v.* Pyke, 4 Bibb 418.

Maryland.— Causten *v.* Burke, 2 Harr. & G. 295, 18 Am. Dec. 297; Roache *v.* Pendergast, 3 Harr. & J. 33.

Massachusetts.— Dunham *v.* Gillis, 8 Mass. 462.

Minnesota.— Berkey *v.* Judd, 22 Minn. 287.

North Carolina.— Scott *v.* Bryan, 96 N. C. 289, 3 S. E. 235.

Ohio.— Masters *v.* Freeman, 17 Ohio St. 323; Manufacturing, etc., Co. *v.* Schoolly, Tapp. 271.

Pennsylvania.— Kerr *v.* Hawthorne, 4 Yeates 170.

See 38 Cent. Dig. tit. "Partnership," § 178.

2. *Alabama.*— Fortune *v.* Brazier, 10 Ala. 791, holding that partners cannot invest such person, as a majority of them shall appoint, with power to sue in his own name for moneys agreed to be contributed by each partner to the general fund.

Indiana.— Duck *v.* Abbott, 24 Ind. 349.

Iowa.— Dixon *v.* Dixon, 19 Iowa 512.

Maryland.— Riarl *v.* Wilhelm, 3 Gill 356; Grahame *v.* Harris, 5 Gill & J. 489.

Massachusetts.— Wiggin *v.* Cumings, 8 Allen 353; Montague *v.* Lobdell, 11 Cush. 111.

New Hampshire.— Burley *v.* Harris, 8 N. H. 233, 29 Am. Dec. 650.

United States.— Edgell *v.* Felder, 84 Fed. 69, 28 C. C. A. 382.

Canada.— Young *v.* Huber, 29 Grant Ch. (U. C.) 49; Mair *v.* Bacon, 5 Grant Ch. (U. C.) 338.

See 38 Cent. Dig. tit. "Partnership," § 178.

Compare Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Howard *v.* France, 3 Alb. L. J. (N. Y.) 305; Fawcett *v.* Whitehouse, 4 L. J. Ch. O. S. 64, 8 L. J. Ch. O. S. 50, 1 Russ. & M. 132, 5 Eng. Ch. 132, 39 Eng. Reprint 51; Radenhurst *v.* Bates, 3 Bing. 463, 4 L. J. C. P. O. S. 169, 11 Moore C. P. 421, 28 Rev. Rep. 659, 11 E. C. L. 229.

3. Chandler *v.* Chandler, 4 Pick. (Mass.) 78. *Compare* Steele *v.* Schaffer, 107 Ill. App. 320.

4. Soule *v.* Hayward, 1 Cal. 345; Hanna *v.* Auter, 4 Rob. (La.) 221 (denying an order of arrest for a partner, who received and refused to pay over partnership money, and who was not liable for any specific sum, but only to account as managing partner); Smith *v.* Small, 54 Barb. (N. Y.) 223; Cary *v.* Williams, 1 Duer (N. Y.) 667.

5. Madge *v.* Puig, 12 Hun (N. Y.) 15 [*reversed* on other grounds in 71 N. Y. 608]; Verastegni *v.* Luzunarez, 12 N. Y. Wkly. Dig. 489.

6. Newsom *v.* Pitman, 98 Ala. 526, 12 So. 412; Levy *v.* Levy, 11 La. 577; Birtwhistle *v.* Woodward, 95 Mo. 113, 7 S. W. 465.

7. Stone *v.* Boone, 24 Kan. 337; Bingham *v.* Keylor, 19 Wash. 555, 53 Pac. 729, denying an attachment against a partner, who had received firm moneys and applied them to his own use, on the ground that defend-

nishment is created and regulated by statute; and in some of the states these remedies are available in equitable as well as in legal actions, whenever the object is to recover money and plaintiff is able to specify the amount of indebtedness.[8]

f. Injunction.[9] A partner may be enjoined from serious breaches of his partnership agreement,[10] or from a course of conduct which amounts to a fraud upon the partnership relation.[11] In this country, however, equity will seldom interfere at the suit of one partner to prevent a dissolution by the other partner or partners, before the time named in the partnership agreement.[12]

g. Receiver. In asking for the appointment of a receiver plaintiff partner invites the court to take control of the firm property and affairs and manage them through its officer, the receiver. This courts are unwilling to do, unless they are convinced that the receivership is only incidental to the dissolution and winding up of the firm.[13] Hence they will rarely appoint a receiver, during the

ant's fraud was not committed in contracting the debt, but was subsequent thereto.

8. See the statutes of the different states. And see Hansen *v.* Morris, 87 Iowa 303, 54 N. W. 223; Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635; Gohle *v.* Howard, 12 Ohio St. 165; Bingham *v.* Keylor, 19 Wash. 555, 558, 53 Pac. 729, "Where the object of the action is to dissolve the partnership and for an accounting, and it is shown that upon such accounting a balance will be due the plaintiff, we perceive no reason why the plaintiff may not have an attachment, provided, of course, he can and does specify in his affidavit the amounts of the indebtedness and some statutory ground for attachment."

9. See, generally, INJUNCTIONS.

10. *Georgia.*— Marshall *v.* Johnson, 33 Ga. 500, enjoined from carrying on the business at a different place than that agreed upon.

Louisiana.— Levine *v.* Michel, 35 La. Ann. 1121, defendant was enjoined from carrying on the partnership business, otherwise than as a partner, in violation of the partnership articles.

Mississippi.— New *v.* Wright, 44 Miss. 202, injunction against one who used a firm sawmill in a manner and for a purpose unauthorized by the partnership contract.

Pennsylvania.— Jennings' Appeal, 2 Mona. 184, 16 Atl. 19, 2 L. R. A. 43 (injunction against changing the stipulated location of the partnership steel works); Page *v.* Vankirk, 1 Brewst. 282 (injunction against using the firm-name for private purposes).

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955, a chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner, even when the dissolution of the partnership is not necessarily contemplated.

England.— Aas *v.* Benham, [1891] 2 Ch. 244, 65 L. T. Rep. N. S. 25 (partner enjoined from using firm-name in business carried on for his individual benefit); Dean *v.* MacDowell, 8 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. Rep. N. S. 862, 26 Wkly. Rep. 486; Clements *v.* Norris, 8 Ch. D. 129, 47 L. J. Ch. 546, 38 L. T. Rep. N. S. 591 (restraining a partner from carrying on a branch of the firm business at a place not assented to by plaintiff); Morison *v.* Moat, 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 492 [*affirmed* in 16 Jur. 321, 21 L. J. Ch. 248] (injunction against divulging trade secrets). *Compare* Marshall *v.* Colman, 2 Jac. & W. 266, 22 Rev. Rep. 116, 37 Eng. Reprint 629.

See 38 Cent. Dig. tit. "Partnership," § 181.

But see O'Bryan *v.* Gibbons, 2 Md. Ch. 9.

11. *Maryland.*— Norwood *v.* Norwood, 4 Harr. & J. 112.

Mississippi.— New *v.* Wright, 44 Miss. 202.

North Carolina.— Phillips *v.* Trezevant, 67 N. C. 370, partner enjoined from disposing of the firm effects and using proceeds.

Ohio.— Halladay *v.* Faurot, 8 Ohio Dec. (Reprint) 633, 9 Cinc. L. Bul. 92, partner enjoined from entering into a competing business with the firm.

Oregon.— Wellman *v.* Harker, 3 Oreg. 253, injunction denied because it was not shown that defendant had neglected any actual duty as a partner.

Pennsylvania.— Stockdale *v.* Ullery, 37 Pa. St. 486, 78 Am. Dec. 440.

South Carolina.— Ellis *v.* Commander, 1 Strohh. Eq. 188, an insolvent partner enjoined from selling or removing firm assets beyond the jurisdiction of the court.

West Virginia.— Grobe *v.* Roup, 44 W. Va. 197, 28 S. E. 699.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955; Miller *v.* O'Boyle, 89 Fed. 140; Leavitt *v.* Windsor Land, etc., Co., 54 Fed. 439, 4 C. C. A. 425.

England.— England *v.* Curling, 8 Beav. 129, 50 Eng. Reprint 51; Gardner *v.* McCutcheon, 4 Beav. 534, 49 Eng. Reprint 446; Read *v.* Bowers, 4 Bro. Ch. 441, 29 Eng. Reprint 978; Greatrex *v.* Greatrex, 1 De G. & Sm. 692, 11 Jur. 1052, 63 Eng. Reprint 1254; Fairthorne *v.* Weston, 3 Hare 387, 8 Jur. 253, 13 L. J. Ch. 263, 25 Eng. Ch. 387, 67 Eng. Reprint 432; Wartnaby *v.* Shuttleworth, 1 Jur. 469.

See 38 Cent. Dig. tit. "Partnership," § 181.

12. Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484 [*reversing* 9 Utah 236, 33 Pac. 1039].

13. Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172; Garretson *v.* Weaver, 3 Edw. (N. Y.) 385; Hall *v.* Hall, 15 Jur. 363, 20 L. J. Ch. 585, 3 Macn. & G. 79, 49 Eng. Ch. 60, 42 Eng. Reprint 191; Roberts *v.* Eber-

continuance of the partnership, in connection with a suit between the partners as individuals. In case, however, the action is brought because of defendant's fraudulent conduct as a partner, or because of his wrongful exclusion of plaintiff from the firm, and it is apparent that a dissolution must be ultimately decreed, a court of equity will not hesitate to appoint a receiver.[14]

h. Pleading — (I) *In General.* If an action between partners is for a balance due, the complaint must aver a settlement of firm affairs and a determination of the amount owing by defendant to plaintiff.[15] If it is for a breach of defendant's agreement to collect the firm assets and apply them to the payment of the firm debts, it is enough to allege this agreement and the collection by defendant and the conversion to his own use, without alleging a demand by plaintiff of defendant's performance.[16] If it is for defendant's breach of his contract to pay all of the firm debts, plaintiff, upon paying a firm debt, need not allege notice to defendant of the debt, nor that plaintiff had been sued to judgment therefor.[17] If the action is for contribution, the complaint must allege the respective interests of the partners as well as a final accounting whereby defendant was found to be indebted to the firm in a certain sum, which had been paid by plaintiff.[18] When the action is brought by plaintiff against defendant for the breach of a contract or obligation, which is no part of the firm business, the complaint must allege that it is separate from the partnership account and that defendant has committed a breach thereof.[19] In actions of the kind under consideration the defendant may either demur[20] or interpose a general denial,[21] or in a proper case he may

hardt, Kay 148, 23 L. J. Ch. 201, 2 Wkly. Rep. 125, 69 Eng. Reprint 63. See also Campbell *v.* Rich Oil Co., 96 S. W. 442, 29 Ky. L. Rep. 716.

Appointment incidental to dissolution see Whitman *v.* Robinson, 21 Md. 30; Randall *v.* Morrell, 17 N. J. Eq. 343; McElvey *v.* Lewis, 76 N. Y. 373.

14. *Kentucky.*— Campbell *v.* Rich Oil Co., 96 S. W. 442, 29 Ky. L. Rep. 716.

Maryland.— Heblebower *v.* Buck, 64 Md. 15, 20 Atl. 991.

Nevada.— Maynard *v.* Railey, 2 Nev. 313.

New Jersey.— Wolbert *v.* Harris, 7 N. J. Eq. 605.

New York.—Alcott *v.* Vultee, 33 N. Y. App. Div. 245, 53 N. Y. Suppl. 474.

Pennsylvania.— Sloan *v.* Moore, 37 Pa. St. 217, during the continuance of a partnership a receiver will not be appointed, merely because of a disagreement, nor even because of a quarrel between partners, unless one behave unrighteously toward the other, as by seeking to exclude him from that control over the concern to which he is entitled by the articles of partnership and the nature of the business carried on under it.

Washington.— Cole *v.* Price, 22 Wash. 18, 60 Pac. 153.

United States.— Einstein *v.* Schnehly, 89 Fed. 540.

England.— See Const *v.* Harris, T. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191, in which a person was appointed to receive money due the firm, and intimated his willingness to appoint a receiver to manage the business pursuant to a decree that plaintiff be restored to his place in the firm. The decision is not accounted an authority, however, for the appointment of a receiver, with full powers of management, for a continuing partnership.

15. *Colorado.*— Bean *v.* Gregg, 7 Colo. 499, 4 Pac. 903.

Indiana.— Wood *v.* Deutchman, 80 Ind. 524, an averment of settlement is not sustained by an award of arbitrators, to whom the parties left the settlement of their business transactions.

Iowa.— Williamson *v.* Haycock, 11 Iowa 40; Wycoff *v.* Purnell, 10 Iowa 332.

New York.— Schulsinger *v.* Blau, 84 N. Y. App. Div. 390, 82 N. Y. Suppl. 686; Mackey *v.* Auer, 8 Hun 180; Covert *v.* Henneberger, 53 How. Pr. 1.

Texas.— Glass *v.* Wiles, (1890) 14 S. W. 225.

Wisconsin.— Edwards *v.* Remington, 51 Wis. 336, 8 N. W. 193.

See 38 Cent. Dig. tit. "Partnership," § 182.

16. Snyder *v.* Baber, 74 Ind. 47; Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545.

17. Clough *v.* Hoffman, 5 Wend. (N. Y.) 499.

18. Warring *v.* Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. Rep. 605; Kennedy *v.* McFadon, 3 Harr. & J. (Md.) 194, 5 Am. Dec. 434.

19. Benton *v.* Hunter, 119 Ga. 381, 46 S. E. 414; Child *v.* Swain, 69 Ind. 230; McCament *v.* Gray, 6 Blackf. (Ind.) 233 (a bill is bad on demurrer which claims a share of moneys collected by defendant, under an agreement to collect debts due the firm, unless it alleges when the collections were made); Lewis *v.* Woolfolk, 2 Pinn. 209, 1 Chandl. (Wis.) 171; Walker *v.* Harris, Anstr. 245.

20. Ridgway *v.* Grant, 17 Ill. 117; Mackey *v.* Auer, 8 Hun (N. Y.) 180; Crooks *v.* Smith, 1 Grant Ch. (U. C.) 356.

21. *Georgia.*— Johnston *v.* Preer, 51 Ga. 313.

Indiana.— Hackney *v.* Williams, 46 Ind.

file a plea alleging that the plaintiff's claim relates to unsettled partnership affairs.[22]

(II) *Issues, Proof, and Variance.* A positive variance or discrepancy between the material allegations of a partner's pleading and proof is, as in actions between other persons, ordinarily fatal to his action or to his defense.[23]

i. Evidence — (I) *Presumptions and Burden of Proof.* It is presumed that the provisions of a partnership agreement are in accordance with the general rules of partnership law, and the burden of proof is upon the partner who sets up a claim under a special and peculiar provision.[24] Again a partner who sues a copartner at law upon a claim which is ordinarily an item in the partnership account has the burden of showing that this claim has been isolated from the firm business, or that the partnership account has been fully settled, and that the claim in suit is for a balance due him from defendant.[25]

(II) *Admissibility, and Weight and Sufficiency.* The usual rules as to the admissibility[26] and the weight and sufficiency of evidence[27] obtain in actions between partners.[28]

413, under a general denial it may be proved that moneys received had been expended for firm purposes.

Louisiana.— Noble *v.* Martin, 7 Mart. N. S. 282.

Michigan.— Wheelock *v.* Rice, 1 Dougl. 267, *non damnificatus* is not a good plea to a declaration on a covenant to indemnify and save plaintiff harmless from all partnership liabilities, which declaration averred that certain of these debts have become due, and that defendant had not assumed and paid them and saved plaintiff harmless therefrom.

Missouri.— Short *v.* Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508, holding that plaintiff must prove the partnership, even though defendant does not verify his denial thereof, Rev. St. § 2186, not applying to such a suit.

North Carolina.— Buffkin *v.* Eason, 110 N. C. 264, 14 S. E. 749, an answer to an action for the recovery of specific property which alleges that the property belongs to the parties as partners is to be deemed controverted by plaintiff as upon a direct denial under Code, § 268.

Pennsylvania.— Reiter *v.* Morton, 96 Pa. St. 229, under a general denial, plaintiff must prove all the material allegations in his complaint.

See 38 Cent. Dig. tit. "Partnership," § 182.

22. Hutcheson *v.* Smith, 5 Ir. Eq. 117; Conger *v.* Platt, 25 U. C. Q. B. 277. *Compare* McSherry *v.* Brooks, 46 Md. 103, holding such a defense unavailable, in a suit brought by one partner against the other on the latter's promissory notes.

23. *Georgia.*— Davis *v.* Wimberly, 86 Ga. 46, 12 S. E. 208.

Illinois.— Tucker *v.* Page, 69 Ill. 179. See also Hartzell *v.* Murray, 224 Ill. 377, 79 N. E. 674 [*affirming* 127 Ill. App. 608].

Massachusetts.— Shattuck *v.* Lawson, 10 Gray 405.

Missouri.— Leabo *v.* Renshaw, 61 Mo. 292.

New York.— Reed *v.* McConnell, 133 N. Y. 425, 31 N. E. 22.

Wisconsin.— Gay *v.* Fretwell, 9 Wis. 186, under a claim in his pleading of a right to hold property as a partner one cannot be allowed at the trial to prove a lien for advances.

Canada.— Carfrae *v.* Vanbuskirk, 1 Grant Ch. (U. C.) 539, a bill against three partners is not sustained by admissions on the part of two that they are partners with the third and plaintiff.

See 38 Cent. Dig. tit. "Partnership," § 183.

24. Cameron *v.* Bickford, 11 Ont. App. 52.

Extra compensation.—A partner who claims extra compensation for his services must prove an agreement therefor. Nevills *v.* Moore Min. Co., 135 Cal. 561, 67 Pac. 1054; Boardman *v.* Close, 44 Iowa 428.

25. Wilt *v.* Bird, 7 Blackf. (Ind.) 258; Murdock *v.* Martin, 12 Sm. & M. (Miss.) 660; Wright *v.* Cobleigh, 21 N. H. 339.

26. See Evidence, 16 Cyc. 1110 *et seq.*

27. See Evidence, 17 Cyc. 753 *et seq.*

28. See the following cases:

California.— Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547.

Colorado.— Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018; Mussetter *v.* Timmerman, 11 Colo. 201, 17 Pac. 504, duplicate bills were admitted, upon plaintiff's testifying that such bills contained correct entries.

Georgia.— Garrett *v.* Morris, 104 Ga. 84, 30 S. E. 685.

Illinois.— Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492 [*affirming* 28 Ill. App. 386]; Purvines *v.* Champion, 67 Ill. 459.

Iowa.— Beidler *v.* Shallenberger, 42 Iowa 203.

Maine.— Wiggin *v.* Goodwin, 63 Me. 389, oral evidence admitted which did not vary the terms of a promissory note given by one partner to another upon dissolution, but only showed a molification thereof in correction of a mutual mistake.

Maryland.— Morrison *v.* Galloway, 2 Harr. & J. 461.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52, if one partner pays an award against the firm, the amount of the award is conclusive on the question of contribution by the others.

j. Trial[29] — (I) *In General.* The rules which govern in the trial of civil cases generally are applicable in actions between partners.[30]

(II) *Functions of the Court and Jury.* To the court belong the right and the duty of construing the pleadings and agreements,[31] of determining whether a partnership exists when the facts are undisputed and the inferences therefrom are clear.[32] Questions of fact, where the evidence is conflicting or where reasonable men may draw different inferences from undisputed evidence, are to be determined by the jury.[33]

(III) *Instructions.*[34] In actions between partners the usual rules as to instructions in civil cases are applicable.[35]

k. Damages. The measure of damages in a suit by a partner against his copartner for the violation of his duty as a partner, or for breach of the partnership articles or of any other contract, depends on the extent of the legal injury inflicted, as in all other cases.[36] When a suit is brought by a partner against his

Michigan.— Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

Minnesota.— Berkey *v.* Judd, 22 Minn. 287, fraud in settling partnership accounts must be proved and will not be presumed, but may be proved by circumstantial evidence.

Missouri.— Burdall *v.* Johnson, 122 Mo. App. 119, 99 S. W. 2; Bricker *v.* Stone, 47 Mo. App. 530.

New Jersey.— Jessup *v.* Cook, 6 N. J. L. 434.

New York.— Mitchell *v.* Read, 84 N. Y. 556 [*affirming* 19 Hun 418]; Berau *v.* O'Connell, 71 Hun 21, 24 N. Y. Suppl. 597.

Pennsylvania.— McCown *v.* Quigley, 147 Pa. St. 307, 23 Atl. 805; Reiter *v.* Morton, 96 Pa. St. 229; Varner's Appeal, 2 Mona. 228, 16 Atl. 98; Brown *v.* Agnew, 6 Watts & S. 235; Yohe *v.* Barnet, 3 Watts & S. 81.

Texas.— Floyd *v.* Efron, 66 Tex. 221, 18 S. W. 497; Marrast *v.* Smith, (Civ. App. 1899) 53 S. W. 707; O'Fiel *v.* King, (Civ. App. 1893) 23 S. W. 696; Waco Water Co. *v.* Sanford, 1 Tex. App. Civ. Cas. § 193.

Washington.— Budlong *v.* Budlong, 43 Wash. 359, 86 Pac. 559.

Wisconsin.— Wilson *v.* Runkel, 38 Wis. 526.

United States.— Towle *v.* Hammond, 99 Fed. 510, 40 C. C. A. 498; Askew *v.* Odenheimer, 2 Fed. Cas. No. 587, Baldw. 380.

Canada.— Stuart *v.* Mott, 23 Nova Scotia 524 [*affirmed* in 14 Can. Sup. Ct. 734]; Cameron *v.* Bickford, 11 Ont. App. 52; Saunders *v.* Furnivall, 2 Ch. Chamb. (U. C.) 49; Burn *v.* Strong, 14 Grant Ch. (U. C.) 651; Clark *v.* Chipman, 26 U. C. Q. B. 170.

See 38 Cent. Dig. tit. "Partnership," §§ 184, 184½.

Entries in partnership books see *infra*, IX, D, 12, f; and Evidence, 17 Cyc. 397.

29. See, generally, Trial.

30. See Wadley *v.* Jones, 55 Ga. 329.

Reference to auditor to state account see Pierce *v.* Thompson, 6 Pick. (Mass.) 193; Whitaker *v.* Bledsoe, 34 Tex. 401.

31. Everitt *v.* Chapman, 6 Conn. 347; Wadley *v.* Jones, 55 Ga. 329; Dorwart *v.* Ball, 71 Nebr. 173, 98 N. W. 652; Whitaker *v.* Bledsoe, 34 Tex. 401.

32. *Delaware.*— Robinson *v.* Green, 5 Harr. 115; Gilpin *v.* Temple, 4 Harr. 190; Beecham *v.* Dodd, 3 Harr. 485.

Illinois.— Bailey *v.* Ferguson, 39 Ill. App. 91.

Michigan.— Kingsbury *v.* Tharp, 61 Mich. 216, 28 N. W. 74.

New York.— Evans *v.* Warner, 20 N. Y. App. Div. 230, 47 N. Y. Suppl. 16.

North Carolina.— Covington *v.* Leak, 88 N. C. 133.

South Carolina.— Terrill *v.* Richards, 1 Nott & M. 20.

See 38 Cent. Dig. tit. "Partnership," § 185½.

33. *Delaware.*— Beecham *v.* Dodd, 3 Harr. 485.

Georgia.— Branch *v.* Cooper, 82 Ga. 512, 9 S. E. 1130.

Illinois.— Blain *v.* Desrosiers, 39 Ill. App. 50.

Iowa.— Carl *v.* Knott, 16 Iowa 379.

Maryland.— Barger *v.* Collins, 2 Gill & J. 410.

Massachusetts.— Adamson *v.* Guild, 177 Mass. 331, 58 N. E. 1081.

New York.— Dart *v.* Laimbeer, 107 N. Y. 664, 14 N. E. 291.

Pennsylvania.— Yohe *v.* Barnet, 3 Watts & S. 81; Roop *v.* Roop, 3 Phila. 364.

34. See, generally, Trial.

35. And see Jowers *v.* Baker, 57 Ga. 81; Hartzell *v.* Murray, 224 Ill. 377, 79 N. E. 674 [*affirming* 127 Ill. App. 608]; Bricker *v.* Stone, 47 Mo. App. 530; Lunham *v.* Hafner, 5 N. Y. App. Div. 480, 38 N. Y. Suppl. 1060.

Illustration.— Where one sued his partners for a balance alleged to be due, it was error to instruct the jury, authorizing them to consider the profits from the partnership in the absence of evidence to show that the partnership made any profits. Grier *v.* Strother, 111 Mo. App. 386, 85 S. W. 976.

36. Wadsworth *v.* Manning, 4 Md. 59; White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971; Bagley *v.* Smith, 19 How. Pr. (N. Y.) 1. See also Sneed *v.* Deal, 53 Ark. 152, 13 S. W. 703 (in which plaintiff's damages for defendant's cancellation of a firm lease and renewal in his own name were limited to the sum paid by plaintiff for repairs on the premises and interest thereon); Gillen *v.* Peters, 39 Kan. 489, 18

copartner, for wrongfully dissolving the partnership prematurely, the ordinary measure of damages is what the interest of plaintiff would have sold for.[37] If there is no probability of any profits, there can be no recovery of compensatory damages.[38] On the other hand if plaintiff shows that he relinquished a valuable appointment in order to enter the partnership, what he lost by such relinquishment may be considered by the jury in fixing his damages.[39]

l. Judgment and Execution. The successful party in a litigation between partners is entitled to such a judgment as the pleadings and proof warrant.[40] Even when the losing party has a good defense, if he fails to interpose it a judgment against him will be conclusive,[41] unless it is reversed for some other cause.[42] When the creditor partner enforces his execution against the debtor partner's interest in firm property and buys in such interest he does this subject to the rights of partnership creditors.[43] Moreover he is bound to act with perfect fairness toward the debtor partner, and must do nothing tending to depress the value of the interest which he purchases.[44] If he pays for such interest with firm money, the sale and purchase do not oust the debtor partner from the firm.[45]

VI. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

A. Representation of Firm by Partner — 1. Power and Authority of Partners Generally — a. Nature and Foundation. The law presumes every ordinary partnership to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner.[46] Accordingly it assumes that in every such partnership each member is an agent of the firm and of his other partners for the purpose of the business of the firm.[47] The

Pac. 613 (holding that the measure of damages in an action for a breach of contract by which one partner agreed to pay certain debts of the firm on a dissolution would be the amount of the debts provided for in the contract).

Illustration.— Where the sole object of a merchandising business was the accumulation of profits, the measure of damages for breach of a partnership contract to engage in such business is the probable profits plaintiff would have made, had not the partnership been wrongfully dissolved. Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018.

37. Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756; Reiter *v.* Morton, 96 Pa. St. 229; Addams *v.* Tutton, 39 Pa. St. 447. See also Corcoran *v.* Sumption, 79 Minn. 108, 81 N. W. 761, 79 Am. St. Rep. 428, holding that where the dissolution was not due to any fault of defendant, plaintiff could recover four fifths of the premium paid by him, the term of the partnership being two years and the dissolution taking place at the end of one year.

38. Jones *v.* Morehead, 3 B. Mon. (Ky.) 377. See also Van Ness *v.* Fisher, 5 Lans. (N. Y.) 236.

39. McNeill *v.* Reid, 9 Bing. 68, 1 L. J. C. P. 162, 2 Moore & S. 89, 23 E. C. L. 489.

40. Whitesides *v.* Collier, 7 Dana (Ky.) 283 (holding that defendant partner was entitled to a judgment for the return of partnership property, which plaintiff had replevied from him); Brinley *v.* Kupfer, 6 Pick. (Mass.) 179 (holding that where plaintiff sued for the balance due him from defendant on the dissolution of their firm, and it appeared that one debt only was owing to the firm, plaintiff was entitled to judgment for the balance alleged and proved, upon executing a release to defendant of the outstanding debt); Cheeseman *v.* Sturges, 9 Bosw. (N. Y.) 246.

41. Johnson-Maakestad *v.* Johnson, 44 Ill. App. 593; Kunneke *v.* Mapel, 60 Ohio St. 1, 53 N. E. 259; Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713.

42. Taylor *v.* Watts, 20 S. W. 388, 14 Ky. L. Rep. 451; Bowman *v.* O'Reilly, 31 Miss. 261.

43. Priestly *v.* Bisland, 9 Rob. (La.) 425.

44. Perrens *v.* Johnson, 3 Jur. N. S. 975, 3 Smale & G. 419, 65 Eng. Reprint 720; Smith *v.* Harrison, 3 Jur. N. S. 287, 26 L. J. Ch. 412, 5 Wkly. Rep. 408, where sale set aside because of the purchasing partner's unfairness.

45. Helmore *v.* Smith, 35 Ch. D. 436, 56 L. T. Rep. N. S. 535, 36 Wkly. Rep. 3; Habershon *v.* Blurton, 1 De G. & Sm. 121, 63 Eng. Reprint 998.

46. Brewster *v.* Hardeman, Dudley (Ga.) 138; *In re* Agriculturist Cattle Ins. Co., L. R. 5 Ch. 725, 23 L. T. Rep. N. S. 424, 18 Wkly. Rep. 1094.

47. *Iowa.*— Saunders *v.* Bentley, 8 Iowa 516; Walker *v.* Clark, 8 Iowa 474; Boardman *v.* Adams, 5 Iowa 224.

Kentucky.— Barker *v.* Mann, 5 Bush 672, 96 Am. Dec. 373.

Mississippi.— Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Nevada.— Roney *v.* Buckland, 4 Nev. 45, holding a firm liable for the loss of bonds by a partner, who had obtained them for the benefit of the firm.

partnership articles need not confer this authority in terms. The partnership relation operates as a grant of power to each partner to transact the firm's business in the usual way,[48] and a third person who has colluded with a partner to defraud his copartners cannot avail himself of the wrong-doing partner's implied authority.[49] So long, however, as a partner's acts are confined to carrying out what appears to be the firm's business in the usual way, his authority is much more extensive than that of a mere agent.[50] If an agency is conferred upon a firm, and not upon the individuals composing it, the rule that, where an authority is conferred upon several persons all must join in its execution, has no application, for the act of one partner is the act of the firm.[51] Generally, however, the appointment of one of several partners as agent is not an appointment of the partnership, and gives no authority to other partners.[52]

b. Commercial Character of the Partnership. It is generally held that the implied authority of a partner is much more extensive in a commercial or trading firm than in a non-commercial firm.[53]

New Hampshire.— Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192.

Ohio.— Harvey *v.* Childs, 28 Ohio St. 319, 22 Am. Rep. 387.

Pennsylvania.— Babcock *v.* Stewart, 58 Pa. St. 179; Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Com. *v.* Rovnianek, 12 Pa. Super. Ct. 86; May *v.* Troutman, 4 Pa. Super. Ct. 42, 40 Wkly. Notes Cas. 63.

South Carolina.— Congdon *v.* Morgan, 13 S. C. 190.

United States.— Andrews *v.* Congar, 131 U. S. appendix clxxxiii, 26 L. ed. 90; Capelle *v.* Hall, 5 Fed. Cas. No. 2,391, 12 Nat. Bankr. Reg. 1.

England.— Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 745; *Ex p.* Hodgkinson, Coop. 99, 10 Eng. Ch. 99, 35 Eng. Reprint 492, 19 Ves. Jr. 291, 34 Eng. Reprint 525, 13 Rev. Rep. 199; *In re* Manby, 3 Jur. N. S. 259, 26 L. J. Ch. 313; *Ex p.* Hall, 1 Rose 2, 17 Ves. Jr. 62, 11 Rev. Rep. 18, 34 Eng. Reprint 24.

Canada.— Howell *v.* McFarland, 2 Ont. App. 31.

See 38 Cent. Dig. tit. "Partnership," § 190.

An infant partner may act as agent for the partnership, and his agreements will bind such partnership. Brown *v.* Hartford F. Ins. Co., 117 Mass. 479. See, generally, INFANTS.

A partner is presumed to consent to all the acts of his copartner within the scope of the firm business. Boardman *v.* Adams, 5 Iowa 224.

In Louisiana by statute the doctrine of agency applies to commercial partnerships; but it is provided that the members of a partnership which is not commercial are not bound by the acts of their copartners, unless these acts are specially authorized, or unless the firm is benefited by the transaction. Buard *v.* Lemée, 12 Rob. 243; Rudy *v.* Harding, 6 Rob. 70; Dumartrait *v.* Gay, 1 Rob. 62; Petrovis *v.* Hyde, 16 La. 223; Reynolds *v.* Swain, 13 La. 193, construing Civ. Code (1870), §§ 2872, 2874.

48. Catlin *v.* Gilders, 3 Ala. 536; Hoskinson *v.* Eliot, 62 Pa St. 393; Winship *v.* U. S. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216. See also Kirby *v.* Ingersoll, Harr. (Mich.) 172, holding that the implied authority of each partner is conferred by the law for the purpose of carrying on the partnership, not for the purpose of destroying it.

49. Poe *v.* Ellis, 99 Ga. 235, 25 S. E. 246; Loftus *v.* Ivy, 14 Tex. Civ. App. 701, 37 S. W. 766.

50. Greeley *v.* Wyeth, 10 N. H. 15.

51. *Maine.*— Purinton *v.* Security L. Ins., etc., Co., 72 Me. 22.

Massachusetts.— Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204.

Michigan.— Eggleston *v.* Boardman, 37 Mich. 14.

Minnesota.— Deakin *v.* Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

Texas.— Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.

United States.— Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 28 L. ed. 156.

Compare Cummings *v.* Parish, 39 Miss. 412, where the agency being conferred upon the members of the firm as individuals, it was held to be necessary for all to join in its execution.

Where a power is given to a partnership in the name of the firm, the act of one of the partners, in the name of the firm, is the act of the firm, is done by both, and is in strict pursuance of the power. Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71.

52. Attwood *v.* Munnings, 7 B. & C. 278, 1 M. & R. 78, 6 L. J. K. B. O. S. 9, 31 Rev. Rep. 194, 14 E. C. L. 130; Edmiston *v.* Wright, 1 Campb. 88.

The retainer of one member of a firm of attorneys is a retainer of all. Eggleston *v.* Boardman, 37 Mich. 14.

53. Judge *v.* Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185, power of one partner to bind the firm by a contract entered into by him on behalf of the firm is implied by law only in the case of commercial partnerships, and with respect to non-commercial firms it

c. Scope of Firm Business. Whether a partnership is commercial or non-commercial, the implied authority of its members depends very largely upon the scope of the firm business. This, in turn, depends chiefly upon two considerations: (1) The usages of business which have grown up in connection with the class of partnerships to which the particular one belongs;[54] and (2) the course of

is a question of fact depending on the partnership articles, course of business, and other circumstances shown in each case.

Commercial partnership defined.— A commercial partnership is a partnership whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally. Marsh *v.* Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40. See also Kimbro *v.* Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313; Winship *v.* U. S. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216; Pinkerton *v.* Ross, 33 U. C. Q. B. 508.

In Louisiana it is provided by statute that "commercial partnerships are such as are formed: 1. For the purchase of any property, and the sale thereof, either in the same state or changed by manufacture. 2. For buying or selling any personal property whatever, as factors or brokers. 3. For carrying personal property for hire, in ships or other vessels." Chaffe *v.* Ludeling, 27 La. Ann. 607; Copley *v.* Lawhead, 11 La. Ann. 615; Cowand *v.* Pulley, 11 La. Ann. 1; Hermanos *v.* Duvigneaud, 10 La. Ann. 114; Stewart *v.* Caldwell, 9 La. Ann. 419; Nachtrib *v.* Prague, 6 La. Ann. 759; English *v.* Wall, 12 Rob. 132; Norris *v.* Ogden, 11 Mart. 455 (construing Civ. Code (1872), art. 2825); Ward *v.* Brandt, 11 Mart. 331, 13 Am. Dec. 352.

Examples of commercial partnerships.—Following are a few of the lines of business in which commercial or trading partnerships have been adjudged to exist: Slaughtering cattle for sale (Wagner *v.* Simmons, 61 Ala. 143), taking and executing plumbing contracts (Marsh *v.* Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40. But see Huey *v.* Fish, 15 Tex. Civ. App. 455, 40 S. W. 29), the real estate, loan and insurance business (Adams *v.* Long, 114 Ill. App. 277), dealing in dry goods (Walsh *v.* Lennon, 98 Ill. 27, 38 Am. Rep. 75), conducting a country store (Dow *v.* Moore, 47 N. H. 419), and manufacturing refrigerators or other articles for sale (Holt *v.* Simmons, 16 Mo. App. 97; Winship *v.* U. S. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216).

Examples of non-commercial partnerships. — It has been held that partnerships for the conduct of the following lines of business are non-commercial: Managing and cultivating land, or clearing it of timber, or dealing in it (Tanner *v.* Hyde, 2 Colo. App. 443, 31 Pac. 344; Lee *v.* Ft. Scott First Nat. Bank, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; Prince *v.* Crawford, 50 Miss. 344; Rumsey *v.* Briggs, 63 Hun (N. Y.) 11, 17 N. Y. Suppl. 562 [*reversed* on other grounds in 139 N. Y. 323, 34 N. E. 929]; Hunt *v.* Chapin, 6 Lans. (N. Y.) 139; Patterson *v.* Brewster, 4 Edw. (N. Y.) 352; Greenslade *v.* Dower, 7 B. & C. 635, 6 L. J. K. B. O. S. 155, 1 M. & R. 640, 31 Rev. Rep. 272, 14 E. C. L. 286), conducting a theater (Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53), partnership between stevedores (Benedict *v.* Thompson, 33 La. Ann. 196), boring wells and buying materials for pumps and windmills (Vetsch *v.* Neiss, 66 Minn. 459, 69 N. W. 315), firm engaged in contracting with the government for carrying mail (Sedalia Third Nat. Bank *v.* Faults, 115 Mo. App. 42, 90 S. W. 755), carrying on a sawmill and manufacturing lumber for sale (National State Capital Bank *v.* Noyes, 62 N. H. 3; Dowling *v.* Boston Nat. Exch. Bank, 145 U. S. 512, 12 S. Ct. 928, 36 L. ed. 795 [*reversing* 30 Fed. 412]), paving and curbing streets (Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677), and practising law (Worster *v.* Forbush, 171 Mass. 423, 50 N. E. 936; Garland *v.* Jacomb, L. R. 8 Exch. 216, 28 L. T. Rep. N. S. 877, 21 Wkly. Rep. 868; Levy *v.* Pyne, C. & M. 453, 41 E. C. L. 249).

54. *Alabama.*— Collier *v.* McCall, 84 Ala. 190, 4 So. 367; Abraham *v.* Hall, 59 Ala. 386.

Georgia.— Eady *v.* Newton Coal, etc., Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. N. S. 650; Standard Wagon Co. *v.* Few, 119 Ga. 293, 46 S. E. 109; Sparks *v.* Flannery, 104 Ga. 323, 30 S. E. 823; Miller *v.* Hines, 15 Ga. 197.

Illinois.— Pahlman *v.* Taylor, 75 Ill. 629, every partner possesses full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from them; and as between the firm and third persons who deal with it in good faith and without notice, it is a matter of no consequence whether the partner is acting fairly with his copartners in the transaction or not, if he is acting within the apparent scope of his authority and professedly for the firm.

Indiana.— Todd *v.* Jackson, 75 Ind. 272; Thompson *v.* Howard, 2 Ind. 245.

Iowa.—Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290, it is outside of the scope of business of a firm of lawyers for one partner to agree to save a surety harmless, if he would execute a bond in a case in which the firm were engaged.

Kentucky.— Brooks-Waterfield Co. *v.* Jackson, 53 S. W. 41, 21 Ky. L. Rep. 854.

Michigan.— Hotchin *v.* Kent, 8 Mich. 526; Kirby *v.* Ingersoll, Harr. 172.

dealing of that particular partnership.[55] The firm and its members are bound by the acts of a partner which are within the general scope of the partnership business, as above defined; but not by others, unless they are actually authorized, assented to, or ratified.[56]

Minnesota.—Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

Mississippi.—Vaiden *v.* Hawkins, (1889) 6 So. 227; Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Nebraska.— Farmers', etc., Ins. Co. *v.* Malone, 45 Nebr. 302, 63 N. W. 802.

New Hampshire.— Mason *v.* Gibson, 73 N. H. 190, 60 Atl. 96.

New York.— Herlehy *v.* Ferguson, 47 N. Y. App. Div. 237, 62 N. Y. Suppl. 648; Palliser *v.* Erhardt, 46 N. Y. App. Div. 222, 61 N. Y. Suppl. 191; Cumpston *v.* McNair, 1 Wend. 457; Ensign *v.* Wands, 1 Johns. Cas. 171.

Ohio.— Union Nat. Bank *v.* Wickham, 18 Ohio Cir. Ct. 685, 6 Ohio Cir. Dec. 790.

Pennsylvania.— Garabrant *v.* Wood, 4 Pa. Super. Ct. 391; Robertson *v.* Wood, 10 Kulp 76; Buckley *v.* Wood, 9 Kulp 189; Andriot *v.* McLean, 4 Leg. Gaz. 222; Thompson's Estate, 12 Phila. 36.

England.— *Ex p.* Snowball, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. Rep. N. S. 894, 20 Wkly. Rep. 786; Hasleham *v.* Young, 5 Q. B. 833, Dav. & M. 700, 8 Jur. 338, 13 L. J. Q. B. 205, 48 E. C. L. 833; Mara *v.* Browne, [1896] 1 Ch. 199, 65 L. J. Ch. 225, 73 L. T. Rep. N. S. 638, 44 Wkly. Rep. 330; Rhodes *v.* Moules, [1895] 1 Ch. 236, 64 L. J. Ch. 122, 71 L. T. Rep. N. S. 599, 12 Reports 6, 43 Wkly. Rep. 99; Dundonald *v.* Masterman, L. R. 7 Eq. 504, 38 L. J. Ch. 350, 20 L. T. Rep. N. S. 271, 17 Wkly. Rep. 548; Atkinson *v.* Mackreth, L. R. 2 Eq. 570, 35 L. J. Ch. 624, 14 L. T. Rep. N. S. 722, 14 Wkly. Rep. 883; Forster *v.* Mackreth, L. R. 2 Exch. 163, 36 L. J. Exch. 94, 16 L. T. Rep. N. S. 23, 15 Wkly. Rep. 747; Harman *v.* Johnson, 3 C. & K. 272, 2 E. & B. 61, 17 Jur. 1096, 22 L. J. Q. B. 297, 75 E. C. L. 61; Natusch *v.* Irving, 2 Coop. t. Cott. 358, 47 Eng. Reprint 1196; Coomer *v.* Bromley, 5 De G. & Sm. 532, 16 Jur. 609, 64 Eng. Reprint 1230; Sims *v.* Brutton, 5 Exch. 802, 20 L. J. Exch. 41; *In re* Fryer, 3 Jur. N. S. 485, 3 Kay & J. 317, 26 L. J. Ch. 398, 5 Wkly. Rep. 552, 69 Eng. Reprint 1129; Biggs *v.* Bree, 51 L. J. Ch. 263, 46 L. T. Rep. N. S. 8, 30 Wkly. Rep. 278; Bourdillon *v.* Roche, 27 L. J. Ch. 681, 6 Wkly. Rep. 618; Warr *v.* Jones, 24 Wkly. Rep. 695.

See 38 Cent. Dig. tit. "Partnership," § 193. See also CUSTOMS AND USAGES, 12 Cyc. 1074.

Notice of general business usages.— Of the general business usages which affect a partner's implied authority, those dealing with a firm are bound to take notice. Standard Wagon Co. *v.* Few, 119 Ga. 293, 46 S. E. 109 (one dealing with a firm is chargeable with notice of the character of the firm business, and, if he takes from one partner a firm note for goods supplied such partner, he is bound to know whether the transaction is within the apparent scope of the partnership business); Herlehy *v.* Ferguson, 47 N. Y. App. Div. 237, 62 N. Y. Suppl. 648; Venable *v.* Levick, 2 Head (Tenn.) 351 (if the public have the usual means of knowledge given them in regard to the business of a partnership, and no acts have been done or suffered by the partners to mislead, everyone is presumed to know the nature and extent of the partnership with whose members he deals; and where a person takes a partnership engagement, without the authority of the firm, for a matter not within the scope of its authority, he is guilty of a fraud, and cannot enforce such engagement); Peterson *v.* Armstrong, 24 Utah 96, 66 Pac. 767; Gutheil *v.* Gilmer, 23 Utah 84, 63 Pac. 817; Cavanaugh *v.* Salisbury, 22 Utah 465, 63 Pac. 39; Town *v.* Hendee, 27 Vt. 258.

55. *Georgia.*— People's Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920 (that a partnership may frequently have drawn checks against its funds in bank for the purpose of discharging the individual debts of its members does not constitute such "a course of dealing" as will justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its note in satisfaction of a debt due by one of the partners to the bank); Pursley *v.* Ramsey, 31 Ga. 403.

Massachusetts.— Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395; Woodward *v.* Winship, 12 Pick. 430.

Michigan.— Davis *v.* Dodge, 30 Mich. 267.

Missouri.— Midland Nat. Bank *v.* Schoen, 123 Mo. 650, 27 S. W. 547, the course of business between members of a firm may tend to show the authority of one partner to act for and charge the partnership.

New York.— Burchell *v.* Voght, 164 N. Y. 602, 58 N. E. 1085 [*affirming* 35 N. Y. App. Div. 190, 55 N. Y. Suppl. 80].

South Carolina.— Galloway *v.* Hughes, 1 Bailey 553.

Texas.— Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

Utah.— Salt Lake City Brewing Co. *v.* Hawke, 24 Utah 199, 66 Pac. 1058.

Canada.— Reid *v.* Smith, 2 Ont. 69; Fraser *v.* McLeod, 8 Grant Ch. 268.

See 38 Cent. Dig. tit. "Partnership," § 194.

56. *Alabama.*— Abraham *v.* Hall, 59 Ala. 386; McCrary *v.* Slaughter, 58 Ala. 230; Waring *v.* Grady, 49 Ala. 465, 20 Am. Rep. 286.

Michigan.— Barnard *v.* Lapeer, etc., Plank Road Co., 6 Mich. 274.

Minnesota.— Irvine *v.* Myers, 4 Minn. 229; Selden *v.* Bank of Commerce, 3 Minn. 229.

Mississippi.— Goodman *v.* White, 25 Miss. 163.

d. Majority and Minority of Firm. In the absence of a provision in the partnership contract to the contrary, differences arising as to ordinary matters connected with the firm business may be decided by a majority of the members, acting in good faith.[57] No change may be made, however, in the nature of the firm business, or in its membership, or in the place where it is to be carried on, without the consent of all existing partners.[58]

e. Restrictions on Partner's Authority. These are often imposed, either in the partnership articles, or in a separate contract. While they are binding upon the partners they do not affect third persons, who deal with the firm or any member thereof, without notice of them; for the implied power of a partner is determined by what the partnership assumes to the public to be, and by its ordinary mode of doing business.[59] Even in the absence of an agreement between the

Missouri.— Rimel *v.* Hayes, 83 Mo. 200; Cayton *v.* Hardy, 27 Mo. 536.

Montana.— Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201, construing Civ. Code, §§ 3231, 3250.

Nebraska.— Norton *v.* Thatcher, 8 Nebr. 186.

New York.— Union Nat Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293; Welles *v.* March, 30 N. Y. 344.

Pennsylvania.— Bell *v.* Faber, 1 Grant 31.

South Carolina.— Nichols *v.* Hughes, 2 Bailey 109.

Tennessee.— Scott *v.* Bandy, 2 Head 197.

United States.— Winship *v.* U. S. Bank, 5 Pet. 529, 8 L. ed. 216; U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176.

See 38 Cent. Dig. tit. "Partnership," § 193.

57. *Alabama.*— Johnston *v.* Dutton, 27 Ala. 245.

Colorado.— Copp *v.* Longstreet, 5 Colo. App. 282, 38 Pac. 601, purchase of real estate by two of three partners.

Iowa.— Western Stage Co. *v.* Walker, 2 Iowa 504, 65 Am. Dec. 789.

Maine.— Staples *v.* Sprague, 75 Me. 458, a sale of personal property belonging to the firm may be made by a majority without the consent of the minority in the absence of fraud.

New York.— Kirk *v.* Hodgson, 3 Johns. Ch. 400, majority may retain a clerk who has overdrawn his account.

Pennsylvania.— Markle *v.* Wilbur, 200 Pa. St. 457, 469, 50 Atl. 204 ("In such case, the minority must yield, so long as the majority do not transcend or pervert the powers with which the firm has been invested. If the number of partners should in any given case be an even number and they should be evenly divided in opinion, with no provision for such a contingency in their articles, then it may be that, as to that subject, the power of the firm to act is suspended so long as the even division continues; and, if the subject be one upon which action is essential to the purposes of the partnership, such disagreement might work a dissolution by rendering the further prosecution of the common enterprise impossible. The same consequences could not flow, however, from the dissent of a minority, because, within the purpose of the partnership and for the promotion of its interests, the majority have the right to control"); Clarke *v.* State Valley R. Co., 136 Pa. St. 408, 20 Atl. 562, 10 L. R. A. 238; Peacock *v.* Cummings, 46 Pa. St. 434, 5 Phila. 253; Potter *v.* McCoy, 26 Pa. St. 458.

England.— Wall *v.* London Assets Corp., [1898] 2 Ch. 469, 67 L. J. Ch. 596, 79 L. T. Rep. N. S. 249, 47 Wkly. Rep. 219; Const *v.* Harris, Turn. & R. 496, 24 Rev. Rep. 108, 12 Eng. Ch. 496, 37 Eng. Reprint 1191.

See 38 Cent. Dig. tit. "Partnership," § 195.

58. Chicago, etc., R. Co. *v.* Hoyt, 1 Ill. App. 374; Abbott *v.* Johnson, 32 N. H. 9; Jennings' Appeal, 2 Mona. (Pa.) 184, 16 Atl. 19, 2 L. R. A. 43; Clements *v.* Norris, 8 Ch. D. 129, 47 L. J. Ch. 546, 38 L. T. Rep. N. S. 591; Natusch *v.* Irving, 2 Coop. t. Cott. 358, 47 Eng. Reprint 1196, Gow Partn. 398; Chapple *v.* Cadell, Jac. 537, 23 Rev. Rep. 138, 4 Eng. Ch. 537, 37 Eng. Reprint 953.

59. *Alabama.*— Humes *v.* O'Bryan, 74 Ala. 64; Monroe *v.* Hamilton, 60 Ala. 226, holding that the registration of a mortgage, given by one partner to another, and containing restrictions on the mortgagor's authority as a partner, is not constructive notice to third persons.

Colorado.— Rocky Mountain Nat. Bank *v.* McCaskill, 16 Colo. 408, 26 Pac. 821.

Connecticut.— Everitt *v.* Chapman, 6 Conn. 347.

Georgia.— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

Illinois.— Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715; McDonald *v.* Fairbanks, 161 Ill. 124, 43 N. E. 783 [*affirming* 58 Ill. App. 384]; Gammon *v.* Huse, 100 Ill. 234.

Iowa.— Evans *v.* Evans, 82 Iowa 492, 48 N. W. 929.

Kansas.— Medberry *v.* Soper, 17 Kan. 369.

Kentucky.— Saufley *v.* Howard, 7 Dana 367.

Louisiana.— Harrison *v.* Poole, 4 Rob. 193.

Maryland.— Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422.

Massachusetts.— Stimson *v.* Whitney, 130 Mass. 591.

Mississippi.— King *v.* Levy, (1892) 13 So. 282; Lynch *v.* Thompson, 61 Miss. 354; Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Missouri.— Bates *v.* Forcht, 89 Mo. 121, 1 S. W. 120; Murphy *v.* Camden, 18 Mo. 122 (notorious insolvency of a partner is not notice of any restriction upon his authority

partners imposing restrictions upon the implied authority of one of their number, any partner may put an end to such authority with respect to new obligations, by giving notice that as to some particular matter he will not be bound by his partners' acts.[60]

f. Firms With Common Partners. Transactions between firms are not invalid because of the fact that they have a common partner.[61] Such transactions are

to bind the firm of which he remains a member); Cargill *v.* Corby, 15 Mo. 425 (if the business be to buy and sell, the individual partner buys and sells for the firm. This is a general authority held out to the world, to which the world has a right to trust).

New Hampshire.— Bromley *v.* Elliet, 38 N. H. 287, 75 Am. Dec. 182.

New York.— Magovern *v.* Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Frost *v.* Hanford, 1 E. D. Smith 540; Walden *v.* Sherburne, 15 Johns. 409.

Ohio.— Benninger *v.* Hess, 41 Ohio St. 64; Seybold *v.* Greenwald, 1 Disn. 425, 4 Ohio Dec. (Reprint) 710.

Pennsylvania.—Rice *v.* Jackson, 171 Pa. St. 89, 32 Atl. 1036; Lerch *v.* Bard, 162 Pa. St. 307, 29 Atl. 890; Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435; Tillier *v.* Whitehead, 1 Dall. 269, 1 L. ed. 131.

Tennessee.— Nichols *v.* Cheairs, 4 Sneed 229.

Texas.— Gallagher *v.* Heidenheimer, 3 Tex. App. Civ. Cas. § 132; Franklin *v.* Hardie, 1 Tex. App. Civ. Cas. § 1219.

Wisconsin.— Wipperman *v.* Stacy, 80 Wis. 345, 50 N. W. 336.

United States.—Winship *v.* U. S. Bank, 5 Pet. 529, 8 L. ed. 216; National Exch. Bank *v.* White, 30 Fed. 412; Davis *v.* Beverly, 7 Fed. Cas. No. 3,627, 2 Cranch C. C. 35.

See 38 Cent. Dig. tit. "Partnership," §§ 196, 197.

Persons having notice.— The firm and other partners, however, are not bound by the acts of a partner in contravention of such restrictions, with respect to persons having notice of them.

Georgia.— Radcliffe *v.* Varner, 55 Ga. 427; Urquhart *v.* Powell, 54 Ga. 29.

Illinois.— Straus *v.* Kohn, 83 Ill. App. 497.

Indiana.— Campbell *v.* Pence, 118 Ind. 313, 20 N. E. 840.

Iowa.— Baxter *v.* Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. Rep. 432; Knox *v.* Buffington, 50 Iowa 320.

Maryland.— Brent *v.* Davis, 9 Md. 217.

Michigan.— Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358.

Mississippi.— Langan *v.* Hewett, 13 Sm. & M. 122.

New York.— Mason *v.* Partridge, 66 N. Y. 633; G. H. Haulenbeck Advertising Agency *v.* November, 27 Misc. 836, 60 N. Y. Suppl. 573; Cantwell *v.* Burke, 6 N. Y. St. 308.

Ohio.— Plimpton *v.* Taylor, 21 Ohio Cir. Ct. 260, 11 Ohio Cir. Dec. 570.

Pennsylvania.— Granby Min., etc., Co. *v.* Laverty, 159 Pa. St. 287, 28 Atl. 207.

Vermont.— Chapman *v.* Devereux, 32 Vt. 616; Hastings *v.* Hopkinson, 28 Vt. 108.

England.—Alderson *v.* Pope, 1 Campb. 404 note; Galway *v.* Matthew, 1 Campb. 403, 10 East 264, 10 Rev. Rep. 289; *Ex p.* Holdsworth, 1 Mont. D. & De G. 475.

See 38 Cent. Dig. tit. "Partnership," § 199.

60. *Alabama.*— Bradley Fertilizer Co. *v.* Pollock, 104 Ala. 402, 16 So. 138 (holding that where one partner notified plaintiff not to supply goods to the firm without his order or approval, he was not liable for goods supplied in disregard of the notice); Johnston *v.* Dutton, 27 Ala. 245 (where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting party liable, unless his liability results from the articles, or from the nature of the partnership).

Connecticut.— Leavitt *v.* Peck, 3 Conn. 124, 8 Am. Dec. 157.

Georgia.— Campbell *v.* Bowen, 49 Ga. 417, firm held liable for articles ordered by a majority for the legitimate use and business of the partnership, notwithstanding one partner had notified the sellers not to extend credit to the firm therefor.

Louisiana.— Drumm *v.* Hanna, 25 La. Ann. 645.

Maryland.— Matthews *v.* Dare, 20 Md. 248, one partner may exempt himself from future liability by giving express previous notice to a third person that he will be no longer bound for the notes or drafts drawn by his copartners in the name of the firm.

New Jersey.— Carr *v.* Hertz, 54 N. J. Eq. 127, 33 Atl. 194 [*affirmed* in 54 N. J. Eq. 700, 37 Atl. 1117].

Pennsylvania.— Yeager *v.* Wallace, 57 Pa. St. 365; Feigley *v.* Sponeberger, 5 Watts & S. 564.

South Carolina.— Sims *v.* Smith, 12 Rich. 685.

England.— Rooth *v.* Quin, 7 Price 193, 21 Rev. Rep. 744; Willis *v.* Dyson, 1 Stark. 164, 2 E. C. L. 70; Vice *v.* Fleming, 1 Y. & J. 227.

See 38 Cent Dig. tit. "Partnership," § 199.

But *compare* Gillilan *v.* Sun Mut. Ins. Co., 41 N. Y. 376; Graser *v.* Stellwagen, 25 N. Y. 315.

61. Fulton *v.* Williams, 11 Cush. (Mass.) 108; Tutt *v.* Addams, 24 Mo. 186; Murphy *v.* Camden, 18 Mo. 122. *Compare* Babcock *v.* Stone, 2 Fed. Cas. No. 701, 3 McLean 172, holding that where a partner in two firms draws a bill by one firm on the other, payable to himself, for his individual debt, which is accepted by the firm, such bill cannot be recovered on by the payee against the drawers or accepters; but it can be enforced by an indorsee for value without notice.

Enforceable in equity.— "The authorities

to be closely scrutinized, when the common member assumes to act on behalf of both firms; and if he uses the property of one firm to pay his individual debt to the other, or otherwise defrauds the first firm, the transaction may be set aside.[62] The fact that a partner in one firm is or becomes a member of another does not of itself involve the first firm in the business affairs of the second, or make the first firm liable for the acts and transactions of the second.[63] But one firm, by adoption or ratification, may make itself liable for the contracts or torts of the common partner, although these originally bound only the other firm.[64] When two firms with a common partner have the same firm-name, it is sometimes difficult to determine which firm is liable upon the contracts made in this name. If the contract is actually connected with the business of the firm on whose behalf it purports to be made, there will be no difficulty in holding all of the members of that firm liable thereon.[65] If, however, it purports to be made on behalf of one firm, but is actually made for the benefit of the other, the first firm will be liable notwithstanding, unless the other party to the transaction knows the nature thereof.[66] When the firms with a common member are known to a person as distinct partnerships, he is bound to exercise reasonable care in ascertaining which firm he is dealing with.[67] If, in the exercise of such care, he enters into a contract, which is within the apparent scope of the business of the firm with which he supposes himself to be dealing, every member of that firm will be liable to him thereon.[68]

g. Individual Contracts and Firm Liability. A partnership is not liable for

are therefore uniform to the effect that one firm cannot maintain a common-law action against another having a common partner, although the law does not treat contracts between such firms as void, and it is only necessary for the creditor firm to make an assignment of its claim, to make it collectable by an action at law. Evidently, as the technical rules mentioned are the only obstacle to the collection of a debt by one firm against another in an action at law, the prohibition does not rest upon any obvious injustice, but is a good illustration of that inelasticity of the common law which it is the province of equity to remedy. The authorities agree that equity may take cognizance of these cases in a suit between the parties. Still equity follows the law in both respects. It does not treat the partnership as an entity, nor does it make the common partner both complainant and defendant; but, all being before the court, it so frames its decree as to grant proper relief." Burrows *v.* Leech, 116 Mich. 32, 35, 74 N. W. 296.

62. Gray *v.* Church, 84 Ga. 125, 10 S. E. 539, 20 Am. St. Rep. 348; Schnehly *v.* Culter, 22 Ill. App. 87; McClurkan *v.* Byers, 74 Pa. St. 405.

63. *Illinois.*— Robbins *v.* Crandall, 70 Ill. 300.

Iowa.—Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601, a partnership is not bound by the acts of another partnership having a common member, unless it authorizes and sanctions those acts.

Minnesota.— National Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. 1043.

Missouri.— Hall *v.* Glessner, 100 Mo. 155, 13 S. W. 349.

New York.— Wright *v.* Ames, 4 Abb. Dec. 644, 2 Keyes 221 (although every member of a firm is, in a sense, a general agent of the firm, a firm is not necessarily the agent, general or special, of any other firm in which either of the members is a partner); Bogert *v.* Lingo, 3 Cai. 92.

Ohio.— Toland *v.* Lutz, 2 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 584.

Pennsylvania.— Wilkins *v.* Boyce, 3 Watts 39.

Texas.— Green *v.* Waco State Bank, 78 Tex. 2, 14 S. W. 253.

Vermont.— Miner *v.* Downer, 19 Vt. 14.

See 38 Cent. Dig. tit. "Partnership," § 200.

Notice.— A member of a firm is not bound to give notice that he is not a partner in a new firm of which a copartner of his is a member. Mears *v.* James, 2 Nev. 342; Jones *v.* O'Farrel, 1 Nev. 354.

64. Miller *v.* Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693 (although a partner has no authority to bind his copartners by entering into another partnership, such copartners, by participating in the business and profits of the other partnership, and joining in an action for its dissolution and appointment of a receiver, make themselves partners in fact, and are liable as such on the dissolution); Waite *v.* High, 96 Iowa 742, 65 N. W. 397; Youmans *v.* Moore, 69 S. C. 350, 48 S. E. 283.

65. Hastings Nat. Bank *v.* Hibbard, 48 Mich. 452, 12 N. W. 651.

66. Baker *v.* Nappier, 19 Ga. 520; Swan *v.* Steele, 7 East 210, 3 Smith K. B. 199, 8 Rev. Rep. 618.

67. Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325; Cushing *v.* Smith, 43 Tex. 261.

68. Baker *v.* Nappier, 19 Ga. 520; Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715; Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505.

money borrowed, or goods bought, or contracts made by a partner in his individual capacity and not in the character of an agent for the firm, simply because such money, goods, or contracts are applied to the use, or inure to the benefit of the firm.[69] The firm may be liable, however, when the individual contracts or transactions of the partner have been adopted by the firm, and their benefits enjoyed by it.[70] But as a rule a partner's individual transactions, especially those which precede the formation of the partnership, bind him only, although their fruits come into its possession.[71]

69. *Alabama.*— Pritchett *v.* Pollock, 82 Ala. 169, 2 So. 735; Guice *v.* Thornton, 76 Ala. 466; Clark *v.* Taylor, 68 Ala. 453.

California.— Burt *v.* Collins, (1884) 3 Pac. 128, charging goods in a partnership account does not make the partnership liable for such goods when they were sold and delivered to one partner individually.

District of Columbia.— Fisher *v.* Hume, 6 Mackey 9.

Georgia.— Floyd *v.* Wallace, 31 Ga. 688; Logan *v.* Bond, 13 Ga. 192.

Illinois.— Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166 [*affirming* 55 Ill. App. 124]; Goodenow *v.* Jones, 75 Ill. 48 (by the mere formation of a partnership the firm does not become liable for the individual debts or contracts of one of its members); Watt *v.* Kirby, 15 Ill. 200.

Indiana.— Bird *v.* Lanius, 7 Ind. 615.

Iowa.— Huhenthal *v.* Kennedy, 76 Iowa 707, 39 N. W. 694.

Kentucky.— McDonald *v.* Parker, Ky. Dec. 208.

Massachusetts.— Clark *v.* Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498; Sylvester *v.* Smith, 9 Mass. 119.

Missouri.— Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Wiggins *v.* Hammond, 1 Mo. 121.

New York.— Salem Nat. Bank *v.* Thomas, 47 N. Y. 15; Tallmadge *v.* Penoyer, 35 Barb. 120; Goodwin *v.* Einstein, 51 How. Pr. 9; Jaques *v.* Marquand, 6 Cow. 497; Ketchum *v.* Durkee, Hoffm. 538.

North Carolina.— Willis *v.* Hill, 19 N. C. 231, 31 Am. Dec. 412.

Ohio.— Peterson *v.* Roach, 32 Ohio St. 374, 30 Am. Rep. 607. But see Merchants Nat. Bank *v.* Little, 4 Ohio Cir. Ct. 195, 2 Ohio Cir. Dec. 496.

Oregon.— Ah Lep *v.* Gong Choy, 13 Oreg. 205, 9 Pac. 483.

Pennsylvania.— North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181, 84 Am. Dec. 487; Graeff *v.* Hitchman, 5 Watts 454; Williams *v.* Jones, 7 Kulp 386.

Tennessee.— Union, etc., Bank *v.* Day, 12 Heisk. 413; Barcroft *v.* Snodgrass, 1 Coldw. 430; Foster *v.* Hall, 4 Humphr. 346; Harris *v.* Miller, Meigs 158, 33 Am. Dec. 138.

Vermont.— Holmes *v.* Burton, 9 Vt. 252, 31 Am. Dec. 621.

Virginia.— Commonwealth Nat. Bank *v.* Cringan, 91 Va. 347, 21 S. E. 820.

Wisconsin.— McLinden *v.* Wentworth, 51 Wis. 170, 8 N. W. 118, 192.

United States.— *In re* Roddin, 20 Fed. Cas. No. 11,989, 6 Biss. 377.

Canada.— Hudson's Bay Co. *v.* Stewart, 6 Manitoba 8.

See 38 Cent. Dig. tit. "Partnership," § 201.

But see Roth *v.* Moore, 19 La. Ann. 86; Tucker *v.* Peaslee, 36 N. H. 167; Farr *v.* Wheeler, 20 N. H. 569.

When partnership bound.—For a partner to bind his copartners by his individual transaction, it must be shown that they authorized or ratified it, or that the partnership was benefited by it. Hamilton *v.* Hodges, 30 La. Ann. 1290.

Individual promise to pay.— If one of several partners promises, individually, to pay a debt, he will not be allowed to show that it was due jointly from himself and copartners. Conley *v.* Good, 1 Ill. 135.

When no credit is given, and there is no expectation, originally, of looking to one partner for debts incurred by the other, there can be no recovery against the firm. Chapman *v.* Devereux, 32 Vt. 616.

Assent of copartner.— One partner cannot, without the other's consent, bind the firm for his individual debts. Noble *v.* McClintock, 2 Watts & S. (Pa.) 152; Atkin *v.* Berry, 1 Lea (Tenn.) 91.

A partner may estop himself from showing that a particular transaction is not that of the firm, when his conduct has led the other party to act upon the understanding that it is a partnership transaction. Newsome *v.* Brazell, 118 Ga. 547, 45 S. E. 397; Gormley *v.* Hartray, 92 Ill. App. 115; White Mountain Bank *v.* West, 46 Me. 15. *Compare* Beardsley *v.* Tuttle, 11 Wis. 74.

70. *Georgia.*— Markham *v.* Hazen, 48 Ga. 570.

Illinois.— Smith *v.* Hood, 4 Ill. App. 360.

Indiana.— Lucas *v.* Coulter, 104 Ind. 81, 3 N. E. 622; Bird *v.* Lanius, 7 Ind. 615.

Massachusetts.— Dix *v.* Otis, 5 Pick. 38.

Missouri.— Braehes *v.* Anderson, 14 Mo. 441.

Nebraska.— Habig *v.* Layne, 38 Nebr. 743, 57 N. W. 539.

New York.— Ross *v.* Whitefield, 56 N. Y. 640; Nordlinger *v.* Anderson, 2 Silv. Sup. 334, 5 N. Y. Suppl. 609.

Ohio.— Wescott *v.* Price, Wright 220.

Pennsylvania.— Nichols *v.* English, 3 Brewst. 260.

Tennessee.— Shoemaker Piano Mfg. Co. *v.* Bernard, 2 Lea 358; Barcroft *v.* Snodgrass, 1 Coldw. 430.

See 38 Cent. Dig. tit. "Partnership," § 201.

71. *Delaware.*— Baxter *v.* Plunkett, 4

h. Use of Firm-Name. Each partner has implied authority to bind the firm and each member thereof by contracts and obligations executed in the firm-name, and which are within the scope of the firm business as such a business is ordinarily conducted.[72] Where the partners have adopted a firm-name, they will not be bound by an obligation executed in any other name by a partner unless the use of such name has been assented to or ratified by the other partners,[73] or unless the difference in the two names is immaterial.[74] But a written contract will be binding on the firm, although signed with the individual names of the partners instead of with the firm-name, when it is shown that it was given in a firm transaction and intended as a firm obligation.[75]

i. Use of Individual Name. At times the individual name of a partner, or of an outsider, is adopted as the firm-name or style. In such cases its use in firm transactions binds all the partners as would the use of any other stipulated firm-name.[76] Even when the firm-name is different from that of any member, a partner may bind them by a contract in his name, when it is shown to be a partnership contract.[77] The use of an individual partner's name, however, raises a strong pre-

Houst. 450, one member of a partnership is not liable for money loaned to another before they became copartners, although knowing that it was borrowed for and afterward put into the partnership.

Illinois.— Wittram *v.* Van Wormer, 44 Ill. 525.

Iowa.— Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182.

Kentucky.— Meador *v.* Hughes, 14 Bush 652; Duncan *v.* Lewis, 1 Duv. 183; Warder *v.* Newdigate, 11 B. Mon. 174, 52 Am. Dec. 567.

Louisiana.— Wells *v.* Siess, 24 La. Ann. 178; Noble *v.* Trost, 24 La. Ann. 84; Lallande *v.* McRae, 16 La. Ann. 193; Smith *v.* Sénécal, 2 Rob. 453; Nathan *v.* Gardere, 11 La. 262.

Minnesota.— Metzner *v.* Baldwin, 11 Minn. 150.

Missouri.— Callaway *v.* Woodward, 28 Mo. App. 320.

New Jersey.— Dannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066 [*affirmed* in 54 N. J. Eq. 701, 37 Atl. 1117].

New York.— Maddock *v.* Steel, 81 Hun 509, 31 N. Y. Suppl. 219; Russell *v.* Bardes, 14 N. Y. Suppl. 473; McGuire *v.* O'Hallaran, Lalor 85.

North Carolina.— Pierce *v.* Alspaugh, 83 N. C. 258.

Pennsylvania.— Donnally *v.* Ryan, 41 Pa. St. 306; Brooke *v.* Evans, 5 Watts 196.

Tennessee.— Morlitzer *v.* Bernard, 10 Heisk. 361.

Texas.— Filter *v.* Meyer, 16 Tex. Civ. App. 235, 41 S. W. 152.

Vermont.— Davis *v.* Evans, 39 Vt. 182.

See 38 Cent. Dig. tit. "Partnership," § 202.

Compare Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538.

72. *Maine.*— Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621.

Massachusetts.— Haskins *v.* D'Este, 133 Mass. 356.

Missouri.— Lamwersick *v.* Boehmer, 77 Mo. App. 136.

New York.— Payn *v.* Ronan, 14 N. Y. St. 339.

Pennsylvania.— Fichthorn *v.* Boyer, 5 Watts 159, 30 Am. Dec. 300.

Tennessee.— Venable *v.* Levick, 2 Head 351; Gordon *v.* Buchanan, 5 Yerg. 71.

United States.— George *v.* Tate, 102 U. S. 564, 26 L. ed. 232.

England.— Hawkins *v.* Blachford, 1 L. J. Ch. O. S. 142.

See 38 Cent. Dig. tit. "Partnership," § 203.

Limitation upon authority.— This authority does not extend to the execution of instruments relating to transactions outside of the firm business, or which disclose on their face that they are entered into as individual obligations of the several partners. Scott *v.* Dansby, 12 Ala. 714; Leckie *v.* Scott, 10 La. 412; Hilliker *v.* Francisco, 65 Mo. 598; Merchant *v.* Belding, 49 How. Pr. (N. Y.) 344; Marsh *v.* Josepn, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 Wkly. Rep. 209.

73. Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599; Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165; Faith *v.* Richmond, 11 A. & E. 339, 9 L. J. Q. B. 97, 3 P. & D. 187, 39 E. C. L. 197; Norton *v.* Seymour, 3 C. B. 792, 11 Jur. 312, 16 L. J. C. P. 100, 54 E. C. L. 792.

74. Tilford *v.* Ramsey, 37 Mo. 563; Moffat *v.* McKissick, 8 Baxt. (Tenn.) 517; Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64.

75. Dreyfus *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Kitner *v.* Whitlock, 88 Ill. 513; Carson *v.* Byers, 67 Iowa 606, 25 N. W. 826; Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535, 11 Am. Rep. 488; Salt Lake City Brewing Co. *v.* Hawke, 24 Utah 199, 66 Pac. 1058.

76. Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; South Carolina Bank *v.* Case, 8 B. & C. 427, 6 L. J. K. B. O. S. 364, 2 M. & R. 459, 15 E. C. L. 213.

77. Horton *v.* Miller, 84 Ala. 537, 4 So. 370; Snead *v.* Barringer, 1 Stew. (Ala.) 134; Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559; Burnley *v.* Rice, 18 Tex. 481.

sumption that the contract is his separate contract, and not the contract of the firm.[78]

j. Use of Seal. As a general rule one partner cannot bind his copartners by a deed, bond, or other instrument under seal without express authority for that purpose,[79] even though the partnership agreement is under seal.[80] In most jurisdictions, however, a partner may bind his copartner by a sealed instrument, made

78. Marvin *v.* Buchanan, 62 Barb. (N. Y.) 468; Smith *v.* Hoffman, 22 Fed. Cas. No. 13,061, 2 Cranch C. C. 651.

79. *Delaware.*—Layton *v.* Hastings, 2 Harr. 147.

Kentucky.— Montgomery *v.* Boone, 2 B. Mon. 244.

Maryland.— Armstrong *v.* Robinson, 5 Gill & J. 412, bond to perform an award.

Massachusetts.— Russell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665 (bond given to procure dissolution of attachment); Butterfield *v.* Hemsley, 12 Gray 226.

Michigan.— Fox *v.* Norton, 9 Mich. 207.

Mississippi.— Smith *v.* Tupper, 4 Sm. & M. 261, 43 Am. Dec. 483, forthcoming bond.

Missouri.— Henry County *v.* Gates, 26 Mo. 315; Gwinn *v.* Rooker, 24 Mo. 290; Fletcher *v.* Vanzant, 1 Mo. 196.

Nevada.— Arnold *v.* Stevenson, 2 Nev. 234.

New York.— McBride *v.* Hagan, 1 Wend. 326; People *v.* Dutchess County Judges, 5 Cow. 34 (appeal-bond); Tom *v.* Goodrich, 2 Johns. 213; Clement *v.* Brush, 3 Johns. Cas. 180.

North Carolina.— Wharton *v.* Woodburn, 20 N. C. 647; Person *v.* Carter, 7 N. C. 321; Anonymous, 3 N. C. 99 [*overruling* Walker *v.* Dickerson, 3 N. C. 23].

Ohio.— James *v.* Bostwick, Wright 142.

Pennsylvania.—Schmertz *v.* Shreeve, 62 Pa. St. 457, 1 Am. Rep. 439; Hart *v.* Withers, 1 Penr. & W. 285, 21 Am. Dec. 382; Gerard *v.* Basse, 1 Dall. 119, 1 L. ed. 63, 1 Am. Dec. 226; Squier *v.* Squier, 1 Lack. Leg. N. 193; Littell *v.* Gas Co., 2 Luz. Leg. Obs. 82.

South Carolina.— Lucas *v.* Sanders, 1 McMull. 311; Krafts *v.* Creighton, 3 Rich. 273. See also Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

Tennessee.— Lambden *v.* Sharp, 9 Humphr. 224, 34 Am. Dec. 642 (where an instrument is signed by the copartnership style of a firm, with a seal attached, it is a sealed instrument, binding all the members of the firm, unless, on the plea of *non est factum*, it appears that the partner who placed the signature there was not authorized to do so); Turbeville *v.* Ryan, 1 Humphr. 113, 34 Am. Dec. 622; Waugh *v.* Carriger, 1 Yerg. 31; Blackburn *v.* McCallister, Peck 371.

Texas.— Sloo *v.* Powell, Dall. 467.

Vermont.— McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

United States.— U. S. *v.* Astley, 24 Fed. Cas. No. 14,472, 3 Wash. 508. *Compare In re* Barrett, 3 Fed. Cas. No. 1,403, 2 Hughes 444; U. S. *v.* Turner, 28 Fed. Cas. No. 16,547, 2 Bond 379.

England.— Steiglitz *v.* Eggington, Holt N. P. 141, 17 Rev. Rep. 622, 3 E. C. L. 63.

Canada.— Logan *v.* Stranahan, 12 U. C. Q. B. 15; Baby *v.* Davenport, 3 U. C. Q. B. 54.

See 38 Cent. Dig. tit. "Partnership," §§ 205, 240.

A charter-party under seal may be executed by one member of copartnership. Straffin *v.* Newell, T. U. P. Charlt. (Ga.) 163, 4 Am. Dec. 705.

As to partnership attachment bonds see ATTACHMENTS, 4 Cyc. 533 note 96. And see Churchill *v.* Sullivan, 8 Iowa 45; Pursell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665; Wallis *v.* Wallace, 6 How. (Miss.) 254; Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Sloo *v.* Powell, Dall. (Tex.) 467.

Equitable relief.— Although one partner cannot bind his copartner by deed for a loan effected in the name of the firm, unless he have express authority by deed for that purpose; yet, in equity, if it can be shown that the loan was in behalf of both the partners, and that the security was by the contract intended to be one binding both the partners but through mistake has been so executed as to bind one only, it seems that the creditor may have relief against both. Wharton *v.* Woodburn, 20 N. C. 647. See also Galt *v.* Calland, 7 Leigh (Va.) 594.

If all the members of a firm are present when one executes a sealed instrument on behalf of the firm, the execution is deemed that of each partner. Willey *v.* Lines, 3 Houst. (Del.) 542; Modisett *v.* Lindley, 2 Blackf. (Ind.) 119; Posey *v.* Bullitt, 1 Blackf. (Ind.) 99; Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; Fichthorn *v.* Boyer, 5 Watts (Pa.) 159, 30 Am. Dec. 300; Fleming *v.* Dunbar, 2 Hill (S. C.) 532; U. S. *v.* Astley, 24 Fed. Cas. No. 14,472, 3 Wash. 508; Ball *v.* Dunsterville, 4 T. R. 313, 2 Rev. Rep. 394; Burn *v.* Burn, 3 Ves. Jr. 573, 30 Eng. Reprint 1162; Reg. *v.* McNancy, 5 Ont. Pr. 438; Moore *v.* Boyd, 15 U. C. C. P. 513.

Sealed instrument as evidence.— In an action of assumpsit against a firm, a writing under seal, executed by one member of the firm in the name of the firm, is admissible as evidence of a promise by the firm, if made upon sufficient consideration. Fagely *v.* Bellas, 17 Pa. St. 67. *Compare* Fronebarger *v.* Henry, 51 N. C. 548.

Binding on partner who executes.— A bond executed by one partner for his firm without authority while not binding on the firm is binding on the partner executing it. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412; Fletcher *v.* Vanzant, 1 Mo. 196; Dickinson *v.* Legare, 1 Desauss. Eq. (S. C.) 537.

80. Van Deusen *v.* Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Harrison *v.* Jackson, 7 T. R. 207, 4 Rev. Rep. 422.

in the name of the firm and for its use, in the course of the firm's business, if this is done with the previous assent of the copartner,[81] or if such execution is ratified by him, either in express terms or by his conduct.[82] But in a few jurisdictions the rule is that one partner cannot bind another by an instrument under seal, without authority or ratification under seal.[83] If the instrument would be valid without a seal, the courts are disposed to treat the seal as surplusage, if possible, and thus hold the copartners.[84] It is generally held that a sealed instrument executed by one partner is binding on him, even when not enforceable against his copartners,[85] and such an instrument when executed by one of several partners, although not binding on the firm, is binding on one who signs as a surety.[86]

2. Authority to Contract — a. In General. Each partner is by virtue of the partnership relation empowered to bind the firm by contracts which are reasonably necessary to carry on the business of the partnership in the ordinary manner and which are usually entered into in the transaction of the kind of

81. *Alabama.*— Grady *v.* Robinson, 28 Ala. 289.

Arkansas.— Day *v.* Lafferty, 4 Ark. 450; Lee *v.* Onstott, 1 Ark. 206.

Florida.— Jeffreys *v.* Coleman, 20 Fla. 536, attachment bond.

Illinois.— Wilcox *v.* Dodge, 12 Ill. App. 517, assent may be implied from acts or declarations.

Iowa.— Price *v.* Alexander, 2 Greene 427, 52 Am. Dec. 526.

Maryland.— Herzog *v.* Sawyer, 61 Md. 344.

Massachusetts.— Swan *v.* Stedman, 4 Metc. 548; Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379.

New York.— Smith *v.* Kerr, 3 N. Y. 144; Gram *v.* Seton, 1 Hall 293.

North Carolina.— Person *v.* Carter, 7 N. C. 321, assent may be implied from circumstances.

Pennsylvania.— Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350; Bond *v.* Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550.

South Carolina.— Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314; Lucas *v.* Sanders, 1 McMull. 311.

Wisconsin.— Kasson *v.* Brocker, 47 Wis. 79, 1 N. W. 418; Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

United States.— Gibson *v.* Warden, 11 Wall. 244, 20 L. ed. 797; U. S. *v.* Brod, 24 Fed. Cas. No. 14,653.

See 38 Cent. Dig. tit. "Partnership," § 205.

82. *Alabama.*— Gunter *v.* Williams, 40 Ala. 561 (ratification may be proved by verbal evidence, and binds the ratifying partner from the date of the instrument); Dodge *v.* McKay, 4 Ala. 346 (bringing an action on a sealed instrument is an adoption of it).

Florida.— Tischler *v.* Kurtz, 35 Fla. 323, 17 So. 661.

Illinois.— Peine *v.* Weber, 47 Ill. 41.

Massachusetts.— Swan *v.* Stedman, 4 Metc. 548.

Minnesota.— Sterling *v.* Bock, 40 Minn. 11, 41 N. W. 236.

New York.— Gates *v.* Graham, 12 Wend. 53, ratified by receiving benefits under the instrument.

Pennsylvania.— Johns *v.* Battin, 30 Pa. St. 84.

South Carolina.— Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314.

Texas.— Lowery *v.* Drew, 18 Tex. 786.

Vermont.— McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303, an instrument under seal executed by one partner may be rendered obligatory by previous parol authority, or by parol ratification, and bind the partnership; but slighter acts are sufficient for that purpose when the subject-matter is within the partnership dealings.

Wisconsin.— Mann *v.* Ætna Ins. Co., 40 Wis. 549.

United States.— U. S. *v.* Turner, 28 Fed. Cas. No. 16,547, 2 Bond 379.

England.— Tupper *v.* Foulkes, 9 C. B. N. S. 797, 7 Jur. N. S. 709, 30 L. J. C. P. 214, 3 L. T. Rep. N. S. 741, 9 Wkly. Rep. 349, 99 E. C. L. 797.

See 38 Cent. Dig. tit. "Partnership," § 205.

83. Cummins *v.* Cassily, 5 B. Mon. (Ky.) 74; Brozee *v.* Poyntz, 3 B. Mon. (Ky.) 178; Doniphan *v.* Gill, 1 B. Mon. (Ky.) 199; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375, 12 Am. Dec. 411; Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677; Penn *v.* Hamlett, 27 Gratt. (Va.) 337; Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Gael *v.* Calland, 7 Leigh (Va.) 594; Porter *v.* Pelton, 33 Can. Sup. Ct. 449; Hamilton Provident, etc., Soc. *v.* Steinhoff, 23 Ont. App. 184. But *compare* Bloomley *v.* Grinton, 9 U. C. Q. B. 455.

84. Price *v.* Alexander, 2 Greene (Iowa) 427, 52 Am. Dec. 526; Sterling *v.* Bock, 40 Minn. 11, 41 N. W. 236; Human *v.* Cuniffe, 32 Mo. 316; Patten *v.* Kavanagh, 11 Daly (N. Y.) 348.

85. *Missouri.*— Settle *v.* Davidson, 7 Mo. 604; Fletcher *v.* Vanzant, 1 Mo. 196.

Ohio.— James *v.* Bostwick, Wright 142.

United States.— U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,574, 14 Blatchf. 229.

England.— Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128; Elliot *v.* Davis, 2 B. & P. 338.

Canada.— Moor *v.* Boyd, 23 U. C. Q. B. 459.

Contra.— Fisher *v.* Pender, 52 N. C. 483; Hart *v.* Withers, 1 Penr. & W. (Pa.) 285, 21 Am. Dec. 382.

86. Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705.

business in which the firm is engaged.[87] A contract which is not within such scope, and is not assented to or ratified by the other partners, will not bind the

87. *Alabama.*— National Bank of Republic *v.* Dickinson, 107 Ala. 265, 18 So. 144 (having the power to purchase goods, a partnership is not limited to any particular mode of paying the price. Whatever mode is in accordance with the usages of trade can be adopted, binding the partnership in its entity, although the transaction was conducted by one partner only); Hall *v.* Cook, 69 Ala. 87.

California.— Meyer *v.* Kohn, 29 Cal. 278, a partner can bind his firm to pay a debt in a specific kind of money.

Colorado.— Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212; Copp *v.* Longstreet, 5 Colo. App. 282, 38 Pac. 601.

Connecticut.— Loomis *v.* Smith, 17 Conn. 115.

Dakota.— Pearson *v.* Post, 2 Dak. 220, 9 N. W. 684.

Georgia.— Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299, a partner competent to contract for the firm is competent to make time of the essence of the contract.

Illinois.— Witter *v.* McNiel, 4 Ill. 433, a contract drawn by one partner and signed by the other in the partnership name is the agreement of both as partners.

Iowa.— Smith *v.* Smyth, 42 Iowa 493.

Kentucky.— Faris *v.* Cook, 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600, 23 Ky. L. Rep. 328; Anderson *v.* Whitlock, 2 Bush 398, 92 Am. Dec. 489; Creel *v.* Bell, 2 J. J. Marsh. 309; Forbes *v.* Morehead, 58 S. W. 982, 22 Ky. L. Rep. 853 (the managing partner of a firm operating a sawmill can bind the firm by a contract as to the return of borrowed lumber); Farmer *v.* Wickliffe Bank, 51 S. W. 586, 21 Ky. L. Rep. 425.

Louisiana.— Jurgens *v.* Ittman, 47 La. Ann. 367, 16 So. 952; White *v.* Kearney, 2 La. Ann. 639; Forstall *v.* Blanchard, 12 La. 1; Hynes *v.* Kirkman, 4 La. 47.

Massachusetts.— White *v.* McPeck, 185 Mass. 451, 70 N. E. 463; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204, one member of a partnership which is the agent of an insurance company has all the powers of the firm in making a parol contract of insurance.

Michigan.— Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167, a member of a firm engaged in the sale of threshing machines on commission, empowered by the partnership agreement to have charge of the canvassing part of the business, had authority to bind his firm by a verbal agreement with the owner that a threshing outfit sold on commission should not be shipped to the buyer until he should give security for the purchase-price.

Missouri.— Eau Claire-St. Louis Lumber Co. *v.* Gray, 81 Mo. App. 337.

New York.—Beakes *v.* Da Cunha, 126 N. Y. 293, 27 N. E. 251 [*affirming* 12 N. Y. Suppl. 351]; Boice *v.* Jones, 86 N. Y. App. Div. 613, 83 N. Y. Suppl. 230; Herlehy *v.* Ferguson, 47 N. Y. App. Div. 237, 62 N. Y. Suppl. 648; Adee *v.* Demorest, 54 Barb. 433; Sun Mut. Ins. Co. *v.* Davis, 3 Rob. (N. Y.) 254 [*reversing* 1 Rob. 602, 19 Abb. Pr. 214]; Lord *v.* Hull, 37 Misc. 83, 74 N. Y. Suppl. 711 [*affirmed* in 80 N. Y. App. Div. 194, 80 N. Y. Suppl. 321].

Ohio.— Draper *v.* Moore, 2 Cinc. Super. Ct. 167.

Oklahoma.— Cassidy *v.* Saline County Bank, 14 Okla. 532, 78 Pac. 324.

Pennsylvania.— Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974; Livingston *v.* Cox, 6 Pa. St. 360; May *v.* Troutman, 4 Pa. Super. Ct. 42, 40 Wkly. Notes Cas. 63.

Tennessee.— Barcroft *v.* Snodgrass, 1 Coldw. 430.

Texas.— Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

Utah.— Salt Lake City Brewing Co. *v.* Hawke, 24 Utah 199, 66 Pac. 1058.

Vermont.— Scott *v.* Shipherd, 3 Vt. 104.

West Virginia.— Conrad *v.* Buck, 21 W. Va. 396.

Wisconsin.— Woolsey *v.* Henke, 125 Wis. 134, 103 N. W. 267, a partner in the newspaper publishing business has *prima facie* authority to lease premises in which to carry on the business.

England.— Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666; Browne *v.* Gibbins, 5 Bro. P. C. 491, 2 Eng. Reprint 817; Hooper *v.* Lusby, 4 Campb. 66; Dyke *v.* Brewer, 2 C. & K. 828, 61 E. C. L. 828; Willet *v.* Chambers, Cowp. 814.

Canada.— Harris *v.* Robertson, 11 N. Brunsw. 496; Simpson *v.* McDonough, 1 U. C. Q. B. 157.

See 38 Cent. Dig. tit. "Partnership," § 206.

Transactions as factor or broker.— A contract on behalf of a firm to act as factor or broker for a third person is binding on all of the members, although made by one partner, provided it be within the scope of the firm's business as such a business is ordinarily conducted (Todd *v.* Jackson, 75 Ind. 272, 56 Ind. 406; Galloway *v.* Hughes, 1 Bailey (S. C.) 553), but not otherwise (Nolan County *v.* Simpson, 74 Tex. 218, 11 S. W. 1098).

Contracts of carriage.— When the business of the partnership is that of common carriers, each partner has implied authority to bind the firm by contracts within the general scope of its powers (Erie, etc., Despatch *v.* Cecil, 112 Ill. 180), but not by other contracts (Walcott *v.* Canfield, 3 Conn. 194, holding that one partner is not authorized by the nature of the business to contract to convey a passenger a certain distance in a specified time).

Disadvantageous contract.— A partnership is bound by a debt contracted in its name, although the debt has not turned to its advantage, unless the contract was beyond the scope of the partnership business. Ward *v.* Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352.

Renewal of note of debtor.— A partner in a particular adventure may renew the note of a

firm,[88] unless the firm has received and retained the benefits thereof.[89] It is clear

purchaser of partnership property. Lallander *v.* Bonny, 6 Rob. (La.) 363.

Promise to pay debt of another.— Since a partner may bind his firm for work about the partnership business, his promise to pay the debt of another, made to obtain service for the firm's benefit, will bind the firm. Winn *v.* Hillyer, 43 Mo. App. 139.

88. *Colorado.*— Lewin *v.* Barry, 15 Colo. App. 461, 63 Pac. 121; Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94, a member of a law firm cannot, in the absence of express authority, sell the interest of a copartner in a certificate of stock issued to the members of the firm.

Georgia.— Davis *v.* Dodson, 95 Ga. 718, 22 S. E. 645, 51 Am. St. Rep. 108, 29 L. R. A. 496, an agreement by a member of a law firm to collect a claim without charge is not binding on the copartners.

Illinois.— Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850.

Louisiana.— Sentell *v.* Rives, 48 La. Ann. 1214, 20 So. 732.

Maryland.— Wells *v.* Turner, 16 Md. 133, holding that one of a firm of machinists cannot bind the firm by an agreement to contribute to the expense of keeping a harbor navigable.

Massachusetts.— Taft *v.* Church, 162 Mass. 527, 39 N. E. 283.

Michigan.— Barnard *v.* Lapeer, etc., Plank Road Co., 6 Mich. 274.

Missouri.— Creath *v.* Nelson Distilling Co., 70 Mo. App. 296; Randall *v.* Lee, 68 Mo. App. 561.

New Jersey.— Borden *v.* Curtis, 48 N. J. Eq. 120, 21 Atl. 472.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Calkins *v.* Smith, 48 N. Y. 614, 8 Am. Rep. 575; Saunier *v.* Barnum, 47 N. Y. App. Div. 28, 62 N. Y. Suppl. 381; Macauley *v.* Palmer, 3 Silv. Sup. 245, 6 N. Y. Suppl. 402; Connell *v.* Alexander, 21 Misc. 644, 47 N. Y. Suppl. 1115; Dooner *v.* Haws, 21 Misc. 639, 47 N. Y. Suppl. 1112; Livingston *v.* Roosevelt, 4 Johns. 251, 4 Am. Dec. 273, one partner cannot bind his copartner by any contract not connected with the trade or business; and a knowledge of third persons of the limited nature of the partnership will be inferred from circumstances.

North Carolina.— Long *v.* Carter, 25 N. C. 238.

Pennsylvania.— Thompson *v.* Franks, 37 Pa. St. 327; Rigby *v.* Oppenheimer, 12 Pa. Super. Ct. 97.

Texas.—Palmo *v.* Slayden, (1906) 92 S. W. 796 [*affirming* (Civ. App. 1905) 90 S. W. 908].

Vermont.— Green *v.* Burton, 59 Vt. 423, 10 Atl. 575.

West Virginia.— Waldron *v.* Hughes, 44 W. Va. 126, 29 S. E. 505.

Wisconsin.— Remington *v.* Minnesota Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

United States.— Pollock *v.* Jones, 124 Fed. 163, 51 C. C. A. 555; Tabb *v.* Gist, 23 Fed. Cas. No. 13,719, 1 Brock. 33.

England.—Alliance Bank *v.* Kearsley, L. R. 6 C. P. 433, 40 L. J. C. P. 249, 24 L. T. Rep. N. S. 552, 19 Wkly. Rep. 822; Heraud *v.* Leaf, 5 C. B. 157, 17 L. J. C. P. 57, 57 E. C. L. 157.

Canada.—Macklin *v.* Kerr, 28 U. C. C. P. 90.

See 38 Cent. Dig. tit. "Partnership," § 206.

Illustrations.— Partnership in a patent right, as to the navigation of steam vessels, does not authorize one partner to bind the partnership in a matter concerning building steamboats, not strictly connected with the enjoyment of their joint privileges. Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23 [*affirmed* in 17 Johns. 437]. A contract by a partner to pay a person for past services to others, with reference to the subject-matter of the partnership, before the existence of the partnership, is not within the scope of his authority. Rice *v.* Jackson, 171 Pa. St. 89, 32 Atl. 1036. A contract creating in fact a new partnership between two different firms, although both engaged in the same business, cannot be made on behalf of either firm by a single member thereof but requires the consent of all the members. Buckingham *v.* Hanna, 20 Ind. 110. As a rule one partner has no implied authority to bind his firm by subscribing for the stock of a corporation (Livingston *v* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 219; Patty *v.* Hillsboro Roller Mill Co., 4 Tex. Civ. App. 224, 23 S. W. 336), even though the existence of such corporation would incidentally benefit the firm (Barnard *v.* Lapeer, etc., Plank Road Co., 6 Mich. 274). In order to hold the firm on such a subscription, actual or apparent authority on the part of the subscribing member must be shown (Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422; Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541), or his unauthorized act must be ratified (Patty *v.* Hillsboro Roller Mill Co., 4 Tex. Civ. App. 224, 23 S. W. 336. See also Moore *v.* Gurney, 21 U. C. Q. B. 127). While it is competent for one partner to bind the other by the sale of the good-will of the business it is out of his power to bind his partner by a contract not to go into the same business. Morean *v.* Edwards, 2 Tenn. Ch. 347.

89. *California.*— Dammon *v.* Beecher, 97 Cal. 530, 32 Pac. 573; Cayton *v.* Walker, 10 Cal. 450.

Georgia.— Williams *v.* Seale, 103 Ga. 801, 30 S. E. 644.

Kansas.— Frye *v.* Sanders, 21 Kan. 26, 30 Am. Rep. 421.

Louisiana.— Lagan *v.* Cragin, 27 La. Ann. 352.

Pennsylvania.— Bast's Appeal, 70 Pa. St. 301.

Texas.— Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

that a partner has no implied authority to impose his individual obligations upon the firm.[90] It seems that a partner has no implied authority to waive the benefit of exemption laws with respect to his copartners.[91]

b. Hiring and Leasing Property. Whether one partner has implied authority to hire property for the firm depends upon the question: Is such a transaction within the scope of the firm's business as such a business is usually conducted?[92] The same test is to be applied when personal property of the firm is leased by a partner. In the case of firm realty, however, a lease under seal executed by one partner in the name of the firm does not pass the estate of the other partners without evidence of previous authority or subsequent ratification by them.[93]

c. Contracts of Employment. Each partner is the general agent of the firm in contracting for the services of third persons, when the employment of such persons is an act done in the ordinary course of business of the partnership.[94] The firm is also bound by a contract of this kind, when the conduct of the other

Virginia.— Weaver *v.* Tapscott, 9 Leigh 424. See also Jordan *v.* Miller, 75 Va. 442.

England.—Sandilands *v.* Marsh, 2 B. & Ald. 673.

See 38 Cent. Dig. tit. "Partnership," § 206.

90. Wood *v.* Martin, 115 Ga. 147, 41 S. E. 490; Cody *v.* Gainesville First Nat. Bank, 103 Ga. 789, 30 S. E. 281; Lamar *v.* Russell, 77 Ga. 307, 2 S. E. 467; Greeley *v.* Wyeth, 10 N. H. 15; Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893.

91. Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333 (when a partner in executing a firm note waives exemptions and signs the firm-name, the waiver is confined to his interest); Terrell *v.* Hurst, 76 Ala. 588. But see Hahn *v.* Allen, 93 Ga. 612, 617, 20 S. E. 74 (in which it is said: "If, then, a partner, by reason of his relations to the firm and of his agency for his copartners, may divest the partnership of its title to its personal assets, and thus defeat the rights of himself and his copartners to an exemption out of the same, why may he not do likewise by waiving the exemption right in that property, both of himself and them? The greater power necessarily includes the less"); *In re* McMurran, 16 Fed. Cas. No. 8,904, 2 Hughes 207.

92. *Connecticut.*— Stillman *v.* Harvey, 47 Conn. 26, holding that the hiring of a brewery was directly in the line of the partnership business of defendants.

Louisiana.— Penn *v.* Kearny, 21 La. Ann. 21; Reynolds *v.* Swain, 13 La. 193, the hired premises were used by the firm.

Maryland.— Bodey *v.* Cooper, 82 Md. 625, 34 Atl. 362, the assent of the copartner to a sealed lease to the firm was shown.

Michigan.— Koch *v.* Endriss, 97 Mich. 444, 56 N. W. 847, no implied authority in a partner to hire a house for himself and family at the expense of the firm.

New York.— Webb *v.* Parks, 85 N. Y. App. Div. 621, 83 N. Y. Suppl. 66.

Rhode Island.— Sweet *v.* Wood, 18 R. I. 386, 28 Atl. 335.

Texas.— Rhodius *v.* Storey, 1 Tex. App. Civ. Cas. § 336.

Wisconsin.— Seaman *v.* Ascherman, 57 Wis. 547, 15 N. W. 788.

England.— Sharp *v.* Milligan, 22 Beav. 606, 52 Eng. Reprint 1242, in a partnership at will one partner has no implied authority to hire premises for firm for a period of twenty-one years.

93. Dillon *v.* Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700. In Bergland *v.* Frawley, 72 Wis. 559, 40 N. W. 372, it was held that one partner of a firm, which is the lessee of premises, cannot make a valid surrender of the lease, if his copartner is reasonably accessible and can be consulted.

94. *Alabama.*— Woodruff *v.* Scaife, 83 Ala. 152, 3 So. 311, when a member of a farming partnership employs a physician to render medical services to the farm laborers, in order for the physician to recover against the firm, it must appear that the partner had express authority to make the contract, or that authority to so contract was usually incident to such a partnership, or that it was a necessary incident to this particular partnership.

Indiana.— Froun *v.* Davis, 97 Ind. 401; Hoffman *v.* Toll, 2 Ind. App. 287, 28 N. E. 557.

Iowa.— Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120, a member of a firm of real estate brokers is authorized to contract with agents to act for it in making sales.

Kentucky.— Mattingly *v.* Moore, 30 S. W. 870, 17 Ky. L. Rep. 220.

Massachusetts.— Bodwell *v.* Eastman, 106 Mass. 525.

Michigan.— Burgan *v.* Lyell, 2 Mich. 102, 55 Am. Dec. 53.

New York.— Cashman *v.* Lawson, 175 N. Y. 488, 67 N. E. 1081 [*affirming* 73 N. Y. App. Div. 419, 77 N. Y. Suppl. 142]; Mead *v.* Shepard, 54 Barb. 474; Bank of North America *v.* Embury, 33 Barb. 323; Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Suppl. 138 [*affirming* 20 Misc. 724, 45 N. Y. Suppl. 1141].

Pennsylvania.— Rice *v.* Jackson, 171 Pa. St. 89, 32 Atl. 1036.

Texas.— Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230.

Vermont.— Carley *v.* Jenkins, 46 Vt. 721.

England.—Donaldson *v.* Williams, 1 Cromp. & M. 345, 2 L. J. Exch. 173, 3 Tyrw. 371; Beckham *v.* Drake, 9 M. & W. 79.

partners gives the third person the right to assume that the contract is within the scope of the firm's business, or when they have assented to it.[95] In such a case the employee is the agent or servant of the firm and not of the individual partner who is active in employing him.[96] When the contract is not made in the ordinary course of the partnership business,[97] or the third person knows that the partner contracting with him is bound by the partnership agreement to provide personally for this service,[98] the contract does not bind the firm.

d. Alteration or Rescission of Contract. Whether one partner has implied authority to alter or rescind a firm contract depends upon the nature of the transaction. If in making the alteration or rescission he is exercising the same power as when he entered into the original contract, he can bind the firm;[99] but if the alteration or rescission calls for the exercise of a power which is not incident to the conduct of the firm business in the ordinary manner, it will not bind the other partners unless they authorize or assent to it.[1]

3. Authority as to Agents. It follows as an immediate consequence of the fundamental rule of partnership law that each partner has the power to contract for the firm on partnership affairs, that each partner has implied authority to appoint other persons agents for carrying on the partnership business,[2] and such agents so appointed become the agents, not of the individual partner appointing them, but of the firm,[3] for whose acts each partner is equally liable, whether he

95. Gruner *v.* Stucken, 39 La. Ann. 1076, 3 So. 338; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655 Brewer *v.* Wright, 25 Nebr. 305, 41 N. W. 159.

Indenture of apprenticeship see APPRENTICES, 3 Cyc. 546 note 26.

96. Munroe *v.* Judson, 82 Hun (N. Y.) 215, 31 N. Y. Suppl. 299; Wiley *v.* Logan, 95 N. C. 358; Messenger's Appeal, 43 Leg. Int. (Pa.) 101; Hills *v.* Bailey, 27 Vt. 548.

97. Beste *v.* His Creditors, 15 La. Ann. 55. In this case the employee was unfit to discharge the duties contracted for, and his employment was kept secret from the other partners.

98. Pollock *v.* Williams, 42 Miss. 88; Briggs *v.* Smith, 4 Daly (N. Y.) 110 (the managing partner dismissed the servant, who remained at the request of the dormant partners, and it was held that his claim was limited to the dormant partners); Conn *v.* Conn, 22 Oreg. 452, 30 Pac. 230 (when the salary of a servant has been fixed by the firm, one partner has no authority to increase it); English Partn. Act (1890), § 5.

99. Harper *v.* McKinnis, 53 Ohio St. 434, 42 N. E. 251, holding that one member of a firm of real estate brokers may bind his copartners by a revocation of a contract previously entered into by him with the owners of lands, whereby, for a time agreed on, such firm acquired an exclusive right to sell such lands. See also Shellito *v.* Sampson, 61 Iowa 40, 15 N. W. 572, holding that it was error to charge that one partner cannot rescind a firm contract without the consent of his copartner, where it does not affirmatively appear that the whole business of the firm was carried on under that contract, and that its rescission would work a practical dissolution, or without instructing the jury to find such facts before applying the rule.

1. Jones *v.* Anderson, 76 Ala. 427; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857.

2. Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655; Burgan *v.* Lyell, 2 Mich. 102, 55 Am. Dec. 53 (holding that every member of a partnership is in legal contemplation, without any special powers being conferred upon him, not only a principal of the firm, but a general agent for all the copartners in the transaction of their company's business, that all are regarded as being present and sanctioning the engagements of each on partnership affairs, and that hence each partner is vested with the right to employ an agent for the partnership, and all are bound by the contract); Tillier *v.* Whitehead, 1 Dall. (Pa.) 269, 1 L. ed. 131 (holding that one of two partners may give an authority to a clerk under the name of the house, and that the clerk may in consequence thereof accept bills, and sign and indorse notes in the name of the company). See also Paton *v.* Baker, 62 Iowa 704, 15 N. W. 586, holding that if one member of a firm can make a valid sale of real estate belonging to the partnership, then the one who holds the legal title may authorize another to make the sale and conveyance, especially if the sale is not made for a purpose outside the scope of the partnership business, as for paying his individual debt.

3. Johnston *v.* Brown, 18 La. Ann. 330 (an agent of a partnership is not the agent of the partners individually, but of the firm, and he cannot act for one alone); Ayer *v.* Ayer, 41 Vt. 346 (an attorney employed by one partner to act for the partnership is the attorney of the firm, and equally accountable and subject to the direction and control of one as the other of the partners). *Compare* Wheatley *v.* Tutt, 4 Kan. 240; Rex *v.* Leach, 3 Stark. 70, 3 E. C. L. 598, where

knew of the employment or not,[4] and for whose services as agent all are equally liable, whether he was employed by one or all of them.[5] These principles are so elementary in the law of partnership that few cases discuss them. Rather, it is usually assumed without discussion that a partnership may become a principal, and be liable in all respects as an individual for the resulting agency.[6]

4. Purchases, Sales, and Warranties — a. Purchases — (1) *In General.* When partners are engaged in the sale of merchandise as a business, each partner has implied authority to bind the firm by purchases of merchandise in which the partnership deals.[7] The same rule obtains in the case of purchases made by a partner for the firm, in carrying on its business in the usual way, whether the partnership is in trade or not.[8] If, however, such purchases are not within the scope of the firm business as ordinarily conducted, the other partners will not be liable therefor unless they actually authorized the purchase, or have adopted it.[9] A

a servant of a partnership was held to be a servant of each partner, and liable to a charge of embezzlement from either individually.

4. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Harvey *v.* McAdams, 32 Mich. 472, holding that the assent of one of two partners to the employment of a constable for the service of an execution in favor of the firm bound both; what either partner does about the firm business is presumptively done with the assent of the other.

Rule inapplicable to mining partnerships.— Where one of several owners of a mine employed an attorney, he was held not to be the agent of the other owners, the court making a distinction between a mining partnership and a commercial partnership. In the former the several owners are tenants in common. Charles *v.* Eshleman, 5 Colo. 107. See, generally, Mines and Minerals.

5. *Illinois.*— Bartlett *v.* Powell, 90 Ill. 331.

Indiana.— Froun *v.* Davis, 97 Ind. 401.

Massachusetts.— Durgin *v.* Somers, 117 Mass. 55; Bodwell *v.* Eastman, 106 Mass. 525.

Pennsylvania.— Moist's Appeal, 74 Pa. St. 166.

Vermont.— Carley *v.* Jenkins, 46 Vt. 721.

England.— Beckham *v.* Drake, 9 M. & W. 79.

Regardless of arrangements between themselves the partners are liable as partners for the services of their agent, and it is immaterial whether he was employed by one of them or all. Mayfield *v.* Averitt, 11 Tex. 140.

6. For example see Rosenthal *v.* Hasberg, 84 N. Y. Suppl. 290, where it was held, not only that a partnership may have an agent, but that a surviving partner may appoint an agent for the partnership, with authority to borrow money to close up the affairs of the partnership.

7. *Alabama.*— Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497, purchase on credit.

Illinois.— Johnson *v.* Barry, 95 Ill. 483.

Louisiana.— Dennistoun *v.* Debuys, 6 Mart. N. S. 48.

Michigan.— Smith, etc., Co. *v.* Schmidt, 142 Mich. 1, 105 N. W. 39.

Texas.— Richardson *v.* Thacker, 1 Tex. App. Civ. Cas. § 138, purchase binding, although contrary to wishes of copartners.

England.— Bond *v.* Gibson, 1 Campb. 185, 10 Rev. Rep. 665.

See 38 Cent. Dig. tit. "Partnership," § 214.

8. *Arkansas.*— Alley *v.* Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73, the purchase of law books by one partner in a firm of attorneys.

Colorado.— McDonald *v.* McLeod, 3 Colo. App. 344, 33 Pac. 285, a firm of carpenters is liable for lumber ordered for use in performing its contracts, although ordered by one partner.

Indiana.— Chapple *v.* Davis, 10 Ind. App. 404, 38 N. E. 355, buying horses is within scope of business of a firm of liverymen.

Michigan.— McPherson *v.* Bristol, 122 Mich. 354, 81 N. W. 254.

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227; Morgan *v.* Pierce, 59 Miss. 210.

Nevada.— Davis *v.* Cook, 14 Nev. 265, purchase of a storehouse and stationery is within the implied powers of the resident partner of a firm of general merchants.

New York.— Ketcham Nat. Bank *v.* Hagen, 164 N. Y. 446, 58 N. E. 523 [*reversing* 35 N. Y. App. Div. 630, 55 N. Y. Suppl. 1142]; Wells *v.* Gates, 18 Barb. 554.

North Carolina.— Johnston *v.* Bernheim, 86 N. C. 339; Dickson *v.* Alexander, 29 N. C. 4; Taylor *v.* Taylor, 6 N. C. 70.

Ohio.— Crary *v.* Williams, 2 Ohio 65.

Pennsylvania.— Kenney *v.* Altvater, 77 Pa. St. 34.

Tennessee.— Venable *v.* Levick, 2 Head 351.

Texas.— Hatchett *v.* Sunset Brick, etc., Co., (Civ. App. 1907) 99 S. W. 174.

Virginia.— Rose *v.* Murchie, 2 Call 409.

Canada.— Hudson's Bay Co. *v.* Stewart, 6 Manitoba 8; Jones *v.* Foster, 12 N. Brunsw. 607.

See 38 Cent. Dig. tit. "Partnership," § 214.

9. *Alabama.*— Alabama Fertilizer Co. *v.* Reynolds, 85 Ala. 19, 4 So. 639, a partner in a firm of commission merchants has no implied authority to buy property.

Iowa.— Sutton *v.* Weber, 127 Iowa 361, 101 N. W. 775.

Kentucky.— See Hyslop *v.* Johnson, 98 S. W. 993, 30 Ky. L. Rep. 379.

partner's implied authority does not extend to pledging the credit of the firm for property which the seller knows is for the personal use or benefit of the partner.[10] A partner, by giving notice to persons dealing with the firm not to extend credit to his copartner, may limit his liability so that he will not be liable for goods furnished in violation of such notice.[11]

(II) *Purchases of Real Estate.* When the purchase of real estate is within the scope of the partnership business, one partner may bind the firm by a contract therefor.[12]

b. Sales — (I) *In General.* In a trading or commercial partnership, each partner has the power of selling the partnership effects for the purposes of the business.[13] Where, however, a partnership is not formed for the purposes of trade, property not held for the purpose of sale cannot be sold by one partner without the consent of the other,[14] although an unauthorized sale may be validated by the assent of the other partners.[15] Every partnership, whether commercial or non-trading, may incur debts in the line of its business and either partner may, without the express assent of the other, transfer partnership property or assets in payment of such indebtedness.[16] A partner has no implied authority to give

Louisiana.— Hazard *v.* Boyd, 4 Mart. N. S. 347.

Nebraska.— Norton *v.* Thatcher, 8 Nebr. 186.

Tennessee.— Bankhead *v.* Alloway, 6 Coldw. 56.

Texas.— Hendricks *v.* Cameron, 3 Tex. App. Civ. Cas. § 261.

See 38 Cent. Dig. tit. "Partnership," § 214.

Illustration.— When a member of a firm, engaged in growing and selling seeds for agricultural purposes, buys a large quantity of flowers from one who knows the business of the firm, such member acts beyond the scope of the partnership authority and the firm is not bound. Sargent *v.* Henderson, 79 Ga. 268, 5 S. E. 122.

When a partnership is formed for a single adventure, the power of one partner to bind the other by making purchases ceases when the adventure is completed. Bentley *v.* White, 3 B. Mon. (Ky.) 263, 38 Am. Dec. 186.

10. Eady *v.* Newton Coal, etc., Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. N. S. 650; Gruner *v.* Stucken, 39 La. Ann. 1076, 3 So. 338; Gray *v.* Tiernan, 18 La. 53; Flower *v.* Williams, 1 La. 22; Riverside Lumber Co. *v.* Lee, 7 Tex. Civ. App. 522, 27 S. W. 161; McBain *v.* Austin, 16 Wis. 87, 82 Am. Dec. 705; Gullat *v.* Tucker, 11 Fed. Cas. No. 5,866, 2 Cranch C. C. 33; Taylor *v.* Rasch, 23 Fed. Cas. No. 13,800, 1 Flipp. 385, 11 Nat. Bankr. Reg. 91. *Compare* Dickson *v.* Alexander, 29 N. C. 4.

11. Dawson *v.* Elrod, 105 Ky. 624, 49 S. W. 465, 20 Ky. L. Rep. 1436, 88 Am. St. Rep. 624. See also Monroe *v.* Conner, 15 Me. 178, 32 Am. Dec. 148.

12. Wormser *v.* Meyer, 54 How. Pr. (N. Y.) 189; Brooke *v.* Washington, 8 Gratt. (Va.) 248, 56 Am. Dec. 142. *Compare* Brooks *v.* Hamilton, 10 Mart. (La.) 285, 13 Am. Dec. 328, holding that a purchase of land was not binding because it was for so large a quantity as to be out of the course of trade.

In Louisiana a partner in a commercial partnership has no implied authority to purchase land for the firm. Kemper *v.* Smith, 3 Mart. 622.

13. *Georgia.*— Bass Dry Goods Co. *v.* Granite Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

Louisiana.— Hermann *v.* Louisiana State Ins. Co., 8 La. 285.

Massachusetts.— Lamb *v.* Durant, 12 Mass. 54, 7 Am. Dec. 31; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

New Jersey.— Boswell *v.* Green, 25 N. J. L. 390.

New York.— Comstock *v.* Buchanan, 57 Barb. 127 [*affirmed* in 57 Barb. 146].

Pennsylvania.— Christ *v.* Firestone, 7 Pa. Cas. 376, 11 Atl. 395, patent right may be sold by one partner.

United States.— Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

England.— Lambert's Case, Godb. 244.

See 38 Cent. Dig. tit. "Partnership," § 217.

Compare Derby *v.* Gallup, 5 Minn. 119.

Sale by insolvent partner of insolvent partnership.— In the absence of fraud or a showing that injury would result to the partnership, an insolvent partner of an insolvent partnership may sell personal property belonging to such firm to a person who is known to be insolvent. O'Toole *v.* Howery, 146 Ind. 685, 45 N. E. 1112.

14. *Arkansas.*— Rutherford *v.* McDonnell, 66 Ark. 448, 51 S. W. 1060, a partner in a firm of farmers has no implied authority to sell the farm stock and utensils.

California.— Henderson *v.* Nicholas, 67 Cal. 152, 7 Pac. 412.

Colorado.— Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

Indiana.— Lownan *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784.

Oklahoma.— Phillips *v.* Thorp, 12 Okla. 617, 73 Pac. 268.

Canada.— See Crossman *v.* Shears, 3 Ont. App. 583.

See 38 Cent. Dig. tit. "Partnership," § 217.

15. Hewitt *v.* Sturdevant, 4 B. Mon. (Ky.) 453.

16. Ullman *v.* Myrick, 93 Ala. 532, 8 So. 410; Mabbett *v.* White, 12 N. Y. 442.

away firm property;[17] and a person taking a transfer of firm property from one partner in fraud of the others acquires no title thereto.[18] A sale by a partner of his interest in the firm does not carry title to any particular property.[19]

(II) *Sale and Conveyance of Real Estate.* The agency resulting from partnership relations does not authorize one partner to dispose of the real estate of the firm, and pass a legal title thereto,[20] unless because of the nature of the partnership or the agreement of the parties the real estate is to be regarded as personalty.[21] If, however, the conveyance by one partner was made in the presence or with the consent of his copartners, or has been ratified by them, it will be binding upon all.[22] Such a conveyance also conveys the individual interest of the partner who executes the transfer.[23] If firm real estate stands in the name of one of the partners, he may make a valid legal conveyance thereof; and a *bona fide* purchaser from him will hold free from the equities of his copartners.[24]

(III) *Assigning Choses in Action.* A partner has implied authority to assign choses in action belonging to the firm, and the *bona fide* assignee acquires a valid title under an assignment, by a partner in the name of the firm.[25] But an

Individual debts.— One member of a partnership has no implied authority to dispose of firm property in satisfaction of his individual debt or for his individual benefit. Columbia Nat. Bank *v.* Rice, 48 Nebr. 428, 67 N. W. 165.

17. Daniel *v.* Daniel, 9 B. Mon. (Ky.) 195; Lobdell *v.* Slawson, 90 Mich. 201, 51 N. W. 349.

18. Gill *v.* Crosby, 63 Ill. 190.

19. Leader *v.* Plante, 95 Me. 343, 50 Atl. 53, 85 Am. St. Rep. 418. See *infra*, VII, A, 3.

20. Calder *v.* Creditors, 47 La. Ann. 346, 16 So. 852; Arnold *v.* Stevenson, 2 Nev. 234; McWhorter *v.* McMahon, Clarke (N. Y.) 400 (although one partner has full control of partnership effects when they consist of personalty, a different rule prevails as to real estate. Each partner is required, both at law and in equity, to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee; and, if one signs with the name of the firm, the deed will not convey more than his own interest therein); Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,116, 3 McLean 27].

Without authority under seal, one partner cannot, in some states, bind the other by deed. Little *v.* Hazzard, 5 Harr. (Del.) 291; Donaldson *v.* Kendall, Ga. Dec. Pt. II, 227; Bentzen *v.* Zierlein, 4 Mo. 417; Snyder *v.* May, 19 Pa. St. 235; Napier *v.* Catron, 2 Humphr. (Tenn.) 534. *Compare supra*, VI, A, 1, j.

21. Rovelsky *v.* Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. Rep. 83 (the business of the firm consisted in buying and selling lands); Davis *v.* Smith, 82 Ala. 198, 2 So. 897; Paton *v.* Baker, 62 Iowa 704, 15 N. W. 586; Young *v.* Wheeler, 34 Fed. 98. See *supra*, IV, E, 8.

22. *Arkansas.*— Ferguson *v.* Hanauer, 56 Ark. 179, 19 S. W. 749; Lee *v.* Onstott, 1 Ark. 206.

Delaware.— Little *v.* Hazzard, 5 Harr. 291.

Iowa.— Haynes *v.* Seachrest, 13 Iowa 455.

Louisiana.— Weld *v.* Peters, 1 La. Ann. 432.

Mississippi.— Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

New York.— Lawrence *v.* Taylor, 5 Hill 107.

Texas.— Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

See 38 Cent. Dig. tit. "Partnership," § 218.

Equitable enforcement.—Although at common law a deed to partnership real estate, if made by one partner only, would not bind the other partner, yet their consent or ratification, even by parol, would create an equity enforceable against them. Baldwin *v.* Richardson, 33 Tex. 16.

23. *Alabama.*— Elliott *v.* Dycke, 78 Ala. 150; Brunson *v.* Morgan, 76 Ala. 593; Brewer *v.* Browne, 68 Ala. 210, a purchaser in such a case is chargeable with notice of the other partners' rights in the property.

Indiana.— Goddard *v.* Renner, 57 Ind. 532, only the grantor's undivided interest passes.

Louisiana.— Willey *v.* Carter, 4 La. Ann. 56; Richardson *v.* Packwood, 1 Mart. N. S. 290.

Mississippi.— Walton *v.* Tusten, 49 Miss. 569.

Pennsylvania.— Garner's Appeal, 1 Walk. 438.

Virginia.— Jones *v.* Neale, 2 Patt. & H. 339.

Canada.— Crane *v.* Rapple, 22 Ont. 519.

See 38 Cent. Dig. tit. "Partnership," § 218.

24. Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Clark *v.* Allen, 34 Iowa 190; Rivarde *v.* Rousseau, 7 La. Ann. 3; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

25. *Connecticut.*— Mills *v.* Barber, 4 Day 428, assignment of debt with power of attorney to collect.

Iowa.— Randolph Bank *v.* Armstrong, 11 Iowa 515, assignment of a judgment.

Louisiana.— Hermann *v.* Louisiana State Ins. Co., 8 La. 285, assignment of insurance policy.

Massachusetts.—Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

Mississippi.— Pierce *v.* Jarnagin, 57 Miss. 107, assignment of claims held by a law firm for collection.

New Hampshire.—Morse *v.* Bellows, 7 N. H.

action cannot be maintained on an assignment of the interest of one partner in a partnership claim unsupported by proof of dissolution of the firm, or that the partner's interest was entire.[26]

(IV) *Disposing of Entire Property.* Unless it is otherwise provided by statute[27] a partner has implied authority to dispose of the entire personal property of his firm, and if the transfer is made in the course of trade, that is, if it is a transfer incidental to the regular business of the firm, it is binding upon all the partners in favor of a *bona fide* transferee.[28] But it is otherwise if such a transfer is not in the course of trade,[29] especially if it is made for the purpose of breaking up the firm or under such circumstances that it practically terminates the business,[30] or if there is no necessity therefor.[31] And where such a transfer is made without the consent of a copartner who is accessible at the time, it is a fraud on the latter and may be avoided by him, although it be made to *bona fide* creditors of the firm.[32]

549, 28 Am. Dec. 372. But *compare* Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

New Jersey.— Sullivan *v.* Visconti, 69 N. J. L. 452, 55 Atl. 1133 [*affirming* 68 N. J. L. 543, 53 Atl. 598]; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61.

New York.— Hudson *v.* McKenzie, 1 E. D. Smith 358; Radt *v.* Rosenfeld, 20 Misc. 312, 45 N. Y. Suppl. 847 [*affirming* 44 N. Y. Suppl. 1128] (transfer was operative, although under seal); Allen *v.* Clark, 21 N. Y. Suppl. 338 (assignment of a judgment); Everit *v.* Strong, 7 Hill 585 [*affirming* 5 Hill 163].

Ohio.— Cincinnati Fourth Nat. Bank *v.* Flach, 2 Ohio S. & C. Pl. Dec. 443, 1 Ohio N. P. 219, transfer of firm book-accounts.

West Virginia.— Clarke *v.* Hogeman, 13 W. Va. 718.

See 38 Cent. Dig. tit. "Partnership," § 219. And see *infra*, VI, A, 9, i.

But *compare* Vance *v.* Campbell, 8 Humphr. (Tenn.) 524; Bird *v.* Fake, 1 Pinn. (Wis.) 290.

26. Mills *v.* Pearson, 2 Hilt. (N. Y.) 16.

27. See the statutes of the different states. And see Carrie *v.* Cloverdale Banking, etc., Co., 90 Cal. 84, 27 Pac. 58; Myers *v.* Moulton, 71 Cal. 498, 12 Pac. 505 (holding that a stallion kept for breeding purposes is not merchandise within Civ. Code, § 2430, which provides that a partner as such has no authority to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise); Crites *v.* Wilkinson, 65 Cal. 559, 4 Pac. 567; Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625 (holding that under Civ. Code, § 3232, providing that a partner has no authority to dispose of the whole of the firm property at once, the purchaser of such property acquires no title against a non-consenting partner regardless of his good faith).

28. *Alabama.*— Ellis *v.* Allen, 80 Ala. 515, 2 So. 676, a sale of all the goods of a mercantile partnership is in the course of trade. *Compare* Halstead *v.* Shepard, 23 Ala. 558, holding that a fraudulent transfer of firm assets, after the partnership business has closed, is subject to the other partners' equities.

Kansas.— Williams *v.* Barnett, 10 Kan. 455, a sale for the individual benefit of the selling partner is fraudulent.

Maryland.— Coakley *v.* Weil, 47 Md. 277.

Massachusetts.— Arnold *v.* Brown, 24 Pick. 89, 35 Am. Dec. 296.

Mississippi.— Whitton *v.* Smith, Freem. 231.

New York.— Graser *v.* Stellwagen, 25 N. Y. 315; Mabbett *v.* White, 12 N. Y. 442. But see Bender *v.* Hemstreet, 12 Misc. 620, 34 N. Y. Suppl. 423.

Oklahoma.—Phillips *v.* Thorp, 12 Okla. 617, 73 Pac. 268, construing Laws (1893), c. 58, art. 3, § 4.

Pennsylvania.— Deckard *v.* Case, 5 Watts 22, 30 Am. Dec. 287, consent of copartner unnecessary.

Tennessee.— Williams *v.* Roberts, 6 Coldw. 493, purchasers at a sale of all the partnership property against the prohibition of one partner, with knowledge of the circumstances, purchase at their peril.

Texas.— Schneider *v.* Sansom, 62 Tex. 201, 50 Am. Rep. 521, sale of entire property to pay debts.

Virginia.— Forkner *v.* Stuart, 6 Gratt. 197.

Washington.— Kuhillus *v.* Ewert, 40 Wash. 38, 82 Pac. 147.

United States.— Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

England.— Fox *v.* Hanbury, Cowp. 445.

See 38 Cent. Dig. tit. "Partnership," § 220.

29. Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966; Cayton *v.* Hardy, 27 Mo. 536; Freeman *v.* Abramson, 30 Misc. (N. Y.) 101, 61 N. Y. Suppl. 839, "A sale by one of the members of a firm, in the firm name, of all the firm property, without the knowledge or consent of the other members, and for a purpose not within the scope of the partnership, and not in payment of a firm debt, nor in the regular course of trade, nor as security for an antecedent firm debt, is invalid."

30. Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. (N. Y.) 495; McGrath *v.* Cowen, 57 Ohio St. 385, 49 N. E. 338; McNair *v.* Wilcox, 121 Pa. St. 437, 15 Atl. 575, 6 Am. St. Rep. 799; Osborne *v.* Barge, 29 Fed. 725.

31. Drake *v.* Thyng, 37 Ark. 228; Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321.

32. McGrath *v.* Cowen, 57 Ohio St. 385, 49 N. E. 338.

When consultation with partner necessary. — One partner has no power to sell the whole firm property without consultation with or

Such a transaction will vest the transferee with the interest of the transferring partner only.[33]

c. Warranties. One partner cannot bind his copartner to execute a deed with covenants of general warranty;[34] but, upon the sale of personal property of the firm by a partner, his warranty thereof will bind his copartners whenever such engagement is incidental to the particular contract of sale, or has been assented to by them.[35]

5. Mortgages and Pledges — a. Of Real Estate. A partner cannot make a valid legal mortgage or deed of trust of firm real estate, without the assent or ratification of all the partners.[36] It is believed that he may bind the firm by an equitable mortgage;[37] and equity will certainly sustain a mortgage upon firm realty given by one partner to secure a firm debt, in a jurisdiction where equity treats such realty as personal estate.[38] An unauthorized mortgage of firm realty will bind the interest of the mortgaging partner.[39]

b. Chattel Mortgages. The power of one partner to bind firm property by a chattel mortgage given to secure a firm debt, without the consent of his

consent of his absent copartner, who could be easily communicated with by mail or telegraph. Hunter *v.* Waynick, 67 Iowa 555, 25 N. W. 776. See also Blaker *v.* Sands, 29 Kan. 551; Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. (N. Y.) 495.

33. Blaker *v.* Sands, 29 Kan. 551; Steinhart *v.* Fyhrie, 5 Mont. 463, 6 Pac. 367; Phillips *v.* Thorp, 12 Okla. 617, 73 Pac. 268.

34. Ruffner *v.* McConnel, 17 Ill. 212, 63 Am. Dec. 362.

35. Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738; Edwards *v.* Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199 [*affirming* 48 Ill. App. 475]; Kemp *v.* Miller, 46 Ill. App. 213 (a warranty of firm horses by one partner binds all); Sweet *v.* Bradley, 24 Barb. (N. Y.) 549 (to the same effect); Erringer *v.* Miller, 3 Phila. (Pa.) 344 (a warranty of genuineness of signatures on a note owned by the firm and sold by one partner is binding on the firm).

36. *Arkansas.*— Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

Georgia.— H. Y. McCord Co. *v.* Callaway, 109 Ga. 796, 35 S. E. 171; Cottle *v.* Harrold, 72 Ga. 830; Printup *v.* Turner, 65 Ga. 71; Sutlive *v.* Jones, 61 Ga. 676.

Kentucky.— Ely *v.* Hair, 16 B. Mon. 230, no subsequent ratification necessary when copartner knows of mortgage and assents thereto.

Louisiana.— Kahn *v.* Becnel, 108 La. 296, 32 So. 444; Baker *v.* Lee, 49 La. Ann. 874, 21 So. 588; Seawell *v.* Payne, 5 La. Ann. 255, a mortgage given by one partner under power of attorney from all is valid. See also Thomson *v.* Mylne, 11 Rob. 349.

Minnesota.— Chittenden *v.* German-American Bank, 27 Minn. 143, 6 N. W. 773, where realty is allowed to stand in mortgaging partner's name, his mortgage is valid.

Mississippi.— See Whitton *v.* Smith, Freem. 231.

New Jersey.— See Jones *v.* Davis, (Ch. 1892) 25 Atl. 370.

New York.— Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753; Tarbel *v.* Bradley, 7 Abb. N. Cas. 213 [*affirmed* in 86 N. Y. 280].

North Carolina.— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488; McNeal Pipe, etc., Co. *v.* Woltman, 114 N. C. 178, 19 S. E. 109.

Tennessee.— Napier *v.* Catron, 2 Humphr. 534.

Texas.— Caviness *v.* Black, (Civ. App. 1895) 33 S. W. 712; Schwab Clothing Co. *v.* Claunch, (Civ. App. 1895) 29 S. W. 922; Byrd *v.* Perry, 7 Tex. Civ. App. 378, 26 S. W. 749; Weir Plow Co. *v.* Evans, (Civ. App. 1893) 24 S. W. 38.

Wisconsin.— Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

United States.—McGahan *v.* Rondout Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

Canada.— Mason *v.* Parker, 16 Grant Ch. (U. C.) 81. See also Bloomley *v.* Grinton, 9 U. C. Q. B. 455.

See 38 Cent. Dig. tit. "Partnership," § 222.

Binding as contract.— A trust deed under seal, executed in the name of a firm by one of the partners, is binding on the firm as a contract, although not as a deed. McNeal Pipe, etc., Co. *v.* Woltman, 114 N. C. 178, 19 S. E. 109.

To prevent the sacrifice of the real estate of a firm, where the circumstances justify it, a partner may secure a firm debt by giving a deed of trust of such real estate. Breen *v.* Richardson, 6 Colo. 605.

A mortgage made by one partner for a firm debt, in consideration of which the mortgagee gave time to the mortgagor, extinguished the simple contract debt, so far as the other partner was concerned. Loomis *v.* Ballard, 7 U. C. Q. B. 366.

37. *Ex p.* Broadbent, 4 Deac. & C. 3, 3 L. J. Bankr. 95, 1 Mont. & A. 635; Lindley Partn. (7th Eng. ed.) 166.

38. Long *v.* Slade, 121 Ala. 267, 26 So. 31. See also Baldwin *v.* Richardson, 33 Tex. 16.

39. Cottle *v.* Harrold, 72 Ga. 830; Printup *v.* Turner, 65 Ga. 71; Baker *v.* Lee, 49 La. Ann. 874, 21 So. 588; Weeks *v.* Mascoma Rake Co., 58 N. H. 101; Watts *v.* Driscoll, 82 L. T. Rep. N. S. 255 [*affirmed* in [1901] 1 Ch.

copartners, is generally recognized.[40] It has been held, however, that one partner cannot over the protest of another mortgage the firm's assets for the firm's benefit.[41] Of course, if given in fraud of copartners, such a mortgage may be set aside as invalid.[42] The mortgagee of a partner's share of firm assets takes subject to all the equities of the copartners of the mortgagor.[43]

c. Pledges and Assignments. Whenever a partner has implied authority to borrow money on the credit of the firm, he has implied authority to pledge or assign firm property to secure firm debts.[44] He has no authority, however, to

294, 70 L. J. Ch. 157, 84 L. T. Rep. N. S. 97, 49 Wkly. Rep. 146].

40. *Arkansas.*— Gates *v.* Bennett, 33 Ark. 475, may mortgage partnership crop.

Georgia.— Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19.

Indiana.— McCarthy *v.* Seisler, 130 Ind. 63, 29 N. E. 407.

Iowa.— Letts *v.* McMaster, 83 Iowa 449, 49 N. W. 1035 (mortgage valid, although results in putting end to firm business); Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551.

Massachusetts.— Patch *v.* Wheatland, 8 Allen 102 (mortgage executed by signing individual names of firm members); Tapley *v.* Butterfield, 1 Metc. 515, 35 Am. Dec. 374 (fact that mortgage sealed is immaterial).

Michigan.— Beckman *v.* Noble, 115 Mich. 523, 73 N. W. 803; Robards *v.* Waterman, 96 Mich. 233, 55 N. W. 662; Sweetzer *v.* Mead, 5 Mich. 107.

Missouri.— Keck *v.* Fisher, 58 Mo. 532; Rogers *v.* Gage, 59 Mo. App. 107; Holt *v.* Simmons, 16 Mo. App. 97.

Nebraska.— Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321; Clay *v.* Greenwood, 35 Nebr. 736, 53 N. W. 659.

New York.— Neer *v.* Oakley, 2 N. Y. Suppl. 482.

Oregon.— Hembree *v.* Blackburn, 16 Oreg. 153, 19 Pac. 73.

South Dakota.— Morris *v.* Hubbard, 14 S. D. 525, 86 N. W. 25.

Washington.— West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

West Virginia.— Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210; Scruggs *v.* Burruss, 25 W. Va. 670.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422; Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452, mortgage not affected by attaching seal.

United States.— Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Settle *v.* Hargadine-McKittrick Dry-Goods Co., 66 Fed. 850, 14 C. C. A. 144; Hawkins *v.* Hastings Bank, 11 Fed. Cas. No. 6,244, 1 Dill. 462, 2 Nat. Bankr. Reg. 337.

England.— *Ex p.* Bosanquet, De Gex 432 (cases of ships); *Ex p.* Howden, 2 Mont. D. & De G. 574.

Canada.— Mason *v.* Parker, 16 Grant Ch. (U. C.) 230; Patterson *v.* Maughan, 39 U. C. Q. B. 371.

See 38 Cent. Dig. tit. "Partnership," § 223.

Execution in individual name.— The execution of a mortgage of personal property of a partnership by one partner in his individual name passes no title. Clark *v.* Houghton, 12 Gray (Mass.) 38.

Execution by partner individually.—A chattel mortgage on firm property is a valid lien on the partnership title, although signed and sealed by the partners individually. Davis *v.* Turner, 120 Fed. 605, 56 C. C. A. 669.

In Wyoming under Rev. St. (1899) § 2808, it is a prerequisite to a valid chattel mortgage of partnership property that every member of the firm should sign it. Thomas *v.* Schmits, 15 Wyo. 181, 87 Pac. 996; Lellman *v.* Mills, 15 Wyo. 149, 87 Pac. 985; Ridgely *v.* First Nat. Bank, 75 Fed. 808.

Mortgage not accepted till after dissolution. — Where a chattel mortgage is signed by one member of a firm without authority, and without the knowledge or consent of his partner or the mortgagee, and delivered to a third person to be delivered to the mortgagee, and the mortgagee upon learning of such mortgage takes time to decide whether to accept, and does not accept it until after a dissolution of the firm, and until after he has notice of such dissolution, such mortgage is not binding on the partners not joining therein. Meyer *v.* Michaels, 69 Nebr. 138, 95 N. W. 63, 97 N. W. 817.

41. H. Y. McCord Co. *v.* Callaway, 109 Ga. 796, 35 S. E. 171 [*citing* Fidelity Banking, etc., Co. *v.* Kangara Valley Tea Co., 95 Ga. 172, 22 S. E. 50].

42. Kirby *v.* McDonald, 70 Fed. 139, 17 C. C. A. 26.

43. Kelly *v.* Hutton, L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. Rep. N. S. 228, 16 Wkly. Rep. 1182.

44. *Maryland.*—Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677.

Michigan.— Hopkins *v.* Thomas, 61 Mich. 389, 28 N. W. 147.

Missouri.— Clark *v.* Rives, 33 Mo. 579; Holt *v.* Simmons, 16 Mo. App. 97.

New York.— McClelland *v.* Remsen, 3 Abb. Dec. 74, 3 Keyes 454, 3 Transcr. App. 182, 5 Abb. Pr. N. S. 250 [*affirming* 36 Barb. 622, 14 Abb. Pr. 331, 23 How. Pr. 175]. And see Mabbett *v.* White, 12 N. Y. 442.

Texas.— Keller *v.* Smith, 20 Tex. Civ. App. 314, 49 S. W. 263.

United States.— George *v.* Tate, 102 U. S. 564, 26 L. ed. 232.

England.— Marshall *v.* Maclure, 10 App. Cas. 325; Reid *v.* Hollinshead, 4 B. & C. 867, 7 D. & R. 444, 28 Rev. Rep. 488, 10 E. C. L. 836; *Ex p.* Booth, 2 Deac. & C. 59, 1 L. J.

pledge or assign firm property as security for his individual debts,[45] although the conduct of his copartners may be such as to estop them from questioning his authority.[46] While an assignment, mortgage, or pledge of firm property by a partner to secure his individual debt is not binding on the partnership,[47] it is not void, but imposes a charge upon the transferring partner's interest in the firm property thus transferred.[48]

6. Collections, Payments, Settlements, and Releases — a. Payment to One Partner. Every partner has implied authority to receive payment of firm debts, in the absence of an agreement to the contrary;[49] and when such an agreement exists, it does not affect the firm debtor, unless he has notice thereof.[50]

b. Payment of Firm Debts by Individual. It is not a fraud upon his separate creditors, in the absence of a statutory provision on the subject, for one partner to apply his individual property to the payment of firm debts.[51] Such a payment extinguishes the firm obligation,[52] and remits the paying partner to the right to be credited in the firm accounts with the advancement, and to contribution from

Bankr. 81; Tupper *v.* Haythorne, Gow 135 note, 21 Rev. Rep. 808 note, 5 E. C. L. 894; Raba *v.* Ryland, Gow 132, 21 Rev. Rep. 806, 5 E. C. L. 893; Butchart *v.* Dresser, 10 Hare 453, 1 Wkly. Rep. 178, 44 Eng. Ch. 438, 68 Eng. Reprint 1004 [*affirmed* in 4 De G. M. & G. 542, 53 Eng. Ch. 424, 43 Eng. Reprint 619].

See 38 Cent. Dig. tit. "Partnership," § 227.

A mortgage to a firm may be assigned by one of the members thereof as security for partnership debts. Morrison *v.* Mendenhall, 18 Minn. 232; Galway *v.* Fullerton, 17 N. J. Eq. 389. See also Wenham *v.* Campbell, 4 Ohio Dec. (Reprint) 122, 1 Clev. L. Rep. 47. And where debts due a firm secured by mortgage are assigned in payment of a claim held by the assignee against the firm, the mortgage is carried with the debts secured thereby. Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

45. *Illinois.*— Smith *v.* Andrews, 49 Ill. 28.

Indiana.— Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854.

Kentucky.— Brooks-Waterfield Co. *v.* Carpenter, 53 S. W. 40, 21 Ky. L. Rep. 851.

New York.— Livingston *v.* Roosevelt, 4 Johns. 251, 4 Am. Dec. 273.

Pennsylvania.— Stockdale *v.* Ullery, 37 Pa. St. 486, 78 Am. Dec. 440.

United States.— Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin *v.* Bennett, 51 Fed. 693.

England.— Wilkinson *v.* Vykyn, 14 L. T. Rep. N. S. 158, 14 Wkly. Rep. 470; Snaith *v.* Burridge, 4 Taunt. 684, 13 Rev. Rep. 731.

See 38 Cent. Dig. tit. "Partnership," §§ 225, 227.

46. Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359; Buchanan *v.* People's Bank, (Tenn. Ch. App. 1899) 57 S. W. 207; Liberty Sav. Bank *v.* Campbell, 75 Va. 534; *Ex p.* Darlington Joint-Stock Banking Co., 4 De G. J. & S. 581, 11 Jur. N. S. 122, 34 L. J. Bankr. 10, 11 L. T. Rep. N. S. 651, 13 Wkly. Rep. 353, 69 Eng. Ch. 445, 46 Eng. Reprint 1044; Dingwall *v.* McBean, 30 Can. Sup. Ct. 441.

47. See cases cited *supra*, note 45.

48. Sloan *v.* Wilson, 117 Ala. 583, 23 So. 145; Rainey *v.* Nance, 54 Ill. 29; Patterson *v.* Atkinson, 20 R. I. 102, 37 Atl. 532; Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971 [*reversing* 14 Fed. 155]; Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin *v.* Bennett, 51 Fed. 693.

49. *Connecticut.*— Noyes *v.* New Haven, etc., R. Co., 30 Conn. 1, a disagreement of the partners as to which shall receive payment and notiee not to pay a certain partner does not affect a firm debtor. An honest payment to either will bind the firm.

Illinois.— Heartt *v.* Walsh, 75 Ill. 200 (misapplication of note given in payment will not invalidate settlement); Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151.

Indiana.— Yandes *v.* Lafavour, 2 Blackf. 371.

Michigan.— Chase *v.* Buhl Iron-Works, 55 Mich. 139, 20 N. W. 827, payment to one, supposed by the debtor to be a partner, although not a partner, is at the risk of the debtor where the receipt is made as if by an agent.

Minnesota.— Vanderburgh *v.* Bassett, 4 Minn. 242.

New York.— Chapin *v.* Clemitson, 1 Barb. 311; Shepard *v.* Ward, 8 Wend. 542.

South Carolina.— McKee *v.* Stroup, Rice 291.

Tennessee.— Allen *v.* Farrington, 2 Sneed 526.

Virginia.— Scott *v.* Trent, 1 Wash. 77.

England.— Anonymous, 12 Mod. 446; Brasier *v.* Hudson, 9 Sim. 1, 16 Eng. Ch. 1, 59 Eng. Reprint 256; Duff *v.* East India Co., 15 Ves. Jr. 198, 33 Eng. Reprint 729.

See 38 Cent. Dig. tit. "Partnership," § 230.

If a firm note is indorsed by the firm to one of the partners payment to another partner after notice of such indorsement is insufficient. Stevenson *v.* Woodhull, 19 Fed. 575.

50. Clark *v.* Lauman, 63 Ill. App. 132, if a debtor has notice, a payment to the partner not entitled to receive it is in fraud of the firm's rights.

51. Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350.

52. Jarman *v.* Ellis, 52 N. C. 77; Tyson *v.* Pollock, 1 Penr. & W. (Pa.) 375; Sprague *v.* Ainsworth, 40 Vt. 47; Watson *v.* Woodman, L. R. 20 Eq. 721, 45 L. J. Ch. 57, 24

his copartners.[53] Whether a pledge of a partner's individual property to secure his debts entitles the pledgee to hold it for firm debts depends upon the terms of the agreement made when the property was pledged.[54]

c. Transferring Firm Property to Pay Firm Debts. Each partner is entitled to have the firm property applied to the satisfaction of its debts, and hence he has implied authority to so apply it.[55]

d. Application of Payments. When there are distinct demands, one against a partnership and the other against a member of the partnership, if the money paid be that of the firm, the creditor is not at liberty to apply it in payment of the individual debt, as that would be to allow the creditor to pay the debt of one person with the money of others.[56] In such case the creditor must have the assent of all the partners.[57] On the other hand, if the money be that of the paying partner, it must be appropriated to his individual debt, unless he authorizes or ratifies its application to firm debts.[58] Where a party owes one account to an individual, and another to a firm, of which such individual is a member, and the individual account is assigned to the firm, it is immaterial on which account money paid is credited.[59]

Wkly. Rep. 47; Goodwin *v.* Parton, 42 L. T. Rep. N. S. 568. See also Schmidt *v.* Foucher, 38 La. Ann. 93; Booth *v.* Farmers', etc., Nat. Bank, 74 N. Y. 228. *Compare* Barker *v.* Blake, 11 Mass. 16, holding that a credit given to one partner on his own separate account is not a discharge *pro tanto* of a demand against the partnership, unless it were intended or accepted as such.

53. Bradbury *v.* Barnes, 19 Cal. 120.

54. La Grange Bank *v.* Cotter, 101 Ga. 134, 28 So. 644; Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Buffalo Bank *v.* Thompson, 121 N. Y. 280, 24 N. E. 473; *Ex p.* McKenna, 3 De G. F. & J. 629, 7 Jur. N. S. 588, 30 L. J. Bankr. 20, 4 L. T. Rep. N. S. 164, 9 Wkly. Rep. 490, 64 Eng. Ch. 492, 45 Eng. Reprint 1022; *Ex p.* Freen, 2 Glyn & J. 246; Chuck *v.* Freen, M. & M. 259, 22 E. C. L. 517.

55. *Alabama.*— Ullman *v.* Myrick, 93 Ala. 532, 8 So. 410; Hyrschfelder *v.* Keyser, 59 Ala. 338.

California.— Bernheim *v.* Porter, (1884) 4 Pac. 446.

Iowa.— Randolph Bank *v.* Armstrong, 11 Iowa 515.

Louisiana.— Murrell *v.* Murrell, 33 La. Ann. 1233.

Massachusetts.—Russell *v.* Leland, 12 Allen 349; Hodges *v.* Harris, 6 Pick. 360.

Montana.— Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828.

New York— Mabbett *v.* White, 12 N. Y. 442; Egberts *v.* Wood, 3 Paige 517, 24 Am. Dec. 236.

Ohio.— Wenham *v.* Campbell, 4 Ohio Dec. (Reprint) 122, 1 Clev. L. Rep. 47.

Pennsylvania.— Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478. But *compare* Sloan *v.* Moore, 37 Pa. St. 217.

Texas.— Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689.

See 38 Cent. Dig. tit. "Partnership," § 231.

For what debts transferable.— One partner can assign firm property for the payment of firm debts, or by way of security for antecedent debts or debts to be thereafter contracted. McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. 331, 23 How. Pr. 175; McGregor *v.* Ellis, 2 Disn. (Ohio) 286.

Transfer by one not a partner.— A transfer of firm assets in payment of a *bona fide* firm debt is valid, although made by one not an actual partner, if he has been previously held out as such, and the purchasing creditor has no notice prior to the consummation of the sale that the supposed partner does not consent thereto. Moore *v.* Dixon, 59 Ill. App. 167.

56. Nottidge *v.* Prichard, 8 Bligh N. S. 493, 5 Eng. Reprint 1026, 2 Cl. & F. 379, 6 Eng. Reprint 1197 [*affirming* 1 Russ. & M. 191, 5 Eng. Ch. 191, 39 Eng. Reprint 74, Taml. 332, 12 Eng. Ch. 332, 48 Eng. Reprint 132]; Thompson *v.* Brown, M. & M. 40, 31 Rev. Rep. 710, 22 E. C. L. 466.

57. *Arkansas.*— Farris *v.* Morrison, 66 Ark. 318, 50 S. W. 693; Feucht *v.* Evans, 52 Ark. 556, 13 S. W. 217.

Minnesota.— Davis *v.* Smith, 27 Minn. 390, 7 N. W. 731.

Rhode Island.— Cornells *v.* Stanhope, 14 R. I. 97.

South Carolina.— Wiesenfeld *v.* Byrd, 17 S. C. 106.

Tennessee.— Rogers *v.* Betterton, 93 Tenn. 630, 27 S. W. 1017.

Estoppel.— The other partners may by their conduct estop themselves from questioning the appropriation of firm money to individual debts. Fitch *v.* McCrimmon, 30 U. C. C. P. 183.

58. *Illinois.*— Lewis *v.* Pease, 85 Ill. 31.

Minnesota.— Flarsheim *v.* Brestrup, 43 Minn. 298, 45 N. W. 438.

New York.— Baker *v.* Stackpoole, 9 Cow. 420, 18 Am. Dec. 508.

Wisconsin.— Miles *v.* Ogden, 54 Wis. 573, 12 N. W. 81.

United States.— Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98.

See 38 Cent. Dig. tit. "Partnership," § 232.

59. Badger *v.* Daeneike, 56 Wis. 678, 14 N. W. 821.

e. Settlements, Compromises, and Releases. The implied authority of each partner to settle and compromise claims of or against the firm and to execute releases results from his general agency for the firm;[60] all such transactions by

60. *Arkansas.*—Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381.

Connecticut.— Noyes *v.* New Haven, etc., R. Co., 30 Conn. 1; Cannon *v.* Wildman, 28 Conn. 472. *Compare* Russell *v.* Green, 10 Conn. 269.

Illinois.— Dyer *v.* Sutherland, 75 Ill. 583.

Indiana.— Yandes *v.* Lafavour, 2 Blackf. 371.

Kansas.— Holderman *v.* Tedford, 7 Kan. App. 657, 53 Pac. 887.

Kentucky.— Collins *v.* Collins, 83 S. W. 99, 26 Ky. L. Rep. 1037; Wade *v.* Bent, 71 S. W. 444, 24 Ky. L. Rep. 1294; Wade *v.* Foster, 71 S. W. 443, 24 Ky. L. Rep. 1292; Walker *v.* Yellow Poplar Lumber Co., 35 S. W. 272, 18 Ky. L. Rep. 76.

Louisiana.— White *v.* Jones, 14 La. Ann. 681; Arnold *v.* Bureau, 11 Mart. 213.

Maryland.— Doremus *v.* McCormick, 7 Gill 49; Smith *v.* Stone, 4 Gill & J. 310.

Massachusetts.— Emerson *v.* Knower, 8 Pick. 63.

Michigan.— Webber *v.* Webber, 146 Mich. 31, 109 N. W. 50; Cook *v.* Blake, 98 Mich. 389, 57 N. W. 249.

New Hampshire.— Allen *v.* Cheever, 61 N. H. 32.

New York.— Minto *v.* Baur, 3 Silv. Sup. 332, 6 N. Y. Suppl. 444, 17 N. Y. Civ. Proc. 314; Beach *v.* Ollendorf, 1 Hilt. 41; Garsia *v.* Burch, 7 Misc. 142, 27 N. Y. Suppl. 385; Bruen *v.* Marquand, 17 Johns. 58; Pierson *v.* Hooker, 3 Johns. 68, 3 Am. Dec. 467; Cunningham *v.* Littlefield, 1 Edw. 104.

North Carolina.— Gates *v.* Pollock, 50 N. C. 344; Crutwell *v.* De Rosset, 50 N. C. 263.

Ohio.— De Haven *v.* Coup, 5 Ohio Dec. (Reprint) 562, 6 Am. L. Rec. 593; Wheeling Corrugating Co. *v.* Veach, 7 Ohio S. & C. Pl. Dec. 521, 7 Ohio N. P. 156.

Pennsylvania.— Salmon *v.* Davis, 4 Binn. 375, 5 Am. Dec. 410; Doyle *v.* Longstreth, 6 Pa. Super. Ct. 475; Fluck *v.* Bond, 3 Phila. 207.

Texas.— Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808; Lowery *v.* Drew, 18 Tex. 786.

United States.— Beltzhoover *v.* Stockton, 3 Fed. Cas. No. 1,283, 4 Cranch C. C. 695.

England.— Henderson *v.* Wild, 2 Campb. 561; *Ex p.* Webster, De Gex 414, 11 Jur. 175; Furnival *v.* Weston, 7 Moore C. P. 356, 24 Rev. Rep. 687, 17 E. C. L. 518; Wilkinson *v.* Lindo, 7 M. & W. 81; Hawkshaw *v.* Parkins, 2 Swanst. 539, 19 Rev. Rep. 125, 36 Eng. Reprint 723.

Canada.— Van Wart *v.* Critchley, 17 Can. L. T. Occ. Notes 316; Raymond *v.* McMackin, 9 N. Brunsw. 524; Hall *v.* Irons, 4 U. C. C. P. 351.

See 38 Cent. Dig. tit. "Partnership," § 233.

Compare Dunnett *v.* Gibson, 78 Vt. 439, 63 Atl. 141.

Receipt or release in name of one partner. — Where one of several partners gives a receipt or executes a release in his own name, having relation to the partnership business, it is obligatory on the partnership. Brown *v.* Lawrence, 5 Conn. 397; White *v.* Jones, 14 La. Ann. 681.

Where a partner signs a general release to a firm debtor, it not appearing to what demands it is intended to apply or that such partner has any separate demand against the debtor, the release operates to discharge debts due the partnership. Emerson *v.* Knower, 8 Pick. (Mass.) 63.

Release in consideration of individual debt. — One partner cannot release a debt due the firm in consideration of a debt due by him individually. Gram *v.* Cadwell, 5 Cow. (N. Y.) 489.

A release without consideration or benefit accruing to the firm and which has not been agreed to or ratified by the other partners is not binding. Weir Plow Co. *v.* Evans, (Tex. Civ. App. 1893) 24 S. W. 38.

Compromise made under mistake.— An attempted compromise by one partner of a debt due by the firm, under a mutual mistake as to the amount due, is good, as against the firm, only for the amount paid, and he cannot charge the firm with the full amount of the debt. Easton *v.* Strother, 57 Iowa 506, 10 N. W. 877.

Where a dispute with a firm is submitted to arbitration, and an award is made in favor of one of the firm, a release from another partner is not binding where defendant in the arbitration knew he had no authority to execute it. Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919.

A bond given by one partner to a debtor of the firm to pay the debt and save the debtor harmless cannot be pleaded or given in evidence as a release. Emerson *v.* Baylies, 19 Pick. (Mass.) 55.

Discharge by third person.— By an instrument under seal a partner may authorize a third person to discharge a debt due the firm. Wells *v.* Evans, 20 Wend. (N. Y.) 251 [*reversed* on other grounds in 22 Wend. 324].

Excess of authority.— Even though a partner has no authority to release more than his share of a debt due the firm, his release of the whole debt binds the partnership. Salmon *v.* Davis, 4 Binn. (Pa.) 375, 5 Am. Dec. 410.

Authority conferred on one partner.—When, in a partnership agreement, an authority has been conferred on a particular member of the firm to make settlements with another, and he abandons the duty of doing so, the firm may, in his absence, make a settlement for themselves that will bind the partnership. Sweet *v.* Morrison, 103 N. Y. 235, 8 N. E. 396.

Delegation of authority.— Where authority

him are binding on the firm unless for some reason the particular transaction is fraudulent.[61]

7. Payment of Individual Debts — a. In General. A partnership is under no obligation for the individual debts of its members;[62] and hence a partner cannot use the firm's assets to pay his individual debts without their consent,[63] nor can he pledge the firm credit for such debts.[64] In order that such transactions may bind the firm, the assent or ratification of the other members must be shown,[65] or a

has been conferred on one member of a firm by the partnership agreement to make settlement, this authority cannot be delegated by him. Sweet *v.* Morrison, 103 N. Y. 235, 8 N. E. 396.

61. Busby *v.* Rooks, (Ark. 1904) 81 S. W. 1056; Adams *v.* Long, 114 Ill. App. 277; South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894; Farrar *v.* Hutchinson, 9 A. & E. 641, 8 L. J. Q. B. 107, 1 P. & D. 437, 2 W. W. & H. 106, 36 E. C. L. 340.

Where by connivance with defendant a release of a suit by one of two partners is procured it is void. Beatson *v.* Harris, 60 N. H. 83.

Release executed by drunken partner.— Where the partner who gives a release was gotten drunk for that purpose, the release is not binding on the firm. Clark *v.* Loumann, 52 Ill. App. 637.

Account stated see Accounts and Accounting, 1 Cyc. 386.

62. Filley *v.* Phelps, 18 Conn. 294; Brobston *v.* Penniman, 97 Ga. 527, 25 S. E. 350; Union Nut, etc., Co. *v.* Doherty, 20 Misc. (N. Y.) 23, 44 N. Y. Suppl. 781.

63. *Alabama.*— Pierce *v.* Pass, 1 Port. 232, express or implied assent necessary.

Connecticut.— Filley *v.* Phelps, 18 Conn. 294 (transfer to pay individual debt is a violation of duty and a fraud on copartners); Yale *v.* Yale, 13 Conn. 185, 33 Am. Dec. 393.

Florida.— Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628, the title of the partnership is not divested by such a transfer.

Iowa.— Brewster *v.* Reel, 74 Iowa 506, 38 N. W. 381, copartner's knowledge and actual consent necessary.

Kentucky.— Jackson *v.* Holloway, 14 B. Mon. 133.

Maryland.— Cadwallader *v.* Kroesen, 22 Md. 200.

Massachusetts.— Brickett *v.* Downs, 163 Mass. 70, 39 N. E. 776; Adams Bank *v.* Jones, 16 Pick. 574. But *compare* Grover *v.* Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506.

Michigan.— Kingsbury *v.* Tharp, 61 Mich. 216, 28 N. W. 74, a purchaser of partnership property sold to pay the debt of one partner acquires only the interest of such partner, after a settlement of the partnership accounts. *Compare* Kull *v.* Thompson, 38 Mich. 685.

Minnesota.— Hinds *v.* Backus, 45 Minn. 170, 47 N. W. 655.

Mississippi.— Stegall *v.* Coney, 49 Miss. 761.

Missouri.— Forney *v.* Adams, 74 Mo. 138; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558.

New Hampshire.— Caldwell *v.* Scott, 54 N. H. 414.

New Jersey.— Matlack *v.* James, 13 N. J. Eq. 126.

North Carolina.— Broaddus *v.* Evans, 63 N. C. 633; Miller *v.* Richardson, 24 N. C. 250; Weed *v.* Richardson, 19 N. C. 535.

Pennsylvania.— Leonard *v.* Winslow, 2 Grant 139.

Texas.— Daugherty *v.* Haynes, (Civ. App. 1894) 28 S. W. 692; Wm. W. Kendall Boot, etc., Co. *v.* Johnston, (Civ. App. 1893) 24 S. W. 583.

Vermont.— Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465.

Wisconsin.— Viles *v.* Bangs, 36 Wis. 131; Sauntry *v.* Dunlap, 12 Wis. 364.

United States.— Rogers *v.* Batchelor, 12 Pet. 221, 9 L. ed. 1063.

See 38 Cent. Dig. tit. "Partnership," §§ 235, 236.

64. *Maine.*— Cumner *v.* Butler, 45 Me. 434.

Missouri.— Huttig Sash, etc., Co. *v.* McMahon, 81 Mo. App. 440.

Pennsylvania.— Brown *v.* Pettit, 178 Pa. St. 17, 35 Atl. 865, 56 Am. St. Rep. 742, 34 L. R. A. 723; Graham *v.* Taggart, 9 Pa. Cas. 70, 11 Atl. 652.

South Carolina.— Ramey *v.* McBride, 4 Strobh. 12.

Tennessee.— Jones' Case, 1 Overt. 455.

See 38 Cent. Dig. tit. "Partnership," § 236.

No action maintainable.— One partner cannot maintain an action of any kind against a partner who purchases the partnership effects, although such sale was made by his copartner in fraud of the partnership rights and in payment of his personal debt. Wells *v.* Mitchell, 23 N. C. 484, 35 Am. Dec. 757.

65. *Alabama.*— Nall *v.* McIntyre, 31 Ala. 532.

Georgia.— McGhees *v.* McCutchen, 82 Ga. 788, 9 S. E. 785.

Illinois.— Jacksonville Nat. Bank *v.* Mapes, 85 Ill. 67 (where consent is withdrawn before a firm check is applied to an individual debt the revocation is effective); McDonald *v.* Western Tube Co., 64 Ill. App. 458.

Iowa.— Newell *v.* Martin, 81 Iowa 238, 46 N. W. 1120; Janney *v.* Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. Rep. 460.

Kentucky.— See Mitchell *v.* Whaley, 92 S. W. 556, 29 Ky. L. Rep. 125.

Missouri.— Hutchinson *v.* Brassfield, 86 Mo. App. 40.

New York.— Lucker *v.* Iba, 54 N. Y. App. Div. 566, 66 N. Y. Suppl. 1019.

case of estoppel must be made out against them.[66] When neither assent, ratification, nor estoppel is shown, a transfer of partnership assets by one partner in discharge of his individual obligation does not divest the firm title, whether the party receiving the property knew that it belonged to the firm or not; for it is a case where the recipient takes property from one who is not its owner, and who has no authority to transfer it save in the course of the partnership business.[67] If the recipient knows that the property is that of the firm he acts fraudulently in taking it without securing the consent of the other partners.[68] Where the creditor of a partner deposits to his credit a draft drawn on a partner in his individual capacity, he is not liable for a misappropriation of partnership funds by a payment of the draft with the firm's check.[69]

b. Setting Off Individual Debt Against Debt of Firm. An agreement by one partner to discharge a debt due the firm by setting off his individual liability against it is not binding on the firm, unless made with the consent of the other partner.[70] Where such set-off has been made and the indebted partner has

North Carolina.— Carter *v.* Beaman, 51 N. C. 44.

Pennsylvania.— Todd *v.* Lorah, 75 Pa. St. 155 (consent will not be inferred from mere knowledge of the transaction); McKinney *v.* Brights, 16 Pa. St. 399, 55 Am. Dec. 512 (consent is not to be presumed).

England.— Heilbut *v.* Nevill, L. R. 4 C. P. 354, 38 L. J. C. P. 273, 20 L. T. Rep. N. S. 490, 17 Wkly. Rep. 853 [*affirmed* in L. R. 5 C. P. 478, 39 L. J. C. P. 245, 22 L. T. Rep. N. S. 662, 18 Wkly. Rep. 898]; Kendal *v.* Wood, L. R. 6 Exch. 243, 39 L. J. Exch. 167, 23 L. T. Rep. N. S. 309.

See 38 Cent. Dig. tit. "Partnership," § 237.

66. *Massachusetts.*— Grover *v.* Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506; Locke *v.* Lewis, 124 Mass. 1, 26 Am. Rep. 631.

Missouri.— Flanagan *v.* Alexander, 50 Mo. 50.

New York.— Dike *v.* Drexel, 11 N. Y. App. Div. 77, 42 N. Y. Suppl. 979 [*affirmed* in 155 N. Y. 637, 49 N. E. 1096]; Ross *v.* Whitefield, 36 N. Y. Super. Ct. 50.

Pennsylvania.— Foster *v.* Andrews, 2 Penr. & W. 160.

Vermont.— Miller *v.* Dow, 17 Vt. 235.

67. *Alabama.*— Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Burwell *v.* Springfield, 15 Ala. 273.

Illinois.— Brewster *v.* Mott, 5 Ill. 378.

Iowa.— Janney *v.* Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. Rep. 460.

Mississippi.—Eyrich *v.* Capital State Bank, 67 Miss. 60, 6 So. 615; Buck *v.* Mosley, 24 Miss. 170.

Missouri.— Forney *v.* Adams, 74 Mo. 138; Ackley *v.* Staehlin, 56 Mo. 558; Hagar *v.* Graves, 25 Mo. App. 164.

New York.— Geery *v.* Cockroft, 33 N. Y. Super. Ct. 146. See also Post *v.* Kimberly, 9 Johns. 470.

Pennsylvania.— Purdy *v.* Powers, 6 Pa. St. 492.

Virginia.— Liberty Sav. Bank *v.* Camphell, 75 Va. 534.

Wisconsin.— McLinden *v.* Wentworth, 51 Wis. 170, 8 N. W. 118, 192.

United States.— Rogers *v.* Batchelor, 12 Pet. 221, 9 L. ed. 1063.

See 38 Cent. Dig. tit. "Partnership," § 238.

In Georgia it is provided by statute that any person receiving firm property in payment of a partner's individual debt, with notice that such person is misapplying the firm assets, cannot be an innocent purchaser. See Clarke *v.* Farrell, 80 Ga. 622, 6 S. E. 20.

When money is paid by one partner and received by his individual creditor in satisfaction of a just debt, without notice that it belongs to the firm, the creditor can retain it. Wiley *v.* Allen, 26 Ga. 568; Babcock *v.* Standish, 53 N. J. Eq. 376, 33 Atl. 385, 51 Am. St. Rep. 633, 30 L. R. A. 604 [*reversing* 52 N. J. Eq. 628, 29 Atl. 327], this results because money has the quality of currency, passing from hand to hand in all *bona fide* transactions, without the necessity of inquiry on the part of him who receives it as to the title of the party who pays it. When property thus passes, the recipient may be put upon inquiry as to its title; when money thus passes, no inquiry is required. See also *In re* Lafferty, 181 Pa. St. 51, 37 Atl. 113 [*affirming* 5 Pa. Dist. 75, 17 Pa. Co. Ct. 401].

68. Johnson *v.* Crichton, 56 Md. 108; Williams *v.* Brimhall, 13 Gray (Mass.) 462; Forney *v.* Adams, 74 Mo. 138; Hagar *v.* Graves, 25 Mo. App. 164; Venable *v.* Levick, 2 Head (Tenn.) 351.

69. Wheatland *v.* Pryor, 133 N. Y. 97, 30 N. E. 652 [*affirming* 14 N. Y. Suppl. 533]. See also Moriarty *v.* Bailey, 46 Conn. 592.

70. *Alabama.*— Cowen *v.* Eartherly Hardware Co., 95 Ala. 324, 11 So. 195.

Arkansas.— Witherington *v.* Huntsman, 64 Ark. 551, 44 S. W. 74.

Georgia.— Eady *v.* Newton Coal, etc., Co., 123 Ga. 557, 565, 51 S. E. 661, 1 L. R. A. N. S. 650 [*overruling* Perry *v.* Butt, 14 Ga. 699].

Illinois.— McNair *v.* Platt, 46 Ill. 211.

Indiana.— Bates *v.* Halliday, 3 Ind. 159.

Iowa.— Thomas *v.* Stetson, 62 Iowa 537, 17 N. W. 751, 49 Am. Rep. 148.

Michigan.— Chase *v.* Buhl Iron-Works, 55 Mich. 139, 20 N. W. 827.

Mississippi.— Minor *v.* Gaw, 11 Sm. & M. 322.

assumed to discharge the debt due the firm, it is generally held that an action at law cannot be maintained by the firm to recover its demand,[71] but equitable relief should certainly be granted to the injured partners.[72]

8. Borrowing Money. A partnership is liable for money borrowed by one of its members on the credit of the firm, within the general scope of its authority, and according to the usual course of its business.[73] Nor will the lender's rights

Nebraska.— Columbia Nat. Bank *v.* Rice, 48 Nebr. 428, 67 N. W. 165.

New York.— Rust *v.* Hauselt, 41 N. Y. Super. Ct. 467; Beudel *v.* Hettrick, 35 N. Y. Super. Ct. 405, 45 How. Pr. 198; Gates *v.* Vincent, 12 N. Y. Suppl. 704; Evernghim *v.* Enswood, 7 Wend. 326.

North Carolina.— See Carter *v.* Beaman, 51 N. C. 44.

Ohio.— Thomas *v.* Pennrich, 28 Ohio St. 55.

Pennsylvania.— Purdy *v.* Powers, 6 Pa. St. 492; Todd *v.* Lorah, 5 Leg. Gaz. 73.

Rhode Island.— Pepper *v.* Peck, 17 R. I. 55, 20 Atl. 16; Cornells *v.* Stanhope, 14 R. I. 97.

South Carolina.—Wilson *v.* Dargan, 4 Rich. 544; Beckham *v.* Peay, 2 Bailey 133. But *compare* Hall *v.* Coe, 4 McCord 136.

Tennessee.— Nugent *v.* Allen, 95 Tenn. 97, 32 S. W. 9.

Texas.— Goode *v.* McCartney, 10 Tex. 193; Sanders *v.* Bush, (Civ. App. 1897) 39 S. W. 203, holding such an agreement binding, when the debtor partner's interest in the firm exceeds the amount of his individual debt, which is set off.

Vermont.— Woolson *v.* Fuller, 71 Vt. 335, 45 Atl. 753; Strong *v.* Fish, 13 Vt. 277. But *compare* Eaton *v.* Whitcomb, 17 Vt. 641.

Wisconsin.— Cotzhausen *v.* Judd, 43 Wis. 213, 28 Am. Rep. 539.

England.— Piercy *v.* Fynney, L. R. 12 Eq. 69, 40 L. J. Ch. 404, 19 Wkly. Rep. 710.

Canada.— Fisher *v.* Linton, 28 Ont. 322; Taylor *v.* Lilley, 15 Quebec Super. Ct. 457.

See 38 Cent. Dig. tit. "Partnership," § 239.

Evidence of consent.— when a partner signs the firm-name to a settlement which extinguishes the individual indebtedness of another partner at the cost of the firm, it is as effective evidence of his conduct, as if he expressly consented in his individual name. Campbell *v.* District of Columbia, 19 Ct. Cl. 160.

71. Bumpus *v.* Turgeon, 98 Me. 550, 57 Atl. 883; Homer *v.* Wood, 11 Cush. (Mass.) 62; Chase *v.* Bean, 58 N. H. 183; Craig *v.* Hulschizer, 34 N. J. L. 363. But see Busby *v.* Rooks, (Ark. 1904) 81 S. W. 1056; McNair *v.* Wilcox, 121 Pa. St. 437, 15 Atl. 575, 6 Am. St. Rep. 799; Purdy *v.* Powers, 6 Pa. St. 492.

72. Hoff *v.* Rogers, 67 Miss. 208, 7 So. 358, 19 Am. St. Rep. 301; Craig *v.* Hulschizer, 34 N. J. L. 363; Cornells *v.* Stanhope, 14 R. I. 97; Midland Counties R. *v.* Taylor, 8 H. L. Cas. 751, 8 Jur. N. S. 419, 31 L. J. Ch. 336, 6 L. T. Rep. N. S. 73, 10 Wkly. Rep. 382, 11 Eng. Reprint 624 [*affirming* 28 Beav. 287, 6 Jur. N. S. 595, 29 L. J. Ch. 731, 8 Wkly. Rep. 401, 54 Eng. Reprint 376].

73. *Alabama.*—Guntersville Bank *v.* Webb, 108 Ala. 132, 19 So. 14; Howze *v.* Patterson, 53 Ala. 205, 25 Am. Rep. 607; Saltmarsh *v.* Bower, 22 Ala. 221.

Illinois.—Blinn *v.* Evans, 24 Ill. 317; Funk *v.* Babbitt, 55 Ill. App. 124; Van Nostrand *v.* Mealand, 39 Ill. App. 178.

Indiana.— Leffler *v.* Rice, 44 Ind. 103.

Iowa.— Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721, 90 Iowa 217, 57 N. W. 838, 48 Am. St. Rep. 432; Buethner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177. See also Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023.

Kansas.— Heitman *v.* Griffith, 43 Kan. 553, 23 Pac. 589 (money borrowed by managing partner from his wife); Lindh *v.* Crowley, 29 Kan. 756.

Maine.— Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621.

Michigan.— Coller *v.* Porter, 88 Mich. 549, 50 N. W. 658, one having knowledge that money is not borrowed for firm purposes cannot recover.

New York.— Best *v.* Straks, 24 How. Pr. 58; Onondaga County Bank *v.* De Puy, 17 Wend. 47; Whitaker *v.* Brown, 16 Wend. 505; Walden *v.* Sherburne, 15 Johns. 409.

Pennsylvania.— Real Estate Inv. Co. *v.* Smith, 162 Pa. St. 441, 29 Atl. 858; Hoskinson *v.* Eliot, 62 Pa. St. 393.

Texas.— Phillips *v.* Stanzell, (Civ. App. 1895) 28 S. W. 900.

Vermont.— Keeler *v.* Mathews, 17 Vt. 125.

Wisconsin.— Morse *v.* Hagenah, 68 Wis. 603, 32 N. W. 634; Freeman *v.* Carpenter, 17 Wis. 126.

See 38 Cent. Dig. tit. "Partnership," § 241.

This rule applies as well to partnerships formed for mechanical or manufacturing as to commercial partnerships, and to special partnerships as well as general partnerships. Hoskinson *v.* Eliot, 62 Pa. St. 393. See also Morse *v.* Hagenah, 68 Wis. 603, 32 N. W. 634.

It is an incident of a trading partnership to borrow money with which to carry on the business in the ordinary way. Brite *v.* Guy, 88 S. W. 1069, 28 Ky. L. Rep. 57; Parker *v.* Parker, 80 S. W. 209, 25 Ky. L. Rep. 2193; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627; Hoskinson *v.* Eliot, 62 Pa. St. 393; Union Nat. Bank *v.* Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. N. S. 426; Brown *v.* Kidger, 3 H. & N. 853, 28 L. J. Exch. 66. And see *supra*, VI, A, 1, b. And a firm carrying on a retail liquor business is a trading firm. Caraway *v.* Citizens' Nat. Bank, (Tex. Civ. App. 1895) 29 S. W. 506.

Notes borrowed.— A partner may borrow a note or bill for the purpose of raising money for the use of the firm (Hogan *v.* Reynolds, 8 Ala. 59; Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; Hutchins *v.* Hudson, 8 Humphr. (Tenn.) 426), provided not more

be affected by the borrowing partner's misapplication of the money, if he has acted in good faith.[74] If, however, the borrowing transaction is not within the scope of the partnership business, as such a business is ordinarily conducted, the firm will not be bound, unless the loan has been applied to the firm's benefit with the knowledge of the other partners, or their assent or ratification in some other way is shown.[75] If the loan is made to an individual partner on his credit, the firm is not liable, although the money ultimately goes to the use of the firm.[76]

9. Negotiable Instruments — a. Authority of Partner in General. Whenever the ordinary conduct of the business of a firm involves the use of negotiable paper, each partner is agent for all to sign the firm-name to such paper and negotiate it.[77] And negotiable paper issued within the scope of the partnership

than legal interest be paid for such bill or note (Hutchins *v.* Hudson, *supra*).

Liability for usurious interest.— A partner who knowingly, and without objection, allows the financial partner to continually raise money at usurious rates, thereby impliedly gives him authority to bind the firm to pay usurious interest, from which he can only escape by pleading usury. Hurd *v.* Haggerty, 24 Ill. 171.

Authority limited by agreement.— A partner is not authorized to borrow money in the firm-name because he is allowed "to draw drafts, sign contracts, buy cotton, and otherwise generally supervise the business," where by the partnership articles the concurrence of both partners is required. King *v.* Levy, (Miss. 1892) 13 So. 282.

Notes given by one partner, in the partnership name, as security for money borrowed, are binding on the partnership, unless the transaction was out of the ordinary course of business, or the lender knew that the partner wanted the money for his own private use. Potter *v.* Dillon, 7 Mo. 228, 37 Am. Dec. 185; Bascom *v.* Young, 7 Mo. 1.

False representation.— The fact that the representation that money borrowed by one partner in the firm-name is to be used in the firm business is false does not release the partnership. Benninger *v.* Hess, 41 Ohio St. 64.

74. *Illinois.*— Chicago Trust, etc., Bank *v.* Kinnare, 174 Ill. 358, 51 N. E. 607; Stark *v.* Corey, 45 Ill. 431; Darlington *v.* Garrett, 14 Ill. App. 238.

Maryland.—Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677.

Massachusetts.— Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716; Warren *v.* French, 6 Allen 317.

New York.— Church *v.* Sparrow, 5 Wend. 223.

Pennsylvania.— Van Brunt *v.* Taylor, 3 Phila. 123, money borrowed by partner while insane, but not an adjudged lunatic.

South Carolina.— Steel *v.* Jennings, Cheves 183.

Tennessee.— Gavin *v.* Walker, 14 Lea 643.

England.— Rothwell *v.* Humphreys, 1 Esp. 406; Okell *v.* Eaton, 31 L. T. Rep. N. S. 330.

See 38 Cent. Dig. tit. "Partnership," § 241.

75. *Florida.*— Chandler *v.* Sherman, 16 Fla. 99, holding that neither member of a firm whose aggregate capital is sixteen thousand dollars has power to borrow two thousand dollars under an agreement to pay therefor twenty-five per cent of the net profits of the firm.

Maine.— Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621.

Missouri.— Powell Hardware Co. *v.* Mayer, 110 Mo. App. 14, 83 S. W. 1008; Tyler *v.* Tyler, 78 Mo. App. 240.

Pennsylvania.— Maffet *v.* Leuckel, 93 Pa. St. 468; Jacobs *v.* Curtis, 11 Leg. Int. 27.

Tennessee.— Anderson *v.* Norton, 15 Lea 14, 54 Am. Rep. 400.

England.— Ricketts *v.* Bennett, 4 C. B. 686, 11 Jur. 1062, 17 L. J. C. P. 17, 56 E. C. L. 685; Lloyd *v.* Freshfield, 2 C. & P. 325, 8 D. & R. 19, 12 E. C. L. 597; Fisher *v.* Tayler, 2 Hare 218, 24 Eng. Ch. 218, 67 Eng. Reprint 91; Blaine *v.* Holland, 60 L. T. Rep. N. S. 285.

Canada. — Robertson *v.* Jones, 20 N. Brunsw. 267; Hamilton *v.* McIlroy, 15 Grant Ch. (U. C.) 332.

See 38 Cent. Dig. tit. "Partnership," § 241.

Agricultural partnership.— Where a partnership is formed for the cultivation and production of agricultural products a member of such firm has no implied power to borrow money and thereby bind the firm. Prince *v.* Crawford, 50 Miss. 344. *Compare* Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

76. *California.*— Evans *v.* Bidleman, 3 Cal. 435.

Missouri.— Klopfer *v.* Levi, 33 Mo. App. 322.

Tennessee.— Johnson *v.* Rankin, (Ch. App. 1900) 59 S. W. 638.

England.— Bevan *v.* Lewis, 1 Sim. 376, 27 Rev. Rep. 205, 2 Eng. Ch. 376, 57 Eng. Reprint 618.

Canada.— Shaw *v.* Cadwell, 17 Can. Sup. Ct. 357.

See 38 Cent. Dig. tit. "Partnership," § 241.

Compare Houser *v.* Riley, 45 Ga. 126.

77. *Alabama.*— Johnston *v.* Dutton, 27 Ala. 245.

California.— Decker *v.* Howell, 42 Cal. 636.

Idaho.— Mankato First Nat. Bank *v.* Grignon, 7 Ida. 646, 65 Pac. 365.

Illinois.— Silverman *v.* Chase, 90 Ill. 37; Dow *v.* Phillips, 24 Ill. 249; Wiley *v.* Stewart, 23 Ill. App. 236 [*affirmed* in 122 Ill. 545, 14 N. E. 835]; Bradley *v.* Linn, 19 Ill. App. 322.

Indiana.— Ditts *v.* Lonsdale, 49 Ind. 521.

Iowa.— Milwaukee Harvesting Co. *v.*

business is binding on all the parties even though signed by one of them without

Crabtree, 101 Iowa 526, 70 N. W. 704; Dickson *v.* Dryden, 97 Iowa 122, 66 N. W. 148; Platt *v.* Koehler, 91 Iowa 592, 60 N. W. 178; Brayley *v.* Hedges, 52 Iowa 623, 3 N. W. 652; Sherwood *v.* Snow, 46 Iowa 481, 26 Am. Rep. 155.

Kentucky.— Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Miller *v.* Hughes, 1 A. K. Marsh. 181, 10 Am. Dec. 719; Patterson *v.* Swickard, 41 S. W. 435, 19 Ky. L. Rep. 661; Glass *v.* Walker, 30 S. W. 22, 17 Ky. L. Rep. 189.

Louisiana.— Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640. But *compare* Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

Maryland.— Coursey *v.* Baker, 7 Harr. & J. 28.

Massachusetts.— Richardson *v.* French, 4 Metc. 577.

Michigan.— Citizens' Commercial, etc., Bank *v.* Platt, 135 Mich. 267, 97 N. W. 694; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627; Clare County Sav. Bank *v.* Goodman, 119 Mich. 338, 78 N. W. 135.

Missouri.— Carter *v.* Steele, 83 Mo. App. 211.

New Jersey.— Voorhees *v.* Jones, 29 N. J. L. 270.

New York.— Rumsey *v.* Briggs, 139 N. Y. 323, 34 N. E. 929 [*reversing* 63 Hun 11, 17 N. Y. Suppl. 562]; National Union Bank *v.* Landon, 45 N. Y. 410 [*affirming* 66 Barb. 189]; Flour City Nat. Bank *v.* Widener, 24 N. Y. App. Div. 330, 48 N. Y. Suppl. 492 [*affirmed* in 163 N. Y. 276, 57 N. E. 471]; Fairchild *v.* Rushmore, 8 Bosw. 698; Kantrowitz *v.* Levin, 13 Misc. 319, 34 N. Y. Suppl. 452 [*affirmed* in 14 Misc. 563, 35 N. Y. Suppl. 1072]; Whitaker *v.* Brown, 16 Wend. 505 [*reversing* 11 Wend. 75]; Graves *v.* Merry, 6 Cow. 701, 16 Am. Dec. 471 (authority implied from the circumstances of the case); Smith *v.* Lusher, 5 Cow. 688. *Compare* Mechanics', etc., Bank *v.* Dakin, 24 Wend. 411.

Ohio.— Gano *v.* Samuel, 14 Ohio 592, holding that an acting partner may, for the benefit of his firm, and in order to raise money, use the name of the firm, by accepting a bill of exchange to be exchanged for the acceptance of another firm.

Pennsylvania.— Boyd *v.* Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. Rep. 685; Kirkpatrick *v.* Turnbull, Add. 259; Mitchell *v.* Beatty, 1 Phila. 133.

Texas.— Bradford *v.* Taylor, 61 Tex. 508; Burnley *v.* Rice, 18 Tex. 481; Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977; Spencer *v.* Jones, (Civ. App. 1898) 47 S. W. 29; Nunn *v.* Lackey, 1 Tex. App. Civ. Cas. § 1331.

Wisconsin.— Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022.

England.— Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20; Lloyd *v.* Ashby, 2 B. & Ad. 23, 9 L. J. K. B. O. S. 144, 22 E. C. L. 20; South Carolina Bank *v.* Case, 8 B. & C. 427, 6 L. J. K. B. O. S. 364, 2 M. & R. 459, 15 E. C. L. 213; Bottomley *v.* Nuttall, 5 C. B. N. S. 122, 5 Jur. N. S. 315, 28 L. J. C. P. 110, 94 E. C. L. 122; Jacaud *v.* French, 12 East 317, 11 Rev. Rep. 390; Brown *v.* Kidger, 3 H. & N. 853, 28 L. J. Exch. 66; Gurney *v.* Evans, 3 H. & N. 122, 27 L. J. Exch. 166; Dass *v.* Hossein, 13 Moore Indian App. 358, 20 Eng. Reprint 585; Lane *v.* Williams, 2 Vern. Ch. 277, 292, 23 Eng. Reprint 779, 789.

Canada.— Manitoba Mortg. Co. *v.* Montreal Bank, 17 Can. Sup. Ct. 692; Canadian Bank of Commerce *v.* Wilson, 36 U. C. Q. B. 9; Stultzman *v.* Yeagley, 32 U. C. Q. B. 630.

See 38 Cent. Dig. tit. "Partnership," § 242.

Acceptances see COMMERCIAL PAPER, 7 Cyc. 760.

Where authority implied.—The law implies an authority in one of several partners to execute notes in the name of the firm: (1) Where such authority is necessary to the successful carrying on of the business of the firm; (2) according to the usage of similar partnerships; or (3) according to the course of trade of that particular partnership. Gray *v.* Ward, 18 Ill. 32.

Character of partnership as affecting authority.— If the firm is a commercial or trading partnership, this agency is implied. Wagner *v.* Simmons, 61 Ala. 143; Storer *v.* Hinkley, Kirby (Conn.) 147; Cottam *v.* Smith, 27 La. Ann. 128 (holding that a member of a commercial firm can bind his copartners by drawing or indorsing commercial paper, although a different rule is established by the parties between themselves, unless it is shown that a third party taking such paper had knowledge of such agreement); Cargill *v.* Corby, 15 Mo. 425; Holt *v.* Simmons, 16 Mo. App. 97; Clark *v.* Johnson, 90 Pa. St. 442; Hatchett *v.* Sunset Brick, etc., Co., (Tex. Civ. App. 1907) 99 S. W. 174; Union Nat. Bank *v.* Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. N. S. 426; Hedley *v.* Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 6 Jur. 853, 11 L. J. Q. B. 293, 43 E. C. L. 752. See also Kimbro *v.* Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313. But the issue of negotiable paper by a non-commercial partnership is generally neither customary nor necessary, and there is no implied authority from the existence of the partnership. Hibbler *v.* De Forest, 6 Ala. 92 (commission merchants); Tanner *v.* Hyde, 2 Colo. App. 443, 31 Pac. 344; Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53 (partnership for conducting a theater); Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 89 (attorneys); Teed *v.* Parsons, 202 Ill. 455, 66 N. E. 1044 [*reversing* 100 Ill. App. 342]; Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240 (firm in dairy business); Lee *v.* Ft. Scott First Nat. Bank, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238 (firm engaged in real estate and insurance business on commission); Benedict *v.* Thompson, 33 La. Ann. 196 (a partnership between stevedores is not a commercial one); Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677 (a contracting partnership is

the knowledge[78] or without the consent and against the wishes of his copartners.[79] But negotiable paper issued without the scope of the partnership business by one member of a firm is not binding on the firm,[80] in the absence of express authority

not a commercial one); Worster *v.* Forbush, 171 Mass. 423, 50 N. E. 936 (attorneys); Vetsch *v.* Neiss, 66 Minn. 459, 69 N. W. 315 (boring and fitting out wells); Deardorf *v.* Thacher, 78 Mo. 128, 47 Am. Rep. 95 (insurance and real estate agents); Stavnow *v.* Kenefick, 79 Mo. App. 41; Webb *v.* Allington, 27 Mo. App. 559; National State Capital Bank *v.* Noyes, 62 N. H. 35 (firm engaged in the manufacture and sale of lumber); Toland *v.* Lutz, 2 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 584; McManus *v.* Smith, 37 Oreg. 222, 61 Pac. 844; Schaeffer *v.* Fowler, 111 Pa. St. 451, 2 Atl. 558; Faires *v.* Ross, (Tex. 1892) 18 S. W. 418 (one member of a firm engaged in repairing machinery cannot bind the firm by giving a note in payment for a patent right); Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757 (partner of a non-commercial firm cannot execute a note unless either he has express authority therefor from his copartner, or the giving of such instruments is necessary to the carrying on of the partnership business or is usual in similar partnerships); Dowling *v.* National Exch. Bank, 145 U. S. 512, 12 S. Ct. 928, 36 L. ed. 795 [*overruling* National Exch. Bank *v.* White, 30 Fed. 412] (partnership organized for "sawing lumber, pickets and lath"); Hedley *v.* Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 6 Jur. 853, 11 L. J. Q. B. 293, 43 E. C. L. 752 (a partnership of attorneys); Garland *v.* Jacomb, L. R. 8 Exch. 216, 28 L. T. Rep. N. S. 877, 21 Wkly. Rep. 868; Yates *v.* Dalton, 28 L. J. Exch. 69; Wilson *v.* Brown, 6 Ont. App. 411. Thus where a partnership is formed for the cultivation and production of agricultural products, a member of such firm has no implied power to issue negotiable paper. McCrary *v.* Slaughter, 58 Ala. 230; Ulery *v.* Ginrich, 57 Ill. 531; Benton *v.* Roberts, 4 La. Ann. 216; Prince *v.* Crawford, 50 Miss. 344; Hunt *v.* Chapin, 6 Lans. (N. Y.) 139; Walker *v.* Walker, 66 Vt. 285, 29 Atl. 146; Kimbro *v.* Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313. *Compare* Selman *v.* Brown, 78 Ga. 332, construing Code (1887), §§ 1890, 1904.

In Georgia by statute (Civ. Code, § 2643) a member of a non-commercial or non-trading partnership may bind the other members of the firm by negotiable paper signed in the firm-name. Davis *v.* Howell Cotton Co., 101 Ga. 128, 28 S. E. 612.

If a firm is engaged to any extent in making collections, even though that may not be the principal business, one of the firm may give a note for a balance of money collected by it. Van Brunt *v.* Mather, 48 Iowa 503.

The members of a partnership created for a particular enterprise are not liable on a note executed in the firm-name by one member, without authority, in the absence of proof of a previous consent to the execution of the note or a subsequent ratification thereof. Gray *v.* Ward, 18 Ill. 32. See also Freeman *v.* Gordon, 59 Ill. App. 189; Toland *v.* Lutz, 2 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 584.

Burden of proof.— A note executed by a partner in a trading partnership in the firm-name *prima facie* binds the partners, on the theory that the partner had authority to make the note, and a copartner, asserting the contrary, has the burden of proving it. Mitchell *v.* Whaley, 92 S. W. 556, 29 Ky. L. Rep. 125.

Where one partner in a limited partnership affixes the name of the firm to a note during the existence of the partnership, the parties are *prima facie* liable thereon; and the burden of proof lies upon any partner seeking to escape liability. Jemison *v.* Dearing, 41 Ala. 283.

Authority limited by partnership articles see Dreyer *v.* Sander, 48 Mo. 400.

Evidence as to character of business admissible.— It being a material question whether certain acceptances in the name of a firm were binding on the partnership, or were the act of one partner individually, without the knowledge of his copartner, and for a consideration outside the scope of the firm business, evidence showing the nature and character of the general business in which the firm was engaged is admissible. Saltmarsh *v.* Bower, 34 Ala. 613.

78. Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640; Smith *v.* Lusher, 5 Cow. (N. Y.) 688.

79. Partin *v.* Luterloh, 59 N. C. 341.

80. *Alabama.*— Talmage *v.* Millikin, 119 Ala. 40, 24 So. 843; Guscott *v.* Roden, 112 Ala. 632, 21 So. 313.

Georgia.— H. Y. McCord Co. *v.* Callaway, 109 Ga. 796, 35 S. E. 171.

Illinois.— Zuel *v.* Bowen, 78 Ill. 234.

Indiana.— Summerlot *v.* Hamilton, 121 Ind. 87, 22 N. E. 973; Bays *v.* Conner, 105 Ind. 415, 5 N. E. 18; Graves *v.* Kellenberger, 51 Ind. 66; Ditts *v.* Lonsdale, 49 Ind. 521.

Iowa.— Rutledge *v.* Squires, 23 Iowa 53.

Kentucky.— Wagnon *v.* Clay, 1 A. K. Marsh. 257.

Massachusetts.— Durrell *v.* Staples, 169 Mass. 49, 47 N. E. 441; Blodgett *v.* Weed, 119 Mass. 215.

Michigan.— Whitla *v.* Butler, 99 Mich. 51, 57 N. W. 1082.

Missouri.— Broughton *v.* Sumner, 80 Mo. App. 386.

New York.— Rumsey *v.* Briggs, 139 N. Y. 323, 34 N. E. 929 [*reversing* 63 Hun 11, 17 N. Y. Suppl. 562].

Ohio.— Toland *v.* Lutz, 2 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 584.

Tennessee.— Scott *v.* Bandy, 2 Head 197.

England.— Hogarth *v.* Latham, 3 Q. B. D. 643, 47 L. J. Q. B. 339, 39 L. T. Rep. N. S. 75, 26 Wkly. Rep. 388; Lloyd *v.* Ashby, 2 C. & P. 138, 12 E. C. L. 493; *Ex p.* Darlington Dist. Joint-Stock Banking Co., 4 De G. J.

or a course of dealing from which such authority can be presumed,[81] or of proof of the necessity,[82] or unless the issue by one partner is ratified by his copartners.[83]

& S. 581, 11 Jur. N. S. 122, 34 L. J. Bankr. 10, 11 L. T. Rep. N. S. 651, 13 Wkly. Rep. 353, 29 Eng. Ch. 445, 46 Eng. Reprint 1044; Crane *v.* Lewis, 36 Wkly. Rep. 480.

Canada.— Creighton *v.* Halifax Banking Co., 18 Can. Sup. Ct. 140; Union Bank *v.* Bulmer, 2 Manitoba 380; Standard Bank *v.* Dunham, 14 Ont. 67; Fraser *v.* McLeod, 8 Grant Ch. (U. C.) 268.

See 38 Cent. Dig. tit. "Partnership," § 242.

Accommodation paper.— A partner cannot bind a copartner by an accommodation acceptance, without his consent, unless it passes into the hands of a *bona fide* purchaser. Beach *v.* State Bank, 2 Ind. 488. See also Talmage *v.* Millikin, 119 Ala. 40, 24 So. 843. And see COMMERCIAL PAPER, 7 Cyc. 724.

Where partners purchase realty as individuals, the power of one to bind the others by acceptance of a draft for part of the purchase-money must be proved by some evidence of direct authority, and cannot be inferred from the fact of partnership. Schaeffer *v.* Fowler, 111 Pa. St. 451, 2 Atl. 558.

An unauthorized stipulation in a note does not invalidate the whole instrument. Webb *v.* Allington, 27 Mo. App. 559. See also Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

Purpose distinct from firm business.— If one partner gives a note in the name of the firm for a purpose distinct from the firm business, the law does not presume that he acted honestly and with the assent of his copartners, but such apparent misuse of the partnership name is *prima facie* evidence that he acted without authority and in fraud of his copartners. Eastman *v.* Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600.

81. *Maryland.*— Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677.

Missouri.—Deardorf *v.* Thacher, 78 Mo. 128, 47 Am. Rep. 95.

South Carolina.— Fant *v.* West, 10 Rich. 149, authority shown by consideration beneficial to both partners, and their course of dealing as to negotiable paper.

Wisconsin.— Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

United States.— Dowling *v.* National Exch. Bank, 145 U. S. 512, 12 S. Ct. 928, 36 L. ed. 795 [*overruling* National Exch. Bank *v.* White, 30 Fed. 412]; Crum *v.* Abbott, 6 Fed. Cas. No. 3,454, 2 McLean 233.

See 38 Cent. Dig. tit. "Partnership," §§ 242, 244.

82. Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677; Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

83. *Alabama.*— Tyree *v.* Lyon, 67 Ala. 1, mere silence of the other partners when told of the existence of a note in the firm-name does not amount to a ratification.

Arizona.— Murphy *v.* Whitlow, 1 Ariz. 340, 25 Pac. 532, promise to pay a note is evidence of ratification.

Arkansas.— See Johnson *v.* Wynne, 76 Ark. 563, 89 S. W. 1049.

California.— Reubin *v.* Cohen, 48 Cal. 545.

Georgia.— American Exch. Nat. Bank *v.* Georgia Constr., etc., Co., 87 Ga. 651, 13 S. E. 505, retaining benefits of negotiable paper, with notice of the material facts is ratification.

Illinois.— Chicago Marine Co. *v.* Carver, 42 Ill. 66, omission to repudiate use of firm check for four years after knowledge is tantamount to ratification.

Iowa.— Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177, using the proceeds of the notes amounts to ratification.

Kansas.— Taylor *v.* Herron, 72 Kan. 652, 82 Pac. 1104.

Louisiana.— Harper *v.* Devene, 10 La. Ann. 724; Stewart *v.* Caldwell, 9 La. Ann. 419.

Maine.— Leonard *v.* Wildes, 36 Me. 265; Dudley *v.* Littlefield, 21 Me. 418.

Maryland.— Calvert Bank *v.* Katz, 102 Md. 56, 61 Atl. 411.

Massachusetts.— Wheeler *v.* Rice, 8 Cush. 205, where the other partner, with knowledge of the facts, by a promise to pay, induced the holder to forbear attempting to collect, he is bound.

Missouri.— Sedalia Third Nat. Bank *v.* Faults, 115 Mo. App. 42, 90 S. W. 755; Deardorf *v.* Thacher, 78 Mo. 128, 47 Am. Rep. 95; Broughton *v.* Sumner, 80 Mo. App. 386, where there was evidence that the execution of a partnership note by a member of the firm to secure a debt of a former firm had been ratified by the other member of the firm, it was error to instruct the jury that plaintiffs could not recover thereon against such other member if, at the time they accepted the note, they knew it was so given without his consent.

New York.— Monongahela Valley Bank *v.* Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547 [*reversing* 12 N. Y. App. Div. 624, 43 N. Y. Suppl. 1150]; Commercial Bank *v.* Warren, 15 N. Y. 577 (no independent consideration required for ratification); Hayes *v.* Baxter, 65 Barb. 181 (knowledge of the fraud is essential to ratification); Mechanics', etc., Bank *v.* Oppenheim, 38 Misc. 763, 78 N. Y. Suppl. 825 (ratification by accepting the benefits of the transaction); Baldwin's Bank *v.* Morris, 17 N. Y. Suppl. 286 [*affirmed* in 144 N. Y. 637, 39 N. E. 493]; Gansevoort *v.* Williams, 14 Wend. 133 (ratification may be implied from circumstances).

Ohio.— Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385.

Pennsylvania.— Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

South Carolina.— Hull *v.* Young, 30 S. C. 121, 8 S. E. 695, 3 L. R. A. 521, knowledge of facts necessary to ratification.

Texas.— Powell *v.* Messer, 18 Tex. 401. *Compare* Burleigh *v.* Parton, 21 Tex. 585; Faires *v.* Ross, (1892) 18 S. W. 418.

Washington.— Moran Bros. Co. *v.* Watson,

Where one partner keeps the bank-account of the firm in his own name, with the knowledge and consent of the other partners, all partnership debts and accounts being paid by checks drawn and signed by him alone, the firm is liable on such a check drawn in its business.[84]

b. Appointment of Agent to Execute. One partner has implied authority to appoint an agent to make and indorse negotiable paper for the firm.[85]

c. Partnership or Individual Transactions. A note given for a firm debt in the firm-name and in the course of its business is a firm note, although executed by one partner,[86] even though the firm-name is that of one partner only.[87] But where a partnership is carried on in the name of an individual, the presumption is that a note signed by such individual is his note and not that of the firm. If the individual whose name is used declares at the time of the transaction that it is on account of the firm, that is sufficient to bind the firm.[88] Even when given in part for the individual debt of the executing partner, it is enforceable against the firm to the extent of any firm indebtedness included in it.[89] A note signed in the individual names of the partners is presumably their individual obligation;[90]

44 Wash. 392, 87 Pac. 508; Richards *v.* Jefferson, 20 Wash. 161, 54 Pac. 1123, ratified by written acknowledgment.

United States.— *In re* Norris, 18 Fed. Cas. No. 10,302, 2 Hask. 191, where a firm note is indorsed by a partner to raise money for his benefit, and the firm books disclose the entire transaction, and the other partners make no objection, they are bound by such indorsement. *Compare In re* Dunkle, 8 Fed. Cas. No. 4,161, 7 Nat. Bankr. Reg. 107.

Canada.— Workman *v.* McKinstry, 21 U. C. Q. B. 622. See also Manitoba Mortg. Co. *v.* Montreal Bank, 17 Can. Sup. Ct. 692.

Compare Hatch *v.* Reid, 112 Mich. 430, 70 N. W. 889.

84. Crocker *v.* Colwell, 46 N. Y. 212.

85. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280 (appointment by parol); Evans *v.* Evans, 82 Iowa 492, 48 N. W. 929; Tillier *v.* Whitehead, 1 Dall. (Pa.) 269, 1 L. ed. 131; Dowling *v.* Eastwood, 3 U. C. Q. B. 376.

86. *Connecticut.*— Storer *v.* Hinkley, Kirby 147.

Kansas.— Deitz *v.* Regnier, 27 Kan. 94.

Missouri.— Meader *v.* Malcolm, 78 Mo. 550.

New York.— Whitaker *v.* Brown, 16 Wend. 505.

United States.— *In re* Norris, 18 Fed. Cas. No. 10,302, 2 Hask. 19.

England.— Vere *v.* Ashby, 10 B. & C. 288, 8 L. J. K. B. O. S. 57, 21 E. C. L. 127.

See 38 Cent. Dig. tit. "Partnership," § 245.

Presumption as to note signed by one of firm.— Where a note is signed by one partner in the name of the firm, the legal presumption is that the note was given for a partnership indebtedness in the regular course of business. Thurston *v.* Lloyd, 4 Md. 283.

87. Morse *v.* Richmond, 97 Ill. 303; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; South Carolina Bank *v.* Case, 8 B. & C. 427, 6 L. J. K. B. O. S. 364, 2 M. & R. 459, 15 E. C. L. 213.

If the partner, whose name is the firm style, carries on a separate business, it is for the holder of a negotiable instrument to show that the contract is that of the firm, if he seeks to hold the firm, while if he sues the individual he must show that the contract was made by him in his individual capacity. Hastings Nat. Bank *v.* Hibbard, 48 Mich. 452, 12 N. W. 651; U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176; Yorkshire Banking Co. *v.* Beatson, 5 C. P. D. 109, 49 L. J. C. P. 380, 42 L. T. Rep. N. S. 455, 28 Wkly. Rep. 879 [*affirming* 4 C. P. D. 204, 48 L. J. C. P. 428, 40 L. T. Rep. N. S. 654, 27 Wkly. Rep. 911]; Stephens *v.* Reynolds, 2 F. & F. 147, 5 H. & N. 513, 29 L. J. Exch. 278, 2 L. T. Rep. N. S. 222.

88. Oliphant *v.* Mathews, 16 Barb. (N. Y.) 608.

89. *Indiana.*— Gamble *v.* Grimes, 2 Ind. 392.

Iowa.— Le Mars Nat. Bank *v.* Gehlen, 85 Iowa 716, 50 N. W. 944.

Massachusetts.— Rice *v.* Doane, 164 Mass. 136, 41 N. E. 126.

Missouri.— Webb *v.* Allington, 27 Mo. App. 559.

Ohio.— Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 269.

England.— *Ex p.* Bolitho, Buck 100; Thicknesse *v.* Bromilow, 2 Cromp. & J. 425.

See 38 Cent. Dig. tit. "Partnership," § 245.

90. *Illinois.*— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223]; Union Nat. Bank *v.* Bank of Commerce, 94 Ill. 271; Lill *v.* Egan, 89 Ill. 609.

Kentucky.— Owings *v.* Trotter, 1 Bibb 157.

Massachusetts.— Manufacturers', etc., Bank *v.* Winship, 5 Pick. 11, 16 Am. Dec. 369.

Missouri.— Dunnica *v.* Clinkscales, 73 Mo. 500.

New Hampshire.— Gay *v.* Johnson, 45 N. H. 587.

New York.— Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293; Turner *v.* Jaycox, 40 N. Y. 470; Chemung Nat. Bank *v.* Ingraham, 58 Barb. 290; Mechanics, etc., Bank *v.* Dakin, 24 Wend. 411.

Tennessee.— Crouch *v.* Bowman, 3 Humphr. 209.

England.— *Ex p.* Bolitho, Buck 100; *Ex p.* Harris, 1 Madd. 583, 16 Rev. Rep. 266, 56 Eng. Reprint 214.

but oral evidence is admissible to show that it was a partnership transaction.[91] Where the members of a firm execute a note to a member of the firm, and he assigns and indorses it to a third party, a suit may be maintained by the latter against the other members of the firm.[92]

d. Form and Requisites. When negotiable paper is signed or indorsed in the name agreed upon in the partnership articles, or in the name recognized by the firm as its business name, or in a name not materially different from its business style, the courts are agreed that it is properly executed.[93] Even when not so executed the holder may recover against the firm if he can show that the paper was issued or has been adopted by the firm as its obligation.[94] When paper has been issued by a partner which is not so executed as to entitle the payee to recover on the instrument, he may still be entitled to recover upon the original consideration.[95]

e. Sealed Bills and Notes. From the principles already stated[96] it follows that a bill or note under seal, given in the firm-name by one partner, does not bind the firm, but only the member or members signing it.[97] But such paper may be assented to by the other partners at the time of execution, or subsequently ratified;[98] and

See 38 Cent. Dig. tit. "Partnership," § 245.

Compare Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

91. Dreyfus *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Fosdick *v.* Van Horn, 40 Ohio St. 459; Miller *v.* Berry, 19 S. D. 625, 104 N. W. 311; Crouch *v.* Bowman, 3 Humphr. (Tenn.) 209; *In re* Warren, 29 Fed. Cas. No. 17,191, 2 Ware 322.

92. Blake *v.* Wheaton, 1 N. C. 49.

93. *Indiana.*—Caldwell *v.* Sithens, 5 Blackf. 99, where the paper was signed "W. Caldwell, W. Saxon, and W. Johnson.— By me, William Johnson."

Iowa.— Two partners may become severally liable on a note in the form "I promise" signed by one in the firm-name and afterward ratified by the other. Sherman *v.* Christy, 17 Iowa 322.

Nebraska.— Peck *v.* Tingley, 53 Nebr. 171, 73 N. W. 450.

New York.— Mohawk Nat. Bank *v.* Van Slyck, 29 Hun 188 (the firm-name was that of one partner); Ganson *v.* Lathrop, 25 Barb. 455 (a note in the firm-name for a firm debt is a firm obligation, although in terms joint and several); Staats *v.* Howlett, 4 Den. 559 ("A. B. for A. B. & Co.," is a firm signature); McGregor *v.* Cleveland, 5 Wend. 475 ("Frederick Cleveland and Rufus Cleveland" is the signature of a firm composed of three persons, it not appearing that they had any other firm-name); Doty *v.* Bates, 11 Johns. 544 ("I promise to pay &c." signed "A. B. & Co." is a firm note).

North Carolina.— Horton *v.* Child, 15 N. C. 460.

Tennessee.— Moffat *v.* McKissick, 8 Baxt. 517, a firm may adopt by use a different name from that stipulated in the partnership articles.

England.— *In re* Barnard, 32 Ch. D. 447, 55 L. J. Ch. 935, 55 L. T. Rep. N. S. 40, 34 Wkly. Rep. 782; Malcomson *v.* Malcomson, L. R. Ir. 228 ("for the Milford Spinning Co. and self" binds the firm and not the individual who signed); Faith *v.* Richmond, 11 A. & E. 339, 9 L. J. Q. B. 97, 3 P. & D. 187, 39 E. C. L. 197 (it is a question for the jury whether name signed substantially described the firm); Norton *v.* Seymour, 3 C. B. 792, 11 Jur. 312, 16 L. J. C. P. 100, 54 E. C. L. 792. *Compare* Kirk *v.* Blurton, 12 L. J. Exch. 117, 9 M. & W. 284.

See 38 Cent. Dig. tit. "Partnership," § 246.

Form and requisites see also COMMERCIAL PAPER, 7 Cyc. 547, 562 note 96, 566; 8 Cyc. 219.

94. *Colorado.*— Melsheimer *v.* Hommel, 15 Colo. 475, 24 Pac. 1079.

Kentucky.— Bacon *v.* Hutchings, 5 Bush 595; Kinsman *v.* Dallam, 5 T. B. Mon. 382.

Mississippi.— Holden *v.* Bloxum, 35 Miss. 381.

Missouri.— Farmers' Bank *v.* Bayless, 41 Mo. 274.

New Hampshire.— Maynard *v.* Fellows, 43 N. H. 255.

See 38 Cent. Dig. tit. "Partnership," § 246.

Compare Royal Canadian Bank *v.* Wilson, 24 U. C. C. P. 362.

95. Barcroft *v.* Haworth, 29 Iowa 462; Fair *v.* Citizens' State Bank, 9 Kan. App. 779, 59 Pac. 43; Macklin *v.* Crutcher, 6 Bush (Ky.) 401, 99 Am. Dec. 680; Hikes *v.* Crawford, 4 Bush (Ky.) 19; Patterson *v.* Swickard, 41 S. W. 435, 19 Ky. L. Rep. 661; Bottomley *v.* Nuttall, 5 C. B. N. S. 122, 5 Jur. N. S. 315, 28 L. J. C. P. 110, 94 E. C. L. 122.

96. See *supra*, VI, A, 1, j.

97. *Delaware.*— Morris *v.* Jones, 4 Harr. 428; Layton *v.* Hastings, 2 Harr. 147.

Kentucky.— Brozee *v.* Poyntz, 3 B. Mon. 178.

North Carolina.— Heath *v.* Gregory, 46 N. C. 417; Horton *v.* Child, 15 N. C. 460.

Pennsylvania.— Hoskinson *v.* Eliot, 62 Pa. St. 393; Palmer *v.* Taggart, 1 Chest. Co. Rep. 107.

South Carolina.— Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298; Hull *v.* Young, 30 S. C. 121, 8 S. E. 695, 3 L. R. A. 521; Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314.

See 38 Cent. Dig. tit. "Partnership," § 247.

98. Henderson *v.* Barbee, 6 Blackf. (Ind.) 26.

where it is proved that the consideration for which the note was given went to the use of the firm and was received by them, they are liable upon the original consideration.[99] Although not liable at law partners who did not join in the execution of a note under seal may under some circumstances be liable in equity.[1]

f. Paper in Individual Name For Firm Use. As a rule the firm is liable on the individual negotiable paper of one or more of its members, when it is shown that such paper was intended to bind the firm and was given and accepted for a firm indebtedness;[2] but not if it were an individual transaction.[3] A firm is liable on a note signed by the members with their individual names, where the consideration is treated as partnership funds.[4]

g. Paper in Firm-Name For Individual Use. Negotiable paper signed in the

99. Daniel *v.* Toney, 2 Metc. (Ky.) 523. See also Walsh *v.* Lennon, 98 Ill. 27, 38 Am. Rep. 75. *Compare* Waugh *v.* Carriger, 1 Yerg. (Tenn.) 31, holding that where a partner executes a note under seal for a firm debt, without authority from the other partners, the firm debt is extinguished and becomes his individual debt — the original indebtedness is merged in his security of a higher nature.

1. Purviance *v.* Sutherland, 2 Ohio St. 478.

2. *Connecticut.*— Dougal *v.* Cowles, 5 Day 511, bill drawn in individual name on firm is a firm bill.

Georgia.— Pannell *v.* Phillips, 55 Ga. 618 (acceptance in individual name of draft on firm binds the firm); Buckner *v.* Lee, 8 Ga. 285.

Illinois.— Farwell *v.* Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237.

Indiana.— Hubbell *v.* Woolf, 15 Ind. 204, in order to make a note, signed in the individual name of one of the partners, binding on the firm, it must be made to appear affirmatively that it was given and received as a firm note binding on all the partners.

Iowa.— Seekell *v.* Fletcher, 53 Iowa 330, 5 N. W. 200; Beebe *v.* Rogers, 3 Greene 319, a draft drawn by one only of three partners but on their joint credit, and for their joint benefit, may be recovered as an item in an account against the firm.

Kentucky.— Lexington Nat. Exch. Bank *v.* Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. Rep. 763; Carter *v.* Mitchell, 94 Ky. 261, 22 S. W. 83, 15 Ky. L. Rep. 53; Smith *v.* Turner, 9 Bush 417; Burns *v.* Parish, 3 B. Mon. 8. See also Hikes *v.* Crawford, 4 Bush 19. But *compare* Macklin *v.* Crutcher, 6 Bush 401, 99 Am. Dec. 680.

Louisiana.— Mitchell *v.* D'Armond, 30 La. Ann. 396.

Massachusetts.— Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716.

Michigan.— Michigan Sav. Bank *v.* Butler, 98 Mich. 381, 57 N. W. 253. See also Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. 818, construing Howell Annot. St. § 1583.

New York.— Ontario Bank *v.* Hennessey, 48 N. Y. 545.

Rhode Island.— Colwell *v.* Waybossett Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

Tennessee.— Puckett *v.* Stokes, 2 Baxt. 442.

Texas.— Sessums *v.* Henry, 38 Tex. 37; Crozier *v.* Kirker, 4 Tex. 252, 51 Am. Dec. 724.

Vermont.— Prentiss *v.* Foster, 28 Vt. 742.

Wisconsin.— Tolman *v.* Hanrahan, 44 Wis. 133.

United States.— Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630.

See 38 Cent. Dig. tit. "Partnership," § 248.

But see Heenan *v.* Nash, 8 Minn. 407, 83 Am. Dec. 790 (holding that an acceptance by a partner in his own name of a bill drawn on his firm binds neither the firm nor him); McCord *v.* Field, 27 U. C. C. P. 391; Port Darlington Harbor Co. *v.* Squair, 18 U. C. Q. B. 533; Goldie *v.* Maxwell, 1 U. C. Q. B. 424; Annis *v.* Lowes, 5 U. C. Q. B. O. S. 198 (no recovery against the firm on the note, but an action may be maintained for the consideration).

Note signed in name of partner and company.— Where the articles of copartnership do not fix the name of the firm, and a contract is made by one of the partners for the joint account, a note executed by him, pursuant to such contract, in the name of himself and company, is binging on all the partners. Aspinwall *v.* Williams, 1 Ohio 84.

In equity it is competent for a creditor to prove that his debt was due from a partnership, although he may have taken an individual note from one of the partners. Williams *v.* Donaghe, 1 Rand. (Va.) 300.

3. *Missouri.*— Farmers' Bank *v.* Bayliss, 41 Mo. 274, 35 Mo. 428.

New York.— Coster *v.* Clarke, 3 Edw. 411.

Virginia.— Cunningham *v.* Smithson, 12 Leigh 32.

United States.— Patriotic Bank *v.* Coote, 18 Fed. Cas. No. 10,807, 3 Cranch C. C. 169.

England.— *In re* Adansonia Fibre Co., L. R. 9 Ch. 635, 43 L. J. Ch. 732, 31 L. T. Rep. N. S. 9, 22 Wkly. Rep. 889; Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347.

Canada.— Bell *v.* Ottawa Trust, etc., Co., 28 Ont. 519; Carruthers *v.* Ardagh, 20 Grant Ch. (U. C.) 579, the holder may proceed against the firm for the original consideration.

See 38 Cent. Dig. tit. "Partnership," § 248.

4. Filley *v.* Phelps, 18 Conn. 294 (joint and several notes, executed by the members of a partnership for the purchase of partnership property, constitute a partnership debt); Graham *v.* Thornton. (Miss. 1891) 9 So. 292; Kendrick *v.* Tarbell, 27 Vt. 512; *In re* Thomas, 23 Fed. Cas. No. 13,886, 8 Biss. 139.

firm-name, but given by one partner in payment of his individual debt or obligation, does not bind the other partners,[5] unless it is shown that the partner issuing it had actual authority,[6] that his conduct has been ratified,[7] that the money was applied for partnership purposes with the knowledge and approbation of the other partners,[8] or that the other partners are estopped from questioning his authority,[9] or unless such paper is transferred to a *bona fide* purchaser before maturity.[10] But if the partner when issuing the paper is acting within his authority, his subsequent diversion or misapplication of its proceeds will not invalidate the paper.[11]

h. Alteration of Negotiable Paper. Whenever a partner can bind his firm by the issue of negotiable paper, he possesses implied authority to alter its terms.[12] Where he has no such power any alteration in the terms of the paper must

5. *Alabama.*— Maudlin *v.* Mobile Branch Bank, 2 Ala. 502. *Compare* Hester *v.* Lumpkin, 4 Ala. 509.

Delaware.— Terry *v.* Platt, 1 Pennew. 185, 40 Atl. 243.

Georgia.— McRae *v.* Campbell, 101 Ga. 662, 28 S. E. 920.

Indiana.— Hickman *v.* Reineking, 6 Blackf. 387.

Kentucky.— Breckenridge *v.* Shrieve, 4 Dana 375.

Louisiana.—Allen *v.* Cary, 33 La. Ann. 1455; Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312, 39 Am. Rep. 293 note; Mechanics', etc., Ins. Co. *v.* Richardson, 33 La. Ann. 1308, 39 Am. Rep. 290.

Massachusetts.— Daniels *v.* Hammond, 154 Mass. 165, 28 N. E. 12.

Michigan.— Roberts *v.* Pepple, 55 Mich. 367, 21 N. W. 319.

Mississippi.— Robinson *v.* Aldridge, 34 Miss. 352.

Missouri.— Hickman *v.* Kunkle, 27 Mo. 401; Klein *v.* Keyes, 17 Mo. 326.

New Hampshire.— Williams *v.* Gilchrist, 11 N. H. 535; Davenport *v.* Runlett, 3 N. H. 386.

New York.— Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293; Rust *v.* Hauselt, 41 N. Y. Super. Ct. 467; Driggs *v.* Driggs, 11 N. Y. St. 256; Livingston *v.* Hastie, 2 Cai. 246.

North Carolina.— Brown *v.* Haynes, 59 N. C. 49.

Pennsylvania.— King *v.* Faber, 22 Pa. St. 21; Clay *v.* Cottrell, 18 Pa. St. 408; Porter *v.* Gunnison, 2 Grant 297; Bell *v.* Faber, 1 Grant 31; Baird *v.* Cochran, 4 Serg. & R. 397; Hazelton First Nat. Bank *v.* Kline, 11 Kulp 115; Purves *v.* Corfield, 1 Phila. 174.

Tennessee.— Crosthwait *v.* Ross, 1 Humphr. 23, 34 Am. Dec. 613.

Texas.— Burleigh *v.* Parton, 21 Tex. 585.

Virginia.— Poindexter *v.* Waddy, 6 Munf. 418, 8 Am. Dec. 749.

United States.— Miles City First Nat. Bank *v.* Miles City State Nat. Bank, 131 Fed. 422, 65 C. C. A. 406.

England.— Leverson *v.* Lane, 13 C. B. N. S. 278, 9 Jur. N. S. 670, 32 L. J. C. P. 10, 7 L. T. Rep. N. S. 326, 11 Wkly. Rep. 74, 106 E. C. L. 278; Ridley *v.* Taylor, 13 East 175; Arden *v.* Sharpe, 2 Esp. 524, 5 Rev. Rep. 748; Smith *v.* Coleman, 7 Jur. 1053; Frankland *v.* McGusty, 1 Knapp 274, 12 Eng. Reprint 324; Green *v.* Deakin, 2 Stark. 347, 3 E. C. L. 438.

Canada.— Creighton *v.* Halifax Banking Co., 18 Can. Sup. Ct. 140; Beals *v.* Sheldon, 4 U. C. Q. B. 302.

See 38 Cent. Dig. tit. "Partnership," § 249.

Indorsers of a note made in the name of a firm by a member thereof without the consent of the other partners, and passed by him for his individual debt, are not liable for its payment. Williams *v.* Walbridge, 3 Wend. (N. Y.) 415.

6. Randall *v.* Hunter, 76 Cal. 255, 18 Pac. 317, 66 Cal. 512, 6 Pac. 331 (actual authority given in the partnership agreement); Levi *v.* Latham, 15 Nebr. 509, 19 N. W. 460, 48 Am. Rep. 361; Howell *v.* Wilcox, etc., Sewing Mach. Co., 12 Nebr. 177, 10 N. W. 700; Tompkins *v.* Woodyard, 5 W. Va. 216; Pitfield *v.* Trotter, 32 Nova Scotia 125. *Compare* Leckie *v.* Scott, 10 La. 412, holding that it is doubtful whether one partner can, even with his copartner's consent, use the indorsement of the firm for a private transaction.

Where a partner has general authority to give notes of the firm for his private debts, it is not necessary to show special authority on the particular notes sued on. Midland Nat. Bank *v.* Schoen, 123 Mo. 650, 27 S. W. 547.

7. Tompkins *v.* Woodyard, 5 W. Va. 216.

8. Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Robinson *v.* Aldridge, 34 Miss. 352; Whitaker *v.* Brown, 11 Wend. (N. Y.) 75.

9. Carver *v.* Dows, 40 Ill. 374 (partner held out as authorized to perform such acts); Boardman *v.* Gore, 15 Mass. 331; Midland Nat. Bank *v.* Schoen, 123 Mo. 650, 27 S. W. 547; Hayner *v.* Crow, 79 Mo. 293.

10. Driggs *v.* Driggs, 11 N. Y. St. 256. See also Boardman *v.* Gore, 15 Mass. 331.

11. *Illinois.*— Weirick *v.* Graves, 73 Ill. App. 266; Gregg *v.* Fisher, 3 Ill. App. 261.

New Hampshire.— Wagner *v.* Freschl, 56 N. H. 495.

New York.— Gale *v.* Miller, 44 Barb. 420 [*affirmed* in 54 N. Y. 536].

Wisconsin.— Freeman *v.* Carpenter, 17 Wis. 126.

United States.— Kimbro *v.* Bullitt, 22 How. 256, 16 L. ed. 313.

12. Pahlman *v.* Taylor, 75 Ill. 629 (place of payment added by one partner to a note

be actually authorized or assented to by all the partners, in order to bind the firm.[13]

i. Transfer of Negotiable Paper. Although the indorsement of negotiable paper, payable to a partnership, by one partner, in his name does not transfer full legal title thereto,[14] an equitable title to partnership paper may be transferred by a partner, who has implied authority to sell firm property, when he indorses it in his individual name and delivers it to a purchaser.[15] Any member of a trading firm has implied authority to transfer paper payable to the firm's order by indorsement in the firm-name;[16] and such a transfer may be made to himself,[17] or to another firm of which he is a member.[18] In these cases not only does title pass but the contract of indorsement binds the firm.[19] If, however, the indorsee

made by him and indorsed by copartners); Uhlendorf *v.* Kaufman, 41 Ill. App. 373 (new notes given in place of old ones, thus reducing the time of payment, are binding on the firm); Mace *v.* Heath, 30 Nebr. 620, 46 N. W. 918 (notes as executed bore interest from maturity; one partner erased "maturity," thus making the notes bear interest from date. Such erasure was held to be within the partner's authority and binding on the firm); Taylor *v.* Taylor, 12 Lea (Tenn.) 714 (an alteration of a firm note by one partner does not release the other partner).

13. Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022 (a partner in a non-trading firm has no implied authority to alter its terms, as by the substitution of another payee; and a note thus altered is not binding on the non-assenting partner, although in the hands of a *bona fide* holder); Greenslade *v.* Dower, 7 B. & C. 635, 6 L. J. K. B. O. S. 155, 1 M. & R. 640, 31 Rev. Rep. 272, 14 E. C. L. 286 (a member of a farming partnership has no implied authority to change the term for which bills of exchange are to run).

14. McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68; Estabrook *v.* Smith, 6 Gray (Mass.) 570, 66 Am. Dec. 443; Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310; McIntire *v.* McLaurin, 2 Humphr. (Tenn.) 71, 36 Am. Dec. 300.

15. Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476; Planters', etc., Bank *v.* Willis, 5 Ala. 770. See also McConeghy *v.* Kirk, 68 Pa. St. 200 (holding that where a note, payable to J. J. & J. P. Kirk, was indorsed "J. J. Kirk," this was *prima facie* an indorsement on the firm account); Manitoba Mortg. Co. *v.* Montreal Bank, 17 Can. Sup. Ct. 692.

16. *Indiana.*— Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Mick *v.* Howard, 1 Ind. 250, Smith 160.

Kentucky.— McGowan *v.* Commonwealth Bank, 5 Litt. 271.

Maine.— Emerson *v.* Harmon, 14 Me. 271.

Massachusetts.— Mechanics' Bank *v.* Hildreth, 9 Cush. 356.

Michigan.— Negaunee First Nat. Bank *v.* Freeman, 47 Mich. 408, 11 N. W. 219.

Mississippi.—Manchester Commercial Bank *v.* Lewis, 13 Sm. & M. 226.

Missouri.— Tevis *v.* Tevis, 24 Mo. 535.

New Hampshire.— Burnham *v.* Whittier, 5 N. H. 334.

New York.— Kirby *v.* Cogswell, 1 Cai. 505; Manhattan Co. *v.* Ledyard, 1 Cai. 192.

Pennsylvania.— Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435, each partner has the same right to raise money for the use of the firm by indorsement of negotiable paper as to do so by means of paper already issued.

Rhode Island.— Windham County Bank *v.* Kendall, 7 R. I. 77.

South Carolina.— Tuten *v.* Ryan, 1 Speers 240, holding that where a promissory note is drawn payable to the firm of R & S or bearer, and R, one of the firm, puts his individual name on the back of the note, he cannot be charged as an original party and maker, although he might be as drawer of a bill of exchange, for as one of the firm he might negotiate the note.

United States.— Childress *v.* Emory, 8 Wheat. 642, 5 L. ed. 705; Drexler *v.* Smith, 30 Fed. 754.

Canada.— Small *v.* Riddel, 31 U. C. C. P. 373, such an indorsement passes no title after the paper has been paid by a member of the firm.

See 38 Cent. Dig. tit. "Partnership," §§ 251, 251½.

Even pending an individual insolvency proceeding one partner may indorse in the firm-name and transfer a note which had been turned over by his partner to him in a division of assets. Mechanic's Bank *v.* Hildreth, 9 Cush. (Mass.) 356.

The transfer may be effected by a firm indorsement insufficient to bind the firm as indorsers. Smith *v.* Johnson, 3 H. & N. 222, 27 L. J. Exch. 363.

17. Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Burnham *v.* Whittier, 5 N. H. 334; Kirby *v.* Cogswell, 1 Cai. (N. Y.) 505.

18. Walker *v.* Kee, 16 S. C. 76. *Compare* Foster *v.* Ward, Cab. & E. 168, holding that no action will lie by a firm as indorsees of a bill against their indorsers, if a member of plaintiff firm be one of the indorsers.

19. Brown *v.* Torver, Minor (Ala.) 370; Meyer *v.* Hegler, 121 Cal. 682, 54 Pac. 271; Allen *v.* Mason, 17 Ill. App. 318, holding that the indorsement of a note to a firm of which the indorser is a member transfers full title.

In case the firm-name is that of the partner who indorses the paper, the indorsement will not bind the firm, unless the paper is owned by the firm or is represented to be that

is aware that the transfer to him is made for the indorsing partner's individual benefit, neither the transfer nor the indorsement contract is binding upon the firm unless actual authority or ratification is shown.[20] Nor as a general rule has a partner in a non-trading firm implied authority to transfer its paper by indorsement.[21] When paper, payable to the order of a partner, is indorsed by him in the firm-name, legal title to the paper passes; for the firm signature includes the signature of every partner assenting thereto.[22] Where the payee of a note in forming a partnership gives it his power of attorney, the other partner may indorse the note in the partnership name.[23]

j. Payees Without Notice and Bona Fide Holders.[24] Where a partnership is engaged in trade and commerce, or it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary to the due transaction thereof, payees without notice of want of authority or of circumstances which should put them on inquiry and *bona fide* holders are entitled to hold all the members of a firm upon negotiable paper, issued or indorsed in the firm-name by any partner.[25] No such right attaches, however, to a payee or

of the firm. U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176 [*affirmed* in 5 Pet. 529, 8 L. ed. 216]; Swan *v.* Steele, 7 East 210, 3 Smith K. B. 199, 8 Rev. Rep. 618.

20. American Exch. Nat. Bank *v.* Georgia Constr., etc., Co., 87 Ga. 651, 13 S. E. 505; Fletcher *v.* Anderson, 11 Iowa 228; Lyon *v.* Fitch, 61 N. Y. Super. Ct. 74, 18 N. Y. Suppl. 867; Newman *v.* Richardson, 9 Fed. 865, 4 Woods 81.

"The theory upon which one partner may bind his copartners by the use of the partnership name upon commercial paper, or other parol contracts, is that a confidence is reposed which amounts to a power or authority to each partner to bind the firm by contracts in matters relating to the business of the partnership. But this power is circumscribed and limited to contracts within the scope of the partnership business." Elliott *v.* Dudley, 19 Barb. (N. Y.) 326, 330.

21. Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 89.

22. Finch *v.* De Forest, 16 Conn. 445; Warder *v.* Gibbs, 92 Mich. 29, 52 N. W. 73; Gardner *v.* Wiley, 46 Oreg. 96, 79 Pac. 341.

23. Sanderson *v.* Oakey, 14 La. 373.

24. See COMMERCIAL PAPER, 7 Cyc. 958 *et seq.*, 8 Cyc. 43.

25. *Georgia.*— Davis *v.* Howell Cotton Co., 101 Ga. 128, 28 S. E. 612 (construing Civ. Code, § 2643); Freeman *v.* Ross, 15 Ga. 252.

Louisiana.— Walworth *v.* Henderson, 9 La. Ann. 339.

Massachusetts.— Blodgett *v.* Weed, 119 Mass. 215; Hayward *v.* French, 12 Gray 453.

Missouri.— Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483.

New Hampshire.— State Capital Bank *v.* Thompson, 42 N. H. 369.

New York.— Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Chittenango First Nat. Bank *v.* Morgan, 6 Hun 346 [*affirmed* in 73 N. Y. 593] (such paper "itself, is presumptive evidence of the existence of a partnership debt"); Watertown Nat. Union Bank *v.* Landon, 66 Barb. 189 [*affirmed* in 45 N. Y. 410]; Mechanics' Bank *v.* Foster, 44 Barb. 87; Church *v.* Farnham, Sheld. 393; Johnson *v.* Mon Lee, 10 N. Y. Suppl. 9; Scranton Nat. Bank *v.* Wolf, 4 N. Y. Suppl. 278; Catskill Bank *v.* Stall, 15 Wend. 364 [*affirmed* in 18 Wend. 466].

North Carolina.— Abpt *v.* Miller, 50 N. C. 32.

Ohio.— Benninger *v.* Hess, 41 Ohio St. 64.

Pennsylvania.— Ihmsen *v.* Negley, 25 Pa. St. 297 (the fact that a member of two firms writes a note payable to himself, signs the name of one firm thereto, and indorses it in his individual name and also in the name of the other firm does not charge the holder with notice of any want of authority in the partner); Loeb *v.* Mellinger, 12 Pa. Super. Ct. 592.

South Carolina.— Duncan *v.* Clark, 2 Rich. 587.

Tennessee.— Fletcher *v.* Brown, 7 Humphr. 385.

Vermont.— Barrett *v.* Russell, 45 Vt. 43.

United States.— National Exch. Bank *v.* White, 30 Fed. 412.

England.— Wintle *v.* Crowther, 1 Cromp. & J. 316, 9 L. J. Exch. O. S. 65, 1 Tyrw. 210; Wells *v.* Masterman, 2 Esp. 731; Wiseman *v.* Easton, 8 L. T. Rep. N. S. 637 (a bill accepted in the name of the firm in the hands of a *bona fide* holder is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent); Sutton *v.* Gregory, 2 Peake N. P. 150, 4 Rev. Rep. 899.

Canada.— City of Glasgow Bank *v.* Murdock, 11 U. C. C. P. 138; Henderson *v.* Carveth, 16 U. C. Q. B. 324; Union Bank *v.* Bulmer, 10 Montreal Leg. N. 361 (holding that where a partner gives an accommodation note in the firm-name to a friend, without authority to do so, a holder for value without knowledge of its defective character can recover thereon); Walter *v.* Molson's Bank, Montreal Q. B. Sept. 18, 1877 (holding that a note made fraudulently by a partner in the partnership's name binds the partners in the hands of a *bona fide* holder for value).

See 38 Cent. Dig. tit. "Partnership," § 252.

Belief in firm's assent.— A partnership note given for the individual debt of one partner

holder having knowledge or notice that the paper was issued or indorsed by a partner without the authority or assent of his copartners and for his individual benefit;[26] or otherwise in fraud of his copartners.[27] Nor does it usually attach in favor of any holder of the negotiable paper of a non-trading firm.[28] Where a

is binding on the firm, if the payee had good reason to believe, and did really believe, the note to have been given with the assent of the firm. Cotton *v.* Evans, 21 N. C. 284.

A misapplication by a partner of the funds borrowed constitutes no defense to a suit for the payment of a note given therefor in the name of the firm, unless it is shown that the lender at the time of the loan had knowledge that the same was to be used for other than partnership purposes. Gregg *v.* Fisher, 3 Ill. App. 261.

Indorsement of third person forged.—A, the active member of an insolvent firm, made a number of promissory notes in the firm-name in favor of one B, by whom the notes purported to be indorsed, but the indorsements were all of them forged. The notes were presented to a bank and negotiated by A, who received the money on them, and a large part of the proceeds were appropriated to partnership purposes. It was held that, although the bank could not claim on the notes, it could rank for the amount of them as money paid. Graham *v.* Nova Scotia Bank, 12 Nova Scotia 251.

26. *Alabama.*— Halstead *v.* Shepard, 23 Ala. 558.

Florida.— Lanier *v.* McCabe, 2 Fla. 32, 48 Am. Rep. 173.

Georgia.— Benson *v.* Dublin Warehouse Co., 99 Ga. 303, 25 S. E. 645.

Indiana.— Taylor *v.* Hillyer, 3 Blackf. 433, 26 Am. Dec. 430.

Iowa.— Sherwood *v.* Snow, 46 Iowa 481, 26 Am. Rep. 155, the fact that a member of a firm, in giving a note for money borrowed, used the form, "I promise to pay," and subscribed his own name, and then the firm-name underneath it, is a circumstance to be considered by the jury in determining whether the lender had notice that the money was borrowed for the partner's individual use.

Massachusetts.— Fall River Union Bank *v.* Sturtevant, 12 Cush. 372.

Missouri.— Cargill *v.* Corby, 15 Mo. 425.

New York.— Van Voorhis *v.* Brown, 29 N. Y. App. Div. 119, 51 N. Y. Suppl. 440.

North Carolina.— Hartness *v.* Wallace, 106 N. C. 427, 11 S. E. 259.

Pennsylvania.— Graham *v.* Taggart, 9 Pa. Cas. 70, 11 Atl. 652.

Tennessee.— Scott *v.* Bandy, 2 Head 197.

Vermont.— Huntington *v.* Lyman, 1 D. Chipm. 438, 12 Am. Dec. 716.

United States.—Miles City First Nat. Bank *v.* State Nat. Bank, 131 Fed. 422, 65 C. C. A. 406.

England.— Galway *v.* Matthew, 1 Campb. 403, 10 East 264, 10 Rev. Rep. 289; Wells *v.* Masterman, 2 Esp. 731; *Ex p.* Goulding, 2 Glyn & J. 118 [*affirmed* in 8 L. J. Ch. O. S. 19]; Hood *v.* Aston, 1 Russ. 412, 25 Rev. Rep. 93, 46 Eng. Ch. 366, 38 Eng. Reprint 160.

Canada.— Halifax Banking Co. *v.* Creighton, 18 Can. Sup. Ct. 140 (E. was a member of the firm of E. & Co., also of the firm of S. C. & Co. In order to raise money for the use of E. & Co., he made a note for five thousand dollars in the name of S. C. & Co., indorsing it in the name of E. & Co., and handing it over to plaintiff bank in payment of an overdraft of E. & Co. This was held to be evidence enough of knowledge on the part of the bank to put it upon inquiry as to E.'s authority to bind S. C. & Co. by this paper); Quebec Bank *v.* Miller, 3 Manitoba 17; McConnell *v.* Wilkins, 13 Ont. App. 438; Federal Bank *v.* Northwood, 7 Ont. 389; Hovey *v.* Cassels, 30 U. C. C. P. 230; Harris *v.* McLeod, 14 U. C. Q. B. 164.

Circumstances putting upon inquiry.— If a creditor knew or had reasonable ground to believe that the money for which a note was given by a partner was not borrowed for the use of the firm, or the circumstances were such as to put him upon inquiry and he neglected to inquire, the firm is not bound. Wagner *v.* Freschl, 56 N. H. 495.

Rebuttal of implied authority.— The general authority of one partner to draw bills or notes to charge his copartners is only an implied authority, and may be rebutted by notice of the absence of such authority. Cargill *v.* Corby, 15 Mo. 425.

Signature by one member.— The fact that a note given by a partner for a firm loan, and indorsed by him in the firm-name, was signed only by the partner negotiating the loan, does not charge the lender with notice of want of authority on the part of the partner to execute the note. Benninger *v.* Hess, 41 Ohio St. 64.

Presumption from taking note for individual debt.— One who takes a firm note in payment of an individual debt of one of the firm is presumed to know that it is a diversion of the firm property, so as to preclude his recovering against the firm. Bradley *v.* Nicola, 9 Ohio Dec. (Reprint) 82, 10 Cinc. L. Bul. 373. See also Gansevoort *v.* Williams, 14 Wend. (N. Y.) 133.

In Pennsylvania in an action on a promissory note against a partnership an affidavit alleging that the firm note was used by one partner without the knowledge or consent of his copartner and for his own private use is sufficient to show that the note was put into circulation by fraud, and to require plaintiff to show that he took the note before maturity and paid value for it. Hazleton First Nat. Bank *v.* Kline, 11 Kulp 115.

27. Mix *v.* Muzzy, 28 Conn. 186; Gray *v.* Ward, 18 Ill. 32.

28. Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; Third Nat. Bank *v.* Snyder, 10 Mo. App. 211 (a firm of mere brokers is not a trading partnership); Snively *v.* Matheson, 12 Wash. 88, 40 Pac. 628, 50 Am. St.

partner makes a note in the name of his firm, without the knowledge or consent of his copartner, and not in the course of partnership business, one seeking, as holder, to recover the amount of the note against the copartner, must show that he took it before maturity, for value and in good faith.[29]

k. Renewals. The implied authority of a partner to issue or transfer the negotiable paper of the firm extends to the renewal of such paper.[30]

l. Demand, Dishonor, and Waiver. A due demand of payment of firm paper made upon either partner, and dishonor by him, will bind the firm, for he represents the firm.[31] So due notice of dishonor to either partner is notice to all;[32] and either partner can bind the firm by a waiver of presentment and notice,[33] as well as by designating the place and method of notice.[34] A partner may waive grace on a firm note given by him.[35]

10. Guaranty and Suretyship — a. In General. The normal partnership is organized to carry on a business for its members, and not to assist other persons by becoming surety for them, or answerable for their debts. Hence it is well established that a partner has no implied authority to bind the firm by a contract of guaranty or suretyship.[36] One who would hold the firm on such a contract must show that it was within the common course of business of the firm or within

Rep. 877 (a partnership carrying on the business of general contractors and builders is a non-trading partnership).

Non-commercial character of firm as notice. — One who accepts from a member of a non-commercial partnership a firm note signed by him and secured on the firm's chattels is charged with notice that under the partnership agreement the partner had no authority to execute the note or mortgage for the firm. Snively *v.* Matheson, 12 Wash. 88, 40 Pac. 628, 50 Am. St. Rep. 877.

29. Clark *v.* Dearborn, 6 Duer (N. Y.) 309 (mere proof that the paper "was passed to the plaintiff for goods sold," or that it "was left with the plaintiff as collateral security," is not sufficient); Hogg *v.* Skeen, 18 C. B. N. S. 426, 11 Jur. N. S. 244, 34 L. J. C. P. 152, 11 L. T. Rep. N. S. 709, 13 Wkly. Rep. 383, 114 E. C. L. 426 [*explaining* Musgrave *v.* Drake, 5 Q. B. 185, Dav. & M. 347, 7 Jur. 1015, 13 L. J. Q. B. 16, 48 E. C. L. 185].

30. *Arizona.*— Charles T. Hayden Milling Co. *v.* Lewis, (1891) 32 Pac. 263.

Illinois.— Hurd *v.* Haggerty, 24 Ill. 171, a partner who has given his individual note for a firm debt may renew it by giving a firm note.

Kansas.— Barber *v.* Van Horn, 54 Kan. 33, 36 Pac. 1070.

Kentucky.— National Exch. Bank *v.* Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. Rep. 763, the renewal note is only evidence of the original transaction.

New York.— Flour City Nat. Bank *v.* Widener, 163 N. Y. 276, 57 N. E. 471 [*affirming* 24 N. Y. App. Div. 330, 48 N. Y. Suppl. 492]; Nealis *v.* Adler, 19 Abb. N. Cas. 385 [*reversed* on other grounds in 19 Abb. N. Cas. 389, 25 N. Y. Wkly. Dig. 19].

Ohio.— McKee *v.* Hamilton, 33 Ohio St. 7; Horsey *v.* Heath, 5 Ohio 353.

Pennsylvania.— Saylor *v.* Merchants' Exch. Bank, 1 Walk. 328.

Tennessee.— Union Bank *v.* Eaton, 5 Humphr. 499.

See 38 Cent. Dig. tit. "Partnership," § 253.

Note for benefit of one partner.— A note given by a firm for the debt of one partner may be renewed by any one of the partners without altering the firm's liability. Midland Nat. Bank *v.* Schoen, 123 Mo. 650, 27 S. W. 547. And one partner may renew a note given for his individual benefit, but which was signed in the partnership name by his only copartner, with the understanding that the loan was made on the credit of the firm. Tilford *v.* Ramsey, 37 Mo. 563. But one partner cannot bind the firm by signing the firm-name to a note given in renewal of a premium note given by such partner in the firm's name for a policy of insurance on his individual property. Lime Rock F. & M. Ins. Co. *v.* Treat, 58 Me. 415.

31. Brown *v.* Turner, 15 Ala. 832; Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207; Forthouse *v.* Parker, 1 Campb. 82, 10 Rev. Rep. 637; Michigan Bank *v.* Gray, 1 U. C. Q. B. 422. See Commercial Paper, 7 Cyc. 1002.

32. Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Miser *v.* Trovinger, 7 Ohio St. 281. See Commercial Paper, 7 Cyc. 1075.

33. Hays *v.* Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573, 19 Ky. L. Rep. 367 (holding that a bank cashier who fails to protest a bill of exchange drawn by a firm of which he is a member is presumed to have waived protest as to his firm); Farmers, etc., Bank *v.* Lonergan, 21 Mo. 46; Driggs *v.* Driggs, 11 N. Y. St. 256. See also Commercial Paper, 7 Cyc. 1125.

34. Nutt *v.* Hunt, 4 Sm. & M. (Miss.) 702; Windham County Bank *v.* Kendall, 7 R. I. 77.

35. Pierce *v.* Jackson, 21 Cal. 636.

36. *Alabama.*— Mauldin *v.* Mobile Branch Bank, 2 Ala. 502; Rolston *v.* Click, 1 Stew. 526.

Colorado.— Lewin *v.* Barry, 15 Colo. App. 461, 63 Pac. 121.

Delaware.— Mayberry *v.* Bainton, 2 Harr. 24.

Iowa.— Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290.

the previous course of dealing between the parties,[37] that it was actually authorized by the firm,[38] or that it has been ratified by the other partners.[39] Ratification or authorization is not to be presumed, but must be proved,[40] although it may be

Kansas.— McCormick Harvesting-Mach. Co. *v.* Reiner, 4 Kan. App. 725, 46 Pac. 539.

Maine.— Rollins *v.* Stevens, 31 Me 454.

Massachusetts.— Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666, one partner cannot, by his individual act, bind the firm as the guarantor of the debt of another.

Minnesota.— Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215; Osborne *v.* Thompson, 35 Minn. 229, 28 N. W. 260; Osborne *v.* Carr, 30 Minn. 25, 13 N. W. 922; Selden *v.* Bank of Commerce, 3 Minn. 166, if a firm has a debt against a third party, a partner may have power to assign it in the course of the firm business and for the benefit of the firm, but he has no authority on that transfer to bind the firm by a guaranty thereof.

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227; Moore *v.* Stevens, 60 Miss. 809; Langan *v.* Hewett, 13 Sm. & M. 122.

Missouri.— Kelley-Goodfellow Shoe Co. *v.* Long-Bell Lumber Co., 86 Mo. App. 438.

New York.— Pinckney *v.* Keyler, 4 E. D. Smith 469; Boyd *v.* Plumb, 7 Wend. 309.

Oregon.— Charman *v.* McLane, 1 Oreg. 339.

Pennsylvania.— Shaaber *v.* Bushong, 105 Pa. St. 514; Hamill *v.* Purvis, 2 Penr. & W. 177; Sutton *v.* Irwine, 12 Serg. & R. 13.

Texas.— Olive *v.* Morgan, 8 Tex. Civ. App. 654, 28 S. W. 572.

Virginia.— Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677.

Wisconsin.—Avery *v.* Rowell, 59 Wis. 82, 17 N. W. 875.

England.— Duncan *v.* Lowndes, 3 Campb. 478, 14 Rev. Rep. 815; Brettel *v.* Williams, 4 Exch. 623, 19 L. J. Exch. 121.

Canada.—Stewart *v.* Parker, 18 N. Brunsw. 223; Marks *v.* Wright, 1 N. Brunsw. 174.

See 38 Cent. Dig. tit. "Partnership," § 256.

Individual note indorsed by firm.— Where a note is executed as the individual note of one of the partners, and a guaranty of the firm is indorsed thereon, it is *prima facie* evidence of an individual debt, and not the debt of the firm. Davis *v.* Blackwell, 5 Ill. App. 32. But see Coursey *v.* Baker, 7 Harr. & J. (Md.) 28.

37. *Iowa.*— Pipestone First Nat. Bank *v.* Rowley, 92 Iowa 530, 61 N. W. 195; Fornes *v.* Wright, 91 Iowa 392, 59 N. Y. 51; Dubuque First Nat. Bank *v.* Carpenter, 41 Iowa 518, where the partners conducted a general exchange and deposit bank.

Massachusetts.— Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666, a precedent authority of a partner to sign the firm-name as guarantor to the debt of another may be implied from the common course of business of the firm or the previous course of dealing between the parties.

Michigan.—Cameron *v.* Blackman, 39 Mich. 108, it is certainly usual and proper for merchants in different lines of business to deal with each other on just such mutual credits, and to furnish each other's customers articles which are charged to the merchant and not to the buyer, and to settle their balances accordingly.

Oklahoma.— McNeal *v.* Gossard, 6 Okla. 363, 50 Pac. 159, the rediscounting of commercial paper is within the scope of business of a banking firm, and the power of rediscounting implies and carries with it the power to guarantee the payment of undertakings rediscounted.

Pennsylvania.— Sutton *v.* Irwine, 12 Serg. & R. 13.

Virginia.— Jordan *v.* Miller, 75 Va. 442.

Canada.— Day *v.* McLeod, 18 U. C. Q. B. 256.

See 38 Cent. Dig. tit. "Partnership," § 256.

Extent of partner's power.— One member of a firm has no authority to bind his firm by a guaranty of commercial paper of a third person, even when such firm is interested in the transaction, unless such guaranty is necessary for carrying on the business of the firm in the ordinary way. Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339, 26 Am. St. Rep. 636.

38. Cunningham *v.* Lamar, 51 Ga. 574; Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458 [*affirmed* in 33 Barb. 465]; Boyd *v.* Plumb, 7 Wend. (N. Y.) 309, the word "surety" added to the name of the firm casts the burden of proof upon the holder to show that the bill was drawn with the assent of all the partners.

39. Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290; Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Sutton *v.* Irwine, 12 Serg. & R. (Pa.) 13.

40. *Illinois.*— Marsh *v.* Thompson Nat. Bank, 2 Ill. App. 217.

Indiana.— Love *v.* Payne, 73 Ind. 80, 38 Am. Rep. 111.

Missouri.— Kelley-Goodfellow Shoe Co. *v.* Long-Bell Lumber Co., 86 Mo. App. 438.

New York.— Pinckney *v.* Keyler, 4 E. D. Smith 469 (to bind a partnership to the payment for goods delivered to third persons, it is not enough to show that one of the partners requested the furnishing of the goods to such third persons); Mercein *v.* Andrus, 10 Wend. 461.

Tennessee.—McGuire *v.* Blanton, 5 Humphr. 361, the power to sign the firm-name, by indorsement, for accommodation purposes, would not authorize the signature of the firm-name on the face of the note, as an unconditional and distinct surety.

United States.—Moran *v.* Prather, 23 Wall. 492, 23 L. ed. 121, the right of a partner to sign the firm-name to a contract of indemnity in favor of third persons must be strictly proved, but not necessarily by a written authority to him.

See 38 Cent. Dig. tit. "Partnership," §§ 256, 288.

The taking of a judgment by one member of a firm, in favor of the firm, for an amount

established by circumstances and conduct, as well as by express statements.[41] The partner executing an unauthorized contract of guaranty or suretyship in the firm-name is bound thereby.[42] An agreement on behalf of a firm to indemnify a third party for becoming its surety is not one of guaranty or suretyship, and therefore is not subject to the rules above stated.[43]

b. Accommodation Acceptance or Indorsement. The acceptance or indorsement of negotiable paper for the accommodation of another is a form of suretyship, and hence not within the implied powers of a partner.[44] Such use of the firm-name by a partner, however, may be authorized or ratified.[45] If the accommodation character of the signature does not appear upon the face of the paper, and the firm is a trading partnership, it will be liable to a *bona fide* holder of the paper.[46] When a partnership becomes an accommodation indorser, the liability of its members is joint, and not several. Hence, if a cosurety is compelled to pay the paper, he can recover from the firm only one half.[47]

11. Submission to Arbitration. It is generally held that the power to bind one's copartners to submit a firm controversy to arbitration does not flow from the

which included a debt owing to a third person, is not evidence of a contract by the firm to pay the debt of such third person. McQuewans *v.* Hamlin, 35 Pa. St. 517.

41. Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Bloom *v.* Stern, 23 La. Ann. 747; Sweetser *v.* French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666. *Compare Ex p.* Nolte, 2 Glyn & J. 295.

42. Gunderson *v.* Hasterlik, 100 Ill. App. 429; Boyd *v.* Plumb, 7 Wend. (N. Y.) 309. See also McPhee *v.* McPhee, 19 Ont. 603, holding that a partner who indorsed in his individual name a non-negotiable note made by his partner individually was liable as a guarantor.

43. Dow *v.* Smith, 8 Ga. 551; Durant *v.* Rogers, 87 Ill. 508; Wilkins *v.* Pearce, 5 Den. (N. Y.) 541 [*affirmed* in 2 N. Y. 469].

44. *Alabama.*— Lang *v.* Waring, 17 Ala. 145.

Connecticut.— New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

District of Columbia.— Presbrey *v.* Thomas, 1 App. Cas. 171.

Georgia.— American Exch. Nat. Bank *v.* Georgia Constr., etc., Co., 87 Ga. 651, 13 S. E. 505.

Iowa.— Whitmore *v.* Adams, 17 Iowa 567.

Kentucky.— Chenowith *v.* Chamberlin, 6 B. Mon. 60, 43 Am. Dec. 145.

Maine.— Darling *v.* March, 22 Me. 184, the assent of all the partners may be inferred from evidence of frequent interchanges of signatures between the maker and the indorsing firm for a long time.

Michigan.— Heffron *v.* Hanaford, 40 Mich. 305.

Mississippi.— Bloom *v.* Helm, 53 Miss. 21 (an accommodation acceptance); Andrews *v.* Planters' Bank, 7 Sm. & M. 192, 45 Am. Dec. 300.

New York.— Smith *v.* Weston, 159 N. Y. 194, 54 N. E. 38 [*affirming* 88 Hun 25, 34 N. Y. Suppl. 557]; Fielden *v.* Lahens, 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341 [*modifying* 9 Bosw. 463]; Early *v.* Reed, 6 Hill 12; Hawks *v.* Munger, 2 Hill 200; Wilson *v.* Williams, 14 Wend. 146, 28 Am. Dec. 518 (in such cases the indorsers are sureties, and the taker of the paper is chargeable with notice); Rochester Bank *v.* Bowen, 7 Wend. 158; Laverty *v.* Burr, 1 Wend. 529; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Foot *v.* Sabin, 19 Johns. 154, 10 Am. Dec. 208.

Pennsylvania.— Bowman *v.* Cecil Bank, 3 Grant 33, a partner is not an agent for his copartner, to indorse other than partnership paper.

Tennessee.— State Bank *v.* Saffarrans, 3 Humphr. 597; Whaley *v.* Moody, 2 Humphr. 495; Berryhill *v.* McKee, 1 Humphr. 31.

United States.—Ft. Madison Bank *v.* Alden, 129 U. S. 372, 9 S. Ct. 332, 32 L. ed. 725; *In re* Irving, 13 Fed. Cas. No. 7,074, 17 Nat. Bankr. Reg. 22.

See 38 Cent. Dig. tit. "Partnership," § 257.

45. Steuben County Bank *v.* Alberger, 101 N. Y. 202, 4 N. E. 341; Baldwin's Bank *v.* Morris, 17 N. Y. Suppl. 286 [*affirmed* in 144 N. Y. 637, 39 N. E. 493] (the ratification of an unauthorized indorsement of a note in the firm-name, made by one of the partners, gives such partner an implied authority to indorse the renewals of the same note); Trullinger *v.* Corcoran, 81* Pa. St. 395 (a firm is bound by an indorsement which was represented to be, and was, for the benefit of the firm, although apparently accommodation); Dundass *v.* Gallagher, 4 Pa. St. 205 (assent may be presumed from circumstances); Flemming *v.* Prescott, 3 Rich. (S. C.) 307, 45 Am. Dec. 766.

46. Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716; Catskill Bank *v.* Stall, 15 Wend. (N. Y.) 364 [*affirmed* in 18 Wend. 466]; Hawes *v.* Dunton, 1 Bailey (S. C.) 146, 19 Am. Dec. 663. *Compare* Pooley *v.* Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733, holding that whether a firm can be held liable to a *bona fide* holder, without notice, on a note indorsed in its name by a member for his own accommodation, depends on the nature of the business, the usage of the trade, and the course of dealing of the particular firm.

47. Clipperton *v.* Spettigue, 15 Grant Ch. (U. C.) 269.

relation of partnership.[48] Some courts have, however, conceded this power to a partner, when its exercise does not require the execution of a sealed instrument.[49] There is no dissent from the view that its exercise by a partner may be authorized or ratified by his copartners,[50] and that its unauthorized exercise binds him, even though the others are not bound.[51]

12. Judgment by Confession or Consent — a. In General. The partnership relation does not confer upon a partner an implied authority to bind his copartner by a confession of judgment against the firm, nor to consent that a judgment be entered against the firm, even for a firm debt.[52] Much less has he authority to

48. *Alabama.*— Fancher *v.* Bibb Furnace Co., 80 Ala. 481, 2 So. 268.

California.— Jones *v.* Bailey, 5 Cal. 345.

Massachusetts.— Horton *v.* Wilde, 8 Gray 425.

Michigan.— Backus *v.* Coyne, 35 Mich. 5; Buchoz *v.* Grandjean, 1 Mich. 367.

Minnesota.— Walker *v.* Bean, 34 Minn. 427, 26 N. W. 232.

New York.—Harrington *v.* Higham, 15 Barb. 524, 13 Barb. 660; Brink *v.* New Amsterdam F. Ins. Co., 5 Rob. 104, a reference to third parties of the extent of damage caused by a fire is not submission to arbitration and one partner may bind the firm by such reference without the assent of his copartners.

Ohio.— Stall *v.* Glascoe, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 397, where suit was brought against the firm, and the only partner appearing assented to the entry of an order referring the claim to arbitration, the award thereunder was binding upon the defaulting partner.

Rhode Island.— Tillinghast *v.* Gilmore, 17 R. I. 413, 22 Atl. 942.

Vermont.— St. Martin *v.* Thrasher, 40 Vt. 460; Boynton *v.* Boynton, 10 Vt. 107.

Virginia.— Wood *v.* Shepherd, 2 Patt. & H. 442.

United States.—Karthaus *v.* Ylias y Ferrer, 1 Pet. 222, 7 L. ed. 121.

England.— Stead *v.* Salt, 3 Bing. 101, 10 Moore C. P. 389, 3 L. J. C. P. O. S. 175, 28 Rev. Rep. 602, 11 E. C. L. 58; Adams *v.* Bankart, 1 C. M. & R. 681, 1 Gale 48, 4 L. J. Exch. 69, 5 Tyrw. 425; Hatton *v.* Royle, 3 H. & N. 500, 27 L. J. Exch. 486.

See 38 Cent. Dig. tit. "Partnership," § 258.

Reason for rule.— This power is not necessary to the ordinary conduct of partnership business, and its exercise is not to be encouraged, as it ousts the regular tribunals of their jurisdiction and cuts off or limits the right of appeal. Harrington *v.* Higham, 13 Barb. (N. Y.) 660.

49. Hallack *v.* March, 25 Ill. 48; Southard *v.* Steele, 3 T. B. Mon. (Ky.) 435; Gay *v.* Waltman, 89 Pa. St. 453; Taylor *v.* Coryell, 12 Serg. & R. (Pa.) 243; Alexander *v.* Mulhall, 1 Tex. Unrep. Cas. 764.

50. Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629; Buchanan *v.* Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Thomas *v.* Atherton, 10 Ch. D. 185, 48 L. J. Ch. 370, 40 L. T. Rep. N. S. 77. See also Peters *v.* Peirce, 8 Mass. 398.

51. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412; Harrington *v.* Higham, 15 Barb. (N. Y.) 524; Strangford *v.* Green, 2 Mod. 227, 86 Eng. Reprint 1041.

52. *Colorado.*— Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

Delaware.— Seal *v.* Seal, 1 Houst. 516.

District of Columbia.— Harper *v.* Cunningham, 8 App. Cas. 430.

Illinois.— Sloo *v.* State Bank, 2 Ill. 428; Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434 (holding that a judgment confessed by a surviving partner, while void as against the estate of the deceased partner, may be satisfied out of firm assets); Chicago Trust, etc., Bank *v.* Kinnare, 67 Ill. App. 186 [*reversed* on other grounds in 174 Ill. 358, 51 N. E. 607].

Indiana.—Davenport Mills Co. *v.* Chambers, 146 Ind. 156, 44 N. E. 1109; Barlow *v.* Reno, 1 Blackf. 252.

Iowa.— North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Edwards *v.* Pitzer, 12 Iowa 607; Christy *v.* Sherman, 10 Iowa 535.

Missouri.— Burr *v.* Mathers, 51 Mo. App. 470; Fairbanks *v.* Kraft, 43 Mo. App. 121.

New Jersey.— Ellis *v.* Ellis, 47 N. J. L. 69.

New York.— Murray *v.* Gerety, 11 N. Y. Suppl. 205, 25 Abb. N. Cas. 161; Binney *v.* Le Gal, 1 Abb. Pr. 283; Everson *v.* Gehrman, 1 Abb. Pr. 167, 10 How. Pr. 301; Crane *v.* French, 1 Wend. 311.

Oregon.— Richardson *v.* Fuller, 2 Oreg. 179.

South Carolina.— Mills *v.* Dickson, 6 Rich. 487.

Vermont.— Shedd *v.* Brattleboro Bank, 32 Vt. 709.

Wisconsin.— Remington *v.* Cummings, 5 Wis. 138.

England.— Rathbone *v.* Drakeford, 6 Bing. 375, 8 L. J. C. P. O. S. 117, 4 M. & P. 57, 19 E. C. L. 174; Hambridge *v.* De la Crouée, 3 C. B. 742, 4 D. & L. 466, 10 Jur. 1096, 16 L. J. C. P. 85, 54 E. C. L. 742; Weall *v.* James, 68 L. T. Rep. N. S. 54, 5 Reports 157.

Canada.— Huff *v.* Cameron, 1 Ont. Pr. 255; Holme *v.* Allan, Taylor (U. C.) 348. See also Joyce *v.* Murray, (Mich. T. 6 Vict.) K. & J. Dig. 672. *Compare* Brown *v.* Cinqmars, 2 Ont. Pr. 205, holding that where eighteen months have elapsed since a judgment entered on a cognovit signed by one has been acted upon, and it seems most probable that the other partner was an assenting party, the court will refuse to set aside the judgment.

See 38 Cent. Dig. tit. "Partnership," § 259.

In Louisiana it has been held that a commercial partner may confess judgment in behalf of the firm. Wilmot *v.* The Ouachita Belle, 32 La. Ann. 607.

confess judgment against the firm for his individual debt.[53] Such a judgment is generally held binding on the partner executing a warrant of attorney therefor, or otherwise responsible for the judgment,[54] and it will be binding upon all the partners, in case their ratification or assent is shown.[55]

b. Who May Attack Validity. A judgment entered by confession against a firm, upon a firm debt, on the warrant of attorney or consent executed by one partner in the firm-name, but without actual authority of his copartners, is not absolutely void, but is voidable only at the election of the non-assenting partners, and hence cannot be impeached by a creditor of the firm,[56] unless it is actually fraudulent.[57]

In New York the statute (Code Civ. Proc. § 738) which provides for the entry of judgment upon a written offer of defendant does not authorize one partner to bind his copartners by an offer of judgment against them or against the firm. Rich *v.* Roberts, 10 N. Y. Suppl. 915, 18 N. Y. Civ. Proc. 205; Garrison *v.* Garrison, 67 How. Pr. 271. See also Bridenbecker *v.* Mason, 16 How. Pr. 203.

In Pennsylvania the rule is that a judgment confessed by one partner in the name of the firm for a firm debt is good against the partner confessing it and under it partnership property may be taken in execution. Adams *v.* James L. Leeds Co., 195 Pa. St. 70, 45 Atl. 666; Evans *v.* Watts, 192 Pa. St. 112, 43 Atl. 464; Franklin *v.* Morris, 154 Pa. St. 152, 26 Atl. 364; Boyd *v.* Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. Rep. 685; McCleery *v.* Thompson, 130 Pa. St. 443, 18 Atl. 735; McDonald *v.* Simcox, 98 Pa. St. 619; Ross *v.* Hornell, 84 Pa. St. 129; Meily *v.* Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Grier *v.* Hood, 25 Pa. St. 430; Barnett's Appeal, 2 Walk. 355; Myers *v.* Sprenkle, 20 Pa. Super. Ct. 549; Gardner *v.* Aystin, 14 Pa. Co. Ct. 549; Budd *v.* Shock, 11 Pa. Co. Ct. 480; Palmer *v.* Taggart, 1 Chest. Co. Rep. 107; Pottery Co. *v.* Ginder, 2 Lanc. L. Rev. 345; McKenna's Estate, 11 Phila. 84; Corson *v.* Beans, 3 Phila. 433. *Compare* Stevens *v.* Diehl, 127 Pa. St. 416, 17 Atl. 985. But such a judgment is not binding upon a partner who does not consent thereto individually nor upon his real or personal estate. Franklin *v.* Morris, *supra*; Boyd *v.* Thompson, *supra*; McNaughton's Appeal, 101 Pa. St. 550; Grier *v.* Hood, 25 Pa. St. 430; Hershey *v.* Fulmer, 3 Pa. Co. Ct. 442; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. 245.

Confession or warrant to confess under seal. — One partner cannot bind his copartner by a warrant of attorney under seal to confess a judgment, unless specially authorized. Remington *v.* Cummings, 5 Wis. 138. *Compare* Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125. In Pennsylvania, however, it has been held that a partner may bind a firm by a confession of judgment under seal, in the firm-name. Hershey *v.* Fulmer, 3 Pa. Co. Ct. 442. *Compare* Cash *v.* Tozer, 1 Watts & S. (Pa.) 519; Palmer *v.* Taggart, 1 Chest. Co. Rep. (Pa.) 107. And it has also been held in this state that a partner by a warrant of attorney under seal may confess a judgment against the firm for a firm debt which will justify the levy and sale of the property of the firm and his own in payment thereof. Boyd *v.* Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. Rep. 685; Pottery Co. *v.* Ginder, 2 Lanc. L. Rev. (Pa.) 345. *Compare* Perth Amboy Terra Cotta Co.'s Appeal, 124 Pa. St. 367, 17 Atl. 4.

53. McNaughton's Appeal, 101 Pa. St. 550; Heft *v.* Basford, 2 Pa. Co. Ct. 278; Williams *v.* Jones, 7 Kulp (Pa.) 386.

54. Davenport Mills Co. *v.* Chambers, 146 Ind. 156, 44 N. E. 1109; North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441 (holding also that the judgment bars another action for the same cause against the firm); St. John *v.* Holmes, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; Adams *v.* James L. Leeds Co., 195 Pa. St. 70, 45 Atl. 666; Lehman Mach. Co. *v.* Rood, 5 Pa. Dist. 655, 8 Kulp 264; Heft *v.* Basford, 2 Pa. Co. Ct. 278.

In Delaware the judgment is not binding upon either partner. Seal *v.* Seal, 1 Houst. 516; Hickman *v.* Branson, 1 Houst. 429.

55. *Iowa.*—Edwards *v.* Pitzer, 12 Iowa 607.

Nebraska.— Werner *v.* Iler, 54 Nebr. 576, 74 N. W. 833.

Pennsylvania.— Overton *v.* Tozer, 7 Watts 331; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. 245; Jackson *v.* Roddy, 2 Pittsb. Leg. J. 183; Miller *v.* Wagner, 24 Pittsb. Leg. J. N. S. 458.

South Carolina.— Bivingsville Cotton Mfg. Co. *v.* Bobo, 11 Rich. 386.

Virginia.—Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

England.— Brutton *v.* Burton, 1 Chit. 707, 18 E. C. L. 385.

See 38 Cent. Dig. tit. "Partnership," §§ 259, 289.

56. Farwell *v.* Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237 [*affirming* 42 Ill. App. 291]; Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Browne *v.* Cassem, 74 Ill. App. 305; Rosenberg *v.* Boehm, 25 N. Y. Suppl. 936; Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437; George W. McAlpin Co. *v.* Finsterwald, 57 Ohio St. 524, 49 N. E. 784; Grier *v.* Hood, 25 Pa. St. 430; Cash *v.* Tozer, 1 Watts & S. (Pa.) 519; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. (Pa.) 245.

In Delaware it has been held that such judgments are void. Seal *v.* Seal, 1 Houst. 516; Hickman *v.* Branson, 1 Houst. 429.

57. McCormick Harvesting Mach. Co. *v.* Coe, 53 Ill. App. 488; Everson *v.* Gehrman, 1 Abb. Pr. (N. Y.) 167, 10 How. Pr. 301; Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203; Siegel *v.* Chidsey, 28 Pa. St. 279, 70

e. Non-Consenting Partner's Remedy. The remedy of the non consenting partner is to have the judgment opened[58] or set aside[59] or execution stayed.[60]

d. Effect of Judgment. As the liability of partners, in the absence of statute, is joint, and not joint and several, a partnership creditor, who takes a judgment by confession against the firm is barred from proceeding thereafter against the firm or the non-consenting partner on the same claim. It is merged in the judgment.[61] This has been changed by statute in many jurisdictions.[62]

13. Assignment For the Benefit of Creditors[63] — a. In General. A general assignment of the firm property to a trustee for the benefit of the creditors of the firm is not a transaction in the ordinary course of the firm's business.[64] On the contrary it is usually made with a view to terminating the business and closing the partnership; it is incident to the destruction, not to the conduct, of the partnership business.[65] Accordingly it is generally held that the partnership relation does not of itself impliedly confer upon a partner implied authority to make such an assignment on behalf of the firm.[66] Actual authority must be

Am. Dec. 124; Nichols *v.* Anguera, 2 Miles (Pa.) 290.

58. McIlvain *v.* James L. Leeds Co., 189 Pa. St. 638, 42 Atl. 307; Franklin *v.* Morris, 154 Pa. St. 152, 26 Atl. 364; Perth Amboy Terra Cotta Co.'s Appeal, 124 Pa. St. 367, 17 Atl. 4.

59. *Illinois.*— Sloo *v.* State Bank, 2 Ill. 428. *Compare* Berg *v.* Commercial Nat. Bank, 84 Ill. App. 614, in which the judgment was not set aside, as the complaining partner made no showing that he was injured by it.

Indiana.— Davenport Mills Co. *v.* Chambers, 146 Ind. 156, 44 N. E. 1109.

Ohio.— McKee *v.* Mt. Pleasant Bank, 7 Ohio, Pt. II, 175.

Pennsylvania.— Bitzer *v.* Shunk, 1 Watts & S. 340, 37 Am. Dec. 469; Hershey *v.* Fulmer, 3 Pa. Co. Ct. 442; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. 245.

Canada.— Pitfield *v.* Oakes, 25 Nova Scotia 116.

See 38 Cent. Dig. tit. "Partnership," § 263.

60. Green *v.* Beals, 2 Cai. (N. Y.) 254.

61. North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Frisbie *v.* Larned, 21 Wend. (N. Y.) 450.

62. See the statutes of the different states. And see Yoho *v.* McGovern, 42 Ohio St. 11; Kauffman *v.* Fisher, 3 Grant (Pa.) 302; Nathanson *v.* Spitz, 19 R. I. 70, 31 Atl. 690; Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783 (construing Michigan statute); Dueber Watch Case Co. *v.* Taggart, 26 Ont. App. 295 [*affirmed* in 30 Can. Sup. Ct. 373].

63. See Assignments For Benefit of Creditors, 4 Cyc. 151.

64. Kirby *v.* Ingersoll, 1 Dougl. (Mich.) 477, Harr. 172 (the power of divesting entirely one partner of his interest, and appointing a trustee for both, is not contemplated or implied by the contract of partnership); Fisher *v.* Murray, 1 E. D. Smith (N. Y.) 341; Havens *v.* Hussey, 5 Paige (N. Y.) 30. But see Harrison *v.* Sterry, 5 Cranch (U. S.) 289, 3 L. ed. 104; Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

65. Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401 (acts and conduct which look toward a destruction of the firm must be participated and joined in, by all the members thereof); Osborne *v.* Barge, 29 Fed. 725.

66. *Alabama.*—Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; Dunklin *v.* Kimball, 50 Ala. 251. See Cullum *v.* Bloodgood, 15 Ala. 34.

Colorado.— Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966, an assignment to a portion of the creditors who know that the other partners are opposed to it is invalid.

Iowa.— Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169, 111 Iowa 654, 82 N. W. 1038; Hunter *v.* Waynick, 67 Iowa 555, 25 N. W. 776; Loeb *v.* Pierpoint, 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122.

Kansas.— Shattuck *v.* Chandler, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227.

Maryland.— Maughlin *v.* Tyler, 47 Md. 545.

Mississippi.— Foot *v.* Goldman, 68 Miss. 529, 10 So. 62, an infant partner is not bound by an assignment executed by his copartner.

Missouri.— Hook *v.* Stone, 34 Mo. 329; Hughes *v.* Ellison, 5 Mo. 463.

Montana.— Steinhart *v.* Fyhrie, 5 Mont. 463, 6 Pac. 367.

New York.— Coope *v.* Bowles, 42 Barb. 87, 18 Abb. Pr. 442, 28 How. Pr. 10; Haggerty *v.* Granger, 15 How. Pr. 243.

Ohio.— H. B. Claflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686; Holland *v.* Drake, 29 Ohio St. 441.

Pennsylvania.— Fox *v.* Curtis, 176 Pa. St. 52, 34 Atl. 952; McCutcheon *v.* Ackland, 1 Chest. Co. Rep. 82; Stockham *v.* Wells, 25 Wkly. Notes Cas. 84.

Rhode Island.— Ormsbee *v.* Davis, 5 R. I. 442.

South Carolina.— Henderson *v.* Haddon, 12 Rich. Eq. 393; Dickinson *v.* Legare, 1 Desauss. Eq. 537. But *compare* Robinson *v.* Crowder, 4 McCord 519, 17 Am. Dec. 762.

Texas.— Turner *v.* Douglass, 77 Tex. 619, 14 S. W. 221; Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69; Baylor County *v.* Craig, 69 Tex. 330, 6 S. W. 305; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

Virginia.— Hill *v.* Postley, 90 Va. 200, 17 S. E. 946.

Wisconsin.— Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253; Brooks *v.* Sullivan, 32 Wis. 444.

United States.— Parker *v.* Brown, 85 Fed.

shown;[67] but the existence of such authority may be implied from circumstances[68] or from the conduct of the partners.[69] Thus where a partner absconds[70] under circumstances that show an intention to leave the business and its control to the remaining partner,[71] or is a non-resident or permanently absent, his copartner being the sole manager,[72] or abandons all attention to or control of the busi-

595, 29 C. C. A. 357; Wooldridge *v.* Irving, 23 Fed. 676.

England.— Harper *v.* Goodsell, L. R. 5 Q. B. 422, 39 L. J. Q. B. 185, 18 Wkly. Rep. 954; Cumberlege *v.* Lawson, 1 C. B. N. S. 709, 26 L. J. C. P. 120, 5 Wkly. Rep. 237, 87 E. C. L. 709; Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128.

Canada.— Stevenson *v.* Brown, 9 Can. L. J. 110; Wilson *v.* Stevenson, 12 Grant Ch. (U. C.) 239; Cameron *v.* Stevenson, 12 U. C. C. P. 389.

See 38 Cent. Dig. tit. "Partnership," § 267. And see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 131, 151.

But see Lasell *v.* Tucker, 5 Sneed (Tenn.) 33; Scruggs *v.* Burruss, 25 W. Va. 670.

Assignment containing preferences.— One partner has no authority without his copartner's consent to make an assignment for the benefit of creditors, giving a preference to some over others. Bull *v.* Harris, 18 B. Mon. (Ky.) 195 (assignment is not valid when preferred creditors have notice of opposition of other partner prior to execution of assignment); Kirby *v.* Ingersoll, 1 Dougl. (Mich.) 477, Harr. 172; Pettee *v.* Orser, 6 Bosw. (N. Y.) 123 [*affirmed* in 28 How. Pr. 581]; Matter of Lowenstein, 7 How. Pr. (N. Y.) 100; Havens *v.* Hussey, 5 Paige (N. Y.) 30; Hitchcock *v.* St. John, Hoffm. (N. Y.) 511; Ormsbee *v.* Davis, 5 R. I. 442; Bowen *v.* Clark, 3 Fed. Cas. No. 1,721, 1 Biss. 128. *Compare* Motley *v.* Frank, 87 Va. 432, 13 S. E. 26; Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

An assignment under seal, executed by one partner, which would be valid and binding on the other partners if without a seal, is not rendered invalid by the addition of such seal. Robinson *v.* Crowder, 4 McCord (S. C.) 519, 17 Am. Dec. 762; Lasell *v.* Tucker, 5 Sneed (Tenn.) 33; McCullough *v.* Sommerville, 8 Leigh (Va.) 415. See also Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Halsey *v.* Fairbanks, 11 Fed. Cas. No. 5,964, 4 Mason 206.

67. *Indiana.*— Callahan *v.* Heinz, 20 Ind. App. 359, 49 N. E. 1073.

Louisiana.— Tyler *v.* His Creditors, 9 Rob. 372.

Minnesota.— Metropolitan Trust Co. *v.* Northern Trust Co., 61 Minn. 462, 63 N. W. 1030; Williams *v.* Frost, 27 Minn. 255, 6 N. W. 793, where the assigning partner is left in charge of the business and told to do whatever in his judgment is best, in view of the financial condition of the firm, he may make a valid assignment.

Mississippi.— Mayer *v.* Bernstein, 69 Miss. 17, 12 So. 257.

New York.— Klumpp *v.* Gardner, 114 N. Y. 153, 21 N. E. 99; Welles *v.* March, 30 N. Y. 344 (assent is shown when the absent partner wrote the assigning partner, "I hereby assign you my interest. . . . Take charge of everything in our business; close it up speedily"); Martine *v.* Robinson, 78 Hun 115, 28 N. Y. Suppl. 1056 (oral authority is sufficient); Stadelman *v.* Loehr, 47 Hun 327; Heald *v.* Macgowan, 15 Daly 233, 5 N. Y. Suppl. 450 [*affirmed* in 117 N. Y. 643, 22 N. E. 1131]; Roberts *v.* Shepard, 2 Daly 110; Baldwin *v.* Tynes, 19 Abb. Pr. 32.

Pennsylvania.— Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825; McNutt *v.* Strayhorn, 39 Pa. St. 269; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Hennessy *v.* Western Bank, 6 Watts & S. 300, 40 Am. Dec. 560; Matter of Mill Work, etc., Co., 4 Pa. Super. Ct. 106.

Texas.— Jackman *v.* Fortson, (Civ. App. 1896) 39 S. W. 215, even when orally assented to, the assignment does not convey real estate, under Rev. St. (1875) art. 624.

United States.— Paul *v.* Cullum, 132 U. S. 539, 10 S. Ct. 151, 33 L. ed. 430 (assigning partner had power of attorney "to bargain, and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession, or in action"); Parker *v.* Brown, 25 Fed. 595, 29 C. C. A. 357; Osborne *v.* Barge, 29 Fed. 725.

Canada.— Nolan *v.* Donnelly, 4 Ont. 440.

See 38 Cent. Dig. tit. "Partnership," § 268.

68. *Indiana.*— Callahan *v.* Heinz, 20 Ind. App. 359, 49 N. E. 1073, the burden of proving the existence of sufficient authority is on the assigning partner and those claiming under him.

Michigan.— Kirby *v.* Ingersoll, 1 Dougl. 477, the power to make such assignment may be inferred from the conduct of the partners, their manner of doing business, and the circumstances in which they place themselves with reference to the firm business.

New York.— Lowenstein *v.* Flaurand, 11 Hun 399 [*affirmed* in 82 N. Y. 494].

Texas.— Graves *v.* Hall, 32 Tex. 665.

Wisconsin.— Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65.

69. Kirby *v.* Ingersoll, 1 Dougl. (Mich.) 477; Lowenstein *v.* Flaurand, 11 Hun (N. Y.) 399 [*affirmed* in 82 N. Y. 494].

70. Sullivan *v.* Smith, 15 Nebr. 476, 19 N. W. 620, 48 Am. Rep. 354; Palmer *v.* Myers, 43 Barb. (N. Y.) 509; Voshmik *v.* Urquhart, 91 Wis. 513, 65 N. W. 60.

71. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10; Baltimore Nat. Bank *v.* Sackett, 2 Daly (N. Y.) 395; Kelly *v.* Baker, 2 Hilt. (N. Y.) 531; Blum *v.* Bratton, 2 Tex. Civ. App. 226, 21 S. W. 65.

72. *California.*— Forbes *v.* Scannell, 13 Cal. 242.

ness,[73] his copartner may make a general assignment for the benefit of the firm's creditors. And according to some of the cases one partner may make such an assignment where there is a crisis in the affairs of the business and his copartner cannot be communicated with in time to meet the emergency.[74] But one partner has no right to make a general assignment because his copartner is temporarily disabled by sickness,[75] or is temporarily absent.[76] And such authority is not established by the mere fact that the assigning partner is the general manager or has a power of attorney to carry on the business of the firm.[77]

b. Ratification. Even when a general assignment by one partner is not authorized, it may be validated by ratification of his copartners.[78] Such ratification, however, does not ordinarily affect liens or other rights acquired by creditors before the ratification is made.[79]

14. Representations and Admissions. If the transaction in connection with which a representation or an admission is made is within the scope of the partner's authority as agent of the firm, such representation or admission will bind all of

Ohio.— H. B. Claflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686.

Texas.— Kellar *v.* Self, 5 Tex. Civ. App. 393, 24 S. W. 578.

Virginia.— McCullough *v.* Sommerville, 8 Leigh 415.

West Virginia.— Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210.

Wisconsin.— See Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65.

United States.— Anderson *v.* Tompkins, 1 Fed. Cas. No. 365, 1 Brock. 456.

See 38 Cent. Dig. tit. "Partnership," § 269.

73. Kemp *v.* Carnley, 3 Duer (N. Y.) 1; H. B. Claflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686.

74. Trumbull *v.* Union Trust Co., 33 Ill. App. 319; *In re* Daniels, 14 R. I. 500. *Compare* Stein *v.* La Dow, 13 Minn. 412 (holding that the test to be applied is whether the other partner is absent "under circumstances which furnish reasonable ground for inferring that he intended to confer upon the assigning partner authority to do any act for the firm which could be done with his concurrence if he were present"); Mayer *v.* Bernstein, 69 Miss. 17, 12 So. 257. But see Welles *v.* March, 30 N. Y. 344 [*overruling* Robinson *v.* Gregory, 29 Barb. (N. Y.) 560].

The execution of a general assignment for firm creditors is not necessary to protect firm property from sacrifice under hostile attacks of racing creditors, nor to secure its equal distribution among creditors. Either partner, if the firm is insolvent, may institute bankruptcy proceedings (Pleasants *v.* Meng, 1 Dall. (Pa.) 380, 1 L. ed. 185), or, in the absence of a federal bankruptcy statute, may institute insolvency proceedings under a state statute (Durgin *v.* Coolidge, 3 Allen (Mass.) 554), or may bring a suit in equity for the dissolution of the partnership and the ratable division of its assets among creditors (Holmes *v.* McDowell, 15 Hun (N. Y.) 585).

75. Stadelman *v.* Loehr, 47 Hun (N. Y.) 327.

Insanity.— One partner is not authorized by the insanity of his copartner, where no inquisition has been held, to execute an assignment for the benefit of the firm's creditors. Friedburgher *v.* Jaherg, 20 Abh. N. Cas. (N. Y.) 279.

76. Stockham *v.* Wells, 25 Wkly. Notes Cas. (Pa.) 84. *Compare* Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

Assignment not void.—An assignment in trust of partnership property by one partner in the absence of his copartner in another state is not void *per se*, but only voidable by such copartner. Sheldon *v.* Smith, 28 Barb. (N. Y.) 593.

77. Callahan *v.* Heinz, 20 Ind. App. 359, 49 N. E. 1073; Kirby *v.* Ingersoll, 1 Dougl. (Mich.) 477; Hook *v.* Stone, 34 Mo. 329; Harper *v.* Goodsell, L. R. 5 Q. B. 422, 39 L. J. Q. B. 185, 18 Wkly. Rep. 954.

78. *Kansas.*— Corbett *v.* Cannon, 57 Kan. 127, 45 Pac. 80.

New York.— Adee *v.* Cornell, 93 N. Y. 572; Sheldon *v.* Smith, 28 Barb. 593 (after ratification a partner cannot alter the assignment); Hooper *v.* Beecher, 15 N. Y. Suppl. 113 [*affirmed* in 135 N. Y. 617, 32 N. E. 645] (a member of a firm who defends an action attacking the validity of the assignment thereby ratifies it).

Ohio.— Holland *v.* Drake, 29 Ohio St. 441.

Pennsylvania.—Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825; Stockham *v.* Wells, 25 Wkly. Notes Cas. 84.

Texas.— Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69; Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615; Matthews *v.* Smelser, (Civ. App. 1894) 26 S. W. 872.

Wisconsin.— Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Dec. 253.

See 38 Cent. Dig. tit. "Partnership," § 290.

79. *Illinois.*— Trumbull *v.* Union Trust Co., 33 Ill. App. 319.

Iowa.— Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169.

Minnesota.— Stein *v.* La Dow, 13 Minn. 412.

Mississippi.— Mayer *v.* Bernstein, 69 Miss. 17, 12 So. 257.

Texas.— Kittrell *v.* Blum, 77 Tex. 336, 14 S. W. 69.

the partners,[80] otherwise it will not,[81] unless actually authorized or ratified by them.[82] It is receivable against the partner making it, although not ordinarily conclusive against him.[83] But it is not receivable in favor of the partner making it, or of one claiming under him.[84] Such admissions or representations are not competent evidence to establish the existence of the partnership relation,[85] nor the extent of the maker's authority to bind the firm.[86]

15. Wrongful Acts — a. In General. The firm is liable for the wrongful acts or omissions of a partner, while he is acting in the ordinary course of the firm's business, or with his copartner's authority.[87] For other torts committed by him

Wisconsin.— Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

See 38 Cent. Dig. tit. "Partnership," § 290.

80. *Alabama.*— Hogan *v.* Reynolds, 8 Ala. 59.

Illinois.— Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569; Olson *v.* O'Malia, 75 Ill. App. 387.

Indiana.— Bisel *v.* Hobbs, 6 Blackf. 479.

Iowa.— Waite *v.* High, 96 Iowa 742, 65 N. W. 397.

Kansas.— Bemis *v.* Becker, 1 Kan. 226.

Maryland.— Doremus *v.* McCormick, 7 Gill 49.

Massachusetts.— Cook *v.* Castner, 9 Cush. 266, partners are responsible for each other's statements in regard to their joint transactions.

Michigan.— Burgan *v.* Lyell, 2 Mich. 102, 55 Am. Dec. 53.

Minnesota.— Milwaukee Harvester Co. *v.* Finnegan, 43 Minn. 183, 45 N. W. 9.

Mississippi.— Lea *v.* Guice, 13 Sm. & M. 656.

Missouri.— Caris *v.* Nimmons, 92 Mo. App. 66.

New Jersey.— Hoboken Sav. Bank *v.* Beckman, 36 N. J. Eq. 83.

Ohio.— McKee *v.* Hamilton, 33 Ohio St. 7.

Oklahoma.— Frick *v.* Reynolds, 6 Okla. 638, 52 Pac. 391.

Pennsylvania.— Crawford *v.* Willing, 4 Dall. 286, 1 L. ed. 836.

Tennessee.— Gavin *v.* Walker, 14 Lea 643.

United States.— Swofford Bros. Dry-Goods Co. *v.* Mills, 86 Fed. 556; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630, the answer of one partner is admissible against his copartner whenever the same statements as admissions are competent.

See 38 Cent. Dig. tit. "Partnership," § 272.

In England it is provided by statute that an admission or representation made by any partner concerning the partnershiff affairs, and in the ordinary course of the business, is evidence against the firm. English Partn. Act (1890), § 15. See also Nottidge *v.* Pritchard, 8 Bligh N. S. 493, 5 Eng. Reprint 1026, 2 Cl. & F. 379, 6 Eng. Reprint 1197 [*affirming* 1 Russ. & M. 191, 5 Eng. Ch. 191, 39 Eng. Reprint 74, Taml. 332, 12 Eng. Ch. 332, 48 Eng. Reprint 132]; Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Wickham *v.* Wickham, 2 Kay & J. 478, 69 Eng. Reprint 870; Blair *v.* Bromley, 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354, 22 Eng. Ch. 354, 41 Eng. Reprint 979; Wood *v.* Braddick, 1 Taunt. 104, 9 Rev. Rep. 711.

Opportunity to contradict.— The answer of one partner cannot be read against the others unless they have an opportunity to contradict it. Parker *v.* Morrell, 12 Jur. 253, 17 L. J. Ch. 226, 2 Phil. 453, 22 Eng. Ch. 453, 41 Eng. Reprint 1018; Dale *v.* Hamilton, 5 Hare 369, 11 Jur. 163, 16 L. J. Ch. 126, 26 Eng. Ch. 369, 67 Eng. Reprint 955.

81. Heffron *v.* Hanaford, 40 Mich. 305 (a partner's declarations will not bind his associates in matters foreign to the partnership, nor will his mere admission or declaration bring a transaction within the scope of the partnership business); Edgell *v.* Macqueen, 8 Mo. App. 71; Taylor *v.* Thompson, 62 N. Y. App. Div. 159, 70 N. Y. Suppl. 997; Rumsey *v.* Briggs, 63 Hun (N. Y.) 11, 17 N. Y. Suppl. 562 (statements by one partner in matter outside of the scope of a non-trading firm's business as to his authority are not binding on the firm); Baer *v.* Leppert, 12 Hun (N. Y.) 516; Kittel *v.* Callahan, 19 N. Y. Suppl. 397; Folk *v.* Schaeffer, 180 Pa. St. 613, 37 Atl. 104; Kaiser *v.* Fendrick, 98 Pa. St. 528.

82. Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. 818; Nixon *v.* Jenkins, 1 Hilt. (N. Y.) 318; Kittel *v.* Callahan, 19 N. Y. Suppl. 397, parol ratification of a guaranty does not come under the statute of frauds.

83. Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65; Stead *v.* Salt, 3 Bing. 101, 3 L. J. C. P. O. S. 175, 10 Moore C. P. 389, 28 Rev. Rep. 602, 11 E. C. L. 58; Wickham *v.* Wickham, 2 Kay & J. 478, 69 Eng. Reprint 870.

84. Smith *v.* Lanier, 101 Ga. 137, 28 S. E. 653; Lewis *v.* Allen, 17 Ga. 300.

85. Reynolds *v.* Radke, 112 Ill. App. 575; Lea *v.* Guice, 13 Sm. & M. (Miss.) 656; Burpee *v.* Smith, 20 N. Brunsw. 408. See *supra*, III, C, 2, d, (III).

86. Taft *v.* Church, 162 Mass. 527, 39 N. E. 283; Columbia Nat. Bank *v.* Rice, 48 Nebr. 428, 67 N. W. 165; *Ex p.* Agace, 2 Cox Ch. 312, 30 Eng. Reprint 145.

87. *Colorado.*—Clark *v.* Ball, 34 Colo. 223, 82 Pac. 529, 114 Am. St. Rep. 154, 2 L. R. A. N. S. 100.

Georgia.— Hobbs *v.* Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320.

Illinois.— Tenney *v.* Foote, 95 Ill. 99; Stokes *v.* Little, 65 Ill. App. 255, firm liable for trust funds used by one partner for the firm's benefit, with copartner's knowledge.

Massachusetts.— Haley *v.* Case, 142 Mass.

neither the firm nor his copartners are liable,[83] unless their assent or ratification is

316, 7 N. E. 877 (all partners are liable for injuries to a servant due to his following negligent directions of one partner); Linton *v.* Hurley, 14 Gray 191; Manufacturers', etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83.

Michigan.— Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167.

Missouri.— Pundmann *v.* Schoenich, 144 Mo. 149, 45 S. W. 1112.

New York.— Lockwood *v.* Bartlett, 130 N. Y. 340, 29 N. E. 257 [*affirming* 5 Silv. Sup. 481, 7 N. Y. Suppl. 481]; Bostwick *v.* Champion, 11 Wend. 571 [*affirmed* in 18 Wend. 175, 31 Am. Dec. 376].

North Carolina.— Hall *v.* Younts, 87 N. C. 285.

Texas.— Thomas *v.* Tucker, (Civ. App. 1905) 89 S. W. 802.

Vermont.— McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661.

Washington.— Trissom *v.* Hofins, 39 Wash. 51, 80 Pac. 1002.

United States.— U. S. *v.* Baxter, 46 Fed. 350.

England.— Hamlyn *v.* Houston, [1903] 1 K. B. 81, 72 L. J. K. B. 72, 87 L. T. Rep. N. S. 500, 51 Wkly. Rep. 99; Cooper *v.* Prichard, 11 Q. B. D. 351, 52 L. J. Q. B. 526, 48 L. T. Rep. N. S. 848, 31 Wkly. Rep. 834; Rhodes *v.* Moules, [1895] 1 Ch. 236, 64 L. J. Ch. 122, 71 L. T. Rep. N. S. 599, 12 Reports 6, 43 Wkly. Rep. 99; Blyth *v.* Fladgate, [1891] 1 Ch. 337, 60 L. J. Ch. 66, 63 L. T. Rep. N. S. 546, 39 Wkly. Rep. 422; Plumer *v.* Gregory, L. R. 18 Eq. 621, 43 L. J. Ch. 616, 31 L. T. Rep. N. S. 80; St. Aubyn *v.* Smart, L. R. 5 Eq. 183, 17 L. T. Rep. N. S. 439, 16 Wkly. Rep. 394 [*affirmed* in L. R. 3 Ch. 646, 19 L. T. Rep. N. S. 192, 16 Wkly. Rep. 1095]; Atkinson *v.* Mackreth, L. R. 2 Eq. 570, 35 L. J. Ch. 624, 14 L. T. Rep. N. S. 722, 14 Wkly. Rep. 833; Eager *v.* Barnes, 31 Beav. 579, 7 L. T. Rep. N. S. 408, 54 Eng. Reprint 1263; Mellor *v.* Shaw, 1 B. & S. 437, 7 Jur. N. S. 845, 30 L. J. Q. B. 333, 9 Wkly. Rep. 748, 101 E. C. L. 437; Ashworth *v.* Stanwix, 3 E. & E. 701, 7 Jur. N. S. 467, 30 L. J. Q. B. 183, 4 L. T. Rep. N. S. 85, 107 E. C. L. 701; Biggs *v.* Bree, 51 L. J. Ch. 263, 46 L. T. Rep. N. S. 8, 30 Wkly. Rep. 278.

Canada.— Brewing *v.* Berryman, 15 N. Brunsw. 515; Thompson *v.* Robinson, 16 Ont. App. 175; Baron *v.* Archambault, 19 Quebec Super. Ct. 1.

See 38 Cent. Dig. tit. "Partnership," § 274.

Statement of rule.—"A defendant cannot be held liable for the tortious act of another on the ground that they were partners, except upon proof that the partnership in fact existed at the time, and that the act was done in relation to the partnership business, with the knowledge and approval or ratification of such defendant, or that it was plainly for the benefit of the firm, and was committed in the usual and ordinary prosecution of the business which the partner committing it was accustomed to transact." Shapard *v.* Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675.

Illustrations.— The owner of a horse borrowed by a partner to be used in the firm business, and lost through his neglect or other wrong-doing, may recover therefor against the partnership. Witcher *v.* Brewer, 49 Ala. 119. A firm of butchers is liable to the owner of a dog which dies from eating poisonous meat which one member of the firm in furtherance of the partnership business negligently causes to be placed where dogs might be reasonably expected to get it. Dudley *v.* Love, 60 Mo. App. 420. Partners are jointly liable for statements made by one in derogation of a competitor and in aid of their own business. Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073. Where attorneys form a partnership for the prosecution of their business as such, one is liable for the negligence of the other in respect to a partnership contract. Livingston *v.* Cox, 6 Pa. St. 360.

Attorney liable for negligence of partner see ATTORNEY AND CLIENT, 4 Cyc. 969.

Publication of libel see LIBEL AND SLANDER, 25 Cyc. 428.

88. *Alabama.*— Williams *v.* Hendricks, 115 Ala. 227, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650.

Arizona.— Wolfley *v.* Brown, 7 Ariz. 157, 62 Pac. 691.

Georgia.—Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835 (construing Civ. Code (1895), § 2658), slanderous reports circulated by a partner, without the knowledge of his copartners, do not result in any liability on their part.

Illinois.— Durant *v.* Rogers, 71 Ill. 121, 87 Ill. 508; Grund *v.* Van Vleck, 69 Ill. 478; Sitter *v.* Karraker, 100 Ill. App. 669; Maxwell *v.* Habel, 92 Ill. App. 510; Titcomb *v.* James, 57 Ill. App. 296; Einstman *v.* Black, 14 Ill. App. 381.

Iowa.— Gwynn *v.* Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286, holding that a gift of a poisonous drug by one of a firm of druggists is not within the scope of the firm business.

New York.— Dounce *v.* Parsons, 45 N. Y. 180; Taylor *v.* Thompson, 74 N. Y. App. Div. 320, 77 N. Y. Suppl. 438 [*affirmed* in 176 N. Y. 168, 68 N. E. 240].

United States.— Graham *v.* Meyer, 10 Fed. Cas. No. 5,673, 4 Blatchf. 129.

England.—Tendring Hundred Water Works Co. *v.* Jones, [1903] 2 Ch. 615, 73 L. J. Ch. 41, 52 Wkly. Rep. 61; Harman *v.* Johnson, 3 C. & K. 272, 2 E. & B. 61, 17 Jur. 1099, 22 L. J. Q. B. 297, 1 Wkly. Rep. 326, 75 E. C. L. 61; *In re* Lawrence, 2 Eq. Rep. 931, 18 Jur. 742, 23 L. J. Ch. 791, 2 Smale & G. 367, 2 Wkly. Rep. 680, 65 Eng. Reprint 439; Chilton *v.* Cooke, 37 L. T. Rep. N. S. 607; Twyford *v.* Trail, 7 Sim. 92, 8 Eng. Ch. 92, 58 Eng. Reprint 771.

See 38 Cent. Dig. tit. "Partnership," § 274.

shown.[89] There is considerable authority for the view that one partner is not presumed to concur in the tort of a copartner which is clearly illegal, although it is connected with partnership affairs.[90] But the true test seems to be, not the illegality, nor the malicious quality of the tort, but whether it is within the scope of the wrong-doing partner's authority.[91]

b. Conversion. All partners are liable for the conversion by a copartner of

Malicious prosecution by partner see also MALICIOUS PROSECUTION, 26 Cyc. 20.

Not liable for money won at gambling.— Marine, etc., Ins. Bank *v.* Megar, Dudley (Ga.) 83.

89. Durant *v.* Rogers, 71 Ill. 121; Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46; Randall *v.* Knevals, 27 N. Y. App. Div. 146, 50 N. Y. Suppl. 748 [*affirmed* in 161 N. Y. 632, 57 N. E. 1122] (notice to one partner is notice to all); Butler *v.* Finck, 21 Hun (N. Y.) 210; U. S. *v.* Baxter, 46 Fed. 350 (ratification by holding the fruits of the wrong-doing partner's act); Cleather *v.* Twisden, 28 Ch. D. 340, 54 L. J. Ch. 408, 52 L. T. Rep. N. S. 330, 33 Wkly. Rep. 435; Petrie *v.* Lamont, C. & M. 93, 41 E. C. L. 57.

90. *Alabama.*— Marks *v.* Hastings, 101 Ala. 165, 13 So. 297, a partner is not liable for a malicious prosecution instituted by his copartner on a charge of larceny, unless he advises, directs, or participates in it.

Georgia.— Martin *v.* Simkins, 116 Ga. 254, 42 S. E. 483. Under Civ. Code, § 2658, providing that partners are not responsible for torts committed by a copartner, where a member of a firm has a person arrested and illegally imprisoned on a charge of larceny of partnership effects, the person so arrested cannot sustain an action against the firm for the acts of the individual partner.

Illinois.— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (a false arrest by one partner does not result in any liability on the part of his copartner); Swenson *v.* Erickson, 90 Ill. App. 358 (a partner is not liable for an attachment sued out by his copartner maliciously and without probable cause); Titcomb *v.* James, 57 Ill. App. 296 (a partner is not liable for an assault by his copartner, while taking possession of property under a chattel mortgage to the firm).

Maryland.— Bernheimer *v.* Becker, 102 Md. 250, 62 Atl. 526, 111 Am. St. Rep. 356, 3 L. R. A. N. S. 221; Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089, false imprisonment in name of firm by one partner does not render his copartner liable.

New Hampshire.—Taylor *v.* Jones, 42 N. H. 25, there is no legal presumption that one partner concurs in the wrongful acts of another.

New Jersey.— Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77, liable to penalty for unlawful sale of oleomargarine.

New York.— Farrell *v.* Friedlander, 63 Hun 254, 18 N. Y. Suppl. 215, in an action against two partners for malicious prosecution, where it does not appear that one of the partners took any part in, knew of, or approved the prosecution in question undertaken by the other, no recovery can be had against the non-acting partner.

Tennessee.—Hutchins *v.* Turner, 8 Humphr. 415 (where money is borrowed by one partner at usurious rate of interest, his copartner is not liable therefor for "an agency or authority to a partner to violate the provisions of a public statute cannot be implied, nor can it be implied that such illegal act is within the scope of the partnership, which could only exist for lawful purposes"); Martin *v.* McNight, 1 Overt. 330 (a *qui tam* action for the penalty incurred by selling goods without a license can only be maintained against the person selling and not against the partner).

Washington.—Noblett *v.* Bartsch, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886, as a prosecution for larceny is not within the scope of the business of a mercantile partnership, there can be no presumption of participation by all the partners, and it is necessary that this fact be proven.

United States.— Graham *v.* Meyer, 10 Fed. Cas. No. 5,673, 4 Blatchf. 129, a usurious loan of money made by one partner without the knowledge of the other does not render the other liable.

See 38 Cent. Dig. tit. "Partnership," § 274.

91. *Georgia.*— Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463, a partnership is liable as such in an action for malicious prosecution when the same was instituted in furtherance of the partnership business.

Massachusetts.— Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528 (liability of partner for slander with malicious intention by copartner); Manufacturers', etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83 (forgery by one partner for the firm benefit subjects his copartner to liability therefor).

Michigan.— Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073, if in the course of the partnership business a partner injures the business of another by slander, the partnership is liable therefor, just as it might be for any other tort of any other agent.

Mississippi.— Robinson *v.* Goings, 63 Miss. 500; Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588, the tort of one partner is considered the joint and several tort of all the partners; and the partner doing the act is considered as the agent of the other partners, when the wrongful act is connected with the business of the firm, and is incident to it as the business is carried on; and any of the partners is chargeable *civiliter* to the same extent to which his copartner would be bound.

South Carolina.— Hyrne *v.* Erwin, 23 S. C. 226, 55 Am. Rep. 15, liability for wanton

the property of a third person, if done in the ordinary course of the firm's business.[92] But innocent partners are not liable when the conversion is not effected in the course of the firm's business, but as an individual transaction of the wrong-doer.[93]

c. Fraud — (i) *In General.* For the fraudulent misconduct of a partner, in the course of the partnership business, the firm is liable in a civil action, although his copartners had no knowledge of the fraud or did not participate therein.[94]

malpractice by a partner in a firm of physicians.

Vermont.—McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661, rebates under an illegal agreement bind the firm, although assented to by only one partner, if he was acting in the course of the firm's business.

United States.—Stockwell *v.* U. S., 13 Wall. 531, 20 L. ed. 491 [*affirming* 23 Fed. Cas. No. 13,466, 3 Cliff. 284], holding that a firm was liable for a penalty, although but one partner was guilty of misconduct, upon the theory that the contract of partnership constitutes all its members agents for each other, and that when a loss must fall upon one of two innocent persons, he must bear it who has been the occasion of the loss or has enabled a third person to cause it.

England.— Hamlyn *v.* Houston, [1903] 1 K. B. 81, 72 L. J. K. B. 72, 87 L. T. Rep. N. S. 500, 51 Wkly. Rep. 99 (a firm is liable for the acts of a partner who obtained information respecting the business of a competing firm by bribing one of its clerks); Atty.-Gen. *v.* Stranyforth, Bunb. 97 (liability of partner where copartner defrauds the crown of revenues upon importations).

See 38 Cent. Dig. tit. "Partnership," § 274.

Compare Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387, holding that an innocent partner is not liable for defamation published by his copartner, but not in the course of the firm's business.

92. *Alabama.*— Bunn *v.* Timberlake, 104 Ala. 263, 16 So. 97; Palmer *v.* Scott, 68 Ala. 380; Hogan *v.* Reynolds, 8 Ala. 59.

Georgia.— Hobbs *v.* Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320; Welker *v.* Wallace, 31 Ga. 362.

Illinois.— Kerr *v.* Sharp, 83 Ill. 199; Loomis *v.* Barker, 69 Ill. 360; Bane *v.* Detrick, 52 Ill. 19, partners may be sued in trover, although there was no joint conversion in fact.

Indiana.— Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Jackson *v.* Todd, 56 Ind. 406, 75 Ind. 272; Bauer *v.* Stumph, Wils. 514.

Kansas.— Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794.

Kentucky.— Ryan *v.* Morrill, 83 Ky. 352.

Michigan.— Sunlin *v.* Skutt, 133 Mich. 208, 94 N. W. 733.

Missouri.—Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.

New York.— Galway *v.* Nordlinger, 4 N. Y. Suppl. 649; Hutchinson *v.* Smith, 7 Paige 26.

Ohio.— Davis *v.* Gelhaus, 44 Ohio St. 69, 4 N. E. 593.

Pennsylvania.— Guillou *v.* Peterson, 89 Pa. St. 163 [*reversing* 9 Phila. 225].

Texas.— Filter *v.* Meyer, 16 Tex. Civ. App. 235, 41 S. W. 152.

Wisconsin.— Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817; Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424.

United States.— Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424 (a partner, however innocent, may be charged for a conversion by his copartners, in the regular line of the firm business); *In re* Ketchum, 1 Fed. 815.

England.— De Ribeyre *v.* Barclay, 23 Beav. 107, 27 L. J. Ch. 747, 53 Eng. Reprint 42; Marsh *v.* Keating, 1 Bing. N. Cas. 198, 27 E. C. L. 604, 8 Bligh N. S. 651, 5 Eng. Reprint 1084, 2 Cl. & F. 250, 6 Eng. Reprint 1149, 1 Scott 5; Clayton's Case, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781.

See 38 Cent. Dig. tit. "Partnership," § 275.

But *compare* Cutter *v.* Fanning, 2 Iowa 580.

If a partner uses trust funds for partnership purposes his copartners are liable (Price *v.* Mulford, 36 Hun (N. Y.) 247 [*reversed* on other grounds in 107 N. Y. 303, 14 N. E. 298]) if they have knowledge thereof (Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365]; Shaffer *v.* Martin, 25 N. Y. App. Div. 501, 49 N. Y. Suppl. 853; Jaques *v.* Marquand, 6 Cow. (N. Y.) 497).

93. Fox *v.* Clemmons, 99 S. W. 641, 30 Ky. L. Rep. 805; Battle *v.* Street, 85 Tenn. 282, 2 S. W. 384; Stokes *v.* Burney, 3 Tex. Civ. App. 219, 22 S. W. 126; Kinsey *v.* Archer, 80 Wis. 201, 49 N. W. 962.

94. *Georgia.*— Alexander *v.* State, 56 Ga. 478.

Illinois.— Wolf *v.* Mills, 56 Ill. 360.

Indiana.— Beach *v.* State Bank, 2 Ind. 488.

Maryland.— Doremus *v.* McCormick, 7 Gill 49.

Massachusetts.— Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Locke *v.* Stearns, 1 Metc. 560, 35 Am. Dec. 382. But see Pierce *v.* Jackson, 6 Mass. 242.

New York.— Bienenstok *v.* Ammidown, 155 N. Y. 47, 49 N. E. 321 [*reversing* 11 Misc. 76, 29 N. Y. Suppl. 593, 31 Abb. N. Cas. 400, 32 N. Y. Suppl. 1138] (where the fraud is not in the course of business copartner not liable); Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Andrews *v.* De Forest, 22 N. Y. App. Div. 132, 47 N. Y. Suppl. 1011; Hawkins *v.* Appleby, 2 Sandf. 421.

Ohio.— Royer *v.* Aydelotte, 1 Cinc. Super. Ct. 80.

Texas.— Gill *v.* First Nat. Bank, (Civ. App. 1898) 47 S. W. 751.

Nor can the innocent partners escape from firm obligations on the ground that they were contracted in fraud of their rights, unless the other party to the transaction participated in the fraud.[95]

(II) *Fraudulent Representations and Deceit.* In an action against a firm for relief from a contract, induced by the fraudulent representations of a partner, or for damages caused by such representations, it is no defense that the other partners are free from moral responsibility for the misrepresentations.[96] But it is a defense that these were not made in the course of the partnership business.[97]

16. Estoppel[98] — a. To Deny Liability on Firm Contracts. So long as a person remains a member in a firm, he holds out his copartners as agents duly authorized to bind him and the firm by any contract incident to carrying on in the usual way business of the kind carried on by his firm;[99] and therefore he is

Virginia.— Reynolds *v.* Waller, 1 Wash. 164.

Wisconsin.— Hawley *v.* Tesch, 88 Wis. 213, 59 N. W. 670, where the fraud is not committed in a partnership transaction but by the partner as an individual his copartner is not liable.

England.— Brydges *v.* Branfil, 6 Jur. 310, 11 L. J. Ch. 249, 12 Sim. 369, 35 Eng. Ch. 313, 59 Eng. Reprint 1174; *In re* Manby, 3 Jur. N. S. 259, 26 L. J. Ch. 313; Hughes *v.* Twisden, 55 L. J. Ch. 481, 54 L. T. Rep. N. S. 570, 34 Wkly. Rep. 498; Lovell *v.* Hicks, 6 L. J. Exch. 85, 2 Y. & C. Exch. 481; Slack *v.* Parker, 54 L. T. Rep. N. S. 212; Kilby *v.* Wilson, R. & M. 178, 21 E. C. L. 726; Norton *v.* Cooper, 3 Smale & G. 375, 65 Eng. Reprint 701.

Canada.— Wallace *v.* James, 5 Grant Ch. (U. C.) 163; Hammond *v.* Howard, 11 U. C. C. P. 261.

See 38 Cent. Dig. tit. "Partnership," § 276.

But see Sherwood *v.* Marwick, 5 Me. 295.

Firm benefited.— If one partner obtain goods or money by fraudulent representations, or by means of forged notes, and such goods or money come to the use of the partnership, all the copartners will be liable for the amount so obtained. Boardman *v.* Gore, 15 Mass. 331; Manufacturers', etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83.

A partner is not liable to arrest and imprisonment in an action based upon a fraud committed by his copartner. Stewart *v.* Levy, 36 Cal. 159; Watson *v.* Hinchman, 42 Mich. 27, 3 N. W. 236; McNeely *v.* Haynes, 76 N. C. 122.

95. *Louisiana.*— Seawell *v.* Payne, 5 La. Ann. 255; Harrison *v.* Poole, 4 Rob. 193.

New Jersey.— Coggswell, etc., Co. *v.* Coggswell, (Ch. 1898) 40 Atl. 213; Renton *v.* Chaplain, 9 N. J. Eq. 62.

New York.— Sweet *v.* Morrison, 103 N. Y. 235, 8 N. E. 396; Dowdall *v.* Lenox, 2 Edw. 267.

Ohio.— Jones *v.* Draper, 26 Ohio Cir. Ct. 785.

Pennsylvania.— Meyran *v.* Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. Rep. 806.

Texas.— Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

See 38 Cent. Dig. tit. "Partnership," § 276.

96. *Iowa.*— Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403; Lindmeier *v.* Monahan, 64 Iowa 24, 19 N. W. 839.

Maine.— Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621.

Massachusetts.—Thwing *v.* Clifford, 136 Mass. 482.

Michigan.— Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116; French *v.* Ryan, 104 Mich. 625, 62 N. W. 1016, an innocent partner who accepts the avails of a fraudulent scheme is liable.

New York.— Bradner *v.* Strang, 89 N. Y. 299; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; Goldberg *v.* Dougherty, 39 N. Y. Super. Ct. 189; Olmsted *v.* Hotaling, 1 Hill 317.

North Dakota.— Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209.

Vermont.— Ladd *v.* Lord, 36 Vt. 194, where a firm has received the avails of the fraud it is liable.

United States.— Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248; Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424.

England.— Moore *v.* Knight, [1891] 1 Ch. 547, 60 L. J. Ch. 271, 63 L. T. Rep. N. S. 831, 39 Wkly. Rep. 312; Rapp *v.* Latham, 2 B. & Ald. 795, 21 Rev. Rep. 495; Blair *v.* Bromley, 5 Hare 542, 11 Jur. 115, 16 L. J. Ch. 105, 26 Eng. Ch. 542, 67 Eng. Reprint 1026 [*affirmed* in 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354, 22 Eng. Ch. 354, 41 Eng. Reprint 979].

See 38 Cent. Dig. tit. "Partnership," § 277.

97. Schwabacker *v.* Riddle, 84 Ill. 517; Bartles *v.* Courtney, 6 Indian Terr. 379, 98 S. W. 133; Gray *v.* Cropper, 1 Allen (Mass.) 337; Taylor *v.* Thompson, 176 N. Y. 168, 68 N. E. 240 [*affirming* 74 N. Y. App. Div. 320, 77 N. Y. Suppl. 438].

98. As to estoppel to deny existence of partnership see *supra*, III, A, 3; III, B, 4.

99. See *supra*, VI, A, 1.

Unauthorized contract.—A contract made by one partner, although it is entered into in the name of the firm, that the purchaser of firm goods may pay for them by supplying such partner with articles for his individual use, is clearly not within the scope of his apparent authority. Eady *v.* Newton Coal, etc., Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. N. S. 650.

estopped to deny his liability on such contracts, as against third persons who have become parties thereto in reliance upon such apparent authority.[1]

b. To Deny Liability For Partner's Conduct. A partner is also estopped to deny his liability to a person, who has been induced to change his position for the worse, by the conduct of a copartner, while acting within the apparent scope of his authority, or by conduct assented to or adopted by defendant partner.[2]

c. To Deny Title Made by a Partner. A partner is estopped to deny the title to property conveyed by a copartner, whenever he has enabled the latter to deal with the property as one authorized to pass a perfect title thereto.[3] But he is not estopped by representations or transactions of his copartner, as to the title of property, of which he was ignorant and for which he is in no way responsible.[4]

17. RATIFICATION[5] — a. What May Be Ratified. Only acts done on behalf of the firm are susceptible of ratification by the partnership.[6]

b. Knowledge or Notice. In order to charge a partner with the ratification of an unauthorized act, it must be shown that he had knowledge of the act, or that

1. *Alabama.*— Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497, 85 Ala. 19, 4 So. 639; Sprague *v.* Zunts, 18 Ala. 382.

Georgia.—Murphey *v.* Bush, 122 Ga. 715, 50 S. E. 1004, a partner is not estopped simply because he has failed to avail himself of opportunities to know that his copartner is misapplying assets.

Illinois.— Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868; Wiley *v.* Stewart, 122 Ill. 545, 14 N. E. 835 [*affirming* 23 Ill. App. 236]; Warder *v.* Sweetser, 32 Ill. App. 567.

Iowa.— Eggleston *v.* Mason, 84 Iowa 630, 51 N. W. 1; Peck *v.* Lusk, 38 Iowa 93; French *v.* Rowe, 15 Iowa 563.

Kentucky.— O'Connor *v.* Sherley, 107 Ky. 70, 52 S. W. 1056, 21 Ky. L. Rep. 735.

Louisiana.— Louisiana Mut. Ins. Co. *v.* Walters, 25 La. Ann. 560.

Minnesota.— Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846.

New York.— Stettheimer *v.* Tone, 114 N. Y. 501, 21 N. E. 1018; Cockroft *v.* Claflin, 64 Barb. 464, where one knew of a signature made for his firm by one of the members thereof to an undertaking at the time, and directed its delivery, he cannot afterward object to the use of the firm-name.

Ohio.— Penfield *v.* Mason, 17 Ohio Cir. Ct. 165, 9 Ohio Cir. Dec. 611.

Pennsylvania.— Enterprise Oil, etc., Co. *v.* National Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. Rep. 746, one cannot claim profits under a lease made by a firm, as a partner therein, and at the same time repudiate the lease because not joined in or assented to by him.

South Carolina.— Salinas *v.* Bennett, 33 S. C. 285, 11 S. E. 968.

Tennessee.— Nugent *v.* Allen, 95 Tenn. 97, 32 S. W. 9.

Vermont.— Kelton *v.* Leonard, 54 Vt. 230.

Washington.— Matthies *v.* Herth, 31 Wash. 665, 72 Pac. 480.

England.—Smith *v.* Ure, 2 Knapp 188, 12 Eng. Reprint 451; Cragg *v.* Lord, 1 Y. & Coll. 280, 20 Eng. Ch. 280, 62 Eng. Reprint. 889.

Canada.— Gray *v.* McCallum, 5 Brit. Col. 462.

See 38 Cent. Dig. tit. "Partnership," §§ 278, 280.

2. *Alabama.*— Elliott *v.* Holbrook, 33 Ala. 659.

California.— Burritt *v.* Dickson, 8 Cal. 113.

Illinois.— Richardson *v.* Lester, 83 Ill. 55; Stewart *v.* Brubaker, 112 Ill. App. 408; Wanner *v.* Winters, 33 Ill. App. 149; Davies *v.* Atkinson, 25 Ill. App. 260 [*affirmed* in 124 Ill. 474, 16 N. E. 899, 7 Am. St. Rep. 373]; Wiley *v.* Thompson, 23 Ill. App. 199.

New York.— Hoeffler *v.* Westcott, 15 Hun 243.

Pennsylvania.— Tams *v.* Hitner, 9 Pa. St. 441; Martin *v.* Zahnizer, 9 Pa. Super. Ct. 13, whether the firm is estopped is a question for the jury.

Virginia.— See Pettyjohn *v.* National Exch. Bank, 101 Va. 111, 43 S. E. 203.

See 38 Cent. Dig. tit. "Partnership," §§ 278, 281.

3. *Illinois.*— Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902 [*affirming* 45 Ill. App. 255].

Massachusetts.— Locke *v.* Lewis, 124 Mass. 1, 26 Am. Rep. 631.

Michigan.— Moran *v.* Palmer, 13 Mich. 367.

Texas.— Spencer *v.* Jones, (Civ. App. 1898) 47 S. W. 665, 29.

Washington.— Patton *v.* Barnett, 12 Wash. 576, 41 Pac. 901.

United States.—Paxson *v.* Brown, 61 Fed. 874, 10 C. C. A. 135; Johnson *v.* Schenck, 13 Fed. Cas. No. 7,412.

See 38 Cent. Dig. tit. "Partnership," §§ 278, 279.

4. Williams *v.* Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. Rep. 403; Andrews *v.* Clark, 5 Nebr. (Unoff.) 361, 98 N. W. 655; Matter of Ryan, 70 Hun (N. Y.) 164, 24 N. Y. Suppl. 273 [*affirmed* in 141 N. Y. 550, 36 N. E. 343].

5. As to the ratification of particular acts, contracts, or transactions see *supra*, VI, A, 2-15.

6. Fraser *v.* Sweet, 13 Manitoba 147, a man cannot be made a party to a contract unless he who assumes to contract does so on behalf of that man; and no ratification can be effectual unless the act has been done by an agent on behalf of the party who ratifies. See also Jacobs *v.* Curtis, 11 Leg. Int. (Pa.)

he had notice of such facts as would put a reasonably prudent man on inquiry, which if pressed with reasonable diligence would result in knowledge of the act.[7]

c. What Amounts to Ratification. A mere offer to recognize the validity of an unauthorized act, upon a condition not accepted and performed by a third party, does not constitute a ratification thereof.[8] But the acceptance of benefits derived from the unauthorized act, or an attempt to enforce an obligation based upon such act, will be treated generally as a ratification, without direct proof of an intent to ratify.[9] A new consideration is not necessary.[10] A ratification may be presumed from failure to repudiate the unauthorized act, provided such failure would naturally operate to induce the third party to forego the exercise of his rights against the partner guilty of the unauthorized act.[11] It is not to be presumed, however, from the adoption of a similar but distinct act,[12] although the repeated adoption of similar acts may be evidence that they are treated by the adopting partners as within the course of the firm's business.[13]

d. Effect of Ratification. So far as the non-assenting partner is concerned, ratification is equivalent to precedent authority, and the ratified obligation relates back to the date of its inception.[14] The effect upon third persons has been pre-

27; Peterson *v.* Armstrong, 24 Utah 96, 66 Pac. 767.

7. Sibley *v.* American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470; Sargent *v.* Henderson, 79 Ga. 268, 5 S. E. 122; Holmes *v.* Kortlander, 64 Mich. 591, 31 N. W. 532; Gutheil *v.* Gilmer, 23 Utah 84, 63 Pac. 817; Marsh *v.* Joseph, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 Wkly. Rep. 209.

8. Hurt *v.* Clarke, 56 Ala. 19, 28 Am. Rep. 751; Koch *v.* Endriss, 97 Mich. 444, 56 N. W. 847.

9. *Colorado.*— Markell *v.* Matthews, 3 Colo. App. 49, 32 Pac. 176.

Illinois.— Porter *v.* Curry, 50 Ill. 319, 99 Am. Dec. 520.

Indiana.— Porter *v.* Wilson, 113 Ind. 350, 15 N. E. 676.

Kentucky.— Fordsville Banking Co. *v.* Thompson, 82 S. W. 251, 26 Ky. L. Rep. 534.

Louisiana.— Arick's Succession, 22 La. Ann. 501; Thomas *v.* Scott, 3 Rob. 256; Smith *v.* Kemper, 4 Mart. 409, 6 Am. Dec. 708.

Massachusetts.— Golding *v.* Brennan, 183 Mass. 286, 67 N. E. 239; Burkhardt *v.* Yates, 161 Mass. 591, 37 N. E. 759; Holbrook *v.* Chamberlin, 116 Mass. 155, 17 Am. Rep. 146, an entry by two partners under a lease to which one has signed the names of both is a ratification thereof by the other.

Michigan.— Davis *v.* Berger, 54 Mich. 652, 20 N. W. 629, the joinder of partners in prosecuting a writ of error to review a judgment on an award against the firm is a ratification of the submission by one partner.

Montana.—Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625.

New York.— Levy *v.* Abramsohn, 39 Misc. 781, 81 N. Y. Suppl. 344.

North Carolina.— Person *v.* Carter, 7 N. C. 321.

Pennsylvania.— Kramer *v.* Dinsmore, 152 Pa. St. 264, 25 Atl. 789; Levick's Appeal, 1 Pa. Cas. 365, 2 Atl. 532.

South Carolina.— Stroman *v.* Varn, 19 S. C. 307.

Texas.— Allen *v.* Meyer, (Civ. App. 1901) 65 S. W. 645; Williams *v.* Meyer, (Civ. App. 1901) 64 S. W. 66.

Utah.— Guthiel *v.* Gilmer, 27 Utah 496, 76 Pac. 628.

Vermont.— Lynch *v.* Flint, 56 Vt. 46.

Wisconsin.— Wipperman *v.* Stacy, 80 Wis. 345, 50 N. W. 336; Richardson *v.* Ames, 79 Wis. 237, 48 N. W. 423.

Canada.— Bloomley *v.* Grinton, 9 U. C. Q. B. 455.

See 38 Cent. Dig. tit. "Partnership," § 282.

10. Foster *v.* Fifield, 29 Me. 136; Scott *v.* Bank of New Brunswick, 23 Can. Sup. Ct. 277; Gray *v.* Tierney, 4 Terr. L. R. 133.

11. *Georgia.*— Sparks *v.* Flannery, 104 Ga. 323, 30 S. E. 823; Perry *v.* Butt, 14 Ga. 699.

Indiana.— Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888.

Michigan.— Clippinger *v.* Starr, 130 Mich. 463, 90 N. W. 280; Barnard *v.* Lapeer, etc., Plank Road Co., 6 Mich. 274.

Minnesota.— Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

Nebraska.— Standard Oil Co. *v.* Hoese, 57 Nebr. 665, 78 N. W. 292.

Pennsylvania.— Livingston *v.* Pittsburgh, etc., R. Co., 2 Grant 219.

Tennessee.— Ferguson *v.* Shepherd, 1 Sneed 254, to remain silent after discovering that one partner has used the firm-name for purposes outside the firm business is evidence of assent, prior or subsequent, but not conclusive as a matter of law.

United States.— Tabb *v.* Gist, 23 Fed. Cas. No. 13,719, 1 Brock. 33, 6 Call (Va.) 279; U. S. Bank *v.* Binney, 28 Fed. Cas. No. 16,791, 5 Mason 176.

See 38 Cent. Dig. tit. "Partnership," § 282.

12. Cody *v.* Gainesville First Nat. Bank, 103 Ga. 789, 30 S. E. 281; Levi *v.* Latham, 15 Nebr. 509, 19 N. W. 460, 48 Am. Rep. 361.

13. Gray *v.* Ward, 18 Ill. 32; Scott *v.* Bandy, 2 Head (Tenn.) 197; Lee *v.* Macdonald, 6 U. C. Q. B. O. S. 130.

14. Gunter *v.* Williams, 40 Ala. 561; Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Cas-

viously considered in treating of judgments by confession or consent and assignments for the benefit of creditors by a partner.[15]

18. Rights Acquired by Firm. A partnership may acquire rights, just as it may incur liabilities, in transactions entered into by a partner, whether in his own name or in a manner not authorized by the firm. The rights acquired in such transaction belong to the firm, when the transactions are firm affairs or are authorized or adopted by the firm, with the other party's assent.[16] Otherwise such rights belong to and are enforceable by the transacting partner individually.[17]

19. Notice and Demand — a. Notice to a Partner. Notice to one partner in reference to any matter relating to a transaction within the ordinary scope of the firm's business is notice to all the partners.[18] If the notice relates to an individual transaction of the notified partner, or to one outside the scope of the firm busi-

sidy *v.* Saline County Bank, 14 Okla. 532, 78 Pac. 324.

15. See *supra*, VI, A, 12, b, 13, h.

16. *Illinois.*— Dishon *v.* Schorr, 19 Ill. 59.

Kentucky.— Creel *v.* Bell, 2 J. J. Marsh. 309, a promise to one member of a firm to refund money belonging to the firm inures to the firm.

Louisiana.— See Mitchel *v.* Gervais, 2 Mart. N. S. 568.

New York.— Beakes *v.* Da Cunha, 126 N. Y. 293, 27 N. E. 251 [*affirming* 12 N. Y. Suppl. 351]; Dansinger *v.* White, 19 N. Y. Suppl. 897.

South Carolina.— Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279.

17. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182 (a firm cannot claim a building lien for materials furnished under a contract with an individual partner); Mead *v.* Tomlinson, 1 Day (Conn.) 148, 2 Am. Dec. 62 (a firm cannot maintain an action on a written instrument, entered into by one partner as an individual); Sage *v.* Lippincott, 170 Mass. 278, 49 N. E. 434; Calkins *v.* Smith, 48 N. Y. 614, 8 Am. Rep. 575.

18. *Alabama.*— Overall *v.* Taylor, 99 Ala. 12, 11 So. 738; Renfro *v.* Adams, 62 Ala. 302, notice to one partner to enter satisfaction of mortgage is notice to all, so as to render all liable to statutory penalty for failure to do so.

California.— Burritt *v.* Dickson, 8 Cal. 113.

Connecticut.— Watson *v.* Wells, 5 Conn. 468.

District of Columbia.— Gedge *v.* Cromwell, 19 App. Cas. 192.

Illinois.— Loeb *v.* Stern, 198 Ill. 371, 64 N. E. 1043 [*affirming* 99 Ill. App. 637]; Haywood *v.* Harmon, 17 Ill. 477; Huthmacher *v.* Lowman, 66 Ill. App. 448; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283.

Iowa.— Middleton Sav. Bank *v.* Dubuque, 19 Iowa 467.

Kansas.— Barber *v.* Van Horn, 54 Kan. 33, 36 Pac. 1070.

Kentucky.— Adams Oil Co. *v.* Christmas, 101 Ky. 564, 41 S. W. 545, 19 Ky. L. Rep. 760; Hays *v.* Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573, 19 Ky. L. Rep. 367; Sanders *v.* Rundle, 2 T. B. Mon. 139, 15 Am. Dec. 148; Gilly *v.* Singleton, 3 Litt. 249.

Louisiana.— Wright *v.* Railey, 13 La. Ann. 536; Thomas *v.* Scott, 3 Rob. 256.

Michigan.— Smith, etc., Co. *v.* Schmidt, 142 Mich. 1, 105 N. W. 39; Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158.

Minnesota.— King *v.* Remington, 36 Minn. 15, 29 N. W. 352.

Mississippi.— Fitch *v.* Stamps, 6 How. 487.

Missouri.— King *v.* National Oil Co., 81 Mo. App. 155.

New York.— Newall *v.* Bartlett, 114 N. Y. 399, 21 N. E. 990; Ross *v.* Whitefield, 36 N. Y. Super. Ct. 50 [*affirmed* in 56 N. Y. 640, 1 Sweeny 318].

Ohio.— Riddle *v.* Canby, 2 Ohio Dec. (Reprint) 586, 4 West. L. Month. 124.

Pennsylvania.— Adams *v.* Ashman, 203 Pa. St. 536, 53 Atl. 375; Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236; McClurkan *v.* Byers, 74 Pa. St. 405.

Vermont.— Barney *v.* Currier, 1 D. Chipm. 315, 6 Am. Dec. 739. *Compare* Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324, holding that where a purchase is made of a firm by an agent without disclosing his agency to the partner with whom he deals, he is not relieved from personal liability by the mere knowledge of his agency by another partner who did not make the sale or know of it.

United States.— Townsend *v.* Hagar, 72 Fed. 949, 19 C. C. A. 256; Capelle *v.* Hall, 5 Fed. Cas. No. 2,391, 12 Nat. Bankr. Reg. 1.

England.—Tomlinson *v.* Broadsmith, [1896] 1 Q. B. 386, 65 L. J. Q. B. 308, 74 L. T. Rep. N. S. 265, 44 Wkly. Rep. 471; Steele *v.* Stuart, L. R. 2 Eq. 84, 14 L. T. Rep. N. S. 620; Porthouse *v.* Parker, 1 Campb. 82, 10 Rev. Rep. 637.

Canada.— Briffill *v.* Goodwin, 23 Grant Ch. (U. C.) 431; Snarr *v.* Small, 13 U. C. Q. B. 125.

See 38 Cent. Dig. tit. "Partnership," § 293.

Illustrations.—A purchase for the benefit of the firm, made by one partner in fraud of the vendor's creditors, is the act of the firm, and the other partner is chargeable with notice of the fraud. Patterson *v.* Seaton, 70 Iowa 689, 28 N. W. 598. Notice of protest to one partner is binding upon all. Collins *v.* Titusville Bank, 1 Walk. (Pa.) 194. If the drawer and accepter are either general or special partners in an adventure of which a bill constitutes a part, notice of the dishonor of the bill need not be given to the drawer. Rhett *v.* Poe, 2 How. (U. S.) 457, 11 L. ed. 338. Where timber is purchased by a firm, prior notice to one member thereof that it was

ness, it ought not to be imputed to his copartners.[19] And notice acquired by a partner where a fraud is being perpetrated upon his copartners by or with his consent will not be imputed to them.[20]

b. Notice to Firm of Acts of a Partner. The acts of a partner in the transaction of firm matters are presumed to be known to all the members of the firm.[21]

c. Demand Upon One Partner. In a matter within the scope of the firm business a demand upon one partner is treated as a demand upon all the partners.[22]

20. Individual Liability Arising From Individual Acts or Interests. While a contract made or a transaction entered into by one partner, without the scope of the firm business and without the consent of his copartner, does not bind his firm, yet he himself may be bound thereby.[23] One entering into a contract in the name of a firm which does not exist,[24] or which is to commence at a future day and is never actually formed,[25] may be bound thereby. A partner who has individually joined as a maker in a promissory note of his firm for its accommodation is not indirectly or secondarily but primarily liable thereon.[26] Partners cannot discharge themselves of their liability for their individual debts by showing that the copartnership has assumed to pay them and is supplied with funds for the purpose. The individual liability is not merged in that of the partnership.[27] Where on the face of an instrument it appears that a partner signed, sealed, and delivered it to

cut from land not belonging to the vendor is notice to all the partners so as to subject them to statutory damages. Tucker *v.* Cole, 54 Wis. 539, 11 N. W. 703.

19. Tennent Shoe Co. *v.* Birdseye, 105 Mo. App. 696, 78 S. W. 1036; Bienenstok *v.* Ammidown, 155 N. Y. 47, 61, 49 N. E. 321 [*reversing* 11 Misc. 76, 29 N. Y. Suppl. 593, 32 N. Y. Suppl. 1138, 31 Abb. N. Cas. 400] (in which it is said: "The rule of law, which attaches a responsibility to the status of a partnership relation for the acts of a copartner, within the scope of business transactions, is founded upon a just view of the requirements of public commercial interests. To extend its operation to the extent of imputing the notice or knowledge of a copartner acquired in transactions outside of the partnership business and which were had for his individual benefit [to the other] would be to convert the rule into an instrumentality of injustice"); Van Bergen *v.* Lehmaier, 72 Hun (N. Y.) 304, 25 N. Y. Suppl. 356; Bignold *v.* Waterhouse, 1 M. & S. 255.

20. Gilruth *v.* Decell, 72 Miss. 232, 16 So. 250; Bienenstok *v.* Ammidown, 155 N. Y. 47, 49 N. E. 321 (a member of a firm will not be permitted by conduct, amounting to a fraud upon his copartners, to bind them, as in some transaction within the sphere of the partnership; and the communication of facts concerning the transaction will not be presumed in such a case); Jones *v.* Draper, 26 Ohio Cir. Ct. 785.

21. Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385; Kramer *v.* Dinsmore, 152 Pa. St. 264, 25 Atl. 789; Coxe *v.* Sartwell, 21 Pa. St. 480; German-American Bank *v.* Magill, 102 Wis. 582, 78 N. W. 782; Estabrook *v.* Messersmith, 18 Wis. 545.

22. Miller *v.* Phenix Ins. Co., 109 Ill. App. 624 (demand to pay over money); La Crosse Milling Co. *v.* Williams, 2 Kan. App. 160, 43 Pac. 288 (demand in replevin); Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207 [*affirming* 3 Thomps. & C. 404] (demand on one of several partners in a firm, who are makers of a note); Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607 (demand of one partner and his refusal, in action for conversion against the firm); Nisbet *v.* Patton, 4 Rawle (Pa.) 120, 26 Am. Dec. 122.

23. *California.*— Jones *v.* Bailey, 5 Cal. 435.

Louisiana.— Cooke *v.* Allison, 30 La. Ann. 963.

Massachusetts.—Taft *v.* Church, 162 Mass. 527, 39 N. E. 283. See also Van Deusen *v.* Blum, 18 Pick. 229, 29 Am. Dec. 582.

New York.— Harrington *v.* Higham, 15 Barb. 524; Brink *v.* New Amsterdam F. Ins. Co., 5 Rob. 104. See also Pond *v.* Starkweather, 99 N. Y. 411, 2 N. E. 42; Gates *v.* Graham, 12 Wend. 53.

Pennsylvania.— York Bank's Appeal, 36 Pa. St. 458. See also Stauffer's Estate, 3 Pa. Dist. 794, 15 Pa. Co. Ct. 492.

Virginia.— Wood *v.* Shepherd, 2 Patt. & H. 442.

See 38 Cent. Dig. tit. "Partnership," § 295½. And see *supra*, VI, A, 3–13.

But *compare* Hughes *v.* Ellison, 5 Mo. 463, holding that an assignment made by one partner in the partnership name without the consent of the other is not valid to pass even the assignor's own interest in the partnership effects.

In California, under Civ. Code, § 2928, a mortgage to secure a firm debt by a partner, in the absence of a personal covenant to pay the firm debt, creates in him no personal obligation but renders him liable as a surety. London, etc., Bank *v.* Smith, 101 Cal. 415, 35 Pac. 1027.

24. Horowitz *v.* Pakas, 22 Misc. (N. Y.) 520, 49 N. Y. Suppl. 1008.

25. Stiles *v.* Meyer, 7 Lans. (N. Y.) 190, 64 Barb. 77.

26. Bell *v.* Ottawa Trust, etc., Co., 28 Ont. 519.

27. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

bind the firm of which he is a member and not as his own individual deed, he cannot be held individually bound;[28] and where a partner employs an attorney in a matter in which the firm is interested but tells him that the firm has no interest therein such partner is individually liable for the attorney's fees.[29]

21. Undisclosed Partnership and Dormant Partners[30] — a. General Rule as to Liability. The rule that an undisclosed principal is liable for contracts made or goods purchased or benefits secured for him by his agent applies to a case where there is an undisclosed or dormant partner.[31] A creditor of an undisclosed partnership does not waive or merge his claim against the firm or a dormant partner, by taking a negotiable security of the ostensible debtor, if this is done in ignorance of the firm's existence.[32]

b. Property of a Dormant Partnership. In a dormant partnership, the effects of the ostensible partner and those purporting to be his, although actually belonging to the partnership, are, with respect to the rights of innocent third parties, to be regarded as his sole property.[33]

28. Fisher *v.* Pender, 52 N. C. 483.

29. Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

30. Who are dormant partners see *supra*, III, B, 6, a.

31. *Colorado.*— McDonald *v.* Clough, 10 Colo. 59, 14 Pac. 121.

Connecticut.— Everitt *v.* Chapman, 6 Conn. 347.

Georgia.— Stubbs *v.* Fleming, 92 Ga. 354, 17 S. E. 935.

Illinois.— Lindsey *v.* Edmiston, 25 Ill. 359; Podrasnik *v.* R. T. Martin Co, 25 Ill. App. 300.

Indiana.— Gilmore *v.* Merritt, 62 Ind. 525; Bisel *v.* Hobbs, 6 Blackf. 479; Tomlinson *v.* Collett, 3 Blackf. 436, partners may be liable for goods purchased for them by their agent, although the agent at the time of the contract mentioned the name of only one of his principals.

Louisiana.—Schmidt *v.* Ittman, 46 La. Ann. 888, 15 So. 310; Boudreaux *v.* Martinez, 25 La. Ann. 167, although credit is given only to the ostensible partner, it is nevertheless binding on all for whom the partner acts, including dormant or secret partners, if the indebtedness was incurred in their business for their benefit.

Massachusetts.— Etheridge *v.* Binney, 9 Pick. 272.

Minnesota.— Wood *v.* Cullen, 13 Minn. 394.

Missouri.— Bracken *v.* March, 4 Mo. 74.

New York.— Duvall *v.* Wood, 3 Lans. 489; Arnold *v.* Morris, 7 Daly 498; Galway *v.* Nordlinger, 4 N. Y. Suppl. 649; Reynolds *v.* Cleveland, 4 Cow. 282, 15 Am. Dec. 369.

North Carolina.— Poole *v.* Lewis, 75 N. C. 417; Baxter *v.* Clark, 26 N. C. 127.

Texas.— Franklin *v.* Hardie, 1 Tex. App. Civ. Cas. § 1219; Mann *v.* Clapp, 1 Tex. App. Civ. Cas. § 503.

Virginia.— Cocke *v.* Upshaw, 6 Munf. 464.

See 38 Cent. Dig. tit. "Partnership," §§ 296, 297, 298.

Credit given ostensible partner only.—A dormant partner is liable for all the partnership debts contracted during his connection with the firm, whether credit is given exclusively to the ostensible partner or not. Lea *v.* Guice, 13 Sm. & M. (Miss.) 656; Richardson *v.* Farmer, 36 Mo. 35, 88 Am. Dec. 129.

Those who have no knowledge of any partnership, and deal with a party who shares the profits with a third person, may charge such third person or a partner for all debts contracted within the apparent scope of the business of the party with whom they deal. Bromley *v.* Elliot, 38 N. H. 287, 75 Am. Dec. 182.

To charge a dormant partner on a note signed by the firm it must be shown that the loan was on the credit of the firm, or that it was used in the business or for the benefit of the firm. Fosdick *v.* Van Horn, 40 Ohio St. 459.

If one partner purchases property on his individual credit, for the use of the firm, and the vendor is not aware of the existence of the partnership, he may, when he discovers it, hold the firm liable for the price. Griffith *v.* Buffum, 22 Vt. 181, 54 Am. Dec. 64.

32. *Connecticut.*— Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

Indiana.— Beach *v.* State Bank, 2 Ind. 488.

Kentucky.— Scott *v.* Colmesnil, 7 J. J. Marsh. 416, a dormant partner, at the date of a note given by the ostensible partner, is liable therefor.

Maryland.— Davidson *v.* Kelly, 1 Md. 492.

Pennsylvania.— Graeff *v.* Hitchman, 5 Watts 454.

South Carolina.— Watson *v.* Owens, 1 Rich. 111.

Texas.— Bradshaw *v.* Apperson, 36 Tex. 133.

United States.— Winship *v.* United States Bank, 5 Pet. 529, 8 L. ed. 216; Alexandria Bank *v.* Mandeville, 2 Fed. Cas. No. 851, 1 Cranch C. C. 575.

England.— Robinson *v.* Wilkinson, 3 Price 538, 18 Rev. Rep. 659.

See 38 Cent. Dig. tit. "Partnership," § 298.

Where the creditor has full knowledge of the partnership relation, when he takes the notes of the ostensible partner, he loses all right against the dormant partner. Usher *v.* Waddingham, 62 Conn. 412, 26 Atl. 538.

33. *California.*— Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Dupuy *v.* Leavenworth, 17 Cal. 262.

c. Rights of the Undisclosed Partnership. An undisclosed partnership becomes the owner of property bought, or of rights acquired in its behalf, although the other party to the transaction did not know of its existence;[34] and its members may join as plaintiffs in an action to enforce such rights.[35]

d. Rights of Dormant Partner. A dormant partner is entitled to revoke the implied authority of his copartners to bind him by contract,[36] as well as to take advantage of the doctrine that a partner has no implied authority to bind his firm by transactions known to the other party to be for the acting partner's individual benefit.[37] He is also entitled to insist that he shall not be charged on an obligation of the firm, unless it be shown that it was contracted on the credit of the firm, in which he is a partner, or that such firm had the benefit of the transaction.[38]

B. Nature and Extent of Firm Liabilities — 1. Liability Upon Contract. The liability of partners upon a contract is at law joint, and not joint and several;[39]

Maine.— White *v.* Farnham, 99 Me. 100, 58 Atl. 425, 105 Am. St. Rep. 261.

Mississippi.— Gumbel *v.* Koon, 59 Miss. 264, construing Code, § 1300.

Pennsylvania.— Callender *v.* Robinson, 96 Pa. St. 454.

South Carolina.— Colburn *v.* Mathews, 1 Strobh. 232.

34. Conklin *v.* Leeds, 58 Ill. 178; Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756; Scott *v.* McKinney, 98 Mass. 344; Badger *v.* Daenicke, 56 Wis. 678, 14 N. W. 821.

35. Havana, etc., R. Co. *v.* Walsh, 85 Ill. 58; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Wright *v.* Herrick, 125 Mass. 154; Cothay *v.* Fennell, 10 B. & C. 671, 8 L. J. K. B. O. S. 302, 21 E. C. L. 284; Garrett *v.* Handley, 4 B. & C. 664, 10 E. C. L. 748, 1 C. & P. 483, 12 E. C. L. 281, 7 D. & R. 144, 27 Rev. Rep. 405.

36. Leavitt *v.* Peck, 3 Conn. 124, 8 Am. Dec. 157.

37. Miller *v.* Manice, 6 Hill (N. Y.) 114; Commonwealth Bank *v.* Hadfeg, 3 Yeates (Pa.) 560; *In re* Munn, 17 Fed. Cas. No. 9,925, 3 Biss. 442, 7 Nat. Bankr. Reg. 468.

38. Fosdick *v.* Van Horn, 40 Ohio St. 459; Alexandria Bank *v.* Mandeville, 2 Fed. Cas. No. 851, 1 Cranch C. C. 575; Palmer *v.* Elliot, 18 Fed. Cas. No. 10,690, 1 Cliff. 63.

39. *Delaware.*— Currey *v.* Warrington, 5 Harr. 147.

Indiana.— Crosby *v.* Jeroloman, 37 Ind. 264.

Louisiana.—Lynch *v.* Postlethwaite, 7 Mart. 69, 12 Am. Dec. 495, applying the general rule which prevailed in Mississippi and governed the case.

Missouri.— Burns *v.* Mason, 11 Mo. 469.

Nebraska.— Bowen *v.* Crow, 16 Nebr. 556, 20 N. W. 850; Nebraska R. Co. *v.* Lett, 8 Nebr. 251, each member is answerable for the whole amount of the firm's debts.

New Jersey.— Brown *v.* Fitch, 33 N. J. L. 418.

New York.— Sparks *v.* Fogarty, 93 N. Y. App. Div. 472, 87 N. Y. Suppl. 648; New York Fastener Co. *v.* Wilatus, 65 N. Y. App. Div. 467, 73 N. Y. Suppl. 67; Harris *v.* Schultz, 40 Barb. 315.

Ohio.— Meier *v.* Cardington First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907.

Oklahoma.— Cox *v.* Gille Hardware, etc., Co., 8 Okla. 483, 58 Pac. 645.

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890.

Pennsylvania.— Good *v.* Good, 7 North. Co. Rep. 159.

Tennessee.— See Brownlee *v.* Lobenstein, (Ch. App. 1897) 42 S. W. 467, holding that a debt is not a firm debt where all the members of the firm are liable therefor as individuals and not as members of the firm.

United States.—Felichy *v.* Hamilton, 8 Fed. Cas. No. 4,719, 1 Wash. 491.

England.— Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 415, 28 Wkly. Rep. 97; Malcolmson *v.* Malcolmson, L. R. 1 Ir. 228; Robeson *v.* Ganderton, 9 C. & P. 476, 38 E. C. L. 282; Wilmer *v.* Currey, 2 De G. & Sm. 347, 12 Jur. 847, 64 Eng. Reprint 156; King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494; Byers *v.* Dobey, 1 H. Bl. 236; *Ex p.* Wilson, 3 Mont. D. & De G. 57.

Canada.— Drouin *v.* Gauthier, 12 Quebec Q. B. 442.

See 38 Cent. Dig. tit. "Partnership," § 301.

Rule stated.—"It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist." Mason *v.* Eldred, 6 Wall. (U. S.) 231, 235, 18 L. ed. 783.

but in equity all partnership debts are deemed joint and several.[40] It is competent for the members of a firm, or any of them, to bind themselves severally as well as jointly for the firm debts, by an agreement to that effect.[41] And one partner may render himself separately liable by holding himself out as the only member of the firm.[42] Whether a contract by a firm not to engage in a certain business binds the partners individually or only as a firm is a question upon which courts differ.[43] If the contract prohibits the partners, "or any of them," from

Statutory provisions.— In some states the common-law rule has been changed, and the contract liability of partners for firm debts is several as well as joint. Dixie Cotton Oil Co. *v.* Morris, 79 Ark. 113, 94 S. W. 933; Kent *v.* Wells, 21 Ark. 411; Hicks *v.* Branton, 21 Ark. 186; Hamilton *v.* Buxton, 6 Ark. 24; McLain *v.* Carson, 4 Ark. 164, 37 Am. Dec. 777; Ryerson *v.* Hendrie, 22 Iowa 480; Williams *v.* Rogers, 14 Bush (Ky.) 776. In some states it has been judicially declared that statutory provisions to the effect that obligations or contracts by several persons shall be joint and several, unless it is otherwise expressly stipulated, do not extend to partnership obligations. Currey *v.* Warrington, 5 Harr. (Del.) 147; Sandusky *v.* Sidwell, 173 Ill. 493, 50 N. E. 1003 [*affirming* 73 Ill. App. 491]; Coates *v.* Preston, 105 Ill. 470; Hyde *v.* Casey-Grimshaw Marble Co., 82 Ill. App. 83 [*reversed* on other grounds in 185 Ill. 580, 57 N. E. 776]; Burns *v.* Mason, 11 Mo. 469; Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787.

In **Louisiana** the members of an ordinary partnership are bound jointly and not severally for firm debts, and are liable not *in solido*, but only for their virile shares. Bank of Commerce *v.* Mayer, 42 La. Ann. 1031, 8 So. 260 (applying Rev. Civ. Code, art. 2872); Hardeman *v.* Tabler, 36 La. Ann. 555; Payne *v.* James, 36 La. Ann. 476 (ordinary partners may stipulate for an obligation *in solido*); Hyams *v.* Rogers, 24 La. Ann. 230; Dupre *v.* Boyd, 23 La. Ann. 495; Field *v.* Cooks, 16 La. Ann. 153; Dyer *v.* Drew, 14 La. Ann. 657; Moores *v.* Bates, 13 La. Ann. 40; Lapeyre *v.* Murphy, 6 La. Ann. 794; Brown *v.* Hughes, 2 La. Ann. 623; Heath *v.* Howell, 15 La. 138; Green *v.* Dakin, 15 La. 152; McGehee *v.* McCord, 14 La. 362; Bennett *v.* Allison, 2 La. 419; Beauregard *v.* Case, 91 U. S. 134, 23 L. ed. 263. But the members of a commercial partnership are liable *in solido* for firm debts and are bound severally as well as jointly. McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630 (construing Rev. Civ. Code, art. 2825); Cooley *v.* Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Villa *v.* Jonte, 17 La. Ann. 9; Twibill *v.* Perkins, 8 La. Ann. 133; Lambeth *v.* Vawter, 6 Rob. 127; Perrett *v.* Dupré, 3 Rob. 52; Pugh *v.* Priestly, 15 La. 287; Hubbell *v.* Read, 14 La. 243; Vigers *v.* Sainet, 13 La. 300; Ward *v.* Brandt, 11 Mart. 331, 13 Am. Dec. 352; Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 615, 4 Woods 201, in which it is said that, although the ultimate liability of partners in a commercial partnership is *in solido*, they cannot be charged individually during the continuance of the partnership, except through the partnership. A lease of real property, even to a commercial partnership, creates a joint obligation. Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77. The joint owners of a steamboat or other vessel, employed in carrying personal property or passengers for hire, are in all transactions relative to the use of such vessel, as to third persons, commercial partners, and as such responsible *in solido*; but, where she is not so employed, they are only ordinary partners, and responsible each for his virile share. Davis *v.* Houren, 6 Rob. (La.) 255; Lambeth *v.* Vawter, *supra*; Kelly *v.* Benedict, 5 Rob. 138, 39 Am. Dec. 530; Byrne *v.* Hooper, 2 Rob. 229; Banchor *v.* Bell, 2 Rob. 182; Black *v.* Savory, 17 La. 85; Shaum *v.* Strong, 14 La. 491; Claiborne *v.* His Creditors, 13 La. 279; Burke *v.* Clarke, 11 La. 206; David *v.* Eloi, 4 La. 106; Hynes *v.* Kirkman, 4 La. 47; Kimbal *v.* Blanc, 8 Mart. N. S. 386; Baldwin *v.* Gray, 4 Mart. N. S. 192, 16 Am. Dec. 169; Carroll *v.* Waters, 9 Mart. 500, 13 Am. Dec. 316.

40. *Connecticut.*— Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321.

Illinois.— Silverman *v.* Chase, 90 Ill. 37.

Missouri.—Simpson *v.* Schulte, 21 Mo. App. 639.

New Jersey.— Edison Electric Illuminating Co. *v.* De Mott, 51 N. J. Eq. 16, 25 Atl. 952.

New York.— Hamersley *v.* Lambert, 2 Johns. Ch. 511.

Ohio.— Belknap *v.* Cram, 11 Ohio 411.

England.— Devoynes *v.* Nobles, 1 Meriv. 529.

See 38 Cent. Dig. tit. "Partnership," § 301.

41. *Alabama.*— Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

Illinois.— McIntyer *v.* Houseman, 98 Ill. App. 76.

Indiana.— Crosby *v.* Jeroloman, 37 Ind. 264.

New York.— *In re* Gray, 111 N. Y. 404, 18 N. E. 719; Amend *v.* Becker, 37 Misc. 496, 75 N. Y. Suppl. 1095.

South Carolina.— Perman *v.* Tunno, Riley Eq. 181.

England.— Denton *v.* Rodie, 3 Campb. 493, 14 Rev. Rep. 823.

See 38 Cent. Dig. tit. "Partnership," § 304.

42. Crosby *v.* Jeroloman, 37 Ind. 264; Bonfield *v.* Smith, 13 L. J. Exch. 105, 12 M. & W. 405.

43. **Partners bound as individuals.**— Love *v.* Stidham, 18 App. Cas. (D. C.) 306, 53 L. R. A. 397; Welsh *v.* Morris, 81 Tex. 159, 16 S. W. 744, 26 Am. St. Rep. 801.

Only the firm is bound and the contract

engaging in the specified business, it is clearly several in its application.[44] Whatever the private agreements and contracts of persons who conduct themselves before the world as partners may be, with reference to debts contracted by them and the responsibilities of the partners respectively, they will be equally and jointly liable to those dealing with the partnership for all debts lawfully contracted.[45] Where two firms agree to indorse notes for each other to enable each other to borrow money, the debt of the sureties on a note made in pursuance of this agreement is a partnership debt.[46] If individuals give a bond, each signing only as an individual, but it is in fact for a partnership debt, although at law it is an individual debt, it is in equity a partnership debt.[47] A partnership is not liable for transactions entered into by the members of the firm individually and which are not connected with the partnership business.[48] Where one deals with the agent of a firm individually, matters growing out of the transaction cannot, in the absence of fraud, be asserted against the firm because of a belief that the firm was being dealt with.[49]

2. Liability in Tort. Whenever a firm is answerable for the tort of any member, the liability of the partners is joint and several.[50]

3. Criminal Responsibility. As a rule a partner is not chargeable with the criminal acts of a copartner, simply because of their partnership relation. It must be shown that he actually authorized or assented to the criminal conduct of his copartner.[51] He may be liable to penalties imposed by statute without such proof;[52] and even to criminal prosecution under peculiar statutes.[53] When a

is not broken by a partner's engaging individually in the specified business. Streichen *v.* Fehleisen, 112 Iowa 612, 84 N. W. 715, 51 L. R. A. 412. See also U. S. Cordage Co. *v.* William Wall's Sons' Rope Co., 90 Hun (N. Y.) 429, 35 N. Y. Suppl. 978.

44. Stark *v.* Noble, 24 Iowa 71; Pittsburg Valve, etc., Co. *v.* Klingelhofer, 210 Pa. St. 513, 60 Atl. 161.

45. Perry *v.* Randolph, 6 Sm. & M. (Miss.) 335.

46. Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

47. McCoy *v.* Jack, 47 W. Va. 201, 34 S. E. 991.

48. Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365], corporate stock bought by persons who are partners in a grocery business.

49. Griffith *v.* Kroeger, (Tex. Civ. App. 1897) 42 S. W. 772.

50. *California.*— Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970.

Illinois.— Miller *v.* Phenix Ins. Co., 109 Ill. App. 624; Liebold *v.* Green, 69 Ill. App. 527, each partner is liable individually for all torts committed in the course of the partnership business, and may be sued alone or with part or all of the other partners.

Louisiana.— Guarantee Trust, etc., Co. *v.* E. C. Drew Inv. Co., 107 La. 251, 31 So. 736; Baldey *v.* Brackenridge, 39 La. Ann. 660, 2 So. 410.

Maine.— Allen *v.* Leighton, 87 Me. 206, 32 Atl. 877, each partner is liable for the aggregate penalty for having unlawful possession of caribou.

Massachusetts.—Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.

New York.— Lockwood *v.* Bartlett, 130 N. Y. 340, 29 N. E. 257 [*affirming* 7 N. Y. Suppl. 481]; Roberts *v.* Johnson, 58 N. Y. 613; Matter of Blackford, 35 N. Y. App. Div. 330, 54 N. Y. Suppl. 972; Walker *v.* Anglo-American Mortg., etc., Co., 72 Hun 334, 25 N. Y. Suppl. 432.

North Carolina.— Barrett *v.* McCrummen, 128 N. C. 81, 38 S. E. 286.

South Carolina.— White *v.* Smith, 12 Rich. 595.

United States.—Stockwell *v.* U. S., 13 Wall. 531, 20 L. ed. 491 [*affirming* 23 Fed. Cas. No. 13,466, 3 Cliff. 284]; Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129. See also Troy Iron, etc., Factory *v.* Winslow, 24 Fed. Cas. No. 14,199, 1 Ban. & A. 98, 11 Blatchf. 513.

England.— Blyth *v.* Fladgate, [1891] 1 Ch. 337, 60 L. J. Ch. 66, 63 L. T. Rep. N. S. 546, 39 Wkly. Rep. 422; Thomas *v.* Atherton, 10 Ch. D. 185, 48 L. J. Ch. 370, 40 L. T. Rep. N. S. 77; Rice *v.* Shute, 5 Burr. 261, W. Bl. 695.

See 38 Cent. Dig. tit. "Partnership," § 306.

51. Whitton *v.* State, 37 Miss. 379; State *v.* Coleman, Dudley (S. C.) 32; U. S. *v.* Cohn, 128 Fed. 615 [*affirmed* in 145 Fed. 1, 76 C. C. A. 31]. See also Williams *v.* Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650.

52. Allen *v.* Leighton, 87 Me. 206, 32 Atl. 877; Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491; Rex *v.* Manning, Comyns 616. But *compare* Williams *v.* Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650. See also *supra*, VI, A, 15, notes 87–91.

Violation of internal revenue law see Internal Revenue, 22 Cyc. 1676.

53. Whitton *v.* State, 37 Miss. 379; State *v.* Neal, 27 N. H. 131; U. S. *v.* Fish, 24 Fed. 585.

partnership is guilty of a crime, the partners should be indicted as individuals, not as a firm.[54]

4. Liability For Acts of Agents and Servants. For the acts of agents or servants of a partnership, the firm as well as each member thereof is answerable, provided these are done in the course of their employment as partnership agents or servants;[55] nor does it matter that they are actually engaged and controlled by but one of the partners.[56] But for the acts of agents or servants of individual partners only the firm is not liable.[57]

C. Application of Assets to Liabilities — 1. Marshaling Firm and Individual Assets — a. In General. As a rule a court of equity will not entertain the question of marshaling the assets of the firm and of its members, unless both funds are within the jurisdiction and control of the court. If a judgment at law be recovered against partners as a firm, the separate property of each partner is alike liable to execution with the property of the firm, and equity will not interfere, unless there are special circumstances.[58] When equity does entertain an application for marshaling, it generally applies the rule that the firm assets are to be applied in the first instance to the payment of firm debts, and the assets of individual partners to the payment of their individual debts.[59] In some jurisdictions the rule prevails that firm creditors are entitled to a priority over individual creditors

54. Peterson *v.* State, 32 Tex. 477. And see State *v.* Powell, 3 Lea (Tenn.) 164, holding that an indictment against A and C, partners trading under the name of A & C, is good, as it will be treated as against them individually. See Indictments and Informations, 22 Cyc. 325.

Partnership relation need not be alleged see Indictments and Informations, 22 Cyc. 358 note 64.

55. *Alabama.*— Barnett *v.* State, 54 Ala. 579.

Louisiana.— Johnston *v.* Brown, 18 La. Ann. 330.

Maryland.— Brent *v.* Davis, 9 Md. 217; Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138.

Massachusetts.— Linton *v.* Hurley, 14 Gray 191 (liability for negligence of servant); Locke *v.* Stearns, 1 Metc. 560, 35 Am. Dec. 382 (fraud in sale of partnership property); Cobb *v.* Abbot, 14 Pick. 289.

New York.— Marvin *v.* Wilber, 52 N. Y. 270, when the agent binds the firm by a contract, the other party cannot enforce it against either partner individually.

Pennsylvania.— McKnight *v.* Ratcliff, 44 Pa. St. 156.

Wisconsin.— Wood *v.* Luscomb, 23 Wis. 287.

England.— Stables *v.* Eley, 1 C. & P. 614, 12 E. C. L. 348.

See 38 Cent. Dig. tit. "Partnership," § 303½.

56. Roberts *v.* Totten, 13 Ark. 609; Mead *v.* Shepard, 54 Barb. (N. Y.) 474; Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230.

57. Sagers *v.* Nuckolls, 3 Colo. App. 95, 32 Pac. 187.

58. Lewis *v.* U. S., 92 U. S. 618, 23 L. ed. 513 [*affirming* 26 Fed. Cas. No. 15,595, 13 Nat. Bankr. Reg. 33, 2 Wkly. Notes Cas. 31]. And see to the same effect Markham *v.* Calvit, 5 How. (Miss.) 427; Meech *v.* Allen, 17 N. Y. 300, 72 Am. Dec. 465; *In re* Sandusky, 21 Fed. Cas. No. 12,308, 17 Nat. Bankr. Reg. 452.

59. *Alabama.*— Smith *v.* Mallory, 24 Ala. 628.

Colorado.— Charles *v.* Eshleman, 5 Colo. 107.

Illinois.— Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 (one who has received a fraudulent conveyance of property, and been decreed to account therefor, is entitled to insist upon the assets being marshaled); Pahlman *v.* Graves, 26 Ill. 405; Morrison *v.* Kurtz, 15 Ill. 193; Greene *v.* Casey, 86 Ill. App. 523; Brown *v.* Stewart, 78 Ill. App. 387.

Indiana.— Dean *v.* Phillips, 17 Ind. 406; Weyer *v.* Thornburgh, 15 Ind. 124.

Kansas.— Taylor *v.* Riggs, 8 Kan. App. 323, 57 Pac. 44.

Maryland.— Glenn *v.* Gill, 2 Md. 1; McCulloh *v.* Dashiell, 1 Harr. & G. 96, 18 Am. Dec. 271.

Massachusetts.— Somerset Potters Works *v.* Minot, 10 Cush. 592.

Mississippi.— Irby *v.* Graham, 46 Miss. 425; Markham *v.* Calvit, 5 How. 427; Arnold *v.* Hamer, Freem. 509.

New Jersey.— Davis *v.* Howell, 33 N. J. Eq. 72 [*affirmed* in 34 N. J. Eq. 292]; Cammack *v.* Johnson, 2 N. J. Eq. 163, the rule does not apply in the case of a silent partner, but the firm assets may be taken for the debts of the ostensible owner.

New York.— Egberts *v.* Wood, 3 Paige 517, 24 Am. Dec. 236; Wilder *v.* Keeler, 3 Paige 167, 23 Am. Dec. 781.

Ohio.— Rodgers *v.* Meranda, 7 Ohio St. 179; Miller *v.* Estill, 5 Ohio St. 508, 67 Am. Dec. 305; Scovil *v.* Stage, 8 Ohio Dec. (Reprint) 54, 5 Cinc. L. Bul. 351.

Pennsylvania.— Black's Appeal, 44 Pa. St. 503; Miller *v.* Miller, 3 Pittsb. 540; Moffat's Estate, 25 Pittsb. Leg. J. N. S. 92.

Tennessee.— Fowlkes *v.* Bowers, 11 Lea 144. *Compare* White *v.* Dougherty, Mart. & Y. 309, 17 Am. Dec. 802.

in the firm assets, and to share *pari passu* with the creditors of the individual partners in their individual assets.[60] In others the firm creditors are bound to exhaust the firm assets before proceeding against the assets of the individual partners, after which they share ratably with their creditors in their individual assets.[61] In still others the rule prevails that the individual creditors of a member of the firm should first be put on an equality with the firm creditors, by receiving a percentage from the individual property equal to that received by the firm creditors from the firm property; and the remaining property should be distributed *pro rata* between both classes.[62]

b. Partner Surety For Firm Debt. When a partner is surety for a firm debt his creditors have a right to insist that the firm property be applied toward the satisfaction of the debt before subjecting his individual property to its payment.[63]

2. Assets of Firm — a. General Rules as to Rights of Creditors. Firm creditors have no legal lien on the firm assets, whether real or personal, simply because they are creditors; they must acquire it by due legal proceedings.[64] Part-

United States.— Lewis *v.* U. S., 92 U. S. 618, 23 L. ed. 513; *In re* Groetzinger, 110 Fed. 366; *In re* Estes, 3 Fed. 134, 6 Sawy. 459.

England.— Read *v.* Bailey, 3 App. Cas. 94, 47 L. J. Ch. 161, 37 L. T. Rep. N. S. 510, 26 Wkly. Rep. 223; Rolfe *v.* Flower, L. R. 1 P. C. 27, 12 Jur. N. S. 345, 35 L. J. P. C. 13, 14 L. T. Rep. N. S. 144, 14 Wkly. Rep. 467.

See 38 Cent. Dig. tit. "Partnership," § 308.

Where there is a dormant partner.— The rule as to marshaling does not apply to a firm, whose business is conducted as that of an individual, but which includes a dormant partner. Cammack *v.* Johnson, 2 N. J. Eq. 163 (holding that the firm property may be taken for the private debts of the ostensible owner, although the firm debts remain unpaid); *Ex p.* Hodgkinson, Coop. 99, 10 Eng. Ch. 99, 35 Eng. Reprint 492, 19 Ves. Jr. 291, 34 Eng. Reprint 525, 13 Rev. Rep. 199 (holding that a creditor without notice of a dormant partner has the option to consider himself a joint or a separate creditor); *Ex p.* Jennings, Mont. 45; *Ex p.* Norfolk, 19 Ves. Jr. 455, 34 Eng. Reprint 585 (this doctrine is subject to modification in England, by reason of the reputed ownership clause in the Bankruptcy Act).

60. Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321.

61. Gueringer *v.* His Creditors, 33 La. Ann. 1279; Blair *v.* Black, 31 S. C. 346, 9 S. E. 1033, 17 Am. St. Rep. 30; Kuhne *v.* Law, 14 Rich. (S. C.) 18; Sniffer *v.* Sass, 14 Rich. 20; Gadsden *v.* Carson, 9 Rich. Eq. (S. C.) 252, 70 Am. Dec. 207; Fleming *v.* Billings, 9 Rich. Eq. (S. C.) 149; Rice *v.* Barnard, 20 Vt. 479, 50 Am. Dec. 54; Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687; Pettyjohn *v.* Woodruff, 86 Va. 478, 10 S. E. 715. But see Sniffer *v.* Sass, 14 Rich. (S. C.) 20.

62. Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507; Fayette Nat. Bank *v.* Kenney, 79 Ky. 133; Whitehead *v.* Chadwell, 2 Duv. (Ky.) 432; Northern Bank *v.* Keizer, 2 Duv. (Ky.) 169. *Compare* Toombs *v.* Hill, 28 Ga. 371.

63. Bell *v.* Hepworth, 134 N. Y. 442, 31 N. E. 918 [*affirming* 51 Hun 616, 4 N. Y. Suppl. 823]; Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Wilder *v.* McKeeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *In re* Foot, 9 Fed. Cas. No. 4,906, 8 Ben. 228, 12 Nat. Bankr. Reg. 337. See also Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415. *Compare* Gotzian *v.* Shakman, 89 Wis. 52, 61 N. W. 304, 46 Am. St. Rep. 820.

64. *Alabama.*— Mayer *v.* Clark, 40 Ala. 259 (a judgment must be obtained and execution had thereon); Reese *v.* Bradford, 13 Ala. 837.

Colorado.— Sickman *v.* Abernathy, 14 Colo. 174, 23 Pac. 447.

Kentucky.— Couchman *v.* Maupin, 78 Ky. 33, a partnership creditor has no lien on partnership effects as against one holding a joint debt against all the individual members of the firm.

Minnesota.— Thorpe *v.* Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

Nebraska.— Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865 (no lien whether the firm be solvent or not); Richards *v.* Leveille, 44 Nebr. 38, 62 N. W. 304.

New York.— Crippen *v.* Hudson, 13 N. Y. 161; Greenwood *v.* Brodhead, 8 Barb. 593, judgment and execution necessary.

North Carolina.— Clement *v.* Foster, 38 N. C. 213, 217, "There seems to be no principle, on which a creditor of a firm can file a bill to stop the business, and tie the hands of all or any of the partners, or one of them, from disposing of the effects, for the purpose of applying them, even to satisfy all the creditors of the firm equitably, and much less singly to his own debt by note, bond, or account. . . . If the Court of Equity had an original jurisdiction of the kind, there would have been but little necessity for a bankrupt act."

Ohio.— Gwin *v.* Selby, 5 Ohio St. 96.

Oregon.— Stahl *v.* Osmers, 31 Oreg. 199, 49 Pac. 958.

South Carolina.— Woddrop *v.* Ward, 3 Desauss. Eq. 203.

Texas.— White *v.* Parish, 20 Tex. 688, 73

ners, however, have an equitable lien upon all firm property, by reason of the partnership relation, for the purpose of having it applied to the payment of firm debts.[65] Through this lien of the partners, firm creditors are able to secure the application of firm property to the payment of their claims, either directly, or in subrogation to the rights of the partners,[66] unless the latter have waived or

Am. Dec. 204; Schuster *v.* Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

Wisconsin.— Reddington *v.* Franey, 124 Wis. 590, 102 N. W. 1065.

United States.— Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173; Tracy *v.* Walker, 24 Fed. Cas. No. 14,129, 1 Flipp. 41.

See 38 Cent. Dig. tit. "Partnership," § 312.

65. *Arkansas.*— Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Nichol *v.* Stewart, 36 Ark. 612.

California.— Leedom *v.* Ham, (1897) 48 Pac. 222 (construing Civ. Code, § 2405); Duryea *v.* Burt, 28 Cal. 569.

Illinois.— Nelson *v.* Hayner, 66 Ill. 487.

Kentucky.— Talbot *v.* Pierce, 14 B. Mon. 195; Black *v.* Bush, 7 B. Mon. 210; Pearson *v.* Keedy, 6 B. Mon. 128, 43 Am. Dec. 160.

Maine.— Crooker *v.* Crooker, 46 Me. 250.

Michigan.— Hamilton *v.* Harris, 72 Mich. 56, 40 N. W. 56.

Missouri.— Freedman *v.* Holberg, 89 Mo. App. 340.

New Jersey.— Standish *v.* Babcock, 52 N. J. Eq. 628, 29 Atl. 327.

Tennessee.— Foster *v.* Hall, 4 Humphr. 346; Hunt *v.* Benson, 2 Humphr. 459.

Texas.— Blackwell *v.* Farmers', etc., Bank, 97 Tex. 445, 79 S. W. 518 [*modifying* (Civ. App. 1903) 76 S. W. 454].

Vermont.— Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687, the partnership effects in equity are pledged to each separate partner until he is released from all his partnership obligations.

Washington.— Skavdale *v.* Mayer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

United States.— Thrall *v.* Crampton, 23 Fed. Cas. No. 14,008, 9 Ben. 218, 16 Nat. Bankr. Reg. 261.

England.— Stocken *v.* Dawson, 9 Beav. 239, 50 Eng. Reprint 335 [*affirmed* in 17 L. J. Ch. 282]; Skipp *v.* Harwood, 2 Swanst. 586, 36 Eng. Reprint 739; *Ex p.* Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970; West *v.* Skip, 1 Ves. 239, 27 Eng. Reprint 1006.

Canada.— Moore *v.* Riddell, 11 Grant Ch. (U. C.) 69.

See 38 Cent. Dig. tit. "Partnership," § 314; and *infra*, IX, C, 5.

On the dissolution of a partnership, each partner has a lien on the partnership effects for his own indemnity against the joint debts. Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. (U. S.) 173.

66. *Alabama.*— Farley *v.* Moog, 79 Ala. 148, 58 Am. Rep. 585; Coster *v.* Georgia Bank, 24 Ala. 37; Emanuel *v.* Bird, 19 Ala. 596, 54 Am. Dec. 200; Lucas *v.* Atwood, 2 Stew. 378.

California.— Burpee *v.* Bunn, 22 Cal. 194; Chase *v.* Steel, 9 Cal. 64.

Colorado.— Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Connecticut.— Rice *v.* McMartin, 39 Conn. 573; Filley *v.* Phelps, 18 Conn. 294.

Delaware.— Bevan *v.* Alee, 3 Harr. 80.

Georgia.— Hoskins *v.* Johnson, 24 Ga. 625, the equity among partners, requiring partnership property to be applied first to the payment of partnership debts, practically gives debts against a partnership a preference over debts against a partner in respect to that partner's interest in the partnership effects.

Illinois.— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223]; Rainey *v.* Nance, 54 Ill. 29; Barnett *v.* Barnett, 86 Ill. App. 625; Coe *v.* Simmons Boot, etc., Co., 61 Ill. App. 602.

Indiana.— Conant *v.* Frary, 49 Ind. 530; Frank *v.* Peters, 9 Ind. 343.

Iowa.— Indianola First Nat. Bank *v.* Brubaker, 128 Iowa 587, 105 N. W. 116, 111 Am. St. Rep. 209, 2 L. R. A. N. S. 256.

Kentucky.— O'Bannon *v.* Miller, 4 Bush 25; Black *v.* Bush, 7 B. Mon. 210 (a partner has a lien on the partnership effects for the payment of the firm's debts, and the firm creditors have the right to be substituted to the lien of the partners in the application and ratable distribution of the firm effects in case of a deficiency); Merkley *v.* Gravel Switch Roller Mills Co., 90 S. W. 1059, 28 Ky. L. Rep. 1010.

Louisiana.— Christen *v.* Ruhlman, 22 La. Ann. 570; Tennessee Bank *v.* McKeage, 11 Rob. 130; Smith *v.* Sénécal, 2 Rob. 453; Claiborne *v.* His Creditors, 13 La. 279; Gardiner *v.* Smith, 12 La. 370; Hagan *v.* Scott, 10 La. 345.

Maine.— Crooker *v.* Crooker, 46 Me. 250.

Maryland.— Simmons *v.* Tongue, 3 Bland 341.

Massachusetts.— Rice *v.* Austin, 17 Mass. 197; Fisk *v.* Herrick, 6 Mass. 271; Pierce *v.* Jackson, 6 Mass. 242.

Michigan.— Topliff *v.* Vail, Harr. 340.

Mississippi.— George *v.* Derby Lumber Co., 81 Miss. 725, 33 So. 496; Bass *v.* Estill, 50 Miss. 300; Williams *v.* Gage, 49 Miss. 777.

Nebraska.— Steele *v.* Kearney Nat. Bank, 47 Nebr. 724, 66 N. W. 841; Perkins *v.* Butler County, 46 Nebr. 314, 64 N. W. 975; Richards *v.* Leveille, 44 Nebr. 38, 62 N. W. 304; Rothell *v.* Grimes, 22 Nebr. 526, 35 N. W. 392; Smith *v.* Jones, 18 Nebr. 481, 25 N. W. 624; Caldwell *v.* Bloomington Mfg. Co., 17 Nebr. 489, 23 N. W. 336; Roop *v.* Herron, 15 Nebr. 73, 17 N. W. 353.

New Jersey.— Matlack *v.* James, 13 N. J. Eq. 126. See also Baldwin *v.* Johnson, 1 N. J. Eq. 441.

New York.— Sage *v.* Chollar, 21 Barb. 596;

destroyed their lien.[67] Such waiver or destruction is ordinarily effected by a sale or other disposition of the firm property to third persons, or to one or more of

Beecher *v.* Bennett, 11 Barb. 374; Muir *v.* Leitch, 7 Barb. 341.

North Carolina.— Ross *v.* Henderson, 77 N. C. 170.

Ohio.— Meier *v.* Cardington First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907; Smead *v.* Lacey, 1 Disn. 239, 12 Ohio Dec. (Reprint) 597.

Pennsylvania.— *In re* Stewart, 193 Pa. St. 347, 44 Atl. 434 (the priority of firm creditors over individual creditors, in the distribution of firm funds, is based on the equity of the partners to have firm assets applied to firm debts, before any part is applied to the individual use of the partners); Himmerlreick *v.* Shaffer, 182 Pa. St. 201, 37 Atl. 1007, 61 Am. St. Rep. 698; Bixler *v.* Kresge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. Rep. 920; Roberts *v.* Dunham, 1 C. Pl. 136.

Rhode Island.— Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

Tennessee.—Foster *v.* Hall, 4 Humphr. 346; White *v.* Dougherty, Mart. & Y. 309, 17 Am. Dec. 802.

Texas.— Grabenheimer *v.* Rindskoff, 64 Tex. 49 (firm creditors are subrogated to the rights of each partner to have the firm property applied to the payment of firm debts); Converse *v.* McKee, 14 Tex. 20.

Vermont.— Washburn *v.* Bellows Falls, 19 Vt. 278.

Virginia.— Christian *v.* Webb, 1 Gratt. 396.

Washington.— Charleson *v.* McGraw, 3 Wash. Terr. 344, 17 Pac. 883.

West Virginia.— Conaway *v.* Stealey, 44 W. Va. 163, 28 S. E. 793.

Wisconsin.— See Thayer *v.* Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549.

United States.— Case *v.* Beauregard, 99 U. S. 119, 25 L. ed. 370 [*affirming* 5 Fed. Cas. No. 2,487, 1 Woods 125]; Fiske *v.* Gould, 12 Fed. 372, 11 Biss. 294; *In re* Lowe, 15 Fed. Cas. No. 8,564, 11 Nat. Bankr. Reg. 221.

See 38 Cent. Dig. tit. "Partnership," §§ 312, 315.

The entire assets of a partnership are, in equity, subject to the payment of the debts. Coster *v.* Georgia Bank, 24 Ala. 37.

Interests of partners immaterial.— Partnership assets must be applied to the payment of partnership debts without reference to any disproportion of the interests of the individual partners as between themselves. *In re* Lowe, 15 Fed. Cas. No. 8,564, 11 Nat. Bankr. Reg. 221.

Enforceable only in equity.— The rule that firm property shall be subject first to the payment of firm in preference to individual debts is enforceable only in equity. Coe *v.* Simmons Boot, etc., Co., 61 Ill. App. 602.

Equities between the partners do not affect the rights of partnership creditors. Bartels *v.* His Creditors, 11 La. Ann. 433.

No right while partnership exists.— The rule that partnership effects must be first applied to partnership debts does not apply to cases where the partnership still exists, and the partners may dispose of their property as they please, but only to cases where equitable principles interfere in the distribution of the partnership property among the creditors. Schæffer *v.* Fithian, 17 Ind. 463; McDonald *v.* Beach, 2 Blackf. (Ind.) 55; Schmidlapp *v.* Currie, 55 Miss. 597, 30 Am. Rep. 530; Mittnight *v.* Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233; Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; De Caussey *v.* Baily, 57 Tex. 665. But *compare* Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687.

Fraudulent transfer by copartner.—A partner has such a lien as will enable him to attack fraudulent transfers by his copartners. Wade *v.* Rusher, 4 Bosw. (N. Y.) 537.

67. *Alabama.*— Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97.

Illinois.— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223] (when a partner waives his right, the equity of the creditor is at an end); Hoffman *v.* Schoyer, 143 Ill. 598, 28 N. E. 823; Farwell *v.* Cook, 42 Ill. App. 291 [*affirmed* in 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237]; Williamson *v.* Adams, 16 Ill. App. 564.

Indiana.— Dunham *v.* Hanna, 18 Ind. 270.

Iowa.— Hawk Eye Woolen Mills *v.* Conklin, 26 Iowa 422 (right of partner destroyed by sale); Stout *v.* Fortner, 7 Iowa 183.

Kentucky.— Couchman *v.* Maupin, 78 Ky. 33; Jones *v.* Lusk, 2 Metc. 356.

Maryland.— Boyd *v.* Wolff, 88 Md. 341, 41 Atl. 897; Holloway *v.* Turner, 61 Md. 217; Thompson *v.* Frist, 15 Md. 24; Guyton *v.* Flack, 7 Md. 398.

Massachusetts.— Giddings *v.* Palmer, 107 Mass. 269, rights of partners destroyed by dissolution, and the division of assets.

Mississippi.— Schmidlapp *v.* Currie, 55 Miss. 597, 30 Am. Rep. 530.

New Jersey.— Linford *v.* Linford, 28 N. J. L. 113.

North Carolina.— Thornton *v.* Lambeth, 103 N. C. 86, 9 S. E. 432; Holmes *v.* Hawes, 43 N. C. 21, lien of partners destroyed by dissolution and an agreed division of assets.

Ohio.— Sigler *v.* Knox County Bank, 8 Ohio St. 511; Miller *v.* Estill, 5 Ohio St. 508, 67 Am. Dec. 305; McGregor *v.* Ellis, 2 Disn. 286; Citizens Nat. Bank *v.* Wehrle, 18 Ohio Cir. Ct. 535, 9 Ohio Cir. Dec. 330.

Pennsylvania.— Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; Backus *v.* Murphy, 39 Pa. St. 397, 80 Am. Dec. 531; Cope's Appeal, 39 Pa. St. 284; Larzelere *v.* Tiel, 3 Pa. Super. Ct. 109, 39 Wkly. Notes Cas. 320.

Texas.— Wiggins *v.* Blackshear, 86 Tex. 665, 26 S. W. 939; Watson *v.* McKinnon, 73 Tex. 210, 11 S. W. 197; Luck *v.* Hopkins, (Civ. App. 1899) 54 S. W. 429.

the partners. If such transfer is made by a solvent partnership,[68] or by an insolvent one for full value and not in violation of any statute,[69] each partner's lien is effectively surrendered. Equity will generally, however, secure firm creditors against a collusive waiver of the partner's lien, or of its destruction by a fraudulent or voluntary conveyance.[70]

b. Rights of Creditors in Firm Realty. Land purchased and held by the members of a firm as a partnership is subject in equity to firm debts in preference to the individual debts of the members.[71]

Vermont.— Rice *v.* Barnard, 20 Vt. 479, 50 Am. Dec. 54.

Virginia.— Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835, a surviving partner cannot waive the right after action brought by firm creditors to have the firm assets applied to firm debts.

United States.— Case *v.* Beauregard, 5 Fed. Cas. No. 2,487, 1 Woods 125 [*affirmed* in 99 U. S. 119, 25 L. ed. 370].

England.— *Ex p.* Grazebrook, 2 Deac. & C. 186.

See 38 Cent. Dig. tit. "Partnership," §§ 315, 319.

68. *Alabama.*— Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538.

Minnesota.— The right to have partnership property applied to the payment of partnership debts is a right which each partner has against the other partners, but may be terminated by agreement or by good faith sale and transfer of the partnership property. Thorpe *v.* Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

Nebraska.— Werner *v.* Iler, 54 Nebr. 576, 74 N. W. 833.

New York.— Nordlinger *v.* Anderson, 123 N. Y. 544, 25 N. E. 992.

Tennessee.—Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

Texas.— De Caussey *v.* Baily, 57 Tex. 665.

69. Richards *v.* Leveille, 44 Nebr. 38, 62 N. W. 304; Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. Rep. 414; Consaulus *v.* McConihe, 2 N. Y. Suppl. 89; Citizens Nat. Bank *v.* Wehrle, 18 Ohio Cir. Ct. 535, 9 Ohio Cir. Dec. 330.

70. *Alabama.*— Thames *v.* Schloss, 120 Ala. 470, 24 So. 835.

Arkansas.— Bartlett *v.* Meyer-Schmidt Grocer Co., 65 Ark. 290, 45 S. W. 1063.

Maryland.— Franklin Sugar Refining Co. *v.* Henderson, 86 Md. 452, 38 Atl. 991, 63 Am. St. Rep. 524.

Massachusetts.—Howe *v.* Lawrence, 9 Cush. 553, 57 Am. Dec. 68.

Minnesota.— Thorpe *v.* Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

Mississippi.— Mechanics' Sav. Bank *v.* Fergason, 79 Miss. 64, 29 So. 791; Jackson Bank *v.* Durfey, 72 Miss. 971, 978, 18 So. 456, 48 Am. St. Rep. 596, 31 L. R. A. 470, "The decided weight of authority is that, while the right of firm creditors to go against the firm property . . . is a derivative right, and rests on the right of members of the firm, and while that right is lost by the *bona fide* waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty, to prevent its being subjected by firm creditors."

Missouri.— Rock Island Implement Co. *v.* Sloan, 83 Mo. App. 438.

New Jersey.— Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066 [*affirmed* in 54 N. J. Eq. 701, 37 Atl. 1117].

New Mexico.— *In re* Spitz, 8 N. M. 622, 45 Pac. 1122, 34 L. R. A. 604.

United States.— *In re* Sauthoff, 21 Fed. Cas. No. 12,380, 8 Biss. 35, 16 Nat. Bankr. Reg. 181.

England.— *Ex p.* Mayou, 4 De G. J. & S. 664, 11 Jur. N. S. 433, 34 L. J. Bankr. 25. 12 L. T. Rep. N. S. 254, 13 Wkly. Rep. 629, 69 Eng. Ch. 508, 46 Eng. Reprint 1076.

The ground for equitable relief is that the lien of partners, which results from their reciprocal rights to have the firm property applied to firm debts, is a property right of the partnership creditors. Jackson Bank *v.* Durfey, 72 Miss. 971, 18 So. 456, 48 Am. St. Rep. 596, 31 L. R. A. 470; Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066 [*affirmed* in 54 N. J. Eq. 701, 37 Atl. 1117]; Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

71. *Alabama.*— Long *v.* Slade, 121 Ala. 267, 26 So. 31.

California.— Golden State, etc., Iron-Works *v.* Davidson, 73 Cal. 389, 15 Pac. 20, this rule is one of equity and not to be applied in a common-law action of ejectment.

Illinois.— Reeves *v.* Ayers, 38 Ill. 418.

Indiana.— Walling *v.* Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Meridian Nat. Bank *v.* Brandt, 51 Ind. 56.

Kentucky.— Flanagan *v.* Shuck, 82 Ky. 617; Bryant *v.* Hunter, 6 Bush 75.

Louisiana.— Calder *v.* Creditors, 47 La. Ann. 346, 16 So. 852.

Maine.— Crooker *v.* Crooker, 46 Me. 250; Blake *v.* Nutter, 19 Me. 16, declining to apply the rule in an action at law.

Michigan.— Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54.

New Jersey.— Standish *v.* Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Uhler *v.* Semple, 20 N. J. Eq. 288; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13 [*reversed* on other grounds in 21 N. J. Eq. 530].

New York.— Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366.

North Carolina.— Donaldson *v.* State Bank, 16 N. C. 103, 18 Am. Dec. 577.

c. Rights of Individual Creditors. The rights of a creditor of an individual partner are confined to the interest of his debtor in the firm assets; and that interest is the latter's share in the surplus remaining after the firm debts are paid, and the equities between him and his copartners are adjusted.[72]

Tennessee.— Lane *v.* Jones, 9 Lea 627.

United States.— Shanks *v.* Klein, 104 U. S. 18, 26 L. ed. 635; Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,116, 3 McLean 27].

See 38 Cent. Dig. tit. "Partnership," § 310.

Even when the title is taken in the name of a partner, equity will secure the property to the creditors of the firm, except as against the claims of *bona fide* purchasers for value, without notice of the firm ownership. Goldthwaite *v.* Janney, 102 Ala. 431, 15 So. 560, 48 Am. St. Rep. 56, 28 L. R. A. 161; Paige *v.* Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Gordon *v.* Kennedy, 36 Iowa 167; Uhler *v.* Semple, 20 N. J. Eq. 288; Page *v.* Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Marvin *v.* Trumbull, Wright (Ohio) 386; North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181, 84 Am. Dec. 487; Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. App. 1896) 37 S. W. 1004; Wells *v.* Stratton, 1 Tenn. Ch. 328; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

Where partnership funds have been used in improving land deeded to the members of a partnership individually and paid for out of the partnership funds, the partnership creditors take priority over the individual creditors. Hiscock *v.* Phelps, 49 N. Y. 97. See also Kendall *v.* Rider, 35 Barb. (N. Y.) 100; Averill *v.* Loucks, 6 Barb. (N. Y.) 19.

72. *Arkansas.*— Dixie Cotton Oil Co. *v.* Morris, 79 Ark. 113, 94 S. W. 933.

Colorado.— Livermore *v.* Truesdell, 9 Colo. App. 332, 48 Pac. 276.

Connecticut.— Witter *v.* Richards, 10 Conn. 37; Brewster *v.* Hammet, 4 Conn. 540.

Georgia.— Haines *v.* Millers, 61 Ga. 344.

Illinois.— McGillis *v.* Hogan, 190 Ill. 176, 60 N. E. 91 [*affirming* 85 Ill. App. 194]; Hurlbut *v.* Johnson, 74 Ill. 64; Low *v.* Arnstein, 73 Ill. App. 215; Campbell *v.* McGuire, 58 Ill. App. 37.

Indiana.— Johnson *v.* Shirley, 152 Ind. 453, 53 N. E. 459.

Iowa.— See Van Zuuk *v.* Pothoven, 132 Iowa 19, 109 N. W. 288.

Kentucky.— Downing *v.* Linville, 3 Bush 472; Wintersmith *v.* Pointer, 2 Metc. 457; Simrall *v.* O'Bannons, 7 B. Mon. 608; Holmes *v.* Miller, 41 S. W. 432, 19 Ky. L. Rep. 660.

Louisiana.— Reily *v.* Creditors, 45 La. Ann. 470, 12 So. 519; Pittman *v.* Robicheau, 14 La. Ann. 108.

Maryland.— Ridgely *v.* Carey, 4 Harr. & M. 167. *Compare* Glenn *v.* Gill, 2 Md. 1, holding that a person who is not a partner, but who, by being held out as such, has become liable as a partner, does not thereby acquire any of the rights of a partner; and therefore as he has no lien on the stock in trade his individual creditors can have none.

Michigan.— Kunze *v.* Cox, 113 Mich. 546, 71 N. W. 864, 67 Am. St. Rep. 480; Cooperstown First Nat. Bank *v.* State Sav. Bank, 30 Mich. 332, 89 N. W. 941, real estate standing in the names of the partners as tenants in common is subject to levy by individual creditors, as separate property of the grantees.

Mississippi.—Atwood *v.* Meredith, 37 Miss. 635.

Missouri.— Mansur-Tebbetts Implement Co. *v.* Ritchie, 159 Mo. 213, 60 S. W. 87; Hargadine-McKittrick Dry Goods Co. *v.* Sappington, 105 Mo. App. 655, 78 S. W. 1049. *Compare* I. X. L. Pressed-Brick Co. *v.* Schoeneich, 65 Mo. App. 283; Dieckmann *v.* St. Louis, 9 Mo. App. 9.

Montana.— Rockefeller *v.* Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. Rep. 613.

New Hampshire.— Tappan *v.* Blaisdell, 5 N. H. 190.

New Jersey.—Standish *v.* Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Scoville Mfg. Co. *v.* Lindsey, (Ch. 1886) 4 Atl. 98; Hill *v.* Beach, 12 N. J. Eq. 31, the firm debts are to be satisfied, and next the equities between the partners; and only then can individual creditors come in.

New York.— United Nat. Bank *v.* Weatherby, 70 N. Y. App. Div. 279, 75 N. Y. Suppl. 3; Drexel *v.* Pease, 13 N. Y. Suppl. 774; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305 note; Robbins *v.* Cooper, 6 Johns. Ch. 186.

North Carolina.— Daniel *v.* Crowell, 125 N. C. 519, 34 S. E. 684.

Ohio.— Rodgers *v.* Meranda, 7 Ohio St. 179.

Oregon.— McManus *v.* Smith, 37 Oreg. 222, 61 Pac. 844.

Pennsylvania.— See Pontius *v.* Walls, 197 Pa. St. 223, 47 Atl. 203; Merchants', etc., Nat. Bank *v.* Kern, 8 Pa. Dist. 75.

South Carolina.— Calhoun *v.* Greenwood Bank, 42 S. C. 357, 20 S. E. 153; Fleming *v.* Billings, 9 Rich. Eq. 149.

Tennessee.— Wright *v.* Market Bank, (Ch. App. 1900) 60 S. W. 623.

Vermont.— Willis *v.* Freeman, 35 Vt. 44, 82 Am. Dec. 619.

Virginia.— Maddock *v.* Skinker, 93 Va. 479, 25 S. E. 535.

West Virginia.— Lewis *v.* Crane, 50 W. Va. 239, 40 S. E. 347; Kenneweg *v.* Schilansky, 45 W. Va. 521, 31 S. E. 949.

Wisconsin.— Rommerdahl *v.* Jackson, 102 Wis. 444, 78 N. W. 742; Garlick *v.* Karger, 97 Wis. 156, 72 N. W. 223.

United States.— New York Commercial Co. *v.* Francis, 101 Fed. 16, 41 C. C. A. 167; New York Commercial Co. *v.* Francis, 96 Fed. 266; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

See 38 Cent. Dig. tit. "Partnership," § 317.

Settlement conclusive.—A settlement be-

d. Rights and Liens of Partners as Creditors of the Firm. Although a partner may be a creditor of his firm for loans or sales to it, or for payments made for it, a court of equity, in marshaling firm assets, applies these to the payment of outside creditors, before permitting him to share them.[73] After such creditors are paid, equity secures to the creditor partner a lien on the balance of the firm assets,[74] to the exclusion of the individual creditors of his copartner.[75]

tween partners which determines their respective interests in a certain partnership fund is conclusive as to the rights of their individual creditors to such fund. Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin *v.* Bennett, 51 Fed. 693.

Acquiescence of copartners.— Creditors of an individual partner will not be allowed to apply the firm assets to the payment of his individual debts, to the prejudice of partnership creditors, even though his copartners acquiesce therein. Carter *v.* Galloway, 36 La. Ann. 473.

Individual debts of a partner incurred before he entered the firm are entitled to payment out of the capital put into the firm by such partner before his copartner is reimbursed for his payment of firm debts. Killefer *v.* McLain, 70 Mich. 508, 38 N. W. 455.

United States a creditor.— Where one of a partnership is indebted to the United States, and an assignment is executed of the joint and several property of the partners. the United States is not entitled to a preference over the joint creditors for the payment of such individual debt, out of the assets of the partnership. U. S. *v.* Baulos, 5 Mart. N. S. (La.) 567; U. S. *v.* Hack, 8 Pet. (U. S.) 271, 8 L. ed. 941; Ames *v.* Ames, 37 Fed. 30; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523; U. S. *v.* Evans, 25 Fed. Cas. No. 15,062, Crabbe 60.

73. *Alabama.*— Coster *v.* Georgia Bank, 24 Ala. 37.

Kentucky.— Wilkerson *v.* Tichenor, 62 S. W. 870, 23 Ky. L. Rep. 244.

Maryland.— Pott *v.* Schmucker, 84 Md. 535, 36 Atl. 592, 57 Am. St. Rep. 415, 35 L. R. A. 392; Conkling *v.* Washington University, 2 Md. Ch. 497.

Missouri.— Ross *v.* Carson, 32 Mo. App. 148.

Nebraska.—Roop *v.* Herron, 15 Nebr. 73, 17 N. W. 353.

New Jersey.— Edison Electric Illuminating Co. *v.* De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Uhler *v.* Semple, 20 N. J. Eq. 288.

New York.— *In re* Rieser, 19 Hun 202 [*affirmed* in 81 N. Y. 629]; Coffin *v.* Hollister, 5 Silv. Sup. 172, 7 N. Y. Suppl. 734 [*affirmed* in 124 N. Y. 644, 26 N. E. 812].

Pennsylvania.— Barr *v.* McFall, 131 Pa. St. 304, 18 Atl. 876; Zell's Appeal, 111 Pa. St. 532, 6 Atl. 107; Gordon's Estate, 11 Phila. 136.

Rhode Island.— Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

Texas.— Schuster *v.* Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93.

Wisconsin.— Gibbs *v.* Humphrey, 91 Wis. 111, 64 N. W. 750, applying the doctrine to a holding-out partner.

United States.— Wallerstein *v.* Ervin, 112 Fed. 124, 50 C. C. A. 129 [*affirming* 109 Fed. 135].

England.— Kay *v.* Johnston, 21 Beav. 536, 52 Eng. Reprint 967.

Canada.— See *In re* Ruby, 24 Ont. App. 509.

See 38 Cent. Dig. tit. "Partnership," § 318.

But see Rowlett *v.* Grieve, 8 Mart. (La.) 483, 13 Am. Dec. 296, holding that a partner who pays partnership debts is subrogated to the creditor's rights on the joint property.

The assignee of a partner who is a creditor stands on an equality with the other creditors. Frank *v.* Anderson, 13 Lea (Tenn.) 695.

Rights of indorsee of firm note payable to a partner.— Where a note is made by a firm payable to a member of the firm, who indorses it, the indorsee takes only such rights as the indorser had, and cannot therefore enforce it against the partnership until after the firm debts are paid. Simrall *v.* O'Bannons, 7 B. Mon. (Ky.) 608.

74. Boyce *v.* Coster, 4 Strobh. Eq. (S. C.) 25. See also Gillespie *v.* Salmon, 2 Cal. App. 501, 84 Pac. 310.

75. *Alabama.*— Warren *v.* Taylor, 60 Ala. 218.

Illinois.— Rainey *v.* Nance, 54 Ill. 29.

Kentucky.— Walter *v.* Herman, 110 Ky. 800, 62 S. W. 857, 23 Ky. L. Rep. 741.

Louisiana.— Purdy *v.* Hood, 5 Mart. N. S. 626, a partner, if a creditor of the partnership, is preferred to a creditor of one of the partners.

Maine.— Crooker *v.* Crooker, 52 Me. 267, 83 Am. Dec. 509.

Maryland.— Pierce *v.* Tiernan, 10 Gill & J. 253; Conkling *v.* Washington University, 2 Md. Ch. 497.

New York.— Cheeseman *v.* Sturges, 6 Bosw. 520; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305.

North Carolina.— Mendenhall *v.* Benbow, 84 N. C. 646.

Texas.— Moore *v.* Steele, 67 Tex. 435, 3 S. W. 448.

Virginia.— Christian *v.* Ellis, 1 Gratt. 396.

United States.— Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

England.— *Ex p.* King, 1 Rose 212, 17 Ves. Jr. 115, 1 Rev. Rep. 34, 34 Eng. Reprint 45.

See 38 Cent. Dig. tit. "Partnership," § 318.

This lien does not extend, however, to claims against a copartner arising out of matters not connected with the partnership. Nichol *v.* Stewart, 36 Ark. 612; Stone *v.* Manning, 3 Ill. 530, 35 Am. Dec. 119.

3. Transactions of Partners Affecting Firm Creditors — a. Diversion of Firm Assets. Any transfer of partnership assets by an insolvent firm which operates to hinder and delay the firm creditors in the collection of their claims is held invalid by most courts.[76] If, however, a firm is solvent, after transferring part of its assets,[77] or if the firm has the benefit of the transfer, it is not invalid.[78]

b. Assumption by Firm of Individual Debts. The assumption of the individual debts of a partner by his firm will be upheld if the firm is solvent,[79] otherwise it will not,[80] unless the transaction is shown to be honest, and for the benefit of the firm.[81]

c. Assignments For Firm Creditors — (i) *In General.* In the absence of a statutory provision on the subject, a partnership may assign all or a part of its property for the benefit of firm creditors with preferences;[82] but it is a fraud upon firm creditors to prefer individual creditors.[83] It is generally held that any partner, under his implied power to sell and to pay debts, may apply partnership property to the satisfaction of particular debts of the firm, although he thereby gives a preference to such creditors over others.[84]

76. Bartlett *v.* Meyer-Schmidt Grocer Co., 65 Ark. 290, 45 S. W. 1063; Bliss *v.* Hornthal, 33 N. Y. App. Div. 225, 53 N. Y. Suppl. 493; Matter of Petze, 26 Misc. (N. Y.) 72, 56 N. Y. Suppl. 482; *In re* Kemptner, L. R. 8 Eq. 286, 21 L. T. Rep. N. S. 223, 17 Wkly. Rep. 818.

77. Densmore Commission Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114, firm solvent at time of transfer, which was made in good faith.

78. Parker *v.* Bowles, 57 N. H. 491, firm had benefit of improvements made with firm funds upon individual real estate appropriated to firm use, and no intent to defraud firm creditors shown.

79. Nordlinger *v.* Anderson, 123 N. Y. 544, 25 N. E. 992; Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529; Powell's Estate, 7 Pa. Dist. 27; *Ex p.* Hill, 1 Deac. 123, 3 Mont. & A. 175, 38 E. C. L. 573.

80. Kidder *v.* Page, 48 N. H. 380; James *v.* Vanzandt, 163 Pa. St. 171, 29 Atl. 879; Walker *v.* Marine Nat. Bank, 98 Pa. St. 574. And see Riddle *v.* McLester-Van Hoose Co., 145 Ala. 307, 40 So. 101.

81. Denver First Nat. Bank *v.* Follett, 20 Colo. App. 372, 80 Pac. 147; Keith *v.* Fink, 47 Ill. 272, strong proof will be required as against partnership creditors that the transaction was honest, was based on a valuable consideration, and was for the benefit of the firm.

82. *Alabama.*— Harmon *v.* McRae, 91 Ala. 401, 8 So. 548.

Iowa.— Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023.

Kentucky.— See Hill *v.* B. M. Creel Co., 35 S. W. 537, 18 Ky. L. Rep. 132.

Minnesota.— See Dispatch Printing Co. *v.* George, 83 Minn. 309, 86 N. W. 339.

Nebraska.— Campbell *v.* Farmers', etc., Bank, 49 Nebr. 143, 68 N. W. 344; Ætna Ins. Co. *v.* Wilcox Bank, 48 Nebr. 544, 67 N. W. 449.

New York.— See George *v.* Grant, 28 Hun 69 [*affirmed* in 97 N. Y. 262].

Wisconsin.— Griswold *v.* Nichols, 117 Wis. 267, 94 N. W. 33.

Canada.— Ball *v.* Tennant, 25 Ont. 50 [*reversed* on other grounds in 21 Ont. App. 602].

See 38 Cent. Dig. tit. "Partnership," § 322.

83. Saunders *v.* Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Murray *v.* Gerety, 11 N. Y. Suppl. 205, 25 Abb. N. Cas. 161; Burhans *v.* Kelly, 2 N. Y. Suppl. 175.

Partnership in failing circumstances.—A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others, and the same rule applies where the debtor is a firm, so long as the payments are made in good faith to creditors of the partnership. Richards *v.* Leveille, 44 Nebr. 38, 62 N. W. 304; Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; Deitrich *v.* Hutchinson, 20 Nebr. 52, 29 N. W. 247; Citizens' Nat. Bank *v.* Riddell, 2 N. Y. Suppl. 331.

Assignment for creditor who is a partner.— An assignment made by all of the partners to secure a creditor who is also a partner is invalid as against outside firm creditors. Johnson *v.* Rothschilds, 63 Ark. 518, 41 S. W. 996.

In New York, under 1 Rev. St. p. 766, § 20, providing that transfers of property by partnerships when insolvent, or in contemplation of insolvency, to any creditor of the firm with preferential intent shall be void as against creditors, each creditor of an insolvent partnership has the right to assert any lien he may have against the assets for his exclusive benefit. Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147.

84. Hanchett *v.* Gardner, 138 Ill. 571, 28 N. E. 788 [*affirming* 37 Ill. App. 79]; Bulger *v.* Rosa, 53 Hun (N. Y.) 239, 6 N. Y. Suppl. 38 [*affirmed* in 119 N. Y. 459, 24 N. E. 853]; McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. 331, 23 How. Pr. 175; Goodman *v.* Goetz, 13 N. Y. Suppl. 267; Russell's Appeal, 2 Walk. (Pa.) 363 [*affirming* 12 Wkly. Notes Cas. 419].

The other partners may prevent such a preference by forbidding the transfer, or dissenting before it is complete. Ellis *v.* Al-

(II) *Fraud in Assignments.*[85] Where an assignment is executed by one partner with a fraudulent intent to hinder and delay the creditors of the firm, it is absolutely void, whether such intent and purpose are participated in by his copartners or not.[86] But where a firm and the individual partners make separate and distinct assignments, the fraud of one partner in his assignment does not vitiate the other assignments.[87] An assignment which fails to provide for the payment of partnership creditors before individual creditors is void.[88] An assignment by one partner to the other of all the property of the firm in trust to pay the assignee's expenses in defending suits which may be brought against the firm, and in obtaining the benefit of the insolvent act, and to apply the residue to the payment of firm debts is fraudulent;[89] and so is such an assignment of all the property of the firm which cannot be reached by execution in trust to pay all the debts of the firm.[90] The reservation of the homesteads of partners in an assignment by a firm does not render such assignment void.[91] A general assignment by a firm of all partnership and individual property, for the benefit of all firm creditors accepting it, is not void, as against individual creditors, as these can, although not named in the assignment, enforce their rights by suit against the assignee, without avoiding the assignment.[92] Where one partner, with the consent of his copartner, executes a deed of assignment of the partnership effects, for the payment of his individual debts, after paying to the copartner, out of the proceeds of the partnership property, a sum equal to such partner's interest therein, it will not be treated as a fraud upon creditors, nor as a reservation of a portion of the partnership property for the benefit of the copartner, as against his own creditors.[93] A voluntary assignment by a firm doing business in the names of the individual partners, treating all their property as firm property and all their debts as firm debts, is not fraudulent as to creditors, although they did not know of the copartnership.[94] Where one of the members of a firm, with his copartner's consent, withdraws a portion of the firm assets for the purpose of paying his individual debts, and is charged therefor on the books of the firm, the portion so withdrawn ceases to be a part of the firm assets, and the omission from a subsequent assign-

len, 80 Ala. 515, 2 So. 676; Bass *v.* Messick, 30 La. Ann. 373.

85. See, generally, Assignments For Benefit of Creditors; Fraudulent Conveyances.

Assignment by infant partner.—An assignment for the benefit of creditors, made by copartners, is not fraudulent and void in law because one of the assignors is an infant. If voidable, it can only be avoided at the election of the infant; and, where he has ratified it after his coming of age, no fraud in fact can be claimed because of the infancy. Yates *v.* Lyon, 61 N. Y. 344 [*reversing* 61 Barb. 205]. See, generally, Infants.

Admissibility of evidence.— Where a partnership assignment of partnership property is attacked for fraud, proof that one of the partners had previously assigned to the same assignee portions of his individual property on a secret trust in his own favor is not admissible to establish such fraud, although it might be admissible in case of an assignment of all the property, joint and individual, of the partners. Guerin *v.* Hunt, 6 Minn. 375.

In Texas where an assignment is made under the statute, no act of the assignor or assignee at the time the assignment is made, or preceding but in contemplation of it, however fraudulent the act, can divest the right of creditors to have the estate administered for their benefit in accordance with the spirit of the statute, and therefore, where one of two partners sells to the other his interest in the partnership assets, and the purchaser then makes a general assignment of all his property for the benefit of creditors, the creditors of the firm cannot attach the property on the ground that the partnership assets were fraudulently withdrawn; they must proceed as general creditors under the assignment. Schneider *v.* De Smith, 2 Tex. Unrep. Cas. 317 [*citing* Blum *v.* Welborne, 58 Tex. 157].

86. Fourth Nat. Bank *v.* Burger, 15 N. Y. St. 101.

87. Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412.

88. Peckham *v.* Mattison, 15 Abb. N. Cas. (N. Y.) 367 note; Friend *v.* Michaelis, 15 Abb. N. Cas. (N. Y.) 354.

89. Sewall *v.* Russell, 2 Paige (N. Y.) 175.

90. Sewall *v.* Russell, 2 Paige (N. Y.) 175.

91. Severson *v.* Porter, 73 Wis. 70, 40 N. W. 577.

92. Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

93. Mandel *v.* Peay, 20 Ark. 325.

94. Severson *v.* Porter, 73 Wis. 70, 40 N. W. 577.

ment of the firm assets will not be fraudulent.[95] Where the only effect of a provision authorizing the assignee in a partnership assignment to pay the individual debts of each partner from the combined individual assets is to divert a very small sum from the payment of a very great indebtedness, the smallness of the sum diverted will furnish proof of the absence of fraudulent intent.[96] Where one partner makes a secret conveyance of his interest in an insolvent partnership to a creditor, and his copartner upon learning of the transfer takes such creditor in and continues the business with him, without notifying creditors of the change, an assignment afterward made as the act and deed of the new firm, and for the benefit of its creditors, is fraudulent and void as to the creditors of the old firm.[97]

d. Transfers to Third Persons. So long as a partnership is an acting concern, it is entitled to transfer its property, and such a transfer to an honest purchaser for value is not impeachable[98] because the members of the firm use the proceeds for their individual benefit;[99] nor is such purchaser liable for firm debts.[1] If, however, the transfer is not fair and *bona fide*, but is made and accepted to defeat firm creditors, they may have it set aside as a fraud upon them.[2] A transfer by a partner of his interest in the firm assets is *prima facie* valid as to firm creditors,[3] for it conveys to the purchaser only the selling partner's interest in any surplus remaining after firm debts are paid.[4] If a partner transfers firm property in satisfaction of his own debts it is impeachable by firm creditors.[5]

e. Transfer of Firm Assets to Partner or New Firm. A valid sale of the partnership property by the firm to one or more of its members, or to a new firm in which some of the former partners are members, puts an end to the old part-

95. Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412.

96. Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174.

97. Cleveland *v.* Battle, 68 Tex. 111, 3 S. W. 681.

98. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Connecticut.—Allen *v.* Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333, an acting concern, although insolvent, may transfer its property.

Illinois.— Singer *v.* Carpenter, 125 Ill. 117, 17 N. E. 761 [*affirming* 26 Ill. App. 28].

Indiana.— Frank *v.* Peters, 9 Ind. 343, 344, "The simple fact that men may be insolvent, in the popular sense of the word, does not deprive them of the power of selling their property by *bona fide* sales."

Kansas.—Woodmansie *v.* Holcomb, 34 Kan. 35, 7 Pac. 603.

Massachusetts.—Arnold *v.* Brown, 24 Pick. 89, 35 Am. Dec. 296.

New York.— Field *v.* Chapman, 15 Abb. Pr. 434 (the right of a creditor of a partnership is subordinate to the power of a partner to make a *bona fide* disposition of the property before it is subjected to the creditor's lien); Field *v.* Hunt, 24 How. Pr. 463.

Ohio.— Gwin *v.* Selby, 5 Ohio St. 96.

South Carolina.— Boozer *v.* Webb, 25 S. C. 82.

United States.— Austin *v.* Seligman, 18 Fed. 519, 21 Blatchf. 506; Francklyn *v.* Sprague, 121 U. S. 215, 7 S. Ct. 951, 30 L. ed. 936.

See 38 Cent. Dig. tit. "Partnership," § 323.

99. Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

1. Frank *v.* Peters, 9 Ind. 343.

If the purchaser agrees to pay the partnership debts in consideration for the transfer, firm creditors may avail themselves of this promise. Olson *v.* Morrison, 29 Mich. 395.

2. Kelley *v.* Flory, 84 Iowa 671, 51 N. W. 181; Flack *v.* Charron, 29 Md. 311; Van Doren *v.* Stickle, 24 N. J. Eq. 331 [*affirmed* in 27 N. J. Eq. 498].

When transfer by active to dormant partner invalid see Elliot *v.* Stevens, 38 N. H. 311; How *v.* Kane, 2 Pinn. (Wis.) 531, 54 Am. Dec. 152, 2 Chandl. 222.

3. Long *v.* West, 31 Kan. 298, 1 Pac. 545; Kimball *v.* Thompson, 13 Metc. (Mass.) 283; Tennant *v.* McKean, 46 Mo. App. 486; Nelson *v.* Kinney, 93 Tenn. 428, 25 S. W. 100.

4. Spurr *v.* Russell, 59 N. H. 338; Morss *v.* Gleason, 64 N. Y. 204; Doner *v.* Stauffer, 1 Penr. & W. (Pa.) 198, 21 Am. Dec. 370; Roberts *v.* Dunham, 1 C. Pl. (Pa.) 136; Still *v.* Focke, 66 Tex. 715, 2 S. W. 59.

Where each partner sells his interest severally to the same person, and neither partner remains in possession of the property, it is held that the equities of the partners are gone, and that the derivative right of firm creditors to have the firm property applied to firm debts has nothing to rest upon, and the purchaser can hold the property free from their claims. McNutt *v.* Strayhorn, 39 Pa. St. 269; Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752; Doner *v.* Stauffer, 1 Penr. & W. (Pa.) 198, 21 Am. Dec. 370.

In South Carolina it has been held that an assignment by one partner of his interest in the firm property is valid at law against the creditors of the firm. Norris *v.* Vernon, 8 Rich. 13; Wilson *v.* Bowden, 8 Rich. 9; Hunt *v.* Smith, 3 Rich Eq. 465.

5. Luce *v.* Barnum, 19 Mo. App. 359; Hartley *v.* White, 94 Pa. St. 31.

nership title and destroys the lien of the partners thereon, as well as the preference of the old partnership creditors therein over the individual creditors of the purchasing partner.[6] If the firm and the purchasing partner are solvent, a transfer of the firm property to the purchaser, in consideration of his assuming the debts of the firm, vests him with full ownership and frees the property from any lien for the payment of firm debts.[7] If the contract provides, however, that the purchasing partner shall use the assets in paying the firm debts, or if by any other provision the selling partners retain their right to have the assets applied in discharge of firm debts, such assets in the hands of the purchasing partner will be treated in equity as partnership assets, and available to firm creditors as such.[8]

6. *Alabama.*— Mayer *v.* Clark, 40 Ala. 259; Reese *v.* Bradford, 13 Ala. 837.

Arkansas.— Jones *v.* Fletcher, 42 Ark. 422.

Colorado.— Brown *v.* Miller, 11 Colo. 431, 18 Pac. 617.

Florida.—Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33.

Illinois.— Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565; Ladd *v.* Griswold, 9 Ill. 25, 46 Am. Dec. 443.

Indiana.— Purple *v.* Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Dunham *v.* Hanna, 18 Ind. 270.

Kansas.— Kincaid *v.* National Wall-Paper Co., 63 Kan. 288, 65 Pac. 247, 88 Am. St. Rep. 243, 54 L. R. A. 412; Burton *v.* Baum, 32 Kan. 641, 5 Pac. 3, a partner may, in the absence of fraudulent intent, purchase property fraudulently mortgaged by his firm from the mortgagee thereof, and may hold it, if of a kind exempt from execution, as against firm creditors.

Michigan.— Topliff *v.* Vail, Harr. 340.

Mississippi.— Fulton *v.* Hughes, 63 Miss. 61; Parish *v.* Lewis, Freem. 299, the right to have partnership property applied to the payment of partnership debts is the right of the partners, and they may terminate it at any time by the sale of the stock in trade by one partner to another.

Missouri.— Norris *v.* Rumsey, 54 Mo. App. 143.

New York.—Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529; Ketchum *v.* Durkee, 1 Barb. Ch. 480, 45 Am. Dec. 412; Robb *v.* Stevens, Clarke 130.

North Carolina.— Latham *v.* Skinner, 62 N. C. 292.

Ohio.— Mortley *v.* Flanagan, 38 Ohio St. 401; Belknap *v.* Cram, 11 Ohio 411; Wilcox *v.* Kellogg, 11 Ohio 394; Pfirrman *v.* Koch, 1 Cinc. Super. Ct. 460.

Texas.— Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

United States.—Johnston *v.* Straus, 26 Fed. 57; Shimer *v.* Huber, 21 Fed. Cas. No. 12,787, 19 Nat. Bankr. Reg. 414, 8 Reports 393, 14 Phila. (Pa.) 402.

England.— *Ex p.* Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970.

See 38 Cent. Dig. tit. "Partnership," § 324.

If, upon a voluntary dissolution of a partnership, one partner transfers to the other all the partnership property, the partnership creditors have no right in equity against such property, but the property can only be reached by creditors, partnership as well as individual, by judgment and execution. Sage *v.* Chollar, 21 Barb. (N. Y.) 596.

Where the surviving partner transfers partnership assets to the administrator of the deceased partner in the settlement of partnership affairs, the priority of partnership creditors as to such assets is lost. Rose *v.* Gunn, 79 Ala. 411.

The sale of one partner's interest to a copartner, when the firm consists of more than two members, does not convert the partnership title into the separate title of the purchaser, nor affect the rights of the firm creditors to the firm assets. Rosenstiel *v.* Gray, 112 Ill. 282; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; *Ex p.* Burnaby, Cooke Bankr. L. 244.

7. *California.*— Conroy *v.* Woods, 13 Cal. 626, 73 Am. Dec. 605.

Illinois.— Hapgood *v.* Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Williamson *v.* Adams, 16 Ill. App. 564.

Iowa.— Maquoketa *v.* Willey, 35 Iowa 323.

New Hampshire.— Caldwell *v.* Scott, 54 N. H. 414.

North Carolina.— Rankin *v.* Jones, 55 N. C. 169.

Pennsylvania.— Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752.

See 38 Cent. Dig. tit. "Partnership," § 325.

8. *Kentucky.*— Bowman *v.* Spalding, 2 S. W. 911, 8 Ky. L. Rep. 691, holding the continuing partners to be trustees of the assets for the old firm creditors.

Michigan.— Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54.

Missouri.— Phelps *v.* McNeely, 66 Mo. 554, 27 Am. Rep. 378.

New York.— Morss *v.* Gleason, 64 N. Y. 204; Matter of Dawson, 59 Hun 239, 12 N. Y. Suppl. 781; Bulger *v.* Rosa, 53 Hun 239, 6 N. Y. Suppl. 38 [*affirmed* in 119 N. Y. 459, 24 N. E. 853]; Wildes *v.* Chapman, 4 Edw. 669.

Pennsylvania.— Fries *v.* Ennis, 132 Pa. St. 195, 19 Atl. 59.

Texas.— Mensing *v.* Atchison, (Civ. App. 1894) 26 S. W. 509.

United States.— McClean *v.* Miller, 15 Fed. Cas. No. 8,692, 2 Cranch C. C. 620; Sedam *v.* Williams, 21 Fed. Cas. No. 12,609, 4 McLean 51.

England.— *Ex p.* Morley, L. R. 8 Ch. 1026, 43 L. J. Bankr. 28, 29 L. T. Rep. N. S. 442, 21 Wkly. Rep. 940; *Ex p.* Manchester Bank, 12 Ch. D. 917, 48 L. J. Bankr. 94, 40 L. T. Rep. N. S. 723 [*affirmed* in 13 Ch. D. 465, 42

In the case of insolvency of the firm and purchasing partner, the courts are disposed to find some loophole for the benefit of firm creditors.[9] Even when the firm and purchasing partner are insolvent, if the sale is made for a consideration which is valuable to the firm estate and in good faith, it transforms the firm ownership into the separate ownership of the purchaser, and puts an end to all claim of firm creditors to have it administered as firm property.[10] In some jurisdictions the same result is held to follow a sale by an insolvent firm to an insolvent partner, although no value is given by the latter to the former, beyond a promise to pay the firm debts, provided the parties have no actual intent to defraud the firm creditors.[11] But the view which generally prevails is that such a promise by an insolvent purchaser is not a thing of value to the firm estate; that the necessary object and consequence of such a transfer with its transformation of firm title into the separate title of the purchaser are to defeat and delay the firm creditors, and consequently that it is voidable by them.[12] The transfer of firm property by a firm to one of its members is not assailable by the individual creditors of the retiring partners, because their rights are not affected thereby.[13] When the purchasing partner assumes the debts of the firm, firm creditors are generally entitled to accept him as their debtor, in the place of the firm, and to share *pari passu*

L. T. Rep. N. S. 299, 28 Wkly. Rep. 484]; *Ex p.* Wheeler, Buck 25.

See 38 Cent. Dig. tit. "Partnership," § 325.

9. See Olson *v.* Morrison, 29 Mich. 395; Thayer *v.* Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549; *Ex p.* Clarkson, 4 Deac. & C. 56, 2 Mont. & A. 4.

10. *Arkansas.*— Hudgins *v.* Rix, 60 Ark. 18, 28 S. W. 422, 30 S. W. 767.

Louisiana.— Hagan *v.* Scott, 10 La. 345.

Tennessee.—Cleveland Nat. Bank *v.* Bryant, (Ch. App. 1899) 54 S. W. 73.

Texas.— Sanchez *v.* Goldfrank, (Civ. App. 1894) 27 S. W. 204.

Utah.— Douglas *v.* Alder, 13 Utah 303, 44 Pac. 706.

See 38 Cent. Dig. tit. "Partnership," § 324.

11. *Florida.*— Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33.

Indiana.— Purple *v.* Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535.

Kansas.— Kincaid *v.* National Wall-Paper Co., 63 Kan. 288, 65 Pac. 247, 88 Am. St. Rep. 243, 54 L. R. A. 412.

Missouri.— Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564 [*distinguished* in McDonald *v.* Cash, 45 Mo. App. 66].

Ohio.— Wilcox *v.* Kellogg, 11 Ohio 394.

United States.—Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971. But see *In re* Worth, 130 Fed. 927.

See 38 Cent. Dig. tit. "Partnership," § 324.

12. *Alabama.*— Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226; Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822.

Arkansas.— Bartlett *v.* Meyer-Schmidt Grocer Co., 65 Ark. 290, 45 S. W. 1063.

Illinois.— *In re* Landfield, 80 Ill. App. 417.

Iowa.— Kelley *v.* Flory, 84 Iowa 671, 51 N. W. 181.

Kentucky.— Wilson *v.* Soper, 13 B. Mon. 411, 56 Am. Dec. 573.

Louisiana.— Saloy *v.* Albrecht, 17 La. Ann. 75; Beer's Succession, 12 La. Ann. 698, 699, in which it is said: "the rights of the creditors of a partnership would be too precarious if they might be defeated by the sale of one or more of the partners of his interest in the partnership to his co-partners. The law has not said that they shall lose their right of preference by such change in the number of the members of the firm, and we cannot decree what the law has not ordained."

Maryland.— Franklin Sugar Refining Co. *v.* Henderson, 86 Md. 452, 38 Atl. 991, 63 Am. St. Rep. 524. *Compare* Armstrong *v.* Fahnestock, 19 Md. 58, where due notice of the dissolution and of the continuance of the business by the purchasing partner being given, and there being no intent to defraud firm creditors, the transfer was upheld.

Mississippi.— Jackson Bank *v.* Durfey, 72 Miss. 971, 18 So. 456, 48 Am. St. Rep. 596, 31 L. R. A. 470.

Nebraska.— Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

New Jersey.—Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712; Red Bank Second Nat. Bank *v.* Farr, (Ch. 1887) 7 Atl. 892.

New York.—Stanton *v.* Westover, 101 N. Y. 265, 4 N. E. 529; Brayton *v.* Sherman, 45 N. Y. App. Div. 58, 60 N. Y. Suppl. 1118 [*affirmed* in 166 N. Y. 610, 59 N. E. 1119].

West Virginia.— Baer *v.* Wilkinson, 35 W. Va. 422, 14 S. E. 1; Darby *v.* Gilligan, 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740.

Wisconsin.— Cribb *v.* Morse, 77 Wis. 322, 46 N. W. 126.

England.— *Ex p.* Mayou, 4 De G. J. & S. 664, 11 Jur. N. S. 433, 34 L. J. Bankr. 25, 12 L. T. Rep. N. S. 254, 13 Wkly. Rep. 629, 69 Eng. Ch. 508, 46 Eng. Reprint 1076.

Canada.— *In re* Caton, 26 U. C. C. P. 308.

See 38 Cent. Dig. tit. "Partnership," § 324.

13. *Iowa.*— Evans *v.* Hawley, 35 Iowa 83.

Louisiana.— Christen *v.* Ruhlman, 22 La. Ann. 570.

Maryland.— Pierce *v.* Tiernan, 10 Gill & J. 253.

with his individual creditors thereafter.[14] But such a transaction cannot relieve the members of the old firm from their liability to firm creditors without the latters' consent.[15]

f. Dividing Firm Assets Among Partners. When a firm is solvent, the partners have a perfect right to divide the property between them, and thus convert it into separate estates. After such a valid division, each partner is entitled to deal with the property thus set off to him, as he is with any other individual property.[16] If, however, a firm is insolvent, the better view seems to be that a division of assets among the partners is invalid against firm creditors who are thereby prevented from enforcing their claims against the property as firm assets.[17] But in a number of decisions such transactions have been upheld, on the ground that the firm creditors have no lien on firm property except through the equities of the partners, and that the partners can waive their equities by consenting to a division.[18]

g. Mortgaging Firm Property For Firm Debts. The power of a partner to mortgage firm property to secure firm debts has been already considered.[19] In this connection it is necessary only to note that when a valid partnership mortgage has been placed on firm property, either by one partner or by all of the partners, it is not impeachable by other firm creditors because it gives to the mortgagee a preference over them;[20] and it takes precedence over the lien of judgments against the partners by individual creditors.[21]

h. Mortgage of Partner's Interest or Share. A mortgage of a partner's interest in partnership property, although made to secure individual debts of the mortgaging partner, is valid; but its lien is subject to the superior claims of the firm creditors. In other words it passes only the ultimate share of such partner, that is, the amount due to him after the payment of firm debts and the adjustment of the equities of his copartners.[22] If firm real estate is allowed to stand in the

New York.— Bush Co. *v.* Gibbons, 87 N. Y. App. Div. 576, 84 N. Y. Suppl. 478; Griffin *v.* Cranston, 1 Bosw. 281; Boynton *v.* Page, 13 Wend. 425.

Texas.— Texas Drug Co. *v.* Baker, 20 Tex. Civ. App. 684, 50 S. W. 157.

See 38 Cent. Dig. tit. "Partnership," § 324.

14. Warren *v.* Farmer, 100 Ind. 593; Robb *v.* Mudge, 14 Gray (Mass.) 534; McManus *v.* Smith, 37 Oreg. 222, 61 Pac. 844. See also Schneider *v.* Roe, (Tex. Civ. App. 1894) 25 S. W. 58, holding that where a new firm assumed the debts of an old one the creditors of both firms were entitled to share *pari passu* in the new firm's assets.

15. *New York.*— Ward *v.* Woodburn, 27 Barb. 346.

South Carolina.— Jones *v.* Smith, 31 S. C. 527, 10 S. E. 340.

Texas.— Yeager *v.* Focke, 6 Tex. Civ. App. 542, 25 S. W. 662.

West Virginia.— Conaway *v.* Stealey, 44 W. Va. 163, 28 S. E. 793.

United States.— Nixdorff *v.* Smith, 16 Pet. 132, 10 L. ed. 913.

See 38 Cent. Dig. tit. "Partnership," § 324.

16. Allen *v.* Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Whitworth *v.* Benbow, 56 Ind. 194; Poole *v.* Seney, 66 Iowa 502, 24 N. W. 27.

17. Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933 (partners divided the assets, in order to claim exemptions out of it, and the transaction was adjudged a fraud upon firm creditors); Clements *v.* Jessup, 36 N. J. Eq. 569; Ransom *v.* Vandeventer, 41 Barb. (N. Y.) 307; Ruhl *v.* Phillips, 2 Daly (N. Y.) 45 [*reversed* on other grounds in 48 N. Y. 125, 8 Am. Rep. 522]; Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16. And see *supra*, VI, C, 3, e.

18. Lee *v.* Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456; Fisher *v.* Syfers, 109 Ind. 514, 10 N. E. 306; Bedford *v.* McDonald, 102 Tenn. 358, 52 S. W. 157; Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971 [*reversing* 14 Fed. 155].

19. See *supra*, VI, A, 5.

20. *Georgia.*— Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303.

Iowa.— Smith *v.* Smith, (1891) 50 N. W. 64; Letts *v.* McMaster, 83 Iowa 449, 49 N. W. 1035; Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551; Fromme *v.* Jones, 13 Iowa 474.

Kansas.— See Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796.

Michigan.— Walker *v.* White, 60 Mich. 427, 27 N. W. 554, holding a mortgage to be valid as to the firm debts, although it purported to secure also an individual debt of one partner.

Texas.— Wiggins *v.* Blackshear, 86 Tex. 665, 26 S. W. 939.

Wisconsin.— Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422.

See 38 Cent. Dig. tit. "Partnership," § 329.

21. Morton *v.* Higgins, 7 N. J. L. J. 343; Huggins *v.* White, 7 Tex. Civ. App. 563, 27 S. W. 1066.

22. *Alabama.*— Sloan *v.* Wilson, 117 Ala.

name of the mortgaging partner, one who loans money to him and takes a mortgage thereon without notice of the firm's rights acquires a lien prior to the claims of the firm creditors.[23]

i. Mortgage Between Partners. A mortgage of firm property by the firm to a partner, or by one partner to another, is not invalid because of the partnership relation,[24] although the fact that the parties are partners, as well as evidence of the manner in which they carry on their business, is competent when the mortgage is attacked as fraudulent.[25] Such a mortgage is subordinate to the rights of firm creditors.[26]

583, 23 So. 145; Fields *v.* Brice, 108 Ala. 632, 18 So. 742.

Arkansas.— Embry *v.* Lewis, (1892) 18 S. W. 372.

California.— Jones *v.* Parsons, 25 Cal. 100; Chase *v.* Steel, 9 Cal. 64.

Indiana.— Lewis *v.* Harrison, 81 Ind. 278; Conant *v.* Frary, 49 Ind. 530; Kistner *v.* Sindlinger, 33 Ind. 114.

Iowa.— Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84, such a mortgage takes precedence of the copartners' lien or equity, if the latter consent to the act of the mortgaging partner.

Kentucky.— Commonwealth Bank *v.* Herndon, 1 Bush 359, 89 Am. Dec. 630; Divine *v.* Mitchum, 4 B. Mon. 488, 41 Am. Dec. 241; Conwell *v.* Sandidge, 8 Dana 273, where the purchasers of a retiring partner's share give a mortgage to the retiring partner on the shares bought out by them, and subsequently the remaining partner makes advances to the partnership, the mortgage will have priority over the remaining partner's lien for such advances. *Compare* Mosely *v.* Garrett, 1 J. J. Marsh. 212.

Massachusetts.— Thompson *v.* Spittle, 102 Mass. 207.

Minnesota.— Churchill *v.* Proctor, 31 Minn. 129, 16 N. W. 694.

Missouri.— Ewart *v.* Nave-McCord Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Priest *v.* Chouteau, 85 Mo. 398, 55 Am. Rep. 373 [*affirming* 12 Mo. App. 252]; Ewart *v.* Tootle, 50 Mo. App. 322.

New Hampshire.— Lovejoy *v.* Bowers, 11 N. H. 404.

New Jersey.— Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334.

New York.— Barber *v.* Palmer, 70 Hun 498, 24 N. Y. Suppl. 451. *Compare* Ruhl *v.* Phillips, 2 Daly 45 [*reversed* on other grounds in 48 N. Y. 125, 8 Am. Rep. 522].

North Carolina.— Strauss *v.* Frederick, 91 N. C. 121.

Ohio.— Norwalk Nat. Bank *v.* Sawyer, 38 Ohio St. 339.

Rhode Island.— Patterson *v.* Atkinson, 20 R. I. 102, 37 Atl. 532.

South Carolina.— Rose *v.* Izard, 7 S. C. 442.

Texas.— Ft. Worth Nat. Bank *v.* Daugherty, 81 Tex. 301, 16 S. W. 1028; Johnston *v.* Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580.

Vermont.— Stebbins *v.* Willard, 53 Vt. 665.

West Virginia.— Cunningham *v.* Ward, 30 W. Va. 572, 5 S. E. 646; Maxwell *v.* Wheeling, 9 W. Va. 206.

See 38 Cent. Dig. tit. "Partnership," § 330.

A bona fide sale of partnership property, for the benefit of the partnership, is good as against a mortgage of the same property by one of the partners, to secure an individual debt. Shaw *v.* McDonald, 21 Ga. 395.

Mortgage in part security of debt of former firm.—A chattel mortgage of partnership property, given in part to secure a debt of a former partnership, and in part to secure the debt of the individual partners is not necessarily invalid as against creditors of the new firm. Fisher *v.* Syfers, 109 Ind. 514, 10 N. E. 306.

An attachment of firm property for a firm debt has precedence over a mortgage given by a partner to secure his individual debt. Fargo *v.* Ames, 45 Iowa 491.

Possession of mortgaged property.—A mortgagee of one partner cannot take possession of the partnership property under the mortgage. Aldridge *v.* Elerick, 1 Kan. App. 306, 41 Pac. 199.

Where no partnership in fact existed between persons alleged to have been partners, mortgages to secure creditors of one of them are valid as against an attachment issued by a creditor of the alleged firm. Densmore *v.* Mathews, 58 Mich. 616, 26 N. W. 146.

Where a partner conveys partnership realty in trust to secure his individual creditors, such realty remains subject to the payment of the partnership debts. Jones *v.* Neale, 2 Patt. & H. (Va.) 339. But real estate belonging to partners, if mortgaged by one of the firm, without notice to the mortgagee of partnership debts, is liable to the mortgagee before partnership creditors can satisfy their claims out of it. McDermot *v.* Laurence, 7 Serg. & R. (Pa.) 438, 10 Am. Dec. 468.

23. Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449 [*affirming* 34 Ill. App. 460]; Reeves *v.* Ayers, 38 Ill. 418; Seeley *v.* Mitchell, 85 Ky. 508, 4 S. W. 190, 9 Ky. L. Rep. 86; Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014. *Compare* Hiscock *v.* Phelps, 49 N. Y. 97.

24. Ricketts *v.* Croom, 102 Ala. 332, 14 So. 637; Waterman *v.* Hunt, 2 R. I. 298 (mortgage to secure an advancement made by a partner); Howell Bros. Shoe Co. *v.* Mars, 82 Tex. 493, 17 S. W. 370.

25. Curtis *v.* Wilcox, 91 Mich. 229, 51 N. W. 992; Strong *v.* Hines, 35 Miss. 201; Heilbronner *v.* Lloyd, 17 Mont. 299, 42 Pac. 853; Taylor *v.* Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466.

26. Ricketts *v.* Croom, 102 Ala. 332, 14

j. Mortgage or Assignment by Firm For Individual Debts. A solvent partnership may validly mortgage or assign or use its property to secure or pay the debts of a partner.[27] According to some of the decisions such a use of its property by an insolvent partnership is impeachable by firm creditors, who are thereby hindered, delayed, or prevented from enforcing their claims against the firm assets.[28] Other decisions, however, have sustained such use even by an insolvent partnership, when it was not accompanied by an actual intention to defraud.[29]

So. 637; Monroe *v.* Hamilton, 60 Ala. 226; Taylor *v.* Watts, 20 S. W. 388, 14 Ky. L. Rep. 451; Parish *v.* Phillips, 1 Mart. (La.) 96; Irwin *v.* Bidwell, 72 Pa. St. 244.

27. *Kansas.*— Woodmansie *v.* Holcomb, 34 Kan. 35, 7 Pac. 603, a transfer of partnership property to pay an individual debt is valid when made upon a *bona fide* consideration with the assent of all the partners.

Kentucky.— Jones *v.* Lusk, 2 Metc. 356.

Mississippi.— Schmidlapp *v.* Currie, 55 Miss. 597, 30 Am. Rep. 530.

Missouri.— McDonald *v.* Cash, 45 Mo. App. 66, the solvency required by law consists not only of the present ability to pay the firm debts, but such a condition of its resources that payment can be enforced by law.

Nebraska.— Wilson *v.* Gamble, 50 Nebr. 426, 69 N. W. 945; Miller *v.* Gunderson, 48 Nebr. 715, 67 N. W. 769.

New York.— Bingham *v.* Tuttle, 82 Hun 51, 31 N. Y. Suppl. 68; Nill *v.* Chidester, 6 N. Y. Suppl. 332.

United States.— See also McKinney *v.* Rosenband, 23 Fed. 785, 23 Blatchf. 235; Goodbar *v.* Cary, 16 Fed. 316, 4 Woods 663.

See 38 Cent. Dig. tit. "Partnership," §§ 331, 333.

Joint debt of individual partner.— It is not fraud as a matter of law for the members of a firm to appropriate firm property to the payment of a debt for which they are all liable, although not a firm indebtedness. Citizens' Bank *v.* Williams, 128 N. Y. 77, 28 N. E. 33, 26 Am. St. Rep. 454.

Authorization or ratification.— Where copartners by their language or actions authorize or ratify the application of firm assets to the payment of the individual debt of one of them all will be bound by such application. Larzelere *v.* Tiel, 3 Pa. Super. Ct. 109, 39 Wkly. Notes Cas. 320.

28. *Illinois.*— Keith *v.* Fink, 47 Ill. 272.

Michigan.— Heineman *v.* Hart, 55 Mich. 64, 20 N. W. 792.

Nebraska.— Rothell *v.* Grimes, 22 Nebr. 526, 35 N. W. 392.

New Hampshire.— Ferson *v.* Monroe, 21 N. H. 462; French *v.* Lovejoy, 12 N. H. 458. *Compare* Farwell *v.* Metcalf, 63 N. H. 276 [*distinguishing* Ferson *v.* Monroe, *supra*], holding that the appropriation of partnership property to the payment of the individual debts of a partner is valid as against subsequent creditors.

New Jersey.— Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066.

New York.— Ransom *v.* Vandeventer, 41 Barb. 307; Lester *v.* Pollock, 3 Rob. 691; *In re* Petze, 26 Misc. 72, 56 N. Y. Suppl. 482; Importers', etc., Nat. Bank *v.* Burger, 6 N. Y. Suppl. 189 [*affirmed* in 125 N. Y. 702, 26 N. E. 752].

West Virginia.— See Snyder *v.* Lunsford, 9 W. Va. 223.

Wisconsin.— See Cribb *v.* Morse, 77 Wis. 322, 46 N. W. 126. *Compare* Hill *v.* Armstrong, 65 Wis. 231, 26 N. W. 447; Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

England.— Young *v.* Keighly, 15 Ves. Jr. 557, 33 Eng. Reprint 865.

See 38 Cent. Dig. tit. "Partnership," §§ 331, 333.

29. *Arkansas.*— Reynolds *v.* Johnson, 54 Ark. 449, 16 S. W. 124.

Colorado.— See Rouss *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

Georgia.— Ellison *v.* Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. Rep. 242. See also Veal *v.* Keely Co., 86 Ga. 130, 12 S. E. 297.

Indiana.— Evansville Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953; Simmons Hardware Co. *v.* Thomas, 147 Ind. 313, 46 N. E. 645; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888; Purple *v.* Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Jewett *v.* Meech, 101 Ind. 289.

Iowa.— Farwell *v.* Stick, 96 Iowa 87, 61 N. W. 565, 64 N. W. 614; Sylvester *v.* Henrick, 93 Iowa 489, 61 N. W. 942; Smith *v.* Smith, 87 Iowa 93, 54 N. W. 73, 43 Am. St. Rep. 359, (1891) 50 N. W. 64. But *compare* Patterson *v.* Seaton, 70 Iowa 689, 28 N. W. 598.

Kansas.— Myers *v.* Tyson, 2 Kan. App. 464, 43 Pac. 91.

Missouri.— Goddard-Peck Grocery Co. *v.* McCune, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681, (1893) 24 S. W. 758 [*reversing* 47 Mo. App. 307, and *overruling* Phelps *v.* McNecly, 66 Mo. 554, 27 Am. Rep. 378]; Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564.

North Carolina.— See Potts *v.* Blackwell, 57 N. C. 58.

Ohio.— Sigler *v.* Knox County Bank, 8 Ohio St. 511; Eeley *v.* Whitney, 2 Ohio Dec. (Reprint) 53, 1 West. L. Month. 216.

Tennessee.— Carver Gin, etc., Co. *v.* Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. Rep. 803 [*distinguishing* Buck Stove Co. *v.* Johnson, 7 Lea 282; Barcroft *v.* Snodgrass, 1 Coldw. 430]; Anderson *v.* Norton, 15 Lea 14, 54 Am. Rep. 400.

Texas.— Batchelor *v.* Sanger, 15 Tex. Civ. App. 110, 38 S. W. 359; Wm. W. Kendall

k. Confession of Judgment. A judgment confessed by one partner for a partnership debt cannot disturb the equities of the partners to have the joint effects applied to partnership debts.[30] As against its creditors a partnership cannot by confessing a judgment assume the individual liabilities of one of its members for which it is neither legally nor morally responsible and apply the partnership property to their payment.[31] Where the confession of a judgment against a partnership is procured by fraud or collusion it is invalid.[32] Where land is held by a firm by deed expressing that it is partnership stock, a judgment on a bond with warrant of attorney against a member of the firm is not a lien upon any interest in it, so as to prevent the firm conveying to the purchaser a clear title.[33]

4. Assets of Individual Partners — a. What Are. The separate estate of a partner includes that part of his property which is not embarked in the partnership enterprise.[34] His interest in lands used for partnership purposes may be available to his individual creditors as his separate property,[35] although acquired with firm funds.[36] A credit item in the firm account of a partner is not to be treated as his separate estate, until partnership affairs are settled.[37] Nor is a partner's interest in an illegal partnership to be treated as separate estate rather than firm assets.[38] In England, under a provision of the bankruptcy statute as to reputed ownership,[39] firm property may be treated in bankruptcy as the separate estate of the partner who is allowed to retain possession of it.[40]

b. Right of Individual Creditors to Individual Assets. In distributing the property of a firm and of its members among creditors equity generally secures to the individual creditors of a partner a preference over the firm creditors in his separate estate.[41]

Boot, etc., Co. *v.* Johnston, (Civ. App. 1893) 24 S. W. 583.

Virginia.— Marks *v.* Hill, 15 Gratt. 400.

Washington.— Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

United States.— Coffin *v.* Day, 34 Fed. 687; *In re* Kahley, 14 Fed. Cas. No. 7,593, 2 Biss. 383, 4 Nat. Bankr. Reg. 378. But see Goodbar *v.* Cary, 16 Fed. 316, 4 Woods 663.

See 38 Cent. Dig. tit. "Partnership," §§ 331, 333.

30. Corson *v.* Beans, 3 Phila. (Pa.) 433.

31. James *v.* Vanzandt, 163 Pa. St. 171, 29 Atl. 879 [*distinguishing* Siegel *v.* Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124].

32. Murray *v.* Gerety, 11 N. Y. Suppl. 205, 25 Abb. N. Cas. 161.

33. Meily *v.* Wood, 71 Pa. St. 488, 10 Am. Rep. 719.

34. Mann *v.* Higgins, 7 Gill (Md.) 265; Very *v.* Clarke, 177 Mass. 52, 58 N. E. 151, 83 Am. St. Rep. 260; Reer *v.* Allerton, 3 Rob. (N. Y.) 551; *Ex p.* Owen, 4 De G. & Sm. 351, 15 Jur. 983, 20 L. J. Bankr. 14, 64 Eng. Reprint 865.

Disposition of individual property.— Members of a firm are entitled to dispose of their individual property as they see fit if there are sufficient partnership assets to satisfy firm debts. Holmes *v.* Ferguson-McKinney Dry Goods Co., 86 Miss. 782, 39 So. 70.

Rights of partner as to property of copartner.— A partner has no right to have the individual property of his copartner applied to the partnership debts. Mann *v.* Higgins, 7 Gill (Md.) 265; McDonald *v.* Meek, 57 Mo. App. 254.

35. Johnson *v.* Clark, 18 Kan. 157; National Union Bank *v.* Mechanics' National Bank, 80 Md. 371, 30 Atl. 913, 45 Am. St. Rep. 350, 27 L. R. A. 476; Parker *v.* Bowles, 57 N. H. 491.

36. Cundey *v.* Hall, 208 Pa. St. 335, 342, 57 Atl. 761, 1134, 101 Am. St. Rep. 938; Stover *v.* Stover, 180 Pa. St. 425, 36 Atl. 921, 57 Am. St. Rep. 654. And see *supra*, III, E.

37. Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

38. Patty *v.* Sherman City Bank, 15 Tex. Civ. App. 475, 41 S. W. 173.

39. English Bankr. Act (1883), § 44 (iii), providing that "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof," are to be divided among his creditors as his property.

40. Graham *v.* McCulloch, L. R. 20 Eq. 397, 32 L. T. Rep. N. S. 748, 23 Wkly. Rep. 786.

41. *Alabama.*— Emanuel *v.* Bird, 19 Ala. 596, 54 Am. Dec. 200.

Georgia.— Toombs *v.* Hill, 28 Ga. 371.

Indiana.— Bond *v.* Nave, 62 Ind. 505; Weyer *v.* Thornburgh, 15 Ind. 124, where it was held that this rule applies, although there be no partnership assets and no surviving partner.

Iowa.— Gillaspy *v.* Peck, 46 Iowa 461, this rule applies only in equity.

Kentucky.— Beard *v.* Hardinsburg Bank, (1897) 39 S. W. 501.

Mississippi.—Arnold *v.* Hamer, Freem. 509.

Missouri.— McDonald *v.* Meek, 57 Mo. App. 254; Level *v.* Farris, 24 Mo. App. 445. But *compare* Shackleford *v.* Clark, 78 Mo. 491.

c. Right of Firm Creditors to Share Individual Assets. In equity partnership debts are regarded as both joint and several and the creditors of a partnership may prove their debts against the estate of a deceased member thereof;[42] but the right of firm creditors to share in the separate estate of a partner is generally limited to sharing in any surplus that remains after the payment of such partner's individual debts.[43] An exception to the foregoing rule exists in many jurisdictions to the effect that, if there is no firm estate and no living solvent partner, the firm creditors may share *pari passu* with the separate creditors in the separate estate.[44] Another exception is generally recognized in cases where a partner

New Hampshire.— Crockett *v.* Crain, 33 N. H. 542; Jarvis *v.* Brooks, 23 N. H. 136.

New Jersey.— Case *v.* McGill, 69 N. J. Eq. 354, 60 Atl. 569; Hiles *v.* Dunn, 61 N. J. Eq. 391, 48 Atl. 315.

New York.— *In re* Baldwin, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122; Ganson *v.* Lathrop, 25 Barb. 455; Matter of Hallock, 47 Misc. 571, 96 N. Y. Suppl. 105 (a note by one partner indorsed by his copartner is not a firm debt); *In re* Stewart, 4 Abb. Pr. 408, 4 Bradf. Surr. 254.

Pennsylvania.— D'Invillier's Estate, 13 Phila. 362.

Canada.— See Felan *v.* McGill, 3 Ch. Chamb. (U. C.) 68, holding that the court will prevent an individual creditor from obtaining an undue preference over firm creditors.

See 38 Cent. Dig. tit. "Partnership," § 339. And see *supra*, VI, C, 1.

42. Greene *v.* Butterworth, 45 N. J. Eq. 738, 17 Atl. 949.

43. *Alabama.*— Claflin *v.* Behr, 89 Ala. 503, 8 So. 45; Van Wagner *v.* Chapman, 29 Ala. 172; Bridge *v.* McCullough, 27 Ala. 661.

Illinois.— Adams *v.* Sturges, 55 Ill. 468; Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233.

Indiana.— Warren *v.* Able, 91 Ind. 107; New Market Nat. Bank *v.* Locke, 89 Ind. 428; Bake *v.* Smiley, 84 Ind. 212; Hardy *v.* Mitchell, 67 Ind. 485 (holding that the fact that individual creditors of a partner elect to forego their rights to attack a conveyance of individual property which is fraudulent as against them will not give partnership creditors a right to attack such conveyance); Hardy *v.* Overman, 36 Ind. 549; Dean *v.* Phillips, 17 Ind. 406, 409 (in which it is said: "If there be no such separate creditors, no one's equitable rights are interfered with by the levy on [the partner] . . . separate effects. So far as the partner himself is concerned, his separate property is equally liable with the joint property, both in law and equity, for the payment of the joint debts").

Maine.— See Egery *v.* Howard, 64 Me. 68, construing Acts (1870), c. 113, § 116.

Maryland.— Hopkins *v.* Adey, 92 Md. 1, 48 Atl. 41, 50 L. R. A. 498; Simmons *v.* Tongue, 3 Bland 341.

Mississippi.— Oakey *v.* Rabb, Freem. 546.

Missouri.— Ault *v.* Bradley, 191 Mo. 709, 90 S. W. 775; Hundley *v.* Farris, 103 Mo. 78, 15 S. W. 312, 23 Am. St. Rep. 863, 12 L. R. A. 254

New York.— Matter of Striker, 24 Misc. 422, 53 N. Y. Suppl. 732; *In re* Stewart, 4 Abb. Pr. 408.

Wisconsin.— Rollins *v.* Humphrey, 98 Wis. 66, 73 N. W. 331.

England.— *Ex p.* McKenna, 7 Jur. N. S. 588, 30 L. J. Bankr. 20, 4 L. T. 164, 9 Wkly. Rep. 490, 64 Eng. Ch. 492, 45 Eng. Reprint 1022; *Ex p.* Parry, 5 Ves. Jr. 575, 31 Eng. Reprint 746.

See 38 Cent. Dig. tit. "Partnership," § 340.

This rule does not apply when the partners have agreed to a several liability for firm debts. Howell *v.* Teel, 29 N. J. Eq. 490; *In re* Gray, 111 N. Y. 404, 18 N. E. 719; Morris *v.* Morris, 4 Gratt. (Va.) 293.

If there are partnership assets, the fact that the assignee, in a vain attempt to realize more, incurs costs larger than the amount of such assets, will not entitle the partnership creditors to share with separate creditors in the distribution of the separate estate of a partner. *In re* Blumer, 12 Fed. 489.

Where one of several members of a firm removes from the state, equity has jurisdiction to subject his individual estate to the claims of the creditors of the firm, such estate not being bound by any judgment at law which the creditors might recover against the firm. Farrar *v.* Haselden, 9 Rich. Eq. (S. C.) 331.

In Louisiana under Civ. Code, § 3152, partnership creditors are entitled to share equally with the individual creditors in the distribution of the individual assets. Flower *v.* His Creditors, 3 La. Ann. 189. The rule was otherwise before the passage of that act. Bernard *v.* Dufour, 17 La. 596; Town *v.* Morgan, 2 La. 112, 20 Am. Dec. 299; Morgan *v.* His Creditors, 8 Mart. N. S. 599, 20 Am. Dec. 262.

In South Carolina firm creditors are entitled to share the separate property of a partner *pro rata* with unsecured individual creditors after exhausting firm assets. Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; Kuhne *v.* Law, 14 Rich. 18 [*overruling* Roberts *v.* Roberts, 8 Rich. 15]; Wilson *v.* McConnell, 9 Rich. Eq. 500; Wardlaw *v.* Gray, Dudley Eq. 85; Gowan *v.* Tunno, Rich. Eq. Cas. 369.

44. *Alabama.*— Emanuel *v.* Bird, 19 Ala. 596, 54 Am. Dec. 200.

Connecticut.— Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703.

Delaware.— Warner *v.* Allee, 1 Del. Ch. 49.

has fraudulently converted partnership property to his own use, without the assent or ratification of his copartners. In such cases the creditors are allowed, either directly or through the medium of a trustee or assignee or receiver, or a surviving partner, to share with separate creditors in the separate estate, upon a claim for the amount so fraudulently withdrawn.[45]

d. Rights of Firm or of Copartners as Creditors. The principle which secures to the separate creditors of a partner priority over firm creditors in his separate estate prevents the firm, and the copartners as representatives of the firm, from sharing in the separate estate, until the separate creditors are paid in full.[46] This rule does not apply to a claim by a copartner in his individual right against the separate estate of an associate,[47] provided the claimant does not come

Illinois.— Ladd *v.* Griswold, 9 Ill. 25, 46 Am. Dec. 443; Westhay *v.* Williams, 5 Ill. App. 521.

Missouri.— Shackelford *v.* Clark, 78 Mo. 491.

Nebraska.— Leach *v.* Milburn Wagon Co., 14 Nebr. 106, 15 N. W. 232.

New Jersey.— Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

Ohio.— Brock *v.* Bateman, 25 Ohio St. 609; Grosvenor *v.* Austin, 6 Ohio 103, 25 Am. Dec. 743; Hubble *v.* Perrin, 3 Ohio 287; *In re* Robb, 5 Ohio S. & C. Pl. Dec. 227, 5 Ohio N. P. 52.

Pennsylvania.— Caldwell *v.* Stileman, 1 Rawle 412; Stauffer's Estate, 3 Pa. Dist. 794, 15 Pa. Co. Ct. 492, 36 Wkly. Notes Cas. 150; Matter of Sperry, 1 Ashm. 347.

Texas.— Higgins *v.* Rector, 47 Tex. 361.

United States.— Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630.

England.— *In re* Budgett, [1894] 2 Ch. 557, 63 L. J. Ch. 847, 71 L. T. Rep. N. S. 72, 1 Manson 230, 8 Reports 424, 42 Wkly. Rep. 551.

See 38 Cent. Dig. tit. "Partnership," § 341.

Contra.— Warren *v.* Farmer, 100 Ind. 593; Weyer *v.* Thornburgh, 15 Ind. 124; Stewart's Case, 4 Abb. Pr. (N. Y.) 408.

In Virginia and West Virginia by statute the rule is that where one who is a member of an insolvent partnership is indebted individually to different persons and dies, the partnership assets are applicable first to the partnership debts, and if insufficient, the partnership creditors come in as general creditors *pari passu* with separate creditors of the same class upon the separate estate of the deceased partner. Pettyjohn *v.* Woodruff, 86 Va. 478, 10 S. E. 715 (construing Code (1887), § 2855); Freeport Stone Co. *v.* Carey, 42 W. Va. 276, 26 S. E. 183 (construing Code (1891), c. 99, § 13). As to the rule in Virginia before the statute see Morris *v.* Morris, 4 Gratt. (Va.) 293.

45. Matter of Walradt, 13 N. Y. App. Div. 142, 43 N. Y. Suppl. 379; *Ex p.* Lodge, 1 Ves. Jr. 166, 1 Rev. Rep. 99, 30 Eng. Reprint 283; Baker *v.* Dawbarn, 10 Grant Ch. (U. C.) 113.

46. *Maryland.*— George *v.* Morison, 93 Md. 132, 48 Atl. 744.

Massachusetts.— Somerset Potters Works *v.* Minot, 10 Cush. 592.

New York.— Kirby *v.* Carpenter, 7 Barb. 373, claims of individual creditors are entitled to priority over those of the surviving members of the firm growing out of the partnership transactions.

Pennsylvania.—McCormick's Appeal, 55 Pa. St. 252.

Wisconsin.— Gibbs *v.* Humphrey, 91 Wis. 111, 64 N. W. 750.

England.— Walton *v.* Butler, 29 Beav. 428, 54 Eng. Reprint 693; Pinkett *v.* Wright, 2 Hare 120, 6 Jur. 1102, 12 L. J. Ch. 119, 24 Eng. Ch. 120, 67 Eng. Reprint 50.

See 38 Cent. Dig. tit. "Partnership," § 341.

Exception to rule.— To this rule, however, the English courts recognize an exception, when the separate estate of a partner has become indebted to the firm in the way of a distinct trade which he has carried on apart from the firm. *Ex p.* Castell, 2 Glyn & J. 124; *Ex p.* Cook, Mont. 228; *Ex p.* Hesham, 1 Rose 146; *Ex p.* St. Barbe, 11 Ves. Jr. 413, 8 Rev. Rep. 196, 32 Eng. Reprint 1147, "A joint trade may prove against a separate trade; but, not a partner against a partner." This exception has not received judicial sanction in this country (*In re* Reiser, 19 Hun (N. Y.) 202 [*affirmed* in 81 N. Y. 629]; *In re* Lane, 14 Fed. Cas. No. 8,044, 2 Lowell 333, 10 Nat. Bankr. Reg. 135; *In re* Savage, 21 Fed. Cas. No. 12,381, 16 Nat. Bankr. Reg. 368); although it seems to be approved by the present bankruptcy statute (U. S. Bankr. Act (1898), § 5, (g)), which authorizes the court to "permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*."

47. *Kentucky.*— Busby *v.* Chenault, 13 B. Mon. 554, holding that where the surviving partner had paid the firm debts, he was entitled to share *pari passu* with the individual creditors in the individual estate of the deceased partner, upon his claim for contribution against such estate.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

New York.— Payne *v.* Matthews, 6 Paige 19, 29 Am. Dec. 738.

Pennsylvania.— Scott's Appeal, 88 Pa. St. 173; Purdy *v.* Lacock, 6 Pa. St. 490.

South Carolina.— Moffatt *v.* Thomson, 5 Rich. Eq. 155, 57 Am. Dec. 737.

Virginia.— Morris *v.* Morris, 4 Gratt. 293.

United States.— *In re* Dell, 7 Fed. Cas. No. 3,774, 5 Sawy. 344.

into competition with the firm creditors in sharing such estate.[48] When a member of a firm fraudulently abstracts some of its assets, a representative of the firm may share ratably with the individual creditors of the delinquent.[49]

e. Transactions By or Between Partners Affecting Rights of Creditors. Where a partner has given a valid lien upon his separate property to a firm creditor, or has permitted one to be acquired by him, before the separate estate is brought into equity for distribution, the separate creditors cannot invoke against such lien the principle that separate property is to be applied to separate debts in preference to firm debts.[50] But a firm creditor, having such security, cannot be compelled to resort to it before sharing in the partnership assets, as the latter are primarily liable for firm debts.[51] A partner can by a general assignment devote his individual property to the payment of debts due by the firm.[52] It is not a fraud upon firm creditors for a partner to convey his separate property at a fair valuation in payment of a separate debt,[53] nor, if the firm is solvent, to give it away;[54] and it has been held that the partners may convert the firm property into the separate property of such partners, and thus enable each partner to apply the proceeds of a sale of his share to the payment of his individual debts.[55] Even if the firm is insolvent, a voluntary conveyance of his separate property cannot be deemed fraudulent against firm creditors who are not also his individual creditors, unless his individual estate is more than sufficient to pay his individual debts.[56] But if the firm and he are insolvent, his voluntary conveyance of individual property will be fraudulent against firm creditors if it operates

England.— *In re* Motion, L. R. 9 Ch. 192, 43 L. J. Bankr. 59, 29 L. T. Rep. N. S. 757, 22 Wkly. Rep. 225 [*reversing* 36 L. J. Bankr. 39]; *Ex p.* Watson, Buck 449, 4 Madd. 477, 20 Rev. Rep. 319, 56 Eng. Reprint 781; *Ex p.* Topping, 4 De G. J. & S. 551, 11 Jur. N. S. 210, 34 L. J. Bankr. 13, 12 L. T. Rep. N. S. 3, 13 Wkly. Rep. 445, 69 Eng. Ch. 423, 46 Eng. Reprint 1033; Wood *v.* Dodgson, 2 M. & S. 195, 1 Rose 47, 14 Rev. Rep. 628.

See 38 Cent. Dig. tit. "Partnership," §§ 341, 342.

48. Mann *v.* Higgins, 7 Gill (Md.) 265; Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Bennett's Estate, 13 Phila. (Pa.) 331; *Ex p.* Andrews, 25 Ch. D. 505, 53 L. J. Ch. 411, 50 L. T. Rep. N. S. 679, 32 Wkly. Rep. 650; *Ex p.* Grazebrook, 2 Deac. & C. 186.

49. McElroy *v.* Allfree, 131 Iowa 518, 108 N. W. 119.

50. *Illinois.*— McIntire *v.* Yates, 104 Ill. 491.

Indiana.— Indianapolis Bd. of Trade *v.* Wallace, 117 Ind. 599, 18 N. E. 48; Winslow *v.* Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179.

New York.— Stewart *v.* Slater, 6 Duer 83; Haynes *v.* Brooks, 8 N. Y. Civ. Proc. 106.

Oregon.— Barrett *v.* Furnish, 21 Oreg. 17, 26 Pac. 861.

Pennsylvania.— Thompson's Appeal, 3 Walk. 345. And see Jackson *v.* Clymer, 43 Pa. St. 79, holding that a fund arising from the separate property of a partner, which had been specifically appropriated to separate debts, could not be diverted to the use of firm creditors.

Tennessee.— Fowlkes *v.* Bowers, 11 Lea 144.

Virginia.— Rixey *v.* Pearre, 89 Va. 113, 15 S. E. 498; Morris *v.* Morris, 4 Gratt. 293.

See 38 Cent. Dig. tit. "Partnership," §§ 343, 344.

In **New Hampshire** such a diversion of separate property from the separate creditors is accounted a fraud upon them. Holton *v.* Holton, 40 N. H. 77.

51. State Bank *v.* Roche, 35 Fla. 357, 17 So. 652; Robinson *v.* Robinson, 1 Lans. (N. Y.) 117; Roberts *v.* Oldham, 63 N. C. 297. *Contra*, White *v.* Dougherty, Mart. & Y. (Tenn.) 309, 17 Am. Dec. 802.

Subrogation.— If the separate estate is forced to pay the claim thus secured, it is entitled to be subrogated to the rights of the firm creditor against the partnership assets. Kendall *v.* Rider, 35 Barb. (N. Y.) 100; Averill *v.* Loucks, 6 Barb. (N. Y.) 470; *In re* Foot, 9 Fed. Cas. No. 4,906, 8 Ben. 228, 12 Nat. Bankr. Reg. 337, 1 N. Y. Wkly. Dig. 76.

52. Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174; Ralph *v.* Brickell, 4 Silv. Sup. (N. Y.) 564, 7 N. Y. Suppl. 825. And see Wheeler *v.* Childs, 22 N. Y. App. Div. 613, 48 N. Y. Suppl. 1023, holding that if a partner undertakes to do so by a general assignment he must in preferring his firm creditors over his individual creditors respect the statute limiting preferences and especially avoid giving himself or his firm a preference over either class of creditors.

53. Smith *v.* Selz, 114 Ind. 229, 16 N. E. 524; Schoverling *v.* Kovar, 15 Nebr. 306, 18 N. W. 134; Chesher *v.* Clamp, 10 Tex. Civ. App. 350, 30 S. W. 466.

54. Hardy *v.* Mitchell, 67 Ind. 485; Leqve *v.* Stoppel, 64 Minn. 152, 66 N. W. 124.

55. Indianola First Nat. Bank *v.* Brubaker, 128 Iowa 587, 105 N. W. 116, 2 L. R. A. N. S. 256.

56. Hull *v.* Deering, 80 Md. 424, 31 Atl. 416.

to diminish the amount they could otherwise obtain from his separate estate.[57] And a conveyance of individual property of a partner in payment of his individual debt, with the intent known to the grantee of defrauding partnership creditors, is void as against them.[58]

5. Partners in Different Firms. The law does not recognize two partnerships when the same persons carry on the same business, although they do this at different places and under different names.[59] But where different firms have common members, each partnership is dealt with by the courts as having a joint fund of its own, and its own set of creditors, who are as clearly entitled to that fund in preference to the creditors of any partnership connected with it by the ties of a common partner, as they are entitled in preference to the individual creditor of its members.[60]

6. Retirement or Admission of Partners. The retirement of a partner and the admission of another results ordinarily in the constitution of a new firm, and a conversion of the property of the old firm into the property of the new firm.[61] Such is not the consequence, however, of a change of membership in a joint stock company,[62] nor in the case of an ordinary partnership when the parties agree that a change of membership by retirement or admission shall not work a dissolution.[63] If the new firm agree to pay the debts of the old, in consideration of the transfer of the latter's property to it, the creditors of the old firm are entitled to share *pari passu* with the creditors of the new firm.[64]

57. *Mississippi.*— Mechanics' Sav. Bank *v.* Fargason, 79 Miss. 64, 29 So. 791; Erb *v.* West, (1896) 19 So. 829.

Missouri.— Kitchen *v.* Reinsky, 42 Mo. 427.

New York.— Brayton *v.* Sherman, 45 N. Y. App. Div. 58, 60 N. Y. Suppl. 1118 [*affirmed* in 166 N. Y. 610, 59 N. E. 1119]; Clark *v.* MacDonald, 62 Hun 149, 16 N. Y. Suppl. 493; Gowing *v.* Warren, 30 Misc. 593, 62 N. Y. Suppl. 797 [*affirming* 29 Misc. 593, 61 N. Y. Suppl. 500].

Vermont.— Forbes *v.* Davison, 11 Vt. 660, a man may be guilty of fraud in the sale of his own property to defraud the creditors of a partnership of which he is a member.

United States.— Earle *v.* Art Library Pub. Co., 95 Fed. 544.

See 38 Cent. Dig. tit. "Partnership," § 345.

58. Cox *v.* Miller, 54 Tex. 16.

59. Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248; Banco de Portugal *v.* Waddell, 5 App. Cas. 161, 49 L. J. Bankr. 33, 42 L. T. Rep. N. S. 698, 28 Wkly. Rep. 477 [*affirming* 11 Ch. D. 317, 48 L. J. Bankr. 65, 40 L. T. Rep. N. S. 406, 27 Wkly. Rep. 856]. But see Oswego Second Nat. Bank *v.* Burt, 93 N. Y. 233; West *v.* Valley Bank, 6 Ohio St. 168.

60. *Florida.*— Gassett *v.* Wilson, 3 Fla. 235.

Georgia.— Thornton *v.* Bussey, 27 Ga. 302; Dennis *v.* Ray, 9 Ga. 449.

Indiana.— Selz *v.* Mayer, 151 Ind. 422, 51 N. E. 485. In this case the two members of one firm who were copartners with a third person in another bought such third person's interest in the second firm, and then mortgaged the assets of both firms to secure the debts of both firms. It was held, in accordance with the rule prevailing in Indiana that, in the absence of fraud, the mortgage was valid as against the creditors of the second firm, who could obtain a preference only through the lien of the partners, and this had been waived.

Louisiana.— Rowlett *v.* Grieve, 8 Mart. 483, 13 Am. Dec. 296.

Nebraska.— Bonwit *v.* Heyman, 43 Nebr. 537, 61 N. W. 716.

New Hampshire.— Weaver *v.* Weaver, 46 N. H. 188, where a person is a member of two partnerships, his separate creditors have a preference over his interest in the property of one of the firms as against creditors of the other firm.

Pennsylvania.— Grove's Appeal, 176 Pa. St. 354, 365, 35 Atl. 237, "As to their respective creditors the two firms are separate and distinct entities, and the assets of each are a separate fund for its own creditors, just as the firm assets and the individual property of the partners are separate funds for the partnership and individual creditors in ordinary cases, although the partners are equally debtors to both. Each class has a prior claim on its own fund, and only a secondary or postponed claim on the other after the latter's preferred creditors are satisfied." *Compare* Greenboum's Appeal, 173 Pa. St. 507, 34 Atl. 224.

South Carolina.— McCauly *v.* McFarlane, 2 Desauss. Eq. 239.

Vermont.— Shedd *v.* Wilson, 27 Vt. 478.

Virginia.— Christian *v.* Ellis, 1 Gratt. 396.

See 38 Cent. Dig. tit. "Partnership," § 347.

61. Locke *v.* Hall, 9 Me. 133; Guild *v.* Leonard, 18 Pick. (Mass.) 511; Smith *v.* Howard, 20 How. Pr. (N. Y.) 121; Hollis *v.* Staley, 3 Baxt. (Tenn.) 167, 27 Am. Rep. 759.

62. Carter *v.* McClure, 98 Tenn. 109, 38 S. W. 585, 60 Am. St. Rep. 842, 36 L. R. A. 282.

63. Rand *v.* Wright, 141 Ind. 226, 39 N. E. 447.

64. Peyser *v.* Myers, 135 N. Y. 599, 32

D. Actions By or Against Firms or Partners — 1. In General — a. Capacity To Sue and Be Sued. As the common law does not recognize a legal personality in a partnership, but views a firm as an aggregation of individuals,[65] in the absence of a statutory provision a partnership cannot be sued as an entity.[66] In some jurisdictions certain partnerships are required to file and publish a certificate showing the names and residences of all the partners, before they can maintain certain actions.[67]

b. Authority of Partner to Institute and Defend Actions. It is generally held to be within the implied powers of a partner to institute ordinary legal proceedings in behalf of a firm, using the names of all the partners as plaintiffs, for the enforcement of the firm's rights;[68] and also to defend actions brought against the firm.[69]

c. Rights of Action and Defenses.[70] In an action at law by partners, all must be entitled to recover, or the action cannot be maintained; as the cause of action is joint and not joint and several. Accordingly if one of the partners does an act which bars him from maintaining a suit on the firm claim, it will defeat all.[71] One partner cannot recover for a trespass to the firm property directed or assented to by a copartner.[72] Where persons sue as partners on a contract alleged to have been made with them as such, it is a defense that they were a corporation when they entered into the contract.[73] And when a partnership is sued as a corporation a judgment entered against it as such cannot be enforced against the partners whether they are indebted to the plaintiff or not.[74] Where persons enter into a

N. E. 699; Smead *v.* Lacey, 1 Disn. (Ohio) 239, 12 Ohio Dec. (Reprint) 597; Shedd *v.* Brattleboro Bank, 32 Vt. 709; Thayer *v.* Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549.

65. See *supra*, IV, B, 3.

66. Kingsland, etc., Mfg. Co. *v.* Mitchell, (Tex. Civ. App. 1896) 36 S. W. 757.

In Louisiana a commercial partnership is an entity capable of being sued (Martin *v.* Meyer, 45 Fed. 435; Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 615, 4 Woods 201); and suits in its favor should be brought in its name as a partnership and under the firm-name (Wolf *v.* New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893).

67. See the statutes of the different states. And see North *v.* Moore, 135 Cal. 621, 67 Pac. 1037; Gray *v.* Wells, 118 Cal. 11, 50 Pac. 23; Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565 (the statute (Civ. Code, §§ 2466, 2468) does not preclude the assignee of such partnership from maintaining an action on a partnership claim); Sweeney *v.* Stanford, 67 Cal. 635, 8 Pac. 444; Byers *v.* Bourret, 64 Cal. 73, 28 Pac. 61; Ralph *v.* Lockwood, 61 Cal. 155 (holding that Civ. Code, § 2468, does not apply to actions of tort); Pedroni *v.* Eppstein, 17 Colo. App. 424, 68 Pac. 794; Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Tucker *v.* Adams, 63 N. H. 361; *In re* Partnerships, 5 Ohio S. & C. Pl. Dec. 578, 7 Ohio N. P. 568; K. B. Co. *v.* Batie, 25 Ohio Cir. Ct. 482 (such statutes are penal and to be construed strictly); New Carlisle Bank *v.* Brown, 11 Ohio Cir. Ct. 77, 5 Ohio Cir. Dec. 94; Choctaw Lumber Co. *v.* Gilmore, 11 Okla. 462, 68 Pac. 733; Pinkerton *v.* Ross, 33 U. C. Q. B. 508.

68. *Iowa.*— German Bank *v.* Schloth, 59 Iowa 316, 31 N. W. 314.

Kansas.— Wheatley *v.* Tutt, 4 Kan. 240.

Missouri.— Jones *v.* Hurst, 67 Mo. 568.

New York.— Ward *v.* Barber, 1 E. D. Smith 423.

Ohio.— Marks *v.* Fordyce, 5 Ohio Dec. (Reprint) 81, 2 Am. L. Rec. 292 [*reversing* 5 Ohio Dec. (Reprint) 12, 1 Am. L. Rec. 257].

Virginia.— McCluny *v.* Jackson, 6 Gratt. 96, a partner can institute attachment proceedings for the firm.

England.— Whitehead *v.* Hughes, 2 Cromp. & M. 318, 2 Dowl. P. C. 258, 4 Tyrw. 92; Harwood *v.* Edwards, Gow Partn. 65 note.

See 38 Cent. Dig. tit. "Partnership," § 350.

69. Taylor *v.* Coryell, 12 Serg. & R. (Pa.) 243; Bennett *v.* Stickney, 17 Vt. 531; Goodman *v.* De Beauvoir, 12 Jur. 989 [*affirmed* in 12 Jur. 1037].

70. Suits by partners for Indian depredations see Indians, 22 Cyc. 152.

71. Cochran *v.* Cunningham, 16 Ala. 448, 50 Am. Dec. 186. And see Broughton *v.* Broughton, 2 Smale & G. 422, 65 Eng. Reprint 464 [*affirmed* in 5 De G. M. & G. 160, 1 Jur. N. S. 965, 25 L. J. Ch. 250, 3 Wkly. Rep. 603, 54 Eng. Ch. 129, 43 Eng. Reprint 831]; Kilby *v.* Wilson, R. & M. 178, 21 E. C. L. 726.

Action by partnership for malicious prosecution see Malicious Prosecution, 26 Cyc. 62 note 58, 63 note 63.

Action for libel or slander of firm or partners see Libel and Slander, 25 Cyc. 426.

72. Sindelar *v.* Walker, 35 Ill. App. 607 [*affirmed* in 137 Ill. 643, 27 N. E. 59, 3 Am. St. Rep. 353].

73. Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

74. Sinsabaugh *v.* Dun, 214 Ill. 70, 73 N. E. 390 [*affirming* 114 Ill. App. 523].

copartnership, with the fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts they cannot bring a joint action against one who forcibly enters their storehouse and seizes their goods.[75] There is no implied obligation to account for mere use and occupation by one partner, who has by his title a right of possession of the whole, although it is joint, and assumpsit can be maintained by one partner against another only on an express promise to pay rent or to account.[76] Where a partner agrees to pay a third person a part of his interest in the net profits of his firm such person may bring suit, although there has been no settlement between such partner and his copartner.[77] A person cannot be charged in equity as a partner and sued at law as a debtor of the same firm.[78] The joint liability of a partnership cannot be set off against a separate demand of one of the partners.[79] Where two partners execute their individual notes for work performed for the partnership, but it is so badly done that the whole consideration fails, the right to make a defense is not lost by the execution of such separate notes, but may be asserted by either partner.[80] The fact that a partner made an illegal agreement to pay rebates to a third person and appropriated partnership funds for that purpose, all without the knowledge of his copartner, does not affect the right of recovery against the partnership on another agreement, it not appearing that the partner making such use of the firm funds is personally irresponsible so as to be unable to account to his partner for the amount of such misappropriation.[81] It is a good defense to an action brought against a partner that judgment has been recovered against his firm upon the same cause of action.[82]

d. Assignee of Obligation Between Firm and Partner or Copartner. While the common law does not permit the maintenance of an action by a partner against his firm, or by a firm against one of its members,[83] nor by one partner against another on a partnership claim before an accounting,[84] a *bona fide* indorsee of a firm or of one of the partners therein may maintain such action;[85] and in juris-

75. McPherson *v.* Pemberton, 46 N. C. 378.

76. Enterprise Oil, etc., Co. *v.* National Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. Rep. 746.

77. Reilly *v.* Reilly, 14 Mo. App. 62.

78. Rheem *v.* Snodgrass, 2 Grant (Pa.) 379.

79. Miller *v.* Florer, 15 Ohio St. 148, 19 Ohio St. 356.

80. Emanuel *v.* Martin, 12 Ala. 233.

81. McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661.

82. Ward *v.* Johnson, 13 Mass. 148; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Smith *v.* Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 418, 28 Wkly. Rep. 97; Cambefort *v.* Chapman, 19 Q. B. D. 229, 51 J. P. 455, 56 L. J. Q. B. 639, 57 L. T. Rep. N. S. 625, 35 Wkly. Rep. 838; Carne *v.* Legh, 6 B. & C. 124, 9 D. & R. 126, 13 E. C. L. 67.

Action for false representations.— An action may be maintained against one partner for making false representations as to the solvency of his firm, even though plaintiff has recovered judgment against the firm for goods sold on credit in consequence of such misrepresentation. Morgan *v.* Skidmore, 55 Barb. (N. Y.) 263.

Merger.— The original demand is deemed by the common law to have merged in the judgment, and cannot be made the subject of another action. Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; King *v.* Hoar, 2 D. & L. 382, 8 Jur. 1127, 14 L. J. Exch. 29, 13 M. & W. 495.

83. Learned *v.* Ayres, 41 Mich. 677, 3 N. W. 178; Ferguson *v.* Wright, 61 Pa. St. 258; Dowling *v.* Clarke, 13 R. I. 134; Richardson *v.* Bank of England, 2 Jur. 911, 8 L. J. Ch. 1, 4 Myl. & C. 165, 18 Eng. Ch. 165, 41 Eng. Reprint 65; Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771, no legal contest could subsist between a partner and his copartners on the one side, and himself on the other side.

84. See *supra*, V, C, 1.

85. *Alabama.*— Hazlehurst *v.* Pope, 2 Stew. & P. 259.

Connecticut.— Roberts *v.* Ripley, 14 Conn. 543.

Illinois.— Kipp *v.* McChesney, 66 Ill. 460.

Indiana.— Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476, in the hands of one who stands in the shoes of the original payee, such note cannot be made the basis of an action at law against the firm or remaining partners.

Maine.— Davis *v.* Briggs, 39 Me. 304.

Massachusetts.— Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839; Thayer *v.* Buffum, 11 Metc. 398.

Michigan.— Carpenter *v.* Greenop, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241. If the indorsement is merely formal to enable the indorsee to sue for the indorser, and he is not a *bona fide* holder, he cannot enforce it free from the equities

dictions where the assignee of a claim may sue in his own name, such an action is maintainable by the assignee of a firm or a partner therein,[86] subject to the equities in favor of defendant, or defendants, which may include an inquiry into the state of accounts between the firm and the partner, and thus defeat the action at law.[87] Even then, however, a bill in equity may be maintainable for an account and distribution of the assignee's share.[88]

e. Joinder of Causes of Action.[89] Where by statute partnership contracts are joint and several, a cause of action against one on a joint contract as a partner may be joined with a cause of action against such partner individually.[90] Where one bringing suit has amended by joining his partner, and the suit is prosecuted as by the partnership, a verdict cannot stand for more than the partnership claim, although the excess be due the original plaintiff as an individual.[91] A partner who is also a stock-holder of a corporation cannot be held, in a suit against him individually, to recover the amount of his stock subscription, for interest on money of the corporation received by his firm and mingled with its funds.[92] The fact that the same firm is doing business under different names does not preclude the partners from joining in one suit claims payable to the firm under its different names.[93]

f. Nature and Form of Remedy.[94] An action at law is the appropriate remedy for one who seeks to enforce a contract or tort obligation or other purely legal claim against a partnership.[95] But if creditors seek to set aside a conveyance or disposition of firm property as fraudulent toward them;[96] or if partners seek redress against a copartner and third persons for fraudulently diverting firm property from the partnership;[97] or if one partnership seeks recovery against another having a common member with it,[98] the proper forum for plaintiffs is a

against the indorser. Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358.

Missouri.— Caldwell *v.* Dismukes, 111 Mo. App. 570, 86 S. W. 270.

Vermont.— Walker *v.* Wait, 50 Vt. 668.

See 38 Cent. Dig. tit. "Partnership," § 352.

86. Bank of British North America *v.* Delafield, 126 N. Y. 410, 27 N. E. 797 [*reversing* 12 N. Y. Suppl. 440]; Mangels *v.* Shaen, 21 N. Y. App. Div. 507, 48 N. Y. Suppl. 526; Beacannon *v.* Liebe, 11 Oreg. 443, 5 Pac. 273.

The assignee of a lease made by the assignor to his firm cannot maintain summary proceedings against the receiver of the firm; the rent being only a charge upon the firm in favor of the landlord partner, who can only recover it upon an accounting. Bailey *v.* Crowell, 13 Misc. (N. Y.) 63, 34 N. Y. Suppl. 53, 1 N. Y. Annot. Cas. 358.

87. Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476; Davis *v.* Merrill, 51 Mich. 480, 16 N. W. 864; Riddell *v.* Ramsey, 31 Mont. 386, 78 Pac. 597.

88. Pendleton *v.* Wambersie, 4 Cranch (U. S.) 73, 2 L. ed. 554.

89. **Joinder of actions** see, generally, JOINDER AND SPLITTING OF ACTIONS.

90. Miller *v.* Northern Bank, 34 Miss. 412; Logan *v.* Wallis, 76 N. C. 416, construing Code Civ. Proc. § 63.

91. Camp *v.* Davis, (Miss. 1894) 14 So. 438.

92. Granite Roofing Co. *v.* Michael, 54 Md. 65.

93. Messner *v.* Lewis, 20 Tex. 221.

94. **Creditors' bill to reach partnership interests** see CREDITORS' SUITS, 12 Cyc. 31.

95. Stokes *v.* Stevens, 40 Cal. 391; Parish *v.* Lewis, Freem. (Miss.) 299, 307 (in which it is said: "I know of no case which holds that the creditors of a partnership, having a purely legal claim, can come into equity for its enforcement upon any other terms than those which govern what is usually called a creditor's bill"); Flourney *v.* Bullock, 11 N. M. 87, 66 Pac. 547, 55 L. R. A. 745; Smith *v.* Bodine, 74 N. Y. 30 (an action at law for services rendered a firm for a per cent of the net profits is proper, although an accounting may be necessary to determine the exact amount to be paid); Moffat *v.* Wood, Seld. (N. Y.) 186.

96. Flack *v.* Charron, 29 Md. 311; Scruggs *v.* Blair, 44 Miss. 406; Blackwell *v.* Rankin, 7 N. J. Eq. 152.

97. Decatur Land Co. *v.* Cook, 125 Ala. 708, 27 So. 1022; Church *v.* Chicago First Nat. Bank, 87 Ill. 68; Arthur Bank *v.* Ellars, 48 Ill. App. 598; Hoff *v.* Rogers, 67 Miss. 208, 7 So. 358, 19 Am. St. Rep. 301; Andrews *v.* Clark, 5 Nebr. (Unoff.) 361, 98 N. W. 655.

98. *Illinois.*— Haven *v.* Wakefield, 39 Ill. 509; Schnebly *v.* Cutler, 22 Ill. App. 87.

Maine.— Portland Bank *v.* Hyde, 11 Me. 196.

Mississippi.— Calvit *v.* Markham, 3 How. 343.

New York.— Englis *v.* Furniss, 4 E. D. Smith 587, 2 Abb. Pr. 333.

North Carolina.— Rogers *v.* Rogers, 40 N. C. 31.

Ohio.— Gibson *v.* Ohio Farina Co., 2 Disn. 499; Riddel *v.* McBeth, 2 Ohio Dec. (Reprint) 606, 6 West L. Month. 153.

court of equity. Such is the forum also for one who asks to have the firm and separate estates marshaled and distributed.[99]

g. Jurisdiction[1] and Venue. The jurisdiction of a court of equity over proceedings connected with the settlement of partnership affairs is very broad and full,[2] extending to real property outside of the county or state;[3] and it is not ousted by the fact of the non-residence of some of the partners,[4] nor by the jurisdiction of a probate court over the estate of a deceased partner,[5] nor by the allegation of defendants that they are not partners but a corporation.[6] If a partner is omitted as plaintiff and made a party defendant with another person who is not a partner and who does not represent the interests of one, the court will not have equity jurisdiction as to the latter.[7] In jurisdictions where a firm is not recognized as a legal entity the venue of actions against it generally depends upon the residence of its members.[8] But where it is suable as an ideal person, it is deemed to have a residence in the county or counties where it carries on business, and may be sued in any such county.[9]

h. Limitations and Laches.[10] The defense of the statute of limitations, when interposed by one partner in an action brought against him and his copartners, on a firm obligation, is generally treated as a personal defense for him, and not as inuring to the benefit of his copartners, in whose favor the statute has not run.[11] Fraud or concealment by one partner in the course of the partnership business which prevents the statute from running in his favor will prevent its running in favor of his copartner.[12] A firm creditor may lose his right to enforce his claim against the retiring partner by laches; as when he delays for a long

Pennsylvania.— Wentworth *v.* Raiguel, 9 Phila. 275, Act of April 14, 1838, giving a remedy at law to parties who are partners of several firms against each other did not take away the remedy in equity.

Vermont.— Green *v.* Chapman, 27 Vt. 236.

United States.— *In re* Buckhause, 4 Fed. Cas. No. 2,086, 2 Lowell 331, 10 Nat. Bankr. Reg. 206.

England.— Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771.

See 38 Cent. Dig. tit. "Partnership," § 356.

99. *Maine.*— Leader *v.* Plante, 95 Me. 343, 50 Atl. 53, 85 Am. St. Rep. 418.

Massachusetts.— Draper *v.* Hollings, 163 Mass. 127, 39 N. E. 793 (construing Pub. St. c. 151, § 2, cl. 11, as amended by St. (1884) c. 285); Fairbanks *v.* Belknap, 135 Mass. 179.

Mississippi.— Scruggs *v.* Blair, 44 Miss. 406.

New Jersey.— Blackwell *v.* Rankin, 7 N. J. Eq. 152.

North Carolina.— Sparger *v.* Moore, 117 N. C. 449, 23 S. E. 359.

Tennessee.— Kelly *v.* Zarecor, (Ch. App. 1901) 62 S. W. 189.

Virginia.— Martin *v.* Lewis, 30 Gratt. 672, 32 Am. Rep. 682; Lindsey *v.* Corkery, 29 Gratt. 650; Williams *v.* Donaghe, 1 Rand. 300.

United States.— Young *v.* Dunn, 10 Fed. 717, 4 Woods 331.

See 38 Cent. Dig. tit. "Partnership," § 356.

1. Citizenship determining federal jurisdiction see COURTS, 11 Cyc. 871.

2. Eden *v.* Nash, 7 Ch. D. 781, 47 L. J. Ch. 325, 26 Wkly. Rep. 392.

3. Jones *v.* Fletcher, 42 Ark. 422; Griggs *v.* Clark, 23 Cal. 427; Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243.

4. Gaines *v.* Nashville Fourth Nat. Bank, (Tenn. Ch. App. 1898) 52 S. W. 467; Harris *v.* Fleming, 13 Ch. D. 208, 49 L. J. Ch. 32, 28 Wkly. Rep. 389; Southern *v.* Harriman, 10 L. T. Rep. N. S. 263, 12 Wkly. Rep. 794.

5. Griggs *v.* Clark, 23 Cal. 427; Cincinnati Fourth Nat. Bank *v.* Flach, 2 Ohio S. & C. Pl. Dec. 443, 1 Ohio N. P. 219.

6. Schick *v.* Corbett, 52 La. Ann. 180, 26 So. 862.

7. Reed *v.* Johnson, 24 Me. 322.

8. Pryon *v.* Ruohs, 120 Ga. 1060, 48 S. E. 434 (a firm may be sued in any county in which one of the partners has such a residence as will confer jurisdiction over his person, regardless of the place of his citizenship); Wadley *v.* Jones, 55 Ga. 329; Sloan *v.* Cooper, 54 Ga. 486; Adams *v.* May, 27 Fed. 907.

9. Sketchley *v.* Smith, 78 Iowa 542, 43 N. W. 524; Fitzgerald *v.* Grimmell, 64 Iowa 261, 20 N. W. 179; Marsh *v.* Marsh, 9 Rob. (La.) 45; Hobson *v.* Whittemore, 13 La. 422.

After the dissolution of a partnership, each partner becomes separately bound and may claim the privilege of being sued in the parish of his individual domicile. Black *v.* Savory, 17 La. 85.

10. See, generally, LIMITATIONS OF ACTIONS.

Power of one partner to interrupt running of statute see LIMITATIONS OF ACTIONS, 25 Cyc. 1357.

11. Harrison *v.* McCormick, 122 Cal. 651, 55 Pac. 592; Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367 [*affirming* 54 Ill. App. 457].

12. McCoon *v.* Galbraith, 29 Pa. St. 293.

time from asserting such claim, and accepts the continuing partner, or a new firm as his debtor.[13]

i. Arrest of Partners.[14] A firm is not subject to arrest, but its members may be.[15] Each partner may be arrested who has been actually guilty of the wrongdoing for which a warrant of arrest is authorized.[16] As a rule, however, the courts decline to hold an innocent partner liable to arrest for the fraud or other misconduct of a copartner, even though it be practised in the transaction of the ordinary affairs of the firm, unless he has ratified his copartner's acts. Actual guilt or moral delinquency on the part of the arrested person is generally held to be the test of his liability to this harsh and extraordinary remedy.[17]

2. Parties[18] **— a. Use of Firm-Name.** Except when it is otherwise provided by statute[19] a suit cannot be brought by or against a partnership in the firm-name

13. Consalus *v.* McConihe, 2 N. Y. Suppl. 89 [*affirmed* in 119 N. Y. 652, 23 N. E. 1150]. *Compare* Haggart *v.* Allan, 4 Grant Ch. (U. C.) 36.

14. See ARREST, 3 Cyc. 912 note 70, 917.

15. Faulkner *v.* Whitaker, 15 N. J. L. 438. And see Gregg *v.* Hilson, 12 Phila. (Pa.) 348; Bard *v.* Naylon, 33 Wkly. Notes Cas. (Pa.) 251.

16. Hitchcock *v.* Peterson, 14 Hun (N. Y.) 389; Townsend *v.* Bogart, 11 Abb. Pr. (N. Y.) 355; Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106. And see Durham Fertilizer Co. *v.* Little, 118 N. C. 808, 24 S. E. 664.

17. Watson *v.* Hinchman, 42 Mich. 27, 3 N. W. 236; Bacon *v.* Kendall, 49 N. Y. Super. Ct. 123; Commonwealth Nat. Bank *v.* Temple, 32 N. Y. Super. Ct. 344, 39 How. Pr. 432; Hanover Co. *v.* Sheldon, 9 Abb. Pr. (N. Y.) 240 [*distinguishing* Anonymous, 6 Abb. Pr. (N. Y.) 319 note]; Wetmore *v.* Earle, 9 Abb. Pr. (N. Y.) 58 note; Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106; McNeely *v.* Haynes, 76 N. C. 122; Bassett *v.* Davis, 1 Pa. L. J. Rep. 310, 2 Pa. L. J. 247. *Contra*, Townsend *v.* Bogart, 11 Abb. Pr. (N. Y.) 355; Sherman *v.* Smith, 42 How. Pr. (N. Y.) 198; Coman *v.* Reese, 21 How. Pr. (N. Y.) 114.

18. Parties to suits to set aside partnership transactions see CANCELLATION OF INSTRUMENTS, 6 Cyc. 322 note 73.

19. See the statutes of the different jurisdictions. And see the following cases:

Alabama.— Levystein *v.* Gerson, 147 Ala. 251, 41 So. 774; Atlantic Glass Co. *v.* Paulk, 83 Ala. 404, 3 So. 800; McCaskey *v.* Pollock, 82 Ala. 174, 2 So. 674; Moore *v.* Burns, 60 Ala. 269; Opelika *v.* Daniel, 59 Ala. 211 (holding that the statute authorizing an action against a partnership by its firm-name does not apply to proceedings in a court of equity); Cox *v.* Harris, 48 Ala. 538; Wyman *v.* Stewart, 42 Ala. 163.

Colorado.— Peabody *v.* Oleson, 15 Colo. App. 346, 62 Pac. 234.

Connecticut.— Stuart *v.* Corning, 32 Conn. 105, a suit for or against partners may be commenced in the firm-name and thereafter amended by inserting the names of the persons composing the firm.

Georgia.— Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750.

Indiana.— Adams Express Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

Iowa.— White *v.* Saver, 50 Iowa 515; Hamsmith *v.* Espy, 13 Iowa 439; Johnson *v.* Smith, Morr. 105.

Nebraska.— Cinfel *v.* Malena, 67 Nebr. 95, 93 N. W. 165; Chamberlain Banking House *v.* Noyes, (1902) 92 N. W. 175; Jansen *v.* Mundt, 20 Nebr. 320, 30 N. W. 53; Leach *v.* Milburn Wagon Co., 14 Nebr. 106, 15 N. W. 232; Cady *v.* Smith, 12 Nebr. 628, 12 N. W. 95; Ruth *v.* Lowry, 10 Nebr. 260, 4 N. W. 977; Kellogg *v.* Spargur, 3 Nebr. (Unoff.) 595, 100 N. W. 1025. *Compare* Weisz *v.* Davey, 28 Nebr. 566, 44 N. W. 470.

New York.— *In re* Jones, 172 N. Y. 575, 65 N. E. 570; Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537.

Ohio.— Byers *v.* Schulpe, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649 (a non-resident partnership doing business in the state may be sued by its firm-name); Haskins *v.* Alcott, 13 Ohio St. 210 (authority to sue in firm-name is limited to partnerships doing business or holding property within the state); Abernathy *v.* Latimore, 19 Ohio 286; Laws *v.* McCarty, 1 Handy 191, 12 Ohio Dec. (Reprint) 96; Calvert *v.* Newberger, 20 Ohio Cir. Ct. 353, 11 Ohio Cir. Dec. 184.

West Virginia.— Allen *v.* South Penn Coal Co., 58 W. Va. 197, 52 S. E. 454.

Wisconsin.— Schweppe *v.* Wellauer, 76 Wis. 19, 45 N. W. 17, a partnership may be sued by its firm-name, and the names of its members substituted when disclosed.

Wyoming.— O'Brien *v.* Foglesong, 3 Wyo. 57, 31 Pac. 1047.

England.— Western Nat. Bank *v.* Perez, [1891] 1 Q. B. 304, 60 L. J. Q. B. 272, 64 L. T. Rep. N. S. 543, 39 Wkly. Rep. 245.

Canada.— Nachod *v.* Stern, 30 Nova Scotia 251; Lang *v.* Thompson, 16 Ont. Pr. 516, a person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name.

See 38 Cent. Dig. tit. "Partnership," § 360.

Cumulative remedy.— Legislation which permits a suit to be brought against a partnership in its firm-name is construed to give a remedy which is merely cumulative, and not to deprive plaintiff of the right to sue all the partners individually as he was bound to do at common law. Davidson *v.* Knox, 67 Cal. 143, 7 Pac. 413; Sawyer *v.* Armstrong, 23 Colo. 287, 47 Pac. 391; Peabody *v.* Oleson, 15 Colo. App. 346, 62 Pac. 234; Markham *v.* Buckingham, 21 Iowa 494, 89 Am. Dec. 590; Hamsmith *v.* Espy, 13 Iowa 439.

alone, but it is necessary that the name of each member of the firm shall be set forth.[20]

b. Firms or Partners as Plaintiffs — (i) *In General.* All the partners are proper and necessary parties plaintiff in an action to enforce a partnership claim.[21]

Actions in name of agent of partnership authorized see Edwards *v.* Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791; Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537; Eliot *v.* Himrod, 108 Pa. St. 569.

20. *Alabama.*— Johnson *v.* Gadsden First Nat. Bank, 145 Ala. 378, 40 So. 78; Foreman *v.* Weil, 98 Ala. 495, 12 So. 815 (an action entitled "W. Bros., a firm composed of I. W. and E. W., Plaintiffs," is brought in the individual names of the parties); Moore *v.* Burns, 60 Ala. 269. *Compare* Hatcher *v.* Branch, 141 Ala. 410, 37 So. 690 [*distinguishing* Simmons *v.* Titche, 102 Ala. 317, 14 So. 786], holding that, although a suit is brought in the name of a partnership as plaintiff, if the individual names of the partners composing the firm are set out in the complaint it is sufficient.

California.— Gilman *v.* Cosgrove, 22 Cal. 356.

Illinois.— See Hinman *v.* Andrews Opera Co., 49 Ill. App. 135.

Indiana.— Pollock *v.* Dunning, 54 Ind. 115; Livingston *v.* Harvey, 10 Ind. 218; Holland *v.* Butler, 5 Blackf. 255; Hughes *v.* Walker, 4 Blackf. 50; Davis *v.* Hubbard, 4 Blackf. 50; Hays *v.* Lanier, 3 Blackf. 322. *Compare* Shane *v.* Lowry, 48 Ind. 205.

Michigan.— Smith *v.* Canfield, 8 Mich. 493.

Mississippi.— Lewis *v.* Cline, (1888) 5 So. 112; Blackwell *v.* Reid, 41 Miss. 102.

Missouri.— See Jones *v.* Hurst, 67 Mo. 568.

Montana.— Doll *v.* Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625, where Code Civ. Proc. § 590, is held not to authorize an action to be brought in the copartnership name.

Nevada.— Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40, 97 Am. Dec. 510.

New Jersey.— Faulkner *v.* Whitaker, 15 N. J. L. 438; Tomlinson *v.* Burke, 10 N. J. L. 295; Burns *v.* Hall, 3 N. J. L. 984; McCrady *v.* Vaneman, 3 N. J. L. 870; Crandall *v.* Denny, 3 N. J. L. 137; Seely *v.* Schenck, 2 N. J. L. 75.

New York.— Bentley *v.* Smith, 3 Cai. 170. See also Crawford *v.* Collins, 45 Barb. 269.

North Carolina.— Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489. See also Palin *v.* Small, 63 N. C. 484.

Oregon.— Dunham *v.* Shindler, 17 Oreg. 256, 20 Pac. 326.

South Carolina.— Martin *v.* Kelly, Cheves 215.

Texas.— Houghton *v.* Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583.

United States.— Adams *v.* May, 27 Fed. 907; Rhea *v.* Rawlings, 20 Fed. Cas. No. 11,737, 3 Cranch C. C. 256.

England.— Escott *v.* Gray, 47 L. J. C. P. 606, 39 L. T. Rep. N. S. 121.

Canada.— Wilson *v.* Roger, 10 Ont. Pr. 355; Browne *v.* Taylor, 28 Quebec Super. Ct. 462. See 38 Cent. Dig. tit. "Partnership," § 360.

Individual names stated in petition.— Where partners bring suit it is enough to state the partnership name in the writ, if the petition states the names of the individual members. Putnam *v.* Wheeler, 65 Tex. 522. See also Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905; De Walt *v.* Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60.

An intervening plea filed by a partnership, without stating the names of the individuals composing the firm, is bad. Behan *v.* Long, (Tex. Civ. App. 1895) 30 S. W. 380.

An action brought in the name of a partnership cannot be changed by amendment, into one by the individual doing business in such firm-name. Voigt Brewery Co. *v.* Paeific Co., 139 Mich. 284, 102 N. W. 739. But *compare* Lang *v.* Thompson, 16 Ont. Pr. 516.

Where a partnership has not registered under the Pennsylvania act of April 14, 1851, it cannot complain in a suit against it that the name of one of the members was omitted or that the names of persons not members were included. Daniel *v.* Lanee, 29 Pa. Super. Ct. 454.

A statement of demand may be against partners in the firm-name where an action has been brought against them in their individual names. Percival *v.* Groff, 8 Blackf. (Ind.) 233.

Where a note is made payable to a firm by its name, it is advisable to declare thereon in the firm-name. Gordon *v.* Janney, Morr. (Iowa) 182. See also Morrison *v.* Tate, 1 Metc. (Ky.) 569.

Foreclosure in individual names of partners of mortgage given to firm see Chieago Lumber Co. *v.* Ashworth, 26 Kan. 212; Pomeroy *v.* Latting, 2 Allen (Mass.) 221.

A warrant of attorney signed in the firm-name by a majority of the partners is sufficient to authorize the use of the firm-name in suit upon a contract made by the firm. Clarke *v.* Slate Valley R. Co., 136 Pa. St. 408, 20 Atl. 562, 10 L. R. A. 238.

21. *Alabama.*— Allen *v.* White, Minor 365. *Compare* Garner *v.* Tiffany, Minor 167.

Arkansas.— Coleman *v.* Fisher, 67 Ark. 27, 53 S. W. 671 (all members of a firm are necessary parties to a suit on an obligation in its favor); Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Matthews *v.* Paine, 47 Ark. 54, 14 S. W. 463; Hot Springs R. Co. *v.* Tyler, 36 Ark. 205.

Georgia.— Frost *v.* Schackleford, 57 Ga. 260.

Illinois.— Minehrod *v.* Ullmann, 163 Ill. 25, 44 N. E. 864 [*affirming* 60 Ill. App. 400]; Sindelare *v.* Walker, 137 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353 [*affirming* 35 Ill. App. 607]; American Cent. R. Co. *v.* Miles, 52 Ill. 174.

Kentucky.— Snodgrass *v.* Broadwell, 2 Litt. 353.

When, however, action is brought upon a claim belonging to a partner in his own right, or to which he has a valid legal title, his copartners need not be joined with him, but he alone is the proper plaintiff.[22] A nominal partner need not be

Louisiana.— McFarland *v.* Connell, 22 La. Ann. 481; Gallot *v.* McCluskey, 18 La. Ann. 259; Halliman *v.* Clark, 4 La. Ann. 179; Shipman *v.* Hickman, 9 Rob. 149; Cutler *v.* Cochran, 13 La. 482; Crozier *v.* Hodge, 3 La. 357.

Maine.— Bumpus *v.* Turgeon, 98 Me. 550, 57 Atl. 883; Hacker *v.* Johnson, 66 Me. 21.

Massachusetts.— Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Fay *v.* Duggan, 135 Mass. 242; Cushing *v.* Marston, 12 Cush. 431. See also Gage *v.* Rollins, 10 Metc. 348; Hewes *v.* Bayley, 20 Pick. 96; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.

Michigan.— Reed *v.* Gould, 105 Mich. 368, 63 N. W. 415, 55 Am. St. Rep. 453.

Minnesota.— See Fuller *v.* Nelson, 35 Minn. 213, 28 N. W. 511.

New Jersey.— Harney *v.* Jersey City First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221.

New York.— Saul *v.* Kruger, 9 How. Pr. 569; Hill *v.* Packard, 5 Wend. 375; Dob *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293.

Rhode Island.— White *v.* Campbell, 18 R. I. 150, 26 Atl. 40.

Tennessee.— McFerrin *v.* Woods, 3 Baxt. 242.

Washington.— De Wit *v.* Lander, 72 Wis. 120, 39 N. W. 349; Miller *v.* Price, 20 Wis. 117.

United States.—Ambler *v.* Choteau, 107 U. S. 586, 1 S. Ct. 556, 27 L. ed. 322 [*affirming* 5 Fed. Cas. No. 272]; Bennett *v.* Scott, 3 Fed. Cas. No. 1,323, 1 Cranch C. C. 339. See also Seymour *v.* Western R. Co., 106 U. S. 320, 1 S. Ct. 123, 27 L. ed. 103.

England.— Garrett *v.* Handley, 4 B. & C. 664, 10 E. C. L. 748, 1 C. & P. 483, 12 E. C. L. 281, 7 D. & R. 144, 27 Rev. Rep. 405; Forster *v.* Lawson, 3 Bing. 452, 4 L. J. C. P. O. S. 148, 11 Moore C. P. 360, 11 E. C. L. 224; Alexander *v.* Barker, 2 Cromp. & J. 133, 1 L. J. Exch. 40, 2 Tyrw. 140; Teed *v.* Elworthy, 14 East 210; Clay *v.* Southern, 7 Exch. 717, 16 Jur. 1074, 21 L. J. Exch. 202; Coppard *v.* Page, Forr. 1; Bond *v.* Pittard, 1 H. & H. 82, 2 Jur. 183, 7 L. J. Exch. 78, 3 M. & W. 357; Spartali *v.* Constantinidi, 20 Wkly. Rep. 823.

Canada.— Brougham *v.* Balfour, 3 U. C. C. P. 72.

See 38 Cent. Dig. tit. "Partnership," § 362.

Compare Cleveland *v.* Heidenheimer, 92 Tex. 108, 46 S. W. 30.

Partners residing in different places.— The fact that a partnership is composed of a large number of members, residing in different counties, does not justify a single partner in bringing an action for the benefit of all to recover a debt due the partnership. Brainerd *v.* Bertram, 5 Abb. N. Cas. (N. Y.) 102.

Where a libel is published concerning a partnership business, each partner may sue separately for the injuries he has sustained or all may join in one suit for damages to the firm. Wills *v.* Jones, 13 App. Cas. (D. C.) 482.

Undisclosed partner.— Where persons making a contract are partners and bills are rendered in the firm-name, the partners may maintain an action as such, although the name of one does not appear in the bills and he is not known to be a partner. McDonnell *v.* Ford, 87 Mich. 198, 49 N. W. 545.

When two sureties from their common or partnership funds pay the debt of their principal they may maintain a joint action for the money so paid. Pearson *v.* Parker, 3 N. H. 366.

Agreement made before partnership formed.— Where an agreement is made with one to pay him a commission for selling land, and he then forms a partnership, which sells it, the partners may sue jointly for the commission. Welsh *v.* Lemert, 92 Iowa 116, 60 N. W. 230.

Services outside of regular business.— An action may be brought in the firm-name for services rendered outside of the regular business of the firm where the other party is benefited and the firm damaged thereby. Tiernan *v.* Doran, 19 Nebr. 492, 26 N. W. 318.

Fraudulent conduct of partner.— An action cannot be maintained in the name of the partnership where it is necessary to set up the fraudulent misapplication of the partnership assets on the part of one of plaintiffs. Blodgett *v.* Sleeper, 67 Me. 499. See also Farley *v.* Lovell, 103 Mass. 387; Homer *v.* Wood, 11 Cush. (Mass.) 62.

Action for possession of realty.—A partner, being a tenant in common with his copartner, may recover possession of the whole of the firm real estate, as against one holding the same without title. Brady *v.* Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

22. *Alabama.*—Giovanni *v.* First Nat. Bank, 51 Ala. 176 (where firm property being levied on each partner claimed exemption, thereby severing their joint interest, it was held that they could not maintain a joint action against the judgment creditor for selling the property); Roberts *v.* Heim, 27 Ala. 678.

Connecticut.— Leveret *v.* Sherman, 1 Root 169, action for personal injury from false imprisonment upon a firm obligation.

Georgia.— Council *v.* Tael, 122 Ga. 61, 49 S. E. 806, one who signs a contract in his individual name may bring suit thereon, although the contract may have been for the benefit of his firm. *Compare* Newsome *v.* Brazell, 118 Ga. 547, 45 S. E. 397, holding that in a suit by a firm, the value of the property of one partner cannot be recovered.

Illinois.— Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504.

Kentucky.— Morrison *v.* Tate, 1 Metc. 569.

Massachusetts.— Knowles *v.* Sullivan, 182 Mass. 318, 65 N. E. 389.

made a party plaintiff;[23] nor need one who is entitled to a share in the profits of a firm as compensation for his services.[24]

(II) *In Actions or Transactions in Partner's Name.* As a rule a suit on a transaction in the name of an individual partner but for the firm's benefit may be brought, either by the partner appearing in the transaction as sole plaintiff,[25] or, under the doctrine of undisclosed principal, by all the partners.[26]

(III) *In Actions For a Partner's Share of Firm Claim.* A partner

Michigan.— Burwitz *v.* Jeffers, 103 Mich. 512, 61 N. W. 784; Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956.

New Hampshire.— Burnham *v.* Whittier, 5 N. H. 334, a partner may bring suit in his own name on a note payable to the order of his firm, after indorsing it in the firm-name to himself.

New York.— Eckert *v.* Lennert, 2 Misc. 198, 21 N. Y. Suppl. 258; Boynton *v.* Page, 13 Wend. 425 (a partner may maintain replevin for stock taken from his possession before title to it passed from him to the firm); Gould *v.* Gould, 6 Wend. 263 [*affirming* 8 Cow. 168] (two partners were subjected to the payment of a third person's debt, the one as surety, and the other as heir of a cosurety, and separate actions were held to be maintainable against the principal, although payment was made from firm funds); Kirby *v.* Cogswell, 1 Cai. 505 (a suit is properly brought in name of a partner who had indorsed to himself a note payable to the order of the firm).

Texas.— Cleveland *v.* Heidenheimer, 92 Tex. 108, 46 S. W. 30 [*affirming* (Civ. App. 1898) 44 S. W. 551] (where a partner makes a contract in his own name and for his own benefit and later transfers one half thereof to his copartner without making it firm property, he may sue alone upon it, for the assignment transfers only an equitable title to the half to the copartner, the legal title remaining in the original contractee); Speake *v.* Prewitt, 6 Tex. 252.

United States.— Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 492, 17 L. ed. 311, bill to abate a nuisance to health may be brought by a partner in his own name, although the partnership property may be affected by it, the court saying: "Nor is there more necessity for joining with his partners . . . than there is for his joining in the suit any other person . . who has sustained injury."

England.— Sims *v.* Bond, 5 B. & Ad. 389, 2 N. & M. 608, 27 E. C. L. 168; Sparrow *v.* Chisman, 9 B. & C. 241, 7 L. J. K. B. O. S. 173, 4 M. & R. 206; Wilsford *v.* Wood, 1 Esp. 182; Jones *v.* Robinson, 1 Exch. 454, 11 Jur. 933, 17 L. J. Exch. 36; Agacio *v.* Forbes, 4 L. T. Rep. N. S. 155, 14 Moore P. C. 160, 9 Wkly. Rep. 503, 15 Eng. Reprint 267.

Canada.— Brougham *v.* Balfour, 3 U. C. C. P. 72.

See 38 Cent. Dig. tit. "Partnership," § 362.

23. Bendel *v.* Hettrick, 35 N. Y. Super. Ct. 405, 45 How. Pr. 198; Spurr *v.* Cass, L. R. 5 Q. B. 656, 39 L. J. Q. B. 24, 23 L. T. Rep. N. S. 409; Kell *v.* Nainby, 10 B. & C. 20, 8 L. J. K. B. O. S. 99, 5 M. & R. 76, 21 E. C. L. 19. *Compare* Waite *v.* Dodge, 34 Vt. 181, holding that an ostensible, although nominal, partner may be joined.

If the action is on a contract under seal, or a negotiable instrument, in which the nominal partner is named as a party, he must be joined as plaintiff. Guidon *v.* Robson, 2 Campb. 302, 11 Rev. Rep. 713.

24. Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542; Delise *v.* Palladino, 16 Misc. (N. Y.) 74, 37 N. Y. Suppl. 705; Cawthron *v.* Trickett, 15 C. B. N. S. 754, 33 L. J. C. P. 182, 9 L. T. Rep. N. S. 609, 12 Wkly. Rep. 311, 109 E. C. L. 754.

25. *Indiana.*— Ewing *v.* French, 1 Blackf. 353.

Kentucky.— New York Mut. F. Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. Rep. 1944.

Massachusetts.— Trott *v.* Irish, 1 Allen 481. But *compare* Halliday *v.* Doggett, 6 Pick. 359.

Missouri.— Hilliker *v.* Francisco, 65 Mo. 598; Taylor *v.* The Robert Campbell, 20 Mo. 254.

Texas.— Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919.

Vermont.— Curtis *v.* Belknap, 21 Vt. 433.

United States.— Simpson *v.* Baker, 2 Black 581, 17 L. ed. 263 (the party who makes a contract and performs the work under it can recover in an action on it in his own name, although he has a partner interested in the contract); Law *v.* Cross, 1 Black 533, 17 L. ed. 185.

England.— Driver *v.* Burton, 17 Q. B. 989, 21 L. J. Q. B. 157, 79 E. C. L. 989; Lomas *v.* Bradshaw, 9 C. B. 620, 19 L. J. C. P. 273, 67 E. C. L. 620.

See 38 Cent. Dig. tit. "Partnership," § 36[illegible]

26. *Illinois.*—Havana, etc., R. Co. *v.* Walsh, 85 Ill. 58; Illinois Cent. R. Co. *v.* Owens, 53 Ill. 391.

Indiana.— Ward *v.* Leviston, 7 Blackf. 466.

Michigan.— Gilbert *v.* Lichtenberg, 98 Mich. 417, 57 N. W. 259, where a member of a partnership sells goods of the firm, the firm may bring suit for the price, although the purchaser thought he was dealing with such member as an individual.

Pennsylvania.— Schnader *v.* Schnader, 26 Pa. St. 384; Chamberlain *v.* Hite, 5 Watts 373.

Wisconsin.— Badger *v.* Daenieke, 56 Wis. 678, 14 N. W. 821.

United States.— Bennett *v.* Scott, 3 Fed. Cas. No. 1,323, 1 Cranch C. C. 339.

England.— Skinner *v.* Stocks, 4 B. & Ald. 437, 23 Rev. Rep. 337, 6 E. C. L. 550; Cothay *v.* Fennell, 10 B. & C. 671, 8 L. J. K. B. O. S. 302, 21 E. C. L. 284; Garrett *v.* Hand-

cannot sue alone for his share of a firm claim,[27] unless the defendant has incurred a several liability to him.[28] Where there has not been a joint letting of firm property, either partner may maintain a separate action for his proportion of the sum due for use and occupation.[29]

(iv) *One Partner Suing as Assignee of Firm.* At common law an assignment of a firm claim to a partner, as distinguished from an indorsement, does not entitle him to maintain an action in his own name.[30] If he sues thereon he must proceed in the names of all the partners, unless he shows that defendant has assented to the transaction; in which case he brings his action upon the new contract between him and defendant which has been substituted for the firm claim.[31] But one member of a partnership may take by indorsement from the firm a note payable to the firm, so as to enable him to maintain an action thereon.[32]

(v) *Dormant Partners as Plaintiffs.* It is a well-settled rule that a dormant partner need not join in an action, brought in behalf of the firm by the ostensible partners, against persons who have dealt with the latter only.[33] It is

ley, 4 B. & C. 664, 10 E. C. L. 748, 1 C. & P. 483, 12 E. C. L. 281, 7 D. & R. 144, 27 Rev. Rep. 405.

See 38 Cent. Dig. tit. "Partnership," § 363.

27. McDonough *v.* Carter, 98 Ga. 703, 25 S. E. 938; Corner *v.* Gilman, 53 Md. 364; Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95; Vinal *v.* West Virginia Oil, etc., Co., 110 U. S. 215, 4 S. Ct. 4, 28 L. ed. 124; Marsolais *v.* Willett, 17 Quebec Super. Ct. 262.

28. Wood *v.* Montgomery, 60 Ala. 500; Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468 (lease of firm property with provision that half the rent should be paid to one of the partners); Blair *v.* Snover, 10 N. J. L. 153 (partners agreed to divide a firm claim and the debtor assented thereto); Bunn *v.* Morris, 3 Cai. (N. Y.) 54 (defendant promised to pay each partner his proportion of the debt).

29. Hammett *v.* Brown, 60 Ala. 498.

30. *Massachusetts.*— Tate *v.* Citizens Mut. F. Ins. Co., 13 Gray 79; Russell *v.* Swan, 16 Mass. 314.

New Hampshire.— Burnham *v.* Whittier, 5 N. H. 334.

New York.— Kirby *v.* Cogswell, 1 Cai. 505.

North Carolina.— Gaither *v.* Caldwell, 21 N. C. 504.

Pennsylvania.— Mosgrove *v.* Golden, 101 Pa. St. 605; Horbach *v.* Huey, 4 Watts 455, the partners cannot "change the original relation of debtor and creditor without the debtor's consent."

Canada.— Brougham *v.* Balfour, 3 U. C. C. P. 72.

See 38 Cent. Dig. tit. "Partnership," § 365.

31. Howell *v.* Reynolds, 12 Ala. 128; Molen *v.* Orr, 44 Ark. 486; De Groot *v.* Darby, 7 Rich. (S. C.) 118; Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

32. Manegold *v.* Dulan, 30 Wis. 541; Merrill *v.* Guthrie, 1 Pinn. (Wis.) 435.

By statute, in many jurisdictions, the assignee of a chose in action may sue thereon in his own name. See the statutes of the different states. And see Pacific Mut. L. Ins. Co. *v.* Fisher, 109 Cal. 566, 42 Pac. 154; Walker *v.* Steel, 9 Colo. 388; Swails *v.* Coverdill, 17 Ind. 337; Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386; Farwell *v.* Davis, 66 Barb. (N. Y.) 73. See, generally, Assignments.

33. *Alabama.*— St. Marys' Bank *v.* St. John, 25 Ala. 566; Shropshire *v.* Shepperd, 3 Ala. 733.

Indiana.— Goble *v.* Gale, 7 Blackf. 218, 41 Am. Dec. 219.

Louisiana.— Keane *v.* Fisher, 9 La. Ann. 70.

Maryland.— Mitchell *v.* Dall, 2 Harr. & G. 159.

Massachusetts.— Wood *v.* O'Kelley, 8 Cush. 406; Johnson *v.* Ames, 6 Pick. 330; Lord *v.* Baldwin, 6 Pick. 348.

New York.— Howe *v.* Savory, 51 N. Y. 631, 49 Barb. 403; Clark *v.* Miller, 4 Wend. 628; Hawley *v.* Cramer, 4 Cow. 717; Clarkson *v.* Carter, 3 Cow. 84. But see Secor *v.* Keller, 4 Duer 416.

North Carolina.— Wilkes *v.* Clark, 12 N. C. 178.

Pennsylvania.— Wilson *v.* Wallace, 8 Serg. & R. 53, holding that where all are active partners, although the names of two do not appear in the firm style, all must join as plaintiffs.

Texas.— Speake *v.* Prewitt, 6 Tex. 252; Boehm *v.* Calisch, (1887) 3 S. W. 293; Keesey *v.* Old, 3 Tex. Civ. App. 1, 21 S. W. 693.

Vermont.— Waite *v.* Dodge, 34 Vt. 181; Morton *v.* Webb, 7 Vt. 123; Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286.

Wisconsin.— Platt *v.* Iron Exch. Bank, 83 Wis. 358, 53 N. W. 737, ostensible partners are trustees of an express trust for the dormant partners under Code, § 2607.

England.— Kell *v.* Nainby, 10 B. & C. 20, 8 L. J. K. B. O. S. 99, 5 M. & R. 76, 21 E. C. L. 19; Leveck *v.* Shaftoe, 2 Esp. 468; Mawman *v.* Gillett, 2 Taunt. 325 note, 11 Rev. Rep. 597; Lloyd *v.* Archbowle, 2 Taunt. 324, 11 Rev. Rep. 595.

Canada.— Briggs *v.* Bower, 5 U. C. Q. B. O. S. 672.

See 38 Cent. Dig. tit. "Partnership," § 366.

Knowledge of existence of dormant partner.— A dormant partner must be joined if the defendant had knowledge that he was a dormant partner in the transaction which

equally well settled, however, that a dormant partner may be joined as plaintiff with the ostensible partner.[34]

(VI) *Using Names of Copartners as Plaintiffs.* As a rule a partner may sue in the name of himself and of his copartners to enforce a partnership claim, even without their consent;[35] but he is not entitled to sue in his own name for the benefit of himself and of his copartners,[36] unless the members are too numerous, or it is otherwise impracticable to bring them in.[37]

c. Firms or Partners as Defendants.[38] The liability of partners upon firm contracts is joint, and not joint and several, at common law; and it necessarily follows that all of the ostensible members of a partnership must be joined as defendants in an action brought upon partnership obligations.[39] But neither a

is the subject-matter of the suit. Bird *v.* Fake, 1 Pinn. (Wis.) 290. *Contra,* Monroe *v.* Ezzell, 11 Ala. 603.

34. *Alabama.*— Desha *v.* Holland, 12 Ala. 513, 46 Am. Dec. 261.

Massachusetts.— Wright *v.* Herrick, 125 Mass. 154; Robinson *v.* Mansfield, 13 Pick. 139.

Pennsylvania.— Rogers *v.* Kichline, 36 Pa. St. 293.

Texas.— Garrett *v.* Muller, 37 Tex. 589.

Vermont.— Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286. But see Boardman *v.* Keeler, 2 Vt. 65.

England.— Cothway *v.* Fennell, 10 B. & C. 671, 8 L. J. K. B. O. S. 302, 21 E. C. L. 284, repudiating the doubt on this point expressed in Mawman *v.* Gillett, 2 Taunt. 325 note, 11 Rev. Rep. 597.

See 38 Cent. Dig. tit. "Partnership," § 366.

Effect as to defenses.— The joinder of a dormant partner is not allowed to affect any defenses which would have been available had the suit been brought without him. Ward *v.* Leviston, 7 Blackf. (Ind.) 466; Emerson *v.* Baylies, 19 Pick. (Mass.) 55; Lord *v.* Baldwin, 6 Pick. (Mass.) 348; Beach *v.* Hayward, 10 Ohio 455; Bryant *v.* Clifford, 27 Vt. 664; Lapham *v.* Green, 9 Vt. 407; Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286; Rose *v.* Murchie, 2 Call (Va.) 409; Stracey *v.* Decy, 2 Esp. 469, 7 T. R. 361 note.

35. Jones *v.* Hurst, 67 Mo. 568; Ward *v.* Barber, 1 E. D. Smith (N. Y.) 423; Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72; Whitehead *v.* Hughes, 2 Cromp. & M. 318, 2 Dowl. P. C. 258, 4 Tyrw. 92, when suit is brought against the consent of his copartners, in the name of all, the partner bringing it may be required to indemnify them against costs.

36. Cutler *v.* Cochran, 13 La. 482; Brainerd *v.* Bertram, 5 Abb. N. Cas. (N. Y.) 102.

37. Pipe *v.* Bateman, 1 Iowa 369; Wallworth *v.* Holt, 4 Myl. & C. 619, 18 Eng. Ch. 619, 41 Eng. Reprint 238; Taylor *v.* Salmon, 4 Myl. & C. 134, 18 Eng. Ch. 134, 41 Eng. Reprint 53; Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302. But see Brainerd *v.* Bertram, 5 Abb. N. Cas. (N. Y.) 102.

38. Form of action.— An action against A and B, partners doing business under the style of A and B, upon notes signed by defendants individually and not disclosing upon their face anything to indicate a partnership, is an action against them as individuals. Crompton *v.* Smith, 120 Ala. 233, 25 So. 300. An action against A and B, partners, etc., is one against them as individuals. Peaks *v.* Graves, 25 Nebr. 235, 41 N. W. 151; Bastian *v.* Adams, 5 Nebr. (Unoff.) 32, 97 N. W. 231. An action against A and B Co., consisting of, etc., is one against the firm. Winters *v.* Means, 50 Nebr. 209, 69 N. W. 753. An action against G, H, and K, under the firm-name of G & Co., is not against the firm as such. Good *v.* Red River Valley Co., 12 N. M. 245, 78 Pac. 46.

39. *California.*— Butler *v.* Delafield, 1 Cal. App. 367, 28 Pac. 260.

Florida.— Martyn *v.* Amold, 36 Fla. 446, 18 So. 791.

Illinois.— Sandusky *v.* Sidwell, 173 Ill. 493, 50 N. E. 1003 [*affirming* 73 Ill. App. 491].

Kentucky.— Fox *v.* Blue Grass Grocery Co., 61 S. W. 265, 22 Ky. L. Rep. 1695.

Louisiana.— Key *v.* Box, 14 La. Ann. 497; McGehee *v.* McCord, 14 La. 362. *Compare* Zacharie *v.* Blandin, 6 La. 193; Phillips *v.* Paxton, 3 Mart. N. S. 39.

Minnesota.—Whittaker *v.* Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55.

New York.— Sparks *v.* Fogarty, 93 N. Y. App. Div. 472, 87 N. Y. Suppl. 648; Bridge *v.* Payson, 5 Sandf. 210 (actions against one partner on partnership contracts cannot be decided without prejudice to the rights of others, within the meaning of Code, § 122, providing that in such cases the court may determine any controversy between the parties before it); Hand *v.* Rogers, 16 Misc. 17, 37 N. Y. Suppl. 657, 25 N. Y. Civ. Proc. 254 [*affirming* 14 Misc. 248, 35 N. Y. Suppl. 712]; Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227. *Compare* Hawks *v.* Munzer, 2 Hill 200.

Oklahoma.— Cox *v.* Gille Hardware, etc., Co., 8 Okla. 483, 58 Pac. 645.

Pennsylvania.— Alexander *v.* McGinn, 3 Watts 220; Daniel *v.* Lance, 29 Pa. Super. Ct. 454 (applying Act of April 14, 1851, § 13 (Pamphl. Laws 612); Hoffman *v.* Galland, 1 Leg. Rec. 16 (such joinder cannot be required where defendants have failed to file a list of the names of the several members of the firm as required by statute).

Rhode Island.— Nathanson *v.* Spitz, 19 R. I. 70, 31 Atl. 690.

Vermont.— Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60.

nominal[40] nor a dormant[41] partner is a necessary party defendant, although he may be joined as defendant. When all partners are not known to plaintiff or when one of the members of a firm makes a contract in his own name, and credit is upon reasonable grounds given to one alone, he alone may be pursued, and the fact that others were associated with him is not sufficient to sustain a plea in abatement.[42] For torts committed by a partner, or by any agent for whose misconduct a partnership is liable, the injured party may, at his election, sue all the partners or any one or more of them.[43]

d. Making a Partner Defendant Who Refuses to Be a Plaintiff. Under statutory provisions in some states, a partner who refuses to be a plaintiff in an action

United States.— Barry *v.* Foyles, 1 Pet. 311, 7 L. ed. 157; Johnson *v.* Byrd, 13 Fed. Cas. No. 7,376, Hempst. 434; Norwood *v.* Sutton, 18 Fed. Cas. No. 10,365, 1 Cranch C. C. 327.

England.— Pierson *v.* Robinson, 3 Swanst. 158, 36 Eng. Reprint 807.

Canada.— Brasserie de Beauport *v.* Dinan, 14 Quebec Super. Ct. 284.

See 38 Cent. Dig. tit. "Partnership," § 369.

When by statute the liability of partners has been made several as well as joint, a several action may be brought against any partner. Clark *v.* Jones, 87 Ala. 474, 6 So. 362; Rabitte *v.* Orr, 83 Ala. 185, 3 So. 420; Cox *v.* Harris, 48 Ala. 538; McCulloch *v.* Judd, 20 Ala. 703; Hicks *v.* Maness, 19 Ark. 701; Burgen *v.* Dwinel, 11 Ark. 314; Hamilton *v.* Buxton, 6 Ark. 24; Chesley *v.* Riley, 20 D. C. 166; Ryerson *v.* Hendrie, 22 Iowa 480; Crane *v.* Ring, 48 Kan. 58, 28 Pac. 1010; Williams *v.* Rogers, 14 Bush (Ky.) 776; Gates *v.* Watson, 54 Mo. 585; Griffin *v.* Samuel, 6 Mo. 50; Curran *v.* W. W. Kendall Boot, etc., Co., 8 N. M. 417, 45 Pac. 1120; Hanstein *v.* Johnson, 112 N. C. 253, 17 S. E. 155; Gratz *v.* Stump, Cooke (Tenn.) 494; People's Nat. Bank *v.* Hall, 76 Vt. 280, 56 Atl. 1012.

When the contract on behalf of the firm recites that it is a joint and several obligation, an action may be brought against any partner individually. Snow *v.* Howard, 35 Barb. (N. Y.) 55; Davis *v.* Golston, 53 N. C. 28.

40. Hatch *v.* Wood, 43 N. H. 633.

41. *California.*— Tomlinson *v.* Spencer, 5 Cal. 291.

Illinois.— Goggin *v.* O'Donnell, 62 Ill. 66; Page *v.* Brant, 18 Ill. 37.

Maryland.— Hopkins *v.* Kent, 17 Md. 72; Mitchell *v.* Dall, 2 Harr. & G. 159.

Minnesota.— Wood *v.* Cullen, 13 Minn. 394.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New York.— North *v.* Bloss, 30 N. Y. 374; Brown *v.* Birdsall, 29 Barb. 549; Hurlbut *v.* Post, 1 Bosw. 28; Arnold *v.* Morris, 7 Daly 498; New York Dry Dock Co. *v.* Treadwell, 19 Wend. 525.

Texas.— Jackson *v.* Alexander, 8 Tex. 109; Masterson *v.* Heitmann, (Civ. App. 1905) 87 S. W. 227; Davis *v.* Bingham, (Civ. App. 1898) 46 S. W. 840.

England.— Gabriel *v.* Evill, C. & M. 358, 9 M. & W. 297, 41 E. C. L. 198; Swan *v.* Steele, 7 East 209, 3 Smith K. B. 199, 8 Rev. Rep. 618; Evans *v.* Drummond, 4 Esp. 89; Beckham *v.* Drake, 9 M. & W. 79 [*affirmed* in 7 Jur. 204, 12 L. J. Exch. 486, 11 M. & W. 315]; Rohinson *v.* Wilkinson, 3 Price 538, 18 Rev. Rep. 659; *Ex p.* Hamper, 17 Ves. Jr. 403, 11 Rev. Rep. 115, 34 Eng. Reprint 156.

Canada.— Isbester *v.* Ray, 26 Can. Sup. Ct. 79.

See 38 Cent. Dig. tit. "Partnership," § 370.

But *compare* Ela *v.* Rand, 4 N. H. 307; Alexander *v.* McGinn, 3 Watts (Pa.) 220.

A judgment will bind the dormant partner as fully as though made a party to the record. Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734. See *infra*, VI, D, 9, g.

42. *California.*— Settembre *v.* Putnam, 30 Cal. 490.

Massachusetts.— Sylvester *v.* Smith, 9 Mass. 119.

New York.— Cookingham *v.* Lasher, 1 Abb. Dec. 436, 2 Keyes 454, 31 How. Pr. 637 note [*affirming* 38 Barb. 656]; Farwell *v.* Davis, 66 Barb. 73; Clark *v.* Holmes, 3 Johns. 148.

Ohio.— Caldwell *v.* Devinney, 7 Ohio Dec. (Reprint) 599, 4 Cinc. L. Bul. 117.

Tennessee.— See Brownlee *v.* Lobenstein, (Ch. App. 1897) 42 S. W. 467.

Vermont.— Hagar *v.* Stone, 20 Vt. 106; Blin *v.* Pierce, 20 Vt. 25; Cleveland *v.* Woodward, 15 Vt. 302, 40 Am. Dec. 682; Goddard *v.* Brown, 11 Vt. 278.

See 38 Cent. Dig. tit. "Partnership," § 369.

43. *California.*— Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970.

Illinois.— Stevens *v.* Faucet, 24 Ill. 483.

Maine.— McCrillis *v.* Hawes, 38 Me. 566.

Maryland.— Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138.

Massachusetts.— Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.

New Jersey.— Randolph *v.* Daly, 16 N. J. Eq. 313.

New York.— Roberts *v.* Johnson, 58 N. Y. 613; Leslie *v.* Wiley, 47 N. Y. 648; Hyde *v.* Lesser, 93 N. Y. App. Div. 320, 87 N. Y. Suppl. 878; Hutton *v.* Murphy, 9 Misc. 151, 29 N. Y. Suppl. 70.

North Carolina.— Mode *v.* Penland, 93 N. C. 292.

South Carolina.— Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170; White *v.* Smith, 12 Rich. 595.

England.— Hudson *v.* Robinson, 4 M. & S. 475.

See 38 Cent. Dig. tit. "Partnership," § 369.

to enforce a firm claim may be made a defendant.[44] But the fact that one partner refuses to be a plaintiff will not justify his copartners in bringing suit in their own names without joining him as defendant.[45]

e. Firms With Common Members. At common law an action was not maintainable between partnerships with a common member, for the same person could not be at once a plaintiff and a defendant in an action at law.[46] Equity, however, permitted a suit under such circumstances;[47] and statutes in many jurisdictions authorize such actions.[48] Even the common-law rule does not preclude a person from suing a firm, upon an individual transaction with him, simply because a member of the defendant firm is his copartner.[49] Much less does it preclude a partner from suing one who has indemnified him against all claims owing by one firm to another firm, of which firms he is a common member.[50]

f. Intervention. A partner,[51] and likewise creditors of a firm,[52] are allowed to intervene as defendants, upon showing that they have an interest in the litigation, which they should be permitted to protect.

g. New Parties and Change of Parties. The courts are very liberal, especially under modern statutes, in permitting the introduction of new parties,[53] or the change of parties by striking out the names of one or more,[54] or the substitution of individuals for a defendant firm or corporation.[55]

44. See the statutes of the different states. And see Hill *v.* Marsh, 46 Ind. 218; Cole *v.* Reynolds, 18 N. Y. 74; Schnaier *v.* Schmidt, 13 N. Y. Suppl. 728; Hines *v.* Dean, 1 Tex. App. Civ. Cas. § 690.

45. Freeman *v.* Abramson, 30 Misc. (N. Y.) 101, 61 N. Y. Suppl. 839, construing Code Civ. Proc. § 448.

46. Taylor *v.* Thompson, 176 N. Y. 168, 68 N. E. 240 [*affirming* 74 N. Y. App. Div. 320, 77 N. Y. Suppl. 438]; Englis *v.* Furniss, 4 E. D. Smith (N. Y.) 587, 2 Abb. Pr. 333; Banks *v.* Mitchell, 8 Yerg. (Tenn.) 111, 29 Am. Dec. 104; Green *v.* Chapman, 27 Vt. 236; Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771.

47. Ford *v.* Stuart Independent Dist., 46 Iowa 294; Crosby *v.* Timolat, 50 Minn. 171, 52 N. W. 526; *Ex p.* Thompson, 3 Deac. & C. 612, 1 Mont. & A. 312, 324.

48. See the statutes of the different states. And see the following cases:

Alabama.—Alexander *v.* Jones, 90 Ala. 474, 7 So. 903.

Mississippi.—Morris *v.* Hillery, 7 How. 61.

New York.—Cole *v.* Reynolds, 18 N. Y. 74; Schnaier *v.* Schmidt, 13 N. Y. Suppl. 725 [*affirmed* in 128 N. Y. 683, 29 N. E. 149].

Ohio.—Gibson *v.* Ohio Farina Co., 2 Disn. 499.

Pennsylvania.—Pennock *v.* Swayne, 6 Watts & S. 239.

49. Moore *v.* Gano, 12 Ohio 300; Jungk *v.* Reed, 9 Utah 49, 33 Pac. 236.

50. Emerson *v.* Torrey, 10 Vt. 323.

51. Peck *v.* Parchem, 52 Iowa 46, 2 N. W. 597; A. E. Johnson Co. *v.* White, 78 Minn. 48, 80 N. W. 838; Caviness *v.* Black, (Tex. Civ. App. 1895) 33 S. W. 712; Elliott *v.* Espenhain, 59 Wis. 272, 18 N. W. 1.

52. Conant *v.* Frary, 49 Ind. 530, intervention by creditors in a suit to foreclose mortgage on firm realty, made by one partner to secure his individual debt.

53. Stuart *v.* Corning, 32 Conn. 105 (construing Rev. St. tit. 1, § 51); Tryon *v.* Butler, 9 Tex. 553; Frese *v.* Bachof, 9 Fed. Cas. No. 5,110, 4 Blatchf. 432, 13 Off. Gaz. 635. But *compare* Wilson *v.* Wallace, 8 Serg. & R. (Pa.) 53, 54 (holding that after action brought by one of several partners for goods sold by the firm, the names of the other partners cannot be added by amendment. The court said: "It is not an informality affecting the merits of the controversy, which, under the act [Mar. 21, 1806] courts may amend; for it has been often decided, that this power, extensive as it is, does not, under the name of amendment, authorize an alteration or change of the cause of action, though it does every defective statement of it"); Dougart *v.* Desangle, 10 Rob. (La.) 430.

54. Lansburg *v.* Cohen, 52 Ala. 180; Hamill *v.* Ashley, 11 Colo. 180, 17 Pac. 502 (construing Code Civ. Proc. §§ 78, 81]; Bull *v.* Lambson, 5 S. C. 288 (construing Code, § 296); Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

55. McCaskey *v.* Pollock, 82 Ala. 174, 2 So. 674 (action against individual partners changed into action against firm as such); Cowan *v.* Leming, 111 Mo. App. 253, 85 S. W. 953; New York State Monitor Milk Pan Co. *v.* Remington's Agricultural Works, 25 Hun (N. Y.) 475 (action against corporation changed into action against individuals as copartners); Tibbs *v.* Parrott, 23 Fed. Cas. No. 14,022, 1 Cranch C. C. 177 (substitution of individual members for firm, as parties plaintiff).

The power of permitting amendments will not be extended to allow the substitution, as defendant, of an entirely different firm, of which one of the original parties defendant is a member (Howes *v.* Patterson, 76 Ga. 689); nor to change an action by a firm "for the use of" one partner, on notes payable to the firm's order, into an action by such partner, without any showing as to

h. Change or Dissolution of Firm Pending Suit. Upon the death of a partner, the survivors have the exclusive right and duty to settle up the firm's affairs.[56] Hence if a partner dies, pending a suit at law, by the partnership, the survivors may continue the suit, if the cause of action survives, without joining the personal representative of the deceased, and by a suggestion of the death upon the record.[57] So if a defendant partner dies, pending a suit at law, it may proceed against the surviving partners, upon a like suggestion of the death upon the record.[58] Where a partner voluntarily dissolves his connection with the partner-

whether he or the firm is the owner of the notes by indorsement or assignment (Norris *v.* Pollard, 75 Ga. 358).

56. See *infra*, VIII.

57. *Alabama.*— Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Davidson *v.* Weems, 58 Ala. 187; Baldwin *v.* Stebbins, Minor 180, where a writ is sued out in the name of two partners and the declaration is filed by one as survivor, there is a sufficient showing of the death of the other.

Georgia.— Guill *v.* Pierce, 78 Ga. 49 (a judgment may be amended *nunc pro tunc* in the name of the survivor); Atlanta *v.* Dooly, 74 Ga. 702.

Illinois.—Roberts *v.* Stigleman, 78 Ill. 120; Finnegan *v.* Allen, 60 Ill. App. 354.

Indiana.— Newman *v.* Gates, (App. 1903) 67 N. E. 468.

Kentucky.— Byrne *v.* Schwing, 6 B. Mon. 199.

Maryland.— Keirle *v.* Shriver, 11 Gill & J. 405, it is error to make the administrator of a deceased partner a party.

Missouri.— State *v.* Stratton, 110 Mo. 426, 19 S. W. 803; Matney *v.* Gregg Bros. Grain Co., 19 Mo. App. 107, under Rev. St. §§ 60, 62, the administrator of deceased may continue the action, if surviving partners fail to give the required bond.

Nebraska.—O'Shea *v.* Kavanaugh, 65 Nebr. 639, 91 N. W. 578; Union Pac. R. Co. *v.* Metcalf, 50 Nebr. 452, 69 N. W. 961.

New York.— Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77 [*reversing* 19 N. Y. Suppl. 849]; Shale *v.* Schantz, 35 Hun 622 (an action of slander brought by the firm survives the death of a member); Latz *v.* Blumenthal, 50 Misc. 407, 100 N. Y. Suppl. 527 [*affirmed* in 116 N. Y. App. Div. 914, 101 N. Y. Suppl. 1128]; Callanan *v.* Keeseville R. Co., 48 Misc. 476, 95 N. Y. Suppl. 513; Lachaise *v.* Libby, 13 Abb. Pr. 6, 21 How. Pr. 362; Taylor *v.* Church, 9 How. Pr. 190.

Ohio.— Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225.

Pennsylvania.— Struthers *v.* Peacock, 3 Wkly. Notes Cas. 517, an action by a firm for libel does not abate by the death of one of the partners.

Rhode Island.— Tucker *v.* Providence, etc., R. Co., 18 R. I. 322, 27 Atl. 448, holding that an action for discrimination in freight rates does not abate.

Texas.— Dunman *v.* Coleman, 59 Tex. 199 (personal representative not a necessary party); Gunter *v.* Jarvis, 25 Tex. 581 (the representative of a deceased partner will be made a party on motion of either defendant or surviving plaintiff).

See 38 Cent. Dig. tit. "Partnership," § 375.

It is only in exceptional cases that the representative of the deceased partner can be made a party litigant, in the place of the deceased. *Ex p.* Ware, 48 Ala. 223; Travis *v.* Tartt, 8 Ala. 574 (under a statute allowing suit against either partner for firm debts the personal representative may be made a party); Pearce *v.* Bruce, 38 Ga. 444; Watson *v.* White, 152 Ill. 364, 38 N. E. 902 (on the revival of a suit brought by deceased for the specific performance of a contract in which his firm had a beneficial interest, his representatives, devisees, and surviving partners may be joined as plaintiffs); Ballance *v.* Samuel, 4 Ill. 380 (a writ of attachment against partners, levied on the real estate of one of them, cannot be revived against his representatives); Hackett *v.* Belden, 10 Abb. Pr. N. S. (N. Y.) 123 [*affirmed* in 47 N. Y. 624] (where a judgment recovered by two partners has been satisfied as to one and not as to the other, the action may be continued upon the latter's decease, against the representative); Blackman *v.* Green, 17 Tex. 322 (where both partners die pending suit the representatives of both may be made parties plaintiff); Wilson *v.* Seligman, 30 Fed. Cas. No. 17,832*a*, 10 Reporter 651.

58. *Alabama.*— Cullum *v.* Batre, 1 Ala. 126.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160, action of tort does not abate.

Iowa.— Childs *v.* Hyde, 10 Iowa 294, 77 Am. Dec. 113.

Nebraska.— King *v.* Bell, 13 Nebr. 409, 14 N. W. 141, action against partners as saloonkeepers for injuries caused by the sale of liquor does not abate.

New York.— Merrill *v.* Blanchard, 7 N. Y. App. Div. 167, 40 N. Y. Suppl. 48 [*affirmed* in 151 N. Y. 645, 45 N. E. 1133, 153 N. Y. 682, 52 N. E. 1125].

Pennsylvania.—Serrill *v.* Denman, Brightly N. P. 65, if the deceased was the only partner summoned or appearing in the action it may proceed against his representatives.

South Carolina.— Sullivan *v.* Susong, 40 S. C. 154, 18 S. E. 268.

Tennessee.— Hammond *v.* St. John, 4 Yerg. 107.

Texas.— Blum *v.* Goldman, 66 Tex. 621, 1 S. W. 899 (plaintiff may have the cause continued against the representative of the deceased partner); Davis *v.* Schaffner, 3 Tex. Civ. App. 121, 22 S. W. 822.

Virginia.— Townes *v.* Birchett, 12 Leigh 173.

ship pending a suit he is still a party to the record.[59] And where after a suit is brought by partners one of them sells his interest to his partner this does not necessitate a change of parties.[60]

i. Miscellaneous. Persons not interested in the result thereof are of course not necessary parties to an action to which a partnership or a member thereof is a party.[61] The wives of partners are not necessary parties defendant in an action to foreclose a lien on firm real estate for a firm debt;[62] nor are the heirs of a deceased partner in an action to set aside as in fraud of the grantor's creditors a conveyance to a firm in payment of a firm debt.[63] The assignee of an insolvent partner cannot either alone or jointly with the other partners bring an action to recover a debt due to the firm; but such insolvent partner may, with the assignee's assent, join his copartner in maintaining such an action.[64]

3. Process, Appearance, Discontinuance, and Dismissal — a. Form of Process.[65] In the absence of special statutory provisions on the subject, the summons or other process instituting an action by or against a firm should contain the names of all the partners, although it need not describe them as partners.[66] A warrant is not the proper process against a firm, where it would not lie against the members thereof individually.[67]

b. Service of Process in General.[68] At common law service of process on one of the partners was not equivalent to service on all, and service on each partner was necessary before judgment could be taken against the firm.[69] Courts of

Wisconsin.— Sherman *v.* Kreul, 42 Wis. 33, the representative of the deceased partner may obtain leave to defend.

United States.— Troy Iron, etc., Factory *v.* Winslow, 24 Fed. Cas. No. 14,199, 1 Ban. & A. 98, 11 Blatchf. 513.

England.— Ellis *v.* Wadeson, [1899] 1 Q. B. 714, 68 L. J. Q. B. 604, 80 L. T. Rep. N. S. 508, 47 Wkly. Rep. 420.

59. Robinson Bank *v.* Miller, 47 Ill. App. 310; Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986; Ayrault *v.* Chamberlin, 26 Barb. (N. Y.) 83.

60. Evans *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

61. Tobey *v.* McFarlin, 115 Mass. 98; Salter *v.* Krueger, 65 Wis. 217, 26 N. W. 544.

62. Harrington *v.* Johnson, 10 Wash. 542, 39 Pac. 141.

63. Folsom *v.* Detrick Fertilizer, etc., Co., 85 Md. 52, 36 Atl. 446.

64. Wonson *v.* Pew, 148 Mass. 299, 19 N. E. 522, construing Pub. St. c. 157, §§ 46, 51.

65. See, generally, Process.

66. *Alabama.*— Tarlton *v.* Herbert, 4 Ala. 359.

Connecticut.— Maritime Bank *v.* Rand, 24 Conn. 9, a writ against an individual "doing business under the name and firm of," etc., is not a writ against a partnership so as to permit amendment by the insertion of the names of others as copartners.

Georgia.— Gillett *v.* Walter, 74 Ga. 291. And see Printup *v.* Turner, 65 Ga. 71, holding that by reason of a statutory provision process need not be prayed against all the partners in order to bind their interest in partnership effects.

Pennsylvania.— Jones *v.* Fegely, 4 Phila. 1.

Texas.— Lash *v.* Morris County Bank, (Civ. App. 1899) 54 S. W. 806. *Compare* Andrews *v.* Ennis, 16 Tex. 45, holding that under a statutory provision the citation may be in the firm-name, if the individual names of the partners appear in the petition.

See 38 Cent. Dig. tit. "Partnership," § 276.

67. Faulkner *v.* Whitaker, 15 N. J. L. 438.

68. See, generally, Process.

69. *Kentucky.*— Rice *v.* Doniphan, 4 B. Mon. 123.

Mississippi.— Demoss *v.* Brewster, 4 Sm. & M. 661.

Pennsylvania.— Pennock *v.* Swayne, 6 Watts & S. 239; Batdorf *v.* Shaffer, 15 Pa. Dist. 780; Cover *v.* Brown, 7 Pa. Dist. 19.

Vermont.— People's Nat. Bank *v.* Hall, 76 Vt. 280, 56 Atl. 1012.

England.— Adam *v.* Townend, 14 Q. B. D. 103; Jackson *v.* Litchfield, 8 Q. B. D. 474, 51 L. J. Q. B. 327, 46 L. T. Rep. N. S. 518, 30 Wkly. Rep. 531; Moredon *v.* Wyer, 6 M. & G. 278, 46 E. C. L. 278; Young *v.* Goodson, 2 Russ. 255, 3 Eng. Ch. 255, 38 Eng. Reprint 331.

See 38 Cent. Dig. tit. "Partnership," § 377; *infra*, VI, D, 9, c; and Judgments, 23 Cyc. 693.

Where one partner is without the state service on the other partner will be sufficient to bind the firm, where a trustee suit is against the firm; but time will be allowed the person summoned to ascertain from his partner as to the state of any claim between the firm and the principal debtor and whether the same has been paid or not. Atkins *v.* Prescott, 10 N. H. 120.

In Louisiana service of process in an action against an ordinary or particular partnership must be made on each and every partner. Le Blanc *v.* Marsoudet, 25 La. Ann. 464; Ridge *v.* Alter, 14 La. Ann. 866; Dougart *v.* Desangle, 10 Rob. 430; McGehee *v.* McCord, 14 La. 362. But during the existence of a commercial partnership, service on one of the

equity, however, permitted suits to be prosecuted, and a decree to be obtained for a firm debt, when service of process had been made upon the resident partners, and the others were out of the jurisdiction, or could not be found.[70] In many jurisdictions it is now provided that actions may be instituted against partnerships, by service of process upon any partner and judgment rendered which is enforceable against firm property, and against the separate property of the partners served.[71] In some jurisdictions statutes provide for the service of process, in suits against a partnership by leaving a copy at its usual place of business with one of its members, or with its clerk or general agent, or other specified person.[72]

c. Service by Publication.[73] Statutes in many jurisdictions provide for the service of non-resident partners by publication.[74]

d. Acknowledgment and Proof of Service.[75] An acknowledgment of service

members of the firm is good against all. Levy *v.* Rich, 106 La. 243, 30 So. 377; Anderson *v.* Arnette, 27 La. Ann. 237; Kearney *v.* Fenner, 14 La. Ann. 870; Gaiennie *v.* Akin, 17 La. 42, 36 Am. Dec. 604; Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 615, 4 Woods 201. Service at the house of one member of a commercial firm on a person not a clerk or agent of the firm is insufficient. Abat *v.* Holmes, 8 Mart. N. S. 145. Where a defendant is sued as a silent partner in a commercial firm, service of process on the clerk of the firm is not sufficient. Ridge *v.* Alter, 14 La. Ann. 866.

In Canada it has been held that the service of a commercial partnership at its business office, the bailiff speaking to a reasonable person, is a service as well of the firm as of each of the partners individually. Sykes *v.* Dillon, 28 Quebec Super. Ct. 230.

70. Leese *v.* Martin, L. R. 13 Eq. 77; Darwent *v.* Walton, 2 Atk. 510, 26 Eng. Reprint 707; Kinder *v.* Forbes, 2 Beav. 503, 9 L. J. Ch. 288, 17 Eng. Ch. 503, 48 Eng. Reprint 1277; Carrington *v.* Cantillon, Bunb. 107; Henderson *v.* Campbell, 34 L. J. Ch. 666, 13 Wkly. Rep. 704; Snow *v.* Hoke, 10 L. J. Ch. 178; Coles *v.* Gurney, 1 Madd. 187, 56 Eng. Reprint 70; Birdwood *v.* Hart, 3 Price 176; Hamilton Bank *v.* Blakeslee, 9 Ont. Pr. 130.

71. See the statutes of the different states. And see the following cases:

Alabama.— Bowin *v.* Sutherlin, 44 Ala. 278; Cox *v.* Cox, 2 Port. 533, under the act of 1807 service of notice of taking depositions is sufficient if served on one partner.

Florida.— Orlando First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239.

Iowa.— Nixon *v.* Downey, 42 Iowa 78; Brydolf *v.* Wolf, 32 Iowa 509; Gregory *v.* Harmon, 10 Iowa 445; Saunders *v.* Bentley, 8 Iowa 516; Walker *v.* Clark, 8 Iowa 474.

Kentucky.— Fox *v.* Blue-Grass Grocery Co., (1901) 60 S. W. 414, limiting Code Civ. Proc. § 51(6), to partnerships all of whose members are non-residents.

Massachusetts.— Parker *v.* Danforth, 16 Mass. 299.

Nebraska.— Rowland *v.* Shephard, 27 Nebr. 494, 43 N. W. 344.

New York.— Feldman *v.* Siegel, 43 Misc. 392, 87 N. Y. Suppl. 538; Manecly *v.* Mayers, 43 Misc. 380, 87 N. Y. Suppl. 471; Kirkbride *v.* Wilgus, 37 Misc. 519, 75 N. Y. Suppl. 1036; Staiger *v.* Theiss, 19 Misc. 170, 43 N. Y. Suppl. 292.

Oklahoma.— Symms Grocer Co. *v.* Burnham, 6 Okla. 618, 52 Pac. 918.

Texas.— Rhodius *v.* Storey, 1 Tex. App. Civ. Cas. § 336.

Wisconsin.— Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

United States.— U. S. *v.* American Bell Tel. Co., 29 Fed. 17, limiting the Ohio statutes to operation against a firm and the partners residing within the state.

See 38 Cent. Dig. tit. "Partnership," § 377; and *infra*, VI, D, 9, c.

72. See the statutes of the different jurisdictions. And see Hanna *v.* Emerson, 45 Nebr. 708, 64 N. W. 229 [*overruling* Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476]; Herron *v.* Cole, 25 Nebr. 692, 41 N. W. 765; Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768; Coughlin *v.* Pinkerton, 41 Wash. 500, 84 Pac. 14; *In re* Grossmayer, 177 U. S. 48, 20 S. Ct. 535, 44 L. ed. 665; Ralya Market Co. *v.* Armour, 102 Fed. 530; Mitchell, etc., Furniture Co. *v.* Sampson, 40 Fed. 805; Pollexfen *v.* Sibson, 16 Q. B. D. 792, 55 L. J. Q. B. 294, 54 L. T. Rep. N. S. 297, 34 Wkly. Rep. 534; *Ex p.* Young, 19 Ch. D. 124, 51 L. J. Ch. 141, 45 L. T. Rep. N. S. 493, 30 Wkly. Rep. 330; Gibson *v.* Le Temps Pub. Co., 6 Ont. L. Rep. 690; Underwood *v.* Malone, 10 Quebec Super. Ct. 435.

73. See, generally, PROCESS.

74. See the statutes of the different states. And see Tabler *v.* Mitchell, 62 Miss. 437; Nye *v.* Rutherford, 8 Ohio Dec. (Reprint) 224, 6 Cinc. L. Bul. 378; Martin *v.* Burns, 80 Tex. 676, 16 S. W. 1072; Likens *v.* McCormick, 39 Wis. 313, where, after order of publication, a single copy of summons and complaint was mailed to defendants by their firm-name, giving only the initials of their christian names which were known to plaintiff, and personal service outside the state was afterward had on one defendant, no attempt being made to serve the other, it was held not a sufficient compliance with the statute.

75. See, generally, PROCESS.

As to sufficiency of return see Peel *v.* Bryson, 72 Ga. 331; Demoss *v.* Brewster, 4 Sm. & M. (Miss.) 661.

of a writ by one partner is binding on the firm,[76] when such acknowledgment is made by one partner in the presence of the other and with his consent.[77] The affidavit of one serving a summons that the persons served are members of the firm named therein as defendant is sufficient to confer jurisdiction over such persons.[78]

e. Appearance.[79] One partner has no implied authority to enter an appearance in a suit for a copartner;[80] but actual authority may be presumed from the facts in a particular case.[81] The voluntary appearance of a partner in a suit against the firm may be entered at any time.[82] Such appearance amounts to waiver of objections to the form of service, or to irregularities in the process,[83] but not to the lack of the court's jurisdiction of the subject-matter of the action.[84]

f. Discontinuance or Dismissal. Where several persons are sued as partners the action may be discontinued at any time as to those defendants who are not partners.[85] An action against a partnership may be discontinued as against those partners who have not been served with process.[86] In most jurisdictions such an

As to acceptance of service by an attorney see Sullivan *v.* Susong, 40 S. C. 154, 18 S. E. 268.

76. Bowin *v.* Sutherlin, 44 Ala. 278; Click *v.* Click, Minor (Ala.) 79 [*distinguished* in Clark *v.* Stoddard, 3 Ala. 366]. But see Duncan *v.* Tombeckbee Bank, 4 Port. (Ala.) 181; Demott *v.* Swaim, 5 Stew. & P. (Ala.) 293.

Where a firm, all of whose members live out of the state, are summoned as trustees, and one of the members comes into the state and signs the partnership name to an acknowledgment of service of the writ, the service is insufficient. Clark *v.* Wilson, 15 N. H. 150.

77. Freeman *v.* Carhart, 17 Ga. 348.

78. Gale *v.* Townsend, 45 Minn. 357, 47 N. W. 1064.

79. See, generally, APPEARANCES.

Appearance by partnership and by members.— A general appearance made by defendants in the name of "Turner Casing Co.," a copartnership composed of four members, is not only an appearance by the company, but also by the members composing it. Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403.

80. *Massachusetts.*— Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56.

New York.— Bean *v.* Mather, 1 Daly 440; Lyles *v.* Hagy, 2 N. Y. Wkly. Dig. 287. *Compare* Binney *v.* Le Gal, 19 Barb. 592.

Pennsylvania.— See Percival *v.* Fuller, 5 Wkly. Notes Cas. 273.

South Carolina.— Loomis *v.* Pearson, Harp. 470; Haslet *v.* Street, 2 McCord 310, 13 Am. Dec. 724.

Texas.— Bright *v.* Sampson, 20 Tex. 21.

United States.— Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; Atchison Sav. Bank *v.* Templar, 26 Fed. 580, no authority after the dissolution of the firm.

England.— Munster *v.* Cox, 10 App. Cas. 680, 55 L. J. Q. B. 108, 53 L. T. Rep. N. S. 474, 34 Wkly. Rep. 461.

Canada.— Mason *v.* Cooper, 15 Ont. Pr. 418; Langman *v.* Hudson, 14 Ont. Pr. 215.

See 38 Cent. Dig. tit. "Partnership," § 381.

Compare Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498. But see Southard *v.* Steele, 3 T. B. Mon. (Ky.) 435; Bennett *v.* Stickney, 17 Vt. 531, holding that where a suit is commenced against a partnership, one of the partners has power to employ an attorney, and that an appearance entered by the attorney so employed will be binding and conclusive on the other partners.

Effect of appearance by one partner.— The entry of an appearance and the filing of a plea by one member of the firm brings the firm into court for the purpose of adjudication so far as the common property of the partnership is concerned. Sanger *v.* Overmier, 64 Tex. 57. See also Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56.

Appearance by resident partners for nonresident partners binding see Marks *v.* Fordyce, 5 Ohio Dec. (Reprint) 81, 2 Am. L. Rec. 392 [*reversing* 5 Ohio Dec. (Reprint) 12, 1 Am. L. Rec. 257].

81. Dennison *v.* Hyde, 6 Conn. 508 (where the record shows an appearance and answer by one partner for himself and his copartner it will be presumed that his authority was shown to the satisfaction of the lower court); Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77 (where the record does not show that an appearance was the act of one partner it will be presumed to be the act of the partnership); Tomlinson *v.* Broadsmith, [1896] 1 Q. B. 386, 65 L. J. Q. B. 308, 74 L. T. Rep. N. S. 265, 44 Wkly. Rep. 471; Taylor *v.* Collier, 51 L. J. Ch. 853, 30 Wkly. Rep. 701.

82. Oatis *v.* Brown, 59 Ga. 711; State *v.* Cloudt, (Tex. Civ. App. 1904) 84 S. W. 415, such an appearance authorizes a judgment binding the firm property as well as the individual property of the member of the firm who appeared.

83. Bowin *v.* Sutherlin, 44 Ala. 278; Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403; Grieff *v.* Kirk, 15 La. Ann. 320; Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137; Nelson *v.* Pastorino, 49 L. T. Rep. N. S. 564. See also Dennison *v.* Hyde, 6 Conn. 508.

84. Lackett *v.* Rumbaugh, 45 Fed. 23.

85. Wheeler *v.* Bullard, 6 Port. (Ala.) 352; Johnson *v.* Green, 4 Port. (Ala.) 127; Stoddart *v.* Van Dyke, 12 Cal. 437. See also Gazzam *v.* Bebee, 8 Port. (Ala.) 49.

86. Nall *v.* Adams, 7 Ala. 475; Clark *v.* Stoddard, 3 Ala. 366; Earbee *v.* Evans, 9

action may be dismissed as to some of the defendants who are alleged to be partners, without affecting the right to proceed against the others.[87] When an action is properly brought against a firm and its members, it may be dismissed as to the latter without defeating it as to the former.[88] If one partner only answers, and disproves plaintiff's case against the partnership, the suit must be dismissed as to all members of the firm, although some have defaulted in appearance.[89] A discontinuance by one partner will not be permitted, if he is acting in collusion with the adverse party, to a copartner's injury.[90]

4. Attachment or Garnishment[91]—a. Right and Liability of Firm or Partners. The right of a partnership to sue out an attachment or garnishment,[92] and likewise the liability of a partnership or of the members thereof to have this remedy invoked against it or them,[93] is to be determined generally by the statutes in force in the different jurisdictions, and except for statutes it seems that an attachment would not lie against a partnership or any member thereof for a partnership debt.[94]

b. Grounds For Proceeding and Property Subject. The most common grounds for attachment are the absconding or non-residence of the debtor, or the removal or transfer of his property in fraud of his creditors.[95] In the case of partnerships, it is generally held that the absconding or non-residence of some of the partners will not authorize an attachment of the firm property, when the other partners remain residents and carry on the firm business within the state.[96] Whether

Port. (Ala.) 295; Lyons *v.* Jackson, 1 How. (Miss.) 474; Moore *v.* Otis, 18 Mo. 118; Hawkins *v.* Tinnen, 10 Tex. 188; Sealfi *v.* State, 31 Tex. Civ. App. 671, 73 S. W. 441, 96 Tex. 559, 74 S. W. 754.

87. *Massachusetts.*— Taft *v.* Church, 164 Mass. 504, 41 N. E. 671.

New York.— Root *v.* Herman, 2 N. Y. City Ct. 409.

Tennessee.— Link *v.* Allen, 1 Heisk. 318.

Texas.— Kingsland, etc., Mfg. Co. *v.* Mitchell, (Civ. App. 1896) 36 S. W. 757.

Virginia.— Brown *v.* Belches, 1 Wash. 9.

West Virginia.— Carlon *v.* Ruffner, 12 W. Va. 297.

United States.—Mason *v.* Connors, 129 Fed. 831.

See 38 Cent. Dig. tit. "Partnership," § 382.

Contra.— Storm *v.* Roberts, 54 Iowa 677, 7 N. W. 124.

88. Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409 [*reversing* (Civ. App. 1893) 23 S. W. 311, (Civ. App. 1894) 26 S. W. 900]; Burnett *v.* Sullivan, 58 Tex. 535.

89. Phillips *v.* Hollister, 2 Coldw. (Tenn.) 269.

90. Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503. *Compare* Hoover *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 480.

91. See, generally, Attachment; Garnishment.

92. See the statutes of the different states. And see Renard *v.* Hargous, 2 Duer (N. Y.) 540, holding that, under a statute authorizing attachment in favor of creditors residing within the state, a firm is entitled to the remedy whose place of business is in the state and whose managing partners are residents, although one member thereof is a non-resident. It is not requisite that all the members of a firm doing business in New York should reside therein, to authorize an attachment to be issued under the statute in their favor for a debt due from non-resident debtors on a contract made without the state. Renard *v.* Hargous, 13 N. Y. 259.

93. See the statutes of the different states. And see Starr *v.* Mayer, 60 Ga. 546 (a partnership is subject to attachment at the instance of its creditors, where each and every member of the firm is in a situation that would expose him to the process for his individual debts, at the instance of his individual creditors); Williams *v.* Muthersbaugh, 29 Kan. 730 (an attachment will lie against all the members of a partnership where the grounds for attachment apply to all of them and will lie against any single partner where the grounds for attachment would apply to him alone or to him and others); Edwards *v.* Hughes, 20 Mich. 289; Cohen *v.* Gamble, 71 Miss. 478, 15 So. 236 (under the Mississippi statute where any ground for attachment except non-residence exists against any partner this is a ground for attachment against all). See also Attachment, 4 Cyc. 598; Garnishment, 20 Cyc. 1029.

94. Williams *v.* Muthersbaugh, 29 Kan. 730. See also Leach *v.* Cook, 10 Vt. 239.

95. See the statutes of the different states. And see Attachment, 4 Cyc. 368.

96. *Louisiana.*— Thomas *v.* Lusk, 13 La. Ann. 277; Shirley *v.* The Bride, 5 La. Ann. 260; Munroe *v.* Frosh, 2 La. Ann. 962, 963, where a firm established in another state keeps one partner resident within the jurisdiction for the purpose of buying goods, its property is not liable to attachment, the court saying: "The partnership cannot be deemed a non-resident. . . . The remedy by attachment is a stringent one; it has always been strictly construed. . . . Its object was to enable suitors in our courts to collect their debts from non-residents. To extend the remedy to the present case would lead to practical results highly detrimental to commerce." The property of a foreign commercial firm, or the interest of a non-resident in such

an attachment will issue against a non-resident partner, in an action upon a firm claim, the other partners being residents, depends upon statutory provisions.[97] Any disposition of firm property by the firm, or by a partner with the consent of his copartners, which amounts to a fraud upon the firm creditors, furnishes ground for attachment against the firm.[98] Firm property is of course attachable in behalf of firm creditors,[99] and the separate property of a partner is attachable in a suit

firm, may be attached. Taylor *v.* Kehlor, 28 La. Ann. 530; Key *v.* Box, 14 La. Ann. 497; Frost *v.* White, 14 La. Ann. 140; Barrière *v.* McBean, 12 La. Ann. 493; Smith *v.* Elliott, 3 Mart. 366.

Maryland.— See Johnston *v.* Mathews, 32 Md. 363, holding that in an attachment against an absconding partner, for the recovery of a partnership debt, the other member of the firm having been summoned, the assets of the firm cannot be attached and condemned.

New Jersey.— Hollingshead *v.* Curtis, 14 N. J. L. 402.

New York.— Bogart *v.* Dart, 25 Hun 395 (holding that the fact that one of two partners has been guilty of fraudulent acts and has thereafter absconded from the state will not authorize the granting of an attachment against firm property where it appears that the other partner has remained in the state engaged in carrying on his business, and has been guilty of no actual misconduct. In such a case the attachment can only be issued against the property of the absconding and guilty party); Decker *v.* Bryant, 7 Barb. 182; Sears *v.* Gearn, 7 How. Pr. 383; *In re* Smith, 16 Johns. 102.

Pennsylvania.— White's Case, 10 Watts 217. But see Fretz *v.* Johnson, 15 Wkly. Notes Cas. 208.

Rhode Island.— Remington *v.* Howard Express Co., 8 R. I. 406.

South Carolina.— Robinson *v.* Crowder, 1 Bailey 185.

Tennessee.— Wallace *v.* Galloway, 5 Coldw. 510.

Vermont.— Leach *v.* Cook, 10 Vt. 239.

West Virginia.— Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

See 38 Cent. Dig. tit. "Partnership," § 385.

But see Sellew *v.* Chrisfield, 1 Handy 86, 12 Ohio Dec. (Reprint) 41.

Whether debt joint or several.— Where as at common law partnership debts are joint the interest of a non-resident partner in a partnership cannot be attached for a partnership debt, where one of the partners resides in the state and is duly served. Whitfield *v.* Hovey, 30 S. C. 117, 8 S. E. 840. See also Wiley *v.* Sledge, 8 Ga. 532. But where partnership debts are both joint and several an attachment may be levied on partnership effects. Green *v.* Payne, 1 Ala. 235; Whitfield *v.* Hovey, 30 S. C. 117, 8 S. E. 840.

97. See the statutes of the different states. And see the following cases:

Alabama.— Conklin *v.* Harris, 5 Ala. 213, attachment allowed because liability in Alabama is joint and several.

Kentucky.— Wilcox *v.* Carey, 9 Dana 297, attachment allowed.

New Jersey.— Hollingshead *v.* Curtis, 14 N. J. L. 402, attachment not allowed.

New York.— Staats *v.* Bristow, 73 N. Y. 264; Brewster *v.* Honigsburger, 2 Code Rep. 50; *In re* Chipman, 14 Johns. 217 (attachment allowed in each case); Robbins *v.* Cooper, 6 Johns. Ch. 186.

Tennessee.— McHaney *v.* Cawthorn, 4 Heisk. 508, attachment allowed.

See 38 Cent. Dig. tit. "Partnership," § 385.

98. *Illinois.*— Bryant *v.* Simoneau, 51 Ill. 324; Reynolds *v.* Radke, 112 Ill. App. 575.

Kentucky.— Wilcox *v.* Carey, 9 Dana 297.

New York.— Hirsch *v.* Hutchison, 3 N. Y. Civ. Proc. 106, 64 How. Pr. 366; Globe Woolen Co. *v.* Carhart, 67 How. Pr. 403. See also Citizens' Bank *v.* Williams, 12 N. Y. Suppl. 678. *Compare* Hoosick Falls First Nat. Bank *v.* Wallace, 4 N. Y. App. Div. 382, 38 N. Y. Suppl. 851 (fraud not shown); Edick *v.* Green, 38 Hun 202.

Tennessee.— Johnson *v.* Rankin, (Ch. App. 1900) 59 S. W. 638.

Wisconsin.— Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227.

See 38 Cent. Dig. tit. "Partnership," § 385.

Compare Wright *v.* Ewen, 19 Phila. (Pa.) 312, 24 Wkly. Notes Cas. 111; Weir Plow Co. *v.* Armentrout, 9 Tex. Civ. App. 117, 28 S. W. 1045, 29 S. W. 405, where the fraud charged is that of two of three partners, relating to their individual interests in firm property, this does not justify the attachment of the property against the firm.

Assignment reserving benefits.— It is ground for attachment against a firm that the debtors are making an assignment, reserving benefits to themselves individually, and authorizing the assignees to sell on credit. Ryhiner *v.* Ruegger, 19 Ill. App. 156.

A conveyance by a partnership of partnership property, to the partnership's own use, is an act of an individual partner, sufficient to sustain an attachment against him for an individual debt. Fleisher *v.* Hinde, (Mo. App. 1906) 93 S. W. 1126.

A conversion by one partner will not justify the attachment of the firm property or the property of the other partner. Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2.

The property of an innocent partner is not subject to attachment at the instance of a firm creditor for the fraud of a copartner. Worthley *v.* Goodbar, 53 Ark. 1, 13 S. W. 216. See also Lawrence *v.* Steadman, 49 Ill. 270; Bogart *v.* Dart, 25 Hun (N. Y.) 395.

99. *Kansas.*— Williams *v.* Muthersbaugh, 29 Kan. 730.

by his separate creditors.[1] Firm creditors may attach and hold the separate property of each partner, in a suit against the firm.[2] It is also well settled that the interest of a partner in firm property may be attached in an action against him individually.[3] But such property itself cannot be seized and sold on an attachment

Maryland.— See Hodges *v.* New York Ninth Nat. Bank, 54 Md. 406.

Missouri.— Hutchinson *v.* Brassfield, 86 Mo. App. 40.

New Hampshire.— Hall *v.* Richardson, 66 N. H. 205, 20 Atl. 978.

Ohio.— Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

Vermont.— Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687.

Where a creditor of a partnership has attached real estate belonging to such partnership, the members of that partnership cannot by mutual releases destroy the nature of the property or of the tenancy, so that either of them can annul the lien of attachment by claiming a part of the land as a homestead. Lindley *v.* Davis, 6 Mont. 453, 13 Pac. 118.

1. Tappan *v.* Brierly, 7 Mart. (La.) 453 (holding that if two persons jointly ship a cargo, and the consignee sell it and credit each for his share, his demand is subject to the attachment of his private creditors); Buckingham *v.* Swezey, 25 Hun (N. Y.) 84; Jarvis *v.* Hyer, 15 N. C. 367; Morgan *v.* D. W. Alderman, etc., Co., 70 S. C. 462, 50 S. E. 26; Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687.

2. *Alabama.*— Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904, in this state the obligation of partners is joint and several.

Florida.— Orlando First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239.

Iowa.— Lewis *v.* Conrad, 11 Iowa 153 (there must be some ground for belief that the firm is insolvent); Conrrier *v.* Cleghorn, 3 Greene 523 (the attachment of separate property by firm creditors is limited to cases where firm assets have been previously exhausted or for some good reason are exempt).

Maine.— Cunningham *v.* Gushee, 73 Me. 417.

Massachusetts.— Stevens *v.* Perry, 113 Mass. 380; Allen *v.* Wells, 22 Pick. 450, 33 Am. Dec. 757, such attachment lien is not defeated by a subsequent attachment by a separate creditor, nor by an assignment for the benefit of creditors. See also Davis *v.* Werden, 13 Gray 305.

Michigan.— Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645, limiting the right of attachment to the separate property of those partners who have been guilty of the misconduct for which the attachment is allowed.

Minnesota.— Daly *v.* Bradbury, 46 Minn. 396, 49 N. W. 190.

New Jersey.— Benedict *v.* Benedict, 15 N. J. Eq. 150, expressly so provided by statute.

Texas.— Kleinsmith *v.* Kempner, 37 Tex. Civ. App. 246, 83 S. W. 409.

Wisconsin.— Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569.

England.— See Miller *v.* Mynn, 1 E. & E. 1075, 2 F. & F. 379, 5 Jur. N. S. 1257, 28 L. J. Q. B. 324, 7 Wkly. Rep. 524, 102 E. C. L. 1075.

See 38 Cent. Dig. tit. "Partnership," § 388.

But see Commercial Nat. Bank *v.* Kirkwood, 184 Ill. 139, 56 N. E. 405 [*affirming* 85 Ill. App. 235]; Bowker *v.* Smith, 48 N. H. 111, 2 Am. Rep. 189; Jarvis *v.* Brooks, 23 N. H. 136.

An attachment against two as copartners cannot be levied on or operate to charge the property of one of the partners only. It must be levied on the partnership effects. Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80. See also Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

An attachment against a partnership by its firm-name, without mention of the names of the individual partners, can only be levied on the partnership property, it cannot be levied on the individual property of the partners. Watts *v.* Rice, 75 Ala. 289.

3. *Connecticut.*— Stevens *v.* Stevens, 39 Conn. 474.

Indiana.—Burgess *v.* Atkins, 5 Blackf. 337.

Louisiana.— Marston *v.* Dewberry, 21 La. Ann. 518; Lee *v.* Bullard, 3 La. Ann. 462; Cucullu *v.* Manzenal, 4 Mart. N. S. 183.

Maine.— Thompson *v.* Lewis, 34 Me. 167; Douglas *v.* Winslow, 20 Me. 89.

Massachusetts.— Phillips *v.* Bridge, 11 Mass. 242.

Minnesota.— Day *v.* McQuillan, 13 Minn. 205.

Missouri.— Fleisher *v.* Hinde, (App. 1906) 93 S. W. 1126.

New Hampshire.— Dow *v.* Sayward, 14 N. H. 9.

New York.— Atkins *v.* Saxton, 77 N. Y. 195; Seligman *v.* Falk, 13 N. Y. Civ. Proc. 77.

Ohio.— Stewart *v.* Hunter, 1 Handy 22, 12 Ohio Dec. (Reprint) 6.

Rhode Island.— Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Randall *v.* Johnson, 13 R. I. 338.

South Carolina.— Knox *v.* Schepler, 2 Hill 595 (interest subject to garnishment); Schatzill *v.* Bolton, 2 McCord 478, 13 Am. Dec. 748.

Tennessee.— Morrow *v.* Fossick, 3 Lea 129; Saunders *v.* Bartlett, 12 Heisk. 316.

Utah.— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Wisconsin.— Brande *v.* Bond, 63 Wis. 140, 23 N. W. 101, *quære.*

See 38 Cent. Dig. tit. "Partnership," § 389.

An interest in a limited partnership is not subject to attachment. Wetherald *v.* Shupe, 15 Wkly. Notes Cas. (Pa.) 366.

Effect of insolvency.—A creditor of one of a firm cannot attach the partnership effects, where the firm is insolvent, so that there

issued against one of the partners only.[4] In an action by one partner against another firm property is attachable.[5] A judgment creditor of one partner cannot take out an execution upon his judgment, and levy upon property in the hands of an assignee of another partner by summoning an agent of the latter as garnishee.[6]

c. Proceedings, Levy, Lien, Custody, and Disposition.[7] Proceedings to procure, support, or enforce attachments to which partners or partnerships are parties are frequently regulated by statute.[8] As a rule courts are disposed to disregard merely formal defects and irregularities in the papers upon which an attachment is asked,[9] but to insist that allegations of fraud or other misconduct

will be no surplus to go to the partner. Commercial Bank *v.* Wilkins, 9 Me. 28; Rice *v.* Austin, 17 Mass. 197. *Compare* Buckingham *v.* Swezey, 25 Hun (N. Y.) 84, 61 How. Pr. 266. But if the firm is solvent when the attachment of the individual partner's interest is made, a lien is acquired which cannot be divested in favor of the partnership debts by its subsequent insolvency. Willis *v.* Freeman, 35 Vt. 44, 82 Am. Dec. 619.

Interest in real estate.— That the firm real estate stands in the name of one of the partners does not prevent a separate creditor of another partner from attaching his interest therein. Hill *v.* Beach, 12 N. J. Eq. 31. See also Louisville Bank *v.* Hall, 8 Bush (Ky.) 672.

Interest in debt due partnership.— It is the rule in most jurisdictions that the interest of a partner in a debt due his firm is not subject to attachment or garnishment. Winston *v.* Ewing, 1 Ala. 129, 34 Am. Dec. 768; People's Bank *v.* Shryock, 48 Md. 427, 30 Am. Rep. 476 [*overruling* Wallace *v.* Patterson, 2 Harr. & M. (Md.) 463]; Bulfinch *v.* Winchenbach, 3 Allen (Mass.) 161; Stone *v.* Dowling, 119 Mich. 476, 78 N. W. 549; Day *v.* McQuillan, 13 Minn. 205; Allis *v.* Day, 13 Minn. 199; Barry *v.* Fisher, 8 Abb. Pr. N. S. (N. Y.) 369, 39 How. Pr. 521; Jarvis *v.* Hyer, 15 N. C. 367; Horne *v.* Petty, 192 Pa. St. 32, 43 Atl. 404; McCoombe *v.* Dunch, 2 Dall. (Pa.) 73, 1 L. ed. 294; Brenton *v.* Thompson, 20 Leg. Int. (Pa.) 133; Raley *v.* Smith, (Tex. Civ. App. 1903) 73 S. W. 54; Menard *v.* Brouillet, 16 Quebec Super. Ct. 148. See also Church *v.* Knox, 2 Conn. 514; Fisk *v.* Herrick, 6 Mass. 271.

See 38 Cent. Dig. tit. "Partnership," § 389. In Iowa the attachment of the interest of a partner in a debt due his firm is authorized by statute. Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756. In Maine a debt due the firm may be attached in trustee process against a member of the firm. Parker *v.* Wright, 66 Me. 392. See also Henderson *v.* Cashman, 85 Me. 437, 27 Atl. 344. In Tennessee where a creditor of a partner seeks an accounting of partnership matters, and the subjection of the partner's interest to the payment of a debt, he may have garnishment to reach such debtor's individual interest in a debt alleged to be due the firm. O. S. Kelly Co. *v.* Zarecor, (Tenn. Ch. App. 1901) 62 S. W. 189.

Whether liable to garnishment.— In Georgia the interest of one partner in the partnership property is not subject to levy and sale under an attachment. It can only be reached at law by process of garnishment. Patterson *v.* Trumbull, 40 Ga. 104. In Louisiana the interest of a partner in a partnership cannot be seized by garnishment process against his copartner. Fay, etc., Co. *v.* Ouachita Excelsior Saw, etc., Mill, 51 La. Ann. 1708, 26 So. 386.

4. New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Marston *v.* Dewberry, 21 La. Ann. 518; Abels *v.* Westervelt, 24 How. Pr. (N. Y.) 284. But *compare* Oliver *v.* Gwin, 17 La. 28.

Right to oppose attachment.— The defense that partnership property is not specially attachable for the individual debt of one partner can be made only by someone having an interest, to-wit: one of the partners or a creditor of the firm. Williams *v.* Williams, 26 La. Ann. 644.

5. Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635.

6. Fenton *v.* Block, 10 Mo. App. 536.

7. **As to affidavit, petition, writ, warrant, or declaration** see Haas *v.* Cook, (Ala. 1906) 41 So. 731; Connon *v.* Dunlap, 64 Ga. 680; Hirsh *v.* Thurher, 54 Md. 210; Bolling *v.* Anderson, 4 Baxt. (Tenn.) 550; Baer *v.* Wilkinson, 35 W. Va. 422, 14 S. E. 1.

As to venue and jurisdiction see Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153 (construing Code, § 2585); Renard *v.* Hargous, 13 N. Y. 259 (in an attachment suit by partners for a partnership debt, it is sufficient if one of the partners be a resident of the state); Sanger *v.* Overmier, 64 Tex. 57.

As to sufficiency of the return see Fleischman *v.* Bowser, 62 Fed. 259, 10 C. C. A. 370.

8. See the statutes of the different states. And see the following cases:

Kentucky.— Nixon *v.* Jack, 16 B. Mon. 174.

Louisiana.— Fraser *v.* Thorpe, 9 La. Ann. 518.

New York.—Woodward *v.* Stearns, 10 Abb. Pr. N. S. 395.

Ohio.— Byers *v.* Schlupe, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

England.— Walker *v.* Rooke, 6 Q. B. D. 631, 50 L. J. Q. B. 470.

9. Mason *v.* Rice, (Iowa 1884) 19 N. W. 897 (defect in petition); Van Benschoten *v.* Fales, 126 Mich. 176, 85 N. W. 476 (error in christian name of one of the partners); Sabin *v.* Michell, 27 Oreg. 66, 39 Pac. 635; Rushton *v.* Rowe, 64 Pa. St. 63 (misnomer of one

shall be set forth with particularity,[10] and be sustained by proof corresponding to such allegations.[11] Service must be made upon all the partners in order to bind firm property;[12] but defects in the service of process may be waived or cured by a general appearance entered by partners.[13] It is only the interest of the partner in the partnership property which can be levied upon and sold under an attachment against him. This interest is the surplus of such property remaining after the adjustment of accounts between the partners and the payment of the firm debts.[14] But it is generally held that in order to render a levy and sale of the

partner immaterial, the name of the firm being accurate); Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137 (omission of names of firm in writ does not make attachment void).

10. O'Connor *v.* Sherley, 107 Ky. 70, 52 S. W. 1056, 21 Ky. L. Rep. 735; Wright *v.* Ewen, 19 Phila. (Pa.) 312, 24 Wkly. Notes Cas. 111.

11. Hinman *v.* Andrews Opera Co., 49 Ill. App. 135; Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684; Tennent *v.* Guenther, 31 Mo. App. 429; Wilson-Obear Grocery Co. *v.* Cole, 26 Mo. App. 5; Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569.

12. Moses P. Johnson Mach. Co. *v.* Watson, 57 Mo. App. 629; Donnell *v.* Williams, 21 Hun (N. Y.) 216, 59 How. Pr. 68; Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131; Lackett *v.* Rumbaugh, 45 Fed. 23. But it has been held that the fact that in an action brought against the members of a firm upon a firm obligation an attachment warrant is obtained against but two of the partners sued will not prevent a levy upon the partnership property. Rogers *v.* Ingersoll, 103 N. Y. App. Div. 490, 93 N. Y. Suppl. 140 [*affirmed* in 185 N. Y. 592, 78 N. E. 1111].

Service when one partner absconds.—Where the debt due plaintiff is a partnership debt, and the money attached is partnership assets, and one of the partners absconds, and the writ is served on the other partner, who appears and contests the claim, as all the assets of the firm in the state devolve in such case on the remaining partner, judgment against him is sufficient to perfect the attachment. Thomas *v.* Brown, 67 Md. 512, 10 Atl. 713.

In West Virginia an attachment may be granted against a partnership before service of summons on all the partners; but actual or substituted service must be made within a reasonable time, before a decree can be rendered in relation to the property attached. Brown *v.* Gorsuch, 50 W. Va. 514, 40 S. E. 376.

13. McClaskey *v.* Pollock, 82 Ala. 174, 2 So. 674; Hyde *v.* Casey-Grimshaw Marble Co., 82 Ill. App. 83; Douglass *v.* Neil, 37 Tex. 528.

14. *Connecticut.*—Filley *v.* Phelps, 18 Conn. 294; Witter *v.* Richards, 10 Conn. 37 (rule applies whether the creditor at the time of giving the credit knew of the partnership or not); Barber *v.* Hartford Bank, 9 Conn. 407. And see Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147.

Kentucky.—Thomas *v.* Winchester Bank, 28 S. W. 774, 31 S. W. 732, 17 Ky. L. Rep. 194.

Louisiana.—New Orleans *v.* Gauthreaux, 32 La. Ann. 1126.

Maine.—Henderson *v.* Cashman, 85 Me. 437, 27 Atl. 344; Parker *v.* Wright, 66 Me. 392; Hacker *v.* Johnson, 66 Me. 21.

Maryland.—People's Bank *v.* Shryock, 48 Md. 427, 30 Am. Rep. 476.

Massachusetts.—Phillips *v.* Bridge, 11 Mass. 242; Pierce *v.* Jackson, 6 Mass. 242.

Mississippi.—Armistead *v.* Cocke, 62 Miss. 198.

Missouri.—Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959; Wright *v.* Radcliffe, 61 Mo. App. 257.

New Hampshire.—Newman *v.* Bean, 21 N. H. 93; Buffum *v.* Seaver, 16 N. H. 160; Dow *v.* Sayward, 12 N. H. 271; Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Tappan *v.* Blaisdell, 5 N. H. 190.

New Jersey.—Clements *v.* Jessup, 36 N. J. Eq. 569.

New York.—Atkins *v.* Saxton, 77 N. Y. 195; Souls *v.* Cornell, 15 N. Y. App. Div. 161, 44 N. Y. Suppl. 194; Doane *v.* Lindsay, 42 N. Y. Super. Ct. 399; Berry *v.* Kelly, 4 Rob. 106; Abels *v.* Westervelt, 24 How. Pr. 284; *In re* Smith, 16 Johns. 102. See also Robbins *v.* Cooper, 6 Johns. Ch. 186.

Oregon.—Cogswell *v.* Wilson, 17 Oreg. 31, 21 Pac. 388.

Pennsylvania.—Lucas *v.* Laws, 27 Pa. St. 211; Lewis *v.* Paine, 1 Leg. Gaz. 508.

Rhode Island.—Randall *v.* Johnson, 13 R. I. 338.

Texas.—See Warren *v.* Wallis, 38 Tex. 225.

Utah.—Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Vermont.—Miner *v.* Pierce, 38 Vt. 610.

West Virginia.—Baer *v.* Wilkinson, 35 W. Va. 422, 14 S. E. 1.

See 38 Cent. Dig. tit. "Partnership," § 392.

No private settlement made between partners, after an attachment has been levied on the interest of one to secure an individual debt, can be admitted in evidence against the attaching creditor, for the purpose of proving the condition of accounts between the partners. Warren *v.* Wallis, 42 Tex. 472.

When the property attached is reduced to money the court will only order so much to be paid over as belongs to the partner sued, and may in their discretion order security to be given for that moiety until settlement between the partners. Chatzel *v.* Bolton, 3 McCord (S. C.) 33.

Sale of entire property in goods attached. —Where an officer attaches goods of a firm

interest of a partner in partnership property effectual the officer may take possession of the whole partnership property and upon a sale may deliver it to the purchaser who takes only the interest of such partner therein.[15] Where a bank balance of a firm is levied on by service of a copy of the attachment and is voluntarily paid over to the officer, the bank is chargeable with notice of the contents of the attachment and cannot recover back the amount paid as for moneys paid by mistake.[16] Where partnership property is attached by several creditors of the same class, the proceeds of such property should be applied according to the order of the attachments.[17] But an attachment on firm assets, in a suit against a member of the firm, must be postponed to a later attachment by a firm creditor in a suit against the firm,[18] and an attachment by a creditor of an individual partner

composed of three members on a writ against two of them only and sells the entire property in the goods attached, the firm may recover the full value of the goods sold. Moore *v.* Pennell, 52 Me. 162, 83 Am. Dec. 500.

15. *Illinois.*— Newhall *v.* Buckingham, 14 Ill. 405.

Kansas.—Hershfield *v.* Claflin, 25 Kan. 166, 37 Am. Rep. 237, an officer holding a writ of execution against an individual partner may seize and hold all or a portion of the partnership property and may sell the interest of the individual partner in such property. *Compare* Russell *v.* Smith, 14 Kan. 366.

Louisiana.— Lee *v.* Bullard, 3 La. Ann. 462.

Massachusetts.— Walker *v.* Fitts, 24 Pick. 191.

New York.—Atkins *v.* Saxton, 77 N. Y. 195; Smith *v.* Orser, 42 N. Y. 132; Marshall *v.* McGregor, 59 Barb. 519; Zoller *v.* Grant, 56 N. Y. Super. Ct. 279, 3 N. Y. Suppl. 539; Goll *v.* Hinton, 8 Abb. Pr. 120; Hergman *v.* Dettleback, 11 How. Pr. 46.

Pennsylvania.— Morgan *v.* Watmough, 5 Whart. 125.

Tennessee.— Morrow *v.* Fossick, 3 Lea 129; Saunders *v.* Bartlett, 12 Heisk. 316.

Utah.— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Vermont.— Reed *v.* Shepardson, 2 Vt. 120, 19 Am. Dec. 697.

Virginia.— Shaver *v.* White, 6 Munf. 110, 8 Am. Dec. 730, on the attachment for a debt of one partner, all the firm effects must be seized, and an undivided moiety sold.

Wisconsin.— North West Bank *v.* Taylor, 16 Wis. 609.

See 38 Cent. Dig. tit. "Partnership," § 392.

Bond for retention of property.— In some jurisdictions where the interest of one partner in firm property has been attached, the other partner may retain possession by giving a bond to have the property forthcoming. Hardy *v.* Sprowle, 32 Me. 322; Stewart *v.* Hunter, 1 Handy (Ohio) 22, 12 Ohio Dec. (Reprint) 6. In Massachusetts the statute (Gen. St. c. 123, §§ 87, 88) providing for the delivery of possession to a part owner of goods attached, upon his giving a bond, does not apply to an attachment of partnership property in an action against one partner. Breck *v.* Blair, 129 Mass. 127.

The seizure and actual removal of specific chattels of a partnership on an attachment against one member thereof for his individual debt, and the exclusion of the firm from the possession thereof is a trespass. Crawford *v.* Capen, 132 Mass. 596 note; Sanborn *v.* Royce, 132 Mass. 594; Haynes *v.* Knowles, 36 Mich. 407. See also Thomas *v.* Lusk, 13 La. Ann. 277; Tennessee Bank *v.* McKeage, 11 Rob. (La.) 130.

In Indian Territory by statute joint owners as partners could not be deprived of the possession of property levied upon except for the purpose of making an inventory and having the same appraised. Carlisle *v.* McAlester, 3 Indian Terr. 164, 53 S. W. 531.

In Maine a creditor of one of the partners of a firm may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required, in order to render the attachment regular, to take the partner's interest in the entire stock of goods. Fogg *v.* Laury, 68 Me. 78, 28 Am. Rep. 19.

In New Hampshire, the goods of a partnership cannot be attached in a suit against one of its members, and removed from its possession. Garvin *v.* Paul, 47 N. H. 158; Hill *v.* Wiggin, 31 N. H. 292; Newman *v.* Bean, 21 N. H. 93; Page *v.* Carpenter, 10 N. H. 77; Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson *v.* Stevens, 7 N. H. 352. But a valid lien as against a debtor who is a member of a partnership may be acquired by attaching all his interest in the effects of the firm and summoning the other partners as trustees; and such lien may be preserved by notice to the parties concerned, and such other acts designed to give notoriety to the attachment as the nature of the property will admit, although possession cannot be taken and the property removed, to the exclusion of the other partners. Treadwell *v.* Brown, 43 N. H. 290.

When the writ is issued against partnership assets instead of against the partner's interest in firm property damages for wrongful attachment may be recovered. Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

A range levy upon cattle for the debt of one of a firm does not deprive the copartners of their possession and control. Donald *v.* Carpenter, 8 Tex. Civ. App. 321, 27 S. W. 1053.

16. Duncan *v.* Berlin, 60 N. Y. 151.

17. Gay *v.* Johnson, 32 N. H. 167.

18. *California.*— Bullock *v.* Hubbard, 23

will not affect the lien acquired by an earlier attachment in favor of a creditor of the firm.[19] A partner who has advanced funds for partnership purposes is entitled to preference over attaching creditors of the other partner.[20] A mortgage made by one of the partners of his interest in the partnership to secure his individual debt cannot take precedence over a statutory attachment by a *bona fide* creditor of the firm, for, as to them, and all other creditors of the partnership, such mortgage is illegal.[21] And a partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.[22] An ordinary creditor with the older equity will be postponed to another creditor of the same class where the former stands by and permits the latter to acquire a valid equitable lien by the levy of an attachment, which goes into judgment.[23] The assets of an insolvent partnership should be divided *pro rata* among all the creditors of the partnership and a judgment creditor gains no priority of lien by attaching firm assets already in the custody of the law for distribution under the attachment bill of the representative of a deceased partner.[24] A ratification by a non-executing partner of an assignment made by the other partner cannot take away the rights of creditors who have attached the property assigned between the execution of the assignment and the time of its ratification.[25] The lien acquired by an attachment of the separate property of a partner to secure a partnership debt is preferred to a subsequent attachment to secure a separate debt, which was contracted subsequently to the first attachment.[26] In equity the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts in preference to the creditors of the individual partners, notwithstanding the separate creditors may have first attached those assets.[27] Where a partnership consists of two members, one of whom is a non-resident and the other a resident of the state, a firm creditor issuing an attachment against the firm, and levying upon the firm assets, does not thereby gain any priority over the firm creditors, except as to the individual interest of the non-resident part-

Cal. 495, 83 Am. Dec. 130; Burpee *v.* Bunn, 22 Cal. 194; Conroy *v.* Woods, 13 Cal. 626, 73 Am. Dec. 605.

Connecticut.— See Witter *v.* Richards, 10 Conn. 37.

Iowa.— Fargo *v.* Ames, 45 Iowa 491; Cox *v.* Russell, 44 Iowa 556; Scudder *v.* Delashmut, 7 Iowa 39, 71 Am. Dec. 428, holding that in such a case it is necessary that the firm creditor shall go into equity and make it appear that all firm property is needed to pay firm debts.

Kentucky.— Walter *v.* Herman, 110 Ky. 800, 62 S. W. 857, 23 Ky. L. Rep. 741; O'Bannon *v.* Miller, 4 Bush 25.

Louisiana.— Montross *v.* Byrd, 6 La. Ann. 518.

Maine.— Smith *v.* Barker, 10 Me. 458; Commercial Bank *v.* Wilkins, 9 Me. 28.

Massachusetts.— Peck *v.* Fisher, 7 Cush. 386; Phillips *v.* Bridge, 11 Mass. 242; Pierce *v.* Jackson, 6 Mass. 242.

Missouri.— Clinton First Nat. Bank *v.* Brenneisen, 97 Mo. 145, 10 S. W. 884; Hargadine-McKittrick Dry Goods Co. *v.* Sappington, 105 Mo. App. 655, 78 S. W. 1049.

New Hampshire.— Tenney *v.* Johnson, 43 N. H. 144.

Ohio.— Putnam *v.* Loeb, 2 Ohio Cir. Ct. 110, 1 Ohio Cir. Dec. 391.

Pennsylvania.— Adams *v.* Hunter, 42 Leg. Int. 205.

Virginia.— Straus *v.* Kerngood, 21 Gratt. 584.

Wisconsin.— Powers *v.* Large, 69 Wis. 621, 35 N. W. 53, 2 Am. St. Rep. 767.

See 38 Cent. Dig. tit. "Partnership," § 394.

Where real estate is owned and used for partnership purposes, and is attached by creditors of the individual members of the firm, a subsequent attachment by creditors of the firm will take precedence of the first attachment. Jarvis *v.* Brooks, 27 N. H. 37, 59 Am. Dec. 359. See also Moody *v.* Lucier, 62 N. H. 584.

19. Cunningham *v.* Gushee, 73 Me. 417; Allen *v.* Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757.

20. Purdy *v.* Hood, 5 Mart. N. S. (La.) 626.

21. Harvey *v.* Stephens, 159 Mo. 486, 60 S. W. 1055.

22. Kitchen *v.* Reinsky, 42 Mo. 427.

23. Butler *v.* Monks, 4 Ky. L. Rep. 996.

24. Watkins *v.* Fakes, 5 Heisk. (Tenn.) 185.

25. Stein *v.* La Dow, 13 Minn. 412.

26. Miles *v.* Pennock, 50 N. H. 564.

27. Washburn *v.* Bellows Falls Bank, 19 Vt. 278.

ner.[28] In an action by an unsecured attaching creditor of a firm to compel a prior attaching creditor to exhaust a mortgage security on land of the firm before sharing in the proceeds of a sale under his attachment, the mere fact that the resort to mortgage security would cause some delay to the prior attaching creditor is not ground for the refusal to so marshal the assets, where, the proceeds of the attached property being in court, his rights are not endangered, nor his prior right to raise his debt out of both funds impaired, nor any part of his security taken from him.[29] A creditor of an ostensible partner, who gave him credit as a single individual, is not to be postponed in his attachment upon the goods of a partnership to another creditor, who afterward attached the same stock for a debt created upon the same credit, although he should have discovered a concealed partner and set up his claim as a partnership creditor.[30]

d. Quashing or Vacating and Wrongful Attachment. An attachment against a partnership will be quashed[31] or will abate[32] if improperly granted. When an attachment is wrongfully employed for the collection of a firm claim, all the partners are liable in damages, even though some of them took no part in the proceedings.[33] In case of a wrongful attachment against a partnership, by a creditor who colludes with a partner, the other members of the firm may maintain an action for damages.[34]

5. Injunction[35] and Receiver.[36] As has been already stated the separate creditor of a partner, by the levy of an attachment on firm property, acquires a lien on the interest of the debtor only in such property.[37] In many jurisdictions it is held that the attachment debtor's copartners are entitled to file a bill for a partnership accounting, and to obtain an injunction against the seizure and sale of the property meantime, under the attachment.[38] In other jurisdictions this right to an injunction by copartners is denied, either absolutely,[39] or unless it is shown that the firm is insolvent and thus that the debtor partner has no interest in the property attached.[40] Partnership creditors who have levied a valid attachment

28. Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414. See also Baer *v.* Wilkinson, 35 W. Va. 422, 14 S. E. 1.

29. Gotzian *v.* Shakman, 89 Wis. 52, 61 N. W. 304, 46 Am. St. Rep. 820.

30. McGregor *v.* Barker, 12 La. Ann. 289; French *v.* Chase, 6 Me. 166; Wright *v.* Herrick, 125 Mass. 154; Lord *v.* Baldwin, 6 Pick. (Mass.) 348. But see Witter *v.* Richards, 10 Conn. 37; Taylor *v.* Parvis, 14 U. S. Q. B. 128.

31. Hauson *v.* Watson, 12 Wkly. Notes Cas. (Pa.) 368.

32. Lawrence *v.* Steadman, 49 Ill. 270.

Where only one of two partners pleads in abatement of a writ of attachment issued against both, a judgment in his favor should not abate the entire attachment, but only as to the one filing the plea. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

33. Vandenburgh *v.* Bassett, 4 Minn. 242 (partner without knowledge of attachment liable); Kuhn *v.* Weil, 73 Mo. 213. See also Gurler *v.* Wood, 16 N. H. 539, where the goods attached are sold under execution and the proceeds applied to meet a firm debt this is proof of ratification by all the partners.

34. Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751; Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72.

35. See, generally, Injunctions.

As to injunctions in actions between partners see *supra*, V, C, 2, f; *infra*, IX, D, 7, b.

36. See, generally, Receivers.

As to distribution of partnership funds by a receiver see Hubbard *v.* Guild, 2 Duer (N. Y.) 685; Eisemann *v.* Thiell, 1 Cinc. Super. Ct. (Ohio) 188.

As to receivers in actions between partners see *supra*, V, C, 2, g; *infra*, IX, D, 7, c.

37. See *supra*, VI, D, 4, c.

38. *Illinois.*— Parker *v.* Merritt, 105 Ill. 293; Newhall *v.* Buckingham, 14 Ill. 405.

Iowa.— Hubbard *v.* Curtis, 8 Iowa 1, 74 Am. Dec. 283, if the firm be found insolvent a perpetual injunction will be granted.

Maine.— Crooker *v.* Crooker, 46 Me. 250.

Ohio.— Place *v.* Sweetzer, 16 Ohio 142.

Texas.— White *v.* Parish, 20 Tex. 688, 73 Am. Dec. 204; Brown *v.* Young, 1 Tex. App. Civ. Cas. § 1240.

England.— Jackson *v.* Stanhope, 10 Jur. 676; Garstin *v.* Asplin, 1 Madd. 150, 56 Eng. Reprint 57; Newell *v.* Townsend, 6 Sim. 419, 9 Eng. Ch. 419, 58 Eng. Reprint 651; Bevan *v.* Lewis, 1 Sim. 376, 27 Rev. Rep. 205, 2 Eng. Ch. 376, 57 Eng. Reprint 618.

See 38 Cent. Dig. tit. "Partnership," § 401.

39. Daniel *v.* Owens, 70 Ala. 297; Brewster *v.* Hammet, 4 Conn. 540; Moody *v.* Payne, 2 Johns. Ch. (N. Y.) 548. See also Wickham *v.* Davis, 24 Minn. 167.

40. Turner *v.* Smith, 1 Abb. Pr. N. S. (N. Y.) 304; Mowbray *v.* Lawrence, 13 Abb. Pr. (N. Y.) 317, 22 How. Pr. 107; Peck *v.*

may have an injunction against a sale by individual creditors of firm property.[41] But an injunction is generally denied to a creditor at large, that is, to one who has not obtained a judgment or levy before making application.[42] Where a partnership is alleged between the complainant and the defendant, an injunction granted to secure the complainant's interest in the property thereof is properly dissolved where the partnership is denied and it is set up that the partnership has been dissolved.[43] A member of a partnership may be enjoined from continuing to violate a contract as to a patent, although his partners are not parties to the bill for the specific performance of such contract, and although the partnership may be embarrassed thereby.[44] The purchaser of a partner's interest will be granted an injunction against the fraudulent interference with firm property by partners who have surrendered control of the business and agreed not to interfere with its management.[45] As a rule a general creditor of a firm is not entitled to equitable aid by the appointment of a receiver for the firm,[46] although such aid has been granted him, when the court has been convinced that unless it was granted him he would sustain great and irreparable injury by the fraudulent misconduct of the firm or some member thereof.[47] A receiver of firm property cannot be appointed at the suit of an execution purchaser of a partner's share of the firm assets against alleged fraudulent purchasers of the partnership assets at execution sale against the firm, where the only surviving partner is not a party to the suit.[48]

6. Pleading — a. In General.[49] Where plaintiffs sue as partners,[50] and where persons are sued as partners,[51] the complaint should allege the fact of their

Schultze, 19 Fed. Cas. No. 10,895, Holmes 28.

41. Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505; Fairbanks *v.* Kraft, 43 Mo. App. 121, an injunction will be granted against a sale under execution on a judgment illegally confessed by a partner against the firm.

42. Jones *v.* Lusk, 2 Metc. (Ky.) 356; Young *v.* Frier, 9 N. J. Eq. 465 [*overruling* Blackwell *v.* Rankin, 7 N. J. Eq. 152]; Henderson *v.* Haddon, 12 Rich. Eq. (S. C.) 393 (partnership creditors whose demands are not due cannot have an injunction); Lamoille Valley R. Co. *v.* Bixby, 55 Vt. 235. *Compare* Dillon *v.* Horn, 5 How. Pr. (N. Y.) 35 [*following* Innes *v.* Lansing, 7 Paige (N. Y.) 583], in which a general creditor was allowed an injunction against the general partners of an insolvent limited partnership, on the theory that the firm assets of such a partnership, when it is insolvent, are made by statute a trust fund to some extent for all the partnership creditors.

43. Carroll *v.* Martin, 35 Ga. 261.

44. American Box Mach. Co. *v.* Crosman, 57 Fed. 1021 [*affirmed* in 61 Fed. 888, 10 C. C. A. 146].

45. Young *v.* Mock, 79 Miss. 714, 31 So. 423.

46. Crippen *v.* Hudson, 13 N. Y. 161.

47. Sanderson *v.* Stockdale, 11 Md. 563; Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

48. Morrison *v.* Benthuysen, 103 N. Y. 675, 9 N. E. 180.

49. Sufficiency of denial of execution of instrument by firm see Commercial Paper, 8 Cyc. 158.

Construction of plea as showing partnership.—Although the name "Artope & Whitt Company," standing alone, would import a corporation, where it is designated in a plea as "a business known as the 'Artope & Whitt Company' and owned by defendants," and is repeatedly referred to in the plea as the business of defendants, such name will be construed as a mere trade-name under which defendants are conducting their business. Whitt *v.* Blount, 124 Ga. 671, 53 S. E. 205.

50. *California.*— Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204 (allegation sufficient); Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369 (complaint sufficient).

Colorado.— Fryer *v.* Breeze, 16 Colo. 323, 26 Pac. 817.

Iowa.— Sweet *v.* Ervin, 54 Iowa 101, 6 N. W. 156.

Minnesota.— Boosalis *v.* Stevenson, 62 Minn. 193, 64 N. W. 380; Foerster *v.* Kirkpatrick, 2 Minn. 210.

Nebraska.— Church *v.* Callihan, 49 Nebr. 542, 68 N. W. 932.

South Carolina.— Bischoff *v.* Blease, 20 S. C. 460.

United States.—Lapeyre *v.* Gales, 14 Fed. Cas. No. 8,081, 2 Cranch C. C. 291.

See 38 Cent. Dig. tit. "Partnership," § 408.

51. *Georgia.*— C. H. Perkins Co. *v.* Shewmake, 119 Ga. 617, 46 S. E. 832, a petition in a suit against the C. H. P. Co., a corporation, is amendable by striking out the words "a corporation," and alleging that the company is a partnership composed of named individuals.

Illinois.— Petrie *v.* Newell, 13 Ill. 647.

Indiana.— Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928, complaint sufficient.

Minnesota.— Keene *v.* Masterman, 66 Minn. 72, 68 N. W. 771, but the absence of such an allegation is waived by litigating the issue without objection.

Missouri.— Jones *v.* Tuller, 38 Mo. 363.

copartnership. Such allegation, however, need not be in any set form of words;[52] but it should state the existence of the partnership as a fact and not merely suggest it as an inference from other facts.[53] No allegation of partnership is necessary when the action is brought upon a claim which is enforceable by or against joint contractors, although plaintiffs or defendants may be partners.[54] If plaintiffs are partners and are suing upon a claim belonging to their firm, the complaint should allege the existence of the partnership, and must in some way show the names of its members.[55] If a statute permits a suit in the name of the firm, an allegation setting forth the individual names of the partners is surplusage,

Nebraska.— Stone *v.* Neeley, 42 Nebr. 567, 60 N. W. 965.

Pennsylvania.— Schollenberger *v.* Seldonridge, 49 Pa. St. 83.

Texas.— Casey-Swasey Co. *v.* Treadwell, 32 Tex. Civ. App. 480, 74 S. W. 791, the question of partnership by estoppel does not arise unless pleaded.

Wisconsin.— Meacham *v.* Batchelder, 3 Pinn. 281, 3 Chandl. 316.

See 38 Cent. Dig. tit. "Partnership," § 408.

52. *California.*— Braun *v.* Woollacott, 129 Cal. 107, 61 Pac. 801; Alpers *v.* Schammel, 75 Cal. 590, 17 Pac. 708; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

Florida.— De Graum *v.* Jones, 23 Fla. 83, 6 So. 925, an allegation that persons are jointly engaged as merchants is equivalent to an allegation of their copartnership.

Indiana.— Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

Iowa.— McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427; Wendall *v.* Osborne, 63 Iowa 99, 18 N. W. 709.

Maryland.— Thorne *v.* Fox, 67 Md. 67, 8 Atl. 667.

Michigan.— Danaher *v.* Hitchcock, 34 Mich. 516; Pegg *v.* Bidleman, 5 Mich. 26.

Missouri.— National Ins. Co. *v.* Bowman, 60 Mo. 252.

Nebraska.— Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476; Chamberlain Banking House *v.* Noyes, 3 Nebr. (Unoff.) 550, 92 N. W. 175.

New York.— Anable *v.* Forest, etc., Steamengine Co., 16 Abb. Pr. 286 [*affirmed* in 25 N. Y. 470].

South Carolina.— Millhiser *v.* Holleyman, 37 S. C. 572, 16 S. E. 688; Harle *v.* Morgan, 29 S. C. 258, 7 S. E. 487.

South Dakota.—Van Brunt, etc., Co. *v.* Harrigan, 8 S. D. 96, 65 N. W. 421.

See 38 Cent. Dig. tit. "Partnership," § 408.

53. Hawley Bros. Hardware Co. *v.* Brownstone, 123 Cal. 643, 56 Pac. 468 (complaint held fatally ambiguous); McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Kessler *v.* Yoakum First Nat. Bank, 21 Tex. Civ. App. 98, 51 S. W. 62.

54. *Arkansas.*— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

New Hampshire.— Maynard *v.* Fellows, 43 N. H. 255.

New York.— Wolf *v.* Strahl, 3 Silv. Sup. 552, 7 N. Y. Suppl. 593; Phillips *v.* Bartlett, 9 Bosw. 678.

North Carolina.— Cowan *v.* Baird, 77 N. C. 201.

Oregon.— Clark *v.* Wick, 25 Oreg. 446, 36 Pac. 165.

South Carolina.— Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279.

South Dakota.—Deadwood First Nat. Bank *v.* Hattenbach, 13 S. D. 365, 83 N. W. 421.

See 38 Cent. Dig. tit. "Partnership," § 408.

55. *Arkansas.*— Loewenberg *v.* Gilliam, 72 Ark. 314, 79 S. W. 1064, but defect in not naming the partners when suit is by the firm may be cured by amendment.

Illinois.— Day *v.* Cushman, 2 Ill. 475.

Indiana.— Hellyer *v.* Bowser, 76 Ind. 35 (record sufficient where names appeared in summons, in title of cause on motion to dismiss, and in beginning of complaint); Clark *v.* Dunlap, 2 Ind. 551 (but statement of names of partners unnecessary in an action before a justice of the peace).

Iowa.— Marsh *v.* Chicago, etc., R. Co., 79 Iowa 332, 44 N. W. 562 (petition sufficient); Gordon *v.* Janney, Morr. 182.

Louisiana.— Wolf *v.* New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893.

Michigan.— Voigt Brewery Co. *v.* Pacifico, 139 Mich. 284, 102 N. W. 739, holding that naming a non-existent partnership, instead of the individual trading under such partnership name, as plaintiff, was not a misnomer, but was a failure to name the true plaintiff, which was fatal to the prosecution of the action, although not raised by plea in abatement.

Nebraska.— Stubendorf *v.* Sonnenschein, 11 Nebr. 235, 9 N. W. 91, naming in title of cause sufficient under Code Civ. Proc. § 92.

South Carolina.— Walter *v.* Godshall, 32 S. C. 187, 10 S. E. 951, setting forth names in title of complaint sufficient.

Texas.— Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905; Putman *v.* Wheeler, 65 Tex. 522; Scott *v.* Llano County Bank, (Civ. App. 1905) 85 S. W. 301.

West Virginia.— Wilson *v.* Carter Oil Co., 46 W. Va. 469, 33 S. E. 249, holding that if plaintiffs have a joint cause of action, the allegation of partnership may be regarded as surplusage.

Wisconsin.— Howard *v.* Boorman, 17 Wis. 459, complaint sufficient.

United States.— Haarmann *v.* Lueders, 109 Fed. 325.

See 38 Cent. Dig. tit. "Partnership," §§ 405, 406.

unless the statute requires a statement of the names.[56] In some jurisdictions plaintiffs must aver compliance with statutory requirements such as making, filing, and publishing a certificate stating the names and places of residence of the partners,[57] but in others non-compliance with such requirements is a matter of defense and need not be alleged.[58] When suit is brought upon an obligation executed in the firm-name, plaintiff should allege the names of those constituting the firm,[59] or at least state them in the caption of his complaint.[60] In other cases of contract liability on the part of defendants it is generally held to be sufficient to allege their joint promise without any averment as to their partnership or their firm-name.[61] In jurisdictions where the liability of partners is several as well as joint, it is unnecessary for plaintiff to make any allegation concerning the firm or its members.[62] This is true too in actions for tort against a partner.[63] A partner who has contracted in the firm-name without the authority of his copartners, express or implied, may be alleged to have individually contracted in that name.[64] Indeed, if an action is brought against one partner only, on a firm contract, he must plead the non-joinder of his copartners in abatement, or plaintiff will be entitled to recover against him alone.[65] The ostensible partners cannot plead in abatement the non-joinder of a secret partner.[66] In order to sustain an

56. Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805.

57. New Carlisle Bank *v.* Brown, 11 Ohio Cir. Ct. 77, 5 Ohio Cir. Dec. 94.

58. Cook *v.* Fowler, 101 Cal. 89, 35 Pac. 431; Phillips *v.* Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Lee *v.* Orr, 70 Cal. 398, 11 Pac. 745; Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924 (on the ground of the presumption that parties have complied with and have not violated statutory requirements); Heegaard *v.* Dakota L. & T. Co., 3 S. D. 569, 54 N. W. 656.

Proof if alleged.— In Sweeney *v.* Stanford, 67 Cal. 635, 8 Pac. 444, it is held that if plaintiffs allege compliance with such requirements, they must prove the allegation.

59. Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204; Lucas *v.* Baldwin, 97 Ind. 471; Rains *v.* Bolin, 6 Ind. App. 181, 33 N. E. 218; Laing *v.* Craig, 14 Tex. Civ. App. 134, 36 S. W. 142; Osborne *v.* Holland, 1 Tex. App. Civ. Cas. § 1087; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847, but defect not ground for general demurrer. *Contra*, Dimond *v.* Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182, holding, under Gen. St. (1894) § 5177, that an action is maintainable against a firm by its firm-name, without any allegation as to the names of its members.

60. Pierson *v.* Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015 (sufficient if all the partners are named in the caption); McGregor *v.* Hubbs, 125 Ind. 487, 25 N. E. 591; Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; Percival *v.* Groff, 8 Blackf. (Ind.) 233; Rains *v.* Bolin, 6 Ind. App. 181, 33 N. E. 218; McCloskey *v.* Strickland, 7 Iowa 259; Kimball *v.* Longstreet, 174 Mass. 487, 55 N. E. 177.

61. Jemison *v.* Dearing, 41 Ala. 283; Faust *v.* Smith, 3 Colo. App. 505, 34 Pac. 261 (where suit was against the firm, but the claims set forth were against the partners as individuals upon separate promises, and hence the actions failed); Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141 (requiring an allegation of joint interest in attachment sued out by defendants). In Allen *v.* Davids, 70 S. C. 260, 49 S. E. 846, it is held that an allegation that plaintiff knew that defendant was a member of a firm when he sold goods to it is not necessary.

62. Kent *v.* Wells, 21 Ark. 411.

63. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Baker *v.* Hornick, 51 S. C. 313, 28 S. E. 941; Frank *v.* Tatum, (Tex. Civ. App. 1894) 26 S. W. 900.

64. Sinsheimer *v.* William Skinner Mfg. Co., 54 Ill. App. 151; Columbus City Bank *v.* Beach, 5 Fed. Cas. No. 2,737, 1 Blatchf. 438.

On the other hand an allegation that W executed a bond for himself and G will not sustain an action against G where there is no averment that G or the firm of W & G promised to pay the debt. Garland *v.* Davidson, 3 Munf. (Va.) 189.

When suit is brought against a non-trading firm on a contract signed in the firm-name by one partner, the complaint must allege that such partner was actually authorized to sign the contract or that its execution was necessary to the business of the firm. Alsop *v.* Central Trust Co., 100 Ky. 375, 38 S. W. 510, 18 Ky. L. Rep. 830.

65. Rice *v.* Shute, 5 Burr. 2611, W. Bl. 695. See also PLEADING. When an action is authorized against a firm in the firm-name, if the wrong name is used in the summons and complaint, that fact must be pleaded in abatement. Adams Express Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

Modern statutes often permit actions to proceed to judgment against one or more partners, and their provisions must be consulted. Ruth *v.* Lowry, 10 Nebr. 260, 4 N. W. 977; Day *v.* Carmichael, 47 N. Y. App. Div. 4, 62 N. Y. Suppl. 142; Kirkbride *v.* Wilgus, 37 Misc. (N. Y.) 519, 73 N. Y. Suppl. 1036; Simonds *v.* Speed, 6 Rich. (S. C.) 390.

66. Mullett *v.* Hook, M. & M. 88, 31 Rev. Rep. 716, 22 E. C. L. 480; Stansfield *v.* Levy,

action against a dormant partner, after his withdrawal from the firm, plaintiff must allege that such partner had been known to him as a member of the firm.[67] A person suing in his own name, on a claim assigned or indorsed to him by a partnership, need not specify the persons composing such firm.[68] Whether the signature and verification of a pleading are proper and sufficient in a particular case is determinable by the statutory provisions and rules of practice of the forum.[69]

b. Denial of Partnership. In the absence of a statutory rule upon the subject, the general issue operates to deny a partnership alleged as a material fact in the complaint.[70] In many jurisdictions, however, a statutory rule or rule of court requires that an allegation of partnership must be specially denied by affidavit or a verified plea.[71] When the existence of a partnership is alleged and it is not

3 Stark. 8; 3 E. C. L. 572, repudiating the doctrine of Dubois *v.* Ludert, 1 Marsh. 246, 5 Taunt. 609, 1 E. C. L. 312, on this point.

67. Warren *v.* Ball, 37 Ill. 76.

68. Shane *v.* Lowry, 48 Ind. 205; Wyckoff *v.* Bishop, 98 Mich. 352, 57 N. W. 170. Where a complaint stated that a certain firm sold defendant goods, and that such firm thereafter assigned the claim to plaintiff, such allegations being sufficient to authorize proof of a sale by an assignor competent to contract, the complaint was not demurrable, although it contained no allegation of partnership, nor specification of persons competent to contract. Crinnian *v.* Knauth, 29 Misc. (N. Y.) 523, 61 N. Y. Suppl. 976.

69. *Alabama.*— Garner *v.* Simpson, Minor 67, verification by one partner held sufficient.

Iowa.— Lessem *v.* Wilson, 43 Iowa 488, verification held sufficient.

New York.— Mooney *v.* Ryerson, 8 N. Y. Civ. Proc. 435 (verification sufficient); Lacy *v.* Wilkinson, 7 N. Y. Civ. Proc. 104 (insufficient as to one partner).

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Moody *v.* Alter, 12 Heisk. 142, verification by one partner held sufficient.

Wisconsin.— Garland *v.* Hickey, 75 Wis. 178, 43 N. W. 832, signature and verification of a petition for a lien on logs by one partner held sufficient.

See 38 Cent. Dig. tit. "Partnership," § 415. And see, generally, PLEADING.

Necessity for verified plea denying partnership see *infra*, VI, D, 6, h.

70. *Colorado.*— Rogers *v.* Nuckolls, 2 Colo. 281, assumpsit.

Indiana.— Graham *v.* Henderson, 35 Ind. 195; Fletcher *v.* Dana, 4 Blackf. 377.

Kansas.— Hayner *v.* Eberhardt, 37 Kan. 308, 15 Pac. 168.

Minnesota.— McKasy *v.* Huber, 65 Minn. 9, 67 N. W. 650 (construing Gen. St. (1894) § 5255, as referring to allegations as to the partnership of plaintiffs only); Fetz *v.* Clark, 7 Minn. 217; Irvine *v.* Myers, 4 Minn. 229.

Missouri.— Wales *v.* Chamblin, 19 Mo. 500.

New York.— Harvey *v.* Walker, 59 Hun 114, 13 N. Y. Suppl. 170.

Texas.— Palmo *v.* Slayden, etc., Co., (1906) 92 S. W. 796 [*affirming* (Civ. App. 1905) 90 S. W. 908], answer denied the existence of the partnership as alleged by plaintiff and denied the execution of the contract by the partnership.

Vermont.— Burton *v.* Bostwick, Brayt. 195.

See 38 Cent. Dig. tit. "Partnership," § 409.

71. *Alabama.*— Goetter *v.* Head, 70 Ala. 532; New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325; Bell *v.* Crosby, 4 Ala. 575.

Arkansas.— McCollum *v.* Cushing, 22 Ark. 540; Trowbridge *v.* Pitcher, 4 Ark. 157.

Georgia.— Waterman *v.* Glisson, 115 Ga. 773, 42 S. E. 95.

Illinois.— Mulhall *v.* Gillespie, 89 Ill. 346; Zuel *v.* Bowen, 78 Ill. 234; Degan *v.* Singer, 41 Ill. 28; Heintz *v.* Cahn, 29 Ill. 308; Robinson *v.* Magarity, 28 Ill. 423; McKinney *v.* Peck, 28 Ill. 174; Shufeldt *v.* Seymour, 21 Ill. 524; Haywood *v.* Harmon, 17 Ill. 477; Warren *v.* Chambers, 12 Ill. 124; Stevenson *v.* Farnsworth, 7 Ill. 715; Langdell *v.* Harney, 36 Ill. App. 406; Bensley *v.* Brockway, 27 Ill. App. 410; Aultman, etc., Co. *v.* Webber, 4 Ill. App. 427; Fergus *v.* Cleveland Paper Co., 3 Ill. App. 629. *Compare* Chicago Stamping Co. *v.* Bignall, 54 Ill. App. 312.

Iowa.— Chicago University *v.* Emmert, 108 Iowa 500, 79 N. W. 285.

Mississippi.— Hirsch *v.* Shafer, 66 Miss. 439, 6 So. 229; Cook *v.* Martin, 13 Miss. 379.

Missouri.— Donk Bros. Coal, etc., Co. *v.* Aronson, 102 Mo. App. 590, 77 S. W. 132; Drumm Flato Comm. Co. *v.* Summers, 89 Mo. App. 300; Richards *v.* McNemee, 87 Mo. App. 396; Mitchell *v.* Railton, 45 Mo. App. 273; Haysler *v.* Dawson, 28 Mo. App. 531.

Pennsylvania.— Reiter *v.* Fruh, 150 Pa. St. 623, 24 Atl. 347, under Court Rule 1, § 2; Vanzandt *v.* Massey, 12 Phila. 340; Sinkler *v.* Lambert, 5 Phila. 36; Wallace *v.* Taylor, 1 Phila. 74.

Texas.— Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Good *v.* Galveston, etc., R. Co., (1889) 11 S. W. 854, 4 L. R. A. 801; Lindsay *v.* Jaffray, 55 Tex. 626; Congdon *v.* Monroe, 51 Tex. 109; Lewis *v.* Lowery, 31 Tex. 663; Lee *v.* Hamilton, 12 Tex. 413; Drew *v.* Harrison, 12 Tex. 279; Buchanan *v.* Edwards, (Civ. App. 1899) 51 S. W. 33; Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595; Gulf, etc., R. Co. *v.* Wilson, 7 Tex. Civ. App. 128, 26 S. W. 131; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Frank-

duly denied by the opposite party, when denial is necessary, and on oath when this is required, its existence need not be proved.[72]

c. **Separate Pleadings by Partners.** Each partner is entitled to plead separately.[73] If he exercises this right, his copartners are not affected by his pleading,[74] unless they adopt it as their own,[75] or admit its allegations.[76]

lin *v.* Ton Jonrs, 1 Tex. App. Civ. Cas. § 506; Cleveland *v.* Duggan, 1 Tex. App. Civ. Cas. § 82.

Wisconsin.— Woolsey *v.* Henke, 125 Wis. 134, 103 N. W. 267; Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212; Martin *v.* American Express Co., 19 Wis. 336 (under Rev. St. c. 137, § 98); Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Barnes *v.* Elmbinger, 1 Wis. 56.

United States.— Byrd *v.* Gasquet, 4 Fed. Cas. No. 2,268*a*, Hempst. 261.

See 38 Cent. Dig. tit. "Partnership," § 409.

72. *Colorado.*—Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947; Smith *v.* Cisson, 1 Colo. 29.

Florida.— Smith *v.* Westcott, 34 Fla. 430, 16 So. 332.

Georgia.— Henderson Warehouse Co. *v.* Brand, 105 Ga. 217, 31 S. E. 551.

Indiana.— Rees *v.* Simons, 10 Ind. 82.

Kentucky.— Fennell *v.* Myers, 76 S. W. 136, 25 Ky. L. Rep. 589 (answer held not to contain a sufficient denial); Craig *v.* Chipman, 57 S. W. 244, 22 Ky. L. Rep. 322 (not a sufficient denial).

Minnesota.— Irvine *v.* Myers, 4 Minn. 229.

Mississippi.— Jameson *v.* Franklin, 6 How. 376.

Missouri.— Hephler *v.* Woodward, 200 Mo. 179, 98 S. W. 488; Vanhoosier *v.* Dunlap, 117 Mo. App. 529, 93 S. W. 350.

New York.— Anable *v.* Conklin, 25 N. Y. 470 (not a sufficient denial); Fairchild *v.* Rushmore, 8 Bosw. 698 (not a sufficient denial); Hand *v.* Rogers, 8 Misc. 79, 28 N. Y. Suppl. 521 (sufficient denial); Haberkorn *v.* Hill, 2 N. Y. Suppl. 243 (sufficient denial).

North Dakota.— State *v.* McMaster, 13 N. D. 58, 99 N. W. 58, a partner who is not served with summons does not admit the partnership by appearing at the trial and participating therein without answering.

Pennsylvania.— Laferty *v.* Sheriff, (1888) 16 Atl. 90 (denial held evasive); O'Brien *v.* Levin, 11 Pa. Dist. 729 (rule of court applies to actions in tort as well as on contract); Lang *v.* Jenkins, 12 Pa. Co. Ct. 634 (sufficient denial).

Virginia.— Phaup *v.* Stratton, 9 Gratt. 615, not a sufficient denial.

West Virginia.— Ruffner *v.* Montgomery, 61 W. Va. 62, 56 S. E. 388.

Wisconsin.— Elliott *v.* Espenhaim, 54 Wis. 231, 11 N. W. 513, answer construed as admitting the partnership.

United States.— Porter *v.* Graves, 104 U. S. 171, 26 L. ed. 691, answer construed as conceding the partnership.

See 38 Cent. Dig. tit. "Partnership," § 409; and cases cited *supra*, note 71.

Extent of admission.— But in an action by a partnership on a contract alleged to have been assigned to the firm, failure to deny the partnership under oath, while it admits the partnership, does not admit that the contract was assigned to the firm and not to one of the members thereof as an individual, as claimed by defendant. Vanhoosier *v.* Dunlap, 117 Mo. App. 529, 93 S. W. 350.

73. *Alabama.*— Plowman *v.* Riddle, 7 Ala. 775.

Florida.— Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 89.

Iowa.— Machinists' Bank *v.* Krum, 15 Iowa 49, holding that one partner may set up usury without the consent of the other partners.

Kentucky.— Vallandingham *v.* Duval, 7 J. J. Marsh. 262, plea of statute of limitations.

Louisiana.— Orleans Bank *v.* Whittemore, 15 La. 276, plea by one waives general denial by both.

New York.— Allison Bros. Co. *v.* Hart, 56 Hun 282, 9 N. Y. Suppl. 692, one partner can demur while the other answers on the merits.

See 38 Cent. Dig. tit. "Partnership," § 410.

Pleas and affidavits not responsive.— Where plaintiffs sued defendants in assumpsit as partners and filed with their declaration and account the affidavit required by W. Va. Code (1899), c. 125, § 46 [Code (1906), § 3866], alleging a liability after deduction of payments and credits, and defendants separately entered pleas of *non assumpsit* and tendered their separate affidavits, denying their individual liability, but filed no affidavit denying partnership, the affidavits not being responsive to the declaration or to the affidavit of plaintiffs, defendants' pleas should be rejected. Ruffner *v.* Montgomery, 61 W. Va. 62, 56 S. E. 388.

74. *Connecticut.*—Anderson *v.* Henshaw, 2 Day 272, one partner's plea of the statute of limitations, adjudged insufficient, does not prevent the other partner from pleading the general issue.

Iowa.— Nixon *v.* Downey, 42 Iowa 78, answer of one partner not conclusive on the other, the allegation of partnership not being proved.

Louisiana.— Orleans Bank *v.* Whittemore, 15 La. 276.

Minnesota.— Brandt *v.* Shepard, 39 Minn. 454, 40 N. W. 521.

Pennsylvania.— Corcoran *v.* Trich, 9 Pa. Cas. 110, 11 Atl. 677.

See 38 Cent. Dig. tit. "Partnership," § 410.

75. Barnett *v.* Watson, 1 Wash. (Va.) 372, holding that a partner who takes part in the trial, without putting in a separate plea, binds himself to abide by the plea of his copartner.

76. Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104, where the allegations were admitted by failure to deny them.

d. Defenses. To a suit by a firm it is a good defense that the debt is due to one partner only.[77] It is also a defense that any one of the joint plaintiffs has estopped himself from maintaining the suit.[78] But a set-off or counter-claim against either of plaintiffs as an individual is not available as a defense to a partnership cause of action.[79] In case of misjoinder or non-joinder of partners as plaintiffs, the objection is to be taken by a plea in abatement, or it will be deemed waived.[80] When a firm is sued upon a partnership obligation, the non-existence of such obligation is a defense;[81] but it is no defense to allege, while admitting the partnership, that one or more of the defendants did not incur the obligation.[82] If want of authority in the partner executing the obligation is the only ground of defense, it should be alleged that such partner acted without authority express or implied, that plaintiff knew, or was chargeable with notice, of such want of authority, and that the unauthorized act has never been adopted or ratified.[83] It is a good defense for any person sued as a partner of the other defendants that he was not a partner, nor liable as one, when the obligation was incurred, provided this is alleged in the manner required by the law of the forum;[84] but a denial that he as an individual made the contract sued on,[85] or that he has any knowledge or information sufficient to form a belief as to the contract or transaction,[86] is bad.

e. Demurrer. A complaint is demurrable where it alleges a contract or transaction with a partnership, but sets forth a contract or transaction which purports or appears to be with one partner only.[87] It is also demurrable at common law, if it discloses that one member of the plaintiff firm is also a member of the

77. Kenan *v.* Starke, 6 Ala. 773.

78. Brownrigg *v.* Rae, 5 Exch. 489.

79. Smith *v.* Brannon, 51 S. W. 178, 21 Ky. L. Rep. 267; De Forest *v.* Andrews, 27 Misc. (N. Y.) 145, 58 N. Y. Suppl. 358; Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787; Hunter *v.* Hubbard, 26 Tex. 537. See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

80. Carlisle *v.* McAlester, 3 Ind. Terr. 164, 53 S. W. 531; Gibson *v.* Stevens, 7 N. H. 352; Deal *v.* Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658. See, generally, PLEADING.

81. Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Buck *v.* Smith, 2 Colo. 500; Fox *v.* Clemmons, 99 S. W. 641, 30 Ky. L. Rep. 805.

82. Platt, etc., Refining Co. *v.* Hepworth, 13 N. Y. Civ. Proc. 122 (where the action was against a firm of four, and the answer of three denied a sale to them); Schoonover *v.* Jones, 11 Pa. Co. Ct. 61 (where one partner denied that he took any part in the management of the firm business); Sinkler *v.* Lambert, 5 Phila. (Pa.) 36; Duffy *v.* Boyer, 8 Del. Co. (Pa.) 43.

83. *Colorado.*— Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212; King *v.* Mecklenburg, 17 Colo. App. 312, 68 Pac. 984.

Georgia.— McCord Co. *v.* Callaway, 109 Ga. 796, 35 S. E. 171.

Illinois.— Dorn *v.* Tyler, 64 Ill. App. 110.

Indiana.— Moffitt *v.* Roche, 92 Ind. 96.

Kentucky.— Fennell *v.* Myers, 76 S. W. 136, 25 Ky. L. Rep. 589.

Louisiana.— Vienne *v.* Harris, 14 La. Ann. 382.

Massachusetts.— Kendall *v.* Carland, 5 Cush. 74.

Minnesota.— Irvine *v.* Myers, 4 Minn. 229.

Missouri.— Bates *v.* Scheik, 47 Mo. App. 642.

Pennsylvania.— Tilli *v.* Vandegrift, 18 Pa. Super. Ct. 485; Potter *v.* Price, 3 Pittsh. 136.

England.— Ellston *v.* Deacon, L. R. 2 C. P. 20; Leverson *v.* Lane, 13 C. B. N. S. 278, 3 F. & F. 221, 9 Jur. N. S. 670, 32 L. J. C. P. 10, 7 L. T. Rep. N. S. 326, 11 Wkly. Rep. 74, 106 E. C. L. 278.

See 38 Cent. Dig. tit. "Partnership," § 413.

84. *Alabama.*— New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325 (sworn plea denying partnership is required by Code, § 2682); Fowlkes *v.* Baldwin, 2 Ala. 705.

Georgia.— Holman *v.* Carhart, 25 Ga. 608.

Kentucky.— Rochester *v.* Trotters, 4 Bibb 444.

Pennsylvania.— Martien *v.* Manheim, 80 Pa. St. 478.

Texas.— Persons *v.* Frost, 25 Tex. Suppl. 129, plea not in proper form under Paschal Dig. art. 1443.

Canada.— Harvey *v.* Mowat, 2 Quebec Pr. 212.

See 38 Cent. Dig. tit. "Partnership," §§ 409, 412.

85. Waterman *v.* Glisson, 115 Ga. 773, 42 S. E. 95. But it has been held a good plea by one partner "that he did not undertake and promise in manner and form as the said plaintiff hath thereof complained against him," when the complaint counts on a joint promise by the defending partner and others. Bradley *v.* Barhour, 65 Ill. 431.

86. Chapman *v.* Palmer, 12 How. Pr. (N. Y.) 37; Mott *v.* Burnett, Code Rep. N. S. (N. Y.) 225 [*reversed* on other grounds in 2 E. D. Smith 50].

87. Wood *v.* Martin, 115 Ga. 147, 41 S. E. 490. A complaint in an action against a partnership for the recovery of money re-

defendant firm.[88] As a demurrer admits the facts alleged in the complaint, a defendant by demurring may lose a defense which he could have interposed by plea.[89]

f. Issues, Proof, and Variance. When the existence of a partnership, on the part either of plaintiffs or of defendants, is properly put in issue by the pleadings, it is incumbent on the party alleging its existence to prove it.[90] In partnership litigations, as in all others, a material variance between a party's proof and his allegation is fatal.[91]

ceived by one of defendants as a member of the firm, but not paid over to plaintiff, to whom it belonged, was not sufficient on demurrer, when read in connection with the exhibits filed with the complaint, where these showed that the transaction was with one of the parties alone, independent of the partnership. Fox *v.* Clemmons, 99 S. W. 641, 30 Ky. L. Rep. 805.

88. Thompson *v.* Young, 90 Md. 72, 44 Atl. 1037.

89. Massey *v.* Pike, 20 Ark. 92; Beacannon *v.* Liebe, 11 Oreg. 443, 5 Pac. 273. See, generally, PLEADING.

90. See the cases cited *infra*, this note.

Existence of partnership in issue.—*Alabama.*— Findlay *v.* Stevenson, 3 Stew. 48.

Arkansas.—Vaughan *v.* McGannon, 52 Ark. 244, 12 S. W. 557; Alford *v.* Thompson, 5 Ark. 347; Trowbridge *v.* Sanger, 4 Ark. 179.

Georgia.— Carlton *v.* Grissom, 98 Ga. 118, 26 S. E. 77, it is enough to prove that the persons alleged to be partners are liable as partners.

Illinois.— Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. 1036 [*affirming* 101 Ill. App. 512]; Smith *v.* Hulett, 65 Ill. 495; Yocum *v.* Benson, 45 Ill. 435; King *v.* Haines, 23 Ill. 340.

Iowa.—Hancock *v.* Hintrager, 60 Iowa 374, 14 N. W. 725; Byington *v.* Woodward, 9 Iowa 360; Bernard *v.* Parvin, Morr. 309.

Kansas.— Burnham *v.* Lutz, 8 Kan. App. 361, 55 Pac. 519.

Louisiana.— Magee *v.* Dunbar, 10 La. 546.

Maine.— Head *v.* Sleeper, 20 Me. 314.

Maryland.— Lighthiser *v.* Allison, 100 Md. 103, 59 Atl. 182.

Massachusetts.— Haskins *v.* D'Este, 133 Mass. 356.

Michigan.— Gray *v.* Gibson, 6 Mich. 300.

Minnesota.— Whitney *v.* Reese, 11 Minn. 138; Fetz *v.* Clark, 7 Minn. 217; Stickney *v.* Smith, 5 Minn. 486; Irvine *v.* Myers, 4 Minn. 229; Bank of Commerce *v.* Selden, 1 Minn. 340.

Mississippi.— Smith *v.* Cromer, 66 Miss. 157, 5 So. 619.

Missouri.— Lessing *v.* Sulzbacher, 35 Mo. 445.

Nebraska.— Hoyt *v.* Kountze, 54 Nebr. 368, 74 N. W. 585.

New York.—Wildrick *v.* Heyshem, 96 N. Y. App. Div. 515, 89 N. Y. Suppl. 78; Follmer *v.* Frommel, 63 Hun 370, 18 N. Y. Suppl. 318; Halliday *v.* McDougall, 22 Wend. 264 [*reversing* 20 Wend. 81].

Ohio.— Clark *v.* Kensell, Wright 480.

Oklahoma.— Johnson *v.* J. J. Douglass Co., 8 Okla. 594, 58 Pac. 743.

Pennsylvania.— Hughes *v.* Moles, 3 Lack. Jur. 382.

Texas.— Bonnet *v.* Tips Hardware Co., (Civ. App. 1900) 59 S. W. 59; Baptist Book Concern *v.* Carswell, (Civ. App. 1898) 46 S. W. 858.

United States.— Nicholson *v.* Patton, 18 Fed. Cas. No. 10,250, 2 Cranch C. C. 164; Tibbs *v.* Parrott, 23 Fed. Cas. No. 14,023, 1 Cranch C. C. 313.

See 38 Cent. Dig. tit. "Partnership," §§ 416, 417.

Existence of partnership not in issue.— *Arkansas.*— McGill *v.* Dowdle, 33 Ark. 311; Hicks *v.* Branton, 21 Ark. 186.

Florida.— Marx *v.* Culpepper, 40 Fla. 322, 24 So. 59.

Illinois.— Wright *v.* Curtis, 27 Ill. 514.

Kansas.— Howard *v.* Woodward, 52 Kan. 106, 34 Pac. 348.

Louisiana.— Derbigny *v.* Mondelli, 15 La. 496, showing a peculiarity of Louisiana law.

Maine.— Head *v.* Goodwin, 37 Me. 181, the action being trover against defendants who were partners.

Michigan.— Naftzker *v.* Lantz, 137 Mich. 441, 100 N. W. 601; Philpott *v.* Bechtel, 104 Mich. 79, 62 N. W. 174.

Minnesota.— Dobson *v.* Hallowell, 53 Minn. 98, 54 N. W. 939; Derby *v.* Gallup, 5 Minn. 119.

Missouri.— Jennings *v.* Russell, 47 Mo. App. 160.

Nebraska.— Graves *v.* Norfolk Nat. Bank, 49 Nebr. 437, 68 N. W. 612.

New Jersey.— Win *v.* Devine, 62 N. J. L. 374, 41 Atl. 213.

New Mexico.— Waldo *v.* Beckwith, 1 N. M. 97.

New York.— Millerd *v.* Thorn, 56 N. Y. 402; Porter *v.* Cumings, 7 Wend. 172; Mack *v.* Spencer, 4 Wend. 411.

North Carolina.— Hall *v.* Younts, 87 N. C. 285; Palin *v.* Small, 63 N. C. 484.

Oregon.— Wallace *v.* Baisley, 22 Oreg. 572, 30 Pac. 432.

Pennsylvania.— Tams *v.* Hitner, 9 Pa. St. 441; Bott *v.* Stoner, 2 Pennyp. 154; Ege *v.* Kyle, 2 Watts 222.

South Dakota.—Deadwood First Nat. Bank *v.* Hattenbach, 13 S. D. 365, 83 N. W. 421.

Texas.— Sanger *v.* Corsicana Nat. Bank, (Civ. App. 1905) 87 S. W. 737.

England.— Bass *v.* Clive, 4 Campb. 78, 4 M. & S. 13; Rordasnz *v.* Leach, 1 Stark. 446, 2 E. C. L. 172.

See 38 Cent. Dig. tit. "Partnership," §§ 416–418. And see *supra*, VI, D, 6, b.

91. *Alabama.*— Warner-Smiley Co. *v.*

7. Evidence — a. Presumptions and Burden of Proof.[92] In an action to enforce a partnership liability, which is denied, the burden of proof is upon the party alleging such liability.[93] There is a presumption, however, that the proper parties have united as plaintiffs in an action by a partnership,[94] and that a transac-

Cooper, 131 Ala. 297, 31 So. 28 (where plaintiffs alleged that their firm was composed of N & S but the proof disclosed that N, S & S were partners); McMillan *v.* Otis, 74 Ala. 560; Wharton *v.* King, 69 Ala. 365; Flake *v.* Day, 22 Ala. 132; Scott *v.* Dansby, 12 Ala. 714.

Alaska.— Carstens *v.* Frye-Bruhn, etc., Co., 1 Alaska 140, where plaintiff counted on a joint liability of defendants, but proved a several liability.

Georgia.— Price *v.* Bell, 88 Ga. 740, 15 S. E. 810 (no variance); Champion *v.* Wilson, 64 Ga. 184 (a variance).

Illinois.—Woodworth *v.* Fuller, 24 Ill. 109; Hurd *v.* Culies, 18 Ill. 188, variance in each case.

Indiana.— Maiden *v.* Webster, 30 Ind. 317, no variance.

Iowa.— Padden *v.* Clark, 124 Iowa 94, 99 N. W. 152 (variance cured by amendment of complaint); Byington *v.* Woodward, 9 Iowa 360 (fatal variance).

Kansas.— Crane *v.* Ring, 48 Kan. 61, 29 Pac. 696 [*affirming* 48 Kan. 58, 28 Pac. 1010], under Civ. Code, § 133, relating to variance.

Kentucky.— Waits *v.* McClure, 10 Bush 763, no variance.

Maryland.— Schroeder *v.* Turner, 68 Md. 506, 13 Atl. 331.

Massachusetts.— Whiting *v.* Withington, 3 Cush. 413, fatal variance.

Missouri.— Stix *v.* Mathews, 63 Mo. 371 (no variance); Schmidt *v.* Schmaelter, 45 Mo. 502; Rippey *v.* Evans, 22 Mo. 157; Hoyt *v.* Reed, 16 Mo. 294 (no variance); American Bank *v.* Campbell, 34 Mo. App. 45 (fatal variance). In an action by a partnership on a contract alleged to have been assigned to it, there can be no recovery by an individual member of the firm on a contract assigned to him as an individual. Vanhoosier *v.* Dunlap, 117 Mo. App. 529, 93 S. W. 350.

New York.— Cooperstown Bank *v.* Woods, 28 N. Y. 545 (no variance); Kayser *v.* Sichel, 34 Barb. 84 (allegation that two persons not joined were partners of defendants, not sustained by evidence offered); Holmes *v.* Daniels, 86 N. Y. Suppl. 19 (action against an individual doing business in a firm-name not sustained by evidence that the business was conducted by a firm consisting of defendant and another); Pease *v.* Morgan, 7 Johns. 468 (a variance); Manhattan Co. *v.* Ledyard, 1 Cai. 192.

Oregon.— Sabin *v.* Michell, 27 Oreg. 66, 39 Pac. 635.

South Carolina.—Spool Cotton Co. *v.* King, 68 S. C. 196, 46 S. E. 1005 (no variance); Fant *v.* Gadberry, 5 Rich. 10; Ball *v.* Strohecker, 2 Speers 364 (fatal variance).

South Dakota.— Cornwall *v.* McKinney, 12 S. D. 118, 80 N. W. 171, no variance.

Tennessee.— Wilson *v.* Smith, 5 Yerg. 379, a variance.

Texas.— Moore *v.* Williams, 31 Tex. Civ. App. 287, 72 S. W. 222, a variance.

Utah.— Duncan *v.* Randall, 2 Utah 131, a variance.

Vermont.— Miner *v.* Downer, 20 Vt. 461 (no variance); Fullerton *v.* Seymour, 5 Vt. 249 (a variance).

Washington.— Grissom *v.* Hofins, 39 Wash. 51, 80 Pac. 1002, applying § 4949 of Ballinger Annot. Code & St., and holding the variance in this case immaterial.

Wisconsin.— Cornhauser *v.* Roberts, 75 Wis. 554, 44 N. W. 744; Whitman *v.* Wood, 6 Wis. 676, no variance.

United States.— Barry *v.* Foyles, 1 Pet. 311, 7 L. ed. 157; Carrington *v.* Ford, 5 Fed. Cas. No. 2,449, 4 Cranch C. C. 231 (allegation not supported by the proof); Coffee *v.* Eastland, 5 Fed. Cas. No. 2,945, Brunn. Col. Cas. 216, Cooke (Tenn.) 159 (no variance); Darst *v.* Roth, 6 Fed. Cas. No. 3,582, 4 Wash. 471 (no variance). Where a complaint alleged that defendant S was a member of defendant's firm, and although the other defendants had accurate knowledge of the facts they did not specially traverse such averment, but proved the contrary under a general denial, it was held that the variance was not material, and the complaint would be deemed amended to conform to the proof. Schiffer *v.* Anderson, 146 Fed. 457, 76 C. C. A. 667.

England.— Story *v.* Richardson, 6 Bing. N. Cas. 123, 4 Jur. 26, 9 L. J. C. P. 43, 8 Scott 291, 37 E. C. L. 541, no variance.

Canada.— McDonald *v.* McKeen, 28 Nova Scotia 329; Pegg *v.* Plank, 3 U. C. C. P. 398 (variance in each case); French *v.* Weir, 17 U. C. Q. B. 245.

See 38 Cent. Dig. tit. "Partnership," §§ 416–418.

92. As to existence of partnership see *supra*, III, C, 1.

93. M. W. Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. 1036 [*affirming* 101 Ill. App. 512]; De St. Aubin *v.* Laskin, 74 Ill. App. 455; Hart *v.* Foley, (Indian Terr. 1905) 91 S. W. 33; Sanger *v.* Corsicana Nat. Bank, (Tex. Civ. App. 1905) 87 S. W. 737 (allegation of partnership not denied and hence no need of evidence as to its existence); Burgue *v.* De Tastet, 3 Stark. 53, 23 Rev. Rep. 755, 3 E. C. L. 590.

94. Smith *v.* Davis, 2 Stew. (Ala.) 224; Smith *v.* Hunt, 2 Stew. (Ala.) 222; Rugely *v.* Gill, 15 La. Ann. 509 (holding, however, that where a person whose name appears in the firm style is not joined, the burden is on plaintiffs to show that they alone compose the firm); Little *v.* Hamilton, 61 N. C. 29; K. B. Co. *v.* Batie, 23 Ohio Cir. Ct. 482; Calvert *v.* Newberger, 20 Ohio Cir. Ct. 353, 11 Ohio Cir. Dec. 184 (holding that in an

tion upon which suit is brought is free from fraud.[95] The presumption also obtains that a transaction on behalf of the firm by one partner is authorized by all, when it is within the course of the firm's business,[96] but not otherwise.[97] In the case of a trading partnership, each partner is presumed to be authorized to issue and negotiate commercial paper in the name of the firm,[98] and such paper is presumed to have been given for a consideration moving to the firm.[99] No such presumption exists in the case of commercial paper in the name of a non-trading firm;[1] nor in the case of such paper when given in a name other than that of the partnership.[2] Limitations upon the ordinarily implied authority of a partner are not presumed to be known to those dealing with him in the firm's

action in the partnership name the presumption is that the law providing for such actions has been complied with).

95. Edwards *v.* Pitzer, 12 Iowa 607; Robinson *v.* Quarles, 1 La. Ann. 460; Smith *v.* Ogilvie, 127 N. Y. 143, 27 N. E. 807 [*affirming* 53 Hun 636, 6 N. Y. Suppl. 233]; Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Ludiker *v.* Ratto, 2 Tex. App. Civ. Cas. § 116.

96. Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721; Rochester *v.* Trotter, 1 A. K. Marsh. (Ky.) 54; Johnston *v.* Trask, 116 N. Y. 136, 22 N. E. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630 [*affirming* 40 Hun 415]; Sheldon *v.* Smith, 28 Barb. (N. Y.) 593; Le Roy *v.* Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

97. *Alabama.*— Harwell *v.* Phillips, etc., Mfg. Co., 123 Ala. 460, 26 So. 501, transaction in course of firm business, but after dissolution.

Colorado.— Hobson *v.* Porter, 2 Colo. 28, no such presumption as to contract under seal.

Kentucky.— Judge *v.* Braswell, 13 Bush 67, 26 Am. Rep. 185.

Louisiana.— Jamison *v.* Cullom, 110 La. 781, 34 So. 775.

Mississippi.— Mayer *v.* Bernstein, 69 Miss. 17, 12 So. 257.

New Jersey.— Lowry *v.* Tivy, 71 N. J. L. 681, 60 Atl. 1134 [*affirming* 70 N. J. L. 457, 57 Atl. 267].

Tennessee.—Morlitzer *v.* Bernard, 10 Heisk. 361; Johnson *v.* Rankin, (Ch. App. 1900) 59 S. W. 638.

Utah.— Gutheil *v.* Gilmer, 23 Utah 84, 63 Pac. 817; Cavanaugh *v.* Salisbury, 22 Utah 465, 63 Pac. 39.

See 38 Cent. Dig. tit. "Partnership," §§ 419, 420.

98. *Alabama.*— Jones *v.* Rives, 3 Ala. 11.

Iowa.— Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701; Platt *v.* Koehler, 91 Iowa 592, 60 N. W. 178; Sherwood *v.* Snow, 46 Iowa 481, 26 Am. Rep. 155.

Kansas.— Lindh *v.* Crowley, 29 Kan. 756; Adams *v.* Ruggles, 17 Kan. 237.

Massachusetts.— Munroe *v.* Cooper, 5 Pick. 412, where defendants show that a note in the firm-name was given by one partner fraudulently, the burden is on plaintiff to show that he took without knowledge of the fraud.

Mississippi.— Sylverstein *v.* Atkinson, 45 Miss. 81; Faler *v.* Jordan, 44 Miss. 283.

New York.— Richardson *v.* Hinck, 169 N. Y. 588, 62 N. E. 1100 [*affirming* 53 N. Y. App. Div. 127, 65 N. Y. Suppl. 872].

See 38 Cent. Dig. tit. "Partnership," § 421; and *supra*, VI, A, 9.

99. *Alabama.*— Knapp *v.* McBride, 7 Ala. 19.

Georgia.— Miller *v.* Hines, 15 Ga. 197.

Iowa.— Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; McMullan *v.* MacKenzie, 2 Greene 368.

Kentucky.— Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509; Magill *v.* Merrie, 5 B. Mon. 168.

Maryland.— Manning *v.* Hays, 6 Md. 5.

Michigan.— Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192; Littell *v.* Fitch, 11 Mich. 525.

Missouri.— Feurt *v.* Brown, 23 Mo. App. 332.

Nebraska.— Schwanck *v.* Davis, 25 Nebr. 196, 41 N. W. 141; Warren *v.* Martin, 24 Nebr. 273, 38 N. W. 849.

New York.— Oliphant *v.* Mathews, 16 Barb. 608; Paul *v.* Van da Linda, 12 N. Y. Suppl. 638; Vallett *v.* Parker, 6 Wend. 615; Doty *v.* Bates, 11 Johns. 544.

Ohio.— Purviance *v.* Sutherland, 2 Ohio St. 478; Penfield *v.* Mason, 17 Ohio Cir. Ct. 165, 9 Ohio Cir. Dec. 611.

Pennsylvania.— Hogg *v.* Orgill, 34 Pa. St. 344; Haldeman *v.* Middletown Bank, 28 Pa. St. 440, 70 Am. Dec. 142; Mifflin *v.* Smith, 17 Serg. & R. 165.

Texas.— Powell *v.* Messer, 18 Tex. 401.

England.— Moore *v.* Smith, 14 Beav. 393, 51 Eng. Reprint 338.

See 38 Cent. Dig. tit. "Partnership," § 421.

1. *Illinois.*— Gray *v.* Ward, 18 Ill. 32.

Indiana.— Schele *v.* Wagner, 163 Ind. 20, 71 N. E. 127; Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240.

Mississippi.— Prince *v.* Crawford, 50 Miss. 344.

Vermont.— Waller *v.* Keyes, 6 Vt. 257.

Wisconsin.— Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

See 38 Cent. Dig. tit. "Partnership," § 421.

2. *Georgia.*— Strauss *v.* Waldo, 25 Ga. 641.

Kentucky.— Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Missouri.— Farmers' Bank *v.* Bayliss, 41 Mo. 274.

New York.— Gernon *v.* Hoyt, 90 N. Y. 631.

Pennsylvania.— Frisbie *v.* McFarlane, 196

business.[3] Where a partner gives a firm obligation or transfers firm property on account of his private debt, the burden is on the payee or transferee to prove the assent of the other partners to the act, or their ratification of it.[4] The same burden rests upon him who seeks to hold the firm upon any contract of suretyship or guarantee executed by one partner in the firm-name,[5] unless its business involves such contracts.[6] Partners who allege the payment or extinguishment of a firm obligation by a copartner have the burden of proving the allegation.[7] It is presumed that each partner knows the entries in the firm books,[8] and that the interests of the copartners in the firm assets are equal.[9]

b. Admissibility and Weight and Sufficiency.[10] In partnership actions, evidence, in order to be admissible, must be confined to the issues raised by the pleadings and must be legally relevant thereto.[11] If the existence of a partnership is in question, the oral statements of its alleged members are admissible

Pa. St. 110, 46 Atl. 359; Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. 180.

Virginia.— Commonwealth Nat. Bank *v.* Cringan, 91 Va. 347, 21 S. E. 820.

United States.— Patriotic Bank *v.* Coote, 18 Fed. Cas. No. 10,807, 3 Cranch C. C. 169.

See 38 Cent. Dig. tit. "Partnership," § 421.

3. Humes *v.* O'Bryan, 74 Ala. 64; Faler *v.* Jordan, 44 Miss. 283; Loftus *v.* Ivy, 14 Tex. Civ. App. 701, 37 S. W. 766.

4. *Alabama.*— Pierce *v.* Pass, 1 Port. 232.

Illinois.— Harts *v.* Byrne, 31 Ill. App. 260.

Indiana.— Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888.

Louisiana.—Allen *v.* Cary, 33 La. Ann. 1455; Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312; Mechanics', etc., Ins. Co. *v.* Richardson, 33 La. Ann. 1308, 39 Am. Rep. 290.

Michigan.— Koch *v.* Endriss, 97 Mich. 444, 56 N. W. 847.

Minnesota.— Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; Bank of Commerce *v.* Selden, 3 Minn. 155.

New Jersey.— Lowry *v.* Tivy, 71 N. J. L. 681, 60 Atl. 1134 [*affirming* 70 N. J. L. 457, 57 Atl. 267].

New York.— Kemeys *v.* Richards, 11 Barb. 312; Williams *v.* Walbridge, 3 Wend. 415.

South Dakota.— Noyes *v.* Crandall, 6 S. D. 460, 61 N. W. 806.

Texas.— Powell *v.* Messer, 18 Tex. 401.

West Virginia.— Tompkins *v.* Woodyard, 5 W. Va. 216.

See 38 Cent. Dig. tit. "Partnership," §§ 420, 421.

5. *Alabama.*— Rolston *v.* Click, 1 Stew. 526.

Connecticut.— New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

Georgia.— Sibley *v.* American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470.

Illinois.— Davis *v.* Blackwell, 5 Ill. App. 32.

Iowa.— Dubuque First Nat. Bank *v.* Carpenter, 34 Iowa 433.

Maine.— Darling *v.* March, 22 Me. 184.

Massachusetts.— Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666.

Michigan.— Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475.

Minnesota.— Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215; Osborne *v.* Stone, 30 Minn. 25, 13 N. W. 922.

Mississippi.— Langan *v.* Hewett, 13 Sm. & M. 122; Andrews *v.* Planters' Bank, 7 Sm. & M. 192, 45 Am. Dec. 300.

New York.— New York Fireproof Tenement Assoc. *v.* Stanley, 105 N. Y. App. Div. 432, 94 N. Y. Suppl. 160; Joyce *v.* Williams, 14 Wend. 141; Mercein *v.* Andrus, 10 Wend. 461; Boyd *v.* Plumb, 7 Wend. 309; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Foot *v.* Sabin, 19 Johns. 154, 10 Am. Dec. 208.

North Dakota.— Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339, 26 Am. St. Rep. 636.

Texas.— Fore *v.* Hitson, 70 Tex. 517, 8 S. W. 292.

See 38 Cent. Dig. tit. "Partnership," § 422.

6. Dubuque First Nat. Bank *v.* Carpenter, 34 Iowa 433.

7. Zachary *v.* Phillips, 101 N. C. 571, 8 S. E. 359 (burden to prove satisfaction of firm liability); *In re* Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574 (burden to prove release from firm debt); Whitwell *v.* Warner, 20 Vt. 425.

8. Burchelle *v.* Voght, 35 N. Y. App. Div. 190, 55 N. Y. Suppl. 80 [*affirmed* in 164 N. Y. 602, 58 N. E. 1085]. See also *infra*, VI, D, 7, b; IX, D, 12, f.

9. Leonard *v.* Worsham, 18 Tex. Civ. App. 410, 45 S. W. 336.

10. Evidence of partnership see *supra*, III, C, 2, 3.

11. See the cases cited *infra*, this note. And see *supra*, VI, D, 6, f.

Evidence held admissible.— Kuhl *v.* Long, 102 Ala. 563, 15 So. 267; Adams *v.* Long, 114 Ill. App. 277; Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559; Coller *v.* Porter, 88 Mich. 549, 50 N. W. 658; Sager *v.* Tupper, 38 Mich. 258; Boyd *v.* Ricketts, 60 Miss. 62; Sedalia Third Nat. Bank *v.* Faults, 115 Mo. App. 42, 90 S. W. 755; Bernstein *v.* Cahen, 48 Misc. (N. Y.) 639, 96 N. Y. Suppl. 209; Carter *v.* Beaman, 51 N. C. 44; Daniel *v.* Lance, 29 Pa. Super. Ct. 454; Kitchen *v.* Dallas Brick Co., (Tex. Civ. App. 1894) 29 S. W. 402; Hinton *v.* Forester, 1 F. & F. 150. See 38 Cent. Dig. tit. "Partnership," § 423.

Evidence held inadmissible.— Preston *v.* Putman County Banking Co., 120 Ga. 546, 48 S. E. 316; Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599; Coller *v.* Porter, 88 Mich.

against them, although the partnership articles are under seal.[12] On an issue whether its act binds the firm, evidence as to the nature of the firm's business is of course admissible,[13] as is also evidence of circumstances attending the transaction which tend to show that it was a firm transaction.[14] The admissions and representations of a partner are always receivable against him,[15] and are receivable against his copartners when made in the ordinary course of the firm's business concerning its affairs,[16] but not in his or their favor.[17] Entries in the books of a firm are admissible against each partner.[18] Parol evidence of the ratification of a

549, 50 N. W. 658; Cashman *v.* Lawson, 175 N. Y. 488, 67 N. E. 1081 [*affirming* 73 N. Y. App. Div. 419, 77 N. Y. Suppl. 132]; Kinney *v.* McBride, 88 N. Y. App. Div. 92, 84 N. Y. Suppl. 958; Lyon *v.* Fitch, 61 N. Y. Super. Ct. 74, 18 N. Y. Suppl. 867; Best *v.* Starks, 24 How. Pr. (N. Y.) 58; Hooks *v.* Houston, 109 N. C. 623, 14 S. E. 49; Jebson *v.* East India, etc., Dock Co., L. R. 10 C. P. 300, 44 L. J. C. P. 181, 32 L. T. Rep. N. S. 321, 23 Wkly. Rep. 624. See 38 Cent. Dig. tit. "Partnership," § 423.

12. Scholtz *v.* Freud, 128 Mich. 72, 87 N. W. 130; Studdy *v.* Sanders, 2 D. & R. 347, 16 E. C. L. 93; Alderson *v.* Clay, 1 Stark. 405, 18 Rev. Rep. 788, 2 E. C. L. 157.

13. *Alabama.*— Saltmarsh *v.* Bower, 34 Ala. 613.

California.— Sanborn *v.* Cunningham, (1893) 33 Pac. 894.

Georgia.— Pursley *v.* Rumsley, 31 Ga. 403.

Michigan.— Botsford *v.* Kleinhans, 29 Mich. 332.

Mississippi.—Lea *v.* Guice, 13 Sm. & M. 656.

Missouri.— Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890.

Rhode Island.—Anthony *v.* Wheatons, 7 R. I. 490.

Vermont.— Harris *v.* Holmes, 30 Vt. 352.

Wisconsin.— Haben *v.* Harshaw, 49 Wis. 379, 5 N. W. 872.

See 38 Cent. Dig. tit. "Partnership," §§ 423, 424.

14. *Alabama.*— Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557.

Connecticut.— Brown *v.* Lawrence, 5 Conn. 397.

Georgia.— Preston *v.* Putman County Banking Co., 120 Ga. 546, 48 S. E. 316; Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

Illinois.— Hallack *v.* March, 25 Ill. 48.

Iowa.— Miller *v.* House, 67 Iowa 737, 25 N. W. 899.

Massachusetts.— Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716.

Michigan.— Carney *v.* Hotchkiss, 48 Mich. 276, 12 N. W. 182.

New Hampshire.— Tucker *v.* Peaslee, 36 N. H. 167.

New York.— Richardson *v.* Hinck, 48 N. Y. App. Div. 531, 62 N. Y. Suppl. 1073.

South Carolina.— Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; Hampton *v.* Ray, 52 S. C. 74, 29 S. E. 537.

Vermont.— McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

See 38 Cent. Dig. tit. "Partnership," § 423.

15. Herman Kahn & Co. *v.* Bowden, 80 Ark. 23, 96 S. W. 126; Rooth *v.* Quin, 7 Price 193, 21 Rev. Rep. 744; Sangster *v.* Mazarredo, 1 Stark. 161, 2 E. C. L. 69. And see *supra*, III, C, 2, d, (III).

Drawing of checks as evidence of name.— Where, in an action by a firm, defendant averred that the name of the firm was not the name alleged, evidence that the firm, in the transaction of its business, drew checks in the name adopted in the action, was held admissible as corroborative of the fact that the partners by mutual consent had changed the name of the firm as given in the articles of copartnership. Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557.

16. *Michigan.*— Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552, not admissible because not in course of firm's business.

New York.— Oakley *v.* Aspinwall, 2 Sandf. 7 [*reversed* on other grounds in 4 N. Y. 513], same as preceding case.

Pennsylvania.— Little *v.* Fairchild, 10 Pa. Super. Ct. 211 [*affirmed* in 195 Pa. St. 614, 46 Atl. 133]; Little *v.* Clarke, 36 Pa. St. 114.

Texas.— Blum *v.* Bratton, 2 Tex. Civ. App. 226, 21 S. W. 65.

Virginia.— Chapman *v.* Wilson, 1 Rob. 267, not shown to be in course of firm's business.

England.— Norton *v.* Seymour, 3 C. B. 792, 11 Jur. 312, 16 L. J. C. P. 100, 54 E. C. L. 792 (admissible); Tunley *v.* Evans, 2 D. & L. 747, 9 Jur. 428, 14 L. J. Q. B. 116; Edmundson *v.* Thompson, 2 F. & F. 564, 8 Jur. N. S. 235, 31 L. J. Exch. 207, 5 L. T. Rep. N. S. 428, 10 Wkly. Rep. 300 (not admissible); Lucas *v.* De la Cour, 1 M. & S. 249, 14 Rev. Rep. 426; Catt *v.* Howard, 3 Stark. 3, 23 Rev. Rep. 751, 3 E. C. L. 570; Wood *v.* Braddick, 1 Taunt. 104, 9 Rev. Rep. 711; Saville *v.* Robertson, 4 T. R. 720.

See 38 Cent. Dig. tit. "Partnership," § 423; and *supra*, III, C, 2, d, (III).

17. Bond *v.* Nave, 62 Ind. 505; Towle *v.* Dunham, 84 Mich. 268, 47 N. W. 683; Best *v.* Starks, 24 How. Pr. (N. Y.) 58; Waller *v.* Heyes, 6 Vt. 257.

18. *Illinois.*— Hurd *v.* Haggerty, 24 Ill. 171; Smith *v.* Hood, 4 Ill. App. 360.

Iowa.— McDermott *v.* Hacker, 109 Iowa 239, 80 N. W. 338.

Louisiana.— Calder *v.* Creditors, 47 La. Ann. 346, 16 So. 852.

Maryland.— Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599, not admissible against outsiders in favor of partners.

New York.— Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 N. Y. App. Div. 327, 44 N. Y. Suppl. 617].

England.— Hill *v.* Manchester, etc., Water-

contract under seal by one partner is admissible.[19] Such evidence is also admissible to show that property standing in the name of one partner is owned by the firm.[20] The weight and sufficiency of evidence are governed by the same rules in partnership litigations as in other actions.[21]

works Co., 5 B. & Ad. 866, 3 L. J. K. B. 19, 2 N. & M. 573, 27 E. C. L. 364.

See 38 Cent. Dig. tit. "Partnership, § 423; and *supra*, III, C, 2, d, (v); *infra*, IX, D, 12, f. See also EVIDENCE, 17 Cyc. 397.

Books not admissible to show absence of entry.— In an action against two persons as partners on a note executed by one of them in the firm-name, wherein the other claimed that the partner executing the note had no authority to do so, there was no error in refusing to admit in evidence books of account kept by the partnership at the time of the giving of the note, for the purpose of showing that the note did not appear thereon as a liability of the firm. Moran Bros. Co. *v.* Watson, 44 Wash. 392, 87 Pac. 508.

19. Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259; McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

20. Gansevoort Bank *v.* Carragan, 69 N. J. L. 404, 55 Atl. 741.

21. See the following cases:

Alabama.— Russell *v.* Bellinger, (1906) 40 So. 132; Clark *v.* Taylor, 68 Ala. 453, evidence not conclusive against firm liability.

Arkansas.— Herman Kahn Co. *v.* Bowden, 80 Ark. 23, 96 S. W. 126, holding that in an action against two persons as partners, evidence that one of them had made declarations to the effect that he was a partner of the other was sufficient to sustain a finding that he was a partner.

California.— Sanborn *v.* Cunningham, (1893) 33 Pac. 894 (evidence sufficient); Pierce *v.* Jackson, 21 Cal. 636 (evidence insufficient).

Georgia.— Hymes *v.* Weld, 91 Ga. 742, 17 S. E. 1001 (evidence sufficient); Newall *v.* Smith, 23 Ga. 170 (evidence sufficient); Miller *v.* Hine, 15 Ga. 197 (evidence sufficient to establish authority in one partner).

Idaho.— Sidney Stevens Implement Co. *v.* Stuart, 9 Ida. 221, 73 Pac. 21, evidence insufficient.

Indiana.— Brudi *v.* Luhrman, 26 Ind. App. 221, 59 N. E. 409 (evidence insufficient to establish liability for injury to firm servant); Ensminger *v.* Marvin, 5 Blackf. 210 (evidence *prima facie* sufficient).

Kentucky.— Lexington Nat. Exch. Bank *v.* Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. Rep. 763, evidence sufficient.

Maine.— Holmes *v.* Porter, 39 Me. 157; Barrett *v.* Swann, 17 Me. 180, evidence sufficient in both cases.

Massachusetts.— Sumner *v.* Gardiner, 184 Mass. 433, 68 N. E. 850, evidence sufficient.

Michigan.— Schroder *v.* Pinch, 126 Mich. 185, 85 N. W. 454; Webber *v.* Turner, 94 Mich. 589, 54 N. W. 300, evidence sufficient in both cases.

Missouri.— Kahn *v.* Overstolz, 82 Mo. App. 235, evidence sufficient.

Nebraska.— Howell *v.* Wilcox, etc., Sewing Mach. Co., 12 Nebr. 177, 10 N. W. 700, evidence insufficient.

New Jersey.— Lowry *v.* Tivy, 70 N. J. L. 457, 57 Atl. 267 [*affirmed* in 71 N. J. L. 681, 60 Atl. 1134], evidence sufficient to require submission to jury.

New York.— Hooper *v.* Baillie, 118 N. Y. 413, 23 N. E. 569 (evidence insufficient); Butler *v.* Stocking, 8 N. Y. 408 (authority to subscribe firm-name as accommodation surety sufficiently proved by circumstances); Hannigan *v.* Allen, 3 Silv. App. 442, 27 N. E. 402 [*reversing* 55 N. Y. Super. Ct. 570, 3 N. Y. Suppl. 945] (evidence sufficient); Richardson *v.* Erckens, 53 N. Y. App. Div. 127, 65 N. Y. Suppl. 872 [*affirmed* in 169 N. Y. 588, 62 N. E. 1100] (evidence sufficient); Brayton *v.* Sherman, 45 N. Y. App. Div. 58, 60 N. Y. Suppl. 1118 [*affirmed* in 166 N. Y. 610, 59 N. E. 1119] (evidence sufficient); Paul *v.* Stevens, 57 Hun 171, 10 N. Y. Suppl. 442 [*affirmed* in 126 N. Y. 630, 27 N. E. 410] (sufficient); Van Epps *v.* Dillaye, 6 Barb. 244 (objection to insufficiency prevented by failure to appear); Barrett *v.* Warren, 84 N. Y. Suppl. 578 (evidence insufficient); Baldwin's Bank *v.* Butler, 14 N. Y. Suppl. 831 (evidence insufficient).

Pennsylvania.— Kaiser *v.* Fendrick, 98 Pa. St. 528 (evidence insufficient); Balliet *v.* Fink, 28 Pa. St. 266 (evidence sufficient).

Texas.— Baker *v.* Smith, 8 Tex. 346; Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505, evidence sufficient in both cases. Evidence that one promised that all the debts of a logging firm should be paid, and that he had uniformly paid for labor employed to cut the timber, is insufficient to go to the jury on the issue of his being a member of the firm. Bartholomew *v.* Shepperd, (Tex. Civ. App. 1906) 93 S. W. 218.

Utah.— Mitchell *v.* Jensen, 29 Utah 346, 81 Pac. 165 (evidence insufficient to show the sale and delivery of certain goods to the defendants as partners); Guthiel *v.* Gilmer, 27 Utah 496, 76 Pac. 628 (evidence sufficient to show ratification).

Wisconsin.— Remington *v.* Minnesota Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321, evidence sufficient.

Wyoming.— Lellman *v.* Mills, 15 Wyo. 149, 87 Pac. 985, evidence sufficient to show that certain property mortgaged by defendant was partnership property.

England.— Heyhoe *v.* Burge, 9 C. B. 431, 19 L. J. C. P. 243, 67 E. C. L. 431 (written agreement not conclusive as to partnership, but sufficient in connection with other evidence); Martyn *v.* Gray, 14 C. B. N. S. 824, 108 E. C. L. 824 (evidence sufficient); Cooke *v.* Seeley, 2 Exch. 746, 17 L. J. Exch. 286 (evidence insufficient); Beech *v.* Eyre, 12 L. J. C. P. 140, 5 M. & G. 415, 6 Scott N. R. 327, 44 E. C. L. 222 (evidence sufficient); Evans *v.* Curtis, 2 C. & P. 296, 12 E. C. L.

8. Trial — a. Instructions and Questions For Court and Jury. It is the duty of the court in instructing the jury, at the request of either party, to state correctly the legal principles governing the right or liability of partners in the particular case,[22] to explain the probative force of evidence which is before them,[23] to inform them of the questions they are to decide and those which the court determines,[24]

581; Rohey *v.* Howard, 2 Stark. 555, 3 E. C. L. 528 (sufficient).

Canada.— Taylor *v.* Cook, 11 Ont. Pr. 60, sufficient.

See 38 Cent. Dig. tit. "Partnership," § 425.

Evidence of partnership see *supra*, III, C, 3.

22. *Alabama.*— Levy *v.* Alexander, 95 Ala. 101, 10 So. 394, erroneous instruction as to holding out of partner.

Arkansas.— Herman Kahn & Co. *v.* Bowden, 80 Ark. 23, 96 S. W. 126, erroneous instructions as to what was necessary to warrant a finding that a person was a member of a firm, and as to the effect of his declarations to such effect.

Colorado.— Ashenfelter *v.* Williams, 12 Colo. App. 345, 55 Pac. 734, instruction as to what constituted a partnership with reference to sharing profits held misleading.

Illinois.— Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715, instruction erroneous in assuming that a purchase of goods was within the apparent scope of the firm business, and also in stating an abstract rule of law not applicable to the facts in the case.

Indiana.— Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082, instruction as to inference of a novation or release from the circumstances, and as to right of partner to pay individual debts with partnership funds and effect of such payment.

Iowa.— Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701, erroneous instruction as to holding out as a partner.

Michigan.— Weeks *v.* Hutchinson, 135 Mich. 160, 97 N. W. 695 (instruction as to existence and evidence of partnership and liability of partners); McPherson *v.* Bristol, 115 Mich. 258, 73 N. W. 236 (instruction as to power of member of non-trading partnership to make note and as to liability thereon); Conely *v.* Wood, 73 Mich. 203, 41 N. W. 259 (correct instruction as to power of partner to bind firm); Sager *v.* Tupper, 38 Mich. 258 (correct instruction as to necessity to prove joint contract or promise).

Minnesota.— Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154, instruction as to sharing of profits making persons partners held not objectionable.

Montana.— Lawrence *v.* Westlake, 28 Mont. 503, 73 Pac. 119, instruction erroneous in assuming existence of partnership and firm liability, and in misstatement as to proof of partnership and degree of proof required.

Nebraska.— McKibbin *v.* Day, 71 Nebr. 280, 98 N. W. 845 (as to parties defendant in action against alleged partners for fraudulent representations); Filley *v.* Walker, 28 Nebr. 506, 44 N. W. 737 (as to parties in interest after one partner had disposed of half his interest); Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395 (as to liability of firm for goods purchased by silent partner).

New York.— Knickerbocker Ice Co. *v.* Theiss, 23 Misc. 625, 52 N. Y. Suppl. 163, erroneous instruction that the jury must find a verdict for or against both defendants.

Pennsylvania.— Entwisle *v.* Carey, 9 Pa. Cas. 423, 12 Atl. 768, instruction as to signatures on notes not misleading.

Texas.— Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977, 31 Tex. Civ. App. 287, 72 S. W. 222, instruction not erroneous in ignoring effect of an agreement as constituting a partnership. See also Haight *v.* Turner, (Civ. App. 1907) 99 S. W. 196, erroneous charge authorizing award to one partner of all the damages for levy on the property of the partnership.

See 38 Cent. Dig. tit. "Partnership," § 426.

23. *District of Columbia.*— Robinson *v.* Parker, 11 App. Cas. 132.

Illinois.— Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569.

Indian Territory.— Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486.

Kentucky.— Humphrey *v.* Mattox, 42 S. W. 1100, 19 Ky. L. Rep. 1053.

Massachusetts.— Woodward *v.* Winship, 12 Pick. 430.

Michigan.— Weeks *v.* Hutchinson, 135 Mich. 160, 97 N. W. 695; Scholtz *v.* Freud, 128 Mich. 72, 87 N. W. 130; Fountain *v.* Hutchinson, 108 Mich. 596, 66 N. W. 477; Linn *v.* Howell, 34 Mich. 102.

New York.— Hagmayer *v.* Armbruster, 35 Misc. 378, 71 N. Y. Suppl. 1029.

North Carolina.— Barrett *v.* McCrummen, 128 N. C. 81, 38 S. E. 286.

Pennsylvania.— Frisbie *v.* McFarlane, 196 Pa. St. 110, 46 Atl. 359; Porter *v.* Wilson, 13 Pa. St. 641.

Texas.— Nolan County *v.* Simpson, 74 Tex. 218, 11 S. W. 1098; Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977.

See 38 Cent. Dig. tit. "Partnership," § 426.

24. *Alabama.*— Edwards *v.* Parker, 88 Ala. 356, 6 So. 684, instruction erroneous in withdrawing from the jury the effect of certain evidence.

Illinois.— Schmidt *v.* Balling, 91 Ill. App. 388.

Massachusetts.— Hewes *v.* Parkman, 20 Pick. 90, proper instruction submitting question of ratification.

Michigan.— Conely *v.* Wood, 73 Mich. 203, 41 N. W. 259.

New Hampshire.— Chase *v.* Stevens, 19 N. H. 465.

Oregon.— McVicker *v.* Cone, 21 Oreg. 353, 28 Pac. 76.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45.

England.— De Mautort *v.* Saunders, 1 B. & Ad. 398, 9 L. J. K. B. O. S. 51, 20 E. C. L. 534.

See 38 Cent. Dig. tit. "Partnership," §§ 426, 427.

and to refuse improper requests for instructions.[25] Questions of law whether presented by the pleadings or by undisputed evidence that warrants but one legal inference are to be determined by the court.[26] Questions of fact, especially those raised by conflicting evidence, are to be determined by the jury.[27] What constitutes a partnership is a question of law;[28] but whether a partnership exists in a

25. *Arkansas.*— Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667, instructions erroneous because conflicting, misleading, and ignoring existence and effect of partnership.

Colorado.— Clark *v.* Ball, 34 Colo. 223, 82 Pac. 529, 114 Am. St. Rep. 154, 2 L. R. A. N. S. 100 (erroneous instruction as to liability of non-trading partnership for loss of money of the firm by absconding of partner); McDonald *v.* Clough, 10 Colo. 59, 14 Pac. 121 (instruction properly refused because it ignored existence of partnership).

Iowa.— Boardman *v.* Adams, 5 Iowa 224, erroneous instruction as to liability of partnership and necessity for knowledge and consent of partner.

Kentucky.— Humphrey *v.* Mattox, 42 S. W. 1100, 19 Ky. L. Rep. 1053, erroneous instructions as to liability of partners.

Maine.— Smith *v.* Smith, 93 Me. 253, 44 Atl. 905, instruction as to liability of firm on employment of relative by partner.

Massachusetts.— White *v.* McPeck, 185 Mass. 451, 70 N. E. 463, holding that an instruction was properly refused as inapplicable to the evidence.

Missouri.— Hodel-Mutti Mfg. Co. *v.* Ham, 112 Mo. App. 718, 87 S. W. 608 (instruction that a person was agent for a firm held erroneous); Tamblyn *v.* Scott, 111 Mo. App. 46, 85 S. W. 918 (erroneous instruction that a certain contract did not make parties partners).

New York.— Costet *v.* Jeantet, 108 N. Y. App. Div. 201, 95 N. Y. Suppl. 638, erroneous instruction authorizing a verdict against defendant partners separately or collectively.

United States.— Teller *v.* Patten, 20 How. 125, 15 L. ed. 831, proper refusal of instruction limiting evidence to declarations of alleged partner made at one particular time, on the question whether he was a partner.

26. *Alabama.*— Desha *v.* Stewart, 6 Ala. 852.

Iowa.— Janney *v.* Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. Rep. 460.

Michigan.— Cook *v.* Blake, 98 Mich. 389, 57 N. W. 249.

Missouri.— Sedalia Third Nat. Bank *v.* Faults, 115 Mo. App. 42, 90 S. W. 755.

New York.— Elmira Iron, etc., Rolling-Mill Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; Millard *v.* Adams, 1 Misc. 431, 21 N. Y. Suppl. 424; Harris *v.* Wilson, 7 Wend. 57.

Vermont.— Miner *v.* Downer, 19 Vt. 14.

Wisconsin.— Hogan *v.* Cushing, 49 Wis. 169, 5 N. W. 490, where, while there was a conflict of evidence, it was not sufficient to warrant submission to a jury.

See 38 Cent. Dig. tit. "Partnership," § 427.

27. *Alabama.*— Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557; Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

Connecticut.— Bonnell *v.* Chamberlin, 26 Conn. 487; Leavitt *v.* Peck, 3 Conn. 124, 8 Am. Dec. 157.

Georgia.— Maynard *v.* Ponder, 75 Ga. 664.

Illinois.— Gray's Harbor Commercial Co. *v.* Weise, 86 Ill. App. 125.

Indiana.— McMillan *v.* Hadley, 78 Ind. 590.

Louisiana.— Flower *v.* Williams, 1 La. 22.

Maine.— Duran *v.* Ayer, 67 Me. 145.

Massachusetts.— Berry *v.* Pelneault, 188 Mass. 413, 74 N. E. 917; Sumner *v.* Gardiner, 184 Mass. 433, 68 N. E. 850; Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325; Woods *v.* Woods, 127 Mass. 141.

Michigan.— Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559; Armstrong *v.* Potter, 103 Mich. 409, 61 N. W. 657; Towle *v.* Dunham, 84 Mich. 268, 47 N. W. 683.

Minnesota.— Davis *v.* Smith, 27 Minn. 390, 7 N. W. 731.

Mississippi.— Blackston Mercantile Co. *v.* McPherson, 77 Miss. 403, 27 So. 523; Marks *v.* Bush, (1893) 14 So. 89.

Missouri.— Frowein *v.* Haysler, 87 Mo. App. 310.

Nebraska.— Ball *v.* Beaumont, 73 Nebr. 174, 102 N. W. 264.

New Hampshire.— Webster *v.* Stearns, 44 N. H. 498.

New Jersey.— Lowry *v.* Tivy, 71 N. J. L. 681, 60 Atl. 1134 [*affirming* 70 N. J. L. 457, 57 Atl. 267].

New York.— Sterrett *v.* Buffalo Third Nat. Bank, 122 N. Y. 659, 25 N. E. 913 [*affirming* 46 Hun 22]; Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Larbig *v.* Peck, 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602 [*affirmed* in 174 N. Y. 513, 66 N. E. 1111]; Neer *v.* Oakley, 2 N. Y. Suppl. 482; Boor *v.* Moschell, 1 N. Y. Suppl. 731; Cordova *v.* Powter, 1 N. Y. Suppl. 147.

North Dakota.— Pirie *v.* Gillitt, 2 N. D. 255, 50 N. W. 710.

Oklahoma.— Cassidy *v.* Saline County Bank, 14 Okla. 532, 78 Pac. 324.

Pennsylvania.— Sweeney *v.* Girolo, 154 Pa. St. 609, 26 Atl. 600; Gates *v.* Watt, 127 Pa. St. 20, 17 Atl. 751; Thomas *v.* Moore, 71 Pa. St. 193; Bonner *v.* Campbell, 48 Pa. St. 286; McDuffie *v.* Bartlett, 3 Pa. St. 317; Watterson *v.* Patrick, 1 Pa. Cas. 262, 1 Atl. 602; Daniel *v.* Lance, 29 Pa. Super. Ct. 454; Daniel *v.* Lance, 21 Pa. Super. Ct. 474; Haydenville Min., etc., Co. *v.* Steffler, 17 Pa. Super. Ct. 609; Huston *v.* Huston, 13 Phila. 183.

Tennessee.— O. S. Kelly Co. *v.* Zarecor, (Ch. App. 1901) 62 S. W. 189; Johnson *v.* Rankin, (Ch. App. 1900) 59 S. W. 638.

Texas.— Hunter *v.* Hubbard, 26 Tex. 537.

Vermont.— Jones *v.* Booth, 10 Vt. 268.

Canada.— Standard Bank *v.* Frind, 14 Ont. Pr. 355.

See 38 Cent. Dig. tit. "Partnership," § 427.

28. See *supra*, III, C, 3, a.

particular case is for the jury, under proper instructions from the court, if the evidence is conflicting or if it is open to more than one inference.[29] Whether the intention of parties in a particular case was to become partners may be a question for the jury.[30] It may also be a question for the jury whether persons who are admitted to be partners intended to contract or to hold property as a firm or as individuals.[31] Whether a particular transaction, conducted by a partner on behalf of the firm, is within the scope of his authority is often a question for the jury.[32]

b. Verdict and Findings.[33] Whether the verdict or the findings in a particular case are proper in form,[34] or are justified by the evidence,[35] is a question for the court. If they are unsupported by evidence, the court will set them aside;[36] and in case the evidence warrants but one conclusion, it may direct a verdict.[37]

9. Judgment[38] **— a. Requisites and Validity in General.** In an action at law against a firm it is improper to enter a judgment adjusting the equities of plaintiffs and the other creditors of the firm; such an adjustment can be had only in

29. *Florida.*— Doggett *v.* Jordan, 2 Fla. 541.

Iowa.— McMullen *v.* Mackenzie, 2 Greene 368.

Michigan.— Negaunee First Nat. Bank *v.* Freeman, 47 Mich. 408, 11 N. W. 219.

Missouri.— Simmons *v.* Ingram, 78 Mo. App. 603; Carson *v.* Culver, 78 Mo. App. 597.

Nebraska.— Waggoner *v.* Creighton First Nat. Bank, 43 Nebr. 84, 61 N. W. 112.

New Jersey.—Seabury *v.* Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136.

New York.— Sheehan *v.* Fleetham, 12 N. Y. Suppl. 158; Drake *v.* Elwyn, 1 Cai. 184.

South Carolina.— Providence Mach. Co. *v.* Browning, 68 S. C. 1, 46 S. E. 550; Dulany *v.* Elford, 22 S. C. 304.

Wisconsin.— Manegold *v.* Grange, 70 Wis. 575, 36 N. W. 263.

England.— Gurney *v.* Evans, 3 H. & N. 122, 27 L. J. Exch. 166.

See 38 Cent. Dig. tit. "Partnership," § 427; and *supra*, III, C, 3, a.

30. Branch *v.* Doane, 17 Conn. 402; Phillips *v.* Trowbridge Furniture Co., 92 Ga. 596, 20 S. E. 4; Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994; Van Tassel *v.* Williams, 76 Hun (N. Y.) 503, 27 N. Y. Suppl. 1067; Butler *v.* Finck, 21 Hun (N. Y.) 210; Galway *v.* Nordlinger, 4 N. Y. Suppl. 649.

31. Dorough *v.* Harrington, 148 Ala. 305, 42 So. 557; City Bank's Appeal, 54 Conn. 269, 7 Atl. 548; Ernest *v.* Wible, 10 Pa. Super. Ct. 576; Merchants' Nat. Bank *v.* Stebbins, 15 S. D. 280, 89 N. W. 674.

32. *Georgia.*— Morris *v.* Marqueze, 74 Ga. 86; Jordan *v.* Ingram, 57 Ga. 92.

Minnesota.— Lynch *v.* Hillstrom, 64 Minn. 521, 67 N. W. 636.

Montana.— Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201.

New York.— G. H. Haulenbeck Advertising Agency *v.* November, 27 Misc. 836, 60 N. Y. Suppl. 573.

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Noble *v.* McClintock, 2 Watts & S. 152; Haydenville Min., etc., Co. *v.* Steffler, 17 Pa. Super. Ct. 609.

United States.— Dowling *v.* National Exch. Bank, 145 U. S. 512, 12 S. Ct. 928, 36 L. ed. 795 [*reversing* 30 Fed. 412]; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

See 38 Cent. Dig. tit. "Partnership," § 427; and *supra*, VI, A, 1, c.

33. See, generally, Trial.

34. Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Maynard *v.* Ponder, 75 Ga. 664; Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919; Matthies *v.* Herth, 31 Wash. 665, 72 Pac. 480; Cornhauser *v.* Roberts, 75 Wis. 554, 44 N. W. 744.

35. Ziegenhein *v.* Smith, 116 Ill. App. 80; Sharp *v.* Murray, 31 Pittsb. Leg. J. N. S. (Pa.) 301; O. S. Kelly Co. *v.* Zarecor, (Tenn. Ch. App. 1901) 62 S. W. 189; Masterson *v.* Heitmann, (Tex. Civ. App. 1905) 87 S. W. 227; Mitchell *v.* Jensen, 29 Utah 346, 81 Pac. 165.

36. Bosworth *v.* West, 68 Ga. 825; O. S. Kelly Co. *v.* Zarecor, (Tenn. Ch. App. 1901) 62 S. W. 189.

37. M. W. Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. 1036 [*affirming* 101 Ill. App. 512]. See, generally, Trial.

38. See, generally, Judgments.

Costs.— Each member of a partnership being liable for the whole of a partnership debt, statutory costs from the commencement of suit may be included upon recovery of judgment against any partner. Moore *v.* Dickson, 121 Wis. 591, 99 N. W. 322.

Binding effect of judgments against partners, surviving partners, etc., see Judgments, 23 Cyc. 1266.

Joint or several judgment see Judgments, 23 Cyc. 811 note 15.

Judgment against one partner as bar to action against another see *infra*, VI, D, 9, b, text and notes 61, 62.

Judgment in another state against one partner as merger see Judgments, 23 Cyc. 1551 note 75.

Recovery by one partner for injury to firm property as bar to action by firm see Judgments, 23 Cyc. 1192 note 63.

Set-off of judgments see Judgments, 23 Cyc. 1482 note 52.

When partners concluded by foreign judgment see Judgments, 23 Cyc. 1555 note 4.

equity.[39] A judgment in favor of "H. & H.," without stating their given names, is not erroneous, when defendant has not objected to the suit proceeding in such name, the irregularity being a matter for abatement.[40] In the absence of statutory provisions on the subject, the judgment in an action against a firm is to be entered against the individuals composing it.[41] If a statute permits a judgment to be entered against a partnership in the firm-name, it cannot be entered against an individual member;[42] but an action may be brought on the judgment against an individual member.[43] In an action by a partnership, judgment may not be rendered in favor of one or more, but less than all of the persons described in the complaint as composing the firm.[44] But when plaintiff counts upon a partnership liability of several persons, and proves a liability against a part only of the defendants, he is generally allowed to take judgment against these.[45] This is allowed everywhere when the liability is in tort.[46] In some jurisdictions, however, he is not allowed to do this, when he counts on a joint promise of all the defendants.[47] If his complaint is on a partnership obligation and his proof establishes such obligation on the part of the defendants, he cannot take judgment against a part of them only, unless he can show statutory authority therefor.[48] A

39. Wilson *v.* Benedict, 90 Mo. 208, 2 S. W. 283.

40. Marshall *v.* Hill, 8 Yerg. (Tenn.) 101.

41. Meyer *v.* Wilson, 166 Ind. 651, 76 N. E. 748; Glasscock *v.* Price, 92 Tex. 271, 47 S. W. 965; Weimer *v.* Rector, 43 W. Va. 735, 28 S. E. 716; Moore *v.* Dickson, 121 Wis. 591, 99 N. W. 322.

42. Marsh *v.* Mead, 57 Iowa 535, 10 N. W. 922; Adkins *v.* Arthur, 33 Tex. 431; Jackson *v.* Litchfield, 8 Q. B. D. 474, 51 L. J. Q. B. 327, 46 L. T. Rep. N. S. 518, 30 Wkly. Rep. 531.

43. Cox *v.* Harris, 48 Ala. 538; Ruth *v.* Lowry, 10 Nebr. 260, 4 N. W. 977; Clark *v.* Cullen, 9 Q. B. D. 355, 47 L. T. Rep. N. S. 307; Isbester *v.* Ray, 26 Can. Sup. Ct. 79 [*affirming* 22 Ont. App. 12 (*affirming* 24 Ont. 497)].

44. Weinreich *v.* Johnston, 78 Cal. 254, 20 Pac. 556 (in a suit by partners upon a note made to one of them individually, Code Civ. Proc. § 578, providing that judgment may be given for one or more of several plaintiffs, will not be applied to permit judgment in favor of such individual partner); Jansen *v.* Hyde, 8 Colo. App. 38, 44 Pac. 760; Cantrell *v.* Fowler, 24 S. C. 424.

45. *Alabama.*— Longstreet *v.* Rea, 52 Ala. 195.

Connecticut.— Salomon *v.* Hopkins, 61 Conn. 47, 23 Atl. 716; Benedict *v.* Stevens, 25 Conn. 392.

Georgia.— Doody Co. *v.* Jeffcoat, 127 Ga. 301, 56 S. E. 421; Phillips *v.* Wait, 105 Ga. 848, 32 S. E. 647; Ledbetter *v.* Dean, 82 Ga. 790, 9 S. E. 720; Maynard *v.* Ponder, 75 Ga. 664.

Kansas.— Silvers *v.* Foster, 9 Kan. 56.

Maryland.— Fersner *v.* Bradley, 87 Md. 488, 40 Atl. 58.

Massachusetts.— Taft *v.* Church, 164 Mass. 504, 41 N. E. 681, under Pub. St. c. 117, § 5, changing the rule in Tuttle *v.* Cooper, 10 Pick. 281.

Minnesota.— Bunce *v.* Pratt, 56 Minn. 8, 57 N. W. 160; Keigher *v.* Dowlan, 47 Minn. 574, 50 N. W. 823.

Missouri.— Crews *v.* Lackland, 67 Mo. 619; Finney *v.* Allen, 7 Mo. 416; Kneisley Lumber Co. *v.* Edward B. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774; Hodel-Mutti Mfg. Co. *v.* Ham, 112 Mo. App. 718, 87 S. W. 608.

Nebraska.— Roggenkamp *v.* Hargreaves, 39 Nebr. 540, 58 N. W. 162.

New Hampshire.— Gay *v.* Johnson, 32 N. H. 167.

New York.— Pruyn *v.* Black, 21 N. Y. 300; Fielden *v.* Lahens, 2 Abb. Dec. 111, 6 Abb. Pr. N. S. 341, 3 Transcr. App. 218; New York Fireproof Tenement Assoc. *v.* Stanley, 105 N. Y. App. Div. 432, 94 N. Y. Suppl. 160; Rogers *v.* Ingersoll, 103 N. Y. App. Div. 490, 93 N. Y. Suppl. 140.

Pennsylvania.— Moses *v.* Dulles, 1 Phila. 46; Sharp *v.* Murray, 31 Pittsb. Leg. J. N. S. 301.

South Dakota.— North Star Boot, etc., Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Texas.— Willis *v.* Morrison, 44 Tex. 27; Hoxie *v.* Farmers', etc., Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Kemp *v.* Wharton County Bank, 4 Tex. Civ. App. 648, 23 S. W. 916.

Vermont.— Armour *v.* Ward, 78 Vt. 60, 61 Atl. 765.

Wisconsin.— Little *v.* Staples, 98 Wis. 344, 73 N. W. 653.

England.— Darwent *v.* Walton, 2 Atk. 510, 26 Eng. Reprint 707.

Canada.— Walker *v.* Lamoureux, 13 Quebec K. B. 209 [*affirming* 21 Quebec Super. Ct. 492].

See 38 Cent. Dig. tit. "Partnership," § 431.

46. Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Swenson *v.* Erickson, 90 Ill. App. 358; Matter of Blackford, 35 N. Y. App. Div. 330, 54 N. Y. Suppl. 972.

47. Blythe *v.* Cordingly, 20 Colo. App. 508, 80 Pac. 495; Gribbin *v.* Thompson, 28 Ill. 61; Rose *v.* Comstock, 17 Ind. 1; Beatty *v.* O'Connor, 2 Ind. App. 337, 27 N. E. 446; Ogle *v.* Miller, 128 Iowa 474, 104 N. W. 502.

48. New York Fastener Co. *v.* Wilatus, 65 N. Y. App. Div. 467, 73 N. Y. Suppl. 67;

plaintiff who sues a firm in its firm-name under statutory authority cannot take judgment against a partner as for a personal debt;[49] although, if one person is transacting business in a firm-name, a judgment may be rendered against him in such name.[50] On the other hand, if a plaintiff sues partners, he cannot take judgment against the partnership in its firm-name;[51] but it must run against the partners as individuals.[52] The persons composing a partnership, whether it is plaintiff or defendant, should be designated by their full names, in the judgment,[53] although irregularities in this respect have been treated by many courts as not fatal;[54] and modern legislation often permits judgments to be entered for or against partnerships in the firm-name.[55] It is elementary that a judgment must conform to the pleadings and verdict or findings.[56]

b. Joint and Several Liability on Judgments. When a judgment has been taken against defendants as partners it can be enforced at common law either against the firm assets, or against the separate property of either partner,[57] for each partner is liable for the entire indebtedness of the firm.[58] In Louisiana this liability *in solido* is limited to members of commercial partnerships.[59] At common law, as we have seen,[60] the liability of partners upon firm contracts is joint, not joint and several. Accordingly a judgment against some of the partners upon such a liability extinguishes the claim against all others, for the contract obligation has been merged in the judgment.[61] Such is not the consequence, however, under statutes which declare the obligation of a partner to be several as well as joint.[62]

c. Partners Not Served With Process. At common law a valid judgment

Nelson *v.* Lloyd, 9 Watts (Pa.) 22; Corcoran *v.* Trich, 9 Pa. Cas. 110, 11 Atl. 677; Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787; Geddes *v.* Simpson, 2 Bay (S. C.) 533. It is improper to allow judgment against one of two partners for half the sum sued for. Teller *v.* Gerry, 30 Misc. (N. Y.) 126, 61 N. Y. Suppl. 864.

49. Ellsberry *v.* Block, 28 Colo. 477, 65 Pac. 629; Breene *v.* Booth, 3 Colo. App. 470, 33 Pac. 1007; Howes *v.* Patterson, 76 Ga. 689.

50. Mueller *v.* Kinkead, 113 Ill. App. 132.

51. La Societe Francaise, etc. *v.* Weidmann, 97 Cal. 507, 32 Pac. 583.

52. Olson *v.* Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

53. Lanford *v.* Patton, 44 Ala. 584; Myers *v.* Sprenkle, 20 Pa. Super. Ct. 549; Gardner *v.* Austin, 14 Pa. Co. Ct. 549; Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293; Burden *v.* Cross, 33 Tex. 685. See JUDGMENTS, 23 Cyc. 816 text and note 47.

54. *Delaware.*— McNamee *v.* Huffman, 3 Harr. 425.

Georgia.— Loyd *v.* Hicks, 31 Ga. 140.

Indiana.— Downard *v.* Sluder, 5 Blackf. 559; Bohon *v.* State, 5 Blackf. 467; Jones *v.* Martin, 5 Blackf. 351.

Kentucky.— Com. *v.* Miller, 6 Dana 315; McCouns *v.* Holmes, 4 Litt. 389.

Mississippi.— Presley *v.* Anderson, 42 Miss. 274.

Missouri.— Davis *v.* Kline, 76 Mo. 310.

North Carolina.— Lash *v.* Arnold, 53 N. C. 206; Brooks *v.* Ratcliff, 33 N. C. 321.

Pennsylvania.— Rice *v.* Summers, 2 Pa. Dist. 31. A judgment is not void because it was entered against a partnership without setting forth the names of the individual partners. Justice *v.* Meeker, 30 Pa. Super. Ct. 207.

Wisconsin.— McIndoe *v.* Hazelton, 19 Wis. 567, 88 Am. Dec. 701.

See 38 Cent. Dig. tit. "Partnership," § 435.

55. Haskins *v.* Alcott, 13 Ohio St. 210; Corder *v.* Steiner, (Tex. Civ. App. 1899) 54 S. W. 277.

56. Freeman *v.* Campbell, 55 Cal. 197; Kellogg *v.* Gilman, 3 N. D. 538, 58 N. W. 339; Hughes *v.* McDill, 1 Tex. App. Civ. Cas. § 1266; Beale *v.* Hall, 97 Va. 383, 34 S. E. 53. See JUDGMENTS, 23 Cyc. 816 *et seq.*

57. See *infra*, VI, D, 10, a.

58. Hamsmith *v.* Espy, 13 Iowa 439; Stevens *v.* Perry, 113 Mass. 380; Meetch *v.* Allen, 17 N. Y. 300, 72 Am. Dec. 455; Abbot *v.* Smith, W. Bl. 947.

59. Bell *v.* Massey, 14 La. Ann. 831; Taylor *v.* Hancock, 14 La. Ann. 693; Hill *v.* Snyder, 7 La. Ann. 557; Chapman *v.* Early, 12 La. 230; Prall *v.* Peet, 3 La. 274; Mitchell, etc., Furniture Co. *v.* Sampson, 40 Fed. 805.

60. See *supra*, VI, B, 1; VI, D, 2, **c**.

61. *Illinois.*— Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Indiana.— Crosby *v.* Jeroloman, 37 Ind. 264.

Iowa.— North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441.

New York.— Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227.

United States.— Mason *v.* Eldred, 6 Wall. 231, 18 L. ed. 783.

England.— Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 418, 28 Wkly. Rep. 97.

See JUDGMENTS, 23 Cyc. 1212.

62. Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815. And see JUDGMENTS, 23 Cyc. 1212.

could not be entered against a partner not served with process,[63] nor could a joint judgment be entered in such case against the partners served,[64] at least unless those not served were non-residents.[65] This, however, has been changed by statute to a varying extent in many jurisdictions.[66]

d. Property Bound by Judgment. Under statutes permitting actions to be prosecuted against a firm in its firm-name, a judgment against the firm is binding only on firm property.[67] At common law a judgment against the members of a firm for a firm debt is binding on the partnership property and also on each part-

63. *Alabama.*— Opelika *v.* Daniel, 59 Ala. 211.

California.— Golden State, etc., Iron-Works *v.* Davidson, 73 Cal. 389, 15 Pac. 20; Feder *v.* Epstein, 69 Cal. 456, 10 Pac. 785.

Iowa.— Weaver *v.* Carpenter, 42 Iowa 343.

Virginia.— Scott *v.* Dunlop, 2 Munf. 349.

Washington.— McCoy *v.* Bell, 1 Wash. 504, 20 Pac. 595.

See 38 Cent. Dig. tit. "Partnership," § 436; and *supra*, VI, D, 3, b. See also JUDGMENTS, 23 Cyc. 693.

64. Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561; Scott *v.* Bogart, 14 La. Ann. 261; Landsberg *v.* Bullock, 79 Mich. 278, 44 N. W. 608. See *supra*, VI, D, 3, b.

65. Southmayd *v.* Backus, 3 Conn. 474; Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59; Tappan *v.* Bruen, 5 Mass. 193.

66. *Alabama.*— Tarlton *v.* Herbert, 4 Ala. 359. This case, however, was under the provision of a former statute for judgment against all partners, although all are not served, which statute has been repealed by Rev. Code, § 2538. Shepard *v.* Lightfoot, 56 Ala. 506.

Colorado.—Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337 (holding, however, that in an action against a firm, a judgment against the only partner served, for a personal debt, is invalid); Dessauer *v.* Koppin, 3 Colo. App. 115, 32 Pac. 182.

Illinois.— Gormley *v.* Hartray, 92 Ill. App. 115, 105 Ill. App. 625, under Rev. St. p. 776, § 9, in an action against several, after judgment against those served, the others may be made parties to the judgment by summons in the nature of scire facias.

Louisiana.— Stevenson *v.* Riser, 23 La. Ann. 421 (judgment against the members of a non-commercial partnership, upon citation of one partner only, is void); Grieff *v.* Kirk, 15 La. Ann. 320.

Massachusetts.— Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757, under Pub. St. c. 164, § 14, in an action against several defendants, judgment is properly taken against those served only.

Missouri.— Simpson *v.* Schulte, 21 Mo. App. 639, the liability of partners being joint and several, judgment may be taken against any partner alone.

Nebraska.—Broatch *v.* Moore, 44 Nebr. 640, 63 N. W. 30 (under Code, § 25, judgment may be entered against a firm, upon service against one partner, the others being absent from the jurisdiction); Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489.

Nevada.— Whitmore *v.* Shiverick, 3 Nev. 288, judgment against the firm is authorized by Civ. Proc. Act, § 32, where but one partner has been served, but such judgment does not bind the separate property of the partners not served.

New York.— Siegert *v.* Abbott, 62 Hun 475, 16 N. Y. Suppl. 914 (a judgment enjoining copartners from infringement of a trademark is improper as against a defendant not served with process); Nealis *v.* Adler, 19 Abb. N. Cas. 385 [*reversed* on other grounds in 19 Abb. N. Cas. 389, 25 N. Y. Wkly. Dig. 19] (under Code Civ. Proc. § 932, where summons is served on one of several defendants jointly indebted, judgment may be had against all); Paton *v.* Wright, 15 How. Pr. 481 (judgment against two of several partners, in an action against all, binds the firm property); Stoutenburgh *v.* Vandenburgh, 7 How. Pr. 229; Matter of Lowenstein, 7 How. Pr. 100; Kidd *v.* Brown, 2 How. Pr. 20 (applying Laws (1833), p. 395, c. 271, permitting judgment against partners upon service on and confession by one only).

Oregon.— North Pac. Lumber Co. *v.* Spore, 44 Oreg. 462, 75 Pac. 890, applying Bellinger & C. Comp. § 61, providing that, where some of several defendants jointly indebted are served, the action may proceed against those served and judgment be taken against all.

Tennessee.— White *v.* Lea, 9 Lea 449, a judgment against partners jointly indebted will not be disturbed, one having been served within the court's jurisdiction and the others within another county by a counterpart writ, although the counterpart did not show that the latter were sued jointly with the former.

Texas.— Glasscock *v.* Price, 92 Tex. 271, 47 S. W. 965; Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145; Patten *v.* Cunningham, 63 Tex. 666; Guimond *v.* Nast, 44 Tex. 114; Alexander *v.* Stern, 41 Tex. 193; Scalfi *v.* State, 31 Tex. Civ. App. 671, 73 S. W. 441 (applying Sayle Civ. St. arts. 1224, 1347); Blumenthal *v.* Youngblood, 24 Tex. Civ. App. 266, 59 S. W. 290; Sanger *v.* Ker, 1 Tex. App. Civ. Cas. § 1081; Stephenson *v.* Tennant, 1 Tex. App. Civ. Cas. § 543; Farris *v.* Seisfield, 1 Tex. App. Civ. Cas. § 350; Rhodius *v.* Storey, 1 Tex. App. Civ. Cas. § 336.

Wisconsin.— Brawley *v.* Mitchell, 92 Wis. 671, 66 N. W. 799, applying Rev. St. § 2884.

Canada.— Standard Bank *v.* Frind, 15 Ont. Pr. 438, applying Rule 876, (b), (c).

See 38 Cent. Dig. tit. "Partnership," §§ 436, 437; and *supra*, VI, D, 3, b. See also JUDGMENTS, 23 Cyc. 693.

67. Baldridge *v.* Eason, 99 Ala. 516, 13 So. 74; Ladiga Saw-Mill Co. *v.* Smith, 78

ner's individual property.[68] A judgment against a partner for an individual debt binds his separate property, and his interest in the partnership property.[69] As it binds only such interest, its lien on the firm assets is subordinate to junior judgments of firm creditors.[70] When the legal title to firm real estate is vested in one of its members, the lien acquired by his individual judgment creditor is subordinate to the lien of judgment creditors of the firm.[71]

e. Default Judgment.[72] What judgment may be taken upon default by some or all of the partners who are defendants depends largely upon local statutory provisions.[73] In the absence of any peculiar legislation on the subject, a verdict for plaintiff upon the merits, when the action has been defended by any partner and the others have made default, entitles plaintiff to enter judgment against all;[74] while a verdict against plaintiff in such a case precludes him from taking judgment against any, even the defaulting, partners.[75]

f. Relief Against Judgment and Collateral Attack. The validity of a judgment against a firm or a partner, unless it is absolutely void, as for want of jurisdiction, cannot be successfully attacked collaterally;[76] but if it has been obtained fraudulently, it may be vacated, or relief may be obtained in equity, upon the application of the proper parties.[77] But a judgment will not ordinarily be vacated

Ala. 108; Stadler *v.* Allen, 44 Iowa 198; Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228; Hensley *v.* Bagdad Sash Factory Co., 1 Tex. App. Civ. Cas. § 718.

68. *Indiana.*— Louden *v.* Ball, 93 Ind. 232.

New York.— McDonald *v.* McDonald, 17 N. Y. Suppl. 230.

Ohio.— Cardington First Nat. Bank *v.* Stiles, 8 Ohio Cir. Ct. 532, 4 Ohio Cir. Dec. 481.

Pennsylvania.— Holt's Appeal, 98 Pa. St. 257; Cummings' Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Thompson's Appeal, 3 Walk. 345; Com. *v.* Rogers, Brightly 450; Bean *v.* Mercer, 1 Chest. Co. Rep. 335.

Tennessee.— House *v.* Thompson, 3 Head 512; Reid *v.* House, 2 Humphr. 576.

Texas.— State *v.* Clondt, (Civ. App. 1904) 84 S. W. 415.

Virginia.— Pitts *v.* Spotts, 86 Va. 71, 9 S. E. 501.

United States.— *In re* Codding, 9 Fed. 849.

See 38 Cent. Dig. tit. "Partnership," §§ 438, 439. And see JUDGMENTS, 23 Cyc. 1375.

69. *Ex p.* Stebbins, R. M. Charlt. (Ga.) 77; Gowan *v.* Tunno, Rich. Eq. Cas. (S. C.) 369. And see JUDGMENTS, 23 Cyc. 1375.

70. Whelan *v.* Shain, 115 Cal. 326, 47 Pac. 57; Green *v.* Ross, 24 Ga. 613; Dennis *v.* Green, 20 Ga. 386; Freedman *v.* Holberg, 89 Mo. App. 340; Johnson *v.* Rogers, 13 Fed. Cas. No. 7,408, 15 Nat. Bankr. Reg. 1, 14 Alb. L. J. 427. And see JUDGMENTS, 23 Cyc. 1375.

71. Coster *v.* State Bank, 24 Ala. 37; Westbrook *v.* Hays, 89 Ga. 101, 14 S. E. 879; Bowen *v.* Billings, 13 Nebr. 439, 14 N. W. 152; Page *v.* Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788.

In Pennsylvania, if the record of land taken in the name of a partner fails to show the firm interest, a lien in favor of a creditor of such partner will be valid if entered of record against the land. Gunnison *v.* Erie Dime Sav., etc., Co., 157 Pa. St. 303, 27 Atl. 747.

72. See also JUDGMENTS, 23 Cyc. 734 *et seq.*

Existence of partnership admitted by default see JUDGMENTS, 23 Cyc. 752 note 77.

73. Williams *v.* Hurley, 135 Ala. 319, 33 So. 159; Reid *v.* McLeod, 20 Ala. 576; Johnson *v.* Hille, 4 Pa. L. J. 28; Owen *v.* Kuhn, (Tex. Civ. App. 1903) 72 S. W. 432.

74. Hobson *v.* Emanuel, 8 Port. (Ala.) 442; Taylor *v.* Henderson, 17 Serg. & R. (Pa.) 453.

75. Phillips *v.* Wheeler, 6 Thomps. & C. (N. Y.) 306 [*affirmed* in 67 N. Y. 104].

76. *Michigan.*— Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376.

Montana.— Wells *v.* Clarkson, 5 Mont. 336, 5 Pac. 894.

Nebraska.— Hough *v.* Stover, 46 Nebr. 588, 65 N. W. 189.

New York.— Jaques *v.* Greenwood, 12 Abb. Pr. 232.

Pennsylvania.— Wright *v.* Ewen, 19 Phila. 312, 24 Wkly. Notes Cas. 111. But *compare* McNaughton's Appeal, 101 Pa. St. 550.

Texas.— Bates *v.* Wills Point Bank, 11 Tex. Civ. App. 73, 32 S. W. 339.

Wisconsin.— Pfister *v.* Graton, etc., Mfg. Co., 97 Wis. 208, 72 N. W. 883.

United States.— MacVeagh *v.* Wild, 95 Fed. 84.

See 38 Cent. Dig. tit. "Partnership," § 443; and JUDGMENTS, 23 Cyc. 1005 *et seq.*

77. *Alabama.*— Morgan *v.* Scott, Minor 81, 12 Am. Dec. 35.

California.— Ramsbottom *v.* Bailey, 124 Cal. 259, 56 Pac. 1036.

Florida.— Baltzell *v.* Randolph, 9 Fla. 366.

Kentucky.— Sneed *v.* Coyle, 4 Litt. 163, holding, however, that such relief will not be granted where the ground upon which it is asked might with ordinary diligence have been used as a defense in the action at law.

New York.— Utter *v.* McLean, 53 Hun 568, 6 N. Y. Suppl. 281, 17 N. Y. Civ. Proc. 150; Bean *v.* Mather, 1 Daly 440; Groespeck *v.* Brown, 2 How. Pr. 21.

or set aside in equity for a mere irregularity,[78] or when the applicant has been guilty of laches.[79]

g. Dormant Partners. If the creditor of a firm takes judgment against the ostensible partners only, his claim against the dormant partner is extinguished at common law by the operation of the doctrine of merger.[80] Such judgment, however, is enforceable against the firm assets with the same effect as though the dormant partner had been a defendant.[81]

10. Execution and Enforcement of Judgment — a. In General. At common law a judgment against all the members of a firm for a firm debt is both joint and several, and execution thereon may be levied either on the firm property or on the property of either partner.[82] Under statutes which permit a partnership to be sued in the firm-name, a judgment in an action so brought is generally enforceable against the firm property only.[83] When statutes permit an action against a firm to proceed to judgment, although but a part of the members are served,[84] such judgment is ordinarily enforceable only against the firm property and the property of the partners served.[85] A similar limitation exists in the case of a judgment against a firm upon confession or consent of one or more but less than all of the partners.[86]

b. Execution Against Firm Property on Judgment Against Partner For Individual Debt. An execution on such a judgment is enforceable against the firm property, at common law, but only to the extent of the judgment debtor's interest therein.[87] As the execution is enforceable only against the debtor part-

Vermont.— Franks *v.* Lockey, 45 Vt. 395.

England.— Fore St. Warehouse Co. *v.* Durrant, 10 Q. B. D. 471, 52 L. J. Q. B. 287, 48 L. T. Rep. N. S. 531, 31 Wkly. Rep. 765, judgment against person of unsound mind doing business under a firm-name.

See 38 Cent. Dig. tit. "Partnership," § 442; and Judgments, 23 Cyc. 889, 976.

78. Kling *v.* Taylor, 90 Ill. App. 165; Marsh *v.* Mead, 57 Iowa 535, 10 N. W. 922; Helios-Upton Co. *v.* Thomas, 96 N. Y. App. Div. 401, 89 N. Y. Suppl. 222 [*affirmed* in 184 N. Y. 585, 77 N. E. 1188]. See Judgments, 23 Cyc. 921, 1002.

79. Smith *v.* Wilson, 87 Wis. 14, 57 N. W. 1115. See Judgments, 23 Cyc. 909, 1046.

80. Penny *v.* Martin, 4 Johns. Ch. (N. Y.) 566; Smith *v.* Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Munster *v.* Railton, 11 Q. B. D. 435, 52 L. J. Q. B. 409, 48 L. T. Rep. N. S. 624, 31 Wkly. Rep. 880. And see *supra*, VI, D, 9, b.

81. *Nevada.*— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New Hampshire.— Elliot *v.* Stevens, 38 N. H. 311.

New York.— Kings County Bank *v.* Courtney, 69 Hun 152, 23 N. Y. Suppl. 542; Van Valen *v.* Russell, 13 Barb. 590.

Texas.— Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734.

Wisconsin.— How *v.* Kane, 2 Pinn. 531, 54 Am. Dec. 152, 2 Chandl. 222.

82. Stout *v.* Baker, 32 Kan. 113, 4 Pac. 141; Wisham *v.* Lippincott, 9 N. J. Eq. 353; Hunter *v.* Martin, 2 Rich. (S. C.) 541; De Camp *v.* Bates, (Tex. Civ. App. 1896) 37 S. W. 644. In Martin *v.* Davis, 21 Iowa 535, the court, sitting in equity, treated firm property as subject to execution in favor of a firm creditor who had taken judgment against one partner only.

83. Yarbrough *v.* Bush, 69 Ala. 170; Fritche *v.* Liddell, 6 Ohio Dec. (Reprint) 971, 9 Am. L. Rec. 309; Halsell *v.* McMurphy, 86 Tex. 100, 23 S. W. 647; Rogers *v.* Bradford, 56 Tex. 630; Hamner *v.* Ballantyne, 16 Utah 436, 52 Pac. 770, 67 Am. St. Rep. 643.

84. See *supra*, VI, D, 9, c.

85. Flannery *v.* Anderson, 4 Nev. 437; Waring *v.* Robinson, Hoffm. (N. Y.) 524; Pottery Co. *v.* Ginder, 2 Lanc. L. Rev. (Pa.) 345; Lowber *v.* Richardson, 2 Pa. L. J. 209; Lee *v.* Hassett, 41 W. Va. 368, 23 S. E. 559; Inbusch *v.* Farwell, 1 Black (U. S.) 566, 17 L. ed. 188.

86. Grant *v.* Hyatt, 22 La. Ann. 411; Ross *v.* Howell, 84 Pa. St. 129; Hershey *v.* Fulmer, 3 Pa. Co. Ct. 442; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. (Pa.) 245; Shelton Bank *v.* Willey, 7 Wash. 535, 35 Pac. 411.

87. *Alabama.*—Andrews *v.* Keith, 34 Ala. 722; Moore *v.* Sample, 3 Ala. 319.

Arkansas.— Jones *v.* Fletcher, 42 Ark. 422.

California.— Robinson *v.* Tevis, 38 Cal. 611; Jones *v.* Thompson, 12 Cal. 191.

Connecticut.— Filley *v.* Phelps, 18 Conn. 294.

Illinois.— Weber *v.* Hertz, 188 Ill. 68, 58 N. E. 676; Swan *v.* Gilbert, 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208; James *v.* Stratton, 32 Ill. 202; Newhall *v.* Buckingham, 14 Ill. 405.

Indiana.— Hardy *v.* Donellan, 33 Ind. 501.

Louisiana.— Choppin *v.* Wilson, 27 La. Ann. 444; Beauchamp *v.* Chacheré, 12 La. Ann. 851; Smith *v.* McMicken, 3 La. Ann. 319; Croft *v.* McKneely, 1 La. 101; Cucullu *v.* Manzenal, 4 Mart. N. S. 183.

Maine.— Moore *v.* Pennell, 52 Me. 162, 83 Am. Dec. 500; Thompson *v.* Lewis, 34 Me. 167.

ner's interest in the firm's assets, its lien is subordinated to that of an execution subsequently levied on behalf of a judgment creditor of the partnership.[88] Hence, if the sheriff exhausts the firm property on a sale under such subsequent firm execution, he may safely return the earlier individual execution *nulla bona*.[89] In case of a dormant partnership, a judgment creditor of the ostensible partner for a firm debt may execute his judgment against the firm property, and is not limited to the ostensible partner's interest.[90] Even at common law it is generally held that an officer is liable in trespass who levies an individual execution on firm property and professes to sell it instead of the debtor partner's interest in it.[91]

c. Levy and Enforcement of Individual Execution. The ordinary manner of levying such an execution on the firm property, at common law, is for the officer

Massachusetts.— Peck *v.* Fisher, 7 Cush. 386; Fisk *v.* Herrick, 6 Mass. 271.

Mississippi.— Sitler *v.* Walker, Freem. 77.

Missouri.— Wiles *v.* Maddox, 26 Mo. 77.

Nebraska.— Richards *v.* Leveille, 44 Nebr. 38, 62 N. W. 304.

New Hampshire.— Dow *v.* Sayward, 14 N. H. 9; Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson *v.* Stevens, 7 N. H. 352.

New Jersey.— Clements *v.* Jessup, 36 N. J. Eq. 569.

New York.— Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Berry *v.* Kelly, 4 Rob. 106; Drexel *v.* Pease, 13 N. Y. Suppl. 774; Sterrett *v.* Buffalo Third Nat. Bank, 10 N. Y. St. 818; Mowbray *v.* Lawrence, 13 Abb. Pr. 317, 22 How. Pr. 107; Waddell *v.* Cook, 2 Hill 47, 37 Am. Dec. 372.

North Carolina.— McPherson *v.* Pemberton, 46 N. C. 378.

Ohio.— Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Suteliffe *v.* Dohrman, 18 Ohio 181, 51 Am. Dec. 450; Place *v.* Sweetzer, 16 Ohio 142.

Pennsylvania.— Knerr *v.* Hoffman, 65 Pa. St. 126; Lothrop *v.* Wightman, 41 Pa. St. 297; Bank *v.* Allen, 1 Del. Co. 277; Bogue *v.* Steel, 1 Phila. 90.

South Carolina.— Knox *v.* Schepler, 2 Hill 595.

Tennessee.— Jones *v.* Richardson, 99 Tenn. 614, 42 S. W. 440; Haskins *v.* Everett, 4 Sneed 531; Johnson *v.* Wingfield, (Ch. App. 1897) 42 S. W. 203; Knight *v.* Ogden, 2 Tenn. Ch. 473.

Texas.— Weaver *v.* Ashcroft, 50 Tex. 427; Nelson *v.* Cockrell, 3 Tex. App. Civ. Cas. § 448; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930; Grant *v.* Williams, 1 Tex. App. Civ. Cas. § 363.

Vermont.— Russ *v.* Fay, 29 Vt. 381.

Washington.— Graden *v.* Turner, 15 Wash. 136, 45 Pac. 733.

United States.— Taylor *v.* Bemis, 23 Fed. Cas. No. 13,779, 4 Biss. 406 (but the interest of one partner in a firm brand or trade-mark is too intangible to permit of sale under a levy by such partner's judgment creditor); U. S. *v.* Williams, 28 Fed. Cas. No. 16,719, 4 McLean 236.

England.— Holmes *v.* Mentze, 4 A. & E. 127, 4 Dowl. P. C. 300, 1 Harr. & W. 608, 5 L. J. K. B. 62, 5 N. & M. 563, 31 E. C. L. 74; Dutton *v.* Morrison, 17 Ves. Jr. 193, 1 Rose 213, 11 Rev. Rep. 56, 34 Eng. Reprint 75.

Canada.— Rennie *v.* Quebec Bank, 3 Ont. L. Rep. 541; Harrison *v.* Harrison, 14 Ont. Pr. 436.

See 38 Cent. Dig. tit. "Partnership," § 449.

88. *Iowa.*— Hubbard *v.* Curtis, 8 Iowa 1, 74 Am. Dec. 283.

Maryland.— Thompson *v.* Frist, 15 Md. 24.

Minnesota.— Barrett *v.* McKenzie, 24 Minn. 20, the right of a firm to sue for a firm debt is not affected by a levy on the interest of one partner in such debt.

Missouri.— Lester *v.* Givens, 74 Mo. App. 395, the priority of partnership creditors cannot be divested by a division of partnership effects by the officer and a sale of a portion of them under an execution for an individual debt of one partner.

New Jersey.— Harney *v.* Jersey City First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221.

New York.— Saunders *v.* Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472 (but the partnership creditors cannot claim a priority over the individual creditors of all the partners on a joint indebtedness); Wilson *v.* Conine, 2 Johns. 280.

Pennsylvania.— Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149.

England.— Davis *v.* Hyman, [1903] 1 K. B. 854, 72 L. J. K. B. 426, 88 L. T. Rep. N. S. 284, 51 Wkly. Rep. 598.

See 38 Cent. Dig. tit. "Partnership," §§ 450, 452.

89. Tappan *v.* Blaisdell, 5 N. H. 190; New York Eighth Nat. Bank *v.* Fitch, 49 N. Y. 539; Dunham *v.* Murdock, 2 Wend. (N. Y.) 553.

90. Van Valen *v.* Russell, 13 Barb. (N. Y.) 590; Carey *v.* Bright, 58 Pa. St. 70; Brown's Appeal, 17 Pa. St. 480. See also *supra*, VI, D, 9, g.

91. *Georgia.*— Jolley *v.* Hardeman, 111 Ga. 749, 36 S. E. 952.

Indiana.— Ferguson *v.* Day, 6 Ind. App. 138, 33 N. E. 213.

Kansas.— Spalding *v.* Black, 22 Kan. 55.

Maine.— Moore *v.* Pennell, 52 Me. 162, 83 Am. Dec. 500.

New York.—Michalover *v.* Moses, 19 N. Y. App. Div. 343, 46 N. Y. Suppl. 456.

Pennsylvania.— Bogue *v.* Steel, 1 Phila. 162.

England.— Fraser *v.* Kershaw, 2 Jur. N. S. 880, 2 Kay & J. 496, 25 L. J. Ch. 445, 4 Wkly. Rep. 431, 69 Eng. Reprint 878.

to seize and take actual possession thereof,[92] although some jurisdictions permit only a constructive levy.[93] Whether he must levy on the debtor partner's interest in the entire assets,[94] or may levy only on his interest in what is necessary to satisfy the execution, or in what is accessible to him,[95] is a question upon which the authorities are at variance. They are also at variance on the question whether the other partners are entitled to equitable interference to prevent a sale under the individual execution until an accounting and settlement can be had,[96] or not.[97] The manner of levying and enforcing individual executions against firm property has been regulated by statute in many jurisdictions.[98]

d. Title and Rights of Purchaser. The purchaser under an execution against one partner levied upon firm assets becomes the owner of the debtor partner's unascertained contingent interest in the assets levied upon, and if the partnership is insolvent he acquires nothing.[99] In order to ascertain the value of his purchase,

92. *Alabama.*—Andrews *v.* Keith, 34 Ala. 722.

Arkansas.— Harris *v.* Phillips, 49 Ark. 58, 4 S. W. 196, although in ordinary cases the lien attaches when the writ is put into the hands of the sheriff, it attaches under Mansfield Dig. § 3018, with reference to property of a partnership only upon actual seizure of the property.

California.— Clark *v.* Cushing, 52 Cal. 617.

Delaware.— Davis *v.* White, 1 Houst. 228.

Illinois.— White *v.* Jones, 38 Ill. 159; Newhall *v.* Buckingham, 14 Ill. 405.

Louisiana.— Broadnax *v.* Thomason, 1 La. Ann. 382, applying the law of Alabama.

Minnesota.— Wickham *v.* Davis, 24 Minn. 167; Barrett *v.* McKenzie, 24 Minn. 20.

Missouri.— Lester *v.* Givens, 74 Mo. App. 395; Carillon *v.* Thomas, 6 Mo. App. 574.

New York.— Read *v.* McLanahan, 47 N. Y. Super. Ct. 275.

Oregon.— Cogswell *v.* Wilson, 17 Oreg. 31, 21 Pac. 388.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,719, 4 McLean 236.

See 38 Cent. Dig. tit. "Partnership," §§ 455, 456.

93. Vandike *v.* Rosskam, 67 Pa. St. 330; Smith *v.* Emerson, 43 Pa. St. 456; Deal *v.* Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Wise *v.* Vosburg, 4 Pa. Super. Ct. 221; Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

94. *Alabama.*— Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Daniel *v.* Owens, 70 Ala. 297.

Illinois.— Weber *v.* Hertz, 188 Ill. 68, 58 N. E. 676; Swan *v.* Gilbert, 67 Ill. App. 236 [*affirmed* in 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208].

Louisiana.— Levy *v.* Cowan, 27 La. Ann. 556; Pittman *v.* Robicheau, 14 La. Ann. 108; Alexander *v.* Burns, 6 La. Ann. 704.

Michigan.— Ernest *v.* Woodworth, 124 Mich. 1, 82 N. W. 661; Hutchinson *v.* Dubois, 45 Mich. 143, 7 N. W. 714; Sirrine *v.* Briggs, 31 Mich. 443.

Mississippi.— Blumenfeld *v.* Seward, 71 Miss. 342, 14 So. 442; Atwood *v.* Meredith, 37 Miss. 635.

See 38 Cent. Dig. tit. "Partnership," §§ 455, 456.

95. Phillips *v.* Cook, 24 Wend. (N. Y.) 389; Acker *v.* Burrall, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582 [*affirming* 21 Wend. 605].

96. Reed *v.* Johnson, 24 Me. 322; Thompson *v.* Frist, 15 Md. 24 (equity will interfere to prevent a separate creditor, levying on firm effects, from standing in a better position than the debtor partner); Krupp *v.* Adams, 124 Mich. 215, 82 N. W. 894; Thompson *v.* Tinnin, 25 Tex. Suppl. 56.

97. Moody *v.* Payne, 2 Johns. Ch. (N. Y.) 548; Bright's Appeal, 1 Walk. (Pa.) 7; Booth *v.* Gest, 17 Pa. Co. Ct. 43; Chapman *v.* Koops, 3 B. & P. 289; Parker *v.* Pistor, 3 B. & P. 288.

98. *Georgia.*— Nussbaum *v.* Connor, 94 Ga. 530, 21 S. E. 709; Waxelbaum *v.* Connor, 94 Ga. 529, 19 S. E. 805; Holifield *v.* White, 52 Ga. 567; Anderson *v.* Chenney, 51 Ga. 372; Willis *v.* Henderson, 43 Ga. 325.

Iowa.— Aultman *v.* Fuller, 53 Iowa 60, 4 N. W. 809; Richards *v.* Haines, 30 Iowa 574.

Kentucky.— Aldrich *v.* Wallace, 8 Dana 287, 33 Am. Dec. 495; McCouns *v.* Holmes, 4 Litt. 389.

New York.— Crane *v.* Cranitch, 3 Misc. 557, 23 N. Y. Suppl. 320; Lang *v.* Otis, 1 N. Y. City Ct. 241; Anonymous, 2 Hill 378.

Pennsylvania.— Dengler's Appeal, 125 Pa. St. 12, 17 Atl. 184; Kaine's Appeal, 92 Pa. St. 273; Hare *v.* Comm., 92 Pa. St. 141; Evans *v.* Howell, 5 Pa. Co. Ct. 313; Little *v.* Lane, 2 Pa. Co. Ct. 609.

Texas.— Adoue *v.* Wettermark, 36 Tex. Civ. App. 585, 82 S. W. 797.

England.— Brown *v.* Hutchinson, [1895] 2 Q. B. 126, 64 L. J. Q. B. 619, 73 L. T. Rep. N. S. 8, 14 Reports 485, 43 Wkly. Rep. 545.

See 38 Cent. Dig., tit. "Partnership," §§ 449, 452, 453.

99. *Massachusetts.*— Peck *v.* Fisher, 7 Cush. 386.

Minnesota.— Lane *v.* Lanfest, 40 Minn. 375, 42 N. W. 84.

Mississippi.— Williams *v.* Gage, 49 Miss. 777.

Missouri.— Wiles *v.* Maddox, 26 Mo. 77.

New Jersey.— Atwood *v.* Impson, 20 N. J. Eq. 150.

New York.— Staats *v.* Bristow, 73 N. Y. 264; Martin *v.* Wagener, 1 Thomps. & C. 509; Willett *v.* Stringer, 17 Abb. Pr. 152; Walsh *v.* Adams, 3 Den. 125.

North Carolina.— Latham *v.* Simmons, 48 N. C. 27; Price *v.* Hunt, 33 N. C. 42.

Pennsylvania.— Foster *v.* Barnes, 81 Pa.

he is generally allowed an accounting with the other partners.[1] In some cases it may be necessary for him to file a bill in equity in order to have his rights defined and secured.[2] It is held in some jurisdictions that the purchaser under a judgment against all the partners, although not for a firm debt, acquires title to the firm assets.[3] The purchaser, on an execution sale under a firm judgment, acquires the entire ownership in the property sold.[4] As at common law a judgment creditor of the firm may make a valid levy of his execution on the separate property of a partner, it follows that the purchaser under such an execution acquires complete ownership of such property,[5] subject only to the liens of separate execution creditors which are prior in time.[6] It is to be borne in mind that in some jurisdictions statutes have modified the common-law right above stated.[7]

e. Disposition of Proceeds. If the sale is made under execution in favor of a separate judgment creditor, the proceeds are payable to him, whether they arise from the sale of separate property or the judgment debtor's interest in firm property; while, if the sale is made under execution in favor of a firm creditor, the

St. 377; Rundall *v.* Stedge, 2 Pa. Co. Ct. 608; Bogue *v.* Steel, 1 Phila. 90.

Tennessee.— Boro *v.* Harris, 13 Lea 36; Haskins *v.* Everett, 4 Sneed 531.

Texas.— McCutchon *v.* Davis, (1888) 8 S. W. 123; Carter *v.* Roland, 53 Tex. 540 (purchaser of partner's interest under execution sale becomes tenant in common with the other partner); Lewis *v.* Alexander, (Civ. App. 1895) 31 S. W. 414.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,719, 4 McLean 236.

England.— Perrens *v.* Johnson, 3 Jur. N. S. 975, 3 Smale & G. 419, 65 Eng. Reprint 720.

See 38 Cent. Dig. tit. "Partnership," § 459½.

1. Barrett *v.* McKenzie, 24 Minn. 20; Sterrett *v.* Buffalo Third Nat. Bank, 10 N. Y. St. 818; Phillips *v.* Cook, 24 Wend. (N. Y.) 389; Lothrop *v.* Wightman, 41 Pa. St. 297; Johnson *v.* Wingfield, (Tenn. Ch. App. 1897) 42 S. W. 203; Clagett *v.* Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213.

2. Ticonic Bank *v.* Harvey, 16 Iowa 141; Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712; Hubble *v.* Perrin, 3 Ohio 287; Cogswell *v.* Wilson, 17 Oreg. 31, 21 Pac. 388; Sterling *v.* Brightbill, 5 Watts (Pa.) 229, 30 Am. Dec. 304.

3. Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366; Davis *v.* Delaware, etc., Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418; Saunders *v.* Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472.

4. Steiner *v.* Peters Store Co., 119 Ala. 371, 24 So. 567; McDuffie *v.* Bartlett, 3 Pa. St. 317.

5. *Alabama.*— Blackman *v.* Moore-Handley Hardware Co., 106 Ala. 458, 17 So. 629; Haralson *v.* Campbell, 63 Ala. 278.

California.— Conroy *v.* Woods, 13 Cal. 626, 73 Am. Dec. 605.

Florida.— Orlando First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239, but a sale under such execution is void if the individual partner was not served with summons and did not appear in the action.

Georgia.— Clayton *v.* Roberts, 84 Ga. 149, 10 S. E. 621 (similar to preceding Florida case); Parler *v.* Johnson, 81 Ga. 254, 7 S. E. 317; Gammell *v.* Mulford, 53 Ga. 78; Baker *v.* Wimpee, 19 Ga. 87; Cleghorn *v.* Columbus Ins. Bank, 9 Ga. 319.

Iowa.— Gordon *v.* Kennedy, 36 Iowa 167; Hamsmith *v.* Espy, 13 Iowa 439.

Mississippi.— Strong *v.* Hines, 35 Miss. 201, similar to Florida case noted above.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13 [*reversed* on other grounds in 21 N. J. Eq. 530]; Randolph *v.* Daly, 16 N. J. Eq. 313.

Pennsylvania.— Com. *v.* Rogers, 1 Brightly 450.

Texas.— Stephens *v.* Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

England.— Mayhew *v.* Herrick, 7 C. B. 229, 13 Jur. 1078, 18 L. J. C. P. 179, 62 E. C. L. 229.

See 38 Cent. Dig. tit. "Partnership," § 461 *et seq.*

But see Bowker *v.* Smith, 48 N. H. 111, 2 Am. Rep. 189; Jarvis *v.* Brooks, 23 N. H. 136.

6. Cleghorn *v.* Columbus Ins. Bank, 9 Ga. 319; Kuhne *v.* Law, 14 Rich. (S. C.) 18 [*overruling* Roberts *v.* Roberts, 8 Rich. (S. C.) 15]; *In re* Sandusky, 21 Fed. Cas. No. 12,308, 17 Nat. Bankr. Reg. 452.

7. *Alabama.*— McCoy *v.* Watson, 51 Ala. 466, applying Rev. Code, § 2538.

Colorado.— Sawyer *v.* Armstrong, 23 Colo. 287, 47 Pac. 391, applying Code Civ. Proc. § 235.

Iowa.— Heins *v.* Tamblyn, 110 Iowa 478, 81 N. W. 698 (under Code (1873), § 3102); Jones *v.* Jones, 13 Iowa 276; Davis *v.* Buchanan, 12 Iowa 575.

New Mexico.— Lewinson *v.* Albuquerque First Nat. Bank, 11 N. M. 510, 70 Pac. 567, applying Comp. Laws, § 2943.

New York.— Souls *v.* Cornell, 15 N. Y. App. Div. 161, 44 N. Y. Suppl. 194, applying Code Civ. Proc. §§ 1934, 1935.

Pennsylvania.— Kneib *v.* Graves, 72 Pa. St. 104; Tassey *v.* Church, 6 Watts & S. 465, 40 Am. Dec. 575, under a statute allowing judgment at law in an action between two firms having members in common, no execution can be had against the separate estates of the members of defendant firm.

England.— Clark *v.* Cullen, 9 Q. B. D. 355, 47 L. T. Rep. N. S. 307.

proceeds are payable to him,[8] unless circumstances arise which authorize a court of equity to interfere and marshal the assets between firm and separate creditors.[9]

f. Priorities of Executions. From the principles above set forth, it follows that when firm property is sold by a sheriff under several executions in his hands, some of which are in favor of firm creditors while others are in favor of separate creditors, the proceeds are to be applied to the satisfaction of firm creditors' executions in preference to those of separate creditors, without regard to the dates of judgments or levies.[10]

11. Appeal and Error. The ordinary rules upon this topic apply to appeals from judgments in partnership litigations.[11] It may be noted that all the partners must join in an appeal from a joint judgment against them;[12] but that the firm as such may appeal from a judgment taken against it under statutory authority.[13] In case a partner dies after a judgment is rendered, an appeal may be prosecuted against the surviving partner.[14] In an action against several on a partnership liability, the appellate court may affirm as to one or more and reverse as to others.[15]

VII. Retirement and Admission of Partners.

A. Change of Membership of Firm[1] **— 1. In General.** It is perfectly com-

Canada.— Banque D'Hochelaga *v.* Maritime R. News Co., 31 Nova Scotia 9; Reid *v.* Graham, 26 Ont. 126.

See 38 Cent. Dig. tit. "Partnership," § 461; and *supra*, VI, D, 10, c.

8. Fenton *v.* Folger, 21 Wend. (N. Y.) 676; Vandike's Appeal, 57 Pa. St. 9; Cope's Appeal, 39 Pa. St. 284; King's Appeal, 9 Pa. St. 124; Roop *v.* Rodgers, 5 Watts (Pa.) 193; Doner *v.* Stauffer, 1 Penr. & W. (Pa.) 198, 21 Am. Dec. 370.

9. Thompson *v.* Frist, 15 Md. 24; Kelly's Appeal, 16 Pa. St. 59; Hershey *v.* Fulmer, 3 Pa. Co. Ct. 442; Rex *v.* Lomman, 3 Phila. (Pa.) 287.

10. *California.*— Commercial Bank *v.* Mitchell, 58 Cal. 42.

Indiana.— Louden *v.* Ball, 93 Ind. 232, the right of preference must be asserted before sale on execution and prior to any prejudicial change of position by the parties.

New York.— Ryder *v.* Gilbert, 16 Hun 163.

Pennsylvania.— Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149; Cooper's Appeal, 26 Pa. St. 262; Snodgrass' Appeal, 13 Pa. St. 471; Overholt's Appeal, 12 Pa. St. 222, 51 Am. Dec. 598.

South Carolina.— Crawford *v.* Baum, 12 Rich. 75.

Texas.— Blankenship *v.* Wartelsky, (1887) 6 S. W. 140.

United States.— Inbusch *v.* Farwell, 1 Black 566, 17 L. ed. 188.

See 38 Cent. Dig. tit. "Partnership," §§ 462, 463, 468.

11. See, generally, Appeal and Error. And see the following cases:

Colorado.— Fryer *v.* Breeze, 16 Colo. 323, 26 Pac. 817, holding that failure by partners plaintiff to allege their partnership cannot be taken advantage of for the first time on appeal.

Georgia.— Bagwell *v.* Morton, 95 Ga. 723, 22 S. E. 575, holding that where the question of a partnership between the parties to an action was vital to the defense, and in the trial court the answer was treated as sufficiently alleging the partnership, the supreme court on appeal would treat it as sufficient.

Illinois.— Pugh *v.* Wallace, 198 Ill. 422, 64 N. E. 1005, jurisdiction and procedure on partnership appeals.

Kentucky.— Cavanaugh *v.* Weber, 11 Ky. L. Rep. 858, no reversal to allow pleading of issue already tried, although not pleaded.

Michigan.— Roberts *v.* Pepple, 55 Mich. 367, 21 N. W. 319, holding that one who has sued a firm and recovered against a single partner only cannot assign error on the ground that a sole judgment cannot be rendered on a partnership liability.

New York.— Wheeler *v.* Timpson, 13 N. Y. Suppl. 640, admission of evidence not ground for reversal where fact was established by uncontradicted evidence.

Washington.— Matthies *v.* Herth, 31 Wash. 665, 72 Pac. 480, presumptions in favor of findings of lower court.

See 38 Cent. Dig. tit. "Partnership," § 470.

Remand on reversal.— Where a decree was obtained against a partnership, and on appeal the appellate court reversed the decree because only one member of the firm was liable, the court refused to remand the cause as to all the defendants, to give opportunity to the complainant to introduce further evidence to charge the firm. Cunningham *v.* Smithson, 12 Leigh (Va.) 32.

12. Kline *v.* Swift Specific Co., 118 Ga. 514, 45 S. E. 314; Westover *v.* Dobson, (Kan. 1897) 47 Pac. 620; Beers *v.* Gurney, 14 Ohio Cir. Ct. 82, 7 Ohio Cir. Dec. 411.

13. Kline *v.* Swift Specific Co., 118 Ga. 514, 45 S. E. 314; McSweeny *v.* Blank, 107 La. 292, 31 So. 636.

14. Robertson *v.* Ford, 164 Ind. 538, 74 N. E. 1.

15. Bridgeford *v.* Fogg, 10 Ky. L. Rep. 773.

1. Withdrawal of partner as dissolution of firm see *infra*, IX, A.

petent for a partner to sell his interest in the firm and retire therefrom.[2] Such transaction does not prevent the continuance of the partnership by the other partners. On the contrary, if the business is thereafter carried on by the other partners, it will be presumed that their original contract remains in force, so far as it is consistent with the change of members.[3] Provisions for the retirement of a member are often inserted in the partnership articles;[4] but in the absence of such provisions the parties may agree at any time upon the terms of retirement of a partner.[5] So, without the retirement of a member, the members of an existing firm may admit a new member into the firm.[6] If the incoming partner is induced to become a member of the firm by false and fraudulent representations, he may rescind or maintain an action of deceit.[7]

2. Transfer of Partner's Interest to a Copartner. When one partner transfers his interest in the firm to a copartner for a valuable consideration, his title to firm assets is extinguished and passes to his vendee,[8] unless the transfer is merely as security;[9] and a note given by the purchasing partner for such interest represents a valid debt, although the selling partner by failing to give notice of his retirement might be liable as a partner thereafter.[10] If, however, the transaction is only a preliminary negotiation for a sale, or the creation of an agency to collect debts due the firm, firm title is not affected.[11] Moreover, the selling partner must act with the utmost good faith toward his copartner, or the transfer will be impeachable for fraud, or give rise to an action for deceit.[12] Such a purchase

Mining partnerships see Mines and Minerals, 27 Cyc. 761.

Tenancy at will not terminated by change in personnel of partnership see Landlord and Tenant, 24 Cyc. 1386 note 3

2. Alvord *v.* Smith, 5 Pick. (Mass.) 232; Cochran *v.* Perry, 8 Watts & S. (Pa.) 262; Cassels *v.* Stewart, 6 App. Cas. 64, 29 Wkly. Rep. 636; *Ex p.* Peake, 1 Madd. 346, 16 Rev. Rep. 233, 56 Eng. Reprint 128.

3. Frederick *v.* Cooper, 3 Iowa 171; Gossett *v.* Weatherly, 58 N. C. 461; Zaepfel *v.* Baumgardner, 6 Lanc. Bar (Pa.) 141, holding that an incoming partner is charged with knowledge of all the conditions of the articles of partnership and is bound by all its stipulations. But see Givens *v.* Berry, 52 S. W. 942, 21 Ky. L. Rep. 680, where it was held that the admission of a new partner annulled a stipulation in the partnership contract that if either partner should become intoxicated, he should pay to the other, as agreed damages, one thousand dollars for each offense.

4. Alvord *v.* Smith, 5 Pick. (Mass.) 232; Guccione *v.* Scott, 33 N. Y. App. Div. 214, 53 N. Y. Suppl. 462 [*affirming* 21 Misc. 410, 47 N. Y. Suppl. 475]; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574; Cooper *v.* Edeburn, 198 Pa. St. 229, 47 Atl. 1116; Wilson *v.* Black, 164 Pa. St. 555, 30 Atl. 488; Houghtailing *v.* Brinckle, 7 Pa. Dist. 518; McGlensey *v.* Cox, 1 Phila. (Pa.) 387; Collins *v.* Barker, [1893] 1 Ch. 578, 62 L. J. Ch. 316, 68 L. T. Rep. N. S. 572, 3 Reports 237, 41 Wkly. Rep. 442; Rowlands *v.* Evans, 30 Beav. 302, 8 Jur. N. S. 88, 31 L. J. Ch. 265, 5 L. T. Rep. N. S. 628, 10 Wkly. Rep. 186, 54 Eng. Reprint 905; Cooper *v.* Watlington, 2 Chit. 451, 18 E. C. L. 732, 3 Dougl. 413, 26 E. C. L. 271; Watney *v.* Trist, 45 L. J. Ch. 412. And see Schuyler *v.* Cullen, 120 N. Y. App. Div. 637, 105 N. Y. Suppl. 544.

5. Hazell *v.* Clark, 89 Mo. App. 78; McConomy *v.* Reed, 152 Pa. St. 42, 25 Atl. 176; Gray *v.* Smith, 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. Rep. N. S. 335, 38 Wkly. Rep. 310, holding, however, that an agreement by the retiring partner to assign his share in firm assets which includes real estate is within the statute of frauds.

6. See *supra*, III, A, 1.

7. Merchants Bank *v.* Thompson, 3 Ont. 541. See *supra*, III, A, 1, j.

8. *Mississippi.*— Richardson *v.* Davis, 70 Miss. 219, 11 So. 790.

New York.— Matherson *v.* Belden, 14 N. Y. App. Div. 519, 43 N. Y. Suppl. 888.

Texas.— Eules *v.* Tomlinson, (Civ. App. 1896) 38 S. W. 534; Bean *v.* Warden, (Civ. App. 1895) 31 S. W. 831.

United States.— Towle *v.* Hammond, 99 Fed. 510, 40 C. C. A. 498.

England.— *Ex p.* Birley, 2 Mont. D. & De G. 354; Cofton *v.* Horner, 5 Price 537; Lingen *v.* Simpson, 1 Sim. & St. 600, 24 Rev. Rep. 249, 1 Eng. Ch. 600, 57 Eng. Reprint 436.

Canada.— Hughes *v.* Chambers, 14 Manitoba 163; Crowe *v.* Buchanan, 36 Nova Scotia 1.

9. Donnelly *v.* McArdle, 120 N. Y. App. Div. 871, 105 N. Y. Suppl. 331, holding that a partner assigning his interest in the firm to his copartner as security for the copartner's advances to the firm has an interest in the surplus assets of the firm after the repayment of the advances.

10. Richardson *v.* Davis, 70 Miss. 219, 11 So. 790. See *infra*, IX, B, 6.

11. Spears *v.* Willis, 151 N. Y. 443, 45 N. E. 849; Riggen *v.* Investment Co., 31 Oreg. 35, 47 Pac. 923.

12. Crawford *v.* Stainback, 76 Ark. 346, 88 S. W. 991; Wright *v.* Duke, 91 Hun (N. Y.) 409, 36 N. Y. Suppl. 853 (where the selling partner maintained an action for deceit);

does not inure to the benefit of a third partner,[13] and the transfer is subject to a prior mortgage given by the selling partner on his share and known to the buying partner.[14]

3. TRANSFER OF PARTNER'S INTEREST TO THIRD PERSON. The legal power of a partner to make a transfer of his interest to a third person is unquestioned.[15] The transferee, however, does not become a tenant in common with the other partners in any specific goods, but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including debts due from the firm to a partner.[16] Such a purchase does not make the buyer a partner in the firm, without the concurrence of all the partners, either given expressly or implied from conduct.[17]

Law *v.* Law, [1905] 1 Ch. 140, 74 L. J. Ch. 169, 92 L. T. Rep. N. S. 1, 21 T. L. R. 102, 53 Wkly. Rep. 227; Stroud *v.* Wiley, 27 Ont. App. 516 (selling partner acted in good faith and in accordance with the uniform usage of the business).

Duty of purchasing partner in order to rescind for fraud see CANCELLATION OF INSTRUMENTS, 6 Cyc. 313 note 16.

13. Towle *v.* Hammond, 99 Fed. 510, 40 C. C. A. 498.

14. Watts *v.* Driscoll, 82 L. T. Rep. N. S. 255.

15. Schurtz *v.* Romer, 82 Cal. 474, 23 Pac. 118; Jackson *v.* Stanford, 19 Ga. 14; Pease *v.* Rush, 2 Minn. 107; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574.

16. *California.*— Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98. But in McCauley *v.* Fulton, 44 Cal. 355, and Stokes *v.* Stevens, 40 Cal. 391, it was held that the purchaser of a partner's interest in real estate becomes a tenant in common with the other partners at law, subject to the equitable right of such partners and the firm creditors to have the property applied in payment of firm debts.

Illinois.— Rosentiel *v.* Gray, 112 Ill. 282.

Iowa.— Shuler *v.* Dutton, 75 Iowa 155, 39 N. W. 239, where the evidence was held to show that the parties intended the sale to pass to the purchaser the seller's interest in specified property.

Maine.— Leader *v.* Plante, 95 Me. 343, 50 Atl. 53, 85 Am. St. Rep. 419.

New York.— Tarbell *v.* West, 86 N. Y. 280; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Van Brunt *v.* Applegate, 44 N. Y. 544; Munford *v.* McKay, 8 Wend. 442, 24 Am. Dec. 34; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417.

Pennsylvania.— Reinheimer *v.* Hemingway, 35 Pa. St. 432; Swoope *v.* Wakefield, 10 Pa. Super. Ct. 342, 44 Wkly. Notes Cas. 209; Seibert *v.* Seibert, 1 Brewst. 531; McGlensey *v.* Cox, 1 Phila. 387.

Texas.— Still *v.* Focke, 66 Tex. 715, 2 S. W. 59.

United States.— New York Fourth Nat. Bank *v.* New Orleans, etc., R. Co., 11 Wall. 624, 20 L. ed. 82.

England.— Partn. Act (1890), § 31; *In re* Ritson, [1899] 1 Ch. 128, 68 L. J. Ch. 77, 79 L. T. Rep. N. S. 455, 15 T. L. R. 76, 47 Wkly. Rep. 213 [*affirming* [1898] 1 Ch. 667, 67 L. J. Ch. 365, 78 L. T. Rep. N. S. 645, 46 Wkly. Rep. 478].

See 38 Cent. Dig. tit. "Partnership," §§ 473½, 474.

But see Keith *v.* Ham, 89 Ala. 590, 7 So. 234, where an assignment by one of the members of a partnership of all his interest in specified property of the partnership was held to make the assignee and the other partner joint owners of the property, and to entitle them to maintain an action for the conversion thereof.

17. *Alabama.*— Butts *v.* Cooper, (1907) 44 So. 616; Meaher *v.* Cox, 37 Ala. 201, consent shown by conduct.

Illinois.— Rosentiel *v.* Gray, 112 Ill. 282, consent may be inferred.

Louisiana.— Freligh *v.* Miller, 16 La. Ann. 418; Fearn *v.* Tiernan, 4 Rob. 367.

Massachusetts.— Kingman *v.* Spurr, 7 Pick. 235.

Michigan.— Harvey *v.* Ford, 83 Mich. 506, 47 N. W. 242, consent shown.

Missouri.— Waterman *v.* Johnson, 49 Mo. 410 (consent shown); Freeman *v.* Bloomfield, 43 Mo. 391.

Montana.— Galigher *v.* Lockhart, 11 Mont. 109, 27 Pac. 446.

Nebraska.— Filley *v.* Walker, 28 Nebr. 506, 44 N. W. 737.

New York.— Fay *v.* Waldron, 3 N. Y. Suppl. 894; Murray *v.* Bogert, 14 Johns. 318, 7 Am. Dec. 466.

Pennsylvania.— Collner *v.* Greig, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. Rep. 899; Cochran *v.* Perry, 8 Watts & S. 262; Mason *v.* Connell, 1 Whart. 381.

South Carolina.— Boyce *v.* Coster, 4 Strobh. Eq. 25.

United States.— McNamara *v.* Gaylord, 16 Fed. Cas. No. 8,910, 1 Bond 302.

England.— Partn. Act (1890), § 24 (7); Singleton *v.* Knight, 13 App. Cas. 788, 57 L. J. P. C. 106, 59 L. T. Rep. N. S. 738; Byrne *v.* Reid, [1902] 2 Ch. 735, 71 L. J. Ch. 830, 87 L. T. Rep. N. S. 507, 51 Wkly. Rep. 52 (where the articles gave one partner power to nominate and introduce into the firm a person for the whole or any part of his share); Matter of Pennant, etc., Consol. Lead Min. Co., 5 De G. M. & G. 837, 1 Jur. N. S. 566, 24 L. J. Ch. 353, 3 Wkly. Rep. 95, 54 Eng. Ch. 656, 43 Eng. Reprint 1095; Bray *v.* Fromont, 6 Madd. 5, 22 Rev. Rep. 221, 56 Eng. Reprint 990; Jeffreys *v.* Smith, 3 Russ. 158, 27 Rev. Rep. 49, 3 Eng. Ch. 158, 38 Eng. Reprint 535.

See 38 Cent. Dig. tit. "Partnership," §§ 474, 475.

4. Continued Use of Firm-Name.[18] The right to continue the use of the old firm-name, after the retirement of a partner, may be acquired by an express agreement with such partner.[19] In the absence of such agreement, it is held in many jurisdictions, and in some it is expressly provided by statute, that the continuing parties are not entitled to use the old firm-name.[20] In England and in some of our states they are entitled to use it if they are the purchasers of the partnership property and business, provided they do not thereby expose the retired partner to any liability for the debts of the new firm.[21] If the name is an arbitrary or fancy one, not designating the retired partner, or if its continued use is under statutory authority, so that it has come to designate a business house rather than the individual members of the firm, its use may be continued by the new firm, under a purchase of the partnership good-will.[22] In case the firm-name is used without legal warrant therefor, and especially if it is so used as to subject the retiring partner to personal liability, to injure his business reputation, or to impose upon the public, such use may be enjoined.[23]

5. Good-Will of Old Firm.[24] The term "good-will" has been defined by statute as "the expectation of continued public patronage."[25] Judges have found no little difficulty in framing a definition;[26] but their tendency is to expand rather than to narrow its scope. Lord Eldon's statement that the good-will of a business "is nothing more than the probability that the old customers will resort to the old place"[27] has been criticized repeatedly as too limited for modern kinds and methods of business. It has been well said that "the habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many things beside place. Confidence in

18. See, generally, Trade-Marks and Trade-Names.

19. Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632; Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794; Rosenheim *v.* Rosenfield, 13 N. Y. Suppl. 720; Fite *v.* Dorman, (Tenn. 1900) 57 S. W. 129. The Maryland and Tennessee cases hold that such right cannot be assigned. The same view is taken in Howland *v.* Roosevelt, 5 N. Y. Suppl. 75.

20. *California.*— Civ. Code, § 992.

Massachusetts.— Lawrence *v.* Hull, 169 Mass. 250, 47 N. E. 1001, applying Pub. St. c. 76, §§ 6, 7.

Michigan.— Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.

New York.— Morgan *v.* Schuyler, 79 N. Y. 490, 35 Am. Rep. 543; Blumenthal *v.* Strauss, 53 Hun 501, 6 N. Y. Suppl. 393, 23 Abb. N. Cas. 339. In Read *v.* Mackay, 47 Misc. 435, 95 N. Y. Suppl. 935, it was held, upon the peculiar facts of the case, that the firm-name could not be sold as an asset of the good-will of the business. In Merry *v.* Hoopes, 111 N. Y. 415, 18 N. E. 714, Steinfeld *v.* National Shirt Waist Co., 99 N. Y. App. Div. 286, 90 N. Y. Suppl. 964, and Adams *v.* Adams, 7 Abb. N. Cas. 292, it is held that the purchaser of the partnership business acquires the right to the use of the firm-name, on the ground that such right is a part of the firm assets.

Wisconsin.— Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

See 38 Cent. Dig. tit. "Partnership," § 476.

21. Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; *In re* Fraser, [1892] 2 Q. B. 633, 67 L. T. Rep. N. S. 401, 9 Morr. Bankr. Cas. 256; Burchell *v.* Wilde, [1900] 1 Ch. 551, 69 L. J. Ch. 314, 82 L. T. Rep. N. S. 576, 48 Wkly. Rep. 491; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Bryce *v.* Davidson, 25 U. C. Q. B. 371.

22. Rogers *v.* Taintor, 97 Mass. 219; Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Slater *v.* Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]. See, generally, Trade-Marks and Trade-Names.

23. Lawrence *v.* Hull, 169 Mass. 250, 47 N. E. 1001; Smith *v.* Cooper, 5 Abb. N. Cas. (N. Y.) 274; Bininger *v.* Clark, 10 Abb. Pr. N. S. (N. Y.) 264; Peterson *v.* Humphrey, 4 Abb. Pr. (N. Y.) 394; Lathrop *v.* Lathrop, 47 How. Pr. (N. Y.) 532 (injunction refused on the ground that plaintiff had an adequate remedy at law); McGowan Bros. Pump, etc., Co. *v.* McGowan, 22 Ohio St. 370 [*affirming* 2 Cinc. Super. Ct. 313]; Weisr *v.* Mohlenhoff, 3 Ohio Dec. (Reprint) 242, 5 Wkly. L. Gaz. 56; Gray *v.* Smith, 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. Rep. N. S. 335, 38 Wkly. Rep. 310.

24. See also Good-Will, 20 Cyc. 1275.

25. Cal. Civ. Code, § 992; Mont. Civ. Code, § 1371; N. D. Civ. Code, § 3486.

26. People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126; Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

27. Cruttwell *v.* Lye, 17 Ves. Jr. 335, 11 Rev. Rep. 98, 34 Eng. Reprint 129.

the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a designating name for the product, and probably many other circumstances, might be mentioned as illustrative."[28] The good-will of a business is property, taxable and salable as such.[29] It passes to the purchasing partner or partners, upon the retirement of a member, when the contract expressly includes it;[30] and even though not mentioned in terms, it passes upon a sale of the retiring partner's interest in the entire property and business of the firm,[31] unless there is a statute to the contrary,[32] or unless there is something in the circumstances which shows that it was not intended so to pass.[33]

6. Competition of Retiring Partner With New Firm. Even though the retiring partner has sold his interest in the partnership good-will to the new firm, he is not bound to retire from this line of business. Indeed, formerly a contract on his part to so retire would have been held void on the ground of public policy.[34] Although such a contract will now be enforced,[35] if the purchaser has duly performed his obligations thereunder,[36] the retiring partner who has not thus bound himself may set up a competing business next door so long as he does not mislead

28. Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473. Similar judicial descriptions of the term will be found in People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126; Trego *v.* Hunt, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. N. S. 514, 44 Wkly. Rep. 225; Churton *v.* Douglass, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385. See also White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862. And see Good-Will, 20 Cyc. 1275.

29. *California.*— Civ. Code, § 993; Bell *v.* Ellis, 33 Cal. 620.

Kentucky.— Whitney *v.* Whitney, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465, holding that the good-will of a firm of insurance agents constitutes an asset which may be sold and conveyed to a purchaser.

Missouri.— Cassidy *v.* Metcalf, 1 Mo. App. 593, holding that the good-will is indivisible and must be sold as an entirety.

Montana.— Civ. Code, § 1372.

Nebraska.— Sheppard *v.* Boggs, 9 Nebr. 257, 2 N. W. 370, where the good-will of a firm of fire insurance agents was held to be worth nine hundred and one dollars and thirty-six cents.

New York.— People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126.

England.— Hill *v.* Fearis, [1905] 1 Ch. 466, 74 L. J. Ch. 237, 21 T. L. R. 187, 53 Wkly. Rep. 457; Burchell *v.* Wilde, [1900] 1 Ch. 551, 69 L. J. Ch. 314, 82 L. T. Rep. N. S. 576, 48 Wkly. Rep. 491; Potter *v.* Inland Revenue, 10 Exch. 147, 18 Jur. 778, 23 L. J. Exch. 345, 2 Wkly. Rep. 561, where the good-will was valued at £20,000, and liable to internal revenue duty.

See also Good-Will, 20 Cyc. 1276, 1277.

30. Warfield *v.* Booth, 33 Md. 63; Dwight *v.* Hamilton, 113 Mass. 175; Burckhardt *v.* Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842 [*reversing* 8 Ohio Dec. (Reprint) 496, 8 Cinc. L. Bul. 253]; Burkhardt *v.* Burkhardt, 5 Ohio Dec. (Reprint) 185, 3 Am. L. Rec. 418 [*reversed* on other grounds in 36 Ohio St. 261]; Townsend *v.* Jarman, [1900] 2 Ch. 698, 69 L. J. Ch. 823, 83 L. T. Rep. N. S. 366, 49 Wkly. Rep. 158; Gillingham *v.* Beddow, [1900] 2 Ch. 242, 69 L. J. Ch. 527, 82 L. T. Rep. N. S. 791, 64 J. P. 617. See also Good-Will, 20 Cyc. 1277.

31. Steinfeld *v.* National Shirt Waist Co., 99 N. Y. App. Div. 286, 90 N. Y. Suppl. 964; Kellogg *v.* Totten, 16 Abb. Pr. (N. Y.) 35; Brass, etc., Works Co. *v.* Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Fite *v.* Dorman, (Tenn. 1900) 57 S. W. 129; Jennings *v.* Jennings, [1898] 1 Ch. 378, 67 L. J. Ch. 190, 77 L. T. Rep. N. S. 786, 46 Wkly. Rep. 344. See Good-Will, 20 Cyc. 1278, 1279.

32. See Good-Will, 20 Cyc. 1278.

33. Webster *v.* Webster, 180 Mass. 310, 62 N. E. 383; McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107.

34. Trego *v.* Hunt, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. N. S. 514, 44 Wkly. Rep. 225. See Good-Will, 20 Cyc. 1279.

35. Watson *v.* Ross, 40 Ill. App. 188; Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 354; Stofflet *v.* Stofflet, 160 Pa. St. 529, 28 Atl. 857; Boadham *v.* Williams, 83 L. T. Rep. N. S. 141; Harrison *v.* Gardner, 2 Madd. 198, 56 Eng. Reprint 308; Williams *v.* Williams, 2 Swanst. 253, 36 Eng. Reprint 612, 1 Wils. Ch. 173 note, 37 Eng. Reprint 202. See Good-Will, 20 Cyc. 1279, 1280. Where on the dissolution of a law firm one of the members retains the office and firm-name, and it is stipulated that all pending cases are to remain under the charge of one member, "subject to the right of the clients," the other member will be enjoined from soliciting the clients to place the cases in his hands. Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794. Such contracts are strictly construed against the purchaser (Garrison *v.* Nute, 87 Ill. 215; Armstrong *v.* Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136), and they do not inure to his transferee (Bagby, etc., Co. *v.* Rivers, 87 Md. 400, 40 Atl. 171, 67 Am. St. Rep. 357, 40 L. R. A. 632).

36. Hollis *v.* Shaffer, 38 Kan. 492, 17 Pac. 86.

customers into the belief that he is carrying on business as the successor of the old firm.[37] In some states he may even solicit the patronage of the customers of the old firm;[38] but in other states and in England he may not do this, the courts declaring that it is not an honest thing to pocket the prize and then to recapture the subject of the sale.[39]

7. Interest of Retiring Partner in Firm Assets. Upon an absolute and executed sale of the retiring partner's interest in the firm, he ceases to have any property interest in its assets.[40] But if the sale is conditional upon the purchaser's performance of some act, such as paying the seller for the goods, or securing payment, or paying the creditors of the firm, the retiring partner retains a lien on the assets, which is available to unpaid firm creditors.[41]

8. Liabilities of Retiring Partner For Obligations of New Firm. Obligations resulting from contracts entered into before a partner's retirement are binding upon him, even though such obligations are not consummated until after his retirement, and although as between himself and the new firm the latter has undertaken to discharge them.[42] The same is true of obligations incurred after

37. *Connecticut.*—Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791.
Illinois.— Garrison *v.* Nute, 87 Ill. 215.
Maryland.—Armstrong *v.* Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136.
Massachusetts.— Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601.
Michigan.— Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.
New York.— White *v.* Jones, 1 Abb. Pr. N. S. 328.
Ohio.— Burkhardt *v.* Burkhardt, 5 Ohio Dec. (Reprint) 185, 3 Am. L. Rec. 418 [*reversed* on other grounds in 36 Ohio St. 261].
Pennsylvania.— White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862.
England.— Trego *v.* Hunt, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. N. S. 514, 44 Wkly. Rep. 225; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385.
See 38 Cent. Dig. tit. "Partnership," § 477½. And see Good-Will, 20 Cyc. 1279.

38. Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Ward *v.* Ward, 15 N. Y. Suppl. 913. In Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794, there is a *dictum* to this effect; but in Hutchinson *v.* Nay, 187 Mass. 262, 72 N. E. 974, 105 Am. St. Rep. 390, 68 L. R. A. 186, and Webster *v.* Webster, 180 Mass. 310, 62 N. E. 383, the court declines to assert this doctrine. See also Good-Will, 20 Cyc. 1279.

39. Burkhardt *v.* Burkhardt, 5 Ohio Dec. (Reprint) 185, 3 Am. L. Rec. 418 [*reversed* on other grounds in 36 Ohio St. 261]; Gillingham *v.* Beddow, [1900] 2 Ch. 242, 82 L. T. Rep. N. S. 791, 64 J. P. 617, 69 L. J. Ch. 527; Jennings *v.* Jennings, [1898] 1 Ch. 378, 67 L. J. Ch. 190, 77 L. T. Rep. N. S. 786, 46 Wkly. Rep. 344; Trego *v.* Hunt, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. N. S. 514, 44 Wkly. Rep. 225; Mogford *v.* Courtenay, 45 L. T. Rep. N. S. 303, 29 Wkly. Rep. 864. See also Good-Will, 20 Cyc. 1279, 1280.
Expelled partner.— But in Dawson *v.* Beeson, 22 Ch. D. 504, 52 L. J. Ch. 563, 48 L. T. Rep. N. S. 407, 31 Wkly. Rep. 537 [*following* Walker *v.* Mottram, 19 Ch. D. 355, 51 L. J. Ch. 108, 45 L. T. Rep. N. S. 659, 30 Wkly. Rep. 165], it was held that a partner who had been expelled from a firm could solicit old customers for a competitive business, in which he afterward engaged.

40. Gilmour *v.* Kerr, (Ky. 1896) 36 S. W. 554; Hyde *v.* Easter, 4 Md. Ch. 80; Mafflyn *v.* Hathaway, 106 Mass. 414; *Ex p.* Clarkson, 4 Deac. & C. 56, 2 Mont. & A. 4; Grace *v.* Smith, W. Bl. 998.

41. *Michigan.*— Olson *v.* Morrison, 29 Mich. 395.
New Jersey.— Fitzgerald *v.* Christl, 20 N. J. Eq. 90.
New York.— Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Matter of Dawson, 59 Hun 239, 12 N. Y. Suppl. 781.
Vermont.— Kellogg *v.* Fox, 45 Vt. 348, holding that the retiring partner could not maintain trover against his conditional purchaser, because the latter's sale of the firm assets was made with the consent of the continuing partner.
Wisconsin.— Reddington *v.* Franey, 124 Wis. 590, 102 N. W. 1065; Thayer *v.* Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549.
England.— *In re* Kemptner, L. R. 8 Eq. 286, 21 L. T. Rep. N. S. 223, 17 Wkly. Rep. 818; *Ex p.* Wilson, Buck 48.

42. *Kentucky.*— Hatchell *v.* Chew, 58 S. W. 816, 22 Ky. L. Rep. 738.
Louisiana.— McDonald *v.* Millaudon, 5 La. 403.
Maryland.— Bernard *v.* Torrance, 5 Gill & J. 383.
Michigan.— Sample *v.* Pickard, 74 Mich. 416, 42 N. W. 54; Goodspeed *v.* South Bend Chilled Plow Co., 45 Mich. 237, 7 N. W. 810.
Missouri.— Tutt *v.* Cloney, 62 Mo. 116.
New York.— Briggs *v.* Briggs, 15 N. Y. 471 [*affirming* 20 Barb. 477]; Merrill *v.* Blanchard, 7 N. Y. App. Div. 167, 40 N. Y. Suppl. 48.
England.— Partn. Act (1890), § 17 (2); Court *v.* Berlin, [1897] 2 Q. B. 396, 66 L. J. Q. B. 714, 77 L. T. Rep. N. S. 293, 46 Wkly. Rep. 55; Dobbin *v.* Foster, 1 C. & K. 323, 47

his retirement, and before notice thereof has been duly given,[43] unless he is a dormant partner.[44] But for liabilities incurred by the new firm after his retirement, which has been duly notified, he is not responsible.[45] Notice, by publication, to persons who had no dealings with the old firm is sufficient; but actual notice or its equivalent must be shown to have been given to persons who have had business with the firm.[46]

E. C. L. 323; Oakford *v.* European, etc., Steam Shipping Co., 1 Hem. & M. 182, 9 L. T. Rep. N. S. 15, 71 Eng. Reprint 80; Hoby *v.* Roebuck, 2 Marsh. 433, 7 Taunt. 157, 17 Rev. Rep. 477, 2 E. C. L. 305.

See 38 Cent. Dig. tit. "Partnership," § 479½.

Renewal of lease.— Where there was a lease to defendants, a mercantile firm, for three years, with the privilege of renewal, and during the original term two of the partners retired, and the third formed a new firm with another person, and they continued in possession of the premises, paying rent according to the conditions of the lease, for the remainder of the term, and one year afterward, it was held that such occupation did not renew or continue a tenancy of defendants after the expiration of the original term. James *v.* Pope, 19 N. Y. 324.

43. *Arkansas.*— Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667.

Illinois.— Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Ellis *v.* Bronson, 40 Ill. 455; Sprague *v.* Keltie Stone Co., 123 Ill. App. 616.

Maryland.— Rose *v.* Coffield, 53 Md. 18, 36 Am. Rep. 389.

Missouri.— Pomeroy *v.* Coons, 20 Mo. 598.

New York.— Clapp *v.* Rogers, 12 N. Y. 283; Wardwell *v.* Haight, 2 Barb. 549; National Bank *v.* Norton, 1 Hill 572; Vernon *v.* Manhattan Co., 22 Wend. 183.

North Carolina.—Alexander *v.* Harkins, 120 N. C. 452, 27 S. E. 120.

Ohio.— Wilder *v.* Block, 10 Ohio Dec. (Reprint) 162, 19 Cinc. L. Bul. 105.

Virginia.— Commercial Bank *v.* Miller, 96 Va. 357, 31 S. E. 812.

United States.— Easton *v.* Wostenholm, 137 Fed. 524, 70 C. C. A. 108; Neal *v.* Smith, 116 Fed. 20, 54 C. C. A. 226.

England.— Scarf *v.* Jardine, 7 App. Cas. 345, 51 L. J. Q. B. 612, 47 L. T. Rep. N. S. 258, 30 Wkly. Rep. 893; Carter *v.* Whalley, 1 B. & Ad. 11, 8 L. J. K. B. O. S. 340, 20 E. C. L. 377; Hart *v.* Alexander, 7 C. P. 746, 6 L. J. Exch. 129, M. & H. 63, 2 M. & W. 484, 32 E. C. L. 851; Parkins *v.* Carruthers, 3 Esp. 248, 6 Rev. Rep. 828.

Canada.— Reid *v.* Coleman, 19 Ont. 93.

See *infra*, IX, B, 6.

44. *Illinois.*— Ellis *v.* Bronson, 40 Ill. 455.

New York.— Davis *v.* Allen, 3 N. Y. 168.

Ohio.— McFarland *v.* McHugh, 12 Ohio Cir. Ct. 485, 5 Ohio Cir. Dec. 546, holding that a dormant partner who after his withdrawal from the firm does not hold himself out as a member thereof is not liable to one dealing with the firm after his withdrawal, although no notice of the withdrawal is published.

Vermont.— Benton *v.* Chamberlain, 23 Vt. 711.

Virginia.— Commercial Bank *v.* Miller, 96 Va. 357, 31 S. E. 812.

England.— Carter *v.* Whalley, 1 B. & Ad. 11, 8 L. J. K. B. O. S. 340, 20 E. C. L. 377.

See *infra*, IX, B, 6, b.

45. *Arkansas.*— Dixie Cotton Oil Co. *v.* Morris, 79 Ark. 113, 94 S. W. 933, holding that where, after the retirement of a member of a firm, the name of the firm was changed, and plaintiff's manager, who was also a member of the firm, and plaintiff's president were informed of the change, the retiring member was not liable for subsequent advances made by plaintiff to the firm.

California.— Smith *v.* Kansas St. Imp. Co., 120 Cal. 517, 52 Pac. 811, 53 Pac. 167.

Georgia.— Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573, nor does it matter that the new liability is incurred for the purpose of paying debts of the old firm.

Illinois.— Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Ellis *v.* Bronson, 40 Ill. 455.

Louisiana.—Violett *v.* Fairchild, 6 La. Ann. 193.

Minnesota.— Porter *v.* Baxter, 71 Minn. 195, 73 N. W. 844.

Missouri.— Henry *v.* Mahone, 23 Mo. App. 83.

New York.— Pringle *v.* Leverick, 97 N. Y. 181, 49 Am. Rep. 522; Ferrari *v.* Saitta, 82 Hun 613, 31 N. Y. Suppl. 14.

Pennsylvania.— Hartley *v.* Kirlin, 45 Pa. St. 49; Cooley *v.* Farmers' Co-operative Bank, 18 Pa. Co. Ct. 366.

South Carolina.— Mathews *v.* Colburn, 1 Strobh. 258.

Virginia.— Commercial Bank *v.* Miller, 96 Va. 357, 31 S. E. 812.

United States.— Penn Nat. Bank *v.* Furness, 114 U. S. 376, 5 S. Ct. 900, 29 L. ed. 168.

England.— Hart *v.* Alexander, 7 C. & P. 746, 6 L. J. Exch. 129, M. & H. 63, 2 M. & W. 484, 32 E. C. L. 851; McIver *v.* Humble, 16 East 169.

See 38 Cent. Dig. tit. "Partnership," §§ 479½, 480.

Capital left by retiring partner as a loan.— In Adams *v.* Albert, 155 N. Y. 356, 49 N. E. 929, 63 Am. St. Rep. 675 [*reversing* 87 Hun 471, 34 N. Y. Suppl. 328], it was held that a retiring partner who had left a part of his capital with the new firm as a loan had so left it at the risk of the business and could not be permitted as against plaintiff, another creditor, to assume the position of a preferred creditor.

46. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Sprague *v.* Keltie Stone

B. Assets of Old Firm — 1. Rights of Retiring Partner. A partner who retires from a firm without selling his interest therein is entitled to his share of the firm assets,[47] including the profits realized from the business after the firm's dissolution.[48] After an absolute sale of his interest, he becomes, as we have seen,[49] a creditor of the purchaser,[50] and the assets are available to the purchaser's creditors,[51] the selling-out partner having no lien on the old firm assets.[52] But if the sale is made subject to the partnership indebtedness, or upon terms from which the court can imply an understanding that the purchaser took the assets subject to a trust for the benefit of the retiring partner and the firm creditors, it is generally held that the retiring partner retains a lien by which the property can be secured for himself or unpaid firm creditors.[53]

Co., 123 Ill. App. 616. See also Rose *v.* Coffield, 53 Md. 18, 36 Am. Rep. 389; Clapp *v.* Rogers, 12 N. Y. 283; Wardwell *v.* Haight, 2 Barb. (N. Y.) 549; National Bank *v.* Norton, 1 Hill (N. Y.) 572; and other cases cited in the preceding notes.

Proof of the mailing of a printed circular, containing notice of the withdrawal of a partner, addressed to a party who had prior dealings with the firm, is *prima facie* evidence that such person received the same in due course of mail, and, without rebuttal, is sufficient to charge such person with notice of that fact. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

Notice of dissolution see *infra*, IX, B, 6.

47. Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54 (hence the retiring partner was allowed to take a part of the firm's real estate as security for the firm's indebtedness to him); Watson *v.* Itasca First Nat. Bank, 95 Tex. 351, 67 S. W. 314 [*affirming* (Civ. App. 1902) 66 S. W. 232]; *In re* Langmead, 20 Beav. 20, 1 Jur. N. S. 198, 24 L. J. Ch. 237, 3 Wkly. Rep. 260, 52 Eng. Reprint 509 [*affirmed* in 7 De G. M. & G. 353, 1 Jur. N. S. 1058, 24 L. J. Ch. 589, 3 Wkly. Rep. 602, 56 Eng. Ch. 272, 44 Eng. Reprint 138]; Fisher *v.* McPhee, 28 Nova Scotia 523.

Special agreement.— Where a partnership agreement in the business of cutting and selling ice was made for three years, and provided that, at the end of that time, or on the sooner determination of the agreement, one of the partners was to receive from the others a certain sum for all his interest in the "icehouse, tools and property" of the firm, it was held that the interest which he was to convey was his interest in the fixed property or plant and did not include the ice or the unsettled partnership accounts; and also that the retiring partner was still liable to share with the other partners, under the agreement, in the profits or losses of the business. Schuyler *v.* Cullen, 120 N. Y. App. Div. 637, 105 N. Y. Suppl. 544.

Interest on share.— Where, on the expiration of a partnership, all but one of the partners took over all its property, formed a new firm and continued the business, it was held that the retiring partner was, on an accounting, entitled to interest from the time of the dissolution on his share of the property of the firm. Blun *v.* Mayer, 113 N. Y. App. Div. 247, 99 N. Y. Suppl. 25.

48. Varnum *v.* Winslow, 106 Iowa 287, 76 N. W. 708; Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64, holding also that, if the continuing partners refuse to pay over to him his share of the assets, they assume a fiduciary relation to him in the care and management of his share.

49. See *supra*, VI, A, 7.

50. Moses *v.* Powers, 19 Pa. Super. Ct. 393; Huffman *v.* Huffman, 63 S. C. 1, 40 S. E. 963; Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634 (held entitled to the appointment of a receiver of the purchasing firm to preserve the firm assets from waste and misapplication); R. F. Scott Grocer Co. *v.* Carter, (Tex. Civ. App. 1896) 34 S. W. 375.

51. Baca *v.* Ramos, 10 La. 417, 29 Am. Dec. 463; Steffee *v.* Kerr, 2 Woodw. (Pa.) 175; Vetterlein *v.* Barnes, 6 Fed. 693.

52. *Alabama.*— Coffin *v.* McCullough, 30 Ala. 107.

Illinois.— Parker *v.* Merritt, 105 Ill. 293; Goembel *v.* Arnett, 100 Ill. 34.

Indiana.— Barkley *v.* Tapp, 87 Ind. 25.

Maryland.— Griffith *v.* Buck, 13 Md. 102.

Mississippi.— Andrews *v.* Mann, 31 Miss. 322; Commercial Bank *v.* Lewis, 13 Sm. & M. 226.

New Jersey.— Alpaugh *v.* Savage, (Ch. 1890) 19 Atl. 380; Vosper *v.* Kramer, 31 N. J. Eq. 420.

New York.— Cory *v.* Long, 2 Sweeny 491.

North Carolina.— Latham *v.* Skinner, 62 N. C. 292.

Ohio.— Seibricht *v.* Rohrkasse, 3 Ohio Dec. (Reprint) 43, 2 Wkly. L. Gaz. 257. See also McGregor *v.* Ellis, 2 Disn. 286.

Tennessee.— Croone *v.* Bivens, 2 Head 339.

Texas.— Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861.

United States.— Tracy *v.* Walker, 24 Fed. Cas. No. 14,129, 1 Flipp. 41.

See 38 Cent. Dig. tit. "Partnership," § 482.

53. *Alabama.*— McGown *v.* Sprague, 23 Ala. 524.

Illinois.— Parker *v.* Merritt, 105 Ill. 293, where it is said that where a stock of goods equal to the firm indebtedness is left with one who continues the business with which to pay the debts, he is not a purchaser so as to subject the goods to the payment of his individual debts. He is a trustee and the trust can be enforced in equity by the retiring partner for the benefit of firm creditors and against subsequent purchasers or execution creditors with notice of equities of retiring partner.

2. Rights of Continuing and Incoming Partners or New Firm. These depend upon the terms of the transaction, by which the outgoing partner retires. If he dissolves the firm by selling his interest to a third person, the continuing partner has power to wind up the firm's affairs, and in so doing to dispose of the firm's assets.[54] If he sells his interest to those who organize and conduct a new firm, or a continuation of the old one, the transferees acquire all the rights possessed by the original firm.[55] But where a firm dissolves by a change in its membership and a new firm is formed, the property interests of the old firm do not become those of the new firm, without a clear agreement to that effect,[56] or acts from which such agreement can be presumed.[57] One who buys the interest of a retiring partner in firm property and assumes his liabilities does not hold the property in trust for the creditors of the firm so as to prevent him from making a deed of trust thereof for the benefit of such creditors with preferences.[58]

3. Debts Due by Partners to Firm or Copartners. The indebtedness of a retiring partner to his firm or his copartners continues to belong to the firm, or to the partners, as the case may be, and does not pass to a new partnership without the agreement of all the parties concerned.[59] Nor is his indebtedness affected by his sale of his interest to one of several copartners or to a third person.[60] If, however, he sells to his copartners his interest in the firm assets and they agree to pay the firm debts, his indebtedness to the firm is extinguished, for his interest or share in the business is only the balance which would come to him after his indebtedness to the firm was satisfied.[61]

Kentucky.— Hatchell *v.* Chew, 58 S. W. 816, 22 Ky. L. Rep. 738.

Michigan.— Topliff *v.* Vail, Harr. 340.

New York.— Williams *v.* Bush, 1 Hill 623; Rohb *v.* Stevens, Clarke 191.

Pennsylvania.— Brenton *v.* Thompson, 20 Leg. Int. 133.

Texas.— White *v.* Parish, 20 Tex. 688, 73 Am. Dec. 204.

England.— *Ex p.* Wood, 10 Ch. D. 554, 39 L. T. Rep. N. S. 646, 27 Wkly. Rep. 401; *Ex p.* Clarkson, 4 Deac. & C. 56, 67, 2 Mont. & A. 4, where it is said: "[The court] has often struggled very hard to find circumstances which might operate to the benefit of creditors."

Canada.— Stevenson *v.* Sexsmith, 21 Grant Ch. (U. C.) 355; McGregor *v.* Anderson, 6 Grant Ch. (U. C.) 354, holding that where a retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by the partner so retiring out of the one fourth of the profits to be derived from the business, the retiring partner had a lien on such fourth part of the profits and a corresponding portion of the capital stock and assets of the partnership, and was entitled to an account of the partnership dealings.

See 38 Cent. Dig. tit. "Partnership," § 482.

54. Lamb *v.* Hall, 147 Cal. 44, 81 Pac. 288; Pease *v.* Dawson, 197 Ill. 340, 64 N. E. 366 [*affirming* 97 Ill. App. 620]; Clark *v.* Wilson, 19 Pa. St. 414; Madison First Nat. Bank *v.* Hackett, 61 Wis. 335, 21 N. W. 280.

55. *Arkansas.*— Rudy *v.* Austin, 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85.

Illinois.— Robbins *v.* Butler, 24 Ill. 387.

Indiana.— Rand *v.* Wright, 141 Ind. 226, 39 N. E. 447.

Maine.— Burnell *v.* Weld, 59 Me. 423.

Minnesota.— Pease *v.* Rush, 2 Minn. 107.

New York.— St. Nicholas Bank *v.* De Rivera, 3 N. Y. Suppl. 666; Gast *v.* Johnston, 3 N. Y. St. 258.

Pennsylvania.— Clark *v.* McClelland, 2 Grant 31.

United States.— Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720.

England.— *Ex p.* Alexander, 1 Glyn & J. 409, 2 Glyn & J. 275, 2 L. J. Ch. O. S. 159; *Ex p.* Peake, 1 Madd. 346, 16 Rev. Rep. 233, 56 Eng. Reprint 128.

See 38 Cent. Dig. tit. "Partnership," § 482½.

56. *Connecticut.*— Adams *v.* Willimantic Linen Co., 46 Conn. 320.

District of Columbia.— Grafton *v.* Paine, 7 App. Cas. 255.

Illinois.— Moshier *v.* Kitchell, 87 Ill. 18.

Michigan.— Tobias *v.* Commercial Sav. Bank, 136 Mich. 135, 98 N. W. 984.

New Jersey.— Forst *v.* Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554.

57. New York Commercial Co. *v.* Francis, 101 Fed. 16, 41 C. C. A. 167.

58. Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401.

59. McCall *v.* Moss, 112 Ill. 493; Rosenstiel *v.* Gray, 112 Ill. 282; Tomlinson *v.* Hammond, 8 Iowa 40; Learned *v.* Ayres, 41 Mich. 677, 3 N. W. 178; Akhurst *v.* Jackson, 1 Swanst. 85, 36 Eng. Reprint 308, 1 Wils. Ch. 47, 37 Eng. Reprint 22.

60. Conwell *v.* Sandidge, 8 Dana (Ky.) 273; Warren *v.* Peabody, 27 Nebr. 224, 42 N. W. 1050; Kendrick *v.* Tarbell, 27 Vt. 512. In Conwell *v.* Sandidge, 5 Dana (Ky.) 210, however, the purchaser was held to have taken upon himself the liability of his vendor.

61. *California.*— Painter *v.* Painter, 68 Cal. 395, 9 Pac. 450.

C. Obligations of Old Firm — 1. Retiring Partner's Liabilities. For obligations of the firm, incurred during his membership, a partner remains liable after his retirement, even though his copartners have contracted with him to discharge such obligation,[62] unless the creditor agrees to accept the liability of the continuing partners or new firm,[63] or unless he is estopped by his conduct or laches from pursuing the retired partner.[64] Even for firm obligations incurred after his retirement he will be liable, as has been seen, unless he was a dormant partner, or unless he has given due notice of his withdrawal.[65]

2. Retiring Partner as Surety For Firm Debts. When a partnership is dissolved by the retirement of one of the partners, and the others agree with him to assume the firm debts, all courts admit that as between themselves the retiring partner becomes a surety for the debts.[66] It is also universally agreed that such an agreement cannot affect the rights of firm creditors to proceed against all the old partners in the collection of their claims against the firm.[67] But the courts differ on the question whether the firm creditors who have notice of such agreement are bound thereafter to observe the relationship of principal and surety thus instituted between the continuing and retiring partners. The weight of authority both in England and in this country is in favor of compelling them to observe it.[68]

Indiana.— Over *v.* Hetherington, 66 Ind. 365; Hasselman *v.* Douglass, 52 Ind. 252.

Iowa.— Mueller *v.* Sutter, 96 Iowa 80, 64 N. W. 665.

Louisiana.— Leeds *v.* Holmes, 6 Mart. N. S. 655.

Nebraska.— Sweet *v.* McConnel, 2 Nebr. 1.

Virginia.— Linke *v.* Fleming, 25 Gratt. 704.

West Virginia.— Hobbs *v.* Wilson, 1 W. Va. 50.

See 38 Cent. Dig. tit. "Partnership," § 483.

Contra.— Jones *v.* Bliss, 45 Ill. 143; Coffing *v.* Taylor, 16 Ill. 457.

There is no presumption that a debt evidenced by notes given the firm by an outgoing partner as collateral security for a loan made by the firm to a third person is settled by the contract of transfer of his interest to the other partner. Clark *v.* Carr, 45 Ill. App. 469.

62. *Alabama.*— Brannum *v.* Wertheimer-Swartz Shoe Co., 117 Ala. 601, 23 So. 639; Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002.

Georgia.— Silas *v.* Adams, 92 Ga. 350, 17 S. E. 280.

Illinois.— Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365]; Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936.

Indian Territory.— Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486.

Iowa.— Byers *v.* Hickman Grain Co., 112 Iowa 451, 84 N. W. 500.

Kansas.— Noyes *v.* Nichols, 63 Kan. 453, 64 Pac. 646.

Louisiana.—Violett *v.* Fairchild, 6 La. Ann. 193.

Mississippi.— Norman *v.* Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419.

Missouri.— Dean *v.* McFaul, 23 Mo. 76; Holden *v.* McFaul, 21 Mo. 215.

Montana.— National Cash Register Co. *v.* Brown, 19 Mont. 200, 47 Pac. 995, 61 Am. St. Rep. 493, 37 L. R. A. 515.

Nebraska.— Grotte *v.* Weil, 62 Nebr. 478, 87 N. W. 173.

New York.— Dunn *v.* Arnold, 60 Hun 576, 14 N. Y. Suppl. 670; Bronx Metal Bed Co. *v.* Wallerstein, 84 N. Y. Suppl. 924.

Ohio.— Little *v.* Quinn, 1 Cinc. Super. Ct. 379.

Texas.— Kellogg *v.* Cayce, 84 Tex. 213, 19 S. W. 388.

Vermont.— Cahoon *v.* Hobart, 38 Vt. 244.

England.— Partn. Act (1890), § 17 (2); Court *v.* Berlin, [1897] 2 Q. B. 396, 66 L. J. Q. B. 714, 77 L. T. Rep. N. S. 293, 46 Wkly. Rep. 55; Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069; David *v.* Ellice, 5 B. & C. 196, 11 E. C. L. 426, 1 C. & P. 368, 12 E. C. L. 219, 7 D. & R. 690, 4 L. J. K. B. O. S. 125, 29 Rev. Rep. 216; Oakford *v.* Europa, etc., Steam Shipping Co., 1 Hem. & M. 182, 9 L. T. Rep. N. S. 15, 71 Eng. Reprint 80; Mills *v.* Boyd, 6 Jur. 943; Heath *v.* Percival, 1 P. Wms. 683, 1 Str. 403, 24 Eng. Reprint 570.

See 38 Cent. Dig. tit. "Partnership," § 484 *et seq.*

63. see *infra*, VII, C, 6.

64. Regester *v.* Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. (N. Y.) 107.

65. See *supra*, VII, A, 8.

66. Burnside *v.* Fetzner, 63 Mo. 107; Dean *v.* Collins, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. N. S. 49; Barlow *v.* Stearns (Tex. Civ. App. 1906) 98 S. W. 455; Johnson *v.* Young, 20 W. Va. 614; and cases cited in the following notes. See also *infra*, IX, C, 6, f.

67. Smart *v.* Breckinridge Bank, 90 S. W. 5, 28 Ky. L. Rep. 646, 4 L. R. A. N. S. 800; Smith, etc., Co. *v.* Schmidt, 142 Mich. 1, 105 N. W. 39.

68. *Georgia.*— Preston *v.* Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124.

New York.— Sizer *v.* Ray, 87 N. Y. 220; Palmer *v.* Purdy, 83 N. Y. 144; Colgrove *v.* Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Morss *v.* Gleason, 64 N. Y. 204 [*affirming* 4 Thomps. & C. 274]; Dodd *v.* Dreyfus, 17 Hun 600; Thurber *v.* Corbin, 51 Barb. 215; McLaughlin *v.* Bieber, 56 N. Y. Suppl. 490.

But a number of courts, in very carefully considered decisions, have reached the opposite conclusion.[69]

3. INDEMNITY OF RETIRING PARTNER AGAINST FIRM DEBTS. A partner who retires from a firm often takes from the continuing partners a contract indemnifying him against firm debts.[70] Such contracts do not ordinarily bind the obligors to

Oregon.— Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033.

Wisconsin.— Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891.

England.— Rouse *v.* Bradford Banking Co., [1894] A. C. 586, 63 L. J. Ch. 890, 71 L. T. Rep. N. S. 522, 6 Reports 349, 43 Wkly. Rep. 78; Oakeley *v.* Pasheller, 10 Bligh N. S. 548, 6 Eng. Reprint 202, 4 Cl. & F. 207, 7 Eng. Reprint 80. *Contra,* Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069.

Canada.— Allison *v.* McDonald, 23 Can. Sup. Ct. 635 [*affirming* 20 Ont. App. 695 (*reversing* 23 Ont. 288)]; Harper *v.* Knowlson, 2 Grant Err. & App. (U. C.) 253; Bailey *v.* Griffith, 40 U. C. Q. B. 418. *Contra,* Birkett *v.* McGuire, 7 Ont. App. 53 [*reversing* 31 U. C. C. P. 430].

See 38 Cent. Dig. tit. "Partnership," § 487. And see *infra,* IX, C, 6, f.

Discharge by extension of time.— Where, after the dissolution of a firm, the continuing partner, having agreed to pay the firm debts, requested an extension from plaintiff, to which plaintiff agreed, without consideration, but the continuing partner's agreement was never fulfilled, it was held that there was no such extension of time as to discharge the retiring partner from liability. Barlow *v.* Stearns, (Tex. Civ. App. 1906) 98 S. W. 455.

69. *Alabama.*— Brannum *v.* Wertheimer-Swartz Shoe Co., 117 Ala. 601, 23 So. 639; Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002; Hall *v.* Jones, 56 Ala. 493.

Missouri.— Ridgley *v.* Robertson, 67 Mo. App. 45.

North Dakota.— Dean *v.* Collins, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. N. S. 49.

Ohio.— Rawson *v.* Taylor, 30 Ohio St. 389, 27 Am. Rep. 464.

Texas.— Shapleigh Hardware Co. *v.* Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783. *Contra,* Gourley *v.* Tyler, (Civ. App. 1891) 15 S. W. 731. And see Barlow *v.* Stearns, (Civ. App. 1906) 98 S. W. 455.

West Virginia.— McCoy *v.* Jack, 47 W. Va. 201, 34 S. E. 991; Barnes *v.* Boyers, 34 W. Va. 303, 12 S. E. 708 [*limiting* Johnson *v.* Young, 20 W. Va. 614].

70. *Alabama.*— Taliaferro *v.* Brown, 11 Ala. 702, holding that a bond executed to a retiring partner was a bond of indemnity against loss or damage and not a covenant against liability to suit.

Florida.— Griffin *v.* Orman, 9 Fla. 22, holding that where a partner has sold out to his copartner and taken a bond of indemnity as security that the latter will pay the debts of the firm according to agreement, he cannot be substituted in the place of the creditors of the old firm, to enforce their claims against such copartner, or enforce against his copartner executions obtained against himself by the creditor, or subject the partnership property sold to the latter to the payment of the debts.

Illinois.— Gage *v.* Lewis, 68 Ill. 604, holding that where one member of a firm purchases the assets and gives his copartner a bond of indemnity conditioned that he shall pay all the debts of the firm due or to become due to any and all persons whosoever, the reasonable construction is that the debts shall be paid when they become due, and as to those then overdue that he shall pay them immediately.

Maine.— Bunton *v.* Dunn, 54 Me. 152 (holding that where plaintiff sold his interest in lands belonging to a partnership to defendant, who was the other partner in the firm, and took from defendant a bond conditioned to save him harmless from all liabilities of the firm, a judgment rendered against the firm on a petition for partition of the land by a person not a member of the firm, brought before the sale of plaintiff's interest, but which judgment was rendered after the sale, is within the condition of the bond); Jepson *v.* Hall, 24 Me. 422 (holding that where a bond was given by defendants to plaintiff, conditioned to be void if defendants should pay plaintiff's part of all debts due from a company consisting of plaintiff and one of defendants, and save him harmless and indemnified from all liabilities of the company named in a certain agreement between the partners, and after the making of the agreement and before the execution of the bond defendants, as principals, and plaintiff, as surety, gave a note for one of the demands named in the agreement, the note was covered by the condition of the bond).

Michigan.— Perry *v.* Spencer, 23 Mich. 89, holding that a bond given to one of a firm upon the sale of his partnership interest, conditioned for the payment of the partnership liabilities, is satisfied by the payment of the debts to the amount of the penalty, although made through the assistance of a succeeding firm.

Pennsylvania.— Lothrop *v.* Blake, 3 Pa. St. 483.

Vermont.— Hodges *v.* Strong, 10 Vt. 247.

England.— Aubin *v.* Holt, 2 Kay & J. 66, 25 L. J. Ch. 36, 4 Wkly. Rep. 112, 69 Eng. Reprint 696; *Ex p.* Ogilvy, 2 Rose 177, 3 Ves. & B. 133, 35 Eng. Reprint 429; Wood *v.* Dodgson, 2 Rose 47; Kennedy *v.* Cassillis, 2 Swanst. 313, 36 Eng. Reprint 635; Musson *v.* May, 3 Ves. & B. 194, 35 Eng. Reprint 452.

See 38 Cent. Dig. tit. "Partnership," § 488. And see *infra,* IX, C, 6, e.

pay an indebtedness of the firm to the retiring partner;[71] nor are they available to the creditors of the firm, unless there is evidence that it was intended that they should inure to their benefit.[72] If the contract is one of indemnity only, the retiring partner must show that he has been compelled to pay firm debts or has sustained other legal harm, as a result of the obligor's breach of contract, before he can maintain an action.[73] If, however, the contract is to pay firm debts, it is broken by the obligor's failure to pay the debts upon maturity.[74] Such contracts of indemnity do not relieve the retiring partner from liability to firm creditors.[75]

4. Liabilities of Continuing Partners or New Firm. For the debts of the old firm, the continuing partners remain liable jointly with the retiring partners, and in some jurisdictions they are severally liable.[76] If, however, they organize a new firm, it is not liable for the old firm's debts, unless it assumes them, either by express agreement,[77] or by conduct.[78] But if one of its members uses its funds in paying a debt of the old firm to a creditor who is ignorant of any change in the firm, it may not be able to recover such payment,[79] although the members not assenting to this use will be entitled to recover their share of the funds from the partner misapplying them.[80]

5. Liability of Incoming Partners. One who becomes a member of an existing firm does not render himself liable for its existing obligations, unless he actually contracts for such liability,[81] or unless his conduct is such as will raise the legal

71. Lambert *v.* Griffith, 50 Mich. 286, 15 N. W. 458.

72. Campbell *v.* Lacock, 40 Pa. St. 448. Creditors are allowed in some states to take advantage of such contracts without giving the evidence mentioned in the text. Kimball *v.* Noyes, 17 Wis. 695.

73. Lothrop *v.* Blake, 3 Pa. St. 483; Sutherland *v.* Webster, 21 Ont. App. 228; Gray *v.* McMillan, 22 U. C. Q. B. 456 [*distinguishing* Mewburn *v.* Mackelcan, 19 Ont. App. 729; Leith *v.* Freeland, 24 U. C. Q. B. 132].

74. Ham *v.* Hill, 29 Mo. 275; Wilson *v.* Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477; Hood *v.* Spencer, 12 Fed. Cas. No. 6,665, 4 McLean 168; Smith *v.* Teer, 21 U. C. Q. B. 412.

75. Richards *v.* Fisher, 2 Allen (Mass.) 527; Reed *v.* Ashe, 18 N. Y. App. Div. 501, 46 N. Y. Suppl. 126; Wilmington Bank *v.* Almond, 1 Whart. (Pa.) 169. See *supra*, VII, C, 1.

76. Strong *v.* Niles, 45 Conn. 52; Wallace *v.* Hull, 28 Ga. 68. See *supra*, VI, B, 1.

77. *Arizona.*— Starr *v.* Stiles, 2 Ariz. 436, 19 Pac. 225.

Illinois.— Weil *v.* Jaeger, 174 Ill. 133, 51 N. E. 196 [*affirming* 73 Ill. App. 271]; Davis Sewing Mach. Co. *v.* Buckles, 89 Ill. 237.

Iowa.— Waller *v.* Davis, 59 Iowa 103, 12 N. W. 798.

Missouri.— Shelton *v.* Baer, 90 Mo. App. 286.

New York.— Stirn *v.* Hemken, 72 Hun 91, 25 N. Y. Suppl. 583; Matter of Ryan, 70 Hun 164, 24 N. Y. Suppl. 273.

Wisconsin.— McLinden *v.* Wentworth, 51 Wis. 170, 8 N. W. 118, 192.

England.— Craufurd *v.* Cocks, 6 Exch. 287, 20 L. J. Exch. 169.

See 38 Cent. Dig. tit. "Partnership," §§ 488, 490.

Pursuing property in hands of succeeding firm.— One who loans money to a firm which is invested in office furniture and other property by such firm, which thereafter sells its property to others, cannot pursue the property for such debt unless he has retained some lien thereon recognized by the laws of the state. Bank of Commerce *v.* Ada County Abstract Co., 11 Ida. 756, 85 Pac. 919.

Partner not innocent purchaser as against creditors.— One partner buying the interest of the other cannot be an innocent purchaser of the property as against claims against the firm, although unknown to him. Dockery *v.* Faulkner, (Tex. Civ. App. 1907) 101 S. W. 501.

78. *Alabama.*— Smith *v.* Ledyard, 49 Ala. 279.

Louisiana.— Drake *v.* Hays, 27 La. Ann. 256.

Massachusetts.— Alexander *v.* McPeck, 189 Mass. 34, 75 N. E. 88 (applying Rev. Laws, c. 90, § 4); Tay *v.* Ladd, 15 Gray 296, 77 Am. Dec. 364.

New York.— La Montagne *v.* Bank of New York Nat. Banking Assoc., 183 N. Y. 173, 76 N. E. 33, where the assets of the old firm were transferred to the new, and the latter was held liable, "at least to the extent of what was fairly and in good faith realized" from such assets.

Pennsylvania.— Fagely *v.* Bellas, 17 Pa. St. 67; Ash *v.* Werner, 12 Pa. Super. Ct. 39; Gwinn *v.* Lee, 6 Pa. Super. Ct. 646, 42 Wkly. Notes Cas. 124.

Texas.— Meyberg *v.* Steagall, 51 Tex. 351.

United States.— Edmondson *v.* Barrell, 8 Fed. Cas. No. 4,284, 2 Cranch C. C. 228.

See 38 Cent. Dig. tit. "Partnership," §§ 489, 490.

79. Newhall *v.* Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712 [*reversing* 68 Hun 1, 22 N. Y. Suppl. 828].

80. Raiguel's Appeal, 80 Pa. St. 234 [*affirming* 9 Phila. 275].

81. *Alabama.*—Humes *v.* Higman, 145 Ala.

presumption of a promise to assume the liability.[82] Nor does the purchaser of a partner's share in a firm thereby become liable for firm debts,[83] unless the partnership is a joint stock company.[84] If one enters an existing firm without specifying the terms upon which he becomes a member, it will be presumed that he accepts the terms of the original partnership articles, except as they are necessarily modified by the addition of a member.[85]

6. Novation.[86] When a creditor of an old firm validly contracts with the continuing partners, or with a firm containing a new member or members, to substitute for the obligation of the old firm the obligation of such continuing partners or new firm, we have a case of novation.[87] While a novation is not to be inferred from the mere expression of the creditor's assent to an arrangement between out-

215, 40 So. 128; Tillis *v.* Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31.

Arkansas.— Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787.

California.— San Luis Obispo First Nat. Bank *v.* Simmons, 98 Cal. 287, 33 Pac. 197.

Georgia.— Ball *v.* Mashburn, 110 Ga. 285, 34 S. E. 851; Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

Idaho.—Bank of Commerce *v.* Ada County Abstract Co., 11 Ida. 756, 85 Pac. 919.

Illinois.— Wright *v.* Brosseau, 73 Ill. 381; Karraker *v.* Eddleman, 101 Ill. App. 23; Hoyt *v.* Hasse, 80 Ill. App. 187; Salter *v.* Edward Hines Lumber Co., 77 Ill. App. 97; Mellor *v.* Lawyer, 55 Ill. App. 679.

Kansas.— Roblfing *v.* Carper, 53 Kan. 251, 36 Pac. 336.

Kentucky.— Meador *v.* Hughes, 14 Bush 652.

Louisiana.— Silliman *v.* Short, 26 La. Ann. 512; Hughes *v.* Waldo, 14 La. Ann. 348, where, however, the contract was construed by the court to bind the incoming partner for the firm debts.

Massachusetts.—Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620.

Michigan.—Ayres *v.* Gallup, 44 Mich. 13, 5 N. W. 1072.

Mississippi.— Lake *v.* Munford, 4 Sm. & M. 312.

Missouri.— Deere *v.* Plant, 42 Mo. 60; Friedman *v.* Engel, 93 Mo. App. 464, 67 S. W. 725.

Nebraska.— Parmalee *v.* Wiggenhorn, 6 Nebr. 322.

New York.— Serviss *v.* McDonnell, 107 N. Y. 260, 14 N. E. 314; Fuller *v.* Rowe, 57 N. Y. 23 [*reversing* 59 Barb. 344]; Matter of Hoagland, 79 N. Y. App. Div. 56, 79 N. Y. Suppl. 1080; Matter of Sheldon, 72 N. Y. App. Div. 625, 76 N. Y. Suppl. 278.

North Carolina.— Morehead *v.* Wriston, 73 N. C. 398.

Oklahoma.— Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94.

Pennsylvania.— Kountz *v.* Holthouse, 85 Pa. St. 235; Babcock *v.* Stewart, 58 Pa. St. 179; Ash *v.* Werner, 12 Pa. Super. Ct. 39.

Tennessee.— Shoemaker Piano Mfg. Co. *v.* Bernard, 2 Lea 358.

Texas.—Adkins *v.* Arthur, 33 Tex. 431; Baptist Book Concern *v.* Carswell, (Civ. App. 1898) 46 S. W. 858; Oliver *v.* Moore, (Civ. App. 1897) 43 S. W. 812; Heidenheimer *v.* Franklin, 1 Tex. App. Civ. Cas. § 840.

Vermont.— Hart *v.* Tomlinson, 2 Vt. 101.

Virginia.— Peters *v.* McWilliams, 78 Va. 567; Poindexter *v.* Waddy, 6 Munf. 418, 8 Am. Dec. 749.

Washington.— Wolff *v.* Madden, 6 Wash. 514, 33 Pac. 975.

Wisconsin.— Reddington *v.* Franey, 124 Wis. 590, 102 N. W. 1065.

United States.—Atwood *v.* Lockhart, 2 Fed. Cas. No. 642, 4 McLean 350.

England.— Partn. Act (1890), § 17 (i); British Home Assur. Corp. *v.* Paterson, [1902] 2 Ch. 404, 71 L. J. Ch. 872, 86 L. T. Rep. N. S. 826, 50 Wkly. Rep. 612; Cripps *v.* Tappin, Cab. & E. 13; Shirreff *v.* Wilks, 1 East 48, 5 Rev. Rep. 509.

Canada.— Mittleberger *v.* Merritt, 1 U. C. Q. B. 330.

See 38 Cent. Dig. tit. "Partnership," § 491.

82. *Illinois.*— Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192; McCracken *v.* Milhous, 7 Ill. App. 169.

New York.— Flour City Nat. Bank *v.* Widener, 163 N. Y. 276, 57 N. E. 471 [*affirming* 24 N. Y. App. Div. 330, 48 N. Y. Suppl. 492].

Oregon.— Kearney *v.* Snodgrass, 12 Oreg. 311, 7 Pac. 309.

United States.— Rogers *v.* Riessner, 30 Fed. 525.

England.— Scott *v.* Beale, 6 Jur. N. S. 559.

83. Nix *v.* Pueblo First Nat. Bank, 23 Colo. 511, 48 Pac. 522; Galigher *v.* Lockhart, 11 Mont. 109, 27 Pac. 446; Wright *v.* Kelley, 4 Lans. (N. Y.) 57; Dodson *v.* Downey, [1901] 2 Ch. 620, 70 L. J. Ch. 854, 85 L. T. Rep. N. S. 273, 50 Wkly. Rep. 57; and other cases cited in the preceding notes.

84. Matter of Pennant, etc., Consol. Lead Min. Co., 5 De G. M. & G. 837, 1 Jur. N. S. 566, 24 L. J. Ch. 353, 3 Wkly. Rep. 95, 54 Eng. Ch. 656, 43 Eng. Reprint 1095.

Limited partnership see *infra*, X.

85. Wilson *v.* Lineberger, 83 N. C. 524; Austen *v.* Boys, 2 De G. & J. 626, 4 Jur. N. S. 719, 27 L. J. Ch. 714, 6 Wkly. Rep. 792, 59 Eng. Ch. 492, 44 Eng. Reprint 1133 [*affirming* 24 Beav. 598, 3 Jur. N. S. 1285, 27 L. J. Ch. 243, 53 Eng. Reprint 488].

86. See, generally, Novation.

87. *California.*— Civ. Code, § 1530.

Iowa.— Sternburg *v.* Callanan, 14 Iowa 251.

Missouri.— Spaunhorst *v.* Link, 46 Mo. 197; Fagan *v.* Long, 30 Mo. 222.

going and continuing partners that the latter shall assume the firm debts,[88] or even by his taking a note or other promise of the new firm for the old debt,[89] it is not necessary that an express contract for release and substitution be proved; but the contract may be implied from the creditor's conduct.[90]

7. APPROPRIATION OF PAYMENTS.[91] When the continuing partners or new firm have assumed the debts of the old firm and go on dealing with a creditor of the old firm, they have a right to apply any payment thereafter made either to the

Rhode Island.— Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Washington.—Frye *v.* Phillips, (1907) 89 Pac. 559.

United States.— Regester *v.* Dodge, 6 Fed. 6, 19 Blatchf. 79.

England.— *Ex p.* Lloyd, 1 Glyn & J. 389, 2 L. J. Ch. O. S. 162.

Canada.— Gurney *v.* Braden, 3 Brit. Col. 474.

See 38 Cent. Dig. tit. "Partnership," § 493. And see the cases cited in the notes following.

88. Chase *v.* Vaughan, 30 Me. 412; Motley *v.* Wickoff, 113 Mich. 231, 71 N. W. 520; Blew *v.* Wyatt, 5 C. & P. 397, 24 E. C. L. 623; Kirwan *v.* Kirwan, 2 Cromp. & M. 617, 3 L. J. Exch. 187, 4 Tyrw. 491.

Novation not established see the following cases:

California.— Chapin *v.* Brown, (1893) 34 Pac. 525.

Illinois.— Silverman *v.* Chase, 90 Ill. 37.

Indiana.— Morrison *v.* Kendall, 6 Ind. App. 212, 33 N. E. 370.

Iowa.— Frentress *v.* Markle, 2 Greene 553.

North Carolina.— Mitchell *v.* Dobson, 42 N. C. 34.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033.

England.— *In re* Smith, L. R. 4 Ch. 662, 20 L. T. Rep. N. S. 835, 17 Wkly. Rep. 833; *In re* Tucker, [1894] 3 Ch. 429, 63 L. J. Ch. 737, 71 L. T. Rep. N. S. 453, 12 Reports 141 [*affirming* [1894] 1 Ch. 724, 63 L. J. Ch. 223, 70 L. T. Rep. N. S. 127, 8 Reports 113, 42 Wkly. Rep. 266]; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, 63 L. J. Ch. 337, 70 L. T. Rep. N. S. 427, 7 Reports 127; *In re* Head, [1893] 3 Ch. 426, 63 L. J. Ch. 35, 3 Reports 712, 69 L. T. Rep. N. S. 753, 42 Wkly. Rep. 55; Benson *v.* Hadfield, 4 Hare 32, 30 Eng. Ch. 32, 67 Eng. Reprint 549; Eyton *v.* Knight, 2 Jur. 8.

Canada.— Osborne *v.* Henderson, 18 Can. Sup. Ct. 698, 11 Can. L. T. Occ. Notes 88 [*reversing* 17 Ont. App. 456 (*reversing* 14 Ont. 137)]. See also Canadian Bank *v.* Marks, 19 Ont. 450.

See 38 Cent. Dig. tit. "Partnership," § 493.

89. Powell *v.* Blow, 34 Mo. 485; Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531; Wadhams *v.* Page, 6 Wash. 103, 32 Pac. 1068; Spenceley *v.* Greenwood, 1 F. & F. 297. See, generally, NOVATION. Where a creditor of a dissolved firm sued the retired partner, it was held that pleas that plaintiff knew of the terms of dissolution between defendant and his copartners; that he assented thereto; that, after the note sued on fell due, plaintiff, without the knowledge of defendant, extended the time of payment for a valuable consideration, and accepted the notes of defendant's former partners, did not show that plaintiff agreed to release defendant as retiring partner, and to look alone to the continuing partnership for payment. Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002. In Lewis *v.* Davidson, 39 Tex. 660, it was held that a note given by the new firm for the old firm debts does not *prima facie* bind the old firm.

90. Harris *v.* Lindsay, 11 Fed. Cas. No. 6,124, 4 Wash. 271, 11 Fed. Cas. No. 6,123, 4 Wash. 98; Harris *v.* Farwell, 15 Beav. 31, 15 L. J. Ch. 185, 51 Eng. Reprint 447; English Partn. Act. (1890), § 17. In *In re* Family Endowment Soc., L. R. 5 Ch. 118, 39 L. J. Ch. 306, 21 L. T. Rep. N. S. 775, 18 Wkly. Rep. 266, it was held that strict proof will be required before it is held that a creditor of a company under a special contract has accepted the liability of another company with which the first is amalgamated.

Novation established see the following cases:

Georgia.— Venable *v.* Stevens, 94 Ga. 281, 21 S. E. 516.

Illinois.— Hellman *v.* Schwartz, 44 Ill. App. 84.

Indiana.— Rusk *v.* Gray, 83 Ind. 589.

Kentucky.— McNeal *v.* Blackburn, 7 Dana 170.

Louisiana.— Hoopes *v.* McCan, 19 La. Ann. 201.

New York.— Consalus *v.* McConihe, 119 N. Y. 652, 23 N. E. 1150 [*affirming* 2 N. Y. Suppl. 89]; Ludington *v.* Bell, 77 N. Y. 138, 33 Am. Rep. 601; Filippini *v.* Stead, 4 Misc. 405, 23 N. Y. Suppl. 1061.

Pennsylvania.— Earon *v.* Mackey, 106 Pa. St. 452; Kaufman *v.* Kaufman, 2 Woodw. 98.

Washington.— Frye *v.* Phillips, (1907) 89 Pac. 559.

United States.— Regester *v.* Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. (N. Y.) 107.

England.— Rolfe *v.* Flower, L. R. 1 P. C. 27, 12 Jur. N. S. 345, 35 L. J. P. C. 13, 14 L. T. Rep. N. S. 144, 14 Wkly. Rep. 773; *In re* Head, [1894] 2 Ch. 236, 63 L. J. Ch. 549, 7 Reports 167, 70 L. T. Rep. N. S. 608, 42 Wkly. Rep. 419; Bilborough *v.* Holmes, 5 Ch. D. 255, 46 L. J. Ch. 446, 35 L. T. Rep. N. S. 75, 25 Wkly. Rep. 297; *In re* Brien, L. R. 11 Ir. 213; Brown *v.* Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 Wkly. Rep. 2, 51 Eng. Reprint 795; Mills *v.* Boyd, 6 Jur. 943; *Ex p.* Oakes, 5 Jur. 757, 10 L. J. Bankr. 69, 2 Mont. D. & De G. 234; *Ex p.* Smith, 2 Mont. D. & De G. 314.

Canada.— Seyfang *v.* Mann, 25 Ont. App. 179 [*modifying* 27 Ont. 631]; Watts *v.* Robinson, 32 U. C. Q. B. 362.

91. See, generally, PAYMENT.

old or to the new indebtedness, as they see fit.[92] If they make no specific application of a payment, the creditor has the right, and, in the absence of special circumstances, is under a duty to appropriate it to the oldest outstanding account.[93] If the indebtedness of the old firm has not been assumed by the continuing partners or new firm, one who is a creditor both of the old firm and of the new firm has no right to appropriate money coming to him from one firm to a debt owing by the other.[94]

8. ASSUMPTION OF OLD FIRM OBLIGATIONS. While it is not to be presumed that the obligations of a firm are assumed by those who continue the business, after the retirement of a member, and a valid contract for the assumption must be established by competent evidence,[95] it is not necessary that such contract be in

92. King *v.* Sutton, 42 Kan. 600, 22 Pac. 695; Rutherford *v.* Schattman, 117 N. Y. 658, 22 N. E. 1133 [*affirming* 1 N. Y. Suppl. 741]; Weaver *v.* White, 19 N. Y. Suppl. 616; Henry *v.* Dietrich, 7 N. Y. Suppl. 505.

93. *Connecticut.*— Fairchild *v.* Holly, 10 Conn. 175.

Iowa.— Where an open, running account with a firm is continued unchanged with a member who buys the interest of his copartner and continues the business, the rule that payments on such an account will be applied to satisfy the oldest items thereof applies to payments made thereon to the firm's successor. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

Massachusetts.—Allcott *v.* Strong, 9 Cush. 323.

New York.— Pineiro *v.* Gurney, 15 N. Y. Suppl. 217; Thurber *v.* McIntire, 9 N. Y. St. 816.

Ohio.— Searington *v.* Ellison, 1 Ohio Dec. (Reprint) 74, 1 West. L. J. 488; Paul *v.* Ellison, 1 Ohio Dec. (Reprint) 67, 1 West. L. J. 452.

Vermont.— Morgan *v.* Tarbell, 28 Vt. 498.

Wisconsin.— Robbins *v.* Lincoln, 12 Wis. 1.

England.— Laing *v.* Campbell, 36 Beav. 3, 55 Eng. Reprint 1057; Copland *v.* Toulmin, 7 Cl. & F. 349, 7 Eng. Reprint 1102, West 164, 9 Eng. Reprint 459 [*affirming* 3 Y. & C. Exch. 625]; Clayton's Case, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781. When a partnership has been dissolved and one or more of the partners continue the business, and a creditor of the firm continues the credit, and blends together his accounts with the old firm and the new, payments made by the new firm on account must be applied in the first instance to the satisfaction of the debt of the old firm. Hooper *v.* Keay, 1 Q. B. D. 178, 34 L. T. Rep. N. S. 574, 24 Wkly. Rep. 485.

See 38 Cent. Dig. tit. "Partnership," § 493½.

94. Burns *v.* Pillsbury, 17 N. H. 66; Scott *v.* Kent, 54 N. Y. Super. Ct. 257; St. Louis Type Foundry Co. *v.* Wisdom, 4 Lea (Tenn.) 695; Eaton *v.* Whitcomb, 17 Vt. 641. In Shenk's Appeal, 33 Pa. St. 371, the same doctrine was applied to payments made by the continuing partners, as in Jones *v.* Maund, 3 Y. & C. Exch. 347.

95. *Alabama.*— Kling *v.* Tunstall, 109 Ala. 608, 19 So. 907.

California.— Smith *v.* Millard, 77 Cal. 440, 19 Pac. 824.

Georgia.— Morris *v.* Marqueze, 74 Ga. 86.

Indiana.— Hyer *v.* Norton, 26 Ind. 269.

Kentucky.— Heller *v.* Heller, 55 S. W. 433, 21 Ky. L. Rep. 1387 (particular debt was assumed); Grundy *v.* Pine Hill Coal Co., 9 S. W. 414, 10 Ky. L. Rep. 833.

Louisiana.— Haas *v.* Godchaux, 45 La. Ann. 128, 11 So. 945; Lott *v.* Parham, 16 La. 245.

Massachusetts.— Hobart *v.* Howard, 9 Mass. 304, debt of firm to copartner assumed.

Missouri.— Hanna *v.* Hyatt, 67 Mo. App. 308.

Nebraska.— Rickards *v.* Hene, 30 Nebr. 259, 46 N. W. 477.

New York.— Corner *v.* Mackey, 147 N. Y. 574, 42 N. E. 29 [*affirming* 73 Hun 236, 25 N. Y. Suppl. 1023]; Thurber *v.* Corwin, 51 Barb. 215; Scott *v.* Kent, 54 N. Y. Super. Ct. 257 (not a binding contract); Wright *v.* Carman, 19 N. Y. Suppl. 696; Schindler *v.* Euell, 45 How. Pr. 33.

South Carolina.—Allen *v.* Cooley, 53 S. C. 77, 30 S. E. 721.

Texas.— Sanders *v.* Bush, (Civ. App. 1897) 39 S. W. 203.

United States.— Where articles of partnership recited that one of the partners had given his promissory note for money borrowed and used for the benefit of the partnership, and provided that the same should be a partnership obligation, and before the maturity of the note the partnership was dissolved, and the other partner who succeeded to the business and property assumed all of the partnership liabilities, it was held that, under such agreements construed together, such partner became directly liable for the payment of the debt, and that under Carter Code Alaska, p. 145, § 1, which abolishes the distinction between actions at law and suits in equity, the holder of the note could maintain an action in his own name against him. Fish *v.* Seattle First Nat. Bank, 150 Fed. 524, 80 C. C. A. 266.

See 38 Cent. Dig. tit. "Partnership," § 495 *et seq.*

Not a partnership transaction.— Where a firm was succeeded by another firm, and the partners in the succeeding firm gave their individual notes to a creditor of the original firm, it was not a partnership transaction, although the succeeding firm may have used a portion of the assets of the original firm. Theus *v.* Armistead, 116 La. 795, 41 So. 95.

writing,[96] nor that an express undertaking to assume them be shown.[97] The existence of a contract for their assumption may be inferred from the conduct of the parties.[98]

9. Effect of Assumption on Rights of Creditors. The assumption of existing debts of a partnership by the continuing partners or by a new firm does not affect the right of a partnership creditor to proceed against all the old partners for the collection of his claim, unless he has validly contracted to accept the continuing partners or the new firm as his debtor, in lieu of the old firm.[99] In England and in some of our jurisdictions a firm creditor who is not a party to the contract of assumption cannot maintain an action against the assuming partner or new firm.[1] In other jurisdictions he can do so in the character of a beneficiary of the contract.[2]

10. Liability to Retiring Partner on Agreement to Assume Firm Debts. One who has entered into such an agreement is liable to the retiring partner for

96. Bessemer Sav. Bank *v.* Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609.

97. *Indiana.*— Hyer *v.* Norton, 26 Ind. 269.

Kentucky.— Peyton *v.* Lewis, 12 B. Mon. 356.

Maryland.— Griffith *v.* Buck, 13 Md. 102.

New York.— Goodrich *v.* Clute, 117 N. Y. 633, 22 N. E. 1129 [*affirming* 3 N. Y. Suppl. 102]; Coleman *v.* Lansing, 65 Barb. 54; Sinclair *v.* Galland, 8 Daly 508.

Rhode Island.—Updike *v.* Doyle, 7 R. I. 446.

See 38 Cent. Dig. tit. "Partnership," § 495 *et seq.*

98. *California.*— Olmstead *v.* Dauphing, 104 Cal. 635, 38 Pac. 505.

Colorado.— Cobb *v.* Benedict, 27 Colo. 342, 62 Pac. 222.

Illinois.— Salter *v.* Edward Hines Lumber Co., 77 Ill. App. 97.

Kansas.— Cross *v.* Burlington Nat. Bank, 17 Kan. 336.

Louisiana.— Love *v.* Adams, 23 La. Ann. 66.

New York.— Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699 [*affirming* 18 N. Y. Suppl. 736]; Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun 367].

England.— Rolfe *v.* Flower, L. R. 1 P. C. 27, 12 Jur. N. S. 345, 35 L. J. P. C. 13, 14 L. T. Rep. N. S. 144, 14 Wkly. Rep. 773.

See 38 Cent. Dig. tit. "Partnership," § 495 *et seq.*

99. *Alabama.*— Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002; Hall *v.* Jones, 56 Ala. 493; Gooden *v.* Morrow, 8 Ala. 486.

Indiana.— Clark *v.* Billings, 59 Ind. 508.

Iowa.— McAreavy *v.* Magril, 123 Iowa 605, 99 N. W. 193; Rand Lumber Co. *v.* Martin, 64 Iowa 551, 21 N. W. 29.

Massachusetts.—Ayer *v.* Kilner, 148 Mass. 468, 10 N. E. 163; Averill *v.* Lyman, 18 Pick. 346.

Michigan.— Botsford *v.* Kleinhaus, 29 Mich. 332.

New Jersey.— Gulick *v.* Gulick, 16 N. J. L. 186.

New York.— Umbarger *v.* Plume, 26 Barb. 461.

Pennsylvania.— Griffee *v.* Griffee, 173 Pa. St. 434, 34 Atl. 441.

Texas.— Eastham *v.* Patty, 29 Tex. Civ. App. 473, 69 S. W. 224; Texas Drug Co. *v.* Coulter, (Civ. App. 1901) 62 S. W. 110.

West Virginia.— Barnes *v.* Boyers, 34 W. Va. 303, 12 S. E. 708.

England.— Thompson *v.* Percival, 5 B. & Ad. 925, 3 L. J. K. B. 98, 3 N. & M. 167, 27 E. C. L. 389; Blew *v.* Wyatt, 5 C. & P. 397, 24 E. C. L. 623.

Canada.— McKeand *v.* Mortimor, 11 U. C. Q. B. 428.

See 38 Cent. Dig. tit. "Partnership," § 498. And see *supra*, VII, C, 2; *infra*, IX, C, 6, e.

Novation see *supra*, VII, C, 6.

1. *Illinois.*— Goodenow *v.* Jones, 75 Ill. 48.

Massachusetts.— Wild *v.* Dean, 3 Allen 579.

Michigan.—Ayres *v.* Gallup, 44 Mich. 13, 5 N. W. 1072.

Missouri.— Manny *v.* Frasier, 27 Mo. 419.

Pennsylvania.— Kountz *v.* Holthouse, 85 Pa. St. 235.

Wyoming.— McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

England.— *Ex p.* Freeman, Buck. 471; *Ex p.* Appleby, 2 Deac. 482; *Ex p.* Fry, 1 Glyn & J. 96.

See 38 Cent. Dig. tit. "Partnership," § 498.

2. *Alabama.*— Bessemer Sav. Bank *v.* Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609. *Contra*, Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Arkansas.— Ringo *v.* Wing, 49 Ark. 457, 5 S. W. 787.

Colorado.— Lehow *v.* Simonton, 3 Colo. 346.

Georgia.— Morris *v.* Marqueze, 74 Ga. 86.

Indiana.— Dunlap *v.* McNeil, 35 Ind. 316; Doxey *v.* Service, 30 Ind. App. 174, 65 N. E. 757.

Iowa.— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223.

Kansas.— Gillen *v.* Peters, 39 Kan. 489, 18 Pac. 613; Floyd *v.* Ort, 20 Kan. 162.

Kentucky.— Francis *v.* Smith, 1 Duv. 121.

New York.— Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Suppl. 432.

Wisconsin.— McGibbon *v.* Walsh, 109 Wis. 670, 85 N. W. 409; J. & H. Clasgens Co. *v.* Silber, 93 Wis. 579, 67 N. W. 1122; Thayer *v.* Goss, 91 Wis. 90, 64 N. W. 312.

Canada.— Hine *v.* Beddome, 8 U. C. C. P. 381. But see Canadian Bank *v.* Marks, 19 Ont. 450.

See 38 Cent. Dig. tit. "Partnership," § 498.

debts which he is compelled to pay,[3] and for expenses properly incurred in connection therewith.[4] If his agreement is to pay the debts, he is liable to suit if he fails to so do, whether the retiring partner has paid them or not.[5] His breach of agreement may give to the retiring partner the right to go into equity for relief.[6]

D. Actions After Change in Membership[7]—1. To Enforce Claims of the Old Firm. At common law, actions to enforce claims of the old firm had to be brought in the names of the partners in the old firm;[8] but under modern legislation they may be brought in the name of the assignee, whether he be the continuing partner, or a new firm,[9] save in exceptional circumstances.[10] And in case the assignee has performed an executory contract of the old firm, with the consent of the other contracting party, such assignee is entitled to sue upon the contract.[11]

2. To Enforce Claims Against the Old Firm. Actions to enforce claims against the old firm can be brought against all the members of the old firm, although they have been assumed by one or more of them, or by a new firm.[12] Indeed if an outgoing partner defends, on the ground of his retirement, he must plead and prove his release from the obligations of the old firm.[13] The presumption is that those who were members of a firm when it incurred an obligation are the proper parties defendant in an action to enforce the obligation.[14]

3. Actions Between Partners on Contracts of Dissolution. The retiring partner is entitled to sue any former copartner, or other person, who has broken a contract with him, to pay for his share in the old firm and to save him harmless from its debts.[15] On the other hand he may be sued by the other contracting

3. *Illinois.*— Robinson *v.* Roos, 138 Ill. 550, 28 N. E. 821 [*affirming* 37 Ill. App. 646].
Indiana.— Warbritton *v.* Cameron, 10 Ind. 302.
Iowa.— Kibby *v.* Kimball, 63 Iowa 665, 18 N. W. 825.
Massachusetts.— Brewer *v.* Worthington, 10 Allen 329; Nichols *v.* Prince, 8 Allen 404.
Nebraska.— Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379.
New York.— Thurber *v.* Corbin, 51 Barb. 215.
See 38 Cent. Dig. tit. "Partnership," § 499.
Failure to set up valid defense.— It has been held, however, that an incoming partner or his surety who has agreed to pay an old partnership debt if the retiring partner becomes liable therefor is not liable where the retiring partner pays a judgment which he has allowed to go against him on a note for such debt, but against which he had a valid defense. Thurber *v.* Corbin, 51 Barb. (N. Y.) 215.

4. Wright *v.* Sewall, 9 Rob. (La.) 128; Drake *v.* Porter, 13 Hun (N. Y.) 658.

5. Gillen *v.* Peters, 39 Kan. 489, 18 Pac. 613. And see *supra*, VI, C, 3.

6. Scovill *v.* Kinsley, 13 Gray (Mass.) 5; Fay *v.* Finley, 14 Phila. (Pa.) 206; Allen *v.* Cooley, 53 S. C. 77, 30 S. E. 721.

7. Enforcing mechanics' liens in name of partnership after change see Mechanics' Liens, 27 Cyc. 346.

8. Crews *v.* Yowell, 76 S. W. 127, 25 Ky. L. Rep. 598; Brown *v.* Haven, 37 Vt. 439; Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552; Brougham *v.* Balfour, 3 U. C. C. P. 72.

9. Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423 (applying Code Civ. Proc. § 379); West *v.* Citizens Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Tolhurst *v.* Associated Portland Cement Manufacturers, [1903] A. C. 414, 72 L. J. K. B. 834, 89 L. T. Rep. N. S. 196, 52 Wkly. Rep. 143.

10. Hausling *v.* Rheinfrank, 103 N. Y. App. Div. 517, 93 N. Y. Suppl. 121, action to cancel an assignment of a partner's interest.

11. Degnan *v.* Nowlin, 5 Indian Terr. 312, 82 S. W. 758; Dyas *v.* Dinkgrave, 15 La. Ann. 502, 77 Am. Dec. 196; Allstan *v.* Contee, 4 Harr. & J. (Md.) 351; Milne *v.* Douglass, 17 Fed. 482, 5 McCrary 401.

12. Shorter *v.* Hightower, 48 Ala. 526; Dean *v.* McFaul, 23 Mo. 76; Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919; *Ex p.* Gould, 4 Deac. & C. 547, 4 L. J. Bankr. 7, 2 Mont. & A. 48.

13. Hall *v.* Jones, 56 Ala. 493; Osborn *v.* Evans, 91 Iowa 13, 58 N. W. 920. See *supra*, VII, C, 1, 2.

14. *Indiana.*— Uhl *v.* Bingaman, 78 Ind. 365.
Maine.— Nevens *v.* Bulger, 93 Me. 502, 45 Atl. 503.
Massachusetts.— Washburn *v.* Walworth, 133 Mass. 499; Shaw *v.* McGregory, 105 Mass. 96.
Ohio.— Vance *v.* Blair, 18 Ohio 532, 51 Am. Dec. 467.
Virginia.—Adams *v.* Powers, 82 Va. 612.
England.— Cox *v.* Hubbard, 4 C. B. 317, 56 E. C. L. 317.

15. *Alabama.*— Burney *v.* Boone, 32 Ala. 486, holding that it is no defense for a new firm, which gave its note for the price of his share in the old firm, sold to one of its members, that he had failed to account to the old firm for moneys collected by him.
California.— Meyer *v.* Parsons, 129 Cal. 653, 62 Pac. 216.
Georgia.— Dickenson *v.* Moore, 117 Ga. 887, 45 S. E. 240 (set-off not allowed); Tucker *v.* Murphey, 114 Ga. 662, 40 S. E. 836.

party for any breach of the contract on his part.[16] In an action on a bond for the payment of firm debts given to a retiring partner, it was held that the court should provide in its judgment for the satisfaction of the firm's creditors out of the money received.[17]

4. Actions by Creditors on Contracts Between Partners. We have seen that the courts differ in their views as to the right of a firm creditor to sue upon a contract between partners, by which some of them, or a new firm in which they become members, undertake to pay existing debts. In some jurisdictions the suit will lie.[18] Where a partner after dissolution goes into business with a new firm and gives a note in the name of the new firm for a debt of the old firm, of which fact the holder is aware, it is incumbent on him, in an action on the note, to show that the debt had been assumed by the new firm for the sake of some benefit derived from the assumption.[19] An incoming partner who has agreed to assume the debts of the old firm may, when sued by one of its creditors, defend by showing that he was defrauded and that plaintiff or his agent was cognizant of it and connived at it.[20] Where a partnership has dissolved and the partner succeeding to the business, having taken a new partner, signs the name of the new firm to a note in renewal of a note of the old firm, the creditor has the burden of showing, against the new partner, that he agreed to assume the old firm's debts.[21] Where a partnership is dissolved and a new firm formed, including, with one exception, the members of the old firm, it will be presumed, as between the latter firm and the retiring partner, that debts of the latter firm were contracted for payment of debts of the former one.[22]

VIII. Death of Partner, and Surviving Partners.

A. Effect of Death of Partner — 1. In General. In the absence of an agreement between the partners upon the subject, the death of a partner dissolves the firm.[23] The firm title to partnership property is not converted by the com-

Illinois.— Teed *v.* Parsons, 100 Ill. App. 342 [*reversed* in 202 Ill. 455, 66 N. E. 1044, on the ground that the officers of defendant firm had no authority to give the note sued on by plaintiff].

Indiana.— Jackson *v.* Hart, 12 Ind. 605, where, however, the complaint was held insufficient.

Massachusetts.— Nichols *v.* Prince, 8 Allen 404 (complaint not sustained by evidence); Scovill *v.* Kinsley, 13 Gray 5.

Michigan.— Berridge *v.* Slawson, 94 Mich. 484, 54 N. W. 278; Gardiner *v.* Fargo, 58 Mich. 72, 24 N. W. 655; Osborn *v.* Osborn, 36 Mich. 48.

Minnesota.— McCarthy *v.* Donnelly, 90 Minn. 104, 95 N. W. 760.

Nebraska.— Meyer *v.* Shamp, 26 Nebr. 729, 42 N. W. 757.

South Carolina.— Huffman *v.* Huffman, 63 S. C. 1, 40 S. E. 963; Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

Texas.— Brazee *v.* Woods, 35 Tex. 302.

See 38 Cent. Dig. tit. "Partnership," § 500 *et seq.*

16. Lee *v.* Davis, 70 Ind. 464; Downs *v.* Woodson, 76 S. W. 152, 25 Ky. L. Rep. 566; Bank of British North America *v.* Delafield, 126 N. Y. 410, 27 N. E. 797 [*affirming* 12 N. Y. Suppl. 440]; Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961.

Parties.— In a suit by an incoming partner against the retiring partner to compel the retiring partner to pay to the incoming partner the amount of the incoming partner's advancements to the new firm, used to pay the debts of the old firm, the incoming partner properly made the retiring partner and the continuing partner parties defendant. Reddington *v.* Franey, 131 Wis. 518, 111 N. W. 725.

17. Wilson *v.* Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477.

18. See *supra*, VII, C, 9.

Instruction as to liability on renewals see Strobridge Lith. Co. *v.* Randall, 78 Mich. 195, 44 N. W. 134.

Instruction not based on issues see Hamilton *v.* Smith, 120 Iowa 93, 94 N. W. 268.

19. Waters *v.* Maddox, 7 La. Ann. 644.

20. Morris *v.* Marqueze, 74 Ga. 86.

21. Scott City Bank *v.* Sandusky, 51 Mo. App. 398.

22. Chaffin *v.* Chaffin, 22 N. C. 255.

Good faith.— Where a new partner came into a firm and the same business was carried on at the same place as by the old firm, and one of the members of the new firm gave an instrument in the name of the new firm to secure a debt due by the old firm to one of its workmen, which was regularly entered on the books of the new firm, it was held that the burden of proving that the paper was given in bad faith and that the receiver of it knew such fact or had reason to believe it was on the defendant. Abpt *v.* Miller, 50 N. C. 32.

23. See *infra*, IX, A, 5, a.

mon-law rule of survivorship into the separate title of the surviving partner,[24] although such survivor has the exclusive right thereafter to control and dispose of the firm title.[25] The dissolution of a firm by the death of a partner does not affect existing contracts to which it is a party,[26] unless the contract has relation to the personal conduct of the deceased partner.[27] Most of the foregoing principles are applicable, when the death of the partner occurs after the dissolution of his firm.[28]

2. Right and Duty to Liquidate Firm Affairs.[29] From the foregoing principles it follows that the surviving partner has the exclusive right to liquidate the affairs of the firm, and that he is under a duty to do this promptly and honestly.[30] Whatever legal power is essential to such liquidation, he may exercise,[31] and he is

24. *Louisiana.*— Prall *v.* Peet, 3 La. 274.

New York.— Matter of Wormser, 51 N. Y. App. Div. 441, 64 N. Y. Suppl. 897 [*modifying* 28 Misc. 608, 59 N. Y. Suppl. 1088]; McCann *v.* Hazard, 36 Misc. 7, 72 N. Y. Suppl. 45 (holding that executor of the surviving partner does not succeed to the position of a surviving partner).

Pennsylvania.— Oyster *v.* Short, 177 Pa. St. 594, 35 Atl. 710.

England.— *Ex p.* Dear, 1 Ch. D. 514, 45 L. J. Bankr. 22, 34 L. T. Rep. N. S. 631, 24 Wkly. Rep. 525; Clements *v.* Hall, 2 De G. & J. 173, 4 Jur. N. S. 494, 27 L. J. Ch. 349, 6 Wkly. Rep. 358, 39 Eng. Ch. 138, 44 Eng. Reprint 954; Buckley *v.* Barber, 6 Exch. 164, 15 Jur. 63, 20 L. J. Exch. 114; Crawshay *v.* Collins, 2 Russ. 325, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358, 15 Ves. Jr. 218, 10 Rev. Rep. 61, 33 Eng. Reprint 736; Jefferys *v.* Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424; Lyster *v.* Dolland, 1 Ves. Jr. 435, 30 Eng. Reprint 422.

Canada.— Rathwell *v.* Rathwell, 26 U. C. Q. B. 179.

25. Callanan *v.* Keeseville, etc., R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. Suppl. 513; Pepper *v.* Robinson, 32 Wkly. Notes Cas. (Pa.) 200; Emerson *v.* Senter, 118 U. S. 3, 6 S. Ct. 981, 30 L. ed. 49; McKinzie *v.* U. S., 34 Ct. Cl. 278; Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Wilkins *v.* Eadie, 4 Quebec Pr. 402.

26. Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620; Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59, 70 L. J. K. B. 26, 83 L. T. Rep. N. S. 431, 49 Wkly. Rep. 223.

27. Starrs *v.* Cosgrave Brewing, etc., Co., 12 Can. Sup. Ct. 571 [*reversing* 11 Ont. App. 156, and restoring 5 Ont. 189], contract of suretyship for a firm. In Burnet *v.* Hope, 9 Ont. 10, it was held that the dissolution of a firm by the death of a partner put an end to a contract with a commercial traveler.

28. *Alabama.*— Strange *v.* Graham, 56 Ala. 614.

Georgia.— Baker *v.* Middlebrooks, 81 Ga. 491, 8 S. E. 320.

Missouri.— Ober *v.* Indianapolis, etc., R. Co., 13 Mo. App. 81. But see Mutual Sav. Inst. *v.* Enslin, 37 Mo. 453.

New York.— Murray *v.* Mumford, 6 Cow. 441.

Pennsylvania.— Cope *v.* Warner, 13 Serg. & R. 411.

South Carolina.—Kinsler *v.* McCants, 4 Rich. 46, 53 Am. Dec. 711.

Texas.— Stanton *v.* Nugent, 22 Tex. Civ. App. 163, 54 S. W. 793. In this case, however, the deceased and the surviving partner had not only dissolved, but had agreed that the property in question should belong to the deceased. Hence the survivor was held to have no right in the property.

See 38 Cent. Dig. tit. "Partnership," § 510.

29. Right of surviving partner to vote stock owned by firm see Corporations, 10 Cyc. 334.

30. *Alabama.*— Word *v.* Word, 90 Ala. 81, 7 So. 412, holding also that if he fails to perform his duty a receiver may be appointed.

Idaho.—McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349.

Illinois.— Beale *v.* Beale, (1885) 2 N. E. 65 (holding that, if he fails to distribute the proceeds promptly, he may be obliged to pay interest thereon); Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434.

Kentucky.— Swafford *v.* White, 89 S. W. 129, 28 Ky. L. Rep. 119.

Louisiana.— Mathison *v.* Field, 3 Rob. 44. In Norris *v.* Ogden, 11 Mart. 455, it is held that the heirs of a commercial partner have a right to participate with the survivor in the liquidation until a partition.

Maine.— Hamlin *v.* Mansfield, 88 Me. 131, 33 Atl. 788.

Maryland.— Walker *v.* House, 4 Md. Ch. 39.

Michigan.— Heath *v.* Waters, 40 Mich. 457, where the surviving partner is called a trustee for the decedent's estate.

Mississippi.— McCaughan *v.* Brown, 76 Miss. 496, 25 So. 155.

Missouri.— Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659; Bredow *v.* Mutual Sav. Inst., 28 Mo. 181; *In re* Kahn, 18 Mo. App. 426.

New York.— Haynes *v.* Brooks, 8 N. Y. Civ. Proc. 106; Camp *v.* Fraser, 4 Dem. Surr. 212.

Ohio.— Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78; Page *v.* Warnock, 25 Ohio Cir. Ct. 695; *In re* Crane, 4 Ohio S. & C. Pl. Dec. 398, 29 Cinc. L. Bul. 93.

Pennsylvania.— Hanna *v.* Wray, 77 Pa. St. 27; Smith's Estate, 11 Phila. 131.

United States.— Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737; *In re* Clap, 5 Fed. Cas. No. 2,783, 2 Lowell 168.

Canada.— Bolckow *v.* Foster, 24 Grant Ch. (U. C.) 333.

See 28 Cent. Dig. tit. "Partnership," § 511.

31. *Louisiana.*— Legendre *v.* Seligman, 35 La. Ann. 113, to deliver bills of lading in possession of the firm.

not to be deemed a trustee for the benefit of firm creditors.[32] Still, many of our courts have treated him as a quasi-trustee for the estate of the deceased partner.[33] He has no power to subject the estate to any new obligations,[34] nor to revive an outlawed claim against it;[35] nor can he release the firm's recourse for accommodation acceptances against a party.[36] The surviving partner cannot bind the estate of the deceased nor his co-survivors by negotiable paper given in the firm-name after the death, or by an indorsement of firm paper thereafter,[37] unless authority to do so has been given him by the deceased;[38] but his indorsement of firm paper will pass a perfect title thereto.[39]

B. Collection and Disposition of Assets — 1. Right to Possess and Collect. Upon the dissolution of a firm by the death of a member, the right of the survivor to the exclusive possession of the firm assets is well established,[40] although formerly there was a disposition to treat the survivor as a tenant in common with

Massachusetts.— Thayer *v.* Badger, 171 Mass. 279, 50 N. E. 541, to turn over firm property to another partnership of which he is a partner for sale.

Michigan.— Comstock *v.* McDonald, 136 Mich. 489, 101 N. W. 55, to sell firm property.

Mississippi.— Lance *v.* Calhoun, 85 Miss. 375, 37 So. 1014, holding that Code (1892), § 1931, has no application to him.

Missouri.—American Hardwood Lumber Co. *v.* Nickey, 101 Mo. App. 20, 73 S. W. 331.

New York.— Betts *v.* June, 51 N. Y. 274, to give notice of intention on behalf of firm to renew a lease.

Texas.— Levy *v.* Archenhold, (Civ. App. 1898) 44 S. W. 46.

Virginia.— Peyton *v.* Stratton, 7 Gratt. 380.

United States.— Gamble *v.* Rural Independent School Dist., 132 Fed. 514.

England.— Brasier *v.* Hudson, 9 Sim. 1, 16 Eng. Ch. 1, 59 Eng. Reprint 256.

32. Burchinell *v.* Koon, 25 Colo. 59, 52 Pac. 1100 [*affirming* 8 Colo. App. 463, 46 Pac. 932].

33. Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129; Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788; Dewey *v.* Chapin, 156 Mass. 35, 30 N. E. 223; Krueger *v.* Speith, 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291.

34. Macon Exch. Bank *v.* Tracy, 77 Mo. 594; Castle *v.* Reynolds, 10 Watts. (Pa.) 51.

35. Bloodgood *v.* Bruen, 8 N. Y. 362 [*reversing* 4 Sandf. 427].

36. Bookout *v.* Anderson, 2 La. Ann. 246.

37. *Alabama.*— Laug *v.* Waring, 17 Ala. 145; Brown *v.* Lang, 4 Ala. 50.

Georgia.— Gainesville First Nat. Bank *v.* Cody, 93 Ga. 127, 19 S. E. 831, holding also that such a note does not discharge the creditor's claim against the firm.

Kentucky.— Lexington Nat. Exch. Bank *v.* Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. Rep. 763, similar holding to that in preceding case.

Michigan.—Cooperstown First Nat. Bank *v.* Ionia State Sav. Bank, 130 Mich. 332, 89 N. W. 941 (note taken in discharge of claim against firm); Jenness *v.* Carleton, 40 Mich. 343; Matteson *v.* Nathanson, 38 Mich. 377.

Missouri.— Central Sav. Bank *v.* Mead, 52 Mo. 546.

Pennsylvania.— Connelly *v.* Withers, 9 Lanc. Bar 117.

See 38 Cent. Dig. tit. "Partnership," § 513.

38. Tillotson *v.* Tillotson, 34 Conn. 335; Dundass *v.* Gallagher, 4 Pa. St. 205.

39. *Alabama.*— Glasscock *v.* Smith, 25 Ala. 474, holding, however, that when the firm-name is written on the back of the paper by the deceased, and no delivery is made before his death, a delivery thereafter by the survivor is not an indorsement by him, and legal title does not pass.

Illinois.— Johnson *v.* Berlizheimer, 84 Ill. 54, 25 Am. Rep. 427.

Louisiana.— Jones *v.* Thorn, 2 Mart. N. S. 463.

Missouri.— Bredow *v.* Mutual Sav. Inst., 28 Mo. 181.

Vermont.— Douglass *v.* Hall, 22 Vt. 451.

See 38 Cent. Dig. tit. "Partnership," § 513.

Contra.— Cavitt *v.* James, 39 Tex. 189.

40. *Alabama.*— Andrews *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252.

Arkansas.—Adams *v.* Ward, 26 Ark. 135; Marlatt *v.* Scantland, 19 Ark. 443.

California.— McKay *v.* Joy, 70 Cal. 581, 11 Pac. 832; People *v.* Hill, 16 Cal. 113; Gray *v.* Palmer, 9 Cal. 616.

Connecticut.— Filley *v.* Phelps, 18 Conn. 294.

Florida.— Price *v.* Hicks, 14 Fla. 565; Territory *v.* Redding, 1 Fla. 279.

Georgia.— Gardner *v.* Cumming, Ga. Dec. 1.

Illinois.— Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; Miller *v.* Jones, 39 Ill. 54.

Indiana.— Needham *v.* Wright, 140 Ind. 190, 36 N. E. 510; Holland *v.* Fuller, 13 Ind. 195.

Iowa.— Starr *v.* Case, 59 Iowa 491, 13 N. W. 645.

Michigan.— Pfeffer *v.* Steiner, 27 Mich. 537; Barry *v.* Briggs, 22 Mich. 201.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713; Hanway *v.* Robertshaw, 49 Miss. 758; Scott *v.* Searles, 5 Sm. & M. 25.

Missouri.— Holman *v.* Nance, 84 Mo. 674; Judy *v.* St. Louis Ice Mfg., etc., Co., 60 Mo. App. 114.

New York.— Loewenstein *v.* Loewenstein, 114 N. Y. App. Div. 65, 99 N. Y. Suppl. 730; Roberts *v.* Law, 4 Sandf. 642; Hooley *v.* Gieve,

the personal representative of the deceased of partnership property in possession.[41] This view still prevails in Louisiana.[42] A court of equity may take from the surviving partner the possession and control of firm assets, and appoint a receiver, when confidence has been destroyed by the survivor's mismanagement, improper conduct, or insolvency.[43] Not only has the surviving partner the right to possess and control the firm property to the exclusion of the representatives of the deceased partner, but he has the right to collect all claims due the firm.[44]

2. Disposition of Assets in General. The surviving partner has full authority to dispose of the partnership property in the performance of firm contracts and in winding up the firm's affairs;[45] but he is bound of course to act in good faith and with an eye single to the advantage of the firm estate,[46] and is not allowed to

9 Daly 104; Carrere *v.* Spofford, 46 How. Pr. 294; Allen *v.* Blanchard, 9 Cow. 631; Murray *v.* Mumford, 6 Cow. 441; Evans *v.* Evans, 9 Paige 178; Egberts *v.* Wood, 3 Paige 517, 24 Am. Dec. 236; Waring *v.* Waring, 1 Redf. Surr. 205.

Ohio.— Enck *v.* Gerding, 67 Ohio St. 245, 65 N. E. 880.

Pennsylvania.— Shipe's Appeal, 114 Pa. St. 205, 6 Atl. 103.

Rhode Island.— Hawkins *v.* Capron, 17 R. I. 679, 24 Atl. 466.

Texas.— Gaut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

Utah.— *In re* Auerbach, 23 Utah 529, 65 Pac. 488.

Vermont.— Stearns *v.* Houghton, 38 Vt. 583.

Washington.— Dyer *v.* Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89.

United States.—Wickliffe *v.* Eve, 17 How. 468, 15 L. ed. 163; McCorry *v.* O'Connor, 87 Fed. 586, 31 C. C. A. 114 [*affirming* 79 Fed. 861]; Bischoffsheim *v.* Baltzer, 20 Fed. 890; Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737.

England.— Partn. Act (1890), § 43; Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Taylor *v.* Taylor, 28 L. T. Rep. N. S. 189.

See 38 Cent. Dig. tit. "Partnership," § 514.

41. Canfield *v.* Hart, 6 Conn. 180; Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Strathy *v.* Crooks, 2 U. C. Q. B. 51. And see Adams *v.* Ward, 26 Ark. 135.

42. Junek *v.* Hazeau, 11 La. Ann. 731; Shipman *v.* Hickman, 9 Rob. (La.) 149; Notrebe *v.* McKinney, 6 Rob. (La.) 13; Mathison *v.* Field, 3 Rob. (La.) 44; Flower *v.* O'Conner, 7 La. 194; Simmins *v.* Parker, 4 Mart. N. S. (La.) 200; Jones *v.* Thorn, 2 Mart. N. S. (La.) 463; Wyer *v.* Winchester, 2 Mart. N. S. (La.) 69.

43. Shad *v.* Fuller, R. M. Charlt. (Ga.) 501; Walker *v.* House, 4 Md. Ch. 39; Connor *v.* Allen, Harr. (Mich.) 371; Evans *v.* Evans, 9 Paige (N. Y.) 178; Collins *v.* Young, 1 Macq. 385; Hartz *v.* Schrader, 8 Ves. Jr. 317, 7 Rev. Rep. 55, 32 Eng. Reprint 376.

44. *Alabama.*— Davis *v.* Sowell, 77 Ala. 262 (holding also that if there are two surviving partners, payment to one discharges the debtor's liability to the firm); Andrews *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252.

Louisiana.— Cockerham *v.* Bostey, 52 La. Ann. 65, 26 So. 814.

Massachusetts.— Peters *v.* Davis, 7 Mass. 257.

Michigan.— O'Connell *v.* Schwanabeck, 76 Mich. 517, 43 N. W. 599; Bassett *v.* Miller, 39 Mich. 133; Teller *v.* Wetherell, 9 Mich. 464.

New York.—Bernard *v.* Wilcox, 2 Johns. Cas. 374.

North Carolina.—Rice *v.* Richards, 45 N. C. 277, holding also that payment to the personal representative of the deceased partner is no defense to a suit by the survivor.

Pennsylvania.— Davis *v.* Church, 1 Watts & S. 240; Wallace *v.* Fitzsimmons, 1 Dall. 248, 1 L. ed. 122.

South Carolina.— Younts *v.* Starnes, 42 S. C. 22, 19 S. E. 1011.

South Dakota.— Grether *v.* Smith, 17 S. D. 279, 96 N. W. 93.

Wisconsin.— Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95.

England.— Dixon *v.* Hamond, 2 B. & Ald. 310; Kemp *v.* Andrews, Carth. 170, 3 Lev. 290; Martin *v.* Crompe, 1 Ld. Raym. 340, 2 Salk. 444.

See 38 Cent. Dig. tit. "Partnership," §§ 514, 514½.

45. *Alabama.*—Offutt *v.* Scott, 47 Ala. 104.

Indiana.— Harrah *v.* State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107.

Mississippi.— Scott *v.* Tupper, 8 Sm. & M. 280.

Nebraska.— Bartlett *v.* Smith, (1901) 95 N. W. 661, 5 Nebr. (Unoff.) 337, 98 N. W. 687 (holding that a sole surviving partner in possession of the firm assets may do any act in the way of settling firm debts which the entire firm could have done); Lindner *v.* Adams County Bank, 49 Nebr. 735, 68 N. W. 1028.

New York.— Thursby *v.* Lidgerwood, 69 N. Y. 198, sale of judgment recovered by firm.

North Carolina.— Hodgin *v.* People's Nat. Bank, 128 N. C. 110, 38 S. E. 294.

Tennessee.— McAlister *v.* Montgomery, 3 Hayw. 94, applying Acts (1874) c. 22, § 6.

Wisconsin.— Roys *v.* Vilas, 18 Wis. 169.

See 38 Cent. Dig. tit. "Partnership," § 515. And see the cases cited under the sections following.

Indorsement and transfer of commercial paper see *supra*, VIII, A, 2.

46. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311; Wiesenfeld *v.* Byrd, 17 S. C. 106.

exercise this authority for his private advantage.[47] Where, however, a surviving partner executed a quitclaim, in which he was described as a party of the first part, and conveyed all interest in the assets or partnership property of the firm, consisting of notes, judgments, mortgages, and other evidences of debt, as well as goods, lands, and chattels, with all rights of the surviving partner to make deeds and other necessary instruments for the winding up of the partnership, the instrument was construed as conveying only the individual interest of the grantor in the partnership assets.[48]

3. MORTGAGING FIRM PROPERTY. The surviving partner has power to mortgage firm property to secure firm debts,[49] or to raise money with which to pay firm debts,[50] or to secure money borrowed by him after his partner's death and which was used in paying firm debts.[51]

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.[52] The great weight of judicial authority is in favor of the view that the surviving partner can, in the absence of statutory prohibition, make a valid assignment of firm assets for the benefit of firm creditors,[53] and, in the absence of statutory provisions on the subject, can validly prefer some creditors over others.[54] In a few jurisdictions a preferential assignment by the surviving partner is held invalid;[55] and in others the power to make an assignment for the benefit of creditors has been taken from the surviving partner by statute.[56]

5. APPLICATION OF PAYMENTS TO OR BY SURVIVOR. Payments made by the surviving partner to one who is a creditor of the old firm and also of the business subsequently conducted by the survivor will be imputed to the earliest item of

47. Gable *v.* Williams, 59 Md. 46; Dewey *v.* Chapin, 156 Mass. 35, 30 N. E. 223.

48. Jackson *v.* Gunton, 218 Pa. St. 275, 67 Atl. 467.

49. Peru First Nat. Bank *v.* Parsons, 128 Ind. 147, 27 N. E. 486; Bell *v.* Hepworth, 134 N. Y. 442, 31 N. E. 918 [*affirming* 51 Hun 616, 4 N. Y. Suppl. 823]; *In re* Crane, 4 Ohio S. & C. Pl. Dec. 398, 29 Cinc. L. Bul. 93; Bohler *v.* Tappan, 1 Fed. 469, 1 McCrary 134.

50. Courtland Forging Co. *v.* Ft. Wayne First Nat. Bank, 141 Ind. 518, 40 N. E. 1070 (applying Rev. St. (1894) §§ 8123–8127, and Rev. St. (1881) §§ 6047–6051, requiring surviving partner to file an inventory of firm property and give a bond); Port Gibson Bank *v.* Baugh, 9 Sm. & M. (Miss.) 290 (holding, however, that such mortgage is not binding on the separate estate of the deceased partner).

51. Burchinell *v.* Koon, 25 Colo. 59, 52 Pac. 1100 [*affirming* 8 Colo. App. 463, 46 Pac. 932].

52. Assignment by firm or by partner in general see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113.

53. *Alabama.*—Espy *v.* Comer, 80 Ala. 333.
Kentucky.—Atchison *v.* Jones, 1 S. W. 406, 8 Ky. L. Rep. 259.
Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.
Minnesota.— Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441.
New York.— Haynes *v.* Brooks, 116 N. Y. 487, 22 N. E. 1083 [*affirming* 42 Hun 528]; Hutchison *v.* Smith, 7 Paige 26.
Pennsylvania.— Farmers' Bank *v.* Ritter, 9 Pa. Cas. 433, 12 Atl. 659.
South Carolina.—White *v.* Union Ins. Co., 1 Nott & M. 556, 9 Am. Dec. 726.
Canada.— Davidson *v.* Papps, 28 Grant Ch. (U. C.) 91.
See 38 Cent. Dig. tit. "Partnership," § 516½. And see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 175.

54. Havens, etc., Co. *v.* Harris, 140 Ind. 387, 39 N. E. 49; Durant *v.* Pierson, 124 N. Y. 444, 26 N. E. 1095, 21 Am. St. Rep. 686, 12 L. R. A. 146; Miller *v.* Pierson, 124 N. Y. 654, 27 N. E. 413 [*reversing* 58 Hun 190, 605, 11 N. Y. Suppl. 842]; Haynes *v.* Brooks, 116 N. Y. 487, 22 N. E. 1083 [*affirming* 42 Hun 528]; Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734 [*affirming* 13 Daly 317, 17 Abb. N. Cas. 162]; Williams *v.* Whedon, 109 N. Y. 333, 16 N. E. 365, 4 Am. St. Rep. 460 [*affirming* 39 Hun 98] (where it is said that the survivors do not take the firm assets as trustees, but, as survivors, hold the legal title subject to such equitable rights as the representatives of the deceased have in the due application of the proceeds, and if the assets are insufficient to pay the debts in full, the representatives have no interest in the question, whether the assets shall be paid to one creditor rather than another); Loeschigk *v.* Hatfield, 51 N. Y. 660 [*affirming* 5 Rob. 26, 4 Abb. Pr. N. S. 210, and *overruling* Loeschigk *v.* Addison, 3 Rob. 331]; Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Patton *v.* Leftwich, 86 Va. 421, 10 S. E. 686, 19 Am. St. Rep. 902, 6 L. R. A. 569; Emerson *v.* Senter, 118 U. S. 3, 6 S. Ct. 981, 30 L. ed. 49. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 175.

55. Salsbury *v.* Ellison, 7 Colo. 167, 303, 2 Pac. 906, 3 Pac. 485, 49 Am. Rep. 347; Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 175.

56. State *v.* Withrow, 141 Mo. 69, 41 S. W. 980.

indebtedness, in the absence of proof that they were properly made in the discharge of later items.[57] Payments made to the surviving partner by one who is a debtor of the old firm and of the new business conducted by the survivor will likewise be imputed to the oldest item.[58]

6. PAYMENT OF INDIVIDUAL DEBTS. While the surviving partner holds the legal title to the firm assets, he has no right to transfer such assets in payment of his individual debts;[59] and a transferee who takes any part of the firm assets in satisfaction of or as security for a debt owing to him by the surviving partner individually can be charged as a trustee thereof at the suit of firm creditors, or of the representatives of the deceased partner.[60]

C. Real Property of Firm[61]— 1. TITLE IN INDIVIDUAL.[62] When real estate is acquired by a firm, and forms a part of the partnership stock, it does not matter that the record title is in one of the partners. Equity will treat the heirs of the deceased partner as trustees for the survivor and those interested in the firm assets.[63] But one who purchases the land for value from the holder of the legal title and without notice of the equitable interest therein can hold unencumbered by such secret equity.[64]

2. TITLE, POSSESSION, AND CONTROL OF SURVIVOR. The custom of merchants was extended by English tribunals, at an early day, to exclude survivorship among partners,[65] and to secure all partnership property, whether real or personal, for the purposes of the partnership in accordance with the partnership agreement.[66] Nevertheless the legal estate or interest in partnership real estate devolves according to the nature and tenure thereof and according to the general rules of real estate law applicable thereto.[67] Equity, however, treats the surviving partner and the heirs of the deceased partner as holding the title after such devolution in trust, so far as necessary, for the persons beneficially interested in the land

57. Stanwood *v.* Owen, 14 Gray (Mass.) 195; Wiesenfeld *v.* Byrd, 17 S. C. 106; Tootle *v.* Jenkins, 82 Tex. 29, 17 S. W. 519 (where, however, the debtor applied the payments on the debts of the new business, and this application was sustained because no evidence was given to show that the payments were made in whole or in part from the proceeds of the old partnership property); Clayton's Case, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781.

58. Boyd *v.* Webster, 59 N. H. 89; Cain *v.* Dietz, 3 Ohio Cir. Ct. 612, 2 Ohio Cir. Dec. 355. In Dick *v.* Laird, 7 Fed. Cas. No. 3,892, 5 Cranch C. C. 328, the payment was specifically appropriated to a bill drawn against a particular shipment by the survivor, and in accordance with the usage of the old firm. Such appropriation was sustained by the court.

59. Hutchinson *v.* Smith, 7 Paige (N. Y.) 26; Knox *v.* Schepler, 2 Hill (S. C.) 595; Allen *v.* Nashville Second Nat. Bank, 6 Lea (Tenn.) 558; Rogers *v.* Flournoy, 21 Tex. Civ. App. 556, 54 S. W. 386.

60. Hill *v.* Draper, 54 Ark. 395, 15 S. W. 1025; Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493.

61. **Surviving partner considered as tenant** where he continues to occupy premises and pay rent from month to month see LANDLORD AND TENANT, 24 Cyc. 883 note 60.

62. See *supra*, III, E, 2.

63. *Alabama.*— Little *v.* Snedecor, 52 Ala. 167; Houston *v.* Stanton, 11 Ala. 412; Pugh *v.* Currie, 5 Ala. 446.

California.— Dupuy *v.* Leavenworth, 17 Cal. 262.

Kansas.— Johnson *v.* Clark, 18 Kan. 157.

Michigan.— Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166.

England.— English Partn. Act (1890), § 20; Burnand *v.* Nerot, 2 Bligh N. S. 215, 4 Eng. Reprint 1112, 6 L. J. Ch. O. S. 81, 4 Russ. 247, 4 Eng. Ch. 247, 38 Eng. Reprint 798.

See 38 Cent. Dig. tit. "Partnership," § 519.

64. Hartnett *v.* Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. Rep. 151. See, generally, VENDOR AND PURCHASER.

65. Lake *v.* Gibson, 1 Eq. Cas. Abr. 290, 21 Eng. Reprint 1052; Jeffereys *v.* Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424.

66. English Partn. Act (1890), § 20 (1).

67. *Alabama.*—Andrews *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713.

New York.— Huber *v.* Case, 93 N. Y. App. Div. 479, 87 N. Y. Suppl. 663; Smith *v.* Cowles, 81 N. Y. App. Div. 328, 81 N. Y. Suppl. 524.

Tennessee.— Gaines *v.* Catron, 1 Humphr. 514; McAlister *v.* Montgomery, 3 Hayw. 94.

England.— Partn. Act (1890), § 20 (2); Custance *v.* Bradshaw, 4 Hare 315, 9 Jur. 486, 14 L. J. Ch. 358, 30 Eng. Ch. 315, 67 Eng. Reprint 669; *In re* Ryan, Ir. R. 3 Eq. 222; Elliot *v.* Brown, 3 Swanst. 489 note, 36 Eng. Reprint 948.

See 38 Cent. Dig. tit. "Partnership," § 520.

as a part of the partnership stock.[68] And the surviving partner is generally accorded the right of possession of such land for the purposes of winding up the firm's business.[69]

3. Sale and Conveyance. While the surviving partner has power to make a valid contract for the sale of partnership realty, when such sale is necessary in order to pay firm debts, and may compel the heirs or devisees of the deceased partner to join in a conveyance of the property in pursuance of such contract,[70] he has not the power to convey a perfect legal title to such realty in his capacity as survivor,[71] unless the realty has been converted into personalty by the partnership contract and the will of the deceased partner,[72] or unless the law of the particular jurisdiction has given to the surviving partner such power.[73] If a sale of firm real estate is made by the survivor in payment of his individual debts, or by a separate judgment creditor of the survivor, only his individual interest therein will pass.[74] A quitclaim deed by a surviving partner of partnership realty conveys only the individual interest of the grantor.[75]

4. Subjection to Payment of Firm Debts. When the personal property of a firm is insufficient to pay its debts in full, its realty can be subjected to their payment either upon application of the surviving partner,[76] or, if he fails to do his duty or the firm is insolvent, upon application of the firm creditors.[77] And if the survivor has sold the realty for full value, in order to pay firm debts, the purchaser can compel the heirs or devisees of the deceased partner to join with the survivor in a conveyance thereof.[78] But the personal representative of the

68. *Alabama.*— Lang *v.* Waring, 17 Ala. 145; Pugh *v.* Currie, 5 Ala. 446.
Arkansas.— French *v.* Vanatta, 83 Ark. 306, 104 S. W. 141.
California.— Smith *v.* Walker, 38 Cal. 385, 99 Am. Dec. 415.
Kansas.— Sternberg *v.* Larkin, 58 Kan. 201, 48 Pac. 861, 37 L. R. A. 195.
Michigan.— Merritt *v.* Dickey, 38 Mich. 41.
Pennsylvania.— Nimick's Estate, 179 Pa. St. 591, 36 Atl. 350.
Washington.— Dyer *v.* Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89.
See 38 Cent. Dig. tit. "Partnership," § 520.

69. *Arkansas.*— French *v.* Vanatta, 83 Ark. 306, 104 S. W. 141.
Connecticut.— Robinson *v.* Roberts, 31 Conn. 145.
Kansas.— Sternberg *v.* Larkin, 58 Kan. 201, 48 Pac. 861, 37 L. R. A. 195.
Louisiana.— Wyer *v.* Winchester, 2 Mart. N. S. 69.
United States.— Holton *v.* Guinn, 65 Fed. 450.

70. Barton *v.* Lovejoy, 56 Minn. 380, 57 N. W. 935, 45 Am. St. Rep. 482; Delmonico *v.* Guillaume, 2 Sandf. Ch. (N. Y.) 366; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510; Pierce *v.* Trigg, 10 Leigh (Va.) 406.

71. *Georgia.*— Anderson *v.* Goodwin, 125 Ga. 663, 54 S. E. 679.
Indiana.— Walling *v.* Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481, holding, however, that his conveyance passes as equitable title, if made in good faith and for fair value.
Iowa.— Van Staden *v.* Kline, 64 Iowa 180, 20 N. W. 3.
Kentucky.— Carter *v.* Flexner, 92 Ky. 400, 17 S. W. 851, 13 Ky. L. Rep. 608; Galbraith *v.* Gedge, 16 B. Mon. 631.
Minnesota.— Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441; Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328.
New York.— Huber *v.* Case, 93 N. Y. App. Div. 479, 87 N. Y. Suppl. 663.
Virginia.— Edgar *v.* Donnally, 2 Munf. 387.
Washington.— Dyer *v.* Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89.
United States.— Griffith *v.* Godey, 113 U. S. 89, 5 S. Ct. 383, 28 L. ed. 934.
See 38 Cent. Dig. tit. "Partnership," § 521.

72. Davis *v.* Smith, 82 Ala. 198, 2 So. 897.

73. Jones *v.* Sharp, 9 Heisk. (Tenn.) 660; Solomon *v.* Fitzgerald, 7 Heisk. (Tenn.) 552; McAlister *v.* Montgomery, 3 Hayw. (Tenn.) 94; Sanborn *v.* Sanborn, 11 Grant Ch. (U. C.) 359.

74. Caldwell *v.* Parmer, 56 Ala. 405; Lang *v.* Waring, 17 Ala. 145; Gainesville First Nat. Bank *v.* Cody, 93 Ga. 127, 19 S. E. 831.

75. Jackson *v.* Gunton, 218 Pa. St. 275, 67 Atl. 467.

76. Dyer *v.* Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Leary *v.* Boggs, 1 N. Y. St. 571; McCaskill *v.* Lancashire, 83 N. C. 393; Clay *v.* Freeman, 118 U. S. 97, 6 S. Ct. 964, 30 L. ed. 104; Shanks *v.* Klein, 104 U. S. 18, 26 L. ed. 635 [*affirming* 14 Fed. Cas. No. 7,870]; Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443. See also French *v.* Vanatta, 83 Ark. 306, 104 S. W. 141.

77. Murphy *v.* Abrams, 50 Ala. 293; Holland *v.* Fuller, 13 Ind. 195; Graves *v.* Hardin, 55 S. W. 679, 21 Ky. L. Rep. 1499; Goodburn *v.* Stevens, 5 Gill (Md.) 1.

78. Andrews *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252; Dupuy *v.* Leavenworth, 17 Cal. 262; Southwestern Georgia Bank *v.* McGarrah, 120 Ga. 944, 18 S. E. 393; Sprague Mfg. Co. *v.* Hoyt, 29 Fed. 421.

deceased partner cannot compel a sale of the latter's interest in firm realty, while such realty is needed to pay firm debts.[79]

5. RIGHTS OF HEIRS, DEVISEES, AND WIDOW. If the surviving partner disposes of firm realty in an inequitable and unauthorized manner, the heirs or devisees of the deceased partner will not be compelled to join in a conveyance thereof;[80] and whatever remains of firm realty after the debts of the firm are paid and the equities between the partners adjusted descends in this country according to the rules of real estate law, and vests in his heirs or devisees,[81] unless the contract of partnership is such as to constitute an equitable conversion of the realty into personalty.[82] His widow is entitled to dower in such remnant, but in nothing beyond this.[83] The heirs of a deceased partner are not necessary or proper parties to a proceeding by the surviving partners for sale of the partnership property, although part of it was realty; it being converted to personalty by the sale, and its descent being according to its character after conversion.[84] If the interest of the deceased partner in firm realty is duly sold by his authorized personal representative, the proceeds belong to his estate.[85]

6. RIGHTS BETWEEN HEIRS AND PERSONAL REPRESENTATIVES. In England partnership realty is treated as personal or movable, and not as real or heritable estate, unless the contrary intention of the partners appears.[86] This rule also obtains in Canada.[87] In this country a deceased partner's share of the surplus of the real estate of the copartnership which remains after paying the debts of the firm and

79. McKean *v.* Vick, 108 Ill. 373; Cilley *v.* Huse, 40 N. H. 358; Williams *v.* Moore, 62 N. C. 211.

80. Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533.

81. *Alabama.*—Abernathy *v.* Moses, 73 Ala. 381; Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533.

Illinois.— Strong *v.* Lord, 107 Ill. 25.

Kentucky.— Hart *v.* Hawkins, 3 Bibb 502, 6 Am. Dec. 666.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107; Wilcox *v.* Wilcox, 13 Allen 252.

Michigan.— Oliver *v.* Olmstead, 112 Mich. 483, 70 N. W. 1036.

Mississippi.— Hanway *v.* Robertshaw, 49 Miss. 758.

New York.— Matter of Wallace, 28 Misc. 603, 59 N. Y. Suppl. 1084.

North Carolina.— Summey *v.* Patton, 60 N. C. 601, 86 Am. Dec. 451.

Tennessee.— Piper *v.* Smith, 1 Head 93; Yeatman *v.* Woods, 6 Yerg. 20, 27 Am. Dec. 452.

Washington.—Hannegan *v.* Roth, 12 Wash. 65, 40 Pac. 636.

United States.— Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,116, 3 McLean 27].

Canada.— Doe *v.* McLeod, 8 U. C. Q. B. 344.

See 38 Cent. Dig. tit. "Partnership," § 522½.

82. Where a partnership, engaged in the business of contracting builders, purchased with firm funds vacant property and erected thereon buildings for the purpose of sale, and at the time of the death of one of the partners the partners held such real estate, it was held that in the distribution of the assets of the firm the real estate should be treated as personalty, and the widow and heirs of the deceased partner were entitled to receive the same as personalty. Patrick *v.* Patrick, (N. J. Ch. 1906) 63 Atl. 848.

83. Walling *v.* Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481 (where the widow had received the deceased partner's share of the proceeds and was estopped from claiming dower); Huston *v.* Neil, 41 Ind. 504 (where there was no surplus and hence no dower); Dyer *v.* Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 59 N. W. 1010, 49 Am. St. Rep. 503, 27 L. R. A. 340; Hauptmann *v.* Hauptmann, 91 N. Y. App. Div. 197, 86 N. Y. Suppl. 427. See DOWER, 14 Cyc. 903.

84. French *v.* Vanatta, 83 Ark. 306, 104 S. W. 141.

85. Hartnett *v.* Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. Rep. 151.

86. Waterer *v.* Waterer, L. R. 15 Eq. 402, 21 Wkly. Rep. 508; Murtagh *v.* Costello, L. R. 7 Ir. 428; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413, 61 Eng. Reprint 992 (where it is said that the mere contract of partnership without any express stipulation involves in it an implied contract, quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners; and that each partner, and the representatives of any deceased partner, have a right to insist on this being done); Houghton *v.* Houghton, 5 Jur. 528, 10 L. J. Ch. 310, 11 Sim. 491, 34 Eng. Ch. 491, 59 Eng. Reprint 963; Partn. Act (1890), § 22.

87. Wylie *v.* Wylie, 4 Grant Ch. (U. C.) 278.

adjusting all the equitable claims of the different members of the firm, as between the heirs at law and the personal representatives of the deceased partner, is to be considered and treated as real estate.[88]

D. Obligations of the Firm — 1. Liability of Surviving Partner. Upon an obligation of the firm, the surviving partner is liable to a several action, precisely as though it were his individual obligation; for the representatives of the deceased partner could not be joined in a suit at law with the survivor.[89] Nor is this liability of the survivor affected by the creditors proceeding against the estate of the deceased for the same claim.[90]

2. Liability of Deceased Partner's Estate. Although a firm creditor cannot join the personal representatives of the deceased partner with the survivor as defendants in an action at law, he is entitled to enforce his claim against the deceased partner's estate,[91] provided the claim is one against the firm.[92] In most

88. *Arkansas.*— Coolidge *v.* Burke, 69 Ark. 237, 62 S. W. 583.

Kentucky.— Lowe *v.* Lowe, 13 Bush 688 [*limiting* Louisville Bank *v.* Hall, 8 Bush 672, to cases where there is an agreement between partners for an out-and-out conversion into personalty].

Massachusetts.— Wilcox *v.* Wilcox, 13 Allen 252.

Mississippi.— Dilworth *v.* Mayfield, 36 Miss. 40.

New Jersey.— Campbell *v.* Campbell, 30 N. J. Eq. 415.

New York.— Duchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Smith *v.* Jackson, 2 Edw. 28.

Ohio.— Fisher *v.* Lang, 10 Ohio Dec. (Reprint) 178, 19 Cinc. L. Bul. 139.

Pennsylvania.— Leaf's Appeal, 105 Pa. St. 505; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Barber's Estate, 3 Pa. Dist. 53, 14 Pa. Co. Ct. 167; Rose's Estate, 6 Pa. Co. Ct. 109; McAvoy's Estate, 12 Phila. 83.

Rhode Island.— Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Tennessee.— Williamson *v.* Fontain, 7 Baxt. 212; Griffey *v.* Northcutt, 5 Heisk. 746; Piper *v.* Smith, 1 Head 93.

United States.— Logan *v.* Greenlaw, 25 Fed. 299.

See 38 Cent. Dig. tit. "Partnership," § 523.

89. *Georgia.*— Ross *v.* Everett, 12 Ga. 30.

Missouri.— McLean *v.* McAllister, 30 Mo. App. 107.

Nebraska.— Wright *v.* Barton, 34 Nebr. 776, 52 N. W. 809.

New York.— Carrere *v.* Spofford, 46 How. Pr. 294; Bridge *v.* Swain, 3 Redf. Surr. 487.

Pennsylvania.— Livingston *v.* Cox, 6 Pa. St. 360.

South Carolina.— Marvin *v.* McRae, Rice 171.

England.— Calder *v.* Rutherford, 3 B. & B. 302, 7 Moore C. P. 158, 7 E. C. L. 743; Martin *v.* Crompe, 1 Ld. Raym. 340, 2 Salk. 444. It is said to be the present rule in England, under the Judicature Acts, that an action may be brought against the surviving partner and the personal representatives of the deceased partner, except where the obligation is purely joint in equity as well as law. Lindley Partn. (7th ed.) 326 [*citing* Can. Rev. St. Ord. XVI, Rules, 1, 4, 68]. Still the survivor may be sued alone. Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59, 70 L. J. K. B. 26, 83 L. T. Rep. N. S. 431, 49 Wkly. Rep. 223.

Canada.— Campbell *v.* Farley, 18 Ont. Pr. 97; Connell *v.* Owen, 4 U. C. C. P. 113.

See 38 Cent. Dig. tit. "Partnership," §§ 524, 525.

90. Finnegan *v.* Allen, 60 Ill. App. 354; *Re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. Rep. N. S. 222, 34 Wkly. Rep. 127.

91. *Alabama.*— Claflin *v.* Behr, 89 Ala. 503, 8 So. 45.

Arkansas.— McLain *v.* Carson, 4 Ark. 164, 37 Am. Dec. 777.

Connecticut.— Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321.

Illinois.— Henry *v.* Caruthers, 196 Ill. 136, 63 N. E. 629 [*affirming* 95 Ill. App. 582]; Hayward *v.* Burke, 151 Ill. 121, 37 N. E. 846 [*reversing* 46 Ill. App. 265]; Doggett *v.* Dill, 108 Ill. 560, 48 Am. Rep. 565; Mason *v.* Tiffany, 45 Ill. 392; Mackay *v.* Pulford, 36 Ill. App. 593; Eads *v.* Mason, 16 Ill. App. 545.

Indiana.— Newman *v.* Gates, 165 Ind. 171, 72 N. E. 638; Ransom *v.* Pomeroy, 5 Blackf. 383.

Kentucky.— Maxey *v.* Averill, 2 B. Mon. 107.

Missouri.— Boatmens Sav. Inst. *v.* Mead, 52 Mo. 543.

New York.— Hamersley *v.* Lambert, 2 Johns. Ch. 508.

Pennsylvania.— Moore's Appeal, 34 Pa. St. 411; Creswell *v.* Blank, 3 Grant 320; Hawk *v.* Johnson, 3 Pa. Cas. 511, 6 Atl. 725; Huber *v.* Wood, 14 Pa. Co. Ct. 13.

South Carolina.— Wilson *v.* McConnell, 9 Rich. Eq. 500.

Wisconsin.— Martin *v.* Morris, 62 Wis. 418, 22 N. W. 525.

England.— Brown *v.* Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 Wkly. Rep. 2, 51 Eng. Reprint 795; Winter *v.* Innes, 2 Jur. 981, 4 Myl. & C. 101, 18 Eng. Ch. 101, 41 Eng. Reprint 40; Wilkinson *v.* Henderson, 2 L. J. Ch. 190, 1 Myl. & K. 582, 7 Eng. Ch. 582, 39 Eng. Reprint 801.

See 38 Cent. Dig. tit. "Partnership," § 525.

92. Evans *v.* Superior Steel Co., 114 Ill. App. 505; Bagel *v.* Miller, [1903] 2 K. B. 212, 8 Com. Cas. 218, 72 L. J. K. B. 495, 88 L. T. Rep. N. S. 769; Friend *v.* Young, [1897] 2 Ch. 421, 66 L. J. Ch. 737, 77 L. T. Rep.

jurisdictions, however, the firm creditors do not share *pari passu* with the separate creditors in the separate estate of the deceased,[93] unless there is no living solvent partner and no firm property.[94] But they are entitled to priority over separate creditors in the deceased partner's share of the firm assets.[95] The time for presenting a claim by a firm creditor against the deceased's estate is not ordinarily limited by the statutory provisions which govern the presentation of claims by individual creditors.[96]

E. Rights and Liabilities of Survivor as to Estate of Deceased — **1. Rights in General.** The survivor is entitled to the possession of the firm assets for the purpose of converting them into cash, paying its debts, and winding up the firm's affairs;[97] but not for the purpose of appropriating them to the payment of individual debts.[98] In England, and in some of our states, the survivor is not deemed a trustee for the estate of the deceased;[99] while other courts treat him as in some sense at least a trustee for the estate.[1]

2. Recovery by Survivor For Improvements. If improvements are made in good faith in winding up the firm's affairs, the survivor is generally allowed reimbursement from the firm's assets; and, if these are insufficient, he is entitled to contribution from the deceased partner's estate.[2]

3. Recovering Funds Misapplied by Deceased or His Representatives. The surviving partner is entitled to recover from the estate of the deceased moneys collected and misapplied by the deceased or by his representatives.[3] He may also fol-

N. S. 50, 46 Wkly. Rep. 139; Stocken *v.* Dawson, 9 Beav. 239, 50 Eng. Reprint 335 [*affirmed* in 17 L. J. Ch. 282]. In these cases the obligation was held to be that of the continuing partner and not of the firm of which deceased was a partner.

93. *Alabama.*— Bridge *v.* McCullough, 27 Ala. 661.

Connecticut.— Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321.

Kentucky.— Spratt *v.* Richmond First Nat. Bank, 84 Ky. 85, 7 Ky. L. Rep. 791, applying Gen. St. c. 39, art. 2, §§ 33, 34.

Mississippi.— Dahlgren *v.* Duncan, 7 Sm. & M. 280; Arnold *v.* Hamer, Freem. 509.

Vermont.— Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176, holding, however, that the firm creditor is entitled to share *pari passu* on a claim for whatever balance is unpaid by the firm estate.

England.— *Ex p.* Dear, 1 Ch. D. 514, 45 L. J. Bankr. 22, 34 L. T. Rep. N. S. 631, 24 Wkly. Rep. 525; Ridgway *v.* Clare, 19 Beav. 111, 52 Eng. Reprint 291; Lodge *v.* Pritchard, 1 De G. J. & S. 610, 32 L. J. Ch. 775, 11 Wkly. Rep. 1086, 9 L. T. Rep. N. S. 107, 2 New Rep. 537, 66 Eng. Ch. 474, 46 Eng. Reprint 242; Whittingstall *v.* Grover, 55 L. T. Rep. N. S. 213, 35 Wkly. Rep. 4; Lee *v.* Flood, 2 Wkly. Rep. 26. If the estate of the deceased partner is compelled to pay firm debts, it is entitled to be indemnified therefor from the firm assets. *Re* Daniel, 75 L. T. Rep. N. S. 143, 3 Manson 312.

See 38 Cent. Dig. tit. "Partnership," §§ 525, 528.

94. Sparhawk *v.* Russell, 10 Metc. (Mass.) 305.

95. Pilcher's Succession, 39 La. Ann. 362, 1 So. 929; Banks *v.* Steele, 27 Nebr. 138, 42 N. W. 883.

96. *California.*— Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7.

Florida.— Fillyau *v.* Laverty, 3 Fla. 72, where the same limitation is enforced against a firm debt as against an individual debt.

Mississippi.— Nagle *v.* Ball, 71 Miss. 330, 13 So. 929.

Missouri.—Denny *v.* Turner, 2 Mo. App. 52.

Virginia.— Sale *v.* Dishman, 3 Leigh 548.

United States.— Pendleton *v.* Phelps, 19 Fed. Cas. No. 10,923, 4 Day (Conn.) 476.

See 38 Cent. Dig. tit. "Partnership," § 526.

97. Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759; Dyas *v.* O'Neil, 3 Ohio S. & C. Pl. Dec. 309, 2 Ohio N. P. 81; Levy *v.* Archenbold, (Tex. Civ. App. 1898) 44 S. W. 46; *In re* Clough, 31 Ch. D. 324, 55 L. J. Ch. 77, 53 L. T. Rep. N. S. 716, 34 Wkly. Rep. 96; Kerrison *v.* Reddington, 11 Ir. Eq. 451. See *supra*, VIII, C, 2, 3.

98. Jones *v.* Dulaney, 86 S. W. 547, 977, 27 Ky. L. Rep. 702, 810.

99. Mulherin *v.* Rice, 106 Ga. 810, 32 S. E. 865; Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Chambers *v.* Howell, 11 Beav. 6, 12 Jur. 905, 50 Eng. Reprint 718; English Partn. Act (1890), § 43.

1. Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129; Jones *v.* Dulaney, 86 S. W. 547, 977, 27 Ky. L. Rep. 702, 810 (declaring him to be the trustee of an express trust); Milam *v.* Hill, 29 Tex. Civ. App. 573, 69 S. W. 447; Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620. In Heffron *v.* Knickerbocker, 57 Ill. App. 336, it is declared that the representative of a deceased partner may buy in firm property, at a master's sale, for the use of the deceased partner's estate.

2. Tillotson *v.* Tillotson, 34 Conn. 335; Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

3. Price *v.* Hicks, 14 Fla. 565; Bradley *v.* Brigham, 144 Mass. 181, 10 N. E. 793 (where the survivor was allowed to recover his share only of the proceeds of bonds owned by the

low the property into which such funds have been changed, provided they can be clearly ascertained, traced, and identified, and the rights of *bona fide* purchasers for value do not intervene.[4]

4. Recovery of Debts Due Firm by Deceased Partner. In winding up the firm's affairs, the survivor is entitled to collect from the estate of the deceased partner any debt owing by the deceased to the firm.[5] He is also entitled to retain the firm assets to the extent necessary to satisfy any indebtedness of the deceased to the firm, or to himself as the creditor partner.[6]

5. Reimbursement For Payments. When the surviving partner, applying the firm assets, is compelled to pay firm debts, he is entitled to reimbursement from the deceased partner's estate to the extent of that partner's share of the losses.[7]

6. Survivor's Liabilities. The liabilities of the surviving partner are measured by his duties. Accordingly he is answerable for any depreciation in the value of the firm's assets, or for any loss thereof, which is due to his failure to wind up the firm's affairs with due diligence and skill.[8] If he uses the assets for his personal benefit or in a manner not legally authorized he does so at his risk;[9] and if he makes a profit from their unauthorized use, the representative of the deceased

firm, but sold by the executor of the deceased partner, and it was held that, if the executor committed a tort in so selling them, he must answer personally therefor); *In re* Miller, 157 Pa. St. 224, 27 Atl. 698; Alexander *v.* Coulter, 2 Serg. & R. (Pa.) 494 (holding that by wrongfully collecting some of the firm debts, the executors do not make themselves answerable for all of the debts).

4. Holmes *v.* Gilman, 138 N. Y. 369, 34 N. E. 205, 34 Am. St. Rep. 463, 20 L. R. A. 566 [*reversing* 64 Hun 227, 19 N. Y. Suppl. 151, and *affirming* 18 N. Y. Suppl. 56].

5. Painter *v.* Painter, 68 Cal. 395, 9 Pac. 450 (applying Code Civ. Proc. § 1585, which requires the survivor to ascertain if the partnership assets will pay the partnership debts before taking a dividend from the deceased partner's separate estate); Bird *v.* Bird, 77 Me. 499, 1 Atl. 455; McCormick's Appeal, 55 Pa. St. 252 (limiting the survivor's claim to one half of the balance due from the deceased to the firm, on the ground that the remaining one half belonged to the deceased).

6. Painter *v.* Painter, (Cal. 1894) 36 Pac. 865; *In re* Morris, L. R. 10 Ch. 68, 44 L. J. Ch. 178, 31 L. T. Rep. N. S. 491, 23 Wkly. Rep. 120.

7. *Indiana.*— Olleman *v.* Reagan, 28 Ind. 109.

Massachusetts.— Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359 (holding the claim not barred by Pub. St. c. 136, § 9); Willey *v.* Thompson, 9 Metc. 329.

Michigan.— Wheeler *v.* Arnold, 30 Mich. 304.

Pennsylvania.— Hanna *v.* Wray, 77 Pa. St. 27; Moist's Appeal, 74 Pa. St. 166; Richard's Estate, 1 Woodw. 362; Scott's Estate, 25 Pittsh. Leg. J. N. S. 475.

England.— Ridgway *v.* Clare, 19 Beav. 111, 52 Eng. Reprint 291; *Re* Daniel, 75 L. T. Rep. N. S. 143, 3 Manson 312.

Canada.— *In re* Ruby, 24 Ont. App. 509.

See 38 Cent. Dig. tit. "Partnership," § 532½.

8. *Illinois.*— Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145 [*affirming* 61 Ill. App. 336]; Miller *v.* Jones, 39 Ill. 54.

Kentucky.— Swafford *v.* White, 89 S. W. 129, 28 Ky. L. Rep. 119, not liable for loss of logs, through no fault of his, while being driven in a stream.

Louisiana.— Cockerham *v.* Bosley, 52 La. Ann. 65, 26 So. 814; Netter *v.* Herman, 26 La. Ann. 458; Wilder's Succession, 21 La. Ann. 371, where the survivor was held liable to account to the estate of the deceased, in lawful money, although he had collected demands in Confederate money.

Maryland.— Baker *v.* Baltimore Safe Deposit, etc., Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. Rep. 463, where, however, the survivor was not liable, because by the partnership articles the capital belonged, not to the firm, but to the deceased partner.

Michigan.— Bundy *v.* Youmans, 44 Mich. 376, 6 N. W. 851; Heath *v.* Waters, 40 Mich. 457.

Pennsylvania.— Stanhope *v.* Suplee, 2 Brewst. 455.

Tennessee.— Condon *v.* Callahan, 115 Tenn. 285, 89 S. W. 400, 112 Am. St. Rep. 833, 1 L. R. A. N. S. 643, not liable for interest on moneys deposited to credit of firm's account, pending settlement.

Texas.— Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Civ. App. 1899) 50 S. W. 1058].

England.— Hunter *v.* Dowling, [1893] 3 Ch. 212, 62 L. J. Ch. 617, 68 L. T. Rep. N. S. 780, 2 Reports 608, 42 Wkly. Rep. 107; Marjoram *v.* Saundeford, Rom. Cas. 110.

Canada.— *In re* Wentworth, etc., Surrogate Ct., 44 U. C. Q. B. 207.

See 38 Cent. Dig. tit. "Partnership," § 533.

9. Morgan *v.* Morgan, 68 Ala. 80; Fitz *v.* Reichard, 20 La. Ann. 549; Bauchie *v.* Smylie, 104 N. Y. App. Div. 513, 93 N. Y. Suppl. 709 (the relation of the survivor to the estate of the deceased involves trust and confidence of the highest character); Hibberd *v.* Hubbard, 211 Pa. St. 331, 338, 60 Atl. 911, 913.

partner can compel him to account for the deceased's ratable share thereof.[10] If the representative of the deceased partner is compelled to pay firm debts he is entitled to call upon the surviving partner for contribution;[11] and if the latter makes a voluntary conveyance of his property, it may be set aside as fraudulent against the deceased partner's representatives.[12]

F. Survivor as Executor or Administrator of Deceased Partner — 1. Collection and Management of Estate. When the surviving partner is also the personal representative of the deceased, he acts in a dual capacity. As survivor, he is entitled and legally bound to convert the assets of the firm into cash, and to receive, hold, and distribute the proceeds.[13] In such capacity, however, he has no right to sell the separate property of the deceased for the payment of firm debts,[14] nor to apply the separate assets to such payment,[15] although he is entitled to call upon such estate for contribution in case the firm assets have proved insufficient to pay the debts and he has paid them,[16] unless he is barred by laches.[17] But he cannot lawfully apply the assets of the separate estate to firm debts, save in such or in similar circumstances;[18] and certainly he cannot apply them to the payment of debts for which he has become primarily liable.[19] On the other hand it is his duty as survivor to collect the decedent's share in the partnership and turn this over to the separate estate of the deceased.[20]

2. Contracts Between Survivor and Executor. The same person cannot enter into an agreement between himself as surviving partner and himself as the personal representative of the deceased.[21] Accordingly a sale by himself in one capacity to himself in the other is voidable, unless it is permitted by statute.[22]

10. *California.*— Painter *v.* Painter, (1901) 65 Pac. 135.

Illinois.— Oliver *v.* Forrester, 96 Ill. 315 [*reversing* 1 Ill. App. 259]; Diversey *v.* Johnson, 93 Ill. 547.

Iowa.— Young *v.* Scoville, 99 Iowa 177, 68 N. W. 670.

Missouri.— Roberts *v.* Hendrickson, 75 Mo. App. 484.

England.— Partn. Act (1890), § 29 (2); Booth *v.* Parkes, Beatty 444.

11. Hill *v.* Huston, 15 Gratt. (Va.) 350.

12. Alston *v.* Rowles, 13 Fla. 117.

13. *Kentucky.*— Pearson *v.* Keedy, 6 B. Mon. 128, 43 Am. Dec. 160, holding also that the sureties on his bond as administrator of deceased are not liable for his disposition of firm assets in his capacity as survivor.

New York.— Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734 [*affirming* 13 Daly 317, 17 Abb. N. Cas. 162]; Matter of Thieriot, 117 N. Y. App. Div. 686, 102 N. Y. Suppl. 952 (holding that where the will of a partner made the other partner executrix, and provided that she should exercise the controlling interest in the management and direction of the business, and should control and dispose of the same, such executrix, while prosecuting the business of closing up the estate, so far as concerned the partnership, and in paying the debts thereof, etc., could not be interfered with on the theory that she had so conducted herself as to justify her removal as testamentary trustee, as her right to so manage the estate was a right possessed by her as surviving partner, irrespective of the will); Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl. 49.

Ohio.— Kreis *v.* Gorton, 23 Ohio St. 468.

Oregon.— Palicio *v.* Bigne, 15 Oreg. 142, 13 Pac. 765.

England.— *In re* Morris, L. R. 10 Ch. 68, 44 L. J. Ch. 178, 31 L. T. Rep. N. S. 491, 23 Wkly. Rep. 120; Way *v.* Bassett, 5 Hare 55, 10 Jur. 89, 15 L. J. Ch. 1, 26 Eng. Ch. 55, 67 Eng. Reprint 825, holding that acts which the survivor was bound to do in that capacity are not presumed to have been done in the capacity of executor.

See 38 Cent. Dig. tit. "Partnership," § 536.

14. Boyle *v.* Boyle, 4 B. Mon. (Ky.) 570.

15. Gee *v.* Humphries, 49 S. C. 253, 27 S. E. 101.

16. Mead *v.* Byington, 10 Vt. 116. See Boyle *v.* Boyle, 4 B. Mon. (Ky.) 570, holding that where there are sufficient partnership funds to pay the firm debts the surviving partner, acting as administrator of the deceased partner, cannot sell personal property belonging to the decedent's estate to pay firm debts; but where there are no partnership funds, the surviving partner acting as such administrator may sell such property to pay one half of the partnership debts, or the whole of such debts in case he himself is insolvent.

17. Hardisty *v.* Hardisty, 77 Md. 179, 26 Atl. 322; *In re* De Coursey, 211 Pa. St. 92, 60 Atl. 490.

18. Shelly *v.* Hiatt, 52 N. C. 509.

19. Matter of Mertens, 39 Misc. (N. Y.) 512, 80 N. Y. Suppl. 376.

20. Woodruff's Estate, Tuck. Surr. (N. Y.) 1; *In re* Dair, Ohio Prob. 233; Grant *v.* McKinney, 36 Tex. 62; Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

21. Leavitt's Estate, 20 N. Y. Suppl. 58, 28 Abb. N. Cas. 457; Egan *v.* Wirth, 26 R. I. 363, 58 Atl. 987.

22. Nelson *v.* Hayner, 66 Ill. 487; Denholm *v.* McKay, 148 Mass. 434, 19 N. E. 551, 12 Am. St. Rep. 574; Bauchle *v.* Smylie,

In Louisiana by statute a surviving partner, who is administrator of the deceased partner's succession, may purchase at a succession sale of his effects.[23]

3. Allowance to Widow. Until firm debts are paid, the widow of the deceased has no right to an allowance from the personal assets of the firm; and if the survivor, being also administrator of the deceased partner's estate, makes such an allowance, he is guilty of a misappropriation of firm assets.[24] This, however, does not apply to payments made to the widow pursuant to provisions in the partnership articles.[25]

4. Accounting and Settlement. The survivor should account to the estate of the deceased partner for the latter's share in firm assets, and if he fails to do so he may be forced to an accounting by application to the proper court.[26] In such proceeding he will be required to account for the fair valuation of the share at the deceased partner's death.[27] As a rule he will not be allowed a compensation for settling the firm's affairs;[28] and if he misappropriates the share, he may be chargeable with compound interest thereon,[29] or with the profits realized from such use.[30]

104 N. Y. App. Div. 513, 93 N. Y. Suppl. 709; Gee *v.* Humphries, 49 S. C. 253, 27 S. E. 101. In Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562, the survivor had taken certain firm property at the highest bid offered at public sale, and was held chargeable with that price.

23. Savage *v.* Williams, 15 La. Ann. 250, applying Laws (1854), p. 155. And see Carter *v.* McManus, 15 La. Ann. 641.

24. Sellers *v.* Shore, 89 Ga. 416, 15 S. E. 494; Julian *v.* Wrightsman, 73 Mo. 569; Miller *v.* Berry, 19 S. D. 625, 104 N. W. 311.

25. McClean *v.* Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323, 30 L. T. Rep. N. S. 186, 22 Wkly. Rep. 382; Johnston *v.* Moore, 4 Jur. N. S. 356, 27 L. J. Ch. 453, 6 Wkly. Rep. 490.

26. *Alabama.*— Vincent *v.* Martin, 79 Ala. 540, holding also that the fact that he has settled with the widow of the deceased will not save him from the necessity of accounting, if a bill is filed therefor by creditors of the deceased.

Kentucky.— Raison *v.* Williams, 42 S. W. 1108, 19 Ky. L. Rep. 1142.

Massachusetts.— Leland *v.* Newton, 102 Mass. 350, where the survivor, who was also administrator of the deceased partner's estate, was compelled to account in the probate court.

Mississippi.— Stewart *v.* Burkhalter, 28 Miss. 396.

New York.— Matter of Mertens, 39 Misc. 512, 80 N. Y. Suppl. 376; Matter of Dummett, 38 Misc. 477, 77 N. Y. Suppl. 1118, holding that he must settle his accounts in the surrogate court. See also Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl. 49, holding that where a surviving partner, who had without authority continued to conduct the firm business, was required to account, he was properly charged with the amount of certain checks which he was unable to prove had been used for the firm business.

Rhode Island.— Egan *v.* Wirth, 26 R. I. 363, 58 Atl. 987.

Canada.— Mack *v.* Mack, 26 Nova Scotia 24 [*affirmed* in 23 Can. Sup. Ct. 146].

See 38 Cent. Dig. tit. "Partnership," § 539.

Compare Hutton *v.* Laws, 55 Iowa 710, 8 N. W. 642, holding that the surviving member of a partnership cannot be held to account to the heirs of his deceased partner while the estate of such deceased partner is in probate, although he is himself the administrator; the remedy of the heirs, if not satisfied with his action, being to make application for his removal and the appointment of a new administrator.

27. Broughton *v.* Broughton, 44 L. J. Ch. 526, 23 Wkly. Rep. 770.

28. Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl. 49; Matter of Harris, 4 Dem. Surr. (N. Y.) 463; Pickens' Estate, 14 Wkly. Notes Cas. (Pa.) 407; MacDonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 10 L. T. Rep. N. S. 166, 65 Eng. Reprint 833; English Partn. Act (1890), § 24 (6). See *infra*, VIII, I, 2. Where a surviving partner, who during the continuance of the partnership had been entitled to draw a certain weekly salary for his services in managing the business, continued to conduct the business after the death of the other partner, and continued to draw the salary, but neither the co-administratrix nor next of kin of the deceased partner objected to the continuance of the business, and it did not appear that they consented that the surviving partner might continue to draw the salary, it was held that, on settlement of the accounts of the surviving partner as administrator of the deceased partner, the surviving partner was properly charged with the amount withdrawn by him as salary. Clausen *v.* Puvogel, *supra*.

Interest on salary improperly withdrawn. — But where a surviving partner who carried on the business for some time was required to account for the profits thereof, it was held that he was not chargeable in such case with interest on amounts improperly withdrawn by him as salary. Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl. 49.

29. Hannahs *v.* Hannahs, 68 N. Y. 610.

30. Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

G. Statutory Partnership Administrators — 1. In General. In some states it is provided by statute that the surviving partner shall not exercise his common-law functions as survivor, until he has given a bond or complied with other specified requirements.[31] Such statutes generally preclude the settlement of such estates in any other manner.[32]

2. Collection and Allowance of Claims and Accounting. The powers of the statutory administrator in collecting firm debts and managing the firm affairs,[33] as well as in allowing, refusing, and paying claims,[34] are prescribed with considerable particularity. He is also subject to an accounting in a specified court.[35]

31. As to the construction of these statutes see the following cases:

Kansas.— Teney *v.* Laing, 47 Kan. 297, 27 Pac. 976; Carr *v.* Catlin, 13 Kan. 393; Towler *v.* Bull, 3 Kan. App. 626, 44 Pac. 30, the settlement of partnership estates, upon the death of a partner, is regulated by Gen. St. (1889) art. 2, c. 37.

Louisiana.— *In re* Curlee, 118 La. 563, 43 So. 165; Klotz *v.* Macready, 35 La. Ann. 596; McKowen *v.* McGuire, 15 La. Ann. 637; Notrebe *v.* McKinney, 6 Rob. 13.

Maine.— Bass *v.* Emery, 74 Me. 338; Putnam *v.* Parker, 55 Me. 235, applying Rev. St. c. 69.

Missouri.— Barnes *v.* Stone, 198 Mo. 471, 95 S. W. 915; Headlee *v.* Cloud, 51 Mo. 301; Green *v.* Virden, 22 Mo. 506; James *v.* Dixon, 21 Mo. 538; State *v.* Shacklett, 115 Mo. App. 715, 91 S. W. 956; Barnes *v.* Stanley, 95 Mo. App. 688, 69 S. W. 682; Weise *v.* Moore, 22 Mo. App. 530. The administrator of the deceased partner may recover possession of property from the surviving partner on his failure to give the statutory security. Bredow *v.* Mutual Sav. Inst., 28 Mo. 181. The heirs at law of a deceased member of a partnership may not sue for his share of an unadministerial asset of the firm, but the administrator of the partnership, or, he being dead, its administrator *de bonis non*, must sue for the asset. Pullis *v.* Pullis, 178 Mo. 683, 77 S. W. 753.

Washington.— State *v.* Neal, 29 Wash. 391, 69 Pac. 1103.

See 38 Cent. Dig. tit. "Partnership," § 540.

32. Towler *v.* Bull, 3 Kan. App. 626, 44 Pac. 30; Notrebe *v.* McKinney, 6 Rob. (La.) 13; and other cases cited in the preceding note.

Removal.—A surviving partner who has given bonds under the statute for the due administration of the partnership effects cannot be removed for non-residence by the probate court as in the case of an ordinary administrator. Green *v.* Virden, 22 Mo. 506.

Public administrator see Headle *v.* Cloud, 51 Mo. 301.

33. Shattuck *v.* Chandler, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227 (survivor, under this regulation of his powers, is deprived of authority to make an assignment for the benefit of creditors); Bell *v.* McCoy, 136 Mo. 552, 38 S. W. 329; Easton *v.* Courtwright, 84 Mo. 27; Springfield Grocer Co. *v.* Shackleford, 56 Mo. App. 642 (chattel mortgage given by a surviving partner cannot be attacked by a stranger, although voidable by those interested in the estate).

34. Easton *v.* Courtwright, 84 Mo. 27; State *v.* Shacklett, 73 Mo. App. 265 (applying Rev. St. (1889) § 64); Collier *v.* Cairns, 6 Mo. App. 188. The surviving partner of a commercial partnership liquidating its affairs is without authority to admit the correctness of debts alleged to be due by the deceased individually, or pay them out of the partnership funds, and the widow of the deceased partner and his succession cannot be called on to litigate such claims in the liquidation proceedings. *In re* Curlee, 118 La. 563, 43 So. 165. Where partners executed a trust deed, the surviving partner and his wife and the wife of the deceased partner could not create a lien on the partnership estate, after another had been appointed administrator and was in charge of the partnership estate, so as to exclude the right of the partnership administrator to the excess of the purchase-money in the hands of the trustee after satisfying the debt. Barnes *v.* Stone, 198 Mo. 471, 95 S. W. 915.

35. Wolfort *v.* Reilly, 133 Mo. 463, 34 S. W. 847 (where counsel fees were allowed to the statutory administrator, as well as disbursements to a bookkeeper for looking after assessments and taxes, but he was chargeable with interest on the sum tendered to the deceased partner's executrix, from the time of tender, if he could have loaned the money or used it after the tender); *In re* Glover, 127 Mo. 153, 29 S. W. 982; Christy *v.* Donegan, 83 Mo. 374 (not allowed for groceries furnished the widow of the deceased); Crow *v.* Weidner, 36 Mo. 412; Cogswell *v.* Freudenau, 93 Mo. App. 482, 67 S. W. 744 (holding that the heirs of the deceased partner may appear in such proceeding and except to the administrator's account). In a contest over the final settlement of a surviving partner administering the partnership estate, whose letters were revoked, the administrator *de bonis non* represents the heirs and creditors of the estate and such final settlement has the effect of a final judgment, which, until impeached in equity, is a complete defense to an action on such surviving partner's bond as administrator. State *v.* Shacklett, 115 Mo. App. 715, 91 S. W. 956. The widow of a deceased partner of a commercial firm, which is in the hands of the surviving partner for the purpose of liquidation, who lives in the city where the liquidation is carried on, and who, presumably, has knowledge of the situation, should, in justice to the liquidator, urge at the time any timely objection which she has to the liquidation, before, and not postpone complaints as to the expense

H. Bond of Surviving Partner or of Statutory Partnership Administrator. The duty on the part of the survivor or of the statutory representative to give a bond,[36] as well as the facts constituting a breach of its conditions and authorizing the maintenance of an action thereon,[37] are determinable by the statutory provisions in the particular jurisdiction as these have been construed by the courts thereof.[38]

I. Rights and Liabilities Incident to Winding Up Business — 1. Obligations Incurred. The surviving partner, in performing his duty of winding up the firm affairs, may subject the assets of the firm to a mortgage or other specific lien,[39] and may render them liable for the satisfaction of new debts properly incurred by him as survivor.[40] If the assets are insufficient to pay such debts, he is entitled to call upon the deceased partner's estate for contribution.[41] As a rule, however, the estate of the deceased partner cannot be made directly liable to third persons by the contracts of the survivor.[42] For the breach of any

incurred in the liquidation until after they have been incurred, and the liquidation closed. *In re* Curlee, 118 La. 563, 43 So. 165. The preparation of the accounts of the surviving partner of a commercial firm liquidating its affairs is part of the duty of the attorney employed in the case, and the liquidator is not authorized to employ a bookkeeper to make out the account and have him paid out of the funds of the partnership, under La. Civ. Code, art. 1142, providing that lawful expenses incurred for the advantage of a partnership during the administration of its affairs after the death of a partner are borne by the succession of the deceased partner in proportion to the interest of the succession in the partnership. *In re* Curlee, *supra*. When an outlay of money by the liquidator of partnership affairs for electric lights is shown by the testimony to have resulted in benefit to the partnership, the widow of the deceased partner who accepts the benefit of the expenditure cannot properly complain of the outlay which produced the benefit. *In re* Curlee, *supra*.

36. Hill *v.* Treat, 67 Me. 501; Cook *v.* Lewis, 36 Me. 340; Gurley *v.* Gurley, 77 Miss. 413, 26 So. 962 (bond must be in a sum equal to the value of the partnership assets, although the survivor's interest in the estate greatly exceeds that of the deceased partner); Goodson *v.* Goodson, 140 Mo. 206, 41 S. W. 737 (the survivor's failure to give the bond required by Rev. St. (1889) § 56, does not deprive him of his common-law right to settle the firm estate, unless the personal representative of the deceased qualifies under section 60, and takes possession); Hays *v.* Odom, 79 Mo. App. 425.

37. Miller *v.* Kingsbury, 128 Ill. 45, 21 N. E. 209 [*affirming* 28 Ill. App. 532]; Carr *v.* Catlin, 13 Kan. 393; State *v.* Baldwin, 31 Mo. 561; State *v.* Myers, 9 Mo. App. 44. Under the statute allowing the surviving member of a partnership to pay all demands against the firm without requiring the same to be exhibited to the probate court for allowance, only when he knows the partnership assets will suffice to discharge all its debts, the payment by a surviving partner of unallowed demands where there is a deficiency of assets to satisfy all creditors, constitutes a breach of his bond. State *v.* Shacklett, 115 Mo. App. 715, 91 S. W. 956. In an action on the bond of a surviving partner administering the partnership estate, the petition averred that such administrator, after wrongfully paying unallowed debts, had eight hundred dollars left in his hands and alleged an indebtedness to relator of two thousand dollars. There was evidence that defendant's successor, as administrator *de bonis non*, had in his hands the sum of nine hundred dollars and was entitled to collect other assets alleged to amount to one thousand four hundred dollars or more. It was held not to show conclusively that there would be a deficiency of assets, authorizing a recovery on the bond, it appearing that all other claims against the estate were paid in full. State *v.* Shacklett, *supra*.

38. State *v.* U. S. Fidelity, etc., Co., 4 Pennew. (Del.) 428, 56 Atl. 607 (bond is for the benefit of the deceased partner's estate); Adams *v.* Marsteller, 70 Ind. 381, 76 N. E. 443, 77 N. E. 747 (bond not required, when death occurred before enactment of statute); Harrah *v.* State, 38 Ind. App. 495; Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517 (construing Rev. Civ. Code, art. 1139, as requiring bonds to run "to the succession representatives"); Walmsley *v.* Mendelsohn, 31 La. Ann. 152; Twibill's Succession, 14 La. Ann. 645; State *v.* Smith, 57 Mo. App. 120.

39. Burchinell *v.* Koon, 25 Colo. 59, 52 Pac. 1100; People's Nat. Bank *v.* Wilcox, 136 Mich. 567, 100 N. W. 24.

40. Central Trust, etc., Co. *v.* Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 99 Am. St. Rep. 317, 56 L. R. A. 479; Rosenthal *v.* Hasberg, 84 N. Y. Suppl. 290; Calvert *v.* Miller, 94 N. C. 600; Herron *v.* Wampler, 194 Pa. St. 277, 45 Atl. 81.

41. Dolan *v.* Lee, 40 N. J. Eq. 338 [*affirming* 39 N. J. Eq. 193]; Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77 [*reversing* 19 N. Y. Suppl. 849]; Allen *v.* Blanchard, 9 Cow. (N. Y.) 631; O'Neill *v.* Duff, 11 Phila. (Pa.) 244; Hart *v.* Bowen, 86 Fed. 877, 31 C. C. A. 31.

42. Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434; Kalbfell's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 273, 27 Pittsb. Leg. J. N. S. 210 (one who sold goods to a survivor

contracts entered into by a surviving partner he is, in the absence of special circumstances, individually liable.[43]

2. Compensation For Winding Up Business. No compensation is allowed to the surviving partner, unless authorized by statute or the partnership articles,[44] or in some jurisdictions unless the circumstances attending the settlement of the firm's affairs are extraordinary.[45] The rule does not apply to the administrator of the surviving partner,[46] nor to the son of such partner.[47]

3. Purchase by Survivor of Deceased Partner's Interest. Partnership articles sometimes provide that, upon the death of a partner, the survivor may purchase the interest of the deceased at a price to be arrived at in a prescribed manner.[48] Even in the absence of such a stipulation, and of a statutory provision on the

for use in winding up the firm's business was allowed to prove his claim against the estate of the deceased partner); Bagel *v.* Miller, [1903] 2 K. B. 212, 8 Com. Cas. 218, 72 L. J. K. B. 495, 88 L. T. Rep. N. S. 769; Ga. Civ. Code, § 2635; English Partn. Act (1890), § 38.

43. Bass Dry Goods Co. *v.* Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415.

44. *Alabama.*— Colgin *v.* Cummins, 1 Port. 148.

California.— Griggs *v.* Clark, 23 Cal. 427.

Idaho.— McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349.

Iowa.—Starr *v.* Case, 59 Iowa 491, 13 N. W. 645.

Kentucky.— Terrell *v.* Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. Rep. 258; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664; Coakley *v.* Hazelwood, 49 S. W. 1067, 21 Ky. L. Rep. 40; Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Louisiana.— *In re* Curlee, 118 La. 563, 43 So. 165 (by express provision of Civ. Code, art. 1142); Smith *v.* Smith, 51 La. Ann. 72, 24 So. 618.

Maryland.— Sangston *v.* Hack, 52 Md. 173.

Massachusetts.— Washburn *v.* Goodman, 17 Pick, 519.

Michigan.— Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

Missouri.— Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525; Gregory *v.* Menefee, 83 Mo. 413; Roberts *v.* Hendrickson, 75 Mo. App. 484 (a statutory commission is allowed in this state); *In re* Tutt, 41 Mo. App. 662 (applying Laws (1885), p. 25).

New York.— King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594; Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl 49; Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363 [*modified* on other grounds in 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796]; Burgess *v.* Badger, 82 Hun 488, 31 N. Y. Suppl. 614; Sterne *v.* Goep, 20 Hun 396 [*affirmed* in 84 N. Y. 641]; Skidmore *v.* Collier, 8 Hun 50; Coursen *v.* Hamlin, 2 Duer 513; Matter of Dummett, 38 Misc. 477, 77 N. Y. Suppl. 1118; Matter of Harris, 4 Dem. Surr. 463.

Pennsylvania.— Brown *v.* McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Beatty *v.* Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Picken's Estate, 14 Wkly. Notes Cas. 407; Mengel's Estate, 1 Woodw. 334.

Rhode Island.— Evans *v.* Weatherhead, 24 R. I. 394, 53 Atl. 286.

Tennessee.— Berry *v.* Jones, 11 Heisk. 206, 27 Am. Rep. 742; Piper *v.* Smith, 1 Head 93.

Wisconsin.— Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

United States.— Denver *v.* Roane, 99 U. S. 355, 25 L. ed. 476.

England.— Partn. Act (1890), § 24 (6) (providing that "no partner shall be entitled to remuneration for acting in the partnership business"); Stocken *v.* Dawson, 6 Beav. 371, 49 Eng. Reprint 869 [*affirmed* in 17 L. J. Ch. 282]; MacDonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 10 L. T. Rep. N. S. 166, 65 Eng. Reprint 833.

Canada.— Butler *v.* Butler, 29 Nova Scotia 145.

See 38 Cent. Dig. tit. "Partnership," § 550. And see *supra*, V, A, 17; *infra*, VIII, J, 6; IX, C, 3, i.

45. Richards *v.* Maynard, 166 Ill. 466, 46 N. E. 1138 [*affirming* 61 Ill. App. 336]; Hite *v.* Hite, 1 B. Mon. (Ky.) 177; Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647; Newell *v.* Humphry, 37 Vt. 265. While the general rule is that the surviving partner is not entitled to salary for settling the partnership business, when a partnership has been carried on for some time after dissolution by death, and such continuance has proved beneficial, compensation may be allowed. McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349. In Royster *v.* Johnson, 73 N. C. 474, 475, it is said that "the English doctrine, that executors, trustees, surviving partners, &c., are not entitled to commissions or compensation for their services, is not suited to this country," and that surviving partners should be allowed reasonable compensation for their services in winding up the firm's affairs. See also Condon *v.* Callahan, 115 Tenn. 285, 89 S. W. 400, 112 Am. St. Rep. 835, 2 L. R. A. N. S. 643.

46. Dayton *v.* Bartlett, 38 Ohio St. 357.

47. Galbraith's Estate, 12 Phila. (Pa.) 20.

48. *California.*— Rankin *v.* Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265.

Missouri.— Scharringhausen *v.* Luebsen, 52 Mo. 337.

New York.— Sands *v.* Miner, 160 N. Y. 693, 55 N. E. 1100 [*affirming* 16 N. Y. App. Div. 347, 44 N. Y. Suppl. 894]; Lowenstein *v.* Schiffer, 38 N. Y. App. Div. 178, 56 N. Y. Suppl. 674; Hull *v.* Cartledge, 18 N. Y. App. Div. 54, 45 N. Y. Suppl. 450.

subject,[49] the surviving partner may validly purchase the interest of the deceased,[50] although his fiduciary relation to the estate of the deceased makes it incumbent upon him to act with the utmost good faith.[51] The deceased partner may by will give his share to the survivor.[52]

J. Continuance of Business of Firm — 1. Right to Continue Business. In the absence of any provision in the partnership articles or in the decedent's will on the subject, the survivor has no authority to continue the business, as distinguished from winding it up.[53] If he does continue it, he alone is liable for debts incurred;[54] and he must answer for all depreciation and loss due to such continuance.[55] It is entirely competent, however, for partners to provide in their articles that the death of a member shall not dissolve the firm, and that the business shall

Ohio.— Jones *v.* Proctor, 5 Ohio S. & C. Pl. Dec. 416, 5 Ohio N. P. 315.

Pennsylvania.— *In re* Fleming, 184 Pa. St. 88, 39 Atl. 29; Rohrbacher's Estate, 168 Pa. St. 158, 32 Atl. 30 [*reversing* 3 Pa. Dist. 264, 14 Pa. Co. Ct. 568].

Texas.— Caut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

United States.— Brown *v.* Slee, 103 U. S. 828, 26 L. ed. 618; Littell *v.* Hackley, 126 Fed. 309, 61 C. C. A. 295; Robertson *v.* Miller, 20 Fed. Cas. No. 11,926, 1 Brock. 466.

England.— *Ex p.* Morley, L. R. 8 Ch. 1026, 43 L. J. Bankr. 28, 29 L. T. Rep. N. S. 442, 21 Wkly. Rep. 940; *In re* David, [1899] 1 Ch. 378, 68 L. J. Ch. 185, 80 L. T. Rep. N. S. 75, 47 Wkly. Rep. 313; Page *v.* Ratliffe, 76 L. T. Rep. N. S. 63, 75 L. T. Rep. N. S. 371.

Canada.— Hibben *v.* Collister, 30 Can. Sup. Ct. 459; Robertson *v.* Junkin, 26 Can. Sup. Ct. 192.

49. Rammelsberg *v.* Mitchell, 29 Ohio St. 22 (applying 56 Ohio Laws, p. 36, act of March 21, 1861); Mitchell *v.* Schultz, 8 Ohio Dec. (Reprint) 78, 5 Cinc. L. Bul. 503; *Ex p.* Sessions, 2 Ch. Chamb. (U. C.) 360 (applying 29 Vict. § 58).

50. *Illinois.*— Hamilton *v.* Wells, 182 Ill. 144, 55 N. E. 143 [*affirming* 81 Ill. App. 274]; Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470].

Indiana.— Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

Kentucky.— Wilson *v.* Soper, 13 B. Mon. 411, 56 Am. Dec. 573.

Louisiana.— Skipwith *v.* Lea, 16 La. Ann. 247.

Massachusetts.— Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299; Washburn *v.* Goodman, 17 Pick. 519.

Nebraska.— Lobeck *v.* Lee-Clarke-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 795.

New York.— Howell *v.* Wallace, 37 N. Y. App. Div. 323, 56 N. Y. Suppl. 280.

Ohio.— Ludlow *v.* Cooper, 4 Ohio St. 1.

See 38 Cent. Dig. tit. "Partnership," § 551.

51. *Illinois.*— Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129, purchaser adjudged to hold certain land in trust for heirs and widow of deceased partner.

Louisiana.— Macready *v.* Schenck, 43 La. Ann. 479, 9 So. 470; Klotz *v.* Macready, 39 La. Ann. 638, 2 So. 203.

Maryland.— Welbourn *v.* Kleinle, 92 Md. 114, 48 Atl. 81.

New York.— Ogden *v.* Astor, 4 Sandf. 311.

Virginia.— Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

See 38 Cent. Dig. tit. "Partnership," § 551.

52. Robertson *v.* Junkin, 26 Can. Sup. Ct. 192.

53. *Arkansas.*—Adams *v.* Ward, 26 Ark. 135; Cline *v.* Wilson, 20 Ark. 154.

Idaho.— McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349.

Illinois.— Remick *v.* Emig, 42 Ill. 342.

Indiana.— Powell *v.* North, 3 Ind. 392, 56 Am. Dec. 513, holding, however, that a court of equity may authorize the continuance of the business on behalf of infants, with the assent of the surviving partners.

Massachusetts.—Williams *v.* Brookline, 194 Mass. 44, 79 N. E. 779.

Michigan.— Frey *v.* Eisenhardt, 116 Mich. 160, 74 N. W. 501.

New York.—Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Collender *v.* Phelan, 79 N. Y. 366 (where the right to continue was given); Dawson *v.* Parsons, 21 N. Y. Suppl. 212 [*affirming* 20 N. Y. Suppl. 65]; Evans *v.* Evans, 9 Paige 178; Egberts *v.* Wood, 3 Paige 517, 24 Am. Dec. 236.

Pennsylvania.— Holden *v.* McMakin, 1 Pars. Eq. Cas. 270.

Wisconsin.— Weld *v.* Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374.

United States.— Perin *v.* Megibben, 53 Fed. 86, 13 C. C. A. 443.

England.— Evans *v.* Hughes, 18 Jur. 691; Myers *v.* Myers, 60 L. J. Ch. 311; Hills *v.* Reeves, 31 Wkly. Rep. 209 [*affirming* 30 Wkly. Rep. 439].

See 38 Cent. Dig. tit. "Partnership," § 552.

Provision not authorizing continuance of business.—A provision in a firm agreement that on the death of a partner his share of the capital shall remain in the business for two years, a surviving partner paying interest thereon at a specified rate, does not authorize a continuance of the business by the executor of a deceased partner. Williams *v.* Brookline, 194 Mass. 44, 79 N. E. 779.

54. Juliand *v.* Watson, 43 N. Y. 571; Staats *v.* Howlett, 4 Den. (N. Y.) 559.

55. Roberts *v.* Hendrickson, 75 Mo. App. 484; Hooley *v.* Gieve, 9 Daly (N. Y.) 104 [*affirmed* in 82 N. Y. 625].

be continued.[56] If the articles provide that the personal representatives or the heirs or assigns of the deceased may become partners in his stead, such provision does not compel them to enter the firm, although it gives them the option to do so.[57] If they exercise the option, a new firm is formed.[58] Even when the articles provide that such representatives shall enter the firm, they may still decline to enter, although their refusal may subject the decedent's estate to damages for the breach of this term of the partnership contract.[59] When the decedent's will or partnership articles provide that the partnership shall continue for a specified period, the provision is generally construed to be binding upon the decedent's estate only to the extent of the capital then embarked in the business.[60] Still it is competent to provide that his entire estate shall be chargeable with the debts of the business carried on after his death.[61]

2. Rights and Liabilities of Survivors. While, as has been seen in the preceding paragraph, the survivor has no right to continue the business of the firm save for the purpose of winding it up,[62] and while a court of equity may take from him even the right of winding up in case of his insolvency and danger of wasting the assets;[63] yet, if he does organize a new firm and passes title to the old firm's stock to it, his rights to such property as surviving partner are extin-

56. *Connecticut.*— Butler *v.* American Toy Co., 46 Conn. 136; Duffield *v.* Brainerd, 45 Conn. 424.

Indiana.— Rand *v.* Wright, 141 Ind. 226, 39 N. E. 447.

Louisiana.— Hart *v.* Anger, 38 La. Ann. 341 (applying Civ. Code, arts. 2880, 2882); Powell *v.* Hopson, 13 La. Ann. 626; Buard *v.* Lemée, 12 Rob. 243 (holding, however, that a partnership cannot be so continued where the succession of the deceased is insolvent).

Maine.— *In re* Shaw, 81 Me. 207, 16 Atl. 662.

Missouri.— Edwards *v.* Thomas, 66 Mo. 468; Hax *v.* Burnes, 98 Mo. App. 707, 73 S. W. 928.

New York.—Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Lane *v.* Arnold, 99 N. Y. 648 [*reversing* 11 Daly 293, 63 How. Pr. 40 (*reversing* 13 Abb. N. Cas. 73)]; Matter of Marx, 106 N. Y. App. Div. 212, 94 N. Y. Suppl. 151; Matter of Laney, 50 Hun 15, 2 N. Y. Suppl. 443 [*affirmed* in 119 N. Y. 607].

Pennsylvania.— Evans *v.* Watts, 192 Pa. St. 112, 43 Atl. 464; Gratz *v.* Bayard, 11 Serg. & R. 41.

Texas.— Alexander *v.* Lewis, 47 Tex. 481; Mason *v.* Slevin, 1 Tex. App. Civ. Cas. § 11.

Vermont.— McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316.

See 38 Cent. Dig. tit. "Partnership," § 553. And see *infra*, IX, A, 5, a.

57. Louisiana Bank *v.* Kenner, 1 La. 384; Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Evans *v.* Watts, 192 Pa. St. 112, 43 Atl. 464; Holland *v.* King, 6 C. B. 727, 60 E. C. L. 727; Downs *v.* Collins, 6 Hare 418, 31 Eng. Ch. 418, 67 Eng. Reprint 1228; Piggott *v.* Bagley, McClell. & Y. 569, 29 Rev. Rep. 850.

58. Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308; Macon Exch. Bank *v.* Tracy, 77 Mo. 594; McGrath *v.* Cowen, 57 Ohio St. 385, 49 N. E. 338; Pemberton *v.* Oakes, 4 Russ. 154, 6 L. J. Ch. O. S. 35, 4 Eng. Ch. 154, 38 Eng. Reprint 763.

59. Burwell *v.* Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Reeve *v.* Lisle, [1902] A. C. 461, 71 L. J. Ch. 763, 87 L. T. Rep. N. S. 308, 51 Wkly. Rep. 576 [*affirming* [1902] 1 Ch. 53, 71 L. J. Ch. 42, 85 L. T. Rep. N. S. 464, 50 Wkly. Rep. 231]; Downs *v.* Collins, 6 Hare 418, 31 Eng. Ch. 418, 67 Eng. Reprint 1228; Lancaster *v.* Allsup, 57 L. T. Rep. N. S. 53, [1887] W. N. 134.

60. *Alabama.*— Steiner *v.* Steiner Land, etc., Co., 120 Ala. 128, 26 So. 494.

Georgia.— Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

Kentucky.— Barber *v.* Murphy, 62 S. W. 894, 23 Ky. L. Rep. 286.

New Jersey.— Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 27 Am. Rep. 552.

New York.—Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Matter of Talmage, 39 N. Y. App. Div. 466, 57 N. Y. Suppl. 427.

Pennsylvania.— Roessler's Estate, 5 Pa. Dist. 776, 19 Pa. Co. Ct. 161; Huber *v.* Wood, 14 Pa. Co. Ct. 13.

United States.—Burwell *v.* Cawood, 2 How. 560, 11 L. ed. 378.

Canada.— Smith *v.* Smith, 13 Grant Ch. (U. C.) 81.

See 38 Cent. Dig. tit. "Partnership," §§ 553, 554.

61. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347; Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; Laughlin *v.* Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592; Ussery *v.* Crusman, (Tenn. Ch. App. 1898) 47 S. W. 567.

62. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57 (survivor may sue alone for a firm debt); Jacksonville, etc., R., etc., Co. *v.* Warriner, 35 Fla. 197, 16 So. 898 (where the survivor completed a contract entered into by his firm); McCann *v.* Hazard, 36 Misc. (N. Y.) 7, 72 N. Y. Suppl. 45.

63. Moyers *v.* Cummings, 17 App. Cas. (D. C.) 269; Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759, holding, however, that the

guished.[64] Whether the rights of the creditors of the old firm to such property are extinguished depends upon whether the transfer of title was *bona fide*.[65] If the survivor simply mingles the firm assets with his own in continuing the business, firm creditors will be entitled to share in the entire assets.[66] Advantages gained by the survivor, while acting as such, must be shared with the estate of the deceased;[67] while losses sustained in continuing the business, as distinguished from winding it up, must be borne by him.[68] If one or more of the survivors continue the business without authority, they do not subject to liability the other survivors who take no part in such continuance.[69]

3. RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS. The executors or administrators of the deceased partner have no right to interfere with the settlement of the firm's business by the survivor,[70] unless they can show that there is reason to apprehend loss to the estate from his mismanagement.[71] They have the right, however, to an accounting from the survivor, and to the decedent's share of the profits from the business as wound up by such survivor.[72] They have no lien on the assets for such share.[73] When the business is continued by the survivor pursuant to provisions in the partnership articles or the decedent's will, the executor or administrator of the deceased is not personally liable for the debts,[74] unless he becomes a member of the firm.[75] In the latter case, if he was anthor-

court may decline to appoint a receiver, even though the survivor is insolvent, if the assets are not being wasted and he can comply with any final decree in favor of the decedent's estate.

64. Lee *v.* Wimberly, 102 Ala. 539, 15 So. 444 (where the old firm accounts were not transferred and hence were in survivor, but firm stock was transferred and hence accounts of new firm belonged to it and not to survivor); Stanford *v.* Lockwood, 95 N. Y. 582.

65. Stanford *v.* Lockwood, 95 N. Y. 582.

66. *District of Columbia.*— Moyers *v.* Cummings, 17 App. Cas. 269.

Indiana.— Bollenbacher *v.* Bloomington First Nat. Bank, 8 Ind. App. 12, 35 N. E. 403.

Missouri.— Tufts *v.* Latshaw, 172 Mo. 359, 72 S. W. 679.

New York.— Hooley *v.* Gieve, 82 N. Y. 625 [*affirming* 9 Daly 104).

Wisconsin.— Spaulding *v.* Stubbings, 86 Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888.

England.— *Ex p.* Harper, 1 De G. & J. 180, 3 Jur. N. S. 724, 26 L. J. Bankr. 74, 5 Wkly. Rep. 537, 58 Eng. Ch. 141, 44 Eng. Reprint 692.

67. Bell *v.* McCoy, 136 Mo. 552, 38 S. W. 329 (profits from a new lease); Yates *v.* Finn, 13 Ch. D. 839, 49 L. J. Ch. 188, 28 Wkly. Rep. 387; Clements *v.* Hall, 2 De G. & J. 173, 4 Jur. N. S. 494, 27 L. J. Ch. 349, 6 Wkly. Rep. 358, 59 Eng. Ch. 138, 44 Eng. Reprint 954; Townend *v.* Townend, 1 Giffard 201, 5 Jur. N. S. 506, 7 Wkly. Rep. 529, 65 Eng. Reprint 885; English Partn. Act (1890), § 43.

68. Dexter *v.* Dexter, 43 N. Y. App. Div. 268, 60 N. Y. Suppl. 371; Booth *v.* Parks, 1 Molloy 465.

69. Cooper *v.* Burns, 6 La. Ann. 739; Matteson *v.* Nathanson, 38 Mich. 377.

70. Rice *v.* Merchants, etc., Nat. Bank, 100 Ala. 617, 13 So. 659.

71. Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759.

72. McLean *v.* Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323, 30 L. T. Rep. N. S. 186, 22 Wkly. Rep. 382; Vyse *v.* Foster, L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. Rep. N. S. 177, 23 Wkly. Rep. 355; Macdonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 10 L. T. Rep. N. S. 166, 65 Eng. Reprint 833.

73. Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; Payn *v.* Hornby, 25 Beav. 280, 4 Jur. N. S. 446, 27 L. J. Ch. 689, 53 Eng. Reprint 643.

74. *Alabama.*— Edgar *v.* Cook, 4 Ala. 588.

Maryland.— Owens *v.* Mackall, 33 Md. 382.

Mississippi.—Avery *v.* Myers, 60 Miss. 367.

New York.— *In re* Talmage, 161 N. Y. 643, 57 N. E. 1126 [*affirming* 39 N. Y. App. Div. 466, 57 N. Y. Suppl. 427]; *In re* Laney, 119 N. Y. 607, 23 N. E. 1143 [*affirming* 50 Hun 15, 2 N. Y. Suppl. 443]; Richter *v.* Poppenhausen, 42 N. Y. 373 [*affirming* 39 How. Pr. 82]; Browne *v.* Bedford, 4 Dem. Surr. 304.

Pennsylvania.— Tisch *v.* Rockafellow, 209 Pa. St. 419, 58 Atl. 805.

See 38 Cent. Dig. tit. "Partnership," § 556.

75. *Connecticut.*—Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703.

Kentucky.— Walker *v.* Walker, 88 Ky. 615, 11 S. W. 718, 11 Ky. L. Rep. 80.

Michigan.— City Nat. Bank *v.* Stone, 131 Mich. 588, 92 N. W. 99.

Minnesota.— Mattison *v.* Farnham, 44 Minn. 95, 46 N. W. 347, holding, however, that even then he is not liable for the debts of the old firm, unless he assumes them.

Mississippi.— Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

New Jersey.— Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

New York.— Johnson *v.* Kellog, 8 N. Y. St. 413.

Canada.— Lovell *v.* Gibson, 19 Grant Ch. (U. C.) 280.

See 38 Cent. Dig. tit. "Partnership," § 556.

ized by the deceased to become a partner, he is entitled to indemnity from the estate to the extent of the decedent's interest in the partnership.[76]

4. Rights and Liabilities of Heirs, Devisees, and Legatees. The decedent's interest in firm real estate descends to his heirs, but in trust.[77] In England this trust is for the persons beneficially interested in the partnership assets.[78] In this country the trust is generally limited to the payment of firm debts.[79] If a partner dies intestate, his heirs and next of kin are entitled to his share.[80] If he leaves a will, disposing of such interest, the devisees or legatees are entitled to receive it from the surviving partner.[81] Although his interest is to remain as a part of the firm assets, the heirs, devisees, or legatees of the remainder of his estate do not become liable for the survivor's debts.[82] The heirs, devisees, or legatees of a deceased partner do not become personally liable for the firm debts unless they become members of the firm.[83]

5. Liabilities of Decedent's Estate For Survivor's Acts. The survivor's acts, in winding up the firm business, will render the estate of the deceased liable, when they are done in the performance of obligations of the firm;[84] but the estate will not be liable for his acts in incurring new obligations.[85] Even when the survivor is continuing the firm's business pursuant to a provision in the partnership articles or in the decedent's will, his acts will not render the decedent's estate liable, beyond the share invested in the firm at his death, for new obligations,[86] unless the deceased has clearly subjected the remainder of the estate to such liability.[87]

76. Burwell *v.* Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; *In re* Johnson, 15 Ch. D. 548, 49 L. J. Ch. 745, 43 L. T. Rep. N. S. 372, 29 Wkly. Rep. 168.

77. See *supra*, VIII, C.

78. Partn. Act (1890), § 20; Matter of Burt, 9 Hare 289, 41 Eng. Ch. 289, 68 Eng. Reprint 513.

79. Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533; Dyer *v.* Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Fairchild *v.* Fairchild, 64 N. Y. 471. See *supra*, VIII, C.

80. Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299.

81. Procter *v.* Procter, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 44; Dulany *v.* Elford, 29 S. C. 19, 6 S. E. 855; Jones *v.* Walker, 103 U. S. 444, 26 L. ed. 404.

82. Pitkin *v.* Pitkin, 7 Conn. 307, 18 Am. Dec. 111.

83. Frazer *v.* Howe, 106 Ill. 563 (holding that a wife who becomes a member of the firm in place of her deceased husband is personally liable for firm debts); Nave *v.* Sturges, 5 Mo. App. 557 (where the children of a deceased partner became members of the firm and personally liable for its debts).

84. Mason *v.* Tiffany, 45 Ill. 392; McGill *v.* McGill, 2 Metc. (Ky.) 258; Hawk *v.* Johnson, 3 Pa. Cas. 511, 6 Atl. 725; Winter *v.* Innes, 2 Jur. 981, 4 Myl. & C. 101, 18 Eng. Ch. 101, 41 Eng. Reprint 40; Sleech's Case, 1 Meriv. 539, 15 Rev. Rep. 155, 35 Eng. Reprint 771; Devaynes *v.* Noble, 2 Russ. & M. 495, 11 Eng. Ch. 495, 39 Eng. Reprint 482, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781; Daniel *v.* Cross, 3 Ves. Jr. 277, 3 Rev. Rep. 94, 30 Eng. Reprint 1009.

85. *Alabama.*— Pyke *v.* Searcy, 4 Port. 52.

Illinois.— Oliver *v.* Forrester, 96 Ill. 315 [*reversing* 1 Ill. App. 259].

Massachusetts.— Stanwood *v.* Owen, 14 Gray 195; Washburn *v.* Goodman, 17 Pick. 519, holding, however, that the representative may make himself liable by adopting the transaction in part.

Mississippi.— Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

New York.—Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410.

South Carolina.— Tompkins *v.* Tompkins, 18 S. C. 1.

Texas.— Tootle *v.* Jenkins, 82 Tex. 29, 17 S. W. 519; Cock *v.* Carson, 45 Tex. 429.

England.— Partn. Act (1890), § 36; Clark *v.* Bickers, 9 Jur. 678, 14 Sim. 639, 37 Eng. Ch. 639, 60 Eng. Reprint 506; Houlton's Case, 1 Meriv. 616, 15 Rev. Rep. 169, 35 Eng. Reprint 796.

See 38 Cent. Dig. tit. "Partnership," § 558.

86. *Alabama.*— Vincent *v.* Martin, 79 Ala. 540.

Connecticut.— Pitkin *v.* Pitkin, 7 Conn. 307, 18 Am. Dec. 111.

Indiana.— Rand *v.* Wright, 141 Ind. 226, 39 N. E. 447.

Mississippi.— Brasfield *v.* French, 59 Miss. 632.

New York.— Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410 [*affirming* 48 Hun 327, 2 N. Y. Suppl. 309, 21 Abb. N. Cas. 63].

Ohio.— Peters *v.* Campbell, 2 Ohio Dec. (Reprint) 526, 3 West. L. Month. 587; Covington City Bank *v.* Wight, 6 Ohio S. & C. Pl. Dec. 350, 4 Ohio N. P. 173.

Pennsylvania.— Wilcox *v.* Derickson, 168 Pa. St. 331, 31 Atl. 1080; Laughlin *v.* Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592.

United States.— Jones *v.* Walker, 103 U. S. 444, 26 L. ed. 404; Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955; Burwell *v.* Cawood, 2 How. 560, 11 L. ed. 378.

See 38 Cent. Dig. tit. "Partnership," § 558. And see *supra*, VIII, J, 1.

87. Blodgett *v.* American Nat. Bank, 49

6. ACCOUNTING AND SETTLEMENT BY SURVIVOR. When the business is carried on by the survivor, for the purpose of completing existing contracts, or pursuant to the partnership articles, he must account to the representatives of the deceased for the profits made in such business.[88] If he carries it on longer than he is authorized to do, the decedent's representatives are generally accorded the election of compelling him to account for the decedent's share of the profits, or to pay interest on decedent's capital thus employed by the survivor.[89] It is also to be borne in mind that the survivor occupies a fiduciary position toward the representatives of the deceased, and is held to a strict accountability.[90] But he is not personally liable for sums of money given in charity, according to the firm's custom, during decedent's life.[91] For his services in continuing the business the survivor will not be allowed to charge unless there is an agreement therefor,[92] unless the court is satisfied that the services have been very beneficial to the state,[93] or unless the representatives of the deceased partner elect to share in the profits.[94] A settlement fairly made by the survivor will bind all parties thereto, in the absence of fraud or mistake.[95]

Conn. 9; Phillips *v.* Blatchford, 137 Mass. 510; Davis *v.* Christian, 15 Gratt. (Va.) 11; Cook *v.* Rogers, 3 Fed. 69.

Nothing but the clearest and most unambiguous language, showing in the most positive manner an intention on the part of the testator to render his general assets liable for debts contracted after his death, will justify a court in extending the liability of his estate beyond the actual fund employed therein at the time of his death. Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Burwell *v.* Cawood, 2 How. (U. S.) 560, 11 L. ed. 378.

88. Harbster's Appeal, 125 Pa. St. 1, 17 Atl. 204 (holding, however, that the representatives are not entitled to profits, after survivor has given stipulated notice that he will take the decedent's share under the partnership articles); De Haven *v.* Anjer, 4 Pa. Cas. 183, 6 Atl. 768; Carroll *v.* Alston, 1 S. C. 7 (where, however, the survivor was held not liable for any profits because of peculiar terms of the partnership articles); McClean *v.* Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323, 30 L. T. Rep. N. S. 186, 22 Wkly. Rep. 382.

89. *Arkansas.*— Bernie *v.* Vandever, 16 Ark. 616.

Georgia.— Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759; Gardner *v.* Cumming, Ga. Dec. 1.

Illinois.— Doughart *v.* Logan, 190 Ill. 243, 60 N. E. 507 [*affirming* 86 Ill. App. 294], holding that the deceased's estate is entitled to a share of profits proportioned to his capital, and not to the share stipulated for in the partnership articles, as that provision ceases to be operative when the partnership expires.

Maryland.— Goodburn *v.* Stevens, 1 Md. Ch. 420.

Michigan.—Millerd *v.* Ramsdell, Harr. 373.

Nevada.— Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

New York.— Haynes *v.* Brooks, 8 N. Y. Civ. Proc. 106.

Pennsylvania.— Brown's Appeal, 89 Pa. St. 139; Fithian *v.* Jones, 12 Phila. 201; Smith's Estate, 11 Phila. 131.

Texas.— Franklin *v.* Tonjours, 1 Tex. App. Civ. Cas. § 506.

United States.— Clay *v.* Field, 138 U. S. 464, 11 S. Ct. 419, 34 L. ed. 1044.

England.— Brown *v.* De Tastet, Jac. 284, 23 Rev. Rep. 59, 4 Eng. Ch. 284, 37 Eng. Reprint 858.

See 38 Cent. Dig. tit. "Partnership," § 559.

90. *Colorado.*— Hottel *v.* Mason, 16 Colo. 43, 26 Pac. 335.

Illinois.— Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540, (1885) 2 N. E. 65.

Maryland.— McLaughlin *v.* Barnum, 31 Md. 425.

Michigan.— Killefer *v.* McLain, 78 Mich. 249, 44 N. W. 405.

Mississippi.— Mayson *v.* Beazley, 27 Miss. 106.

New York.— Ogden *v.* Astor, 4 Sandf. 311; Ames *v.* Downing, 1 Bradf. Surr. 321.

Pennsylvania.—Marshall's Estate, 34 Pittsb. Leg. J. N. S. 382.

See 38 Cent. Dig. tit. "Partnership," § 559.

91. Tillotson *v.* Tillotson, 34 Conn. 335.

92. *New York.*— Wood *v.* Wood, 26 Barb. 356; Matter of Bach, 12 N. Y. Suppl. 712, 2 Connoly Surr. 490, an agreement.

Pennsylvania.— O'Neill *v.* Duff, 11 Phila. 244, not entitled after representative demands that the business be wound up.

Tennessee.—Godfrey *v.* Templeton, 86 Tenn. 161, 6 S. W. 47, where there was evidence of an agreement for a salary.

Virginia.— Patton *v.* Calhoun, 4 Gratt. 138, where no charge was made by the survivor until nearly six years after settlement with the executors and was consequently disallowed.

England.— Stocken *v.* Dawson, 6 Beav. 371, 49 Eng. Reprint 869 [*affirmed* in 17 L. J. Ch. 282].

See 38 Cent. Dig. tit. "Partnership," § 560. See also *supra*, VIII, I, 2.

93. O'Reilly *v.* Brady, 28 Ala. 530; Painter *v.* Painter, (Cal. 1894) 36 Pac. 865; Griggs *v.* Clark, 23 Cal. 427; Schenkl *v.* Dana, 118 Mass. 236.

94. Cameron *v.* Francisco, 26 Ohio St. 190.

95. Blaker *v.* Morse, 60 Kan. 24, 55 Pac.

7. Rights of Firm Creditors. Those who are creditors of the firm when it is dissolved by the death of a partner, and those who become creditors as the result of transactions with the survivor while he is discharging existing obligations of the firm, are entitled to share in the assets of the firm, to the exclusion of the individual creditors of the survivor.[96] Even when the survivor has formed a new partnership and is using the old firm's assets in the business, the old firm's creditors are entitled to have any of those assets which remain in specie appropriated to their claims in preference to those of the new firm.[97] But if the old assets have been honestly and in good faith purchased by the new firm, the old creditors have no lien upon them, nor any preferential interest in them.[98] In case, however, the new firm has assumed the debts of the old firm, the old creditors are allowed, in most jurisdictions, to enforce their claims against the new firm *pari passu* with those who have become creditors by dealing with the new firm.[99]

K. Name and Good-Will of Firm — 1. Continued Use of Firm-Name.[1] It is well settled that the estate of a deceased partner is not subjected to any liability by the survivor's continuance of the business in the old firm style, although such style includes the name of the deceased.[2] In some states legislation has been enacted authorizing the personal representatives of a deceased partner to enjoin such use by the survivor.[3] On the other hand statutes have been passed authorizing the continued use of such name upon compliance with their provisions.[4]

2. Good-Will of Firm.[5] What constitutes the good-will of a firm has been considered in a former connection.[6] Although there are decisions both in England and in this country that the right to use the firm-name passes to the survivor,[7] it is now pretty well settled that such right, if valuable, is a part of the good-will and hence a part of the firm assets, which must be accounted for by the

274; Joplin *v.* Cordrey, 5 S. W. 397, 9 Ky. L. Rep. 445; Reynaud *v.* Peytavin, 13 La. 121.

96. *Connecticut.*— Filley *v.* Phelps, 18 Conn. 294.

Massachusetts.— Washburn *v.* Goodman, 17 Pick. 519.

New Hampshire.— Benson *v.* Ela, 35 N. H. 402.

United States.— *Ex p.* Clap, 5 Fed. Cas. No. 2,783, 2 Lowell 168.

England.— *Ex p.* Butcher, 13 Ch. D. 465, 42 L. T. Rep. N. S. 299, 28 Wkly. Rep. 484 [*affirming* 12 Ch. D. 917, 48 L. J. Bankr. 94, 40 L. T. Rep. N. S. 723]; Brett *v.* Beckwith, 3 Jur. N. S. 31, 26 L. J. Ch. 130, 5 Wkly. Rep. 112.

See 38 Cent. Dig. tit. "Partnership," § 561.

97. *Ex p.* Morley, L. R. 8 Ch. 1026, 43 L. J. Bankr. 28, 29 L. T. Rep. N. S. 442, 21 Wkly. Rep. 940.

98. McGinty *v.* Flannagan, 106 U. S. 661, 1 S. Ct. 380, 27 L. ed. 215; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211; *In re* Simpson, L. R. 9 Ch. 572, 43 L. J. Bankr. 147, 30 L. T. Rep. N. S. 448, 22 Wkly. Rep. 697.

99. Morgan *v.* Randolph, etc., Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653 (where creditors were denied the right, but the court admitted that in most of the states the right would have been granted); Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 [*affirming* 61 Hun 557, 16 N. Y. Suppl. 337].

1. **Right to use firm-name as part of good-will** see *infra*, VIII, K, 2.

2. Price *v.* Mathews, 14 La. Ann. 11; Maryland Nat. Bank *v.* Hollingsworth, 135 N. C. 556, 47 S. E. 618; Altgelt *v.* Sullivan, (Tex. Civ. App. 1903) 79 S. W. 333; Webster *v.* Webster, 3 Swanst. 492, 19 Rev. Rep. 258, 36 Eng. Reprint 949; English Partn. Act (1890), § 14 (2).

3. Lodge *v.* Weld, 139 Mass. 499, 2 N. E. 95; Morse *v.* Hall, 109 Mass. 409; Bowman *v.* Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55. In Lane *v.* Arnold, 11 Daly (N.Y.) 293, 63 How. Pr. 40 [*reversing* 13 Abb. N. Cas. 73, and *reversed* in 99 N. Y. 648], and in Sparrow *v.* Kohn, 109 Pa. St. 359, 2 Atl. 498, 58 Am. Rep. 726, it was held that the use of the firm-name, after the death of a partner, although it included the name of the deceased, did not violate the New York statute which prohibits a firm transacting business in the name of one not interested in the firm.

4. Groves *v.* Wilson, 168 Mass. 370, 47 N. E. 100 (applying Mass. St. (1887) c. 248); Slater *v.* Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796 [*modifying* 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363] (applying N. Y. Laws (1897), c. 420, § 20).

5. **Disposal of good-will and valuation** on dissolution of partnership by death of partner see *infra*, IX, C, 2, d, 3, k.

6. See *supra*, VII, A, 5. See also Douthart *v.* Logan, 86 Ill. App. 294 (no good-will in a partnership business of buying and selling grain on commission); Smith *v.* Smith, 51 La. Ann. 72, 24 So. 618 (similar holding in case of an insurance agency partnership).

7. Mason *v.* Dawson, 15 Misc. (N. Y.) 595, 37 N. Y. Suppl. 90; Blake *v.* Barnes, 12 N. Y. Suppl. 69, 26 Abb. N. Cas. 208; Lewis *v.* Langdon, 4 L. J. Ch. 258, 7 Sim. 421, 40

survivor.[8] He may purchase it from the representatives of the deceased,[9] and in many jurisdictions he may do much to destroy its value by setting up in the same business at the old stand, without accountability for the damage thus done to this item of the firm's assets.[10]

L. Actions — 1. Actions By or Against Survivors or Deceased Partner's Representatives — a. Actions at Law By Survivors. From the principles stated in the foregoing paragraphs it follows that actions at law to enforce the rights of the firm are to be brought by the survivors and by them alone,[11] in the absence

Rev. Rep. 166, 8 Eng. Ch. 421, 58 Eng. Reprint 899.

8. *New York.*— Slater *v.* Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605 [*modifying* 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363, and *overruling* the cases in the preceding note]; Kirkman *v.* Kirkman, 20 Misc. 211, 45 N. Y. Suppl. 373 [*affirmed* in 26 N. Y. App. Div. 395, 49 N. Y. Suppl. 683]; Fenn *v.* Bolles, 7 Abb. Pr. 202.

Ohio.— Rammelsberg *v.* Mitchell, 29 Ohio St. 22.

Pennsylvania.— Holden *v.* McMakin, 1 Pars. Eq. Cas. 270.

Virginia.— Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

Wisconsin.— Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

England.— *In re* David, [1899] 1 Ch. 378, 68 L. J. Ch. 185, 80 L. T. Rep. N. S. 75, 47 Wkly. Rep. 313; Wedderburn *v.* Wedderburn, 22 Beav. 84, 2 Jur. N. S. 674, 25 L. J. Ch. 710, 52 Eng. Reprint 1039; Scott *v.* Scott, 89 L. T. Rep. N. S. 582 (where, however, it was held that the goodwill was not to be accounted for because of the peculiar provisions of the partnership articles and circumstances of the case); Smith *v.* Hawthorn, 76 L. T. Rep. N. S. 716; Page *v.* Ratliffe, 76 L. T. Rep. N. S. 63.

See 38 Cent. Dig. tit. "Partnership," §§ 562, 563.

9. Rankin *v.* Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265.

10. *Massachusetts.*— Hutchinson *v.* Nay, 187 Mass. 262, 266, 72 N. E. 974, 105 Am. St. Rep. 390, 68 L. R. A. 186, where it was said: "We are of opinion that if a sale of the firm's good will had been asked for and ordered in the case at bar, it would have been directed to be conducted on the footing that the surviving partner was at liberty to enter on a competing business and to solicit trade from the customers of the old firm. Where, therefore, the defendant in the case at bar, for a year and eleven months after the death of Hutchinson, carried on business at the old stand, with customers of the old firm, there being only slight changes in the personnel of the customers, and then sold the good will of his business, with a covenant to continue in the employ of the purchaser for six months, and to do all in his power to hold the customers for the purchaser, and with another covenant not to engage in the teaming business for five years within the district covered by the old business, the good will sold was not the good will of the old firm, but the good will of the defendant, and there is no obligation to account for even a nominal sum."

Michigan.— Witbeck *v.* Chittenden, 50 Mich. 426, 15 N. W. 537; Chittenden *v.* Witbeck, 50 Mich. 401, 15 N. W. 526.

Missouri.— Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659.

Nebraska.— Lobeck *v.* Lee-Clark-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 305.

New York.— Fisk *v.* Fisk, 77 N. Y. App. Div. 83, 79 N. Y. Suppl. 37, 12 N. Y. Annot. Cas. 228; De Grauw *v.* Schmid, 38 N. Y. App. Div. 189, 56 N. Y. Suppl. 593, applying Laws (1897), c. 420.

England.— Davies *v.* Hodgson, 25 Beav. 177, 4 Jur. N. S. 252, 27 L. J. Ch. 449, 6 Wkly. Rep. 355, 53 Eng. Reprint 604.

11. *Alabama.*— Evans *v.* Silvey, 144 Ala. 398, 42 So. 62; Costley *v.* Wilkerson, 49 Ala. 210.

California.— Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549; Berson *v.* Ewing, 84 Cal. 89, 23 Pac. 1112.

Illinois.— Linn *v.* Downing, 216 Ill. 261, 74 N. E. 729 [*affirming* 116 Ill. App. 454], holding that a proceeding to revive a judgment should be brought in the name of the surviving partner alone.

Indiana.—McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Nicklaus *v.* Dahn, 63 Ind. 87, holding, however, that the misjoinder of deceased's administrator as a plaintiff is waived by defendant's failure to object thereto.

Iowa.— Brown *v.* Allen, 35 Iowa 306, where it is also said that the survivor should sue as such, and not in his own right.

Kentucky.— McCandless *v.* Hadden, 9 B. Mon. 186, holding that even though the survivor, during the progress of the suit, becomes bankrupt, he may continue the action.

Maine.— Matherson *v.* Wilkinson, 79 Me. 159, 8 Atl. 684; Clark *v.* Howe, 23 Me. 560.

Massachusetts.— Stafford *v.* Gold, 9 Pick. 533; Peters *v.* Davis, 7 Mass. 257; Austin *v.* Walsh, 2 Mass. 401; Walker *v.* Maxwell, 1 Mass. 104. In Whitman *v.* Boston, etc., R. Co., 3 Allen 133, the administrator of the deceased was allowed to join with the surviving partner in an action for damages to land because the court deemed the partners tenants in common of the land.

Michigan.— O'Connell *v.* Schwanaback, 76 Mich. 517, 43 N. W. 599; Cragin *v.* Gardner, 64 Mich. 399, 31 N. W. 206; Teller *v.* Wetherell, 9 Mich. 464.

Missouri.— Hargadine *v.* Gibbons, 114 Mo. 561, 21 S. W. 726 [*affirming* 45 Mo. App. 460].

of legislation.[12] A surviving partner in a single action may recover demands due him individually as well as demands due him as surviving partner.[13]

b. Actions at Law Against Survivors. Actions at law to enforce firm obligations must be brought against the survivors only, in most jurisdictions,[14] although in some the deceased partner's representatives may be joined as defendants.[15]

New Hampshire.— Boyd *v.* Webster, 58 N. H. 336.

New York.— Clift *v.* Moses, 112 N. Y. 426, 20 N. E. 392; Daby *v.* Ericsson, 45 N. Y. 786; Place *v.* Bleyl, 45 N. Y. App. Div. 17, 60 N. Y. Suppl. 800, 7 N. Y. Annot. Cas. 95; Woarms *v.* Bauer, 16 Daly 333, 11 N. Y. Suppl. 59 [*affirming* 7 N. Y. Suppl. 323] (where, however, it was held that the suit was properly brought by deceased's executor and the survivor, inasmuch as the partnership articles provided that the executor should take the deceased's place in the firm); Carrere *v.* Spofford, 46 How. Pr. 294; Holmes *v.* De Camp, 1 Johns. 34, 3 Am. Dec. 293.

North Carolina.— Felton *v.* Reid, 52 N. C. 269.

Ohio.— Beach *v.* Hayward, 10 Ohio 455.

Rhode Island.— Hawkins *v.* Capron, 17 R. I. 679, 24 Atl. 466.

South Carolina.— Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295.

Tennessee.— Davis *v.* Ross, (Ch. App. 1898) 50 S. W. 650.

Texas.— Watson *v.* Miller, 55 Tex. 289; Philadelphia Fire Assoc. *v.* Laning, (Civ. App. 1895) 31 S. W. 681; Campbell *v.* Wallace, 3 Tex. App. Civ. Cas. § 433; Hines *v.* Dean, 1 Tex. App. Civ. Cas. § 690.

United States.— Robinson *v.* Hintrager, 36 Fed. 752; Pagan *v.* Sparks, 18 Fed. Cas. No. 10,659, 2 Wash. 325.

England.— Richards *v.* Heather, 1 B. & Ald. 29.

Canada.— Bolckow *v.* Foster, 25 Grant Ch. (U. C.) 476.

See 38 Cent. Dig. tit. "Partnership," §§ 569–572.

12. Notrebe *v.* McKinney, 6 Rob. (La.) 13; McCord *v.* West Feliciana R. Co., 1 Rob. (La.) 519; Dick *v.* Dunlap, 1 Rob. (La.) 54; Babcock *v.* Brashear, 19 La. 404; Connelly *v.* Cheevers, 16 La. 30; Cutler *v.* Cochran, 13 La. 482; Hoey *v.* Twogood, 11 La. 195; Flower *v.* O'Connor, 7 La. 194; Crozier *v.* Hodge, 3 La. 357; Norris *v.* Ogden, 11 Mart. (La.) 455; Latimer *v.* Newman, 69 Mo. App. 76; Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805. Even in Louisiana the survivor need not join the representatives of the deceased partner in an action brought to annul a sale in which he has an individual interest. Lockhart *v.* Harrell, 6 La. Ann. 530.

13. Blackstone *v.* Ragan, 125 Ill. App. 546.

14. *California.*— Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7; West Coast Lumber Co. *v.* Apfield, 86 Cal. 335, 24 Pac. 993.

Colorado.— Doty *v.* Irwin-Phillips Co., 15 Colo. App. 96, 61 Pac. 188.

Georgia.— Ross *v.* Everett, 12 Ga. 30; Roosvelt *v.* McDowell, 1 Ga. 489.

Illinois.— Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434; Horton *v.* Brown, 45 Ill. App. 171.

Iowa.— Black *v.* Struthers, 11 Iowa 459; Childs *v.* Hyde, 10 Iowa 294, 77 Am. Dec. 113; Postlewait *v.* Howes, 3 Iowa 365.

Kentucky.— Southard *v.* Lewis, 4 Dana 148; Fennell *v.* Myers, 76 S. W. 136, 25 Ky. L. Rep. 589.

Maine.— McNally *v.* Kerswell, 37 Me. 550.

Maryland.— Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180.

Michigan.— Manning *v.* Williams, 2 Mich. 105. Where an action is commenced against partners, and upon the death of one is continued against the other alone as survivor, although plaintiffs might present and prove their claim against the estate of the deceased partner, or proceed in equity to settle the rights of the estate and of creditors, they are not bound to do so, and by continuing their action against the survivor they do not abandon their suit against the deceased. Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713; Freeman *v.* Stewart, 41 Miss. 138; Robinson *v.* Thompson, Sm. & M. Ch. 454.

New Jersey.— Rustling *v.* Brodhead, 55 N. J. Eq. 200, 35 Atl. 841.

New York.—Merrill *v.* Blanchard, 158 N. Y. 682, 52 N. E. 1125 [*affirming* 7 N. Y. App. Div. 167, 40 N. Y. Suppl. 48]; Richter *v.* Poppenhausen, 42 N. Y. 373 [*affirming* 9 Abb. Pr. N. S. 263]; Voorhis *v.* Childs, 17 N. Y. 354 [*affirming* 18 Barb. 592, 1 Abb. Pr. 43]; Smith *v.* Ferguson, 33 N. Y. App. Div. 561, 53 N. Y. Suppl. 1097; Callanan *v.* Keeseville, 48 Misc. 476, 95 N. Y. Suppl. 513; Goelet *v.* McKinstry, 1 Johns. Cas. 405.

North Carolina.— McCaskill *v.* Lancashire, 83 N. C. 393.

Oregon.— Poppleton *v.* Jones, 42 Oreg. 24, 69 Pac. 919.

Pennsylvania.— McClaren *v.* Citizens' Oil, etc., Co., 14 Pa. Super. Ct. 167.

Tennessee.—Brooks *v.* Brooks, 12 Heisk. 12; Saunders *v.* Stallings, 5 Heisk. 65.

Texas.— Gaut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94; Lovelady *v.* Bennett, (Civ. App. 1895) 30 S. W. 1124; Dulaney *v.* Walshe, 3 Tex. Civ. App. 174, 22 S. W. 131.

Washington.— Brigham-Hopkins Co. *v.* Gross, 30 Wash. 277, 70 Pac. 480; Brigham Hopkins Co. *v.* Gross, 20 Wash. 218, 54 Pac. 1127 (applying 2 Ballinger Code & St. §§ 6188–6190, which modify the common-law doctrine); Barlow *v.* Coggan, 1 Wash. Terr. 257.

United States.— Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769.

England.— Wilkinson *v.* Henderson, 2 L. J. Ch. 190, 1 Myl. & K. 582, 7 Eng. Ch. 582, 39 Eng. Reprint 801.

See 38 Cent. Dig. tit. "Partnership," §§ 573–575.

15. *Georgia.*—Anderson *v.* Pollard, 62 Ga. 46; Garrard *v.* Dawson, 49 Ga. 434.

c. Liability of Decedent's Estate. While the representatives of the deceased partner cannot be joined with the survivor as a rule, in an action at law, the estate is everywhere liable for firm obligations.[16] According to some of the cases the claimant may pursue his concurrent remedies against the survivor and against the decedent's estate at the same time.[17] According to others, before he can proceed against the decedent's estate, he must show that the surviving partners have been proceeded against to execution at law or else that they are insolvent, so that to proceed against them would be unavailing.[18] This rule is based upon the doctrine that the assets of the firm in the control of the survivor are the primary fund for the payment of firm debts.[19] Courts of equity often permit proceedings against the estate of the deceased partner, and permit the joinder of

Indiana.— Indiana Pottery Co. *v.* Bates, 14 Ind. 8, action to compel conveyance of land.

Kentucky.— Marble *v.* Marble, 4 Ky. L. Rep. 360, holding that the heirs of the deceased partner are necessary parties to an action to determine the title to firm lands.

Tennessee.— Trundle *v.* Edwards, 4 Sneed 572 (applying Acts (1789), c. 57, § 5); Simpson *v.* Young, 2 Humphr. 514.

Virginia.— Carter *v.* Currie, 5 Call 158.

England.— Partn. Act (1890), § 9; Sup. Ct. Ord. XVI, Rules 1, 4, 6, 8.

See 38 Cent. Dig. tit. "Partnership," §§ 573–575.

16. *Alabama.*— Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97.

California.— Savings, etc., Soc. *v.* Gibb, 21 Cal. 595.

Connecticut.— Storer *v.* Hinkley, Kirby 147.

Illinois.— Evans *v.* Superior Steel Co., 114 Ill. App. 505.

Massachusetts.— Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327, applying Rev. St. c. 97, § 28.

New York.— Morgan *v.* Skidmore, 3 Abb. N. Cas. 92.

Pennsylvania.— Lang *v.* Keppele, 1 Binn. 123.

Texas.— Gaut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

Virginia.— Sale *v.* Dishman, 3 Leigh 548.

See 38 Cent. Dig. tit. "Partnership," § 564 *et seq.*

17. *Alabama.*— Smith *v.* Mallory, 24 Ala. 628 (but firm creditor cannot share *pari passu* with separate creditors in such estate, if it is insolvent); McCulloch *v.* Judd, 20 Ala. 703 ("but cannot have execution until he has sued the surviving partners to insolvency").

Arkansas.— Smith *v.* Van Gilder, 26 Ark. 527.

Connecticut.— Filley *v.* Phelps, 18 Conn. 294, where partnership notes sued on were joint and several.

Illinois.— Doggett *v.* Dill, 108 Ill. 560, 48 Am. Rep. 565 [*distinguishing* Pahlman *v.* Graves, 26 Ill. 405].

Indiana.— Newman *v.* Gates, 165 Ind. 171, 72 N. E. 638; Vance *v.* Cowing, 13 Ind. 460; Small *v.* Davis, 12 Ind. App. 635, 40 N. E. 934, applying Rev. St. (1894) §§ 2465–2467.

Maine.— Bass *v.* Emery, 74 Me. 338, applying Rev. St. c. 69, § 4.

Michigan.— Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182.

Mississippi.— Freeman *v.* Stewart, 41 Miss. 138.

Ohio.— Grosvenor *v.* Austin, 6 Ohio 103, 25 Am. Dec. 743; Williams *v.* Bradley, 5 Ohio Cir. Ct. 114, 3 Ohio Cir. Dec. 58, applying Rev. St. § 6102.

Tennessee.— Saunders *v.* Wilder, 2 Head 577, applying Act (1789), c. 57, § 5.

Virginia.— Sale *v.* Dishman, 3 Leigh 548.

England.— *In re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. Rep. N. S. 222, 34 Wkly. Rep. 127; Hills *v.* McRae, 9 Hare 297, 15 Jur. 766, 20 L. J. Ch. 533, 41 Eng. Ch. 297, 68 Eng. Reprint 516; Cheetham *v.* Crook, McClell. & Y. 307; Stephenson *v.* Chiswell, 3 Ves. Jr. 566, 30 Eng. Reprint 1158; Thorpe *v.* Jackson, 2 Y. & C. Exch. 553; Partn. Act (1890), § 9.

See 38 Cent. Dig. tit. "Partnership," § 564 *et seq.*

18. *Alabama.*— Winfrey *v.* Clarke, 107 Ala. 355, 18 So. 141.

Colorado.— Beaton *v.* Wade, 14 Colo. 4, 22 Pac. 1093.

New York.— Leggat *v.* Leggat, 176 N. Y. 590, 68 N. E. 1119 [*affirming* 79 N. Y. App. Div. 141, 80 N. Y. Suppl. 327]; Pope *v.* Cole, 55 N. Y. 124, 14 Am. Rep. 198 [*affirming* 66 Barb. 282, 64 Barb. 406]; Hoyt *v.* Bonnett, 50 N. Y. 538 [*reversing* 58 Barb. 529]; Richter *v.* Poppenhausen, 42 N. Y. 373 [*affirming* 9 Abb. Pr. N. S. 263]; Tracy *v.* Suydam, 30 Barb. 110; Voorhies *v.* Baxter, 18 Barb. 592, 1 Abb. Pr. 43 [*affirmed* in 17 N. Y. 354]; Dubois' Case, 3 Abb. Pr. 177; Lawrence *v.* Leake, etc., Orphan House, 2 Den. 577; Hamersley *v.* Lambert, 2 Johns. Ch. 508; Slatter *v.* Carroll, 2 Sandf. Ch. 573.

North Carolina.— Burgwin *v.* Hostler, 1 N. C. 75, 1 Am. Dec. 582.

Ohio.— Horsey *v.* Heath, 5 Ohio 353.

Rhode Island.— Island Sav. Bank *v.* Galvin, 19 R. I. 569, 36 Atl. 1125 (applying Gen. Laws, c. 233); Taylor *v.* Slater, 17 R. I. 801, 24 Atl. 835; Pearce *v.* Cooke, 13 R. I. 184; Shaw *v.* Knowles, 3 R. I. 112.

South Carolina.— Philson *v.* Bampfield, 1 Brev. 202.

United States.— Nelson *v.* Hill, 5 How. 127, 12 L. ed. 81; Troy Iron, etc., Factory *v.* Winslow, 24 Fed. Cas. No. 14,199, 1 Ban. & A. 98, 11 Blatchf. 513.

See 38 Cent. Dig. tit. "Partnership," § 564½ *et seq.*

19. See the cases cited in the following note.

survivors and the representatives of the deceased partner, when courts of law would not permit them.[20]

d. Jurisdiction of Actions. Equity has jurisdiction of actions by the survivor or by firm creditors against the estate of a deceased partner,[21] in the absence of statutes giving to probate courts exclusive cognizance thereof.[22]

e. Limitations of Actions. The time within which actions must be brought by or against surviving partners or representatives of deceased partners depends upon the statutory provisions in the particular jurisdiction.[23] Whether the representatives of a deceased partner can set up the statute of limitations against a firm creditor while the surviving partner remains liable and has the right of contribution against them is a point on which the courts differ.[24] In jurisdictions where the creditor is not entitled to sue pending the administration of the firm estate in specified courts, the statute of limitations does not run against his claim during such settlement.[25]

f. Receiver and Attachment. The appointment of a receiver in a creditor's action against the surviving partner will be made whenever the court deems this essential to the preservation or honest administration of the assets.[26] In what cases an attachment will issue against the survivor in an action upon a firm claim and the procedure therein is generally determinable by local statutes.[27]

20. *Alabama.*— Waldron *v.* Simmons, 28 Ala. 629.
Florida.— Fillyau *v.* Laverty, 3 Fla. 72.
Georgia.— Scott *v.* Scott, 33 Ga. 102.
Illinois.— Garvin *v.* Stewart, 59 Ill. 229.
Indiana.— Weyer *v.* Thornburgh, 15 Ind. 124; Indiana Pottery Co. *v.* Bates, 14 Ind. 8.
Kentucky.— Pearson *v.* Keedy, 6 B. Mon. 128, 43 Am. Dec. 160.
Maine.— Bennett *v.* Bennett, 93 Me. 241, 44 Atl. 894.
Mississippi.— Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305; Hanway *v.* Robertshaw, 49 Miss. 758; Boisgerard *v.* Wall, Sm. & M. Ch. 404.
New York.— Haines *v.* Hollister, 64 N. Y. 1; Zimmerman *v.* Kunkel, 6 N. Y. St. 768; Butts *v.* Genung, 5 Paige 254; Copcutt *v.* Merchant, 4 Bradf. Surr. 18.
North Carolina.— Drake *v.* Blount, 17 N. C. 353.
Virginia.— Jackson *v.* King, 8 Leigh 689; Galt *v.* Calland, 7 Leigh 594.
United States.—Nelson *v.* Hill, 5 How. 127, 12 L. ed. 81; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.
England.— Brett *v.* Beckwith, 3 Jur. N. S. 31, 26 L. J. Ch. 130, 5 Wkly. Rep. 112.
Canada.— Baxter *v.* Turnbull, 2 Grant Ch. (U. C.) 521.
See 38 Cent. Dig. tit. "Partnership," § 564 *et seq.*

21. E. A. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666; Hills *v.* McRae, 9 Hare 297, 20 L. J. Ch. 533, 15 Jur. 766, 41 Eng. Ch. 297, 68 Eng. Reprint 516.

22. Lewis *v.* Moore, 9 Rob. (La.) 196; Anderson *v.* Birdsall, 19 La. 441. And see Caldwell *v.* Hawkins, 73 Mo. 450. In Knox *v.* Bates, 79 Ga. 425, 5 S. E. 61, it was held that a court of law in the county of the survivor's residence has no jurisdiction of the administrator of the deceased in another county, in the absence of an averment that the firm is insolvent.

23. *Alabama.*— Goldsmith *v.* Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97.
Georgia.— Willis *v.* Sutton, 116 Ga. 283, 42 S. E. 526.
Maine.— Bennett *v.* Bennett, 92 Me. 80, 42 Atl. 237, applying Rev. St. c. 87, § 12.
Missouri.— Denny *v.* Turner, 2 Mo. App. 52.
New York.—Gibbons *v.* Bush Co., 115 N. Y. App. Div. 619, 101 N. Y. Suppl. 721; Cohen *v.* Hymes, 64 Hun 54, 18 N. Y. Suppl. 571.
Tennessee.— Hambough *v.* Carney, (Ch. App. 1901) 62 S. W. 503.
Virginia.— Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33.
England.— Brown *v.* Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 Wkly. Rep. 2, 51 Eng. Reprint 795; Braithwaite *v.* Britain, 1 Keen 206, 15 Eng. Ch. 206, 48 Eng. Reprint 285.
Canada.— McFadgen *v.* Stewart, 11 Grant Ch. (U. C.) 272.
Federal courts.— In Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769, it was held that the provisions of a state statute of limitations did not apply in an action in the federal court by a partnership creditor against a surviving partner.

24. Buckingham *v.* Ludlum, 37 N. J. Eq. 137 [*affirmed* in 41 N. J. Eq. 348, 7 Atl. 851], and Winter *v.* Innes, 2 Jur. 981, 4 Myl. & C. 101, 18 Eng. Ch. 101, 41 Eng. Reprint 40, hold that they cannot, while Way *v.* Bassett, 5 Hare 55, 10 Jur. 89, 15 L. J. Ch. 1, 26 Eng. Ch. 55, 67 Eng. Reprint 825, holds that they can.

25. Brigham-Hopkins Co. *v.* Gross, 30 Wash. 277, 70 Pac. 480; Brigham Hopkins Co. *v.* Gross, 20 Wash. 218, 54 Pac. 1127.

26. Word *v.* Word, 90 Ala. 81, 7 So. 412; Dick *v.* Laird, 7 Fed. Cas. No. 3,891, 4 Cranch C. C. 667. See also *supra*, VI, D, 5; *infra*, IX, D, 7, c.

27. *Connecticut.*— Filley *v.* Phelps, 18 Conn. 294.
Georgia.— Sheffield *v.* Key, 14 Ga. 537.

g. Pleadings and Issues — (I) *Declaration or Complaint.* In the absence of statutory provisions upon the subject, it is not necessary, as a rule, that the surviving partner should describe himself as such in an action brought by him to enforce a partnership claim; but he should set forth in his complaint or declaration all the facts which are necessary to show his right to maintain the action without the joinder of those who were his copartners, when the claim arose.[28] When a new firm has succeeded to the business of one dissolved by the death of a partner, and snes upon a claim of the old firm, it must allege an assignment of the claim to itself.[29] The rule stated above as to the complaint or declaration in an action by a surviving partner applies to a complaint or declaration in an action against the survivor on a firm obligation.[30] If the action is brought against the representatives of the deceased partner plaintiff's allegations must include the insolvency of the survivor in jurisdictions where a firm creditor must exhaust his remedy against the survivor as a condition precedent to an action against the estate of the deceased.[31] In other jurisdictions such allegations are unnecessary.[32]

(II) *Subsequent Pleadings.* The defense of payment, whether on behalf of the survivor or against him, must be pleaded.[33] When one sued as a survivor denies the existence of the partnership, he is not thereby precluded from having the partnership effects applied to the payment of firm debts.[34] The answer or plea of the representative of a deceased partner will vary, according to the jurisdiction in which the action is brought.[35] In every jurisdiction, however, such representative states a good defense when he answers that the claim sued on is an individual debt of the surviving partner.[36]

(III) *Issues and Variance.* The issues as framed by the pleadings must be sustained by the proof of the party having the affirmative.[37] If plaintiff's cause

Louisiana.— Powell *v.* Hopson, 13 La. Ann. 626; Turner *v.* Collins, 1 Mart. N. S. 369.

Maryland.— Berry *v.* Harris, 22 Md. 30, 85 Am. Dec. 639.

Minnesota.— Allis *v.* Day, 13 Minn. 199.

Mississippi.— Roach *v.* Brannon, 57 Miss. 490.

Montana.— Krueger *v.* Speith, 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291, applying Prob. Prac. Act, §§ 229, 533.

Pennsylvania.— Swezey *v.* Brown, 10 Wkly. Notes Cas. 207.

See 38 Cent. Dig. tit. "Partnership," § 576. And see *supra*, VI, D, 4; *infra*, IX, D, 7, a.

28. *Arkansas.*— Keith *v.* Pratt, 5 Ark. 661 (holding that in an action on a note payable to "E. Y. B. & Co." the surviving partner must aver the identity of the payees with himself as the deceased partner); Bonne *v.* Kay, 5 Ark. 19 (need not negative payment to the deceased partner).

Indiana.— Hubbell *v.* Skiles, 16 Ind. 138.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595.

Louisiana.— Johnson *v.* Levy, 109 La. 1036, 34 So. 68.

Maine.— Stevens *v.* Rollins, 34 Me. 226.

Nevada.— Reese *v.* Kinkead, 17 Nev. 447, 30 Pac. 1087.

New Hampshire.— Joyslin *v.* Taylor, 24 N. H. 268; Ledden *v.* Colby, 14 N. H. 33, 40 Am. Dec. 173.

New York.— Daby *v.* Ericsson, 45 N. Y. 786.

Texas.— Wright *v.* McCamphell, 75 Tex. 644, 13 S. W. 293.

Wisconsin.— Howard *v.* Boorman, 17 Wis. 459, holding that an averment that the plaintiff now holds the note sued on, as "surviving partner" of a specified firm is equivalent to an averment that it is firm property.

England.— French *v.* Andrade, 6 T. R. 582; Slipper *v.* Stidstone, 5 T. R. 493, 1 Esp. 47.

See 38 Cent. Dig. tit. "Partnership," § 577.

29. Needham *v.* Wright, 140 Ind. 190, 39 N. E. 510; Spalding *v.* Mure, 6 T. R. 363.

30. *Arkansas.*— Hess *v.* Adler, 67 Ark. 444, 55 S. W. 843.

Indiana.— Pattison *v.* Norris, 29 Ind. 165; Culbertson *v.* Townsend, 6 Ind. 64; Bradley *v.* Ward, 6 Blackf. 190.

Maryland.— Raborg *v.* Columbia Bank, 1 Harr. & G. 231.

Minnesota.— Berkey *v.* Judd, 12 Minn. 52.

New York.—Tom *v.* Goodrich, 2 Johns. 213.

Wisconsin.— Hoeflinger *v.* Wells, 47 Wis. 628, 3 N. W. 589.

See 38 Cent. Dig. tit. "Partnership," § 577.

31. Pearson *v.* Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Voorhis *v.* Childs, 17 N. Y. 354 [*affirming* 18 Barb. 592, 1 Abb. Pr. 43]; Pope *v.* Cole, 66 Barb. (N. Y.) 282 [*affirmed* in 55 N. Y. 124, 14 Am. Rep. 198]; Ricart *v.* Townsend, 6 How. Pr. (N. Y.) 460.

32. Brewster *v.* Sterrett, 32 Pa. St. 115.

33. Massey *v.* Pike, 20 Ark. 92; Lang *v.* Lewis, 1 Rand. (Va.) 277.

34. Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

35. Small *v.* Davis, 12 Ind. App. 635, 40 N. E. 934; Hartley *v.* Kirlin, 45 Pa. St. 49.

36. Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122.

37. Brown *v.* Farnham, 58 Minn. 499, 60 N. W. 344 (where plaintiff alleged a breach

of action is alleged to have arisen during the existence of the partnership, while the evidence shows that it arose subsequently, the variance is fatal.[38]

h. Evidence. The rules which relate to the admissibility of evidence, to presumptions and burden of proof, as well as to the weight and sufficiency of evidence, in actions such as we are now considering, are not peculiar, although the necessity of giving evidence in a particular case, its admissibility and its probative force, depend very largely upon the principles of substantive law, which have been stated in the foregoing sections of this article.[39]

i. Instructions and Questions For Jury. It is the duty of the court to properly instruct the jury as to the rules of law applicable to the issue presented to them by the evidence.[40] It is for the jury to decide all disputed questions of fact.[41]

j. Judgment. The judgment must follow the pleadings. Hence, in an action brought by a surviving partner, a judgment in favor of the firm is irregular, even in a jurisdiction where a firm may sue as such.[42] Again the judgment should dispose of every material issue involved in the action.[43] A judgment may be

of contract by defendant but failed to give any evidence of breach, and the action was dismissed); Baughan *v.* Graham, 1 How. (Miss.) 220 (holding that one sued as a surviving partner must be proved to have been a member of the firm); Ledden *v.* Colby, 14 N. H. 33, 40 Am. Dec. 173 (holding that a plaintiff who claims as surviving partner must prove the death of his copartner); Fogarty *v.* Cullen, 49 N. Y. Super. Ct. 397 (holding that the defense by a deceased partner's representatives that plaintiff had agreed to accept a new firm's liability in lieu of that of the old must be clearly proved).

38. Mead *v.* Raymond, 52 Mich. 14, 17 N. W. 221.

39. *Alabama.*— Rose *v.* Gunn, 79 Ala. 411 (an acknowledgment of debt by the survivor is not evidence against the deceased partner's representative); Humes *v.* O'Bryan, 74 Ala. 64; Dixon *v.* Barclay, 22 Ala. 370; Richardson *v.* Humphreys, Minor 383.

Colorado.— Cooper *v.* Wood, 1 Colo. App. 101, 27 Pac. 884.

Connecticut.— Sturges *v.* Beach, 1 Conn. 507, holding that a judgment against the surviving partner is not evidence of a debt of the partnership so as to charge the deceased partner's representatives therewith.

Illinois.— Henry *v.* Caruthers, 196 Ill. 136, 63 N. E. 629 [*affirming* 95 Ill. App. 582, burden of proving extinguishment of firm debt, as to the estate of the deceased is upon him who alleges it]; MacDonald *v.* Crosby, 192 Ill. 283, 61 N. E. 505; Denison Nat. Bank *v.* Danahy, 89 Ill. App. 92, admission by deceased during his life is received against his representatives.

Indiana.— Bond *v.* Nave, 62 Ind. 505, holding that a survivor's inventory is not evidence of a partnership as against the deceased partner's estate.

Kentucky.— Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509.

Maine.— Fuller *v.* Wilder, 61 Me. 525.

Maryland.— Stewart *v.* Rogers, 19 Md. 98.

Michigan.— Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Cragin *v.* Gardner, 64 Mich. 399, 31 N. W. 206.

Missouri.— Blythe *v.* Primeau, 35 Mo. 529; Klopfer *v.* Levi, 33 Mo. App. 322.

Nevada.— Roney *v.* Buckland, 5 Nev. 219.

New York.— Stewart *v.* Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Green *v.* Edick, 56 N. Y. 613 (in an action against the survivor plaintiff cannot testify to a conversation between him and the deceased partner); Daby *v.* Ericsson, 45 N. Y. 786; Bush Co. *v.* Gibbons, 87 N. Y. App. Div. 576, 84 N. Y. Suppl. 478 [*affirming* 46 N. Y. App. Div. 513, 62 N. Y. Suppl. 120]; Driggs *v.* Driggs, 11 N. Y. St. 256.

Ohio.— Leach *v.* Church, 15 Ohio St. 169.

Pennsylvania.— Camden Nat. State Bank *v.* Pennock, 2 Mona. 166; Welsh *v.* Speakman, 8 Watts & S. 257.

Tennessee.— Trundle *v.* Edwards, 4 Sneed 572; Phillips *v.* Carney, (Ch. App. 1901) 62 S. W. 509.

Virginia.— Brockenbrough *v.* Hackley, 6 Call 51.

England.—Jell *v.* Douglas, 4 B. & Ald. 374, 23 Rev. Rep. 310, 6 E. C. L. 523.

See 38 Cent. Dig. tit. "Partnership," §§ 580–582.

40. Little Grocer Co. *v.* Johnson, 50 Ark. 62, 6 S. W. 231 (instruction held erroneous); Stillwell *v.* Gray, 17 Ark. 473 (instruction was unexceptionable); Beckett *v.* Little, 23 Ind. App. 65, 54 N. E. 1069 (not erroneous); O'Neill *v.* Crane, 77 N. Y. App. Div. 638, 79 N. Y. Suppl. 118 (charge not justified).

41. Stewart *v.* Rogers, 19 Md. 98 (whether there had been an assignment of the accounts of the old firm to the new, and whether defendant had assented to it); Sparling *v.* Smeltzer, 133 Mich. 454, 95 N. W. 571 (whether a partnership existed); Johnson *v.* Emerick, 70 Mich. 215, 38 N. W. 223 (whether plaintiff had notice that upon the dissolution of a firm the continuing partner assumed the firm debts); Dallmeyer *v.* Dallmeyer, (Pa. 1888) 16 Atl. 72.

42. Green *v.* Jones, 102 Ala. 303, 14 So. 630.

43. Hensley *v.* Bagdad Sash Factory Co., 1 Tex. App. Civ. Cas. § 718, where the judg-

a nullity,[44] but if it is merely defective or irregular it cannot be attacked collaterally.[45] A judgment which has been duly entered against the surviving partner and has thus become a legal lien upon his property will not be postponed to a subsequent lien acquired by the judgment debtor's individual creditor.[46] But a judgment which has not become a legal lien on specific property will be postponed, in most jurisdictions, to the claims of the separate creditors of the judgment debtor, if the latter's estate is insolvent.[47] The judgment for plaintiffs, in an action by a firm after the death of a member, is a judgment for the surviving members, in whom the right to sue for partnership debts vests on the death of a member.[48]

k. Execution. The surviving partner is entitled to issue execution upon a judgment recovered by the firm.[49] A judgment against him for a firm debt may be enforced by an execution against the firm property in his hands;[50] but a judgment against him for an individual debt cannot be enforced against firm assets to the detriment of firm creditors.[51] Nor can a judgment against him for a firm debt be enforced by execution against the estate of the deceased partner.[52]

2. Actions Between Survivor and Deceased's Representatives — a. By Survivor. The surviving partner may sue the representative of the deceased partner at law in a proper case to recover partnership property which the representative wrongfully withholds or the proceeds of that which he has wrongfully disposed of,[53] or

ment was held defective, because it contained no dismissal of the action as to the representative of the deceased partner, who had been improperly joined as defendant.

44. Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539, 7 Atl. 647, where a judgment at law against the surviving partner, taken after the appointment of a receiver for the firm, was declared to be a nullity.

45. Brent *v.* Cheevers, 16 La. 23.

46. Postlewait *v.* Howes, 3 Iowa 365; Meech *v.* Allen, 17 N. Y. 300, 72 Am. Dec. 465; Chalmers *v.* Turnipseed, 21 S. C. 126.

47. *New York.*— Matter of Potter, 5 Dem. Surr. 108.

Ohio.— Williams *v.* Bradley, 7 Ohio Cir. Ct. 227, 4 Ohio Cir. Dec. 570, 5 Ohio Cir. Ct. 114, 3 Ohio Cir. Dec. 58.

Pennsylvania.— Stauffer's Estate, 3 Pa. Dist. 794, 15 Pa. Co. Ct. 492.

South Carolina.— Woodrop *v.* Ward, 3 Desauss. Eq. 203.

United States.— *In re* Lawrence, 5 Fed. 349.

England.— *In re* McRae, 25 Ch. D. 16, 53 L. J. Ch. 1132, 49 L. T. Rep. N. S. 544, 32 Wkly. Rep. 304.

See 38 Cent. Dig. tit. "Partnership," § 587.

48. Evans *v.* Silvey, 144 Ala. 398, 42 So. 62.

49. Corder *v.* Steiner, (Tex. Civ. App. 1899) 54 S. W. 277.

50. Dulaney *v.* Walshe, 3 Tex. Civ. App. 174, 22 S. W. 131.

Firm realty.— In Caldwell *v.* Parmer, 56 Ala. 405, it was held that firm realty, held in the individual names of the partners, cannot be sold under an execution at law against the survivor alone, although it can be subjected to the partnership debts by proceeding in equity.

51. Gant *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

52. Cowan *v.* Leming, 111 Mo. App. 253, 85 S. W. 953, applying Rev. St. (1890) § 65. In Bartlett *v.* McRae, 4 Ala. 688, the firm creditor, after obtaining judgment against the surviving partner, secured a judgment against the administratrix of the deceased partner. She paid the judgment against her and took an assignment of the judgment against the survivor, but was not allowed to enforce this by execution, on the ground that her only remedy was in equity for an accounting by the survivor. The satisfaction of the judgment against her operated to satisfy the judgment against the survivor.

53. *Alabama.*— Calvert *v.* Marlow, 18 Ala. 67.

Louisiana.— Hoss' Succession, 33 La. Ann. 1256 (holding, however, that the survivor was debarred from maintaining the action by having acted conjointly with the personal representative in matters whereof he complained); Abat *v.* Songy, 7 Mart. 274 (holding that the court of probate had not jurisdiction of such action under Acts (1805), No. 13).

Massachusetts.— Wilby *v.* Phinney, 15 Mass. 116.

New York.— Berolzheimer *v.* Strauss, 51 N. Y. Super. Ct. 96.

Oregon.— Gardner *v.* Gillihan, 20 Oreg. 598, 27 Pac. 220.

Pennsylvania.— Kutz *v.* Dreibelbis, 126 Pa. St. 335, 17 Atl. 609 (where the survivor was defeated because of a provision in the partnership articles that the money sued for should be paid by the firm debtor to the deceased or his personal representatives); Sharman *v.* Adams, 3 Pa. Cas. 363, 6 Atl. 891; Guldin *v.* Lorah, 8 Pa. Co. Ct. 503 (holding, however, that the statute of limitations is a good defense to such action).

Rhode Island.— Hawkins *v.* Capron, 17 R. I. 679, 24 Atl. 466, holding that trover was maintainable by the survivor against the deceased's representatives for firm assets.

Texas.— Franklin *v.* Tonjours, 1 Tex. App. Civ. Cas. § 506, where, however, it was held to be a defense that the funds in defendant's hands were not needed to pay firm debts.

for a debt due from the deceased to the firm, which does not form an item in the partnership account,[54] or for a sum due from the estate of the deceased as shown by a final accounting,[55] or for a definite sum due by way of contribution.[56] But an action will not lie against the administrator of a deceased partner for the expenses of the surviving partner in collecting the debts and managing the concerns of the partnership.[57] Even when an action at law will not lie, the survivor may be entitled to maintain a suit in equity for an accounting and decree against the deceased partner's representatives, or for a transfer of firm property standing in the name of the deceased or of a third party, or for other relief not obtainable at common law.[58]

b. By Deceased's Partner's Representative. The relief, which is ordinarily sought by the representative of the deceased partner against the survivor, is obtainable, not in an action at law, but in an equity proceeding for an accounting and distribution by the latter.[59] But such representative may maintain an action

Virginia.— Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33.

Wisconsin.— Shields *v.* Fuller, 4 Wis. 102, 65 Am. Dec. 293.

United States.—Allison *v.* Alexander, 1 Fed. Cas. No. 251, 1 Cranch C. C. 237, may be compelled to elect between remedy at law and in equity.

England.— Powdrell *v.* Jones, 2 Eq. Rep. 624, 18 Jur. 1048, 23 L. J. Ch. 606, 2 Smale & G. 305, 2 Wkly. Rep. 513, 65 Eng. Reprint 412.

Canada.— Strathy *v.* Crooks, 2 U. C. Q. B. 51, holding, however, that as the executor of the deceased partner was a tenant in common with the survivor of firm property, he could not be sued by the latter in conversion for selling the whole of the firm property against the latter's wish.

See 38 Cent. Dig. tit. "Partnership," § 589 *et seq.*

Presentation of claim in probate court.— In McKay *v.* Joy, (Cal. 1886) 9 Pac. 940, and Pitkin *v.* Pitkin, 7 Conn. 307, 18 Am. Dec. 111, it was held that the surviving partner was entitled to present his claim to the personal representative of the deceased in the probate court.

54. Miller *v.* Andres, 13 Ga. 366; Johnson *v.* Ames, 11 Pick. (Mass.) 173; Kern's Estate, 5 Kulp (Pa.) 168; Powdrell *v.* Jones, 2 Eq. Rep. 624, 18 Jur. 1048, 23 L. J. Ch. 606, 2 Smale & G. 305, 2 Wkly. Rep. 513, 65 Eng. Reprint 412. In Lacy *v.* Le Bruce, 6 Ala. 904, and Wilby *v.* Phinney, 15 Mass. 116, the survivors of the creditor firm were allowed to maintain an action at law against the debtor firm, after the death of the common partner.

55. Huff *v.* Lutz, 87 Ind. 471 (where, however, the survivor was defeated because no such accounting was had); Morrison *v.* Kramer, 58 Ind. 38; Powell's Succession, 14 La. Ann. 425 (a full and entire settlement must be shown); Wilby *v.* Phinney, 15 Mass. 116; Ozeas *v.* Johnson, 1 Binn. (Pa.) 191, 4 Dall. 434, 1 L. ed. 897.

56. Johnson *v.* Peck, 58 Ark. 580, 25 S. W. 865; Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595; Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

57. Wilby *v.* Phinney, 15 Mass. 116.

58. *Arkansas.*— Choate *v.* O'Neal, 57 Ark. 299, 21 S. W. 470.

Illinois.— White *v.* Russell, 79 Ill. 155; Smith *v.* Ramsey, 6 Ill. 373.

Kansas.— Scruggs *v.* Russell, McCahon 39.

Louisiana.— Cousteaud's Succession, 11 La. Ann. 216.

Maryland.— Bruns *v.* Heise, 101 Md. 163, 60 Atl. 604, where, however, a demurrer was sustained because of defects in the bill and defect of parties.

Massachusetts.— Johnson *v.* Ames, 11 Pick. 173, where, however, the bill was dismissed because of the survivor's contract with the deceased partner.

Michigan.— Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271.

Minnesota.— Little *v.* Simonds, 46 Minn. 380, 49 N. W. 186.

Mississippi.— Whitney *v.* Cotten, 53 Miss. 689.

New York.— Arnold *v.* Arnold, 90 N. Y. 580; Francisco *v.* Fitch, 25 Barb. 130.

Ohio.— Thompson *v.* The Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658.

South Carolina.— Cook *v.* Garrett, 1 Brev. 388.

Virginia.—Compton *v.* Thorn, 90 Va. 653, 19 S. E. 451, holding that in an action to enforce contribution by means of subrogation to the rights of creditors, the estate of the deceased partner is a necessary party.

United States.— Van Vleet *v.* Sledge, 45 Fed. 743; Kelley *v.* Greenleaf, 14 Fed. Cas. No. 7,657, 3 Story 93.

England.— Alder *v.* Fouraere, 3 Swanst. 489, 19 Rev. Rep. 256, 36 Eng. Reprint 947.

See 38 Cent. Dig. tit. "Partnership," § 589 *et seq.*

59. *Arizona.*— Franklin *v.* Trickey, (1905) 80 Pac. 352, applying Rev. St. (1901) §§ 1739, 1742, 1743, 1749.

Kentucky.— Coakley *v.* Hazelwood, 49 S. W. 1067, 21 Ky. L. Rep. 40.

Michigan.— Howard *v.* Patrick, 38 Mich. 795.

Mississippi.— Scott *v.* Scarles, 5 Sm. & M. 25.

Missouri.— Tufts *v.* Latshaw, 172 Mo. 359, 72 S. W. 679; Lindell *v.* Lee, 34 Mo. 103; Byers *v.* Weeks, 105 Mo. App. 72, 79 S. W. 485.

at law against the survivor upon his personal obligation to the deceased,[60] or for the balance due upon a final accounting from the survivor to the estate of the deceased,[61] or, in some circumstances, for the wrongful conversion or misappropriation of firm assets.[62] In the absence of a statute the probate court has no jurisdiction over claims by the representative of one partner against the representative of another based on partnership accounts.[63]

IX. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.[64]

A. Causes of Dissolution — 1. Power of Partner to Dissolve — a. Partnership at Will. Where no fixed term has been agreed upon for the duration of the partnership, any partner may dissolve it at any time by notice of his intention to do so to all the other partners.[65] In some jurisdictions, however, the

New Hampshire.— Harris *v.* Harris, 39 N. H. 45.

New York.— Fleischmann *v.* Fleischmann, 54 N. Y. App. Div. 202, 66 N. Y. Suppl. 631 [*affirming* 31 Misc. 216, 65 N. Y. Suppl. 93].

Ohio.— Jones *v.* Proctor, 24 Ohio Cir. Ct. 80; Weidig *v.* Moore, 11 Ohio Dec. (Reprint) 83, 24 Cinc. L. Bul. 376.

Pennsylvania.— Ainey's Appeal, 2 Pennyp. 192.

Tennessee.— Parker *v.* Oakley, (Ch. App. 1900) 57 S. W. 426.

Texas.— Booth *v.* Todd, 8 Tex. 137.

Wisconsin.— Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

United States.— Wickliffe *v.* Eve, 17 How. 468, 15 L. ed. 163; Churchill *v.* Buck, 102 Fed. 38, 42 C. C. A. 148; Kirby *v.* Lake Shore, etc., R. Co., 8 Fed. 462.

England.— Partn. Act (1890), §§ 42, 43; Downs *v.* Collins, 6 Hare 418, 31 Eng. Ch. 418, 67 Eng. Reprint. 1228.

Canada.— Bilton *v.* Blakely, 7 Grant Ch. 214, 6 Grant Ch. 575.

See 38 Cent. Dig. tit. "Partnership," § 589 *et seq.*

60. *Illinois.*— Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762, assumpsit.

Indiana.—Anderson *v.* Ackerman, 88 Ind. 481; Beckett *v.* Little, 23 Ind. App. 65, 54 N. E. 1069.

Missouri.— Feurt *v.* Ambrose, 34 Mo. App. 360.

New York.— Fuller *v.* Straus, 44 N. Y. App. Div. 348, 60 N. Y. Suppl. 917.

Texas.— Johnston *v.* Ballard, 83 Tex. 486, 18 S. W. 686.

Wisconsin.— Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710.

See 38 Cent. Dig. tit. "Partnership," § 590 *et seq.*

61. *Kansas.*— Palm *v.* Poponoe, 60 Kan. 297, 56 Pac. 480.

Massachusetts.— Forward *v.* Forward, 6 Allen 494.

Missouri.— Holman *v.* Nance, 84 Mo. 674.

Pennsylvania.— Seltzer *v.* Brundage, (1889) 17 Atl. 9.

Texas.— McKay *v.* Overton, 65 Tex. 82.

See 38 Cent. Dig. tit. "Partnership," § 590.

62. Morrison *v.* Kramer, 58 Ind. 38; Krutz *v.* Craig, 53 Ind. 561; Ravenscraft *v.* Pratt, 22 Kan. 20; Strode *v.* Gilpin, 187 Mo. 383, 86 S. W. 77; Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807.

63. Booth *v.* Todd, 8 Tex. 137.

64. **Commencement and duration of partnership** see *supra*, III, D.

Dissolution of mining partnership see Mines and Minerals, 27 Cyc. 762.

Effect of dissolution on contract of employment see Master and Servant, 26 Cyc. 984, 1039 note 7.

65. *California.*— Civ. Code, § 2450 (2).

Georgia.— Civ. Code, § 2632, three months' notice must be given.

Illinois.— Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67.

Indiana.— Carlton *v.* Cummins, 51 Ind. 478.

Kansas.— Koenig *v.* Adams, 37 Kan. 52, 14 Pac. 439.

Massachusetts.—Fletcher *v.* Reed, 131 Mass. 312.

Michigan.— Walker *v.* Whipple, 58 Mich. 476, 25 N. W. 472.

Missouri.— Gaty *v.* Tyler, 33 Mo. App. 494.

Montana.— Civ. Code, § 3261 (2).

New Jersey.— Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009.

New York.— Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259]; Skinner *v.* Tinker, 34 Barb. 333; Gansevoort *v.* Kennedy, 30 Barb. 279; Briggs *v.* Weidmann Cooperage Co., 3 N. Y. Suppl. 813; Sims *v.* Vyse, 13 N. Y. St. 355; Driggs *v.* Driggs, 11 N. Y. St. 256; Coe *v.* Davidge, 6 N. Y. St. 93.

North Dakota.— Civ. Code, § 5847 (2).

South Dakota.— Civ. Code, § 1752 (2).

United States.— Meysenburg *v.* Littlefield, 135 Fed. 184.

England.— Partn. Act (1890), § 26; Featherstonhaugh *v.* Turner, 25 Beav. 382, 28 L. J. Ch. 812, 53 Eng. Reprint 683 (but if he dissolves the firm directly after becoming a partner he cannot retain the premium paid him by a copartner); Laycock *v.* Bulmer, 13 L. J. Exch. 156; Littlewood *v.* Caldwell, 11 Price 97, 25 Rev. Rep. 711; Crawshay *v.* Maul, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 479, 18 Rev. Rep. 126.

Canada.— Annand *v.* Tupper, 21 Nova Scotia 11 [*affirmed* in 16 Can. Sup. Ct. 718].

See 38 Cent. Dig. tit. "Partnership," § 600. And see *supra*, III, D, 2.

exercise of this power is limited by the requirement that it shall be made in good faith and not at an unreasonable time.[66]

b. Partnership For Fixed Term. In the case of such partnership the authorities are divided. Some of our states follow the English view that neither partner has the power to dissolve the partnership of his own volition during the stipulated term.[67] In most jurisdictions, however, he is accorded this power, but exercises it subject to his liability to pay damages for his breach of contract, unless the circumstances are such as would entitle him to a decree of dissolution.[68]

2. Form and Requisites. To effect the dissolution of a partnership at will there must be a mutual agreement to dissolve, or else there must be notice by the party desiring a dissolution to his copartners of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other parties.[69] No particular form of notice or of agreement is necessary.[70] It may be oral,[71] in the absence of a statutory provision on the subject.[72] But it must be given or actually authorized by a partner.[73]

3. Dissolution by Mutual Consent — a. Shown by Agreement. Of course, as in the case of other contracts, a partnership may be dissolved, at any time during the term for which it was organized, by the valid mutual agreement of the partners,[74]

Compare Reboul *v.* Chalker, 27 Conn. 114; Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255.

Partnership held not one at will.— Dobbins *v.* Tatem, (N. J. Ch. 1892) 25 Atl. 544.

66. Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376; Neilson *v.* Mossend Iron Co., 11 App. Cas. 298 (applying the Scotch law); La. Civ. Code, art. 2884.

67. Von Tagen *v.* Roberts, 4 Leg. Op. (Pa.) 610; Hannaman *v.* Karrick, 9 Utah 256, 33 Pac. 1039; Cole *v.* Moxley, 12 W. Va. 730; McMahon *v.* McClernan, 10 W. Va. 419; Allhusen *v.* Borries, 15 Wkly. Rep. 739; English Partn. Act (1890), §§ 24 (7), 25. See also Reboul *v.* Chalker, 27 Conn. 114; Blake *v.* Dorgan, 1 Greene (Iowa) 537; Dobbins *v.* Tatem, (N. J. Ch. 1892) 25 Atl. 544.

68. *California.*— Civ. Code, § 2451.

Connecticut.— Lapenta *v.* Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315.

Georgia.— Civ. Code, § 2633, provides that a partnership is dissolved by, among other things, such misconduct of either party as will justify a court of equity to decree dissolution.

Michigan.— Solomon *v.* Kirkwood, 55 Mich. 256, 21 N. W. 336.

Montana.— Civ. Code, § 3262.

North Dakota.— Civ. Code, § 5848.

Pennsylvania.— Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Becker *v.* Hill, 20 Lanc. L. Rev. 345.

South Dakota.— Civ. Code, § 1753.

United States.—Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

69. Spears *v.* Willis, 151 N. Y. 443, 45 N. E. 849; Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259].

Action or answer as notice of election.— The bringing of an action to dissolve a partnership at will and for an accounting does not necessarily constitute notice of election to end the partnership. Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979; Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259]. But where the answers of the defendants in such action deny the existence of the partnership, they constitute a notice that the same is dissolved from the time such answers are served. Brady *v.* Powers, *supra.*

70. Armstrong *v.* Fahnestock, 19 Md. 58; Wood *v.* Gault, 2 Md. Ch. 433; Paton *v.* Wright, 15 How. Pr. (N. Y.) 481; Green *v.* Waco State Bank, 78 Tex. 2, 14 S. W. 253.

71. Cregler *v.* Durham, 9 Ind. 375; York *v.* Clemens, 41 Iowa 95; Rackstraw *v.* Imber, Holt N. P. 368, 3 E. C. L. 149.

72. English Partn. Act (1890), § 26 (2), requires the notice to be in writing when the partnership has been originally constituted by deed.

73. Jonau *v.* Blanchard, 2 Rob. (La.) 513 (power to give this notice not included in the general authority of an agent); Gansevoort *v.* Kennedy, 30 Barb. (N. Y.) 279 (nor of a copartner).

74. *Arkansas.*— Lee *v.* Kirby, 80 Ark. 366, 97 S. W. 298, holding also that a partner had ratified his brother's act in entering into a dissolution agreement on his behalf.

Georgia.— Phelps *v.* State, 109 Ga. 115, 34 S. E. 210, the agreement may not operate as an immediate dissolution; whether it does depends upon the intention of the parties as disclosed by the facts of the case.

Illinois.— Gregg *v.* Hord, 129 Ill. 613, 22 N. E. 528, no agreement shown.

Iowa.— Howard *v.* Pratt, 110 Iowa 533, 81 N. W. 722, a written agreement of dissolution, containing full terms of settlement, is binding on the parties, in the absence of fraud or mistake.

Kentucky.— McBurnie *v.* Semple, 19 S. W. 183, 14 Ky. L. Rep. 30.

Missouri.— Dupont *v.* McLaran, 61 Mo. 502.

New Jersey.— Dobbins *v.* Tatem, (Ch. 1892) 25 Atl. 544 (no agreement shown); Fitzgerald *v.* Christl, 20 N. J. Eq. 90 (agreement not obligatory).

including a dormant partner.[75] It may be dissolved also in accordance with the mutual consent of the parties as expressed in the original articles of partnership.[76] Under this head fall dissolutions by reason of the expiration of the term for which the partnership was organized, and of the completion of the enterprise for which the firm was formed.[77]

b. Shown by Conduct. The consent of the partners to a dissolution may be evinced by their conduct, as when one partner withdraws, or a new partner is admitted, without objection from the others;[78] or when one partner transfers his interest to his copartners, or to a third person without objection from them;[79]

New York.— Ferguson *v.* Baker, 116 N. Y. 257, 22 N. E. 400.

See 38 Cent. Dig. tit. "Partnership," § 605.

75. Stevenson *v.* Shields, 7 La. 433.

76. *Georgia.*— Ross *v.* Cornell, 97 Ga. 340, 22 S. E. 394, plaintiff might dissolve by giving certain notice, if business unprofitable.

Iowa.— Swift *v.* Ward, 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302, by sixty days' notice in writing by either party.

Nebraska.— Krigbaum *v.* Vindquest, 10 Nebr. 435, 6 N. W. 631, defendant might terminate partnership, if plaintiff became dissipated and neglected the business.

New Jersey.— Hill *v.* Smalley, 37 N. J. L. 103, defendant entitled to terminate partnership at end of eighteen months, if the business did not pay its expenses.

New York.— Comstock *v.* White, 31 Barb. 301.

Texas.— Wright *v.* Ross, 30 Tex. Civ. App. 207, 70 S. W. 234, construed as a partnership at will.

Wisconsin.— Read *v.* Nevitt, 41 Wis. 348.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11, where, however, the contingency warranting dissolution had not happened.

England.— Carmichael *v.* Evans, [1904] 1 Ch. 486, 73 L. J. Ch. 329, 90 L. T. Rep. N. S. 573, 20 T. L. R. 267 (by notice of dissolution for breach of articles); Plews *v.* Baker, L. R. 16 Eq. 564, 43 L. J. Ch. 212; Griffiths *v.* Bracewell, 35 Beav. 43, 55 Eng. Reprint 810; Smith *v.* Mules, 9 Hare 556, 16 Jur. 261, 21 L. J. Ch. 803, 41 Eng. Ch. 556, 68 Eng. Reprint 633; Robertson *v.* Lockie, 10 Jur. 533, 15 Sim. 285, 38 Eng. Ch. 285, 60 Eng. Reprint 627; Perrens *v.* Johnson, 3 Jur. N. S. 975, 3 Smale & G. 419, 65 Eng. Reprint 720; Warder *v.* Stilwell, 3 Jur. N. S. 9, 26 L. J. Ch. 373, 5 Wkly. Rep. 174; Snow *v.* Mitford, 18 L. T. Rep. N. S. 142, 16 Wkly. Rep. 554; Campbell *v.* Campbell, 6 Reports 137; Kershaw *v.* Matthews, 2 Russ. 62, 26 Rev. Rep. 13, 3 Eng. Ch. 62, 38 Eng. Reprint 259.

See 38 Cent. Dig. tit. "Partnership," § 604.

77. *California.*— Civ. Code, § 2450 (1).

Louisiana.— Civ. Code, art. 2876 (1).

Minnesota.— Bohrer *v.* Drake, 33 Minn. 408, 23 N. W. 840.

Montana.— Civ. Code, § 3261 (1).

New York.— Peyser *v.* Myers, 18 N. Y. Suppl. 736.

North Dakota.— Civ. Code, § 5847 (1).

Ohio.— Jones *v.* Jones, 18 Ohio Cir. Ct. 260, 10 Ohio Cir. Dec. 71.

South Dakota.—Civ. Code, § 1752 (1).

England.— Partn. Act (1890), § 32 (a), (b).

78. *Alabama.*— Hatchett *v.* Blanton, 72 Ala. 423. And see Butts *v.* Cooper, (1907) 44 So. 616.

Arkansas.— Beaver *v.* Lewis, 14 Ark. 138.

Colorado.—Abbott *v.* Smith, 3 Colo. App. 264, 32 Pac. 843, where, however, plaintiff's act was held not to amount to a withdrawal.

Illinois.— McCall *v.* Moss, 112 Ill. 493. Where a partner abandons the business and property of the firm and writes to his partners refusing to join in a settlement of the partnership business and telling them to settle as they please, and they form a new firm and transfer the property of the old firm to the new, the dissolution is complete. Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67. The positive refusal of a partner further to recognize the partnership as operative, or to do anything more under it, terminates it. Ligare *v.* Peacock, 109 Ill. 94.

Louisiana.—Ahat *v.* Penny, 19 La. Ann. 289; Violett *v.* Fairchild, 6 La. Ann. 193.

Missouri.— Spaunhorst *v.* Link, 46 Mo. 197; Mudd *v.* Bast, 34 Mo. 465; Warren *v.* Maloney, 29 Mo. App. 101.

Rhode Island.— Potter *v.* Moses, 1 R. I. 430, holding that, where one of several copartners deserts the firm, it is dissolved between him and the remaining partners; but if the remaining copartners elect to continue the company business between them, the firm continues and will not be dissolved by the subsequent death of the deserting copartner.

Tennessee.— Mobile Bank *v.* Andrews, 2 Sneed 535.

Vermont.— Sanderson *v.* Milton Stage Co., 18 Vt. 107, otherwise where withdrawal, although threatened, was not consummated.

Virginia.— Peters *v.* McWilliams, 78 Va. 567.

See 38 Cent. Dig. tit. "Partnership," §§ 607, 609. See *supra*, VII.

79. *California.*— Rowe *v.* Simmons, 113 Cal. 688, 45 Pac. 983; Chapman *v.* Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109.

Colorado.—Lendholm *v.* Bailey, 16 Colo. App. 190, 64 Pac. 586.

Florida.— Durham *v.* Edwards, 50 Fla. 495, 38 So. 926; Schleicher *v.* Walker, 28 Fla. 680, 10 So. 33.

Georgia.— Cody *v.* Cody, 31 Ga. 619, but sale of a part of his share does not dissolve the firm.

Illinois.— Edens *v.* Williams, 36 Ill. 252; Clark *v.* Carr, 45 Ill. App. 469.

New York.— Emerson *v.* Parsons, 46 N. Y.

but a mortgage of his interest by a partner does not work a dissolution.[80] Where the enterprise is unsuccessful and is abandoned by all the partners, such abandonment is ordinarily treated as working a dissolution by mutual consent.[81]

4. Withdrawal of Partner or Sale of Partner's Share or of Whole Property Without Consent. In most jurisdictions in this country, although not in England,[82] any partner may work a dissolution of the firm by withdrawing, or selling his share in the partnership, or by selling the entire firm property, without the consent of his copartners.[83]

5. By Operation of Law — a. Death of Partner. This produces a dissolution of the firm, not only as to the estate of the deceased, but as to all the partners,[84] unless the continuance of the partnership has been provided for by the

560 [*affirming* 2 Sweeny 447]; Seldon *v.* Hickock, 2 Cai. 166.

South Carolina.— Brown *v.* Chandler, 50 S. C. 385, 27 S. E. 868, executory contract for transfer canceled.

Texas.— Watson *v.* McKinnon, 73 Tex. 210, 11 S. W. 197; Carroll *v.* Evans, 27 Tex. 262; Rogers *v.* Nichols, 20 Tex. 719; Sanchez *v.* Goldfrank, (Civ. App. 1894) 27 S. W. 204.

United States.— *In re* Shepard, 21 Fed. Cas. No. 12,754, 3 Ben. 347, 3 Nat. Bankr. Reg. 172, partial assignment of share did not work a dissolution.

England.— Helmore *v.* Smith, 35 Ch. D. 436, 56 L. T. Rep. N. S. 535, 36 Wkly. Rep. 3, where, however, a partner's interest was bought under execution against him, by his copartner, who paid for same with firm money, and it was held that the firm was not dissolved.

See 38 Cent. Dig. tit. "Partnership," § 608.

80. Monroe *v.* Hamilton, 60 Ala. 226; State *v.* Quick, 10 Iowa 451; Dupont *v.* McLaran, 61 Mo. 502; Inglis *v.* Floyd, 33 Mo. App. 565. See also Russell *v.* Leland, 12 Allen (Mass.) 349; Taft *v.* Buffum, 14 Pick. (Mass.) 322; Lobdell *v.* Baldwin, 93 Mich. 569, 53 N. W. 730; Russell *v.* White, 63 Mich. 409, 29 N. W. 865.

81. Barber *v.* Barnes, 52 Cal. 650; Richardson *v.* Gregory, 126 Ill. 166, 18 N. E. 777 [*affirming* 27 Ill. App. 621]; Byrd *v.* Hughes, 84 Ill. 174, 25 Am. Rep. 442; Potter *v.* Tolbert, 113 Mich. 486, 71 N. W. 849.

Dissolution by judicial decree see *infra*, IX, A, 6, c.

82. See *supra*, IX, A, 1, b.

83. *California.*— Miller *v.* Brigham, 50 Cal. 615.

Illinois.— Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67; McCall *v.* Moses, 112 Ill. 493; Ligare *v.* Peacock, 109 Ill. 94; Smith *v.* Vanderburgh, 46 Ill. 34.

Louisiana.— Leonard *v.* Sparks, 109 La. 543, 33 So. 594; Violett *v.* Fairchild, 6 La. Ann. 193.

Massachusetts.—Avery *v.* Craig, 173 Mass. 110, 53 N. E. 153.

Mississippi.— Whitton *v.* Smith, Freem. 231.

Missouri.— Freeman *v.* Hemenway, 75 Mo. App. 611.

New Jersey.—Coggswell, etc., Co. *v.* Coggswell, (Ch. 1898) 40 Atl. 213; Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009.

New Mexico.— De Mandefield *v.* Field, 7 N. M. 17, 32 Pac. 146.

New York.— Mumford *v.* McKay, 8 Wend. 442, 24 Am. Dec. 34; Marquand *v.* New York Mfg. Co., 17 Johns. 525.

Pennsylvania.— Hæberly's Appeal, 191 Pa. St. 239, 43 Atl. 207; Horton's Appeal, 13 Pa. St. 67; Cochran *v.* Perry, 8 Watts & S. 262; Harkins *v.* Buxton, 11 Pa. Dist. 159, 27 Pa. Co. Ct. 22; Swoope *v.* Wakefield, 10 Pa. Super. Ct. 342, 44 Wkly. Notes Cas. 209; *In re* Weles, 4 Lack. Leg. N. 135.

Rhode Island.— Potter *v.* Moses, 1 R. I. 430.

Texas.— Moore *v.* Steele, 67 Tex. 435, 3 S. W. 448.

Vermont.— Ayer *v.* Ayer, 41 Vt. 346.

West Virginia.— Conrad *v.* Buck, 21 W. Va. 396; Ballard *v.* Callison, 4 W. Va. 326.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45.

United States.— Meysenburg *v.* Littlefield, 135 Fed. 184.

Canada.— Westbrook *v.* Wheeler, 25 Ont. 559; Kennedy *v.* Gaudaur, 1 Ont. L. Rep. 430.

See 38 Cent. Dig. tit. "Partnership," §§ 607, 608.

84. *Alabama.*— Knapp *v.* McBride, 7 Ala. 19.

California.— Civ. Code, § 2450 (3).

Connecticut.— Filley *v.* Phelps, 18 Conn. 294.

Georgia.— Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

Louisiana.— Cane *v.* Battle, 3 La. Ann. 642; Buard *v.* Lemée, 12 Rob. 243; Mathison *v.* Field, 3 Rob. 44; Civ. Code, art. 2876 (3).

Maryland.— Goodhurn *v.* Stevens, 5 Gill 1; Williamson *v.* Wilson, 1 Bland 418.

Michigan.— Jenness *v.* Carleton, 40 Mich. 343.

Minnesota.— Hoard *v.* Clum, 31 Minn. 186, 17 N. W. 275.

Montana.— Civ. Code, § 3261 (3).

New York.— Loewenstein *v.* Loewenstein, 114 N. Y. App. Div. 65, 99 N. Y. Suppl. 730; Dexter *v.* Dexter, 43 N. Y. App. Div. 268, 60 N. Y. Suppl. 371.

North Dakota.— Civ. Code, § 5847 (3).

Ohio.— Easton *v.* Ellis, 1 Handy 70, 12 Ohio Dec. (Reprint) 32; Peters *v.* Campbell, 2 Ohio Dec. (Reprint) 526, 2 West. L. Month. 587.

agreement of the parties.[85] That a partner's death should have this legal consequence follows from the principle that by the contract of partnership each member has the right to the continuance of all his associates as members of the firm. The personal qualities of each member of a firm enter largely into the inducements which lead parties to form a normal partnership.[86] As this principle does not apply to joint stock associations, it follows that the death of one of its members does not work a dissolution *ipso facto*.[87]

b. Disability of Partner. In Tennessee it has been held that an adjudication of lunacy as to one partner *ipso facto* dissolves the firm;[88] but the general view is that it only affords a ground for judicial dissolution.[89] The mere weakening of the mental faculties of a partner, although it may be ground for dissolution, does not of itself cause a dissolution.[90]

c. Bankruptcy or Insolvency of Partner or Firm. The bankruptcy or the adjudicated insolvency of a partner or of the firm dissolves the firm;[91] but

Pennsylvania.— Williams *v.* Philadelphia Trust, etc., Co., 150 Pa. St. 20, 24 Atl. 346; *In re* Darling, 7 Kulp 323; Smith's Estate, 11 Phila. 131.

South Carolina.— Jones *v.* McMichael, 12 Rich. 176.

South Dakota.— Civ. Code, § 1752 (3).

Tennessee.— Cowan *v.* Gill, 11 Lea 674.

Texas.— Altgelt *v.* Sullivan, (Civ. App. 1903) 79 S. W. 333. But the death of a spouse does not dissolve a firm of which the surviving spouse is a member, and in which firm the community property is invested. Simpson *v.* Gregg, 1 Tex. Unrep. Cas. 380.

Virginia.— Davis *v.* Christian, 15 Gratt. 11.

United States.— Burwell *v.* Cawood, 2 How. 560, 11 L. ed. 378; Scholefield *v.* Eichelberger, 7 Pet. 586, 8 L. ed. 793.

England.— Partn. Act (1890), § 33 (1); Bell *v.* Nevin, 12 Jur. N. S. 935, 15 Wkly. Rep. 85; Gillespie *v.* Hamilton, 3 Madd. 251, 56 Eng. Reprint 501; Vulliamy *v.* Noble, 3 Meriv. 593, 17 Wkly. Rep. 143, 36 Eng. Reprint 228; Crawshay *v.* Maule, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 79, 18 Rev. Rep. 126.

See 38 Cent. Dig. tit. "Partnership," § 621.

85. *Alabama.*— Knapp *v.* McBride, 7 Ala. 19.

Georgia.— Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

Louisiana.— Buard *v.* Lemée, 12 Rob. 243; Mathison *v.* Field, 3 Rob. 44.

Ohio.— Peters *v.* Campbell, 2 Ohio Dec. (Reprint) 526, 2 West. L. Month. 587.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45.

United States.—Burwell *v.* Cawood, 2 How. 560, 11 L. ed. 378; Lincoln *v.* Orthwein, 120 Fed. 880, 57 C. C. A. 540, both holding that a provision in a partner's will that his death should not terminate the partnership, when assented to by the survivors, becomes effective, and the firm is not dissolved by the testator's death.

A provision in partnership articles for the continuance of the firm for a fixed period does not amount to such an agreement. Goodburn *v.* Stevens, 5 Gill (Md.) 1; Hoard *v.* Clum, 31 Minn. 186, 17 N. W. 275.

86. Marlett *v.* Jackman, 3 Allen (Mass.) 257.

87. Horner *v.* Meyers, 4 Ohio S. & C. Pl. Dec. 404, 1 Ohio N. P. 314; Carter *v.* McClure, 98 Tenn. 109, 38 S. W. 585, 60 Am. St. Rep. 842, 36 L. R. A. 282. See JOINT STOCK COMPANIES, 23 Cyc. 466.

88. Isler *v.* Baker, 6 Humphr. (Tenn.) 85.

89. Raymond *v.* Vaughan, 128 Ill. 256, 21 N. E. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440; Jurgens *v.* Ittman, 47 La. Ann. 367, 16 So. 952; J—— *v.* S——, [1894] 3 Ch. 72, 63 L. J. Ch. 615, 70 L. T. Rep. N. S. 757, 8 Reports 436, 42 Wkly. Rep. 617; Jones *v.* Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. Rep. N. S. 487, 20 Wkly. Rep. 785; Whitwell *v.* Arthur, 35 Beav. 140, 55 Eng. Reprint 848; Rowlands *v.* Evans, 30 Beav. 302, 8 Jur. N. S. 88, 31 L. J. Ch. 265, 5 L. T. Rep. N. S. 628, 10 Wkly. Rep. 186, 54 Eng. Reprint 905; Mellersh *v.* Keen, 27 Beav. 236, 54 Eng. Reprint 92; Bagshaw *v.* Parker, 10 Beav. 532, 50 Eng. Reprint 685; Sadler *v.* Lee, 6 Beav. 324, 7 Jur. 476, 12 L. J. Ch. 407, 49 Eng. Reprint 850; Sayer *v.* Bennet, 1 Cox Ch. 107, 29 Eng. Reprint 1084; Leaf *v.* Coles, 1 De G. M. & G. 171, 50 Eng. Ch. 131, 42 Eng. Reprint 517; Milne *v.* Bartlet, 3 Jur. 358, 8 L. J. Ch. 254; Kirby *v.* Carr, 2 Jur. 741, 8 L. J. Exch. 31, 3 Y. & C. Exch. 184; Anonymous, 2 Kay & J. 441, 69 Eng. Reprint 855; Ogilby *v.* Gregory, 25 L. J. Ch. 32, 4 Wkly. Rep. 67; Patey *v.* Patey, 5 L. J. Ch. 198; Jones *v.* Noy, 3 L. J. Ch. 14, 2 Myl. & K. 125, 7 Eng. Ch. 125, 39 Eng. Reprint 892; Pearce *v.* Chamberlain, 2 Ves. 35, 28 Eng. Reprint 23; Cal. Civ. Code, § 2452 (1); English Partn. Act (1890), § 35 (1).

90. Jurgens *v.* Ittmann, 47 La. Ann. 367, 16 So. 952.

91. *Louisiana.*— Civ. Code, art. 2876 (4). See Saloy *v.* Albrecht, 17 La. Ann. 75.

Maryland.—Williamson *v.* Wilson, 1 Bland 418.

Mississippi.— Halsey *v.* Norton, 45 Miss. 703, 7 Am. Rep. 745.

North Carolina.—Blackwell *v.* Claywell, 75 N. C. 213.

his or its mere insolvency or inability to pay debts as they mature does not,[92] although it entitles the solvent partner to a decree of dissolution and also to the possession and management of the firm assets.[93] A voluntary assignment for the benefit of creditors works an immediate dissolution in some jurisdictions,[94] while in others it operates only to give an option to the copartners to have the firm dissolved.[95]

d. Marriage. At common law, the marriage of a female partner worked an immediate dissolution of the firm, as it gave to the husband the legal right to her share in the partnership and deprived her of her contractual power.[96] But under many modern statutes removing the disabilities of married women and giving them the right to their property, marriage does not produce this result.[97]

e. War or Illegality of Partnership. As a rule the breaking out of war operates to dissolve a partnership, requiring commercial intercourse between the belligerent states, because such intercourse is illegal.[98] And the happening of any other event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership, dissolves the firm.[99]

f. Misconduct of Partner. The absconding or other misconduct of a partner does not *ipso facto* dissolve the partnership,[1] although it may be ground for a judicial dissolution.[2] The failure of one of the partners to comply with the terms and conditions of the partnership contract will not annul the partnership unless the condition is a condition precedent.[3]

g. Attachment or Execution. The fact that after an attachment of partnership property and its application toward paying the firm debts the partners cease

England.— Partn. Act (1890), § 33 (1); Smith *v.* De Silva, Cowp. 469; Fox *v.* Hanbury, Cowp. 448; Dodds *v.* Preston, 59 L. T. Rep. N. S. 718.

Canada.— MacLean *v.* Stewart, 25 Can. Sup. Ct. 225.

See 38 Cent. Dig. tit. "Partnership," § 616.

92. Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Siegel *v.* Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

93. Boyce *v.* Burchard, 21 Ga. 74; Havener *v.* Stephens, 58 S. W. 372, 22 Ky. L. Rep. 498; Tracy *v.* Walker, 24 Fed. Cas. No. 14,129, 1 Flipp. 41.

94. Wells *v.* Ellis, 68 Cal. 243, 9 Pac. 80; Civ. Code, § 2450 (4); Welles *v.* March, 30 N. Y. 344; Ogden *v.* Arnot, 29 Hun (N. Y.) 146; Dunbar Fire Brick Co. *v.* Madeira, 7 Pa. Dist. 246; Cameron *v.* Stevenson, 12 U. C. C. P. 389.

Void assignment.— An assignment of partnership property for the benefit of creditors will not work a dissolution of the partnership, where it is void for want of conformity with statutory requirements. Simmons *v.* Curtis, 41 Me. 373.

95. Williston *v.* Camp, 9 Mont. 88, 22 Pac. 501; Pleasants *v.* Meny, 1 Dall. (Pa.) 380, 1 L. ed. 185; English Partn. Act (1890), § 33 (2).

96. Bassett *v.* Shepardson, 52 Mich. 3, 17 N. W. 217; Little *v.* Hazlett, 197 Pa. St. 591, 47 Atl. 855; Little *v.* Grayson, 30 Pittsb. Leg. J. N. S. (Pa.) 222; Brown *v.* Chancellor, 61 Tex. 437; Nerot *v.* Burnand, 2 Bligh N. S. 215, 4 Eng. Reprint 1112, 6 L. J. Ch. O. S. 81, 4 Russ. 247, 4 Eng. Ch. 247, 38 Eng. Reprint 798. See HUSBAND AND WIFE, 21 Cyc. 1341.

97. N. Y. Dom. Rel. L. (1896) c. 272, § 21; English Married Women's Prop. Act (1882), c. 75, §§ 1, 2. See HUSBAND AND WIFE, 21 Cyc. 1341.

98. *California.*— Civ. Code, §§ 24, 50 (5).

Kentucky.— McAdams *v.* Hawes, 9 Bush 15.

Montana.— Civ. Code, § 3261 (5).

New York.— Seaman *v.* Waddington, 16 Johns. 510; Griswold *v.* Waddington, 16 Johns. 438 [*affirming* 15 Johns. 57].

North Dakota.— Civ. Code, § 5847 (5).

South Dakota.— Civ. Code, § 1752 (5).

Virginia.— Small *v.* Lumpkin, 28 Gratt. 832; Booker *v.* Kirkpatrick, 26 Gratt. 145.

United States.— The William Bagaley *v.* U. S., 5 Wall. 377, 18 L. ed. 583; Planters Bank *v.* St. John, 19 Fed. Cas. No. 11,208, 1 Woods 585.

England.— Esposito *v.* Bowden, 7 E. & B. 763, 3 Jur. N. S. 1209, 27 L. J. Q. B. 17, 5 Wkly. Rep. 732, 90 E. C. L. 763; Evans *v.* Richardson, 3 Meriv. 469, 36 Eng. Reprint 181.

See 38 Cent. Dig. tit. "Partnership," § 612.

If the partnership business is not essentially antagonistic to the laws governing a state of war, the courts will strive to treat the partnership as suspended rather than dissolved by war. Mutual Ben. L. Ins. Co. *v.* Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741; Douglas *v.* U. S., 14 Ct. Cl. 1.

99. Justice *v.* Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405, a partnership between lawyers, one of whom has been elected a judge.

1. Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Whitman *v.* Leonard, 3 Pick. (Mass.) 177.

2. See *infra*, IX, A, 6, d.

3. Murray *v.* Johnson, 1 Head (Tenn.) 353.

to do business does not operate as a dissolution;[4] and where a plaintiff in execution against a member of a partnership seizes the interest of his debtor in the partnership property, such execution does not dissolve the partnership.[5] On the other hand it has been held that a partnership for the cultivation of a plantation is dissolved by the seizure of an undivided interest therein, whereby the partnership is deprived of control of the plantation,[6] and that a sale of partnership property under a separate execution against one partner operates as a dissolution.[7] The filing of an attachment bill by one member of a firm against the others dissolves the firm; but it is otherwise where a creditor files the bill and attaches the property of the firm.[8]

h. Loss of Entire Capital. It has also been held that the loss of the entire capital of a partnership will operate as a dissolution.[9]

6. Dissolution by Judicial Decree — a. In General. Courts of equity have the power to dissolve a partnership for a sufficient cause before the expiration of the term for which it was formed,[10] even on the application of the partner committing the acts set up as grounds for dissolution,[11] and even though the partnership articles contain a clause requiring six months' notice of intention to dissolve and a clause providing for arbitration.[12] But dissolution of a partnership by decree of court may be refused when the circumstances render the dissolution inconvenient, as where a large operation has been commenced and cannot be arrested without serious loss.[13]

b. Because of Partner's Incapacity. When a partner becomes permanently incapable of performing his duties under the partnership contract, the court may decree a dissolution.[14] The lunacy of a partner is ground for a judicial dissolution.[15]

c. Because Business Can Only Be Carried on at a Loss. As the object for which a partnership is formed is pecuniary gain, as soon as it becomes apparent that the business can no longer be carried on at a profit any member is entitled to have the firm dissolved.[16]

d. Because of Partner's Misconduct. The courts do not hesitate to dissolve a

4. Barber *v.* Barnes, 52 Cal. 650.
5. Choppin *v.* Wilson, 27 La. Ann. 444.
6. Borah *v.* O'Niell, 116 La. 672, 41 So. 29.
7. Renton *v.* Chaplain, 9 N. J. Eq. 62.
8. Foster *v.* Hall, 4 Humphr. (Tenn.) 346.
9. Claiborne *v.* His Creditors, 18 La. 501 (holding that a partnership in a steamboat was dissolved by the destruction of the boat); Van Ness *v.* Fisher, 5 Lans. (N. Y.) 236 (holding, in an action to recover damages for breach of an agreement to continue a partnership for five years, that the fact that the whole capital provided for by the articles of partnership had been lost was a sufficient ground for a refusal by one of the partners to continue the business).
10. Fogg *v.* Johnston, 27 Ala. 432, 62 Am. Dec. 771 (dissolution *ab initio*); Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172; Ferrero *v.* Buhlmeyer, 34 How. Pr. (N. Y.) 33; Page *v.* Vankirk, 1 Brewst. (Pa.) 282, and other cases cited under the sections following. And see *infra*, IX, D, 2, a.
11. Ferrero *v.* Buhlmeyer, 34 How. Pr. (N. Y.) 33.
12. Page *v.* Vankirk, 1 Brewst. (Pa.) 282.
13. Richards *v.* Baurman, 65 N. C. 162.
14. Yoos *v.* Doyle, 4 Lack. Leg. N. (Pa.) 128 (incapacity due to the partner's acceptance of a public office); Cal. Civ. Code, § 2452 (1).
15. See *supra*, IX, A, 5, b.
16. *California.*— Civ. Code, § 2452 (3).
Georgia.— Civ. Code, § 2633, "by the extinction of the business for which [the partnership] was formed."
Kentucky.— Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.
Louisiana.— Leonard *v.* Sparks, 109 La. 543, 33 So. 594 (where the business could no longer be carried on by the partners, because one was lawfully dismissed from the agency which constituted the partnership business); Claiborne *v.* His Creditors, 18 La. 501 (where the steamboat with which the partnership business was carried on was destroyed).
Montana.— Civ. Code, § 3263 (3).
New Jersey.— Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172.
New York.— Van Ness *v.* Fisher, 5 Lans. 236.
North Dakota.— Civ. Code, § 5849 (3).
Oregon.—Holladay *v.* Elliott, 8 Oreg. 84.
Pennsylvania.— Page *v.* Vankirk, 1 Brewst. 282.
South Dakota.— Civ. Code, § 1754 (3).
Tennessee.— Brien *v.* Harriman, 1 Tenn. Ch. 467.
West Virginia.—Cross *v.* Hopkins, 6 W. Va. 323.
United States.— Rosenstein *v.* Burns, 41 Fed. 841; Brown *v.* Hicks, 8 Fed. 155.

partnership, upon the application of a partner who shows that his copartner is guilty of misconduct which is seriously prejudicial to the business,[17] and especially if the misconduct consists in wilful and persistent breaches of the partnership articles,[18] or is of such a character as to render it impracticable for the partners to carry on the business together.[19] But slight negligence or misconduct or mere error of judgment is not ground for dissolution.[20] Where one of the parties to

England.— Partn. Act (1890), § 35 (e); Baring *v.* Dix, 1 Cox Ch. 213, 1 Rev. Rep. 23, 29 Eng. Reprint 1134; Jennings *v.* Baddeley, 3 Jur. N. S. 108, 3 Kay & J. 78, 69 Eng. Reprint 1029.

See 38 Cent. Dig. tit. "Partnership," § 611.

Dissolution by mutual consent see *supra*, IX, A, 3, b.

17. Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376; Ambler *v.* Whipple, 20 Wall. (U. S.) 546, 22 L. ed. 403; Carmichael *v.* Evans, [1904] 1 Ch. 486, 73 L. J. Ch. 329, 90 L. T. Rep. N. S. 573, 20 T. L. R. 267; Barnes *v.* Youngs, [1898] 1 Ch. 414, 67 L. J. Ch. 263, 46 Wkly. Rep. 332; Essell *v.* Hayward, 30 Beav. 158, 6 Jur. N. S. 690, 29 L. J. Ch. 806, 8 Wkly. Rep. 593, 54 Eng. Reprint 849; English Partn. Act (1890), § 35 (c).

18. *Alabama.*— Turnipseed *v.* Goodwin, 9 Ala. 372.

Arkansas.— Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376.

California.— Quinn *v.* Quinn, 81 Cal. 14, 22 Pac. 264.

Georgia.— Civ. Code, § 2633.

Louisiana.— Breaux *v.* Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. Rep. 403; New Orleans *v.* Guillotte, 12 La. Ann. 818; Bruce *v.* Ross, 18 La. 341.

Massachusetts.—Arnold *v.* Brown, 24 Pick. 89, 35 Am. Dec. 296; Whitman *v.* Leonard, 3 Pick. 177.

New Hampshire.—Abbot *v.* Johnson, 32 N. H. 9, selling spirituous liquors in violation of articles.

New Jersey.— Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172.

New York.—Hollister *v.* Simonson, 36 N. Y. App. Div. 63, 55 N. Y. Suppl. 372 (but such misconduct may not warrant a rescission of the partnership contract); Flammer *v.* Green, 47 N. Y. Super. Ct. 538. See Campbell *v.* Sherman, 4 Silv. Sup. 6, 8 N. Y. Suppl. 630.

Wisconsin.— Wood *v.* Beath, 23 Wis. 254.

England.— Partn. Act (1890), § 35 (d); Cheesman *v.* Price, 35 Beav. 142, 55 Eng. Reprint 849; Anderson *v.* Anderson, 25 Beav. 190, 53 Eng. Reprint 609; Hawkins *v.* Parsons, 8 Jur. N. S. 452, 31 L. J. Ch. 479, 10 Wkly. Rep. 377; Lemann *v.* Berger, 34 L. T. Rep. N. S. 235; Cooper *v.* Page, 34 L. T. Rep. N. S. 90.

See 38 Cent. Dig. tit. "Partnership," § 620.

19. *Alabama.*— Brooke *v.* Tucker, (1907) 43 So. 141 (holding that there was ground for judicial dissolution, where defendant partner was insolvent and had collected money due the firm and appropriated the same to his own use without making any entry on the partnership books and without acquainting the complainant partner of the facts); Gillett *v.* Higgins, 142 Ala. 444, 38 So. 664; Fogg *v.* Johnston, 27 Ala. 432, 62 Am. Dec. 771.

California.— Civ. Code, § 2452 (2); Crosby *v.* McDermitt, 7 Cal. 146.

Illinois.— Cash *v.* Earnshaw, 66 Ill. 402.

Indiana.—Adams *v.* Shewalter, 139 Ind. 178, 38 N. E. 607, misappropriation of money and refusal to account therefor.

Kentucky.— Hynes *v.* Stewart, 10 B. Mon. 429 (inducing partnership relation by fraudulent representation); Kennedy *v.* Kennedy, 3 Dana 239 (getting possession of entire firm property and excluding other partner unlawfully).

Michigan.— Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611.

Montana.— Civ. Code, § 3263 (2).

New Jersey.— Hartman *v.* Woehr, 18 N. J. Eq. 383, illegal exclusion of plaintiff from firm affairs.

New York.— Philipp *v.* Von Raven, 26 Misc. 552, 57 N. Y. Suppl. 701.

North Dakota.— Civ. Code, § 5849 (2).

Pennsylvania.— Page *v.* Vankirk, 1 Brewst. 282.

South Dakota.— Civ. Code, § 1754 (2).

Texas.— Rische *v.* Rische, (Civ. App. 1907) 101 S. W. 849 (holding that a partner excluded from the management of or a participation in the profits of the firm is entitled to a dissolution in the absence of an agreement to the contrary); Sewell *v.* Connor, (Civ. App. 1893) 23 S. W. 555 (wrongful exclusion).

Vermont.— Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465, fraudulent disposition of firm assets.

United States.— Gaddie *v.* Mann, 147 Fed. 960 [*reversed* on other grounds in 158 Fed. 42]; Einstein *v.* Schnebly, 89 Fed. 540; Rosenstein *v.* Burns, 41 Fed. 841.

England.— Partn. Act (1890), § 35 (d); Watney *v.* Wells, 30 Beav. 56, 54 Eng. Reprint 810; Smith *v.* Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Waters *v.* Taylor, 2 Ves. & B. 299, 13 Rev. Rep. 91, 35 Eng. Reprint 333.

See 38 Cent. Dig. tit. "Partnership," § 620.

20. Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376 (holding that where one partner was to furnish funds for keeping up the supplies when in his power to do so, and the other was to attend to selling the goods while he remained at home, occasional absence from the state without the other's objection, or detention at home by sickness of his family, did not warrant a dissolution of the partnership); Cash *v.* Earnshaw, 66 Ill. 402 (holding that a mere error of judgment, especially where it involved no permanent mischief, was no ground for judicial dissolution); Page *v.* Vankirk, 1 Brewst. (Pa.) 282 (holding that the payment of individual debts by a partner

an agreement of partnership has been induced to enter into it by the fraudulent representations of the other, the partnership may be declared void.[21]

e. Because of Dissensions. While a court will not dissolve a firm because of trifling or temporary disputes of partners,[22] yet, if their dissensions are so serious and persistent as to make the successful continuance of the firm impracticable, a dissolution will be decreed.[23]

f. Because a Dissolution Is Just and Equitable. The Louisiana code permits a partner to dissolve the firm "for just cause";[24] and the English Partnership Act provides that the court may decree a dissolution "whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved."[25] Even in the absence of such a statutory provision, courts of equity have not hesitated to exercise the power thus recognized.[26]

7. Time of Taking Effect. When the firm is dissolved by the agreement of the parties, the dissolution takes effect at the time agreed upon.[27] A partnership at will is terminated at the time when notice is given.[28] When a firm is dissolved by judicial decree, the date of dissolution is ordinarily the date of entering judgment therefor.[29]

with the firm's money does not entitle the other partner to a dissolution, where the capital of the partner so using the money is at all times unimpaired, and the transactions have been regularly entered); Leavitt *v.* Windsor Land, etc., Co., 54 Fed. 439, 4 C. C. A. 425.

The fact that a partner was not generally a very profitable or attentive one is no ground for dissolution. Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376.

21. Hynes *v.* Stewart, 10 B. Mon. (Ky.) 429. But where one partner filed a bill against his copartners for a settlement of the partnership accounts and his share of the profits, it was held that a fraud perpetrated by him on one of the defendants in a former partnership between them individually, by means of which he procured the funds contributed as his share of the capital of the new firm, was no ground for annulling the contract of partnership.

22. Gerard *v.* Gateau, 84 Ill. 121, 25 Am. Rep. 438; Lafond *v.* Deems, 1 Abb. N. Cas. (N. Y.) 318, 52 How. Pr. [*affirmed* in 81 N. Y. 507, 8 Abb. N. Cas. 344]; Henn *v.* Walsh, 2 Edw. (N. Y.) 129; Wray *v.* Hutchinson, 3 L. J. Ch. 62, 2 Myl. & K. 235, 7 Eng. Ch. 235, 39 Eng. Reprint 934.

23. *Alabama.*— Moore *v.* Price, 116 Ala. 247, 22 So. 531; Meaher *v.* Cox, 37 Ala. 201.

Illinois.— Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921 [*affirming* 92 Ill. App. 235].

Iowa.— Blake *v.* Dorgan, 1 Greene 537.

New York.— Philipp *v.* Von Raven, 26 Misc. 552, 57 N. Y. Suppl. 701; Lafond *v.* Deems, 1 Abb. N. Cas. 318, 52 How. Pr. 41 [*affirmed* in 81 N. Y. 507, 8 Abb. N. Cas. 344]; Bishop *v.* Breckles, Hoffm. 534.

Pennsylvania.— Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Roberts *v.* Dunham, 1 C. Pl. 136.

Texas.— Rische *v.* Rische, (Civ. App. 1907) 101 S. W. 849.

Wisconsin.— Singer *v.* Heller, 40 Wis. 544.

England.— Roberts *v.* Eberhardt, 2 Eq. Rep. 780, Kay 148, 23 L. J. Ch. 201, 2 Wkly. Rep. 125, 69 Eng. Reprint 63.

See 38 Cent. Dig. tit. "Partnership," § 619.

24. La. Civ. Code, arts. 2887, 2888. See Breaux *v.* Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. Rep. 403.

25. English Partn. Act (1890), § 35 (f).

26. *California.*— Barber *v.* Barnes, 52 Cal. 650.

New Jersey.— Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172; Renton *v.* Chaplain, 9 N. J. Eq. 62, holding that a sale of firm property under a separate execution against one partner operates as a dissolution.

New York.— Ferrero *v.* Buhlmeyer, 34 How. Pr. 33.

Pennsylvania.— Page *v.* Vankirk, 1 Brewst. 282.

Tennessee.— Foster *v.* Hall, 4 Humphr. 346.

England.— Steuart *v.* Gladstone, 10 Ch. D. 626, 40 L. T. Rep. N. S. 145, 27 Wkly. Rep. 512 [*affirming* 47 L. J. Ch. 423, 38 L. T. Rep. N. S. 557, 26 Wkly. Rep. 657]; Harrison *v.* Tennant, 21 Beav. 482, 52 Eng. Reprint 945; Blisset *v.* Daniel, 1 Eq. Rep. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478, 68 Eng. Reprint 1022; Aspinall *v.* London, etc., R. Co., 11 Hare 325, 1 Wkly. Rep. 518, 45 Eng. Ch. 325, 68 Eng. Reprint 1299.

27. Magill *v.* Merrie, 5 B. Mon. (Ky.) 168; Sharpe *v.* Johnston, 59 Mo. 557.

28. Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259] (holding also that answers by partners in a suit by another partner for dissolution and accounting, denying the existence of the partnership, were notice of dissolution as of the time such answers were served); Shepherd *v.* Allen, 33 Beav. 577, 55 Eng. Reprint 492 (holding also that filing a bill for dissolution may be treated as notice). See *supra*, IX, A, 1, a.

29. Abrahams *v.* Myers, 40 Md. 499; Sander *v.* Sander, 2 Coll. 276, 33 Eng. Ch. 276, 63 Eng. Reprint 733; Besch *v.* Frolich, 7 Jur.

B. Rights, Powers, and Disabilities After Dissolution — 1. Status of Firm After Dissolution. The dissolution of a firm does not relieve any of its members from liability for existing obligations,[30] although it does save them from new obligations to which they have not expressly or impliedly assented,[31] and any of them may be discharged from old obligations by novation or other form of release.[32] It is often said that a partnership continues, even after dissolution, for the purpose of winding up its affairs.[33] After the dissolution of a firm one of the members cannot act as the agent of a creditor of the firm in holding obligations due the firm as collateral security for a note due from the firm to such creditor, and taking a conveyance of land in settlement of such an obligation.[34]

2. Effect of Dissolution on Powers of Partners — a. In General. The dissolution of a partnership terminates those powers of the partners which are implied from the partnership relation,[35] except those which are necessary to the winding up of the business.[36] In other cases a partner, after dissolution duly notified, has

73, 12 L. J. Ch. 118, 1 Phil. 172, 19 Eng. Ch. 172, 41 Eng. Reprint 597.

30. *Georgia.*—Boone *v.* Sirrine, 38 Ga. 121, lease continued after dissolution by death.

Indiana.— Corbin *v.* Henry, 36 Ind. App. 184, 74 N. E. 1096.

Massachusetts.— Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64.

Minnesota.— Moore *v.* Allen, 82 Minn. 89, 84 N. W. 654.

Missouri.— Bryant *v.* Hawkins, 47 Mo. 410.

Nebraska.— People *v.* Roy, 3 Nebr. 261.

New York.— Gilbert *v.* Warren, 56 N. Y. App. Div. 289, 67 N. Y. Suppl. 978 [*affirmed* in 171 N. Y. 665, 64 N. E. 1121]; Bronx Metal Bed Co. *v.* Wallerstein, 84 N. Y. Suppl. 924.

Pennsylvania.— Jeisley *v.* Haiter, 4 Yeates 337.

West Virginia.— McCoy *v.* Jack, 47 W. Va. 201, 34 S. E. 991.

Wisconsin.— Waldeck *v.* Brande, 61 Wis. 579, 21 N. W. 533; Jackson *v.* Bohrman, 59 Wis. 422, 18 N. W. 456; Bray *v.* Morse, 41 Wis. 343.

United States.— *In re* Cingue, 109 Fed. 455; Horst *v.* Roehm, 84 Fed. 565; Hudgins *v.* Lane, 12 Fed. Cas. No. 6,827, 2 Hughes 361.

England.— Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069; Lodge *v.* Dicas, 3 B. & Ald. 611, 22 Rev. Rep. 497, 5 E. C. L. 352; *In re* Hindmarsh, 1 Dr. & Sm. 129, 1 L. T. Rep. N. S. 475, 8 Wkly. Rep. 203, 62 Eng. Reprint 327; Gough *v.* Davies, 4 Price 200, 18 Rev. Rep. 697; Beak *v.* Beak, 3 Swanst. 627, 36 Eng. Reprint 1000.

Canada.— Osborne *v.* Henderson, 18 Can. Sup. Ct. 698.

See 38 Cent. Dig. tit. "Partnership," § 636.

31. Frank *v.* Pringle, 96 Va. 456, 31 S. E. 605; Hammond *v.* Heward, 11 U. C. C. P. 261, 20 U. C. Q. B. 36.

32. Wiley *v.* Temple, 85 Ill. App. 69 (retiring partner discharged by creditors giving time to continuing partner, knowing that the latter had assumed the firm debts); Hobson *v.* Cowley, 27 L. J. Exch. 205, 6 Wkly. Rep. 334 (retiring partner exonerated by creditors' new agreement with continuing partners); Birkett *v.* McGuire, 19 Can. L. J. N. S. 275. See *supra*, VII, C, 2.

33. *Louisiana.*—Lobdell *v.* Bushnell, 24 La. Ann. 295.

Maine.— Gannett *v.* Cunningham, 34 Me. 56.

New Jersey.— Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009.

Pennsylvania.— Petrikin *v.* Collier, 1 Pa. St. 247.

Virginia.— Brown *v.* Higginbotham, 5 Leigh 583, 27 Am. Dec. 618.

See 38 Cent. Dig. tit. "Partnership," § 624.

34. Bray *v.* Morse, 41 Wis. 343.

35. *Georgia.*— Bower *v.* Douglass, 25 Ga. 714 (cannot settle account and change the liability from an account to an interest-bearing note); Brewster *v.* Hardeman, Dudley 138 (cannot convert open account into liquidated demand).

Louisiana.— Buard *v.* Lemee, 12 Rob. 243; Carr *v.* Woods, 11 Rob. 95; Natchez Commercial Bank *v.* Perry, 10 Rob. 61, 43 Am. Dec. 168; Rudy *v.* Harding, 6 Rob. 70; Lachomette *v.* Thomas, 5 Rob. 172; Fisk *v.* Mead, 18 La. 332; Peters *v.* Gardere, 8 La. 565; Offutt *v.* Bredlove, 4 La. 31.

Mississippi.— Port Gibson Bank *v.* Baugh, 9 Sm. & M. 290, cannot contract new debts or buy, sell, or pledge goods on account of the firm.

New Hampshire.— Hutchins *v.* Gilman, 9 N. H. 359.

New York.— Gansevoort *v.* Kennedy, 30 Barb. 279; Stirnermaun *v.* Cowing, 7 Johns. Ch. 275.

North Carolina.—Allison *v.* Davidson, 17 N. C. 79.

England.— Benham *v.* Gray, 5 C. B. 138, 17 L. J. C. P. 50, 57 E. C. L. 138; Dolman *v.* Orchard, 2 C. & P. 104, 12 E. C. L. 474; Mulford *v.* Griffin, 1 F. & F. 145; Pinder *v.* Wilks, 1 Marsh. 248, 5 Taunt. 612, 1 E. C. L. 314; Rathbone *v.* Drakeford, 4 M. & P. 57, 6 Bing. 375, 8 L. J. C. P. O. S. 117, 19 E. C. L. 174; Wells *v.* Ross, 7 Taunt. 403, 2 E. C. L. 420.

Canada.— Cleve *v.* Bickerdike, 5 Quebec Pr. 391.

See 38 Cent. Dig. tit. "Partnership," § 625. And see *supra*, V, A.

36. *Georgia.*— Brewster *v.* Hardeman, Dudley 138.

the power of binding his former partner only when actual authority therefor has been conferred upon him.[37] Moreover, he is bound to observe the utmost good faith toward his late partners in all matters connected with the settlement of firm affairs.[38]

b. Power to Administer Firm Affairs. In case of dissolution by the death of a partner, the power to administer the firm affairs belongs to the survivor.[39] When dissolution is caused by the bankruptcy or insolvency of a partner, this power belongs to the solvent partner.[40] In other cases of dissolution each partner is entitled to take part in administering the firm's affairs, unless there is an agreement between them, or an order of court, committing the power of liquidation to one or some only of the members.[41] Partners cannot be regarded as trustees for each other after the firm is dissolved and its business closed.[42]

c. As Affected by Agreements For Dissolution. It is not only competent for the partners by agreement to commit the power of liquidating the partnership business to one or some of their number, but they may provide, as between themselves, that one or some may become the owners of the firm assets, upon prescribed terms;[43] or that one or some shall assume and pay the firm debts.[44] Such

Iowa.— Ketchum *v.* Larkin, 88 Iowa 215, 55 N. W. 472.

Maryland.— Seldner *v.* Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190 (waiver of demand and notice on note); Holloway *v.* Turner, 61 Md. 217 (employment of bookkeeper).

Massachusetts.—Buxton *v.* Edwards, 134 Mass. 567, adjustment of claim.

Michigan.— McArthur *v.* Oliver, 53 Mich. 299, 305, 19 N. W. 5, 8, submission to arbitration.

New York.— Marietta, etc., R. Co. *v.* Mowry, 28 Hun 79, transfer of bonds and notice of defect in title.

Vermont.—Ayer *v.* Ayer, 41 Vt. 346 (continuation of employment of attorney); Torrey *v.* Baxter, 13 Vt. 452 (receiving back note wrongfully put in circulation).

England.— King *v.* Smith, 4 C. & P. 108, 19 E. C. L. 430; Butchart *v.* Dresser, 10 Hare 453, 1 Wkly. Rep. 178, 44 Eng. Ch. 438, 68 Eng. Reprint 1004 [*affirming* 4 De G. M. & G. 542, 53 Eng. Ch. 424, 43 Eng. Reprint 619]; Porter *v.* Taylor, 6 Moore & S. 156, 2 Stark. 50, 18 Rev. Rep. 338, 3 E. C. L. 312.

Canada.— Hale *v.* People's Bank, 2 Com. L. Rep. 405, 2 N. Brunsw. Eq. 433.

See 38 Cent. Dig. tit. "Partnership," § 625.

37. *Illinois.*— Smith *v.* Dennison, 101 Ill. 531.

Iowa.— Dunlap *v.* Limes, 49 Iowa 177.

Louisiana.— Mark *v.* Bowers, 4 Mart. N. S. 95.

New York.— Leserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869.

Virginia.—Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.

England.— Smith *v.* Winter, 8 L. J. Exch. 34, 4 M. & W. 454.

38. Stephens *v.* Orman, 10 Fla. 9. But he is not liable for a depreciation in the currency which he receives in payment of debts due the firm. McNair *v.* Ragland, 16 N. C. 516.

39. See *supra*, VIII, A, 2. And see Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033, where all of the survivors were held liable for acts of a part, who had been permitted by all to manage the business, after the death.

40. Vetterlein *v.* Barnes, 6 Fed. 693; *Ex p.* Owen, 13 Q. B. D. 113, 53 L. J. Q. B. 863, 32 Wkly. Rep. 811; Luckie *v.* Forsyth, 3 J. & L. 388; U. S. Bankr. L. (1898) § 5 (h); English Partn. Act (1890), § 38. *Compare* Hubbard *v.* Guild, 1 Duer (N. Y.) 662.

41. *California.*— Civ. Code, § 2460.

Illinois.— Granger *v.* McGilvra, 24 Ill. 152.

Louisiana.— Skannel *v.* Taylor, 12 La. Ann. 773.

Maine.— Davis *v.* Briggs, 39 Me. 304.

Maryland.— Ellicott *v.* Nichols, 7 Gill 85, 48 Am. Dec. 546; Drury *v.* Roberts, 2 Md. Ch. 157.

New York.— Hilton *v.* Vanderbilt, 82 N. Y. 591; Becker *v.* Boon, 61 N. Y. 317; Robbins *v.* Fuller, 24 N. Y. 570; Meyer *v.* Reimers, 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 1112 [*affirming* 30 Misc. 307, 63 N. Y. Suppl. 681]; De Mott *v.* Kendrick, 20 N. Y. Suppl. 195; Hayes *v.* Heyer, 4 Sandf. Ch. 485.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

England.— Partn. Act (1890), § 39.

See 38 Cent. Dig. tit. "Partnership," § 626.

Compare Renton *v.* Chaplain, 9 N. J. Eq. 62, holding that where a partnership is dissolved by the *bona fide* sale of partnership property under a separate execution against one of the partners, the court will not interfere with the other partner in settling the concerns of the partnership and grant an injunction or appoint a receiver, unless there be some breach of duty on the part of the acting partner.

42. Pierce *v.* McClellan, 93 Ill. 245.

43. Mafflyn *v.* Hathaway, 106 Mass. 414; Young *v.* Clute, 12 Nev. 31; Belcher *v.* Sikes, 8 B. & C. 185, 6 L. J. K. B. O. S. 314, 15 E. C. L. 99; Warder *v.* Stilwell, 3 Jur. N. S. 9, 26 L. J. Ch. 373, 5 Wkly. Rep. 174; Frank *v.* Beswick, 44 U. C. Q. B. 1; Gerhardt *v.* Davis, 12 Quebec Super. Ct. 137.

44. Young *v.* Clute, 12 Nev. 31 (purchaser held not to have assumed the taxes upon

stipulations as these, however, do not bind third parties unless it is shown that they consented thereto.[45]

d. Right to Use Firm-Name. After dissolution neither partner has the implied power to use the firm-name so as to bind the other partners thereby.[46] In the absence of an agreement on the subject, however, he has the right to use the old firm-name, provided such use does not expose his late copartners to liability or risk.[47]

e. Power and Duty to Perform Contracts. The dissolution of a firm does not deprive a partner of the power to perform on behalf of the firm existing contracts,[48] nor does it relieve him from the duty of having them performed.[49] On the other hand, such dissolution does not ordinarily absolve third persons from their contractual obligations to the firm.[50] This rule does not apply, however,

firm property which he bought upon dissolution); Rodgers *v.* Maw, 4 D. & L. 66, 16 L. J. Exch. 137, 15 M. & W. 444.

45. Bedford *v.* Deakin, 2 B. & Ald. 210, 2 Stark. 178, 3 E. C. L. 366; Lacy *v.* McNeile, 4 D. & R. 7, 16 E. C. L. 185; Featherstone *v.* Hunt, 2 D. & R. 233, 1 B. & C. 113, 1 L. J. K. B. O. S. 49, 8 E. C. L. 49; Isbester *v.* Ray, 26 Can. Sup. Ct. 79 [*affirming* 22 Ont. App. 12 (*reversing* 24 Ont. 497)]; Bresse *v.* Griffith, 24 Ont. 492. See *supra*, VII, C, 2, 3.

46. Cronly *v.* Commonwealth Bank, 18 B. Mon. (Ky.) 405; Pontiac First Commercial Bank *v.* Talbert, 103 Mich. 625, 61 N. W. 888, 50 Am. St. Rep. 385; Mobile Bank *v.* Andrews, 2 Sneed (Tenn.) 535.

47. Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794; Burchell *v.* Wilde, [1900] 1 Ch. 551, 69 L. J. Ch. 314, 82 L. T. Rep. N. S. 576, 48 Wkly. Rep. 491; Levy *v.* Walker, 10 Ch. D. 436, 48 L. J. Ch. 273, 39 L. T. Rep. N. S. 654, 27 Wkly. Rep. 370; Chappell *v.* Griffith, 50 J. P. 86, 53 L. T. Rep. N. S. 459; Aikins *v.* Piper, 15 Grant Ch. (U. C.) 581. See *supra*, VII, A, 4.

48. *Alabama.*— Davis *v.* Sowell, 77 Ala. 262.

Iowa.— Western Stage Co. *v.* Walker, 2 Iowa 504, 65 Am. Dec. 789.

Louisiana.— White *v.* Kearney, 2 La. Ann. 639.

Michigan.— Feige *v.* Babcock, 111 Mich. 538, 70 N. W. 7.

Mississippi.— Holmes *v.* Shands, 27 Miss. 40.

Missouri.— Bryant *v.* Hawkins, 47 Mo. 410; Dean *v.* McFaul, 23 Mo. 76; Powell *v.* Roberts, 116 Mo. App. 629, 92 S. W. 752.

North Carolina.— French *v.* Griffin, 104 N. C. 141, 10 S. E. 166.

Pennsylvania.— Robertson *v.* Wood, 10 Kulp 76.

England.— Partn. Act (1890), §§ 38, 39; Ault *v.* Goodrich, 4 Russ. 430, 28 Rev. Rep. 151, 4 Eng. Ch. 430, 38 Eng. Reprint 867; Crawshay *v.* Collins, 2 Russ. 325, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358, 15 Ves. Jr. 218, 10 Rev. Rep. 61, 33 Eng. Reprint 736.

See 38 Cent. Dig. tit. "Partnership," §§ 629, 637.

Liability for money collected under contract.— Where partners, commission merchants, receive a consignment of goods for sale, and a dissolution of the partnership afterward takes place before the goods are sold, and they are turned over to, and are sold by, the partner continuing in the business, the outgoing partner is not exonerated from his liability to the shipper by the mere fact that a special notice of the dissolution of the partnership was sent to such shipper, containing also a statement that the goods of the shipper were left in the hands of the continuing partner. Dean *v.* McFaul, 23 Mo. 76. So, where a firm of attorneys took a note for collection, and obtained judgment on the same, and dissolved partnership before collecting the judgment, one member of the firm was held liable to the client for an amount collected on the note after dissolution of the partnership by the other member, and converted by the latter to his own use. Powell *v.* Roberts, 116 Mo. App. 629, 92 S. W. 752. See also Bryant *v.* Hawkins, 47 Mo. 410.

49. *Alabama.*— Fail *v.* McRee, 36 Ala. 61.

Connecticut.— Whiting *v.* Farrand, 1 Conn. 60.

Florida.— Jacksonville, etc., R., etc., Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

Illinois.—Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936 [*affirming* 75 Ill. App. 165].

Indiana.— Dickson *v.* Indianapolis Cotton Mfg. Co., 63 Ind. 9.

Iowa.— Ayres *v.* Chicago, etc., R. Co., 52 Iowa 478, 3 N. W. 522.

Louisiana.— Mutual Bldg., etc., Assoc. *v.* Maryland Fidelity, etc., Co., 50 La. Ann. 291, 23 So. 405.

Massachusetts.— Nickerson *v.* Russell, 172 Mass. 584, 53 N. E. 141; Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620.

Virginia.— Booker *v.* Kirkpatrick, 26 Gratt. 145.

England.—Anderson *v.* Weston, 6 Bing. N. Cas. 296, 4 Jur. 105, 9 L. J. C. P. 194, 8 Scott 583, 37 E. C. L. 631; Cholmondeley *v.* Clinton, Coop. 80, 10 Eng. Ch. 80, 35 Eng. Reprint 485, 19 Ves. Jr. 261, 13 Rev. Rep. 261, 34 Eng. Reprint 515.

See 38 Cent. Dig. tit. "Partnership," § 637.

50. *Arkansas.*— Smith *v.* Hill, 13 Ark. 173.

Iowa.— Turk *v.* Nicholson, 30 Iowa 407, where, however, the dissolution and conduct of the partners was held to work an abandon-

where it is shown that there was an express or implied condition that the dissolution should have this effect.[51]

f. Admissions and Representations. The courts are agreed that neither partner has implied authority, after a duly notified dissolution, to bind his late copartners by an admission or representation which subjects them to a new obligation. Authority to him to do this must be actually conferred by them.[52] Many courts in this country apply the same rule to all admissions and representations by a partner after dissolution,[53] while other courts follow the English rule[54] that such admissions and representations are binding upon his late copartners when they relate to rights created during the partnership, or to transactions which are merely incidental to the settlement of firm affairs.[55]

g. Power to Confess Judgment. Where a judgment is confessed by one of the partners after the dissolution of a firm, it does not bind his late copartners, although it is for a firm debt.[56] But it has been held that where a partnership consists of an active and a dormant partner, a confession of judgment for a partnership debt by the active partner will bind both partners, so far as the partner-

ment of the contract and thus absolve the other party from liability to perform.

Kentucky.— Campbellsville Lumber Co. *v.* Bradlee, 96 Ky. 494, 29 S. W. 313, 16 Ky. L. Rep. 572.

Massachusetts.— Palmer *v.* Sawyer, 114 Mass. 1.

Nebraska.— Swobe *v.* New Omaha Thomson-Houston Electric Light Co., 39 Nebr. 586, 58 N. W. 181.

United States.— Roehm *v.* Horst, 91 Fed. 345, 33 C. C. A. 550 [*affirming* 84 Fed. 565].

Canada.— McCraney *v.* McCool, 19 Ont. 470 [*affirmed* in 18 Ont. App. 217].

See 38 Cent. Dig. tit. "Partnership," § 637.

51. *Michigan.*— Roberts *v.* Kelsey, 38 Mich. 602.

New York.— Hurlbut *v.* Post, 1 Bosw. 28.

South Carolina.— Holmes *v.* Caldwell, 8 Rich. 247.

Texas.— Fulton *v.* Thompson, 18 Tex. 278.

England.— Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476.

Canada.— Dougall *v.* Ockerman, 9 U. C. Q. B. 354.

See 38 Cent. Dig. tit. "Partnership," § 637.

Agency contract.— Where a contract between a corporation and a partnership made the latter selling agents for the former, it being understood that one of the partners, who was known to the corporation, would use his personal efforts, and as incidental to the agency the corporation contracted to sell machines to the partnership, a dissolution of the partnership authorized the corporation to abandon the contract both as to the agency and as to the sales. Wheaton *v.* Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399.

52. Garland *v.* Agee, 7 Leigh (Va.) 362; Draper *v.* Bissel, 7 Fed. Cas. No. 4,068, 3 McLean 275; and other cases in the following notes.

53. *California.*— Burns *v.* McKenzie, 23 Cal. 101; Civ. Code, §§ 2458–2462.

Kentucky.— Craig *v.* Alverson, 6 J. J. Marsh. 609.

Missouri.— Dowzelot *v.* Rawlings, 58 Mo. 75.

New Jersey.— Flanagin *v.* Champion, 2 N. J. Eq. 51.

New York.— Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554 (with classification of cases in note); Hart *v.* Woodruff, 24 Hun 510; Baker *v.* Stackpoole, 9 Cow. 420, 18 Am. Dec. 508; Hackley *v.* Patrick, 3 Johns. 536.

South Carolina.— Meggett *v.* Finney, 4 Strobh. 220; White *v.* Union Ins. Co., 1 Nott & M. 556, 9 Am. Dec. 726.

Tennessee.— Berryhill *v.* McKee, 1 Humphr. 31.

Texas.— Hensley *v.* Bagdad Sash Factory Co., 1 Tex. App. Civ. Cas. § 718.

Virginia.— Shelton *v.* Cocke, 3 Munf. 191.

Canada.— Banserean *v.* Gervais, 12 Quebec Super. Ct. 86.

See 38 Cent. Dig. tit. "Partnership," § 630.

54. English Partn. Act (1890), § 15; Pritchard *v.* Draper, 1 R. & M. 191, 5 Eng. Ch. 191, 39 Eng. Reprint 74, Taml. 332, 12 Eng. Ch. 332, 48 Eng. Reprint 132; Wood *v.* Braddick, 1 Taunt. 104, 9 Rev. Rep. 711.

55. *Connecticut.*— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

Indiana.— Kirk *v.* Hiatt, 2 Ind. 322.

Maine.— Parker *v.* Merrill, 6 Me. 41.

Massachusetts.— Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379.

New Jersey.— McElroy *v.* Ludlum, 32 N. J. Eq. 828.

Ohio.— Feigley *v.* Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778.

South Carolina.— Fripp *v.* Williams, 14 S. C. 502.

Vermont.— Woodworth *v.* Downer, 13 Vt. 522, 37 Am. Dec. 611.

56. *Alabama.*— Mitchell *v.* Rich, 1 Ala. 228.

Louisiana.— Conery *v.* Rotchford, 30 La. Ann. 692; Herrick *v.* Conant, 4 La. Ann. 276.

Missouri.— Morgan *v.* Richardson, 16 Mo. 409, 57 Am. Dec. 235.

New York.— Lambert *v.* Converse, 22 How. Pr. 265; Waring *v.* Robinson, Hoffm. 524.

Pennsylvania.— Mair *v.* Beck, 1 Pa. Cas. 360, 2 Atl. 218; Bennett *v.* Marshall, 2 Miles 436; Headly Chocolate Co. *v.* Hall, 21 Lanc.

ship property is concerned, even though as between themselves the partnership has been dissolved.[57]

h. Power to Assign For Benefit of Creditors. When all the former partners are living,[58] neither has the power to make a valid assignment of the firm assets for the benefit of creditors.[59]

i. Power to Compromise and Release. When the partners agree that one or some of their number shall liquidate firm affairs, none of the others has power to compromise or settle firm claims, and such agreement must be observed by third persons having notice thereof;[60] but compromises and releases in good faith by the liquidating partner are valid.[61] In the absence of an agreement of this sort, each partner, even after dissolution, has the power to pay valid claims and to receive payment of debts and give receipts and releases therefor.[62] As a rule, however, the authority to receive payment does not include the power to take any sort of property in satisfaction,[63] nor to make an arrangement that subjects the other partners to any new obligation.[64] In this country the courts are disposed to uphold an honest compromise or release by a partner, even after dissolution;[65] and in some jurisdictions it is provided by statute that a partner authorized to act in liquidation may collect, compromise, or release any debts due the partnership.[66] By statute in some states, a firm creditor may compromise with one partner, without destroying his claim against the others.[67]

j. Power to Revive Debts. After a duly notified dissolution,[68] neither partner has the implied power according to the prevailing view to revive a debt barred

L. Rev. 348; Kannenberg *v.* Kannenberg, 21 Lanc. L. Rev. 180.

57. Robison *v.* Kemerer, 1 C. Pl. (Pa.) 49.

58. Power of surviving partner to make such assignment see *supra*, VIII, B, 4.

59. Deckert *v.* Filbert, 3 Watts & S. (Pa.) 454; Kellogg *v.* Cayce, 84 Tex. 213, 19 S. W. 388, holding that where all the members of a firm, for the purpose of obtaining goods on credit, joined in a statement of its financial condition, and one partner withdrew before the goods were received, and after such withdrawal the other members assigned for the benefit of creditors, the assignment was void as to such seller for not having been executed by all the members of the firm who contracted the debt.

60. Roberts *v.* Strang, 38 Ala. 566, 82 Am. Dec. 729; Hodge *v.* Whitall, 15 La. 503; Chace *v.* Higgins, 1 Thomps. & C. (N. Y.) 229; Burhans *v.* Burhans, 1 N. Y. Suppl. 37; Gram *v.* Cadwell, 5 Cow. (N. Y.) 489.

61. Burhans *v.* Burhans, 1 N. Y. Suppl. 37, holding that a partner to whom, by agreement on dissolution, is given power to use the firm-name in liquidation of the business, and who has given bond to account for money coming into his hands in settling the business, may discharge a mortgage held as partnership property.

62. See *supra*, IX, B, 2, b.

63. Kirk *v.* Hiatt, 2 Ind. 322.

64. Rootes *v.* Wellford, 4 Munf. (Va.) 215, 6 Am. Dec. 510; Niemann *v.* Niemann, 43 Ch. D. 198, 59 L. J. Ch. 220, 62 L. T. Rep. N. S. 339, 38 Wkly. Rep. 258.

65. *Florida.*— Nickels *v.* Mooring, 16 Fla. 76.

Massachusetts.— Gordon *v.* Albert, 168 Mass. 150, 46 N. E. 423, holding that such release is a bar to an action at law, as it disables the releasing partner from suing and the others cannot maintain the action without him.

Mississippi.— Bass *v.* Taylor, 34 Miss. 342.

New York.— Napier *v.* McLeod, 9 Wend. 120.

South Carolina.— Sims *v.* Smith, 11 Rich. 565; Union Bank *v.* Hall, Harp. 245.

Texas.— Weir Plow Co. *v.* Evans, (Civ. App. 1893) 24 S. W. 38.

Vermont.— Thrall *v.* Seward, 37 Vt. 573.

See 38 Cent. Dig. tit. "Partnership," § 633.

Discharge in consideration of release of individual indebtedness.— But after dissolution of the partnership one partner cannot discharge the debt of a third person to the firm by a receipt given for the release of his individual indebtedness to such person, particularly where the debtor has notice not to pay such partner. Sims *v.* Smith, 11 Rich. (S. C.) 565.

Release by partner after disposing of his interest.— And where a member of the firm has sold his interest in the partnership property, he cannot afterward bind his former copartner by releasing the seller of the property to the firm from liability on his warranty. Brayley *v.* Goff, 40 Iowa 76.

66. See Hawn *v.* Seventy-Six Land, etc., Co., 74 Cal. 418, 16 Pac. 196; Cal. Civ. Code, § 2461.

67. Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311 [*affirming* 55 Hun 335, 8 N. Y. Suppl. 695]; Stitt *v.* Cass, 4 Barb. (N. Y.) 92; Saxton *v.* Dodge, 46 How. Pr. (N. Y.) 467; Turner *v.* Ross, 1 R. I. 88.

68. If the dissolution has not been duly notified to the creditor, it is generally held that he is entitled to rely on the act or new promise of any partner. Buxton *v.* Edwards, 134 Mass. 567. See *infra*, IX, B, 6.

by the statute of limitations,[69] or to bind his partners by a promise to pay a note indorsed by the firm, but from liability on which they have been discharged by want of notice of dishonor,[70] or to pay a debt from which the firm have been discharged in bankruptcy,[71] or which for any other cause is legally extinct.[72] In a few jurisdictions, however, such power has been recognized.[73]

k. Liability For Wrongful Acts. The dissolution of a firm does not absolve a partner from liability for wrongful acts of a copartner, done within the scope of the business;[74] nor does it relieve him from liability for his late copartner's wrongful acts to which his own conduct has contributed,[75] or the benefit of which he has received without repudiation.[76]

3. Control and Disposition of Firm Property — a. In General. Upon the dissolution of the firm, while its members are living, they may agree that one or more of their number shall have exclusive control and disposition of the partnership property.[77] Even in the absence of such an agreement, if one partner sells his interest in the firm to a stranger, or permits it to be sold under an execution against him, or to be transferred to a trustee in bankruptcy or insolvency, the right to the control and disposition of firm assets vests in the other partners.[78] In other cases each partner has the right and duty of disposing of the firm assets for the purpose of winding up its affairs and of distributing the proceeds among the firm creditors and the partners.[79] If he so applies the proceeds with reasonable promptness, he is not chargeable with interest thereon, while they are in his

69. *Alabama.*— Wilson *v.* Torbert, 3 Stew. 296, 21 Am. Dec. 632.

Florida.— Tate *v.* Clements, 16 Fla. 339, 26 Am. Rep. 709.

Louisiana.— Carroll *v.* Gayarre, 15 La. Ann. 671 (but he can interrupt the running of the statute, in this state, even against his late copartners); Buard *v.* Lemée, 12 Rob. 243; Davis *v.* Houren, 6 Rob. 255; Hart *v.* Long, 1 Rob. 83.

Minnesota.— Whitney *v.* Reese, 11 Minn. 138.

New York.— Taylor *v.* Hotchkiss, 81 N. Y. App. Div. 470, 80 N. Y. Suppl. 1042 [*affirmed* in 179 N. Y. 546, 71 N. E. 1140]; Payne *v.* Slate, 39 Barb. 634 [*affirmed* in 29 N. Y. 146].

Pennsylvania.— Schoneman *v.* Fegley, 7 Pa. St. 433; Kauffman *v.* Fisher, 3 Grant 302.

Rhode Island.— Turner *v.* Ross, 1 R. I. 88.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Cronkhite *v.* Herrin, 15 Fed. 888.

See 38 Cent. Dig. tit. "Partnership," § 634.

If the firm resumes business, a promise by one partner is binding on all. Taylor *v.* Hotchkiss, 81 N. Y. App. Div. 470, 80 N. Y. Suppl. 1042 [*affirmed* in 179 N. Y. 546, 71 N. E. 1140].

70. Schoneman *v.* Fegley, 7 Pa. St. 433.

71. Atwood *v.* Gillett, 2 Dougl. (Mich.) 206.

72. Wilson *v.* Torbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174.

73. Day *v.* Merritt, 38 N. J. L. 32, 20 Am. Rep. 362; Carlton *v.* Coffin, 28 Vt. 504; Shelton *v.* Cocke, 3 Munf. (Va.) 191.

74. Smith *v.* Jameson, 1 Peake N. P. 213, 5 T. R. 601. See also Powell *v.* Roberts, 116 Mo. App. 629, 92 S. W. 752.

75. *In re* Hughes, 15 Quebec Super. Ct. 225.

76. Roberts *v.* Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Brown *v.* Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618.

77. *Connecticut.*— Stanton *v.* Lewis, 26 Conn. 444.

Illinois.— Renfrow *v.* Pearce, 68 Ill. 125.

New Jersey.— Baldwin *v.* Johnson, 1 N. J. Eq. 441.

New York.— Smith *v.* Proskey, 177 N. Y. 526, 69 N. E. 1131 [*reversing* 82 N. Y. App. Div. 19, 81 N. Y. Suppl. 424, and *affirming* 39 Misc. 385, 79 N. Y. Suppl. 851] (the liquidating partner takes absolute title, if the agreement "vests" the property in him); Smith *v.* Underhill, 19 N. Y. Suppl. 249; Weston *v.* Watts, 8 N. Y. Suppl. 633 (the liquidating partner's powers may be modified by the fact that he is indebted to the firm).

Ohio.— Jones *v.* Jones, 18 Ohio Cir. Ct. 260, 10 Ohio Cir. Dec. 71.

Pennsylvania.— Nixon *v.* Champion, 4 Leg. Gaz. 73, 29 Leg. Int. 76, the liquidating partner may sell at public auction.

Tennessee.— Mygatt *v.* McClure, 3 Head 495; Hetterman Bros. Co. *v.* Young, (Ch. App. 1898) 52 S. W. 532.

See 38 Cent. Dig. tit. "Partnership," § 638.

78. Reece *v.* Hoyt, 4 Ind. 169 (the stranger has no right personally to interfere with the sale of the property, by the other partners); Chase *v.* Scott, 33 Iowa 309; Macdonald *v.* Trojan Button-Fastener Co., 10 N. Y. Suppl. 91 [*affirming* 9 N. Y. Suppl. 383]; Fraser *v.* Kershaw, 2 Jur. N. S. 880, 2 Kay & J. 496, 25 L. J. Ch. 445, 4 Wkly. Rep. 431, 69 Eng. Reprint 878.

79. *Connecticut.*— Lapenta *v.* Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315.

Iowa.— Bach *v.* State Ins. Co., 64 Iowa 595, 21 N. W. 99.

Kansas.— Hogendobler *v.* Lyon, 12 Kan.

hands.[80] Otherwise he may be chargeable with interest.[81] This power must not be exercised to the prejudice of his copartners or of firm creditors,[82] and the power may be modified by the partnership articles.[83] If a partner carries on the business after dissolution, he may be compelled to account to his copartner for the profits.[84]

b. Assigning or Transferring Firm Property to Creditors. A liquidating partner certainly has authority to assign a book-account to a firm creditor, or to a purchaser, for full value.[85] But neither he nor any other partner has implied authority after dissolution to make a general assignment of firm property for the benefit of creditors.[86] Nor has a partner authority to transfer firm property in satisfaction of his individual debts,[87] unless the copartners assent thereto and firm creditors are paid.[88] If, by the terms of dissolution, one partner becomes the sole owner of the firm property, the others have no authority to mortgage it thereafter, even to secure firm debts.[89]

c. Real Estate of Firm. For the purpose of paying firm debts, partnership real estate is treated in equity as personal assets,[90] and the surviving partner can convey an equitable title thereto.[91] So can one of several living partners, when conveyance is necessary for the payment of firm debts.[92] But, in order to convey a perfect legal title to firm real estate, all the partners must join in the deed.[93] In England neither partner is entitled to a partition of firm realty.[94] In this country the prevailing rule is that a partner is not so entitled as long as partnership debts remain unliquidated;[95] but that he has a right to compel the

276, limiting this power to the sale of property necessary to pay partnership debts, on the ground that partners, after dissolution, are only tenants in common of the firm assets, a view which is unsound in principle and opposed to the weight of authority. See *supra*, IX, B, 1.

Louisiana.— Claiborne *v.* His Creditors, 18 La. 501.

New Jersey.— Phillips *v.* Reeder, 18 N. J. Eq. 95.

New York.— Bennett *v.* Buchan, 61 N. Y. 222 [*affirming* 53 Barb. 578, 5 Abb. Pr. N. S. 412]; Castle *v.* Marks, 50 N. Y. App. Div. 320, 63 N. Y. Suppl. 1039; Kennett *v.* Hopkins, 40 N. Y. App. Div. 367, 57 N. Y. Suppl. 961 [*affirming* 20 Misc. 259, 45 N. Y. Suppl. 797]; Van Doren *v.* Horton, 19 Hun 7.

Wisconsin.— Noonan *v.* McNab, 30 Wis. 277.

United States.— Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

Canada.— Fisher *v.* McPhee, 28 Nova Scotia 523; Murphy *v.* Yeomans, 29 U. C. C. P. 421. *Compare* Hockin *v.* Whellams, 6 Manitoba 521, considering it doubtful whether one partner, after dissolution, can assign a judgment. See 38 Cent. Dig. tit. "Partnership," § 638.

80. Randolph *v.* Inman, 172 Ill. 575, 50 N. E. 104.

81. Buckley *v.* Kelly, 70 Conn. 411, 39 Atl. 601.

82. Claiborne *v.* His Creditors, 18 La. 501.

83. Phillips *v.* Reeder, 18 N. J. Eq. 95.

84. Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

85. Stanton *v.* Lewis, 26 Conn. 444; Kellar *v.* Self, 5 Tex. Civ. App. 393, 24 S. W. 578, where the same power was conceded to a partner, after his copartner had sold his interest to a stranger.

86. Paton *v.* Wright, 15 How. Pr. (N. Y.) 481; Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236.

87. Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Curry *v.* Burnett, 36 Ind. 102; Geortner *v.* Canajoharie, 2 Barb. (N. Y.) 625; Crossman *v.* Shears, 3 Ont. App. 583.

88. Treadwell *v.* Williams, 9 Bosw. (N. Y.) 649; Corwin *v.* Suydam, 24 Ohio St. 209; McLanahan *v.* Ellery, 16 Fed. Cas. No. 8,869, 3 Mason 269.

89. Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

90. Dupuy *v.* Leavenworth, 17 Cal. 262; Burchinell *v.* Koon, 8 Colo. App. 463, 46 Pac. 932; State *v.* Neal, 29 Wash. 391, 69 Pac. 1103; Shanks *v.* Klein, 104 U. S. 18, 26 L. ed. 635. In Myers *v.* Myers, 61 L. T. Rep. N. S. 757, the realty was used by the firm, but did not become a part of the firm stock, and upon dissolution belonged to the partners as tenants in common.

91. See *supra*, VIII, C, 3.

92. Dupuy *v.* Leavenworth, 17 Cal. 262; Langlois *v.* Dubray, 17 Quebec Super. Ct. 328.

93. McKee *v.* Covalt, 71 Kan. 772, 81 Pac. 475.

94. Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413, 61 Eng. Reprint 992 (on the ground that every contract of partnership involves an implied agreement that, upon dissolution, all the firm assets, of every kind, shall be sold, in order to determine the profits which are to be divided among the partners); English Partn. Act (1890), § 39.

95. *California.*— Moran *v.* McInerney, 129 Cal. 29, 61 Pac. 575; Bates *v.* Babcock, 95 Cal. 479, 30 Pac. 605, 29 Am. St. Rep. 133, 16 L. R. A. 745; Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Iowa.— Pennybacker *v.* Leary, 65 Iowa 220, 21 N. W. 575.

North Carolina.— Mendenhall *v.* Benbow, 84 N. C. 646.

partition of partnership realty which remains after all the debts of the partnership have been paid.[96]

4. COLLECTIONS AND PAYMENTS. It is the right as well as the duty of each partner to collect debts due the firm and give discharges therefor,[97] in the absence of an agreement between them limiting such right and duty to one or some of their number.[98] When such an agreement exists and is made known to a firm debtor, he is bound to observe its terms;[99] and the liquidating partner is bound to act with due diligence[1] and to account for the proceeds collected.[2] The right to collect firm debts does not authorize a partner to accept payment in anything but the money due the firm.[3] Clearly it does not authorize him to accept notes or other securities payable to him individually;[4] nor to deduct his individual indebtedness from the firm debt.[5] As an incident to winding up the affairs of the firm, each partner after dissolution has the right and duty of paying firm debts.[6] Although one of the partners may have bound himself to the others to pay the debts, such agreement does not preclude the creditors from enforcing their claims against all the partners,[7] although it may compel them to observe the

Wisconsin.— Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

96. Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Hæberly's Appeal, 191 Pa. St. 239, 43 Atl. 207.

97. *Illinois.*— Heartt *v.* Walsh, 75 Ill. 200; Major *v.* Hawkes, 12 Ill. 298; Gordon *v.* Freeman, 11 Ill. 14; Hansen *v.* Miller, 44 Ill. App. 550 [*affirmed* in 145 Ill. 538, 32 N. E. 548].

Kentucky.— Wilder *v.* Morris, 7 Bush 420.

Maine.— Gannett *v.* Cunningham, 34 Me. 56.

New York.— Gillilan *v.* Sun Mut. Ins. Co., 41 N. Y. 376; Robbins *v.* Fuller, 24 N. Y. 570; Huntington *v.* Potter, 32 Barb. 300; Ward *v.* Barber, 1 E. D. Smith 423.

North Carolina.— McRae *v.* McKenzie, 22 N. C. 232.

Ohio.— Feigley *v.* Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778.

South Carolina.— Lamb *v.* Saltus, 3 Brev. 130.

Vermont.— Ayer *v.* Ayer, 41 Vt. 346.

See 38 Cent. Dig. tit. "Partnership," § 642.

It makes no difference that the collecting partner is insolvent (Major *v.* Hawkes, 12 Ill. 298), or that a third person has been appointed collecting agent for the firm (Gordon *v.* Freeman, 11 Ill. 14).

The right may be forfeited by a partner's selling his interest to a third person and absconding. Ayer *v.* Ayer, 41 Vt. 346.

One partner cannot deprive his copartner of the right by publishing a notice forbidding creditors to pay to the latter. Gillilan *v.* Sun Mut. Ins. Co., 41 N. Y. 376.

Application of money collected.—The debtor is not bound to see that the money is properly applied by the collecting partner. Major *v.* Hawkes, 12 Ill. 298.

The fact that the books of the partnership remain after the dissolution in the hands of one of the partners does not, in the absence of a special undertaking to collect the debts, render him liable to his copartner for omitting to collect a debt. McRae *v.* McKenzie, 22 N. C. 232.

98. Hawn *v.* Seventy-Six Land, etc., Co., 74 Cal. 418, 16 Pac. 196 (applying Civ. Code, § 2461, as to powers of a liquidating partner); McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789; Manning *v.* Brickell, 3 N. C. 133; Esterly *v.* Bressler, 15 Pa. Super. Ct. 455.

Formation of new partnership.— The exclusive right of the liquidating partner is not affected by the formation of a new partnership between the members of the dissolved firm. Esterly *v.* Bressler, 15 Pa. Super. Ct. 455.

Appointment of receiver.— The right is taken away by the valid judicial appointment of a receiver for the firm. Manning *v.* Brickell, 3 N. C. 133. See *infra*, IX, D, 7, c.

99. Clark *v.* Reed, 7 Leg. Gaz. (Pa.) 35, 31 Leg. Int. 413.

1. Chretien *v.* Giron, 115 La. 24, 38 So. 881; Phelan *v.* Hutchison, 62 N. C. 116, 93 Am. Dec. 602.

2. Metcalf *v.* Fouts, 27 Ill. 110 (money to be divided as fast as received); Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475; Kennett *v.* Hopkins, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18]; Burstall *v.* Baptist, 21 Wkly. Rep. 485.

3. Kutz *v.* Naugle, 7 Pa. Super. Ct. 179.

4. Granger *v.* McGilvra, 24 Ill. 152; Lemiette *v.* Starr, 66 Mich. 539, 33 N. W. 832.

5. Brunson *v.* McLendon, 98 Ala. 568, 13 So. 523; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Lees *v.* Laforest, 14 Beav. 250, 51 Eng. Reprint 283; Pritchard *v.* Draper, 1 Russ. & M. 191, 5 Eng. Ch. 191, 39 Eng. Reprint 74, Taml. 332, 12 Eng. Ch. 332, 48 Eng. Reprint 132.

6. Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31 [*affirming* 66 Ill. App. 282]; Woody *v.* Haworth, 24 Ind. App. 634, 57 N. E. 272; Hanks *v.* Flynn, 108 Iowa 165, 78 N. W. 839; Woodworth *v.* Downer, 13 Vt. 522, 37 Am. Dec. 611.

7. Fowler *v.* Coker, 107 Ga. 817, 33 S. E. 661; Weirick *v.* Graves, 73 Ill. App. 266;

relationship of principal and surety thereafter existing between the assuming partner and his late copartners.[8]

5. Contracting New Obligations — a. In General. The dissolution of a partnership terminates the implied authority of each partner to enter into new obligations on behalf of the firm or of his copartners.[9] Nor is such authority conferred in most jurisdictions by an agreement that one or some of the members shall have exclusive power to settle the firm's affairs.[10] This rule, however, does not prevent the contracting or incurring of obligations, in the due course of settling the affairs of the partnership, by reason of transactions prior to the dissolution.[11]

McLoughlin *v.* Bieber, 41 N. Y. App. Div. 561, 58 N. Y. Suppl. 790 [*reversing* 56 N. Y. Suppl. 490]. In Rowand *v.* Fraser, 1 Rich. (S. C.) 325, the partners had severed in their promises to the creditor, with his assent.

8. See *supra*, VII, C, 2.

9. *Alabama.*— Wilson *v.* Torbert, 3 Stew. 296, 21 Am. Dec. 632.

District of Columbia.— Grafton *v.* Paine, 7 App. Cas. 255.

Georgia.— McGee *v.* Potts, 87 Ga. 615, 13 S. E. 746, where, however, the evidence was held sufficient to warrant a finding by the jury that the sale was to the firm, although the goods were supplied after dissolution.

Illinois.— Milwaukee Harvester Co. *v.* Newell, 65 Ill. App. 612.

Indiana.— Hayden *v.* Cretcher, 75 Ind. 108.

Iowa.— Gard *v.* Clark, 29 Iowa 189.

Kentucky.— Montague *v.* Reakert, 6 Bush 393; Bacon *v.* Hutchings, 5 Bush 595.

Louisiana.— Richard *v.* Mouton, 109 La. 465, 33 So. 563; Clarke *v.* Jones, 1 Rob. 78.

Maine.— Lane *v.* Tyler, 49 Me. 252.

Maryland.— Ellicott *v.* Nichols, 7 Gill 85, 48 Am. Dec. 546.

Minnesota.— Boyle *v.* Musser, 77 Minn. 153, 79 N. W. 664.

Missouri.— Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580.

New York.— Bennett *v.* Buchan, 61 N. Y. 222 [*affirming* 53 Barb. 578, 5 Abb. Pr. N. S. 412]; Payne *v.* Smith, 28 Hun 104; Kirby *v.* Hewitt, 26 Barb. 607; Sutton *v.* Dillaye, 3 Barb. 529.

Ohio.— Roots *v.* Kilbreth, 10 Ohio Dec. (Reprint) 20, 18 Cinc. L. Bul. 58.

Pennsylvania.— Atlantic Refining Co. *v.* Mengel, 6 Pa. Dist. 223.

South Carolina.— Veale *v.* Hassan, 3 McCord 278; White *v.* Union Ins. Co., 1 Nott & M. 556, 9 Am. Dec. 726.

Tennessee.— Williams *v.* Whitmore, 9 Lea 262; Jones' Case, 1 Overt. 455.

Texas.— Lee *v.* Stowe, 57 Tex. 444; Haddock *v.* Crocheron, 32 Tex. 276, 5 Am. Rep. 244; Baptist Book Concern *v.* Carswell, (Civ. App. 1898) 46 S. W. 858.

Vermont.— Pratt *v.* Page, 32 Vt. 13, where it is said that to establish the liability as partners of defendants, who have dissolved partnership, it must appear: (1) That plaintiff at the time the contract was made under which his account accrued knew that defendants had been in partnership; (2) that he was ignorant of their dissolution; and (3) that he made the contract supposing he was contracting with defendants as partners and in reliance upon their joint liability.

Washington.— Harris *v.* Zier, 43 Wash. 573, 86 Pac. 928.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Lockwood *v.* Comstock, 15 Fed. Cas. No. 8,449, 4 McLean 383.

Canada.— McDonald *v.* McKeen, 28 Nova Scotia 329.

See 38 Cent. Dig. tit. "Partnership," § 645. See also *infra*, IX, B, 6, e.

10. *Indiana.*—Chase *v.* Kendall, 6 Ind. 304; Hamilton *v.* Seaman, Smith 129.

Maine.— Perrin *v.* Keene, 19 Me. 355, 36 Am. Dec. 759.

Maryland.— Hurst *v.* Hill, 8 Md. 399, 63 Am. Dec. 705.

New York.— Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554.

Ohio.— Palmer *v.* Dodge, 4 Ohio St. 21, 62 Am. Dec. 271.

Texas.— Speake *v.* White, 14 Tex. 364.

Virginia.— Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277.

See 38 Cent. Dig. tit. "Partnership," § 645.

It is conferred in Louisiana (Prudhomme *v.* Henry, 5 La. Ann. 700) and in Pennsylvania (Jack *v.* McLanahan, 191 Pa. St. 631, 43 Atl. 356; Garretson *v.* Brown, 185 Pa. St. 447, 40 Atl. 293; Brown *v.* Clark, 14 Pa. St. 469; *In re* Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574).

11. Gard *v.* Clark, 29 Iowa 189 (holding that where one member of a partnership has, after dissolution thereof, defended and appealed from a judgment rendered in a suit against the firm, all the members are liable to a surety on the appeal-bond, who is afterward compelled to pay the judgment); Williams *v.* Whitmore, 9 Lea (Tenn.) 262 (holding that where, after dissolution of a law firm, payment of a preëxisting debt to the firm was made to one of the members, in a sum larger than that to which they were entitled, the other partner was liable therefor, although he received none of the proceeds).

Liability for compensation for driving logs marked with the mark of a partnership, and intermingled with plaintiff's logs, under Minn. Gen. St. (1894) § 2466, see Boyle *v.* Musser, 77 Minn. 153, 79 N. W. 664.

b. Negotiable Paper. It necessarily follows from the principles above stated that after the dissolution of a partnership neither partner has implied authority to bind the firm or his copartners by making,[12] renewing,[13] or indorsing[14] negotiable

12. *Alabama.*— Cunningham *v.* Bragg, 37 Ala. 436.

California.— Curry *v.* White, 51 Cal. 530.

Illinois.— Easter *v.* Farmers' Nat. Bank, 57 Ill. 215; Whitesides *v.* Lee, 2 Ill. 548.

Indiana.— Whitworth *v.* Ballard, 56 Ind. 279; Huntington-White Lime Co. *v.* Mock, 14 Ind. App. 221, 42 N. E. 761.

Louisiana.— Meyer *v.* Atkins, 29 La. Ann. 586; Peet *v.* Riley, 26 La. Ann. 712 (but the partner signing is liable); Durkee *v.* Price, 11 La. Ann. 333; Lowe *v.* Penny, 7 La. Ann. 356; Johnson *v.* Marsh, 2 La. Ann. 772.

Maine.— Stearns *v.* Burnham, 4 Me. 84.

Massachusetts.— Robb *v.* Mudge, 14 Gray 534; Whitman *v.* Leonard, 3 Pick. 177.

Michigan.— Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

Minnesota.— Leithauser *v.* Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336.

Mississippi.— Maxey *v.* Strong, 53 Miss. 280; Brown *v.* Broach, 52 Miss. 536.

Missouri.— Knaus *v.* Givens, 110 Mo. 58, 19 S. W. 535; Richardson *v.* Moies, 31 Mo. 430; Patterson *v.* Camden, 25 Mo. 13; Long *v.* Story, 10 Mo. 636; Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580.

New York.— Gale *v.* Miller, 54 N. Y. 536 [*affirming* 1 Lans. 451]; Fitch *v.* Fraser, 84 N. Y. App. Div. 119, 82 N. Y. Suppl. 138 (binding on each one signing the paper); Johanning *v.* Wilson, 86 N. Y. Suppl. 7 (where, however, the payee had no notice of the dissolution, and hence a note was binding on all the members of the firm); McPherson *v.* Rathbone, 11 Wend. 96 (but a partner may liquidate a previous account by a note, as he does not thereby create a debt against his copartners); Bristol *v.* Sprague, 8 Wend. 423; Graves *v.* Merry, 6 Cow. 701, 16 Am. Dec. 471.

Ohio.— Palmer *v.* Dodge, 4 Ohio St. 21, 62 Am. Dec. 271; Haven *v.* Goodel, 1 Disn. 26, 12 Ohio Dec. (Reprint) 465.

Pennsylvania.— McCleery *v.* Thompson, 130 Pa. St. 443, 18 Atl. 735.

South Carolina.—Loomis *v.* Pearson, Harp. 470; State Bank *v.* Humphreys, 1 McCord 388; Hammond *v.* Aiken, 3 Rich. Eq. 119.

Tennessee.— McElroy *v.* Melear, 7 Coldw. 140.

Texas.— Brown *v.* Chancellor, 61 Tex. 437; White *v.* Tudor, 24 Tex. 639, 76 Am. Dec. 126.

Vermont.— Woodworth *v.* Downer, 13 Vt. 522, 37 Am. Dec. 611; Scott *v.* Shipherd, 3 Vt. 104; Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

Virginia.— Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277.

West Virginia.— Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

United States.— Dick *v.* Laird, 7 Fed. Cas. No. 3,892, 5 Cranch C. C. 328; Draper *v.* Bissel, 7 Fed. Cas. No. 4,068, 3 McLean 275; Fraser *v.* Wolcott, 9 Fed. Cas. No. 5,065, 4 McLean 365; Tombeckbee Bank *v.* Dumell, 24 Fed. Cas. No. 14,081, 5 Mason 56.

England.— Newsome *v.* Coles, 2 Camph. 617, 12 Rev. Rep. 756; Wright *v.* Pulham, 2 Chit. 121, 18 Rev. Rep. 784, 18 E. C. L. 542, 1 Stark. 375, 18 Rev. Rep. 784, 2 E. C. L. 146; Brown *v.* Leonard, 2 Chit. 120, 23 Rev. Rep. 744, 18 E. C. L. 541 (where, however, although the firm was dissolved, defendant allowed his name to continue in the firm, and he was held liable); Williams *v.* Keats, 2 Stark. 290, 19 Rev. Rep. 723, 13 E. C. L. 413.

See 38 Cent. Dig. tit. "Partnership," § 646.

13. *Maine.*— Lumberman's Bank *v.* Pratt, 51 Me. 563.

Missouri.— Moore *v.* Lackman, 52 Mo. 323; Richardson *v.* Moies, 31 Mo. 430; Long *v.* Story, 10 Mo. 636; Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580.

Ohio.— Wilson *v.* Forder, 20 Ohio St. 89, 5 Am. Rep. 627.

South Carolina.— Foltz *v.* Pourie, 2 Desauss. Eq. 40.

Texas.— Brown *v.* Chancellor, 61 Tex. 437.

Wisconsin.— Lange *v.* Kennedy, 20 Wis. 279.

England.— Spenceley *v.* Greenwood, 1 F. & F. 297.

See 38 Cent. Dig. tit. "Partnership," § 647.

14. *Connecticut.*—Dean *v.* Savage, 28 Conn. 359, but the indorsement is binding upon the partner who indorses.

Louisiana.— Bogereau *v.* Guêringer, 14 La. Ann. 478; Carr *v.* Woods, 11 Rob. 95; Rudy *v.* Harding, 6 Rob. 70; Nott *v.* Douming, 6 La. 680, 26 Am. Dec. 491; Poignand *v.* Livermore, 5 Mart. N. S. 324; Walker *v.* McMicken, 9 Mart. 192.

Maine.— Lumberman's Bank *v.* Pratt, 51 Me. 563.

Massachusetts.— Parker *v.* Macomber, 18 Pick. 505.

Missouri.— McDaniel *v.* Wood, 7 Mo. 543.

New Hampshire.— Fellows *v.* Wyman, 33 N. H. 351.

New York.— Sanford *v.* Mickles, 4 Johns. 224.

Ohio.— Rice *v.* Goodenow, Tapp. 94.

South Carolina.— White *v.* Union Ins. Co., 1 Nott & M. 556, 9 Am. Dec. 726.

Tennessee.— Dickerson *v.* Wheeler, 1 Humphr. 51.

Texas.— Tarver *v.* Evansville Furniture Co., 20 Tex. Civ. App. 66, 48 S. W. 199.

Virginia.— Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277.

England.—Abel *v.* Sutton, 3 Esp. 108, 6 Rev. Rep. 818; Kilgour *v.* Finlyson, 1 H. Bl. 155.

See 38 Cent. Dig. tit. "Partnership," § 648.

paper in the firm-name, and this is true even though the obligation be given for a firm debt,[15] or, in most jurisdictions, by the liquidating partner.[16] Authority to do either of these acts after dissolution may be given during the existence of the partnership,[17] or at a later time;[18] and such act, although unauthorized when done, may be ratified.[19] It would seem that either partner even after dissolution, in exercising his right to convert the property into cash and to collect the debts, should have authority to sell negotiable paper payable to the firm, and to indorse it without recourse. This authority is sanctioned by some courts.[20]

15. *Alabama.*— Fontaine *v.* Lee, 6 Ala. 889.
Georgia.— Humphries *v.* Chastain, 5 Ga. 166, 48 Am. Dec. 247.
Michigan.— Carleton *v.* Jenness, 42 Mich. 110, 3 N. W. 284.
Minnesota.— Bryant *v.* Lord, 19 Minn. 396.
Pennsylvania.— McKenna *v.* McSherry, 1 Lack. Leg. N. 230.
Texas.— White *v.* Tudor, 24 Tex. 639, 76 Am. Dec. 126.
See 38 Cent. Dig. tit. "Partnership," § 646 *et seq.*

16. *Alabama.*— Brown *v.* Bamberger, 110 Ala. 342, 20 So. 114; Myatts *v.* Bell, 41 Ala. 222.
Georgia.— Macon First Nat. Bank *v.* Ells, 68 Ga. 192.
Illinois.— Montreal Bank *v.* Page, 98 Ill. 109.
Indiana.— Conklin *v.* Ogborn, 7 Ind. 553; Hamilton *v.* Seaman, 1 Ind. 185.
Iowa.— Van Valkenburg *v.* Bradley, 14 Iowa 108.
Michigan.— Potter *v.* Tolbert, 113 Mich. 486, 71 N. W. 849.
Missouri.— Long *v.* Story, 10 Mo. 636.
New York.— Lusk *v.* Smith, 8 Barb. 570; National Bank *v.* Norton, 1 Hill 572.
South Carolina.— Planters', etc., Bank *v.* Galliott, 1 McMull. 209, 36 Am. Dec. 256; State Bank *v.* Humphreys, 1 McCord 388; Martin *v.* Walton, 1 McCord 16.
Tennessee.— Fowler *v.* Richardson, 3 Sneed 508; Martin *v.* Kirk, 2 Humphr. 529.
Virginia.— Parker *v.* Cousins, 2 Gratt. 372, 44 Am. Dec. 388.
United States.— Lockwood *v.* Comstock, 15 Fed. Cas. No. 8,449, 4 McLean 383.
England.— Kilgour *v.* Finlyson, 1 H. Bl. 155.
See 38 Cent. Dig. tit. "Partnership," § 646 *et seq.* And see the other cases cited in the preceding notes.
Contra.— Meyran *v.* Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. Rep. 806; Siegfried *v.* Ludwig, 102 Pa. St. 547 (a liquidating partner has implied authority to make partnership notes in closing up the business); Lloyd *v.* Thomas, 79 Pa. St. 68 (but if not *bona fide* for liquidation, and the proceeds are not used for firm debts, the other partners are not bound).

17. Star Wagon Co. *v.* Swezy, 59 Iowa 609, 13 N. W. 749, 52 Iowa 391, 3 N. W. 421; Kemp *v.* Coffin, 3 Greene (Iowa) 190; Richardson *v.* Moies, 31 Mo. 430; Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580; Greatrake *v.* Brown, 10 Fed. Cas. No. 5,743, 2 Cranch C. C. 541; Lewis *v.* Reilly, 1 Q. B. 349, 5 Jur. 98, 10 L. J. Q. B. 135, 4 P. & D. 629, 41 E. C. L. 572; Usher *v* Dauncey, 4 Campb. 97, 15 Rev. Rep. 729; Pitfield *v.* Trotter, 32 Nova Scotia 125. See also Waite *v.* Foster, 33 Me. 424.

18. *Georgia.*— Bower *v.* Douglass, 25 Ga. 714.
Illinois.— Easter *v.* Farmers' Nat. Bank, 57 Ill. 215, where, however, authority was not shown, and hence other partners were not bound.
Massachusetts.— Yale *v.* Ames, 1 Metc. 486; Eaton *v.* Taylor, 10 Mass. 54, *prima facie* evidence of authority.
Michigan.—Pontiac First Commercial Bank *v.* Talbert, 103 Mich. 625, 61 N. W. 888, 50 Am. St. Rep. 385.
Montana.— Williston *v.* Camp, 9 Mont. 88, 22 Pac. 501.
New York.—Randolph *v.* Peck, 1 Hun 138; Gould *v.* Horner, 12 Barb. 601.
South Carolina.— Myers *v.* Huggins, 1 Strobh. 473.
Tennessee.— Mobile Bank *v.* Andrews, 2 Sneed 535.
Vermont.— Douglass *v.* Hall, 22 Vt. 451.
United States.— Sanborn *v.* Stark, 31 Fed. 18.
England.— Smith *v.* Winter, 8 L. J. Exch. 34, 4 M. & W. 454.
See 38 Cent. Dig. tit. "Partnership," § 646 *et seq.*

19. *Georgia.*— Silas *v.* Adams, 92 Ga. 350, 17 S. E. 280 (ratification established); Roberts *v.* Barrow, 53 Ga. 314 (lower court should have charged the jury on the subject of ratification).
Illinois.— Easter *v.* Farmers' Nat. Bank, 57 Ill. 215.
Indiana.— Whitworth *v.* Ballard, 56 Ind. 279 (ratification established); Carter *v.* Pomeroy, 30 Ind. 438.
Pennsylvania.—Myers *v.* Sprenkle, 13 York Leg. Rec. 181, burden of showing ratification is on holder of paper.
Rhode Island.— Murray *v.* Ayer, 16 R. I. 665, 19 Atl. 241, ratification shown by acts.
Tennessee.— Hatton *v.* Stewart, 2 Lea 233, where, however, mere silence was held not to be a ratification.
United States.— Draper *v.* Bissel, 7 Fed. Cas. No. 4,068, 3 McLean 275, a promise to pay the notes is ratification of them.
See 38 Cent. Dig. tit. "Partnership," § 649.

20. Milliken *v.* Loring, 37 Me. 408; Waite *v.* Foster, 33 Me. 424; Temple *v.* Seaver, 11 Cush. (Mass.) 314; Yale *v.* Eames, 1 Metc. (Mass.) 486; Parker *v.* Macomber, 18 Pick.

Other courts, however, have held that a partner has no such authority after dissolution.[21]

6. NOTICE OF DISSOLUTION — a. In General. When a partnership exists, each partner is its accredited agent in the ordinary conduct of its business,[22] and third persons have a right to infer that this agency continues until its revocation is duly notified.[23] Accordingly each member of a firm continues liable for the acts of any partner within the ordinary scope of its business, although a dissolution has taken place, until due notice of such dissolution has been given,[24] unless the customer has actual knowledge of the dissolution or the legal equivalent of such knowledge, in which case a formal notice is not necessary.[25] In some jurisdictions this rule is expressly declared by statute.[26] In case, however, of dissolution by operation of law,[27] notice thereof need not be given by a partner or his representative, as everyone is bound to take notice of such a dissolution.[28] A notice of

(Mass.) 505; Lewis *v.* Reilly, 1 Q. B. 349, 5 Jur. 98, 10 L. J. Q. B. 135, 4 P. & D. 629, 41 E. C. L. 572. See also Douglass *v.* Hall, 22 Vt. 451.

Otherwise where the indorsement did not contain the limitation "without recourse." Fowle *v.* Harrington, 1 Cush. (Mass.) 146.

21. Stair *v.* Richardson, 108 Ind. 429, 9 N. E. 300; Curry *v.* Burnett, 36 Ind. 102; Sanford *v.* Mickles, 4 Johns. (N. Y.) 224. See also Geortner *v.* Canajoharie, 2 Barb. (N. Y.) 625.

Bona fide purchasers for value acquire a good title. Cony *v.* Wheelock, 33 Me. 366; Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Anderson *v.* Weston, 6 Bing. N. Cas. 296, 4 Jur. 105, 9 L. J. C. P. 194, 8 Scott 583, 37 E. C. L. 631.

22. See *supra*, VI, A.

23. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936 [*affirming* 75 Ill. App. 165]; Cal. Civ. Code, § 2453; English Partn. Act (1890), § 36 (1), providing that where a person deals with a firm, after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has notice of the change.

24. *Alabama.*— Stewart *v.* Sonuehorn, 51 Ala. 126; Grady *v.* Robinson, 28 Ala. 289.

Georgia.— Bush *v.* McCarty Co., 127 Ga. 308, 56 S. E. 430; Pryon *v.* Ruohs, 120 Ga. 1060, 48 S. E. 434; Holland *v.* Long, 57 Ga. 36; Civ. Code (1895), § 2634.

Idaho.— Mankato First Nat. Bank *v.* Grignon, 7 Ida. 646, 65 Pac. 365.

Illinois.— Chicago Trust, etc., Bank *v.* Kinnare, 174 Ill. 358, 5 N. E. 607 [*affirming* 67 Ill. App. 186]; Holtgreve *v.* Wintker, 85 Ill. 470; Weise *v.* Gray's Harbor Commercial Co., 111 Ill. App. 647.

Indiana.— Miller *v.* Pfeiffer, 168 Ind. 219, 80 N. E. 409; Strecker *v.* Conn, 90 Ind. 469.

Kentucky.—Ach *v.* Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. Rep. 893; Price *v.* Towsey, 3 Litt. 423, 14 Am. Dec. 81; Humphrey *v.* Mattox, 42 S. W. 1100, 19 Ky. L. Rep. 1053.

Maine.— Nevens *v.* Bulger, 93 Me. 502, 45 Atl. 503.

Massachusetts.— Puritan Trust Co. *v.* Coffey, 180 Mass. 510, 62 N. E. 970 (holding, however, that the rule did not apply in this case, as the act was not within the scope of the partnership business); Elkinton *v.* Booth, 143 Mass. 479, 10 N. E. 460 (not necessary to show that plaintiff knew the names of the partners); Howe *v.* Thayer, 17 Pick. 91.

Michigan.— Hall *v.* Heck, 92 Mich. 458, 52 N. W. 749.

Missouri.—Curtis *v.* Sexton, 201 Mo. 217, 100 S. W. 17.

Nebraska.— Stoddard Mfg. Co. *v.* Krause, 27 Nebr. 83, 42 N. W. 913.

New Hampshire.— Deering *v.* Flanders, 49 N. H. 225.

New York.— Elmira Iron, etc., Rolling-Mill Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541; Bouker Contracting Co. *v.* Scribner, 52 N. Y. App. Div. 505, 65 N. Y. Suppl. 444; Lynch *v.* Rabe, 28 Misc. 215, 59 N. Y. Suppl. 109; Sinclair *v.* Hollister, 14 Misc. 607, 36 N. Y. Suppl. 460; Ketcham *v.* Clark, 6 Johns. 144, 5 Am. Dec. 197.

North Carolina.— Bynum *v.* Clark, 125 N. C. 352, 34 S. E. 438.

Ohio.— Easton *v.* Ellis, 1 Handy 70, 12 Ohio Dec. (Reprint) 32.

Pennsylvania.— Shamburg *v.* Ruggles, 83 Pa. St. 148; Taylor *v.* Young, 3 Watts 339; Daniel *v.* Lance, 29 Pa. Super. Ct. 454.

England.— Partn. Act (1890), §§ 36, 37; Hendry *v.* Turner, 32 Ch. D. 355, 55 L. J. Ch. 562, 54 L. T. Rep. N. S. 292, 34 Wkly. Rep. 513 (the court can compel all partners to concur in a notice of dissolution); Troughton *v.* Hunter, 18 Beav. 470, 52 Eng. Reprint 185; Fox *v.* Hanbury, Cowp. 445.

Canada.— Richards *v.* Rowe, 4 Manitoba 112 (notice may be waived by the creditor); Oakville *v.* Andrew, 10 Ont. L. Rep. 709.

See 38 Cent. Dig. tit. "Partnership," § 651; and *supra*, VII, A, 8.

25. Miller *v.* Pfeiffer, 168 Ind. 219, 80 N. E. 409. And see Holtgreve *v.* Wintker, 85 Ill. 470; Smith *v.* Vanderburg, 46 Ill. 34; Ach *v.* Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. Rep. 893; Irby *v.* Vining, 2 McCord (S. C.) 379; Young *v.* Tibbitts, 32 Wis. 79; Barfoot *v.* Goodall, 3 Campb. 147, 3 Rev. Rep. 673; Hart *v.* Alexander, 7 C. & P. 746, 6 L. J. Exch. 129, M. & H. 63, 2 M. & W. 484, 32 E. C. L. 851. And see *infra*, IX, B, 6, c.

26. See *supra*, note 24.

27. See *supra*, IX, A, 5.

28. Dissolution by death.— Bass Dry Goods

proposed dissolution does not affect the implied agency of either partner, if the dissolution does not take place.[29] On the other hand, a notice of dissolution is unnecessary, where a valid partnership has never existed.[30] A person, having no knowledge of a partnership at the time of the dealings which form the basis of his action, is not entitled to notice that it had been dissolved.[31]

b. In Case of Dormant Partner. So long as a member of a firm remains a dormant partner in the strict sense of that term,[32] he is not bound to give notice of dissolution in order to escape liability for the firm's subsequent obligations, for he has never been an accredited agent of the firm, nor has his connection with it given credit.[33] But if his membership in the firm has become known, he must give notice of the dissolution to those who have had knowledge of his membership.[34]

c. Persons Entitled to Notice and Sufficiency of Notice. Those who have had dealings with and given credit to the partnership during its existence are entitled to personal or actual notice of its dissolution.[35] Others are duly notified by a publication, in the manner and form hereafter described. The actual or personal

Co. *v.* Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Price *v.* Mathews, 14 La. Ann. 11; Maryland Nat. Union Bank *v.* Hollingsworth, 135 N. C. 556, 47 S. E. 618.

Dissolution by marriage.— Little *v.* Hazlett, 197 Pa. St. 591, 47 Atl. 855.

Dissolution by bankruptcy.— Eustis *v.* Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327.

Dissolution by war.— Griswold *v.* Waddington, 16 Johns. (N. Y.) 438 [*affirming* 15 Johns. 57]; Planters' Bank *v.* St. John, 19 Fed. Cas. No. 11,208, 1 Woods 585.

29. Spragans *v.* Lawson, 60 S. W. 373, 22 Ky. L. Rep. 1248.

30. Chamberlain *v.* Dow, 10 Mich. 319; Jeter *v.* Burgwyn, 113 N. C. 157, 18 S. E. 113, a case of quasi-partnership as to a single venture, which did not include plaintiff's transaction with the owner of the business.

31. Chamberlain *v.* Dow, 10 Mich. 319; Swigert *v.* Aspden, 52 Minn. 565, 59 N. W. 738; Wright *v.* Fonda, 44 Mo. App. 634; Bloch *v.* Price, 24 Mo. App. 14; Blanks *v.* Halfin, (Tex. Civ. App. 1895) 30 S. W. 941.

32. See *supra*, III, B, 6.

33. *Illinois.*— Nussbaumer *v.* Becker, 87 Ill. 281, 29 Am. Rep. 53.

Kansas.— Pitkin *v.* Benfer, 50 Kan. 108, 31 Pac. 695, 34 Am. St. Rep. 110.

Kentucky.— Magill *v.* Merrie, 5 B. Mon. 168; Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Louisiana.— Edwards *v.* McFall, 5 La. Ann. 167; Lacaze *v.* Sejour, 10 Rob. 444.

Massachusetts.— Grosvenor *v.* Lloyd, 1 Metc. 19.

New York.— Kelley *v.* Hurlburt, 5 Cow. 534.

North Carolina.— Gorman *v.* Davis, etc., Co., 118 N. C. 370, 24 S. E. 770.

Pennsylvania.— Deford *v.* Reynolds, 36 Pa. St. 325.

Tennessee.— Vaccaro *v.* Toof, 9 Heisk. 194.

Texas.— Baptist Book Concern *v.* Carswell, (Civ. App. 1898) 46 S. W. 858.

United States.— Oppenheimer *v.* Clemmons, 18 Fed. 886; Bigelow *v.* Elliot, 3 Fed. Cas. No. 1,399, 1 Cliff. 28.

England.— Partn. Act (1890), § 36 (3); Reynolds *v.* Bowley, L. R. 2 Q. B. 474, 8 B. & S. 406, 36 L. J. Q. B. 247, 16 L. T. Rep. N. S. 532, 15 Wkly. Rep. 813 (the share of the dormant partner in the partnership stock cannot be dealt with, under the Bankruptcy Act (12 & 13 Vict. c. 106, § 125) as in the possession, order, or disposition of the ostensible partner and thus distributed as his separate property); Heath *v.* Sansom, 4 B. & Ad. 172, 2 L. J. K. B. 25, 1 N. & M. 104, 24 E. C. L. 83.

Canada.— Darling *v.* Magnan, 12 U. C. Q. B. 471.

See 38 Cent. Dig. tit. "Partnership," § 654; and *supra*, VII, A, 8.

34. *Alabama.*— Park *v.* Wooten, 35 Ala. 242.

Illinois.— Warren *v.* Ball, 37 Ill. 76.

Indiana.— Cregler *v.* Durham, 9 Ind. 375.

New York.— Elmira Iron, etc., Steel Rolling Mill Co. *v.* Harris, 124 N. Y. 280, 26 N. E. 541 (even though not individually known, if his connection with the firm had lent it credit he must give notice of dissolution); Davis *v.* Allen, 3 N. Y. 168.

Pennsylvania.— Rowland *v.* Estes, 190 Pa. St. 111, 42 Atl. 528, same holding as in Elmira Iron, etc., Steel Rolling Mill Co. *v.* Harris, *supra*.

South Carolina.— Brown *v.* Foster, 41 S. C. 118, 19 S. E. 299.

Texas.— Milmo Nat. Bank *v.* Bergstrom, 1 Tex. Civ. App. 151, 20 S. W. 836.

England.— Farrar *v.* Deflinne, 1 C. & K. 580, 47 E. C. L. 580.

See 38 Cent. Dig. tit. "Partnership," § 654.

35. *Alabama.*— Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327; Mauldin *v.* Mobile Branch Bank, 2 Ala. 502.

Arkansas.— Sanders *v.* Ward, 23 Ark. 241, holding, however, that the maker of a note, indorsed by a firm, is not such a dealer with the firm as to be entitled to actual notice of dissolution.

California.— Civ. Code, § 2543. See Treadwell *v.* Wells, 4 Cal. 260 (may not be entitled to actual notice because of lapse of time since former dealings); Johnson *v.* Totten, 3 Cal. 343, 58 Am. Dec. 412.

Connecticut.— Lyon *v.* Johnson, 28 Conn. 1.

Georgia.— Camp *v.* Southern Banking, etc., Co., 97 Ga. 582, 25 S. E. 362; Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573 (a purchaser

notice of dissolution to former dealers need not be in any particular form,[36] nor

of goods from a firm is not a dealer entitled to actual notice); Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955; Richards *v.* Butler, 65 Ga. 593; Ennis *v.* Williams, 30 Ga. 691. Under Civ. Code (1895), § 2634, providing that the dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world, actual notice must be given to creditors. Bush *v.* McCarty Co., 27 Ga. 308, 56 S. E. 430.

Illinois.— Holtgreve *v.* Wintker, 85 Ill. 470; Page *v.* Brant, 18 Ill. 37; Roof *v.* Morrisson, 37 Ill. App. 37.

Indiana.— Richardson *v.* Snider, 72 Ind. 425, 37 Am. Rep. 168.

Kansas.— Merritt *v.* Williams, 17 Kan. 287, a single cash sale to a firm does not entitle the seller to actual notice.

Kentucky.— Gaar *v.* Huggins, 12 Bush 259.

Louisiana.— Denman *v.* Dosson, 19 La. Ann. 9; Lowe *v.* Penny, 7 La. Ann. 356; Brashear *v.* Dwight, 2 La. Ann. 403; Nott *v.* Douming, 6 La. 680, 26 Am. Dec. 491.

Michigan.— Sibley *v.* Parsons, 93 Mich. 538, 53 N. W. 786.

Missouri.— Pope *v.* Risley, 23 Mo. 185; Bloch *v.* Price, 24 Mo. App. 14 ("the customer must have been a regular or a recent customer"); Costello *v.* Nixdorff, 9 Mo. App. 501 (formal notice to an employee not necessary).

Montana.— Farwell *v.* Cashman, 16 Mont. 393, 41 Pac. 443.

Nebraska.— Stoddard Mfg. Co. *v.* Krause, 27 Nebr. 83, 42 N. W. 913.

New York.— Commonwealth Bank *v.* Mudgett, 44 N. Y. 514 [*affirming* 45 Barb. 663]; Brooklyn City Bank *v.* McChesney, 20 N. Y. 240 (not a former dealer entitled to actual notice); Clapp *v.* Rogers, 12 N. Y. 283 [*affirming* 1 E. D. Smith 549] (a seller on credit is entitled to actual notice); Bouker Contracting Co. *v.* Scribner, 52 N. Y. App. Div. 505, 65 N. Y. Suppl. 444 (not shown to be a dealer); Knapp *v.* Knapp, 28 N. Y. App. Div. 324, 51 N. Y. Suppl. 144 (plaintiff had had "credit dealings" with the firm); National Shoe, etc., Bank *v.* Herz, 24 Hun 260 [*affirmed* in 89 N. Y. 629]; Mechanics' Bank *v.* Livingston, 33 Barb. 458 [*affirmed* in 33 Barb. 465]; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Van Eps *v.* Dillaye, 6 Barb. 244; Wardwell *v.* Haight, 2 Barb. 549; Thomas *v.* Haight, 2 Edm. Sel. Cas. 25; Vernon *v.* Manhattan Co., 22 Wend. 183 [*affirming* 17 Wend. 524].

North Carolina.— Scheiffelin *v.* Stevens, 60 N. C. 106, 84 Am. Dec. 355.

Ohio.— Crosier *v.* McNeal, 17 Ohio Cir. Ct. 644, 60 Ohio Cir. Dec. 748, not a "former dealer."

Pennsylvania.— Forepaugh *v.* Baker, 10 Pa. Cas. 97, 13 Atl. 465; Kneedler *v.* Lucas, 2 Leg. Rec. 365.

South Carolina.— White *v.* Murphy, 3 Rich. 369.

South Dakota.— Tobin *v.* McKinney, 14 S. D. 52, 84 N. W. 228; Civ. Code, § 4059.

Tennessee.— Kirkman *v.* Snodgrass, 3 Head 370; Hutchins *v.* Hudson, 8 Humphr. 426; Hutchins *v.* Sims, 8 Humphr. 423; Hutchins *v.* State Bank, 8 Humphr. 418, one is not a "previous dealer" who has dealt in the firm's paper but not directly with the firm.

Texas.— Green *v.* Waco State Bank, 78 Tex. 2, 14 S. W. 253; Gilbough *v.* Stahl Bldg. Co., 16 Tex. Civ. App. 448, 41 S. W. 535; Jackson *v.* Lee, 14 Tex. Civ. App. 144, 36 S. W. 286.

Vermont.— Simonds *v.* Strong, 24 Vt. 642; Prentiss *v.* Sinclair, 5 Vt. 149, 26 Am. Dec. 288.

Virginia.— Dickinson *v.* Dickinson, 25 Gratt. 321.

Wisconsin.— Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

England.— Partn. Act (1890), § 36; Graham *v.* Hope, 1 Peake N. P. 154, 3 Rev. Rep. 671.

See 38 Cent. Dig. tit. "Partnership," § 646; and *supra*, VII, A, 8.

The word "creditors," as used in Civ. Code (1895), § 2634, declaring that the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world, is not limited to persons who were creditors at the time of the dissolution, but a person who had previously sold goods and given credit to the firm during its continuance was within its meaning. Bush *v.* W. A. McCarty Co., 127 Ga. 308, 56 S. E. 430.

36. *Arkansas.*— Burr *v.* Williams, 20 Ark. 171, holding that the words "in liquidation" under the firm signature of a note is a circumstance from which a jury may infer a notice of dissolution to the payee.

Delaware.— Danforth *v.* Hertel, 3 Pennew. 57, 49 Atl. 168.

Illinois.— Smith *v.* Vanderburg, 46 Ill. 34 (facts may put the payee of a note on inquiry as to dissolution); Arnold *v.* Cannon, 76 Ill. App. 323.

Indiana.— Miller *v.* Pfeiffer, 168 Ind. 219, 80 N. E. 409.

Iowa.— Rosenbaum *v.* Horton, 89 Iowa 692, 57 N. W. 609.

Michigan.— Edwards *v.* Wheeler, 130 Mich. 219, 89 N. W. 679.

Minnesota.— Robertson Lumber Co. *v.* Anderson, 96 Minn. 527, 105 N. W. 972.

Missouri.— Comfort *v.* Lynam, 67 Mo. App. 668.

New Hampshire.— Zollar *v.* Janvrin, 47 N. H. 324, proper evidence of notice to be considered by jury.

New York.— Noyes *v.* Turnbull, 130 N. Y. 639, 29 N. E. 145 [*affirming* 54 Hun 26, 7 N. Y. Suppl. 114] (change in letter heads a sufficient notice of dissolution); American Linen Thread Co. *v.* Wortendyke, 24 N. Y. 550 (a change in firm-name from "Wortendyke Bros." to "Wortendyke Bros. & Co." is insufficient to put dealers on inquiry as to the fact that one of the brothers has withdrawn); Holt *v.* Allenbrand, 52 Hun 217, 4 N. Y.

personally communicated by the partner.[37] It may be given to a duly authorized agent of the dealer;[38] but notice to an agent not authorized to receive it on behalf of his principal is ineffective.[39] Actual notice may be inferred from the notoriety of the dissolution,[40] or from the fact that the dissolution was published in a newspaper taken and read by the dealer;[41] but the dissolution must be as notorious as the existence of the partnership, and therefore the degree of publicity required will

Suppl. 922 (change in banker's certificates a sufficient notice).

Ohio.— Crosier *v.* McNeal, 17 Ohio Cir. Ct. 644, 6 Ohio Cir. Dec. 748, plaintiff may be notified by statement in a commercial agency report.

South Carolina.— Irby *v.* Vining, 2 McCord 379, circumstances may show knowledge by creditor of dissolution.

Texas.— Bonnet *v.* Tips Hardware Co., (Civ. App. 1900) 59 S. W. 59.

Virginia.— Chapman *v.* Wilson, 1 Rob. 267.

Wisconsin.— Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557; Young *v.* Tibbitts, 32 Wis. 79; Clapp *v.* Upson, 12 Wis. 492.

England.— Barfoot *v.* Goodall, 3 Campb. 147, 3 Rev. Rep. 673 (notice by change in printed checks); Glassington *v.* Thwaites, Coop. t. Brough. 115, 47 Eng. Reprint 41.

Canada.— Bouchard *v.* Plamondon, 16 Quebec Super. Ct. 483 (bank made a party to proceedings for dissolution); Houde *v.* Grenier, 12 Quebec Super. Ct. 259.

See 38 Cent. Dig. tit. "Partnership," § 657 *et seq.* And see the cases cited *supra*, IX, B, 6, a, note 25.

Evidence insufficient to show notice.— On an issue as to whether plaintiff, a creditor of a partnership, had notice of its dissolution, it appeared that after the retirement of one member and the admission of another the stationery was printed with the name of the new member substituted for that of the retiring member, that a circular was sent out generally advertising a reduction in prices and was signed in the same manner, but there was no proof that a copy of the circular or any of the stationery was mailed to plaintiff or sent to any place from which it might be inferred that he saw it. It also appeared that an advertising sign was placed on all the roads leading to defendant's place of business, signed with the name of the new firm, but plaintiff's place of business was twenty-one miles distant in a different town, and it was not shown that any of his agents ever went to the place of defendant's business or passed along any of the roads where the signs were placed. It was held that the evidence was insufficient to show notice of the dissolution to plaintiff. Bush *v.* W. A. McCarty Co., 127 Ga. 308, 56 S. E. 430.

37. Uhl *v.* Bingaman, 78 Ind. 365; Kehoe *v.* Carville, 84 Iowa 415, 51 N. W. 166; Coddington *v.* Hunt, 6 Hill (N. Y.) 595.

38. Miller *v.* Pfeiffer, 168 Ind. 219, 80 N. E. 409; Ach *v.* Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. Rep. 893; Cox *v.* Pearce, 10 N. Y. St. 443; Cowan *v.* Roberts, 133 N. C. 629, 45 S. E. 954.

39. Cowan *v.* Roberts, 133 N. C. 629, 45 S. E. 954; Speer *v.* Bishop, 5 Ohio Dec. (Reprint) 128, 3 Am. L. Rec. 91 (holding that a notice handed to plaintiff's employee, but not shown to have reached plaintiff, was not binding on him); Brown *v.* Foster, 41 S. C. 118, 19 S. E. 299 (notice to a mere clerk not notice to the employer); Miller *v.* Schneider, 2 Tex. App. Civ. Cas. § 369; Powles *v.* Page, 3 C. B. 16, 10 Jur. 526, 15 L. J. C. P. 217, 54 E. C. L. 16 (notice to a director in a banking company, who has no part in the management, is not notice to the company). See, generally, PRINCIPAL AND AGENT.

40. *Alabama.*— Mauldin *v.* Mobile Branch Bank, 2 Ala. 502.

Louisiana.— Brashear *v.* Dwight, 2 La. Ann. 403.

Missouri.— Gage *v.* Rogers, 51 Mo. App. 428, actual notice may be inferred by the jury, when notice was given to commercial agencies, which distributed the information by daily slips to subscribers, among whom was the creditor, and such slips were daily examined by the latter's credit man.

New York.— Holdane *v.* Butterworth, 5 Bosw. 1.

South Carolina.— Brown *v.* Foster, 41 S. C. 118, 19 S. E. 299.

See 38 Cent. Dig. tit. "Partnership," § 657 *et seq.*

Opinion evidence.— Notoriety cannot be shown by the opinion of witnesses; their testimony must be limited to facts. Brown *v.* Foster, 41 S. C. 118, 19 S. E. 299.

41. *California.*— Treadwell *v.* Wells, 4 Cal. 260.

Georgia.— Richards *v.* Butler, 65 Ga. 593, but publication in a paper not read by creditor is insufficient.

Illinois.— Page *v.* Brant, 18 Ill. 37.

Louisiana.— Reilly *v.* Smith, 16 La. Ann. 31 (not enough to show that paper was taken by creditor); Skannel *v.* Taylor, 12 La. Ann. 773 (similar holding).

Maryland.— Rose *v.* Coffield, 53 Md. 18, 36 Am. Rep. 389; Boyd *v.* McCann, 10 Md. 118, not enough that notice was published; proof must show that the creditor took and read the paper.

New Hampshire.— Zollar *v.* Janvrin, 47 N. H. 324, to the same effect as the Maryland cases cited *supra*, this note.

New York.— Commonwealth Bank *v.* Mudgett, 45 Barb. 663 [*affirmed* in 44 N. Y. 514]; Vernon *v.* Manhattan Co., 22 Wend. 183 [*affirming* 17 Wend. 524], not conclusive evidence of notice, although the creditor took the paper.

South Carolina.— Martin *v.* Walton, 1 McCord 16.

Tennessee.— Haynes *v.* Carter, 12 Heisk. 7, 27 Am. Rep. 747 (insufficient where creditor was not shown to have read the paper,

vary with the circumstances of the case;[42] and notoriety has been held insufficient where the notice required by law was not given.[43] The burden of proving notice is on the partner.[44] Notice of dissolution may be given by mail, and in case proper mailing is shown the presumption arises that the notice reached the addressee;[45] but if such presumption is rebutted by evidence that it did not reach him, the attempted notification is ineffective.[46] Notice by publication is often regulated by statute.[47] In the absence of such legislation, it is sufficient that the notice of dissolution be published in some newspaper of general circulation, in the locality where the partnership has its place of business, and in such a manner as to fairly inform the public of the dissolution.[48]

although sent to him with a mark around the notice); Hutchins *v.* State Bank, 8 Humphr. 418 (receipt of such a paper is a circumstance tending to prove notice, but not itself sufficient).

See 38 Cent. Dig. tit. "Partnership," § 660.

42. Humes *v.* O'Bryan, 74 Ala. 64 (notoriety at the place of business of a firm is not evidence of notice to a dealer living at a distance); Mauldin *v.* Mobile Branch Bank, 2 Ala. 502; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280 (notoriety not sufficient in this case); Roof *v.* Morrisson, 37 Ill. App. 37 (slight change in business name not notice of dissolution); Hammond *v.* Aiken, 3 Rich. Eq. (S. C.) 119 (posting notices of sale of firm assets, although including in statement that the firm is dissolved, is not sufficient notoriety); Southwick *v.* Allen, 11 Vt. 75 (notoriety in a neighborhood does not show notice of dissolution to creditors living at a distance).

43. Martin *v.* Searles, 28 Conn. 43; Lyon *v.* Johnson, 28 Conn. 1; Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306, mere notoriety held insufficient, when no personal or published notice has been given.

44. *California.*— Dellapiazza *v.* Foley, 112 Cal. 380, 44 Pac. 727.

Georgia.— Moore *v.* Duckett, 91 Ga. 752, 17 S. E. 1037; Pursley *v.* Ramsey, 31 Ga. 403.

Illinois.— Dixon Nat. Bank *v.* Spielmann, 35 Ill. App. 184.

Indiana.— Strecker *v.* Conn, 90 Ind. 469; Uhl *v.* Harvey, 78 Ind. 26.

Iowa.— Duff *v.* Baker, 78 Iowa 642, 43 N. W. 463.

Kentucky.— Mitchum *v.* Commonwealth Bank, 9 Dana 166.

Louisiana.— Grinnan *v.* Baton Rouge Mills Co., 7 La. Ann. 638.

New York.— Reading Braid Co. *v.* Stewart, 20 Misc. 86, 45 N. Y. Suppl. 69 [*affirming* 19 Misc. 431, 43 N. Y. Suppl. 1129].

North Carolina.— Ellison *v.* Sexton, 105 N. C. 356, 11 S. E. 180, 18 Am. St. Rep. 907.

Pennsylvania.— Newcomet *v.* Brotzman, 69 Pa. St. 185.

Vermont.— Southwick *v.* Allen, 11 Vt. 75.

United States.— Birckhead *v.* De Forest, 120 Fed. 645, 57 C. C. A. 107.

See 38 Cent. Dig. tit. "Partnership," § 657 *et seq.*

45. Hunt *v.* Colorado Milling, etc., Co., 1 Colo. App. 120, 27 Pac. 873; Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246.

46. Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495.

47. See Cal. Civ. Code, § 2453; English Partn. Act (1890), § 36 (2).

48. *Alabama.*— Mauldin *v.* Mobile Branch Bank, 2 Ala. 502; Lucas *v.* Darien Bank, 2 Stew. 280.

Connecticut.— Mowatt *v.* Howland, 3 Day 353, where business was carried on at Norwich, Conn., and a notice published for several successive weeks in a paper printed at Norwich, and in a paper printed at New London, a neighboring town, was held sufficient.

Georgia.— Under Civ. Code (1895), § 2634, declaring that the dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world, a fair and reasonable publication in a public gazette circulated in the locality in which the business of the partnership has been conducted is generally sufficient notice to the world. Bush *v.* McCarty Co., 127 Ga. 308, 56 S. E. 430. See also Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573.

Indiana.— Backus *v.* Taylor, 84 Ind. 503.

Michigan.—Solomon *v.* Kirkwood, 55 Mich. 256, 21 N. W. 336, a local item notice of the dissolution may be sufficient; whether it is a fair and reasonable notice is for the jury.

Mississippi.— Polk *v.* Oliver, 56 Miss. 566.

New York.— Citizens' Nat. Bank *v.* Weston, 162 N. Y. 113, 56 N. E. 494 [*reversing* 45 N. Y. Suppl. 1136, and *following* Monongahela Valley Bank *v.* Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547] (holding that notice of dissolution to two prominent commercial agencies, and as a local item in one or two newspapers in the vicinity, is insufficient); Graves *v.* Merry, 6 Cow. 701, 16 Am. Dec. 471; Lansing *v.* Gaine, 2 Johns. 300, 3 Am. Dec. 422.

Pennsylvania.— Watkinson *v.* Commonwealth Bank, 4 Whart. 482, 34 Am. Dec. 521.

South Carolina.— Planters', etc., Bank *v.* Galliott, 1 McMull. 209, 36 Am. Dec. 256.

Vermont.— Simonds *v.* Strong, 24 Vt. 642 (advertisement, as distinguished from a local news item required); Prentiss *v.* Sinclair, 5 Vt. 149, 26 Am. Dec. 288.

Wisconsin.— Young *v.* Tibbitts, 32 Wis. 79, local item may be sufficient.

United States.— Shurlds *v.* Tilson, 22 Fed. Cas. No. 12,827, 2 McLean 458.

d. Transactions Without Notice. Although a partnership has been dissolved, and one or more of the members have withdrawn therefrom, all the partners will be bound by an obligation incurred on its behalf by any former partner, in the usual course of business[49] with a person who became a party to the obligation on the faith of the partnership,[50] without notice of its dissolution.[51]

e. Operation and Effect of Notice. When due notice of dissolution has been given, it terminates the implied power of every partner to bind the others by new

England.—Before the act of 1890. Wright *v.* Pulham, 2 Chit. 121, 18 Rev. Rep. 784, 18 E. C. L. 542; Godfrey *v.* Turnbull, 1 Esp. 371; Gorham *v.* Thompson, 1 Peake N. P. 42, 3 Rev. Rep. 650.

See 38 Cent. Dig. tit. "Partnership," §§ 658, 660.

49. Hicks *v.* Russell, 72 Ill. 230; Spurck *v.* Leonard, 9 Ill. App. 174; Whitman *v.* Leonard, 3 Pick. (Mass.) 177. The rule in the text applies only to transactions in the usual course of business. Whitman *v.* Leonard, *supra.*

50. Cal. Civ. Code, § 2453 ("To the extent in either case to which such persons part with value in good faith, and in the belief that such partner is still a member of the firm"); Farmers', etc., Bank *v.* Green, 30 N. J. L. 316 (firm had been dissolved eleven years, and there was no evidence that the plaintiff trusted to the credit of the retiring partner); Morrison *v.* Perry, 11 Hun (N. Y.) 33 (plaintiff was not a holder for new value of the note sued on — a note for an existing indebtedness).

51. *Alabama.*— Lee *v.* Ryan, 104 Ala. 125, 16 So. 2.

Arkansas.— Burr *v.* Williams, 20 Ark. 171.

California.— Williams *v.* Bowers, 15 Cal. 321, 76 Am. Dec. 489.

Colorado.— Rocky Mountain Nat. Bank *v.* McCaskill, 16 Colo. 408, 26 Pac. 821.

Connecticut.— Martin *v.* Searles, 28 Conn. 43; Bradley *v.* Camp, Kirby 77, 1 Am. Dec. 13.

Georgia.— St. Louis Electric Lamp Co. *v.* Marshall, 78 Ga. 168, 1 S. E. 430; Ewing *v.* Trippe, 73 Ga. 776; Carmichael *v.* Greer, 55 Ga. 116.

Illinois.— Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850 [*affirming* 26 Ill. App. 287]; Bartlett *v.* Powell, 90 Ill. 331; Holtgreve *v.* Wintker, 85 Ill. 470; Southern *v.* Grim, 67 Ill. 106.

Indiana.— Iddings *v.* Pierson, 100 Ind. 418; Hunt *v.* Hall, 8 Ind. 215.

Iowa.— Dickson *v.* Dryden, 97 Iowa 122, 66 N. W. 148; Southwick *v.* McGovern, 28 Iowa 533.

Kentucky.— Ach *v.* Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. Rep. 893; Merrit *v.* Pollys, 16 B. Mon. 355; Combs *v.* Boswell, 1 Dana 473; Price *v.* Towsey, 3 Litt. 423, 14 Am. Dec. 81; Kerr *v.* Franks, 30 S. W. 1012, 17 Ky. L. Rep. 335.

Louisiana.— Schorten *v.* Davis, 21 La. Ann. 173.

Maine.— Cony *v.* Wheelock, 33 Me. 366.

Maryland.— Taylor *v.* Hill, 36 Md. 494; Bernard *v.* Torrance, 5 Gill & J. 383.

Massachusetts.— Buxton *v.* Edwards, 134 Mass. 567; Pecker *v.* Hall, 14 Allen 532.

Michigan.— Hall *v.* Heck, 92 Mich. 458, 52 N. W. 749.

Minnesota.— Shakopee First Nat. Bank *v.* Strait, 75 Minn. 396, 78 N. W. 101.

Mississippi.— McLemore *v.* Rankin Mfg. Co., 68 Miss. 196, 8 So. 845.

Missouri.— Curtis *v.* Sexton, 201 Mo. 217, 100 S. W. 17; Holt *v.* Simmons, 16 Mo. App. 97.

New Hampshire.— Zollar *v.* Janvrin, 47 N. H. 324; Dailey *v.* Blake, 35 N. H. 29; Kenniston *v.* Avery, 16 N. H. 117.

New York.— Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246; Howell *v.* Adams, 68 N. Y. 314 [*affirming* 1 Thomps. & C. 425]; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Williams *v.* Tilt, 36 N. Y. 319 [*affirming* 6 Bosw. 299]; Buffalo City Bank *v.* Howard, 35 N. Y. 500; Cox *v.* Pearce, 10 N. Y. St. 443; Fairchild *v.* Rushmore, 8 Bosw. 698; Fettretch *v.* Armstrong, 5 Rob. 339; Sinclair *v.* Hollister, 14 Misc. 607, 36 N. Y. Suppl. 460; Bristol *v.* Sprague, 8 Wend. 423.

Ohio.— Sorg *v.* Thornton, 1 Cinc. Super. Ct. 383.

Pennsylvania.— Kenney *v.* Altvater, 77 Pa. St. 34; Forepaugh *v.* Baker, 10 Pa. Cas. 97, 13 Atl. 465.

South Carolina.— Hammond *v.* Aiken, 3 Rich. Eq. 119; Lamb *v.* Singleton, 2 Brev. 490.

Texas.— Long *v.* Garnett, 59 Tex. 229; Dunham *v.* Simon, 1 Tex. Unrep. Cas. 548 (holding that where persons who have dealt with the firm are not notified of its dissolution by a withdrawal of a member therefrom, and the remaining partners execute a note in the firm-name for goods purchased for the firm, the retiring partner is liable on such note, since he can only relieve himself from liability for debts thereafter incurred in the firm-name by giving express notice to all persons dealing with the firm on the dissolution of the partnership); White *v.* Hudson, (Civ. App. 1896) 36 S. W. 332.

Vermont.— Sanderson *v.* Milton Stage Co., 18 Vt. 107.

Virginia.— Dickinson *v.* Dickinson, 25 Gratt. 321.

Wisconsin.— Clement *v.* Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760.

United States.— Bloch *v.* Price, 32 Fed. 562.

England.— Western Bank of Scotland *v.* Needell, 1 F. & F. 461.

See 38 Cent. Dig. tit. "Partnership," § 655. See also *supra* IX, B, 6, a, c; *infra*, IX, B, 7, and the cases there cited.

obligations,[52] and operates to inform third persons of the facts stated in the notice.[53]

f. Evidence of Notice. It follows from the principles stated in the foregoing paragraphs that it is not incumbent upon a partner who has withdrawn from a firm to establish plaintiff's knowledge of a dissolution by direct evidence. Either kind of notice of withdrawal; that is, either personal notice thereof or notice by publication, may be shown by circumstantial evidence.[54] But, as has already been pointed out, the burden is in all cases on the retired partner to show by

52. *Kentucky.*— Kennedy *v.* Bohannon, 11 B. Mon. 118.

Maine.— Monroe *v.* Conner, 15 Me. 178, 32 Am. Dec. 148, where the notice in this case was that the partner giving it would "not be holden as a partner," and the partnership was one at will.

Michigan.— Goodspeed *v.* Wiard Plow Co., 45 Mich. 322, 7 N. W. 902.

Missouri.— Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580.

New York.— Davis *v.* Keyes, 38 N. Y. 94; Pineiro *v.* Gurney, 15 N. Y. Suppl. 217; Brisban *v.* Boyd, 4 Paige 17, where a seller was not allowed to recover against the retiring partner for goods sold before notice of dissolution, but delivered after notice, on the ground that he had a right to retain possession until they were paid for by the purchasing partner.

Ohio.— Bain *v.* Wilson, 10 Ohio St. 14.

Washington.— Harris *v.* Zier, 43 Wash. 573, 86 Pac. 928.

England.— Jones *v.* Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. Rep. N. S. 487, 22 Wkly. Rep. 785 (when a partner has given notice of dissolution of a partnership at will to an insane copartner, he cannot withdraw it without such copartner's consent); Benham *v.* Grady, 5 C. B. 138, 17 L. J. C. P. 50, 57 E. C. L. 138 (a partnership at will is determined by a notice given by either partner); Willis *v.* Dyson, 1 Stark. 164, 2 E. C. L. 70.

See also *supra*, IX, B, 5.

53. Kelly *v.* Murphy, 70 Cal. 560, 12 Pac. 467 (notice admissible on the question in whose possession the firm property remained after the dissolution); Filippini *v.* Stead, 4 Misc. (N. Y.) 405, 23 N. Y. Suppl. 1061 (admissible on the question whether one of the partners had assumed the firm's liabilities).

54. *California.*— Treadwell *v.* Wells, 4 Cal. 260, holding that where defendants deny the existence of a partnership between them at the time of the incurring of the obligation sued on, and proof has been admitted that a newspaper containing notice of the dissolution of the partnership between defendants was taken by plaintiff, other papers not taken by him may properly be admitted in evidence by way of establishing the publicity of the notice and raising the presumption of actual knowledge of the fact.

Colorado.— Hunt *v.* Colorado Milling, etc., Co., 1 Colo. App. 120, 27 Pac. 873, holding that proof that plaintiff rendered bills in the name of the continuing partner only, and received checks signed by such partner individually, is evidence of actual notice to plaintiff of a dissolution.

Georgia.— Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573, holding that evidence of the general notoriety of defendant's withdrawal is competent evidence tending to show notice to plaintiff, but not necessarily sufficient.

Maryland.— Boyd *v.* McCann, 10 Md. 118.

Massachusetts.— Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325 (notoriety is an important circumstance tending to show notice of dissolution); Swift *v.* Carr, 145 Mass. 552, 15 N. E. 146 (letter heads received by plaintiff, containing the statement that the business was carried on by one of the old partners, under the old firm-name, is competent evidence of actual notice); Smith *v.* Jackman, 138 Mass. 143 (evidence that notice of a dissolution was published in a daily newspaper is competent on the issue of whether a certain person knew of the dissolution); Roberts *v.* Spencer, 123 Mass. 397.

Pennsylvania.— Little *v.* Clarke, 36 Pa. St. 114.

Texas.— Laird *v.* Ivens, 45 Tex. 621; Mann *v.* Clapp, 1 Tex. App. Civ. Cas. § 503, may be shown by direct or circumstantial evidence.

Utah.— Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260, evidence that plaintiffs were subscribers to and received commercial reports containing a statement of dissolution is competent as tending to show knowledge of the dissolution by plaintiffs.

Vermont.— Cahoon *v.* Hobart, 38 Vt. 244, writ drawn by plaintiffs as attorneys for three persons, describing one of them as a late partner in the firm, is evidence of plaintiff's knowledge that firm was dissolved.

United States.— Lovejoy *v.* Spafford, 93 U. S. 430, 23 L. ed. 851 (circumstantial evidence admissible); Shurlds *v.* Tilson, 22 Fed. Cas. No. 12,827, 2 McLean 458.

England.— Hart *v.* Alexander, 7 C. & P. 746, 6 L. J. Exch. 129, M. & H. 63, 2 M. & W. 484, 32 E. C. L. 851 (advertisement in newspaper is admissible, although no direct proof that plaintiff saw it); Jenkins *v.* Blizard, 1 Stark. 418, 18 Rev. Rep. 792, 2 E. C. L. 162 (that paper was taken by plaintiff, although no proof that he saw the advertisement, is admissible); Doe *v.* Miles, 4 Campb. 373, 1 Stark. 181, 16 Rev. Rep. 805, 2 E. C. L. 76; Paterson *v.* Zachariah, 1 Stark. 71, 2 E. C. L. 36 (if plaintiff knew of intention to dissolve, it lies on him to show that the intention was abandoned).

competent evidence that plaintiff had notice of the dissolution at the time when he became a creditor.[55]

g. Functions of Court and Jury. Whether the kind of notice to which a particular plaintiff is entitled has been given him is a question for the jury;[56] but it is the duty of the court to explain to the jury what constitutes proper notice in the particular case,[57] and to state the legal principles applicable thereto.[58] If the facts are undisputed and, in the opinion of the court, but one inference can be drawn therefrom, it may withdraw the question of notice from the jury.[59]

7. Holding Out as Partner After Dissolution. A partner who has actually retired from the firm, but who has failed to give proper notice of the dissolution, is treated in law as holding himself out as still a member of the firm, and is liable as such.[60] And even though he has given proper notice of dissolution, his subsequent conduct may be such as to induce others to believe that he is a member of the firm, or at least that he is content to be liable as a partner, and in such a case he can be held as a partner by one who has given credit in reliance on such conduct.[61]

55. Pursley *v.* Ramsey, 31 Ga. 403; Dixon Nat. Bank *v.* Spielmann, 35 Ill. App. 184; Southwick *v.* Allen, 11 Vt. 75. See *supra*, IX, B, 5, c, text and note 44.

56. *California.*— Rabe *v.* Wells, 3 Cal. 148.
Connecticut.— Streeker *v.* Conn, 90 Ind. 469.
Georgia.— Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573, holding that whether the particular publication was fair and reasonable is generally for the jury.
Indiana.— Cregler *v.* Durham, 9 Ind. 375.
Michigan.— Solomon *v.* Kirkwood, 55 Mich. 256, 21 N. W. 336.
Minnesota.— Robertson Lumber Co. *v.* Anderson, 96 Minn. 527, 105 N. W. 972.
Missouri.— Osborn *v.* Wood, 125 Mo. App. 250, 102 S. W. 580.
Pennsylvania.— Daniel *v.* Lance, 29 Pa. Super. Ct. 454.
Texas.— Masterson *v.* Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505; Tudor *v.* White, 27 Tex. 584.

57. Mauldin *v.* Mobile Branch Bank, 2 Ala. 502; Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573.

58. Hooper *v.* Hartwell, 12 Colo. App. 161, 54 Pac. 864; Deford *v.* Reynolds, 36 Pa. St. 325.

59. Mowatt *v.* Howland, 3 Day (Conn.) 353. And see Miller *v.* Pfeiffer, 168 Ind. 219, 80 N. E. 409.

60. *Georgia.*— Richards *v.* Hunt, 65 Ga. 342, holding that a retiring partner who consents to the continued use of the firm-name is estopped from denying his liability under the partnership to one who, without notice of the change, has given credit on the strength of his belief in no change; and this, although no credit was given until after the change.
Illinois.— Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495; Holtgreve *v.* Wintker, 85 Ill. 470; Ellis *v.* Bronson, 40 Ill. 455; Podrasnik *v.* R. T. Martin Co., 25 Ill. App. 300.
Indiana.— Stall *v.* Cassady, 57 Ind. 284.
Kentucky.— Spears *v.* Toland, 1 A. K. Marsh. 203, 10 Am. Dec. 722.
Massachusetts.— Goddard *v.* Pratt, 16 Pick. 412.
Michigan.— Morrill *v.* Bissell, 99 Mich. 409, 58 N. W. 324, letters written with the same firm heading and same signature, the latter including the retired partner's name.
Missouri.— Curtis *v.* Sexton, 201 Mo. 217, 100 S. W. 17.
New Jersey.— Thatcher *v.* Allen, 58 N. J. L. 240, 33 Atl. 284.
New York.— Monongahela Valley Bank *v.* Weston, 172 N. Y. 259, 64 N. E. 946 [*reversing* 62 N. Y. App. Div. 623, 71 N. Y. Suppl. 1132]; Frankel *v.* Wathen, 58 Hun 543, 12 N. Y. Suppl. 591.
Texas.— Davis *v.* Willis, 47 Tex. 154.
Vermont.— Amidown *v.* Osgood, 24 Vt. 278, 59 Am. Dec. 171.
United States.— *In re* Krueger, 14 Fed. Cas. No. 7,941, 2 Lowell 66, 5 Nat. Bankr. Reg. 439; *In re* Morse, 17 Fed. Cas. No. 9,854, 13 Nat. Bankr. Reg. 376; *In re* Tomes, 24 Fed. Cas. No. 14,084, 19 Nat. Bankr. Reg. 36.
See 38 Cent. Dig. tit. "Partnership," § 665. And see *supra*, IX, B, 6, a, c, d.

61. *Illinois.*— Gammon *v.* Huse, 100 Ill. 234 [*affirming* 9 Ill. App. 557].
Indian Territory.— Shapard Grocery Co. *v.* Hynes, 3 Indian Terr. 74, 53 S. W. 486.
Maine.— Casco Bank *v.* Hills, 16 Me. 155, holding out by surviving partners as a new firm.
New York.— Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132 (retiring partner's name continued in style of new firm with his assent); Dreher *v.* Connolly, 16 Daly 106, 9 N. Y. Suppl. 635 (where the partners, after a sale of their business, permitted the firm-name to be used in connection with it); Garbett *v.* Gedney, 15 Misc. 440, 37 N. Y. Suppl. 200; Norquist *v.* Dalton, 11 N. Y. Suppl. 351 (where the retiring partner knew that her name was still on the sign, but did not know that this affected her liability).
Ohio.— Speer *v.* Bishop, 24 Ohio St. 598 [*affirming* 5 Ohio Dec. (Reprint) 128, 3 Am. L. Rec. 91], where the retiring partner's name was continued in the firm style with his consent.
South Carolina.— Metz *v.* Commercial Bank, 45 S. C. 216, 23 S. E. 13.

Whether defendant's conduct amounted to a holding out is often, as was shown in a former connection, a difficult question of fact.[62]

8. Actions After Dissolution — a. Against Partners on Old Obligations. Although a firm has been dissolved, its obligations remain the joint obligations of its living members, and actions upon such obligations should be brought against all the partners, in the absence of legislative enactments modifying the common-law rules on the point.[63] If one or some of the partners have assumed the firm obligations, suits may be maintained against such partner or partners, in some jurisdictions;[64] while in others all the partners must be joined as defendants, unless plaintiff has accepted the obligation in satisfaction of the firm liability.[65] As has been seen, the firm creditor may discharge the outgoing partner in some jurisdictions by acts which prejudice such partner's position as surety for the assuming partner.[66]

Vermont.— Wait *v.* Brewster, 31 Vt. 516.

West Virginia.— Farmers' Bank *v.* Smith, 26 W. Va. 541.

Wisconsin.— Wausau First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215; Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557.

United States.— *In re* McFarland, 16 Fed. Cas. No. 8,788, 10 Nat. Bankr. Reg. 381.

England.— *Ex p.* Cooper, 5 Jur. 10, 10 L. J. Bankr. 11, 1 Mont. D. & De G. 358.

See 38 Cent. Dig. tit. "Partnership," § 665.

62. *Maryland.*— Boyd *v.* McCann, 10 Md. 118, where the mere fact that the old firm-name had been kept over the door after dissolution was held not enough to render the retiring partner liable on a note given in the firm-name.

Minnesota.— Reid *v.* Frazer, 37 Minn. 473, 35 N. W. 269, where the evidence was held sufficient to create to create an estoppel against defendant.

New York.— Barkley *v.* Beckwith, 90 N. Y. App. Div. 570, 86 N. Y. Suppl. 128, where the fact that a retiring partner permitted the continuing one to use old firm stationery was held insufficient to create an estoppel against the outgoing partner.

Ohio.— Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568, holding that negligently permitting the continuing partner to use old firm stationery was not an estoppel, where it did not appear that such stationery operated to obtain credit from plaintiff.

Canada.— Burt *v.* Clarke, 5 Manitoba 150, holding that the retiring partner, although he had not given notice, was not liable for a tort committed by the continuing partner, where plaintiff could not show that he was misled to his injury by the failure to give notice.

See 38 Cent. Dig. tit. "Partnership," §§ 664, 665. And see *supra*, III, B, 4.

63. *Alabama.*— McConnell *v.* Worns, 102 Ala. 587, 14 So. 849; Beal *v.* Snedicor, 8 Port. 523.

Connecticut.— Mortimer *v.* Caldwell, Kirby 53.

Delaware.— Evans *v.* Graves, 2 Houst. 15, if a partner defends on the ground that a note sued on was given after dissolution, he must file an affidavit of defense denying the existence of the firm, when the note was given.

Iowa.— Mellinger *v.* Parsons, 51 Iowa 58, 49 N. W. 861.

Louisiana.—Helm *v.* O'Rourke, 46 La. Ann. 178, 15 So. 400; Dowd *v.* Elstner, 23 La. Ann. 656; Cutler *v.* Cochran, 13 La. 482. In this state a commercial partnership exists for the purposes of its liquidation after it has been dissolved, and may sue or be sued when represented by all of its members. *In re* Dunn, 115 La. 1084, 40 So. 466. Where a solvent commercial firm was dissolved, and two of the partners were appointed liquidators under agreement, and the appointment was confirmed by a court, but neither the convention nor the order vested the liquidators with authority to sue and be sued, such proceedings did not affect the right of the creditors to sue the firm and its members *in solido*. *In re* Dunn, *supra*.

Nebraska.— Bowen *v.* Crow, 16 Nebr. 556, 20 N. W. 850, statute as to joint debtors does not apply to partners.

New York.— Green *v.* Shute, 15 Daly 358, 7 N. Y. Suppl. 645 [*affirming* 7 N. Y. Suppl. 69]; Griggs *v.* Smith, 13 N. Y. Suppl. 273.

North Carolina.— Holt *v.* Kernodle, 23 N. C. 199.

United States.— Goodrich *v.* Hunton, 10 Fed. Cas. No. 5,544, 2 Woods 137, applying La. Code Prac. arts. 162, 165.

See 38 Cent. Dig. tit. "Partnership," § 666 *et seq.*

64. Powers *v.* Fletcher, 84 Ind. 154; Melvain *v.* Tomes, 14 Hun (N. Y.) 31; Emerson *v.* Parsons, 2 Sweeny (N. Y.) 447 [*affirmed* in 46 N. Y. 560]; Blackwell *v.* Farmers', etc., Nat. Bank, 97 Tex. 445, 79 S. W. 518 [*modifying* (Civ. App. 1903) 76 S. W. 454] (assumption not shown); Bradford *v.* Taylor, 74 Tex. 175, 12 S. W. 20; Gates *v.* Hughes, 44 Wis. 332. And see *supra*, VII, C, 2, 6, 9.

65. Sneed *v.* Wiester, 2 A. K. Marsh. (Ky.) 277; Fowle *v.* Torrey, 131 Mass. 289, where there was no evidence that the partner had assented to pay this as his private debt.

66. See *supra*, VII, C, 2, 6, 9. And see Anniston First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002, holding that if a firm creditor holds collaterals received from the firm and surrenders them to the assuming partner, without the other partner's knowledge, he thereby releases the latter.

b. On Obligations Subsequent to Dissolution Without Notice. All the partners are properly made defendants in an action upon an obligation incurred after dissolution, if plaintiff had no notice thereof, and the obligation was within the scope of a partner's implied powers,[67] or if it has been assented to by all.[68]

c. On Such Obligations With Notice, or on Individual Obligation. An action cannot be maintained upon an obligation in the firm-name, incurred after dissolution, of which plaintiff had due notice,[69] nor upon one incurred by a partner as an individual.[70] The action must be brought against such partner alone.

d. Service of Process and Appearance. After a firm is dissolved, neither partner has implied authority to accept service of process, or appear in the action for a copartner, so as to entitle plaintiff to a judgment against such copartner or against the firm,[71] in the absence of a statute permitting such a judgment.[72]

e. Actions by Partners.[73] If these are brought to enforce claims acquired by the firm, before dissolution, they may and should be brought by all the partners;[74]

67. *Colorado.*— Hooper *v.* Hartwell, 12 Colo. App. 161, 54 Pac. 864.
Georgia.— McGee *v.* Potts, 87 Ga. 615, 13 S. E. 746.
Illinois.— Weise *v.* Gray's Harbor Commercial Co., 111 Ill. App. 647; City Nat. Bank *v.* King, 81 Ill. App. 244.
Maine.— Nevens *v.* Bulger, 93 Me. 502, 45 Atl. 503.
Minnesota.— Utley *v.* Clements, 79 Minn. 68, 81 N. W. 739, the same rule applies in the case of a sham dissolution.
Missouri.— Knaus *v.* Givens, 110 Mo. 58, 19 S. W. 535.
Pennsylvania.— Robinson *v.* Floyd, 159 Pa. St. 165, 28 Atl. 258; Potts *v.* Taylor, 140 Pa. St. 601, 21 Atl. 443; Shamburg *v.* Abbott, 112 Pa. St. 6, 4 Atl. 518; Clark *v.* Fletcher, 96 Pa. St. 416; Williamson *v.* Fox, 38 Pa. St. 214; Brown *v.* Clark, 14 Pa. St. 469; Dundass *v.* Gallagher, 4 Pa. St. 205; Farrar *v.* Babb, 4 Pa. Co. Ct. 407; Sagnier *v.* Watson, 15 Wkly. Notes Cas. 455.

68. *Alabama.*— Riggs *v.* Andrews, 8 Ala. 628.
Colorado.—Copp *v.* Longstreet, 5 Colo. App. 282, 38 Pac. 601.
Georgia.— Bower *v.* Douglass, 25 Ga. 714.
Pennsylvania.— Robinson *v.* Taylor, 4 Pa. St. 242.
Texas.— Bradford *v.* Taylor, 61 Tex. 508.

69. Starr *v.* Hunt, 25 Ind. 313; Waller *v.* Davis, 59 Iowa 103, 12 N. W. 798; Jack *v.* McLanahan, 191 Pa. St. 631, 43 Atl. 356; Farrar *v.* Babb, 4 Pa. Co. Ct. 407; Funck *v.* Heintze, (Tex. Civ. App. 1893) 23 S. W. 417.

70. *Colorado.*— Cowles *v.* Robinson, 11 Colo. 587, 19 Pac. 654.
Iowa.— Fletcher *v.* Anderson, 11 Iowa 228.
Massachusetts.— Bartlett *v.* Parks, 1 Cush. 82, applying Rev. St. c. 118, § 43.
New Hampshire.— Treadwell *v.* Brown, 41 N. H. 12.
New York.— Brown *v.* Davis, 6 Duer 549.
Pennsylvania.— McLeod *v.* McCrea, 2 Lack. Leg. N. 231.
Virginia.— Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277.

71. *Alabama.*— Faver *v.* Briggs, 18 Ala. 478; Mitchell *v.* Rich, 1 Ala. 228; Beal *v.* Snedicor, 8 Port. 523; Duncan *v.* Tombeckbee Bank, 4 Port. 181; Demott *v.* Swaim, 5 Stew. & P. 293.
Iowa.— Newlon *v.* Heaton, 42 Iowa 593; Stephens *v.* Parkhurst, 10 Iowa 70.
Louisiana.—Anderson *v.* Arnette, 27 La. Ann. 237; Michie *v.* Brown, 20 La. Ann. 75; Gaiennie *v.* Akin, 17 La. 42, 36 Am. Dec. 604.
New Jersey.— Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009.
Ohio.— Sarver *v.* Scarlett, 8 Ohio Dec. (Reprint) 765, 9 Cinc. L. Bul. 312.
South Carolina.— Loomis *v.* Pearson, Harp. 470.
Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.
United States.— Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; Atchison Sav. Bank *v.* Templar, 26 Fed. 580.
See 38 Cent. Dig. tit. "Partnership," §§ 670, 676.

72. Click *v.* Click, Minor (Ala.) 79; Harford *v.* Street, 46 Iowa 594; Newlon *v.* Heaton, 42 Iowa 593; Hale *v.* Van Saun, 18 Iowa 19; Montague *v.* Weil, 30 La. Ann. 50; Lambeth *v.* Vawter, 6 Rob. (La.) 127; Texas, etc., R. Co. *v.* McCaughey, 62 Tex. 271; Sanger *v.* Overmier, 64 Tex. 57.

73. Enforcing mechanics' liens see MECHANICS' LIENS, 27 Cyc. 346.

74. *California.*— Braun *v.* Wollacott, 129 Cal. 107, 61 Pac. 801.
Georgia.— Chicago Cheese Co. *v.* Smith, 94 Ga. 663, 20 S. E. 106; Thompson *v.* McDonald, 84 Ga. 5, 10 S. E. 448.
Kentucky.— Snow *v.* Burnett, 1 S. W. 634, 8 Ky. L. Rep. 345.
Louisiana.— Estlin *v.* Ryder, 20 La. Ann. 251; Florance *v.* Bridge, 5 La. Ann. 735; Cutler *v.* Cochran, 13 La. 482; Terril *v.* Flower, 6 Mart. 583.
Maine.— Gannett *v.* Cunningham, 34 Me. 56; Day *v.* Swann, 13 Me. 165.
Massachusetts.— Hyde *v.* Moxie Nerve-Food Co., 160 Mass. 559, 36 N. E. 585; Fish *v.* Gates, 133 Mass. 441; Page *v.* Wolcott, 15 Gray 536.
Missouri.— Sanders *v.* Clifford, 72 Mo. App. 548, under the practice in this state, if one partner refuses to join in the suit, the other may make him a defendant and sue for one half of the amount due.

unless one or more of them have become the exclusive owners, and the action is brought in a jurisdiction where the assignee of a claim may sue in his own name;[75] or unless there are peculiar circumstances which give rise to an individual cause of action in favor of plaintiff partner.[76]

f. Attachment and Garnishment. Whether an attachment, garnishment, or similar process will issue as an incident to such actions as we are now considering depends largely upon statutory provisions, in the particular jurisdictions.[77]

g. Judgment.[78] When the action is against all the partners upon a firm claim, a joint judgment will be rendered, unless statutory provisions permit several judgments.[79] A judgment against one partner is not generally conclusive upon

Nebraska.— Smith *v.* Gregg, 9 Nebr. 212, 2 N. W. 459.

New Jersey.— Wright *v.* Williamson, 3 N. J. L. 978.

New Mexico.— Wormser *v.* Lindauer, 9 N. M. 23, 49 Pac. 896, but if the claim does not belong to the firm, the action should not be brought in the names of all the partners.

New York.— Smith *v.* Williams, 90 N. Y. App. Div. 507, 85 N. Y. Suppl. 506.

Oregon.— Riggen *v.* Investment Co., 31 Oreg. 35, 47 Pac. 923.

Texas.— American Cotton Co. *v.* Whitfield, (Civ. App. 1905) 88 S. W. 300.

See 38 Cent. Dig. tit. "Partnership," § 666 *et seq.*

75. *Alabama.*— Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31; Howell *v.* Reynolds, 12 Ala. 128. If no partnership existed when the claim accrued, the suit must be brought by the owner. Starke *v.* Kenan, 11 Ala. 818.

California.— Brush *v.* Maydwell, 14 Cal. 208.

Colorado.— Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423.

Illinois.— Carpenter *v.* Wells, 65 Ill. 451.

Kansas.— Frayser *v.* Moore, 22 Kan. 115.

Kentucky.— Jarman *v.* Howard, 3 A. K. Marsh. 383, assignee not entitled to sue in his own name.

Louisiana.— Miller *v.* Cappel, 39 La. Ann. 881, 2 So. 807; White *v.* Jones, 14 La. Ann. 681.

Missouri.— Canefox *v.* Anderson, 22 Mo. 347.

New York.— Leavitt *v.* Dodge, 16 N. Y. Suppl. 309.

North Carolina.— Scott *v.* Green, 89 N. C. 278.

Pennsylvania.— Mosgrove *v.* Golden, 101 Pa. St. 605, but the surviving partner was not allowed to join a claim in that capacity, with one held by him as an individual.

Wisconsin.— Viles *v.* Bangs, 36 Wis. 131.

United States.— McMicken *v.* Webb, 6 How. 292, 12 L. ed. 443; Low *v.* U. S., 7 Ct. Cl. 515.

Canada.— Teer *v.* Smith, 21 U. C. Q. B. 417, the same principle applies to an action by one partner against a former copartner.

See 38 Cent. Dig. tit. "Partnership," § 666 *et seq.*

76. Davies *v.* Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. Rep. 373 [*affirming* 25 Ill. App. 260]; Hogendobler *v.* Lyon, 12 Kan. 276 (plaintiff allowed to maintain the action because the court treated him as a tenant in common, after the dissolution); Farley *v.* Lovell, 103 Mass. 387; Kintrea *v.* Charles, 12 Grant Ch. (U. C.) 123 (action by one partner against his copartner for improper conduct causing damage to plaintiff).

77. See, generally, ATTACHMENT. And see the following cases:

Connecticut.— Rice *v.* McMartin, 39 Conn. 573, allowed.

Louisiana.—Smith *v.* McMicken, 3 La. Ann. 319, not allowed.

New Hampshire.— Burnham *v.* Hopkinson, 17 N. H. 259, trustee process will not lie against one partner to get at a balance which it is supposed will be found due to the other on an adjustment of the accounts.

Ohio.— Swasey *v.* Antram, 24 Ohio St. 87, allowed.

Pennsylvania.— Ryon *v.* Wynkoop, 148 Pa. St. 188, 23 Atl. 1002 (money alleged to be due from one partner to another, as the latter's share of firm profits, cannot be garnished by a judgment creditor of the latter, unless the firm's affairs have been wound up, and an admitted balance is due); Knerr *v.* Hoffman, 65 Pa. St. 126 (applying Act June 16, 1836, § 35).

South Carolina.— Schatzill *v.* Bolton, 2 McCord 478, 13 Am. Dec. 748, allowed.

Virginia.— Lindsey *v.* Corkery, 29 Gratt. 650, allowed, but not so as to give a preference over other partnership creditors, as the individual partners were bankrupts.

See 38 Cent. Dig. tit. "Partnership," § 671.

78. Service of process and appearance to support judgment see *supra*, IX, B, 8, d.

79. Beatty *v.* Ambs, 11 Minn. 331 (holding Pub. St. c. 60, § 38, not applicable); Chicago First Nat. Bank *v.* Sloman, 42 Nebr. 350, 60 N. W. 589, 47 Am. St. Rep. 707; Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

Personal judgment.—A petition wherein defendants are described as "M. H. S. and E. H. S., late partners, doing business as S. Bros.," will sustain a personal judgment against defendants. Chicago First Nat. Bank *v.* Sloman, 42 Nebr. 350, 60 N. W. 589, 47 Am. St. Rep. 707.

Labor claims on which judgments have been rendered against a firm, after the transfer of the interest of one member and an assignment by another, are invalid as against the individual estate of the latter, to the exclusion of individual creditors. Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

the others.[80] The form of judgment to be taken, when a part only of the members of a dissolved firm are served with process, will depend upon local statutes.[81]

C. Distribution and Settlement Between Partners and Their Representatives — 1. In General — a. Necessity of and Right to Settlement or Accounting. Before the rights of the several partners in the property of the firm can be ascertained, and such property distributed among them, a settlement of partnership affairs must generally be had.[82] Such a settlement is necessary also before an action for contribution can be maintained by one partner against his copartner or against the latter's representative.[83] This rule does not apply, how-

80. Reed *v.* Orton, 3 Pa. Cas. 371, 6 Atl. 369; Bowler *v.* Huston, 30 Gratt. (Va.) 266, 32 Am. Rep. 673.

81. Texas, etc., R. Co. *v.* McCaughey, 62 Tex. 271; White *v.* Tudor, 32 Tex. 758.

82. *Alabama.*— Chandler *v.* Wynne, 85 Ala. 301, 4 So. 653, a claim by surviving partners against the insolvent estate of their deceased copartner for the balance of an unsettled partnership account disallowed, the probate court having no jurisdiction to settle firm accounts.

California.— Gleason *v.* White, 34 Cal. 258.

Illinois.— Carter *v.* Bradley, 58 Ill. 101; Derby *v.* Gage, 38 Ill. 27.

Indiana.— Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476.

Kentucky.— Leonard *v.* Boyd, 71 S. W. 508, 24 Ky. L. Rep. 1320, same rule applied, although plaintiff had not furnished his agreed share of capital, but had been recognized as a partner by defendant.

Minnesota.— Reis *v.* Reis, 99 Minn. 446, 109 N. W. 997; Wilcox *v.* Comstock, 37 Minn. 65, 33 N. W. 42.

Missouri.— Scott *v.* Caruth, 50 Mo. 120.

New Hampshire.— Gale *v.* Sulloway, 62 N. H. 57.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

North Carolina.— McRae *v.* McKenzie, 22 N. C. 232.

Ohio.— Lorenz *v.* Reynolds, 9 Ohio S. & C. Pl. Dec. 540, 7 Ohio N. P. 17, where there had been such settlement.

Pennsylvania.— Singizer's Appeal, 28 Pa. St. 524.

Texas.— Hines *v.* Dean, 1 Tex. App. Civ. Cas. § 690, holding that an adjustment of the accounts of a partnership is necessary to a determination of the rights of partners in property of the firm, as the interest of a partner consists in his proportion of whatever balance may ultimately be left after payment of the partnership debts and settlement of account between the partners, and neither partner has any exclusive right to any part of the joint effects for any sum due him until the balance of the account is struck.

West Virginia.— Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21.

Wisconsin.— Sprout *v.* Crowley, 30 Wis. 187.

England.— *Ex p.* Harper, 1 De G. & J. 180, 2 Jur. N. S. 724, 26 L. J. Bankr. 74, 5 Wkly. Rep. 537, 58 Eng. Ch. 141, 44 Eng. Reprint 692.

See 38 Cent. Dig. tit. "Partnership," § 679.

The fact that one of several partners, who has in his possession all the assets of the firm, paid two of the partners their capital invested, under the belief that on the sale of the goods there would be no loss, does not bind him to anticipate the sale of the goods in settling with the other partners when called upon by them for an account. Derby *v.* Gage, 38 Ill. 27.

A surrogate may inquire into the correctness of a surviving partner's claim for a balance of account alleged to be due from the decedent partner, and allow the claim for the proper amount. Sellis' Case, 4 Abb. Pr. (N. Y.) 272.

83. *Alabama.*— De Jarnette *v.* McQueen, 31 Ala. 230, 68 Am. Dec. 164.

Connecticut.— Bishop *v.* Bishop, 54 Conn. 232, 6 Atl. 426; Mickle *v.* Peet, 43 Conn. 651.

Illinois.— Bracken *v.* Kennedy, 4 Ill. 558; Wright *v.* Cudahy, 64 Ill. App. 453.

Indiana.— Crossley *v.* Taylor, 83 Ind. 337.

Kentucky.— Warring *v.* Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. Rep. 605; Lawrence *v.* Clark, 9 Dana 257, 35 Am. Dec. 133.

Louisiana.— Thens *v.* Armistead, 116 La. 795, 41 So. 95; Hennegin *v.* Wilcoxon, 13 La. Ann. 576.

Massachusetts.—Phillips *v.* Blatchford, 137 Mass. 510; White *v.* Harlow, 5 Gray 463; Haskell *v.* Adams, 7 Pick. 59.

Michigan.— McGunn *v.* Hanlin, 29 Mich. 476.

Missouri.— Morin *v.* Martin, 25 Mo. 360.

Nebraska.— Foss *v.* Dawes, 72 Nebr. 608, 101 N. W. 237, 102 N. W. 609; Younglove *v.* Liebhardt, 13 Nebr. 557, 14 N. W. 526.

New Jersey.— Clayton *v.* Davett, (Ch. 1897) 38 Atl. 308.

New York.— Gridley *v.* Dole, 4 N. Y. 486; Torrey *v.* Twombly, 57 How. Pr. 149.

Oregon.— McDonald *v.* Holmes, 22 Oreg. 212, 29 Pac. 735.

Pennsylvania.— Murray *v.* Herrick, 171 Pa. St. 21, 32 Atl. 1125; Fulton's Appeal, 95 Pa. St. 323; Leidy *v.* Messinger, 71 Pa. St. 177; Lacy *v.* Hall, 37 Pa. St. 360; Miners' Trust Co. Bank *v.* Wren, 10 Phila. 502.

Tennessee.— Eddins *v.* Menefee, (Ch. App. 1899) 54 S. W. 992.

Texas.— Lockhart *v.* Lytle, 47 Tex. 452.

Virginia.— Compton *v.* Thorn, 90 Va. 653, 19 S. E. 451.

West Virginia.— Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653.

United States.— Halderman *v.* Halderman, 11 Fed. Cas. No. 5,909, Hempst. 559; Riggs *v.*

ever, when one partner has contracted to repay to the other a certain sum, which the latter has paid for him to a firm creditor;[84] nor when the sum sued for is one which defendant promised plaintiff to contribute to the firm capital;[85] nor when a single item remains unadjusted;[86] nor when the claim for contribution concerns a matter that is not involved in the partnership accounts;[87] nor where the partners have agreed on a settlement or where the court finding the facts and granting relief has had before it all the evidence pertaining to the accounts.[88]

b. Who Entitled to Require an Accounting. Upon the dissolution of a firm, each partner is entitled to an account from his copartners of their partnership dealings and transactions,[89] unless he has legally waived or parted with such right.[90] This right to an accounting after a dissolution belongs to a silent part-

Stewart, 20 Fed. Cas. No. 11,830, 2 Cranch C. C. 171.

England.— Sadler *v.* Hinxman, 5 B. & Ald. 936, 3 L. J. K. B. 101, 2 N. & M. 258, 27 E. C. L. 394.

See 38 Cent. Dig. tit. "Partnership," § 171.

84. *Alabama.*— Lyon *v.* Malone, 4 Port. 497.

Massachusetts.— Hunt *v.* Rogers, 7 Allen 469, 83 Am. Dec. 704.

New York.— Gilmore *v.* Ham, 133 N. Y. 664, 31 N. E. 624 [*affirming* 61 Hun 1, 15 N. Y. Suppl. 391, 21 N. Y. Civ. Proc. 102]; Johnson *v.* Kelly, 4 Thomps. & C. 417; Halsted *v.* Schmelzel, 17 Johns. 80, but only when such contract is clearly shown.

South Carolina.— Coleman *v.* Coleman, 12 Rich. 183.

Texas.— Long *v.* Garnett, 59 Tex. 229; Merriwether *v.* Hardeman, 51 Tex. 436.

See 38 Cent. Dig. tit. "Partnership," § 171. See also *supra*, V, C.

85. Bumpass *v.* Webb, 1 Stew. (Ala.) 19, 18 Am. Rep. 34; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Sprout *v.* Crowley, 30 Wis. 187; Brown *v.* Tapscott, 9 L. J. Exch. 139, 6 M. & W. 119. See *supra*, V, C.

86. Jepsen *v.* Beck, 78 Cal. 540, 21 Pac. 184; Clarke *v.* Mills, 36 Kan. 393, 13 Pac. 569; Clouch *v.* Moyer, 23 Kan. 404; Wheeler *v.* Arnold, 30 Mich. 304; Brown *v.* Agnew, 6 Watts & S. (Pa.) 235. And see *supra*, V, C.

87. *Illinois.*— Volk *v.* Roche, 70 Ill. 297; Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289.

Kentucky.—Lambert *v.* Ingram, 15 B. Mon. 265.

Pennsylvania.— Power *v.* Rees, 189 Pa. St. 496, 42 Atl. 26; McKelvy's Appeal, 72 Pa. St. 409.

South Carolina.— Eakin *v.* Knox, 6 S. C. 14.

Wisconsin.— Edwards *v.* Remington, 51 Wis. 336, 8 N. W. 193.

England.— Batard *v.* Hawes, 3 C. & K. 277, 2 E. & B. 287, 17 Jur. 1154, 22 L. J. Q. B. 443, 1 Wkly. Rep. 387, 75 E. C. L. 287; Edger *v.* Knapp, 1 D. & L. 73, 7 M. & G. 753, 6 Scott N. R. 707, 49 E. C. L. 393; Osborne *v.* Harper, 5 East 225, 1 Smith K. B. 411, 7 Rev. Rep. 696.

See 38 Cent. Dig. tit. "Partnership," § 171. And see *supra*, V, C.

88. Reis *v.* Reis, 99 Minn. 446, 109 N. W. 997.

89. *Florida.*— Hargis *v.* Campbell, 14 Fla. 27, the surviving partner can compel the personal representative of a deceased partner to account.

Georgia.— King *v.* Courson, 57 Ga. 11.

Illinois.— Taylor *v.* Coffing, 18 Ill. 422.

Louisiana.— Simonton *v.* McLain, 37 La. Ann. 663, a member of a firm, which is itself a member of a larger firm, is entitled to call the latter partnership to an account with him as a member of the former firm.

Maryland.— Bruns *v.* Spalding, 90 Md. 349, 45 Atl. 194, the right to an account affirmed between parties, although they were not technically partners.

Massachusetts.— Malden Bridge *v.* Salem Turnpike, etc., Bridge Co., 112 Mass. 152 (rule applied to corporations which were partners in the property and franchise of a bridge); Shearer *v.* Paine, 12 Allen 289.

Michigan.— Feige *v.* Babcock, 111 Mich. 538, 70 N. W. 7, the right to account exists, although the partners have sold their interests in the firm to others.

Minnesota.—Reis *v.* Reis, 99 Minn. 446, 109 N. W. 997.

New York.— Lord *v.* Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484 [*reversing* 80 N. Y. App. Div. 194, 80 N. Y. Suppl. 321 (*affirming* 37 Misc. 83, 74 N. Y. Suppl. 711)] (until dissolution a partner is not entitled to an action for accounting, save in exceptional circumstances); Kelly *v.* Kelly, 3 Barb. 419; Petrakion *v.* Arbelly, 26 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183 (the adjustment of liabilities between partners gives to each the right to an account, even though there are not assets to be divided); Long *v.* Majestre, 1 Johns. Ch. 305; Ketchum *v.* Durkee, Hoffm. 538 (the right may survive a sale by one partner of his interest to another).

Pennsylvania.— Bradly *v.* Jennings, 201 Pa. St. 473, 51 Atl. 343; Lacy *v.* Hall, 37 Pa. St. 360.

United States.— Mellor *v.* Smither, 114 Fed. 116, 52 C. C. A. 64.

See 38 Cent. Dig. tit. "Partnership," § 680 *et seq.*

90. *California.*— Wagner *v.* Wagner, 50 Cal. 76, waived by agreement.

Kentucky.— Grashell *v.* Knoll, 16 S. W. 453, 13 Ky. L. Rep. 241, waived by conduct.

Michigan.— Thompson *v.* Noble, 108 Mich. 19, 65 N. W. 563 (not waived by a defendant who denies his partnership with plaintiff,

ner,[91] and also to the purchaser or assignee of a partner's share.[92] Some courts permit a separate creditor of a partner who has levied his execution upon the debtor's interest in the firm property to call for an accounting, in order to ascertain such partner's beneficial interest in the property levied on and to have this subjected to the lien of the execution;[93] but as a rule individual creditors are not entitled to an accounting.[94] The personal representatives of a deceased partner are entitled to an accounting from the surviving partners.[95] In case the surviving partners are the personal representatives of the deceased, an accounting may be granted to the legatees, or the creditors of the decedent.[96] But the heirs of a deceased partner

but who is found to be a partner); Lobdell *v.* Baldwin, 93 Mich. 569, 53 N. W. 730 (right lost in this case).

Missouri.— Bassett *v.* Henry, 34 Mo. App. 548.

New York.— Moffat *v.* Moffat, 10 Bosw. 468, 17 Abb. Pr. 4.

North Carolina.— Buford *v.* Neely, 17 N. C. 481, an assignment of his share as security for a debt by a partner, who continues to act and to be recognized as such, not a waiver of his right to account from his copartners.

See 38 Cent. Dig. tit. "Partnership," § 681.

Negligence of the husband of one of the partners in an adventure in performing the duties devolving upon him under the partnership agreement in the management of the business does not defeat the wife's right to an accounting. Bradly *v.* Jennings, 201 Pa. St. 473, 51 Atl. 343.

91. Harvey *v.* Varney, 98 Mass. 118; Maddock *v.* Steel, 68 Hun (N. Y.) 522, 23 N. Y. Suppl. 61; Parsons *v.* Hayward, 4 De G. F. & J. 474, 8 Jur. N. S. 924, 31 L. J. Ch. 666, 16 L. T. Rep. N. S. 628, 10 Wkly. Rep. 654, 65 Eng. Ch. 368, 45 Eng. Reprint 1267; Brigham *v.* Smith, 3 Grant Err. & App. (U. C.) 46.

92. *Georgia.*— Fountaine *v.* Urquhart, 33 Ga. Suppl. 184.

Maine.— Hacker *v.* Johnson, 66 Me. 21, purchaser at an execution sale entitled to accounting.

New York.— Stokes *v.* Stokes, 59 Hun 431, 13 N. Y. Suppl. 407 [*affirmed* in 128 N. Y. 615, 28 N. E. 253], an assignee is accorded this right, on the ground that the other partners are trustees of such interest.

Oregon.— Marx *v.* Goodnough, 23 Oreg. 545, 32 Pac. 511, on the ground that the assignee becomes a tenant in common with the other partners in the firm property.

Tennessee.— Knight *v.* Ogden, 2 Tenn. Ch. 473, for same reason as in the preceding Oregon case.

United States.— Mathewson *v.* Clarke, 6 How. 122, 12 L. ed. 370.

England.— Watts *v.* Driscoll, [1901] 1 Ch. 294, 70 L. J. Ch. 157, 84 L. T. Rep. N. S. 97, 49 Wkly. Rep. 146, applying Partn. Act (1890), § 31 (2), which accords an accounting to the assignee of a partner of a dissolved firm, as from the date of the dissolution. Subsection (1) compels the assignee of a share of a partner during the continuance of the partnership to accept the account of profits agreed to by the partners, and denies him the right to require any accounts of the partnership transactions, or to inspect the partnership books.

See 38 Cent. Dig. tit. "Partnership," §§ 680, 686.

An assignee of an assignee of a copartner in a joint purchase and sale of lands may sustain a bill in equity against the other copartners and the agent of the partnership, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. Pendleton *v.* Wambersie, 4 Cranch (U. S.) 73, 2 L. ed. 554.

93. Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390. See *supra*, VI, D, 10.

94. Milleman *v.* Kavanaugh, 213 Pa. St. 240, 62 Atl. 907.

95. *California.*— Robertson *v.* Burrell, 110 Cal. 568, 42 Pac. 1086 (applying Code Civ. Proc. § 1585); Little *v.* Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89.

Illinois.— Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 586, holding that all rights and causes of action growing out of the dealings between decedent and the firms to which he belonged, and any right to an accounting with the surviving partners, passed to and vested in the administrator, and an attempted transfer of the same by the widow and children to the judgment creditor of decedent was nugatory.

New York.— Cheeseman *v.* Wiggins, 1 Thomps. & C. 595, holding that the representatives are entitled to an accounting absolutely, and need not show that there would be something due to them from the firm on settlement; their right to an account resulting from their interest in the effects of the firm, and the liability of the estate to contribute to the payment of the firm debts.

North Carolina.— Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489, dealing with Code, § 1326.

Vermont.— Newell *v.* Humphrey, 37 Vt. 265.

England.— Clegg *v.* Fishwick, 1 Hall & T. 390, 47 Eng. Reprint 1463, 12 Jur. 993, 19 L. J. Ch. 49, 1 Macn. & G. 294, 47 Eng. Ch. 235, 41 Eng. Reprint 1278; Taylor *v.* Taylor, 28 L. T. Rep. N. S. 188.

See 38 Cent. Dig. tit. "Partnership," §§ 684, 685.

96. Beningfield *v.* Baxter, 12 App. Cas. 16, 56 L. J. P. C. 13, 56 L. T. Rep. N. S. 127; Travis *v.* Milne, 9 Hare 141, 20 L. J. Ch. 665, 41 Eng. Ch. 141, 68 Eng. Reprint 449; Cropper *v.* Knapman, 6 L. J. Exch. 9, 2 Y. & C. Exch. 338; Bowsher *v.* Watkins, 1 Russ. & M. 277, 5 Eng. Ch. 277, 39 Eng. Reprint

are not entitled to call the surviving partner to an account, in the absence of special circumstances, as their remedy is generally against the personal representatives of the deceased.[97] If the surviving partner is a bankrupt, any creditor of the deceased partner may bring a suit in equity to have the partnership estate administered.[98] But the creditors of a partner who has made an assignment for the benefit of creditors cannot call the other partners to an account, their remedy being against the assignee.[99]

c. Who May Be Compelled to Account. Each living partner of a dissolved partnership is bound to account to his copartners for his dealings and transactions as such partner.[1] The surviving partner is bound to account to the representatives of the deceased partner,[2] unless the partnership agreement permits him to take the firm assets at a valuation, or otherwise exempts him from liability to an accounting.[3] On the other hand the representative of the deceased is bound to account, when he, or the deceased partner, had the management or control of firm assets.[4] But the surety of a deceased partner cannot be called to account to the survivor, when his only connection with the firm consists in this suretyship relation.[5]

2. Property and Transactions to Be Included — a. In General. All property belonging to the firm and forming a part of its assets, whatever its nature,

107. In Hyer *v.* Burdett, 1 Edw. (N. Y.) 325, it is said that even in such a case fraud or collusion must be shown, in order to maintain the bill.

97. Rosenzweig *v.* Thompson, 66 Md. 593, 8 Atl. 659; Harrison *v.* Righter, 11 N. J. Eq. 389; Edgar *v.* Baca, 1 N. M. 613; Boggs *v.* Bird, 131 N. Y. 665, 30 N. E. 868 [*affirming* 14 N. Y. Suppl. 344] (where the heir was allowed an accounting in order to determine whether the decedent's share of firm realty was needed to pay firm debts]; Hyer *v.* Burdett, 1 Edw. (N. Y.) 325. In Dent *v.* Slough, 40 Ala. 518, the widow of a partner was allowed a bill of discovery and account against the surviving partner, the circumstances being peculiar.

98. Brett *v.* Beckwith, 3 Jur. N. S. 31, 26 L. J. Ch. 130, 5 Wkly. Rep. 112.

99. Bruce *v.* Jennings, 1 Leg. Op. (Pa.) 33.

1. *Illinois.*— Rosenstiel *v.* Gray, 112 Ill. 282.

Iowa.— Taylor *v.* Wells, 113 Iowa 326, 85 N. W. 30.

Kentucky.—Peterson *v.* Poignard, 6 B. Mon. 570; Shiddell *v.* Messick, 4 B. Mon. 157, where the accounting partner had expelled his copartner from the firm's business.

New Jersey.— Ruckman *v.* Decker, 23 N. J. Eq. 283 [*reversed* on other grounds in 28 N. J. Eq. 614].

New York.— Walford *v.* Harris, 78 Hun 341, 29 N. Y. Suppl. 123.

Pennsylvania.— Wilson *v.* Keller, 195 Pa. St. 98, 45 Atl. 682.

England.— Partn. Act (1890), § 29.

Canada.— When upon the dissolution of a partnership by mutual consent, one of the partners takes over the assets for due consideration, and agrees to share with his late partner any amount of the book-debts he may collect in excess of a stated amount, he becomes liable to such partner to account for collections so made. O'Meara *v.* Ouellet, 28 Quebec Super. Ct. 418.

See 38 Cent. Dig. tit. "Partnership," §§ 687, 688.

Agent of partner.— Generally the rule does not apply to the mere agent of the partner. Taylor *v.* Wells, 113 Iowa 326, 85 N. W. 30. It has been held, however, that where there has been a dissolution of a partnership and one of the partners takes possession of the firm assets, agreeing to pay the firm debts, but subsequently dies, his agent, having possession of the effects, will be required to account therefor to the surviving partner, although no administration has been granted on the estate of the deceased partner. Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570.

2. Chapin *v.* Chapin, (Mass. 1894) 36 N. E. 746 (duty to account extends to a partner of the surviving partner, who knows that the capital furnished by the survivor consists of assets of the old firm); Ogden *v.* Astor, 4 Sandf. (N. Y.) 311; Hutchinson *v.* Campbell, 13 Misc. (N. Y.) 152, 34 N. Y. Suppl. 82; Taylor *v.* Taylor, 28 L. T. Rep. N. S. 189. See also *supra*, IX, C, 1, h, text and note 95.

3. Vyse *v.* Foster, L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. Rep. N. S. 177, 23 Wkly. Rep. 355.

4. Marlatt *v.* Scantland, 19 Ark. 443; Hargis *v.* Campbell, 14 Fla. 27; Gaskill *v.* Adams, 83 Mo. App. 380; Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 137. Plaintiff and his deceased partner, who were tenants in common of a certain quarry, entered into a partnership to operate the same, by which each was to have half of the rents and profits. After decedent's death, defendant, in his capacity as executor and as distributee of decedent's interest in the firm, collected and retained all of the rents and profits belonging to the quarry. It was held that one half of such rents and profits only belonged to defendant or the estate, and that he held the other half as a bailiff for plaintiff. Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

5. Bissell *v.* Ames, 17 Conn. 121.

is to be brought into the final accounting, upon the settlement of the firm's affairs.[6] But property which has never belonged to the firm,[7] or which has ceased to be a part of the firm assets because of the express agreement or of the conduct of the partners,[8] is not to be included in the account. Nor is property which is held by them as joint owners but has never formed a part of the firm assets.[9] The amount for which a partner is chargeable who takes exclusive control of the firm stock upon dissolution is generally its fair value at the date of dissolution.[10] A partner who has made a profit by selling his own goods to the

6. *Connecticut.*— Russell *v.* Green, 10 Conn. 269, where one partner was held liable for the net avails of his copartners' shares of certain firm lumber, although he had compromised the claim for such avails for a portion of its face.

Kentucky.— Swafford *v.* White, 89 S. W. 129, 28 Ky. L. Rep. 119; Whitney *v.* Whitney, 88 S. W. 311, 27 Ky. L. Rep. 1197, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465, holding that the books showing expirations of policies were a part of the assets of a firm of insurance agents, and should be sold with the other property of the firm.

Louisiana.— Klotz *v.* Macready, 39 La. Ann. 638, 2 So. 203, where the partnership articles bound the surviving partner to liquidate within six months after the dissolution.

Michigan.— Killefer *v.* McLain, 70 Mich. 508, 38 N. W. 455, holding that in arriving at a decree settling a partnership, the trial court should take an account of assets and liabilities, gains and losses, how accounts stood at the death of a deceased member, what debts a surviving member has paid, and what has become of the assets of the firm.

New York.— Arthur *v.* Sire, 105 N. Y. App. Div. 454, 94 N. Y. Suppl. 346 [*modifying* 45 Misc. 257, 92 N. Y. Suppl. 158].

Oregon.— Church *v.* Adams, 37 Oreg. 355, 61 Pac. 639; Langell *v.* Langell, 17 Oreg. 220, 20 Pac. 286, where the court settled the affairs of the firm upon the basis of the amount of funds received by the delinquent partner who had failed to keep accounts.

Pennsylvania.— Plumly *v.* Plumly, 6 Pa. Co. Ct. 72.

Vermont.— Washburn *v.* Washburn, 23 Vt. 576.

West Virginia.— Moore *v.* Wheeler, 10 W. Va. 35, holding that the accounting will commence from the last account stated between the partners, unless special circumstances render that account inconclusive.

See 38 Cent. Dig. tit. "Partnership," § 692.

Business done in another place.— Where the business of a partnership has been placed in the hands of a receiver at the suit of a creditor of a partner, business done in another city should be brought in, so as to affect the value of defendant's share, if such business is an extension of the original business, but not if carried on by the same partners as a new and independent venture. Gay *v.* Ray, 195 Mass. 8, 80 N. E. 693.

7. See Waisner *v.* Waisner, 15 Wyo. 420, 89 Pac. 580, holding that where, in proceedings for the dissolution of a partnership, the partners submitted their differences to arbitrators, and it appeared that the wife of a partner had purchased with her own money a tract of land which the partnership used, but there was no evidence that the wife held the property as trustee for the partnership, the arbitrators had no right to treat such tract as a part of the firm property.

Interest in public lands.— Partners seeking a dissolution of the firm submitted their differences to arbitrators. It appeared that a partner had made a homestead entry under the federal land laws. The partner testified that the land was not partnership land, and was not included in the agreement of submission to arbitration, and the copartner offered no evidence in opposition thereto. It was held that the land could not be regarded as firm property, especially in view of the fact that an agreement by the partner to convey the land to the firm would be void. Waisner *v.* Waisner, 15 Wyo. 420, 89 Pac. 580.

8. *Arkansas.*— Rushing *v.* Peoples, 42 Ark. 390, where stock levied on by certain creditors of one partner was sold with the assent of both partners, and thus ceased to be firm assets.

Florida.— Price *v.* Hicks, 14 Fla. 565, holding that where certain property was invested in the name of the wife of one of the partners, it was not to be accounted for by his estate after his death, in the absence of proof that the investment had been disposed of by the deceased or used for his benefit.

Louisiana.— Rhoton's Succession, 34 La. Ann. 893.

Minnesota.— Blakeley *v.* Le Duc, 22 Minn. 476.

Missouri.— Burress *v.* Blair, 61 Mo. 133.

New York.— Tygart *v.* Wilson, 39 N. Y. App. Div. 58, 56 N. Y. Suppl. 827 (holding that a lease renewed in favor of some of the partners, after one partner, had given notice of his intention to retire from the firm, was not a firm asset in which he had any interest); Fellerman *v.* Goldberg, 28 Misc. 235, 58 N. Y. Suppl. 1113.

Pennsylvania.— Browne *v.* Scull, 27 Pa. Super. Ct. 513.

South Dakota.— Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

See 38 Cent. Dig. tit. "Partnership," § 692.

9. Jones *v.* Jones, 23 Ark. 212.

10. *New York.*— Cheeseman *v.* Wiggins, 1 Thomps. & C. 595.

Pennsylvania.— Parker *v.* Broadbent, 134 Pa. St. 322, 19 Atl. 631.

South Carolina.— Kinloch *v.* Hamlin, 2 Hill Eq. 19, 27 Am. Dec. 441.

Vermont.— King *v.* White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. Rep. 752.

firm is accountable to the firm for this profit, unless his copartners have assented to the transaction.[11] On the other side of the account are to be included all debts and expenditures fairly incurred and made on behalf of the firm.[12]

b. Premiums For Admission Into the Partnership.[13] In some cases of dissolution a partner who has received from a copartner a premium or bonus for admission into the firm is bound to return a part of such premium to the copartner, on the ground that a part of the consideration for the premium was the continuance of the partnership, during an agreed, or at least an expected, period.[14] In England the subject is now regulated by statute.[15] In the United States there seems to be no disposition on the part of the courts to order a return of any part of a premium, unless the partner who received it induced its payment by fraud.[16]

United States.— Gunnell *v.* Bird, 10 Wall. 304, 19 L. ed. 913.

England.— Simmons *v.* Leonard, 3 Hare 581, 25 Eng. Ch. 581, 67 Eng. Reprint 512.

See 38 Cent. Dig. tit. "Partnership," § 692.

11. Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29.

12. Chambers *v.* Crook, 42 Ala. 171, 94 Am. Dec. 637; Remick *v.* Emig, 42 Ill. 342 (holding that an accounting between surviving partners and the administrator of a deceased partner, the partners all having equal interests, should be made by ascertaining the state of the stock at the death of the deceased partner, and its proceeds up to the date of account, charging each partner with the amount he has failed to bring into the partnership or may have overdrawn on his account, and after allowing each his advancements to the partnership, distributing the balance equally to the surviving partners and administrator); Lusk *v.* Graham, 21 La. Ann. 159; Ridgway *v.* Clare, 19 Beav. 111, 52 Eng. Reprint 291.

13. See also *infra*, IX, C, 2, e, text and note 30.

14. Pease *v.* Hewitt, 31 Beav. 22, 8 Jur. N. S. 1166, 7 L. T. Rep. N. S. 11, 10 Wkly. Rep. 535, 54 Eng. Reprint 1045; Bury *v.* Allen, 1 Coll. 589, 66 Rev. Rep. 200, 28 Eng. Ch. 589, 63 Eng. Reprint 556; Freeland *v.* Stansfeld, 2 Eq. Rep. 118, 1 Jur. N. S. 8, 23 L. J. Ch. 923, 2 Smale & G. 479, 2 Wkly. Rep. 575, 65 Eng. Reprint 490; Bullock *v.* Crockett, 3 Giffard 507, 8 Jur. N. S. 502, 5 L. T. Rep. N. S. 882, 66 Eng. Reprint 509. See also *supra*, V, A, 3.

15. English Partn. Act (1890), § 40, providing as follows: "Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless (a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium." See Lyon *v.* Tweddell, 17 Ch. D. 529, 45 J. P. 680, 50 L. J. Ch. 571, 44 L. T. Rep. N. S. 785, 29 Wkly. Rep. 689; Bluck *v.* Capstick, 12 Ch. D. 863, 48 L. J. Ch. 766, 41 L. T. Rep. N. S. 215, 28 Wkly. Rep. 75 (if dissolution is due to the misconduct of a partner, who has agreed to pay a premium, but who has not paid it, he will be ordered to pay the whole, notwithstanding the dissolution); Lee *v.* Page, 7 Jur. N. S. 768, 30 L. J. Ch. 857, 9 Wkly. Rep. 754; Yates *v.* Cousins, 60 L. T. Rep. N. S. 535 (plaintiff not entitled to a return of the premium because of his misconduct); Brewer *v.* Yorke, 46 L. T. Rep. N. S. 289 (mere incompetence of plaintiff will not bar a recovery but may affect the amount of his recovery). See also *supra*, V, A, 3.

16. Herrington *v.* Walthal, 98 Ga. 776, 25 S. E. 836; Petrie *v.* Steedly, 94 Ga. 196, 21 S. E. 512; Durham *v.* Hartlett, 32 Ga. 22 (where one partner had given his note for the bonus, and was compelled to pay it after dissolution, because the agreement of dissolution did not relieve him from liability thereon); Carlton *v.* Cummins, 51 Ind. 478 (where a partnership at will had continued more than a year, and it was held that no part of the bonus was recoverable, but it was said that an action will lie for a return of the bonus, when the other party has wholly failed or refused to comply with the contract); Swift *v.* Ward, 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302 (where a return was refused, although plaintiff had paid a bonus of three thousand one hundred dollars, and the partnership was to continue for ten years, unless sooner dissolved by mutual consent, or by written notice given by one partner to the other, where after fifteen months plaintiff's health broke down, and he was obliged to leave the state, when the other partner gave written notice of dissolution, provided for in the partnership articles); Boughner *v.* Black, 83 Ky. 521, 4 Am. St. Rep. 174 (partner released from paying his note given for the bonus, because he was induced to give the note and become a partner by the fraudulent conduct of the payee); Gaty *v.* Tyler, 33 Mo. App. 494. The general rule is that, where a partnership is created for a specified time and determined by a dissolution by mutual consent before the expiration of that time, then, in the absence of a provision in the original articles of agreement for return of any part of the premium or bonus paid when the partnership was formed on any contingency, the party who paid it is not entitled

In such a case a return would be ordered in England, even when the partnership is one at will.[17]

c. **Partial Accounting.** One partner cannot maintain an action against his copartners for an accounting as to particular items or transactions.[18] Nor, while the partnership continues, will a court of equity interfere to settle accounts and state the balance between the partners, except where the complaining partner establishes a case of extreme necessity;[19] for it is not the office of a court to enter into a consideration of partnership squabbles and attempt to right them.[20] But partners may make a partial settlement by arbitration at any time.[21]

d. **Good-Will of Firm.** This constitutes a part of the firm's assets,[22] and, upon dissolution, every partner is entitled to have it converted into cash and included in the firm's accounts,[23] unless by his agreement or conduct he has precluded himself from asserting such right.[24] In computing the value of the good-will of a decedent's business at the time of his death, the basis should be the annual profits before his death.[25] In particular circumstances, as in a case where it is shown

to the return of any part of it, unless the dissolution agreement so provides. Crouse *v.* McCandless, 121 Ill. App. 237 [*affirmed* in 220 Ill. 344, 77 N. E. 202]. Where parties have agreed to dissolve a partnership but have left the terms of dissolution for further agreement between themselves, upon their failing to agree, a court of equity will fix such terms and, in such connection, will inquire into the matters preceding the agreement by which the dissolution was effected, will examine the contract of partnership to ascertain if there was any fraud in its inception, and consider such other matters as will aid it in making an equitable adjustment. Crouse *v.* McCandless, *supra.* See also *supra,* V, A, 3.

Reconveyance of real estate conveyed as bonus at a certain valuation see McCandless *v.* Crouse, 220 Ill. 344, 77 N. E. 202.

17. English Partn. Act (1890), § 41; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237, 44 Eng. Reprint 1285 [*affirming* 1 Giffard 355, 4 Jur. N. S. 999, 6 Wkly. Rep. 509, 65 Eng. Reprint 954]; Jauncey *v.* Knowles, 29 L. J. Ch. 95, 1 L. T. Rep. N. S. 116, 8 Wkly. Rep. 69. See *supra,* V, A, 3.

18. Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476; Walmsley *v.* Mendelsohn, 31 La. Ann. 152; Davis *v.* Davis, 60 Miss. 615, 620, an attempt to force an accounting as to a particular plantation, while ignoring the accounts of the general business of the firm, which failed, the court saying: "It is no more competent for a partner to do this, ignoring the state of accounts as to the general business, than it would be to seek an account and a decree for the profits of one year, disregarding the losses of preceding and succeeding ones."

19. Lord *v.* Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484 [*reversing* 80 N. Y. App. Div. 194, 80 N. Y. Suppl. 321 (*affirming* 37 Misc. 83, 74 N. Y. Suppl. 711)]; Fairthorne *v.* Weston, 3 Hare 387, 8 Jur. 353, 13 L. J. Ch. 263, 64 Rev. Rep. 342, 25 Eng. Ch. 387, 67 Eng. Reprint 432. In Lindley Partn. (7th ed.) 537, these exceptional cases are classified as follows: "(1) Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all."

20. Wray *v.* Hutchinson, 3 L. J. Ch. 62, 2 Myl. & K. 235, 7 Eng. Ch. 235, 39 Eng. Reprint 934; Knebell *v.* White, 5 L. J. Exch. 98, 2 Y. & C. Exch. 15, 47 Rev. Rep. 329.

21. Kendrick *v.* Tarbell, 26 Vt. 416.

22. See *supra,* VII, A, 5; VIII, K, 2.

23. Rice *v.* Baggot, 4 Silv. Sup. (N. Y.) 383, 7 N. Y. Suppl. 518; Williams *v.* Wilson, 4 Sandf. Ch. (N. Y.) 379; Rammelsberg *v.* Mitchell, 29 Ohio St. 22.

Dissolution by death.— When dissolution of a partnership is caused by the death of one of the partners, the same principles apply for the disposal of the good-will as in other cases of dissolution, where no agreement has been made by the parties concerning it. Matter of Silkman, 121 N. Y. App. Div. 202, 105 N. Y. Suppl. 872 [*affirmed* in 190 N. Y. 560, 83 N. E. 1131].

24. Douthart *v.* Logan, 190 Ill. 243, 60 N. E. 507; McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107 (lost by agreeing to leave the firm at the end of a year); Smith *v.* Wood, 12 N. Y. Suppl. 724 (holding that a secret partner loses the right to an accounting for the good-will by permitting the accounting partner to conduct the business in his individual name); Van Dyke *v.* Jackson, 1 E. D. Smith (N. Y.) 419 (similar to preceding case); Smith *v.* Greer, 7 Ont. L. Rep. 332 (where such right was lost by laches); O'Keefe *v.* Curran, 17 Can. Sup. Ct. 596 [*reversing* 15 Ont. 84 (*affirming* 15 Ont. App. 103)] (where the right was forfeited by misconduct, as agreed in partnership articles).

25. Matter of Silkman, 121 N. Y. App. Div. 202, 105 N. Y. Suppl. 872 [*affirmed* in 190 N. Y. 560, 83 N. E. 1131].

that the business has long been conducted at a loss, etc., the good-will of a firm may not have any pecuniary value.[26]

e. Claims Between Partners and Firm and Between Copartners. Upon a final accounting and settlement of firm affairs, valid claims by any partner against the firm upon firm transactions are to be credited to him;[27] and valid claims by the firm upon a partner are to be charged against him.[28] The same rule applies to claims between partners which are veritable partnership transactions;[29] and these, in England, include claims for the repayment of premiums.[30] But claims growing out of individual transactions between partners and having nothing to do with partnership affairs are not to be included in the partnership accounting.[31] As between the partners themselves, however, when the rights of creditors are not involved, it has been held that an individual indebtedness from one partner to another may be deducted from a partnership balance due from the latter to the former.[32]

f. Transactions Subsequent to Dissolution. If these are connected with the winding up of the firm affairs, or with the completion of contracts entered into before dissolution and binding upon the firm thereafter, they are to be included in the final settlement between the partners.[33] If the transactions consist in the

26. Farwell *v.* Huling, 132 Ill. 112, 23 N. E. 438, holding that the evidence that a partnership had been conducted less than a year at a heavy loss does not warrant a finding that the good-will is of any value, in the absence of evidence that the name of the firm or the location of the store had any special value.

27. Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16 (where the claim was for money paid by the claimant in satisfaction of firm debts); Gandolfo *v.* Appleton, 40 N. Y. 533; Whittle *v.* McFarlane, 1 Knapp 311, 12 Eng. Reprint 338 (where the claim was not valid, being for commissions on claims collected by him for his firm); Lawton Saw Co. *v.* Machum, 2 N. Brunsw. Eq. 191 (where a partner was held not entitled to claim for depreciation in value of machinery the use of which he contributed to the firm).

28. *District of Columbia.*— Cooper *v.* Olcott, 1 App. Cas. 123, where, however, the claim was too indefinite and vague to be allowed.

Illinois.— Scroggs *v.* Cunningham, 81 Ill. 110.

Kentucky.— Francis *v.* Shearer, 16 S. W. 365, 17 S. W. 165, 13 Ky. L. Rep. 283, indebtedness to firm for firm property lost through his negligence.

Missouri.— Silver *v.* St. Louis, etc., R. Co., 72 Mo. 194 [*affirming* 5 Mo. App. 381].

New York.— Tygart *v.* Wilson, 39 N. Y. App. Div. 58, 56 N. Y. Suppl. 827, holding, however, that a duplicate payment of a firm bill by mistake of a partner is not to be charged to him unless he was grossly negligent.

Pennsylvania.— Brown *v.* McFarland, 41 Pa. St. 129, 80 Am. Dec. 598.

England.— Partn. Act (1890), §§ 29, 30 (compelling a partner to account for the profits derived by him in a business which is competitive with that of the firm, or from transactions concerning the partnership); Hancock *v.* Heaton, 22 Wkly. Rep. 784 [*affirming* 30 L. T. Rep. N. S. 592, 22 Wkly. Rep. 592].

Canada.— Wright *v.* Kane, (Nov. Sc.) Cass. Dig. 596.

See 38 Cent. Dig. tit. "Partnership," § 695.

29. Royster *v.* Johnson, 73 N. C. 474.

30. Atwood *v.* Maude, L. R. 3 Ch. 369, 16 Wkly. Rep. 665; Edmonds *v.* Robinson, 29 Ch. D. 170, 54 L. J. Ch. 586, 52 L. T. Rep. N. S. 339, 33 Wkly. Rep. 471; Astle *v.* Wright, 23 Beav. 77, 2 Jur. N. S. 849, 25 L. J. Ch. 864, 4 Wkly. Rep. 764, 53 Eng. Reprint 30; Mackenna *v.* Parkes, 36 L. J. Ch. 366, 15 L. T. Rep. N. S. 500, 15 Wkly. Rep. 217; Andrews *v.* Jones, 12 L. T. Rep. N. S. 229. See *supra*, IX, C, 2, b.

31. *Florida.*— Nims *v.* Nims, 23 Fla. 69, 1 So. 527.

Illinois.— Berry *v.* Powell, 18 Ill. 98.

Massachusetts.— Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359.

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227.

New Hampshire.— Reid *v.* McQuesten, 61 N. H. 421.

New York.— Caldwell *v.* Leiber, 7 Paige 483.

Tennessee.— Looney *v.* Gillenwaters, 11 Heisk. 133.

See 38 Cent. Dig. tit. "Partnership," § 695.

32. Jones *v.* Jones, 23 Ark. 212; Parker *v.* Parker, 65 Barb. (N. Y.) 205.

33. *California.*— Little *v.* Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89, where the rule was applied to the conduct of a lawsuit by the surviving partner in a firm of attorneys.

Illinois.— Davenport *v.* Henderson, 47 Ill. 74.

Massachusetts.— Perkins *v.* Stern, 152 Mass. 518, 25 N. E. 969; Tyng *v.* Thayer, 8 Allen 391.

Michigan.— Thompson *v.* Noble, 108 Mich. 19, 65 N. W. 563, holding the solvent partner not liable for loss occasioned by mortgaging firm property to secure a valid firm

use of firm property by one or more partners, such partners must account to the others therefor.[34] Other transactions between partners after dissolution, although they may have some connection with the former partnership and may give rise to individual liability from one to the other, are not to be included in the partnership accounting.[35]

g. Matters Connected With Previous Partnerships. These cannot be brought into an accounting,[36] unless the parties thereto have by agreement or conduct made them a part of the affairs of the firm which is in process of settlement.[37]

3. Determination and Disposition of Share of Partners — a. Inventory and Valuation of Assets. The value of a partner's share is determinable by converting the firm's assets into cash,[38] paying the liabilities of the firm, and striking a balance. The proportion of such balance to which he is entitled under the partnership agreement constitutes his share.[39] This method of determining the value of a partner's share is often modified by agreement;[40] and a partner who has prevented the sale of firm assets, or their accurate valuation, may be charged with their fair value.[41] At times statutes provide for an inventory and appraisement of

debt, and its subsequent sale for less than its value.

Pennsylvania.— Harris *v.* Rosenberg, 161 Pa. St. 367, 29 Atl. 44.

South Carolina.— Carrere *v.* Whaley, 17 S. C. 595, surviving partner not accountable for the entire fee collected in a case commenced before the other's death, but prosecuted and finished thereafter.

England.— McClean *v.* Kennard, L. R. 9 Ch. 336, 43 L. J. Ch. 323, 30 L. T. Rep. N. S. 186, 22 Wkly. Rep. 382.

See 38 Cent. Dig. tit. "Partnership," § 696.

34. Ligare *v.* Peacock, 109 Ill. 94; Freeman *v.* Freeman, 136 Mass. 260; McGraw *v.* Dole, 63 Mich. 1, 29 N. W. 477; Chittenden *v.* Witbeck, 50 Mich. 401, 15 N. W. 526; Pine *v.* Ormsbee, 2 Abb. Pr. N. S. (N. Y.) 375; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209.

35. *Connecticut.*— Patterson *v.* Kellogg, 53 Conn. 38, 22 Atl. 1096.

Maryland.— Goodburn *v.* Stevens, 5 Gill 1.

Michigan.— Candler *v.* Stange, 53 Mich. 479, 19 N. W. 154; Chittenden *v.* Witbeck, 50 Mich. 401, 15 N. W. 526.

New York.—Tennant *v.* Guy, 3 N. Y. Suppl. 697.

England.— Broughton *v.* Broughton, 44 L. J. Ch. 526, 23 Wkly. Rep. 770.

Canada.— Cane *v.* Macdonald, 10 Brit. Col. 444; O'Lone *v.* O'Lone, 2 Grant Ch. (U. C.) 125.

See 38 Cent. Dig. tit. "Partnership," § 696.

36. Beeson's Appeal, 1 Pa. Cas. 465, 2 Atl. 683; Nicholson *v.* Kinsey, (Tenn. Ch. App. 1896) 38 S. W. 1033.

37. Burchard *v.* Boyce, 21 Ga. 6; Toulmin *v.* Copland, 3 Y. & C. Exch. 625 [*affirmed* in 7 Cl. & F. 349, 7 Eng. Reprint 1102, West. 164, 9 Eng. Reprint 459].

38. Partition see *supra*, V, C, 1, g.

39. Sigourney *v.* Munn, 7 Conn. 11; Austin *v.* Da Rocha, 23 La. Ann. 44; Moore *v.* Huntington, 17 Wall. (U. S.) 417, 21 L. ed. 642; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413, 61 Eng. Reprint 992; English Partn. Act (1890), § 39.

40. *Massachusetts.*— Chapin *v.* Chapin, (1894) 36 N. E. 746; Leach *v.* Leach, 18 Pick. 68.

Missouri.— Quinlivan *v.* English, 42 Mo. 362.

New Jersey.— Van Horn *v.* Van Horn, (Ch. 1890) 20 Atl. 826, manifest errors may be corrected, so as to make the appraised valuation conform to the terms of the agreement.

New York.— Marquand *v.* New York Mfg. Co., 17 Johns. 525, an agreed valuation is binding, although the property may thereafter decline in value.

Pennsylvania.— Holloway *v.* Frick, 149 Pa. St. 178, 24 Atl. 201, construing the language of the agreement.

Texas.— Veck *v.* Culbertson, (Civ. App. 1897) 42 S. W. 253, the agreed valuation is binding in the absence of fraud.

England.— Bell *v.* Barnett, 21 Wkly. Rep. 119.

See 38 Cent. Dig. tit. "Partnership," § 698.

41. *Connecticut.*— Gillett *v.* Hall, 13 Conn. 426.

Kentucky.— Thomas *v.* Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. Rep. 1502, every presumption is against the partner who should have kept the firm books but did not.

Louisiana.— Bush *v.* Guion, 6 La. Ann. 797, claims against firm debtors who are not shown to be insolvent are to be treated as cash in the hands of a partner who has taken possession of them.

Mississippi.— Randle *v.* Richardson, 53 Miss. 176, but if the partner, having claims for collection, gives evidence that they were largely on insolvent persons, he should not be charged with their face value.

New Jersey.— Phillips *v.* Reeder, 18 N. J. Eq. 95.

New York.— Turner *v.* Weston, 133 N. Y. 650, 31 N. E. 91 [*affirming* 16 N. Y. Suppl. 772]; White *v.* Reed, 124 N. Y. 468, 26 N. E. 1037 [*modifying* 58 N. Y. Super. Ct. 33, 11 N. Y. Suppl. 575].

Pennsylvania.— Hay's Appeal, 91 Pa. St. 265; Barclay's Appeal, 5 Pa. Cas. 26, 8 Atl. 169; Crawford *v.* Spotz, 11 Phila. 255.

the assets of the firm upon dissolution.[42] If any part of the firm's assets is valueless, it is not to be included in determining a partner's share.[43] On the other hand, if a partner has contributed property of any kind to the firm he is to be credited with its agreed price,[44] or, if no agreement has been made, with its fair valuation.[45]

b. Discharge of Firm Obligations. As stated in the foregoing paragraph, these are to be paid out of the firm assets, before any partner's share can be ascertained, and therefore before any partner is entitled to any part of the assets.[46] These obligations include items of indebtedness of the firm to a partner;[47] and upon these he is entitled to receive interest, if his copartners have agreed that he shall have interest.[48] In some jurisdictions an agreement for interest will be implied, whenever his copartners assent to his advances for the firm.[49]

c. Apportionment of Losses. If the assets of the firm are insufficient to pay

Rhode Island.—Evans *v.* Weatherhead, 24 R. I. 394, 53 Atl. 286.

Virginia.— Stinson *v.* Barley, (1892) 14 S. E. 531.

See 38 Cent. Dig. tit. "Partnership," § 698.

42. Matter of Champion, 2 Ohio S. & C. Pl. Dec. 388, 2 Ohio N. P. 385, applying Rev. St. §§ 3167, 3169, as amended by Act (1890), c. 87, p. 97.

43. Douthart *v.* Logan, 190 Ill. 243, 60 N. E. 507 [*affirming* 86 Ill. App. 294], where certain leases were of no value as firm assets because of their peculiar provisions.

44. Wolf *v.* Levi, 33 S. W. 418, 17 Ky. L. Rep. 1024; Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904; Goldman *v.* Rosenberg, 116 N. Y. 78, 22 N. E. 259 (the agreement of a partner to receive back factory buildings and premises, at the price for which he contributed them to the firm, will not be enforced against him after the destruction of the buildings by fire); Leonard *v.* Martin, 52 Barb. (N. Y.) 113; Cooke *v.* Benbow, 3 De G. J. & S. 1, 6 New Rep. 135, 68 Eng. Ch. 1, 46 Eng. Reprint 538.

45. Flagg *v.* Stowe, 85 Ill. 164; Frierson *v.* Morrow, (Tenn. Ch. App. 1898) 48 S. W. 245.

46. *Indiana.*— Powell *v.* Bennett, 131 Ind. 465, 30 N. E. 518; Page *v.* Thompson, 33 Ind. 137.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506.

Louisiana.— Mourain *v.* Delamarre, 2 La. Ann. 142; Akin *v.* Oakey, 10 Rob. 410; Tyler *v.* His Creditors, 9 Rob. 372; Claiborne *v.* His Creditors, 13 La. 279; Ward *v.* Brandt, 11 Mart. 331, 13 Am. Dec. 352.

Maryland.— Conkling *v.* Washington University, 2 Md. Ch. 497.

Minnesota.— Pease *v.* Rush, 2 Minn. 107.

Mississippi.— Gaines *v.* Coney, 51 Miss. 323; Stewart *v.* Burkhalter, 28 Miss. 396.

New Jersey.— Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415.

New York.— Woolverton *v.* Austin, 57 N. Y. App. Div. 347, 68 N. Y. Suppl. 47.

South Carolina.— White *v.* Union Ins Co., 1 Nott & M. 556, 9 Am. Dec. 726.

See 38 Cent. Dig. tit. "Partnership," § 699.

47. *Florida.*— Nims *v.* Nims, 23 Fla. 69, 1 So. 527; Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Illinois.— Snell *v.* De Land, 136 Ill. 533, 27 N. E. 183; Heffron *v.* Gore, 40 Ill. App. 257.

Kentucky.— Whitney *v.* Whitney, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465, 88 S. W. 311, 27 Ky. L. Rep. 1197; Bales *v.* Ferrell, 49 S. W. 759, 20 Ky. L. Rep. 1564.

Maryland.— Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60; Keiley *v.* Turner, 81 Md. 269, 31 Atl. 700 (where partner's salaries were held claims against the partnership under provisions of the partnership articles); Holloway *v.* Turner, 61 Md. 217.

Nevada.— Beck *v.* Thompson, 22 Nev. 368, 40 Pac. 516, such debt is satisfied when repaid to the creditor partner out of the firm funds, although he is an equal partner.

New Hampshire.— Mason *v.* Gibson, 73 N. H. 190, 60 Atl. 96.

New York.— Leserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869; Rodgers *v.* Clement, 15 N. Y. App. Div. 561, 44 N. Y. Suppl. 516 [*reversed* on other grounds in 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342].

Pennsylvania.— Christman *v.* Baurichter, 10 Phila. 115.

Virginia.— Robertson *v.* Read, 17 Gratt. 544.

United States.— Henderson *v.* Ries, 108 Fed. 709, 47 C. C. A. 625, certain sums paid by one partner in this case were not advances under the terms of the partnership.

England.— Bury *v.* Allen, 1 Coll. 589, 66 Rev. Rep. 200, 28 Eng. Ch. 589, 63 Eng. Reprint 556.

See 38 Cent. Dig. tit. "Partnership," § 701.

48. Young *v.* Barras, 74 Mich. 343, 42 N. W. 42. In Thomas *v.* Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. Rep. 1502, interest was allowed on payments made out of his own funds by a partner, after dissolution, although in that state interest is not allowed on advances made during the existence of the firm, unless there is an actual agreement between the partners therefor. See Lee *v.* Lashbrooke, 8 Dana (Ky.) 214. See also *infra*, IX, C, 4, b.

49. Folsom *v.* Marlette, 23 Nev. 459, 49 Pac. 39; Rodgers *v.* Clement, 162 N. Y. 422,

its debts, including its debts to the partners for their contributions of capital, the losses thus ascertained are to be borne by the partners in the proportion in which they are entitled to share profits,[50] unless by the agreement of the parties losses are to be apportioned in a different manner.[51] In some jurisdictions it is held that a partner who furnishes labor as his part of the capital cannot be required to bear any part of the loss of his copartner's contribution, which was in money.[52] Losses due to a partner's breach of the partnership contract, or to his gross negligence, are to be borne by him exclusively.[53]

d. Repayment of Capital. The capital furnished by any party is, in the absence of agreement to the contrary,[54] a debt owing by the firm to the contributing partner; and accordingly it is to be repaid to him, if the firm assets are sufficient, after paying the firm's liabilities to outsiders and to the partners for

56 N. E. 901, 76 Am. St. Rep. 342; *Ex p.* Shepherd, 3 Tenn. Ch. 189. See *infra*, IX, C, 4, b.

50. *Georgia.*— Houston *v.* Polk, 124 Ga. 103, 52 S. E. 83.

Illinois.— Taft *v.* Schwamb, 80 Ill. 289.

Maine.— Bradbury *v.* Smith, 21 Me. 117.

Maryland.— Julliard *v.* Orem, 70 Md. 465, 17 Atl. 333.

Massachusetts.— Moley *v.* Brine, 120 Mass. 324; Whitcomb *v.* Converse, 119 Mass. 38, 20 Am. Rep. 311, holding that, in the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of a partnership even if one contributes the whole capital and the other nothing but his labor.

New Hampshire.— Raymond *v.* Putnam, 44 N. H. 160.

New York.— Gansevoort *v.* Kennedy, 30 Barb. 279; Hasbrouck *v.* Childs, 3 Bosw. 105.

Pennsylvania.— Emerick *v.* Moir, 124 Pa. St. 498, 17 Atl. 1; Knox *v.* Sprecher, 68 Pa. St. 415.

Tennessee.— Shea *v.* Donahue, 15 Lea 160, 54 Am. Rep. 407.

Wisconsin.— Wipperman *v.* Stacy, 80 Wis. 345, 50 N. W. 336; Edwards *v.* Remington, 60 Wis. 33, 18 N. W. 404.

United States.— Hellebush *v.* Coughlin, 37 Fed. 294.

England.— Partn. Act (1890), § 44 (a); *In re* Albion L. Assur. Soc., 16 Ch. D. 83, 43 L. T. Rep. N. S. 524, 29 Wkly. Rep. 109; Nowell *v.* Nowell, L. R. 7 Eq. 538; Collins *v.* Jackson, 31 Beav. 645, 54 Eng. Reprint 1289.

Canada.— Foster *v.* Chaplin, 19 Grant Ch. (U. C.) 251.

See 38 Cent. Dig. tit. "Partnership," § 700; and *supra*, V, A, 20; *infra*, IX, D, 12, d.

51. *Georgia.*— Under a partnership agreement, providing that, if the business of running a plantation should be a failure, then one of the partners should be charged with two thirds of the expense of the crop and the other partner one third of the expense, where the partnership resulted in loss, the proceeds of the business should be first deducted from the expense account and two thirds of the actual loss charged to one partner and one third to the other. Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64. Although ordinarily, in the absence of an agreement to that effect in the contract of partnership, a partner is not liable on an accounting, subsequently to a dissolution of the firm, for a depreciation in the value of the manufacturing plant which is the subject of the partnership, but the loss caused by the depreciation must be borne by the partnership, yet under a contract limiting the duration of the contract to one year, and allowing certain partners to retire at that time and receive one-half the profits the retiring partners are entitled to an accounting for their share of the profits. McConnell *v.* Stubbs, 124 Ga. 1038, 53 S. E. 698.

Illinois.— Taylor *v.* Coffing, 18 Ill. 422, where the agreement bound the partners to share the losses equally.

Maryland.— Baker *v.* Baltimore Safe Deposit, etc., Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. Rep. 463.

Massachusetts.— Woelfel *v.* Thompson, 173 Mass. 301, 53 N. E. 819 (losses to be borne equally); Leach *v.* Leach, 18 Pick. 68.

New York.— Jones *v.* Butler, 87 N. Y. 613 [*affirming* 23 Hun 367].

England.— *Ex p.* Barber, L. R. 5 Ch. 687, 23 L. T. Rep. N. S. 230, 18 Wkly. Rep. 940; Wood *v.* Scoles, L. R. 1 Ch. 369, 12 Jur. N. S. 555, 35 L. J. Ch. 547, 14 Wkly. Rep. 621; *In re* Aldridge, [1894] 2 Ch. 97, 63 L. J. Ch. 465, 70 L. T. Rep. N. S. 724, 8 Reports 189, 42 Wkly. Rep. 409; Gillan *v.* Morrison, 1 De G. & Sm. 421, 11 Jur. 861, 63 Eng. Reprint 1131.

See 38 Cent. Dig. tit. "Partnership," § 700; and *supra*, V, A, 20; *infra*, IX, D, 12, d.

52. Meadows *v.* Mocquot, 110 Ky. 220, 61 S. W. 28, 22 Ky. L. Rep. 1646; Rau *v.* Boyle, 5 Bush (Ky.) 253; Heran *v.* Hall, 1 B. Mon. (Ky.) 159, 35 Am. Dec. 178; Everly *v.* Durborrow, 8 Phila. (Pa.) 93.

53. Bonis *v.* Louvrier, 8 La. Ann. 4; Tygart *v.* Wilson, 39 N. Y. App. Div. 58, 56 N. Y. Suppl. 827.

54. Groth *v.* Kersting, 23 Colo. 213, 47 Pac. 393; Scutt *v.* Robertson, 127 Ill. 135, 19 N. E. 851, (1888) 17 N. E. 14; Wood *v.* Scoles, L. R. 1 Ch. 369, 12 Jur. N. S. 555, 35 L. J. Ch. 547, 14 Wkly. Rep. 621; Lawton Saw Co. *v.* Machum, 2 N. Brunsw. Eq. 191.

advances or loans, to repay the entire capital;[55] and if insufficient, then his ratable proportion is to be repaid.[56] This right to have a ratable proportion applied to the repayment of a partner's capital may be contracted away by a partner, or lost by his conduct.[57]

e. Contribution Between Partners. Whenever a partner has been compelled to pay the liabilities of the firm out of his own funds, and there are no firm assets with which to indemnify him, he is entitled to have his copartners contribute toward his indemnification, so that all shall be put on a footing of equality.[58] In the absence of an agreement to the contrary, it is to be presumed that the partners are to contribute equally;[59] but if they have agreed to share the profits in fixed proportions, whether these are equal or unequal, they are presumed to intend to contribute in the same proportions.[60] If one or more of the partners are insol-

55. *Illinois.*— Bullock *v.* Ashley, 90 Ill. 102; Pearce *v.* Pearce, 77 Ill. 284.

Indiana.— Jackson *v.* Crapp, 32 Ind. 422.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Kentucky.— Thomas *v.* Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. Rep. 1502. If the partners were to put in equal amounts of capital, but one contributes more than the other, this excess is to be first repaid, and the balance equally divided. Chamberlain *v.* Sawyers, 32 S. W. 475, 17 Ky. L. Rep. 716.

Louisiana.— Frigerio *v.* Crottes, 20 La. Ann. 351.

Massachusetts.— Livingston *v.* Blanchard, 130 Mass. 341; Whitcomb *v.* Converse, 119 Mass. 38, 20 Am. Rep. 311; Leach *v.* Leach, 18 Pick. 68.

New York.— Jones *v.* Butler, 87 N. Y. 613 [*affirming* 23 Hun 367] (where one partner had contributed fifteen thousand dollars and the other three thousand dollars as capital, and the court ordered one-half the excess of the first partner's contribution paid to him); Neudecker *v.* Kohlberg, 3 Daly 407.

Pennsylvania.— Rowland *v.* Miller, 7 Phila. 362.

South Carolina.— Wilson *v.* Wilson, 74 S. C. 30, 54 S. E. 227.

Texas.— Johnston *v.* Ballard, 83 Tex. 486, 18 S. W. 686; Washington *v.* Washington, (Civ. App. 1895) 31 S. W. 88.

See 38 Cent. Dig. tit. "Partnership," § 702.

56. Hasbrouck *v.* Childs, 3 Bosw. (N. Y.) 105; English Partn. Act (1890), § 40 (b), 3.

57. Kibby *v.* Kimball, 63 Iowa 665, 19 N. W. 825 (where defendant partners bought out the other, paying for his share by their assumption of the firm's debts); Neudecker *v.* Kohlberg, 3 Daly (N. Y.) 407 (holding that an accounting between copartners is to be governed by the copartnership agreement, and the right to a return of capital invested by each partner is only to be destroyed by an express contrary stipulation; and, unless waived by agreement, the return of capital or other means furnished by each for use and employment in the business, is, as between them, an obligation of the partnership, which must be discharged before any final disposition of the profits); Shea *v.* Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Escallier *v.* Baines, 40 Wash. 176, 82 Pac. 181 (lost by misconduct).

58. *California.*— Civ. Code, § 1432.

Illinois.— Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289.

Indiana.— Warring *v.* Hill, 89 Ind. 497, where he was held entitled to full indemnity from defendant, as he had paid his share of the firm's indebtedness to defendant, and later was compelled to pay a debt to a firm creditor.

Kentucky.— Tibbetts *v.* Magruder, 9 Dana 79; Noel *v.* Bowman, 2 Litt. 46; Turner *v.* Turner, 5 S. W. 457, 9 Ky. L. Rep. 456.

Louisiana.— Maginnis *v.* Crosby, 11 La. Ann. 400; Flower *v.* Millaudon, 19 La. 185.

Michigan.— Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

Minnesota.— Bohrer *v.* Drake, 33 Minn. 408, 23 N. W. 840.

Missouri.— Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17 (but not entitled to contribution until after a settlement has been reached and it is clear that he has paid more than his share and cannot have it credited to him on the firm accounts); Cockrell *v.* Thompson, 85 Mo. 510.

New York.— Mendez *v.* Schleuter, 9 N. Y. Suppl. 278, holding, however, that one partner cannot call on another for contribution, when there are sufficient firm assets to repay him in full.

Ohio.— Gardner *v.* Conn, 34 Ohio St. 187.

Pennsylvania.— Wall *v.* Fife, 37 Pa. St. 394 (but this right of contribution does not exist between tenants in common, although they are partners in other transactions); Kelly *v.* Kauffman, 18 Pa. St. 351.

Tennessee.— Isler *v.* Outlaw, 4 Humphr. 118.

Wisconsin.— Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022 (contribution allowed before final settlement); Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769.

England.— Partn. Act (1890), § 24; *Ex p.* Good, 5 Ch. D. 46, 46 L. J. Bankr. 65, 35 L. T. Rep. N. S. 554, 25 Wkly. Rep. 83 (no partnership and hence no right of contribution); Sedgwick *v.* Daniell, 2 H. & N. 319, 27 L. J. Exch. 116 (when the item has been separated from partnership affairs, contribution is allowed before a settlement).

See 38 Cent. Dig. tit. "Partnership," § 155.

59. English Partn. Act (1890), § 24 (1).

60. Flagg *v.* Stowe, 85 Ill. 164; Whitcomb

vent or outside the jurisdiction, the solvent and resident partners are to contribute as though there were no others.[61] This right of contribution has been based by some authorities on the actual agreement of the partics when entering into the partnership relation, although such agreement is not express.[62] Others prefer to treat it as resulting from an obligation imposed by law.[63] There is no doubt that the right may be modified or negatived by the contract of the partners,[64] or by the conduct of the one claiming the right.[65]

f. Division of Personal Assets. As stated in a former paragraph, all the personal assets of a firm are to be converted into cash, upon the firm's dissolution, and what remains, after paying firm debts, is to be distributed among the partners.[66] But if the rights of firm creditors are not harmed thereby, the partners may divide firm assets in specie between them.[67] An equal partnership is always presumed;[68] but this presumption may be and often is rebutted by evidence of an express or implied agreement between the partners that their shares shall be unequal.[69] Whether their shares are equal or unequal, if a partner is indebted to the firm, such indebtedness is to be paid by him, before his share is ascertainable; or if it is not actually paid, it is to be treated as a firm asset and deducted from

v. Converse, 119 Mass. 38, 20 Am. Rep. 311; *In re* Albion L. Assur. Soc., 16 Ch. D. 83, 43 L. T. Rep. N. S. 523, 29 Wkly. Rep. 109; English Partn. Act (1890), § 44 (a).

61. Whitcomb *v.* Converse, 119 Mass. 38, 20 Am. Rep. 311; Whitman *v.* Porter, 107 Mass. 522; Scott *v.* Bryan, 96 N. C. 289, 3 S. E. 235; Henry *v.* Jackson, 37 Vt. 431; *Ex p.* Plowden, 2 Deac. 456, 3 Mont. & A. 402.

62. Sells *v.* Hubbell, 2 Johns. Ch. (N. Y.) 394; Wright *v.* Hunter, 1 East 20, 5 Ves. Jr. 792, 31 Eng. Reprint 861.

63. Pollock Dig. Partn. (5th ed.) 72.

64. McCormick *v.* Stofer, 12 S. W. 151, 11 Ky. L. Rep. 398; Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659; McFadden *v.* Leeka, 48 Ohio St. 513, 28 N. E. 874; Magilton *v.* Stevenson, 173 Pa. St. 560, 34 Atl. 235.

65. Morris *v.* Neel, 78 Ga. 797, 3 S. E. 643 (where the loss was due to the fact that plaintiff had contributed unsound property, when he should have contributed sound property); Clayton *v.* Davett, (N. J. Ch. 1897) 38 Atl. 308 (where the loss was due to plaintiff's individual tort); Thomas *v.* Atherton, 10 Ch. D. 185, 48 L. J. Ch. 370, 40 L. T. Rep. N. S. 77.

66. McCormick *v.* Bailey, 17 W. Va. 585. See *supra*, IX, C, 3, a.

67. *Alabama.*— Donelson *v.* Posey, 13 Ala. 752.

Kentucky.— Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Maryland.— Turner *v.* Turner, 98 Md. 22, 55 Atl. 1023.

Missouri.— Miller *v.* Hale, 96 Mo. App. 427, 70 S. W. 258.

New Jersey.— Ratzer *v.* Ratzer, 28 N. J. Eq. 136.

North Carolina.— Jones *v.* Jones, 36 N. C. 332; Taylor *v.* Taylor, 6 N. C. 70.

Pennsylvania.— Christman *v.* Baurichter, 10 Phila. 115.

Tennessee.— McAlister *v.* Montgomery, 3 Hayw. 94.

England.— Nelson *v.* Bealby, 30 Beav. 472, 5 L. T. Rep. N. S. 599, 54 Eng. Reprint 973 [*affirmed* in 4 De G. & J. 321, 8 Jur. N. S. 397, 5 L. T. Rep. N. S. 736, 65 Eng. Ch. 248, 45 Eng. Reprint 1207].

See 38 Cent. Dig. tit. "Partnership," § 703.

Decree making division in kind.— In Harper *v.* Lamping, 33 Cal. 641, the court approved a judgment decreeing a division of firm property in kind, where there were no debts to be paid, and such division was as fair to the partners as a sale and division of the proceeds.

68. *Alabama.*— Sloan *v.* Wilson, 117 Ala. 583, 23 So. 145.

Illinois.— McKee *v.* Cowles, 161 Ill. 201, 43 N. E. 785 [*affirming* 59 Ill. App. 28].

Indiana.— Curry *v.* Burnett, 36 Ind. 102.

Iowa.— Proper *v.* Lambert, (1903) 95 N. W. 251.

Massachusetts.— Leach *v.* Leach, 18 Pick. 68.

Canada.— Langlois *v.* Dubray, 17 Quebec Super. Ct. 328.

See 38 Cent. Dig. tit. "Partnership," § 703.

69. *Illinois.*—Adams *v.* Gordon, 98 Ill. 598.

Louisiana.—Klotz *v.* Macready, 39 La. Ann. 638, 2 So. 203.

Minnesota.— Brandt *v.* Edwards, 91 Minn. 505, 98 N. W. 647.

Nebraska.— Krigbaum *v.* Vindquest, 10 Nebr. 435, 6 N. W. 631.

New Jersey.— Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536.

New York.— Parks *v.* Comstock, 59 Barb. 16.

Pennsylvania.— McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962.

South Carolina.— Wilson *v.* Wilson, 74 S. C. 30, 54 S. E. 227, holding that where a partnership was formed in parol, each party contributing unequal amounts to the partnership assets, on dissolution of the partnership the assets should be distributed between the persons in proportion to the amount originally contributed by each.

United States.— Chouteau *v.* Barlow, 110 U. S. 238, 3 S. Ct. 620, 28 L. ed. 132.

See 38 Cent. Dig. tit. "Partnership," § 703.

his share.[70] This rule only applies, of course, in the absence of an agreement to the contrary.[71]

g. Division of Firm Realty. That real estate may be acquired by a firm and held as a part of the firm assets is no longer open to doubt.[72] When it is so acquired and held, and upon dissolution it is not needed to pay firm debts, the partners may divide it between them.[73] In this country such surplus realty of the firm may be partitioned by judicial decree,[74] in the absence of an agreement between the partners for its out and out conversion into personalty.[75] When improvements are made upon firm realty by a partner, he is entitled to be treated as a creditor of the firm therefor.[76]

h. Ascertainment and Division of Profits. In the absence of a special agreement on the subject,[77] the profits of the firm upon its dissolution [78] are the balance remaining after the payment of all its debts, including its liabilities to its members for advances and for capital.[79] Such balance is to be treated as firm profits, although a part of it has been gained by a receiver of the firm, or by a liquidating

70. Corbin *v.* Henry, 36 Ind. App. 184, 74 N. E. 1096; Leserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869; Lyons *v.* Lyons, 207 Pa. St. 7, 56 Atl. 54 (where the interest of one partner was attached by his individual creditor, and the liquidating partner, it was held, was not bound to pay over his share to him, until the attachment was determined); Binney *v.* Mutric, 12 App. Cas. 160, 36 Wkly. Rep. 129; Ross *v.* White, [1894] 3 Ch. 326, 64 L. J. Ch. 48, 71 L. T. Rep. N. S. 277, 7 Reports 42. Under a partnership agreement, each partner was to sustain one half of the loss, and on settlement each would have been entitled to one half of the remainder of the proceeds of the stock after the payment of debts. One of the partners, without authority, withdrew from the bank certain of the partnership funds and departed, thereafter writing the other partner, turning the stock of goods over to him, with directions to sell and pay the debts, retaining all that he had paid into the firm, and turn the balance, if any, over to the wife and child of the absent partner. Partly from the fact that the absent partner had abandoned the business, and that the remainder of the goods on hand were sold at loss, there was not a sufficient balance after payment of the debts to pay the remaining partner the amount that he had put into the firm. It was held that he should have received the whole of the proceeds of the goods. Greenwell *v.* Negley, 101 S. W. 961, 31 Ky. L. Rep. 144.

71. Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525.

72. See *supra*, IV, E.

73. Carpenter *v.* Hathaway, 87 Cal. 424, 25 Pac. 549; Cooper *v.* Frederick, 4 Greene (Iowa) 403.

74. *Kentucky.*— Chambers *v.* Chambers, 11 S. W. 469, 11 Ky. L. Rep. 25.

Michigan.—Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166; Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Thayer *v.* Lane, Walk. 200. Where each of the partners in a firm holds the legal title to the land forming a part of the firm assets, the land is subject to the partnership obligations, and on the dissolution of the firm it may be divided by compulsory partition, if it be shown that it will not be required to satisfy firm debts. Chase *v.* Angell, (1906) 108 N. W. 1105.

Missouri.— Collins *v.* Warren, 29 Mo. 236.

North Carolina.— Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

Oregon.— Burnside *v.* Savier, 6 Oreg. 154, the surviving partner is not entitled to make a partition without authority from the court.

United States.— Holton *v.* Guinn, 65 Fed. 450, an action for partition cannot be turned into an action for a partnership accounting and settlement.

See 38 Cent. Dig. tit. "Partnership," § 704. See also *supra*, IV, E.

75. See *supra*, IV, E, 8.

76. Cooper *v.* Frederick, 4 Greene (Iowa) 403; Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

77. Molineaux *v.* Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Braun's Appeal, 105 Pa. St. 414, where a part of the profits was added to the capital, during the progress of the firm.

78. The division of profits during the life of the firm is generally governed by the partnership articles or by the mutual understanding of the partners. O'Connor *v.* Stark, 2 Cal. 153; Safe Deposit, etc., Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023.

79. *California.*— Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Connecticut.— Lacon *v.* Davenport, 16 Conn. 331.

Illinois.— Norris *v.* Rogers, 107 Ill. 148; Cox *v.* Pierce, 22 Ill. App. 43, where the partner who had sold firm goods and appropriated the proceeds was charged with the cost price thereof and the net profits thereon.

Indiana.— Smith *v.* Hazelton, 34 Ind. 481, a partner who has not paid in his agreed share of the capital is not entitled to share equally in the firm assets.

Kentucky.— Clift *v.* Stockdon, 4 Litt. 215.

Massachusetts.—Washburn *v.* Goodman, 17 Pick. 519.

New York.— Oppe *v.* Webensdorfer, 7 N. Y. St. 283.

Ohio.— Gill *v.* Geyer, 15 Ohio St. 399; Meyer *v.* Oberhelman, 6 Ohio Dec. (Reprint) 1151, 10 Am. L. Rec. 686.

or a surviving partner, after dissolution, or even by a partner who has wrongfully excluded his copartner from the business.[80] But profits made by a partner after he has become the individual owner of the former assets of the firm or of a part of them are not firm profits;[81] nor are profits made by some of the partners after dissolution of a partnership at will, where no part of the assets of the old firm have been used by them.[82] When firm profits are shown to exist, every partner is entitled to share in them,[83] unless he has disposed of or has forfeited this right,[84]

Oregon.—Woldenberg *v.* Berg, 45 Oreg. 291, 77 Pac. 873.

Rhode Island.— Smith *v.* Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602.

Texas.— Russell *v.* Nail, 79 Tex. 664, 15 S. W. 635, where the question whether fees, earned during the partnership in a litigation begun before its formation, formed a part of the firm's assets was held a question for the jury.

Utah.— Knauss *v.* Cahoon, 7 Utah 182, 26 Pac. 295.

Vermont.— Brigham *v.* Dana, 29 Vt. 1.

England.— Partn. Act (1890), § 44; Dinham *v.* Bradford, L. R. 5 Ch. 519; Badham *v.* Williams, 86 L. T. Rep. N. S. 191.

See 38 Cent. Dig. tit. "Partnership," §§ 707–709.

Deduction of bad accounts.— The losses incurred in the prosecution of a business which are to be deducted in ascertaining the net profits of such business necessarily include such accounts as are to be treated as bad and uncollectable. McCulsky *v.* Klosterman, 20 Oreg. 108, 25 Pac. 366, 10 L. R. A. 785.

80. *California.*— Osment *v.* McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Clark *v.* Jones, 50 Cal. 425.

Illinois.— Kimball *v.* Lincoln, 5 Ill. App. 316.

Iowa.— Varnum *v.* Winslow, 106 Iowa 287, 76 N. W. 708.

Louisiana.— Oteri *v.* Oteri, 37 La. Ann. 74; Dowling *v.* Gally, 33 La. Ann. 893.

Massachusetts.— Freeman *v.* Freeman, 142 Mass. 98, 7 N. E. 710.

Michigan.— Hughes *v.* Love, 136 Mich. 169, 98 N. W. 977, 138 Mich. 281, 101 N. W. 536; Major *v.* Todd, 84 Mich. 85, 47 N. W. 841.

Mississippi.—Berry *v.* Folkes, 60 Miss. 576.

New Jersey.— Hartman *v.* Woehr, 18 N. J. Eq. 383.

New York.— Tolan *v.* Carr, 12 Daly 520.

North Carolina.— Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

Ohio.— Durbin *v.* Barber, 14 Ohio 311, holding that if a court of equity fix upon an antecedent time at which a partnership shall be considered as having determined, and it appear that the capital of one partner was subsequently employed by another, who continued to carry on the business, the former is entitled to such proportion of the profits as his capital thus retained bears to the whole capital.

Pennsylvania.— Smith *v.* Ervin, 3 Pa. Dist. 485; Fithian *v.* Jones, 12 Phila. 201.

West Virginia.— Cole *v.* Moxley, 12 W. Va. 730; McMahon *v.* McClernan, 10 W. Va. 419.

England.— Lambert *v.* Lambert, L. R. 16 Eq. 320, 43 L. J. Ch. 106, 21 Wkly. Rep. 748 [*affirmed* in 29 L. T. Rep. N. S. 878, 22 Wkly. Rep. 359]; Willett *v.* Blanford, 1 Hare 253, 6 Jur. 274, 11 L. J. Ch. 182, 23 Eng. Ch. 253, 66 Eng. Reprint 1027; Cook *v.* Collingridge, Jac. 607, 1 L. J. Ch. O. S. 74, 23 Rev. Rep. 155, 767, 4 Eng. Ch. 607, 37 Eng. Reprint 979.

See 38 Cent. Dig. tit. "Partnership," § 707 *et seq.*

Compare Whitesides *v.* Lafferty, 3 Humphr. (Tenn.) 150, holding that profits made by one partner with firm funds, while receiver of the firm, are not to be accounted for as firm profits.

Contra.— McMahon *v.* McClernan, 10 W. Va. 419.

81. *Connecticut.*— Patterson *v.* Kellogg, 53 Conn. 38, 22 Atl. 1096.

Delaware.— Reybold *v.* Dodd, 1 Harr. 401, 26 Am. Dec. 401.

New Jersey.— Phillips *v.* Reeder, 18 N. J. Eq. 95.

New York.— White *v.* Reed, 124 N. Y. 468, 26 N. E. 1037; White *v.* White, 55 N. Y. Super. Ct. 417, 14 N. Y. St. 738.

Pennsylvania.—Plumly's Appeal, (1889) 16 Atl. 728; Plumly *v.* Plumly, 6 Pa. Co. Ct. 72.

See 38 Cent. Dig. tit. "Partnership," § 707 *et seq.*

Compare Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Civ. App. 1899) 50 S. W. 1058].

82. Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259], partnership leasing a place and giving bicycle races.

83. *Nevada.*— Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

New Jersey.— Hartman *v.* Woehr, 18 N. J. Eq. 383.

New York.— King *v.* Leighton, 100 N. Y. 386, 3 N. E. 594; Wight *v.* Wood, 85 N. Y. 402; Thomas *v.* Rogers, 8 N. Y. St. 284.

Virginia.— Garrett *v.* Bradford, 28 Gratt. 609.

Wisconsin.— Singer *v.* Heller, 40 Wis. 544, but neither partner is entitled to damages, measured by anticipated profits, for a premature dissolution of the firm, when the dissolution is due to misconduct on both sides.

See 38 Cent. Dig. tit. "Partnership," § 707 *et seq.*; and *supra*, V, A, 19.

84. White *v.* Reed, 124 N. Y. 468, 26 N. E. 1037 (disposed of); Yoos *v.* Doyle, 4 Lack. Leg. N. (Pa.) 128 (forfeited by ceasing to participate in firm affairs); Taylor *v.* Hutchinson, 25 Gratt. (Va.) 536, 18 Am. Rep. 699

and such right passes to his personal representatives or assigns.[85] This statement does not apply, however, to those partnerships which are engaged in a business which is under the ban of the law.[86] But an innocent partner in a lawful business cannot be beaten out of his share of the profits by his copartner, because the latter has increased the profits by cheating customers.[87] All partners are entitled to share equally in the firm profits,[88] unless this right is varied, as it frequently is, by the express or implied agreement of the partners.[89]

i. Compensation For Services in Winding Up. The rule which denies to a partner a right to compensation for services rendered to his firm during its life, save in exceptional circumstances,[90] is generally applied in this country to partners who render services after dissolution in winding up the affairs of the firm.[91] The reason assigned for this rule is that, after the dissolution as before, each partner is acting in his own interest, and pursuant to a duty implied from the nature of the partnership relation, in conducting the firm's affairs; and these affairs extend to the collection of assets and the winding up of the business.[92] In England it

(forfeited by having drawn out his capital and having no property interest in firm).

85. Kimball *v.* Lincoln, 5 Ill. App. 316; Goodburn *v.* Stevens, 5 Gill (Md.) 1.

86. Watson *v.* Murray, 23 N. J. Eq. 257; Lane *v.* Thomas, 37 Tex. 157. See *supra*, III, A, 3, b. So far as Pfeuffer *v.* Maltby, 54 Tex. 454, 38 Am. Rep. 631; Pfeiffer *v.* Maltby, 38 Tex. 523; Brooks *v.* Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732, and Wann *v.* Kelley, 5 Fed. 584, 2 McCrary 628, are inconsistent with the doctrine stated in the text, they cannot be considered authoritative, since Wiggins *v.* Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837, and McMullen *v.* Hoffman, 174 U. S. 639, 19 S. Ct. 839, 43 L. ed. 1117. See also *supra*, III, A, 1, d, (II).

87. Pennington *v.* Todd, 47 N. J. Eq. 569, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589.

88. Van Housen *v.* Copeland, 180 Ill. 74, 54 N. E. 169 [*affirming* 79 Ill. App. 139]; Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506; Randle *v.* Richardson, 53 Miss. 176; Webster *v.* Bray, 7 Hare 159, 27 Eng. Ch. 159, 68 Eng. Reprint 65; English Partn. Act (1890), § 24 (1). And see *supra*, V, A, 19.

89. *Arkansas.*— Moore *v.* Trieber, 31 Ark. 113.

California.— Little *v.* Caldwell, 112 Cal. 27, 44 Pac. 340.

Maryland.— Fleischmann *v.* Gottschalk, 70 Md. 523, 17 Atl. 384; Welsh *v.* Canfield, 60 Md. 469.

New York.— *In re* Laney, 119 N. Y. 607, 23 N. E. 1143 [*affirming* 50 Hun 15, 2 N. Y. Suppl. 443]; Davenport *v.* Morrissey, 14 N. Y. App. Div. 586, 44 N. Y. Suppl. 29 [*affirmed* in 154 N. Y. 782, 49 N. E. 782]; Gimpel *v.* Wilson, 10 Misc. 153, 30 N. Y. Suppl. 942; Conville *v.* Shook, 24 N. Y. Suppl. 547 [*affirmed* in 144 N. Y. 686, 39 N. E. 405].

England.— Binney *v.* Mutrie, 12 App. Cas. 160, 36 Wkly. Rep. 129; Straker *v.* Wilson, L. R. 6 Ch. 503, 40 L. J. Ch. 630, 24 L. T. Rep. N. S. 763, 29 Wkly. Rep. 761; Browne *v.* Collins, L. R. 12 Eq. 586; Peacock *v.* Peacock, 2 Campb. 45; Bell *v.* Barnett, 21 Wkly. Rep. 119.

See 38 Cent. Dig. tit. "Partnership," § 707 *et seq.*; and *supra*, V, A, 19.

90. See *supra*, V, A, 17.

91. *Alabama.*— Shelton *v.* Knight, 68 Ala. 598.

California.— Civ. Code, § 2413.

Illinois.— Kimball *v.* Lincoln, 5 Ill. App. 316.

Iowa.—McFarland *v.* McCormick, 114 Iowa 368, 86 N. W. 369.

Massachusetts.— Dunlap *v.* Watson, 124 Mass. 305.

Michigan.— Loomis *v.* Armstrong, 49 Mich. 521, 14 N. W. 505; Heath *v.* Waters, 40 Mich. 457.

Nebraska.— Lamb *v.* Wilson, 3 Nebr. (Unoff.) 496, 92 N. W. 167.

New York.— Burgess *v.* Badger, 82 Hun 488, 31 N. Y. Suppl. 614; Coursen *v.* Hamlin, 2 Duer 513.

Ohio.— Hellman *v.* Mendel, 6 Ohio Dec. (Reprint) 829, 8 Am. L. Rec. 360.

Pennsylvania.— Stockdale *v.* Maginn, 207 Pa. St. 226, 56 Atl. 439; Jennings' Case, 157 Pa. St. 630, 27 Atl. 532; Shriver's Appeal, 118 Pa. St. 427 note, 12 Atl. 553; Robertson *v.* Schwenk, 18 Pa. Co. Ct. 577.

Tennessee.—Brien *v.* Harriman, 1 Tenn. Ch. 467.

Virginia.— Forrer *v.* Forrer, 29 Gratt. 134.

West Virginia.— Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Hyre *v.* Lambert, 37 W. Va. 26, 16 S. E. 446.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11.

England.— Macdonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 10 L. T. Rep. N. S. 166, 65 Eng. Reprint 833; Whittle *v.* McFarlane, 1 Knapp 311, 12 Eng. Reprint 338; Partn. Act (1890), § 24 (6), providing that no partner shall be entitled to remuneration for acting in the partnership business subject to any agreement express or implied.

Canada.— Liggett *v.* Hamilton, 24 Can. Sup. Ct. 665.

See 38 Cent. Dig. tit. "Partnership," § 710; and *supra*, VIII, I, 2.

92. Hoag *v.* Alderman, 184 Mass. 217, 68 N. E. 199; Ames *v.* Downing, 1 Bradf. Surr. (N. Y.) 321; Brown *v.* McFarland, 41 Pa. St.

was held before the present statute[93] that the rule did not apply to a partner carrying on the business after dissolution.[94] As this rule rests upon the implied intention of the parties in entering into the partnership, it will not be applied when the parties have expressly agreed that compensation may be had;[95] nor if the circumstances show an implied agreement for compensation.[96] And the courts are disposed to give compensation for services which have proved exceptionally beneficial,[97] as well as for extra services imposed upon one partner by the indefensible misconduct of his copartner.[98]

j. Allowanee For Expenses in Winding Up. A partner who incurs a liability or expends money in winding up the affairs of the firm is entitled to be credited therewith on the final accounting, and to be indemnified by his copartners therefor, provided he has acted reasonably in the performance of his duties as a winding-up partner,[99] and in a lawful manner.[1]

k. Right to Firm-Name, Good-Will, and Books of Account. The nature of the good-will of a firm,[2] and the rights and duties of the surviving partner respecting it,[3] have been considered. We are now to consider the rights of partners to the good-will of the firm, including the use of the firm-name, after dissolution between living partners. Such good-will is undoubtedly an asset of the firm which each partner is entitled to have converted into cash,[4] unless it is shown

129, 80 Am. Dec. 598; Beatty *v.* Wray, 19 Pa. St. 516, 57 Am. Dec. 677.

93. See the provision of the state, *supra*, note 91.

94. Featherstonhaugh *v.* Turner, 25 Beav. 382, 28 L. J. Ch. 812, 53 Eng. Reprint 683; Brown *v.* De Tastet, Jac. 284, 23 Rev. Rep. 59, 4 Eng. Ch. 284, 37 Eng. Reprint 858; Crawsbay *v.* Collins, 2 Russ. 325, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358, 15 Ves. Jr. 218, 10 Rev. Rep. 61, 33 Eng. Reprint 736; Lindley Partn. (7th ed.) p. 427, expresses the opinion that this is still the rule notwithstanding the statute.

95. Gray *v.* Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; Pierce *v.* Cubberly, 19 Ind. 157; Garretson *v.* Brown, 185 Pa. St. 447, 40 Atl. 293.

96. *Connecticut.*— Utley *v.* Smith, 24 Conn. 290, 63 Am. Dec. 163.

Illinois.— Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145 [*affirming* 61 Ill. App. 336].

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506; Clement *v.* Ditterline, 11 S. W. 658, 11 Ky. L. Rep. 294.

New Jersey.— Hutchinson *v.* Onderdonk, 6 N. J. Eq. 277 [*reversed* on the facts in 6 N. J. Eq. 632].

Vermont.— Bradley *v.* Chamberlin, 16 Vt. 613.

See 38 Cent. Dig. tit. "Partnership," § 710.

97. Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145 [*affirming* 61 Ill. App. 337]; Thayer *v.* Badger, 171 Mass. 279, 50 N. E. 541; Lamb *v.* Wilson, 3 Nebr. (Unoff.) 496, 92 N. W. 167; McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962; Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647.

98. Mattingly *v.* Stone, 35 S. W. 921, 18 Ky. L. Rep. 187; Clement *v.* Ditterline, 11 S. W. 658, 11 Ky. L. Rep. 294; Airey *v.* Borham, 29 Beav. 620, 4 L. T. Rep. N. S. 391, 54 Eng. Reprint 768.

99. *Illinois.*— Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3 [*affirming* 29 Ill. App. 358], moneys expended in defending a suit brought against the firm after dissolution.

Massachusetts.— Tyng *v.* Thayer, 8 Allen 391, the liquidating partners have the right to use their best judgment in incurring expenses, which seem to them reasonable and necessary in closing up the affairs.

New Hampshire.— Converse *v.* Hobbs, 64 N. H. 42, 5 Atl. 832, moneys paid to take care of a firm note.

Ohio.— Rockefeller *v.* Morehouse, 4 Ohio Dec. (Reprint) 247, 1 Clev. L. Rep. 158, expenses of a suit in tort against the firm after dissolution.

Pennsylvania.— *In re* Kalbfell, 27 Pittsb. Leg. J. N. S. 210, expenditures for purchases to make the firm stock more salable.

Texas.— Bufford *v.* Ashcroft, 72 Tex. 104, 10 S. W. 346, costs of a suit defended in good faith by the liquidating partner.

Vermont.— Fish *v.* Thompson, 68 Vt. 273, 35 Atl. 174 (but liability to indemnify the liquidating partner does not extend to an assignee of a copartner's interest who does not make himself a copartner); Porter *v.* Wheeler, 37 Vt. 281.

United States.— Lewis *v.* Loper, 54 Fed. 237, applying the Pennsylvania doctrine that a liquidating partner may bind his copartners by borrowing money for liquidating purposes.

See 38 Cent. Dig. tit. "Partnership," § 711.

1. Pratt *v.* McHatton, 11 La. Ann. 260, holding that partners in a lease of the penitentiary can make no contract for the use or hire of negro convicts, except in the employments required by law; that any contract for any other use is against public policy and cannot be enforced; and that all items for such services, in the liquidation of the partnership, must be struck from the account between partners.

2. See *supra*, VII, A, 5.

3. See *supra*, VIII, K.

4. *Massachusetts.*— Griffith *v.* Kirley, 189 Mass. 522, 76 N. E. 201; Moore *v.* Rawson,

that the good-will in the particular case is worthless.[5] It must be confessed that the rights of the purchaser of a firm's good-will are not satisfactorily settled at present. He acquires the right to hold himself out as the successor of the firm, to the exclusion of any of the old partners.[6] He is also entitled to use the old firm-name, provided always that such use does not subject any of the old partners to the risk of liability for the purchaser's debts.[7] But in this country he is probably not entitled to prevent a former partner from carrying on business in a firm style which includes his own name, although it may be substantially the style of the old firm,[8] unless the conduct of such old partner is calculated to deceive the public into believing that, when dealing with him, it is dealing with the purchaser.[9] In the absence of an agreement to the contrary,[10] each member of a partnership is entitled to have access to the firm books, and to inspect and copy any of them.[11]

4. Interest — a. On Capital. A partner is not entitled to interest on capital which he contributes to the firm, although his contribution is greatly in excess of that of his copartners,[12] unless they have agreed that he may have interest.[13]

185 Mass. 264, 70 N. E. 64 (holding that where a partnership has been in existence for a time long enough to establish a business sufficiently permanent in character to include not only its customers but the incidents of locality and distinctive name, a good-will exists which forms an asset of commercial value in a winding up between the partners); McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358 (that it is difficult of appraisal is no reason for denying to an outgoing partner its value).

Nebraska.— Sheppard *v.* Boggs, 9 Nebr. 257, 2 N. W. 370.

New York.— Slater *v.* Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796 [*modifying* 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363]; Read *v.* Mackay, 47 Misc. 435, 95 N. Y. Suppl. 935; Dayton *v.* Wilkes, 17 How. Pr. 510.

Ohio.— Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657.

England.— Townsend *v.* Jarman, [1900] 2 Ch. 698, 69 L. J. Ch. 823, 83 L. T. Rep. N. S. 366, 49 Wkly. Rep. 158.

See 38 Cent. Dig. tit. "Partnership," § 712.

5. Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382; Dyer *v.* Shove, 20 R. I. 259, 38 Atl. 498; Rice *v.* Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769.

6. Holbrook *v.* Nesbitt, 163 Mass. 120, 39 N. E. 794; Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, 70 Eng. Reprint 385.

7. Slater *v.* Slater, 175 N. Y. 141, 69 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796; Steinfeld *v.* National Shirt Waist Co., 99 N. Y. App. Div. 286, 90 N. Y. Suppl. 964; Macdonald *v.* Trojan Button-Fastener Co., 10 N. Y. Suppl. 91 [*affirming* 9 N. Y. Suppl. 383], Listman Mill Co. *v.* William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; Menendez *v.* Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. ed. 526; Horton Mfg. Co. *v.* Horton Mfg. Co., 18 Fed. 816 (a partnership which is permitted by one to use his name in its firm style has no right to sell such permission to a corporation); Banks *v.* Gibson, 34 Beav. 566, 11 Jur. N. S. 680, 34 L. J. Ch. 591, 13 Wkly. Rep. 1012, 55 Eng. Reprint 753; Scott *v.* Rowland, 26 L. T. Rep. N. S. 391, 20 Wkly. Rep. 508.

8. Iowa Seed Co. *v.* Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446; Lathrop *v.* Lathrop, 47 How. Pr. (N. Y.) 532; Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510.

9. Morgan *v.* Schuyler, 79 N. Y. 490, 493, 35 Am. Rep. 543 (where it is said that "he had the exclusive right to occupy the rooms of the late firm, and as incident thereto, the benefit of that good will, which Lord Eldon defines, in Cruttwell *v.* Lye, 17 Ves. Jr. 335, 11 Rev. Rep. 98, 34 Eng. Reprint 129, 'as the probability that the old customers will resort to the old place' . . . but it is after all a very different thing from the good will which may be said to attach to the person of a professional man, as the result of confidence in his skill and ability. The first is of no value except to the occupant of the place . . . while the latter is inseparable from the person"); Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47.

10. Davis *v.* Davis, 10 N. Y. Suppl. 897.

11. See *supra*, V, A, 14.

12. *Maryland.*— Julliard *v.* Orem, 70 Md. 465, 17 Atl. 333.

Minnesota.— St. Paul Trust Co. *v.* Finch, 52 Minn. 342, 54 N. W. 190.

New York.— Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342.

Pennsylvania.— Brenner *v.* Carter, 10 Pa. Dist. 457.

Canada.— Wilson *v.* McCarty, 13 Can. L. J. N. S. 303; Jardine *v.* Hope, 19 Grant Ch (U. C.) 76.

See *supra*, V, A, 8.

13. Taft *v.* Schwamb, 80 Ill. 289; Keiley *v.* Turner, 81 Md. 269, 31 Atl. 700; Wells *v.* Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Barfield *v.* Loughborough, L. R. 8 Ch. 1, 42 L. J. Ch. 179, 27 L. T. Rep. N. S. 499, 21 Wkly. Rep. 86; Ibbotson *v.* Elam,

Even when such an agreement exists, interest stops with the dissolution of the firm.[14]

b. On Advances and Overdrafts. When a partner makes an advance or loan to his firm for partnership purposes, it seems fair that he should receive interest thereon,[15] and, when he overdraws his account or borrows money from the firm he should be charged with interest on such amount,[16] even though no express agreement has been made on the subject. This rule has been formulated in the English Partnership Act.[17] In some of our jurisdictions, however, interest is not allowed on advances in the absence of an agreement therefor.[18]

c. On Balances. A partner is not allowed interest on fluctuating balances during partnership, unless there is an agreement with his copartners therefor.[19] On balances in his hands after a dissolution, he will be charged with interest only when there is an agreement therefor,[20] when he has retained the money an

L. R. 1 Eq. 188, 33 Beav. 594, 12 Jur. N. S. 114, 14 Wkly. Rep. 241, 55 Eng. Reprint 1027. And see *supra*, V, A, 8.

14. St. Paul Trust Co. *v.* Finch, 52 Minn. 342, 54 N. W. 190 (holding that capital does not bear interest in the absence of an express agreement, or a usage of the firm to allow it; and, even where there is an agreement that interest shall be allowed thereon, it ceases to operate at dissolution, as its earning capacity has ceased, and it is then resolved into property held only for distribution); Lesserman *v.* Bernheimer, 10 N. Y. St. 47; Wayne *v.* Hinkle, 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282.

15. *Illinois.*— McCall *v.* Moss, 112 Ill. 493, where, however, an understanding was shown that interest should be paid.

Kentucky.— Wolf *v.* Levi, 33 S. W. 418, 17 Ky. L. Rep. 1024, where prompt payment of firm debts was necessary, and the partner who borrowed money with which to pay was allowed interest.

Louisiana.— Hoss' Succession, 42 La. Ann. 1022, 8 So. 833.

Maryland.— Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60; Keiley *v.* Turner, 81 Md. 269, 31 Atl. 700.

Massachusetts.— Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

New York.— Dougherty *v.* Van Nostrand, Hoffm. 68.

Ohio.— Wayne *v.* Hinkle, 20 Cinc. L. Bul. 19 [*affirming* 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282].

Texas.— Bufford *v.* Ashcroft, 72 Tex. 104, 10 S. W. 346, but he ought not to have credit for interest paid by him on a firm debt after the date at which he had agreed to discharge it.

See 38 Cent. Dig. tit. "Partnership," §§ 713½, 714. And see *supra*, V, A, 9; IX, C, 3, b.

16. McCall *v.* Moss, 112 Ill. 493; Atherton *v.* Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. Rep. 185.

17. English Partn. Act (1890), § 24 (3).

18. Prentice *v.* Elliott, 72 Ga. 154 (applying Code, § 2885); Lee *v.* Lashbrooke, 8 Dana (Ky.) 214; Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514. In Dinham *v.* Bradford, L. R. 5 Ch. 519, interest was not allowed on profits left by a partner in the business. In Holloway *v.* Turner, 61 Md. 217, no interest was allowed on a payment by a partner to his son, for services rendered to the firm, the partner not demanding reimbursement until a settlement of the firm. And in Masury *v.* Whiton, 6 N. Y. St. 697, the partner who paid a firm debt before maturity was allowed interest only from maturity. See *supra*, V, A, 7, 9; IX, C, 3, b.

19. *California.*— Falkner *v.* Hendy, 80 Cal. 636, 22 Pac. 401.

Iowa.—McFarland *v.* McCormick, 114 Iowa 368, 86 N. W. 369.

Massachusetts.— Bradley *v.* Brigham, 137 Mass. 545.

Pennsylvania.— Van Loon *v.* Lindsay, 12 Luz. Leg. Reg. N. S. 93.

England.— Barfield *v.* Loughborough, L. R. 8 Ch. 1, 42 L. J. Ch. 179, 27 L. T. Rep. N. S. 499, 21 Wkly. Rep. 86.

See *supra*, V, A, 7, b.

20. *Georgia.*— Wilson *v.* Wilkinson, 97 Ga. 814, 25 S. E. 908.

Kentucky.— Ashbrook *v.* Ashbrook, 28 S. W. 660, 18 Ky. L. Rep. 593; Turner *v.* Turner, 5 S. W. 457, 9 Ky. L. Rep. 456.

Mississippi.— Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690.

Missouri.— Campbell *v.* Coquard, 93 Mo. 474, 6 S. W. 360 (holding that in an action for settlement of a partnership which had been terminated, leaving a balance in the hands of defendant, and also a large amount of unsettled business outstanding, it was not error for the referee to charge defendant ten per cent interest from the termination of the business, on plaintiff's share of the fund in his hands, having allowed him ten per cent on the unsettled transactions); Gregory *v.* Menefee, 83 Mo. 413.

Rhode Island.— Smith *v.* Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890; Green *v.* Stacy, 90 Wis. 46, 62 N. W. 627; Carroll *v.* Little, 73 Wis. 52, 40 N. W. 582.

England.— Ewing *v.* Ewing, 8 App. Cas. 822; Pim *v.* Harris, Ir. R. 10 Eq. 442; Beater *v.* Murray, 19 Wkly. Rep. 92; Watney *v.* Wells, 9 Jur. N. S. 396, 32 L. J. Ch. 194, 1 New Rep. 82, 11 Wkly. Rep. 228.

See 38 Cent. Dig. tit. "Partnership," § 714.

unreasonable time,[21] when he is wrongfully withholding it,[22] or when there are other circumstances from which the court can conclude that interest should be allowed from the date of dissolution.[23]

5. Lien of a Partner. On the dissolution of a firm, each partner has an equitable lien on the firm assets for whatever is due to him from the firm,[24] after payment of firm debts.[25] A creditor partner has a like lien on the share of the

21. *Illinois.*— Beale *v.* Beale, (1885) 2 N. E. 65; Randolph *v.* Inman, 71 Ill. App. 176.

Kentucky.— Hite *v.* Hite, 1 B. Mon. 177.

Louisiana.—Klotz *v.* Macready, 39 La. Ann. 638, 2 So. 203.

Massachusetts.— Crabtree *v.* Randall, 133 Mass. 552; Dunlap *v.* Watson, 124 Mass. 305; Washburn *v.* Goodman, 17 Pick. 519.

New York.— Blun *v.* Mayer, 189 N. Y. 153, 81 N. E. 780 [*affirming* 113 N. Y. App. Div. 247, 99 N. Y. Suppl. 25] (as to which case see the note following); Johnson *v.* Hartshorne, 52 N. Y. 173.

Pennsylvania.— Steiger *v.* Bradley, 34 Wkly. Notes Cas. 123.

See 38 Cent. Dig. tit. "Partnership," § 714.

22. *Alabama.*— Christian, etc., Grocery Co. *v.* Hill, 122 Ala. 490, 26 So. 149.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Illinois.— Robbins *v.* Laswell, 58 Ill. 203.

Indiana.— Sanders *v.* Scott, 68 Ind. 130.

Kansas.— Turner *v.* Otis, 30 Kan. 1, 1 Pac. 19.

Kentucky.— Taylor *v.* Young, 2 Bush 428; Honore *v.* Colmesnil, 7 Dana 199; Bowling *v.* Dobyns, 5 Dana 434.

Missouri.— Powell *v.* Horrell, 92 Mo. App. 406.

New York.— White *v.* White, 55 N. Y. Super. Ct. 417, 14 N. Y. St. 738. Where on the day previous to the termination of a partnership by limitation a balance sheet and grand trial balance was made and entered upon the firm's books showing the interest of a retiring partner in the business, which interest was transferred to and taken over by defendants, who formed a new firm, conducted the same business and received all the benefits and profits of the capital of the retiring partner, it was held that interest was properly allowed on the balance found due in an action for an accounting brought by the retiring partner, continued by his representative and not decided until twenty-seven years thereafter, since the balance sheet may be regarded for all the purposes of the question of interest as an account stated, and, as the surviving partners for a long period received the benefit of the capital of the retiring partner it would be manifestly inequitable to relieve them from the obligation either to pay interest or account for the profits. Blun *v.* Mayer, 189 N. Y. 153, 81 N. E. 780 [*affirming* 113 N. Y. App. Div. 247, 99 N. Y. Suppl. 25].

Pennsylvania.— Ahl *v.* Ahl, 186 Pa. St. 99, 40 Atl. 405.

Texas.— Corralitos Co. *v.* Mackay, 31 Tex. Civ. App. 316, 72 S. W. 624.

See 38 Cent. Dig. tit. "Partnership," § 714.

23. *Iowa.*— Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14.

New York.— Leserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869; Johnson *v.* Hartshorne, 52 N. Y. 173; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Beacham *v.* Eckford, 2 Sandf. Ch. 116; Andrews *v.* Andrews, 3 Bradf. Surr. 99.

North Carolina.— Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514.

Pennsylvania.— Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382.

Tennessee.— Swepson *v.* Davis, (Ch. App. 1900) 60 S. W. 619.

England.— Hutcheson *v.* Smith, 5 Ir. Eq. 117.

See 38 Cent. Dig. tit. "Partnership," § 714.

Compound interest cannot be allowed upon balances in favor of one partner, but may be charged upon debits in cases of bad faith, refusal to account, or private use of the money of the firm, and the question of its propriety in such cases is one of fact for the trial court, whose decision is conclusive. Johnson *v.* Hartshorne, 52 N. Y. 173.

24. *Alabama.*— Donelson *v.* Posey, 13 Ala. 752.

California.— Gray *v.* Palmer, 9 Cal. 616.

Indiana.— Roberts *v.* McCarty, 9 Ind. 16, 68 Am. Dec. 604.

Iowa.— Pierce *v.* Wilson, 2 Iowa 20.

Kentucky.— Conwell *v.* Sandidge, 8 Dana 273; Hodges *v.* Holeman, 1 Dana 50.

Mississippi.— Dilworth *v.* Mayfield, 36 Miss. 40.

New Jersey.— Standish *v.* Babcock, 52 N. J. Eq. 628, 29 Atl. 327.

New York.— Wade *v.* Rusher, 4 Bosw. 537; Hooley *v.* Gieve, 9 Daly 104 [*affirmed* in 82 N. Y. 625]; Frith *v.* Lawrence, 1 Paige 434.

South Dakota.— Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

Tennessee.— Williams *v.* Love, 2 Head 80, 73 Am. Dec. 191.

United States.— Henderson *v.* Ries, 108 Fed. 709, 47 C. C. A. 625; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

See 38 Cent. Dig. tit. "Partnership," § 715 *et seq.*; and *supra*, V, A, 22.

25. Donelson *v.* Posey, 13 Ala. 752; Standish *v.* Babcock, 52 N. J. Eq. 628, 29 Atl. 327 [*reversed* on other grounds in 53 N. J. Eq. 376, 33 Atl. 385, 51 Am. St. Rep. 633, 30 L. R. A. 604]; Hooley *v.* Gieve, 9 Daly (N. Y.) 104 [*affirmed* in 82 N. Y. 625]; *Ex p.* Taylor, 12 Ch. D. 366, 41 L. T. Rep. N. S. 6, 28 Wkly. Rep. 205; *Ex p.* Delhasse, 7 Ch. D. 511, 38 L. T. Rep. N. S. 106, 26

debtor partner for any balance or claim incident to the partnership business.[26] He has no such lien, however, for a balance or claim arising from transactions outside the firm affairs, and which is not involved in partnership accounts.[27] Even when a partner is entitled to a lien, he may waive it or by his conduct lose its benefit.[28]

6. Private Accounting and Settlement — a. Validity and Construction. The members of a firm are perfectly competent to conduct a partnership accounting, without resort to a court of justice, and, even to settle the affairs of the firm without a formal accounting,[29] provided they do not defraud their creditors by such settlement.[30] In order that a private accounting shall bind all partners all must assent to it, and, in order that it may operate as a complete settlement of firm affairs, it must embrace all the partnership transactions.[31] When all partners have assented to a settlement of all of the firm's affairs upon a definite and clearly expressed basis, no difficulty is experienced by the courts in adjusting the rights of the parties under it.[32] But it often happens that the parties have not

Wkly. Rep. 338 [*affirming* 37 L. T. Rep. N. S. 440, 26 Wkly. Rep. 20]; *Ex p.* Macarthur, 40 L. J. Bankr. 86, 19 Wkly. Rep. 821.

26. *Alabama.*— Warren *v.* Taylor, 60 Ala. 218.

California.— Civ. Code, § 2405.

Illinois.— Mack *v.* Woodruff, 87 Ill. 570.

Maryland.— Karthaus *v.* Owings, 4 Harr. & J. 263.

Minnesota.— Brandt *v.* Edwards, 91 Minn. 505, 98 N. W. 647.

North Dakota.— Civ. Code, § 4377.

Vermont.— Fish *v.* Thompson, 68 Vt. 273, 35 Atl. 174.

England.— Partn. Act (1890), § 41; Mycock *v.* Beatson, 13 Ch. D. 384, 49 L. J. Ch. 127, 42 L. T. Rep. N. S. 141, 28 Wkly. Rep. 319; Payne *v.* Hornby, 25 Beav. 280, 53 Eng. Reprint 643.

See 38 Cent. Dig. tit. "Partnership," § 715 *et seq.*

27. Nichol *v.* Stewart, 36 Ark. 612; Moffat *v.* Thomson, 5 Rich. Eq. (S. C.) 155, 57 Am. Dec. 737.

28. Robertson *v.* Baker, 11 Fla. 192 (lost by partitioning the property between the partners, the creditor partner taking a mortgage on the assets which were turned over to the debtor partner); Kemmerer *v.* Kemmerer, 85 Iowa 193, 52 N. W. 194 (lost by the creditor partner's sale of his interest in the firm and of his judgment against the debtor partner); Wilhite *v.* Boulware, 88 Ky. 160, 10 S. W. 629, 11 Ky. L. Rep. 59 (lost by permitting the debtor partner to hold and to mortgage certain assets as his individual property); Wishek *v.* Hammond, 10 N. D. 72, 84 N. W. 587 (lost by assenting to a division of the assets between the partners).

29. Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640.

30. Sage *v.* Woodin, 66 N. Y. 578 (no fraud or mistake, hence settlement binding on firm creditors); *Ex p.* Walker, 4 De G. F. & J. 509, 6 L. T. Rep. N. S. 631, 10 Wkly. Rep. 656, 65 Eng. Ch. 396, 45 Eng. Reprint 1281; *Ex p.* Mayor, 4 De G. J. & S. 664, 11 Jur. N. S. 433, 34 L. J. Bankr. 25, 12 L. T. Rep. N. S. 254, 6 New Rep. 8, 13 Wkly. Rep. 629, 69 Eng. Ch. 508, 46 Eng. Reprint 1076 (fraudulent and void as to firm creditors); *Ex p.* Brewster, 22 L. J. Bankr. 62.

31. Chadsey *v.* Harrison, 11 Ill. 151; Cooper *v.* Frederick, 4 Greene (Iowa) 403; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Lamalere *v.* Caze, 14 Fed. Cas. No. 8,003, 1 Wash. 435.

32. *Iowa.*— Goodenow *v.* Parkinson, 67 Iowa 95, 24 N. W. 608.

Louisiana.— Kyle *v.* McKerrall, 52 La. Ann. 1235, 27 So. 667.

Maryland.— Dorsey *v.* Dashiell, 1 Md. 198.

Massachusetts.— Robinson *v.* Simmons, 156 Mass. 123, 30 N. E. 362.

Minnesota.— Blakely *v.* Le Duc, 22 Minn. 476.

Missouri.— Paul *v.* Edwards, 1 Mo. 30.

New York.— Smith *v.* Proskey, 177 N. Y. 526, 69 N. E. 1131 [*reversing* 82 N. Y. App. Div. 19, 81 N. Y. Suppl. 424 (*reversing* 39 Misc. 385, 79 N. Y. Suppl. 851)]; Gram *v.* Cadwell, 5 Cow. 489.

Pennsylvania.— Little *v.* Stanton, 32 Pa. St. 299; Hulse's Estate, 12 Phila. 130.

Vermont.— Brigham *v.* Dana, 29 Vt. 1.

West Virginia.— Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19.

England.— Jackson *v.* Stopherd, 2 Cromp. & M. 361, 3 L. J. Exch. 95, 4 Tyrw. 330, where the parties had agreed on the valuation of all the assets, and one partner had taken possession of them, and the other was held entitled to demand at once one half their value.

See 38 Cent. Dig. tit. "Partnership," § 718 *et seq.*

Action for amount found due on settlement. — In an action to recover a sum found due to plaintiff on a partnership settlement between the parties, it is not necessary to show that the firm debts were paid. Burley *v.* Brown, 73 Kan. 780, 85 Pac. 527. A complaint in such action alleging that plaintiff and defendant dissolved their partnership and settled the "business," but that defendant failed to pay the amount due plaintiff, is not objectionable on the ground that it does not allege the settlement of the partnership affairs. Burley *v.* Brown, *supra.*

Action on account stated.— After the disso-

stated the terms of their settlement with clearness nor fully disclosed their intentions as to the extent and operation of their settlement. In such cases, if a litigation ensues, the court is compelled to construe any writings upon the subject which have passed between the parties, and to interpret their conduct, in order to ascertain their intention.[33] Whether a settlement agreement between partners is

lution of a partnership one of the partners may maintain an action against the other upon an account stated, without showing that he has paid the partnership debts which he agreed to pay. Cochrane *v.* Allen, 58 N. H. 250.

Defenses and counter-claims in actions based on dissolution agreement.— Where plaintiff, after dissolution of a partnership existing between himself and defendant, sued to restrain defendant from using the firm-name in a similar business, and based his right of action on the dissolution agreement, it was held that a separate defense alleging that such agreement was signed by defendant's attorney in fact contrary to defendant's instructions, and was subsequently repudiated by defendant, was not demurrable. Bastable *v.* Carroll, 116 N. Y. App. Div. 205, 101 N. Y. Suppl. 637. It was held, however, that a special defense alleging that the attorney in fact was induced by plaintiff to sign the agreement by means of a sum of money paid to him by plaintiff was immaterial and demurrable; and further that an allegation in the answer that plaintiff directed the postmaster to deliver all mail directed to the firm to himself, and that plaintiff thereby obtained large quantities of mail belonging to defendant to his damage in a certain sum, was not available either as a defense or as a counter-claim. Bastable *v.* Carroll, *supra*.

33. *Alabama.*— Shows *v.* Folmar, 133 Ala. 599, 32 So. 495, where the evidence was held to disclose a final accounting and division of the proceeds.

Connecticut.— Hurlbut *v.* Phelps, 30 Conn. 42 (where the settlement agreement was held to discharge a debt due from petitioner to the surviving partner); Beach *v.* Hotchkiss, 2 Conn. 425 (holding that the payment by one partner to another of a certain sum as his share is not equivalent to a settlement of the partnership account; nor is it evidence that the same sum has been ascertained as the share of each partner, so that assumpsit will lie by a third partner).

Georgia.— Neal *v.* Conwell, 115 Ga. 471, 41 S. E. 607; Blalock *v.* Jackson, 94 Ga. 469, 20 S. E. 346; Thomas *v.* Gaboury, 80 Ga. 443, 7 S. E. 690, where the settlement was held to be a full and complete one.

Illinois.— Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868 (not a final settlement); Muhlheim *v.* Foster, 41 Ill. App. 458 (the continuing partner agreed to pay the retiring partner one thousand dollars for his share, as soon as the stock of goods was sold; but before they were sold they were destroyed by fire, and the continuing partner collected but one thousand six hundred and thirty-four dollars insurance, and yet he was held liable for the sum he had agreed to pay).

Indiana.— McDowell *v.* Nortb, 24 Ind. App. 435, 55 N. E. 789.

Iowa.— Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14; Corning *v.* Grohe, 65 Iowa 328, 21 N. W. 662; Murdock *v.* Mehlhop, 26 Iowa 213, where an indebtedness of the selling out partner was extinguished by the agreement of dissolution and settlement.

Louisiana.— Murphy *v.* Murphy, 45 La. Ann. 433, 12 So. 496; Burke *v.* Fuller, 41 La. Ann. 740, 6 So. 557, holding that a settlement between all the partners will be presumed to have included all matters of difference.

Maine.— Farnsworth *v.* Whitney, 74 Me. 370, holding that when partners settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefor a sum agreed upon, and assumes the payment of the partnership debts, the assignor's indebtedness to the firm and interest in it is extinguished.

Maryland.— Trump *v.* Baltzell, 3 Md. 295; Lilly *v.* Kroesen, 3 Md. Ch. 83.

Massachusetts.— Stoddard *v.* Wood, 9 Gray 90, holding that an outgoing partner who sells his share to the continuing partner is relieved from his precedent indebtedness to the firm.

Missouri.— *In re* Judy, 166 Mo. 13, 65 S. W. 993 (a surviving partner may make a settlement with himself as administrator of the deceased partner, subject to the approval of the probate court; and after such approval it is binding upon all interests); Bambrick *v.* Simms, 132 Mo. 48, 33 S. W. 445 (no settlement intended in this case).

New Jersey.— Martin *v.* Smith, (Ch. 1888) 13 Atl. 398, only a partial settlement.

New York.— Ralph *v.* Eldridge, 137 N. Y. 525, 33 N. E. 559 [*reversing* 58 Hun 203, 11 N. Y. Suppl. 840] (where a bond given by one partner to another was construed not to be a guaranty of debts due the firm named therein); Watts *v.* Adler, 130 N. Y. 646, 29 N. E. 131 [*reversing* 7 N. Y. Suppl. 564] (not a final settlement); Eno *v.* Diefendorf, 102 N. Y. 720, 7 N. E. 798 (not a final settlement); Hughes *v.* Smither, 23 N. Y. App. Div. 590, 49 N. Y. Suppl. 115 [*affirmed* in 163 N. Y. 553, 57 N. E. 1112] (holding that the doctrine as between debtor and creditor, of an implied promise to pay, resulting from the rendition of an account by one party which is received and retained by the other in silence, is not applicable to a partnership account); Burch *v.* Newberry, 1 Barb. 648 [*affirmed* in 10 N. Y. 374, Seld. 28] (a final settlement as to certain property of the firm); Sayre *v.* Peck, 1 Barb. 464; Weldon *v.* Beckel, 10 Daly 472; Applebee *v.* Duke, 13 N. Y. Suppl. 929 (not a final settlement);

valid depends upon the principles which determine the validity of contracts generally.[34]

b. When Conclusive. In the absence of fraud or mutual mistake, a private accounting and settlement between partners is conclusive upon them,[35] especially

Weber *v.* Defor, 8 How. Pr. 302 (complete transfer of firm assets to one of the partners).

Pennsylvania.— Seaton *v.* Shaner, 158 Pa. St. 69, 27 Atl. 871 (a settlement not shown); Wilson *v.* Fenimore, 2 Pa. Cas. 297, 3 Atl. 795 (final settlement shown).

South Carolina.— Schmidt *v.* Lebby, 11 Rich. Eq. 329, settlement not shown.

Tennessee.— Babb *v.* Mosby, 7 Lea 105 (only a partial settlement); Farrar *v.* Shepherd, 4 Baxt. 190 (a final settlement inferred from the conduct of the parties); Woodward *v.* Winfrey, 1 Coldw. 478 (a final settlement).

Texas.— Morris *v.* Nunn, 79 Tex. 125, 15 S. W. 220, where the conduct of the parties showed their intention to bring certain individual transactions into the partnership account.

Wisconsin.— Upton *v.* Johnston, 84 Wis. 8, 54 N. W. 266, a settlement shown.

United States.— Sanford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167, construction of agreement for readjustment of accounts as limited to particular items.

England.— *Ex p.* Barber, L. R. 5 Ch. 687, 23 L. T. Rep. N. S. 230, 18 Wkly. Rep. 940 (the deceased partner's estate entitled under the partnership contract to receive the value of his share as appearing by the balance sheet, without any deduction for losses subsequently ascertained); Lawes *v.* Lawes, 9 Ch. D. 98, 38 L. T. Rep. N. S. 370, 27 Wkly. Rep. 186 (provision in partnership articles for settlement of accounts construed); Browning *v.* Browning, 31 Beav. 316, 54 Eng. Reprint 1160; Coventry *v.* Barclay, 3 De G. J. & S. 320, 9 Jur. N. S. 1331, 9 L. T. Rep. N. S. 496, 3 New Rep. 224, 12 Wkly. Rep. 500, 68 Eng. Ch. 659 [*modifying* 33 Beav. 1, 2 New Rep. 375, 11 Wkly. Rep. 892, 55 Wkly. Rep. 266]; Travis *v.* Milne, 9 Hare 141, 20 L. J. Ch. 665, 41 Eng. Ch. 141, 68 Eng. Reprint 449 (in the absence of an agreement it will not be presumed that the annual stock-taking represents the actual value of each partner's share); Rigden *v.* Pierce, 6 Madd. 353, 23 Rev. Rep. 242, 56 Eng. Reprint 1126; Pettyt *v.* Janeson, 6 Madd. 146, 22 Rev. Rep. 259, 56 Eng. Reprint 1047; Clark *v.* Glennie, 3 Stark. 10, 3 E. C. L. 573 (sufficient evidence of a settlement).

See 38 Cent. Dig. tit. "Partnership," § 719 *et seq.*

34. *California.*— Cayton *v.* Walker, 10 Cal. 450.

Illinois.— Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868, no consideration shown for an alleged release of one partner's interest in the firm.

Indiana.— Selz *v.* Mayer, 151 Ind. 422, 51 N. E. 485 (holding that when one partner surrenders his interest in the firm to other members in consideration of their assuming the firm debts and releasing him from his indebtedness to the firm, the agreement is supported by a valid consideration); Herald *v.* Harper, 8 Blackf. 170 (a valid settlement).

Iowa.— Nystuen *v.* Hanson, (1902) 91 N. W. 1071, holding that a written contract of settlement is not invalidated by an allegation of mutual mistake, when no reformation is asked.

Louisiana.— Landry *v.* Landry, 23 La. Ann. 312, holding that notes given by partners for their supposed indebtedness to the firm can be enforced against the maker by a purchaser after maturity only to the extent of his actual indebtedness to the firm.

Maine.— Wiggin *v.* Goodwin, 63 Me. 389, holding that in case of a mistake in drafting a contract between two partners for the sale of one's interest to the other, if the parties subsequently settled on the basis of the contract as it should have been written, a parol promise to pay or allow the balance thus found due will be enforced.

Maryland.— Trump *v.* Baltzell, 3 Md. 295, holding that a settlement on the basis that the books have been correctly kept can be modified at the request of the partner harmed.

Massachusetts.— Forward *v.* Forward, 6 Allen 494; Miller *v.* Lord, 11 Pick. 11 (not void for uncertainty in this case, nor because one partner alleged that he did not understand the settlement as the other partner did); Farnam *v.* Brooks, 9 Pick. 212 (a partner not a true trustee for his copartner after dissolution).

Michigan.— Scudder *v.* Andrus, 124 Mich. 252, 82 N. W. 1050.

Missouri.— Buckham *v.* Singleton, 10 Mo. 405.

New York.— Manufacturers' Nat. Bank *v.* Cox, 2 Hun 572 [*affirmed* in 59 N. Y. 659] (but a settlement is not binding on copartners who are ignorant that the other partner has received moneys for which he has not accounted to the firm); Ogden *v.* Astor, 4 Sandf. 311 (a surviving partner sustains a confidential relation toward the representative of the deceased); Campbell *v.* Campbell, 16 N. Y. Suppl. 165 (a surviving partner is not a true trustee for the estate of the deceased, and has not the burden of showing the fairness of a settlement between himself and the personal representative of deceased).

Texas.— Moore *v.* Bivins, (Civ. App. 1896) 33 S. W. 881, not a sufficient ground for setting aside a settlement between partners that it was harsh or unequal in its operation.

Wisconsin.— Gauger *v.* Pantz, 45 Wis. 449, agreement based upon a sufficient consideration.

See 38 Cent. Dig. tit. "Partnership," § 718 *et seq.*

35. *Alabama.*— Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640.

when it appears that they were familiar with the firm's affairs, and that neither reposed any special confidence in the other in making up the account.[36] Even when a partner has not been familiar with the details of the accounting, he may be estopped from questioning its accuracy if he continues to enjoy the fruits of the settlement, after ample opportunity for investigation.[37] A partner who impeaches an accounting and settlement to which he has assented has the burden of showing that it is inaccurate and that his assent was induced by mistake or fraud.[38] The settlement is not conclusive as to matters not included in

California.—Cayton *v.* Walker, 10 Cal. 450.
Colorado.— Gibson *v.* Glover, 3 Colo. App. 506, 34 Pac. 687.
Iowa.— Howard *v.* Pratt, 110 Iowa 533, 81 N. W. 722; Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14; Hunter *v.* Aldrich, 52 Iowa 442, 3 N. W. 574.
Kansas.— Knox *v.* Pearson, 64 Kan. 711, 68 Pac. 613.
Kentucky.— Ferguson *v.* Hite, 9 Dana 553; Turner *v.* Turner, (1891) 16 S. W. 137. And see Shoemaker *v.* Shoemaker, 92 S. W. 546, 29 Ky. L. Rep. 134.
Louisiana.— Keough *v.* Foreman, 33 La. Ann. 1434; Job *v.* Heuer, 25 La. Ann. 279; Coleman *v.* Marble, 9 La. Ann. 476.
Massachusetts.— Eddy *v.* Fogg, 192 Mass. 543, 78 N. E. 549.
Michigan.— McGunn *v.* Hanlin, 29 Mich. 476.
New York.— Corner *v.* Mackey, 147 N. Y. 574, 42 N. E. 29 [*affirming* 73 Hun 236, 25 N. Y. Suppl. 1023]; Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Campbell *v.* Campbell, 16 N. Y. Suppl. 165. And see Ogden *v.* Astor, 4 Sandf. 311.
North Carolina.— Patterson *v.* Martin, 28 N. C. 111.
North Dakota.— Lay *v.* Emery, 8 N. D. 515, 79 N. W. 1053, holding that partners who have made a settlement of their accounts, in whole or in part, and reduced it to writing, are concluded thereby, where it is free from fraud, duress, misrepresentation, or concealment or mistake of fact.
Pennsylvania.— Shirk's Appeal, 3 Brewst. 119.
South Carolina.— Main *v.* Howland, Rich. Eq. Cas. 352.
Texas.—Kneeland *v.* McLachlen, 4 Tex. Civ. App. 203, 23 S. W. 309; Henry *v.* Chapman, (App. 1891) 16 S. W. 543.
West Virginia.— Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Mahnke *v.* Neale, 23 W. Va. 57.
Wisconsin.— Heath *v.* Van Cott, 9 Wis. 516.
United States.— Sanford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167; Hallock *v.* Streeter, 102 Fed. 193.
England.— Coventry *v.* Barclay, 3 De G. J. & S. 320, 9 Jur. N. S. 1331, 9 L. T. Rep. N. S. 496, 3 New Rep. 224, 12 Wkly. Rep. 500, 68 Eng. Ch. 244, 46 Eng. Reprint 659 [*modifying* 33 Beav. 1, 2 New Rep. 375, 11 Wkly. Rep. 892, 59 Eng. Reprint 266]; Maund *v.* Allies, 5 Jur. 860; Oldaker *v.* Lavender, 6 Sim. 239, 9 Eng. Ch. 239, 58 Eng. Reprint 583 (accounts found to be fraudulent, and hence not binding on the innocent partner).
Canada.— Migner *v.* Goulet, 31 Can. Sup. Ct. 26, settlement not honest.

See 38 Cent. Dig. tit. "Partnership," § 721.

Account stated see ACCOUNTS AND ACCOUNTING, 1 Cyc. 386.

A sale by one partner of his entire interest in the firm is an adjustment of all accounts between the partners, and the presumption is that all accounts between them were taken into consideration (Hamilton *v.* Wells, 182 Ill. 144, 55 N. E. 143; Milloy *v.* Hoyt, 123 Ill. App. 568), including a salary item which it was provided by the partnership articles should not be considered net profit, but come out of the general expense account (Milloy *v.* Hoyt, *supra*).

36. *Alabama.*— Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640, where each was a capable business man and had no confidence in the other.
Louisiana.— Coleman *v.* Marble, 9 La. Ann. 476.
New York.— Dorsett *v.* Ormiston, 53 N. Y. App. Div. 629, 65 N. Y. Suppl. 931 [*affirming* 25 Misc. 570, 55 N. Y. Suppl. 1037], where plaintiff was a lawyer of many years' experience and was represented on the settlement by an eminent lawyer.
North Dakota.— Little *v.* Little, 2 N. D. 175, 49 N. W. 736, where partners voluntarily and at arm's length entered into a written contract of settlement.
United States.— Hallock *v.* Streeter, 102 Fed. 193.

See 38 Cent. Dig. tit. "Partnership," § 721.

37. Shows *v.* Folmar, 133 Ala. 599, 32 So. 495; Lucas *v.* Cooper, 23 S. W. 959, 15 Ky. L. Rep. 642.

38. *Alabama.*— Scheuer *v.* Berringer, 102 Ala. 216, 14 So. 640.
Colorado.— Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681.
Indiana.— Pouder *v.* Tate, 76 Ind. 1.
Kentucky.— Shoemaker *v.* Shoemaker, 92 S. W. 546, 29 Ky. L. Rep. 134.
Louisiana.— Wells *v.* Erstein, 24 La. Ann. 317.
Maryland.— Lilly *v.* Kroesen, 3 Md. Ch. 83.
Missouri.— Silver *v.* St. Louis, etc., R. Co., 72 Mo. 194 [*affirming* 5 Mo. App. 381].
New Jersey.— Murray *v.* Elston, 24 N. J. Eq. 310 [*affirmed* in 24 N. J. Eq. 589].
New York.— Dorsett *v.* Ormiston, 25 Misc. 570, 55 N. Y. Suppl. 1037 [*affirmed* in 53 N. Y. App. Div. 629, 65 N. Y. Suppl. 931]; Bryant *v.* Gay, 34 N. Y. Suppl. 632 [*affirmed* in 153 N. Y. 655, 47 N. E. 1105].
Utah.— Anderson *v.* Anderson, 24 Utah 497, 68 Pac. 319, 25 Utah 164, 70 Pac. 608.

it;[39] nor is it binding upon third persons who are not in privity with either party to the settlement,[40] although it does bind creditors and others who must claim through the settling partners or either of them,[41] if it is an honest settlement,[42] and one not in violation of the bankruptcy statute.[43]

e. Laches in Disputing Settlement. Courts are not disposed to look with favor upon attempts to question a private settlement between partners which are not made promptly. Hence, if a partner, or one claiming through him, permits a settlement to stand for a long time unquestioned, his laches will bar an action to open it or set it aside,[44] unless the delay is satisfactorily explained.[45]

d. Mistake or Fraud in Settlement. A mistake by one of the members of a partnership in construing a written agreement of settlement will not justify a court in setting it aside at the instance of the other,[46] and one cannot impeach a settlement for mistake, while continuing to hold property obtained under it;[47]

West Virginia.— Mahnke *v.* Neale, 23 W. Va. 57.

United States.— Sanford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167; Brydie *v.* Miller, 4 Fed. Cas. No. 2,071, 1 Brock. 147.

England.— Cuthbert *v.* Edinborough, 21 Wkly. Rep. 98.

See 38 Cent. Dig. tit. "Partnership," § 721. And see *infra*, IX, C, 6, d.

39. Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Hey *v.* Harding, 53 S. W. 33, 21 Ky. L. Rep. 771; Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Ryman *v.* Machell, 8 Kulp (Pa.) 316; Horne *v.* Greer, (Tenn. Ch. App. 1897) 43 S. W. 774; Morris *v.* Wood, (Tenn. Ch. App. 1896) 35 S. W. 1013.

40. Boggs *v.* Bird, 131 N. Y. 665, 30 N. E. 868 [*affirming* 14 N. Y. Suppl. 344], where a settlement between the surviving partner and the representative of the deceased was held not binding upon the heir of the deceased, as to firm lands.

41. Sage *v.* Woodin, 66 N. Y. 578; Ludlow *v.* Cooper, 4 Ohio St. 1. In the latter case the partners agreed that real estate purchased by the firm should be considered and held as personal property; and it was held that a relinquishment of all claim to the realty by the administrator of the deceased partner was binding upon the heirs of the deceased. Here the heir could claim only through the administrator, while in Boggs *v.* Bird, 131 N. Y. 665, 30 N. E. 868 (in the preceding note) the heir did not so claim.

42. Merchants' Bank of Canada *v.* McLachlan, 23 Can. Sup. Ct. 143 [*reversing* 2 Quebec Q. B. 431], not honest as against creditors.

43. Whitmore *v.* Mason, 2 Johns. & H. 204, 8 Jur. N. S. 278, 31 L. J. Ch. 433, 5 L. T. Rep. N. S. 631, 10 Wkly. Rep. 168, 70 Eng. Reprint 1031.

44. *Illinois.*— Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588, where there was an unexplained delay of six years, during which one of the partners had died and the situation of the others had materially changed.

Kentucky.— Gilmour *v.* Kerr, 25 S. W. 270, 18 Ky. L. Rep. 400, where the settlement had been treated as accurate for twenty-five years.

Maryland.— Hunt *v.* Stuart, 53 Md. 225, holding that a delay of four years and seven months after knowledge of mistake, unexplained, was fatal to equitable relief.

Michigan.— Fitzsimons *v.* Foley, 80 Mich. 518, 45 N. W. 364, where the settlement was made while all the partners were living and knew the facts, and there could be no satisfactory judicial accounting because the parties had not kept a record of what each had drawn from the business.

New York.— Dorsett *v.* Ormiston, 53 N. Y. App. Div. 629, 65 N. Y. Suppl. 931 [*affirming* 25 Misc. 570, 55 N. Y. Suppl. 1037], where two years had passed, during which time others had changed their position relying on the settlement.

Vermont.— King *v.* White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. Rep. 752, where all had full opportunity to learn of the alleged overcharges before the settlement, which occurred twelve years before suit, during which time the managing partner had died.

United States.— Baker *v.* Cummings, 169 U. S. 189, 18 S. Ct. 367, 42 L. ed. 7 1; Holladay *v.* Land, etc., Imp. Co., 57 Fed. 774, 6 C. C. A. 560 (lapse of twenty-four years and death of two partners); Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Lewis *v.* Loper, 54 Fed. 237 (where plaintiff had acquiesced in settlement for fourteen years); Claflin *v.* Bennett, 51 Fed. 693.

England.— Millar *v.* Craig, 6 Beav. 433, 49 Eng. Reprint 893; Jackson *v.* Sedgwick, 1 Swanst. 460, 36 Eng. Reprint 465, 1 Wils. Ch. 297, 37 Eng. Reprint 130, 18 Rev. Rep. 109.

See 38 Cent. Dig. tit. "Partnership," § 722.

45. Murphy *v.* Kirby, 3 App. Cas. (D. C.) 207 (where a delay of sixteen years was held not fatal because plaintiff was ignorant of defendant's fraud in the settlement until shortly before bringing suit); Ogden *v.* Astor, 4 Sandf. (N. Y.) 311 (where a delay of fourteen years was excused because the administrators of the deceased partner had not learned all the important facts until shortly before the suit); McGinn *v.* Benner, 180 Pa. St. 396, 36 Atl. 925.

46. Sweet *v.* Sweet, 14 Ind. App. 618, 43 N. E. 274.

47. Mattingly *v.* Elder, 44 S. W. 139, 19

but a mutual mistake of fact as to the amount actually due one of the parties, the amount of the firm assets, or the like, is ground for relief.[48] But the complainant's allegation of mistake must be definite, and his evidence in its support must be clear and strong.[49] An innocent misrepresentation may entitle the party misled by it into particular terms of settlement to relief.[50] When a partner seeks to set aside a settlement because of fraud, duress, or imposition practised upon him by a copartner, he is bound to establish his claim by clear and cogent proof.[51] Upon such proof, however, he is entitled to have the settlement set aside,[52] unless

Ky. L. Rep. 1647. But in Ryman *v.* Machell, 8 Kulp (Pa.) 316, a partner was held not to be estopped to impeach a fraudulent settlement, because he had made use of the balance shown by it to be due him, as an offset in an action at law.

48. *Delaware.*—Martin *v.* Solomon, 5 Harr. 344, where one of the partners subsequently admitted a larger balance in his hands than had been debited to him in the settlement.

Iowa.— Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14, where there were mistakes of computation.

Kentucky.— Davis *v.* Ferguson, 92 S. W. 968, 29 Ky. L. Rep. 214; Ehrmann *v.* Stitzel, 90 S. W. 275, 28 Ky. L. Rep. 728.

Massachusetts.— Gould *v.* Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501, holding that a note mistakenly given for twice the amount due may be treated as valid for the correct amount.

Minnesota.— Cobb *v.* Cole, 51 Minn. 48, 52 N. W. 985, where by mutual mistake as to the balance shown by the books it was agreed that one partner should be paid more than was due him.

South Carolina.— Roach *v.* Ivey, 7 S. C. 434, where the settlement based on an approximate estimate of resources and liabilities and the estimate was erroneous.

England.— Gething *v.* Keighley, 9 Ch. D. 547, 48 L. J. Ch. 45, 27 Wkly. Rep. 283; McKellar *v.* Wallace, 1 Eq. Rep. 309, 5 Moore Indian App. 372, 18 Eng. Reprint 936, 8 Moore P. C. 378, 14 Eng. Reprint 114.

See 38 Cent. Dig. tit. "Partnership," § 723.

49. *Alabama.*— Desha *v.* Smith, 20 Ala. 747.

Maine.— Holyoke *v.* Mayo, 50 Me. 385.

Maryland.— Lilly *v.* Kroesen, 3 Md. Ch. 83, holding that if two partners adjust their partnership accounts upon complete and truthful data, ascertain what proportion of certain surplus funds each is entitled to, and stipulate in writing how and from what source each shall receive the sum due him, the accounts on which the stipulation is based cannot be surcharged or falsified on the ground of error or mistake.

New Jersey.— Nicholson *v.* Janeway, 16 N. J. Eq. 285.

New York.— Augsbury *v.* Flower, 68 N. Y. 619; Springer *v.* Dwyer, 58 Barb. 189 [*reversed* on other grounds in 50 N. Y. 19]; Watts *v.* Adler, 7 N. Y. Suppl. 564 [*reversed* on other grounds in 130 N. Y. 646, 29 N. E. 131].

United States.— Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin *v.* Bennett, 51 Fed. 693.

See 38 Cent. Dig. tit. "Partnership," § 723.

Burden of proof see *supra*, IX, C, 6, b.

50. Stephens *v.* Orman, 10 Fla. 9; Barrow *v.* Barrow, 27 L. T. Rep. N. S. 431; West *v.* Benjamin, 29 Can. Sup. Ct. 282, a partner is entitled to relief if the errors and mistakes are such as to inflict upon him substantial injustice.

51. *Alabama.*— Atwood *v.* Smith, 11 Ala. 894, where the only evidence of fraudulent representations by one partner as to the value of the business was the fact that profits had been realized, after defendant's purchase of plaintiff's interest, when loss was anticipated.

California.— Wiester *v.* Wiester, (1897) 48 Pac. 1086, where firm lands in a boom town depreciated in value after plaintiff's purchase of defendant's interest, but the evidence showed that both parties believed the lands worth the price fixed in their settlement agreement.

Kentucky.— Loesser *v.* Loesser, 81 Ky. 139.

Michigan.— Gilchrist *v.* Kelley, 85 Mich. 413, 48 N. W. 700, fraud not established.

New York.— Campbell *v.* Campbell, 16 N. Y. Suppl. 165.

Pennsylvania.— Ryman *v.* Machell, 8 Kulp 316; Robinson *v.* Dawson, 2 Wkly. Notes Cas. 185.

United States.— Richardson *v.* Walton, 49 Fed. 888.

England.— Laing *v.* Campbell, 36 Beav. 3, 55 Eng. Reprint 1057.

See 38 Cent. Dig. tit. "Partnership," § 723.

Burden of proof see *supra*, IX, C, 6, b.

52. *Michigan.*— Heath *v.* Waters, 40 Mich. 457, where a valuable firm claim was wilfully suppressed by defendant, the surviving partner.

Missouri.— Pomeroy *v.* Benton, 57 Mo. 531.

New Jersey.— Doughty *v.* Doughty, 7 N. J. Eq. 227, where mental incompetency of plaintiff partner was taken advantage of by defendant to secure an unfair settlement.

New York.— Herrick *v.* Ames, 8 Bosw. 115 (where defendants had made and kept clandestine profits, but settled with plaintiff on the basis of the books' showing their entire liability to the firm); Binney *v.* Delmar, 17 N. Y. Suppl. 524 (where defendant partner had collected two claims without entering them on the books, and settled with

the circumstances are such that full justice may be done by modifying it, instead of setting it wholly aside.[53]

e. Assumption Of, and Indemnity Against, Firm Debts. Agreements by which one or more of the partners assume the firm debts and indemnify the other partners against such claims, upon the dissolution of the partnership, are not uncommon, as we have seen in a former connection.[54] When such an agreement is made in consideration of the promisee's transfer of his interest in the firm to the promisor, then there can be no question of its validity as between the partners.[55] It is not binding upon the firm creditors,[56] however, unless they assent to the substitution of the assuming partner as their debtor, in place of the firm.[57] Being valid, as between the partners, it creates an indebtedness on the part of the promising partner to the promisee for any sum which the latter is legally compelled to pay firm creditors;[58] but one which may be compromised or discharged by a new agreement of the parties.[59] An agreement to pay firm debts, as distinguished from one to indemnify him against them, is broken by a failure to pay such debts as they mature, or within a reasonable time thereafter.[60] The agreements we are now considering are to be construed as limited to partnership liabilities,[61] unless there is clear evidence that the parties intended them to include the individual indebtedness of the promisee partner.[62] An agreement may limit the assuming partner's

plaintiff on the basis of what appeared on the books).

Ohio.— Smith *v.* Loring, 2 Ohio 440, satisfactory evidence of imposition.

Pennsylvania.— Abrahams *v.* Hunt, 26 Pa. St. 49.

England.— Gething *v.* Keighley, 9 Ch. D. 547, 48 L. J. Ch. 45, 27 Wkly. Rep. 283.

Canada.— O'Connor *v.* Naughton, 13 Grant Ch. (U. C.) 428.

See 38 Cent. Dig. tit. "Partnership," § 723.

Ratification by retention of assets, etc.— Where a party to an agreement of dissolution of a partnership discovers shortly after the settlement is effected that he has been defrauded by the other, the retention of the assets turned over to such injured party and the application of them by him to the indebtedness of the firm, which he assumed under the agreement of dissolution, will not be treated as a ratification by him of the terms of the dissolution when the other partner has been in no way injured thereby. Oliver *v.* House, 125 Ga. 637, 54 S. E. 732.

53. Turner *v.* Otis, 30 Kan. 1, 1 Pac. 19 (holding that a settlement between partners upon dissolution will not necessarily be set aside wholly because of misrepresentations and deceit in minor matters connected with the settlement on the part of one of the partners; if justice can be done by making a correction, this will be done, and the settlement as a whole allowed to stand); Trump *v.* Baltzell, 3 Md. 295 (where a single fraudulent entry was corrected).

54. See *supra*, VII, C, 2, 3, 8, 10.

55. Vanness *v.* Dubois, 64 Ind. 338; Topliff *v.* Jackson, 12 Gray (Mass.) 565 (agreement construed to bind promisor only to apply the assets in his hands to the payment of firm debts, and not to assume them absolutely); McLucas *v.* Durham, 20 S. C. 302; Bankhead *v.* Alloway, 6 Coldw. (Tenn.) 56 (holding that the fact that one partner has made an improvident contract, in such a case, will not entitle him to relief therefrom in a court of equity).

56. Brown *v.* Hughes, 2 La. Ann. 623; Case *v.* Seass, 44 Mich. 195, 6 N. W. 227; Skinner *v.* Hitt, 32 Mo. App. 402; U. S. National Bank *v.* Underwood, 2 N. Y. App. Div. 342, 37 N. Y. Suppl. 838. See *supra*, VII, C, 9.

57. Rice *v.* Tobias, 89 Ala. 214, 7 So. 765; Powers *v.* Mann, 156 Mass. 375, 31 N. E. 10, applying Pub. St. c. 157, § 125. See *supra*, VII, C, 6.

58. *Indiana.*— Price *v.* Cavins, 50 Ind. 122 (where the promisee was allowed to prove such debt against the estate of the deceased promisor); Hinkle *v.* Reid, 43 Ind. 390.

Iowa.— Myers *v.* Smith, 15 Iowa 131.

Maine.— Duran *v.* Ayer, 67 Me. 145.

Minnesota.— Rose *v.* Roberts, 9 Minn. 119.

New York.— Patterson *v.* Boulton, 14 N. Y. St. 91.

Pennsylvania.— Biddle *v.* Moore, 3 Pa. St. 161; Wright *v.* Smyth, 4 Watts & S. 527.

South Carolina.— Doty *v.* Crawford, 39 S. C. 1, 17 S. E. 377.

See 38 Cent. Dig. tit. "Partnership," § 724.

59. Parmenter *v.* Kingsley, 45 Vt. 362; Austin *v.* Cummings, 10 Vt. 26.

60. Faust *v.* Burgevin, 25 Ark. 170; Kohler *v.* Matlage, 72 N. Y. 259 [*affirming* 42 N. Y. Super. Ct. 247]; Miller *v.* Bailey, 19 Oreg. 539, 25 Pac. 27.

61. Haskell *v.* Moore, 29 Cal. 437; McCormack *v.* Sweeney, 7 Ind. App. 671, 35 N. E. 45; Mette *v.* Feldman, 45 Mich. 25, 7 N. W. 233; Gibbs *v.* Bates, 43 N. Y. 192; Denise *v.* Swett, 68 Hun (N. Y.) 188, 22 N. Y. Suppl. 950 [*reversed* on other grounds in 142 N. Y. 602, 37 N. E. 627].

62. Hopkins *v.* Johnson, 2 La. Ann. 842 (where the individual indebtedness of one partner had been assumed by the firm, before the agreement was made, and thus had become a firm debt); Thropp *v.* Richardson, 132 Pa. St. 399, 19 Atl. 218 (similar to preceding case); Mann *v.* Ætna Ins. Co., 40 Wis. 549

liability to a part only of the firm's debts.[63] When the promisor partner receives firm assets and binds himself to apply their proceeds to the payment of firm debts, the promisee partner, upon breach, may follow the proceeds and recover property in which they have been invested from a transferee with notice.[64]

f. The Promisee Partner as Surety For Firm Debts. When one or more partners on dissolution take the firm property and promise the other partners to assume and pay the firm's debts, they become the principal debtors and the promisees are thereafter sureties for them.[65] As between the partners, this is unquestioned; but some courts, as pointed out in an earlier part of this article, decline to apply this doctrine to firm creditors.[66] In the jurisdictions where it is applied, creditors of the firm are entitled to be subrogated to the rights of the promisee partner to a bond given by the promisor as security for the performance of his agreement.[67]

7. Arbitration and Award — a. Submission and Agreements Therefor. A stipulation in the partnership articles that all matters of controversy between the partners shall be submitted to arbitration does not oust the courts of jurisdiction over such controversies,[68] in the absence of legislation on the subject,[69] or of a clear agreement by the partners that arbitration shall be a condition precedent to the right to sue.[70] Agreements for arbitration, even when pursued by the parties, are generally subjected by the courts to a strict construction.[71] After a dissolution has occurred, the parties may submit any controversies connected with it to arbitration.[72] If an arbitration fails through no fault of the parties, but

(where the language of the assuming promise was very broad).

63. Raymond *v.* Bigelow, 11 N. H. 466 (limited to debts contracted by the promisor in the name of the firm); Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77 [*reversing* 19 N. Y. Suppl. 849]; Holmes *v.* Hubbard, 60 N. Y. 183 (where the indemnity was limited to liabilities in a specified schedule); Miles *v.* Everson, 123 Pa. St. 292, 16 Atl. 473 (where the debts assumed were limited to a fixed sum); Case *v.* Cushman, 3 Watts & S. (Pa.) 544, 39 Am. Dec. 47 (limited to those on the firm books); Lewis *v.* Woolfolk, 2 Pinn. (Wis.) 209, 1 Chandl. 171.

64. Robinson *v.* Roos, 138 Ill. 550, 28 N. E. 821 [*affirming* 37 Ill. App. 646].

65. *Florida.*— West *v.* Chasten, 12 Fla. 315.

Illinois.— Conwell *v.* McCowan, 81 Ill. 285.

Indiana.— Fensler *v.* Prather, 43 Ind. 119, applying 2 Gavin & H. St. §§ 672, 673.

Michigan.— Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

Minnesota.— Wendlandt *v.* Sohre, 37 Minn. 162, 33 N. W. 700.

Mississippi.— Graham *v.* Thornton, (1891) 9 So. 292.

Nevada.— Barber *v.* Gillson, 18 Nev. 89, 1 Pac. 452.

Ohio.— Still *v.* Holland, 1 Ohio Dec. (Reprint) 584, 10 West. L. J. 481.

Vermont.— Ætna Ins. Co. *v.* Wires, 28 Vt. 93.

Wisconsin.— Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710.

See 38 Cent. Dig. tit. "Partnership," § 725. And see *supra*, VII, C, 2.

66. See *supra*, VII, C, 2.

67. Devol *v.* McIntosh, 23 Ind. 529; Wilson *v.* Stilwell, 14 Ohio St. 464.

68. *Alabama.*— Meaher *v.* Cox, 37 Ala. 201.

Illinois.— Waugh *v.* Schlenk, 23 Ill. App. 433.

Massachusetts.— Pearl *v.* Harris, 121 Mass. 390.

Pennsylvania.— Page *v.* Vankirk, 1 Brewst. 282, 6 Phila. 264.

England.— Cooke *v.* Cooke, L. R. 4 Eq. 77, 36 L. J. Ch. 480, 15 Wkly. Rep. 981; Lee *v.* Page, 7 Jur. N. S. 768, 30 L. J. Ch. 857, 9 Wkly. Rep. 754.

See 38 Cent. Dig. tit. "Partnership," § 726; and *supra*, V, A, 16.

69. English Arb. Act (1889); Vawdrey *v.* Simpson, [1896] 1 Ch. 166, 65 L. J. Ch. 369, 44 Wkly. Rep. 123; Belfield *v.* Bourne, [1894] 1 Ch. 521, 63 L. J. Ch. 104, 69 L. T. Rep. N. S. 786, 8 Reports 61, 42 Wkly. Rep. 189; Law *v.* Garrett, 8 Ch. D. 26, 38 L. T. Rep. N. S. 3, 26 Wkly. Rep. 426; Gillett *v.* Thornton, L. R. 19 Eq. 599, 44 L. J. Ch. 398, 23 Wkly. Rep. 437; Dennehy *v.* Jolly, 22 Wkly. Rep. 449; *Re* Evans, 22 L. T. Rep. N. S. 507, 18 Wkly. Rep. 723.

70. Altman *v.* Altman, 5 Daly (N. Y.) 456; Spurrier *v.* La Cloche, [1902] A. C. 446, 71 L. J. P. C. 106, 86 L. T. Rep. N. S. 631, 51 Wkly. Rep. 1; Dinham *v.* Bradford, L. R. 5 Ch. 519.

71. De Pusey *v.* Du Pont, 1 Del. Ch. 82; Gallier *v.* Walsh, 1 Rob. (La.) 226; Piercy *v.* Young, 14 Ch. D. 200, 42 L. T. Rep. N. S. 710, 28 Wkly. Rep. 845 (what matters in dispute are within the submission is a question for the court); Cook *v.* Catchpole, 10 Jur. N. S. 1068, 34 L. J. Ch. 60, 11 L. T. Rep. N. S. 264, 13 Wkly. Rep. 42; Joplin *v.* Postlethwaite, 61 L. T. Rep. N. S. 629.

72. *California.*— Foster *v.* Carr, 135 Cal. 83, 67 Pac. 43.

Illinois.— Tucker *v.* Page, 69 Ill. 179, where every question in dispute was to be adjusted by the arbitrators.

because of the failure of the arbitrators to agree or from other similar cause, a judicial accounting and settlement may be had.[73]

b. Proceedings of Arbitrators. These should conform to the terms of the submission agreement.[74] Each party is bound in good faith to lay before the arbitrators all pertinent facts known to him;[75] and neither party is entitled to revoke the submission after the arbitrators have entered upon their duties.[76]

c. The Award.[77] This should follow the provisions of the submission, disposing of all the questions presented for decision,[78] and be definite and certain in its terms.[79]

Kansas.— Anderson *v.* Beebe, 22 Kan. 768, applying Laws (1876), c. 102.

Kentucky.— Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251; Newton *v.* West, 3 Metc. 24.

Maine.— Hayes *v.* Forskoll, 31 Me. 112, submission "of all demands" does not submit questions as to the property which is owned by the firm, or as to the debts which are due from the firm.

Massachusetts.— Richards *v.* Todd, 127 Mass. 167 (a submission of differences as to partnership affairs precludes either party from disputing before the arbitrators the existence of a partnership); Shearer *v.* Handy, 22 Pick. 417.

New York.— Locke *v.* Filley, 14 Hun 139; Francisco *v.* Fitch, 25 Barb. 130.

United States.— Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585 [*affirming* 12 Fed. Cas. No. 6,810].

England.— Duxbury *v.* Isherwood, 12 Wkly. Rep. 821.

See 38 Cent. Dig. tit. "Partnership," § 726; and *supra*, V, A, 16.

73. Norton *v.* Hayden, 129 Mich. 374, 88 N. W. 876.

74. *Illinois.*— Ives *v.* Ashelby, 26 Ill. App. 244, where the stipulation authorized the arbitrator to take and state an account of all the partnership dealings and transactions between the partners, and of all moneys received and paid out by either of them on account of the partnership property, and fix what sum if any should be paid by one party to the other, or *vice versa*, and that the award should become the basis of the decree for the disposition of all the firm property.

Kentucky.— Adams *v.* Ringo, 79 Ky. 211, 1 Ky. L. Rep. 251, holding that the submission did not involve uncollected assets in the hands of the surviving partner.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718, holding that the arbitrators properly passed on the question whether the liquidating partners were liable for the defalcation of one of their employees.

New York.— Masury *v.* Whiton, 111 N. Y. 679, 18 N. E. 638, holding that the force and effect of an allegation in plaintiff's complaint for an accounting were determinable by the arbitrator agreed upon by the parties.

North Carolina.— Masters *v.* Gardner, 50 N. C. 298, holding that when arbitrators are chosen to settle a partnership they possess authority to decide what constitutes partnership effects.

Ohio.— Mitchell, etc., Furniture Co. *v.* Runk, 7 Ohio Dec. (Reprint) 491, 3 Cinc. L. Bul. 538.

Pennsylvania.— Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557, holding that the authority of arbitrators may be extended by parol after submission.

Tennessee.— Brown *v.* Harklerode, 7 Humphr. 19.

England.— Thomson *v.* Anderson, L. R. 9 Eq. 523, 39 L. J. Ch. 468, 22 L. T. Rep. N. S. 570, 18 Wkly. Rep. 445, holding that when the only question in dispute is whether one partner shall pay the other £20,000 or £18,000 for the latter's share, the arbitrator has no power to name a sum outside these limits.

See 38 Cent. Dig. tit. "Partnership," § 726 *et seq.*

75. Beam *v.* Macomber, 33 Mich. 127.

76. Haley *v.* Bellamy, 137 Mass. 357, 359 (where it is said: "We think this is analogous to an agreement in a contract that the amount of money to be paid for property transferred, material furnished, or labor done, under the contract, shall be determined by third persons, which becomes an irrevocable part of the contract, and cannot be avoided unless it becomes impossible to obtain the decision of such third person, without rescinding the whole contract. There are no facts stated in the report which entitle the defendant to rescind the whole contract, and he has not attempted to do so"); Wilson *v.* Barcarras Brook Steamship Co., [1893] 1 Q. B. 422, 7 Aspin. 321, 62 L. J. Q. B. 245, 68 L. T. Rep. N. S. 312, 4 Reports 286, 41 Wkly. Rep. 486.

77. Partial settlement by arbitration see *supra*, IX, C, 2, c.

78. *Kentucky.*— Johnston *v.* Dulin, 10 Ky. L. Rep. 403, holding that the arbitrators were under no duty to divide the firm property or specify what debts each partner should pay.

Louisiana.— Deneufbourg *v.* Gaiennie, 14 La. 53.

Massachusetts.— Paine *v.* Paine, 15 Gray 299.

New York.— Masury *v.* Whiton, 111 N. Y. 679, 18 N. E. 638.

North Carolina.— Waugh *v.* Mitchell, 21 N. C. 510.

United States.— McCormick *v.* Gray, 13 How. 26, 14 L. ed. 36, award held void as not following the submission.

England.— Wilkinson *v.* Page, 1 Hare 276, 6 Jur. 567, 11 L. J. Ch. 193, 58 Rev. Rep. 77, 23 Eng. Ch. 276, 66 Eng. Reprint 1036, award vitiated by mistake.

Canada.— Thirkell *v.* Strachan, 4 U. C. Q. B. 136.

See 38 Cent. Dig. tit. "Partnership," § 728.

79. *California.*— Carsley *v.* Lindsay, 14 Cal. 390, sufficiently certain.

When it is of this character it will be enforced by the courts when susceptible of affirmative enforcement,[80] or may be used as a defense to any action inconsistent with it.[81] The award will not bind the parties, however, as to matters not included in the submission[82] or omitted by mistake of the arbitrators.[83] The setting aside of an award does not affect transactions which are collateral to it but not a part of the arbitration proceedings.[84]

D. Actions For Dissolution and Accounting — 1. In General — a. Nature and Scope of Remedy. An action for a partnership dissolution and accounting is a proceeding in equity,[85] and an action at law by one partner against another

Illinois.— Henrickson *v.* Reinback, 33 Ill. 299, sufficiently certain and final.

Indiana.— Russell *v.* Smith, 87 Ind. 457, negligence of arbitrator in collecting accounts does not vitiate his award, although it may render him liable to the parties for the loss which they sustained by his negligence.

Kentucky.—Abell *v.* Phillips, 13 S. W. 109, 11 Ky. L. Rep. 913, award will not be disturbed unless there has been concealment or fraud.

Maryland.— Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718, sufficiently certain when it gives the proportion coming to each partner, although it does not name the amount of each share.

Missouri.— Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854, sufficiently definite.

New Jersey.— Bell *v.* Price, 22 N. J. L. 578, sufficiently certain.

New York.—Herbst *v.* Hagenaers, 137 N. Y. 290, 33 N. E. 315 [*affirming* 62 Hun 568, 17 N. Y. Suppl. 58] (void for uncertainty); Case *v.* Ferris, 2 Hill 75 (sufficiently certain).

North Carolina.— Osborne *v.* Calvert, 83 N. C. 365, sufficiently certain.

Vermont.— Lamphire *v.* Cowan, 39 Vt. 420, sufficiently certain.

See 38 Cent. Dig. tit. "Partnership," § 728.

80. Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718; Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854; Byers *v.* Van Deusen, 5 Wend. (N. Y.) 268; Redick *v.* Skelton, 18 Ont. 100. See also Ehrlich *v.* Pike, 53 Misc. (N. Y.) 328, 104 N. Y. Suppl. 818; Needham *v.* Bythewood, (Tex. Civ. App. 1901) 61 S. W. 426. See *supra*, V, A, 16.

Accountant as arbitrator.— Where, in arbitration to settle partnership accounts, one of the arbitrators is an accountant chosen to examine the books and save trouble to the other arbitrators, and he prepares a statement used by the arbitrators in making the award, a claim that he thus became an expert witness, and that his testimony was erroneously received in the absence of the defeated parties, is untenable. Ehrlich *v.* Pike, 53 Misc. (N. Y.) 328, 104 N. Y. Suppl. 818.

81. Yates *v.* Petty, 1 Harr. & J. (Md.) 58; Richardson *v.* Huggins, 23 N. H. 106; Titenson *v.* Peat, 3 Atk. 529, 26 Eng. Reprint 1105. And see Eddy *v.* Fogg, 192 Mass. 543, 78 N. E. 549. See *supra*, V, A, 16.

82. Thornton *v.* McNeill, 23 Miss. 369; Masury *v.* Whiton, 6 N. Y. St. 697; Garrow *v.* Nicolai, 24 Oreg. 76, 32 Pac. 1036; Doupe *v.* Stewart, 28 U. C. Q. B. 192.

83. Paine *v.* Paine, 15 Gray (Mass.) 299; Teacher *v.* Calder, [1899] A. C. 451; Spencer *v.* Spencer, 2 Y. & J. 249, 31 Rev. Rep. 583. In Deneufbourg *v.* Gaiennie, 14 La. 53, and Reily *v.* Russell, 34 Mo. 524, 528, the award was held binding, although an error of judgment on the part of the arbitrator was charged. In the latter case the court said: "If an award could be set aside for error in judgment, law, or conclusions of facts, not one award in a hundred could stand the test of legal criticism, and parties would be driven to further and protracted litigation." See also Ehrlich *v.* Pike, 53 Misc. (N. Y.) 328, 104 N. Y. Suppl. 818.

84. Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3 [*affirming* 29 Ill. App. 358], where a sale of property provided for in the submission agreement was not set aside, although the award was.

85. *Alabama.*— Reese *v.* McCurdy, 121 Ala. 425, 25 So. 918.

Georgia.— Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64.

Illinois.— Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145 [*affirming* 61 Ill. App. 336], application by the executor of the deceased partner.

Indiana.— Kisling *v.* Barrett, 34 Ind. App. 304, 71 N. E. 507; Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125.

Louisiana.— Boimare *v.* St. Gene, 113 La. 830, 37 So. 770; Burton *v.* Maltby, 18 La. 531; Millaudon *v.* Sylvestre, 8 La. 262.

Maryland.— Brums *v.* Heise, 101 Md. 163, 60 Atl. 604.

New York.— Robinson *v.* McGinty, 84 N. Y. App. Div. 639, 82 N. Y. Suppl. 736, the action being for an accounting between partners, there was nothing to justify a recovery upon any special contract.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55 (such a suit is not radically changed by an amendment to the complaint, which eliminates the partnership element but retains a claim for the equitable adjustment of the rights of the parties as joint owners of land); Zimmerman *v.* Chambers, 79 Wis. 20, 47 N. W. 947.

England.— Partn. Act (1890), § 39; Airey *v.* Borham, 29 Beav. 620, 4 L. T. Rep. N. S. 391, 54 Eng. Reprint 768; Prole *v.* Blasterman, 21 Beav. 61, 52 Eng. Reprint 781.

Canada.— Tupper *v.* Annand, 16 Can. Sup. Ct. 718.

See 38 Cent. Dig. tit. "Partnership," § 729.

Equity jurisdiction see *infra*, IX, D, 3, a, 4, a.

for an alleged balance cannot be maintained, until an accounting has been had,[86] unless by statute.[87] Any partner, or his personal representative, is entitled to institute a proceeding in equity for an accounting upon the dissolution of the firm,[88] unless his culpable negligence has been such as to render the accounting abortive.[89] A partnership accounting is not to be had, as an incident to some other litigation between partners,[90] except when allowed by statute;[91] nor when a partnership is not shown to exist;[92] nor, as a rule, while the partnership continues.[93] The commencement of an action for an accounting is a legal demand of plaintiff's share of the assets from the partners in possession and may be evidence of their conversion thereof.[94] If the action is successful the partnership may be treated as dissolved from the filing of the bill.[95] Such action as a rule is not to be complicated by proceedings therein for the partition of real estate.[96]

b. Joinder of Causes of Action. Plaintiff's bill is not objectionable, because different causes of action are joined therein, provided all are directly involved in a final settlement of the firm's affairs.[97] If not so involved, they should not be joined.[98]

86. Newman *v.* Tichenor, 88 Ill. App. 1; Head *v.* King, 33 Misc. (N. Y.) 89, 67 N. Y. Suppl. 141 (a private settlement); Barber *v.* Morgan, (Tex. Civ. App. 1900) 76 S. W. 319; Brierly *v.* Cripps, 7 C. & P. 709, 32 E. C. L. 833 (an agreed settlement); Richardson *v.* Bank of England, 2 Jur. 911, 8 L. J. Ch. 1, 4 Myl. & C. 165, 18 Eng. Ch. 165, 41 Eng. Reprint 65. See *supra*, V, C, 1, a, b.

87. Green *v.* Chapman, 27 Vt. 236; Lefebvre *v.* Aubry, 26 Can. Sup. Ct. 602.

88. *Kentucky.*— Green *v.* Hart, 87 S. W. 315, 27 Ky. L. Rep. 970.

Michigan.— Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611.

New York.— Sterling *v.* Chapin, 102 N. Y. App. Div. 589, 92 N. Y. Suppl. 904; Larkin *v.* Martin, 46 Misc. 179, 93 N. Y. Suppl. 198, extending the right to an accounting to a case where the defendant partner had been guilty of a breach of the partnership contract.

England.— Partn. Act (1890), § 39; Betjemann *v.* Betjemann, [1895] 2 Ch. 474, 64 L. J. Ch. 641, 73 L. T. Rep. N. S. 2, 44 Wkly. Rep. 182, 12 Reports 455; Hunter *v.* Sheppard, 4 Bro. P. C. 210, 2 Eng. Reprint 143 (right extended to an agent who had conspired with one partner to defraud the other); Ogle *v.* Sansom, 1 Bro. P. C. 149, 1 Eng. Reprint 477; Price *v.* Peppercorne, 6 New Rep. 317.

Canada.— Doupe *v.* Stewart, 13 Grant Ch. (U. C.) 637.

89. Garnett *v.* Wills, 69 S. W. 695, 24 Ky. L. Rep. 617; Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690; Eyre *v.* Lesher, 14 Montg. Co. Rep. (Pa.) 189; Heffernan *v.* Sheridan, 11 Quebec K. B. 3.

90. Beardslee *v.* Citizens' Commercial, etc., Bank, 112 Mich. 377, 70 N. W. 1027 (action to secure release of a mortgage from certain premises and the sale of other premises under a mortgage foreclosure); Santleben *v.* Froboese, 17 Tex. Civ. App. 626, 43 S. W. 571 (a personal claim by one partner against another is not to be adjusted in a partnership action for account). In Rommerdahl *v.* Jackson, 102 Wis. 444, 78 N. W. 742, all the partners had agreed in liquidating and converting into cash their several claims to a fund, brought into court in another action, and the court deemed an action for an accounting unnecessary.

91. Scott *v.* Buffum, 52 N. H. 345.

92. Pratt *v.* McGuinness, 173 Mass. 170, 53 N. E. 380; Bryant *v.* Galbraith, (Tex. Civ. App. 1897) 43 S. W. 833.

93. Lord *v.* Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484. It was allowed, however, in Hudson *v.* Barrett, 1 Pars. Eq. Cas. (Pa.) 414. See *supra*, V, C, 1, b; *infra*, IX, D, 2, c.

94. Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

95. Swepson *v.* Davis, (Tenn. Ch. App. 1896) 37 S. W. 896.

96. Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Pierce *v.* Covert, 39 Wis. 252.

97. McLaughlin *v.* Simpson, 3 Stew. & P. (Ala.) 85 (where complainant, being administrator of a deceased partner, was allowed to join his claims as an individual with those of the decedent's estate in a bill for a settlement against the other partners); Tarabino *v.* Nicoli, 5 Colo. App. 545, 39 Pac. 362 (there was no misjoinder, although plaintiff alleged non-payment of the sums due from the firm business, and those due by special agreement, and a refusal by defendants to account for collections or to allow plaintiff access to the books, and prayed for a sale, partition, and accounting); Wade *v.* Rusher, 4 Bosw. (N. Y.) 537 (holding that in an action brought by a partner for an accounting and settlement by his copartner, a claim against a third person alleged to have fraudulently obtained from defendant portions of the partnership property may be joined in order to subject the property to payment of any balance found due).

98. Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828 (holding that a cause of action by one partner against another to dissolve the firm and wind up its affairs cannot be joined with one to set aside an unauthorized sale of firm property by such other partner); Schlicker *v.* Whyte, 65 N. J. Eq. 404, 54 Atl. 1125 [*affirming* 61 N. J. Eq. 158, 47 Atl. 448] (where a partner assigns all his interest in

2. Grounds of Action and Defenses — a. For Dissolution. These, as we have seen, generally consist in the fraudulent misconduct of defendant partner or some serious breach of the partnership contract or duty.[99] If the partnership is one at will, either partner is at liberty to bring an action for dissolution at any time.[1]

b. For an Accounting After Dissolution. The mere fact that a partnership has been dissolved makes out a *prima facie* case for a partnership accounting;[2] although a plaintiff rarely resorts to a court for a judicial accounting, unless some of the partners are improperly withholding firm assets,[3] or neglecting to

the firm business to another partner, the latter cannot compel the retiring partner to pay a note given for his portion of the capital of the firm, in a suit for accounting, since the purchase is an adjustment of the accounts of the retiring partner with the firm). See, generally, Joinder and Splitting of Actions.

99. *California.*— Cottle *v.* Leitch, 35 Cal. 434, where defendant defrauded plaintiff of his rightful portion of receipts by false entries.

Indiana.— Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475, where the partner in possession refused to account for firm property, and used it for his own purposes.

Massachusetts.— Smith *v.* Everett, 126 Mass. 304, where defendant induced plaintiff to form the partnership by false statements as to profits of the business.

Missouri.— Wachter *v.* Heman, 82 Mo. App. 243, holding that if the partnership is never launched because of defendant's failure to perform his contract for a partnership, plaintiff's proper action is at law for damages.

New York.— Wittingham *v.* Darrin, 45 Misc. 478, 92 N. Y. Suppl. 752 (the action will not lie if the evidence fails to establish a partnership); Jennings *v.* Whittemore, 2 Thomps. & C. 377.

Pennsylvania.— Stibich *v.* Goenner, 8 Pa. Dist. 227, a court of equity will not entertain a bill for dissolution, when the firm has been dissolved, or a dissolution can be effected by plaintiff without an action.

United States.— Oteri *v.* Scalzo, 145 U. S. 578, 12 S. Ct. 895, 36 L. ed. 824, partnership induced by defendant's fraudulent representations.

Canada.— Newton *v.* Doran, 1 Grant Ch. (U. C.) 590 (misconduct on the part of defendant in defying action of majority); Whimbey *v.* Clark, 22 Quebec Super. Ct. 453 (where defendant claimed exclusive ownership of the business).

See 38 Cent. Dig. tit. "Partnership," § 731. See *supra*, IX, A, 6.

1. Wright *v.* Ross, 30 Tex. Civ. App. 207, 70 S. W. 234. See also *supra*, IX, A, 1, a.

2. *Maine.*— Bradley *v.* Webb, 53 Me. 462.

Maryland.— Stevens *v.* Yeatman, 19 Md. 480.

Missouri.— Dye *v.* Bowling, 82 Mo. App. 587.

New York.— Schulsinger *v.* Blau, 84 N. Y. App. Div. 390, 82 N. Y. Suppl. 686; Burkardt *v.* Walsh, 49 N. Y. App. Div. 634, 64 N. Y. Suppl. 779.

South Dakota.— See Goodfellow *v.* Kelsey, (1907) 111 N. W. 555.

Wisconsin.— Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

United States.— Spear *v.* Newell, 22 Fed. Cas. No. 13,224, 2 Paine 267, but it does not lie against a partner who has no account to render. In Brew *v.* Cochran, 141 Fed. 459, all but one of the members of a banking partnership died before the time fixed for its termination. The articles provided that on the death of any partner his capital should remain in the firm until that time, and should share in the profits unless otherwise mutually agreed. For some time the surviving partner carried on the business, and then by agreement of all parties in interest the business and the greater part of the assets of the firm were transferred to a corporation in exchange for its stock, which was placed in the hands of the surviving partner as trustee. It was held that the personal representative of one of the partners who had been dead eight years, and upon whose share no profits had been paid, because his right was disputed, was entitled to maintain a suit in equity for a settlement and accounting without waiting until the remnant of the partnership had been fully closed up, it being within the power of the court in such a case to protect the interests of all persons concerned in the final decree.

England.— Cruikshank *v.* McVicar, 8 Beav. 106, 14 L. J. Ch. 41, 50 Eng. Reprint 42; Habershon *v.* Blurton, 1 De G. & Sm. 121, 63 Eng. Reprint 998; Law *v.* Law, 11 Jur. 463, 16 L. J. Ch. 375 [*affirming* 2 Coll. 41, 9 Jur. 745, 14 L. J. Ch. 313, 33 Eng. Ch. 41, 63 Eng. Reprint 627].

See 38 Cent. Dig. tit. "Partnership," § 731.

Where parties have agreed to dissolve a partnership, but have left the terms of dissolution for further agreement between themselves, on their failing to agree, a court of equity on a bill for an accounting will fix such terms, and, in such connection, will inquire into the matters preceding the agreement by which the dissolution was effected, will examine the contract of partnership to ascertain if there was any fraud in its inception, and consider such other matters as will aid it in making an equitable adjustment. Crouse *v.* McCandless, 121 Ill. App. 237.

3. *Alabama.*— Costley *v.* Towles, 46 Ala. 660.

Colorado.— Tarabino *v.* Nicoli, 5 Colo. App. 545, 39 Pac. 362.

Indiana.— Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475.

Kansas.— Simpson *v.* Tenney, 41 Kan. 561, 21 Pac. 634.

account,[4] or have defrauded plaintiff into an unfair settlement,[5] or have excluded him from the partnership business,[6] or have carried on a business in competition with the firm.[7] But the representative of a deceased partner is not entitled to call the surviving partner to account, where the deceased was indebted to the survivor, and it is not shown that the latter has partnership property in excess of such debt.[8]

c. For an Accounting Without Dissolution. As we saw in a former connection, a bill for an accounting will not be entertained during the existence of a partnership, save in exceptionable circumstances.[9]

d. Conditions Precedent to an Accounting. When a firm has been dissolved, and no private accounting or settlement has taken place, either partner has the unconditional right to institute a suit for a judicial accounting.[10] And a demand for an accounting is not a condition precedent.[11] But a partner who has been intrusted with the collection of firm debts must render an accounting thereof as a condition of maintaining a suit against his copartners.[12] A creditor of a partner is not entitled to bring such a suit as a rule, until he has obtained judgment and secured a lien on his debtor's interest in the firm,[13] or has become a purchaser of the debtor's interest.[14] A partner who has been defrauded into a private settlement may institute a suit for a judicial accounting, without rescinding the settlement and putting the defrauding partner *in statu quo*.[15]

e. Defenses. It is no defense to an action for dissolution that all the firm

Nebraska.— Reed *v.* Snell, 36 Nebr. 815, 55 N. W. 249.

New Hampshire.— Morrill *v.* Weeks, 70 N. H. 178, 46 Atl. 32.

New Jersey.— Dignan *v.* Dignan, (Ch. 1888) 14 Atl. 887.

Oregon.— Holladay *v.* Elliott, 3 Oreg. 340.

Canada.— Lefehvre *v.* Aubry, 26 Can. Sup. Ct. 602.

See 38 Cent. Dig. tit. "Partnership," § 731.

4. *Georgia.*— Orr *v.* Cooledge, 117 Ga. 195, 43 S. E. 527.

Illinois.— Miller *v.* Jones, 39 Ill. 54; Bailey *v.* Moore, 25 Ill. 347.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Kansas.— Tenney *v.* Simpson, 37 Kan. 579, 15 Pac. 512.

Louisiana.— Thompson *v.* Walker, 40 La. Ann. 676, 4 So. 881.

New York.— Tannenbaum *v.* Armeny, 81 Hun 581, 31 N. Y. Suppl. 55.

Pennsylvania.— Kent *v.* Norcross, 9 Pa. Dist. 754; Carroll *v.* Tufts, 9 Pa. Dist. 144.

England.— Hue *v.* Richards, 2 Beav. 305, 17 Eng. Ch. 305, 48 Eng. Reprint 1198.

See 38 Cent. Dig. tit. "Partnership," § 721.

5. Shaw *v.* Chase, 77 Mich. 436, 43 N. W. 883.

6. McCabe *v.* Sinclair, 66 N. J. Eq. 24, 58 Atl. 412; Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091 [*affirming* 52 Hun 340, 5 N. Y. Suppl. 361]; Green *v.* Tuchner, 87 N. Y. App. Div. 314, 84 N. Y. Suppl. 345.

7. Dean *v.* Macdowell, 8 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. Rep. N. S. 862, 26 Wkly. Rep. 486.

8. Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

9. Hogan *v.* Walsh, 122 Ga. 283, 50 S. E. 84 (where it was allowed in a case where defendant was seeking to withhold plaintiff's share of the profits and to expel the latter from the partnership); Miller *v.* Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504 (where it was allowed because the partnership articles contemplated a settlement at the end of each year). See *supra*, V, C, 1, b; IX, D, 1, a.

10. Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475; McClung *v.* Capehart, 24 Minn. 17; Deveney *v.* Mahoney, 23 N. J. Eq. 247; Stibich *v.* Goenner, 8 Pa. Dist. 227. See *supra*, IX, D, 2, b.

11. Cottle *v.* Leitch, 35 Cal. 434 (in which case it was held that there need not be a demand for a reaccounting, a prior accounting being tainted with fraud); Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475; McClung *v.* Capehart, 24 Minn. 17.

12. De Gagné *v.* Pigeon, 17 Quebec Super. Ct. 308.

13. Lincoln Sav. Bank *v.* Gray, 12 Lea (Tenn.) 459.

14. Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Miller *v.* Brigham, 50 Cal. 615.

15. Richards *v.* Fraser, 122 Cal. 456, 55 Pac. 246; Wallace *v.* Sisson, (Cal. 1893) 33 Pac. 496; Cottle *v.* Leitch, 35 Cal. 434; Oliver *v.* House, 125 Ga. 637, 54 S. E. 732. In Zimmerman *v.* Chambers, 79 Wis. 20, 47 N. W. 947, it was held that where two contract to purchase a boat as joint owners and partners in it and its business, but one fraudulently procures the bill of sale to be made to himself, and then takes sole possession of the boat and excludes his partner, who has paid part of the purchase-price, from all participation in the business and profits, the ousted partner can sue in equity to compel the conveyance to him of a half interest in the boat, and for an accounting, and it is not essential to the maintenance of the suit that plaintiff should first tender the balance of his share of the purchase-money.

profits have not been collected.[16] Nor is it a defense to an action for an accounting that the partners have had a partial settlement;[17] that defendant has no balance which is due plaintiff;[18] that plaintiff has failed to perform his obligations under the partnership agreement;[19] that the business was carried on in defendant's name;[20] that plaintiff is a corporation whose connection with the completed partnership transaction for which an accounting is asked was *ultra vires*;[21] that the administrator of a deceased partner seeking an accounting has received money from the survivor on account of a claim outside the partnership settlement;[22] that there is an unexecuted agreement for a settlement;[23] nor that a void assignment for the benefit of creditors has been made.[24] Nor does a judgment in a suit at law, between partners, as to a particular firm transaction, preclude the debtor from maintaining an action for a firm accounting, including this very transaction.[25] But a complete private settlement,[26] or arbitration,[27] of the partnership business is a bar to a judicial accounting. And the plaintiff's misconduct may be such as to debar his action for an account.[28] The fact that under the particular circumstances it may be difficult to make a true accounting on dissolution of a partnership, or that the only statement possible will be an approximation to correctness, is no reason for refusing an accounting.[29]

f. Set-Off and Counter-Claim. In partnership accountings, personal demands in favor of one partner are the proper subject of set off against any final balance found due the other partner, if the rights of creditors are not involved,[30] unless they are wholly disconnected with partnership affairs.[31] A defendant partner is

16. Kimble *v.* Seal, 92 Ind. 276.

17. Harris *v.* Harris, 132 Ala. 208, 31 So. 355; Parsons *v.* Jennings, 71 Conn. 494, 42 Atl. 630; Raymond *v.* Vaughn, 128 Ill. 256, 21 N. E. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440 [*affirming* 17 Ill. App. 144].

18. Sharp *v.* Hibbins, 42 N. J. Eq. 543, 9 Atl. 113; Smith *v.* Fitchett, 56 Hun (N. Y.) 473, 10 N. Y. Suppl. 459; Martin *v.* Smith, 53 N. Y. Super. Ct. 277.

19. Boyd *v.* Mynatt, 4 Ala. 79; Palmer *v.* Tyler, 15 Minn. 106; Clarke *v.* Hart, 6 H. L. Cas. 633, 5 Jur. N. S. 447, 27 L. J. Ch. 615, 10 Eng. Reprint 1443 [*affirming* 6 De G. M. & G. 232, 3 Eq. Rep. 264, 24 L. J. Ch. 137, 3 Wkly. Rep. 147, 55 Eng. Ch. 183, 43 Eng. Reprint 1222]; *In re* Shadwell Waterworks Co., 18 Wkly. Rep. 160.

20. Blalock *v.* Copeland, 65 S. W. 349, 23 Ky. L. Rep. 1455.

21. Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. (N. Y.) 372.

22. Kearney *v.* Morris, 18 N. Y. Suppl. 346.

23. Lent *v.* Montross, 8 N. Y. St. 831.

24. Wetter *v.* Schlieper, 6 Abb. Pr. (N. Y.) 123, 15 How. Pr. 268.

25. Gregg *v.* Brower, 67 Ill. 525.

26. Cayton *v.* Walker, 10 Cal. 450; Durham *v.* Edwards, 50 Fla. 495, 38 So. 926; Iredell's Appeal, 10 Pa. Cas. 127, 13 Atl. 752; Brenner *v.* Brenner, 9 Pa. Dist. 511; Chapman *v.* Chapman, 13 R. I. 680. See *supra*, IX, C, 6.

27. See *supra*, IX, C, 7.

28. *Louisiana.*— Gassie's Succession, 42 La. Ann. 239, 7 So. 454, where through mutual fault of the parties the accounts were brought into inextricable confusion and accounting was denied.

Michigan.— Kinney *v.* Robinson, 66 Mich. 113, 33 N. W. 172, where plaintiff took possession of a large amount of firm property, without giving the bond required by the court, and disposed of it, and this unauthorized conduct precluded him from the relief of an accounting against his copartner.

Nebraska.—Hart *v.* Deitrich, 69 Nebr. 685, 96 N. W. 144, where plaintiff took a large amount of firm money and absconded, and it was held that he had no right to demand an accounting of his copartner.

Pennsylvania.— Quinn *v.* Quinn, 8 Del. Co. 257, where the managing partner kept no books.

Virginia.— Ryman *v.* Ryman, 100 Va. 20, 40 S. E. 96, where plaintiff had kept no books of firm transactions, although the managing partner, and he was denied an accounting.

Negligence of a partner's husband in the management of the partnership business does not defeat her right to an accounting. Bradly *v.* Jennings, 201 Pa. St. 473, 51 Atl. 343.

29. Reis *v.* Reis, 99 Minn. 446, 109 N. W. 997.

30. *Arkansas.*— Jones *v.* Jones, 23 Ark. 212.

Iowa.—Kemmerer *v.* Kemmerer, 85 Iowa 193, 52 N. W. 194, a case of considerable hardship to plaintiff.

Kentucky.— Wathen *v.* Russell, 47 S. W. 437, 20 Ky. L. Rep. 709.

New York.— Newhall *v.* Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712 [*reversing* 68 Hun 1, 22 N. Y. Suppl. 828].

Pennsylvania.— Helb *v.* Hake, 15 York Leg. Rec. 110.

United States.— Warren *v.* Burnham, 32 Fed. 579.

See 38 Cent. Dig. tit. "Partnership," § 734.

31. Colgin *v.* Cummins, 1 Port. (Ala.) 148

often allowed to counter-claim for plaintiff's violation of his duty as a partner,[32] although as a rule such claims form items in the account itself, rather than subjects of set-off or counter-claim, in the technical sense.[33]

3. Form of Remedy — a. Generally by Bill in Equity. A partner who seeks a judicial settlement of the firm's affairs ordinarily institutes a suit in equity because of its flexible procedure, and because of the special machinery possessed by equity courts for dealing with complicated interests and accounts.[34] If a private settlement has been reached by the parties, an action at law will lie to enforce collection of the sum due,[35] as it will to recover for the breach of an individual covenant by a defendant partner.[36]

b. Common-Law Action of Account. In England this action appears never to have been employed.[37] In this country it has been resorted to rather sparingly,[38]

(a note made by a deceased partner in his lifetime to a stranger, and obtained by the surviving partner after the maker's death, cannot be set off against the personal representative's claim for the deceased's share); Turner *v.* Weston, 133 N. Y. 650, 31 N. E. 91 [*affirming* 16 N. Y. Suppl. 772]; Boyd *v.* Foot, 5 Bosw. (N. Y.) 110; Schermerhorn *v.* Brewer, 17 N. Y. Suppl. 701 (goods supplied by the surviving partner to the heirs of the deceased cannot be set off against the personal representative); Carey *v.* Williams, 1 Lea (Tenn.) 51. See also Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

32. McConnell *v.* Stubbs, 124 Ga. 1038, 53 S. E. 698; More *v.* Rand, 60 N. Y. 208; Brown *v.* Dennison, 28 N. Y. App. Div. 535, 51 N. Y. Suppl. 300 [*reversing* 22 Misc. 59, 49 N. Y. Suppl. 420].

33. McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Reeves *v.* Bushby, 25 Misc. (N. Y.) 226, 55 N. Y. Suppl. 70; James *v.* Browne, 1 Dall. (Pa.) 339, 1 L. ed. 165; Turquand *v.* Wilson, 1 Ch. D. 85, 45 L. J. Ch. 104, 24 Wkly. Rep. 56; Fromont *v.* Coupland, 2 Bing. 170, 9 E. C. L. 531, 1 C. & P. 275, 12 E. C. L. 165, 3 L. J. C. P. O. S. 237, 9 Moore C. P. 319, 27 Rev. Rep. 575.

34. *Alabama.*—Monroe *v.* Hamilton, 47 Ala. 217.

California.— Barnstead *v.* Empire Min. Co., 5 Cal. 299; Nugent *v.* Locke, 4 Cal. 318; Stone *v.* Fouse, 3 Cal. 292.

Connecticut.— Gillett *v.* Hall, 13 Conn. 426; Russell *v.* Green, 10 Conn. 269; Beach *v.* Hotchkiss, 2 Conn. 425.

Georgia.— Printup *v.* Fort, 40 Ga. 276. And see Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64.

Illinois.— Bracken *v.* Kennedy, 4 Ill. 558.

Kentucky.— Neal *v.* Keel, 4 T. B. Mon. 162; Squair *v.* Ford, 7 S. W. 152, 9 Ky. L. Rep. 826.

Louisiana.— Atkinson *v.* Rogers, 14 La. Ann. 633.

Maryland.— Corner *v.* Gilman, 53 Md. 364.

Michigan.— Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859, where the court, being satisfied that the surviving partner had converted most of the firm estate, had produced a false account of partnership affairs, and had unduly prolonged the contest with the representatives of the deceased partner, decided that no further accounting was necessary, and decreed that the survivor should pay four hundred and twenty-six thousand, twenty-nine dollars and sixty-six cents, with all the costs of the litigation and a counsel fee of twenty thousand dollars.

New Hampshire.— Converse *v.* Hobbs, 64 N. H. 42, 5 Atl. 832.

New Jersey.— Lilliendahl *v.* Stegmair, 45 N. J. Eq. 648, 18 Atl. 216.

New York.— Kirkwood *v.* Smith, 47 Misc. 301, 95 N. Y. Suppl. 926 [*affirmed* in 111 N. Y. App. Div. 923, 96 N. Y. Suppl. 1132]; Watts *v.* Adler, 13 N. Y. St. 553; Rickey *v.* Bowne, 18 Johns. 131.

Pennsylvania.— Ainey's Appeal, 2 Pennyp. 192, a bill in equity is the more favored remedy, by reason of the greater flexibleness of the processes used in such a proceeding, and the chances of more correct and reliable results.

Vermont.— Spear *v.* Newell, 13 Vt. 288.

United States.— Oteri *v.* Scalzo, 145 U. S. 578, 12 S. Ct. 895, 36 L. ed. 824; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. ed. 66; Wilkinson *v.* Tilden, 9 Fed. 683, an accounting is not to be had on affidavits.

England.— Foster *v.* Donald, 1 Jac. & W. 252, 21 Rev. Rep. 157, 37 Eng. Reprint 371; Good *v.* Blewitt, 19 Ves. Jr. 336, 34 Eng. Reprint 542; Toulmin *v.* Copland, 3 Y. & C. Exch. 625.

See 38 Cent. Dig. tit. "Partnership," § 735.

35. Short *v.* Barry, 58 Barb. (N. Y.) 177; Hunt *v.* Gookin, 6 Vt. 462.

36. Doyle *v.* Bailey, 75 Ill. 418; Bennett *v.* Smith, 40 Mich. 211; Lampert *v.* Ravid, 33 Misc. (N. Y.) 115, 67 N. Y. Suppl. 82; Lessig *v.* Langton, Brightly (Pa.) 191. See *supra*, V, C, 1, c.

37. Lindley Partn. (7th ed.) 591 note (g).

38. *Connecticut.*— Beach *v.* Hotchkiss, 2 Conn. 425.

Kansas.— Clarke *v.* Mills, 36 Kan. 393, 13 Pac. 569, where the accounting included but few items and had no complications.

Maryland.— Wilhelm *v.* Caylor, 32 Md. 151.

Massachusetts.— Fowle *v.* Kirkland, 18 Pick. 299, afterward abolished by statute.

Nebraska.— Dorwart *v.* Ball, 91 Nebr. 173, 98 N. W. 652.

New York.— McMurray *v.* Rawson, 3 Hill 59; Jacobs *v.* Fountain, 19 Wend. 121; Rickey

for the settlement of the affairs of partnership having only two members.[39] In partnerships with more than two members, the action is held not to be maintainable because two or more partners could not be made either joint plaintiffs or joint defendants, their rights and liabilities being several and not joint. Hence the only remedy in such cases is in equity.[40] In some states, however, the jurisdiction of common-law courts over the action of account has been extended by statute to partnerships with more than two members.[41]

c. Action of Assumpsit. In some jurisdictions a partner has been permitted to adjust all differences between himself and a copartner in an action of assumpsit,[42] when the partnership has been limited to a single transaction, or when a basis for settlement has been agreed upon, or a final balance has been stated between them.[43]

4. Jurisdiction and Venue — a. Jurisdiction. In the absence of statutory provisions on the subject, a court of equity has exclusive jurisdiction of actions for the dissolution and settlement of partnerships.[44] As a rule this juris-

v. Bowne, 18 Johns. 131; Duncan *v.* Lyon, 3 Johns. 351, 8 Am. Dec. 513.

Pennsylvania.— Kutz *v.* Dreibelbis, 126 Pa. St. 335, 17 Atl. 609; Ainey's Appeal, 2 Pennyp. 192; Leonard *v.* Leonard, 1 Watts & S. 342; Griffith *v.* Willing, 3 Binn. 317; James *v.* Browne, 1 Dall. 339, 1 L. ed. 165; Demmy *v.* Dougherty, 1 Pearson 236.

Vermont.— Newell *v.* Humphrey, 37 Vt. 265; Warren *v.* Wheelock, 21 Vt. 323.

See 38 Cent. Dig. tit. "Partnership," § 736; and Accounts and Accounting, 1 Cyc. 401 note 31, 405.

Persons jointly interested in business.— In Porter *v.* Bichard, 1 Ariz. 87, 27 Pac. 530, and in Lesley *v.* Rosson, 39 Miss. 368, 77 Am. Dec. 679, actions for an account at common law were approved between persons, who were jointly interested in business, but not partners.

39. Appleby *v.* Brown, 24 N. Y. 143; Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354; Foster *v.* Ives, 53 Vt. 458; Wiswell *v.* Wilkins, 4 Vt. 137.

40. Beach *v.* Hotchkiss, 2 Conn. 425; Farrar *v.* Pearson, 59 Me. 561, 8 Am. Rep. 439; Appleby *v.* Browne, 24 N. Y. 143; Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354.

41. Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354; Park *v.* McGowen, 64 Vt. 173, 23 Atl. 855; Foster *v.* Ives, 53 Vt. 458; Hydeville Co. *v.* Barnes, 37 Vt. 588; Duryea *v.* Whitcomb, 31 Vt. 395; Green *v.* Chapman, 27 Vt. 236.

42. See Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381, where Judge Gray sketches the history of the common-law action of account, and that of assumpsit in cases involving account. The former was abolished in Massachusetts by Rev. St. (1836) § 43, c. 118.

43. *Kansas.*— Pettingill *v.* Jones, 28 Kan. 749.

Maine.— Pray *v.* Mitchell, 60 Me. 430, holding, however, that if plaintiff's membership in the firm is denied, he must sue in equity and not in assumpsit.

Massachusetts.— Fanning *v.* Chadwick, 3 Pick. 420, 15 Am. Dec. 233.

Missouri.— Brewer *v.* Swartz, 83 Mo. App. 451, where an arrangement had been had as to all but three or four items, for the settlement of which a definite agreement had been made.

Pennsylvania.— Galbreath *v.* Moore, 2 Watts 86, a single transaction.

England.— Way *v.* Milestone, 2 H. & H. 32, 3 Jur. 727, 5 M. & W. 21 (a final statement of account); Rackstraw *v.* Imber, Holt N. P. 368, 3 E. C. L. 149; Foster *v.* Allanson, 2 T. R. 479.

44. *Alabama.*— Dugger *v.* Tutwiler, 129 Ala. 258, 30 So. 91.

Arkansas.— Choate *v.* O'Neal, 57 Ark. 299, 21 S. W. 470; Nelson *v.* Green, 22 Ark. 547.

California.— Andrade *v.* San Francisco Super. Ct., 75 Cal. 459, 17 Pac. 531; Griggs *v.* Clark, 23 Cal. 427; Brush *v.* Maydwell, 14 Cal. 208.

Colorado.— Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803.

Connecticut.— Niles *v.* Williams, 24 Conn. 279, holding that the jurisdiction of courts of equity extends to the settlement of partnership accounts, however small may be the number of partners, where a court of law cannot make a complete and final adjustment of the partnership concerns by reason of its inability to furnish the peculiar relief necessary for that purpose.

Florida.— Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Georgia.— Epping *v.* Aiken, 71 Ga. 682. Equity has jurisdiction of accounting between partners which is not lost because discovery from defendant is waived by plaintiffs. Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64.

Idaho.— Aram *v.* Edwards, 9 Ida. 333, 74 Pac. 961.

Illinois.— Strong *v.* Clawson, 10 Ill. 346.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Kansas.— Carter *v.* Christie, 57 Kan. 492, 46 Pac. 964.

Louisiana.— Gordon *v.* Dick, 15 La. 33; Walmsley *v.* Mendelsohn, 31 La. Ann. 152; Thomson *v.* Mylne, 11 Rob. 349; Gallier *v.* Walsh, 1 Rob. 226.

Massachusetts.—White *v.* White, 169 Mass. 52, 47 N. E. 499; Miller *v.* Lord, 11 Pick. 11; Chandler *v.* Chandler, 4 Pick. 78.

diction has been continued by modern codes and statutes,[45] although occasionally the jurisdiction has been vested in courts of probate.[46] Even a court of equity may be ousted of jurisdiction by a fair and final settlement between the partners.[47] It is not ousted of jurisdiction, however, by defendant's showing that plaintiff is not entitled to all the relief which the bill demands, so long as he is entitled to any relief under the bill which he cannot obtain in a court of law.[48]

b. Venue. The proper venue of an equity action for the dissolution and settlement of a partnership is generally determined by the residence of the parties,[49] and not by the locality of the firm assets, even when these include real estate.[50] Some statutes, however, localize the action in the county where firm real estate is situated.[51]

5. Time to Sue — a. In General. In the absence of legislation on the subject,[52] an action for an accounting may be brought immediately upon dissolution.[53] Even when an action is prematurely brought, it will not be dismissed, provided it appears at the trial that complainant is entitled to any relief consistent with his prayer.[54]

Missouri.— Torbert *v.* Jeffrey, 161 Mo. 645, 61 S. W. 823; Hodges *v.* Black, 76 Mo. 537 [*affirming* 8 Mo. App. 389]; Wright *v.* Radcliffe, 61 Mo. App. 257.

New York.— Kennett *v.* Hopkins, 175 N. Y. 496, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18]; Simpson *v.* Simpson, 44 N. Y. App. Div. 492, 60 N Y. Suppl. 879; Blake *v.* Barnes, 18 N. Y. Suppl. 471, 28 Abb. N. Cas. 401; Duncan *v.* Lyon, 3 Johns. 351, 8 Am. Dec. 513 [*citing* Coke Litt. 171*a*; 1 Montague Partn. p. 45] (equity has not exclusive jurisdiction of an accounting, when the firm has been dissolved); Cunningham *v.* Littlefield, 1 Edw. 104.

Oregon.— Gleason *v.* Van Aernam, 9 Oreg. 343.

Pennsylvania.— Wiley's Appeal, 84 Pa. St. 270; Wise *v.* Wright, 10 Pa. Dist. 152, 24 Pa. Co. Ct. 528 (a justice of the peace has no jurisdiction of such an action); Roberts *v.* Dunham, 1 C. Pl. 136.

South Carolina.— Taylor *v.* Holman, 1 Mill 172.

United States.— Esterly *v.* Rua, 122 Fed. 609, 58 C. C. A. 548, applying Alaska Code, tit. 2.

England.— Jud. Act (1873), § 34; Rules Sup. Ct. Ord. XV; Maunder *v.* Lloyd, 2 Johns. & H. 718, 1 New Rep. 123, 11 Wkly. Rep. 141, 70 Eng. Reprint 1248; Hendrick *v.* Wood, 30 L. J. Ch. 583, 9 Wkly. Rep. 588; Joplin *v.* Postlethwaite, 61 L. T. Rep. N. S. 629; Luchmeechund *v.* Mill, 3 L. T. Rep. N. S. 603.

See 38 Cent. Dig. tit. "Partnership," § 739. See also *supra*, IX, D, 1, 2, 3.

The probate court has no jurisdiction to settle partnership accounts of a deceased and a surviving partner (Nelson *v.* Green, 22 Ark. 547), unless such jurisdiction is given by statute (see *infra*, this section, text and note 46). In California a probate court has jurisdiction to require the survivor to file an account and to submit to an examination, but not to settle the partnership account nor to pass upon the existence of a partnership, if that is denied. Andrade *v.* San Francisco Super. Ct., 75 Cal. 459, 17 Pac. 531.

45. Choate *v.* O'Neal, 57 Ark. 299, 21 S. W. 470; King *v.* White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. Rep. 752; Foster *v.* Ives, 53 Vt. 458; Kendrick *v.* Tarbell, 27 Vt. 512.

46. Harrah *v.* State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Caldwell *v.* Hawkins, 73 Mo. 450; Ensworth *v.* Curd, 68 Mo. 282; Unruh's Estate, 13 Phila. (Pa.) 337.

No jurisdiction in absence of statute see *supra*, note 44.

47. Logan *v.* Lucas, 59 Ill. 237; Correll *v.* Freeman, 29 Ill. App. 39.

48. *California.*—Brush *v.* Maydwell, 14 Cal. 208.

Colorado.— Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803.

Georgia.— Epping *v.* Aiken, 71 Ga. 682.

Massachusetts.—White *v.* White, 169 Mass. 52, 47 N. E. 499; Miller *v.* Lord, 11 Pick. 11.

Missouri.—Torbert *v.* Jeffrey, 161 Mo. 645, 61 S. W. 823.

Pennsylvania.— Roberts *v.* Dunham, 1 C. Pl. 136.

United States.— Brower *v.* Brower, 29 Fed. 485.

See 38 Cent. Dig. tit. "Partnership," § 740.

49. Quinn *v.* McMahan, 40 Ill. App. 593; Lobdell *v.* Bushnell, 24 La. Ann. 295; Brinegar *v.* Griffin, 2 La. Ann. 154. See *supra*, VI, D, 1, g, h.

50. Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Morris *v.* Nunn, 79 Tex. 125, 15 S. W. 220.

51. Clark *v.* Brown, 83 Cal. 181, 23 Pac. 289 (applying Code Civ. Proc. § 392); Falls of Neuse Mfg. Co. *v.* Brower, 105 N. C. 440, 11 S. E. 313 (applying Code, §§ 190, 195).

52. Word *v.* Word, 90 Ala. 81, 7 So. 412, holding that under Code (1886), § 2263, the action was not maintainable.

53. Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673; Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833; Foster *v.* Rison, 17 Gratt. (Va.) 321. See *supra*, IX, D, 2, b, d.

54. Funk *v.* Leachman, 4 Dana (Ky.) 24.

b. Statute of Limitations — (I) *Its Application.* It is well settled that an equity action for an account and settlement between parties is subject to the statute of limitations.[55] It is not always easy, however, to determine the particular provision of a local statute which applies to a particular case.[56]

(II) *Running of Statute.* As a rule the statute begins to run from the time when the cause of action set forth in the complaint matured,[57] and not

In Inglis *v.* Floyd, 33 Mo. App. 565, it was held that a partner who had mortgaged his share to a copartner for advances made by the latter was entitled to institute an action for a dissolution and accounting immediately upon being excluded from the firm business, although the time for redemption of the mortgage had not expired.

55. *Alabama.*— Bradford *v.* Spyker, 32 Ala. 134.

Arkansas.— Adams *v.* Taylor, 14 Ark. 62.

California.— Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

Maryland.— McKaig *v.* Hebb, 42 Md. 227; Wilhelm *v.* Caylor, 32 Md. 151.

Massachusetts.— Currier *v.* Studley, 159 Mass. 17, 33 N. E. 709; Farnam *v.* Brooks, 9 Pick. 212; Burditt *v.* Grew, 8 Pick. 108.

Michigan.— Jenny *v.* Perkins, 17 Mich. 28.

Mississippi.— Prewett *v.* Buckingham, 28 Miss. 92.

Missouri.— Coudrey *v.* Gilliam, 60 Mo. 86.

New Jersey.— Cowart *v.* Perrine, 18 N. J. Eq. 454.

New York.— Atwater *v.* Fowler, 1 Edw. 417.

Ohio.— Gray *v.* Kerr, 46 Ohio St. 652, 23 N. E. 136.

South Carolina.— Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963; Montgomery *v.* Montgomery, Rich. Eq. Cas. 64.

United States.— Campbell *v.* Clark, 101 Fed. 972, 42 C. C. A. 123.

England.— Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Bridges *v.* Mitchell, Gilb. 224, 25 Eng. Reprint 156.

Canada.— Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161; Carroll *v.* Eccles, 17 Grant Ch. (U. C.) 529, holding that the statute of limitations cannot be raised under the common decree directing an account of the partnership transactions.

See 38 Cent. Dig. tit. "Partnership," § 743.

"Claims between partners."— Where a surviving partner is sued by the heirs of the deceased partner for a debt due the firm in an individual capacity and for an amount of firm debts collected by him, the claims are claims between partners to which the four-year statute of limitation applies, under Rev. St. (1895) art. 3356. Wylie *v.* Langhorne, (Tex. Civ. App. 1907) 101 S. W. 527.

56. "Merchants' accounts."—In the following cases it was held that accounts between partners are not "merchants' accounts" within the statute of limitations: Patterson *v.* Brown, 6 T. B. Mon. (Ky.) 10; Lansdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330; Wilhelm *v.* Caylor, 32 Md. 151; Manchester *v.* Mathewson, 3 R. I. 237; Coalter *v.* Coalter, 1 Rob. (Va.) 79. But it was held to be within that phrase in Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

Statute applicable to common-law action of account.— In the following cases it was held that the statutory limitation applicable to a common-law action of account applies to an equity suit for a partnership accounting: Bradford *v.* Spyker, 32 Ala. 134; Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833 [*affirming* 18 Ill. App. 562]; Quayle *v.* Guild, 91 Ill. 378; Coalter *v.* Coalter, 1 Rob. (Va.) 79.

57. *Alabama.*— Cary *v.* Simmons, 87 Ala. 524, 6 So. 416.

California.— Payments claimed to have been made by plaintiff's deceased partner for the benefit of the firm, more than two years before an action for an accounting, were barred by limitations. Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

Colorado.— Lendholm *v.* Bailey, 16 Colo. App. 190, 64 Pac. 586, where the action was treated as one on an account stated, and hence the statute began to run from the time the account was received.

Kentucky.—Hellenbrand *v.* Bates, 56 S. W. 418, 21 Ky. L. Rep. 1759.

Louisiana.— Parker's Succession, 17 La. Ann. 28 (action for balance barred by a silence of five years after balance struck); King *v.* Wartelle, 14 La. Ann. 740 (action for an account prescribed by ten years after the dissolution).

Minnesota.— McClung *v.* Capehart, 24 Minn. 17, action for accounting between partners must be brought within six years from the time the cause of action accrues.

New York.— Fellowes *v.* Johnson, 91 N. Y. App. Div. 611, 86 N. Y. Suppl. 436 (as affairs were settled at time of dissolution, statute then began to run); Didier *v.* Davison, 2 Barb. Ch. 477.

Ohio.— Gray *v.* Kerr, 46 Ohio St. 652, 23 N. E. 136 (ten years after the cause of action accrues, under Rev. St. § 4985); Jones *v.* Jones, 18 Ohio Cir. Ct. 260, 10 Ohio Cir. Dec. 71.

Pennsylvania.— Brew *v.* Hastings, 206 Pa. St. 155, 55 Atl. 922; Garretson *v.* Brown, 185 Pa. St. 447, 40 Atl. 293, holding that closed transactions between partners are in the nature of accounts stated, and therefore subject to the statute of limitations.

Texas.— Peel *v.* Giesen, 21 Tex. Civ. App. 334, 51 S. W. 44.

England.— Partn. Act (1890), § 43; Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Noyes *v.* Crawley, 10 Ch. D. 31, 48 L. J. Ch. 112, 39 L. T. Rep. N. S. 267, 27 Wkly. Rep. 109; Watson *v.* Wood-

before.[58] It is generally agreed, however, that the statutory period of limitations does not begin to run against a suit for an accounting before the firm's dissolution,[59] unless plaintiff's claim for an accounting is joined with a claim for dissolution, and the latter claim is based upon a cause of action accruing before dissolution.[60] Beyond this point the cases present a great diversity of view. Some hold that the statutory period begins to run immediately upon dissolution, inasmuch as either partner may then bring a suit for an accounting.[61] Others hold that it does not begin to run until the last item of debit or credit, or other like partnership transaction, on account between the partners.[62] Still others hold,

man, L. R. 20 Eq. 721, 45 L. J. Ch. 57, 24 Wkly. Rep. 47; Whitley *v.* Lowe, 2 De G. & J. 704, 4 Jur. N. S. 815, 6 Wkly. Rep. 819, 59 Eng. Ch. 552, 44 Eng. Reprint 1163 [*affirming* 25 Beav. 421, 53 Eng. Reprint 697]; Tatam *v.* Williams, 3 Hare 347, 25 Eng. Ch. 347, 67 Eng. Reprint 415; Taylor *v.* Taylor, 28 L. T. Rep. N. S. 189.

See 38 Cent. Dig. tit. "Partnership," §§ 743, 744.

58. *Alabama.*— Dugger *v.* Tutwiler, 129 Ala. 258, 30 So. 91.

Illinois.— Raymond *v.* Vaughn, 128 Ill. 256, 21 N. E. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440.

Kentucky.— Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186.

North Carolina.— McNair *v.* Ragland, 16 N. C. 533.

England.— Miller *v.* Miller, L. R. 8 Eq. 499; *Ex p.* Hall, 3 Deac. 125; *Ex p.* Gould, 4 Deac. & C. 547, 4 L. J. Bankr. 7, 2 Mont. & A. 48; Clements *v.* Hall, 2 De G. & J. 173, 4 Jur. N. S. 494, 27 L. J. Ch. 349, 6 Wkly. Rep. 358, 59 Eng. Ch. 138, 44 Eng. Reprint 954.

See 38 Cent. Dig. tit. "Partnership," §§ 743, 744.

59. *Illinois.*— Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868; Askew *v.* Springer, 111 Ill. 662.

Iowa.— Petty *v.* Haas, 122 Iowa 257, 98 N. W. 104.

Massachusetts.— A partner's right to an accounting and settlement accrues on the dissolution of the firm. Eddy *v.* Fogg, 192 Mass. 543, 78 N. E. 549. See also Farnam *v.* Brooks, 9 Pick. 212.

Minnesota.—Broderick *v.* Beaupre, 40 Minn. 379, 42 N. W. 83.

Mississippi.— Vaiden *v.* Hawkins, (1889) 6 So. 227.

North Carolina.— Clinton Loan Assoc. *v.* Ferrell, 114 N. C. 301, 19 S. E. 240, holding that the statute of limitations does not begin to run in favor of a member of a firm, who has signed, as surety, a note payable to the firm, until the dissolution of the firm.

Rhode Island.— Allen *v.* Woonsocket Co., 11 R. I. 288.

South Carolina.— Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741. Limitations begin to run in favor of a member of a firm, against an accounting, at his death. McBrayer *v.* Mills, 62 S. C. 36, 39 S. E. 788.

England.— Betjemann *v.* Betjemann, [1895] 2 Ch. 474, 64 L. J. Ch. 641, 73 L. T. Rep. N. S. 2, 12 Reports 455, 44 Wkly. Rep. 182; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237, 44 Eng. Reprint 1285 [*affirming* 1 Giffard 355, 4 Jur. N. S. 999, 6 Wkly. Rep. 509, 65 Eng. Reprint 954].

See 38 Cent. Dig. tit. "Partnership," § 744.

60. Brush *v.* Jay, 113 N. Y. 482, 21 N. E. 184.

61. *Alabama.*— Stovall *v.* Clay, 108 Ala. 105, 20 So. 387.

California.— West *v.* Russell, 74 Cal. 544, 16 Pac. 392.

Illinois.— Richardson *v.* Gregory, 126 Ill. 166, 18 N. E. 777 [*affirming* 27 Ill. App. 621]; Blake *v.* Sweeting, 121 Ill. 67, 12 N. E. 67.

Louisiana.— King *v.* Wartelle, 14 La. Ann. 740.

Massachusetts.— Currier *v.* Studley, 159 Mass. 17, 33 N. E. 709.

New York.— Gray *v.* Green, 125 N. Y. 203, 26 N. E. 253 [*reversing* 41 Hun 524, 6 N. Y. Suppl. 451, but *limited* in 142 N. Y. 316, 321, 37 N. E. 124, 40 Am. St. Rep. 596, to a state of facts where one partner is made exclusive liquidator and his right to the possession of assets is denied and resisted]; Murray *v.* Coster, 20 Johns. 576, 11 Am. Dec. 333.

North Carolina.— Weisman *v.* Smith, 59 N. C. 124, a case in which defendant was the personal representative of a deceased partner.

Ohio.— Gray *v.* Kerr, 46 Ohio St. 652, 23 N. E. 136 (unless there is some agreement express or implied, fixing a period for accounting beyond that time, or circumstances rendering an accounting then impracticable); Jones *v.* Jones, 18 Ohio Cir. Ct. 260, 10 Ohio Cir. Dec. 71.

Pennsylvania.— Guldin *v.* Lorah, 141 Pa. St. 109, 21 Atl. 504 [*affirming* 8 Pa. Co. Ct. 503]; McKelvy's Appeal, 72 Pa. St. 409.

Rhode Island.— Allen *v.* Woonsocket Co., 11 R. I. 288.

Texas.— Morris *v.* Nunn, 79 Tex. 125, 15 S. W. 220.

See 38 Cent. Dig. tit. "Partnership," § 744.

62. *Alabama.*— Dugger *v.* Tutwiler, 129 Ala. 258, 30 So. 91; Haynes *v.* Short, 88 Ala. 562, 7 So. 157; Wells *v.* Brown, 83 Ala. 161, 3 So. 439; Brewer *v.* Browne, 68 Ala. 210; Cannon *v.* Copeland, 43 Ala. 201; Bradford *v.* Spyker, 32 Ala. 134. See Causler *v.* Wharton, 62 Ala. 358.

and this holding is correct in principle, that the statute does not begin to run until the partnership affairs have been settled and a balance struck.[63] Another class holds that the statute begins to run after the lapse of a reasonable time for settlement.[64] And yet other cases hold that the statute begins to run as soon as one partner disputes a claim of the other, or holds firm assets adversely to him.[65] Some judges have expressed the opinion that the time from which the period of limitations is to be computed must depend on the circumstances of each case, and cannot be governed by rigid or formal rule.[66] And in a number of cases it has been held that where, after a dissolution, the agreement of the parties or the circumstances are such as to create a continuing trust, the statute will not begin to run until a demand or repudiation of the trust.[67] As a rule, in the case of fraud,

California.— White *v.* Conway, 66 Cal. 383, 5 Pac. 672.

Kentucky.— Taylor *v.* Morrison, 7 Dana 241.

Minnesota.— McClung *v.* Capehart, 24 Minn. 17.

Missouri.— Where a firm of lawyers dissolved and agreed that each member should collect the fees for the business he had brought into the partnership, and that such fees should be equally divided, and plaintiff, within less than five years from the time he brought his action, discovered that defendant had not accounted for all the fees he had collected, the action was not barred by the five-year statute of limitations. Dye *v.* Bowling, 82 Mo. App. 587.

New Jersey.— Todd *v.* Rafferty, 30 N. J. Eq. 254 [*affirmed* in 34 N. J. Eq. 552]; Stout *v.* Seabrook, 30 N. J. Eq. 187 [*affirmed* in 32 N. J. Eq. 826].

New York.— Green *v.* Ames, 14 N. Y. 225.

Pennsylvania.— Helb *v.* Hake, 15 York Leg. Rec. 110.

Texas.— Bluntzer *v.* Hirsch, 32 Tex. Civ. App. 585, 75 S. W. 326.

See 38 Cent. Dig. tit. "Partnership," § 744.

63. *Georgia.*— Prentice *v.* Elliott, 72 Ga. 154; Hammond *v.* Hammond, 20 Ga. 556.

Illinois.— Weber *v.* Zacharias, 105 Ill. App. 640.

Louisiana.—Benoist *v.* Markey, 25 La. Ann. 59; Bauduc *v.* Laurent, 2 La. 449.

Maryland.— Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60, 33 Atl. 645.

Missouri.— Coudrey *v.* Gilliam, 60 Mo. 86; Bender *v.* Markle, 37 Mo. App. 234. Where a firm was engaged in a joint speculation with other parties outside of its regular business which resulted in a loss, and in a subsequent settlement of the firm business, the firm adjusted among the partners its share in the loss, it was held that the statute of limitations did not begin to run in favor of a partner who had specially authorized the speculation, as to his liability, until the date of the adjustment, and therefore suit brought against him within five years thereafter was not barred. Tutt *v.* Cloney, 62 Mo. 116.

New York.— Atwater *v.* Fowler, 1 Edw. 417.

North Carolina.— Partners, as to each other, stand in the relation of trustees; and the statute of limitations will not run in favor of one against the other until something is done to render that relation adversary. Rencher *v.* Anderson, 95 N. C. 208.

Oregon.— McDonald *v.* Holmes, 22 Oreg. 212, 29 Pac. 735.

Tennessee.— Miller *v.* Harris, 9 Baxt. 101.

Virginia.— Jordan *v.* Miller, 75 Va. 442; Foster *v.* Rison, 17 Gratt. 321 (applying Code, c. 149, § 5); Marsteller *v.* Weaver, 1 Gratt. 391.

West Virginia.— Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653; Boggs *v.* Johnson, 26 W. Va. 821; Sandy *v.* Randall, 20 W. Va. 244.

United States.— Thomas *v.* Hurst, 73 Fed. 372.

See 38 Cent. Dig. tit. "Partnership," § 744.

64. Prentice *v.* Elliott, 72 Ga. 154; Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554 [*affirming* 20 N. Y. Suppl. 203].

65. Gray *v.* Green, 125 N. Y. 203, 26 N. E. 253 [*reversing* 41 Hun 524, 6 N. Y. Suppl. 451, and *distinguished* from same case on a different set of facts in 142 N. Y. 316, 37 N. E. 124, 40 Am. St. Rep. 596]; Merino *v.* Munoz, 5 N. Y. App. Div. 71, 38 N. Y. Suppl. 678; Murray *v.* Penny, 108 N. C. 324, 12 S. E. 957; McNair *v.* Ragland, 7 N. C. 139; Allen *v.* Woonsocket Co., 11 R. I. 288.

Where a partner bought land with the partnership funds, without the consent of his copartner, and had the conveyance made to a third person who knew the facts, a cause of action accrued immediately to the copartner, and it was not necessary that there should be a denial of the trust before the statute of limitations would begin to run. Howell *v.* Howell, 15 Wis. 55.

66. Massey *v.* Tingle, 29 Mo. 437; Gray *v.* Green, 142 N. Y. 316, 321, 37 N. E. 124, 40 Am. St. Rep. 596 [*affirming* 66 Hun 469, 21 N. Y. Suppl. 533]. Where the affairs of a partnership are fully settled, with the exception of certain outstanding accounts, which are considered worthless, but which one of the partners does finally collect, the statute of limitations runs in his favor, as against the other partner, from the settlement of the partnership, and not merely from the time of collection. Mellish *v.* McMahon, 19 N. Y. Suppl. 455.

67. *Alabama.*— Causler *v.* Wharton, 62 Ala. 358, holding that where the partnership affairs are unsettled on a dissolution, and one

the statute of limitations does not begin to run until the fraud is or should be discovered.[68]

c. Laches. Even when plaintiff's suit for an accounting is not subject to the statute of limitations, it may be defeated by his laches,[69] especially if by reason of

partner, by written agreement with the other, leaves the partnership assets with him to dispose of whenever he can do so at a fair price, a continuing trust is thereby created, and the statute of limitations will not begin to run against the right to an account of the partnership dealings, so long as the partner to whom the assets were delivered acts under the trust or admits that it is still continuing.

California.— Roach *v.* Caraffa, 85 Cal. 436, 25 Pac. 22.

Illinois.— See King *v.* Hamilton, 16 Ill. 190.

Missouri.— Coudrey *v.* Gilliam, 60 Mo. 86, holding that where the mutual arrangement, after dissolution, delegates to one partner the collection of debts due to the firm, no cause of action accrues against him in favor of his copartner, nor does the statute of limitation begin to run, so long as a faithful discharge of that duty postpones a final settlement.

North Carolina.— Faison *v.* Stewart, 112 N. C. 332, 17 S. E. 157; MacNair *v.* Ragland, 7 N. C. 139, holding that where, after the dissolution of a partnership, the acting partner was authorized to settle the partnership affairs, collect debts, etc., and was to account to the other members of the firm whenever required by them, such acting partner was trustee in respect to the partnership funds coming to his hands; and the statute of limitations did not begin to run in his favor, against his copartners, until they had demanded of him an account.

South Carolina.— See Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963.

Texas.— Carroll *v.* Evans, 27 Tex. 262, holding that where a partnership is dissolved by an assignment by one partner of his interest in the concern, the remaining partner holds the property in trust for himself and the assignee, and therefore the statute of limitations does not begin to run against the assignee in favor of the remaining partner until he repudiates the trust.

United States.— Riddle *v.* Whitehill, 135 U. S. 621, 10 S. Ct. 924, 34 L. ed. 282, holding that where a member of a partnership, who by the agreement could terminate the partnership at any time, made an assignment for the benefit of creditors, and the partnership agreement provided that, on a dissolution by such member, the other partner, who had charge and control of the partnership property, should "wind up their affairs, and sell the stock to the best advantage for all parties concerned," after the dissolution the partner remaining in possession held the partnership property, by the terms of the agreement, under a continuing trust for the other partner, and the statute of limitations did not begin to run against the latter's right to an account of the partnership dealings so long as the former did not repudiate the trust.

Repudiation of trust.— Where, after the dissolution of a partnership between W and P, the former holds possession of the firm assets as trustee, the filing by the administrator of W, in the proper office, of an inventory of the property of his intestate which includes all the assets of such firm, is a repudiation of the trust so as to set the statute of limitations running against P; the latter being charged with notice of the contents of the inventory. Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963.

68. Betjemann *v.* Betjemann, [1895] 2 Ch. 474, 64 L. J. Ch. 641, 73 L. T. Rep. N. S. 2, 12 Reports 455, 44 Wkly. Rep. 182, holding that as between partners, in cases of concealed fraud, the statute of limitations does not commence to run from the time when, with reasonable diligence, the fraud might have been discovered, but only from the time when it has in fact been discovered, unless the person complaining has had his suspicion aroused, and, having the means of knowledge, has not chosen to avail himself of that means.

69. *Alabama.*—Philippi *v.* Philippi, 61 Ala. 41, holding that aversion to litigation is no excuse for failing to sue for twenty years.

California.— Robertson *v.* Burrell, 110 Cal. 568, 42 Pac. 1086 (the demand is stale after a lapse of thirty-one years); Bell *v.* Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791 (after twenty-five years; nor can the suit be treated as one for the partition of firm real estate, ejectment, or mesne profits); Harris *v.* Hillegrass, 66 Cal. 79, 4 Pac. 987 (equity will not ordinarily entertain a suit for a partnership accounting twenty years after dissolution).

Missouri.— Goodson *v.* Goodson, 140 Mo. 206, 41 S. W. 737, if plaintiff seeks to excuse his delay on the ground of fraudulent representations of defendant, he must state the facts constituting the fraud.

New York.— Ray *v.* Bogart, 2 Johns. Cas. 432, the lapse of twenty years after dissolution and the death of a partner will defeat an action for accounting by the survivor.

Pennsylvania.— Andriessen's Appeal, 123 Pa. St. 303, 16 Atl. 840; Iredell's Appeal, 10 Pa. Cas. 127, 13 Atl. 752.

South Carolina.— Wagner *v.* Sanders, 62 S. C. 73, 39 S. E. 950.

United States.— Van Vleet *v.* Sledge, 45 Fed. 743, holding that a demand against a partner by the other members of the firm should be refused on the ground of laches, where it is made ten years after the affairs of the partnership have been amicably settled, and the accounts of the several partners, as between themselves, satisfactorily adjusted.

Canada.— Toothe *v.* Kittredge, 24 Can. Sup. Ct. 287.

See 38 Cent. Dig. tit. "Partnership," § 745.

his long delay defendants have lost their evidence or been placed in a disadvantageous position,[70] or it has become impossible for the court to do full justice to both parties.[71] And even though plaintiff's laches may not bar his claim entirely it may defeat his right to interest on such claim.[72] Mere delay, however, will not defeat plaintiff's claim for an accounting, where the partnership relation admittedly continues, or where peculiar circumstances justify the delay.[73] Nor will laches bar an action before the expiration of the statutory period.[74]

6. Parties, Process, and Appearance — a. The Partners. To actions for dissolution and accounting all the partners are necessary parties,[75] at least all within the jurisdiction;[76] for unless all are brought into the litigation a decree cannot be

70. Lawrence *v.* Rokes, 61 Me. 38.

71. Stout *v.* Seabrook, 30 N. J. Eq. 187 [*affirmed* in 32 N. J. Eq. 826].

72. O'Lone *v.* O'Lone, 2 Grant Ch. (U. C.) 125; Rowe *v.* Cotton, 17 U. C. Q. B. 533.

73. *Arkansas.*— McGuire *v.* Ramsey, 9 Ark. 518.

California.— Harris *v.* Hillegass, 54 Cal. 463.

District of Columbia.— Baker *v.* Cummings, 4 App. Cas. 230.

Iowa.— Petty *v.* Haas, 122 Iowa 257, 98 N. W. 104.

Maine.— Lawrence *v.* Rokes, 61 Me. 38.

Maryland.— Glenn *v.* Hebb, 12 Gill & J. 271.

Missouri.— Dye *v.* Bowling, 82 Mo. App. 587.

United States.— Clay *v.* Freeman, 118 U. S. 97, 6 S. Ct. 964, 30 L. ed. 104.

England.— *Ex p.* Trueman, 1 Deac. & C. 464.

Canada.— Archibald *v.* McNerhanie, 29 Can. Sup. Ct. 564 [*affirming* 6 Brit. Col. 260].

See 38 Cent. Dig. tit. "Partnership," § 745.

Fraud.— Where one of the parties to an agreement for dissolution of a partnership discovers soon after the settlement that he has been defrauded by the other, and immediately calls upon such other partner to rectify the wrong, which the latter declines to do, the former is not guilty of such laches as will preclude a recovery by waiting seven months before filing his petition for further accounting. Oliver *v.* House, 125 Ga. 637, 54 S. E. 732.

74. Foster *v.* Rison, 17 Gratt. (Va.) 321.

75. *California.*— Cuyamaca Granite Co. *v.* Pacific Paving Co., 95 Cal. 252, 30 Pac. 525; Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534; Settembre *v.* Putnam, 30 Cal. 490.

Colorado.— Lynch *v.* Foley, 32 Colo. 110, 76 Pac. 370.

Georgia.— Elliott *v.* Deason, 64 Ga. 63; Wells *v.* Strange, 5 Ga. 22.

Illinois.— Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350.

Louisiana.— Francis *v.* Lavine, 21 La. Ann. 265; Lincoln *v.* Ball, 6 La. 685; Dufan *v.* Massicot, 6 Mart. N. S. 182.

Maine.— Beal *v.* Bass, 86 Me. 325, 29 Atl. 1088; Fuller *v.* Benjamin, 23 Me. 255.

Maryland.— McKaig *v.* Hebb, 42 Md. 227.

Massachusetts.— Bartlett *v.* Parks, 1 Cush. 82.

Minnesota.— Wilcox *v.* Comstock, 37 Minn. 65, 33 N. W. 42.

New Mexico.— De Manderfield *v.* Field, 7 N. M. 17, 32 Pac. 146.

New York.— Stokes *v.* Stokes, 128 N. Y. 615, 28 N. E. 253 [*affirming* 59 Hun 431, 13 N. Y. Suppl. 407]; Arnold *v.* Arnold, 90 N. Y. 580; Kirkwood *v.* Smith, 47 Misc. 301, 95 N. Y. Suppl. 926.

Texas.— Boyd *v.* Boyd, 34 Tex. Civ. App. 57, 78 S. W. 39.

Virginia.— Waggoner *v.* Gray, 2 Hen. & M. 603.

United States.— New York Fourth Nat. Bank *v.* New Orleans, etc., R. Co., 11 Wall. 624, 20 L. ed. 82; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638; Parsons *v.* Howard, 18 Fed. Cas. No. 10,777, 2 Woods 1; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

England.— Bainbridge *v.* Burton, 2 Beav. 539, 17 Eng. Ch. 539, 48 Eng. Reprint 1290; Hills *v.* Nash, 10 Jur. 148, 15 L. J. Ch. 107, 1 Phil. 594, 19 Eng. Ch. 594, 41 Eng. Reprint 759; Sibley *v.* Minton, 27 L. J. Ch. 53, 5 Wkly. Rep. 675; Ireton *v.* Lewes, Rep. t. Finch. 96, 23 Eng. Reprint 52; Long *v.* Yonge, 2 Sim. 369, 2 Eng. Ch. 369, 57 Eng. Reprint 827; Baldwin *v.* Lawrence, 2 Sim. & St. 18, 1 Eng. Ch. 18, 57 Eng. Reprint 251; Leigh *v.* Thomas, 2 Ves. 312, 28 Eng. Reprint 201; Beaumont *v.* Meredith, 3 Ves. & B. 180, 35 Eng. Reprint 447; Spartali *v.* Constantinidi, 20 Wkly. Rep. 823. But *compare* Chancey *v.* May, Prec. Ch. 592, 24 Eng. Reprint 265, where a part of the members were allowed to sue on behalf of themselves and others.

See 38 Cent. Dig. tit. "Partnership," § 746.

And see Stimson *v.* Lewis, 36 Vt. 91, where the court sustained a bill by three members of a protective union, composed of about eighty members, against twenty-eight other members, upon condition of its appearing that no difficulty was found in doing justice to all the parties to the bill, and that no injury would be caused to the interests of others.

76. Towle *v.* Pierce, 12 Metc. (Mass.) 329, 46 Am. Dec. 679 (where the non-resident partners had been paid in full); Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562 (where the non-resident partner had disposed of all his interest to his copartner, who was a party); Duxbury *v.* Isherwood, 10 L. T. Rep. N. S. 712. In Wright *v.* Ward, 65 Cal. 525,

made which will finally dispose of all questions involved.[77] When all the partners are living and within the jurisdiction, they are ordinarily the only necessary or proper parties to such actions.[78]

b. Transferees of a Partner. In this country the transferee of a partner's interest is a proper party plaintiff,[79] or defendant,[80] to an action for a firm accounting. When such transferee sues his transferrer for an accounting, the other partners need not be joined.[81]

c. Personal Representatives of a Deceased Partner. These are necessary parties to a suit for a partnership settlement and accounting,[82] unless a third party

4 Pac. 534, and Lincoln *v.* Ball, 6 La. 685, it was held that even a non-resident partner is a necessary party to an action for an accounting.

77. Selman *v.* Walling, (Ala. 1905) 39 So. 568; Wells *v.* Strange, 5 Ga. 22; Elliott *v.* Stevenson, 21 Ind. 359.

78. *Arkansas.*— Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376, holding that one who has ceased to be a partner is not a necessary party.

California.— Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101 (holding that an individual creditor of a partner who has attached the debtor's interest in certain firm assets is not a necessary party); Harper *v.* Anderson, (1894) 37 Pac. 926 (nor the partner in a different firm of one copartner); Chapin *v.* Brown, 101 Cal. 500, 35 Pac. 1051 (nor the assignee of a part of one partner's interest).

Connecticut.— Townsend *v.* Anger, 3 Conn. 354.

Maine.— Warren *v.* Warren, 56 Me. 360, holding that a retired partner who has fully accounted and been paid in full is not a necessary party.

Maryland.— White *v.* White, 4 Md. Ch. 418.

New York.— Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979 [*reversing* 91 Hun 599, 36 N. Y. Suppl. 653].

Pennsylvania.— Parker *v.* Broadbent, 134 Pa. St. 322, 19 Atl. 631; Luzier *v.* Naylor Line, etc., Co., 8 Pa. Dist. 632.

England.— *In re* Flavell, 25 Ch. D. 89, 53 L. J. Ch. 185, 49 L. T. Rep. N. S. 690, 32 Wkly. Rep. 102; Ehrmann *v.* Ehrmann, 72 L. T. Rep. N. S. 17, 43 Wkly. Rep. 125; Williams *v.* Poole, 28 L. T. Rep. N. S. 292, 21 Wkly. Rep. 252.

See 38 Cent. Dig. tit. "Partnership," § 746.

79. Fountaine *v.* Urquhart, 33 Ga. Suppl. 184; Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350; De Manderfield *v.* Field, 7 N. M. 17, 32 Pac. 146; Stokes *v.* Stokes, 59 Hun (N. Y.) 431, 13 N. Y. Suppl. 407 [*affirmed* in 128 N. Y. 615, 28 N. E. 253]; Dayton *v.* Wilkes, 5 Bosw. (N. Y.) 655. See *supra*, IX, C, 1, b.

80. *Illinois.*— Rosenstiel *v.* Gray, 112 Ill. 282.

Maine.— Fuller *v.* Benjamin, 23 Me. 255.

Maryland.— White *v.* White, 4 Md. Ch. 418.

Michigan.— Glynn *v.* Phetteplace, 26 Mich. 383.

New York.— Johnson *v.* Snyder, 7 How. Pr. 395.

North Carolina.— Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489 (holding that the mortgagees of the surviving partner's interest in a partnership mill are necessary parties defendant to a suit by the executor of the deceased partner for a partnership settlement and accounting, as they become the legal owners of the mortgaging partner's interest, and their rights are involved in the settlement); Waugh *v.* Mitchell, 21 N. C. 510.

South Carolina.— Wagner *v.* Sanders, 49 S. C. 192, 27 S. E. 68, applying section 139 of the code.

United States.—Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

See 38 Cent. Dig. tit. "Partnership," § 747.

81. Brown *v.* De Tastet, Jac. 284, 23 Rev. Rep. 59, 4 Eng. Ch. 284, 37 Eng. Reprint 858.

82. *Georgia.*— Burchard *v.* Boyce, 21 Ga. 6, holding also that a bill may be amended so as to bring them in.

Louisiana.— Walmsley *v.* Mendelsohn, 31 La. Ann. 152.

Michigan.— Carpenter *v.* St. Clair Cir. Judge, 122 Mich. 323, 81 N. W. 95; Jenness *v.* Smith, 58 Mich. 280, 25 N. W. 191.

New Jersey.— Harrison *v.* Righter, 11 N. J. Eq. 389.

New York.— Secor *v.* Tradesmen's Nat. Bank, 92 N. Y. App. Div. 294, 87 N. Y. Suppl. 181; Simpson *v.* Simpson, 44 N. Y. App. Div. 492, 60 N. Y. Suppl. 879; Krumbeck *v.* Clancy, 41 N. Y. App. Div. 397, 58 N. Y. Suppl. 727 (holding that the executor of a member of a firm who died after the court had appointed a referee to state the partnership accounts between the parties, in an action for dissolution of the partnership, is properly substituted as a party to the accounting); Coster *v.* Clarke, 3 Edw. 428.

Pennsylvania.—De Haven's Appeal, 44 Leg. Int. 38; Pettit *v.* Baird, 30 Leg. Int. 208.

Wisconsin.— Blakely *v.* Smock, 96 Wis. 611, 71 N. W. 1052.

United States.— Moore *v.* Huntington, 17 Wall. 417, 21 L. ed. 642; Bartle *v.* Nutt, 4 Pet. 184, 7 L. ed. 825 [*affirming* 2 Fed. Cas. No. 1,072, 3 Cranch C. C. 283]. To a suit in equity by the personal representative of a deceased partner against a sole surviving partner, to whom also all the assets of the partnership have been transferred as trustee under an agreement between all parties in interest, to obtain a final settlement of the partnership affairs, the personal representatives of other deceased partners are indis-

has taken their place with the consent of the surviving partners,[83] or unless they refuse to bring an action for an accounting, or their position is such that injury may result to them if they become parties.[84]

d. Heirs. The heirs of a deceased partner can rarely bring an action for a partnership accounting, as the proper party plaintiff is either the surviving partner[85] or the personal representative of the deceased partner.[86] They are often made parties defendant in this country, and should be such whenever their interests may be affected by the result of the accounting.[87]

e. Creditors. As a rule creditors are neither necessary nor proper parties to a suit between partners for a firm settlement and accounting.[88] They are often permitted, however, to appear in such a suit for the purpose of establishing their claims,[89] and even for the purpose of compelling an honest distribution of firm assets.[90]

f. Fraudulent Grantee or Confederate. When the avoidance of a fraudulent transfer or of a scheme harmful to the partnership in which a partner has had a confederate is necessary to a full settlement and accounting by the partnership, the fraudulent transferee or confederate may be made a party.[91]

g. Process and Appearance. As a rule every necessary party to a suit for an accounting must be served with process or appear in the proceeding, before a final decree can be entered.[92]

7. Provisional Remedies — a. Attachment. An attachment is allowed by some state statutes as a provisional remedy in actions for partnership accountings,[93] but

pensable parties. Brew *v.* Cochran, 141 Fed. 459.

England.— Simpson *v.* Chapman, 4 De G. M. & G. 154, 53 Eng. Ch. 121, 43 Eng. Reprint 466; Clegg *v.* Fishwick, 1 Hall & T. 390, 47 Eng. Reprint 1463, 12 Jur. 993, 19 L. J. Ch. 49, 1 Macn. & G. 294, 47 Eng. Ch. 235, 41 Eng. Reprint 1278; Cox *v.* Stephens, 9 Jur. N. S. 1144, 8 L. T. Rep. N. S. 721, 2 New Rep. 436, 11 Wkly. Rep. 929; Scholefield *v.* Heafield, 5 L. J. Ch. 218, 7 Sim. 667, 8 Eng. Ch. 667, 58 Eng. Reprint 993.

See 38 Cent. Dig. tit. "Partnership," § 748.

83. Waugh *v.* Mitchell, 21 N. C. 510, where the third person had covenanted with the survivors to stand in the place of the deceased partner.

84. Mertens *v.* Mertens, 87 N. Y. App. Div. 295, 84 N. Y. Suppl. 352; Blake *v.* Barnes, 18 N. Y. Suppl. 471, 28 Abb. N. Cas. 401 (in such a case a legatee may be allowed to bring the suit); Pointon *v.* Pointon, L. R. 12 Eq. 547, 40 L. J. Ch. 609, 25 L. T. Rep. N. S. 294, 19 Wkly. Rep. 1051.

85. Van Aken *v.* Clark, 82 Iowa 256, 48 N. W. 73. See *supra*, IX, C, 1, b.

86. Mason *v.* Mason, 76 Vt. 287, 56 Atl. 1011 (applying St. 2445, and holding that the heir cannot bring an action in the absence of fraud, collusion, or danger of irreparable loss); Robinson *v.* Swift, 3 Vt. 377.

87. *Alabama.*— Cannon *v.* Copeland, 43 Ala. 201.

Arkansas.— McGuire *v.* Ramsey, 9 Ark. 518.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Louisiana.— Savage *v.* Williams, 15 La. Ann. 250.

Mississippi.— Dilworth *v.* Mayfield, 36 Miss. 40.

New York.— Haas *v.* Craighead, 19 Hun 396, applying Code, §§ 447, 452.

See 38 Cent. Dig. tit. "Partnership," § 748.

88. New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Gridley *v.* Conner, 2 La. Ann. 87; Davis *v.* Grove, 2 Rob. (N. Y.) 134, 27 How. Pr. 70; Duden *v.* Maloy, 37 Fed. 98; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173; Escott *v.* Gray, 47 L. J. C. P. 606, 39 L. T. Rep. N. S. 121.

89. White *v.* White, 169 Mass. 52, 47 N. E. 499; Washburn *v.* Goodman, 17 Pick. (Mass.) 519; Jacobson *v.* Landolt, 73 Wis. 142, 40 N. W. 636, 9 Am. St. Rep. 767 (the creditor claimed a lien); Newton *v.* Donan, 3 Grant Ch. (U. C.) 353.

90. Grossini *v.* Perazzo, 66 Cal. 545, 6 Pac. 450; Bell *v.* Miller, 11 Ohio Dec. (Reprint) 163, 25 Cinc. L. Bul. 126 (where unsecured creditors of a partnership were allowed to come in and contest the validity of preferences given to other creditors); Updike *v.* Doyle, 7 R. I. 446.

91. *Minnesota.*— Palmer *v.* Tyler, 15 Minn. 106.

New Hampshire.— Penniman *v.* Jones, 58 N. H. 447.

New Jersey.— Schlicher *v.* Vogel, 61 N. J. Eq. 158, 47 Atl. 448 [*affirmed* in 65 N. J. Eq. 404, 54 Atl. 1125], 59 N. J. Eq. 351, 46 Atl. 726.

New York.— Jennings *v.* Whittemore, 2 Thomps. & C. 377; Webb *v.* Helion, 3 Rob. 625; Wade *v.* Rusher, 4 Bosw. 537.

Washington.— Capecci *v.* Alladio, 8 Wash. 637, 36 Pac. 692.

92. Lynch *v.* Foley, 32 Colo. 110, 76 Pac. 370; Maude *v.* Rodes, 4 Dana (Ky.) 144; Eshbach *v.* Slonaker, 1 Pa. Dist. 32.

93. Humphreys *v.* Matthews, 11 Ill. 471; Hansen *v.* Morris, 87 Iowa 303, 54 N. W.

it is not an available remedy in such suits unless it is allowed by statute, and as a rule it is not so allowed.[94]

b. Injunction. In the absence of legislation authorizing an injunction,[95] it cannot be claimed as a matter of right upon the dissolution of the partnership, where the rights of the parties can be fully protected without it.[96] It will be refused as a rule when the existence of a partnership is denied,[97] or when the answer denies all the equities of the bill.[98] On the other hand it will be granted to restrain a partner from misapplying firm property, especially if he is insolvent,[99] from subjecting his copartners to new obligations,[1] from wrongfully excluding any of them from proper participation in winding up the affairs of the firm,[2] or from

223; Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635; Goble *v.* Howard, 12 Ohio St. 165.

94. Blanchard *v.* Luce, 19 La. Ann. 46 (a sequestration is the proper remedy in this state); Barrow *v.* McDonald, 12 La. Ann. 110; Johnson *v.* Short, 2 La. Ann. 277; Brinegar *v.* Griffin, 2 La. Ann. 154; Ketchum *v.* Ketchum, 1 Abb. Pr. N. S. (N. Y.) 157 [*affirmed* in 46 Barb. 43].

95. Guyton *v.* Flack, 7 Md. 398.

96. Moies *v.* O'Neill, 23 N. J. Eq. 207; Petit *v.* Chevelier, 13 N. J. Eq. 181; Van Kuren *v.* Trenton Locomotive, etc., Mfg. Co., 13 N. J. Eq. 302; Dunham *v.* Jarvis, 8 Barb. (N. Y.) 88, 2 Edm. Sel. Cas. 145; Walker *v.* Trott, 4 Edw. (N. Y.) 38; Ellis *v.* Commander, 1 Strobh. Eq. (S. C.) 188; Morison *v.* Moat, 16 Jur. 321, 21 L. J. Ch. 248 [*affirming* 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513, 41 Eng. Ch. 241, 68 Eng. Reprint 492]; Littlewood *v.* Caldwell, 11 Price 97, 25 Rev. Rep. 711; Cofton *v.* Horner, 5 Price 537; Lawson *v.* Morgan, 1 Price 303; Webster *v.* Webster, 3 Swanst. 492, 19 Rev. Rep. 258, 36 Eng. Reprint 949; Glassington *v.* Thwaites, 1 L. J. Ch. O. S. 113, 1 Sim. & St. 124, 24 Rev. Rep. 153, 1 Eng. Ch. 124, 57 Eng. Reprint 50. In an action between partners for an accounting, no dissolution being asked, an injunction pending the action restraining defendant from doing that which the partnership agreement gave it the right to do was unauthorized, in the absence of a showing that defendant, unless restrained, would do some act during the pendency of the action which would produce injury to plaintiffs, or that it had threatened to do some act in violation of plaintiffs' rights. Greenwald *v.* Gotham-Attucks Music Co., 118 N. Y. App. Div. 29, 103 N. Y. Suppl. 123.

97. McMahon *v.* O'Donnell, 20 N. J. Eq. 306; Goulding *v.* Bain, 4 Sandf. (N. Y.) 716; Popper *v.* Scheider, 7 Abb. Pr. N. S. (N. Y.) 56, 38 How. Pr. 34; Baxter *v.* Buchanan, 3 Brewst. (Pa.) 435.

98. Gusdorff *v.* Schlessner, 85 Md. 360, 37 Atl. 170 (defendant partner cannot be enjoined from withdrawing his individual deposits from banks, where it is not shown that he is insolvent); Quinlivan *v.* English, 44 Mo. 46 (where articles of partnership provide that, in case of the dissolution of the partnership by the death or withdrawal of any of the partners, a general account shall be taken, and prescribe the manner in which the concern shall be settled and its assets distributed, an injunction will not lie, at the instance of the outgoing partners against the remaining partner, until the latter has had an opportunity of closing up the concern under the articles of partnership); Hollister *v.* Barkley, 9 N. H. 230; Fielding *v.* Lucas, 87 N. Y. 197 [*affirming* 22 Hun 22, 60 How. Pr. 134]; Wickes *v.* Hatch, 103 N. Y. App. Div. 426, 92 N. Y. Suppl. 1017; Donnelly *v.* Morris, 59 N. Y. Super. Ct. 557, 13 N. Y. Suppl. 427; White *v.* Jones, 1 Rob. (N. Y.) 321, 1 Abb. Pr. N. S. 328; Green *v.* Tuchner, 39 Misc. (N. Y.) 154, 79 N. Y. Suppl. 143; Philipp *v.* Von Raven, 26 Misc. (N. Y.) 552, 57 N. Y. Suppl. 701, applying Code Civ. Proc. § 1947.

99. *Iowa.*— Fletcher *v.* Vandusen, 52 Iowa 448, 3 N. W. 488.

Maryland.— Drury *v.* Roberts, 2 Md. Ch. 157.

New Jersey.— McCabe *v.* Sinclair, 66 N. J. Eq. 24, 58 Atl. 412; Large *v.* Ditmars, 27 N. J. Eq. 283; Randall *v.* Morrell, 17 N. J. Eq. 343.

New York.— Davis *v.* Grove, 2 Rob. 134, 27 How. Pr. 70; Haggerty *v.* Granger, 15 How. Pr. 243.

North Carolina.— Taylor *v.* Russell, 119 N. C. 30, 25 S. E. 710.

United States.— Gaddie *v.* Mann, 147 Fed. 960 [*reversed* on other grounds in 158 Fed. 42].

England.— Francis *v.* Spittle, 9 L. J. Ch. 230; Lawson *v.* Morgan, 1 Price 303; Hartz *v.* Schrader, 8 Ves. Jr. 317, 7 Rev. Rep. 55, 32 Eng. Reprint 376.

Canada.— Thibodo *v.* Scobell, 5 Can. L. J. 117; Watt *v.* Foster, 4 Grant Ch. (U. C.) 543; Wilson *v.* Richardson, 2 Grant Ch. (U. C.) 449.

See 38 Cent. Dig. tit. "Partnership," §§ 755, 756.

On appointment of receiver.— Where the court enters a decree rescinding a contract of partnership and appoints a receiver, an injunction follows as a matter of course. Jones *v.* Weir, 217 Pa. St. 321, 66 Atl. 550.

1. Joselove *v.* Bohrman, 119 Ga. 204, 45 S. E. 982; J. *v.* S., [1894] 3 Ch. 72, 63 L. J. Ch. 615, 8 Reports 436, 70 L. T. Rep. N. S. 757, 42 Wkly. Rep. 617.

2. *New Jersey.*— Sutro *v.* Wagner, 23 N. J. Eq. 388 [*affirmed* in 24 N. J. Eq. 589]; Wolbert *v.* Harris, 7 N. J. Eq. 605.

New York.— McCracken *v.* Ware, 3 Sandf. 688, Code Rep. N. S. 215, when one partner enjoins his copartner from disposing of firm proceeds the latter is entitled to a like injunction against the former.

doing any act that will cause irreparable injury to firm property or to his copartner.[3]

c. Receivers — (1) *The Appointment of.* In a suit for partnership dissolution and settlement, a court of equity has ample power to appoint a receiver,[4] but the application for such appointment is addressed to the discretion of the court.[5]

South Carolina.— Ellis *v.* Commander, 1 Strobh. Eq. 188, an injunction will be granted where a partner is violating his duty as a partner, or breaking his contract.

Wisconsin.—Zimmerman *v.* Chambers, 79 Wis. 20, 47 N. W. 947, where a partner is fraudulently in possession of a firm chattel, he may be enjoined from disposing of or encumbering his interest therein.

United States.— Gaddie *v.* Mann, 147 Fed. 960 [*reversed* on other grounds in 158 Fed. 42].

England.— Hall *v.* Hall, 12 Beav. 414, 50 Eng. Reprint 1119; Greatrex *v.* Greatrex, 1 De G. & Sm. 692, 11 Jur. 1052, 63 Eng. Reprint 1254 (injunction may be granted against a partner's removal of the firm books from the partnership place of business); Blachford *v.* Hawkins, 1 L. J. Ch. O. S. 141.

See 38 Cent. Dig. tit. "Partnership," §§ 755, 756.

3. *New Jersey.*— Wagoner *v.* Warne, (Ch. 1888) 14 Atl. 215.

New York.— Coe *v.* Davidge, 6 N. Y. St. 93; Mitchell *v.* Stewart, 3 Abb. Pr. N. S. 250.

Pennsylvania.— Sloan *v.* Moore, 37 Pa. St. 217; Slobig's Appeal, 2 Pa. Cas. 365, 5 Atl. 670; Koehler *v.* Roshi, 28 Leg. Int. 373.

West Virginia.— Ballard *v.* Callison, 4 W. Va. 326.

United States.— Wilkinson *v.* Tilden, 9 Fed. 683.

England.— Marshall *v.* Watson, 25 Beav. 501, 53 Eng. Reprint 728; Anderson *v.* Wallace, 2 Molloy 540; Elliot *v.* Brown, 3 Swanst. 492, 36 Eng. Reprint 948, where the surviving partner against whom the injunction was granted had been guilty of breaches of trust with respect to firm assets.

Canada.— Bourdon *v.* Dinelle, 5 Quebec Pr. 240.

See 38 Cent. Dig. tit. "Partnership," §§ 755, 756.

4. Gridley *v.* Conner, 2 La. Ann. 87; Cox *v.* Volkert, 86 Mo. 505; Nolan *v.* Nolan, 8 Lack. Leg. N. (Pa.) 291; Spencer *v.* Emery, 8 Lack. Leg. N. (Pa.) 278; Shulte *v.* Hoffman, 18 Tex. 678; Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342, applying Rev. St. (1895) arts. 1177, 1465, which prohibit the appointment of a receiver before a petition in the suit is filed in the clerk of court's office. The equitable jurisdiction which courts exercise over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution and receivership are incidents necessary to final and complete relief. Walsh *v.* St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383. And see the cases cited in the notes following. See also *supra*, V, C, 2, g; VIII, B, 1; VIII, L, 1, f.

5. *Alabama.*— Gillett *v.* Higgins, 142 Ala. 444, 38 So. 664.

California.— Silveira *v.* Reese, (1903) 71 Pac. 515.

Louisiana.— McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310; Pratt *v.* McHatton, 11 La. Ann. 260. Where plaintiff asked for the appointment of a receiver for a business partnership which was engaged in a large and prosperous business, and the necessity for the appointment of a receiver was not apparent, and the rights of the parties were not threatened with loss, a judgment refusing to appoint a receiver was authorized. Meyer *v.* Meyer, 116 La. 456, 40 So. 794.

New Jersey.—Rhodes *v.* Wilson, (Ch. 1890) 19 Atl. 732 (where a receiver was not appointed, because the partner in possession was responsible and the assets inadequate to bear the expense of a receiver); Wilson *v.* Fitcher, 11 N. J. Eq. 71 (denied unless defendant partner had been guilty of breach of partnership duty); Birdsall *v.* Colie, 10 N. J. Eq. 63 (not necessary to protect the interests of the parties).

New York.— Dunham *v.* Jarvis, 8 Barb. 88, 2 Edm. Sel. Cas. 145 (if a receiver is not necessary for the protection of property rights he will not be appointed); Pratt *v.* Underwood, 4 N. Y. Civ. Proc. 167 (where a receiver appointed in another jurisdiction was appointed in New York, upon giving a bond for the discharge of his duties there); Garretson *v.* Weaver, 3 Edw. 385. In an action between partners for an accounting and recovery of the amount due them, no claim being made that defendant was not responsible or able to respond to any judgment which plaintiffs might recover, and no dissolution of the partnership being asked, the appointment of a receiver pending the action to take charge of the partnership property was unauthorized. Greenwald *v.* Gotham-Attucks Music Co., 118 N. Y. App. Div. 29, 103 N. Y. Suppl. 123. See also Sarasohn *v.* Kamaiky, 110 N. Y. App. Div. 713, 97 N. Y. Suppl. 529; Bimberg *v.* Wagenhals, 53 Misc. 13, 102 N. Y. Suppl. 925.

Texas.— The court, on an application by a partner for the appointment of a receiver of the partnership assets, is not required to pass on the question of the rights between the parties, the object being to protect the assets for the benefit of those to whom it will appear that they belong, but a receiver will not be appointed unless the partner applying therefor is entitled to a dissolution of the partnership. Rische *v.* Rische, (Civ. App. 1907) 101 S. W. 849.

England.— Pini *v.* Roncoroni, [1892] 1 Ch. 633, 61 L. J. Ch. 218, 66 L. T. Rep. N. S. 255, 40 Wkly. Rep. 297; Tippetts *v.* Phillips, 1 Wkly. Rep. 163.

As the appointment results in transferring to an officer of the court the control of the firm's affairs, and in preventing all other persons from taking part in their management, the court is never anxious to exercise this power,[6] especially if the partners have once agreed as to the manner in which the partnership shall be settled.[7] Accordingly a receiver will not be appointed, when the existence of the partnership alleged in the petition or bill is denied, unless the court is satisfied that there is a partnership, or the funds are in danger,[8] or the affairs in question are not involved in the partnership settlement,[9] nor without notice to the other partners,[10] nor to take possession of firm assets in a foreign jurisdiction.[11] But if all the partners are living the court will appoint a receiver if they concur in asking for one,[12] or if they seriously disagree concerning the management of affairs during

See 38 Cent. Dig. tit. "Partnership," § 759 *et seq.*

6. *Iowa.*— Loomis *v.* McKenzie, 31 Iowa 425.

Michigan.— Morey *v.* Grant, 48 Mich. 326, 12 N. W. 202.

New Jersey.— Hard *v.* Klaus, 9 N. J. L. 370; Moies *v.* O'Neill, 23 N. J. Eq. 207; Cox *v.* Peters, 13 N. J. Eq. 39; Birdsall *v.* Colie, 10 N. J. Eq. 63.

New York.— Buchanan *v.* Comstock, 57 Barb. 568.

Texas.— Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342.

Washington.— Wales *v.* Dennis, 9 Wash. 308, 37 Pac. 450.

United States.— Cary Bros. *v.* Dalhoff Constr. Co., 126 Fed. 583; Devereux *v.* Fleming, 47 Fed. 177.

England.—Oliver *v.* Hamilton, 2 Anstr. 453, 3 Rev. Rep. 611; Baxter *v.* West, 28 L. J. Ch. 169; Waters *v.* Taylor, 2 Ves. & B. 299, 13 Rev. Rep. 91, 35 Eng. Reprint 333, 15 Ves. Jr. 10, 33 Eng. Reprint 658; Carlen *v.* Drury, 1 Ves. & B. 154, 12 Rev. Rep. 203, 35 Eng. Reprint 61.

Canada.— Burden *v.* Howard, 2 N. Brunsw. Eq. 461.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

7. *Indiana.*— Bufkin *v.* Boyce, 104 Ind. 53, 57, 3 N. E. 615, where it is said: "From the whole record, the case seems to be this: The partnership having come to an end, the plaintiff was unwilling to take the responsibility of settling the business of the firm himself. Without showing any sufficient cause for it, he distrusted the defendant. He desired, therefore, to impose the burden of administering its affairs on the court."

Maryland.— Heflebower *v.* Buck, 64 Md. 15, 20 Atl. 991; Drury *v.* Roberts, 2 Md. Ch. 157, where the parties had delegated mutual and common right to one of the partners, and a motion for a receiver was denied.

Michigan.—Simon *v.* Schloss, 48 Mich. 233, 12 N. W. 196.

New Jersey.— Parkhurst *v.* Muir, 7 N. J. Eq. 307.

New York.— Meyer *v.* Reimers, 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 1112 [*affirming* 30 Misc. 307, 63 N. Y. Suppl. 681]; Rice *v.* Buggot, 4 Silv. Sup. 383, 7 N. Y. Suppl. 518; MacDonald *v.* Trojan Button-Fastener Co., 10 N. Y. Suppl. 91.

England.— Law *v.* Garrett, 8 Ch. D. 26, 38 L. T. Rep. N. S. 3, 26 Wkly. Rep. 426.

See 38 Cent. Dig. tit. "Partnership," § 759.

8. *Alabama.*— Irwin *v.* Everson, 95 Ala. 64, 10 So. 320.

California.— Williamson *v.* Monroe, 3 Cal. 383.

Illinois.— Leeds *v.* Townsend, 74 Ill. App. 444.

Iowa.— Hobart *v.* Ballard, 31 Iowa 521.

New York.— Kirkwood *v.* Smith, 64 N. Y. App. Div. 615, 72 N. Y. Suppl. 291; Day *v.* Dow, 46 N. Y. App. Div. 148, 61 N. Y. Suppl. 793; Goulding *v.* Bain, 4 Sandf. 716; Bimberg *v.* Wagenhals, 53 Misc. 13, 102 N. Y. Suppl. 925; McCarty *v.* Stanwix, 16 Misc. 132, 38 N. Y. Suppl. 820.

Pennsylvania.— Baxter *v.* Buchanan, 3 Brewst. 435; McGlensey *v.* Cox, 1 Phila. 387.

West Virginia.— Wood *v.* Wood, 50 W. Va. 570, 40 S. E. 416.

United States.—Rowland *v.* Auto Car Co., 133 Fed. 835.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

But where the court is satisfied of the existence of a partnership, it will appoint a receiver on the application of one of the partners, notwithstanding a denial of the existence of the partnership is made by the copartner. Rische *v.* Rische, (Tex. Civ. App. 1907) 101 S. W. 849.

9. Gomez *v.* Higgins, 130 Ala. 493, 30 So. 417; Jordan *v.* Jordan, 121 Ala. 419, 25 So. 855; Lowther *v.* Lowther, 105 N. Y. App. Div. 638, 94 N. Y. Suppl. 159; Meyer *v.* Reimers, 30 Misc. (N. Y.) 307, 63 N. Y. Suppl. 681 [*affirmed* in 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 1112].

10. Larson *v.* West, 110 Ill. App. 150; Martin *v.* Blanchin, 16 La. Ann. 237; Alford *v.* Berkele, 29 Hun (N. Y.) 633, applying Code Civ. Proc. § 1947, which authorizes the appointment of a receiver without notice to a non-resident partner.

11. Harvey *v.* Varney, 104 Mass. 436.

12. *Iowa.*— Saylor *v.* Mockbie, 9 Iowa 209.

Louisiana.— Fitzner *v.* Noullet, 114 La. 167, 38 So. 94; Newman *v.* Schminke, 50 La. Ann. 516, 23 So. 714.

Tennessee.— Todd *v.* Rich, 2 Tenn. Ch. 107, holding that one of the partners may be appointed in such cases, if the interests of creditors are not endangered thereby.

England.— Taylor *v.* Neute, 39 Ch. D. 538,

the period of settlement,[13] or in case of serious breach of agreement as to the use and disposition of firm assets,[14] or of other misconduct by the partners against whom the receivership is sought which threatens a waste of the assets,[15] or in case a cause of action arises between the copartners, a partner applying for the appointment of a receiver of the partnership property need not prove that the property is in danger of being lost, but is entitled to the appointment of a receiver on showing that he has been wrongfully excluded from the management of the partnership affairs. Rische *v.* Rische, *supra*.

57 L. J. Ch. 1044, 60 L. T. Rep. N. S. 179, 37 Wkly. Rep. 190.

Canada.— Mitchell *v.* Lister, 21 Ont. 22.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

13. *Alabama.*— Gillett *v.* Higgins, 142 Ala. 444, 38 So. 664.

Florida.— Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Georgia.— Bennett *v.* Smith, 108 Ga. 466, 34 S. E. 156; Taylor *v.* Bliley, 86 Ga. 154, 12 S. E. 210; Dunn *v.* McNaught, 38 Ga. 179; Terrell *v.* Goddard, 18 Ga. 664.

Indiana.— Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682.

Iowa.— Taylor *v.* Welles, 113 Iowa 326, 85 N. W. 30; Anderson *v.* Powell, 44 Iowa 20.

Kentucky.— Story *v.* Moon, 3 Dana 331.

Maryland.— Whitman *v.* Robinson, 21 Md. 30; Speights *v.* Peters, 9 Gill 472.

Michigan.— Kirby *v.* Ingersoll, 1 Dougl. 477.

Missouri.— Martin *v.* Hurley, 84 Mo. App. 670.

Nebraska.— Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116.

New Jersey.— Birdsall *v.* Colie, 10 N. J. Eq. 63.

New York.— McElvey *v.* Lewis, 76 N. Y. 373; Witherbee *v.* Witherbee, 17 N. Y. App. Div. 181, 45 N. Y. Suppl. 297; Wilcox *v.* Pratt, 52 Hun 340, 5 N. Y. Suppl. 361 [*affirmed* in 125 N. Y. 688, 25 N. E. 1091]; Brush *v.* Jay, 50 Hun 446, 3 N. Y. Suppl. 332; Davis *v.* Grove, 2 Rob. 134, 27 How. Pr. 70; Bernheimer *v.* Schmid, 36 Misc. 456, 73 N. Y. Suppl. 767 [*affirmed* in 71 N. Y. App. Div. 244, 75 N. Y. Suppl. 899]; Coe *v.* Davidge, 6 N. Y. St. 93; Van Rensselaer *v.* Emery, 9 How. Pr. 135; Marten *v.* Van Schaick, 4 Paige 479; Law *v.* Ford, 2 Paige 310.

North Carolina.— Richards *v.* Baurman, 65 N. C. 162.

Oregon.— Fleming *v.* Carson, 37 Oreg. 252, 62 Pac. 374.

Pennsylvania.— Fox *v.* Curtis, 176 Pa. St. 52, 34 Atl. 952; Sloan *v.* Moore, 37 Pa. St. 217; Gowan *v.* Jeffries, 2 Ashm. 296.

Texas.— Watson *v.* McKinnon, 73 Tex. 210, 11 S. W. 197; Rische *v.* Rische, (Civ. App. 1907) 101 S. W. 849. A partner applying for a receiver of the partnership assets, who shows that he has been wrongfully excluded from participation in the management of the property, is entitled to a receiver, without proving the insolvency of the copartner. Rische *v.* Rische, *supra*. Under Rev. St. (1895) art. 1465, authorizing the appointment of a receiver in an action between partners on the application of a partner, etc., and article 1492, providing that nothing shall prevent a member of a partnership from having a receiver appointed whenever

Virginia.— Jordan *v.* Miller, 75 Va. 442.

Washington.— Whipple *v.* Lee, 46 Wash. 266, 89 Pac. 712.

West Virginia.— McMahon *v.* McClernan, 10 W. Va. 419.

England.— Smith *v.* Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Davis *v.* Amer, 3 Drew. 64, 61 Eng. Reprint 826; Jefferys *v.* Smith, 1 Jac. & W. 298, 21 Rev. Rep. 175, 37 Eng. Reprint 389; Katsch *v.* Schenck, 13 Jur. 668, 18 L. J. Ch. 386; Wilson *v.* Greenwood, 1 Swanst. 471, 36 Eng. Reprint 469, 1 Wils. Ch. 223, 18 Rev. Rep. 118, 37 Eng. Reprint 97.

Canada.— McLaren *v.* Whiting, 16 Ont. Pr. 552.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

14. *Florida.*— West *v.* Chasten, 12 Fla. 315.

Maryland.— Haight *v.* Burr, 19 Md. 130.

New Jersey.— Sutro *v.* Wagner, 23 N. J. Eq. 388 [*affirmed* in 24 N. J. Eq. 589]; Wolbert *v.* Harris, 7 N. J. Eq. 605; Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113.

Pennsylvania.— Sloan *v.* Moore, 37 Pa. St. 217.

Washington.— Redding *v.* Anderson, 37 Wash. 209, 79 Pac. 628.

United States.— Einstein *v.* Schnebly, 89 Fed. 540.

England.— Blakeney *v.* Dufaur, 15 Beav. 40, 51 Eng. Reprint 451; Hale *v.* Hale, 4 Beav. 369; Lawson *v.* Morgan, 1 Price 303; Harding *v.* Glover, 18 Ves. Jr. 281, 34 Eng. Reprint 323.

Canada.— Steele *v.* Grossmith, 19 Grant Ch. (U. C.) 141; Doupe *v.* Stewart, 13 Grant Ch. (U. C.) 637; Prentiss *v.* Brennan, 1 Grant Ch. (U. C.) 371.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

15. *Alabama.*— Brooke *v.* Tucker, (1907) 43 So. 141, holding that where a bill in an action by a partner for a reference to state an account and for the appointment of a receiver alleged that defendant partner was insolvent, and that he had collected money due the firm, which he had appropriated to his own use without making any entry on the partnership books and without acquainting complainant partner of the facts, it was sufficient, when supported by proof, to warrant a decree for dissolution and the appointment of a receiver.

California.— Fischer *v.* Tuolumne County Super. Ct., 98 Cal. 67, 32 Pac. 875.

of insanity.[16] When a partnership has been dissolved by the death of a partner and the surviving partner is settling its affairs, a receiver will not be appointed, against his opposition, unless there is clear evidence of mismanagement or improper conduct on his part, or that by reason of his insolvency or other circumstances the rights of the deceased partner's estate are endangered.[17] If both partners are dead, however, a receiver will be appointed.[18] The creditors of a firm, or of a partner, are rarely entitled to have a receiver of firm property appointed,[19] except in cases where such appointment is necessary to save the property from being squandered or to enforce their lien thereon.[20]

Georgia.— Joselove *v.* Bohrman, 119 Ga. 204, 45 S. E. 982.

Indiana.— Fink *v.* Montgomery, 162 Ind. 424, 68 N. E. 1010; Barnes *v.* Jones, 91 Ind. 161.

Maryland.— Katz *v.* Brewington, 71 Md. 79, 20 Atl. 139; Shannon *v.* Wright, 60 Md. 520; Speights *v.* Peters, 9 Gill 472; Drury *v.* Roberts, 2 Md. Ch. 157; Williamson *v.* Wilson, 1 Bland 418.

Nevada.— Maynard *v.* Railey, 2 Nev. 313.

New Jersey.— Coddington *v.* Tappan, 26 N. J. Eq. 141; Randall *v.* Morrell, 17 N. J. Eq. 343.

New York.— Geortner *v.* Canajoharie, 2 Barb. 625; Haggerty *v.* Granger, 15 How. Pr. 243, when the firm becomes insolvent, any partner may apply for a receiver.

North Carolina.— Phillips *v.* Trezevant, 67 N. C. 370, where an insolvent partner was appropriating assets to his own use.

Pennsylvania.— Gowan *v.* Jeffries, 2 Ashm. 296; Dolphin *v.* Steell, 2 Lack. Leg. N. 111. See also Warren *v.* Stagner, 7 Wkly. Notes Cas. 127.

Texas.—Rische *v.* Rische, (Civ. App. 1907) 101 S. W. 849.

Washington.— Cole *v.* Price, 22 Wash. 18, 60 Pac. 153.

West Virginia.— Ballard *v.* Callison, 4 W. Va. 326.

United States.— Gaddie *v.* Mann, 147 Fed. 960 [*reversed* on other grounds in 158 Fed. 42]; Watson *v.* Bettman, 88 Fed. 825.

England.— Smith *v.* Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Butchart *v.* Dresser, 4 De G. M. & G. 542, 53 Eng. Ch. 424, 43 Eng. Reprint 619 [*affirming* 10 Hare 453, 1 Wkly. Rep. 178, 44 Eng. Ch. 438, 68 Eng. Reprint 1004]; Freeland *v.* Stansfield, 2 Eq. Rep. 118, 1 Jur. N. S. 8, 23 L. J. Ch. 923, 2 Smale & G. 479, 2 Wkly. Rep. 575, 65 Eng. Reprint 490; *Ex p.* Stoveld, 1 Glyn & J. 303; Hoffman *v.* Duncan, 18 Jur. 69; Collenridge *v.* Cook, 1 Jur. 771; Young *v.* Buckett, 51 L. J. Ch. 504, 46 L. T. Rep. N. S. 266, 30 Wkly. Rep. 511; Estwick *v.* Conningsby, 1 Vern. Ch. 118, 23 Eng. Reprint 355.

Canada.— Cane *v.* Macdonald, 9 Brit. Col. 297; Prentiss *v.* Brennan, 2 Grant Ch. (U. C.) 322.

See 38 Cent. Dig. tit. "Partnership," § 757 *et seq.*

On rescission of a contract of partnership for fraud the court will appoint a receiver to take charge of the partnership effects. Jones *v.* Weir, 217 Pa. St. 321, 66 Atl. 550.

Legal title in defendant.— The fact that defendant, in an action for an accounting of a partnership, had the legal title to the partnership property, was no obstacle to the appointment of a receiver, where the complainant partner had paid money into the firm, and the profits, in which complainant had an interest, had been converted by defendant to his own use. Brooke *v.* Tucker, (Ala. 1907) 43 So. 141.

16. Reynolds *v.* Austin, 4 Del. Ch. 24.

17. *California.*—Painter *v.* Painter, (1894) 36 Pac. 865.

Louisiana.— Helme *v.* Littlejohn, 12 La. Ann. 298.

Michigan.— Comstock *v.* McDonald, 113 Mich. 626, 71 N. W. 1087.

New York.— Booth *v.* Smith, 79 Hun 384, 29 N. Y. Suppl. 790; Dawson *v.* Parsons, 21 N. Y. Suppl. 212 [*affirming* 20 N. Y. Suppl. 65]; Brown *v.* Finch, 63 Hun 235, 17 N. Y. Suppl. 805, 28 Abb. N. Cas. 36.

North Carolina.— People's Nat. Bank *v.* Hodgin, 129 N. C. 247, 39 S. E. 959.

Pennsylvania.— Holden *v.* McMakin, 1 Pars. Eq. Cas. 270.

Wisconsin.— Jennings *v.* Chandler, 10 Wis. 21.

England.— Madgwick *v.* Wimble, 6 Beav. 495, 7 Jur. 661, 14 L. J. Ch. 387, 49 Eng. Reprint 917; Fraser *v.* Kershaw, 2 Jur. N. S. 880, 2 Kay & J. 496, 25 L. J. Ch. 445, 4 Wkly. Rep. 431, 69 Eng. Reprint 878. Pending the winding up of the business of a partnership, which had become dissolved by the death of one of the partners, it is a ground for appointing a receiver and manager, and for not appointing the surviving partner to the office, that the latter has, while carrying on the business after his partner's death, so acted as to diminish the value of the assets by transferring to a new business to be carried on by himself the benefit of the custom and good-will of the business. Young *v.* Buckett, 51 L. J. Ch. 504, 46 L. T. Rep. N. S. 266, 30 Wkly. Rep. 511.

Canada.— Bilton *v.* Blakely, 6 Grant Ch. (U. C.) 575.

See 38 Cent. Dig. tit. "Partnership," § 759 *et seq.*

18. Philips *v.* Atkinson, 2 Bro. Ch. 272, 29 Eng. Reprint 149.

19. Choppin *v.* Wilson, 27 La. Ann. 444; Henry *v.* Henry, 10 Paige (N. Y.) 314; Bell *v.* Miller, 11 Ohio Dec. (Reprint) 163, 25 Cinc. L. Bul. 126.

20. Oliver *v.* Victor, 74 Ga. 543; Greenwood *v.* Brodhead, 8 Barb. (N. Y.) 593.

(II) *Effect of Appointment and Receiver's Title.* As soon as a receiver is appointed all the property of the firm passes into the custody of the court,[21] and therefore neither a partner nor a creditor can interfere with it, save with the court's consent, without being guilty of contempt.[22] The appointment does not vest the receiver with title to the individual property of the partners,[23] nor does it dispose of the rights of creditors or others in such property,[24] for the receiver can take no better title than the firm had.[25] If the partnership is solvent, the partners cannot, by securing the appointment of a receiver, prevent their creditors from securing a judgment and execution lien on firm property.[26]

(III) *Authority of Receiver.* This, in the absence of any provision to the contrary in the order or decree of the court, extends to whatever is necessary for the ordinary winding up of the firm's business, and the receiver is not bound to take orders from either partner,[27] although a partner may make himself liable to third persons by inducing the receiver to act in a particular manner.[28] The

21. *Illinois.*— Jackson *v.* Lahee, 114 Ill. 287, 2 N. E. 172.

Indiana.—Wallace *v.* Miligan, 110 Ind. 498, 11 N. E. 599.

Louisiana.— Andrew's Succession, 16 La. Ann. 197, holding that the books of the partnership should be delivered to the receiver.

Nebraska.— Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116.

New York.— Holmes *v.* McDowell, 76 N. Y. 596 [*affirming* 15 Hun 585]; Clapp *v.* Clapp, 10 N. Y. St. 733; Barry *v.* Kennedy, 11 Abb. Pr. N. S. 421; Waring *v.* Robinson, 1 Hoff. Ch. 524.

Ohio.— Merrick *v.* Merchants' Nat. Bank, 11 Ohio S. & C. Pl. Dec. 293, holding that by the appointment of a receiver over a partnership the right of possession, control, and disposition of the firm property is taken away from the partners and given to the receiver, who takes the whole equitable title to the partnership property without an assignment, and represents the interests of all parties to the suit in which he was appointed.

Oklahoma.— See Foster *v.* Field, 13 Okla. 230, 74 Pac. 190.

Oregon.— *In re* Hamilton, 26 Oreg. 579, 584, 38 Pac. 1088, where it is said: "Choses in action pass to the receiver subject to the equitable right of set-off existing at the time of his appointment. When a receiver is appointed the accounts of the insolvent debtor are closed, and no changes can thereafter be made by any assignment of credits against the estate, as this, if allowed, would injure the trust fund, and defeat ratable distribution."

Washington.— Cole *v.* Price, 22 Wash. 18, 60 Pac. 153.

England.— Chater *v.* Maclean, 3 Eq. Rep. 375, 1 Jur. N. S. 175, 3 Wkly. Rep. 261; Defries *v.* Creed, 11 Jur. N. S. 360, 34 L. J. Ch. 607, 12 L. T. Rep. N. S. 262, 6 New Rep. 17, 13 Wkly. Rep. 632 (the receiver's title does not attach until his final appointment); Brand *v.* Sandground, 85 L. T. Rep. N. S. 517; Dacie *v.* John, McClell. 206, 13 Price 446, 28 Rev. Rep. 706.

Canada.— O'Brien *v.* Christie, 30 Nova Scotia 145; Prentiss *v.* Brennan, 1 Grant Ch. (U. C.) 484.

No vesting of title until decree entered.— In some cases it is held that the receiver's title does not vest, so as to cut off the lien of creditors, until a decree in the suit is entered. Adams *v.* Woods, 9 Cal. 24; Naglee *v.* Minturn, 8 Cal. 540; Adams *v.* Woods, 8 Cal. 153, 68 Am. Dec. 313; Adams *v.* Hackett, 7 Cal. 187; Ross *v.* Titsworth, 37 N. J. Eq. 333.

22. Helmore *v.* Smith, 35 Ch. D. 449, 56 L. J. Ch. 145, 56 L. T. Rep. N. S. 72, 35 Wkly. Rep. 157; Lane *v.* Sterne, 3 Giffard 629, 9 Jur. N. S. 320, 10 Wkly. Rep. 555, 66 Eng. Reprint 559.

Conversion of assets into money and collections see *infra*, IX, D, 13, a.

23. Adams *v.* Hannah, 97 Ga. 515, 25 S. E. 330; Wallace *v.* Milligan, 110 Ind. 498, 11 N. E. 599; Saylor *v.* Mockbie, 9 Iowa 209.

24. Stuparick Mfg. Co. *v.* San Francisco Super. Ct., 123 Cal. 290, 55 Pac. 985 (holding that the person claiming the ownership of personal property cannot be deprived thereof by a summary order of the court, based on the affidavits of one of the parties to an action for dissolution of partnership that it is the property of the firm, directing the receiver to take possession); Bird *v.* Austin, 40 N. Y. Super. Ct. 109 (the appointment of a receiver does not rescind a contract between the firm and an employee); Higgins *v.* Bailey, 7 Rob. (N. Y.) 613; McGrath *v.* Cowen, 57 Ohio St. 385, 49 N. E. 338; Blakeney *v.* Dufaur, 15 Beav. 40, 51 Eng. Reprint 451.

25. Security Title, etc., Co. *v.* Schlender, 190 Ill. 609, 60 N. E. 854 [*affirming* 93 Ill. App. 617]; Gillam *v.* Nussbaum, 95 Ill. App. 277.

26. Myers *v.* Myers, 15 N. Y. App. Div. 448, 44 N. Y. Suppl. 513 [*affirming* 18 Misc. 663, 43 N. Y. Suppl. 737]; Schloss *v.* Schloss, 14 N. Y. App. Div. 333, 43 N. Y. Suppl. 788; Matter of Thompson, 10 N. Y. App. Div. 40, 41 N. Y. Suppl. 740.

27. Holloway *v.* Turner, 61 Md. 217; Dixon *v.* Dixon, [1904] 1 Ch. 161, 73 L. J. Ch. 103, 89 L. T. Rep. N. S. 272; Hills *v.* Reeves, 31 Wkly. Rep. 209 [*affirming* 30 Wkly. Rep. 439].

Collections see *infra*, IX, D, 13, a.

28. Curtin *v.* Munford, 53 Ga. 168.

receiver is a trustee for all the partners,[29] but he is not empowered to bind them personally by any new engagement.[30] He may be authorized to carry on the business temporarily.[31] In the absence of a statute conferring authority, he is not entitled to maintain an action to set aside conveyances of the partnership, or judgments confessed by the firm, as in fraud of creditors.[32] The mere appointment of a receiver does not change the relative position of partners to each other;[33] but the court, in its final decree in the action, may determine the rights and liabilities of the partners toward each other.[34]

(IV) *ACTIONS BY AND AGAINST RECEIVER.* The receiver may institute actions to collect what is due the firm and to otherwise enforce and protect its rights.[35] With permission of the court he may be sued, when such proceeding is necessary to determine the rights or protect the interests of plaintiff.[36]

(V) *ACCOUNTING OF RECEIVER.* It is the duty of a receiver in these actions to render a proper account of his proceedings[37] and pay over any balance that may remain in his hands to the partners.[38] If the estate sustains a loss through his failure to properly perform his duties he is chargeable therewith.[39]

8. EFFECT OF BRINGING ACTION. The mere institution of a suit for dissolution and accounting does not dissolve the firm, nor vest title to firm assets in firm creditors or in any one on their behalf;[40] nor will an injunction against a partner's meddling with the firm property prevent him from confessing judgment or creditors from securing a judgment and lien.[41] But in most jurisdictions the appointment of a receiver will preclude creditors from thereafter obtaining a lien, although such appointment is made before a decree in the action; while in others creditors are not thus precluded, until a decree is made.[42] The appointment of a receiver will operate to prevent a partner from selling as his own property purchased with firm funds and claimed by the receiver.[43] The bringing of an action for the dissolution of a partnership and for an accounting does not constitute an election on the part of plaintiff to exercise his right to dissolve the

29. Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506.

30. Lake *v.* Munford, 4 Sm. & M. (Miss.) 312.

31. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478 (where the receiver was experienced in the lumber business, and carried out the firm's contract to furnish a quantity of lumber); Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198 (but a court cannot authorize the receiver to carry on the business permanently); Wolhert *v.* Harris, 7 N. J. Eq. 605 (nor will he be compelled to continue the business); Jackson *v.* De Forest, 14 How. Pr. (N. Y.) 81; Marten *v.* Van Schaick, 4 Paige (N. Y.) 479.

32. Walsh *v.* St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383; Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131; Ferguson *v.* Bruckman, 23 N. Y. App. Div. 182, 48 N. Y. Suppl. 887; Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757.

33. Gridley *v.* Conner, 4 Rob. (La.) 445.

34. Atkinson *v.* Cash, 79 Ill. 53.

35. Nealis *v.* Lissner, 52 Hun (N. Y.) 503, 5 N. Y. Suppl. 682; Fincke *v.* Funke, 25 Hun (N. Y.) 616 (requiring the receiver to get leave of the court to sue for debts); Barry *v.* Nelms, 2 Pa. Co. Ct. 440; Prentiss *v.* Brennan, 2 Grant Ch. (U. C.) 274. But in McBride *v.* Ricketts, 98 Iowa 539, 67 N. W. 410, it was held that if there is no partnership the receiver in an action for a partnership accounting cannot maintain an action against defendant partner to recover money paid by the latter to an individual creditor, where he has enough assets to pay the creditors of the business without this. And in May *v.* Pagett, 2 Pa. Dist. 276, it is held that a receiver cannot maintain an attachment against a partner for money with which to pay firm debts, where it does not appear that he has not sufficient assets for that purpose.

Collection of debts due firm see *infra*, IX, D, 13, a.

36. Robinson *v.* Hodgkins, 168 Mass. 465, 47 N. E. 195; Blum *v.* Van Vechten, 92 Wis. 378, 66 N. W. 507.

37. Gridley *v.* Conner, 2 La. Ann. 87.

38. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478; Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363, applying Code Civ. Proc. § 3320.

39. Clapp *v.* Clapp, 10 N. Y. St. 733. See, generally, RECEIVERS.

40. Marye *v.* Jones, 9 Cal. 335; Naglee *v.* Minturn, 8 Cal. 540; Bagnetto *v.* Bagnetto, 51 La. Ann. 1200, 25 So. 987; Ross *v.* Titsworth, 37 N. J. Eq. 333; Brown *v.* Gray, 17 Pa. Super. Ct. 563.

41. McCredie *v.* Senior, 4 Paige (N. Y.) 378; Hewitt *v.* Patrick, 26 Tex. 326.

42. See *supra*, IX, D, 7, c, (II).

43. Kennett *v.* Hopkins, 40 N. Y. App. Div. 367, 57 N. Y. Suppl. 961 [*affirming* 20 Misc. 259, 45 N. Y. Suppl. 797].

partnership, which was one at will, where in his complaint he expressly considered the partnership as existing.[44]

9. Pleading — a. Bill, Petition, or Complaint. If the action is for dissolution of the firm, as well as for an accounting and settlement, plaintiff must allege facts which entitle him to a decree of dissolution.[45] If the suit is brought for an accounting, the complaint should allege the existence and dissolution[46] of the partnership, that the affairs of the firm have not been settled, and that a balance will be due plaintiff or the facts showing his legal right to an accounting.[47] If

44. Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259].

45. *California.*— Bradley *v.* Harkness, 26 Cal. 69, sufficient facts not stated.

Connecticut.— Duffield *v.* Brainerd, 45 Conn. 424.

Indiana.— Davis *v.* Niswonger, 145 Ind. 426, 44 N. E. 542 (complaint demurrable if it shows that the firm has been already dissolved); Adams *v.* Shewalter, 139 Ind. 178, 38 N. E. 607; Kimble *v.* Seal, 92 Ind. 276; Dehority *v.* Nelson, 56 Ind. 414.

Kentucky.— Havener *v.* Stephens, 58 S. W. 372, 22 Ky. L. Rep. 498.

Montana.— Arnold *v.* Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

New York.— Waite *v.* Aborn, 60 N. Y. App. Div. 521, 69 N. Y. Suppl. 967.

Pennsylvania.— Roberts *v.* Dunham, 1 C. Pl. 136, applying the act of 1840 which requires the filing of a certificate that there is no adequate remedy at law, when the suit is brought in the court of common pleas.

England.— Master *v.* Kirton, 3 Ves. Jr. 74, 30 Eng. Reprint 901.

See *supra*, IX, A, 6.

46. See *supra*, V, C, 1, b; *infra*, IX, D, 1, a, 2, c.

47. *Alabama.*— Dugger *v.* Tutwiler, 129 Ala. 258, 30 So. 91; Haynes *v.* Short, 88 Ala. 562, 7 So. 157.

California.— Bremner *v.* Leavitt, 109 Cal. 130, 41 Pac. 859; Young *v.* Pearson, 1 Cal. 448.

Connecticut.— Buckley *v.* Kelly, 70 Conn. 411, 39 Atl. 601, if the complaint refers to a partnership relation beginning at a certain time a prior partnership cannot be considered.

Georgia.— Houston *v.* Polk, 124 Ga. 103, 52 S. E. 83; Wells *v.* Strange, 5 Ga. 22. An allegation in a petition to the effect that an item in a statement of a firm's indebtedness, according to the partner who had charge of the firm's books and who drew the statement, to be used as a basis of a settlement on dissolution, represented the amount due by the firm in addition to the liabilities more specifically set forth therein, will, as against a demurrer, be treated, not as a mere expression of opinion by such partner, but as a statement of fact. Oliver *v.* House, 125 Ga. 637, 54 S. E. 732.

Illinois.— Bracken *v.* Kennedy, 4 Ill. 558; Gutsch Brewing Co. *v.* Fischbeck, 41 Ill. App. 400, not sufficient.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

Kansas.— Carlin *v.* Donegan, 15 Kan. 495.

Louisiana.— A petition which alleges a partnership and good reasons why it should be dissolved, and alleges that defendant partner owes the petitioners certain specific debts by failure to contribute his share of the expense, and which prays for dissolution and judgment for the specific debts, or, if the court should fail to find these amounts were due, then for a judgment for whatever amount the court might find to be due, and for further relief, shows a cause of action. Borah *v.* O'Niell, 116 La. 672, 41 So. 29.

Mississippi.— Hunt *v.* Gorden, 52 Miss. 194.

Missouri.— Pope *v.* Salsman, 35 Mo. 362, holding that a complaint is defective which does not show the existence of the partnership nor ask for a statement of account by defendant.

Nebraska.— Shriver *v.* McCloud, 20 Nebr. 474, 30 N. W. 534.

New Jersey.— A bill for discovery and accounting between partners, which alleges the partnership, but makes no statement as to the contributions of the parties to the partnership assets or the proportions in which they were to sustain losses or divide profits, is insufficient. Patterson *v.* Sadler, (Ch. 1906) 63 Atl. 1115.

New York.— Emrick *v.* Goldstein, 103 N. Y. App. Div. 17, 92 N. Y. Suppl. 680 (complaint did not state a cause of action); Schulsinger *v.* Blau, 84 N. Y. App. Div. 390, 82 N. Y. Suppl. 686 (a cause of action was stated); Teschmacher *v.* Lenz, 82 Hun 594, 31 N. Y. Suppl. 543; Ludington *v.* Taft, 10 Barb. 447; Reeves *v.* Bushby, 25 Misc. 226. 55 N. Y. Suppl. 70; Ketchum *v.* Lewis, 19 N. Y. Suppl. 452; Redfield *v.* Middleton, 1 Abb. Pr. N. S. 15; McMurray *v.* Rawson, 3 Hill 59 (the complaint "must aver that the partnership was mercantile, in such terms as to show the case is within the law of merchants").

Ohio.— Champion *v.* Williams, 2 Ohio S. & C. Pl. Dec. 388, 2 Ohio N. P. 329, holding that the complaint need not allege that a balance will be due to plaintiff.

Pennsylvania.— Everhart *v.* Everhart, 3 Luz. Leg. Reg. 217 (applying the act of 1840 as to certificate necessary to the court's jurisdiction); Bachman *v.* Einhorn, 12 Phila. 391; Harris *v.* Donavan, 33 Pittsb. Leg. J. N. S. 286. In Harkins *v.* Buxton, 11 Pa. Dist. 159, 27 Pa. Co. Ct. 22, and Keiler *v.* Keller, 26 Pa. Co. Ct. 445, the complaint did not show such right.

Rhode Island.—Congdon *v.* Aylesworth, 16 R. I. 281, 18 Atl. 247.

plaintiff claims a definite lien on partnership property,[48] or counts upon an award by arbitrators,[49] or an account stated,[50] or upon the fraudulent conduct of a partner,[51] as a special ground of relief, he must allege the facts upon which he bases the particular claim. His bill or complaint should also contain a prayer for the relief to which he deems himself entitled.[52] If the suit is brought by an assignee of a partner, the bill or complaint must state the facts which entitle him to an accounting.[53]

b. Answer and Cross Complaint and Intervention. The defendant's answer or plea must be certain[54] as well as responsive to the entire bill.[55] If he would secure affirmative relief, he must file a cross complaint or equivalent pleading,[56] unless

Texas.— Wright *v.* Ross, 30 Tex. Civ. App. 207, 70 S. W. 234.

Utah.— Owen *v.* Oviatt, 4 Utah 95, 6 Pac. 527.

Vermont.— Park *v.* McGowen, 64 Vt. 173, 23 Atl. 855.

West Virginia.— Wood *v.* Wood, 50 W. Va. 570, 40 S. E. 416; Coville *v.* Gilman, 13 W. Va. 314.

United States.— Einstein *v.* Schnebly, 89 Fed. 540.

England.— Good *v.* Blewitt, 13 Ves. Jr. 397, 33 Eng. Reprint 343.

See 38 Cent. Dig. tit. "Partnership," § 769.

48. Reese *v.* McCurdy, 121 Ala. 425, 25 So. 918.

49. Foster *v.* Carr, 135 Cal. 83, 67 Pac. 43; Straus *v.* Heyenga, 5 N. Y. St. 37.

50. Tarabino *v.* Nicoli, 5 Colo. App. 545, 39 Pac. 362.

51. *Iowa* — Levi *v.* Karrick, 13 Iowa 344.

Massachusetts.— Jaynes *v.* Goepper, 147 Mass. 309, 17 N. E. 831.

Minnesota.— Shackleton *v.* Kneisley, 48 Minn. 451, 51 N. W. 470.

New Jersey.— Harrison *v.* Farrington, 36 N. J. Eq. 107 [*affirmed* in 37 N. J. Eq. 316].

New York.— Simpson *v.* Simpson, 44 N. Y. App. Div. 492, 60 N. Y. Suppl. 879.

Tennessee.— Gernt *v.* Cusack, 106 Tenn. 141, 59 S. W. 335.

West Virginia.— Hunter *v.* Tolbard, 47 W. Va. 258, 34 S. E. 737.

United States.— Campbell *v.* Clark, 101 Fed. 972, 42 C. C. A. 123.

See 38 Cent. Dig. tit. "Partnership," § 769.

52. *Georgia.*— Bennett *v.* Woolfolk, 15 Ga. 213, holding that a prayer that defendant pay over one half of the net profits was equivalent to a prayer for an account.

Indiana.— Adams *v.* Shewalter, 139 Ind. 178, 38 N. E. 607; Dehority *v.* Nelson, 56 Ind. 414.

Louisiana.— Richard *v.* Mouton, 106 La. 435, 30 So. 894; Thompson *v.* Walker, 39 La. Ann. 892, 2 So. 789.

Pennsylvania.— Von Tagen *v.* Roberts, 4 Leg. Op. 610.

United States.— Oteri *v.* Scalzo, 145 U. S. 578, 12 S. Ct. 895, 36 L. ed. 824.

See 38 Cent. Dig. tit. "Partnership," § 771.

53. Cuyamaca Granite Co. *v.* Pacific Paving Co., 95 Cal. 252, 30 Pac. 525; Sheldon *v.* Stevens, 32 Misc. (N. Y.) 314, 66 N. Y. Suppl. 796 [*affirmed* in 57 N. Y. App. Div. 630, 68 N. Y. Suppl. 1148]. See *supra*, IX, C, 1, b.

54. *Maryland.*— Danels *v.* Taggart, 1 Gill & J. 311, plea void for uncertainty.

Michigan.— Major *v.* Tood, 84 Mich. 85, 47 N. W. 841, where the entire answer was construed by the court as involving an admission of the partnership existence, although in one paragraph thereof its existence was expressly denied.

New Jersey.— Gordon *v.* Hammell, 19 N. J. Eq. 216.

New York.— Isles *v.* Tucker, 5 Duer 393 (answer sufficiently definite); Reeves *v.* Bushby, 25 Misc. 226, 55 N. Y. Suppl. 70 (where the answer was construed to concede plaintiff's right to equitable relief as well as the firm's existence); Tennant *v.* Guy, 3 N. Y. Suppl. 697 (defendant's failure to deny an indefinite allegation in plaintiff's complaint is not an admission of such allegation); Scott *v.* Pinkerton, 3 Edw. 70 (denial that anything is due plaintiff does not defeat the latter's right to an accounting).

Pennsylvania.— Koons *v.* Bute, 2 Phila. 170.

Rhode Island.— Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247, applying Pub. St. c. 134, § 9.

England.— Davies *v.* Davies, 1 Jur. 446, 2 Keen 534, 14 Eng. Ch. 534, 48 Eng. Reprint 733.

See 38 Cent. Dig. tit. "Partnership," § 772.

55. Carter *v.* Holbrook, 3 Cush. (Mass.) 331 (plea met all the material allegations of the bill); Burditt *v.* Grew, 8 Pick. (Mass.) 108; Everitt *v.* Watts, 3 Edw. (N. Y.) 486 [*affirmed* in 10 Paige 82]; Innes *v.* Evans, 3 Edw. (N. Y.) 454; Cresson's Appeal, 91 Pa. St. 168; Oplinger *v.* Oplinger, 9 North. Co. Rep. (Pa.) 316; Merzlak *v.* Barbic, 32 Pittsb. Leg. J. N. S. (Pa.) 314.

56. *Indiana.*— Miller *v.* Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Shoemaker *v.* Smith, 74 Ind. 71, holding that a demurrer to a cross complaint was improperly overruled, as there was no averment as to the contract by which the firm was formed, the time it was to exist, or the method of its dissolution, and it was not averred that appellant had violated his contract; that the firm, or either member of it, was not abundantly able to pay its liabilities, or that the appellant was not willing to dissolve the firm, pay the debts, and divide the assets; in short, nothing being really averred, except that the firm was in debt and was not making money.

such relief is properly involved in the full statement of the partnership accounting.[57] As a rule third parties have no right to intervene in these actions for the purpose of trying issues which are not germane thereto.[58]

c. Reply. When it is necessary for plaintiff to reply, and the effect of such pleading, are largely matters of statutory regulation at present.[59]

d. Construction of Pleadings and Amended and Supplemental Pleadings. In actions for dissolution and accounting, the courts act with much liberality in allowing and construing amended and supplemental pleadings;[60] as they do in the construction of the original pleadings which are objected to as defective.[61]

e. Issues, Proof, and Variance. Although the courts will construe the pleadings liberally, yet if they have raised a definite issue between the parties, he who has the affirmative of the issue must support it by competent proof;[62] and he

Iowa.— Helmer *v.* Yetzer, 92 Iowa 627, 61 N. W. 206.

Missouri.— Inglis *v.* Floyd, 33 Mo. App. 565.

New York.—Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342 [*reversing* 15 N. Y. App. Div. 561, 44 N. Y. Suppl. 516]; Petrakion *v.* Arbelly, 26 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183; Smith *v.* Underhill, 19 N. Y. Suppl. 249; Heartt *v.* Corning, 3 Paige 566.

North Carolina.— Eaton *v.* Eaton, 43 N. C. 102.

South Carolina.— Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741.

England.— Jacobs *v.* Goodman, 2 Cox Ch. 282, 30 Eng. Reprint 130.

See 38 Cent. Dig. tit. "Partnership," § 772.

57. Corcoran *v.* Sumption, 79 Minn. 108, 81 N. W. 761, 79 Am. St. Rep. 428 (the defendant was entitled to charge plaintiff in the account with damages sustained by reason of the wrongful institution of the suit for dissolution and accounting); Scott *v.* Lalor, 18 N. J. Eq. 301 (defendant was entitled to demand an account from plaintiff without a cross bill).

58. Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101 (where the intervener sought to try the *bona fides* of mortgages made by defendant partner on his separate property); Loftus *v.* Fischer, 114 Cal. 131, 45 Pac. 1058.

59. Chamberlain *v.* Sawyers, 32 S. W. 475, 17 Ky. L. Rep. 716; Anderson *v.* Anderson, 24 Utah 497, 68 Pac. 319, 25 Utah 164, 70 Pac. 608. See, generally, PLEADING.

60. *California.*— Chalmers *v.* Chalmers, 81 Cal. 81, 22 Pac. 395.

Connecticut.— Moran *v.* Bentley, 69 Conn. 392, 37 Atl. 1092, but an amendment after trial will not be allowed when it would change the cause of action.

Georgia.— Jeter *v.* Johnston, 110 Ga. 308, 35 S. E. 166 (applying Civ. Code, § 5101); Patillo *v.* Jones, 104 Ga. 301, 30 S. E. 788 (amendment not allowed because it would change the cause of action). In an accounting between partners, all the partnership debts must be taken into account, and, in petition by executors of a deceased partner against the survivor for an accounting of partnership transactions, it is not error to allow an amendment alleging that plaintiffs, since the filing of the suit, had paid a partnership debt which was prayed to be considered in adjusting the balances between the parties. Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64.

Kentucky.— Funk *v.* Leachman, 4 Dana 24.

Massachusetts.— McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358, amendment allowed as not tending to vary the case stated in the original bill, but merely to measure the relief asked for.

Minnesota.— Chouteau *v.* Rice, 1 Minn. 106.

Missouri.— Boyle *v.* Hardy, 21 Mo. 62, where refusal to allow amendment was held cause for remanding the suit.

Virginia.— Laskey *v.* Burrill, 105 Va. 480, 54 S. E. 23, holding that complainant was entitled to file an amended and supplemental bill.

United States.— Mellor *v.* Smither, 114 Fed. 116, 52 C. C. A. 64.

See 38 Cent. Dig. tit. "Partnership," § 775.

61. *Colorado.*— Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633, bill for an accounting not defective because it did not contain an offer to pay any balance that might be found against plaintiff.

Connecticut.— Moran *v.* Bentley, 69 Conn. 392, 37 Atl. 1092, but the cause of action pleaded must be the one proved by the evidence.

Illinois.— Snell *v.* Deland, 138 Ill. 55, 27 N. E. 707, objection not made until after decree is too late.

Kentucky.— McCombs *v.* Matney, 63 S. W. 578, 23 Ky. L. Rep. 654, defects in pleadings on both sides disregarded, when both prayed for a reference to a commissioner to settle the accounts.

New York.— Waite *v.* Aborn, 60 N. Y. App. Div. 521, 69 N. Y. Suppl. 967 (demurrer to complaint as insufficient overruled); Fairchild *v.* Valentine, 7 Rob. 564 (when both parties seek an accounting, the absence of an averment in the complaint, that the firm has been dissolved and of a prayer for a decree of dissolution may be disregarded after trial).

Texas.— Wiggins *v.* Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

England.— Master *v.* Kirton, 3 Ves. Jr. 74, 30 Eng. Reprint 901.

62. *Alabama.*— Wood *v.* Wood, 118 Ala. 666, 24 So. 1006 (complainant not entitled to a decree, when the partnership proved is different from the one alleged); Owens *v.* Col-

will not be allowed to prove a claim or defense which he has not pleaded.[63] But particular acts or transactions need not be pleaded when evidence of these is pertinent to the issue raised by the pleadings.[64] Even though a partnership is alleged and not proved, plaintiff may be entitled to an accounting,[65] unless he bases his right thereto solely upon the partnership relation.[66]

10. Evidence and Trial[67] — a. Presumptions and Burden of Proof. The burden rests upon the party asking for the statement of a partnership account of giving sufficient evidence to enable the court, master, or referee to state the account.[68] So, when either party makes a material affirmative allegation in his pleading, the burden of establishing it rests upon him.[69] The burden of over-

lins, 23 Ala. 837 (fatal variance between the allegation as to the purchase of certain property by the firm and the proof).

Connecticut.— Moran *v.* Bentley, 69 Conn. 392, 37 Atl. 1092.

Illinois.— Waugh *v.* Schlenk, 23 Ill. App. 433, where the bill relied on the contract of partnership for recovery, but the proof showed that the only ground of recovery was a subsequent agreement, and plaintiff therefore failed.

Indiana.— Elliott *v.* Stevenson, 21 Ind. 359, defense of payment not sustained by proof.

Louisiana.— Thompson *v.* Walker, 39 La. Ann. 892, 2 So. 789 (plea of full and final settlement of firm affairs not sustained by proof of a partial settlement); Hill *v.* Matta, 12 La. Ann. 179.

Massachusetts.— Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52.

Minnesota.— Cochrane *v.* Halsey, 25 Minn. 52, action for dissolution because of actual fraud not sustained by proof of constructive fraud.

New Jersey.— Farrington *v.* Harrison, 44 N. J. Eq. 232, 10 Atl. 105, 15 Atl. 8, plea of full accounting not sustained by the evidence.

New York.— Turner *v.* Weston, 133 N. Y. 650, 31 N. E. 91, 626 [*affirming* 16 N. Y. Suppl. 772] (defendant cannot prove a claim against plaintiff which is independent of the partnership, when he has not pleaded it as a counter-claim); Harlow *v.* La Brun, 82 Hun 292, 31 N. Y. Suppl. 487 [*affirmed* in 151 N. Y. 278, 45 N. E. 859]; McCall *v.* Moschowitz, 14 Daly 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107.

Ohio.— Benninger *v.* Gall, 1 Cinc. Super. Ct. 331.

Vermont.— Woodward *v.* Francis, 19 Vt. 434.

Virginia.— Laskey *v.* Burrill, 105 Va. 480, 54 S. E. 23, no variance.

See 38 Cent. Dig. tit. "Partnership," §§ 776, 777.

63. Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659.

64. *California.*— Richards *v.* Fraser, 122 Cal. 456, 55 Pac. 246, holding that under the allegations of a partnership, plaintiff is entitled to prove that defendant obtained a fraudulent release from liability to account, because under Civ. Code, § 2411, every partner is bound to act in the highest good faith toward his copartners.

Louisiana.— Littlefield *v.* Beamis, 5 Rob. 145.

New York.— Boyd *v.* Foot, 5 Bosw. 110, defendants entitled to an investigation of all partnership transactions, although they were not set forth in their pleadings by way of counter-claim.

Pennsylvania.— James *v.* Browne, 1 Dall. 339, 1 L. ed. 165.

Tennessee.— Morris *v.* Wood, (Ch. App. 1895) 35 S. W. 1013.

See 38 Cent. Dig. tit. "Partnership," §§ 776, 777.

65. Bass *v.* Taylor, 34 Miss. 342; Mitchell *v.* O'Neale, 4 Nev. 504. But see Arnold *v.* Angell, 62 N. Y. 508 [*reversing* 38 N. Y. Super. Ct. 27].

66. Arnold *v.* Angell, 62 N. Y. 508; Salter *v.* Ham, 31 N. Y. 321; Heye *v.* Tilford, 2 N. Y. App. Div. 346, 37 N. Y. Suppl. 751 [*affirmed* in 154 N. Y. 757, 49 N. E. 1098].

67. Partnership books and statements see *infra*, IX, D, 12, f.

68. *Florida.*— Nims *v.* Nims, 23 Fla. 69, 1 So. 527.

Louisiana.— Cockerham *v.* Bosley, 52 La. Ann. 65, 26 So. 814; Camblat *v.* Tupery, 2 La. Ann. 10.

Maine.— Bradley *v.* Webb, 53 Me. 462.

Ohio.— Oglesby *v.* Thompson, 59 Ohio St. 60, 51 N. E. 878.

Oregon.— Ashley *v.* Williams, 17 Oreg. 441, 21 Pac. 556.

Tennessee.— Maupin *v.* Daniel, 3 Tenn. Ch. 223.

West Virginia.— Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

United States.— On a partnership accounting of the ownership and operation of a boat, the burden was on the partner having charge of the bookkeeper and his books to produce the same in order to show the amount that should be allowed for operating expenses. Sandford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167.

See 38 Cent. Dig. tit. "Partnership," § 779.

69. *Alabama.*— Butts *v.* Cooper, (1907) 44 So. 616, holding that where, in a suit for a partnership accounting, the existence of the partnership was denied, the burden of proof thereof was on complainant.

California.— Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678, allegation that a preëmption right had been waived by a copartner.

Colorado.— Michael *v.* Tracy, 15 Colo. App. 312, 62 Pac. 1048, allegation that one partner was to have a salary.

coming a presumption arising from the partnership relation, or from the facts previously established during the progress of the trial, rests upon him against whom the presumption exists.[70]

b. Admissibility and Weight and Sufficiency.[71] In actions for partnership accounting, the admissibility of evidence is determined by the general rules of evidence,[72] except, of course, in so far as they are rendered inapplicable by the rela-

District of Columbia.— Consaul *v.* Cummings, 24 App. Cas. 36.

Georgia.— McAllister *v.* Payne, 108 Ga. 517, 31 S. E. 165, allegation that one partner was to be compensated for extra services.

Illinois.— Clark *v.* Carr, 45 Ill. App. 469.

Iowa.— Willson *v.* Morse, 117 Iowa 581, 91 N. W. 823 (allegation that partnership contract is illegal); Brainerd *v.* Wilson, 51 Iowa 707, 1 N. W. 706; McCabe *v.* Franks, 44 Iowa 208.

Kentucky.— Moon *v.* Story, 8 Dana 226.

Michigan.— Lambert *v.* Griffith, 44 Mich. 65, 6 N. W. 106.

Missouri.—Burgess *v.* Ransom, 72 Mo. App. 207.

New Jersey.—Christopher *v.* Mattlage, (Ch. 1905) 60 Atl. 1124; Farrington *v.* Harrison, 44 N. J. Eq. 232, 10 Atl. 105, 15 Atl. 8; Silverthorn *v.* Brands, 42 N. J. Eq. 703, 11 Atl. 328.

New York.—Aronson *v.* Greenberg, 78 N. Y. App. Div. 639, 79 N. Y. Suppl. 1063; Dwyer *v.* Rorke, 10 N. Y. App. Div. 236, 41 N. Y. Suppl. 721.

North Carolina.— Gossett *v.* Weatherly, 58 N. C. 46.

Oregon.— Marabitti *v.* Bagolan, 21 Oreg. 299, 28 Pac. 10.

Pennsylvania.— McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962; Patterson *v.* Silliman, 28 Pa. St. 304; Stibich *v.* Goenner, 8 Pa. Dist. 227.

Wyoming.— Tregea *v.* Mills, 11 Wyo. 438, 72 Pac. 578, 73 Pac. 209.

See 38 Cent. Dig. tit. "Partnership," § 779.

70. *Alabama.*— Patterson *v.* Ware, 10 Ala. 444, presumption that debts had been collected.

Colorado.— Hottel *v.* Mason, 16 Colo. 43, 26 Pac. 335, presumption that property sold was that of the individual partner overcome by the fact that the note taken by him for the price named the firm as payees.

District of Columbia.— Kilbourn *v.* Latta, 7 Mackey 80.

Illinois.— Laswell *v.* Robbins, 39 Ill. 219.

Iowa.— Where, on an accounting between partners who had been engaged in the real estate business, it did not appear that the purchase of land had been originally contemplated, but one of the partners advanced a sum for the purchase, which was forfeited by failure to complete it, the one making the advance had the burden of showing that the other authorized or ratified the transaction, in order to hold him liable for any part of the loss. Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113.

Kentucky.—Rodes *v.* Rodes, 6 B. Mon. 400; Wilson *v.* Potter, 42 S. W. 836, 19 Ky. L. Rep. 988.

Louisiana.— Long *v.* Kee, 44 La. Ann. 309, 10 So. 854; Bry *v.* Cook, 15 La. Ann. 493.

Mississippi.— Mayson *v.* Beazley, 27 Miss. 106.

New Jersey.— Van Horn *v.* Van Horn, (Ch. 1890) 20 Atl. 826.

New York.— Van Name *v.* Van Name, 38 N. Y. App. Div. 451, 56 N. Y. Suppl. 659. Where defendant, as managing partner of a wholesale drug firm which also operated a retail establishment, sold goods to another retail firm in which he was interested, the burden was on him, in a proceeding to dissolve the wholesale concern, to prove that he obtained the best price obtainable for the goods sold to his retail firm, and that he did not use his connection with the wholesale concern at its expense to benefit his other business. Van Deusen *v.* Crispell, 114 N. Y. App. Div. 361, 99 N. Y. Suppl. 874.

See 38 Cent. Dig. tit. "Partnership," § 779.

71. Partnership books and statements see *infra*, IX, D, 12, f.

72. *California.*— Harper *v.* Lamping, 33 Cal. 641, in an action to wind up a partnership evidence that one of the partner's contribution to the capital was the money of a third person is irrelevant.

Georgia.— Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64, in construing a partnership agreement, testimony that one partner before signing the articles of partnership had made the same offer of partnership to a relative who had declined it is not relevant, nor is a letter from one of the partners to his factor authorizing his copartner to draw on his private account for funds in conducting the partnership enterprise.

Illinois.— McCandless *v.* Crouse, 220 Ill. 344, 77 N. E. 202, where a firm has been dissolved by mutual consent, evidence as to the causes of the dissolution and the responsibility of the parties therefor is immaterial in a suit for an accounting.

Indiana.— Kitson *v.* Hillabold, 95 Ind. 136.

Kansas.— Taggart *v.* Burdick, (1896) 43 Pac. 243; Veatch *v.* Babcock, 54 Kan. 297, 38 Pac. 274; Butcher *v.* Auld, 3 Kan. 217.

Kentucky.— McBrayer *v.* Hanks, 72 S. W. 2, 24 Ky. L. Rep. 1699.

Louisiana.— Keough *v.* Foreman, 32 La. Ann. 1309.

Massachusetts.— Freeman *v.* Freeman, 142 Mass. 98, 7 N. E. 710. Where in a partnership accounting it appeared that one of the partners had accepted a retainer of two thousand five hundred dollars a year from the G company, which was agreed should be partnership property, but there was no claim concerning any services rendered for others, evidence as to whether he had rendered services to any other company for which he had

tion of the parties and the nature of the proceeding; and the same is true with respect to the weight and sufficiency of evidence.[73]

made no charge was irrelevant. Young *v.* Winkley, 191 Mass. 570, 78 N. E. 377.

Minnesota.— Johnson *v.* Garrett, 23 Minn. 565.

Missouri.— Inglis *v.* Floyd, 33 Mo. App. 565.

Montana.— Lawlor *v.* Kemper, 20 Mont. 13, 49 Pac. 398.

Nebraska.— Morris *v.* Haas, 54 Nebr. 579, 74 N. W. 828.

Nevada.— Folsom *v* Marlette, 23 Nev. 459, 49 Pac. 39.

New York.— Van Name *v.* Van Name, 38 N. Y. App. Div. 451, 56 N. Y. Suppl. 659; Rodgers *v.* Clement, 15 N. Y. App. Div. 561, 44 N. Y. Suppl. 516 [*reversed* on other grounds in 162 N. Y. 423, 56 N. E. 901, 16 Am. St. Rep. 342].

Oregon.— Boire *v.* McGinn, 8 Oreg. 466.

Texas.— Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Civ. App. 1899) 50 S. W. 1058]; Veck *v.* Culbertson, (Civ. App. 1900) 57 S. W. 1114. Where, in a suit by a partner in a real estate firm for an accounting, there was a controversy as to the commission on sales of land owned by defendant, where a part of the consideration had been paid and the land had reverted to defendant for failure to pay the balance, and there was a question whether the partnership agreement covered such matters, and defendant testified that another agreement had been entered into in relation to such transactions, which was denied by plaintiff, proof of custom as to sales of real estate by brokers and their fees due thereon was admissible as a basis on which to act if they should find that there was no agreement as to commissions in such transactions. Morgan *v.* Barber, (Civ. App. 1907) 99 S. W. 730.

Washington.— Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942.

See 38 Cent. Dig. tit. "Partnership," § 780.

73. *Alabama.*— Harris *v.* Harris, 132 Ala. 208, 31 So. 355 (evidence of a partial division of firm assets insufficient to show a complete settlement); Adams *v.* Warren, (1892) 11 So. 754.

California.— Painter *v.* Painter, (1894) 36 Pac. 865, evidence insufficient to show that an entry on firm books was fraudulent and void.

District of Columbia.— Rick *v.* Neitzy, 1 Mackey 21, no decree for an accounting will be made, when the parties have kept their accounts so negligently that the court cannot do justice between them.

Illinois.— Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3 (evidence held sufficient to sustain finding of trial court); Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540.

Iowa.— Hartung *v.* Oldfield, 124 Iowa 184, 187, 99 N. W. 699 (where it was said: "The caution defendant appears to have exercised to conceal the transaction from his partner toward whom he should have acted openly and with perfect candor, the fact that the money was paid immediately upon the completion of the invoice, and the treatment of the supplemental agreement not to enter business again as a part of the original contract . . . incline us to reject the claim of defendant"); Levi *v.* Karrick, 13 Iowa 344.

Kansas.— Wolfley *v.* Shuemaker, 4 Kan. App. 38, 45 Pac. 792.

Kentucky.— Caldwell *v.* Lang, 101 S. W. 972, 31 Ky. L. Rep. 237; Wilson *v.* Potter, 42 S. W. 836, 19 Ky. L. Rep. 988; Chamberlain *v.* Sawyers, 32 S. W. 475, 17 Ky. L. Rep. 716; Scott *v.* Perry, 32 S. W. 401, 17 Ky. L. Rep. 746; Atherton *v.* Cochran, 9 S. W. 519, 11 S. W. 301, 11 Ky. L. Rep. 185; Dixon *v.* Ford, 1 S. W. 817, 8 Ky. L. Rep. 420.

Louisiana.— Denton *v.* Erwin, 6 La. Ann. 317.

Maryland.— Turner *v.* Turner, 98 Md. 22, 55 Atl. 1023; Grove *v.* Fresh, 9 Gill & J. 280.

Michigan.— Clarke *v.* Pierce, 74 Mich. 638, 42 N. W. 357; Heath *v.* Waters, 40 Mich. 457.

Minnesota.—Lizee *v.* Robert, 96 Minn. 169, 104 N. W. 836; Nesbitt *v.* Robbins, 34 Minn. 380, 25 N. W. 802.

Mississippi.— Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690 (evidence sufficient to show that the lands in question were not purchased with firm funds); Frank *v.* Webb, 67 Miss. 462, 6 So. 620; Berry *v.* Folkes, 60 Miss. 576.

Missouri.— Ely *v.* Coontz, 167 Mo. 371, 67 S. W. 299; Campbell *v.* Coquard, 93 Mo. 474, 6 S. W. 360; Dale *v.* Hogan, 39 Mo. App. 646, evidence held to be too indefinite to warrant a referee in stating an account.

Nevada.— Folsom *v.* Marlette, 23 Nev. 459, 49 Pac. 39.

New Jersey.— Richardson *v.* Hatch, (Ch. 1903) 55 Atl. 1115 (evidence sufficient to show that accounts had been balanced between the parties at a certain date); Hutchinson *v.* Onderdonk, 6 N. J. Eq. 277 [*reversed* on other grounds in 6 N. J. Eq. 632].

New Mexico.— De Manderfield *v.* Field, 7 N. M. 17, 32 Pac. 146, evidence furnished no basis on which a correct balance could be struck, and allegations of fraud not sustained by vague imputations not resting on definite statements of fact.

New York.— Sterling *v.* Chapin, 185 N. Y. 395, 78 N. E. 158 [*reversing* 111 N. Y. App. Div. 912, 96 N. Y. Suppl. 1147]; Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43; Brady *v.* Powers, 112 N. Y. App. Div. 845, 98 N. Y. Suppl. 237 [*modifying* 105 N. Y. App. Div. 476, 94 N. Y. Suppl. 259]; Robinson *v.* McGinty, 84 N. Y. App. Div. 639, 82 N. Y. Suppl. 736 (judgment was against the weight of evidence); Reilly *v.* Freeman, 84 N. Y. App. Div. 433, 82 N. Y. Suppl. 929; Aronson *v.* Greenberg, 78 N. Y. App. Div. 639, 79 N. Y. Suppl. 1063; Tygart *v.* Wilson, 39 N. Y. App. Div. 58, 56 N. Y. Suppl. 827; Newhall *v.* Wyatt, 68 Hun 1, 22 N. Y. Suppl. 828 [*reversed* on

c. Proceedings Upon Trial. These follow the ordinary course of a suit in equity,[74] except as they are regulated by local statute.[75] If there are disputed questions of fact, these may be referred to a jury for determination,[76] under proper instructions from the court.[77] If the bill asks for a dissolution of the firm and an accounting, a finding of the fact of partnership should precede an order for an account;[78] but if the partnership is admitted and the court orders it dissolved,[79] or if the bill is simply for an accounting after the dissolution of an admitted partnership, an interlocutory order or decree for an accounting is of course, unless plaintiff has lost his right thereto by laches or the statute of limitations or for some other cause.[80] A party who has drawn and entered such an order or judgment is bound by its terms.[81]

11. Other Proceedings on Accounting. The defendant's liability to account, where it is disputed, should be determined before a reference to a master or referee to take the account is made;[82] for if the question is decided against complainant it may end the litigation.[83] The plaintiff is not debarred from a reference

another point in 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712]; Gray *v.* Green, 66 Hun 469, 21 N. Y. Suppl. 533 [*affirmed* in 142 N. Y. 316, 37 N. E. 124, 40 Am. St. Rep. 596]; Comey *v.* Andrews, 14 Daly 437, 14 N. Y. St. 672 [*affirmed* in 124 N. Y. 623, 26 N. E. 758]; Larkin *v.* Martin, 46 Misc. 179, 93 N. Y. Suppl. 198; Tennant *v.* Guy, 3 N. Y. Suppl. 697.

North Carolina.— Brown *v.* Haynes, 59 N. C. 49.

Tennessee.— Horne *v.* Greer, (Ch. App. 1897) 43 S. W. 774.

Utah.—Anderson *v.* Anderson, 24 Utah 497, 68 Pac. 319, 25 Utah 164, 70 Pac. 608.

Virginia.— Slaughter *v.* Danner, 102 Va. 270, 46 S. E. 289.

Wisconsin.— Ehrlich *v.* Brucker, 121 Wis. 495, 99 N. W. 213; Bennett *v.* Luby, 112 Wis. 118, 88 N. W. 37.

United States.— Clay *v.* Field, 138 U. S. 464, 11 S. Ct. 419, 34 L. ed. 1044; Moore *v.* Huntington, 17 Wall. 417, 21 L. ed. 642.

England.— Carr *v.* Smith, 5 Q. B. 128, Dav. & M. 192, 48 E. C. L. 128 (settlement in question could operate only as an award, and could not so operate for want of stamp); Worts *v.* Pern, 3 Bro. P. C. 548, 1 Eng. Reprint 1490 (draft of articles of partnership, together with a stated account and payment of money by acting partner to others is sufficient evidence of partnership to ground a decree for account).

See 38 Cent. Dig. tit. "Partnership," § 781.

74. *Illinois.*— Southworth *v.* People, 183 Ill. 621, 56 N. E. 407 [*affirming* 85 Ill. App. 289].

New York.— Kirkwood *v.* Smith, 72 N. Y. App. Div. 429, 75 N. Y. Suppl. 1016.

Pennsylvania.— Fries *v.* Ennis, 8 Pa. Co. Ct. 113.

Virginia.— Slaughter *v.* Danner, 102 Va. 270, 46 S. E. 289.

England.— Teacher *v.* Calder, [1899] A. C. 451; Ambler *v.* Bolton, L. R. 14 Eq. 427, 41 L. J. Ch. 783, 20 Wkly. Rep. 934; Bate *v.* Robins, 32 Beav. 73, 55 Eng. Reprint 28.

75. Cook *v.* Jenkins, 79 N. Y. 575, applying Code Civ. Proc. § 974, as to the trial of issues of fact arising on a counter-claim.

76. Carlin *v.* Donegan, 15 Kan. 495; Roache *v.* Pendergast, 3 Harr. & J. (Md.) 33; Johnson *v.* Clements, 23 Tex. Civ. App. 112, 54 S. W. 272.

77. Wadley *v.* Jones, 55 Ga. 329; Moore *v.* Stone, 50 Ga. 157; Smith *v.* Smith, 93 Me. 253, 44 Atl. 905; Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635; Carroll *v.* Evans, 27 Tex. 262; Herring *v.* Herring, (Tex. Civ. App. 1899) 51 S. W. 865; Yarwood *v.* Billings, 31 Wash. 542, 72 Pac. 104.

78. Reybold *v.* Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401 (an interlocutory decree for an account, in such a case, decides the fact of a partnership but not the terms of the partnership agreement); Nims *v.* Nims, 20 Fla. 204; Jones *v.* Lester, 77 N. Y. App. Div. 174, 78 N. Y. Suppl. 1000.

79. Nisbet *v.* Nash, 52 Cal. 540.

80. *Alabama.*— Collins *v.* Owens, 34 Ala. 66.

Georgia.— Jeter *v.* Johnston, 110 Ga. 308, 35 S. E. 166.

Maryland.— McKaig *v.* Hebb, 42 Md. 227 (the order should not be made, if it appears that plaintiff has no real cause of complaint and that no good purpose can be served by the order); Glenn *v.* Hebb, 12 Gill & J. 271.

Mississippi.— Felder *v.* Wall, 26 Miss. 595.

New Jersey.— Rennie *v.* Crombie, 12 N. J. Eq. 457.

New York.—Smith *v.* Fitchett, 56 Hun 473, 10 N. Y. Suppl. 459 [*affirming* 2 N. Y. Suppl. 261, 15 N. Y. Civ. Proc. 207]; Kennedy *v.* Shilton, 1 Hilt. 546, 9 Abb. Pr. 157 note; Pine *v.* Ormsbee, 2 Abb. Pr. N. S. 375.

North Carolina.— Smith *v.* Barringer, 74 N. C. 665.

See 38 Cent. Dig. tit. "Partnership," § 787.

81. Kennett *v.* Hopkins, 175 N. Y. 496, 67 N. E. 1084, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18].

82. Jones *v.* Lester, 77 N. Y. App. Div. 174, 78 N. Y. Suppl. 1000 (applying Code Civ. Proc. § 1013); Bantes *v.* Brady, 8 How. Pr. (N. Y.) 216; Dampf's Appeal, 106 Pa. St. 72; Collyer *v.* Collyer, 38 Pa. St. 257.

83. Adams *v.* Gaubert, 69 Ill. 585; Vermillion *v.* Bailey, 27 Ill. 230 (in these two cases

by the fact that it is apparent that he cannot supply evidence which will enable the referee to state an absolutely accurate account;[84] but it is premature to require a referee to take and state an account, before the assets have been sold.[85] Plaintiff is certainly entitled to a reference, when the answer admits everything essential to authorize the court to order it,[86] unless the court itself will undertake the task of stating the account,[87] or defendant is willing to accept the account as stated by plaintiff,[88] or defendant alleges a full adjustment and settlement of the accounts and arrival at an agreed balance.[89] When an accounting is ordered it should include a complete adjustment of all firm accounts,[90] which have not been previously settled by the parties,[91] or have not been taken out of the accounting by some other proceedings.[92] The account should not be drawn up as one between the partners as individual debtor and creditor, but the account of the partnership with non-partners should be first ascertained and stated; then each partner should be credited with what he has brought in, or advanced, as a partnership transaction, and lastly it should apportion between them the profits to be divided and losses to be made good, and ascertain what, if anything, any partner should pay to the other, in order that all cross claims may be settled.[93] This method of stating the account may be modified by the circumstances of a particular case, including the business usages of the firm.[94]

the bill was dismissed); Driggs *v.* Morely, 2 Pinn. (Wis.) 403, 2 Chandl. 59 (in this case the bill was retained, although plaintiff failed to prove a partnership, because he was entitled to an accounting as assignee of a former partner of defendant).

84. Costello *v.* Montague, 101 Ala. 426, 13 So. 428.

85. Trufant *v.* Merrill, 1 Sweeny (N. Y.) 462, 6 Abb. Pr. N. S. 462, 37 How. Pr. 531.

86. *Illinois.*— Wilcoxon *v.* Wilcoxon, 111 Ill. App. 90.

Kansas.—Auld *v.* Butcher, 2 Kan. 135.

Kentucky.— Bush *v.* Stamper, 61 S. W. 267, 22 Ky. L. Rep. 1592.

Nebraska.— Gerber *v.* Jones, 36 Nebr. 126, 54 N. W. 81.

New York.— Kennett *v.* Hopkins, 175 N. Y. 496, 67 N. E. 1084, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18 (*affirming* 20 Misc. 259, 45 N. Y. Suppl. 797)].

North Carolina.—McPeters *v.* Ray, 85 N. C. 462.

Oklahoma.— Conley *v.* Horner, 10 Okla. 277, 62 Pac. 807, applying Code, § 304.

South Carolina.— Bouland *v.* Carpin, 27 S. C. 235, 3 S. E. 219, applying Code, § 293.

Tennessee.— Frierson *v.* Morrow, (Ch. App. 1898) 48 S. W. 245, application for recommitting an account denied because it was apparent that a new account would be still less in his favor than the first one.

England.— Zalinoff *v.* Hammond, [1898] 2 Ch. 92, 67 L. J. Ch. 370, 78 L. T. Rep. N. S. 456; Barnes *v.* Youngs, [1898] 1 Ch. 414, 62 L. J. Ch. 263, 46 Wkly. Rep. 332, a disputed question of law or of fraud should not be referred.

See 38 Cent. Dig. tit. "Partnership," § 790.

87. Roelofs *v.* Wever, 119 Mich. 334, 78 N. W. 136.

88. Diehl *v.* Dreyer, 84 N. Y. App. Div. 247, 82 N. Y. Suppl. 770.

89. Wynkoop *v.* Wynkoop, 119 N. Y. App. Div. 679, 104 N. Y. Suppl. 296.

90. Bernie *v.* Vandever, 16 Ark. 616; Randolph *v.* Inman, 172 Ill. 575, 50 N. E. 104; Sharp *v.* Morrow, 6 T. B. Mon. (Ky.) 300; Wiggin *v.* Fine, 17 Mont. 575, 44 Pac. 75.

91. Boyle *v.* Hardy, 28 Mo. 390; Parkhurst *v.* Muir, 7 N. J. Eq. 555; Leinbach *v.* Wolle, 211 Pa. St. 629, 61 Atl. 248; Sim *v.* Sim, 11 Ir. Ch. 310.

92. Price *v.* Eccles, 73 N. C. 162 (applying Code Civ. Proc. § 127); Herring *v.* Herring, (Tex. Civ. App. 1899) 51 S. W. 865.

93. Garrett *v.* Robinson, 80 Ala. 192; McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Neudecker *v.* Kohlberg, 3 Daly (N. Y.) 407; Strathy *v.* Crooks, 6 Grant Ch. (U. C.) 162. In Cockerham *v.* Bosley, 52 La. Ann. 65, 26 So. 814, it is said that the account of a liquidator of a partnership should be so made out as to be susceptible of easy understanding by those who have to deal with the same, and who are not professional bookkeepers, or expert accountants; and where it is not the case will be remanded at the expense personally of the liquidator. See also Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

94. *Kentucky.*— Hume *v.* McNees, 10 S. W. 384, 10 Ky. L. Rep. 947.

New York.— Lowther *v.* Lowther, 105 N. Y. App. Div. 638, 94 N. Y. Suppl. 159.

United States.— Kelsey *v.* Hobby, 16 Pet. 269, 10 L. ed. 961.

England.— Thornton *v.* Proctor, Anstr. 94, 3 Rev. Rep. 553; Watney *v.* Wells, 9 Jur. N. S. 396, 32 L. J. Ch. 194, 1 New Rep. 82, 11 Wkly. Rep. 228.

Canada.—Davidson *v.* Thirkell, 3 Grant Ch. (U. C.) 330.

Filing verified account.— In New York a party in a suit for the dissolution of a partnership and for an accounting, adjudged to account, should, as required by chancery rule 107, file a verified account, and the adverse party, if not satisfied, should file objections and specify what surcharges he claims should be made, thereby making issues for litigation.

12. CHARGES AND CREDITS — a. In General. In stating the account, as intimated in the last paragraph, each partner is to be credited with every contribution which he has made to the partnership estate, as shown by the books,[95] or by other competent evidence.[96] But he is not entitled to credit for expenditures made for the firm, or extra services rendered to it, unless he can show authority from the firm for such charge, or its acquiescence therein.[97] Nor, as a rule, are matters having nothing to do with the partnership business to be taken into consideration.[98] A partner is to be charged with all sums of money drawn from the firm and with all other forms of its property appropriated by him,[99] as well as with all losses sustained by the firm through his failure properly to perform his duties as partner.[1] In most jurisdictions he will be charged with interest on a

Kliger *v.* Rosenfeld, 120 N. Y. App. Div. 396, 105 N. Y. Suppl. 214; New York Bank-Note Co. *v.* Hamilton Bank-Note Engraving, etc., Co., 56 N. Y. App. Div. 488, 67 N. Y. Suppl. 827. But failure of defendant to object may estop him to complain on the ground that no account was filed. Kliger *v.* Rosenfeld, *supra*.

95. Murphey *v.* Bush, 122 Ga. 715, 50 S. E. 1004; Ernst *v.* Schmitz, 207 Ill. 604, 69 N. E. 923; Rosenstiel *v.* Gray, 112 Ill. 282 (but he must not be twice credited for the same advance); Parker *v.* Ramsbottom, 5 D. & R. 138, 3 B. & C. 257, 3 L. J. K. B. O. S. 16, 10 E. C. L. 124.

96. *District of Columbia.*—Consaul *v.* Cummings, 24 App. Cas. 36, one of a firm of attorneys credited with his expenses on behalf of the firm in attempting to collect disallowed claims.

Georgia.— McAllister *v.* Payne, 108 Ga. 517, 34 S. E. 165, where an agreement for the credit was shown.

Illinois.— Snell *v.* De Land, 136 Ill. 533, 27 N. E. 183.

Michigan.— Hake *v.* Coach, 114 Mich. 558, 72 N. W. 623, circumstances showed that a note given by one partner and paid by him was executed for the benefit of the firm, with the copartner's consent.

Mississippi.— Randle *v.* Richardson, 53 Miss. 176.

New York.— Neal *v.* Abel, 103 N. Y. App. Div. 414, 92 N. Y. Suppl. 1045. Where, in an action by a partner for an accounting, defendant claimed a credit for certain foreign currency bonds delivered by him as an expense in the joint enterprise, and such bonds were of no value except as transferable at a discount for gold bonds, some of which defendant held under the enterprise, it was held that, although delivery of the currency bonds was not a proper credit as against plaintiff, defendant's account should not be surcharged with their face value, but the exchangeable equivalent in gold bonds should be added to the account of the gold bonds held by him. Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

Pennsylvania.— Finletter *v.* Baum, 207 Pa. St. 361, 56 Atl. 941.

Tennessee.— Frierson *v.* Morrow, (Ch. App. 1898) 48 S. W. 245, holding that a partner was to be credited with a debt due him from the firm for services as receiver of another firm.

Texas.—Barber *v.* Morgan, (Civ. App. 1900) 76 S. W. 319, not to be twice credited for the same claim.

Virginia.— Dixon *v.* Paddock, 104 Va. 387, 51 S. E. 841.

West Virginia.— Moore *v.* Wheeler, 10 W. Va. 35.

England.— Cruikshank *v.* McVicar, 8 Beav. 106, 14 L. J. Ch. 41, 50 Eng. Reprint 42.

See 38 Cent. Dig. tit. "Partnership," § 792 *et seq.*

97. *District of Columbia.*—Consaul *v.* Cummings, 24 App. Cas. 36.

Oregon.— Willard *v.* Bullen, 41 Oreg. 25, 67 Pac. 924, 68 Pac. 422.

Pennsylvania.—Willock *v.* Dubbs, 32 Pittsb. Leg. J. N. S. 250.

Virginia.— Dixon *v.* Paddock, 104 Va. 387, 51 S. E. 841.

England.— Barrett *v.* Hartley, L. R. 2 Eq. 789, 12 Jur. N. S. 426, 14 L. T. Rep. N. S. 474, 14 Wkly. Rep. 684; Macdonald *v.* Richardson, 1 Giffard 81, 5 Jur. N. S. 9, 10 L. T. Rep. N. S. 166, 65 Eng. Reprint 833; Whittle *v.* McFarlane, 1 Knapp 311, 12 Eng. Reprint 338.

98. Where, in an action for a partnership accounting, the pleadings relate solely to an accounting of such business, a note executed by one of the partners and his wife to the other previous to the partnership, and having nothing to do with the partnership business, cannot be considered in the accounting. Payne *v.* Martin, 39 Colo. 265, 89 Pac. 46.

99. *Kentucky.*— Archer *v.* Barry, 62 S. W. 485, 23 Ky. L. Rep. 12, but not to be charged with money misappropriated by his son who is an agent of the firm.

North Dakota.— Lay *v.* Emery, 8 N. D. 515, 79 N. W. 1053, a partner who has retained the agreed compensation for his whole time, in managing the business, but has devoted only a part of his time, should be charged with overdrawing his account.

Washington.— Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

England.— Fereday *v.* Wightwick, 1 Russ. & M. 45, 5 Eng. Ch. 45, 39 Eng. Reprint 18, Taml. 250, 12 Eng. Ch. 250, 48 Eng. Reprint 100, 31 Rev. Rep. 93.

1. *Connecticut.*— Gillett *v.* Hall, 13 Conn. 426.

Illinois.— Randolph *v.* Inman, 71 Ill. App.

liquidated indebtedness to the firm,[2] especially if it results from the wrongful abstraction of firm property.[3] If one partner has excluded his copartner from the business, or has taken the assets and assumed the payment of the debts out of such assets, he is to be charged with the receipts from the business and credited with the legitimate expenses of conducting and closing it, and any balance is to be divided as profits.[4] And generally the share of a partner as determined by a final accounting is his proportion of the residue, after the payment of non-partners, and after the several partners have been credited with the sums due them from the firm and have been charged with the sums due from them to the firm.[5]

b. Effect of Partnership Agreements and Settlements. The foregoing rules as to charges and credits are often modified by the agreements of the partners in their original articles,[6] or upon intermediate settlements,[7] if these are made in good faith.[8]

c. Firm Assets and Contributions. In stating the account, the firm is to be charged with the contribution of each partner to the firm;[9] but it is not charge-

176, no loss to firm shown, hence partner not to be charged.

Iowa.— Yetzer *v.* Applegate, 83 Iowa 726, 50 N. W. 66 (where a partner paid firm notes which were void for usury and was charged with the amount so paid); Webb *v.* Fordyce, 55 Iowa 11, 7 N. W. 385.

Kentucky.— Lee *v.* Lashbrooke, 8 Dana 214, where defendant agreed to be charged with the good debts of the firm.

Louisiana.— Richard *v.* Mouton, 109 La. 465, 33 So. 563, holding that a partner who undertakes the collection of accounts must show why he has not collected them, or he will be charged with them.

Pennsylvania.— Lyons *v.* Lyons, 207 Pa. St. 7, 56 Atl. 54, 99 Am. St. Rep. 779 (no negligence on the part of liquidating partner, and the firm debtor insolvent; not a case for charging the liquidating partner with loss); Fairfield *v.* Kreps, 33 Pittsb. Leg. J. N. S. 407 (loss because of partner's fraudulent over-valuation of property which he contributed to the firm).

West Virginia.— Moore *v.* Wheeler, 10 W. Va. 35.

See 38 Cent. Dig. tit. "Partnership," § 795.

2. Buckley *v.* Kelly, 70 Conn. 411, 39 Atl. 601; Snell *v.* Taylor, 182 Ill. 473, 55 N. E. 545 [*affirming* 79 Ill. App. 462] (defendant not charged with interest, because of plaintiff's laches); Randolph *v.* Inman, 172 Ill. 575, 50 N. E. 104; Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64. In Pennsylvania the tendency is not to charge the debtor partner with interest, in the absence of special circumstances, or of an agreement therefor. Brenner *v.* Carter, 203 Pa. St. 75, 52 Atl. 178.

3. Porter *v.* Long, 136 Mich. 150, 98 N. W. 990.

4. Howell *v.* Harvey, 5 Ark. 270, 39 Am. Dec. 376; Dale *v.* Hogan, 39 Mo. App. 646; Koelz *v.* Brinkman, 50 W. Va. 270, 40 S. E. 578.

5. *Alabama.*— Glover *v.* Hembree, 82 Ala. 324, 8 So. 251.

Kentucky.— Archer *v.* Barry, 62 S. W. 485, 23 Ky. L. Rep. 12.

Michigan.— Snyder *v.* O'Beirne, 132 Mich. 340, 93 N. W. 872.

New York.— Hagenbuchle *v.* Schultz, 69 Hun 183, 23 N. Y. Suppl. 611.

Pennsylvania.— Wauby *v.* Jahn, 34 Pittsb. Leg. J. N. S. 91.

Texas.— Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Civ. App. 1899) 50 S. W. 1058].

West Virginia.— Koelz *v.* Brinkman, 50 W. Va. 270, 40 S. E. 578; Moore *v.* Wheeler, 10 W. Va. 35.

6. *Iowa.*— Levi *v.* Karrick, 8 Iowa 150.

Maryland.— Stevens *v.* Yeatman, 19 Md. 480.

Missouri.— Pardue *v.* McCollum, 116 Mo. App. 603, 92 S. W. 757.

Nebraska.— Leighton *v.* Clarke, 42 Nebr. 427, 60 N. W. 875.

New Hampshire.— Morrill *v.* Weeks, 70 N. H. 178, 46 Atl. 32.

Oregon.— Langell *v.* Langell, 17 Oreg. 220, 20 Pac. 286.

Pennsylvania.— Becker *v.* Hill, 20 Lanc. L. Rev. 345, the contract provided that a partner who withdrew should forfeit his right, title, and interest in the business.

England.— Featherstonhaugh *v.* Turner, 25 Beav. 382, 28 L. J. Ch. 812, 53 Eng. Reprint 683.

Canada.— Worthington *v.* Macdonald, 9 Can. Sup. Ct. 327.

See 38 Cent. Dig. tit. "Partnership," § 792 *et seq.*

7. Loveland *v.* Peter, 108 Mich. 154, 65 N. W. 748; Van Horn *v.* Van Horn, (N. J. Ch. 1890) 20 Atl. 826; Parkhurst *v.* Muir, 7 N. J. Eq. 555; Thornton *v.* Proctor, Anstr. 94, 3 Rev. Rep. 358; Coventry *v.* Barclay, 33 Beav. 1, 2 New Rep. 375, 11 Wkly. Rep. 892, 55 Eng. Reprint 266; Luckie *v.* Forsyth, 3 J. & L. 388.

8. Richards *v.* Fraser, 136 Cal. 460, 69 Pac. 83.

9. Boskowitz *v.* Nickel, 97 Cal. 19, 31 Pac. 732; Durham *v.* Sumpter, 32 S. W. 257, 17 Ky. L. Rep. 655; Imeson *v.* Schriver, 11 S. W. 598, 11 Ky. L. Rep. 71; Mitchell *v.* Mitchell, 92 Mich. 618, 52 N. W. 1024; Westerfield *v.* Price, 80 Hun (N. Y.) 401, 30 N. Y. Suppl.

able with property or payments of a partner, although connected with the business, of which it does not get a proprietary benefit.[10]

d. Debts, Losses, and Expenses. A partner who pays the debts of his firm or defrays its legitimate expenses or losses out of his own property is to be credited therewith in the firm account.[11] Such credit should include interest and discount charges paid by him in connection with these matters.[12] The amount to be credited as expenses, when accounts thereof have not been kept, may be shown by the testimony of experts.[13] A partner who compromises a firm debt is to be credited with only the amount which he has paid.[14] The account of each partner is to be charged with all debts which he owes the firm.[15] Also with all losses which his misconduct has caused the firm,[16] but not those due to honest mistakes as distinguished from clear violation of duty.[17] An agreement to share profits implies an agreement to share costs in the same proportion, unless the capital of one partner is staked against the skill of the other.[18] All members of a firm are chargeable with their share of expenses incurred after dissolution of a firm in defending actions commenced against it before such time and continued thereafter.[19]

e. Duty to Keep Accounts. If a party fails to perform his duty of keeping accurate account of partnership affairs, all doubts respecting particular items will be resolved against him, unless there is some reason for not applying the rule,[20]

356; Schulte *v.* Anderson, 45 N. Y. Super. Ct. 489.

10. Gillett *v.* Hall, 13 Conn. 426; Gruhbs *v.* McIlvain, 36 S. W. 16, 18 Ky. L. Rep. 383 (firm not to be charged with the amount paid by one partner to another for the latter's place in the firm); Plumly's Appeal, (Pa. 1889) 16 Atl. 728.

11. *California.*— Clark *v.* Gridley, 41 Cal. 119.

Connecticut.— Smith *v.* Brush, 11 Conn 359.

Illinois.— Brownell *v.* Steere, 128 Ill. 209, 21 N. E. 3 [*affirming* 29 Ill. App. 358], moneys expended in defending a suit for the firm.

Massachusetts.— Fletcher *v.* Reed, 131 Mass. 312; Harvey *v.* Varney, 104 Mass. 436.

Michigan.— Hake *v.* Coach, 114 Mich. 558, 72 N. W. 623; Pierce *v.* Pierce, 89 Mich. 233, 50 N. W. 851.

New York.— Van Bokkelen *v.* Berdell, 130 N. Y. 141, 29 N. E. 254 [*reversing* 3 N. Y. Suppl. 333].

Virginia.— Robertson *v.* Read, 17 Gratt. 544.

United States.— Lewis *v.* Loper, 54 Fed. 237, on a copartnership accounting one partner is entitled to credit himself with a firm debt transferred to him by his father, and charged against him as an advancement.

England.— Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098.

Canada.— Storm *v.* Cumberland, 18 Grant Ch. (U. C.) 245.

See 38 Cent. Dig. tit. "Partnership," § 796.

12. Fletcher *v.* Reed, 131 Mass. 312; Bundy *v.* Youmans, 44 Mich. 376, 6 N. W. 851.

13. Lamb *v.* Rowan, 83 Miss. 45, 35 So. 427, 690.

14. Filbrun *v.* Ivers, 92 Mo. 388, 4 S. W. 674.

15. Couch *v.* Woodruff, 63 Ala. 466; Clark *v.* Gridley, 41 Cal. 119; Chandler *v.* Sherman, 16 Fla. 99; Phelan *v.* Hutchison, 62 N. C. 116, 93 Am. Dec. 602.

16. Webber *v.* Webber, 146 Mich. 31, 109 N. W. 50 (barred notes, overdrafts, and interest); Jessup *v.* Cook, 6 N. J. L. 434; Kennett *v.* Hopkins, 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18 [*affirmed* in 174 N. Y. 545, 67 N. E. 1084]; Devall *v.* Burbridge, 6 Watts & S. (Pa.) 529. See *supra*, IX, D, 12, a.

17. Day *v.* Lockwood, 24 Conn. 185; Leon Exch. Bank *v.* Gardner, 104 Iowa 176, 73 N. W. 591; Hollister *v.* Barkley, 11 N. H. 501.

18. Brenner *v.* Carter, 10 Pa. Dist. 457.

19. Blun *v.* Mayer, 113 N. Y. App. Div. 247, 99 N. Y. Suppl. 25.

20. *Arkansas.*— Pierce *v.* Scott, 37 Ark. 308.

Kentucky.— Archer *v.* Barry, 62 S. W. 485, 23 Ky. L. Rep. 12 (holding, however, that this rule will not be applied against a partner who cannot read or write and whose son kept accounts under the supervision of the other partner); Kirwan *v.* Henry, 16 S. W. 828, 13 Ky. L. Rep. 199.

Louisiana.— Leftwitch *v.* Leftwitch, 6 La. Ann. 346.

Maryland.— Bevans *v.* Sullivan, 4 Gill 383.

Michigan.— Mitchell *v.* Mitchell, 92 Mich. 618, 52 N. W. 1024; Young *v.* Barras, 74 Mich. 343, 42 N. W. 42.

New Jersey.— Van Ness *v.* Van Ness, 32 N. J. Eq. 669 [*reversed* on other grounds in 32 N. J. Eq. 729].

North Carolina.— Clements *v.* Mitchell, 62 N. C. 3.

Wisconsin.— Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140, the rule not to be applied, however, if the copartner knows that the partner charged with the duty is incompetent to perform it, and there is no evidence of dishonesty or an intent to defraud.

See 38 Cent. Dig. tit. "Partnership," § 797.

and in such case the court will resort to the best evidence obtainable to ascertain the true state of the account.[21]

f. Partnership Books and Statements. Each partner is entitled to an inspection of the firm books, in an action for an accounting.[22] If it is shown that all the partners had access to the books, at or soon after the time when the entries were made, such entries are presumed to be correct and are admissible as between the partners,[23] or their representatives,[24] even though they do not accord with the partnership articles.[25] Their evidential value is increased if their correctness is attested by the verified pleading of a partner,[26] and, as against himself, it is increased by a partner's presentation of an account based upon them.[27] The presumption does not attach to entries in the private books of a partner,[28] nor to those in firm books as against a dormant partner;[29] and entries in firm books, made after the retirement of one of the partners, are not admissible in evidence, in favor of the firm, against such retired partner.[30] Even in the case of firm

21. *Iowa.*—Petty *v.* Haas, 122 Iowa 257, 98 N. W. 104.
Maryland.— Bevans *v.* Sullivan, 4 Gill 383.
Michigan.— Young *v.* Barras, 74 Mich. 343, 42 N. W. 42.
South Carolina.— Schmidt *v.* Lebby, 11 Rich. Eq. 329.
Tennessee.— Myers *v.* Bennett, 3 Lea 184; Budeke *v.* Ratterman, 2 Tenn. Ch. 459.
Wisconsin.—Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.
See 38 Cent. Dig. tit. "Partnership," § 797.

22. Knoch *v.* Funke, 59 N. Y. Super. Ct. 240, 14 N. Y. Suppl. 477 (where, however, a motion for inspection of defendant's books and papers was denied, as it was not shown that they contained evidence of partnership transactions); Stebbins *v.* Harmon, 17 Hun (N. Y.) 445; Kelly *v.* Eakford, 5 Paige (N. Y.) 548; Saunders *v.* Duval, 19 Tex. 467; Calloway *v.* Tate, 1 Hen. & M. (Va.) 9; Millar *v.* Craig, 6 Beav. 433, 49 Eng. Reprint 893; Walmsley *v.* Walmsley, 3 J. & L. 556.

23. *Alabama.*— Desha *v.* Smith, 20 Ala. 747. And see Powers *v.* Dickie, 49 Ala. 81.
Arkansas.— Haller *v.* Williamowicz, 23 Ark. 566.
California.— Morgans *v.* Adel, (1888) 18 Pac. 247.
Illinois.— O'Brien *v.* Hanley, 86 Ill. 278.
Indiana.— Eden *v.* Lingenfelter, 39 Ind. 19. And see Reno *v.* Crane, 2 Blackf. 217.
Iowa.— See Hale *v.* Philbrick, 47 Iowa 217.
Kentucky.— Simms *v.* Kirtley, 1 T. B. Mon. 79; Moon *v.* Story, 8 Dana 226.
Louisiana.— Carpenter *v.* Camp, 39 La. Ann. 1024, 3 So. 269; Parker *v.* Jonté, 15 La. Ann. 290; Armistead *v.* Spring, 1 Rob. 567; Jordan *v.* White, 4 Mart. N. S. 335.
Massachusetts.— Topliff *v.* Jackson, 12 Gray 565.
Michigan.— Howard *v.* Patrick, 38 Mich. 795.
New Jersey.— Dunnell *v.* Henderson, 23 N. J. Eq. 174.
New York.— Cheever *v.* Lamar, 19 Hun 130; Caldwell *v.* Leiber, 7 Paige 483; Heartt *v.* Corning, 3 Paige 566; Stoughton *v.* Lynch, 2 Johns. Ch. 209.
Oregon.— Boire *v.* McGinn, 8 Oreg. 466.
Rhode Island.— Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247.
South Carolina.— Richardson *v.* Wyatt, 2 Desauss. Eq. 471; Cameron *v.* Watson, 10 Rich. Eq. 64.
Tennessee.— Myers *v.* Bennett, 3 Lea 184; Budeke *v.* Ratterman, 2 Tenn. Ch. 459; Hicks *v.* Chadwell, 1 Tenn. Ch. 251.
Virginia.— Brickhouse *v.* Hunter, 4 Hen. & M. 363, 4 Am. Dec. 528; Fletcher *v.* Pollard, 2 Hen. & M. 544.
England.— Brierly *v.* Cripps, 7 C. & P. 709, 32 E. C. L. 833; Lodge *v.* Pritchard, 3 De G. M. & G. 906, 52 Eng. Ch. 703, 43 Eng. Reprint 354; Sim *v.* Sim, 11 Ir. Ch. 310.
See 38 Cent. Dig. tit. "Partnership," § 799.
Compare, however, Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,648, 1 Cranch C. C. 2.

24. Routen *v.* Bostwick, 59 Ala. 360; Powers *v.* Dickie, 49 Ala. 81; Gardner *v.* Cumming, Ga. Dec. 1; Howard *v.* Patrick, 38 Mich. 795; Morehouse *v.* Newton, 3 De G. & Sm. 307, 13 Jur. 420, 64 Eng. Reprint 491; Townend *v.* Townend, 1 Giffard 201, 5 Jur. N. S. 506, 7 Wkly. Rep. 529, 65 Eng. Reprint 885.

25. Gregg *v.* Hord, 129 Ill. 613, 22 N. E. 528.

26. Haller *v.* Willamowicz, 23 Ark. 566; Wendling *v.* Jennisch, 85 Iowa 392, 52 N. W. 341.

27. Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066.

28. Wheatley *v.* Wheeler, 34 Md. 62; Sim *v.* Sim, 11 Ir. Ch. 310. A private memorandum book kept by one of the partners, who was treasurer of the company, and to which other partners did not have access, is not evidence for the party keeping it. Turnipseed *v.* Goodwin, 9 Ala. 372. An account-book kept by one partner is not admissible in evidence in an action against him by the other, without proof that it was fairly kept and was accessible to the other. Adams *v.* Funk, 53 Ill. 219.

29. Taylor *v.* Herring, 10 Bosw. (N. Y.) 447.

30. Bank of British North America *v.* Delafield, 80 Hun (N. Y.) 564, 30 N. Y. Suppl. 600 [*affirmed* in 152 N. Y. 624, 46 N. E. 1144].

books, the presumption may be rebutted by evidence of mistake or fraud,[31] unless the party offering the evidence is estopped from questioning their accuracy.[32] Accounts current rendered between partners are admissible to show, by the admissions of the parties, that the items are not items of partnership account.[33] An account, proved to be in the handwriting of one partner, is evidence to go to the jury in an action between the partners, although it is not signed.[34]

13. CONVERSION OF ASSETS INTO MONEY AND ALLOWANCE OF CLAIMS — a. Collections. Until a receiver is appointed, each partner has authority to collect debts due the firm.[35] From and after such appointment this authority vests in the receiver,[36] and he is entitled to all collections made by a partner and for which he has not accounted to the firm.[37] He has the same right against the assignee of the firm appointed in a proceeding which has been judicially declared illegal and void.[38]

b. Sale of Firm Property. In an action for partnership dissolution and accounting, the entire property of the firm is to be converted into cash, unless all the partners, by an honest and lawful agreement, assent to a distribution of the assets in specie; and such conversion is ordinarily made by a sale of the property.[39]

Entries by partner winding up business.— The rule that entries in the books of a firm are evidence against all of the parties is true only of those made while the firm is doing business. Entries so made by a partner who is winding up the partnership under a transfer to him for that purpose are not *per se* evidence for him against a copartner. Clements *v.* Mitchell, 62 N. C. 3.

31. *Indiana.*— Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446.

Kentucky.— Bannon *v.* Hawkins, 35 S. W. 636, 18 Ky. L. Rep. 150; Greer *v.* Greer, 23 S. W. 866, 15 Ky. L. Rep. 472; Kirwan *v.* Henry, 16 S. W. 828, 13 Ky. L. Rep. 199.

New York.— Jamer *v.* Jacobs, 147 N. Y. 710, 42 N. E. 723 [*affirming* 71 Hun 176, 24 N. Y. Suppl. 1126]; Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066; Boyd *v.* Foot, 5 Bosw. 110; Barrett *v.* Kling, 16 N. Y. Suppl. 92.

Ohio.— Keys *v.* Baldwin, 10 Ohio Dec. (Reprint) 271, 19 Cinc. L. Bul. 376.

Pennsylvania.— Ziegler's Appeal, 2 Pa. Cas. 351, 4 Atl. 837.

Texas.— Johnston *v.* Ballard, 83 Tex. 486, 18 S. W. 686.

See 38 Cent. Dig. tit. "Partnership," § 799 *et seq.*

Effect of possession by partner after bill for dissolution.— The fact that one of the partners of the firm, who remained in possession of the shop and stock of goods after a bill was filed for a dissolution of the partnership, kept possession of the books, and refused to give them up, is no reason for excluding the books as *prima facie* evidence, at least, of the affairs of the concern, there being no proof of the allegation that the books were altered or mutilated by him. Moon *v.* Story, 8 Dana (Ky.) 226.

Expert's books.— In an action for the dissolution of a partnership and for an accounting, where the evidence showed that the books had been so improperly kept by defendant that it was impossible to tell anything about the condition of the affairs of the partnership, the attorneys stipulated that experts should be employed by the referee to reduce the books to intelligible shape. The experts made out a set of new books from the old books. It was held that the expert books were properly admitted in evidence in connection with the report of the referee. Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16.

Expert's account from altered books.— Although ordinarily plaintiff would have had no right to introduce books as evidence of the settlement of partnership affairs after the dissolution of the partnership, when he had altered such books, a statement of account by an expert, made from such altered books, was admissible, where there was other evidence showing the correctness of the statement. Butler *v.* Beech, 55 Cal. 28.

32. Wendling *v.* Jennisch, 85 Iowa 392, 52 N. W. 341.

33. Barry *v.* Barry, 2 Fed. Cas. No. 1,060, 3 Cranch C. C. 120.

34. Jessup *v.* Cook, 6 N. J. L. 434.

35. See *supra*, IX, B, 3, 4.

36. Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Receiver's title and authority see *supra*, IX, 7, c, (II), (III).

37. Adams *v.* Haskell, 6 Cal. 113, 65 Am. Dec. 491; Murphy *v.* Du Berg, 11 Abb. N. Cas. (N. Y.) 112; Dixon *v.* Paddock, 104 Va. 387, 51 S. E. 841.

38. Adams *v.* Haskell, 6 Cal. 113, 65 Am. Dec. 491.

39. *California.*— Wulff *v.* San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78; Hall *v.* Lonkey, 57 Cal. 80; Stower *v.* Kamphefner, (App. 1907) 91 Pac. 424.

Connecticut.— Dickinson *v.* Dickinson, 29 Conn. 600; Sigourney *v.* Munn, 7 Conn. 324; Tomlinson *v.* Ward, 2 Conn. 396.

Illinois.— Renfrow *v.* Pearce, 68 Ill. 125, when the property is sold to a partner, the record should show payment before confirmation.

Kentucky.— Whitney *v.* Whitney, 88 S. W. 311, 27 Ky. L. Rep. 1197, 77 S. W. 206, 25 Ky. L. Rep. 1142, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465.

The sale should include as a rule the good-will of the firm[40] as well as its real estate.[41] It should not be ordered, however, unless the partnership is actually dissolved,[42] nor should it include property which does not belong to the firm,[43] nor for the sale of which there is no necessity,[44] nor when it will give one or some of the partners an unfair advantage over others.[45] Where the wife of a partner has a dower right in real estate to be sold in a suit for a partnership accounting, her right should be determined and protected under a statute requiring this in the case of judicial sales.[46] The rule that if a trustee, or one standing in a similar capacity, becomes a purchaser of the trust property, such act is voidable at the instance of the person whom he represents, applies with full force to a sale of partnership property by a master, pursuant to a decree in partition, and under

Louisiana.— Pratt *v.* McHatton, 11 La. Ann. 260; Kohn *v.* Marsh, 3 Rob. 48.

Maryland.— Loney *v.* Bayly, 45 Md. 447, a partner has no right, as a condition of his assenting to a sale, that creditors shall release the firm from its indebtedness.

Missouri.— Filbrun *v.* Ivers, 92 Mo. 388, 4 S. W. 674.

Montana.— Murphy *v.* Patterson, 24 Mont. 591, 63 Pac. 380.

Nevada.— Rhodes *v.* Williams, 12 Nev. 20.

New York.— Wing *v.* Bliss, 138 N. Y. 643, 34 N. E. 513 [*affirming* 8 N. Y. Suppl. 500].

North Carolina.— Waugh *v.* Mitchell, 21 N. C. 510.

Ohio.— Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657.

Oregon.— Fleming *v.* Carson, 37 Oreg. 252, 62 Pac. 374.

Pennsylvania.— Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255.

Texas.— Watson *v.* Williamson, (Civ. App. 1903) 76 S. W. 793.

Virginia.— Pierce *v.* Trigg, 10 Leigh 406.

United States.— Burns *v.* Rosenstein, 135 U. S. 449, 10 S. Ct. 817, 34 L. ed. 193; Montross *v.* Mabie, 30 Fed. 234; Wiegand *v.* Copeland, 14 Fed. 118, 7 Sawy. 442; Olcott *v.* Wing, 18 Fed. Cas. No. 10,481, 4 McLean 15.

England.— Rowlands *v.* Evans, 30 Beav. 302, 31 L. J. Ch. 265, 8 Jur. N. S. 88, 5 L. T. Rep. N. S. 628, 10 Wkly. Rep. 186, 54 Eng. Reprint 905; Wild *v.* Milne, 26 Beav. 504, 53 Eng. Reprint 993; Burdon *v.* Barkus, 4 De G. F. & J. 42, 3 Jur. N. S. 656, 31 L. J. Ch. 521, 7 L. T. Rep. N. S. 116, 65 Eng. Ch. 34, 45 Eng. Reprint 1098 [*affirming* 3 Giffard 412, 8 Jur. N. S. 130, 5 L. T. Rep. N. S. 573, 66 Eng. Reprint 470]; Cook *v.* Collingridge, Jac. 617, 1 L. J. Ch. O. S. 74, 23 Rev. Rep. 155, 767, 4 Eng. Ch. 607, 37 Eng. Reprint 979; Hall *v.* Barrows, 9 Jur. N. S. 483, 8 L. T. Rep. N. S. 227, 1 New Rep. 543, 11 Wkly. Rep. 525; Page *v.* Slade, 54 L. J. Ch. 1131, 52 L. T. Rep. N. S. 961, 33 Wkly. Rep. 701; Heath *v.* Fisher, 38 L. J. Ch. 14, 19 L. T. Rep. N. S. 805, 17 Wkly. Rep. 69; Crawshay *v.* Collins, 2 Russ. 325, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358, 15 Ves. Jr. 227, 10 Rev. Rep. 61, 33 Eng. Reprint 736; Crawshay *v.* Maule, 1 Swanst. 495, 36 Eng. Reprint 479, 1 Wils. Ch. 181, 37 Eng. Reprint 79, 18 Rev. Rep. 126; Waters *v.* Taylor, 2 Ves. & B. 299, 13 Rev. Rep. 91, 35 Eng. Reprint 333; Featherstonaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115; Class *v.* Marshall, 33 Wkly. Rep. 409; Cragg *v.* Ford, 1 Y. & Coll. 280, 20 Eng. Ch. 280, 62 Eng. Reprint 889.

See 38 Cent. Dig. tit. "Partnership," § 803 *et seq.*

40. Wulff *v.* San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78; Whitney *v.* Whitney, 88 S. W. 311, 27 Ky. L. Rep. 1197, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465; Mitchell *v.* Read, 84 N. Y. 556 [*affirming* 19 Hun 418] (in this case the good-will was not sold); Dougherty *v.* Van Nostrand, Hoffm. (N. Y.) 68; Snyder Mfg. Co. *v.* Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657. See *supra*, VIII, K, 2.

41. *Colorado.*— Tarabino *v.* Nicoli, 5 Colo. App. 545, 39 Pac. 362, where the realty was ordered to be sold and not partitioned.

Illinois.— Mauck *v.* Mauck, 54 Ill. 281, where the real estate was ordered to be sold.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107, only so much to be sold as necessary to pay firm debts.

Minnesota.— Barron *v.* Mullin, 21 Minn. 374, all the real estate sold by receiver.

Wisconsin.— Pierce *v.* Covert, 39 Wis. 252, real estate remaining after firm debts are paid need not be sold.

See 38 Cent. Dig. tit. "Partnership," §§ 803, 804. And see *supra*, IV, E, 8.

42. Broadwood *v.* Goding, 5 L. J. Ch. 96.

43. Brush *v.* Jay, 113 N. Y. 482, 21 N. E. 184; Graham *v.* McCulloch, L. R. 20 Eq. 397, 32 L. T. Rep. N. S. 748, 23 Wkly. Rep. 786.

But when a partner, without objection, permits property to be sold as that of the firm, he may be estopped from claiming it as his property. Nichols *v.* Murphy, 136 Ill. 380, 26 N. E. 509.

44. Pratt *v.* McHatton, 11 La. Ann. 260; Duden *v.* Maloy, 63 Fed. 183, 11 C. C. A. 119.

45. Kelley *v.* Shay, 206 Pa. St. 208, 55 Atl. 925; Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473; Pawsey *v.* Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 Wkly. Rep. 469; Knight *v.* Marjoribanks, 2 Hall & T. 308, 47 Eng. Reprint 1700, 2 Man. & G. 10, 48 Eng. Ch. 7, 42 Eng. Reprint 4 [*affirming* 11 Beav. 322, 13 Jur. 136, 50 Eng. Reprint 841]; Blyth *v.* Blyth, 4 L. T. Rep. N. S. 536.

46. Chase *v.* Angell, 148 Mich. 1, 108 N. W. 1105.

this rule, where the same is purchased by one of the partners, the other partner may avoid the sale.[47]

c. Presentation and Allowance of Claims. Provision is ordinarily made by the court for the presentation of claims before final distribution,[48] in order that those only shall be paid which are fairly chargeable against the firm.[49] Where all the creditors of a partnership are on the same plane in the order in which assets are to be marshaled for distribution among them, any agreement favoring a few to the exclusion of the others will not be upheld, unless made with the assent of all.[50]

14. Decision, Findings, or Report on an Accounting — a. What Should Be Included. The decision, findings, or report should include findings upon all questions submitted by the court;[51] and the most important of these ordinarily are those relating to the amount of firm assets, to the claims against the firm, and to the share of each partner in any surplus.[52]

b. Objections, Exceptions, and Recommittal. The report or findings may be successfully objected to, if they fail to find upon a point properly submitted,[53] or

47. Cresse *v.* Loper, (N. J. Ch. 1907) 65 Atl. 1001.

48. *Iowa.*— Hubbard *v.* Curtis, 8 Iowa 1, 74 Am. Dec. 283. In an action for the dissolution of a partnership and for an accounting and final settlement, where a receiver was appointed and ordered to sell the partnership property, but, no sale being made, the parties entered into a stipulation for the appointment of an assistant receiver to take possession of the property and apply one-half the proceeds of the business to the payment of the creditors of the partnership, a creditor was entitled by a petition in intervention, alleging that his claim had been duly listed with the receiver, but that no part of it had been paid, although part of the sum collected had been paid to other creditors, to secure judgment directing the payment of his claim. Johnson *v.* Johnson, (1906) 107 N. W. 802.

Mississippi.— Berry *v.* Folkes, 60 Miss. 576.

New Jersey.— Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Richardson *v.* Hatch, (Ch. 1903) 55 Atl. 1115.

New York.— Law *v.* Ford, 2 Paige 310.

Ohio.— Mitchell, etc., Furniture Co. *v.* Runk, 7 Ohio Dec. (Reprint) 491, 3 Cinc. L. Bul. 538.

Pennsylvania.— McCoy *v.* Black, 36 Leg. Int. 471.

See 38 Cent. Dig. tit. "Partnership," § 809.

49. Leppel *v.* Lumley, 19 Colo. App. 413, 75 Pac. 605 (where the claim arose before the formation of the firm and was disallowed); Holloway *v.* Turner, 61 Md. 217 (where employees of the receiver were allowed to prove their claims against the estate, without resorting to an action at law); Matter of Brown, 3 Edw. (N. Y.) 384; Gordon *v.* Moore, 134 Pa. St. 486, 19 Atl. 753.

50. Fried *v.* Danziger, 120 N. Y. App. Div. 604, 121 N. Y. App. Div. 903, 105 N. Y. Suppl. 44.

51. Levi *v.* Karrick, 8 Iowa 150.

52. *Alabama.*— Zimmerman *v.* Huber, 29 Ala. 379.

California.— Hart *v.* Finigan, 71 Cal. 578, 12 Pac. 682, the report or findings may be of such a character as to defeat a judgment in plaintiff's behalf. As to sufficiency of findings and conflict in findings see Haight *v.* Haight, 151 Cal. 90, 90 Pac. 197; Stower *v.* Kamphefner, (App. 1907) 91 Pac. 424; Durphy *v.* Pearsall, (App. 1907) 91 Pac. 407.

Connecticut.— Johnson *v.* Sanford, 13 Conn. 461, report too indefinite to form the basis of a decree.

Florida.— Nims *v.* Nims, 20 Fla. 204, report not intelligible as to the balance in favor of a partner.

Illinois.— Brockman *v.* Aulger, 12 Ill. 277.

Kansas.— Lannan *v.* Clavin, 3 Kan. 17.

Massachusetts.— Young *v.* Winkley, 191 Mass. 570, 78 N. E. 377, findings not inconsistent.

Missouri.— Johnson *v.* Ewald, 82 Mo. App. 276.

New York.— Kennett *v.* Hopkins, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18]; Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342 [*reversing* 15 N. Y. App. Div. 561, 44 N. Y. Suppl. 516]; Matter of Muller, 96 N. Y. App. Div. 619, 88 N. Y. Suppl. 673; McCall *v.* Moschowitz, 14 Daly 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Kapp *v.* Barthan, 1 E. D. Smith 622.

Tennessee.— Powell *v.* Ford, 4 Lea 278.

Utah.— Kahn *v.* Central Smelting Co., 2 Utah 371.

West Virginia.— Koelz *v.* Brinkman, 50 W. Va. 270, 40 S. E. 578.

Wisconsin.— Ciscel *v.* Wheatley, 27 Wis. 618.

United States.— Van Tine *v.* Hilands, 142 Fed. 613, report of master stating an account between partners confirmed.

Canada.— Smith *v.* Crooks, 3 Grant Ch. (U. C.) 321.

See 38 Cent. Dig. tit. "Partnership," § 810.

53. Day *v.* Lockwood, 24 Conn. 185 (where the auditors failed to find whether there was an agreement that interest should be allowed on the capital of a partner); Laswell *v.* Robbins, 39 Ill. 219; Lyons *v.* Lyons, 199 Pa. St. 302, 48 Atl. 1079; Eaton's Appeal, 66 Pa. St. 483.

find upon a point not submitted and involved in the litigation,[54] provided such point is a material one.[55] The right to object may be lost, however, by laches,[56] and the report will not be recommitted, when the court has before it the facts upon which it may found a satisfactory decree.[57] Exceptions to a master's or referee's report must be sufficiently specific.[58]

15. Final Judgment or Decree — a. Its General Character. If the action seeks a dissolution of the partnership, it is proper for the decree to fix the date of the dissolution,[59] as well as the terms thereof.[60] With respect to accounting and distribution, the decree should provide for a final adjustment of all controverted questions before the court and for a final distribution of all firm effects.[61] It may and often does include an adjudication that a balance is due from one or more

54. Kennett *v.* Hopkins, 174 N. Y. 545, 67 N. E. 1084 [*affirming* 58 N. Y. App. Div. 407, 69 N. Y. Suppl. 18]; Bullock *v.* Bemis, 3 N. Y. Suppl. 390; Bouton *v.* Bouton, 42 How. Pr. (N. Y.) 11 [*reversing* 40 How. Pr. 217]; Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198.

55. Green *v.* Castleberry, 77 N. C. 164.

56. *Connecticut.*— Pond *v.* Clark, 24 Conn. 370.

Illinois.— Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921 [*affirming* 92 Ill. App. 235].

New York.— Smith *v.* Fitchett, 56 Hun 473, 10 N. Y. Suppl. 459.

North Carolina.— Jones *v.* Jones, 36 N. C. 332.

United States.— Duden *v.* Maloy, 63 Fed. 183, 11 C. C. A. 119.

See 38 Cent. Dig. tit. "Partnership," §§ 810, 811.

57. Patterson *v.* Kellogg, 53 Conn. 38, 22 Atl. 1096; Lobb's Appeal, 3 Walk. (Pa.) 374.

58. Brown *v.* Rogers, 76 S. C. 180, 56 S. E. 680, holding that an exception that a referee erred in stating accounts of partners in the form of firm accounts, in that he should have first stated the same in the form of an account with an individual with the firm, was too general, in failing to specify in what respect it was prejudicial.

59. Dumont *v.* Ruepprecht, 38 Ala. 175 (date fixed at a time earlier than the abandonment of the partnership by the aggrieved party); Durbin *v.* Barber, 14 Ohio 311; Besch *v.* Frolich, 7 Jur. 73, 12 L. J. Ch. 118, 1 Phil. 172, 65 Rev. Rep. 363, 19 Eng. Ch. 172, 41 Eng. Reprint 597 (dissolution not made retrospective).

60. Lyon *v.* Tweddell, 17 Ch. D. 529, 45 J. P. 680, 50 L. J. Ch. 571, 44 L. T. Rep. N. S. 785, 29 Wkly. Rep. 689.

61. *California.*— Moran *v.* McInerney, 129 Cal. 29, 61 Pac. 575, decree defective because it distributed the real property of the firm subject to liens and costs, when it should have ordered the property sold and all proper charges paid out of the proceeds.

Florida.— Nims *v.* Nims, 20 Fla. 204.

Illinois.— Veneman *v.* Ruckle, 120 Ill. App. 251.

Iowa.— Levi *v.* Karrick, 8 Iowa 150, before a final decree, the assets should be converted into cash, and the balance due each partner be ascertained.

Kansas.— Lannan *v.* Clavin, 3 Kan. 17.

Louisiana.— Stark *v.* Howcott, 118 La. 489, 43 So. 61.

Massachusetts.— Tyng *v.* Thayer, 8 Allen 391.

New York.— Williams *v.* Lindblom, 142 N. Y. 682, 37 N. E. 825 [*affirming* 68 Hun 173, 22 N. Y. Suppl. 678]; Gimpel *v.* Wilson, 10 Misc. 153, 30 N. Y. Suppl. 942.

North Carolina.— Dickerson *v.* Wilcoxon, 97 N. C. 309, 1 S. E. 636.

Ohio.— Oglesby *v.* Thompson, 59 Ohio St. 60, 51 N. E. 878; Peck *v.* Cavagna, 7 Ohio S. & C. Pl. Dec. 142, 4 Ohio N. P. 284, where an equal distribution of the remaining assets was decreed, because the course of business as pursued by all the partners rendered it impossible to state an account between the partners.

Oregon.— Durkheimer *v.* Heilner, 24 Oreg. 270, 33 Pac. 401, 34 Pac. 475; Ashley *v.* Williams, 17 Oreg. 441, 21 Pac. 556.

Pennsylvania.— McGinn *v.* Benner, 22 Pa. Super. Ct. 134; Becker *v.* Hill, 20 Lanc. L. Rev. 345.

West Virginia.— Hyre *v.* Lambert, 37 W. Va. 26, 16 S. E. 446 (holding that in a suit between partners for a settlement, it was error to render a final decree against one of the partners for a definite sum of money, where it appeared that there were debts of the firm still unpaid, since the partner decreed against was still liable to the unpaid partnership creditors); Carper *v.* Hawkins, 8 W. Va. 291.

Wisconsin.— Strang *v.* Thomas, 114 Wis. 599, 91 N. W. 237; Green *v.* Stacy, 90 Wis. 46, 62 N. W. 627; Singer *v.* Heller, 40 Wis. 544.

See 38 Cent. Dig. tit. "Partnership," § 813.

The following is a simple form of judgment for a partnership account: "Let an account be taken of all partnership dealings and transactions between the plaintiff and the defendant as co-partners from the —— day of ——. And let what upon taking the said account shall be certified to be due from either of the said parties to the other of them, be within one month of the Master's certificate paid by the party from whom to the party to whom the same shall be certified to be due. Liberty to apply." Lindley Partn. (7th ed.) p. 561; Seton Decrees (6th ed.) 2166.

Form of decree, where a partner has died and new partners have been admitted and have retired see Wedderburn *v.* Wedderburn, 2 Keen 722, 15 Eng. Ch. 722, 48 Eng. Reprint 807 [*affirmed* in 3 Jur. 596, 8 L. J.

partners to another.[62] If the court finds that a partnership agreement is void in its inception, because one partner fraudulently induced the other to make the agreement, it may decree that the wrong-doing partner shall repay to the other all sums of money contributed by the latter to the firm, make reasonable reparation for his services, and indemnify him against all partnership liability.[63] No personal decree should be rendered in partnership dissolution proceedings against individual partners until the assets have been converted into money.[64]

b. Determination as to All Parties. It follows from the general principles stated in the foregoing paragraph that the decree should settle partnership concerns between all the partners,[65] unless the nature of the partnership is such that plaintiff's share of the profits for which he brings suit is separable from the rest of the firm business.[66] The decree should not undertake to determine rights of third parties, not brought into the suit,[67] nor the rights of partners in transactions outside of the partnership business.[68]

c. Joint or Several Judgment. Ordinarily the accounts of the partners with the firm should be taken separately and separate judgments be rendered as to each partner.[69] But this rule does not apply where two or more of the partners are joint contractors on the one side, with the plaintiff partner on the other side,[70] nor when two or more partners have acted jointly in wronging plaintiff.[71]

d. Conformity to Pleadings and Findings. A judgment is not authorized

Ch. 177, 4 Myl. & C. 41, 18 Eng. Ch. 41, 41 Eng. Reprint 16].

62. *Idaho.*— Taylor *v.* Peterson, 1 Ida. 513.

Kansas.— McGillvray *v.* Moser, 43 Kan. 219, 23 Pac. 96; Tenney *v.* Simpson, 37 Kan. 579, 15 Pac. 512, such judgment may be declared a lien on the share of land set off to the creditor partner.

Kentucky.— Swafford *v.* White, 89 S. W. 129, 28 Ky. L. Rep. 119.

Louisiana.— Cazeau *v.* Faget, 11 Rob. 10.

Massachusetts.—Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299, when all the parties are before the court it may decree payment by the surviving partner directly to the heirs of the deceased, instead of to his administrator.

Michigan.— McLean *v.* McLean, 109 Mich. 258, 67 N. W. 118; Wyatt *v.* Sweet, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525.

New Hampshire.— Raymond *v.* Came, 45 N. H. 201.

New York.— White *v.* Reed, 124 N. Y. 468, 26 N. E. 1037 [*modifying* 58 N. Y. Super. Ct. 333, 11 N. Y. Suppl. 575]; Hollister *v.* Simonson, 36 N. Y. App. Div. 63, 55 N. Y. Suppl. 372; Scott *v.* Pinkerton, 3 Edw. 70.

Washington.— Yarwood *v.* Billings, 31 Wash. 542, 72 Pac. 104.

Wisconsin.— Strang *v.* Thomas, 114 Wis. 599, 91 N. W. 237.

See 38 Cent. Dig. tit. "Partnership," § 813.

Interlocutory and final judgment as to transfer of shares of stock see Reilly *v.* Freeman, 109 N. Y. App. Div. 4, 95 N. Y. Suppl. 1069 [*affirmed* in 184 N. Y. 610, 77 N. E. 1196].

Allowance of interest.— Where a suit for a partnership accounting was referred to a master, who made up his report without computing interest, it was within the power of the presiding judge to allow interest on the balance due one of the partners from the date of the writ, notwithstanding Mass. Rev. Laws, c. 177, § 8, authorizing an allowance of interest to the entry of judgment in certain cases where interest has already been allowed. Young *v.* Winkley, 191 Mass. 570, 78 N. E. 377.

63. Richards *v.* Todd, 127 Mass. 167.

64. Stower *v.* Kamphefner, (Cal. App. 1907) 91 Pac. 424. See *supra*, IX, D, 13, b.

65. *California.*— Griggs *v.* Clark, 23 Cal. 427.

Iowa.— Smith *v.* Knight, 77 Iowa 540, 42 N. W. 438.

Kentucky.— Maude *v.* Rodes, 4 Dana 144.

Maryland.— Grove *v.* Fresh, 9 Gill & J. 280.

Michigan.— Clink *v.* Carpenter, 122 Mich. 681, 81 N. W. 932.

New Hampshire.— Raymond *v.* Came, 45 N. H. 201.

West Virginia.— Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

England.— *Ex p.* Martin, 2 Bro. Ch. 15, 29 Eng. Reprint 8.

See 38 Cent. Dig. tit. "Partnership," § 814.

66. Patterson *v.* Ware, 10 Ala. 444.

67. Jose *v.* Lynch, 15 Wash. 654, 47 Pac. 105.

68. Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

69. Starr *v.* Case, 59 Iowa 491, 13 N. W. 645; Levi *v.* Karrick, 8 Iowa 150 (where a judgment in favor of plaintiff against the partnership of which he had been a member was held erroneous); Lord *v.* Anderson, 16 Kan. 185; Leserman *v.* Bernheimer, 113 N. Y. 39, 20 N. E. 869; Rhiner *v.* Sweet, 2 Lans. (N. Y.) 386.

70. Groth *v.* Kersting, 23 Colo. 213, 47 Pac. 393 [*affirming* 4 Colo. App. 395, 36 Pac. 156]; Colehour *v.* Coolhaugh, 81 Ill. 29.

71. Lord *v.* Anderson, 16 Kan. 185; Berkey *v.* Judd, 12 Minn. 52; Bloomfield *v.* Buchanan, 14 Oreg. 181, 12 Pac. 238.

which contains a material provision not supported by the findings,[72] nor within the issues as shown by the pleadings.[73] But if its terms are indefinite or ambiguous, it will be so construed as to sustain its regularity and validity, if it is susceptible of such construction.[74] The prayer for general relief will authorize the court to apply the firm assets to the payment of the firm debts,[75] and to decree to the partners any balance found due them.[76]

16. APPEAL AND REVIEW. Appeals in suits for dissolution of partnerships and accountings are governed by the same principles as appeals generally in equity cases.[77] A judgment or decree will not be reversed for error based on a finding of fact, where the testimony is conflicting,[78] or on a finding requested by the appellant,[79] or where it appears that the judgment does substantial justice to both parties.[80] But it may be reversed or modified where it is apparent that a mistake in computation has been made,[81] or that it does not rest upon any satisfactory evidence,[82] or is based upon an erroneous conception of law.[83] Where plaintiff sued for the appointment of a receiver for a partnership and for a settlement and an accounting, and an order refusing to appoint a receiver is affirmed, the right will be reserved to plaintiffs to sue for a settlement and an accounting.[84]

17. COSTS. As a rule the costs of a suit for a partnership accounting, including the fees of experts and of attorneys,[85] are to be paid out of the partnership

72. Williams *v.* Williams, 104 Cal. 85, 37 Pac. 784 (a finding that certain defendants owe the partnership a stated sum does not authorize a judgment that this sum be paid to plaintiffs); Albery *v.* Geis, 1 Cal. App. 381, 82 Pac. 262; Griffith *v.* Kirley, 189 Mass. 522, 76 N. E. 201; Arnold *v.* Angell, 62 N. Y. 508; Clark *v.* Gallaher, 3 Tex. Civ. App. 541, 22 S. W. 1047.

73. *Illinois.*— Johnson *v.* Miller, 50 Ill. App. 60.

Kentucky.— Turner *v.* Turner, 5 S. W. 457, 9 Ky. L. Rep. 456, where defendant alleged that he was entitled to a credit of four thousand one hundred and thirty-four dollars and twenty-eight cents, and it was held error for the court to allow him credit for four thousand four hundred and seventy-nine dollars and forty-nine cents.

Michigan.— Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067.

Nebraska.— Clark *v.* Hall, 54 Nebr. 479, 74 N. W. 856, holding that a court cannot reform a partnership contract of its own motion, nor disregard it as the basis of its judgment.

New York.— Reilly *v.* Freeman, 109 N. Y. App. Div. 4, 95 N. Y. Suppl. 1069 [*affirmed* in 184 N. Y. 610, 77 N. E. 1196]; Cox *v.* Clarke, 45 Misc. 102, 91 N. Y. Suppl. 587.

Washington.— Yarwood *v.* Billings, 31 Wash. 542, 72 Pac. 104.

England.— Turquand *v.* Wilson, 1 Ch. D. 85, 45 L. J. Ch. 104, 24 Wkly. Rep. 56.

See 38 Cent. Dig. tit. "Partnership," § 816.

74. Noble *v.* Faull, 26 Colo. 467, 58 Pac. 681; Knowlton *v.* Dolan, 151 Ind. 79, 51 N. E. 97; Hayes *v.* Reese, 34 Barb. (N. Y.) 151 (a decree upon an accounting necessarily implies that the amount named as due to a partner has been ascertained after a full settlement of partnership affairs); Goldman *v.* Marcus, (Tex. App. 1891) 15 S. W. 412.

75. Veneman *v.* Ruckle, 120 Ill. App. 251.

76. Stark *v.* Howcott, 118 La. 489, 43 So. 61.

77. See, generally, APPEAL AND ERROR.

78. *Iowa.*— Yetzer *v.* Applegate, 83 Iowa 726, 50 N. W. 66.

Kentucky.— Bannon *v.* Hawkins, 35 S. W. 636, 18 Ky. L. Rep. 150.

Nebraska.— May *v.* Cahn, 34 Nebr. 652, 52 N. W. 288.

Pennsylvania.— Fidelity Title, etc., Co. *v.* Bell, 188 Pa. St. 637, 41 Atl. 637; Burroughs' Appeal, 26 Pa. St. 264. Where the trial judge calls to his assistance a competent accountant as an assessor, and reaches a decree after a painstaking investigation of complicated and obscure accounts, and the result reached is as nearly correct as it is possible to secure from the books of the parties, the appellate court will not interfere. Mays *v.* Melat, 29 Pa. Super. Ct. 365.

United States.— Gunn *v.* Black, 60 Fed. 151, 8 C. C. A. 534.

See 38 Cent. Dig. tit. "Partnership," § 819.

79. Schermerhorn *v.* Brewer, 17 N. Y. Suppl. 701; Yarwood *v.* Billings, 31 Wash. 542, 72 Pac. 104. In Snyder *v.* O'Beirne, 132 Mich. 340, 93 N. W. 872, it was held that on appeal by defendant from a decree on a partnership accounting, the court has no power to revise a finding of fact and increase the amount allowed plaintiff.

80. Eames *v.* Miller, 108 Mich. 406, 66 N. W. 338; McCullough *v.* De Witt, 163 Mo. 306, 63 S. W. 694; Jones *v.* Webb, 8 S. C. 202; Green *v.* Stacy, 90 Wis. 46, 62 N. W. 627; Tolford *v.* Tolford, 44 Wis. 547.

81. White *v.* Bullock, 18 Mo. 16.

82. Richard *v.* Mouton, 106 La. 435, 30 So. 894.

83. Savage *v.* Carter, 9 Dana (Ky.) 408; Ferrell *v.* Bales, 65 S. W. 604, 23 Ky. L. Rep. 1516; Lafferty *v.* Lafferty, 174 Pa. St. 536, 34 Atl. 203, 205; Botham *v.* Keefer, 2 Ont. App. 595.

84. Meyer *v.* Meyer, 116 La. 456, 40 So. 794.

85. Faulkner *v.* Hendy, 79 Cal. 265, 21 Pac. 754; Chandler *v.* Sherman, 16 Fla. 99;

estate,[86] or if this is insufficient they are to be borne by the partners in proportion to their respective partnership shares.[87] But, as in other equity suits, the court may exercise discretion in the award of costs,[88] and it not infrequently charges the entire costs to one or some of the partners, either as a sort of punishment for misconduct, or because he has needlessly forced or prolonged the litigation, or because for some other reason the court concludes that justice demands it.[89]

Payne *v.* McNamara, 9 Ohio Cir. Ct. 132, 6 Ohio Cir. Dec. 62. And see Patrick *v.* Patrick, (N. J. Ch. 1906) 63 Atl. 848, holding that each party to the suit was entitled to a counsel fee to be paid out of the partnership assets in addition to the taxable costs.

86. *Kentucky.*— Swafford *v.* White, 89 S. W. 129, 28 Ky. L. Rep. 119; Dyer *v.* Ballinger, 72 S. W. 738, 24 Ky. L. Rep. 1918; Broeg *v.* Pool, 60 S. W. 518, 22 Ky. L. Rep. 1354; Lyford *v.* Haines, 53 S. W. 646, 21 Ky. L. Rep. 948; McBurnie *v.* Semple, 19 S. W. 183, 14 Ky. L. Rep. 30.

Louisiana.— Baxter *v.* Hewes, 45 La. Ann. 1065, 13 So. 864; Burke *v.* Fuller, 41 La. Ann. 740, 6 So. 557; Philpot *v.* Patterson, 5 Mart. N. S. 273.

Massachusetts.— Whitney *v.* Cook, 5 Mass. 139.

New Jersey.— Patrick *v.* Patrick, (Ch. 1906) 63 Atl. 848.

New York.— Hopfensack *v.* Hopfensack, 9 Daly 457; Crotty *v.* Jarvis, 1 Misc. 316, 20 N. Y. Suppl. 728 [*affirming* 17 N. Y. Suppl. 949].

Oregon.— Fleming *v.* Carson, 37 Oreg. 252, 62 Pac. 374.

Pennsylvania.— Gordon *v.* Moore, 134 Pa. St. 486, 19 Atl. 753; Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382.

England.— Potter *v.* Jackson, 13 Ch. D. 845, 49 L. J. Ch. 232, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 411; Austin *v.* Jackson, 11 Ch. D. 942 note; Bonville *v.* Bonville, 35 Beav. 129, 55 Eng. Reprint 844; Jones *v.* Welch, 1 Jur. N. S. 994, 1 Kay & J. 765, 69 Eng. Reprint 668; Rosher *v.* Crannis, 63 L. T. Rep. N. S. 272; Rowlands *v.* Evans, 14 Wkly. Rep. 882; Timothy *v.* Hindley, 14 Wkly. Rep. 382.

Canada.— Curran *v.* Carey, 4 Manitoba 450; Chapman *v.* Newell, 14 Ont. Pr. 208; Blaney *v.* McGrath, 9 Ont. Pr. 417.

See 38 Cent. Dig. tit. "Partnership," § 820.

87. *Kansas.*— Isenhart *v.* Hazen, (App. 1901) 63 Pac. 451.

Louisiana.— Pratt *v.* McHatton, 11 La. Ann. 260.

Missouri.— Campbell *v.* Coquard, 16 Mo. App. 552.

Oregon.— *In re* Beck, 19 Oreg. 503, 24 Pac. 1038.

Pennsylvania.— Gordon *v.* Moore, 8 Pa. Co. Ct. 289.

Texas.— Baker *v.* Milde, (Civ. App. 1895) 33 S. W. 152.

England.— Newton *v.* Taylor, L. R. 19 Eq. 14, 23 Wkly. Rep. 330.

Canada.—Curran *v.* Carey, 4 Manitoba 450.

See 38 Cent. Dig. tit. "Partnership," § 820.

88. *Connecticut.*— Granville *v.* Anott, (1904) 59 Atl. 405.

Iowa.— See Starr *v* Case, 59 Iowa 491, 13 N. W. 645, holding that in an action to account between surviving partners and estate of a deceased partner, each party should pay his own witnesses, and the other costs, including those on appeal, should be proportioned according to the respective interests of each partner.

Kentucky.— McBurnie *v.* Semple, 19 S. W. 183, 14 Ky. L. Rep. 30, holding that in an action to dissolve a partnership which defendant contested, being honest in his claim, the chancellor properly refused to tax him with all the costs.

New York.— Struthers *v.* Christal, 3 Daly 327; Smith *v.* Green, 8 N. Y. Civ. Proc. 163; Smith *v.* Underhill, 19 N. Y. Suppl. 249.

Ohio.— Wehrman *v.* McFarland, 10 Ohio S. & C. Pl. Dec. 320, 8 Ohio N. P. 673.

Pennsylvania.— Gordon *v.* Moore, 8 Pa. Co. Ct. 289, holding that costs of settling partnership accounts in a suit in equity are chargeable to both parties equally, in the absence of exceptional circumstances.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890; Ritter *v.* Ritter, 100 Wis. 468, 76 N. W. 347.

England.— Wright *v.* Hunter, 5 Ves. Jr. 792, 31 Eng. Reprint 861.

Canada.— Bingham *v.* Smith, 16 Grant Ch. (U. C.) 373; O'Lone *v.* O'Lone, 2 Grant Ch. (U. C.) 125.

See 38 Cent. Dig. tit. "Partnership," § 820.

Discretion of referee see Barker *v.* White, 1 Abb. Dec. (N. Y.) 95.

Costs of appeal.— One of plaintiffs in a bill by partners for relief against the other partners, who does not withdraw till after the evidence is heard, although before the decree against defendants, will, they having appealed, be charged with costs of appeal, although the decree is reversed. Markle *v.* Wilbur, 200 Pa. St. 473, 50 Atl. 209.

89. *Illinois.*— Taft *v.* Schwamb, 80 Ill. 289.

Kentucky.— Caldwell *v.* Lang, 101 S. W. 972, 31 Ky. L. Rep. 237, holding that where plaintiffs were entitled on demand to a settlement and a dissolution of a partnership, which was denied them by defendants, thereby entailing an action to enforce a settlement, defendants were liable for the expenses of settlement.

Louisiana.— Richard *v.* Mouton, 109 La. 465, 33 So. 563.

North Carolina.— Taylor *v.* Cawthorne, 17 N. C. 221.

Wisconsin.—Briere *v.* Taylor, 126 Wis. 347, 105 N. W. 817; Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

United States.— Gunn *v.* Ewan, 93 Fed. 80, 35 C. C. A. 213.

England.— Hamer *v.* Giles, 11 Ch. D. 942,

When the assets are insufficient to repay the just demands of the partners for advances and capital, and one partner has overdrawn his share, he must make good such overdraft, before the costs will be charged to the estate.[90]

18. Effect of a Judicial Accounting — a. Its Conclusiveness. A judgment in an action for partnership accounting and settlement is conclusive upon the parties thereto as to all issues properly before the court, until it has been regularly set aside;[91] but it does not conclude as to matters not before the court at the time of the settlement.[92] It does not bar an action for conversion by the executor of a deceased partner against the survivor and a third person, who joined him in converting the firm assets.[93] When a judicial accounting has been had, it so far fixes the rights of partners and creditors that the suit cannot thereafter be dismissed without their consent.[94] A partner, although discharged, by a settlement of the firm business, of the legal obligation to pay an additional sum to a copartner, may recognize a moral obligation to pay it, and, if he does so without fraud of the copartner, he cannot recover back the money paid.[95]

b. Opening or Setting Aside. A final judgment in actions now under consideration may be opened or set aside for the causes available in other equity actions.[96] If it is reopened, the parties will be entitled as a rule to an entire restatement of the account.[97]

X. LIMITED PARTNERSHIP.

A. The Relation — 1. History of Limited Partnership. This species of partnership has never been recognized by the English common law,[98] nor did it receive

48 L. J. Ch. 508, 41 L. T. Rep. N. S. 270, 27 Wkly. Rep. 834; Norton *v.* Russell, L. R. 19 Eq. 343, 23 Wkly. Rep. 252; Lodge *v.* Pritchard, 4 Giffard 295, 66 Eng. Reprint 717; Payne *v.* Felton, 4 L. J. Ch. O. S. 175.

Canada.—Carmichael *v.* Sharp, 1 Ont. 381; Woolans *v.* Vansickle, 17 Grant Ch. (U. C.) 451; Garven *v.* Allan, 3 Grant Ch. (U. C.) 238.

See 38 Cent. Dig. tit. "Partnership," § 820.

Compare Stevens *v.* Yeatman, 19 Md. 480, where it is said that the question as to which of the parties has by his conduct caused the discord between them is never considered, with a view to an adjustment of the costs of a settlement of their partnership affairs in court.

90. Ross *v.* White, [1894] 3 Ch. 326, 64 L. J. Ch. 48, 71 L. T. Rep. N. S. 277, 7 Reports 420; Potter *v.* Jackson, 13 Ch. D. 845, 49 L. J. Ch. 232, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 411; Rosher *v.* Crannis, 63 L. T. Rep. N. S. 272.

91. Broda *v.* Greenwald, 66 Ala. 538; Maginnis *v.* Crosby, 11 La. Ann. 400 (such a judgment unappealed from was deemed *prima facie* correct in an action by a partner who had paid the debts described in said judgment, against the other for contribution); Hayes *v.* Reese, 34 Barb. (N. Y.) 151; Cockley *v.* Brucker, 54 Ohio St. 214, 44 N. E. 590.

Under the Missouri statute, it was held that the judicial settlement of the partnership estate in the probate court did not vest in the administrator title to the property of the estate on hand at the time of the settlement, where it did not appear that he had accounted for the firm assets. Tiemann *v.* Molliter, 71 Mo. 512.

92. Schnell *v.* Schnell, 39 Ind. App. 556, 80 N. E. 432, holding that after the death of one of the partners the final settlement of the partnership and the discharge of the receiver did not conclude the surviving partner from asserting a claim against the widow of the deceased partner for money received by her on a note due the partnership, where such claim was not before the court at the time of the settlement; and also that it was not necessary that the surviving partner should have the proceedings reopened and another receiver appointed in order to collect his claim.

93. Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807 [*reversing* 68 Hun 44, 22 N. Y. Suppl. 615].

94. Updike *v.* Doyle, 7 R. I. 446; Fisher *v.* Stovall, 85 Tenn. 316, 2 S. W. 567.

95. Devereux *v.* Peterson, 126 Wis. 558, 106 N. W. 249.

96. Powers *v.* Dickie, 49 Ala. 81; Green *v.* Thornton, 96 Cal. 67, 30 Pac. 965; Robertson *v.* Gibb, 38 Mich. 165. See, generally, JUDGMENTS.

97. Black *v.* Merrill, 65 Cal. 90, 3 Pac. 113; Hunt *v.* Stuart, 53 Md. 225; Pritt *v.* Clay, 6 Beav. 503, 49 Eng. Reprint 920.

98. In Coope *v.* Eyre, 1 H. Bl. 37, 48, Lord Loughborough said: "In many parts of Europe, limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages." Partnership en Commandite, or Limited Liability Recognized and Permitted by the Existing Law of England (by Matthew B. Begbie, London, 1852), contains an argument that a

legislative sanction in England until 1907.[99] On this side of the Atlantic it has always existed in Louisiana, whose jurisprudence is based upon the modern civil law of France,[1] and has been established by statute in most of the United States as well as in Canada.[2] New York was the first common-law state to introduce limited partnership.[3] Her example was followed a few months later by Connecticut.[4] Both statutes were framed upon the common model found in the French code of commerce, although they are quite independent pieces of legislation.[5] The New York statute has been copied more or less closely by many other states.

2. A SPECIES OF PARTNERSHIP. In all jurisdictions the limited partnership is dealt with as a modified form of the normal partnership, and not as a new and

partnership can be organized and carried on, under the English common law, so as to secure one who furnishes a part of the capital with a right to a share of the profits, without subjecting him to a partner's liability.

"Limited partnerships were unknown to the common law, but in some countries of Europe have existed for hundreds of years. 13 Am. C. L. 804. In Italy they were known and recognized in the laws of Pisa and Florence as early as 1166; in Geneva in 1562; in France (Marseilles) 1253; also under Louis X in 1315; and still continue under the republic, being regulated by the new code of commerce, 'La Société en Commandite.' In England it is said that limited partnerships only exist as joint stock companies. Coope *v.* Eyre, 1 H. Bl. 37, 48. They seem to have been devised to enable persons to engage in mercantile business without being known or named, became the most frequent combination of trade, and in large degree contributed to the commercial prosperity which the above named countries afterward enjoyed. In our own state there was enacted a statute authorizing limited partnerships in the year 1822, being substantially a copy from the French act, and since that time similar laws have been adopted in most of the other states and territories which have patterned their statutes after that of New York. In these later days the object is to protect the special partner, enable him to employ his wealth in trade without risking more than he originally subscribed, and at the same time secure co-operation of men of integrity and ability." Moorhead *v.* Seymour, 77 N. Y. Suppl. 1050, 1054.

99. "An Act to Establish Limited Partnerships" (7 Edw. VII, c. 24). See 6 Mich. L. Rev. p. 525 (article by Francis M. Burdick on "Limited Partnership in America and England"). The latest previous attempt at legislation on this topic is recounted by Sir Frederick Pollock, in Essays in Jurisprudence and Ethics, c. 4, and in the introduction to the third edition of his Digest of the Law of Partnership. The appendix to this edition contains his proposed draft of the limited partnership clauses in the bill of 1880. They were omitted from the bill by the parliamentary committee and form no part of the Partnership Act of 1890. In his Essays in Jurisprudence and Ethics, Sir Frederick Pollock remarks: "This form of partnership has been known on the continent for many centuries. The Mediterranean trade of the middle ages was carried on principally by its means. In France, Louis XIV regulated it by an ordinance of 1673, which has been substantially adopted in the modern commercial code. How it failed to establish itself in England and Scotland, I am unable to say; it is not impossible that it was recognized by the special tribunals which administered the law merchant down to the seventeenth century, but of the proceedings of those courts we know hardly anything. . . . So it was, at all events, that when the law of partnership was formed by modern judges and chancellors, the notion of a partner with limited liability never appeared. . . . Thus we are left practically alone in excluding it; and I think there is a fairly strong presumption that we lose something by not possessing an institution which has been found useful by so many mercantile communities." Practical Opinions against Partnership with Limited Liability (by Edmund Potter, London, 1855), contains an emphatic protest against this form of partnership.

1. La. Civ. Code (1825), arts. 2799, 2810–2822; Civ. Code (1900), arts. 2828, 2839–2851. Sir Frederick Pollock observes: "Louisiana and Florida, not being English Colonies in the first instance, have always had the system of partnership *en commandite*." Essays on Jurisprudence and Ethics 101. This is true of Louisiana; but Florida adopted in 1822, as the basis of its legal system, the common law of England and the statutes in aid thereof, down to the fourth year of James I. Rev. St. (1891) § 59. Hart *v.* Bostwick, 14 Fla. 162, 173. A limited partnership statute, fashioned after the New York statute, was enacted in 1838 (McClellan Dig. (1881) c. 159), but has been repealed. Laws (1881), c. 3309, Rev. St. (1891).

2. See the statutes of the different states.

3. Laws (1822), c. 244.

4. Now embodied in Rev. St. (1902) tit. 29, c. 225. The statute is much shorter than that of New York.

5. Clapp *v.* Lacey, 35 Conn. 463, 464, where it is said: "Our statute in relation to limited partnerships, and that of New York, were both passed in the year 1822. Both were taken in substance from the law of France and neither is a copy of the other; they differ in their arrangement and some of their provisions."

distinct kind of business association.[6] Its characteristic features are that one or more of its members, although contributing to its capital and sharing in its profits, have no voice in its management and are not personally liable for its debts; but that the rights of its creditors are limited to the partnership fund and to the general partners.[7] It will be observed that the form of limited partnership contains one or more general partners whose personal liability is unlimited. In some states, however, a second form is authorized by separate legislation, which approaches more nearly to the corporation and in which the partnership assets are liable for partnership debts, while the individuals owning the partnership property are subject to no personal liability.[8]

3. What Law Governs. When the question before the court is whether a valid limited partnership has been formed, or whether it has carried on its business as a limited partnership, or what are the powers of the special partner, the law applicable thereto is that of the jurisdiction in which the partnership is formed and has its existence.[9] But the construction of a local statute authorizing a limited partnership,[10] or a question as to the manner in which such a partnership is to sue or be sued,[11] is governed by the local law.

4. Construction of Statutes. While some courts have favored a very strict construction of limited partnership statutes against the special partner,[12] the pre-

6. Marshall *v.* Lambeth, 7 Rob. (La.) 471; Lachomette *v.* Thomas, 5 Rob. (La.) 172 (applying Civ. Code (1900), arts. 2828, 2840, which provides that "there is also a species of partnership, which may be incorporated with either of the other kinds, called partnership *in commendam*. . . . It is therefore a modification, of which the several kinds of partnerships are susceptible, rather than a separate division of partnerships); Safe Deposit, etc., Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819; Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206; Jacquin *v.* Buisson, 11 How. Pr. (N. Y.) 385; Ames *v.* Downing, 1 Bradf. Surr. (N. Y.) 321, 328, 8 N. Y. Leg. Obs. 317 ("The special partnership is by no means a complete anomaly. By the statute it is termed a partnership, and both as to the rights of the parties to the contract, and as to the world, it is in itself a proper partnership, except as it limits the liability of the special partner, and restricts his control over the business of the firm").

7. See the cases cited in last note. See also Groves *v.* Wilson, 168 Mass. 370, 47 N. E. 100; Pierce *v.* Bryant, 5 Allen (Mass.) 91; White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276.

8. Edwards *v.* Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791 (applying the Pennsylvania statute found in Brightly Purdon Dig. (12th ed.) 1086–1888); Staver, etc., Mfg. Co. *v.* Blake, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798 (applying Howell Annot. St. c. 79, "An act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association"); Sturgeon *v.* Apollo Oil, etc., Co., 203 Pa. St. 369, 53 Atl. 189; Sheble *v.* Strong, 128 Pa. St. 315, 18 Atl. 397; Eliot *v.* Himrod, 108 Pa. St. 569; Com. *v.* Sandy Lick Gas Co., 1 Dauph. Co. Rep. (Pa.) 314 (applying the Pennsylvania statute above cited); Deckert *v.* Chesapeake Western Co., 101 Va. 804, 45 S. E. 799. In Coleman *v.* Bellhouse, 9 U. C. C. P. 31, 44, it was held that without complying with a limited partnership statute, "where parties associate for a trading purpose, taking specified shares of a fixed amount, with a mutual understanding that they are only to be liable to the extent of their shares, and on the agreement that their business is to be conducted by certain of their partners acting as directors or managers; if a party deals with such directors, with a full knowledge of the terms and stipulations of the association, and accepts an undertaking from them which is expressly founded on such terms and stipulations, he cannot maintain an action based upon his dealings against the shareholders and directors, charging them with a joint liability as ordinary partners in a trading concern."

9. Richardson *v.* Carlton, 109 Iowa 515, 80 N. W. 532 (the law of Illinois governed); Lawrence *v.* Batcheller, 131 Mass. 504; King *v.* Sarria, 69 N. Y. 24, 25 Am. Rep. 128 [*affirming* 7 Hun 167] (the contract of partnership was to be construed to be governed by the laws of Spain, and the liability of defendant and the extent of the authority of the acting partners to bind him were to be determined thereby); Jacquin *v.* Buisson, 11 How. Pr. (N. Y.) 385 (the rights and position of the partners were governed by the law of Belgium, where the contract of partnership was made); Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283 (the authority of a partner to bind the firm depends on the law where the partnership was organized and exists; but a special partner may make himself liable by representing that he is a general partner).

10. Pierce *v.* Bryant, 5 Allen (Mass.) 91.

11. Edwards *v.* Warren Linoline, etc., Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791.

12. Pierce *v.* Bryant, 5 Allen (Mass.) 91; Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 15

vailing view at present is that the special partner should be held to an honest and full compliance with all of the statutory provisions which are designed for the protection of persons dealing with the partnership,[13] but that the general object of these statutes is to remedy a defect of the common law, and accordingly they are to receive a reasonably liberal construction.[14]

5. GENERAL REQUISITES TO CREATION. While the statutes differ in various respects on this topic, they generally confine limited partnerships to the conduct of a mercantile, mechanical, or manufacturing business;[15] require the execution, recording, and publication of certain papers;[16] and provide for at least one general partner whose liability for the debts is unlimited.[17]

6. PARTICULAR REQUISITES — a. Certificate. A prime requisite to the organization of a legal limited partnership, under all statutes, is the execution of a prescribed certificate.[18] This document as a rule must contain: (1) The name or firm under which such limited partnership is to be conducted[19] and its principal place of business;[20] (2) the general nature of the business intended to be transacted;[21] (3) the names of all the general and special partners, stating which are general and which are special and their respective residences;[22] (4) the amount of capital which each

N. E. 712; *In re* Merrill, 17 Fed. Cas. No. 9,467, 12 Blatchf. 221.

13. Cummings *v.* Hayes, 100 Ill. App. 347 [*citing* Haggerty *v.* Foster, 103 Mass. 17]; Fox *v.* Graham, How. N. P. (Mich.) 90; Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Lachaise *v.* Marks, 4 E. D. Smith (N. Y.) 610; Argall *v.* Smith, 3 Den. (N. Y.) 435 [*affirming* 6 Hill 479]; Maloney *v.* Bruce, 94 Pa. St. 249.

14. White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276; Abington Dairy Co. *v.* Reynolds, 24 Pa. Super. Ct. 632; Webster *v.* Lanum, 137 Fed. 376, 70 C. C. A. 56.

Amendment of statute.— In Rothchild *v.* Hoge, 43 Fed. 97, it was held that an amendment to the statute (Va. Code, § 2871) does not apply to special partnerships entered into before the amendment took effect.

15. Safe Deposit, etc., Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819 (applying Code Pub. Gen. Laws, art. 73, § 1); Bowers *v.* Holland, 14 U. C. Q. B. 316 (holding that the buying and building of steamboats and employing them in transportation of passengers and freight was a mercantile business). The statutes in each jurisdiction should be examined, as it is impossible to differentiate them here.

16. These papers are particularly considered later. See *infra*, X, A, 6.

17. Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066 [*affirming* 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188] (the fact that one of the general partners is an infant does not convert the partnership into a general one, when the statute does not require the general partners to be of full age); Richardson *v.* Hogg, 38 Pa. St. 153 (the partnership was held to be a general one, because the contract provided that the general partner should sign no note or check for money without the knowledge and consent of the special partner's son). In Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318, the fact that the partnership articles provided that the special partner should bear a proportionate share of the firm losses was held not to turn the partnership into a general one, as this provision was in the interest of creditors, and the statute did not prohibit such agreement.

18. Walker *v.* Wood, 170 Ill. 463, 48 N. E. 919 [*affirming* 69 Ill. App. 542] (if the certificate is signed and acknowledged by an attorney in fact of a partner, it must be accompanied by evidence showing the attorney's authority so to act, in order that the record may show without outside inquiry who are the responsible members of the firm); Cummings *v.* Hayes, 100 Ill. App. 347.

19. Cal. Civ. Code, § 2479; Partn. Law, N. Y. Laws (1897), c. 420, § 30.

20. Safe Deposit, etc., Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819 (applying Code Gen. Pub. Laws, art. 73, § 4); Van Riper *v.* Poppenhausen, 43 N. Y. 68 (this provision enables any one dealing with the firm to know where to look for the record of its formation, and where to inquire about its credit).

21. McGehee *v.* Powell, 8 Ala. 827 (the certificate should show that the business to be carried on is of a kind which the statute permits a limited partnership to conduct); Manhattan Co. *v.* Phillips, 109 N. Y. 383, 17 N. E. 129 (where the certificate described the business as "a general commission business, buying and selling grain, flour and produce on commission," while the advertisements described the partnership as formed "for the purpose of conducting a general commission business"; and the court held that there was no material variance between the statements); Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318 (the certificate need not state all of the details of the partnership agreement); Benedict *v.* Allen, 17 U. C. Q. B. 234 (a description of the business as that of "general dealers" is not a compliance with the statutory requirement on this point, as it is too indefinite).

22. Buck *v.* Alley, 145 N. Y. 488, 40 N. E. 236; Lachaise *v.* Marks, 4 E. D. Smith (N. Y.) 610; Hubbard *v.* Morgan, 12 Fed. Cas. No. 6,817; Md. Code, Gen. Pub. Laws, art. 73, § 3. In Hall *v.* Glessner, 100 Mo. 155, 13 S. W. 349, it was held that N was not made a special partner in one firm by the fact that

special partner has contributed;[23] and (5) the period at which the partnership shall commence and shall terminate.[24] The statements thus required by the statute in the certificate must be true at the time the certificate and other required papers are filed.[25]

b. The Contribution by the Special Partner. It is not required by the statutes that the general partner shall make any contribution to the firm capital;[26] but they do require the special partner to make a contribution, and most of them require that this contribution shall be in cash.[27] When this requirement exists, the statute is not satisfied by contribution of stocks, bonds,[28] bills,[29] notes,[30]

his copartner W in another firm paid his (W's) contribution as a special partner in the former firm by a check drawn in the firm name of "N & W," and charged to his individual account in such firm. In Webster *v.* Lanum, 137 Fed. 376, 70 C. C. A. 56, the person named as special partner was acting as a dummy for other persons, and the court declined to pass upon the question whether this fact made him liable as a general partner, because it was not raised by the pleadings.

23. Blumenthal *v.* Whitaker, 170 Pa. St. 309, 33 Atl. 103 (a statement in the certificate that the special partners have contributed a certain amount in goods and merchandise does not satisfy the Pennsylvania statute, Acts 1836 and 1865); Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392 (applying Rev. St. § 1410, which requires that the amount of capital contributed by each special partner shall be stated in the certificate, and holding that this requirement was not complied with by a statement of the aggregate amount contributed by all the special partners).

24. Cal. Civ. Code, § 2479 (5); Md. Gen. Pub. Laws, art. 73, § 3; Partn. Law, N. Y. Laws (1897), c. 420, § 30 (5); S. C. Rev. St. § 1410 (5).

25. White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276; Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158 [*affirming* 41 N. Y. Super. Ct. 53]; La Montagne *v.* State Bank, 94 N. Y. App. Div. 219, 88 N. Y. Suppl. 21 [*modified* on another point in 183 N. Y. 173, 76 N. E. 33]; Fifth Ave. Bank *v.* Colgate, 54 N. Y. Super. Ct. 188; Manhattan Co. *v.* Colgate, 13 Daly (N. Y.) 544; Ropes *v.* Colgate, 17 Abb. N. Cas. (N. Y.) 136.

26. Selden *v.* Hall, 21 Mo. App. 452.

27. *California.*— Civ. Code, § 2481, "Actually and in good faith paid, in the lawful money of the United States."

Maryland.— Lineweaver *v.* Slagle, 64 Md. 465, 483, 2 Atl. 693, 54 Am. Rep. 775, where it is said: "The object [of this provision] is to provide a fund on the day the company is formed, to be thereafter subject to no contingencies or losses, except those which come from the proper business of the partnership."

Massachusetts.— Haggerty *v.* Foster, 103 Mass. 17 ("Actual cash payment as capital"); Pierce *v.* Bryant, 5 Allen 91.

Minnesota.— *In re* Allen, 41 Minn. 430, 43 N. W. 382, where property and not cash was contributed and hence a limited partnership was not formed.

New York.— Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158 [*affirming* 41 N. Y. Super. Ct. 53]; Van Ingen *v.* Whitman, 62 N. Y. 513; Haviland *v.* Chace, 39 Barb. 283 (contribution of goods not cash); Benedict, etc., Mfg. Co. *v.* Hutchinson, 53 N. Y. Super. Ct. 486; Hennessey *v.* Farrelly, 13 Daly 468 (check not paid when presented and the contribution was not actually made until a month afterward); Metropolitan Nat. Bank *v.* Palmer, 9 N. Y. Suppl. 239 (certified check on solvent bank treated as cash); Van Dolsen *v.* Abendroth, 1 N. Y. City Ct. 469 (check not paid for several days is not cash).

Pennsylvania.— Richardson *v.* Hogg, 38 Pa. St. 153 (the Pennsylvania statute did not, at that time, allow a contribution of goods, but required cash); Hogg *v.* Orgill, 34 Pa. St. 344 (checks of third persons, turned over by the special partner and cashed in ordinary course of business, were treated as cash, because by the general usages of business they passed as such).

United States.— Rothchild *v.* Hoge, 43 Fed. 97 (where a check which the bank gave the general partner credit for as cash, and which was paid as soon as presented in the ordinary course of business, was treated as a cash payment by the special partner); McGinnis *v.* Farrelly, 27 Fed. 33, 23 Blatchf. 465 (where a check was held not to be cash, as it was not paid when presented, nor until a month thereafter); *In re* Merrill, 17 Fed. Cas. No. 9,467, 12 Blatchf. 221, 13 Nat. Bankr. Reg. 91 (contribution of goods and cash does not comply with the statute); *In re* Thayer, 23 Fed. Cas. No. 13,867 (contribution consisted of nine thousand dollars in boots and shoes, eight thousand dollars in a credit on old debt, and eight thousand dollars in cash).

Canada.— Patterson *v.* Holland, 7 Grant Ch. (U. C.) 1; Whittemore *v.* Macdonell, 6 U. C. C. P. 547; Benedict *v.* Von Allen, 17 U. C. Q. B. 234 (contribution of £750 made by giving up a claim for that amount against the general partner not a compliance with 12 Vict. c. 75, §§ 2, 4, which require the contribution to be actually paid in cash); Watts *v.* Taft, 16 U. C. Q. B. 256.

28. Haggerty *v.* Foster, 103 Mass. 17, United States bonds were treated as not cash. *Compare* Chick *v.* Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

29. Whittemore *v.* Macdonell, 6 U. C. C. P. 547.

30. Pierce *v.* Bryant, 5 Allen (Mass.) 91; Benedict, etc., Mfg. Co. *v.* Hutchinson, 53 N. Y. Super. Ct. 486.

checks,[31] or other evidences of debt,[32] however readily these may sell in the market. It is usually held, however, that where the special partner has money actually in the bank to his credit, his check against such account, which gives absolute and final control to the general partner of the amount named in the check, is to be treated as an actual payment in cash.[33] In some states the special partner is allowed to contribute property, but he is generally required to describe it and give its cash or appraised value, so that those dealing with the firm can know how much in money's worth the special partner has contributed.[34] As a rule the statutes require the contribution to be made before the formation of the partnership, but the Missouri statute has been construed to permit the contribution to be made thereafter.[35] It is immaterial how the special partner has acquired the money or property which he contributes,[36] so long as he passes title to it to the partnership free from any lien or condition.[37] Nor is it necessary that the general partner keep the money in hand until the certificate is filed.[38] Moreover it is not in violation of the statute for the general partners to use the money in buying a stock of goods from the special partner, or from a firm of which he is a member, so long as the transaction is in good faith; or in other words, provided that the stock was needed by the new firm in its business, and that the price paid was fair and reasonable, and the transaction was not resorted to as a cover or device to evade the statute.[39] But the general partner's

31. Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158 [*affirming* 41 N. Y. Super. Ct. 53]; Maginn *v.* Lawrence, 45 N. Y. Super. Ct. 235; Hennessey *v.* Farrelly, 13 Daly (N. Y.) 468, 473 (where it is said: "If the check had been paid promptly and in the regular course of business, after its delivery by Farrelly to Flynn, the court would not be astute in sifting the evidence, in order to discover whether by some possibility the affidavit of the general partner was not made and filed a fraction of a day in advance of the presentation of the check at the bank. But here it appears that the check was never paid at all. After the lapse of more than a month, it was returned to Farrelly, who gave another check for a larger amount to Flynn"); Van Dolsen *v.* Abendroth, 1 N. Y. City Ct. 469; McGinnis *v.* Farrelly, 27 Fed. 33, 23 Blatchf. 465 (applying N. J. Rev. St. p. 807, § 2); Patterson *v.* Holland, 7 Grant Ch. (U. C.) 1.

32. *In re* Thayer, 23 Fed. Cas. No. 13,867; Benedict *v.* Von Allen, 17 U. C. Q. B. 234.

33. White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276; Metropolitan Nat. Bank *v.* Palmer, 9 N. Y. Suppl. 239.

34. Holliday *v.* Union Bag, etc., Co., 3 Colo. 342; Manhattan Brass Co. *v.* Allin, 35 Ill. App. 336 ("A specific amount of capital in cash, or other property at cash value"); Wilson *v.* Bean, 33 Ill. App. 529 (the certificate was misleading and deceptive, and not in compliance with the statute); Danville First Nat. Bank *v.* Creveling, 177 Pa. St. 270, 35 Atl. 595; Robbins Electric Co. *v.* Weber, 172 Pa. St. 635, 34 Atl. 116; Siegel *v.* Wood, 3 Pa. Dist. 463 (noting the change made in the Pennsylvania statute on this point by the act of March 30, 1865, and applying the provisions of the later act); Rehfuss *v.* Moore, 6 Pa. Co. Ct. 245 (patent rights may be contributed by the special partner); Deckert *v.* Chesapeake Western Co., 101 Va. 804, 45 S. E. 799 (applying Acts (1901–1902), p. 181, authorizing the contribution of real and personal estate at a reasonable value, to be approved by all the members).

35. Selden *v.* Hall, 21 Mo. App. 452.

36. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Lawrence *v.* Merrifield, 73 N. Y. 590 [*affirming* 42 N. Y. Super. Ct. 36]; Webster *v.* Lanum, 137 Fed. 376, 70 C. C. A. 56.

37. Manhattan Co. *v.* Phillips, 109 N. Y. 383, 17 N. E. 129 [*affirming* 53 N. Y. Super. Ct. 84]; Metropolitan Nat. Bank *v.* Palmer, 9 N. Y. Suppl. 239.

38. Anderson *v.* Stone, 24 Ill. App. 342 (where the money was used in paying debts for goods already on hand); Vernon *v.* Brunson, 54 N. J. L. 586, 25 Atl. 511 (where payment was made by the special partner unconditionally, and on the same day, and before the certificate was filed, was paid away for the *bona fide* uses of the firm); Continental Nat. Bank *v.* Strauss, 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188 [*affirmed* in 137 N. Y. 148, 32 N. E. 1066]; Seibert *v.* Bakewell, 87 Pa. St. 506 (the general partner's misappropriation of the special partner's contribution, without the privity of the special partner, does not affect the latter, nor make him liable as a general partner).

39. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Moorhead *v.* Seymour, 77 N. Y. Suppl. 1050 (a mere device and statute not complied with); Ropes *v.* Colgate, 17 Abb. N. Cas. (N. Y.) 136; Hanover Nat. Bank *v.* Sirret, 15 Abb. N. Cas. (N. Y.) 334 note. These cases hold that whether or not fraud was committed in such a transaction is a question of fact for the jury.

"A mere expectation that the capital of the partnership would be employed to purchase the stock of an immediately preceding firm does not deprive the former of its character

agreement to buy property from the special partner must not be made the condition of the latter's contribution to the firm's capital.[40]

c. Affidavit as to Contribution. One of the fundamental requirements of the statute, in most jurisdictions, is an affidavit of one or more of the general partners stating that the sums or property specified in the certificate to have been contributed by each of the special partners have been actually and in good faith paid or supplied.[41] The courts have held that the affidavit need not contain the exact language of the statute, but it must contain its substance.[42]. If the affidavit is false, all the persons interested in the partnership shall be liable for all the engagements thereof as general partners.[43] As the statutes of some of the states differ from the foregoing provisions, the reader should be careful to consult the statute governing a particular case.[44]

d. Acknowledging, Filing, and Publishing the Certificate. The statutory provisions on these points differ in matters of detail, but they usually require that the certificate be acknowledged before a specified officer,[45] and be published in certain newspapers,[46] or in some other manner,[47] and that the certificate with proof of publication and with the affidavit be filed or registered in a specified office.[48] Until these requirements have been complied with, the statutes usually declare no limited partnership has been formed.[49] While the courts insist upon a faithful performance of all these requirements in matters of substance,[50] yet failures in

as a limited partnership, for, in the absence of an actual agreement to that effect when the capital was contributed, the partnership would be at liberty to use its capital, when it was received, in that or any other direction." Metropolitan Nat. Bank *v.* Palmer, 9 N. Y. Suppl. 239 [*following* Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318].

40. Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Loomis *v.* Hoyt, 52 N. Y. Super. Ct. 287.

41. Ill. Rev. St. (1893) c. 84, § 7; Howell Annot. St. Mich. § 2342 *et seq.*; Partn. Law, N. Y. Laws (1897), c. 420, § 31.

42. Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974 [*reversing* 47 Ill. App. 574]; Myers *v.* Edison Gen. Electric Co., 59 N. J. L. 153, 35 Atl. 1069; White *v.* Eiseman, 134 N. Y. 101, 31 N. E. 276 [*reversing* 58 Hun 484, 12 N. Y. Suppl. 885]; Manhattan Co. *v.* Colgate, 13 Daly (N. Y.) 544; Johnson *v.* McDonald, 2 Abb. Pr. (N. Y.) 290; Chick *v.* Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833. The special partner is bound to see that the affidavit complies with the statute and is true. Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392; Whittemore *v.* Macdonell, 6 U. C. C. P. 547.

43. Anderson *v.* Stone, 24 Ill. App. 342 (affidavit not false); Myers *v.* Edison Gen. Electric Co., 59 N. J. L. 153, 35 Atl. 1069 (affidavit false, as contribution of special partner was by check, which was not cashed until a week after the affidavit was filed); Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158 [*affirming* 41 N. Y. Super. Ct. 53] (the contribution was a check for ten thousand dollars dated several days ahead); Maginn *v.* Lawrence, 45 N. Y. Super. Ct. 235 (affidavit false because the contribution was of uncertified checks without money to meet them). A false affidavit does not conclude creditors who sue to compel the delinquent special partner to pay in the capital mentioned in the certificate. Robinson *v.* McIntosh, 3 E. D. Smith (N. Y.) 221.

44. The California statute (Civ. Code, § 2481) requires the affidavit to be made by each partner. The Colorado statute (Gen. St. (1883) § 2520) requires the special partner to make the affidavit. In several states no affidavit is specifically required.

45. Hubbard *v.* Morgan, 12 Fed. Cas. No. 6,817, the recorder of the city of New York was empowered to take acknowledgments of partners under the New York statute.

46. Hinchman *v.* Barns, 21 Mich. 556; Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318.

47. In Maryland the papers may be published by posting them, if no newspaper is published in the county where the partnership is established. Gen. Pub. Laws, art. 73, § 7.

48. Henkel *v.* Heyman, 91 Ill. 96 [*affirming* 1 Ill. App. 145] (applying Rev. St. (1874) p. 678, §§ 6–8, and holding that the statute is not complied with, when a partner leaves the papers in the proper office and withdraws them without having them actually filed and recorded); Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 15 N. E. 712 [*reversing* 53 N. Y. Super. Ct. 22, 17 Abb. N. Cas. 123] (the failure of the clerk to record the papers when they have been actually filed with him is not to be charged to the partners as they have no power to compel the public officer to do the act required of him by statute, and the statute does not charge them with the duty of overseeing his acts); Buckle *v.* Iler, 40 Misc. (N. Y.) 214, 81 N. Y. Suppl. 631.

49. Adam *v.* Musson, 37 Ill. App. 501; Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815, applying Code, § 3096.

50. Argall *v.* Smith, 3 Den. (N. Y.) 435 [*affirming* 6 Hill 479], where by mistake the notice in one newspaper stated the contri-

matters of form are not treated as fatal, if the mistakes are not in bad faith and misleading to those dealing with the firm.[51]

e. Firm-Name and Sign. The statutes require that the partnership shall have a firm-name, and that this shall be set forth in the certificate. Generally they require that the firm-name shall contain only the names of the general partners,[52] although the use of the words "and Company" or "& Co." is permitted in some states, where there are two or more general partners.[53] The special partner's name is not to appear in the firm style, save when the limited partnership succeeds to a general partnership, whose name it is authorized by statute to adopt as its own.[54] If his name is used with his privity, and without such legislative permission, he shall be deemed a general partner.[55] A few statutes provide that the limited partnership shall put up in a conspicuous place in front of the building in which is its chief place of business a sign in legible English containing all of the names of the members, stating who are general and who are special partners.[56]

B. Duration — 1. The Original Term. The period at which the partnership shall begin and at which it shall terminate must be stated in the certificate; and hence all those dealing with it have notice of the term for which it is organized.[57] But the statutes expressly provide that a limited partnership shall not be formed until the certificate is executed, acknowledged, registered, and the affidavit made and filed, as required by statute.[58] If the partnership does business before these statutory requisites are complied with, its members are liable as general partners for the obligations incurred during that period;[59] but not for the obligations of the business incurred after the partnership has been duly formed.[60] So, if the partnership does business after the expiration of the period named in the certifi-

bution of the special partner as five thousand dollars, when it should have been two thousand dollars, and the partnership was held to be a general one.

51. Ulman *v.* Briggs, 32 La. Ann. 655; Manhattan Co. *v.* Phillips, 109 N. Y. 383, 17 N. E. 129 [*reversing* on another point 53 N. Y. Super. Ct. 84] (the partnership was recorded October 1, and the publication was begun October 10; this was held to be "immediately" after the record); Levy *v.* Lock, 5 Daly (N. Y.) 46, 47 How. Pr. 394 (the certificate need not be filed contemporaneously with its execution); Madison County Bank *v.* Gould, 5 Hill (N. Y.) 309 (the certificate stated that the partnership would commence October 16, while the published notice gave the date as November 16, but the variance was deemed immaterial); Bowen *v.* Argall, 24 Wend. (N. Y.) 496 (a mistake in spelling the name of one partner was treated as immaterial, and beginning the publication within seven days after the registry of the papers was held to be "immediately" as required by the statute); Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615 (the publication of the name of one partner twice was an immaterial error).

52. Buck *v.* Alley, 145 N. Y. 488, 40 N. E. 236 [*reversing* 82 Hun 29, 31 N. Y. Suppl. 324]. Under the act of June 2, 1874 (Pa. Laws 271), authorizing the formation of limited partnership associations, providing that the omission of the word "Limited" in the use of the name of the partnership association shall render every participant in such omission liable for any indebtedness, damages, or liability arising therefrom, the use of the abbreviation "Ltd." instead of the full word "Limited" is not such a failure to comply with the law as will subject the association to a penalty. Abington Dairy Co. *v.* Reynolds, 24 Pa. Super. Ct. 632.

53. Buck *v.* Alley, 145 N. Y. 488, 40 N. E. 236 [*reversing* 82 Hun 29, 31 N. Y. Suppl. 324] (holding that the use of "and company" to represent the special partner is prohibited by the New York statute, but that such use does not render the partnership a general one, as the statute does not impose any penalty for this violation); Hubbard *v.* Morgan, 12 Fed. Cas. No. 6,817 (to the same effect). In Pennsylvania such use has been held to render the special partner liable as a general partner. Andrews *v.* Schott, 10 Pa. St. 47; Metropolitan Nat. Bank *v.* Gruber, 14 Wkly. Notes Cas. (Pa.) 12.

54. Groves *v.* Wilson, 168 Mass. 370, 47 N. E. 100, applying Pub. St. c. 75, § 3, in connection with St. (1887) c. 248, § 1.

55. See the cases in the two preceding notes.

56. Vandike *v.* Rosskam, 67 Pa. St. 330; Vilas Bank *v.* Bullock, 10 Phila. (Pa.) 309; Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615.

57. Haggerty *v.* Taylor, 10 Paige (N. Y.) 261.

58. Pierce *v.* Bryant, 5 Allen (Mass.) 91; Buck *v.* Alley, 145 N. Y. 488, 40 N. E. 236; Cal. Civ. Code, § 2482 ("No special partnership is formed until the provisions of the last five sections are complied with").

59. Gray *v.* Gibson, 6 Mich. 300; Robinson *v.* McIntosh, 3 E. D. Smith (N. Y.) 221.

60. Lachomette *v.* Thomas, 5 Rob. (La.) 172; Levy *v.* Lock, 5 Daly (N. Y.) 46, 47 How. Pr. 394.

cate, it is thereby transformed into a general partnership as to its new engagements thereafter.[61]

2. CONTINUANCE OR RENEWAL. The statutes permit a continuance or renewal of a limited partnership, provided that it shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice given in the manner required for its original formation.[62] If this provision is not complied with, the firm which continues the business is a general partnership, although its members may not have intended this result.[63] Whether a valid renewal can be made when the original capital of the firm has been impaired is a question upon which the courts have differed.[64] In Massachusetts the present statute provides that no renewal of the limited partnership shall be made unless the capital contributed by the special partner is equal in amount to, or more than, the aggregate capital the special partner originally contributed.[65] The provisions now under consideration do not apply to an attempt by the members of a limited partnership to organize a new firm, as distinguished from continuing an existing one.[66]

C. Mutual Rights, Duties, and Liabilities of Partners. These are the same in the case of the general partners in a limited partnership as those of the members of an ordinary firm.[67] But the special partner is not entitled to a voice in the management of the firm,[68] nor to supervise its affairs or act in its behalf save to the extent which is authorized by statute.[69] His contribution passes under the ownership of the firm,[70] and he is not its creditor for that,[71] although he may be entitled to receive interest upon it.[72] Under some statutes he may sell property or loan money to the firm or buy or borrow from it as a stranger may do;[73] but under other statutes he may not thus become a creditor of the firm.[74] A

61. Sarmiento *v.* The Catherine C., 110 Mich. 120, 67 N. W. 1085.

62. Partn. Law, N. Y. Laws (1897), c. 420, § 33. See Cal. Civ. Code, § 2485.

63. Strange *v.* Thomas, 114 Wis. 599, 91 N. W. 237, applying Rev. St. (1898) § 1711.

64. The following cases hold that the renewal papers need not refer to the present condition of the capital, but that the statement in them as to the special partner's contribution refers to the original contribution. Hogan *v.* Hadzsits, 113 Mich. 568, 71 N. W. 1092; Fifth Ave. Bank *v.* Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712 [*reversing* 55 N. Y. Super. Ct. 541, 54 N. Y. Super. Ct. 188]; Ropes *v.* Colgate, 17 Abb. N. Cas. (N. Y.) 136; Arnold *v.* Danziger, 30 Fed. 898. It is held in the following cases that the renewal papers must state that the capital contributed by the special partner remains unimpaired and undiminished. Fourth St. Nat. Bank *v.* Whitaker, 170 Pa. St. 297, 33 Atl. 100; Haddock *v.* Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Andrews *v.* Schott, 10 Pa. St. 47; Reitzel *v.* Haines, 3 Pa. Dist. 523.

65. Durgin *v.* Colburn, 176 Mass. 110, 57 N. E. 213, applying St. (1887) c. 248, § 3.

66. Columbia Bank *v.* Berolzheimer, 33 N. Y. App. Div. 235, 53 N. Y. Suppl. 417 (if a limited partnership has once ceased to exist, by the expiration of the period named in the agreement and certificate, no matter for how short a space of time, it cannot thereafter be continued by the subsequent filing of a renewal certificate, and if the business is continued the special partner becomes a general partner); Jersey City Nat. Bank *v.* Huber, 75 Hun (N. Y.) 80, 26 N. Y. Suppl. 961; Hardt *v.* Levy, 72 Hun (N. Y.) 225, 25 N. Y. Suppl. 248 (a new general partner was introduced); Lee *v.* Burnley, 195 Pa. St. 58, 45 Atl. 668 [*affirming* 7 Del. Co. 558]; Blumenthal *v.* Whitaker, 170 Pa. St. 309, 33 Atl. 103; Hirsch *v.* Vanuxem, 15 Wkly. Notes Cas. (Pa.) 467 (holding that an interval of six days between the expiration of the original term and the execution and recording of new papers does not invalidate the renewal, when the name, members, and capital of the firm remain unchanged, and no business is done during the interval).

67. Emery *v.* Kalamazoo, etc., Constr. Co., 132 Mich. 560, 94 N. W. 19; Van Dolsen *v.* Abendroth, 1 N. Y. City Ct. 469; Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787, applying 1 Rev. St. § 1408.

68. Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Hutchinson *v.* Bowes, 15 U. C. Q. B. 156; Cal. Civ. Code, § 2489.

69. Cal. Civ. Code, § 2490; Partn. Law, N. Y. Laws (1897), c. 420, § 37; Ohio Rev. St. (1892) § 3153.

70. Bradbury *v.* Smith, 21 Me. 117.

71. Clapp *v.* Lacey, 35 Conn. 463; Sherwood *v.* His Creditors, 42 La. Ann. 103, 7 So. 79.

72. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Tillinghast *v.* Walton, 4 N. Y. St. 35.

73. Rayne *v.* Terrell, 33 La. Ann. 812; Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106.

74. Jaffe *v.* Krum, 88 Mo. 669; White *v.* Hackett, 20 N. Y. 178 (decided under the original statute of New York and now

special partner may sue his general partner on a claim arising outside the partnership,[75] and he may institute a suit for the dissolution of the firm and the appointment of a receiver, when the misconduct of the general partner or the insolvency of the firm warrants it.[76] The general partner or partners may institute legal proceedings to compel the special partner to bear any share of the losses which he has bound himself in the partnership articles to bear,[77] but not to restore sums withdrawn with their consent.[78]

D. Rights and Liabilities of Partners to Third Persons — 1. Failure to Comply With Statute. If the members of a limited partnership fail to comply with a fundamental requirement of the statute, their association is a general partnership, and the special partner's liability for its obligations is unlimited.[79] Accordingly if the business to be carried on by the partnership is one which the statute does not permit a limited partnership to conduct;[80] if the papers specifically required by the statute have not been duly executed, registered, and published;[81] or if material statements contained therein are false,[82] all the members are liable as general partners. When this liability has once attached it continues against the partner's estate even after his death,[83] and although the partnership is

changed); Ward *v.* Newell, 42 Barb. (N. Y.) 482, 28 How. Pr. 102 (decided under the New Jersey statute containing the same provision as the New York statute which was construed in White *v.* Hackett, *supra*); Dunning's Appeal, 44 Pa. St. 150; McArthur *v.* Chase, 13 Gratt. (Va.) 683.

75. Battaille *v.* Battaille, 6 La. Ann. 682.

76. Snyder *v.* Leland, 127 Mass. 291; Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066.

77. Baily *v.* Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; Wilkins *v.* Davis, 29 Fed. Cas. No. 17,664, 2 Lowell 511, 15 Nat. Bankr. Reg. 60.

78. Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436.

79. See *supra*, X, A, 6.

Liability of purchaser from special partner. — In Strang *v.* Thomas, 114 Wis. 599, 91 N. W. 237, it was held that one who purchased the interest of a special partner in a partnership in which all were in law generally liable owing to a failure to comply with the statutes relative to special partners was liable generally, although he had no intent to become a general partner.

80. McGehee *v.* Powell, 8 Ala. 827, a banking business, which was not authorized by the Alabama statute.

81. *Colorado.*— Peabody *v.* Oleson, 15 Colo. App. 346, 62 Pac. 234.

Illinois.— Henkel *v.* Heyman, 91 Ill. 96; Manhattan Brass Co. *v.* Allin, 35 Ill. App. 336 (a notice to creditors that certain members of a firm intended to become liable as special partners only will not limit their liability); Pfirmann *v.* Henkel, 1 Ill. App. 145.

Louisiana.— Lachomette *v.* Thomas, 5 Rob. 172.

Massachusetts.— Lancaster *v.* Choate, 5 Allen 530; Pierce *v.* Bryant, 5 Allen 91.

New York.— Smith *v.* Argall, 6 Hill 479 [*affirmed* in 3 Den. 435]; West Point Foundry Assoc. *v.* Brown, 3 Edw. 284. But they are not liable for debts contracted prior to the attempted formation of the partnership. West Point Foundry Assoc. *v.* Brown, *supra*.

Pennsylvania.— Haddock *v.* Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Vandike *v.* Rosskam, 67 Pa. St. 330; Richardson *v.* Hogg, 38 Pa. St. 153; Andrews *v.* Schott, 10 Pa. St. 47. Where several persons attempt to form a limited partnership, under the provisions of Pa. Act, June 2, 1874 (Pamphl. Laws 271), but fail to sign, acknowledge, and record a statement in writing in accordance with the provisions of the act, and also subsequently attempt to amend the articles of association, but the amendment is signed by one partner only, all of the partners are liable to creditors as general partners. Chatham Nat. Bank *v.* Gardner, 31 Pa. Super. Ct. 135.

South Carolina.— Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392.

Canada.— Patterson *v.* Holland, 6 Grant Ch. (U. C.) 414.

See 38 Cent. Dig. tit. "Partnership," § 842 *et seq.* And see the cases cited *supra*, X, A, 6, a.

82. Myers *v.* Edison Gen. Electric Co., 59 N. J. L. 153, 35 Atl. 1069; Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158 [*affirming* 41 N. Y. Super. Ct. 53]; Van Ingen *v.* Whitman, 62 N. Y. 513 (the statement need not be intentionally false); Hartford Nat. Bank *v.* Beinecke, 80 N. Y. App. Div. 546, 80 N. Y. Suppl. 803; Haviland *v.* Chace, 39 Barb. (N. Y.) 283; Maginn *v.* Lawrence, 45 N. Y. Super. Ct. 235; Fulmer *v.* Abendroth, 2 N. Y. St. 123; Reitzel *v.* Whitaker, 170 Pa. St. 306, 33 Atl. 103; Fourth St. Nat. Bank *v.* Whitaker, 170 Pa. St. 297, 33 Atl. 100; Matter of Mill Work, etc., Co., 4 Pa. Super. Ct. 106; Siegel *v.* Wood, 3 Pa. Dist. 463; Fourth St. Nat. Bank *v.* Haines, 3 Pa. Dist. 437; Ussery *v.* Crusman, (Tenn. Ch. App. 1898) 47 S. W. 567 (applying Milliken & V. Code, §§ 2404-2422).

83. Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 N. Y. App. Div. 327, 44 N. Y. Suppl. 617 (*affirming* 8 Misc. 554, 41 N. Y. Suppl. 991)]; Jersey City First Nat. Bank *v.* Huber, 75 Hun (N. Y.) 80, 26 N. Y. Suppl. 961.

continued after the period for which it was organized.[84] Whether a particular association, the members of which have failed to follow the statutory requirements, is to be deemed a general partnership for all purposes,[85] or is to be treated as a limited partnership whose members are liable as general partners to claimants against the firm, but not otherwise,[86] should depend upon the provisions of the applicatory statute. Most of the cases, but not all, may be reconciled upon this theory.[87]

2. Alteration in Members or Business. It is a fundamental requirement of the statutes that the recorded and published statements upon the organization of a limited partnership should fully advise all persons having transactions with it of its membership and its business. Hence the statutory provision that any alteration in the members of the firm except such as is specifically permitted by the statute,[88] or in its business, shall operate to dissolve the firm,[89] and render the special partner liable as a general partner in any business thereafter carried on with his consent.[90] An alteration in the business includes a removal of the partnership place of business into another county from that in which this was located when the firm was organized and the original papers filed.[91] In order that alterations may thus subject the special partner to a general partner's liability they must have been made with his assent.[92]

3. Withdrawal of Capital or Profits. The withdrawal of any part of the special partner's capital, either directly or under the guise of dividends, profits,

84. Tournade *v.* Methfessel, 3 Hun (N. Y.) 144, 5 Thomps. & C. 288; Haviland *v.* Chace, 39 Barb. (N. Y.) 283. In Tilge *v.* Brooks, 124 Pa. St. 178, 182, 16 Atl. 746, 2 L. R. A. 796, it was held that the special partner's failure to give notice of the dissolution of the firm at the expiration of the period for which its certificate stated it was formed did not render him liable for the subsequent debts of the firm, although a false statement in the original papers had made him liable as a general partner. The court said: "When the act declares that under certain circumstances a special partner shall be deemed a general partner, it certainly does not mean that he is in fact a general partner. . . . Nor do I see how the legislature can make a man a member of a firm without his consent. . . . It may, indeed, make him liable for the debts of a firm as though he were a general partner, and this is all the legislature probably intended to do."

85. Patterson *v.* Holland, 6 Grant Ch. (U. C.) 414. And see the New York cases cited in the preceding note.

86. Buckle *v.* Iler, 40 Misc. (N. Y.) 214, 81 N. Y. Suppl. 631; Webster *v.* Lanum, 137 Fed. 376, 70 C. C. A. 56. The statute did not affix a penalty to the non-compliance in these cases.

87. Waters *v.* Harris, 60 N. Y. Super. Ct. 192, 17 N. Y. Suppl. 370, 28 Abb. N. Cas. 89 (as between the partners they are bound by the terms of their agreement); Corbit *v.* Corbit, 19 N. Y. Wkly. Dig. 77; Guillou *v.* Peterson, 89 Pa. St. 163 (by failure to comply with the statute the special partner becomes liable as a general partner to the public, but remains a special partner as to his copartners); Deckert *v.* Chesapeake Western Co., 101 Va. 804, 45 S. E. 799 (holding that where parties attempt in good faith to form a limited partnership pursuant to the provisions of the statute, but fail to comply with its provisions, they are not liable as general partners, but only to the extent of the unpaid portions of their subscriptions to the capital, determined as to those contributing property by deducting the fair cash value thereof at the date of contribution from the amount subscribed); Abendroth *v.* Van Dolsen, 131 U. S. 66, 73, 9 S. Ct. 619, 33 L. ed. 57 [*affirming* 1 N. Y. City Ct. 469] (where it is said that all the special partner's relations to his copartners and their obligations growing out of the relation to him as a special partner remain unimpaired).

88. Cal. Civ. Code, § 2508, and Partn. Law, N. Y. Laws (1897), c. 420, § 41, furnish examples of such exceptions.

89. Lachaise *v.* Marks, 4 E. D. Smith (N. Y.) 610; Ames *v.* Downing, 1 Bradf. Surr. (N. Y.) 321; Singer *v.* Macalester, 4 Phila. (Pa.) 312.

90. Beers *v.* Reynolds, 11 N. Y. 97 [*affirming* 12 Barb. 288]; Bulkley *v.* Dingman, 11 Barb. (N. Y.) 289.

The loaning of money by the special partner to the firm is not an alteration of the nature of its business or its shares of capital within the statute. Walkenshaw *v.* Perzel, 4 Rob. (N. Y.) 426, 32 How. Pr. 233; Metropolitan Nat. Bank *v.* Palmer, 9 N. Y. Suppl. 239.

91. Van Riper *v.* Poppenhausen, 43 N. Y. 68; Loomis *v.* Hoyt, 52 N. Y. Super. Ct. 287.

92. Galesburg First Nat. Bank *v.* Clark, 143 Ill. 83, 32 N. E. 255 [*affirming* 38 Ill. App. 558 (where the special partner refused to take any part in a new enterprise entered into by the general partners, and he was held not liable); Madison County Bank *v.* Gould, 5 Hill (N. Y.) 309; Singer *v.* Kelly, 44 Pa. St. 145; Singer *v.* Macalester, 4 Phila. (Pa.) 312.

or the assumption of his individual debts, is prohibited.[93] In some jurisdictions the statutory penalty for such withdrawal is liability as a general partner.[94] In others it is a liability to restore the amount thus illegally withdrawn,[95] and this only, unless the withdrawal amounts to an alteration of the capital of the firm, when, as we saw in the preceding paragraph, the liability becomes that of a general partner for future obligations.

4. ESTOPPEL. It is clear that a special partner will become liable as a general partner, when he induces a person to deal with the firm on the strength of his representation that he is a general partner.[96] He may also estop himself from showing that the limited partnership was not duly organized;[97] but he is not so estopped against one who has dealt with the firm as a general partnership and who offers no evidence that he gave credit to it as a limited partnership, or in any way acted on the faith of any representation that it was such.[98] There is authority for the view that persons who deal with a firm as a limited partnership are estopped from denying the validity of its organization;[99] but the better doctrine is that creditors are not thus estopped,[1] unless they have advised the partners to carry on their business in this irregular manner[2] or have expressly assented to the limited liability of the special partner.[3]

5. RIGHTS AND LIABILITIES OF SPECIAL PARTNERS. The statutes usually deny to a special partner any right to participate in the management of the partnership, and vest the entire power of control in the general partners.[4] Accordingly the

93. Hogan *v.* Hadzsits, 113 Mich. 568, 71 N. W. 1092 (the receipt of interest on his capital does not violate the statute, where the capital stock is not thereby impaired, and the assets are sufficient to pay the firm debts); Baily *v.* Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645 (the capital was repaid at the expiration of the partnership period, but the firm was insolvent, and the statute was violated); George *v.* Carpenter, 73 Hun (N. Y.) 221, 25 N. Y. Suppl. 1086 [*affirmed* in 147 N. Y. 686, 42 N. E. 723] (the provision not violated); Lachaise *v.* Marks, 4 E. D. Smith (N. Y.) 610 (statute was violated); Coffin's Appeal, 106 Pa. St. 280 [*reversing* 14 Wkly. Notes Cas. 140] (a violation); Hogg *v.* Orgill, 34 Pa. St. 344 (holding that it was not a violation of the statute for the special partner to borrow money from the firm where he repaid it with interest).

94. *California.*— Civ. Code, §§ 2495, 2501.
Missouri.— Rev. St. (1899) § 4442; Rev. St. (1889) § 7207.
Montana.— Civ. Code, §§ 3314, 3331.
New Hampshire.— Pub. Laws, c. 122, § 7.
North Dakota.— Rev. Codes, §§ 4430, 4435.
South Dakota.— Rev. Civ. Code, §§ 1782, 1787.
Wyoming.— Rev. St. § 2504.

95. La Chomette *v.* Thomas, 1 La. Ann. 120; Bell *v.* Merrifield, 28 Hun (N. Y.) 219, 226 (where it is said that by the act of the general partners, title to the funds and assets which plaintiff seeks to reach become vested in defendant and as his title is perfect against all persons, except the creditors, he may insist that there be an execution issued against the property of the general partners and returned unsatisfied, before the creditor can enforce the liability of the special partner); Hampden Bank *v.* Morgan, 11 Fed. Cas. No. 6,008.

96. Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283.

97. Casola *v.* Vasquez, 164 N. Y. 608, 58 N. E. 1085 [*affirming* 33 N. Y. App. Div. 428, 54 N. Y. Suppl. 89]; Sturgeon *v.* Apollo Oil, etc., Co., 203 Pa. St. 369, 53 Atl. 189, applying the partnership act of 1874.

98. Hardt *v.* Levy, 72 Hun (N. Y.) 225, 25 N. Y. Suppl. 248.

99. Staver, etc., Mfg. Co. *v.* Blake, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798; Carhart *v.* Killough, 1 Tex. App. Civ. Cas. § 112; Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879.

1. Manhattan Brass Co. *v.* Allin, 35 Ill. App. 336; Sheble *v.* Strong, 128 Pa. St. 315, 18 Atl. 397.

2. Allegheny Nat. Bank *v.* Bailey, 147 Pa. St. 111, 23 Atl. 439.

3. Imperial Shale Brick Co. *v.* Jewett, 169 N. Y. 143, 62 N. E. 167; Hess *v.* Werts, 4 Serg. & R. (Pa.) 356. In Benedict, etc., Mfg. Co. *v.* Hutchinson, 53 N. Y. Super. Ct. 486, it was held that the receipt of a dividend under an order on an accounting in proceedings on an assignment for the benefit of creditors, made by a special partnership, and an appearance in such proceedings, do not estop the creditor from bringing an action thereafter, for the balance of the claim, against all the partners, and enforcing the liability of the alleged special partner as a general partner; it not appearing that the court in the assignment proceedings had power to litigate the question whether such alleged partner was a general or special partner, or that such question was there litigated.

4. Lawrence *v.* Batcheller, 131 Mass. 504; Locke *v.* Lewis, 124 Mass. 1, 26 Am. Rep. 631; Abington Dairy Co. *v.* Reynolds, 24 Pa. Super. Ct. 632 (a case of a limited partnership association); Strang *v.* Thomas, 114

special partner has no implied authority to bind the firm by his acts;[5] and if he does take part in the firm's management, in violation of the statute, "he shall be deemed and be liable as a general partner."[6] The general partners have no authority to change the nature of the business, without the consent of the special partner.[7] They may change it with his consent,[8] but in that event he becomes liable as a general partner.[9]

6. Insolvent Limited Partnerships. As soon as a limited partnership becomes insolvent, or is in contemplation of insolvency, it is prohibited by statute from making transfers of its property, of creating liens thereon, or of confessing judgments, with intent of giving a preference to any creditor; and this prohibition is extended to each of the partners.[10] In case of such a violation of the statute, any partnership creditor may institute an action, without obtaining a judgment at law, to have the prohibited transfer, judgment, or lien set aside and to have a receiver appointed to take possession of and distribute the partnership assets ratably among all the firm creditors.[11] If such violation has been assented to by the special partner he becomes liable as a general partner.[12] It is not a violation

Wis. 599, 91 N. W. 237 (applying Rev. St. (1898) § 176).

5. Columbia Land, etc., Co. *v.* Daly, 46 Kan. 504, 26 Pac. 1042 (applying Gen. St. (1889) § 3992); Matter of Ryan, 70 Hun (N. Y.) 164, 24 N. Y. Suppl. 273 [*affirmed* in 141 N. Y. 550, 36 N. E. 343].

6. Partn. Law, N. Y. Laws (1897), c. 420, § 37; Canandaigua First Nat. Bank *v.* Whitney, 4 Lans. (N. Y.) 34 [*affirmed* in 53 N. Y. 627] (where the special partner bought the entire firm property, during the existence of the limited partnership, and thus rendered himself liable as a general partner from the commencement of the partnership); Madison County Bank *v.* Gould, 5 Hill (N. Y.) 309; Whittemore *v.* Macdonell, 6 U. C. C. P. 547; Davis *v.* Bowes, 15 U. C. Q. B. 280; Hutchinson *v.* Bowes, 15 U. C. Q. B. 156; Bowes *v.* Holland, 14 U. C. Q. B. 316. In the following cases there had not been such an interference in the business by the special partner as to make him liable as a general partner: Ulman *v.* Briggs, 32 La. Ann. 655 (consulting once with the general partners and advising third persons that the firm was all right); Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066 [*affirming* 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188] (bringing an action for the dissolution of the firm and the preservation of the fund for creditors, in which he is appointed receiver, is not prohibited interference by the special partner); Outcalt *v.* Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. (Reprint) 207 (settling the firm's affairs after dissolution not an interference); Lawson *v.* Wilmer, 3 Phila. (Pa.) 122.

Trespass.— In McKnight *v.* Ratcliff, 44 Pa. St. 156, it was held that, although the special partner had made himself liable as a general partner, he was not answerable for a trespass to property committed by agents of the firm, with the consent of his copartners, if he had not taken part in or assented to it.

7. Galesburg First Nat. Bank *v.* Clark, 143 Ill. 83, 32 N. E. 255 [*affirming* 38 Ill. App. 558]; Singer *v.* Kelly, 44 Pa. St. 145; Taylor *v.* Rasch, 23 Fed. Cas. No. 13,800, 1 Flipp. 385, 11 Nat. Bankr. Reg. 91.

8. Woodward *v.* Nelligan, 19 App. Cas. (D. C.) 550.

9. Guillou *v.* Peterson, 89 Pa. St. 163 [*reversing* 9 Phila. 225].

10. Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974 [*affirming* 47 Ill. App. 574]; Green *v.* Hood, 42 Ill. App. 652; Batchelder *v.* Altheimer, 10 Mo. App. 181 (the funds of an insolvent limited partnership become a trust fund); Baily *v.* Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645 [*affirming* 89 Hun 514, 35 N. Y. Suppl. 437]; George *v.* Grant, 97 N. Y. 262 [*affirming* 28 Hun 69]; Mattison *v.* Demarest, 4 Rob. (N. Y.) 161 (the preference in this case was by a general partnership which had succeeded to a limited partnership, and it was upheld); Whitcomb *v.* Fowle, 10 Daly (N. Y.) 23, 7 Abb. N. Cas. 295, 56 How. Pr. 365; Mills *v.* Argall, 6 Paige (N. Y.) 577; McArthur *v.* Chase, 13 Gratt. (Va.) 683. Under a statute concerning limited partnerships, and declaring that every sale, assignment, or transfer of any property or conveyance of such partnership, made when insolvent or in contemplation of insolvency, shall be void, etc., it is held that the word "insolvency" means that the partnership has not sufficient property and effects to pay all of its debts. McArthur *v.* Chase, *supra*.

11. Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 40 N. E. 974 [*affirming* 47 Ill. App. 574]; Batchelder *v.* Altheimer, 10 Mo. App. 181; Innes *v.* Lansing, 7 Paige (N. Y.) 583.

12. Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Farnsworth *v.* Boardman, 131 Mass. 115; Whitcomb *v.* Fowle, 10 Daly (N. Y.) 23, 7 Abb. N. Cas. 295, 56 How. Pr. 365; McArthur *v.* Chase, 13 Gratt. (Va.) 683. The law making a special partner who accepts a transfer from the partnership, knowing it to be insolvent, with intent to secure a debt, liable as general partner, the liability so incurred is not a penalty which will not be enforced in another state, since the law simply withdraws the protection accorded and leaves him to the

of the statute for the partners to allow a judgment to be taken or an attachment to be obtained against the partnership by default,[13] nor to make a general assignment for the benefit of creditors without preferences,[14] nor to make a sale of firm property to a *bona fide* purchaser.[15]

7. Application of Assets to Liabilities. From the principles stated in the last preceding section it follows that, until a receiver is appointed of an insolvent limited partnership, its property may be levied upon by a firm creditor under a valid judgment.[16] But an execution in favor of an individual creditor of a special partner cannot be levied upon the firm property by the sheriff's taking such property from the possession of the general partners, nor can the sheriff by a sale under such an execution, convey title or give possession to such property, or deprive the special partner of his interest in the firm.[17] A creditor of a general partner, although he be the special partner, is subordinated to the creditors of the firm, as in an ordinary partnership.[18] Whether a special partner can share in the firm assets as a general creditor depends upon the statutory provisions in the particular jurisdiction.[19] A creditor who secures a preference which is avoided as a violation of the statute does not lose his right thereby to share *pro rata* with the other creditors of the firm.[20]

E. Actions By or Against Firms or Partners — 1. In General. When a limited partnership has been duly organized, all suits by or against it respecting its business while it is a going concern, as well as those common-law actions instituted during the winding up of its affairs, are to be brought and conducted by and against the general partners, in the same manner as if there were no special partners.[21] But if the partnership has not been validly organized, or if the action involves a case where the special partner has become liable as a general partner, all the partners who are liable as general partners may and should join or be joined as parties plaintiff or defendant,[22] unless the facts establish a case of

liability incurred. Casola *v.* Kugelman, 33 N. Y. App. Div. 428, 54 N. Y. Suppl. 89.

13. Hall *v.* Glessner, 100 Mo. 155, 13 S. W. 349; Van Alstyne *v.* Cook, 25 N. Y. 489; Greene *v.* Breck, 32 Barb. (N. Y.) 73; Walkenshaw *v.* Perzel, 4 Rob. (N. Y.) 426. These New York cases virtually overrule Jackson *v.* Sheldon, 9 Abb. Pr. (N. Y.) 27, holding that it is not in the power of a portion of the creditors to obtain by any act or omission on the part of the partners a priority over other creditors.

14. Schwartz *v.* Soutter, 103 N. Y. 683, 9 N. E. 448; Robinson *v.* McIntosh, 3 E. D. Smith (N. Y.) 221; Darrow *v.* Bruff, 36 How. Pr. (N. Y.) 479; Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879, applying Tex. Rev. St. arts. 3444, 3455.

15. State Bank *v.* Blanchard, 90 Va. 22, 17 S. E. 742, applying Code, § 2874.

16. Van Alstyne *v.* Cook, 25 N. Y. 489.

17. Harris *v.* Murray, 28 N. Y. 574, 86 Am. Dec. 268.

18. Sherwood *v.* His Creditors, 42 La. Ann. 103, 7 So. 79; Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479.

19. See *supra*, X, C. In the following cases he was not allowed to share in competition with firm creditors even for loans made by him to the firm: Jaffe *v.* Krum, 88 Mo. 669 (applying Rev. St. § 3409); Hayes *v.* Bement, 3 Sandf. (N. Y.) 394; Coffin's Appeal, 106 Pa. St. 280 (applying Act, March 21, 1836, § 23); Dunning's Appeal, 44 Pa. St. 150; Purdy *v.* Lacock, 6 Pa. St. 490 (such a claim is valid as against an individual creditor of a general partner); Brooke *v.* Alexander, 3 Wkly. Notes Cas. (Pa.) 304. He was allowed to share in the following cases: Clapp *v.* Lacey, 35 Conn. 463; Rayne *v.* Terrell, 33 La. Ann. 812; Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Hayes *v.* Heyer, 35 N. Y. 326.

20. Green *v.* Hood, 42 Ill. App. 652.

21. *Maryland.*— Baltimore City Safe Deposit, etc., Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819, applying Pub. Gen. Laws, art. 73, § 19.

Massachusetts.— Lawrence *v.* Batcheller, 131 Mass. 504.

New Jersey.— Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659.

New York.— Richter *v.* Poppenhausen, 42 N. Y. 373, 9 Abb. Pr. N. S. 263; Artisans' Bank *v.* Treadwell, 34 Barb. 553; Schulten *v.* Lord, 4 E. D. Smith 206.

Pennsylvania.—Hunt *v.* Joy, 1 Wkly. Notes Cas. 219.

West Virginia.—Wetherill *v.* McCloskey, 28 W. Va. 195.

See 38 Cent. Dig. tit. "Partnership," §§ 853, 854.

A partner in commendam is not a real partner as to third persons, and need not be joined in a suit against the firm in liquidation. *In re* Dunn, 115 La. 1084, 40 So. 466.

22. Baltimore City Safe Deposit, etc., Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819; Sarmiento *v.* The Catherine C, 110 Mich. 120, 67 N. W. 1085; Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 N. Y. App. Div. 327,

estoppel.[23] Although a creditor has obtained a judgment at law against the general partners, he may maintain an action against the special partner upon discovering the facts which render the latter liable as a general partner.[24] Actions brought to wind up the affairs of the firm and for a receiver may properly include the special partner or his personal representative.[25] An action may be brought against the special partner alone to enforce his individual liability,[26] as one may be brought by him to redress an injury to him or his property by a firm creditor, or a creditor of the general partner.[27]

2. INJUNCTION AND RECEIVER. An injunction may be obtained by or against a limited partnership, when it would be obtainable against a general partnership.[28] It may also be obtained and a receiver appointed, as soon as the partnership is insolvent, upon the application of any firm creditor,[29] although the creditor would not be entitled to such relief, if the partnership were a general one.[30]

3. PLEADINGS. The complaint in an action against all the members of a limited partnership need not allege an attempt and failure to form such partnership, but it may treat them all as general partners; and under such complaint plaintiff may show upon the trial that all are liable as general partners.[31] If the complaint is against a limited partnership as such it properly names as defendants the general partners only.[32] When the special partner is sued as a general partner, and bases his defense upon the valid formation and conduct of a limited partnership, he should plead compliance with the statutory requirements.[33] In case such answer is interposed, it would seem to be the safer course for plaintiff to reply, pointing out the specific violations of the statute on which he relies to charge the special partner as a general partner.[34] The debtor of a limited partnership is not entitled to counter-claim an individual indebtedness of the general partner to him.[35]

4. TRIAL AND JUDGMENT. A plaintiff who brings an action upon a partnership obligation is bound to establish the existence of a partnership.[36] If he alleges a

44 N. Y. Suppl. 617 (*affirming* 18 Misc. 554, 41 N. Y. Suppl. 991)].

23. See *supra*, X, D, 4.

24. Durant *v.* Abendroth, 97 N. Y. 132; McArthur *v.* Chase, 13 Gratt. (Va.) 683.

25. Greene *v.* Breck, 32 Barb. (N. Y.) 72 [*reversing* 10 Abb. Pr. 42]; Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y.) 233.

26. Robinson *v.* McIntosh, 3 E. D. Smith (N. Y.) 221, to compel special partner to pay in the amount of his capital.

27. Spalding *v.* Black, 22 Kan. 55, for trespass to his property by a firm creditor of the general partner.

28. Blaylock's Appeal, 73 Pa. St. 146 (injunction obtained by the general partners); American Box Mach. Co. *v.* Crosman, 61 Fed. 888, 10 C. C. A. 146 [*modifying* 57 Fed. 1021]. See *supra*, VI, D, 5; IX, D, 7, b.

29. Batchelder *v.* Altheimer, 10 Mo. App. 181; Whitewright *v.* Stimpson, 2 Barb. (N. Y.) 379; Whitcomb *v.* Fowle, 10 Daly (N. Y.) 23, 7 Abb. N. Cas. 295, 56 How. Pr. 365; Jackson *v.* Sheldon, 9 Abb. Pr. (N. Y.) 127; Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y.) 233. But an injunction and the appointment of a receiver will not be granted, when defendants deny that plaintiff is a creditor. La Chaise *v.* Lord, 1 Abb. Pr. (N. Y.) 213, 10 How. Pr. 461.

30. Gray *v.* Levy, 75 Hun (N. Y.) 96, 26 N. Y. Suppl. 861; Hardt *v.* Levy, 72 Hun (N. Y.) 225, 25 N. Y. Suppl. 248.

31. Pierce *v.* Bryant, 5 Allen (Mass.) 91 (nor need he allege that he has sustained any special loss by reason of the special partner's failure to comply with the statute); Sharp *v.* Hutchinson, 100 N. Y. 533, 3 N. E. 500 [*affirming* 49 N. Y. Super. Ct. 50]; Continental Nat. Bank *v.* Strauss, 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188; Loomis *v.* Hoyt, 52 N. Y. Super. Ct. 287 [*affirmed* in 137 N. Y. 148, 32 N. E. 1066].

In an action on a note given by a limited partnership association, it is not necessary to aver in plaintiff's statement that defendants did not comply with the act of June 2, 1874, in order to hold them liable as general partners for non-compliance with that act. Merchants, etc., Bank *v.* Gardner, 31 Pa. Super. Ct. 143.

32. Howland *v.* Bethune, 13 U. C. Q. B. 270.

33. Henkel *v.* Heyman, 91 Ill. 96 (answer held demurrable); Blumenthal *v.* Whitaker, 170 Pa. St. 309, 33 Atl. 103; Andrews *v.* Schott, 10 Pa. St. 47; Conrow *v.* Gravenstine, 1 Pa. Cas. 480, 5 Atl. 43; Siegel *v.* Wood, 3 Pa. Dist. 463; Bergner, etc., Brewing Co. *v.* Cobb, 12 Pa. Co. Ct. 460; Bausman *v.* Rogers, 2 Wkly. Notes Cas. (Pa.) 428; Abendroth *v.* Van Dolsen, 131 U. S. 66, 9 S. Ct. 619, 33 L. ed. 57; Rawitzer *v.* Wyatt, 42 Fed. 287.

34. Williams *v.* Kilpatrick, 21 Abb. N. Cas. (N. Y.) 61.

35. Rosenberg *v.* Block, 50 N. Y. Super. Ct. 357 [*reversed* on other grounds in 102 N. Y. 255, 6 N. E. 580]; Taylor *v.* Rasch, 23 Fed. Cas. No. 13,800, 1 Flipp. 385, 11 Nat. Bankr. Reg. 91.

36. Prince *v.* Lamb, 128 Cal. 120, 60 Pac.

limited partnership, and proves that the special partner is liable as a general partner, he is entitled to recover nevertheless.[37] But if he alleges that a partnership which was organized as a limited one has become a general partnership, or that the special partner has become liable as a general partner, the burden is upon him to establish the truth of such allegation,[38] for the affidavit and other papers required by statute are *prima facie* evidence of the due formation of a limited partnership.[39] The books of a limited partnership are admissible against the special partner as well as against the general partner.[40] When the facts are undisputed, and reasonable men cannot differ as to the proper inferences therefrom, the only questions upon the trial are for the court.[41] Where the facts are in dispute, or the inferences from the evidence are uncertain, a question is presented for the jury.[42] A judgment against the special partner is not authorized in an action against a limited partnership upon a partnership obligation.[43] In an action, however, which charges a special partner with liability as a general partner, such a judgment is proper;[44] and when a court of equity has acquired jurisdiction in an action to wind up the affairs of a limited partnership it may render such personal decrees as the rights and liabilities of the parties require.[45]

F. Dissolution, Settlement, and Accounting — 1. Causes and Manner of Dissolution. A limited partnership may be dissolved for the causes which justify a dissolution of a general partnership;[46] and it is dissolved by operation of law whenever a general partnership would be thus dissolved,[47] unless the statute provides to the contrary.[48] When it is dissolved by the expiration of the term for which it was organized, notice of the dissolution need not be given, as in the case of a general partnership, as the recorded papers are notice to all the world of the

689; Fox *v.* Graham, How. N. P. (Mich.) 90.

37. Rosenberg *v.* Block, 50 N. Y. Super. Ct. 357 [*reversed* on other grounds in 102 N. Y. 255, 6 N. E. 580].

38. Continental Nat. Bank *v.* Strauss, 137 N. Y. 553, 32 N. E. 1066 [*affirming* 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188]; Whilldin *v.* Bullock, 4 Wkly. Notes Cas. (Pa.) 234; Booth *v.* Hunt, 69 Fed. 220, 16 C. C. A. 214.

39. Van Ingen *v.* Whitman, 62 N. Y. 513; Hampden Bank *v.* Morgan, 11 Fed. Cas. No. 6,008.

These papers are not admissible as rebutting evidence after plaintiff has made out a *prima facie* case against the special partner. Madison County Bank *v.* Gould, 5 Hill (N. Y.) 309.

40. Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 N. Y. App. Div. 327, 44 N. Y. Suppl. 617]; Jersey City First Nat. Bank *v.* Huber, 75 Hun (N. Y.) 138, 26 N. Y. Suppl. 963; Chick *v.* Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

But the books of a former partnership of which the present special partner was not a member are not admissible against him. Kohler *v.* Lindenmeyr, 129 N. Y. 498, 29 N. E. 957 [*reversing* 58 Hun 513, 12 N. Y. Suppl. 738]; Jersey City First Nat. Bank *v.* Lindenmeyr, 19 N. Y. Suppl. 269.

41. Levy *v.* Levy, 6 Abb. Pr. (N. Y.) 89 (evidence of insolvency sufficient to authorize an injunction and the appointment of a receiver); McKnight *v.* Ratcliff, 44 Pa. St. 156 (not sufficient proof to charge the special partner as a general partner).

42. Manhattan Co. *v.* Phillips, 109 N. Y. 383, 17 N. E. 129 [*reversing* 53 N. Y. Super. Ct. 84]; Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, 15 Abb. N. Cas. 318; Chambers *v.* Webster, 69 N. Y. App. Div. 546, 75 N. Y. Suppl. 31; Metropolitan Bank *v.* Palmer, 9 N. Y. Suppl. 239; Hanover Nat. Bank *v.* Sirrett, 15 Abb. N. Cas. (N. Y.) 334 note; Bowen *v.* Argall, 24 Wend. (N. Y.) 496.

43. Burt *v.* Laplace, 114 La. 489, 38 So. 429.

44. Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 N. Y. App. Div. 327, 44 N. Y. Suppl. 617 (*affirming* 18 Misc. 554, 41 N. Y. Suppl. 991)].

45. McArthur *v.* Chase, 13 Gratt. (Va.) 683.

46. Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066 (misconduct of general partner); Tournade *v.* Methfessel, 3 Hun (N. Y.) 144, 5 Thomps. & C. 288 (for fraud practised on the special partner by the general partner); Outcalt *v.* Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. (Reprint) 207 (abandonment of the business by a general partner); Andrews *v.* Schott, 10 Pa. St. 47 (attempted entrance of third party into firm); Patterson *v.* Holland, 7 Grant Ch. (U. C.) 1 (for defect in organization). See *supra*, IX, A, 6.

47. Jacquin *v.* Buisson, 11 How. Pr. (N. Y.) 385; Matter of Downing, 8 N. Y. Leg. Obs. (N. Y.) 317, 1 Bradf. Surr. 321 (death of the special partner); Wilkins *v.* Davis, 29 Fed. Cas. No. 17,664, 2 Lowell 511, 15 Nat. Bankr. Reg. 60 (bankruptcy of a partner). See *supra*, IX, A, 5.

48. Partn. Law, N. Y. Laws (1897), c. 420, § 41, is an example, modifying, as it does, the New York cases cited in the preceding note.

term of the partnership.[49] Dissolution of a limited partnership by the acts of the parties is specifically regulated by the statutes. Acts of alteration or of prohibited interference by the special partner operate to dissolve the firm as a limited partnership, and render all the members liable as general partners.[50] In case of dissolution by mutual consent, the statute usually provides that this shall not take place until a notice of it shall have been filed and recorded in the office where the original papers are recorded, and published in certain papers for a specified period.[51]

2. Rights, Powers, and Liabilities of Partners. When a limited partnership has been duly dissolved, the general partners have the right and power to wind up its affairs;[52] but they have no implied authority to bind the special partner by new obligations.[53] If the business is carried on after the parties have effected a dissolution as between themselves, but before it has been perfected in accordance with the statute, the special partner is liable for all obligations incurred in the business during this period.[54] Whether a firm creditor may sue the estate of a deceased special partner, where he would be liable to such suit if he were living, without exhausting his remedies against the surviving partners, depends upon the jurisdiction.[55] A special partner does not incur the liability of a general partner by instituting a suit to wind up the affairs of the firm, and becoming receiver thereof, because of a general partner's misconduct.[56]

3. Distribution and Settlement Between Partners. The rules upon this topic are the same as in the case of general partnerships,[57] except as they are modified by statutory provisions.[58]

4. Actions For Dissolution and Accounting. These are governed by substantially the same rules as those which we have considered in dealing with ordinary partnerships.[59] In case the partnership is insolvent, a general creditor, as we have seen, may institute an action for dissolution and accounting.[60]

PARTNERSHIP DEBT. A debt which is joint, and not joint and several.[1] (See Debt; and, generally, Partnership.)

49. Marshall *v.* Lambeth, 7 Rob. (La.) 471 (the presumption being that the partnership has expired with such period); Haggerty *v.* Taylor, 10 Paige (N. Y.) 261.

50. See *supra*, X, D, 2, 5.

51. Emery *v.* Kalamazoo, etc., Constr. Co., 132 Mich. 560, 94 N. W. 19 (applying Comp. Laws (1897), § 6087, regulating the manner in which the assets of a limited partnership association shall be disposed of); Beers *v.* Reynolds, 11 N. Y. 97 [*affirming* 12 Barb. 288]; Fanshawe *v.* Lane, 16 Abb. Pr. (N. Y.) 71; Bulkley *v.* Marks, 15 Abb. Pr. (N. Y.) 454, 24 How. Pr. 455; *In re* King, 14 Fed. Cas. No. 7,779, 5 Ben. 453, 7 Nat. Bankr. Reg. 279.

52. Richter *v.* Poppenhausen, 42 N. Y. 373, 9 Abb. Pr. N. S. 263; Singer *v.* Kelly, 44 Pa. St. 145 (it is not the duty of special partner to care for or collect the assets of the firm); Farmers' Bank *v.* Ritter, 22 Wkly. Notes Cas. (Pa.) 128.

53. Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Marshall *v.* Lambeth, 7 Rob. (La.) 471; Waters *v.* Harris, 60 N. Y. Super. Ct. 192, 17 N. Y. Suppl. 370, 28 Abb. N. Cas. 89; Pusey *v.* Dusenbury, 75 Pa. St. 437.

54. Beers *v.* Reynolds, 11 N. Y. 97 [*affirming* 12 Barb. 288]; *In re* Terry, 23 Fed. Cas. No. 13,836, 5 Biss. 110.

55. De Lizardi *v.* Gossett, 1 La. Ann. 138; Richter *v.* Poppenhausen, 42 N. Y. 373, 9 Abb. Pr. N. S. 263. See *supra*, VIII, L.

56. Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066 [*affirming* 60 N. Y. Super. Ct. 151, 17 N. Y. Suppl. 188].

57. Tillinghast *v.* Walton, 4 N. Y. St. 35; Hellman *v.* Mendel, 6 Ohio Dec. (Reprint) 829, 8 Am. L. Rec. 360 (special partner not to be allowed for services); Sturgeon *v.* Apollo Oil, etc., Co., 203 Pa. St. 369, 53 Atl. 189 [*affirming* 31 Pittsb. Leg. J. N. S. 197]. See *supra*, IX, C.

58. Emery *v.* Kalamazoo, etc., Constr. Co., 132 Mich. 560, 94 N. W. 19. In this case it is held that a limited partnership association in Michigan may not wind up its affairs by exchanging its property for stock of a corporation and compel the non-assenting members to take their *pro rata* share of such stock in lieu of their share of the partnership assets.

59. See *supra*, IX, D. And see Latting *v.* Fassman, 29 La. Ann. 280; De Lizardi *v.* Gossett, 1 La. Ann. 138; Walkenshaw *v.* Perzel, 4 Rob. (N. Y.) 426, 32 How. Pr. 233; Hogg *v.* Ellis, 8 How. Pr. (N. Y.) 473; Smith *v.* Ervin, 168 Pa. St. 271, 31 Atl. 1067; Stringfellow *v.* Wise, (Va. 1897) 27 S. E. 432.

60. See *supra*, X, E, 1, 2.

1. Whitfield *v.* Hovey, 30 S. C. 117, 120, 8 S. E. 840.

PART-OWNERS. A term of common use in the law to denote a class of persons distinct from partners, who own property jointly, but in a different manner and by a different tenure.[2] (Part-Owners: In General, see JOINT TENANCY; TENANCY IN COMMON. Of Vessel, see ADMIRALTY; SHIPPING.)

PART PAYMENT. Payment of a part.[3] (Part Payment: In General, see PAYMENTS. Affecting — Amount in Controversy, see APPEAL AND ERROR; COURTS; JUSTICES OF THE PEACE; Operation of Statute of Limitations, see LIMITATIONS OF ACTIONS. Application in Computation of Interest, see INTEREST. Taking Contract Out of Statute of Frauds, see FRAUDS, STATUTE OF.)

PART PERFORMANCE. A term commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced.[4] (Part Performance: Of Bond, see BONDS. Of Contract, see CONTRACTS; SPECIFIC PERFORMANCE. Of Services by Employee, see MASTER AND SERVANT. Of Work Under Contract For Public Improvement, see MUNICIPAL CORPORATIONS. Operation and Effect on Amount and Extent of Lien, see MECHANICS' LIENS. Taking Contract Out of Statute of Frauds, see FRAUDS, STATUTE OF. See also PART PAYMENT.)

PARTRIDGE. A species of game bird.[5] (See, generally, FISH AND GAME.)

PARTS BEYOND SEA. A term said to be analogous to the expression "out of the State";[6] out of the realm of England.[7]

PARTUS EX LEGITIMO THORO NON CERTIUS NOSCIT MATREM QUAM GENETOREM SUUM. A maxim meaning "The offspring of a legitimate bed knows not his mother more certainly than his father."[8]

PARTUS SEQUITUR VENTREM. A maxim meaning "The offspring follows the dam."[9]

PART WITH. To assign, to part with the possession of.[10] (See, generally, ASSIGNMENTS.)

PARTY. In its ordinary sense, one concerned or interested in an affair;[11] a plurality of persons, as a political party; a select company invited to an entertainment; a company made up for a given occasion;[12] a body composed of several individuals, as a body sole and individually, and no more.[13] In military affairs, a detachment or a small number of troops.[14] In politics, a body of men united for promoting, by their joint endeavor, a national interest upon some particular principle in which they are all agreed;[15] a company or number of persons ranged on

2. Breck *v.* Blair, 129 Mass. 127, 128.

3. Young *v.* Perkins, 29 Minn. 173, 174, 12 N. W. 515; Brisbin *v.* Farmer, 16 Minn. 215. See also Moffitt *v.* Carr, 48 Nebr. 403, 407, 67 N. W. 150, 58 Am. St. Rep. 696. Construing these words as used in Code Civ. Proc. § 22.

"Part payment of rent of certain pasture fields" see Jennings *v.* Colorado Springs First Nat. Bank, 13 Colo. 417, 420, 22 Pac. 777, 16 Am. St. Rep. 210.

4. Veum *v.* Sheeran, 95 Minn. 315, 319, 104 N. W. 135; Brown *v.* Hogg, 35 Minn. 373, 375, 29 N. W. 135; Borrow *v.* Borrow, 34 Wash. 684, 690, 76 Pac. 305.

5. Gunn *v.* State, 89 Ga. 341, 343, 15 S. E. 458.

6. Campbell *v.* Rankins, 11 Me. 103, 106.

7. Battersby *v.* Kirk, 2 Bing. N. Cas. 584, 602, 1 Hodges 451, 5 L. J. C. P. 166, 3 Scott 11, 29 E. C. L. 672.

8. Morgan Leg. Max. [*citing* Fortescue 42].

9. Morgan Leg. Max. [*citing* 2 Blackstone Comm. 390].

Applied in: Andrews *v.* Cox, 42 Ark. 473, 477, 48 Am. Rep. 68; Phipps *v.* Martin, 33 Ark. 207, 211; Hull *v.* Hull, 48 Conn. 250, 256, 40 Am. Rep. 165; Bryant *v.* Pennell, 61 Me. 108, 109, 14 Am. Rep. 550 (brief); Ontario *v.* Dominion of Canada, 25 Can. Sup. Ct. 434, 454.

10. Doe *v.* Hogg, 1 C. & P. 160, 12 E. C. L. 102, 4 D. & R. 226, 16 E. C. L. 196, 2 L. J. K. B. O. S. 121. See also Doe *v.* Glover, 1 C. B. 448, 459, 50 E. C. L. 448.

11. Webster Dict. [*quoted* in Speer *v.* Blairsville Borough School Directors, 50 Pa. St. 150, 176].

"Party of the first part" see Mogk *v.* Peterson, 75 Cal. 496, 499, 17 Pac. 446; Huyler *v.* Atwood, 26 N. J. Eq. 504, 507; Fairchild *v.* Lynch, 42 N. Y. Super. Ct. 265, 278.

12. Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405, 408.

13. People *v.* Croton Aqueduct Bd., 5 Abb. Pr. (N. Y.) 316, 319, where it is said that it everywhere implies unity, but is properly used to signify a unit composed of many parts as an individual or one incapable of division, actual or speculative, if such a one can be.

14. Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405, 408.

15. Burke [*quoted* in *In re* McKinley-Citizens Party, 6 Pa. Dist. 109, 110].

one side or united in opinion or design in opposition to others in the community;[16] a part or portion of a greater number of persons ranged on one side or united in opinion or design in opposition to others in the community;[17] a number of persons united in opinion, and organized in the manner usual to the then existing political parties.[18] (Party: Aggrieved, see APPEAL AND ERROR. Cast, see PARTY CAST. Jury, see JURIES. Nomination, see PARTY NOMINATION. Structure, see PARTY STRUCTURE. To Action, see PARTIES. To Be Charged, see FRAUDS, STATUTE OF. See also generally, ELECTIONS.)

PARTY AGGRIEVED. See APPEAL AND ERROR.

PARTY CAST. The party defeated in a lawsuit.[19] (See CAST.)

PARTY JURY. See ALIENS; JURY.

PARTY NOMINATION. A nomination made by large masses of people, organized as parties, holding caucuses and conventions.[20] (See, generally, ELECTIONS.)

PARTY-RATE TICKET. A name given to designate railroad tickets for the transportation of ten or more persons at a reduced rate;[21] a ticket for the transportation of a party of persons from a place in one state or territory to a place situate in another state or territory at a rate less than that charged to a single individual for a like transportation on the same trip.[22] (See COMMUTATION TICKET; EXCURSION TICKET; and, generally, CARRIERS.)

PARTY STRUCTURE. A term which has been held to include party-walls, and also partitions, arches, floors, and other structures separating buildings, stories, or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances.[23] (See, generally, PARTY-WALLS.)

PARTY TO BE CHARGED. See FRAUDS, STATUTE OF.

16. Century Dict. [*quoted* in Schafer *v.* Whipple, 25 Colo. 400, 403, 55 Pac. 180; *In re* McKinley-Citizens Party, 6 Pa. Dist. 109, 110].

17. Webster Dict. [*quoted* in *In re* McKinley-Citizens Party, 6 Pa. Dist. 109, 110]. See also Ogg *v.* Glover, 72 Kan. 247, 252, 83 Pac. 1039.

18. State *v.* Metcalf, 18 S. D. 393, 398, 100 N. W. 923, 67 L. R. A. 331.

Similar definitions are: "A voluntary association of voters who are desirous of promoting a common political end, or carrying out a certain line of public policy." Schafer *v.* Whipple, 25 Colo. 400, 403, 55 Pac. 180.

"A number of persons united in opinion or action, as distinguished from or opposite to the rest of a community or association; especially one of the parts into which a people is divided on questions of public policy." Webster Int. Dict. [*quoted* in Davidson *v.* Hanson, 87 Minn. 211, 218, 91 N. W. 1124, 92 N. W. 93].

19. See Webster Int. Dict. See also Peace *v.* Person, 5 N. C. 188, 189.

20. Matter of Smith, 41 Misc. (N. Y.) 501, 85 N. Y. Suppl. 14.

21. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 278, 12 S. Ct. 844, 36 L. ed 699, where the court said that they are issued in the form of one ticket for all the persons in the party to be so transported.

22. Raleigh, etc., R. Co. *v.* Swanson, 102 Ga. 754, 759, 28 S. E. 601, 39 L. R. A. 275.

23. Wheeler *v.* Gray, 4 C. B. N. S. 584, 595, 27 L. J. C. P. 267, 6 Wkly. Rep. 676, 93 E. C. L. 584.

PARTY-WALLS

By Frank W. Jones*

I. NATURE OF PROPERTY OR RIGHT IN GENERAL, 771
A. *Definition and Nature*, 771
B. *Structures Constituting*, 773
C. *Statutory Provisions in General*, 775
II. CREATION AND EXISTENCE OF RIGHT, 775
A. *In General*, 775
B. *Agreements of Adjoining Owners*, 776
1. *In General*, 776
2. *Breach or Revocation of Agreement*, 776
C. *Use or Acquiescence in Use*, 777
D. *Prescription*, 777
E. *Sale or Conveyance by Owner of Adjoining Lots*, 778
F. *Statutory Provisions*, 779
III. TERMINATION OF RIGHT, 779
A. *Duration of Easement*, 779
B. *Destruction or Decay of Wall*, 779
IV. RIGHTS, DUTIES, AND LIABILITIES OF ADJOINING OWNERS, 780
A. *With Respect to Building and Construction*, 780
1. *In General*, 780
2. *Manner of Construction*, 780
a. *In General*, 780
b. *Statutory and Municipal Provisions*, 780
3. *Right to Use Adjoining Land*, 781
a. *In General*, 781
b. *Remedy For Encroachment*, 781
B. *With Respect to Destruction, Rebuilding, Additions, and Alterations*, 781
1. *For Destruction and Rebuilding*, 781
a. *In General*, 781
b. *Dangerous or Insufficient Wall*, 782
(I) *In General*, 782
(II) *Upon Due Notice to Adjoining Owner*, 782
(III) *When Wall Condemned*, 783
c. *Wall Accidentally Destroyed*, 783
2. *Additions and Alterations*, 783
a. *In General*, 783
b. *Construction of Contracts Governing*, 783
3. *Injuries Occasioned*, 784
a. *In General*, 784
b. *Injunction*, 784
C. *With Respect to Use and Enjoyment*, 784
1. *In General*, 784
2. *Construction of Contracts Governing*, 785
3. *Flues in Wall*, 785
4. *Windows and Other Openings*, 785

* Author of "Conversion," 9 Cyc. 822; "Dead Bodies," 13 Cyc. 266; "Drains," 14 Cyc. 1018; and joint author of "Champerty and Maintenance," 6 Cyc. 847; "Death," 13 Cyc. 290; "Gaming," 20 Cyc. 873; "Gifts," 20 Cyc. 1189.

5. *Land in Front of Wall*, 787
D. *Contribution and Compensation*, 787
1. *For Cost of Erection and Use*, 787
a. *In General*, 787
b. *Use of Wall as Fixing Liability*, 788
(I) *In General*, 788
(II) *What Constitutes Use*, 789
(III) *Injunction For Non-Payment*, 789
c. *Waiver of Right to Arbitration*, 789
2. *For Costs of Repairs, Alterations, Etc.*, 790
E. *Injuries Incident to Construction, Alteration, or Removal*, 790
1. *In General*, 790
2. *Tearing Down or Repairing*, 790
a. *In General*, 790
b. *Failure to Tear Down or Repair*, 791

V. RIGHTS, DUTIES, AND LIABILITIES OF PURCHASER, 791
A. *Independent of Covenant or Agreement*, 791
1. *In General*, 791
2. *Right to Compensation*, 791
3. *Liability For Cost of Rebuilding*, 792
4. *Rights and Liabilities Between Grantor and Grantee*, 792
a. *In General*, 792
b. *Recovery For Breach of Covenant Against Encumbrances*, 792
B. *Covenants and Agreements as to Party-Walls as Affecting Purchasers*, 792
1. *Construction and Operation in General*, 792
2. *Covenants and Agreements Personal or Running With the Land*, 793
3. *Notice of Party-Wall Agreement*, 795
a. *Operation and Effect*, 795
b. *Record as Notice*, 795

VI. ACTIONS, 796
A. *Nature and Form*, 796
B. *Defenses*, 796
C. *Pleading and Parties*, 797
D. *Evidence*, 797
E. *Trial*, 798
1. *In General*, 798
2. *Questions For Jury*, 799

CROSS-REFERENCES

For Matters Relating to:
Adjoining Landowners Generally, see ADJOINING LANDOWNERS.
Building Regulations Generally, see MUNICIPAL CORPORATIONS.
Easement Generally, see EASEMENTS.
Mechanic's Lien For Building Party-Wall, see MECHANICS' LIENS.
Partition Fence, see FENCES.
Tenants in Common, see TENANCY IN COMMON.

I. NATURE OF PROPERTY OR RIGHT IN GENERAL.

A. Definition and Nature. The term "party-wall" may be used in four different senses: (1) In the ordinary acceptation and primary meaning of the

term, it is a wall of which two adjoining owners are tenants in common.[1] (2) A wall divided longitudinally into two strips, one belonging to each of the neighboring owners.[2] (3) A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements.[3] (4) A wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety.[4] In the United States the general rule is that the owners of a party-wall standing in part upon the land of each are not tenants in common of the wall, but each owns in severalty so much thereof as stands upon his lot, subject to the easement of the other owner for its support, and the equal use thereof as an exterior wall of his building.[5]

1. Watson *v.* Gray, 14 Ch. D. 192, 194, 44 J. P. 537, 49 L. J. Ch. 243, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 438; Standard Bank *v.* Stokes, 9 Ch. D. 68, 47 L. J. Ch. 554, 38 L. T. Rep. N. S. 672, 26 Wkly. Rep. 492; Cubitt *v.* Porter, 8 B. & C. 257, 265, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133; Wiltshire *v.* Sidford, 1 M. & R. 404, 17 E. C. L. 675. See other definitions given *infra*, note 5.

"Party-wall" may mean a wall of which the adjoining owners are tenants in common. Montgomery *v.* Masonic Hall, 70 Ga. 38; Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 158, 106 N. W. 357; Hunt *v.* Amhruster, 17 N. J. Eq. 208. But for general American rule see *infra*, text and note 5.

Tenant in common generally see TENANCY IN COMMON.

2. Matts *v.* Hawkins, 5 Taunt. 20, 14 Rev. Rep. 695, 1 E. C. L. 24 [*cited* with approval in Watson *v.* Gray, 14 Ch. D. 192, 44 J. P. 537, 49 L. J. Ch. 243, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 438]. See other definitions given *infra*, note 5. See also general American rule *infra*, text and note 5.

Not tenants in common.— If two persons have a party-wall, one half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall or the land on which it stands. Matts *v.* Hawkins, 5 Taunt. 20, 14 Rev. Rep. 695, 1 E. C. L. 24 [*quoted* in James *v.* Clement, 13 Ont. 115, 122]. See also *infra*, text and note 5.

The term "wall in common" may mean a wall possessed in severalty by adjoining owners. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

3. Spero *v.* Shultz, 14 N. Y. App. Div. 423, 425, 429, 43 N. Y. Suppl. 1016 [*affirmed* in 160 N. Y. 660, 55 N. E. 1101]; Watson *v.* Gray, 14 Ch. D. 192, 195, 44 J. P. 537, 49 L. J. Ch. 243, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 438, so used in some of the English building acts. See also *infra*, I, B; and other definitions given *infra*, note 5.

4. Watson *v.* Gray, 14 Ch. D. 192, 195, 44 J. P. 537, 49 L. J. Ch. 243, 42 L. T. Rep. N. S. 294, 28 Wkly. Rep. 438. See other definitions given *infra*, note 5.

5. *Alabama.*— Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298.

Illinois.— Springer *v.* Darlington, 207 Ill. 238, 69 N. E. 946; Gibson *v.* Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; Ingals *v.* Plamondon, 75 Ill. 118, holding likewise that land covered by a party-wall remains the several property of the owner of each half, but the title of each one is qualified by the easement to which the other is entitled of supporting his building by means of the half of the wall belonging to his neighbor.

Iowa.— See Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

Kentucky.— Fonda *v.* Parr, 10 Ky. L. Rep. 445.

Massachusetts.— See Normille *v.* Gill, 159 Mass. 427, 24 N. E. 543, 38 Am. St. Rep. 441.

Minnesota.— Johnson *v.* Minnesota Tribune Co., 91 Minn. 476, 98 N. W. 321.

Mississippi.— Hoffman *v.* Kuhn, 57 Miss. 746, 34 Am. Rep. 491, holding that the owners of adjoining buildings, connected by a party-wall resting partly on the soil of each, are neither joint owners nor tenants in common of the wall. Each is possessed in severalty of his own soil up to the dividing line, and not of that portion of the wall which rests upon it, and the soil of each, with the wall belonging to him, is burdened with the easement and servitude of support in favor of the other.

Nebraska.— Shiverick *v.* R. J. Gunning Co., 58 Nebr. 29, 78 N. W. 460.

New York.— Sherred *v.* Cisco, 4 Sandf. 480.

Wisconsin.— Andrae *v.* Haseltine, 58 Wis. 395, 17 N. W. 18, 46 Am. Rep. 635.

See 38 Cent. Dig. tit. "Party Walls," § 1.

Compare cases giving other definitions of the term cited *infra*, this note.

Contra.— Montgomery *v.* Masonic Hall, 70 Ga. 38, set out *supra*, note 1.

Other definitions are: "A wall built partly on the land of one and partly on the land of another, for the common benefit of both, in supporting timbers, used in the construction of contiguous buildings." Brown *v.* Werner, 40 Md. 15, 19 [*quoted* in Coggins *v.* Carey, (Md. 1907) 66 Atl. 673, 676, 10 L. R. A. N. S. 1191].

"A wall built upon the dividing line between two adjoining properties, usually having half its thickness on each property." Scott *v.* Baird, 145 Mich. 116, 126, 108 N. W. 737.

"A wall constructed upon the line of lands of two adjoining proprietors, and partly upon

B. Structures Constituting. It is not necessary that a party-wall should stand one half upon each of the adjoining parcels of land; it may stand one half upon each, or wholly upon one, and may or may not be the common property of each, or it may be that the wall and the land upon which it stands are held in common." Hunt *v.* Ambruster, 17 N. J. Eq. 208, 213.

"A wall erected on the boundary between adjacent land, one part being on the property of the one and part on the other, and which is or can be used for the mutual support of adjacent buildings." Musgrave *v.* Sherwood, 54 How. Pr. (N. Y.) 338, 339.

"A wall erected on the line between two adjoining estates belonging to different persons, for the use of both estates." 2 Bouvier Inst. 1615 [*quoted* in Lukens *v.* Lasher, (Pa. 1902) 51 Atl. 887, 889]; 2 Bouvier L. Dict. [*quoted* in Mulligan *v.* Bailie, 11 Pa. Dist. 311, 312].

"A wall erected on the line between two adjoining pieces of land, belonging to different persons, for the use of both properties." 2 Washburn Real Prop. (6th ed.) § 1300 [*quoted* in Scott *v.* Baird, 145 Mich. 116, 126, 108 N. W. 737].

"A dividing wall between two buildings . . . owned by different parties, the foundations of which rest partly upon the ground of each," it being immaterial that the foundation is not equally laid on the lot of each party, and that the wall itself above the foundation is fully within the lot of one of the adjoining owners. Western Nat. Bank's Appeal, 102 Pa. St. 171, 182.

"A dividing wall between two houses to be used as an exterior wall for each." Ensign *v.* Colt, 75 Conn. 111, 118, 52 Atl. 829, 946.

"A dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses. It is a substitute for a separate wall for each adjacent owner." Bellenot *v.* Laube, 104 Va. 842, 847, 52 S. E. 698. See also Everett *v.* Edwards, 149 Mass. 588, 591, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110.

"A division wall between two connected and mutually supporting buildings, either both actually erected or one only contemplated, of different owners, commonly but not necessarily standing half on the land of each, ordinarily maintained at mutual cost, and always with the right of each owner to insert therein his timbers." Bishop Non-Contr. L. art. 914 [*quoted* in Dunscomb *v.* Randolph, 107 Tenn. 89, 97, 64 S. W. 21, 89 Am. St. Rep. 915].

"One in which there is community of use." Church of Holy Communion *v.* Paterson Extension R. Co., 63 N. J. L. 470, 474, 43 Atl. 696.

"A structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it." Field *v.* Leiter, 118 Ill. 17, 25, 6 N. E. 877.

"Such walls as are built partly on the land of another, for the common benefit of both, in supporting timbers, used in the construction of contiguous buildings." Barry *v.* Edlavitch, 84 Md. 95, 111, 35 Atl. 170, 33 L. R. A. 294 [*quoted* in Coggins *v.* Carey, (Md. 1907) 66 Atl. 673, 10 L. R. A. N. S. 1191].

"Walls between two estates which are used for the common benefit of both." Washburn Real Prop. (5th ed.) 385 [*quoted* in Harber *v.* Evans, 101 Mo. 661, 665, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41]; 2 Washburn Real Prop. (4th ed.) 463 [*quoted* in Glover *v.* Mersman, 4 Mo. App. 90, 93].

A party-wall has also been defined to be a structure for the common benefit and convenience of both tenements which it separates, and either party may use it. Such a wall is a substitute for a separate wall to each adjoining owner, and neither may impair its value to the other. Each adjoining proprietor is the owner in severalty of his part, both of the wall and of the land on which it stands, subject to the gross easement of support, and for other common needs in favor of the other proprietor. Fidelity Lodge No. 50 I. O. O. F. *v.* Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825. See also Everett *v.* Edwards, 149 Mass. 588, 591, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110; Bellenot *v.* Laube, 104 Va. 842, 847, 52 S. E. 698.

A common or party-wall is one which has been built at the common expense, or one which has been built by one party, but in which another has acquired a common right. Every wall or separation between two buildings is presumed to be a common or party-wall. Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 340, 8 Am. Dec. 570.

In New York the term "party-wall," when used in an executory contract for the sale of land, without restrictive terms, and in its general ordinary signification, bas been defined as a dividing wall between two houses, to be used equally for all the purposes of an external wall, by both "parties"; that is, by the respective owners of both houses. Fettretch *v.* Leamy, 9 Bosw. 510.

In England by statute it is defined as being "every wall used or built in order to be used as a separation of any building from any other building, with a view to the same being occupied by different persons." Metr. Bldg. Act (18 & 19 Vict. c. 122, § 3) [*quoted* in Wheeler *v.* Gray, 6 C. B. 606, 609, 5 Jur. N. S. 916, 28 L. J. C. P. 200, 7 Wkly. Rep. 325, 95 E. C. L. 606].

Synonymous with "wall in common."—The examination of statutes and authorities clearly shows that the terms "wall in common" and "party-wall" are used synonymously, and that neither term is of particular value in determining the legislative intent. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

Partition wall distinguished in Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal.

the two proprietors.[6] However, in the absence of a special agreement or controlling custom to the contrary, it is an essential characteristic of a party-wall that it should be capable of substantially similar use by each of the adjoining owners.[7]

111, 116, 37 Pac. 192, where it is said: "I think the phrase 'partition wall,' in the first section, and 'division partition wall,' in the second, must be understood as applied to a wall which is merely a fence. 'Partition wall' is not a phrase which in legal technology is used to designate a wall used by adjoining owners as a party wall. A party wall is always, at least in this state, such by agreement. A division fence is provided for in our code."

A right to a party-wall is a right which an owner of land has to build a division line partly over his line on the land of another. It is therefore a right appurtenant to land, and may properly be called an easement and servitude. Roberts *v.* Bye, 30 Pa. St. 375, 72 Am. Dec. 710.

Wall supported by arch.— Where the party-wall between two estates is built upon an arch, which covers a passageway between them, the owner of one estate has an easement in the other to have his half of the wall supported by that part of the arch which rests upon the other estate. Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 623.

6. *California.*— Nippert *v.* Warneke, 128 Cal. 501, 61 Pac. 96, 270; Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061.

Illinois.— McChesney *v.* Davis, 86 Ill. App. 380, holding likewise that where a party-wall is built under a contract providing that the adjoining owner may use such wall upon payment of one-half the value of the wall the title to the whole wall is appurtenant to the lot of the builder, and passes by every conveyance of it until the severance of the one half by the payment of the purchase-money.

Indiana.— Bloch *v.* Isham, 28 Ind. 37, 92 Am. Dec. 287.

Maryland.— Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96 [*quoted* in Coggins *v.* Carey, (1907) 66 Atl. 673, 676, 10 L. R. A. N. S. 1191], holding that while a party-wall ordinarily means a wall on the land of each adjoining owner, yet a division wall built wholly on the land of one owner may become by agreement a party-wall. But see Moore *v.* Rayner, 58 Md. 411, where the wall was not considered a party-wall.

Missouri.— Glover *v.* Mersman, 4 Mo. App. 90.

New York.— Pearsall *v.* Westcott, 30 N. Y. App. Div. 99, 51 N. Y. Suppl. 663; Fettretch *v.* Leany, 9 Bosw. 510; Nash *v.* Kemp, 49 How. Pr. 522 [*affirmed* in 12 Hun 592]; Brondage *v.* Warner, 2 Hill 145.

Pennsylvania.— Bright *v.* Allan, 203 Pa. St. 394, 53 Atl. 251; Western Bank's Appeal, 102 Pa. St. 171; Gordon *v.* Milne, 10 Phila. 15.

Tennessee.— Dunscomb *v.* Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

See 38 Cent. Dig. tit. "Party Walls," § 2.

But see Schafer *v.* Baker, 16 App. Cas. (D. C.) 213, where the wall was not considered a party-wall.

Creation of right see *infra*, II.

Whether a tenancy in common see *supra*, I, A.

Nature of foundation as test.— The character of a party-wall may be determined in part from its foundation. If a builder starts a wall upon the line and thus takes the land of the adjoining owner, he must carry it up strictly as a party-wall, or at least in such manner as to give the adjoining owner all the benefits of such wall. Milne's Appeal, 81 Pa. St. 54 [*approved* in Western Nat. Bank's Appeal, 102 Pa. St. 171]. But *compare* Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 647, 46 Am. St. Rep. 677, where the wall was not considered to be a party-wall, notwithstanding the builder extended it in some places a few inches over on to the land of the adjoining proprietor, it appearing that by reason of a mistake in the survey this was done without any intention on the part of the builder to consider the wall as a party-wall. The builder of a wall extending beneath the surface upon the adjoining owner's property is bound to maintain it as a party-wall, although the wall above the basement or foundation is wholly within the line of his own lot. Western Nat. Bank's Appeal, 102 Pa. St. 171. *Contra*, Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924, where it was held that the extension of the footing or foundation of a wall erected by a property-owner upon his own property, six inches on to that of his neighbor, did not make the wall a party-wall, where it was not shown to have interfered with the use by the neighbor of his property. See also *infra*, note 14.

When a wall is built on the dividing line between two lots owned by the same person the wall is his, and it is not necessary to consider how much rests on one lot and how much on the other. Mulligan *v.* Baylie, 11 Pa. Dist. 311, 312; Doyle *v.* Ritter, 6 Phila. (Pa.) 577. Such a wall is not a party-wall; and *a fortiori* it is not a party-wall when not built upon any division line whatever. Mulligan *v.* Baylie, *supra*.

7. Kelly *v.* Taylor, 43 La. Ann. 1157, 10 So. 255; Hammann *v.* Jordan, 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 238, 58 N. Y. Super. Ct. 580, 9 N. Y. Suppl. 423. *Compare* Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357, holding likewise that the words "wall in common," as used in the Code, tit. 14, c. 10, relating to party-walls, mean a wall for the common benefit and convenience of both the tenements which it separates. See also *infra*, V, C, 1.

"**The central idea**, the true, comprehensive and undivided meaning of the term 'party-wall' . . . would seem to be that of 'mutuality of benefit.'" Harbor *v.* Evans, 101

A wall may be a party-wall as to a portion of its height, and cease to be a party-wall for the rest of its height.[8]

C. Statutory Provisions in General. In many jurisdictions there are statutes regulating the construction of and the rights of adjacent owners in party-walls.[9] Some of the statutes confer the power upon municipalities to regulate these rights by ordinances.[10] Such statutes are sustainable on the principles of the police power, and that equality is equity, and are governed by the strict letter of the statutes providing therefor.[11]

II. CREATION AND EXISTENCE OF RIGHT.

A. In General. In the legal sense of the term a party-wall can only exist in two ways — by contract[12] or statute.[13] The common law creates no such right.[14]

Mo. 661, 665, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41.

8. Weston *v.* Arnold, L. R. 8 Ch. 1084, 43 L. J. Ch. 123, 22 Wkly. Rep. 284 [*cited* in James *v.* Clement, 13 Ont. 115, 125]; Drury *v.* Army, etc., Auxiliary Co-operative Supply, [1896] 2 Q. B. 271, 60 J. P. 421, 65 L. J. M. C. 169, 74 L. T. Rep. N. S. 621, 44 Wkly. Rep. 560 (holding likewise that section 75 of the London Building Act of 1894 does not make a wall a party-wall above the line where it ceases to divide buildings); Colebeck *v.* Girdless Co., 1 Q. B. D. 234, 45 L. J. Q. B. 225, 34 L. T. Rep. N. S. 350, 24 Wkly. Rep. 577; Knight *v.* Pursell, 11 Ch. D. 412, 48 L. J. Ch. 395, 40 L. T. Rep. N. S. 391, 27 Wkly. Rep. 817; Waddington *v.* Naylor, 60 L. T. Rep. N. S. 480. See also Howell *v.* Goss, 128 Iowa 569, 105 N. W. 61; Bellenot *v.* Laube, 104 Va. 842, 52 S. E. 698. *Compare* Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924.

Horizontal structure.— The expression "party-wall" is, it seems, applicable only to a vertical structure, and not to a floor or other horizontal structures. Reading *v.* Barnard, 1 M. & M. 71, 22 E. C. L. 475.

9. Zugenbuhler *v.* Gilliam, 3 Iowa 391 (statute declaratory of the common law); Jamison *v.* Duncan, 12 La. Ann. 785; Scott *v.* Baird, 145 Mich. 116, 108 N. W. 737; Kraft *v.* Stott, 14 Fed. Cas. No. 7,929, 1 Hayw. & H. 33; Miller *v.* Elliot, 17 Fed. Cas. No. 9,568, 5 Cranch C. C. 543.

Other statutory provisions see *infra*, IV, A, 2, b; and generally *passim*, this article.

Party-wall statutes are of ancient origin and are of much the same tenor and effect. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

10. Nivin *v.* Stevens, 5 Harr. (Del.) 272 (holding, however, that the act of assembly of June 13, 1772, giving to city regulators the power to regulate streets and party-walls, does not confer authority to said regulators to adjudge questions of title between adjoining lot owners); Schmidt *v.* Lewis, 63 N. J. Eq. 565, 52 Atl. 707; Heron *v.* Houston, 217 Pa. St. 1, 66 Atl. 108; Godshall *v.* Mariam, 1 Binn. (Pa.) 352; May *v.* Prendergast, 2 Pa. Dist. 613, 12 Pa. Co. Ct. 220; Rodearmel *v.* Hutchison, 2 Pearson (Pa.) 324; Whitman *v.* Shoemaker, 2 Pearson (Pa.) 320; Hurlburt *v.* Firth, 31 Leg. Int. (Pa.) 140.

11. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357; Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462; Jamison *v.* Duncan, 12 La. Ann. 785, holding that Civ. Code, art. 671, giving the right to the first proprietor of lands in cities who builds to take possession of his neighbor's land for the foundation of his building, is in derogation of the right of property, and hence must be strictly construed.

Police power generally see CONSTITUTIONAL LAW, 8 Cyc. 863; MUNICIPAL CORPORATIONS, 28 Cyc. 692.

12. Agreements between adjoining owners see *infra*, II, B.

13. Statutory provisions see *infra*, II, F.

14. List *v.* Hornbrook, 2 W. Va. 340.

In absence of contract or statute.—As illustrating the statement in the text see also Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924 (holding that where a wall is entirely upon the lot of one of two adjoining lot owners, the mere fact that the footing or foundation thereof extends about six inches on to the lot of the other, such extension being underneath the surface of the ground, and not interfering with the use of his property by the other owner in erecting a wall on the edge of his lot, does not entitle him to use the wall above the surface of the ground as a party-wall); Simonds *v.* Shields, 72 Conn. 141, 44 Atl. 29 (holding that the wall of a building wholly upon the land of one of such owners does not, from the mere fact that it is built up to the divisional line, become a party-wall, to the extent that the other may build his timbers into it, or rest them upon it); Cartwright *v.* Adair, 27 Ind. App. 293, 61 N. E. 240 (holding that an easement in a party-wall must be based either upon a contract, express or implied, or upon prescription, in the absence of statute); Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928 (holding that merely building a wall by one of two adjacent owners, and placing the same in equal proportions on each lot, does not make it a party-wall, in the absence of agreement to that effect); Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 647, 46 Am. St. Rep. 677 (holding that where one, intending to construct a wall for his building within the line of his own lot, by mistake extends

B. Agreements of Adjoining Owners[15] — **1. In General.** A division wall, built entirely on the land of one person, or partly on the land of two adjoining owners, may by agreement, actual or presumed, become a party-wall.[16]

2. Breach or Revocation of Agreement. An agreement for the construction of a party-wall, one-half the expense of the building of which is to be paid by each of the adjoining owners, may be revoked by either of the parties prior to a part performance of the agreement.[17] The rule, however, is otherwise where the

the foundation therefor on to an adjoining lot, the wall does not thereby become a party-wall).

Nature of foundation as a test see *supra*, note 6.

The sources of a party-wall are three: "An express or implied contract between the parties, prescription, which is a particular form of the implied contract, a statute or municipal by-law." Bishop Non-Contr. L. art. 915 [*quoted* in Dunscomb *v.* Randolph, 107 Tenn. 89, 98, 64 S. W. 21, 89 Am. St. Rep. 915].

Right by prescription see *infra*, II, D.

Use or acquiescence in use see *infra*, II, C.

15. Statute of frauds: Affecting contract relating to party-wall see FRAUDS, STATUTE OF, 20 Cyc. 233. Part performance of party-wall agreement affecting operation of see FRAUDS, STATUTE OF, 20 Cyc. 295. Promise to pay for use of party-wall affecting operation of see FRAUDS, STATUTE OF, 20 Cyc. 295.

16. *Alabama.*— Lagomarsino *v.* Crowe, 134 Ala. 377, 32 So. 661.

Arkansas.— See Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 1 L. R. A. N. S. 924.

California.— Escondido Bank *v.* Thomas, (1895) 41 Pac. 462; Guttenberger *v.* Woods, 51 Cal. 523.

Indiana.— See Cartwright *v.* Adair, 27 Ind. App. 293, 61 N. E. 240.

Iowa.— Knapp *v.* Sioux City, etc., R. Co., 65 Iowa 91, 21 N. W. 198, 54 Am. Rep. 1. See also Cornell *v.* Bickley, 85 Iowa 219, 52 N. W. 192.

Kansas.— Zeininger *v.* Schnitzler, 48 Kan. 63, 28 Pac. 1007.

Maryland.— Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96; Berry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294. See also Brown *v.* Werner, 40 Md. 15.

Massachusetts.— Quinn *v.* Morse, 130 Mass. 317. *Compare* Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572.

New York.— Negus *v.* Becker, 72 Hun 479, 25 N. Y. Suppl. 640; Cutting *v.* Stokes, 72 Hun 376, 25 N. Y. Suppl. 365 [*affirmed* in 148 N. Y. 730, 42 N. E. 722]; Webster *v.* Stevens, 5 Duer 553.

Ohio.— Duhme *v.* Jones, 8 Ohio Dec. (Reprint) 757, 9 Cinc. L. Bul. 293.

South Dakota.— Scottish-American Mortg. Co. *v.* Russell, (1905) 104 N. W. 607.

Texas.— Everly *v.* Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046.

See 38 Cent. Dig. tit. "Party Walls," § 6.

A parol agreement creating a party-wall is valid unless revoked before the wall is built or used. Rice *v.* Roberts, 24 Wis. 461, 1 Am. Rep. 195.

A wall built entirely on one man's land may, by grant, acquire the characteristics of a party-wall. Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484; Fettretch *v.* Leamy, 9 Bosw. (N. Y.) 510; Nash *v.* Kemp, 49 How. Pr. (N. Y.) 522 [*affirmed* in 12 Hun 592]; Brondage *v.* Warner, 2 Hill (N. Y.) 145.

Easement only granted.— The provision in a contract between owners of adjoining lots, authorizing either to build a party-wall on the line, the other one using it to pay half the costs, and providing that "the said parties hereby convey to each other . . such interest in the land covered, or to be covered by said party wall as may be necessary to carry out the terms of this agreement," does not convey a fee simple, but merely grants an easement. Scottish-American Mortg. Co. *v.* Russell, (S. D. 1905) 104 N. W. 607.

A release does not necessarily constitute or embody a party-wall agreement. Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572.

Destruction of stairway.— The right to erect a party-wall, to the destruction of a stairway on adjoining land, does not arise from an agreement allowing the erection of a cellar wall partly on each adjoining lot. Cornell *v.* Bickley, 85 Iowa 219, 52 N. W. 192.

Rights of parties, how determined.— When a party-wall is created by contract, "the contracting terms, as judicially interpreted, determine the rights of the parties." Bishop Non-Contr. L. art. 916 [*quoted* in Dunscomb *v.* Randolph, 107 Tenn. 89, 98, 64 S. W. 21, 89 Am. St. Rep. 915].

17. Rice *v.* Roberts, 24 Wis. 461, 1 Am. Rep. 195, where plaintiff and defendant, being adjoining owners, agreed that plaintiff should erect a party-wall on both sides of the line between them, defendant to pay one half the expense, and it was held that the sale of his lot by defendant, with notice to plaintiff, before the wall was commenced, operated as a revocation of the license, releasing defendant from all liability for the subsequent erection of the wall.

Effect of statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 233, 295.

Withdrawal of option.—A party-wall agreement without consideration, by one who has erected a wall upon his own property, to permit his neighbor to construct an upward extension or to make use of one constructed by the owner of the wall is, until acted upon, a mere option which may be withdrawn at any time. Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924.

agreement for the construction of a party-wall has been executed by one of the parties.[18]

C. Use or Acquiescence in Use. The use of a division wall by an adjoining owner, or his acquiescence in the erection or use thereof by the other adjoining owner, may estop him from denying that such wall is a party-wall.[19]

D. Prescription. A right to a party-wall may arise by prescription, and where a wall between adjoining houses has for a prescriptive period, usually twenty years, been used as a party-wall by their respective owners, such wall becomes a party-wall, within the legal meaning of the term, at least to the extent of the user, made thereof.[20]

18. Rawson *v.* Bell, 46 Ga. 19; Knappenberger *v.* Fairchild, 210 Pa. St. 173, 59 Atl. 986.

For example, plaintiff and defendant having by their contract treated a wall as a party-wall and agreed upon a sum, subject to be enlarged or diminished by measurement of the wall, to be paid by defendant for its use, and this sum having been paid and defendant having begun the erection of a building, plaintiff is not entitled to return the money and enjoin defendant's use of the wall, on the ground that it is not in fact a party-wall. Lukens *v.* Lasher, 202 Pa. St. 327, 51 Atl. 887.

Mutuality.— Mere failure of one of the parties to sign a party-wall agreement does not make it invalid, if otherwise valid, where it obligates him to do nothing but to allow the other party to use an upward extension in case he chooses so to build. Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924.

License to erect party-wall.— Where the owner of a lot has granted a license to his adjoining owner to erect a portion of a party-wall on his land, he cannot revoke such license after it has become an executed license. Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348.

19. *California.*— Escondido Bank *v.* Thomas, (1895) 41 Pac. 462.

Iowa.— Zugenbuhler *v.* Gilliam, 3 Iowa 391.

Kansas.— Zeininger *v.* Schnitzler, 48 Kan. 63, 28 Pac. 1007, 48 Kan. 66, 29 Pac. 694.

New York.— Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545 [*affirming* 4 Lans. 283, where defendant, having obtained by user the right to the half of a wall which adjoined his and plaintiff's premises, as a party-wall, built up the whole wall and erected additional stories to his house, with the knowledge and without objection of plaintiff, and it was held that the latter was estopped from disputing the former's right to use and maintain the additional wall].

Pennsylvania.— Lukens *v.* Lasher, 202 Pa. St. 327, 51 Atl. 887, holding that plaintiffs and defendant having by their contract treated a wall as a party-wall, and agreed on a sum, subject to be enlarged or diminished by measurement of the wall, to be paid by defendant for its use, and this sum having been paid, and defendant having begun erection of the wall, plaintiffs are not entitled to return the money and to enjoin defendant's use of the wall, on the ground that it is not in fact a party-wall.

Texas.— Mahoney *v.* Lapowski, 3 Tex. App. Civ. Cas. § 307, holding that where an owner of land burdened with the easement of a party-wall elects to use the wall and pay half its value, he thereby becomes owner, not only of the one half standing on his own line, but of an easement in the other half.

England.— See Cubitt *v.* Porter, 8 B. & C. 257, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133.

See 38 Cent. Dig. tit. "Party Walls," § 8.

20. *Delaware.*— O'Daniel *v.* Bakers' Union, 4 Houst. 488.

Illinois.— Kœnig *v.* Haddix, 21 Ill. App. 53.

Indiana.— See Cartwright *v.* Adair, 27 Ind. App. 293, 61 N. E. 240.

Louisiana.— Kelly *v.* Taylor, 43 La. Ann. 1157, 10 So. 255.

Maryland.— Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294; Brown *v.* Werner, 40 Md. 15, holding that, although a division wall between two houses may have been built exclusively upon the land of one party, if it has been enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence, that such use and enjoyment was permissive, and that the wall is a party-wall. Dowling *v.* Hennings, 20 Md. 179, 83 Am. Dec. 545.

Massachusetts.— Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572 (holding that after the prescriptive period has ripened, a division wall between buildings may take on the character of a party-wall, and be treated as such, although the right thus acquired is limited to the exact use of it by the adjoining owner, who claims the easement); McLaughlin *v.* Cecconi, 141 Mass. 252, 5 N. E. 261.

New York.— Schile *v.* Brokhahus, 80 N. Y. 614; Browning *v.* Goldenberg, 71 N. Y. App. Div. 616, 76 N. Y. Suppl. 1010 [*affirming* 36 Misc. 438, 73 N. Y. Suppl. 759]; Pearsall *v.* Westcott, 30 N. Y. App. Div. 99, 51 N. Y. Suppl. 663; Webster *v.* Stevens, 5 Duer 553; Eno *v.* Del Vecchio, 4 Duer 53.

Pennsylvania.— McVey *v.* Durkin, 136 Pa. St. 418, 20 Atl. 541 (holding that where a wall between adjoining houses has for more than twenty-one years been used by their respective owners, it will be regarded as a party-wall, whether equally on the land

E. Sale or Conveyance by Owner of Adjoining Lots. The severance of the ownership of two houses having a party-wall, of each of which the wall forms a part, will put upon each house the burden and privilege of a party-wall,[21] in the absence of language in the instrument of conveyance clearly indicating that the whole of such wall was to pass with the lot conveyed, or to be reserved with the other, as the case may be.[22]

of each or not); Western Nat. Bank's Appeal, 102 Pa. St. 171; Mayer's Appeal, 73 Pa. St. 164.

West Virginia.— List *v.* Hornbrook, 2 W. Va. 340.

England.— See Cubitt *v.* Porter, 8 B. & C. 257, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133

See 38 Cent. Dig. tit. "Party Walls," § 9.

Secret user.—A preliminary injunction to restrain the taking down of an alleged party-wall will not be sustained, where it appears that the wall was entirely on the land of defendant, and where, there being no express grant, the easement or right of plaintiff to have the wall maintained as a party-wall must depend solely upon prescription based upon a user invisible to and unknown by the owner who was a successor in the title after the alleged imposition of the easement. Harrison *v.* Union Nat. Bank, 13 Pa. Super. Ct. 274 [*affirming* 22 Pa. Co. Ct. 562].

21. *District of Columbia.*— Goldschmid *v.* Starring, 5 Mackey 582. See also Priest *v.* Talbott, 16 App. Cas. 422.

Illinois.— Ingals *v.* Plamondon, 75 Ill. 118.

Kentucky.— Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484.

Louisiana.— See Ribet *v.* Howard, 109 La. 113, 33 So. 103.

Massachusetts.—Allen *v.* Evans, 161 Mass. 485, 37 N. E. 571; Carlton *v.* Blake, 152 Mass. 176, 25 N. E. 83, 23 Am. St. Rep. 818.

New York.—Rogers *v.* Sinsheimer, 50 N. Y. 646; Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545 [*affirming* 4 Lans. 283]; Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Heartt *v.* Kruger, 56 N. Y. Super. Ct. 382, 5 N. Y. Suppl. 192 [*affirmed* in 121 N. Y. 386, 24 N. E. 841, 18 Am. St. Rep. 829, 9 L. R. A. 135]; Eno *v.* Del Vecchio, 6 Duer 17; Webster *v.* Stevens, 5 Duer 553.

Pennsylvania.— Norris *v.* Adams, 2 Miles 337; Oat *v.* Middleton, 2 Miles 247; Giess *v.* Schadt, 14 Pa. Co. Ct. 177; Finley *v.* Stuehing, 38 Leg. Int. 386; Doyle *v.* Ritter 6 Phila. 577. But see Harrison *v.* Union Nat. Bank, 13 Pa. Super. Ct. 274 [*affirming* 22 Pa. Co. Ct. 562].

Wisconsin.— Duncan *v.* Rodecker, 90 Wis. 1, 62 N. W. 533.

England.— Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626.

Canada.— Duperrault *v.* Roy, 28 Quebec Super. Ct. 519.

See 38 Cent. Dig. tit. "Party Walls," § 10.

Priority of titles.— Where several houses so built as to require mutual support are alienated by the common owner at different times, the grantees will enjoy the right to mutual support without regard to the question of the priority of their titles. Bartley *v.* Spaulding, 21 D. C. 47; Richards *v.* Rose, 7 C. L. R. 311, 9 Exch. 218, 17 Jur. 1036, 23 L. J. Exch. 3.

Easement only, not any part of the land passes to grantee. Duncan *v.* Rodecker, 90 Wis. 1, 62 N. W. 533.

Amicable partition between grantees.— Where an owner having built two houses upon his land, with a common wall between them, and having conveyed the houses to persons by one deed as tenants in common, they by amicable partition divide the property, making the middle of the common wall their division line, such wall becomes a party-wall. Duhme *v.* Jones, 8 Ohio Dec. (Reprint) 757, 9 Cinc. L. Bul. 293.

22. *Illinois.*— Price *v.* McConnell, 27 Ill. 255.

Iowa.— Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

Kentucky.—Smith *v.* Martin, 4 Ky. L. Rep. 442.

Massachusetts.— Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572.

New York.— Sloat *v.* McDougal, 9 N. Y. Suppl. 631.

See also cases cited *supra*, note 21.

Particular agreements.— Where the owner of land, upon one portion of which is a frame house, conveys the other portion by a deed wherein the dividing line between the portion retained and that conveyed is described as "northwestwardly with the front line of the frame house," etc., and in the same deed it is provided that "nothing shall be put up which will obstruct the light from the front of the frame house," the front wall of the house in question is not a party-wall but remains wholly on the parcel of land retained by the grantor. Schafer *v.* Baker, 16 App. Cas. (D. C.) 213. Where two houses were built by the same person at different times, and the wall of the house first built was used to support the house afterward built, the allotment of the house first built and the ground on which it stood to one of the heirs of the original owner passed the title to the entire wall, giving to the heir to whom the other house was allotted only a right to the use of the wall as a support for his house; and that the fact that the second house was built a story higher than the first, and that the upper story was made to rest on and extend over the wall of the first house, did not change the location of the original division line or affect the title of the wall originally constructed. Smith *v.* Martin, 4 Ky. L. Rep. 442. Where the vendor of a lot, carved out of a larger lot owned by him, conveyed by metes and bounds in such a way as to include a strip fourteen inches wide

F. Statutory Provisions. Some statutes expressly authorize every owner of land adjoining a wall to make it a party-wall, by reimbursing the owner of the wall one half of its value, and one half of the value of the soil upon which the wall is built, where the foundation of the wall is laid entirely upon the estate of the builder thereof.[23] In some jurisdictions, by express provision of statute, every separating wall between buildings is, as high as the upper part of the first story, presumed to be a wall in common, in the absence of proof to the contrary.[24]

III. TERMINATION OF RIGHT.

A. Duration of Easement. The general rule is, that where the right to use a party-wall is perfected, it is not lost by any number of years' omission to use it.[25] Where the occupants of adjoining lots, who erect a party-wall for mutual support, are merely tenants for a term of years, the easement continues only during the term common to both, and does not constitute a charge upon the reversion, either against the reversioners or their grantees.[26]

B. Destruction or Decay of Wall. The casement of support by means of the common party-wall, which belongs to adjoining buildings, ceases with the state of things which created it, when the wall is accidentally destroyed, or is so much decayed as to require rebuilding from the foundation.[27]

occupied by the foundation of his house on the portion of the lot retained, without any express reservation of an easement for the support of such wall, and it was held that no such easement could be subsequently asserted by the purchaser against the grantee of the remaining portion of the lot. Sloat *v.* McDougal, 9 N. Y. Suppl. 631. The owner of two lots executed deeds for the same to two separate parties. One deed provided that, if the building erected on the lot was over twenty-five feet in width and extended over the line of the other lot, the wall so extending over such line should be held a party-wall, so that the grantee in the deed should not be compelled to take it down "past his own pleasure." The deed to the second lot provided that, if the building erected on the adjoining lot should extend over the line of the lot and on to the lot conveyed by the second deed, the wall should be held to be a party-wall between the lot conveyed by such second deed and the adjoining landowner, so that such landowner should not be compelled to take down said wall "past his own pleasure." It was held not to constitute an agreement between the respective vendees and their successors in title that the wall then existing should remain a party-wall, not to be taken down except at the pleasure of the grantee of the first lot or those claiming under him. Heron *v.* Houston, 217 Pa. St. 4, 66 Atl. 109. The vendor of a building of which the wall is in the condition of a party-wall may reserve the right of the party-wall himself. This right to a common wall applies to the eventual rights of the vendor or his representatives in either of two alternatives; that is, to make the wall common without payment of the compensation provided by art. 518 C. C., should he acquire the adjoining premises, or to recover such compensation from the owner of such adjoining premises making it a party-wall. Duperrault *v.* Roy, 28 Quebec Super. Ct. 519.

23. Bryant *v.* Sholars, 104 La. 786, 29 So. 350, holding, however, that the statute applies only to walls properly so called, and hence does not apply to the side of a wooden building.

Contribution to cost of erection generally see *infra*, IV, D, 1.

24. Howell *v.* Goss, 128 Iowa 569, 105 N. W. 61; Bellenot *v.* Laube, 104 Va. 842, 52 S. E. 698.

25. Beaver *v.* Nutter, 32 Leg. Int. (Pa.) 179 (holding that where the owner erected a wall partly on his own lot and partly on the lot adjoining, and he then purchased the adjoining lot, and sold the first lot to defendant, defendant's property was burdened with an easement for the support of the party-wall, the owner's unity of title suspending, but not extinguishing, the easement); Roudet *v.* Bedell, 1 Phila. (Pa.) 366. See also Ribet *v.* Howard, 109 La. 113, 33 So. 103, holding that where a wall of a brick house rests partly on two city lots, as walls in common are usually constructed, but there is no evidence as to when or by whom the house was built, or by whom the wall was paid for, it will not be assumed that the owner of the lot adjoining that on which the house stands has forfeited his right to make such a wall in common, or that the same is barred by prescription.

Agreement as to length of use.— The provision in a party-wall agreement that the rights of the parties shall continue "so long as the wall shall stand" does not mean so long as any portion of the wall itself shall remain, but so long as the wall shall remain fit for use as a party-wall, and therefore it does not violate a provision in the agreement that "no perpetual right or easement shall be thereby acquired." Odd Fellows' Hall *v.* Hegele, 24 Oreg. 16, 32 Pac. 679.

26. Webster *v.* Stevens, 5 Duer (N. Y.) 553.

27. Bonney *v.* Greenwood, 96 Me. 335, 52

IV. RIGHTS, DUTIES, AND LIABILITIES OF ADJOINING OWNERS.

A. With Respect to Building and Construction — 1. In General. In the absence of agreement, or statutory provision imposing such duty, there is no legal obligation upon the owners of adjoining lots in a city to unite in building a party-wall on the dividing line of such lots.[28]

2. Manner of Construction — a. In General. While it is the duty of one erecting a party-wall to make it of sufficient strength to support another building similar to the one of which it forms a part,[29] yet he is not bound to make it strong enough to support any kind of a building which may be erected by the adjoining proprietor.[30]

b. Statutory and Municipal Provisions. Statutes and ordinances enacted in pursuance thereof may, and usually do, prescribe the character of the wall, the material to be used in its construction,[31] and the minimum and maximum dimensions thereof.[32]

Atl. 786 (holding that the right to use a party-wall which does not involve any interest in the soil apart from the building is extinguished by the destruction of the building); Hoffman *v.* Kuhn, 57 Miss. 746, 34 Am. Rep. 491; Heartt *v.* Kruger, 121 N. Y. 386, 24 N. E. 841, 18 Am. St. Rep. 829, 9 L. R. A. 135 [*affirming* 56 N. Y. Super. Ct. 382, 5 N. Y. Suppl. 192]; Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 632 [*affirming* 3 Duer 184]; Odd Fellows' Hall *v.* Hegele, 24 Oreg. 16, 32 Pac. 679. See also Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480 [*distinguishing* Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570, 6 Johns. Ch. 21]. See *infra*, IV, B, 1, c.

However, there is authority for the doctrine that an easement in a party-wall between adjoining buildings, although suspended by the destruction of the buildings by accidental cause, is revived by the reconstruction of the buildings, including the party-wall, as they originally existed. Douglass *v.* Coonley, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580 [*reversing* 84 Hun 158, 32 N. Y. Suppl. 444], in which case both parties united in the reconstruction of the buildings and party-wall.

Abandonment.— Where one owning an easement in a wall which forms a side of his building, after the destruction of the wall and building, erects a new building on a different foundation, he thereby abandons and extinguishes the easement. Duncan *v.* Rodecker, 90 Wis. 1, 62 N. W. 533.

Partial destruction.— If a party-wall is built partly on the land of an adjoining owner, its partial destruction and weakening by fire do not divest the builder of his interest in the land of such adjoining owner so as to render the latter the sole owner of that part of the wall standing on his land, and make him liable for its dangerous condition. Beidler *v.* King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246.

28. Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480; Richards *v.* Rose, 2 C. L. R. 311, 9 Exch. 218, 23 L. J. Exch. 3, 17 Jur. 1036; Lewis *v.* Allison, 30 Can. Sup. Ct. 173; Bernard *v.* Pauzé, 16 Quebec Super. Ct. 406 [*affirming* 14 Quebec Super. Ct. 140]. See Crocker *v.* Blanc, 2 La. 531, holding that walls on property which still leave a space between it and that adjacent do not surround the premises and cannot prevent the erection of a division wall on both under Civ. Code, art. 671.

29. Cutler *v.* Williams, 3 Allen (Mass.) 196. See also Burton *v.* Moffitt, 3 Oreg. 29; Milne's Appeal, 81 Pa. St. 54.

30. Gilbert *v.* Woodruff, 40 Iowa 320.

31. Heine *v.* Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637 (holding that the requirement of Civ. Code, art. 675, that the wall in common should be built in stone or brick, applies only to the wall and its foundation proper, and does not forbid the use of heavy timbers to make a firm and smooth basis on which to build the brick foundation, any more than it would apply to wooden piles driven for the same purpose); Duncan *v.* Labouisse, 9 La. Ann. 49; Vollmer's Appeal, 61 Pa. St. 118; Kraft *v.* Stott, 14 Fed. Cas. No. 7,929, 1 Hayw. & H. 33 (holding that under the building regulations of Washington, D. C., Oct. 17, 1791, there is no right to build a party-wall for a brick house when there is already a frame building on the adjoining lot); Reg. *v.* Copp, 17 Ont. 738 (holding that Ont. Rev. St. c. 184, § 496, subs. 10, does not apply to internal walls separating buildings belonging to the same owner, for to constitute party-walls they should separate the adjoining property of different owners, and therefore the municipal councils have no power to prescribe of what material such internal walls should be).

Acquiescence by the owner of a lot in the construction of a party-wall estops him and any one claiming under him from objecting, after its completion, to the method by which, or the materials with which, it was constructed. Keating *v.* Korfhage, 88 Mo. 524 [*affirming* Sharp *v.* Cheatham, 88 Mo. 498, 57 Am. Rep. 433].

32. Heine *v.* Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637 (holding, however, that the provision of Civ. Code, art. 675, restricting the right of one co-proprietor to rest a wall on more than nine inches of the land of his neighbor, applies to the wall itself and not to its foundation which in New Orleans must

3. Right to Use Adjoining Land — a. In General. In the absence of statutory regulations, each party must build his wall upon his own land, unless he makes an agreement with the adjoining owner to build one half upon the land of the latter.[33] In many jurisdictions, however, the statutes give the right to the owner of a lot to build his party-wall partly on the land of the adjoining owner, under certain specified restrictions.[34]

b. Remedy For Encroachment. Where a party-wall encroaches on the property of an adjoining owner, but the latter allows the building to be completed without complaint, he is guilty of laches, and an injunction will not lie in his favor, but he will be left to his remedy at law.[35]

B. With Respect to Destruction, Rebuilding, Additions, and Alterations — 1. For Destruction and Rebuilding[36] — a. In General. Where a party has gained an easement in a party-wall, by prescription or otherwise,[37] the adjoining landowner has no right to destroy or remove such wall, or to so deal with it as to render it insufficient for the support of the former's building, or to impair his easement therein, without his consent.[38]

necessarily be wider than the walls); Traute *v.* White, 46 N. J. Eq. 437, 19 Atl. 196; Schmidt *v.* Lewis, 63 N. J. Eq. 565, 52 Atl. 707; Kirby *v.* Fitzpatrick, 168 Pa. St. 434, 32 Atl. 53; Deringer *v.* Augusta Hotel Co., 155 Pa. St. 609, 26 Atl. 769; Morris *v.* Balderston, 2 Brewst. (Pa.) 459 (holding that a lot sixteen feet and one-half inch wide is not within a provision of a statute that "any lot of the width of sixteen feet or less shall not be encumbered with more than four and a half inches of brick [party] wall").

33. Whiting *v.* Gaylord, 66 Conn. 337, 34 Atl. 85, 50 Am. St. Rep. 87; Scott *v.* Baird, 145 Mich. 116, 108 N. W. 737; Harber *v.* Evans, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41.

34. Switzer *v.* Davis, 97 Iowa 266, 66 N. W. 174 (holding, however, that Code (1873), § 2019, providing that the owner of a lot in a city or town, and being "about to build" thereon contiguous to his neighbor's lot, may, if there is no wall between them, rest half the wall for his building, if of brick or stone, on the neighbor's lot, does not authorize the building and maintenance of a stone wall, half on the lot of a neighbor, by one who simply "intends" to build a brick superstructure thereon); Cornell *v.* Bickley, 85 Iowa 219, 52 N. W. 192 (holding, however, that the Iowa statute does not authorize the erection of such a wall where the wall, if erected, will destroy a stairway on the adjoining land, since the expression "wall on the line" refers, not merely to the actual wall of a building, but to any part of a building); Carrigan *v.* De Neufbourg, 3 La. Ann. 440 (holding that Civ. Code, art. 671, which gives a right to the owner who first builds to rest half of his wall on the land of his neighbor, establishes a servitude on urban property, without reference to title or the agreement of parties); Larche *v.* Jackson, 9 Mart. (La.) 724; Scott *v.* Baird, 145 Mich. 116, 108 N. W. 737; Schmidt *v.* Lewis, 63 N. J. Eq. 565, 52 Atl. 707 (holding that where an ordinance authorizing a party-wall to be built partly on the land of an adjoining owner without his consent also provides that no person shall lay the foundation of any party-wall without first applying to the city surveyor to set out and regulate the construction, such application must be made before the wall can be built); Heron *v.* Houston, 217 Pa. St. 1, 66 Atl. 108; Lukens *v.* Lasher, 202 Pa. St. 327, 51 Atl. 887; Monroe *v.* Conroy, 1 Phila. (Pa.) 441; Rodearmel *v.* Hutchinson, 2 Pearson (Pa.) 324; Whitman *v.* Shoemaker, 2 Pearson (Pa.) 320. See also *supra*, I, C.

35. Browning *v.* Goldenberg, 36 Misc. (N. Y.) 438, 73 N. Y. Suppl. 759 (holding that where a visible party-wall encroaches on the land of an adjoining owner, such owner's failure to ascertain such fact by a survey will not prevent the other owner from obtaining an easement by prescription to maintain the wall as it stands); Mayer's Appeal, 73 Pa. St. 164; Walsh *v.* Luburg, 10 Pa. Co. Ct. 641. See also Sauer *v.* Monroe, 20 Pa. St. 219.

Use of wall as defense see *infra*, note 73.

Encroachment affecting right to compensation see *infra*, note 70.

Creation by estoppel see *supra*, II, C.

36. Removal of party-wall as an eviction see Landlord and Tenant, 24 Cyc. 1060 note 91.

Termination of easement by destruction or decay of party-wall see *supra*, III, B.

37. In the absence of a valid easement, however, either party may remove the half of the wall on his land. Roberts *v.* White, 2 Rob. (N. Y.) 425; Fettretch *v.* Leamy, 9 Bosw. (N. Y.) 510; Eno *v.* Del Vecchio, 4 Duer (N. Y.) 53; Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480; Nash *v.* Kemp, 49 How. Pr. (N. Y.) 522; Bradbee *v.* Christ's Hospital, 2 Dowl. P. C. N. S. 164, 11 L. J. C. P. 209, 4 M. & G. 714, 5 Scott N. R. 79, 43 E. C. L. 368.

Where the implied easement is terminated by the destruction of a party-wall, and one of the adjoining owners rebuilds the wall, the other may recover his portion of the land on which it stands. Heartt *v.* Kruger, 56 N. Y. Super. Ct. 382, 5 N. Y. Suppl. 192.

38. *Maryland.*— Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279.

b. Dangerous or Insufficient Wall — (i) *In General.* In many jurisdictions the right of an adjoining owner to take down an insufficient party-wall and replace it by one strong enough to support the building which he is about to erect is well recognized.[39] The coöwner, however, it seems, is entitled, under such circumstances, to reimbursement for the necessary expenses incurred by him in protecting his property during the change.[40]

(ii) *Upon Due Notice to Adjoining Owner.* Where a party-wall between two buildings is so much dilapidated as to be dangerous to life or property, the owner of one estate, upon giving reasonable notice to the owner of the other, may tear down and rebuild the wall; and if he uses proper skill and makes no unnecessary delay, he is not answerable to the occupant of the adjoining building for injury to the building or its contents caused by the weather or otherwise.[41]

Massachusetts.— Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572; Phillips *v.* Bordman, 4 Allen 147, holding that an injunction will lie to restrain the owner of one half of an ancient solid party-wall, long used for the support of buildings erected on each side of it, from cutting away a portion of its face, and erecting a new wall upon his own land at a distance of two inches from that portion of the ancient wall which is left standing, and connected with it by occasional projecting bricks and ties.

New York.— Potter *v.* White, 6 Bosw. 644; Eno *v.* Del Vecchio, 4 Duer 53.

Ohio.— Miller *v.* Brown, 33 Ohio St. 547.

Pennsylvania.— Ferguson *v.* Fallons, 2 Phila. 168.

England.— Jones *v.* Read, Ir. R. 10 C. L. 315.

See 38 Cent. Dig. tit. "Party Walls," § 32.

Compare Montgomery *v.* Masonic Hall, 70 Ga. 38.

39. Fowler *v.* Saks, 7 Mackey (D. C.) 570, 7 L. R. A. 649; Heine *v.* Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637 (holding likewise that such a right is an absolute one, and that previous consent of the neighbor is unnecessary); Gettwerth *v.* Hedden, 30 La. Ann. 30; Duhme *v.* Jones, 8 Ohio Dec. (Reprint) 757, 9 Cinc. L. Bul. 293; Evans *v.* Jayne, 23 Pa. St. 34. See, however, Wilson *v.* Leiberman, 3 Fed. Cas. No. 17,816*a*, 2 Hayw. & H. 312, holding that a party-wall in Washington, D. C., although built wholly on one lot, after it has remained there twelve years, cannot be pulled down by the owner of such lot and rebuilt on the surveyed line. *Contra*, Partridge *v.* Lyon, 67 Hun (N. Y.) 29, 21 N. Y. Suppl. 848, holding that one of the adjoining owners of a party-wall, who desires to erect a new building, requiring a deeper foundation than his own building, has no right, against the objection of the other owner, to tear down the party-wall, and rebuild it, merely because so doing would render it more convenient and less expensive for him in putting in the foundation for his new building, where such wall is not dilapidated, and affords a sufficient support for his present building, as well as for the building of the other owner. See also cases cited *infra*, note 40.

A landlord is justified, under the Metropolitan Building Act (18 & 19 Vict. c. 122, § 83), in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving notice required by section 85, such tenant not being an "owner" within the interpretation clause, section 3; and it is no objection that he has neglected to give notice to the district surveyor as required by section 38. Wheeler *v.* Gray, 6 C. B. N. S. 606, 5 Jur. N. S. 916, 28 L. J. C. P. 200, 7 Wkly. Rep. 325, 95 E. C. L. 606. *Compare* Landlord and Tenant, 24 Cyc. 1060 note 91.

40. Putzel *v.* Drovers', etc., Nat. Bank, 78 Md. 349, 28 Atl. 276, 44 Am. St. Rep. 298, 22 L. R. A. 632. See also Field *v.* Leiter, 18 Ill. App. 155 (holding that defendant, who was about to build next to complainant's building, having covenanted to strengthen the party-wall and its foundation, so far as it might be necessary to secure the complainant's building from injury, by additions placed on his own land on the east side, had no right to invade complainant's premises and make additions on the west side, even though it was impossible adequately to strengthen the wall without making additions on both sides); Dermott *v.* Fowler, 30 Fed. Cas. No. 18,289, 2 Hayw. & H. 124; Pfluger *v.* Hocken, 1 F. & F. 142. But *compare infra*, IV, B, 1, b, (II).

41. *Illinois.*— Maypole *v.* Forsyth, 44 Ill. App. 494.

Massachusetts.— Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572.

Missouri.— Crawshaw *v.* Sumner, 56 Mo. 517.

New York.— Schile *v.* Brokhahus, 80 N. Y. 614; Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 632 [*affirming* 3 Duer 184]; Reynolds *v.* Fargo, Sheld. 531. *Compare* Berry *v.* Todd, 14 Daly 450, 15 N. Y. St. 371.

Pennsylvania.— McVey *v.* Durkin, 136 Pa. St. 418, 20 Atl. 541.

England.— See Peyton *v.* St. Thomas' Hospital, 9 B. & C. 725, 4 M. & R. 625, 17 E. C. L. 324.

At common law no action lies against a tenant in common for pulling down a party-wall for the purpose of building a new one or for repairing the wall or for replacing an old foundation by a new one even without notice to the adjoining owner. In such case there is no destruction or destructive waste.

(III) *When Wall Condemned.* An owner of a party-wall may be compelled to remove it, where it has been condemned by proper authority.[42]

c. Wall Accidentally Destroyed. In the absence of express agreement, where a party-wall is destroyed by accidental cause, there is no implied agreement or legal obligation on the part of adjoining owners to contribute toward rebuilding it.[43]

2. Additions and Alterations — a. In General. The law seems to be well settled that where there is a party-wall, each of the owners may, within the limits of his own lot, increase the height, length, or thickness thereof, when it can be done without injury to the adjoining building, and without impairing the value of the cross easements to which the adjoining proprietor is entitled.[44] However, one owner cannot so alter the wall as to thereby injure or destroy the adjoining owner's easement therein.[45]

b. Construction of Contracts Governing.[46] Contracts governing additions and

Standard Bank *v.* Stokes, 9 Ch. D. 68, 47 L. J. Ch. 554, 38 L. T. Rep. N. S. 672, 26 Wkly. Rep. 492.

42. Evans *v.* Jayne, 23 Pa. St. 34, holding that, under the Pennsylvania act of April 5, 1849, providing for the condemnation of insufficient party-walls, the report of the surveyor directing the removal of a party-wall is conclusive, no appeal therefrom lying to the common pleas. *Compare* Ferguson *v.* Fallons, 2 Phila. (Pa.) 168, holding that, under the Pennsylvania act of April 11, 1836, relating to the inspection of buildings, the owner of a party-wall cannot be compelled to take it down at his own expense because it is not of sufficient strength for an erection which his neighbor desires to make on the adjoining premises.

43. Antomarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40; Hoffman *v.* Kuhn, 57 Miss. 746, 34 Am. Rep. 491; Reynolds *v.* Fargo, Sheld. (N. Y.) 531; Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480. See *supra*, III, B.

Liability for contribution see *infra*, IV, D.

44. *Alabama.*— Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298.

California.— Frowenfeld *v.* Casey, 139 Cal. 421, 73 Pac. 152; Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061. See, however, Henne *v.* Lankershim, 146 Cal. 70, 79 Pac. 591, holding that where the agreement is for a party-wall of a designated height, the designation of the height is, in the absence of other provisions, a limitation beyond which neither party can go without the consent of the other.

Iowa.— Howell *v.* Goss, 128 Iowa 569, 105 N. W. 61; Ottumwa First Nat. Bank *v.* Taylor, 44 Iowa 343.

Louisiana.— Pierce *v.* Musson, 17 La. 389, holding, however, that if the wall cannot support the additional height, the owner must rebuild it entirely anew at his own expense, and take the additional thickness from his own property. See, however, Duncan *v.* Labouisse, 9 La. Ann. 49.

Maryland.— Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96; Poultney *v.* Depkin, (1894) 30 Atl. 705; Brown *v.* Werner, 40 Md. 15.

Massachusetts.— Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572; Matthews *v.* Dixey, 149 Mass. 595, 22 N. E. 61, 5 L. R. A. 102; Everett *v.* Edwards, 149 Mass. 588, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110.

New York.— Negus *v.* Becker, 143 N. Y. 303, 38 N. E. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667 [*affirming* 68 Hun 293, 22 N. Y. Suppl. 986]; Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Mittnacht *v.* Slevin, 67 Hun 315, 22 N. Y. Suppl. 131 [*affirmed* in 142 N. Y. 683, 37 N. E. 825]; Eno *v.* Del Vecchio, 4 Duer 53; Berry *v.* Todd, 14 Daly 450, 15 N. Y. St. 371. See, however, Musgrave *v.* Sherwood, 60 How. Pr. 339 [*reversing* 54 How. Pr. 338], where the owner of houses on adjoining lots sold one of the houses with the right to the use of a party-wall between the two houses, and it was held that the owner could not thereafter enlarge his remaining house for business purposes, although he would have the right to build on the party-wall if the object were to enlarge his house as a private residence.

Virginia.— Bellenot *v.* Laube, 104 Va. 842, 52 S. E. 698.

Wisconsin.— Andrae *v.* Haseltine, 58 Wis. 395, 17 N. W. 18, 46 Am. Rep. 635.

England.— Weston *v.* Arnold, L. R. 8 Ch. 1084, 43 L. J. Ch. 123, 22 Wkly. Rep. 284; Knight *v.* Pursell, 11 Ch. D. 412, 48 L. J. Ch. 395, 40 L. T. Rep. N. S. 391, 27 Wkly. Rep. 817; Standard Bank *v.* Stokes, 9 Ch. D. 68, 47 L. J. Ch. 554, 38 L. T. Rep. N. S. 672, 26 Wkly. Rep. 492.

Canada.— Sproule *v.* Stratford, 1 Ont. 335 [*cited* in James *v.* Clement, 13 Ont. 115].

See 38 Cent. Dig. tit. "Party Walls," § 31.

But see Duncan *v.* Hanbest, 2 Brewst. (Pa.) 362, holding that where a party-wall is placed back from the line of the street by the first builder, and has so remained for more than fifty years after the erection of an adjoining building, the owner of the house first built cannot extend the party-wall to the line of the street without the assent of the other.

45. Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294; Calmelet *v.* Sichl, 48 Nebr. 505, 67 N. W. 467, 58 Am. St. Rep. 700.

46. Contracts governing use and enjoyment see *infra*, IV, C, 2.

alterations to party-walls are to be liberally construed in favor of the grantee, and not according to the literal construction of the agreement.[47]

3. INJURIES OCCASIONED[47a] — a. In General. The owner of a party-wall, it has been held, is absolutely responsible to his coöwner for any damage which the change by reason of an addition or alteration occasions when not required for purposes of repair.[48]

b. Injunction. On the ground of preventing a continuing injury the wrongful erection of an additional story to a party-wall has been enjoined,[49] as has the destruction of a party-wall which supported the roof of complainant's house;[50] but an injunction has been refused where the injury could be compensated in damages.[51]

C. With Respect to Use and Enjoyment[52] — 1. IN GENERAL. Each adjoining owner of a party-wall has the right to its use in the improvement of his property,[53] but at his own peril, so far as injury may result therefrom to his neigh-

47. Trulock *v.* Parse, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. N. S. 924; Grimley *v.* Davidson, 133 Ill. 116, 24 N. E. 439 [*affirming* 35 Ill. App. 31]; Field *v.* Leiter, 118 Ill. 17, 6 N. E. 877 [*reversing* 18 Ill. App. 155]; Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96; Palmer *v.* Evangelical Baptist Benev., etc., Soc., 166 Mass. 143, 43 N. E. 1028. See also Beidler *v.* King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246 [*affirming* 108 Ill. App. 23]. See, however, Frowenfeld *v.* Casey, 139 Cal. 421, 73 Pac. 152.

Want of consideration.—After construction of a two-story dividing wall, by agreement of adjoining lot owners that it should "be equally used by each for all the purposes of an exterior wall," a new agreement that one might erect a third story on the party-wall, it being of sufficient strength to support it, was held to be without consideration. Dauenhauer *v.* Devine, 51 Tex. 480, 32 Am. Rep. 627.

47a. See also *infra*, IV, E.

48. Fleming *v.* Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572; Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545 [*affirming* 4 Lans. 283]. See, however, Levy *v.* Fenner, 48 La. Ann. 1389, 20 So. 895 (holding that where one, in the erection of a new building on his land, demolishes an old party-wall and erects a new one, and as a result his neighbor's building settles and is damaged, he is not liable for the damages unless it is shown affirmatively that the settling occurred through negligence or want of skill in the demolition and reconstruction of the wall); Demers *v.* Lemieux, 21 Quebec Super. Ct. 26 (holding that one owner of a party-wall, who increases the height thereof, is not liable to the other owner for damages to his building which result, not from increasing the height, but from the removal of the support afforded by the former's house). *Compare supra*, text and notes 41, 45.

Effect of consent of coöwner.— See Riiff *v.* Garvey, 74 Nebr. 522, 104 N. W. 1143, holding that one who consents to the uncovering of a portion of the roof upon a building belonging to him to allow one of its walls which is a party-wall to be built higher cannot recover from his coöwner for damages from leakage, unless he proves that the injuries resulted from the negligence of defendant.

49. Calmelet *v.* Siebl, 48 Nebr. 505, 67 N. W. 467, 58 Am. St. Rep. 700.

50. Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484; Ogden *v.* Jones, 2 Bosw. (N. Y.) 685.

51. Burton *v.* Moffitt, 3 Oreg. 29.

Party-wall agreement.— Where, by agreement between the owners of adjoining lots, one covenants with the other that he will build a wall for a certain distance, half on one lot and half on the other, and, upon his failure so to do, the other party enters and begins to extend the wall to the point agreed, the latter will not be restrained by injunction; but if there is a dispute as to the distance the wall is to be extended and the extension will render necessary the cutting away of part of a building, a temporary injunction will be granted until the question of right can be settled. Church of Holy Innocents *v.* Keech, 5 Bosw. (N. Y.) 691. Where one fails to carry out his part of the agreement and the other completes the wall, the former will be enjoined from using it in the erection of a house. Masson's Appeal, 70 Pa. St. 26.

52. Use as between grantor and grantee see *infra*, V, A, 4; V, B.

53. Freeman *v.* Herwig, 84 Iowa 435, 51 N. W. 169; Faisans *v.* Lovie, McGloin (La.) 113; Reynolds *v.* Fargo, Sheld. (N. Y.) 531; Nash *v.* Kemp, 49 How. Pr. (N. Y.) 522 [*affirmed* in 12 Hun 592] (holding that a party-wall may be used by the adjoining owners, for whose mutual benefit it was constructed, not only for the support of beams and for the construction therein of fireplaces and flues, but also to form a complete and perfect junction, in an ordinary good mechanical manner, between it and the exterior walls of the house); Daly *v.* Grimley, 49 How. Pr. (N. Y.) 520.

The central idea, the true comprehensive and undivided meaning of the term "party-wall," when used in an agreement by the owners of adjoining lots of land, providing that one may build a wall resting one half on each lot, and that the other shall have the right to use it on payment of one half of its value, is that of mutuality of benefit

bor.[54] However, he cannot subject it to a servitude foreign to its use as a party-wall.[55]

2. CONSTRUCTION OF CONTRACTS GOVERNING.[56] In the case of an express grant, the fact of the creation of the easement, as well as its nature and extent, is to be determined by the language of the instrument, taken in connection with the circumstances existing at the time of making it.[57]

3. FLUES IN WALL. The general rule is that a party-wall may be used by the adjoining owners, for whose benefit it was created, for the construction therein of fireplaces and flues.[58]

4. WINDOWS AND OTHER OPENINGS. By common usage the words "party-wall" and "partition wall" have come to mean a solid wall.[59] Hence in the absence of

and excludes the idea of any exclusive wall. Harber *v.* Evans, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41; Houston *v.* De Zeng, 78 Mo. App. 522. See *supra*, text and note 7.

54. Faisans *v.* Lovie, McGloin (La.) 113; Reynolds *v.* Fargo, Sheld. (N. Y.) 531; Davis *v.* Grimley, 49 How. Pr. (N. Y.) 520.

55. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357 (holding that Code, § 2998, providing that every co-proprietor may build against a party-wall and cause beams to be placed therein, does not give the co-proprietor the absolute right to place soil pipes in the wall, regardless of the effect on the wall, as neither proprietor has the right to so weaken the wall as to render it unsafe for the use of the other); Sullivan *v.* Graffort, 35 Iowa 531; Bright *v.* Morgan, 218 Pa. St. 178, 67 Atl. 58. See also Welford *v.* Gerard, 108 Ky. 322, 56 S. W. 416, 22 Ky. L. Rep. 203 (holding that defendant's prescriptive right to use plaintiff's wall for the support of a certain building does not give him the right to use the wall for the support of a building of greater height and depth); McLaughlin *v.* Cecconi, 141 Mass. 252, 5 N. E. 261 (holding that one cannot enlarge or add to the right of using a party-wall acquired by adverse use, except by some other title).

Erection of sign.— The use of a party-wall for the purpose of a sign, which subjects plaintiff to inconvenience and annoyance, is one not contemplated by the law, and will be enjoined. Bedell *v.* Rittenhouse Co., 5 Pa. Dist. 689.

The law of party-walls is based on the doctrine of lateral support and is a statutory extension of the principle to buildings, and an owner of the party-wall cannot extend the beams of his building beyond the center of the wall. Lederer *v.* Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357, 358.

Flues in wall see infra, IV, C, 3.

Windows, etc., in wall see *infra*, IV, C, 4.

56. Contracts governing additions or alterations see *supra*, IV, B, 2, b.

57. *Connecticut.*— Simonds *v.* Shields, 72 Conn. 141, 44 Atl. 29; Goodwin *v.* Hamersley, 69 Conn. 115, 36 Atl. 1065.

Maryland.— Poultney *v.* Depkin, (1894) 30 Atl. 705; Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389, holding that the contract should be construed in favor of the grantee, and that the evident design was that whenever the grantee should find it necessary to erect a more substantial construction, his enjoyment of the property, according to its true lines, should no longer be restricted.

Massachusetts— Pfeiffer *v.* Matthews, 161 Mass. 487, 37 N. E. 571, 42 Am. St. Rep. 435.

Nebraska.— Loyal Mystic Legion *v.* Jones, 73 Nebr. 342, 102 N. W. 621, where a party-wall agreement provided that the party of the second part, his heirs and executors and grantees, had the privilege of using the wall as a party-wall for any building such second party or his grantees might erect, and it was held that it was the intention of the parties that the privileges and liabilities imposed by the contract should pass to all persons obtaining title to either of the lots on which the wall stood by grant from the original parties.

New York.— Hammann *v.* Jordan, 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228 [*reversed* on other grounds in 129 N. Y. 61, 29 N. E. 294].

See 38 Cent. Dig. tit. "Party Walls," § 20.

58. Pier *v.* Salot, (Iowa 1906) 107 N. W. 420; Weill *v.* Baker, 39 La. Ann. 1102, 3 So. 361 (holding that the circumstance of a flue being constructed in the lower stories of a party-wall, in that half of it which is on the side of one property, does not establish exclusive ownership in the flue, or destroy the presumption that it was intended for the common use and benefit of both, particularly when the extension of the flue in the upper story, without which it would be useless, lies in the center of the wall, and it had been years ago used by the co-proprietor); Nash *v.* Kemp, 49 How. Pr. (N. Y.) 522 [*affirmed* in 12 Hun 592]; Daly *v.* Grimley, 49 How. Pr. (N. Y.) 520. See, however, Ingals *v.* Plamondon, 75 Ill. 118 (holding that the only proper easement attached to a party-wall is the right of support, and that it does not include a right of one party to the unobstructed use of a flue upon the land of the other); Koolbeck *v.* Baughn, 126 Iowa 194, 101 N. W. 860.

Evidence as to the general custom in New York as to flues when party-walls are erected may be some evidence of the meaning of the term as used in an agreement for such walls. Hammann *v.* Jordan, 129 N. Y. 61, 29 N. E. 294 [*reversing* 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228].

59. *Alabama.*— Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R.

agreement between the adjoining property-owners allowing them,[60] windows and other such apertures have no proper place in a party-wall;[61] and such use of the wall may be restrained by injunction.[62] However, it has been held that until the

A. 298 [*cited* in Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294].

Maine.— Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786.

Maryland.— Coggins *v.* Carey, (1907) 66 Atl. 673, 10 L. R. A. N. S. 1191 [*citing* Jones Easem. § 687].

New York.—Cutting *v.* Stokes, 72 Hun 376, 25 N. Y. Suppl. 365 [*affirmed* in 148 N. Y. 730, 42 N. E. 722]. But see Hammann *v.* Jordan, 129 N. Y. 61, 29 N. E. 294 [*reversing* 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228], where it is said that the term does not as a matter of law necessarily imply a solid structure.

Tennessee.— Dunscomb *v.* Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

Texas.— See Everly *v.* Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046.

60. Grimley *v.* Davidson, 133 Ill. 116, 24 N. E. 439; Weigmann *v.* Jones, 163 Pa. St. 330, 30 Atl. 198.

Estoppel.—A part-owner of a party-wall may, by permitting the cutting of windows and openings therein and by his conduct, estop himself from objecting to the continuance and maintenance thereof, in the absence of injury therefrom, or desire to use the wall. Dunscomb *v.* Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

61. *Alabama.*— Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298 [*cited* in Coggins *v.* Carey, (Md. 1907) 66 Atl. 673, 10 L. R. A. N. S. 1191].

Illinois.— Springer *v.* Darlington, 207 Ill. 238, 69 N. E. 946.

Iowa.— Sullivan *v.* Graffort, 35 Iowa 531.

Louisiana.— Fisk *v.* Haber, 7 La. Ann. 652, holding that a servitude through doors and windows in a division wall between two lots, established by the deceased proprietor of both, is destroyed by a probate sale to different purchasers; that the wall is presumed common, and the purchaser, over whose right the servitude is claimed, may compel the other to close the openings, or, giving up the right in common, erect a new wall against the old.

Maine.— Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786.

Maryland.— Coggins *v.* Carey, (1907) 66 Atl. 673, 10 L. R. A. N. S. 1191.

Massachusetts.— Normille *v.* Gill, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441.

New York.— De Baun *v.* Moore, 167 N. Y. 598, 60 N. E. 1110 [*affirming* 32 N. Y. App. Div. 397, 52 N. Y. Suppl. 1092]; Albany Nat. Commercial Bank *v.* Gray, 71 Hun 295, 24 N. Y. Suppl. 997 [*affirmed* in 144 N. Y. 701, 39 N. E. 858]. But see Hammann *v.* Jordan, 129 N. Y. 61, 29 N. E. 294 [*reversing* 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228].

Ohio.— Dawson *v.* Kemper, 11 Ohio Cir. Ct. 180, 5 Ohio Cir. Dec. 130.

Pennsylvania.— Milne's Appeal, 81 Pa. St. 54; Bedell *v.* Rittenhouse Co., 5 Pa. Dist. 689; Vansyckel *v.* Tryon, 6 Phila. 401. See Roudet *v.* Bedell, 1 Phila. 366, holding that where a party-wall contains windows, equity will not enjoin against stopping them up, although the party-wall had not been used as a party-wall for over twenty-one years. But *compare* McCall *v.* Barrie, 15 Wkly. Notes Cas. 28, where A erected a solid party-wall the whole length of his building to the height of sixteen feet above the ground, and continued the wall as a solid wall to the height of seventy feet, except in three places, forty feet apart, where he receded from the party-wall nine feet, and then built on the foundations on his own ground, thus forming recesses for light and air, and it was held that he had a right to erect a wall with such recesses.

Tennessee.— Dunscomb *v.* Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

Texas.— Everly *v.* Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046, holding that where plaintiff agreed that defendant might erect a party-wall on the division line between their respective lots, such agreement, in the absence of anything to the contrary, implied that the wall should be solid and without windows, and defendant had no right to place windows in the second story thereof. *Compare* Dauenhauer *v.* Devine, 51 Tex. 480, 32 Am. Rep. 627.

England.— Young *v.* Spencer, 10 B. & C. 145, 8 L. J. K. B. O. S. 106, 5 M. & R. 47, 2 Rolle Abr. 815, 21 E. C. L. 70; Queen's College *v.* Hallett, 14 East 489.

See 38 Cent. Dig. tit. "Party Walls," § 15.

62. *Alabama.*— Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298, holding likewise that the doctrine of ancient lights has no bearing in such a case.

District of Columbia.— Bartley *v.* Spaulding, 21 D. C. 47; Corcoran *v.* Nailor, 6 Mackey 580.

Iowa.— Sullivan *v.* Graffort, 35 Iowa 531.

Maine.— Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786.

Maryland.— Coggins *v.* Carey, (1907) 66 Atl. 673, 10 L. R. A. N. S. 1191.

Missouri.— Harber *v.* Evans, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41; Huston *v.* De Zeng, 78 Mo. App. 522.

Pennsylvania.— Vollmer's Appeal, 61 Pa. St. 118; Vansyckel *v.* Tryon, 6 Phila. 401.

Tennessee.— Dunscomb *v.* Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

Texas.— See Dauenhauer *v.* Devine, 51 Tex. 480, 32 Am. Rep. 627.

Canada.— Sproule *v.* Stratford, 1 Ont. 335.

See 38 Cent. Dig. tit. "Party Walls," § 15.

Extent of rule.—A mandatory injunction will lie to compel one of the owners of a party-wall to close windows opened by him in the wall, although he stands ready to fill up the openings whenever plaintiff desires to use the wall as a party-wall (Coggins *v.* Carey, (Md. 1907) 66 Atl. 673, 10 L. R. A.

adjoining owner pays one half of the cost of a wall erected partly on his premises, it is not a party-wall, and the builder can open or shut apertures therein at his pleasure,[63] subject only to police regulations, since in so doing he exercises a right of property, and not a right of servitude.[64] So too it has been held that under statutes regulating the erection of party-walls, such walls may be constructed with windows or openings in them[65] in the absence of express prohibitory clauses in such statutes.[66]

5. Land in Front of Wall. The land lying in front of a party-wall, between that and the line of the street, is to be exclusively enjoyed by its owners, free from any burden or easement growing out of a simple party-wall agreement, or created by statute, and is to be occupied by the adjoining owners according to the boundary lines of their lots for the construction of their fronts.[67]

D. Contribution and Compensation — 1. For Cost of Erection and Use — a. In General. While parties may stipulate by agreement to pay each one half of the cost of building a party-wall,[68] the mere building of a party-wall gives no claim for contribution from the owner of the adjoining lot, in the absence of any express agreement between the parties or of use of the wall by such adjoining owner.[69] It has been held that an agreement between adjoining owners that one of them is to construct a party-wall on the division line and that the other is to pay one half of the cost when he utilizes it is binding on the parties and creates an equitable lien on the land of the other owner in favor of the one constructing the wall.[70]

N. S. 1191), and also whether plaintiff intends to make use of the wall or not (Harber *v.* Evans, 101 Mo. 661, 14 So. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41).

63. Jeannin *v.* De Blanc, 11 La. Ann. 465; Witte *v.* Schasse, (Tex. Civ. App. 1899) 54 S. W. 275 [*citing* Dauenhauer *v.* Devine, 51 Tex. 480, 82 Am. Rep. 627]. But *compare* Coggins *v.* Carey, (Md. 1907) 66 Atl. 673, 10 L. R. A. N. S. 1191; Harber *v.* Evans, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41.

Where wall is not a party-wall.—An owner of land has the right to place windows and doors in a wall overlooking the land of his neighbor, if the wall is not a party-wall but is wholly on the former's land and the neighbor has no remedy for the overlooking of his privacy, if he is not guarded therein by deed or contract, except to build on his land opposite the offensive windows and doors. Schafer *v.* Baker, 16 App. Cas. (D. C.) 213.

Necessity of contribution see *infra*, IV, D.

64. Jeannin *v.* De Blanc, 11 La. Ann. 465. See cases cited *infra*, note 72.

65. Pierce *v.* Lemon, 2 Houst. (Del.) 519.

66. Trauts *v.* White, 46 N. J. Eq. 437, 19 Atl. 196; Vollmer's Appeal, 61 Pa. St. 118.

67. Marion *v.* Johnson, 23 La. Ann. 597; Jamison *v.* Duncan, 12 La. Ann. 785; Johnson *v.* Minnesota Tribune Co., 91 Minn. 476, 98 N. W. 321 (holding that a front wall, although tied or fastened to a party-wall, is no part of it, but is distinct from it, and neither of the owners of a party-wall has the right to extend the front wall of his own building beyond the line which marks the division between the properties); Nash *v.* Kemp, 49 How. Pr. (N. Y.) 522 [*affirmed* in 12 Hun 592].

68. *Arkansas.*— Rugg *v.* Lemley, 78 Ark. 65, 93 S. W. 570, 115 Am. St. Rep. 17.

California.— Watkins *v.* Glas, 5 Cal. App. 68, 89 Pac. 840.

Illinois.— McEwen *v.* Nelson, 40 Ill. App. 272.

Indiana.— Cartwright *v.* Adair, 27 Ind. App. 293, 61 N. E. 240.

Iowa.— Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462.

Missouri.— Harber *v.* Evans, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41.

New York.— Scott *v.* McMillan, 4 N. Y. Suppl. 434.

North Carolina.— Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753.

Texas.— Arnold *v.* Chamberlain, 14 Tex. Civ. App. 634, 39 S. W. 201.

See 38 Cent. Dig. tit. "Party Walls, §§ 19, 20.

69. Orman *v.* Day, 5 Fla. 385; Huck *v.* Flentye, 80 Ill. 258; McCord *v.* Herrick, 18 Ill. App. 423; Bernard *v.* Pauzé, 16 Quebec Super. Ct. 406.

If a party-wall was originally lawfully built, it must have been with the assent, express or implied, of the adjoining owner, and such assent in the absence of proof of an express contract to pay cannot be stretched into an implied contract to pay. List *v.* Hornbrook, 2 W. Va. 340.

If a party-wall was originally built unlawfully, of course no contribution can be claimed. List *v.* Hornbrook, 2 W. Va. 340.

Constitutionality of statute compelling payment for one half of cost of party-wall see Constitutional Law, 10 Cyc. 1098.

70. Stehr *v.* Raben, 33 Nebr. 437, 50 N. W. 327. See however Goodrich *v.* Lincoln, 93 Ill. 359, where A and B, owners of adjoining lots, agreed that A should build a party-wall and when B built he should pay him one

b. Use of Wall as Fixing Liability — (i) *In General.* A proprietor of land has no right to avail himself of a division wall built by an adjacent proprietor before paying his proportionate share of the cost of its erection,[71] for until he pays his share of the cost the wall is not one in common, but the exclusive property of the builder;[72] but where he does make use of such wall the party first building may recover one-half the cost of construction of the wall thus used in common,[73] or a moiety of the charge of such part of the wall as he shall use.[74]

half of the cost thereof, and B afterward built but before payment was adjudged a bankrupt, and it was held that A had no lien for the cost of the erection of the wall and hence was entitled to no preference of priority over other creditors.

Encroachments as affecting right to recover. — It has been held that one who, without any agreement, builds a wall partly on his own lot and partly on his neighbor's, is not entitled to contribution, even though the neighbor subsequently uses the wall. Huck *v.* Flentye, 80 Ill. 258; McCord *v.* Herrick, 18 Ill. App. 423; Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480. Remedy for encroachment see *supra*, IV, A, 3, b.

71. Florance *v.* Maillot, 22 La. Ann. 114; Jamison *v.* Duncan, 12 La. Ann. 785; Sullivan *v.* Smith, 11 La. Ann. 701; Murrell *v.* Fowler, 3 La. Ann. 165; Faisans *v.* Lovie, McGloin (La.) 113; Polye *v.* Sheehy, 1 N. Y. City Ct. 98; Eichert *v.* Wallace, 2 Am. L. J. (Pa.) 326; Brierly *v.* Tudor, 2 Am. L. J. (Pa.) 191; Miller *v.* Elliot, 17 Fed. Cas. No. 9,568, Cranch C. C. 543.

Contra.— Bisquay *v.* Jeunelot, 10 Ala. 245, 44 Am. Dec. 483 (holding that an action of assumpsit will not lie to recover damages for the use by one of the wall of plaintiff's house in the construction of his own house, in the absence of any contract to pay for its use); Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480 (holding that if the owner of a city lot on building upon it place half of the wall upon the adjoining lot the owner of the latter is not liable to contribute toward the expense of the wall upon his subsequently using in his own erection the part of the wall that stands upon his own land); Griffin *v.* Sansom, 31 Tex. Civ. App. 560, 72 S. W. 864 (holding that the mere fact that an adjoining owner makes use of a party-wall rebuilt and standing partly on his land, but to the rebuilding of which he has not agreed to contribute, nor induced by countenancing an expectation of contribution, will not render him liable for part of its cost).

72. Mickel *v.* York, 175 Ill. 62, 51 N. E. 848 [*reversing* 66 Ill. App. 464]; Costa *v.* Whitehead, 20 La. Ann. 341; Jeannin *v.* De Blanc, 11 La. Ann. 465; Masson's Appeal, 70 Pa. St. 26 [*cited* in Glover *v.* Mersman, 4 Mo. App. 90]. See also *supra*, text and notes 63, 64.

73. *Illinois.*— Nelson *v.* McEwen, 35 Ill. App. 100.

Iowa.— Pier *v.* Salot, (1906) 107 N. W. 420; Deere *v.* Weir-Shugart Co., 91 Iowa 422, 59 N. W. 255; Molony *v.* Dixon, 65 Iowa 136, 21 N. W. 488, 54 Am. Rep. 1.

Kentucky.— Welford *v.* Gerard, 108 Ky. 322, 56 S. W. 416, 22 Ky. L. Rep. 203. See also Sherley *v.* Burns, 58 S. W. 691, 22 Ky. L. Rep. 788.

Louisiana.— Winter *v.* Reynolds, 24 La. Ann. 113; Auch *v.* Labouisse, 20 La. Ann. 553; Costa *v.* Whitehead, 20 La. Ann. 341; Davis *v.* Grailhe, 14 La. Ann. 338.

Pennsylvania.— Davids *v.* Harris, 9 Pa. St. 501; Fidelity Ins., etc., Co., *v.* Hafner, 6 Pa. Super. Ct. 48.

See 38 Cent. Dig. tit. "Party Walls," § 17.

Contra.— Eckleman *v.* Miller, 57 Ind. 88, holding that in absence of agreement to pay use of wall does not bind one to pay.

Owner not contractor entitled to compensation.—A party-wall is the property of the owner of the house, and not of the contractor who built the wall, and hence the contractor is not entitled to compensation from the builder of an adjoining house, who makes use of a party-wall erected by the first builder. Eichert *v.* Wallace, 2 Am. L. J. (Pa.) 326; Brierly *v.* Tudor, 2 Am. L. J. (Pa.) 191.

Cost of wall controls recovery.— The right of action for the use of a party-wall is limited to half the cost of building it, and plaintiff cannot recover half the value on the ground that the value of the materials has increased since. Florance *v.* Maillot, 22 La. Ann. 114.

Waiver of trespass.— In Monteleone *v.* Harding, 50 La. Ann. 1147, 23 So. 990, it was held that where a wall built by plaintiff encroaches two inches more upon the land of an adjoining owner than is authorized by Civ. Code, § 678, relating to party-walls, the adjoining owner, by utilizing the wall in the construction of a building on his own land, loses his right to demand a demolition of the wall on account of trespass.

The grantor of one half of a wall built upon a dividing line between two lots owned by him, as well as an easement that the portion of the wall not conveyed shall remain as a support or buttress to the house and shall not be moved to the injury of the building, was held not to have conveyed to the grantee any right to be compensated for the use of that part of the wall not conveyed. Mulligan *v.* Baylie, 11 Pa. Dist. 311.

74. *District of Columbia.*— Hutchins *v.* Munn, 22 App. Cas. 88.

Illinois.— Huck *v.* Flentye, 80 Ill. 258.

Iowa.— Monroe Lodge No. 8 I. O. O. F. *v.* Albia State Bank, 112 Iowa 487, 84 N. W. 682; Beggs *v.* Duling, 102 Iowa 13, 70 N. W. 732; Zugenbuhler *v.* Gilliam, 3 Iowa 391.

Massachusetts.— Walker *v.* Stetson, 162

(II) *What Constitutes Use.* Under an agreement of an adjoining owner to pay for the use of a party-wall whenever he should thereafter use it, the wall cannot be said to be used until the erection of an adjoining building and the appropriation thereby of so much of the wall as was intended to be used.[75] To make an adjoining owner liable for the use of a party-wall he must actually use the party-wall, mere passive benefit not being sufficient to charge him.[76]

(III) *Injunction For Non-Payment.* An adjoining owner who attempts to use a wall erected by his neighbor, without contributing to the expense thereof, may be enjoined from so doing.[77]

c. Waiver of Right to Arbitration. Where, by statute or agreement, it is provided that in case the parties are unable to agree as to the value of the wall the matter should be submitted to arbitration, defendant's refusal to arbitrate fixes his liability from the time of such refusal.[78]

Mass. 86, 38 N. E. 18, 44 Am. St. Rep. 350; Cutter *v.* Williams, 3 Allen 196.

Missouri.— Huston *v.* De Zeng, 78 Mo. App. 522.

Pennsylvania.— Allen *v.* Cass-Stauffer Co., 11 Pa. Co. Ct. 231; Haines *v.* Drips, 2 Pars. Eq. Cas. 236.

United States.— Miller *v.* Elliot, 17 Fed. Cas. No. 9,568, 5 Cranch C. C. 543.

See 38 Cent. Dig. tit. "Party Walls," §§ 16, 17.

75. Glover *v.* Mersman, 4 Mo. App. 90; Hunt *v.* Ambruston, 17 N. J. Eq. 208; Brown *v.* McKee, 57 N. Y. 684. And see Graihle *v.* Hown, 1 La. Ann. 140.

76. Greenwald *v.* Kappes, 31 Ind. 216; Beggs *v.* Duling, 102 Iowa 13, 70 N. W. 732; Sheldon Bank *v.* Royce, 84 Iowa 288, 50 N. W. 986 (holding that where an adjoining owner constructs a wall against a party-wall, but does not attach it thereto, and the party-wall is not necessary for its support, the fact that he relies upon the party-wall for protection and so constructs his own of poorer materials than are generally used for outside work does not show such a "use" of said wall as to render him liable for one-half its value); Kingsland *v.* Tucker, 115 N. Y. 574, 22 N. E. 268 [*reversing* 44 Hun 91]; Wetherill *v.* Horan, 5 Pa. Co. Ct. 190; Heiland *v.* Cooper, 38 Wkly. Notes Cas. (Pa.) 560 (holding that the use of a party-wall which will make a joint owner responsible for half the cost is its use for support of his own structure by permanent physical attachment to the wall). See also cases cited *supra*, note 75.

Use creating liability.— For cases where a portion of a party-wall was held to be so used by an adjoining owner as to come within an agreement to pay for one half of the value of so much of the party-wall as was used see Jebeles, etc., Confectionery Co. *v.* Brown, 147 Ala. 593, 41 So. 626; Harris *v.* Dozier, 72 Ill. App. 542; Deere *v.* Weir-Shugart Co., 91 Iowa 422, 59 N. W. 255; Montpelier Nat. L. Ins. Co. *v.* Lee, 75 Minn. 157, 77 N. W. 794; Keith *v.* Ridge, 146 Mo. 90, 47 S. W. 904; Nalle *v.* Paggi, 81 Tex. 201, 16 S. W. 932, 13 L. R. A. 50; Mahoney *v.* Lapowski, 3 Tex. App. Civ. Cas. § 307, a parol agreement between adjoining proprietors whereby one builds a party-wall one half on the premises of the adjoining owner who agrees to pay one half of the value when he shall use the wall.

Use creating no liability.— For cases in which there was held to be no such use of the party-wall by the adjoining owner as to render him liable for the value of a part of such wall see Shaw *v.* Hitchcock, 119 Mass. 254; Jenkins *v.* Spooner, 5 Cush. (Mass.) 419, 52 Am. Dec. 739; Fox *v.* Mission Free School, 120 Mo. 349, 25 S. W. 172; Kingsland *v.* Tucker, 115 N. Y. 574, 22 N. E. 268 [*reversing* 44 Hun 91]; Brown *v.* McKee, 57 N. Y. 684.

Payment for "any use."— Under a contract for the erection of a party-wall, which provides that before a party makes "any" use thereof, he shall pay one-half the value of such wall to the party who erected it, it is not material that the party sought to be charged did not have the full use of it for supporting his building. McEwen *v.* Nelson, 40 Ill. App. 272.

77. Zugenbuhler *v.* Gilliam, 3 Iowa 391; Faisans *v.* Lovic, McGloin (La.) 113; Hileman *v.* Hoyt, 23 Pa. Co. Ct. 533 (where an agreement for the erection of a party-wall provided that the value of the wall was to be determined by arbitrators, and arbitrators were chosen and an award made, and it was held that, after the award was made, equity would restrain by injunction the breaking into the wall or using it until the amount of the award had been made); Cox *v.* Willetts, 2 Am. L. J. (Pa.) 327.

Contra, in Alabama, where an owner has built a party-wall on the boundary between his lot and the lot of an adjoining owner, and the latter has not promised to contribute to the expense, equity will not enjoin him or his grantee from using the wall without contribution. Preiss *v.* Parker, 67 Ala. 500.

Effect of tender of payment.— Making use of a party-wall erected by the owner of one of two adjoining vacant lots after tender of payment of half the cost of the wall will not be enjoined. Zugenbuhler *v.* Gilliam, 3 Iowa 391.

78. Scott *v.* McMillan, 4 N. Y. Suppl. 434; Sauer *v.* Monroe, 20 Pa. St. 219, holding that where an adjoining owner breaks into a party-wall, without notice to the other party, who was the first builder, he thereby waives his right to choose arbitrators, and to have a de-

2. FOR COST OF REPAIRS, ALTERATIONS, ETC. The same rules seem to apply to the apportionment of the cost of repairs, alterations, and the like to party-walls as to the cost of their original erection;[79] and where one party has borne the whole cost an adjoining owner is liable for his share thereof as soon as he takes advantage of the wall in its repaired or altered condition.[80]

E. Injuries Incident to Construction, Alteration, or Removal[80a]**— 1. IN GENERAL.** One of two joint owners of a party-wall is answerable to the other for any damages resulting from his interference with the wall where the necessary precautions are not taken to avoid injury.[81] However, since, if in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy, a part-owner of a party-wall is not liable to an adjoining owner for damage to his property caused by the lawful use of such wall.[82]

2. TEARING DOWN OR REPAIRING — a. In General. Some of the authorities broadly state the rule that a part-owner of a party-wall is liable to an adjoining owner for all damages caused by making repairs to or demolishing and rebuilding such wall;[83] while others hold that he is only liable where the work is done in a

cision as to the value of the wall by regulators, as provided for in the act of March 6, 1820. See also Hileman *v.* Hoyt, 23 Pa. Co. Ct. 533.

79. See *supra*, IV, D, 1.

80. *Iowa.*— Howell *v.* Goss, 128 Iowa 569, 105 N. W. 61.

New York.— Campbell *v.* Messier, 4 Johns. Ch. 334, 8 Am. Dec. 570. But see Berry *v.* Todd, 14 Daly 450, 15 N. Y. St. 371, where defendant tore down his house, leaving the party-wall between him and plaintiff in a ragged condition, and the roof which had joined the buildings torn and leaking. Pursuant to a notice from the buildings bureau, plaintiff repaired the wall without notice to defendant, who intended to rebuild and to repair and strengthen the party-wall, and it was held that plaintiff could not recover what he had expended in such repairs, although he did not know of defendant's intention to rebuild; one of the grounds for the decision being plaintiff's failure to notify defendant before making the repairs.

Pennsylvania.— Hoffstot *v.* Voight, 146 Pa. St. 632, 23 Atl. 351 (where, however, it was held that the adjoining owner was not liable until he began to make a new use of the wall, and the mere replacing of his beams in the wall as they had been in the old wall was not such a use, but a continuance of the old use); Eppelsheimer *v.* Steel, 21 Wkly. Notes Cas. 380; Bailey's Appeal, 1 Wkly. Notes Cas. 350. See also Pratt *v.* Meigs, 2 Pars. Eq. Cas. 302.

Tennessee.— Sanders *v.* Martin, 2 Lea 213, 31 Am. Rep. 598.

Virginia.— Bellenot *v.* Laube, 105 Va. 842, 52 S. E. 698.

See 38 Cent. Dig. tit. "Party Walls," § 36.

Compare Beidler *v.* King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246.

But see Automarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40, holding that where a party-wall is destroyed by fire, and one of the adjoining owners rebuilds the wall on the same foundation, he cannot compel a purchaser from the other owner to contribute to the cost of the wall, or to make compensation for using it in the subsequent erection of a building on the other lot.

Where wall accidentally destroyed see *supra*, IV, B, 1, c.

80a. See also *supra*, IV, B, 3.

81. *Indiana.*— Briggs *v.* Klosse, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238.

Louisiana.— Pierce *v.* Musson, 17 La. 381.

Michigan.— Feige *v.* East Saginaw First Nat. Bank, 58 Mich. 164, 24 N. W. 772.

Missouri.— Lynds *v.* Clark, 14 Mo. App. 74.

New York.— Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545 [*affirming* 4 Lans. 283]; Eno *v.* Del Vecchio, 4 Duer 53.

England.— Bradbee *v.* Christ's Hospital, 2 Dowl. P. C. N. S. 164, 11 L. J. C. P. 209, 4 M. & G. 714, 5 Scott N. R. 79, 43 E. C. L. 368.

See 38 Cent. Dig. tit. "Party Wall," § 40.

82. Clemens *v.* Speed, 93 Ky. 284, 19 S. W. 660, 14 Ky. L. Rep. 625, 19 L. R. A. 240 (where it is held that whatever injury was done plaintiff's house was *damnum absque injuria*); Negus *v.* Becker, 143 N. Y. 303, 38 N. E. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667 [*reversing* 68 Hun 293, 22 N. Y. Suppl. 986, and *distinguishing* Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545]; Richart *v.* Scott, 7 Watts (Pa.) 460, 32 Am. Dec. 779.

83. Nippert *v.* Warneke, 128 Cal. 501, 61 Pac. 96, 270 (where plaintiff removed a party-wall after defendant had repudiated the claim that it was a party-wall, and warned him that he intended to continue excavations being made, and advised him to take care of his building, and it was held that such removal was caused by defendant, and hence plaintiff could recover for damages resulting therefrom); Fowler *v.* Saks, 7 Mackey (D. C.) 570, 7 L. R. A. 649; Fischer-Leaf Co. *v.* Caldwell, 15 Ky. L. Rep. 542; Schile *v.* Brokhahus, 80 N. Y. 614; Earl *v.* Beadleston, 42 N. Y. Super. Ct. 294; Potter *v.* White, 6 Bosw. (N. Y.) 644; Berry *v.* Todd, 14 Daly (N. Y.) 450, 15 N. Y. St. 371.

careless or negligent manner,[84] and that, where the adjoining owner refuses or neglects to join in the expense of repairing or rebuilding a dangerous wall, he cannot maintain an action for the inconvenience or damages occasioned thereby, where the work is done with due care and despatch.[85]

b. Failure to Tear Down or Repair. A part-owner of a party-wall who negligently permits it to stand after its partial destruction and weakening by fire is liable to another part-owner who is using part of the wall for damages resulting to the latter from a falling of another portion of the wall in which he has no interest and is not using.[86] The builder of a party-wall, under a contract that he shall be the owner of such wall until the other party to the contract makes payment therefor, is liable for damages for failure to maintain it in a safe condition.[87]

V. RIGHTS, DUTIES, AND LIABILITIES OF PURCHASER.[88]

A. Independent of Covenant or Agreement — 1. IN GENERAL. As has already been stated, the rule is that where, after erecting a party-wall between two lots, the owner sells one lot, such conveyance, unless there is an express reservation to the contrary in the conveyance, conveys to the purchaser the right to use the party-wall.[89] One who buys land bounded by a party-wall, in ignorance that his vendor has not paid his share of the cost of the wall, does not acquire the right to use the wall.[90]

2. RIGHT TO COMPENSATION. Under statutes giving to the builder of a party-wall, located partly upon an adjoining lot, the right to compensation for half the cost of so much thereof as the adjoining owner shall thereafter use, the purchaser of the lot from the builder of the wall is entitled to such compensation and not his vendor.[91]

84. McMinn *v.* Karter, 116 Ala. 390, 22 So. 517 (holding that a weakening in a party-wall incident to the adjoining of a building thereto in the customary and proper manner does not violate a legal duty, nor a contract providing that nothing shall be done to impair the strength of the wall as a party-wall); Gettwerth *v.* Hedden, 30 La. Ann. 30; Pierce *v.* Musson, 17 La. 389; Loney *v.* High, 13 La. 271. See also Pokorny *v.* Pratt, 110 La. 603, 34 So. 703.

85. Crawshaw *v.* Sumner, 56 Mo. 517. See Hieatt *v.* Morris, 10 Ohio St. 523, 78 Am. Dec. 280, where A and B built houses at the same time, and built a partition wall on the division line at joint expense, without any agreement as to its maintenance. After a peaceful occupancy of twenty-one years, A's grantee notified B's grantee that he was about to tear down half the partition wall in order to erect a better building, and against the objections of the latter the former tore down the half on his land, using due care, notwithstanding which the other's building fell. It was held that there was no cause of action, no agreement having been made as to its maintenance, or as to the length of time during which it should stand.

86. Beidler *v.* King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246.

87. McChesney *v.* Davis, 86 Ill. App. 380.

88. **Conveyance, sale, or transfer of:** Easement see EASEMENTS, 14 Cyc. 1184. Estate held by tenant in common see TENANCY IN COMMON. Real property see DEEDS.

89. See *supra*, II, E.

Easements by prescription.— Where an adjoining owner obtains by prescription an easement for the support of his building on his neighbor's wall, such easement becomes appurtenant to his estate, and passes to his grantee. Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294.

90. Chism *v.* Lefebre, 27 La. Ann. 199; Lavergne *v.* Lacoste, 26 La. Ann. 507; McGittigan *v.* Evans, 8 Phila. (Pa.) 264.

Where grantor was not liable.— In Eckleman *v.* Miller, 57 Ind. 88, it was held that such use of the party-wall by the grantee will not bind the grantor, in the absence of special agreement on the grantor's part to bear his share of the cost of its erection.

91. Halpine *v.* Barr, 21 D. C. 331; Thomson *v.* Curtis, 28 Iowa 229; Hunt *v.* Ambruster, 17 N. J. Eq. 208.

The Pennsylvania act of April 10, 1849 (Pamphl. Laws (1849), p. 600), provides that in all conveyances of houses and buildings the right to compensation for party-walls passes to the purchaser, unless otherwise expressed. It has been held, however, that a conveyance made before the passage of this act, and containing no express conveyance of the right to compensation for a party-wall, did not pass such right to the vendee. Voight *v.* Wallace, 179 Pa. St. 520, 36 Atl. 315; Bell *v.* Bronson, 17 Pa. St. 363; Dannaker *v.* Riley, 14 Pa. St. 435. See Lea *v.* Jones, 209 Pa. St. 22, 57 Atl. 1113, holding that this act makes the right to compensation pass with the land and vest in the owner at the time of such use, and where such right has actually vested it does not pass by a subsequent conveyance.

3. LIABILITY FOR COST OF REBUILDING. In some jurisdictions the rule is that where a party-wall becomes so ruinous that it is necessary to rebuild it the expense of tearing it down and rebuilding is an equitable charge on the wall, which will bind the purchaser to contribute one-half the expense thereof.[92]

4. RIGHTS AND LIABILITIES BETWEEN GRANTOR AND GRANTEE — a. In General. An easement in a party-wall may be granted in fee, so that the grantee cannot be disturbed by ejectment, or otherwise, in his enjoyment of it.[93]

b. Recovery For Breach of Covenant Against Encumbrances.[94] While the right of an adjoining owner to use a party-wall does not constitute such an encumbrance upon the premises, or defect in the title thereof, as will relieve the vendee from his contract for purchase thereof,[95] a mutual easement of adjoining proprietors in a party-wall being a benefit and not a burden,[96] where a vacant lot supports the half of the wall of the building erected on an adjoining lot, and a purchaser of the vacant lot is bound by the terms of a party-wall agreement entered into between his grantor and the adjoining owner to pay half of the cost of such wall in order to use the same, it is held that the purchaser may sue for a breach of the covenant against encumbrances.[97] So too the existence of a party-wall wholly on one of two adjacent lots of land, yet subject to the right of enjoyment by the owner of the other, constitutes an encumbrance, and is a breach of the covenant against encumbrances.[98]

B. Covenants and Agreements as to Party-Walls as Affecting Purchasers[99] — 1. CONSTRUCTION AND OPERATION IN GENERAL. Where by a party-wall agreement one party agrees to erect the wall, and the adjoining owner agrees that whenever he or any one claiming under him shall make use of such wall he will pay to the builder his proportionate share of the cost of its erection, a subsequent purchaser of the adjoining land, by whom the wall is used, with full notice[1] of the builder's rights, cannot avail himself of the use of the wall without compliance with the terms under which it was built.[2]

92. Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21. See, however, Davis *v.* Marshall, 9 La. Ann. 480, holding that where one buys after the reconstruction of a party-wall which neither he nor his vendor is shown to have used, unless he has personally undertaken to pay half the cost, he is not bound to do so.

93. Hendrick *v.* Haly, 4 Ky. L. Rep. 356; Ogden *v.* Jones, 2 Bosw. (N. Y.) 685; Brondage *v.* Warner, 2 Hill (N. Y.) 145. See also Ridgway *v.* Vose, 3 Allen (Mass.) 180; Musgrave *v.* Sherwood, 53 How. Pr. (N. Y.) 311.

94. Right of lessee against landlord for breach of covenant against encumbrances see LANDLORD AND TENANT, 24 Cyc. 1070 note 62.

95. Hendricks *v.* Stark, 37 N. Y. 106, 93 Am. Dec. 549; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320; Butterworth *v.* Crawford, 3 Daly (N. Y.) 57 [*reversed* on other grounds in 46 N. Y. 349, 7 Am. Rep. 352].

96. Brooks *v.* Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Hendricks *v.* Stark, 37 N. Y. 106, 93 Am. Dec. 549; Musgrave *v.* Sherwood, 54 How. Pr. (N. Y.) 338 [*reversed* on other grounds in 23 Hun 669]. See also Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 632.

97. Savage *v.* Mason, 3 Cush. (Mass.) 500; Mackey *v.* Harmon, 34 Minn. 168, 24 N. W. 702; Blondeau *v.* Sheridan, 47 Mo. App. 460; Burr *v.* Lamaster, 30 Nebr. 688, 46 N. W. 1015, 27 Am. St. Rep. 428, 9 L. R. A. 637.

In Iowa, however, where the statute gives the right to rest half of the wall upon the contiguous lot and requires the owner of the vacant lot to pay his proportionate share of the expense of the wall before he enters upon its enjoyment, the purchaser of the vacant lot cannot maintain an action for breach of a covenant against encumbrances. Bertram *v.* Curtis, 31 Iowa 46.

98. Cecconi *v.* Rodden, 147 Mass. 164, 16 N. E. 749; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320; Giles *v.* Dugro, 1 Duer (N. Y.) 331; Stern *v.* Saeger, 34 Leg. Int. (Pa.) 21.

99. Purchaser's right to recover against his vendor for breach of covenant against encumbrances see *supra*, V, A, 4, b.

1. Notice of agreement see *infra*, V, B, 3.

2. Richardson *v.* Tobey, 121 Mass. 457, 23 Am. Rep. 283; Standish *v.* Lawrence, 111 Mass. 111; Maine *v.* Cumston, 98 Mass. 317; Knowles *v.* Ott, (Tex. Civ. App. 1895) 34 S. W. 295; Irving *v.* Turnbull, [1900] 2 Q. B. 129, 69 L. J. Q. B. 593. See Lester *v.* Barron, 40 Barb. (N. Y.) 297, where L, plaintiff, owned a lot in fee, and C held a contract for the adjoining lot. L erected a building upon his lot, and, by agreement with C, placed half of the partition wall on C's lot. When C built upon his lot, he and those deriving title under him were to pay L half the cost of the wall. C sold his interest to W, who obtained a deed from the owner of the fee. W then conveyed the lot to B, defendant, allowing him a deduction of one hundred dollars from the purchase-money, on account of the liability to L for half the wall. The deed to B

2. Covenants and Agreements Personal or Running With the Land. Upon the question as to whether the assigns of the builder of a party-wall can recover on a covenant for contribution, and whether the assignee of the covenantor is liable on such covenant, there is a conflict of opinion which it is difficult to reconcile.[3] However, according to the seeming weight of authority, the right to reimbursement for the use of a party-wall under an agreement with an adjoining owner is personal, and does not run with the land, so as to inure to the benefit of the assignee of the covenantee;[4] although in some jurisdictions, in the absence of contract and stipulations to the contrary,[5] it is held that the covenants of party-wall contracts do run with the land, and that all their benefits and burdens — the liability to perform and the right to take advantage of them — both pass to the heir or assignee of the land to which the covenant is attached.[6] Upon the second part of the question, namely, as to whether an agreement whereby the builder of a party-wall is to be paid for the use thereof by an adjoining owner is a covenant running with the land, so as to bind the assigns of the adjoining owner, there is

contained this clause: "The above conveyance is executed, subject to the wall now standing on the north line of said lot, the party of the second part assuming all liability under or by reason of any contract now existing in respect to said wall." B erected a building on his lot, using the partition wall. It was held that this was not an agreement in terms to pay L, or to pay for the wall or any part of it, but was simply an undertaking to assume W's liability. The parties thereto intended only to limit W's covenant, and to save him harmless from all personal liability. See also Houghton *v.* Mendenhall, 50 Minn. 40, 52 N. W. 269; and cases cited *infra*, note 13. See, however, Joy *v.* Boston Penny Sav. Bank, 115 Mass. 60, holding that a contract not under seal between adjacent landowners that one shall build a division wall, half on the land of each, and the other pay half the expense, gives the builder no interest in the land of the other, enforceable by the builder or his grantee in a suit at law. *Compare* Lincoln *v.* Burrage, 177 Mass. 378, 59 N. E. 67, 52 L. R. A. 110.

Covenants personal or running with land see *infra*, V, B, 2.

3. See, generally, Covenants, 11 Cyc. 1084. See also cases cited *infra*, notes 4–12.

4. *Colorado.*— Crater *v.* McCormick, 4 Colo. 496.

District of Columbia.— Eberly *v.* Behrend, 20 D. C. 215.

Illinois.— Gibson *v.* Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; McMullen *v.* Moffitt, 68 Ill. App. 160; Behrens *v.* Hoxie, 26 Ill. App. 417. *Contra*, Tomblin *v.* Fish, 18 Ill. App. 439.

Indiana.— Bloch *v.* Isham, 28 Ind. 37, 92 Am. Dec. 287.

Missouri.— Huling *v.* Chester, 19 Mo. App. 607.

New York.— Hart *v.* Lyon, 90 N. Y. 663; Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611 [*overruling* Burlock *v.* Peck, 2 Duer 90]; Schwenker *v.* Picken, 91 N. Y. App. Div. 367, 86 N. Y. Suppl. 681; Sebald *v.* Mulholland, 11 Misc. 714, 31 N. Y. Suppl. 863 [*affirming* 6 Misc. 349, 26 N. Y. Suppl. 913, and *affirmed* in 155 N. Y. 455, 50 N. E. 260] (holding this to be true, even though the agreement also provided that it should be construed as a covenant running with the land); Frohman *v.* Dickinson, 11 Misc. 9, 31 N. Y. Suppl. 851, 1 N. Y. Annot. Cas. 332; Squires *v.* Pinkney, 13 N. Y. St. 749; Squier *v.* Townshend, 2 N. Y. City Ct. 142. *Contra*, Brown *v.* Pentz, 1 Abb. Dec. 227; Weyman *v.* Ringold, 1 Bradf. Surr. 40.

Pennsylvania.— Todd *v.* Stokes, 10 Pa. St. 155; Davids *v.* Harris, 9 Pa. St. 501; Hart *v.* Kucher, 5 Serg. & R. 1; Ingles *v.* Bringhurst, 1 Dall. 341, 1 L. ed. 167; Pratt *v.* Meigs, 2 Pars. Eq. Cas. 302.

West Virginia.— List *v.* Hornbrook, 2 W. Va. 340.

Canada.— Kenny *v.* Mackenzie, 12 Ont. App. 346.

See 38 Cent. Dig. tit. "Party Walls," § 49.

5. Pillsbury *v.* Morris, 54 Minn. 492, 56 N. W. 170.

6. Adams *v.* Noble, 120 Mich. 545, 79 N. W. 810; Kimm *v.* Griffin, 67 Minn. 25, 69 N. W. 634, 64 Am. St. Rep. 385 [*distinguishing* Pillsbury *v.* Morris, 54 Minn. 492, 56 N. W. 170]; Loyal Mystic Legion *v.* Jones, 73 Nebr. 342, 102 N. W. 621 [*criticizing* and practically *overruling* Cook *v.* Paul, 4 Nebr. (Unoff.) 93, 93 N. W. 430, 66 L. R. A. 673]; Platt *v.* Eggleston, 20 Ohio St. 414; Pendleton *v.* Fosdick, 6 Ohio Dec. (Reprint) 795, 8 Am. L. Rec. 149 (holding that where a party-wall is *in esse* at the time an agreement is made as to its use, the use of the word "assigns" is not necessary to make the easement run with the land to the grantee of the covenantee); Irving *v.* Turnbull, [1900] 2 Q. B. 129, 69 L. J. Q. B. 593 (holding that where an estate has been laid out in plots for building upon the condition, *inter alia*, that the purchaser of a plot first building a party-wall is to be repaid by the purchaser of the adjoining plot one half of the value of the party-wall, and the original purchasers of plots sell their plots, either built upon or vacant, to other purchasers, an implied contract arises between these subpurchasers of adjoining plots that, as between them, and the subpurchaser of a vacant plot, adjoining a plot on which a house has already been built by an original purchaser, when he builds his house up to the house already built and makes use of its

an even greater conflict of authority, the decisions not even harmonizing in the same jurisdiction. There is weighty authority for the rule that such an agreement is a covenant running with the land,[7] some of the decisions being based on the ground that the burden of the agreement runs with the land,[8] and others seemingly upon the clearly expressed intention of the parties to the agreement to bind the assigns of the covenantor;[9] nevertheless there is eminent authority to the effect that such covenants are not in the nature of covenants running with the land, but purely personal, and that the right to exact payment does not pass to the grantee of the one, and the obligation to pay does not rest upon the grantee of the other;[10] and yet even in jurisdictions where the latter rule obtains there are decisions to the effect that where a party-wall agreement expressly provides that the covenants thereof shall run with the land, it will be construed as running with and charging the land, the effect of the covenant being to grant or create an

gable walls he shall repay the then owner of the house, and not the original builder, the half cost of the party gable wall).

7. *Georgia.*— Rawson *v.* Bell, 46 Ga. 19.

Kansas.— Southworth *v.* Perring, 71 Kan. 755, 81 Pac. 481, 114 Am. St. Rep. 527, 2 L. R. A. N. S. 87, (1905) 82 Pac. 785.

Kentucky.—Ferguson *v.* Worrall, 101 S. W. 966, 31 Ky. L. Rep. 219, 9 L. R. A. N. S. 1261.

Louisiana.— Winter *v.* Reynolds, 24 La. Ann. 113.

Massachusetts.— Richardson *v.* Tobey, 121 Mass. 457, 23 Am. Rep. 283.

Minnesota.— Montpelier Nat. L. Ins. Co. *v.* Lee, 75 Minn. 157, 77 N. W. 794; Kimm *v.* Griffin, 67 Minn. 25, 69 N. W. 634, 64 Am. St. Rep. 385.

Missouri.— Huling *v.* Chester, 19 Mo. App. 607.

Nebraska.— Loyal Mystic Legion *v.* Jones, 73 Nebr. 342, 102 N. W. 621 [*criticizing* Cook *v.* Paul, 4 Nebr. (Unoff.) 93, 93 N. W. 430, 66 L. R. A. 673].

New York.— Keteltas *v.* Penfold, 4 E. D. Smith 122, holding that a right granted by one man to another for the use of a part of a lot, for the purpose of erecting a party-wall, is an incorporeal hereditament, and a covenant connected with it binds and is a charge upon the land.

Pennsylvania.— Vollmer's Appeal, 61 Pa. St. 118.

Texas.— Arnold *v.* Chamberlain, 14 Tex. Civ. App. 634, 39 S. W. 201; Mahoney *v.* Lapowski, 3 Tex. App. Civ. Cas. § 307.

England.— Baird *v.* Bell, [1898] A. C. 420.

See 38 Cent. Dig. tit. "Party Walls," § 49.

8. King *v.* Wight, 155 Mass. 444, 29 N. E. 644; Fergus Falls First Nat. Bank *v.* Security Bank, 61 Minn. 25, 63 N. W. 264; Pillsbury *v.* Morris, 54 Minn. 492, 56 N. W. 170; Jordan *v.* Kraft, 33 Nebr. 844, 51 N. W. 286; Platt *v.* Eggleston, 20 Ohio St. 14; Hall *v.* Geyer, 14 Ohio Cir. Ct. 229, 7 Ohio Cir. Dec. 436; Mithoff *v.* Hughes, 5 Ohio Cir. Ct. 120, 3 Ohio Cir. Dec. 62.

9. Jebeles, etc., Confectionery Co. *v.* Brown, 147 Ala. 593, 41 So. 626; Conduitt *v.* Ross, 102 Ind. 166, 26 N. E. 198; Maine *v.* Cumston, 98 Mass. 317; Savage *v.* Mason, 3 Cush. (Mass.) 500; Parsons *v.* Baltimore Bldg., etc., Assoc., 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769.

10. *Illinois.*— Gibson *v.* Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146 [*affirming* 16 Ill. App. 411].

Indiana.— Bloch *v.* Isham, 28 Ind. 37, 92 Am. Dec. 287.

Massachusetts.— Lincoln *v.* Burrage, 177 Mass. 378, 59 N. E. 67, 52 L. R. A. 110.

Mississippi.— Mayer *v.* Martin, 83 Miss. 322, 35 So. 218 (holding that each purchaser of either lot on which a party-wall has been placed has the right to assume that any compensation as between their vendors has been paid); Kells *v.* Helm, 56 Miss. 700.

Nebraska.— Cook *v.* Paul, 4 Nebr. (Unoff.) 93, 93 N. W. 430, 66 L. R. A. 673.

New York.— Sebald *v.* Mulholland, 155 N. Y. 455, 50 N. E. 260 [*affirming* 11 Misc. 714, 31 N. Y. Suppl. 863, and *distinguishing* Mott *v.* Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409]; Scott *v.* McMillan, 76 N. Y. 141 [*affirming* 8 Daly 320]; Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611 [*overruling* Burlock *v.* Peck, 2 Duer 90] (holding that the obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate); McDonnell *v.* Culver, 8 Hun 155; Duer *v.* Fox, 29 Misc. 81, 60 N. Y. Suppl. 580; Squires *v.* Pinckney, 13 N. Y. St. 749; Squier *v.* Townshend, 2 N. Y. City Ct. 142; Curtiss *v.* White, Clarke 389. See also Weeks *v.* McMillan, 13 Daly 139, holding that where an agreement concerning a party-wall makes no attempt to bind subsequent grantees, they are not bound.

Pennsylvania.— White *v.* Snyder, 2 Miles 395.

Texas.— Nalle *v.* Paggi, (1888) 9 S. W. 205, 1 L. R. A. 33.

Washington.— Kinnear *v.* Moses, 32 Wash. 215, 73 Pac. 380, holding that one taking a warranty deed without reservation from tenants in common is not bound by a previous party-wall agreement between his grantors on the one hand and one of them owning an adjoining parcel on the other, although the agreement is declared to be a covenant running with the land.

See 38 Cent. Dig. tit. "Party Walls," § 49.

interest in the premises.[11] In at least one jurisdiction there are decisions drawing a distinction between the benefit and burden of the agreement, and holding that the former is purely personal, while the latter concerns the land and runs with it.[12]

3. Notice of Party-Wall Agreement — a. Operation and Effect. Where the owner of land builds a wall under an agreement with an adjoining owner that the latter shall, on using any part of the wall, pay proportionately therefor, a purchaser with notice from such adjoining owner will be liable for any part of such wall used by him.[13] However, to affect a purchaser of property with notice of an easement in favor of an adjoining owner, the easement must be obvious and apparent to any observer. An apparent sign of servitude must exist on the premises purchased, in favor of the adjoining owner, or, as expressed by some of the authorities, the marks of the burden must be open and visible.[14]

b. Record as Notice. In some jurisdictions the proper registration of a party-wall agreement is notice to all purchasers of the real estate affected by the agreement.[15]

11. Mott *v.* Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; Guentzer *v.* Juch, 51 Hun (N. Y.) 397, 4 N. Y. Suppl. 39; Bedell *v.* Kennedy, 38 Hun (N. Y.) 510 [*affirmed* in 109 N. Y. 153, 16 N. E. 326]; Stewart *v.* Aldrich, 8 Hun (N. Y.) 241; Kearr *v.* Sossan, 26 N. Y. Wkly. Dig. 480.

12. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Roche *v.* Ullman, 104 Ill. 111; Harris *v.* Dozier, 72 Ill. App. 542.

13. *Iowa.*— Pew *v.* Buchanan, 72 Iowa 637, 34 N. W. 453; Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348.

Massachusetts.— Standish *v.* Lawrence, 111 Mass. 111.

Minnesota.— Fergus Falls First Nat. Bank *v.* Security Bank, 61 Minn. 25, 63 N. W. 264; Warner *v.* Rogers, 23 Minn. 34.

Missouri.— Keating *v.* Korfhage, 88 Mo. 524; Sharp *v.* Cheatham, 88 Mo. 498, 57 Am. Rep. 433.

Nebraska.—Garmire *v.* Willy, 36 Nebr. 340, 54 N. W. 562; Stehr *v.* Raben, 33 Nebr. 437, 50 N. W. 327.

New York.— Mott *v.* Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; Bedell *v.* Kennedy, 38 Hun 510 [*affirmed* in 109 N. Y. 153, 16 N. E. 326].

Ohio.— Mithoff *v.* Hughes, 5 Ohio Cir. Ct. 120, 3 Ohio Cir. Dec. 62.

Texas.— Mahoney *v.* Lapowski, 3 Tex. App. Civ. Cas. § 307. *Contra,* Nalle *v.* Paggi, (1888) 9 S. W. 205, 1 L. R. A. 33, holding that, although a purchaser had notice of an agreement by his grantor to pay for his share of a party-wall when used, he is not bound thereby, there being no privity of contract.

West Virginia.— Parsons *v.* Baltimore Bldg., etc., Assoc., 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769.

See 38 Cent. Dig. tit. "Party Walls," § 53; and cases cited *supra,* note 2.

Want of notice actual or constructive.— In Heimbach *v.* Hartzell, 4 Pa. Cas. 537, 7 Atl. 737, it was held that a right to use for the purpose of support a dividing wall erected wholly on the land of one of the owners is not valid as against the vendee of the grantor of the right, if such vendee had no notice of it, either actual or constructive.

14. Ingals *v.* Plamondon, 75 Ill. 118; McChesney *v.* Davis, 86 Ill. App. 380 (holding that the fact that a party-wall stands upon a lot at the time of its purchase constitutes an apparent sign of servitude, and is sufficient of itself to put a purchaser upon inquiry as to what is the nature of such servitude); Howell *v.* Goss, 128 Iowa 569, 105 N. W. 61; Heimbach *v.* Hartzell, 4 Pa. Cas. 537, 7 Atl. 737. See Brower *v.* Williams, 44 N. Y. App. Div. 337, 60 N. Y. Suppl. 716 (holding that where a party-wall agreement was never recorded, and the purchaser of one lot had no notice of it, and the owner of the other had never used the wall, nor paid his share of the cost, it was not a party-wall as to the purchaser, and he had a right to assume that it was a wall of his own building, partly built on the adjoining lot through ignorance or misconception of the location of the true line, and hence, upon a suit to restrain him from tearing it down, a temporary injunction will be dissolved); Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480 (holding that the fact that one half of a party-wall stands upon the adjoining lot is not notice to the purchaser of any lien for the cost of erection in favor of the neighboring owner who erected it); Scottish-American Mortg. Co. *v.* Russell, (S. D. 1905) 104 N. W. 607 (holding that the presence of a party-wall on the dividing line between adjoining lots is not constructive notice to a purchaser of one of them, so as to make him liable, on using the wall, for half of its cost, under the unrecorded contract between his grantor and the owner of the other lot, whereby each conveyed to the other such interest in the land to be covered by the wall as should be necessary to carry out the agreement, and either was authorized to build the wall, the other, on using it, to pay half the cost).

15. Loyal Mystic Legion *v.* Jones, 73 Nebr. 342, 102 N. W. 621; Garmire *v.* Willy, 36 Nebr. 340, 54 N. W. 562; Knowles *v.* Ott, (Tex. Civ. App. 1895) 34 S. W. 295; Parsons *v.* Baltimore Bldg., etc., Assoc., 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769.

Action to have verbal agreement put in writing and executed for the purpose of registration see Brooks *v.* Conley, 8 Ont. 549.

VI. ACTIONS.

A. Nature and Form. An action at law is the proper remedy to recover of an adjoining owner, who uses a party-wall, his proportion of the cost of such wall.[16] Ejectment will lie by an adjoining owner for encroachment of a party-wall on his lot.[17] At common law no action lies for opening windows lawfully in party-walls, although the privacy of the adjoining premises is thereby destroyed;[18] but a party to a party-wall agreement is entitled to the intervention of equity to restrain its violation by the other party's replacing the original wall by one in which numerous openings occur, and is not remitted to an action at law for damages.[19]

B. Defenses. It is no defense to an action to recover from an adjoining owner, under a party-wall agreement, his share of the cost of the wall, that it was not constructed in precise accordance with the agreement, where defendant has used the wall without objection thereto;[20] nor that before defendant used the wall it was partially impaired by fire;[21] nor that plaintiff or his assignor had not

16. Evans *v.* Howell, 211 Ill. 85, 71 N. E. 854 [*affirming* 111 Ill. App. 167]; Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462 (holding that one who builds a party-wall partly on the land of a neighbor on the latter's express promise to pay one half of the expense thereof when he shall use it may recover upon the promise at common law); Walker *v.* Stetson, 162 Mass. 86, 38 N. E. 18, 44 Am. St. Rep. 350; Richardson *v.* Tobey, 121 Mass. 457, 23 Am. Rep. 283; Standish *v.* Lawrence, 111 Mass. 111; Maine *v.* Cumston, 98 Mass. 317; Cutter *v.* Williams, 3 Allen (Mass.) 196; Savage *v.* Mason, 3 Cush. (Mass.) 500; Brown *v.* McKee, 57 N. Y. 684 (holding, however, that where an adjoining owner agreed to pay for the use of the party-wall when used, an action for contribution brought against such adjoining owner's grantee is prematurely brought if there has been no building erected on the adjoining property); Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475 (holding that where, under a parol agreement between two adjoining proprietors to jointly build a party-wall, one half on the premises of each, the parties have gone on and built a portion of the wall, one party, who has prepared his materials and planned his building in view of and relying upon the performance of the contract, upon the refusal of the other to proceed, is not limited to an action for specific performance, but may, after notice to the other, complete the wall and recover of the other one-half the expense). See Mulligan *v.* Fitzpatrick, 10 Pa. Co. Ct. 179, holding that under the building laws of the city of Philadelphia, affording a person interested in a party-wall relief in case of its defective construction, by application to the building inspectors, a court of equity has no jurisdiction to compel the removal of the wall.

Condition precedent to action.—Under Iowa Code (1873), § 2020, providing that if a party refuse to contribute to the erection of a party-wall he shall have the "right of making it a wall in common by paying to the person who built it one half of the appraised value of the wall before using it," it is not necessary, before bringing an action for half the cost of the wall which defendant has used as a party-wall without permission, that the value should be ascertained by appraisal. Molony *v.* Dixon, 65 Iowa 136, 21 N. W. 488, 54 Am. Rep. 1.

17. Cautley *v.* Morgan, 51 W. Va. 304, 41 S. E. 201. See also Stedman *v.* Smith, 8 E. & B. 1, 3 Jur. N. S. 1248, 26 L. J. Q. B. 314, 92 E. C. L. 1.

Ejectment generally see 15 Cyc. 1 *et seq.*

Injunction against encroachment see *supra*, IV, A, 3, b.

Use of wall as defense see *supra*, II, C, note 14.

18. Pierce *v.* Lemon, 2 Houst. (Del.) 519; Moore *v.* Rawson, 3 B. & C. 332, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156; Chandler *v.* Thompson, 3 Campb. 80, 13 Rev. Rep. 756.

19. Springer *v.* Darlington, 207 Ill. 238, 69 N. E. 946.

Injunction generally see INJUNCTIONS, 22 Cyc. 724 *et seq.* See also *supra*, IV, A, 3, b.

Dismissal of a bill to restore a party-wall was held to be proper, where it appeared that the injury to the party-wall was caused by an independent contractor of defendant, contrary to the stipulation in the building contract, encroaching on plaintiff's property, and that plaintiff has a full legal remedy, and that he delayed for months, until the alleged injury was completed, and that the removal was of a part of the wall which was in no way necessary to the security of plaintiff's property. Wakeling *v.* Cocker, 208 Pa. St. 651, 57 Atl. 1104.

20. Warner *v.* Rogers, 23 Minn. 34; Oakes *v.* Senneff, 4 Wkly. Notes Cas. (Pa.) 413, holding that where one has made use of a party-wall without paying the compensation therefor, he cannot afterward avail himself of the non-compliance with the law regulating party-walls, as a defense in equity against the payment of said compensation properly assessed.

21. Thornton *v.* Royce, 56 Mo. App. 179, holding that defendant's contract was to pay for half the cost of the wall, and not half of its value at the time he used it.

actually paid for the construction of the wall;[22] and in such action defendant has no interest to question plaintiff's title further than to ascertain whether the claim demanded can safely be paid to the claimant.[23] In an action for damages for tearing down a party-wall, contributory negligence is no defense, such action not being based upon negligence.[24] But the fact that defendant parted with the ownership of the adjoining lot before use of the wall is a matter of defense.[25] Likewise the statute of limitations is a good defense to an action to compel payment by way of contribution for the building,[26] or compensation for the use of a party-wall.[27]

C. Pleading[28] and Parties.[29] Where suit is brought against an adjoining owner for infringement of the right to support a party-wall, the fact that plaintiff in his complaint charged negligence in the making of the excavation which affected the wall's condition will not change the nature of the action.[30] In an action to enjoin defendants from using a certain wall as a party-wall, an answer alleging that said wall rested in part on defendant's land sufficiently raises the issue as to whether plaintiff's building extended over the dividing line.[31] A supplemental answer need not be filed setting up the facts that defendant has closed the openings in the party-walls, where at the trial it appears that he offered to close up the openings; it being presumed that he had closed them before the trial.[32] Where the claim for reimbursement for the moiety of the cost of a party-wall is personal, suit therefor should be brought in the name of the original owner, and not in the name of the purchaser.[33] Where the party entitled to recover is dead, his executor or administrator is the proper party plaintiff.[34]

D. Evidence.[35] In the absence of any showing to the contrary, an old wall from long usage may be presumed to be a party-wall, either from some agreement to that effect, or from its being built upon the line of the two lots for that purpose by the respective owners.[36] Where a half wall rests upon a vacant lot, the presumption is that it belongs to the owner of the contiguous lot whereon rests the main building; otherwise, however, if such half wall has been used by the erection of a building supported therein on the lot vacant when the other half

22. Watkins *v.* Glas, 5 Cal. App. 68, 89 Pac. 840, holding that under an agreement that on the erection of a party-wall by either of two adjoining owners the other owner would pay half the cost of the wall, an action lay by the assignees of the owner building the wall against the other to recover one-half the cost, even though the party building the wall had not paid for the construction thereof.

23. Irwin *v.* Peterson, 25 La. Ann. 300. See McCourt *v.* McCabe, 46 Wis. 596, 1 N. W. 192, where a party-wall agreement provided that one party should construct the same, and the other, on paying his share, should receive a bill of sale for one half thereof, and it was held, in an action on an award made on submission of the question of how much should be paid therefor, that the bill of sale was not necessary to pass title to the half of the wall standing on defendant's land, and that his only objection to paying the award having been that it was excessive, he could not set up as a defense that the deed had not been tendered.

24. Schile *v.* Brokhahus, 80 N. Y. 614.

25. Prefontaine *v.* McMicken, 8 Wash. 694, 36 Pac. 1048.

26. List *v.* Hornbrook, 2 W. Va. 340.

27. Pier *v.* Salot, 134 Iowa 357, 111 N. W. 989, (1906) 107 N. W. 420, holding that the fact that a party, in beginning an action against the adjacent owner to enjoin him from closing a chimney in a party-wall, held to the theory that his use of the wall was not such as to render him liable under the party-wall statute for any part of the value thereof, does not affect his right to rely on the statute of limitations as against defendant's claim to compel plaintiff to pay for a part of the value of the wall.

28. Pleading generally see PLEADING.

29. Parties generally see PARTIES.

30. Cartwright *v.* Adair, 27 Ind. App. 293, 61 N. E. 240.

31. Escondido Bank *v.* Thomas, (Cal. 1895) 41 Pac. 462.

32. Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061.

33. White *v.* Snyder, 2 Miles (Pa.) 395.

34. Burlock *v.* Peck, 2 Duer (N. Y.) 90.

35. Evidence generally see EVIDENCE, 16 Cyc. 821 *et seq.*, 17 Cyc. 1 *et seq.*

36. Weill *v.* Baker, 39 La. Ann. 1102, 3 So. 361; Brown *v.* Werner, 40 Md. 15; Jones *v.* Read, Ir. R. 10 C. L. 315; James *v.* Clement, 13 Ont. 115. See also Dowling *v.* Hennings, 20 Md. 179, 83 Am. Dec. 545; Schile *v.* Brokhahus, 80 N. Y. 614.

But such presumption is rebuttable.—James *v.* Clement, 13 Ont. 115.

wall was built.[37] In an action to recover the value of a party-wall erected by plaintiff partly on defendant's land, no express agreement as to payment being shown, the jury may infer a promise to pay, if plaintiff undertook and completed the wall with the expectation that defendant would pay for it, and defendant had reason to know that plaintiff was so acting with that expectation, and allowed him so to act without objection.[38] In an action on a party-wall agreement, the rules as to the admissibility of evidence[39] and burden of proof[40] are the same as those governing actions on contracts generally.

E. Trial — 1. In General.[41] Questions of procedure on the trial of actions relating to party-walls, such as the giving of instructions,[42] the verdict and findings,[43] and the decree[44] are governed by the rules applicable to the trial of civil actions generally.

37. Bertram *v.* Curtis, 31 Iowa 46.

38. Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347.

39. See Contracts, 9 Cyc. 747 *et seq.* And see Watkins *v.* Glas, 5 Cal. App. 68, 89 Pac. 840 (holding that in an action for contribution under a party-wall agreement, the contract between the owner building the wall and the contractors, specifying the extent of the work to be done and showing that under its terms the contractors were to erect the wall in question, was admissible in evidence); Simonds *v.* Shields, 72 Conn. 141, 44 Atl. 29 (where defendants introduced, as authority for inserting timbers into plaintiff's wall, a deed granting them the right to build against or upon his wall. Plaintiff offered in evidence a deed whereby defendants reserved the right to build on the foundation of plaintiff's wall, and also offered witnesses to prove that this foundation projected beyond the wall, and it was held that this deed and testimony were admissible, as bearing upon the construction of the deed from plaintiff); Price *v.* Lien, 84 Iowa 590, 51 N. W. 52 (holding that an oral agreement for the erection of a wall on the line between two owners is a special agreement, within the meaning of section 2030 of the code, providing that no evidence of such agreement shall be competent unless it be in writing, etc.); Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348 (holding that it was harmless error to admit parol evidence of the terms on which a person had permission to use a party-wall, where they in nowise differed from the contract which the law would enforce in their absence); Hammann *v.* Jordan, 129 N. Y. 61, 29 N. E. 294 [*reversing* 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228] (holding that in an action to recover half the price of a party-wall built by plaintiff under a contract that defendant, when he used the wall, was to pay for half of it, where the objection is made that the wall was improperly built, in that it contained flues which encroached two inches on defendant's portion of the wall, it is proper to ask an architect whether it was customary to build flues in party-walls).

40. Watkins *v.* Glas, 5 Cal. App. 68, 89 Pac. 840, holding that in an action for contribution under a party-wall agreement providing that the cost of the wall should be fixed by an architect, the burden was on defendants to show any error or mistake in the appraisement made by the architect prejudicial to them.

41. Trial generally see Trial.

42. Instructions generally see Trial. See also Waller *v.* Lasher, 37 Ill. App. 609, where plaintiff and defendant were adjoining proprietors, the north wall of plaintiff's house being a party-wall, the agreement providing for the use of the same by defendant after paying one half of the value thereof. In an action for injuries to plaintiff's house caused by defendant cutting into such wall, defendant not having paid the half value thereof, there was evidence of a license to use such wall, and it was held that it was error to instruct the jury that defendant was liable for the damages necessarily resulting from defendant's making use of the wall, as in case of a license the agreement was a good defense.

43. Verdict or findings generally see Trial. See also Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061 (holding that where it was the original purpose of defendant to construct openings in the wall erected by him upon the party-wall, but where, in the answer to a complaint seeking to enjoin its erection there is an offer to close up the openings, a finding that the new wall is solid and has no openings will be sustained when there is no specification of insufficiency of the evidence to justify the findings); Nalle *v.* Paggi, (Tex. 1888) 9 S. W. 205, 1 L. R. A. 33 (holding that in an action on an agreement to pay half the cost of a party-wall, it is not error for the court to fail to find whether the advantage gained by plaintiff in space was greater than the benefit derived by defendant from the wall, the benefits accruing to each owner being necessarily the same).

44. Judgment or decree generally see Equity; Judgments. See also Springer *v.* Darlington, 207 Ill. 238, 69 N. E. 946 (holding that a decree in an injunction suit to restrain the violation of a party-wall agreement, which enjoins defendant from maintaining openings in the wall as reconstructed by him, and from interfering with the complainant in closing them up, is not objectionable as wrongfully depriving defendant of the possession of his property); Pier *v.* Salot, 134 Iowa 357, 111 N. W. 989, (1906) 107 N. W. 420 (holding that where the roof

2. Questions For Jury. In an action on a party-wall agreement, the questions as to whether a slight encroachment by the flues was a substantial defect in the construction, and whether it prevented defendant from using the wall in the same way that plaintiff might,[45] and where it is alleged by defendant that the wall is not upon the division line, the question whether defendant, by accepting and using the wall with full knowledge, has precluded himself from claiming damages therefor on his counter-claim,[46] are for the jury, under proper instructions.

PARUM CAVET NATURA. A maxim meaning "Nature takes little heed."[1]

PARUM DIFFERUNT QUÆ RE CONCORDANT. A maxim meaning "Things which agree in substance differ but little."[2]

PARUM EST LATAM ESSE SENTENTIAM NISI MANDETUR EXECUTIONI. A maxim meaning "It is little [or to little purpose] that judgment be given unless it be committed to execution."[3]

PARUM PROFICIT SCIRE QUID FIERI DEBET, SI NON COGNOSCAS QUOMODO SIT FACTURUM. A maxim meaning "It profits little to know what ought to be done, if you do not know how it is to be done."[4]

PAR VALUE. A term meaning a dollar in money for every dollar in security.[5] Applied to bonds, the value equal to the face of the bonds;[6] the sum due on them and not the sum originally secured by them.[7] Applied to treasury notes or bank bills, the sum named on their face.[8] (See Par; Value.)

PASS. As a noun, a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.[9] As a verb, to deliver in exchange for something else, equally expressed by the words sell, Exchange, *q. v.*, or Deliver,[10] *q. v.*;

of plaintiff's building was built against a party-wall in such a way as to form a gutter liable to become out of repair, to the injury of defendant, the decree settling the rights of the parties should require plaintiff to keep the gutter in repair, and clear of accumulations of ice, snow, or other materials likely to cause water to overflow and soak into and through the wall); Mott *v.* Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409 (where, in an action to restrain defendant from using a party-wall except on payment of half its cost, and for such other relief as might seem just, it appearing that relief by way of injunction was not proper, but that plaintiff was entitled to such amount, and that defendant's premises were charged therewith, it was held proper to decree that unless payments be made the premises should be sold therefor); Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21 (where, in a suit for contribution for the expense of erecting a party-wall, it was admitted between one of defendants and his vendor that the latter was to indemnify him against any claim of plaintiff for the expense of such wall. Both the vendor and purchaser were parties defendant, and it was held that a decree directing the vendor to pay the moiety of the expense of the wall with interest, and dismissing the bill as to the purchaser without costs, was proper).

45. Hammann *v.* Jordan, 129 N. Y. 61, 29 N. E. 294 [*reversing* 59 N. Y. Super. Ct. 91, 13 N. Y. Suppl. 228].

46. Gilbert *v.* Miller, 82 Iowa 728, 47 N. W. 1016; Standard Bank *v.* Stokes, 9 Ch. D. 68, 47 L. J. Ch. 554, 38 L. T. Rep. N. S. 672, 26 Wkly. Rep. 492; Reading *v.* Barnard, 1 M. & M. 71, 22 E. C. L. 475.

1. Black L. Dict.

Applied in Vandenheuvel *v.* United Ins. Co., 2 Johns Cas. (N. Y.) 127, 166.

2. Burrill L. Dict.

3. Black L. Dict. [*citing* Coke Litt. 289].

4. Black L. Dict.

5. Delafield *v.* Illinois, 2 Hill (N. Y.) 159, 172. See also People *v.* Miller, 84 N. Y. App. Div. 168, 170, 82 N. Y. Suppl. 621.

6. Ft. Edward *v.* Fish, 156 N. Y. 363, 370, 50 N. E. 973.

7. Delafield *v.* Illinois, 2 Hill (N. Y.) 159, 172 [*quoted* in Evans *v.* Tillman, 38 S. C. 238, 246, 17 S. E. 49].

8. Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 417, 18 Atl. 414, 498, 5 L. R. A. 367.

Distinguished from nominal value see Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 417, 18 Atl. 414, 498, 5 L. R. A. 367.

9. Black L. Dict. See also, generally, Carriers.

May include a piece of cloth.— This word, as used in a statute making it an offense to use a British pass or protection, will include a piece of cloth. It is as much a pass as if a ring or a watch seal or any other symbol had been given, upon the exhibition of which the party would be permitted to go unmolested. U. S. *v.* Briggs, 24 Fed. Cas. No. 14,646, 2 Gall. 363.

10. State *v.* Harroun, 199 Mo. 519, 526, 98 S. W. 467; State *v.* Watson, 65 Mo. 115, 119.

to execute and deliver;[11] a term which, according to the connection, may be the equivalent of to constitute, to ESTABLISH, *q. v.*; to ORDAIN,[12] *q. v.*; sometimes used in the sense of to Go,[13] *q. v.*; to run or to be located[14] and often used as the equivalent of DEVISE,[15] *q. v.* (See DEADHEADS; FREE PASS; PASS-BOOK.)

PASSABLE. Capable of being traveled, or the like.[16]

PASSAGE. A way over water;[17] carriage of passengers by water, or money paid for such carriage;[18] travel by sea; a voyage over water;[19] transmission.[20] Applied to a bill or resolution, ENACTMENT,[21] *q. v.* (See, generally, MARINE INSURANCE; SHIPPING; STATUTES.)

PASSAGEWAY. A way or highway;[22] that portion of a theatre through which persons going to or from their seats are accustomed to, or must of necessity pass.[23] (See, generally, EASEMENTS; PRIVATE ROADS; STREETS AND HIGHWAYS.)

PASS-BOOK. A book of the buyer or usually debtor party, in which he allows the other party to enter their mutual transactions.[24] (See, generally, ACCOUNTS AND ACCOUNTING; BANKS AND BANKING; EVIDENCE.)

PASSENGER. A passer or passerby; one who is making a passage; a traveller, especially by some established conveyance; a person conveyed on a journey;[25] one who passes; is on his way; a traveller; a wayfarer.[26] (See, generally, CARRIERS; NEGLIGENCE; SHIPPING.)

Used in connection with counterfeit money it means to deliver bank notes as money, or as a known and conventional substitute for money. Com. *v.* Starr, 4 Allen (Mass.) 301, 303; Hopkins *v.* Com., 3 Metc. (Mass.) 460, 464. See also U. S. *v.* Nelson, 27 Fed. Cas. No. 15,861, 1 Abb. 135, 136.

"Passed" a bill see Burns *v.* Sewell, 48 Minn. 425, 430, 51 N. W. 224.

"Passing" distinguished from "depositing," "pledging" (see Gentry *v.* State, 3 Yerg. (Tenn.) 451); "uttering" or "publishing" (see Com. *v.* Searle, 2 Binn. (Pa.) 332, 338, 4 Am. Dec. 446).

11. As applied to papers, conveyances, etc., see Linthicum *v.* Thomas, 59 Md. 574, 577. See also Reg. *v.* Ion, 2 Den. C. C. 475, 489, 14 Eng. L. & Eq. 556, 16 Jur. 746, 21 L. J. M. C. 166, brief.

12. Kepner *v.* Com., 40 Pa. St. 124, 129.

13. Miles *v.* Douglas, 34 Conn. 393, 394 ("pass and repass"); Gillespie *v.* Weinberg, 148 N. Y. 238, 239, 42 N. E. 676 ("passing and re-passing").

14. North Missouri R. Co. *v.* Winkler, 29 Mo. 318, 320, as where a person subscribes to the stock of a railroad company upon condition that the road should "pass" through a certain county, and on a certain designated route.

"Passing through a county" see Grey *v.* Greenville, etc., R. Co., 59 N. J. Eq. 372, 380, 46 Atl. 638.

"Passing through the town" see State *v.* Collins, 6 Ohio 126, 142.

15. Young *v.* Boardman, 97 Mo. 181, 185, 10 S. W. 48; Gant *v.* Henly, 64 Mo. 162, 164.

"Pass by will" see *In re* Joyslin's Estate, 76 Vt. 88, 92, 56 Atl. 281.

16. Webster Int. Dict. As a "passable highway." Vanatta *v.* Waterhouse, 33 Ind. App. 516, 71 N. E. 159, 160.

17. Black L. Dict.

18. Black L. Dict.

"Passage home" is a passage to the port at which the seaman was shipped, or to some other port in the United Kingdom, agreed to by the seaman. Purnes *v.* Straits of Dover Steamship Co., [1899] 2 Q. B. 217, 221, 8 Aspin. 566, 68 L. J. Q. B. 925, 81 L. T. Rep. N. S. 35, 47 Wkly. Rep. 630.

"Passage-money" is the charge made for the conveyance of a passenger in a ship or other vessel. Century Dict. See also FARE, 19 Cyc. 456; and, generally, SHIPPING.

"Passage ticket" is a mere token or voucher furnished by the carrier to the passenger upon the payment by him of fare. Thompson Negl. [*quoted* in McCollum *v.* Southern Pac. Co., 31 Utah 494, 499, 88 Pac. 663].

19. Black L. Dict.

20. See U. S. *v.* Claypool, 14 Fed. 127, 129, where "passage of the mails" is said to mean the transmission of mail matter from the time the same is deposited in a place designated by law or by the rules of the post-office department, up to the time the same is delivered to the person to whom it is addressed.

21. Black L. Dict.

22. Chandler *v.* Goodridge, 23 Me. 78, 82.

The terms "street, lane or passage way" include any way which was actually open and used for the ordinary purposes of an open way. Com. *v.* Thompson, 12 Metc. (Mass.) 231, 232.

23. Sturgis *v.* Grau, 39 Misc. (N. Y.) 330, 332, 79 N. Y. Suppl. 843.

24. Ruch *v.* Friche, 28 Pa. St. 241, 245. See also Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 60, 4 N. E. 123, 54 Am. Rep. 653; Augsbury *v.* Shurtliff, 114 N. Y. App. Div. 626, 632, 99 N. Y. Suppl. 989.

25. Webster Dict. [*quoted* in Pennsylvania R. Co. *v.* Price, 96 Pa. St. 256, 267, 2 Ky. L. Rep. 183, 189].

26. Worcester Dict. [*quoted* in Pennsylvania R. Co. *v.* Price, 96 Pa. St. 256, 267, 2 Ky L. Rep. 183, 189].

"Passenger boat" is a sailing boat, river steamboat, rowboat, wherry, or other like craft, used for carrying passengers. Kennaird *v.* Cory, [1898] 2 Q. B. 578, 584, 19

PASSENGER-CAR. See CARRIERS.

PASSENGER-SHIP. See SHIPPING.

PASSENGER STATION. See CARRIERS.

PASSES. See PASS.

PASSION. Any of the emotions of the mind known as ANGER (*q. v.*), rage, sudden resentment, or terror, rendering the mind incapable of cool reflection.[27] (See ADEQUATE CAUSE; MALICE; and generally, HOMICIDE.)

PASSIVE. Not active, but acted upon.[28] (Passive: Trust, see TRUSTS.)

PASSIVE TRUST. See TRUSTS.

PASSPORT. A permission from a neutral state, to a master of a ship, to proceed on the voyage proposed, and usually contains his name, and residence, the name, description and destination of the ship, with such other matters as the practice of the place requires;[29] in modern European law, a warrant of protection and authority to travel, granted to persons moving from place to place, by the competent officer.[30] (Passport: As Evidence of Citizenship, see CITIZENS. Of Vessel, see SHIPPING.)

PASS WAY. See EASEMENTS.

PAST. Of or pertaining to a former time or state.[31]

PASTEBOARD. A paper of a coarse and inferior quality.[32] (See PAPER.)

PASTERS. See ELECTIONS.

PASTILLE. An aromatic or medicated drop or lozenge of sugar confectionery.[33]

PASTIME. Sport; AMUSEMENT, *q. v.*; DIVERSION,[34] *q. v.*

Cox C. C. 145, 62 J. P. 580, 67 L. J. Q. B. 809, 78 L. T. Rep. N. S. 816, 47 Wkly. Rep. 30. See also, generally, SHIPPING.

"Passenger depot" is a depot building used for the reception of passengers (St. Louis, etc., R. Co. *v.* State, 61 Ark. 9, 12, 31 S. W. 570); or a stopping place at which passenger tickets are ordinarily sold (Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 597, 15 Atl. 411). See also DEPOT; DEPOT GROUNDS; and, generally, CARRIERS.

Passenger elevator see CARRIERS; NEGLIGENCE.

"Passenger's ticket" is the acknowledgment of the receipt of the passenger's fare, and the obligation to carry him for the purposes and upon the terms specified. Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 133, 52 Am. Rep. 620. See, generally, CARRIERS.

"Passenger train" is a train which consists of passenger, baggage, express, and mail cars. Railroad Commissioner *v.* Wabash R. Co., 123 Mich. 669, 671, 82 N. W. 526. Mixed trains, made up in part of a passenger equipment and in part of freight cars, used for the transportation of passengers, are passenger trains, within the meaning of the terms of a contract giving a railroad company depot facilities for passenger trains. Chicago Great Western R. Co. *v.* St. Paul Union Depot Co., 68 Minn. 220, 222, 71 N. W. 23.

27. Stell *v.* State, (Tex. Cr. App. 1900) 58 S. W. 75, 76; Tickle *v.* State, 6 Tex. App. 623, 641.

"Passion" presupposes absence of malice. — "Malice" excludes passion. State *v.* Johnson, 23 N. C. 354, 362, 35 Am. Dec. 742.

28. Webster Int. Dict.

"Passive sufferance" are words which imply knowledge, and if the acts suffered were without remonstrance, it would be assent, although perhaps not choice. Sherwood *v.* Titman, 55 Pa. St. 77, 81.

29. Sleght *v.* Hartshorne, 2 Johns. (N. Y.) 531, 543 [*quoting* Marshall Ins. 317].

Distinguished from "sea-letter" by Marshall who says that the sea-letter "specifies the nature and quantity of the cargo, the place from whence it comes, and its destination, and is not so necessary as the 'passport.'" Sleght *v.* Hartshorne, 2 Johns. (N. Y.) 531, 544. But "in our treaties with 'France,' 'Holland' and 'Spain,' 'sea-letters' and 'passports' are used synonymously; and are to express the name, property and bulk of the ship, as also the name and place of habitation of the master. They, therefore, relate solely to the 'vessel.'" Sleght *v.* Hartshorne, *supra*.

30. Black L. Dict. [*citing* Brande].

31. Webster Int. Dict.

"Past-due interest" is interest which has matured and is collectable on demand. Coquard *v.* Kansas City Bank, 12 Mo. App. 261, 266. See also, generally, INTEREST.

"Past recollection" refers to the testimony from memoranda which the witness made himself of observations at a time anterior to testifying and of the facts recorded by which he has no present independent recollection, but has a knowledge derived from the fact of his record. Diamond Glue Co. *v.* Wietzychowski, 125 Ill. App. 277, 285.

32. Patteson *v.* Garret, 7 J. J. Marsh. (Ky.) 112, 115.

33. Abendroth *v.* State, 34 Tex. Cr. 325, 328, 30 S. W. 787.

34. Century Dict.

Money staked on the result of an election is not money bet on a game, sport, or pastime. Hickman *v.* Littlepage, 2 Dana (Ky.) 344, 346; Graves *v.* Ford, 3 B. Mon. (Ky.) 113, 114.

PASTOR. One who has been installed, according to the usages of some Christian denomination, in charge of a specific church or body of churches.[35] (Pastor: In General, see Religious Societies. Privileged Communications to, see Libel and Slander; Witnesses. See also Clergyman; Curate.)

PASTURAGE. The right of grazing one's cattle on the estate of another.[36] (See Pasture.)

PASTURE. A term which includes not only the grass growing upon the ground, but the ground or sod itself upon which the grass grows.[37] (Pasture: In General, see Animals. Common of, see Common Lands. Use of Land For as Evidence of Adverse Possession, see Adverse Possession. See also Emblements; Pasturage.)

PATEAT UNIVERSIS PER PRÆSENTES. Literally "Know all men by the presents."[38]

PATENS. That which appeareth to be ambiguous upon the deed or instrument.[39] (See Ambiguity; Patent.)

PATENT. Open; manifest; evident; unsealed.[40] As a noun, a grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals.[41] (Patent: Ambiguity, see Ambiguity; Evidence. For Invention, see Patents. For Land, see Mines and Minerals; Public Lands. Law, see Patents. Medicine—In General, see Druggists; Customs Duties, see Customs Duties; Internal Revenue, see Internal Revenue. Office, see Patents. Right, see Patents. (See also Latent, and Cross-References Thereunder.)

PATENTABLE COMBINATION. See Patents.

PATENT AMBIGUITY. See Evidence.[42]

PATENT FOR LAND. See Mines and Minerals; Public Lands.

PATENT LAW. See Patents.

PATENT MEDICINE.[43] See Customs Duties; Druggists; Internal Revenue.

PATENT OFFICE. See Patents.

PATENT RIGHT. See Patents.

35. Perry First Presb. Church *v.* Myers, 5 Okla. 809, 825, 50 Pac. 70, 38 L. R. A. 687 [*citing* Century Dict.; Webster Dict.].

36. La. Civ. Code (1900), art. 726.

37. Gulf, etc., R. Co. *v.* Jones, 1 Tex. Civ. App. 372, 374, 21 S. W. 145.

38. Burrill L. Dict.

39. Bacon Max. [*quoted* in Carter *v.* Holman, 60 Mo. 498, 504; Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108, 113].

40. Black L. Dict.

41. Black L. Dict.

"Patent dangers" are such defects or dangers as are perceptible to the senses. Williams *v.* Walton, etc., Co., 9 Houst. (Del.) 322, 331, 32 Atl. 726. See also Danger, 13 Cyc. 256; Latent Dangers, 25 Cyc. 162.

"Patent defect" is one that may be discovered by the exercise of ordinary diligence. Lawson *v.* Baer, 52 N. C. 461, 462. See also Defect, 13 Cyc. 761.

"Patent flour" is flour of the first grade, so called, because it is said to be the best product obtained in a mill from wheat handled by it. Nordyke, etc., Co. *v.* Kehlor, 155 Mo. 643, 653, 56 S. W. 287, 78 Am. St. Rep. 600. See also Flour, 19 Cyc. 1080.

"Patent fuel" is an article composed of coal dust, mixed with a certain percentage of pitch and lime (London *v.* Parkinson, 10 C. B. 228, 238, 70 E. C. L. 228); a term said to be capable of being aptly applied to coal broken by a patented machine, and having a peculiar shape (Howard *v.* Great Western Ins. Co., 109 Mass. 384, 388). See also Coal, 7 Cyc. 266.

"Patent insides" or "outsides" is a name given to newspaper sheets printed on one side with general and miscellaneous matter, and furnished wholesale to offices of small newspapers, where the blank pages are filled up with recent and local news. Webster Int. Dict. See also Palmer *v.* McCormick, 30 Fed. 82, 84.

"Patent leather" see 25 Cyc. 171 note 42.

42. See also Ambiguity, 2 Cyc. 278.

43. "Patent . . . medicines" are medicines prepared for immediate use by the public, put up in packages or bottles labeled with the name and accompanied with wrappers containing directions for their use and the conditions for which they are specifics. State *v.* Donaldson, 41 Minn. 74, 80, 42 N. W. 781. See also Medicine, 27 Cyc. 466.

PATENTS

By Charles Holland Duell*

I. Nature of Patents, 815

A. *In General,* 815
1. *Grant,* 815
2. *No Common-Law Right,* 815
3. *Consideration For Grant,* 816
4. *Creation of Statute,* 816
5. *Contract,* 816
6. *Monopoly,* 816

B. *Rights of Patentees,* 817
1. *Nature of Right,* 817
2. *Territory Covered by Right,* 817
3. *Need Not Use Invention or License Others to Use,* 817
4. *Right of Government to Use Invention,* 818
5. *Government Cannot Cancel Patent,* 818

C. *Patents as Property,* 819
1. *Personal Property,* 819
2. *Location,* 819
3. *How Reached by the Courts,* 819

D. *Constitutional Authority For Patents,* 819
1. *In General,* 819
2. *Grant to Inventors Not to Importers,* 820
3. *Patents Granted by State,* 820

II. Subjects of Patents, 820

A. *Patentable Subject-Matter,* 820
1. *In General,* 820
2. *Statutory Classes of Invention,* 820
3. *Physical Things Only Are Patentable,* 820
4. *Result of Principle Not Patentable,* 821
5. *Means Are Patentable,* 822

B. *Art,* 822
1. *In General,* 822
2. *Must Produce Physical Result,* 824
3. *Function Not Patentable,* 824
4. *Independent of Apparatus,* 824
5. *Chemical or Elemental Action,* 825
6. *Mechanical Processes,* 825
7. *Knowledge of Principles Involved Unnecessary,* 825

C. *Machines,* 825

D. *Manufacture,* 825

E. *Composition of Matter,* 826

F. *Improvement,* 826
1. *In General,* 826
2. *Superiority Unnecessary,* 826

G. *Designs,* 827
1. *In General,* 827
2. *Term,* 828

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The author acknowledges valuable assistance from John M. Coit, Esq., of the Washington City Bar. Mr. Coit was for many years Law Clerk of the Patent Office and later Examiner-in-Chief.

III. PATENTABILITY, 828
A. *In General*, 828
B. *Novelty*, 828
1. *In General*, 828
2. *Prior Knowledge in This Country*, 829
3. *Extent of Prior Knowledge*, 829
4. *Date of Knowledge*, 829
5. *Prior Knowledge or Use Abroad*, 829
6. *Publication or Patent Abroad*, 830
7. *Novelty of Means*, 830
8. *Novelty of Function or Result*, 830
9. *Novelty of Form*, 831
10. *Novelty in Combination*, 831
C. *Anticipation*, 832
1. *In General*, 832
a. *Introductory Statement*, 832
b. *Full Disclosure Necessary*, 832
c. *Identity*, 832
d. *General Knowledge of Public Unnecessary*, 834
e. *Patentee's Knowledge of Anticipation Unnecessary*, 835
2. *Prior Patents*, 835
a. *In General*, 835
b. *Foreign Patents*, 835
c. *Paper Patents*, 836
d. *Secret Patents*, 836
e. *Sufficiency of Description*, 836
f. *Failure to Claim Immaterial*, 837
3. *Prior Publication*, 837
a. *In General*, 837
b. *Sufficiency of Publication*, 837
c. *Sufficiency of Description*, 838
4. *Prior Knowledge and Use*, 838
a. *Sufficiency of Knowledge*, 838
b. *Mental Idea Insufficient*, 838
c. *Necessity For Perfected Invention*, 838
d. *Necessity For Demonstration of Success*, 839
e. *Abandoned or Unsuccessful Experiments*, 839
f. *Models and Unpublished Drawings*, 840
g. *Accidental Production of Invention*, 840
h. *Lost Art*, 841
i. *Combination of Old Elements*, 841
j. *Non-Analogous Use*, 842
k. *Evidence*, 842
(I) *Presumptions and Burden of Proof*, 842
(II) *Admissibility*, 842
(A) *In General*, 842
(B) *Application For Patent*, 843
(III) *Weight and Sufficiency*, 844
D. *Utility*, 845
1. *In General*, 845
2. *Evidence of Utility*, 846
E. *Invention*, 847
1. *Necessity*, 847
2. *Nature*, 847
3. *Invention and Discovery Synonymous*, 848
4. *Prior Art Considered*, 848
5. *Novelty and Superiority Not Invention*, 848

6. *Simplicity Does Not Negative*, 849
7. *Complexity Not Proof of Invention*, 849
8. *Mechanical Skill*, 849
9. *Superior Finish or Form Not Invention*, 850
10. *Difference in Degree Not Patentable*, 851
11. *Duplication of Parts*, 852
12. *Double Use*, 852
13. *New and Non-Analogous Use*, 854
14. *Substitution of Equivalents*, 855
    a. *In General*, 855
    b. *Superiority of Substituted Part No Test*, 856
15. *Substitution of Material*, 856
16. *Change of Location of Parts*, 857
17. *Omission of Parts*, 857
18. *Making Parts Integral or Separate*, 858
19. *Making Device Portable*, 858
20. *Combination*, 858
    a. *In General*, 858
    b. *Lack of Novelty in Elements Immaterial*, 859
    c. *Coaction of Elements Necessary*, 859
21. *Aggregation*, 860
    a. *In General*, 860
    b. *Multiplication of Elements*, 861
    c. *Novel Elements*, 861
22. *Evidence of Invention*, 861
    a. *Unsuccessful Efforts of Others*, 861
    b. *Supplying Long-Felt Want*, 862
    c. *Popularity of the Supposed Invention*, 862

F. *Statutory Forfeiture Regardless of Intent*, 863
1. *In General*, 863
2. *Publication Two Years Before Application*, 863
3. *Foreign Patent*, 864
4. *Concealment of Invention*, 864
5. *Date of Application*, 864
6. *Renewal or Substitute Application*, 864
7. *Divisional Applications*, 865
8. *Prior Public Use or Sale*, 865
    a. *As Bar to Patent*, 865
    b. *Nature of Use Sufficient to Bar Patent*, 866
        (I) *In General*, 866
        (II) *Single Instance Sufficient*, 866
        (III) *Knowledge or Consent of the Inventor*, 866
        (IV) *Invention Must Be Complete*, 867
        (V) *Experimental Use*, 867
        (VI) *Secret Use*, 867
        (VII) *Natural and Intended Use*, 867
        (VIII) *Use For Profit*, 867
        (IX) *Use in a Foreign Country*, 868
    c. *On Sale*, 868
        (I) *In General*, 868
        (II) *Single Sale Sufficient*, 868
        (III) *Offer For Sale*, 868
        (IV) *Sale For Experiment*, 868
        (V) *Conditional Sale*, 869
        (VI) *Perfected Invention*, 869
        (VII) *Burden of Proof*, 869

G. *Abandonment of Invention*, 869

1. *In General*, 869
2. *Question of Intent*, 870
3. *Express Abandonment*, 870
4. *Abandonment by Conduct*, 870
5. *Necessity of Disclosure to Public*, 871
6. *Abandoned Experiments*, 871
7. *Failure to Claim in Patent*, 871
8. *Abandonment of Application*, 871
9. *Evidence of Abandonment*, 872

IV. PERSONS ENTITLED TO PATENTS, 872

A. *Original and First Inventor*, 872
1. *In General*, 872
2. *First Inventor*, 873
3. *Originality of Invention*, 873
4. *Citizenship of Inventor*, 874
5. *Reduction to Practice*, 874
a. *In General*, 874
b. *Constructive Reduction to Practice*, 875
6. *Diligence*, 876
7. *Models, Drawings, and Description*, 877
8. *Assistance by Others*, 877
9. *Invention Made Abroad*, 878
10. *Evidence as to Originality and Priority*, 878
a. *Presumptions and Burden of Proof*, 878
b. *Admissibility and Sufficiency*, 878

B. *Joint Inventors*, 879
1. *In General*, 879
2. *Joinder and Grant*, 879

C. *Employer and Employee*, 880
1. *In General*, 880
2. *Perfection of Employer's Ideas*, 881
3. *Presumptions as to Inventorship*, 881

D. *Government Employees*, 881
E. *Assignees*, 882
F. *Personal Representatives*, 882
G. *Heirs*, 882
H. *Guardian of Insane Person*, 882

V. APPLICATION AND PROCEEDINGS THEREON, 882

A. *In General*, 882
B. *Requisites of Application*, 882
1. *In General*, 882
2. *Specification or Description*, 883
a. *In General*, 883
b. *Matters of Common Knowledge*, 884
c. *Uses of Invention*, 884
d. *Philosophical Principles*, 885
e. *Improvements*, 885
f. *Concealment and Deception*, 885
3. *Claims*, 886
a. *In General*, 886
b. *Vague, Indefinite, and Inaccurate Claims*, 886
c. *Must State Means, Not Function or Result*, 886
d. *Breadth of Claim*, 886
e. *Alternative Claims*, 887
f. *Multiplicity of Claims*, 887
4. *Drawings*, 887

5. *Oath*, 888
a. *Necessity*, 888
b. *By and Before Whom Made*, 888
c. *Absence of Written Oath*, 888
6. *Fees*, 889
7. *Subject-Matter or Scope*, 889
C. *Examination and Proceedings in Patent Office*, 889
1. *In General*, 889
2. *Rejection*, 890
3. *Evidence at Hearing*, 890
4. *Amendment*, 891
a. *In General*, 891
b. *New Matter*, 891
c. *Delay in Amending*, 891
d. *Oath*, 892
5. *Allowance*, 892
6. *Forfeiture and Renewal*, 892
7. *Abandonment*, 892
8. *Interference*, 892
a. *In General*, 892
b. *Between Applicants and Patentees*, 893
c. *Evidence*, 894
(I) *Burden of Proof*, 894
(II) *Admissibility and Weight and Sufficiency*, 895
d. *Pleadings*, 895
e. *Second Interference*, 896
9. *Appeal*, 896
a. *In General*, 896
b. *Who Entitled to Appeal*, 896
c. *Formalities and Proceedings*, 897
d. *Appealable Decisions*, 897
e. *Review*, 898
f. *Time For Appeal*, 899
10. *Caveats*, 899
a. *In General*, 899
b. *By Whom Filed*, 899
11. *Secrecy of Applications and Caveats*, 900
12. *Right to Inspect and Obtain Copies of Patent Office Records*, 900
13. *Copies of Records*, 900
14. *Rules of Patent Office*, 900
15. *Conclusiveness and Effect of Patent Office Decisions*, 900
a. *In General*, 900
b. *As to Application and Procedure in Obtaining Patent*, 901
c. *As to Patentability*, 902
d. *As to Originality and Priority*, 902
e. *As to Abandonment*, 903
16. *Remedy in Equity For Refusal of Patent*, 903
a. *In General*, 903
b. *Time and Place of Suit*, 904
c. *Burden of Proof*, 904

VI. REQUISITES AND VALIDITY OF LETTERS PATENT, 904

A. *Form and Contents*, 904
1. *As an Instrument*, 904
2. *Record*, 905
3. *Date of Issue*, 905

B. *Validity*, 905
1. *In General*, 905
2. *Sufficiency of Description*, 906
3. *Name of Patentee*, 906
4. *Deceptive Patent*, 906
a. *In General*, 906
b. *Suppression of Facts*, 907
5. *Joinder of Several Inventions*, 907
6. *Double Patenting*, 907
7. *Claims*, 908
a. *In General*, 908
b. *Excessive Claims*, 909
8. *Delay of Application in Patent Office*, 909
9. *Jurisdiction to Determine Validity*, 909
C. *Correction or Amendment of Patents*, 910
D. *Interfering Patents*, 910
1. *In General*, 910
2. *Proceedings*, 910
3. *Judgment*, 911
E. *Annulment or Repeal*, 911
F. *Estoppel to Dispute Validity*, 912
1. *In General*, 912
2. *Estoppel of Infringer*, 912
3. *Estoppel of Assignor*, 913
4. *Estoppel of Assignee, Grantee, or Licensee*, 914
5. *Expired License*, 914

VII. TERM, 915
A. *In General*, 915
1. *Mechanical Patents*, 915
2. *Designs*, 915
3. *Reissues*, 915
4. *Limitation by Foreign Patent*, 915
a. *In General*, 915
b. *Identity of Invention*, 916
c. *Date of Foreign Patent*, 917
d. *Term of Foreign Patent*, 917
e. *Lapse or Expiration of Foreign Patent*, 917
B. *Extensions*, 918

VIII. REISSUES, 919
A. *In General*, 919
1. *Definition*, 919
2. *Power to Reissue and Grounds*, 919
3. *Persons Entitled to Reissue*, 920
4. *Term*, 921
B. *Time For Application*, 921
1. *In General*, 921
2. *Intervening Rights of Third Persons*, 921
3. *Excuses For Delay*, 922
C. *Identity of Invention*, 923
1. *In General*, 923
2. *New Matter*, 925
a. *In General*, 925
b. *Intention to Claim*, 925
c. *Apparatus, Process, and Product*, 926
3. *Reinsertion of Canceled Claim*, 926

D. *Surrender of Original Patent*, 926
E. *Applications and Proceedings Thereon*, 927
1. *In General*, 927
2. *Divisional Reissues*, 927
F. *Reissues of Reissued Patents*, 927
G. *Conclusiveness and Effect of Patent Office Decisions*, 927
1. *In General*, 927
2. *As to Grounds For Reissue*, 928
3. *As to Identity*, 928
H. *Validity, Construction, and Operation of Reissues*, 929
1. *Validity*, 929
2. *Construction and Operation*, 929
a. *In General*, 929
b. *Retroactive Operation*, 930

IX. DISCLAIMERS, 930

A. *In General*, 930
B. *Subject-Matter of Disclaimer*, 930
C. *Time For Disclaimer*, 931
D. *Effect of Failure to Disclaim*, 931
E. *Effect of Disclaimer*, 932

X. CONSTRUCTION AND OPERATION OF LETTERS PATENT, 932

A. *In General*, 932
1. *General Rules of Construction Relating to Contracts Applicable*, 932
2. *Liberally Construed*, 933
3. *Plain Meaning Not Varied*, 933
4. *Intention of Inventor*, 934
5. *Proceedings in Patent Office*, 934
6. *Opinion of Experts*, 935
7. *State of the Art*, 935
8. *Patent as Notice*, 936
9. *Questions For Court and Jury*, 936
B. *Limitation of Claims*, 936
1. *In General*, 936
2. *Claims Construed by Specifications*, 938
3. *Effect of Words "Substantially as Described" in Claim*, 939
4. *Reference Letters*, 939
5. *Equivalents*, 939
6. *Pioneer Inventions*, 940
7. *Improvements*, 940
8. *Combination*, 941
9. *Amendment in Patent Office*, 941
10. *Separate Claims Distinguished*, 943
11. *Designs*, 943

XI. TITLE, CONVEYANCES, AND CONTRACTS, 943

A. *Assignments and Other Transfers*, 943
1. *In General*, 943
a. *Assignability*, 943
b. *Who May Assign*, 943
(I) *In General*, 943
(II) *Joint Owners*, 943
2. *Agreements to Assign*, 944
a. *In General*, 944
b. *Future Patents*, 944

c. *Recording*, 945
d. *Actions*, 945
3. *Requisites and Validity*, 946
a. *In General*, 946
b. *Form and Contents*, 946
c. *Validity*, 947
4. *Recording*, 947
a. *In General*, 947
b. *Notice*, 948
c. *Acknowledgment Before Notary*, 948
5. *Construction and Operation*, 948
a. *In General*, 948
b. *Warranty*, 949
c. *Rights and Interests Conveyed*, 949
(I) *In General*, 949
(II) *Rights in Extended Term*, 950
(III) *Rights in Reissue*, 950
(IV) *After-Acquired Title*, 950
(V) *Rights of Action For Past Infringement*, 950
d. *Covenants, Conditions, and Restrictions*, 951
(I) *In General*, 951
(II) *Remedy For Breach of Conditions*, 951
(A) *Rescission or Cancellation*, 951
(B) *Recovery of Damages*, 951
6. *Rights, Remedies, and Liabilities of Parties*, 952
a. *In General*, 952
b. *As to Each Other*, 952
(I) *In General*, 952
(II) *Liability For, and Recovery Of, Consideration*, 952
(III) *Recovery Back of Consideration by Assignee*, 953
c. *As to Third Parties*, 953
7. *Transfer by Succession or Inheritance*, 954
B. *Licenses and Contracts*, 954
1. *Licenses*, 954
a. *In General*, 954
b. *Requisites and Validity*, 954
(I) *In General*, 954
(II) *Implied License*, 955
(A) *In General*, 955
(B) *From Sale of Patented Article*, 955
c. *Recording*, 956
d. *Construction and Operation*, 956
(I) *In General*, 956
(II) *Rights and Interests Conveyed*, 956
(A) *In General*, 956
(B) *Place For Exercise of License*, 957
(1) *Express License*, 957
(2) *Implied License*, 957
(C) *Duration of License*, 957
(1) *In General*, 957
(2) *In Extended Term*, 958
(III) *Covenants and Conditions*, 958
e. *Rights, Remedies, and Liabilities*, 959
(I) *In General*, 959
(II) *Enjoining Use of Invention*, 959
(III) *Liability For and Recovery Of Consideration For License*, 960

f. *Assignments and Sublicenses*, 960
(I) *In General*, 960
(II) *Assent to or Recognition of Assignment by Licensor*, 960
(III) *Rights and Liabilities of Parties*, 961
g. *Revocation, Forfeiture, or Other Termination*, 961
(I) *By Licensor*, 961
(II) *By Licensee*, 962
(III) *By Death of Licensee*, 962
(IV) *By Dissolution of Partnership or Corporation*, 962
(V) *Revival of Forfeited License*, 962
2. *Contracts*, 962
3. *Royalties*, 963
a. *Rights and Liabilities of Parties*, 963
(I) *When Royalties Due*, 963
(II) *Amount of Royalty*, 963
(III) *Persons Entitled to Royalties*, 964
(IV) *Persons Liable For Royalties*, 964
(V) *Lien*, 965
b. *Remedies*, 965
C. *Enforcement of Assignments, Contracts, and Agreements*, 966

XII. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES, 967

A. *By Congress*, 967
1. *Failure to Mark Patented Articles*, 967
2. *Marking Unpatented Article*, 968
3. *Penalties*, 968
a. *In General*, 968
b. *Infringement of Design Patents*, 969
B. *By States*, 969

XIII. INFRINGEMENT, 971

A. *What Constitutes*, 971
1. *In General*, 971
2. *Making, Using, or Selling*, 972
3. *Article Made Before Patent*, 972
4. *Experimental Use*, 972
5. *Knowledge or Intent of Infringer*, 973
6. *Identity of Infringing Device*, 973
a. *In General*, 973
b. *Limitation of Claims*, 975
c. *Diversity of Use*, 975
d. *Combination*, 975
e. *Process*, 977
f. *Composition*, 978
g. *Substitution of Equivalents*, 979
(I) *In General*, 979
(II) *What Are Equivalents*, 980
(III) *Necessity For Knowledge of Equivalent at Date of Patent*, 982
h. *Omission of Parts*, 983
i. *Addition of Parts*, 984
j. *Transposition of Elements*, 984
k. *Repair*, 985
l. *Superiority or Inferiority as a Test of Infringement*, 986
m. *Patented Improvement*, 987

7. *Designs*, 988
8. *Infringement After Expiration of Patent*, 989
B. *Contributory Infringement*, 989
1. *In General*, 989
2. *Selling Parts of Patented Invention*, 989
3. *Selling Article Used With Patented Invention*, 990
4. *Miscellaneous*, 991
C. *Suits*, 991
1. *In General*, 991
2. *Jurisdiction*, 991
a. *In General*, 991
b. *Suit For an Accounting*, 992
c. *Expiration of Patent*, 993
3. *Place to Sue*, 993
4. *Grounds*, 994
5. *Conditions Precedent*, 994
6. *Defenses*, 994
a. *In General*, 994
b. *Estoppel*, 995
c. *Combination in Restraint of Trade*, 995
d. *Limitations and Laches*, 996
(I) *Limitations*, 996
(II) *Laches*, 996
(A) *In General*, 996
(1) *As Bar to Permanent Injunction*, 996
(2) *As Bar to Preliminary Injunction*, 997
(3) *As Bar to Accounting For Profits*, 998
(B) *Excuses For Delay*, 998
(1) *Ignorance of Infringement*, 998
(2) *Other Excuses*, 998
(C) *Laches of Prior Owner*, 999
7. *Persons Entitled to Sue and Parties Plaintiff*, 999
a. *In General*, 999
b. *Licenses*, 1000
(I) *In Suits Against Strangers*, 1000
(II) *In Suits Against Patentee*, 1001
8. *Persons Liable and Parties Defendant*, 1001
a. *In Actions at Law*, 1001
b. *In Suits in Equity*, 1002
(I) *Persons Liable*, 1002
(A) *Private Corporations and Their Officers*, 1002
(B) *Officers of United States*, 1002
(C) *Joint Owner of Patent*, 1003
(D) *Agents and Servants*, 1003
(E) *Joint and Several Liability*, 1003
(II) *Parties*, 1003
(A) *In General*, 1003
(B) *Receivers of Private Corporation*, 1004
(C) *Agents and Servants*, 1004
c. *Addition or Substitution of Parties*, 1004
9. *Joinder of Causes of Action*, 1004
10. *Suit on Separate Claims of One Patent*, 1005
11. *Injunctions*, 1005
a. *In General*, 1005
b. *Preliminary Injunction*, 1006
(I) *In General*, 1006
(II) *Issuance and Validity of Patent*, 1008

(III) *Public Acquiescence in Validity*, 1010
(IV) *Previous Adjudications*, 1010
(A) *As a Prerequisite to the Allowance of Injunctions*, 1010
(B) *As a Ground For Refusing or Granting Injunctions*, 1011
(C) *Effect on Question of Infringement*, 1013
(V) *Terms and Conditions*, 1013
(VI) *Indemnity Bond*, 1014
(VII) *Application and Proceedings Thereon*, 1014
(VIII) *Consideration and Judgment on Motion*, 1015
(IX) *Modifying or Dissolving*, 1015
c. *Permanent Injunction*, 1016
d. *Violation and Punishment*, 1016
(I) *Writ or Mandate Violated*, 1016
(II) *Knowledge or Notice*, 1017
(III) *Who Liable*, 1017
(IV) *Acts or Conduct Constituting Violation*, 1017
(V) *Defenses*, 1018
(VI) *Proceedings to Punish*, 1018
(A) *Notice*, 1018
(B) *Evidence*, 1019
(C) *Hearing and Determination*, 1019
(VII) *Punishment*, 1020
(A) *Matters Considered in Mitigation*, 1020
(B) *Amount of Fine*, 1020
(C) *Distribution of Fine*, 1020
(VIII) *Costs*, 1020
12. *Damages and Profits*, 1020
a. *Damages in Actions at Law*, 1020
(I) *Right to Recover and Form of Action*, 1020
(II) *Amount Recoverable*, 1020
(A) *In General*, 1020
(B) *Counsel Fees and Expenses*, 1023
(C) *Interest*, 1023
(D) *Double and Treble Damages*, 1023
(III) *Designs*, 1023
(IV) *Effect of Recovery*, 1024
b. *Profits and Damages in Suits in Equity*, 1024
(I) *In General*, 1024
(II) *Estimation of Profits and Damages*, 1025
13. *Pleadings*, 1029
a. *In Actions at Law*, 1029
(I) *In General*, 1029
(II) *Declaration or Complaint*, 1029
(III) *Plea or Answer*, 1029
(A) *In General*, 1029
(B) *Notice of Special Matter of Defense*, 1030
b. *In Suits in Equity*, 1031
(I) *Bill*, 1031
(II) *Plea or Answer*, 1033
(A) *Plea*, 1033
(1) *In General*, 1033
(2) *Requisites and Sufficiency*, 1034
(3) *Effect of Setting Down For Argument*, 1034
(B) *Answer*, 1034

(1) *Matters Required to Be Raised by Answer*, 1034
(2) *Requisites and Sufficiency*, 1034
(3) *Amendment*, 1035
(4) *Admissions in Answer*, 1035
(5) *Notice of Special Matter*, 1036
(a) *Necessity*, 1036
(b) *Sufficiency*, 1037
(c) *Verification*, 1037
(d) *Waiver*, 1037
(III) *Cross Bill*, 1037
(IV) *Supplemental Bill*, 1037
(V) *Demurrer and Exceptions*, 1037
(VI) *Amendments, Variance, and Multifariousness*, 1038
14. *Evidence*, 1039
a. *In General*, 1039
b. *Presumptions and Burden of Proof*, 1040
c. *Evidence as to Invalidity of Patent*, 1041
d. *Expert Witnesses*, 1042
e. *Estoppel*, 1042
f. *Evidence as to Infringement*, 1042
g. *Secret Inventions*, 1042
h. *Proving Patents and Patent Office Records*, 1042
i. *Judicial Notice*, 1043
15. *Issues, Proof, and Variance*, 1043
16. *Trial in Actions at Law*, 1044
a. *In General*, 1044
b. *Questions For Court and Jury*, 1044
17. *Hearing in Suits in Equity*, 1045
a. *Questions Determined*, 1045
b. *Submission of Issues to Jury*, 1046
c. *Reception of Evidence*, 1046
d. *Dismissal*, 1047
(I) *At What Stage of Cause Allowable*, 1047
(II) *Grounds*, 1047
(III) *Dismissal Without Prejudice*, 1047
(IV) *Operation and Effect*, 1047
18. *Interlocutory Decree and Accounting*, 1047
a. *Interlocutory Decree*, 1047
b. *Proceedings in Accounting*, 1048
19. *Costs*, 1049
a. *In Actions at Law*, 1049
b. *In Suits in Equity*, 1050
20. *Appeal and Error*, 1051
a. *In Actions at Law*, 1051
b. *In Suits in Equity*, 1051
(I) *Final Decree*, 1051
(II) *Interlocutory Decree*, 1051
21. *Rehearing*, 1053
D. *Threats of Suit*, 1054
E. *Operation and Effect of Decision*, 1054
1. *In General*, 1054
2. *Recovery by Patentee as Vesting Title in Infringer*, 1056

CROSS-REFERENCES

For Matters Relating to:
Copyright, see COPYRIGHT.
Injunction to Restrain Slander of Title, see INJUNCTIONS.

For Matters Relating to — (*continued*)
Mandamus to Compel Issuance of Patent, see MANDAMUS.
Monopoly, see MONOPOLIES.
Patent For Land:
In General, see PUBLIC LANDS.
Land Under Water, Cancellation of, see NAVIGABLE WATERS.
Mineral Land, see MINES AND MINERALS.
Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES.

I. NATURE OF PATENTS.

A. In General — 1. GRANT. A patent for an invention is a grant by the state to the inventor, his heirs or assigns, of the exclusive right to make, use, and vend the thing patented for a definite period of time.[1] The inventor has a natural right to make, use, and vend his invention, and therefore the patent confers upon him no right save the right to exclude others from making, using, or selling his invention.[2]

2. NO COMMON-LAW RIGHT. At common law the inventor has no right to prevent others from using his invention,[3] but he may keep it secret and in that way deprive the public of its benefits.

1. U. S. Rev. St. (1878) § 4884 [U. S. Comp. St. (1901) p. 3381].

Other definitions are: "A grant made by the government to an inventor, conveying and securing to him the exclusive right to make and sell his invention for a term of years." Black L. Dict.

"Public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 533, 20 L. ed. 33.

"Patent right."—"A monopoly of a certain way of doing a thing. It is an exclusive right of way, in the region of invention, secured to one for a limited period as a compensation for having first discovered it" (Vose *v.* Singer, 4 Allen (Mass.) 226, 230, 81 Am. Dec. 696, where it is said to be analogous to a right of way or a right to collect tolls); "the exclusive liberty conferred by letters patent from the sovereign on an inventor or his alienee of making and vending articles according to his invention" (Avery *v.* Wilson, 20 Fed. 856, 858); "the right, protected by letters patent, to use the process, combination, or appliance, discovered by the patentee, for the production of a certain result" (Com. *v.* Central Dist., etc., Tel. Co., 145 Pa. St. 121, 127, 22 Atl. 841, 27 Am. St. Rep. 677); "the right to make, use or vend a patented invention, or inventions claimed to be patented" (State *v.* Peck, 25 Ohio St. 26, 28); a right which is said to "resemble a franchise in being a privilege which concerns, and is intended to benefit the public, which depends for existence and preservation upon the authority which confers it" (Crown Cork, etc., Co. *v.* State, 87 Md. 687, 698, 40 Atl. 1074, 67 Am. St. Rep. 371); it has also been said to be an exclusive right, a monopoly (Gilbert El. R. Co. *v.* Kobbe, 70 N. Y. 361, 370; King *v.* Platt, 37 N. Y. 155, 4 Transcr. App. 19, 3 Abb. Pr. N. S. 434, 35 How. Pr. 23); and is "incorporeal property, not susceptible of actual delivery or possession" (Waterman *v.* Mackenzie, 138 U. S. 252, 260, 11 S. Ct. 334, 34 L. ed. 923).

"Patented."—A thing is "patented" by the actual issuance of the patent under the seal of the government, speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly, and does not mean the preliminary proceedings. Edison Electric Light Co. *v.* Waring Electric Co., 59 Fed. 358, 364.

2. "A patent does not confer even the right to use the invention. The inventor had that right before. It is merely an incorporeal right to exclude others from using the invention throughout the United States conferred by the government upon compliance with certain requirements." Jewett *v.* Atwood Suspender Co., 100 Fed. 647, 648. See also Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Bloomer *v.* McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845.

The government makes no transfer to the patentee of a right preferred, or estate theretofore vested in itself.— The essential right is in the inventor before he obtains the patent. Western Electric Co. *v.* Sperry Electric Co., 59 Fed. 295, 296, 8 C. C. A. 129.

3. Dudley *v.* Mayhew, 3 N. Y. 9; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed.

3. CONSIDERATION FOR GRANT. In order that inventions may be disclosed to the public so that all may obtain the benefits,[4] the state grants to the inventor the exclusive right to make, use, and vend the invention for a limited time on condition that the inventor furnish such full, clear, and exact description of the invention as will enable those skilled in the art to which it relates, or to which it is most nearly related, to make and use it after the expirations of the patent.[5]

4. CREATION OF STATUTE. The exclusive right which inventors have to their inventions is statutory,[6] and therefore statutory provisions must be complied with in all essentials.[7]

5. CONTRACT. While a patent is a grant, it also has the elements of a contract, since it is based upon consideration flowing from the inventor to the public represented by the officials of state.[8]

6. MONOPOLY. While, under the patent laws, a patent creates a monopoly,[9] it is not a monopoly of what existed before and belonged to others — which is the true idea of a monopoly — but is a monopoly of what did not exist before and what belongs to the patentee.[10] In consequence it does not create an odious monopoly,[11] and the rights of patentees thereunder are to be liberally construed,[12]

1115; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; *In re* Dann, 129 Fed. 495; Rein *v.* Clayton, 37 Fed. 354, 3 L. R. A. 78: American Hide, etc., Splitting, etc., Mach Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co., 78 Off. Gaz. 171. And see *infra*, I, A, 4.

4. The benefit to the public by the disclosure of inventions is the primary consideration for the grant of patents (Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336; International Tooth Crown Co. *v.* Hanks' Dental Assoc. 111 Fed. 916; Liardet *v.* Johnson, Buller N. P. 76; Newbery *v.* James, 2 Meriv. 446, 16 Rev. Rep. 195, 35 Eng. Reprint 1011), the interests of the public in the granting of patents being paramount to those of inventors (Warner *v.* Smith, 13 App. Cas. (D. C.) 111).

The purpose of granting temporary monopoly is to induce disclosure. Gayler *v.* Wilder, 11 How. (U. S.) 477, 13 L. ed. 504; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, Wall. Jr. 356.

5. U. S. Rev. St. (1878) § 4888 [U. S. Comp. St. (1901) p. 3383]. See *infra*, V, A, 2, a.

6. Marsh *v.* Nichols, 128 U. S. 605, 9 S. Ct. 168, 32 L. ed. 538; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; U. S. *v.* American Bell Tel. Co., 32 Fed. 591; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465. And see *supra*, I, A, 2.

7. Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; U. S. *v.* American Bell Tel. Co., 32 Fed. 591.

8. A patent is a contract and the same rules of construction apply as in other contracts. National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Atty.-Gen. *v.* Rumford Chemical Works, 32 Fed. 608; Harris *v.* Allen, 15 Fed. 106. A patent is a contract. O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; Barter *v.* Smith, 2 Can. Exch. 455.

Renewal or extension.— There is no contract by the state that the public may use the invention at the expiration of the patent and therefore the state may renew or extend the patent. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [*reversed* in 3 Wheat. 454, 4 L. ed. 433].

9. Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058.

10. Davoll *v.* Brown, 7 Fed. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558.

11. Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645; Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co., 78 Off. Gaz. 171; Barter *v.* Smith, 2 Can. Exch. 455.

Statute of monopolies.—Patents are exempt from the statute of monopolies. Peck *v.* Hindes, 67 L. J. Q. B. 272.

12. De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; Lein *v.* Myers, 97 Fed. 607; McBride *v.* Kingman 72 Fed. 908; Fitch *v.* Bragg, 8 Fed. 588; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356;

and in harmony with the intent and purpose of the patent law and doubts resolved in their favor.[13]

B. Rights of Patentees[14]—**1. Nature of Right.** The grant of a patent gives nothing to the patentee except the right to exclude others from making, using, or selling his invention;[15] but the right is transferable by an instrument in writing.[16]

2. Territory Covered by Right. The right conferred by a patent extends to all territory mentioned in the grant and in the statutes authorizing the grant.[17] In the United States it extends throughout the several states and territories,[18] but not to unorganized territory in its possession;[19] nor are the rights of the patentee operative outside of the limits of the United States.[20] While the rights extend to American vessels on the high seas,[21] they do not extend to foreign vessels in our ports.[22]

3. Need Not Use Invention or License Others to Use. In the United States the inventor does not forfeit his patent or his right to exclude others from using his invention by his failure to make use of it himself,[23] or his refusal to license others to use it upon reasonable terms.[24] The question of licensing others to use his invention is one which the patentee alone has the right to answer, and courts cannot lawfully compel him to make use of his invention, or to permit others to use it against his will.[25] In many countries it is required that the invention be worked or the patent is void.[26]

Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645.

Patentees are a meritorious class and all the aid and protection which the law allows this court will cheerfully give them. Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

13. McMichael, etc., Mfg. Co. *v.* Stafford, 105 Fed. 380.

14. As affected by local laws see *infra*, XII, B.

15. Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Jewett *v.* Atwood Suspender Co., 100 Fed. 647.

In Canada it is held that the patentee cannot import or permit others to import patented articles without invalidating patent. Anderson Tire Co. *v.* American Dunlop Tire Co., 5 Can. Exch. 82; Wright *v.* Bell Tel. Co., 2 Can. Exch. 552; Mitchell *v.* Hancock Inspirator Co., 2 Can. Exch. 539; Barter *v.* Smith, 2 Can. Exch. 455.

16. U. S. Rev. St. (1878) § 4898.

17. Brown *v.* Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

In England the patent is effective throughout the United Kingdom and the Isle of Man. Act (1883), § 16; 46 & 47 Vict. c. 57.

18. U. S. Rev. St. (1878) § 4884 [U. S. Comp. St. (1901) p. 3381].

19. Opinion Atty.-Gen., 113 Off. Gaz. 2503, the doctrine being applied in respect of the Panama canal zone.

20. Brown *v.* Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

21. Gardiner *v.* Howe, 9 Fed. Cas. No. 5,219, 2 Cliff. 462.

22. Brown *v.* Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

23. James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Packard *v.* Lacing-Stud Co., 70 Fed. 66, 16 C. C. A. 639; Masseth *v.* Johnston, 59 Fed. 613; Campbell Printing-Press, etc., Co. *v.* Manhattan R. Co., 49 Fed. 930 [*disapproving* Hoe *v.* Knap, 27 Fed. 204].

Although never used commercially, the patent is *prima facie* valid. McKay-Copeland Lasting Mach. Co. *v.* Copeland Rapid-Last Mfg. Co., 77 Fed. 306.

Non-user of a patent does not cause a forfeiture of a patent, nor ordinarily does it justify a court of equity in withholding injunctive relief. Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 210 U. S. 405, 28 S. Ct. 748.

In England the patentee, if he fails to manufacture under his patent within four years after its grant, may have it revoked. He may also be required to grant a license under it on terms to be fixed. Act (1907), §§ 27, 24.

24. Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Masseth *v.* Reiber, 59 Fed. 614; Campbell Printing-Press, etc., Co. *v.* Manhattan R. Co., 49 Fed. 930; Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 803; U. S. *v.* American Bell Tel. Co., 29 Fed. 17; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 78 Off. Gaz. 171. *Contra*, *dictum*, in Hoe *v.* Knap, 27 Fed. 204.

25. Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 803.

26. The patentee must actually manufacture the article in Canada within two years after the patent, and must stand ready to furnish the article at a reasonable price or license others to do so. Importation from abroad invalidates the patent. Power *v.* Griffin, 33 Can. Sup. Ct. 39; Hambly *v.* Albright, 7 Can. Exch. 363; Auer Incandescent Light Mfg. Co. *v.* O'Brien, 5 Can. Exch. 243; Royal Electric Co. *v.* Edison Electric Co., 2 Can. Exch. 576; Brook *v.* Broadhead, 2 Can. Exch. 562; Toronto Tel. Mfg. Co. *v.* Bell Tel. Co., 2 Can. Exch. 524; Barter *v.* Smith, 2

4. Right of Government to Use Invention. Although the consent of the owner of a patented device is not positively necessary in order to enable the United States government to use the invention described in the letters patent, particularly in cases where it relates to the mode of construction of implements of warfare needed by the government,[27] it has no right to use a patented invention without compensation to the patentee.[28] When it grants letters patent for a new invention or discovery in the arts, it confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.[29] Nevertheless, no injunction can be obtained against the government or against an official acting for the government,[30] unless expressly permitted by act of congress,[31] nor can suit be maintained against the government for damages for infringement. It is not liable to suits founded in tort.[32] While compensation can be obtained by suit on an express or implied contract, this is the only method by which it may be obtained.[33]

5. Government Cannot Cancel Patent. In the United States a patent cannot be canceled by any officer of the government,[34] but may be canceled upon an

Can. Exch. 455; Consolidated Car Heating Co. *v.* Came, 18 Quebec Super. Ct. 44.

27. Dashiell *v.* Grosvenor, 74 Off. Gaz. 500.

28. Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; Russell *v.* U. S., 182 U. S. 516, 21 S. Ct. 899, 45 L. ed. 1210; Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530; Schillinger *v.* U. S., 155 U. S. 163, 15 S. Ct. 85, 39 L. ed. 108; Hill *v.* U. S., 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862; Solomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667; U. S. *v.* Palmer, 128 U. S. 262, 9 S. Ct. 104, 32 L. ed. 442; James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Cammeyer *v.* Newton, 94 U. S. 225, 24 L. ed. 72; Morgan *v.* U. S., 14 Wall. (U. S.) 531, 20 L. ed. 738; U. S. *v.* Burns, 12 Wall. (U. S.) 246, 20 L. ed. 388; Gibbons *v.* U. S., 8 Wall. (U. S.) 269, 19 L. ed. 453; McKeever *v.* U. S., 14 Ct. Cl. 396; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

In England the patent excludes only subjects, and the crown reserves the right to use the invention. It, however, must pay what is reasonable. Act (1883), § 27; 46 & 47 Vict. c. 57. *In re* Napier, 6 App. Cas. 174, 50 L. J. P. C. 40, 29 Wkly. Rep. 745; Dixon *v.* London Small Arms Co., 1 App. Cas. 632, 46 L. J. Q. B. 617, 35 L. T. Rep. N. S. 559, 25 Wkly. Rep. 142; *Ex p.* Pering, 4 A. & E. 949, 6 N. & M. 472, 31 E. C. L. 413; Feather *v.* Reg., 6 B. & S. 257, 35 L. J. Q. B. 200, 12 L. T. Rep. N. S. 114, 118 E. C. L. 257.

In Canada the government may use any patented invention, paying what is just. St. 35 Vict. c. 26, § 21.

29. U. S. *v.* Palmer, 128 U. S. 262, 9 S. Ct. 104, 32 L. ed. 442; James v. Campbell, 104 U. S. 356, 26 L. ed. 786.

The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor. James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786.

30. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; International Postal Supply Co. *v.* Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. ed. 1134.

31. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599.

32. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530; Schillinger *v.* U. S., 155 U. S. 163, 15 S. Ct. 85, 39 L. ed. 108; Harley *v.* U. S., 116 Off. Gaz. 875.

Suits against state or county.— Suit cannot be brought against a state for infringement, but may be brought against a county which is a quasi-municipal corporation. May *v.* Fond du Lac, 27 Fed. 695; May *v.* Mercer County, 41 Off. Gaz. 815; May *v.* Ralls County, 40 Off. Gaz. 575.

33. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530; U. S. *v.* Palmer, 128 U. S. 262, 9 S. Ct. 104, 32 L. ed. 442; U. S. *v.* Burns, 12 Wall. (U. S.) 246, 20 L. ed. 388; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Harley *v.* U. S., 116 Off. Gaz. 875; International Postal Supply Co. *v.* Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. ed. 1134.

34. U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 364, 9 S. Ct. 90, 35 L. ed. 450,

adjudication by the courts upon proper action instituted by the government for that purpose.[35]

C. Patents as Property[36] — **1. Personal Property.** A patent right is personal property,[37] and in so far as its incorporeal nature permits is subject to the general laws relating to such property,[38] and is surrounded by the same rights and sanctions which attend all other property.[39]

2. Location. It has no definite *situs* within the territorial jurisdiction of any court but is coexistent in every part of the United States.[40]

3. How Reached by the Courts. It can be reached by the courts only by securing jurisdiction of the owner.[41]

D. Constitutional Authority For Patents — 1. In General. In the United States congress has power to grant patents under the constitutional provision that it shall have power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[42] The power of congress to grant to inventors is general, and it is in their discretion to say when, for what length of time, and under what circumstances the patent for an invention shall be granted.[43] The power may, under the constitution, be exercised in making special grants to inventors,[44] and it may patent what is in public use.[45] Congress cannot, how-

in which it was said: "The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States."

35. Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591; U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 9 S. Ct. 90, 32 L. ed. 450; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; U. S. *v.* American Bell Tel. Co., 79 Off. Gaz. 1362.

A private individual cannot maintain an action to cancel a patent. Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858.

In England a patent may be annulled by proceeding in court on petition of the attorney-general or a party interested. Act (1883), § 26; 46 & 47 Vict. c. 57.

36. As passing to trustees in bankruptcy see Bankruptcy, 5 Cyc. 346.

As subject to seizure and sale by execution see Executions, 17 Cyc. 945 *et seq.*

Subjection to payment of debts in creditors' suits see Creditors' Suits, 12 Cyc. 31.

37. McCormick Harvesting Mach. Co. *v.* Aultman-Miller Co., 169 U. S. 606, 18 S. Ct. 443, 42 L. ed. 875; De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; U. S. *v.* Palmer, 128 U. S. 262, 9 S. Ct. 104, 32 L. ed. 442; Cammeyer *v.* Newton, 94 U. S. 225, 24 L. ed. 72; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

38. Patents pass with the personal estate to the legal representatives. De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co., 78 Off. Gaz. 171.

Receiver of corporation.— Patents do not vest in the receiver of a corporation. Dick *v.* Oil Well Supply Co., 25 Fed. 105; Dick *v.* Struthers, 25 Fed. 103; Adams *v.* Howard, 22 Fed. 656, 23 Blatchf. 27.

39. Densmore *v.* Scofield, 102 U. S. 375, 26 L. ed. 214.

40. Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942; Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155.

41. Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942; Jewett *v.* Atwood Suspender Co., 100 Fed. 647; Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 52 Off. Gaz. 901.

42. U. S. Const. art. 1, § 8.

In England the common law and the statute of monopolies permit the crown within reasonable limits to grant the exclusive right to trade in a new invention. Reg. *v.* Prosser, 11 Beav. 306, 13 Jur. 71, 18 L. J. Ch. 35, 50 Eng. Reprint 834; Caldwell *v.* Vanvlissengen, 9 Hare 415, 16 Jur. 115, 21 L. J. Ch. 97, 41 Eng. Ch. 415, 68 Eng. Reprint 571. The judicial committee of the privy council may confirm the grant of a patent. *Re* Card, 12 Jur. 507, 6 Moore P. C. 207, 13 Eng. Reprint 663; *In re* Honiball, 9 Moore P. C. 378, 14 Eng. Reprint 340; *In re* Robinson, 5 Moore P. C. 65, 13 Eng. Reprint 414. The statute for monopolies, section 6, permitted the granting of patents for the term of fourteen years to the true and first inventor. St. 21 Jac. I, c. 3.

43. Fire-Extinguisher Case, 21 Fed. 40; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535.

44. Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158.

45. McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Page *v.* Holmes Burglar Alarm Tel. Co., 1 Fed. 304, 17 Blatchf. 485 (holding that the consent of the inventor to the public use of his invention, or the withdrawal of his application for a patent, does not vest any right of property in the general

ever, take away the right of a party to use an article previously purchased by him.[46]

2. GRANT TO INVENTORS NOT TO IMPORTERS. Congress has no authority to grant patents to any one save inventors and discoverers, and hence cannot grant a patent to a party who merely imports a device not before known and used in this country.[47] The patentee must be the inventor.[48] In England, however, one who imports knowledge of an invention from abroad is entitled to a patent.[49]

3. PATENTS GRANTED BY STATE. While some states granted patents for inventions before the passage of a patent law by the United States they have no such right now that congress has assumed control of the matter.[50]

II. SUBJECTS OF PATENTS.

A. Patentable Subject-Matter — 1. IN GENERAL. In the United States patentable subject-matter consists of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof,[51] or any new, original, and ornamental design for any article of manufacture.[52]

2. STATUTORY CLASSES OF INVENTION. Nothing is patentable, however beneficial and novel, unless it comes within one of the statutory classes of patentable inventions.[53]

3. PHYSICAL THINGS ONLY ARE PATENTABLE. The subject-matter of patents is limited to physical things or acts producing physical effects and does not include mental theories or plans of action.[54] An idea is not patentable, but only the

public, in the sense of the fifth amendment to the constitution of the United States, so as to prevent the subsequent allowance of a patent for such invention, by act of congress, unless there was, in a particular case, a reduction of the invention to use and practice, by its embodiment in some apparatus prior to the issue of such patent. Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535.

46. Bloomer *v.* McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532.

47. Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507.

48. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441; Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. Rep. 110; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

49. *In re* Worth, 12 Ch. D. 303, 28 Wkly. Rep. 329; Plimpton *v.* Malcolmson, 3 Ch. D. 531, 45 L. J. Ch. 505, 34 L. T. Rep. N. S. 340; Nickels *v.* Ross, 8 C. B. 679, 65 E. C. L. 679; *In re* Claridge, 7 Moore P. C. 394, 13 Eng. Reprint 932.

Where a patent is taken out as for an original invention on an invention communicated from abroad, it is void. Milligan *v.* Marsh, 2 Jur. N. S. 1083; Steedman *v.* Marsh, 2 Jur. N. S. 391. But see Beard *v.* Egerton, 3 C. B. 97, 10 Jur. 643, 15 L. J. C. P. 270, 54 E. C. L. 97.

50. The power of congress is exclusive. Evans *v.* Robinson, 8 Fed. Cas. No. 4,571, Brunn. Col. Cas. 400.

51. U. S. Rev. St. (1878) § 4886; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

Constitutionality of statute.— U. S. Rev. St. (1878) § 4886 [amended by U. S. Comp. St. (1901) p. 3382], is not unconstitutional because it provides that inventions or discoveries may be either arts, machines, manufactures, or compositions of matter, and that presumptively no two of these subjects are one invention. Inventions have been thus distinguished continuously since 1793, and the supreme court of the United States has frequently recognized the validity of this division. *In re* Frasch, 27 App. Cas. (D. C.) 25.

Process and machine for performing it may be patented. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Westinghouse Electric, etc., Co. *v.* Dayton Fan, etc., Co., 106 Fed. 724 [*affirmed* in 118 Fed. 562, 55 C. C. A. 390].

52. U. S. Rev. St. (1878) § 4929, as amended May 9, 1902. See *infra*, II, G.

53. Fond du Lac County *v.* May, 137 U. S. 395, 11 S. Ct. 98, 34 L. ed. 714; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558.

54. National Meter Co. *v.* Neptune Meter Co., 122 Fed. 82 [*affirmed* in 129 Fed. 124, 63 C. C. A. 626]; McEwan Bros. Co. *v.* McEwan, 91 Fed. 787; Andrews *v.* Carman, 1 Fed. Cas. No. 371, 2 Ban. & A. 277, 13 Blatchf. 307, 9 Off. Gaz. 1011; Detmold *v.* Reeves, 7 Fed. Cas. No. 3,831, 1 Fish. Pat. Cas. 127; Draper *v.* Potomska Mills Corp., 7 Fed. Cas. No. 4,072, 3 Ban. & A. 214, 13 Off. Gaz. 276; Judson *v.* Bradford, 14 Fed.

means for utilizing it practically.[55] The mental conception must have been susceptible of embodiment, and must have been in fact embodied in some mechanical device, or some process of art.[56]

4. Result or Principle Not Patentable. The discovery of a new principle,[57] or law of nature,[58] or an end or result to be accomplished,[59] is not patentable. A

Cas. No. 7,564, 3 Ban. & A. 539, 16 Off. Gaz. 171. And see *infra*, II, B, 3; III, B, 3.

Speculation or conjecture.—A patent cannot be predicated of mere speculation or conjecture. Westinghouse Electric, etc., Co. *v.* Saranac Lake Electric Light Co., 108 Fed. 221.

Plan for preserving and filing bonds not patentable. Munson *v.* New York, 124 U. S. 601, 8 S. Ct. 622, 31 L. ed. 586.

Intellectual notion that a thing could be done and would be useful is not patentable. Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408].

Where the patentee has not invented a machine which will do what he claims, his patent is void. Bloxam *v.* Elsee, 6 B. & C. 169, 13 E. C. L. 88, 1 C. & P. 558, 12 E. C. L. 320, 9 D. & R. 215, 5 L. J. K. B. O. S. 104, R. & M. 187, 30 Rev. Rep. 275.

Discovery of new function for old device is not patentable. Lane Fox *v.* Kensington Electric Co., [1892] 3 Ch. 424, 67 L. T. Rep. N. S. 440.

55. Rubber Tip Pencil Co. *v.* Howard, 20 Wall. (U. S.) 498, 22 L. ed. 410; Wheaton *v.* Kendall, 85 Fed. 666; Foote *v.* Silsby, 9 Fed. Cas. No. 4,919, 2 Blatchf. 260; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

56. Detmold *v.* Reeves, 7 Fed. Cas. No. 3,831.

An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not patentable. Draper *v.* Potomska Mills Corp., 7 Fed. Cas. No. 4,072, 3 Ban. & A. 214, 13 Off. Gaz. 276.

57. Le Roy *v.* Tatham, 14 How. (U. S.) 156, 14 L. ed. 367, 22 How. 132, 16 L. ed. 366; Cameron Septic Tank Co. *v.* Saratoga Springs, 151 Fed. 242 [*reversed* on other grounds in 159 Fed. 453]; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; American Strawboard Co. *v.* Elkhart Egg-Case Co., 84 Fed. 960; Steam-Gauge, etc., Co. *v.* St. Louis R. Supplies Mfg. Co., 25 Fed. 491; Beam *v.* Smallwood, 2 Fed. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Foote *v.* Silsby, 9 Fed. Cas. No. 4,919, 2 Blatchf. 260; Shaw, etc., Co. *v.* Lovejoy, 21 Fed. Cas. No. 12,727, 7 Blatchf. 232; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Smith *v.* Ely, 22 Fed. Cas. No. 13,043, Fish. Pat. Rep. 339, 5 McLean 76 [*reversed* on other grounds in 15 How. 137, 14 L. ed. 634]; Stone *v.* Sprague, 23 Fed. Cas. No. 13,487, 2 Robb Pat. Cas. 10, 1 Story 270; Whitney *v.* Carter, 29 Fed. Cas. No. 17,583; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Application of rule.—A claim for the art of cutting ice by an apparatus worked by any power other than human is a claim for an abstract principle and is void. Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

58. *In re* Kemper, 14 Fed. Cas. No. 7,687, Cranch Pat. Dec. 89, McArthur Pat. Cas. 1; Morton *v.* New York Eye Infirmary, 17 Fed. Cas. No. 9,865, 5 Blatchf. 116, 2 Fish. Pat. Cas. 320; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4.

Fumigating trees in absence of the sun's rays is not patentable. Wall *v.* Leck, 66 Fed. 552, 13 C. C. A. 630 [*affirming* 61 Fed. 291].

59. Matter of Merrill, 1 MacArthur (D. C.) 301; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly *v.* Morse, 15 How. (U. S.) 62 14 L. ed. 601; Le Roy *v.* Tatham, 14 How. (U. S.) 156, 14 L. ed. 367; Carver *v.* Hyde, 16 Pet. (U. S.) 513, 10 L. ed. 1051; Union Gas-Engine Co. *v.* Doak, 88 Fed. 86; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408]; New Process Fermentation Co. *v.* Maus, 20 Fed. 725; American Pin Co. *v.* Oakville Co., 1 Fed. Cas. No. 313, 3 Blatchf. 190; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Burr *v.* Cowperthwait, 4 Fed. Cas. No. 2,188, 4 Blatchf. 163; Case *v.* Brown, 5 Fed. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268 [*affirmed* in 2 Wall. 320, 17 L. ed. 817]; Evarts *v.* Ford, 8 Fed. Cas. No. 4,574, 6 Fish. Pat. Cas. 587, 5 Off. Gaz. 58; Marsh *v.* Dodge, etc., Mfg. Co., 16 Fed. Cas. No. 9,115, 6 Fish. Pat. Cas. 562, 5 Off. Gaz. 398; Sickles *v.* Falls Co., 22 Fed. Cas. No. 12,834, 4 Blatchf. 508, 2 Fish. Pat. Cas. 202; Waterous *v.* Bishop, 20 U. C. C. P. 29.

A discovery that inhaling ether produces insensibility to pain is not a patentable invention. Morton *v.* New York Eye Infirmary, 17 Fed. Cas. No. 9,865, 5 Blatchf. 116, 2 Fish. Pat. Cas. 320.

The measurement of time or expansion of steam is not patentable but only the means for utilizing it. Whittemore *v.* Cutter, 29

principle in the abstract, it has been said, is a fundamental truth; an original cause; a motive; these cannot be patented, because no one can claim in either of them an exclusive right.[60] The patentee is always restricted to the particular device by which he has undertaken to avail himself of the beneficial influence of the principle.[61] So as to laws of nature the processes used to extract, modify, and concentrate them constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects.[62] And it is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted and not the result itself.[63]

5. **Means Are Patentable.** The means devised for utilizing the principle or accomplishing the end or result may be patentable,[64] whether it is by chemical agency or combination, or by utilizing principles of natural philosophy or mechanics.[65]

B. Art — 1. In General. An art or process is patentable as well as machinery.[66] The term "art" has been defined by the United States supreme court as follows: "It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. . . . The process requires that certain things should be done with certain substances, and in a certain order."[67]

Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

60. Le Roy *v.* Tatham, 14 How. (U. S.) 156, 14 L. ed. 367. There is no authority to grant a patent for a "principle," a "mode of operation," or an "idea," or for any other abstraction. Burr *v.* Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661.

61. Steam-Gauge, etc., Co. *v.* St. Louis R. Supplies Mfg. Co., 25 Fed. 491.

62. Le Roy *v.* Tatham, 14 How. (U. S.) 156, 14 L. ed. 367.

63. Corning *v.* Burden, 15 How. (U. S.) 252, 268, 14 L. ed. 683.

64. Le Roy *v.* Tatham, 22 How. (U. S.) 132, 16 L. ed. 366; Carver *v.* Hyde, 16 Pet. (U. S.) 513, 10 L. ed. 1051; Cameron Septic Tank Co. *v.* Saratoga Springs, 151 Fed. 242 [*reversed* on other grounds in 159 Fed. 4531]; Union Gas-Engine Co. *v.* Doak, 88 Fed. 86; *In re* Henry, 11 Fed. Cas. No. 6,371, McArthur Pat. Cas. 467; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4; Smith *v.* Ely, 22 Fed. Cas. No. 13,043, Fish. Pat. Rep. 339, 5 McLean 76 [*reversed* on other grounds in 15 How. 137, 14 L. ed. 634]; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,761; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239. And see *infra*, III, B, 7; III, E, 2.

Where result is old. — Means may be patentable where the result is old. Hullet *v.* Hague, 2 B. & Ad. 370, 9 L. J. K. B. O. S. 242, 22 E. C. L. 158; Minter *v.* Wells, 1 C. M. & R. 505, 4 L. J. Exch. 2, 5 Tyrw. 163; Hill *v.* Evans, 4 De G. F. & J. 288, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 6 L. T. Rep. N. S. 90, 65 Eng. Ch. 223, 45 Eng. Reprint 1195; Betts *v.* Menzies, 10 H. L. Cas. 117, 9 Jur. N. S. 29, 31 L. J. Q. B. 233, 7 L. T. Rep. N. S. 110, 11 Wkly. Rep. 1, 11 Eng. Reprint 970; Curtis *v.* Platt, 11 L. T. Rep. N. S. 245.

65. Brush Electric Co. *v.* Electric Imp. Co., 52 Fed. 965; Brush Electric Co. *v.* Ft. Wayne Electric Light Co., 40 Fed. 826; Burr *v.* Cowperthwait, 4 Fed. Cas. No. 2,188, 4 Blatchf. 163.

Means for utilizing law of nature is patentable. Hammerschlag *v.* Scamoni, 7 Fed. 584; Hall *v.* Wiles, 11 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433.

Discovery that a substance is soluble and useful for a new purpose is patentable. Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163.

66. New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 7 S. Ct. 1304, 30 L. ed. 1103; Tilgham *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4; Smith *v.* Downing, 22 Fed. Cas. No. 13,036, 1 Fish. Pat. Cas. 64; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Badische Anilin, etc., Fabrik *v.* Levinstein, 12 App. Cas. 710, 57 L. T. Rep. N. S. 853; Cornish *v.* Keene, 3 Bing. N. Cas. 570, 2 Hodges 281, 6 L. J. C. P. 225, 4 Scott 337, 32 E. C. L. 265; Boulton *v.* Bull, 2 H. Bl. 463, 3 Rev. Rep. 439; Booth *v.* Kennard, 1 H. & N. 527, 3 Jur. N. S. 21, 26 L. J. Exch. 23, 5 Wkly. Rep. 85; Hills *v.* Liverpool United Gas Light Co., 9 Jur. N. S. 140, 32 L. J. Ch. 28, 7 L. T. Rep. N. S. 537; Crane *v.* Price, 12 L. J. C. P. 81, 4 M. & G. 580, 5 Scott N. R. 338, 43 E. C. L. 301; Otto *v.* Linford, 46 L. T. Rep. N. S. 35; Hornblower *v.* Boulton, 8 T. R. 95, 3 Rev. Rep. 439.

67. Cochrane *v.* Deener, 94 U. S. 780, 788, 24 L. ed. 139.

In patent law the term has a different and more restricted meaning than it has in ordinary usage.[68] It has reference to the steps followed or successive acts performed in producing some desired physical effect.[69] It must produce some article or substance or change the physical condition of some article or substance;[70] but

Other definitions or descriptions.—"[A term] used as it is in the statute in the sense of the employment of means to a desired end, or the adaptation of powers in the natural world to the uses of life." Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20.

"A mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." Appleton Mfg. Co. *v.* Star Mfg. Co., 60 Fed. 411, 413, 9 C. C. A. 42.

A result or effect produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another; in another and more vague sense it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. Corning *v.* Burden, 15 How. (U. S.) 252, 267, 14 L. ed. 683.

"The application or operation of some element or power of nature, or of one subject to another." Boyd *v.* Cherry, 50 Fed. 279, 282.

A "new process" is usually the result of a discovery, as distinguished from "machine" which is an invention. Corning *v.* Burden, 15 How. (U. S.) 252, 267, 14 L. ed. 683.

"Patentable process."—A process combining instrumentalities before known, but not employed together to accomplish a new and useful result. Andrews *v.* Carman, 1 Fed. Cas. No. 371, 13 Blatchf. 307.

"Process" or "methods" are terms which when used to represent the means of producing a beneficial result are in law synonymous with "art," provided the means are not effected by mechanism or mechanical combinations. Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20

68. Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683.

69. *In re* Weston, 17 App. Cas. (D. C.) 431; Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; Royer *v.* Coupe, 146 U. S. 524, 13 S. Ct. 166, 36 L. ed. 1073; International Tooth-Crown Co. *v.* Gaylord, 140 U. S. 55, 11 S. Ct. 716, 35 L. ed. 347; Lawther *v.* Hamilton, 124 U. S. 1, 8 S. Ct. 342, 31 L. ed. 325; New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 7 S. Ct. 1304, 40 L. ed. 1103; Downton *v.* Yeager Milling Co., 108 U. S. 466, 27 L. ed. 789; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; American Wood Paper Co. *v.* Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; American Fibre-Chamois Co. *v.* Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Wall *v.* Leck, 66 Fed. 552, 13 C. C. A. 630; Boyd *v.* Cherry, 50 Fed. 279.

70. Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139. And see *supra*, II, A, 3.

A process, all the steps of which are old, may be new and patentable when, coöperating with each other, they produce a result that is new and useful. German American Filter Co. *v.* Erdrich, 98 Fed. 300.

Reversal of mode of operation may be patentable. Thus a process for pasteurizing beer in bottles by moving the bottles through heated water which is stationary is not anticipated by a patent for a process involving the moving of heated water around stationary bottles containing the liquor to be pasteurized. *In re* Wagner, 22 App. Cas. (D. C.) 267.

Process of rolling metal forgings is patentable. Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 90 Fed. 201.

Copperplate printing patentable. Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9.

Transmitting speech by electricity is patentable. Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863.

Artificial honey is patentable. *In re* Corbin, 6 Fed. Cas. No. 3,224, McArthur Pat. Cas. 521.

Other patentable processes.—New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 7 S. Ct. 1304, 30 L. ed. 1103; Downton *v.* Yeager Milling Co., 108 U. S. 466, 3 S. Ct. 10, 27 L. ed. 789; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; American Wood Paper Co. *v.* Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 131; Mitchell *v.* Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; American Fibre-Chamois Co. *v.* Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Travers *v.* American Cordage Co., 64 Fed. 771; Uhlman *v.* Arnholdt, etc., Brewing Co., 53 Fed. 485; Union Paper-Bag Mach. Co. *v.* Waterbury, 39 Fed. 389; Eastern Paper-Bag Co. *v.* Standard Paper-Bag Co., 30 Fed. 63; Buchanan *v.* Howland, 4 Fed. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Carnegie Steel Co. *v.* Cambria Iron Co., 99 Off. Gaz. 1866; John R. Williams Co. *v.* Miller, etc., Mfg. Co., 97 Off. Gaz. 2308; Thomas *v.* Electric Porcelain, etc., Co., 97 Off. Gaz. 1838; Welsbach Light Co. *v.* Union Incandescent Light Co., 91 Off. Gaz. 2574; Western Mineral Wool, etc., Co. *v.* Globe Mineral Wool Co., 77 Off. Gaz. 1127; Imperial Chemical Mfg. Co. *v.* Stein, 75 Off. Gaz. 1551; Covert *v.* Travers Bros. Co., 75 Off.

it is not necessary that the thing produced shall be new, since a new process for accomplishing an old result is patentable.[71]

2. Must Produce Physical Result. It must be a method of effecting a physical result and not a mere plan or theory of conduct.[72] The physical result, however, need not be a permanent condition of the article or substance acted upon, but may be temporary, as in the case of transmitting speech by certain regulated undulations of the electric current in the telephone.[73]

3. Function Not Patentable. The mere function of a machine is not a patentable process, although a patentable process may be performed by machinery.[74]

4. Independent of Apparatus. A patentable process is separate from and independent of any machine or apparatus used in performing it.[75] A process may be patentable irrespective of the particular form of the instrumentalities used.[76] It may be said in general that processes of manufacture which involve chemical or other similar elemental action are patentable, although mechanism may be necessary to the application or carrying out of such a process, while those which consist solely in the operation of a machine are not.[77] "Most processes which have been held to be patentable require the aid of mechanism in their

Gaz. 349; Tannage Patent Co. *v.* Zahn, 74 Off. Gaz. 143; Hoke *v.* Brown, Dec. Com. Pat. (1889) 470; Neilson *v.* Harford, I Web. Pat. Cas. 295.

The following processes have been held not to be patentable: An improvement in sewing machines, by which the soles and uppers of boots and shoes could be sewed together without any welt by a certain kind of stitches (MacKay *v.* Jackman, 12 Fed. 615, 20 Blatchf. 466); a process of washing shavings in breweries (Brainard *v.* Cramme, 12 Fed. 621, 20 Blatchf. 530); an improved method of treating seed by steam (Gage *v.* Kellogg, 23 Fed. 891); a process for crimping heel-stiffenings of boots and shoes (Hatch *v.* Moffitt, 15 Fed. 252).

71. Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566. Article may be new and process old. American Wood Paper Co. *v.* Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31.

72. Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; U. S. Credit System Co. *v.* American Credit Indemnity Co., 53 Fed. 818; *Ex p.* Dixon, 7 Fed. Cas. No. 3,927; Smith *v.* Downing, 22 Fed. Cas. No. 13,036, 1 Fish. Pat. Cas. 64. And see *supra*, II, A, 3; III, B, 1.

73. Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863.

74. *In re* Cunningham, 21 App. Cas. (D. C.) 29; *In re* Weston, 17 App. Cas. (D. C.) 431, 94 Off. Gaz. 1786; Westinghouse *v.* Boyden Power-Brake Co., 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136; Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; Fuller *v.* Yentzer, 94 U. S. 288, 24 L. ed. 103; Burr *v.* Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Cleveland Foundry Co. *v.* Detroit Vapor Stove Co., 131 Fed. 740; National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 99 Fed. 758; American Strawboard Co. *v.* Elkhart Egg-Case Co., 84 Fed. 960; Gindorff *v.* Deering, 81 Fed. 952; Chicopee Folding-Box Co. *v.* Rogers, 32 Fed. 695; Excelsior Needle Co. *v.* Union Needle Co., 32 Fed. 221, 23 Blatchf. 147; Gage *v.* Kellogg, 23 Fed. 891; Albany Steam Trap Co. *v.* Felthousen, 20 Fed. 633, 22 Blatchf. 169; Hatch *v.* Moffitt, 15 Fed. 252; Goss *v.* Cameron, 14 Fed. 576, 11 Biss. 389; Brainard *v.* Cramme, 12 Fed. 621, 20 Blatchf. 530; MacKay *v.* Jackman, 12 Fed. 615, 20 Blatchf. 466; Matthews *v.* Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Sickels *v.* Falls Co., 22 Fed. Cas. No. 12,834, 4 Blatchf. 508, 2 Fish. Pat. Cas. 202; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Carnegie Steel Co. *v.* Cambria Iron Co., 99 Off. Gaz. 1866; Busch *v.* Jones, 99 Off. Gaz. 229; New *v.* Warren, 22 Off. Gaz. 587. And see *infra*, II, B, 7.

75. *In re* Weston, 17 App. Cas. (D. C.) 431; Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; Heald *v.* Rice, 104 U. S. 737, 26 L. ed. 910; James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Gindorff *v.* Deering, 81 Fed. 952; Wells Glass Co. *v.* Henderson, 67 Fed. 930, 15 C. C. A. 84; Burr *v.* Cowperthwait, 4 Fed. Cas. No. 2,188, 4 Blatchf. 163; Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [*reversed* on other grounds in 91 U. S. 37, 23 L. ed. 200]; *In re* Creveling, 117 Off. Gaz. 1167; U. S. Repair, etc., Co. *v.* Assyrian Asphalt Co., 98 Off. Gaz. 582; Vermont Farm Mach. Co. *v.* Gibson, 56 Off. Gaz. 1566.

76. Cochrane *v.* Deener, 94 U. S. 780, 787, 24 L. ed. 139, in which it was said: "If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill."

77. Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899;

practical application, but where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process; since he would lose the benefit of his real discovery, which might be applied in a dozen different ways, if he were not entitled to such patent."[78]

5. Chemical or Elemental Action. Arts or processes within the meaning of the term in patent law have been defined as those in which chemical or elemental action is called into play and such processes have always been regarded as patentable.[79]

6. Mechanical Processes. It would seem, however, that mechanical processes involving simple manipulation may be patentable, even where there is no chemical or elemental action.[80] The mere fact that the use of machinery may be necessary in carrying out the process does not render it unpatentable.[81]

7. Knowledge of Principles Involved Unnecessary. An art may be patentable, although the inventor himself does not know the philosophical or abstract principles involved in the practice of the art.[82] He must, however, know and describe the steps by which the result is accomplished so that those skilled in the art may practice the invention.[83]

C. Machines. A machine is a combination of mechanical elements adapted to perform a mechanical function.[84] It includes movable parts and differs from an article or implement in that it has a rule of action of its own. It differs from a process, in that a new process is usually the result of discovery, and a machine of invention.[85]

D. Manufacture. An article of manufacture is any article or implement produced by human agency and adapted to perform a mechanical function but having no rule of action of its own.[86]

78. Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 72, 15 S. Ct. 745, 39 L. ed. 899.

79. *In re* Weston, 17 App. Cas. (D. C.) 431; Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 7 S. Ct. 1304, 30 L. ed. 1103; Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; American Fibre-Chamois Co. *v.* Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [*reversed* on other grounds in 91 U. S. 37, 23 L. ed. 200].

Process and apparatus.—A process and an apparatus, while presumptively independent inventions when considered in the light of U. S. Rev. St. (1878) § 4886 [amended by U. S. Comp. St. (1901) p. 3382), providing that inventions or discoveries may be either arts, machines, or composition of matter, nevertheless may be so connected in their design and operation as to constitute unitary invention. *In re* Frasch, 27 App. Cas. (D. C.) 25.

80. Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968; Melvin *v.* Potter, 91 Fed. 151; Travers *v.* American Cordage Co., 64 Fed. 771; Union Paper-Bag Mach. Co. *v.* Waterbury, 39 Fed. 389; Eastern Paper-Bag Co. *v.* Standard Paper-Bag Co., 30 Fed. 63; Detroit Lubricator Mfg. Co. *v.* Renchard, 9 Fed. 293; Wilton *v.* Railroad Co., 30 Fed. Cas. No. 17,856. But see Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; Stokes Bros. Mfg. Co. *v.* Heller, 96 Fed. 104; American Strawboard Co. *v.* Elkhart Egg-Case Co., 84 Fed. 960; Wells Glass Co. *v.* Henderson, 67 Fed. 930, 15 C. C. A. 84.

81. *In re* Weston, 17 App. Cas. (D. C.) 431; Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968. See *supra*, II, B, 4.

82. Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [*reversed* on other grounds in 91 U. S. 37, 23 L. ed. 200]; Wilton *v.* Railroad Co., 30 Fed. Cas. No. 17,856. And see *infra*, V, B, 2.

83. See *infra*, V, B, 2, a.

84. Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683. A word which is said to include every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Appleton Mfg. Co. *v.* Star Mfg. Co., 60 Fed. 411, 9 C. C. A. 42; Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20.

New combinations as well as new organizations of mechanism are included in the term. Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

85. Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683.

86. Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Hotchkiss *v.* Greenwood, 12 Fed. Cas. No. 6,718, 2 Robb Pat. Cas. 730, 4 McLean 456. As used in the patent law, it is a word of very comprehensive meaning, and embraces whatever is made by the art or industry of man, not being a machine, a com-

E. Composition of Matter. A composition of matter is a mechanical mixture or chemical combination of two or more substances,[87] and may be patentable.[88] The test of patentability is the same as in machines.[89]

F. Improvement — 1. In General. An improvement is an addition to, or change in, a known art, machine, manufacture, or composition of matter which produces a useful result,[90] and is patentable[91] if it amounts to invention.[92] The improvement may be upon the patentee's own invention.[93]

2. Superiority Unnecessary. In the sense of the patent law it is not necessary that the improved article be superior to the original in all respects.[94] It is sufficient that the thing including the improvement is useful and possesses some advantage over the original for some purposes.[95] The advantage may reside in

position of matter, or a design. Johnson *v.* Johnston, 60 Fed. 618.

Any tool or implement used by hand is patentable. Coupe *v.* Weatherhead, 16 Fed. 673.

A book having a novel construction is a patentable article, and the relative arrangement of printed matter and blank spaces may be considered an element of structure. Thomson *v.* Citizens' Nat. Bank, 53 Fed. 250, 3 C. C. A. 518; Munson *v.* New York, 3 Fed. 338, 5 Ban. & A. 486, 18 Blatchf. 237 [*reversed* in 124 U. S. 601, 8 S. Ct. 622, 31 L. ed. 586]; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10, 8 Off. Gaz. 685; Hawes *v.* Cook, 11 Fed. Cas. No. 6,236, 5 Off. Gaz. 493; Hawes *v.* Washburne, 11 Fed. Cas. No. 6,242, 5 Off. Gaz. 491.

A teaching chart with skitted leaves is patentable. *In re* Snyder, 10 App. Cas. (D. C.) 140.

87. Holliday *v.* Schulze-Berge, 78 Fed. 493; Rogers *v.* Ennis, 20 Fed. Cas. No. 12,010, 3 Ban. & A. 366, 15 Blatchf. 47, 14 Off. Gaz. 601; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92.

New proportions of old ingredients patentable.— Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Stephens *v.* Felt, 22 Fed. Cas. No. 13,368*a*; Woodward *v.* Morrison, 30 Fed. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124, 2 Off. Gaz. 120.

New way or new form.—A composition is not patentable because made in a new way (*In re* Maule, 16 Fed. Cas. No. 9,308, McArthur Pat. Cas. 271); or in a new form (Rumford Chemical Works *v.* New York Baking Powder Co., 125 Fed. 231).

Although process is old the product may be new. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163.

A substance in nature is not patentable because new means are devised for obtaining it (American Wood-Paper Co. *v.* Fibre Disintegrating Co., 1 Fed. Cas. No. 320, 6 Blatchf. 27, 3 Fish. Pat. Cas. 362 [*affirmed* in 23 Wall. (U. S.) 566, 23 L. ed. 31]; when separated from other materials with which it is found combined (American Wood-Paper Co. *v.* Fibre Disintegrating Co., *supra*).

In England a composition first made commercially is patentable, although it was known as a chemical curiosity. Frearson *v.* Loe, 9 Ch. D. 48, 27 Wkly. Rep. 183; Lewis *v.* Davis, 3 C. & P. 502, 14 E. C. L. 685; Electric Tel. Co. *v.* Brett, 10 C. B. 838, 15 Jur. 579, 20 L. J. C. P. 123, 70 E. C. L. 838; Nickels *v.* Ross, 8 C. B. 679, 65 E. C. L. 679; Young *v.* Fernie, 4 Giffard 577, 10 Jur. N. S. 926, 10 L. T. Rep. N. S. 861, 12 Wkly. Rep. 901, 66 Eng. Reprint 836; Crane *v.* Price, 12 L. J. C. P. 81, 4 M. & G. 580, 5 Scott N. R. 338, 43 E. C. L. 301; Hornblower *v.* Boulton, 8 T. R. 95, 3 Rev. Rep. 439.

88. Cochrane *v.* Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 S. Ct. 455, 28 L. ed. 433; Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952.

89. Arlington Mfg. Co. *v.* Celluloid Co., 97 Fed. 91, 38 C. C. A. 60; Antisdel *v.* Chicago Hotel Cabinet Co., 89 Fed. 308, 32 C. C. A. 216.

Lack of identity is shown by results. Matheson *v.* Campbell, 77 Fed. 280.

90. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 130 Fed. 542; Thomson-Houston Electric Co. *v.* Bullock Electric Co., 101 Fed. 587; Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845; Wales *v.* Waterbury Mfg. Co., 59 Fed. 285; Bray *v.* Hartshorn, 4 Fed. Cas. No. 1,820, 1 Cliff. 538; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

A change in an old machine may consist alone of a new and useful combination of the several parts of which it is composed, or it may consist of a material alteration or modification of one or more of the several devices which enter into its construction, or it may consist in adding new devices. Bray *v.* Hartshorn, 4 Fed. Cas. No. 1,820, 1 Cliff. 538.

91. Phillips *v.* Page, 24 How. (U. S.) 164, 16 L. ed. 639; Wales *v.* Waterbury Mfg. Co., 59 Fed. 285; Coupe *v.* Weatherhead, 16 Fed. 673; Bray *v.* Hartshorn, 4 Fed. Cas. No. 1,820, 1 Cliff. 538; Losh *v.* Hague, Web. Pat. Cas. 200.

92. Pelzer *v.* Dale Co., 106 Fed. 989, 46 C. C. A. 83.

93. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Grimes *v.* Allen, 102 Fed. 606, 42 C. C. A. 559.

94. Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609. And see *infra*, III, D.

95. Detroit Lubricator Mfg. Co. *v.* Renchard, 9 Fed. 293; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197.

the ease or cheapness of manufacture or it may reside in the functions performed by it.[96]

G. Designs — 1. In General. A patentable design may consist of a new and ornamental shape given to an article of manufacture or of an ornamentation to be placed upon an article of old shape.[97] The design law was intended to encourage the decorative arts, and therefore deals with the appearance rather than the structure, uses, or functions of the article.[98] The design must be novel and must have called for an exercise of the inventive faculties as distinguished from ordinary skill.[99] The patentability of a design does not depend on its æsthetic value.

96. Jones *v.* Wetherill, 13 Fed. Cas. No. 7,508, McArthur Pat. Cas. 409.

97. U. S. Rev. St. (1878) § 4929 [U. S. Comp. St. (1901) p. 3398].

Combination of old elements producing new appearance is patentable. Matthews, etc., Mfg. Co. *v.* American Lamp, etc., Co., 103 Fed. 634; Untermeyer *v.* Freund, 58 Fed. 205, 7 C. C. A. 183.

For designs held patentable see Caldwell *v.* Powell, 73 Fed. 488, 19 C. C. A. 592 [*reversing* 71 Fed. 970]; Stewart *v.* Smith, 58 Fed. 580, 7 C. C. A. 380; Smith *v.* Stewart, 55 Fed. 481; New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 48 Fed. 556 [*reversed* on other grounds in 53 Fed. 810, 4 C. C. A. 21]; Anderson *v.* Saint, 46 Fed. 760; Eclipse Mfg. Co. *v.* Adkins, 44 Fed. 280; Foster *v.* Crossin, 44 Fed. 62; Simpson *v.* Davis, 12 Fed. 144, 20 Blatchf. 413; Miller *v.* Smith, 5 Fed. 359.

For unpatentable subject-matter see Niedringhaus *v.* Commissioner of Patents, 2 MacArthur (D. C.) 149; Rowe *v.* Blodgett, etc., Co., 112 Fed. 61, 50 C. C. A. 120; Eclipse Mfg. Co. *v.* Holland, 62 Fed. 465 [*affirmed* in 79 Fed. 993, 25 C. C. A. 676]; Foster *v.* Crossin, 44 Fed. 62; Post *v.* T. C. Richards Hardware Co., 26 Fed. 618 [*affirmed* in 131 U. S. 444, 9 S. Ct. 802, 33 L. ed. 218]; Adams, etc., Mfg. Co. *v.* St. Louis Wire-Goods Co., 1 Fed. Cas. No. 72, 3 Ban. & A. 77.

Movable parts.— Design may include movable parts. Chandler Adjustable Chair, etc., Co. *v.* Heywood Bros., etc., Co., 91 Fed. 163.

Uniting old forms and parts.—Whatever ingenuity is displayed in producing a new design which imparts to the eye a pleasing impression, even though it be the result of uniting old forms and parts, such production is patentable. General Gaslight Co. *v.* Matchless Mfg. Co., 129 Fed. 137.

In England designs are copyrighted and not patented. St. 5 & 6 Vict. c. 100; Holdsworth *v.* McCrea, L. R. 2 H. L. 380, 36 L. J. Q. B. 297, 14 Wkly. Rep. 226; Windover *v.* Smith, 32 Beav. 200, 9 Jur. N. S. 397, 32 L. J. Ch. 561, 7 L. T. Rep. N. S. 776, 1 New Rep. 349, 11 Wkly. Rep. 323, 55 Eng. Reprint 78; Dalglish *v.* Jarvie, 2 Hall & T. 437, 47 Eng. Reprint 1754, 14 Jur. 945, 20 L. J. Ch. 475, 2 Macn. & G. 231, 48 Eng. Ch. 178, 42 Eng. Reprint 89; Pierce *v.* Worth, 18 L. T. Rep. N. S. 710.

98. *In re* Tournier, 17 App. Cas. (D. C.) 481; Miller *v.* Young, 33 Ill. 354; Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 20 L. ed. 731; West Disinfecting Co. *v.* Frank, 146 Fed. 388 [*affirmed* in 149 Fed. 423, 79 C. C. A. 359]; Bradley *v.* Eccles, 126 Fed. 945, 61 C. C. A. 669; Eaton *v.* Lewis, 115 Fed. 635 [*affirmed* in 127 Fed. 1018, 61 C. C. A. 562]; Bevin Bros. Mfg. Co. *v.* Starr Bros. Bell Co., 114 Fed. 362; Rowe *v.* Blodgett, etc., Co., 103 Fed. 873 [*affirmed* in 112 Fed. 61, 50 C. C. A. 120]; Pelouze Scale, etc., Co. *v.* American Cutlery Co., 102 Fed. 916, 43 C. C. A. 52; Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70; Redway *v.* Ohio Stove Co., 38 Fed. 582; Untermeyer *v.* Freund, 37 Fed. 342; Wood *v.* Dolby, 7 Fed. 475, 19 Blatchf. 214; Northrup *v.* Adams, 18 Fed. Cas. No. 10,328, 2 Ban. & A. 567, 12 Off. Gaz. 430; Perry *v.* Starrett, 19 Fed. Cas. No. 11,012, 3 Ban. & A. 485, 14 Off. Gaz. 599.

99. *In re* Freeman, 23 App. Cas. (D. C.) 226; Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; General Gaslight Co. *v.* Matchless Mfg. Co., 129 Fed. 137; Bevin Bros. Mfg. Co. *v.* Starr Bros. Bell Co., 114 Fed. 362; Cary Mfg. Co. *v.* Neal, 98 Fed. 617, 39 C. C. A. 189; Soehner *v.* Favorite Stove, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Hammond *v.* Stockton Combined Harvester, etc., Works, 70 Fed. 716, 17 C. C. A. 356; Krick *v.* Jansen, 61 Fed. 847, 10 C. C. A. 114; Paine *v.* Snowden, 46 Fed. 189; Pratt *v.* Rosenfeld, 3 Fed. 335, 18 Blatchf. 234; Collender *v.* Griffith, 6 Fed. Cas. No. 3,000, 11 Blatchf. 212, 3 Off. Gaz. 689; Northrup *v.* Adams, 18 Fed. Cas. No. 10,328, 2 Ban. & A. 567, 12 Off. Gaz. 430.

As much invention is required as in mechanical patent.— Design patents stand on as high a plane as utility patents and require as high a degree of exercise of the inventive or original faculty. Perry *v.* Hoskins, 111 Fed. 1002; Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345; Western Electric Mfg. Co. *v.* Odell, 18 Fed. 321.

Double use of the same thing for different purposes is not invention. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Untermeyer *v.* Freund, 58 Fed. 205, 7 C. C. A. 183; Cahoone Barnet Mfg. Co. *v.* Rubber, etc., Harness Co., 45 Fed. 582; New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 30 Fed. 785.

Identity of designs.— Designs are the same when an ordinary observer giving ordinary attention would mistake one for the other. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Jennings *v.* Kibbe, 10 Fed. 669, 20 Blatchf.

The design act, as construed by the courts, intends that the patentability of a design shall be determined by its appeal to the eyes of the ordinary man, and not to the eyes of a jury of artists.[1] The same rules as to construction and validity apply as in the case of mechanical inventions.[2]

2. TERM. Design patents are granted for three years and six months, for seven years, or for fourteen years, as the applicant may in his application elect.[3]

III. PATENTABILITY.[4]

A. In General. The subject-matter of patents must not only come within the statutory classes, but must be new[5] and useful.[6] It must further be of such a character as to have called for an exercise of the inventive or creative faculties of the mind, as distinguished from the mere exercise of the knowledge and judgment expected of those skilled in the particular art.[7] It must not have been abandoned by the inventor,[8] nor have become public property by forfeiture under statutory provisions.[9]

B. Novelty[10]**— 1. IN GENERAL.** The subject-matter of patents must be new.[11]

353. The test of identity is the sameness of appearance to the eye of the ordinary observer. Smith *v.* Whitman Saddle Co., 146 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606.

Utility is to be considered in determining invention. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Lehnbeuter *v.* Holthaus, 105 U. S. 94, 26 L. ed. 939.

Where the peculiarities of an applicant's design do not rise to the dignity of invention, the design is not patentable, although the peculiarities are such as to prevent the design from being regarded in the trade as a substitute for a design already patented. *In re* Schraubstadter, 26 App. Cas. (D. C.) 331.

1. *In re* Schraubstadter, 26 App. Cas. (D. C.) 331. *Compare* Williams Calk Co. *v.* Kemmerer, 145 Fed. 928, 76 C. C. A. 466 [*affirming* 136 Fed. 210].

2. Miller *v.* Smith, 5 Fed. 359; U. S. Rev. St. (1878) § 4933 [U. S. Comp. St. (1901) p. 3399].

3. U. S. Rev. St. (1878) § 4931 [U. S. Comp. St. (1901) p. 3399].

4. **Conclusiveness and effect of decision in patent office as to patentability of invention** see *infra*, V, C, 15.

5. See *infra*, III, B, 1.

6. See *infra*, III, D, 1.

7. See *infra*, III, E, 1.

8. U. S. Rev. St. (1878) § 4886. And see *supra*, II, G.

9. Sewall *v.* Jones, 91 U. S. 171, 23 L. ed. 275; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Dawson *v.* Foflen, 7 Fed. Cas. No. 3,670, 1 Robb Pat. Cas. 9, 2 Wash. 311. And see *infra*, II, F.

10. **Application to new use as involving invention** see *infra*, III, E, 13.

Conclusiveness and effect of decisions of patent office see *infra*, V, C, 15.

11. U. S. Rev. St. (1878) § 4886; *In re* Moeser, 27 App. Cas. (D. C.) 307; Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Smyth Mfg. Co. *v.* Sheridan, 149 Fed. 208, 79 C. C. A. 166; Sellers *v.* Cofrode, 35 Fed. 131; Celluloid Mfg. Co. *v.* Tower, 26 Fed. 451 [*affirmed* in 136 U. S. 633, 10 S. Ct. 1066, 34 L. ed. 551]; Gardner *v.* Herz, 12 Fed. 491, 20 Blatchf. 538 [*affirmed* in 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158]; Bean *v.* Smallwood, 2 Fed. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; *In re* Henry, 11 Fed. Cas. No. 6,371, McArthur Pat. Cas. 467; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Roberts *v.* Ward, 20 Fed. Cas. No. 11,918, 4 McLean 565, 2 Robb Pat. Cas. 746; Seligman *v.* Day, 21 Fed. Cas. No. 12,643, 2 Ban. & A. 467, 14 Blatchf. 72; Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Thompson *v.* Haight, 23 Fed. Cas. No. 13,957; Winans *v.* New York, etc., R. Co., 30 Fed. Cas. No. 17,863, 1 Fish. Pat. Cas. 213 [*affirmed* in 21 How. 88, 16 L. ed. 68]; *Ex p.* Manceaux, L. R. 6 Ch. 272, 18 Wkly. Rep. 1184; Stocker *v.* Warn, 1 C. B. 148, 9 Jur. 136, 50 E. C. L. 148; Ralston *v.* Smith, 20 C. B. N. S. 28, 11 H. L. Cas. 223, 35 L. J. C. P. 49, 13 L. T. Rep. N. S. 1, 11 Eng. Reprint 1318; Harwood *v.* Great Northern R. Co., 11 H. L. Cas. 654, 35 L. J. Q. B. 27, 12 L. T. Rep. N. S. 771, 14 Wkly. Rep. 1, 11 Eng. Reprint 1488; Hill *v.* Thompson, Holt N. P. 636, 3 E. C. L. 249, 2 Meriv. 622, 17 Rev. Rep. 156, 36 Eng. Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 20 Rev. Rep. 488, 4 E. C. L. 190; White *v.* Toms, 37 L. J. Ch. 204, 17 L. T. Rep. N. S. 348. And see Butch *v.* Boyer, 8 Phila. (Pa.) 57.

Novelty either in result or mode of operation is necessary. Batten *v.* Clayton, 2 Fed. Cas. No. 1,105.

This is equally the case whether the invention claimed consists of an entire machine or improvement of a machine, or a combination of several mechanical powers.[12] Patent rights of this kind are given only to inventors or discoverers of some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof.[13] And to be new the thing must not have been known to any one before.[14]

2. PRIOR KNOWLEDGE IN THIS COUNTRY. It must be new not merely to the patentee but to all people in the United States.[15]

3. EXTENT OF PRIOR KNOWLEDGE. To negative novelty the prior knowledge must have been of the complete operative invention and must not have been mere theory or speculation as to what might be done.[16] Prior knowledge by a single person, however, is sufficient.[17]

4. DATE OF KNOWLEDGE. The question of novelty is to be determined by the knowledge possessed by people in the United States at the time that the patentee makes the invention,[18] and not at the time that he secures his patent or files his application.[19]

5. PRIOR KNOWLEDGE OR USE ABROAD. By the express provision of the federal

Making and selling a part of an old and known manufacture as a new article of trade is not patentable. Seligman *v.* Day, 21 Fed. Cas. No. 12,643, 2 Ban. & A. 467, 14 Blatchf. 72.

An article is not new merely because made by a new process. Cochrane *v.* Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 S. Ct. 455, 28 L. ed. 433; American Wood Paper Co. *v.* Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31.

Evidence of novelty.— In all cases the great commercial success of a patented device, and the fact that it supplants or supersedes other devices of the same kind used for the same purpose, are evidence of patentable invention, novelty, and utility of no mean order or low degree, and such facts are in many cases persuasive evidence of a most valuable conception. Heywood Bros., etc., Co. *v.* Syracuse Rapid Transit R. Co., 152 Fed. 453. Although the fact that a device has supplanted prior devices in the trade may turn the scale in favor of the existence of invention, where that question is in doubt, yet such fact has no weight where the want of patentable novelty is already reasonably clear. Utility is not novelty. *In re* Garrett, 27 App. Cas. (D. C.) 19.

12. Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432.

13. Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34.

14. U. S. Rev. St. (1878) § 4886. And see *infra*, III, D.

15. Stitt *v.* Eastern R. Co., 22 Fed. 649; Miller *v.* Foree, 9 Fed. 603 [*affirmed* in 116 U. S. 22, 6 S. Ct. 204, 29 L. ed. 552]; Larabee *v.* Cortlan, 14 Fed. Cas. No. 8,084, 3 Fish. Pat. Cas. 5, Taney 180. And see *infra*, III, C, 1, d.

16. Gordon *v.* Warder, 150 U. S. 47, 14 S. Ct. 32, 37 L. ed. 992; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Sickles *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535. And see *infra*, III, C, 1, b.

Suggestion of result not means will not anticipate. Graham *v.* Gammon, 10 Fed. Cas. No. 5,668, 3 Ban. & A. 7, 7 Biss. 490.

Mere suggestion not sufficient. Diamond Match Co. *v.* Schenck, 71 Fed. 521 [*affirmed* in 77 Fed. 208, 23 C. C. A. 122].

That invention must be operative see Bowers *v.* San Francisco Bridge Co., 91 Fed. 381; Gormully, etc., Mfg. Co. *v.* Stanley Cycle Mfg. Co., 90 Fed. 279.

17. See *infra*, III, C, 1, d.

18. Bowers *v.* Von Schmidt, 63 Fed. 572; Wilcox *v.* Bookwalter, 31 Fed. 224; Consolidated Bunging Apparatus Co. *v.* Woerle, 29 Fed. 449; Yale Lock Mfg. Co. *v.* Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Comstock *v.* Sandusky Seat Co., 6 Fed. Cas. No. 3,082, 3 Ban. & A. 188, 13 Off. Gaz. 230; Dixon *v.* Moyer, 7 Fed. Cas. No. 3,931, 1 Robb Pat. Cas. 224, 4 Wash. 68; National Spring Co. *v.* Union Car Spring Mfg. Co., 17 Fed. Cas. No. 10,051, 1 Ban. & A. 240, 12 Blatchf. 80, 6 Off. Gaz. 224; U. S., etc., Salamander Felting Co. *v.* Haven, 28 Fed. Cas. No. 16,788, 2 Ban. & A. 164, 9 Off. Gaz. 253.

Patentee may show date of invention on the question of anticipation. Anderson *v.* Collins, 122 Fed. 451, 58 C. C. A. 669; Bannerman *v.* Sanford, 85 Fed. 448; American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500; Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44.

19. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419; Bartholomew *v.* Sawyer, 2 Fed. Cas. No. 1,070, 4 Blatchf. 347, 1 Fish. Pat. Cas. 516; Brodie *v.* Ophir Silver Min. Co., 4 Fed. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Nichols *v.* Pearce, 18 Fed. Cas. No. 10,246, 7 Blatchf. 5; Treadwell *v.* Bladen, 24 Fed. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. 703; White *v.* Allen,

statutes relating to patents and devices known and used in foreign countries, but not patented there nor described in a printed publication, such inventions or devices are patentable in the United States by a person without notice thereof.[20] If, however, he has notice thereof he cannot obtain a patent even though the invention or discovery had not been patented or described in any printed publication abroad.[21] Prior to the enactment of the statute under consideration, a patent could not be allowed to an inventor unless he showed that he was the original inventor in relation to every part of the world.[22]

6. PUBLICATION OR PATENT ABROAD. By the express provisions of such statutes, however, an invention or discovery cannot be patented in the United States, where it has hitherto been patented or described in a printed publication abroad.[23]

7. NOVELTY OF MEANS. Patentable novelty may reside in the particular means used for accomplishing an old result.[24]

8. NOVELTY OF FUNCTION OR RESULT.[25] Novelty may also reside in the use of old means in a new way or in a new relation where it performs new functions and produces a new result.[26] It is not negatived by the existence of the same thing

29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

20. U. S. Rev. St. (1878) § 4923 [U. S. Comp. St. (1901) p. 3396]; Hurlbut *v.* Schillinger, 130 U. S. 456, 9 S. Ct. 584, 32 L. ed. 1011; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 70 Fed. 986 [*reversed* on other grounds in 80 Fed. 395, 25 C. C. A. 500]; Doyle *v.* Spaulding, 19 Fed. 744; Worswick Mfg. Co. *v.* Steiger, 17 Fed. 250; Cornely *v.* Marckwald, 17 Fed. 83, 21 Blatchf. 367; Bartholomew *v.* Sawyer, 2 Fed. Cas. No. 1,070, 4 Blatchf. 347, 1 Fish. Pat. Cas. 516; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Roemer *v.* Logowitz, 20 Fed. Cas. No. 11,996; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343. And see *infra*, III, F, 2; IV, A, 9. *Contra*, Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118.

In Canada prior public use abroad is a bar. Vannorman *v.* Leonard, 2 U. C. Q. B. 72.

21. Forbush *v.* Cook, 9 Fed. Cas. No. 4,931, 2 Fish. Pat. Cas. 668.

22. Dawson *v.* Follen, 7 Fed. Cas. No. 3,670, 1 Robb Pat. Cas. 9, 2 Wash. 311.

23. U. S. Rev. St. (1878) § 4923 [U. S. Comp. St. (1901) p. 3396]; *In re* Schaeffer, 2 App. Cas. (D. C.) 1.

That foreign publication must clearly disclose invention see Dececo Co. *v.* George E. Gilchrist Co., 125 Fed. 293, 60 C. C. A. 207; New Process Fermentation Co. *v.* Koch, 21 Fed. 580; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615.

Descriptions in foreign publications as clear as the patent will anticipate.— Woven-Wire Mattress Co. *v.* Whittlesey, 30 Fed. Cas. No. 18,058, 8 Biss. 23.

24. Cochrane *v.* Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 S. Ct. 455, 28 L. ed. 433; American Wood Paper Co. *v.* Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31; Anderson *v.* Collins, 122 Fed. 451, 58 C. C. A. 669; Deere *v.* Rock Island Plow Co., 84 Fed. 171, 28 C. C. A. 308; Gottfried *v.* Bartholomae, 10 Fed. Cas. No. 5,632, 3 Ban. & A. 308, 8 Biss. 219, 13 Off. Gaz. 1128; Wilton *v.* Railroad Co., 30 Fed. Cas. No. 17,856. And see *supra*, II, A, 5.

Novelty of operation may be invention. Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., 115 Fed. 498, 53 C. C. A. 230.

Reversal of operation may be invention. Diamond Stone Sawing Mach. Co. *v.* Brown, 130 Fed. 896 [*affirmed* in 131 Fed. 910, 70 C. C. A. 248]; Eames *v.* Cook, 8 Fed. Cas. No. 4,239, 2 Fish. Pat. Cas. 146; *In re* Hebbard, 11 Fed. Cas. No. 6,314, McArthur Pat. Cas. 543; Howe *v.* Abbott, 12 Fed. Cas. No. 6,766, 2 Robb Pat. Cas. 99, 2 Story 190.

For cases showing want of novelty see Computing Scale Co. *v.* Automatic Scale Co., 26 App. Cas. (D. C.) 238 [*affirmed* in 204 U. S. 609, 27 S. St. 307, 51 L. ed. 645]; *In re* Weber, 26 App. Cas. (D. C.) 29.

25. **Application to new use as involving invention** see *infra*, III, E, 13.

26. Krementz *v.* S. Cottle Co., 148 U. S. 556, 13 S. Ct. 719, 37 L. ed. 558; Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177; Irwin *v.* Hasselman, 97 Fed. 964, 38 C. C. A. 587; American Automaton Weighing Mach Co. *v.* Blauvelt, 50 Fed. 213; Clark Patent Steam, etc., Regulator Co. *v.* Copeland, 5 Fed. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; *Ex p.* Jacobs, 13 Fed. Cas. No. 7,158; Poillon *v.* Schmidt, 19 Fed. Cas. No. 11,241, 6 Blatchf. 299, 3 Fish. Pat. Cas. 476, 37 How. Pr. (N. Y.) 77; Wilton *v.* Railroad Co., 30 Fed. Cas. No. 17,856. And see *infra*, III, E, 13.

Novelty of result indicates invention. Dodge *v.* Porter, 98 Fed. 624; Wood *v.* Packer, 17 Fed. 650.

Substitution of equivalents.— If a patentee shows a new result to be attained, and means which are new and novel for attaining that result, and the device indicated is operative,

used for another purpose where the new use is one which would not occur to one using the original thing.[27]

9. Novelty of Form. Changes of shape or form to produce new functions and results may be patentable;[28] but patentable novelty includes more than mere changes from prior inventions since the changes must amount to invention;[29] mere novelty of form is insufficient.[30]

10. Novelty in Combination.[31] Novelty may reside in the arrangement or combination of old elements whereby an advantageous result is accomplished.[32]

his patent is good, even if in subsequently applying it he varies the means employed by substituting equivalents. Hillard *v.* Fisher Book Typewriter Co., 151 Fed. 34 [*affirmed* in 159 Fed. 439].

Where the question of novelty is in doubt, the fact that a new combination and arrangement of known elements produces a new and useful result, displacing other devices employed for a like purpose, is sufficient to turn the scale in favor of invention. *In re* Thomson, 26 App. Cas. (D. C.) 419.

A change in prior devices, in order to be patentable, must be made by transferring an old device to use in an entirely different and unrelated art. *In re* Thurston, 26 App. Cas. (D. C.) 315.

The fact that a new device or construction may have displaced others by reason of its manifest superiority is material only when the question of patentable novelty is otherwise a matter of doubt. Millett *v.* Allen, 27 App. Cas. (D. C.) 70.

27. Clough *v.* Gilbert, etc., Mfg. Co., 106 U. S. 166, 1 S. Ct. 188, 27 L. ed. 134.

28. Winans *v.* Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Davis *v.* Palmer, 7 Fed. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Union Paper Collar Co. *v.* White, 24 Fed. Cas. No. 14,396, 2 Ban. & A. 60.

29. Lettelier *v.* Mann, 91 Fed. 909. And see *infra*, III, E, 1.

30. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Dodge Mfg. Co. *v.* Ohio Valley Pulley Works, 101 Fed. 584; Lovell *v.* Johnson, 82 Fed. 206; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Wilson Packing Co. *v.* Clapp, 30 Fed. Cas. No. 17,851, 4 Ban. & A. 355, 8 Biss. 545, 8 Reporter 262 [*affirmed* in 105 U. S. 566, 26 L. ed. 1172]. And see *infra*, III, E, 9.

Changes of size, form, or proportion not patentable. Syracuse Chilled Plow Co. *v.* Robinson, 35 Fed. 502 [*affirmed* in 145 U. S. 655, 12 S. Ct. 988, 36 L. ed. 856]; West *v.* Rae, 33 Fed. 45; *Ex p.* Chatfield, 5 Fed. Cas. No. 2,631*a*; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Evans *v.* Robinson, 8 Fed. Cas. No. 4,571, Brunn. Col. Cas. 400.

Changing the form of a die is not invention. Butler *v.* Steckel, 137 U. S. 21, 11 S. Ct. 25, 34 L. ed. 582 [*affirming* 27 Fed. 219]; Smith *v.* American Bridge Co., 22 Fed. Cas. No. 13,002, 3 Ban. & A. 565, 8 Biss. 312.

Making grate to fit fire pot is not patentable. Howard *v.* Detroit Stove Works, 150 U. S. 164, 14 S. Ct. 68, 37 L. ed. 1039.

31. Combination of parts of prior invention as showing prior knowledge or use see *infra*, III, C, 4, i.

Combination or aggregation as involving invention see *infra*, III, E, 20, 21.

32. Fenton Metallic Mfg. Co. *v.* Office Specialty Mfg. Co., 12 App. Cas. (D. C.) 201 [*reversed* on other grounds in 174 U. S. 492, 19 S. Ct. 641, 43 L. ed. 1058]; A. R. Milner Seating Co. *v.* Yesbera, 133 Fed. 916, 67 C. C. A. 210; Eck *v.* Kutz, 132 Fed. 758; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 129 Fed. 378; Stilwell-Bierce, etc., Co. *v.* Eufaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Schroeder *v.* Brammer, 98 Fed. 880; Michigan Stove Co. *v.* Fuller-Warren Co., 81 Fed. 376; U. S. Printing Co. *v.* American Playing-Card Co., 70 Fed. 50; Welling *v.* Crane, 14 Fed. 571; Densmore *v.* Schofield, 7 Fed. Cas. No. 3,809, 4 Fish. Pat. Cas. 148; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 476, 1 Robb Pat. Cas. 140; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*. And see *infra*, III, E, 20, a.

New result necessary.— Unless the combination of well-known elements accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable invention, but an aggregation of elements. *In re* Hill, 26 App. Cas. (D. C.) 318.

Substitution of element performing similar result.— The substitution for an old element, in a combination, of an element performing a similar function, but constructed in a different way, does not render the combination itself patentable where there is no resultant change in the operation. In such a case, although the substituted element may be superior, the invention lies in the element, and not in the combination. *In re* Hawley, 26 App. Cas. (D. C.) 324.

Determination as to novelty.— Where the elements of a combination sought to be patented are well known, and, if not known in the combination described, are known in analogous combinations, the court is at liberty to determine whether there is any inven-

C. Anticipation[33] — **1. In General — a. Introductory Statement.** A patentee's claim to an invention is anticipated when it appears that another made the invention before the date when the patentee made it.[34] Such anticipation may consist of prior patents or publications.[35] To authorize the allowance of a patent there must be a substantial difference in principle from prior inventions.[36] If the prior invention relied on to defeat a subsequent patent existed and was used, it is of no consequence whether it was patented or not,[37] and abandonment of prior invention does not prevent anticipation.[38] Nevertheless mere surmises of earlier students of the same subject do not anticipate.[39]

b. Full Disclosure Necessary. Nothing is an anticipation which is not a full and complete disclosure of the invention to the public such as will enable those skilled in the art to make and use it.[40] A disclosure which is insufficient to support a patent cannot be relied upon as an anticipation.[41] To amount to anticipation, however, it is not necessary that the ordinary laborer or mechanic could understand the disclosure.[42]

c. Identity.[43] To amount to anticipation there must be identity in substance and not merely identity in form.[44] The two things must accomplish the same

tion in using them in the exact combination claimed. *In re* Hill, 26 App. Cas. (D. C.) 318.

Claim to combination is an admission that elements are old. Overweight Counterbalance Elevator Co. *v.* Improved Order of Red Men's Hall Assoc., 94 Fed. 155, 36 C. C. A. 125.

Novelty of design, how determined. — The novelty of a design is to be determined by the comparative appearance of the designs to the eyes of average observers, and not to the eyes of experts. *In re* Schraubstadter, 26 App. Cas. (D. C.) 331.

33. Original inventors and priority between inventors see *infra*, IV, A.

34. Chittenden *v.* Mallory, 41 Fed. 215.

Anticipation must be by another and not by patentee. Eck *v.* Kutz, 132 Fed. 758.

A process patent can only be anticipated by a similar process. — It is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless at least such use of it would have occurred to one whose duty it was to make practical use of the mechanism described. Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 48 L. ed. 968 [*reversing* 96 Fed. 850 (*reversing* 89 Fed. 721)].

Several patents. — May be anticipation by several patents each showing parts. Voightman *v.* Weis, etc., Cornice Co., 133 Fed. 298.

35. Byerly *v.* Cleveland Linseed Oil Works, 31 Fed. 73.

Publication without use will bar. Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 1 Fish. Pat. Rep. 41, 3 McLean 432; *Ex p.* Seeley, 21 Fed. Cas. No. 12,627; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058.

36. Smith *v.* Pearce, 22 Fed. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13.

37. Colt *v.* Massachusetts Arms Co., 6 Fed. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

38. Merrimac Mattress Mfg. Co. *v.* Feldman, 133 Fed. 64.

39. American Graphophone Co. *v.* Leeds, 87 Fed. 873.

40. Crown Cork, etc., Co. *v.* Ideal Stopper Co., 123 Fed. 666 [*affirmed* in 131 Fed. 244, 65 C. C. A. 436]; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., 122 Fed. 470 [*affirmed* in 125 Fed. 378, 60 C. C. A. 244]; McNeely *v.* Williames, 96 Fed. 978, 37 C. C. A. 641; Acme Flexible Clasp Co. *v.* Cary Mfg. Co., 96 Fed. 344, 99 Fed. 500; Shannon *v.* Bruner, 33 Fed. 289 [*affirmed* in 149 U. S. 767, 13 S. Ct. 1043, 37 L. ed. 930]; Nathan *v.* New York El. R. Co., 2 Fed. 225; Atlantic Giant Powder Co. *v.* Parker, 2 Fed. Cas. No. 625, 4 Ban. & A. 292, 16 Blatchf. 281, 16 Off. Gaz. 495; Cahill *v.* Brown, 4 Fed. Cas. No. 2,291, 3 Ban. & A. 580, 15 Off. Gaz. 697; Jenkins *v.* Walker, 13 Fed. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120, 1 Off. Gaz. 359; Neilson *v.* Betts, L. R. 5 H. L. 1, 40 L. J. Ch. 317, 19 Wkly. Rep. 1121; Hill *v.* Evans, 4 De G. F. & J. 288, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 6 L. T. Rep. N. S. 90, 65 Eng. Ch. 223, 45 Eng. Reprint 1195; Betts *v.* Menzies, 10 H. L. Cas. 117, 9 Jur. N. S. 29, 31 L. J. Q. B. 233, 7 L. T. Rep. N. S. 110, 11 Wkly. Rep. 1, 11 Eng. Reprint 970; Otto *v.* Linford, 46 L. T. Rep. N. S. 35; Betts *v.* De Vitre, 11 L. T. Rep. N. S. 445; General Engineering Co. *v.* Dominion Cotton Mills Co., 6 Can. Exch. 309.

41. Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163.

42. Anglo-American Brush Electric Light Corp. *v.* King, [1892] A. C. 367; Pickard *v.* Prescott, [1892] A. C. 263; Betts *v.* Neilson, L. R. 3 Ch. 429, 37 L. J. Ch. 321, 18 L. T. Rep. N. S. 165, 16 Wkly. Rep. 524.

43. Conclusiveness and effect of decision of patent office as to identity of invention in reissue proceedings see *infra*, VIII, G.

Identity of invention as showing right of patentee to reissue see *infra*, VIII, C.

44. Matter of Merrill, 1 McArthur (D. C.) 301; Fryer *v.* Mutual L. Ins. Co., 30 Fed. 787; Crandal *v.* Walters, 9 Fed. 659, 20

purpose by substantially the same means operating in substantially the same way.[45]

Blatchf. 97; Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1.

Similarity of appearance is not proof of identity. Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198.

Identity of form is not necessary. *In re* Bedford, 14 App. Cas. (D. C.) 376.

Identity is not a matter of words of description but of things. Poupard *v.* Fardell, 18 Wkly. Rep. 127.

45. Decisions in which facts were held to show identity.— *In re* Hodges, 28 App. Cas. (D. C.) 525; *In re* McNeil, 28 App. Cas. (D. C.) 461; *In re* Hoey, 28 App. Cas. (D. C.) 416; *In re* Welch, 28 App. Cas. (D. C.) 362; Johnston *v.* Woodbury, 109 Fed. 567, 48 C. C. A. 550; Root *v.* Third-Ave. R. Co., 43 Fed. 73; Berryman *v.* Ainsworth Boiler, etc., Covering Co., 40 Fed. 879; Norton *v.* Cary, 39 Fed. 544; Wight Fire-Proofing Co. *v.* Chicago Fire-Proof Co., 35 Fed. 582; Sox *v.* Taylor Iron Works, 30 Fed. 835 [*affirmed* in 149 U. S. 785, 13 S. Ct. 1051, 37 L. ed. 964]; Dodds *v.* Stoddard, 17 Fed. 645; Matteson *v.* Caine, 17 Fed. 525, 8 Sawy. 498; Crandall *v.* Richardson, 8 Fed. 808; Blackman *v.* Hibbler, 3 Fed. Cas. No. 1,471, 4 Ban. & A. 641, 17 Blatchf. 333, 17 Off. Gaz. 107; Gould *v.* Ballard, 10 Fed. Cas. No. 5,635, 3 Ban. & A. 324, 13 Off. Gaz. 1081; Richardson *v.* Lockwood, 20 Fed. Cas. No. 11,787, 6 Fish. Pat. Cas. 454, 4 Off. Gaz. 398.

Decisions in which the facts were held to show lack of identity.— *In re* Weiss, 21 App. Cas. (D. C.) 214; *In re* Marsden, 14 App. Cas. (D. C.) 223; *In re* Green, 20 D. C. 237; Thayer *v.* Wold, 142 Fed. 776 [*affirmed* in 148 Fed. 227, 78 C. C. A. 350]; Greene *v.* United Shoe Mach. Co., 132 Fed. 973, 66 C. C. A. 43; Diamond State Iron Co. *v.* Goldie, 84 Fed. 972, 28 C. C. A. 589; Chase *v.* Fillebrown, 58 Fed. 374; Jonathan Mills Mfg. Co. *v.* Whitehouse, 56 Fed. 589; Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 490 [*reversed* on other grounds in 63 Fed. 588, 11 C. C. A. 342]; Winchester Repeating Arm Co. *v.* American Buckle, etc., Co., 54 Fed. 703; Sawyer Spindle Co. *v.* W. G. & A. R. Morrison Co., 54 Fed. 693; Ricker *v.* Crocker-Wheeler Motor Co., 54 Fed. 519; Roberts *v.* H. P. Nail Co., 53 Fed. 916; Tibbe, etc., Mfg. Co. *v.* Heineken, 43 Fed. 75; Brush Electric Co. *v.* Julien Electric Co., 41 Fed. 679; Norton *v.* Cary, 39 Fed. 544; O'Brien Bros. Mfg. Co. *v.* Peoria Plow Co., 34 Fed. 786; Enterprise Mfg. Co. *v.* Sargent, 34 Fed. 134; Hammerschlag Mfg. Co. *v.* Bancroft, 32 Fed. 585; Starling *v.* St. Paul Plow Works, 32 Fed. 290; Cincinnati Ice-Mach. Co. *v.* Foss-Schneider Brewing Co., 31 Fed. 469; Adams, etc., Mfg. Co. *v.* Rathbone, 26 Fed. 262; Hicks *v.* Otto, 19 Fed. 749; Bruce *v.* Marder, 10 Fed. 750, 20 Blatchf. 355; Robinson *v.* Sutter, 8 Fed. 828, 10 Biss. 100 [*reversed* on other grounds in 119 U. S. 530, 7 S. Ct. 376, 30 L. ed. 492]; Watkins *v.* Cincinnati, 8 Fed. 325; Hobbs *v.* King, 8 Fed. 91; Zinn *v.* Weiss, 7 Fed. 914; Pennington *v.* King, 7 Fed. 462; *Ex p.* Barstow, 2 Fed. Cas. No. 1,063; Blake *v.* Rawson, 3 Fed. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200, 3 Off. Gaz. 122; Bullock Printing Press Co. *v.* Jones, 4 Fed. Cas. No. 2,132, 3 Ban. & A. 195, 13 Off. Gaz. 124; Cooke *v.* New York Cent., etc., R. Co., 6 Fed. Cas. No. 3,176, 4 Ban. & A. 398, 16 Off. Gaz. 856; Decker *v.* Grote, 7 Fed. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143, 3 Off. Gaz. 65; Gibbs *v.* Johnson, 10 Fed. Cas. No. 5,384; *Ex p.* Hayden, 11 Fed. Cas. No. 6,256; *In re* Hebbard, 11 Fed. Cas. No. 6,314, 1 McArthur Pat. Cas. 543; *Ex p.* Leach, 15 Fed. Cas. No. 8,155; Locomotive Engine Safety Truck Co. *v.* Erie R. Co., 15 Fed. Cas. No. 8,452, 10 Blatchf. 292, 6 Fish. Pat. Cas. 187, 3 Off. Gaz. 93; Masury *v.* Tiemann, 16 Fed. Cas. No. 9,271, 8 Blatchf. 426, 4 Fish. Pat. Cas. 524; Platt *v.* U. S. Patent Button, etc., Mfg. Co., 19 Fed. Cas. No. 11,222, 9 Blatchf. 342, 5 Fish. Pat. Cas. 265, 1 Off. Gaz. 524; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466; Schillinger *v.* Gunther, 21 Fed. Cas. No. 12,458, 17 Blatchf. 66, 14 Off. Gaz. 713; *In re* Smith, 22 Fed. Cas. No. 12,982, 1 McArthur Pat. Cas. 255; Tilghman *v.* Morse, 23 Fed. Cas. No. 14,044, 9 Blatchf. 421, 5 Fish. Pat. Cas. 323, 1 Off. Gaz. 574; Yale, etc., Mfg. Co. *v.* North, 30 Fed. Cas. No. 18,123, 5 Blatchf. 455, 3 Fish. Pat. Cas. 279.

Lack of identity in woven fabrics see Hoyle *v.* Kerr, 58 Fed. 395, 7 C. C. A. 269.

Lack of identity in materials see Tibbe, etc., Mfg. Co. *v.* Lamparter, 51 Fed. 763; Shuter *v.* Davis, 16 Fed. 564; Simons *v.* Blackinton, 22 Fed. Cas. No. 12,866, 3 Ban. & A. 481.

Lack of identity in process see Simonds Rolling Mach. Co. *v.* Hathorn Mfg. Co., 93 Fed. 958, 36 C. C. A. 24.

Substantial identity of materials see Giles *v.* Hesyinger, 150 U. S. 627, 14 S. Ct. 211, 37 L. ed. 1204.

Difference in operation see Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 14 S. Ct. 295, 38 L. ed. 103; Hubbell *v.* U. S., 20 Ct. Cl. 354; Adams *v.* Jolict Mfg. Co., 1 Fed. Cas. No. 56, 3 Ban. & A. 1, 12 Off. Gaz. 93; Barnes *v.* Straus, 2 Fed. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531, 2 Off. Gaz. 62; Miller *v.* Androscoggin Pulp Co., 17 Fed. Cas. No. 9,559, 5 Fish. Pat. Cas. 340, Holmes 142, 1 Off. Gaz. 409; Potter *v.* Muller, 19 Fed. Cas No. 11,334, 2 Fish. Pat. Cas. 465; Pike *v.* Providence, etc., R. Co., 20 Fed. Cas. No. 11,163, 1 Ban. & A. 560, Holmes 445, 6 Off. Gaz. 575; Putnam *v.* Hickey, 20 Fed. Cas. No. 11,480, 3 Biss. 157, 5 Fish. Pat. Cas. 334, 2 Off. Gaz. 225; Sanford *v.* Messer, 21 Fed. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149, 2 Off. Gaz. 470; Watson *v.* Cunningham, 29 Fed. Cas. No. 17,280, 4 Fish. Pat. Cas. 528.

Difference in result see Robbins *v.* Columbus Watch Co., 50 Fed. 545; Stuart *v.* Thorman, 37 Fed. 90; Putnam *v.* Weatherbee, 20 Fed. Cas. No. 11,485, 2 Ban. & A. 78, 8 Off.

Resemblance without identity is insufficient.[46] But identity need extend no further than to matter claimed.[47] And mere superiority of the invention for which a patent is sought does not prevent anticipation.[48] What would infringe the claims of a patent will anticipate it if prior in date.[49]

d. General Knowledge of Public Unnecessary. It is not necessary that the anticipating invention be known generally or that it is a matter of common knowledge,[50] but it is sufficient that some members of the public in this country knew of the invention.[51] Knowledge by a single member of the public is sufficient.[52]

Gaz. 320; Putnam *v.* Yerrington, 20 Fed. Cas. No. 11,486, 2 Ban. & A. 237, 9 Off. Gaz. 689; Rice *v.* Heald, 20 Fed. Cas. No. 11,752 [*reversed* on other grounds in 104 U. S. 737, 26 L. ed. 910]; Willimantic Linen Co. *v.* Clark Thread Co., 30 Fed. Cas. No. 17,763, 4 Ban. & A. 133.

Lack of identity in the structure of books see Hawes *v.* Cook, 11 Fed. Cas. No. 6,236, 5 Off. Gaz. 493; Hawes *v.* Gage, 11 Fed. Cas. No. 6,237, 5 Off. Gaz. 494; Hawes *v.* Washburne, 11 Fed. Cas. No. 6,242, 5 Off. Gaz. 491.

Designs.— Identity of designs is identity of appearance so that one would be mistaken for the other. Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Sagendorph *v.* Hughes, 95 Fed. 478; Frank *v.* Hess, 84 Fed. 170; Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70; Britton *v.* White Mfg. Co., 61 Fed. 93. Ability to distinguish one design from another will not avoid anticipation. *In re* Freeman, 23 App. Cas. (D. C.) 226.

Changes and additions.—An old device will not be considered sufficient to defeat a patent, when its construction is such that radical changes and additions would be required before it could be made to perform the work of the patented device satisfactorily. Western Electric Co. *v.* Home Tel. Co., 85 Fed. 649; Consolidated Bunging Apparatus Co. *v.* Woerle, 29 Fed. 449; Livingston *v.* Jones, 15 Fed. Cas. No. 8,413, 1 Fish. Pat. Cas. 521. There is no anticipation where modification is necessary to produce the desired result. Fenton Metallic Mfg. Co. *v.* Office Specialty Mfg. Co., 12 App. Cas. (D. C.) 201; Ryan *v.* Newark Spring Mattress Co., 96 Fed. 100.

Identity of structure is not necessary but the same result should be produced by substantially the same means and operation. *In re* Marshutz, 13 App. Cas. (D. C.) 228.

Reversal of operation will not avoid anticipation. Bryant Electric Co. *v.* Electric Protection Co., 110 Fed. 215.

Mere suggestions as to what may be done but not how to do it will not anticipate. Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 59 Fed. 902.

Devices may be the same, although not designed for same use. Codman *v.* Amia, 70 Fed. 710 [*affirmed* in 74 Fed. 634, 20 C. C. A. 566]; Wright, etc., Wire-Cloth Co. *v.* Clinton, 67 Fed. 790, 14 C. C. A. 646.

Inefficient substitutes.— A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine. United Shirt, etc., Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442 [*affirming* 138 Fed. 136].

46. Wilson *v.* Coon, 6 Fed. 611, 18 Blatchf. 532; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, 1 Fish. Pat. Rep. 319, 5 McLean 44.

47. Patent covers only what is claimed. McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Roemer *v.* Newmann, 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277; Burns *v.* Meyer, 100 U. S. 671, 25 L. ed. 738; Merrell *v.* Yeomans, C. D. 1877, 279; Keystone *v.* Phoenix, C. D. 1877, 384; Sutter *v.* Robinson, C. D. 1885, 155; Lehigh Valley *v.* Mellon, C. D. 1881, 485.

48. Daniels *v.* Restein, 131 Fed. 469 [*affirmed* in 146 Fed. 74, 76 C. C. A. 536]; Waterman *v.* Thomson, 29 Fed. Cas. No. 17,260, 2 Fish. Pat. Cas. 461.

49. Miller *v.* Eagle Mfg. Co., 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; Grant *v.* Walter, 148 U. S. 547, 13 S. Ct. 699, 37 L. ed. 552; Peters *v.* Active Mfg. Co., 129 U. S. 530, 9 S. Ct. 389, 32 L. ed. 738; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; Eames *v.* Worcester Polytechnic Inst., 123 Fed. 67, 60 C. C. A. 37; National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 99 Fed. 758; Electric Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Peters *v.* Active Mfg. Co., 21 Fed. 319.

What would not infringe cannot anticipate. Stainthorp *v.* Elkinton, 22 Fed. Cas. No. 13,278, 1 Fish. Pat. Cas. 349.

Omission which would be supplied by mechanic does not prevent anticipation. Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98.

50. Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148.

Disuse of prior device does not avoid anticipation. Packard *v.* Gilbert, 18 Fed. Cas. No. 10,651.

Use concealed from public view will anticipate. Spring *v.* Packard, 22 Fed. Cas. No. 13,260, 1 Ban. & A. 531, 7 Off. Gaz. 341.

51. Daniel *v.* Restein, 131 Fed. 469 [*affirmed* in 146 Fed. 74, 76 C. C. A. 536]; Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 1 Robb Pat. Cas. 166, 3 Wash. 408 [*affirmed* in 7 Wheat. 453, 5 L. ed. 496].

52. Egbert *v.* Lippmann, 104 U. S. 333, 26 L. ed. 755; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Boston Elastic Fabrics Co. *v.* East Hampton Rubber Thread Co., 3 Fed. Cas. No. 1,675, 2 Ban. & A. 268,

e. Patentee's Knowledge of Anticipation Unnecessary. It is not of consequence that the patentee made the invention by his own efforts and thought and in ignorance of the prior invention by another, since the fact of prior invention is what controls.[53]

2. Prior Patents — a. In General. A patent disclosing the invention granted in this country or abroad before the claimant's date of invention is a bar to the grant of a patent to him for that invention.[54] A prior patent alleged to anticipate must be taken in the meaning disclosed upon its face, and extrinsic evidence is not admissible to reconstruct it, as by showing that a word having a sensible meaning in the context was erroneously used for another word.[55] It cannot properly have implied into it, from necessity, more than it fairly shows, to make it represent an operative structure. What is required and not so shown is left for later inventors.[56] An impracticable prior device, not capable of performing the functions of a subsequent patented device that is practicable and useful, is not an anticipation.[57] Furthermore in order that a prior patent may operate to defeat a subsequent patent, the two must be for the same invention.[58]

b. Foreign Patents. A foreign patent in order to invalidate an American patent must antedate the invention patented,[59] not merely the application for letters patent,[60] or the issuance of the patent by the United States.[61] A foreign patent exists as a patent only as of the date when the invention was published or made accessible to the public.[62] An invention is not "patented" in England within the meaning of the act of congress until the enrolment or sealing of the complete specifications.[63] The enrolled specification takes effect only from the date of its enrolment,

9 Off. Gaz. 745; Packard *v.* Gilbert, 18 Fed. Cas. No. 10,651; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Stephens *v.* Felt, 22 Fed. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. Rep. 144. And see *supra*, III, B, 3.

53. See *infra*, III, E, 4.

Ignorance of patentee no defense. Patterson *v.* Gas Light, etc., Co., 3 App. Cas. 239, 47 L. J. Ch. 402, 38 L. T. Rep. N. S. 303, 26 Wkly. Rep. 482; *In re* Honiball, 9 Moore P. C. 378, 14 Eng. Reprint 340.

54. U. S. Rev. St. (1878) §§ 4886, 4923 [U. S. Comp. St. (1901) p. 3396]; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673; Muntz *v.* Foster, 2 Web. Pat. Cas. 96.

It is a good defense to an action for infringement that the patented device was anticipated by a prior patent to the same patentee. Barnes Automatic Sprinkler Co. *v.* Walforth Mfg. Co., 60 Fed. 605, 9 C. C. A. 154.

55. Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163.

56. Wirt *v.* Farrelly, 84 Fed. 891.

57. Bowers *v.* San Francisco Bridge Co., 91 Fed. 381; Harwood *v.* Mill River Woolen Mfg. Co., 11 Fed. Cas. No. 6,187, 3 Fish. Pat. Cas. 526; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,538, 8 Blatchf. 440, 4 Fish. Pat. Cas. 508.

Slight modifications to perform function of later patent.— A patent is not anticipated by prior patents for devices which might by slight modifications have been made to perform the functions of that of the later patent, where it does not appear that the patentees had in mind their use or adaptation to accomplish such result. Gunn *v.* Bridgeport Brass Co., 148 Fed. 239 [*reversed* in 152 Fed. 434, 81 C. C. A. 576, where patent was declared void].

58. See *infra*, V, C, 8.

59. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Columbus Chain Co. *v.* Standard Chain Co., 148 Fed. 622, 78 C. C. A. 394; Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586.

The words "previously patented in a foreign country" must be taken to mean "patented according to the laws and usages of such foreign country." Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 643, 647, 42 C. C. A. 554.

60. Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440, holding that where a foreign patent, granted before the application of the American patentee, is relied upon to destroy the novelty of the American patent, the patentee may prove that his invention was made prior to the granting of the foreign patent.

61. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

In other words an invention reduced to practice in the United States prior to the granting of an English patent will be sustained as against such patent. National Spring Co. *v.* Union Car Spring Mfg. Co., 17 Fed. Cas. No. 10,051, 1 Ban. & A. 240, 12 Blatchf. 80, 6 Off. Gaz. 224.

62. De Florez *v.* Raynolds, 17 Off. Gaz. 503.

63. Rousseau *v.* Brown, 21 App. Cas. (D. C.) 73; Ireson *v.* Pierce, 39 Fed. 795;

and not from the date of the filing of the provisional specification.[64] The instrument known under the German law as "Gebrauchsmuster" is not one the filing of which charges any one with notice of its contents or which has the effect of a foreign patent as an anticipation of a subsequent United States patent.[65]

c. Paper Patents. It is well settled that mere paper patents may negative otherwise patentable novelty, provided they sufficiently disclose the principles of the alleged invention, or provided the alleged objections can be obviated by mere mechanical skill.[66] But anticipatory matter which has never gone into practical use is to be narrowly construed.[67]

d. Secret Patents. The expression "patented," as used in a statute,[68] providing that, in an action for infringement, defendant may prove that the patentee's invention had been patented prior to his supposed invention, means only invention laid open to the public and protected to the inventors.[69] There are, however, in some foreign countries, patents which may, for public and special reasons, be kept secret. Therefore defendant must show whether the alleged anticipating patent was a public or a private grant.[70]

e. Sufficiency of Description. A prior patent to invalidate a subsequent patent must describe the invention in such full, clear, and exact terms as to enable one skilled in the art to construct and use it without the necessity of making experiments.[71] The sufficiency of the description in the prior patent must be

Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Railway Register Mfg. Co. *v.* Broadway, etc., R. Co., 26 Fed. 522 [*affirmed* in 149 U. S. 783, 13 S. Ct. 1051, 37 L. ed. 958]; Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Willimantic Linen Co. *v.* Clark Thread Co., 30 Fed. Cas. No. 17,763, 4 Ban. & A. 133; American Bell Tel. Co. *v.* Cushman, 65 Off. Gaz. 135.

64. Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586.

An English provisional specification is not an anticipation until it has been printed, the invention described in it not being patented until the completed specification is filed. Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Parsons *v.* Colgate, 15 Fed. 600, 21 Blatchf. 171; Coburn *v.* Schroeder, 11 Fed. 425, 20 Blatchf. 392.

65. Steiner *v.* Schwarz, 148 Fed. 868.

66. Pickering *v.* McCullough, 104 U. S. 310, 26 L. ed. 749; Universal Winding Co. *v.* Willimantic Linen Co., 80 Off. Gaz. 1273; Miller *v.* Meriden Bronze Co., 79 Off. Gaz. 1520.

Where more than mechanical skill is required a paper patent will not anticipate. Thomson-Houston Electric Co. *v.* Winchester Ave. R. Co., 71 Fed. 192.

67. Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 90 Fed. 201.

However a patentee cannot be denied invention because of a prior patent for a device which never came into use, unless the idea upon which his patent is predicated is so clearly set forth or suggested in the alleged anticipating patent that a mechanic with such patent before him could by the exercise of mere mechanical skill so modify proportions or change the mode of operation as to overcome the difficulties which excluded the prior device from commercial utility. Ideal Stopper Co. *v.* Crown Cork, etc., Co., 131 Fed. 244, 65 C. C. A. 436 [*affirming* 123 Fed. 666].

68. U. S. Rev. St. (1878) § 4920, par. 3.

69. Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209; Brooks *v.* Norcross, 4 Fed. Cas. No. 1,957, 2 Fish. Pat. Cas. 661.

70. Brooks *v.* Norcross, 4 Fed. Cas. No. 1,957, 2 Fish. Pat. Cas. 661. But, as against an objection that it did not appear from the copy of a foreign patent, introduced to show prior invention, whether it was an open or a secret one, it has been held that, since only public records are provable by copy certified merely, and as the authorities of a foreign government would not have a patent in a condition to be certified if it was secret, the fact that it is certified shows it to be public. Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

71. Matter of McCloskey, 3 MacArthur (D. C.) 14; Pettibone *v.* Pennsylvania Steel Co., 133 Fed. 730 [*reversed* on other grounds in 141 Fed. 95]; Springfield Furnace Co. *v.* Miller Down-Draft Furnace Co., 96 Fed. 418; Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721; Hanifen *v.* E. H. Godschalk Co., 84 Fed. 649, 28 C. C. A. 507 [*reversing* 78 Fed. 811]; Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 59 Fed. 902; U. S. Bung Mfg. Co. *v.* Independent Bung, etc., Co., 31 Fed. 76, 24 Blatchf. 406; Nathan *v.* New York El. R. Co., 2 Fed. 225; Atlantic Giant-Powder Co. *v.* Parker, 2 Fed. Cas. No. 625, 4 Ban. & A. 292, 16 Blatchf. 281, 16 Off. Gaz. 87; Goff *v.* Stafford, 10 Fed. Cas. No. 5,504, 3 Ban. & A. 610, 14 Off. Gaz. 748; Jenkins *v.* Walker, 13 Fed. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120, 1 Off. Gaz. 359; Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [*reversed* on other grounds in 10 Wall. 117, 19 L. ed. 866]; Betts *v.* Menzies, 10 H. L. Cas. 117, 9 Jur. N. S. 29, 31 L. J. Q. B. 233, 7 L. T. Rep. N. S. 110, 11 Wkly. Rep. 1, 11 Eng. Reprint 970.

tested by the knowledge of persons skilled in the art as it existed at the date of such patent.[72]

f. Failure to Claim Immaterial. It is immaterial whether the prior patent includes a claim to the subject-matter so long as it discloses it with such clearness as to enable one skilled in the art to make and use it.[73] The failure of the patentee to include the device among the claims of his own invention implies either that he abandoned it to the public or that he regarded it as well known.[74] The patent is evidence of the state of the art at the time the drawings and specifications upon which it was afterward granted were made, and it is the state of the art and not the patent which constitutes anticipation.[75]

3. Prior Publication — a. In General. A prior publication is a printed book, newspaper, or document of public character disclosing the invention intended and actually employed for the purpose of conveying information to the public.[76] The invention must be intended for the public and actually published.[77]

b. Sufficiency of Publication. Publication in a book of general circulation is sufficient.[78] But mere business catalogues or circulars intended for particular persons engaged in the trade are not publications within the meaning of the law.[79] Otherwise, however, as to trade magazines found in libraries.[80] A published drawing without description is a publication of the invention if the disclosure therein is sufficient to enable one skilled in the art to make and use it.[81] A provisional specification published in England amounts to publication.[82] A book containing the minutes of a company,[83] or an application for a patent,[84] is not a publi-

Insufficient descriptions.— A patent so obscure in its terminology that two conflicting theories as to its meaning may be deduced therefrom and supported by equally plausible arguments is too indefinite to operate as an anticipation. Cimiotti Unhairing Co. *v.* Comstock Unhairing Co., 115 Fed. 524. So mere prophetical suggestions in a patent as to the possibilities of an invention, when no one has ever tested the truth of the suggestions, do not anticipate a subsequent patent for the invention suggested. Westinghouse Air-Brake Co. *v.* Great Northern R. Co., 88 Fed. 258, 81 C. C. A. 525.

Mechanism.—Where a patent is for mechanism by which a particular result is produced, a prior patent, in order to anticipate it, must contain more than a mere statement that the result may be accomplished. It must contain a description of the mechanism by which it is accomplished. Graham *v.* Gammon, 10 Fed. Cas. No. 5,668, 3 Ban. & A. 7, 7 Biss. 490.

72. Bowers *v.* San Francisco Bridge Co., 91 Fed. 381.

73. *In re* Millet, 18 App. Cas. (D. C.) 186; Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157. *Compare* Battin *v.* Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Vermont Farm Mach. Co. *v.* Marble, 19 Fed. 307; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39, all holding that an inventor is not barred from obtaining a patent because his invention is described, although not claimed, in a prior patent to himself.

74. *In re* Millett, 18 App. Cas. (D. C.) 186; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. ed. 665; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783.

75. *In re* Millett, 18 App. Cas. (D. C.) 186.

76. Britton *v.* White Mfg. Co., 61 Fed. 93.

77. Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368.

78. Lang *v.* Gisborne, 31 Beav. 133, 8 Jur. N. S. 736, 31 L. J. Ch. 769, 6 L. T. Rep. N. S. 771, 10 Wkly. Rep. 368, 54 Eng. Reprint 1088; Stead *v.* Williams, 8 Jur. 930, 13 L. J. C. P. 218, 7 M. & G. 818, 8 Scott N. R. 440, 49 E. C. L. 818.

79. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Britton *v.* White Mfg. Co., 61 Fed. 93; New Process Fermentation Co. *v.* Koch, 21 Fed. 580; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368; Parsons *v.* Colgate, 24 Off. Gaz. 203; Atterbury's Appeal, 9 Off. Gaz. 640.

80. Truman *v.* Carvill Mfg. Co., 87 Fed. 470.

81. *In re* Millett, 18 App. Cas. (D. C.) 186; Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Britton *v.* White Mfg. Co., 61 Fed. 93; Webb *v.* Quintard, 29 Fed. Cas. No. 17,324, 9 Blatchf. 352, 5 Fish. Pat. Cas. 276, 1 Off. Gaz. 525. But see Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368.

82. Cohn *v.* U. S. Corset Co., 6 Fed. Cas. 2,969, 1 Ban & A. 340, 12 Blatchf. 225, 6 Off. Gaz. 259 [*affirmed* in 93 U. S. 366, 23 L. ed. 907].

83. Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327].

84. Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed.

cation. So a single copy of a book published in a foreign country not entered in the list of books contained in a library is not a publication.[85] Copies of foreign patents in the patent office or public libraries accessible to all amount to sufficient publication.[86]

c. Sufficiency of Description. The publication must describe the invention so fully as to enable one skilled in the art to which it belongs or pertains to construct or use it.[87]

4. Prior Knowledge and Use — a. Sufficiency of Knowledge. Anticipating knowledge must be of the complete operative invention such as will enable those skilled in the art without further instructions to make and use it.[88]

b. Mental Idea Insufficient. Anticipating knowledge includes not the mere mental conception that the thing can be done,[89] and of the means for doing it, but the certainty of information derived from a practical demonstration.[90] Mere theories are insufficient.[91]

c. Necessity For Perfected Invention. To constitute an anticipation the invention must have been in a form adapted and intended for immediate practical use.[92] An inoperative device will not anticipate.[93]

Cas. No. 10,337, 1 Ban. & A. 177, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227.

85. Plimpton *v.* Spiller, 6 Ch. D. 412, 47 L. J. Ch. 211, 37 L. T. Rep. N. S. 56, 26 Wkly. Rep. 285.

86. Harris *v.* Rothwell, 35 Ch. D. 416, 56 L. J. Ch. 459, 56 L. T. Rep. N. S. 552, 35 Wkly. Rep. 581; Plimpton *v.* Spiller, 6 Ch. D. 412, 47 L. J. Ch. 211, 37 L. T. Rep. N. S. 56, 26 Wkly. Rep. 285; British Tanning Co. *v.* Groth, 60 L. J. Ch. 235, 64 L. T. Rep. N. S. 21.

87. Driven Well Cases, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; Western Electric Co. *v.* Millheim Electric Tel. Co., 88 Fed. 505; Am Ende *v.* Seabury, 36 Fed. 593 [*affirmed* in 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553]; Hood *v.* Boston Car-Spring Co., 21 Fed. 67; Nathan *v.* New York El. R. Co., 2 Fed. 225; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Colgate *v.* Gold, etc., Tel. Co., 6 Fed. Cas. No. 2,991, 4 Ban. & A. 415, 16 Blatchf. 503, 16 Off. Gaz. 583; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, 1 Fish. Pat. Rep. 319, 5 McLean 44; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4, 4 Brewst. (Pa.) 260.

88. Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553; Driven Well Cases, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Hood *v.* Boston Car-Spring Co., 21 Fed. 67; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, 1 Fish. Pat. Rep. 319, 5 McLean 44; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4, 4 Brewst. (Pa.) 260. And see *supra*, III, C, 1, h.

89. Cobb *v.* Goebel, 23 App. Cas. (D. C.) 75.

90. Howe *v.* Underwood, 12 Fed. Cas. No. 6,775, 1 Fish. Pat. Cas. 160; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,415, 3 Biss. 52, 4 Fish. Pat. Cas. 584. And see *infra*, III, C, 4, d; IV, A, 4.

91. National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375; Cox *v.* Griggs, 6 Fed. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Judson *v.* Bradford, 14 Fed. Cas. No. 7,564, 3 Ban. & A. 539, 16 Off. Gaz. 171; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. Rep. 161, 8 N. Y. Leg. Obs. 146; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Stephens *v.* Felt, 22 Fed. Cas. No. 13,368*a*; Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600. And see *supra*, II, A, 3.

92. Lindemeyr *v.* Hoffman, 18 App. Cas. (D. C.) 1; Coffin *v.* Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Buser *v.* Novelty Tufting Mach. Co., 151 Fed. 478, 81 C. C. A. 16; Allis *v.* Buckstaff, 13 Fed. 879; Putnam *v.* Hollender, 6 Fed. 882, 19 Blatchf. 48; *Ex p.* Henry, L. R. 8 Ch. 167, 42 L. J. Ch. 363, 21 Wkly. Rep. 233; Murray *v.* Clayton, L. R. 7 Ch. 570, 20 Wkly. Rep. 649; Lewis *v.* Marling, 10 B. & C. 22, 21 E. C. L. 20, 4 C. & P. 52, 19 E. C. L. 403, 8 L. J. K. B. O. S. 46, 5 M. & R. 66; Pneumatic Tire Co. *v.* East London Rubber Co., 75 L. T. Rep. N. S. 488.

Mere laboratory experiments will not anticipate. Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636.

93. Timolat *v.* Philadelphia Pneumatic Tool Co., 131 Fed. 257; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 129 Fed. 598; Farmers' Mfg. Co. *v.* Spruks Mfg. Co., 127 Fed. 691, 62 C. C. A. 447; Kirchberger *v.* American Acetylene Burner Co., 124 Fed. 764 [*affirmed* in 128 Fed. 599, 64 C. C. A. 107]; Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., 115 Fed. 498, 53 C. C. A. 230.

d. Necessity For Demonstration of Success. Ordinarily the invention must have been tested and found satisfactory,[94] although some devices are so simple that no test is necessary to demonstrate their success.[95] And mere mechanical defects which would be cured by the ordinary mechanic will not prevent anticipation.[96]

e. Abandoned or Unsuccessful Experiments. Mere unsuccessful and abandoned experiments do not constitute anticipating knowledge or use.[97] To justify

94. Dashiell *v.* Tasker, 21 App. Cas. (D. C.) 64; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Fefel *v.* Stocker, 94 Off. Gaz. 433; Kelly *v.* Fynn, 92 Off. Gaz. 1237. And see *supra*, III, C, 4, b; *infra*, IV, A, 5.

Process must have been actually performed. Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [*reversed* on other grounds in 91 U. S. 37, 23 L. ed. 200]; Croskey *v.* Atterbury, 76 Off. Gaz. 163.

Commercial use is not necessary.—Wyman *v.* Donnelly, 21 App. Cas. (D. C.) 81.

95. Lindemeyr *v.* Hoffman, 18 App. Cas. (D. C.) 1; Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86; Coffin *v.* Ogden, 5 Fed. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [*affirmed* in 18 Wall. 120, 21 L. ed. 821]; Parker *v.* Ferguson, 18 Fed. Cas. No. 10,733, 1 Blatchf. 407, Fish. Pat. Rep. 260. And see *infra*, IV, A, 5, a.

96. Brush *v.* Condit, 132 U. S. 39, 10 S. Ct. 1, 33 L. ed. 251; Merrimac Mattress Mfg. Co. *v.* Feldman, 133 Fed. 64; Patent Button Co. *v.* Scovill Mfg. Co., 92 Fed. 151; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Jenner *v.* Dickinson, 117 Off. Gaz. 600; Gallagher *v.* Hien, 115 Off. Gaz. 1330; Bechman *v.* Wood, 89 Off. Gaz. 2459; Hein *v.* Buhaup, 81 Off. Gaz. 2088; Bromley Bros. Carpet Factory *v.* Stewart, 61 Off. Gaz. 1481.

97. Dashiell *v.* Tasker, 21 App. Cas. (D. C.) 64; Tripler *v.* Linde, 21 App. Cas. (D. C.) 32; Traver *v.* Brown, 14 App. Cas. (D. C.) 34; Glidden *v.* Noble, 5 App. Cas. (D. C.) 480; Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 14 S. Ct. 295, 38 L. ed. 103; Whiteley *v.* Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199; United Shoe Mach. Co. *v.* Greenman, 153 Fed. 283, 82 C. C. A. 581 [*affirming* 145 Fed. 538]; Arrott *v.* Standard Sanitary Mfg. Co., 131 Fed. 457 [*affirmed* in 135 Fed. 750, 68 C. C. A. 388]; General Electric Co. *v.* Wise, 119 Fed. 922; R. Thomas, etc., Co. *v.* Electric Porcelain, etc., Co., 111 Fed. 923; Westinghouse Electric, etc., Co. *v.* Beacon Lamp Co., 95 Fed. 462; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 61 Fed. 948, 10 C. C. A. 184; American Bell Tel. Co. *v.* American Cushman Tel. Co., 35 Fed. 734, 1 L. R. A. 60; International Tooth-Crown Co. *v.* Richmond, 30 Fed. 775; Hutchinson *v.* Everett, 26 Fed. 531; Hoyt *v.* Slocum, 26 Fed. 329; American Bell Tel. Co. *v.* People's Tel. Co., 25 Fed. 725 [*affirmed* in 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863]; Fay *v.* Allen, 24 Fed. 804; Phillips *v.* Carroll, 23 Fed. 249; Whittlesey *v.* Ames, 13 Fed. 893, 9 Biss. 225; Albright *v.* Celluloid Harness Trimming Co., 1 Fed. Cas. No. 147, 2 Ban & A. 629, 12 Off. Gaz. 227; Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303; Aultman *v.* Holley, 2 Fed. Cas. No. 656, 11 Blatchf. 317, 6 Fish. Pat. Cas. 534, 5 Off. Gaz. 3; Blake *v.* Rawson, 3 Fed. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200, 3 Off. Gaz. 122; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 379; Gallahue *v.* Butterfield, 9 Fed. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203, 2 Off. Gaz. 645; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86; Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,538, 8 Blatchf. 440, 4 Fish. Pat. Cas. 508; Howe *v.* Underwood, 12 Fed. Cas. No. 6,775, 1 Fish. Pat. Cas. 160; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,960, 1 Ban. & A. 428, 6 Off. Gaz. 724; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; McCormick *v.* Howard, 15 Fed. Cas. No. 8,719, McArthur Pat. Cas. 238; Many *v.* Jagger, 16 Fed. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. Rep. 222; Many *v.* Sizer, 16 Fed. Cas. No. 9,056, 1 Fish. Pat. Cas. 17; Murphy *v.* Eastham, 17 Fed. Cas. No. 9,949, 5 Fish. Pat. Cas. 306, Holmes 113, 2 Off. Gaz. 61; Parham *v.* American Buttonhole, etc., Mach. Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4, 4 Brewst. (Pa.) 260; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Smith *v.* Fay, 22 Fed. Cas. No. 13,045, 6 Fish. Pat. Cas. 446; Smith *v.* Glendale Elastic Fabrics Co., 22 Fed. Cas. No. 13,050, 1 Ban. & A. 58, Holmes 340, 5 Off. Gaz. 429 [*affirmed* in 100 U. S. 110]; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Union Paper Bag Co. *v.* Pultz, etc., Co., 24 Fed. Cas. No. 14,392, 3 Ban. & A. 403, 15 Blatchf. 160, 15 Off. Gaz. 423; United Nickel Co. *v.* Anthes, 24 Fed. Cas. No. 14,406, 5 Fish. Pat. Cas. 517, Holmes 155, 1 Off. Gaz. 578; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Winans *v.* Danforth, 30 Fed. Cas. No. 17,859; Winans *v.* New York, etc., R. Co., 30 Fed. Cas. No. 17,864, 4 Fish. Pat. Cas. 1; Woodman *v.*

a court in overthrowing a patent granted for what appears to be a new and useful invention or improvement, on the ground that the device has been anticipated by another and earlier invention, the court should be well satisfied by clear and credible testimony that the alleged earlier invention actually existed; that it was a perfected device, capable of practical use, and that it was embodied in distinct form, and carried into operation as a complete thing, and was not merely an unperfected or abandoned experiment.[98]

f. Models and Unpublished Drawings. Models or unpublished drawings or descriptions, however completely they may disclose the invention, do not anticipate.[99] Illustrative drawings of conceived ideas do not constitute an invention, and unless they are followed up by a seasonable observance of the requirements of the patent laws they can have no effect upon a subsequently granted patent to another.[1]

g. Accidental Production of Invention. Prior, accidental production of the same thing does not amount to anticipation, where the operator does not recognize or understand the means by which the accidental result is accomplished,[2] and no knowledge of them or of the method of employment is derived from it by any one.[3] "A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by

Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98.

Combinations of similar elements which could not be successfully used to produce the effect produced by the patented machine do not anticipate the patent. Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,270, 3 Biss 66, 3 Fish. Pat. Cas. 330.

A single experimental use of an apparatus, afterward destroyed, in such way as to involve the practice of a certain process, does not prevent a subsequent original inventor or discoverer of the same process from having a valid patent therefor. Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20.

Mere failure to use invention will not prevent anticipation. McNish *v.* Everson, 2 Fed. 899; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523; Shoup *v.* Henrici, 22 Fed. Cas. No. 12,814, 2 Ban. & A. 249; Waterman *v.* Thomson, 29 Fed. Cas. No. 17,260, 2 Fish. Pat. Cas. 461.

Where a patent has been granted for improvements which, after a full and fair trial, resulted in unsuccessful experiments, and have been finally abandoned, if any other person takes up the subject of the improvements and is successful he is entitled to the merit of them as an original inventor. Whitely *v.* Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199.

98. Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675.

99. Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86; Dolbear *v.* American Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; American Writing Mach. Co. *v.* Wagner Typewriter Co., 151 Fed. 576, 81 C. C. A. 120 [*affirming* 138 Fed. 108]; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 608]; Uhlmann *v.* Bartholomæ, etc., Brewing Co., 41 Fed. 132; Pennsylvania Diamond Drill Co. *v.* Simpson, 29 Fed. 288; Detroit Lubricator Mfg. Co. *v.* Renchard, 9 Fed. 293; Judson *v.* Cope, 2 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Ellithorp *v.* Robertson, 8 Fed. Cas. No. 4,408, 4 Blatchf. 307, 2 Fish. Pat. Cas. 83; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466; Hunter *v.* Stikeman, 85 Off. Gaz. 610; McCormick *v.* Cleal, 83 Off. Gaz. 1514; Croskey *v.* Atterbury, 76 Off. Gaz. 163; Porter *v.* Louden, 73 Off. Gaz. 1551; New Process Fermentation Co. *v.* Koch, 29 Off. Gaz. 535; *In re* Atterbury, 9 Off. Gaz. 640.

1. Detroit Lubricator Mfg. Co. *v.* Renchard, 9 Fed. 293; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466.

2. Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Chisholm *v.* Johnson, 106 Fed. 191; German-American Filter Co. *v.* Erdrich, 98 Fed. 300; Tannage Patent Co. *v.* Donallan, 93 Fed. 811; Wickelman *v.* A. B. Dick, 88 Fed. 264, 31 C. C. A. 530; Taylor Burner Co. *v.* Diamond, 72 Fed. 182; Pittsburg Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301; Boyd *v.* Cherry, 50 Fed. 279; Andrews *v.* Carman, 1 Fed. Cas. No. 371, 2 Ban. & A. 277, 13 Blatchf. 307, 9 Off. Gaz. 1011; Colgate *v.* Western Union Tel. Co., 6 Fed. Cas. No. 2,995, 4 Ban. & A. 36, 15 Blatchf. 365, 14 Off. Gaz. 943; Pelton *v.* Waters, 19 Fed. Cas. No. 10, 913. 1 Ban. & A. 599, 7 Off. Gaz. 425; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252.

3. Wickelman *v.* A. B. Dick Co., 88 Fed. 264, 31 C. C. A. 530.

putting it to practical and intelligent use, first makes it available to man."[4] It has been held, however, that to constitute anticipation of a later patent it is enough that such a construction had been in well-established use, whether it originated in design or by accident;[5] and an invention will not be deemed accidental because all the advantages thereof were not understood[6] or because the new form of result had not been before contemplated.[7] While as already shown an accidental and unnoted use does not amount to an anticipation, the mere discovery in an old combination of a new property however beneficial is not patentable.[8]

h. Lost Art. An invention which was never made public and which has been forgotten will not anticipate.[9] But an invention merely concealed by the inventor is not a lost art.[10]

i. Combination of Old Elements.[11] The fact that the various elements of a combination are old will not anticipate a claim to the combination.[12] To anticipate a combination it must be shown that the same or equivalent elements have been combined in substantially the same way to produce substantially the same result.[13]

4. Andrews *v.* Carman, 1 Fed. Cas. No. 371, 2 Ban. & A. 277, 13 Blatchf. 307, 323, 9 Off. Gaz. 1011 [*quoted* in Wickelman *v.* A. B. Dick Co., 88 Fed. 264, 31 C. C. A. 530].

5. National Harrow Co. *v.* Quick, 74 Fed. 236, 20 C. C. A. 410.

6. Merrimac Mattress Co. *v.* Feldman, 133 Fed. 64; Soehner *v.* Favorite Stove, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Woodbury Patent Planing Mach. Co. *v.* Keith, 30 Fed. Cas. No. 17,970, 4 Ban. & A. 100 [*affirmed* in 101 U. S. 479, 25 L. ed. 939].

7. Ansonia Brass, etc., Co. *v.* Electrical Supply Co., 144 U. S. 11, 12 S. Ct. 601, 36 L. ed. 327 [*affirming* 32 Fed. 81, 35 Fed. 68].

8. National Meter Co. *v.* Neptune Meter Co., 122 Fed. 82 [*affirmed* in 129 Fed. 124, 63 C. C. A. 626].

9. Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Hall *v.* Bird, 11 Fed. Cas. No. 5,926, 6 Blatchf. 438, 3 Fish. Pat. Cas. 595; Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110, 8 Off. Gaz. 90.

10. Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86.

11. Combination or aggregation as involving invention see *infra*, III, E, 20, 21.

New combinations as showing novelty of device see *supra*, III, B, 10.

12. Allen *v.* Grimes, 89 Fed. 869; Western Electric Co. *v.* Millheim Electric Tel. Co., 88 Fed. 505; Railway Register Mfg. Co. *v.* North Hudson County R. Co., 26 Fed. 411; Yale Lock Mfg. Co. *v.* Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Booth *v.* Parks, 3 Fed. Cas. No. 1,648, 1 Ban. & A. 225, 1 Flipp. 381 [*affirmed* in 102 U. S. 96, 26 L. ed. 54]; *In re* Boughton, 3 Fed. Cas. No. 1,696, McArthur Pat. Cas. 278; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Child *v.* Boston etc., Iron Works, 5 Fed. Cas. No. 2,675, 6 Fish. Pat. Cas. 606, Holmes 303, 5 Off. Gaz. 61; Christman *v.* Rumsey, 5 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903; Crosby *v.* Lopouraille, 6 Fed. Cas. No. 3,424, Taney 374; Emigh *v.* Chicago, etc., R. Co., 8 Fed. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, 1 Robb Pat. Cas. 68; Forbush *v.* Cook, 9 Fed. Cas. No. 4,931, 2 Fish. Pat. Cas. 668; Forsyth *v.* Clapp, 9 Fed. Cas. No. 4,949, 6 Fish. Pat. Cas. 528, Holmes 528, 4 Off. Gaz. 527; Hailes *v.* Van Wormer, 11 Fed. Cas. No. 5,904, 7 Blatchf. 443 [*affirmed* in 20 Wall. 353, 22 L. ed. 241]; *In re* Halsey, 11 Fed. Cas. No. 5,963, McArthur Pat. Cas. 459; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673; Kerosene Lamp Heater Co. *v.* Littell, 14 Fed. Cas. No. 7,724, 3 Ban. & A. 312, 13 Off. Gaz. 1009; Munson *v.* Gilbert, etc., Mfg. Co., 17 Fed. Cas. No. 9,934, 3 Ban. & A. 595, 18 Off. Gaz. 194; Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 2 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327]; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Tatham *v.* LeRoy, 23 Fed. Cas. No. 13,761; *In re* Wagner, 28 Fed. Cas. No. 17,038, McArthur Pat. Cas. 510; Willimantic Linen Co. *v.* Clark Thread Co., 30 Fed. Cas. No. 17,763, 4 Ban. & A. 133; Winans *v.* Schenectady, etc., R. Co., 30 Fed. Cas. No. 17,865, 2 Blatchf. 279. And see *infra*, III, E, 20, b.

A combination of all the elements but one will not anticipate. Rice *v.* Heald, 20 Fed. Cas. No. 11,752 [*reversed* on other grounds in 104 U. S. 737, 26 L. ed. 910]; Watson *v.* Cunningham, 29 Fed. Cas. No. 17,280, 4 Fish. Pat. Cas. 528.

13. Hubbell *v.* U. S., 179 U. S. 86, 21 S. Ct. 28, 45 L. ed. 100; Parks *v.* Booth, 102 U. S. 96, 26 L. ed. 54; Stilwell-Bierce, etc., Co. *v.* Eufaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584; Brill *v.* Third Ave. R. Co., 103 Fed. 289; Gormully, etc., Mfg. Co. *v.* Stanley Cycle Mfg. Co., 90 Fed. 279; Packard *v.* Lacing-Stud Co., 70 Fed. 66, 16 C. C. A. 639; American Automaton Weighing Mach. Co. *v.* Blauvelt, 50 Fed. 213; Ross *v.* Montana Union R. Co. *v.* 45 Fed. 424; Bell *v.* U. S. Stamping Co., 19 Fed. 312; Worswick Mfg.

j. Non-Analogous Use. The fact that the same thing in form is old in a non-analogous art where it is used to perform different functions will not constitute an anticipation or negative novelty.[14]

k. Evidence — (I) *Presumptions and Burden of Proof.* A patent is *prima facie* evidence that the patentee was the original and first inventor of the device patented,[15] and whoever controverts or denies his claim in this respect has the burden of proof upon him to establish the contrary.[16] This presumption of originality, in the absence of the application for the patent, extends back only to the date of the patent,[17] and in no case does it extend further back than to the time of the filing of the original application.[18] Where defendant has shown knowledge and use of the invention prior to the patent, the burden of proving a still prior invention is thrown on plaintiff.[19]

(II) *Admissibility* — (A) *In General.* To overcome the *prima facie* pre-

Co. *v.* Steiger, 17 Fed. 250; Clark Patent Steam, etc., Regulator Co. *v.* Copeland, 5 Fed. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Johnson *v.* Root, 13 Fed. Cas. No. 7,410, 2 Cliff. 637; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,270, 3 Biss. 66, 3 Fish. Pat. Cas. 330; Watson *v.* Cunningham, 29 Fed. Cas. No. 17,280, 4 Fish. Pat. Cas. 528.

14. *In re* Weiss, 21 App. Cas. (D. C.) 214; National Meter Co. *v.* Neptune Meter Co., 122 Fed. 75 [*reversed* on other grounds in 127 Fed. 563]; Durfee *v.* Bawo, 118 Fed. 853; Moore *v.* Schaw, 118 Fed. 602; Daylight Prism Co. *v.* Marcus Prism Co., 110 Fed. 980; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544. And see *supra*, III, B, 8; *infra*, III, E, 15.

Illustration.— Panel of ceiling not anticipated by bottom of bird cage or a tea-tray. Kinnear, etc., Co. *v.* Capital Sheet-Metal Co., 81 Fed. 491.

15. Donoughe *v.* Hubbard, 27 Fed. 742; Green *v.* French, 11 Fed. 591; Rogers *v.* Beecher, 3 Fed. 639; Brodie *v.* Ophir Silver Min. Co., 4 Fed. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Doherty *v.* Haynes, 7 Fed. Cas. No. 3,963, 1 Ban. & A. 289, 4 Cliff. 291; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Johnson *v.* Root, 13 Fed. Cas. No. 7,410, 2 Cliff. 637; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Konold *v.* Klein, 14 Fed. Cas. No. 7,925, 3 Ban. & A. 226, 5 Reporter 427; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Putnam *v.* Yerrington, 20 Fed. Cas. No. 11,486, 2 Ban. & A. 237, 9 Off. Gaz. 689; Rice *v.* Heald, 20 Fed. Cas. No. 11,752; Rollbaus *v.* McPherson, 20 Fed. Cas. No. 12,026; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Serrell *v.* Collins, 21 Fed. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

The extension of a patent resisted on the ground of want of novelty strengthens the presumption that the patentee was the original inventor. Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 2 Off. Gaz. 89, 1 Woods 195.

16. Roberts *v.* Pittsburgh Wire Co., 69 Fed. 624 [*affirmed* in 71 Fed. 706, 18 C. C. A. 302]; Roberts *v.* H. P. Nail Co., 53 Fed. 916; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Thayer *v.* Spaulding, 27 Fed. 66; Duffy *v.* Reynolds, 24 Fed. 855; Albany Steam Trap Co. *v.* Felthousen, 20 Fed. 633, 22 Blatchf. 169; Green *v.* French, 11 Fed. 591; Shirley *v.* Sanderson, 8 Fed. 905; Brodie *v.* Ophir Silver Min. Co., 4 Fed. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Fisk *v.* Church, 9 Fed. Cas. No. 4,826, 5 Fish. Pat. Cas. 540, 1 Off. Gaz. 634; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110, 8 Off. Gaz. 90; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

17. Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Wing *v.* Richardson, 30 Fed. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

18. Johnson *v.* Root, 13 Fed. Cas. No. 7,410, 2 Cliff. 637; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Wing *v.* Richardson, 30 Fed. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

19. Webster Loom Co. *v.* Higgins, 29 Fed. Cas. No. 17,342, 4 Ban. & A. 88, 15 Blatchf. 446, 16 Off. Gaz. 675. In other words, when the patentee desires to show that his invention was of a date prior to his original application he takes the burden upon himself, and must prove by competent and sufficient evi-

sumption of the validity of a patent, evidence is admissible to prove that the device was previously made and reduced to practice by another in this country;[20] that it had been previously known to, and used by, others here before it was invented by the patentee;[21] or that it had been patented or described in some printed publication prior to the supposed invention by the patentee.[22] Evidence of an acknowledgment that the patentee was the original inventor is also admissible.[23] In rebuttal of evidence to show anticipation, it is competent, as bearing on the state of the art, to introduce the testimony of persons whose business and experience were adapted to bring to them a knowledge of all improvements therein to the effect that no such improvement as that covered by the patent in suit had previously come to their knowledge.[24] In determining whether one invention anticipates another, evidence may be, and in a difficult case ought to be, heard concerning the construction and actual operation of the devices respectively.[25] So too the jury may take into consideration the fact that the prior invention was known to persons who experimented to produce the subsequent invention but failed to do so.[26]

(B) *Application For Patent.* Mere applications for patents cannot be considered on the question of novelty. To make the things described in them available, there must be evidence that such things were actually constructed in working form.[27] Rejected specifications and drawings may be received in evi-

dence that he made the invention at the period suggested, and that he reduced the same to practice in the form of an operative machine. Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Wing *v.* Richardson, 30 Fed. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

20. **Direct evidence of reduction to practice and use necessary.**— The reduction to practice and use of inventions claimed to be prior to the patent in suit, so as to invalidate such patent, must be shown by direct evidence of the construction and use of the machine or device. Howes *v.* McNeal, 4 Fed. 151, 17 Blatchf. 396. Nothing from the patent office can be admitted in evidence of earlier dates than the patent. All such evidence would be hearsay and secondary. Howes *v.* McNeal, *supra.*

File wrappers of patents alleged to anticipate are not competent as evidence to show the reduction to practice and use of the inventions therein claimed at a date prior to the invention of the patent in suit. Howes *v.* McNeal, 4 Fed. 151, 17 Blatchf. 396.

21. **Evidence of prior use in a foreign country** is inadmissible where such prior use is not shown in a patent or printed publication. Hurlbut *v.* Schillinger, 130 U. S. 456, 9 S. Ct. 584, 32 L. ed. 1011.

22. **The court must first construe the patent offered in evidence,** and if by its true construction it has a tendency to support the issue for which it is offered, it is admissible, but if it has no such tendency, it must be excluded. Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397.

A certified copy of a patent afterward surrendered and canceled may be given in evidence to show that a device subsequently patented is not original. Delano *v.* Scott, 7 Fed. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700.

A certificate of the commissioner of patents of a copy or translaton of a French volume in the patent office is inadmissible to prove the existence of an invention prior to the patent in suit, such evidence being merely hearsay. The production of the book itself or a duly sworn and proved translation is the only way its contents can be shown. Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rec. 494.

A drawing exhibited in a mere trade circular, unaccompanied by any evidence that it was ever actually published, or intended for general use, or accessible to the public, is not admissible as a printed publication for the purpose of showing an anticipation. Britton *v.* White Mfg. Co., 61 Fed. 93. But drawings exhibited for the purpose of showing anticipation of a design patent are not rendered irrelevant by the fact tbat they are unaccompanied by a written description. This objection merely affects their weight as evidence and not their admissibility. Britton *v.* White Mfg. Co., *supra.*

23. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68.

24. Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537.

25. Thomson-Houston Electric Co. *v.* Western Electric Co., 72 Fed. 530, 19 C. C. A. 1.

Evidence of impracticability of prior invention.— Evidence is admissible to show that the device set forth in the prior patent is inoperative, impracticable, and worthless. Harwood *v.* Mill River Woolen Mfg. Co., 11 Fed. Cas. No. 6,187, 3 Fish. Pat. Cas. 526.

26. Many *v.* Jagger, 16 Fed. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. Rep. 222.

27. Barker *v.* Stowe, 2 Fed. Cas. No. 994, 3 Ban. & A. 337, 15 Blatchf. 49, 14 Off. Gaz. 559.

dence, however, after the invention is perfected, to ascertain the date of the invention, the design of the inventor, and the principal intended functions and mode of operation.[28] And it has been held that the defense of prior invention by, and patent to, a third person may be met by producing the application of, and the patent to, such third person, with his accompanying or contemporaneous declarations.[29]

(III) *Weight and Sufficiency.* In order to defeat a patent on the ground of want of novelty, the proof of prior use or knowledge must be clear and convincing,[30] and sufficient to establish the fact beyond a reasonable doubt.[31] Anticipation may be established by testimony entirely from recollection of the existence and use of a prior device, when the witnesses are numerous, disinterested, and unimpeached,[32] but not where such testimony is indefinite and contradictory.[33] The bare recollection of one witness in regard to the peculiar construction of a piece of machinery, especially if the structure is one of complex character, is not ordinarily sufficient evidence to defeat a patent;[34] but it may be sufficient where the invention sought to be anticipated is of simple character.[35] Much less testi-

A rejected application for a patent is not evidence that the thing described was ever used (Herring *v.* Nelson, 12 Fed. Cas. No. 6,424, 3 Ban. & A. 55, 14 Blatchf. 293 [*reversed* on other grounds in 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601]; Howes *v.* McNeal, 12 Fed. Cas. No. 6,789, 3 Ban. & A. 376, 15 Blatchf. 103, 15 Off. Gaz. 608); nor is such a description a patent or a publication (Herring *v.* Nelson, *supra*; Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227).

28. Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227.

29. Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537.

30. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154 [*reversing* 33 Fed. 261]; Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Donoughe *v.* Hubbard, 27 Fed. 742; Thayer *v.* Spaulding, 27 Fed. 66 (strong and convincing if not absolutely conclusive proof); Zane *v.* Peck, 9 Fed. 101; Woven-Wire Mattress Co. *v.* Wire-Web Bed Co., 8 Fed. 87; Rogers *v.* Beecher, 3 Fed. 639; Magic Ruffle Co. *v.* Douglas, 16 Fed. Cas. No. 8,948, 2 Fish. Pat. Cas. 330; Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110, 8 Off. Gaz. 90.

31. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154 [*reversing* 33 Fed. 261]; Coffin *v.* Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Binns *v.* Zucker, etc., Chemical Co., 70 Fed. 711; Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Wetherell *v.* Keith, 27 Fed. 364; Duffy *v.* Reynolds, 24 Fed. 855; Doubleday *v.* Beatty, 11 Fed. 729; Shirley *v.* Sanderson, 8 Fed. 905; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42, 18 Off. Gaz. 979, 8 Reporter 455; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10, 8 Off. Gaz. 685; Konold *v.* Klein, 14 Fed. Cas. No. 7,925, 3 Ban. & A. 226, 5 Reporter 427; Treadwell *v.* Bladen, 24 Fed. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. 703, holding that proof of an article which might have been made by a machine similar to that for which plaintiff afterward obtained a patent is not sufficient to invalidate the patent.

Evidence held sufficient to show prior knowledge and use.— Simmond *v.* Morrison, 44 Fed. 757; Gibson *v.* Scribner, 22 Fed. 840; Doubleday *v.* Beatty, 11 Fed. 729; Parker *v.* Ferguson, 18 Fed. Cas. No. 10,733, 1 Blatchf. 407, Fish. Pat. Rep. 260.

Evidence held insufficient to show prior knowledge or use.— Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 55 Fed. 292, 5 C. C. A. 111 [*affirming* 53 Fed. 375]; Edison Electric Light Co. *v.* Beacon Vacuum Pump, etc., Co., 54 Fed. 678; Smith *v.* Davis, 34 Fed. 783; Wetherell *v.* Keith, 27 Fed. 364; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 26 Fed. 104.

Where the proof of prior knowledge or use is contradictory, mere preponderance is not sufficient to invalidate the patent. The preponderance must be such as to remove all reasonable doubt. Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10, 8 Off. Gaz. 685.

32. American Roll-Paper Co. *v.* Weston, 59 Fed. 147, 8 C. C. A. 56.

33. Untermeyer *v.* Freund, 58 Fed. 205, 7 C. C. A. 183; Shirley *v.* Sanderson, 8 Fed. 905; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10, 8 Off. Gaz. 685.

34. Mack *v.* Spencer Optical Mfg. Co., 52 Fed. 819; Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Smith *v.* Davis, 34 Fed. 783; Woven-Wire Mattress Co. *v.* Wire-Web Bed Co., 8 Fed. 87; Blake *v.* Eagle Works Mfg. Co., 3 Fed. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Blake *v.* Rawson, 3 Fed. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200, 3 Off. Gaz. 122.

35. Lee *v.* Upson, etc., Co., 43 Fed. 670; Riley *v.* Daniels, 20 Fed. Cas. No. 11,837.

mony is sufficient to prove that a very simple invention had been anticipated than is necessary to prove the anticipation of a complex machine.[36]

D. Utility[37] — **1. In General.** To warrant the allowance of a patent it must be capable of some beneficial use, in contradistinction to what is pernicious, frivolous, or worthless.[38] An invention will be deemed useful when it will operate to perform the functions and secure the result intended, and its use is not contrary to public health or morals.[39] While utility is essential, any utility, however slight, will be sufficient.[40] It is not essential that the invention should be the best

36. National Casket Co., *v.* Stolts, 157 Fed. 392; Lee *v.* Upson, etc., Co., 43 Fed. 670; Riley *v.* Daniels, 20 Fed. Cas. No. 11,837.

37. Conclusiveness and effect of decision of patent office see *infra*, V, C, 15.

38. Dickinson *v.* Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390; Adams *v.* Loft, 1 Fed. Cas. No. 61, 4 Ban. & A. 495, 8 Reporter 612; Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; Cox *v.* Griggs, 6 Fed. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Jones *v.* Wetherill, 13 Fed. Cas. No. 7,508, McArthur Pat. Cas. 409; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9; Lowell *v.* Lewis, 15 Fed. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Roemer *v.* Logowitz, 20 Fed. Cas. No. 11,996; *In re* Smith, 22 Fed. Cas. No. 12,982, McArthur Pat. Cas. 255; Thompson *v.* Haight, 23 Fed. Cas. No. 13,957; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

39. Must have practical utility. Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566.

Designs.—In designs utility relates to ornamental appearance. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Westinghouse Electric, etc., Co. *v.* Triumph Electric Co., 97 Fed. 99, 38 C. C. A. 65; Rowe *v.* Blodgett, etc., Co., 98 Off. Gaz. 1286. And see Simpson *v.* Davis, 12 Fed. 144, 20 Blatchf. 413.

An inoperative device is not useful. Thomson-Houston Electric Co. *v.* Lorain Steel Co., 103 Fed. 641; Torrant *v.* Duluth Lumber Co., 30 Fed. 830; Brown *v.* Whittemore, 4 Fed. Cas. No. 2,033, 5 Fish. Pat. Cas. 524, 2 Off. Gaz. 248; *In re* Cushman, 6 Fed. Cas. No. 3,513, McArthur Pat. Cas. 569.

Artificial honey is useful and not a fraud. *In re* Corbin, 6 Fed. Cas. No. 3,224, McArthur Pat. Cas. 521.

Devices for amusement are useful and patentable. Boynton Co. *v.* Morris Chute Co., 82 Fed. 440.

Spotting tobacco leaves to deceive users is not a useful invention and the patent is void. Rickard *v.* Du Bon, 103 Fed. 868, 43 C. C. A. 360.

Devices used for gambling.— Where a patented device can be used only for gambling purposes, the patent is void for want of utility (Schultze *v.* Holtz, 82 Fed. 448); and the same has been held to be the case in regard to a device which has been used only for gambling purposes, although it is possible that a useful application may be found for it (Reliance Novelty Co. *v.* Dworzek, 80 Fed. 902; National Automatic Device Co. *v.* Lloyd, 40 Fed. 89, 5 L. R. A. 784). But see Fuller *v.* Berger, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381, holding that a patent for a bogus coin detector for coin-operated vending machines, which is adapted to be used with any coin-operated machine, is not void for lack of utility because it was assigned by the inventor to a manufacturer of gambling machines and has been used solely in connection with such machines.

Useful by itself.—It need not be necessarily useful by itself. Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442.

In England utility does not mean either abstract utility or comparative or competitive utility, or commercial utility. Welsbach Incandescent Gas Light Co. *v.* New Incandescent Gas Lighting Co., [1900] 1 Ch. 843, 69 L. J. Ch. 343, 82 L. T. Rep. N. S. 293, 48 Wkly. Rep. 362 (Buckley, J.); Haworth *v.* Hardcastle, 1 Bing. N. Cas. 182, 3 L. J. C. P. 311, 4 Moore & S. 720, 27 E. C. L. 597.

40. Dowagiac Mfg. Co. *v.* Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36; Gibbs *v.* Hoefner, 19 Fed. 323; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Doherty *v.* Haynes, 7 Fed. Cas. No. 3,963, 1 Ban. & A. 289, 4 Cliff. 291, 6 Off. Gaz. 118; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Tilghman *v.* Werk, 23 Fed. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483.

Limitation of rule.— The rule that when an invention is useful for some purpose the degree of usefulness is not a subject for consideration is applicable only when the validity of a patent already issued is attacked

of its kind or incapable of improvement,[41] or that it should accomplish all that the inventor claimed for it;[42] and it is of no consequence whether the utility of an invention be general or limited to a few cases.[43] Every patent as to utility depends on the state of the art at the time of the claim made or patent issued;[44] and if the invention was useful when the patent was granted, the patent is valid, and the fact that it has become useless since by the discovery of some other method which dispenses with it gives no right to others to use it.[45]

2. EVIDENCE OF UTILITY. Extensive use is evidence of utility;[46] and where an invention involves reflection and experiments to bring it to practical maturity, its evident utility, indicated by its prompt displacement of other devices and extensive use, strongly attest its patentable merit.[47] While the issuance of a patent is not conclusive evidence on the question of utility,[48] it is *prima facie* evidence thereof.[49] The presumptions of the law are in favor of a patent[50] and the burden is on defendant to show that it is not useful in any degree.[51] An infringement of an invention amounts to an admission of utility[52] because use implies utility. It

in a court of law; but when the question is as to the issuance of a patent the rule is that prescribed by the statute (Acts (1836), § 7), namely, that "the Commissioner shall deem it to be sufficiently useful and important." *In re* Cushman, 6 Fed. Cas. No. 3,513, McArthur Pat. Cas. 569.

41. Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., 120 Fed. 267, 56 C. C. A. 547; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Westinghouse *v.* Boyden Power Brake Co., 66 Fed. 997; Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Blake *v.* Smith, 3 Fed. Cas. No. 1,502; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493; Many *v.* Jagger, 16 Fed. Cas. No. 9,055, 1 Blatchf. 372, 1 Fish. Pat. Rep. 222; Mix *v.* Perkins, 17 Fed. Cas. No. 9,677; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,757, 1 Blatchf. 488, 1 Fish. Pat. Rep. 161; Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442; Wilbur *v.* Beecher, 29 Fed. Cas. No. 17,634, 2 Blatchf. 132, 1 Fish. Pat. Rep. 401.

42. Eames *v.* Cook, 8 Fed. Cas. No. 4,239, 2 Fish. Pat. Cas. 146.

43. Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148.

The word "useful" as used in the statutes does not prescribe general utility as the test of the sufficiency of an invention to support a patent. It is used merely in contradistinction to what is frivolous or mischievous to the public. Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

44. U. S., etc., Salamander Felting Co. *v.* Haven, 28 Fed. Cas. No. 16,788, 2 Ban. & A. 164, 9 Off. Gaz. 253; Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442.

45. Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62.

46. Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1; Schaum *v.* Baker, 21 Fed. Cas. No. 12,440. And see *In re* Thurston, 26 App. Cas. (D. C.) 315.

Increased salableness shows utility. Newbury *v.* Fowler, 28 Fed. 454.

47. Lorillard *v.* McDowell, 15 Fed. Cas. No. 8,510, 2 Ban. & A. 531, 11 Off. Gaz. 640, 13 Phila. (Pa.) 461.

48. Bierce *v.* Stocking, 11 Gray (Mass.) 174.

49. Corvallis Fruit Co. *v.* Curran, 8 Fed. 150, 7 Sawy. 270; Miller, etc., Mfg. Co. *v.* Du Brul, 17 Fed. Cas. No. 9,597, 2 Ban. & A. 618, 12 Off. Gaz. 351; Potter *v.* Holland, 19 Fed. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Rice *v.* Heald, 20 Fed. Cas. No. 11,752 [*reversed* on other grounds in 104 U. S. 737, 26 L. ed. 910]; Rollhaus *v.* McPherson, 20 Fed. Cas. No. 12,026.

50. Kirk *v.* Du Bois, 33 Fed. 252; Geier *v.* Goetinger, 10 Fed. Cas. No. 5,299, 1 Ban. & A. 553, 7 Off. Gaz. 563.

51. Kirk *v.* Du Bois, 33 Fed. 252; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, 5 McLean 44, Fish. Pat. Rep. 319; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483.

52. International Tooth Crown Co. *v.* Hanks' Dental Assoc., 111 Fed. 916 [*affirmed* in 122 Fed. 74, 58 C. C. A. 180]; Goss Printing-Press Co. *v.* Scott, 108 Fed. 253, 47 C. C. A. 302; Niles Tool Works *v.* Betts Mach. Co., 27 Fed. 301; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; Foye *v.* Nichols, 13 Fed. 125, 8 Sawy. 201; Tyler *v.* Crane, 7 Fed. 775; Coleman *v.* Liesor, 5 Fed. Cas. No. 2,984; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Simpson *v.* Mad River R. Co., 22 Fed. Cas. No. 12,885, 6 McLean 603; Smith *v.* Glendale Elastic Fabrics Co., 22 Fed. Cas. No. 13,050, 1 Ban. & A. 58, Holmes 340, 5 Off. Gaz. 429; Smith *v.* Prior, 22 Fed. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461, 4 Off. Gaz. 633; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,270, 3 Biss. 66, 3 Fish. Pat. Cas. 330; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [*reversed* on other grounds in 14 Wall. 620, 20 L. ed. 860].

is fair to presume that the person using an invention would not do so if he thought it of no utility,[53] and he is estopped to deny that it possesses utility.[54]

E. Invention — 1. Necessity. The subject-matter of patents must be of such a character as to have called for an exercise of the inventive or creative faculties of the mind[55] as distinguished from the mere exercise of the knowledge and judgment expected of those skilled in the particular art,[56] although the right to a patent does not depend upon the quantity of thought, ingenuity, skill, labor, or experiment which was bestowed upon the production.[57]

2. Nature. While attempts have been made to define invention,[58] the courts and text writers have found it impossible to so define it as to furnish a test for determining whether a particular act or discovery called for an exercise of the inventive faculties.[59] It is a matter resting in judgment and therefore no fixed rule for its determination is possible. Certain controlling principles are, however, settled and assist in reaching the proper conclusion in particular cases. Thus it is declared that an act of invention is primarily mental and involves the conception or mental construction of a means not previously known for accomplishing a useful result.[60] It is not the mere adaptation of old means by common reasoning,

The fact that the patented article has superseded all others before in use, and that the party charged with infringing has adopted it in the place of those before made and sold by him, constitutes strong evidence of usefulness. Smith *v.* Prior, 22 Fed. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461, 4 Off. Gaz. 633.

53. Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984.

54. Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483.

55. *In re* Schraubstadter, 26 App. Cas. (D. C.) 331; Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. ed. 952; Thompson *v.* Boisselier, 114 U. S. 1, 5 S. Ct. 1042, 29 L. ed. 76; Enterprise Mfg. Co. *v.* Sargent, 28 Fed. 185; Patterson *v.* Gaslight, etc., Co., 2 Ch. D. 812, 45 L. J. Ch. 843, 35 L. T. Rep. N. S. 11; Pirrie *v.* York St. Flax Spinning Co., [1894] 1 Ir. 417; Nicoll *v.* Swears, 69 L. T. Rep. N. S. 110; Kemp *v.* Chown, 7 Can. Exch. 306; Yates *v.* Great Western R. Co., 2 Ont. App. 226; Waterous *v.* Bishop, 20 U. C. C. P. 29.

If there is an invention to any extent it is sufficient. Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48.

56. Pearce *v.* Mulford, 102 U. S. 112, 26 L. ed. 93; Muller *v.* Ellison, 27 Fed. 456; Arnold *v.* Pettee, 1 Fed. Cas. No. 561*b*.

New result indicates invention. Cannington *v.* Nuttall, L. R. 5 H. L. 205, 40 L. J. Ch. 739; Curtis *v.* Platt, L. R. 1 H. L. 337, 35 L. J. Ch. 852; Proctor *v.* Bennis, 36 Ch. D. 740, 57 L. J. Ch. 11, 57 L. T. Rep. N. S. 662, 36 Wkly. Rep. 456; Thompson *v.* Moore, L. R. 23 Ir. 599.

57. Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Hoe *v.* Cottrell, 1 Fed. 597, 17 Blatchf. 546; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Clark Patent Steam, etc., Co. *v.* Copeland, 5 Fed. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Magic Ruffle Co. *v.* Douglas, 16 Fed. Cas. No. 8,948, 2 Fish. Pat. Cas. 330; Middleton Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Potter *v.* Holland, 19 Fed. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382.

58. Invention is that intuitive faculty of the mind put forth in the search of new results or new methods creating what had not before existed or bringing to light what had been hidden from visions. Hollister *v.* Benedict, etc., Mfg. Co., 113 U. S. 59, 5 S. Ct. 717, 28 L. ed. 901. The finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life or which can add to the enjoyment of mankind. Leidersdorf *v.* Flint, 15 Fed. Cas. No. 8,219, 8 Biss. 327, 6 Reporter 739.

59. McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Hanifen *v.* Armitage, 117 Fed. 845.

Judicial minds may reach different conclusions in simple cases. Beer *v.* Waldridge, 100 Fed. 465, 40 C. C. A. 496.

60. Eck *v.* Kutz, 132 Fed. 758; Davis *v.* Fredericks, 99 Fed. 69, 21 Blatchf. 556; Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252. And see *infra*, IV, A, 10.

To constitute invention there must be a definite idea of the complete operative means. — Must leave no essential for subsequent conception. Wheaton *v.* Kendall, 85 Fed. 666.

Mental doubt. — A patentable invention is a mental result. The machine process or product is but its material reflex and embodiment. Smith *v.* Nichols, 21 Wall. (U. S.) 118, 22 L. ed. 566.

The date of invention is the date of the mental conception. Colt *v.* Massachusetts Arms Co., 6 Fed. Cas. No. 3,030, 1 Fish. Pat.

but is the construction of new means through an exercise of the creative faculties of the mind.[61]

3. INVENTION AND DISCOVERY SYNONYMOUS. There is no distinction in patent law between invention and discovery.[62] The discovery of a new substance or element of nature or a new principle or force is not patentable, but the invention or discovery of a new means for making them practically useful may be.[63]

4. PRIOR ART CONSIDERED. In determining whether there was invention in a particular case everything previously known in the art through patents, publications, or use must be taken into consideration,[64] since the patentee is in law presumed to have known of everything in the prior art.[65]

5. NOVELTY AND SUPERIORITY NOT INVENTION. A party has not necessarily made an invention merely because he has done what no one had done before. Mere novelty and utility are not enough to sustain a patent, since there must also be invention.[66] He must do something which the ordinary person skilled in the art

Cas. 108. See also U. S. Rev. St. (1878) § 4920.

61. Matter of Gould, 1 MacArthur (D. C.) 410; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Cleveland Faucet Co. *v.* Vulcan Brass Co., 72 Fed. 505; Muller *v.* Ellison, 27 Fed. 456; Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [*reversed* on other grounds in 10 Wall. 117, 19 L. ed. 866].

Result.— Invention may reside more in the result than in the changes of structure. Stewart *v.* Mahony, 5 Fed. 302; Treadwell *v.* Fox, 24 Fed. Cas. No. 14,156. Tapering umbrella stick is patentable. Rose *v.* Hirsch, 77 Fed. 469, 23 C. C. A. 246 [*reversing* 71 Fed. 881].

Placing hand-holds on book-shelves is not invention. Fenton Metallic Mfg. Co. *v.* Chase, 73 Fed. 831.

Mere directions how to use a tool skilfully is not invention. Walker *v.* Rawson, 29 Fed. Cas. No. 17,083, 4 Ban. & A. 128.

Changing sequence of operation is not invention. Union Paper-Bag Mach. Co. *v.* Waterbury, 70 Fed. 240, 17 C. C. A. 84 [*affirming* 58 Fed. 566].

Putting old article in convenient receptacle is not invention. Hurd *v.* Snow, 35 Fed. 423.

Making parts match or fit each other is not invention. Delvin *v.* Heise, 43 Fed. 795 [*affirmed* in 159 U. S. 251, 15 S. Ct. 1038, 40 L. ed. 138].

Placing sheets of fly paper face to face is not invention. Andrews *v.* Thum, 67 Fed. 911, 15 C. C. A. 67 [*reversing* 53 Fed. 84].

For other cases illustrative of lack of invention see Corbin Cabinet Lock Co. *v.* Eagle Co., 150 U. S. 38, 14 S. Ct. 28, 37 L. ed. 989; Patent Clothing Co. *v.* Glover, 141 U. S. 560, 12 S. Ct. 79, 35 L. ed. 858; McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Clark Pomace-Holder Co. *v.* Ferguson, 119 U. S. 335, 7 S. Ct. 382, 30 L. ed. 406; Estey *v.* Burdett, 109 U. S. 633, 3 S. Ct. 531, 27 L. ed. 1058; Office Specialty Mfg. Co. *v.* Cooke, etc., Co., 73 Fed. 684; New York *v.* American Cable R. Co., 70 Fed. 853, 17 C. C. A. 467 [*reversing* 56 Fed. 149, 68 Fed. 227]; Covert *v.* Travers Co., 70 Fed. 788; Philadelphia Novelty Mfg. Co. *v.* Weeks, 61 Fed. 405, 9 C. C. A. 555 [*affirming* 52 Fed. 816]; Butte City St. R. Co. *v.* Pacific Cable R. Co., 60 Fed. 410, 9 C. C. A. 41 [*reversing* 55 Fed. 760]; Green *v.* Lynn, 55 Fed. 516; National Surface Guard Co. *v.* Merrill, 49 Fed. 157, 1 C. C. A. 214; Root *v.* Sontag, 47 Fed. 309; Davis *v.* Parkman, 45 Fed. 693 [*affirmed* in 71 Fed. 961, 18 C. C. A. 398]; Williams Mfg. Co. *v.* Franklin, 41 Fed. 393; Puetz *v.* Bransford, 31 Fed. 458; Celluloid Mfg. Co. *v.* Zylonite Novelty Co., 30 Fed. 617.

62. *In re* Kemper, 14 Fed. Cas. No. 7,687, Cranch Pat. Dec. 89, McArthur Pat. Cas. 1.

63. See *supra*, II, A, 5.

64. Busell Trimmer Co. *v.* Stevens, 137 U. S. 423, 11 S. Ct. 150, 34 L. ed. 719 [*affirming* 28 Fed. 575]; Foote *v.* Silsby, 9 Fed. Cas. No. 4,919, 1 Blatchf. 542, 1 Fish. Pat. Rep. 391.

65. Millett *v.* Allen, 27 App. Cas. (D. C.) 70; Derby *v.* Thompson, 146 U. S. 476, 13 S. Ct. 181, 36 L. ed. 1051; Sewall *v.* Jones, 91 U. S. 171, 23 L. ed. 275; Evans *v.* Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; Lettelier *v.* Mann, 91 Fed. 909; Fry *v.* Rookwood Pottery Co., 90 Fed. 494; Stearns *v.* Russell, 85 Fed. 218, 29 C. C. A. 121; Crompton *v.* Knowles, 7 Fed. 199; Dawson *v.* Follen, 7 Fed. Cas. No. 3,670, 1 Robb Pat. Cas. 9, 2 Wash. 311; Hovey *v.* Henry, 12 Fed. Cas. No. 6,742; Larabee *v.* Cortlan, 14 Fed. Cas. No. 8,084, 3 Fish. Pat. Cas. 5, Taney 180; Roemer *v.* Simon, 20 Fed. Cas. No. 11,997, 1 Ban. & A. 138, 5 Off. Gaz. 555; Spain *v.* Gamble, 22 Fed. Cas. No. 13,199, McArthur Pat. Cas. 358.

66. *In re* Colton, 21 App. Cas. (D. C.) 17; Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. ed. 952; Thompson *v.* Boisselier, 114 U. S. 1, 5 S. Ct. 1042, 29 L. ed. 76; Milligan, etc., Glue Co. *v.* Upton, 97 U. S. 3, 24 L. ed. 985; Wills *v.* Scranton Cold Storage Co., 147 Fed. 525 [*affirmed* in 153 Fed. 181]; Dunbar *v.* Eastern Elevating Co., 81 Fed. 201, 26 C. C. A. 330; Baldwin *v.* Haynes, 28 Fed. 99; May *v.* Fond du Lac County, 27 Fed. 691; Perry *v.* Co-operative Foundry Co., 12 Fed. 436, 20 Blatchf. 498. See also Wisner *v.* Grant, 7 Fed. 485.

would not know how to do if the occasion for it arose.[67] He has not made an invention merely because he was the first to see the occasion or appreciate the advisability of doing the thing,[68] or because he has done it better. An article is not patentable merely because it is better, cheaper, or more merchantable,[69] although novelty combined with superiority may show invention.[70]

6. Simplicity Does Not Negative. Simplicity of the means employed does not show that there was no exercise of the inventive faculty in devising it,[71] but on the contrary the highest order of inventive genius may have been required to perceive that such simple means might be used to accomplish the desired result.[72]

7. Complexity Not Proof of Invention. Mere multiplicity of elements in the means employed does not show that invention was required to devise it.[73] Multiplicity of elements may go on indefinitely without making invention.[74]

8. Mechanical Skill. Where the ordinary person skilled in the particular art advised of the end to be accomplished would spontaneously think of or produce the means for accomplishing it, the production of the means involves mere mechanical skill and not invention.[75] The design of the patent laws is to reward

Utility may help to determine the question of invention, increased efficiency being accepted as an important factor. American Caramel Co. *v.* Mills, 149 Fed. 743, 79 C. C. A. 449.

67. Hollister *v.* Benedict, etc., Mfg. Co., 113 U. S. 59, 5 S. Ct. 717, 28 L. ed. 901; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Johnson Co. *v.* Tidewater Steel Works, 56 Fed. 43, 5 C. C. A. 412 [*affirming* 50 Fed. 90]; Welling *v.* Crane, 14 Fed. 571; Barry *v.* Gugenheim, 2 Fed. Cas. No. 1,061, 5 Fish. Pat. Cas. 452, 1 Off. Gaz. 382; Carter *v.* Messinger, 5 Fed. Cas. No. 2,478, 11 Blatchf. 34; Smith *v.* Frazer, 22 Fed. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 2 Off. Gaz. 175. And see *supra*, III, E, 1; *infra*, III, E, 8.

Every shadow of a shade of an idea is not patentable. Atlantic Works *v.* Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. ed. 438.

68. Hollister *v.* Benedict, etc., Mfg. Co., 113 U. S. 59, 5 S. Ct. 717, 28 L. ed. 901; Couse *v.* Johnson, 6 Fed. Cas. No. 3,288, 4 Ban. & A. 501, 16 Off. Gaz. 719.

69. Hotchkiss *v.* Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; Greist Mfg. Co. *v.* Parsons, 125 Fed. 116, 60 C. C. A. 34; Peters *v.* Union Biscuit Co., 120 Fed. 679 [*reversed* on other grounds in 125 Fed. 601, 60 C. C. A. 337]; Shoe *v.* Gimbel, 96 Fed. 96; Birmingham Cement Mfg. Co. *v.* Gates Iron Works, 78 Fed. 350, 24 C. C. A. 132; Schwarzwaelder *v.* Detroit, 77 Fed. 886; Andrews *v.* Thum, 67 Fed. 911, 15 C. C. A. 67; Smith *v.* Nichols, 22 Fed. Cas. No. 13,084, 6 Fish. Pat. Cas. 61, Holmes 172, 2 Off. Gaz. 649 [*affirmed* in 21 Wall. 112, 22 L. ed. 566]; Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193.

70. Ballard *v.* McCluskey, 58 Fed. 880.

71. United Shirt, etc., Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442 [*affirming* 138 Fed. 136]; Johnson *v.* Brooklyn Heights R. Co., 75 Fed. 668; Ross *v.* Montana Union R. Co., 45 Fed. 424; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240; Many *v.* Sizer, 16 Fed. Cas. No. 9,056, 1 Fish. Pat. Cas. 17; Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48; Yates *v.* Great Western R. Co., 24 Grant Ch. (U. C.) 495; Sumner *v.* Abell, 15 Grant Ch. (U. C.) 532; Powell *v.* Begley, 13 Grant Ch. (U. C.) 381.

72. Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177; Gindorff *v.* Deering, 81 Fed. 952; King *v.* Hammond, 14 Fed. Cas. No. 7,797, 4 Fish. Pat. Cas. 488; Ryan *v.* Goodwin, 21 Fed. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514.

73. See *infra*, III, E, 21, b.

74. Richards *v.* Chase Elevator Co., 158 U. S. 299, 15 S. Ct. 831, 39 L. ed. 991, 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225.

75. *In re* Volkmann, 28 App. Cas. (D. C.) 441; *In re* Hayes, 27 App. Cas. (D. C.) 393; *In re* Baker, 26 App. Cas. (D. C.) 363; Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Giles *v.* Heysinger, 150 U. S. 627, 14 S. Ct. 211, 37 L. ed. 1204; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; French *v.* Carter, 137 U. S. 239, 11 S. Ct. 90, 34 L. ed. 664; Shenfield *v.* Nashawannuck Mfg. Co., 137 U. S. 56, 11 S. Ct. 5, 34 L. ed. 573; Royer *v.* Roth, 132 U. S. 201, 10 S. Ct. 58, 33 L. ed. 322; Aron *v.* Manhattan R. Co., 132 U. S. 84, 10 S. Ct. 24, 33 L. ed. 272; Clark Pomace-Holder Co. *v.* Ferguson, 119 U. S. 335, 7 S. Ct. 382, 30 L. ed. 406; Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. ed. 952; Hollister *v.* Benedict, etc., Mfg. Co., 113 U. S. 59, 5 S. Ct. 717, 28 L. ed. 901; Morris *v.* McMillin, 112 U. S. 244, 5 S. Ct. 218, 28 L. ed. 702; Phillips *v.* Detroit, 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532; Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576; Atlantic Works *v.* Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. ed. 438; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Smyth Mfg. Co. *v.* Sheridan, 149 Fed. 208, 79 C. C. A. 166; Gates Iron Works *v.* Overland Gold Min. Co., 147 Fed. 700, 78 C. C. A. 88; Felt, etc., Mfg. Co. *v.* Mechanical Accountant Co., 129 Fed. 386; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., 125 Fed. 378, 60 C. C. A. 244; Stanley Rule, etc., Co. *v.* Ohio Tool Co., 115 Fed. 813 [*affirmed* in 125 Fed. 947, 60 C. C. A. 185]; National Hollow Brake-

those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacture.[76] Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists.[77]

9. Superior Finish or Form Not Invention. It is well settled that an article of manufacture is not patentable because means have been devised for making it more perfectly than before.[78] It must be new in itself and not merely in

Beam Co. *v.* Interchangeable Brake-Beam Co., 99 Fed. 758; Yale, etc., Mfg. Co. *v.* Sargent, 97 Fed. 106; Davey Pegging-Mach. Co. *v.* Prouty, 96 Fed. 336; Ingraham Co. *v.* E. N. Welch Mfg. Co., 92 Fed. 1019, 35 C. C. A. 163; Thomson-Houston Electric Co. *v.* Union R. Co., 87 Fed. 879; Tiemann *v.* Kraatz, 85 Fed. 437, 29 C. C. A. 257; Gormully, etc., Mfg. Co. *v.* Western Wheel Works, 84 Fed. 968, 28 C. C. A. 586; National Harrow Co. *v.* Wescott, 84 Fed. 671; Buck *v.* Timony, 78 Fed. 487; National Folding-Box, etc., Co. *v.* Stecher Lith. Co., 77 Fed. 828; Clune *v.* Madden, 77 Fed. 205; Schreiber, etc., Co. *v.* Grimm, 72 Fed. 671, 19 C. C. A. 67; Union Paper-Bag Mach. Co. *v.* Waterbury, 70 Fed. 240, 17 C. C. A. 84; Smith *v.* Macbeth, 67 Fed. 137, 14 C. C. A. 241; Westinghouse *v.* Edison Electric Light Co., 63 Fed. 588, 11 C. C. A. 342; Johnson Co. *v.* Pennsylvania Steel Co., 62 Fed. 156; Merritt *v.* Middleton, 61 Fed. 680, 10 C. C. A. 10; Northrop *v.* Keighley, 48 Fed. 455; Davis *v.* Parkman, 45 Fed. 693 [*affirmed* in 71 Fed. 961, 18 C. C. A. 398]; Facer *v.* Midvale Steel-Work Co., 38 Fed. 231; Yale Lock Mfg. Co. *v.* Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Perfection Window Cleaner Co. *v.* Bosley, 2 Fed. 574, 9 Biss. 385; Belt *v.* Crittenden, 2 Fed. 82, 1 McCrary 209; Barry *v.* Gugenheim, 2 Fed. Cas. No. 1,061, 5 Fish. Pat. Cas. 452, 1 Off. Gaz. 382; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Flood *v.* Hicks, 9 Fed. Cas. No. 4,877, 2 Biss. 169, 4 Fish. Pat. Cas. 156; Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48; Saxby *v.* Gloucester Waggon Co., 7 Q. B. D. 305, 50 L. J. Q. B. 577 [*affirmed* in 75 L. T. J. 167].

Although study, effort, and experience were required for the production of the patented device, there is no invention if only mechanical skill was required. Butler *v.* Steckel, 27 Fed. 219.

An obvious mechanical expedient is not patentable. Consolidated Store-Service Co. *v.* Siegel-Cooper Co., 103 Fed. 489.

Merely broadening the flange of a mail bag and increasing the number of rivets used in attaching it to the bag require no invention. Thompson *v.* U. S., 27 Ct. Cl. 61.

A tapering shaft and cylindrical bearing being old in stone crushers, the desirability and practicability of producing a continuous line of contact in the bearing is obvious, and involves no invention. Fraser *v.* Gates Iron Works, 85 Fed. 441, 29 C. C. A. 261.

Mechanical skill in making clothing illustrated see Corser *v.* Brattleboro Overall Co., 93 Fed. 809; Way *v.* McClarin, 91 Fed. 663; Fay *v.* Duell, 90 Off. Gaz. 1157; Ypsilanti Dress Stay Mfg. Co. *v.* Van Valkenburg, 76 Off. Gaz. 333; Dalby *v.* Lynes, 71 Off. Gaz. 1317; Shenfield *v.* Nashawannuck Mfg. Co., 53 Off. Gaz. 1093.

The true test of invention is not whether an ordinary mechanic can make the combination, if it is suggested, but whether he would make the combination without suggestion, by means of his ordinary knowledge. Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98.

76. Atlantic Works *v.* Brady, 107 U. S. 192, 200, 2 S. Ct. 225, 27 L. ed. 438, in which it was further said: "Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts."

77. Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609.

78. *In re* Draper, 10 App. Cas. (D. C.) 545; Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 15 S. Ct. 745, 39 L. ed. 899; Burt *v.* Evory, 133 U. S. 349, 10 S. Ct. 394, 33 L. ed. 647; Pickering *v.* McCullough, 104 U. S. 310, 26 L. ed. 749; Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Harder *v.* U. S. Steel Piling Co., 149 Fed. 434; Baker *v.* Duncombe Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; Farmers' Mfg. Co. *v.* Spruks Mfg. Co., 119 Fed. 594 [*reversed* on other grounds in 127 Fed. 691, 62 C. C. A. 447]; National Folding-Box, etc., Co. *v.* Stecher Lith. Co., 81 Fed. 395, 26 C. C. A. 448; Hake *v.* Brown, 37 Fed. 783; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Arnold *v.* Pettee, 1 Fed. Cas. No. 561*b*; *In re* Fultz, 9 Fed. Cas. No. 5,156, McArthur Pat. Cas. 178; Isaacs *v.* Abrams, 13 Fed. Cas. No. 7,095, 3 Ban. & A. 616, 14 Off. Gaz. 861; Meyer *v.* Pritchard, 17 Fed. Cas. No. 9,517, 1 Ban. & A. 261, 12 Blatchf. 101, 7 Off. Gaz. 1012; Wooster *v.*

workmanship.[79] A machine-made article is not patentable over one which is hand-made or rough.[80]

10. Difference in Degree Not Patentable. A difference in degree is a mere carrying forward of new or more extended application by one person of the original thought of another.[81] And a change in an existing means which produces nothing save a difference in degree is not patentable.[82]

Calhoun, 30 Fed. Cas. No. 18,035, 11 Blatchf. 215, 6 Fish. Pat. Cas. 514; Huntington *v.* Lutz, 13 U. C. C. P. 168. And see *supra*, III, B, 9.

Obtaining a more attractive exterior, or securing a more salable article, does not prove originality of conception. *In re* Hoey, 28 App. Cas. (D. C.) 416.

79. McDonald *v.* McLean, 38 Fed. 328, 13 Sawy. 635; Holly *v.* Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Smith *v.* Elliott, 22 Fed. Cas. No. 13,041, 9 Blatchf. 400, 5 Fish. Pat. Cas. 315, 1 Off. Gaz. 331.

Skilful manipulation does not make invention. Blakesley Novelty Co. *v.* Connecticut Web Co., 78 Fed. 480.

80. Boyd *v.* Janesville Hay-Tool Co., 37 Fed. 887; U. S. Bung Mfg. Co. *v.* Independent Bung, etc., Co., 31 Fed. 76, 24 Blatchf. 406; MacKay *v.* Jackman, 12 Fed. 615, 20 Blatchf. 466; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Draper *v.* Hudson, 7 Fed. Cas. No. 4,069, 6 Fish. Pat. Cas. 327, Holmes 208, 3 Off. Gaz. 354; Miller's Falls Co. *v.* Backus, 17 Fed. Cas. No. 9,598, 5 Ban. & A. 53, 17 Off. Gaz. 852; *In re* Nutting, 18 Fed. Cas. No. 10,385, McArthur Pat. Cas. 455; Wooster *v.* Calhoun, 30 Fed. Cas. No. 18,035, 11 Blatchf. 215, 6 Fish. Pat. Cas. 514.

Comminuted glue is not patentable over glue in flakes. Milligan, etc., Glue Co. *v.* Upton, 17 Fed. Cas. No. 9,607, 1 Ban. & A. 497, 4 Cliff. 237, 6 Off. Gaz. 837 [*affirmed* in 97 U. S. 3, 24 L. ed. 985].

81. *In re* Klemm, 21 App. Cas. (D. C.) 186; *In re* Iwan, 17 App. Cas. (D. C.) 566; Voightmann *v.* Weis, etc., Cornice Co., 133 Fed. 298 [*affirmed* in 148 Fed. 848]; Galvin *v.* Grand Rapids, 115 Fed. 511, 53 C. C. A. 165; Dodge Mfg. Co. *v.* Ohio Valley Pulley Works, 101 Fed. 584; Soehner *v.* Favorite Stove, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Troy Laundry Mach. Co. *v.* Ap Rees, 67 Fed. 336, 14 C. C. A. 405; Hill *v.* Houghton, 12 Fed. Cas. No. 6,493, 1 Ban. & A. 291, 6 Off. Gaz. 3; Smith *v.* Nichols, 22 Fed. Cas. No. 13,084, 6 Fish. Pat. Cas. 61, Holmes 172, 2 Off. Gaz. 649 [*affirmed* in 21 Wall. 112, 22 L. ed. 566].

Mere superiority of device does not prove invention. Rice *v.* Heald, 20 Fed. Cas. No. 11,752 [*reversed* on other grounds in 104 U. S. 737, 26 L. ed. 910].

82. *In re* Beswick, 16 App. Cas. (D. C.) 345; American Road-Mach. Co. *v.* Pennock, etc., Co., 164 U. S. 26, 17 S. Ct. 1, 41 L. ed. 337; Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Ansonia Brass, etc., Co. *v.* Electrical Supply Co., 144 U. S. 11, 12 S. Ct. 601, 36 L. ed. 327; International Tooth-Crown Co. *v.* Gaylord, 140 U. S. 55, 11 S. Ct. 716, 35 L. ed. 347; Burt *v.* Evory, 133 U. S. 349, 10 S. Ct. 394, 33 L. ed. 647; Guidet *v.* Brooklyn, 105 U. S. 550, 26 L. ed. 1106; Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Eames *v.* Worcester Polytechnic Inst., 123 Fed. 67, 60 C. C. A. 37; Johnston *v.* Woodbury, 96 Fed. 421; Lappin Brake-Shoe Co. *v.* Corning Brake-Shoe Co., 94 Fed. 162 [*affirmed* in 99 Fed. 1004, 40 C. C. A. 215]; Corser *v.* Brattleboro Overall Co., 93 Fed. 809; Solvay Process Co. *v.* Michigan Alkali Co., 90 Fed. 818, 33 C. C. A. 285; Talbot *v.* Fear, 89 Fed. 197, 32 C. C. A. 186; Gibbon *v.* Loewer Sole-Rounder Co., 79 Fed. 325, 24 C. C. A. 612; Eastman Co. *v.* Getz, 77 Fed. 412; Ferris *v.* Batcheller, 70 Fed. 714; Caverly *v.* Deere, 66 Fed. 305, 13 C. C. A. 452 [*affirming* 52 Fed. 758]; American Roll-Paper Co. *v.* Weston, 59 Fed. 147, 8 C. C. A. 56; Steiner Fire-Extinguisher Co. *v.* Adrian, 59 Fed. 132, 8 C. C. A. 44 [*affirming* 52 Fed. 731]; Curtis *v.* Overman Wheel Co., 58 Fed. 784, 7 C. C. A. 493 [*reversing* 53 Fed. 247]; D. E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61; Peoria Target Co. *v.* Cleveland Target Co., 47 Fed. 725; Spill *v.* Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441; Theberath *v.* Rubber, etc., Harness Trimming Co., 15 Fed. 246; Sawyer *v.* Miller, 12 Fed. 725, 4 Woods 472; Perry *v.* Co-operative Foundry Co., 12 Fed. 149, 20 Blatchf. 505; Beatty *v.* Hodges, 8 Fed. 610, 19 Blatchf. 381; Dane *v.* Chicago Mfg. Co., 6 Fed. Cas. No. 3,557, 3 Biss. 380, 6 Fish. Pat. Cas. 130, 2 Off. Gaz. 677; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. Rep. 161, 8 N. Y. Leg. Obs. 146; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,760, 2 Blatchf. 474; Thomson *v.* U. S., 27 Ct. Cl. 61.

Mere enlarging and strengthening is not invention. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939.

A change in size or proportions is not invention. Day *v.* Bankers' etc., Tel. Co., 7 Fed. Cas. No. 3,672, 9 Blatchf. 345, 5 Fish. Pat. Cas. 268, 1 Off. Gaz. 551.

Increasing weight of hand-wheel is not invention. American Road-Mach. Co. *v.* Pennock, etc., Co., 164 U. S. 26, 17 S. Ct. 1, 41 L. ed. 337.

Use of pure chemicals in place of impure is not invention. Buckan *v.* McKesson, 7 Fed. 100, 18 Blatchf. 485.

Change in strength of solution used is not invention. Spill *v.* Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441 [*affirmed* in 140 U. S. 698, 11 S. Ct. 1028, 35 L. ed. 593].

Merely extending valve rod for convenience is not invention. Crosby Steam Gage, etc., Co. *v.* Ashton Valve Co., 94 Fed. 516, 36 C. C. A. 335.

11. DUPLICATION OF PARTS.[83] A mere duplication of parts is not patentable;[84] but, where one so modifies the other as to produce a new result and not the mere added results of the two, there may be patentability.[85]

12. DOUBLE USE. Double use is the use of an old means for a new but analogous purpose and is not patentable.[86] The application of an old process or

83. Duplication or combination of parts as infringement see *infra*, XIII, A, 6, i.

84. *In re* Volkmann, 28 App. Cas. (D. C.) 441; *In re* Klemm, 21 App. Cas. (D. C.) 186; McBerty *v.* Cook, 16 App. Cas. (D. C.) 133; Maier *v.* Bloom, 95 Fed. 159; Interior Lumber Co. *v.* Perkins, 80 Fed. 528, 25 C. C. A. 613; Shaw Electric Crane Co. *v.* Worthington, 77 Fed. 992; Office Specialty Mfg. Co. *v.* Globe Co., 77 Fed. 465, 23 C. C. A. 242; New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 73 Fed. 469, 19 C. C. A. 534; Troy Laundry Mach. Co. *v.* Ap Rees, 67 Fed. 337, 14 C. C. A. 405; Thomson *v.* U. S., 27 Ct. Cl. 61; *In re* Scott, 117 Off. Gaz. 278.

Putting additional pane of glass in fare box is not invention. Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576.

The insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion is not invention. *In re* Volkmann, 28 App. Cas. (D. C.) 441.

Putting several articles in one package is not patentable. King *v.* Frostel, 14 Fed. Cas. No. 7,794, 4 Ban. & A. 236, 8 Biss. 510, 8 Reporter 490, 16 Off. Gaz. 956 [*affirmed* in 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870].

Making screen in three parts instead of two is not invention. Ferguson *v.* Ed. Roos Mfg. Co., 71 Fed. 416, 18 C. C. A. 162.

Connecting the shafts of two mills is not invention. Consolidated Roller-Mill Co. *v.* Barnard, 43 Fed. 527 [*affirmed* in 156 U. S. 261, 15 S. Ct. 333, 39 L. ed. 417].

Insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion is not invention. New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 73 Fed. 469, 19 C. C. A. 534.

85. Goss Printing-Press Co. *v.* Scott, 108 Fed. 253, 47 C. C. A. 302; Gindorff *v.* Deering, 81 Fed. 952; Brush Electric Co. *v.* Ft. Wayne Electric Light Co., 40 Fed. 826; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44.

86. *In re* McNeil, 28 App. Cas. (D. C.) 461; *In re* Welch, 28 App. Cas. (D. C.) 362; *In re* Klemm, 21 App. Cas. (D. C.) 186; *In re* Bedford, 14 App. Cas. (D. C.) 376; Mast *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856; Market St. Cable R. Co. *v.* Rowley, 155 U. S. 621, 15 S. Ct. 224, 39 L. ed. 284, 70 Off. Gaz. 632; Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737, 63 Off. Gaz. 1201; Lovell Mfg. Co. *v.* Cary, 147 U. S. 623, 13 S. Ct. 472, 37 L. ed. 307, 62 Off. Gaz. 1821; Busell Trimmer Co. *v.* Stevens, 137 U. S. 423, 11 S. Ct. 150, 34 L. ed. 719, 53 Off. Gaz. 2044; Fond du Lac County *v.* May, 137 U. S. 395, 11 S. Ct. 98, 34 L. ed. 714; St. Germain *v.* Brunswick, 135 U. S. 227, 10 S. Ct. 822, 34 L. ed. 122, 51 Off. Gaz. 1129; Howe Mach. Co. *v.* National Needle Co., 134 U. S. 388, 10 S. Ct. 570, 33 L. ed. 963, 31 Off. Gaz. 475; Marchand *v.* Emken, 132 U. S. 195, 10 S. Ct. 65, 33 L. ed. 332, 49 Off. Gaz. 1841; Day *v.* Fair Haven, etc., R. Co., 132 U. S. 98, 10 S. Ct. 11, 33 L. ed. 265, 49 Off. Gaz. 1364; Peters *v.* Hanson, 129 U. S. 541, 9 S. Ct. 393, 32 L. ed. 742, 47 Off. Gaz. 945; Crescent Brewing Co. *v.* Gottfried, 128 U. S. 158, 9 S. Ct. 83, 32 L. ed. 390, 45 Off. Gaz. 944; Holland *v.* Shipley, 127 U. S. 396, 8 S. Ct. 1089, 32 L. ed. 185; Dreyfus *v.* Searle, 124 U. S. 60, 8 S. Ct. 390, 31 L. ed. 352; Blake *v.* San Francisco, 113 U. S. 679, 5 S. Ct. 692, 28 L. ed. 1070; Morris *v.* McMillin, 112 U. S. 244, 5 S. Ct. 218, 28 L. ed. 702; Pennsylvania R. Co. *v.* Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 S. Ct. 220, 28 L. ed. 222, 27 Off. Gaz. 207; Vinton *v.* Hamilton, 104 U. S. 485, 26 L. ed. 807; Roberts *v.* Ryer, 91 U. S. 150, 23 L. ed. 267; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Tucker *v.* Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515; Baker *v.* F. A. Duncombe Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; Voightmann *v.* Weis, etc., Cornice Co., 133 Fed. 298 [*affirmed* in 148 Fed. 848]; Antisdel *v.* Bent, 122 Fed. 811; Indiana Novelty Mfg. Co. *v.* Crocker Chair Co., 103 Fed. 496, 43 C. C. A. 287; Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 98 Fed. 105; Chatillon *v.* Forschner, 96 Fed. 342; Thomson-Houston Electric Co. *v.* Rahway Electric Light, etc., Co., 95 Fed. 660; Briggs *v.* Duell, 93 Fed. 972, 36 C. C. A. 38; Gaitley *v.* Greene, 92 Fed. 367; Falk Mfg. Co. *v.* Missouri R. Co., 91 Fed. 155; Solvay Process Co. *v.* Michigan Alkali Co., 90 Fed. 818, 33 C. C. A. 285; Clisby *v.* Reese, 88 Fed. 645, 32 C. C. A. 80; Capital Sheet-Metal Co. *v.* Kinnear, etc., Co., 87 Fed. 333, 31 C. C. A. 3; Safeguard Account Co. *v.* Wellington, 86 Fed. 146; Bannerman *v.* Sanford, 85 Fed. 448; Paul Boynton Co. *v.* Morris Chute Co., 82 Fed. 440; Interior Lumber Co. *v.* Perkins, 80 Fed. 528, 25 C. C. A. 613 [*reversing* 51 Fed. 286]; Shaw Electric Crane Co. *v.* Worthington, 77 Fed. 992; Office Specialty Mfg. Co. *v.* Globe Co., 77 Fed. 465, 23 C. C. A. 242 [*affirming* 65 Fed. 599]; Potts *v.* Creager, 77 Fed. 454; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Eastman Co. *v.* Getz, 77 Fed. 412; New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 73 Fed. 469, 19 C. C. A. 534; Inman Mfg. Co. *v.* Beach, 71 Fed. 420, 18 C. C. A. 165, 74 Off. Gaz. 379; Codman *v.* Amia, 70 Fed. 710 [*affirmed* in 74 Fed. 634, 20 C. C. A. 566]; Thomson Meter Co. *v.* National Meter Co., 65 Fed. 427, 12 C. C. A. 671, 70 Off. Gaz. 925; Steiner Fire-Extinguisher Co. *v.* Adrian, 59 Fed. 132, 8 C. C. A. 44; Forgie *v.* Oil-Well Supply Co.,

machine to a similar or analogous subject with no change in the manner of apply-

57 Fed. 742 [*affirmed* in 58 Fed. 871, 7 C. C. A. 551]; Zinsser *v.* Krueger, 48 Fed. 296, 1 C. C. A. 73 [*affirming* 45 Fed. 572]; Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652; Simmond *v.* Morrison, 44 Fed. 757; Grinnell *v.* Walworth Mfg. Co., 43 Fed. 590; McCarty *v.* Lehigh Valley R. Co., 43 Fed. 384; Smith *v.* Partridge, 42 Fed. 57; Royer *v.* Schultz Belting Co., 40 Fed. 160 [*following* Royer *v.* Chicago Mfg. Co., 20 Fed. 853]; Hale, etc., Mfg. Co. *v.* Hartford Woven Wire Mattress Co., 36 Fed. 762; Mann's Boudoir Car Co. *v.* Monarch Parlor Sleeping Car Co., 34 Fed. 130; Byerly *v.* Cleveland Linseed Oil Works, 31 Fed. 73; Scheidler *v.* Tustin, 23 Fed. 887; Royer *v.* Chicago Mfg. Co., 20 Fed. 853; Clark Pomace-Holder Co. *v.* Ferguson, 17 Fed. 79, 21 Blatchf. 376; New York Grape Sugar Co. *v.* American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Gottfried *v.* Crescent Brewing Co., 9 Fed. 762; Crandal *v.* Walters, 9 Fed. 659, 20 Blatchf. 97; Griffiths *v.* Holmes, 8 Fed. 154; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906]; American Whip Co. *v.* Hampden Whip Co., 1 Fed. 87; Bean *v.* Smallwood, 2 Fed. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; *Ex p.* Berry, 3 Fed. Cas. No. 1,353; *In re* Blandy, 3 Fed. Cas. No. 1,528, McArthur Pat. Cas. 552; Couse *v.* Johnson, 6 Fed. Cas. No. 3,288, 4 Ban. & A. 501, 16 Off. Gaz. 719; Dennis *v.* Cross, 7 Fed. Cas. No. 3,792, 3 Biss. 389, 6 Fish. Pat. Cas. 138; Hazard *v.* Green, 11 Fed. Cas. No. 6,277; Mahn *v.* Harwood, 16 Fed. Cas. No. 8,966, 3 Ban. & A. 515, 14 Off. Gaz. 859 [*affirmed* in 112 U. S. 354, 6 S. Ct. 451, 28 L. ed. 665]; Northrup *v.* Adams, 18 Fed. Cas. No. 10,328, 2 Ban. & A. 567, 12 Off. Gaz. 430; Piper *v.* Moon, 19 Fed. Cas. No. 11,182, 10 Blatchf. 264, 6 Fish. Pat. Cas. 180, 3 Off. Gaz. 4; Richardson *v.* Lockwood, 20 Fed. Cas. No. 11,787, 6 Fish. Pat. Cas. 454, 4 Off. Gaz. 398; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Tyler *v.* Deval, 24 Fed. Cas. No. 14,307, 1 Code Rep. (N. Y.) 30; U. S., etc., Salamander Felting Co. *v.* Haven, 28 Fed. Cas. No. 16,788, 2 Ban. & A. 164, 9 Off. Gaz. 253; Winans *v.* Boston, etc., R. Co., 30 Fed. Cas. No. 17,858, 2 Robb Pat. Cas. 136, 2 Story 412; Woven-Wire Mattress Co. *v.* Whittlesey, 30 Fed. Cas. No. 18,058, 8 Biss. 23; Millett, etc., Steam Gage, etc., Co. *v.* Allen, 115 Off. Gaz. 1586; *In re* Adams, 114 Off. Gaz. 2093; Parkes *v.* Stevens, L. R. 5 Ch. 36, 22 L. T. Rep. N. S. 635, 18 Wkly. Rep. 233; Jordan *v.* Moore, L. R. 1 C. P. 624, 12 Jur. N. S. 766, 35 L. J. C. P. 268, 14 Wkly. Rep. 769; Reg. *v.* Cutler, 14 Q. B. 372 note, 68 E. C. L. 373, 3 C. & K. 215, 1 Stark. 354, 2 E. C. L. 138; Thompson *v.* James, 32 Beav. 570, 55 Eng. Reprint 224; Window Cleanot Co. *v.* Bosley, 15 Brodix Am. & Eng. Pat. Cas. 64; Ralston *v.* Smith, 20 C. B. N. S. 28, 11 H. L. Cas. 223, 35 L. J. C. P. 49, 13 L. T. Rep. N. S. 1, 11 Eng. Reprint 1318; Ormson *v.* Clarke, 13 C. B. N. S. 337, 9 Jur. N. S. 749, 32 L. J. C. P. 8, 7 L. T. Rep. N. S. 361, 11 Wkly. Rep. 118 [*affirmed* in 14 C. B. N. S. 475, 10 Jur. N. S. 128, 32 L. J. C. P. 291, 11 Wkly. Rep. 787, 108 E. C. L. 475]; Horton *v.* Mabon, 12 C. B. N. S. 437, 31 L. J. C. P. 255, 6 L. T. Rep. N. S. 289, 10 Wkly. Rep. 582, 104 E. C. L. 437 [*affirmed* in 16 C. B. N. S. 141, 9 L. T. Rep. N. S. 815, 12 Wkly. Rep. 491, 111 E. C. L. 141]; Patent Bottle Envelope Co. *v.* Seymer, 5 C. B. N. S. 164, 5 Jur. N. S. 174, 28 L. J. C. P. 22, 94 E. C. L. 164; Tetley *v.* Easton, 2 C. B. N. S. 706, 26 L. J. C. P. 269, 89 E. C. L. 706; Steiner *v.* Heald, 6 Exch. 607, 17 Jur. 875, 20 L. J. Exch. 410; Young *v.* Fernie, 4 Giffard 577, 10 Jur. N. S. 926, 10 L. T. Rep. N. S. 861, 12 Wkly. Rep. 901, 66 Eng. Reprint 836; Brook *v.* Aston, 5 Jur. N. S. 1025, 28 L. J. Q. B. 175 [*affirming* 8 E. & B. 478, 5 Jur. N. S. 279, 27 L. J. Q. B. 145, 6 Wkly. Rep. 42, 92 E. C. L. 478]; Meldrum *v.* Wilson, 7 Can. Exch. 198; Abell *v.* McPherson, 17 Grant Ch. (U. C.) 23 [*affirmed* in 18 Grant Ch. (U. C.) 437].

Applications of rule.— Use in gloves of a welt old in shoes is not invention. Busby *v.* Ladd, 39 Fed. 551. Stitch old in cardigan jackets not patentable for undershirts. Dalby *v.* Lynes, 64 Fed. 376. Use of old shifting device on fulling machines is not invention. Royer *v.* Roth, 132 U. S. 201, 10 S. Ct. 58, 33 L. ed. 322. Fire-extinguisher is anticipated by soda-water apparatus. Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227. Safety pins in ore crusher is mere double use. Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734. Lifting pills by device used for lifting paper is not patentable. Stearns *v.* Russell, 85 Fed. 218, 29 C. C. A. 121. Anti-friction rollers in pipe cutter is not invention. Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157. Preserving corn by process old for other vegetables is not patentable. Jones *v.* Hodges, 13 Fed. Cas. No. 7,469, Holmes 37. Making flat suspender ends like other button holes has been made not invention. Shenfield *v.* Nashawannuck Mfg. Co., 137 U. S. 56, 11 S. Ct. 5, 34 L. ed. 573. Tempering furniture springs by process old applied to watch springs not invention. Lovell Mfg. Co. *v.* Cary, 147 U. S. 623, 13 S. Ct. 472, 37 L. ed. 307 [*reversing* 31 Fed. 344]. Swaging tooth crowns by old method of swaging is not invention. Rynear Co. *v.* Evans, 83 Fed. 696. Electric gas lighter applied to gas engines is not invention. Union Gas-Engine Co. *v.* Doak, 88 Fed. 86. Hog hoist is anticipated by hoist for building material. *In re* Lowry, 14 App. Cas. (D. C.) 473. Suspenders and stocking supporters are analogous. *In re* Smith, 14 App. Cas. (D. C.) 181. Woodworking machine used in shoemaking is not invention. McKay-Copeland Lasting Mach. Co. *v.* Cope-

ing it and no result substantially distinct in its nature will not sustain a patent even if the new form of result has not before been contemplated.[87]

13. New and Non-Analogous Use. The transfer of an old invention from one art to another which is not analogous and the adaptation of it to perform new functions and accomplish new results in the new art may amount to invention.[88]

land Rapid-Laster Mfg. Co., 77 Fed. 306. Painting on clay and canvas are analogous. Fry *v.* Rookwood Pottery, 101 Fed. 723, 41 C. C. A. 634. Wood-planing and ice-cutting are analogous. *In re* Briggs, 9 App. Cas. (D. C.) 478. Journal bearings are in the same art in whatever apparatus they are found. Fraser *v.* Gates Iron Works, 85 Fed. 441, 29 C. C. A. 261. Use of valve in a new place is not invention unless changes necessary. Judson *v.* Moore, 14 Fed. Cas. No. 7,569. 1 Bond 285, 1 Fish. Pat. Cas. 544.

Chemical processes.— It has been held that the rule does not apply to chemical processes. Young *v.* Fernie, 4 Giffard 577, 10 Jur. N. S. 926, 10 L. T. Rep. N. S. 861, 12 Wkly. Rep. 901, 66 Eng. Reprint 836.

87. Millett *v.* Allen, 27 App. Cas. (D. C.) 70; *In re* Butterfield, 23 App. Cas. (D. C.) 84; *In re* Verley, 19 App. Cas. (D. C.) 597; *In re* Nimmy, 13 App. Cas. (D. C.) 565; Western Electric Co. *v.* La Rue, 139 U. S. 601, 11 S. Ct. 670, 35 L. ed. 294 [*affirming* 31 Fed. 80, 24 Blatchf. 392]; Miller *v.* Foree, 116 U. S. 22, 6 S. Ct. 204, 29 L. ed. 552; Pennsylvania R. Co. *v.* Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 S. Ct. 220, 28 L. ed. 222; National Meter Co. *v.* Neptune Meter Co., 122 Fed. 75 [*reversed* on other grounds in 127 Fed. 563, 62 C. C. A. 345]; Johnson Co. *v.* Toledo Traction Co., 119 Fed. 885, 56 C. C. A. 415; Standard Caster, etc., Co. *v.* Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109; Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 107 Fed. 277, 46 C. C. A. 263; Edison Electric Light Co. *v.* E. G. Bernard Co., 88 Fed. 267; U. S. Repair, etc., Co. *v.* Standard Paving Co., 87 Fed. 339; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Young *v.* Baltimore County Hedge, etc., Fence Co., 51 Fed. 109; Union Paper-Collar Co. *v.* Leland, 24 Fed. Cas. No. 14,394, 1 Ban. & A. 491, Holmes 427, 7 Off. Gaz. 221.

88. *In re* Weiss, 21 App. Cas. (D. C.) 214; Potts *v.* Creager, 155 U. S. 597, 15 S. Ct. 194, 39 L. ed. 275; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 124 Fed. 514; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 289; R. Thomas, etc., Co. *v.* Electric Porcelain, etc., Co., 111 Fed. 923; Wilfley *v.* Denver Engineering Works Co., 111 Fed. 760; American Well Works *v.* F. C. Austin Mfg. Co., 98 Fed. 992 [*affirmed* in 121 Fed. 76, 57 C. C. A. 330]; Dodge *v.* Porter, 98 Fed. 624; Reynolds *v.* Buzzell, 96 Fed. 997, 37 C. C. A. 656; Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721 [*affirmed* in 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968]; Hanifen *v.* E. H. Godshalk Co., 78 Fed. 811; Rose *v.* Hirsh, 77 Fed. 469, 23 C. C. A. 246; Dick Co. *v.* Henry, 75 Fed. 388; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; A. B. Dick Co. *v.* Wichelman, 74 Fed. 799; Binns *v.* Zucker, etc., Chemical Co., 70 Fed. 711; Taws *v.* Laughlins, 70 Fed. 102; Consolidated Brake-Shoe Co. *v.* Chicago, etc., R. Co., 69 Fed. 412; Pacific Contracting Co. *v.* Southern California Bituminous Paving Co., 48 Fed. 300; Peninsular Novelty Co. *v.* American Shoe-Tip Co., 39 Fed. 791; Moffitt *v.* Rogers, 8 Fed. 147 [*affirmed* in 106 U. S. 423, 1 S. Ct. 70, 27 L. ed. 76]; *In re* Boughton, 3 Fed. Cas. No. 1,696, McArthur Pat. Cas. 278; Burden *v.* Corning, 4 Fed. Cas. No. 2,144 [*reversed* on other grounds in 15 How. 252, 14 L. ed. 683]; Clark Patent Steam, etc., Regulator Co. *v.* Copeland, 5 Fed. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Plastic Slate-Roofing Joint-Stock Co. *v.* Moore, 19 Fed. Cas. No. 11,209, Holmes 167; Treadwell *v.* Parrott, 24 Fed. Cas. No. 14,158, 5 Blatchf. 369, 3 Fish. Pat. Cas. 124; Winans *v.* Schenectady, etc., R. Co., 30 Fed. Cas. No. 17,865, 2 Blatchf. 279; Penn *v.* Bibby, L. R. 2 Ch. 127, 36 L. J. Ch. 455, 15 L. T. Rep. N. S. 299, 15 Wkly. Rep. 208; Lane Fox *v.* Kensington Electric Lighting Co., [1892] 3 Ch. 424, 67 L. T. Rep. N. S. 440; Higgs *v.* Goodwin, E. B. & E. 529, 5 Jur. N. S. 97, 27 L. J. Q. B. 421, 96 E. C. L. 529; Newton *v.* Vaucher, 6 Exch. 859, 21 L. J. Exch. 305; Hills *v.* London Gas Light Co., 5 H. & N. 312, 29 L. J. Exch. 409; Crane *v.* Price, 12 L. J. C. P. 81, 4 M. & G. 580, 5 Scott N. R. 338, 43 E. C. L. 301; Gadd *v.* Manchester, 67 L. T. Rep. N. S. 569; Dangerfield *v.* Jones, 13 L. T. Rep. N. S. 142; Bicknell *v.* Peterson, 24 Ont. App. 427. And see *supra*, III, B, 8; III, C, 4, j.

Applications of rule.—Mending holes in firemen's hose and mending tin cans not analogous. *Ex p.* Mackay, 16 Fed. Cas. No. 8,836. Automatic safe lock not analogous to gas cock. Yale Lock Co. *v.* Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123. Corset springs not analogous to carriage springs. Barnes *v.* Straus, 2 Fed. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531, 2 Off. Gaz. 62. Carriage step not analogous to shoe soles or stirrups. Rubber Step Mfg. Co. *v.* Metropolitan R. Co., 20 Fed. Cas. No. 12,101, 3 Ban. & A. 252, 13 Off. Gaz. 549. Spinning machines and centrifugal driers are not analogous. Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 [*affirming* 69 Fed. 837]. Egg crate not anticipated by sample case. Coburn *v.* Schroeder, 8 Fed. 519, 19 Blatchf. 377. Dyeing and tanning are not analogous. Tannage Co. *v.* Zahn, 70 Fed. 1003, 17 C. C. A. 552 [*reversing* 66 Fed. 986]. Sucker rods for wells and lightning rods are not analogous. Grosjean *v.* Peck, etc., Co., 11 Fed. Cas. No. 5,841, 11 Blatchf. 54. Wash boiler and bake pan not analogous. Bell *v.* U. S. Stamping

As already shown, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty.[89] "Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before; . . . but the decisive answer is that with dozens and perhaps hundred of others laboring in the same field, it had never occurred to any one before."[90]

14. Substitution of Equivalents[91] — a. In General. The substitution of an art, machine manufacture, or composition of matter of one element or device for another which performs the same functions in substantially the same way and accomplishes substantially the same result is not invention.[92] The substantial

Co., 32 Fed. 549. System of electric distribution not analogous to gas and water distribution. Edison Electric Co. *v.* Westinghouse, 55 Fed. 490 [*reversed* on other grounds in 63 Fed. 588, 11 C. C. A. 342]. Combination of muslin and paper patentable for collars, although before used for maps. Union Paper Collar Co. *v.* White, 24 Fed. Cas. No. 14,396, 2 Ban. & A. 60, 7 Off. Gaz. 698, 877, 11 Phila. (Pa.) 479, 1 Wkly. Notes Cas. 362. Spikes and nails are in different arts. Diamond State Iron Co. *v.* Goldie, 84 Fed. 972, 28 C. C. A. 589. Dyeing and tanning are not analogous. Tannage Patent Co. *v.* Donallen, 93 Fed. 811. Spinning wheels and centrifugal machines are not analogous. Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; Codman *v.* Amia, 74 Fed. 634, 20 C. C. A. 566. Where no change is necessary to adapt device to new use there is no invention, however remote the art. Stearns *v.* Russell, 85 Fed. 218, 29 C. C. A. 121.

89. Potts *v.* Creager, 155 U. S. 597, 15 S. Ct. 194, 39 L. ed. 275; General Electric Co. *v.* Bullock Electric Mfg. Co., 152 Fed. 427, 81 C. C. A. 569 [*reversing* 146 Fed. 552].

90. Potts *v.* Creagher, 155 U. S. 597, 607, 15 S. Ct. 194, 39 L. ed. 275; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203.

91. **Substitution of equivalents of elements in infringing combination** see *infra*, XIII, A, 6, g.

92. *In re* Hodges, 28 App. Cas. (D. C.) 525; *In re* Thurston, 26 App. Cas. (D. C.) 315; *In re* McNeill, 20 App. Cas. (D. C.) 294; Lehigh Valley R. Co. *v.* Kearney, 158 U. S. 461, 15 S. Ct. 871, 39 L. ed. 1055; Du Bois *v.* Kirk, 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895; Sargent *v.* Covert, 152 U. S. 516, 14 S. Ct. 676, 38 L. ed. 536; Hoyt *v.* Horne, 145 U. S. 302, 12 S. Ct. 922, 36 L. ed. 713; Hartshorn *v.* Saginaw Barrel Co., 119 U. S. 664, 7 S. Ct. 421, 30 L. ed. 539; Stephenson *v.* Brooklyn Cross-Town R. Co., 114 U. S. 149, 5 S. Ct. 777, 29 L. ed. 58; Hall *v.* Macneale, 107 U. S. 90, 2 S. Ct. 73, 27 L. ed. 367; Heald *v.* Rice, 104 U. S. 737, 26 L. ed. 910; Crouch *v.* Roemer, 103 U. S. 797, 26 L. ed. 426; Union Paper Bag Mach. Co. *v.* Murphy, 97 U. S. 120, 24 L. ed. 935; Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Stimpson *v.* Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Lourie Implement Co. *v.* Lenhart, 130 Fed. 122, 64 C. C. A. 456; U. S. Peg Wood, etc., Co. *v.* B. F. Sturtevant Co., 125 Fed. 378, 60 C. C. A. 244; Seiler *v.* Fuller, etc., Mfg. Co., 121 Fed. 85, 57 C. C. A. 339; Alaska Packers' Assoc. *v.* Letson, 119 Fed. 599; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Potts *v.* Creager, 97 Fed. 78, 38 C. C. A. 47; Bundy Mfg. Co. *v.* Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Parsons *v.* Seelye, 92 Fed. 1005; Boynton Co. *v.* Morris Chute Co., 82 Fed. 440; Forgie *v.* Duff Mfg. Co., 81 Fed. 865, 26 C. C. A. 654; New Departure Bell Co. *v.* Hardware Specialty Co., 69 Fed. 152; Oval Wood Dish Co. *v.* Sandy Creek, N. Y., Wood Mfg. Co., 60 Fed. 285; Geo. L. Thomson Mfg. Co. *v.* Walbridge, 60 Fed. 91 [*affirmed* in 67 Fed. 1021, 15 C. C. A. 166]; Saunders *v.* Allen, 53 Fed. 109 [*affirmed* in 60 Fed. 610, 9 C. C. A. 157]; McCarty *v.* Lehigh Valley R. Co., 43 Fed. 384; American Split-Feather Duster Co. *v.* Levy, 43 Fed. 381; May *v.* Fond du Lac County, 27 Fed. 691; Sawyer *v.* Miller, 12 Fed. 725, 4 Woods 472; Perry *v.* Co-operative Foundry Co., 12 Fed. 436, 20 Blatchf. 498; Crompton *v.* Knowles, 7 Fed. 204; Holly *v.* Vergennes Mfg. Co., 4 Fed. 74, 18 Blatchf. 327; Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. Rep. 184; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; *Ex p.* Dietz, 7 Fed. Cas. No. 3,902; *In re* Everson, 8 Fed. Cas. No. 4,580, McArthur Pat. Cas. 406; Fisher *v.* Craig, 9 Fed. Cas. No. 4,817, 1 Ban. & A. 365, 3 Sawy. 69; King *v.* Louisville Cement Co., 14 Fed. Cas. No. 7,798, 6 Fish. Pat. Cas. 336, 4 Off. Gaz. 181; Potter *v.* Thayer, 19 Fed. Cas. No. 11,340, 6 Fish. Pat. Cas. 603, Holmes 293, 2 Off. Gaz. 32; Spain *v.* Gamble, 22 Fed. Cas.

equivalent of a thing is, in the sense of the patent law, the same as the thing itself. Two devices which perform the same function in substantially the same way and accomplish substantially the same result are therefore the same, although they may differ in name and form.[93]

b. Superiority of Substituted Part No Test. The fact that the substituted part performs the function better does not make the act of substitution an invention,[94] unless some new or added function or result is secured which would not be obvious to one skilled in the art.[95]

15. Substitution of Material. The mere substitution of one material for another in an old article where it performs substantially the same functions is not an invention,[96] although the substituted material may be better for the pur-

No. 13,199, McArthur Pat. Cas. 358; Treadwell *v.* Fox, 24 Fed. Cas. No. 14,156; Woodbury Patent Planing-Mach. Co. *v.* Keith, 30 Fed. Cas. No. 17,970, 4 Ban. & A. 100 [*affirmed* in 101 U. S. 479, 25 L. ed. 939]; Millett *v.* Allen, 115 Off. Gaz. 1586; Wisner *v.* Coulthard, 22 Can. Sup. Ct. 178; Hunter *v.* Carrick, 11 Can. Sup. Ct. 300; Smith *v.* Goldie, 9 Can. Sup. Ct. 46.

Substitution of bolt for screw not patentable. Root *v.* Sontag, 47 Fed. 309.

Substitution of logs for rollers not invention. Woodbury Patent Planing-Mach. Co. *v.* Keith, 30 Fed. Cas. No. 17,970, 4 Ban. & A. 100 [*affirmed* in 101 U. S. 479, 25 L. ed. 939].

Substitution of screw for hand operated paddles not invention. Marchand *v.* Emken, 132 U. S. 195, 10 S. Ct. 65, 33 L. ed. 332 [*affirming* 26 Fed. 629, 23 Blatchf. 435].

Substitution of electric motor for engine not invention. Shaw Electric Crane Co. *v.* Shriver, 86 Fed. 466, 30 C. C. A. 196.

Substitution of internal for external gears not invention. Mast *v.* Stover Mfg. Co., 91 Off. Gaz. 1239.

Unless the mode of operation is the same there is no equivalency.— Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12.

Unexpected result shows lack of equivalency.— Westinghouse Electric, etc., Co. *v.* New England Granite Co., 103 Fed. 951.

Substitution of single element performing function of several.— Where three separate elements in a patented device, each performing an individual function, are supplanted in another device by a single element which itself performs the functions of all three, the threefold capacity of the single element is not the equivalent of the three separate elements. Lambert Hoisting Engine Co. *v.* Lidgerwood Mfg. Co., 154 Fed. 372, 83 C. C. A. 350 [*modifying* 150 Fed. 364].

Mechanical devices are equivalents when skilful and experienced workmen know that one will produce the same result as the other. May *v.* Fond du Lac County, 27 Fed. 691; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

What are equivalents illustrated.— Howard *v.* Detroit Stove Works, 150 U. S. 164, 14 S. Ct. 68, 37 L. ed. 1039; Morley Sewing Mach. Co. *v.* Lancaster, 129 U. S. 263, 9 S. Ct. 299, 32 L. ed. 715; Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222, 26 L. ed. 149; Hyndman *v.* Roots, 97 U. S. 224, 24 L. ed. 975; Tyler *v.* Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93.

93. Union Paper Bag Mach. Co. *v.* Murphy, 97 U. S. 120, 24 L. ed. 935.

94. *In re* McNeill, 20 App. Cas. (D. C.) 294; National Hat-Pouncing Mach. Co. *v.* Hedden, 148 U. S. 482, 13 S. Ct. 680, 37 L. ed. 529; Stimpson *v.* Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; Lyons *v.* Bishop, 95 Fed. 154; Parsons *v.* Seelye, 92 Fed. 1005; Kelly *v.* Springfield R. Co., 81 Fed. 617 [*affirmed* in 92 Fed. 614, 34 C. C. A. 570]; National Folding-Box, etc., Co. *v.* Stecher Lith. Co., 81 Fed. 395, 26 C. C. A. 448; Codman *v.* Amia, 74 Fed. 634, 20 C. C. A. 566; Puetz *v.* Bransford, 31 Fed. 458; Hutchinson *v.* Meyer, 12 Fed. Cas. No. 6,957.

95. Substitution of part performing new function may be invention. Mosher *v.* Joyce, 31 Fed. 557; Woodward *v.* Dinsmore, 30 Fed. Cas. No. 18,003, 4 Fish. Pat. Cas. 163.

Torsional spring for fulcrum and coil spring in telegraph instrument is invention. La Rue *v.* Western Electric Co., 31 Fed. 80, 24 Blatchf. 392 [*affirmed* in 139 U. S. 601, 11 S. Ct. 670, 35 L. ed. 294].

Coil spring for flat spring invention. Bray *v.* U. S. Net, etc., Co., 70 Fed. 1006.

96. Brinkerhoff *v.* Aloe, 146 U. S. 515, 13 S. Ct. 221, 36 L. ed. 1068; Gardner *v.* Herz, 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158; Houghton *v.* Whitin Mach. Works, 153 Fed. 740, 83 C. C. A. 84; New York Belting, etc., Co. *v.* Sierer, 149 Fed. 756 [*affirmed* in 158 Fed. 819]; Drake Castle Pressed Steel Lug Co. *v.* Brownell, 123 Fed. 86, 59 C. C. A. 216; National Tooth Crown Co. *v.* Macdonald, 117 Fed. 617; Union Hardware Co. *v.* Selchow, 112 Fed. 1006; Billings, etc., Co. *v.* Van Wagoner, etc., Hardware Co., 98 Fed. 732; Kilhourne *v.* W. Bingham Co., 50 Fed. 697, 1 C. C. A. 617 [*affirming* 47 Fed. 57]; Vulcanized Fiber Co. *v.* Taylor, 49 Fed. 744; Tibbe, etc., Mfg. Co. *v.* Heineken, 37 Fed. 686; National Sheet-Metal Roofing Co. *v.* Garwood, 35 Fed. 658; Mott Iron-Works *v.* Cassidy, 31 Fed. 47, 24 Blatchf. 289; Forschner *v.* Baumgarten, 26 Fed. 858; Welling *v.* Crane, 21 Fed. 707; American Iron Co. *v.* Anglo-American Roofing Co., 16 Fed. 915, 21 Blatchf. 324; Palmenbing *v.* Buchholz, 13 Fed. 672. 21 Blatchf. 162; Carter *v.* Messinger, 5 Fed. Cas. No. 2,478, 11 Blatchf. 34; Holbrook *v.* Small, 12 Fed. Cas. No. 6,595,

pose.[97] The rule applies even where the material is new and was invented by the one claiming the substitution as his invention. He should claim the material only unless the act of substitution after the production of the material call for inventive thought.[98] Where, however, the substituted material performs new functions and its adaptability for the purpose was not obvious there may be invention in the substitution.[99] And substitution may be considered on the issue of invention where it makes possible changes in other elements of a combination to produce improved operation.[1]

16. Change of Location of Parts. Ordinariiy changes of the relative location of parts without changing the functions performed is not an invention.[2]

17. Omission of Parts.[3] The omission of a part with a corresponding omission of its function is not invention,[4] but an omission of a part with a rearrangement

2 Ban. & A. 396, 10 Off. Gaz. 508; Mannie *v.* Everett, 16 Fed. Cas. No. 9,039; Rushton *v.* Crawley, L. R. 10 Eq. 522; Ball *v.* Compton Corset Co., 13 Can. Sup. Ct. 469.

Drawn metal for cast metal is not invention. McKloskey *v.* Du Bois, 8 Fed. 710, 19 Blatchf. 205.

Wood for stone in pavement blocks is not invention. Phillips *v.* Detroit, 19 Fed. Cas. No. 11,100, 4 Ban. & A. 347, 17 Off. Gaz. 191 [*affirmed* in 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532].

Artificial honey is not a mere substitution of materials in real honey. *In re* Corbin, 6 Fed. Cas. No. 3,224, McArthur Pat. Cas. 521.

Substitution of materials in designs not invention. Post *v.* T. C. Richards Hardware Co., 26 Fed. 618.

97. *In re* Cheneau, 5 App. Cas. (D. C.) 197; Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734 [*affirming* 42 Fed. 49]; Florsheim *v.* Schilling, 137 U. S. 64, 11 S. Ct. 20, 34 L. ed. 574; Hicks *v.* Kelsey, 18 Wall. (U. S.) 670, 21 L. ed. 852; A. B. Dick Co. *v.* Wichelman, 105 Fed. 629; Dodge Mfg. Co. *v.* Ohio Valley Pulley Works, 101 Fed. 584; Plastic Fireproof Constr. Co. *v.* San Francisco, 97 Fed. 620; Strom Mfg. Co. *v.* Weir Frog Co., 83 Fed. 170, 27 C. C. A. 502; Hotchkiss *v.* Greenwood, 12 Fed. Cas. No. 6,718, 4 McLean 456, 2 Robb Pat. Cas. 730 [*affirmed* in 11 How. 248, 13 L. ed. 683]; *In re* Maynard, 16 Fed. Cas. No. 9,352, McArthur Pat. Cas. 536.

98. Brigham *v.* Coffin, 149 U. S. 557, 13 S. Ct. 939, 37 L. ed. 845; Underwood *v.* Gerber, 149 U. S. 224, 13 S. Ct. 854, 37 L. ed. 710.

99. Ansonia Brass, etc., Co. *v.* Electrical Supply Co., 144 U. S. 11, 12 S. Ct. 601, 36 L. ed. 327; Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; George Frost Co. *v.* Cohn, 119 Fed. 505, 56 C. C. A. 185 [*affirming* 112 Fed. 1009]; King *v.* Anderson, 90 Fed. 500; Fairbanks Wood Rim Co. *v.* Moore, 78 Fed. 490; Perkins *v.* Interior Lumber Co., 51 Fed. 286; Clarke *v.* Johnson, 4 Fed. 437, 18 Blatchf. 450; Spill *v.* Celluloid Mfg. Co., 2 Fed. 707, 18 Blatchf. 190; *Ex p.* Adams, 1 Fed. Cas. No. 38*a*; Goodyear Dental Vulcanite Co. *v.* Willis, 10 Fed. Cas. No. 5,603, 1 Ban. & A. 568, 1 Flipp. 388, 7 Off. Gaz. 41.

Substitution of carbon filament for platinum is invention. Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83.

1. Houghton *v.* Whitin Mach. Works, 153 Fed. 740, 83 C. C. A. 84.

2. *In re* Garrett, 27 App. Cas. (D. C.) 19; Goss Printing-Press Co. *v.* Scott, 108 Fed. 253, 47 C. C. A. 302; Lettelier *v.* Mann, 91 Fed. 909; Stevenson Co. *v.* McFassell, 88 Fed. 278; Olmsted *v.* Andrews, 77 Fed. 835, 23 C. C. A. 488; New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 73 Fed. 459, 19 C. C. A. 534; Reed *v.* Pomeroy, 71 Fed. 299; Stutz *v.* Robson, 54 Fed. 506; Haughey *v.* Lee, 48 Fed. 382; Davis *v.* Parkman, 45 Fed. 693 [*affirmed* in 71 Fed. 961, 18 C. C. A. 398]; Gorse *v.* Parker, 35 Fed. 129; Hancock Inspirator Co. *v.* Lelly, 27 Fed. 88; Dederick *v.* Whitman Agricultural Co., 26 Fed. 755; Phipps *v.* Yost, 26 Fed. 447; Dane *v.* Illinois, 6 Fed. Cas. No. 3,558, 3 Biss. 374, 6 Fish. Pat. Cas. 124, 2 Off. Gaz. 680; Gilbert, etc., Mfg. Co. *v.* Walworth Mfg. Co., 10 Fed. Cas. No. 5,418, 2 Ban. & A. 271, 9 Off. Gaz. 746; Kirby *v.* Beardsley, 14 Fed. Cas. No. 7,837, 5 Blatchf. 438, 3 Fish. Pat. Cas. 265; Marsh *v.* Dodge, etc., Mfg. Co., 16 Fed. Cas. No. 9,115; Owens *v.* Taylor, 29 Grant Ch. (U. C.) 210; Taylor *v.* Brandon Mfg. Co., 21 Ont. App. 361.

Mere reversal of parts is not invention. *In re* Iwan, 17 App. Cas. (D. C.) 566; Penfield *v.* Chambers Bros. Co., 92 Fed. 630, 34 C. C. A. 579; Sax *v.* Taylor Iron Works, 30 Fed. 835 [*affirmed* in 149 U. S. 485, 13 S. Ct. 1051, 37 L. ed. 964].

Making lower roll instead of upper movable is not invention. Abbott Mach. Co. *v.* Bonn, 51 Fed. 223.

Changing location of attachment for train pipes for convenience is not invention. Plumb *v.* New York, etc., R. Co., 97 Fed. 645.

3. **Omission of elements in infringing combination** see *infra*, XIII, A, 6, h.

4. *In re* Butterfield, 23 App. Cas. (D. C.) 84; Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Magin *v.* Karle, 150 U. S. 387, 14 S. Ct. 153, 37 L. ed. 1118; Dececo Co. *v.* George E. Gilchrist Co., 125 Fed. 293, 60 C. C. A. 207; Gormully, etc., Mfg. Co. *v.* Sager Mfg. Co., 87 Fed. 945; Ferguson *v.* Ed. Roos Mfg. Co., 71 Fed. 416, 18 C. C. A. 162; Needham *v.*

of the remaining parts whereby the same result is secured by a less number of parts may be.[5]

18. Making Parts Integral or Separate. There is ordinarily no invention in making solid castings in place of attached parts,[6] or in making separately parts before made integral.[7] The practice is so well known as to be within the knowledge of the ordinary mechanic.[8]

19. Making Device Portable. There is no invention in merely making an old device in such form that it is portable.[9]

20. Combination[10] — a. In General. Where old elements are brought into a new relation, where by their interaction they perform new functions and produce a new result there is a patentable invention.[11] But it is not invention to merely

Washburn, 17 Fed. Cas. No. 10,082, 1 Ban. & A. 537, 4 Cliff. 254, 7 Off. Gaz. 649; Stow *v.* Chicago, 23 Fed. Cas. No. 13,512, 3 Ban. & A. 83, 8 Biss. 47 [*affirmed* in 104 U. S. 547, 26 L. ed. 816].

5. Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Magin *v.* Karle, 150 U. S. 387, 14 S. Ct. 153, 37 L. ed. 1118; Lawther *v.* Hamilton, 124 U. S. 1, 8 S. Ct. 342, 31 L. ed. 325; Brown *v.* Huntington Piano Co., 134 Fed. 735, 67 C. C. A. 639 [*affirming* 131 Fed. 273]; Eck *v.* Kutz, 132 Fed. 758; Dececo Co. *v.* George E. Gilchrist Co., 125 Fed. 293; American Graphaphone Co. *v.* Leeds, 87 Fed. 873; Coupe *v.* Weatherhead, 16 Fed. 673; Stow *v.* Chicago, 23 Fed. Cas. No. 13,512, 3 Ban. & A. 83, 8 Biss. 47 [*affirmed* in 104 U. S. 547, 26 L. ed. 816].

Omission of element of composition may be invention. Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92.

6. Howard *v.* Detroit Stove Works, 150 U. S. 164, 14 S. Ct. 68, 37 L. ed. 1039; General Electric Co. *v.* Yost Electric Mfg. Co., 131 Fed. 874; Eames *v.* Worcester Polytechnic Inst., 123 Fed. 67, 60 C. C. A. 37; Lay *v.* Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 C. C. A. 313; Standard Caster, etc., Co. *v.* Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109; Consolidated Electric Mfg. Co. *v.* Holtzer, 67 Fed. 907, 15 C. C. A. 63; Williams *v.* Goodyear Metallic Rubber Shoe Co., 54 Fed. 498, 4 C. C. A. 485; Kilbourne *v.* W. Bingham Co., 50 Fed. 697, 1 C. C. A. 617 [*affirming* 47 Fed. 57]; Bothe *v.* Paddock-Hawley Iron Co., 50 Fed. 536, 1 C. C. A. 575.

Riveted in place of cast parts is not patentable. Johnson Co. *v.* Pacific Rolling Mills Co., 59 Fed. 242.

Pasting parts together is not invention. Johnson *v.* Hero Fruit-Jar Co., 55 Fed. 659.

Swaging instead of casting is not invention. Strom Mfg. Co. *v.* Weir Frog Co., 75 Fed. 279 [*affirmed* in 83 Fed. 170, 27 C. C. A. 502].

Fusing instead of cementing parts is not invention. *In re* Locke, 17 App. Cas. (D. C.) 314.

Making collar button in one piece is patentable. Krementz *v.* S. Cottle Co., 148 U. S. 556, 13 S. Ct. 719, 37 L. ed. 558 [*reversing* 39 Fed. 323].

7. Making part detachable is not invention. Roehr *v.* Bliss, 82 Fed. 445; Kidd *v.* Horry, 33 Fed. 712.

Making parts removable may be invention. McMichael, etc., Mfg. Co. *v.* Stafford, 105 Fed. 380.

8. *In re* Seabury, 23 App. Cas. (D. C.) 377.

9. Hendy *v.* Golden State, etc., Iron Works, 127 U. S. 370, 8 S. Ct. 1275, 32 L. ed. 207; Thompson *v.* Boisselier, 114 U. S. 1, 5 S. Ct. 1042, 29 L. ed. 76; Atlantic Works *v.* Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. ed. 438; Olmsted *v.* Andrews, 77 Fed. 835, 23 C. C. A. 488; Black Diamond Coal Min. Co. *v.* Excelsior Coal Co., 70 Off. Gaz. 1797. And see Kokomo Fence Machine Co. *v.* Kitselman, 189 U. S. 8 [*reversing* 108 Fed. 632, 47 C. C. A. 538].

10. **Combination of parts of prior invention as showing prior knowledge or use** see *supra*, III, C, 4, i.

New combination as showing novelty of device see *supra*, III, B, 10.

11. Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Spear *v.* Keystone Lantern Co., 131 Fed. 879 [*reversed* on other grounds in 136 Fed. 595, 69 C. C. A. 369]; Perkins Electric Switch Mfg. Co. *v.* Buchanan, 129 Fed. 134 [*affirmed* in 135 Fed. 90, 67 C. C. A. 564]; L. A. Thompson Scenic R. Co. *v.* Chestnut Hill Casino Co., 127 Fed. 698, 62 C. C. A. 454; Brill *v.* North Jersey St. R. Co., 124 Fed. 778 [*reversed* on other grounds in 134 Fed. 580, 67 C. C. A. 380]; Peters *v.* Union Biscuit Co., 120 Fed. 679 [*reversed* on other grounds in 125 Fed. 601, 60 C. C. A. 337]; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 295; Moore *v.* Schaw, 118 Fed. 602; Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 118 Fed. 136, 55 C. C. A. 86; Consolidated Rubber Tire Co. *v.* Finley Rubber Tire Co., 116 Fed. 629; Dowagiac Mfg. Co. *v.* Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36; Nelson *v.* A. D. Farmer, etc., Type-Founding Co., 95 Fed. 145, 37 C. C. A. 32; American Graphophone Co. *v.* Leeds, 87 Fed. 873; Deere *v.* Rock Island Plow Co., 84 Fed. 171, 28 C. C. A. 308; Muller *v.* Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Western Wheel-Scraper Co. *v.* Doinnin, 77 Fed. 194; American Soda-Fountain Co. *v.* Green, 75 Fed. 680; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; Fisher *v.*

extend the use of an old combination of elements, where no new result is produced and no new method of producing the old result.[12]

b. Lack of Novelty in Elements Immaterial. The invention in such case has nothing to do with the novelty or lack of novelty in the separate elements, but resides in the particular way in which the elements have been combined.[13] When a combination is claimed it is said that there is an implied concession that the elements are separately old.[14]

c. Coaction of Elements Necessary. It is not necessary that each element should perform its own function and also modify the function performed by every other,[15] but there must be such coaction and modification that a result is

American Pneumatic Tool Co., 71 Fed. 523, 18 C. C. A. 235 [*affirming* 69 Fed. 331]; U. S. Printing Co. *v.* American Playing-Card Co., 70 Fed. 50; Johnson *v.* Forty Second St., etc., R. Co., 33 Fed. 499; Niles Tool Co. *v.* Betts Mach. Co., 27 Fed. 301; McKesson *v.* Carnrick, 9 Fed. 44, 19 Blatchf. 158; Brickill *v.* New York, 7 Fed. 479, 18 Blatchf. 273; McMillan *v.* Rees, 1 Fed. 722; Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Bailey Washing, etc., Mach. Co. *v.* Lincoln, 2 Fed. Cas. No. 750, 4 Fish. Pat. Cas. 379; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Gallahue *v.* Butterfield, 9 Fed. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203, 2 Off. Gaz. 645; Herring *v.* Nelson, 12 Fed. Cas. No. 6,424, 3 Ban. & A. 55, 14 Blatchf. 293, 12 Off. Gaz. 753; Many *v.* Sizer, 16 Fed. Cas. No. 9,056, 1 Fish. Pat. Cas. 17; Pitts *v.* Whitman, 19 Fed. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Roemer *v.* Logowitz, 20 Fed. Cas. No. 11,996; Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632, 2 Off. Gaz. 495; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Woodward *v.* Dinsmore, 30 Fed. Cas. No. 18,003, 4 Fish. Pat. Cas. 163; Clark *v.* Adie, 2 App. Cas. 315, 46 L. J. Ch. 585, 36 L. T. Rep. N. S. 923 [*affirming* 23 Wkly. Rep. 898]; Harrison *v.* Anderston Foundry Co., 1 App. Cas. 574; Murray *v.* Clayten, L. R. 7 Ch. 570, 20 Wkly. Rep. 649; Adie *v.* Clark, 3 Ch. D. 134, 45 L. J. Ch. 228, 35 L. T. Rep. N. S. 349, 24 Wkly. Rep. 1007; Daw *v.* Eley, L. R. 3 Eq. 496, 36 L. J. Ch. 482, 15 L. T. Rep. N. S. 559; Newton *v.* Grand Junction R. Co., 5 Exch. 331 note, 20 L. J. Exch. 427 note; Lukie *v.* Robson, 2 Jur. 201; *In re* Martin, 3 Wkly. Rep. 433; Dansereau *v.* Bellemare, 16 Can. Sup. Ct. 180; Hunter *v.* Carrick, 28 Grant Ch. (U. C.) 489 [*reversed* on other grounds in 10 Ont. App. 449 (*affirmed* in 11 Can. Sup. Ct. 300)].

Addition of one element to old combination may be patentable. Buck *v.* Hermance, 4 Fed. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. Rep. 251; Frink *v.* Petry, 9 Fed. Cas. No. 5,128, 1 Ban. & A. 1, 11 Blatchf. 422, 5 Off. Gaz. 201; Hall *v.* Wiles, 11 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433.

Alarm and time recorder combined is patentable. Municipal Signal Co. *v.* Gamewell Fire-Alarm Tel. Co., 52 Fed. 459.

Merely putting several articles in one package is not invention. King *v.* Frostel, 14 Fed. Cas. No. 7,794, 4 Ban. & A. 236, 8 Biss. 510, 16 Off. Gaz. 956, 8 Reporter 490 [*affirmed* in 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870].

12. Voightmann *v.* Weis, etc., Cornice Co., 148 Fed. 848, 78 C. C. A. 538 [*affirming* 133 Fed. 298]; Schweichler *v.* Levinson, 147 Fed. 704, 78 C. C. A. 92.

13. Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553; Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177; Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Eck *v.* Kutz, 132 Fed. 758; Lowrie *v.* H. A. Meldrum Co., 124 Fed. 761 [*reversed* on other grounds in 130 Fed. 886, 65 C. C. A. 194]; Emerson Electric Mfg. Co. *v.* Van Nort Bros. Electric Co., 116 Fed. 974; American Tobacco Co. *v.* Streat, 83 Fed. 700, 28 C. C. A. 18; Buck *v.* Hermance, 4 Fed. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. Rep. 251; Ryan *v.* Goodwin, 21 Fed. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636; Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [*reversed* on other grounds in 10 Wall. 117, 19 L. ed. 866]; Spencer *v.* Jack, 3 De G. J. & S. 346, 8 Jur. N. S. 1165, 10 L. T. Rep. N. S. 242, 1 Wkly. Rep. 114, 68 Eng. Ch. 262, 46 Eng. Reprint 669; Lister *v.* Leather, 8 E. & B. 1004, 4 Jur. N. S. 947, 27 L. J. Q. B. 295, 92 E. C. L. 1004; Bovill *v.* Moore, 2 Marsh. 211, 17 Rev. Rep. 514, 4 E. C. L. 481; Smith *v.* Goldie, 9 Can. Sup. Ct. 46; Griffin *v.* Toronto R. Co., 7 Can. Exch. 411; Mitchell *v.* Nancock Inspirator Co., 2 Can. Exch. 539; Toronto Tel. Mfg. Co. *v.* Bell Tel. Co., 2 Can. Exch. 495; Yates *v.* Great Western R. Co., 24 Grant Ch. (U. C.) 495; Patric *v.* Sylvester, 23 Grant Ch. (U. C.) 573; Emery *v.* Iredale, 11 U. C. C. P. 106. And see *supra*, III, C, 4, i.

14. Hay *v.* S. F. Heath Cycle Co., 71 Fed. 411, 18 C. C. A. 157.

15. Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Dayton Malleable Iron Co. *v.* Forster, 153 Fed. 201; Sanders *v.* Hancock, 128 Fed. 424, 63 C. C. A. 166; American St. Car Advertising Co. *v.* Newton St. R. Co., 82 Fed. 732; National Cash-Register Co. *v.* American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559; Wood *v.* Packer, 17 Fed. 650; Strobridge *v.* Landers, 11 Fed. 880, 20 Blatchf. 73; Fitch *v.* Bragg, 8 Fed. 588.

produced which is not merely the sum of the results produced by the separate elements.[16]

21. Aggregation — a. In General. An aggregation is the mere bringing together of separate elements without changing the function performed by them or producing any result other than the added result of the separate operation of the elements and is not a patentable invention.[17] A combination, to be patent-

16. Adams *v.* Bellaire Stamping Co., 141 U. S. 539, 12 S. Ct. 66, 35 L. ed. 849; Beecher Mfg. Co. *v.* Atwater Mfg. Co., 114 U. S. 523, 5 S. Ct. 1007, 29 L. ed. 232; Voightman *v.* Perkinson, 133 Fed. 934 [*affirmed* in 138 Fed. 56, 70 C. C. A. 482]; Diamond Match Co. *v.* Ruby Match Co., 127 Fed. 341; J. L. Mott Iron Works *v.* Hoffman, etc., Mfg. Co., 120 Fed. 1019, 56 C. C. A. 151 [*affirming* 110 Fed. 772]; Goodyear Tire, etc., Co. *v.* Rubber Tire Wheel Co., 116 Fed. 363, 53 C. C. A. 583; Parsons *v.* Minneapolis Threshing-Mach. Co., 106 Fed. 941; St. Louis Car-Coupler Co. *v.* National Malleable Castings Co., 87 Fed. 885, 31 C. C. A. 265; Deere *v.* Rock Island Plow Co., 84 Fed. 171, 28 C. C. A. 308; Beach *v.* Hobbs, 82 Fed. 916; American Soda-Fountain Co. *v.* Green, 75 Fed. 680; Bowers *v.* Von Schmidt, 63 Fed. 572; Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581; Brickill *v.* Hartford, 49 Fed. 372; Railway Register Mfg. Co. *v.* North Hudson Co. R. Co., 24 Fed. 793; Peard *v.* Johnson, 23 Fed. 507; Stutz *v.* Armstrong, 20 Fed. 843; Clark Pomace-Holder Co. *v.* Ferguson, 17 Fed. 79, 21 Blatchf. 376; Western Electric Mfg. Co. *v.* Chicago Electric Mfg. Co., 14 Fed. 691, 11 Biss. 427; Hoe *v.* Cottrell, 1 Fed. 597, 17 Blatchf. 546; Gallahue *v.* Butterfield, 9 Fed. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203, 2 Off. Gaz. 645; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

Simultaneous operation of elements is not necessary. Hoffman *v.* Young, 2 Fed. 74; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Forbush *v.* Cook, 9 Fed. Cas. No. 4,931, 2 Fish. Pat. Cas. 668.

17. *In re* Seabury, 23 App. Cas. (D. C.) 377; *In re* Davenport, 23 App. Cas. (D. C.) 370; *In re* Griswold, 9 App. Cas. (D. C.) 496; Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Richards *v.* Chase Elevator Co., 158 U. S. 299, 15 S. Ct. 831, 39 L. ed. 991; Palmer *v.* Corning, 156 U. S. 342, 15 S. Ct. 381, 39 L. ed. 445; Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Giles *v.* Heysinger, 150 U. S. 627, 14 S. Ct. 211, 37 L. ed. 1204; Ide *v.* Ball Engine Co., 149 U. S. 550, 13 S. Ct. 941, 37 L. ed. 843; Brinkerhoff *v.* Aloe, 146 U. S. 515, 13 S. Ct. 221, 36 L. ed. 1068; Derby *v.* Thompson, 146 U. S. 476, 13 S. Ct. 181, 36 L. ed. 1051; Patent Clothing Co. *v.* Glover, 141 U. S. 560, 12 S. Ct. 79, 35 L. ed. 858; Adams *v.* Bellaire Stamping Co., 141 U. S. 539, 12 S. Ct. 66, 35 L. ed. 849; Cluett *v.* Claflin, 140 U. S. 180, 11 S. Ct. 725, 35 L. ed. 385; Union Edge-Setter Co. *v.* Keith, 139 U. S. 530, 11 S. Ct. 621, 35 L. ed. 261; Busell Trimmer Co. *v.* Stevens, 137 U. S. 423, 11 S. Ct. 150, 34 L. ed. 719; Fond du Lac County *v.* May, 137 U. S. 395, 11 S. Ct. 98, 34 L. ed. 714; Burt *v.* Evory, 133 U. S. 349, 10 S. Ct. 394, 33 L. ed. 647; Hendy *v.* Golden State, etc., Iron Works, 127 U. S. 370, 8 S. Ct. 1275, 32 L. ed. 207; Thatcher Heating Co. *v.* Burtis, 121 U. S. 286, 7 S. Ct. 1034, 30 L. ed. 942; Beecher Mfg. Co. *v.* Atwater Mfg. Co., 114 U. S. 523, 5 S. Ct. 1007, 29 L. ed. 232; Bussey *v.* Excelsior Mfg. Co., 110 U. S. 131, 4 S. Ct. 38, 28 L. ed. 95; Pickering *v.* McCullough, 104 U. S. 310, 26 L. ed. 749; Rubber-Coated Harness Trimming Co. *v.* Welling, 97 U. S. 7, 24 L. ed. 942; Reckendorfer *v.* Faber, 92 U. S. 347, 23 L. ed. 719; Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Cameron Septic Tank Co. *v.* Saratoga Springs, 151 Fed. 242 [*reversed* on other grounds in 159 Fed. 453]; Rich *v.* Baldwin, 133 Fed. 920, 66 C. C. A. 464; West Coast Safety Faucet Co. *v.* Jackson Brewing Co., 117 Fed. 295, 54 C. C. A. 533; Wellman *v.* Midland Steel Co., 106 Fed. 221; Gast *v.* New York Asbestos Mfg. Co., 105 Fed. 68; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 101 Fed. 282, 41 C. C. A. 351; Smith *v.* Maxwell, 93 Fed. 466; Clisby *v.* Reese, 88 Fed. 645, 32 C. C. A. 80; Osgood Dredge Co. *v.* Metropolitan Dredging Co., 75 Fed. 670, 21 C. C. A. 491; Office Specialty Mfg. Co. *v.* Globe Co., 65 Fed. 599 [*affirmed* in 77 Fed. 465, 23 C. C. A. 242]; Deere *v.* J. I. Case Plow Works, 56 Fed. 841, 6 C. C. A. 157; Mott Iron Works Co. *v.* Standard Mfg. Co., 53 Fed. 819, 4 C. C. A. 28; Campbell *v.* Bailey, 45 Fed. 564 [*affirmed* in 63 Fed. 463, 11 C. C. A. 284]; National Progress Bunching Mach. Co. *v.* John R. Williams Co., 44 Fed. 190, 12 L. R. A. 107; Young *v.* Jackson, 43 Fed. 387; Rapid Service Store R. Co. *v.* Taylor, 43 Fed. 249; Richards *v.* Michigan Cent. R. Co., 40 Fed. 165; Jones *v.* Clow, 39 Fed. 785; Schmid *v.* Scovill Mfg. Co., 37 Fed. 345; Tower *v.* Bemis, etc., Hardware, etc., Co., 19 Fed. 498; Doubleday *v.* Roess, 11 Fed. 737; Moffitt *v.* Rogers, 8 Fed. 147 [*affirmed* in 106 U. S. 423, 1 S. Ct. 70, 27 L. ed. 76]; Double-Pointed Tack Co. *v.* Two Rivers Mfg. Co., 3 Fed. 26, 9 Biss. 258; Sarven *v.* Hall, 21 Fed. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415, 1 Off. Gaz. 437; Griswold *v.* Seymour, 78 Off. Gaz. 482.

Placing oil tank and other receptacles on one car not invention. Standard Oil Co. *v.* Southern Pac. Co., 54 Fed. 521, 4 C. C. A. 491 [*affirming* 48 Fed. 109].

Window in stove flue is mere aggregation. Perry *v.* Co-operative Foundry Co., 12 Fed. 436, 20 Blatchf. 498.

Placing rubber on end of lead pencil is aggregation not invention. Reckendorfer *v.*

able, must produce a different force, effect, or result in the combined forces or processes from that given by their separate parts.[18] No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.[19] Superiority does not make aggregation patentable.[20]

b. Multiplication of Elements. The multiplication of elements may go on indefinitely without producing a patentable invention,[21] since no exercise of the inventive faculty is involved in merely collecting at one place or in one machine a lot of elements which do not so modify the actions of each other as to produce a new result.[22]

c. Novel Elements. Novelty in one or more of the separate elements does not justify a claim to the collection of those elements unless there is coaction between them producing a new result.[23] The novel element in such case may be patentable if claimed separately.[24]

22. Evidence of Invention — a. Unsuccessful Efforts of Others. Proof that others skilled in the art had previously sought to accomplish the results of the patented device and that their efforts and experiments were unsuccessful may be and ordinarily is evidence that invention and not mere judgment and skill was required in conceiving and producing it.[25] It has been held, however, that the

Faber, 92 U. S. 347, 23 L. ed. 719; Rubber Tip Pencil Co. *v.* Howard, 20 Fed. Cas. No. 12,102, 9 Blatchf. 490, 5 Fish. Pat. Cas. 377, 1 Off. Gaz. 407 [*affirmed* in 20 Wall. 498, 22 L. ed. 410].

Fire lighter attached to kindling wood is not invention. Alcott *v.* Young, 1 Fed. Cas. No. 149, 4 Ban. & A. 197, 16 Blatchf. 134, 7 Reporter 552, 16 Off. Gaz. 403.

Aggregation of door and striker plate.— *In re* Forg, 2 App. Cas. (D. C.) 58.

Aggregation of staple and washer see Double-Pointed Tack Co. *v.* Two Rivers Mfg. Co., 109 U. S. 117, 3 S. Ct. 105, 27 L. ed. 877.

18. Reckendorfer *v.* Faber, 92 U. S. 347, 23 L. ed. 719.

19. Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241.

20. Office Specialty Mfg. Co. *v.* Fenton Metallic Mfg. Co., 174 U. S. 492, 19 S. Ct. 641, 43 L. ed. 1058; Goodyear Tire, etc., Co. *v.* Rubber Tire Wheel Co., 116 Fed. 363, 53 C. C. A. 583. Aggregation applies to article as well as machine. Antisdel *v.* Chicago Hotel Cabinet Co., 89 Fed. 308, 32 C. C. A. 216. Aggregation applies to designs. Northrup *v.* Adams, 18 Fed. Cas. No. 10,328, 2 Ban. & A. 567, 12 Off. Gaz. 430.

21. Richards *v.* Chase Elevator Co., 158 U. S. 299, 15 S. Ct. 831, 39 L. ed. 991, 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225.

22. Florsheim *v.* Schilling, 137 U. S. 64, 11 S. Ct. 20, 34 L. ed. 574; Overweight Counterbalance Elevator Co. *v.* Henry Vogt Mach. Co., 102 Fed. 957, 43 C. C. A. 80; Interior Lumber Co. *v.* Perkins, 80 Fed. 528, 25 C. C. A. 613; Campbell *v.* H. T. Conde Implement Co., 74 Fed. 745; Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140; Buck *v.* Hermance, 4 Fed. Cas. No. 2,082, 1 Blatchf. 398, 1 Fish. Pat. Rep. 251.

23. *In re* McNeill, 20 App. Cas. (D. C.) 294; Batten *v.* Clayton, 2 Fed. Cas. No. 1,105.

Claim to combination is an implied concession that the elements are separately old. Overweight Counterbalance Elevator Co. *v.* Improved Order of Red Men's Hall Assoc., 94 Fed. 155, 36 C. C. A. 125; Hay *v.* S. F. Heath Cycle Co., 71 Fed. 411, 18 C. C. A. 157.

24. Claim to combination protects all new parts. Parkes *v.* Stevens, L. R. 5 Ch. 36, 22 L. T. Rep. N. S. 635, 18 Wkly. Rep. 233 [*affirmed* in L. R. 8 Eq. 358, 38 L. J. Ch. 627, 17 Wkly. Rep. 846].

25. Gandy *v.* Main Belting Co., 143 U. S. 587, 12 S. Ct. 598, 36 L. ed. 272; American Graphophone Co. *v.* Universal Talking Mach. Mfg. Co., 151 Fed. 595, 81 C. C. A. 139 [*reversing* 145 Fed. 636, 643]; Albright *v.* Langfeld, 131 Fed. 473; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; George Frost Co. *v.* Cohn, 119 Fed. 505, 56 C. C. A. 185; Hanifen *v.* Armitage, 117 Fed. 845; Star Brass Works *v.* General Electric Co., 111 Fed. 398, 49 C. C. A. 409; Tannage Patent Co. *v.* Donallan, 93 Fed. 811; Thomson-Houston Electric Co. *v.* Winchester Ave. R. Co., 71 Fed. 192; Binns *v.* Zucker, etc., Chemical Co., 70 Fed. 711; Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581 [*modified* in 63 Fed. 962, 11 C. C. A. 528]; Columbia Chemical Works *v.* Rutherford, 58 Fed. 787; Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 47 Fed. 874; Niles Tool-Works *v.* Betts Mach. Co., 27 Fed. 301; Ward *v.* Grand Detour Plow Co., 14 Fed. 696; Pearl *v.* Ocean Mills, 19 Fed. Cas. No. 10,876, 2 Ban. & A. 469, 11 Off. Gaz. 2; Terry Clock Co. *v.* New Haven Clock Co., 23 Fed. Cas. No. 13,840, 4 Ban.

scope of mechanical skill not being restricted to the skill of any particular mechanic, it is not conclusive that more than mechanical skill was involved in producing a particular device, that, prior to the application for the patent thereon, a device has been produced by another person for the same purpose which was different from and inferior to that of the patent;[26] and simultaneous suggestion by many is evidence that invention is lacking.[27]

b. Supplying Long-Felt Want. A long-felt want and unsupplied need for means accomplishing the results of the patented device is evidence tending to show that its production called for an exercise of the inventive faculties.[28]

c. Popularity of the Supposed Invention. The fact that the patented device meets with immediate public favor and displaces others for the same purpose on the market is evidence of utility and some evidence of invention,[29] but will not be

& A. 121, 17 Off. Gaz. 909. *Compare* Butler *v.* Steckel, 27 Fed. 219.

Conception of new method involving different principle.— Where an existing process or device discloses what appear to be insuperable objections to practical operations, it is persuasive evidence of invention that an improver has the foresight and courage to break away from such disclosure and conceive of some new method involving a different principle. American Graphophone Co. *v.* Universal Talking Mach. Mfg. Co., 151 Fed. 595, 81 C. C. A. 139 [*reversing* 145 Fed. 636, 643].

26. Johnson Co. *v.* Pennsylvania Steel Co., 67 Fed. 940 [*affirmed* in 70 Fed. 244, 17 C. C. A. 88].

27. Thomson-Houston Electric Co. *v.* Lorain Steel Co., 117 Fed. 249, 54 C. C. A. 281; Haslem *v.* Pittsburg Plate-Glass Co., 68 Fed. 479; Bromley Bros. Carpet Co. *v.* Stewart, 51 Fed. 912.

28. Matter of Pennock, 1 MacArthur (D. C.) 531; Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553; Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 14 S. Ct. 295, 38 L. ed. 103 [*reversing* 35 Fed. 579]; Brill *v.* North Jersey St. R. Co., 124 Fed. 778 [*reversed* on other grounds in 134 Fed. 580, 67 C. C. A. 380]; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 124 Fed. 514; Peters *v.* Union Biscuit Co., 120 Fed. 679 [*reversed* on other grounds in 125 Fed. 601, 60 C. C. A. 337]; Hallock *v.* Davison, 107 Fed. 482; Celluloid Co. *v.* Arlington Mfg. Co., 85 Fed. 449; Steel-Clad Bath Co. *v.* Davison, 77 Fed. 736; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 [*affirming* 69 Fed. 837]; Taylor Burner Co. *v.* Diamond, 72 Fed. 182; Horn *v.* Bergner, 68 Fed. 428 [*affirmed* in 72 Fed. 687]; Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 59 Fed. 902; Watson *v.* Stevens, 51 Fed. 757, 2 C. C. A. 500 [*reversing* 47 Fed. 117]; Electrical Accumulator Co. *v.* New York, etc., R. Co., 50 Fed. 81; Guarantee Trust, etc., Co. *v.* New Haven Gas-Light Co., 39 Fed. 268; Asmus *v.* Alden, 27 Fed. 684 [*reversed* on other grounds in 145 U. S. 226, 12 S. Ct. 939, 36 L. ed. 685].

Increasing work performed by machine one fourth shows invention. Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177.

Superiority indicates invention. Sawyer Spindle Co. *v.* Taylor, 69 Fed. 837 [*affirmed* in 75 Fed. 301, 22 C. C. A. 203]; *Ex p.* Arthur, 1 Fed. Cas. No. 563*a*; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Many *v.* Sizer, 16 Fed. Cas. No. 9,056, 1 Fish. Pat. Cas. 17; Seymour *v.* Marsh, 21 Fed. Cas. No. 12,687, 6 Fish. Pat. Cas. 115, 2 Off. Gaz. 675, 9 Phila. (Pa.) 380.

29. Fenton Metallic Mfg. Co. *v.* Office Specialty Mfg. Co., 12 App. Cas. (D. C.) 201; Olin *v.* Timken, 155 U. S. 141, 15 S. Ct. 49, 39 L. ed. 100; Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553; Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 14 S. Ct. 295, 38 L. ed. 103; Duer *v.* Corbin Cabinet Lock Co., 149 U. S. 216, 13 S. Ct. 850, 37 L. ed. 707; Krementz *v.* S. Cottle Co., 148 U. S. 556, 13 S. Ct. 719, 37 L. ed. 558; Grant *v.* Walter, 148 U. S. 547, 13 S. Ct. 699, 37 L. ed. 552; Gandy *v.* Main Belting Co., 143 U. S. 587, 12 S. Ct. 598, 36 L. ed. 272; McCreary *v.* Pennsylvania Canal Co., 141 U. S. 459, 12 S. Ct. 40, 35 L. ed. 817; McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Magowan *v.* New York Belting, etc., Co., 141 U. S. 332, 12 S. Ct. 71, 35 L. ed. 781; Goodyear Tire, etc., Co. *v.* Ruhber Tire Wheel Co., 116 Fed. 363, 53 C. C. A. 583; Kinloch Tel Co. *v.* Western Electric Co., 113 Fed. 659, 51 C. C. A. 369; Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., 113 Fed. 264, 51 C. C. A. 221; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Christy *v.* Hygeia Pneumatic Bicycle Saddle Co., 93 Fed. 965, 36 C. C. A. 31; Stevenson Co. *v.* McFassell, 90 Fed. 707, 33 C. C. A. 249; Morrin *v.* Lawler, 90 Fed. 285; Wilkins Shoe-Button Fastener Co. *v.* Webb, 89 Fed. 982; Allington, etc., Mfg. Co. *v.* Globe Co., 89 Fed. 865; Consolidated Car Heating Co. *v.* American Electric Heating Corp., 82 Fed. 993; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 [*affirming* 69 Fed. 837]; Dueber Watch-Case Mfg. Co. *v.* Robbins, 75 Fed. 17, 21 C. C. A. 198; Brownson *v.* Dodson-Fisher-Brockmann Co., 71 Fed. 517; National Co. *v.* Belcher, 68 Fed. 665; Holmes *v.* Truman, 67 Fed. 542, 14 C. C. A. 517; Miller *v.* Handley, 61 Fed. 100; Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157; Lalance, etc., Mfg. Co. *v.* Habermann Mfg. Co., 53 Fed. 375; Featherstone *v.* George R. Bidwell Cycle

accepted as proof except in cases of doubt.[30] This is because the popularity may be due to extensive advertising or other things than its superiority.[31]

F. Statutory Forfeiture Regardless of Intent — 1. In General. Since the purpose of the patent system is to secure for the public of this country a knowledge of and the right to use new inventions and discoveries the inventor is required to proceed diligently in securing his patent under penalty of a forfeiture of his inchoate right.[32] There are provisions in the statutes by which this forfeiture may occur contrary to the inventor's intent and without his knowledge.[33]

2. Publication Two Years Before Application. If the invention is described in a patent or printed publication in this country or abroad, with or without the knowledge or consent of the inventor, more than two years before his application for patent is filed, no valid patent can issue.[34]

Co., 53 Fed. 113; Fox *v.* Perkins, 52 Fed. 205, 3 C. C. A. 32; Watson *v.* Stevens, 51 Fed. 757, 2 C. C. A. 500; Electrical Accumulator Co. *v.* New York, etc., R. Co., 50 Fed. 81; Stearns *v.* Phillips, 43 Fed. 792; Chicopee Folding-Box Co. *v.* Nugent, 41 Fed. 139 [*affirmed* in 51 Fed. 229, 2 C. C. A. 165]; Parker *v.* Dickinson, 38 Fed. 413; Palmer *v.* Johnston, 34 Fed. 336; Good *v.* Bailey, 33 Fed. 42; Hill *v.* Biddle, 27 Fed. 560; Miller *v.* Pickering, 16 Fed. 540; Western Electric Mfg. Co. *v.* Chicago Electric Mfg. Co., 14 Fed. 691, 11 Biss. 427; Gottfried *v.* Crescent Brewing Co., 13 Fed. 479; Lindsay *v.* Stein, 10 Fed. 907, 20 Blatchf. 370; Shedd *v.* Washburn, 9 Fed. 904; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Strobridge *v.* Lindsay, 2 Fed. 692; Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Eames *v.* Cook, 8 Fed. Cas. No. 4,239, 2 Fish. Pat. Cas. 146; Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Lorillard *v.* McDowell, 15 Fed. Cas. No. 8,510, 2 Ban. & A. 531, 11 Off. Gaz. 640, 13 Phila. (Pa.) 461; Schaum *v.* Baker, 21 Fed. Cas. No. 12,440; Stanley Works *v.* Sargent, 22 Fed. Cas. No. 13,289, 8 Blatchf. 344, 4 Fish. Pat. Cas. 443.

Where the patent is void, extensive use is immaterial. Duer *v.* Corbin Cabinet Lock Co., 149 U. S. 216, 13 S. Ct. 850, 37 L. ed. 707 [*affirming* 37 Fed. 338].

No extent of use can cure the want of invention or make aggregation patentable. Voightmann *v.* Weis, etc., Cornice Co., 133 Fed. 298 [*affirmed* in 148 Fed. 848, 78 C. C. A. 538].

30. *In re* Smith, 14 App. Cas. (D. C.) 181; Durham *v.* Seymour, 6 App. Cas. (D. C.) 78; Adams *v.* Bellaire Stamping Co., 141 U. S. 539, 12 S. Ct. 66, 35 L. ed. 849; McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Voightmann *v.* Weis, etc., Cornice Co., 148 Fed. 848, 78 C. C. A. 538 [*affirming* 133 Fed. 298]; General Electric Co. *v.* Yost Electric Mfg. Co., 131 Fed. 874; American Salesbook Co. *v.* Carter-Crume Co., 125 Fed. 499 [*reversed* on other grounds in 129 Fed. 1004, 62 C. C. A. 679]; American Sales Book Co. *v.* Bullivant, 117 Fed. 255, 54 C. C. A. 287; Standard Caster, etc., Co. *v.* Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109; Goss Printing-Press Co. *v.* Scott, 103 Fed. 650 [*reversed* on other grounds in 108 Fed. 253, 47 C. C. A. 302]; National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 99 Fed. 758; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Ingraham Co. *v.* E. N. Welch Mfg. Co., 92 Fed. 1019, 35 C. C. A. 163; Rubber Tire Wheel Co. *v.* Columbia Pneumatic Wagon Wheel Co., 91 Fed. 978; McEwan Bros. Co. *v.* McEwan, 91 Fed. 787; Perry *v.* Revere Rubber Co., 86 Fed. 633; Michigan Stove Co. *v.* Fuller-Warren Co., 81 Fed. 376; Schwarzwaelder *v.* Detroit, 77 Fed. 886; Klein *v.* Seattle, 77 Fed. 200, 23 C. C. A. 114 [*affirming* 63 Fed. 702]; Consolidated Electric Mfg. Co. *v.* Holtzer, 67 Fed. 907, 15 C. C. A. 63; Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157; Washburn, etc., Mfg. Co. *v.* Grinnell Wire Co., 24 Fed. 23; Wilson Packing Co. *v.* Chicago Packing, etc., Co., 9 Fed. 547, 10 Biss. 559; Dion *v.* Dupuis, 12 Quebec Super. Ct. 465.

That success is important only in case of doubt see Falk Mfg. Co. *v.* Missouri R. Co., 103 Fed. 295, 43 C. C. A. 240.

31. Gardner *v.* Herz, 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158; Doig *v.* Morgan Mach. Co., 122 Fed. 460, 59 C. C. A. 616; Dowagiac *v.* Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36; Dueber Watch Case Co. *v.* Robbins, 75 Fed. 17, 21 C. C. A. 198 [*reversing* 71 Fed. 186]; Stahl *v.* Williams, 64 Fed. 121; Fox *v.* Perkins, 52 Fed. 205, 3 C. C. A. 32; Peoria Target Co. *v.* Cleveland Target Co., 47 Fed. 725. And see Ypsilanti Dress-Stay Mfg. Co. *v.* Van Valkenburg, 72 Fed. 277 [*affirmed* in 78 Fed. 926, 24 C. C. A. 416], in which it was said that popularity may be due to workmanship, attractive display, or advertising.

32. *In re* Mower, 15 App. Cas. (D. C.) 144; Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86; Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Eck *v.* Kutz, 132 Fed. 758; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323; Matthes *v.* Burt, 114 Off. Gaz. 764.

33. U. S. Rev. St. (1878) § 4886; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609.

34. U. S. Rev. St. (1878) §§ 4886, 4920 [U. S. Comp. St. (1901) pp. 3382, 3394], as amended by Act, March 3, 1897.

3. Foreign Patent. If the inventor first secures or allows his representatives to secure a patent upon the invention abroad on an application filed more than twelve months before his application in this country no valid patent can issue here.[35] The limitation is four months in case of design patents.[36]

4. Concealment of Invention. If the inventor conceals the invention from the public for a long period of time after he has perfected it, and in the mean time some other party makes the invention, the invention becomes public property and cannot be patented by any one,[37] or is to be patented to the one who was really second to invent, but first to give to the public.[38]

5. Date of Application. The date of application controlling in considering public use or sale and publication is the date of application in this country,[39] or the date of application abroad within twelve months of the application here, provided the foreign country is a member of the international convention or has similar treaty relations with this country.[40]

6. Renewal or Substitute Application. Where an application here is forfeited and renewed,[41] or is filed as a substitute for and continuation of a prior application,[42] the original filing date controls; but to obtain the benefit of the original

35. U. S. Rev. St. (1878) § 4887 [U. S. Comp. St. (1901) p. 3382], as amended March 3, 1903. Under the act of March 3, 1897, the limitation was seven months and that applies to applications filed between Jan. 1, 1898, and the passage of the act of 1903. *In re* Swinburne, 19 App. Cas. (D. C.) 565.

Application of statute.—The act applies only to patents granted after Jan. 1, 1898. Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85; Patric *v.* Sylvester, 23 Grant Ch. (U. C.) 573.

36. U. S. Rev. St. (1878) § 4887 [U. S. Comp. St. (1901) p. 3382], as amended March 3, 1903.

37. *In re* Mower, 15 App. Cas. (D. C.) 144; Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68; Kindall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252. The inventor may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement shall have been made and introduced by others. Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165.

Where due to poverty, concealment and failure to apply for patent is not a bar. Celluloid Mfg. Co. *v.* Crofut, 24 Fed. 796; Ayling *v.* Hull, 2 Fed. Cas. No. 686, 2 Cliff. 494; Sprague *v.* Adriance, 22 Fed. Cas. No. 13,248, 3 Ban. & A. 124, 14 Off. Gaz. 308.

38. Brown *v.* Blood, 22 App. Cas. (D. C.) 216; Thomson *v.* Weston, 19 App. Cas. (D. C.) 373; Warner *v.* Smith, 13 App. Cas. (D. C.) 111; Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86; Berg *v.* Thistle, 3 Fed. Cas. No. 1,337; Bullock Printing-Press Co. *v.* Jones, 4 Fed. Cas. No. 2,132, 3 Ban. & A. 195, 13 Off. Gaz. 124; Consolidated Fruit-Jar Co. *v.* Wright, 6 Fed. Cas. No. 3,135, 12 Blatchf. 149, 1 Ban. & A. 320, 6 Off. Gaz. 327; Marcy *v.* Trotter, 16 Fed. Cas. No. 9,063; Snowden *v.* Pierce, 22 Fed. Cas. No. 13,151, 2 Hayw. & H. 386; Spear *v.* Belson, 22 Fed. Cas. No. 13,223, McArthur Pat. Cas. 699; U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 28 Fed. Cas. No. 16,793, 2 Ban. & A. 493, 14 Blatchf. 94, 11 Off. Gaz. 373; Walker *v.* Forbes, 29 Fed. Cas. No. 17,069; Matthes *v.* Burt, 114 Off. Gaz. 764.

39. Date of filing in patent office and not date of execution controls. Campbell *v.* New York, 35 Fed. 504, 1 L. R. A. 48.

The English application dates from provisional specification. *In re* Swinburn, 19 App. Cas. (D. C.) 565.

40. U. S. Rev. St. (1878) § 4887 [U. S. Comp. St. (1901) p. 3382], as amended March 3, 1903.

41. U. S. Rev. St. (1878) § 4897 [U. S. Comp. St. (1901) p. 3386]; Cain *v.* Park, 14 App. Cas. (D C.) 42; Ligowski Clay-Pigeon Co. *v.* American Clay-Bird Co., 34 Fed. 328.

The renewed application confers no right in addition to that of the first application.—It confers no right as against a prior inventor who happened to file his application subsequent to that of the second inventor. At most the first application could only acquire an inchoate right as against a prior inventor, dependent upon it being made to appear that the first inventor had either abandoned his invention or lost the right to it by the want of reasonable diligence in perfecting it and making application for a patent. Christensen *v.* Noyes, 90 Off. Gaz. 227.

42. Godfrey *v.* Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Stimpson *v.* West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; L. E. Waterman Co. *v.* McCutcheon, 127 Fed. 1020, 61 C. C. A. 653; L. E. Waterman *v.* Forsyth, 121 Fed. 103; International Tooth-Crown Co. *v.* Richmond, 30 Fed. 775; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Bevin *v.* East Hampton Bell Co., 3 Fed. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed.

date, the renewal must be in accordance with the terms of the law;[43] and where there is unreasonable delay between applications, the date of the second controls.[44]

7. Divisional Applications. The principles stated in the preceding section apply in the case of divisional applications.[45]

8. Prior Public Use or Sale — a. As Bar to Patent. By the provisions of the statutes, if the invention was in public use or on sale in this country with or without the consent of the inventor more than two years before his application was filed the grant of a patent is barred.[46] It must, however, have been in public use

Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Goodyear Dental Vulcanite Co. *v.* Root, 10 Fed. Cas. No. 5,597, 1 Ban. & A. 384, 6 Off. Gaz. 154; Goodyear Dental Vulcanite Co. *v.* Smith, 10 Fed. Cas. No. 5,598, 1 Ban. & A. 201, Holmes 354, 5 Off. Gaz. 585 [*affirmed* in 93 U. S. 486, 23 L. ed. 952]; Henry *v.* Francestown Soapstone Stove Co., 11 Fed. Cas. No. 6,382, 2 Ban. & A. 221, 9 Off. Gaz. 408; Howe *v.* Newton, 12 Fed. Cas. No. 6,771, 2 Fish. Pat. Cas. 531; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630; Matthews *v.* Wade, 16 Fed. Cas. No. 9,292, McArthur Pat. Cas. 143; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1, 1 Pittsb. (Pa.) 31; Singer *v.* Braunsdorf, 22 Fed. Cas. No. 12,897, 7 Blatchf. 521; Smith *v.* Prior, 22 Fed. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461, 4 Off. Gaz. 633; Weston *v.* White, 29 Fed. Cas. No. 17,459, 2 Ban. & A. 364, 13 Blatchf. 447.

Withdrawal due to mistake of patent office will not forfeit rights. Hayden *v.* James, 11 Fed. Cas. No. 6,260.

Application abandoned before another is filed cannot avail the patentee. Carty *v.* Kellogg, 7 App. Cas. (D. C.) 542; Hayes-Young Tie Plate Co. *v.* St. Louis Transit Co., 130 Fed. 900; Lindsay *v.* Stein, 10 Fed. 907, 20 Blatchf. 370; Bevin *v.* East Hampton Bell Co., 3 Fed. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1.

For excusable delay in renewing application see Colgate *v.* Western Union Tel. Co., 6 Fed. Cas. No. 2,995, 4 Ban. & A. 36, 15 Blatchf. 365, 14 Off. Gaz. 943; Goodyear Dental Vulcanite Co. *v.* Willis, 10 Fed. Cas. No. 5,603, 1 Ban. & A. 568, 1 Flipp. 388, 7 Off. Gaz. 41; Howes *v.* McNeal, 12 Fed. Cas. No. 6,789, 3 Ban. & A. 376, 15 Blatchf. 103, 15 Off. Gaz. 608.

43. Ostergren *v.* Tripler, 17 App. Cas. (D. C.) 557; Christensen *v.* Noyes, 90 Off. Gaz. 223.

44. U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53; Consolidated Fruit-Jar Co. *v.* Bellaire Stamping Co., 27 Fed. 377; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 26 Fed. 104; Bevin *v.* East Hampton Bell Co., 3 Fed. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; *Ex p.* Dedericks, 7 Fed. Cas. No. 3,734; *Ex p.* Raymond, 20 Fed. Cas. No. 11,592*a*; Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645.

45. Stirling Co. *v.* St. Louis Brewing Assoc., 79 Fed. 80; Dederick *v.* Fox, 56 Fed. 714; Frankfort Whisky Process Co. *v.* Mill Creek Distilling Co., 37 Fed. 533; Graham *v.* Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

46. U. S. Rev. St. (1878) §§ 4886, 4920; Andrews *v.* Hovey, 123 U. S. 267, 8 S. Ct. 101, 31 L. ed. 160; Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68; Lettelier *v.* Mann, 91 Fed. 917; Hutchinson *v.* Everett, 26 Fed. 531; Union Paper-Bag Mach. Co. *v.* Atlas Bag Co., 6 Fed. 398; Arnold *v.* Bishop, 1 Fed. Cas. No. 552, Cranch Pat. Dec. 103, McArthur Pat. Cas. 27; Blackinton *v.* Douglass, 3 Fed. Cas. No. 1,470, McArthur Pat. Cas. 622; Cleveland *v.* Towle, 5 Fed. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Cowperwaithe *v.* Gill, 6 Fed. Cas. No. 3,298; Ellithorp *v.* Robertson, 8 Fed. Cas. No. 4,410, McArthur Pat. Cas. 634; Hunt *v.* Howe, 12 Fed. Cas. No. 6,891, McArthur Pat. Cas. 366; Justice *v.* Jones, 13 Fed. Cas. No. 7,588, McArthur Pat. Cas. 635; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 4 Cliff. 424, 3 Ban. & A. 438, 14 Off. Gaz. 673; Lovering *v.* Dutcher, 15 Fed. Cas. No. 8,553, 2 Hayw. & H. 367; Manning *v.* Cape Ann Isinglass, etc., Co., 16 Fed. Cas. No. 9,041, 4 Ban. & A. 612, 9 Reporter 337 [*affirmed* in 108 U. S. 462, 2 S. Ct. 860, 27 L. ed. 793]; Monce *v.* Woodworth, 17 Fed. Cas. No. 9,706, 4 Ban. & A. 307, 19 Off. Gaz. 998; Rugg *v.* Haines, 20 Fed. Cas. No. 12,114, McArthur Pat. Cas. 420; Tappan *v.* National Bank-Note Co., 24 Fed. Cas. No. 14,100.

The rule is inflexible without regard to excuses for delay. Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Sisson *v.* Gilbert, 22 Fed. Cas. No. 12,912, 9 Blatchf. 185, 5 Fish. Pat. Cas. 109. *Contra*, see McMillan *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275.

The rule applies to designs as well as mechanical inventions. Anderson *v.* Monroe, 55 Fed. 407; Anderson *v.* Eiler, 46 Fed. 777 [*affirmed* in 50 Fed. 775, 1 C. C. A. 659]; Theberath *v.* Rubber, etc., Harness Trimming Co., 15 Fed. 246; *In re* Tournier, 94 Off. Gaz. 2166.

In England any use by inventor or others in realm before patent is a bar. Household Coal, etc., Co. *v.* Neilson, 9 Cl. & F. 788, 8 Eng. Reprint 616. The use must be public. Heath *v.* Smith, 2 C. L. R. 1584, 3 E. & B. 256, 18 Jur. 601, 23 L. J. Q. B. 166, 2 Wkly. Rep. 200, 77 E. C. L. 256; Caldwell *v.* Van-

or on sale for more than two years prior to the application to bar the grant of a patent.[47]

b. Nature of Use Sufficient to Bar Patent — (i) *In General.* The bar of public use arises from use by the inventor himself or by others,[48] but in either case it must be such as makes the invention accessible to some members of the public.[49] Public use, however, does not mean a general adoption or use by the public, but a use in public, as distinguished from a secret use.[50] Exhibition of a design is a public use.[51]

(ii) *Single Instance Sufficient.* A single instance of public use by a single individual will operate as a bar.[52] General and continuous use is unnecessary.[53]

(iii) *Knowledge or Consent of the Inventor.* The bar arises whether or not the inventor knows of or consents to the public use.[54]

vlissengen, 9 Hare 415, 16 Jur. 115, 21 L. J. Ch. 97, 41 Eng. Ch. 415, 68 Eng. Reprint 571; Carpenter *v.* Smith, 11 L. J. Exch. 213, 9 M. & W. 300.

In Canada public use with the inventor's consent before application is a bar. Bonathan *v.* Bowmanville Furniture Mfg. Co., 31 U. C. Q. B. 413.

47. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Babcock *v.* Degener, 2 Fed. Cas. No. 698, McArthur Pat. Cas. 607; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240 [*modified* in 16 How. 480, 14 L. ed 1024]; McMillan *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Mellus *v.* Silsbee, 16 Fed. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506; Root *v.* Ball, 20 Fed. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167; Sicles *v.* Pacific Mail Steamship Co., 22 Fed. Cas. No. 12,842.

48. National Phonograph Co. *v.* Lambert Co., 125 Fed. 388 [*affirmed* in 142 Fed. 164, 73 C. C. A. 382]; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 117 Fed. 249, 54 C. C. A. 281; Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327]; Sisson *v.* Gilbert, 22 Fed. Cas. No. 12,912, 9 Blatchf. 185, 5 Fish. Pat. Cas. 109.

Where the inventor for pay teaches others to use the invention it is public use. International Tooth-Crown Co. *v.* Gaylord, 140 U. S. 55, 11 S. Ct. 716, 35 L. ed. 347.

In England use bars a patent in Scotland. Brown *v.* Annandale, 8 Cl. & F. 437, 8 Eng. Reprint 170; *In re* Robinson, 5 Moore P. C. 65, 13 Eng. Reprint 414. Making without sale after application may not constitute a bar. Betts *v.* Menzies, 5 Jur. N. S. 1164, 28 L. J. Q. B. 361; Summers *v.* Abell, 15 Grant Ch. (U. C.) 532.

49. Indiana Novelty Mfg. Co. *v.* Crocker Chair Co., 90 Fed. 488; American Roll-Paper Co. *v.* Weston, 59 Fed. 147, 8 C. C. A. 56.

50. Blackinton *v.* Douglass, 3 Fed. Cas. No. 1,470, McArthur Pat. Cas. 622; Ellithorp *v.* Robertson, 8 Fed. Cas. No. 4,409, McArthur Pat. Cas. 585; Henry *v.* Providence Tool Co., 11 Fed. Cas. No. 6,384, 3 Ban. & A. 501, 14 Off. Gaz. 855; Hunt *v.* Howe, 12 Fed. Cas. No. 6,891, McArthur Pat. Cas. 366.

Use in shop where the workmen are under no pledge of secrecy is a public use. Perkins *v.* Nashua Card, etc., Co., 2 Fed. 451.

51. Young *v.* Clipper Mfg. Co., 121 Fed. 560 [*affirmed* in 130 Fed. 150, 64 C. C. A. 502].

Exhibition of an experimentally constructed machine by the inventor to a non-paying audience is not a public use. Victor Talking Mach. Co. *v.* American Graphophone Co., 140 Fed. 860 [*affirmed* in 145 Fed. 350, 76 C. C. A. 180].

52. Clark Pomace-Holder Co. *v.* Ferguson, 17 Fed. 79, 21 Blatchf. 376; Jones *v.* Barker, 11 Fed. 597; Egbert *v.* Lippmann, 8 Fed. Cas. No. 4,306, 3 Ban. & A. 468, 15 Blatchf. 295, 14 Off. Gaz. 822 [*affirmed* in 104 U. S. 333, 26 L. ed. 755]; Dalby *v.* Lynes, 71 Off. Gaz. 1317; Worley *v.* Loker Tobacco Co., 21 Off. Gaz. 559; Household Coal, etc., Co. *v.* Neilson, 9 Cl. & F. 788, 8 Eng. Reprint 616; Hessin *v.* Coppin, 19 Grant Ch. (U. C.) 629; Abell *v.* McPherson, 17 Grant Ch. (U. C.) 23.

Three articles made and used as samples constitute a bar. Dalby *v.* Lynes, 64 Fed. 376.

53. Flomerfelt *v.* Newwitter, 88 Fed. 696; Clisby *v.* Reese, 88 Fed. 645, 32 C. C. A. 80.

54. *In re* Drawbaugh, 3 App. Cas. (D. C.) 236; Andrews *v.* Hovey, 123 U. S. 267, 8 S. Ct. 101, 31 L. ed. 160; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673.

In Canada public use one year is a bar with or without consent. Patric *v.* Sylvester, 23 Grant Ch. (U. C.) 573.

Under the former law, knowledge and consent were necessary. Davis *v.* Fredericks, 19 Fed. 99, 21 Blatchf. 556; Emery *v.* Cavanagh, 17 Fed. 242; Campbell *v.* New York, 9 Fed. 500, 35 Fed. 504, 1 L. R. A. 48; Carroll *v.* Gambrill, 5 Fed. Cas. No. 2,454, McArthur Pat. Cas. 581; Draper *v.* Wattles, 7 Fed. Cas. No. 4,073, 3 Ban. & A. 618, 16 Off. Gaz. 629; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632, 2

(iv) *Invention Must Be Complete.* To constitute public use the invention must have been complete.[55] This does not mean, however, that the machine embodying it must have been perfect, but merely that it shall be sufficiently perfect to be practically applied to its intended purpose.[56]

(v) *Experimental Use.* Use for purposes of experiment having in view the perfection of the invention is not a public use, although it occurs in public,[57] and such experimental use may continue for many years without operating as a bar,[58] according to the character of the particular invention and the time necessary to develop and perfect it and determine its practical efficiency.[59]

(vi) *Secret Use.* Use of the invention in secret either by the inventor or his agents under an injunction of secrecy is not a public use.[60] But permitting another to use the invention without any injunction of secrecy is public use, although the use may have been concealed from others.[61]

(vii) *Natural and Intended Use.* Use of an invention in public, however, in its natural and intended way is a public use,[62] although from its nature it is concealed from the general view of the public.[63]

(viii) *Use For Profit.* When an invention is used for the purpose of

Off. Gaz. 495; Ryan *v.* Goodwin, 21 Fed. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

55. Huntington Dry-Pulverizer Co. *v.* Newell Universal Mill Co., 109 Fed. 269; Peeney *v.* Lakeview, 35 Fed. 586; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.

56. Newark Mach. Co. *v.* Hargett, 28 Fed. 567; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.

57. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; American Caramel Co. *v.* Mills, 149 Fed. 743, 79 C. C. A. 449 [*reversing* 138 Fed. 142]; Comptograph Co. *v.* Universal Accountant Mach. Co., 142 Fed. 539 [*reversed* on other grounds in 146 Fed. 981, 77 C. C. A. 227]; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 117 Fed. 249, 54 C. C. A. 281; Westinghouse Electric, etc., Co. *v.* Saranac Lake Electric Light Co., 108 Fed. 221; Pacific Cable R. Co. *v.* Butte City St. R. Co., 55 Fed. 760 [*reversed* in 60 Fed. 410, 9 C. C. A. 41]; Eastern Paper-Bag Co. *v.* Standard Paper-Bag Co., 30 Fed. 63; Railway Register Mfg. Co. *v.* Broadway, etc., R. Co., 22 Fed. 655, 26 Fed. 522; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Jennings *v* Pierce, 13 Fed. Cas. No. 7,283, 3 Ban. & A. 361, 15 Blatchf. 42; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630; Locomotive Engine Safety Truck Co. *v.* Pennsylvania R. Co., 15 Fed. Cas. No. 8,453, 1 Ban. & A. 470, 10 Blatchf. 292, 6 Off. Gaz. 927, 1 Wkly. Notes Cas. (Pa.) 16; Morris *v.* Huntington, 17 Fed. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441; Stanley *v.* Hewitt, 22 Fed. Cas. No. 13,285; U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 28 Fed. Cas. No. 16,793, 2 Ban. & A. 493, 14 Blatchf. 94, 11 Off. Gaz. 373 [*affirmed* in 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53]; Winans *v.* Schenectady, etc., R. Co., 30 Fed. Cas. No. 17,865, 2 Blatchf. 279; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Morgan *v.* Seaward, 1 Jur. 527, 6 L. J. Exch. 153, M. & H. 55, 2 M. & W. 544; Conway *v.* Ottawa Electric R. Co., 8 Can. Exch. 432.

Unavoidable disclosure in experiments is no bar. *In re* Newall, 4 C. B. N. S. 269, 4 Jur. N. S. 562, 27 L. J. C. P. 337, 93 E. C. L. 269; Bentley *v.* Fleming, 1 C. & K. 587, 47 E. C. L. 587; Hills *v.* London Gas Light Co., 5 H. & N. 312, 29 L. J. Exch. 409.

58. Use of pavement on public street six years for experiment not public use. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

59. Henry *v.* Francestown Soapstone Stove Co., 11 Fed. Cas. No. 6,382, 2 Ban. & A. 221, 9 Off. Gaz. 408.

Use without inventor's knowledge during experiments by him is no bar. Campbell *v.* New York, 47 Fed. 515.

60. Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1; Hunt *v.* Howe, 12 Fed. Cas. No. 6,891, McArthur Pat. Cas. 366.

61. Manning *v.* Cape Ann Isinglass, etc., Co., 108 U. S. 462, 2 S. Ct. 860, 27 L. ed. 793; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

62. Brush *v.* Condit, 132 U. S. 39, 10 S. Ct. 1, 33 L. ed. 251; Hall *v.* Macneale, 107 U. S. 90, 2 S. Ct. 73, 27 L. ed. 367; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 110 Fed. 654 [*affirmed* in 117 Fed. 249, 54 C. C. A. 281]; Lettelier *v.* Mann, 91 Fed. 917.

Use in employer's factory is public use. *In re* Tournier, 17 App. Cas. (D. C.) 481; Worley *v.* Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821.

63. Brush *v.* Condit, 132 U. S. 39, 10 S. Ct. 1, 33 L. ed. 251; Hall *v.* Macneale, 107 U. S. 90, 2 S. Ct. 73, 27 L. ed. 367; Perkins *v.* Nashua Card, etc., Co., 2 Fed. 451.

experiment it is not rendered a public use by the fact that a profit was derived from its use.[64] But where profit was the controlling cause of the use and the experiment was merely incidental the grant of a patent is barred.[65]

(IX) *USE IN A FOREIGN COUNTRY.* Use abroad is not a public use which will invalidate a patent in the United States. To constitute a bar the use must be in this country.[66] In Canada public use abroad before the invention by the patentee invalidates the patent.[67]

c. On Sale — (I) *IN GENERAL.* An invention is on sale when articles or machines embodying it are made and offered for sale or are sold,[68] but an offer or agreement to make and deliver an invention not already made and tested does not place it on sale.[69] An assignment of the right to secure a patent is not placing the invention on sale.[70]

(II) *SINGLE SALE SUFFICIENT.* A single unrestricted sale is sufficient to constitute placing the invention on sale.[71]

(III) *OFFER FOR SALE.* An offer to sell articles previously made and tested embodying the invention places it on sale, although no actual sales were made.[72]

(IV) *SALE FOR EXPERIMENT.* There may be an actual sale without placing the invention on sale within the meaning of the law where done for the purpose of securing an adequate test of the invention.[73] There is a clear distinction between sales for the purpose of testing the market and sales to test the invention

64. Smith, etc., Mfg. Co. *v.* Sprague, 123 U. S. 249, 8 S. Ct. 122, 31 L. ed. 141; Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265; Jennings *v.* Pierce, 13 Fed. Cas. No. 7,283, 3 Ban. & A. 361, 15 Blatchf. 42.

65. Root *v.* Third Ave. R. Co., 146 U. S. 210, 13 S. Ct. 100, 36 L. ed. 946; Smith, etc., Mfg. Co. *v.* Sprague, 123 U. S. 249, 8 S. Ct. 122, 31 L. ed. 141 [*reversing* 12 Fed. 721]; Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68.

66. U. S. Rev. St. (1878) § 4923 [U. S. Comp. St. (1901) p. 3396]; Gandy *v.* Main Belting Co., 143 U. S. 587, 12 S. Ct. 598, 36 L. ed. 272; Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163; American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 70 Fed. 986 [*reversed* on other grounds in 80 Fed. 395, 25 C. C. A. 500]; Worswick Mfg. Co. *v.* Steiger, 17 Fed. 250; Roemer *v.* Logowitz, 20 Fed. Cas. No. 11,996. And see *supra*, III, B, 5.

67. Vanorman *v.* Leonard, 2 U. C. Q. B. 72.

68. Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68; Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265; Covert *v.* Covert, 106 Fed. 183 [*affirmed* in 115 Fed. 493, 53 C. C. A. 225]; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Plimpton *v.* Winslow, 14 Fed. 919; Kells *v.* McKenzie, 9 Fed. 284; Burton *v.* Greenville, 3 Fed. 642; *In re* Mills, 117 Off. Gaz. 904; Smith, etc., Mfg. Co. *v.* Mellon, 66 Off. Gaz. 173; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569.

In Canada the rule is that sale one year before application does not constitute a bar unless the sale was with the inventor's consent. Patric *v.* Sylvester, 23 Grant. Ch. (U. C.) 573.

69. Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,208, 1 Blatchf. 205; Fish. Pat. Rep. 110, 5 N. Y. Leg. Obs. 122; *In re* Mills, 117 Off. Gaz. 904.

If something remains to be done to property by the vendor, an agreement to sell it is merely executory. Hatch *v.* Standard Oil Co., 100 U. S. 124, 25 L. ed. 554.

70. U. S. Electric Lighting Co. *v.* Consolidated Electric Light Co., 33 Fed. 869.

71. Swain *v.* Holyoke Mach. Co., 102 Fed. 910 [*affirmed* in 109 Fed. 154, 48 C. C. A. 265]; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Schneider *v.* Thill, 21 Fed. Cas. No. 12,470*a*, 5 Ban. & A. 565; *In re* Mills, 117 Off. Gaz. 904; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569; Hessen *v.* Coppin, 19 Grant Ch. (U. C.) 629; Abell *v.* McPherson, 17 Grant Ch. (U. C.) 23.

72. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Cantrell *v.* Wallick, 117 U. S. 689, 6 S. Ct. 970, 29 L. ed. 1017; Coffin *v.* Ogden, 8 Wall. (U. S.) 120, 21 L. ed. 821; Mack *v.* Spencer Mfg. Co., 52 Fed. 819; Wright *v.* Postel, 44 Fed. 352; Cluett *v.* Clafin, 30 Fed. 921; Plimpton *v.* Winslow, 14 Fed. 919; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 3 Story 122, 2 Robb Pat. Cas. 206; Waterman *v.* Thomson, 29 Fed. Cas. No. 17,260, 2 Fish. Pat. Cas. 461; Mullins *v.* Hart, 3 C. & K. 297.

Leaving one article at a store for sale places the invention on sale. Covert *v.* Covert, 106 Fed. 183 [*affirmed* on other grounds in 115 Fed. 493, 44 C. C. A. 225].

73. Smith, etc., Mfg. Co. *v.* Sprague, 123 U. S. 249, 8 S. Ct. 122, 31 L. ed. 141; Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Harmen *v.* Struthers, 43 Fed. 437, 57 Fed. 637; Innis *v.* Oil City Boiler Works, 22 Fed. 780; Graham *v.* Geneva Lake Crawford Mfg. Co., 11 Fed. 133; *In re* Mills, 117 Off. Gaz. 904; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569.

itself. The former is a trader's and not an inventor's experiment and does not carve an exception out of the statute.[74]

(v) *Conditional Sale.* The sale must be absolute to constitute a bar, and where the inventor retains a certain control over the machine for purposes of test it is not on sale.[75]

(vi) *Perfected Invention.* It is not necessary that the machine sold shall be perfect or well made mechanically but it is sufficient that it is operative.[76]

(vii) *Burden of Proof.* The presumption is against two years public use or sale, and the burden is upon the one alleging it to establish it by proof beyond a reasonable doubt.[77] Where, however, the use or sale is established the burden is upon the patentee to show that it was for experiment.[78]

G. Abandonment of Invention— 1. In General. The abandonment of an invention is the relinquishment by the inventor of the inchoate right to secure a patent upon an invention made by him and the consequent dedication of that invention to the free and unlimited use of the public.[79] An invention may be abandoned at any time before or after application;[80] and the right once abandoned cannot be resumed.[81] The benefit of the abandonment, however, inures to

74. Smith, etc., Mfg. Co. *v.* Mellen, 58 Fed. 705, 7 C. C. A. 439; Consolidated Fruit-Jar Co. *v.* Wright, 6 Fed. Cas. No. 3,135, 1 Ban. & A. 320, 12 Blatchf. 149, 6 Off. Gaz. 527 [*affirmed* in 94 U. S. 92, 24 L. ed. 68].

75. Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569. *re* Mills, 117 Off. Gaz. 904.

76. Newark Mach. Co. *v.* Hargett, 28 Fed. 567; Lyman *v.* Maypole, 19 Fed. 735; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39; American Hide, etc., Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569.

77. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Albright *v.* Longfeld, 131 Fed. 473; Timolat *v.* Philadelphia Pneumatic Tool Co., 131 Fed. 257; Durfee *v.* Bawo, 118 Fed. 853; Loew Filter Co. *v.* German-American Filter Co., 107 Fed. 949, 47 C. C. A. 94; Brown *v.* Zaubitz, 105 Fed. 242; Flomerfelt *v.* Newwitter, 88 Fed. 696; Mast *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191; Kraatz *v.* Tieman, 79 Fed. 322; Dodge *v.* Post, 76 Fed. 807; Oval Wood Dish Co. *v.* Sandy Creek, N. Y. Wood Mfg. Co., 60 Fed. 285; Converse *v.* Matthews, 58 Fed. 246; Francis *v.* Kirkpatrick, 52 Fed. 824; Wetherell *v.* Keith, 27 Fed. 364; Adams, etc., Mfg. Co. *v.* Rathbone, 26 Fed. 262; Dreyfus *v.* Schneider, 25 Fed. 481; Innis *v.* Oil City Boiler Works, 22 Fed. 780; Everest *v.* Buffalo Lubricating Oil Co., 20 Fed. 848; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; American Hide, etc., Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Andrews *v.* Carmen, 1 Fed. Cas. No. 371, 2 Ban. & A. 277, 13 Blatchf. 307, 9 Off. Gaz. 1011; Brown *v.* Whittemore, 4 Fed. Cas. No. 2,033, 5 Fish. Pat. Cas. 524, 2 Off. Gaz. 248; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Parker *v.* Remhoff, 18 Fed. Cas. No. 10,747, 3 Ban. & A. 550, 17 Blatchf. 206, 14 Off. Gaz. 601; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

For proof held insufficient see Beedle *v.* Bennett, 122 U. S. 71, 7 S. Ct. 1090, 30 L. ed. 1074; Anderson *v.* Monroe, 55 Fed. 396 [*reversed* on other grounds in 58 Fed. 398, 7 C. C. A. 272]; Haughey *v.* Meyer, 48 Fed. 679; Zinsser *v.* Kremer, 39 Fed. 111; Adams, etc., Mfg. Co. *v.* Rathbone, 26 Fed. 262.

78. Smith, etc., Mfg. Co. *v.* Sprague, 123 U. S. 249, 8 S. Ct. 122, 31 L. ed. 141; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 117 Fed. 249, 54 C. C. A. 281; Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265, 111 Fed. 468, 49 C. C. A. 419; Lettelier *v.* Mann, 91 Fed. 917; *In re* Mills, 117 Off. Gaz. 904; Henry *v.* Francestown Soapstone Co., 17 Off. Gaz. 569.

Insufficient proof that use was for experiment see Root *v.* Third Ave. R. Co., 146 U. S. 210, 13 S. Ct. 100, 36 L. ed. 946.

79. U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53; Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68; Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689.

80. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

An invention may be abandoned within two years before application as well as prior to that time. Mast *v.* Dempster Mill Mfg. Co., 71 Fed. 701; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.

81. McCay *v.* Burr, 6 Pa. St. 147, 47 Am. Dec. 441; Gill *v.* U. S., 160 U. S. 426, 16 S. Ct. 322, 40 L. ed. 480; Woodbury Patent

the public and not to a later inventor.[82] Abandonment to the public is not confined to reissues, but statute applies to all patents.[83]

2. QUESTION OF INTENT. Abandonment involves a consideration of the inventor's intent, but the intent may be presumed from conduct as well as from words.[84]

3. EXPRESS ABANDONMENT. Declarations by the inventor manifesting an intent not to secure a patent upon his invention amounts to abandonment.[85]

4. ABANDONMENT BY CONDUCT. Where the inventor acquiesces in the use of his invention by others and his conduct is such as to lead the public to believe that he does not intend to secure a patent he has abandoned it.[86] So the acceptance of a patent with claims narrowed to exclude matter cited by the patent office as an anticipation is an abandonment thereof to the public;[87] and one who retires from an interference proceeding and withdraws his claim for the specific element forming the subject of the interference is thereafter precluded from claiming such element under his patent.[88] Publication is not abandonment,[89] and merely permitting others to use an invention before application for a patent does not amount to abandonment.[90] And mere delay in applying for a patent is not abandonment.[91]

Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92, 24 L. ed. 68; Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Holmes Electric Protective Co. *v.* Metropolitan Burglar Alarm Co., 33 Fed. 254; American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Batten *v.* Taggert, 2 Fed. Cas. No. 1,107, 2 Wall. Jr. 101; Colt *v.* Massachusetts Arms Co., 6 Fed. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Mellus *v.* Silsbee, 16 Fed. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

Estoppel.— Where an inventor has declared a purpose to abandon his invention and not to take out a patent, he will be estopped from afterward asserting his rights as against any person who has acted on the faith of such declaration. Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

82. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Pickering *v.* McCullough, 19 Fed. Cas. No. 11,121, 3 Ban. & A. 279, 6 Reporter 101, 13 Off. Gaz. 818 [*affirmed* in 104 U. S. 310, 26 L. ed. 749]; Sturtevant *v.* Greenough, 23 Fed. Cas. No. 13,579.

83. Railway Register Mfg. Co. *v.* Broadway, etc., R. Co., 26 Fed. 522.

84. Must be declaration or act showing intent. Beedle *v.* Bennett, 122 U. S. 71, 7 S. Ct. 1090, 30 L. ed. 1074; U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53; Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Burdon Wire, etc., Co. *v.* Williams, 128 Fed. 927; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523.

85. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523.

For declarations not amounting to abandonment see Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

86. Mast *v.* Dempster Mill Mfg. Co., 71 Fed. 701; Craver *v.* Weyhrich, 31 Fed. 607 [*affirmed* in 124 U. S. 196, 8 S. Ct. 459, 31 L. ed. 389]; Carroll *v.* Gambrill, 5 Fed. Cas. No. 2,454, McArthur Pat. Cas. 581; U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 28 Fed. Cas. No. 16,793, 2 Ban. & A. 493, 14 Blatchf. 94, 11 Off. Gaz. 373 [*affirmed* in 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53]; Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645. And see Universal Adding Mach. Co. *v.* Comptograph Co., 146 Fed. 981, 77 C. C. A. 227 [*reversing* 142 Fed. 539].

Acquiescence in public use may be abandonment. Mellus *v.* Silsbee, 16 Fed. Cas. No. 9,404, 1 Robb Pat. Cas. 506, 4 Mason 108; Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327].

87. Maier *v.* Bloom, 95 Fed. 159.

88. Shoemaker *v.* Merrow, 61 Fed. 945, 10 C. C. A. 181 [*reversing* 59 Fed. 120].

89. Goodyear *v.* Day, 10 Fed. Cas. No. 5,566.

90. McCay *v.* Burr, 6 Pa. St. 147, 47 Am. Dec. 441; Mast *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191 [*reversing* 71 Fed. 701]; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240 [*reversed* in part in 16 How. 480, 14 L. ed. 1024].

91. Bates *v.* Coe, 98 U. S. 31, 25 L. ed.

5. Necessity of Disclosure to Public. There can be no abandonment to the public unless the complete invention has been disclosed to the public.[92]

6. Abandoned Experiments. An abandonment of experiments upon an incomplete and imperfect invention is not a dedication of that invention to the public.[93]

7. Failure to Claim in Patent. What is disclosed in a patent and not claimed therein is presumedly not novel or is dedicated to the public by the patentee.[94] The presumption, however, is rebutted if the patentee has another application pending in the patent office claiming it,[95] or if he files such application promptly.[96] Matter erased from one application and presented in a second after grant of a patent is not abandoned.[97]

8. Abandonment of Application. A party may abandon a particular application for patent without abandoning the intent to secure a patent at some time

68; Appert *v.* Brownsville Plate Glass Co., 144 Fed. 115; Eck *v.* Kutz, 132 Fed. 758; Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164; U. S. Electric Lighting Co. *v.* Consolidated Electric Light Co., 33 Fed. 869; Miller *v.* Smith, 5 Fed. 359; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Heath *v.* Hildreth, 11 Fed. Cas. No. 6,309; Knox *v.* Loweree, 14 Fed. Cas. No. 7,910, 1 Ban. & A. 589, 6 Off. Gaz. 802; Perry *v.* Cornell, 19 Fed. Cas. No. 11,002, McArthur Pat. Cas. 68; Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632, 2 Off. Gaz. 495; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193.

Date of application during experiment not abandonment. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177.

If action is taken within the time fixed by statute, delay in prosecution of application in patent office not abandonment. Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Adams *v.* Jones, 1 Fed. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; U. S. *v.* American Bell Tel. Co., 79 Off. Gaz. 1362.

Effect of intervening rights.—Long delay in applying for a patent where there are intervening rights is abandonment. Fefel *v.* Stocker, 17 App. Cas. (D. C.) 317; *In re* Mower, 15 App. Cas. (D. C.) 144; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252.

92. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Ross *v.* Montana Union R. Co., 45 Fed. 424; Miller *v.* Smith, 5 Fed. 359; Babcock *v.* Degener, 2 Fed. Cas. No. 698, McArthur Pat. Cas. 607.

93. Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164; Dederick *v.* Fox, 56 Fed. 714. And see *supra*, III, C, 4, e.

94. *In re* Millett, 18 App. Cas. (D. C.) 186; Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Deering *v.* Winona Harvester Works, 155 U. S. 286, 15 S. Ct. 118, 39 L. ed. 153; McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 135 U. S. 342, 10 S. Ct. 884, 34 L. ed. 168; Parker, etc., Co. *v.* Yale Clock Co., 123 U. S. 87, 8 S. Ct. 38, 31 L. ed. 100; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. ed. 665; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Campbell *v.* H. T. Conde Implement Co., 74 Fed. 745; McBride *v.* Kingman, 72 Fed. 908; Holmes Electric Protective Co. *v.* Metropolitan Burglar Alarm Co., 33 Fed. 254; Swift *v.* Jenks, 19 Fed. 641; Batten *v.* Taggert, 3 Fed. Cas. No. 1,107, 2 Wall. Jr. 101 [*reversed* on other grounds in 17 How. 74, 15 L. ed. 37].

A claim to a specific combination and a failure to claim other combinations apparent on the face of the patent is a dedication of them to the public. Bantz *v.* Frantz, 105 U. S. 160, 26 L. ed. 1013; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Fassett *v.* Ewart Mfg. Co., 58 Fed. 360 [*affirmed* in 62 Fed. 404, 10 C. C. A. 441].

Claim to a combination is held to amount to a disclaimer of the separate elements. Wells *v.* Curtis, 66 Fed. 318, 13 C. C. A. 494; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906].

Mere disclosure without claim will not prevent subsequent patent. Vermont Farm Mach. Co. *v.* Marble, 19 Fed. 307; Graham *v.* Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

Description of process in machine patent is not abandonment. Eastern Paper-Bag Co. *v.* Nixon, 35 Fed. 752; Eastern Paper-Bag Co. *v.* Standard Paper-Bag Co., 30 Fed. 63.

95. Miller *v.* Eagle Mfg. Co., 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121; Suffolk Mfg. Co. *v.* Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Kinnear Mfg. Co. *v.* Wilson, 142 Fed. 970, 74 C. C. A. 232; Victor Talking Mach. Co. *v.* American Graphophone Co., 140 Fed. 860 [*affirmed* in 145 Fed. 350, 76 C. C. A. 180]; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682; Singer *v.* Braunsdorf, 22 Fed. Cas. No. 12,897, 7 Blatchf. 521.

96. Dederick *v.* Fox, 56 Fed. 714; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39.

97. Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140.

and therefore without abandoning the invention claimed therein. He may file a subsequent application and secure a patent.[98] Nevertheless where an application for a patent has been filed and withdrawn, lapse of time is a fact which may give great point and force to testimony disclosing what was done in the interval.[99]

9. EVIDENCE OF ABANDONMENT. Abandonment is never presumed;[1] on the contrary the presumption is against abandonment and the burden is upon the one asserting it to prove it beyond a reasonable doubt.[2] The issue of letters patent is *prima facie* evidence that there has been no abandonment.[3] Where the evidence raises a presumption of abandonment, it may be rebutted by showing acts prosecuting or asserting the discovery, as the filing of drawings in the patent office.[4] Where the undisputed acts of an inventor furnish evidence of abandonment, his testimony that he did not intend to abandon his invention is not entitled to much weight.[5]

IV. PERSONS ENTITLED TO PATENTS.[6]

A. Original and First Inventor[7]—1. IN GENERAL. No valid patent can issue in the United States except upon the application of a person who made the invention by his own original thought,[8] or if he is dead upon the application of his executor or administrator.[9] As between two original inventors of the same thing, the one first to make it in this country or bring it to this country is

98. Edison *v.* American Mutoscope Co., 110 Fed. 660 [*reversed* in 114 Fed. 926, 52 C. C. A. 546]; Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164; Dederick *v.* Fox, 56 Fed. 714; Lindsay *v.* Stein, 10 Fed. 907, 20 Blatchf. 370.

Abandonment of application and at the same time filing a new application is not an abandonment of the invention. Dederick *v.* Fox, 56 Fed. 714.

99. Consolidated Fruit Jar Co. *v.* Bellaire Stamping Co., 27 Fed. 377.

1. American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94.

2. Computing Scale Co. *v.* Automatic Scale Co., 26 App. Cas. (D. C.) 238 [*affirmed* in 204 U. S. 609, 27 S. Ct. 307, 51 L. ed. 645]; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275. And see Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336.

3. Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94.

4. Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, 1 Fish. Pat. Rep. 77.

5. Bevin *v.* East Hampton Bell Co., 3 Fed. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23.

6. **Right to extension of patent** see *infra*, VII, B.

Right to reissues see *infra*, VIII.

7. **Competency of witnesses on issue of priority** see WITNESSES.

Prior public use or sale in general see *supra*, III, F, 8.

8. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385]; Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Haselden *v.* Ogden, 11 Fed. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Stearns *v.* Davis, 22 Fed. Cas. No. 13,338, McArthur Pat. Cas. 696.

Introducer.— Must be inventor not introducer. Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507; American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 70 Fed. 986 [*reversed* on other grounds in 80 Fed. 395, 25 C. C. A. 500].

User.— Must be inventor and not mere user. *In re* Honiball, 9 Moore P. C. 378, 14 Eng. Reprint 340.

Contracts as to ownership cannot affect the question of inventorship. Tyler *v.* Kelch, 19 App. Cas. (D. C.) 180; Hunt *v.* McCaskin, 10 App. Cas. (D. C.) 527.

Abandonment of the right to a patent by the original inventor does not entitle another to a patent therefor. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Pickering *v.* McCullough, 19 Fed. Cas. No. 11,121, 3 Ban. & A. 279, 6 Reporter 101, 13 Off. Gaz. 818 [*affirmed* in 104 U. S. 310, 26 L. ed. 749].

In **Canada** the applicant must be the original inventor. Smith *v.* Goldie, 9 Can. Sup. Ct. 46; American Dunlop Tire Co. *v.* Goold Bicycle Co., 6 Can. Exch. 223.

9. U. S. Rev. St. (1878) § 4896; De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; Eagleton Mfg. Co. *v.* West Bradley, etc., Mfg. Co., 111 U. S. 490, 4 S. Ct. 593, 28 L. ed. 493.

entitled to the patent.[10] A patent granted upon the application of one who is not the inventor is void.[11]

2. First Inventor. The first inventor is the one who first has a mental conception of the invention provided he exercises diligence thereafter in adapting and perfecting it, but as against a rival claimant who first reduced the invention to practice the burden is upon the first conceiver to show diligence.[12] The party first to reduce to practice is *prima facie* the first inventor;[13] but the man who first conceives and in a mental sense first invents a machine, art, or composition of matter may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act.[14]

3. Originality of Invention. A person is not an original inventor unless the ideas embodied in the invention originated in the creative faculties of his mind. If he merely adapts and gives effect to the ideas of others he is not an original inventor and is not entitled to obtain a patent.[15]

10. Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Eames *v.* Richards, 8 Fed. Cas. No. 4,240; Gibbs *v.* Johnson, 10 Fed. Cas. No. 5,384; Goodyear *v.* Day, 10 Fed. Cas. No. 5,569, 2 Wall. Jr. 283; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; Lowell *v.* Lewis, 15 Fed. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Woodcock *v.* Parker, 30 Fed. Cas. No. 17,971, 1 Gall. 438, 1 Robb Pat. Cas. 37; Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193. And see *infra*, V, C, 8, a.

Agreement of parties.— Rights cannot be changed by agreement between parties. New Departure Bell Co. *v.* Corbin, 88 Fed. 901.

First inventor and not the first applicant for a patent is the one entitled to the patent. Pacific Cable R. Co. *v.* Butte City St. R. Co., 58 Fed. 420.

Foreign inventors applying for a patent here, and who are placed in interference, are entitled under the law to claim the date they communicated their invention here as the date of their conception, and the date of the filing of their application here as the date of their constructive reduction to practice. Harris *v.* Stern, 22 App. Cas. (D. C.) 164.

In England the first to secure a patent is the first inventor, although the last to file application. *Ex p.* Bates, L. R. 4 Ch. 577, 38 L. J. Ch. 501, 21 L. T. Rep. N. S. 410, 17 Wkly. Rep. 900.

11. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576.

12. U. S. Rev. St. (1878) § 4920; Hillard *v.* Brooks, 23 App. Cas. (D. C.) 526; Liberman *v.* Williams, 23 App. Cas. (D. C.) 223; Paul *v.* Johnson, 23 App. Cas. (D. C.) 187; Funk *v.* Haines, 20 App. Cas. (D. C.) 285; Silverman *v.* Dendrickson, 19 App. Cas. (D. C.) 381; Yates *v.* Huson, 8 App. Cas. (D. C.) 93; Westinghouse Electric, etc., Co. *v.* Roberts, 125 Fed. 6; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Electric R. Signal Co. *v.* Hall R. Signal Co., 6 Fed. 603 [*affirmed* in 114 U. S. 87, 5 S. Ct. 1069, 29 L. ed. 96]; Kneeland *v.* Sheriff, 2 Fed. 901; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493; Davidson *v.* Lewis, 7 Fed. Cas. No. 3,606, McArthur Pat. Cas. 599; Draper *v.* Potomska Mills Corp., 7 Fed. Cas. No. 4,072, 3 Ban. & A. 214, 13 Off. Gaz. 276; Heath *v.* Hildreth, 11 Fed. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McArthur Pat. Cas. 12; Hicks *v.* Shaver, 12 Fed. Cas. No. 6,462; Hill *v.* Dunklee, 12 Fed. Cas. No. 6,489, McArthur Pat. Cas. 475; Marshall *v.* Mee, 16 Fed. Cas. No. 9,129, McArthur Pat. Cas. 229; Mix *v.* Perkins, 17 Fed. Cas. No. 9,677; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Stephens *v.* Salisbury, 22 Fed. Cas. No. 13,369, McArthur Pat. Cas. 379; Taylor *v.* Archer, 23 Fed. Cas. No. 13,778, 18 Blatchf. 315, 4 Fish. Pat. Cas. 449; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440. And see *infra*, IV, A, 6.

13. Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408]; Warner *v.* Goodyear, 29 Fed. Cas. No. 17,183, Cranch Pat. Dec. 125, McArthur Pat. Cas. 60.

14. Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590. And see cases cited *supra*, note 12.

15. Greenwood *v.* Dover, 23 App. Cas. (D. C.) 251; Soley *v.* Hebbard, 5 App. Cas. (D. C.) 99; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367; Alden *v.* Dewey, 1 Fed. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; Burrows *v.* Wetherill, 4 Fed. Cas. No. 2,208, McArthur Pat. Cas. 315; Stearns *v.* Davis, 22 Fed. Cas. No. 13,338, McArthur Pat. Cas. 696.

Suggestion of result but not means does not constitute invention. Streat *v.* White, 35 Fed. 426; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544.

Suggestion of some features by another than the patentee will not invalidate the patent. Corser *v.* Brattleboro Overall Co., 93 Fed. 807; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

4. Citizenship of Inventor. In the United States there is no limitation as to the residence, citizenship, or age of the patentee, since any and all persons from any and all countries may secure patents upon exactly the same conditions,[16] and the same rule obtains in England.[17]

5. Reduction to Practice — a. In General. An invention is reduced to practice when a mechanical embodiment of it is made in such form and so far perfected as to be capable of practical and successful use.[18] Mechanical perfection

The true test to determine whether suggestions made to an inventor should deprive him of the claim to originality in the invention is to inquire whether enough has been communicated to enable him to apply it without the exercise of invention. Watson *v.* Belfield, 26 Fed. 536.

Where the patentee learned of the invention abroad he is not an original inventor. American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 70 Fed. 986 [*reversed* on other grounds in 80 Fed. 395, 25 C. C. A. 500].

16. U. S. Rev. St. (1878) § 4886.

17. Act (1883), § 34, 46 & 47 Vict. c. 57.

18. Sherwood *v.* Drewson, 29 App. Cas. (D. C.) 161; Hillard *v.* Brooks, 23 App. Cas. (D. C.) 526; Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Howard *v.* Hey, 18 App. Cas. (D. C.) 142; Latham *v.* Armat, 17 App. Cas. (D. C.) 345; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493; Farley *v.* National Steam-Gauge Co., 8 Fed. Cas. No. 4,648, McArthur Pat. Cas. 618; Heath *v.* Hildreth, 11 Fed. Cas. No. 6,309, Cranch Pat. Cas. 96, 132, McArthur Pat. Cas. 12; Lyman Ventilating, etc., Co. *v.* Chamberlain, 15 Fed. Cas. No. 8,631, 2 Ban. & A. 433, 10 Off. Gaz. 588; Lyman Ventilating, etc., Co. *v.* Lalor, 15 Fed. Cas. No. 8,632, 1 Ban. & A. 403, 12 Blatchf. 303, 6 Off. Gaz. 642; Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 77, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227; Roberts *v.* Reed Torpedo Co., 20 Fed. Cas. No. 11,910, 3 Fish. Pat. Cas. 629, 3 Brewst. (Pa.) 558; Smith *v.* Prior, 22 Fed. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461, 4 Off. Gaz. 633.

The rules of law as to what constitutes a prior use and what constitutes a reduction to practice are the same. Gilman *v.* Hinson, 26 App. Cas. (D. C.) 409.

The device constructed must be fashioned out of a material capable of actual use for the intended purpose in order to constitute a reduction to practice. Gilman *v.* Hinson, 26 App. Cas. (D. C.) 409.

Models and drawings.—A model is not a reduction to practice (Howell *v.* Hess, 30 App. Cas. (D. C.) 194; Hunter *v.* Stikeman, 13 App. Cas. (D. C.) 214; Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86; Porter *v.* Louden, 7 App. Cas. (D. C.) 64; Stainthorp *v.* Humiston, 22 Fed. Cas. No. 13,281, 4 Fish. Pat. Cas. 107), unless the invention belongs to that class of simple inventions which require no other proof of their practicability than the construction of a model (O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77). Models and drawings constituted a reduction to practice under the act of 1836. Heath *v.* Hildreth, 11 Fed. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McArthur Pat. Cas. 12; Perry *v.* Cornell, 19 Fed. Cas. No. 11,002, Cranch Pat. Cas. 132, McArthur Pat. Cas. 68.

Sketches and drawings are not a reduction to practice. Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33. See also *supra*, III, C, 4, f.

Unsuccessful machine is not a reduction to practice. Pelton *v.* Waters, 19 Fed. Cas. No. 10,913, 1 Ban. & A. 599, 7 Off. Gaz. 425. See also *supra*, III, C, 4, e.

Proof of various experiments in search of a particular process, and an approximation to that process, does not sufficiently show a reduction to practice. Bourn *v.* Hill, 27 App. Cas. (D. C.) 291.

Voting machine must work with accuracy. McKenzie *v.* Cummings, 24 App. Cas. (D. C.) 137.

Process.— A process is reduced to practice only when used. Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207.

Later manufacture on larger scale.— If an experimental machine completely embodies the invention, and is capable of testing its efficiency to the full extent of its power, the mere fact that later manufactures to fill orders may be on a larger scale cannot impair its effect as constituting reduction to practice. Robinson *v.* Thresher, 28 App. Cas. (D. C.) 22.

Long delay in making use of an invention claimed to have been reduced to practice, or in applying for a patent, is a potent circumstance tending to show that the alleged reduction to practice was nothing more than an unsatisfactory or abandoned experiment; and this is especially the case where, in the meantime, the inventor has been engaged in the prosecution of similar inventions. Gilman *v.* Hinson, 26 App. Cas. (D. C.) 409.

Where the inventor is already engaged in disposing of a large stock of devices manufactured under former patents relating to the same subject-matter, of which the new invention is an improvement, a failure immediately to manufacture and put on the market the newly invented device does not afford any reasonable foundation for denying the date claimed for its conception. Laas *v.* Scott, 26 App. Cas. (D. C.) 354.

The dismantling of an experimental machine by a large and prosperous company has more weight as showing the lack of success of the trial than it would have if done by a poor inventor whose necessities compel him to utilize the parts for other purposes. Robinson *v.* Thresher, 28 App. Cas. (D. C.) 22.

Delay in filing application as effective weight of proof of actual reduction to prac-

is not necessary.[19] A perfect invention does not necessarily mean a perfectly constructed machine, but one so constructed as to embody all the essential elements of the invention in a form that would make them practical and operative, so as to accomplish the result in a practical way.[20] Demonstration of the success by actual use is usually necessary,[21] although some devices are so simple that the mere construction without use is sufficient.[22] The same act, or set of acts, may or may not constitute a reduction to practice, modified, as they may be, by the special circumstances of the particular case.[23] The reduction to practice must be by the applicant himself, or by his authorized agent, and not by some other third party.[24] It is not enough to entitle an applicant to a patent that someone else has shown the practicability of the invention by reducing it to practice. The work of such third party will not be taken as sufficient to relieve the applicant of the consequences of his own want of diligence.[25]

b. Constructive Reduction to Practice. The filing of an allowable application for a patent is a constructive reduction to practice of the invention at the date when it was filed.[26] So also is a description of the invention in a foreign patent

tice see Seeberger *v.* Russel, 26 App. Cas. (D. C.) 344.

Reduction to practice of device for protecting low-tension telephone circuits see Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336.

Evidence of reduction to practice see Seeberger *v.* Russel, 26 App. Cas. (D. C.) 344.

19. Lowrie *v.* Taylor, 27 App. Cas. (D. C.) 522; Coffee *v.* Guerrant, 3 App. Cas. (D. C.) 497; Brunswick-Balke-Collender Co. *v.* Backus Automatic Pin Setter Co., 153 Fed. 288; Rogers Typograph Co. *v.* Mergenthaler Linotype Co., 64 Fed. 799, 12 C. C. A. 422; Mergenthaler Linotype Co. *v.* Press Pub. Co., 57 Fed. 502; Jenner *v.* Dickinson, 117 Off. Gaz. 600; Hope *v.* Voight, 115 Off. Gaz. 1585; Gallagher *v.* Hien, 115 Off. Gaz. 1330; National Cash Register Co. *v.* Lamson Consol. Store Service Co., 67 Off. Gaz. 680.

Later improvements.— Success is not negatived by later improvements. Wyman *v.* Donnelly, 21 App. Cas. (D. C.) 81; Hien *v.* Buhoup, 11 App. Cas. (D. C.) 293.

20. Burson *v.* Vogel, 29 App. Cas. (D. C.) 388; Coffee *v.* Guerrant, 3 App. Cas. (D. C.) 497; American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503.

21. Wickers *v.* McKee, 29 App. Cas. (D. C.) 4; Macdonald *v.* Edison, 21 App. Cas. (D. C.) 527; Latham *v.* Armat, 17 App. Cas. (D. C.) 345; Kelly *v.* Fynn, 16 App. Cas. (D. C.) 573; Appert *v.* Schmertz, 13 App. Cas. (D. C.) 117; Ocumpaugh *v.* Norton, 115 Off. Gaz. 1850; Paul *v.* Hess, 115 Off. Gaz. 251.

A shop test is sufficient.— Demonstration need not be in commercial use. Wyman *v.* Donnelly, 21 App. Cas. (D. C.) 81; Wurts *v.* Harrington, 10 App. Cas. (D. C.) 149.

22. Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336; Couch *v.* Barnett, 23 App. Cas. (D. C.) 446; Loomis *v.* Hauser, 19 App. Cas. (D. C.) 401; Lindemeyr *v.* Hoffman, 18 App. Cas. (D. C.) 1; Mason *v.* Hepburn, 13 App. Cas. (D. C.) 86.

23. Andrews *v.* Nilson, 27 App. Cas. (D. C.) 451; Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336.

24. Robinson *v.* McCormick, 29 App. Cas. (D. C.) 98; Hunter *v.* Stikeman, 13 App. Cas. (D. C.) 214; Burgess *v.* Wetmore, 16 Off. Gaz. 765.

25. Hunter *v.* Stikeman, 13 App. Cas. (D. C.) 214.

26. Davis *v.* Garrett, 28 App. Cas. (D. C.) 9; Cobb *v.* Goebel, 23 App. Cas. (D. C.) 75; Dashiell *v.* Tasker, 21 App. Cas. (D. C.) 64; Lindemeyr *v.* Hoffman, 18 App. Cas. (D. C.) 1; Hulett *v.* Long, 15 App. Cas. (D. C.) 284; McCormick *v.* Cleal, 12 App. Cas. (D. C.) 335; Dodge *v.* Fowler, 11 App. Cas. (D. C.) 592; Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207; Porter *v.* Louden, 7 App. Cas. (D. C.) 64; Dane *v.* Chicago Mfg. Co., 6 Fed. Cas. No. 3,557, 3 Biss. 380, 6 Fish. Pat. Cas. 130, 2 Off. Gaz. 677; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94; Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; New England Screw Co. *v.* Sloan, 18 Fed. Cas. No. 10,158, McArthur Pat. Cas. 210; Wheeler *v.* Clipper, Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442.

Where application fails to disclose invention sufficiently it is not a reduction to practice. Stevens *v.* Seher, 11 App. Cas. (D. C.) 245.

Caveat is not a reduction to practice. American Bell Tel. Co. *v.* National Tel. Mfg. Co., 109 Fed. 976.

Renewal of application takes date of original. Lotterhand *v.* Hanson, 23 App. Cas. (D. C.) 372; Cain *v.* Park, 14 App. Cas. (D. C.) 42.

Forfeited application cannot defeat a patent regularly granted. Christensen *v.* Noyes, 15 App. Cas. (D. C.) 94.

Divisional application takes date of original. Hillard *v.* Brooks, 23 App. Cas. (D. C.) 526.

Reissue application dates from original and applicant is entitled to date of original as date of constructive reduction to practice. Austin *v.* Johnson, 18 App. Cas. (D. C.) 83.

In England the patent bears date of appli-

or a printed publication.[27] Where an application for a patent is first made abroad in a country having the requisite treaty relations with this country, the date of the application, if within twelve months before the application here, controls.[28] In case of designs the foreign application must be within four months.

6. DILIGENCE.[29] The person who is first to conceive the invention but later than his rival in reducing it to practice is not regarded as the first inventor unless he exercised due diligence in efforts to perfect the invention,[30] at and continuously after the time that his rival entered the field against him.[31] Knowledge of the entry of the rival in the field is not necessary in order to impose the duty of diligence.[32] The question of due diligence is not a matter of comparative diligence as between the two parties,[33] but it is merely required that the last to reduce to practice shall show that he was exercising reasonable diligence under all of the surrounding circumstances.[34]

cation and is effective from that date. *Ex p.* Bailey, L. R. 8 Ch. 60, 42 L. J. Ch. 264, 27 L. T. Rep. N. S. 430, 21 Wkly. Rep. 31; Holste *v.* Robertson, 4 Ch. D. 9, 46 L. J. Ch. 1, 35 L. T. Rep. N. S. 457, 25 Wkly. Rep. 35; Saxby *v.* Hennett, L. R. 8 Exch. 210, 42 L. J. Exch. 137, 28 L. T. Rep. N. S. 639, 22 Wkly. Rep. 16; *Ex p.* Henry, L. R. 8 Ch. 167, 42 L. J. Ch. 363, 21 Wkly. Rep. 233. The patent, however, bars the grant of a subsequent patent even upon an earlier application. Lee *v.* Walker, L. R. 7 C. P. 121, 41 L. J. C. P. 91, 26 L. T. Rep. N. S. 70. Where two applications were filed on the same date both patents were granted. *In re* Dering, 13 Ch. D. 393, 42 L. T. Rep. N. S. 634, 28 Wkly. Rep. 710.

27. Parker *v.* Appert, 75 Off. Gaz. 1201.

Foreign patent is effective only from the date of issue. Rousseau *v.* Brown, 21 App. Cas. (D. C.) 73.

Acts abroad not considered unless in form of patent or publication. Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117.

28. This applies only to applications filed after March 3, 1903. 32 U. S. St. at L. 1225, c. 1019.

Foreign application was ineffective under the old law. Rousseau *v.* Brown, 21 App. Cas. (D. C.) 73.

29. Abandonment of invention in general see *supra*, III, G.

30. Moore *v.* Hewitt, 31 App. Cas. (D. C.) 577; Rose *v.* Clifford, 31 App. Cas. (D. C.) 195; Gordon *v.* Wentworth, 31 App. Cas. (D. C.) 150; Feinberg *v.* Cowan, 29 App. Cas. (D. C.) 80; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Fowler *v.* Boyce, 27 App. Cas. (D. C.) 48; Fowler *v.* McBerty, 27 App. Cas. (D. C.) 41; Laas *v.* Scott, 26 App. Cas. (D. C.) 354; Dashiell *v.* Tasker, 21 App. Cas. (D. C.) 64; Oliver *v.* Felbel, 20 App. Cas. (D. C.) 255; Marvel *v.* Decker, 13 App. Cas. (D. C.) 562; Platt *v.* Shipley, 11 App. Cas. (D. C.) 576; Yates *v.* Huson, 8 App. Cas. (D. C.) 93; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Hubel *v.* Dick, 28 Fed. 132; Cox *v.* Griggs, 6 Fed. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Ellithorp *v.* Robertson, 8 Fed. Cas. No. 4,409, McArthur Pat. Cas. 585; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368.

Nature of diligence required.— The diligence required of an inventor is diligence rather in the reduction of his invention to practice than in application to the patent office, or in manufacturing his device for public use. Woods *v.* Poor, 29 App. Cas. (D. C.) 397; Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336.

Constructive reductions to practice.— Diligence in applying for patent is effective. Newton *v.* Woodward, 17 App. Cas. (D. C.) 34; Odell *v.* Stout, 22 Fed. 159; Jones *v.* Cooke, 117 Off. Gaz. 1493.

Lack of diligence in prosecuting application after it is filed is of no consequence. Miehle *v.* Read, 18 App. Cas. (D. C.) 128.

Filing caveat will not excuse diligence. Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

Work on other inventions is not diligence. Bliss *v.* McElroy, 29 App. Cas. (D. C.) 120; Lotterhand *v.* Hanson, 23 App. Cas. (D. C.) 372; Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207.

Diligence must be in testing and perfecting the invention and not merely in exploiting it commercially. Howell *v.* Hess, 30 App. Cas. (D. C.) 194; Laas *v.* Scott, 26 App. Cas. (D. C.) 354; Seeberger *v.* Dodge, 114 Off. Gaz. 2382.

31. Effective diligence must commence before rival entered the field and continue thereafter. It need not commence with conception. McArthur *v.* Mygatt, 31 App. Cas. (D. C.) 514; De Wallace *v.* Scott, 15 App. Cas. (D. C.) 157; Griffin *v.* Swenson, 15 App. Cas. (D. C.) 135; Platt *v.* Shipley, 11 App. Cas. (D. C.) 576; Yates *v.* Huson, 8 App. Cas. (D. C.) 93; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590.

32. Platt *v.* Shipley, 11 App. Cas. (D. C.) 576.

33. Not a race of diligence.— Paul *v.* Johnson, 23 App. Cas. (D. C.) 187; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Electric R. Signal Co. *v.* Hall R. Signal Co., 6 Fed. 603 [*affirmed* in 114 U. S. 87, 5 S. Ct. 1069, 29 L. ed. 96].

34. Diligence cannot be determined by any

7. Models, Drawings, and Description. Models, unpublished drawings, and verbal or unpublished description of an invention do not constitute proof of priority.[35] They must be followed by diligence in reduction to practice.[36]

8. Assistance by Others. The inventor who furnishes the ideas to produce the result is entitled to avail himself of the mechanical skill or scientific knowledge of others in carrying those ideas into effect and he does not thereby forfeit the right to a patent.[37]

general rule but depends upon the special circumstances of the particular case. Mead *v.* Davis, 31 App. Cas. (D. C.) 590; Woods *v.* Poor, 29 App. Cas. (D. C.) 397; O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77; De Wallace *v.* Scott, 15 App. Cas. (D. C.) 157; McCormick *v.* Cleal, 12 App. Cas. (D. C.) 335.

Only such diligence as is reasonable is required. Mead *v.* Davis, 31 App. Cas. (D. C.) 590; Garrels *v.* Freeman, 21 App. Cas. (D. C.) 207.

Experiments.— Reasonable time is allowed for experiments. De Wallace *v.* Scott, 15 App. Cas. (D. C.) 157; Dietz *v.* Wade, 7 Fed. Cas. No. 3,903.

Making drawings only is not diligence. Watson *v.* Thomas, 23 App. Cas. (D. C.) 65.

Poverty and illness will not excuse indefinite delays. Griffin *v.* Swenson, 15 App. Cas. (D. C.) 135.

Mistake in supposing invention covered by a prior patent is no excuse for delay. Platt *v.* Shipley, 11 App. Cas. (D. C.) 576.

Resumption after abandonment.—An inventor of a complicated device, who attempts to construct a completed machine with his own hands during a period of over a year, and finally abandons the effort from lack of time and money, and immediately makes a model and drawings, is exercising due diligence. Davis *v.* Garrett, 28 App. Cas. (D. C.) 9.

For cases in which the particular facts were held to show diligence see Howard *v.* Bones, 31 App. Cas. (D. C.) 619; Davis *v.* Horton, 31 App. Cas. (D. C.) 601; Mead *v.* Davis, 31 App. Cas. (D. C.) 590; O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77; Roe *v.* Hanson, 19 App. Cas. (D. C.) 559; Christensen *v.* Ellis, 17 App. Cas. (D. C.) 498; Newton *v.* Woodward, 17 App. Cas. (D. C.) 34; Shellaberger *v.* Sommer, 8 App. Cas. (D. C.) 3; McCormick Harvesting Mach. Co. *v.* Minneapolis Harvester Works, 42 Fed. 152; Hubel *v.* Dick, 28 Fed. 132; Appleton *v.* Chambers, 1 Fed. Cas. No. 497*a*; Mix *v.* Perkins, 17 Fed. Cas. No. 9,677; New England Screw Co. *v.* Sloan, 18 Fed. Cas. No. 10,158, McArthur Pat. Cas. 210; Phelps *v.* Brown, 19 Fed. Cas. No. 11,072, 4 Blatchf. 362, 1 Fish. Pat. Cas. 479.

For cases in which the particular facts were held to show lack of diligence see Kinsman *v.* Kentner, 31 App. Cas. (D. C.) 293; Gordon *v.* Wentworth, 31 App. Cas. (D. C.) 150; Bliss *v.* McElroy, 29 App. Cas. (D. C.) 120; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Turnbull *v.* Curtis, 27 App. Cas. (D. C.) 567; Anderson *v.* Wells, 27 App. Cas. (D. C.) 115; Liberman *v.* Williams, 23 App. Cas. (D. C.) 223; Paul *v.* Johnson, 23 App. Cas. (D. C.) 187; Harris *v.* Stern, 22 App. Cas. (D. C.) 164; Wyman *v.* Donnelly, 21 App. Cas. (D. C.) 81; Hallwood *v.* Lalor, 21 App. Cas. (D. C.) 61; Petrie *v.* De Schweinitz, 19 App. Cas. (D. C.) 386; Stapleton *v.* Kinney, 18 App. Cas. (D. C.) 394; Miehle *v.* Read, 18 App. Cas. (D. C.) 128; Austin *v.* Johnson, 18 App. Cas. (D. C.) 83; Locke *v.* Boch, 17 App. Cas. (D. C.) 75; Darnell *v.* Grant, 16 App. Cas. (D. C.) 589; Jackson *v.* Getz, 16 App. Cas. (D. C.) 343; Jackson *v.* Knapp, 16 App. Cas. (D. C.) 338; Marvel *v.* Decker, 13 App. Cas. (D. C.) 562; Dodge *v.* Fowler, 11 App. Cas. (D. C.) 592; Arnold *v.* Tyler, 10 App. Cas. (D. C.) 175; Porter *v.* Louden, 7 App. Cas. (D. C.) 64; Wright *v.* Postel, 44 Fed. 352; Pennsylvania Diamond Drill Co. *v.* Simpson, 29 Fed. 288; Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368; Savary *v.* Lauth, 21 Fed. Cas. No. 12,389, McArthur Pat. Cas. 691; Gallagher *v.* Hien, 115 Off. Gaz. 1330; Paul *v.* Hess, 115 Off. Gaz. 251; Seeberger *v.* Dodge, 114 Off. Gaz. 2382.

35. Howell *v.* Hess, 30 App. Cas. (D. C.) 194; Guilbert *v.* Killinger, 13 App. Cas. (D. C.) 107; McCormick *v.* Cleal, 12 App. Cas. (D. C.) 335; Porter *v.* Louden, 7 App. Cas. (D. C.) 64; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Uhlman *v.* Bartholomæ, etc., Brewing Co., 41 Fed. 132; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368; Stillwell, etc., Mfg. Co. *v.* Cincinnati Gaslight, etc., Co., 23 Fed. Cas. No. 13,453, 1 Ban. & A. 610, 7 Off. Gaz. 829; Hammond *v.* Basch, 115 Off. Gaz. 804.

Small size of machine will not prevent reduction to practice. Gallagher *v.* Hien, 115 Off. Gaz. 1330.

36. See *supra*, IV, A, 6.

37. McKellof *v.* Fetzer, 31 App. Cas. (D. C.) 586; Huebel *v.* Bernard, 15 App. Cas. (D. C.) 510; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Smith *v.* Stewart, 55 Fed. 481 [*affirmed* in 58 Fed. 580, 7 C. C. A. 380]; Eclipse Mfg. Co. *v.* Adkins, 44 Fed. 280; Yoder *v.* Mills, 25 Fed. 821; National Feather Duster Co. *v.* Hibbard, 9 Fed. 558, 11 Biss. 76; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327];

9. Invention Made Abroad. Acts performed abroad, whether by a citizen of this country or a foreigner, are not pertinent to the question of his right to a patent, since under the statute knowledge or use of the invention abroad is no bar to the grant of a patent to an original inventor who firsts makes or discloses the invention here.[38]

10. Evidence as to Originality and Priority[39] — a. Presumptions and Burden of Proof. The presumption is that the person who obtained the patent was the first and original inventor,[40] and the burden is upon the person seeking to show the contrary to prove it beyond a reasonable doubt.[41]

b. Admissibility and Sufficiency. The admissibility of evidence in actions to establish priority between inventors is governed by the rules applicable in civil

Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. Rep. 110, 5 N. Y. Leg. Obs. 122; Watson *v.* Bladen, 29 Fed. Cas. No. 17,277, 1 Robb Pat. Cas. 510, 4 Wash. 580; Allen *v.* Rawson, 1 C. B. 551, 50 E. C. L. 551; Milligan *v.* Marsh, 2 Jur. N. S. 1083; Steadman *v.* Marsh, 2 Jur. N. S. 391. And see *infra*, IV, C, 2.

38. U. S. Rev. St. (1878) § 4923 [U. S. Comp. St. (1901) p. 3396]. And see *supra*, III, B, 5.

Unless in the form of a patent or publication acts abroad are not pertinent. Electric Accumulator Co. *v.* Brush, 52 Fed. 130, 2 C. C. A. 682.

In Canada a foreign inventor who was first to conceive but who did not make public or use is not entitled to the patent. Reg. *v.* La Force, 4 Can. Exch. 14.

As against an infringer, date of invention abroad may be shown. Welsbach Light Co. *v.* American Incandescent Lamp Co., 98 Fed. 613, 39 C. C. A. 185; Hanifen *v.* Price, 96 Fed. 435 [*reversed* on other grounds in 102 Fed. 509, 42 C. C. A. 484]; Hanifen *v.* E. H. Godshalk Co., 78 Fed. 811.

39. Conclusiveness and effect of decision of patent office see *infra*, VI, C, 15, d.

40. Lewis *v.* Cronemeyer, 29 App. Cas. (D. C.) 174; Bader *v.* Vajen, 14 App. Cas. (D. C.) 241; Dodge *v.* Fowler, 11 App. Cas. (D. C.) 592; Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207; Soley *v.* Hebbard, 5 App. Cas. (D. C.) 99; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Merrimac Mattress Mfg. Co. *v.* Feldman, 133 Fed. 64; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408]; Front Rank Furnace Co. *v.* Wrought Iron Range Co., 63 Fed. 995; Green *v.* French, 11 Fed. 591; Albright *v.* Celluloid Harness Trimming Co., 1 Fed. Cas. No. 147, 2 Ban. & A. 629, 12 Off. Gaz. 227; Carter *v.* Carter, 5 Fed. Cas. No. 2,475, McArthur Pat. Cas. 388; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. Rep. 268 [*affirmed* in 14 How. 218, 14 L. ed. 394]; Goodyear *v.* Day, 10 Fed. Cas. No. 5,569, 2 Wall. Jr. 283; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Matthews *v.* Skates, 16 Fed. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Putnam *v.* Yerrington, 20 Fed. Cas. No. 11,486, 2 Ban. & A. 237, 9 Off. Gaz. 689; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 1 Off. Gaz. 466, 9 Phila. (Pa.) 368; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Winans *v.* New York, etc., R. Co., 30 Fed. Cas. No. 17,864, 4 Fish. Pat. Cas. 1.

To what time presumption extends.— The presumption of originality arising from the grant of a patent only extends back to the time when the application was filed in the patent office. Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Johnson *v.* Root, 13 Fed. Cas. No. 7,410, 2 Cliff. 637; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275]; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Webster Loom Co. *v.* Higgins, 29 Fed. Cas. No. 17,342, 4 Ban. & A. 88, 15 Blatchf. 446, 16 Off. Gaz. 675; White *v.* Allen, 29 Fed. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Wing *v.* Richardson, 30 Fed. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

41. Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530; Larkin *v.* Richardson, 28 App. Cas. (D. C.) 471; Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Hall Signal Co. *v.* Union Switch, etc., Co., 115 Fed. 638; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Donoughe *v.* Hubbard, 27 Fed. 712; Duffy *v.* Reynolds, 24 Fed. 855; Rogers *v.* Beecher, 3 Fed. 639; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42, 8 Reporter 455, 18 Off. Gaz. 979; Cox *v.* Griggs, 6 Fed. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Fisk *v.* Church, 9 Fed. Cas. No. 4,826, 5 Fish. Pat. Cas. 540, 1 Off. Gaz. 634; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10, 8 Off. Gaz. 685; Konold *v.* Klein, 14 Fed. Cas. No. 7,925, 3 Ban. & A. 226, 5 Reporter 427.

actions generally.[42] The weight and sufficiency of the evidence in actions to establish priority between inventors is governed by the rules applicable in civil cases generally.[43]

B. Joint Inventors — 1. In General. Two or more parties may by mutual contributions or suggestions so aid in developing the idea of each as to produce an invention which must be regarded as the result of the joint mental efforts of both, and not as the separate invention of either, and in such case they must apply for and receive the patent jointly.[44]

2. Joinder in Grant. A patent issued to two parties as joint inventors is invalid where it appears that one of them is the sole inventor,[45] or where different

42. See, generally, Evidence.

Verbal declarations of a person that he has made an invention, coupled with a description of the nature and objects of the invention, are a part of the *res gestæ*, and admissible to prove priority of invention (Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Gibbs *v.* Johnson, 10 Fed. Cas. No. 5,384; Stephens *v.* Salisbury, 22 Fed. Cas. No. 13,369, McArthur Pet. Cas. 379) and such verbal descriptions, without drawing or model, are admissible for the purpose of proving priority of invention, when the invention is of great simplicity and the time is not so long as to make the recollection improbable (Stephens *v.* Salisbury, *supra*). But it seems that conversations and declarations by one of the parties describing a device by which he has already constructed a model is inadmissible, if such model is not produced or its non-production accounted for (Richardson *v.* Hicks, 20 Fed. Cas. No. 11,783, McArthur Pat. Cas. 335); and it has been held error to allow a witness testifying to such conversations and declarations to testify that a model shown to him and not claimed to be the one that the inventor had then constructed corresponds to the description given, and that he could have made it from such description (Richardson *v.* Hicks, *supra*).

A certificate of a commissioner of patents of the correctness of a copy or translation from a French volume in the patent office is inadmissible to prove the existence of an invention prior to plaintiff's patent, as the book itself, or a duly proved translation, is the only way its contents can be shown. Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 4 Am. L. Rec. 494.

43. See, generally, Evidence.

Evidence held sufficient see National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375; Uhlman *v.* Arnholdt, etc., Brewing Co., 53 Fed. 485; Bliss *v.* Merrill, 33 Fed. 39; Atkinson *v.* Boardman, 2 Fed. Cas. No. 608, Cranch Pat. Dec. 139, McArthur Pat. Cas. 80; Babcock *v.* Degener, 2 Fed. Cas. No. 698, McArthur Pat. Cas. 607; Collins *v.* White, 6 Fed. Cas. No. 3,019; Jillson *v.* Winsor, 13 Fed. Cas. No. 7,321, McArthur Pat. Cas. 136; Sherwood *v.* Sherman, 21 Fed. Cas. No. 12,780.

Evidence held insufficient see Gibbons *v.* Pellar, 28 App. Cas. (D. C.) 530; Shuman *v.* Beall, 27 App. Cas. (D. C.) 324; Henry *v.* Doble, 27 App. Cas. (D. C.) 33; Gillette *v.* Sendelbach, 146 Fed. 758, 77 C. C. A. 55; Ashe *v.* Mutual Lasting Co., 42 Fed. 840; Lamson Cash R. Co. *v.* Osgood Cash Car Co., 29 Fed. 210; Hutchinson *v.* Everett, 26 Fed. 531; Beach *v.* Tucker, 2 Fed. Cas. No. 1,153; Carter *v.* Carter, 5 Fed. Cas. No. 2,475, McArthur Pat. Cas. 388; Clarke *v.* Cramer, 5 Fed. Cas. No. 2,848, McArthur Pat. Cas. 473; Cornell *v.* Hyatt, 6 Fed. Cas. No. 3,237, McArthur Pat. Cas. 423; Warner *v.* Goodyear, 29 Fed. Cas. No. 17,183, Cranch Pat. Dec. 125, McArthur Pat. Cas. 60.

On testimony which is vague and wanting in precision in respect to the essential features of the device for which priority is claimed, priority of invention will not be adjudged. Cornell *v.* Hyatt, 6 Fed. Cas. No. 3,237, McArthur Pat. Cas. 423.

Acknowledgment or admission of priority. — On a question of priority between two inventors, the fact that one of them participated in the application of the other would seem to constitute a conclusive acknowledgment of priority. National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375. But the fact that one who claims to be the first and original inventor of a device has taken into partnership with himself the assignees of another, who also claim to be the original inventor, instead of litigating with them the question of priority, is not to be regarded as an admission by the former patentee of the validity of the patent claimed by the latter, if the arrangement was induced either directly or indirectly by fraud or misrepresentation. Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*.

44. Consolidated Bunging Apparatus Co. *v.* Woerle, 29 Fed. 449; Worden *v.* Fisher, 11 Fed. 505; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675.

Where each has invented a distinct improvement on the same machine, the object sought to be attained being a unit, a joint patent may be issued. Wilson *v.* Singer, 30 Fed. Cas. No. 17,835.

Mutual suggestions and improvements are sufficient to constitute a joint invention. Worden *v.* Fisher, 11 Fed. 505.

Filing a sale caveat is no estoppel to secure joint patent. Hoe *v.* Kahler, 25 Fed. 271, 23 Blatchf. 354, 12 Fed. 111, 20 Blatchf. 430.

When a claim covers a series of steps or a number of elements in a combination, the invention may well be joint, although some of the steps or some of the elements may have come as the thought of one. Quincey Min. Co. *v.* Krause, 151 Fed. 1012, 81 C. C. A. 290.

45. Bannerman *v.* Sanford, 99 Fed. 294, 39

improvements on the same machine were invented by each separately without the participation or knowledge of the other,[46] and a patent issued to a party as sole inventor is invalid where it appears that he made the invention jointly with another.[47] One of two joint inventors cannot make application and secure the patent upon assignment from the other. Both must join.[48] In an action for the infringement of a patent, the burden of showing as a defense that the patentee was a joint inventor with some other person, of the thing invented, is upon the patentee.[49] The issuance of a patent to two persons as joint inventors constitutes *prima facie* proof that the invention was joint.[50] And to invalidate a patent granted to two jointly the evidence must be clear and convincing.[51]

C. Employer and Employee[52] **— 1. In General.** The statutes of the United States require that the patent issue upon the application of and in the name of the real inventor, although he was employed and paid to make it for the benefit of the one employing him.[53] In such case the employer may be entitled to the ownership of the patent and may compel its transfer by assignment, but this depends upon the nature of the agreement between them.[54] A company that employs a skilled workman to make improvements on its machinery is not entitled to a conveyance of the patents secured by the workman on improvements so made in the absence of agreement to that effect.[55] An employee, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever

C. C. A. 534; Stewart *v.* Tenk, 32 Fed. 665; Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648; Royer *v.* Coupe, 29 Fed. 358; Hotchkiss *v.* Greenwood, 12 Fed. Cas. No. 6,718, 4 McLean 456, 2 Robb Pat. Cas. 730 [*affirmed* in 11 How. 248, 13 L. ed. 683]; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Act (1885), § 5, 48 & 49 Vict. c. 63.

46. De Laval Separator Co. *v.* Vermont Farm Mach. Co., 126 Fed. 536 [*affirmed* in 135 Fed. 772, 68 C. C. A. 474].

47. Arnold *v.* Bishop, 1 Fed. Cas. Nos. 552, 553, McArthur Pat. Cas. 27, 36; Thomas *v.* Weeks, 23 Fed. Cas. No. 13,914, Fish. Pat. Rep. 5, 2 Paine 92.

Evidence held insufficient to show joint invention see Ashcroft *v.* Cutter, 2 Fed. Cas. No. 578, 6 Blatchf. 511.

48. 2 Op. Atty.-Gen. 571.

49. Ashcroft *v.* Cutter, 2 Fed. Cas. No. 578, 6 Blatchf. 511.

50. Page Woven Wire Fence Co. *v.* Land, 49 Fed. 936.

51. Page Woven Wire Fence Co. *v.* Land, 49 Fed. 936; Schlicht, etc., Co. *v.* Chicago, Sewing-Mach. Co., 36 Fed. 585; Consolidated Bunging Apparatus Co. *v.* Woerle, 29 Fed. 449; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675.

Testimony of one of joint patentees insufficient to invalidate patent. Priestly *v.* Montague, 47 Fed. 650.

52. See Master and Servant, 26 Cyc. 1021.

53. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385]; Tyler *v.* Kelch, 19 App. Cas. (D. C.) 180; Hunt *v.* McCaslin, 10 App. Cas. (D. C.) 527, 79 Off. Gaz. 861; Green *v.* Willard Improved Barrel Co., 1 Mo. App. 202; Damon *v.* Eastwick, 14 Fed. 40.

In England, where a servant or employee makes an invention the patent is granted to him. *Ex p.* Scott, L. R. 6 Ch. 274, 19 Wkly. Rep. 425; Bloxam *v.* Elsee, 6 B. & C. 169, 13 E. C. L. 88, 1 C. & P. 558, 12 E. C. L. 320, 9 D. & R. 215, 5 L. J. K. B. O. S. 104, R. & M. 187, 30 Rev. Rep. 275; Matter of Russell, 2 De G. & J. 130, 6 Wkly. Rep. 95, 59 Eng. Ch. 104, 45 Eng. Reprint 937.

54. Hunt *v.* McCaslin, 10 App. Cas. (D. C.) 527.

Circumstances showing title in employer see Baldwin *v.* Von Micheroux, 83 Hun (N. Y.) 43, 31 N. Y. Suppl. 696 [*affirming* 5 Misc. 386, 25 N. Y. Suppl. 857]; Annin *v.* Wren, 44 Hun (N. Y.) 352; Bonsack Mach. Co. *v.* Hulse, 57 Fed. 519 [*affirmed* in 65 Fed. 864, 13 C. C. A. 180].

Insufficient proof of agreement.— Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749 [*reversing* 38 Fed. 597].

Securing patent at expense of company by employee will not give company title. Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321.

55. Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168; Burr *v.* De la Vergne, 102 N. Y. 415, 7 N. E. 366; Burden *v.* Burden Iron Co., 39 Misc. (N. Y.) 559, 80 N. Y. Suppl. 390; Gill *v.* U. S., 160 U. S. 426, 16 S. Ct. 322, 40 L. ed. 480; Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Barber *v.* National Carbon Co., 129 Fed. 370, 64 C. C. A. 40, 5 L. R. A. N. S. 1154; Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444 [*affirmed* in 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. N. S. 1172]; Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110, 8 Off. Gaz. 90; Whiting *v.* Graves, 29 Fed. Cas. No. 17,577, 3 Ban. & A. 222, 13 Off. Gaz. 455. And see *infra*, IV, D.

invention he may thus conceive and perfect is his individual property.[56] The company, however, has an implied license to make, use, and sell the invention.[57]

2. PERFECTION OF EMPLOYER'S IDEAS. Where the employer has a preconceived plan of an invention, and while engaged in experiments to perfect it the employee makes suggestions ancillary to the plan and preconceived ideas of the employer, the invention as a whole including the improvements is to be regarded as the invention of the employer.[58] It is otherwise, however, if the suggestions of the employee amount to a new method or arrangement which is in itself a complete invention. To enable the employer to claim the invention he must have, not merely the idea of the end or result to be accomplished, but a definite idea of the means which the employee amplifies or improves in details.[59]

3. PRESUMPTIONS AS TO INVENTORSHIP. Where a party employs another to assist in giving practical effect to his ideas, the presumption is that the employer is the inventor of the thing produced by their joint effort, and the burden is upon the employee to show clearly that he made the invention.[60] On the other hand where a party is employed to exercise his inventive skill because of his supposed ability as an inventor, the presumption is in favor of the employee.[61]

D. Government Employees. Government employees in general may secure patents upon inventions made by them during their employment and are entitled to own the patents upon the same conditions as other employees.[62] The government may have an implied license to use the invention, but has no title to the patent except by express agreement.[63] Employees of the patent office cannot receive or own a patent except by inheritance or bequest;[64] but after their employment ceases they may secure a patent upon an invention made during their employment.[65]

Agreement not against public policy.— An agreement by an employee to assign an interest in all inventions made by him to the employer, in consideration of the employment, is not against public policy. Wright *v.* Vocalion Organ Co., 148 Fed. 209, 78 C. C. A. 183.

Construction of contract for interest in future inventions see Wright *v.* Vocalion Organ Co., 148 Fed. 209, 78 C. C. A. 183.

Improvements made after expiration of agreement do not belong to employer. Appleton *v.* Bacon, 2 Black (U. S.) 699, 17 L. ed. 338.

56. Solomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667.

57. Gill *v.* U. S., 160 U. S. 426, 16 S. Ct. 322, 40 L. ed. 480; Keyes *v.* Eureka Consol. Min. Co., 158 U. S. 150, 15 S. Ct. 772, 39 L. ed. 929; Lane, etc., Co. *v.* Locke, 150 U. S. 193, 14 S. Ct. 78, 37 L. ed. 1049; Solomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667; Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Blauvelt *v.* Interior Conduit, etc., Co., 80 Fed. 906, 26 C. C. A. 243; Whiting *v.* Graves, 29 Fed. Cas. No. 17,577, 3 Ban. & A. 222, 13 Off. Gaz. 455. And see Bonathan *v.* Bowmanville Furniture Mfg. Co., 31 U. C. Q. B. 413.

58. McKellof *v.* Fetzer, 31 App. Cas. (D. C.) 586; Larkin *v.* Richardson, 28 App. Cas. (D. C.) 471; Kreag *v.* Green, 28 App. Cas. (D. C.) 437; Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228; Gallagher *v.* Hastings, 21 App. Cas. (D. C.) 88; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Hunt *v.* McCaslin, 10 App. Cas. (D. C.) 527; Milton *v.* Kingsley, 7 App. Cas. (D. C.) 531; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; King *v.* Gedney, 14 Fed. Cas. No. 7,795, McArthur Pat. Cas. 443; Wellman *v.* Blood, 29 Fed. Cas. No. 17,385, McArthur Pat. Cas. 432; Huebel *v.* Bernard, 90 Off. Gaz. 751.

Lack of mechanical skill and employment of another to construct a machine does not forfeit the right to an invention. United Shirt, etc., Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442 [*affirming* 138 Fed. 136].

59. Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168; Streat *v.* Simpson, 53 Fed. 358.

60. Whitney *v.* Howard, 21 App. Cas. (D. C.) 218; Flather *v.* Weber, 21 App. Cas. (D. C.) 179; Gallagher *v.* Hastings, 21 App. Cas. (D. C.) 88; Slaughter *v.* Halle, 21 App. Cas. (D. C.) 19; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Miller *v.* Kelly, 18 App. Cas. (D. C.) 163; Milton *v.* Kingsley, 7 App. Cas. (D. C.) 531; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Thibodeau *v.* Hildreth, 117 Off. Gaz. 601; Corsy *v.* McDermott, 117 Off. Gaz. 279.

61. See *supra*, IV, C, 1.

62. Gill *v.* U. S., 160 U. S. 426, 16 S. Ct. 322, 40 L. ed. 480; Solomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667.

63. Gill *v.* U. S., 160 U. S. 426; McAleer *v.* U. S., 150 U. S. 424, 14 S. Ct. 160, 37 L. ed. 1130; Solomons *v.* U. S., 137 U. S. 342.

64. U. S. Rev. St. (1878) § 480 [U. S. Comp. St. (1901) p. 271].

65. Page *v.* Holmes Burglar Alarm Tel. Co., 1 Fed. 304, 17 Blatchf. 485; Foote *v.*

E. Assignees. Patents may be issued and reissued to assignees upon applications made by the inventors.[66] It is not necessary, however, for the patent to issue in the name of the assignee in order that he shall acquire title, since it vests in him by operation of law when the instrument of transfer is made.[67] Assignees as well as inventors may transfer title to patents owned by them since the right of transfer is unlimited.[68]

F. Personal Representatives. Upon the death of the inventor before issue of patent, the right of applying for and obtaining the patent devolves upon the executor or administrator.[69] The personal representatives take the patent with other property in trust for the heirs.[70] A foreign executor or administrator may apply for and receive the patent, but his authority must be proved by a certificate of a diplomatic or consular officer of the United States.[71]

G. Heirs. If after applying for a patent the inventor dies and the patent issues in his name after his death, it goes by operation of law to the heirs.[72]

H. Guardian of Insane Person. Where an inventor becomes insane before securing a patent, his legally appointed guardian, conservator, or representative may apply for and obtain the patent in trust for him.[73]

V. APPLICATION AND PROCEEDINGS THEREON.[74]

A. In General. The application for a patent must be made to the commissioner of patents,[75] and the statutory requirements must be complied with in making application and in the proceedings thereon or the patent is void.[76] The proceedings upon applications are governed by rules adopted by the commissioner of patents with the approval of the secretary of the interior under section 483 of the Revised Statutes.

B. Requisites of Application — 1. In General. An application for patent in the United States comprises a petition, specification, claims, oath, fee of fifteen dollars, drawings if the nature of the inventions admits of illustration, and a model if required by the patent office.[77] Models are seldom required and are

Frost, 9 Fed. Cas. No. 4,910, 3 Ban. & A. 607, 14 Off. Gaz. 860.

66. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385]; Hendrie *v.* Sayles, 98 U. S. 546, 25 L. ed. 176.

Copartnership may issue to copartnership as assignee. Wright *v.* Randel, 8 Fed. 591, 19 Blatchf. 495; Harrison *v.* Morton, 76 Off. Gaz. 1275.

67. Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Consolidated Electric Light Co. *v.* McKeesport Light Co., 34 Fed. 335; Consolidated Electric Light Co. *v.* Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412.

Record in the patent office is delivery of possession. Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923.

68. U. S. Rev. St. (1878) § 4398 [U. S. Comp. St. (1901) p. 3002]; Selden *v.* Stockwell Self-Lighting Gas-Burner Co., 9 Fed. 390, 19 Blatchf. 544.

69. U. S. Rev. St. (1878) § 4896; De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; Eagleton Mfg. Co. *v.* West Bradley, etc., Mfg. Co., 111 U. S. 490, 4 S. Ct. 593, 28 L. ed. 493; Stimpson *v.* Rogers, 23 Fed. Cas. No. 13,457, 4 Blatchf. 333.

In England the executor or administrator must apply for patent within six months. Act (1883), § 34, 46 & 47 Vict. c. 57.

70. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177, 10 Phila. (Pa.) 227, 6 Off. Gaz. 34.

71. U. S. Rev. St. (1878) § 4896, as amended March 3, 1903, 32 U. S. St. at L. 1227.

72. De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138.

73. The above is embodied in the act of Feb. 26, 1899, c. 227, 30 U. S. St. at L. 915 [U. S. Comp. St. (1901) p. 3386], but through obvious clerical error does not appear in U. S. Rev. St. (1878) § 4896, as rewritten in the act of March 3, 1903, c. 1019, § 3, 32 U. S. St. at L. 1226 [U. S. Comp. St. Suppl. (1905) p. 665].

Patent to guardian is valid.— Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652.

74. **Application for extension of patent** see *infra*, VII, B.

Application for reissue see *infra*, VIII, E.

75. U. S. Rev. St. (1878) § 4888 [U. S. Comp. St. (1901) p. 3383].

76. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Roemer *v.* Simon, 95 U. S. 214, 24 L. ed. 384. And see *supra*, I, A, 4.

77. U. S. Rev. St. (1878) §§ 4888, 4889, 4891, 4892, 4934 [U. S. Comp. St. (1901) pp. 3383, 3384, 3400].

never necessary as a prerequisite to the entry of the application as complete.[78] All parts save the model must be filed in the patent office before the application will be given a filing date.[79] The application must be signed by the inventor if alive and two witnesses.[80] Copies of the specification, claims, and drawings are attached to the patent and form a part thereof.[81]

2. Specification or Description — a. In General. The word "specification," when used separately from the word "claim," as used in the statute, means the written description of the invention and of the manner and process of making, constructing, compounding, and using it and the claims made.[82] While it is said that courts are reluctant to declare patents void for insufficient description,[83] the applicant must nevertheless describe not merely the principle of his invention, but the best mode in which he contemplates applying the principle and must describe the means to be employed in such full, clear, and exact terms as will enable those skilled in the art without other aid to make and use the invention.[84] If this is not done the patent is void.[85] It has been decided that nothing should be left to

78. Pract. Rule 56.

A model is no part of patent. Barry *v.* Gugenheim, 2 Fed. Cas. No. 1,061, 5 Fish. Pat. Cas. 452, 1 Off. Gaz. 382.

Necessity for specimens.—The patent office determines whether specimens are necessary. Badische Anilin, etc., Fabrik *v.* Cochrane, 2 Fed. Cas. No. 719, 4 Ban. & A. 215, 16 Blatchf. 155 [*reversed* on other grounds in 111 U. S. 293, 4 S. Ct. 45, 28 L. ed. 433].

79. Pract. Rule 31.

80. U. S. Rev. St. (1878) § 4888 [U. S. Comp. St. (1901) p. 3383].

81. U. S. Rev. St. (1878) § 4889 [U. S. Comp. St. (1901) p. 3383].

82. Wilson *v.* Coon, 6 Fed. 611, 18 Blatchf. 532.

83. Adams *v.* Joliet Mfg. Co., 1 Fed. Cas. No. 56, 3 Ban. & A. 1, 12 Off. Gaz. 93; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

84. U. S. Rev. St. (1878) § 4888 [U. S. Comp. St. (1901) p. 3383]; Parks *v.* Booth, 102 U. S. 96, 26 L. ed. 54; Gill *v.* Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Grier *v.* Castle, 17 Fed. 523; Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303; Burr *v.* Cowperthwait, 4 Fed. Cas. No. 2,188, 4 Blatchf. 163; Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379; Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Mabie *v.* Haskell, 15 Fed. Cas. No. 8,653, 2 Cliff. 507; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Sullivan *v.* Redfield, 23 Fed. Cas. No. 13,597, Paine 441, 1 Robb Pat. Cas. 477; Swift *v.* Whisen, 23 Fed Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48; Tucker *v.* Tucker Mfg. Co., 24 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464; Vogler *v.* Semple, 28 Fed. Cas. No. 16,987, 2 Ban. & A. 556, 7 Biss. 382, 11 Off. Gaz. 923; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Reasons for rule.—Exactitude in the description of an invention is required in order that the government may know what they have granted, and what will become public property when the patent expires; that licensees may know how to use and practice the invention during the term of the patent; and that subsequent inventors may know what portion of the field of an invention is unoccupied. Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Tucker *v.* Tucker Mfg. Co., 24 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

Construction of phrase "mounted on" see *In re* Duncan, 28 App. Cas. (D. C.) 457.

In England provisional specification need describe the invention only roughly and not in detail. Murray *v.* Clayton, L. R. 7 Ch. 570, 20 Wkly. Rep. 649; Stoner *v.* Todd, 4 Ch. D. 58, 46 L. J. Ch. 32, 35 L. T. Rep. N. S. 661, 25 Wkly. Rep. 38; Daw *v.* Eley, L. R. 3 Eq. 496, 36 L. J. Ch. 482, 15 L. T. Rep. N. S. 559; *In re* Newall, 4 C. B. N. S. 269, 4 Jur. N. S. 562, 27 L. J. C. P. 357, 93 E. C. L. 269; Pneumatic Tyre Co. *v.* East London Rubber Co., 75 L. T. Rep. N. S. 488. When provisional specification is allowed by the law officer of the crown it cannot be impeached as insufficient. Penn *v.* Bibby, L. R. 2 Ch. 127, 36 L. J. Ch. 455, 15 L. T. Rep. N. S. 399, 15 Wkly. Rep. 208.

85. Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77; Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 1 Robb Pat. Cas. 166, 3 Wash. 408 [*affirmed* in 7 Wheat. 453, 5 L. ed. 496]; Lippincott *v.* Kelly, 15 Fed. Cas. No. 8,381; Lowell *v.* Lewis, 15 Fed. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44.

For descriptions held insufficient see Miller *v.* Mawhinney Last Co., 105 Fed. 523, 44 C. C. A. 581; Davis *v.* Parkman, 71 Fed. 961, 18 C. C. A. 398; Schneider *v.* Thill, 21 Fed. Cas. No. 12,470*a*, 5 Ban. & A. 565; Sullivan *v.*

experiment.[86] A specification is sufficient, if a mechanic skilled in the art can from the descriptions and drawings make and use the invention;[87] and sufficiency is to be determined by knowledge possessed at the time of the grant.[88] By "skilled in the art" is meant those of ordinary skill and not the very expert.[89] Whether the description is so full, clear, and exact as to enable any one skilled in the art to make and use it is a question for the jury to determine[90] upon the evidence of persons skilled in the art to which the patent appertains.[91]

b. Matters of Common Knowledge. It is not necessary to describe matters of common knowledge which those skilled in the art would understand without description.[92]

c. Uses of Invention. It is not necessary to describe all uses to which the invention may be put, but it is necessary to describe some intended use.[93] The inventor is entitled to all uses of his invention whether he foresaw them or not.[94]

Redfield, 23 Fed. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Webster Loom Co. *v.* Higgins, 29 Fed. Cas. No. 17,342, 4 Ban. & A. 88, 15 Blatchf. 446, 16 Off. Gaz. 675.

For cases in which allegations of insufficiency of description were overruled see Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553; Lawther *v.* Hamilton, 124 U. S. 1, 8 S. Ct. 342, 31 L. ed. 325; Consolidated Safety-Valve Co. *v.* Crosby Steam Gauge, etc., Co., 113 U. S. 157, 5 S. Ct. 513, 28 L. ed. 939; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; De Lamar *v.* De Lamar Min. Co., 110 Fed. 538 [*affirmed* in 117 Fed. 240, 54 C. C. A. 272]; Hensel-Colladay Co. *v.* Rosenau, 105 Fed. 968; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83; Burrows *v.* Wetherill, 4 Fed. Cas. No. 2,208, McArthur Pat. Cas. 315; Goodyear *v.* Wait, 10 Fed. Cas. No. 5,587, 5 Blatchf. 468, 3 Fish. Pat. Cas. 242; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; Wilbur *v.* Beecher, 29 Fed. Cas. No. 17,634, 2 Blatchf. 132, Fish. Pat. Rep. 401.

Stating proportions.— A claim for a compound is not void because the exact proportions are not stated, where proportions may be varied. Klein *v.* Russell, 19 Wall. (U. S.) 433, 22 L. ed. 116.

Stating dimensions.— When the novelty of an invention consists in the dimensions or the material of the new thing devised, the patentee must specify the particular dimensions or the particular material his invention contemplates. Bullock Electric Mfg. Co. *v.* General Electric Co., 149 Fed. 409, 79 C. C. A. 229 [*reversing* 146 Fed. 549].

86. Head *v.* Stevens, 19 Wend. (N. Y.) 411; Tyler *v.* Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384.

Patent for chemical process must disclose materials and proportions with such clearness that no experiment is necessary. Béné *v.* Jeantet, 129 U. S. 683, 9 S. Ct. 428, 32 L. ed. 803; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384.

87. Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177; Am Ende *v.* Seabury, 36 Fed. 593; Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; St. Louis Stamping Co. *v.* Quinby, 21 Fed. Cas. No. 12,240, 4 Ban. & A. 192, 16 Off. Gaz. 135; Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Stephens *v.* Salisbury, 22 Fed. Cas. No. 13,369, McArthur Pat. Cas. 379.

88. Matheson *v.* Campbell, 69 Fed. 597 [*affirmed* in 78 Fed. 910, 24 C. C. A. 384].

89. Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Tannage Patent Co. *v.* Zahn, 66 Fed. 986 [*reversed* on other grounds in 70 Fed. 1003, 17 C. C. A. 552].

90. Wood *v.* Underhill, 5 Wall. (U. S.) 1, 12 L. ed. 23; Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Davis *v.* Palmer, 7 Fed. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

91. Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23.

92. American Delinter Co. *v.* American Mach., etc., Co., 128 Fed. 709, 63 C. C. A. 307; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Davis *v.* Palmer, 7 Fed. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9; Tompkins *v.* Gage, 24 Fed. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31.

For description of old features reference may be made to a prior patent. Parkes *v.* Stevens, L. R. 5 Ch. 36, 22 L. T. Rep. N. S. 635, 18 Wkly. Rep. 233.

93. Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Blanchard *v.* Eldridge, 3 Fed. Cas. No. 1,509; Pike *v.* Potter, 19 Fed. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Macnamara *v.* Hulse, C. & M. 471, 41 E. C. L. 258; Derosne *v.* Fairie, 2 C. M. & R. 476, 1 Gale 109, 5 Tyrw. 393.

94. Stow *v.* Chicago, 104 U. S. 547, 26 L. ed. 816; Roberts *v.* Ryer, 91 U. S. 150, 23 L. ed. 267; Tucker *v.* Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515; Goshen Sweeper Co. *v.* Bissell Carpet-Sweeper Co., 72 Fed. 67,

d. Philosophical Principles. If the inventor does not know the philosophical principles upon which his invention works or what takes place during its operation, the failure to describe them does not render the patent void so long as the description is sufficient to enable those skilled in the art to practice the invention and get the results desired.[95]

e. Improvements. The general rule governing description of the thing for which a patent is asked[96] applies in the case of improvements.[97] The description should show clearly in what the improvement consists.[98] It should be confined to the specific improvement and such parts of the old mechanism as necessarily coöperate with it.[99] It should distinguish between the old and the new.[1] If this is not done the only mode of obviating the difficulty is either by an amended specification or a new patent.[2] It is usually unnecessary to describe the old machine,[3] a general reference thereto being sufficient,[4] unless a description of the whole machine as it operates with the improvement is essential to make the description understood by a person of the trade to which it belongs.[5] A description in a patent for an improvement is sufficient if a practical mechanic acquainted with the construction of the old machine in which the improvement is made, can, with the aid of the patent and diagram, adopt the improvement.[6]

f. Concealment and Deception. Where the inventor in his patent intentionally conceals facts about his invention or attempts to deceive or mislead the public in regard to it, the patent is void.[7] An untrue statement of a material fact invalidates a patent, although a skilled workman might avoid it.[8] Mere defects in the description not intended to deceive will not invalidate a patent;[9] and if fraud is charged it must be proved.[10]

19 C. C. A. 13; Stearns *v.* Russell, 84 Off. Gaz. 1434.

95. National Meter Co. *v.* Thomson Meter Co., 106 Fed. 531; Emerson Co. *v.* Nimocks, 99 Fed. 737, 40 C. C. A. 87; Knickerbocker Co. *v.* Rogers, 61 Fed. 297; Dixon-Woods Co. *v.* Pfeifer, 55 Fed. 390, 5 C. C. A. 148; Haffcke *v.* Clark, 46 Fed. 770; Andrews *v.* Cross, 8 Fed. 269, 19 Blatchf. 294; St. Louis Stamping Co. *v.* Quinby, 21 Fed. Cas. No. 12,240, 4 Ban. & A. 192, 16 Off. Gaz. 135. And see *supra*, II, B, 7.

96. See *supra*, V, A, 2.

97. Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118.

98. Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Dixon *v.* Moyer, 7 Fed. Cas. No. 3,931, 4 Wash. 68, 1 Robb Pat. Cas. 324.

99. Pract. Rule 31; Cross *v.* Huntly, 13 Wend. (N. Y.) 385; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Sargent *v.* Carter, 21 Fed. Cas. No. 12,362, 1 Fish. Pat. Cas. 277; Sullivan *v.* Redfield, 23 Fed. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

1. Gill *v.* Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Cerealine Mfg. Co. *v.* Bates, 101 Fed. 272, 41 C. C. A. 341; Alexandria Bank *v.* Wilson, 2 Fed. Cas. No. 856, 2 Cranch C. C. 5; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Dixon *v.* Moyer, 7 Fed. Cas. No. 3,931, 4 Wash. 68, 1 Robb Pat. Cas. 324; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17; Lowell *v.* Lewis, 15 Fed. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Clark *v.* Adie, 2 App. Cas. 315, 46 L. J. Ch. 585, 36 L. T. Rep. N. S. 923; Foxwell *v.* Bostock, 4 De G. J. & S. 298, 10 L. T. Rep. N. S. 144, 12 Wkly. Rep. 723, 69 Eng. Ch. 231, 46 Eng. Reprint 934; Macfarlane *v.* Price, 1 Stark. 199, 18 Rev. Rep. 760, 2 E. C. L. 82.

2. Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17.

3. Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177; Ives *v.* Hamilton, 92 U. S. 426, 23 L. ed. 494; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77; Gibbs *v.* Ellithorp, 10 Fed. Cas. No. 5,383, McArthur Pat. Cas. 702; Winans *v.* New York, etc., R. Co., 30 Fed. Cas. No. 17,863, 1 Fish. Pat. Cas. 213 [*affirmed* in 21 How. 88, 16 L. ed. 68].

4. Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118.

5. Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

6. Ives *v.* Hamilton, 92 U. S. 426, 23 L. ed. 494.

7. U. S. Rev. St. (1878) § 4920; Davis *v.* Bell, 8 N. H. 500, 31 Am. Dec. 202; Carlton *v.* Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Evans *v.* Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; *Ex p.* Sanders, 21 Fed. Cas. No. 12,292.

8. Simpson *v.* Holliday, L. R. 1 H. L. 315, 35 L. J. Ch. 811; Beard *v.* Egerton, 8 C. B. 165, 13 Jur. 1004, 19 L. J. C. P. 36, 65 E. C. L. 165; Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806.

9. Lowell *v.* Lewis, 15 Fed. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131.

10. Goodyear *v.* Day, 10 Fed. Cas. No. 5,567.

3. Claims[11] — a. In General. The specification must conclude with a definite and distinct claim or claims pointing out the feature or features of the device disclosed which the applicant regards as his invention or discovery.[12] The claims fix the extent of the protection furnished by the patent.[13] The protection afforded by the patent does not extend to all that is shown but only to what is set forth in the claim.[14] While the specification may be referred to to limit the claim, it can never be made available to expand it.[15] The claims are essential parts which the public are to look to and scrutinize to ascertain their rights, and must control;[16] and the courts should be careful not to enlarge by construction the claim which the patent office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms.[17] If a patentee describe and claim a part only of his patent he is presumed to have abandoned the residue to the public.[18]

b. Vague, Indefinite, and Inaccurate Claims. The claim must be definite and clear so as to inform the public with certainty just what it is that the patent secures as a monopoly,[19] and it must be accurate.[20] If it is vague and indefinite it is void.[21]

c. Must State Means, Not Function or Result. The claim must state the physical structure or elements of mechanism by which the function desired is attained or the end or result produced,[22] and is not valid if it merely states the function, end, or result.[23]

d. Breadth of Claim. While the claim should include such elements as are

11. Correction and amendment of claims on reissue see *infra*, VIII.

Excessive claims as affecting validity of patent see *infra*, VI, B, 7, b.

12. U. S. Rev. St. (1878) § 4888 [U. S. Comp. St. (1901) p. 3383]; Roemer *v.* Neumann, 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277; Calkins *v.* Bertrand, 4 Fed. Cas. No. 2,317, 2 Ban. & A. 215, 6 Biss. 494, 9 Off. Gaz. 795.

If the claim be for an improvement, it must distinguish the new from the old so that it may not cover any parts that are old. Blake *v.* Sperry, 3 Fed. Cas. No. 1,503, 2 N. Y. Leg. Obs. 251.

Old elements shown need not be included. Goshen Sweeper Co. *v.* Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 C. C. A. 13; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; Forbush *v.* Cook, 9 Fed. Cas. No. 4,931, 2 Fish. Pat. Cas. 668.

Omission of essential element is fatal. Doubleday *v.* Beatty, 11 Fed. 729.

Claim not supported by description is void. Knox *v.* Quicksilver Min. Co., 4 Fed. 809; Huggins *v.* Hubby, 12 Fed. Cas. No. 6,839.

In designs a claim to "the design shown" is sufficient. Dobson *v.* Dorman, 118 U. S. 10, 6 S. Ct. 946, 30 L. ed. 63.

The object of the claim is to eliminate or disclaim what is old. Plimpton *v.* Spiller, 6 Ch. D. 412, 47 L. J. Ch. 211, 7 L. T. Rep. N. S. 56, 26 Wkly. Rep. 285; Hinks *v.* Safety Lighting Co., 4 Ch. D. 607, 46 L. J. Ch. 185, 36 L. T. Rep. N. S. 391.

13. McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Sutter *v.* Robinson, 119 U. S. 530, 7 S. Ct. 376, 30 L. ed. 492; Burns *v.* Meyer, 100 U. S. 671, 25 L. ed. 738; Merrill *v.* Yeomans, 94 U. S. 568, 24 L. ed. 235; Untermeyer *v.* Jeannot, 20 Fed. 503; Cimiotti Unhairing Co. *v.* American Fur Refining Co., 116 Off. Gaz. 1452; Lehigh Valley R. Co. *v.* Mellon, 20 Off. Gaz. 1891; Masury *v.* Anderson, 4 Off. Gaz. 55.

14. *In re* Seabury, 23 App. Cas. (D. C.) 377; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., 122 Fed. 470 [*affirmed* in 125 Fed. 378, 60 C. C. A. 244]; Ingham *v.* Pierce, 31 Fed. 822; Toohey *v.* Harding, 1 Fed. 174, 4 Hughes 253; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; *Ex p.* Tillman, 23 Fed. Cas. No. 14,050.

15. McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800.

16. Untermeyer *v.* Jeannot, 20 Fed. 503.

17. Burns *v.* Meyer, 100 U. S. 671, 25 L. ed. 738.

18. McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Keystone Bridge Co. *v.* Phœnix Iron Co., 95 U. S. 274, 24 L. ed. 344.

19. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; *In re* Creveling, 117 Off. Gaz. 1161; *In re* Dilg, 115 Off. Gaz. 1067.

20. *In re* Creveling, 117 Off. Gaz. 1167.

21. Consolidated Electric Light Co. *v.* McKeesport Light Co., 159 U. S. 465, 16 S. Ct. 75, 40 L. ed. 221; Brickill *v.* Baltimore, 50 Fed. 274; Brickill *v.* Hartford, 49 Fed. 372; Edgarton *v.* Furst, etc., Mfg. Co., 9 Fed. 450, 10 Biss. 402; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

22. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Canda *v.* Michigan Malleable Iron Co., 124 Fed. 486, 61 C. C. A. 194; National Meter Co. *v.* Neptune Meter Co., 122 Fed. 82 [*affirmed* in 129 Fed. 124, 63 C. C. A. 626]; *In re* Creveling, 117 Off. Gaz. 1161.

23. Diamond Match Co. *v.* Ruby Match Co., 127 Fed. 341; Boyden Power-Brake Co. *v.* Westinghouse, 70 Fed. 816, 17 C. C. A. 430 [*affirmed* in 83 Off. Gaz. 1067]. And see *supra*, II, A, 4; II, B, 4.

necessary to produce the desired result,[24] it is not necessary that the claim specify in detail mechanism which constitutes the invention;[25] but it may refer to the elements of mechanism by broad terms of description which will include equivalent mechanism for the purpose.[26] The inventor may make a generic claim including many specific forms.[27]

e. Alternative Claims. Claims should not seek to include two elements by referring to them in the alternative but should use some broad term of description applicable to both.[28]

f. Multiplicity of Claims. While a number of claims may be made in a single patent,[29] they should contain material differences and should not consist of mere repetitions in varying phraseology of the same thing.[30] A needless multiplicity of claims calls for a limited construction of them,[31] and the patent may be invalid because of ambiguity.[32]

4. Drawings. The drawings must be referred to in the specifications[33] and

24. *In re* Creveling, 117 Off. Gaz. 1167.

Omission of understood element will not invalidate. Chicago Wooden Ware Co. *v.* Miller Ladder Co., 133 Fed. 541, 66 C. C. A. 517.

25. Schroeder *v.* Brammer, 98 Fed. 880; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203. And see General Electric Co. *v.* Bullock Electric Mfg. Co., 152 Fed. 427, 81 C. C. A. 569 [*reversing* 146 Fed. 552].

Limiting claims.— Where there are many devices on the market which closely resemble each other in appearance and structure, it is necessary for an applicant for a patent for a similar device to carefully limit and differentiate his claims in his application. *In re* Hoey, 28 App. Cas. (D. C.) 416.

26. Rosell *v.* Allen, 16 App. Cas. (D. C.) 559; Hill *v.* Hodge, 12 App. Cas. (D. C.) 528; Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331, 5 Off. Gaz. 268 [*affirmed* in 94 U. S. 568, 24 L. ed. 235]; American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 80 Off. Gaz. 515.

27. Bowers *v.* Pacific Coast Dredging, etc., Co., 99 Fed. 745; Brickill *v.* New York, 98 Fed. 113; Wilcox, etc., Sewing-Mach. Co. *v.* Merrow Mach. Co., 93 Fed. 206, 35 C. C. A. 269, 85 Off. Gaz. 1078; Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323. And see Macnamara *v.* Hulse, C. & M. 471, 41 E. C. L. 258; Thomas *v.* Foxwell, 5 Jur. N. S. 37 [*affirmed* in 6 Jur. N. S. 271].

Claim may be in broad terms which apply to the means shown and to equivalents see *In re* Green, 20 D. C. 237; Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; Electric Smelting Co. *v.* Carborundum Co., 102 Fed. 618, 42 C. C. A. 537; Pittsburgh Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301; Brush Electric Co. *v.* Electric Imp. Co., 52 Fed. 965; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Union Paper-Bag Mach. Co. *v.* Nixon, 24 Fed. Cas. No. 14,391, 2 Ban. & A. 244, 1 Flipp. 491, 9 Off. Gaz. 691; Union Paper Collar Co. *v.* White, 24 Fed. Cas. No. 14,396, 2 Ban. & A. 60, 7 Off. Gaz. 698, 877, 11 Phila. (Pa.) 479, 1 Wkly. Notes Cas. (Pa.) 363.

Terms covering forms not yet invented may be used. U. S. Glass Co. *v.* Atlas Glass Co., 88 Fed. 493.

Omission of elements which would be understood is not fatal. Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 [*affirming* 69 Fed. 837]; American Automaton Weighing Mach. Co. *v.* Blauvelt, 50 Fed. 213; Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

Sub-combination in machine not useful alone may be claimed. Roberts *v.* H. P. Nail Co., 53 Fed. 916; Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

28. Burr *v.* Smith, 4 Fed. Cas. No. 2,196; Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31; Wheeler *v.* Simpson, 29 Fed. Cas. No. 17,500, 1 Ban. & A. 420, 6 Off. Gaz. 435.

29. *In re* Carpenter, 24 App. Cas. (D. C.) 110; Carlton *v.* Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517; Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 69 Fed. 257; Britton *v.* White Mfg. Co., 61 Fed. 93; Brush Electric Co. *v.* Electrical Accumulator Co., 47 Fed. 48; Tompkins *v.* Gage, 24 Fed. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Computing Scale Co. *v.* Automatic Scale Co., 119 Off. Gaz. 1586.

30. Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 69 Fed. 257 [*reversed* on other grounds in 71 Fed. 396, 18 C. C. A. 145].

31. Carlton *v.* Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517.

32. Carlton *v.* Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517.

33. Pract. Rule 38.

Drawings considered in connection with claims and specifications see Cutler-Hammer Mfg. Co. *v.* Union Electric Mfg. Co., 147 Fed. 266.

That drawings are part of the patent see Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; Howes *v.* Nute, 12 Fed.

must clearly show the invention.[34] They are not required to be working drawings or made to an exact scale, but it is sufficient if they disclose the inventor's idea so that one skilled in the art may make it.[35] They may be signed by the applicant or his attorney, but there must be two witnesses to the signature.[36]

5. Oath — a. Necessity. It is provided by statute that the applicant must make oath that he believes himself to be the original and first inventor of the thing for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used and shall state of what country he is a citizen.[37] In construing this statute it has been held that the taking of the oath is but a prerequisite to the granting of the patent and in no sense essential to its validity.[38] The patent office also requires that he shall state that the invention has not been in public use or on sale in this country or described in a printed publication in this country or abroad more than two years before the application was filed and shall give the date of foreign patents granted upon the invention.[39]

b. By and Before Whom Made. The oath must be made by the inventor if living and sane,[40] and if dead, by the executor or administrator.[41] It may be made in the United States before any officer authorized to administer oaths; and if made abroad before any diplomatic or consular officer of the United States or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths[42] the authority of the foreign officer shall be proved by a certificate of a diplomatic or consular officer of the United States.[43]

c. Absence of Written Oath. A patent is not invalid merely because no written oath appears among the papers of the record, since it is to be presumed that an oath was taken.[44]

Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

Designs.— Reference to a drawing fully showing the design is sufficient. *In re* Freeman, 23 App. Cas. (D. C.) 226; Dobson *v.* Dornan, 118 U. S. 10, 6 S. Ct. 946, 30 L. ed. 63. *Compare In re* Mygatt, 26 App. Cas. (D. C.) 366. In an application for a design patent for a font of type, it is sufficient to furnish the conventional drawing accepted for years by the patent office, and it is not necessary, under the patent office rules relating to designs, to show or describe the type themselves. *In re* Schraubstadter, 26 App. Cas. (D. C.) 331.

34. Pract. Rule 50.

One of several forms shown in drawings.— Where a skilled mechanic could construct the three forms of buffers described from the specifications and drawings, the specification in that respect is sufficient, although but one form is shown in the drawings. Pullman Palace-Car Co. *v.* Wagner Palace-Car Co., 38 Fed. 416.

35. Dashiell *v.* Grosvenor, 162 U. S. 425, 16 S. Ct. 805, 40 L. ed. 1025; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 485, 48 C. C. A. 72; American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Johnston *v.* Woodbury, 97 Off. Gaz. 402.

36. U. S. Rev. St. (1878) § 4889 [U. S. Comp. St. (1901) p. 3383]; *In re* Henry, 11 Fed. Cas. No. 6,371, McArthur Pat. Cas. 467.

37. U. S. Rev. St. (1878) § 4892 [U. S. Comp. St. (1901) p. 3384].

Date of oath.— The burden is on the party questioning the correctness of the date given at the date of the oath to an application for a patent. O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77.

38. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Child *v.* Adams, 5 Fed. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28.

Oath of executor to support proper amendment after inventor's death is not necessary. De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138.

The statute is directory to the officer who superintends the issuing of letters patent, but is not a condition to the validity of the patent. Dyer *v.* Rich, 1 Metc. (Mass.) 180.

Innocent mistake as to citizenship in oath is not fatal. Tondeur *v.* Chambers, 37 Fed. 333.

39. Pract. Rule 46.

40. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385].

41. U. S. Rev. St. (1878) § 4896.

42. Jurat need not be dated. French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133.

43. U. S. Rev. St. (1878) § 4892 [U. S. Comp. St. (1901) p. 3384]; U. S. Rev. St. (1878) § 4896, as amended March 3, 1903, 32 U. S. St. at L. 1226 [U. S. Comp. St. Suppl. (1905) p. 665].

44. Holmes Burglar Alarm Tel. Co. *v.* Domestic Tel., etc., Co., 42 Fed. 220, 51 Off. Gaz. 2083; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; Hartshorn *v.* Eagle Shade Roller

6. Fees. In the United States the first fee of fifteen dollars must be paid upon filing the application;[45] and the final fee of twenty dollars must be paid within six months after the application is passed and allowed by the patent office.[46] This means six calendar months.[47] The patent, however, is not subject to collateral attack upon the ground that the fee was not paid.[48]

7. Subject-Matter or Scope. An application for a patent should relate to a single subject and should claim only one invention, or if more than one only such as are related and dependent. The application cannot include independent inventions,[49] although it may include related inventions.[50] The doctrine of the patent office that applications for patents shall not be severable except on structural lines must be held to mean upon physical lines which actually divide the machine into separate parts,[51] but his decision is not conclusive and may be passed upon by the courts.[52]

C. Examination and Proceedings in Patent Office — 1. In General. The commissioner of patents is required by law to make or cause to be made by the primary examiner an examination for each application for patent and to determine whether the applicant has complied with the law and discloses a new invention which is sufficiently useful and important to warrant the grant of a patent.[53]

Co., 18 Fed. 90; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; De Florez *v.* Raynolds, 7 Fed. Cas. No. 3,742, 4 Ban. & A. 331, 16 Blatchf. 397; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429, 1 Robb. Pat. Cas. 28; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

Recitals in letters patent in the absence of fraud are conclusive evidence that the necessary oaths were taken before the patent was granted. Seymour *v.* Osborne, 10 Wall. (U. S.) 516, 20 L. ed. 33.

45. U. S. Rev. St. (1878) §§ 4893, 4934 [U. S. Comp. St. (1901) pp. 3384, 3400].

46. U. S. Rev. St. (1878) § 4885 [U. S. Comp. St. (1901) p. 3382].

47. Economy Feed Water-Heater Co. *v.* Lamprey Boiler Furnace-Mouth Protector Co., 65 Fed. 1000, 13 C. C. A. 271 [*affirming* 62 Fed. 590]; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

48. In Canada the fee when application is filed is sixty dollars for eighteen years, forty dollars for twelve years, and twenty dollars for six years. Pat. Act, 56 Vict. c. 34, § 4.

49. Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609 [*reversing* 21 Fed. 124]; Gage *v.* Kellogg, 23 Fed. 891; McKay *v.* Dibert, 5 Fed. 587; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Root *v.* Ball, 20 Fed. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

50. U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555, 109 Off. Gaz. 549; Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Maxheimer *v.* Meyer, 9 Fed. 460, 20 Blatchf. 17; Adams *v.* Jones, 1 Fed. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 311, 6 Fish. Pat. Cas. 424, 3 Off. Gaz. 522 [*modified* in 97 U. S. 126, 24 L. ed. 1000]; Densmore *v.* Schofield, 7 Fed. Cas. No. 3,809, 4 Fish. Pat. Cas. 148; Hayden *v.* James, 11 Fed. Cas. No. 6,260; Lee *v.* Blandy, 15 Fed. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; Morris *v.* Barrett, 17 Fed. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Welling *v.* Rubber-Coated Harness Trimming Co., 29 Fed. Cas. No. 17,383, 2 Ban. & A. 1, 7 Off. Gaz. 608. And see Act England (1883), § 33, 46 & 47 Vict. c. 57.

Process and product may be included in one patent. Welling *v.* Rubber-Coated Harness Trimming Co., 29 Fed. Cas. No. 17,383, 2 Ban. & A. 1, 7 Off. Gaz. 608.

A rule of the patent office requiring division between process and apparatus in all cases is invalid because arbitrary. U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555, 109 Off. Gaz. 549.

51. Fassett *v.* Ewart Mfg. Co., 58 Fed. 360 [*affirmed* in 62 Fed. 404, 10 C. C. A. 441]. Whether an invention or improvement shall be embraced in one or in several patents is a question as to which some discretion must be left to the head of the patent office. U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555; Bennett *v.* Fowler, 8 Wall. (U. S.) 445, 19 L. ed. 431; *In re* Frasch, 27 App. Cas. (D. C.) 25.

52. Fassett *v.* Ewart Mfg. Co., 58 Fed. 360 [*affirmed* in 62 Fed. 404, 10 C. C. A. 441].

53. Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; Burr *v.* Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; *In re* Aiken, 1 Fed. Cas. No. 107, McArthur Pat. Cas. 126; *In re* Cushman, 6 Fed. Cas. No. 3,513, McArthur Pat. Cas. 569.

English practice.— The application is referred by the controller to an examiner to determine its sufficiency. Act (1883), § 6. If complete application is accepted it is advertised (Act (1883), § 10) and any one may oppose the grant within two months after publication. Act (1883), § 11. The grant may

The statutory requirement that he shall give the applicant such reasons and suggestions as will enable him to judge of the experience of abandoning or modifying his application is directory merely and his action in the premises is not reviewable.[54] He should decide not only questions of law, but also of fact,[55] and his action in awarding or refusing a patent is judicial.[56] The decision of the examiner or board of examiners is not conclusive upon him, and he may refuse a patent allowed by the examiner.[57] So it is his duty, if there be within his knowledge or cognizance any substantial or reasonable ground why a patent should not issue, to refuse the patent, whether the specific objection be raised and acted upon by the examiners or not.[58] The applicant being given the right of appeal, the commissioner will not determine doubtful questions in his favor.[59]

2. REJECTION. If upon such examination it appears that the applicant is not entitled to a patent as claimed the application will be rejected and the reasons therefor will be stated.[60] The application may be rejected for want of diligence and abandonment.[61] The rejection will be reconsidered upon request supported by proper argument pointing out the supposed errors therein.[62]

3. EVIDENCE AT HEARING. The patent office is not confined to technical evidence in rejecting applications but may base its action upon anything which shows the facts with reasonable certainty.[63] The burden is on the applicant to

be opposed by one interested but not refused where there is doubt. *Ex p.* Sheffield, L. R. 8 Ch. 237, 42 L. J. Ch. 356, 21 Wkly. Rep 233; *In re* Bailey, L. R. 8 Ch. 60, 42 L. J. Ch. 264, 27 L. T. Rep. N. S. 430, 21 Wkly. Rep. 31; *In re* Vincent, L. R. 2 Ch. 341, 15 Wkly. Rep. 524; Matter of Spence, 3 De G. & J. 523, 7 Wkly. Rep. 157, 60 Eng. Ch. 406, 44 Eng. Reprint 1370; Matter of Russell, 2 De G. & J. 130, 6 Wkly. Rep. 95, 59 Eng. Ch. 104, 45 Eng. Reprint 937; Tolson's Patent, 6 De G. M. & G. 422, 4 Wkly. Rep. 518, 55 Eng. Ch. 329, 43 Eng. Reprint 1297; *In re* Lowe, 25 L. J. Ch. 454, 4 Wkly. Rep. 429; *Ex p.* Daly, Vern. & S. 499; *Re* Tolhausen, 14 Wkly. Rep. 551; *In re* Stoll, 1 Wkly. Rep. 472, 483. Caveat against sealing must be with leave of the lord chancellor. *Re* Heathorn, 10 Jur. N. S. 810, 10 L. T. Rep. N. S. 802, 12 Wkly. Rep. 1068. Opposition referred to law officer to determine if patent should issue. *Ex p.* Manceaux, L. R. 5 Ch. 518, 18 Wkly. Rep. 854; *Ex p.* Yates, L. R. 5 Ch. 1, 21 L. T. Rep. N. S. 663, 18 Wkly. Rep. 1, 153. Law officer must decide between rival claimants and not seal both patents. *Ex p.* Henry, L. R. 8 Ch. 167, 42 L. J. Ch. 363, 21 Wkly. Rep. 233. May order sealing on conditions. *In re* Daine, 26 L. J. Ch. 298, 4 Wkly. Rep. 155. May oppose before law officer and if he orders sealing may oppose before lord chancellor. *In re* Mitchell, L. R. 2 Ch. 343; *In re* Vincent, L. R. 2 Ch. 341, 15 Wkly. Rep. 524; Matter of Brennard, 3 De G. F. & J. 695, 7 Jur. N. S. 690, 4 L. T. Rep. N. S. 456, 64 Eng. Ch. 543, 45 Eng. Reprint 1048. Ruling of law office not overruled except for fraud or new evidence. *In re* Vincent, L. R. 2 Ch. 341, 15 Wkly. Rep. 524. On application for sealing, witnesses can be examined *viva voce*. *In re* Gething L. R. 9 Ch. 633. Time for application for sealing may be extended. *In re* Hersee, L. R. 1 Ch. 518, 14 L. T. Rep. N. S. 842; *In re* Somerset, 15 Ch. D. 397, 42 L. T. Rep. N. S. 635, 28 Wkly. Rep. 709; *In re* Mackintosh, 2 Jur. N. S. 1242, 5 Wkly. Rep. 194. Where opposition withdrawn opposer pays costs. *In re* Cobley, 8 Jur. N. S. 106, 31 L. J. Ch. 333, 5 L. T. Rep. N. S. 387; *Re* Ashenhurst, 2 Wkly. Rep. 3.

54. *Ex p.* Spence, 22 Fed. Cas. No. 13,228. And see *Ex p.* Munson, 17 Fed. Cas. No. 9,933.

55. Hunt *v.* Howe, 12 Fed. Cas. No. 6,891, McArthur Pat. Cas. 366 (abandonment); Marcy *v.* Trotter, 16 Fed. Cas. No. 9,063 (abandonment); Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645 (abandonment).

Public use or sale.—He may investigate and determine public use or sale. Mowry *v.* Barber, 17 Fed. Cas. No. 9,892, McArthur Pat. Cas. 563.

56. Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656; U. S. *v.* Duell, 86 Off. Gaz. 995.

57. Hull *v.* Patent Com'r, 2 MacArthur (D. C.) 90.

58. *In re* Drawbaugh, 9 App. Cas. (D. C.) 219.

59. *In re* Kemper, 14 Fed. Cas. No. 7,687, Cranch Pat. Dec. 89, McArthur Pat. Cas. 1.

60. U. S. Rev. St. (1878) § 4903 [U. S. Comp. St. (1901) p. 3389]; *In re* Wagner, 29 Fed. Cas. No. 17,038, McArthur Pat. Cas. 510.

In England the crown may refuse patent at any time before sealing. *In re* Schlumberger, 2 Eq. Rep. 36, 9 Moore P. C. 1, 14 Eng. Reprint 197. Sealing not refused for formal defects. *In re* Wirth, 12 Ch. D. 303, 28 Wkly. Rep. 329.

61. Hunt *v.* Howe, 12 Fed. Cas. No. 6,891, McArthur Pat. Cas. 366; Marcy *v.* Trotter, 16 Fed. Cas. No. 9,063; Wickersham *v.* Singer, 29 Fed. Cas. No. 17,610, McArthur Pat. Cas. 645.

62. U. S. Rev. St. (1878) § 4903 [U. S. Comp. St. (1901) p. 3389.

63. *In re* Drawbaugh, 9 App. Cas. (D. C.) 219.

Microscope may be used as basis for con-

show the patentability of the thing claimed as an invention.[64] The oath of the applicant is *prima facie* evidence of the novelty, but the commissioner has power and it is his duty to resort to any circumstances legitimately in his possession for the purpose of repelling the presumption.[65]

4. Amendment — a. In General. Where objection is made to the form of the application, amendment may be made by the applicant or his attorney to correct the error,[66] and where a claim is rejected the applicant or his attorney may amend it to avoid the references cited or reasons for rejection given.[67] He may amend at any time prior to the entry by the primary examiner of a final order of rejection.[68]

b. New Matter. All amendments must be within the scope of the original disclosure and must not introduce new matter.[69] An improvement upon the invention disclosed must be claimed in a separate application.[70] A claim made by amendment to matter not disclosed in the application as originally filed is invalid.[71] The description of the functions, operation, or advantages of the invention may be changed so long as there is no change in the disclosure of the invention itself.[72]

c. Delay in Amending. Under express statutory provisions amendment or other responsive action must be made within one year from the date of the pre-

clusion. Flora *v.* Powrie, 23 App. Cas. (D. C.) 195.

Commissioner's records.—Commissioner may take judicial notice of his own records. Cain *v.* Park, 14 App. Cas. (D. C.) 42.

Ex parte affidavits.— Cannot reject upon *ex parte* affidavits. *In re* Alteneck, MacArthur & M. (D. C.) 353.

Exhibition of experiments.— Commissioner is not compelled to submit to an exhibition of experiments at the discretion of applicant. *Ex p.* Spence, 22 Fed. Cas. No. 13,288.

64. *In re* Drawbaugh, 9 App. Cas. (D. C.) 219; Durham *v.* Seymour, 71 Off. Gaz. 601.

65. *In re* Wagner, 29 Fed. Cas. No. 17,038, McArthur Pat. Cas. 510.

66. Bowers *v.* Von Schmidt, 63 Fed. 572.

67. U. S. Rev. St. (1878) § 4903 [U. S. Comp. St. (1901) p. 3389]; McBerty *v.* Cook, 16 App. Cas. (D. C.) 133; Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207; Edison *v.* American Mutoscope Co., 110 Fed. 660 [*reversed* on other grounds in 114 Fed. 926, 52 C. C. A. 546]; Hillborn *v.* Hale, etc., Mfg. Co., 69 Fed. 958, 16 C. C. A. 569; Railway Register Mfg. Co. *v.* North Hudson Co. R. Co., 24 Fed. 793; Collins *v.* White, 6 Fed. Cas. No. 3,019; Östergren *v.* Tripler, 95 Off. Gaz. 837.

68. Pract. Rule 68; Singer *v.* Braunsdorf, 22 Fed. Cas. No. 12,897, 7 Blatchf. 521; *In re* Dilg, 115 Off. Gaz. 1067.

69. Luger *v.* Browning, 21 App. Cas. (D. C.) 201; Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; Eagleton Mfg. Co. *v.* West Bradley, etc., Mfg. Co., 111 U. S. 490, 4 S. Ct. 593, 28 L. ed. 493; Chicago, etc., R. Co. *v.* Sayles, 97 U. S. 554, 24 L. ed. 1053; Long *v.* Pope Mfg. Co., 75 Fed. 835, 21 C. C. A. 533; Michigan Cent. R. Co. *v.* Consolidated Car-Heating Co., 67 Fed. 121, 14 C. C. A. 232; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682; Consolidated Electric Light Co. *v.* McKeesport Light Co., 40 Fed. 21 [*affirmed* in 73 Off. Gaz. 1289]; Globe Nail Co. *v.* Superior Nail Co., 27 Fed. 450; Milligan *v.* Lalance, etc., Mfg. Co., 21 Fed. 570; *In re* Scott, 117 Off. Gaz. 278; *In re* Dilg, 115 Off. Gaz. 1067; Miehle *v.* Read, 96 Off. Gaz. 426.

The settled limitation upon the amendment of applications in respect of claims is that there must be a basis for them in the description and specifications of the application as originally filed. *In re* Duncan, 28 App. Cas. (D. C.) 457.

In England complete specification may amplify but cannot change invention disclosed in provisional specification. Vickers *v.* Siddell, 15 App. Cas. 496, 60 L. J. Ch. 105, 63 L. T. Rep. N. S. 590, 39 Wkly. Rep. 385; Bailey *v.* Robertson, 3 App. Cas. 1055, 38 L. T. Rep. N. S. 854, 27 Wkly. Rep. 17; Penn *v.* Bibby, L. R. 2 Ch. 127, 36 L. J. Ch. 455, 15 L. T. Rep. N. S. 399, 15 Wkly. Rep. 208; Lane Fox *v.* Kensington Electric Lighting Co., [1892] 3 Ch. 424, 67 L. T. Rep. N. S. 440; Nuttall *v.* Hargreaves, [1892] 1 Ch. 23, 61 L. J. Ch. 94, 65 L. T. Rep. N. S. 597, 40 Wkly. Rep. 200; United Tel. Co. *v.* Harrison, 21 Ch. D. 720, 51 L. J. Ch. 705, 46 L. T. Rep. N. S. 620, 30 Wkly. Rep. 724; Hills *v.* London Gaslight Co., 5 H. & N. 312, 29 L. J. Exch. 409; Gadd *v.* Manchester, 67 L. T. Rep. N. S. 569. Complete specification may include additional details not departing from the general nature of the invention. Siddell *v.* Vickars, 30 Ch. D. 92, 59 L. T. Rep. N. S. 575 [*affirmed* in 15 App. Cas. 496, 60 L. J. Ch. 105, 63 L. T. Rep. N. S. 590, 39 Wkly. Rep. 385]; Thomas *v.* Welch, L. R. 1 C. P. 192, 12 Jur. N. S. 316, 35 L. J. C. P. 200; Moseley *v.* Victoria Rubber Co., 57 L. T. Rep. N. S. 142; Woodward *v.* Sansum, 56 L. T. Rep. N. S. 347.

70. See note *supra*, 69.

71. See note *supra*, 69.

72. Clevcland Foundry Co. *v.* Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233; Western Electric Co. *v.* Sperry Electric Co.,

ceding action by the patent office. Further delay works an abandonment of the application unless shown to the satisfaction of the commissioner to have been unavoidable.[73]

d. Oath. An amendment which is within the scope of the original specification does not require a new oath.[74] Otherwise, however, where the specification as well as the claim is enlarged so as to include an invention not before described.[75]

5. Allowance. If the invention is found to be patentable the application must be passed and allowed.[76] The applicant must pay the final fee within six months thereafter and the patent must issue within three months after the payment of the final fee or the application is forfeited.[77]

6. Forfeiture and Renewal. A case forfeited by failure to pay the final fee within six months after allowance may be renewed by any one having an interest in the invention at any time within two years after the original notice of allowance.[78] The right of renewal, whether more than one renewal be asked, must be exercised within the two years.[79] The original papers may be used in the renewal application but a new fee is required.[80]

7. Abandonment. Upon the failure of the applicant to complete his application and prepare it for examination within one year after the filing of the petition, and upon his failure to take proper action in prosecution of it within one year after action by the patent office, the application is abandoned unless it be shown to the satisfaction of the commissioner that the delay was unavoidable.[81] The commissioner's ruling upon the question of abandonment of an application is final and conclusive.[82]

8. Interference[83]—a. In General. Where two parties make application for

58 Fed. 186, 7 C. C. A. 164; Beach *v.* Inman Mfg. Co., 74 Off. Gaz. 379.

Changing "cement" to "hydraulic cement" is not new matter. National Conduit Mfg. Co. *v.* Connecticut Pipe Mfg. Co., 75 Off. Gaz. 1361.

Where invention resides in operation, operation cannot be changed. American Bell Tel. Co. *v.* Century Tel. Co., 109 Fed. 976.

73. U. S. Rev. St. (1878) § 4894. Decision of commissioner is final. Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164.

74. Phillips *v.* Sensenich, 31 App. Cas. (D. C.) 159; Cutler-Hammer Mfg. Co. *v.* Union Electric Mfg. Co., 147 Fed. 266; De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; John R. Williams Co. *v.* Miller, etc., Mfg. Co., 107 Fed. 290. And see Wirt *v.* Hicks, 45 Fed. 256, holding that where an application for a patent is made by the inventor in his lifetime by attorney the fact that changes were made by the attorney in the specifications and claims without new oaths will not invalidate the patent, since a discretion as to the allowance of such amendment is vested in the commissioner.

The changing of claims for inventions described in the specifications does not enlarge the scope of the application and seems to be well within the authority of attorneys to prosecute it. John R. Williams Co. *v.* Miller, etc., Mfg. Co., 107 Fed. 290.

75. Eagleton Mfg. Co. *v.* West, etc., Mfg. Co., 111 U. S. 490, 4 S. Ct. 593, 28 L. ed. 493.

76. U. S. Rev. St. (1878) § 4893 [U. S. Comp. St. (1901) p. 3384]; Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656; *In re* Seely, 21 Fed. Cas. No. 12,632, McArthur Pat. Cas. 248; *In re* Wagner, 28 Fed. Cas. No. 17,038, McArthur Pat. Cas. 510.

77. U. S. Rev. St. (1878) § 4885, as amended May 23, 1908, Public No. 133.

78. U. S. Rev. St. (1878) § 4897 [U. S. Comp. St. (1901) p. 3386]; Christensen *v.* Noyes, 15 App. Cas. (D. C.) 94; Bowers *v.* San Francisco Bridge Co., 69 Fed. 640.

79. Weston Electrical Instrument Co. *v.* Empire Electrical Instrument Co., 131 Fed. 90 [*affirmed* in 136 Fed. 599, 69 C. C. A. 329]; *In re* Atty.-Gen., 70 Off. Gaz. 493.

80. Pract. Rule 176.

81. U. S. Rev. St. (1878) § 4894, as amended March 3, 1897, 29 U. S. St. at L. 692 [U. S. Comp. St. (1901) p. 3384]. Two years were allowed by statute upon applications filed before Jan. 1, 1898.

Delay caused by patent office does not work abandonment. Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; Adams *v.* Jones, 1 Fed. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 96 Off. Gaz. 2573.

Negligence of attorney is no excuse for delay. Lay *v.* Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 C. C. A. 313.

In England complete specification must be filed within nine months after provisional specification and unless accepted in twelve months is void. Act (1883), § 8.

82. Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377.

83. Interfering patents see *infra*, VI, D.

a patent upon substantially the same patentable invention an interference is declared to exist, and the parties are permitted to present proofs in support of their claims.[84] The question to be determined is that of priority of invention.[85] Priority is ordinarily the only thing at issue.[86] The right of one of the parties to make a claim may be considered as an ancillary question.[86a] The question of patentability is not involved.[87] The proceedings are conducted under rules established by the commissioner,[88] but are analogous to proceedings in equity and the same rules of evidence are applicable.[89] The issue is construed in accordance with the specification of the party who first made the claim.[90]

b. Between Applicants and Patentees. An interference must always involve an application for a patent, but may be declared between an application and a patent previously granted to another for the same thing, for, although the patent office cannot cancel the patent already issued, it may issue a second patent to the real inventor.[91]

84. U. S. Rev. St. (1878) § 4904 [U. S. Comp. St. (1901) p. 3389].

There must be two claimants for the same invention or the interference fails. Cushman *v.* Lines, 10 App. Cas. (D. C.) 156; Tyson *v.* Rankin, 24 Fed. Cas. No. 14,320, McArthur Pat. Cas. 262; Lattig *v.* Dean, 117 Off. Gaz. 1798.

Failure to move to dissolve an interference on the ground that an accepted amendment to one of the applications involves new matter is an acquiescence in the allowance of the amendment. Croskey *v.* Atterbury, 9 App. Cas. (D. C.) 207.

Interference in fact.— Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; Bain *v.* Morse, 2 Fed. Cas. No. 754, McArthur Pat. Cas. 90; Nichols *v.* Harris, 18 Fed. Cas. No. 10,244, McArthur Pat. Cas. 362; Stephenson *v.* Hoyt, 22 Fed. Cas. No. 13,373, McArthur Pat. Cas. 292. Interference in fact not determined by admissions. Hutchinson *v.* Meyer, 12 Fed. Cas. No. 6,957.

Lack of interference see Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399, 120 Off. Gaz. 2127; O'Reilly *v.* Smith, 18 Fed. Cas. No. 10,566, McArthur Pat. Cas. 218; Tyson *v.* Rankin, 24 Fed. Cas. No. 14,320, McArthur Pat. Cas. 262; Lallig *v.* Dean, 117 Off. Gaz. 1796.

In Canada three arbitrators are appointed to determine. Each party appoints one, and the commissioner of patents appoints the third. Pat. Act, 35 Vict. c. 26, § 43; Faller *v.* Aylen, 8 Ont. L. Rep. 70, per Anglin, J.

85. U. S. Rev. St. (1878) § 4904 [U. S. Comp. St. (1901) p. 3389].

The question whether the disclosure in a party's application is sufficient is not in issue. Bechman *v.* Southgate, 28 App. Cas. (D. C.) 405; Lotterhand *v.* Hanson, 23 App. Cas. (D. C.) 372; Schüpphaus *v.* Stevens, 95 Off. Gaz. 1452; Ostergren *v.* Tripler, 95 Off. Gaz. 837; Dodge *v.* Fowler, 82 Off. Gaz. 595.

86. Swihart *v.* Mauldin, 19 App. Cas. (D. C.) 570; Austin *v.* Johnson, 18 App. Cas. (D. C.) 83; Hisey *v.* Peters, 6 App. Cas. (D. C.) 68, 71 Off. Gaz. 892; Bechman *v.* Wood, 89 Off. Gaz. 2462; Hulett *v.* Long, 89 Off. Gaz. 1141; Cross *v.* Phillips, 87 Off. Gaz. 1399; Cushman *v.* Lines, 78 Off. Gaz. 2051; Westinghouse *v.* Duncan, 66 Off. Gaz. 1009.

86a. Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399; Lindmark *v.* Hodgkinson, 31 App. Cas. (D. C.) 612; MacMulkin *v.* Bollee, 30 App. Cas. (D. C.) 112; U. S. Co. *v.* Moore, 30 App. Cas. (D. C.) 464.

87. Mell *v.* Midgley, 31 App. Cas. (D. C.) 534; Sobey *v.* Holselaw, 28 App. Cas. (D. C.) 65; Johnson *v.* Mueser, 29 App. Cas. (D. C.) 61; Dunbar *v.* Schellenger, 29 App. Cas. (D. C.) 129; Slaughter *v.* Halle, 21 App. Cas. (D. C.) 19; Newton *v.* Woodward, 16 App. Cas. (D. C.) 568; McBerty *v.* Cook, 16 App. Cas. (D. C.) 133; Hill *v.* Hodge, 12 App. Cas. (D. C.) 528, 83 Off. Gaz. 1211; Doyle *v.* McRoberts, 10 App. Cas. (D. C.) 445, 79 Off. Gaz. 1029; Hisey *v.* Peters, 6 App. Cas. (D. C.) 68, 71 Off. Gaz. 892; Latham *v.* Armat, 95 Off. Gaz. 232; Hulett *v.* Long, 89 Off. Gaz. 1141.

Res judicata.— Patentability is *res judicata*. Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493.

There must be an adjudication of patentability final to all ordinary intent and purposes before the court can be called upon to determine the right of ownership as between rival claimants. Oliver *v.* Felbel, 20 App. Cas. (D. C.) 255.

88. U. S. Rev. St. (1878) §§ 483, 4905 [U. S. Comp. St. (1901) pp. 272, 3390]; Spear *v.* Abbott, 22 Fed. Cas. No. 13,222; Jones *v.* Starr, 117 Off. Gaz. 1495; Ross *v.* Loewer, 77 Off. Gaz. 2141.

Time for taking testimony is within the discretion of commissioner of patents. Hopkins *v.* Lewis, 12 Fed. Cas. No. 6,688; O'Reilly *v.* Smith, 18 Fed. Cas. No. 10,566, McArthur Pat. Cas. 218; Wellman *v.* Blood, 29 Fed. Cas. No. 17,385, McArthur Pat. Cas. 432.

89. Pract. Rule 159; Blackford *v.* Wilder, 104 Off. Gaz. 580; Nielson *v.* Bradshaw, 91 Off. Gaz. 644.

90. Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399, 120 Off. Gaz. 2127; Tracy *v.* Leslie, 14 App. Cas. (D. C.) 126, 87 Off. Gaz. 891; Ructe *v.* Elwell, 87 Off. Gaz. 2119. And see Sobey *v.* Holselaw, 28 App. Cas. (D. C.) 65.

91. U. S. Rev. St. (1878) § 4904 [U. S. Comp. St. (1901) p. 3389]; Pract. Rule 93.

c. Evidence — (1) *Burden of Proof.* The burden of proof in an interference case is upon the party last to file his application,[92] and where his opponent has a patent granted before that filing date he must prove his case beyond a reasonable doubt.[93] But a preponderance of evidence will be sufficient where the question involved is to which one of the two parties making separate applications for patent does the right of original invention or discovery of the subject-matter in issue belong,[94] or where the application of the junior party was pending when a patent was granted to his adversary.[95] Where each of two parties to an interference claims a disclosure to the other, the presumption is in favor of the one who has a practical knowledge of the art, and against the one who has not such knowledge.[96]

92. Duff *v.* Latshaw, 31 App. Cas. (D. C.) 235; Goolman *v.* Hobart, 31 App. Cas. (D. C.) 286; Smith *v.* Smith, 31 App. Cas. (D. C.) 518; Braunstein *v.* Holmes, 30 App. Cas. (D. C.) 328; Weeks *v.* Dale, 30 App. Cas. (D. C.) 498; Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530; Lowrie *v.* Taylor, 27 App. Cas. (D. C.) 522; Cleveland *v.* Wilkin, 27 App. Cas. (D. C.) 311; Bourn *v.* Hill, 27 App. Cas. (D. C.) 291; Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228; Fowler *v.* Dyson, 27 App. Cas. (D. C.) 52; Ball *v.* Flora, 26 App. Cas. (D. C.) 394; Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Flora *v.* Powrie, 23 App. Cas. (D. C.) 195; McKnight *v.* Pohle, 22 App. Cas. (D. C.) 219; Flather *v.* Weber, 21 App. Cas. (D. C.) 179; Tyler *v.* Kelch, 19 App. Cas. (D. C.) 180. And see *supra*, IV, A, 5.

Priority of invention and reasonable diligence.— He must show not only priority of invention, but also reasonable diligence in adapting and perfecting his invention. Fowler *v.* Dyson, 27 App. Cas. (D. C.) 52; Ball *v.* Flora, 26 App. Cas. (D. C.) 394; Funk *v.* Haines, 20 App. Cas. (D. C.) 285; Hunter *v.* Stikeman, 13 App. Cas. (D. C.) 214; McCormack *v.* Cleal, 12 App. Cas. (D. C.) 335.

When burden of proof increased.— The burden imposed upon an applicant in interference with a patentee is increased by adverse decisons of all the patent office tribunals. Johnson *v.* Mucser, 29 App. Cas. (D. C.) 61; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228; Bauer *v.* Crone, 26 App. Cas. (D. C.) 352; Macdonald *v.* Edison, 21 App. Cas. (D. C.) 527; Hallwood *v.* Lalor, 21 App. Cas. (D. C.) 61; Swihart *v.* Mauldin, 19 App. Cas. (D. C.) 570; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Howard *v.* Hey, 18 App. Cas. (D. C.) 142.

When burden shifts.— Where the junior party to an interference shows by his evidence a disclosure and reduction to practice prior to the filing date of the senior party's application, the burden of proof is shifted to the senior party to establish a date of invention and reduction to practice prior to that of the junior party. Herman *v.* Fullman, 23 App. Cas. (D. C.) 259.

93. McKnight *v.* Pohle, 30 App. Cas. (D. C.) 92; Weeks *v.* Dale, 30 App. Cas. (D. C.) 498; Lewis *v.* Cronemeyer, 29 App. Cas. (D. C.) 174; Shuman *v.* Beall, 27 App. Cas. (D. C.) 324, 329; Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336; French *v.* Halcomb, 26 App. Cas. (D. C.) 307; Quist *v.* Ostrom, 23 App. Cas. (D. C.) 69; Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168; Gallagher *v.* Hastings, 21 App. Cas. (D. C.) 88; Dashiell *v.* Tasker, 21 App. Cas. (D. C.) 64; Meyer *v.* Sarfert, 21 App. Cas. (D. C.) 26; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Sharer *v.* McHenry, 19 App. Cas. (D. C.) 158; Reichenbach *v.* Kelley, 17 App. Cas. (D. C.) 333; Fefel *v.* Stocker, 17 App. Cas. (D. C.) 317; Locke *v.* Boch, 17 App. Cas. (D. C.) 75; Kelly *v.* Fynn, 16 App. Cas. (D. C.) 573; Nielson *v.* Bradshaw, 16 App. Cas. (D. C.) 92; Williams *v.* Ogle, 14 App. Cas. (D. C.) 145; Guilbert *v.* Killinger, 13 App. Cas. (D. C.) 107; Doyle *v.* McRoberts, 10 App. Cas. (D. C.) 445; Hill *v.* Parmelee, 9 App. Cas. (D. C.) 503; La Flare *v.* Chase, 8 App. Cas. (D. C.) 83.

A limitation on this doctrine is that where a patent was inadvertently granted to one party during the pendency of his opponent's application both parties are to be treated as if they were applicants. Cutler *v.* Leonard, 31 App. Cas. (D. C.) 297; Jansson *v.* Larsson, 30 App. Cas. (D. C.) 203; De Ferranti *v.* Lyndmark, 30 App. Cas. (D. C.) 417; Fenner *v.* Blake, 30 App. Cas. (D. C.) 507; Shaffer *v.* Dolan, 23 App. Cas. (D. C.) 79; Watson *v.* Thomas, 23 App. Cas. (D. C.) 65; Miehle *v.* Read, 18 App. Cas. (D. C.) 128; Hulett *v.* Long, 15 App. Cas. (D. C.) 284; Esty *v.* Newton, 14 App. Cas. (D. C.) 50; Hunt *v.* McCaslin, 10 App. Cas. (D. C.) 527; Paul *v.* Hess, 115 Off. Gaz. 251; Furman *v.* Dean, 114 Off. Gaz. 1552.

Disclosure to patentee.— A junior applicant in interference, if he would prevail on the ground that he disclosed the invention to his rival, who has received a patent, must prove such disclosure beyond a reasonable doubt. Anderson *v.* Wells, 27 App. Cas. (D. C.) 115.

94. Flather *v.* Weber, 21 App. Cas. (D. C.) 179.

95. Andrews *v.* Nilson, 27 App. Cas. (D. C.) 451.

Burden not increased.— The burden of proof imposed on a junior applicant in interference proceedings is not increased by the granting of a patent to his opponents while his application is pending. Laas *v.* Scott, 26 App. Cas. (D. C.) 354.

96. Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541.

(II) *Admissibility and Weight and Sufficiency.* In deciding the question of priority of invention the ordinary rules as to the admissibility[97] and weight of evidence are applied.[98] Corroboration by independent circumstances is necessary.[99]

d. Pleadings. If a party to an interference wishes to take testimony to show

97. Nielson *v.* Bradshaw, 16 App. Cas. (D. C.) 92, 91 Off. Gaz. 644.

The evidence must relate to the relative rights of the parties involved and evidence that some third party was prior to both is irrelevant. Brown *v.* Blood, 22 App. Cas. (D. C.) 216; Garrels *v.* Freeman, 21 App. Cas. (D. C.) 207; Foster *v.* Antisdel, 14 App. Cas. (D. C.) 552; Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193.

That the proofs must conform to the issue see Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530; McKnight *v.* Pohle, 22 App. Cas. (D. C.) 219; Sachs *v.* Hundhausen, 21 App. Cas. (D. C.) 511; Blackford *v.* Wilder, 21 App. Cas. (D. C.) 1; Tracy *v.* Leslie, 14 App. Cas. (D. C.) 126; Mergenthaler *v.* Scudder, 11 App. Cas. (D. C.) 264.

Ex parte affidavits filed after the close of the taking of testimony to correct alleged errors and deficiencies in the testimony will not be considered. Blackford *v.* Wilder, 104 Off. Gaz. 580; Nielson *v.* Bradshaw, 91 Off. Gaz. 644.

Exhibits offered may be examined microscopically. Flora *v.* Powrie, 23 App. Cas. (D. C.) 195.

Depositions not taken in accordance with the rules will not be considered. Arnold *v.* Bishop, 1 Fed. Cas. No. 552, Cranch Pat. Dec. 109, McArthur Pat. Cas. 36; Perry *v.* Cornell, 19 Fed. Cas. No. 11,001, Cranch Pat. Dec. 130, McArthur Pat. Cas. 66; Jones *v.* Starr, 117 Off. Gaz. 1495.

Testimony in one interference is admissible in a second, although a new party is added. Carter *v.* Carter, 5 Fed. Cas. No. 2,475, McArthur Pat. Cas. 388; Eames *v.* Richards, 8 Fed. Cas. No. 4,240.

Testimony of inventor is admissible and so is proof of declaration by him. Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193.

An inventor who has assigned his rights is not a competent witness nor is his wife. Eames *v.* Richards, 8 Fed. Cas. No. 4,240.

Objections to testimony must be made at proper time. Allen *v.* Alter, 1 Fed. Cas. No. 212; Brown *v.* Hall, 4 Fed. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Smith *v.* Flickenger, 22 Fed. Cas. No. 13,047, Cranch Pat. Dec. 116, McArthur Pat. Cas. 46. Technical objections must be taken before hearing. Meyer *v.* Rothe, 13 App. Cas. (D. C.) 97.

98. **Signing opponent's application as a witness** is strong evidence in favor of the latter. Pickles *v.* Aglar, 13 App. Cas. (D. C.) 556; Barr Car Co. *v.* Chicago, etc., R. Co., 110 Fed. 972, 49 C. C. A. 194.

Taking assignment from opponent is evidence against a party. Winslow *v.* Austin, 14 App. Cas. (D. C.) 137.

Failure of party to deny allegation of disclosure to him by opponent is conclusive against him. Ingersoll *v.* Holt, 15 App. Cas. (D. C.) 519; Winslow *v.* Austin, 14 App. Cas. (D. C.) 137.

Long delay in making application casts doubt on claims of early invention. Fefel *v.* Stocker, 17 App. Cas. (D. C.) 317; Nielson *v.* Bradshaw, 16 App. Cas. (D. C.) 92; Beals *v.* Finkenbiner, 12 App. Cas. (D. C.) 23; Hunt *v.* McCaslin, 10 App. Cas. (D. C.) 527.

Unsupported recollections of witnesses as to facts occurring several years before are insufficient to establish priority of invention over an earlier patent. Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456. And see Caster Socket Co. *v.* Clark, 110 Fed. 976.

The unsupported testimony of the inventor or of two joint inventors will not be accepted as sufficient proof. Durkee *v.* Winquist, 31 App. Cas. (D. C.) 248; Taylor *v.* Lowrie, 27 App. Cas. (D. C.) 527; French *v.* Halcomb, 26 App. Cas. (D. C.) 307; Garrels *v.* Freeman, 21 App. Cas. (D. C.) 207; Petrie *v.* De Schweinitz, 19 App. Cas. (D. C.) 386; Sharer *v.* McHenry, 19 App. Cas. (D. C.) 158; Mergenthaler *v.* Scudder, 11 App. Cas. (D. C.) 264; Fay *v.* Mason, 120 Fed. 506 [*reversed* on other grounds in 127 Fed. 325, 62 C. C. A. 159].

99. Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399, 120 Off. Gaz. 2127.

Failure to rebut sworn statement of disclosure.— The rule that the failure of a party to an interference to rebut the sworn statement of his adversary that he had fully disclosed the invention to him furnishes strong evidence that the latter is not the prior inventor does not apply where there is no evidence of a complete disclosure, and merely unsatisfactory evidence of a partial disclosure. Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399, 120 Off. Gaz. 2127.

Sufficiency of memorandum to prove prior conception see French *v.* Halcomb, 26 App. Cas. (D. C.) 307.

Conduct inconsistent with claims see Talbot *v.* Monell, 23 App. Cas. (D. C.) 108; Adams *v.* Murphy, 18 App. Cas. (D. C.) 172; Reichenbach *v.* Kelley, 17 App. Cas. (D. C.) 333; Warner *v.* Smith, 13 App. Cas. (D. C.) 111; Hill *v.* Parmelee, 9 App. Cas. (D. C.) 503; Wells *v.* Reynolds, 4 App. Cas. (D. C.) 43; Barr Car Co. *v.* Chicago, etc., R. Co., 110 Fed. 972, 49 C. C. A. 194; Jenner *v.* Dickinson, 117 Off. Gaz. 600; Harter *v.* Barrett, 114 Off. Gaz. 975; Hillard *v.* Brooks, 111 Off. Gaz. 302.

Evidence held sufficient to support claim see Turnbull *v.* Curtis, 27 App. Cas. (D. C.) 567.

Evidence insufficient to show interference.— Podlesak *v.* McInnerney, 26 App. Cas. (D. C.) 399, 120 Off. Gaz. 2127.

invention before his application date, he must file in the patent office a statement within a time fixed and before seeing his opponent's case setting forth the dates of his conception and development of his invention.[1] Such statements correspond to the pleadings, and the party will not be permitted to prove a date earlier than alleged therein.[2] The statements are not considered as proofs.[3]

e. Second Interference. The power of the commissioner is not exhausted by once deciding a question of interference;[4] but where cause is shown, he may permit the unsuccessful party to withdraw his application, and refile it and then declare anew an interference between the same parties.[5]

9. APPEAL — a. In General. A party dissatisfied with the rejection of his claims by the primary examiner or with the decision in an interference case may appeal to the board of examiners-in-chief;[6] if dissatisfied with their decision he may appeal to the commissioner in person;[7] and if dissatisfied with his decision he may appeal to the court of appeals of the District of Columbia.[8] No appeal lies to the supreme court from the court of appeals, in a case brought up from the patent office.[9] There is no appeal to the secretary of the interior from the commissioner's action granting or refusing patents and he cannot control in any way such action.[10]

b. Who Entitled to Appeal. One to whom a patent is allowed has no grounds

Admissions as proving disclosure see Henry *v.* Dohle, 27 App. Cas. (D. C.) 33.

1. Pract. Rule 110.

Amendment of the statement may be permitted in the discretion of the commissioner upon proper showing. Cross *v.* Phillips, 14 App. Cas. (D. C.) 228; Stevens *v.* Seher, 11 App. Cas. (D. C.) 245; Parker *v.* Appert, 8 App. Cas. (D. C.) 270.

For variance between allegations and proofs see Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Shaffer *v.* Dolan, 23 App. Cas. (D. C.) 79.

2. Pract. Rule 110; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Lowrie *v.* Taylor, 27 App. Cas. (D. C.) 522; Neth *v.* Ohmer, 27 App. Cas. (D. C.) 319; Fowler *v.* Boyce, 27 App. Cas. (D. C.) 48; Fowler *v.* McBerty, 27 App. Cas. (D. C.) 41, 46; Funk *v.* Haines, 20 App. Cas. (D. C.) 285; Bader *v.* Vajen, 14 App. Cas. (D. C.) 241; Cross *v.* Phillips, 14 App. Cas. (D. C.) 228; Stevens *v.* Seher, 11 App. Cas. (D. C.) 245; Colhoun *v.* Hodgson, 5 App. Cas. (D. C.) 21; Hammond *v.* Basch, 115 Off. Gaz. 804.

Where the commissioner has refused to permit an amendment of the statement, evidence to show dates other than those given in the statement are inadmissible. Fowler *v.* Boyce, 27 App. Cas. (D. C.) 55; Fowler *v.* Dyson, 27 App. Cas. (D. C.) 52; Fowler *v.* McBerty, 27 App. Cas. (D. C.) 41, 46. The rule will not be ignored, with the consent of the counsel, unless expressly approved by the commissioner of patents or his representatives. While cases may often arise where the interest of the parties to interference proceedings and the public will be best subserved by permitting dates earlier than those set forth in the preliminary statements to be proved, this should be done under the supervision of and with the approval of the patent office. Fowler *v.* Boyce, *supra*.

3. Ingersoll *v.* Holt, 15 App. Cas. (D. C.) 519.

4. Matthews *v.* Wade, 16 Fed. Cas. No. 9,292, McArthur Pat. Cas. 143; Potter *v.* Dixon, 19 Fed. Cas. No. 11,325, 5 Blatchf. 160, 2 Fish. Pat. Cas. 381.

5. Matthews *v.* Wade, 16 Fed. Cas. No. 9,292, McArthur Pat. Cas. 143.

6. U. S. Rev. St. (1878) § 4909 [U. S. Comp. St. (1901) p. 3390]; U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555.

Appeals in interference and from rejection of claims are separate and distinct rights. Hisey *v.* Peters, 6 App. Cas. (D. C.) 68.

7. U. S. Rev. St. (1878) § 4910 [U. S. Comp. St. (1901) p. 3391].

Assistant commissioner may hear and decide appeals. U. S. *v.* Duell, 17 App. Cas. (D. C.) 575.

8. U. S. Rev. St. (1878) § 4911, and U. S. St. at L. p. 436, § 9, 27 U. S. St. at L. 436 [U. S. Comp. St. (1901) p. 3391]; Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656.

Constitutionality of statutes.— Statute permitting appeals to the court of appeals is constitutional. U. S. *v.* Duell, 13 App. Cas. (D. C.) 379 [*affirmed* in 86 Off. Gaz. 995]; U. S. *v.* Seymour, 10 App. Cas. (D. C.) 294.

Appeal not a proceeding in equity.— An appeal to this court in an interference case is not a proceeding in equity, and the provisions of U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392], providing for relief by a bill in equity where the patent has been finally refused, do not apply. It is a proceeding at law, and hence a decision of the supreme court of the United States as to the statute referred to does not apply. Sobey *v.* Holsclaw, 28 App. Cas. (D. C.) 65.

9. Rousseau *v.* Brown, 21 App. Cas. (D. C.) 73.

10. U. S. *v.* Seymour, 10 App. Cas. (D. C.) 294; Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656; U. S. *v.* Duell, 86 Off. Gaz. 995.

for appeal.[11] There is a conflict of authority as to whether a patentee may appeal from an adverse decision in interference proceedings; while there are some decisions affirming the right of appeal,[12] the weight of authority is against it,[13] it being said that a decision awarding priority to the applicant and granting him a patent does not invalidate the existing patent.[14]

c. Formalities and Proceedings. The appellant must file in the patent office within a fixed time a notice of appeal to the court of appeals together with his reasons of appeal specifically set forth in writing and within a fixed time thereafter must file in court a certified copy of all the original papers and evidence in the case.[15] The commissioner must furnish the court with a statement in writing of the grounds for his decision touching the points involved in the reasons of appeal.[16] The commissioner and examiners may be examined orally by the court.[17] Officers of the patent office may attend the hearing and advise the court.[18]

d. Appealable Decisions. An action which amounts to a final refusal of a patent as requested is to be regarded as a rejection and appealable whatever form that action may take.[19] The refusal to entertain an application is a rejection,[20] and the requirement that an application be divided is a rejection and appealable.[21] Mere interlocutory or preliminary rulings or orders are not appealable but only final decisions.[22] A rejection or decision by the commissioner is appealable even where there has been no decision in the case by the examiner or examiners-in-chief.[23] A refusal of a rehearing is not appealable;[24] nor is a decision dissolving

11. Cushman *v.* Lines, 10 App. Cas. (D. C.) 156.

12. Babcock *v.* Degener, 2 Fed. Cas. No. 698, McArthur Pat. Cas. 607; Beach *v.* Tucker, 2 Fed. Cas. No. 1,153.

13. Drake *v.* Cunningham, 7 Fed. Cas. No. 4,060, McArthur Pat. Cas. 378; Hopkins *v.* Barnum, 12 Fed. Cas. No. 6,685, McArthur Pat. Cas. 334; Pomeroy *v.* Connison, 19 Fed. Cas. No. 11,259, Cranch Pat. Dec. 112, McArthur Pat. Cas. 40; Whipple *v.* Renton, 29 Fed. Cas. No. 17,521, McArthur Pat. Cas. 332.

14. Pomeroy *v.* Connison, 19 Fed. Cas. No. 11,259, Cranch Pat. Dec. 112, McArthur Pat. Cas. 40.

15. U. S. Rev. St. (1878) §§ 4912, 4913 [U. S. Comp. St. (1901) p. 3391].

Reasons of appeal must be clear and definite. Blackinton *v.* Douglass, 3 Fed. Cas. No. 1,470, McArthur Pat. Cas. 622; Greenough *v.* Clark, 10 Fed. Cas. No. 5,784, McArthur Pat. Cas. 173.

16. U. S. Rev. St. (1878) § 4913 [U. S. Comp. St. (1901) p. 3391]; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493; *In re* Henry, 11 Fed. Cas. No. 6,371, McArthur Pat. Cas. 467.

17. U. S. Rev. St. (1878) § 4913; Richardson *v.* Hicks, 20 Fed. Cas. No. 11,783, McArthur Pat. Cas. 335; *In re* Seely, 21 Fed. Cas. No. 12,632, McArthur Pat. Cas. 248.

18. Perry *v.* Cornell, 19 Fed. Cas. No. 11,001, Cranch Pat. Dec. 130, McArthur Pat. Cas. 66.

19. U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555; Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

20. Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

21. *Ex p.* Frasch, 192 U. S. 566, 24 S. Ct. 424, 48 L. ed. 564; U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555 [*overruling In re* Frasch, 20 App. Cas. (D. C.) 298; Blackford *v.* Wilder, 104 Off. Gaz. 582].

22. Davis *v.* Garrett, 28 App. Cas. (D. C.) 9; Jones *v.* Starr, 26 App. Cas. (D. C.) 64; Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Hulett *v.* Long, 15 App. Cas. (D. C.) 284; Cross *v.* Phillips, 14 App. Cas. (D. C.) 228; *In re* Marshutz, 13 App. Cas. (D. C.) 228; *In re* Neill, 11 App. Cas. (D. C.) 584; Westinghouse *v.* Duncan, 2 App. Cas. (D. C.) 131; *In re* Chinnock, 21 D. C. 594; Allen *v.* U. S., 116 Off. Gaz. 2253; Hillard *v.* Brooks, 111 Off. Gaz. 302; Luger *v.* Browning, 104 Off. Gaz. 1123; Swihart *v.* Mauldin, 99 Off. Gaz. 2322.

Application of rule.— A motion to dissolve an interference in the patent office before the final hearing of the question of priority, and before the case is ready for such hearing, is an interlocutory proceeding, and is not appealable to the court of appeals unless made so by statute or rule of court. Allen *v.* U. S., 26 App. Cas. (D. C.) 8.

23. Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; *In re* Chambers, 5 Fed. Cas. No. 2,581, McArthur Pat. Cas. 641; Snowden *v.* Pierce, 22 Fed. Cas. No. 13,151, 2 Hayw. & H. 386. See, however, *Ex p.* Frasch, 192 U. S. 566, 24 S. Ct. 424, 48 L. ed. 564; and the *dictum* to the contrary in Westinghouse *v.* Duncan, 2 App. Cas. (D. C.) 131.

24. Greenwood *v.* Dover, 23 App. Cas. (D. C.) 251; Ross *v.* Loewer, 9 App. Cas. (D. C.) 563; *In re* Janney, 13 Fed. Cas. No. 7,209, Cranch Pat. Dec. 143, McArthur Pat. Cas. 86; *In re* Rouse, 20 Fed. Cas. No. 12,086, McArthur Pat. Cas. 286.

Refusal by commissioner to reopen case and his action suppressing testimony for irregularity are not appealable. Jones *v.* Starr, 117 Off. Gaz. 1495.

an interference.[25] The reasons for a decision are not appealable, but only the decision itself.[26]

e. Review. On appeal from the decision of the commissioner of patents the court is limited to the points involved in the reasons of appeal.[27] And the exercise of the discretion of the commissioner of patents should not be disturbed save where that discretion has palpably been abused.[28] Except in extraordinary cases, the court will not disturb the findings of fact of the patent office. Nevertheless the court is not bound by the conclusions drawn from such facts, unless convinced that such conclusions are correct.[29] The question of identity of invention is in general one which should be settled by the experts of the patent office, and not by the court.[30] And the question of the operativeness of the device cannot be considered by this court as an incident of the main question of priority.[31] So the court will not consider the patentability of the invention, the question in interference cases being one of priority and not of patentability.[32] The unanimous decision of the patent office will not be reversed except for clear error.[33] It will not be reversed on any mere question of doubt whether it be correct or not.[34] If the decision of the commissioner is correct the fact that his opinion is erroneous

25. Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Cushman *v.* Lines, 10 App. Cas. (D. C.) 156; Hillard *v.* Brooks, 111 Off. Gaz. 302. *Contra*, see Carter *v.* Carter, 5 Fed. Cas. No. 2,475, McArthur Pat. Cas. 388; King *v.* Gedney, 14 Fed. Cas. No. 7,795, McArthur Pat. Cas. 443.

26. *In re* Aiken, 1 Fed. Cas. No. 107, McArthur Pat. Cas. 126; *In re* Crooker, 6 Fed. Cas. No. 3,414, McArthur Pat. Cas. 134; *Ex p.* Spence, 22 Fed. Cas. No. 13,228.

Mere comments by the commissioner in his decision are not appealable. *In re* Freeman, 23 App. Cas. (D. C.) 226.

27. *In re* Conklin, 1 McArthur (D. C.) 375; *In re* Aiken, 1 Fed. Cas. No. 107, McArthur Pat. Cas. 126; Arnold *v.* Bishop, 1 Fed. Cas. No. 553, McArthur Pat. Cas. 36, Cranch Pat. Dec. 109; Burlew *v.* O'Neil, 4 Fed. Cas. No. 2,167, McArthur Pat. Cas. 168.

New matter is not considered. *In re* Jackson, 13 Fed. Cas. No. 7,126, McArthur Pat. Cas. 485; *In re* Jewett, 13 Fed. Cas. No. 7,308, McArthur Pat. Cas. 259; *Ex p.* Sanders, 21 Fed. Cas. No. 12,292; Sturtevant *v.* Greenough, 23 Fed. Cas. No. 13,579.

28. Davis *v.* Garrett, 28 App. Cas. (D. C.) 9; *In re* Frasch, 27 App. Cas. (D. C.) 25. And see Jones *v.* Starr, 26 App. Cas. (D. C.) 64.

Extent of oral argument.— The court cannot control the action of the commissioner of patents in a discretionary matter, such as the extent of oral argument to be permitted at a hearing of an interference. Sobey *v.* Holsclaw, 28 App. Cas. (D. C.) 65.

Leave to amend.— Whether leave shall be given to amend a preliminary statement is a matter that rests in the discretion of the commissioner of patents, and is not reviewable in the court of appeals, save possibly in a case of palpable abuse of that discretion. Neth *v.* Ohmer, 27 App. Cas. (D. C.) 319.

29. O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77.

30. Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1. And see Bechman *v.* Southgate, 28 App. Cas. (D. C.) 405, holding that except in extreme cases this court will not go behind the declaration of interference in order to determine the question of identity of invention; and such a case is not presented where it appears that the assignee and employer of the junior and unsuccessful party, after the latter saw his rival's application and drawings, filed the junior party's application, with specifications reading very much like those of the senior party.

31. Duryea *v.* Rice, 28 App. Cas. (D. C.) 423.

32. Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228; Hillard *v.* Brooks, 23 App. Cas. (D. C.) 526; Ostergreen *v.* Tripler, 17 App. Cas. (D. C.) 557; Schupphaus *v.* Stevens, 17 App. Cas. (D. C.) 548; Latham *v.* Armat, 17 App. Cas. (D. C.) 345; Newton *v.* Woodward, 17 App. Cas. (D. C.) 34; Westinghouse *v.* Duncan, 2 App. Cas. (D. C.) 131; Stone *v.* Pupin, 100 Off. Gaz. 1113. See also Potter *v.* McIntosh, 28 App. Cas. (D. C.) 510; Kreag *v.* Geen, 28 App. Cas. (D. C.) 437; Sobey *v.* Holsclaw, 28 App. Cas. (D. C.) 65. But see Burrows *v.* Wetherill, 4 Fed. Cas. No. 2,208, McArthur Pat. Cas. 315; Jones *v.* Wetherill, 13 Fed. Cas. No. 7,508, McArthur Pat. Cas. 409; Yearsley *v.* Brookfield, 30 Fed. Cas. No. 18,131, McArthur Pat. Cas. 193.

33. Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Bourn *v.* Hill, 27 App. Cas. (D. C.) 291; Fowler *v.* McBerty, 27 App. Cas. (D. C.) 41, 46; Ball *v.* Flora, 26 App. Cas. (D. C.) 394; Flora *v.* Powrie, 23 App. Cas. (D. C.) 195; Talbott *v.* Monell, 23 App. Cas. (D. C.) 108; Cobb *v.* Goebel, 23 App. Cas. (D. C.) 75.

Unanimity in the patent office tribunals imposes upon the appellant in this court the burden of showing very clearly that the commissioner erred in the final decision appealed from. *In re* Clunies, 28 App. Cas. (D. C.) 18; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1.

34. Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228.

is immaterial.[35] The court has no power to send the case back to take further proofs.[36]

f. Time For Appeal. Appeals must be taken from the patent office within one year,[37] or within a shorter period fixed in the decision.[38] Notice of appeal to the court of appeals from decisions of the commissioner must be given to the commissioner of patents within forty days from the date of the decision exclusive of Sundays and holidays.[39] A transcript of the record must be filed in the court of appeals within forty days thereafter.[40]

10. Caveats — a. In General. A caveat is simply notice that the one filing it claims to be the inventor of the subject-matter disclosed.[41] It entitles him to notice from the patent office if any one files an application for the same thing within the life of the caveat which is one year,[42] but it does not entitle him to notice of applications filed previously or subsequently.[43] Its purpose is to prevent the issue of a patent to another while the caveator is perfecting his invention.[44] But the fact that a patent is inadvertently granted while a caveat is pending does not of itself vacate the patent, or authorize the granting of a patent to the other party unless he shows priority of invention.[45] The caveat is not conclusive evidence that the invention is in part perfected; a person may chose to file a caveat while he is going on and making improvements upon an invention which he has already completed so as to be of practical utility.[46]

b. By Whom Filed. A caveat can be filed only by the actual inventor but may be filed by a foreigner as well as a citizen of the United States.[47]

35. *In re* Aiken, 1 Fed. Cas. No. 107, McArthur Pat. Cas. 126; *In re* Crooker, 6 Fed. Cas. No. 3,414, McArthur Pat. Cas. 134.

36. *Ex p.* Sanders, 21 Fed. Cas. No. 12,292; Blackford *v.* Wilder, 104 Off. Gaz. 580.

37. U. S. Rev. St. (1878) § 4894.

Motion for rehearing does not extend time. Ross *v.* Loewer, 9 App. Cas. (D. C.) 563; *Ex p.* Linton, 15 Fed. Cas. No. 8,378.

Appellant entitled to time allowed by rules.— An appeal from the decision of the commissioner of patents will not be dismissed because the appellant has availed himself of all the time allowed by the rules for taking and perfecting his appeal, although by so doing he necessarily prevents the hearing of the appeal until after the summer recess of the court. Jones *v.* Starr, 26 App. Cas. (D. C.) 64.

Computation of time.— Saturday half holidays do not count in computing time. Ocumpaugh *v.* Norton, 114 Off. Gaz. 545.

38. U. S. Rev. St. (1878) § 4904 [U. S. Comp. St. (1901) p. 3389]; Greenough *v.* Clark, 10 Fed. Cas. No. 5,784, McArthur Pat. Cas. 173; Justice *v.* Jones, 14 Fed. Cas. No. 7,588, McArthur Pat. Cas. 635.

Power to limit time.— The court has authority to limit the time for appeals. *In re* Hien, 166 U. S. 432, 17 S. Ct. 624, 41 L. ed. 1066.

39. U. S. Rev. St. (1878) § 4912 [U. S. Comp. St. (1901) p. 3391]; Pract. Rule 149; Ross *v.* Loewer, 9 App. Cas. (D. C.) 563; Hein *v.* Pungs, 9 App. Cas. (D. C.) 492; *In re* Bryant, 9 App. Cas. (D. C.) 447.

40. Court of Appeals, rule 21.

41. U. S. Electric Co. *v.* Jamaica, etc., Co., 61 Fed. 655; Hoe *v.* Kahler, 12 Fed. 111, 20 Blatchf. 430; Heath *v.* Hildreth, 11 Fed. Cas. No. 6,309; *Ex p.* Woodruff, 30 Fed. Cas. No. 17,989.

In Canada the law is substantially the same as that in the United States. Pat. Act, 35 Vict. c. 26, § 39.

In England a caveat is simply opposition at any stage to the grant of a patent to another. *In re* Johnson, 13 Ch. D. 398 note, 28 Wkly. Rep. 709 note; *In re* Somerset, 13 Ch. D. 397, 42 L. T. Rep. N. S. 635, 28 Wkly. Rep. 709. It entitles the caveator to notice. Reg. *v.* Cutler, 14 Q. B. 372 note, 68 E. C. L. 373, 3 C. & K. 215, 1 Starke 354, 2 E. C. L. 138; Matter of Fawcett, 2 De G. M. & G. 439, 51 Eng. Ch. 344, 42 Eng. Reprint 942.

42. U. S. Rev. St. (1878) § 4902 [U. S. Comp. St. (1901) p. 3388]; Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372.

Prior caveat.— One who has filed a caveat cannot be prejudiced by the omission of the commissioner to give him notice of the application for a patent by one who had filed a prior caveat. Phelps *v.* Brown, 19 Fed. Cas. No. 11,072, 4 Blatchf. 362, 1 Fish. Pat. Cas. 479.

43. U. S. Rev. St. (1878) § 4902 [U. S. Comp. St. (1901) p. 3388]; Johnson *v.* Onion, 13 Fed. Cas. No. 7,401, 4 Fish. Pat. Cas. 170, 3 Hughes 290.

44. Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303.

45. Cochrane *v.* Waterman, 5 Fed. Cas. No. 2,929, Cranch Pat. Dec. 121, McArthur Pat. Cas. 52.

46. The invention is not necessarily imperfect when caveat is filed.— Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Calhoun *v.* Hodgson, 70 Off. Gaz. 276.

47. U. S. Rev. St. (1878) § 4902, as amended March 3, 1903, 32 U. S. St. at L. 1227 [U. S. Comp. St. Suppl. (1905) p. 666].

11. SECRECY OF APPLICATIONS AND CAVEATS. Applications for patents and caveats are preserved in secrecy by the patent office because of the express provisions of the federal statutes[48] that an inventor cannot be compelled to disclose a secret invention made or owned by him.[49]

12. RIGHT TO INSPECT AND OBTAIN COPIES OF PATENT OFFICE RECORDS. Any one making proper application therefor and paying the fees provided by law may obtain copies of all public records of the patent office;[50] but they cannot obtain copies of pending applications to which they are not parties except upon a proper showing made to the commissioner of the right to and necessity for the copies or upon the order of a competent court.[51]

13. COPIES OF RECORDS. Certified copies of records, books, papers, or drawings belonging to the patent office are received as evidence in all cases where the originals could be evidence;[52] and certified copies of the specifications and drawings of foreign letters patent in the United States patent office constitute *prima facie* evidence of the fact of the granting of such letters patent and of the date and contents thereof.[53]

14. RULES OF PATENT OFFICE. The rules of procedure established for the patent office have the force of law where not inconsistent with law and are binding upon the commissioner as well as upon applicants for patents.[54]

15. CONCLUSIVENESS AND EFFECT OF PATENT OFFICE DECISIONS[55]— a. In General. The decision of the commissioners of patents in the allowance and issue of a patent creates only a *prima facie* right, and is subject to examination by the courts;[56] but the commissioner of patents must abide by the decision of his prede-

48. U. S. Rev. St. (1878) § 4902 [U. S. Comp. St. (1901) p. 3388]; U. S. Rev. St. (1878) § 4908 [U. S. Comp. St. (1901) p. 3390].

49. Pract. Rule 15.

The rule of secrecy in the patent office has no application to investigation of caveat by courts. Diamond Match Co. *v.* Oshkosh Match Works, 63 Fed. 984.

In Canada all papers are open to inspection save caveats. Pat. Act, 35 Vict. c. 26, § 44.

50. U. S. *v.* Butterworth Patent Com'r, 81 Off. Gaz. 505; *In re* Drawbaugh, 66 Off. Gaz. 1451.

A rude and insulting demand is not a legal demand. Boyden *v.* Burke, 14 How. (U. S.) 575, 14 L. ed. 548.

In England an application to inspect provisional specification has been refused. Tolson's Patent, 6 De G. M. & G. 422, 4 Wkly. Rep. 518, 55 Eng. Ch. 329, 43 Eng. Reprint 1297.

51. U. S. *v.* Patent Com'r, 19 D. C. 223; U. S. *v.* Butterworth Patent Com'r, 81 Off. Gaz. 505; U. S. *v.* Patent Com'r, 62 Off. Gaz. 1968; U. S. *v.* Patent Com'r, 54 Off. Gaz. 267; U. S. *v.* Hall, 48 Off. Gaz. 1263.

52. U. S. Rev. St. (1878) § 892 [U. S. Comp. St. (1901) p. 673]; Paine *v.* Trask, 56 Fed. 231; Toohey *v.* Harding, 1 Fed. 174, 4 Hughes 253; Johnson *v.* Beard, 13 Fed. Cas. No. 7,371, 12 Ban. & A. 50, 8 Off. Gaz. 435.

A certified copy of the patent office record of an assignment is accepted in place of the original instrument. Carpenter *v.* Eberhard Mfg. Co., 78 Fed. 127; Standard Elevator Co. *v.* Crane Elevator Co., 76 Fed. 767, 22 C. C. A. 549; National Folding-Box, etc., Co. *v.* American Paper Pail, etc., Co., 55 Fed. 488; Dederick *v.* Whitman Agricultural Co., 26 Fed. 763; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 1 Fish. Pat. Rep. 41, 3 McLean 432; Lee *v.* Blandy, 15 Fed. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Parker *v.* Haworth, 18 Fed. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725. *Contra*, see National Cash Register Co. *v.* Navy Cash-Register Co., 99 Fed. 89; International Tooth-Crown Co. *v.* Bennett, 72 Fed. 169; New York *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336; Paine *v.* Trask, 56 Fed. 231.

In Canada the law is like that of the United States. Pat. Act, 35 Vict. c. 26, § 2.

53. U. S. Rev. St. (1878) § 893 [U. S. Comp. St. (1901) p. 673]; Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

Certificate by acting commissioner is sufficient. Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

In England copy of foreign patent under seal of that country is proved without proof of official character of signer. *In re* Betts, 9 Jur. N. S. 137, 7 L. T. Rep. N. S. 577, 1 Moore P. C. N. S. 49, 1 New Rep. 137, 11 Wkly. Rep. 221, 15 Eng. Reprint 621.

54. U. S. Rev. St. (1878) § 483 [U. S. Comp. St. (1901) p. 272]; Mell *v.* Midgley, 31 App. Cas. (D. C.) 534; U. S. *v.* Allen, 22 App. Cas. (D. C.) 56; O'Hara *v.* Hawes, 18 Fed. Cas. No. 10,466.

55. On application for extension see *infra*, VII, B.

56. Reckendorfer *v.* Faber, 92 U. S. 347, 23 L. ed. 719; Hayes-Young Tie Plate Co. *v.* St. Louis Transit Co., 137 Fed. 80, 70 C. C. A. 1; Wilkins Shoe-Button Fastener Co. *v.* Webb, 89 Fed. 982; Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303; Brooks *v.* Jenkins, 4

cessor, granting a patent, so long as it is unreversed by a competent court.[57] Such being the *prima facie* presumption the burden of proof to establish a contrary conclusion is upon the opposite party.[58] If the proofs do not overcome this presumption, and the device is of such a character, or relates to such special and peculiar subject-matters, that it does not come within the range of common experience or judicial knowledge, the *prima facie* showing must stand.[59] This presumption in favor of the validity of a patent does not, however, obtain where the records and papers of the patent office show conclusively that the commissioner has acted without authority or has exceeded it,[60] or where his decision is impeached for fraud.[61] It cannot be shown, however, that the commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent. The patent is conclusively valid until it is successfully impeached in a direct proceeding properly instituted for that purpose.[62] If there was fraud practised in obtaining the patent, that is a matter between the patent office and the patentee. The patent, although obtained by fraud, must be respected and enforced until reversed or annulled by some proceedings directly for that purpose. It is not exposed to the attacks of strangers or third persons for such reason.[63]

b. As to Application and Procedure in Obtaining Patent. In the absence of fraud, the issue of a patent is conclusive evidence that the statutory requirements as to the application and procedure in the patent office have been complied with.[64]

Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Congress Rubber Co. *v.* American Elastic Cloth Co., 6 Fed. Cas. No. 3,099*a*; Potter *v.* Holland, 19 Fed. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277.

No court is bound by the decision of the patent office granting a patent when immediate steps are taken to test its validity in an action instituted for that purpose. Minneapolis Harvester Works *v.* McCormick Harvesting-Mach. Co., 28 Fed. 565.

Conclusive as to state court.—A patent conferred upon an inventor is conclusive of its own validity, and a state court cannot go behind it. Cowan *v.* Mitchell, 11 Heisk. (Tenn.) 87.

Due heed and consideration must always be given by the court or jury, as the case may be, to this presumption, but the real question in all cases is whether or not the evidence in the case is or is not sufficient to overcome the *prima facie* presumption which the patent affords. Los Angeles Art Organ Co. *v.* Æolian Co., 143 Fed. 880, 75 C. C. A. 88.

Joint patent prima facie evidence that all patentees participated in invention.— Hotchkiss *v.* Greenwood, 12 Fed. Cas. No. 6,718, 4 McLean 456, 2 Robb Pat. Cas. 730 [*affirmed* in 11 How. 248, 13 L. ed. 683].

57. Matter of Hoevler, 21 D. C. 107; *Ex p.* Larowe, 14 Fed. Cas. No. 8,093; *Ex p.* Simpson, 22 Fed. Cas. No. 12,878.

58. Wilkins Shoe-Button Fastener Co. *v.* Webb, 89 Fed. 982; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277. And see *supra*, V, C, 4, c; IV, A, 10, a; IV, C, 3.

59. Packard *v.* Lacing-Stud Co., 70 Fed. 66, 16 C. C. A. 639, holding that the fact that no machine has been constructed or put into practical operation under a patent is not of itself sufficient to show the patent inoperative, or to overcome the presumption of its validity arising from the fact of issuance.

60. Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. ed. 665; Allen *v.* Blunt, 1 Fed. Cas. No. 216, 2 Robb Pat. Cas. 288, 3 Story 742; Whitely *v.* Swayne, 29 Fed. Cas. No. 17,568, 4 Fish. Pat. Cas. 117 [*affirmed* in 7 Wall. 685, 19 L. ed. 199].

The commissioner of patents is an officer of limited authority, whose jurisdiction is restricted to the particular cases mentioned in the statute; and therefore, whenever it is apparent upon inspection of the patents that he has acted without authority, or has exceeded it, his judgment must necessarily be regarded as invalid. Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508.

61. Allen *v.* Blunt, 1 Fed. Cas. No. 216, 2 Robb Pat. Cas. 288, 3 Story 742.

Fraud must be shown prima facie.— Where fraud is charged upon a party in respect to his patent, it must be made out at least *prima facie*. Goodyear *v.* Day, 10 Fed. Cas. No. 5,567.

62. Blackford *v.* Wilder, 28 App. Cas. (D. C.) 535; Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395.

63. Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

64. Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Calculagraph Co. *v.* Wilson, 132 Fed. 20 [*reversed* on other grounds in 144 Fed. 91, 75 C. C. A. 249]; Giant Powder Co. *v.* Safety Nitro Powder Co., 19 Fed. 509; Hoe *v.* Cottrell, 1 Fed. 597, 17 Blatchf. 546; McMillan *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92. *Compare* Fassett *v.* Ewart Mfg. Co., 58 Fed. 360 [*af-*

c. As to Patentability. The decision of the patent office, upon an application for a patent, is never final upon the question of the novelty and utility of an invention. Upon reason and authority, the new patent granted after a hearing merely makes out a *prima facie* case for the successful applicant,[65] and the original presumptions of novelty and utility arising from the grant of a patent are strengthened by its extension.[66] Even where an interference is claimed, and as against the parties to the hearing, the commissioner's decision is not conclusive.[67] But while the decision of the commissioner of patents is not *res judicata* on the question of novelty, it is entitled to the highest respect,[68] and where patentable novelty has been denied by all the tribunals of the patent office, it will require a very clear case to obtain a reversal.[69] On the question of usefulness and cost of an invention, it has been held that the testimony of machinists and manufacturers having practical knowledge of the subject-matter is of greater weight than the opinion of the commissioner of patents.[70]

d. As to Originality and Priority. The issuance of a patent establishes *prima facie* the patentee's title as the original and first inventor.[71] So a previous deci-

firmed in 62 Fed. 404, 10 C. C. A. 441], holding that the action of the patent office in allowing a separation of claims into divisional applications is not conclusive, and the question whether the severance was proper and valid may be passed upon by the courts. See also McKay *v.* Dibert, 5 Fed. 587.

As to giving notice and paying fees.— A patent once granted cannot be subsequently impeached by evidence tending to show a want of compliance with the law as to giving notice, or paying fees, etc. Lamprey Boiler Furnace Mouth Protector Co. *v.* Economy Feed Water Heater Co., 62 Fed. 590 [*affirmed* in 65 Fed. 1000, 13 C. C. A. 271]; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92.

As to taking of oaths.— Recitals in letters patent in the absence of fraud are conclusive evidence that the necessary oaths were taken before the patent was granted. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; De Florez *v.* Raynolds, 7 Fed. Cas. No. 3,742, 3 Ban. & A. 292, 14 Blatchf. 505. The fact that a blank form of oath not executed is found among the papers cannot overcome the direct recital of the letters patent that the oath was taken, or the presumption that the requirements of the law were complied with in issuing the patent. Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

As to signatures.— The presumption is that a patent is signed and countersigned rightly. Smith *v.* Mercer, 5 Pa. L. J. 529.

65. *Alabama.*— Stephenson *v.* Allison, 123 Ala. 439, 26 So. 290.

Ohio.— Clark *v.* Bentel, 9 Ohio Dec. (Reprint) 289, 12 Cinc. L. Bul. 53.

South Carolina.— Wright *v.* Wilson, 11 Rich. 144.

Tennessee.— Green *v.* Stuart, 7 Baxt. 418.

United States.— Boyd *v.* Janesville Hay-Tool Co., 158 U. S. 260, 15 S. Ct. 837, 39 L. ed. 973; National Mach. Co. *v.* Wheeler, etc., Mfg. Co., 72 Fed. 185 (holding that the fact that a party to an interference proceeding permits the decision to go against him by default does not make such decision conclusive against him upon the question of the patentability of the machine in a subsequent suit against him for infringement); Ney *v.* Ney Mfg. Co., 69 Fed. 405, 16 C. C. A. 293; Frankfort Whisky Process Co. *v.* Mill Creek Distilling Co., 37 Fed. 533; Shaver *v.* Skinner Mfg. Co., 30 Fed. 68; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Serrell *v.* Collins, 21 Fed. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Spaulding *v.* Tucker, 22 Fed. Cas. No. 13,220, Deady 649 [*reversed* on other grounds in 13 Wall. 453, 20 L. ed. 515]; Union Paper-Bag Mach. Co. *v.* Crane, 24 Fed. Cas. No. 14,388, 1 Ban. & A. 494, Holmes 429, 6 Off. Gaz. 801.

See 38 Cent. Dig. tit. "Patents," § 164.

The issuance of patents on two applications which were pending at the same time, and relate to the same subject-matter, is in effect an adjudication by the patent office that there is a substantial difference betwen the inventions, and raises a presumption that the device of the later patent is not an infringement of the earlier one. Boyd *v.* Janesville Hay-Tool Co., 158 U. S. 260, 15 S. Ct. 837, 39 L. ed. 973.

66. Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; Evarts *v.* Ford, 8 Fed. Cas. No. 4,574, 6 Fish. Pat. Cas. 587, 5 Off. Gaz. 58.

67. Union Paper-Bag Mach. Co. *v.* Crane, 24 Fed. Cas. No. 14,388, 1 Ban. & A. 494, Holmes 429, 6 Off. Gaz. 801.

68. Boyden Power-Brake Co. *v.* Westinghouse Air-Brake Co., 70 Fed. 816, 17 C. C. A. 430; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89.

69. *In re* Beswick, 16 App. Cas. (D. C.) 345; *In re* Smith, 14 App. Cas. (D. C.) 181; *In re* Barratt, 11 App. Cas. (D. C.) 177.

70. *Ex p.* Arthur, 1 Fed. Cas. No. 563*a*.

71. Clark *v.* Bentel, 9 Ohio Dec. (Reprint) 289, 12 Cinc. L. Bul. 53; Maurice *v.* Devol, 23 W. Va. 247; Ashcroft *v.* Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Smith *v.*

sion by the commissioner of patents in interference proceedings upon the question of fact as to priority of invention must be accepted as controlling, unless the contrary is established by testimony which, in character and amount, carries thorough conviction.[72] Much more is this effect to be given to the decision of the commissioner when it has been affirmed by the court of appeals of the District of Columbia.[73] While the decision of the patent office on this question is never final,[74] even as against the parties to an interference proceeding,[75] it is nevertheless entitled to sufficient weight in an infringement suit to cast the burden of proof on the party against whom it was rendered.[76] When the *prima facie* force of a patent as to priority of invention on the part of the patentee has been once destroyed by evidence of prior invention on the part of another, it cannot be restored by the patent itself, but only by specific testimony from witnesses.[77]

e. As to Abandonment. The action of the commissioner of patents in granting letters patent does not conclude the question whether there has been an abandonment.[78]

16. Remedy in Equity For Refusal of Patent — a. In General. Where there is an adverse decision by the court of appeals of the District of Columbia upon appeal from the commissioner in an application for patent or in an interference, the defeated party may file a bill in equity and retry the question.[79] The proceed-

Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 129 Fed. 598; Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721 [*affirmed* in 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968]; Stonemetz Printers' Mach. Co. *v.* Brown Folding-Mach. Co., 57 Fed. 601; Pacific Cable R. Co. *v.* Butte City St. R. Co., 52 Fed. 863 [*affirmed* in 60 Fed. 90, 8 C. C. A. 484]; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Goodyear Dental Vulcanite Co. *v.* Gardiner, 10 Fed. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Haskell *v.* Shoe Mach. Mfg. Co., 11 Fed. Cas. No. 6,194, 3 Ban. & A. 553, 15 Off. Gaz. 509; Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Spear *v.* Belson, 22 Fed. Cas. No. 13,223, McArthur Pat. Cas. 699 (holding that the issuance of a patent establishes *prima facie* the patentee's title as an original inventor, and he must be considered as such even in a subsequent interference proceeding in which prior invention by another is shown, unless there is proof either positive or presumptive that he had knowledge thereof); Tucker *v.* Tucker Mfg. Co., 24 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464.

72. Morgan *v.* Daniels, 153 U. S. 120, 14 S. Ct. 772, 38 L. ed. 657 [*reversing* 42 Fed. 451]; John R. Williams Co. *v.* Miller, etc., Mfg. Co., 107 Fed. 290; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408]; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73.

The evidence must establish clearly the priority of a completed and useful machine over that of the patentee, or it is unavailing. To doubt upon this point is to resolve it in the negative. Parham *v.* American Buttonhole, etc., Mach. Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

Mere suggestion of mistake insufficient.— The decision of the commissioner of patents is not final on the question of the priority of invention, but the successful applicant will not be enjoined from receiving his patent upon the mere suggestion that the commissioner was mistaken. Whipple *v.* Miner, 15 Fed. 117.

73. R. Thomas, etc., Co. *v.* Electric Porcelain, etc., Co., 111 Fed. 923.

74. Hubel *v.* Tucker, 24 Fed. 701, 23 Blatchf. 297; Gloucester Isinglass, etc., Co. *v.* Brooks, 19 Fed. 426; Whipple *v.* Miner, 15 Fed. 117; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Perry *v.* Starrett, 19 Fed. Cas. No. 11,012, 3 Ban. & A. 485, 14 Off. Gaz. 599; Union Paper-Bag Mach. Co. *v.* Crane, 24 Fed. Cas. No. 14,388, 1 Ban. & A. 494, Holmes 429, 6 Off. Gaz. 801.

75. Union Paper-Bag Mach. Co. *v.* Crane, 24 Fed. Cas. No. 14,388, 1 Ban. & A. 494, Holmes 429, 6 Off. Gaz. 801. But see Shuter *v.* Davis, 16 Fed. 564.

76. Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Stonemetz Printers' Mach. Co. *v.* Brown Folding-Mach. Co., 57 Fed. 601 [*affirmed* in 58 Fed. 571, 7 C. C. A. 374]; Gloucester Isinglass, etc., Co. *v.* Brooks, 19 Fed. 426; Wire Book Sewing Mach. Co. *v.* Stevenson, 11 Fed. 155.

77. Barstow *v.* Swan, 2 Fed. Cas. No. 1,065.

78. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; U. S. Rifle, etc., Co. *v.* Whitney Arms Co., 28 Fed. Cas. No. 16,793, 2 Ban. & A. 493, 14 Blatchf. 94, 11 Off. Gaz. 373 [*affirmed* in 118 U. S. 22, 6 S. Ct. 950, 30 L. ed. 53].

79. U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392]; Jones *v.* Starr, 26 App. Cas. (D. C.) 64; McKnight *v.* Metal Volatilization Co., 128 Fed. 51.

Conditions precedent.— Right of appeal must be exhausted. Kirk *v.* Patent Com'r, 5 Mackey (D. C.) 229.

ing is original in its nature and not appellate,[80] and new evidence may be presented.[81] In interference proceedings, whether a party not involved in the suit was the first inventor is not in issue.[82] The complainant is not entitled to a decree as a matter of right but must establish it.[82a] Where there is no interfering claimant a copy of the bill must be served upon the commissioner of patents, and in such case all costs and expenses of the proceedings must be paid by the complainant whether the decision is in his favor or not.[83] The court has no power to enjoin the commissioner from issuing a patent pending suit.[84] A judgment of the court that the applicant is entitled to a patent will authorize the commissioner to issue.[85]

b. Time and Place of Suit. The suit must be brought within one year,[86] and must be brought in the district in which defendant is an inhabitant or may be found.[87] The commissioner of patents is a resident of the District of Columbia and the suit must be brought there against him where there is no interfering party,[88] unless he consents to be sued in another district.[89]

c. Burden of Proof. In a suit in equity to obtain a patent, the burden is upon the complainant to prove his right beyond a reasonable doubt.[90]

VI. REQUISITES AND VALIDITY OF LETTERS PATENT.[91]

A. Form and Contents — 1. As an Instrument. A patent is an instrument issued in the name of the United States of America, under the seal of the patent office, signed by the commissioner of patents, containing a short title or description of the invention or discovery indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof, and must refer to the specification for the particulars thereof.[92] So, by the provisions of the statute, it is necessary that a

80. Dover *v.* Greenwood, 154 Fed. 854; Minneapolis Harvester Works *v.* McCormick Harvesting-Mach. Co., 28 Fed. 565; Butler *v.* Shaw, 21 Fed. 321; New York Belting, etc., Co. *v.* Sibley, 15 Fed. 386; Whipple *v.* Miner, 15 Fed. 117; *In re* Squire, 22 Fed. Cas. No. 13,269, 3 Ban. & A. 133, 12 Off. Gaz. 1025.

Claims considered.— Complainant is confined to claims passed on by patent office. Durham *v.* Seymour, 6 App. Cas. (D. C.) 78; Wheaton *v.* Kendall, 85 Fed. 666.

81. Durham *v.* Seymour, 6 App. Cas. (D. C.) 78; Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33; *In re* Squire, 22 Fed. Cas. No. 13,269, 3 Ban. & A. 133, 12 Off. Gaz. 1025.

82. Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33.

Questions of fact.— Where the question which of two applicants for a patent for the same invention was the true inventor depends on questions of fact, the court, in an action brought under U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392], by the unsuccessful applicant to compel an issuance of the patent to him, must be very clearly satisfied that the decision of the patent office tribunals between the two was erroneous before it will be justified in reversing the same. Gillette *v.* Sendelbach, 146 Fed. 758, 77 C. C. A. 55.

82a. Davis *v.* Garrett, 152 Fed. 723.

83. U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392].

Expenses are paid by complainant only where there is no opposing party save the commissioner. Butler *v.* Shaw, 21 Fed. 321.

Parties.— In interference cases the commissioner is not a necessary party. Graham *v.* Teter, 25 Fed. 555. The secretary of the interior is not a proper party. Kirk *v.* Patent Com'r, 5 Mackey (D. C.) 229.

84. Illingworth *v.* Atha, 42 Fed. 141; Whipple *v.* Miner, 15 Fed. 117.

85. U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392].

In an interference where the issue is not patentable there can be no judgment. Hill *v.* Wooster, 132 U. S. 693, 10 S. Ct. 228, 33 L. ed. 502; Leslie *v.* Tracy, 100 Fed. 475.

86. U. S. Rev. St. (1878) § 4894.

The statute relating to delay in prosecuting applications applies to bill in equity. Gandy *v.* Marble, 122 U. S. 432, 7 S. Ct. 1290, 30 L. ed. 1223.

87. Gandy *v.* Marble, 122 U. S. 432, 7 S. Ct. 1290, 30 L. ed. 1223; Bernardin *v.* Northall, 77 Fed. 849; Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117.

88. Butterworth *v.* Hill, 114 U. S. 128, 5 S. Ct. 796, 29 L. ed. 119.

89. Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117.

90. Durham *v.* Seymour, 6 App. Cas. (D. C.) 78; Morgan *v.* Daniels, 153 U. S. 120, 14 S. Ct. 772, 38 L. ed. 657 [*reversing* 42 Fed. 451]; Standard Cartridge Co. *v.* Peters Cartridge Co., 77 Fed. 630, 23 C. C. A. 367 [*affirming* 69 Fed. 408].

91. **Decisions of United States courts as to validity as precedents for other courts** see COURTS, 11 Cyc. 752.

Validity of agreement not to contest patent see CONTRACTS, 9 Cyc. 515.

92. U. S. Rev. St. (1878) § 4883, as

copy of the specification and drawings be annexed to the patent and form a part thereof.[93]

2. RECORD. The patent together with the specification must be recorded in the patent office in books kept for that purpose.[94]

3. DATE OF ISSUE. Every patent shall issue within three months from date of payment of final fee, which fee must be paid within six months from date of allowance and notice to applicant or to his agent.[95] A patent cannot be antedated.[96]

B. Validity — 1. IN GENERAL. Where the statutory requirements in the issue of the patent have not been complied with the patent is invalid and this may be shown at any time,[97] although as a general rule a patent is not subject to collateral attack for defects not appearing on the face of the patent.[98] As has already

amended April 11, 1902, 32 U. S. St. at L. 95 [U. S. Comp. St. Suppl. (1905) p. 662]; U. S. Rev. St. (1878) § 4884 [U. S. Comp. St. (1901) p. 3381]. Prior to the amendment of April 11, 1902, patents had to be signed by the secretary of the interior or an assistant secretary and had to be countersigned by the commissioner of patents, and a failure to comply with the statutory provisions, such as the omission of the signature of the secretary of the interior, is fatal to the validity of the patent. Marsh *v.* Nichols, 128 U. S. 605, 9 S. Ct. 168, 32 L. ed. 538.

The acting commissioner may sign patents. Smith *v.* Mercer, 22 Fed. Cas. No. 13,078, 5 Pa. L. J. 529; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

In Canada the law is like that in the United States except that the time is six, twelve, or eighteen years as elected. Pat. Act, 35 Vict. c. 25, § 10.

93. U. S. Rev. St. (1878) § 4884 [U. S. Comp. St. (1901) p. 3381].

Drawing is part of patent. Poupard *v.* Fardell, 18 Wkly. Rep. 127; Reg. *v.* La Force, 4 Can. Exch. 14.

The drawings of a patent are not required to be working plans, but are merely illustrative, to be read in connection with the specification and claims, and a patented device will not be held inoperative merely because of imperfections in the drawing in respect to the dimensions or relative position of parts of the mechanism. Wold *v.* Thayer, 148 Fed. 227, 78 C. C. A. 350 [*affirmed* in 142 Fed. 776].

94. U. S. Rev. St. (1878) § 4883; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

English practice.— Patent must be enrolled by patentee within the time fixed and cannot be kept secret. *In re* Brough, 7 Beav. 104, 29 Eng. Ch. 104, 49 Eng. Reprint 1002; *Ex p.* Beck, 1 Bro. Ch. 578, 28 Eng. Reprint 1308; *Ex p.* Hoops, 6 Ves. 599, 31 Eng. Reprint 1215. Master of rolls can correct only clerical errors. *In re* Dismore, 18 Beav. 538, 52 Eng. Reprint 211; *In re* Sharp, 3 Beav. 245, 10 L. J. Ch. 86, 43 Eng. Ch. 245, 49 Eng. Reprint 96; *In re* Redmund, 6 L. J. Ch. O. S. 183, 5 Russ. 44, 5 Eng. Ch. 44, 38 Eng. Reprint 943.

95. U. S. Rev. St. § 4885 as amended May 23, 1908, Public No. 132 [U. S. Comp. St. (1901) p. 3382]. Where patentee refuses to accept patent because of error therein and it is canceled and an amended patent issued, it dates from amendment. Railway Register Mfg. Co. *v.* North Hudson County R. Co., 23 Fed. 593.

Reallowance and issuance of patent more than six months after the first allowance does not invalidate it. Western Electric Co. *v.* North Electric Co., 135 Fed. 79, 67 C. C. A. 553.

English practice.— Patent is effective when seal applied and before enrolment. Devonshire *v.* Neill, L. R. 2 Ir. 132, 146; Russell *v.* Ledsam, 9 Jur. 557, 14 L. J. Exch. 353, 14 M. & W. 574 [*affirmed* in 16 L. J. Exch. 145, 16 M. & W. 633 (*affirmed* in 1 H. L. Cas. 687, 9 Eng. Reprint 931)]. Patent not given date of foreign application under international convention unless requested within seven months. Acetylene Illuminating Co. *v.* United Alkali Co., [1902] 1 Ch. 494, 71 L. J. Ch. 301, 50 Wkly. Rep. 361.

96. Marsh *v.* Nichols, 128 U. S. 605, 9 S. Ct. 168, 32 L. ed. 538; Gramme Electrical Co. *v.* Arnoux, etc., Electric Co., 17 Fed. 838, 21 Blatchf. 450.

97. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Marsh *v.* Nichols, 128 U. S. 605, 9 S. Ct. 168, 32 L. ed. 538; Eagleton Mfg. Co. *v.* West Bradley, etc., Mfg. Co., 111 U. S. 490, 4 S. Ct. 593, 28 L. ed. 493; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Moffitt *v.* Gaar, 17 Fed. Cas. No. 9,690, 1 Bond 315, 1 Fish. Pat. Cas. 610. See *supra*, I, A, 4. Clerical error by patent office will not invalidate. Deere *v.* Arnold, 95 Fed. 169, 92 Fed. 186.

Compliance with prerequisites need not be recited. Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380.

98. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Railway Register Mfg. Co. *v.* North Hudson County R. Co., 23 Fed. 593; Hoe *v.* Cottrell, 1 Fed. 597, 17 Blatchf. 546; American Wood-Paper Co. *v.* Glens Falls Paper Co., 1 Fed. Cas. No. 321, 8 Blatchf. 513, 4 Fish. Pat. Cas. 324; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Crompton *v.* Belknap

been shown in previous chapters, it is invalid if any of the statutory bars to its grant existed.[99]

2. Sufficiency of Description. A patent is invalid if it does not disclose the invention with such clearness as to enable one skilled in the art to make and use it.[1]

3. Name of Patentee. Clerical errors in the name of the patentee will not render the patent void, provided the patent contains a description of him by which he can be identified.[2]

4. Deceptive Patent — a. In General. If there be a false suggestion of a material fact set forth in the specification, the patent is invalid.[3] Inaccuracies in

Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Doughty *v.* West, 7 Fed. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380; Tilghman *v.* Mitchell, 23 Fed. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [*reversed* on other grounds in 19 Wall. 287, 22 L. ed. 125]. See *infra*, VI, E. See also *supra*, V, C, 15.

99. See *supra*, II; III.

Irregular grant of a subsequent patent for the same thing will not invalidate a patent. Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630 [*reversed* on other grounds in 91 U. S. 171, 23 L. ed. 275].

In Canada a patent is void if not manufactured in Canada within two years and if importations are allowed after one year. St. 35 Vict. c. 26, § 28; 38 Vict. c. 14, § 2. Importation of parts will not invalidate. Anderson Tire Co. *v.* American Dunlop Tire Co., 5 Can. Exch. 82. Trifling and accidental importation will not invalidate. Consolidated Car Heating Co. *v.* Came, 18 Quebec Super. Ct. 44.

1. See *supra*, I, A, 3; V, B, 2, a. And see Stevens *v.* Seher, 11 App. Cas. (D. C.) 245; Béné *v.* Jeantet, 129 U. S. 683, 9 S. Ct. 428, 32 L. ed. 803; Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Panzl *v.* Battle Island Paper Co., 138 Fed. 48, 70 C. C. A. 474 [*modifying* 132 Fed. 607]; Windle *v.* Parks, etc., Mach. Co., 134 Fed. 381, 67 C. C. A. 363; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384.

The description is sufficient if it enables those skilled in the art to make it. Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; Lawther *v.* Hamilton, 124 U. S. 1, 8 S. Ct. 342, 31 L. ed. 325; Eames *v.* Andrews, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Sewall *v.* Jones, 91 U. S. 171, 23 L. ed. 275; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Wegmann *v.* Corcoran, 13 Ch. D. 65, 41 L. T. Rep. N. S. 358, 28 Wkly. Rep. 331; Plimpton *v.* Malcolmson, 3 Ch. D. 531, 45 L. J. Ch. 505, 34 L. T. Rep. N. S. 340; Parkes *v.* Stevens, L. R. 8 Eq. 358, 38 L. J. Ch. 627, 17 Wkly. Rep. 846 [*affirmed* in L. R. 5 Ch. 36, 22 L. T. Rep. N. S. 635, 18 Wkly. Rep. 233]; Felton *v.* Greaves, 3 C. & P. 611, 14 E. C. L. 743; Simpson *v.* Holliday, 12 L. T. Rep. N. S. 99, 13 Wkly. Rep. 577 [*affirmed* in L. R. 1 H. L. 315, 35 L. J. Ch. 811].

Omissions obvious to mechanic will not invalidate. Crossley *v.* Beverly, 9 B. & C. 63, 17 E. C. L. 38, 3 C. & P. 513, 14 E. C. L. 690, 7 L. J. K. B. O. S. 127, M. & M. 283, 22 E. C. L. 522, 1 Russ. & M. 166 note, 5 Eng. Ch. 166 note, 39 Eng. Reprint 65.

Drawings may aid in disclosure. Bloxam *v.* Elsee, 6 B. & C. 169, 13 E. C. L. 88, 1 C. & P. 558, 12 E. C. L. 320, 9 D. & R. 215, 5 L. J. K. B. O. S. 104, R. & M. 187, 30 Rev. Rep. 275; Daw *v.* Eley, 13 L. T. Rep. N. S. 399, 14 Wkly. Rep. 126.

The means for accomplishing a result covered by a patent need not be illustrated therein, if they are sufficiently described in the specification. Hillard *v.* Fisher Book Typewriter Co., 151 Fed. 34 [*affirmed* in 159 Fed. 439].

Ambiguous or misleading patent is void. Hastings *v.* Brown, 1 E. & B. 450, 17 Jur. 647, 22 L. J. Q. B. 161, 72 E. C. L. 450; Patent Type-Founding Co. *v.* Richard, Johns. 381, 6 Jur. N. S. 39, 70 Eng. Reprint 470; Turner *v.* Winter, 1 T. R. 602.

Particular descriptions held insufficient see Smith *v.* Murray, 27 Fed. 69; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Evans *v.* Chambers, 8 Fed. Cas. No. 4,555, 1 Robb Pat. Cas. 7, 2 Wash. 125; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Betts *v.* Neilson, L. R. 3 Ch. 429, 37 L. J. Ch. 321, 18 L. T. Rep. N. S. 165, 16 Wkly. Rep. 524; Hinks *v.* Safety Lighting Co., 4 Ch. D. 607, 46 L. J. Ch. 185, 36 L. T. Rep. N. S. 391; Rex *v.* Wheeler, 2 B. & Ald. 345, 20 Rev. Rep. 465; Sturz *v.* De la Rue, 7 L. J. Ch. O. S. 47, 5 Russ. 322, 5 Eng. Ch. 322, 38 Eng. Reprint 1048, 29 Rev. Rep. 24; Taylor *v.* Brandon Mfg. Co., 21 Ont. App. 361.

Particular descriptions held sufficient see Valentine *v.* Marshall, 28 Fed. Cas. No. 16,812*a*; Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442; Ralston *v.* Smith, 11 H. L. Cas. 223, 20 C. B. N. S. 28, 35 L. J. C. P. 49, 13 L. T. Rep. N. S. 1, 11 Reprint 1318; Smith *v.* Mutchmore, 11 U. C. C. P. 458; Smith *v.* Ball, 21 U. C. Q. B. 122.

2. Bignall *v.* Harvey, 4 Fed. 334, 18 Blatchf. 353; Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177, 6 Off. Gaz. 34, 10 Phila. (Pa.) 227.

3. U. S. Rev. St. (1878) § 4920; Carlton *v.* Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517; Mowry *v.* Whitney, 14 Wall. (U. S.)

matters not vital, will not, however, invalidate the patent if they are due to mistake.[4]

b. Suppression of Facts. A fraudulent suppression of material facts about the invention in the specification will render the patent void.[5] To invalidate the patent, however, the omissions must have been made with intent to deceive.[6] Omissions due to mistake or error of judgment will not invalidate the patent, provided the specification is sufficient to enable those skilled in the art to make and use the invention.[7]

5. Joinder of Several Inventions. A patent is not invalid for misjoinder therein of claims to separate inventions if those inventions are connected in design and operation and mutually contribute to the production of a single result.[8]

6. Double Patenting. Where more than one patent is granted to one inventor for a single invention, the first only is valid.[9] The invention covered by two pat-

620, 20 L. ed. 860; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Child *v.* Adams, 5 Fed. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Delano *v.* Scott, 7 Fed. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Reg. *v.* Cutler, 14 Q. B. 372 note, 68 E. C. L. 373, 3 C. & K. 215, 1 Stark. 354, 2 E. C. L. 138. See *supra*, V, B, 2, f; *infra*, VI, B, 4, b.

The title must correctly indicate what is described or the patent is void. Cook *v.* Pearce, 8 Q. B. 1044, 8 Jur. 499, 13 L. J. Q. B. 189, 55 E. C. L. 1044; Rex *v.* Wheeler, 2 B. & Ald. 345, 20 Rev. Rep. 465; Croll *v.* Edge, 9 C. B. 479, 19 L. J. C. P. 261, 14 Jur. 553, 67 E. C. L. 479.

Title may be broader than description see Oxley *v.* Holden, 8 C. B. N. S. 666, 30 L. J. C. P. 68, 2 L. T. Rep. N. S. 464, 8 Wkly. Rep. 626, 98 E. C. L. 666; Patent Bottle Envelope Co. *v.* Seymer, 5 C. B. N. S. 164, 5 Jur. N. S. 174, 28 L. J. C. P. 22, 94 E. C. L. 164; Nickells *v.* Haslam, 8 Jur. 474, 13 L. J. C. P. 146, 7 M. & G. 378, 8 Scott N. R. 97, 49 E. C. L. 378; Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806.

4. Hemolin Co. *v.* Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 70 C. C. A. 480 [*affirming* 131 Fed. 483]; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Blanchard's Gun Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. Rep. 184.

Mistake as to theory of operation will not invalidate. See *supra*, V, B, 2, d.

5. U. S. Rev. St. (1878) § 4920; Philadelphia, etc., R. Co. *v.* Dubois, 12 Wall. (U. S.) 47, 20 L. ed. 265; Electric Boot, etc., Finishing Co. *v.* Little, 75 Fed. 276 [*affirmed* in 138 Fed. 732, 71 C. C. A. 270]. And see *supra*, V, B, 2, f.

English practice.— Patent must distinguish between what is original and what was communicated from abroad. Renard *v.* Levinstein, 10 L. T. Rep. N. S. 177. Must describe best mode of practising invention. Wood *v.* Zimmer, Holt 58, 17 Rev. Rep. 605, 3 E. C. L. 32; Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806.

Suppression not shown see Edison, etc., Electric Light Co. *v.* Woodhouse, 32 Ch. D. 520, 55 L. J. Ch. 243, 55 L. T. Rep. N. S. 263, 34 Wkly. Rep. 626.

6. Featherstone *v.* George R. Bidwell Cycle Co., 53 Fed. 113; Celluloid Mfg. Co. *v.* Russell, 37 Fed. 676; Ligowski Clay-Pigeon Co. *v.* American Clay-Bird Co., 34 Fed. 328; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Park *v.* Little, 18 Fed. Cas. No. 10,715, 1 Robb Pat. Cas. 17, 3 Wash. 196; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,000, 1 Gall. 478, 1 Robb Pat. Cas. 40.

7. Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Michaelis *v.* Roessler, 34 Fed. 325; McKesson *v.* Carnick, 9 Fed. 44, 19 Blatchf. 158; Grant *v.* Mason, 10 Fed. Cas. No. 5,701; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Whitney *v.* Carter, 29 Fed. Cas. No. 17,583.

8. U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555, 109 Off. Gaz. 549; Hogg *v.* Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Sanitas Nut Food Co. *v.* Voigt, 139 Fed. 551, 71 C. C. A. 535; Wilkins Shoe-Button Fastener Co. *v.* Webb, 89 Fed. 982; Fire-Extinguisher Case, 21 Fed. 40. And see *supra*, V, B, 7.

Machine and separate parts may be claimed in one case. Holly *v.* Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31.

Process and article must be covered by separate claims. Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331 [*affirmed* in 94 U. S. 568, 24 L. ed. 235].

Designs.— Entire design and parts may be claimed. Dobson *v.* Bigelow Carpet Co., 114 U. S. 439, 5 S. Ct. 945, 29 L. ed. 177 [*reversing* 10 Fed. 385].

9. Hill *v.* Patent Com'r, 4 Mackey (D. C.) 266; Jackson *v.* Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; Miller *v.* Eagle Mfg. Co., 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121; Underwood *v.* Gerber, 149 U. S. 224, 13 S. Ct. 854, 37 L. ed. 710; Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Mosler Safe, etc., Co. *v.* Mosler, 127 U. S. 354, 8 S. Ct. 1148, 32 L. ed. 182; Suffolk Mfg. Co. *v.* Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Palmer Pneumatic Tire Co. *v.* Lozier, 90 Fed. 732, 33 C. C. A. 255; Palmer *v.* John E. Brown Mfg. Co., 84 Fed. 454; Thompson-

ents is not different merely because it is differently stated in the claims, since there must be a material difference in the subject-matter and not merely in the scope of the claims.[10]

7. Claims[11] — a. In General. Some claims made in a patent may be invalid without invalidating the entire patent, since each claim is separately considered and is a separate statement of the field intended to be covered.[12]

Houston Electric Co. *v.* Western Electric Co., 70 Fed. 69, 16 C. C. A. 642; Russell *v.* Kern, 69 Fed. 94, 16 C. C. A. 154; Westinghouse *v.* New York Air-Brake Co., 63 Fed. 962, 11 C. C. A. 342; Fassett *v.* Ewart Mfg. Co., 62 Fed. 404, 10 C. C. A. 441; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682; Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 25; McMillan *v.* Rees, 1 Fed. 722; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630; Morris *v.* Huntington, 17 Fed. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Thomson-Houston Electric Co. *v.* Union R. Co., 83 Off. Gaz. 597; Thomson-Houston Electric Co. *v.* Hoosick R. Co., 80 Off. Gaz. 967; Thomson-Houston Electric Co. *v.* Western Electric Co., 73 Off. Gaz. 1123.

English.— Crown may grant second patent. National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Barnes Automatic Sprinkler Co. *v.* Walworth Mfg. Co., 60 Fed. 605, 9 C. C. A. 154; *In re* Gething, L. R. 9 Ch. 633; *Ex p.* Manceaux, L. R. 6 Ch. 272, 18 Wkly. Rep. 1184; *In re* Dering, 13 Ch. D. 393, 42 L. T. Rep. N. S. 634, 28 Wkly. Rep. 710.

If issued on the same day, the patentee may elect. H. W. Johns Mfg. Co. *v.* Robertson, 89 Fed. 504; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682. Or they are presumed to have issued in numerical order. Crown Cork, etc., Co. *v.* Standard Stopper Co., 136 Fed. 841, 69 C. C. A. 200.

Splitting up inventions not approved. Norden *v.* Spaulding, 24 App. Cas. (D. C.) 286.

10. *In re* Creveling, 25 App. Cas. (D. C.) 530; Miller *v.* Eagle Mfg. Co., 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121; Otis Elevator Co. *v.* Portland Co., 127 Fed. 557, 62 C. C. A. 339 [*affirming* 119 Fed. 928]; Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 71 Fed. 396, 18 C. C. A. 145; Root *v.* Sioux City Cable R. Co., 42 Fed. 412.

Different parts of the same machine may be separately patented. Thomson-Houston Electric Co. *v.* Black River Traction Co., 135 Fed. 759, 68 C. C. A. 461; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 71 Fed. 396, 18 C. C. A. 145; Cahn *v.* Wong Town On, 19 Fed. 424, 9 Sawy. 630; McMillan *v.* Rees, 1 Fed. 722; *Ex p.* Hayden, 11 Fed. Cas. No. 6,256; Hayden *v.* James, 11 Fed. Cas. No. 6,260. Party may patent improvement upon his own patented device. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Ryan *v.* Newark Spring Mattress Co., 96 Fed. 100; Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 697; Mathews *v.* Flower, 25 Fed. 830. Patent for improvement does not invalidate subsequent broad patent granted on a co-pending application. Cleveland Foundry Co. *v.* Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233; Badische Anilin, etc., Fabrik *v.* Klipstein, 125 Fed. 543; Westinghouse Electric, etc., Mfg. Co. *v.* Dayton Fan, etc., Co., 106 Fed. 724; Allington, etc., Mfg. Co. *v.* Globe Co., 89 Fed. 865; Allington, etc., Mfg. Co. *v.* Glor, 83 Fed. 1014; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 69 Fed. 257 [*reversed* on other grounds in 71 Fed. 396, 18 C. C. A. 145]; Eagle Mfg. Co. *v.* Bradley, 35 Fed. 295; Holmes Electric Protective Co. *v.* Metropolitan Burglar Alarm Co., 33 Fed. 254; Singer *v.* Braunsdorf, 22 Fed. Cas. No. 12,897, 7 Blatchf. 521; Independent Electric Co. *v.* Jeffrey Mfg. Co., 78 Off. Gaz. 797; National Mach. Co. *v.* Wheeler, etc., Mfg. Co., 74 Off. Gaz. 1588; Railway Register Mfg. Co. *v.* Broadway, etc., R. Co., 30 Off. Gaz. 180; Swift *v.* Jenks, 27 Off. Gaz. 621; Graham *v.* Geneva Lake Crawford Mfg. Co., 21 Off. Gaz. 1536; Graham *v.* McCormick, 21 Off. Gaz. 1533.

Machine, process, and produce may be separately patented. Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 90 Fed. 201; McKay *v.* Dibert, 5 Fed. 587; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499; Goodyear *v.* Wait, 10 Fed. Cas. No. 5,587, 5 Blatchf. 468, 3 Fish. Pat. Cas. 242; Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331, 5 Off. Gaz. 268 [*affirmed* in 94 U. S. 568, 24 L. ed. 235].

Designs.— Design patent invalid in view of prior mechanical patent. Cary Mfg. Co. *v.* Neal, 90 Fed. 725.

Mechanical patent invalid in view of prior design patent. Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Fed. 210 [*affirmed* in 145 Fed. 928, 76 C. C. A. 466].

11. Disclaimers see *infra*, IX.

12. U. S. Rev. St. (1878) §§ 4917, 4922 [U. S. Comp. St. (1901) pp. 3393, 3396]; Hotchkiss *v.* Oliver, 5 Den. (N. Y.) 314; Seymour *v.* McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; Hake *v.* Brown, 37 Fed. 783; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 124, 14 Off. Gaz. 673; Peterson *v.* Wooden, 19 Fed. Cas. No. 11,038, 3 McLean 248, 2 Robb Pat. Cas. 116; Rumford Chemical Works *v.* Lauer, 20 Fed. Cas. No. 12,135, 10 Blatchf. 122, 5 Fish. Pat. Cas. 615, 3 Off. Gaz. 349; Stephens *v.* Felt, 22 Fed. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. Rep. 144. Patent may be valid for part. Frearson *v.*

b. Excessive Claims. Where claims are so broad as to include prior inventions they are invalid,[13] and where they do not identify the invention of the patentee they are invalid.[14]

8. Delay of Application in Patent Office. A patent is not rendered invalid by delays in the patent office where the applicant for patent takes proper action in prosecution of his application within the time fixed by statute.[15]

9. Jurisdiction to Determine Validity. A patent is merely *prima facie* valid, and the United States courts have jurisdiction to declare them invalid in whole or in part, where the issue as to their validity is raised in a proper proceeding.[16] In a suit for infringement of a patent the court may give judgment for defendant on the ground that the patent is invalid, but it cannot in such a proceeding annul the patent, and in the case of interfering patents may declare one void; but it is

Loe, 9 Ch. D. 48, 27 Wkly. Rep. 183; Plimpton *v.* Spiller, 6 Ch. D. 412, 47 L. J. Ch. 211, 37 L. T. Rep. N. S. 56, 26 Wkly. Rep. 285.

Where one of several distinct parts claimed by the patentee is old, the entire patent is for that reason void. Kay *v.* Marshall, 5 Bing. N. Cas. 492, 8 L. J. C. P. 261, 7 Scott 548, 35 E. C. L. 266 [*affirmed* in 8 Cl. & F. 245, 8 Eng. Reprint 96, 5 Jur. 1028, West 682, 9 Eng. Reprint 643]; Morgan *v.* Seaward, 1 Jur. 527, 6 L. J. Exch. 153, 2 M. & W. 544, M. & H. 55.

13. Vance *v.* Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Adjustable Window Screen Co. *v.* Boughton, 1 Fed. Cas. No. 81, 1 Ban. & A. 327, 10 Phila. (Pa.) 251; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Hopkins, etc., Mfg. Co. *v.* Corbin, 12 Fed. Cas. No. 6,695, 3 Ban. & A. 199, 14 Blatchf. 396, 14 Off. Gaz. 3 [*affirmed* in 103 U. S. 786, 26 L. ed. 610]; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17; Odiorne *v.* Winkley, 18 Fed. Cas. No. 10,432, 2 Gall. 51, 1 Robb Pat. Cas. 52; Stanley *v.* Hewitt, 22 Fed. Cas. No. 13,285; Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Stanley Rule, etc., Co. *v.* Davis, 22 Fed. Cas. No. 13,288; Turner *v.* Johnson, 24 Fed. Cas. No. 14,261, 2 Cranch C. C. 287, Fish. Pat. Rep. 4; Tyler *v.* Deval, 24 Fed. Cas. No. 14,307, 1 Code Rep. (N. Y.) 30; Watson *v.* Bladen, 29 Fed. Cas. No. 17,277, 1 Robb Pat. Cas. 510, 4 Wash. 580; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb. Pat. Cas. 40. And see *supra*, V, B.

Claim so broad as to include substances which will not perform the necessary functions is void. Consolidated Electric Light Co. *v.* McKeesport Light Co., 159 U. S. 465, 16 S. Ct. 75, 40 L. ed. 221 [*affirming* 40 Fed. 21]; De Lamar *v.* De Lamar Min. Co., 117 Fed. 240, 54 C. C. A. 272; Rickard *v.* Du Bon, 97 Fed. 96; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Wegmann *v.* Corcoran, 13 Ch. D. 65, 41 L. T. Rep. N. S. 358, 28 Wkly. Rep. 331; Stevens *v.* Keating, 2 Exch. 772, 19 L. J. Exch. 57.

Excessive claim is void. Minter *v.* Mower, 6 A. & E. 735, 6 L. J. K. B. 183, 1 N. & P. 595, W. W. & D. 262, 33 E. C. L. 387; Campion *v.* Benyon, 3 B. & B. 5, 6 Moore C. P. 71, 23 Rev. Rep. 549, 7 E. C. L. 574; Hill *v.* Thompson, Holt N. P. 636, 3 E. C. L. 249, 3 Meriv. 629, 17 Rev. Rep. 156, 36 Eng. Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 20 Rev. Rep. 488, 4 E. C. L. 190; Cochrane *v.* Smethurst, 1 Stark. 205, 18 Rev. Rep. 761, 2 E. C. L. 84.

14. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; Hoke Engraving Plate Co. *v.* Schraubstadter, 47 Fed. 506; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Murray *v.* Clayton, L. R. 7 Ch. 570, 20 Wkly. Rep. 649.

15. U. S. *v.* American Bell Tel. Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. ed. 144 [*affirming* 68 Fed. 542, 15 C. C. A. 569]; Electric Storage Battery Co. *v.* Buffalo Electric Carriage Co., 117 Fed. 314 [*affirmed* in 120 Fed. 672, 57 C. C. A. 183]; Thomson-Houston Electric Co. *v.* Winchester Ave. R. Co., 71 Fed. 192; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682; Brush Electric Co. *v.* Electrical Accumulator Co., 47 Fed. 48; Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Howard *v.* Christy, 12 Fed. Cas. No. 6,754, 2 Ban. & A. 457, 10 Off. Gaz. 981; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523; Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. Rep. 110, 5 N. Y. Leg. Obs. 122.

16. U. S. Rev. St. (1878) §§ 711, 4918, 4920 [U. S. Comp. St. (1901) p. 3394]. And see *infra*, VI, E; XIII, A, 1; XIII, C, 2, a.

State courts have no jurisdiction to decide on the validity of a patent. Elmer *v.* Pennel, 40 Me. 430.

In Canada the minister of agriculture determines disputes as to validity under Pat. Act (1872), § 28; Smith *v.* Goldie, 9 Can. Sup. Ct. 46 [*affirming* 7 Ont. App. 628]; Toronto Tel. Mfg. Co. *v.* Bell Tel. Co., 2 Can. Exch. 524; *In re* Bell Tel. Co., 9 Ont. 339; *In re* Bell Tel. Co., 7 Ont. 605.

only by suit instituted by the government that the United States courts can annul and cancel a patent.[17]

C. Correction or Amendment of Patents.[18] The officials of the government have authority to correct errors made by them in the issue of patents,[19] and errors made by the applicant may be corrected by disclaimer or reissue.[20]

D. Interfering Patents[21]— **1. In General.** Interfering patents are those which claim the same invention in whole or in part.[22] Where two patents are issued, some or all of the claims of which are substantially the same, any one interested in either patent or any one interested in the working of the invention claimed under either of them may have relief against the interfering patentee by suit in equity and the court may adjudge either patent invalid.[23]

2. Proceedings. The suit is governed by ordinary equity rules,[24] and must be brought in the district where defendant may be found.[25] If the bill fails to show that defendants are the owners of the alleged interfering patent it is bad on special demurrer.[26] Suit to annul an interfering patent may be joined with suit for infringement.[27] It is not necessary for defendant to file a cross bill to obtain affirmative relief.[28] The better opinion is that the evidence should be confined to the question of priority of invention between the patentees,[29] although there are authorities to the effect that evidence as to the state of the art is admissible.[30] The suit is independent of any interference in the patent office, and the deposi-

17. U. S. Rev. St. (1878) §§ 4918, 4920 [U. S. Comp. St. (1901) p. 3394]; U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 9 S. Ct. 90, 32 L. ed. 450; Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858.

In Canada the court may determine validity in an infringement suit. St. 35 Vict. c. 26, § 26; Maw *v.* Massey-Harris Co., 13 Manitoba 252.

18. Reissues see *infra*, VIII.

19. Marsh *v.* Nichols, 128 U. S. 605, 9 S. Ct. 168, 32 L. ed. 538; Bell *v.* Hearne, 19 How. (U. S.) 252, 15 L. ed. 614; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389; Reed *v.* Street, 34 Off. Gaz. 339.

English practice.— The master of the rolls may correct clerical errors. *In re* Johnson, 5 Ch. D. 503, 46 L. J. Ch. 555. Amendment by way of correction or explanation is permissible but not to cover an enlarged or different invention. Kelly *v.* Heathman, 45 Ch. D. 256, 60 L. J. Ch. 22, 63 L. T. Rep. N. S. 517, 39 Wkly. Rep. 91; Marsden *v.* Moser, 73 L. T. Rep. N. S. 667. Corrected by application to lord chancellor. *In re* Nickel, 5 Jur. 882, 1 Phil. 36, 19 Eng. Ch. 36, 41 Eng. Reprint 544.

20. See *infra*, VIII; IX.

In Canada the law as to disclaimer and reissue is much like the United States law. St. 35 Vict. c. 26, §§ 19–20; 38 Vict. c. 14, § 1.

21. **Interferences on application** see *supra*, V, C, 8.

22. Nathan Mfg. Co. *v.* Craig, 49 Fed. 370. See also Dederick *v.* Fox, 56 Fed. 714.

23. U. S. Rev. St. (1878) § 4918 [U. S. Comp. St. (1901) p. 3394]; Cantrell *v.* Wallick, 117 U. S. 689, 6 S. Ct. 970, 29 L. ed. 1017; Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; Thomson-Houston Electric Co. *v.* Western Electric Co., 72 Fed. 530, 19 C. C. A. 1; Palmer Pneumatic Tire Co. *v.* Lozier, 69 Fed. 346; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73.

That parties must claim as well as show the same invention see Stonemetz Printers' Mach. Co. *v.* Brown Folding-Mach. Co., 57 Fed. 601; Dederick *v.* Fox, 56 Fed. 714; Nathan Mfg. Co. *v.* Craig, 49 Fed. 370; Morris *v.* Kempshall Mfg. Co., 20 Fed. 121; Gold, etc., Ore Separating Co. *v.* U. S. Disintegrating Ore Co., 10 Fed. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489.

24. Liggett, etc., Tobacco Co. *v.* Miller, 1 Fed. 203, 1 McCrary 31.

Laches.— Long delay by complainant in filing his bill after an adverse decision by the commissioner will be considered as bearing on the good faith of complainant's proceeding, no explanation of the delay being offered. Sawyer *v.* Massey, 25 Fed. 144.

25. Prentiss *v.* Ellsworth, 27 Off. Gaz. 623.

26. Nathan Mfg. Co. *v.* Craig, 47 Fed. 522.

27. American Roll-Paper Co. *v.* Knopp, 44 Fed. 609.

Complainant may sue for infringement instead of under Rev. St. § 4918. Western Electric Co. *v.* Sperry Electric Co., 59 Fed. 295, 8 C. C. A. 129.

28. Electrical Accumulator Co. *v.* Brush Electric Co., 44 Fed. 602; American Clay-Bird Co. *v.* Ligowski Clay-Bird Co., 31 Fed. 466; Lockwood *v.* Cleaveland, 6 Fed. 721.

Where affirmative relief is prayed in the answer plaintiff cannot dismiss. Electrical Accumulator Co. *v.* Brush Electric Co., 44 Fed. 602.

29. Palmer Pneumatic Tire Co. *v.* Lozier, 84 Fed. 659 [*reversed* on other grounds in 90 Fed. 732, 33 C. C. A. 255]; Nathan Mfg. Co. *v.* Craig, 47 Fed. 522; American Clay-Bird Co. *v.* Ligowski Clay-Pigeon Co., 31 Fed. 466; Sawyer *v.* Massey, 25 Fed. 144; Pentlarge *v.* Pentlarge, 19 Fed. 817.

30. Palmer Pneumatic Tire Co. *v.* Lozier, 90 Fed. 732, 33 C. C. A. 255; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73; Foster

tions there taken are not ordinarily admissible in evidence.[31] Where two patents interfere there is a rebuttable presumption that the patentee who first filed his application is the first inventor.[32]

3. JUDGMENT. If there is no interference in fact the bill of complaint will be dismissed.[33] If there is an interference the court will declare the patent of the later inventor void in whole or in part, or as inoperative or invalid in a specified part of the United States in accordance with the interest of the parties,[34] and may grant relief by injunction when necessary to protect the rights of a party.[35] The judgment does not affect the rights of persons not parties to the suit unless they acquire title from one of the parties subsequently.[36]

E. Annulment or Repeal. The United States government can maintain a suit in the United States courts to annul or cancel a patent on the ground that it was obtained through fraud, but no individual can bring or maintain such a suit.[37] The matter of instituting suit is within the control of the attorneys for the government, and they are not required to institute such suit at the request of a party who declares the patent to be invalid.[38] Suit may be maintained by the government not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual;[39] and prayers for cancellation of two patents relating to the same

v. Lindsay, 9 Fed. Cas. No. 4,975, 1 Ban. & A. 605, 7 Off. Gaz. 514.

31. Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73; Atkinson *v.* Boardman, 2 Fed. Cas. No. 607.

Where the depositions cannot be retaken, it has been held that they may be read. Clow *v.* Baker, 36 Fed. 692.

32. Ashton Valve Co. *v.* Coale Muffler, etc., Co., 50 Fed. 100 [*affirmed* in 52 Fed. 314, 3 C. C. A. 98]; American Roll-Paper Co. *v.* Knopp, 44 Fed. 609; Pelton *v.* Waters, 19 Fed. Cas. No. 10,913, 1 Ban. & A. 599, 7 Off. Gaz. 425.

33. Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Boston Pneumatic Power Co. *v.* Eureka Patents Co., 139 Fed. 29; Simplex R. Appliance Co. *v.* Wands, 115 Fed. 517, 53 C. C. A. 171; Stonemetz Printers' Mach. Co. *v.* Brown Folding-Mach. Co., 57 Fed. 601; Dederick *v.* Fox, 56 Fed. 714; Nathan Mfg. Co. *v.* Craig, 49 Fed. 370; Electrical Accumulator Co. *v.* Brush Electric Co., 44 Fed. 602; Morris *v.* Kempshall Mfg. Co., 20 Fed. 121; Gold, etc., Ore Separating Co. *v.* U. S. Disintegrating Ore Co., 10 Fed. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489.

34. U. S. Rev. St. (1878) § 4918 [U. S. Comp. St. (1901) p. 3394]. Court may declare either or both patents void. Palmer Pneumatic Tire Co. *v.* Lozier, 90 Fed. 732, 33 C. C. A. 255; Foster *v.* Lindsay, 9 Fed. Cas. No. 4,975, 1 Ban. & A. 605, 7 Off. Gaz. 514.

35. Palmer Pneumatic Tire Co. *v.* Lozier, 69 Fed. 346; Sawyer *v.* Massey, 25 Fed. 144.

36. U. S. Rev. St. (1878) § 4918 [U. S. Comp. St. (1901) p. 3394]; Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858. Does not prevent suit on patent where claims are different. Brush *v.* Naugatuck R. Co., 24 Fed. 371, 23 Blatchf. 277.

37. U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 9 S. Ct. 90, 32 L. ed. 450; Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; *Ex p.* Wood, 9 Wheat. (U. S.) 603, 6 L. ed. 171; U. S. *v.* American Lumber Co., 85 Fed. 827, 29 C. C. A. 431; Atty.-Gen. *v.* Rumford Chemical Works, 32 Fed. 608; U. S. *v.* Gunning, 18 Fed. 511, 21 Blatchf. 516; Delano *v.* Scott, 7 Fed. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Merserole *v.* Union Paper Collar Co., 17 Fed. Cas. No. 9,488, 6 Blatchf. 356, 3 Fish. Pat. Cas. 483; Thompson *v.* Haight, 23 Fed. Cas. No. 13,956.

English practice.— Scire facias abolished, and now patents may be revoked on petition to court by attorney-general or a party interested. Act (1883), § 26. Bill in equity to set aside may be maintained by person interested where fraud alleged. *In re* Avery, 36 Ch. D. 307, 56 L. J. Ch. 1007, 57 L. T. Rep. N. S. 506, 36 Wkly. Rep. 249; Atty.-Gen. *v.* Vernon, 2 Ch. Rep. 353, 21 Eng. Reprint 685, 1 Vern. Ch. 277, 23 Eng. Reprint 468; *Re* Edge, 63 L. T. Rep. N. S. 370, 38 Wkly. Rep. 698; *Re* Morgan, 58 L. T. Rep. N. S. 713.

Canadian practice.— Scire facias to annul must be by attorney-general and not by private party. Reg. *v.* Pattee, 5 Ont. Pr. 292; Patent Elbow Co. *v.* Cunin, 10 Quebec Super. Ct. 56. Not annulled because foreign patent expired. Reg. *v.* Ontario Gen. Engineering Co., 6 Can. Exch. 328.

38. New York, etc., Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174.

Canadian practice.— Proceedings according to practice on scire facias in England. Smith *v.* Goldie, 9 Can. Sup. Ct. 46; Reg. *v.* Ontario Gen. Engineering Co., 6 Can. Exch. 328; Peterson *v.* Crown Cork, etc., Co., 5 Can. Exch. 400; Reg. *v.* La Force, 4 Can. Exch. 14; Reg. *v.* Hall, 27 U. C. Q. B. 146.

39. U. S. *v.* American Bell Tel. Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. ed. 144.

When the bill to annul a patent is really in the interest of private parties, who have given bond to indemnify the government from

subject and owned by the same party may be joined.[40] It cannot maintain a suit to repeal on grounds that have been sustained in a suit for infringement,[41] nor ask an injunction restraining the commencement or prosecution of suits for infringement of a patent for the repeal of which they have begun an action.[42] The appropriate remedy is by bill in equity,[43] and actual fraud must be alleged and proved.[44]

F. Estoppel to Dispute Validity — 1. In General. The issuance of a patent does not estop the patentee from proving that the invention claimed therein is not novel in the absence of bad faith in procuring such patent.[45] Nor, as a general rule, will a contest in the patent office upon the question of priority of invention foreclose the defeated applicant for a patent from assailing the validity of the patent upon other grounds.[46] A patentee is, however, estopped to deny the correctness of the description in the specification of the existing art.[47] So also a patentee, who secures a correction limiting the life of his patent, is estopped, as against infringers, to deny the validity of the limitation.[48] Furthermore other persons associated with him in the ownership of rights under the patent are also estopped, in the absence of an affirmative showing that they were ignorant of his acts in procuring the limitation.[49] An answer in an infringement suit asserting the validity of a patent granted to defendant estops him to deny on the hearing the validity of a similar patent granted to plaintiff.[50] In a suit upon a license or contract, which contains a covenant upon the part of the licensee, by which the validity of the patent is admitted, and the licensee has had the benefit of the license, he is estopped to deny the validity of the patent by setting up anything contrary to the admissions in his contract.[51] So a covenant or agreement not to infringe estops the parties thereto from controverting the validity of the patent.[52] But it has been held that an arrangement made by two patentees, by way of compromise to avoid litigation, will not be construed as an acknowledgment by either of the validity of the other's patent, so as to estop him or his assigns or licensees to deny its validity.[53] Nor does a mere mercantile agreement not to deal in certain patented machines operate as an estoppel to deny the validity of the patent.[54]

2. Estoppel of Infringer. An infringer cannot deny the utility of the invention, although he may deny its novelty.[55] But it has been held that one

all costs and who could have set up the matters on which the suit is based as a defense in a suit against them by the patentee, it must be dismissed. U. S. *v.* Frazer, 22 Fed. 106.

40. U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 9 S. Ct. 90, 32 L. ed. 450 [*reversing* 32 Fed. 591].

41. U. S. *v.* Colgate, 32 Fed. 624.

42. U. S. *v.* Colgate, 21 Fed. 318.

43. U. S. *v.* Gunning, 18 Fed. 511, 21 Blatchf. 516.

44. U. S. *v.* American Bell Tel. Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. ed. 144 [*affirming* 68 Fed. 542, 15 C. C. A. 569]; Mowry *v.* Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; U. S. *v.* Gunning, 18 Fed. 511, 21 Blatchf. 516; Delano *v.* Scott, 7 Fed. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Stearns *v.* Barrett, 22 Fed. Cas. No. 13,337, 1 Mason 153, 1 Robb Pat. Cas. 97.

45. Greenwood *v.* Bracher, 1 Fed. 856.

46. Holliday *v.* Pickhardt, 29 Fed. 853.

47. Heaton-Peninsular Button-Fastener Co. *v.* Schlochtmeyer, 69 Fed. 592.

48. Edison Electric Light Co. *v.* Buckeye Electric Co., 64 Fed. 225.

49. Edison Electric Light Co. *v.* Buckeye Electric Co., 64 Fed. 225.

50. Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632, 2 Off. Gaz. 495.

51. Marsh *v.* Harris Mfg. Co., 63 Wis. 276, 22 N. W. 516; Washburn, etc., Mfg. Co. *v.* Cincinnati Barbed-Wire Fence Co., 22 Fed. 712; Evory *v.* Candee, 8 Fed. Cas. No. 4,583, 4 Ban. & A. 545, 17 Blatchf. 200; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,949, 2 Ban. & A. 152, 13 Blatchf. 151, 8 Off. Gaz. 773; Waterbury Brass Co. *v.* New York, etc., Brass Co., 29 Fed. Cas. No. 17,256.

52. Hall Mfg. Co. *v.* American R. Supply Co., 48 Mich. 331, 12 N. W. 205; Brooks *v.* Moorhouse, 4 Fed. Cas. No. 1,956, 3 Ban. & A. 229, 13 Off. Gaz. 499; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,949, 2 Ban. & A. 152, 13 Blatchf. 151, 8 Off. Gaz. 773.

53. Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855. See also White *v.* S. Harris, etc., Mfg. Co., 3 Fed. 161.

54. Mannie *v.* Everett, 16 Fed. Cas. No. 9,039.

55. Gandy *v.* Main Belting Co., 143 U. S. 587, 12 S. Ct. 598, 36 L. ed. 272; Simmond *v.* Morrison, 44 Fed. 757; Kirk *v.* Du Bois, 33 Fed. 252 [*affirmed* in 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895]; La Rue *v.* Western Electric Co., 31 Fed. 80, 24 Blatchf. 392 [*affirmed*

making use of another's patent mark is estopped to deny the validity of the patent.[56]

3. Estoppel of Assignor. One who assigns a patent cannot dispute its validity as against his assignee.[57] As to the rest of the world the patent may be void but the assignor is estopped from urging that defense against his assignee.[58] The assignor is not estopped, however, to deny infringement or to show that the patent is limited in its scope.[59]

in 139 U. S. 601, 11 S. Ct. 670, 35 L. ed. 294]; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9; Vance *v.* Campbell, 28 Fed. Cas. No. 16,836; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [*reversed* on other grounds in 14 Wall. 620, 20 L. ed. 860].

56. Washburn, etc., Mfg. Co. *v.* Haish, 29 Fed. Cas. No. 17,217, 4 Ban. & A. 571, 9 Biss. 141, 18 Off. Gaz. 465.

57. Mathews Gravity Carrier Co. *v.* Lister, 154 Fed. 490; Wold *v.* Thayer, 148 Fed. 227, 78 C. C. A. 350 [*affirming* 142 Fed. 776]; Frank *v.* Bernard, 131 Fed. 269 [*affirmed* in 135 Fed. 1021, 68 C. C. A. 566]; Force *v.* Sawyer-Boss Mfg. Co., 113 Fed. 1018, 51 C. C. A. 592; Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87; Martin, etc., Cash-Carrier Co. *v.* Martin, 67 Fed. 786, 14 C. C. A. 642; Woodward *v.* Boston Lasting Mach. Co., 60 Fed. 283, 8 C. C. A. 622; Corbin Cabinet Lock Co. *v.* Yale, etc., Mfg. Co., 58 Fed. 563; Adee *v.* Thomas, 41 Fed. 342; American Paper Barrel Co. *v.* Laraway, 28 Fed. 141; Parker *v.* McKee, 24 Fed. 808; Underwood *v.* Warren, 21 Fed. 573; Curren *v.* Burdsall, 20 Fed. 835, 31 Fed. 918; Consolidated Middlings Purifier Co. *v.* Guilder, 9 Fed. 155, 3 McCrary 186; Bowman *v.* Taylor, 2 A. & E. 278, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142; Chambers *v.* Crichley, 33 Beav. 374, 55 Eng. Reprint 412; Walton *v.* Lavater, 8 C. B. N. S. 162, 6 Jur. N. S. 1251, 29 L. J. C. P. 275, 3 L. T. Rep. N. S. 272, 98 E. C. L. 162; Smith *v.* Scott, 6 C. B. N. S. 771, 5 Jur. N. S. 1356, 28 L. J. C. P. 325, 95 E. C. L. 771; Heugh *v.* Chamberlain, 25 Wkly. Rep. 742; Clark *v.* Adie, 21 Wkly. Rep. 456 [*affirmed* in 21 Wkly. Rep. 764].

Estoppel to deny title of licensee.— The owner of a patent who grants an exclusive license thereunder is estopped to deny that the licensee took good title to the privilege which he undertook to convey. Seal *v.* Beach, 113 Fed. 831.

The foundation of the estoppel against a vendor patentee is the fact that he has received and retained a valuable thing in consideration of the statements contained in the application for, or specification of, the patent. Therefore, when an assignment is made pending the application for a patent, it is immaterial whether or not the vendor may have made representations to the purchasers concerning the probability of obtaining a patent. Nor is it material that the purchasers knew that the thing sought to be patented was old, when they understood that the patent was sought for a new application and use of it. National Conduit Mfg. Co. *v.* Connecticut Pipe Mfg. Co., 73 Fed. 491.

Infringement of another patent.— The patentee is estopped to deny the validity of the patent on the ground that it infringes another patent owned by him. Essex Button Co. *v.* Paul, 48 Fed. 310; Adee *v.* Thomas, 41 Fed. 346; Curran *v.* Burdsall, 20 Fed. 835.

A patentee whose wife has sold the patent to another is estopped to deny the validity of the patent. Onderdonk *v.* Fanning, 4 Fed. 148.

Corporations.— The rule applies to corporations as well as to natural persons. Marvel Co. *v.* Pearl, 114 Fed. 946; Force *v.* Sawyer-Boss Mfg. Co., 111 Fed. 902 [*affirmed* in 113 Fed. 1018, 51 C. C. A. 592]; Edison Electric Light Co. *v.* Buckeye Electric Co., 64 Fed. 225. The estoppel against the assignor of a patent operates against a corporation subsequently formed by him, and which is entirely owned and controlled by him. The corporation will be estopped, even if another party has a substantial interest therein, where it appears that at the time of acquiring his interest he had known of the patent and its assignment and had been associated with the assignor in the line of business to which the patent relates. National Conduit Mfg. Co. *v.* Connecticut Pipe Mfg. Co., 73 Fed. 491. The mere fact, however, that an inventor, who has assigned his patent, subsequently becomes an officer in a corporation which is alleged to be an infringer does not render applicable to such corporation the estoppel which operates against him personally. Corbin Cabinet Lock Co. *v.* Yale, etc., Mfg. Co., 58 Fed. 563.

Mortgage trustee is estopped. Regina Music Box Co. *v.* Newell, 131 Fed. 606.

Licensor estopped. National Heeling-Mach. Co. *v.* Abbott, 77 Fed. 462.

As to patent not sued on there is no estoppel. McCormick Harvesting Mach. Co. *v.* Aultman, 69 Fed. 371, 16 C. C. A. 259.

58. Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87; Adee *v.* Thomas, 41 Fed. 346.

59. Noonan *v.* Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Martin, etc., Cash-Carrier Co. *v.* Martin, 67 Fed. 786, 14 C. C. A. 642; Western Tel. Constr. Co. *v.* Stromberg, 66 Fed. 550; Babcock *v.* Clarkson, 63 Fed. 607, 11 C. C. A. 351; Ball, etc., Fastener Co. *v.* Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498.

A limitation on this doctrine, however, is that he cannot insist on a construction that would render the patent valueless. Hurwood Mfg. Co. *v.* Wood, 138 Fed. 835.

4. ESTOPPEL OF ASSIGNEE, GRANTEE, OR LICENSEE. A licensee or grantee cannot dispute the validity of the patent unless it has been pronounced invalid by a court of last resort.[60] An assignee or licensee cannot dispute the validity of the patent for the purpose of avoiding carrying out the conditions of sale or license.[61] A mere offer to take a license will not operate as an estoppel,[62] and there is no estoppel where an implied license is alleged.[63] A corporation is not estopped by a personal license to a stock-holder.[64] In the absence of any specific agreement not to contest the validity of the patent, the estoppel of a lessee or licensee is confined to the particular article covered by the lease or license;[65] but a party may bind himself generally not to dispute the validity of the patents embodied in those articles.[66]

5. EXPIRED LICENSE. The fact that a party once operated under a license will not estop him from disputing the validity of the patent, unless there was some agreement by him to that effect.[67]

60. Hyatt *v.* Dale Tile Mfg. Co., 106 N. Y. 651, 12 N. E. 705 [*affirmed* in 125 U. S. 46, 8 S. Ct. 756, 31 L. ed. 683]; Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43, 82 N. Y. 526; Hyatt *v.* Ingalls, 49 N. Y. Super. Ct. 375; Hardwick *v.* Galbraith, 147 Pa. St. 333, 23 Atl. 451; Harvey Steel Co. *v.* U. S., 38 Ct. Cl. 662; Clark *v.* Adie, 2 App. Cas. 423, 46 L. J. Ch. 598, 37 L. T. Rep. N. S. 1, 26 Wkly. Rep. 45; Hills *v.* Laming, 9 Exch. 256, 23 L. J. Exch. 60; Crossley *v.* Dixon, 10 H. L. Cas. 293, 9 Jur. N. S. 607, 32 L. J. Ch. 617, 8 L. T. Rep. N. S. 260, 11 Wkly. Rep. 716, 11 Eng. Reprint 1039; Beam *v.* Merner, 14 Ont. 412; Whiting *v.* Tuttle, 17 Grant Ch. (U. C.) 454; Gray *v.* Billington, 21 U. C. C. P. 288.

Where the patent has been pronounced void, there is no estoppel. Hawkes *v.* Swett, 4 Hun (N. Y.) 146; Ross *v.* Fuller, etc., Co., 105 Fed. 510.

The licensee may dispute construction given to patent by licensor. Trotman *v.* Wood, 16 C. B. N. S. 479, 111 E. C. L. 479.

61. *Illinois.*— Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Charter Gas Engine Co. *v.* Charter, 47 Ill. App. 36. *Contra*, Pratt *v.* Paris Gas Light, etc., Co., 51 Ill. App. 603.

Maine.— Jones *v.* Burnham, 67 Me. 93, 24 Am. Rep. 10.

Minnesota.— Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321.

New Hampshire.— Clark *v.* Amoskeag Mfg. Co., 62 N. H. 612.

New York.— Saltus *v.* Belford Co., 133 N. Y. 499, 31 N. E. 518; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285; Hyatt *v.* Dale Tile Mfg. Co., 106 N. Y. 651, 12 N. E. 705; Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43; General Electric Co. *v.* Nassau Electric R. Co., 36 N. Y. App. Div. 510, 55 N. Y. Suppl. 858; Skidmore *v.* Fahys Watch-Case Co., 28 N. Y. App. Div. 94, 50 N. Y. Suppl. 1016; Denise *v.* Swett, 68 Hun 188, 22 N. Y. Suppl. 950; Marsh *v.* Dodge, 4 Hun 278; Baylis *v.* Bullock Electric Mfg. Co., 32 Misc. 218, 66 N. Y. Suppl. 253 [*reversed* on other grounds in 59 N. Y. App. Div. 576, 69 N. Y. Suppl. 693]; Kaffeman *v.* Stern, 23 Misc. 599, 53 N. Y. Suppl. 260; Montgomery *v.* Waterbury, 2 Misc. 145, 21 N. Y. Suppl. 637 [*affirmed* in 142 N. Y. 652, 37 N. E. 569]; Smith *v.* Standard Laundry Mach. Co., 11 Daly 154; Brusie *v.* Peck, 16 N. Y. Suppl. 648.

Ohio.— Ely *v.* Topliff, 41 Ohio St. 357; Clark *v.* Bentel, 9 Ohio Dec. (Reprint) 289, 12 Cinc. L. Bul. 53.

Pennsylvania.— Jarecki *v.* Hays, 161 Pa. St. 613, 29 Atl. 118; Hubbard *v.* Allen, 123 Pa. St. 198, 16 Atl. 772; Patterson's Appeal, 99 Pa. St. 521; Hardwick *v.* Caves, 1 Pa. Dist. 137.

United States.— U. S. *v.* Harvey Steel Co., 196 U. S. 310, 25 S. Ct. 240, 49 L. ed. 492; Kinsman *v.* Parkhurst, 18 How. 289, 15 L. ed. 385; United Shoe Mach. Co. *v.* Caunt, 134 Fed. 239; Consolidated Rubber Tire Co. *v.* Finley Rubber Tire Co., 116 Fed. 629; Piaget Novelty Co. *v.* Headley, 108 Fed. 870, 48 C. C. A. 116 [*affirming* 107 Fed. 134]; Moore *v.* National Water-Tube Boiler Co., 84 Fed. 346; Godell *v.* Wells, etc., Co., 70 Fed. 319; Platt *v.* Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 C. C. A. 357; National Rubber Co. *v.* Boston Rubber-Shoe Co., 41 Fed. 48; Rogers *v.* Riessner, 30 Fed. 525; Birdsall *v.* Perego, 3 Fed. Cas. No. 1,435, 5 Blatchf. 251; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Wilder *v.* Adams, 29 Fed. Cas. No. 17,647, 2 Woodb. & M. 329. *Contra*, Baltimore Car-Wheel Co. *v.* North Baltimore Pass. R. Co., 21 Fed. 47; Pelham *v.* Edelmeyer, 15 Fed. 262, 21 Blatchf. 188; National Mfg. Co. *v.* Meyers, 7 Fed. 355; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659; Morse Arms Mfg. Co. *v.* U. S., 16 Ct. Cl. 296.

Contra.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

62. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68.

63. Harvey Steel Co. *v.* U. S., 38 Ct. Cl. 662.

64. Newark Spring-Mattress Co. *v.* Ryan, 102 Fed. 693, 42 C. C. A. 594.

65. Dunham *v.* Bent, 72 Fed. 60.

66. Dunham *v.* Bent, 72 Fed. 60.

67. Stimpson Computing Scale Co. *v.* W. F. Stimpson Co., 104 Fed. 893, 44 C. C. A. 241; Dueber Watch-Case Mfg. Co. *v.* Robbins, 75 Fed. 17, 21 C. C. A. 198 [*reversing* 71 Fed. 186]; Mudgett *v.* Thomas, 55 Fed. 645; Tibbe, etc., Mfg. Co. *v.* Heineken, 37 Fed. 686; Blatherwick *v.* Carey, 9 Fed. 202, 10 Biss. 494; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190,

VII. TERM.[68]

A. In General — 1. Mechanical Patents. All mechanical patents granted in the United States upon applications filed after December 31, 1897, have a term of seventeen years from the date of the grant.[69] The term of seventeen years was fixed by the act of 1871;[70] but between that date and the time the act of March 3, 1897, went into effect, patents were limited to expire with foreign patents upon the invention. Under section 8, the act of 1897 applied only to patents granted on applications filed after December 31, 1897.[70a]

2. Designs. The term of a design patent is three and one-half, seven, or fourteen years, as elected in the application for patent.[71]

3. Reissues. A reissued patent is operative only for the unexpired part of the term of the original patent.[72]

4. Limitation by Foreign Patent — a. In General. Patents granted upon applications filed before January 1, 1898, are by statute limited to expire at the same time as any foreign patent previously procured by or for the United States patentee having the shortest term to run.[73] The question of secrecy or publicity in the

2 Fish. Pat. Cas. 275 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661]; Wooster *v.* Singer Mfg. Co., 30 Fed. Cas. No. 18,039*a*, 15 Reporter 524, 23 Off. Gaz. 2513; Goucher *v.* Clayton, 11 Jur. N. S. 107, 34 L. J. Ch. 239, 11 L. T. Rep. N. S. 732, 13 Wkly. Rep. 336; Dangerfield *v.* Jones, 13 L. T. Rep. N. S. 142.

68. Term of reissued patent see *infra*, VIII, A, 4.

69. U. S. Rev. St. (1878) § 4884 [U. S. Comp. St. (1901) p. 3381]; Guarantee Ins. Trust, etc., Co. *v.* Sellers, 123 U. S. 276, 8 S. Ct. 117, 31 L. ed. 153.

In England the term is fourteen years from date, but fees must be paid at stated times to keep it in force. Act (1883), § 17.

In Canada the term is eighteen years, but the fee may be paid for only six years, or twelve if so elected. St. 55 & 56 Vict. c. 24, § 5.

70. 12 U. S. St. at L. 249.

70a. United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 155 Fed. 842, 84 C. C. A. 76.

71. U. S. Rev. St. (1878) § 4931 [U. S. Comp. St. (1901) 3399].

72. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393].

73. U. S. Rev. St. (1878) § 4887, prior to the amendment of March 3, 1897, 29 U. S. St. at L. 692 [U. S. Comp. St. (1901) p. 3382]; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 155 Fed. 842, 84 C. C. A. 76; Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 15 S. Ct. 508, 39 L. ed. 601; Commercial Mfg. Co. *v.* Fairbank Canning Co., 135 U. S. 176, 10 St. C. 718, 34 L. ed. 88; Pohl *v.* Anchor Brewing Co., 134 U. S. 381, 10 S. Ct. 577, 33 L. ed. 953; Bate Refrigerating Co. *v.* Hammond, 129 U. S. 151, 9 S. Ct. 225, 32 L. ed. 645; Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; Guarantee Ins. Trust, etc., Co. *v.* Sellers, 123 U. S. 276, 8 S. Ct. 117, 31 L. ed. 153; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682; De Florez *v.* Reynolds, 8 Fed. 434, 17 Blatchf. 436; Nathan *v.* New York El. R. Co., 2 Fed. 225; Weston *v.* White, 29 Fed. Cas. No. 17,458, 2 Ban. & A. 321, 13 Blatchf. 364, 9 Off. Gaz. 1196.

Assignment of right to patent.— The fact that an applicant for a patent assigned his right thereto to another before applying for and obtaining a foreign patent for the invention which was issued before the one in this country will not prevent the latter from being limited to the term of the foreign patent. John R. Williams Co. *v.* Miller, etc., Mfg. Co., 115 Fed. 526.

The statute is not retroactive and does not apply to American patents granted before the law took effect or to the reissues of such patents granted after the law took effect. Badische Anilin, etc., Fabrik *v.* Hamilton Mfg. Co., 2 Fed. Cas. No. 721, 3 Ban. & A. 235, 13 Off. Gaz. 273; Goff *v.* Stafford, 10 Fed. Cas. No. 5,504, 3 Ban. & A. 610, 14 Off. Gaz. 748.

"Term."— The word "term," which when used in reference to a foreign patent, when more than one such patent exists, indicates what was meant as the time of duration. Paillard *v.* Bruno, 29 Fed. 864, 865.

In England the patent expires with any foreign patent granted before the English patent. *In re* Winan, L. R. 4 P. C. 93, 8 Moore P. C. N. S. 306, 17 Eng. Reprint 327; *In re* Betts Patent, 9 Jur. N. S. 137, 7 L. T. Rep. N. S. 577, 1 Moore P. C. N. S. 49, 1 New Rep. 137, 11 Wkly. Rep. 221, 15 Eng. Reprint 621; *In re* Bodmer, 8 Moore P. C. 282, 14 Eng. Reprint 108.

In Canada the patent expires with any foreign patent in existence during the life of the Canadian patent. Dominion Cotton Mills Co. Ltd. *v.* Ontario Gen. Engineering Co., [1902] A. C. 570, 71 L. J. P. C. 119, 87 L. T. Rep. N. S. 186; Auer Incandescent Light Mfg. Co. *v.* Dreschel, 6 Can. Exch. 55

foreign patent does not prevent the limitation.[74] To act as a limitation, however, the foreign patent must be procured by the United States patentee or by his consent or be ratified by him.[75] It would be manifestly unjust that a patentee should lose the full fruits of his patent by the fact that some intermeddler had caused the invention to be patented abroad.[76] A provisional patent issued in a foreign country which merely secures the applicant against the effects of publication for three years and entitles him to a definitive patent on making the required proofs of the existence of either the article itself or a model thereof within that time is not such a patent as is referred to in the statute,[77] and a foreign patent void *ab initio* will not limit or invalidate the United States patent.[78] The rule is otherwise, however, as to a patent issued by virtue of the recognized lawful authority vested in the king of a foreign country, although there was no patent law in the shape of a legislative enactment.[79] Failure to limit the patent on its face so as to expire at the same time with the prior foreign patent having the shortest time does not affect its validity.[80] Although the patentee procures the "correction" of a patent limiting it to expire with a foreign patent, which attempted "correction" is void for want of jurisdiction of the commissioner to make it, he is not estopped to claim that the patent was in force for the full term of its life as originally fixed.[81]

b. Identity of Invention. It is not necessary that the patents be identical in all particulars, or that the inventions disclosed therein be identical, since it is sufficient if upon examination of the two instruments it appears that substantially the same thing is intended to be covered thereby.[82] A difference in mere detail does not avoid identity,[83] unless such difference affects the essence of the invention in a patentable sense.[84] And a foreign patent and a subsequent American patent are not for different inventions because the latter contains a more genuine claim, which covers the specific form of device described in the former, and other

[*affirmed* in 28 Can. Sup. Ct. 608]; Barter *v.* Howland, 26 Grant Ch. (U. C.) 135.

74. Gramme Electrical Co. *v.* Arnoux, etc., Electrical Co., 17 Fed. 838, 21 Blatchf. 450.

Act March 3, 1903 (32 U. S. St. at L. 1225 [U. S. Comp. St. Suppl. (1905) p. 663]) is not retroactive to revive an expired patent. Sawyer Spindle Co. *v.* Carpenter, 133 Fed. 238 [*affirmed* in 143 Fed. 976, 75 C. C. A. 162].

75. Hobbs *v.* Beach, 180 U. S. 363, 21 S. Ct. 409, 45 L. ed. 586 [*affirming* 92 Fed. 146, 34 C. C. A. 248]; United Shoe Mach., etc., Co. *v.* Duplessis Shoe Mach. Co., 155 Fed. 842, 84 C. C. A. 76; Sawyer Spindle Co. *v.* Carpenter, 133 Fed. 238 [*affirmed* in 143 Fed. 976, 75 C. C. A. 162]; Willcox, etc., Sewing Mach. Co. *v.* Industrial Mfg. Co., 110 Fed. 210 [*reversed* on other grounds in 112 Fed. 535, 50 C. C. A. 387]; Beach *v.* Hobbs, 82 Fed. 916; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 35 Fed. 134; Kendrick *v.* Emmons, 14 Fed. Cas. No. 7,695, 2 Ban. & A. 208, 9 Off. Gaz. 201.

76. Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586.

77. Société Anonyme, etc. *v.* General Electric Co., 97 Fed. 604.

78. Bate Refrigerating Co. *v.* Gillett, 20 Fed. 192.

79. Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 643, 42 C. C. A. 554 [*affirming* 102 Fed. 338].

80. Bate Refrigerating Co. *v.* Hammond, 129 U. S. 151, 9 S. Ct. 225, 32 L. ed. 645; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83; American Paper Barrel Co. *v.* Laraway, 28 Fed. 141; Canan *v.* Pound Mfg. Co., 23 Fed. 185, 23 Blatchf. 173. *Contra*, Smith *v.* Ely, 22 Fed. Cas. No. 13,043, 5 McLean 76, 1 Fish. Pat. Cas. 339.

81. Edison Electric Light Co. *v.* Bloomingdale, 65 Fed. 212; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83.

82. Commercial Mfg. Co. *v.* Fairbank Canning Co., 135 U. S. 176, 10 S. Ct. 718, 34 L. ed. 88; Bate Refrigerating Co. *v.* Hammond, 129 U. S. 151, 9 S. Ct. 225, 32 L. ed. 645; Guarantee Ins. Trust, etc., Co. *v.* Sellers, 123 U. S. 276, 8 S. Ct. 117, 31 L. ed. 153; Plummer *v.* Sargent, 120 U. S. 442, 7 S. Ct. 640, 30 L. ed. 737; United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31; Aquarama Co. *v.* Old Mill Co., 124 Fed. 229; Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 338 [*affirmed* in 102 Fed. 643, 42 C. C. A. 554]; J. L. Mott Iron Works *v.* Henry McShane Mfg. Co., 80 Fed. 516; Accumulator Co. *v.* Julien Electric Co., 57 Fed. 605; Clark *v.* Wilson, 28 Fed. 95; Brush Electric Co. *v.* Electric Accumulator Co., 56 Off. Gaz. 1334 [*affirmed* in 61 Off. Gaz. 886].

Patent is limited, although one is for process and the other for product. Accumulator Co. *v.* Julien Electric Co., 57 Fed. 605.

83. Thomson-Houston Electric Co. *v.* McLean, 153 Fed. 883, 82 C. C. A. 629.

84. Thomson-Houston Electric Co. *v.* McLean, 153 Fed. 883, 82 C. C. A. 629.

forms as well.[85] But a prior patent in a foreign country for a minor part of a broad or basic invention is not for the same invention as a subsequent United States patent covering both the minor parts and the broad main invention.[86] When American letters patent are issued covering the same invention described in foreign letters patent of an earlier date, the life of the American patent is not prolonged by the fact that it also covers improvements upon the invention as patented in a foreign country.[87] It is necessary that the foreign patent claim the same invention; it is not sufficient that it disclose the invention of the later United States patent, where it is not claimed therein.[88]

e. Date of Foreign Patent. To limit a United States patent the foreign patent must have been actually sealed and issued before the date of the United States patent, and the antedating of a foreign patent will not make it limit a patent here which was actually granted first.[89] Dates of actual issue and not the dates of application control.[90]

d. Term of Foreign Patent. The term of a foreign patent is the time which the patentee may as a matter of right keep it in force under the law of the country.[91] It includes not merely the term mentioned in the grant, but any extension thereof which may be procured at the option of the patentee, and it is immaterial whether or not such extension is actually procured.[92] The judgment of the courts of the foreign country as to the meaning of its laws and the term of the patents is controlling.[93]

e. Lapse or Expiration of Foreign Patent. Where, at the time that the United States patent is granted, a foreign patent is in force, granted for a certain term, and that patent subsequently lapses through failure to pay fees or taxes or for similar cause, the United States patent does not lapse with the foreign patent,

85. Sawyer Spindle Co. *v.* Carpenter, 133 Fed. 238 [*affirmed* in 143 Fed. 976, 75 C. C. A. 162]. And see Accumulator Co. *v.* Julien Electric Co., 57 Fed. 605.

86. Victor Talking Mach. Co. *v.* Leeds, etc., Co., 146 Fed. 534 [*affirmed* without opinion in 148 Fed. 1022, 79 C. C. A. 536].

87. Guarantee Ins. Trust, etc., Co. *v.* Sellers, 123 U. S. 276, 8 S. Ct. 117, 31 L. ed. 153.

88. Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189; Holmes Electric Protective Co. *v.* Metropolitan Burglar Co., 22 Fed. 341. *Contra,* Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189; Western Electric Co. *v.* Citizens' Tel. Co., 106 Fed. 215.

89. Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 15 S. Ct. 508, 39 L. ed. 601; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Edison Electric Light Co. *v.* Waring Electric Co., 59 Fed. 358 [*affirmed* in 69 Fed. 645, 15 C. C. A. 700]; American Bell Tel. Co. *v.* Cushman, 57 Fed. 842; Holmes Burglar Alarm Tel. Co. *v.* Domestic Tel., etc., Co., 42 Fed. 220; Seibert Cylinder Oil Cup Co. *v.* William Powell Co., 35 Fed. 591; Emerson *v.* Lippert, 31 Fed. 911; Gold, etc., Tel. Co. *v.* Commercial Tel. Co., 23 Fed. 340, 23 Blatchf. 199.

In Canada the foreign patent must be in existence when the Canadian patent is granted. Ontario Gen. Engineering Co. *v.* Dominion Cotton Mills Co., 31 Can. Sup. Ct. 75; Auer Incandescent Light Mfg. Co. *v.* Dreschel, 6 Can. Exch. 55 [*affirmed* in 28 Can. Sup. Ct. 608].

90. Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 15 S. Ct. 508, 39 L. ed. 601; Accumulator Co. *v.* Julien Co., 57 Fed. 605; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 35 Fed. 134; Bate Refrigerating Co. *v.* Gillett, 13 Fed. 553, 31 Fed. 809.

91. Pohl *v.* Anchor Brewing Co., 134 U. S. 381, 10 S. Ct. 577, 33 L. ed. 953; Bate Refrigerating Co. *v.* Hammond, 129 U. S. 151, 9 S. Ct. 225, 32 L. ed. 645; Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 338 [*affirmed* in 102 Fed. 643, 42 C. C. A. 554]; Bonsack Mach. Co. *v.* Smith, 70 Fed. 383; Consolidated Roller Mill Co. *v.* Walker, 43 Fed. 575 [*affirmed* in 138 U. S. 124, 11 S. Ct. 292, 34 L. ed. 920]. See also Edison Electric Light Co. *v.* Perkins Electric Lamp Co., 42 Fed. 327.

92. Bate Refrigerating Co. *v.* Hammond, 129 U. S. 151, 9 S. Ct. 225, 32 L. ed. 645; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83. *Contra,* Gramme Electrical Co. *v.* Arnoux, etc., Electric Co., 17 Fed. 838, 21 Blatchf. 450; Bate Refrigerating Co. *v.* Gillett, 13 Fed. 553; Henry *v.* Providence Tool Co., 11 Fed. Cas. No. 6,384, 3 Ban. & A. 501; Reissner *v.* Sharp, 20 Fed. Cas. No. 11,689, 4 Ban. & A. 366, 16 Blatchf. 383.

Extension under subsequent law will not avoid. Accumulator Co. *v.* Julien Electric Co., 57 Fed. 605.

93. Consolidated Roller Mill Co. *v.* Walker, 43 Fed. 575 [*affirmed* in 136 U. S. 124, 11 S. Ct. 292, 34 L. ed. 920].

but extends throughout the original term of the foreign patent.[94] The life of a United States patent must be certain from the day of the grant.[95] Where the foreign patent expired or lapsed for any cause before the grant of the United States patent, the United States patent is void.[96]

B. Extensions.[97] There is no general act of congress permitting the extension of patents, and therefore patents can now be extended only by special acts of congress.[98] Congress, however, as is shown by a very considerable number of

94. Pohl *v.* Anchor Brewing Co., 134 U. S. 381, 10 S. Ct. 577, 33 L. ed. 593; Victor Talking Mach. Co. *v.* Leeds, etc., Co., 146 Fed. 534 [*affirmed* without opinion in 148 Fed. 1022, 79 C. C. A. 536]; Welsbach Light Co. *v.* Apollo Incandescent Gaslight Co., 96 Fed. 332, 37 C. C. A. 508; Diamond Match Co. *v.* Adirondack Match Co., 65 Fed. 803; Pohl *v.* Heyman, 58 Fed. 568; Paillard *v.* Bruno, 29 Fed. 864; Holmes Electric Protective Co. *v.* Metropolitan Burglar Alarm Co., 21 Fed. 458.

95. Huber *v.* N. O. Nelson Mfg. Co., 148 U. S. 270, 13 S. Ct. 603, 37 L. ed. 447; Bate Refrigerating Co. *v.* Gillett, 40 Off. Gaz. 1029; Paillard *v.* Bruno, 38 Off. Gaz. 900; Henry *v.* Providence Tool Co., 14 Off. Gaz. 855. Where foreign patent lapsed after the application in the United States, the United States patent is valid. Welsbach Light Co. *v.* Apollo Incandescent Gaslight Co., 96 Fed. 332, 37 C. C. A. 508.

96. Huber *v.* N. O. Nelson Mfg. Co., 148 U. S. 270, 13 S. Ct. 603, 37 L. ed. 447.

97. **Extension of reissued patent** see *infra*, VIII, F.

98. Act 1861 (12 U. S. St. at L. 249) prohibited extensions. Guarantee Ins. Trust, etc., Co. *v.* Sellers, 123 U. S. 276, 8 S. Ct. 117, 31 L. ed. 153.

Extension by treaty.— The term of a patent granted by the United States to a citizen thereof cannot be extended by a treaty. United Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 148 Fed. 31 [*affirmed* in 155 Fed. 842, 84 C. C. A. 76].

In England the crown may extend patents (*In re* Parsons, [1898] A. C. 673, 67 L. J. P. C. 55; Matter of Brandon, 9 App. Cas. 589, 53 L. J. P. C. 84; *In re* Betts, 9 Jur. N. S. 137, 7 L. T. Rep. N. S. 577, 1 Moore P. C. N. S. 49, 1 New Rep. 137, 11 Wkly. Rep. 221, 15 Eng. Reprint 621; Ledsam *v.* Russell, 1 H. L. Cas. 687, 9 Eng. Reprint 931); and may extend the time even after expiration hearing on petition prior thereto (Ledsam *v.* Russell, 1 H. L. Cas. 687, 9 Eng. Reprint 931; *Re* Bodmer, 2 Moore P. C. 471, 12 Eng. Reprint 1085). The assignees may secure extension (Russell *v.* Ledsam, 9 Jur. 557, 14 L. J. Exch. 353, 14 M. & W. 574 [*affirmed* in 16 L. J. Exch. 145, 16 M. & W. 633 (*affirmed* in 1 H. L. Cas. 687, 9 Eng. Reprint 931)]; *In re* Napier, 13 Moore, P .C. 543, 9 Wkly. Rep. 390, 15 Eng. Reprint 204), but their claims are not viewed so favorably (*In re* Hopkinson, [1897] A. C. 249, 66 L. J. P. C. 38, 75 L. T. Rep. N. S. 462; *In re* Normand, L. R. 3 P. C. 193, 6 Moore P. C. N. S. 477, 17 Eng. Reprint 805; *In re* Norton, 9 Jur. N. S. 419, 1 Moore P. C. N. S. 339, 1 New Rep. 557, 11 Wkly. Rep. 720, 15 Eng. Reprint 729). An importer from abroad may secure extension, but is not looked upon favorably. *In re* Johnson's Patent, L. R. 4 P. C. 75, 8 Moore P. C. N. S. 282, 17 Eng. Reprint 318; *In re* Newton, 14 Moore P. C. 156, 10 Wkly. Rep. 731, 15 Eng. Reprint 265; *In re* Claridge, 7 Moore P. C. 394, 13 Eng. Reprint 932. An extension will be refused where clearly invalid. *In re* Blake, L. R. 4 P. C. 535, 9 Moore P. C. N. S. 373, 17 Eng. Reprint 554; *Re* Hill, 9 Jur. N. S. 1209, 9 L. T. Rep. N. S. 101, 1 Moore P. C. N. S. 258, 12 Wkly. Rep. 25, 15 Eng. Reprint 698; *In re* Bett, 9 Jur. N. S. 137, 7 L. T. Rep. N. S. 877, 1 Moore P. C. N. S. 49, 1 New Rep. 137, 11 Wkly. Rep. 221, 15 Eng. Reprint 621. An extension may be granted on conditions. *In re* Mallet, L. R. 1 P. C. 308; Ledsam *v.* Russell, 1 H. L. Cas. 687, 9 Eng. Reprint 931; *In re* Bodmer, 8 Moore P. C. 282, 14 Eng. Reprint 108; Baxter's Patent, 13 Jur. 593. Invention must have merit and public utility and the patentee must have been sufficiently remunerated. *In re* McDougal, L. R. 2 P. C. 1, 37 L. J. P. C. 17, 5 Moore P. C. N. S. 1, 16 Eng. Reprint 415; *In re* Pinkus, 12 Jur. 233; *In re* Bell, 10 Jur. 363; *In re* Heath, 8 Moore P. C. 217, 14 Eng. Reprint 83; *In re* Smith, 7 Moore P. C. 133, 13 Eng. Reprint 830; *Re* Russell, 2 Moore P. C. 496, 12 Eng. Reprint 1095. Petition for extension must state everything fully and fairly and must include complete account of profits. *In re* Wuterich, [1903] A. C. 206, 72 L. J. P. C. 60, 88 L. T. Rep. N. S. 306; *In re* Peach, [1902] A. C. 414, 71 L. J. P. C. 98, 87 L. T. Rep. N. S. 153; *In re* Johnson, L. R. 5 P. C. 87; *In re* Wield, L. R. 4 P. C. 89, 8 Moore P. C. N. S. 300, 17 Eng. Reprint 325; *In re* Pitman, L. R. 4 P. C. 84, 8 Moore P. C. N. S. 293, 17 Eng. Reprint 322; *In re* Clark, L. R. 3 P. C. 421, 7 Moore P. C. N. S. 255, 17 Eng. Reprint 97; *In re* Bett, 9 Jur. N. S. 137, 7 L. T. Rep. N. S. 577, 1 Moore P. C. N. S. 49, 1 New Rep. 137, 11 Wkly. Rep. 221, 15 Eng. Reprint 621; *In re* Markwick, 13 Moore P. C. 310, 8 Wkly. Rep. 333, 15 Eng. Reprint 116. Expenses, etc., must be deducted in estimating profits (*In re* Carr, L. R. 4 P. C. 539, 9 Moore P. C. N. S. 379, 17 Eng. Reprint 556; *In re* Poole, L. R. 1 P. C. 514; Matter of Galloway, 7 Jur. 453; *In re* Newton, 14 Moore P. C. 156, 10 Wkly. Rep. 731, 15 Eng. Reprint 265); and failure of profits must be shown not to be due to failure to make proper efforts (*In re* Thornycroft, [1899] A. C. 415, 68 L. J. P. C. 68; *In re* Patterson, 13 Jur. 593, 6 Moore P. C. 469, 13 Eng. Reprint 765; *In re* Norton, 9 Jur.

decisions, has authority to extend the term of patents either by general law or special act.[99]

VIII. REISSUES.[1]

A. In General — 1. Definition. A reissued patent is in effect an amendment of the original patent made to cure some defect or insufficiency in the original;[2] a patent which merely secures the patent rights more definitely in some particular wherein the original patent was defective.[3]

2. Power to Reissue and Grounds. The statutes of the United States authorize a reissue of a patent where the original is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee's claiming as his own invention or discovery more than he has a right to claim as new, provided the error arose by inadvertence, accident, or mistake and without any fraudulent or deceptive intent.[4] The statute is mandatory and gives the commissioner no dis-

N. S. 419, 1 Moore P. C. N. S. 339, 1 New Rep. 557, 11 Wkly. Rep. 720, 15 Eng. Reprint 729). An extension will be refused where not sufficiently useful (*In re* Allan, L. R. 1 P. C. 507; *In re* Herbert, L. R. 1 P. C. 399; Matter of Simister, 7 Jur. 451, 4 Moore P. C. 164, 13 Eng. Reprint 264), and time of filing petition for extension must be considered (*In re* Marshall, [1891] A. C. 430; *In re* Jablochkoff, [1891] A. C. 293, 60 L. J. P. C. 61, 65 L. T. Rep. N. S. 5; Matter of Brandon, 9 App. Cas. 589, 53 L. J. P. C. 84; *In re* Hutchison, 14 Moore P. C. 364, 15 Eng. Reprint 343). Any one filing caveat may oppose extension (*In re* Schlumberger, 2 Eq. Rep. 36, 9 Moore P. C. 1, 14 Eng. Reprint 197; *In re* Lowe, 8 Moore P. C. 1, 14 Eng. Reprint 1; *In re* Smith, 7 Moore P. C. 133, 13 Eng. Reprint 830; *Re* Woodcroft, 3 Moore P. C. 171, 13 Eng. Reprint 72), and an objection to extension should state grounds but not necessarily particulars (*In re* Ball, 4 App. Cas. 171, 48 L. J. P. C. 24, 27 Wkly. Rep. 477). Costs are allowed on opposition to extension. *In re* Wield, L. R. 4 P. C. 89, 8 Moore P. C. N. S. 300, 17 Eng. Reprint 325; *In re* Johnson, L. R. 4 P. C. 75, 8 Moore P. C. N. S. 282, 17 Eng. Reprint 318; *In re* Jones, 9 Moore P. C. 41, 14 Eng. Reprint, 213; *In re* Milner, 9 Moore P. C. 39, 14 Eng. Reprint 212.

99. Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; New American File Co. *v.* Nicholson File Co., 8 Fed. 816; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. Rep. 184; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Evans *v.* Robinson, 8 Fed. Cas. No. 4,571, Brunn. Col. Cas. 400; Gibson *v.* Gifford, 10 Fed. Cas. No. 5,395, 1 Blatchf. 529, Fish. Pat. Rep. 366; Gibson *v.* Harris, 10 Fed. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. Rep. 115; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Potter *v.* Braunsdorf, 19 Fed. Cas. No. 11,321, 7 Blatchf. 97; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248; Woodworth *v.* Sherman, 30 Fed. Cas. No. 18,019, 2 Robb Pat. Cas. 257, 3 Story 171.

1. Correction or amendment of original patent see *supra*, VI, C.

Extension of original patent see *supra*, VII, B.

2. Lattig *v.* Dean, 25 App. Cas. (D. C.) 591; McBurney *v.* Goodyear, 11 Cush. (Mass.) 569; Dobson *v.* Lees, 137 U. S. 258, 11 S. Ct. 71, 34 L. ed. 652; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Shaw *v.* Colwell Lead Co., 11 Fed. 711, 20 Blatchf. 417; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536.

Either the specification or claim may be amended. Battin *v.* Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Hart, etc., Mfg. Co. *v.* Anchor Electric Co., 92 Fed. 657, 34 C. C. A. 606.

3. Ingersoll *v.* Holt, 104 Fed. 682.

4. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; Sewing-Mach. Co. *v.* Frame, 24 Fed. 596; Gold, etc., Tel. Co. *v.* Wiley, 17 Fed. 234; Hailes *v.* Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271; Woven-Wire Mattress Co. *v.* Wire-Web Bed Co., 8 Fed. 87; Smith *v.* Merriam, 6 Fed. 713; Wilson *v.* Coon, 6 Fed. 611, 18 Blatchf. 532; Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Atlantic Giant-Powder Co. *v.* Goodyear, 2 Fed. Cas. No. 623, 3 Ban. & A. 161, 13 Off. Gaz. 45; Badische Anilin, etc., Fabrik *v.* Higgin, 2 Fed. Cas. No. 722, 3 Ban. & A. 462, 15 Blatchf. 290, 14 Off. Gaz. 414; *Ex p.* Ball, 2 Fed. Cas. No. 810; Dyson *v.* Gambrill, 8 Fed. Cas. No. 4,230; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Tucker *v.* Tucker Mfg. Co., 24 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464; Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

Prior to the passage of the reissue statute the authority to grant a reissue existed. Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

cretion as to cases within its provisions.[5] While it is to be construed liberally according to its spirit,[6] a reissue cannot be granted except as provided therein.[7] To warrant a reissue it is necessary that there should be a *bona fide* mistake or accident and not merely an error in judgment,[8] and the patent must be inoperative and invalid.[9] Claims that are too narrow render the patent inoperative and justify a reissue.[10] So where the patent claims too much there may be a reissue.[11] The reissue is not invalid because the error corrected was immaterial.[12]

3. PERSONS ENTITLED TO REISSUE. A reissue may be granted to the inventor, his executor or administrator, or in case of assignment recorded in the patent office may be granted to the assignee.[13] Joint owners must all join in a surrender for reissue or ratify a reissue, otherwise it is invalid.[14] In regard to reissues citizens and aliens have the same rights.[15]

In Canada the law is like that in the United States. St. 35 Vict. c. 26, § 19. Defective or inoperative patent may be amended by reissue. Auer Incandescent Light Mfg. Co. *v.* O'Brien, 5 Can. Exch. 243; Hunter *v.* Carrick, 28 Grant Ch. (U. C.) 489 [*reversed* on other grounds in 10 Ont. App. 449].

5. *Ex p.* Dyson, 8 Fed. Cas. No. 4,228.

6. *Ex p.* Ball, 2 Fed. Cas. No. 810.

7. Burr *v.* Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Peoria Target Co. *v.* Cleveland Target Co., 58 Fed. 227, 7 C. C. A. 197; Child *v.* Adams, 5 Fed. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20.

8. *In re* Conklin, 1 MacArthur (D. C.) 375; Huber *v.* N. O. Nelson Mfg. Co., 148 U. S. 270, 13 S. Ct. 603, 37 L. ed. 447 [*affirming* 38 Fed. 830]; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 135 U. S. 342, 10 S. Ct. 884, 34 L. ed. 168; Yale Lock Mfg. Co. *v.* James, 125 U. S. 447, 8 S. Ct. 967, 31 L. ed. 807; Matthews *v.* Iron-Clad Mfg. Co., 124 U. S. 347, 8 S. Ct. 639, 31 L. ed. 477; Eames *v.* Andrews, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Coon *v.* Wilson, 113 U. S. 268, 5 S. Ct. 537, 28 L. ed. 963; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 115 Fed. 810; American Soda-Fountain Co. *v.* Swietusch, 85 Fed. 968, 29 C. C. A. 506; Jenkins *v.* Stetson, 32 Fed. 398; Arnheim *v.* Finster, 24 Fed. 276; American Diamond Drill Co. *v.* Sullivan Mach. Co., 21 Fed. 74; Newton *v.* Furst, etc., Mfg. Co., 14 Fed. 465, 11 Biss. 405; Putnam *v.* Hutchinson, 12 Fed. 127, 11 Biss. 233; Whitehouse *v.* Travelers' Ins. Co., 29 Fed. Cas. No. 17,566.

Actual mistake shown see Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Peoria Target Co. *v.* Cleveland Target Co., 43 Fed. 922; National Spring Co. *v.* Union Car Spring Mfg. Co., 17 Fed. Cas. No. 10,051, 1 Ban. & A. 240, 12 Blatchf. 80, 6 Off. Gaz. 224; *In re* Briede, 123 Off. Gaz. 322.

How shown.—Mistake may be shown by evidence outside of official record. *Ex p.* Dyson, 8 Fed. Cas. No. 4,228; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

9. Burr *v.* Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Idealite Co. *v.* Protection Light Co., 103 Fed. 973; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No. 5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* on other grounds in 98 U. S. 126, 25 L. ed. 77]; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566.

10. *In re* Briede, 27 App. Cas. (D. C.) 298, 123 Off. Gaz. 322; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 135 U. S. 342, 10 S. Ct. 884, 34 L. ed. 168; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30; Giant Powder Co. *v.* Safety Nitro Powder Co., 19 Fed. 509; Welling *v.* Rubber-Coated Harness Trimming Co., 29 Fed. Cas. No. 17,383, 2 Ban. & A. 1.

11. Hubel *v.* Dick, 28 Fed. 656; Mathews *v.* Flower, 25 Fed. 830; Dorsey Harvester Revolving-Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Treadwell *v.* Bladen, 24 Fed. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. 703.

12. Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; Thomson-Houston Electric Co. *v.* Black River Traction Co., 135 Fed. 759, 68 C. C. A. 461; Buerk *v.* Valentine, 4 Fed. Cas. No. 2,109, 9 Blatchf. 479, 5 Fish. Pat. Cas. 366, 2 Off. Gaz. 295.

13. U. S. Rev. St. (1878) §§ 4895, 4916 [U. S. Comp. St. (1901) pp. 3393, 3385]; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Smith *v.* Mercer, 22 Fed. Cas. No. 13,078, 5 Pa. L. J. 529; Wing *v.* Warren, 30 Fed. Cas. No. 17,871, 5 Fish. Pat. Cas. 548, 2 Off. Gaz. 342.

Assignee may secure reissue in his own name and for his own benefit without consent of inventor. Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,398, Holmes 45; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

14. Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Woodworth *v.* Stone, 30 Fed. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749.

15. Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689.

4. Term. The reissue is granted for the unexpired part of the term of the original patent.[16]

B. Time For Application — 1. In General. Application for reissue should be made with promptness,[17] and while the length of delay which is permissible depends on the circumstances of the particular case,[18] it has been said that where claims are broadened a delay of two years will ordinarily be regarded as too long unless excuse is shown therefor.[19]

2. Intervening Rights of Third Persons. Where a reissue is sought merely to expand the claims of a patent, so as to embrace structures or devices brought into use since the issuance of the original, and which were not infringements of the claim of the original, there being no proof of mistake or inadvertence, the right to a reissue is lost by unreasonable delay, and the reissue, being made, is void.[20]

16. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; Gibson *v.* Harris, 10 Fed. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. Rep. 115; Morris *v.* Huntington, 17 Fed. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

17. Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 135 U. S. 342, 10 S. Ct. 884, 34 L. ed. 168; Hartshorn *v.* Saginaw Barrel Co., 119 U. S. 664, 7 S. Ct. 421, 30 L. ed. 539; Wollensak *v.* Reiher, 115 U. S. 96, 5 S. Ct. 1137, 29 L. ed. 350; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665; Thomson-Houston Electric Co. *v.* Sterling-Meaker Co., 150 Fed. 589; Milloy Electric Co. *v.* Thompson-Houston Electric Co., 148 Fed. 843, 78 C. C. A. 533; Pelzer *v.* Meyberg, 97 Fed. 969; Shirley *v.* Mayer, 25 Fed. 38, 23 Blatchf. 249; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30; Ives *v.* Sargent, 17 Fed. 447, 21 Blatchf. 417; Pope Mfg. Co. *v.* Marqua, 15 Fed. 400; Jones *v.* Barker, 11 Fed. 597; Kidder *v.* Smart Mfg. Co., 8 Ont. 362.

18. Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30; Odell *v.* Stout, 22 Fed. 159; Stutz *v.* Armstrong, 20 Fed. 843.

For facts showing unreasonable delay, see *In re* Starkey, 21 App. Cas. (D. C.) 519; *In re* Messinger, 12 App. Cas. (D. C.) 532; Eby *v.* King, 158 U. S. 366, 15 S. Ct. 972, 39 L. ed. 1018; Wollensak *v.* Sargent, 151 U. S. 221, 14 S. Ct. 291, 38 L. ed. 137; Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737; Electric Gas-Lighting Co. *v.* Boston Electric Co., 139 U. S. 481, 11 S. Ct. 586, 35 L. ed. 250; Hartshorn *v.* Saginaw Barrel Co., 119 U. S. 664, 7 S. Ct. 421, 30 L. ed. 539; White *v.* Dunbar, 119 U. S. 47, 7 S. Ct. 72, 30 L. ed. 303; Gardner *v.* Herz, 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158; Thomson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105; Torrent, etc., Lumber Co. *v.* Rodgers, 112 U. S. 659, 5 S. Ct. 501, 28 L. ed. 842; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. ed. 665; Johnson *v.* Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Bantz *v.* Frantz, 105 U. S. 160, 26 L. ed. 1013; Matthews *v.* Boston Mach. Co., 105 U. S. 54, 26 L. ed. 1022; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; United Blue-Flame Oil Stove Co. *v.* Glazier, 119 Fed. 157, 55 C. C. A. 553; Troy Laundry Mach. Co. *v.* Adams Laundry Mach. Co., 112 Fed. 437; Pfenninger *v.* Heubner, 99 Fed. 440; Horn, etc., Mfg. Co. *v.* Pelzer, 91 Fed. 665, 34 C. C. A. 45; Mast *v.* Iowa Windmill, etc., Co., 76 Fed. 816, 22 C. C. A. 586; Philadelphia Novelty Mfg. Co. *v.* Rouss, 39 Fed. 273; Wollensak *v.* Sargent, 33 Fed. 840; Shickle, etc., Iron Co. *v.* South St. Louis Foundry Co., 29 Fed. 866; Curran *v.* St. Louis Refrigerator, etc., Co., 29 Fed. 320; Hubel *v.* Dick, 28 Fed. 656; Shirley *v.* Mayer, 25 Fed. 38, 23 Blatchf. 249; Tuttle *v.* Loomis, 24 Fed. 789; Scrivner *v.* Oakland Gas Co., 22 Fed. 98, 10 Sawy. 390; Singer Mfg. Co. *v.* Goodrich, 15 Fed. 455; Sheriff *v.* Fulton, 12 Fed. 136; Combined Patents Can Co. *v.* Lloyd, 11 Fed. 149. After a decision of a court of appeals declaring a patent void, the owner cannot continue litigation in other circuits and wait until the patent has again been declared void before applying for a reissue. Thomson-Houston Electric Co. *v.* Western Electric Co., 158 Fed. 813.

For facts showing reasonable diligence see *In re* Briede, 27 App. Cas. (D. C.) 298, 123 Off. Gaz. 322; *In re* Heroult, 29 App. Cas. (D. C.) 42; Featherstone *v.* George R. Bidwell Cycle Co., 53 Fed. 113; Russell *v.* Laughlin, 26 Fed. 699; *In re* Briede, 123 Off. Gaz. 322.

19. *In re* Ams, 29 App. Cas. (D. C.) 91; *In re* Starkey, 21 App. Cas. (D. C.) 519; Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Wollensak *v.* Reiher, 115 U. S. 96, 5 S. Ct. 1137, 29 L. ed. 350; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665; Asmus *v.* Alden, 27 Fed. 684; Phillips *v.* Risser, 26 Fed. 308.

Application to enlarge monopoly.— Where the reissue was obtained, not for the purpose of correcting a mistake, but for the mere purpose of enlarging the monopoly of the patent, it is immaterial that the application for reissue was made within two years from the time of the original grant. Parker, etc., Co. *v.* Yale Clock Co., 123 U. S. 87, 8 S. Ct. 38, 31 L. ed. 100; Coon *v.* Wilson, 113 U. S. 268, 5 S. Ct. 537, 28 L. ed. 963; Union Paper-Bag Mach. Co. *v.* Waterbury, 39 Fed. 389; Russell *v.* Laughlin, 26 Fed. 699.

20. Dunham *v.* Dennison Mfg. Co., 154 U. S. 103, 14 S. Ct. 986, 38 L. ed. 924 [*affirming* 40 Fed. 667]; Ives *v.* Sargent, 119 U. S. 652, 7 S. Ct. 436, 30 L. ed. 544; Newton

Even if the claim is technically narrowed instead of broadened, a reissue after long delay, during which adverse equities have arisen, cannot be sustained, when the original patent did not indicate, or even hint at, the invention of the reissue.[21] What is not claimed in an original patent is dedicated to the public unless the patent is surrendered and reissued within a reasonable time and before adverse rights have accrued.[22] It will not do for the patentee to wait until other inventors have produced new forms of improvement and then, with the new light thus acquired, under pretense of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms.[23] Such a process of expansion carried on indefinitely, without regard to lapse of time, would operate most unjustly against the public and is totally unauthorized by the law.[24] No matter how valuable and meritorious an invention may be, a patentee has no right, by reissuing his patent, to gradually widen the scope of his claims so as to keep pace with the progress of invention.[25] But a reissued patent is not void, because the things claimed in the original had been in public use in the interval between the original and the reissued patent. Such a publication is not an abandonment or dedication.[26]

3. Excuses For Delay. The applicant may excuse delay in applying for reissue by showing good reasons for failing to make the application sooner.[27] The question whether delay is unreasonable is a matter of law for the court.[28]

v. Furst, etc., Mfg. Co., 119 U. S. 373, 7 S. Ct. 369, 30 L. ed. 442; White *v.* Dunbar, 119 U. S. 47, 7 S. Ct. 72, 30 L. ed. 303 [*reversing* 15 Fed. 747, 4 Woods 116]; Brown *v.* Davis, 116 U. S. 237, 6 S. Ct. 379, 29 L. ed. 659; Coon *v.* Wilson, 113 U. S. 268, 5 S. Ct. 537, 28 L. ed. 963; Torrent, etc., Lumber Co. *v.* Rodgers, 112 U. S. 659, 5 S. Ct. 501, 28 L. ed. 872; Turner, etc., Mfg. Co. *v.* Dover Stamping Co., 111 U. S. 319, 4 S. Ct. 401, 28 L. ed. 442; Clements *v.* Odorless Excavating Apparatus Co., 109 U. S. 641, 3 S. Ct. 525, 27 L. ed. 1060; Gill *v.* Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Troy Laundry Mach. Co. *v.* Adams Laundry Mach. Co., 112 Fed. 437; Horn, etc., Mfg. Co. *v.* Pelzer, 91 Fed. 665, 34 C. C. A. 45; American Soda-Fountain Co. *v.* Swietusch, 85 Fed. 968, 29 C. C. A. 506 [*affirming* 75 Fed. 573]; Mast *v.* Iowa Windmill, etc., Co., 76 Fed. 816, 22 C. C. A. 586 [*affirming* 68 Fed. 213]; Hubel *v.* Dick, 28 Fed. 132; Hudnut *v.* Lafayette Hominy Mills, 26 Fed. 636; Flower *v.* Detroit, 22 Fed. 292; Wooster *v.* Handy, 21 Fed. 51; Baltimore Car-Wheel Co. *v.* North Baltimore Pass. R. Co., 21 Fed. 47; Turrell *v.* Bradford, 15 Fed. 808, 21 Blatchf. 284; Holt *v.* Keeler, 13 Fed. 464, 21 Blatchf. 68; Batten *v.* Taggert, 2 Fed. Cas. No. 1,107, 2 Wall. Jr. 101 [*reversed* on other grounds in 17 How. 74, 15 L. ed. 37]; Swain Turbine, etc., Co. *v.* Ladd, 23 Fed. Cas. No. 13,662, 2 Ban. & A. 488, 11 Off. Gaz. 153. See also as sustaining this view Whitely *v.* Swayne, 29 Fed. Cas. No. 17,568, 4 Fish. Pat. Cas. 117 [*affirmed* in 7 Wall. 685, 19 L. ed. 199].

One having actual, as distinguished from constructive, notice of an original patent is not thereby chargeable with notice of all the possibilities of reissue, so as to make unavailable in his behalf the doctrine of intervening rights of one making devices covered by the reissue, but not by the original patent. American Soda-Fountain Co. *v.* Swietusch, 85 Fed. 968, 29 C. C. A. 506 [*affirming* 75 Fed. 573].

21. Carpenter Straw-Sewing Mach. Co. *v.* Searle, 60 Fed. 82, 8 C. C. A. 476 [*affirming* 52 Fed. 809].

22. Clements *v.* Odorless Excavating Apparatus Co., 109 U. S. 641, 3 S. Ct. 525, 27 L. ed. 1060; Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Flower *v.* Detroit, 22 Fed. 292; Baltimore Car-Wheel Co. *v.* North Baltimore Pass. R. Co., 21 Fed. 47; Brainard *v.* Cramme, 12 Fed. 621, 20 Blatchf. 530.

23. Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Flower *v.* Detroit, 22 Fed. 292; Wooster *v.* Handy, 21 Fed. 51.

24. Miller *v.* Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783.

25. Swain Turbine, etc., Co. *v.* Ladd, 23 Fed. Cas. No. 13,662, 2 Ban. & A. 488, 11 Off. Gaz. 153.

26. Goodyear *v.* Day, 10 Fed. Cas. No. 5,566.

27. *In re* Briede, 27 App. Cas. (D. C.) 298, 123 Off. Gaz. 322; *In re* Heroult, 29 App. Cas. (D. C.) 42; Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652; Boland *v.* Thompson, 26 Fed. 633, 23 Blatchf. 440.

For facts constituting insufficient excuse see *In re* Briede, 27 App. Cas. (D. C.) 298; Wollensak *v.* Sargent, 151 U. S. 221, 14 S. Ct. 291, 38 L. ed. 137; Ives *v.* Sargent, 119 U. S. 652, 7 S. Ct. 436, 30 L. ed. 544; Haines *v.* Peck, 26 Fed. 625.

For circumstances showing sufficient excuse for thirteen or fourteen years' delay see Maitland *v.* B. Goetz Mfg. Co., 86 Fed. 124, 29 C. C. A. 607; Celluloid Mfg. Co. *v.* Zylonite Brush, etc., Co., 27 Fed. 291.

28. Hoskin *v.* Fisher, 125 U. S. 217, 8 S. Ct. 834, 31 L. ed. 759; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30.

C. Identity of Invention[29] — **1. In General.** The reissued patent must be for the same invention as the original patent and no new matter can be introduced.[30] The invention may be differently stated, but must remain the same.[31] The "same invention" as used in the reissue statute refers to whatever invention was described in the original letters patent and appears to have been secured

29. Conclusiveness and effect of decision in patent office on issue of identity see *infra*, VIII, G, 3.

30. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; *In re* Hoey, 28 App. Cas. (D. C.) 416; Lehigh Valley R. Co. *v.* Kearney, 158 U. S. 461, 15 S. Ct. 871, 39 L. ed. 1055; Eby *v.* King, 158 U. S. 366, 15 S. Ct. 972, 39 L. ed. 1018; Olin *v.* Timken, 155 U. S. 141, 15 S. Ct. 49, 39 L. ed. 100; Dunham *v.* Dennison Mfg. Co., 154 U. S. 103, 14 S. Ct. 986, 38 L. ed. 924; Corbin Cabinet Lock Co. *v.* Eagle Lock Co., 150 U. S. 38, 14 S. Ct. 28, 37 L. ed. 989; Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737; Huber *v.* N. O. Nelson Mfg. Co., 148 U. S. 270, 13 S. Ct. 603, 37 L. ed. 447; Freeman *v.* Asmus, 145 U. S. 226, 12 S. Ct. 939, 36 L. ed. 685; Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Patent Clothing Co. *v.* Glover, 141 U. S. 560, 12 S. Ct. 79, 35 L. ed. 858; Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 135 U. S. 342, 10 S. Ct. 884, 34 L. ed. 168; Pattee Plow Co. *v.* Kingman, 129 U. S. 294, 9 S. Ct. 259, 32 L. ed. 700; Farmers' Friend Mfg. Co. *v.* Challenge Corn-Planter Co., 128 U. S. 506, 9 S. Ct. 146, 32 L. ed. 529; Flower *v.* Detroit, 127 U. S. 563, 8 S. Ct. 1291, 32 L. ed. 175; Worden *v.* Searls, 121 U. S. 14, 7 S. Ct. 814, 30 L. ed. 853; Gardner *v.* Herz, 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158; Eachus *v.* Broomall, 115 U. S. 429, 6 S. Ct. 229, 29 L. ed. 419; Cochrane *v.* Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 S. Ct. 455, 28 L. ed. 433; McMurray *v.* Mallory, 111 U. S. 97, 4 S. Ct. 375, 28 L. ed. 365; Gage *v.* Herring, 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601; Wing *v.* Anthony, 106 U. S. 142, 1 S. Ct. 93, 27 L. ed. 110; Johnson *v.* Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Heald *v.* Rice, 104 U. S. 737, 26 L. ed. 910; James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Garneau *v.* Dozier, 102 U. S. 230, 26 L. ed. 133; Ball *v.* Langles, 102 U. S. 128, 26 L. ed. 104; Giant Powder Co. *v.* California Powder Works, 98 U. S. 126, 25 L. ed. 77; Marsh *v.* Seymour, 97 U. S. 348, 24 L. ed. 963; Russell *v.* Dodge, 93 U. S. 460, 23 L. ed. 973; Union Paper Collar Co. *v.* Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Gill *v.* Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Battin *v.* Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Troy Laundry Mach. Co. *v.* Adams Laundry Mach. Co., 112 Fed. 437; Idealite Co. *v.* Protection Light Co., 103 Fed. 973; Gaskill *v.* Myers, 81 Fed. 854, 26 C. C. A. 642; Peoria Target Co. *v.* Cleveland Target Co., 58 Fed. 227, 7 C. C. A. 197; American Heat Insulating Co. *v.* Johnston, 52 Fed. 228, 3 C. C. A. 53; Philadelphia Novelty Mfg. Co. *v.* Rouss, 39 Fed. 273; Hubel *v.* Dick, 28 Fed. 132; Gage *v.* Kellogg, 26 Fed. 242; Reed *v.* Chase, 25 Fed. 94; Driven Well Cases, 16 Fed. 387, 5 McCrary 181; Doane, etc., Mfg. Co. *v.* Smith, 15 Fed. 459; Gould *v.* Spicer, 15 Fed. 344; Hayes *v.* Seton, 12 Fed. 120, 20 Blatchf. 484; Walters *v.* Crandal, 11 Fed. 868, 20 Blatchf. 118; Smith *v.* Merriam, 6 Fed. 903; Novelty Paper-Box Co. *v.* Stapler, 5 Fed. 919; Flower *v.* Rayner, 5 Fed. 793; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Putnam *v.* Tinkham, 4 Fed. 411; Siebert Cylinder Oil-Cup Co. *v.* Harper Steam Lubricator Co., 4 Fed. 328; Yale Lock Mfg. Co. *v.* Scovill Mfg. Co., 3 Fed. 288, 18 Blatchf. 248; Ball *v.* Withington, 2 Fed. Cas. No. 815, 1 Ban. & A. 549, 6 Off. Gaz. 933; Cahart *v.* Austin, 4 Fed. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Cammeyer *v.* Newton, 4 Fed. Cas. No. 2,344, 4 Ban. & A. 159, 16 Off. Gaz. 720; *Ex p.* Dyson, 8 Fed. Cas. No. 4,228; Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Johnson *v.* Flushing, etc., R. Co., 13 Fed. Cas. No. 7,384, 3 Ban. & A. 428, 15 Blatchf. 192 [*affirmed* in 105 U. S. 539, 26 L. ed. 1162]; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Sickles *v.* Evans, 22 Fed. Cas. No. 12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Tucker *v.* Tucker Mfg. Co., 24 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464.

Statement of advantage does not change invention. Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652; Kearney *v.* Lehigh Valley R. Co., 32 Fed. 320; Potter *v.* Stewart, 7 Fed. 215, 18 Blatchf. 561; *Ex p.* Ball, 2 Fed. Cas. No. 810.

31. McCreary *v.* Pennsylvania Canal Co., 14 Phila. (Pa.) 441; Driven Well Cases, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Gage *v.* Herring, 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Haggenmacher *v.* Nelson, 88 Fed. 486; Gaskill *v.* Myers, 81 Fed. 854, 26 C. C. A. 642; Pratt *v.* Lloyd, 65 Fed. 800; Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652; Hubel *v.* Waldie, 35 Fed. 414; National Pump Cylinder Co. *v.* Gunnison, 17 Fed. 812; Schillinger *v.* Greenway Brewing Co., 17 Fed. 244, 21 Blatchf. 383; Meyer *v.* Goodyear India-Rubber Glove Mfg. Co., 11 Fed. 891, 20 Blatchf 91; Yale Lock Mfg. Co. *v.* Scovill Mfg. Co., 3 Fed. 288, 18 Blatchf. 248; Cahart *v.* Austin, 4 Fed. Cas. No. 2,288, 2 Cliff.

thereby.[32] A broader claim than that in the original patent will not invalidate the reissue if it is for the same invention.[33] If not for the same invention it will.[34] Claims may be amended to include features not before claimed.[35] What may

528, 2 Fish. Pat. Cas. 543; Carew *v.* Boston Electric Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Christman *v.* Rumsey, 5 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903, 58 How. Pr. (N. Y.) 114; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Decker *v.* Grote, 7 Fed. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143, 3 Off. Gaz. 65; *Ex p.* Dietz, 7 Fed. Cas. No. 3,902; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499; Hussey *v.* McCormick, 12 Fed. Cas. No. 6,948, 1 Biss. 300, 1 Fish. Pat. Cas. 509; Parham *v.* American Buttonhole, etc., Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Pearl *v.* Ocean Mills, 19 Fed. Cas. No. 10,876, 2 Ban. & A. 469, 11 Off. Gaz. 2; Pennsylvania Salt Mfg. Co. *v.* Thomas, 19 Fed. Cas. No. 10,956, 5 Fish. Pat. Cas. 148, 8 Phila. (Pa.) 144; St. Louis Stamping Co. *v.* Quinby, 21 Fed. Cas. No. 12,240, 4 Ban. & A. 192, 16 Off. Gaz. 135; Sarven *v.* Hall, 21 Fed. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415, 1 Off. Gaz. 437; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92; Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31; Union Paper-Collar Co. *v.* Leland, 24 Fed. Cas. No. 14,394, 1 Ban. & A. 491, Holmes 427, 7 Off. Gaz. 221; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

32. Walker Pat. § 233; Parker, etc., Co. *v.* Yale Clock Co., 123 U. S. 87, 8 S. Ct. 38, 31 L. ed. 100; *In re* Briede, 27 App. Cas. (D. C.) 298, 123 Off. Gaz. 322.

33. Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Morey *v.* Lockwood, 8 Wall. (U. S.) 230, 19 L. ed. 339; Fay *v.* Mason, 120 Fed. 506 [*reversed* on other grounds in 127 Fed. 325]; Hammond *v.* Franklin, 22 Fed. 833, 23 Blatchf. 77; Odell *v.* Stout, 22 Fed. 159; Jones *v.* Barker, 11 Fed. 597; Combined Patents Can Co. *v.* Lloyd, 11 Fed. 149; Wilson *v.* Coon, 6 Fed. 611, 18 Blatchf. 532 [*reversed* on other grounds in 113 U. S. 268, 5 S. Ct. 537, 28 L. ed. 963]; Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; Lorillard *v.* McDowell, 15 Fed. Cas. No. 8,510, 2 Ban. & A. 531, 11 Off. Gaz. 640, 13 Phila. (Pa.) 461; Morse, etc., Tel. Case, 17 Fed. Cas. No. 9,861; Seymour *v.* Marsh, 21 Fed. Cas. No. 12,687, 6 Fish. Pat. Cas. 115, 2 Off. Gaz. 675, 9 Phila. (Pa.) 380.

34. McMurray *v.* Mallory, 111 U. S. 97, 4 S. Ct. 375, 28 L. ed. 365; American Heat Insulating Co. *v.* Johnston, 52 Fed. 228, 3 C. C. A. 53 [*reversing* 48 Fed. 446]; International Terra-Cotta Lumber Co. *v.* Maurer, 44 Fed. 618; Dunham *v.* Dennison Mfg Co., 40 Fed. 667 [*affirmed* in 154 U. S. 103, 14 S. Ct. 986, 38 L. ed. 924]; Driven Well Cases, 16 Fed. 387 [*affirmed* in 123 U. S. 267]; Fay *v.* Preble, 14 Fed. 652, 11 Biss. 422; Searls *v.* Bouton, 12 Fed. 874, 20 Blatchf. 528; New York Bung, etc., Co. *v.* Hoffman, 9 Fed. 199, 20 Blatchf. 3; Meyer *v.* Maxheimer, 9 Fed. 99; Flower *v.* Rayner, 5 Fed. 793; Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583.

35. Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581 [*modified* in 63 Fed. 962, 11 C. C. A. 528]; Adee *v.* Peck, 42 Fed. 497; Holmes Burglar Alarm Tel. Co. *v.* Domestic Tel., etc., Co., 42 Fed. 220; Jenkins *v.* Stetson, 32 Fed. 398; Hubel *v.* Dick, 28 Fed. 132; Asmus *v.* Alden, 27 Fed. 684; Odell *v.* Stout, 22 Fed. 159; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419; Atwood *v.* Portland Co., 10 Fed. 283; Dederick *v.* Cassell, 9 Fed. 306; Smith *v.* Merriam, 6 Fed. 713; Stephenson *v.* Second Ave. R. Co., 1 Fed. 416; Bantz *v.* Elsas, 2 Fed. Cas. No. 967, 1 Ban. & A. 251, 6 Off. Gaz. 117; Boomer *v.* United Power Press Co., 3 Fed. Cas. No. 1,638, 2 Ban. & A. 106, 13 Blatchf. 107; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Chicago Fruit-House Co. *v.* Busch, 5 Fed. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Christian *v.* Rumsey, 5 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903; Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Gallahue *v.* Butterfield, 9 Fed. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203, 2 Off. Gaz. 645; Gould *v.* Ballard, 10 Fed. Cas. No. 5,635, 3 Ban. & A. 324, 13 Off. Gaz. 1081; Herring *v.* Nelson, 12 Fed. Cas. No. 6,424, 3 Ban. & A. 55, 14 Blatchf. 293, 12 Off. Gaz. 753 [*reversed* on other grounds in 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601]; Middletown Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Morris *v.* Royer, 17 Fed. Cas. No. 9,835, 2 Bond 66, 3 Fish. Pat. Cas. 176; Parham *v.* American Buttonhole Overseaming, etc., Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Pennsylvania Salt Mfg. Co. *v.* Thomas, 18 Fed. Cas. No. 10,956, 5 Fish. Pat. Cas. 148, 8 Phila. (Pa.) 144; Pearl *v.* Ocean Mills, 19 Fed. Cas. No. 10,876, 2 Ban. & A. 469, 11 Off. Gaz. 2; Richardson *v.* Lockwood, 20 Fed. Cas. No. 11,786, 4 Cliff. 128; Seymour *v.* Marsh, 21 Fed. Cas. No. 12,687, 6 Fish. Pat. Cas. 115, 2 Off. Gaz. 675, 9 Phila. (Pa.) 380; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 348; Woodward

have been claimed originally may be included in the reissue.[36] Where the reissue omits several devices which were essential to the original purpose, the reissue is void.[37]

2. New Matter — a. In General. The rule is otherwise, however, where the omission does not constitute an essential or material change but is only an incidental feature.[38] The reissue cannot include matter which formed a part of the patentee's real invention unless that matter was actually included in the original patent.[39] A failure to include it through inadvertence, accident, or mistake does not justify its inclusion by reissue.[40] Where the claims of the reissue contain new patentable matter which is so interwoven with other elements specified in the original that they cannot be separated, the entire reissued claim must be taken together and a patent issued thereon is void.[41]

b. Intention to Claim. It must furthermore appear from the face of the papers that the subject-matter covered by the claims of the reissue was not merely disclosed in the original patent, but was sought and intended to be claimed therein.[42] Matter abandoned or disclaimed on the original application cannot

v. Dinsmore, 30 Fed. Cas. No. 18,003, 4 Fish. Pat. Cas. 163; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

36. *In re* Briede, 27 App. Cas. (D. C.) 298, 123 Off. Gaz. 322; *In re* Heroult, 29 App. Cas. (D. C.) 42; Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 100 Fed. 849; Hendy *v.* Golden State, etc., Iron Works, 17 Fed. 515, 8 Sawy. 468; Calkins *v.* Bertrand, 4 Fed. Cas. No. 2,317, 2 Ban. & A. 215, 6 Biss. 494, 9 Off. Gaz. 795; Draper *v.* Wattles, 7 Fed. Cas. No. 4,073, 3 Ban. & A. 618, 16 Off. Gaz. 629; Swift *v.* Whisen, 22 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Wilson *v.* Singer, 30 Fed. Cas. No. 17,835; *In re* Briede, 123 Off. Gaz. 322.

37. Johnson *v.* Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Russell *v.* Dodge, 93 U. S. 460, 23 L. ed. 973; Featherstone *v.* George R. Bidwell Cycle Co., 57 Fed. 631, 6 C. C. A. 487; Brewster *v.* Shuler, 37 Fed. 785; Blackman *v.* Hibbler, 3 Fed. Cas. No. 1,471, 4 Ban. & A. 641, 17 Blatchf. 333, 10 Reporter 257, 17 Off. Gaz. 107.

38. Adee *v.* Peck, 42 Fed. 497; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419.

39. Schillinger *v.* Cranford, 4 Mackey (D. C.) 450; Parker *v.* Yale Clock Co., 123 U. S. 87, 8 S. Ct. 38, 31 L. ed. 100; Ives *v.* Sargent, 119 U. S. 652, 7 S. Ct. 436, 30 L. ed. 544; Hopkins, etc., Mfg. Co. *v.* Corbin, 103 U. S. 786, 26 L. ed. 610; Ball *v.* Langles, 102 U. S. 128, 26 L. ed. 104; Russell *v.* Dodge, 93 U. S. 460, 23 L. ed. 973; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Weston Electrical Instrument Co. *v.* Stevens, 134 Fed. 574, 67 C. C. A. 374; Hammond *v.* Franklin, 22 Fed. 833, 23 Blatchf. 77; Washburn, etc., Mfg. Co. *v.* Fuchs, 16 Fed. 661, 5 McCrary 236; Lorillard *v.* McAlpin, 14 Fed. 112; Atwater Mfg. Co. *v.* Beecher Mfg. Co., 8 Fed. 608; Siebert Cylinder Oil-Cup Co. *v.* Harper Steam Lubricator Co., 4 Fed. 328; Albright *v.* Celluloid Harness Trimming Co., 1 Fed. Cas. No. 147, 2 Ban. & A. 629, 12 Off. Gaz. 227; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Chicago Fruit-House Co. *v.* Busch, 5 Fed. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No. 5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* on other grounds in 98 U. S. 126, 25 L. ed. 77]; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673; Sarven *v.* Hall, 21 Fed. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415, 1 Off. Gaz. 437; Thomas *v.* Shoe Mach. Mfg. Co., 22 Fed. Cas. No. 13,911, 3 Ban. & A. 557, 16 Off. Gaz. 541; Tarr *v.* Webb, 23 Fed. Cas. No. 13,757, 10 Blatchf. 96, 5 Fish. Pat. Cas. 593, 2 Off. Gaz. 568; Vogler *v.* Semple, 28 Fed. Cas. No. 16,987, 2 Ban. & A. 556, 7 Biss. 382, 11 Off. Gaz. 923.

40. James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Carpenter Straw-Sewing Mach. Co. *v.* Searle, 60 Fed. 82, 8 C. C. A. 476; Cahart *v.* Austin, 4 Fed. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No. 5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* on other grounds in 98 U. S. 126, 25 L. ed. 77].

41. Cahart *v.* Austin, 4 Fed. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543.

42. Corbin Cabinet Lock Co. *v.* Eagle Lock Co., 150 U. S. 38, 14 S. Ct. 28, 37 L. ed. 989; Freeman *v.* Asmus, 145 U. S. 226, 12 S. Ct. 939, 36 L. ed. 685; Parker *v.* Yale Clock Co., 123 U. S. 87, 8 S. Ct. 38, 31 L. ed. 100; Matthews *v.* Boston Mach. Co., 105 U. S. 54, 26 L. ed. 1022; Whip Co. *v.* Hassler, 134 Fed. 398; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; American Soda-Fountain Co. *v.* Zwietusch, 75 Fed. 573; Carpenter Straw-Sewing Mach. Co. *v.* Searls, 52 Fed. 809 [*affirmed* in 60 Fed. 82, 8 C. C. A. 476]; Railway Register Mfg. Co. *v.* Broadway, etc., R. Co., 26 Fed. 522; Turrell *v.* Bradford, 15 Fed. 808, 21 Blatchf. 284; Kells *v.* McKenzie, 9 Fed. 284; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No.

ordinarily be claimed on reissue.[43] This doctrine does not apply, however, if the disclaimer was made by accident, inadvertence, or mistake.[44]

c. Apparatus, Process, and Product. A patent for an apparatus cannot generally be reissued to claim the process, since a process and the apparatus are not necessarily one and the same invention.[45] A process patent cannot generally be reissued to cover the apparatus.[46] There is no hard and fixed rule, however, and in some cases such a reissue may be allowed.[46a] A process patent may, however, in some cases be reissued to cover the product produced by the process.[47]

3. Reinsertion of Canceled Claim. The patentee cannot obtain by reissue claims inserted in the original application and canceled therefrom in view of objection or rejection by the patent office.[48]

D. Surrender of Original Patent. To obtain a reissue, the applicant must surrender the original patent, but the surrender does not take effect until the reissue is granted, and if the reissue is refused the original patent is in force.[49] The so-called surrender is nothing but a preliminary offer prior to the issue of the new patent;[50] the original patent is extinguished by reissue.[51] Whether, if

5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* on other grounds in 98 U. S. 126, 25 L. ed. 77].

43. Leggett *v.* Avery, 101 U. S. 256, 25 L. ed. 865; Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 115 Fed. 810; Putnam *v.* Hutchinson, 12 Fed. 127, 11 Biss. 233; Edgarton *v.* Furst, etc., Mfg. Co., 9 Fed. 450, 10 Biss. 402; Atwater Mfg. Co. *v.* Beecher Mfg. Co., 8 Fed. 608.

44. American Shoe-Tip Co. *v.* National Shoe-Toe Protector Co., 1 Fed. Cas. No. 317, 2 Ban. & A. 551, 11 Off. Gaz. 740; Hayden *v.* James, 11 Fed. Cas. No. 6,260; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

45. Eachus *v.* Broomall, 115 U. S. 429, 6 S. Ct. 229, 29 L. ed. 419; Heald *v.* Rice, 104 U. S. 737, 26 L. ed. 910; James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786; Brainard *v.* Cramme, 12 Fed. 621, 20 Blatchf. 530; New *v.* Warren, 22 Off. Gaz. 587.

46. Wing *v.* Anthony, 106 U. S. 142, 1 S. Ct. 93, 27 L. ed. 110; James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786.

46a. *In re* Heroult, 29 App. Cas. (D. C.) 42.

47. Giant Powder Co. *v.* California Powder Works, 98 U. S. 126, 25 L. ed. 77; Tucker *v.* Dana, 7 Fed. 213; Badische Anilin, etc., Fabrik *v.* Hamilton Mfg. Co., 2 Fed. Cas. No. 721, 3 Ban. & A. 235, 13 Off. Gaz. 273; Badische Anilin, etc., Fabrik *v.* Higgin, 2 Fed. Cas. No. 722, 3 Ban. & A. 462, 15 Blatchf. 290, 14 Off. Gaz. 414; Tucker *v.* Burditt, 24 Fed. Cas. No. 14,216, 4 Ban. & A. 569; Hunter *v.* Carrick, 11 Can. Sup. Ct. 300 [*affirming* 10 Ont. App. 449 (*reversing* 28 Grant Ch. (U. C.) 489)]; Auer Incandescent Light Mfg. Co. *v.* O'Brien, 5 Can. Exch. 243.

Process reissued for product declared invalid in the following cases see Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737; Giant Powder Co. *v.* California Powder Works, 98 U. S. 126, 25 L. ed. 77; Vacuum Oil Co. *v.* Buffalo Lubricating Oil Co., 20 Fed. 850; Kelleher *v.* Darring, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673.

48. *In re* Lacroix, 30 App. Cas. (D. C.) 299; *In re* Denton, 12 App. Cas. (D. C.) 504; *In re* Hatchman, 3 Mackey (D. C.) 288; Corbin Cabinet Lock Co. *v.* Eagle Lock Co., 150 U. S. 38, 14 S. Ct. 28, 37 L. ed. 989; Dobson *v.* Lees, 137 U. S. 258, 11 S. Ct. 71, 34 L. ed. 652; Crawford *v.* Heysinger, 123 U. S. 589, 8 S. Ct. 399, 31 L. ed. 269; Beecher Mfg. Co. *v.* Atwater Mfg. Co., 114 U. S. 523, 5 S. Ct. 1007, 29 L. ed. 232; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 112 U. S. 624, 5 S. Ct. 475, 28 L. ed. 828; Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222, 26 L. ed. 149; Leggett *v.* Avery, 101 U. S. 256, 25 L. ed. 865; Franklin *v.* Illinois Moulding Co., 128 Fed. 48 [*affirmed* in 138 Fed. 58, 70 C. C. A. 484]; American Soda-Fountain Co. *v.* Swietusch, 85 Fed. 968, 29 C. C. A. 506; Dobson *v.* Lees, 30 Fed. 625; Boland *v.* Thompson, 26 Fed. 633, 23 Blatchf. 440; Arnheim *v.* Finster, 26 Fed. 277; Arnheim *v.* Finster, 24 Fed. 276; Streit *v.* Lauter, 11 Fed. 309; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No. 5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* on other grounds in 98 U. S. 126, 25 L. ed. 77]; Wicks *v.* Stevens, 29 Fed. Cas. No. 17,616, 2 Ban. & A. 318, 2 Woods 310.

Actual mistake in canceling claim may be corrected. Morey *v.* Lockwood, 8 Wall. (U. S.) 230, 19 L. ed. 339; Dunbar *v.* Eastern Elevating Co., 75 Fed. 567; Hutchinson *v.* Everett, 33 Fed. 502.

49. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; McCormick Harvesting Mach. Co. *v.* Aultman-Miller Co., 169 U. S. 606, 18 S. Ct. 443, 42 L. ed. 875; Allen *v.* Culp, 166 U. S. 501, 17 S. Ct. 644, 41 L. ed. 1093; Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379.

Grounds of refusal of reissue in terms may show that original patent is void. Peck *v.* Collins, 103 U. S. 660, 26 L. ed. 512.

50. Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379.

51. Peck *v.* Collins, 103 U. S. 660, 26 L. ed. 512; Franklin *v.* Illinois Moulding Co., 128 Fed. 48 [*affirmed* in 138 Fed. 58, 70 C. C. A. 484]; Brown *v.* Hinkley, 4 Fed. Cas. No.

the reissue be void, the patentee may fall back on his original patent has not been decided by the supreme court, although the question has been raised.[52] It has been held in the circuit court that, if the reissue is void for want of authority to make it, the surrender is ineffective for want of authority to accept it.[53] Suit cannot be maintained on the original after application for reissue and before the grant.[54]

E. Applications and Proceedings Thereon — 1. In General. Where the application should put forth facts entitling the patentee to a reissue[55] it is not indispensable that the petitioner should use the exact phraseology of the statute if he employs language which actually conveys its legal meaning.[56] It must be signed and sworn to by the inventor if he is alive and must be acquieseed in by assignees.[57] The proceedings thereon are the same as in the case of original applications except that a filing fee of thirty dollars is charged and no final fee is required.[58]

2. Divisional Reissues. Several reissues may be granted for parts of the thing patented upon the payment of separate fees and other due proceedings had.[59]

F. Reissues of Reissued Patents. A reissue may be granted of a reissued patent as well as of the original,[60] and a second reissue may return to the language of the original patent and be identical therewith.[61]

G. Conclusiveness and Effect of Patent Office Decisions — 1. In General. The grant of a reissue by the patent office raises a presumption that the patentee

2,012, 6 Fish. Pat. Cas. 370, 3 Off. Gaz. 384; Reedy *v.* Scott, 10 Am. & Eng. Pat. Cas. 133.

52. See Allen *v.* Culp, 166 U. S. 501, 17 S. Ct. 644, 41 L. ed. 1093; Eby *v.* King, 158 U. S. 366, 15 S. Ct. 972, 39 L. ed. 1018.

53. French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133. See also Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

54. Moffitt *v.* Garr, 1 Black (U. S.) 273, 17 L. ed. 207 [*affirming* 17 Fed. Cas. No. 9,690, 1 Bond 315, 1 Fish. Pat. Cas. 610]; Burrell *v.* Hackley, 35 Fed. 833. *Compare* Robbins *v.* Illinois Watch Co., 50 Fed. 542 [*affirmed* in 52 Fed. 215, 3 C. C. A. 42].

55. Eby *v.* King, 158 U. S. 366, 15 S. Ct. 972, 39 L. ed. 1018, in which it was said to be doubtful whether the commissioner acquired any jurisdiction, where there is only a bare statement that the patentee wishes to surrender his patent and obtain a reissue.

56. Gold, etc., Tel. Co. *v.* Wiley, 17 Fed. 234.

57. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385]; Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; Selden *v.* Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544. And see *supra*, VIII, A, 3.

Licensee need not join in application. Meyer *v.* Bailey, 17 Fed. Cas. No. 9,516, 2 Ban. & A. 73, 8 Off. Gaz. 437.

Assignee may file where inventor is dead. Wooster *v.* Handy, 21 Fed. 51.

Guardian of insane person may file application. Whitcomb *v.* Spring Valley Coal Co., 47 Fed. 652.

Absence of oath has been held not fatal. Hartshorn *v.* Eagle Shade Roller Co., 18 Fed. 90.

58. U. S. Rev. St. (1878) §§ 4916, 4934 [U. S. Comp. St. (1901) pp. 3393, 3400].

Subject to reëxamination see McCormick Harvesting Mach. Co. *v.* Aultman-Miller Co., 169 U. S. 606, 18 S. Ct. 443, 42 L. ed. 875; Allen *v.* Culp, 166 U. S. 501, 17 S. Ct. 644, 41 L. ed. 1093; Peck *v.* Collins, 103 U. S. 660, 26 L. ed. 512; Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; Wilson *v.* Singer, 30 Fed. Cas. No. 17,835.

59. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; International Terra-Cotta Lumber Co. *v.* Maurer, 44 Fed. 618; Selden *v.* Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; Tucker *v.* Dana, 7 Fed. 213; Badische Anilin, etc., Fabrik *v.* Hamilton Mfg. Co., 2 Fed. Cas. No. 721, 3 Ban. & A. 235, 13 Off. Gaz. 273; Pennsylvania Salt Mfg. Co. *v.* Thomas, 19 Fed. Cas. No. 10,956, 5 Fish. Pat. Cas. 148, 8 Phila. (Pa.) 144; *Ex p.* Selden, 21 Fed. Cas. No. 12,638; Tucker *v.* Burditt, 24 Fed. Cas. No. 14,216, 4 Ban. & A. 569; Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442; Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,499, 11 Blatchf. 334, 6 Fish. Pat. Cas. 551, 4 Off. Gaz. 692.

60. Schneider *v.* Bassett, 13 Fed. 351; Selden *v.* Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Giant Powder Co. *v.* California Powder Works, 10 Fed. Cas. No. 5,379, 2 Ban. & A. 131, 3 Sawy. 448 [*reversed* in 98 U. S. 126, 25 L. ed. 77]; Morse, etc., Tel. Case, 17 Fed. Cas. No. 9,861; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Union Paper Collar Co. *v.* White, 24 Fed. Cas. No. 14,396, 2 Ban. & A. 60, 7 Off. Gaz. 877, 11 Phila. (Pa.) 479.

61. Sawyer Spindle Co. *v.* Eureka Spindle Co., 33 Fed. 836 [*affirmed* in 145 U. S. 637, 12 S. Ct. 980, 36 L. ed. 849]; Celluloid Mfg. Co. *v.* Zylonite Brush, etc., Co., 27 Fed. 291; Giant Powder Co. *v.* Safety Nitro Powder Co., 19 Fed. 509.

was entitled to it and therefore the reissue is *prima facie* valid.[62] Except as to matters appearing on the face of the papers showing excess of jurisdiction by the patent it is conclusive.[63]

2. As to Grounds For Reissue. The conclusion of the patent office officials as to inadvertence, accident, or mistake and as to regularity of proceedings is conclusive in the absence of a showing of fraud.[64]

3. As to Identity. The grant of a reissne raises a presumption that it covers the same invention which was sought and intended to be claimed in the original, but such presumption is not conclusive and is to be decided from the face of the papers.[65]

62. Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; American Diamond Rock Boring Co. *v.* Sheldon, 1 Fed. Cas. No. 296, 4 Ban. & A. 551, 17 Blatchf. 208; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 311, 6 Fish. Pat. Cas. 424, 3 Off. Gaz. 522 [*modified* in 97 U. S. 126, 24 L. ed. 1000]; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Eickemeyer Hat Blocking Mach. Co. *v.* Pearce, 8 Fed. Cas. No. 4,312, 10 Blatchf. 403, 6 Fish. Pat. Cas. 219, 3 Off. Gaz. 150; Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Middletown Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181.

63. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Spaeth *v.* Barney, 22 Fed. 828; Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165, 6 Off. Gaz. 682; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Chicago Fruit-House Co. *v.* Busch, 5 Fed. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Judson *v.* Bradford, 14 Fed. Cas. No. 7,564, 3 Ban. & A. 539, 16 Off. Gaz. 171; Metropolitan Washing-Mach. Co. *v.* Providence Tool Co., 17 Fed. Cas. No. 9,507, Holmes 161 [*affirmed* in 20 Wall. 342, 22 L. ed. 303]; Milligan, etc., Glue Co. *v.* Upton, 17 Fed. Cas. No. 9,607, 1 Ban. & A. 497, 4 Cliff. 237, 6 Off. Gaz. 837; Parham *v.* American Buttonhole, etc., Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Thomas *v.* Shoe Mach. Mfg. Co., 23 Fed. Cas. No. 13,911, 3 Ban. & A. 557, 16 Off. Gaz. 541; Wells *v.* Gill, 29 Fed. Cas. No. 17,394, 6 Fish. Pat. Cas. 89, 2 Off. Gaz. 590; Wells *v.* Jaques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

64. Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. ed. 665; Stimpson *v.* West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Justi *v.* Clark, 108 Fed. 659, 47 C. C. A. 565 [*affirming* 100 Fed. 855]; Beach *v.* Hobbs, 82 Fed. 916; Asmus *v.* Alden, 27 Fed. 684; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30; Selden *v.* Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; Smith *v.* Merriam, 6 Fed. 713; Christman *v.* Rumsey, 3 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903, 58 How. Pr. (N. Y.) 114; Day *v.* Goodyear, 7 Fed. Cas. No. 3,678; Hoffheins *v.* Brandt, 12 Fed. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Kerosene Lamp Heater Co. *v.* Littell, 14 Fed. Cas. No. 7,724, 3 Ban. & A. 312, 13 Off. Gaz. 1009; Middleton Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Miller, etc., Mfg. Co. *v.* Du Brul, 17 Fed. Cas. No. 9,597, 2 Ban. & A. 618, 12 Off. Gaz. 351; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Thomas *v.* Shoe Mach. Mfg. Co., 23 Fed. Cas. No. 13,911, 3 Ban. & A. 557, 16 Off. Gaz. 541.

Limitation of rule.—Error manifest from the record will be considered. Westinghouse Electric, etc., Mfg. Co. *v.* Stanley Electric Mfg. Co., 115 Fed. 810; Peoria Target Co. *v.* Cleaveland Target Co., 58 Fed. 227, 7 C. C. A. 197 [*affirming* 47 Fed. 728]; Featherstone *v.* George R. Bidwell Cycle Co., 57 Fed. 631, 6 C. C. A. 487.

In Canada the ruling of the commissioner of patents that the patent was defective or inoperative is conclusive. Auer Incandescent Light Mfg. Co. *v.* O'Brien, 5 Can. Exch. 243.

65. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Dederick *v.* Cassell, 9 Fed. 306; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 311, 6 Fish. Pat. Cas. 424, 3 Off. Gaz. 522 [*modified* in 97 U. S. 126, 24 L. ed. 1000]; Andrews *v.* Wright, 1 Fed. Cas. No. 382, 3 Ban. & A. 329, 6 Reporter 193, 13 Off. Gaz. 969; Bantz *v.* Elsas, 2 Fed. Cas. No. 967, 1 Ban. & A. 351, 6 Off. Gaz. 117; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; French *v.* Rogers, 9 Fed. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Guidet *v.* Barber, 11 Fed. Cas. No. 5,857, 5 Off. Gaz. 149; House *v.* Young, 12 Fed. Cas. No. 6,738, 3 Fish. Pat. Cas. 335; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Hussey *v.* McCormick, 12 Fed. Cas. No. 6,948, 1 Biss. 300, 1 Fish. Pat. Cas. 509; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Poppenhusen *v.* Falke, 19 Fed.

H. Validity, Construction, and Operation of Reissues[66] — **1. Validity.** Aside from the questions of new matter and estoppel, the validity of a reissue is determined by the same considerations as the original patent,[67] and, upon the questions of anticipation and public use and sale, relates back to the date of the original application for patent.[68] Fraud will invalidate the reissue,[69] but clerical error,[70] or irregularities of procedure in matters not vital,[71] will not. One claim in a reissue may be void without necessarily invalidating the other claims, and in such case it is proper to disclaim the void claim,[72] and a reissue is not invalid merely because the claim of the original patent was valid.[73]

2. Construction and Operation — a. In General. As respects the construction and operation of reissues the same rules apply as in original patents.[74]

Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Reissner *v.* Anness, 20 Fed. Cas. No. 11,688, 3 Ban. & A. 176, 13 Off. Gaz. 870; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Stevens *v.* Pritchard, 23 Fed. Cas. No. 13,407, 2 Ban. & A. 390, 4 Cliff. 417, 10 Off. Gaz. 505; Thomas *v.* Shoe Mach. Mfg. Co., 24 Fed. Cas. No. 13,911, 3 Ban. & A. 557, 16 Off. Gaz. 541; U. S., etc., Felting Co. *v.* Haven, 28 Fed. Cas. No. 16,788, 2 Ban. & A. 164, 3 Dill. 131, 9 Off. Gaz. 253; Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

That identity is determined by comparison of original and reissue see Hoskin *v.* Fisher, 125 U. S. 217, 8 S. Ct. 834, 31 L. ed. 759; Russell *v.* Dodge, 93 U. S. 460, 23 L. ed. 973; Stimpson *v.* West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Searls *v.* Worden, 11 Fed. 501; Flower *v.* Rayner, 5 Fed. 793; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 598, 2 Woodb. & M. 121; American Diamond Rock Boring Co. *v.* Sheldon, 1 Fed. Cas. No. 296, 4 Ban. & A. 603, 17 Blatchf. 303; Bridge *v.* Brown, 4 Fed. Cas. No. 1,857, Holmes 53; Cahart *v.* Austin, 4 Fed. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Goodyear *v.* Berry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Johnson *v.* Beard, 13 Fed. Cas. No. 7,371, 2 Ban. & A. 50, 8 Off. Gaz. 435; Middleton Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Reissner *v.* Anness, 20 Fed. Cas. No. 11,688, 3 Ban. & A. 176, 13 Off. Gaz. 870; Sickles *v.* Evans, 22 Fed. Cas. No. 12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Thomas *v.* Shoe Mach. Mfg. Co., 23 Fed. Cas. No. 13,911, 3 Ban. & A. 557, 16 Off. Gaz. 541; Tucker *v.* Tucker Mfg. Co., 25 Fed. Cas. No. 14,227, 2 Ban. & A. 401, 4 Cliff. 397, 10 Off. Gaz. 464; Woodward *v.* Dinsmore, 30 Fed. Cas. No. 18,003, 4 Fish. Pat. Cas. 163.

The question of identity is one of law for the court. Heald *v.* Rice, 104 U. S. 737, 26 L. ed. 910; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

That original patent must be introduced for comparison see Doherty *v.* Haynes, 7 Fed. Cas. No. 3,963, 1 Ban. & A. 289, 4 Cliff. 291, 6 Off. Gaz. 118; Johnson *v.* Beard, 13 Fed. Cas. No. 7,371, 2 Ban. & A. 50, 8 Off. Gaz. 435.

66. **Identity of invention** see *supra*, VIII, C.

67. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393] Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Forsyth *v.* Clapp, 9 Fed. Cas. No. 4,949, 6 Fish. Pat. Cas. 528, Holmes 278, 4 Off. Gaz. 527.

68. U. S. Stamping Co. *v.* King, 7 Fed. 860, 17 Blatchf. 55; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; House *v.* Young, 12 Fed. Cas. No. 6,738, 3 Fish. Pat. Cas. 335; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Smith *v.* Pearce, 22 Fed. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13; Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

69. Odell *v.* Stout, 22 Fed. 159; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

70. Bignall *v.* Harvey, 4 Fed. 334, 18 Blatchf. 353; Kendricks *v.* Emmons, 14 Fed. Cas. No. 7,695, 2 Ban. & A. 208, 9 Off. Gaz. 201; Robertson *v.* Secombe Mfg. Co., 20 Fed. Cas. No. 11,928, 10 Blatchf. 481, 6 Fish. Pat. Cas. 268, 3 Off. Gaz. 412.

71. Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87.

72. Gage *v.* Herring, 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601; Rawson, etc., Mfg. Co. *v.* C. W. Hunt Co., 147 Fed. 239, 77 C. C. A. 381; Worden *v.* Searls, 21 Fed. 406; Havemeyer *v.* Randall, 21 Fed. 404; Dryfoos *v.* Wiese, 19 Fed. 315; Fetter *v.* Newhall, 17 Fed. 841, 21 Blatchf. 445; Wood *v.* Packer, 17 Fed. 650; Schillinger *v.* Greenway Brewing Co., 17 Fed. 244, 21 Blatchf. 383; Cote *v.* Moffitt, 15 Fed. 345; Starrett *v.* Athol Mach. Co., 14 Fed. 910; Tyler *v.* Galloway, 12 Fed. 567, 20 Blatchf. 445; Collins Co. *v.* Coes, 3 Fed. 225.

73. Wilson *v.* Coon, 6 Fed. 611, 18 Blatchf. 532.

74. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; Grant *v.* Townsend, 10 Fed. Cas. No. 5,701; Parham *v.* American Buttonhole Overseaming, etc., Mach. Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

If possible the reissue will be sustained. Brainard *v.* Cramme, 12 Fed. 621, 20 Blatchf.

b. Retroactive Operation. An infringer of the claims of a reissue can be held only for acts committed after the reissue is granted.[75] But the fact that he was using the invention before the reissue was granted does not relieve him from liability for using it subsequent to the reissue.[76]

IX. DISCLAIMERS.

A. In General. The patentee, his heirs or assigns, whether of the whole or any particular interest therein, may upon payment of the fee fixed by law make his disclaimer of such parts of the thing patented as he shall not choose to claim or hold under the patent.[77] It must indicate the interest of the disclaimant,[78] and must be in writing attested by one or more witnesses and must be recorded in the patent office.[79]

B. Subject-Matter of Disclaimer. The separate claims of a patent may be eliminated by disclaimer, but they cannot be amended and transformed into other claims, and matter cannot be added to the specification under guise of disclaimer.[80]

530; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64.

75. U. S. Rev. St. (1878) § 4916 [U. S. Comp. St. (1901) p. 3393]; Brown *v.* Hinkley, 4 Fed. Cas. No. 2,012, 6 Fish. Pat. Cas. 370, 3 Off. Gaz. 384; Perry *v.* Skinner, 1 Jur. 433, 6 L. J. Exch. 124, M. & H. 122, 2 M. & W. 471; 35 Vict. c. 26, § 19; 38 Vict. c. 14, § 1.

76. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Stimpson *v.* West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Bliss *v.* Brooklyn, 3 Fed. Cas. No. 1,544, 8 Blatchf. 533, 4 Fish. Pat. Cas. 596; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; Carr *v.* Rice, 5 Fed. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

77. U. S. Rev. St. (1878) § 4917 [U. S. Comp. St. (1901) p. 3393]; Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Collins Co. *v.* Coes, 130 U. S. 56, 9 S. Ct. 514, 32 L. ed. 858; Hailes *v.* Albany Stove Co., 123 U. S. 582, 8 S. Ct. 262, 31 L. ed. 284; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 112 U. S. 624, 5 S. Ct. 475, 28 L. ed. 828; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Cambria Iron Co. *v.* Carnegie Steel Co., 96 Fed. 850, 37 C. C. A. 693 [*reversing* 89 Fed. 721]; Schwarzwalder *v.* New York Filter Co., 66 Fed. 152, 13 C. C. A. 380; Matthews *v.* Spangenberg, 19 Fed. 823, 20 Blatchf. 482; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Whitney *v.* Emmett, 2 Fed. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,727, 3 Blatchf. 209; Tuck *v.* Bramhill, 24 Fed. Cas. No. 14,213, 6 Blatchf. 95, 3 Fish. Pat. Cas. 400.

In Canada the law is like that in the United States. St. 35 Vict. c. 26, § 20.

English practice.—Application to the patent office for leave to amend by disclaimer may be made at any time where suit is not pending (*In re* Hall, 21 Q. B. D. 137, 57 L. J. Q. B. 494, 59 L. T. Rep. N. S. 37, 36 Wkly. Rep. 892), and amendment may be made pending suit in order of court (Cropper *v.* Smith, 28 Ch. D. 148, 54 L. J. Ch. 287, 52 L. T. Rep. N. S. 94, 33 Wkly. Rep. 338; Yates *v* Armstrong, 77 L. T. Rep. N. S. 267; Singer *v.* Hasson, 50 L. T. Rep. N. S. 326); master of rolls may expunge disclaimer improperly filed (*In re* Berdan, L. R. 20 Eq. 346, 44 L. J. Ch. 544, 23 Wkly. Rep. 823); amendment permitted by court pending suit on conditions (Deeley *v.* Perkes, [1896] A. C. 496, 65 L. J. Ch. 912; Ludington Cigarette Mach. Co. *v.* Baron Cigarette Mach. Co., [1900] 1 Ch. 508, 69 L. J. Ch. 321, 82 L. T. Rep. N. S. 173, 48 Wkly. Rep. 505; Gaulard *v.* Lindsay, 38 Ch. D. 38, 57 L. J. Ch. 687, 52 L. T. Rep. N. S. 44; Haslam Foundry, etc., Co. *v.* Goodfellow, 37 Ch. D. 118, 56 L. J. Ch. 245, 57 L. T. Rep. N. S. 788, 36 Wkly. Rep. 391; Bray *v.* Gardner, 34 Ch. D. 668, 56 L. J. Ch. 497, 56 L. T. Rep. N. S. 292, 35 Wkly. Rep. 341; Fusee Vesta Co. *v.* Bryant, 34 Ch. D. 458, 56 L. J. Ch. 187, 56 L. T. Rep. N. S. 110, 35 Wkly. Rep. 267; *In re* Gaulard, 57 L. J. Ch. 209, 5 Rep. Pat. Cas. 192; Lang *v.* Whitecross Co., 62 L. T. Rep. N. S. 119 [*affirmed* in 89 L. T. J. 251]; and assignee may disclaim (Spilsbury *v.* Clough, 2 Q. B. 466, 2 G. & D. 17, 6 Jur. 579, 11 L. J. Q. B. 109, 42 E. C. L. 763; Wallington *v.* Dale, 23 L. J. Exch. 49).

78. Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432.

79. U. S. Rev. St. (1878) § 4917 [U. S. Comp. St. (1901) p. 3393]; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17.

80. Hailes *v.* Albany Stove Co., 123 U. S. 582, 8 S. Ct. 262, 31 L. ed. 284; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 112 U. S. 624, 5 S. Ct. 475, 28 L. ed. 828; Westinghouse Air Brake Co. *v.* New York Air Brake Co., 139 Fed. 265; Otis Elevator Co. *v.* Portland Co., 127 Fed. 557, 62 C. C. A. 339 [*affirming* 119 Fed. 928]; Torrant *v.* Duluth Lumber Co., 30 Fed. 830;

A disclaimer may extend to a part of the specification as well as to a claim or one feature of a claim,[81] and part of a reissued patent may be disclaimed.[82] A disclaimer can eliminate only matter which is clearly severable from the balance, and which can be removed without changing the balance.[83] Elements of a combination claim cannot be eliminated.[84] Where a reissue is void because too broad the original patent cannot be revived by merely filing a disclaimer of all extensions thereof.[85]

C. Time For Disclaimer. Disclaimer should be filed without unreasonable delay, and, unless filed before suit is brought, no costs can be recovered by the patentee.[86] Disclaimer may, however, be made after as well as before suit;[87] the failure to file before suit affecting costs only and not the decree.[88] Whether a delay in filing a disclaimer is unreasonable is a question of law.[89]

D. Effect of Failure to Disclaim. It is not necessary to enter disclaimer

Hailes *v.* Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271; Thomas *v.* Welch, L. R. 1 C. P. 192, 12 Jur. N. S. 316, 35 L. J. C. P. 200; Ralston *v.* Smith, 11 C. B. N. S. 471, 8 Jur. N. S. 100, 31 L. J. C. P. 102, 103 E. C. L. 471 [*affirmed* in 20 C. B. N. S. 28, 11 H. L. Cas. 223, 35 L. J. C. P. 49, 13 L. T. Rep. N. S. 1, 11 Eng. Reprint 1318]; Tetley *v.* Easton, 2 C. B. N. S. 706, 26 L. J. C. P. 269, 89 E. C. L. 706; Seed *v.* Higgins, 8 H. L. Cas. 550, 6 Jur. N. S. 1264, 30 L. J. Q. B. 314, 3 L. T. Rep. N. S. 101, 11 Eng. Reprint 544.

Limitation to particular use is proper. Thompson *v.* N. T. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456 [*reversing* 88 Fed. 81].

That the patentee cannot add a feature to the invention claimed see Albany Steam Trap Co. *v.* Worthington, 79 Fed. 966, 25 C. C. A. 258; White *v.* E. P. Gleason Mfg. Co., 17 Fed. 159, 21 Blatchf. 364; Hailes *v.* Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271; Coburn *v.* Schroeder, 11 Fed. 425, 20 Blatchf. 392.

That the patentee may claim combination and disclaim separate elements see Black *v.* Thorne, 3 Fed. Cas. No. 1,465, 10 Blatchf. 66, 5 Fish. Pat. Cas. 550, 2 Off. Gaz. 388.

81. Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968 [*reversing* 96 Fed. 850, 37 C. C. A. 593].

82. Hurlbut *v.* Schillinger, 130 U. S. 456, 9 S. Ct. 584, 32 L. ed. 1011; Gage *v.* Herring, 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601; Tyler *v.* Galloway, 12 Fed. 567, 20 Blatchf. 445; Collins Co. *v.* Coes, 3 Fed. 225; Schillinger *v.* Gunther, 21 Fed. Cas. No. 12,458, 4 Ban. & A. 479, 17 Blatchf. 66, 16 Off. Gaz. 905.

83. Hailes *v.* Albany Stove Co., 123 U. S. 582, 8 S. Ct. 262, 31 L. ed. 284; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; Schillinger *v.* Gunther, 21 Fed. Cas. No. 12,458, 4 Ban. & A. 479, 17 Blatchf. 66, 16 Off. Gaz. 905.

84. Cerealine Mfg. Co. *v.* Bates, 77 Fed. 883; Batten *v.* Clayton, 2 Fed. Cas. No. 1,105; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636.

85. McMurray *v.* Mallory, 111 U. S. 97, 4 S. Ct. 375, 28 L. ed. 365.

86. U. S. Rev. St. (1878) § 4922 [U. S. Comp. St. (1901) p. 3396]; Roemer *v.* Neumann, 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277; Silsby *v.* Foote, 20 How. (U. S.) 378, 15 L. ed. 822; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590.

Reasonable delay illustrated see O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Thompson *v.* N. T. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456; Christman *v.* Rumsey, 5 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903, 58 How. Pr. (N. Y.) 114.

English practice.—Amendment by disclaimer pending suit is for discretion of the judge. Deeley *v.* Perkes, [1896] A. C. 496, 65 L. J. Ch. 912; Brooks *v.* Lycett's Saddle, etc., Accessory Co., [1904] 1 Ch. 512, 73 L. J. Ch. 319; *In re* Geipel, [1904] 1 Ch. 239, 73 L. J. Ch. 215, 90 L. T. Rep. N. S. 70, 52 Wkly. Rep. 339; *In re* Geipel, [1903] 2 Ch. 715, 73 L. J. Ch. 47, 89 L. T. Rep. N. S. 127, 52 Wkly. Rep. 63; Ludington's Cigarette Mach. Co. *v.* Baron Cigarette Mach. Co., [1900] 1 Ch. 508, 69 L. J. Ch. 321, 82 L. T. Rep. N. S. 173, 48 Wkly. Rep. 505; *In re* Owen, [1899] 1 Ch. 157, 68 L. J. Ch. 63, 79 L. T. Rep. N. S. 458, 47 Wkly. Rep. 180; *In re* Gaulard, 57 L. J. Ch. 209, 5 Rep. Pat. Cas. 192; Yates *v.* Armstrong, 77 L. T. Rep. N. S. 267; *In re* Lang, 7 Rep. Pat. Cas. 469. Suit instituted after petition to amend is no bar. Wolfe *v.* Automatic Picture Gallery, [1903] 1 Ch. 18, 72 L. J. Ch. 34, 87 L. T. Rep. N. S. 539 [*affirming* 51 Wkly. Rep. 121]. Disclaimer pending suit does not include "correction and explanation," but only elimination. *In re* Owen, *supra; In re* Gaulard, *supra; In re* Lang, *supra.*

87. Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Libbey *v.* Mt. Washington Glass Co., 26 Fed. 757; Myers *v.* Frame, 17 Fed. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

88. Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Plecker *v.* Poorman, 147 Fed. 528; Stutz *v.* Armstrong, 20 Fed. 843; Hall *v.* Wiles, 11 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433.

89. Seymour *v.* McCormick, 19 How. (U. S.) 96, 15 L. ed. 557. *Compare* Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,963, Fish. Pat. Rep. 41, 3 McLean 432.

except as to substantial or material parts.[90] The failure to disclaim invalid claims will not prevent recovery of damages for the infringement of valid claims in the patent where the patentee was not guilty of fraud and where there was no unreasonable neglect or delay in entering disclaimer.[91] Unreasonable delay, however, will be a good defense to the suit.[92]

E. Effect of Disclaimer. In determining the meaning of a disclaimer, the same rules are to be observed as in construing any other written instrument, the purpose being to carry out the intention of the person executing it as indicated by its language when construed with reference to the proceedings of which it forms a part.[93] A disclaimer limits the patent in so far as the disclaimant is concerned to the matter therein which is not disclaimed.[94] It is effective only as to the party filing it,[95] and a disclaimer in one patent does not affect another.[96]

X. CONSTRUCTION AND OPERATION OF LETTERS PATENT.[97]

A. In General — 1. General Rules of Construction Relating to Contracts Applicable. A patent is subject to the same general rules of construction that apply to other contracts.[98] The entire instrument, including the drawings and specifications, is to be considered in arriving at its intent and meaning.[99]

90. Hall *v.* Wiles, 11 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433; Peek *v.* Frame, 19 Fed. Cas. No. 10,904, 5 Fish. Pat. Cas. 211.

91. Affects only costs. Hotchkiss *v.* Oliver, 5 Den. (N. Y.) 314; Seymour *v.* McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; Kittle *v.* Hall, 30 Fed. 239; Schillinger *v.* Gunther, 21 Fed. Cas. No. 12,458, 4 Ban. & A. 479, 17 Blatchf. 66, 16 Off. Gaz. 905; Tuck *v.* Bramhill, 23 Fed. Cas. No. 14,213, 6 Blatchf. 95, 3 Fish. Pat. Cas. 400.

Disclaimer by attorney in prosecuting application distinguished. Mann *v.* Bayliss, 16 Fed. Cas. No. 9,034, 10 Off. Gaz. 113.

English practice.— Patent void unless disclaimer entered. Cannington *v.* Nuttall, L. R. 5 H. L. 205, 40 L. J. Ch. 739; *In re* Dellwick, [1896] 2 Ch. 705, 65 L. J. Ch. 905.

92. Rice *v.* Garnhart, 34 Wis. 453, 17 Am. Rep. 448; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Hall *v.* Wiles, 10 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,745, 2 Robb Pat. Cas. 479, 1 Woodb. & M. 479; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,727, 3 Blatchf. 209; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 319; Reed *v.* Cutter, 20 Fed. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590.

93. Graham *v.* Earl, 82 Fed. 737, 92 Fed. 155, 34 C. C. A. 267.

A construction which would render the disclaimer nugatory must be essentially wrong and cannot be accepted. Atlantic Giant Powder Co. *v.* Hulings, 21 Fed. 519.

Disclaimer before issue of patent entitled to great weight. Brown Folding Mach. Co. *v.* Stonematz Printers' Mach. Co., 58 Fed. 571, 7 C. C. A. 374 [*affirming* 57 Fed. 601].

94. Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Silsby *v.* Foote, 20 How. (U. S.) 378, 15 L. ed. 953; Manhattan Gen. Constr. Co. *v.* Helios Upton Co., 135 Fed. 785; Graham *v.* Earl, 92 Fed. 155, 34 C. C. A. 267; Schwarzwalder *v.* New York Filter Co., 66 Fed. 152, 13 C. C. A. 380; Atlantic Giant Powder Co. *v.* Hulings, 21 Fed. 519.

95. Potter *v.* Holland, 20 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

96. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Hill *v.* Dunklee, 12 Fed. Cas. No. 6,489, McArthur Pat. Cas. 475.

97. Decisions of United States as to construction as precedents for other courts see Courts, 11 Cyc. 752.

98. O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Elgin Co-operative Butter-Tub Co. *v.* Creamery Package Mfg. Co., 80 Fed. 293, 25 C. C. A. 426; Harris *v.* Allen, 15 Fed. 106; Whitney *v.* Emmett, 29 Fed. Cas. No. 17,535, Baldw. 303, 1 Robb Pat. Cas. 567; Came *v.* Consolidated Car Heating Co., 11 Quebec K. B. 103.

Terms given ordinary meaning see Clark *v.* Adie, 2 App. Cas. 423, 46 L. J. Ch. 598, 27 L. T. Rep. N. S. 1, 26 Wkly. Rep. 45; Grossley *v.* Beverley, 9 B. & C. 63, 17 E. C. L. 38, 3 C. & P. 513, 14 E. C. L. 690, 7 L. J. K. B. O. S. 127, M. & M. 283, 1 Russ. & M. 166 note, 5 Eng. Ch. 166 note, 39 Eng. Reprint 65; Elliott *v.* Turner, 2 C. B. 446, 15 L. J. C. P. 49, 52 E. C. L. 446.

To make up a claim two patents cannot be read together. Rose *v.* Hirsh, 77 Fed. 469, 23 C. C. A. 246.

99. Hogg *v.* Emerson, 6 How. (U. S.) 437, 12 L. ed. 505, 11 How. 587, 13 L. ed. 824; O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; Holt *v.* Kendall, 26 Fed. 622; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Davoll *v.* Brown, 7 Fed. Cas. No.

2. Liberally Construed. Patents are to be liberally construed so as to secure to the inventor the real invention which he intends to secure by his patent, and technical defects or inaccuracies will not be permitted to prevent this result.[1] The description of the patent, however, must be so certain as to be understood by those acquainted with the subject-matter.[2] There should not be a liberality of construction which permits the inventor to couch his specification in such ambiguous terms that its claims may be expanded or contracted to suit the exigency;[3] and where an inventor divides up his invention so as to present certain elements in different patents, he is thereby limited to a more strict and narrow construction than might have been otherwise necessary.[4]

3. Plain Meaning Not Varied. The plain and clear meaning of the terms

3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Earle *v.* Sawyer, 8 Fed. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, 1 Robb Pat. Cas. 68, Pet. C. C. 322; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Hamilton *v.* Ives, 11 Fed. Cas. No. 5,982, 6 Fish. Pat. Cas. 244, 3 Off. Gaz. 30; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Ingels *v.* Mast, 13 Fed. Cas. No. 7,035, 2 Ban. & A. 24, 1 Flipp. 424, 7 Off. Gaz. 836; Kittle *v.* Merriam, 14 Fed. Cas. No. 7,857, 2 Curt. 475; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Russell *v.* Cowley, 1 C. M. & R. 864.

1. Ruete *v.* Elwell, 15 App. Cas. (D. C.) 21; Ives *v.* Hamilton, 92 U. S. 426, 23 L. ed. 494; Winans *v.* Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Eck *v.* Kutz, 132 Fed. 758; Nutter *v.* Mossberg, 128 Fed. 55 [*affirmed* in 135 Fed. 95, 68 C. C. A. 257]; Severy Process Co. *v.* Harper, 113 Fed. 581; Gaisman *v.* Gallert, 105 Fed. 955; Huntington Dry-Pulverizer Co. *v.* Whitaker Cement Co., 89 Fed. 323; Salomon *v.* Garvin Mach. Co., 84 Fed. 195; Red Jacket Mfg. Co. *v.* Davis, 82 Fed. 432, 27 C. C. A. 204; Consolidated Fastener Co. *v.* Columbian Fastener Co., 79 Fed. 795; Beach *v.* Inman, 75 Fed. 840; McBride *v.* Kingman, 72 Fed. 908; Loring *v.* Booth, 52 Fed. 150; Robbins *v.* Aurora Watch Co., 43 Fed. 521; Fitch *v.* Bragg, 8 Fed. 588; Consolidated Safety-Valve Co. *v.* Crosby Steam-Gauge, etc., Co., 7 Fed. 768; Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,516, 1 Cliff. 288; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Coffin *v.* Ogden, 5 Fed. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [*affirmed* in 18 Wall. 120, 21 L. ed. 821]; Davoll *v.* Brown, 7 Fed. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Goodyear *v.* Barry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Goodyear *v.* New Jersey Central R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Imlay *v.* Norwich, etc., R. Co., 13 Fed. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Ingels *v.* Mast, 13 Fed. Cas. No. 7,033, 6 Fish. Pat. Cas. 415; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Pike *v.* Potter, 19 Fed. Cas. No. 11,102, 3 Fish. Pat. Cas. 55; Potter *v.* Holland, 19 Fed. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Ryan *v.* Goodwin, 21 Fed. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514; Waterbury Brass Co. *v.* New York Brass Co., 29 Fed. Cas. No. 17,256, 3 Fish. Pat. Cas. 43; Whipple *v.* Middlesex Co., 29 Fed. Cas. No. 17,520, 4 Fish. Pat. Cas. 41; Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [*reversed* on other grounds in 10 Wall. 117, 19 L. ed. 866]; Bickford *v.* Skewes, 1 Q. B. 938, 1 G. & D. 736, 6 Jur. 167, 41 E. C. L. 848; Neilson *v.* Betts, L. R. 5 H. L. 1, 40 L. J. Ch. 317, 19 Wkly. Rep. 1121.

That terms are given reasonable, not technically exact, meaning see Kip-Armstrong Co. *v.* King Phillip Mills, 130 Fed. 28 [*reversed* on other grounds in 132 Fed. 975, 66 C. C. A. 45]; U. S. Repair, etc., Co. *v.* Assyrian Asphalt Co., 96 Fed. 235; Union R. Co. *v.* Sprague Electric R., etc., Co., 88 Fed. 82, 31 C. C. A. 391; A. B. Dick Co. *v.* Wichelman, 80 Fed. 519; American Sulphite Co. *v.* Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500; Johnson *v.* Brooklyn Heights R. Co., 75 Fed. 668; Thompson *v.* Jennings, 75 Fed. 572, 21 C. C. A. 486; Grier *v.* Castle, 17 Fed. 523; Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593, McArthur Pat. Cas. 493.

That regard should be had for things, not names, see Daylight Prism Co. *v.* Marcus Prism Co., 110 Fed. 980; Palmer Pneumatic Tire Co. *v.* Lozier, 84 Fed. 659.

Subtle distinctions will not be made.— Davoll *v.* Brown, 7 Fed. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Henderson *v.* Cleveland Co-operative Stove Co., 11 Fed. Cas. No. 6,351, 2 Ban. & A. 604, 12 Off. Gaz. 4.

Claim to result will be construed to cover means where possible. Expanded Metal Co. *v.* St. Louis Bd. of Education, 103 Fed. 287; Henderson *v.* Cleveland Co-operative Stove Co., 11 Fed. Cas. No. 6,351, 2 Ban. & A. 604, 12 Off. Gaz. 4.

2. Davoll *v.* Brown, 7 Fed. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53.

3. Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

4. New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 64 Fed. 859 [*reversed* on other

employed cannot be varied by construction.[5] The construction must be in conformity with the self-imposed limitations which are contained in the claims.[6]

4. Intention of Inventor. The intention of the parties in formulating the patent is entitled to great consideration when it can be determined from the record.[7] The court will look to the manifest design in order to remove any ambignity arising from the terms employed; but this ambiguity must not be such as would perplex any ordinary mechanic in the art to which it applies.[8]

5. Proceedings in Patent Office. The proceedings in the patent office pending an application are not as a general rule admissible as evidence tending to enlarge, diminish, or vary the language of the claim of the patent.[9] An amendment of the claim which comes in incidentally and in reference to an incidental matter does not necessarily exclude a liberal interpretation when the invention is a broad one.[10] Matters which have been duly disclaimed after issue of the patent cease to be a part of the invention, and the patent is then to be construed as though they had never been included in the description of the invention or the claim of the specification.[11] Any correspondence between the inventor and the patent office prior to the grant of the patent is inadmissible to enlarge, diminish, or vary the language of the patent afterward issued,[12] at least where its terms are not

grounds in 73 Fed. 469, 19 C. C. A. 534]; Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 2 C. C. A. 682.

5. Westinghouse Air Brake Co. *v.* New York Air Brake Co., 119 Fed. 874, 56 C. C. A. 404; Schreiber, etc., Mfg. Co. *v.* Adams Co., 117 Fed. 830, 54 C. C. A. 128; Bracewell *v.* Passaic Print Works, 107 Fed. 467; Peifer *v.* Brown, 106 Fed. 938; U. S. Glass Co. *v.* Atlas Glass Co., 88 Fed. 493; Edison Electric Light Co. *v.* E. G. Bernard Co., 88 Fed. 267; Chemical Rubber Co. *v.* Raymond Rubber Co., 68 Fed. 570 [*affirmed* in 71 Fed. 179, 18 C. C. A. 31]; Holtzer *v.* Consolidated Electric Mfg. Co., 60 Fed. 748 [*reversed* on other grounds in 67 Fed. 907, 15 C. C. A. 63]; Duff Mfg. Co. *v.* Forgie, 57 Fed. 748 [*affirmed* in 59 Fed. 772, 8 C. C. A. 261]; Yale Lock Mfg. Co. *v.* James, 20 Fed. 903; Many *v.* Sizer, 16 Fed. Cas. No. 9,057, 1 Fish. Pat. Cas. 31; Rich *v.* Close, 20 Fed. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

Evidence cannot change instrument see Clark *v.* Adie, 2 App. Cas. 423, 46 L. J. Ch. 598, 37 L. T. Rep. N. S. 1, 26 Wkly. Rep. 45.

6. New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 64 Fed. 859; Judd *v.* Fowler, 61 Fed. 821, 10 C. C. A. 100; Groth *v.* International Postal Supply Co., 61 Fed. 284, 9 C. C. A. 507.

The remedy for unnecessary limitations is by reissue not by construction. Pittsburg Meter Co. *v.* Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580.

7. Thomson-Houston Electric Co. *v.* Black River Traction Co., 135 Fed. 759, 68 C. C. A. 461; Paxton *v.* Brinton, 107 Fed. 137; Kursheedt Mfg. Co. *v.* Naday, 103 Fed. 948; Electric Smelting, etc., Co. *v.* Carborundum Co., 102 Fed. 618, 42 C. C. A. 537; Magic Light Co. *v.* Economy Gas-Lamp Co., 97 Fed. 87; Blount Mfg. Co. *v.* Bardsley, 75 Fed. 674, 21 C. C. A. 495; Duff Mfg. Co. *v.* Forgie, 57 Fed. 748 [*affirmed* in 59 Fed. 772, 8 C. C. A. 261]; Bradley *v.* Dull, 19 Fed. 913; Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Roberts *v.* Schreiber, 2 Fed. 855; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Pike *v.* Potter, 19 Fed. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31.

Subsequent declarations of patentee cannot vary instrument. Union Paper-Bag Mach. Co. *v.* Pultz, etc., Co., 24 Fed. Cas. No. 14,392, 3 Ban. & A. 403, 15 Blatchf. 160, 15 Off. Gaz. 423.

Mistake as to theory of operation is not binding.— U. S. Mitis Co. *v.* Midvale Steel Co., 135 Fed. 103.

8. Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31.

9. Goodyear Dental Vulcanite Co. *v.* Gardiner, 11 Fed. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224.

10. Heywood Bros., etc., Co. *v.* Syracuse Rapid Transit R. Co., 152 Fed. 453. See also Heap *v.* Greene, 91 Fed. 792, 34 C. C. A. 86; Reece Button-Hole Mach. Co. *v.* Globe Button-Hole Mach. Co., 61 Fed. 958, 10 C. C. A. 194.

Amendment of specifications leaving claim unchanged.— Claims of a patent are not limited by the amendment of the specifications more particularly describing the device shown in the drawings to meet the objections of the patent office, where the claims themselves are left unchanged. Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785.

11. Dunbar *v.* Myers, 94 U. S. 187, 24 L. ed. 34; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; Bracewell *v.* Passaic Print Works, 107 Fed. 467.

12. Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222, 26 L. ed. 149; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Goodyear Dental Vul-

ambiguous.[13] But it has been held that when the patent bears on its face a particular construction, such a construction may be confirmed by what the patentee said when he was making his application.[14] Formal admissions imposed upon the applicant as a condition precedent to the allowance of a patent are binding.[15] Argumentative statements of counsel in the course of proceedings in the patent office do not estop the patentee from claiming what is clearly granted by the patent.[16] Mere remarks by the examiner in the course of the proceedings do not estop the patentee from claiming the construction shown by the specification and original claim.[17] Where it is in evidence from the record of the patent office that a certain construction was there contemplated, and that the patent would not otherwise have been granted, no objection can be made to the same construction of it by the court on the ground that such construction is narrow, and will render the patent practically useless.[18]

6. Opinion of Experts. The court is not bound by the opinions of experts in patent cases and may reject them where they do not seem reasonable.[19]

7. State of the Art. A patent is to be construed in the light of the state of the art at the time it was granted,[20] and it has been very generally held that in

canite Co. *v.* Gardiner, 10 Fed. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Piper *v.* Brown, 19 Fed. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [*reversed* on other grounds in 91 U. S. 37, 23 L. ed. 200]. But see Pike *v.* Potter, 19 Fed. Cas. No. 11,162, 3 Fish. Pat. Cas. 55, holding that the correspondence between the patent office and the patentee is evidence, at least in a court of equity, for the purpose of showing the limitation placed by the patentee upon his claims.

Argumentative suggestion.— The language of the patent as issued may not be contradicted by mere argumentative suggestions made by the applicant in his communications to the patent office, especially where no change is made in the claim. Victor Talking Mach. Co. *v.* American Graphophone Co., 151 Fed. 601, 81 C. C. A. 145.

13. Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140.

Language of solicitor employed to obtain patent.— Where the specifications of the application and of the letters patent are not ambiguous and are capable of a definite construction, the language of a solicitor employed to obtain the patent, used in a communication with the patent office to convey an idea of his own, will not override the language of the patent, especially where there is no evidence to show that the idea was ever adopted by the patent office. Wirt *v.* Brown, 32 Fed. 283.

14. Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222, 26 L. ed. 149. See also Victor Talking Mach. Co. *v.* American Graphophone Co., 151 Fed. 601, 81 C. C. A. 145.

15. Welsbach Light Co. *v.* Cremo Incandescent Light Co., 151 Fed. 1023, 81 C. C. A. 683 [*affirming* 145 Fed. 521]; Victor Talking Mach. Co. *v.* American Graphophone Co., 151 Fed. 601, 81 C. C. A. 145, holding that when claims are rejected on references cited against them, the applicant is called upon to exercise his election between insistence and appeal, or desistance and acquiescence, and, if he acquiesces, the public is entitled to the benefit of the limitations and admissions imposed upon him as a condition precedent to the allowance of the patent.

Where the patent is not for a broad invention but merely for a change of form, admissions contained in a file-wrapper and its contents in respect to amendments made upon the citation of references involving the issue of novelty constitute an estoppel against the patentee in the interpretation of his claims. Richardson *v.* American Pin Co., 73 Fed. 476.

16. Britton *v.* White Mfg. Co., 61 Fed. 93. See also Consolidated Fastener Co. *v.* Columbian Fastener Co., 79 Fed. 795.

The use of an unsound and unsuccessful argument by the inventor's solicitor with respect to a rejected claim will not have the effect of imposing a constructive limitation upon the claim allowed Société Anonyme Usine J. Cléret *v.* Rehfuss, 75 Fed. 657.

The claims of a patent are not narrowed by statements made on an argument by counsel before the patent office to obtain a reconsideration after the application has been rejected, where no changes are made in the claims. Boyer *v.* Keller Tool Co., 127 Fed. 130, 62 C. C. A. 244.

17. Acme Flexible Clasp Co. *v.* Cary Mfg. Co., 96 Fed. 344, 99 Fed. 500. See also Consolidated Fastener Co. *v.* Columbian Fastener Co., 79 Fed. 795.

18. Geis *v.* Kimber, 36 Fed. 105.

19. Computing Scale Co. *v.* Keystone Store-Service Co., 88 Fed. 788; Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452; Union Paper-Bag Co. *v.* Nixon, 24 Fed. Cas. No. 14,386, 6 Fish. Pat. Cas. 402, 4 Off. Gaz. 31.

20. Simplex Railway Appliance Co. *v.* Wands, 115 Fed. 517, 53 C. C. A. 171; Allen *v.* Grimes, 89 Fed. 869; New Departure Bell Co. *v.* Corbin, 88 Fed. 901; Miller Co. *v.* Meriden Bronze Co., 80 Fed. 523; Elgin Co-operative Butter-Tub Co. *v.* Creamery Package Mfg. Co., 80 Fed. 293, 25 C. C. A. 426; Rowlett *v.* Anderson, 76 Fed. 827; Missouri Lamp, etc., Mfg. Co. *v.* Stempel, 75 Fed. 583; Koch *v.* Bolz, 42 Fed. 454; Parsons *v.* Colgate, 15 Fed. 600, 21 Blatchf. 171; Neacy *v.*

respect of the state of the art the court may take judicial notice of matters of common knowledge.[21]

8. Patent as Notice. Everyone is bound to take notice of a patent, since the record thereof in the patent office is legal notice to all the world.[22]

9. Questions For Court and Jury. The scope and meaning of a patent is a matter of law for the court, and the application of the law to the facts of the case is for the jury.[23] It is for the court to construe the patent and instruct the jury as to its meaning.[24]

B. Limitation of Claims — 1. In General. The protection furnished by a patent is measured by what is set forth in the claims.[25] Everything not covered

Allis, 13 Fed. 874; Barker *v.* Todd, 13 Fed. 473; Scott *v.* Evans, 11 Fed. 726; Root *v.* Lamb, 7 Fed. 222; Giant Powder Co. *v.* California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Estabrook *v.* Dunbar, 8 Fed. Cas. No. 4,535, 2 Ban. & A. 427, 10 Off. Gaz. 909; Huggins *v.* Hubby, 12 Fed. Cas. No. 6,839; Mann *v.* Bayliss, 16 Fed. Cas. No. 9,034, 10 Off. Gaz. 113, 789; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Sprague *v.* Adriance, 22 Fed. Cas. No. 13,248, 3 Ban. & A. 124, 14 Off. Gaz. 308. And see *infra*, X, B, 6, 7.

Evidence as to meaning of terms admitted see Betts *v.* Menzies, 10 H. L. Cas. 117, 9 Jur. N. S. 29, 31 L. J. Q. B. 233, 7 L. T. Rep. N. S. 110, 11 Wkly. Rep. 1, 11 Eng. Reprint 970.

Particular patents construed to be limited by the prior art in order to sustain them at all.—Dunham *v.* Dennison Mfg. Co., 154 U. S. 103, 14 S. Ct. 986, 38 L. ed. 924; Pope Mfg. Co. *v.* Gormully, etc., Mfg. Co., 144 U. S. 238, 12 S. Ct. 641, 36 L. ed. 419; Phœnix Caster Co. *v.* Spiegel, 133 U. S. 360, 10 S. Ct. 409, 33 L. ed. 663; Ashcroft *v.* Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Brill *v.* Peckham Motor Truck, etc., 108 Fed. 267, 47 C. C. A. 315; Consolidated Store-Service Co. *v.* Siegel Cooper Co., 107 Fed. 716, 46 C. C. A. 599; Sprague Electric R., etc., Co. *v.* Nassau Electric R. Co., 102 Fed. 761, 42 C. C. A. 612; Santa Clara Valley Mill, etc., Co. *v.* Prescott, 102 Fed. 501, 42 C. C. A. 477; Empire Target Co. *v.* Cleveland Target Co., 102 Fed. 354, 42 C. C. A. 393; Rauh *v.* Guinzburg, 101 Fed. 1007, 42 C. C. A. 139; Dodge *v.* Ohio Valley Pulley Works, 101 Fed. 581; Regina Music-Box Co. *v.* Hasse, 97 Fed. 617; Ball, etc., Fastener Co. *v.* A. Edgarton Mfg. Co. 96 Fed. 489, 37 C. C. A. 523; Davey Pegging-Mach. Co. *v.* Prouty, 96 Fed. 336; Electric Gas Lighting Co. *v.* Fuller, 59 Fed. 1003, 8 C. C. A. 442; Curtis *v.* Atlanta St. R. Co., 56 Fed. 596; St. Paul Plow-Works *v.* Deere, 54 Fed. 501; Overman *v.* Warwick Cycle Mfg. Co., 54 Fed. 496 [*affirmed* in 61 Fed. 986, 10 C. C. A. 222]; National Harrow Co. *v.* Hanby, 54 Fed. 493; Briggs *v.* Central Ice Co. 54 Fed. 376 [*affirmed* in 60 Fed. 87, 8 C. C. A. 480]; Blair Camera Co. *v.* Barker, 53 Fed. 483; Baumer *v.* Will, 53 Fed. 373; Pettibone *v.* Stanford, 53 Fed. 118, 3 C. C. A. 469; Actiebolaget Separator *v.* Sharpless, 50 Fed. 87; Ricks *v.* Craig, 48 Fed. 169; Zan *v.* Quong Sang Lung, 47 Fed. 901; Johnson Co. *v.* Pacific Rolling Mills Co., 47 Fed. 586 [*affirmed* in 51 Fed. 762, 2 C. C. A. 506]; Firman *v.* New Haven Clock Co., 44 Fed. 205; Root *v.* Sioux City Cable R. Co., 42 Fed. 500; Reed *v.* Smith, 40 Fed. 882; Hatch *v.* Towne, 35 Fed. 139; Dodds *v.* Stoddard, 17 Fed. 645; Putnam *v.* Von Hofe, 6 Fed. 897, 19 Blatchf. 63; Decker *v.* Griffith, 7 Fed. Cas. No. 3,725, 2 Ban. & A. 178, 13 Blatchf. 187, 8 Off. Gaz. 944.

21. Richards *v.* Chase Elevator Co., 159 U. S. 477, 16 S. Ct. 53, 40 L. ed. 225; Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576; Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; American Fibre-Chamois Co. *v.* Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Butte City St. R. Co. *v.* Pacific Cable R. Co., 60 Fed. 410, 9 C. C. A. 41.

22. Eclipse Bicycle Co. *v.* Farrow, 16 App. Cas. (D. C.) 468; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514.

23. Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48.

24. Simplex R. Appliance Co. *v.* Wands, 115 Fed. 517, 53 C. C. A. 171; Batten *v.* Clayton, 2 Fed. Cas. No. 1,105; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Davis *v.* Palmer, 7 Fed. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Serrell *v.* Collins, 21 Fed. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [*reversed* on other grounds in 1 Black 427, 17 L. ed. 168].

That question may be submitted to jury where there is parol evidence as to meaning of terms see Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Davoll *v.* Brown, 7 Fed. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

25. Grant *v.* Walter, 148 U. S. 547, 13 S. Ct. 699, 37 L. ed. 552; White *v.* Dunbar, 119 U. S. 47, 7 S. Ct. 72, 30 L. ed. 303; Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. ed. 952; Western Electric Mfg. Co. *v.* Ansonia Brass, etc., Co., 114 U. S. 447, 5 S. Ct. 941, 29 L. ed. 210;

by the claim is disclaimed,[26] and the patentee is bound by limitations contained therein.[27] While terms used must be so construed where possible to sustain the patent and protect the real invention,[28] limitations not stated in a claim will not

Lehigh Valley R. Co. *v.* Mellon, 104 U. S. 112, 26 L. ed. 639; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., 125 Fed. 378, 60 C. C. A. 244; General Fire Extinguisher Co. *v.* Mallers, 110 Fed. 529, 49 C. C. A. 138; Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 90 Fed. 201; Griffith *v.* Shaw, 89 Fed. 313; Kelly *v.* Clow, 89 Fed. 297, 32 C. C. A. 205; New Departure Bell Co. *v.* Corbin, 88 Fed. 901; U. S. Glass Co. *v.* Atlas Glass Co., 88 Fed. 493; Tiemann *v.* Kraatz, 85 Fed. 437, 29 C. C. A. 257; Walder *v.* Ulrich, 83 Fed. 477; Monroe *v.* McGreer, 81 Fed. 954; Olmsted *v.* Andrews, 77 Fed. 835, 23 C. C. A. 488; Thomas *v.* Rocker Spring Co., 77 Fed. 420, 23 C. C. A. 211; Long *v.* Pope Mfg. Co., 75 Fed. 835, 21 C. C. A. 533; Missouri Lamp, etc., Co. *v.* Stempel, 75 Fed. 583; McBride *v.* Kingman, 72 Fed. 908; National Mach. Co. *v.* Wheeler, etc., Mfg. Co., 72 Fed. 185; Kennedy *v.* Solar Refining Co., 69 Fed. 715; Wells *v.* Curtis, 66 Fed. 318, 13 C. C. A. 494; Reece Button-Hole Mach. Co. *v.* Globe Button-Hole Mach. Co., 61 Fed. 958, 10 C. C. A. 194; Stutz *v.* Robson, 54 Fed. 506; Brush Electric Co. *v.* Ft. Wayne Electric Light Co., 40 Fed. 826; Delaware Coal, etc., Co. *v.* Packer, 1 Fed. 851; McMillan *v.* Rees, 1 Fed. 722; Tinker *v.* Wilber Eureka Mower, etc., Mfg. Co., 1 Fed. 138; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Kidd *v.* Spence, 14 Fed. Cas. No. 7,755, 4 Fish. Pat. Cas. 37; Rich *v.* Close, 20 Fed. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

Forms coming within the terms of a claim as well as the form disclosed are included within the claim. National Enameling, etc., Co. *v.* New England Enameling Co., 151 Fed. 19, 80 C. C. A. 485 [*reversing* 139 Fed. 643]; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785; Oehrle *v.* William H. Horstmann Co., 131 Fed. 487; Albright *v.* Langfeld, 131 Fed. 473; Smeeth *v.* Perkins, 125 Fed. 285, 60 C. C. A. 199; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Krajewski *v.* Pharr, 105 Fed. 514, 44 C. C. A. 572; Metallic Extraction Co. *v.* Brown, 104 Fed. 345, 43 C. C. A. 568; U. S. Mitis Co. *v.* Carnegie Steel Co., 89 Fed. 343; American Dunlop Tire Co. *v.* Erie Rubber Co., 66 Fed. 558; Consolidated Bunging Apparatus Co. *v.* Metropolitan Brewing Co., 60 Fed. 93, 8 C. C. A. 485; Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140; Roemer *v.* Neuman, 26 Fed. 102. See *supra*, V, B, 3.

26. Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 652, 51 C. C. A. 362; McBride *v.* Kingman, 97 Fed. 217, 38 C. C. A. 123; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223.

Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself, the failure of the patentee to refer to it is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent. Edison Gen. Electric Co. *v.* Crouse-Hinds Electric Co., 152 Fed. 437, 81 C. C. A. 579 [*reversing* 146 Fed. 539].

Error in reference to prior art.— If a patentee in his specification describes in appropriate language a real invention and properly sets forth his claim to that invention, he is not to be deprived of it merely because he has inadvertently erred in his reference to the prior art. Babcock, etc., Co. *v.* North American Dredging Co., 151 Fed. 265.

27. Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Watson *v.* Cincinnati, etc., R. Co., 132 U. S. 161, 10 S. Ct. 45, 33 L. ed. 295; Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 373, 6 S. Ct. 931, 29 L. ed. 950; Fay *v.* Cordesman, 109 U. S. 408, 3 S. Ct. 236, 27 L. ed. 979; Durfee *v.* Bawo, 118 Fed. 853; Peifer *v.* Brown, 106 Fed. 938; Consolidated Store-Service Co. *v.* Seybold, 105 Fed. 978, 45 C. C. A. 152; Dodge *v.* Ohio Valley Pulley Works, 101 Fed. 581; Starrett *v.* J. Stevens Arms, etc., Co., 100 Fed. 93, 40 C. C. A. 289; Seabury *v.* Johnson, 76 Fed. 456; Muller *v.* Lodge, etc., Mach. Tool Co., 69 Fed. 738 [*affirmed* in 77 Fed. 621, 23 C. C. A. 357]; Pettibone *v.* Stanford, 53 Fed. 118, 3 C. C. A. 469; Celluloid Mfg. Co. *v.* Arlington Mfg. Co., 52 Fed. 740, 3 C. C. A. 269; Williams *v.* Stolzenbach, 23 Fed. 39; Le Fever *v.* Remington, 13 Fed. 86, 21 Blatchf. 80; Fuller *v.* Yentzer, 9 Fed. Cas. No. 5,151, 1 Ban. & A. 520, 6 Biss. 203 [*affirmed* in 94 U. S. 288, 24 L. ed. 103]; Hawes *v.* Gage, 11 Fed. Cas. No. 6,237, 5 Off. Gaz. 494; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1, 1 Pittsb. (Pa.) 31.

A patent cannot be given a construction broader than its terms, in order to cover something which might have been claimed, but was not. Universal Brush Co. *v.* Sonn, 154 Fed. 665, 83 C. C. A. 422 [*reversing* 146 Fed. 517].

Statements of function in claims are binding. Masseth *v.* Larkin, 111 Fed. 409; Thomson Meter Co. *v.* National Meter Co., 106 Fed. 519.

28. Johnson *v.* Willimantic Linen Co., 33 Conn. 436; Miel *v.* Young, 29 App. Cas. (D. C.) 481; Andrews *v.* Nilson, 27 App. Cas. (D. C.) 451; Consolidated Rubber Tire Co. *v.* Firestone Tire, etc., Co., 151 Fed. 237, 80 C. C. A. 589 [*affirming* 147 Fed. 739]; Estabrook *v.* Dunbar, 8 Fed. Cas. No. 4,535, 2 Ban. & A. 427, 10 Off. Gaz. 909; Goodyear Dental Vulcanite Co. *v.* Davis, 10 Fed. Cas. No. 5,589, 3 Ban. & A. 115, 12 Off. Gaz. No. 14 [*affirmed* in 102 U. S. 222, 26 L. ed. 149]; Henderson *v.* Cleveland Co-Operative Store Co., 11 Fed. Cas. No. 6,351, 2 Ban. & A. 604, 12 Off. Gaz. 4. See *supra*, X, A, 2.

be read into a claim for the purpose of making out a case of novelty or infringement.[29]

2. CLAIMS CONSTRUED BY SPECIFICATIONS. The meanings of terms used in the claim are to be determined by reference to the specification,[30] and specific references in the claim to the specification is not necessary in order to warrant its consideration.[31] While specifications may be looked to to determine the meaning of the claim,[32] they cannot change the claim.[33]

A strict construction should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim. Wagner Typewriter Co. *v.* Wyckoff, 151 Fed. 585, 81 C. C. A. 129 [*modifying* 138 Fed. 108].

29. McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. ed. 358; Wollensak *v.* Sargent, 151 U. S. 221, 14 S. Ct. 291, 38 L. ed. 137; Western Electric Mfg. Co. *v.* Ansonia Brass Co., 114 U. S. 447, 5 S. Ct. 941, 29 L. ed. 210; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; Metallic Extraction Co. *v.* Brown, 110 Fed. 665, 49 C. C. A. 147; Santa Clara Valley Mill, etc., Co. *v.* Prescott, 102 Fed. 501, 42 C. C. A. 477; Parsons *v.* Seelye, 100 Fed. 455, 40 C. C. A. 486; Lappin Brake-Shoe Co. *v.* Corning Brake-Shoe Co., 94 Fed. 162; Wilson *v.* McCormick Harvesting Mach. Co., 92 Fed. 167, 34 C. C. A. 280; Western Electric Co. *v.* Citizens' Tel. Co., 89 Fed. 670; Doig *v.* Sutherland, 87 Fed. 991; Stearns *v.* Russell, 85 Fed. 218, 29 C. C. A. 121; Paul Boynton Co. *v.* Morris, 82 Fed. 440 [*affirmed* in 87 Fed. 225, 30 C. C. A. 617]; Royer *v.* Schultz Belting Co., 28 Fed. 850; Roemer *v.* Neumann, 26 Fed. 102; Couse *v.* Johnson, 6 Fed. Cas. No. 3,288, 4 Ban. & A. 501, 16 Off. Gaz. 719. *Compare* Sanders *v.* Hancock, 128 Fed. 424, 63 C. C. A. 166; Canda *v.* Michigan Malleable Iron Co., 123 Fed. 95; Wellman *v.* Midland Steel Co., 106 Fed. 221; Miller *v.* Mawhinney Last Co., 96 Fed. 248.

30. Andrews *v.* Nilson, 27 App. Cas. (D. C.) 451; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; McClain *v.* Ortmeyer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Haines *v.* McLaughlin, 135 U. S. 584, 10 S. Ct. 876, 34 L. ed. 290; Howe Mach. Co. *v.* National Needle Co., 134 U. S. 388, 10 S. Ct. 570, 33 L. ed. 963; Snow *v.* Lake Shore, etc., R. Co., 121 U. S. 617, 7 S. Ct. 1343, 30 L. ed. 1004; White *v.* Dunbar, 119 U. S. 47, 7 S. Ct. 72, 30 L. ed. 303; Yale Lock Co. *v.* Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. ed. 952; Lehigh Valley R. Co. *v.* Mellon, 104 U. S. 112, 26 L. ed. 639; Merrill *v.* Yeomans, 94 U. S. 568, 24 L. ed. 235; Fuller *v.* Yentzer, 94 U. S. 288, 24 L. ed. 103; Hailes *v.* Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Mitchell *v.* Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Turrill *v.* Michigan Southern, etc., R. Co., 1 Wall. (U. S.) 491, 17 L. ed. 668; Robins Conveying Belt Co. *v.* American Road Mach. Co., 145 Fed. 923, 76 C. C. C. 461 [*affirming* 142 Fed. 221]; Stilwell-Bierce, etc., Co. *v.* Enfaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584; Lyons *v.* Drucker, 106 Fed. 416, 45 C. C. A. 368; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 100 Fed. 849; Soehner *v.* Favorite Store, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Gould Coupler Co. *v.* Trojan Car-Coupler Co., 74 Fed. 794, 21 C. C. A. 97; American Fibre-Chamois Co. *v.* Port Huron Fibre-Garment Mfg. Co., 72 Fed. 516, 18 C. C. A. 670; Chemical Rubber Co. *v.* Raymond Rubber Co., 68 Fed. 570; Groth *v.* International Postal Supply Co., 61 Fed. 284, 9 C. C. A. 507; La Rue *v.* Western Electric Co., 28 Fed. 85; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; Evans *v.* Kelly, 13 Fed. 903, 9 Biss. 251; Matthews *v.* Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Holly *v.* Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*; Carter *v.* Messinger, 5 Fed. Cas. No. 2,478, 11 Blatchf. 34; Coffin *v.* Ogden, 6 Fed. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [*affirmed* in 18 Wall. 120, 21 L. ed. 821]; Estabrook *v.* Dunbar, 8 Fed. Cas. No. 4,535, 2 Ban. & A. 427, 10 Off. Gaz. 909; Francis *v.* Mellar, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; King *v.* Gedney, 14 Fed. Cas. No. 7,795, McArthur Pat. Cas. 443; Morris *v.* Barrett, 17 Fed. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Roberts *v.* Dickey, 20 Fed. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 1 Off. Gaz. 4, 4 Brewst. (Pa.) 260; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

Provisional specification cannot be used to enlarge the meaning of the complete specification. Mackelcan *v.* Rennie, 13 C. B. N. S. 52, 106 E. C. L. 52.

31. National Meter Co. *v.* Neptune Meter Co., 122 Fed. 75; Francis *v.* Mellar, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157.

32. Krajewski *v.* Pharr, 105 Fed. 514, 44 C. C. A. 572; Electric Smelting, etc., Co. *v.* Carborundum Co., 102 Fed. 618, 42 C. C. A. 537; Melvin *v.* Potter, 91 Fed. 151; Bennett *v.* Schooley, 75 Fed. 392.

33. Coburn Trolley-Track Mfg. Co. *v.* Chandler, 91 Fed. 260; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Kidd *v.* Horry, 33 Fed. 712 [*affirmed* in 145 U. S. 643, 12 S. Ct. 983, 36

3. EFFECT OF WORDS "SUBSTANTIALLY AS DESCRIBED" IN CLAIM. Such words as "substantially as described" placed at the end of a claim do not have the effect of limiting the claim to precisely what is described and shown,[34] but mean merely that the specification and drawings are to be looked to in determining the meaning and scope of the terms used.[35] The words do limit the claim if necessary to sustain it or to cover the real invention.[36] They are implied in all claims whether they are actually present or not.[37]

4. REFERENCE LETTERS. The use in the claims of letters of reference appearing in the drawing as representing parts of the apparatus is not to be regarded as limiting the claim to the precise form of those parts unless such limitation is necessary in order to make the claim patentable over the prior art.[38]

5. EQUIVALENTS. A patentee is entitled to hold as infringer not merely one who makes or uses a device having the specific elements disclosed and claimed by him, but any one who makes or uses a device having elements which are known equivalents of those claimed.[39] The things, however, must be known equivalents

L. ed. 857]; Railway Register Mfg. Co. *v.* Third Ave. R. Co., 33 Fed. 31 [*affirmed* in 149 U. S. 783, 13 S. Ct. 1051, 37 L. ed. 964]; Becker *v.* Hastings, 22 Fed. 827; McKesson *v.* Carnrick, 9 Fed. 44, 19 Blatchf. 158; Detmold *v.* Reeves, 7 Fed. Cas. No. 3,831, 1 Fish. Pat. Cas. 127.

34. Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586; McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. ed. 358; American Can Co. *v.* Hickmott Asparagus Canning Co., 142 Fed. 141, 73 C. C. A. 359; Boyer *v.* Keller Tool Co., 127 Fed. 130, 62 C. C. A. 244; General Electric Co. *v.* International Specialty Co., 126 Fed. 755, 61 C. C. A. 329; Lowrie *v.* H. A. Meldrum Co., 124 Fed. 761 [*reversed* on other grounds in 130 Fed. 886, 65 C. C. A. 194]; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 289; Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248; Boynton Co. *v.* Morris Chute Co., 87 Fed. 225, 30 C. C. A. 617; Goshen Sweeper Co. *v.* Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 C. C. A. 13; Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581 [*modified* in 63 Fed. 962, 11 C. C. A. 528]; Lorillard *v.* McDowell, 15 Fed. Cas. No. 8,510, 2 Ban. & A. 531, 11 Off. Gaz. 640, 13 Phila. (Pa.) 461.

35. Brown *v.* Davis, 116 U. S. 237, 6 S. Ct. 379, 29 L. ed. 659; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Scott *v.* Fisher Knitting Mach. Co., 139 Fed. 137 [*reversed* on other grounds in 145 Fed. 915, 76 C. C. A. 447]; Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845; Campbell *v.* Richardson, 76 Fed. 976, 22 C. C. A. 669; Columbus Watch Co. *v.* Robbins, 64 Fed. 384, 12 C. C. A. 174; Westinghouse *v.* Edison Electric Light Co., 63 Fed. 588, 11 C. C. A. 342; Bortree *v.* Jackson, 43 Fed. 136; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Knight *v.* Gavit, 14 Fed. Cas. No. 7,884.

36. Schaum *v.* Riehl, 124 Fed. 320; Parsons *v.* Seelye, 92 Fed. 1005; Brill *v.* St. Louis Car Co., 90 Fed. 666, 33 C. C. A. 213; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Davis *v.* Parkman, 71 Fed. 961, 18 C. C. A. 398; Carter Mach. Co. *v.* Hancs, 70 Fed. 859; Boyden Power-Brake Co. *v.* Westinghouse Air-Brake Co., 70 Fed. 816, 17 C. C. A. 430 [*reversed* on other grounds in 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136]; Lee *v.* Pillsbury, 49 Fed. 747; Rapid Service Store R. Co. *v.* Taylor, 43 Fed. 249; Bruce *v.* Marder, 10 Fed. 750, 20 Blatchf. 355; Vance *v.* Campbell, 28 Fed. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [*reversed* on other grounds in 1 Black 427, 17 L. ed. 168].

37. National Meter Co. *v.* Neptune Meter Co., 122 Fed. 75 [*reversed* on other grounds in 127 Fed. 563, 62 C. C. A. 345]; Beach *v.* Hobbs, 82 Fed. 916; Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Metropolitan Wringing-Mach. Co. *v.* Young, 17 Fed. Cas. No. 9,508, 2 Ban. & A. 460, 14 Blatchf. 46; Westinghouse *v.* Gardner, etc., Air-Brake Co., 29 Fed. Cas. No. 17,450, 2 Ban. & A. 55, 9 Off. Gaz. 538.

38. Brunswick-Balke-Collender Co. *v.* Rosatto, 159 Fed. 729; Electric Candy Mach. Co. *v.* Morris, 156 Fed. 972; Kelsey Heating Co. *v.* James Spear Stove, etc., Co., 155 Fed. 976; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Bonnette Arc Lawn Sprinkler Co. *v.* Koehler, 82 Fed. 428, 27 C. C. A. 200; Muller *v.* Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Schreiber, etc., Co. *v.* Grimm, 72 Fed. 671, 19 C. C. A. 67; McCormick Harvesting Mach. Co. *v.* Aultman, 69 Fed. 371, 16 C. C. A. 259; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Brown *v.* Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 C. C. A. 528.

Improvements of narrow character.— The use of letters in a claim to describe a patented invention, which is merely an improvement of a narrow character, will limit the inventor to the elements so designated, as shown in the drawings and specifications to which the letters refer, which are by such reference, in effect, incorporated in the claim. Ross-Moyer Mfg. Co. *v.* Randall, 104 Fed. 355, 43 C. C. A. 578.

39. Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863; Diamond

of each other at the time of the patent.[40] What is regarded as an equivalent depends upon the circumstances of the particular case.[41]

6. PIONEER INVENTIONS.[42] Where the invention is broad and meritorious and makes a radical advance in the art, the field of equivalents is equally broad and the claim will receive a broad and liberal interpretation.[43] A patent original in its character is entitled to a broader construction than one which is for a mere improvement.[44]

7. IMPROVEMENTS. Where the invention is a narrow specific improvement upon prior inventions, the field of equivalents is restricted and the patent must be narrowly construed.[45] One who merely makes and secures a patent for a slight

Match Co. *v.* Ruby Match Co., 127 Fed. 341; Klauder-Weldon Dyeing Mach. Co. *v.* Steadwell Dyeing Mach. Co., 122 Fed. 640 [*affirmed* in 128 Fed. 724, 63 C. C. A. 322]; Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., 104 Fed. 337, 43 C. C. A. 560; Bundy Mfg. Co. *v.* Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Thrall *v.* Poole, 89 Fed. 718; Delemater *v.* Heath, 58 Fed. 414, 7 C. C. A. 279; Rodebaugh *v.* Jackson, 37 Fed. 882; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Corliss *v.* Wheeler, etc., Mfg. Co., 4 Fed. Cas. No. 2,233, 2 Fish. Pat. Cas. 199; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; Murphy *v.* Eastham, 17 Fed. Cas. No. 9,949, 5 Fish. Pat. Cas. 306, Holmes 113, 2 Off. Gaz. 61. And see *infra*, X, B, 6.

Equivalents in process see Schwarzwalder *v.* New York Filter Co., 66 Fed. 152, 13 C. C. A. 380; Bridge *v.* Brown, 4 Fed. Cas. No. 1,857, Holmes 53.

Equivalent ingredients of composition see Blount *v.* Societe Anonyme du Filtre Chamberland Systeme Pasteur, 53 Fed. 98, 3 C. C. A. 455; Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Goodyear *v.* Berry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Matthews *v.* Skates, 16 Fed. Cas. No. 9,291, 1 Fish. Pat. Cas. 602.

40. Folger *v.* Dow Portable Electric Co., 128 Fed. 45 [*affirmed* in 133 Fed. 295, 68 C. C. A. 551]; Severy Process Co. *v.* Harper, 113 Fed. 581; Magic Light Co. *v.* Economy Gas-Lamp Co., 97 Fed. 87, 38 C. C. A. 56; Kelly *v.* Springfield R. Co., 92 Fed. 614, 34 C. C. A. 570; Gerard *v.* Diebold Safe, etc., Co., 61 Fed. 209, 9 C. C. A. 451, 54 Fed. 889, 4 C. C. A. 644; Colgate *v.* Law Tel. Co., 6 Fed. Cas. No. 2,993*a*, 5 Ban. & A. 437; McCormick *v.* Manny, 15 Fed. Cas. No. 8,724, 6 McLean 539 [*affirmed* in 20 How. 402, 15 L. ed. 930].

41. Rich *v.* Baldwin, 133 Fed. 920, 66 C. C. A. 464; Dowagiac Mfg. Co. *v.* Brennan, 118 Fed. 143 [*reversed* on other grounds in 127 Fed. 143, 62 C. C. A. 257]; Adams Co. *v.* Schreiber, etc., Mfg. Co., 111 Fed. 182 [*reversed* on other grounds in 117 Fed. 830, 54 C. C. A. 128]; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Carter Mach. Co. *v.* Hanes, 70 Fed. 859; Erie Rubber Co. *v.* American Dunlop Tire Co., 70 Fed. 58, 16 C. C. A. 632; Pittsburgh Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301; Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 42 Fed. 900; Michaelis *v.* Roessler, 34 Fed. 325; Bridgeport Wood Finishing Co. *v.* Hooper, 5 Fed. 63, 18 Blatchf. 459.

42. The word "pioneer" is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before. Westinghouse *v.* Boyden Power-Brake Co., 170 U. S. 537, 561, 18 S. Ct. 707, 42 L. ed. 1136.

43. Tecktonius *v.* Scott, 110 Wis. 441, 86 N. W. 672; Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136; Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Morley Sewing Mach. Co. *v.* Lancaster, 129 U. S. 263, 9 S. Ct. 299, 32 L. ed. 715; Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. 657; Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 118 Fed. 136, 55 C. C. A. 86; Metallic Extraction Co. *v.* Brown, 104 Fed. 345, 43 C. C. A. 568; Ford *v.* Bancroft, 98 Fed. 309, 39 C. C. A. 91; King Ax Co. *v.* Hubbard, 97 Fed. 795, 38 C. C. A. 423; Penfield *v.* Chambers Bros. Co., 92 Fed. 630, 34 C. C. A. 579; Muller *v.* Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Tuttle *v.* Claflin, 76 Fed. 227, 22 C. C. A. 138; Reminder Lock Co. *v.* Adler, 71 Fed. 183; Bowers *v.* Von Schmidt, 63 Fed. 572; Groth *v.* International Postal Supply Co., 61 Fed. 284, 9 C. C. A. 507; Harmon *v.* Struthers, 57 Fed. 637; Troy Laundry Mach. Co. *v.* Sharp, 54 Fed. 712; Dederick *v.* Seigmund, 51 Fed. 233, 2 C. C. A. 169; Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452; Torrant *v.* Duluth Lumber Co., 30 Fed. 830; May *v.* Fond du Lac, 27 Fed. 691; Standard Measuring Mach. Co. *v.* Teague, 15 Fed. 390; Hammerschlag *v.* Scamoni, 7 Fed. 584; Knapp *v.* Joubert, 7 Fed. 219, 19 Blatchf. 148; Cornell *v.* Downer, etc., Brewing Co., 6 Fed. Cas. No. 3,236, 2 Ban. & A. 514, 7 Biss. 346, 11 Off. Gaz. 331.

44. May *v.* Fond du Lac, 27 Fed. 691.

45. Singer Mfg. Co. *v.* Cramer, 192 U. S. 265, 24 S. Ct. 291, 48 L. ed. 437; Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed.

improvement on an old device or combination, which performed the same functions before as after the improvement, is protected against those only who use the very device or improvement he describes or claims, or mere colorable evasions of it.[46] The term "mechanical equivalent," when applied to a slight and almost immaterial improvement in the progress of an art, has a very narrow and limited meaning.[47]

8. Combination. Every element included in a combination claim must be regarded as material, and therefore the claim covers nothing less than the entire combination.[48]

9. Amendment in Patent Office. Limitations placed in a claim by amendment in response to rejections by the patent office must be regarded as material,

64; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; Chicago, etc., R. Co. *v.* Sayles, 97 U. S. 554, 24 L. ed. 1053; Hardison *v.* Brinkman, 156 Fed. 962; Kenney Mfg. Co. *v.* J. L. Mott Iron Works, 137 Fed. 431; Rich *v.* Baldwin, 133 Fed. 920, 66 C. C. A. 464; Weisgerber *v.* Clowney, 131 Fed. 477; Folger *v.* Dow Portable Electric Co., 128 Fed. 45 [*affirmed* in 133 Fed. 295, 68 C. C. A. 551]; Sander *v.* Rose, 121 Fed. 835, 58 C. C. A. 171; General Fire Extinguisher Co. *v.* Mallers, 110 Fed. 528; Goodyear Shoe Mach. Co. *v.* Spaulding, 110 Fed. 393, 49 C. C. A. 88; Thomas-Houston Electric Co. *v.* Lorain Steel Co., 107 Fed. 711, 46 C. C. A. 593; Davey Pegging Mach. Co. *v.* Prouty, 107 Fed. 505, 46 C. C. A. 439; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Winslow *v.* Bronson, 106 Fed. 178; Kursheedt Mfg. Co. *v.* Naday, 103 Fed. 948; Reineke *v.* Dixon-Woods Co., 102 Fed. 349, 42 C. C. A. 388; Noonan *v.* Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Nutter *v.* Brown, 98 Fed. 892, 39 C. C. A. 332; McBride *v.* Kingman, 97 Fed. 217, 38 C. C. A. 123; Westinghouse Air-Brake Co. *v.* New York Air-Brake Co., 96 Fed. 991, 37 C. C. A. 649; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 96 Fed. 761, 37 C. C. A. 580; Taber Bas-Relief Photograph Co. *v.* Marceau, 87 Fed. 871; MacColl *v.* Crompton Loom Works, 87 Fed. 731 [*affirmed* in 95 Fed. 987]; Hart, etc., Mfg. Co. *v.* Anchor Electric Co., 82 Fed. 911; Norton *v.* Jensen, 81 Fed. 494; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Murphy Mfg. Co. *v.* Excelsior Car-Roof Co., 76 Fed. 965, 22 C. C. A. 658; Edison Electric Light Co. *v.* Electrical Engineering, etc., Co., 72 Fed. 274; Carter Mach. Co. *v.* Hanes, 70 Fed. 859; Wright, etc., Wire-Cloth Co. *v.* Clinton Wire-Cloth Co., 67 Fed. 790, 14 C. C. A. 646; Wells *v.* Curtis, 66 Fed. 318, 13 C. C. A. 494; Stirrat *v.* Excelsior Mfg. Co., 61 Fed. 980, 10 C. C. A. 216; Standard Folding-Bed Co. *v.* Osgood, 51 Fed. 675 [*reversed* on other grounds in 58 Fed. 583, 7 C. C. A. 382]; Jones Co. *v.* Muneger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 C. C. A. 158; Wright *v.* Postel, 44 Fed. 352; Schmid *v.* Scovill Mfg. Co., 37 Fed. 345; Hill *v.* Sawyer, 31 Fed. 282, 24 Blatchf. 430; Hoff *v.* Iron-Clad Mfg. Co., 31 Fed. 45; Johnston Ruffler Co. *v.* Avery Mach. Co., 28 Fed. 193; Osceola Mfg. Co. *v.* Pie, 28 Fed. 83; Tobey Furniture Co. *v.* Colby, 26 Fed. 100; Buzzell *v.* Andrews, 25 Fed. 822; Root *v.* Lamb, 7 Fed. 222; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Fuller *v.* Yentzer, 9 Fed. Cas. No. 5,151, 1 Ban. & A. 520, 6 Biss. 203 [*affirmed* in 94 U. S. 288, 24 L. ed. 103]; Rapp *v.* Bard, 20 Fed. Cas. No. 11,577, 1 Fish. Pat. Cas. 196; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Yuengling *v.* Johnson, 30 Fed. Cas. No. 18,195, 3 Ban. & A. 99, 1 Hughes 607; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 356.

Patentee entitled to reasonable range of equivalents see Levy *v.* Harris, 124 Fed. 69 [*affirmed* in 130 Fed. 711, 65 C. C. A. 113]; McSherry Mfg. Co. *v.* Dowagiac Mfg. Co., 101 Fed. 716, 41 C. C. A. 627; Tatum *v.* Gregory, 41 Fed. 142; Wollensak *v.* Reiher, 28 Fed. 424.

46. Chicago, etc., R. Co. *v.* Sayles, 97 U. S. 554, 24 L. ed. 1053; McCormick *v.* Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Stirrat *v.* Excelsior Mfg. Co., 61 Fed. 980, 10 C. C. A. 216.

47. Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41.

48. Wollensak *v.* Sargent, 151 U. S. 221, 14 S. Ct. 291, 38 L. ed. 137; Snow *v.* Lake Shore, etc., R. Co., 121 U. S. 617, 7 S. Ct. 1343, 30 L ed. 1004; Bragg *v.* Fitch, 121 U. S. 478, 7 S. Ct. 978, 30 L. ed. 1008; Electric R. Signal Co. *v.* Hall R. Signal Co., 114 U. S. 87, 5 S. Ct. 1069, 29 L. ed. 96; Rowell *v.* Lindsay, 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906; Fay *v.* Cordesman, 109 U. S. 408, 3 S. Ct. 236, 27 L. ed. 979; Case *v.* Brown, 2 Wall. (U. S.) 320, 17 L. ed. 817; U. S. Peg Wood, etc., Co. *v.* B. F. Sturtevant, 122 Fed. 476 [*affirmed* in 125 Fed. 382, 60 C. C. A. 248]; Muller *v.* Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Thomson-Houston Electric Co. *v.* Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 C. C. A. 1; Mott Iron-Works Co. *v.* Standard Mfg. Co., 53 Fed. 819, 4 C. C. A. 28; Stewart *v.* Mahoney, 5 Fed. 302; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Parham *v.* American Buttonhole, etc., Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 478; Prouty *v.* Draper, 20 Fed. Cas. No. 11,446, 2 Rapp Pat. Cas. 75, 1 Story 568 [*affirmed* in 16 Pet. 336, 10 L. ed. 985]. And see *infra*, XIII, A, 5.

and therefore the claim cannot be given the meaning which it would have had without amendment.[49] The rule applies to cases in which the original claim is narrower than the patent as well as to cases in which it is broader.[50] So it applies, although the objections to the claim were unfounded and the limitation unnecessary.[51] Mere formal amendments, however, will not limit the patent;[52] and in any event the patent will not be limited by the amendment beyond what is necessary,[53] nor construed as a disclaimer of the patentee's actual invention, if

49. Hubbell *v.* U. S., 179 U. S. 86, 21 S. Ct. 28, 45 L. ed. 100; McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. ed. 358; Lehigh Valley R. Co. *v.* Kearney, 158 U. S. 461, 15 S. Ct. 871, 39 L. ed. 1055; Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. ed. 500; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; Royer *v.* Coupe, 146 U. S. 524, 13 S. Ct. 166, 36 L. ed. 1073; Phœnix Caster Co. *v.* Spiegel, 133 U. S. 360, 10 S. Ct. 409, 33 L. ed. 663; McCormick *v.* Whitmer, 129 U. S. 1, 9 S. Ct. 213, 32 L. ed. 593; Crawford *v.* Heysinger, 128 U. S. 589, 8 S. Ct. 399, 31 L. ed. 269; Sutter *v.* Robinson, 119 U. S. 530, 7 S. Ct. 376, 30 L. ed. 492; Shepard *v.* Carrigan, 116 U. S. 593, 6 S. Ct. 493, 29 L. ed. 723; Sargent *v.* Hall Safe, etc., Co., 114 U. S. 63, 5 S. Ct. 1021, 29 L. ed. 67; American Stove Co. *v.* Cleveland Foundry Co., 158 Fed. 978; St. Louis St. Flushing Mach. Co. *v.* American St. Flushing Mach. Co., 156 Fed. 574, 84 C. C. A. 340; Good Form Mfg. Co. *v.* White, 153 Fed. 759; Greene *v.* Buckley, 135 Fed. 520, 68 C. C. A. 70; Hale *v.* World Mfg. Co., 127 Fed. 964, 62 C. C. A. 596; Ludington Novelty Co. *v.* Leonard, 119 Fed. 937 [*affirmed* in 127 Fed. 155, 62 C. C. A. 269]; General Fire Extinguisher Co. *v.* Mallers, 110 Fed. 528; Millard *v.* Chase, 108 Fed. 399, 47 C. C. A. 429; Reineke *v.* Dixon-Woods Co., 102 Fed. 349, 42 C. C. A. 388; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 101 Fed. 282, 41 C. C. A. 351; National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 99 Fed. 758; Anthony *v.* Gennert, 99 Fed. 95; Irwin *v.* Hasselman, 97 Fed. 964, 38 C. C. A. 587; Coburn Trolley-Track Mfg. Co. *v.* Chandler, 97 Fed. 333, 38 C. C. A. 201; Magic Light Co. *v.* Economy Gas-Lamp Co., 97 Fed. 87, 38 C. C. A. 56; Norton *v.* Jensen, 90 Fed. 415, 33 C. C. A. 141; Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721 [*reversed* on other grounds in 96 Fed. 850, 37 C. C. A. 593]; Griffith *v.* Shaw, 89 Fed. 313; Kelly *v.* Clow, 89 Fed. 297, 32 C. C. A. 205; Perkins Electric Switch Mfg. Co. *v.* Gibbs Electric Mfg. Co., 87 Fed. 922; Stearns *v.* Russell, 85 Fed. 218, 29 C. C. A. 121; Olmsted *v.* Andrews, 77 Fed. 835, 23 C. C. A. 488; Wheaton *v.* Norton, 70 Fed. 833, 17 C. C. A. 447; Kennedy *v.* Solar Refining Co., 69 Fed. 715; Reece Button-Hole Mach. Co. *v.* Globe Button-Hole Mach. Co., 61 Fed. 958, 10 C. C. A. 194; McCormack Harvesting Mach. Co. *v.* Aultman, 58 Fed. 773; Temple Pump Co. *v.* Goss Pump, etc., Mfg. Co., 58 Fed. 196, 7 C. C. A. 174; Merritt *v.* Middleton, 55 Fed. 976 [*affirmed* in 61 Fed. 680, 10 C. C. A. 10]; Mott Iron-Works Co. *v.* Standard Mfg. Co., 53 Fed. 819, 4 C. C. A. 28; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 52 Fed. 471; Douglas *v.* Abraham, 50 Fed. 420; Shaw Stocking Co. *v.* Pearson, 48 Fed. 234; Falls Rivet Co. *v.* Wolfe, 40 Fed. 465; Brahn *v.* Ramapo Iron-Works, 35 Fed. 63; Romer *v.* Peddie, 27 Fed. 702; New York Belting, etc., Co. *v.* Sibley, 15 Fed. 386. And see *supra*, X, A, 5.

Qualification of acquiescence.— The applicant cannot qualify the effect of acquiescence by statements. Norton *v.* Jensen, 81 Fed. 494; Thomas *v.* Rocker Spring Co., 77 Fed. 420, 23 C. C. A. 211.

Liberal construction of claim as granted.— While it is settled law that a patentee who has acquiesced in the rejection of a broad claim by substituting a narrower one cannot insist upon a construction of the latter to cover that which was rejected, yet such rule does not debar him from a liberal construction of the claim as granted, nor from the benefit of the doctrine of equivalents. Heywood Bros., etc., Co. *v.* Syracuse Rapid Transit R. Co., 152 Fed. 453.

Amendments as to incidental matters.— If there was no amendment narrowing a claim of a patent in respect to the essential feature of the invention disclosed therein, amendments made in reference to an incidental matter intended to perfect the claim or device impose no restriction on the rights of the patentee in respect to equivalents. Heywood Bros., etc., Co. *v.* Syracuse Rapid Transit R. Co., 152 Fed. 453.

50. Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. ed. 500.

51. Safety Oiler Co. *v.* Scovill Mfg. Co., 110 Fed. 203; Brill *v.* St. Louis Car Co., 90 Fed. 666, 33 C. C. A. 213; Truman *v.* Deere Implement Co., 80 Fed. 109; Smith *v.* Macbeth, 67 Fed. 137, 14 C. C. A. 241; Ball, etc., Fastener Co. *v.* Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498; Reece Buttonhole Mach. Co. *v.* Globe Buttonhole Mach. Co., 54 Fed. 884 [*reversed* on other grounds in 61 Fed. 958, 10 C. C. A. 194]; Blades *v.* Rand, 27 Fed. 93 [*affirmed* in 136 U. S. 631, 10 S. Ct. 1065, 34 L. ed. 553].

52. Welsbach Light Co. *v.* Cremo Incandescent Light Co., 145 Fed. 521 [*affirmed* in 151 Fed. 1023, 81 C. C. A. 683]; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 282 [*reversed* on other grounds in 123 Fed. 882, 59 C. C. A. 370]; Babcock *v.* Clarkson, 58 Fed. 581; Bunt Bros. Fruit-Packing Co. *v.* Cassidy, 53 Fed. 257, 3 C. C. A. 525; Brush Electric Co. *v.* Electric Imp. Co., 52 Fed. 965.

53. Eck *v.* Kutz, 132 Fed. 758; National Hollow Brake-Beam Co. *v.* Interchangeable

such construction can be avoided without doing violence to the obvious meaning of the language used.[54]

10. Separate Claims Distinguished. The several claims of a patent must be so construed where possible as to give them different meanings.[55]

11. Designs. Design patents govern not merely the identical design disclosed, but such as so nearly resemble it in appearance as to deceive ordinary observers.[56] The ordinary principles of construction apply.[57]

XI. TITLE, CONVEYANCES, AND CONTRACTS.[58]

A. Assignments and Other Transfers[59] — **1. In General — a. Assignability.** Under express statutory provisions patents and interests therein are assignable.[60]

b. Who May Assign[61] — (I) *In General.* The patentee, his assigns or legal representatives, may transfer interests in or rights under the patent.[62]

(II) *Joint Owners.*[63] Where two or more parties own a patent jointly, either may make, use, and sell the invention, or grant to others the right to do so, and this is true without regard to the proportionate interest which the parties own.[64]

Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Bundy Mfg. Co. *v.* Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Heap *v.* Greene, 91 Fed. 792, 34 C. C. A. 86; Westinghouse *v.* Boyden Power-Brake Co., 66 Fed. 997; Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 25.

54. Lake Shore, etc., R. Co. *v.* National Car-Brake Shoe Co., 110 U. S. 229, 4 S. Ct. 33, 28 L. ed. 129; Westinghouse *v.* Boyden Power-Brake Co., 66 Fed. 997; Reece Button-Hole Mach. Co. *v.* Globe Button-Hole Mach. Co., 61 Fed. 958, 10 C. C. A. 194.

55. Ruete *v.* Elwell, 15 App. Cas. (D. C.) 21; Diamond Match Co. *v.* Ruby Match Co., 127 Fed. 341; Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 110 Fed. 647; Anderson Foundry, etc., Works *v.* Potts, 108 Fed. 379, 47 C. C. A. 409; Bresnahan *v.* Tripp Giant Leveller Co., 102 Fed. 899, 43 C. C. A. 48; Page Woven Wire Fence Co. *v.* Land, 49 Fed. 936; Tondeur *v.* Stewart, 28 Fed. 561; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477.

Co-pending applications covering other developments will not limit claims. Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. 785.

Later patent for one form may indicate intended scope of claims in first. McCormick Harvesting Mach. Co. *v.* Aultman, 58 Fed. 773.

56. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70.

Mechanical constructions are not covered by design patents. Royal Metal Mfg. Co. *v.* Art Metal Works, 121 Fed. 128 [*affirmed* in 130 Fed. 778, 66 C. C. A. 88].

Limited to particular design shown. — Design patents cannot be enlarged by the specification but are limited to the particular design shown in the drawings filed. Frank *v.* Hess, 84 Fed. 170.

Changes of color are immaterial. Whittall *v.* Lowell Mfg. Co., 79 Fed. 787.

57. U. S. Rev. St. (1878) § 4933 [U. S. Comp. St. (1901) p. 3399]; Northrup *v.* Adams, 18 Fed. Cas. No. 10,328, 2 Ban. & A. 567, 12 Off. Gaz. 430; *In re* Mygatt, 12 Off. Gaz. 51.

58. See *supra*, I, A, 5.

Regulation of dealings in patent rights and patented articles see *infra*, XII.

Subject to: Creditors' suits see Creditors' Suits, 12 Cyc. 31. Execution see Executions, 17 Cyc. 943.

59. Insolvency see Insolvency, 22 Cyc. 1281.

60. U. S. Rev. St. (1878) § 4898; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92, holding that all interests in patents are assignable in writing.

Sale of patent right and of article made under patent are distinguished in Burns *v.* Sparks, 82 S. W. 425, 26 Ky. L. Rep. 688.

61. Agent's power to assign see Principal and Agent.

62. U. S. Rev. St. (1878) § 4898.

An administrator or executor may assign. Donoughe *v.* Hubbard, 27 Fed. 742; Elwood *v.* Christy, 17 C. B. N. S. 754, 10 Jur. N. S. 1079, 34 L. J. C. P. 130, 11 L. T. Rep. N. S. 342, 13 Wkly. Rep. 54, 112 E. C. L. 754.

One of two administrators may assign. Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

Assignment by person of unsound mind is void. Colburn *v.* Van Velzer, 11 Fed. 795, 3 McCrary 650. See, generally, Insane Persons, 22 Cyc. 1194.

Husband and wife may make transfers as if strangers. Armitage *v.* Mace, 96 N. Y. 538; Adams *v.* Adams, 91 N. Y. 381, 43 Am. Rep. 675; Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923.

The ability of a married woman to make the instrument of assignment must be found in state laws. Fetter *v.* Newhall, 17 Fed. 841, 21 Blatchf. 445. See, generally, Husband and Wife, 21 Cyc. 1310 *et seq.*

63. Who entitled to royalties see *infra*, XI, B, 3, a, (III).

64. Gates *v.* Fraser, 9 Ill. App. 624 [*affirmed* in 118 Ill. 99, 1 N. E. 817]; Lalance, etc., Mfg. Co. *v.* National Enameling, etc.,

But a part owner of a patent has no right to use an infringing device. If he does he is liable to his coöwner for the wrong done.[65] A coöwner cannot maintain a suit for infringement against the grantee.[66] Nor can one joint owner be held accountable to his coöwners for any part of the profits he may make from the manufacture and sale or use of the patented article.[67] The rights of the coöwners may, however, be limited by an express contract.[68]

2. Agreements to Assign[69] — a. In General. An agreement to assign a patent is an executory contract which may be enforced in a court of equity.[70] The agreement to assign may be oral, such an agreement not being within the statute of frauds, nor within section 4898 of the Revised Statutes requiring assignments of patents to be in writing.[71] Specific performance of such an agreement will, however, be refused where the patent is void.[72]

b. Future Patents. An agreement to assign patents not yet secured may be enforced if it is sufficiently definite as to the subject-matter. If the parties intend to contract for future inventions, language plainly expressing such a purpose must be used.[73] An assignment of a patent with future improvements

Co., 108 Fed. 77; Levy *v.* Dattlebaum, 63 Fed. 992; Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 697; Clum *v.* Brewer, 5 Fed. Cas. No. 2,900, 2 Curt. 506; Dunham *v.* Indianapolis, etc., R. Co., 8 Fed. Cas. No. 4,151, 2 Ban. & A. 327, 7 Biss. 223; May *v.* Chaffee, 16 Fed. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160. See also Paulus *v.* M. M. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162. *Contra*, Pitts *v.* Hall, 19 Fed. Cas. No. 11,193, 3 Blatchf. 201. One of two complainants cannot pending suit make an assignment to or license defendant and thus defeat suit. Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 93 Fed. 197, 107 Fed. 487.

English practice.— Either joint owner may use and must account only for royalties received. Stears *v.* Rogers, [1892] 2 Ch. 13, 61 L. J. Ch. 676, 66 L. T. Rep. N. S. 502 [*affirmed* in [1893] A. C. 232, 62 L. J. Ch. 671, 68 L. T. Rep. N. S. 726, 1 Reports 173]; Mathers *v.* Green, L. R. 1 Ch. 29, 11 Jur. N. S. 845, 35 L. J. Ch. 1, 13 L. T. Rep. N. S. 420, 5 New Rep. 358, 14 Wkly. Rep. 17; Hancock *v.* Bewley, Johns. 601, 70 Eng. Reprint 559; Lovell *v.* Hicks, 6 L. J. Exch. 85, 2 Y. & C. Exch. 481; Heyl-Dia *v.* Edmunds, 81 L. T. Rep. N. S. 579, 48 Wkly. Rep. 167. Joint owners are partners. Lovell *v.* Hicks, 6 L. J. Exch. 85, 2 Y. & C. Exch. 481. See Lovell *v.* Hicks, 5 L. J. Exch. 101, 2 Y. & C. Exch. 46.

65. Herring *v.* Gas Consumers' Assoc., 9 Fed. 556, 3 McCrary 206.

66. Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 108 Fed. 77; Pusey, etc., Co. *v.* Miller, 61 Fed. 401.

67. Vose *v.* Singer, 4 Allen (Mass.) 226, 81 Am. Dec. 696; De Witt *v.* Elmira Nobles Mfg. Co., 5 Hun (N. Y.) 301 [*affirmed* in 66 N. Y. 459, 23 Am. Rep. 73]; Blackledge *v.* Weir, etc., Mfg. Co., 108 Fed. 71, 47 C. C. A. 212. But see Pusey, etc., Co. *v.* Miller, 61 Fed. 401; Curran *v.* Burdsall, 20 Fed. 835; Herring *v.* Gas Consumers' Assoc., 9 Fed. 556, 3 McCrary 206.

68. Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 108 Fed. 77.

69. Assignment of invention or right to patent see *infra*, XI, A, 2, b.

70. Birkery Mfg. Co. *v.* Jones, 71 Conn. 113, 40 Atl. 917; Bates Mach. Co. *v.* Bates, 192 Ill. 138, 61 N. E. 518; Wheeler *v.* Fishell, 32 Ill. App. 343; Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Thourot *v.* Holub, 81 N. Y. App. Div. 634, 80 N. Y. Suppl. 1083; Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Ball, etc., Fastener Co. *v.* Patent Button Co., 136 Fed. 272; Day *v.* Candee, 7 Fed. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Pitts *v.* Hall, 19 Fed. Cas. No. 11,193, 3 Blatchf. 201; Hill *v.* Mount, 18 C. B. 72, 25 L. J. C. P. 190, 4 Wkly. Rep. 563, 86 E. C. L. 72; National Soc., etc. *v.* Gibbs, [1900] 2 Ch. 280, 69 L. J. Ch. 457, 82 L. T. Rep. N. S. 443, 48 Wkly. Rep. 499.

An agreement by an employee to assign improvements to his employer is binding. Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180.

71. Whitney *v.* Burr, 115 Ill. 289, 3 N. E. 434; Searle *v.* Hill, 73 Iowa 367, 35 N. W. 490, 5 Am. St. Rep. 688; Spears *v.* Willis, 151 N. Y. 443, 43 N. E. 849; Jones *v.* Reynolds, 120 N. Y. 213, 24 N. E. 279; Blakeney *v.* Goode, 30 Ohio St. 350; Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444 [*affirmed* in 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. N. S. 1172]; Cook *v.* Sterling Electric Co., 118 Fed. 45; Dalgleish *v.* Conboy, 26 U. C. C. P. 254.

72. Wheeler *v.* Fishell, 32 Ill. App. 343; Watson *v.* Deeds, 3 Ind. App. 75, 29 N. E. 151; Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Hammond *v.* Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767; Cowles Electric Smelting, etc., Co. *v.* Lowrey, 79 Fed. 331, 24 C. C. A. 616; Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368; Kelly *v.* Porter, 17 Fed. 519, 8 Sawy. 482; Clum *v.* Brewer, 5 Fed. Cas. No. 2,909, 2 Curt. 509; Herbert *v.* Adams, 12 Fed. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505.

73. Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029; Jones *v.* Reynolds, 120 N. Y. 213, 24 N. E. 279; Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St.

passes only improvements on the particular machine secured by the patent and not unrelated inventions.[74] An agreement to assign all future inventions cannot be enforced.[75] An instrument of transfer identifying the invention and requesting the commissioner of patents to issue the patent to the assignee therein operates as an absolute assignment.[76] If the assignment contains no request that the patent issue in the name of the assignee, his title is equitable merely.[77]

c. Recording. The law does not require that agreements to assign patents be recorded, and therefore their record is not constructive notice.[78]

d. Actions. An agreement to assign may be enforced by suit in equity to compel specific performance,[79] and if the patentee has parted with title and is unable to carry out his contract damages may be recovered.[80]

Rep. 740; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Nilsson *v.* De Haven, 47 N. Y. App. Div. 537, 62 N. Y. Suppl. 506; Maurice *v.* Devol, 23 W. Va. 247; Gill *v.* U. S., 160 U. S. 426, 16 S. Ct. 322, 40 L. ed. 480; Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; De la Vergne Refrigerating Mach. Co. *v.* Featherston, 147 U. S. 219, 13 S. Ct. 283, 37 L. ed. 138; Solomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667; Ambler *v.* Whipple, 20 Wall. (U. S.) 546, 22 L. ed. 403; Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Shaw *v.* Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Reece Folding Mach. Co. *v.* Fenwick, 140 Fed. 287, 72 C. C. A. 39, 2 L. R. A. N. S. 1094; Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 49 Fed. 68, 1 C. C. A. 169; Emmons *v.* Sladdin, 8 Fed. Cas. No. 4,470, 2 Ban. & A. 199, 9 Off. Gaz. 352; Maxim Nordenfelt Guns, etc., Co. *v.* Nordenfelt, [1893] 1 Ch. 630, 62 L. J. Ch. 273, 68 L. T. Rep. N. S. 833, 41 Wkly. Rep. 604; Bewley *v.* Hancock, 6 De G. M. & G. 391, 2 Jur. N. S. 289, 4 Wkly. Rep. 334, 55 Eng. Ch. 305, 43 Eng. Reprint 1285; Knowles *v.* Bovill, 22 L. T. Rep. N. S. 70; Watson *v.* Harris, 31 Ont. 134. See Davis, etc., Temperature Controlling Co. *v.* Tagliabue, 159 Fed. 712.

It is an executory contract and not an actual transfer. Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 49 Fed. 68, 1 C. C. A. 169.

Agreement not contrary to public policy see Printing, etc., Co. *v.* Sampson, L. R. 19 Eq. 462, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463, 44 L. J. Ch. 705.

Refusal of one party to carry out the agreement releases the other from all liability thereunder. Buck *v.* Timony, 79 Fed. 487 [*affirmed* in 84 Fed. 887, 28 C. C. A. 561].

A contract for the sale of improvements includes only those already made unless the contrary is expressed. Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247; Lamson *v.* Martin, 159 Mass. 557, 35 N. E. 78.

74. Bates Mach. Co. *v.* Bates, 192 Ill. 138 61 N. E. 518; McFarland *v.* Stanton Mfg. Co., 53 N. J. Eq. 649, 33 Atl. 962, 51 Am. St. Rep. 647 [*affirming* (Ch. 1895) 30 Atl. 1058]; Allison *v.* Allison, 144 N. Y. 21, 38 N. E. 956; May *v.* Page, 60 N. Y. 628; Bessemer Steel Co. *v.* Reese, 122 Pa. St. 392, 15 Atl. 807; Frick Co. *v.* Geiser Mfg. Co., 100 Fed. 94, 40 C. C. A. 291; Independent Electric Co. *v.* Jeffrey, 76 Fed. 981; Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 49 Fed. 68, 1 C. C. A. 169; Aspinwall *v.* Gill, 32 Fed. 697 [*affirmed* in 140 U. S. 669, 11 S. Ct. 1015, 35 L. ed. 597]; Bunker *v.* Stevens, 26 Fed. 245; Nesmith *v.* Calvert, 18 Fed. Cas. No. 10,123, 2 Robb Pat. Cas. 311, 1 Woodb. & M. 34; Watson *v.* Harris, 31 Ont. 134.

The contract will not be enforced where the invention as patented is different.— Bingham *v.* McMurray, 30 Can. Sup. Ct. 159.

75. Bates Mach. Co. *v.* Bates, 87 Ill. App. 225 [*affirmed* in 192 Ill. 138, 61 N. E. 518].

76. Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99; Johnson *v.* Wilcox, etc., Sewing Mach. Co., 27 Fed. 689, 23 Blatchf. 531; Wright *v.* Randel, 8 Fed. 591, 19 Blatchf. 495; Gay *v.* Cornell, 10 Fed. Cas. No. 5,280. 1 Blatchf. 506, Fish. Pat. Rep. 312; Rathbone *v.* Orr, 20 Fed. Cas. No. 11,585, Fish. Pat. Rep. 355, 5 McLean 131.

Assignment of provisional protection gives an equitable title only. E. M. Powden's Patents Syndicate *v.* Smith, [1904] 2 Ch. 86, 73 L. J. Ch. 522, 52 Wkly. Rep. 630.

77. Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99; Wright *v.* Randel, 8 Fed. 591, 19 Blatchf. 495.

Title vests in the assignee, although patent issues in the name of assignor.— Consolidated Electric Light Co. *v.* Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412; U. S. Stamping Co. *v.* Jewett, 7 Fed. 869, 18 Blatchf. 469.

78. **English practice.**— Equitable assignment may be recorded but statute refers only to legal transfers. *In re* Casey, [1892] 1 Ch. 104, 61 L. J. Ch. 61, 66 L. T. Rep. N. S. 93, 40 Wkly. Rep. 180 [*affirming* 65 L. T. Rep. N. S. 40].

79. See *supra*, XI, A, 2, a. See also Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Thourot *v.* Holub, 80 N. Y. Suppl. 1083; Cogent *v.* Gibson, 33 Beav. 557, 55 Eng. Reprint 485; Powell *v.* Peck, 11 Can. Sup. Ct. 494 [*affirming* 8 Ont. App. 498, and *reversing* 26 Grant Ch. (U. C.) 322]; Dalgleish *v.* Conboy, 26 U. C. C. P. 254.

80. See *infra*, XI, B, 5, d, (II), (B). See also Barret *v.* Verdery, 93 Ga. 526, 21 S. E.

3. Requisites and Validity — a. In General. The monopoly granted by the patent laws is one entire thing, and cannot be divided into parts except as authorized by law.[81] A patentee or his assigns may by instrument in writing assign, grant, and convey, either: (1) The whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States.[82] A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself.[83] Any assignment or transfer short of one of these is a mere license giving the licensee no title in the patent.[84] Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions.[85] Such an assignment may be either absolute, or by way of mortgage, and liable to be defeated by non-performance of a condition subsequent.[86]

b. Form and Contents. The assignment of a patent must be an assignment in writing signed by the patentee, his assigns or legal representatives,[87] and like

64; Lord *v.* Owen, 35 Ill. App. 382; Ft. Wayne, etc., R. Co. *v.* Haberkorn, 15 Ind. App. 479, 44 N. E. 322; Kirschmann *v.* Lediard, 61 Barb. (N. Y.) 573.

81. Pope Mfg. Co. *v.* Gormully, etc., Mfg. Co., 144 U. S. 238, 12 S. Ct. 637, 36 L. ed. 419; Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923.

The subject-matter of a patent is not partible except in respect to territorial assignment. Suydam *v.* Day, 23 Fed. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. Rep. 88.

In England part of a patent may be assigned and the assignee may sue as to that part. Walton *v.* Lavater, 8 C. B. N. S. 162, 6 Jur. N. S. 1251, 29 L. J. C. P. 275, 2 L. T. Rep. N. S. 272, 98 E. C. L. 162; Dunnicliff *v.* Mallet, 7 C. B. N. S. 209, 6 Jur. N. S. 252, 29 L. J. C. P. 70, 1 L. T. Rep. N. S. 514, 8 Wkly. Rep. 260, 97 E. C. L. 209.

82. U. S. Rev. St. (1878) § 4898. See also Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Paulus *v.* M. M. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162; Parker *v.* Haworth, 18 Fed. Cas. No. 10,738, 2 Robb Pat. Cas. 725, 4 McLean 370; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327.

83. Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923.

84. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394].

Reservation of part of the right in the territory referred to makes the instrument a license, and not an assignment. Tuttle *v.* La Dow, 54 Hun (N. Y.) 149, 7 N. Y. Suppl. 277; Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Hatfield *v.* Smith, C. D. 1891, 330; Rice *v.* Boss, C. D. 1891, 400; C. D. 1891, 457. See also *infra*, XI, B, 1, a.

85. Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923.

Assignment and license defined and distinguished.— Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404; Salomons *v.* U. S., 137 U. S. 342, 11 S. Ct. 88, 34 L. ed. 667; Laver *v.* Dennett, 109 U. S. 90, 3 S. Ct. 73, 27 L. ed. 867; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 862; Hayward *v.* Andrews, 108 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271; Burdell *v.* Denig, 92 U. S. 716, 23 L. ed. 764; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Adams *v.* Burks, 17 Wall. (U. S.) 453, 21 L. ed. 700; Nicholson Pavement Co. *v.* Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Heaton Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 78 Off. Gaz. 171, 35 L. R. A. 267; Anderson *v.* Eiler, 50 Fed. 775, 1 C. C. A. 659.

Reservation of mill right will not prevent legal transfer. Russell *v.* Kern, 58 Fed. 382.

Reservation of right to manufacture does not prevent transfer. Hamilton *v.* Kingsbury, 11 Fed. Cas. No. 5,984, 2 Ban. & A. 346, 15 Blatchf. 64, 14 Off. Gaz. 448.

86. U. S. Rev. St. (1878) § 4898.

Mortgage constitutes transfer of legal title. — Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; Moore *v.* Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Paper Bag Cases, C. D. 1882, 197; Littlefield *v.* Perry, 7 Off. Gaz. 964.

An assignment in trust carries the legal title. Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42, 18 Off. Gaz. 979.

87. U. S. Rev. St. (1878) § 4898. See also Jewett *v.* Atwood Suspender Co., 100 Fed. 647; Baldwin *v.* Sibley, 2 Fed. Cas. No. 805, 1 Cliff. 150; Newton *v.* Buck, 75 Off. Gaz. 673; Duvergier *v.* Fellows, 10 B. & C. 826, 8 L. J. K. B. O. S. 270, 2 M. & P. 384, 21 E. C. L. 346 [*affirmed* in 1 Cl. & F. 39, 6 Eng. Reprint 831]; Dalglcish *v.* Conboy, 26 U. C. C. P. 254.

any deed must be free from ambiguity;[88] but no particular form of written instrument is required.[89] An instrument worded as a mere license may, on account of the actual interest conveyed, amount to an assignment.[90]

c. Validity. The validity of an assignment of a patent is determined by the same considerations as apply to other deeds and contracts.[91]

4. Recording[92] — a. In General. By statute, an assignment, grant, or conveyance must be recorded in the patent office within three months, or it will be void as against any subsequent purchaser without notice.[93] Within that period, the

Consent in writing to transfer by another is valid. Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

88. Dudley *v.* Suddoth, 91 Ala. 349, 8 So. 873; Hill *v.* Thuermer, 13 Ind. 351; Harmon *v.* Bird, 22 Wend. (N. Y.) 113; Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65; Clark *v.* Scott, 5 Fed. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245, 2 Off. Gaz. 4; United Nickel Co. *v.* American Nickel-Plating Works, 24 Fed. Cas. No. 14,405, 4 Ban. & A. 74.

Mistake in name of the invention transferred is not vital. Holden *v.* Curtis, 2 N. H. 61; Case *v.* Morey, 1 N. H. 347.

Designation of assignee by last name only is sufficient where his identity is certain. Fisk *v.* Hollander, MacArthur & M. (D. C.) 355.

Assignment to a person named "et al." is valid. Bliss *v.* Reed, 102 Fed. 903 [*affirmed* in 106 Fed. 314, 45 C. C. A. 304].

89. Canda *v.* Michigan Malleable Iron Co., 123 Fed. 95 [*modified* in 124 Fed. 436]; D. M. Sechler Carriage Co. *v.* Deere, etc., Co., 113 Fed. 285, 51 C. C. A. 242; Piaget Novelty Co. *v.* Headley, 107 Fed. 134 [*affirmed* in 108 Fed. 870, 48 C. C. A. 116]; Jonathan Mills Mfg. Co. *v.* Whitehurst, 56 Fed. 589; Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 49 Fed. 68, 1 C. C. A. 169; Lowry *v.* Cowles Electric Co., C. D. 1893, 549.

A general transfer of property carries patents. Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64 [*affirmed* in 160 Fed. 928]; Schaum *v.* Baker, 21 Fed. Cas. No. 12,440.

90. Douglass *v.* Campbell, 24 Ohio Cir. Ct. 241; Union Switch, etc., Co. *v.* Johnson R. Signal Co., 61 Fed. 940, 10 C. C. A. 176 [*reversing* 59 Fed. 20]; Ritter *v.* Serrell, 20 Fed. Cas. No. 11,866, 2 Blatchf. 379; Lowry *v.* Cowles Electric Co., C. D. 1893, 549; Rapp *v.* Killing, C. D. 1890, 483.

91. Nicholson Pavement Co. *v.* Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Kansas City Hay-Press Co. *v.* Devol, 72 Fed. 717 [*reversed* on other grounds in 81 Fed. 726, 26 C. C. A. 578]; National Folding Box, etc., Co. *v.* American Paper Pail, etc., Co., 55 Fed. 488; Gibson *v.* Cook, 10 Fed. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. Rep. 415.

Lack of consideration invalidates the assignment of a patent. Cowles *v.* Rochester Folding Box Co., 81 N. Y. App. Div. 414, 80 N. Y. Suppl. 811 [*affirmed* in 179 N. Y. 87, 71 N. E. 468].

An assignment by a person of unsound mind is void. Colburn *v.* Van Velzer, 11 Fed. 795, 3 McCrary 650.

Assignment void for fraud see Goldsmith *v.* Koopman, 140 Fed. 618.

Misrepresentations.— Misrepresentations by a vendor of a patent right entitle the vendee to rescind where they amount to an untrue statement of some present fact (Bell *v.* Felt, 102 Ill. App. 218; Lederer *v.* Yule, 67 N. J. Eq. 65, 57 Atl. 309; Lindsay *v.* Roraback, 57 N. C. 124; Hull *v.* Fields, 76 Va. 594); but a mere promise or prediction is not sufficient (Lederer *v.* Yule, *supra*), and misrepresentations amounting to mere "trade talk" will not vitiate a sale (Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 563).

Where the whole transaction is founded upon a mistake of fact, the sale is void. Burrall *v.* Jewett, 2 Paige (N. Y.) 134.

92. **Agreement for assignment** see *supra*, XI, A, 2, c.

Assignment of license see *infra*, XI, B, 1, f.

Record as evidence see *infra*, XIII, C, 14, h.

93. U. S. Rev. St. (1878) § 4898.

Purchaser may rely on record see Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734; Paulus *v.* M. M. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162; Secombe *v.* Campbell, 2 Fed. 357, 18 Blatchf. 108; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92; Boyd *v.* McAlpin, 3 Fed. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277; Newell *v.* West, 18 Fed. Cas. No. 10,150, 2 Ban. & A. 113, 13 Blatchf. 114, 9 Off. Gaz. 1110, 8 Off. Gaz. 598.

Record within three months fixes title see Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 697 [*affirmed* in 140 U. S. 669, 11 S. Ct. 1015, 35 L. ed. 597].

English practice.—Assignee cannot sue until the deed is recorded. Chollet *v.* Hoffman, 7 E. & B. 686, 3 Jur. N. S. 935, 26 L. J. Q. B. 249, 5 Wkly. Rep. 573, 90 E. C. L. 686. Assignment is good against the assignor, although not recorded. Hassall *v.* Wright, L. R. 10 Eq. 509, 40 L. J. Ch. 145, 18 Wkly. Rep. 821. Purchaser with notice has no equity. New Ixion Tyre, etc., Co. *v.* Spilsbury, [1898] 2 Ch. 484, 67 L. J. Ch. 557, 79 L. T. Rep. N. S. 229 [*affirming* [1898] 2 Ch. 137, 67 L. J. Ch. 424, 78 L. T. Rep. N. S. 543, 46 Wkly. Rep. 567].

Estoppel to allege failure to record see Hassall *v.* Wright, L. R. 10 Eq. 509, 40 L. J. Ch. 145, 18 Wkly. Rep. 821. High court of justice has jurisdiction over register and may expunge or order correction. *In re* Horsley,

three months, an unrecorded prior assignment will prevail.[94] This statute is merely directory for the protection of *bona fide* purchasers without notice, and does not require the recording of an assignment within three months as a prerequisite to its validity.[95] Hence, as between the parties and as against everyone except a subsequent purchaser without notice, an unrecorded assignment is good.[96] The assignment of a patent not yet issued need not be recorded.[97] Nor is it necessary that an assignment of a patent by a bankruptcy court to the assignee of the owner of the patent be recorded.[98]

b. Notice. An unrecorded written assignment is good against a subsequent purchaser having actual or constructive notice of it.[99]

c. Acknowledgment Before Notary. If the assignment is acknowledged before a notary public or certain other officers, the certificate of the notary or other officer is *prima facie* evidence of execution.[1] The acknowledgment of an assignment of a patent relates to the date of the assignment.[2]

5. Construction and Operation — a. In General. Assignments and grants of patent rights are subject to the same rules of construction as other contracts.[3]

L. R. 8 Eq. 475, 39 L. J. Ch. 157, 21 L. T. Rep. N. S. 345, 17 Wkly. Rep. 1054; *In re* Morey, 25 Beav. 581, 6 Wkly. Rep. 612, 53 Eng. Reprint 759; *In re* Morgan, 24 Wkly. Rep. 245. Master of rolls may expunge entry wrongfully made. *Re* Green, 24 Beav. 145, 53 Eng. Reprint 312; *In re* Horsley, L. R. 4 Ch. 784, 17 Wkly. Rep. 1000.

Canadian practice.—Assignment is good between parties without record, but not against subsequent purchasers. Doyon *v.* Canadian Fire Extinguishing Co., 14 Quebec Super. Ct. 367.

94. Gibson *v.* Cook, 10 Fed. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. Rep. 415.

95. Winfrey *v.* Gallatin, 72 Mo. App. 191; Pitts *v.* Whitman, 19 Fed. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609.

96. Black *v.* Stone, 33 Ala. 327; Peck *v.* Bacon, 18 Conn. 377; Hildreth *v.* Turner, 17 Ill. 184; McKernan *v.* Hite, 6 Ind. 428; Moore *v.* Bare, 11 Iowa 198; Sone *v.* Palmer, 28 Mo. 539; Holden *v.* Curtis, 2 N. H. 61; Horne *v.* Chatham, 64 Tex. 36; Maurice *v.* Devol, 23 W. Va. 247; Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64; Boyd *v.* McAlpin, 3 Fed. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277; Case *v.* Redfield, 5 Fed. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Hall *v.* Speer, 11 Fed. Cas. No. 5,947, 1 Pittsb. (Pa.) 513; Pitts *v.* Whitman, 19 Fed. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Turnbull *v.* Weir Plow Co., 24 Fed. Cas. No. 14,244, 1 Ban. & A. 544, 6 Biss. 225, 7 Off. Gaz. 173; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,854.

Purchaser without consideration.—An unrecorded assignment is good against a later assignment without consideration. Saxton *v.* Aultman, 15 Ohio St. 471.

97. Wright *v.* Randel, 8 Fed. 591, 19 Blatchf. 495.

98. Prime *v.* Brandon Mfg. Co., 19 Fed. Cas. No. 11,421, 4 Ban. & A. 379, 16 Blatchf. 453.

99. Coleman *v.* Ryan, 33 Misc. (N. Y.) 715, 68 N. Y. Suppl. 253; Hapgood *v.* Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Dare *v.* Boylston, 6 Fed. 493, 18 Blatchf. 548; Ashcroft *v.* Walworth, 2 Fed. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152, 2 Off. Gaz. 546; Continental Windmill Co. *v.* Empire Windmill Co., 6 Fed. Cas. No. 3,142, 8 Blatchf. 295, 4 Fish. Pat. Cas. 428; Valentine *v.* Marshal, 28 Fed. Cas. No. 16,812*a*.

Knowledge of facts sufficient to put a party on inquiry will bind him as notice. Stanton Mfg. Co. *v.* McFarland, (N. J. Ch. 1895) 30 Atl. 1058 [*affirmed* in 53 N. J. Eq. 649, 33 Atl. 962, 51 Am. St. Rep. 647]; Auburn Button Co. *v.* Sylvester, 72 Hun (N. Y.) 498, 25 N. Y. Suppl. 237 [*affirmed* in 147 N. Y. 714, 42 N. E. 721]; Jonathan Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130; National Heeling-Mach. Co. *v.* Abbott, 70 Fed. 54; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Kearney *v.* Lehigh Valley R. Co., 27 Fed. 699; Hamilton *v.* Kingsbury, 4 Fed. 428, 17 Blatchf. 460; Prime *v.* Brandon Mfg. Co., 19 Fed. Cas. No. 11,421, 4 Ban. & A. 379, 16 Blatchf. 453.

Notice held insufficient see Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 49 Fed. 68, 1 C. C. A. 169.

A purchaser with notice holds in trust for the first assignee. Whitney *v.* Burr, 115 Ill. 289, 3 N. E. 434; Pontiac Knit Boot Co. *v.* Merino Shoe Co., 31 Fed. 286.

1. Act March 3, 1897, 29 U. S. St. at L. 693.

Act applies to instruments executed before its passage.— Lanyon Zinc Co. *v.* Brown, 115 Fed. 150, 53 C. C. A. 354; De Laval Separator Co. *v.* Vermont Farm-Mach. Co., 109 Fed. 813.

The signature of the assignor need not be proved where the assignment is duly acknowledged before a notary. New York Pharmical Assoc. *v.* Tilden, 14 Fed. 740, 21 Blatchf. 190. Conversely, it is not essential to the validity of an assignment of a patent that it should be acknowledged, where the genuineness of the assignor's signature is proved. Clancy *v.* Troy Belting, etc., Co., 152 Fed. 188 [*reversed* on other grounds in 157 Fed. 554].

2. Murray Co. *v.* Continental Gin Co., 149 Fed. 989, 79 C. C. A. 499.

3. **Intent rather than technical form controls.**— See Cowles Electric Smelting, etc., Co.

b. Warranty. The assignment of a patent creates an implied warranty of title in the assignor,[4] but no warranty that the patent is valid,[5] or that the invention does not infringe prior patents.[6]

c. Rights and Interests Conveyed — (i) *In General.* Within the limits of the grant the assignee has the same rights as were formerly possessed by the patentee.[7] An assignment of all the grantor's right, title, and interest in and to a certain patent carries only the existing interest of the grantor at the term of the assignment.[8] Words restricting the grant to such patents as the grantor "holds in his own right" do not exclude patents of which his tenure is not exclusive.[9] An assignment of an invention as described in the specifications filed covers all the devices claimed therein to be patentable, and not merely such as are covered by the patent as ultimately issued.[10] But an assignment of all right, title, and interest in an improvement of a machine already patented conveys no interest in the original patent.[11] An assignee may bring suit in his own name and may transfer the whole or a part of his interest.[12]

v. Lowrey, 79 Fed. 331, 24 C. C. A. 616; Kearney *v.* Lehigh Valley R. Co., 27 Fed. 699.

Contemporaneous instruments referring to same matter construed together see Hammond *v.* Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767; Levy *v.* Dattlebaum, 63 Fed. 992; Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 47 Fed. 511 [*reversed* on other grounds in 49 Fed. 68, 1 C. C. A. 169].

Particular contracts construed see Standard Combustion Co. *v.* Farr, 9 Ohio Dec. (Reprint) 509, 14 Cinc. L. Bul. 201; Reese's Appeal, 122 Pa. St. 392, 15 Atl. 807; Geiser Mfg. Co. *v.* Frick Co., 92 Fed. 189; Lowry *v.* Cowles Electric Smelting, etc., Co., 56 Fed. 488; Adriance *v.* McCormick Harvesting Mach. Co., 55 Fed. 288 [*affirmed* in 56 Fed. 918, 6 C. C. A. 168]; Siebert Cylinder Oil-Cup Co. *v.* Beggs, 32 Fed. 790; Buckley *v.* Sawyer Mfg. Co., 7 Fed. 358, 2 McCrary 350; Emigh *v.* Chicago, etc., R. Co., 8 Fed. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387.

4. Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Herzog *v.* Heyman, 8 Misc. (N. Y.) 27, 28 N. Y. Suppl. 74; Carman *v.* Trude, 25 How. Pr. (N. Y.) 440; Faulks *v.* Kamp, 3 Fed. 898, 17 Blatchf. 432.

Purchaser must investigate prior claims of which he has notice sufficient to put him on inquiry. Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575.

5. *Connecticut.*— Bull *v.* Pratt, 1 Conn. 342.

Indiana.— Detrick *v.* McGlone, 46 Ind. 291.

Maine.— Elmer *v.* Pennel, 40 Me. 430.

Massachusetts.— Gilmore *v.* Aiken, 118 Mass. 94.

Michigan.— Brazel *v.* Smith, 141 Mich. 628, 104 N. W. 1097.

New Jersey.— Barclay *v.* Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 Atl. 715; Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401.

New York.— Nilsson *v.* De Haven, 47 N. Y. App. Div. 537, 62 N. Y. Suppl. 506 [*affirmed* in 168 N. Y. 656, 61 N. E. 1131]. But see Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

United States.— Milligan *v.* Lalance, etc., Mfg. Co., 21 Fed. 570.

England.— Otto *v.* Singer, 62 L. T. Rep. N. S. 220.

6. Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Standard Button Fastening Co. *v.* Harney, 155 Mass. 507, 29 N. E. 1148; Horne *v.* Hoyle, 27 Fed. 216.

An express warranty against infringement may be made. Green *v.* Watson, 10 Ont. App. 113 [*affirming* 2 Ont. 627].

7. U. S. Rev. St. (1878) §§ 4895, 4898 [U. S. Comp. St. (1901) p. 3385]. See also Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Werderman *v.* Société Générale d'Électricité, 19 Ch. D. 246, 45 L. T. Rep. N. S. 514, 30 Wkly. Rep. 33.

After assignment the assignor cannot make or sell the invention and he may be enjoined from so doing. Bennett *v.* Wortman, 2 Ont. L. Rep. 292.

8. Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111; Regan Vapor-Engine Co. *v.* Pacific Gas-Engine Co., 47 Fed. 511 [*reversed* on other grounds in 49 Fed. 68, 1 C. C. A. 169]; Turnbull *v.* Weir Plow Co., 14 Fed. 108, 9 Biss. 334; Ashcroft *v.* Walworth, 2 Fed. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152, 2 Off. Gaz. 546; Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish. Pat. Cas. 424; Turnbull *v.* Weir Plow Co., 24 Fed. Cas. No. 14,244, 1 Ban. & A. 544, 6 Biss. 225, 7 Off. Gaz. 173.

9. Lowry *v.* Cowles Electric Smelting, etc., Co., 56 Fed. 488; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

10. Puetz *v.* Bransford, 31 Fed. 458.

11. Leach *v.* Dresser, 69 Me. 129.

12. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394]; Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787; Rude *v.* Westcott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888; D. M. Sechler Carriage Co. *v.* Deere, etc., Co., 113 Fed 285, 51 C. C. A. 242; Paine *v.* Trask, 56 Fed. 233, 5 C. C. A. 497; Cook *v.* Bidwell, 8 Fed. 452.

(II) *Rights in Extended Term.*[13] The extent to which an assignee may enjoy the benefits of an extended term of a patent depends entirely upon the stipulations of the contract.[14] The operation of such an instrument is not limited to the term specified in the patent where the instrument contains apt words to show that the parties intended that its operation should be more comprehensive;[15] but in the absence of a specific provision to that effect an assignment of letters patent does not carry with it any interest in a subsequently extended term.[16] Where, however, the conveyance is of the invention, before the issue of letters patent therefor, the assignee is entitled, unless the instrument of assignment shows a different intention, to obtain a renewal at the expiration of the original term.[17]

(III) *Rights in Reissue.* Where after assignment a patent is reissued the rights of the assignee are the same under a reissued patent as under the original.[18] But the assignee must consent to or ratify such reissue.[19]

(IV) *After-Acquired Title.* Where an instrument of transfer is made when the assignor has no title, an after-acquired title inures to the benefit of the assignee.[20]

(V) *Rights of Action For Past Infringement.* The assignee of a patent does not acquire a right of action for past infringement unless so specified in the assignment.[21] But when the assignment includes, expressly or impliedly, all

13. Rights of licensees see *infra*, XI, B, 1, c.

14. Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Adams *v.* Bridgewater Iron Co., 26 Fed. 324; Fire Extinguisher Mfg. Co. *v.* Graham, 16 Fed. 543; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Chase *v.* Walker, 5 Fed. Cas. No. 2,630, 3 Fish. Pat. Cas. 120; Day *v.* Union India-Rubber Co., 7 Fed. Cas. No. 3,691, 3 Blatchf. 488 [*affirmed* in 20 How. 216, 15 L. ed. 883]; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855.

15. Nicholson Pavement Co. *v.* Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Case *v.* Redfield, 5 Fed. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Chase *v.* Walker, 5 Fed. Cas. No. 2,630, 3 Fish. Pat. Cas. 120; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380; Gear *v.* Holmes, 10 Fed. Cas. No. 5,292, 6 Fish. Pat. Cas. 595; Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish. Pat. Cas. 424; Pitts *v.* Hall, 19 Fed. Cas. No. 11,193, 3 Blatchf. 201; Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,117, 10 Blatchf. 52, 5 Fish. Pat. Cas. 581; Sayles *v.* Dubuque, etc., R. Co., 21 Fed. Cas. No. 12,417, 3 Ban. & A. 219, 5 Dill. 561; Thayer *v.* Wales, 23 Fed. Cas. No. 13,872, 5 Fish. Pat. Cas. 130; Wilson *v.* Turner, 30 Fed. Cas. No. 17,845, Fish. Pat. Rep. 28, Taney 278 [*affirmed* in 4 How. 712, 11 L. ed. 1171].

16. Goodyear *v.* Day, 6 Duer (N. Y.) 154; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,945, Fish. Pat. Rep. 65, 4 McLean 64; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380; Gibson *v.* Cook, 10 Fed. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. Rep. 415; Goodyear *v.* Hullihen, 10 Fed. Cas. No. 5,573, 3 Fish. Pat. Cas. 251, 2 Hughes 492; Jenkins *v.* Nicolson Pavement Co., 13 Fed. Cas. No. 7,273, 1 Abb. 567, 4 Fish. Pat. Cas. 201 [*reversed* on other grounds in 14 Wall. 452, 20 L. ed. 777]; Phelps *v.* Comstock, 19 Fed. Cas. No. 11,075, Fish. Pat. Rep. 215, 4 McLean 353; Waterman *v.* Wallace, 29 Fed. Cas. No. 17,261, 2 Ban. & A. 126, 13 Blatchf. 128; Woodworth *v.* Sherman, 30 Fed. Cas. No. 18,019, 2 Robb Pat. Cas. 257, 3 Story 171.

No right to extension implied.— Johnson *v.* Wilcox, etc., Sewing Mach. Co., 27 Fed. 689, 23 Blatchf. 531; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; Mowry *v.* Grand St., etc., R. Co., 17 Fed. Cas. No. 9,893, 10 Blatchf. 89, 5 Fish. Pat. Cas. 586; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

17. Hendrie *v.* Sayles, 98 U. S. 546, 25 L. ed. 176.

18. U. S. Rev. St. (1878) § 4895 [U. S. Comp. St. (1901) p. 3385]. See also Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rec. 494; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Smith *v.* Mercer, 22 Fed. Cas. No. 13,078, 5 Pa. L. J. 529.

19. Burdell *v.* Denig, 4 Fed. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Meyer *v.* Bailey, 17 Fed. Cas. No. 9,516, 2 Ban. & A. 73, 8 Off. Gaz. 437.

20. Gottfried *v.* Miller, 104 U. S. 521, 26 L. ed. 851; Keene Mach. Co. *v.* Barratt, 100 Fed. 590, 40 C. C. A. 571; Curran *v.* Burdsall, 20 Fed. 835; Faulks *v.* Kamp, 3 Fed. 898, 17 Blatchf. 432; Emmons *v.* Slaudin, 8 Fed. Cas. No. 4,470, 2 Ban. & A. 199, 9 Off. Gaz. 352. *Compare* Perry *v.* Corning, 19 Fed. Cas. No. 11,004, 7 Blatchf. 195.

21. Superior Drill Co. *v.* Ney Mfg. Co., 98 Fed. 734; Jones *v.* Berger, 58 Fed. 1006;

claims for past infringements, the assignee may sue therefor.[22] Mere intention, however, not signified in the assignment, to include therein claims for infringements previously committed, will not suffice to invest the assignee with any title to those claims.[23]

d. Covenants, Conditions, and Restrictions — (I) *In General.* Covenants and conditions in an assignment do not prevent it from operating as an absolute assignment where they are conditions subsequent, such as a stipulation as to division of royalty or profits.[24] But conditions precedent must be performed before an assignment will become operative.[25]

(II) *Remedy For Breach of Conditions* — (A) *Rescission or Cancellation.* For the non-payment of royalties or other non-performance of conditions, a forfeiture may be enforced; but in the case of a condition subsequent, the title which had theretofore vested remains in the assignee until the forfeiture is enforced.[26] If it is so stipulated, however, the title will revert to the assignor by operation of law, upon the breach of a condition.[27] The general rules governing the rescission and cancellation of written instruments are applicable to contracts for assignment of patents.[28] A patentee may, by his acquiescence, estop himself to claim the cancellation of an assignment.[29]

(B) *Recovery of Damages.* Either party may recover damages for a breach of a condition or covenant.[30]

Emerson *v.* Hubbard, 34 Fed. 327; Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444; May *v.* Juneau County, 30 Fed. 241; New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 24 Fed. 604; New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519; Dibble *v.* Augur, 7 Fed. Cas. No. 3,879, 7 Blatchf. 86.

The original owner of a patent, who has assigned it, may maintain an action for an infringement committed during the time of his ownership. Moore *v.* Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37.

22. May *v.* Saginaw County, 32 Fed. 629; May *v.* Logan County, 30 Fed. 250; Adams *v.* Bellaire Stamping Co., 25 Fed. 270; Consolidated Oil Well Packer Co. *v.* Eaton, 12 Fed. 865; Merriam *v.* Smith, 11 Fed. 588.

23. Emerson *v.* Hubbard, 34 Fed. 327.

24. Church *v.* Anti-Kalsomine Co., 138 Mich. 211, 101 N. W. 230; Ford *v.* Dyer, 148 Mo. 528, 49 S. W. 1091; Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787; Rude *v.* Westcott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888; Janney *v.* Pancoast International Ventilator Co., 122 Fed. 535; D. M. Sechler Carriage Co. *v.* Deere, etc., Co., 113 Fed. 285, 51 C. C. A. 242; Day *v.* Stellman, 7 Fed. Cas. No. 3,690, 1 Fish. Pat. Cas. 487; Cartwright *v.* Amatt, 2 B. & P. 43.

Conveyance on condition as creating trust see Duff *v.* Gilliland, 139 Fed. 16, 71 C. C. A. 428.

A clause appointing the assignee attorney of the patentee, with authority to use his name whenever they deem proper in the management of the business, does not restrict the interest or power of the assignee. Rude *v.* Westcott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888.

Particular assignments with conditions construed see Scheurle *v.* Husbands, 65 N. J. L. 681, 48 Atl. 1118; Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825; Tecktonius *v.* Scott, 110 Wis. 441, 86 N. W. 672; Holmes *v.* McGill, 108 Fed. 238, 47 C. C. A. 296; Bracher *v.* Hat-Sweat Mfg. Co., 49 Fed. 921.

25. Thourot *v.* Holub, 81 N. Y. App. Div. 634, 80 N. Y. Suppl. 1083; Arnold Monophase Electric Co. *v.* Wagner Electric Mfg. Co., 148 Fed. 234; Grier *v.* Baynes, 49 Fed. 363; Hull *v.* Pitrat, 45 Fed. 94 [*affirmed* in 145 U. S. 650, 12 S. Ct. 986, 36 L. ed. 847].

26. Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Stanley Rule, etc., Co. *v.* Bailey, 22 Fed. Cas. No. 13,287, 3 Ban. & A. 297, 14 Blatchf. 510.

Where the remedy at law is sufficient, a court of equity will not interfere. Osborne *v.* Jullion, 3 Drew. 596, 26 L. J. Ch. 6, 4 Wkly. Rep. 767, 61 Eng. Reprint 1031.

27. Pierpoint Boiler Co. *v.* Penn Iron, etc., Co., 75 Fed. 289.

28. See Morgan *v.* National Pump Co., 74 Mo. App. 155 (holding that mere allegations of insolvency, failure to pay royalty, and failure to perform conditions without allegation of fraud or offer to return consideration are insufficient to justify equitable interposition in rescinding an assignment of a patent); Dow *v.* Harkin, 67 N. H. 383, 29 Atl. 846; Andrews *v.* Fielding, 20 Fed. 123.

29. Duff *v.* Gilliland, 139 Fed. 16, 71 C. C. A. 428 [*reversing* 135 Fed. 581].

30. *Georgia.*— Barrett *v.* Verdery, 93 Ga. 546, 21 S. E. 64; Hornsby *v.* Butts, 85 Ga. 694, 11 S. E. 846.

Illinois.— Lord *v.* Owen, 35 Ill. App. 382.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Haberkorn, 15 Ind. App. 479, 44 N. E. 322.

Massachusetts.—Weed *v.* Draper, 104 Mass. 28.

Missouri.— Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

New Jersey.— Johnson *v.* Johnson R. Signal Co., 57 N. J. Eq. 79, 40 Atl. 193.

New York.— Warth *v.* Liebovitz, 179 N. Y.

6. Rights, Remedies, and Liabilities of Parties[31] **— a. In General.** The assignee acquires no other or greater rights than were possessed by the assignor and is bound by the legal consequences of the assignor's acts.[32]

b. As to Each Other — (I) *In General.* In the absence of warranty equity can give no relief to the assignee of a patent found to be void unless fraud is shown.[33] To rescind a contract of sale of a patent right on the ground of false and fraudulent representations, such representations must have been of material facts, constituting an inducement to the contract, whereon the purchaser had a right to rely, and did rely, and was thereby misled to his injury.[34] Fraudulent representations, in order to afford a ground for relief, must be of facts then existing or preëxisting, as distinguished from an opinion, a promise or an assumed future fact. Furthermore these facts must be of a concrete character, as distinguished from a truth or principle.[35] Representations by the seller of a patent that the same is valid and does not interfere with any prior patent must be regarded as matters of opinion, and not as statements of facts,[36] unless it appears that there was a prior patent covering the identical invention, and that the seller was aware thereof.[37] So a statement that letters patent are new and useful, if untrue, is not cause for avoiding a sale of the letters made in reliance on such statement.[38] Nor is a mere false assertion of value, when no warranty is intended, ground of relief to a purchaser, because the assertion is matter of opinion.[39] But a gross misrepresentation of the capacity of a machine and the success in selling and operating it, of which the purchaser was ignorant, has been held sufficient to warrant the rescission of a contract induced thereby.[40]

(II) *Liability For, and Recovery Of, Consideration.*[41] In the absence of fraud or warranty the assignee of a patent right cannot refuse to make the payments agreed upon merely because the patent is found to be invalid,[42] or

200, 71 N. E. 734; Kirschmann *v.* Lediard, 61 Barb. 573; Brusie *v.* Peck, 16 N. Y. Suppl. 648 [*reversed* on other grounds in 135 N. Y. 622, 32 N. E. 76].

Texas.— Clark *v.* Cyclone Woven Wire Fence Co., 22 Tex. Civ. App. 41, 54 S. W. 392.

Vermont.— Vaughan *v.* Porter, 16 Vt. 266.

31. Assignment in trust see Trusts.

32. McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Walter A. Wood Mowing, etc., Mach. Co. *v.* Deering, 66 Fed. 547; Grier *v.* Baynes, 46 Fed. 523; Pennington *v.* Hunt, 20 Fed. 195; Washburn, etc., Mfg. Co. *v.* Griesche, 16 Fed. 669, 5 McCrary 246.

Assignee takes only what assignor owned. — Coleman *v.* Ryan, 33 Misc. (N. Y.) 715, 68 N. Y. Suppl. 253; Abbett *v.* Zusi, 1 Fed. Cas. No. 7, 5 Ban. & A. 38. See also *supra*, XI, A, 5, c, (I).

33. Fowler *v.* Mallory, 53 Conn. 420, 3 Atl. 560; Dillman *v.* Nadelhoffer, 19 Ill. App. 375 [*affirmed* in 119 Ill. 567, 7 N. E. 88]; Wade *v.* Ringo, 122 Mo. 322, 25 S. W. 901; Cansler *v.* Eaton, 55 N. C. 499; Hiatt *v.* Twomey, 21 N. C. 315.

34. Hull *v.* Fields, 76 Va. 594.

35. Wade *v.* Ringo, 122 Mo. 322, 25 S. W. 901.

36. Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88 [*affirming* 19 Ill. App. 375].

37. Reeves *v.* Corning, 51 Fed. 774.

38. Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88 [*affirming* 19 Ill. App. 375].

39. Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88 [*affirming* 19 Ill. App. 375]; Rockafellow *v.* Baker, 41 Pa. St. 319, 80 Am. Dec. 624.

40. Pierce *v.* Wilson, 34 Ala. 596.

41. See Commercial Paper, 7 Cyc. 694; Contracts, 9 Cyc. 369.

42. *Connecticut.*— Fowler *v.* Mallory, 53 Conn. 420, 3 Atl. 560.

Illinois.— Dillman *v.* Nadelhoffer, 19 Ill. App. 375 [*affirmed* in 119 Ill. 567].

Indiana.— Detrick *v.* McGlone, 46 Ind. 291.

Maryland.— Schwarzenbach *v.* Odorless Excavating Apparatus Co., 65 Md. 34, 3 Atl. 676, 57 Am. Rep. 301.

Massachusetts.— Gilmore *v.* Aiken, 118 Mass. 94.

Minnesota.— Clark *v.* Smith, 21 Minn. 539.

New York.— McGill *v.* Holmes, 168 N. Y. 647, 61 N. E. 1131.

North Carolina.— Cansler *v.* Eaton, 55 N. C. 499; Hiatt *v.* Twomey, 21 N. C. 315.

United States.— Eclipse Bicycle Co. *v.* Farrow, 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317; Wilson *v.* Simpson, 9 How. 109, 13 L. ed. 66; Milligan *v.* Lalance, etc., Mfg. Co., 21 Fed. 570.

In the absence of warranty invalidity is no defense. Saxton *v.* Dodge, 57 Barb. (N. Y.) 84; Smith *v.* Neale, 2 C. B. N. S. 67, 3 Jur. N. S. 516, 26 L. J. C. P. 143, 4 Wkly. Rep. 563, 89 E. C. L. 67; Hall *v.* Conder, 2 C. B. N. S. 22, 3 Jur. N. S. 366, 26 L. J. C. P. 138, 89 E. C. L. 22 [*affirmed* in 2 C. B. N. S. 53, 3 Jur. N. S. 963, 26 L. J. C. P. 288, 5 Wkly. Rep. 742, 89 E. C. L. 53]; Lawes *v.* Purser, 6 E. & B. 930, 3 Jur. N. S. 182, 26 L. J. Q. B. 25, 5 Wkly. Rep. 43, 88 E. C. L. 930; Smith

because the patented device infringes another patent;[43] but he may refuse where there is a total failure of consideration flowing from the assignor, as where the patented device is inoperative or useless.[44] But in order to sustain the defense of want of consideration it is not enough that the practical utility of the patent be limited, or that the manufactured article cannot be manufactured and sold at a profit, if it be capable of use.[45] A breach of a warranty given on the sale of a patent right is equivalent to a failure of consideration and furnishes a good defense to an action for the price.[46]

(III) *Recovery Back of Consideration by Assignee.* Since no warranty is implied in the sale of a patent right the purchaser of such a right cannot, in the absence of fraud, and without an express covenant, recover of his vendor the price paid for it, because it is found to be invalid.[47] He may, however, recover back the purchase-money if the patent right was not that which he agreed to buy, unless he has accepted a deed describing the patent.[48] If a patentee elects to rescind a contract of sale for non-payment of the whole purchase-price the vendee is entitled to recover back the amount paid on the contract.[49]

c. As to Third Parties.[50] An assignee of a patent takes the title subject to the equities of other parties who have acquired rights therein, of which he had notice, express or implied.[51] It has been held, however, that in the absence of express

v. Buckingham, 21 L. T. Rep. N. S. 819, 18 Wkly. Rep. 314; Hayne *v.* Maltby, 3 T. R. 438; Liardet *v.* Hammond Electric Light, etc., Co., 31 Wkly. Rep. 710; Vermilyea *v.* Canniff, 12 Ont. 164; Owens *v.* Taylor, 29 Grant Ch. (U. C.) 210.

43. Fowler *v.* Mallory, 53 Conn. 420, 3 Atl. 560; Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Standard Button Fastening Co. *v.* Harney, 155 Mass. 507, 29 N. E. 1148; Horne *v.* Hoyle, 27 Fed. 216. *Compare* Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

Proof that a patent is void for infringement is not admissible in a suit upon a note given for its conveyance, unless that fact has been determined by a competent court. Elmer *v.* Pennel, 40 Me. 430.

44. Snyder *v.* Kurtz, 61 Iowa 593, 16 N. W. 722; Scott *v.* Sweet, 2 Greene (Iowa) 224; Groff *v.* Hansel, 33 Md. 161; McDougall *v.* Fogg, 2 Bosw. (N. Y.) 387; Herzog *v.* Heyman, 8 Misc. (N. Y.) 27, 28 N. Y. Suppl. 74; Clough *v.* Patrick, 37 Vt. 421; Cragin *v.* Fowler, 34 Vt. 326, 80 Am. Dec. 680.

Question of utility is for jury.— Rowe *v.* Blanchard, 18 Wis. 441, 86 Am. Dec. 783.

45. *Indiana.*— Hunter *v.* McLaughlin, 43 Ind. 38.

Maine.— Elmer *v.* Pennel, 40 Me. 430.

Massachusetts.— Howe *v.* Richards, 102 Mass. 64.

Minnesota.— Van Norman *v.* Barbeau, 54 Minn. 388, 55 N. W. 1112.

North Carolina.— Fair *v.* Shelton, 128 N. C. 105, 38 S. E. 290.

Evidence of slight value inadmissible see Vaughan *v.* Porter, 16 Vt. 266.

46. Hawes *v.* Twogood, 12 Iowa 582.

47. Schwarzenbach *v.* Odorless Excavating Apparatus Co., 65 Md. 34, 3 Atl. 676, 57 Am. Rep. 301; Foss *v.* Richardson, 15 Gray (Mass.) 303; Hiatt *v.* Twomey, 21 N. C. 315.

48. Foss *v.* Richardson, 15 Gray (Mass.) 303.

49. Bellis *v.* Henwood, 6 Pa. Co. Ct. 78.

50. **Patent rights as subject to creditors' suits** see CREDITORS' SUITS, 12 Cyc. 31.

Patent rights as subject to execution see EXECUTIONS, 17 Cyc. 943.

Who entitled to sue infringers see *infra*, XIII, C, 7, a, b.

51. Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565; New York Phonograph Co. *v.* Edison, 136 Fed. 600 [*affirmed* in 144 Fed. 404, 75 C. C. A. 382]; Bradford Belting Co. *v.* Kisinger-Ison Co., 113 Fed. 811, 51 C. C. A. 483; Westinghouse Air-Brake Co. *v.* Chicago Brake, etc., Co., 85 Fed. 786; Carroll *v.* Goldschmidt, 83 Fed. 508, 27 C. C. A. 566; Sheldon Axle Co. *v.* Standard Axle Works, 37 Fed. 789, 3 L. R. A. 656; Kearney *v.* Lehigh Valley R. Co., 27 Fed. 699; Hapgood *v.* Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Gottfried *v.* Miller, 10 Fed. 471; Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575.

An assignee of a patent is chargeable with notice of every fact in relation to an outstanding interest the possible existence of which is indicated by the recitals of the assignment. Jonathan Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Prime *v.* Brandon Mfg. Co., 19 Fed. Cas. No. 11,421, 4 Ban. & A. 379, 16 Blatchf. 453.

Notice of oral contract.—A purchaser of a patent with notice of a prior oral contract to convey the patent to another will be treated as a trustee for such prior contracting party, and decreed to convey to him. Whitney *v.* Burr, 115 Ill. 289, 3 N. E. 434.

Not subject to equities of which he had no notice.— Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734 [*affirming* 42 Fed. 49]; Davis, etc., Temperature Controlling Co. *v.* Tagliabue, 150 Fed. 372 [*reversed* on other grounds in 159 Fed. 712]; Faulkner *v.* Empire State Nail Co., 67 Fed. 913, 15 C. C. A. 69 [*affirming* 55 Fed. 819].

contract he assumes no affirmative obligation to make good the previous contracts of his assignor.[52]

7. Transfer by Succession or Inheritance.[53] Upon the death of the patentee the patent vests in the administrator or executor and not in the heirs.[54]

B. Licenses and Contracts[55] — **1. Licenses — a. In General.** A license is any right to make, use, or sell the patented invention which is less than an undivided part interest in the patent itself.[56] A license operates only as a waiver of the monopoly as to the licensee, and estops the licensor from exercising his prohibitory powers in derogation of the privileges conferred by him upon the licensee.[57] It gives no right to bring suit upon the patent and has been defined as the right not to be sued.[58]

b. Requisites and Validity — (1) *In General.* A license may be express or implied. An express license may be oral or in writing.[59] If in writing no particular form of words is necessary. Anything which confers upon another the right to do an act which otherwise would be illegal is sufficient.[60] Its validity is determined by the same principles that apply to other contracts.[61] A license to

52. Courter *v.* Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 Atl. 609; Bradford Belting Co. *v.* Kisinger-Ison Co., 113 Fed. 811, 51 C. C. A. 483; Mueller *v.* Mueller, 95 Fed. 155, 37 C. C. A. 392.

53. Power of administrator to assign patent see *supra*, XI, A, 1, b, (I).

54. Bradley *v.* Dull, 19 Fed. 913; Shaw Relief Valve Co. *v.* New Bedford, 19 Fed. 753; Hodge *v.* North Missouri R. Co., 12 Fed. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161. See also *supra*, IV, F; I, C, 1.

Surviving partner takes patent. Smith *v.* London, etc., R. Co., 2 E. & B. 69, 17 Jur. 1071, 75 E. C. L. 69.

55. Regulation of dealings in patent rights and patented articles see *infra*, XII.

Specific performance of agreements for licenses see Specific Performance.

56. Eclipse Wind Engine Co. *v.* Zimmerman Mfg. Co., 16 Ind. App. 496, 44 N. E. 1115; Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 864; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Rice *v.* Boss, 46 Fed. 195; Theherath *v.* Celluloid Mfg. Co., 3 Fed. 143; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Sanford *v.* Messer, 21 Fed. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149, 2 Off. Gaz. 470. And see 35 Vict. c. 26, § 22.

The separate rights of making, using, or selling may be separately conveyed.— Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 862; Hayward *v.* Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271; Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504.

Particular transfers held to constitute licenses see Ft. Wayne, etc., R. Co. *v.* Haberkorn, 15 Ind. App. 479, 44 N. E. 322; Standard Button Fastening Co. *v.* Ellis, 159 Mass. 448, 54 N. E. 682; Hurd *v.* Gere, 27 N. Y. App. Div. 625, 50 N. Y. Suppl. 235; Topliff *v.* Topliff, 122 U. S. 121, 7 S. Ct. 1057, 30 L. ed. 1110; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Atwood Lock Co. *v.* Yale, etc., Mfg. Co., 115 Fed. 332; Rice *v.* Boss, 46 Fed. 195; Hatfield *v.* Smith, 44 Fed. 355; Ingalls *v.* Tice, 14 Fed. 297; Gamewell Fire-Alarm Tel. Co. *v.* Brooklyn, 14 Fed. 255; Nellis *v.* Pennock Mfg. Co., 13 Fed. 451; Armstrong *v.* Hanlenbeck, 1 Fed. Cas. No. 544, 3 N. Y. Leg. Obs. 43; Brooks *v.* Byam, 4 Fed. Cas. No. 1,948, 2 Robb. Pat. Cas. 161, 2 Story 525; Farrington *v.* Gregory, 8 Fed. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Hussey *v.* Whitely, 12 Fed. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Sanford *v.* Messer, 21 Fed. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149, 2 Off. Gaz. 470; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,195, 1 Blatchf. 467, Fish. Pat. Rep. 290.

57. Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171; Bennett *v.* Iron Clad Mfg. Co., 110 N. Y. App. Div. 443, 96 N. Y. Suppl. 968.

58. Hawks *v.* Swett, 4 Hun (N. Y.) 146; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171 [*reversing* 65 Fed. 619]; Heap *v.* Hartley, 42 Ch. D. 461, 58 L. J. Ch. 790, 61 L. T. Rep. N. S. 538, 38 Wkly. Rep. 136; Renard *v.* Levinstein, 2 Hem. & M. 628, 11 L. T. Rep. N. S. 766, 5 New Rep. 301, 13 Wkly. Rep. 382, 71 Eng. Reprint 607.

59. Buss *v.* Putney, 38 N. H. 44; Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734; Cook *v.* Sterling Electric Co., 150 Fed. 766, 80 C. C. A. 502 [*affirming* 118 Fed. 45]; Jones *v.* Berger, 58 Fed. 1006; Baldwin *v.* Sibley, 2 Fed. Cas. No. 805, 1 Cliff. 150; Protheroe *v.* May, 9 L. J. Exch. 121, 5 M. & W. 675; Roden *v.* London Small Arms Co., 46 L. J. Q. B. 213, 35 L. T. Rep. N. S. 305, 25 Wkly. Rep. 269.

60. A covenant not to sue for future infringements is in substance and effect a license. Seibert Cylinder Oil-Cup Co. *v.* Detroit Lubricator Co., 34 Fed. 216; Colgate *v.* Western Electric Mfg. Co., 28 Fed. 146.

61. Heaton-Peninsular Button-Fastener Co.

use an invention may be given before it is patented,[62] and if without restrictions, and if acted on by applying the invention to machines or mechanisms constructed before the granting of the patent, will protect the licensee in its use afterward.[63] It must conform to the requirements of state laws,[64] and not be in restraint of trade.[65]

(II) *Implied License*[66] — (A) *In General.* The conduct of the owner of the patent may be such as to create an implied license to make, use, or sell the invention.[67] Mere acquiescence, if founded on a valuable consideration, is sufficient of itself to amount to a license.[68]

(B) *From Sale of Patented Article.* The sale of a patented article by one entitled to sell it carries with it the right to use the particular article anywhere desired, and to sell it to others unless there was an agreement to the contrary when the sale was made. By virtue of the contract of sale and the unconditional delivery the article sold is released from the monopoly.[69] The sale of a patented article without condition or restriction carries with it dominion over the article so sold, and the purchaser may use it in any manner and for any purpose,[70] so long as such use does not violate the vendor's exclusive property in another invention.[71]

v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171.

62. Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029; Bezer *v.* Hall Signal Co., 22 N. Y. App. Div. 489, 48 N. Y. Suppl. 203; Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368.

63. Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029.

64. Sandage *v.* Studabaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548. See also *infra*, XII, B.

65. Exclusive license not illegal.—An agreement by a patentee to allow an association and its members the exclusive use and sale of inventions patented by him is not illegal as being in restraint of trade. Good *v.* Daland, 121 N. Y. 1, 24 N. E. 15. But a public corporation cannot refuse to give equal service to all merely because operating under a patent. Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

66. Implied from relation of employer and employee see *supra*, IV, C.

67. Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321; O'Rourke Engineering Constr. Co. *v.* McMullen, 150 Fed. 338; Mueller *v.* Mueller, 95 Fed. 155, 37 C. C. A. 392; Anderson *v.* Eiler, 50 Fed. 775, 1 C. C. A. 659; Dodge Mfg. Co. *v.* Puster, 42 Fed. 54; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,516, 1 Cliff. 288; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380; Magoun *v.* New England Glass Co., 16 Fed. Cas. No. 8,960, 3 Ban. & A. 114; McKeever *v.* U. S., 14 Ct. Cl. 396; Incandescent Gas Light Co. *v.* New Incandescent Gas Lighting Co., 76 L. T. Rep. N. S. 47; Kenny's Patent Button-holeing Co. *v.* Somervell, 38 L. T. Rep. N. S. 878, 26 Wkly. Rep. 786.

Evidence held insufficient to show implied license see Lawther *v.* Hamilton, 124 U. S. 1, 8 S. Ct. 342, 31 L. ed. 325; Keller *v.* Stolzenbach, 20 Fed. 47.

68. Seibert Cylinder Oil-Cup Co. *v.* Detroit Lubricator Co., 34 Fed. 216; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,516, 1 Cliff. 288.

69. Pratt *v.* Marean, 25 Ill. App. 516; Howe *v.* Wooldredge, 12 Allen (Mass.) 18; Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. ed. 500; Hobbie *v.* Jennison, 149 U. S. 355, 13 S. Ct. 879, 37 L. ed. 766; Waterman *v.* MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Newton *v.* McGuire, 97 Fed. 614; Hanifen *v.* Lupton, 95 Fed. 465; Edison Electric Light Co. *v.* Goelet, 65 Fed. 612; Edison Electric Light Co. *v.* Bloomingdale, 65 Fed. 212; Edison Electric Light Co. *v.* Citizens' Electric Light, etc., Co., 64 Fed. 491; Hobbie *v.* Smith, 27 Fed. 656; Alabastine Co. *v.* Richardson, 26 Fed. 620; Roosevelt *v.* Western Electric Co., 20 Fed. 724; Porter Needle Co. *v.* National Needle Co., 17 Fed. 536; Detweiler *v.* Voege, 8 Fed. 600, 19 Blatchf. 482; Adams *v.* Burks, 1 Fed. Cas. No. 50, 4 Fish. Pat. Cas. 392, Holmes 40, 1 Off. Gaz. 282 [*affirmed* in 17 Wall. 453, 21 L. ed. 700]; American Cotton-Tie Co. *v.* Simmons, 1 Fed. Cas. No. 293, 3 Ban. & A. 320, 13 Off. Gaz. 967 [*reversed* on other grounds in 106 U. S. 89, 1 S. Ct. 52, 27 L. ed. 79]; Black *v.* Hubbard, 3 Fed. Cas. No. 1,460, 3 Ban. & A. 39, 12 Off. Gaz. 842; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,963, Fish. Pat. Rep. 137, 4 McLean 275; Farrington *v.* Gregory, 8 Fed. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Goodyear *v.* Beverly Rubber Co., 10 Fed. Cas. No. 5,557, 1 Cliff. 348; McKay *v.* Wooster, 16 Fed. Cas. No. 8,847, 6 Fish. Pat. Cas. 375, 2 Sawy. 373, 3 Off. Gaz. 441.

Sale by patentee's agent abroad see Betts *v.* Willmott, L. R. 6 Ch. 239, 25 L. T. Rep. N. S. 188, 19 Wkly. Rep. 369.

70. George Frost Co. *v.* Kora Co., 136 Fed. 487 [*affirmed* in 140 Fed. 987, 71 C. C. A. 19]; Goodyear *v.* Beverly Rubber Co., 10 Fed. Cas. No. 5,557, 1 Cliff. 348.

71. Roosevelt *v.* Western Electric Co., 20 Fed. 724.

A sale, in order to have this effect, however, must be by one entitled to sell.[72] The purchaser has no right to make another machine or structure like it, nor to buy one from an infringer.[73]

c. Recording.[74] The law does not require that a license be recorded in the patent office even as against subsequent purchasers.[75]

d. Construction and Operation — (I) *In General.* Licenses are to be construed like other contracts,[76] according to the intention of the parties.[77] If the license is in writing, all previous parol agreements are merged therein,[78] and oral evidence is not admissible to explain its provisions,[79] unless it is capable of two interpretations and a doubt exists as to its true meaning.[80] Several licenses constituting one transaction may be construed together.[81]

(II) *Rights and Interests Conveyed* — (A) *In General.* The rights conferred by a license must be taken subject to the conditions therein made by the licensor.[82] The licensee has, however, the right to do those things which are necessary to the enjoyment of his license, such as to make a machine which he has been licensed to use.[83] Conversely a conveyance of the right to make and

72. Brooks *v.* Stolley, 4 Fed. Cas. No. 1,963, Fish. Pat. Rep. 137, 4 McLean 275; Union Paper-Bag Mach. Co. *v.* Nixon, 24 Fed. Cas. No. 14,391, 2 Ban. & A. 244, 1 Flipp. 491, 9 Off. Gaz. 691.

73. Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Brown *v.* Puget Sound Reduction Co., 110 Fed. 383; Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485; Davis *v.* Chesapeake, etc., Co., 77 Fed. 895; Vermont Farm Mach. Co. *v.* Gibson, 56 Fed. 143, 5 C. C. A. 451; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 24 Fed. Cas. No. 14,369, 2 Ban. & A. 593, 11 Off. Gaz. 1113.

A purchaser's right to use the patent is a mere incident to his ownership of the particular machine or structure sold to him by the patentee, and when it is worn out or destroyed the right to use the invention ceases. Brown *v.* Puget Sound Reduction Co., 110 Fed. 383.

74. **Of assignment** see *supra*, XI, A, 4.

75. Peoria Malting Co. *v.* Davenport Grain, etc., Co., 68 Ill. App. 104; Stevens *v.* Head, 9 Vt. 174, 31 Am. Dec. 617; Jones *v.* Berger, 58 Fed. 1006; Brooks *v.* Byam, 4 Fed. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525; Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Hamilton *v.* Kingsbury, 11 Fed. Cas. No. 5,985, 4 Ban. & A. 615, 17 Blatchf. 264, 17 Off. Gaz. 147.

English practice.— Record is unnecessary unless royalty fixed. *In re* Fletcher, 62 L. J. Ch. 938, 69 L. T. Rep. N. S. 129, 3 Reports 626.

76. Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171.

77. Laver *v.* Dennett, 109 U. S. 90, 3 S. Ct. 73, 27 L. ed. 867; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

Particular licenses construed.— Hegelein *v.* Anthony, 33 Misc. (N. Y.) 616, 68 N. Y. Suppl. 2; Leonard *v.* Crocker Wheeler Co., 125 Fed. 375 [*reversed* on other grounds in 125 Fed. 342, 60 C. C. A. 320]; Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684.

78. Evory *v.* Candee, 8 Fed. Cas. No. 4,583, 4 Ban. & A. 545, 17 Blatchf. 200.

79. McAleer *v.* U. S., 150 U. S. 424, 14 S. Ct. 160, 37 L. ed. 1130; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,195, 1 Blatchf. 467, Fish. Pat. Rep. 290.

80. Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684 [*reversed* on other grounds in 125 Fed. 342, 60 C. C. A. 220].

81. Hammond *v.* Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767.

82. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Pelzer *v.* Binghamton, 95 Fed. 823, 37 C. C. A. 288; Hobbie *v.* Smith, 27 Fed. 656; Bloomer *v.* Gilpin, 3 Fed. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,321, 3 Ban. & A. 281, 4 Cliff. 568; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385. See also *infra*, XI, B, 1, d, (II), (B).

English and Canadian practice.— Licensee abroad cannot use or sell in England Société Anonyme des Manufactures de Glaces *v.* Telgliman's Patent Sand Blast Co., 25 Ch. D. 1, 53 L. J. Ch. 1, 49 L. T. Rep. N. S. 451, 32 Wkly. Rep. 71. Licensee cannot prevent grant of license to others. Fire Extinguisher Co. *v.* Northwestern Fire Extinguisher Co., 20 Grant Ch. (U. C.) 625.

83. Edison Electric Light Co. *v.* Peninsular Light, etc., Co., 95 Fed. 669 [*affirmed* in 101 Fed. 831, 43 C. C. A. 479]; Illingworth *v.* Spaulding, 43 Fed. 827; Hamilton *v.* Kingsbury, 11 Fed. Cas. No. 5,984, 3 Ban. & A. 346, 15 Blatchf. 64, 14 Off. Gaz. 448; Steam Stonecutter Co. *v.* Shortsleeves, 22 Fed. Cas. No. 13,334, 4 Ban. & A. 364, 16 Blatchf. 381; Woodworth *v.* Curtis, 30 Fed. Cas. No. 18,013, 2 Robb Pat. Cas. 603, 2 Woodb. & M. 524; MacLaughlin *v.* Lake Erie, etc., R. Co., 2 Ont. L. Rep. 190.

English and Canadian practice.— License to manufacture gives right to use and sell. Thomas *v.* Hunt, 17 C. B. N. S. 183, 112 E. C. L. 183. Need not use in patented form.

sell a patented article includes the right to use it.[84] So one licensed to make and use may add improvements.[85] But the right to use a composition does not carry the right to use the process.[86]

(B) *Place For Exercise of License*—(1) EXPRESS LICENSE. A license to use a patented device in a particular territory,[87] or at a particular establishment,[88] or on a particular railroad,[89] is binding upon the licensee and its use elsewhere is unlawful. But a license to use and sell a machine within a specified territory authorizes the licensee to sell the product of the machine out of the said territory.[90] And a license to use a patented device in a particular shop does not prevent its manufacture elsewhere.[91]

(2) IMPLIED LICENSE. It is well settled that the sale of a patented article by one authorized to sell it carries the right to use it anywhere,[92] even in the territory of another assignee or licensee.[93] The right to sell, as distinguished from the right to use, in the territory of another, was formerly denied;[94] but the recent decisions have overruled this doctrine, holding that the sale of patented articles by the patentee or a territorial assignee confers upon the purchasers of such articles the right to carry the same into the territory of another assignee, and there sell them, in the usual course of trade, without the consent or license of the latter assignee.[95]

(C) *Duration of License*[96]—(1) IN GENERAL. A license not expressly limited in duration continues until the patent expires or the license is forfeited through some act of the licensee, if not terminated by mutual consent.[97] How-

MacLaughlin *v.* Lake Erie, etc., R. Co., 3 Ont. L. Rep. 706.

84. Turnbull *v.* Weir Plow Co., 14 Fed. 108, 9 Biss. 334.

85. Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; MacLaughlin *v.* Lake Erie, etc., R. Co., 3 Ont. L. Rep. 706.

86. United Nickel Co. *v.* California Electrical Works, 25 Fed. 475.

87. Burke *v.* Partridge, 58 N. H. 349; Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Wicke *v.* Kleinknecht, 29 Fed. Cas. No. 17,608, 1 Ban. & A. 608, 7 Off. Gaz. 1098; Woodworth *v.* Cook, 30 Fed. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. Rep. 423.

88. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

A license to use an invention to the capacity of a factory confers the right to use the invention in a subsequent addition to the factory, where the total use does not exceed the original capacity. England *v.* Thompson, 8 Fed. Cas. No. 4,487, 3 Cliff. 271.

A lease of premises and machinery by which a patented process is carried on is not a general license, but gives the licensee a right to use such process on the leased premises only. Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

89. A license to a railroad company extends no further than the road in use or which it was authorized to construct at the date of the license. Emigh *v.* Chicago, etc., R. Co., 8 Fed. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387, holding that it cannot use the patent on lines afterward built or leased. A license to use a patented brake on any and all cars belonging to the licensed company covers the use of brakes on trucks and running gear belonging to the company, although the superstructure belongs to another. Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410. But a license to use a patented invention upon the locomotives used by a railroad company on its road or on any road or roads now owned or that may hereafter be owned or operated by said company embraces not only locomotives in use at the date of the license upon roads then owned and operated by the company, but also such other locomotives as it might thereafter use and other roads which it might thereafter operate. Matthew *v.* Pennsylvania R. Co., 8 Fed. 45.

90. Simpson *v.* Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169.

91. Wood *v.* Wells, 29 Fed. Cas. No. 17,967, 6 Fish. Pat. Cas. 382.

92. Robbie *v.* Jennison, 149 U. S. 355, 13 S. Ct. 879, 37 L. ed. 766; Adams *v.* Burks, 17 Wall. (U. S.) 453, 21 L. ed. 700; Edison Electric Light Co. *v.* Goelet, 65 Fed. 613.

93. Hobbie *v.* Jennison, 149 U. S. 355, 13 S. Ct. 879, 37 L. ed. 766; Adams *v.* Burks, 17 Wall. (U. S.) 453, 21 L. ed. 700.

94. California Electrical Works *v.* Finck, 47 Fed. 583; Sheldon Axle Co. *v.* Standard Axle Works, 37 Fed. 789, 3 L. R. A. 656; Hatch *v.* Adams, 22 Fed. 434.

95. Keeler *v.* Standard Folding-Bed Co., 157 U. S. 659, 15 S. Ct. 738, 39 L. ed. 848 [*reversing* 37 Fed. 693, 41 Fed. 51]; Jackson *v.* Vaughan, 73 Fed. 837.

96. Revocation or other termination see *infra*, XI, B, 1, g.

97. St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404; American St. Car Advertising Co. *v.* Jones, 122 Fed. 803 [*reversed* on other grounds in 142 Fed. 974, 74 C. C. A. 236]; Edison Electric Light Co. *v.* Peninsular Light, etc., Co., 95 Fed. 669; McKay *v.* Mace, 23 Fed. 76;

ever an express stipulation in the contract as to the duration of the license will of course control.[98]

(2) In Extended Term. The presumption of law in regard to every license under a patent is that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest; and unless there be such a stipulation, showing that the parties contemplated an extension, the provisions of the license will be construed as relating to the then existing term only.[99] There is, however, a distinction between the grant of the right to make and vend the patented article, and the grant of the right to use it. Purchasers of the exclusive privilege of making or vending the patented article hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and the interest which the purchaser acquires at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary.[1] But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds. Where such a sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine until it is worn out in spite of any and every extension subsequently obtained by the patentee or his assigns.[2] But a licensee who, having machines in use at the end of an original term of a patent, takes a license for another year under the extended term, waives any rights which he had to use such machines when the first term ended.[3] If before the extension the right to use was limited to a particular district or to a specified number of machines, it continues during the extension subject to the same limitations.[4]

(iii) *Covenants and Conditions.* The rights of the licensee may be limited by special covenants and conditions,[5] and a violation of those conditions make

Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410.

98. Nichols *v.* Murphy, 136 Ill. 380, 26 N. E. 509; Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Sherborne *v.* Wilcox, etc., Sewing-mach. Co., 105 Fed. 970.

99. New York Phonograph Co. *v.* Edison, 136 Fed. 600 [*affirmed* in 144 Fed. 404, 75 C. C. A. 382]; Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,560, 6 Blatchf. 165.

Construction of particular stipulations.—A stipulation in a license that it shall continue "during the term for which said letters patent are or may be granted" (Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410), or "for the whole term of the patent which may be granted" (Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385), does not authorize the use of the invention during the extended term.

1. Union Paper-Bag Mach. Co. *v.* Nixon, 105 U. S. 766, 26 L. ed. 959; Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Bloomer *v.* Millinger, 1 Wall. (U. S.) 340, 17 L. ed. 581; Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, Fish. Pat. Rep. 376, 5 McLean 158; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

The right to use a patented process during the original term of the patent does not authorize the use of it after the patent is extended. Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385.

2. Union Paper-Bag Mach. Co. *v.* Nixon, 105 U. S. 766, 26 L. ed. 959; Mitchell *v.* Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Bloomer *v.* Millinger, 1 Wall. (U. S.) 340, 17 L. ed. 581; Chaffee *v.* Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Bloomer *v.* McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; Blanchard *v.* Whitney, 3 Fed. Cas. No. 1,519, 3 Blatchf. 307; Farrington *v.* Gregory, 8 Fed. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; May *v.* Chaffee, 16 Fed. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160; Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 2 Off. Gaz. 471, 9 Phila. (Pa.) 385; Woodworth *v.* Curtis, 30 Fed. Cas. No. 18,013, 2 Robb Pat. Cas. 603, 2 Woodb. & M. 524; Wooster *v.* Sidenberg, 30 Fed. Cas. No. 18,039, 2 Ban. & A. 91, 13 Blatchf. 88, 10 Off. Gaz. 244.

3. Wooster *v.* Taylor, 30 Fed. Cas. No. 18,040, 1 Ban. & A. 594, 12 Blatchf. 384, 8 Off. Gaz. 644.

4. Day *v.* Union India-Rubber Co., 7 Fed. Cas. No. 3,691, 3 Blatchf. 488 [*affirmed* in 20 How. 216, 15 L. ed. 833].

5. Whitson *v.* Columbia Phonograph Co., 18 App. Cas. (D. C.) 565; Garst *v.* Harris, 177

him an infringer of the patent.[6] A party selling patented machines may impose any conditions desired upon the use or further sale of those machines, and a purchaser with notice is bound by those conditions.[7] But a purchaser without notice of any private agreements between the patentee and his licensee is not bound thereby.[8]

e. Rights, Remedies, and Liabilities[9]—(i) *In General.* The rights and liabilities of the parties arise from the license contract and are to be determined from its terms and conditions.[10] Where a licensee violates his express covenants or repudiates the license, the licensor may sue either for breach of the agreement or for infringement.[11] Where the licensee has exclusive right within certain territory the patentee cannot invade that right and the licensee may maintain suit against him for infringement.[12]

(ii) *Enjoining Use of Invention.* A provisional injunction will be granted against a licensee to restrain his use of a patented machine in violation of restrictions contained in the license.[13] But such an injunction will be refused where it appears that the licensee violated the restrictions under a misapprehension of his rights, and had discontinued the violation.[14] So where a licensee undertakes to use a patent without paying the license-fee, the use will be enjoined whether or not the license becomes voidable at law.[15] The exercise of a license to build a cer-

Mass. 72, 58 N. E. 174; Burke *v.* Partridge, 58 N. H. 349; Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; National Phonograph Co. *v.* Schlegel, 128 Fed. 733, 64 C. C. A. 594; Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; Edison Phonograph Co. *v.* Pike, 116 Fed. 863; Cortelyou *v.* Lowe, 111 Fed. 1005, 49 C. C. A. 671; Edison Phonograph Co. *v.* Kaufmann, 105 Fed. 960; Dickerson *v.* Tinling, 84 Fed. 192, 28 C. C. A. 139; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Washburn, etc., Mfg. Co. *v.* Southern Wire Co., 37 Fed. 428; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,962, 3 McLean 523, 2 Robb Pat. Cas. 281; Dorsey Revolving Harvester Rake Co. *v.* Bradley Mfg. Co., 7 Fed. Cas. No. 4,015, 1 Ban. & A. 330, 12 Blatchf. 202; Goodyear *v.* Day, 10 Fed. Cas. No. 5,567; Wood *v.* Wells, 30 Fed. Cas. No. 17,967, 6 Fish. Pat. Cas. 382; Woodworth *v.* Cook, 30 Fed. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. Rep. 423.

An agreement to use only the patented form is not contrary to public policy. Jones *v.* Lees, 1 H. & N. 189, 2 Jur. N. S. 645, 26 L. J. Exch. 9.

6. Cortelyou *v.* Johnson, 138 Fed. 110 [*reversed* in 145 Fed. 933, 76 C. C. A. 455, and later decision *affirmed* in 207 U. S. 196, 28 S. Ct. 105, on the ground that there was no sufficient proof of notice of restrictions on sale]; Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; Edison Phonograph Co. *v.* The Pike, 116 Fed. 863; Edison Phonograph Co. *v.* Kaufmann, 105 Fed. 960; Tubular Rivet, etc., Co. *v.* O'Brien, 93 Fed. 200; Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575.

7. Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; Edison Phonograph Co. *v.* Pike, 116 Fed. 863; Edison Phonograph Co. *v.* Kaufmann, 105 Fed. 960; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Porter Needle Co. *v.* National Needle Co., 17 Fed. 536; American Cotton-Tie Supply Co. *v.* Bullard, 1 Fed. Cas. No. 294, 4 Ban. & A. 520, 17 Blatchf. 160, 9 Reporter 70, 17 Off. Gaz. 389; Wilson *v.* Sherman, 30 Fed. Cas. No. 17,833, 1 Blatchf. 536, 2 Fish. Pat. Rep. 361; British Mutoscope, etc., Co. *v.* Homer, [1901] 1 Ch. 671, 70 L. J. Ch. 279, 84 L. T. Rep. N. S. 26, 49 Wkly. Rep. 277.

Notice of conditions printed and posted upon each machine is binding upon purchasers. Cortelyou *v.* Johnson, 138 Fed. 110 [*reversed* in 145 Fed. 933, 76 C. C. A. 455 (see same case, 207 U. S. 196, 28 St. Ct. 105)]; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

8. Washing Mach. Co. *v.* Earle, 29 Fed. Cas. No. 17,219, 2 Fish. Pat. Cas. 203, 3 Wall. Jr. 320.

9. **Recovery of royalties** see *infra*, XI, B, 3. **Revocation of license** see *infra*, XI, B, 1, g.

10. See *supra*, XI, B, 1, d, (III).

11. Cohn *v.* National Rubber Co., 6 Fed. Cas. No. 2,968, 6 Ban. & A. 568, 15 Off. Gaz. 829; England *v.* Thompson, 8 Fed. Cas. No. 4,487, 3 Cliff. 271; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,949, 2 Ban. & A. 152, 13 Blatchf. 151, 8 Off. Gaz. 773.

12. Whitson *v.* Columbia Phonograph Co., 18 App. Cas. (D. C.) 565; Waterman *v.* McKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141.

13. Wilson *v.* Sherman, 30 Fed. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. Rep. 361.

14. Wilson *v.* Sherman, 30 Fed. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. Rep. 361.

15. Day *v.* Hartshorn, 7 Fed. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; Woodworth *v.* Weed, 30 Fed. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. Rep. 108.

tain number of patented machines will not be restrained until such number of machines has been completed.[16] A bill by a licensee to enjoin the licensor from manufacturing the goods contrary to his agreement cannot be maintained where it appears that the licensee himself has ceased to manufacture any goods under the license.[17]

(III) *Liability For, and Recovery Of, Consideration For License.*[18] The grant of a license to make, use, or sell a patented article is a sufficient consideration to support a promise to pay the price of such license if the patent is valid, although it may not be a profitable one.[19] Where the compensation for the use of the patent is not fixed by the contract, and where there is no established license-fee, the licensor is entitled to the reasonable value of such use.[20]

f. Assignments and Sublicenses — (I) *In General.* Generally a license by a patentee is personal to the licensee, and not transferable.[21] In order to give the quality of assignability to a mere license it must contain express words to that effect, must run to the licensee and his assigns, or by other equivalent language indicate the intention to make the privilege transmissible by the licensee.[22] A licensee cannot apportion his license by assignment, unless a manifest intent to confer such a right appears in the contract of license;[23] and such intent cannot be inferred merely from the grant to him and his "assigns."[24] But where such a license runs to the executors and administrators of the licensees as well as to their assigns, it is apportionable and divisible by assignment, and may be transferred in severalty by one of the licensees.[25]

(II) *Assent to or Recognition of Assignment by Licensor.* A continuing assignable quality may be given to a licensee to use a patented invention

16. Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 702.

17. Adams, etc., Mfg. Co. *v.* Westlake, 53 Fed. 588.

18. Recovery of royalties see *infra*, XI, B, 3.

19. Elmer *v.* Pennel, 40 Me. 430; Wilson *v.* Hentges, 26 Minn. 288, 3 N. W. 338; Montgomery *v.* Waterbury, 2 Misc. (N. Y.) 145, 21 N. Y. Suppl. 631 [*affirmed* in 142 N. Y. 652, 37 N. E. 569]; Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Want of consideration.— The utter worthlessness of a patent right is a perfect defense to a suit on a note given by a licensee (Clough *v.* Patrick, 37 Vt. 421); and it is sufficient to sustain a plea of want of consideration to show that no patent had ever issued for the article licensed to be made and sold (Brown *v.* Wright, 17 Ark. 9), or that the patent issued was void (Harlow *v.* Putnam, 124 Mass. 553).

20. Griffin *v.* White, 142 N. Y. 539, 37 N. E. 468; Skinner *v.* Walter A. Wood Mowing Mach. Co., 14 N. Y. St. 317.

How value determined.— To determine this value all the elements of value on the case will be considered (Berdan Firearms Mfg. Co. *v.* U. S., 26 Ct. Cl. 48 [*affirmed* in 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530]; McKeever *v.* U. S., 14 Ct. Cl. 396); and the testimony of experts is also admissible for this purpose (Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321).

21. Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 862; Troy Iron, etc., Factory *v.* Corning, 14 How. (U. S.) 193, 14 L. ed. 383; Bowers *v.* Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 C. C. A. 493; Walter A. Wood Harvester Co. *v.* Minneapolis-Esterly Harvester Co., 61 Fed. 256; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Eclipse Windmill Co. *v.* Woodmanse Windmill Co., 24 Fed. 650; Curran *v.* Craig, 22 Fed. 101; Gibbs *v.* Hoefner, 19 Fed. 323; Wilson *v.* Stolley, 30 Fed. Cas. No. 17,840, 5 McLean 1, Fish. Pat. Rep. 261. But see Baldwin *v.* Sibley, 2 Fed. Cas. No. 805, 1 Cliff. 150; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,963, Fish. Pat. Rep. 137, 4 McLean 275.

An implied license to make and use does not pass by an administrator's sale of the licensee's place of business, including a few articles covered by the patent. Kraatz *v.* Tieman, 79 Fed. 322.

22. Tuttle *v.* La Dow, 54 Hun (N. Y.) 149, 7 N. Y. Suppl. 277; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 862; Troy Iron, etc., Factory *v.* Corning, 14 How. (U. S.) 193, 14 L. ed. 383; Bowers *v.* Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 C. C. A. 493; Waldo *v.* American Soda Fountain Co., 92 Fed. 623; Walter A. Wood Harvester Co. *v.* Minneapolis-Esterly Harvester Co., 61 Fed. 256; Adams *v.* Howard, 22 Fed. 656, 23 Blatchf. 27; Putnam *v.* Hollender, 6 Fed. 882, 19 Blatchf. 48.

23. Consolidated Fruit-Jar Co. *v.* Whitney, 6 Fed. Cas. No. 3,132, 1 Ban. & A. 356, 10 Phila. (Pa.) 268.

24. Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368; Brooks *v.* Byam, 4 Fed. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525.

25. Adams *v.* Howard, 22 Fed. 656, 23 Blatchf. 27.

originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license.[26] Even where a license contains a stipulation that it should be non-transferable, it may be assigned with the assent of the licensor, since such a stipulation is for his sole benefit.[27]

(III) *Rights and Liabilities of Parties.* In the case of an assignment of a license, the assignee is bound to perform the conditions of the license, or the license will become forfeited.[28] But in the absence of any statutory provision the owner of a patented invention is not required to give notice to a voluntary purchaser of a licensee's right in order to enable him to hold such purchaser to the restricted use and enjoyment of the invention stipulated in the license.[29] It is the duty of the purchaser to inform himself of the nature of the licensee's ownership, and the extent of his right.[30]

g. Revocation, Forfeiture, or Other Termination[31] — (I) *By Licensor.* Where a license contains no power of revocation it cannot be annulled by the licensor without the consent of the licensee,[32] but he must proceed at law for breach of contract.[33] A breach of covenant does not *per se* work a forfeiture of a patent license,[34] even if the license contains an express stipulation to that effect.[35] It will remain in force so as to defeat a suit against the licensee for infringement until it has been rescinded by decree of a court having jurisdiction.[36] Where the licensor has an adequate remedy at law, equity will not interfere.[37] Where stipulations as to termination are included in the license they must be followed, and

26. Bowers *v.* Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 C. C. A. 493.

Thus the patentee may affirm an assignment by a licensee by receiving royalties from such assignee or otherwise recognizing and dealing with him as a licensee. Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873; Wilde *v.* Smith, 8 Daly (N. Y.) 196; Lane, etc., Co. *v.* Locke, 150 U. S. 193, 14 S. Ct. 78, 37 L. ed. 1049; Holmes Burglar Alarm Tel. Co. *v.* Domestic Tel., etc., Co., 42 Fed. 220; Bloomer *v.* Gilpin, 3 Fed. Cas. No. 1,558, 4 Fish. Pat. Cas. 50.

27. Scutt *v.* Robertson, 127 Ill. 135, 19 N. E. 851.

28. Moody *v.* Taber, 17 Fed. Cas. No. 9,747, 1 Ban. & A. 41, Holmes 325, 5 Off. Gaz. 273; Wilson *v.* Stolley, 30 Fed. Cas. No. 17,840, Fish. Pat. Rep. 261, 5 McLean 1.

The grantee from a licensee must pay the license-fees stipulated in the license from the patentee. Paper Stock Disinfecting Co. *v.* Boston Disinfecting Co., 147 Mass. 318, 17 N. E. 554; Goodyear *v.* Congress Rubber Co., 10 Fed. Cas. No. 5,565, 3 Blatchf. 449. But he will not be enjoined from acting under the license because of failure of his grantee to pay license-fees accrued before the conveyance, nor is he liable therefor. Goodyear *v.* Congress Rubber Co., *supra.*

29. Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575.

30. Chambers *v.* Smith, 5 Fed. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575.

31. Duration of license in general see *supra,* XI, B, 1, c.

32. Scutt *v.* Robertson, 127 Ill. 135, 19 N. E. 851; Barclay *v.* Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 Atl. 715; Bezer *v.* Hall Signal Co., 22 N. Y. App. Div. 489, 48 N. Y. Suppl. 203; Consolidated Oil Well Packer Co. *v.* Jarecki Mfg. Co., 157 Pa. St. 342, 27 Atl. 543, 545; Wagner Typewriter Co. *v.* Watkins, 84 Fed. 57; Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368; Illingworth *v.* Spaulding, 43 Fed. 827; Goddard *v.* Wilde, 17 Fed. 845; Kelly *v.* Porter, 17 Fed. 519, 8 Sawy. 482; Cook *v.* Bidwell, 8 Fed. 452; Burdell *v.* Denig, 4 Fed. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Bower *v.* Hodges, 13 C. B. 765, 17 Jur. 1057, 22 L. J. C. P. 194, 76 E. C. L. 765; Tielens *v.* Hooper, 5 Exch. 830, 20 L. J. Exch. 78; Guyot *v.* Thomson, 71 L. T. Rep. N. S. 124, 8 Reports 810 [*affirmed* in [1894] 3 Ch. 388, 64 L. J. Ch. 32, 71 L. T. Rep. N. S. 416, 8 Reports 814 note]; Ward *v.* Livesey, 5 Rep. Pat. Cas. 102; McLaughlin *v.* Lake Erie, etc., R. Co., 2 Ont. L. Rep. 190.

33. Chase *v.* Cox, 41 Fed. 475.

34. Maitland *v.* Central Gas, etc., Co., 7 Misc. (N. Y.) 408, 27 N. Y. Suppl. 965 [*affirming* 7 Misc. 245, 27 N. Y. Suppl. 421]; New York Phonograph Co. *v.* Edison, 136 Fed. 600 [*affirmed* in 144 Fed. 404, 75 C. C. A. 382]; Hanifen *v.* Lupton, 95 Fed. 465; Dare *v.* Boylston, 6 Fed. 493, 18 Blatchf. 548; White *v.* Lee, 3 Fed. 222; Woodworth *v.* Weed, 30 Fed. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. Rep. 108.

35. Standard Dental Mfg. Co. *v.* National Tooth Co., 95 Fed. 291.

36. Hanifen *v.* Lupton, 95 Fed. 465; Standard Dental Mfg. Co. *v.* National Tooth Co., 95 Fed. 291.

The exceptions to this rule are where the licensee has assumed such a hostile attitude toward the patent as to amount to a repudiation of the right conveyed by the license. Wood *v.* Wells, 30 Fed. Cas. No. 17,967, 6 Fish. Pat. Cas. 382.

37. Densmore *v.* Tanite Co., 32 Fed. 544.

when performed end the agreement.[38] An agreement that upon failure of a party to a license to perform his covenant it may be forfeited by a written notice served on him is valid, and may be enforced.[39]

(II) *By Licensee.* In the absence of a stipulation to that effect, a license is not revocable by the licensee, except by mutual consent, or by the fault of the other party.[40] When so stipulated a licensee may terminate the license by giving written notice, and he will no longer be liable for royalty under it;[41] but the notice given must be clear and unequivocal.[42] The surrender of a license by part of the licensees does not avoid the license as to the remainder of the licensees.[43]

(III) *By Death of Licensee.* A mere personal license is immediately terminated by the death of the licensee, and no rights thereunder pass to his personal representatives.[44]

(IV) *By Dissolution of Partnership or Corporation.* The dissolution of a partnership or corporation exercising a patent license extinguishes the license, in the absence of language importing transferability,[45] except as to a continuing partner.[46]

(V) *Revival of Forfeited License.* A license declared forfeited for breach of conditions cannot be revived by a tender of royalties due.[47]

2. Contracts.[48] Contracts in regard to patent rights are interpreted and enforced in the same manner as other legal engagements.[49]

38. Garver *v.* Bement, 69 Mich. 149, 37 N. W. 63; Warth *v.* Liebovitz, 83 N. Y. App. Div. 632, 82 N. Y. Suppl. 578 [*affirmed* in 179 N. Y. 200, 71 N. E. 734]; Pitts *v.* Jameson, 15 Barb. (N. Y.) 310; Stimpson Computing Scale Co. *v.* W. F. Stimpson Co., 104 Fed. 893, 44 C. C. A. 241; Union Switch, etc., Co. *v.* Johnson, 72 Fed. 147, 18 C. C. A. 490; Woodworth *v.* Weed, 30 Fed. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. Rep. 108.

39. Hammacher *v.* Wilson, 26 Fed. 239.

Necessity of notice.— In case of default written notice must be served on the licensee in order to terminate the license, where such license provides in terms for such notice. Hurd *v.* Gere, 27 N. Y. App. Div. 625, 50 N. Y. Suppl. 235; Rogers *v.* Riessner, 30 Fed. 525; White *v.* Lee, 3 Fed. 222.

40. St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404; Laver *v.* Dennett, 109 U. S. 90, 3 S. Ct. 73, 27 L. ed. 867; Cherry *v.* Heming, 2 Exch. 557, 17 L. J. Exch. 305; Lewin *v.* Brown, 14 Wkly. Rep. 640.

Licensee may abandon license where patent is void see Standard Button Fastening Co. *v.* Ellis, 159 Mass. 448, 34 N. E. 682; Harlow *v.* Putnam, 124 Mass. 553; Forncrook Mfg. Co. *v.* Barnum Wire, etc., Works, 63 Mich. 195, 29 N. W. 537; Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Marston *v.* Swett, 82 N. Y. 526; Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Ross *v.* Fuller, etc., Co., 105 Fed. 510; Mudgett *v.* Thomas, 55 Fed. 645.

41. Garver *v.* Bement, 69 Mich. 149, 37 N. W. 63.

42. Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; Hurd *v.* Gere, 27 N. Y. App. Div. 625, 50 N. Y. Suppl. 235.

43. Theberath *v.* Celluloid Mfg. Co., 3 Fed. 143.

44. Smith *v.* Preston, 170 Ill. 179, 48 N. E. 688; Oliver *v.* Rumford Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. ed. 862.

45. Warth *v.* Mertens, 71 N. Y. App. Div. 395, 75 N. Y. Suppl. 1092 [*affirmed* in 173 N. Y. 626, 66 N. E. 1117]; Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Carroll *v.* Goldschmidt, 80 Fed. 520; Elgin Wind Power, etc., Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578; Haffcke *v.* Clark, 50 Fed. 531, 1 C. C. A. 570; Curran *v.* Craig, 22 Fed. 101; Hapgood *v.* Hewitt, 11 Fed. 422, 11 Biss. 184. But see Wilson *v.* Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550 [*reversing* 57 N. Y. App. Div. 158, 68 N. Y. Suppl. 173].

46. Belding *v.* Turner, 3 Fed. Cas. No. 1,243, 8 Blatchf. 321, 4 Fish. Pat. Cas. 446.

47. Platt *v.* Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 C. C. A. 357.

48. **Power of attorney to procure or manage patent** see Principal and Agent.

49. Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Morse *v.* O'Reilly, 17 Fed. Cas. No. 9,858; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,321, 3 Ban. & A. 281, 4 Cliff. 568.

Intention of parties controls see Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; Wooster *v.* Trowbridge, 120 Fed. 667, 57 C. C. A. 129 [*affirming* 115 Fed. 722]; Hartz *v.* Cleveland Block Co., 95 Fed. 681, 37 C. C. A. 227; Macallen Co. *v.* Johns-Pratt Co., 80 Fed. 410.

Unambiguous contract not changed by parol evidence see Ralya *v.* Atkins, 157 Ind. 331, 61 N. E. 726.

3. Royalties — a. Rights and Liabilities of Parties — (I) *When Royalties Due.* The time during which royalty must be paid depends entirely upon the terms of the contract.[50] No royalties, however, can be required on an agreement to grant a license under a patent if the patent is never granted.[51]

(II) *Amount of Royalty.* The amount of royalty to which the licensor is entitled is the amount which has been fixed in the license agreement[52] or in the

Not construed to be retroactive see National Sewing-Mach. Co. *v.* Willcox, etc., Sewing-Mach. Co., 74 Fed. 557, 20 C. C. A. 654.

Consideration see Magnolia Anti-Friction Metal Co. *v.* Singley, 17 N. Y. Suppl. 251 [*affirmed* in 137 N. Y. 557, 33 N. E. 337]; Piaget Novelty Co. *v.* Headley, 108 Fed. 870, 48 C. C. A. 116 [*affirming* 107 Fed. 134].

Contract rather than the patent controls see Wilder *v.* Adams, 16 Gray (Mass.) 478; Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Harvey Steel Co. *v.* U. S., 39 Ct. Cl. 297.

Binding on successors see Pratt *v.* Wilcox Mfg. Co., 64 Fed. 589.

Damages for breach see Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

Agreement not to dispute validity of patent is not against public policy. Philadelphia Creamery Supply Co. *v.* Davis, etc., Co., 77 Fed. 879; Pratt *v.* Wilcox Mfg. Co., 64 Fed. 589.

Agreement not to defend against any patents owned by the plaintiff is against public policy and void. Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 S. Ct. 632, 36 L. ed. 414.

Contracts construed see Eclipse Bicycle Co. *v.* Farrow, 16 App. Cas. (D. C.) 468; Lamson *v.* Martin, 159 Mass. 557, 35 N. E. 78; Mouat *v.* Bamlet, 123 Mich. 345, 82 N. W. 74; Myrick *v.* Purcell, 99 Minn. 457, 109 N. W. 995; Mankato Mills Co. *v.* Willard, 94 Minn. 160, 102 N. W. 202; Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008; Bancroft *v.* Union Embossing Co., 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298; Peck *v.* Collins, 70 N. Y. 376 [*affirmed* in 103 U. S. 660, 26 L. ed. 512]; Corbet *v.* Manhattan Brass Co., 93 N. Y. App. Div. 217, 87 N. Y. Suppl. 577; Ebert *v.* Loewenstein, 42 N. Y. App. Div. 109, 58 N. Y. Suppl. 889 [*reversed* on other grounds in 167 N. Y. 577, 60 N. E. 1110]; Miller *v.* Jones, 67 Hun (N. Y.) 281, 22 N. Y. Suppl. 86; Hargraves *v.* A. B. Pitkin Mach. Co., 19 R. I. 426, 34 Atl. 738; Vaughan *v.* Porter, 16 Vt. 266; Murphey *v.* Weil, 92 Wis. 467, 66 N. W. 532; Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; Ball, etc., Fastener Co. *v.* Patent Button Co., 152 Fed. 187; New York Phonograph Co. *v.* Edison, 136 Fed. 600 [*affirmed* in 144 Fed. 404, 75 C. C. A. 382]; Kenny *v.* Knight, 119 Fed. 475; Wooster *v.* Trowbridge, 115 Fed. 722; Kerr *v.* Southwick, 109 Fed. 482; Fox Solid Pressed Steel Co. *v.* Schoen, 77 Fed. 29; Denning *v.* Bray, 61 Fed. 651, 10 C. C. A. 6; Goddard *v.* Wilde, 17 Fed. 845; Dibble *v.* Augur, 7 Fed. Cas. No. 3,879, 7 Blatchf. 86. See also Eclipse Bicycle Co. *v.* Farrow, 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317.

50. Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029; Hamilton *v.* Park, etc., Co., 112 Mich. 138, 70 N. W. 436; Nilsson *v.* De Haven, 168 N. Y. 656, 61 N. E. 1131; Fries *v.* Merck, 167 N. Y. 445, 60 N. E. 777; Bezer *v.* Hall Signal Co., 22 N. Y. App. Div. 489, 48 N. Y. Suppl. 203; People *v.* Remington, 59 Hun (N. Y.) 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98 [*affirmed* in 126 N. Y. 654, 27 N. E. 853]; Union Mfg. Co. *v.* Lounsbury, 42 Barb. (N. Y.) 125 [*affirmed* in 41 N. Y. 363]; Willcox, etc., Sewing-Mach. Co. *v.* Sherborn, 109 Fed. 319, 48 C. C. A. 378; Shepard *v.* Kinner, 86 Fed. 638, 30 C. C. A. 315.

Release.— Invalidity of patent releases licensee if he quits using invention. Standard Button Fastening Co. *v.* Ellis, 159 Mass. 448, 34 N. E. 682; Harlow *v.* Putnam, 124 Mass. 553; Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Dutchess Tool Co. *v.* Kolb, 44 N. Y. App. Div. 624, 60 N. Y. Suppl. 94; Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Mudgett *v.* Thomas, 55 Fed. 645.

Date of payments see Confectioners' Mach., etc., Co. *v.* Panoualias, 134 Fed. 393, 67 C. C. A. 391; American Paper-Bag Co. *v.* Van Nortwick, 52 Fed. 752, 3 C. C. A. 274; Dare *v.* Boylston, 6 Fed. 493, 18 Blatchf. 548; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,962, 3 McLean 523, 2 Robb Pat. Cas. 281.

Due from legal representatives after licensee's death see Dancel *v.* Goodyear Shoe-Mach. Co., 109 Fed. 333.

51. Hamilton *v.* Park, etc., Co., 125 Mich. 72, 83 N. W. 1018; Travis *v.* Hunter, 41 Minn. 176, 42 N. W. 1015.

By agreement royalty due before grant of patent see Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029; Hamilton *v.* Park, etc., Co., 112 Mich. 138, 70 N. W. 436; Nilsson *v.* De Haven, 168 N. Y. 656, 61 N. E. 1131; Bezer *v.* Hall Signal Co., 22 N. Y. App. Div. 489, 48 N. Y. Suppl. 203; Willcox, etc., Sewing-Mach. Co. *v.* Sherborn, 109 Fed. 319, 48 C. C. A. 378.

Liable under special agreement although patent not granted see Ingraham *v.* Schaum, 157 Pa. St. 88, 27 Atl. 404; Beecher *v.* Stein, 139 Pa. St. 570, 21 Atl. 79.

In absence of special agreement due upon issue of patent see D. M. Steward Mfg. Co. *v.* Steward, 109 Tenn. 288, 70 S. W. 808.

52. Keith *v.* Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598; Linington *v.* Strong, 111 Ill. 152; Simonds Rolling Mach. Co. *v.* Pope Mfg. Co., 180 Mass. 393, 62 N. E.

absence of definite agreement between the parties is determined by what is reasonable.[53]

(III) *Persons Entitled to Royalties.* The owner of a patent who grants a license is entitled to royalty in accordance with the conditions of the contract whether express or implied.[54] Where one of several joint owners issues a license the others cannot recover part of the royalty from the licensee,[55] nor can they recover it from the licensor under an accounting.[56]

(IV) *Persons Liable For Royalties.* The licensee is liable during the continuation of the contract for the use of the invention referred to therein,[57]

467; McGill *v.* Holmes, 168 N. Y. 647, 61 N. E. 1131.

Minimum sum fixed see Hamilton *v.* Park, etc., Co., 112 Mich. 138, 70 N. W. 436; Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; Corbet *v.* Manhattan Brass Co., 93 N. Y. App. Div. 217, 87 N. Y. Suppl. 577; Ebert *v.* Loewenstein, 42 N. Y. App. Div. 109, 58 N. Y. Suppl. 889 [*affirmed* in 167 N. Y. 577, 60 N. E. 1110]; Meyer *v.* Brenzinger, 22 Misc. (N. Y.) 712, 49 N. Y. Suppl. 1091.

Particular contracts construed see Bates Mach. Co. *v.* Cookson, 202 Ill. 248, 66 N. E. 1093; Goodyear Shoe Mach. Co. *v.* Selz, 157 Ill. 186, 41 N. E. 625; Warth *v.* Loewenstein, 121 Ill. App. 71 [*affirmed* in part in 219 Ill. 222, 76 N. E. 379]; Spurck *v.* Benner, 89 Ill. App. 79; Cummings *v.* Standard Harrow Co., 55 Misc. (N. Y.) 601, 105 N. Y. Suppl. 646; Dick *v.* Bovaird, 8 Pa. Cas. 70, 5 Atl. 30; Bovaird *v.* Dick, 8 Pa. Cas. 60, 5 Atl. 26; Bowers *v.* Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 C. C. A. 493; Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 60 C. C. A. 220.

Interest on overdue royalty see Pressey *v.* H. B. Smith Mach. Co., 45 N. J. Eq. 872, 19 Atl. 618.

53. Bates Mach. Co. *v.* Cookson, 202 Ill. 248, 66 N. E. 1093; Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008; Ross *v.* Fuller, etc., Co., 105 Fed. 510.

54. Blair *v.* Lippincott Glass Co., 52 Fed. 226; Consolidated Fruit-Jar Co. *v.* Whitney, 6 Fed. Cas. No. 3,134, 2 Ban. & A. 375.

Equitable rights of partner see Rogers *v.* Riessner, 30 Fed. 525.

Contract inuring to benefit of owner see Mann's Boudoir Car Co. *v.* Gilbert Car Mfg. Co., 69 Hun (N. Y.) 245, 23 N. Y. Suppl. 697 [*affirmed* in 141 N. Y. 571, 36 N. E. 345]; Grier *v.* Baynes, 46 Fed. 523; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,195, 1 Blatchf. 467, Fish. Pat. Rep. 290 [*reversed* on other grounds in 14 How. 193, 14 L. ed. 383].

Royalty implied under other patents see Felix *v.* Scharnweber, 19 Ill. App. 628 [*affirmed* in 119 Ill. 445, 10 N. E. 16].

Conduct of licensor may be such as to estop see Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Angier *v.* Eaton, 98 Pa. St. 594. Granting licenses to others, however, will not estop him in the absence of agreement. Jarecki *v.* Hays, 161 Pa. St. 613, 29 Atl. 118; Hardwick *v.* Galbraith, 147 Pa. St. 333, 23 Atl. 451.

55. Paulus *v.* M. M. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162; Lalance, etc., Mfg. Co. *v.* National Enameling, etc., Co., 108 Fed. 77; Levy *v.* Dattlebaum, 63 Fed. 992; Pusey, etc., Co. *v.* Miller, 61 Fed. 401.

56. Vose *v.* Singer, 4 Allen (Mass.) 226, 81 Am. Dec. 696; De Witt *v.* Elmira Nobles Mfg. Co., 5 Hun (N. Y.) 301 [*affirmed* in 66 N. Y. 459, 23 Am. Rep. 73]; Blackledge *v.* Weir, etc., Mfg. Co., 108 Fed. 71, 47 C. C. A. 212.

57. The licensee is liable for at least the minimum amount specified; it makes no difference whether he uses the invention or not. Linington *v.* Strong, 90 Ill. 556; Simonds Rolling Mach. Co. *v.* Pope Mfg. Co., 180 Mass. 393, 62 N. E. 467; Wing *v.* Ansonia Clock Co., 102 N. Y. 531, 7 N. E. 621; Hackett *v.* Hackett Hatch Door Mfg. Co., 52 N. Y. Super. Ct. 263.

Eviction or proper surrender is necessary to terminate liability. Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540 [*affirming* 20 N. Y. Suppl. 251]; Hurd *v.* Gere, 27 N. Y. App. Div. 625, 50 N. Y. Suppl. 235; Maitland *v.* Drew, 14 Misc. (N. Y.) 60, 35 N. Y. Suppl. 249; McKay *v.* Smith, 39 Fed. 556; McKay *v.* Jackman, 17 Fed. 641.

Liable after cancellation for past use see Hamilton *v.* Park, etc., Co., 112 Mich. 138, 70 N. W. 436.

Not relieved by invalidity of patent see Warwick *v.* Stockton, (N. J. Ch. 1897) 37 Atl. 458; Hurd *v.* Gere, 27 N. Y. App. Div. 625, 50 N. Y. Suppl. 235; Holmes *v.* McGill, 108 Fed. 238, 47 C. C. A. 296; National Sewing-Mach. Co. *v.* Willcox, etc., Sewing-Mach. Co., 74 Fed. 557, 20 C. C. A. 654; Covell *v.* Bostwick, 39 Fed. 421. See also *supra*, VI, F. 4.

Infringement by licensor or others does not *per se* relieve the licensor. Nunes *v.* Russell, 65 Ill. App. 171; Skidmore *v.* Fahys Watch-Case Co., 28 N. Y. App. Div. 94, 50 N. Y. Suppl. 1016; Birdsall *v.* Perego, 3 Fed. Cas. No. 1,435, 5 Blatchf. 251.

Transfer of license or business does not end liability. Porter *v.* Standard Measuring Mach. Co., 142 Mass. 191, 7 N. E. 925; Rodgers *v.* Torrant, 43 Mich. 113, 4 N. W. 507; Wilson *v.* Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550; Marsh *v.* Dodge, 4 Hun (N. Y.) 278 [*affirmed* in 66 N. Y. 533]; Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

whether it is fully protected by patent or not.[58] He cannot allege invalidity or termination of contract so long as he acts under it.[59] Where a contractor is employed to do certain work and in doing it infringes a patent the contractor and not the employer is liable.[60]

(v) *Lien.* An agreement to pay royalties is a personal contract and creates no lien on the manufactured articles.[61]

b. Remedies. Royalties may be collected by an action at law,[62] and an action

Where the device infringes another patent the licensee may stop use and refuse to pay further royalty. Standard Button Fastening Co. *v.* Ellis, 159 Mass. 448, 34 N. E. 682; Harlow *v.* Putnam, 124 Mass. 553; Macon Knitting Co. *v.* Leicester Mills Co., 65 N. J. Eq. 138, 55 Atl. 401; Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Mudgett *v.* Thomas, 55 Fed. 645; McKay *v.* Smith, 39 Fed. 556; McKay *v.* Jackman, 17 Fed. 641.

58. Keith *v.* Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598; Eclipse Bicycle Co. *v.* Farrow, 23 App. Cas. (D. C.) 411 [*reversed* on other grounds in 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317]; Palmer's Appeal, 96 Pa. St. 106; U. S. *v.* Harvey Steel Co., 196 U. S. 310, 25 S. Ct. 240, 49 L. ed. 492; Corbin *v.* Taussig, 137 Fed. 151; Leslie *v.* Standard Sewing-Mach. Co., 98 Fed. 827, 39 C. C. A. 314; Sproull *v.* Pratt, etc., Co., 97 Fed. 807.

Liability includes unpatented as well as patented articles see McGill *v.* Holmes, 48 N. Y. App. Div. 628, 64 N. Y. Suppl. 787 [*affirmed* in 168 N. Y. 647, 61 N. E. 1131].

Agreement controls and not the scope of the patent. Kroegher *v.* McConway, etc., Co., 149 Pa. St. 444, 23 Atl. 341; Kirkpatrick *v.* Pope Mfg. Co., 64 Fed. 369.

Substitution of another device does not avoid liability. Eclipse Bicycle Co. *v.* Farrow, 16 App. Cas. (D. C.) 468, 23 App. Cas. (D. C.) 411 [*reversed* on other grounds in 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317]; Denise *v.* Swett, 68 Hun (N. Y.) 188, 22 N. Y. Suppl. 950 [*reversed* on other grounds in 142 N. Y. 602, 37 N. E. 627].

Not liable for use of things outside of patent and of agreement see Forncrook Mfg. Co. *v.* Barnum Wire, etc., Works, 63 Mich. 195, 29 N. W. 537; Dutchess Tool Co. *v.* Kolb, 44 N. Y. App. Div. 624, 60 N. Y. Suppl. 94; Hyatt *v.* Mark, 55 N. Y. Super. Ct. 507, 2 N. Y. Suppl. 727 [*affirmed* in 124 N. Y. 93, 26 N. E. 285]; Moore *v.* National Water-Tube Boiler Co., 84 Fed. 346; Standard Sewing-Mach. Co. *v.* Leslie, 78 Fed. 325, 24 C. C. A. 107; Covell *v.* Bostwick, 39 Fed. 421.

Use of one of several patents mentioned see Kline *v.* M. Garland Co., 135 Mich. 313, 97 N. W. 768; Pope Mfg. Co. *v.* Owsley, 27 Fed. 100.

Not liable for different invention see Eclipse Bicycle Co. *v.* Farrow, 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317. Royalty only on machines under patent. Goucher *v.* Clayton, 11 Jur. N. S. 462, 13 L. T. Rep. N. S. 111. Liable under contract whether or not followed strictly. Smith *v.* Goldie, 9 Can. Sup. Ct. 46; Yates *v.* Great Western R. Co., 24 Grant Ch. (U. C.) 495; Smith *v.* Powell, 7 U. C. C. P. 332.

59. Bowers' California Dredging Co. *v.* San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475; Illinois Watch Case Co. *v.* Ecaubert, 177 Ill. 587, 52 N. E. 861; Clark *v.* Amoskeag Mfg. Co., 62 N. H. 612; Warwick *v.* Stockton, (N. J. Ch. 1897) 37 Atl. 458; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285 [*affirming* 55 N. Y. Super. Ct. 507, 2 N. Y. Suppl. 727]; Dutchess Tool Co. *v.* Kolb, 44 N. Y. App. Div. 624, 60 N. Y. Suppl. 94; Skidmore *v.* Fahys Watch-Case Co., 28 N. Y. App. Div. 94, 50 N. Y. Suppl. 1016; Denise *v.* Swett, 68 Hun (N. Y.) 188, 22 N. Y. Suppl. 950 [*reversed* on other grounds in 142 N. Y. 602, 37 N. E. 627]; Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rec. 494; Consolidated Oil Well Packer Co. *v.* Jarecki Mfg. Co., 157 Pa. St. 342, 27 Atl. 543, 545; U. S. *v.* Harvey Steel Co., 196 U. S. 310, 25 S. Ct. 240, 49 L. ed. 492; American St. Car Advertising Co. *v.* Jones, 122 Fed. 803 [*reversed* on other grounds in 142 Fed. 974, 74 C. C. A. 236]; Holmes *v.* McGill, 108 Fed. 238, 47 C. C. A. 296; Leslie *v.* Standard Sewing-Mach. Co., 98 Fed. 827, 39 C. C. A. 314; Sproull *v.* Pratt, etc., Co., 97 Fed. 807; Moore *v.* National Water-Tube Boiler Co., 84 Fed. 346; Bonsack Mach. Co. *v.* Hess, 68 Fed. 119, 15 C. C. A. 303; Harvey Steel Co. *v.* U. S., 38 Ct. Cl. 662.

60. May *v.* Juneau County, 30 Fed. 241; Bryce *v.* Dorr, 4 Fed. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302; Stow *v.* Chicago, 23 Fed. Cas. No. 13,512, 3 Ban. & A. 83, 8 Biss. 47 [*affirmed* in 104 U. S. 547, 26 L. ed. 816].

Release of contractor releases employer. Bigelow *v.* Louisville, 25 Fed. Cas. No. 1,400, 3 Fish. Pat. Cas. 602.

Where employer is licensee contractor is released. Union Switch, etc., Co. *v.* Johnson R. Signal Co., 52 Fed. 867 [*reversed* on other grounds in 55 Fed. 487, 5 C. C. A. 204].

Both liable where both have knowledge see Palmer *v.* Landphere, 118 Fed. 52.

61. People *v.* Remington, 126 N. Y. 654, 27 N. E. 853 [*affirming* 59 Hun 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98].

62. Preston *v.* Smith, 156 Ill. 359, 40 N. E. 949; American Merchants' Mfg. Co. *v.* Kantrowitz, 77 Ill. App. 155; American Mach., etc., Co. *v.* Stewart, 115 La. 188, 38 So. 960; Stewart Mfg. Co. *v.* Iron Clad Mfg. Co., 67 N. J. L. 577, 52 Atl. 391; Scheurle *v.* Husbands, 65 N. J. L. 40, 46 Atl. 759; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285; Guggenheim *v.* Kirchofer, 66 Fed. 755, 14 C. C. A. 72; Washburn, etc., Mfg. Co *v.* Cincinnati Barbed-Wire Fence Co., 42 Fed. 675; Wash-

for an accounting may be joined with a demand for equitable relief by forfeiture of the license.[63] State courts have jurisdiction of an action to recover royalties under an agreement where there is no question as to the validity of the patent.[64]

C. Enforcement of Assignments, Contracts, and Agreements. A court of equity will enforce the rights of parties under a contract or agreement relating to patent rights by making appropriate orders in the same manner as under other agreements.[65] It is held that the ordinary rules of practice and procedure

burn, etc., Mfg. Co. *v.* Freeman Wire Co., 41 Fed. 410; Moxon *v.* Bright, L. R. 4 Ch. 292, 20 L. T. Rep. N. S. 961; Kernot *v.* Potter, 3 De G. F. & J. 447, 64 Eng. Ch. 350, 45 Eng. Reprint 951.

Facts entitling plaintiff to royalty must be shown. Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539; Stewart Mfg. Co. *v.* Iron Clad Mfg. Co., 67 N. J. L. 577, 52 Atl. 391; Russell *v.* U. S., 35 Ct. Cl. 154.

May sue for breach or for infringement see Kilburn *v.* Holmes, 121 Fed. 750, 58 C. C. A. 116; Starling *v.* St. Paul Plow-Works, 32 Fed. 290; Cohn *v.* National Rubber Co., 6 Fed. Cas. No. 2,968, 3 Ban. & A. 568, 15 Off. Gaz. 829; England *v.* Thompson, 8 Fed. Cas. No. 4,487, 3 Cliff. 271; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,949, 2 Ban. & A. 152, 13 Blatchf. 151, 8 Off. Gaz. 773; Woodworth *v.* Weed, 30 Fed. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. Rep. 108. But see Consolidated Middlings Purifier Co. *v.* Wolf, 28 Fed. 814.

Invalidity of patent is no defense. Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Jones *v.* Burnham, 67 Me. 93, 24 Am. Rep. 10; Hall Mfg. Co. *v.* American R. Supply Co., 48 Mich. 331, 12 N. W. 205; Clark *v.* Amoskeag Mfg. Co., 62 N. H. 612; Warwick *v.* Stockton, (N. J. Ch. 1897) 37 Atl. 458; Hyatt *v.* Ingalls, 49 N. Y. Super. Ct. 375; Baylis *v.* Bullock Electric Mfg. Co., 32 Misc. (N. Y.) 218, 66 N. Y. Suppl. 253 [*reversed* on other grounds in 59 N. Y. App. Div. 576, 69 N. Y. Suppl. 693]; McGill *v.* Holmes, 64 N. Y. Suppl. 787; Brusie *v.* Peck, 16 N. Y. Suppl. 648; Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Ingraham *v.* Schaum, 157 Pa. St. 88, 27 Atl. 404; Patterson's Appeal, 99 Pa. St. 521; Marsh *v.* Harris Mfg. Co., 63 Wis. 276, 22 N. W. 516; Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Moore *v.* National Water-Tube Boiler Co., 84 Fed. 346; Godell *v.* Wells, etc., Co., 70 Fed. 319.

Burden of proof see Bennett *v.* Iron Clad Mfg. Co., 121 N. Y. App. Div. 133, 105 N. Y. Suppl. 593.

Weight and sufficiency of evidence see Bennett *v.* Iron Clad Mfg. Co., 121 N. Y. App. Div. 133, 105 N. Y. Suppl. 593.

Question for jury see Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rec. 494.

Right of appeal where infringement or validity involved see St. Paul Plow-Works *v.* Starling, 127 U. S. 376, 8 S. Ct. 1327, 32 L. ed. 251.

Review on appeal see Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285 [*affirming* 55 N. Y. Super. Ct. 507, 2 N. Y. Suppl. 727]; U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530.

Procedure before referee see Hyatt *v.* Mark, 55 N. Y. Super. Ct. 507, 2 N. Y. Suppl. 727 [*affirmed* in 124 N. Y. 93, 26 N. E. 285].

63. Eclipse Bicycle Co. *v.* Farrow, 16 App. Cas. (D. C.) 468; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285 [*affirming* 55 N. Y. Super. Ct. 507, 2 N. Y. Suppl. 727]; Adams *v.* Meyrose, 7 Fed. 208, 2 McCrary 360; Woodworth *v.* Weed, 30 Fed. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. Rep. 108; Ashworth *v.* Roberts, 45 Ch. D. 623, 60 L. J. Ch. 27, 63 L. T. Rep. N. S. 160, 39 Wkly. Rep. 170; Haddan *v.* Smith, 11 Jur. 959, 17 L. J. Ch. 43, 16 Sim. 42, 39 Eng. Ch. 42, 60 Eng. Reprint 788. And see Eclipse Bicycle Co. *v.* Farrow, 23 App. Cas. (D. C.) 411 [*reversed* in part in 199 U. S. 581, 26 S. Ct. 150, 50 L. ed. 317].

Discovery, injunction, and account see Ball Glove Fastening Co. *v.* Ball, etc., Fastener Co., 36 Fed. 309; McKay *v.* Smith, 29 Fed. 295 [*affirmed* in 164 U. S. 701, 17 S. Ct. 1001, 41 L. ed. 1180].

Equity interferes only where remedy at law inadequate see Washburn, etc., Mfg. Co. *v.* Cincinnati Barbed-Wire Fence Co., 42 Fed. 675; Washburn, etc., Mfg. Co. *v.* Freeman, 41 Fed. 410.

64. Peck *v.* Bacon, 18 Conn. 377; Bull *v.* Pratt, 1 Conn. 342; Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873; Illinois Watch Case Co. *v.* Ecaubert, 75 Ill. App. 418; Hunt *v.* Hoover, 24 Iowa 231; Binney *v.* Annan, 107 Mass. 94, 9 Am. Rep. 10; Continental Store Service Co. *v.* Clark, 100 N. Y. 365, 3 N. E. 335; Snow *v.* Judson, 38 Barb. (N. Y.) 210; Darst *v.* Brockway, 11 Ohio 462; Standard Combustion Co. *v.* Farr, 9 Ohio Dec. (Reprint) 509, 14 Cinc. L. Bul. 201; Hubbard *v.* Allen, 123 Pa. St. 198, 16 Atl. 772; Wade *v.* Lawder, 165 U. S. 624, 17 S. Ct. 425, 41 L. ed. 851; Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413; Walter A. Wood Mowing, etc., Mach. Co. *v.* Skinner, 139 U. S. 293, 11 S. Ct. 528, 35 L. ed. 193; Felix *v.* Scharnweber, 125 U. S. 54, 8 S. Ct. 759, 31 L. ed. 687; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 8 S. Ct. 756, 31 L. ed. 683; Albright *v.* Teas, 106 U. S. 613, 1 S. Ct. 550, 27 L. ed. 295; Wilson *v.* Sandford, 10 How. (U. S.) 99, 13 L. ed. 344; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,516, 1 Cliff. 288; Goodyear *v.* Day, 10 Fed. Cas. No. 5,568, 1 Blatchf. 565, Fish. Pat. Rep. 385.

65. **Specific performance** see Manvel *v.* Holdredge, 45 N. Y. 151; Maugham *v.* Parkes Sewing Mach. Co., 69 N. Y. App. Div. 609, 74 N. Y. Suppl. 689; Leicester, etc., Mills Co.

apply.[66] State courts have jurisdiction where there is no question of infringement or validity of the patents.[67]

XII. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

A. By Congress — 1. Failure to Mark Patented Articles. Patentees are required to give notice that their articles are patented by placing a notice to that effect upon the articles or upon the package containing them.[68] In the absence

v. Macon Knitting Co., 116 Fed. 196, 53 C. C. A. 621; Foster *v.* Goldschmidt, 21 Fed. 70; Wood *v.* Wells, 30 Fed. Cas. No. 17,967, 6 Fish. Pat. Cas. 382.

When specific performance refused see Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576.

Suit to annul see Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290; American Street Car Advertising Co. *v.* Jones, 122 Fed. 803 [*reversed* on other grounds in 142 Fed. 974, 74 C. C. A. 236]; Patton *v.* Glatz, 56 Fed. 367.

Injunction granted see Ball, etc., Fastener Co. *v.* Patent Button Co., 136 Fed. 272; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Goddard *v.* Wilde, 17 Fed. 845; Day *v.* Hartshorn, 7 Fed. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, 6 Fish. Pat. Cas. 480, Holmes 253, 4 Off. Gaz. 553; Wilson *v.* Sherman, 30 Fed. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. Rep. 361.

Injunction refused see Henderson *v.* Dougherty, 95 N. Y. App. Div. 346, 88 N. Y. Suppl. 665; Brunner *v.* Kaempfer, 2 N. Y. App. Div. 177, 37 N. Y. Suppl. 700; Young Reversible Lock-Nut Co. *v.* Young Lock-Nut Co., 66 Fed. 563; Adams, etc., Mfg. Co. *v.* Westlake, 53 Fed. 588; Pope Mfg. Co. *v.* Johnson, 40 Fed. 584; Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 702; Washburn, etc., Mfg. Co. *v.* Cincinnati Barbed-Wire Fence Co., 22 Fed. 712; Baker Mfg. Co. *v.* Washburn, etc., Mfg. Co., 18 Fed. 172, 5 McCrary 504; Crowell *v.* Parmenter, 6 Fed. Cas. No. 3,446, 3 Ban. & A. 480, 18 Off. Gaz. 360; Florence Sewing-Mach. Co. *v.* Singer Mfg. Co., 9 Fed. Cas. No. 4,884, 8 Blatchf. 113, 4 Fish. Pat. Cas. 329; Smith *v.* Cummings, 22 Fed. Cas. No. 13,034, 1 Fish. Pat. Cas. 152; Wilson *v.* Sherman, 30 Fed. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. Rep. 361. Where there is an adequate remedy at law equity will not interfere. Crandall *v.* Plano Mfg. Co., 24 Fed. 738; Perkins *v.* Hendryx, 23 Fed. 418; Baker Mfg. Co. *v.* Washburn, etc., Mfg. Co., *supra*.

66. Parties see Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290; Rogers *v.* Riessner, 30 Fed. 525; Florence Sewing-Mach. Co. *v.* Singer Mfg. Co., 9 Fed. Cas. No. 4,884, 8 Blatchf. 113, 4 Fish. Pat. Cas. 329.

Pleading see Ralya *v.* Atkins, 157 Ind. 331, 61 N. E. 726; Torrent *v.* Rodgers, 39 Mich. 85; Dalzell *v.* Fahy's Watch Case Co., 138 N. Y. 285, 33 N. E. 1071; Marsh *v.* Dodge, 5 Lans. (N. Y.) 541; Smith *v.* Standard Laundry Mach. Co., 11 Daly (N. Y.) 154; Wilcox, etc., Sewing Mach. Co. *v.* Himes, 21 N. Y. Suppl. 760; Dancel *v.* United Shoe Mach. Co., 120 Fed. 839; White *v.* Lee, 4 Fed. 916; Theberath *v.* Celluloid Mfg. Co., 3 Fed. 143.

Evidence see Brusie *v.* Peck, 135 N. Y. 622, 32 N. E. 76; Marsh *v.* Dodge, 5 Lans. (N. Y.) 541; Hubbard *v.* Allen, 123 Pa. St. 198, 16 Atl. 772; St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404; Rogers *v.* Riessner, 34 Fed. 270.

67. Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Illinois Watch Case Co. *v.* Ecaubert, 75 Ill. App. 418 [*affirmed* in 177 Ill. 587, 52 N. E. 861]; Standard Combustion Co. *v.* Farr, 9 Ohio Dec. (Reprint) 509, 14 Cinc. L. Bul. 201. See also *supra*, XI, B, 1, e.

68. U. S. Rev. St. (1878) § 4900 [U. S. Comp. St. (1901) p. 3388].

Sufficiency of notice see Dunlap *v.* Schofield, 152 U. S. 244, 14 S. Ct. 576, 38 L. ed. 426; Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Inman Mfg. Co. *v.* Beach, 71 Fed. 420, 18 C. C. A. 165.

Marking is legal notice to all. Hogg *v.* Gimbel, 94 Fed. 518.

The article and not merely the package must be marked where possible. Smith *v.* Walton, 51 Fed. 17; Sessions *v.* Romadka, 21 Fed. 124.

Particular part of article for notice is immaterial.— Dade *v.* Boorum, etc., Co., 121 Fed. 135.

Patented processes are not within the requirement. U. S. Mitis Co. *v.* Midvale Steel Co., 135 Fed. 103; U. S. Mitis Co. *v.* Carnegie Steel Co., 89 Fed. 206 [*affirmed* in 90 Fed. 829, 33 C. C. A. 387].

Where patentee has not made and sold articles under his patent the requirement does not apply. Ewart Mfg. Co. *v.* Baldwin Cycle-Chain Co., 91 Fed. 262; Campbell *v.* New York, 81 Fed. 182.

Date.— Notice must include date. Traver *v.* Brown, 62 Fed. 933 [*reversed* on other grounds in 70 Fed. 810, 17 C. C. A. 424]; Hawley *v.* Bagley, 11 Fed. Cas. No. 6,248.

Excuse for not marking is immaterial. Putnam *v.* Sudhoff, 20 Fed. Cas. No. 11,483, 1 Ban. & A. 198.

Burden of proof.— The burden is on defendant to show absence of mark. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; U. S. Printing Co. *v.* American Playing-Card Co., 70 Fed. 50; Schofield *v.* Dunlop, 42 Fed. 323; Goodyear *v.* Allyn, 10 Fed. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374. *Contra*, Matthews, etc., Mfg. Co. *v.* National Brass, etc., Works, 71 Fed. 518; National Co. *v.* Belcher, 68 Fed. 665 [*modified* in 71 Fed. 876, 18 C. C. A. 375].

Complainant must allege marking see Sprague *v.* Bramhall-Deane Co., 133 Fed. 738.

of such notice on the article no damages can be collected except where the infringer continues after actual notice.[69]

2. MARKING UNPATENTED ARTICLE. Parties are prohibited by statute from marking articles for which they have not obtained a patent with any mark indicating that they are patented,[70] and are prohibited from marking articles patented by another with any mark in imitation of the name or marks of the real patentee.[71]

3. PENALTIES — a. In General. For such wrongful marking of articles the guilty party is liable to a penalty of not less than one hundred dollars with costs for every offense, one half of such penalty going to the party who shall sue for the same and the other to the United States.[72]

Canada.— Must mark subject to penalty of one hundred dollars. St. 38 Vict. c. 14, § 3.

69. Must prove actual notice.— Dunlap *v.* Schofield, 152 U. S. 244, 14 S. Ct. 576, 38 L. ed. 426; Pairpoint Mfg. Co. *v.* Eldridge Co., 71 Fed. 307.

Sufficiency of actual notice see U. S. Mitis Co. *v.* Midvale Steel Co., 135 Fed. 103; Jennings *v.* Rogers Silver Plate Co., 96 Fed. 340; Thompson *v.* N. T. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456; Ryan *v.* Newark Spring Mattress Co., 96 Fed. 100; New York Pharmical Assoc. *v.* Tilden, 14 Fed. 740, 21 Blatchf. 190.

Recovery limited to infringement after notice see Allen *v.* Deacon, 21 Fed. 122; Putnam *v.* Sudhoff, 20 Fed. Cas. No. 11,483, 1 Ban. & A. 198.

When some articles marked and some not marked only nominal damages are recoverable. B. B. Hill Mfg. Co. *v.* Stewart, 116 Fed. 927.

Right to injunction.—Absence of notice affects damages only and not right to injunction. McDowell *v.* Kurtz, 77 Fed. 206, 23 C. C. A. 119; Horn *v.* Bergner, 68 Fed. 428 [*affirmed* in 72 Fed. 687]; Anderson *v.* Monroe, 55 Fed. 398 [*reversed* on other grounds in 58 Fed. 398, 7 C. C. A. 272]; Goodyear *v.* Allyn, 10 Fed. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374.

70. U. S. Rev. St. (1878) § 4901 [U. S. Comp. St. (1901) p. 3388].

Intent to deceive is necessary in order to create offense. Bowman *v.* Read, 2 Wall. (U. S.) 591, 17 L. ed. 812; A. B. Dick Co. *v.* Fuerth, 57 Fed. 834; Hotchkiss *v.* Samuel Cupples Wooden-Ware Co., 53 Fed. 1018; Lawrence *v.* Holmes, 45 Fed. 357; Tompkins *v.* Butterfield, 25 Fed. 556; Nichols *v.* Newell, 18 Fed. Cas. No. 10,245, 1 Fish. Pat. Cas. 647; Stephens *v.* Caldwell, 22 Fed. Cas. No. 13,367; Walker *v.* Hawxhurst, 29 Fed. Cas. No. 17,071, 5 Blatchf. 494.

Marking after application but before payment may or may not constitute offense according to intent. Lauferty *v.* Wheeler, 11 Daly (N. Y.) 194; Nichols *v.* Newell, 18 Fed. Cas. No. 10,245, 1 Fish. Pat. Cas. 647; Stephens *v.* Caldwell, 22 Fed. Cas. No. 13,367.

Expiration of patent on device does not create offense. Wilson *v.* Singer Mfg. Co., 30 Fed. Cas. No. 17,836, 4 Ban. & A. 637, 9 Biss. 173, 16 Off. Gaz. 1091, 9 N. Y. Wkly. Dig. 338 [*affirmed* in 12 Fed. 57, 11 Biss. 298].

Actual sale of article is not necessary. Nichols *v.* Newell, 18 Fed. Cas. No. 10,245, 1 Fish. Pat. Cas. 647.

Whether the things marked are of such a nature as to be capable of being patented bears simply upon intent to deceive. Winne *v.* Snow, 19 Fed. 507; Oliphant *v.* Salem Flouring Mills Co., 18 Fed. Cas. No. 10,486, 3 Ban. & A. 256, 5 Sawy. 128; U. S. *v.* Morris, 26 Fed. Cas. No. 15,814, 2 Bond 23, 3 Fish. Pat. Cas. 72.

Marking "Patent Applied For" is permissible. A. B. Dick Co. *v.* Fuerth, 57 Fed. 834; Schwebel *v.* Bothe, 40 Fed. 478.

71. U. S. Rev. St. (1878) § 4901 [U. S. Comp. St. (1901) p. 3388].

Article must be covered by the patent see Russell *v.* Newark Mach. Co., 55 Fed. 297; French *v.* Foley, 11 Fed. 801.

Injunction.— Patentee may obtain injunction. Stimpson Computing Scale Co. *v.* W. F. Stimpson Co., 104 Fed. 893, 44 C. C. A. 241; Washburn, etc., Mfg. Co. *v.* Haish, 29 Fed. Cas. No. 17,217, 4 Ban. & A. 571, 9 Biss. 141, 18 Off. Gaz. 465.

Invalidity of the patent is no defense for marking without patentee's consent. Myers *v.* Baker, 3 H. & N. 802, 28 L. J. Exch. 90, 7 Wkly. Rep. 66.

72. U. S. Rev. St. (1878) § 4901 [U. S. Comp. St. (1901) p. 3388].

Canada.— Penalty two hundred dollars or imprisonment for six months or both. St. 35 Vict. c. 26, § 50.

Offense committed see Nichols *v.* Newell, 18 Fed. Cas. No. 10,245, 1 Fish. Pat. Cas. 647; Oliphant *v.* Salem Flouring Co., 18 Fed. Cas. No. 10,486, 3 Ban. & A. 256, 5 Sawy. 128.

Offense not committed see Russell *v.* Newark Mach. Co., 55 Fed. 297; Wilson *v.* Singer Mfg. Co., 12 Fed. 57, 11 Biss. 298.

The amount of the penalty is one hundred dollars and no more. Stimpson *v.* Pond, 23 Fed. Cas. No. 13,455, 2 Curt. 502. *Compare* Nichols *v.* Newell, 18 Fed. Cas. No. 10,245, 1 Fish. Pat. Cas. 647.

Single offense may include marking of a number of articles at the same time. Hoyt *v.* Computing Scale Co., 96 Fed. 250; Hotchkiss *v.* Samuel Cupples Wooden-Ware Co., 53 Fed. 1018.

Where the patentee has failed to mark his own articles "patented" it is held that the patentee cannot recover the penalty. Smith *v.* Walton, 56 Fed. 499; Smith *v.* Walton, 51 Fed. 17.

b. Infringement of Design Patents. One who knowingly infringes a design patent is liable in the amount of at least two hundred and fifty dollars and if his profits are greater he is liable for the excess.[73] The owner of the patent may recover the amount at law or in equity.[74]

B. By States. The owner of a patent himself cannot make and sell his patented articles in violation of the laws of the state prescribed for the general welfare.[75] The right conferred by statute to make, use, and vend his invention throughout the United States and the territories thereof is not granted or secured without reference to the general powers which the several states of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or police.[76] The manufacture and sale of patented articles is subject to state legislation enacted in pursuance of the police power inherent in the state,[77] to the taxing power of the states,[78] if there is no discrimination in such taxation as between the patented article and the sale of other similar articles in the state,[79] and a license-fee can be required for selling in the state patented articles.[80] With respect to the power of states to regulate the transfer or sale of patent rights themselves, there is a very considerable conflict of authority. In a large number

The informer, although without interest, brings suit in his own name and not in the name of the United States. Winne *v.* Snow, 19 Fed. 507; U. S. *v.* Morris, 26 Fed. Cas. No. 15,814, 2 Bond 23, 3 Fish. Pat. Cas. 72.

Where suit brought.—Suits must be brought in the district where offense committed. Winne *v.* Snow, 19 Fed. 507; Pentlarge *v.* Kirby, 19 Fed. 501.

Allegations.— Essential facts must be alleged, but not necessarily the day stamping was done. Fish *v.* Manning, 31 Fed. 340.

Intent is a question for the jury. Walker *v.* Hawxhurst, 29 Fed. Cas. No. 17,071, 5 Blatchf. 494.

Statute strictly construed see Pentlarge *v.* Kirby, 19 Fed. 501.

Proofs strictly construed see Hawloetz *v.* Kass, 25 Fed. 765 [*affirmed* in 136 U. S. 638, 10 S. Ct. 1068, 34 L. ed. 549]; Hawley *v.* Bagley, 11 Fed. Cas. No. 6,248.

73. Act Feb. 4, 1887, 24 U. S. St. at L. 387 [U. S. Comp. St. (1901) p. 3398]; Frank *v.* Geiger, 121 Fed. 126.

Infringement must be wilful after notice. —See Fuller *v.* Field, 82 Fed. 813, 27 C. C. A. 165; Monroe *v.* Anderson, 58 Fed. 398, 7 C. C. A. 272.

Infringement of several claims in one patent constitutes only one offense. Gimbel *v.* Hogg, 97 Fed. 791, 38 C. C. A. 419.

Sufficiency of notice.— Marking patented articles is not such notice as will make infringer's act one after notice. Gimbel *v.* Hogg, 97 Fed. 791, 38 C. C. A. 419.

74. See *infra*, XIII, C, 12, a, (III).

75. Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507; Jordan *v.* Dayton, 4 Ohio 294; Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171; *In re* Brosnahan, 18 Fed. 62, 4 McCrary 1.

Sale of patent rights and patented articles distinguished.— There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. When the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a state, it is subject to its laws, like other property. Patterson *v.* Com., 11 Bush (Ky.) 311, 21 Am. Rep. 220 [*affirmed* in 97 U. S. 501, 24 L. ed. 1115].

76. Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115.

77. *In re* Opinion of Justices, 193 Mass. 605, 81 N. E. 142; Webber *v.* Virginia, 103 U. S. 344, 347, 26 L. ed. 565 (in which it was said: "Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits"); Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 78 Off. Gaz. 171.

78. Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429; State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565; *In re* Sheffield, 64 Fed. 833.

79. Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429. To the same effect see *In re* Sheffield, 64 Fed. 833.

A law imposing a fee only in case the articles are made outside of the state is invalid as subjecting them to a discriminating regulation or burden. Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565.

80. People *v.* Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478, 25 Off. Gaz. 504; Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565. *Contra*, State *v.* Butler, 3 Lea (Tenn.), 222.

of cases, both state and federal, the right has been upheld,[81] while in others, both state and federal, the constitutionality of such regulations has been denied,[82] and it has been held that a license-tax cannot be imposed upon the right to vend patent rights.[83] In a very recent decision of the United States supreme court, however, it was held that a "state has the power, certainly until congress legislates upon the subject, with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud," and a state law providing that before barter or sale of patent rights an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the county within which the rights were sold was sustained as a reasonable regulation.[84] And in another recent decision of that court the validity of a state statute making void a note given for a patent, if the note fails to show on its face for what it was given, was upheld.[85]

81. *Arkansas.*— Tilson *v.* Gatling, 60 Ark. 114, 29 S. W. 35.

Indiana.— Sandage *v.* Studabaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; Mayfield *v.* Sears, 133 Ind. 86, 32 N. E. 816; Hankey *v.* Downey, 116 Ind. 118, 18 N. E. 271, 1 L. R. A. 447; New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Brechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695 [*overruling* Grover, etc., Sewing Mach. Co. *v.* Butler, 53 Ind. 454, 21 Am. Rep. 200]. *Contra*, Helm *v.* Huntington First Nat. Bank, 43 Ind. 167, 13 Am. Rep. 395.

Kansas.— Nyhart *v.* Kubach, 76 Kan. 154, 90 Pac. 796; Allen *v.* Riley, 71 Kan. 378, 80 Pac. 952, 114 Am. St. Rep. 481 [*affirmed* in 203 U. S. 347, 27 S. Ct. 95, 51 L. ed. 216]; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548.

Ohio.— Tod *v.* Wick, 36 Ohio St. 370.

Pennsylvania.— Graham's Estate, 14 Phila. 280.

United States.— Reeves *v.* Corning, 51 Fed. 774. And see cases cited *infra*, this note.

Instances.— A state may require that notes given for patent rights be marked to indicate the fact. Pinney *v.* Concordia First Nat. Bank, 68 Kan. 223, 75 Pac. 119; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548; Rumbley *v.* Hall, 107 Ky. 349, 54 S. W. 4, 21 Ky. L. Rep. 1071; Nunn *v.* Citizens' Bank, 107 Ky. 262, 53 S. W. 665, 21 Ky. L. Rep. 961; Bohon *v.* Brown, 101 Ky. 354, 41 S. W. 273, 19 Ky. L. Rep. 540, 72 Am. St. Rep. 420, 38 L. R. A. 503; Herdic *v.* Roessler, 39 Hun (N. Y.) 198 [*affirmed* in 109 N. Y. 127, 16 N. E. 198]; Shires *v.* Com., 120 Pa. St. 368, 14 Atl. 251; Haskell *v.* Jones, 86 Pa. St. 173; State *v.* Cook, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174. So the state may require the filing of a copy of the patent and an affidavit as to its genuineness. New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Brechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695.

What constitutes sale of patent right.— A contract by which the owner of a patent right conveys to another the exclusive right to sell the patented article within certain prescribed territory for a term of years is a sale of such an interest in a patent right as brings the transaction within Gen. St. (1901) §§ 4356–4358, relating to the registration and sale of patent rights, and prescribing a penalty for the violation thereof. Nyhart *v.* Kubach, 76 Kan. 154, 90 Pac. 796. A territorial lease and appointment of agency giving the party of the second part six sample machines and the agency for the sale of the same for a term of years, the company agreeing to furnish all machines ordered by the agent at a certain fixed price, is a contract for the sale of a patent right within Gen. St. (1901) §§ 4356–4358. Nyhart *v.* Kubach, *supra*.

82. *Illinois.*— Hollida *v.* Hunt, 70 Ill. 109, 22 Am. Rep. 63.

Michigan.— People *v.* Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478, 25 Off. Gaz. 504; Cransen *v.* Smith, 37 Mich. 309, 26 Am. Rep. 514.

Minnesota.— Crittenden *v.* White, 23 Minn. 24, 23 Am. Rep. 676.

Nebraska.— Wilch *v.* Phelps, 14 Nebr. 134, 15 N. W. 361.

Wisconsin.— State *v.* Lockwood, 43 Wis. 403.

United States.— Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336; Ozan Lumber Co. *v.* Union County Nat. Bank, 145 Fed. 344, 76 C. C. A. 218; U. S. Consol. Seeded Raisin Co. *v.* Griffin, etc., Co., 126 Fed. 364, 61 C. C. A. 334; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; Castle *v.* Hutchinson, 25 Fed. 394; *Ex p.* Robinson, 20 Fed. Cas. No. 11,932, 2 Biss. 309, 4 Fish. Pat. Cas. 186; Woollen *v.* Banker, 30 Fed. Cas. No. 18,030, 2 Flipp. 33, 5 Reporter 259, 17 Alb. L. J. (N. Y.) 72.

83. Com. *v.* Petty, 96 Ky. 452, 29 S. W. 291, 16 Ky. L. Rep. 488, 29 L. R. A. 786; People *v.* Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478, 25 Off. Gaz. 504; *In re* Sheffield, 64 Fed. 833.

84. Allen *v.* Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. ed. 216 [*affirming* 71 Kan. 378, 80 Pac. 952, 114 Am. St. Rep. 481].

85. Woods *v.* Carl, 203 U. S. 358, 27 S. Ct. 99, 51 L. ed. 219 [*affirming* 75 Ark. 328, 87 S. W. 621].

XIII. INFRINGEMENT.[86]

A. What Constitutes — 1. In General. The infringement of a patent is the unauthorized making, using, or selling of the invention during the life of the patent.[87] The use of what was old prior to the patentee's invention will not infringe.[88] The patent must be a valid one, otherwise there is no basis for a suit for infringement.[89]

86. **Enjoining libel or slander on patent** see INJUNCTIONS, 22 Cyc. 901.

Use by the government see *supra*, I, B, 4.

87. See cases cited *infra*, this note.

Authorization by owner.— There is no infringement where the manufacture, use, or sale was authorized by the owner of the patent. Holmes *v.* Kirkpatrick, 133 Fed. 232, 66 C. C. A. 286; Hanifen *v.* Lupton, 101 Fed. 462, 41 C. C. A. 462; American Graphophone Co. *v.* Talking-Mach. Co., 98 Fed. 729, 39 C. C. A. 245; Pelzer *v.* Binghamton, 95 Fed. 823, 37 C. C. A. 288; Sprague Electric R., etc., Co. *v.* Nassau Electric R. Co., 95 Fed. 821, 37 C. C. A. 286; Blakey *v.* National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; Dibble *v.* Augur, 7 Fed. Cas. No. 3,879, 7 Blatch. 86; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533.

The giving away of infringing articles as premiums with other goods sold is in effect a sale, and constitutes infringement. Benbow-Brammer Mfg. Co. *v.* Heffron-Tanner Co., 144 Fed. 429.

Equitable owner of the patent is not an unauthorized user. Clum *v.* Brewer, 5 Fed. Cas. No. 2,909, 2 Curt. 506.

Licensee may infringe by violating conditions. Hobbie *v.* Smith, 27 Fed. 656.

Refusal of patentee to furnish device does not authorize infringement. Masseth *v.* Reiber, 59 Fed. 614.

Importation.— Importation of the invention is infringement. Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787 [*reversing* 33 Fed. 279, 13 Sawy. 17]; Dickerson *v.* Tinling, 84 Fed. 192, 28 C. C. A. 139; Dickerson *v.* Matheson, 57 Fed. 524, 6 C. C. A. 466; Featherstone *v.* Ormonde Cycle Co., 53 Fed. 110; Neilson *v.* Betts, L. R. 5 H. L. 1, 40 L. J. Ch. 317, 19 Wkly. Rep. 1121; Von Heyden *v.* Neustadt, 14 Ch. D. 230, 50 L. J. Ch. 126, 42 L. T. Rep. N. S. 300, 28 Wkly. Rep. 496; Emslie *v.* Boursier, L. R. 9 Eq. 217, 39 L. J. Ch. 328, 18 Wkly. Rep. 665. Where patentee or his agent sells articles abroad they may be imported without infringement. Holiday *v.* Mattheson, 24 Fed. 185, 23 Blatchf. 239.

One who purchases abroad from the patentee and imports is not an infringer. Betts *v.* Willmott, L. R. 6 Ch. 239, 25 L. T. Rep. N. S. 188, 19 Wkly. Rep. 369; Saccharin Corp. *v.* Reitmeyer, [1900] 2 Ch. 659, 69 L. J. Ch. 761, 83 L. T. Rep. N. S. 397, 49 Wkly. Rep. 199.

Shipping parts to foreign country for use there in making the invention is no infringement. Bullock Electric, etc., Co. *v.* Westinghouse Electric, etc., Co., 129 Fed. 105, 63 C. C. A. 607.

Use on foreign vessel in port is not infringement. Brown *v.* Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

Use on United States vessel at sea is infringement. Gardiner *v.* Howe, 9 Fed. Cas. No. 5,219, 2 Cliff. 462.

Use of armor on United States war vessel is not infringement. Heaton *v.* Quintard, 11 Fed. Cas. No. 6,311, 7 Blatchf. 73.

Use pending application is not infringement. Brill *v.* St. Louis Car Co., 80 Fed. 909.

Selling article made on patented machine is not infringement. Simpson *v.* Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169.

A mere agreement to buy infringing articles is no infringement. Keplinger *v.* De Young, 10 Wheat. (U. S.) 358, 6 L. ed. 341.

Use after expiration of patent is not infringement. Sawyer Spindle Co. *v.* Carpenter, 133 Fed. 238 [*affirmed* in 143 Fed. 976, 75 C. C. A. 162].

Selling after expiration of patent is not infringement. British Insulated Wire Co. *v.* Dublin United Tramways Co., [1900] 1 Ir. 287.

In Canada the purchaser and user of articles made in derogation of the patent is an infringer. Toronto Auer Light Co. *v.* Colling, 31 Ont. 18.

88. Pope Mfg. Co. *v.* Gormully, etc., Mfg. Co., 144 U. S. 238, 12 S. Ct. 641, 36 L. ed. 419; Jones *v.* Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662; McCormick *v.* Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Wilson *v.* Townley Shingle Co., 125 Fed. 491, 60 C. C. A. 327; Marsh *v.* Quick-Meal Stove Co., 51 Fed. 203; Challenge Corn-Planter Co. *v.* Gearhardt, 46 Fed. 768; Lee *v.* Upson, etc., Co., 42 Fed. 530; Webster *v.* Ovens, 39 Fed. 388; Simon *v.* Neumann, 20 Fed. 196; Consolidated Safety-Valve Co. *v.* Kunkle, 14 Fed. 732; Adams, etc., Mfg. Co. *v.* St. Louis Wire-Goods Co., 1 Fed. Cas. No. 72, 3 Ban. & A. 77, 12 Off. Gaz. 940; Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666; Rich *v.* Lippincott, 20 Fed. Cas. No. 11,758, 2 Fish. Pat. Cas. 1, 1 Pittsb. (Pa.) 31; Smith *v.* Clark, 22 Fed. Cas. No. 13,027, Brunn. Col. Cas. 345; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058.

89. Johnston *v.* Woodbury, 109 Fed. 567, 48 C. C. A. 550; Swain *v.* Holyoke Mach. Co., 109 Fed. 154, 48 C. C. A. 265; American Ordnance Co. *v.* Driggs-Seabury Gun, etc., Co., 109 Fed. 83, 48 C. C. A. 241; Hoskins *v.* Matthes, 108 Fed. 404, 47 C. C. A. 434; Goss Printing-Press Co. *v.* Scott, 108 Fed. 253, 47 C. C. A. 302; Thomson-Houston Electric Co.

2. MAKING, USING, OR SELLING. Infringement may consist either in making, using, or selling the invention, or in all three.[90]

3. ARTICLE MADE BEFORE PATENT. Any person who purchases of the inventor, or with his knowledge and consent, constructs an article embodying the invention prior to his application for patent has the right to use and sell the particular article after a patent is granted.[91]

4. EXPERIMENTAL USE.[92] The making of the patented invention for amusement or scientific investigation with no intent of using it practically is not an actionable infringement; but it is otherwise where the thing made is sold or put into actual use.[93]

v. Nassau Electric R. Co., 107 Fed. 277, 46 C. C. A. 263; Pelzer *v.* Dale Co., 106 Fed. 989, 46 C. C. A. 83; Dodge Mfg. Co. *v.* Collins, 106 Fed. 935, 46 C. C. A. 53; Solvay Process Co. *v.* Michigan Alkali Co., 90 Fed. 818, 33 C. C. A. 285; Chuse *v.* Ide, 89 Fed. 491, 32 C. C. A. 260; Antisdel *v.* Chicago Hotel Cabinet Co., 89 Fed. 308, 32 C. C. A. 216; Kelly *v.* Clow, 89 Fed. 297, 32 C. C. A. 205; Talbot *v.* Fear, 89 Fed. 197, 32 C. C. A. 186; Clisby *v.* Recse, 88 Fed. 645, 32 C. C. A. 80; Eastman Co. *v.* Getz, 84 Fed. 458, 28 C. C. A. 459; Soehner *v.* Favorite Stove, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Dunbar *v.* Eastern Elevating Co., 81 Fed. 201, 26 C. C. A. 330; Crossley *v.* Duggan, 79 Fed. 992, 25 C. C. A. 681; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384.

90. Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Tuttle *v.* Matthews, 28 Fed. 98; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Haselden *v.* Ogden, 11 Fed. Cas. No. 6,190, 3 Fish. Pat. Cas. 378.

Making without use or sale is infringement. Carter Crume Co. *v.* American Sales Book Co., 124 Fed. 903; Page Woven Wire Fence Co. *v.* Land, 49 Fed. 936; Ketchum Harvester Co. *v.* Johnson Harvester Co., 8 Fed. 586, 19 Blatchf. 367; Bloomer *v.* Gilpin, 3 Fed. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Jenkins *v.* Greenwald, 13 Fed. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28.

Use for personal benefit or convenience is infringement without sale. Beedle *v.* Bennett, 122 U. S. 71, 7 S. Ct. 1090, 30 L. ed. 1074; United Nickel Co. *v.* Central Pac. R. Co., 36 Fed. 186; Andrews *v.* Cross, 8 Fed. 269, 19 Blatchf. 294.

A single sale is an infringement. Hutter *v.* De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652.

Sale to agent of patentee is infringement. Chicago Pneumatic Tool Co. *v.* Philadelphia Pneumatic Tool Co., 118 Fed. 852.

Sale by sheriff on execution is not an actionable infringement. Sawin *v.* Guild, 21 Fed. Cas. No. 12,391, 1 Gall. 485, 1 Robb Pat. Cas. 47.

Any use is infringement. Betts *v.* Neilson, 3 De G. J. & S. 82, 11 Jur. N. S. 679, 34 L. J. Ch. 537, 12 L. T. Rep. N. S. 719, 6 Wkly. Rep. 221, 13 Wkly. Rep. 1028, 68 Eng. Ch. 63, 46 Eng. Reprint 569.

Making and offering for sale is infringement even without actual sale. Oxley *v.* Holden, 8 C. B. N. S. 666, 30 L. J. C. P. 68, 2 L. T. Rep. N. S. 464, 8 Wkly. Rep. 626, 98 E. C. L. 666.

Making for sale abroad is infringement. British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122, 70 L. J. Ch. 21, 83 L. T. Rep. N. S. 419, 49 Wkly. Rep. 183; Goucher *v.* Clayton, 11 Jur. N. S. 462, 13 L. T. Rep. N. S. 111.

91. U. S. Rev. St. (1878) § 4899 [U. S. Comp. St. (1901) p. 3387]; Dable Grain Shovel Co. *v.* Flint, 137 U. S. 41, 11 S. Ct. 8, 34 L. ed. 618; Wade *v.* Metcalfe, 129 U. S. 202, 9 S. Ct. 271, 32 L. ed. 661 [*affirming* 16 Fed. 130]; Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Campbell *v.* New York, 35 Fed. 504, 1 L. R. A. 48; Duffy *v.* Reynolds, 24 Fed. 855.

That the right must be derived directly or indirectly from the inventor see Pierson *v.* Eagle Screw Co., 19 Fed. Cas. No. 11,156, 2 Robb Pat. Cas. 268, 3 Story 402.

An article made or bought without the inventor's consent cannot be used. Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Evans *v.* Weiss, 8 Fed. Cas. No. 4,572, 1 Robb Pat. Cas. 10, 2 Wash. 342; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,745, 2 Robb Pat. Cas. 479, 1 Woodb. & M. 290.

Transfer of license.— The implied license is not transferable. Thomson *v.* Citizens' Nat. Bank, 53 Fed. 250, 3 C. C. A. 518.

Articles properly obtained before patent may be used after extension. Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Simpson *v.* Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141.

Canada.—Pat. Act, Rev. St. Can. c. 61, § 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use and sell the articles manufactured by him prior thereto. Fowell *v.* Chown, 25 Ont. 71. And see Victor Sporting Goods Co. *v.* Harold A. Wilson Co., 24 Can. L. T. Occ. Notes 211, 7 Ont. L. Rep. 570, 2 Ont. Wkly. Rep. 465, 3 Ont. Wkly. Rep. 496.

92. **Experiments and incomplete inventions as showing prior knowledge or use** see *supra*, III, C, 4, c, e.

93. Cimiotti Unhairing Co. *v.* Derbeklow,

5. KNOWLEDGE OR INTENT OF INFRINGER.[94] A party is no less an infringer because he did not intend to infringe or because he did not know of the patent.[95] His lack of knowledge or intent can have no effect save possibly on the amount of damages.[96]

6. IDENTITY OF INFRINGING DEVICE[97] — a. In General. It is not necessary that every feature of the invention disclosed in the patent be used in order to constitute infringement, but it is sufficient that the essential features as set forth in the claim are taken. Substantial identity is all that is required. If the essence of the invention is taken, variations in detail will not avoid infringement.[98] Mere

87 Fed. 997; Clerk *v.* Tannage Patent Co., 84 Fed. 643, 28 C. C. A. 501; Bonsack Mach. Co. *v.* Underwood, 73 Fed. 206; Albright *v.* Celluloid Harness Trimming Co., 1 Fed. Cas. No. 147, 2 Ban. & A. 629, 12 Off. Gaz. 227; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62. But see United Tel. Co. *v.* Sharples, 29 Ch. D. 164, 54 L. J. Ch. 633, 52 L. T. Rep. N. S. 384, 33 Wkly. Rep. 444, holding that use for experiment and instruction is infringement.

94. Knowledge of one whose infringement is contributory see *infra*, XIII, B.

95. A. B. Dick Co. *v.* Henry, 149 Fed. 424; Pardy *v.* J. D. Hooker Co., 148 Fed. 631, 78 C. C. A. 403; Thompson *v.* N. T. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456 [*reversing* 88 Fed. 81]; National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; MacKnight *v.* McNiece, 64 Fed. 115; Grosvenor *v.* Dashiell, 62 Fed. 584; Smith *v.* Stewart, 55 Fed. 481 [*affirmed* in 58 Fed. 580, 7 C. C. A. 380]; Winchester Repeating Arms Co. *v.* American Buckle, etc., Co., 54 Fed. 703; Pirkl *v.* Smith, 42 Fed. 410; Timken *v.* Olin, 41 Fed. 169; Bate Refrigerating Co. *v.* Gillett, 31 Fed. 809; Matthews *v.* Skates, 16 Fed. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Wright *v.* Hitchcock, L. R. 5 Exch. 37, 39 L. J. Exch. 97; Stead *v.* Anderson, 4 C. B. 806, 11 Jur. 877, 16 L. J. C. P. 250, 56 E. C. L. 806; Heath *v.* Unwin, 11 Jur. 420, 16 L. J. Ch. 283, 15 Sim. 552, 60 Eng. Reprint 733; Curtis *v.* Platt, 11 L. T. Rep. N. S. 245.

Warning infringers.— It is not incumbent upon patentees to warn infringers. Proctor *v.* Bennis, 36 Ch. D. 740, 57 L. J. Ch. 11, 57 L. T. Rep. N. S. 662, 36 Wkly. Rep. 456.

An erroneous decision holding patent void does not relieve other infringers from liability. Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664.

96. Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Regina Music-Box Co. *v.* Paillard, 85 Fed. 644; Burdett *v.* Estey, 3 Fed. 566, 19 Blatchf. 1. And see *infra*, XIII, C, 12, a, (II), (D).

97. Change of form as involving invention see *supra*, III, E, 9.

98. Hobbs *v.* Beach, 180 U. S. 383, 21 S. Ct. 409, 45 L. ed. 586 [*affirming* 92 Fed. 146, 34 C. C. A. 248]; Driven Well Cases, 122 U. S. 40, 7 S. Ct. 1073, 30 L. ed. 1064; Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64; Edison Gen. Electric Co. *v.* Crouse-Hinds Electric Co., 146 Fed. 539 [*reversed* on other grounds in 152 Fed. 437, 81 C. C. A. 579]; Hillard *v.* Fisher Book Typewriter Co., 159 Fed. 439; Wagner Typewriter Co. *v.* Wyckoff, 151 Fed. 585, 81 C. C. A. 129; Smyth Mfg. Co. *v.* Sheridan, 144 Fed. 423; International Time Recording Co. *v.* Dey, 142 Fed. 736, 74 C. C. A. 68; Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; Cazier *v.* Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 C. C. A. 104; Solmson *v.* Bredin, 136 Fed. 187, 69 C. C. A. 203 [*affirming* 132 Fed. 161]; Hutter *v.* De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652; Van Epps *v.* International Paper Co., 124 Fed. 542; H. C. White Co. *v.* Walbridge, 118 Fed. 166; Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., 115 Fed. 498, 53 C. C. A. 230; Morrison *v.* Sonn, 111 Fed. 172; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Morgan *v.* Maul, 84 Fed. 336; Dunbar *v.* Eastern Elevating Co., 75 Fed. 567; Consolidated Car Heating Co. *v.* Martin Anti-Fire Car Heater Co., 71 Fed. 697; Shaver *v.* Skinner Mfg. Co., 30 Fed. 68; May *v.* Fond du Lac County, 27 Fed. 691; Globe Nail Co. *v.* U. S. Horse Nail Co., 19 Fed. 819; Coupe *v.* Weatherhead, 16 Fed. 673; Ward *v.* Grand Detour Plow Co., 14 Fed. 696; Crompton *v.* Knowles, 7 Fed. 204; Holly *v.* Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; American Mfg. Co. *v.* Lane, 1 Fed. Cas. No. 304, 3 Ban. & A. 268, 14 Blatchf. 438, 15 Off. Gaz. 421; Blanchard *v.* Eldridge, 3 Fed. Cas. No. 1,509; Blanchard *v.* Reeves, 3 Fed. Cas. No. 1,515, 1 Fish. Pat. Cas. 103; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Burr *v.* Prentiss, 4 Fed. Cas. No. 2,194; Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Collender *v.* Came, 6 Fed. Cas. No. 2,999, 2 Ban. & A. 412, 4 Cliff. 393, 10 Off. Gaz. 467; Conover *v.* Roach, 6 Fed. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Converse *v.* Cannon, 6 Fed. Cas. No. 3,144, 2 Woods 7, 9 Off. Gaz. 105; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Davis *v.* Palmer, 7 Fed. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Fuller *v.* Yentzer, 9 Fed. Cas. No. 5,151, 1 Ban. & A. 520, 6 Biss. 203; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Henderson *v.* Cleveland Co-operative Stove Co., 11 Fed. Cas. No. 6,351, 2 Ban. & A.

differences in form are immaterial,[99] unless the invention claimed resides in the form. Where this is the case substantial identity of form is necessary.[1] To constitute infringement the principle of operation must be the same,[2] and there must be substantial identity of means and not merely of function or result.[3]

604, 12 Off. Gaz. 4; Howes *v.* McNeal, 12 Fed. Cas. No. 6,789, 3 Ban. & A. 376, 15 Blatchf. 103, 15 Off. Gaz. 608; Lorillard *v.* McDowell, 15 Fed. Cas. No. 8,510, 2 Ban. & A. 531, 11 Off. Gaz. 640, 13 Phila. (Pa.) 461; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240; Odiorne *v.* Winkley, 18 Fed. Cas. No. 10,432, 2 Gall. 51, 1 Robb Pat. Cas. 52; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Parker *v.* Haworth, 18 Fed. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Pitts *v.* Edmonds, 19 Fed. Cas. No. 11,191, 1 Biss. 168, 2 Fish. Pat. Cas. 52; Root *v.* Ball, 20 Fed. Cas. No. 12,035, 2 Robb Pat. Cas. 513, 4 McLean 177; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Smith *v.* Downing, 22 Fed. Cas. No. 13,036, 1 Fish. Pat. Cas. 64; Storrs *v.* Howe, 23 Fed. Cas. No. 13,495, 2 Ban. & A. 420, 4 Cliff. 388, 10 Off. Gaz. 421; Thorn *v.* Worthing Skating Rink Co., 6 Ch. D. 415 note; Consolidated Car Heating Co. *v.* Came, 18 Quebec Super. Ct. 44.

Theory is immaterial if there is substantial identity of things. Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31.

99. Busch *v.* Jones, 16 App. Cas. (D. C.) 23; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64; Ferry-Hallock Co. *v.* Hallock, 142 Fed. 172; Nathan *v.* Howard, 143 Fed. 889, 75 C. C. A. 97 [*affirmed* in 160 Fed. 928]; Rood *v.* Evans, 92 Fed. 371; National Folding-Box, etc., Co. *v.* Elsas, 86 Fed. 917, 30 C. C. A. 487; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 [*affirming* 69 Fed. 837]; Kilmer Mfg. Co. *v.* Griswold, 62 Fed. 119 [*reversed* on other grounds in 67 Fed. 1017, 15 C. C. A. 161]; Jones *v.* Holman, 58 Fed. 973 [*reversed* on other grounds in 61 Fed. 105, 9 C. C. A. 385]; National Folding-Box, etc., Co. *v.* American Paper Pail, etc., Co., 55 Fed. 488; American Paper Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229, 2 C. C. A. 165; Chicopee Folding-Box Co. *v.* Nugent, 41 Fed. 139; Sewing-Mach. Co. *v.* Frame, 24 Fed. 596; Grier *v.* Castle, 17 Fed. 523; Collignon *v.* Hayes, 8 Fed. 912; Blanchard *v.* Puttman, 3 Fed. Cas. No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Case *v.* Brown, 5 Fed. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268 [*affirmed* in 2 Wall. 320, 17 L. ed. 817]; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Potter *v.* Wilson, 19 Fed. Cas. No. 11,342, 2 Fish. Pat. Cas. 102; Sargent *v.* Larned, 21 Fed. Cas. No. 12,364, 2 Curt. 340; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Teese *v.* Phelps, 23 Fed. Cas. No. 13,819, McAllister 48; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,851, 1 Blatchf. 187, Fish. Pat. Rep. 120.

Making in two parts instead of one will not avoid infringement. Hammond Buckle Co. *v.* Hathaway, 48 Fed. 834; Hayes *v.* Bickelhoupt, 21 Fed. 567; Mabie *v.* Haskell, 15 Fed. Cas. No. 8,653, 2 Cliff. 507. See Western Tube Co. *v.* Rainear, 156 Fed. 49 [*affirmed* in 159 Fed. 431].

Difference in size will not avoid infringement. Rogers *v.* Sargent, 20 Fed. Cas. No. 12,020, 7 Blatchf. 507.

1. Lehigh Valley R. Co. *v.* Mellon, 104 U. S. 112, 26 L. ed. 639; Werner *v.* King, 96 U. S. 218, 24 L. ed. 613; Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64 [*affirmed* in 160 Fed. 928]; Polsdorfer *v.* St. Louis Wooden-Ware Works, 37 Fed. 57; Toepfer *v.* Goetz, 31 Fed. 913; Newark Mach. Co. *v.* Hargett, 28 Fed. 567; Scott *v.* Evans, 11 Fed. 726.

2. Peerless Rubber Mfg. Co. *v.* White, 118 Fed. 827, 55 C. C. A. 502; Goodyear Shoe Mach. Co. *v.* Spaulding, 110 Fed. 393, 49 C. C. A. 88; Brett *v.* Quintard, 10 Fed. 741, 20 Blatchf. 320; White *v.* Noyes, 2 Fed. 782; May *v.* Johnson County, 16 Fed. Cas. No. 9,334; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

3. Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136 [*reversing* 70 Fed. 816, 17 C. C. A. 430]; Masseth *v.* Larkin, 119 Fed. 171, 56 C. C. A. 167 [*affirming* 111 Fed. 409]; Pittsburg Meter Co. *v.* Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580; Taber Bas-Relief Photograph Co. *v.* Marceau, 87 Fed. 871; Dickinson *v.* A. Plamondon Mfg. Co., 76 Fed. 455; American Pin Co. *v.* Oakville Co., 1 Fed. Cas. No. 313, 3 Blatchf. 190; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661]; Lee *v.* Blandy, 15 Fed. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Morris *v.* Barrett, 17 Fed. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Reckendorfer *v.* Faber, 20 Fed. Cas. No. 11,625, 1 Bau. & A. 229, 12 Blatchf. 68, 5 Off. Gaz. 697 [*affirmed* in 92 U. S. 347, 23 L. ed. 719]; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558.

b. Limitation of Claims. Each claim of the patent is separately considered in determining infringement,[4] and while a claim describing the invention in broad terms may be infringed by devices differing in many respects from that of the patent,[5] a claim including a distinct limitation to a particular feature is not infringed unless that feature is used.[6]

c. Diversity of Use. The use of an invention for an analogous purpose is infringement,[7] but use for a non-analogous purpose where invention is necessary to procure its adaptability is not infringement.[8]

d. Combination. A claim to a combination of old elements, materials, or parts is not infringed unless every element, material, or part mentioned in the claim, or its equivalent, is used in the same relation;[9] and in the application of this rule it is immaterial that one or more of the elements specified in the claim are not of

Identity of means, operation, and result is necessary. American Can Co. *v.* Hickmott Asparagus Canning Co., 137 Fed. 86.

4. Mast *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191; Holloway *v.* Dow, 54 Fed. 511; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600.

5. General Electric Co. *v.* Brooklyn Heights R. Co., 117 Fed. 613; Tuscarawas Mfg. Co. *v.* Cole, 109 Fed. 161; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 103 Fed. 641 [*affirmed* in 107 Fed. 711, 46 C. C. A. 593]; Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975; Parsons *v.* Seelye, 100 Fed. 455, 40 C. C. A. 486 [*reversing* 92 Fed. 1005]; American Paper Barrel Co. *v.* Laraway, 28 Fed. 141; Fricke *v.* Hum, 22 Fed. 302; Gibson *v.* Betts, 10 Fed. Cas. No. 5,390, 1 Blatchf. 163, Fish. Pat. Rep. 91.

6. Lane *v.* Levi, 21 App. Cas. (D. C.) 168; Hubbell *v.* U. S., 179 U. S. 77, 21 S. Ct. 24, 45 L. ed. 95; Ball, etc., Fastener Co. *v.* Kraetzer, 150 U. S. 111, 14 S. Ct. 48, 37 L. ed. 1019; McClain *v.* Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. ed. 800; Anderson Foundry, etc., Works *v.* Potts, 108 Fed. 379, 47 C. C. A. 409; Consolidated Store-Service Co. *v.* Siegel-Cooper Co., 107 Fed. 716, 46 C. C. A. 599; Lepper *v.* Randall, 105 Fed. 975; Ross-Moyer Mfg. Co. *v.* Randall, 104 Fed. 355, 43 C. C. A. 578; Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., 104 Fed. 337, 43 C. C. A. 560; Starrett *v.* J. Stevens Arms, etc., Co., 96 Fed. 244; A. J. Phillips Co. *v.* Owosso Mfg. Co., 83 Fed. 176; Foos Mfg. Co. *v.* Springfield Engine, etc., Co., 49 Fed. 641, 1 C. C. A. 410 [*affirming* 44 Fed. 595]; Heine Safety Boiler Co. *v.* Anheuser-Busch Brewing Assoc., 43 Fed. 786 [*affirmed* in 154 U. S. 504, 14 S. Ct. 1146, 38 L. ed. 1083]; Newark Mach. Co. *v.* Hargett, 28 Fed. 567; Osceola Mfg. Co. *v.* Pie, 28 Fed. 83; Celluloid Mfg. Co. *v.* Pratt, 21 Fed. 313; McKay *v.* Stowe, 17 Fed. 516; Cornell *v.* Littlejohn, 6 Fed. Cas. No. 3,238, 2 Ban. & A. 324, 9 Off. Gaz. 837, 922; Keystone Bridge Co. *v.* Phœnix Iron Co., 14 Fed. Cas. No. 7,751, 5 Fish. Pat. Cas. 468, 1 Off. Gaz. 471, 9 Phila. (Pa.) 374.

Claim to an article including limitations as to the process of making it is not infringed by another process. Expanded Metal Co. *v.* St. Louis Bd. of Education, 103 Fed. 287.

7. Sanitary Fireproofing, etc., Co. *v.* Sprickerhoff, 139 Fed. 801, 71 C. C. A. 565; Westinghouse Electric, etc., Co. *v.* Roberts, 125 Fed. 6; Williams Patent Crusher, etc., Co. *v.* St. Louis Pulverizer Co., 104 Fed. 795; Red Jacket Mfg. Co. *v.* Davis, 82 Fed. 432, 27 C. C. A. 204; Long *v.* Pope Mfg. Co., 75 Fed. 835, 21 C. C. A. 533; Thompson *v.* Gildersleeve, 34 Fed. 43; Cincinnati Ice-Mach. Co. *v.* Foss Schneider Brewing Co., 31 Fed. 469; Zinn *v.* Weiss, 7 Fed. 914; American Wood-Paper Co. *v.* Fibre Disintegrating Co., 1 Fed. Cas. No. 320, 6 Blatchf. 27, 3 Fish. Pat. Cas. 362 [*affirmed* in 23 Wall. 566, 23 L. ed. 31]; Mabie *v.* Haskell, 15 Fed. Cas. No. 8,653, 2 Cliff. 507; Pike *v.* Potter, 19 Fed. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Young *v.* Lippman, 30 Fed. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230, 2 Off. Gaz. 249, 342; Cannington *v.* Nuttall, L. R. 5 H. L. 205, 40 L. J. Ch. 739.

8. Cary Mfg. Co. *v.* Standard Metal Strap Co., 120 Fed. 945, 57 C. C. A. 235; Johnson *v.* McCurdy, 108 Fed. 671, 47 C. C. A. 577; Thomson Meter Co. *v.* National Meter Co., 106 Fed. 519; Palmer *v.* De Yongh, 90 Fed. 281; MacColl *v.* Knowles Loom Works, 87 Fed. 727; Heap *v.* Tremont, etc., Mills, 82 Fed. 449, 27 C. C. A. 316; Boston, etc., Electric St. R. Co. *v.* Bemis Car Box Co., 80 Fed. 287, 25 C. C. A. 420; Long *v.* Pope Mfg. Co., 75 Fed. 835, 21 C. C. A. 533; Hoe *v.* Knap, 27 Fed. 204; Osmer *v.* J. B. Sickles Saddlery Co., 23 Fed. 724; Judd *v.* Babcock, 8 Fed. 605; Brown *v.* Rubber Step Mfg. Co., 4 Fed. Cas. No. 2,028, 3 Ban. & A. 232, 13 Off. Gaz. 369; Stuart *v.* Shantz, 23 Fed. Cas. No. 13,556, 6 Fish. Pat. Cas. 35, 2 Off. Gaz. 524, 9 Phila. (Pa.) 376; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,762; Higgs *v.* Goodwin, E. B. & E. 529, 5 Jur. N. S. 97, 27 L. J. Q. B. 421, 96 E. C. L. 529.

9. Fenton Metallic Mfg. Co. *v.* Office Specialty Mfg. Co., 12 App. Cas. (D. C.) 201; Knapp *v.* Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. ed. 1059; Garratt *v.* Seibert, 131 U. S. appendix cxv, 21 L. ed. 956; Electric R. Signal Co. *v.* Hall R. Signal Co., 114 U. S. 87, 5 S. Ct. 1069, 29 L. ed. 96; Rowell *v.* Lindsay, 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906 [*affirming* 6 Fed. 290, 10 Biss. 217]; McMurray *v.* Mallory, 111 U. S. 97, 4 S. Ct. 375, 28 L. ed. 365 [*affirming* 5 Fed. 593, 4

the essence of the invention. Every element claimed must be regarded as

Hughes 265]; Fuller *v.* Yentzer, 94 U. S. 288, 24 L. ed. 103; Rees *v.* Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Stimpson *v.* Baltimore, etc., R. Co., 10 How. (U. S.) 329, 13 L. ed. 441; Consolidated Engine Stop Co. *v.* Landers, 160 Fed. 79; H. F. Brainmer Mfg. Co. *v.* Witte Hardware Co., 159 Fed. 726; Ajax Forge Co. *v.* Morden Frog, etc., Works, 156 Fed. 591]; American Chocolate Mach. Co. *v.* Helmstetter, 142 Fed. 978, 74 C. C. A. 240; O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; American Can Co. *v.* Hickmott Asparagus Canning Co., 137 Fed. 86; Levy *v.* Harris, 130 Fed. 711, 65 C. C. A. 113; American Fur Refining Co. *v.* Cimiotti Unhairing Mach. Co., 123 Fed. 869, 59 C. C. A. 357 [*affirmed* in 198 U. S. 399, 25 S. Ct. 697, 49 L. ed. 1100]; Cimiotti Unhairing Co. *v.* Derbohlaw, 115 Fed. 510, 53 C. C. A. 164; Pittsburg Meter Co. *v.* Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580; Wellman *v.* Midland Steel Co., 106 Fed. 221; Starrett *v.* J. Stevens Arms, etc., Co., 100 Fed. 93, 40 C. C. A. 289; Norton *v.* Wheaton, 97 Fed. 636; Thompson *v.* Second Ave. Traction Co., 89 Fed. 321; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578; Carter Mach. Co. *v.* Hanes, 78 Fed. 346, 24 C. C. A. 128; Muller *v.* Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223 [*affirming* 63 Fed. 986]; P. H. Murphy Mfg. Co. *v.* Excelsior Car-Roof Co., 76 Fed. 965, 22 C. C. A. 658; Engle Sanitary, etc., Co. *v.* Elwood, 73 Fed. 484; Brown *v.* Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 C. C. A. 528; Ashton Valve Co. *v.* Coale Muffler, etc., Co., 50 Fed. 100 [*affirmed* in 52 Fed. 314, 3 C. C. A. 98]; Ross *v.* Montana Union R. Co., 45 Fed. 424; Innis *v.* Oil City Boiler Works, 41 Fed. 788; Tatum *v.* Gregory, 41 Fed. 142; Ott *v.* Barth, 32 Fed. 89; Thoens *v.* Israel, 31 Fed. 556; Blades *v.* Rand, 27 Fed. 93 [*affirmed* in 136 U. S. 631, 10 S. Ct. 1065, 34 L. ed. 553]; Saladee *v.* Racine Wagon, etc., Co., 20 Fed. 686; Gould *v.* Spicers, 20 Fed. 317; Howe *v.* Neemes, 18 Fed. 40; Matteson *v.* Caine, 17 Fed. 525, 8 Sawy. 498; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906]; Fourot *v.* Hawes, 3 Fed. 456; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Bell *v.* Daniels, 3 Fed. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Brooks *v.* Bicknell, 3 Fed. Cas. No. 1,946, Fish. Pat. Rep. 72, 4 McLean 70; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661]; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Howe *v.* Abbott, 12 Fed. Cas. No. 6,766, 2 Robb Pat. Cas. 99, 2 Story 190; Huggins *v.* Hubby, 12 Fed. Cas. No. 6,839; McCormick *v.* Manny, 15 Fed. Cas. No. 8,724, 6 McLean 539 [*affirmed* in 20 How. 402, 15 L. ed. 930]; Nicholson Pavement Co. *v.* Hatch, 18 Fed. Cas. No. 10,251, 3 Fish. Pat. Cas. 432, 4 Sawy. 692; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,195, 6 McLean 558; Rich *v.* Close, 20 Fed. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Rollhaus *v.* McPherson, 20 Fed. Cas. No. 12,026; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058; Berdan Fire-Arms Mfg. Co. *v.* U. S., 25 Ct. Cl. 355 [*affirmed* in 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530]; Pacific Submarine, etc., Proof Wall Co. *v.* U. S., 19 Ct. Cl. 234; Dudgeon *v.* Thomson, 3 App. Cas. 34; Clark *v.* Adie, 2 App. Cas. 315, 46 L. J. Ch. 585, 36 L. T. Rep. N. S. 923; Curtis *v.* Platt, L. R. 1 H. L. 337, 35 L. J. Ch. 852; Parkes *v.* Stevens, L. R. 8 Eq. 358, 38 L. J. Ch. 627, 17 Wkly. Rep. 846 [*affirmed* in L. R. 5 Ch. 36, 22 L. T. Rep. N. S. 635, 18 Wkly. Rep. 233]; Saxby *v.* Clunes, 43 L. J. Exch. 228; White *v.* Fenn, 15 L. T. Rep. N. S. 505, 15 Wkly. Rep. 348.

Similarity of result not sufficient to constitute infringement. Westinghouse *v.* Boyden Power-Brake Co., 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136; Miller *v.* Eagle Mfg. Co., 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121; Gage *v.* Herring, 107 U. S. 640, 2 S. Ct. 819, 27 L. ed. 601; Jenkins *v.* Mahoney, 135 Fed. 550 [*reversed* on other grounds in 138 Fed. 404, 70 C. C. A. 662]; Norton *v.* Wheaton, 97 Fed. 636.

For cases holding that there was no infringement see Ball, etc., Fastener Co. *v.* Kraetzer, 150 U. S. 111, 14 S. Ct. 48, 37 L. ed. 1019; Gordon *v.* Warder, 150 U. S. 47, 14 S. Ct. 32, 37 L. ed. 992; Roemer *v.* Peddie, 132 U. S. 313, 10 S. Ct. 98, 33 L. ed. 382; Sharp *v.* Riessner, 119 U. S. 631, 7 S. Ct. 417, 30 L. ed. 507; Bridge *v.* Excelsior Mfg. Co., 105 U. S. 618, 26 L. ed. 1191; Kursheedt Mfg. Co. *v.* Adler, 107 Fed. 488, 46 C. C. A. 422 [*affirming* 103 Fed. 948]; Consolidated Store-Service Co. *v.* Seybold, 105 Fed. 978, 45 C. C. A. 152; Jones Special Mach. Co. *v.* Pentucket Variable Stitch Sewing-Mach. Co., 104 Fed. 556, 44 C. C. A. 33; Consolidated Store-Service Co. *v.* Siegel-Cooper Co., 103 Fed. 489; Whitaker Cement Co. *v.* Huntington Dry Pulverizer Co., 95 Fed. 471, 37 C. C. A. 151; Risdon Iron, etc., Works *v.* Trent, 92 Fed. 375 [*modified* in 102 Fed. 635, 42 C. C. A. 529]; Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578; Babcock *v.* Clarkson, 58 Fed. 581; Gates Iron Works *v.* Fraser, 55 Fed. 409, 5 C. C. A. 154; Douglas *v.* Abraham, 50 Fed. 420; Stauffer *v.* Spangler, 50 Fed. 84; Foos Mfg. Co. *v.* Springfield Engine, etc., Co., 49 Fed. 641, 1 C. C. A. 410; Challenge Corn-Planter Co. *v.* Gearhardt, 46 Fed. 768; Joliet Mfg. Co. *v.* Keystone Mfg. Co., 39 Fed. 798; Royer *v.* Schultz Belting Co., 28 Fed. 850; Buckingham *v.* Porter, 26 Fed. 759, 10 Sawy. 289; Crompton *v.* Knowles, 7 Fed. 199; Birdsell *v.* Hagerstown Agricultural Implement Mfg Co., 3 Fed. Cas. No. 1,436, 2 Ban. & A. 519, 1 Hughes 59, 11 Off. Gaz. 420; Merriam *v.* Drake, 17 Fed. Cas. No. 9,461, 9 Blatchf. 336, 5 Fish. Pat. Cas. 259; Wheeler *v.* Simpson,

material, although it is not so in fact.[10] A patentee will not be heard to deny the materiality of any element included in his claim.[11] When parts are substituted they must be equivalents to constitute infringement,[12] and they must be combined in the same way.[13] While, as already shown, a patent for a combination is not infringed if any one of the elements is omitted, a mere change of form or location, or sequence of the elements, which does not change the essence of the combination, will not avoid infringement.[14] So where some of the parts of the combination are new, and those parts are taken and used in the same manner, but with different things from the rest of the combination patented, and a part of the patented invention is taken although the whole is not, it is an infringement to that extent.[15]

e. Process. A claim to an art or process is not infringed except by the use of all of the steps or their equivalents and in the order stated.[16] And it is well

29 Fed. Cas. No. 17,500, 1 Ban. & A. 420, 6 Off. Gaz. 435; Carter *v.* Hamilton, 23 Can. Sup. Ct. 172; Sylvester *v.* Masson, 12 Ont. App. 335.

10. Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Union Water Meter Co. *v.* Desper, 101 U. S. 332, 25 L. ed. 1024; Levy *v.* Harris, 124 Fed. 69 [*affirmed* in 135 Fed. 1023]; Pittsburg Meter Co. *v.* Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580; Kinzel *v.* Luttrell Brick Co., 67 Fed. 926, 15 C. C. A. 82; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906].

11. Eames *v.* Godfrey, 1 Wall. (U. S.) 78, 17 L. ed. 547; Adam *v.* Folger, 120 Fed. 260, 56 C. C. A. 540.

12. Robins Conveying Belt Co. *v.* American Road Mach. Co., 145 Fed. 923, 76 C. C. A. 461; Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Noonan *v.* Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Burdett *v.* Estey, 4 Fed. Cas. No. 2,146, 4 Ban. & A. 141, 16 Blatchf. 105; Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Densmore *v.* Schofield, 7 Fed. Cas. No. 3,809, 4 Fish. Pat. Cas. 148.

13. Crompton *v.* Belknap Mills, 6 Fed. Cas. No. 3,406, 3 Fish. Pat. Cas. 536, 30 Fed. Cas. No. 18,285; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,760, 2 Blatchf. 474.

14. Adam *v.* Folger, 120 Fed. 260, 56 C. C. A. 540; Dowagiac Mfg. Co. *v.* Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Thompson *v.* Second Ave. Traction Co., 93 Fed. 824, 35 C. C. A. 620; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203.

15. Thompson *v.* American Bank-Note Co., 35 Fed. 203; Adair *v.* Thayer, 4 Fed. 441, 17 Blatchf. 468; Sharp *v.* Tifft, 2 Fed. 697, 18 Blatchf. 132; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Lee *v.* Blandy, 15 Fed. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Rose *v.* Sibley Mach. Co., 20 Fed. Cas. No. 12,051; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Lister *v.* Leather, 8 E. & B. 1004, 4 Jur. N. S. 947, 27 L. J. Q. B. 295, 92 E. C. L. 1004; Newton *v.* Grand Junction R. Co., 5 Exch. 331 note, 20 L. J. Exch. 427 note, 6 Eng. L. & Eq. 557; Sellers *v.* Dickinson, 5 Exch. 312, 20 L. J. Exch. 417, 6 Eng. L. & Eq. 544.

16. U. S. Glass Co. *v.* Atlas Glass Co., 90 Fed. 724, 33 C. C. A. 254; Kennedy *v.* Solar Refining Co., 69 Fed. 715; Brush Electric Co. *v.* Electrical Accumulator Co., 47 Fed. 48 [*modified* in 52 Fed. 130, 2 C. C. A. 682]; Hatch *v.* Towne, 35 Fed. 139; Royer *v.* Chicago Mfg. Co., 20 Fed. 853; Arnold *v.* Phelps, 20 Fed. 315; Heller *v.* Bauer, 19 Fed. 96; Cotter *v.* New Haven Copper Co., 13 Fed. 234; Hammerschlag *v.* Garrett, 10 Fed. 479; Hudson *v.* Draper, 12 Fed. Cas. No. 6,834, 4 Cliff. 178, 4 Fish. Pat. Cas. 256; Unwin *v.* Heath, 16 C. B. 713, 81 E. C. L. 713, 5 H. L. Cas. 505, 10 Eng. Reprint 997, 25 L. J. C. P. 8; Patent Bottle Envelope Co. *v.* Seymer, 5 C. B. N. S. 164, 5 Jur. N. S. 174, 28 L. J. C. P. 22, 94 E. C. L. 164.

Identity of result is not sufficient. Schwartz *v.* Housman, 88 Fed. 519; Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331, 5 Off. Gaz. 268 [*affirmed* in 94 U. S. 568, 24 L. ed. 235].

But similarity of result may indicate identity of process. Hemolin Co. *v.* Harway Dyewood, etc., Mfg. Co., 131 Fed. 483 [*affirmed* in 138 Fed. 54, 70 C. C. A. 480].

Sufficiency of substantial identity.— Absolute identity is not necessary, but only substantial identity. Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968 [*reversing* 96 Fed. 850]; Burdon Wire, etc., Co. *v.* Williams, 128 Fed. 927; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; U. S. Mitis Co. *v.* Carnegie Steel Co., 89 Fed. 343 [*reversed* on other grounds in 90 Fed. 829, 33 C. C. A. 387]; New York Filter Mfg. Co. *v.* Elmira Waterworks Co., 82 Fed. 459, 83 Fed. 1013; New York Filter Mfg. Co. *v.* Niagara Falls Waterworks Co., 80 Fed. 924, 26 C. C. A. 252, 77 Fed. 900; American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 795; Celluloid Mfg. Co. *v.* American Zylonite Co., 31 Fed. 904; Cary

settled that the purchaser and user of an article made by the process is not an infringer.[17]

f. Composition.[18] A claim to an article or substance composed of a particular ingredient or combination of ingredients is infringed by an article having the same characteristics and composed of the same or equivalent ingredients.[19] The

v. Wolff, 24 Fed. 139, 23 Blatchf. 92; Gottfried *v.* Bartholomae, 10 Fed. Cas. No. 5,632, 3 Ban. & A. 308, 8 Biss. 219, 6 Reporter 390, 13 Off. Gaz. 1128; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Jones *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz. 401; Roberts *v.* Roter, 20 Fed. Cas. No. 11,912, 5 Fish. Pat. Cas. 295; United Nickel Co. *v.* Keith, 24 Fed. Cas. No. 14,408, 1 Ban. & A. 44, Holmes 328, 5 Off. Gaz. 272; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157.

Additions which do not essentially vary the process do not avoid infringement. Ford Morocco Co. *v.* Tannage Patent Co., 84 Fed. 644, 28 C. C. A. 503; Clerk *v.* Tannage Patent Co., 84 Fed. 643, 28 C. C. A. 501; Lalance, etc., Mfg. Co. *v.* Habermann Mfg. Co., 53 Fed. 375; Maryland Hominy, etc., Co. *v.* Dorr, 46 Fed. 773.

Substitution of equivalent materials is infringement. Johnson *v.* Willimantic Linen Co., 33 Conn. 436; United Nickel Co. *v.* Central Pac. R. Co., 36 Fed. 186; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213.

Process held not infringed see California Artificial Stone Paving Co. *v.* Schalicke, 119 U. S. 401, 7 S. Ct. 391, 30 L. ed. 471; Burns *v.* Meyer, 100 U. S. 671, 25 L. ed. 738; Wolff *v.* De Nemours, 122 Fed. 944 [*affirmed* in 134 Fed. 862, 67 C. C. A. 488]; Bradford *v.* Belknap Motor Co., 105 Fed. 63 [*affirmed* in 115 Fed. 711, 53 C. C. A. 293]; Cambria Iron Co. *v.* Carnegie Steel Co., 96 Fed. 850, 37 C. C. A. 593; U. S. Repair, etc., Co. *v.* Standard Paving Co., 95 Fed. 137, 37 C. C. A. 28; Michaelis *v.* Larkin, 91 Fed. 778; U. S. Glass Co. *v.* Atlas Glass Co., 90 Fed. 724, 33 C. C. A. 254; Cary Mfg. Co. *v.* De Haven, 88 Fed. 698; Tabor Bas-Relief Photograph Co. *v.* Marceau, 87 Fed. 871; Chicago Sugar-Refining Co. *v.* Charles Pope Glucose Co., 84 Fed. 977, 28 C. C. A. 594; Philadelphia Creamery Supply Co. *v.* Davis, etc., Bldg., etc., Co., 84 Fed. 881, 28 C. C. A. 555; Electric Smelting, etc., Co. *v.* Carborundum Co., 83 Fed. 492; Jackson *v.* Birmingham Brass Co., 79 Fed. 801, 25 C. C. A. 196; Cowles Electric Smelting, etc., Co. *v.* Lowrey, 79 Fed. 331, 24 C. C. A. 616; Clement Mfg. Co. *v.* Upson, etc., Co., 50 Fed. 538; Smith *v.* Pittsburgh Gas Co., 42 Fed. 145; Wickwire *v.* Wire Fabric Co., 41 Fed. 36; Consolidated Bunging Apparatus Co. *v.* H. Clausen, etc., Brewing Co., 39 Fed. 277; Gloucester Isinglass, etc., Co. *v.* Le Page, 30 Fed. 370; Globe Nail Co. *v.* Superior Nail Co., 27 Fed. 450 [*affirmed* in 136 U. S. 636, 10 S. Ct. 1068, 34 L. ed. 552]; Celluloid Mfg. Co. *v.* Comstock, 23 Fed. 38; Boneless Fish Co. *v.* Roberts, 12 Fed. 627; Doubleday *v.* Bracheo, 7 Fed. Cas. No. 4,018; Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331, 5 Off. Gaz. 268.

Process held infringed see Chisholm *v.* Johnson, 106 Fed. 191; Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87; German-American Filter Co. *v.* Erdrich, 98 Fed. 300; Streator Cathedral Glass Co. *v.* Wire-Glass Co., 97 Fed. 950, 38 C. C. A. 573; Westinghouse Electric, etc., Co. *v.* Beacon Lamp Co., 95 Fed. 462; Badische Anilin, etc., Fabrik *v.* Kalle, 94 Fed. 163; Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 90 Fed. 201; Celluloid Co. *v.* Arlington Mfg. Co., 85 Fed. 449; Ford Morocco Co. *v.* Tannage Patent Co., 84 Fed. 644, 28 C. C. A. 503; Adams *v.* Tannage Patent Co., 81 Fed. 178, 26 C. C. A. 326; Matheson *v.* Campbell, 77 Fed. 280.

17. Brown *v.* District of Columbia, 3 Mackey (D. C.) 502; National Phonograph Co. *v.* Lambert Co., 125 Fed. 388 [*affirmed* in 142 Fed. 164, 73 C. C. A. 382]; Welsbach Light Co. *v.* Union Incandescent Light Co., 101 Fed. 131, 41 C. C. A. 255; Ferris *v.* Batcheller, 70 Fed. 714; Durand *v.* Green, 60 Fed. 392 [*affirmed* in 61 Fed. 819, 10 C. C. A. 97]; Anonymous, 1 Fed. Cas. No. 477.

Sale of article is not an infringement of the machine which makes it. Boyd *v.* McAlpin, 3 Fed. Cas. No. 1,748, 3 McLean, 427, 2 Robb Pat. Cas. 277; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

In England the importation of articles made abroad according to the patented process is infringement. Saccharin Corp. *v.* Anglo-Continental Chemical Works, [1901] 1 Ch. 414, 70 L. J. Ch. 194, 48 Wkly. Rep. 444; Elmslie *v.* Boursier, L. R. 9 Eq. 217, 39 L. J. Ch. 328, 18 Wkly. Rep. 665; Von Heyden *v.* Neustadt, 14 Ch. D. 230, 50 L. J. Ch. 126, 42 L. T. Rep. N. S. 300, 28 Wkly. Rep. 496.

In Canada use or sale of article is infringement. Toronto Auer Light Co. *v.* Colling, 31 Ont. 18.

18. Substitution of materials as involving invention see *supra*, III, E, 15.

19. Dickerson *v.* Maurer, 108 Fed. 233; Propfe *v.* Coddington, 108 Fed. 86, 47 C. C. A. 218 [*affirming* 105 Fed. 951]; Badische Anilin, etc., Fabrik *v.* Kalle, 104 Fed. 802, 44 C. C. A. 201; Stelwagon Co. *v.* Childs, 101 Fed. 989, 42 C. C. A. 127; King *v.* Anderson, 90 Fed. 500; Wickelman *v.* A. B. Dick Co., 88 Fed. 264, 31 C. C. A. 530 [*affirming* 80 Fed. 519]; American Graphophone Co. *v.* Leeds, 87 Fed. 873; Welsbach Light Co. *v.* Sunlight Incandescent Gas Lamp Co., 87 Fed. 221; Holliday *v.* Schulze-Berge, 78 Fed. 493; Pasteur Chamberland Filter Co. *v.* Funk, 52 Fed. 146; Tibbe, etc., Mfg. Co. *v.* Lamparter, 51 Fed. 763; Vulcanite Co. *v.* American Co., 34 Fed. 320; Roosevelt *v.* Law Tel. Co., 33

addition of other ingredients to those claimed does not avoid infringement if the essential character of the compound remains the same.[20] But an addition changing the character of the compound is no infringement.[21] There is no infringement if an ingredient claimed is omitted,[22] although in the specifications the use of such ingredient is stated to be for a particular case only.[23]

g. Substitution of Equivalents[24] — (i) *In General.* Infringement is not

Fed. 505; Hobbie *v.* Smith, 27 Fed. 656; Kimball *v.* Hess, 15 Fed. 393; Atlantic Giant-Powder Co. *v.* Goodyear, 2 Fed. Cas. No. 623, 3 Ban. & A. 161, 13 Off. Gaz. 45; Atlantic Giant-Powder Co. *v.* Parker, 2 Fed. Cas. No. 625, 4 Ban. & A. 292, 16 Blatchf. 281, 16 Off. Gaz. 495; Atlantic Giant-Powder Co. *v.* Rand, 2 Fed. Cas. No. 626, 4 Ban. & A. 263, 16 Blatchf. 250, 16 Off. Gaz. 87; Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*; Collender *v.* Came, 6 Fed. Cas. No. 2,999, 2 Ban. & A. 412, 4 Cliff. 393, 10 Off. Gaz. 467; Goodyear Dental Vulcanite Co. *v.* Gardiner, 10 Fed. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Goodyear Dental Vulcanite Co. *v.* Preterre, 10 Fed. Cas. No. 5,596, 3 Ban. & A. 471, 15 Blatchf. 274, 14 Off. Gaz. 346; Hoffman *v.* Aronson, 12 Fed. Cas. No. 6,576, 8 Blatchf. 324, 4 Fish. Pat. Cas. 456; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,133, 2 Ban. & A. 351, 10 Off. Gaz. 289; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 50 Off. Gaz. 92; Taylor *v.* Archer, 23 Fed. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449; United Nickel Co. *v.* Keith, 24 Fed. Cas. No. 14,408, 1 Ban. & A. 44, Holmes 328, 5 Off. Gaz. 272; United Nickel Co. *v.* Manhattan Brass Co., 24 Fed. Cas. No. 14,410, 4 Ban. & A. 173, 16 Blatchf. 68; Woodward *v.* Morrison, 30 Fed. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124, 2 Off. Gaz. 120.

Equivalent ingredients are those known in the art as possessing the desired properties. Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222, 26 L. ed. 149; United Nickel Co. *v.* Pendleton, 15 Fed. 739, 21 Blatchf. 226; Babcock *v.* Judd, 1 Fed. 408; Atlantic Giant-Powder Co. *v.* Mowbray, 2 Fed. Cas. No. 624, 2 Ban. & A. 442, 12 Off. Gaz. No. 14, p. iii; Matthews *v.* Skates, 16 Fed. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Woodward *v.* Morrison, 30 Fed. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124, 2 Off. Gaz. 120. An ingredient may be equivalent, although subsequently discovered, if it performs no new function in the compound. Read Holliday *v.* Schulze-Berge, 78 Fed. 493.

Where the articles or compounds are the same, there is infringement, although they are made by different processes. Maurer *v.* Dickerson, 113 Fed. 870, 51 C. C. A. 494; Badische Anilin, etc., Fabrik *v.* Cochrane, 2 Fed. Cas. No. 719, 4 Ban. & A. 215, 16 Blatchf. 155; Badische Anilin, etc., Fabrik *v.* Cummins, 2 Fed. Cas. No. 720, 4 Ban. & A. 489; Badische Anilin, etc., Fabrik *v.* Hamilton Mfg. Co., 2 Fed. Cas. No. 721, 3 Ban. & A. 235, 13 Off. Gaz. 273; Badische Anilin, etc., Fabrik *v.* Higgin, 2 Fed. Cas. No. 722, 3 Ban. & A. 462, 15 Blatchf. 290, 14 Off. Gaz. 414. The Baur patent, No. 451,847, for an artificial musk, in view of the disclaimer filed, limiting it to the product of the process of patent No. 416,710 to the same patentee, is not infringed by a product not shown to have been made by such process. Societe Fabriques, etc. *v.* Lueders, 142 Fed. 753, 74 C. C. A. 15 [*affirming* 135 Fed. 102].

Not equivalent ingredients.— Hurlbut *v.* Schillinger, 130 U. S. 456, 9 S. Ct. 584, 32 L. ed. 1011; New York Asbestos Mfg. Co. *v.* Ambler Asbestos Air-Cell Covering Co., 103 Fed. 316; S. Rauh *v.* Guinzburg, 101 Fed. 1007, 42 C. C. A. 139; New Jersey Wire-Cloth Co. *v.* Merritt, 101 Fed. 460, 41 C. C. A. 460; Tower *v.* Eagle Pencil Co., 94 Fed. 361, 36 C. C. A. 294; Matheson *v.* Campbell, 78 Fed. 910, 24 C. C. A. 384; Johns Mfg. Co. *v.* Robertson, 77 Fed. 985, 23 C. C. A. 601; Seabury *v.* Johnson, 76 Fed. 456; Atlantic Dynamite Co. *v.* Climax Powder Mfg. Co., 72 Fed. 925; Blumenthal *v.* Burrell, 53 Fed. 105, 3 C. C. A. 462 [*affirming* 43 Fed. 667]; Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 47 Fed. 454 [*affirmed* in 52 Fed. 300, 3 C. C. A. 83]; Hood *v.* Boston Car Spring Co., 37 Fed. 792; Western, etc., Mfg. Co. *v.* Rosenstock, 30 Fed. 67; Union Tubing Co. *v.* Patterson, 23 Fed. 79; Tucker *v.* Sargent, 9 Fed. 299, 19 Blatchf. 538; Ashcroft *v.* Hollings, 2 Fed. Cas. No. 579, 11 Off. Gaz. 879; Baldwin *v.* Schultz, 2 Fed. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75, 2 Off. Gaz. 315, 319; Clarke *v.* Johnson, 5 Fed. Cas. No. 2,855, 4 Ban. & A. 403, 16 Blatchf. 495, 17 Off. Gaz. 1401; Goodyear Dental Vulcanite Co. *v.* Flagg, 10 Fed. Cas. No. 5,590, 9 Off. Gaz. 153; Tarr *v.* Folsom, 23 Fed. Cas. No. 13,756, 1 Ban. & A. 24, Holmes 312, 5 Off. Gaz. 92; Union Paper Collar Co. *v.* White, 24 Fed. Cas. No. 14,396, 2 Ban. & A. 60, 7 Off. Gaz. 698, 877, 11 Phila. (Pa.) 479, 1 Wkly. Notes Cas. (Pa.) 362; West *v.* Silver Wire, etc., Mfg. Co., 29 Fed. Cas. No. 17,425, 5 Blatchf. 477, 3 Fish. Pat. Cas. 306; Wonson *v.* Gilman, 30 Fed. Cas. No. 17,933, 2 Ban. & A. 590, 11 Off. Gaz. 1011.

20. Eastman *v.* Hinckel, 8 Fed. Cas. No. 4,256, 5 Ban. & A. 1; Thompson *v.* Jewett, 23 Fed. Cas. No. 13,961; United Nickel Co. *v.* Manhattan Brass Co., 24 Fed. Cas. No. 14,410, 4 Ban. & A. 173, 16 Blatchf. 68; Wonson *v.* Peterson, 30 Fed. Cas. No. 17,934, 3 Ban. & A. 249, 13 Off. Gaz. 548.

21. Dougherty *v.* Doyle, 63 Fed. 475, 11 C. C. A. 298 [*affirming* 59 Fed. 470].

22. Otley *v.* Watkins, 36 Fed. 323; Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666.

23. Otley *v.* Watkins, 36 Fed. 323.

24. Substitution of materials or equivalents as involving invention see *supra*, III, E, 14, 15.

evaded by substituting equivalent elements for those set forth in the patented claim.[25] Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent.[26]

(II) *WHAT ARE EQUIVALENTS.* Similarity or differences are to be determined not by the names but by what the elements will do.[27] Where there is iden-

25. Union Water Meter Co. *v.* Desper, 101 U. S. 332, 25 L. ed. 1024; Ives *v.* Hamilton, 92 U. S. 426, 23 L. ed. 494; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Westinghouse Electric, etc., Co. *v.* Condit Electrical Mfg. Co., 159 Fed. 154; Dey Time Register Co. *v.* Syracuse Time Recorder Co., 152 Fed. 440; Benbow-Brammer Mfg. Co. *v.* Simpson Mfg. Co., 132 Fed. 614; Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 652, 51 C. C. A. 369; Lepper *v.* Randall, 113 Fed. 627, 51 C. C. A. 337; Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845; Bundy Mfg. Co. *v.* Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Thompson *v.* Second Ave. Traction Co., 93 Fed. 824, 35 C. C. A. 620; Hart, etc., Mfg. Co. *v.* Anchor Electric Co., 92 Fed. 657, 34 C. C. A. 606; Huntington Dry-Pulverizer Co. *v.* Whittaker Cement Co., 89 Fed. 323; Salomon *v.* Garvin Mach. Co., 84 Fed. 195; Boston, etc., Electric St. R. Co. *v.* Bemis Car-Box Co., 80 Fed. 287, 25 C. C. A. 420; Tripp Giant Leveler Co. *v.* Bresnahan, 70 Fed. 982 [*affirmed* in 72 Fed. 920]; McCormick Harvesting Mach. Co. *v.* Auitman, 69 Fed. 371, 16 C. C. A. 259; Oval Wood Dish Co. *v.* Sandy Creek, New York, Wood Mfg. Co., 60 Fed. 285; Standard Folding Bed Co. *v.* Osgood, 58 Fed. 583, 7 C. C. A. 382; Cutcheon *v.* Herrick, 52 Fed. 147 [*modified* in 60 Fed. 80]; Hoe *v.* Cranston, 42 Fed. 837; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Putnam *v.* Hutchinson, 12 Fed. 131, 11 Biss. 240; Dederick *v.* Cassell, 9 Fed. 306; Singer Mfg. Co. *v.* Henry Stewart Co., 8 Fed. 920; Barrett *v.* Hall, 2 Fed. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Foster *v.* Moore, 9 Fed. Cas. No. 4,978, 1 Curt. 279; May *v.* Johnson County, 16 Fed. Cas. No. 9,334; Rice *v.* Heald, 20 Fed. Cas. No. 11,752; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*; Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509, 72 L. J. P. C. 110, 89 L. T. Rep. N. S. 224; Palmer *v.* Wagstaff, 2 C. L. R. 1052, 9 Exch. 494, 23 L. J. Exch. 217; Ellington *v.* Clark, 58 L. T. Rep. N. S. 818; Woodward *v.* Clement, 10 Ont. 348; Patrice *v.* Sylvester, 23 Grant Ch. (U. C.) 573.

Combining parts of two patented structures which results in changing one type of machine into the other is an infringement. National Cash Register Co. *v.* Grobet, 153 Fed. 905, 82 C. C. A. 651.

26. Imhaeuser *v.* Buerk, 101 U. S. 647, 25 L. ed. 945.

27. Columbia Wire Co. *v.* Kokomo Steel, etc., Co., 139 Fed. 578; Stetson *v.* Herreshoff Mfg. Co., 113 Fed. 952; Western Electric Co. *v.* Home Tel. Co., 85 Fed. 649; *In re* Boughton, 3 Fed. Cas. No. 1,696, McArthur Pat. Cas. 278; Smith *v.* Downing, 22 Fed. Cas. No. 13,036, 1 Fish. Pat. Cas. 64.

Substantial and not technical identity is the test. Sayre *v.* Scott, 55 Fed. 971, 5 C. C. A. 366; Brush Electric Co. *v.* Western Electric Light, etc., Co., 43 Fed. 533; Delong *v.* Bickford, 13 Fed. 32; Whipple *v.* Middlesex Co., 29 Fed. Cas. No. 17,520, 4 Fish. Pat. Cas. 41.

Equivalents illustrated.— Lidgerwood Mfg. Co. *v.* Lambert Hoisting Engine Co., 150 Fed. 364; Robins Conveying Belt Co. *v.* American Road Mach. Co., 145 Fed. 923, 76 C. C. A. 461 [*affirming* 142 Fed. 221]; Bredin *v.* Solmson, 132 Fed. 161 [*affirmed* in 136 Fed. 187, 69 C. C. A. 203]; Lepper *v.* Randall, 113 Fed. 627, 51 C. C. A. 337; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72 [*reversing* 100 Fed. 849]; Dowagiac Mfg. Co. *v.* Smith, 108 Fed. 67; Kampfe *v.* Reichard, 105 Fed. 624; Owatonna Mfg. Co. *v.* Fargo, 94 Fed. 519; Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248 [*modifying* 82 Fed. 916]; Heap *v.* Greene, 91 Fed. 792, 34 C. C. A. 86 [*reversing* 75 Fed. 405]; Huntington Dry-Pulverizer Co. *v.* Whittaker Cement Co., 89 Fed. 323; Heap *v.* Tremont, etc., Mills, 82 Fed. 449, 27 C. C. A. 316; C. T. Ham Mfg. Co. *v.* R. E. Dietz Co., 69 Fed. 841, 13 C. C. A. 687 [*affirming* 58 Fed. 367, 13 C. C. A. 687]; H. Tibbe, etc., Mfg. Co. *v.* Missouri Cob-Pipe Co., 62 Fed. 158; Ballard *v.* McCluskey, 58 Fed. 880; Winchester Repeating Arms Co. *v.* American Buckle, etc., Co., 54 Fed. 703; Riker *v.* Crocker-Wheeler Motor Co., 54 Fed. 519; Consolidated Piedmont Cable Co. *v.* Pacific Cable R. Co., 53 Fed. 385, 3 C. C. A. 570; Pacific Cable R. Co. *v.* Butte City St. R. Co., 52 Fed. 863 [*affirmed* in 60 Fed. 90, 8 C. C. A. 484]; Municipal Signal Co. *v.* Gamewell Fire-Alarm Tel. Co., 52 Fed. 459; Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452; Creamery Package Mfg. Co. *v.* Elgin Co-operative Butter Tub Co., 43 Fed. 892; Harmon *v.* Struthers, 43 Fed. 437; Rapid Service Store R. Co. *v.* Taylor, 43 Fed. 249; Reed *v.* Smith, 40 Fed. 882; Simonds Counter Mach. Co. *v.* Knox, 39 Fed. 702; Root *v.* Third Ave. R. Co., 39 Fed. 281; Coleman Hardware Co. *v.* Kellogg, 39 Fed. 39; Pullman's Palace-Car Co. *v.* Wagner Palace-Car Co., 38 Fed. 416; Sawyer Spindle Co. *v.* Buttrick, 37 Fed. 794; Bradley, etc., Mfg. Co. *v.* Charles Parker Co., 35 Fed. 748; Casey *v.* Butterfield, 35 Fed. 77; Morss *v.* Ufford,

tity of operation there is equivalency.[28] Mere differences of form are immaterial

34 Fed. 37; Thaxter *v.* Boston Electric Co., 32 Fed. 833; Royer *v.* Coupe, 29 Fed. 358; Pennsylvania Diamond-Drill Co. *v.* Simpson, 29 Fed. 288; Hoyt *v.* Slocum, 26 Fed. 329; Norton Door-Check, etc., Co. *v.* Elliott Pneumatic Door-Check Co., 26 Fed. 320; Adams, etc., Mfg. Co. *v.* Excelsior Oil-Stove Mfg. Co., 26 Fed. 270; Parker *v.* Montpelier Carriage Co., 23 Fed. 886; Hartford Woven-Wire Mattress Co. *v.* Peerless Wire Mattress Co., 23 Fed. 587, 23 Blatchf. 227; Parker *v.* Stow, 23 Fed. 252; Maxheimer *v.* Meyer, 9 Fed. 460, 20 Blatchf. 17; Brainard *v.* Pulsifer, 7 Fed. 349; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; American Whip Co. *v.* Lombard, 1 Fed. Cas. No. 319, 3 Ban. & A. 598, 4 Cliff. 495, 14 Off. Gaz. 900; Blake *v.* Robertson, 3 Fed. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Buchanan *v.* Howland, 4 Fed. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Cook *v.* Howard, 6 Fed. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Crehore *v.* Norton, 6 Fed. Cas. No. 3,381; Doughty *v.* West, 7 Fed. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580; Gibson *v.* Harris, 10 Fed. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. Rep. 115; Gibson *v.* Van Dresar, 10 Fed. Cas. No. 5,402, 1 Blatchf. 532, Fish. Pat. Rep. 369; Harwood *v.* Mill River Woolen Mfg. Co., 11 Fed. Cas. No. 6,187, 3 Fish. Pat. Cas. 526; Johnsen *v.* Fassman, 13 Fed. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138, 2 Off. Gaz. 94; Knox *v.* Loweree, 14 Fed. Cas. No. 7,910, 1 Ban. & A. 589, 6 Off. Gaz. 802; Maynadier *v.* Tenney, 16 Fed. Cas. No. 9,350, 2 Ban. & A. 615; Megraw *v.* Carroll, 16 Fed. Cas. No. 9,393*b*, 5 Ban. & A. 324; Myers *v.* Frame, 17 Fed. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [*reversed* on other grounds in 94 U. S. 187, 24 L. ed. 34]; Parker *v.* Remhoff, 18 Fed. Cas. No. 10,747, 3 Ban. & A. 550, 17 Blatchf. 206, 14 Off. Gaz. 601; Tilghman *v.* Morse, 23 Fed. Cas. No. 14,044, 9 Blatchf. 421, 5 Fish. Pat. Cas. 323, 1 Off. Gaz. 574; Waterbury Brass Co. *v.* Miller, 29 Fed. Cas. No. 17,254, 9 Blatchf. 77, 5 Fish. Pat. Cas. 48; Waterbury Brass Co. *v.* New York, etc., Brass Co., 29 Fed. Cas. No. 17,256, 3 Fish. Pat. Cas. 43; Weston *v.* Nash, 29 Fed. Cas. No. 17,454, 2 Ban. & A. 40, Holmes 488, 7 Off. Gaz. 1096; Woolcocks *v.* Many, 30 Fed. Cas. No. 18,024, 9 Blatchf. 139, 5 Fish. Pat. Cas. 72; Berdan Fire-Arms Mfg. Co. *v.* U. S., 25 Ct. Cl. 355.

Not equivalents.— Cimiotti Unhairing Co. *v.* American Fur Refining Co., 198 U. S. 399, 25 S. Ct. 697, 49 L. ed. 1100 [*affirming* 123 Fed. 869, 59 C. C. A. 357]; Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Gates Iron Works *v.* Fraser, 153 U. S. 332, 14 S. Ct. 883, 38 L. ed. 734; Ball, etc., Fastener Co. *v.* Kraetzer, 150 U. S. 111, 14 S. Ct. 48, 37 L. ed. 1019; Weatherhead *v.* Coupe, 147 U. S. 322, 13 S. Ct. 312, 37 L. ed. 188; Joyce *v.* Chillicothe Foundry, etc., Co., 127 U. S. 557, 8 S. Ct. 1311, 32 L. ed. 171; Forncrook *v.* Root, 127 U. S. 176, 8 S. Ct. 1247, 32 L. ed. 97; Matthews *v.* Iron-Clad Mfg. Co., 124 U. S. 347, 8 S. Ct. 639, 31 L. ed. 477; Electric R. Signal Co. *v.* Hall R. Signal Co., 114 U. S. 87, 5 S. Ct. 1069, 29 L. ed. 96; Blake *v.* San Francisco, 113 U. S. 679, 5 S. Ct. 692, 28 L. ed. 1070; L. E. Waterman Co. *v.* McCutchean, 127 Fed. 1020, 61 C. C. A. 653; Evans *v.* Newark Rivet Works, 121 Fed. 133 [*affirmed* in 126 Fed. 492, 61 C. C. A. 474]; L. E. Waterman Co. *v.* Forsyth, 121 Fed. 107 [*affirmed* in 128 Fed. 926, 63 C. C. A. 648]; Wellman *v.* Midland Steel Co., 106 Fed. 221; Lepper *v.* Randall, 105 Fed. 975; McCully *v.* Kny-Scheerer Co., 103 Fed. 648; Dodge *v.* Ohio Valley Pulley Works, 101 Fed. 581; Rauh *v.* Guinzburg, 95 Fed. 151; Johnson Electric Service Co. *v.* Powers Regulator Co., 85 Fed. 863, 29 C. C. A. 459; Norton *v.* Jensen, 81 Fed. 494; Engle Sanitary, etc., Co. *v.* Elwood, 73 Fed. 484; Wells *v.* Curtis, 66 Fed. 318, 13 C. C. A. 494; Whitcomb Envelope Co. *v.* Logan, etc., Envelope Co., 63 Fed. 982; Ball, etc., Fastener Co. *v.* Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498; Detwiler *v.* Bosler, 58 Fed. 249, 55 Fed. 660; Morss *v.* Domestic Sewing-Mach. Co., 55 Fed. 79, 5 C. C. A. 47; Holloway *v.* Dow, 54 Fed. 511; Dudley E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 C. C. A. 158; Hitchcock *v.* Wanzer Lamp Co., 45 Fed. 362; Sackett *v.* Smith, 42 Fed. 846; Brush Electric Co. *v.* Julien Electric Co., 41 Fed. 679; Ligowsky Clay-Pigeon Co. *v.* Peoria Target Co., 35 Fed. 758; Eastern Paper-Bag Co. *v.* Standard Paper-Bag Co., 29 Fed. 787; McFarland *v.* Deere, etc., Mfg. Co., 22 Fed. 781; Deis *v.* Doll, 21 Fed. 523; Lloyd *v.* Miller, 19 Fed. 915; Field *v.* Ireland, 19 Fed. 835; Schmidt *v.* Freese, 12 Fed. 563; Field *v.* De Comean, 9 Fed. Cas. No. 4,765, 5 Ban. & A. 40, 17 Off. Gaz. 568 [*affirmed* in 116 U. S. 187, 6 S. Ct. 363, 29 L. ed. 596]; Forsyth *v.* Clapp, 9 Fed. Cas. No. 4,949, 6 Fish. Pat. Cas. 528, Holmes 278, 4 Off. Gaz. 527; Sickles *v.* Youngs, 22 Fed. Cas. No. 12,838, 3 Blatchf. 293; Sickles *v.* Evans, 22 Fed. Cas. No. 12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Smith *v.* Marshall, 22 Fed. Cas. No. 13,077, 2 Ban. & A. 371, 10 Off. Gaz. 375; Wheeler *v.* Simpson, 29 Fed. Cas. No. 17,500, 1 Ban. & A. 420, 6 Off. Gaz. 435.

28. Westinghouse Mach. Co. *v.* Press Pub. Co., 127 Fed. 822 [*reversed* on other grounds in 135 Fed. 767, 68 C. C. A. 469]; Anderson *v.* Collins, 122 Fed. 451, 58 C. C. A. 669; Cimiotti Unhairing Co. *v.* Nearseal Unhairing Co., 115 Fed. 507, 53 C. C. A. 161 [*affirming* 113 Fed. 588]; Powell *v.* Leicester Mills Co., 108 Fed. 386, 47 C. C. A. 416; Rosenblatt *v.* Fraser Tablet Triturate Mfg. Co., 106 Fed. 733; Diamond State Iron Co. *v.* Goldie, 84 Fed. 972, 28 C. C. A. 589; Bowers *v.* Von Schmidt, 63 Fed. 572.

On the other hand literal application of claims does not make infringement where the principle of operation is different. Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 18 S. Ct. 707, 42 L. ed. 1136 [*reversing* 70 Fed. 816, 17 C. C. A. 430]; Standard Com-

if the function and result are the same;[29] and a part is no less equivalent because it performs additional functions.[30] Parts are also equivalents whether made integral or separate.[31] Parts are not equivalents if they do not operate to perform the same function.[32] They must perform substantially the same function in substantially the same way to produce the same result,[33] or where reorganization is necessary to effect the substitution.[34] Substitution of a material not known as an equivalent is not infringement.[35]

(III) *Necessity For Knowledge of Equivalent at Date of Patent.* To constitute infringement by the substitution of equivalents, it is essential that the equivalent was known at the date of the patent as a proper substitute.[36]

puting Scale Co. *v.* Computing Scale Co., 126 Fed. 639, 61 C. C. A. 541.

29. Hillard *v.* Fisher Book Typewriter, 159 Fed. 439; Eck *v.* Kutz, 132 Fed. 758; Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 118 Fed. 136, 55 C. C. A. 86; Adams Co. *v.* Schreiber, etc., Mfg. Co., 111 Fed. 182; Huntington Dry-Pulverizer Co. *v.* Whittaker Cement Co., 89 Fed. 323; Adams *v.* Keystone Mfg. Co., 41 Fed. 595; Celluloid Mfg. Co. *v.* American Zylonite Co., 31 Fed. 904; U. S. Metallic Packing Co. *v.* Tripp, 31 Fed. 350; Adams *v.* Bridgewater Iron Co., 26 Fed. 324; Shannon *v.* J. M. W. Jones Stationery, etc., Co., 9 Fed. 205, 10 Biss. 498; Adams *v.* Joliet Mfg. Co., 1 Fed. Cas. No. 56, 3 Ban. & A. 1, 12 Off. Gaz. 93; Smith *v.* Higgins, 22 Fed. Cas. Nos. 13,057, 13,059, 1 Fish. Pat. Cas. 537.

30. Universal Brush Co. *v.* Sonn, 146 Fed. 517 [*reversed* on other grounds in 154 Fed. 665, 83 C. C. A. 422]; Comptograph Co. *v.* Mechanical Accountant Co., 145 Fed. 331, 75 C. C. A. 205; Atlantic Giant-Powder Co. *v.* Goodyear, 2 Fed. Cas. No. 623, 3 Ban. & A. 161, 13 Off. Gaz. 45; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Sarven *v.* Hall, 21 Fed. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415, 1 Off. Gaz. 437; Wheeler *v.* Clipper Mower, etc., Co., 29 Fed. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1, 2 Off. Gaz. 442.

31. Standard Caster, etc., Co. *v.* Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109; Bundy Mfg. Co. *v.* Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Brown *v.* Reed Mfg. Co., 81 Fed. 48; Fryer *v.* New York Mut. L. Ins. Co., 30 Fed. 787; Baldwin *v.* Bernard, 2 Fed. Cas. No. 797, 9 Blatchf. 509 note, 5 Fish. Pat. Cas. 442, 2 Off. Gaz. 320; Baldwin *v.* Schultz, 2 Fed. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75, 2 Off. Gaz. 315, 319.

32. Hubbell *v.* U. S., 179 U. S. 86, 21 S. Ct. 28, 45 L. ed. 100; Dey Time Register Co. *v.* Syracuse Time Recorder Co., 152 Fed. 440; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; Scarborough *v.* Neff, 75 Fed. 579; Engle Sanitary, etc., Co. *v.* Elwood, 73 Fed. 484; Binder *v.* Atlanta Cotton Seed Oil Mills, 73 Fed. 480; Richardson *v.* American Pin Co., 73 Fed. 476; Jackson *v.* Birmingham Brass Co., 72 Fed. 269 [*affirmed* in 79 Fed. 801, 25 C. C. A. 196]; New York Paper-Bag Mach., etc., Co. *v.* Hollingsworth, etc., Co., 56 Fed. 224, 5 C. C. A. 490 [*affirming* 48 Fed. 562]; Williams *v.* Steam-Gauge, etc., Co., 47 Fed. 322; Bortree *v.* Jackson, 43 Fed. 136; Peninsular Novelty Co. *v.* American Shoe-Tip Co., 39 Fed. 791; Huntington *v.* Hartford Heel-Plate Co., 36 Fed. 689; Matthews *v.* Chambers, 6 Fed. 874; Blake *v.* Rawson, 3 Fed. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200, 3 Off. Gaz. 122; Bridge *v.* Brown, 4 Fed. Cas. No. 1,858, 6 Fish. Pat. Cas. 236, Holmes 205, 3 Off. Gaz. 121; Brown *v.* Rubber Step Mfg. Co., 4 Fed. Cas. No. 2,028, 3 Ban. & A. 232, 13 Off. Gaz. 369.

33. Rowell *v.* Lindsay, 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906 [*affirming* 6 Fed. 290, 10 Biss. 217]; O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 72 C. C. A. 304; International Mfg. Co. *v.* H. F. Brammer Mfg. Co., 138 Fed. 396, 71 C. C. A. 633; Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 652, 51 C. C. A. 362; Wilt *v.* Grier, 5 Fed. 450; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Johnson *v.* Root, 13 Fed. Cas. No. 7,410, 2 Cliff. 637; May *v.* Johnson County, 16 Fed. Cas. No. 9,334.

Similarity of result is not sufficient.— Rich *v.* Baldwin, 133 Fed. 920, 66 C. C. A. 464; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 289; Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., 104 Fed. 337, 43 C. C. A. 560; Powell *v.* Leicester Mills Co., 103 Fed. 476 [*reversed* on other grounds in 108 Fed. 386, 47 C. C. A. 416]; Wilson *v.* McCormick Harvesting Mach. Co., 92 Fed. 167, 34 C. C. A. 280; Schmidt *v.* Freese, 12 Fed. 563.

34. American Pneumatic Tool Co. *v.* Philadelphia Pneumatic Tool Co., 123 Fed. 891; Pittsburg Meter Co. *v.* Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580; Crompton *v.* Belknap Mills, 30 Fed. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

35. Badische Anilin, etc., Fabrik *v.* Levinstein, 24 Ch. D. 156, 52 L. J. Ch. 704, 48 L. T. Rep. N. S. 822, 31 Wkly. Rep. 913 [*affirmed* in 12 App. Cas. 710, 57 L. T. Rep. N. S. 853].

36. Imhaeuser *v.* Buerk, 101 U. S. 647, 25 L. ed. 945; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Magic Light Co. *v.* Economy Gas-Lamp Co., 97 Fed. 87, 38 C. C. A. 56; Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 C. C. A. 158; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906]; King *v.* Louisville Cement Co., 14 Fed. Cas. No. 7,798, 6 Fish. Pat. Cas. 336, 4 Off. Gaz. 181; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No.

h. Omission of Parts.[37] A claim is not infringed when an element included therein is omitted and no equivalent is used;[38] and the rule applies, although the element is not really essential.[39] However, the omission of features not claimed does not avoid infringement.[40]

14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Webster *v.* New Brunswick Carpet Co., 29 Fed. Cas. No. 17,337, 1 Ban. & A. 84, 5 Off. Gaz. 522; Welling *v.* Rubber-Coated Harness Trimming Co., 29 Fed. Cas. No. 17,382, 1 Ban. & A. 282, 7 Off. Gaz. 606.

37. Omission of parts as involving invention see *supra*, III, E, 17.

38. Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Phœnix Caster Co. *v.* Spiegel, 133 U. S. 360, 10 S. Ct. 409, 33 L. ed. 663; Peters *v.* Active Mfg. Co., 129 U. S. 530, 9 S. Ct. 389, 32 L. ed. 738; Prouty *v.* Ruggles, 16 Pet. (U. S.) 336, 10 L. ed. 985; Mallon *v.* Gregg, 137 Fed. 68, 69 C. C. A. 48; Westinghouse Electric, etc., Co. *v.* Cutter Electric, etc., Co., 136 Fed. 217 [*reversed* on other grounds in 143 Fed. 966, 75 C. C. A. 540]; Levy *v.* Harris, 124 Fed. 69 [*affirmed* in 130 Fed. 711, 65 C. C. A. 113]; Mayo Knitting Mach., etc., Co. *v.* Jenckes Mfg. Co., 121 Fed. 110 [*affirmed* in 133 Fed. 527, 66 C. C. A. 557]; American School-Furniture Co. *v.* J. M. Sauder Co., 113 Fed. 576; Moore *v.* Eggers, 107 Fed. 491, 46 C. C. A. 425; Parsons *v.* Minneapolis Threshing-Mach. Co., 106 Fed. 941; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Thomson Meter Co. *v.* National Meter Co., 106 Fed. 519; Keyes *v.* United Indurated Fibre Co., 104 Fed. 1006, 44 C. C. A. 265; Goodyear Shoe Mach. Co. *v.* Spaulding, 101 Fed. 990; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 100 Fed. 849; Mesick *v.* Moore, 100 Fed. 845; Ryan *v.* Runyon, 93 Fed. 970, 36 C. C. A. 36; Regina Music-Box Co. *v.* Paillard, 85 Fed. 644; Keyes *v.* United Indurated Fibre Co., 82 Fed. 32; Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578; Roemer *v.* Peddie, 81 Fed. 380, 26 C. C. A. 440; Excelsior Coal Co. *v.* Oregon Imp. Co., 79 Fed. 355, 24 C. C. A. 640; Carter Mach. Co. *v.* Hanes, 78 Fed. 346, 24 C. C. A. 128; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Murphy Mfg. Co. *v.* Excelsior Car-Roof Co., 76 Fed. 965, 22 C. C. A. 658; Wheaton *v.* Norton, 70 Fed. 833, 17 C. C. A. 447; Adee *v.* J. L. Mott Iron-Works, 55 Fed. 876, 5 C. C. A. 288; Baumer *v.* Will, 53 Fed. 373; Adee *v.* J. L. Mott Iron-Works, 46 Fed. 77; Mack *v.* Levy, 43 Fed. 69; Sun Vapor St. Light Co. *v.* Western St. Light Co., 41 Fed. 43; Catchpole *v.* Pulsifer, 35 Fed. 766; Ligowski Clay-Pigeon Co. *v.* Peoria Target Co., 35 Fed. 755; Kidd *v.* Ransom, 35 Fed. 588; Wight Fireproofing Co. *v.* Chicago Fireproof Co., 35 Fed. 582; Wheeler *v.* Hart, 32 Fed. 78 [*affirmed* in 140 U. S. 704, 11 S. Ct. 1031, 35 L. ed. 602]; Tobey Furniture Co. *v.* Colby, 26 Fed. 100; Sheeder *v.* Shannon, 25 Fed. 824 [*affirmed* in 131 U. S. 447, 9 S. Ct. 803, 33 L. ed. 224]; Taft *v.* Steere, 19 Fed. 600; Snow *v.* Lake Shore, etc., R. Co., 18 Fed. 602 [*affirmed* in 121 U. S. 617, 7 S. Ct. 1343, 30 L. ed. 1004]; National Pump Cylinder Co. *v.* Simmons Hardware Co., 18 Fed. 324, 5 McCrary 592; Doane, etc., Mfg. Co. *v.* Smith, 15 Fed. 459; Fay *v.* Preble, 14 Fed. 652, 11 Biss. 422; Morgan Elevated R. Co. *v.* Pullman, 14 Fed. 648; Goss *v.* Cameron, 14 Fed. 576, 11 Biss. 389; Hayes *v.* Seton, 12 Fed. 120, 20 Blatchf. 484; Onderdonk *v.* Fanning, 9 Fed. 106, 19 Blatchf. 363; Rowell *v.* Lindsay, 6 Fed. 290, 10 Biss. 217 [*affirmed* in 113 U. S. 97, 5 S. Ct. 507, 28 L. ed. 906]; Baldwin *v.* Schultz, 2 Fed. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75, 2 Off. Gaz. 315, 319; Bliss *v.* Haight, 3 Fed. Cas. No. 1,548, 7 Blatchf. 7, 3 Fish. Pat. Cas. 621; Brown *v.* Hinkley, 4 Fed. Cas. No. 2,012, 6 Fish. Pat. Cas. 370, 3 Off. Gaz. 384; Burr *v.* Cowperthwait, 4 Fed. Cas. No. 2,188, 4 Blatchf. 163; Case *v.* Brown, 5 Fed. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268; Craig *v.* Smith, 6 Fed. Cas. No. 3,339, 1 Ban. & A. 556, 4 Dill. 349 [*affirmed* in 100 U. S. 226, 25 L. ed. 577]; Dodge *v.* Card, 7 Fed. Cas. No. 3,951, 1 Bond 393, 2 Fish. Pat. Cas. 116; Evarts *v.* Ford, 8 Fed. Cas. No. 4,574, 6 Fish. Pat. Cas. 587, 5 Off. Gaz. 58; Florence Mfg. Co. *v.* Boston Diatite Co., 9 Fed. Cas. No. 4,882, 1 Ban. & A. 396, Holmes 415, 6 Off. Gaz. 728; Hailes *v.* Van Wormer, 11 Fed. Cas. No. 5,904, 7 Blatchf. 443 [*affirmed* in 20 Wall. 353, 22 L. ed. 241]; Hale *v.* Stimpson, 11 Fed. Cas. No. 5,915, 2 Fish. Pat. Cas. 565; Haselden *v.* Ogden, 11 Fed. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; Hill *v.* Houghton, 12 Fed. Cas. No. 6,493, 1 Ban. & A. 291, 6 Off. Gaz. 3; Roberts *v.* Harnden, 20 Fed. Cas. No. 11,903, 2 Cliff. 500; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Sanford *v.* Merrimack Hat Co., 21 Fed. Cas. No. 12,313, 2 Ban. & A. 408, 4 Cliff. 404, 10 Off. Gaz. 466; Smith *v.* Higgins, 22 Fed. Cas. No. 13,060, 2 Fish. Pat. Cas. 97; Sweetser *v.* Helms, 23 Fed. Cas. No. 13,689, 2 Ban. & A. 263, 10 Off. Gaz. 4; Seed *v.* Higgins, 8 H. L. Cas. 550, 6 Jur. N. S. 1264, 30 L. J. Q. B. 314, 3 L. T. Rep. N. S. 101, 11 Eng. Reprint 544.

39. Wright *v.* Yuengling, 155 U. S. 47, 15 S. Ct. 1, 39 L. ed. 64; Henry Huber Co. *v.* J. L. Mott Iron Works, 113 Fed. 599; Elfelt *v.* Steinhart, 11 Fed. 896, 6 Sawy. 480; Dodge *v.* Fearey, 8 Fed. 329.

In Canada the omission of essential parts avoids infringement. Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509, 72 L. J. P. C. 110, 89 L. T. Rep. N. S. 224. Omission will not avoid infringement where the essence is taken. Consolidated Car Heating Co. *v.* Came, 18 Quebec Super. Ct. 44.

40. Letson *v.* Alaska Packers' Assoc., 130 Fed. 129, 64 C. C. A. 463 [*modifying* 119 Fed. 599]; Hobbs Mfg. Co. *v.* Gooding, 111

i. Addition of Parts.[41] The addition of one or more parts or features to the construction claimed securing additional functions will not avoid infringement.[42] There is no infringement, however, where the combination claimed is changed or destroyed by the addition making a new combination.[43]

j. Transposition of Elements.[44] A mere change in the location of an element will not avoid infringement where the operation is substantially the same,[45] but a

Fed. 403, 49 C. C. A. 414; Brammer *v.* Schroeder, 106 Fed. 918, 46 C. C. A. 41; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Bresnahan *v.* Tripp Giant Leveller Co., 102 Fed. 899, 43 C. C. A. 48; Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485; Mast *v.* Dempster Mills Mfg. Co., 82 Fed. 327, 27 C. C. A. 191; National Cash-Register Co. *v.* American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559; American Automaton Weighing Mach. Co. *v.* Blauvelt, 50 Fed. 213; National Cash-Register Co. *v.* Boston Cash Indicator, etc., Co., 45 Fed. 481; National Car-Brake Shoe Co. *v.* Lake Shore, etc., R. Co., 4 Fed. 219, 9 Biss. 503; Francis *v.* Mellor, 9 Fed. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 1 Off. Gaz. 48, 8 Phila. (Pa.) 157; Jurgensen *v.* Magnin, 14 Fed. Cas. No. 7,586, 9 Blatchf. 294, 5 Fish. Pat. Cas. 237; Macdonald *v.* Shepard, 16 Fed. Cas. No. 8,767, 4 Ban. & A. 343.

41. **Duplication of parts as involving invention** see *supra*, III, E, 11.

42. Rees *v.* Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Walker Patent Pivoted Bin Co. *v.* Miller, 132 Fed. 823 [*affirmed* in 139 Fed. 134, 71 C. C. A. 398]; Dowagiac Mfg. Co. *v.* Brennan, 118 Fed. 143 [*reversed* on other grounds in 127 Fed. 143, 62 C. C. A. 257]; Brislin *v.* Carnegie Steel Co., 118 Fed. 579 [*reversed* on other grounds in 124 Fed. 213, 59 C. C. A. 651]; Powell *v.* Leicester Mills Co., 108 Fed. 386, 47 C. C. A. 416 [*reversing* 103 Fed. 476]; Newton *v.* McGuire, 97 Fed. 614; Consolidated Fastener Co. *v.* Hays, 95 Fed. 168; Jones *v.* Holman, 58 Fed. 973 [*reversed* on other grounds in 61 Fed. 105, 680, 9 C. C. A. 385]; Heaton-Peninsular Button-Fastener Co. *v.* Elliott Button-Fastener Co., 58 Fed. 220; Williames *v.* Barnard, 41 Fed. 358; Baldwin *v.* T. G. Conway Co., 35 Fed. 519; Filley *v.* Littlefield Stove Co., 30 Fed. 434; Wirt *v.* Brown, 30 Fed. 188; Blake *v.* Robertson, 3 Fed. Cas. No. 1,501, 6 Off. Gaz. 297 [*affirmed* in 94 U. S. 728, 24 L. ed. 245]; Cleveland *v.* Towle, 5 Fed. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Earle *v.* Harlow, 8 Fed. Cas. No. 4,246, 2 Ban. & A. 264, 9 Off. Gaz. 1018; Imlay *v.* Norwich, etc., R. Co., 13 Fed. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,949, 2 Ban. & A. 152, 13 Blatchf. 151, 8 Off. Gaz. 773; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,195, 6 McLean 558; Robertson *v.* Hill, 20 Fed. Cas. No. 11,925, 6 Fish. Pat. Cas. 465, 4 Off. Gaz. 132; Waterbury Brass Co. *v.* New York, etc., Brass Co., 29 Fed. Cas. No. 17,256, 3 Fish. Pat. Cas. 43; Williams *v.* Boston, etc., R. Co., 29 Fed. Cas. No. 17,716, 4 Ban. & A. 441, 17 Blatchf. 21, 16 Off. Gaz. 906.

Making one of the parts perform additional functions does not avoid infringement. Colby *v.* Card, 63 Fed. 462 [*reversed* on other grounds in 64 Fed. 594, 12 C. C. A. 319]; Pacific Cable R. Co. *v.* Butte City St. R. Co., 55 Fed. 760 [*reversed* in 60 Fed. 410, 9 C. C. A. 41]; Masseth *v.* Palm, 51 Fed. 824; Brush Electric Co. *v.* Ft. Wayne Electric Co., 44 Fed. 284; Holmes Burglar Alarm Tel. Co. *v.* Domestic Tel., etc., Co., 42 Fed. 220; Shaver *v.* Skinner Mfg. Co., 30 Fed. 68; Yale Lock Mfg. Co. *v.* Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; New York Rubber Co. *v.* Chaskel, 18 Fed. Cas. No. 10,215, 9 Off. Gaz. 923; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948*a*.

Duplicating one or more parts will not avoid infringement. Diamond State Iron Co. *v.* Goldie, 84 Fed. 972, 28 C. C. A. 589 [*affirming* 81 Fed. 173]; Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581 [*modified* in 63 Fed. 962, 11 C. C. A. 528]; Butz Thermo-Electric Regulator Co. *v.* Jacobs Electric Co., 36 Fed. 191; Blake *v.* Eagle Works Mfg. Co., 3 Fed. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Kittle *v.* Frost, 14 Fed. Cas. No. 7,856, 9 Blatchf. 214, 5 Fish. Pat. Cas. 213; Pike *v.* Providence, etc., R. Co., 19 Fed. Cas. No. 11,163, 1 Ban. & A. 560, Holmes 445, 6 Off. Gaz. 575.

Interposing parts in combination will not avoid infringement where the operation of the combination is the same. Union R. Co. *v.* Sprague Electric R., etc., Co., 88 Fed. 82, 31 C. C. A. 391; Steel-Clad Bath Co. *v.* Davison, 77 Fed. 736; Loercher *v.* Crandal, 11 Fed. 872, 20 Blatchf. 106.

43. Voss *v.* Fisher, 113 U. S. 213, 5 S. Ct. 511, 28 L. ed. 975; Barr Co. *v.* New York, etc., Automatic Sprinkler Co., 35 Fed. 513; Reckendorfer *v.* Faber, 20 Fed. Cas. No. 11,625, 1 Ban. & A. 229, 12 Blatchf. 68, 5 Off. Gaz. 697 [*affirmed* in 92 U. S. 347, 23 L. ed. 719]; Robertson *v.* Hill, 20 Fed. Cas. No. 11,925, 6 Fish. Pat. Cas. 465, 4 Off. Gaz. 132.

44. **Change of location of parts as involving invention** see *supra*, III, E, 16.

45. Wagner Typewriter Co. *v.* Wyckoff, 151 Fed. 585, 81 C. C. A. 129 [*modifying* 138 Fed. 108]; Pettibone *v.* Pennsylvania Steel Co., 133 Fed. 730 [*reversed* on other grounds in 141 Fed. 95]; Consolidated Fastener Co. *v.* Hays, 100 Fed. 984, 41 C. C. A. 142; Schroeder *v.* Brammer, 98 Fed. 880; Sawyer Spindle Co. *v.* W. G. & A. R. Morrison Co., 54 Fed. 693; Henzel *v.* California Electrical Works, 51 Fed. 754, 2 C. C. A. 495; Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452; California Electrical Works *v.* Henzel, 48 Fed.

rearrangement producing different operations but the same result is not an infringement.[46]

k. Repair. The purchaser of a patented machine has the right to use it until worn out,[47] and therefore he may repair it and substitute new parts for old so long as the identity of the machine is not destroyed.[48] He may not, however,

375; Sawyer Spindle Co. *v.* Eureka Spindle Co., 33 Fed. 836 [*affirmed* in 145 U. S. 637, 12 S. Ct. 980, 36 L. ed. 849]; Kirk *v.* Du Bois, 33 Fed. 252; Belle Patent Button Fastener Co. *v.* Lucas, 28 Fed. 371; Hartford Mach. Screw Co. *v.* Reynolds, 26 Fed. 528; Hoyt *v.* Slocum, 26 Fed. 329; Putnam *v.* Hollender, 6 Fed. 882, 19 Blatchf. 48; Adams *v.* Joliet Mfg. Co., 1 Fed. Cas. No. 56, 3 Ban. & A. 1, 12 Off. Gaz. 93; Conover *v.* Dohrman, 6 Fed. Cas. No. 3,120, 6 Blatchf. 60, 3 Fish. Pat. Cas. 382; Decker *v.* Grote, 7 Fed. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143, 3 Off. Gaz. 65; Gale Mfg. Co. *v.* Prutzman, 9 Fed. Cas. No. 5,191*a*, 5 Ban. & A. 154, 17 Off. Gaz. 743; Hamilton *v.* Ives, 11 Fed. Cas. No. 5,982, 6 Fish. Pat. Cas. 244, 3 Off. Gaz. 30 [*affirmed* in 92 U. S. 426, 23 L. ed. 494]; King *v.* Maudelbaum, 14 Fed. Cas. No. 7,799, 8 Blatchf. 468, 4 Fish. Pat. Cas. 577; Knox *v.* Great Western Quicksilver Min. Co., 14 Fed. Cas. No. 7,907, 4 Ban. & A. 25, 7 Reporter 325, 6 Sawy. 430, 14 Off. Gaz. 897; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058; Winans *v.* Danforth, 30 Fed. Cas. No. 17,859.

Mere reversal of position or operation does not avoid infringement. Heap *v.* Greene, 91 Fed. 792, 34 C. C. A. 86 [*reversing* 75 Fed. 405]; Huntington Dry-Pulverizer Co. *v.* Whittaker Cement Co., 89 Fed. 323; Société Anonyme Usine J. Cléret *v.* Rehfuss, 75 Fed. 657; Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164, 59 Fed. 295, 8 C. C. A. 129; Brown Mfg. Co. *v.* Mast, 53 Fed. 578; Masseth *v.* Palm, 51 Fed. 824; Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. Rep. 184; Buerk *v.* Imhaeuser, 4 Fed. Cas. No. 2,106, 1 Ban. & A. 337, 5 Off. Gaz. 752 [*affirmed* in 101 U. S. 647, 25 L. ed. 945]; Potter *v.* Schenck, 19 Fed. Cas. No. 11,337, 1 Biss. 515, 3 Fish. Pat. Cas. 82; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 24 Fed. Cas. No. 14,369, 2 Ban. & A. 593, 11 Off. Gaz. 1113; Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

Infringement of a process patent is not avoided by reversing one of the mechanical steps of the process, where the purpose and result of the step is the same. Burdon Wire, etc., Co. *v.* Williams, 128 Fed. 927.

46. McCormick *v.* Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Campbell Printing-Press, etc., Co. *v.* Duplex Printing-Press Co., 101 Fed. 282, 41 C. C. A. 351; Overweight Counterbalance Elevator Co. *v.* Improved Order Red Men's Hall Assoc., 94 Fed. 155, 36 C. C. A. 125; Edison Electric Light Co. *v.* Electric Engineering, etc., Co., 83 Fed. 473, 27 C. C. A. 562; Brown *v.* Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 C. C. A. 528 [*reversing* 49 Fed. 738]; Reece Buttonhole Mach. Co. *v.* Globe Buttonhole Mach. Co., 54 Fed. 884 [*reversed* on other grounds in 61 Fed. 958, 10 C. C. A. 194]; Bruff *v.* Waterbury Buckle Co., 29 Fed. 214; Otis Bros. Mfg. Co. *v.* Crane Bros. Mfg. Co., 27 Fed. 550 [*affirmed* in 136 U. S. 646, 10 S. Ct. 1072, 34 L. ed. 553]; National Car-Brake Shoe Co. *v.* Boston, etc., R. Co., 15 Fed. 462; Pattee *v.* Moline Plow Co., 9 Fed. 821, 10 Biss. 377; Gorham *v.* Mixter, 10 Fed. Cas. No. 5,626, Brunn. Col. Cas. 327; Habeman *v.* Whitman, 11 Fed. Cas. No. 5,885*a*, 5 Ban. & A. 530.

Similarity of result is not sufficient. McCormick *v.* Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Westinghouse Air Brake Co. *v.* New York Air Brake Co., 119 Fed. 874, 56 C. C. A. 404; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 659, 51 C. C. A. 369; Adams Electric Co. *v.* Lindell R. Co., 77 Fed. 432, 23 C. C. A. 223; Robbins *v.* Aurora Match Co., 43 Fed. 434; Taylor *v.* Garretson, 23 Fed. Cas. No. 13,792, 9 Blatchf. 156, 5 Fish. Pat. Cas. 116.

47. Chaffee *v.* Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Wilson *v.* Simpson, 9 How. (U. S.) 109, 13 L. ed. 66; Shickle, etc., Iron Co. *v.* St. Louis Car-Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Day *v.* Union India-Rubber Co., 7 Fed. Cas. No. 3,691, 3 Blatchf. 488 [*affirmed* in 20 How. 216, 15 L. ed. 883]; May *v.* Chaffee, 16 Fed. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160; Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702.

48. Chaffee *v.* Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Wilson *v.* Simpson, 9 How. (U. S.) 109, 13 L. ed. 66; O'Rourke Engineering Constr. Co. *v.* McMullen, 150 Fed. 338; Morrin *v.* Robert White Engineering Works, 138 Fed. 68 [*modified* and *affirmed* in 143 Fed. 519, 74 C. C. A. 466]; Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692; Alaska Packers' Assoc. *v.* Pacific Steam Whaling Co., 93 Fed. 672; Shickle, etc., Iron Co. *v.* St. Louis Car-Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Young *v.* Foerster, 37 Fed. 203 [*affirmed* in 159 U. S. 272, 15 S. Ct. 1044, 40 L. ed. 138]; Aiken *v.* Manchester Print Works, 1 Fed. Cas. No. 113, 2 Cliff. 435; Farrington *v.* Detroit Water Com'rs, 8 Fed. Cas. No. 4,687, 4 Fish. Pat. Cas. 216; Steam Cutter Co. *v.* Sheldon, 22 Fed. Cas. No. 13,331, 10 Blatchf. 1, 5 Fish. Pat. Cas. 477.

Patented process cannot be used in repairing. Goodyear Dental Vulcanite Co. *v.* Preterre, 10 Fed. Cas. No. 5,596, 3 Ban. & A. 471, 15 Blatchf. 274, 14 Off. Gaz. 346.

reconstruct or rebuild a worn-out machine.[49] No general rule can be laid down by which to determine the line of demarkation between legitimate repairs which a purchaser of a patented machine may rightfully make thereon, and a reconstruction or reproduction which will constitute infringement. Each case must in that regard be decided on its own facts, having reference to the scope and purpose of the invention and the fair and reasonable intention of the parties.[50]

l. Superiority or Inferiority as a Test of Infringement. Although superiority may indicate such difference as to avoid infringement,[51] the fact that the infringing article is superior to that made by the patentee will not avoid infringement so long as the essential features of the patented article are used,[52] nor will the fact

Parts for sale to others cannot be manufactured see St. Louis Car-Coupling Co. *v.* Shickle, etc., Iron Co., 70 Fed. 783 [*reversed* on other grounds in 77 Fed. 739].

Parts of different construction may be substituted to improve the device. Thomson-Houston Electric Co. *v.* Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 C. C. A. 1 [*modifying* 72 Fed. 1016].

49. Morrin *v.* Robert White Engineering Works, 138 Fed. 68 [*modified* and *affirmed* in 143 Fed. 519, 74 C. C. A. 466]; Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 100 Fed. 462, 40 C. C. A. 494 [*affirming* 93 Fed. 672]; Shickle, etc., Iron Co. *v.* St. Louis Car-Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Davis Electric Works *v.* Edison Electric Light Co., 60 Fed. 276, 8 C. C. A. 615 [*affirming* 58 Fed. 878]; Bicknell *v.* Todd, 3 Fed. Cas. No. 1,389, 5 McLean 236, Fish. Pat. Rep. 452; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4, 17 Off. Gaz. 675; Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 24 Fed. Cas. No. 14,369, 2 Ban. & A. 593, 11 Off. Gaz. 1113; Wortendyke *v.* White, 30 Fed. Cas. No. 18,050, 2 Ban. & A. 25; Dunlop Pneumatic Tyre Co. *v.* Neal, [1899] 1 Ch. 807, 68 L. J. Ch. 378, 80 L. T. Rep. N. S. 746, 47 Wkly. Rep. 632.

Changing and reconstructing patented machines and selling them under a different name is infringement. National Phonograph Co. *v.* Fletcher, 117 Fed. 149.

50. Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692.

51. Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Johnson *v.* Root, 13 Fed. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Smith *v.* Woodruff, 22 Fed. Cas. No. 13,128*a*, 6 Fish. Pat. Cas. 476.

52. Hoyt *v.* Horne, 145 U. S. 302, 12 S. Ct. 922, 36 L. ed. 713; Morley Sewing Mach. Co. *v.* Lancaster, 129 U. S. 263, 9 S. Ct. 299, 32 L. ed. 715; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Evans *v.* Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Diamond Match Co. *v.* Ruby Match Co., 127 Fed. 341; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., 125 Fed. 926, 60 C. C. A. 636; Brislin *v.* Carnegie Steel Co., 118 Fed. 579 [*reversed* on other grounds in 124 Fed. 213, 59 C. C. A. 651]; Adams Co. *v.* Schreiber, etc., Mfg. Co., 111 Fed. 182 [*reversed* on other grounds in 117 Fed. 830, 54 C. C. A. 128]; Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Bonnette Arc Lawn Sprinkler Co. *v.* Koehler, 82 Fed. 428, 27 C. C. A. 200; Whitely *v.* Fadner, 73 Fed. 486; Goshen Sweeper Co. *v.* Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 C. C. A. 13; Robbins *v.* Dueber Watch-Case Mfg. Co., 71 Fed. 186; Traver *v.* Brown, 62 Fed. 933; Simmons *v.* Standard Oil Co., 62 Fed. 928; Woodward *v.* Boston Lasting Mach. Co., 60 Fed. 283, 8 C. C. A. 622; Merrow *v.* Shoemaker, 59 Fed. 120 [*reversed* on other grounds in 61 Fed. 945, 10 C. C. A. 181]; Gilbert *v.* Reinhardt Numbering Mach. Co., 58 Fed. 975; Stonemetz Printers' Mach. Co. *v.* Brown Folding-Mach. Co., 57 Fed. 601 [*affirmed* in 58 Fed. 571, 7 C. C. A. 374]; Pittsburg Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301; White *v.* Walbridge, 46 Fed. 526; National Typographic Co. *v.* New York Typographic Co., 46 Fed. 114; Shaver *v.* Skinner Mfg. Co., 30 Fed. 68; Royer *v.* Coupe, 29 Fed. 358; Filley *v.* Littlefield, 25 Fed. 282; Celluloid Mfg. Co. *v.* Chrolithion Collar, etc., Co., 23 Fed. 397, 23 Blatchf. 205; Bostock *v.* Goodrich, 21 Fed. 316; Roemer *v.* Simon, 20 Fed. 197; Evory *v.* Burt, 15 Fed. 112 [*reversed* on other grounds in 133 U. S. 349, 10 S. Ct. 394, 33 L. ed. 647]; Foye *v.* Nichols, 13 Fed. 125, 8 Sawy. 201; Frost *v.* Marcus, 13 Fed. 88; American Bell Tel. Co. *v.* Spencer, 8 Fed. 509; Pennington *v.* King, 7 Fed. 462; Adams *v.* Joliet Mfg. Co., 1 Fed. Cas. No. 56, 3 Ban. & A. 1, 12 Off. Gaz. 93; Alden *v.* Dewey, 1 Fed. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; American Whip Co. *v.* Lombard, 1 Fed. Cas. No. 319, 3 Ban. & A. 598, 4 Cliff. 495, 14 Off. Gaz. 900; Blake *v.* Eagle Works Mfg. Co., 3 Fed. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Blake *v.* Robertson, 3 Fed. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Carstaedt *v.* U. S. Corset Co., 5 Fed. Cas. No. 2,468, 2 Ban. & A. 119, 13 Blatchf. 119, 9 Off. Gaz. 151; Chicago Fruit-House Co. *v.* Busch, 5 Fed. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Colt *v.* Massachusetts Arms Co., 6 Fed. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Conover *v.* Rapp, 6 Fed. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Converse *v.* Cannon, 6 Fed. Cas. No. 3,144, 2 Woods 7, 9 Off. Gaz. 105; Cook

that it is inferior.[53] Infringement is not avoided by intentionally making the device imperfect or defective.[54]

m. Patented Improvement. A device is none the less an infringement because it is covered by an improvement patent granted to the infringer.[55] Change in

v. Howard, 6 Fed. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Crehore *v.* Norton, 6 Fed. Cas. No. 3,381; Decker *v.* Griffith, 7 Fed. Cas. No. 3,724, 10 Blatchf. 343 note; De Florez *v.* Raynolds, 7 Fed. Cas. No. 3,742, 3 Ban. & A. 292, 14 Blatchf. 505; Flint *v.* Roberts, 9 Fed. Cas. No. 4,875, 4 Ban. & A. 165; Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379; Foss *v.* Herbert, 9 Fed. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Goodyear *v.* Mathews, 10 Fed. Cas. No. 5,576, 1 Paine 300, 1 Robb Pat. Cas. 50; Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Howe *v.* Morton, 12 Fed. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Imlay *v.* Norwich, etc., R. Co., 13 Fed. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Kendrick *v.* Emmons, 14 Fed. Cas. No. 7,695, 2 Ban. & A. 208, 9 Off. Gaz. 201; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; Odiorne *v.* Denney, 18 Fed. Cas. No. 10,431, 3 Ban. & A. 287, 13 Off. Gaz. 965, 1 N. J. L. J. 183; Pitts *v.* Wemple, 19 Fed. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Reutgen *v.* Kanowrs, 20 Fed. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. 168; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,415, 3 Biss. 52, 4 Fish. Pat. Cas. 584; Stainthorp *v.* Humiston, 22 Fed. Cas. No. 13,281, 4 Fish. Pat. Cas. 107; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,321, 3 Ban. & A. 281, 4 Cliff. 568; Turrell *v.* Spaeth, 24 Fed. Cas. No. 14,269, 3 Ban. & A. 458, 14 Off. Gaz. 377; Union Paper-Bag Mach. Co. *v.* Pultz, etc., Co., 24 Fed. Cas. No. 14,392, 3 Ban. & A. 403, 15 Blatchf. 160, 15 Off. Gaz. 423; Westinghouse *v.* Gardner, etc., Air Brake Co., 29 Fed. Cas. No. 17,450, 2 Ban. & A. 55, 9 Off. Gaz. 538; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; Wilbur *v.* Beecher, 29 Fed. Cas. No. 17,634, 2 Blatchf. 132, Fish. Pat. Rep. 401; Winans *v.* New York, etc., R. Co., 30 Fed. Cas. No. 17,864, 4 Fish. Pat. Cas. 1; Woodcock *v.* Parker, 30 Fed. Cas. No. 17,971, 1 Gall. 438, 1 Robb Pat. Cas. 37; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 3 Woodb. & M. 135, 2 Robb Pat. Cas. 625; United Tel. Co. *v.* Harrison, 21 Ch. D. 720, 51 L. J. Ch. 705, 46 L. T. Rep. N. S. 620, 30 Wkly. Rep. 724; American Dunlop Tire Co. *v.* Anderson Tire Co., 5 Can. Exch. 194.

Relative superiority of devices is irrelevant. Stevens *v.* Pierpont, 42 Conn. 360; Lourie Implement Co. *v.* Lenhart, 130 Fed. 122, 64 C. C. A. 456; May *v.* Fond du Lac County, 27 Fed. 691 [*reversed* on other grounds in 137 U. S. 395, 11 S. Ct. 98, 34 L. ed. 714]; Cox *v.* Griggs, 6 Fed. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Roberts *v.* Harnden, 20 Fed. Cas. No. 11,903, 2 Cliff. 500; Tilghman *v.* Werk, 23 Fed. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229.

53. Cimiotti Unhairing Co. *v.* Bowsky, 95 Fed. 474; Hubbard *v.* King Ax Co., 89 Fed. 713; Union R. Co. *v.* Sprague Electric R., etc., Co., 88 Fed. 82, 31 C. C. A. 391; National Folding-Box, etc., Co. *v.* Elsas, 86 Fed. 917, 30 C. C. A. 487; Heap *v.* Greene, 75 Fed. 405 [*reversed* on other grounds in 91 Fed. 792, 34 C. C. A. 86]; Robinson *v.* Sutter, 8 Fed. 828, 10 Biss. 100; Forbes *v.* Barstow Stove Co., 9 Fed. Cas. No. 4,923, 2 Cliff. 379; Union Paper-Bag Mach. Co. *v.* Binney, 24 Fed. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

54. Crown Cork, etc., Co. *v.* Standard Stopper Co., 136 Fed. 199; A. R. Milner Seating Co. *v.* Yesbera, 133 Fed. 916, 67 C. C. A. 210; White *v.* Peerless Rubber Mfg. Co., 111 Fed. 190; King Ax Co. *v.* Hubbard, 97 Fed. 795, 38 C. C. A. 423; Penfield *v.* Chambers, 92 Fed. 630, 34 C. C. A. 579; Whiteley *v.* Fadner, 73 Fed. 486; Tripp Giant Leveller Co. *v.* Bresnahan, 70 Fed. 982 [*affirmed* in 72 Fed. 920, 19 C. C. A. 237]; Sawyer Spindle Co. *v.* W. G. & A. R. Morrison Co., 52 Fed. 590; Chicago Fruit-House Co. *v.* Busch, 5 Fed. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395.

55. Cantrell *v.* Wallick, 117 U. S. 689, 6 S. Ct. 970, 29 L. ed. 1017; Tilghman *v.* Proctor, 102 U. S. 707, 26 L. ed. 279; Blanchard *v.* Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Ries *v.* Barth Mfg. Co., 136 Fed. 850, 69 C. C. A. 528; Bradford Belting Co. *v.* Kisinger-Ison Co., 113 Fed. 811, 51 C. C. A. 483; Smith *v.* Uhrich, 94 Fed. 865; Bowers *v.* Von Schmidt, 63 Fed. 572; Putnam *v.* Keystone Bottle Stopper Co., 38 Fed. 234; Tate *v.* Thomas, 27 Fed. 306; Wilson *v.* Cubley, 26 Fed. 156; Zeun *v.* Kaldenberg, 16 Fed. 539; Star Salt Caster Co. *v.* Alden, 10 Fed. 555; White *v.* Heath, 10 Fed. 291; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 513; Cleveland *v.* Towle, 5 Fed. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Jones *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz. 401; Morse Fountain-Pen Co. *v.* Esterbrook Steel-Pen Mfg. Co., 17 Fed. Cas. No. 9,862, 3 Fish. Pat. Cas. 515; Storrs *v.* Howe, 23 Fed. Cas. No. 13,495, 2 Ban. & A. 420, 4 Cliff. 388, 10 Off. Gaz. 421; Wilson *v.* Barnum, 30 Fed. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb Pat. Cas. 749, 1 Wall Jr. 347.

Use of patented machine to perform a process previously patented by another is infringement. Expanded Metal Co. *v.* Bradford, 136 Fed. 870 [*reversed* on other grounds

the details of construction of a patented article may be patentable as improvements, but is no protection against the infringement of the original patent.[56] The original patentee cannot use the patented improvement.[57]

7. DESIGNS. An article infringes a design patent when it so nearly resembles the patented design in appearance as to lead ordinary purchasers to mistake one for the other. The test is the sameness of appearance to the ordinary observer giving ordinary attention to the matter.[58] Difference in structure or appearance which will enable experts to distinguish them will not prevent infringement.[59] But confusion which is due to lack of attention by purchasers or other causes than similarity of the patented form will not show infringement.[60] And it is

in 146 Fed. 984, 77 C. C. A. 230]; Collette *v.* Lasnier, 13 Can. Sup. Ct. 563; Merrill *v.* Cousins, 26 U. C. Q. B. 49.

Where the alleged infringer has a subsequently granted patent upon his device, the presumption is against infringement. New Jersey Wire Cloth Co. *v.* Buffalo Expanded Metal Co., 131 Fed. 265 [*affirmed* in 135 Fed. 1021, 68 C. C. A. 672]; Anderson *v.* Collins, 122 Fed. 451, 58 C. C. A. 669; Powell *v.* Leicester Mills Co., 103 Fed. 476 [*reversed* on other grounds in 108 Fed. 386, 47 C. C. A. 416]; Norton *v.* Jensen, 90 Fed. 415, 33 C. C. A. 141; Griffith *v.* Shaw, 89 Fed. 313; St. Louis Car-Coupler Co. *v.* National Malleable Castings Co., 87 Fed. 885, 31 C. C. A. 265; Kohler *v.* George Worthington Co., 77 Fed. 844; Ransome *v.* Hyatt, 69 Fed. 148, 16 C. C. A. 185; National Harrow Co. *v.* Hanby, 54 Fed. 493; Brown *v.* Selby, 4 Fed. Cas. No. 2,030, 2 Biss. 457, 4 Fish. Pat. Cas. 363; Buerk *v.* Imhaeuser, 4 Fed. Cas. No. 2,108, 2 Ban. & A. 465, 11 Off. Gaz. 112. *Contra*, Bowers *v.* Pacific Coast Dredging, etc., Co., 99 Fed. 745; Hardwick *v.* Masland, 71 Fed. 887; Holliday *v.* Pickhardt, 12 Fed. 147.

56. Tate *v.* Thomas, 27 Fed. 306; Wilson *v.* Cubley, 26 Fed. 156; White *v.* Heath, 10 Fed. 291; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512.

57. Cantrell *v.* Wallick, 117 U. S. 689, 6 S. Ct. 970, 29 L. ed. 1017; Royer *v.* Coupe, 29 Fed. 358; Crehore *v.* Norton, 6 Fed. Cas. No. 3,381; Flint *v.* Roberts, 9 Fed. Cas. No. 4,475, 4 Ban. & A. 165; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,321, 3 Ban. & A. 281, 4 Cliff. 568; Whipple *v.* Baldwin Mfg. Co., 29 Fed. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

58. Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606; Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Fed. 210 [*affirmed* in 145 Fed. 928, 76 C. C. A. 466]; Bevin Bros. Mfg. Co. *v.* Starr Bros. Bell Co., 114 Fed. 362; Pelouze Scale, etc., Co. *v.* American Cutlery Co., 102 Fed. 916, 43 C. C. A. 52; Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345; Byram *v.* Friedberger, 87 Fed. 559; Whittall *v.* Lowell Mfg. Co., 79 Fed. 787; Henderson *v.* Tompkins, 60 Fed. 758; Macbeth *v.* Gillinder, 54 Fed. 171; Ripley *v.* Elson Glass Co., 49 Fed. 927; Dreyfus *v.* Schneider, 25 Fed. 481; Dryfoos *v.* Friedman, 18 Fed. 824, 21 Blatchf. 563; Jennings *v.* Kibbe, 10 Fed. 669, 20 Blatchf. 353; Wood *v.* Dolby, 7 Fed. 475, 19 Blatchf. 214; McCrea *v.* Holdsworth, L. R. 6 Ch. 418, 23 L. T. Rep. N. S. 444, 19 Wkly. Rep. 36.

Use of different names or trade-marks.— Where two designs are substantially similar the fact that different names or trade-marks are or may be used in connection with them will not sufficiently distinguish them. Perry *v.* Starrett, 19 Fed. Cas. No. 11,012, 3 Ban. & A. 485, 14 Off. Gaz. 599.

What was old at the date of the patent will not infringe. Byram *v.* Friedberger, 87 Fed. 559.

Cases holding design infringed see Matthews, etc., Mfg. Co. *v.* American Lamp, etc., Co., 103 Fed. 634; American Electrical Novelty, etc., Co. *v.* Acme Electric Lamp Co., 98 Fed. 895; Whittall *v.* Lowell Mfg. Co., 79 Fed. 787; Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70; Stewart *v.* Smith, 58 Fed. 580, 7 C. C. A. 380 [*affirming* 55 Fed. 481]; Macbeth *v.* Gillinder, 54 Fed. 171; Ripley *v.* Elson Glass Co., 49 Fed. 927; Perry *v.* Starrett, 19 Fed. Cas. No. 11,012, 3 Ban. & A. 485, 14 Off. Gaz. 599.

Cases holding design not infringed see Buerkle *v.* Standard Heater Co., 105 Fed. 779; Pelouze Scale, etc., Co. *v.* American Cutlery Co., 102 Fed. 916, 43 C. C. A. 52; Byram *v.* Friedberger, 100 Fed. 963, 41 C. C. A. 121 [*affirming* 87 Fed. 559]; Magic Light Co. *v.* Economy Gas-Lamp Co., 97 Fed. 87, 38 C. C. A. 56; Mesinger Bicycle Saddle Co. *v.* Humber, 94 Fed. 672, 674; Soehner *v.* Favorite Stove, etc., Co., 84 Fed. 182, 28 C. C. A. 317; Frank *v.* Hess, 84 Fed. 170; Michigan Stove Co. *v.* Fuller-Warren Co., 81 Fed. 376; Sutro Bros. Braid Co. *v.* Schloss, 44 Fed. 356; Dukes *v.* Bauerle, 41 Fed. 784; Crocker *v.* Cutter Tower Co., 29 Fed. 456 [*affirmed* in 140 U. S. 678, 11 S. Ct. 1019, 35 L. ed. 600]; Jennings *v.* Kibbe, 24 Fed. 697.

59. Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 20 L. ed. 731 [*reversing* 10 Fed. Cas. No. 5,627, 7 Blatchf. 513, 2 Whitm. Pat. Cas. 392]; Hutter *v.* Broome, 114 Fed. 655; Redway *v.* Ohio Stove Co., 38 Fed. 582; Tomkinson *v.* Willets Mfg. Co., 23 Fed. 895; Miller *v.* Smith, 5 Fed. 359; Perry *v.* Starrett, 19 Fed. Cas. No. 11,012, 3 Ban. & A. 485, 14 Off. Gaz. 599.

60. Kruttschnitt *v.* Simmons, 122 Fed. 1020, 58 C. C. A. 111 [*affirming* 118 Fed.

of course obvious that an invalid design patent will not support a claim of infringement.[61]

8. Infringement After Expiration of Patent. Articles illegally made during the life of a patent cannot be lawfully sold after the patent has expired.[62] The illegality attaches to the things themselves. The person making them has no right to make them, no right to them when made.[63] But the part manufacture of articles not constituting an infringement, with intent to complete into the patented article immediately on the expiration of the patent, is not infringement, as the monopoly only exists during the life of the patent.[64]

B. Contributory Infringement — 1. In General. Contributory infringement is the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention,[65] and this is usually done by making or selling a part of the patented invention with the intent and purpose of so aiding.[66] The essence of contributory infringement lies in concerting with others in an unlawful invasion of the patentee's rights.[67] The burden of proof is on complainant to show an intention on the part of defendants to aid others in such infringement.[68]

2. Selling Parts of Patented Invention. Selling parts adapted and intended for use in making the patented invention in violation of the patent is contributory infringement.[69] The mere fact that they might be so used, however, will not

851]; Monroe *v.* Anderson, 58 Fed. 398, 7 C. C. A. 272.

61. Union Welting Co. *v.* McCarter, 108 Fed. 398, 47 C. C. A. 428; Feder *v.* Stewart, etc., Co., 105 Fed. 628; Kampfe *v.* Reichard, 105 Fed. 622; Rowe *v.* Blodgett, etc., Co., 103 Fed. 873 [*affirmed* in 112 Fed. 161, 46 C. C. A. 214]; Matthews, etc., Mfg. Co. *v.* American Lamp, etc., Co., 103 Fed. 634; Koenen *v.* Drake, 101 Fed. 466, 41 C. C. A. 466; Cary Mfg. Co. *v.* Neal, 98 Fed. 617, 39 C. C. A. 189; Westinghouse Electric, etc., Co. *v.* Triumph Electric Co., 97 Fed. 99, 38 C. C. A. 65; Sagendorph *v.* Hughes, 95 Fed. 478.

62. Underwood Typewriter Co. *v.* Elliott-Fisher Co., 156 Fed. 588; American Diamond Rock-Boring Co. *v.* Rutland Marble Co., 2 Fed. 355, 18 Blatchf. 147; American Diamond Rock-Boring Co. *v.* Sheldon, 1 Fed. 870, 18 Blatchf. 50; Crossley *v.* Beverly, 9 B. & C. 63, 17 E. C. L. 38, 3 C. & P. 513, 14 E. C. L. 690, 7 L. J. K. B. O. S. 127, M. & M. 283, 22 E. C. L. 522, 1 Russ. & M. 166 note, 5 Eng. Ch. 166 note, 39 Eng. Reprint 65 [*affirmed* in 4 L. J. Ch. 25]; Richards *v.* Williamson, 30 L. T. Rep. N. S. 746, 22 Wkly. Rep. 765.

63. American Diamond Rock-Boring Co. *v.* Sheldon, 1 Fed. 870, 18 Blatchf. 50.

64. White *v.* Walbridge, 46 Fed. 526.

65. Howson Contrib. Infr. Pat. 1; Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Thomson-Houston Electric Co. *v.* Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 C. C. A. 1; Hatch *v.* Hall, 30 Fed. 613; American Cotton-Tie Supply Co. *v.* McCready, 1 Fed. Cas. No. 295, 4 Ban. & A. 588, 17 Blatchf. 291, 17 Off. Gaz. 565.

Intent to aid is necessary. Snyder *v.* Bunnell, 29 Fed. 47; Saxe *v.* Hammond, 21 Fed. Cas. No. 12,411, 1 Ban. & A. 629, Holmes 456, 7 Off. Gaz. 781.

66. Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692.

67. Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692.

68. Thomson-Houston Electric Co. *v.* Kelsey Electric R. Specialty Co., 72 Fed. 1016; Snyder *v.* Bunnell, 29 Fed. 47; Coolidge *v.* McCone, 6 Fed. Cas. No. 3,186, 1 Ban. & A. 78, 2 Sawy. 571, 5 Off. Gaz. 458; Saxe *v.* Hammond, 21 Fed. Cas. No. 12,411, 1 Ban. & A. 629, Holmes 456.

69. Leeds, etc., Co. *v.* Victor Talking Mach. Co., 154 Fed. 58, 83 C. C. A. 170; Victor Talking Mach. Co. *v.* Leeds, etc., Co., 150 Fed. 147; A. B. Dick Co. *v.* Henry, 149 Fed. 424; Cutler-Hammer Mfg. Co. *v.* Union Electric Mfg. Co., 147 Fed. 266; Canda *v.* Michigan Malleable Iron Co., 124 Fed. 486, 61 C. C. A. 194; American Graphophone Co. *v.* Leeds, 87 Fed. 873; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107 [*affirming* 78 Fed. 139]; American Graphophone Co. *v.* Amet, 74 Fed. 789; St. Louis Car-Coupler Co. *v.* Shickle, etc., Iron Co., 70 Fed. 783 [*affirmed* in 77 Fed. 739, 23 C. C. A. 433]; Stearns *v.* Phillips, 43 Fed. 792; Travers *v.* Beyer, 26 Fed. 450, 23 Blatchf. 423; Schneider *v.* Pountney, 21 Fed. 399; Holly *v.* Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Richardson *v.* Noyes, 20 Fed. Cas. No. 11,792, 2 Ban. & A. 398, 10 Off. Gaz. 507; Wallace *v.* Holmes, 29 Fed. Cas. No. 17,100, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 1 Off. Gaz. 117. *Contra*, Byam *v.* Farr, 4 Fed. Cas. No. 2,264, 1 Curt. 260. And see Larochella *v.* Gauthier, 14 Quebec Super. Ct. 87.

Selling the ingredients of a composition with the expectation and intent that they be used in making it is infringement. Rum-

make the seller an infringer if they are capable of other use,[70] and the seller did not intend that they should be used for purposes of infringement.[71] It is not contributory infringement to make and sell parts to licensees under the patent for legitimate purposes of repair,[72] or to make and ship parts abroad,[73] and there is no infringement if the parts are never put into actual use in the patented combination.[74] So the doctrine of contributory infringement has no application where the thing alleged to be contributed is one of general use, suitable to a great variety of other methods of use,[75] and especially where there is no agreement or definite purpose that the thing sold shall be employed with other things so as to infringe a patent right.[76]

3. Selling Article Used With Patented Invention. The sale of an article

ford Chemical Works *v.* New York Baking Powder Co., 136 Fed. 873; Imperial Chemical Mfg. Co. *v.* Stein, 69 Fed. 616; Celluloid Mfg. Co. *v.* American Zylonite Co., 35 Fed. 417; Celluloid Mfg. Co. *v.* American Zylonite Co., 30 Fed. 437, 35 Fed. 417; Willis *v.* McCullen, 29 Fed. 641; Alabastine Co. *v.* Payne, 27 Fed. 559; Bowker *v.* Dows, 3 Fed. Cas. No. 1,734, 3 Ban. & A. 518, 15 Off. Gaz. 510; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,133, 2 Ban. & A. 351, 10 Off. Gaz. 289.

One who sells a device, the natural use of which will make the purchaser an infringer, is guilty of contributory infringement. Davis *v.* Perry, 120 Fed. 941, 57 C. C. A. 231 [*reversing* 115 Fed. 333]; Loew Filter Co. *v.* German-American Filter Co., 107 Fed. 949, 47 C. C. A. 94 [*affirming* 103 Fed. 303]; John R. Williams Co. *v.* Miller, etc., Mfg. Co., 107 Fed. 290; Westinghouse Electric, etc., Co. *v.* Dayton Fan, etc., Co., 106 Fed. 724; American Graphophone Co. *v.* Hawthorne, 92 Fed. 516; New York Filter Mfg. Co. *v.* Jackson, 91 Fed. 422; Boyd *v.* Cherry, 50 Fed. 279; Celluloid Mfg. Co. *v.* American Zylonite Co., 30 Fed. 437; Snyder *v.* Bunnell, 29 Fed. 47; Alabastine Co. *v.* Payne, 27 Fed. 559; American Diamond Rock Boring Co. *v.* Sullivan Mach. Co., 1 Fed. Cas. No. 298, 2 Ban. & A. 522, 14 Blatchf. 119; Bowker *v.* Dows, 3 Fed. Cas. No. 1,734, 3 Ban. & A. 518, 15 Off. Gaz. 510; Knight *v.* Gavit, 14 Fed. Cas. No. 7,884.

Merely omitting an element of the combination which must be supplied by the user will not avoid infringement. Heekin *v.* Baker, 127 Fed. 828 [*reversed* on other grounds in 138 Fed. 63, 70 C. C. A. 559]; Bishop, etc., Co. *v.* Levine, 119 Fed. 363; Red Jacket Mfg. Co. *v.* Davis, 82 Fed. 432, 27 C. C. A. 204.

Making and selling parts separately to be assembled by user is infringement. Lee *v.* Northwestern Stove Repair Co., 50 Fed. 202 [*reversed* on other grounds in 58 Fed. 182, 7 C. C. A. 160]; Strobridge *v.* Lindsay, 6 Fed. 510; Barnes *v.* Straus, 2 Fed. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531, 2 Off. Gaz. 62.

Manufacturing an improved element of a patented combination and substituting it in machines sold by the patentee is infringement. National Phonograph Co. *v.* Fletcher, 117 Fed. 149.

Perishable articles.— The rule has no application to a perishable article which it is the object of the mechanism to deliver and which must be renewed periodically. Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. ed. 500.

70. Standard Computing Scale Co. *v.* Computing Scale Co., 126 Fed. 639, 61 C. C. A. 541; Lane *v.* Park, 49 Fed. 454; Robbins *v.* Aurora Watch Co., 43 Fed. 521; Winne *v.* Bedell, 40 Fed. 463; Snyder *v.* Bunnell, 29 Fed. 47; Keystone Bridge Co. *v.* Phœnix Iron Co., 14 Fed. Cas. No. 7,751, 5 Fish. Pat. Cas. 468, 1 Off. Gaz. 471, 9 Phila. (Pa.) 374 [*affirmed* in 95 U. S. 274, 24 L. ed. 344].

71. Where wrongful use intended there is infringement. Cary Mfg. Co. *v.* Standard Metal Strap Co., 113 Fed. 429; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Boyd *v.* Cherry, 50 Fed. 279; Saxe *v.* Hammond, 21 Fed. Cas. No. 12,411, 1 Ban. & A. 629, Holmes 456, 7 Off. Gaz. 781; Wallace *v.* Holmes, 29 Fed. Cas. No. 17,100, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 1 Off. Gaz. 117.

72. O'Rourke Engineering Constr. Co. *v.* McMullen, 150 Fed. 338; Shickle, etc., Iron Co. *v.* St. Louis Car-Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Thomson-Houston Electric Co. *v.* Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 C. C. A. 1 [*modifying* 72 Fed. 1016]; Robbins *v.* Columbus Watch Co., 50 Fed. 545 [*affirmed* in 64 Fed. 384, 12 C. C. A. 174]. See also on this point Columbus Watch Co. *v.* Robbins, 52 Fed. 337, 3 C. C. A. 103.

73. Bullock Electric, etc., Co. *v.* Westinghouse Electric, etc., Co., 129 Fed. 105, 63 C. C. A. 607.

74. Campbell *v.* Kavanaugh, 11 Fed. 83, 20 Blatchf. 256.

75. Rumford Chemical Works *v.* Hygienic Chemical Co., 148 Fed. 862 [*affirmed* in 154 Fed. 65, 83 C. C. A. 177]; Cortelyou *v.* Johnson, 145 Fed. 933, 76 C. C. A. 455 [*affirmed* in 207 U. S. 196, 28 S. Ct. 105, and *reversing* 138 Fed. 110]; Edison Electric Light Co. *v.* Peninsular Light, etc., Co., 95 Fed. 669 [*affirmed* in 101 Fed. 831, 43 C. C. A. 479], And see Geis *v.* Kimber, 36 Fed. 105; Millner *v.* Schofield, 17 Fed. Cas. No. 9,609*a*, 4 Hughes 258.

76. Edison Electric Light Co. *v.* Peninsular Light, etc., Co., 95 Fed. 669 [*affirmed* in 101 Fed. 831, 43 C. C. A. 479].

not covered by the claims of a patent but capable of use with the patented invention is ordinarily not infringement.[77] A sale, however, with intent to induce a licensee under the patent to violate the terms of his license agreement is infringement.[78]

4. Miscellaneous. Furnishing plans of an infringing device and sharing in the profits is infringement,[79] and so is the inducing of licensees to violate the conditions of a license.[80]

C. Suits — 1. In General. Suit may be maintained at law or in equity to enforce the rights arising from granted patents,[81] or from contracts relating to them.[82]

2. Jurisdiction[83] — a. In General. The United States courts have exclusive jurisdiction of suits for infringement of patents whether at law or in equity without regard to the citizenship of the parties,[84] and this jurisdiction is vested in the

77. Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. ed. 500; Wagner Typewriter Co. *v.* F. S. Webster Co., 144 Fed. 405; Gerard *v.* Diebold Safe, etc., Co., 54 Fed. 889, 4 C. C. A. 644 [*affirming* 48 Fed. 380]; Bliss *v.* Merrill, 33 Fed. 39.

Sale of article made by patented machine is no infringement. Boyd *v.* Brown, 3 Fed. Cas. No. 1,747, 3 McLean 295, 2 Robb Pat. Cas. 203.

78. Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; Rupp, etc., Co. *v.* Elliott, 131 Fed. 730, 65 C. C. A. 544; Brodrick Copygraph Co. *v.* Mayhew, 131 Fed. 92 [*affirmed* in 137 Fed. 596, 70 C. C. A. 557]; Tubular Rivet Co. *v.* O'Brien, 93 Fed. 200; Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

79. Trent *v.* Risdon Iron, etc., Works, 102 Fed. 635, 42 C. C. A. 529 [*modifying* 92 Fed. 375]; Toppan *v.* Tiffany Refrigerator Car Co., 39 Fed. 420.

80. Cortelyou *v.* Johnson, 138 Fed. 110 [*reversed* on other grounds in 145 Fed. 935, 76 C. C. A. 455, and that decision *affirmed* on other grounds in 207 U. S. 196, 28 S. Ct. 105].

81. U. S. Rev. St. (1878) §§ 629, 4919 [U. S. Comp. St. (1901) p. 3394].

Suits in equity may be brought for the infringement of a patent (U. S. Rev. St. (1878) § 4921, amended by Act March 3, 1897, 29 U. S. St. at L. 692 [U. S. Comp. St. (1901) p. 3395]; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Morss *v.* Knapp, 35 Fed. 218; Bragg *v.* Stockton, 27 Fed. 509; Colgate *v.* Compagnie Francaise, etc., 23 Fed. 82, 23 Blatchf. 86; Brickill *v.* New York, 7 Fed. 479, 18 Blatchf. 273; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]), and the ordinary rules of equity jurisprudence are applicable (Keyes *v.* Pueblo Smelting, etc., Co., 31 Fed. 560).

82. See, generally, *supra*, XI.

83. See, generally, Courts, 11 Cyc. 860, 988.

Jurisdiction of actions for infringement against foreign corporations see Courts, 11 Cyc. 854.

84. U. S. Rev. St. (1878) § 711; Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Ayling *v.* Hull, 2 Fed. Cas. No. 686, 2 Cliff. 494.

State courts have no jurisdiction of questions involving infringement of patents. Parkhurst *v.* Kinsman, 6 N. J. Eq. 600; Allison Bros. Co. *v.* Hart, 56 Hun (N. Y.) 282, 9 N. Y. Suppl. 692; Wilcox, etc., Sewing Mach. Co. *v.* Kruse, etc., Mfg. Co., 14 Daly (N. Y.) 16, 3 N. Y. St. 590.

Where there is involved a controverted question as to the validity or infringement of a patent, the federal courts have jurisdiction even of suits on contracts. Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413; St. Paul Plow-Works *v.* Starling, 127 U. S. 376, 8 S. Ct. 327, 32 L. ed. 251; Pacific Contracting Co. *v.* Union Paving, etc., Co., 80 Fed. 737; Dunham *v.* Bent, 72 Fed. 60; Everett *v.* Haulenbeek, 68 Fed. 911; Seibert Cylinder Oil-Cup Co. *v.* Manning, 32 Fed. 625.

Where the question of infringement is raised, the federal courts have jurisdiction, although the party also has a remedy by action for breach of contract. Rupp, etc., Co. *v.* Elliott, 131 Fed. 730, 65 C. C. A. 544.

Where the subsisting contract is shown governing the rights of the parties and defendant admits the validity and his use of plaintiff's letters patent, the suit cannot be maintained between citizens of the same state in a federal court as arising under the patent laws. Rich *v.* Atwater, 16 Conn. 409; White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413; Walter A. Wood Mowing, etc., Mach. Co. *v.* Skinner, 139 U. S. 293, 11 S. Ct. 528, 35 L. ed. 193; Albright *v.* Teas, 106 U. S. 613, 1 S. Ct. 550, 27 L. ed. 295; Hartell *v.* Tilghman, 99 U. S. 547, 25 L. ed. 357; Brown *v.* Shannon, 20 How. (U. S.) 55, 15 L. ed. 826; Wilson *v.* Sanford, 10 How. (U. S.) 99, 13 L. ed. 344; Bowers *v.* Concanon, 105 Fed. 525; Alaska Packers' Assoc. *v.* Pacific Steam Whaling Co., 93 Fed. 672; Aiken *v.* Manchester Print Works, 1 Fed. Cas. No. 113, 2 Cliff. 435; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93. And see Courts, 11 Cyc. 998.

Although the use of the invention and the

various circuit courts, in certain district courts, and in the supreme court of the District of Columbia.[85] The federal statutes confer jurisdiction upon the federal courts of equity equally with courts of law;[86] but their jurisdiction arises only where there are grounds for equitable interference and not where the remedy at law would be full and complete.[87] In this respect the matter of jurisdiction at law is determined by the same general principles that apply in other suits.[88] If it is not clear that the remedy at law would be adequate, equity has jurisdiction.[89]

b. Suit For an Accounting. An action for an account of profits and damages alone cannot be maintained in equity where there is no equitable ground of relief.[90]

validity of the patent are admitted and a license is alleged, the federal courts may have jurisdiction. White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; Young Reversible Lock-Nut Co. *v.* Young Lock-Nut Co., 72 Fed. 62; Elgin Wind Power, etc., Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578.

Where infringement depends on breach of contract of assignment the breach must be established before the federal courts. Routh *v.* Boyd, 51 Fed. 821.

85. U. S. Rev. St. (1878) §§ 571, 629.

Supreme court of the District of Columbia has circuit court jurisdiction. Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139.

86. U. S. Rev. St. (1878) § 4921; White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; McCoy *v.* Nelson, 121 U. S. 484, 7 S. Ct. 1000, 30 L. ed. 1017; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Jonathan Mills Mfg. Co. *v.* Whitehurst, 56 Fed. 589; Kirk *v.* Du Bois, 28 Fed. 460; Avery *v.* Wilson, 20 Fed. 856; Doughty *v.* West, 7 Fed. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Goodyear *v.* Hullihen, 10 Fed. Cas. No. 5,573, 3 Fish. Pat. Cas. 251, 2 Hughes 492; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377.

English practice.— Court may award damages as well as injunction (Newell *v.* Wilson, 2 De G. M. & G. 282, 51 Eng. Ch. 220, 42 Eng. Reprint 880; Tuck *v.* Silver, Johns. 218, 70 Eng. Reprint 403), and may order infringing article destroyed (Vavasseur *v.* Krupp, 9 Ch. D. 351, 39 L. T. Rep. N. S. 437, 27 Wkly. Rep. 176).

87. Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Edison Phonograph Co. *v.* Hawthorne, etc., Mfg. Co., 108 Fed. 630; Overweight Counterbalance Elevator Co. *v.* Standard Elevator, etc., Co., 96 Fed. 231; Ross *v.* Ft. Wayne, 58 Fed. 404 [*reversed* on other grounds in 63 Fed. 466, 11 C. C. A. 288]; Drainage Construction Co. *v.* Chelsea, 41 Fed. 47; Ulman *v.* Chickering, 33 Fed. 582; Smith *v.* Sands, 24 Fed. 470; Hayward *v.* Andrews, 12 Fed. 786; Adams *v.* Meyrose, 7 Fed. 208, 2 McCrary 360; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241; Sayles *v.* Richmond, etc., R. Co., 21 Fed. Cas. No. 12,424, 4 Ban. & A. 239, 3 Hughes 172, 16 Off. Gaz. 43; Vaughan *v.* Central Pac. R. Co., 28 Fed. Cas. No. 16,897, 3 Ban. & A. 27, 4 Sawy. 280; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 2 Ban. & A. 537, 1 Flipp. 621, 11 Off. Gaz. 789.

Where suit is primarily on contract, equity has no jurisdiction, although an account is asked. Perry *v.* Noyes, 96 Fed. 233.

Where bill alleges grounds for equity jurisdiction, admissions by defendant cannot oust jurisdiction. Lilienthal *v.* Washburn, 8 Fed. 707, 4 Woods 65.

Jurisdiction is not ousted by cessation of infringement by defendant. Cayuta Wheel, etc., Co. *v.* Kennedy Valve Mfg. Co., 127 Fed. 355.

Right to injunction gives jurisdiction to a court of equity. Henzel *v.* California Electrical Works, 51 Fed. 754, 2 C. C. A. 495 [*affirming* 48 Fed. 375].

88. Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Woodmanse, etc., Mfg. Co. *v.* Williams, 68 Fed. 489, 15 C. C. A. 520; Brooks *v.* Miller, 28 Fed. 615.

89. Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 65 Fed. 619; Bicknell *v.* Todd, 3 Fed. Cas. No. 1,389, Fish. Pat. Rep. 452, 5 McLean 236; McMillan *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 2 Ban. & A. 537, 1 Flipp. 621, 11 Off. Gaz. 789.

90. Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Russell *v.* Kern, 69 Fed. 94, 16 C. C. A. 154 [*affirming* 64 Fed. 581]; Germain *v.* Wilgus, 67 Fed. 597, 14 C. C. A. 561; American Cable R. Co. *v.* Citizens' R. Co., 44 Fed. 484; Consolidated Middlings Purifier Co. *v.* Wolf, 28 Fed. 814; Burdell *v.* Comstock, 15 Fed. 395; Draper *v.* Hudson, 7 Fed. Cas. No. 4,069, 6 Fish. Pat. Cas. 327, Holmes 208, 3 Off. Gaz. 354; Jenkins *v.* Greenwald, 13 Fed. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]; Sayles *v.* Richmond, etc., R. Co., 21 Fed. Cas. No. 12,424, 4 Ban. & A. 239, 3 Hughes 172, 16 Off. Gaz. 43. *Contra*, Atwood *v.* Portland Co., 10 Fed. 283; Smith *v.* Baker, 22 Fed. Cas. No. 13,010, 1 Ban. & A. 117, 5 Off. Gaz. 496, 10 Phila. (Pa.) 221. See also *infra*, XIII, C, 2, c.

An account is an incident to an injunction and cannot be had otherwise. Smith *v.* Lon-

Nevertheless, an account may be had where there is ground for equitable interference.[91]

c. Expiration of Patent. Where suit is brought upon a patent which has expired, equity ordinarily has no jurisdiction, the proper remedy being at law;[92] but where expired and unexpired patents are joined, equity may take jurisdiction;[93] and where jurisdiction is once acquired it will not ordinarily be ousted by the expiration of the patent.[94] A preliminary injunction against infringement will not be granted where, before the determination of the motion therefor, the patent sued on has expired.[95]

3. Place to Sue. Suit for infringement must be brought in the district of which defendant is an inhabitant,[96] or in the district in which defendant, whether

don, etc., R. Co., 2 Eq. Rep. 428, 1 Kay 408, 23 L. J. Ch. 562, 2 Wkly. Rep. 310, 69 Eng. Reprint 173; Price's Patent Candle Co. *v.* Bauwen's Patent Candle Co., 4 Kay & J. 727, 70 Eng. Reprint 302.

91. Eclipse Bicycle Co. *v.* Farrow, 16 App. Cas. (D. C.) 468; McMillin *v.* St. Louis, etc., Transp. Co., 18 Fed. 260, 5 McCrary 561; Perry *v.* Corning, 19 Fed. Cas. No. 11,003, 6 Blatchf. 134.

Where jurisdiction acquired accounting may be continued, although impossible to grant the equitable relief. Busch *v.* Jones, 16 App. Cas. (D. C.) 23.

92. Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Adams *v.* Bridgewater Iron Co., 26 Fed. 324; Consolidated Safety-Valve Co. *v.* Ashton Valve Co., 26 Fed. 319; Lord *v.* Whitehead, etc., Mach. Co., 24 Fed. 801; Hewitt *v.* Pennsylvania Steel Co., 24 Fed. 367; Campbell *v.* Ward, 12 Fed. 150. *Contra*, Gordon *v.* Anthony, 10 Fed. Cas. No. 5,605, 4 Ban. & A. 248, 16 Blatchf. 234, 16 Off. Gaz. 1135; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Sayles *v.* Dubuque, etc., R. Co., 21 Fed. Cas. No. 12,417, 3 Ban. & A. 219, 5 Dill. 561; Sickles *v.* Gloucester Mfg. Co., 22 Fed. Cas. No. 12,841, 4 Blatchf. 229, 1 Fish. Pat. Cas. 222; Stevens *v.* Kansas Pac. R. Co., 23 Fed. Cas. No. 13,401, 5 Dill. 486; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 2 Ban. & A. 537, 1 Flipp. 621, 11 Off. Gaz. 789.

93. Huntington Dry Pulverizer Co. *v.* Virginia-Carolina Chemical Co., 130 Fed. 558.

94. Expiration of patent pending suit does not oust jurisdiction, and while preventing injunction will not prevent account. Busch *v.* Jones, 16 App. Cas. (D. C.) 23; Beedle *v.* Bennett, 122 U. S. 71, 7 S. Ct. 1090, 30 L. ed. 1074; Clark *v.* Wooster, 119 U. S. 322, 7 S. Ct. 217, 30 L. ed. 392; Huntington Dry Pulverizer Co. *v.* Virginia-Carolina Chemical Co., 130 Fed. 558; U. S. Mitis Co. *v.* Detroit Steel, etc., Co., 122 Fed. 863, 59 C. C. A. 589; Chinnock *v.* Paterson, etc., Tel. Co., 112 Fed. 531, 50 C. C. A. 384 [*reversing* 110 Fed. 199]; Bradner Adjustable Hanger Co. *v.* Waterbury Button Co., 106 Fed. 735; Ross *v.* Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288; Singer Mfg. Co. *v.* Wilson Sewing Mach. Co., 38 Fed. 586; Kittle *v.* Rogers, 33 Fed. 49; Kittle *v.* Schneider, 30 Fed. 690; Kittle *v.* De Graaf, 30 Fed. 689; Brooks *v.* Miller, 28 Fed. 615; Adams *v.* Bridgewater Iron Co., 26 Fed. 324; Dick *v.* Struthers, 25 Fed. 103; New York Grape Sugar Co. *v.* Peoria Grape Sugar Co., 21 Fed. 878; Adams *v.* Howard, 19 Fed. 317; Gottfried *v.* Moerlein, 14 Fed. 170; Jones *v.* Barker, 11 Fed. 597; Bloomer *v.* Gilpin, 3 Fed. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Imlay *v.* Norwich, etc., R. Co., 13 Fed. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Davenport *v.* Rylands, L. R. 1 Eq. 302, 12 Jur. N. S. 71, 35 L. J. Ch. 204, 14 L. T. Rep. N. S. 53, 14 Wkly. Rep. 243; Fox *v.* Dellestable, 15 Wkly. Rep. 194.

Where the equitable relief prayed may be obtained after expiration of the patent the suit may be sustained. Toledo Mower, etc., Co. *v.* Johnston Harvester Co., 24 Fed. 739, 23 Blatchf. 332.

Where patent was about to expire when suit filed and no special ground for equitable interference was shown, the suit was dismissed. Miller *v.* Schwarner, 130 Fed. 561; Heap *v.* Borchers, 108 Fed. 237; McDonald *v.* Miller, 84 Fed. 344; American Cable R. Co. *v.* Chicago City R. Co., 41 Fed. 522; Racine Seeder Co. *v.* Joliet Wire-Check Rower Co., 27 Fed. 367; Davis *v.* Smith, 19 Fed. 823.

Where impossible to obtain final decree before expiration of the patent the suit was dismissed. Bragg Mfg. Co. *v.* Hartford, 56 Fed. 292; American Cable R. Co. *v.* Chicago City R. Co., 41 Fed. 522.

95. Huntington Dry Pulverizer Co. *v.* Virginia-Carolina Chemical Co., 121 Fed. 136.

96. Act March 3, 1897, c. 395, 29 U. S. St. at L. 695 [U. S. Comp. St. (1901) p. 588].

Sales anywhere enjoined.— Resident of district may be enjoined from selling anywhere. Hatch *v.* Hall, 22 Fed. 438; Boyd *v.* McAlpin, 3 Fed. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277.

Where residence and business are in different districts there is no jurisdiction. Goodyear *v.* Chaffee, 10 Fed. Cas. No. 5,564, 3 Blatchf. 268.

In Canada suit must be brought in court nearest defendant's residence. Short *v.* Federation Brand Salmon Canning Co., 6 Brit. Col. 385, 436; Aitcheson *v.* Maun, 9 Ont. Pr. 253, 473; Goldsmith *v.* Walton, 9 Ont. Pr. 10.

a person, partnership, or corporation, shall have committed acts of infringement, and has a regular and established place of business.[97] In the last case subpœna or process may be served upon the agent conducting the business.[98]

4. GROUNDS.[99] To constitute a basis for an infringement suit, there must have been an unauthorized use[1] by defendant of an invention covered by a valid patent owned by plaintiff.[2]

5. CONDITIONS PRECEDENT. Under U. S. Rev. St. (1878) § 4900 [U. S. Comp. St. (1901) p. 3388], a patentee or his assignee cannot in a suit against infringers recover damages, without alleging and proving either that patented articles made and sold by him, or the packages containing them, are marked "patented," or else that it gave notice to defendants of his patents and their infringement;[3] and in the event that direct notice to defendants is alleged and proved neither damages nor profits are recoverable, except for infringement after such notice was given.[4] The owner of a patent who has obtained an interlocutory decree adjudging its validity and infringement is not required to wait until it has become final before bringing suit against defendant for infringement by the same device in another district; nor is he precluded, by the fact that evidence has been taken in the second suit, from pleading therein the final decree when obtained in the first suit as an adjudication.[5]

6. DEFENSES[6] — a. In General. Defendant may show that he does not use the patented invention.[7] So also he may show that plaintiff is not the owner of the

97. Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 121 Fed. 101; Chicago Pneumatic Tool Co. *v.* Philadelphia Pneumatic Tool Co., 118 Fed. 852; Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 116 Fed. 641.

Infringement committed in the district is necessary. International Wireless Tel. Co. *v.* Fessenden, 131 Fed. 491; Streat *v.* American Rubber Co., 115 Fed. 634; Wilson Packing Co. *v.* Clapp, 30 Fed. Cas. No. 17,850, 3 Ban. & A. 243, 8 Biss. 154, 13 Off. Gaz. 368.

Place of business in the district at the time of suit is necessary. Feder *v.* Fiedler, 116 Fed. 378.

Defects in allegations and service are waived by appearance. U. S. Consol. Seeded Raisin Co. *v.* Phœnix Raisin Seeding, etc., Co., 124 Fed. 234.

98. Act March 3, 1897, 29 U. S. St. at L. 695 [U. S. Comp. St. (1901) p. 588]. And see Eagle Mfg. Co. *v.* Miller, 41 Fed. 351 [*reversed* on other grounds in 151 U. S. 186, 14 S. Ct. 310, 38 L. ed. 121].

Service upon one merely designated agent under state law is insufficient. U. S. Gramophone Co. *v.* Columbia Phonograph Co., 106 Fed. 220.

Agent and established place of business defined see Thomson-Houston Electric Co. *v.* Bullock Electric Co., 101 Fed. 587.

99. Grounds for preliminary injunction see *infra*, XIII, C, 11, b.

Recovery back of payment see PAYMENT.

1. Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Eunson *v.* Dodge, 18 Wall. (U. S.) 414, 21 L. ed. 766; Hammacher *v.* Wilson, 26 Fed. 239 [*affirmed* in 145 U. S. 662, 12 S. Ct. 991, 36 L. ed. 853]; Tilghman *v.* Hartell, 23 Fed. Cas. No. 14,039, 2 Ban. & A. 260, 11 Phila. (Pa.) 500 [*reversed* on other grounds in 99 U. S. 547, 25 L. ed. 357]; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636.

Use must be unauthorized.— Betts *v.* Willmott, L. R. 6 Ch. 239, 25 L. T. Rep. N. S. 188, 19 Wkly. Rep. 369.

Proof of infringement is necessary. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Fuller *v.* Yentzer, 94 U. S. 288, 24 L. ed. 103. See also *infra*, XIII, C, 14, b.

That infringement must be before suit is brought see Humane Bit Co. *v.* Barnet, 117 Fed. 316; Slessinger *v.* Buckingham, 17 Fed. 454, 8 Sawy. 469.

2. Henius *v.* Lublin, 30 Fed. 838; Miller *v.* Foree, 9 Fed. 603; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Morgan *v.* McAdam, 15 L. T. Rep. N. S. 348.

Before a patent is granted, no suit can be maintained. Rein *v.* Clayton, 37 Fed. 354, 3 L. R. A. 78; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

3. Dunlap *v.* Schofield, 152 U. S. 244, 14 S. Ct. 576, 38 L. ed. 426. And see Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117.

Prior to the enactment of the statute under consideration it seems that previous notice or claim of right and exclusive use of device was not essential to enable the patentee to recover damages for infringement. Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482.

4. Loraiu Steel Co. *v.* New York Switch, etc., Co., 153 Fed. 205.

5. Bredin *v.* National Metal Weatherstrip Co., 147 Fed. 741 [*affirmed* in 157 Fed. 1003].

6. To suits for permanent injunction see *infra*, XIII, C, 11, c.

7. See *supra*, XIII, A, 6.

patent,[8] or is not entitled to maintain the suit against him thereon,[9] or that the patent upon which suit is brought is void.[10] The fact that the machine of a patent has never been put into commercial use does not preclude the owner of the patent from maintaining a suit in equity to enjoin its infringement.[11]

b. Estoppel. The general principles of estoppel apply in suits for infringement.[12]

c. Combination in Restraint of Trade. It is no defense to a suit upon a patent that the complainant has made an illegal combination with others in restraint of trade.[13]

Failure to deny is admission. Parker *v.* Bamker, 18 Fed. Cas. No. 10,725, 6 McLean 631.

8. Bunnett *v.* Smith, 2 D. & L. 380, 8 Jur. 1634, 14 L. J. Exch. 47, 13 M. & W. 552. And see *infra*, XIII, C, 7, a.

Part ownership of a patent is a complete defense. Aspinwall Mfg. Co. *v.* Gill, 32 Fed. 697.

9. **License** is a complete defense (Hapgood *v.* Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. ed. 369; Eunson *v.* Dodge, 18 Wall. (U. S.) 414, 21 L. ed. 766; Barber *v.* National Carbon Co., 129 Fed. 370, 64 C. C. A. 40, 5 L. R. A. N. S. 1154; Hammacher *v.* Wilson, 26 Fed. 239 [*affirmed* in 145 U. S. 662, 12 S. Ct. 991, 36 L. ed. 853]; Loercher *v.* Crandal, 11 Fed. 872, 20 Blatchf. 106; Black *v.* Hubbard, 3 Fed. Cas. No. 1,460, 3 Ban. & A. 39, 12 Off. Gaz. 842; Tilghman *v.* Hartell, 23 Fed. Cas. No. 14,039, 2 Ban. & A. 260, 9 Off. Gaz. 886, 11 Phila. (Pa.) 500 [*reversed* on other grounds in 99 U. S. 547, 25 L. ed. 357]; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636), except where its conditions are violated (Jones *v.* Berger, 58 Fed. 1006; Timken *v.* Olin, 41 Fed. 169; Fetter *v.* Newhall, 17 Fed. 841, 21 Blatchf. 445).

10. **Invalidity is a complete defense.**— Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323; Henius *v.* Lublin, 30 Fed. 838; Shaw *v.* Colwell Lead Co., 11 Fed. 711, 20 Blatchf. 417; Miller *v.* Foree, 9 Fed. 603; Knight *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Morris *v.* Huntington, 17 Fed. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448.

The defenses are not confined to those mentioned in U. S. Rev. St. (1878) § 4920, but include any showing that the patent is void. Gardner *v.* Herz, 118 U. S. 180, 6 S. Ct. 1027, 30 L. ed. 158; Thompson *v.* Boisselier, 114 U. S. 1, 5 S. Ct. 1042, 29 L. ed. 76; Mahn *v.* Harwood, 112 U. S. 354, 5 S. Ct. 174, 28 L. ed. 665.

11. Eastern Paper Bag Co. *v.* Continental Paper Bag Co., 150 Fed. 741 [*affirmed* in 210 U. S. 405, 28 S. Ct. 748]. And see U. S. Fastener Co. *v.* Bradley, 149 Fed. 222, 79 C. C. A. 180.

12. Thomson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Consolidated Rubber Tire Co. *v.* Finley Rubber Tire Co., 119 Fed. 705; Jennings *v.* Rogers Silver Plate Co., 118 Fed. 339; Burrell *v.* Elgin Creamery Co., 96 Fed. 234; Time Tel. Co. *v.* Himmer, 19 Fed. 322. See also *supra*, VI, F.

Estoppel as assignor.— The assignor cannot ordinarily deny the validity of letters patent (Griffith *v.* Shaw, 89 Fed. 313; Daniel *v.* Miller, 81 Fed. 1000); but the rule does not apply either as against him or his co-defendants, where the latter are the principal infringers and he is acting merely as an employee (Boston Lasting Mach. Co. *v.* Woodward, 82 Fed. 97, 27 C. C. A. 69 [*affirming* 75 Fed. 272]), so he may dispute the alleged scope of the patent in view of the prior art (Smith *v.* Ridgely, 103 Fed. 875, 43 C. C. A. 365; Griffith *v.* Shaw, 89 Fed. 313).

One who fails to perform his agreement to assign a patent cannot sue his proposed assignee for infringement. Schmitt *v.* Nelson Valve Co., 125 Fed. 754, 60 C. C. A. 522.

Infringer cannot deny utility. Animarium Co. *v.* Filloon, 102 Fed. 896 [*reversing* 98 Fed. 103].

Co-complainant cannot license defendant and defeat the suit. Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 107 Fed. 487.

Non-use or misuse of the invention by complainant does not operate as estoppel. Fuller *v.* Berger, 120 Fed. 274, 56 C. C. A. 588.

Admissions in open court are binding. Kirchberger *v.* American Acetylene Burner Co., 124 Fed. 764 [*affirmed* in 128 Fed. 599, 64 C. C. A. 107].

Holder of reissue not estopped to sue one who used the invention prior to reissue. Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72 [*reversing* 100 Fed. 849].

Filing an application for patent for the same thing does not estop defendant, but has weight. Haughey *v.* Lee, 151 U. S. 282, 14 S. Ct. 331, 38 L. ed. 162; R. Thomas, etc., Co. *v.* Electric Porcelain, etc., Co., 111 Fed. 923.

13. Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; Cimiotti Unhairing Co. *v.* American Fur Refining Co., 120 Fed. 672; Otis Elevator Co. *v.* Geiger, 107 Fed. 131; National Folding-Box, etc., Co. *v.* Robertson, 99 Fed. 985; Brown Saddle Co. *v.* Troxel, 98 Fed. 620; Bonsack Mach. Co. *v.* Smith, 70 Fed. 383; Edison Electric Light Co. *v.* Sawyer-Man Electric Co., 53 Fed. 592, 3 C. C. A. 605 [*modifying* 52 Fed. 300]. But see Good *v.* Daland, 121 N. Y. 1, 24 N. E. 15; Indiana Mfg. Co. *v.* J. I. Case Threshing Mach. Co., 148 Fed. 21.

d. Limitations and Laches — (i) *Limitations.* By express provisions of a recent federal enactment no damages can be recovered for acts of infringement occurring more than six years before suit is brought.[14] So by express provision this statute applies to all existing causes of action;[15] and it is held to apply to actions at law as well as to suits in equity.[16] In all cases where a federal statute of limitation exists, state statutes of limitation can have no application.[17] But prior to 1870,[18] and subsequent to 1874,[19] no federal statutes existed limiting the time within which actions for infringement of patents must be brought, and the question frequently arose whether actions at law were subject to state statutes of limitation, there being considerable conflict in the decisions.[20] This question was finally set at rest by the supreme court of the United States, which held that in the absence of federal legislation the statutes of limitation of the several states were applicable.[21]

(ii) *Laches* — (a) *In General* — (1) As Bar to Permanent Injunction. Mere delay in bringing a suit for infringement, unaccompanied by such deceitful acts or silence on the part of the patentee, and by such circumstances as amount to an equitable estoppel, will not warrant the application of the doctrine of laches to such a suit within the time fixed by statute for the commencement of the analogous action at law.[22] Thus mere delay in bringing suit for infringement of a patent will not prevent the owner thereof from obtaining relief in a court of equity when the infringement has been persisted in with knowledge of the patent, and there have been no acts of commission or omission on the part of the

14. U. S. Rev. St. (1878) § 4921, as amended March 3, 1897, 29 U. S. St. at L. 693 [U. S. Comp. St. (1901) p. 3395].

15. U. S. Rev. St. (1878) § 4921, as amended March 3, 1897, 29 U. S. St. at L. 693 [U. S. Comp. St. (1901) p. 3395]; American Pneumatic Tool Co. *v.* Pratt, etc., Co., 106 Fed. 229.

16. Peters *v.* Hanger, 134 Fed. 586, 67 C. C. A. 386.

17. Hayden *v.* Oriental Mills, 22 Fed. 103; Sayles *v.* Louisville City R. Co., 9 Fed. 512; Sayles *v.* Oregon Cent. R. Co., 21 Fed. Cas. No. 12,423, 4 Ban. & A. 429, 8 Reporter 424, 6 Sawy. 31; Sayles *v.* Dubuque, etc., R. Co., 21 Fed. Cas. No. 12,417, 3 Ban. & A. 219, 5 Dill. 561; Sayles *v.* Richmond, etc., R. Co., 21 Fed. Cas. No. 12,424, 4 Ban. & A. 239, 3 Hughes 172, 7 Reporter 743, 16 Off. Gaz. 43; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 2 Ban. & A. 537, 1 Flipp. 621, 11 Off. Gaz. 789.

18. Campbell *v.* New York, 81 Fed. 182; Hayden *v.* Oriental Mills, 22 Fed. 103; Parker *v.* Hallock, 18 Fed. Cas. No. 10,735, 2 Fish. Pat. Cas. 543 note; Wood *v.* Cleveland Rolling-Mill Co., 30 Fed. Cas. No. 17,941, 4 Fish. Pat. Cas. 550.

19. Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; May *v.* Logan, 30 Fed. 250.

20. **Cases holding that state statutes control.**— Hayden *v.* Oriental Mills, 15 Fed. 605; Parker *v.* Hawk, 18 Fed. Cas. No. 10,737, 2 Fish. Pat. Cas. 58.

Cases adopting the contrary view.— Brickill *v.* Baltimore, 52 Fed. 737; Brickill *v.* Buffalo, 49 Fed. 371; California Artificial Stone Paving Co. *v.* Starr, 48 Fed. 560; McGinnis *v.* Erie County, 45 Fed. 91; May *v.* Ralls County, 31 Fed. 473; May *v.* Cass County, 30 Fed. 762; May *v.* Logan County, 30 Fed. 250; Hayward *v.* St. Louis, 11 Fed. 427, 3 McCrary 614; Collins *v.* Peebles, 6 Fed. Cas. No. 3,017, 2 Fish. Pat. Cas. 541.

21. Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280.

22. Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Stearns-Roger Mfg. Co. *v.* Brown, 114 Fed. 939, 52 C. C. A. 559; Imperial Chemical Mfg. Co. *v.* Stein, 77 Fed. 612, 23 C. C. A. 353 [*reversing* 69 Fed. 616]; Taylor *v.* Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; Bragg Mfg. Co. *v.* Hartford, 56 Fed. 292; Price *v.* Joliet Steel Co., 46 Fed. 107; New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519; Atlantic Giant-Powder Co. *v.* Rand, 2 Fed. Cas. No. 626, 4 Ban. & A. 263, 16 Blatchf. 250, 16 Off. Gaz. 87; Stevens *v.* Felt, 23 Fed. Cas. No. 13,397. The mere discontinuance of proceedings against infringers and forbearance to sue any of the parties thereto for a period of a year or more thereafter cannot be construed into an acquiescence in the infringement complained of. Thompson *v.* Jewett, 23 Fed. Cas. No. 13,961.

Conduct held to constitute laches see Wilcox, etc., Co. *v.* Farrand Organ Co., 139 Fed. 46; American Tube Works *v.* Bridgewater Iron Co., 132 Fed. 16, 65 C. C. A. 636 (three years after knowledge of infringement); Meyrowitz Mfg. Co. *v.* Eccleston, 98 Fed. 437; McLaughlin *v.* People's R. Co., 21 Fed. 574; Goodyear *v.* Honsinger, 10 Fed. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Conduct held not to constitute laches see New York Phonograph Co. *v.* Edison, 136 Fed. 600; Carter *v.* Wollschlaeger, 53 Fed. 573.

patentee to encourage its use,[23] nor where it appears that during the delay another suit was pending for infringement by a machine substantially the same as defendant's.[24] An injunction will not, however, be granted in any case where the party applying for it has not shown good faith, conscience, activity, and diligence, nor where there is any doubt or uncertainty as to the facts.[25] So where a patentee, with knowledge of a device made by defendant, makes no claim of infringement for several years, he will be held estopped to thereafter place a different construction on his patent, for the purpose of making out a case of infringement.[26] A patentee cannot maintain an action of infringement against a mere user who, in common with the public generally, has used the patented device for a period of eleven years with the full knowledge of the patentee and without objection.[27] Where there is no acquiescence on the part of the patentee, nor conscious infringement on the part of the defendants, there is no moral delinquency on either side, or an actual estoppel; and both parties being innocent, diligence will be required of him whose property is to be protected, and the patentee will be left to his action for damages.[28]

(2) As Bar to Preliminary Injunction. The granting or withholding of a preliminary injunction in an infringement suit is within the proper discretion of the court. Where a patentee has known of infringement of his patent, and has acquiesced therein for a considerable length of time, a preliminary injunction will not be granted without an explanation of such acquiescence.[29] It will be withheld when apparently sought for the purpose of obtaining an undue advantage,[30] for the purpose of creating mischief,[31] or of coercing a compromise.[32] But mere

23. Wilcox, etc., Co. *v.* Farrand Organ Co., 139 Fed. 46.

24. Plecker *v.* Poorman, 147 Fed. 528.

25. Cooper *v.* Mattheys, 6 Fed. Cas. No. 3,200, 5 Pa. L. J. 38. And see Beid-Archer Co. *v.* North American Chemical, etc., Co., 147 Fed. 746.

26. McGill *v.* Whitehead, etc., Co., 137 Fed. 97; Westinghouse Electric, etc., Co. *v.* Wagner Electric Mfg. Co., 129 Fed. 604.

A delay of ten years by a patent owner after knowledge of an alleged infringement, and correspondence with defendant, who in good faith contended for a construction of the patent avoiding infringement, is such laches as will bar all relief in equity. Starrett *v.* J. Stevens Arms, etc., Co., 96 Fed. 244.

27. Edison Electric Light Co. *v.* Equitable L. Assur. Soc., 55 Fed. 478.

28. Merriam *v.* Smith, 11 Fed. 588.

29. Brush Electric Co. *v.* Electric Storage Battery Co., 64 Fed. 775; Price *v.* Joliet Steel Co., 46 Fed. 107; Waite *v.* Chichester Chair Co., 45 Fed. 258; Keyes *v.* Pueblo Smelting, etc., Co., 31 Fed. 560; Ladd *v.* Cameron, 25 Fed. 37; Mundy *v.* Kendall, 23 Fed. 591; United Nickel Co. *v.* New Home Sewing Mach. Co., 17 Fed. 528, 21 Blatchf. 415; Goodyear *v.* Honsinger, 10 Fed. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Green *v.* French, 10 Fed. Cas. No. 5,757, 4 Ban. & A. 169, 16 Off. Gaz. 215; North *v.* Kershaw, 18 Fed. Cas. No. 10,311, 4 Blatchf. 70; Sloat *v.* Plymton, 22 Fed. Cas. No. 12,948; Sperry *v.* Ribbans, 22 Fed. Cas. No. 13,238, 3 Ban. & A. 260; Spring *v.* Domestic Sewing-Mach. Co., 22 Fed. Cas. No. 13,258, 4 Ban. & A. 427, 16 Off. Gaz. 721; Whitney *v.* Rollstone Mach. Works, 29 Fed. Cas. No. 17,596, 2 Ban. & A. 170, 8 Off. Gaz. 908; Bovill *v.* Crate, L. R. 1 Eq. 388; Bridson *v.* Benecke, 12 Beav. 1, 50 Eng. Reprint 960; Flavel *v.* Harrison, 10 Hare 467, 17 Jur. 368, 22 L. J. Ch. 866, 1 Wkly. Rep. 213, 44 Eng. Ch. 452, 68 Eng. Reprint 1010; Baxter *v.* Combe, 1 Ir. Ch. 284.

A delay of eighteen months, after knowledge of an infringement, in applying for a preliminary injunction, is of itself good ground for its refusal. Hockholzer *v.* Eager, 12 Fed. Cas. No. 6,556, 2 Sawy. 361.

A delay of three months in filing a bill after the infringement was ascertained, defendant not having been induced to change his position, is no ground for refusing an injunction. Union Paper-Bag Mach. Co. *v.* Binney, 24 Fed. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

One who is known to the patentee to be using his patent in apparent good faith is entitled to definite and early information of the patentee's construction of his own rights, and of his intention to enforce them. Morris *v.* Lowell Mfg. Co., 17 Fed. Cas. No. 9,833, 3 Fish. Pat. Cas. 37.

A preliminary injunction will not issue against a mere user of a machine, when the patentee has known for several years that the makers thereof were manufacturing such machines and did not warn or proceed against them or any one else. Ballou Shoe-Mach. Co. *v.* Dizer, 85 Fed. 864.

30. Ney Mfg. Co. *v.* Superior Drill Co., 56 Fed. 152.

31. Neilson *v.* Thompson, Web. Pat. Cas. 275.

32. Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 Pa. L. J. Rep. 443.

forbearance to sue for a reasonable time, after notice given, will not, in the absence of any affirmative encouragement to defendant, affect plaintiff's right to a preliminary injunction in a plain case.[33] Nor will a delay of several years, after knowledge of defendant's infringement, affect the right to a preliminary injunction, where his proceedings had been the subject of dispute and negotiation during the whole period.[34] And where it seems apparent that an injunction at the final hearing is inevitable, an injunction *pendente lite* will be granted, notwithstanding laches of the complainant in asserting his rights.[35]

(3) As Bar to Accounting For Profits. Mere delay in seeking relief against infringers is in general sufficient to preclude a patentee from the right to an account for past profits, although it may not prevent an injunction.[36] *A fortiori* where the infringers have acted in good faith, and there has been acquiescence and inexcusable laches on the part of the patentee, a decree for an accounting will not be granted.[37] It has been held, however, that there must be something more than mere lapse of time to bar an accounting.[38]

(B) *Excuses For Delay*—(1) Ignorance of Infringement. Long acquiescence and laches on the part of a patentee may be excused by satisfactory proof that he had no knowledge or means of knowledge that his patent was being infringed.[39] But a patentee cannot stand by with "easy indifference" when there are facts sufficient to put him on notice, and then plead ignorance as an excuse for his laches.[40] Where the complainant's suspicions of infringement are allayed by the direct misrepresentations of defendant, delay in applying for an injunction does not constitute laches.[41]

(2) Other Excuses. Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches.[42] So delay in suing an infringer may be excused on the ground that the infringing article, as at first constructed by defendant, was not believed by complainant to be commercially harmful, the grounds for such belief being reasonable.[43] Nor is laches to be imputed to a patent owner because of his failure to prosecute to judgment a suit against an infringer after the latter has become totally insolvent,[44] or when it appears that the complainant was disabled from carrying on litigation by lack of

33. Loring *v.* Booth, 52 Fed. 150; Collignon *v.* Hayes, 8 Fed. 912.

34. National Heeling-Mach. Co. *v.* Abbott, 77 Fed. 462.

35. Brush Electric Co. *v.* Electric Imp. Co., 45 Fed. 241.

36. Price *v.* Joliet Steel Co., 46 Fed. 107; New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519.

Where a patent has been infringed by defendant for seven years, with the knowledge of the complainant, and without a word of protest, a decree for an accounting will not be granted. Westinghouse Air Brake Co. *v.* New York Air Brake Co., 111 Fed. 741.

A delay of fourteen years in bringing suit, while the owner of the patent knew that defendant was continually engaged in infringing, is a bar to a decree for an accounting. Covert *v.* Travers Bros. Co., 96 Fed. 568.

37. Keller *v.* Stolzenbach, 28 Fed. 81.

38. American Street Car Advertising Co. *v.* Jones, 122 Fed. 803 [*reversed* on other grounds in 142 Fed. 974, 74 C. C. A. 236].

39. Wortendyke *v.* White, 30 Fed. Cas. No. 18,050, 2 Ban. & A. 25.

40. New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 24 Fed. 604.

41. Wortendyke *v.* White, 30 Fed. Cas. No. 18,050, 2 Ban. & A. 25.

42. Hutter *v.* Koscherak, 137 Fed. 92; U. S. Mitis Co. *v.* Detroit Steel, etc., Co., 122 Fed. 863, 59 C. C. A. 589 (six months after adjudication of validity); Timolat *v.* Franklin Boiler Works Co., 122 Fed. 69, 58 C. C. A. 405; Stearns-Roger Mfg. Co. *v.* Brown, 114 Fed. 939, 52 C. C. A. 559; New York Filter Mfg. Co. *v.* Jackson, 91 Fed. 422; New York Filter Mfg. Co. *v.* Loomis-Manning Filter Co., 91 Fed. 421; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929; Jonathan Mills Mfg. Co. *v.* Whitehurst, 56 Fed. 589; American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 795; Atlantic Giant-Powder Co. *v.* Rand, 2 Fed. Cas. No. 626, 4 Ban. & A. 263, 16 Blatchf. 250, 16 Off. Gaz. 87; Colgate *v.* Gold, etc., Tel. Co., 6 Fed. Cas. No. 2,991, 4 Ban. & A. 415, 16 Blatchf. 503, 16 Off. Gaz. 583; Green *v.* French, 10 Fed. Cas. No. 5,757, 4 Ban. & A. 169, 16 Off. Gaz. 215, 2 N. J. L. J. 148.

A patentee is not obliged to proceed against all infringers at the same time, and acquiescence will not be inferred from his neglect to do so. McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419.

43. Accumulator Co. *v.* Edison Electric Illuminating Co., 63 Fed. 979.

44. Huntington Dry-Pulverizer Co. *v.* Newell Universal Mill Co., 91 Fed. 661.

financial means.[45] It is no excuse for delay that his coöwners of the patent would not agree to prosecute infringers.[46]

(c) *Laches of Prior Owner.* The negligence or acquiescence of a former owner of a patent in an alleged infringement has, in equity, the same effect upon his assignee's rights as his own neglect or acquiescence.[47] Subsequent purchasers of a patent succeed only to the rights of their assignors and are chargeable with their laches in failing for a considerable time after knowledge of an infringement to take steps to stop it.[48]

7. Persons Entitled to Sue and Parties Plaintiff[49] — a. In General. A party interested as patentee, assignee, or grantee,[50] and any one holding the patent in

45. Bradford *v.* Belknap Motor Co., 105 Fed. 63 [*affirmed* in 115 Fed. 711, 53 C. C. A. 293].

While a patent is in a court of bankruptcy, laches can be imputed to no one. Kittle *v.* Hall, 29 Fed. 508. It is not the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and his failure to do so is not negligence. Kittle *v.* Hall, *supra.*

46. Richardson *v.* D. M. Osborne, etc., Co., 93 Fed. 828, 36 C. C. A. 610 [*affirming* 82 Fed. 95].

47. Woodmanse, etc., Mfg. Co. *v.* Williams, 68 Fed. 489, 15 C. C. A. 520.

48. New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 24 Fed. 604; Spring *v.* Domestic Sewing-Mach. Co., 22 Fed. Cas. No. 12,258, 4 Ban. & A. 427, 16 Off. Gaz. 721, 2 N. J. L. J. 274.

A party who purchases a patent which has for years been freely plundered by a multitude of trespassers does not answer the charge of laches by showing that he commenced immediately after he acquired title to bring the wrong-doers to account. Kittle *v.* Hall, 29 Fed. 508.

49. See, generally, Parties.

50. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394].

Until he has parted with his legal title to the patent, the patentee may sue. Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Ormsby *v.* Connors, 133 Fed. 548; Freese *v.* Swartchild, 35 Fed. 141; Still *v.* Reading, 9 Fed. 40, 4 Woods 345; Hussey *v.* Whitely, 12 Fed. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Park *v.* Little, 18 Fed. Cas. No. 10,715, 1 Robb Pat. Cas. 17, 3 Wash. 196; Sanford *v.* Messer, 21 Fed. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149, 2 Off. Gaz. 470.

Owner necessary party.— The legal owner is a necessary party complainant. Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 536, 6 S. Ct. 934, 29 L. ed. 954; Milwaukee Carving Co. *v.* Brunswick-Balke Collender Co., 126 Fed. 171, 61 C. C. A. 175; Owatonna Mfg. Co. *v.* Fargo, 94 Fed. 519; Gormully, etc., Mfg. Co. *v.* Stanley Cycle Mfg. Co., 90 Fed. 279; Carpenter *v.* Eberhard Mfg. Co., 78 Fed. 127; Dueber Watch-Case Mfg. Co. *v.* Fahys Watch-Case Co., 45 Fed. 697; Herbert *v.* Adams, 12 Fed. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505; North *v.* Kershaw, 18 Fed. Cas. No. 10,311, 4 Blatchf. 70; Potter *v.* Wilson, 19 Fed. Cas. No. 11,342, 2 Fish. Pat. Cas. 102.

Joinder.—All legal owners must join. Tyler *v.* Tuel, 6 Cranch (U. S.) 324, 3 L. ed. 237; Postal Tel. Cable Co. *v.* Netter, 102 Fed. 691; Van Orden *v.* Nashville, 67 Fed. 331; Edgerton *v.* Breck, 8 Fed. Cas. No. 4,279, 5 Ban. & A. 42; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Knight *v.* Gavit, 14 Fed. Cas. No. 7,884; Stein *v.* Goddard, 22 Fed. Cas. No. 13,353, 1 McAllister 82; Valentine *v.* Marshal, 28 Fed. Cas. No. 16,812*a*; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28. *Compare* Sheehan *v.* Great Eastern R. Co., 16 Ch. D. 59, 50 L. J. Ch. 68, 43 L. T. Rep. N. S. 432, 29 Wkly. Rep. 69.

Disclaimer.— One who appears from record to be part-owner may disclaim ownership. Graham *v.* Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

Legal and equitable owners should join in equity suit. Chisholm *v.* Johnson, 106 Fed. 191; Clement Mfg. Co. *v.* Upson, etc., Co., 40 Fed. 471; Otis Bros. Mfg. Co. *v.* Crane Bros. Mfg. Co., 27 Fed. 550 [*affirmed* in 136 U. S. 646, 10 S. Ct. 1072, 34 L. ed. 553]; Goodyear *v.* Allyn, 10 Fed. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Stimpson *v.* Rogers, 23 Fed. Cas. No. 13,457, 4 Blatchf. 333.

An attorney in fact cannot bring suit. Goldsmith *v.* American Paper Collar Co., 2 Fed. 239, 18 Blatchf. 82.

Selling agent cannot bring suit. Adams *v.* North British R. Co., 29 L. T. Rep. N. S. 367.

Only those having interest in patent should be joined as plaintiffs. Chisholm *v.* Johnson, 106 Fed. 191.

Amendment.— Suit should not be dismissed for misjoinder but amendment permitted (Tesla Electric Co. *v.* Scott, 97 Fed. 588), or party dismissed from suit (Edgarton *v.* Breck, 8 Fed. Cas. No. 4,279, 5 Ban. & A. 42).

Technical defense as to legal ownership by complainant is not favored. McMichael, etc., Mfg. Co. *v.* Ruth, 128 Fed. 706, 63 C. C. A. 304 [*reversing* 123 Fed. 888]; Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578 [*reversing* 72 Fed. 717], 84 Fed. 463, 28 C. C. A. 464; A. B. Dick Co. *v.* Henry, 75 Fed. 388; Kearney *v.* Lehigh Val-

trust, including the executor or administrator, may bring suit for infringement in his own name.[51]

b. Licenses — (i) *In Suits Against Strangers.* A licensee of a patent cannot bring a suit in his own name, either at law or in equity, for its infringement by a stranger.[52] An action at law for the benefit of an exclusive license must be brought in the name of the patentee alone.[53] A suit in equity may be

ley R. Co., 27 Fed. 699; Graham *v.* McCormick, 11 Fed. 859, 10 Biss. 39; Graham *v.* Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

Patentee may sue for past infringement after assigning patent. Moore *v.* Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37.

That territorial assignee may sue without joining patentee see Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Wilson *v.* Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Russell *v.* Kendall, 58 Fed. 381; Canton Steel Roofing Co. *v.* Kanneberg, 51 Fed. 599; Bicknell *v.* Todd, 3 Fed. Cas. No. 1,389, Fish. Pat. Rep. 452, 5 McLean 236; Perry *v.* Corning, 19 Fed. Cas. No. 11,004, 7 Blatchf. 195; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

Assignee of entire interest may sue without joining patentee. Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Lincoln Ironworks *v.* W. H. McWhirter Co., 131 Fed. 880; Newton *v.* Buck, 72 Fed. 777 [*reversed* on other grounds in 77 Fed. 614, 23 C. C. A. 355]; Rapp *v.* Kelling, 41 Fed. 792; Siebert Cylinder Oil-Cup Co. *v.* Beggs, 32 Fed. 790; Herman *v.* Herman, 29 Fed. 92; Nellis *v.* Pennock Mfg. Co., 13 Fed. 451; Seibert Cylinder Oil-Cup Co. *v.* Phillips Lubricator Co., 10 Fed. 677; Jenkins *v.* Greenwald, 13 Fed. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Suydam *v.* Day, 23 Fed. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. Rep. 88.

Assignee of part should join the patentee with him. Yates *v.* Great Western R. Co., 24 Grant Ch. (U. C.) 495.

Conditions in the assignment do not necessarily take away the right of assignee to sue alone. Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Union Trust Co. *v.* Walker Electric Co., 122 Fed. 814; Platt *v.* Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 C. C. A. 357; Russell *v.* Kern, 58 Fed. 382; Pope Mfg. Co. *v.* Clark, 46 Fed. 789; Hobbie *v.* Smith, 27 Fed. 656; Frankfort Whisky Process Co. *v.* Pepper, 26 Fed. 336.

51. One holding legal title in trust may sue. Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*; Dibble *v.* Augur, 7 Fed. Cas. No. 3,879, 7 Blatchf. 86; Knight *v.* Gavit, 14 Fed. Cas. No. 7,884.

Executor or administrator may sue.— De La Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 13 S. Ct. 283, 37 L. ed. 138; Illinois Cent. R. Co. *v.* Turrill, 110 U. S. 301, 4 S. Ct. 5, 28 L. ed. 154; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; May *v.* Logan County, 30 Fed. 250; Hodge *v.* North Missouri R. Co., 12 Fed. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161.

Assignee of foreign administrator may sue, although no ancillary letters of administration taken out. Smith *v.* Mercer, 22 Fed. Cas. No. 13,078, 5 Pa. L. J. 529.

Heirs need not join administrator. Haarmann *v.* Lueders, 109 Fed. 325; Hodge *v.* North Missouri R. Co., 12 Fed. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161.

Assignee of heirs.— One having assignment from heirs after administrator discharged has title and may sue. Winkler *v.* Studebaker Bros. Mfg. Co., 105 Fed. 190. *Cestui que trust* for profits need not be joined. Goodyear *v.* Day, 10 Fed. Cas. No. 5,566.

Mortgagor may sue without joining mortgagee. Van Gelder *v.* Sowerby Bridge United Dist. Flour Soc., 44 Ch. D. 374, 59 L. J. Ch. 535, 63 L. T. Rep. N. S. 132, 38 Wkly. Rep. 625.

52. Watertown *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Paper-Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Excelsior Wooden Pipe Co. *v.* Seattle, 117 Fed. 140, 55 C. C. A. 156; Bowers Hydraulic Dredging Co. *v.* Vare, 112 Fed. 63; New York Continental Jewell Filtration Co. *v.* Sullivan, 111 Fed. 179; Chauche *v.* Pare, 75 Fed. 283, 21 C. C. A. 329; Moore Mfg., etc., Co. *v.* Cronk Hanger Co., 69 Fed. 998; Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368; Rice *v.* Boss, 46 Fed. 195; Cottle *v.* Krementz, 25 Fed. 494; Bogart *v.* Hinds, 25 Fed. 484; Wilson *v.* Chickering, 14 Fed. 917; Gamewell Fire-Alarm Tel. Co. *v.* Brooklyn, 14 Fed. 255; Blanchard *v.* Eldridge, 3 Fed. Cas. No. 1,510, 2 Robb Pat. Cas. 737, 1 Wall. Jr. 337; Grover, etc., Sewing-Mach. Co. *v.* Sloat, 11 Fed. Cas. No. 5,846, 2 Fish. Pat. Cas. 112; Hill *v.* Whitcomb, 12 Fed. Cas. No. 6,502, 1 Ban. & A. 34, Holmes 317, 5 Off. Gaz. 430; Nelson *v.* McMann, 17 Fed. Cas. No. 10,109, 4 Ban. & A. 203, 16 Blatchf. 139, 16 Off. Gaz. 761; Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Sanford *v.* Messer, 21 Fed. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149, 2 Off. Gaz. 470; Suydam *v.* Day, 23 Fed. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. Rep. 88. *Compare* Brammer *v.* Jones, 4 Fed. Cas. No. 1,806, 2 Bond 100, 3 Fish. Pat. Cas. 340.

53. Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Goodyear *v.* McBurney, 10 Fed. Cas. No. 5,574, 3 Blatchf. 32; Nelson *v.* McMann,

brought by the patentee and the exclusive licensee together.[54] Indeed, an exclusive licensee may join the patentee with him as party complainant even against his will.[55] But a simple licensee has no such interest as to make him either a necessary or a proper party to an infringement suit.[56] Nor is a licensee whose license is not such as to amount to an assignment of the patent a necessary party complainant in such a suit.[57]

(II) *In Suits Against Patentee.* Where, however, the patentee himself is the infringer, the licensee may, to prevent an absolute failure of justice, sue him in equity in his own name.[58]

8. Persons Liable and Parties Defendant[59] — a. In Actions at Law. The general principle of law is that all who participate in the infringement of a patent are liable in an action at law for damages which may have been sustained by the patentee by reason thereof.[60] If one joint owner of a patent for a machine uses or sells such patentee's machine without the authority of his coöwner as respects the right of the latter, he is liable to an action at law by such coöwner for an infringement of the patent.[61] The rule is, both on principle and authority, that servants and agents who make use of or sell for another a patented article are liable in an action at law to the patentee for damages sustained by him.[62] A

17 Fed. Cas. No. 10,109, 4 Ban. & A. 203, 16 Blatchf. 139, 16 Off. Gaz. 761.

54. Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Woolworth *v.* Wilson, 4 How. (U. S.) 712, 11 L. ed. 1171; Daimler Mfg. Co. *v.* Conklin, 145 Fed. 955; New York Continental Jewell Filtration Co. *v.* Sullivan, 111 Fed. 179; Sharples *v.* Moseley, etc., Mfg. Co., 75 Fed. 595; Dorsey Revolving Harvester Rake Co. *v.* Bradley Mfg. Co., 7 Fed. Cas. No. 4,015, 1 Ban. & A. 330, 12 Blatchf. 202; Goodyear *v.* McBurney, 10 Fed. Cas. No. 5,574, 3 Blatchf. 32; Nelson *v.* McMann, 17 Fed. Cas. No. 10,109, 4 Ban. & A. 203, 16 Blatchf. 139, 16 Off. Gaz. 761.

When suit by patentee alone improper.— The owner of a patent who has granted an exclusive license thereunder for certain territory cannot, suing alone, recover profits made by an infringer which, but for the infringement, would have inured to the sole benefit of the licensee. Bredin *v.* Solmson, 145 Fed. 944.

55. Excelsior Wooden Pipe Co. *v.* Seattle, 117 Fed. 140, 55 C. C. A. 156; Excelsior Wooden-Pipe Co. *v.* Allen, 104 Fed. 553, 44 C. C. A. 30; Brush Electric Co. *v.* California Electric Light Co., 52 Fed. 945, 3 C. C. A. 368; Brush Electric Co. *v.* Electric Imp. Co., 49 Fed. 73; Brush-Swan Electric Light Co. *v.* Thomson-Houston Electric Co., 48 Fed. 224.

Licensee and patentee necessary parties.— Where an exclusive license has been granted, the licensee and the patentee are both necessary parties to an infringement suit. Bowers Hydraulic Dredging Co. *v.* Vare, 112 Fed. 63; Hammond *v.* Hunt, 11 Fed. Cas. No. 6,003, 4 Ban. & A. 111.

56. Blair *v.* Lippincott Glass Co., 52 Fed. 226.

57. Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Shepherd *v.* Deitsch, 138 Fed. 83 [*reversed* on other grounds in 146 Fed. 756, 77 C. C. A. 246]; Peters *v.* Union Biscuit Co., 120 Fed. 672; Union Switch, etc., Co. *v.* Johnson R. Signal Co., 52 Fed. 867 [*reversed* on other grounds in 55 Fed. 487, 5 C. C. A. 204]; Nellis *v.* Pennock Mfg. Co., 13 Fed. 451; Aultman *v.* Holley, 2 Fed. Cas. No. 656, 11 Blatchf. 317, 6 Fish. Pat. Cas. 534, 5 Off. Gaz. 3; Potter *v.* Wilson, 19 Fed. Cas. No. 11,342, 2 Fish. Pat. Cas. 102.

58. Waterman *v.* Mackenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. ed. 923; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Smith *v.* Ridgely, 103 Fed. 875, 43 C. C. A. 365; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Adriance *v.* McCormick Harvesting Mach. Co., 55 Fed. 288 [*affirmed* in 56 Fed. 918, 6 C. C. A. 168].

59. See, generally, Parties.

Liability of counties see 11 Cyc. 497.

Liability of municipal corporations see 28 Cyc. 49.

60. Graham *v.* Earl, 82 Fed. 737; Cramer *v.* Fry, 68 Fed. 201; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514. See also York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27. But see United Nickel Co. *v.* Worthington, 13 Fed. 392, where the court laid down the doctrine that only those persons can be held to damages who own or have some interest in the business of making, using, or selling the thing which is an infringement; such doctrine, however, being disapproved in Graham *v.* Earl, *supra*.

The fact that a postmaster who infringed a patent turned the moneys saved by its use over to the government does not affect his personal liability to such patentee for such infringement. Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92.

61. Pitts *v.* Hall, 19 Fed. Cas. No. 11,193, 3 Blatchf. 201.

62. Cramer *v.* Fray, 68 Fed. 201; Bryce *v.*

mere purchaser of infringing articles is not liable in an action at law as an infringer.[63] Whenever an agent of a corporation proceeding within the general scope of his powers and of the powers delegated to it by him infringes a patent, the corporation is liable to the patentee in an action at law for damages.[64] So too where a private corporation, as a principal, coöperates with another corporation in the infringement of a patent, it is directly responsible to the patentee in an action at law for the resulting damage.[65] As to whether an action at law may be maintained by a patentee against officers of a corporation which infringes his patent, there is a conflict of authority; some cases holding that such an action is not maintainable, even where such officers personally conducted the business which constituted the infringement,[66] while other cases hold that such officers, whenever they actually participate in the infringement, are liable.[67]

b. In Suits in Equity[68]—(I) *Persons Liable*—(A) *Private Corporations and Their Officers.* A private corporation is liable in a suit in equity to recover profits resulting from the infringement of a patent by one of its agents while proceeding within the scope of its powers.[69] A suit for an accounting cannot be maintained against an individual who is not alleged to have infringed the patent except in his official capacity as an officer of the corporation charged to have committed the infringement where it is not shown that the corporation is insolvent,[70] or that there is any other obstacle in the way of obtaining full relief against the corporation.[71] But one who in his capacity as officer of a private corporation actively participates in an infringement of a patent by it will be restrained by injunction.[72]

(B) *Officers of United States.* An officer of the United States is personally liable to be sued at law for his own infringement of a patent, notwithstanding all of his acts in relation thereto were performed under orders of the government; but a suit in equity will not lie as no injunction can be granted.[73]

Dorr, 4 Fed. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302. See also Morse *v.* Davis, 17 Fed. Cas. No. 9,855, 5 Blatchf. 40.

63. Blanchard's Gun-Stock Turning Factory *v.* Jacobs, 3 Fed. Cas. No. 1,520, 2 Blatchf. 69, Fish. Pat. Rep. 158.

64. Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62. See also York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

65. York, etc, R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

66. United Nickel Co. *v.* Worthington, 13 Fed. 392.

Unless he has acted beyond the scope of his powers infringement by a corporation causes no right of action at law for damages against one of its officers individually. Cazier *v.* Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 C. C. A. 104.

67. National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514. See also Cahoone Barnet Mfg. Co. *v.* Rubber, etc., Harness Co., 45 Fed. 582.

68. Liability of counties see 11 Cyc. 497. Liability of municipal corporations see 28 Cyc. 49.

69. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

70. Glucose Sugar Refining Co. *v.* St. Louis Syrup, etc., Co., 135 Fed. 540; Hutter *v.* De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652; Greene *v.* Buckley, 120 Fed. 955 [*reversed* on other grounds in 135 Fed. 520, 68 C. C. A. 70]; Loomis-Manning Filter Co. *v.* Manhattan Filter Co., 117 Fed. 325 [*affirmed* in 128 Fed. 1023]; Bowers *v.* Atlantic, etc., Co., 104 Fed. 887; Mergenthaler Linotype Co. *v.* Ridder, 65 Fed. 853; Howard *v.* St. Paul Plow-Works, 35 Fed. 743.

71. Loomis-Manning Filter Co. *v.* Manhattan Filter Co., 117 Fed. 325 [*affirmed* in 128 Fed. 1023]; Mergenthaler Linotype Co. *v.* Ridder, 65 Fed. 853.

72. Cahoone Barnet Mfg. Co. *v.* Rubber, etc., Harness Co., 45 Fed. 582; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 123; American Cotton-Tie Supply Co. *v.* McCready, 1 Fed. Cas. No. 295, 4 Ban. & A. 588, 17 Blatchf. 291, 8 Reporter 811, 17 Off. Gaz. 565; Goodyear *v.* Phelps, 10 Fed. Cas. No. 5,581, 3 Blatchf. 91; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181. Officers of non-resident corporation, made defendants and served with process in a suit for infringement of a patent while acting for the corporation, may be restrained from such infringement, although the corporation is not a party, and is not within the jurisdiction of the court. Edison Electric Light Co. *v.* Packard Electric Co., 61 Fed. 1002.

73. Belknap *v.* Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. ed. 599; International Postal Supply Co. *v.* Bruce, 114 Fed. 509 [*affirmed* in 132 Fed. 1006, 65 C. C. A. 130 (*affirmed* in 194 U. S. 601, 24 S. Ct. 820, 48 L. ed. 1134)]; Head *v.* Porter, 48 Fed. 481; Fore-

(c) *Joint Owner of Patent.* A joint owner of a patent who uses an infringing device is liable in equity to his coöwner for the wrong done.[74]

(d) *Agents and Servants.* One who as agent for another person sells an article which is an infringement of a patent may be restrained by injunction,[75] even where he had no pecuniary interest in the sale;[76] but such an agent is not liable to be compelled to account to the patentee for the profits of the sale of the infringing article,[77] unless it appears that he was pecuniarily interested in the sale.[78] And the use by one as the agent of another person of a patented device does not render him liable to account for infringement of the patent.[79]

(e) *Joint and Several Liability.* All persons participating in the infringement of a patent are jointly[80] or severally[81] liable on a bill for such an infringement.

(ii) *Parties*—(a) *In General.* Officers of a private corporation are neither necessary nor proper parties defendant in a suit in equity against the corporation for the infringement of a patent, where they perform no act of infringement,[82] and were not pecuniarily interested therein;[83] but such officers, where they have personally infringed and are joint tort-feasors, may be made co-defendants with a corporation,[84] and may also, for injunctive purposes, be made co-defendants, where they have, in their capacity as officers of a corporation, actively participated in an infringement.[85] The owner of infringing machines and a lessee from him may

hand *v.* Porter, 15 Fed. 256. But see James *v.* Campbell, 104 U. S. 356, 26 L. ed. 786.

74. Herring *v.* Gas Consumers' Assoc., 9 Fed. 556, 3 McCrary 206.

75. Featherstone *v.* Ormonde Cycle Co., 53 Fed. 110; Steiger *v.* Heidelberger, 4 Fed. 455, 18 Blatchf. 426; Buck *v.* Cobb, 4 Fed. Cas. No. 2,079, Brunn. Col. Cas. 550; Goodyear *v.* Phelps, 10 Fed. Cas. No. 5,581, 3 Blatchf. 91; Maltby *v.* Bobo, 16 Fed. Cas. No. 8,998, 2 Ban. & A. 459, 14 Blatchf. 53.

76. Featherstone *v.* Ormonde Cycle Co., 53 Fed. 110; Maltby *v.* Bobo, 16 Fed. Cas. No. 8,998, 2 Ban. & A. 459, 14 Blatchf. 53.

77. Featherstone *v.* Ormonde Cycle Co., 53 Fed. 110. See also Young *v.* Foerster, 37 Fed. 203.

78. Steiger *v.* Heidelberger, 4 Fed. 455, 18 Blatchf. 426.

79. Emigh *v.* Chamberlain, 8 Fed. Cas. No. 4,447, 1 Biss. 367, 2 Fish. Pat. Cas. 192. A workman, however, who uses an infringing article, his own property, is liable to be compelled to account to the patentee. Wooster *v.* Marks, 30 Fed. Cas. No. 18,038, 5 Ban. & A. 56, 17 Blatchf. 368, 9 Reporter 201.

80. American Bell Tel. Co. *v.* Albright, 32 Fed. 287; Jennings *v.* Dolan, 29 Fed. 861.

Applications of rule.—Where one defendant operates a planing machine and two others owned it, an injunction should properly issue against the three. Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120. Where one who has contracted to erect a building lets a portion of the work to a subcontractor, and in the prosecution of their respective parts each infringes the patent rights of another, both are liable as joint infringers. Jackson *v.* Nagle, 47 Fed. 703.

Where there is a privity of connection between the different defendants with reference to the subject-matter of the action, they are jointly liable on a bill for infringing a patent. Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

Although when it comes to an accounting, complainant must prove that a given defendant is liable to him in profits or damages, under risk of which the court may possibly order concerning costs, yet an injunction should go against all of the defendants participating in the infringement. Standard Paint Co. *v.* Bird, 65 Fed. 509 [*reversed* on other grounds in 68 Fed. 483, 15 C. C. A. 516]; Starrett *v.* Athol Mach. Co., 14 Fed. 910.

Defendants held not jointly liable.— Contractors laid a pavement for a city which infringed the patent of one A, and the city paid them as much therefor as it would have paid to A had he done the work, thus realizing no profits from the infringement. It was held that in a suit in equity to recover profits against the city and the contractors, notwithstanding the latter answered jointly, the latter alone were responsible, although the former might have been enjoined before the completion of the work and would undoubtedly have been liable in an action for damages. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

81. Jennings *v.* Dolan, 29 Fed. 861.

82. Hutter *v.* De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652.

83. Matthews, etc., Mfg. Co. *v.* Trenton Lamp Co., 73 Fed. 212.

84. Whiting Safety Catch Co. *v.* Western Wheeled Scraper Co., 148 Fed. 396; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 123.

On a complaint alleging that a corporation and its president have infringed plaintiff's patent, the joining of the president as co-defendant with the corporation is proper, although there is no specific allegation that he directed or participated in the infringement complained of. Cleveland Forge, etc., Co. *v.* U. S. Rolling-Stock Co., 41 Fed. 476.

85. Nichols *v.* Pearce, 18 Fed. Cas. No. 10,246, 7 Blatchf. 5.

be joined as defendants in a suit for infringement.[86] And a corporation and an individual may be joined as defendants in a suit for infringement of a patent, where it is alleged that the individual defendant owns practically all the stock of the corporation and personally directs its affairs, and that they conspired together to commit the acts of infringement.[87] A party alleged to be encouraging the manufacture and sale by the other defendants of the infringing device and who was closely connected with the transactions complained of is a proper party to the bill.[88]

(B) *Receivers of Private Corporation.* A private corporation and its receiver may be joined as defendants in a bill for the infringement of a patent.[89]

(C) *Agents and Servants.* One who is pecuniarily interested in the manufacture of an infringing article and acts as agent for its sale may be joined with the manufacturer as a defendant in a suit for the infringement.[90]

c. Addition or Substitution of Parties. The ordinary rules apply as to the addition or substitution of parties.[91]

9. Joinder of Causes of Action. A single suit may be brought for the infringement of several patents where the inventions covered by those patents are embodied in one infringing process, machine, manufacture, or composition of matter.[92] In the absence of such conjoint use, a single suit cannot be maintained.[93]

86. Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

87. Whiting Safety Catch Co. *v.* Western Wheeled Scraper Co., 148 Fed. 396.

88. Simplex Electric Heating Co. *v.* Leonard, 147 Fed. 744, 148 Fed. 1023.

89. Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 833.

90. Lattimore Mfg. Co. *v.* Jones, 133 Fed. 550 [*reversed* on other grounds in 138 Fed. 62, 70 C. C. A. 558].

91. See cases cited *infra*, this note.

Survivor.— Upon the death of defendant cause of action survives against estate and the suit may be revived. Griswold *v.* Hilton, 87 Fed. 256; Head *v.* Porter, 70 Fed. 498; Hohorst *v.* Howard, 37 Fed. 97; Kirk *v.* Du Bois, 28 Fed. 460; Smith *v.* Baker, 22 Fed. Cas. No. 13,010, 1 Ban. & A. 117, 5 Off. Gaz. 496, 10 Phila. (Pa.) 221. *Contra*, Draper *v.* Hudson, 7 Fed. Cas. No. 4,069, 6 Fish. Pat. Cas. 327, Holmes 208, 3 Off. Gaz. 354.

Suit against administrator survives after finding of infringement and reference to master. Atterbury *v.* Gill, 2 Fed. Cas. No. 638, 3 Ban. & A. 174, 2 Flipp. 239, 13 Off. Gaz. 276.

Substitution or joinder of assignee.—Assignee after suit may be substituted by original bill in the nature of a supplemental bill (Leadam *v.* Ringgold, 140 Fed. 611; Ross *v.* Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288); but assignee after suit not joined where no right to past damages (New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 47 Fed. 504).

The owner of an equitable right or interest in a patent may be added as complainant upon request. Patterson *v.* Stapler, 7 Fed. 210.

Intervention.— The general rules as to intervention of parties apply. Ring Refrigerator, etc., Co. *v.* St. Louis Ice Mfg., etc., Co., 67 Fed. 535; Standard Oil Co. *v.* Southern Pac. Co., 54 Fed. 521, 4 C. C. A. 491; Thomas-Huston Electric Co. *v.* Sperry Electric Co., 46 Fed. 75; Curran *v.* St. Charles Car Co., 32 Fed. 835.

Addition of defendant by supplemental bill see Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,758, 2 Blatchf. 72, Fish. Pat. Rep. 175, 8 N. Y. Leg. Obs. 73.

92. Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578; Huber *v.* Myers Sanitary Depot, 34 Fed. 752; Deering *v.* Winona Harvester Works, 24 Fed. 90; Case *v.* Redfield, 5 Fed. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Gillespie *v.* Cummings, 10 Fed. Cas. No. 5,434, 1 Ban. & A. 587, 3 Sawy. 259; Nourse *v.* Allen, 18 Fed. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63; Richardson *v.* Noyes, 20 Fed. Cas. No. 11,792, 2 Ban. & A. 398, 10 Off. Gaz. 507.

Where conjoint use is alleged, the bill is not multifarious. Edison Phonograph Co. *v.* Victor Talking Mach. Co., 120 Fed. 305; Continental Gin Co. *v.* F. H. Lummus Sons' Co., 110 Fed. 390; Elliott, etc., Book-Typewriter Co. *v.* Fisher Typewriter Co., 109 Fed. 330.

Allegation that the inventions are used in one machine is a sufficient allegation of conjoint use. Horman Patent Mfg. Co. *v.* Brooklyn City R. Co., 12 Fed. Cas. No. 6,703, 4 Ban. & A. 86, 15 Blatchf. 444, 7 Reporter 295.

Proof of the conjoint use of several inventions but not all will sustain the suit. Chisholm *v.* Johnson, 106 Fed. 191; Kansas City Hay-Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 578.

Validity of patents and damages are determined separately for each. Consolidated Electric Light Co. *v.* Brush-Swan Electric Light Co., 20 Fed. 502.

In England, where suit is brought on numerous patents, plaintiff may be required to limit the number. Saccharin Corp. *v.* Wild, [1903] 1 Ch. 410, 72 L. J. Ch. 272, 88 L. T. Rep. N. S. 101; Saccharin Corp. *v.* White, 88 L. T. Rep. N. S. 850.

93. Louden Mach. Co. *v.* Ward, 96 Fed.

10. Suit on Separate Claims of One Patent. Suit may be maintained upon some of the claims of a patent and not others,[94] and it is not defeated by the invalidity of the others.[95]

11. Injunctions[96] — a. In General. Injunctions are granted to preserve property rights in patents upon the same principle that they are granted to preserve other property rights and the same general rules control.[97]

232; Diamond Match Co. *v.* Ohio Match Co., 80 Fed. 117; Rose *v.* Hirsh, 77 Fed. 469, 23 C. C. A. 246 [*affirming* 71 Fed. 881]; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 68 Fed. 913; Griffith *v.* Segar, 29 Fed. 707; Shickle *v.* South St. Louis Foundry Co., 22 Fed. 105; Consolidated Electric Light Co. *v.* Brush-Swan Electric Light Co., 20 Fed. 502; Lilliendahl *v.* Detwiller, 18 Fed. 176; Barney *v.* Peck, 16 Fed. 413; Nellis *v.* Pennock Mfg. Co., 13 Fed. 451; Hayes *v.* Dayton, 8 Fed. 702, 18 Blatchf. 420.

94. U. S. Rev. St. (1878) § 4922 [U. S. Comp. St. (1901) p. 3396]; Gordon *v.* Warder, 150 U. S. 47, 14 S. Ct. 32, 37 L. ed. 992; Russell *v.* Winchester Repeating Arms, 97 Fed. 634; Blake *v.* Smith, 3 Fed. Cas. No. 1,502; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; Moody *v.* Fiske, 17 Fed. Cas. No. 9,745, 2 Mason 112, 1 Robb Pat. Cas. 312; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

95. U. S. Rev. St. (1878) §§ 4917, 4922 [U. S. Comp. St. (1901) pp. 3393, 3396]; Whitney *v.* Boston R. Co., 50 Fed. 72 [*reversed* on other grounds in 53 Fed. 913]; Burdett *v.* Estey, 4 Fed. Cas. No. 2,145, 4 Ban. & A. 7, 15 Blatchf. 349, 15 Off. Gaz. 877. See also *supra*, IX.

96. See, generally, Injunctions, 22 Cyc. 724.

97. Westinghouse Air-Brake Co. *v.* Carpenter, 32 Fed. 484; Keyes *v.* Pueblo Smelting, etc., Co., 31 Fed. 560; Brick *v.* Staten Island R. Co., 25 Fed. 553; Merriam *v.* Smith, 11 Fed. 588; American Cotton-Tie Co. *v.* McCready, 1 Fed. Cas. No. 295, 4 Ban. & A. 588, 17 Blatchf. 291, 8 Reporter 811, 17 Off. Gaz. 565; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; Sargent *v.* Larned, 22 Fed. Cas. No. 12,364, 2 Curt. 340.

Even where a license contract is alleged an injunction may be granted.— Busch *v.* Jones, 184 U. S. 598, 22 S. Ct. 511, 46 L. ed. 707; Hat-Sweat Mfg. Co. *v.* Porter, 34 Fed. 745; Brown *v.* Lapham, 27 Fed. 77, 23 Blatchf. 475.

Gambling device.— Injunction will not be granted on patent covering gambling device. Reliance Novelty Co. *v.* Dworzek, 80 Fed. 902.

Use in public contract.—An infringer may be enjoined, although the device was used in a public contract which the patentee could not get. Colgate *v.* International Ocean Tel. Co., 6 Fed. Cas. No. 2,993, 4 Ban. & A. 609, 17 Blatchf. 308, 9 Reporter 166, 17 Off. Gaz. 194.

Use for government.— No injunction against government officer using invention for government. International Postal Supply Co. *v.* Bruce, 114 Fed. 509 [*affirmed* in 132 Fed. 1006, 65 C. C. A. 130 (*affirmed* in 194 U. S. 601, 24 S. Ct. 820, 48 L. ed. 1134)].

A contributory infringer may be enjoined. Thomson-Houston Electric Co. *v.* Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107.

A mere user may be enjoined (Busch *v.* Jones, 16 App. Cas. (D. C.) 23; Bresnahan *v.* Tripp Giant Leveller Co., 72 Fed. 920, 19 C. C. A. 237; Thompson *v.* American Bank-Note Co., 35 Fed. 203; Tucker *v.* Burditt, 24 Fed. Cas. No. 14,216, 4 Ban. & A. 569), but only in a clear case (Jefferson Electric Light, etc., Co. *v.* Westinghouse Electric, etc., Co., 134 Fed. 392, 67 C. C. A. 189; Westinghouse Air-Brake Co. *v.* Burton Stock-Car Co., 70 Fed. 619; Howe *v.* Newton, 12 Fed. Cas. No. 6,771, 2 Fish. Pat. Cas. 531; Morris *v.* Lowell Mfg. Co., 17 Fed. Cas. No. 9,833, 3 Fish. Pat. Cas. 67).

Although the patentee has never used the invention himself an injunction may be granted. Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Campbell Printing-Press Mfg. Co. *v.* Manhattan R. Co., 49 Fed. 930; American Bell Tel. Co. *v.* Cushman Tel., etc., Co., 36 Fed. 488, 1 L. R. A. 799.

Actual infringement is not necessary to warrant an injunction.—An injunction may be granted if an intent to infringe is established. Westinghouse Mach. Co. *v.* Press Pub. Co., 127 Fed. 822 [*reversed* on other grounds in 135 Fed. 767, 68 C. C. A. 469]; National Meter Co. *v.* Thomson Meter Co., 106 Fed. 531; Brill *v.* St. Louis Car Co., 80 Fed. 909; Johnson R. Signal Co. *v.* Union Switch, etc., Co., 55 Fed. 487, 5 C. C. A. 204; Sessions *v.* Gould, 49 Fed. 855 [*affirmed* in 63 Fed. 1001, 11 C. C. A. 546]; Butz Thermo-Electric Regulator Co. *v.* Jacobs Electric Co., 36 Fed. 191; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,281, 4 Blatchf. 184, 2 Fish. Pat. Cas. 74; Woodworth *v.* Stone, 30 Fed. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749; Frearson *v.* Loe, 9 Ch. D. 48, 27 Wkly. Rep. 183.

Restraining complainant from bringing further suits.— In a suit for infringement of a patent, a court of equity has the power upon petition of defendant to restrain complainant from bringing further suits against the purchasers or users of the patented article, and will do so when it appears that the suits are vexatious and oppressive. National Cash-Register Co. *v.* Boston Cash Indicator, etc., Co., 41 Fed. 51; Ide *v.* Ball Engine Co., 31 Fed. 901; Allis *v.* Stowell, 16 Fed. 783;

b. Preliminary Injunction — (1) *In General.* A preliminary injunction is granted only in the discretion of the court[98] to prevent irreparable injury,[99] and the right to and necessity for the injunction must be clearly shown.[1] The court will not attempt to decide doubtful questions on motion for a preliminary injunction.[2] In case of doubt such injunction will not be granted,[3] especially where

Motte *v.* Bennett, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642.

Where plaintiff is guilty of deception injunction will be refused. Ironclad Mfg. Co. *v.* Sugar Loaf Dairy Co., 140 Fed. 108.

98. American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189, 18 Pittsb. Leg. J. (Pa.) 85; Earth Closet Co. *v.* Fenner, 8 Fed. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Irwin *v.* Dane, 13 Fed. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Union Paper-Bag Mach. Co. *v.* Binney, 24 Fed. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

The court has no discretion even after decision on appeal holding that the patent is valid and infringed. *In re* Chicago Sugar Refining Co., 87 Fed. 750, 31 C. C. A. 221.

Even after hearing on the merits a temporary injunction may be granted. Cimiotti Unhairing Co. *v.* American Fur Refining Co., 117 Fed. 623.

Notice. — May be granted without notice. Yuengling *v.* Johnson, 30 Fed. Cas. No. 18,195, 3 Ban. & A. 99, 1 Hughes 607.

99. Irreparable injury is the foundation for motion for injunction. Bowers Dredging Co. *v.* New York Dredging Co., 77 Fed. 980; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929; New York Grape Sugar Co. *v.* American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Batten *v.* Silliman, 2 Fed. Cas. No. 1,106, 3 Wall. Jr. 124; Dorsey Revolving Harvester Rake Co. *v.* Bradley Mfg. Co., 7 Fed. Cas. No. 4,015, 1 Ban. & A. 330, 12 Blatchf. 202; Morris *v.* Lowell Mfg. Co., 17 Fed. Cas. No. 9,833, 3 Fish. Pat. Cas. 67; North *v.* Kershaw, 18 Fed. Cas. No. 10,311, 4 Blatchf. 70; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 Pa. L. J. 443.

1. International Tooth-Crown Co. *v.* Mills, 22 Fed. 659; Cooper *v.* Mattheys, 6 Fed. Cas. No. 3,200, 5 Pa. L. J. 38; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 Pa. L. J. 443; Sickels *v.* Youngs, 22 Fed. Cas. No. 12,838, 3 Blatchf. 293.

2. Thomson-Houston Electric Co. *v.* Exeter Co., 110 Fed. 986; Sprague Electric R., etc., Co. *v.* Nassau Electric R. Co., 95 Fed. 821, 37 C. C. A. 286; Welsbach Light Co. *v.* Apollo Incandescent Gaslight Co., 94 Fed. 1005.

3. Bridson *v.* McAlpine, 8 Beav. 229, 50 Eng. Reprint 90; Bacon *v.* Spottiswoode, 1 Beav. 382, 3 Jur. 476, 994, 17 Eng. Ch. 382, 48 Eng. Reprint 988, 4 Myl. & C. 433, 18 Eng. Ch. 433, 41 Eng. Reprint 167; Collard *v.* Allsion, 4 Myl. & C. 487, 18 Eng. Ch. 487, 41 Eng. Reprint 188; Goodwin *v.* Fader, 19 Can. L. T. Occ. Notes 364.

Refused where infringement doubtful see Thomson-Houston Electric Co. *v.* Wagner Electric Mfg. Co., 130 Fed. 902; Armat Moving Picture Co. *v.* Edison Mfg. Co., 125 Fed. 939, 60 C. C. A. 380; Stearns-Roger Mfg. Co. *v.* Brown, 114 Fed. 939, 52 C. C. A. 559; National Folding-Box, etc., Co. *v.* Munson, 99 Fed. 86; National Folding-Box, etc., Co. *v.* Brown, 98 Fed. 437; Blakey *v.* National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; Consolidated Fastener Co. *v.* American Fastener Co., 94 Fed. 523; Whippany Co. *v.* United Indurated Fibre Co., 87 Fed. 215, 30 C. C. A. 615; Menasha Pulley Co. *v.* Dodge, 85 Fed. 971, 29 C. C. A. 508, 86 Fed. 904, 30 C. C. A. 455; Société Anonyme, etc., *v.* Allen, 84 Fed. 812; American Pneumatic Tool Co. *v.* Bigelow Co., 77 Fed. 988, 23 C. C. A. 603; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 75 Fed. 1004; Western Tel. Constr. Co. *v.* Stromberg, 66 Fed. 550; George Ertel Co. *v.* Stahl, 65 Fed. 519, 13 C. C. A. 31; Brush Electric Co. *v.* Electric Storage Battery Co., 64 Fed. 775; Hammond Buckle Co. *v.* Goodyear Rubber Co., 49 Fed. 274; Standard Paint Co. *v.* Reynolds, 43 Fed. 304; American Fire Hose Mfg. Co. *v.* Cornelius Callahan Co., 41 Fed. 50; Russell *v.* Hyde, 39 Fed. 614; Morss *v.* Knapp, 39 Fed. 608; Thompson *v.* Rand-Avery Supply Co., 38 Fed. 112; Steam-Gauge, etc., Co. *v.* St. Louis R. Supplies Mfg. Co., 25 Fed. 491; Gold, etc., Tel. Co. *v.* Commercial Tel. Co., 22 Fed. 838; Zinsser *v.* Colledge, 17 Fed. 538; Allis *v.* Stowell, 15 Fed. 242; Hardy *v.* Marble, 10 Fed. 752; Cross *v.* Livermore, 9 Fed. 607; Steam-Gauge, etc., Co. *v.* Miller, 8 Fed. 314; Pullman *v.* Baltimore, etc., R. Co., 5 Fed. 72, 4 Hughes 236; Blake *v.* Boissellier, 3 Fed. Cas. No. 1,493*a*, 5 Ban. & A. 352, 16 Off. Gaz. 854; Dodge *v.* Card, 7 Fed. Cas. No. 3,951, 1 Bond 393, 2 Fish. Pat. Cas. 116; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Mowry *v.* Grand St., etc., Co., 17 Fed. Cas. No. 9,893, 10 Blatchf. 89, 5 Fish. Pat. Cas. 586; Winans *v.* Eaton, 30 Fed. Cas. No. 17,861, 1 Fish. Pat. Cas. 181; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 1 Woodb. & M. 248, 2 Robb Pat. Cas. 495.

Validity and infringement must be shown beyond doubt. Brookfield *v.* Elmer Glassworks, 132 Fed. 312; Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648; Consolidated Fastener Co. *v.* American Fastener Co., 94 Fed. 523; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

Cases in which preliminary injunction refused see National Phonograph Co. *v.* American Graphophone Co., 136 Fed. 231; A. B.

defendant is financially responsible.[4] It is ground to deny a preliminary injunction that there has been laches on the part of plaintiff;[5] that the alleged infringer has a later patent under which he is working;[6] or that the patent is about to

Dick Co. *v.* Roper, 126 Fed. 966; Westinghouse Air-Brake Co. *v.* Christensen Engineering Co., 121 Fed. 558; U. S. Gramophone Co. *v.* National Gramophone Co., 107 Fed. 129; Westinghouse Air-Brake Co. *v.* Christensen Engineering Co., 103 Fed. 491; Western Electric Co. *v.* Anthracite Tel. Co., 100 Fed. 301; Vermilya *v.* Erie R. Co., 89 Fed. 96; Société Anonyme *v.* Allen, 84 Fed. 812; Welsbach Light Co. *v.* Benedict, etc., Mfg. Co., 82 Fed. 747; Société Fabriques, etc. *v.* Franco-American Trading Co., 82 Fed. 439; Carter-Crume Co. *v.* Watson, 69 Fed. 267; Dickerson *v.* Matheson, 57 Fed. 524, 6 C. C. A. 466; Johnson *v.* Aldrich, 40 Fed. 675; Amazeen Mach. Co. *v.* Knight, 39 Fed. 612; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 25 Fed. 30; Gold, etc., Tel. Co. *v.* Pearce, 19 Fed. 419; Tillinghast *v.* Hicks, 13 Fed. 388; Steam-Gauge, etc., Co. *v.* Miller, 11 Fed. 718; Toohey *v.* Harding, 1 Fed. 174, 4 Hughes 253; Andrews *v.* Spear, 1 Fed. Cas. No. 380, 3 Ban. & A. 82, 4 Dill. 472; Earth Closet Co. *v.* Fenner, 8 Fed. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Gear *v.* Holmes, 10 Fed. Cas. No. 5,292, 6 Fish. Pat. Cas. 595; Jones *v.* McMurray, 13 Fed. Cas. No. 7,479, 3 Ban. & A. 130, 2 Hughes 527, 13 Off. Gaz. 6; Jones *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz. 401; North *v.* Kershaw, 18 Fed. Cas. No. 10,311, 4 Blatchf. 70.

Cases in which preliminary injunction granted see Continental Wire Fence Co. *v.* Pendergast, 126 Fed. 381; Stearns-Roger Mfg. Co. *v.* Brown, 114 Fed. 939, 52 C. C. A. 559; National Folding-Box, etc., Co. *v.* Robertson, 99 Fed. 985; Welsbach Light Co. *v.* Rex Incandescent Light Co., 94 Fed. 1006; Welsbach Light Co. *v.* Rex Incandescent Light Co., 94 Fed. 1004; New York Filter Mfg. Co. *v.* Chemical Bldg. Co., 93 Fed. 827; Alaska Packers' Assoc. *v.* Pacific Steam Whaling Co., 93 Fed. 672; Electric Car Co. *v.* Nassau Electric R. Co., 89 Fed. 204; Peck, etc., Co. *v.* Fray, 88 Fed. 784; Westinghouse Air-Brake Co. *v.* Great Northern R. Co., 88 Fed. 258, 31 C. C. A. 525; United Indurated Fibre Co. *v.* Whippany Mfg. Co., 83 Fed. 485; Pacific Contracting Co. *v.* Union Paving, etc., Co., 80 Fed. 737; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 78 Fed. 139; Allington, etc., Mfg. Co. *v.* Booth, 72 Fed. 772 [*affirmed* in 78 Fed. 878, 24 C. C. A. 378]; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; Corser *v.* Brattleboro Overall Co., 59 Fed. 781; Carter *v.* Wollschlaeger, 53 Fed. 573; New York Grape Sugar Co. *v.* American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; White *v.* Heath, 10 Fed. 291; Plimpton *v.* Winslow, 3 Fed. 333; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Clum *v.* Brewer, 5 Fed. Cas. No. 2,909, 2 Curt. 506; Colt *v.* Young, 6 Fed. Cas. No. 3,032, 2 Blatchf. 471; Irwin *v.* Dane, 13 Fed. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Miller *v.* Androscoggin Pulp Co., 17 Fed. Cas. No. 9,559, 5 Fish. Pat. Cas. 340, Holmes 142, 1 Off. Gaz. 409; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Pentlarge *v.* Beeston, 19 Fed. Cas. No. 10,963, 3 Ban. & A. 142, 14 Blatchf. 352; Potter *v.* Fuller, 19 Fed. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241; Sickels *v.* Mitchell, 22 Fed. Cas. No. 12,835, 3 Blatchf. 548.

4. Thomson-Houston Electric Co. *v.* Wagner Electric Mfg. Co., 130 Fed. 902; Diamond Match Co. *v.* Union Match Co., 129 Fed. 602; Hallock *v.* Babcock Mfg. Co., 124 Fed. 226; Bradley *v.* Eccles, 120 Fed. 947; Scoville Mfg. Co. *v.* Patent Button Co., 99 Fed. 743; Huntington Dry-Pulverizer Co. *v.* Alpha Portland Cement Co., 91 Fed. 534; Overweight Counterbalance Elevator Co. *v.* Cahill, etc., Elevator Co., 86 Fed. 338; Nilsson *v.* Jefferson, 78 Fed. 366; George Ertel Co. *v.* Stahl, 65 Fed. 519, 13 C. C. A. 31; Rogers Typographic Co. *v.* Mergenthaler Linotype Co., 58 Fed. 693; Standard Elevator Co. *v.* Crane Elevator Co., 56 Fed. 718, 6 C. C. A. 100; Williams *v.* McNeely, 56 Fed. 265; Ironclad Mfg. Co. *v.* Jacob J. Vollrath Mfg. Co., 52 Fed. 143; Dietz Co. *v.* C. T. Ham Mfg. Co., 47 Fed. 320; Southwestern Brush Electric Light, etc., Co. *v.* Louisiana Electric Light Co., 45 Fed. 893; Kane *v.* Huggins Cracker, etc., Co., 44 Fed. 287; Consolidated Roller-Mill Co. *v.* Richmond City Mill-Works, 40 Fed. 474; Hurlburt *v.* Carter, 39 Fed. 802; National Hat-Pouncing Mach. Co. *v.* Hedden, 29 Fed. 147; United Nickel Co. *v.* New Home Sewing Mach. Co., 17 Fed. 528, 21 Blatchf. 415; Hoe *v.* Boston Daily Advertising Corp., 14 Fed. 914; New York Grape Sugar Co. *v.* American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Pullman *v.* Baltimore, etc., R. Co., 5 Fed. 72, 4 Hughes 236; Essex Hosiery Mfg. Co. *v.* Door Mfg. Co., 8 Fed. Cas. No. 4,533; Guidet *v.* Palmer, 11 Fed. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82; McGuire *v.* Eames, 16 Fed. Cas. No. 8,814, 3 Ban. & A. 499, 15 Blatchf. 312; Morris *v.* Lowell Mfg. Co., 17 Fed. Cas. No. 9,833, 3 Fish. Pat. Cas. 67.

5. Ladd *v.* Cameron, 25 Fed. 37; Hall *v.* Speer, 11 Fed. Cas. No. 5,947, 1 Pittsb. (Pa.) 513. See *supra*, XIII, C, 6, d.

6. American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189; American Shoe-Tip Co. *v.* National Shoe-Toe Protector Co., 1 Fed. Cas. No. 317, 2 Ban. & A. 551, 11 Off. Gaz. 740; Congress Rubber Co. *v.* American Elastic Cloth Co., 6 Fed. Cas. No. 3,099*a*; Goodyear *v.* Dunbar, 10 Fed. Cas. No. 5,570, 1 Fish. Pat. Cas. 472, 3 Wall. Jr. 310; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659; Sargent *v.* Carter, 21 Fed. Cas. No. 12,362, 1 Fish. Pat. Cas. 277; Sargent Mfg. Co. *v.* Woodruff, 21 Fed. Cas. No. 12,368, 5 Biss. 444. *Compare* Jones *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz.

expire.[7] And an injunction may be refused where the granting thereof would work great injury to defendant and its refusal would injure plaintiff in a much less degree.[8] It is not a ground to deny an injunction that defendant has discontinued infringement and promised not to renew it.[9] An injunction will not be refused because of mere inconvenience to the public or to defendant,[10] but where the granting thereof would injure the public and defendant gives security it may be refused.[11] It is not a ground for denying an injunction that it may be used for advertising purposes to injure defendant.[12]

(II) *Issuance and Validity of Patent.* No injunction can be granted before issuance of a patent,[13] and the fact that the complainant owns a patent and the defendant infringes it will not ordinarily justify a preliminary injunction.[14]

401; Morse Fountain-Pen Co. *v.* Esterbrook Steel-Pen Mfg. Co., 17 Fed. Cas. No. 9,862, 3 Fish. Pat. Cas. 515; Wilson *v.* Barnum, 30 Fed. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb Pat. Cas. 749, 1 Wall. Jr. 347.

Reason for rule.—The grant of letters patent to him is virtually a decision by the patent office that there is a substantial difference between the inventions, and, while the presumption may be overcome, it is not to be disregarded on a motion for preliminary injunction. American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189.

7. Keyes *v.* Eureka Consol. Min. Co., 158 U. S. 150, 15 S. Ct. 772, 39 L. ed. 929; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93. *Contra,* Westinghouse Air-Brake Co. *v.* Carpenter, 32 Fed. 484; Rumford Chemical Works *v.* Vice, 20 Fed. Cas. No. 12,136, 2 Ban. & A. 584, 14 Blatchf. 179, 11 Off. Gaz. 600. See also *supra,* XIII, C, 2, c.

After expiration of patent the sale of articles made before such expiration may be enjoined. New York Belting, etc., Co. *v.* Magowan, 27 Fed. 111.

8. Bowers Dredging Co. *v.* New York Dredging Co., 77 Fed. 980; Root *v.* Mt. Adams, etc., R. Co., 40 Fed. 760; Day *v.* Candee, 7 Fed. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Hockholzer *v.* Eager, 12 Fed. Cas. No. 6,556, 2 Sawy. 361; Morris *v.* Lowell Mfg. Co., 17 Fed. Cas. No. 9,833, 3 Fish. Pat. Cas. 67; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87.

Limitation of rule.—An injunction will not be refused for hardship on defendant where the infringement is wilful (Thomson-Houston Electric Co. *v.* Jeffrey Mfg. Co., 144 Fed. 130; United Indurated Fibre Co. *v.* Whippany Mfg. Co., 83 Fed. 485; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929), or where the validity of the patent is fully established and its infringement clear (Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,560, 6 Blatchf. 165).

9. Johnson *v.* Foos Mfg. Co., 141 Fed. 73, 72 C. C. A. 105; General Electric Co. *v.* Bullock Electric Mfg. Co., 138 Fed. 412; Brookfield *v.* Elmer Glassworks, 132 Fed. 312; Consolidated Fastener Co. *v.* Toppen, 113 Fed. 697; New York Filter Mfg. Co. *v.* Chemical Bldg. Co., 93 Fed. 827; Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70; New York Belting, etc., Co. *v.* Gutta Percha, etc., Mfg. Co., 56 Fed. 264; Sawyer Spindle Co. *v.* Turner, 55 Fed. 979; Celluloid Mfg. Co. *v.* Arlington Mfg. Co., 34 Fed. 324; Goodyear *v.* Berry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Jenkins *v.* Greenwald, 13 Fed. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Potter *v.* Crowwell, 19 Fed. Cas. No. 11,323, 1 Abb. 89, 3 Fish. Pat. Cas. 112; Rumford Chemical Works *v.* Vice, 20 Fed. Cas. No. 12,136, 2 Ban. & A. 584, 14 Blatchf. 179, 11 Off. Gaz. 600; Sickels *v.* Mitchell, 22 Fed. Cas. No. 12,835, 3 Blatchf. 548; Geary *v.* Norton, 1 De G. & Sm. 9, 63 Eng. Reprint 949. *Contra,* General Electric Co. *v.* Pittsburg-Buffalo Co., 144 Fed. 439; Silver *v.* J. P. Eustis Mfg. Co., 130 Fed. 348; General Electric Co. *v.* New England Electric Mfg. Co., 123 Fed. 310; Edison Gen. Electric Co. *v.* New England Electric Mfg. Co., 121 Fed. 125; National Cash-Register Co. *v.* Boston Cash Indicator, etc., Co., 41 Fed. 144; Brammer *v.* Jones, 4 Fed. Cas. No. 1,806, 2 Bond 100, 3 Fish. Pat. Cas. 340.

10. Lanyon Zinc Co. *v.* Brown, 115 Fed. 150, 53 C. C. A. 354; Pelzer *v.* Binghamton, 95 Fed. 823, 37 C. C. A. 288; Poughkeepsie *v.* National Meter Co., 89 Fed. 1014, 32 C. C. A. 463; Westinghouse Air-Brake Co. *v.* Great Northern R. Co., 86 Fed. 132; New York Filter Mfg. Co. *v.* Niagara Falls Waterworks Co., 80 Fed. 924, 26 C. C. A. 252; Thomson-Houston Electric Co. *v.* Union R. Co., 78 Fed. 365; National Meter Co. *v.* Poughkeepsie, 75 Fed. 405; Goodyear *v.* New Jersey Cent. R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Sickels *v.* Tileston, 22 Fed. Cas. No. 12,837, 4 Blatchf. 109.

11. American Ordnance Co. *v.* Driggs-Seabury Co., 87 Fed. 947; Campbell Printing-Press, etc., Co. *v.* Manhattan R. Co., 47 Fed. 663; Southwestern Brush Electric Light, etc., Co. *v.* Louisiana Electric Light Co., 45 Fed. 893; Guidet *v.* Palmer, 11 Fed. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82.

12. New York Belting, etc., Co. *v.* Gutta Percha, etc., Mfg. Co., 56 Fed. 264.

13. Gayler *v.* Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Standard Scale, etc., Co. *v.* McDonald, 127 Fed. 709; Hoeltge *v.* Hoeller, 12 Fed. Cas. No. 6,574, 2 Bond 386.

14. Société Anonyme, etc. *v.* Allen, 84 Fed. 812; Palmer Pneumatic Tire Co. *v.* Newton

The validity of the patent must be made to clearly appear and the injunction will be refused where its validity is doubtful.[15] Ordinarily, where the validity of the patent has neither been adjudicated nor acquiesced in by the public, an injunction will be refused,[16] although there are some limitations of the rule.[17]

Rubber Works, 73 Fed. 218; Grover, etc., Sewing-Mach. Co. *v.* Williams, 11 Fed. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659; Orr *v.* Littlefield, 18 Fed. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13.

15. Aquarama Co. *v.* Old Mill Co., 115 Fed. 806, 53 C. C. A. 376; Welsbach Light Co. *v.* Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 C. C. A. 418; Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975; Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648; Duff Mfg. Co. *v.* Kalamazoo Railway-Supply Co., 100 Fed. 357; Overhead R., etc., Co. *v.* Hiller, 98 Fed. 620; Welsbach Light Co. *v.* Rex Incandescent Light Co., 94 Fed. 1005; Bowers Dredging Co. *v.* New York Dredging Co., 77 Fed. 980; New York Paper-Bag Mach., etc., Co. *v.* Western Paper-Bag Co., 75 Fed. 395; George Ertel Co. *v.* Stahl, 65 Fed. 519, 13 C. C. A. 31; Mack *v.* Spencer, 44 Fed. 346; Standard Paint Co. *v.* Reynold, 43 Fed. 304; Glaenzer *v.* Wiederer, 33 Fed. 583; Huber *v.* Myers Sanitary Depot, 33 Fed. 48; Baldwin *v.* Conway, 32 Fed. 795; Canfield Rubber Co. *v.* Gross, 32 Fed. 226; Osborn *v.* Judd, 29 Fed. 96; Consolidated Safety-Valve Co. *v.* Ashton Valve Co., 26 Fed. 319; Bradley Mfg. Co. *v.* Charles Parker Co., 17 Fed. 240; Brewster *v.* Parry, 14 Fed. 694; Illingworth *v.* Spaulding, 9 Fed. 154; Consolidated Safety-Valve Co. *v.* Crosby Steam-Gauge, etc., Co., 7 Fed. 768; White *v.* S. Harris, etc., Mfg. Co., 3 Fed. 161; American Shoe-Tip Co. *v.* National Shoe-Toe Protector Co., 1 Fed. Cas. No. 317, 2 Ban. & A. 551, 11 Off. Gaz. 740; Isaacs *v.* Cooper, 13 Fed. Cas. No. 7,096, 1 Robb Pat. Cas. 332, 4 Wash. 259; Jones *v.* Hodges, 13 Fed. Cas. No. 7,469, Holmes 37; McGuire *v.* Eames, 16 Fed. Cas. No. 8,814, 3 Ban. & A. 499, 15 Blatchf. 312; Mannie *v.* Everett, 16 Fed. Cas. No. 9,039; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Sullivan *v.* Redfield, 23 Fed. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Wilson Packing Co. *v.* Clapp, 30 Fed. Cas. No. 17,850, 3 Ban. & A. 243, 8 Biss. 154, 13 Off. Gaz. 368; Winans *v.* Eaton, 30 Fed. Cas. No. 17,861, 1 Fish. Pat. Cas. 181; Sugg *v.* Silber, 2 Q. B. D. 493; Davenport *v.* Rylands, L. R. 1 Eq. 302, 12 Jur. N. S. 71, 35 L. J. Ch. 204, 14 L. T. Rep. N. S. 53, 14 Wkly. Rep. 243; Hill *v.* Evans, 4 De G. F. & J. 288, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 1 L. T. Rep. N. S. 90, 65 Eng. Ch. 223, 45 Eng. Reprint 1195; Foxwell *v.* Webster, 4 De G. J. & S. 77, 10 Jur. N. S. 137, 9 L. T. Rep. N. S. 528, 12 Wkly. Rep. 186, 69 Eng. Ch. 60, 46 Eng. Ch. 60, 46 Eng. Reprint 844; Curtis *v.* Cutts, 3 Jur. 34, 8 L. J. Ch. 184; Davenport *v.* Jepson, 1 New Rep. 173.

16. Sharp *v.* Bellinger, 155 Fed. 139; Earll *v.* Rochester, etc., R. Co., 157 Fed. 241; Hall Signal Co. *v.* General R. Signal Co., 153 Fed. 907, 82 C. C. A. 653; Karfiol *v.* Rothner, 151 Fed. 777; Bristol Oil, etc., Co. *v.* Beacon, 143 Fed. 550; Alphons Custodis Chimney Const. Co. *v.* H. R. Heinicke, 135 Fed. 552; Silver *v.* J. P. Eustis Mfg. Co., 130 Fed. 348; Newhall *v.* McCabe Hanger Mfg. Co., 125 Fed. 919, 60 C. C. A. 629; Pennsylvania Globe Gaslight Co. *v.* American Lighting Co., 117 Fed. 324; Reed Mfg. Co. *v.* Smith, etc., Co., 107 Fed. 719, 46 C. C. A. 601; Planters' Compress Co. *v.* Moore, etc., Co., 106 Fed. 500; American Sulphite Pulp Co. *v.* Burgess Sulphate Fibre Co., 103 Fed. 975; Smith *v.* Meriden Britannia Co., 97 Fed. 987, 39 C. C. A. 32 [*affirming* 92 Fed. 1003]; Elliott *v.* Harris, 92 Fed. 374; Richmond Mica Co. *v.* De Clyne, 90 Fed. 661; Wilson *v.* Consolidated Store-Service Co., 88 Fed. 286, 31 C. C. A. 533; Williams *v.* Breitling Metal-Ware Mfg. Co., 77 Fed. 285, 23 C. C. A. 171; Johnson *v.* Aldrich, 40 Fed. 675; Raymond *v.* Boston Woven Hose Co., 39 Fed. 365; Dickerson *v.* De la Vergne Refrigerating Mach. Co., 35 Fed. 143; Edward Barr Co. *v.* New York, etc., Automatic Sprinkler Co., 32 Fed. 79, 24 Blatchf. 566; Johnson Ruffler Co. *v.* Avery Mach. Co., 28 Fed. 193; Fish *v.* Domestic Sewing Mach. Co., 12 Fed. 495; Kirby Bung Mfg. Co. *v.* White, 1 Fed. 604, 1 McCrary 155; Doughty *v.* West, 7 Fed. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Earth Closet Co. *v.* Fenner, 8 Fed. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Jones *v.* Field, 13 Fed. Cas. No. 7,461, 2 Ban. & A. 39, 12 Blatchf. 494; Noe *v.* Prentice, 18 Fed. Cas. No. 10,284; North *v.* Kershaw, 18 Fed. Cas. No. 10,311, 4 Blatchf. 70; Stevens *v.* Felt, 23 Fed. Cas. No. 13,397.

17. Limitations of rule.— The rule, it has been said, applies only when there is some question as to the validity of the patents. Fuller *v.* Gilmore, 121 Fed. 129; Foster *v.* Crossin, 23 Fed. 400. It does not apply where the invention is both new and useful and there is no evidence assailing the validity of the patent (Fuller *v.* Gilmore, *supra*; Wilson *v.* Consolidated Store-Service Co., 88 Fed. 286, 31 C. C. A. 533; Hussey Mfg. Co. *v.* Deering, 20 Fed. 795); where defendant has for three years been making and selling the patented article under a license subsequently terminated, and since the termination of the license has been marking the articles sold by him as made under the patent (Adam *v.* Folger, 120 Fed. 260, 56 C. C. A. 540); where it clearly appears that the patent has been intentionally infringed under a patent procured for that purpose (Plimpton *v.* Winslow, 3 Fed. 333); or where there is no prior patent or publication submitted, nor any statement as to the prior state of

(III) *Public Acquiescence in Validity.* A long continued and public acquiescence in the claims of the patentee may justify the acceptance of the patent as valid for the purpose of a preliminary injunction[18] without an adjudication of validity.[19] What constitutes acquiescence depends on the facts of each particular case.[20]

(IV) *Previous Adjudications*[21]—(A) *As a Prerequisite to the Allowance of Injunctions.* A prior adjudication at law sustaining the patent is not an absolute prerequisite to an injunction,[22] although the court in its discretion may require it.[23] While the right should be clear, it may be made to appear otherwise than by a judgment or decree.[24] A preliminary injunction may be granted without

the art, the presumption induced by the granting of the patent being sufficient to warrant the issuing of an injunction (Seidenberg *v.* Davidson, 112 Fed. 431). Suit on the facts appearing defendant may be estopped to deny the validity of the patent. Burr *v.* Kimbark, 28 Fed. 574; Onderdonk *v.* Fanning, 4 Fed. 148; American Shoe-Tip Co. *v.* National Shoe-Tip Protector Co., 1 Fed. Cas. No. 317, 2 Ban. & A. 551, 11 Off. Gaz. 740.

18. Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., 133 Fed. 167, 68 C. C. A. 523; Smith *v.* Meriden Britannia Co., 97 Fed. 987, 39 C. C. A. 32; Peck, etc., Co. *v.* Fray, 88 Fed. 784; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; Kennedy *v.* Penn Iron, etc., Co., 67 Fed. 339; Corser *v.* Brattleboro Overall Co., 59 Fed. 781; Blount *v.* Societe Anonyme, etc., 53 Fed. 98, 3 C. C. A. 455; Sessions *v.* Gould, 49 Fed. 855; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. 419; Tyler *v.* Crane, 7 Fed. 775; American Shoe-Tip Co. *v.* National Shoe-Toe Protector Co., 1 Fed. Cas. No. 317, 2 Ban. & A. 551, 11 Off. Gaz. 740; Burleigh Rock Drill Co. *v.* Lobdell, 4 Fed. Cas. No. 2,166, 1 Ban. & A. 625, Holmes 450, 7 Off. Gaz. 836; Chase *v.* Wesson, 5 Fed. Cas. No. 2,631, 6 Fish. Pat. Cas. 517, Holmes 274, 4 Off. Gaz. 476; Orr *v.* Badger, 18 Fed. Cas. No. 10,587; Orr *v.* Littlefield, 18 Fed. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13; Sargent *v.* Seagrave, 21 Fed. Cas. No. 12,365, 2 Curt. 553; Thomas *v.* Weeks, 23 Fed. Cas. No. 13,914, Fish. Pat. Rep. 5, 2 Paine 92; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248. Acquiescence must be clearly shown. Keasbey, etc., Co. *v.* Philip Carey Mfg. Co., 139 Fed. 571; American Coat Pad Co. *v.* Phœnix Pad Co., 113 Fed. 629, 51 C. C. A. 339; Keasbey, etc., Co. *v.* Phillip Carey Co., 110 Fed. 747; Mannie *v.* Everett, 16 Fed. Cas. No. 9,039.

Acquiescence in claim of right before issuance of patent may be entitled to weight in considering whether the patentee is entitled to a preliminary injunction. Sargent *v.* Seagrave, 21 Fed. Cas. No. 12,365, 2 Curt. 553.

Acquiescence in the original patent does not apply to a reissue. Grover, etc., Sewing-Mach. Co. *v.* Williams, 11 Fed. Cas. No. 5,847, 2 Fish. Pat. Cas. 133.

Mere failure to infringe is not acquiescence. Welsbach Light Co. *v.* Benedict, etc., Mfg. Co., 82 Fed. 747; Stahl *v.* Williams, 52 Fed. 648; Guidet *v.* Palmer, 11 Fed. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82.

19. Hill *v.* Thompson, Holt N. P. 636, 3 E. C. L. 249, 3 Meriv. 622, 17 Rev. Rep. 156, 36 Eng. Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 20 Rev. Rep. 488, 4 E. C. L. 190; Davenport *v.* Richard, 3 L. T. Rep. N. S. 503.

20. Consolidated Fastener Co. *v.* American Fastener Co., 94 Fed. 523; Nilsson *v.* Jefferson, 78 Fed. 366; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659; Potter *v.* Muller, 19 Fed. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Sargent *v.* Seagrave, 21 Fed. Cas. No. 12,365, 2 Curt. 553.

For facts held to show acquiescence see McDowell *v.* Kurtz, 77 Fed. 206, 23 C. C. A. 119; Thomson Electric Welding Co. *v.* Two Rivers Mfg. Co., 63 Fed. 120; White *v.* Hunter, 47 Fed. 819.

For facts held not to show acquiescence see Palmer *v.* John E. Brown Mfg. Co., 84 Fed. 454 [*reversed* on other grounds in 92 Fed. 925, 35 C. C. A. 86]; Palmer Pneumatic Tire Co. *v.* Newton Rubber Works Co., 73 Fed. 218; Corbin Cabinet Lock Co. *v.* Yale, etc., Mfg. Co., 58 Fed. 563; Upton *v.* Wayland, 36 Fed. 691; Guidet *v.* Palmer, 11 Fed. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82.

21. **Operation and effect of previous adjudications in general** see *infra*, XIII, E.

22. Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Lambert Snyder Vibrator Co. *v.* Marvel Vibrator Co., 138 Fed. 82; Wilson *v.* Consolidated Stove-Service Co., 88 Fed. 286, 31 C. C. A. 533; Cary Mfg. Co. *v.* De Haven, 58 Fed. 786; Motte *v.* Bennett, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642; Potter *v.* Muller, 19 Fed. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Shelly *v.* Brannan, 21 Fed. Cas. No. 12,751, 2 Biss. 315, 4 Fish. Pat. Cas. 198; Clark *v.* Fergusson, 1 Giffard 184, 5 Jur. N. S. 1155, 65 Eng. Reprint 878; Young *v.* Fernie, 9 L. T. Rep. N. S. 590, 3 New Rep. 270, 12 Wkly. Rep. 221.

23. Miller *v.* McElroy, 2 Pa. L. J. 305; Wise *v.* Grand Ave. R. Co., 33 Fed. 277; Booth *v.* Garelly, 3 Fed. Cas. No. 1,646, 1 Blatchf. 247, Fish. Pat. Rep. 154; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,946, Fish. Pat. Rep. 72, 4 McLean 70; Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*; Cooper *v.* Mattheys, 6 Fed. Cas. No. 3,200, 5 Pa. L. J. 38; Muscan Hair Mfg. Co. *v.* American Hair Mfg. Co., 17 Fed. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320; Ogle *v.* Ege, 18 Fed. Cas. No. 10,462, 1 Robb Pat. Cas. 516, 4 Wash. 584.

24. Cary Mfg. Co. *v.* De Haven, 58 Fed.

prior adjudication in view of acquiescence by the public,[25] and sometimes a preliminary injunction may issue when the validity of the patent is clear, even though it has not been sustained by a prior adjudication or public acquiescence.[26]

(B) *As a Ground For Refusing or Granting Injunctions.* A preliminary injunction will be refused where a prior adjudication was against the patent,[27] or where it has been adjudged by a circuit court of appeals of another circuit, after full consideration and upon substantially the same record that defendant's device does not infringe.[28] Where the patent has been sustained either at law or in equity, such injunction will ordinarily be granted,[29] unless new evidence is pre-

786; Blount *v.* Societe Anonyme, etc., 53 Fed. 98, 9 C. C. A. 526.

25. National Typographic Co. *v.* New York Typograph Co., 46 Fed. 114; White *v.* Surdam, 41 Fed. 790; Buck *v.* Cobb, 4 Fed. Cas. No. 2,079, Brunn. Col. Cas. 550; Foster *v.* Moore, 9 Fed. Cas. No. 4,978, 1 Curt. 279; Goodyear *v.* Central R. Co., 10 Fed. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Grover, etc., Sewing-Mach. Co. *v.* Williams, 11 Fed. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Gutta Percha, etc., Mfg. Co. *v.* Goodyear Rubber Co., 11 Fed. Cas. No. 5,879, 2 Ban. & A. 212, 3 Sawy. 542; Hockholzer *v.* Eager, 12 Fed. Cas. No. 6,556, 2 Sawy. 361; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659; Muscan Hair Mfg. Co. *v.* American Hair Mfg. Co., 17 Fed. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Weston *v.* White, 29 Fed. Cas. No. 17,459, 2 Ban. & A. 364, 13 Blatchf. 447; Dudgeon *v.* Thomson, 3 App. Cas. 34 [*affirming* 30 L. T. Rep. N. S. 244, 22 Wkly. Rep. 464].

26. Wyckoff *v.* Wagner Typewriter Co., 88 Fed. 515; Foster *v.* Crossin, 23 Fed. 400; Gardner *v.* Broadhent, 2 Jur. N. S. 1041, 4 Wkly. Rep. 767; Renard *v.* Levinstein, 10 L. T. Rep. N. S. 94 [*affirmed* in 10 L. T. Rep. N. S. 177]. But see Plympton *v.* Malcolmson, L. R. 20 Eq. 37, 44 L. J. Ch. 257, 23 Wkly. Rep. 404.

27. American Graphophone Co. *v.* National Gramophone Co., 92 Fed. 364, 34 C. C. A. 412; Edison Electric Light Co. *v.* Citizens' Electric Light, etc., Co., 64 Fed. 491; Hicks *v.* Beardsley, 32 Fed. 281; Keyes *v.* Pueblo Smelting, etc., Co., 31 Fed. 560; Concord *v.* Norton, 16 Fed. 477; Onderdonk *v.* Fanning, 18 Fed. Cas. No. 10,510*a*, 5 Ban. & A. 562; Price's Patent Candle Co. *v.* Bauwen's Patent Candle Co., 6 Wkly. Rep. 318.

28. Calculagraph Co. *v.* Automatic Time Stamp Co., 149 Fed. 436.

29. Scott *v.* Laas, 150 Fed. 764, 80 C. C. A. 500; Elite Pottery Co. *v.* Dececo Co., 150 Fed. 581, 80 C. C. A. 567; Timolat *v.* Philadelphia Pneumatic Tool Co., 123 Fed. 899; Westinghouse Electric, etc., Co. *v.* Royal Weaving Co., 115 Fed. 733; Diehl Mfg. Co. *v.* Dayton Fan, etc., Co., 109 Fed. 566; Brill *v.* Peckham Motor Truck Co., 105 Fed. 626; American Sulphite Pulp Co. *v.* Burgess Sulphite Fibre Co., 103 Fed. 975; Consolidated Fastener Co. *v.* Hays, 100 Fed. 984, 41 C. C. A. 142; Welsbach Light Co. *v.* Rex Incandescent Light Co., 94 Fed. 1006; Duff Mfg. Co. *v.* Norton, 92 Fed. 921; New York Filter Mfg. Co. *v.* Loomis-Manning Filter Co., 91 Fed. 421; Allington, etc., Mfg. Co. *v.* Globe Co., 89 Fed. 865; Westinghouse Air-Brake Co. *v.* Great Northern R. Co., 86 Fed. 132; Southern Pac. Co. *v.* Earl, 82 Fed. 690, 27 C. C. A. 185; Adams *v.* Tannage Patent Co., 81 Fed. 178, 26 C. C. A. 326; Carroll *v.* Goldschmidt, 80 Fed. 520; Thomson-Houston Electric Co. *v.* H. W. Johns Mfg. Co., 78 Fed. 364; Thomson-Houston Electric Co. *v.* Union R. Co., 78 Fed. 363; Thomson-Houston Electric Co. *v.* Johnson Co., 78 Fed. 361; Woodard *v.* Ellword Gas Stove, etc., Co., 68 Fed. 717; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929; American Bell Tel. Co. *v.* Cushman, 57 Fed. 842; S. S. White Dental Mfg. Co. *v.* Johnson, 56 Fed. 262; Consolidated Electric Storage Co. *v.* Accumulator Co., 55 Fed. 485, 5 C. C. A. 202; Carter *v.* Wollschlaeger, 53 Fed. 573; Putnam *v.* Keystone Bottle Stopper Co., 38 Fed. 234; Schneider *v.* Missouri Glass Co., 36 Fed. 582; American Bell Tel. Co. *v.* National Improved Tel. Co., 27 Fed. 663; Cary *v.* Domestic Spring-Bed Co., 27 Fed. 299; Cary *v.* Lovell Mfg. Co., 24 Fed. 141; Mallory Mfg. Co. *v.* Hickok, 20 Fed. 116; Coburn *v.* Brainard, 16 Fed. 412, 5 McCrary 215; Coburn *v.* Clark, 15 Fed. 804, 5 McCrary 99; Kirby Bung Mfg. Co. *v.* White, 1 Fed. 604, 1 McCrary 155; Woven-Wire Mattress Co. *v.* Wire-Web Bed Co., 1 Fed. 222; American Middlings Purifier Co. *v.* Christian, 1 Fed. Cas. No. 307, 3 Ban. & A. 42, 4 Dill. 448; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189; American Wood-Paper Co. *v.* Fibre Disintegrating Co., 1 Fed. Cas. No. 320, 6 Blatchf. 27, 3 Fish. Pat. Cas. 362 [*affirmed* in 23 Wall. 566, 23 L. ed. 31]; Clum *v.* Brewer, 5 Fed. Cas. No. 2,909, 2 Curt. 506; Conover *v.* Mers, 6 Fed. Cas. No. 3,123, 3 Fish. Pat. Cas. 386; Cook *v.* Ernest, 6 Fed. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195, 2 Off. Gaz. 89; Gibson *v.* Betts, 10 Fed. Cas. No. 5,390, 1 Blatchf. 163, Fish. Pat. Rep. 91; Goodyear *v.* Berry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Goodyear *v.* Honsinger, 10 Fed. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Green *v.* French, 10 Fed. Cas. No. 5,757, 4 Ban. & A. 169, 16 Off. Gaz. 215 [*following* Gibson *v.* Van Dresar, 10 Fed. Cas. No. 5,402, 1 Blatchf. 532, Fish. Pat. Rep. 369]; Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537; Orr *v.* Badger, 18 Fed. Cas. No. 10,587, Brunn. Col. Cas. 536; Pennsylvania Salt Mfg. Co. *v.* Myers, 19 Fed. Cas. No. 10,955, 1 Wkly.

sented such as would have changed the prior decision.[80] Such prior adjudication, however, unless made by the United States supreme court or the circuit court of

Notes Cas. (Pa.) 377; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,281, 4 Blatchf. 184, 2 Fish. Pat. Cas. 74; Potter *v.* Muller, 19 Fed. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Robertson *v.* Hill, 20 Fed. Cas. No. 11,925, 6 Fish. Pat. Cas. 465, 4 Off. Gaz. 132; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,133, 2 Ban. & A. 351, 10 Off. Gaz. 289; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,134, 2 Ban. & A. 386, 11 Off. Gaz. 330; Sickels *v.* Tileston, 22 Fed. Cas. No. 12,837, 4 Blatchf. 109; Tilghman *v.* Mitchell, 23 Fed. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [*reversed* on other grounds in 19 Wall. 287, 22 L. ed. 125]; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855; Bovill *v.* Goodier, L. R. 2 Eq. 195, 12 Jur. N. S. 404, 35 L. J. Ch. 432; Newall *v.* Wilson, 2 De G. M. & G. 282, 51 Eng. Ch. 220, 42 Eng. Reprint 880.

Although the parties are different, the prior adjudication has great weight. A. B. Dick Co. *v.* Pomeroy Duplicator Co., 117 Fed. 154; American Paper Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229, 2 C. C. A. 165; Burr *v.* Prentiss, 4 Fed. Cas. No. 2,194; Potter *v.* Fuller, 19 Fed. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87.

Where appeal or writ of error pending, adjudication is not binding. Bowers Dredging Co. *v.* New York Dredging Co., 77 Fed. 980; Day *v.* Hartshorn, 7 Fed. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; Bridson *v.* McAlpine, 8 Beav. 229, 50 Eng. Reprint 90.

Where decision is reversed injunction granted on prior adjudication will be dissolved. Brill *v.* Peckham Mfg. Co., 135 Fed. 784, 68 C. C. A. 486; Prieth *v.* Campbell Printing-Press, etc., Co., 80 Fed. 539, 25 C. C. A. 624.

Interlocutory motion.— Ruling even on interlocutory motion may be followed. Maitland *v.* Graham, 96 Fed. 247; Duff Mfg. Co. *v.* Norton, 92 Fed. 921; Horn, etc., Mfg. Co. *v.* Pelzer, 91 Fed. 665, 34 C. C. A. 45.

Decision in interference in patent office is not a controlling adjudication (Reed Mfg. Co. *v.* Smith, etc., Co., 107 Fed. 719, 46 C. C. A. 601; Wilson *v.* Consolidated Store-Service Co., 88 Fed. 286, 31 C. C. A. 533 [*reversing* 83 Fed. 201]; Empire State Nail Co. *v.* American Solid Leather Button Co., 61 Fed. 650; Dickerson *v.* De la Vergne Refrigerating Mach. Co., 35 Fed. 143; Potter *v.* Stevens, 19 Fed. Cas. No. 11,338, 2 Fish. Pat. Cas. 163), but may be sufficient between parties (Consolidated Bunging Apparatus Co. *v.* Peter Schoenhofen Brewing Co., 28 Fed. 428; Celluloid Mfg. Co. *v.* Chrolithian Collar, etc., Co., 24 Fed. 275; Smith *v.* Halkyard, 16 Fed. 414).

Whether judgment on original patent shall be followed on reissue depends on circumstances. American Middlings Purifier Co. *v.* Atlantic Milling Co., 1 Fed. Cas. No. 305, 3 Ban. & A. 168, 4 Dill. 100; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Wells *v.* Jacques, 29 Fed. Cas. No. 17,399, 5 Fish. Pat. Cas. 136.

30. Brill *v.* Peckham Mfg. Co., 129 Fed. 139; George Frost Co. *v.* Crandall Wedge Co., 123 Fed. 104 [*affirmed* in 125 Fed. 942, 60 C. C. A. 180]; Westinghouse Electric, etc., Co. *v.* Royal Weaving Co., 115 Fed. 733; American Sulphite Pulp Co. *v.* Burgess Sulphite Fibre Co., 103 Fed. 975; Welsbach Light Co. *v.* Rex Incandescent Light Co., 94 Fed. 1006; Duff Mfg. Co. *v.* Kalamazoo R. Velocipede, etc., Co., 94 Fed. 154; Tripp Giant Leveler Co. *v.* Bresnahan, 92 Fed. 391; Doig *v.* Morgan Mach. Co., 91 Fed. 1001, 33 C. C. A. 683; New York Filter Mfg. Co. *v.* Jackson, 91 Fed. 422; Doig *v.* Morgan Mach. Co., 89 Fed. 489; Consolidated Car Heating Co. *v.* Gold Car Heating Co., 87 Fed. 996; Mast *v.* Stover Mfg. Co., 85 Fed. 782; Bowers *v.* Pacific Coast Dredging, etc., Co., 81 Fed. 569; Bowers Dredging Co. *v.* New York Dredging Co., 80 Fed. 119; Tannage Patent Co. *v.* Adams, 77 Fed. 191; Earl *v.* Southern Pac. Co., 75 Fed. 609; Tannage Patent Co. *v.* Donallan, 75 Fed. 287; Bresnahan *v.* Tripp Giant Leveler Co., 72 Fed. 920, 19 C. C. A. 237; Allington, etc., Mfg. Co. *v.* Lynch, 71 Fed. 409; Singer Mfg. Co. *v.* New Home Sewing-Mach. Co., 70 Fed. 985; Philadelphia Trust, etc., Co. *v.* Edison Electric Light Co., 65 Fed. 551, 13 C. C. A. 40; Electric Mfg. Co. *v.* Edison Electric Light Co., 61 Fed. 834, 10 C. C. A. 106; Norton *v.* Eagle Automatic Can Co., 61 Fed. 293; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929; Edison Electric Light Co. *v.* Electric Mfg. Co., 57 Fed. 616; Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 796 [*affirmed* in 55 Fed. 485, 5 C. C. A. 202]; National Folding-Box, etc., Co. *v.* American Paper Pail, etc., Co., 48 Fed. 913; Ladd *v.* Cameron, 25 Fed. 37; Bailey Wringing Mach. Co. *v.* Adams, 2 Fed. Cas. No. 752, 3 Ban. & A. 96, 5 Reporter 102; Blaisdell *v.* Dows, 3 Fed. Cas. No. 1,489, 4 Ban. & A. 499; Jones *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz. 401; Parker *v.* Brant, 14 Fed. Cas. No. 10,727, 1 Fish. Pat. Cas. 58.

That injunction may be granted upon prior adjudication notwithstanding new evidence see Armat Moving Picture Co. *v.* Edison Mfg. Co., 121 Fed. 559 [*reversed* on other grounds in 125 Fed. 939, 60 C. C. A. 380]; Consolidated Fastener Co. *v.* Hays, 100 Fed. 984; New York Filter Mfg. Co. *v.* Niagara Falls Waterworks Co., 80 Fed. 924, 26 C. C. A. 252; Campbell Printing-Press Co. *v.* Prieth, 77 Fed. 976; Tannage Patent Co. *v.* Donallan, 75 Fed. 287; Sawyer Spindle Co. *v.* Taylor, 56 Fed. 110; Macbeth *v.* Braddock Glass Co., 54 Fed. 173 [*affirmed* in 64 Fed. 118, 12 C. C. A. 70]; Carter *v.* Wollschlaeger, 53 Fed. 573; Brush Electric Co. *v.* Accumulator Co., 50 Fed. 833; Seibert Cylinder Oil-Cup Co. *v.* Michigan Lubricator

appeals[31] is not controlling upon the judgment of the court but merely persuasive.[32] The prior adjudication will not be followed where the points involved were not fairly in issue and decided,[33] or where there was collusion,[34] and an adjudication without contest is not sufficient upon which to base a preliminary injunction.[35] There is some conflict of authority as to whether an injunction will be granted where there are conflicting prior adjudications.[36]

(c) *Effect on Question of Infringement.* Prior adjudication as to the validity of a patent leaves open the question of infringement.[37]

(v) *Terms and Conditions.* The terms and conditions to be imposed in disposing of a motion for an injunction rest in the sound discretion of the court and depend upon the special circumstances of the case.[38]

Co., 34 Fed. 33; Birdsall *v.* Hagerstown Agricultural Implement Mfg. Co., 3 Fed. Cas. No. 1,433, 1 Ban. & A. 426, 6 Off. Gaz. 604. The new evidence is to be accepted with caution and must be clear and convincing to warrant what is substantially a reversal of a prior adjudication. Consolidated Fastener Co. *v.* Hays, 100 Fed. 984.

31. Adjudication of United States supreme court or circuit court of appeals is conclusive. Westinghouse Air Brake Co. *v.* Christiansen Engineering Co., 113 Fed. 594; American Sulphite Pulp Co. *v.* Burgess Co., 103 Fed. 975; Bowers Dredging Co. *v.* New York Dredging Co., 80 Fed. 119; American Bell Tel. Co. *v.* McKeesport Tel. Co., 57 Fed. 661; American Middlings Purifier Co. *v.* Christian, 1 Fed. Cas. No. 307, 3 Ban. & A. 42, 4 Dill. 448; Richardson *v.* Lockwood, 20 Fed. Cas. No. 11,786, 4 Cliff. 128.

32. Diamond Match Co. *v.* Union Match Co., 129 Fed. 602; Western Electric Co. *v.* Keystone Tel. Co., 115 Fed. 809; Brunswick-Balke-Collender Co. *v.* Koehler, 115 Fed. 648; Welsbach Light Co. *v.* Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 C. C. A. 418; Western Electric Co. *v.* Anthracite Tel. Co., 100 Fed. 301; Horn, etc., Mfg. Co. *v.* Pelzer, 91 Fed. 665, 34 C. C. A. 45; Ross *v.* Chicago, 91 Fed. 265; Stover Mfg. Co. *v.* Mast, 89 Fed. 333, 32 C. C. A. 231; Société Anonyme, etc., *v.* Allen, 84 Fed. 812; Bowers *v.* San Francisco Bridge Co., 69 Fed. 640; Edison Electric Light Co. *v.* Columbia Incandescent Lamp Co., 56 Fed. 496; Stahl *v.* Williams, 52 Fed. 648; Jacobson *v.* Alpi, 46 Fed. 767; Lockwood *v.* Faber, 27 Fed. 63; Cornell *v.* Littlejohn, 6 Fed. Cas. No. 3,238, 2 Ban. & A. 324, 9 Off. Gaz. 837, 922; U. S., etc., Felting Co. *v.* Asbestos Felting Co., 28 Fed. Cas. No. 16,787, 10 Off. Gaz. 828.

33. Southern Pac. R. Co. *v.* Earl, 82 Fed. 690, 27 C. C. A. 185; American Graphaphone Co. *v.* Leeds, 77 Fed. 193; National Hat-Pouncing Mach. Co. *v.* Hedden, 29 Fed. 147; Page *v.* Holmes Burglar Alarm Tel. Co., 2 Fed. 330, 18 Blatchf. 118; Grover *v.* Williams, 11 Fed. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 Pa. L. J. 443; Wells *v.* Gill, 29 Fed. Cas. No. 17,394, 6 Fish. Pat. Cas. 89, 2 Off. Gaz. 590.

34. Western Electric Co. *v.* Anthracite Tel. Co., 113 Fed. 834.

Mere failure to appeal does not show collusion. Doig *v.* Morgan Mach. Co., 89 Fed. 489 [*affirmed* in 91 Fed. 1001, 33 C. C. A. 683].

Where the merits were considered by the court, a collusive decree set aside may still have weight. A. B. Dick Co. *v.* Wichelman, 74 Fed. 799.

35. National Enameling Co. *v.* New England Enameling Co., 123 Fed. 436; American Coat Pad Co. *v.* Phœnix Pad Co., 113 Fed. 629, 51 C. C. A. 339; American Electrical Novelty Co. *v.* Newgold, 99 Fed. 567; Wilson *v.* Consolidated Store-Service Co., 88 Fed. 286, 31 C. C. A. 533; Société Anonyme, etc. *v.* Allen, 84 Fed. 812; Bowers Dredging Co. *v.* New York Dredging Co., 77 Fed. 980; Fenton Metallic Mfg. Co. *v.* Chase, 73 Fed. 831; Covert *v.* Travers, 70 Fed. 788; De Ver Warner *v.* Bassett, 7 Fed. 468, 19 Blatchf. 145; Hayes *v.* Leton, 5 Fed. 521; Mannie *v.* Everett, 16 Fed. Cas. No. 9,039; Orr *v.* Littlefield, 18 Fed. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13 (holding that judgment without contest has weight where there is no collusion); Potter *v.* Fuller, 19 Fed. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Spring *v.* Domestic Sewing-Mach. Co., 22 Fed. Cas. No. 13,258, 4 Ban. & A. 427, 16 Off. Gaz. 721, 2 N. J. L. J. 274.

36. Refused where conflicting prior adjudications. Eldred *v.* Breitwieser, 132 Fed. 251; Wilgus *v.* Van Sickle, 99 Fed. 443; Allen *v.* Sprague, 1 Fed. Cas. No. 238, 1 Blatchf. 567, Fish. Pat. Rep. 388. In case of conflict the decision in the same circuit controls. Pullman's Palace-Car Co. *v.* Wagner Palace-Car Co., 44 Fed. 764. Later decision controls. Pelser *v.* Geise, 87 Fed. 869. In case of conflict the best considered will be followed. Pelzer *v.* Newhall, 93 Fed. 684; Philadelphia Trust, etc., Co. *v.* Edison Electric Light Co., 65 Fed. 551, 13 C. C. A. 40; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855.

37. Westinghouse Electric, etc., Co. *v.* American Transformer Co., 121 Fed. 560 [*affirmed* in 130 Fed. 550]; Whippany Mfg. Co. *v.* United Indurated Fibre Co., 87 Fed. 215, 30 C. C. A. 615 [*reversing* 83 Fed. 485]; Sawyer Spindle Co. *v.* Turner, 55 Fed. 979; Carey *v.* Miller, 34 Fed. 392; Odorless Excavating Co. *v.* Lanman, 12 Fed. 788, 4 Woods 129. But see Duff Mfg. Co. *v.* Norton, 92 Fed. 921.

38. Palmer *v.* Mills, 57 Fed. 221; Westinghouse Air-Brake Co. *v.* Carpenter, 32 Fed. 545; Sessions *v.* Romadka, 21 Fed. 124; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No.

(VI) *INDEMNITY BOND.* In place of an injunction defendant may be required to give bond conditioned for the payment of all damages awarded.[39] Likewise where an injunction is granted the complainant may be required to give bond to indemnify defendant.[40] Whether such bond shall be required of complainant depends upon circumstances.[41]

(VII) *APPLICATION AND PROCEEDINGS THEREON.* Motion for preliminary injunction must be made, supported by the affidavits of the complainant and others to all facts not shown in the bill of complaint necessary to establish his right.[42]

4,431, 4 Fish. Pat. Cas. 64; Hodge v. Hudson River R. Co., 12 Fed. Cas. No. 6,560, 6 Blatchf. 165; Rogers v. Abbot, 20 Fed. Cas. No. 12,004, 1 Robb Pat. Cas. 465, 4 Wash. 514; Serrell v. Collins, 21 Fed. Cas. No. 12,671, 4 Blatchf. 61; Smith v. Sharp's Rifle Mfg. Co., 22 Fed. Cas. No. 13,106, 3 Blatchf. 545; Sykes v. Manhattan Elevator, etc., Co., 23 Fed. Cas. No. 13,710, 6 Blatchf. 496; Tilghman v. Mitchell, 23 Fed. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [*reversed* on other grounds in 19 Wall. 287, 22 L. ed. 125].

Injunction refused but defendant ordered to give security and keep an account see Marvel Co. v. Pearl, 114 Fed. 946; Macbeth v. Lippencott Glass Co., 54 Fed. 167; Eagle Mfg. Co. v. Chamberlain Plow Co., 36 Fed. 905; American Middlings Purifier Co. v. Atlantic Milling Co., 1 Fed. Cas. No. 305, 3 Ban. & A. 168, 4 Dill. 100; Blake v. Greenwood Cemetery, 3 Fed. Cas. No. 1,497, 3 Ban. & A. 112, 14 Blatchf. 342, 13 Off. Gaz. 1046; Blake v. Robertson, 3 Fed. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Stainthorp v. Humiston, 22 Fed. Cas. No. 13,280, 2 Fish. Pat. Cas. 311.

For cases in which modification of the injunction was refused see Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Munson v. New York, 19 Fed. 313.

39. Karfiol v. Rothner, 151 Fed. 777; National Enameling Co. v. New England Enameling Co., 123 Fed. 436; Marvel Co. v. Pearl, 114 Fed. 946; Seiler v. Fuller, etc., Mfg. Co., 102 Fed. 344, 42 C. C. A. 386; National Cash-Register Co. v. Navy Cash-Register Co., 99 Fed. 565; Duplex Printing-Press Co. v. Campbell Printing-Press, etc., Co., 69 Fed. 250, 16 C. C. A. 220; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496; Eastern Paper-Bag Co. v. Nixon, 35 Fed. 752; Hoe v. Knap, 27 Fed. 204; New York Belting, etc., Co. v. Magowan, 23 Fed. 596; Greenwood v. Bracher, 1 Fed. 856; Gilbert, etc., Mfg. Co. v. Bussing, 10 Fed. Cas. No. 5,416, 1 Ban. & A. 621, 12 Blatchf. 426, 8 Off. Gaz. 144; Goodyear v. Hills, 10 Fed. Cas. No. 5,571*a*, 3 Fish. Pat. Cas. 134; Howe v. Morton, 12 Fed. Cas. No. 6,769, Fish. Pat. Rep. 586; Irwin v. McRoberts, 13 Fed. Cas. No. 7,085, 4 Ban. & A. 411, 16 Off. Gaz. 853; Morris v. Shelbourne, 17 Fed. Cas. No. 9,836, 8 Blatchf. 266, 4 Fish. Pat. Cas. 377.

Computation of amount of bond.— In fixing the amount of a bond required of defendant in a suit for infringement of patents as a condition to the refusing of a preliminary injunction, the amount of the profits made by him from the alleged infringement affords the only approximate basis for computation. Karfiol v. Rothner, 151 Fed. 779.

Security required only where showing is such as would justify injunction see American Middlings Purifier Co. v. Atlantic Milling Co., 1 Fed. Cas. No. 305, 3 Ban. & A. 168, 4 Dill. 100.

Where doubt, bond required in place of injunction.— Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 106 Fed. 175.

Bond not accepted in a clear case in place of injunction see Electric Storage Battery Co. v. Buffalo Electric Carriage Co., 117 Fed. 314; Campbell Printing-Press Co. v. Prieth, 77 Fed. 976; Carter v. Wollschlaeger, 53 Fed. 573; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 545; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Conover v. Mers, 6 Fed. Cas. No. 3,123, 3 Fish. Pat. Cas. 386; Ely v. Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Morse v. O'Reilly, 17 Fed. Cas. No. 9,859; Tracy v. Torrey, 24 Fed. Cas. No. 14,127, 2 Blatchf. 275. But see Westinghouse Air-Brake Co. v. Burton Stock-Car Co., 77 Fed. 301, 23 C. C. A. 174, holding that bond may be accepted in place of injunction even in a clear case where great injury to defendant.

40. Consolidated Electric Storage Co. v. Accumulator Co., 55 Fed. 485, 5 C. C. A. 202 [*affirming* 53 Fed. 796]; Shelly v. Brannan, 21 Fed. Cas. No. 12,751, 2 Biss. 315, 4 Fish. Pat. Cas. 198.

Complainant is liable for injury due to injunction where final judgment against him. National Phonograph Co. v. American Graphophone Co., 136 Fed. 231; Tobey Furniture Co. v. Colby, 35 Fed. 592.

41. Pasteur Chamberland Filter Co. v. Funk, 52 Fed. 146; Van Hook v. Wood, 28 Fed. Cas. No. 16,855.

42. Palmer Pneumatic Tire Co. v. Newton Rubber Works, 73 Fed. 218; American Diamond Rock Boring Co. v. Sullivan Mach. Co., 1 Fed. Cas. No. 298, 2 Ban. & A. 552, 14 Blatchf. 119; Beane v. Orr, 2 Fed. Cas. No. 1,176, 2 Ban. & A. 176, 9 Off. Gaz. 255; Gutta Percha, etc., Mfg. Co. v. Goodyear Rubber Co., 11 Fed. Cas. No. 5,879, 2 Ban. & A. 212, 3 Sawy. 542; Stevens v. Felt, 23 Fed. Cas. No. 13,397; Sullivan v. Redfield, 23 Fed. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Young v. Lippman, 30 Fed. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230, 2 Off. Gaz. 249, 342.

Production of documents.— Documents referred to should be produced. Siemens-Lungren Co. v. Hatch, 47 Fed. 64; National Typographic Co. v. New York Typograph Co., 46 Fed. 114.

Defendant may file counter affidavits,[43] and in some jurisdictions the complainant may file rebutting affidavits.[44]

(VIII) *CONSIDERATION AND JUDGMENT ON MOTION.* On motion for preliminary injunction the court will not undertake to determine disputed and difficult questions of law or fact,[45] nor pass upon the credibility of witnesses.[46] It will, however, consider all pertinent facts which are clearly shown,[47] and will make such order as the equities of the case demand.[48]

(IX) *MODIFYING OR DISSOLVING.* The dissolution or modification of an injunction is a matter resting in the sound discretion of the court.[49]

Affidavit of third parties see Lombard *v.* Stillwell, 15 Fed. Cas. No. 8,472.

The court may take judicial notice of matters of common knowledge see Adams, etc., Mfg. Co. *v.* St. Louis Wire-Goods Co., 1 Fed. Cas. No. 72, 3 Ban. & A. 77, 12 Off. Gaz. 940.

English practice application must make out a case and include the allegation that the complainant believes himself to be the first inventor. Whitton *v.* Jennings, 1 Dr. & Sm. 110, 6 Jur. N. S. 164, 1 L. T. Rep. N. S. 395, 62 Eng. Reprint 320; Hill *v.* Thompson, Holt N. P. 636, 3 E. C. L. 249, 3 Meriv. 622, 17 Rev. Rep. 156, 36 Eng. Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 20 Rev. Rep. 488, 4 E. C. L. 190; Mayer *v.* Spence, 1 Johns. & H. 87, 6 Jur. N. S. 672, 8 Wkly. Rep. 559, 70 Eng. Reprint 673; Gardner *v.* Broadbent, 2 Jur. N. S. 1041, 4 Wkly. Rep. 767; Sturz *v.* De la Rue, 7 L. J. Ch. O. S. 47, 5 Russ. 322, 29 Rev. Rep. 24, 5 Eng. Ch. 322, 38 Eng. Reprint 1048.

43. Brill *v.* Peckham Motor Truck, etc., Co., 189 U. S. 57, 23 S. Ct. 562, 47 L. ed. 706; Robinson *v.* Randolph, 20 Fed. Cas. No. 11,962, 4 Ban. & A. 163; Wickershaff *v.* Jones, 29 Fed. Cas. No. 17,609; Young *v.* Lippman, 30 Fed. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230, 2 Off. Gaz. 249, 342.

Answer as an affidavit on motion see Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

Answer insufficient as disclaimer of intent to use or sell machines embodying features of the patent see Deere, etc., Co. *v.* Dowagiac Mfg. Co., 153 Fed. 177, 82 C. C. A. 351.

Admissions by answer see Deere, etc., Co. *v.* Dowagiac Mfg. Co., 153 Fed. 177, 82 C. C. A. 351.

Estoppel by averments in answer see Morse Fountain-Pen Co. *v.* Esterbrook Steel-Pen Mfg. Co., 17 Fed. Cas. No. 9,862, 3 Fish. Pat. Cas. 515.

44. Brill *v.* Peckham Motor Truck, etc., Co., 189 U. S. 57, 23 S. Ct. 562, 47 L. ed. 706; Norton *v.* Eagle Automatic Can Co., 57 Fed. 929; Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Union Paper-Bag Mach. Co. *v.* Binney, 24 Fed. Cas. No. 14,387, 5 Fish. Pat. Cas. 166; Gibbs *v.* Cole, Dick. 64, 21 Eng. Reprint 192, 3 P. Wms. 255, 24 Eng. Reprint 1051.

45. Seal *v.* Beach, 113 Fed. 831; Consolidated Fastener Co. *v.* Columbian Fastener Co., 73 Fed. 828; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189; Bailey Wringing Mach. Co. *v.* Adams, 2 Fed. Cas. No. 752, 3 Ban. & A. 96, 5 Reporter 102; Crowell *v.* Harlow, 6 Fed. Cas. No. 3,444, 3 Ban. & A. 478, 18 Off. Gaz. 466; Parker *v.* Sears, 18 Fed. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Sickels *v.* Youngs, 22 Fed. Cas. No. 12,838, 3 Blatchf. 293.

Evidence insufficient to warrant granting of injunction see Mathews Gravity Carrier Co. *v.* Lister, 154 Fed. 490; Marconi Wireless Tel Co. *v.* American De Forest Wireless Tel. Co., 154 Fed. 74; Hall Signal Co. *v.* General R. Signal Co., 153 Fed. 907, 82 C. C. A. 653.

46. Sessions *v.* Gould, 48 Fed. 855 [*affirmed* in 63 Fed. 1001, 11 C. C. A. 546]; Cooper *v.* Mattheys, 6 Fed. Cas. No. 3,200, 5 Pa. L. J. 38.

47. Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 117 Fed. 309; Irwin *v.* Dane, 13 Fed. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Morse Fountain-Pen Co. *v.* Esterbrook Steel-Pen Mfg. Co., 17 Fed. Cas. No. 9,862, 3 Fish. Pat. Cas. 515; Sickels *v.* Youngs, 22 Fed. Cas. No. 12,838, 3 Blatchf. 293; Union Paper-Bag Mach. Co. *v.* Binney, 24 Fed. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

Verbal admissions by defendant see Joncs *v.* Merrill, 13 Fed. Cas. No. 7,481, 8 Off. Gaz. 401; Morse Fountain-Pen Co. *v.* Esterbrook Steel-Pen Mfg. Co., 17 Fed. Cas. No. 9,862, 3 Fish. Pat. Cas. 515.

Where case depends on written instruments court decides. Clum *v.* Brewer, 5 Fed. Cas. No. 2,909, 2 Curt. 506.

Patent not in record not considered see Drainage Constr. Co. *v.* Englewood Sewer Co., 67 Fed. 141.

Parties cannot so frame issues as to prevent decision as to patentability or as to scope of claims. Millard *v.* Chase, 108 Fed. 399, 47 C. C. A. 429.

48. Antisdel *v.* Chicago Hotel Cabinet Co., 89 Fed. 308, 32 C. C. A. 216; American Middlings Purifier Co. *v.* Vail, 1 Fed. Cas. No. 308, 4 Ban. & A. 1, 15 Blatchf. 315; Atlantic Giant-Powder Co. *v.* Goodyear, 2 Fed. Cas. No. 623, 3 Ban. & A. 161, 13 Off. Gaz. 45; Burr *v.* Smith, 4 Fed. Cas. No. 2,196; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,760, 2 Blatchf. 78, Fish. Pat. Rep. 180; Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 603, 3 Woodb. & M. 524.

49. Barnard *v.* Gibson, 7 How. (U. S.) 650, 12 L. ed. 857; Brown *v.* Deere, 6 Fed. 487, 2

c. Permanent Injunction. The right to a permanent injunction ordinarily exists where judgment is in favor of the complainant,[50] but there may be special circumstances which will prevent its issuance.[51]

d. Violation and Punishment — (1) *Writ or Mandate Violated.* The writ of injunction cannot be the foundation for an attachment for contempt against

McCrary 425; Orr *v.* Badger, 18 Fed. Cas. No. 10,587, Brunn. Col. Cas. 536; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135.

That injunction will not be dissolved on coming in of answer merely denying equity of the bill see Orr *v.* Littlefield, 18 Fed. Cas. No. 10,590, 2 Robb Pat. Cas. No. 323, 1 Woodb. & M. 13; Orr *v.* Merrill, 18 Fed. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376.

Must overcome equity and evidence see Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. Rep. 110; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135.

Motion to dissolve heard upon the same evidence or that which should have been produced see National School Furniture Co. *v.* Paton, 18 Fed. Cas. No. 10,050, 4 Ban. & A. 432, 16 Blatchf. 563; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135.

Evidence taken too late on the merits cannot be presented on motion to dissolve. Union Paper-Bag Mach. Co. *v.* Newell, 24 Fed. Cas. No. 14,389, 1 Ban. & A. 113, 11 Blatchf. 549, 5 Off. Gaz. 459.

Cases in which motion to dissolve denied see Holmes Electric Protective Co. *v.* Metropolitan Burglar Alarm Co., 31 Fed. 562; Bassett *v.* Malone, 11 Fed. 801; Richardson *v.* Croft, 11 Fed. 800; Perry *v.* Littlefield, 2 Fed. 464; Consolidated Fruit-Jar Co. *v.* Whitney, 6 Fed. Cas. No. 3,132, 1 Ban. & A. 356, 10 Phila. (Pa.) 268; Hussey *v.* Whitely, 12 Fed. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Potter *v.* Mack, 19 Fed. Cas. No. 11,331, 3 Fish. Pat. Cas. 428; Thompson *v.* Barry, 23 Fed. Cas. No. 13,942, 2 Wkly. Notes Cas. (Pa.) 100; Woodworth *v.* Hall, 30 Fed. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135.

Cases in which motion to dissolve granted see Cary *v.* Domestic Spring-Bed Co., 26 Fed. 38; Goodyear *v.* Bourn, 10 Fed. Cas. No. 5,561, 3 Blatchf. 266; Wilson *v.* Barnum, 30 Fed. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb Pat. Cas. 749, 1 Wall. Jr. 347; Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

50. Horton *v.* New York Cent., etc., R. Co., 63 Fed. 897; Roemer *v.* Neumann, 26 Fed. 332; Avery *v.* Wilson, 20 Fed. 856; Potter *v.* Mack, 19 Fed. Cas. No. 11,331, 3 Fish. Pat. Cas. 428; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,134, 2 Ban. & A. 386, 11 Off. Gaz. 330; Nunn *v.* D'Albuquerque, 34 Beav. 595, 55 Eng. Reprint 765.

Although damages granted were only nominal, injunction may be granted. Du Bois *v.* Kirk, 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895 [*affirming* 33 Fed. 252].

Not refused because defendant solvent see Bement *v.* National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; General Electric Co. *v.* Wise, 119 Fed. 922.

Not refused because defendant quits infringing see Western Electric Co. *v.* Capital Tel., etc., Co., 86 Fed. 769; Matthews, etc., Mfg. Co. *v.* National Brass, etc., Works, 71 Fed. 518; White *v.* Walbridge, 46 Fed. 526; Kane *v.* Huggins Cracker, etc., Co., 44 Fed. 287; Facer *v.* Midvale Steel-Works, 38 Fed. 231; Bullock Printing-Press Co. *v.* Jones, 4 Fed. Cas. No. 2,132, 3 Ban. & A. 195, 13 Off. Gaz. 124.

Granted although great damage to defendant see Edison Electric Light Co. *v.* United Electric Light, etc., Co., 58 Fed. 572, 7 C. C. A. 375 [*affirming* 57 Fed. 642].

Granted although patent about to expire see American Bell Tel. Co. *v.* Western Tel. Constr. Co., 58 Fed. 410; American Bell Tel. Co. *v.* Brown, Tel., etc., Co., 58 Fed. 409.

Granted without verdict of jury see Buchanan *v.* Howland, 4 Fed. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Goodyear *v.* Day, 10 Fed. Cas. No. 5,569, 2 Wall. Jr. 283.

Against whom operative. — Permanent injunction goes against all connected with the infringement. National Mechanical Directory Co. *v.* Polk, 121 Fed. 742, 58 C. C. A. 24.

That permanent injunction means for the life of the patent see De Florez *v.* Raynolds, 8 Fed. 434, 17 Blatchf. 436.

Goods made before expiration of patent. — Injunction continues after expiration of patent as to goods made before. American Diamond Rock-Boring Co. *v.* Rutland Marble Co., 2 Fed. 356, 18 Blatchf. 146. *Contra*, Westinghouse *v.* Carpenter, 43 Fed. 894.

Cases in which injunction granted see National Folding-Box, etc., Co. *v.* Elsas, 65 Fed. 1001; American Bell Tel. Co. *v.* Globe Tel. Co., 31 Fed. 729, 24 Blatchf. 522; Odell *v.* Stout, 22 Fed. 159; Weeks *v.* Buffalo Scale Co., 11 Fed. 901; Merriam *v.* Smith, 11 Fed. 588; Pentlarge *v.* Beesten, 1 Fed. 862, 18 Blatchf. 38; Potter *v.* Whitney, 19 Fed. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87.

51. Marden *v.* Campbell Printing-Press, etc., Co., 79 Fed. 653, 25 C. C. A. 142; Many *v.* Sizer, 16 Fed. Cas. No. 9,057, 1 Fish. Pat. Cas. 31.

Permanent injunction refused where not necessary and allowance injurious to public. — Campbell Printing-Press, etc., Co. *v.* Manhattan R. Co., 49 Fed. 930; Ballard *v.* Pittsburg, 12 Fed. 783; Bliss *v.* Brooklyn, 3

any person, except perhaps a defendant served with the bill of complaint, where it refers merely to the bill for a description of the thing enjoined.[52]

(II) *Knowledge or Notice.* According to the modern practice, actual service of an order of injunction upon the person sought to be restrained from infringing a patent is not requisite to lay the foundation of a proceeding against him for contempt,[53] actual notice of such order of injunction being deemed sufficient.[54]

(III) *Who Liable.* Defendants as individuals are in contempt if they organize a company and continue infringement,[55] and it is the duty of a defendant enjoined from making or selling a patented article to take such steps as will prevent violation of the injunction by employees, and a fine will be imposed for contempt where the injunction is violated by employees.[56] One who knowingly assists another in violating an injunction is guilty of contempt.[57] An officer of defendant corporation who continues infringement individually after injunction is guilty of contempt.[58] A person pending suit is not bound to obey an injunction not directed to him.[59]

(IV) *Acts or Conduct Constituting Violation.* Although the command of an injunction against the infringement of a patent must be explicitly obeyed, yet it is the spirit and not the letter of the injunction which must be obeyed;[60] hence, no subterfuge amounting to a substantial violation of the injunction will be allowed to succeed merely because not contrary to the letter of the prohibitory clause.[61] Advertising for sale articles which have been adjudged infringements

Fed. Cas. No. 1,544, 8 Blatchf. 533, 4 Fish. Pat. Cas. 596.

52. Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190.

53. Christensen Engineering Co. *v.* Westinghouse Air-Brake Co., 135 Fed. 774, 68 C. C. A. 476.

54. Christensen Engineering Co. *v.* Westinghouse Air-Brake Co., 135 Fed. 774, 68 C. C. A. 476. See also Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 736 [*affirmed* in 129 Fed. 1005, 64 C. C. A. 122].

Injunction ordered but not issued.— The rule is that where an injunction against the infringement of a patent has been ordered, a party who, having knowledge of that order, deliberately violates the injunction ordered, although not yet issued, is guilty of contempt of court. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 736 [*affirmed* in 129 Fed. 1005, 64 C. C. A. 122], holding, however, that, in order to convict a person of contempt under such circumstances, it must be shown clearly that he had knowledge of the order of the injunction in such a way that it can be held that he understood it, and with that knowledge committed wilful violation of the order.

55. Diamond Drill, etc., Co. *v.* Kelley, 130 Fed. 893; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 123.

56. Westinghouse Air Brake Co. *v.* Christensen Engineering Co., 121 Fed. 562; Mundy *v.* Lidgerwood Mfg. Co. 34 Fed. 541; Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 3 Ban. & A. 150, 2 Flipp. 92, 16 Off. Gaz. 627; Potter *v.* Muller, 19 Fed. Cas. No. 11,333, 1 Bond 601, 2 Fish. Pat. Cas. 631.

57. Hamilton *v.* Diamond Drill, etc., Co., 137 Fed. 417, 69 C. C. A. 532; Diamond Drill, etc., Co. *v.* Kelley, 132 Fed. 978, 130 Fed. 893; Welshach Light Co. *v.* Daylight Incandescent Gaslight Co., 97 Fed. 950; Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,577, 5 Blatchf. 429, 3 Fish. Pat. Cas. 209.

Illustrations.— One who with knowledge of an injunction enjoining certain persons from infringement takes over their business and continues it in collusion with them is guilty of contempt. Hamilton *v.* Diamond Drill, etc., Co., 137 Fed. 417, 69 C. C. A. 532; Diamond Drill, etc., Co. *v.* Kelley, 132 Fed. 978, 130 Fed. 893. Assisting another infringer in a suit contesting the validity of the patent is contempt. Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683.

58. Janney *v.* Pancoast International Ventilator Co., 124 Fed. 972; Stahl *v.* Ertel, 62 Fed. 920; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,463, 1 Ban. & A. 105, 5 Off. Gaz. 460.

A person acting only officially is not liable. Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 3 Ban. & A. 150, 2 Flipp. 92, 16 Off. Gaz. 627.

59. Bate Refrigerating Co. *v.* Gillett, 30 Fed. 685.

60. Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683.

61. Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683; Burr *v.* Kimbark, 29 Fed. 428; Colgate *v.* Gold, etc., Tel. Co., 6 Fed. Cas. No. 2,992, 4 Ban. & A. 559, 17 Off. Gaz. 193; Craig *v.* Fisher, 6 Fed. Cas. No. 3,332, 2 Sawy. 345; Hamilton *v.* Simons, 11 Fed. Cas. No. 5,991, 5 Biss. 77; Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 3 Ban. & A. 150, 2 Flipp. 92, 16 Off. Gaz. 627; Potter *v.* Muller, 19 Fed. Cas. No. 11,333, 1 Bond 601, 2 Fish. Pat. Cas. 631. And see Victor Talking Mach. Co. *v.* Leeds, etc., Co., 150 Fed. 147.

Illustrations.— Where the principle involved in a patent is the point in issue in a suit to restrain its infringement, defendant

of complainant's patent, and the sale of which has been enjoined, does not in itself constitute a breach of the injunction;[62] but advertising the articles enjoined, in defiance of the precise terms of the injunction, is strong evidence of the violation of the injunction, and requires positive proof on the part of defendant to the contrary.[63] An injunction against the sale of an infringing article is violated by the sale of such article outside of the territorial jurisdiction of the court granting the injunction, whether the article was sent within such jurisdiction or not.[64]

(v) *Defenses.* The fact that the writ was erroneously granted furnishes no excuse for its violation,[65] the remedy in such case being by appeal or writ of error.[66] Temptation due to financial straits is no excuse for violation of an injunction,[67] nor is the advice of counsel,[68] nor good faith or absence of intention to infringe,[69] nor a misnomer in the injunction.[70] So the fact that the infringing machine is made according to a junior patent is no excuse.[71] That the injunction was granted upon a patent which has since been materially altered by disclaimer constitutes a defense to the proceeding.[72] And an injunction against the infringement of a patent for an invention consisting of the combination of known appliances is not violated by using the combination after the expiration of the patent.[73]

(vi) *Proceedings to Punish*—(a) *Notice.* Generally the rule obtains that, before a party who has violated an injunction against infringing a patent can be punished for contempt, it must appear that he has been served with notice of the proceedings therefor.[74]

commits a breach of a preliminary injunction and is punishable for contempt where, for the purpose of evading the injunction, he continues to manufacture articles involving the same principle, with but slight modifications of structure. Burr *v.* Kimbark, 29 Fed. 428. Where a party who has been enjoined from infringing a patent by manufacturing or selling the infringing article continues to sell as the agent of another, he is guilty of contempt, and is liable to attachment. Potter *v.* Muller, 19 Fed. Cas. No. 11,333, 1 Bond 601, 2 Fish. Pat. Cas. 631.

62. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 736. See also Allis *v.* Stowell, 19 Off. Gaz. 727.

63. Stahl *v.* Ertel, 62 Fed. 920.

64. Macauley *v.* White Sewing Mach. Co., 9 Fed. 698.

Sending infringing article to foreign country or selling it there.—A sale in Canada, to be there used, of articles patented by letters patent of the United States, Canada being a territory in which the patentee had no exclusive right, cannot be regarded as in contempt of an injunction not in future to make or sell in violation of the patent. Gould *v.* Sessions, 67 Fed. 163, 14 C. C. A. 366. And the making and selling of a single element of a patented combination, with the purpose and expectation that such element should be sent to a foreign country, and be there used in combination with other elements, or in the practice of a method covered by the patent, is not contributory infringement, inasmuch as there was no intent that the elements should be put to an infringing use, the protection of the patent not extending beyond the limits of the United States. Bullock Electric, etc., Co. *v.* Westinghouse, etc., Co., 129 Fed. 105, 63 C. C. A. 607.

65. Roener *v.* Newman, 19 Fed. 98; Craig *v.* Fisher, 6 Fed. Cas. No. 3,332, 2 Sawy. 345; Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 3 Ban. & A. 150, 2 Flipp. 92, 16 Off. Gaz. 627; Valentine *v.* Reynolds, 28 Fed. Cas. No. 16,813; Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190.

66. Craig *v.* Fisher, 6 Fed. Cas. No. 3,332, 2 Sawy. 345.

67. A. B. Dick Co. *v.* Henry, 88 Fed. 80.

68. Calculagraph Co. *v.* Wilson, 136 Fed. 196; Paxton *v.* Brinton, 126 Fed. 542; Bowers *v.* Pacific Coast Dredging, etc., Co., 99 Fed. 745; Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683; Burr *v.* Kimbark, 29 Fed. 428. *Contra*, Goss Printing Press Co. *v.* Scott, 134 Fed. 880; Hamilton *v.* Simons, 11 Fed. Cas. No. 5,991, 5 Biss. 77.

Judgment of court.—Defendant should get the judgment of the court whether changes made avoid infringement. Bowers *v.* Pacific Coast Dredging, etc., Co., 99 Fed. 745; Hamilton *v.* Simons, 11 Fed. Cas. No. 5,991, 5 Biss. 77.

69. Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683. And see Robinson *v.* S. & B. Lederer Co., 146 Fed. 993.

Trivial violation.—One will not be punished for the violation of an injunction restraining the use of articles infringing a patent when he has made an honest effort to remove the offending articles from the premises where they were used, although, by oversight, a few articles remain. Edison Electric Light Co. *v.* Goelet, 65 Fed. 612.

70. Dickerson *v.* Armstrong, 94 Fed. 864.

71. Norton *v.* Eagle Automatic Can Co., 59 Fed. 137. And see Valentine *v.* Reynolds, 28 Fed. Cas. No. 16,813.

72. Dudgeon *v.* Thomson, 3 App. Cas. 34.

73. Johnson *v.* Brooklyn, etc., R. Co., 37 Fed. 147, 2 L. R. A. 489.

74. Christensen Engineering Co. *v.* Westinghouse Air-Brake Co., 135 Fed. 774, 68

(B) *Evidence.* The rules of evidence governing in proceedings to punish the violation of injunctions in general apply to proceedings to punish the violation of injunctions in patent cases.[75]

(C) *Hearing and Determination.* On the hearing of the motion the question as to whether the machine constructed is the same as the old one enjoined is one of fact to be determined on the evidence.[76] Where a court issues an injunction to prevent the infringement of a patent solely upon the authority of a decision in another circuit, in a suit between the same parties, it will, on the hearing of a motion for an attachment for contempt in violating the injunction, follow the construction which was placed upon the patent in such other circuit.[77] If the violation of an injunction against the infringing of a patent, either as to its character or the fact of its commission, is doubtful upon the proofs, the court will remit the party to his right to file a supplemental bill in the original suit,[78] or to institute a new and plenary action.[79] However, where the violation of an injunction is wilful, the summary method of correction is imperative, and will not be arrested by the fact that the proofs of violation are conflicting, or that the things used by defendant are in some respects different from those interdicted.[80] A

C. C. A. 476, holding, however, that where notice of the commencement of contempt proceedings was properly given to defendant's attorney, and, under order of court, notice of the application for attachment and a copy of the affidavits to be issued thereon, were sent to defendant by registered mail and returned marked "Refused," defendant not having controverted the charge of contempt, an objection that the notice of the proceeding was not properly served is not well taken.

75. See INJUNCTIONS, 22 Cyc. 1023.

Presumptions.— Machines designated by the same name and made by the same company as the machines containing infringing devices, the manufacture and sale of which were enjoined, will be presumed to be the same, in the absence of any denial, in proceedings to punish a violation of the injunction. Stahl *v.* Ertel, 62 Fed. 920. Defendant, four months before the service of an injunction on him, executed a bond to plaintiff, acknowledging the validity of his patent and his right to all that was granted by it. It was held that the bond was no evidence of a breach of the injunction further than the recital that defendant had infringed the patent might have a tendency to establish such breach, and that the inference of presumption arising from it might be overcome by credible and positive testimony, proving no infringement. Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666.

Burden of proof.— The burden of proof establishing the violation of the injunction rests with complainant. Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793.

Admissibility.— On a motion for attachment for contempt for violating an injunction issued to restrain the infringement of a patent, after a construction has been given to a patent by the court, no testimony is admissible to vary such construction. Burdett *v.* Estey, 4 Fed. Cas. No. 2,146, 4 Ban. & A. 141, 16 Blatchf. 105. Affidavits to show that the patentee was not the first and original inventor of the thing patented are immaterial and irrelevant. Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190. It is a matter of discretion whether the court will receive expert testimony on the question of infringement, or will examine the alleged infringing articles for itself. Burdett *v.* Estey, *supra*.

Weight and sufficiency.— The evidence of a breach of an injunction must be clear to authorize punishment therefor. Woodruff *v.* North Bloomfield Gravel Min. Co., 45 Fed. 129; Smith *v.* Halkyard, 19 Fed. 602; Birdsell *v.* Hagerstown Agricultural Implement Mfg. Co., 3 Fed. Cas. No. 1,436, 2 Ban. & A. 519, 1 Hughes 59, 11 Off. Gaz. 420.

76. Birdsell *v.* Hagerstown Agricultural Implement Mfg. Co., 3 Fed. Cas. No. 1,436, 2 Ban. & A. 519, 1 Hughes 59, 11 Off. Gaz. 420.

77. Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793.

78. Enterprise Mfg. Co. *v.* Sargent, 48 Fed. 453; Allis *v.* Stowell, 15 Fed. 242.

79. U. S. Playing-Card Co. *v.* Spalding, 93 Fed. 822; Enterprise Mfg. Co. *v.* Sargent, 48 Fed. 453; Truax *v.* Detweiler, 46 Fed. 117; Pennsylvania Diamond-Drill Co. *v.* Simpson, 39 Fed. 284; Temple Pump Co. *v.* Goss Pump, etc., Co., 31 Fed. 292; Wirt *v.* Brown, 30 Fed. 187; Allis *v.* Stowell, 15 Fed. 242; Bate Refrigerating Co. *v.* Eastman, 11 Fed. 902; Putnam *v.* Hollender, 11 Fed. 75; Liddle *v.* Cory, 15 Fed. Cas. No. 8,338, 7 Blatchf. 1. A consent decree against defendant for damages and a perpetual injunction is not such a general decree in favor of complainant as will allow him to obtain an attachment for violation of the injunction upon motion, but if he desires to enjoin the alleged infringement it must be done by a bill in the usual way. Howard *v.* Mast, etc., Co., 33 Fed. 867; Highby *v.* Columbia Rubber Co., 18 Fed. 601.

80. Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,463, 1 Ban. & A. 105, 5 Off. Gaz. 460.

motion for an attachment may be denied without prejudice to the rights of the same question of infringement on the accounting under the interlocutory decree.[81]

(VII) *PUNISHMENT*—(A) *Matters Considered in Mitigation.* The fact that the injunction was erroneously issued may be considered in mitigation of punishment,[82] as may the fact that the acts in violation were without intention to disobey the injunction.[83]

(B) *Amount of Fine.* The amount of the fine assessed for the violation of the injunction is within the sound discretion of the court.[84] As contempt in the violation of injunctions in a patent case is a criminal offense, the fine should bear a just proportion to the magnitude of the offense, and ought not in general to exceed such amount as would ordinarily be imposed as a fine when paid over to the government.[85] A light fine will be imposed where the violation was probably unintentional.[86]

(C) *Distribution of Fine.* The court may direct payment to the complainant of a part or all of the fine imposed, as a compensation for his time and outlay in prosecuting the application;[87] but the court will not compensate complainant for any profits or damages resulting from the infringement involved in the violation of the injunction.[88]

(VIII) *COSTS.* Where the injunction has been violated, and defendant is protected from the consequences only by a defect in the service of the writ, no costs will be allowed to him on denial of a motion for an attachment for such violation.[89]

12. DAMAGES AND PROFITS[90]—a. Damages in Actions at Law—(I) *RIGHT TO RECOVER AND FORM OF ACTION.* Damages for the infringement of a patent may be recovered by an action at law,[91] the proper action being trespass on the case.[92]

(II) *AMOUNT RECOVERABLE*—(A) *In General.* Plaintiff is entitled to a verdict only for the actual damages sustained by him because of and during the time of the infringement for which the suit was brought,[93] and not to exemplary

81. Burdett *v.* Estey, 4 Fed. Cas. No. 2,146, 4 Ban. & A. 141, 16 Blatchf. 105.

82. Westinghouse Air-Brake Co. *v.* Christensen Engineering Co., 128 Fed. 749.

83. *In re* De Forest Wireless Tel. Co., 154 Fed. 81; Norton *v.* Eagle Automatic Can Co., 59 Fed. 137; Morss *v.* Domestic Sewing-Mach. Co., 38 Fed. 482; Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 615; Carstaedt *v.* U. S. Corset Co., 5 Fed. Cas. No. 2,468, 2 Ban. & A. 331, 13 Blatchf. 371, 10 Off. Gaz. 3; Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 3 Ban. & A. 150, 2 Flipp. 92, 16 Off. Gaz. 627. See also Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,577, 5 Blatchf. 429, 3 Fish. Pat. Cas. 209.

84. Morss *v.* Domestic Sewing-Mach. Co., 38 Fed. 482; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 615; Carstaedt *v.* U. S. Corset Co., 5 Fed. Cas. No. 2,468, 2 Ban. & A. 331, 13 Blatchf. 371, 10 Off. Gaz. 3.

85. Searls *v.* Worden, 13 Fed. 716.

86. Frank *v.* Bernard, 146 Fed. 137.

87. Christensen Engineering Co. *v.* Westinghouse Air-Brake Co., 135 Fed. 774, 68 C. C. A. 476; Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 108 Fed. 873, 48 C. C. A. 118; Macaulay *v.* White Sewing Mach. Co., 9 Fed. 698.

88. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 735, 61 C. C. A. 57 [*affirmed* in 129 Fed. 1005, 64 C. C. A. 122]; Macaulay *v.* White Sewing Mach. Co., 9 Fed. 698. But see Searls *v.* Worden, 13 Fed. 716.

89. Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190.

90. Damages generally see DAMAGES.

91. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394]; Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; Harper, etc., Co. *v.* Wilgus, 56 Fed. 587, 6 C. C. A. 45; Bragg *v.* Stockton, 27 Fed. 509; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662].

92. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394]; Byam *v.* Bullard, 4 Fed. Cas. No. 2,262, 1 Curt. 100; Stein *v.* Goddard, 22 Fed. Cas. No. 13,353, McAllister 82.

93. Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; Lee *v.* Pillsbury, 49 Fed. 747; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [*affirmed* in 3 Wall. 315, 18 L. ed. 76]; Ransom *v.* New York, 20 Fed. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Smith *v.* Higgins, 22 Fed. Cas. No. 13,057.

No damages for use before patent are al-

damages.[94] Damages are to be measured by the actual loss to plaintiff,[95] which must be shown.[96] It may be shown by any means which will best establish the loss.[97]

lowable. Brodie *v.* Ophir Silver Min. Co., 4 Fed. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 808.

On reissue no damages before date of reissue are allowable. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177.

Damages limited to direct effect and the use of the particular invention patented see Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512.

94. Buck *v.* Hermance, 4 Fed. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. Rep. 251; Hall *v.* Wiles, 11 Fed. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. Rep. 433; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,727, 3 Blatchf. 209; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40. *Contra*, Parker *v.* Corbin, 18 Fed. Cas. No. 10,731, 4 McLean 462, 2 Robb Pat. Cas. 736.

95. Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; Cassidy *v.* Hunt, 75 Fed. 1012; Lee *v.* Pillsbury, 49 Fed. 747; Earle *v.* Sawyer, 8 Fed. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490; Goodyear *v.* Bishop, 10 Fed. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 2 Ban. & A. 561; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; United Horseshoe, etc., Co. *v.* Stewart, 13 App. Cas. 401, 59 L. T. Rep. N. S. 561.

Profits which plaintiff might have made but for the infringement are the damages recoverable. McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240 [*reversed* in part in 16 How. 480, 14 L. ed. 1024], 15 Fed. Cas. No. 8,727, 3 Blatchf. 209 [*affirmed* in 19 How. 96, 15 L. ed. 557]; Rice *v.* Heald, 20 Fed. Cas. No. 11,752 [*reversed* on other grounds in 104 U. S. 737, 26 L. ed. 910]. Damages include not only the loss upon the patented device but the loss of other profits which would have accompanied it. Hawes *v.* Washburne, 11 Fed. Cas. No. 6,242, 5 Off. Gaz. 491.

Where plaintiff did not mark his articles "patented" nominal damages only are recoverable. McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117.

Where employee innocently infringes damages are nominal. Bryce *v.* Dorr, 4 Fed. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302.

Making invention without using it gives only nominal damages. Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

Where there is no established license-fee and no use of the invention save by defendant there is no loss to plaintiff and only nominal damages can be awarded. Seattle *v.* McNamara, 81 Fed. 863, 26 C. C. A. 652.

Where there is no damage or loss suit will not lie. Byam *v.* Bullard, 4 Fed. Cas. No. 2,262, 1 Curt. 100.

Part of machine covered by patent.— The estimation of damages must be confined to the particular part of the machine covered by the patent upon which suit is brought. McCreary *v.* Pennsylvania Canal Co., 141 U. S. 459, 12 S. Ct. 40, 35 L. ed. 817; Fischer *v.* Hayes, 22 Fed. 529; Burdell *v.* Denig, 4 Fed. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Wayne *v.* Holmes, 29 Fed. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

Entire damage may be assessed where the entire value is due to the patented feature. Hunt Bros Fruit-Packing Co. *v.* Cassiday, 64 Fed. 585, 12 C. C. A. 316; Fifield *v.* Whittemore, 33 Fed. 835.

Injury to business by unfair competition not included in damages. Stephens *v.* Felt, 22 Fed. Cas. No. 13,368*a*; United Horse Shoe, etc., Co. *v.* Stewart, 13 App. Cas. 401, 59 L. T. Rep. N. S. 561. But see American-Braided Wire Co. *v.* Thomson, 44 Ch. D. 274, 59 L. J. Ch. 425, 62 L. T. Rep. N. S. 616 [*reversing* 38 Wkly. Rep. 329].

Damages for separate patents sued on need not be apportioned. Timken *v.* Olin, 41 Fed. 169.

96. Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; Philp *v.* Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588; Lee *v.* Pillsbury, 49 Fed. 747. See also *infra*, XIII, C, 14, b.

Where the amount of actual loss is not shown, nominal damages only can be awarded. Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; New York *v.* Ransom, 23 How. (U. S.) 487, 16 L. ed. 515; Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485; Houston, etc., R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568; Hunt Bros. Fruit-Packing Co. *v.* Cassidy, 53 Fed. 257, 3 C. C. A. 525; Lee *v.* Pillsbury, 49 Fed. 747; Royer *v.* Schultz Belting Co., 45 Fed. 51 [*affirmed* in 154 U. S. 515, 14 S. Ct. 1152, 38 L. ed. 1075]; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Proctor *v.* Brill, 4 Fed. 415; Burdell *v.* Denig, 4 Fed. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Rollhaus *v.* McPherson, 20 Fed. Cas. No. 12,026; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058.

97. Suffolk Mfg. Co. *v.* Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588; Hunt Bros. Fruit Packing Co. *v.* Cassiday, 64 Fed. 585, 12 C. C. A. 316; Lee *v.* Pillsbury, 49 Fed. 747; Goodyear *v.* Bishop, 10 Fed. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Berdon Fire-Arms Mfg. Co. *v.* U. S., 26 Ct. Cl. 48

License-fees charged others may be used as guides.[98] Where there is no other means of estimating damages the profits derived by the infringer may be considered,[99]

[*affirmed* in 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530]; McKeever *v.* U. S., 14 Ct. Cl. 396.

Where patentee does not license others but manufacturers, it is to be presumed that he would have made all infringing sales. Rose *v.* Hirsh, 94 Fed. 177, 36 C. C. A. 132. It will not be presumed, however, that plaintiff would have sold the same number as infringer at a higher price. Jennings *v.* Rogers Silver Plate Co., 118 Fed. 339.

Evidence of settlement with others not competent nor is royalty paid by defendant to others. International Tooth Crown Co. *v.* Hank's Dental Assoc., 111 Fed. 916; Ewart Mfg. Co. *v.* Baldwin Cycle-Chain Co., 91 Fed. 262; Westcott *v.* Rude, 19 Fed. 830; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514.

Prior judgment upon different evidence does not fix value. Blake *v.* Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222.

98. Established license-fees may be taken as the measure of damages.—Clark *v.* Wooster, 119 U. S. 322, 7 S. Ct. 217, 30 L. ed. 392; Washington, etc., Steam Packet Co. *v.* Sickles, 19 Wall. (U. S.) 611, 22 L. ed. 203; Philp *v.* Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; Seymour *v.* McCormick, 16 How. (U. S.) 480, 14 L. ed. 1024; Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Leeds, etc., Co. *v.* Victor Talking Mach. Co., 154 Fed. 58, 83 C. C. A. 170; Cassidy *v.* Hunt, 75 Fed. 1012; Houston, etc., R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568; Timken *v.* Olin, 41 Fed. 169; McDonald *v.* Whitney, 39 Fed. 466; Cary *v.* Lovell Mfg. Co., 37 Fed. 654; May *v.* Fond du Lac County, 27 Fed. 691; Graham *v.* Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Wooster *v.* Simonson, 20 Fed. 316; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Emerson *v.* Simm, 8 Fed. Cas. No. 4,443, 6 Fish. Pat. Cas. 281, 3 Off. Gaz. 293; Goodyear *v.* Bishop, 10 Fed. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,727, 3 Blatchf. 209; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 8 Pittsb. Leg. J. (Pa.) 361; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,320, 4 Ban. & A. 566; Penn *v.* Jack, L. R. 5 Eq. 81, 37 L. J. Ch. 136, 17 L. T. Rep. N. S. 407, 16 Wkly. Rep. 243; United Tel. Co. *v.* Walker, 56 L. T. Rep. N. S. 508. But a license-fee is not an arbitrary guide and need not be followed unless circumstances warrant it. Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; Keller *v.* Stolzenbaugh, 43 Fed. 378; Colgate *v.* Western Electric Co., 28 Fed. 146; Wooster *v.* Thornton, 26 Fed. 274 [*affirmed* in 136 U. S. 651, 10 S. Ct. 1074, 34 L. ed. 550]; Campbell *v.* Barclay, 4 Fed. Cas. No. 2,353, 5 Biss. 179; Sickels *v.* Borden, 23 Fed. Cas. No. 13,832, 3 Blatchf. 535.

To serve as a guide the license-fees must be established and uniform and made under such circumstances as to indicate the real value. Rude *v.* Westcott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888; International Tooth Crown Co. *v.* Hank's Dental Assoc., 111 Fed. 916; Royer *v.* Shultz Belting Co., 45 Fed. 51 [*affirmed* in 154 U. S. 515, 14 S. Ct. 1152, 38 L. ed. 1075]; Hammacher *v.* Wilson, 32 Fed. 796; Bates *v.* St. Johnsbury, etc., R. Co., 32 Fed. 628; Graham *v.* Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Westcott *v.* Rude, 19 Fed. 830; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Bussey *v.* Excelsior Co., 1 Fed. 640, 1 McCrary 161 [*reversed* on other grounds in 110 U. S. 131, 4 S. Ct. 38, 28 L. ed. 95]; Judson *v.* Bradford, 14 Fed. Cas. No. 7,564, 3 Ban. & A. 539, 16 Off. Gaz. 171.

Fee may be regarded as fixed, although exceptions sometimes made. Asmus *v.* Freeman, 34 Fed. 902.

Where it includes other inventions, the license-fee is no guide. Vulcanite Pavement Co. *v.* American Artificial Stone Pavement Co., 36 Fed. 378; Willimantic Linen Co. *v.* Clark Thread Co., 27 Fed. 865; Porter Needle Co. *v.* National Needle Co., 22 Fed. 829; Wooster *v.* Simonson, 16 Fed. 680.

Unless plaintiff would have made the sales, the rule as to license-fees is not applied. La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 2 Ban. & A. 561.

99. Cassidy *v.* Hunt, 75 Fed. 1012; Brickill *v.* Baltimore, 60 Fed. 98, 8 C. C. A. 500; Royer *v.* Coupe, 29 Fed. 358; Bell *v.* Phillips, 3 Fed. Cas. No. 1,262; Campbell *v.* Barclay, 4 Fed. Cas. No. 2,353, 5 Biss. 179; Case *v.* Brown, 5 Fed. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268; Conover *v.* Rapp, 6 Fed. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Grant *v.* ——, 10 Fed. Cas. No. 5,701; Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Parker *v.* Bamker, 18 Fed. Cas. No. 10,725, 6 McLean 631; Parker *v.* Perkins, 18 Fed. Cas. No. 10,745; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441; Wilbur *v.* Beecher, 29 Fed. Cas. No. 17,634, 2 Blatchf. 132, Fish. Pat. Rep. 401; Wintermute *v.* Redington, 30 Fed. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

Equitable test as to profits may be used where no other measure of damages is available. Burdell *v.* Denig, 92 U. S. 716, 23 L. ed. 764.

Settlements with other infringers do not constitute guides and evidence thereof is inadmissible. Cornely *v.* Marckwald, 131 U. S. 159, 9 S. Ct. 744, 33 L. ed. 117 [*affirming* 32 Fed. 292, 23 Blatchf. 163]; Keyes *v.* Pueblo, etc., Co., 43 Fed. 478 [*affirmed* in 154 U. S. 507, 513, 14 S. Ct. 1148, 38 L. ed. 1083]; United Nickel Co. *v.* Central Pac. R. Co., 36 Fed. 186; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Matthews *v.* Spangenberg, 14 Fed. 350.

but it is not the controlling consideration. The test is what plaintiff lost and not what defendant gained.[1]

(B) *Counsel Fees and Expenses.* Counsel fees and expenses of the litigation cannot be included in the damages.[2]

(C) *Interest.* Interest upon the amount due plaintiff may be included in the verdict.[3]

(D) *Double and Treble Damages.* The verdict at law must be for the actual damages but the court may in its discretion enter judgment thereon for any sum above the verdict not exceeding three times the amount of the verdict.[4] Damages may be increased to recompense plaintiff, where the circumstances of the infringement are aggravated and the litigation expensive.[5]

(III) *DESIGNS.* Damages for the infringement of design patents may be recovered in the same manner as other patents,[6] except that where the infringement was wilful after notice, a minimum amount of two hundred and fifty dollars may be collected for each offense.[7]

1. Royer *v.* Shultz Belting Co., 45 Fed. 51 [*affirmed* in 154 U. S. 515, 14 S. Ct. 1151, 38 L. ed. 1075]; Cowing *v.* Rumsey, 6 Fed. Cas. No. 3,296, 8 Blatchf. 36, 4 Fish. Pat. Cas. 275; McComb *v.* Brodie, 15 Fed. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153, 2 Off. Gaz. 117.

Lack of actual profits made by defendant is no defense where there is real loss to plaintiff. Campbell *v.* Barclay, 4 Fed. Cas. No. 2,353, 5 Biss. 179; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Goodyear Dental Vulcanite Co. *v.* Van Antwerp, 10 Fed. Cas. No. 5,600, 2 Ban. & A. 252, 9 Off. Gaz. 497; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, 1 Fish. Pat. Rep. 441.

2. Philp *v.* Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; Teese *v.* Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479; Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, 1 Fish. Pat. Rep. 184; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Stimpson *v.* Railroads, 23 Fed. Cas. No. 13,456, 2 Robb Pat. Cas. 595, 1 Wall. Jr. 164; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28. *Contra,* Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Boston Mfg. Co. *v.* Fiske, 3 Fed. Cas. No. 1,681, 2 Mason 119, 1 Robb Pat. Cas. 320; Knight *v.* Gavit, 14 Fed. Cas. No. 7,884; Pierson *v.* Eagle Screw Co., 19 Fed. Cas. No. 11,156, 2 Robb Pat. Cas. 268, 3 Story 402.

3. It is generally held that interest from time suit brought may be included. May *v.* Fond du Lac, 27 Fed. 691 [*reversed* on other grounds in 137 U. S. 395, 11 S. Ct. 98, 34 L. ed. 714]; McCormick *v.* Seymour, 15 Fed. Cas. No. 8,726, 2 Blatchf. 240; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, 1 Fish. Pat. Rep. 441; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,760, 2 Blatchf. 474.

Where a fixed royalty is taken as the measure interest is allowed from the date when such royalties would have been due. McNeely *v.* Williames, 96 Fed. 978, 37 C. C. A. 641; Locomotive Safety Truck Co. *v.* Pennsylvania R. Co., 2 Fed. 677 [*reversed* on other grounds in 110 U. S. 490, 4 S. Ct. 220, 28 L. ed. 222].

4. U. S. Rev. St. (1878) § 4919 [U. S. Comp. St. (1901) p. 3394]; Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; National Folding-Box, etc., Co. *v.* Elsas, 81 Fed. 197; Welling *v.* La Bau, 35 Fed. 302; Bell *v.* U. S. Stamping Co., 32 Fed. 549; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Gray *v.* James, 10 Fed. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Guyon *v.* Serrell, 11 Fed. Cas. No. 5,881, 1 Blatchf. 244, 1 Fish. Pat. Rep. 151; Whittemore *v.* Cutter, 29 Fed. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

5. National Folding Box, etc., Co. *v.* Robertson, 125 Fed. 524; Morss *v.* Union Form Co., 39 Fed. 468; Lyon *v.* Donaldson, 34 Fed. 789; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Bell *v.* McCullough, 3 Fed. Cas. No. 1,256, 1 Bond 194, 1 Fish. Pat. Cas. 380; Brodie *v.* Ophir Silver Min. Co., 4 Fed. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Guyon *v.* Serrell, 11 Fed. Cas. No. 5,881, 1 Blatchf. 244, Fish. Pat. Rep. 151; Peek *v.* Frame, 19 Fed. Cas. No. 10,903, 9 Blatchf. 194, 5 Fish. Pat. Cas. 113; Russell *v.* Place, 21 Fed. Cas. No. 12,161, 9 Blatchf. 173, 5 Fish. Pat. Cas. 134 [*affirmed* in 94 U. S. 606, 24 L. ed. 214].

Without bad faith of defendant or special circumstances, damages will not be increased. Welling *v.* La Bau, 35 Fed. 302; Carlock *v.* Tappan, 5 Fed. Cas. No. 2,412; Schwarzel *v.* Holenshade, 21 Fed. Cas. No. 12,506, 2 Bond 29, 3 Fish. Pat. Cas. 116.

6. U. S. Rev. St. (1878) § 4933 [U. S. Comp. St. (1901) p. 3399], and § 2, Act Feb. 4, 1887, 24 U. S. St. at L. 387 [U. S. Comp. St. (1901) p. 3398].

7. 24 U. S. St. at L. 387 [U. S. Comp. St. (1901) p. 3398]; Frank *v.* Geiger, 121 Fed. 126; Gimbel *v.* Hogg, 97 Fed. 791, 38 C. C. A. 419; Fuller *v.* Field, 82 Fed. 813, 27 C. C. A. 165; Lowell Mfg. Co. *v.* Whittall, 71 Fed. 515; Monroe *v.* Anderson, 58 Fed.

(IV) *Effect of Recovery.* The recovery of damages for past infringement does not give the infringer the right to continue the infringement thereafter,[8] but the recovery of full damages in satisfaction for the use of the particular machines may operate to release them from the monopoly.[9]

b. Profits and Damages in Suits in Equity — (I) *In General.* In equity the complainant may recover the amount of the gains and profits that defendant has made from the use of the invention,[10] and in addition may have the damages sustained by him assessed.[11]

398, 7 C. C. A. 272; Untermeyer *v.* Freund, 50 Fed. 77 [*affirmed* in 58 Fed. 205, 7 C. C. A. 183]; Ripley *v.* Elson Glass Co., 49 Fed. 927.

The statute is not unconstitutional but valid. Untermeyer *v.* Freund, 58 Fed. 205, 7 C. C. A. 183.

Although there were no profits two hundred and fifty dollars may be collected. Pirkl *v.* Smith, 42 Fed. 410 [*affirmed* in 154 U. S. 517, 14 S. Ct. 1153, 38 L. ed. 1082].

For facts showing sufficient notice see Anderson *v.* Saint, 46 Fed. 760.

8. Birdsell *v.* Shaliol, 112 U. S. 485, 5 S. Ct. 244, 28 L. ed. 768; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Suffolk Mfg. Co. *v.* Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Electric Gas-Lighting Co. *v.* Wollensak, 70 Fed. 790; Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Friarson *v.* Loe, 9 Ch. D. 48, 27 Wkly. Rep. 183; Needham *v.* Oxley, 8 L. T. Rep. N. S. 604, 2 New Rep. 388, 11 Wkly. Rep. 852.

Recovery from vendor does not release the vendee from liability. Westinghouse Electric, etc., Co. *v.* New York Mut. L. Ins. Co., 129 Fed. 213; Van Epps *v.* International Paper Co., 124 Fed. 542; Tuttle *v.* Matthews, 28 Fed. 98; Blake *v.* Greenwood Cemetery 16 Fed. 676, 21 Blatchf. 222.

9. Electric Gas-Lighting Co. *v.* Wollensak, 70 Fed. 790; Fisher *v.* Consolidated Amador Mine, 25 Fed. 201; Steam Stone-Cutter Co. *v.* Sheldons, 21 Fed. 875; Allis *v.* Stowell, 16 Fed. 783; Steam Stone-Cutter Co. *v.* Sheldons, 15 Fed. 608, 21 Blatchf. 260; Booth *v.* Seevers, 3 Fed. Cas. No. 1,648*a*, 19 Off. Gaz. 1140; Gilbert, etc., Mfg. Co. *v.* Bussing, 10 Fed. Cas. No. 5,416, 1 Ban. & A. 621, 12 Blatchf. 426, 8 Off. Gaz. 144; Perrigo *v.* Spaulding, 19 Fed. Cas. No. 10,994, 2 Ban. & A. 348, 13 Blatchf. 389, 12 Off. Gaz. 352; Spalding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

Where license-fee is adopted as measure of damages, article is released from monopoly. Stutz *v.* Armstrong, 25 Fed. 147; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702. *Contra*, Emerson *v.* Simm, 8 Fed. Cas. No. 4,443, 6 Fish. Pat. Cas. 281, 3 Off. Gaz. 293.

10. May recover the actual profits made by the infringer. Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Burdell *v.* Denig, 92 U. S. 716, 23 L. ed. 764; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Dean *v.* Mason, 20 How. (U. S.) 198, 15 L. ed. 876; Livingston *v.* Woodworth, 15 How. (U. S.) 546, 14 L. ed. 809; Campbell *v.* New York, 81 Fed. 182; Kirk *v.* Du Bois, 46 Fed. 486 [*affirmed* in 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895]; Morss *v.* Union Form Co., 39 Fed. 468; Munson *v.* New York, 16 Fed. 560, 21 Blatchf. 342; Burdett *v.* Estey, 3 Fed. 566, 19 Blatchf. 1; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 2 Ban. & A. 561; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535; Tilghman *v.* Werks, 23 Fed. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 2 Ban. & A. 537, 1 Flipp. 621, 11 Off. Gaz. 789; Wetherill *v.* New Jersey Zinc. Co., 30 Fed. Cas. No. 18,464, 1 Ban. & A. 485.

The fact that the profits are due principally to business judgment and skill of defendant does not affect the rule. Lawther *v.* Hamilton, 64 Fed. 221.

The fact that defendant could have made equal profits on similar unpatented articles does not limit the recovery. Warren *v.* Keep, 155 U. S. 265, 15 S. Ct. 83, 39 L. ed. 144; Am Ende *v.* Seabury, 43 Fed. 672; Simpson *v.* Davis, 22 Fed. 444, 22 Blatchf. 113; Burdett *v.* Estey, 3 Fed. 566, 19 Blatchf. 1.

Although the patentee has himself made no use of his patent, he is entitled to profits. Crosby Steam Gage, etc., Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441, 12 S. Ct. 49, 35 L. ed. 809.

Profits occurring after complainant sells his patent pending suit cannot be recovered. Goss Printing Press Co. *v.* Scott, 134 Fed. 880.

Manufacturer's profits.—A trader is not liable for manufacturer's profits. Kissinger-Ison Co. *v.* Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221.

That user may be sued for profits after collecting damages from manufacturer see U. S. Printing Co. *v.* American Playing-Card Co., 70 Fed. 50.

11. Damages in addition to profits recoverable see U. S. Rev. St. (1878) § 4921; Williams *v.* Rome, etc., R. Co., 2 Fed. 702, 18 Blatchf. 181; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91.

Profits and damages distinct.—On an ac-

(II) *Estimation of Profits and Damages.* It must be clearly shown what saving or advantage defendant has actually derived from the infringement,[12] and the burden is on the complainant to show this. Where plaintiff fails to show the amount of profits due to the use of his invention, nominal damages only will be allowed.[13] Defendant is not responsible for all profits of the business but only such

counting for infringement of a patent under U. S. Rev. St. (1878) § 4921, defendant's profits and complainant's damages are distinct from and independent of each other and are governed by different principles, and one cannot be said to be the measure of the other, nor the allowance of one to preclude recovery of the other. Beach *v.* Hatch, 153 Fed. 763. It is proper for the master to report as to each separately. Mast *v.* Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157.

Where profits are insufficient to recompense plaintiff damages will be allowed. Birdsall *v.* Coolidge, 93 U. S. 64, 23 L. ed. 802; U. S. Mitis Co. *v.* Carnegie Steel Co., 89 Fed. 206 [*affirmed* in 90 Fed. 829, 33 C. C. A. 387]; Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. 865; Andrews *v.* Creegan, 7 Fed. 477, 19 Blatchf. 113; Burdett *v.* Estey, 3 Fed. 566, 19 Blatchf. 1; Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,795, 3 Ban. & A. 577, 15 Off. Gaz. 965; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,950, 2 Ban. & A. 152, 13 Blatchf. 109, 11 Off. Gaz. 501. Where profits are sufficient to recompense plaintiff no damages are allowed. Hammacher *v.* Wilson, 32 Fed. 796; Ford *v.* Kurtz, 12 Fed. 789, 11 Biss. 324.

That damages in addition to profits were first allowed by the act of 1870 see Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. 865; Williams *v.* Leonard, 29 Fed. Cas. No. 17,726, 13 Blatchf. 282, 43 Conn. 569.

English practice.— Equity cannot award both damages and profits but the complainant must elect. De Vitre *v.* Betts, L. R. 6 H. L. 319, 42 L. J. Ch. 841, 21 Wkly. Rep. 705; Neilson *v.* Betts, L. R. 5 H. L. 1, 40 L. J. Ch. 317, 19 Wkly. Rep. 1121; Holland *v.* Fox, 2 C. L. R. 1576, 3 E. & B. 977, 1 Jur. N. S. 13, 23 L. J. Q. B. 357, 2 Wkly. Rep. 558, 77 E. C. L. 977; Needham *v.* Oxley, 8 L. T. Rep. N. S. 604, 2 New Rep. 388, 11 Wkly. Rep. 852. May recover profits from manufacturer and damages from infringer. Penn *v.* Bibby, L. R. 3 Eq. 308, 36 L. J. Ch. 277, 15 Wkly. Rep. 192.

Canadian practice.— Plaintiff cannot have damages and profits from the same infringer but may have profits from manufacturer and damages from user. Toronto Auer Light Co. *v.* Colling, 31 Ont. 18.

12. Only actual profits are recoverable, not what it was possible for defendant to make. Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411; Burdell *v.* Denig, 92 U. S. 716, 23 L. ed. 764; Dean *v.* Mason, 20 How. (U. S.) 198, 15 L. ed. 876; Westinghouse *v.* New York Air Brake Co., 140 Fed. 545, 72 C. C. A. 61; Robbins *v.* Illinois Watch Co., 78 Fed. 124; Munson *v.* New York, 16 Fed. 560, 21 Blatchf. 342; Burdett *v.* Estey, 3 Fed. 566, 19 Blatchf. 1.

License-fees.—Plaintiff is entitled to actual profits without regard to his fixed license-fees. Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Wales *v.* Waterbury Mfg. Co., 87 Fed. 920; Fisk *v.* Mahler, 54 Fed. 528; Knox *v.* Great Western Quicksilver Min. Co., 14 Fed. Cas. No. 7,907, 4 Ban. & A. 25, 7 Reporter 325, 6 Sawy. 430, 14 Off. Gaz. 897; Wooster *v.* Taylor, 30 Fed. Cas. No. 18,041, 3 Ban. & A. 241, 14 Blatchf. 403. In case of doubt license-fees followed. Emigh *v.* Baltimore, etc., R. Co., 6 Fed. 283, 4 Hughes 271.

That profits must be direct and not indirect see Diamond Drill, etc., Co. *v.* Kelley, 131 Fed. 89; Winchester Repeating Arms Co. *v.* American Buckle, etc., Co., 62 Fed. 278; Piper *v.* Brown, 19 Fed. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196, 3 Off. Gaz. 97; Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,464, 1 Ban. & A. 485.

Profits derived from advertisers in the infringing hotel register may be recovered. Hawes *v.* Gage, 11 Fed. Cas. No. 6,237, 5 Off. Gaz. 494.

Profits of other manufacturers or cost to them are not relevant but actual profits of defendant must be shown. Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 14 S. Ct. 295, 38 L. ed. 103 [*reversing* 41 Fed. 595]; Robbins *v.* Illinois Watch Co., 81 Fed. 957, 27 C. C. A. 21; Child *v.* Boston, etc., Iron Works, 5 Fed. Cas. No. 2,674; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 6 Blatchf. 328, 3 Fish. Pat. Cas. 497.

Proof of complainant's profits admitted under special circumstances see Rose *v.* Hirsh, 94 Fed. 177, 36 C. C. A. 132, 51 L. R. A. 801.

Only profits actually made by defendant are recoverable. Elwood *v.* Christy, 18 C. B. N. S. 494, 34 L. J. C. P. 130, 13 Wkly. Rep. 498, 114 E. C. L. 494; Walton *v.* Lavater, 8 C. B. N. S. 162, 6 Jur. N. S. 1251, 29 L. J. C. P. 275, 3 L. T. Rep. N. S. 272, 98 E. C. L. 162. Defendant must disclose cost before and after using invention. Siddell *v.* Vickers, 61 L. T. Rep. N. S. 233. Price of infringing articles may be recovered. Holland *v.* Fox, 23 L. J. Q. B. 211, 1 L. & M. 221, 2 Wkly. Rep. 166.

13. Rude *v.* Westcott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888; Dobson *v.* Hartford Carpet Co., 114 U. S. 439, 5 S. Ct. 945, 29 L. ed. 177; Black *v.* Thorne, 111 U. S. 122, 4 S. Ct. 326, 28 L. ed. 372; Canda *v.* Michi-

as are due to the patented improvement,[14] and the burden is on the complainant to separate and apportion the profits by reliable and tangible proofs.[15] The profits

gan Malleable Iron Co., 152 Fed. 178, 81 C. C. A. 420; Kansas City Hay Press Co. *v.* Devol, 127 Fed. 363; Paxton *v.* Brinton, 126 Fed. 541; Hohorst *v.* Hamburg-American Packet Co., 91 Fed. 655, 34 C. C. A. 39 [*affirming* 84 Fed. 354]; Rose *v.* Hirsh, 91 Fed. 149; Hohorst *v.* Hamburg-American Packet Co., 84 Fed. 354; Keep *v.* Fuller, 42 Fed. 896; Fischer *v.* Hayes, 39 Fed. 613; Everest *v.* Buffalo Lubricating Oil Co., 31 Fed. 742; Roemer *v.* Simon, 31 Fed. 41, 24 Blatchf. 396; Tuttle *v.* Gaylord, 28 Fed. 97; Moffitt *v.* Cavanagh, 27 Fed. 511; Blake *v.* Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222; Calkins *v.* Bertrand, 8 Fed. 755, 10 Biss. 445; Kirby *v.* Armstrong, 5 Fed. 801, 10 Biss. 135; Fisk *v.* West Bradley, etc., Mfg. Co., 9 Fed. Cas. No. 4,830*a*, 19 Off. Gaz. 545; Garretson *v.* Clark, 10 Fed. Cas. No. 5,249, 17 Blatchf. 256 [*affirmed* in 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371]; Gould's Mfg. Co. *v.* Cowing, 10 Fed. Cas. No. 5,643, 3 Ban. & A. 75, 14 Blatchf. 315, 12 Off. Gaz. 942 [*reversed* on other grounds in 105 U. S. 253, 26 L. ed. 987]; Schillinger *v.* Gunther, 21 Fed. Cas. No. 12,457, 3 Ban. & A. 491, 15 Blatchf. 303, 14 Off. Gaz. 713.

In case of wilful infringement all doubts as to amount of profits are resolved against the infringer. Regina Music Box Co. *v.* Otto, 114 Fed. 505.

14. Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411; Illinois Cent. R. Co. *v.* Turrill, 94 U. S. 695, 24 L. ed. 238; Mowry *v.* Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 40 Fed. 476; McMurray *v.* Emerson, 36 Fed. 901; Locomotive Safety Truck Co. *v.* Pennsylvania R. Co., 2 Fed. 677; Knox *v.* Great Western Quicksilver Min. Co., 14 Fed. Cas. No. 7,907, 4 Ban. & A. 25, 7 Reporter 325, 6 Sawy. 430, 14 Off. Gaz. 897; Serrell *v.* Collins, 21 Fed. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,464, 1 Ban. & A. 485.

Where the patented improvement is only a part of the machine, entire profits on the machine are not recoverable. Westinghouse *v.* New York Air Brake Co., 140 Fed. 545, 72 C. C. A. 61; Lattimore *v.* Hardsocg Mfg. Co., 121 Fed. 986, 58 C. C. A. 287; Westinghouse *v.* New York Air Brake Co., 115 Fed. 645; Brickill *v.* New York, 112 Fed. 65, 50 C. C. A. 1; Fay *v.* Allen, 30 Fed. 446; Reed *v.* Lawrence, 29 Fed. 915; Calkins *v.* Bertrand, 8 Fed. 755, 10 Biss. 445; Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,795, 3 Ban. & A. 577, 15 Off. Gaz. 965; Garretson *v.* Clark, 10 Fed. Cas. No. 5,248, 3 Ban. & A. 352, 15 Blatchf. 70, 14 Off. Gaz. 485 [*affirmed* in 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371]; Graham *v.* Mason, 10 Fed. Cas. No. 5,672, 5 Fish. Pat. Cas. 290, Holmes 88, 1 Off. Gaz. 609; Ingels *v.* Mast, 13 Fed. Cas. No. 7,034, 2 Ban. & A. 24, 1 Flipp. 424, 7 Off. Gaz. 836; Webster *v.* New Brunswick Carpet Co., 29 Fed. Cas. No. 17,338, 2 Ban. & A. 67, 9 Off. Gaz. 203; Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,464, 1 Ban. & A. 485. And see Canda *v.* Michigan Malleable Iron Co., 152 Fed. 178, 81 C. C. A. 420.

Where sales of articles are due solely to the patented improvement, the entire profits may be recovered. Warren *v.* Keep, 155 U. S. 265, 15 S. Ct. 83, 39 L. ed. 144; Crosby Steam Gage, etc., Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441, 12 S. Ct. 49, 35 L. ed. 809 [*affirming* 44 Fed. 66]; Hurlbut *v.* Schillinger, 130 U. S. 456, 9 S. Ct. 584, 32 L. ed. 1011; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Force *v.* Sawyer-Boss Mfg. Co., 131 Fed. 884; Westinghouse *v.* New York Air Brake Co., 131 Fed. 607 [*reversed* on other grounds in 140 Fed. 545, 72 C. C. A. 61]; Penfield *v.* Potts, 126 Fed. 475, 61 C. C. A. 371; Piaget Novelty Co. *v.* Headley, 123 Fed. 897; Coddington *v.* Propfe, 112 Fed. 1016; Wales *v.* Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250; Heaton Button-Fastener Co. *v.* Macdonald, 57 Fed. 648; Hoke Engraving Plate Co. *v.* Schraubstadter, 53 Fed. 817; Tatum *v.* Gregory, 51 Fed. 446; Putnam *v.* Lomax, 9 Fed. 448, 10 Biss. 546; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [*reversed* on other grounds in 1 Wall. 155, 17 L. ed. 662]; Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,116, 2 Ban. & A. 627, 12 Off. Gaz. 716; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [*reversed* on other grounds in 14 Wall. 620, 20 L. ed. 860].

Where it is shown that profits are due to the patented invention the burden is on defendant to show that part is due to other things. Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Campbell *v.* New York, 81 Fed. 182; Tuttle *v.* Claflin, 76 Fed. 227, 22 C. C. A. 138; Morss *v.* Union Form Co., 39 Fed. 468; Fitch *v.* Bragg, 16 Fed. 243, 21 Blatchf. 302; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 309, 1 Ban. & A. 439, 6 Off. Gaz. 764 [*modified* in 97 U. S. 126, 24 L. ed. 1000]; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512.

15. Complainant must show how much of the profits is due to the patented part of the infringing machine. Garretson *v.* Clark, 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371; Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; Westinghouse *v.* New York Air Brake Co., 140 Fed. 545, 72 C. C. A. 61; Brinton *v.* Paxton, 134 Fed. 78, 67 C. C. A. 204; Kansas City Hay Press Co. *v.* Devol, 127 Fed. 363; Crane Co. *v.* Baker, 125 Fed. 1, 60 C. C. A. 138 [*reversed* on other grounds in 138 Fed. 60, 70 C. C. A. 486]; Elgin Wind Power, etc., Co. *v.* Nichols, 105 Fed. 780, 45 C. C. A. 49; Robbins *v.* Illinois Watch Co., 81 Fed.

which resulted from the infringement consist of the saving or advantage in the use of the patented improvement as compared with other old substitutes.[16] In determining profits all legitimate expenses of manufacture and sale are to be deducted from the selling price,[17] but not taxes, insurance, and interest upon

957, 27 C. C. A. 21 [*affirming* 78 Fed. 124]; Williames *v.* McNeely, 77 Fed. 894; Tuttle *v.* Claflin, 62 Fed. 453 [*reversed* on other grounds in 76 Fed. 227, 22 C. C. A. 138]; Heaton Button-Fastener Co. *v.* Macdonald, 57 Fed. 648; Mosher *v.* Joyce, 45 Fed. 205 [*affirmed* in 51 Fed. 441, 2 C. C. A. 322]; Roemer *v.* Simon, 31 Fed. 41, 24 Blatchf. 396; Fay *v.* Allen, 30 Fed. 446; Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. 865; Bostock *v.* Goodrich, 25 Fed. 819; Kirby *v.* Armstrong, 5 Fed. 801, 10 Biss. 135; Black *v.* Munson, 3 Fed. Cas. No. 1,463, 2 Ban. & A. 623, 14 Blatchf. 265 [*affirmed* in 111 U. S. 122, 4 S. Ct. 326, 28 L. ed. 372]; Gould's Mfg. Co. *v.* Cowing, 10 Fed. Cas. No. 5,642, 1 Ban. & A. 375, 12 Blatchf. 243, 8 Off. Gaz. 277; Ingersoll *v.* Musgrove, 13 Fed. Cas. No. 7,040, 3 Ban. & A. 304, 14 Blatchf. 541, 13 Off. Gaz. 966; Star Salt Caster Co. *v.* Crossman, 22 Fed. Cas. No. 13,320, 4 Ban. & A. 566.

16. New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 28 N. Y. App. Div. 411, 50 N. Y. Suppl. 1093 [*reversed* on other grounds in 180 N. Y. 280, 73 N. E. 48]; McCreary *v.* Pennsylvania Canal Co., 141 U. S. 459, 12 S. Ct. 40, 35 L. ed. 817 [*affirming* 5 Fed. 367]; Dotem *v.* Boston, 138 Fed. 406, 70 C. C. A. 308; Rose *v.* Hirsh, 91 Fed. 149; Webster Loom Co. *v.* Higgins, 43 Fed. 673; Coupe *v.* Weatherhead, 37 Fed. 16; Vulcanite Paving Co. *v.* American Artificial Stone Pavement Co., 36 Fed. 378; Tomkinson *v.* Willets Mfg. Co., 34 Fed. 536; Shannon *v.* Bruner, 33 Fed. 871; Turrill *v.* Illinois Cent. R. Co., 20 Fed. 912; Maier *v.* Brown, 17 Fed. 736; Faulks *v.* Kamp, 10 Fed. 675; Knox *v.* Great Western Quicksilver Min. Co., 14 Fed. Cas. No. 7,907, 4 Ban. & A. 25, 7 Reporter 325, 6 Sawy. 430, 14 Off. Gaz. 897; Mulford *v.* Pearce, 17 Fed. Cas. No. 9,908, 2 Ban. & A. 542, 14 Blatchf. 141, 11 Off. Gaz. 741 [*reversed* on other grounds in 102 U. S. 112, 26 L. ed. 93]; Sargent *v.* Yale Lock Mfg. Co., 21 Fed. Cas. No. 12,367, 4 Ban. & A. 579, 17 Blatchf. 249, 17 Off. Gaz. 106; Tilghman *v.* Mitchell, 23 Fed. Cas. No. 14,041, 9 Blatchf. 1, 4 Fish. Pat. Cas. 599; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,272, 5 Biss. 344 [*reversed* in part in 94 U. S. 695, 24 L. ed. 238].

An improvement upon the patented machine by the infringer does not relieve him from liability but profits may be apportioned. Tuttle *v.* Claflin, 76 Fed. 227, 22 C. C. A. 138; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24. *Compare* Graham *v.* Mason, 10 Fed. Cas. No. 5,672, 5 Fish. Pat. Cas. 290, Holmes 88, 1 Off. Gaz. 609.

17. Actual cost of making and selling articles should be deducted in determining profits, and this includes wages, rent, advertising, etc. Goulds Mfg. Co. *v.* Cowing, 105 U. S. 253, 26 L. ed. 987; Piaget Novelty Co. *v.* Headley, 123 Fed. 897; Zane *v.* Peck, 13 Fed. 475; American Saw Co. *v.* Emerson, 8 Fed. 806; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 2 Ban. & A. 561; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 3 Fish. Pat. Cas. 497, 6 Blatchf. 328.

Commissions to agents are deducted but must be shown by defendant. Kissinger-Ison Co. *v.* Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221.

Apportionment of running expenses.— Running expenses will be apportioned between infringing article and other business. Kinner *v.* Shepard, 118 Fed. 48; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,539, 5 Fish. Pat. Cas. 310, 9 Blatchf. 385 [*affirmed* in 23 Wall. 518, 23 L. ed. 97].

Allowance made and deducted for use of shop and tools see Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 3 Fish. Pat. Cas. 497, 6 Blatchf. 328.

Loss on entire business or upon particular articles will not be deducted from profits of infringing article. Force *v.* Sawyer-Boss Mfg. Co., 131 Fed. 884; Conover *v.* Mers, 6 Fed. Cas. No. 3,122, 6 Fish. Pat. Cas. 506, 11 Blatchf. 197; Graham *v.* Mason, 10 Fed. Cas. No. 5,672, 5 Fish. Pat. Cas. 290, Holmes 88, 1 Off. Gaz. 609; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

Manufacturers' profits.— No deduction is made for ordinary "manufacturers' profits." Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; National Folding-Box, etc., Co. *v.* Elsas, 86 Fed. 917, 30 C. C. A. 487. *Contra*, Hammacher *v.* Wilson, 32 Fed. 796.

Cost of experiments will be deducted. Crosby Steam Gage, etc., Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441, 12 S. Ct. 49, 35 L. ed. 809 [*affirming* 44 Fed. 66].

Infringement of other patents.— Where a part of a machine made and sold by defendant is found to infringe complainant's patent, the court will not undertake to determine, in reduction of damages, the collateral question whether or not such part also infringes another patent, the validity and scope of which are not directly put in issue. Brinton *v.* Paxton, 134 Fed. 78, 67 C. C. A. 204.

Royalty under other patents will be deducted. La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 2 Ban. & A. 561.

money invested in the manufacturing plant,[18] nor compensation for personal services.[19] So it has been held that only losses occurring concurrently with the making of profits and directly resulting from the particular transactions on which the profits are allowed may be considered in diminution of profits.[20] It has been held that interest on profits should not be allowed except under special circumstances.[21] It is very generally held that if allowed, interest commences to run from the date of the master's report.[22] Damages are estimated as in actions at law,[23]

18. Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553 [*affirming* 43 Fed. 672]; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Piaget Novelty Co. *v.* Headley, 123 Fed. 897; National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 95 Fed. 991; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

Only where interest is actually paid will it be allowed. Herring *v.* Gage, 12 Fed. Cas. No. 6,422, 3 Ban. & A. 396, 15 Blatchf. 124.

19. Nothing is to be deducted from profits for the personal services or salary of defendant or of officers of the company. Seabury *v.* Am Ende, 152 U. S. 561, 14 S. Ct. 683, 38 L. ed. 553 [*affirming* 43 Fed. 672]; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Kansas City Hay Press Co. *v.* Devol, 127 Fed. 363; Piper *v.* Brown, 19 Fed. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196, 3 Off. Gaz. 97; Williams *v.* Leonard, 29 Fed. Cas. No. 17,726, 9 Blatchf. 476, 5 Fish. Pat. Cas. 381. *Contra*, National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 95 Fed. 991; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

20. Canda *v.* Michigan Malleable Iron Co., 152 Fed. 178, 81 C. C. A. 420.

21. Parks *v.* Booth, 102 U. S. 96, 26 L. ed. 54; Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Graham *v.* Plano Mfg. Co., 35 Fed. 597; Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,795, 3 Ban. & A. 577, 15 Off. Gaz. 965; Holbrook *v.* Small, 12 Fed. Cas. No. 6,596, 3 Ban. & A. 625, 17 Off. Gaz. 55.

22. Crosby Steam Gage, etc., Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441, 12 S. Ct. 49, 35 L. ed. 809 [*affirming* 44 Fed. 66]; Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; Illinois Cent. R. Co. *v.* Turrill, 110 U. S. 301, 4 S. Ct. 5, 28 L. ed. 154; Westinghouse *v.* New York Air Brake Co., 133 Fed. 936; Campbell *v.* New York, 105 Fed. 631; National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 97 Fed. 331; Turrill *v.* Illinois Cent. R. Co., 20 Fed. 912. *Compare* American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 309, 1 Ban. & A. 439, 6 Off. Gaz. 764 (interest allowed from final decree); Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24, 22 Fed. Cas. No. 13,336, 5 Ban. & A. 335, 18 Blatchf. 47 (interest allowed from interlocutory decree); Webster *v.* New Brunswick Carpet Co., 29 Fed. Cas. No. 17,338, 2 Ban. & A. 67, 9 Off. Gaz. 203 (interest allowed from final decree).

Filing bill.— Interest is not allowed from the filing of the bill. National Folding-Box, etc., Co. *v.* Elsas, 81 Fed. 197.

23. The loss to plaintiff by the infringement constitutes the damages to be recovered. See *supra*, XIII, C, 12, a, (II).

Profits which plaintiff would have made on infringing sales are recoverable. Westinghouse *v.* New York Air Brake Co., 131 Fed. 607 [*reversed* on other grounds in 140 Fed. 545]; Creamer *v.* Bowers, 35 Fed. 206; Welling *v.* La Bau, 34 Fed. 40; Blake *v.* Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222; Zane *v.* Peck, 13 Fed. 475.

Showing sales except for infringement.— To recover as damages any part of the profits he would have made on the infringing sales, plaintiff must show that he would have made the sales except for the infringer. Dobson *v.* Dorman, 118 U. S. 10, 6 S. Ct. 946, 30 L. ed. 63; Jennings *v.* Rogers Silver-Plate Co., 105 Fed. 967; Tatum *v.* Gregory, 51 Fed. 446; Covert *v.* Sargent, 38 Fed. 237 [*reversed* on other grounds in 152 U. S. 516, 14 S. Ct. 676, 38 L. ed. 536]; Bell *v.* U. S. Stamping Co., 32 Fed. 549; Cornely *v.* Marckwald, 32 Fed. 292, 23 Blatchf. 163 [*affirmed* in 131 U. S. 159, 9 S. Ct. 744, 33 L. ed. 117]; McSherry Mfg. Co. *v.* Dowagiac Mfg. Co., 160 Fed. 948; Hall *v.* Stern, 20 Fed. 788; Buerk *v.* Imhaeuser 4 Fed. Cas. No. 2,107, 2 Ban. & A. 452, 14 Blatchf. 19, 10 Off. Gaz. 907; Ingersoll *v.* Musgrove, 13 Fed. Cas. No. 7,040, 3 Ban. & A. 304, 14 Blatchf. 541, 13 Off. Gaz. 966; St. Louis Stamping Co. *v.* Quimby, 21 Fed. Cas. No. 12,240*a*, 5 Ban. & A. 275, 18 Off. Gaz. 571.

Counsel fees are not recoverable. Bancroft *v.* Acton, 2 Fed. Cas. No. 833, 7 Blatchf. 505.

Damages after suit may be recovered, although none were proved before. Canton Steel Roofing Co. *v.* Kanneberg, 51 Fed. 599.

Entire profits on infringing article are recoverable, providing the evidence is sufficient to prove that the marketable value of the article is due solely to the patented feature. Westinghouse *v.* New York Air Brake Co., 140 Fed. 545, 72 C. C. A. 61.

Reduction in price due to the infringement is an item to be considered in estimating damages (Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 536, 6 S. Ct. 934, 29 L. ed. 954 [*affirming* 21 Fed. Cas. No. 12,366, 4 Ban. & A. 574, 17 Blatchf. 244, 17 Off. Gaz. 105]; Kinner *v.* Shepard, 107 Fed. 952; Am Ende *v.* Seabury, 43 Fed. 672; Hobbie *v.* Smith, 27 Fed. 656; Fitch *v.* Bragg, 16 Fed. 243, 21 Blatchf. 302); but must be clearly shown to be due to the infringement (Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787 [*reversing* 33 Fed. 279, 13 Sawy. 17]; Cornely *v.* Marck-

and it has been held that the court may allow complainant double or treble damages.[24]

13. PLEADINGS[25] — a. In Actions at Law — (I) *IN GENERAL.* The pleadings in actions at law must conform to the rules of the courts of the state where brought,[26] except as modified by statute,[27] providing the general issue may be pleaded, and that on giving notice certain special matters of defense may be proved.[28] Oyer of the patent cannot be demanded.[29]

(II) *DECLARATION OR COMPLAINT.* The declaration must embody all that is essential to enable plaintiff to give evidence of his right and of its violation by defendant and afford defendant the opportunity to interpose every defense allowed him by law,[30] but critical and over-nice objections to matters of form will not be sustained.[31]

(III) *PLEA OR ANSWER* — (A) *In General.* By virtue of express statutory provision,[32] in any action for infringement, defendant may plead the general issue, and having given thirty days' notice in writing may prove any one or more of several special defenses therein enumerated.[33] He may show without notice the

wald, 131 U. S. 159, 9 S. Ct. 744, 33 L. ed. 117).

24. Equity may allow increased or exemplary damages in an aggravated case. Fox *v.* Knickerbocker Engraving Co., 158 Fed. 422; National Folding-Box, etc., Co. *v.* Elsas, 86 Fed. 917, 30 C. C. A. 487 [*affirming* 81 Fed. 197]; Stutz *v.* Armstrong, 25 Fed. 147; Graham *v.* Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Goodyear Dental Vulcanite Co. *v.* Van Antwerp, 10 Fed. Cas. No. 5,600, 2 Ban. & A. 252, 9 Off. Gaz. 497; Parker *v.* Corbin, 18 Fed. Cas. No. 10,731, 4 McLean 462, 2 Robb Pat. Cas. 736. See also *supra*, XIII, C, 12, a, (II), (D).

Under the act of 1836, equity could not award exemplary damages. Livingston *v.* Jones, 15 Fed. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330; Motte *v.* Bennett, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642; Sanders *v.* Logan, 21 Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.

Profits cannot be increased in equity but only damages such as might have been allowed at law. Covert *v.* Sargent, 42 Fed. 298; Campbell *v.* James, 5 Fed. 806; Holbrook *v.* Small, 12 Fed. Cas. No. 6,596, 3 Ban. & A. 625, 17 Off. Gaz. 55.

25. See, generally, PLEADING.

26. U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684]; Celluloid Mfg. Co. *v.* American Zylonite Co., 34 Fed. 744; Cottier *v.* Stimson, 18 Fed. 689, 9 Sawy. 435.

27. U. S. Rev. St. (1878) § 4920.

28. Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345; Celluloid Mfg. Co. *v.* American Zylonite Co., 34 Fed. 744. See also Myers *v.* Cunningham, 14 Fed. 346. See *infra*, XIII, C, 13, a, (III), (B).

29. Singer *v.* Wilson, 22 Fed. Cas. No. 12,901; Smith *v.* Ely, 22 Fed. Cas. No. 13,043, Fish. Pat. Rep. 339, 5 McLean 76. *Contra*, Cutting *v.* Myers, 6 Fed. Cas. No. 3,520, 1 Robb Pat. Cas. 94, 4 Wash. 220.

Reference to patent makes it part of complaint. Graham *v.* Earl, 82 Fed. 737; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. Rep. 128.

30. Gray *v.* James, 10 Fed. Cas. No. 5,719, 1 Robb Pat. Cas. 140, Pet. C. C. 476; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 1 Blatchf. 597, Fish. Pat. Rep. 128. See *infra*, XIII, C, 13, b, (I).

The preliminary steps leading to grant of patent need not be specifically alleged. Cutting *v.* Myers, 6 Fed. Cas. No. 3,520, 1 Robb Pat. Cas. 159, 4 Wash. 220; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,854; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. Rep. 128.

Facts as to damage and not evidence must be alleged, so that there may be an issue. Rude *v.* Wescott, 130 U. S. 152, 9 S. Ct. 463, 32 L. ed. 888; Ewart Mfg. Co. *v.* Baldwin Cycle-Chain Co., 91 Fed. 262.

Marking goods. — It must be alleged that plaintiff marked his goods under the patent with the word "patented." Streat *v.* Finch, 154 Fed. 378; Sprague *v.* Bramhall-Deane Co., 133 Fed. 738.

Where the patent contains numerous claims, the ones relied on must be specified. Russell *v.* Winchester Repeating Arms Co., 97 Fed. 634.

Infringement within six years need not be alleged. Defendant may show that the infringement was not within six years under the general issue. Peters *v.* Hanger, 134 Fed. 586, 67 C. C. A. 386.

The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement. Thomas *v.* St. Louis, etc., R. Co., 149 Fed. 753, 79 C. C. A. 89.

31. May *v.* Mercer County, 30 Fed. 246; Gray *v.* James, 10 Fed. Cas. No. 5,719, 1 Robb Pat. Cas. 140, Pet. C. C. 476; Parker *v.* Haworth, 18 Fed. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,854; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 1 Blatchf. 31, Fish. Pat. Rep. 128.

32. U. S. Rev. St. (1878) § 4920.

33. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Teese *v.* Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479; Henry *v.* U. S., 22 Ct. Cl. 75.

Want of patentability need not be specially pleaded. Richards *v.* Chase Elevator Co., 158

prior state of the art,[34] or that the patent is void on its face.[35] As the statute mentioned is permissive merely it does not prevent special pleas under ordinary rules.[36] And, where defenses are specially pleaded which might be shown under the general issues, no notice is necessary.[37] However, if notice of special matter of defense is given, a plea covering the same matter cannot be filed.[38] The question of fraud can be raised only by distinct and special allegations in the plea or answer.[39]

(B) *Notice of Special Matter of Defense.* The special matters of defense covered by statute[40] cannot be proved unless notice is given in accordance with the terms of the statute,[41] or unless it is waived.[42] The notice must be definite and certain as to name, place, and subject-matter,[43] and must be given thirty

U. S. 299, 15 S. Ct. 831, 39 L. ed. 991; May *v.* Juneau County, 137 U. S. 408, 11 S. Ct. 102, 34 L. ed. 729; Hendy *v.* Golden State, etc., Iron Works, 127 U. S. 370, 8 S. Ct. 1275, 32 L. ed. 207; Zane *v.* Soffe, 110 U. S. 200, 3 S. Ct. 562, 28 L. ed. 119.

Any special matter showing that the patent is invalid may be proved. U. S. Rev. St. (1878) § 4920; Brown *v.* Piper, 91 U. S. 37, 33 L. ed. 200; Baldwin *v.* Kresl, 76 Fed. 823, 22 C. C. A. 593; Woodward *v.* Boston Lasting Mach. Co., 63 Fed. 609, 11 C. C. A. 353; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, 1 Robb Pat. Cas. 68, Pet. C. C. 322; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9.

Statute of limitations.— Under general issue may show infringement more than six years before suit. Peters *v.* Hanger, 134 Fed. 586, 67 C. C. A. 386 [*reversing* 127 Fed. 820, 62 C. C. A. 498].

That proofs are confined to matter in notice see Lyon *v.* Donaldson, 34 Fed. 789.

Separate defenses.— Where several patents sued on may give separate defense for each. Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673.

For insufficient pleas see Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Brickill *v.* Hartford, 57 Fed. 216; Kelleher *v.* Darling, 14 Fed. Cas. No. 7,653, 3 Ban. & A. 438, 4 Cliff. 424, 14 Off. Gaz. 673; Root *v.* Ball, 20 Fed. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513; Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267, 4 Fish. Pat. Cas. 433.

For pleas sustained as sufficient see National Mfg. Co. *v.* Meyers, 7 Fed. 355; Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294. Under the English practice monopoly cannot be set up as a defense to the general issue (Gillett *v.* Wilby, 9 C. & P. 334, 38 E. C. L. 201), nor fraudulent evasion of patent (Stead *v.* Anderson, 4 C. B. 806, 11 Jur. 877, 16 L. J. C. P. 250, 56 E. C. L. 806).

34. Vance *v.* Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Parsons *v.* Seelye, 100 Fed. 452, 40 C. C. A. 484; Overweight Counterbalance Elevator Co. *v.* Improved Order Red Men's Hall Assoc., 94 Fed. 155, 36 C. C. A. 125; Kennedy *v.* Solar Refining Co., 69 Fed. 715; Stevenson *v.* Magowan, 31 Fed. 824; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,960, 1 Ban. & A. 428, 6 Off. Gaz. 724.

35. Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9.

36. Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

37. Brickill *v.* Hartford, 57 Fed. 216; Cottier *v.* Stimson, 20 Fed. 906; Cottier *v.* Stimson, 18 Fed. 689, 9 Sawy. 435; Day *v.* New England Car-Spring Co., 7 Fed. Cas. No. 3,687, 3 Blatchf. 179; Root *v.* Ball, 20 Fed. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513.

38. Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Read *v.* Miller, 20 Fed. Cas. No. 11,610, 2 Biss. 12, 3 Fish. Pat. Cas. 310.

39. Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Clark *v.* Scott, 5 Fed. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245, 2 Off. Gaz. 4; Doughty *v.* West, 7 Fed. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380.

In England he may plead patent fraudulently obtained. Bedells *v.* Massey, 8 Jur. 808, 13 L. J. C. P. 173, 7 M. & G. 630, 8 Scott N. R. 337, 49 E. C. L. 630.

40. U. S. Rev. St. (1878) § 4920.

41. Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Arrott *v.* Standard Sanitary Mfg. Co., 113 Fed. 389; Kiesele *v.* Haas, 32 Fed. 794; Bragg *v.* Stockton, 27 Fed. 509; Coleman *v.* Liesor, 6 Fed. Cas. No. 2,984; Dixon *v.* Moyer, 7 Fed. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. 68; Roberts *v.* Buck, 20 Fed. Cas. No. 11,897, Holmes 224, 6 Fish. Pat. Cas. 325, 3 Off. Gaz. 268.

Patents and publications not admitted without notice. Earl *v.* Dexter, 8 Fed. Cas. No. 4,242, 1 Ban. & A. 400, Holmes 412, 6 Off. Gaz. 729; Odiorne *v.* Denney, 18 Fed. Cas. No. 10,431, 3 Ban. & A. 287, 13 Off. Gaz. 965, 1 N. J. L. J. 183.

42. Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Roemer *v.* Simon, 20 Fed. Cas. No. 11,997, 1 Ban. & A. 138, 5 Off. Gaz. 555 [*affirmed* in 95 U. S. 214, 24 L. ed. 384].

43. Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Wise *v.* Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Teese *v.* Huntingdon, 23 How. (U. S.)

days before trial.[44] It may be given in the answer[45] and need not be under oath.[45]

b. In Suits in Equity[47]—(i) *Bill.* The bill or complaint should clearly identify the invention claimed in the patent,[48] should allege ownership thereof,[49]

2, 16 L. ed. 479; Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Tatum *v.* Eby, 60 Fed. 408; Orr *v.* Merrill, 18 Fed. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376.

Names and residences of prior users must be given, but not necessarily the names of witnesses by whom allegation is to be established. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; Allis *v.* Buckstaff, 13 Fed. 879; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Lock *v.* Pennsylvania R. Co., 15 Fed. Cas. No. 8,438; Many *v.* Jagger, 16 Fed. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. Rep. 222; Wilton *v.* Railroads, 30 Fed. Cas. No. 17,857, 2 Robb Pat. Cas. 641, 1 Wall. Jr. 192.

Use by others in addition to those mentioned in the notice may be proved. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Evans *v.* Kremer, 8 Fed. Cas. No. 4,565, Pet. C. C. 215, 1 Robb Pat. Cas. 66; Treadwell *v.* Bladen, 24 Fed. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. 703.

Time of use need not be specified. Phillips *v.* Page, 24 How. (U. S.) 164, 16 L. ed. 639.

Place of use must be stated specifically and not merely the county or city. Schenck *v.* Diamond Match Co., 77 Fed. 208, 23 C. C. A. 122 [*affirming* 71 Fed. 521]; Hays *v.* Sulsor, 11 Fed. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Latta *v.* Shawk, 14 Fed. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465.

Defense.—Each defense must be specified in notice. Meyers *v.* Busby, 32 Fed. 670, 13 Sawy. 33.

Notices held sufficient see Anderson *v.* Miller, 129 U. S. 70, 9 S. Ct. 224, 32 L. ed. 635; Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157; American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Smith *v.* Frazer, 22 Fed. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 2 Off. Gaz. 175, 3 Pittsb. (Pa.) 397.

44. Brunswick *v.* Holzalb, 4 Fed. Cas. No. 2,057; Westlake *v.* Cartter, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636.

45. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Arrott *v.* Standard Sanitary Mfg. Co., 113 Fed. 389; Smith *v.* Frazer, 22 Fed. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 2 Off. Gaz. 175, 3 Pittsb. (Pa.) 397.

Plea stricken out is not notice. Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. Rep. 268 [*affirmed* in 14 How. 218, 14 L. ed. 394].

46. Campbell *v.* New York, 45 Fed. 243.

47. Form and requisites of bill have been settled by numerous decisions and the practice can only be changed by an amendment of the equity rules, or of the rules of the circuit courts. American Graphophone Co. *v.* National Phonograph Co., 127 Fed. 349.

48. Wise *v.* Grand Ave. R. Co., 33 Fed. 277; Noe *v.* Prentice, 18 Fed. Cas. No. 10,284*a*; Peterson *v.* Wooden, 19 Fed. Cas. No. 11,038, 3 McLean 248, 2 Robb Pat. Cas. 116.

Identification held insufficient.—Title of invention and date and number of patent not sufficient identification. Welsbach Light Co. *v.* Rex Incandescent Light Co., 87 Fed. 477; Electrolibration Co. *v.* Jackson, 52 Fed. 773; Stirrat *v.* Excelsior Mfg. Co., 44 Fed. 142; Post *v.* T. C. Richards Hardware Co., 25 Fed. 905.

Identification held sufficient.—General reference to the invention with profert of the patent is sufficient identification and places patent before the court. Edison *v.* American Mutoscope, etc., Co., 127 Fed. 361; Fowler *v.* New York, 121 Fed. 747, 58 C. C. A. 113 [*affirming* 110 Fed. 749]; Chinnock *v.* Paterson, etc., Tel. Co., 110 Fed. 199 [decree *reversed* on other grounds in 112 Fed. 531, 50 C. C. A. 384]; Heaton-Peninsular Button-Fastener Co. *v.* Schlochtermeyer, 72 Fed. 520, 18 C. C. A. 674 [*affirming* 69 Fed. 592]; Germain *v.* Wilgus, 67 Fed. 597, 14 C. C. A. 561; Enterprise Mfg. Co. *v.* Snow, 67 Fed. 235; U. S. Credit System Co. *v.* American Credit Indemnity Co., 53 Fed. 818; Dickerson *v.* Greene, 53 Fed. 247; International Terra-Cotta Lumber Co. *v.* Maurer, 44 Fed. 618; American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 803; Bogart *v.* Hinds, 25 Fed. 484; McMillin *v.* St. Louis, etc., Valley Transp. Co., 18 Fed. 260, 5 McCrary 561; Pitts *v.* Whitman, 19 Fed. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609. It is unnecessary to specify particular claims of the patent except under unusual circumstances. Morton Trust Co. *v.* American Car, etc., Co., 129 Fed. 916, 64 C. C. A. 367; Johnson *v.* Columbia Phonograph Co., 106 Fed. 319. But see Eastwood *v.* Cutler-Hammer Mfg. Co., 148 Fed. 718. Reference to patent for full disclosure is sufficient. Graham *v.* Earl, 92 Fed. 155, 34 C. C. A. 267.

Profert of patent does not make it proof of the allegations contained therein as to the prior art. Indurated Fibre Industries Co. *v.* Grace, 52 Fed. 124.

49. Must show ownership at time of suit and not merely ownership at some time. Bowers *v.* Bucyrus Co., 132 Fed. 39; American Graphophone Co. *v.* National Phonograph Co., 127 Fed. 349; Lettelier *v.* Mann, 79 Fed. 81; De Beaumont *v.* Williames, 71 Fed. 812; Krick *v.* Jansen, 52 Fed. 823. Allegation of ownership need not be in set words. Arrott *v.* Standard Mfg. Co., 113 Fed. 1014; Atherton Mach. Co. *v.* Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72.

The various assignments by which title was acquired need not be alleged. Edison Electric

and should set forth those facts which are statutory prerequisites to the grant of a valid patent.[50] A positive averment of such prerequisites is necessary. Allegations on belief are insufficient.[51] The bill should allege infringement by defendant,[52]

Light Co. *v.* Packard Electric Co., 61 Fed. 1002; Clement Mfg. Co. *v.* Upson, etc., Co., 40 Fed. 471; Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, Fish. Pat. Rep. 41, 3 McLean 432; Meerse *v.* Allen, 16 Fed. Cas. No. 9,393*a*; Nourse *v.* Allen, 18 Fed. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63.

Recording of assignment need not be alleged. Perry *v.* Corning, 19 Fed. Cas. No. 11,004, 7 Blatchf. 195.

Where judgment of court is relied on to show title such proceedings should be alleged. Parker *v.* Brant, 18 Fed. Cas. No. 10,727, 1 Fish. Pat. Cas. 58.

Presumption as to ownership.— Original patentee presumed to be the owner until the contrary appears. Fischer *v.* Neil, 6 Fed. 89.

Insufficient allegation of ownership see Jaros Hygienic Underwear Co. *v.* Fleece Hygienic Underwear Co., 60 Fed. 622.

Sufficient allegation of ownership shown see Æolian Co. *v.* Hallett, etc., Piano Co., 134 Fed. 872; General Electric Co. *v.* Wagner Electric Mfg. Co., 123 Fed. 101 [*affirmed* in 130 Fed. 772, 66 C. C. A. 82]; Arnold Monophase Electric Co. *v.* Wagner Electric Mfg. Co., 118 Fed. 653; Goss Printing-Press Co. *v.* Scott, 108 Fed. 253, 47 C. C. A. 302, 110 Fed. 402, 49 C. C. A. 97.

Sufficient allegations as to territorial assignment see Washburn, etc., Mfg. Co. *v.* Haish, 4 Fed. 900, 10 Biss. 65.

50. Eastwood *v.* Cutler-Hammer Mfg. Co., 148 Fed. 718; American Graphophone Co. *v.* National Phonograph Co., 127 Fed. 349; Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85; Miller *v.* Smith, 5 Fed. 359, design patents.

An allegation that the invention was not in public use or on sale for two years before application is necessary. Hayes-Young Tie Plate Co. *v.* St. Louis Transit Co., 130 Fed. 900 [*affirmed* in 137 Fed. 80, 70 C. C. A. 1]; Krick *v.* Jansen, 52 Fed. 823; Coop *v.* Dr. Savage Physical Development Inst., 47 Fed. 899; Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 47 Fed. 894; Nathan Mfg. Co. *v.* Craig, 47 Fed. 522; Blessing *v.* John Trageser Steam Copper Works, 34 Fed. 753. *Contra*, Noe *v.* Prentice, 18 Fed. Cas. No. 10,284*a*. It is not sufficient to allege that it was not in public use or on sale with the inventor's consent. Coop *v.* Dr. Savage Physical Development Inst., *supra*; Blessing *v.* John Trageser Steam Copper Works, *supra*.

An allegation that the invention was not patented or described in a printed publication is necessary. Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85; Diamond Match Co. *v.* Ohio Match Co., 80 Fed. 117; Goebel *v.* American R. Supply Co., 55 Fed. 825; Overman Wheel Co. *v.* Elliott Hickory Cycle Co., 49 Fed. 859. An allegation as to foreign patent must be made under U. S. Rev. St. § 4887, as amended March 3, 1897, 29 U. S. St. at L. 692 [U. S. Comp. St. (1901) p. 3382]; Elliott, etc., Book-Typewriter Co. *v.* Fisher Typewriter Co., 109 Fed. 330.

An allegation that the invention was not abandoned is unnecessary since that is matter of defense. Warren Featherbone Co. *v.* Warner Bros. Co., 92 Fed. 990.

Proceedings in patent office.— The filing of application for patent in due form is presumed from grant of patent and need not be alleged, any defect therein being matter of defense (Bowers *v.* Bucyrus Co., 132 Fed. 39); nor is it necessary in a suit for infringement of a reissued patent to allege specifically the ground on which reissue was obtained (Spaeth *v.* Barney, 22 Fed. 828).

The fact that some patents in suit have expired does not render the bill bad. Where the inventions covered by several patents enter into and constitute one compact machine, it is necessary in suing for infringement to complain upon all the patents. Russell *v.* Kern, 58 Fed. 382 [*affirmed* in 64 Fed. 581].

Separate affidavit as to inventorship is unnecessary. Consolidated Brake-Shoe Co. *v.* Detroit Steel, etc., Co., 47 Fed. 894.

An allegation of prior adjudication sustaining patent is impertinent unless injunction is prayed. Haarmann *v.* Lueders, 109 Fed. 327; Wirt *v.* Hicks, 46 Fed. 71. But prior litigation may be recited where injunction is sought. American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 803; Steam-Gauge, etc., Co. *v.* McRoberts, 26 Fed. 765.

Immaterial matters alleged in the bill will be stricken out on motion. Western Electric Co. *v.* Williams-Abbott Electric Co., 83 Fed. 842.

Bills held sufficient.— Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85; American Cable R. Co. *v.* New York, 42 Fed. 60; Thompson *v.* Jewett, 23 Fed. Cas. No. 13,961.

English practice.— Complainant must make oath that he believes himself to be the first inventor. Hill *v.* Thompson, Holt N. P. 636, 3 E. C. L. 249, 3 Meriv. 622, 17 Rev. Rep. 156, 36 Eng. Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 20 Rev. Rep. 488, 4 E. C. L. 190. Enrolment within prescribed time must be alleged. Bentley *v.* Goldthorp, 1 C. B. 368, 2 D. & L. 795, 9 Jur. 470, 14 L. J. Ch. 115, 50 E. C. L. 368. Express averment of novelty is not necessary. Amory *v.* Brown, L. R. 8 Eq. 663, 38 L. J. Ch. 593, 20 L. T. Rep. N. S. 654, 17 Wkly. Rep. 849.

51. Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85.

52. **General allegation is sufficient.**— Indurated Fibre Industries Co. *v.* Grace, 52 Fed. 124; American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 803; Fischer *v.* Hayes, 6 Fed. 76, 19 Blatchf. 26; American Diamond Rock-Boring Co. *v.* Rutland Marble Co., 2 Fed. 355, 18 Blatchf. 147; Haven *v.* Brown, 11 Fed. Cas. No. 6,228, 6 Fish. Pat. Cas. 413; Thatcher Heating Co. *v.* Carbon Stove Co.,

and should include a prayer for an accounting together with a prayer for equitable relief such as discovery or an injunction.[53] The bill should be verified.[54]

(II) *Plea or Answer*—(A) *Plea*—(1) In General. A plea in equity is a special answer urging some particular defense by which the issue is reduced to a single point. Any defense which brings forward new matter in opposition to the equity of the bill may be presented by plea.[55] A mere denial of the allegations of the bill without any averment of new matter cannot be made by plea.[56]

23 Fed. Cas. No. 13,864, 4 Ban. & A. 68, 7 Reporter 199, 15 Off. Gaz. 1051, 2 N. J. L. J. 25; Turrell *v.* Cammerrer, 24 Fed. Cas. No. 14,266, 3 Fish. Pat. Cas. 462.

Where the bill does not clearly show wrongful use of the patented invention by defendant it is bad. Knox Rock-Blasting Co. *v.* Rairdon Stone Co., 87 Fed. 969; American Solid Leather Button Co. *v.* Empire State Nail Co., 50 Fed. 929; Still *v.* Reading, 9 Fed. 40, 4 Woods 345; Miller *v.* Smith, 5 Fed. 359; Noe *v.* Prentice, 18 Fed. Cas. No. 10,284*a*.

Amount of damages need not be alleged. American Graphophone Co. *v.* National Phonograph Co., 127 Fed. 349.

Infringement within six years need not be alleged. Peters *v.* Hanger, 134 Fed. 586, 67 C. C. A. 386 [*reversing* 127 Fed. 820, 62 C. C. A. 498].

Allegation upon information and belief sufficient. Murray Co. *v.* Continental Gin Co., 126 Fed. 533; Wyckoff *v.* Wagner Typewriter Co., 88 Fed. 515.

Allegations held sufficient see Adee *v.* Peck, 42 Fed. 497 [*following* Adee *v.* Peck, 39 Fed. 209]; Schneider *v.* Missouri Glass Co., 36 Fed. 582; Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444; McMillin *v.* St. Louis, etc., Transp. Co., 18 Fed. 260, 5 McCrary 561.

English practice.—Particulars should be given. Ledgard *v.* Bull, 11 App. Cas. 648; Batley *v.* Kynock, L. R. 19 Eq. 229, 44 L. J. Ch. 219, 31 L. T. Rep. N. S. 573, 23 Wkly. Rep. 209; Finnegan *v.* James, L. R. 19 Eq. 72, 44 L. J. Ch. 185, 23 Wkly. Rep. 373; Needham *v.* Oxley, 1 Hem. & M. 248, 9 Jur. N. S. 593, 8 L. T. Rep. N. S. 532, 2 New Rep. 267, 11 Wkly. Rep. 745, 71 Eng. Reprint 108; Wenham Co. *v.* Champion Gas Lamp Co., 63 L. T. Rep. N. S. 827. But see Talbot *v.* La Roche, 15 C. B. 310, 2 C. L. R. 836, 80 E. C. L. 310.

53. American Graphophone Co. *v.* National Phonograph Co., 127 Fed. 349.

Interrogations.—Interrogatories as to business not permitted until validity of patent and infringement shown. Lovell Mfg. Co. *v.* Automatic Wringer Co., 124 Fed. 971; Keller *v.* Strauss, 88 Fed. 517. Permitted where validity not in issue. Haarmann *v.* Lueders, 109 Fed. 327.

Production of books.—Complainant cannot compel production of all books of a big concern, but must specify those wanted. Fuller *v.* Field, 82 Fed. 813, 27 C. C. A. 165.

Damages by name need not be prayed. Emerson *v.* Simm, 8 Fed. Cas. No. 4,443, 6 Fish. Pat. Cas. 281, 3 Off. Gaz. 293.

Prayers held sufficient see Wyckoff *v.* Wagner Typewriter Co., 88 Fed. 515; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92.

English practice.—Discovery may be had, although patent has not been sustained. Foxwell *v.* Webster, 9 Jur. N. S. 1189, 9 L. T. Rep. N. S. 363, 3 New Rep. 103, 12 Wkly. Rep. 94; Benno Jaffe, etc., Lanolin Fabrik *v.* Richardson, 62 L. J. Ch. 710, 68 L. T. Rep. N. S. 404, 3 Reports 515, 41 Wkly. Rep. 534; Swinborne *v.* Nelson, 22 L. J. Ch. 331, 1 Wkly. Rep. 155; Renard *v.* Levinstein, 10 L. T. Rep. N. S. 94, 11 L. T. Rep. N. S. 79, 3 New Rep. 665. Discovery before plea see Jones *v.* Pratt, 6 H. & N. 697, 7 Jur. N. S. 978, 30 L. J. Exch. 365, 4 L. T. Rep. N. S. 411, 9 Wkly. Rep. 696; Thomas *v.* Tillie, 17 Ir. C. L. 783. May have discovery of names of purchasers. Murray *v.* Clayton, L. R. 15 Eq. 115, 42 L. J. Ch. 191, 27 L. T. Rep. N. S. 664, 21 Wkly. Rep. 498; Tetley *v.* Easton, 18 C. B. 643, 25 L. J. C. P. 293, 86 E. C. L. 643; Crossley *v.* Stewart, 7 L. T. Rep. N. S. 848, 1 New Rep. 426. Discovery not used oppressively to compel disclosure of secret processes. Ashworth *v.* Roberts, 45 Ch. D. 623, 60 L. J. Ch. 27, 63 L. T. Rep. N. S. 160, 39 Wkly. Rep. 170.

Canadian practice.—Discovery of secret process cannot be had until the validity of the patent is established. Dickerson *v.* Radcliffe, 17 Ont. Pr. 586.

54. Verification on "belief" is insufficient. It should be positive. Rubber Tire Wheel Co. *v.* Davie, 100 Fed. 85. But see Elliott, etc., Book-Typewriter Co. *v.* Fisher Typewriter Co., 109 Fed. 330.

Assignee may verify. Thompson *v.* Jewett, 23 Fed. Cas. No. 13,961.

Equitable owner may verify. Goodyear *v.* Allyn, 10 Fed. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374.

55. See cases cited *infra*, this note.

Objection to the jurisdiction of the court may be taken by plea. Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 35 Fed. 134.

Reissue departing from original.—The defense that a reissue sued on is invalid because it covers an invention not included in the original may be presented by a special plea. Hubbell *v.* De Land, 14 Fed. 471, 11 Biss. 382.

The defense of laches may be presented by plea. Edison Electric Light Co. *v.* Equitable L. Assur. Soc., 55 Fed. 478.

Date of patent.—A defense to a suit for infringement on the ground that the patent bears date more than six months later than the notice given to the applicant of the allowance of the application may properly be taken by plea. Western Electric Co. *v.* North Electric Co., 135 Fed. 79, 67 C. C. A. 553.

56. Hubbell *v.* De Land, 14 Fed. 471, 11

(2) Requisites and Sufficiency. The allegations of the plea should be direct and distinct,[57] and must be limited to a single defense or issue, unless, by permission of the court, defendant is allowed to plead double.[58] A plea may contain an averment of several facts, but they must all conduce to a single point of defense.[59] If the plea contains more than one defense, the practice is not to confine defendant to his first ground of defense by striking out the others, but to allow him either to set down the pleas as an answer, or to put him to his election as to which of the pleas he will abide by.[60]

(3) Effect of Setting Down For Argument. By setting down pleas for argument, a complainant admits the facts, but not the conclusions, pleaded therein.[61]

(b) *Answer*—(1) Matters Required to Be Raised by Answer. Defenses which go to the merits and relate in no wise to matters in abatement or in bar must be raised by answer.[62] But where the infringement complained of has not been committed by defendant but by another person, this issue may be tendered by plea.[63] So also the defenses mentioned in the statute[64] must be set up by answer and not by plea.[65]

(2) Requisites and Sufficiency. The allegations of the answer must be sufficiently definite and precise to inform plaintiff what defense he has to meet.[66] It must include all matters of defense on which defendant intends to rely, except

Biss. 382; Sharp *v.* Reissner, 9 Fed. 445, 20 Blatchf. 10.

57. Westinghouse, etc., Co. *v.* Stanley, 65 Fed. 321.

58. Schnauffer *v.* Aste, 148 Fed. 867; Western Electric Co. *v.* North Electric Co., 135 Fed. 79, 67 C. C. A. 553; Giant Powder Co. *v.* Safety Nitro Powder Co., 19 Fed. 509.

59. Reissner *v.* Anness, 20 Fed. Cas. No. 11,686, 3 Ban. & A. 148, 12 Off. Gaz. 842.

60. Reissner *v.* Anness, 20 Fed. Cas. No. 11,686, 3 Ban. & A. 148, 12 Off. Gaz. 842.

61. General Electric Co. *v.* New England Electric Mfg. Co., 128 Fed. 738, 63 C. C. A. 448; Edison Electric Light Co. *v.* Equitable L. Assnr. Co., 55 Fed. 478.

By taking issue upon a plea the complainant admits its sufficiency. Birdseye *v.* Heilner, 26 Fed. 147.

62. See cases cited *infra*, this note.

The defenses of lack of invention and non-infringement cannot be made by plea, but only by answer. Glucose Sugar Refining Co. *v.* Douglass, etc., Co., 145 Fed. 949; Western Electric Co. *v.* North Electric Co., 135 Fed. 79, 67 C. C. A. 553; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 833; Leatherbee *v.* Brown, 69 Fed. 590; Korn *v.* Wiehusch, 33 Fed. 50; Sharp *v.* Reissner, 9 Fed. 445, 20 Blatchf. 10.

Issues raised by answer.— Where a bill for infringement of a patent against a non-resident defendant alleged infringement in the district where the suit was brought, which allegation was denied in the answer, the issue as to infringement is limited to infringement within such district. Gray *v.* Grinberg, 159 Fed. 138 [*affirming* 147 Fed. 732].

63. Leatherbee *v.* Brown, 69 Fed. 590.

64. U. S. Rev. St. (1878) § 4920.

65. Carnrick *v.* McKesson, 8 Fed. 807, 19 Blatchf. 369.

The defenses of a prior patent or previous description in a printed publication must be set up in an answer, and not in a plea. Carnrick *v.* McKesson, 8 Fed. 807, 19 Blatchf. 369.

A defense of prior invention and use cannot be raised by plea, but only by answer. Arrott *v.* Standard Sanitary Mfg. Co., 113 Fed. 389.

66. See cases cited *infra*, this note.

If fraud or subterfuge is relied on, the allegations must point out specifically the details thereof. American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., 70 Fed. 986 [*reversed* on other grounds in 80 Fed. 395, 25 C. C. A. 500]; Clark *v.* Scott, 5 Fed. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245, 2 Off. Gaz. 4; Donghty *v.* West, 7 Fed. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215, 3 Off. Gaz. 380, holding that an allegation that an extension of a patent was procured by fraud, misrepresentation, and in violation of law is simply an allegation of a conclusion of law from facts — which facts are not pleaded.

The denial of infringement, it has been held, must be specific and unevasive. Chase *v.* Fillebrown, 58 Fed. 374; Miller *v.* Buchanan, 5 Fed. 366; Jordan *v.* Wallace, 13 Fed. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. (Pa.) 165.

The issue of abandonment must be tendered by clear and specific averments. Western Electric Co. *v.* Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164.

The defense of prior patent is insufficient without a distinct averment that the invention had been before patented. Saunders *v.* Allen, 53 Fed. 109.

A denial of the novelty of the invention described in the patent named in the bill, specifying it by number, is sufficient to raise the issue of invention, although the title of the patent as stated in the answer may be technically inaccurate. Robinson *v.* Ameri-

such as are proper subjects of a plea or a demurrer.[67] Defenses not set up in the answer will not be considered by the court in rendering its decision.[68] More than one defense may be presented in an answer in equity,[69] provided they are not inconsistent;[70] but each should be separately and clearly alleged without condition or qualification.[71] They ought not to be blended in the same allegations where they depend upon different principles.[72]

(3) AMENDMENT. The general rules governing the allowance of amendments to answers in equity cases are applicable in suits for the infringement of patents.[73] An amendment will not be allowed where it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer[74] where it would be inconsistent with the answer as filed;[75] or where, upon the state of facts shown by the movant's affidavits, plaintiff's patent would not be defeated.[76] Nor will a motion to amend be regarded favorably where the new defense is dependent wholly on parol evidence.[77] Authority to grant the amendment being established, the court may properly allow it to be entered *nunc pro tunc*.[78]

(4) ADMISSIONS IN ANSWER. An allegation of infringement in the bill should be answered distinctly and unevasively, and if defendant does not deny or disprove it the fact of infringement is admitted.[79] The fact thus admitted must be

can Car, etc., Co., 135 Fed. 693, 68 C. C. A. 331.

67. See Robinson Pat. § 1115.

68. Session *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Puetz *v.* Bransford, 31 Fed. 458; Burden *v.* Corning, 4 Fed. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jennings *v.* Pierce, 13 Fed. Cas. No. 7,283, 3 Ban. & A. 361, 15 Blatchf. 42; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Pitts *v.* Edmonds, 19 Fed. Cas. No. 11,191, 1 Biss. 168, 2 Fish. Pat. Cas. 52; Williams *v.* Boston, etc., R. Co., 29 Fed. Cas. No. 17,716, 4 Ban. & A. 441, 17 Blatchf. 21, 16 Off. Gaz. 906; Wonson *v.* Peterson, 30 Fed. Cas. No. 17,934, 3 Ban. & A. 249, 13 Off. Gaz. 548; Wyeth *v.* Stone, 30 Fed. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273. *Compare* Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; Dunlap *v.* Schofield, 152 U. S. 244, 14 S. Ct. 576, 38 L. ed. 426; Lowell Mfg. Co. *v.* Hogg, 70 Fed. 787.

The defense of prior use should be pleaded, or notice given before trial, with particulars of time, place, and persons. Klein *v.* Seattle, 63 Fed. 702 [*affirmed* in 77 Fed. 200, 23 C. C. A. 114].

Want of novelty as a defense to a suit for infringement must be specially alleged. Guidet *v.* Barber, 11 Fed. Cas. No. 5,857, 5 Off. Gaz. 149; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533.

The defense of non-patentability can be availed of without setting it up in the answer. Hendy *v.* Golden State, etc., Iron Works, 127 U. S. 370, 8 S. Ct. 1275, 32 L. ed. 207; Guidet *v.* Barber, 11 Fed. Cas. No. 5,857, 5 Off. Gaz. 149.

69. Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 Off. Gaz. 630.

70. National Mfg. Co. *v.* Meyers, 7 Fed. 355.

Defenses are inconsistent when they cannot both be true, but where there are different defenses and they may all be true, although entirely different in their nature, they are not inconsistent. National Mfg. Co. *v.* Meyers, 7 Fed. 355.

71. Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1.

72. Jones *v.* Sewall, 13 Fed. Cas. No. 7,495, 3 Cliff. 563, 6 Fisb. Pat. Cas. 343, 3 Off. Gaz. 630.

73. See EQUITY, 16 Cyc. 1.

Absence of laches.— The amendment of an answer may be permitted where there has been no laches or delay, where the application was made as soon as the new facts were discovered, and there is nothing contradictory or inconsistent between the answer as filed and the amendment proposed to be made. Morehead *v.* Jones, 17 Fed. Cas. No. 9,791, 3 Wall. Jr. 306.

74. India Rubber Comb Co. *v.* Phelps, 13 Fed. Cas. No. 7,025, 8 Blatchf. 85, 4 Fish. Pat. Cas. 315; Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,118, 1 Ban. & A. 92, 11 Blatchf. 524.

75. Pentlarge *v.* Beeston, 19 Fed. Cas. No. 10,964, 4 Ban. & A. 23, 15 Blatchf. 347.

76. Richardson *v.* Croft, 11 Fed. 800.

77. India Rubber Comb Co. *v.* Phelps, 13 Fed. Cas. No. 7,025, 8 Blatchf. 85, 4 Fish. Pat. Cas. 315.

78. Roemer *v.* Simon, 95 U. S. 214, 24 L. ed. 384.

79. Chase *v.* Fillebrown, 58 Fed. 374; Lane *v.* Soverign, 43 Fed. 890; Globe Nail Co. *v.* Superior Nail Co., 27 Fed. 454; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566; Jordan *v.* Wallace, 13 Fed. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. 165.

accepted as established,[80] but the admission need go no further than its terms necessarily imply.[81]

(5) Notice of Special Matter — (a) Necessity. Under the statute[82] persons sued as infringers in a suit in equity, if they give the required notice in their answer, may prove at the final hearing the same special matters in defense to the charge of infringement as those which defendant, in an action at law, may set up under like conditions.[83] Notices of the kind, when the suit is in equity, may be given in the answer or amended answer,[84] and must be filed fully thirty days before trial.[85] Under such a pleading and notice, the respondent in an equity suit may prove that the patentee was not the original and first inventor of the alleged improvement, or that it had been patented or described in some printed publication, or that the invention had been in public use or on sale in this country for more than two years prior to the application; and the provision is that the judgment or decree must be in favor of the defending party if he proves any one or more of these special matters.[86] Where the defenses of prior invention, knowledge, or use is set up, the answer must allege the names and places of residence of those whom they intend to prove have possessed prior knowledge of the thing, and where the same has been used.[87] Testimony of witnesses examined in a case as to alleged prior use, etc., by parties of whom no notice was given in the answer, is incompetent;[88] such testimony is admissible only for the purpose of showing the state of the art at the time of the patentee's invention.[89] But notice of the names and places of residence of the witnesses by whom it is intended to prove such prior knowledge and use is not required.[90] The defenses authorized by statute[91] are separate and independent defenses; and each requires

80. Jones *v.* Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662; Lane *v.* Soverign, 43 Fed. 890; Jordan *v.* Wallace, 13 Fed. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. (Pa.) 165.

81. Jones *v.* Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662.

82. U. S. Rev. St. (1878) § 4920.

83. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68.

The option which is given by statute to file the general issue and give notice does not take away the right to set up the special matter in a plea. Phillips *v.* Combstock, 19 Fed. Cas. No. 11,099, 4 McLean 525, 2 Robb Pat. Cas. 724.

84. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68.

85. Brunswick *v.* Holzalb, 4 Fed. Cas. No. 2,057.

Plaintiff is entitled to the thirty days whether the matter be set up by plea or notice. Phillips *v.* Combstock, 19 Fed. Cas. No. 11,099, 4 McLean 525, 2 Robb Pat. Cas. 724.

86. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68.

87. Anderson *v.* Miller, 129 U. S. 70, 9 S. Ct. 224, 32 L. ed. 635; Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Tatum *v.* Eby, 60 Fed. 408 (holding that an allegation that a prior machine was built by a person named is not an allegation of prior use by that person); Brown *v.* Hall, 4 Fed. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Earl *v.* Dexter, 8 Fed. Cas. No. 4,242, 1 Ban. & A. 400, Holmes 412, 6 Off. Gaz. 729; Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Orr *v.* Merrill, 18 Fed. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376.

Place of use essential.— A notice of a defense of prior use which recites the names and residences of the alleged users, but wholly omits to describe the place of such use, is fatally defective. Diamond Match Co. *v.* Schenck, 71 Fed. 521 [*affirmed* in 77 Fed. 208, 23 C. C. A. 122].

Prior patents relied on by a defendant in a suit for infringement as anticipations of the one in suit must be pleaded (Jones *v.* Cyphers, 115 Fed. 324 [*affirmed* in 126 Fed. 753, 62 C. C. A. 21]; Odiorne *v.* Denney, 18 Fed. Cas. No. 10,431, 3 Ban. & A. 287, 13 Off. Gaz. 965, 1 N. J. L. J. 183); otherwise they cannot be considered for that purpose, but only to show the state of the art, and to limit the claims involved (Jones *v.* Cyphers, *supra*).

88. Stevenson *v.* Magowan, 31 Fed. 824; Bragg *v.* Stockton, 27 Fed. 509; Collender *v.* Griffith, 6 Fed. Cas. No. 3,000, 11 Blatchf. 213, 3 Off. Gaz. 689; Decker *v.* Grote, 7 Fed. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143, 3 Off. Gaz. 65; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,960, 1 Ban. & A. 428, 6 Off. Gaz. 724.

89. Kennedy *v.* Solar Refining Co., 69 Fed. 715; Stevenson *v.* Magowan, 31 Fed. 824; Geier *v.* Goetinger, 10 Fed. Cas. No. 5,299, 1 Ban. & A. 553, 7 Off. Gaz. 563; La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,960, 1 Ban. & A. 428, 6 Off. Gaz. 724.

90. Woodbury Patent Planing Mach. Co. *v.* Keith, 101 U. S. 479, 25 L. ed. 939; Allis *v.* Buckstaff, 13 Fed. 879; Wilton *v.* Railroads, 30 Fed. Cas. No. 17,857, 2 Robb Pat. Cas. 641, 1 Wall. Jr. 192.

91. U. S. Rev. St. (1878) § 4920.

its appropriate notice or answer in order to let in evidence to establish the defense.[92]

(b) SUFFICIENCY. In giving such notice, the respondent is not bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly supplies his adversary with the means of verifying his proof it is all that can be required;[93] and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts.[94]

(c) VERIFICATION. The notice required to be given by the statute[95] need not be under oath.[96]

(d) WAIVER. The absence of notice of want of novelty is waived where the testimony of witnesses to prove such defense is received without objection.[97]

(III) *CROSS BILL.* The general rules in regard to the filing of a cross bill apply to cross bills filed in patent suits.[98] Thus it must be germane to the original bill,[99] and must not include mere matters of defense.[1]

(IV) *SUPPLEMENTAL BILL.* The general rules relating to supplemental bills apply in suits for infringement of patents.[2]

(V) *DEMURRER AND EXCEPTIONS.* The filing of a demurrer or exceptions is controlled by the ordinary rules of equity pleading.[3] If the patent is void on its

92. Meyers *v.* Busby, 32 Fed. 670, 13 Sawy. 33.

93. Wise *v.* Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784 (holding that it is sufficient, in a suit for infringing a patent for such large objects as millstones, to state the names and addresses of the witnesses without stating the particular mill in which the stones were used); Smith *v.* Frazer, 22 Fed. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 2 Off. Gaz. 175, 3 Pittsb. (Pa.) 397.

94. Wise *v.* Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784.

95. U. S. Rev. St. (1878) § 4920.

96. Campbell *v.* New York, 45 Fed. 243.

97. Crouch *v.* Speer, 6 Fed. Cas. No. 3,438, 1 Ban. & A. 145, 6 Off. Gaz. 187; Roemer *v.* Simon, 20 Fed. Cas. No. 11,997, 1 Ban. & A. 138, 5 Off. Gaz. 555 [*affirmed* in 95 U. S. 214, 24 L. ed. 384].

98. See cases cited *infra*, this section.

99. Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 78 Fed. 639; New Departure Bell Co. *v.* Hardware Specialty Co., 62 Fed. 462; International Tooth-Crown Co. *v.* Carmichael, 44 Fed. 350; Johnson R. Signal Co. *v.* Union Switch, etc., Co., 43 Fed. 331; Curran *v.* St. Charles Car Co., 32 Fed. 835.

1. Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 78 Fed. 639; Atkins *v.* Parke, 61 Fed. 953, 10 C. C. A. 189; Puetz *v.* Bransford, 32 Fed. 318.

2. Newly discovered evidence.— Supplemental bills in the nature of a bill of review permitted upon newly discovered evidence. Diamond Drill, etc., Co. *v.* Kelley, 138 Fed. 833; Kelley *v.* Diamond Drill, etc., Co., 136 Fed. 855, 69 C. C. A. 599; Municipal Signal Co. *v.* Gamewell Fire-Alarm Tel. Co., 77 Fed. 452. *Contra*, where the evidence might have been discovered originally. Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189; Bennett *v.* Schooley, 77 Fed. 352.

New infringement.— Supplemental bill is permitted as to new infringement since original bill. Westinghouse Air Brake Co. *v.* Christensen Engineering Co., 126 Fed. 764. *Contra*, Chicago Grain Door Co. *v.* Chicago, etc., R. Co., 137 Fed. 101.

Supplemental bill setting up adjudication in other circuits is permitted. Electrical Accumulator Co. *v.* Brush Electric Co., 44 Fed. 602.

Supplemental bill bringing in other defendants overruled. Tubman *v.* Wason Mfg. Co., 44 Fed. 429.

Suit on original patent cannot be continued as to reissue by supplemental bill see Fry *v.* Quinlan, 9 Fed. Cas. No. 5,140, 13 Blatchf. 205. *Contra*, Woodworth *v.* Stone, 30 Fed. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749.

3. Thus the point that the allegations of the bill are insufficient may be taken by demurrer. Hutton *v.* Star Slide Seat Co., 60 Fed. 747; Hanlon *v.* Primrose, 56 Fed. 600; Coop *v.* Dr. Savage Physical Development Inst., 47 Fed. 899; International Terra-Cotta Lumber Co. *v.* Maurer, 44 Fed. 618; Mershon *v.* J. F. Pease Furnace Co., 24 Fed. 741, 23 Blatchf. 329; Fischer *v.* O'Shaughnessey, 6 Fed. 92.

Demurrer for insufficiency overruled see Bragg Mfg. Co. *v.* Hartford, 56 Fed. 292; Allis *v.* Stowell, 15 Fed. 242; Perry *v.* Corning, 19 Fed. Cas. No. 11,004, 7 Blatchf. 195; Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

Reference in bill to patents not produced does not place them before the court for consideration on demurrer. Bowers *v.* Bucyrus Co., 132 Fed. 39; Warner Bros. Co. *v.* Warren-Featherbone Co., 97 Fed. 604.

Patentability not admitted by demurrer see Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

Exceptions for discovery see Graham *v.*

face the point may be made by and determined on demurrer.[4] In determining the question of validity the court will take judicial notice of matters of common knowledge.[5]

(VI) *Amendments, Variance, and Multifariousness.* The ordinary rules which govern equity pleading are held applicable in respect of the amendment of pleadings in suits brought for the infringement of patents.[6] They are like-

Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1.

Exceptions for surplusage see Stirrat *v.* Excelsior Mfg. Co., 44 Fed. 142.

4. Richards *v.* Chase Elevator Co., 158 U. S. 299, 15 S. Ct. 831, 39 L. ed. 991 [*affirming* 40 Fed. 165]; Jackes-Evans Mfg. Co. *v.* Hemp, 140 Fed. 254, 71 C. C. A. 646; American Salesbook Co. *v.* Carter-Crume Co., 125 Fed. 499 [*reversed* on other grounds in 129 Fed. 1004, 62 C. C. A. 679]; Strom Mfg. Co. *v.* Weir Frog Co., 83 Fed. 170, 27 C. C. A. 502 [*affirming* 75 Fed. 279]; Covert *v.* Travers Bros. Co., 70 Fed. 788; Heaton-Peninsular Button-Fastener Co. *v.* Schlochtmeyer, 69 Fed. 592; Root *v.* Sontag, 47 Fed. 309; Bottle Seal Co. *v.* De la Vergne Bottle, etc., Co., 47 Fed. 59; Fougeres *v.* Murbarger, 44 Fed. 292; West *v.* Rae, 33 Fed. 45; Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

Invalidity must be obvious and not doubtful see Hogan *v.* Westmoreland Specialty Co., 154 Fed. 66, 83 C. C. A. 178; General Electric Co. *v.* Campbell, 137 Fed. 600; Regensberg *v.* American Exch. Cigar Co., 130 Fed. 549; American Fibre-Chamois Co. *v.* Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Cleveland Faucet Co. *v.* Vulcan Brass Co., 72 Fed. 505; Caldwell *v.* Powell, 71 Fed. 970 [*reversed* on other grounds in 73 Fed. 488, 19 C. C. A. 592]; Covert *v.* Travers Bros. Co., 70 Fed. 788; Heaton-Peninsular Button-Fastener Co. *v.* Schlochtmeyer, 69 Fed. 592; Drainage Constr. Co. *v.* Englewood Sewer Co., 67 Fed. 141; Rodwell Mfg. Co. *v.* Housman, 58 Fed. 870; Haulon *v.* Primrose, 56 Fed. 600; Goebel *v.* American R. Supply Co., 55 Fed. 825; Standard Oil Co. *v.* Southern Pac. Co., 42 Fed. 295; Eclipse Mfg. Co. *v.* Adkins, 36 Fed. 554; Dick *v.* Oil Well Supply Co., 25 Fed. 105.

Unless invalidity is so clear that no evidence could change the conclusion, a demurrer will not be sustained. A. R. Milner Seating Co. *v.* Yesbera, 111 Fed. 386, 49 C. C. A. 397; Neidich *v.* Fosbenner, 108 Fed. 266; Electric Vehicle Co. *v.* Winton Motor-Carriage Co., 104 Fed. 814; Ballou *v.* Potter, 88 Fed. 786; Patent Button Co. *v.* Consolidated Fastener Co., 84 Fed. 189; Blessing *v.* John Trageser Steam Copper Works, 34 Fed. 753.

Sufficiency of disclosure in patent will not be passed upon on demurrer. Dade *v.* Boorum, etc., Co., 121 Fed. 135.

Prior art will not be investigated on demurrer. Rowe *v.* Blodgett, etc., Co., 87 Fed. 868.

Identity with prior expired patents to the same inventor will be considered on demurrer. Russell *v.* Kern, 64 Fed. 581 [*affirmed* in 69 Fed. 94, 16 C. C. A. 154].

Invalidity of reissue when compared to original patent will be determined on demurrer where original patent and reissue before court. Edison *v.* American Mutoscope, etc., Co., 127 Fed. 361; Adams, etc., Mfg. Co. *v.* Meyrose, 12 Fed. 440.

Cases in which demurrer sustained and patent held void see Lamson Consol. Service Co. *v.* Siegel-Cooper Co., 106 Fed. 734; Lyons *v.* Bishop, 95 Fed. 154; E. Ingraham Co. *v.* E. N. Welch Mfg. Co., 92 Fed. 1019, 35 C. C. A. 163; Warren Featherbone Co. *v.* Warner Bros. Co., 92 Fed. 990; E. Ingraham Co. *v.* E. N. Welch Mfg. Co., 87 Fed. 1000; Conley *v.* Marum, 83 Fed. 309; Strom Mfg. Co. *v.* Weir Frog Co., 75 Fed. 279.

Cases in which demurrer overruled see Fabric Coloring Co. *v.* Alexander Smith, etc., Carpet Co., 109 Fed. 328; Lyons *v.* Drucker, 106 Fed. 416, 45 C. C. A. 368; J. Elwood Lee Co. *v.* B. F. Goodrich Co., 105 Fed. 627; Electric Vehicle Co. *v.* Winton Motor-Carriage Co., 104 Fed. 814; Fairies Mfg. Co. *v.* Brown, 102 Fed. 508; Beer *v.* Walbridge, 100 Fed. 465, 40 C. C. A. 496; Higgin Mfg. Co. *v.* Scherer, 100 Fed. 459, 40 C. C. A. 491; L. E. Waterman Co. *v.* Vassar College, 99 Fed. 564; Warren Featherbone Co. *v.* Warner Bros. Co., 92 Fed. 990; Chandler Adjustable Chair, etc., Co. *v.* Heywood Bros., etc., Co., 91 Fed. 163; Ballou *v.* Potter, 88 Fed. 786; Noe *v.* Prentice, 18 Fed. Cas. No. 10,284*a*.

5. Phillips *v.* Detroit, 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532; Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Strom Mfg. Co. *v.* Weit Frog Co., 83 Fed. 170, 27 C. C. A. 502; Caldwell *v.* Powell, 71 Fed. 970 [*reversed* on other grounds in 73 Fed. 488, 19 C. C. A. 592]; Heaton-Peninsular Button-Fastener Co. *v.* Schlochtmeyer, 69 Fed. 592 [*affirmed* in 72 Fed. 520, 18 C. C. A. 674]; Root *v.* Sontag, 47 Fed. 309; Eclipse Mfg. Co. *v.* Adkins, 36 Fed. 554; Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444; Knapp *v.* Benedict, 26 Fed. 627.

Court must distinguish between special knowledge and common and general knowledge see American Fibre-Chamois Co. *v.* Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Cleveland Faucet Co. *v.* Vulcan Brass Co., 72 Fed. 505. There must be no doubt that the knowledge is common. Lalance, etc., Mfg. Co. *v.* Mosheim, 48 Fed. 452.

6. **Incomplete or indefinite allegations of the bill** may be cured by amendment (Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 68 Fed. 914; New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 64 Fed. 859 [*reversed* on other grounds in 73 Fed. 469, 19 C. C. A. 534]; Ross *v.* Ft. Wayne, 58 Fed. 404 [*reversed* on other grounds in 63 Fed. 466, 11 C. C. A. 288]; Edison Electric Light Co. *v.*

wise held applicable in respect of multifariousness,[7] and variance between the allegations and proofs.[8]

14. Evidence[9] — a. In General. The ordinary rules of evidence are applicable to suits for infringement, so far as the special nature of the right in controversy permits and except where modified by special statutory provisions.[10]

Mather Electric Co., 53 Fed. 244; New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 20 Fed. 505), and amendment is permitted to bring in some new fact (John R. Williams Co. *v.* Miller, etc., Mfg. Co., 108 Fed. 967; Patent-Button Co. *v.* Pilcher, 95 Fed. 479; Westinghouse Electric, etc., Co. *v.* Mustard, 87 Fed. 336; Reay *v.* Berlin, etc., Envelope Co., 30 Fed. 448; Reay *v.* Raynor, 19 Fed. 308; Holste *v.* Robertson, 4 Ch. D. 9, 46 L. J. Ch. 1, 35 L. T. Rep. N. S. 457, 25 Wkly. Rep. 35; Penn *v.* Bibby, L. R. 1 Eq. 548).

Amendment of answer.— The answer may be amended by giving new names of witnesses or new facts of anticipations. Roemer *v.* Simon, 95 U. S. 214, 24 L. ed. 384; Standard Elevator Interlock Co. *v.* Ramsey, 130 Fed. 151; Campbell *v.* New York, 45 Fed. 243; Babcock, etc., Co. *v.* Pioneer Iron-Works, 34 Fed. 338; Morehead *v.* Jones, 17 Fed. Cas. No. 9,791, 3 Wall. Jr. 306. Amendment to answer refused where facts should have been discovered and alleged originally (India Rubber Comb Co. *v.* Phelps, 13 Fed. Cas. No. 7,025, 8 Blatchf. 85, 4 Fish. Pat. Cas. 315); or where amendment would not change the decision (Richardson *v.* Croft, 11 Fed. 800).

Amendment to deny former admissions will be refused. Pentlarge *v.* Beeston, 19 Fed. Cas. No. 10,964, 4 Ban. & A. 23, 15 Blatchf. 347; Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,118, 1 Ban. & A. 92, 11 Blatchf. 524.

7. Patents capable of conjoint use.— Suit on several patents is not multifarious where they are capable of conjoint use and such use is alleged. Gamewell Fire-Alarm Tel. Co. *v.* Chillicothe, 7 Fed. 351; Gillespie *v.* Cummings, 10 Fed. Cas. No. 5,434, 1 Ban. & A. 587, 3 Sawy. 259; Mecrse *v.* Allen, 16 Fed. Cas. No. 9,393*a*; Nourse *v.* Allen, 18 Fed. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63. Unless conjoint use by defendant is alleged, a suit on several patents is multifarious. Western Tel. Mfg. Co. *v.* American Electric Tel. Co., 137 Fed. 603; Russell *v.* Winchester Repeating Arms Co., 97 Fed. 634; Louden Mach. Co. *v.* Ward, 96 Fed. 232; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 833; Hayes *v.* Dayton, 8 Fed. 702, 18 Blatchf. 420; Hayes *v.* Bickelhoupt, 11 Fed. Cas. No. 6,261*b*, 19 Off. Gaz. 177; Nellis *v.* McLanahan, 17 Fed. Cas. No. 10,099, 6 Fish. Pat. Cas. 286.

A bill primarily for infringement is not rendered multifarious by setting out a contract between plaintiff and defendant binding defendant not to contest the validity of the patent. Dunham *v.* Bent, 72 Fed. 60.

A bill claiming relief for interfering patents and infringement is not multifarious. Stonemetz Printers' Mach. Co. *v.* Brown Co., 46 Fed. 72.

A bill on expired and unexpired patents is not multifarious.—Huntington Dry Pulverizer Co. *v.* Virginia-Carolina Chemical Co., 130 Fed. 558; Roemer *v.* Logowitz, 20 Fed. Cas. No. 11,996.

A bill for infringement praying cancellation of assignment is not multifarious. Atherton Mach. Co. *v.* Atwood Morrison Co., 102 Fed. 949, 43 C. C. A. 72.

A bill praying relief from infringement of a patent and unfair competition is multifarious. George Frost Co. *v.* Kora Co., 136 Fed. 487 [*affirmed* in 140 Fed. 987, 71 C. C. A. 19]; Ball, etc., Fastener Co. *v.* Cohn, 90 Fed. 664.

A bill joining infringement of a patent and slander is multifarious. Fougeres *v.* Murbarger, 44 Fed. 292.

A bill to enjoin infringement and the use of the name applied to the article by the patentee is not multifarious. Adam *v.* Folger, 120 Fed. 260, 56 C. C. A. 540; Jaros Hygienic Underwear Co. *v.* Fleece Hygiene Underwear Co., 60 Fed. 622.

8. Tryon *v.* White, 24 Fed. Cas. No. 14,208, Pet. C. C. 96, 1 Robb Pat. Cas. 64.

9. See, generally, Evidence.

10. See, generally, Evidence.

Prior patents and publications.— Prior patents are admissible in actions at law under the general issue without any special notice, and in equity suits without any averment in the answer touching the subject, to show the state of the art (Grier *v.* Wilt, 120 U. S. 412, 7 S. Ct. 718, 30 L. ed. 712; Jones *v.* Cyphers, 126 Fed. 753, 62 C. C. A. 21; Parsons *v.* New Home Sewing Mach. Co., 125 Fed. 386 [*affirmed* in 134 Fed. 394, 67 C. C. A. 392]; Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345; American Saddle Co. *v.* Hogg, 1 Fed. Cas. No. 315, 5 Fish. Pat. Cas. 353, Holmes 133, 2 Off. Gaz. 59. But see Clark *v.* Adie, 3 Ch. D. 134, 45 L. J. Ch. 228, 35 L. T. Rep. N. S. 349, 24 Wkly. Rep. 1007 [*affirmed* in 2 App. Cas. 423, 46 L. J. Ch. 598, 27 L. T. Rep. N. S. 1, 26 Wkly. Rep. 45]; Atty.-Gen. *v.* Taylor, Prec. Ch. 59, 24 Eng. Reprint 29), and to aid the court in the construction of a patent sued on (Grier *v.* Wilt, *supra*; Eachus *v.* Broomall, 115 U. S. 429, 6 S. Ct. 229, 29 L. ed. 419; Parsons *v.* New Home Sewing Mach. Co., *supra*), but not to show want of novelty in the invention claimed in complainant's patent (Grier *v.* Wilt, *supra*; American Saddle Co. *v.* Hogg, *supra*; Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395), or for the purpose of showing anticipation (Jones *v.* Cyphers, *supra*. See also Myers *v.* Brown, 102 Fed. 250, 42 C. C. A. 320), and a prior foreign publication is competent as evidence in regard to the state of the art, and as a foundation for the inquiry

b. Presumptions and Burden of Proof. The patent is presumptively valid and the burden is on defendant to show its invalidity[11] beyond a reasonable

whether it required invention to pass from a structure set forth in the publication to the patented structure (French *v.* Carter, 137 U. S. 239, 11 S. Ct. 90, 34 L. ed. 664). Patents relied on must be properly introduced. Oregon Imp. Co. *v.* Excelsior Coal Co., 132 U. S. 215, 10 S. Ct. 54, 33 L. ed. 344; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Vermont Farm Mach. Co. *v.* Gibson, 56 Fed. 143, 5 C. C. A. 451; Alaska Refrigerator Co. *v.* Wisconsin Refrigerator Co., 47 Fed. 324; National Pump Cylinder Co. *v.* Simmons Hardware Co., 18 Fed. 324, 5 McCrary 592; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Grover, etc., Sewing-Mach. Co. *v.* Sloat, 11 Fed. Cas. No. 5,846, 2 Fish. Pat. Cas. 112.

Ex parte affidavits are not admissible. Lilienthal *v.* Washburn, 8 Fed. 707, 4 Woods 65.

Decision and evidence in interference involving different parties are not admissible. Westinghouse Electric, etc., Co. *v.* Roberts, 125 Fed. 6.

Admissions or declarations.— It is competent to prove admissions or declarations by a party to the suit bearing upon the question at issue. National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; Rose *v.* Hirsh, 77 Fed. 469, 23 C. C. A. 246; Wright *v.* Postel, 44 Fed. 352; Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140; Thacher Heating Co. *v.* Drummond, 23 Fed. Cas. No. 13,865, 3 Ban. & A. 138. Admissions by the inventor are not binding against the assignee. Wilson *v.* Simpson, 9 How. (U. S.) 109, 13 L. ed. 66.

Opinion expressed before suit is not binding. Osgood Dredge Co. *v.* Metropolitan Dredge Co., 75 Fed. 670, 21 C. C. A. 491.

Testimony that witness never heard of invention before plaintiff made it is not admissible. Hitchcock *v.* Shoninger Melodeon Co., 11 Fed. Cas. No. 6,537.

Evidence of purchase by plaintiff's agent from defendant for purpose of showing infringement is admissible. Badische Anilin, etc., Fabrik *v.* Klopstein, 125 Fed. 543; De Florez *v.* Raynolds, 7 Fed. Cas. No. 3,742, 3 Ban. & A. 292, 14 Blatchf. 505. *Contra*, Byam *v.* Bullard, 4 Fed. Cas. No. 2,262, 1 Curt. 100.

Names of customers.— Defendant is not compelled to give names of customers where infringement and validity denied. Roberts *v.* Walley, 14 Fed. 167.

Experiments conducted with a view to litigation are looked on with distrust. Young *v.* Fernie, 4 Giffard 577, 10 Jur. N. S. 926, 10 L. T. Rep. N. S. 861, 4 New Rep. 218, 12 Wkly. Rep. 901, 66 Eng. Reprint 836.

Communications to patent agent as such are not privileged. Moseley *v.* Victoria Rubber Co., 55 L. T. Rep. N. S. 482.

Inadmissible evidence see St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 11 S. Ct. 803, 35 L. ed. 404; Blanchard *v.* Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Harper, etc., Co. *v.* Wilgus, 56 Fed. 587, 6 C. C. A. 45; Seibert Cylinder Oil-Cup Co. *v.* William Powell Co., 38 Fed. 600; Judson *v.* Cope, 14 Fed. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615.

Weight of evidence see Brill *v.* St. Louis Car Co., 80 Fed. 909; Dobson *v.* Graham, 49 Fed. 17 [*affirmed* in 154 U. S. 501, 14 S. Ct. 1145, 38 L. ed. 1076]; Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68; Woodman *v.* Stimpson, 30 Fed. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [*reversed* on other grounds in 10 Wall. 117, 19 L. ed. 866].

Rebuttal.— *Prima facie* evidence cannot be put in as rebuttal. Smith *v.* Uhrich, 94 Fed. 865; American Paper Barrel Co. *v.* Laraway, 28 Fed. 141; Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Stainthorp *v.* Humiston, 22 Fed. Cas. No. 13,281, 4 Fish. Pat. Cas. 107.

Invention prior to date proved by defendant may be shown on rebuttal. St. Paul Plow-Works *v.* Starling, 140 U. S. 184, 4 S. Ct. 803, 35 L. ed. 404 [*affirming* 29 Fed. 790].

11. Atwood-Morrison Co. *v.* Sipp Electric Co., 136 Fed. 859 [*reversed* on other grounds in 142 Fed. 149]; De Lamar *v.* De Lamar Min. Co., 110 Fed. 538 [*affirmed* in 117 Fed. 240, 54 C. C. A. 272]; National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375; Williames *v.* Bernard, 41 Fed. 358; American Bell Tel. Co. *v.* Molecular Tel. Co., 32 Fed. 214, 23 Blatchf. 253; Hoe *v.* Cottrell, 1 Fed. 597, 17 Blatchf. 546; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,794, 2 Ban. & A. 436, 4 Cliff. 408, 10 Off. Gaz. 702; Brown *v.* Whittemore, 4 Fed. Cas. No. 2,033, 5 Fish. Pat. Cas. 524, 2 Off. Gaz. 248; Howes *v.* Nute, 12 Fed. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jordan *v.* Dobson, 13 Fed. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Pitts *v.* Hall, 19 Fed. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. Rep. 441.

Where it does not appear that the patent was granted after proper consideration of the prior art, the presumption of validity is not so strong. American Soda Fountain Co. *v.* Sample, 130 Fed. 145, 64 C. C. A. 497; Cleveland Foundry Co. *v.* Kaufmann, 126 Fed. 658 [*reversed* on other grounds in 135 Fed. 360, 68 C. C. A. 658]; Earle *v.* Wanamaker, 87 Fed. 740. Where defendant shows use by others before application the burden of proof shifts to patentee to show prior invention. Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481, 11 S. Ct. 846, 35 L. ed. 521; Michigan Cent. R. Co. *v.* Consolidated Car-Heating Co., 67 Fed. 121, 14 C. C. A. 232; Caverly *v.* Deere, 52 Fed. 758.

Presumption as to date of invention.— The date of application printed in the patent is presumably the date of invention. Drewson

doubt.[12] But the burden is on plaintiff to prove infringement,[13] and that notice of his rights was given by marking the patented article.[14] He must also prove facts which will show the amount of damages.[15]

e. Evidence as to Invalidity of Patent. Evidence of any fact tending to show that the patent is invalid is admissible,[16] provided proper basis for it is laid in the pleadings or under the general issue and provided thirty days' notice in writing is given to plaintiff or his attorney. To prove previous invention, knowledge, or use of a thing patented defendant must state the names of the patentees, dates of the patents, the names and residences of the alleged prior users, and where and by whom the invention was used.[17]

v. Hartje Paper Mfg. Co., 131 Fed. 734, 65 C. C. A. 548.

Technical defenses must be clearly proved. A. B. Dick Co. *v.* Fuerth, 57 Fed. 834.

12. Deering *v.* Winona Harvester Works, 155 U. S. 286, 15 S. Ct. 118, 39 L. ed. 153; Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; Western Electric Co. *v.* Home Tel. Co., 85 Fed. 649; Osgood Dredge Co. *v.* Metropolitan Dredging Co., 75 Fed. 670, 21 C. C. A. 491; Frankfort Whisky Process Co. *v.* Mill Creek Distilling Co., 37 Fed. 533; Tompkins *v.* Gage, 24 Fed. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Wood *v.* Cleveland Rolling-Mill Co., 30 Fed. Cas. No. 17,941, 4 Fish. Pat. Cas. 550.

13. Infringement is a tort which must be proved and not left to conjecture. Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Elizabeth *v.* American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; National Casket Co. *v.* Stolts, 135 Fed. 534, 68 C. C. A. 84; King *v.* Anderson, 90 Fed. 500; Stirling Co. *v.* Pierpoint Boiler Co., 72 Fed. 780, 77 Fed. 1007, 22 C. C. A. 680; Masten *v.* Hunt, 51 Fed. 216 [*affirmed* in 55 Fed. 78, 5 C. C. A. 42]; Royer *v.* Chicago Mfg. Co., 20 Fed. 853; National Car-Brake Shoe Co. *v.* Detroit, etc., R. Co., 4 Fed. 224; Cook *v.* Howard, 6 Fed. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Dixon *v.* Moyer, 7 Fed. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. 68; Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; Hudson *v.* Draper, 12 Fed. Cas. No. 6,834, 4 Cliff. 178, 4 Fish. Pat. Cas. 256; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Sands *v.* Wardwell, 21 Fed. Cas. No. 12,306, 3 Cliff. 277; Betts *v.* Willmott, L. R. 6 Ch. 239, 25 L. T. Rep. N. S. 188, 19 Wkly. Rep. 369.

Use of entire combination and not merely part must be shown. Vance *v.* Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Tatum *v.* Gregory, 41 Fed. 142.

Sale at defendant's place of business by an employee is presumably a sale by defendant. Hutler *v.* De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652.

Use of device before patent raises no presumption of infringement afterward. Brill *v.* St. Louis Car Co., 80 Fed. 909.

In a suit against a mere user evidence should be convincing. Marcus *v.* Sutton, 124 Fed. 74.

Where infringement is not explicitly denied, little proof is necessary. Hutter *v.* De Q. Bottle Stopper Co., 119 Fed. 190; Gear *v.* Fitch, 10 Fed. Cas. No. 5,290, 3 Ban. & A. 573, 16 Off. Gaz. 1231; Goodyear *v.* Berry, 10 Fed. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439.

Failure of defendant to disclose what he uses justifies presumption of infringement. Read *v.* Schulze-Berge, 78 Fed. 493; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Piper *v.* Brown, 19 Fed. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196, 3 Off. Gaz. 97.

Identity of product raises presumption that process is the same. Matheson *v.* Campbell, 77 Fed. 280.

Where use is proved the burden is on defendant to show license. Armat Moving Picture Co. *v.* Edison Mfg. Co., 121 Fed. 559 [*reversed* on other grounds in 125 Fed. 939, 60 C. C. A. 380]; Searls *v.* Bouton, 12 Fed. 140, 20 Blatchf. 426; Watson *v.* Smith, 7 Fed. 350; Day *v.* New England Car-Spring Co., 7 Fed. Cas. No. 3,688.

Insufficient proof of infringement.— Edison Electric Light Co. *v.* Kaelber, 76 Fed. 804; Commoss *v.* Somers, 49 Fed. 920; Judson Mfg. Co. *v.* Burge-Donahoe Co., 47 Fed. 463; Parsons *v.* Colgate, 15 Fed. 600, 21 Blatchf. 171; Standard Measuring Mach. Co. *v.* Teague, 15 Fed. 390.

Sufficient proof of infringement see White *v.* Hunter, 47 Fed. 819; Schneider *v.* Missouri Glass Co., 36 Fed. 582; Kiesele *v.* Haas, 32 Fed. 794; Peterson *v.* Simpkins, 25 Fed. 486.

14. Lorain Steel Co. *v.* New York Switch, etc., Co., 153 Fed. 205.

Effect of admission of notice see Lorain Steel Co. *v.* New York Switch, etc., Co., 153 Fed. 205.

15. Robertson *v.* Blake, 94 U. S. 728, 24 L. ed. 245; Lee *v.* Pillsbury, 49 Fed. 747; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Burdell *v.* Denig, 4 Fed. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Carter *v.* Baker, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512. See also *supra*, XIII, C, 12, a, b.

Where the amount of actual damages is not proved, nominal damages only may be collected. New York *v.* Ransom, 23 How. (U. S.) 487, 16 L. ed. 515.

Doubts resolved against wanton infringer see Rose *v.* Hirsh, 94 Fed. 177, 36 C. C. A. 132, 51 L. R. A. 801.

16. See *supra*, XIII, A, 1.

17. U. S. Rev. St. (1878) § 4920. And see *supra*, XIII, C, 3, d.

d. Expert Witnesses. It is proper in patent cases to produce the testimony of expert witnesses to explain the inventions and the differences between inventions;[18] but their testimony is not necessarily accepted as controlling contrary to the judgment of the court,[19] nor is mere opinion evidence admissible.[20]

e. Estoppel. Disclaimers[21] and admissions made in the prosecution of the application in the patent office are binding upon the patentee and copies of the office records are admissible to prove them.[22] Defendant cannot as against his assignee produce evidence to show that the patent assigned by him is invalid or that the assignee's title is not good.[23]

f. Evidence as to Infringement. Evidence is admissible which tends to show whether or not the claims of the patent properly construed apply to the alleged infringing device. Prior patents and publications are admissible as bearing upon the scope but not the validity of the patent in suit, even where they are not set up in the pleadings or formal notice.[24]

g. Secret Inventions. A witness is not required to disclose a secret invention or discovery made or owned by himself.[25]

h. Proving Patents and Patent Office Records. A certified copy of any record, book, paper, or drawing belonging to the patent office and of letters

18. Fenton Mfg. Co. *v.* Office Specialty Co., 12 App. Cas. (D. C.) 201; National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; American Linoleum Mfg. Co. *v.* Nairn Linoleum Co., 44 Fed. 755; Conover *v.* Rapp, 6 Fed. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Hudson *v.* Draper, 12 Fed. Cas. No. 6,834, 4 Cliff. 178, 4 Fish. Pat. Cas. 256; Badische Anilin, etc., Fabrik *v.* Levenstein, 24 Ch. D. 156, 52 L. J. Ch. 704, 48 L. T. Rep. N. S. 822, 31 Wkly. Rep. 913 [*affirmed* in 12 App. Cas. 710, 57 L. T. Rep. N. S. 853]; Seed *v.* Higgins, 8 H. L. Cas. 550, 6 Jur. N. S. 1264, 30 L. J. Q. B. 314, 3 L. T. Rep. N. S. 101, 11 Eng. Reprint 544. Where difficult questions are involved, experts are necessary. Fay *v.* Mason, 127 Fed. 325, 62 C. C. A. 159; Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371; Miller *v.* Smith, 5 Fed. 359. Where questions involved are clear, experts should not be allowed. Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64. Differences in designs may be pointed out. Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345.

Model is the best evidence of character of machine. Swift *v.* Whisen, 23 Fed. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

19. Overweight Counterbalance Elevator Co. *v.* Improved Order Red Men's Hall Assoc., 94 Fed. 155, 36 C. C. A. 125; Hanifen *v.* Godshalk Co., 84 Fed. 649, 28 C. C. A. 507; Spaulding *v.* Tucker, 22 Fed. Cas. No. 13,220, Deady 649.

Evidence of experiments accepted where not contradicted. Badische Anilin, etc., Fabrik *v.* Klipstein, etc., Co., 125 Fed. 543; A. B. Dick Co. *v.* Belke, 86 Fed. 149.

Testimony of experts as to the result of experiments is not to be lightly accepted. National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375.

Conflict of testimony see Béné *v.* Jeantet, 129 U. S. 683, 9 S. Ct. 428, 32 L. ed. 803.

20. Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; Lee *v.* Pillsbury, 49 Fed. 747.

21. See *supra*, IX, E.

22. Crawford *v.* Heysinger, 123 U. S. 589, 8 S. Ct. 399, 31 L. ed. 269; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Philadelphia, etc., Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Richardson *v.* Campbell, 72 Fed. 525; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77. See *supra*, X, A, 5.

23. See *supra*, VI, F, 3.

24. Grier *v.* Wilt, 120 U. S. 412, 7 S. Ct. 718, 30 L. ed. 712; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Jones *v.* Cyphers, 126 Fed. 753, 62 C. C. A. 21; Parsons *v.* New Home Sewing Mach. Co., 125 Fed. 386 [*affirmed* in 134 Fed. 394, 67 C. C. A. 392]; Myers *v.* Brown, 102 Fed. 250, 42 C. C. A. 320; Universal Winding Co. *v.* Willimantic Linen Co., 82 Fed. 228; Dayton Loop, etc., Co. *v.* Ruhl, 55 Fed. 649; Forschner *v.* Baumgarten, 26 Fed. 858; American Saddle Co. *v.* Hogg, 1 Fed. Cas. No. 315, 5 Fish. Pat. Cas. 353, Holmes 133, 2 Off. Gaz. 59; Middletown Tool Co. *v.* Judd, 17 Fed. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Westlake *v.* Cartler, 29 Fed. Cas. No. 17,451, 6 Fish. Pat. Cas. 519, 4 Off. Gaz. 636.

Evidence held insufficient to show sale of infringing article within district essential to give jurisdiction see Gray *v.* Grinberg, 147 Fed. 732 [*affirmed* in 159 Fed. 138].

25. U. S. Rev. St. (1878) § 4908 [U. S. Comp. St. (1901) p. 3390]; Stokes Bros. Mfg. Co. *v.* Heller, 56 Fed. 297; Dobson *v.* Graham, 49 Fed. 17.

Other methods of performing the invention claimed in the patent are not protected as secret under U. S. Rev. St. (1878) § 4908 [U. S. Comp. St. (1901) p. 3390]. Dornan *v.* Keefer, 49 Fed. 462.

Patent office rule of secrecy of application has been held not to apply in court. Diamond Match Co. *v.* Oshkosh Match Works, 63 Fed. 984.

patent may be received in evidence in place of the originals.[26] A copy of a foreign patent certified by the commissioner of patents of the United States will be accepted as *prima facie* evidence of the fact of the granting of such patent and of the date and contents thereof.[27] The printed copies of specifications and drawings of patents deposited in the capitols of the various states and territories and certified by the commissioner of patents will be received as evidence of all matters therein contained.[28]

i. Judicial Notice. Courts may properly take judicial notice of facts that may be regarded as part of the common knowledge of every person of ordinary understanding and intelligence.[29] The court is permitted to avail itself of common knowledge in regard to matters of science, and by that knowledge to define the scope of the patent.[30] The court may take judicial notice of a thing in common use throughout the country.[31] The court may refer to dictionaries and encyclopedias for the definition and scope of scientific terms or names, when necessary to go outside of the record, or where the testimony of experts is conflicting.[32] For the purpose of ascertaining the state of the art the court may take judicial notice of what is disclosed by its own records in a previous case involving devices appertaining to the same art.[33] The courts will not take judicial notice of patents or inventions.[34]

15. Issues, Proof, and Variance. The issue of fraud in the reissue of a patent can only be raised by distinct and special allegations in the plea or answer.[35] The general rule that the proof and pleading must correspond applies to actions at law and suits in equity for infringement of patents.[36] In actions at law for

26. U. S. Rev. St. (1878) § 892 [U. S. Comp. St. (1901) p. 673]; Crawford *v.* Heysinger, 123 U. S. 589, 8 S. Ct. 399, 31 L. ed. 269; Corning *v.* Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Philadelphia, etc., Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Richardson *v.* Campbell, 72 Fed. 525; Emerson *v.* Hogg, 8 Fed. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. Rep. 77.

Assignment of patent.— That an assignment of a patent was recorded and is produced and put in evidence by a subsequent assignee in a suit for infringement is sufficient evidence of its delivery. Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. 64 [*affirmed* on other grounds in 160 Fed. 928].

27. U. S. Rev. St. (1878) § 893 [U. S. Comp. St. (1901) p. 673].

Foreign patent may be proved by copy under seal of country. Gatling *v.* Newell, 9 Ind. 572; Schoerken *v.* Swift, 7 Fed. 469, 19 Blatchf. 209.

28. U. S. Rev. St. (1878) § 894 [U. S. Comp. St. (1901) p. 673].

29. Phillips *v.* Detroit, 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532; King *v.* Gallum, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870.

Of facts cited in encyclopedias, dictionaries, or other publications, judicial notice will not be taken unless they are of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

30. Knapp *v.* Benedict, 26 Fed. 627.

31. Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Phillips *v.* Detroit, 116 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532; King *v.* Gallun, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870; Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576; Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Root *v.* Sontag, 47 Fed. 309.

Where the court has the slightest doubt that such was the fact, it will not take judicial notice that certain similar articles exhibited at the argument were in use before the date of the patent. Lalance, etc., Mfg. Co. *v.* Mosheim, 48 Fed. 452.

32. Panzl *v.* Battle Island Paper, etc., Co., 132 Fed. 607.

33. American Salesbook Co. *v.* Carter-Crume Co., 125 Fed. 499 [*reversed* in open court without opinion in 129 Fed. 1004, 62 C. C. A. 679]; Cushman Paper-Box Mach. Co. *v.* Goddard, 95 Fed. 664, 37 C. C. A. 221.

34. American Salesbook Co. *v.* Carter-Crume Co., 125 Fed. 499 [*reversed* in open court without opinion in 129 Fed. 1004, 62 C. C. A. 679]; Bottle Seal Co. *v.* De la Vergne Bottle, etc., Co., 47 Fed. 59.

35. Blake *v.* Stafford, 3 Fed. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

36. New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 48 Fed. 556 [*reversed* on other grounds in 53 Fed. 810, 4 C. C. A. 21]; Allis *v.* Buckstaff, 13 Fed. 879; Roberts *v.* Buck, 20 Fed. Cas. No. 11,897, 6 Fish. Pat. Cas. 325, Holmes 224, 3 Off. Gaz. 268.

The court cannot take notice of any proof concerning which there is not a corresponding allegation. Serls *v.* Bouton, 12 Fed. 140, 20 Blatchf. 426; Marks *v.* Fox, 6 Fed. 727, 18 Blatchf. 502; Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395.

infringements of patents the defendant may, under the general issue, show the prior state of the art,[37] or that the patentee is not the original inventor,[38] or give in evidence the act of congress relating to his rights.[39] So too defendant may give evidence of the use of a machine by other persons in other places than those mentioned in a notice of special matter, where the general issue is pleaded.[40] An averment in a declaration in an action for infringement that disclaimers were duly and legally executed in writing and accepted by the commissioner is sufficient to enable plaintiff to give evidence of their execution as required by statute.[41]

16. TRIALS IN ACTIONS AT LAW — a. In General. The ordinary rules of practice and procedure in civil actions apply.[42]

b. Questions For Court and Jury. It is for the court to instruct the jury as to the law,[43] and this includes a definition of the scope and meaning of the patent,[44] and it is for the jury to find the facts and apply the law as expounded.[45]

Slightest variance fatal.— When a declaration in an action for the infringement of a patent right professes to set forth the specification in the patent as part of the grant, the slightest variance is fatal. Tryon *v.* White, 24 Fed. Cas. No. 14,208, Pet. C. C. 96, 1 Robb Pat. Cas. 64.

37. Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200.

38. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68, holding further that, where the general issue is pleaded, there is no limitation of the period in which defendant may show that the patentee is not the original inventor.

39. Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. 9.

40. Evans *v.* Eaton, 8 Fed. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68.

41. Van Hook *v.* Wood, 28 Fed. Cas. No. 16,854.

42. Exception as to defense under U. S. Rev. St. (1878) § 4920; McClurg *v.* Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102.

Setting aside verdict see Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348; Blanchard's Gun-Stock Turning Factory *v.* Jacobs, 3 Fed. Cas. No. 1,520, 2 Blatchf. 69, Fish. Pat. Rep. 158.

Motion to withdraw jury for surprise see Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. Rep. 268.

Feigned issue awarded see Foote *v.* Silsby, 9 Fed. Cas. No. 4,918, 1 Blatchf. 545, Fish. Pat. Rep. 357.

Objections and exceptions.— Objection to evidence must be seasonably made (Pettibone *v.* Pennsylvania Steel Co., 134 Fed. 889; Brown *v.* Hall, 4 Fed. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Lock *v.* Pennsylvania R. Co., 15 Fed. Cas. No. 8,438), and must be definite (Barker *v.* Stowe, 2 Fed. Cas. No. 994, 3 Ban. & A. 337, 15 Blatchf. 49, 14 Off. Gaz. 559). Exceptions must also be taken seasonably. Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. Rep. 268 [*affirmed* in 14 How. 218, 14 L. ed. 394].

Records and exhibits.— The court may order the production of records and exhibits (Diamond Match Co. *v.* Oshkosh Match Works, 63 Fed. 984; Johnson Steel Street-Rail Co. *v.* North Branch Steel Co., 48 Fed. 191; Wisner *v.* Dodds, 14 Fed. 655), but it will not order the filing of an ink copy of exhibit (Tubman *v.* Wason Mfg. Co., 44 Fed. 429).

Experiments.— The court will not order defendant to conduct his experiments in the presence of plaintiff's witnesses. Simonds Rolling-Mach. Co. *v.* Hathorn Mfg. Co., 83 Fed. 490.

Witness ordered to answer certain questions see Coop *v.* Dr. Savage Physical Development Inst., 48 Fed. 239, 47 Fed. 899; Delamater *v.* Reinhardt, 43 Fed. 76; Turrell *v.* Spaeth, 24 Fed. Cas. No. 14,267, 2 Ban. & A. 185, 8 Off. Gaz. 986.

Infringement is a question for the jury. Clark *v.* Adie, 2 App. Cas. 315, 46 L. J. Ch. 585, 36 L. T. Rep. N. S. 923; Macnamara *v.* Hulse, C. & M. 471, 41 E. C. L. 258; De la Rue *v.* Dickenson, 7 E. & B. 738, 3 Jur. N. S. 841, 5 Wkly. Rep. 754, 90 E. C. L. 738; Seed *v.* Higgins, 8 H. L. Cas. 550, 6 Jur. N. S. 1264, 30 L. J. Q. B. 314, 3 L. T. Rep. N. S. 101, 11 Eng. Reprint 544.

43. Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; Graham *v.* Earl, 82 Fed. 737; Many *v.* Jagger, 16 Fed. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. Rep. 222; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Hill *v.* Evans, 4 De G. F. & J. 288, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 6 L. T. Rep. N. S. 90, 65 Eng. Ch. 223, 45 Eng. Reprint 1195.

44. Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; Marsh *v.* Quick-Meal Stove Co., 51 Fed. 203; National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Clark Patent Steam, etc., Regulator Co. *v.* Copeland, 5 Fed. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Bovil *v.* Plimm, 11 Exch. 718; Seed *v.* Higgins, 8 H. L. Cas. 550, 6 Jur. N. S. 1264, 30 L. J. Q. B. 314, 3 L. T. Rep. N. S. 101, 11 Eng. Reprint 544.

Until the evidence is in the court may refuse to construe the patent. Young *v.* Fermie, 4 Giffard 577, 10 Jur. N. S. 926, 10 L. T. Rep. N. S. 861, 4 New Rep. 218, 12 Wkly. Rep. 901, 66 Eng. Reprint 836.

45. Battin *v.* Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. Rep.

The jury must determine the question of identity of the alleged infringing device,[46] the question of the validity of the patent,[47] and the amount of damages.[48] In a clear case the court may direct the jury to bring in a verdict for defendant.[49]

17. Hearing in Suits in Equity — a. Questions Determined. Where defendant denies the infringement and avers that the alleged infringing article was made under a later patent than that sued upon, the court may, in a plain case, determine the question of infringement by an inspection and comparison of the two patents.[50] The construction placed on the claims of a patent by the court on

268; Goodyear *v.* Bishop, 10 Fed. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Parker *v.* Stiles, 18 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Poppenhusen *v.* Falke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181.

Expression of opinion.— The court may express opinion upon a fact which is clear. Bollmans *v.* Parry, 3 Fed. Cas. No. 1,612.

46. Coupe *v.* Royer, 155 U. S. 565, 15 S. Ct. 199, 39 L. ed. 263; Tucker *v.* Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515; Tyler *v.* Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588; Graham *v.* Earl, 82 Fed. 737; May *v.* Fond du Lac County, 27 Fed. 691; Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. Rep. 184; Matthews *v.* Skates, 16 Fed. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Parker *v.* Stiles, 17 Fed. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327]; Smith *v.* Higgins, 22 Fed. Cas. No. 13,058; Tatham *v.* Le Roy, 23 Fed. Cas. No. 13,761.

On demurrer to evidence court may instruct jury to find for defendant. Royer *v.* Schultz Belting Co., 28 Fed. 850.

In a plain case the court may determine infringement by comparing article and patent. Connors *v.* Ormsby, 148 Fed. 13, 78 C. C. A. 181; Hardwick *v.* Masland, 71 Fed. 887; Jennings *v.* Kibbe, 10 Fed. 669, 20 Blatchf. 353.

47. Battin *v.* Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Graham *v.* Earl, 82 Fed. 737; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Sullivan *v.* Redfield, 23 Fed. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Teese *v.* Phelps, 23 Fed. Cas. No. 13,818, McAllister 17.

Anticipation is a question for the jury. Keyes *v.* Grant, 118 U. S. 25, 6 S. Ct. 974, 30 L. ed. 54; Bischoff *v.* Wethered, 9 Wall. (U. S.) 812, 19 L. ed. 829; Turrill *v.* Michigan, etc., R. Co., 1 Wall. (U. S.) 491, 17 L. ed. 668; Hunt Bros. Fruit Packing Co. *v.* Cassidy, 53 Fed. 257, 3 C. C. A. 525; Waterman *v.* Thomson, 29 Fed. Cas. No. 17,260, 2 Fish. Pat. Cas. 461.

In England anticipation by prior patents is for the court. Bush *v.* Fox, 5 H. L. Cas. 707, 2 Jur. N. S. 1029, 25 L. J. Exch. 251, 4 Wkly. Rep. 675, 10 Eng. Reprint 1080; Booth *v.* Kennard, 2 H. & N. 84, 26 L. J. Exch. 305, 5 Wkly. Rep. 607; Thomas *v.* Foxwell, 5 Jur. N. S. 37 [*affirmed* in 6 Jur. N. S. 271]. Invention is a question for the jury. Willis *v.* Miller, 121 Fed. 985, 58 C. C. A. 286; San Francisco Bridge Co. *v.* Keating, 68 Fed. 351, 15 C. C. A. 476.

Sufficiency of description is a question for the jury. Wood *v.* Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Reutgen *v.* Kanowrs, 20 Fed. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. 168.

Abandonment is a question for the jury. Godfrey *v.* Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Kendall *v.* Winsor, 21 How. (U. S.) 322, 16 L. ed. 165.

Fraud is a question for the jury. Hogg *v.* Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Reutgen *v.* Kanowrs, 20 Fed. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. 168.

Reading to the jury the decision of another court as to validity is improper. Arey *v.* De Loriea, 55 Fed. 323, 5 C. C. A. 116.

Where anticipated in patents the court may so instruct the jury. Market St. Cable R. Co. *v.* Rowley, 155 U. S. 621, 15 S. Ct. 224, 39 L. ed. 284.

If a patent is void on its face, the court may so instruct. Roberts *v.* Bennett, 135 Fed. 193, 69 C. C. A. 533; Langdon *v.* De Groot, 14 Fed. Cas. No. 8,059, 1 Paine 203, 1 Robb Pat. Cas. 433.

Sufficiency of description is a question for the jury. Bickford *v.* Skewes, 1 Q. B. 938, 1 G. & D. 736, 6 Jur. 167, 41 E. C. L. 848; Betts *v.* Menzies, 10 H. L. Cas. 117, 9 Jur. N. S. 29, 31 L. J. Q. B. 233, 7 L. T. Rep. N. S. 110, 11 Wkly. Rep. 1, 11 Eng. Reprint 970.

48. National Car-Brake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514; Alden *v.* Dewey, 1 Fed. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Goodyear *v.* Bishop, 10 Fed. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Grant *v.* ——, 10 Fed. Cas. No. 5,701; Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Stephens *v.* Felt, 22 Fed. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. Rep. 144.

49. Keyes *v.* Grant, 118 U. S. 25, 6 S. Ct. 974, 30 L. ed. 54.

50. Hardwick *v.* Masland, 71 Fed. 887.

Unless the character of the invention has so little complexity that expert evidence is not necessary to aid the court in understanding whether one patent, or several patents considered together, describe the devices or combination of devices which are the subject-

granting a preliminary injunction should be followed at the final hearing, where there has been no substantial change in the cause so far as it relates to the question of construction.[51] The court will not determine a moot question at the final hearing, as where no infringement is found the court will not pass upon the question of the novelty of a patented invention.[52] Where the patent is recent, the specification obscure, and the proof of infringement meager and unsatisfactory, the court will not grant an injunction, even upon a final hearing, but will retain the bill for a certain period and require complainant to bring an action at law, in which case the bill will stand dismissed, unless the action at law is brought within the time limited.[53]

b. Submission of Issues to Jury. The circuit court may impanel a jury of not less than five and not more than twelve persons and submit to them such questions of fact arising in the cause as the court shall deem expedient.[54]

c. Reception of Evidence. Documentary evidence set forth in defendant's answer will not be received after the cause has been submitted upon plaintiff's evidence;[55] but it has been held that, where it is an important point in the defense that a reissued patent is broader in its scope than the original, the case will be reopened to enable defendant to introduce testimony tending to show that fact, it being alleged that such testimony is newly discovered.[56] The court will not, on complainant's motion, compel defendant to file an exhibit in a form different from that already filed by him.[57] Complainant is entitled as a matter of right to introduce evidence in rebuttal,[58] but not after the argument has com-

matter of the subsequent patent, the court will examine a large number of patents prior in date to that of complainant, which patents have been offered in evidence to sustain the defense of want of novelty. Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371.

In a suit upon design patents, the absence of evidence of identity does not make it improper for the court to compare such patent and the alleged infringing articles offered in evidence, the designs being of a simple character. Jennings *v.* Kibbe, 10 Fed. 669, 29 Blatchf. 353.

51. Sessions *v.* Gould, 60 Fed. 753 [*affirmed* in 63 Fed. 1001, 11 C. C. A. 546, 550].

52. Saxe *v.* Hammond, 21 Fed. Cas. No. 12,411, 1 Ban. & A. 629, Holmes 456, 7 Off. Gaz. 781.

53. Muscan Hair Mfg. Co. *v.* American Hair Mfg. Co., 17 Fed. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320.

54. Act Feb. 16, 1875, 18 U. S. St. at L. 316 [U. S. Comp. St. (1901) p. 526]; Watt *v.* Starke, 101 U. S. 247, 25 L. ed. 826. In case of doubt the court may in its discretion award an issue to be tried by jury. Gray *v.* Halkyard, 28 Fed. 854; Allen *v.* Sprague, 1 Fed. Cas. No. 238, 1 Blatchf. 567, Fish. Pat. Rep. 388; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Parker *v.* Hatfield, 18 Fed. Cas. No. 10,736, Fish. Pat. Rep. 94, 4 McLean 61; Sicles *v.* Pacific Mail Steamship Co., 22 Fed. Cas. No. 12,842; Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,851, 1 Blatchf. 187, Fish. Pat. Rep. 120.

That an issue to be tried by jury not granted at the mere request of a party see Brooks *v.* Norcross, 4 Fed. Cas. No. 1,957, 2 Fish. Pat. Cas. 661; Goodyear *v.* Day, 10 Fed. Cas. No. 5,566.

Issue for jury refused see Buchanan *v.* Howland, 4 Fed. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64.

Court may order trial at law see Booth *v.* Garelly, 3 Fed. Cas. No. 1,646, 1 Blatchf. 247, Fish. Pat. Rep. 154; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*.

English practice.— Court may in its discretion direct issue of fact to be tried by jury. Bovill *v.* Hitchcock, L. R. 3 Ch. 417, 37 L. J. Ch. 223, 16 Wkly. Rep. 321; Davenport *v.* Goldberg, 2 Hem. & M. 282, 5 New Rep. 484, 71 Eng. Reprint 472. In the absence of special circumstances the issues will be tried before the court and not before a jury. Patent Mar. Invention Co. *v.* Chadburn, L. R. 16 Eq. 447, 26 L. T. Rep. N. S. 614, 21 Wkly. Rep. 745.

55. Peterson *v.* Simpkins, 25 Fed. 486.

56. Johnson *v.* Beard, 13 Fed. Cas. No. 7,371, 2 Ban. & A. 50, 8 Off. Gaz. 435.

57. Tubman *v.* Wason Mfg. Co., 44 Fed. 429, where the complainant moved that the court order defendant to file an ink drawing of an exhibit which was already on file in pencil, and the court held that such an order would be improper, counsel for defendant having a right, at defendant's risk, to offer an exhibit in one form or another.

58. Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397, holding, however, that the fresh evidence which may be introduced is limited strictly to rebutting evidence, and hence evidence of any experiments upon the machine in question cannot be introduced by plaintiff in his rebutting testimony.

On the ground of surprise leave may be granted to complainant to introduce evidence in rebuttal. Pouopard *v.* Fardell, 18

menced.[59] Under a general denial of the patentee's priority of invention, evidence of prior knowledge and use, taken without objection, is competent at the final hearing, not only as demonstrative of the state of the art, so as to limit the construction of the patent,[60] but also on the question of the validity of the patent.[61] So too where an objection was not distinctly made when the evidence was taken such evidence is deemed waived and is competent at the final hearing.[62]

d. Dismissal — (I) *At What Stage of Cause Allowable.* The court may, in its discretion, permit defendant at the close of complainant's proofs to present by a motion to dismiss a jurisdictional question,[63] or a question of the legal sufficiency of the proof of title to the patent,[64] without requiring defendant to abide by the case as then made in the event that his motion shall be overruled.

(II) *Grounds.* The bill will be dismissed,[65] without regard to the answer,[66] where it appears that letters patent are void on their face because the process or device described therein is not patentable. That defendant has, by his action in selling his alleged patent, necessarily abandoned his intention to infringe is no sufficient ground, after the testimony has been taken, for dismissing the bill and remanding plaintiff to his remedy at law.[67] If a suit commenced to restrain from infringing letters patent and to recover profits and damages be begun so late that under the rules of the court no injunction can be obtained before the expiration of the patent, the bill should be dismissed for want of jurisdiction.[68]

(III) *Dismissal Without Prejudice.* Where the alleged infringement has been disproved, an application for dismissal without prejudice, as to one of the defendants, will be denied.[69]

(IV) *Operation and Effect.* Dismissal of the bill for failure to show an infringement does not estop plaintiff or his assigns from again suing the same defendant for infringing the same patent.[70]

18. Interlocutory Decree and Accounting — a. Interlocutory Decree. Where the finding is in favor of the validity and infringement of the patent, an interlocutory decree for the complainant is entered and the cause is referred to a master to ascertain the amount to be recovered.[71]

Wkly. Rep. 59. See also Penn *v.* Jack, L. R. 2 Eq. 314, 14 L. T. Rep. N. S. 495, 14 Wkly. Rep. 760.

59. Stainthorp *v.* Humiston, 22 Fed. Cas. No. 13,281, 4 Fish. Pat. Cas. 107, holding, however, that where defendant relies on defenses other than the alienage of complainant, the latter may introduce evidence to rebut proof that he was not an alien, upon payment of all costs incurred by defendant in proving the alienage of complainant.

60. Zane *v.* Soffe, 110 U. S. 200, 3 S. Ct. 562, 28 L. ed. 119.

61. Zane *v.* Soffe, 110 U. S. 200, 3 S. Ct. 562, 28 L. ed. 119; Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177.

62. Barker *v.* Stowe, 2 Fed. Cas. No. 994, 3 Ban. & A. 337, 15 Blatchf. 49, 14 Off. Gaz. 559.

63. Streat *v.* American Rubber Co., 115 Fed. 634.

64. De Laval Separator Co. *v.* Vermont Farm-Mach. Co., 109 Fed. 813.

65. Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Quirolo *v.* Ardito, 1 Fed. 610, 17 Blatchf. 400; Passaic Zinc Co. *v.* Spear, 18 Fed. Cas. No. 10,789. See also Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293; Dunbar *v.* Meyers, 94 U. S. 187, 24 L. ed. 34; Wills *v.* Scranton Cold Storage, etc., Co., 153 Fed. 181, 82 C. C. A. 355 [*affirming* 147 Fed. 525].

66. Slawson *v.* Grand St., etc., R. Co., 107 U. S. 649, 2 S. Ct. 663, 27 L. ed. 576; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Conderman *v.* Clements, 147 Fed. 915, 78 C. C. A. 51; Quirolo *v.* Ardito, 1 Fed. 610, 17 Blatchf. 400.

67. Winchester Repeating Arms Co. *v.* American Buckle, etc., Co., 54 Fed. 703.

68. Clark *v.* Wooster, 119 U. S. 322, 7 S. Ct. 217, 30 L. ed. 392, holding, however, that where the suit is begun in such time that an injunction can be obtained before the expiration of the patent, although only three days remain for it to run, it is within the discretion of the court to take jurisdiction; and if it does, it may, without enjoining defendant, proceed to grant the other incidental relief asked for.

69. Archer *v.* Arnd, 31 Fed. 475 [*affirmed* in 140 U. S. 668, 11 S. Ct. 1015, 35 L. ed. 599].

70. Steam-Gauge, etc., Co. *v.* Meyrose, 27 Fed. 213.

71. Timolat *v.* Philadelphia Pneumatic Tool Co., 130 Fed. 903; Campbell Printing-Press, etc., Co. *v.* Manhattan R. Co., 49 Fed. 930; Whitney *v.* Boston, etc., R. Co., 48 Fed. 444; Andrews *v.* Creegan, 7 Fed. 477, 19 Blatchf. 113; Allen *v.* Blunt, 1 Fed. Cas. No.

b. Proceedings in Accounting. The authority of the master and the proceedings before him are controlled by the ordinary rules of equity practice.[72] On

215, 1 Blatchf. 480, Fish. Pat. Rep. 303, 8 N. Y. Leg. Obs. 105; Bullock Printing-Press Co. *v.* Jones, 4 Fed. Cas. No. 2,132, 3 Ban. & A. 195, 13 Off. Gaz. 124; Carew *v.* Boston Elastic Fabric Co., 5 Fed. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90, 1 Off. Gaz. 91.

For form of interlocutory decree see Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

Decree held too broad see Littlefield *v.* Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Creamer *v.* Bowers, 30 Fed. 185.

Time after complainant has sold his patent cannot be included in accounting. Goss Printing Press Co. *v.* Scott, 134 Fed. 880. Defendant is the only party accounting within the meaning of equity rule 79. Goss Printing Press Co. *v.* Scott, 148 Fed. 393.

Construction of particular decree see New York Grape Sugar Co. *v.* American Grape Sugar Co., 42 Fed. 455.

Where the decree is reversed the testimony may be used in a subsequent accounting. Campbell *v.* New York, 35 Fed. 504, 1 L. R. A. 48.

Further report.— The case may be referred back to master for further report. Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,116, 2 Ban. & A. 627, 12 Off. Gaz. 716; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,593, 4 Fish. Pat. Cas. 141. On exceptions to the master's report, a former decision in the case as to the rule of damages must be followed. Webster Loom Co. *v.* Higgins, 39 Fed. 462.

Compliance with interlocutory order to keep an account see Wilder *v.* Gayler, 29 Fed. Cas. No. 17,648, 1 Blatchf. 511, Fish. Pat. Rep. 317.

Where damages are trivial, the case will not be referred to a master. Bradford *v.* Belknap Motor Co., 105 Fed. 63.

Where no infringement is shown, the suit will be dismissed. American Wood-Paper Co. *v.* Heft, 1 Fed. Cas. No. 322, 3 Fish. Pat. Cas. 316; Saxe *v.* Hammond, 21 Fed. Cas. No. 12,411, 1 Ban. & A. 629, Holmes 456, 7 Off. Gaz. 781.

A request for dismissal without prejudice will be refused where infringement is disproved. Archer *v.* Arnd, 31 Fed. 475 [*affirmed* in 140 U. S. 668, 11 S. Ct. 1015, 35 L. ed. 599]. Moot questions will not be decided. Sprague Electric R., etc., Co. *v.* Steel Motor Co., 105 Fed. 959.

After interlocutory decree court will not advise parties whether different article infringes. Thomas, etc., Co. *v.* Electric Porcelain Co., 114 Fed. 407.

English practice.— An account will be refused where it is clear that there were no profits. Bergmann *v.* Macmillan, 17 Ch. D. 423, 44 L. T. Rep. N. S. 794, 29 Wkly. Rep. 890. An account where complicated may be by inquiry in chambers. Betts *v.* De Vitre, 11 L. T. Rep. N. S. 533, 5 New Rep. 165. Defendant may be ordered to permit inspection of factory and machines. Garrard *v.* Edge, 58 L. J. Ch. 397, 60 L. T. Rep. N. S. 557, 37 Wkly. Rep. 501; Germ Milling Co. *v.* Robinson, 55 L. J. Ch. 287, 53 L. T. Rep. N. S. 696, 34 Wkly. Rep. 194; Jones *v.* Lee, 25 L. J. Exch. 241; Singer Mfg. Co. *v.* Wilson, 12 L. T. Rep. N. S. 140, 5 New Rep. 505, 13 Wkly. Rep. 560. Form of order for inspection. Davenport *v.* Jepson, 1 New Rep. 307.

72. **Mode of procedure.**— The master appoints a day for proceeding with the reference, and gives notice, by mail or otherwise, to the parties or their solicitors. The solicitor should be notified, whether the party is or not; although, probably, under rule 75, notice to the party is a good notice. If defendant does not appear, the master proceeds *ex parte* and makes out the profits and damages, if he can, from the evidence produced by plaintiff. If it appears that an account of profits is necessary to a just decision of the cause, and is desired by plaintiff, he makes an order that defendant furnish an account by a certain day, and adjourns the hearing to that day. Defendant should be served personally with a notice of this adjournment, and of the order to produce his account, if it is intended to move for an attachment in case he fails to appear. The service may be made by any disinterested person, and need not be by the marshal. If defendant then fails to appear and account, he will be in contempt. Kerosene Lamp-Heater Co. *v.* Fisher, 1 Fed. 91.

Damages and profits.— The master determines damages and profits. Reedy *v.* Western Electric Co., 83 Fed. 709, 28 C. C. A. 27 [*affirming* 66 Fed. 163]; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,134, 2 Ban. & A. 386, 11 Off. Gaz. 330; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,272, 5 Biss. 344 [*reversed* in part in 94 U. S. 695, 24 L. ed. 238].

The master should take an account to the time of his report and if defendant has changed his machine should determine if the new machine is substantially like the old one. Hoe *v.* Scott, 87 Fed. 220; Knox *v.* Great Western Quicksilver Min. Co., 14 Fed. Cas. No. 7,907, 4 Ban. & A. 25, 7 Reporter 325, 6 Sawy. 430, 14 Off. Gaz. 897; Tatham *v.* Lowber, 23 Fed. Cas. No. 13,765, 4 Blatchf. 86 [*reversed* on other grounds in 22 How. 132, 16 L. ed. 366].

The liability of each defendant should be determined. Herring *v.* Gage, 12 Fed. Cas. No. 6,422, 3 Ban. & A. 396, 15 Blatchf. 124; Tatham *v.* Lowber, 23 Fed. Cas. No. 13,765, 4 Blatchf. 86.

Determination of cost of manufacture see Mast *v.* Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157.

The questions of validity and infringement are not open before the master. Skinner *v.* Vulcan Iron-Works, 39 Fed. 870; Celluloid Mfg. Co. *v.* Comstock, etc., Co., 27 Fed.

an account before a master for damages for infringement of a patent, evidence of license contracts made between complainant and other responsible parties, by which they were to pay a royalty for the use of the patented device, is admissible.[73] He is bound by the terms of the interlocutory decree.[74]

19. Costs[75] **— a. In Actions at Law.** The ordinary rule as to costs prevails,[76] except as affected by delay in filing a disclaimer.[77]

358; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,272, 5 Biss. 344; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,594, 4 Fish. Pat. Cas. 207. *Compare* Walker Patent Pivoted Bin Co. *v.* Miller, 146 Fed. 249.

Proof of damages.— Master not called upon to suggest how profits and damages may be proved. Garretson *v.* Clark, 10 Fed. Cas. No. 5,250, 4 Ban. & A. 536, 16 Off. Gaz. 806.

Report of oral evidence.— Master not required to report oral evidence unless requested at the time. Hammacher *v.* Wilson, 32 Fed. 796.

Where evidence is introduced both as to damages and profits, it is proper for the master to report his findings and conclusions upon each line of evidence separately. Mast *v.* Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157.

Where the master by his rulings limits the scope of the inquiry, the matter may properly be presented to the court for decision by a motion for instructions to the master. Walker Patent Pivoted Bin Co. *v.* Miller, 146 Fed. 249.

Burden of proof.— The burden is on the complainant to show affirmatively the amount of profits. Mosher *v.* Joyce, 51 Fed. 441, 2 C. C. A. 322 [*affirming* 45 Fed. 205]; Hammacher *v.* Wilson, 32 Fed. 796; Black *v.* Munson, 3 Fed. Cas. No. 1,463, 2 Ban. & A. 623, 14 Blatchf. 265 [*affirmed* in 111 U. S. 122, 4 S. Ct. 326, 28 L. ed. 372]; Webster *v.* New Brunswick Carpet Co., 29 Fed. Cas. No. 17,338, 2 Ban. & A. 67, 9 Off. Gaz. 203. Circumstances may place the burden on defendant of showing what part of profits not due to patented part. Cimiotti Unhairing Co. *v.* Bowsky, 113 Fed. 698; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 309, 1 Ban. & A. 439, 6 Off. Gaz. 764 [*modified* in 97 U. S. 126, 24 L. ed. 1000].

Admissibility of evidence.— Evidence that other devices were capable of use is incompetent. American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 309, 1 Ban. & A. 439, 6 Off. Gaz. 764 [*modified* in 97 U. S. 126, 24 L. ed. 1000]. Evidence as to cost of manufacture is admissible. Mast *v.* Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157.

73. Mast *v.* Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157. Evidence as to the comparative profits of the patented and similar devices may be competent. Webster Loom Co. *v.* Higgins, 39 Fed. 462; Black *v.* Thorne, 3 Fed. Cas. No. 1,466, 1 Ban. & A. 155, 12 Blatchf. 20, 7 Off. Gaz. 176; Garretson *v.* Clark, 10 Fed. Cas. No. 5,250, 4 Ban. & A. 536, 16 Off. Gaz. 806.

Weight of evidence.— Rulings of master as to the weight of evidence not disturbed where reasonable. Welling *v.* La Bau, 35 Fed. 301; Creamer *v.* Bowers, 35 Fed. 206; Welling *v.* La Bau, 34 Fed. 40; Hammacher *v.* Wilson, 32 Fed. 796; Wooster *v.* Thornton, 26 Fed. 274 [*affirmed* in 136 U. S. 651, 10 S. Ct. 1074, 34 L. ed. 550]; Piper *v.* Brown, 19 Fed. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196, 3 Off. Gaz. 97.

Setting up alleged new infringements by supplemental bill see Murray *v.* Orr, etc., Hardware Co., 153 Fed. 369, 82 C. C. A. 445.

Setting aside.— The master's report may be set aside for manifest error of law or fact. Greenleaf *v.* Yale Lock Mfg. Co., 10 Fed. Cas. No. 5,783, 4 Ban. & A. 583, 17 Blatchf. 253, 17 Off. Gaz. 625; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

Recommitting case.— The case may be recommitted for specific findings. Webster Loom Co. *v.* Higgins, 43 Fed. 673. It will not be recommitted for immaterial error. Zane *v.* Peck, 13 Fed. 475.

Exceptions.— Exceptions overruled where error is not pointed out. Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,272, 5 Biss. 344 [*reversed* in part in 94 U. S. 695, 24 L. ed. 238]. Exceptions overruled and order for recount refused. Timken *v.* Olin, 41 Fed. 169; Morss *v.* Union Form Co., 39 Fed. 468; Garretson *v.* Clark, 10 Fed. Cas. No. 5,248, 3 Ban. & A. 352, 15 Blatchf. 70, 14 Off. Gaz. 485 [*affirmed* in 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371].

English practice.— In accounting before master the court may make an order for discovery and the production of defendant's books. Saccharin Corp. *v.* Chemicals, etc., Co., [1900] 2 Ch. 556, 69 L. J. Ch. 820, 83 L. T. Rep. N. S. 206, 49 Wkly. Rep. 1; Saxby *v.* Easterbrook, L. R. 7 Exch. 207, 41 L. J. Exch. 113, 26 L. T. Rep. N. S. 439, 20 Wkly. Rep. 751. Question of validity is not in issue. Clark *v.* Adie, 3 Ch. D. 134, 45 L. J. Ch. 228, 35 L. T. Rep. N. S. 349, 24 Wkly. Rep. 1107 [*affirmed* in 2 App. Cas. 423, 46 L. J. Ch. 598, 37 L. T. Rep. N. S. 1, 25 Wkly. Rep. 45].

74. Hoe *v.* Scott, 87 Fed. 220; Skinner *v.* Vulcan Iron Works, 39 Fed. 870; Turrill *v.* Illinois Cent. R. Co., 24 Fed. Cas. No. 14,272, 5 Biss. 344; Whitney *v.* Mowry, 29 Fed. Cas. No. 17,594, 4 Fish. Pat. Cas. 207; Williams *v.* Leonard, 29 Fed. Cas. No. 17,726, 9 Blatchf. 476, 5 Fish. Pat. Cas. 381.

75. See, generally, COSTS.

76. Corser *v.* Brattleboro Overall Co., 93 Fed. 809; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,876, Fish. Pat. Rep. 1, 4 Wash. 106; Merchant *v.* Lewis, 17 Fed. Cas. No. 9,437, 1 Bond 172. See *infra*, XIII, C, 19, b.

77. Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Dunbar *v.* Meyers,

b. In Suits in Equity. In infringement suits costs are awarded to the successful party unless there are special circumstances which render this unjust.[78] Where some of the claims sued on are void, costs for the complainant are usually refused, although the decree is in his favor upon other claims.[79] Costs may be divided in

94 U. S. 187, 24 L. ed. 34; Smith *v.* Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Peek *v.* Frame, 19 Fed. Cas. No. 10,904, 5 Fish. Pat. Cas. 211.

Copies of patents are not part of costs. Ryan *v.* Gould, 32 Fed. 754; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Woodruff *v.* Barney, 30 Fed. Cas. No. 17,986, 1 Bond 528, 2 Fish. Pat. Cas. 244.

78. See, generally, COSTS, 11 Cyc. 1.

Costs to successful party refused under special circumstances.— Green *v.* Lynn, 81 Fed. 387; Lowell Mfg. Co. *v.* Whittall, 71 Fed. 515; Consolidated Brake-Shoe Co. *v.* Chicago, etc., R. Co., 69 Fed. 412; Marks Adjustable Folding Chair Co. *v.* Wilson, 43 Fed. 302; Hayes *v.* Bickelhoupt, 23 Fed. 183; Tyler *v.* Galloway, 13 Fed. 477, 21 Blatchf. 66; American Wood-Paper Co. *v.* Heft, 1 Fed. Cas. No. 322, 3 Fish. Pat. Cas. 316; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Prime *v.* Brandon Mfg. Co., 19 Fed. Cas. No. 11,421, 4 Ban. & A. 379, 16 Blatchf. 453; Smith *v.* Woodruff, 22 Fed. Cas. No. 13,128*a*, 6 Fish. Pat. Cas. 476.

Recovery of nominal damages.— Where nominal damages only are found, cost of reference to master taxed against complainant. Kansas City Hay Press Co. *v.* Devol, 127 Fed. 363; Hill *v.* Smith, 32 Fed. 753; Everest *v.* Buffalo Lubricating Oil Co., 31 Fed. 742; Kirby *v.* Armstrong, 5 Fed. 801, 10 Biss. 135. *Compare* Calkins *v.* Bertrand, 8 Fed. 755, 10 Biss. 445, holding that where nominal damages only are allowed the taxation of costs depends on circumstances.

Unnecessary costs.— No costs unnecessarily accumulated will be allowed. Brunswick-Balke-Collender Co. *v.* Klump, 131 Fed. 93; Ford *v.* Kurtz, 12 Fed. 789, 11 Biss. 324.

Where the decree drawn by the successful party is not in accordance with the judgment, no costs can be allowed him on appeal. Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975, 41 C. C. A. 133; Shute *v.* Morley Sewing Mach. Co., 64 Fed. 368, 12 C. C. A. 356.

Expense of accounting.— Defendant must bear the expense of accounting in the first instance. Urner *v.* Kayton, 17 Fed. 539, 21 Blatchf. 428.

Compensation of master.— In Massachusetts plaintiff must pay master's compensation in the first instance to be recovered as costs. Macdonald *v.* Shepard, 10 Fed. 919.

Prior to entry of decree taxing costs, each party pays his own costs. U. S. Printing Co. *v.* American Playing-Card Co., 81 Fed. 506.

Where an execution for costs is returned unsatisfied, a receiver will not be appointed to take possession of the patent. Thayer *v.* Hart, 24 Fed. 558, 23 Blatchf. 303.

English practice.— No costs are allowed unless the judge certifies that particulars are proved. Wilcox *v.* Janes, [1897] 2 Ch. 71, 66 L. J. Ch. 525, 45 Wkly. Rep. 474; Longbottom *v.* Shaw, 43 Ch. D. 46, 58 L. J. Ch. 734, 61 L. T. Rep. N. S. 325, 37 Wkly. Rep. 792; Honiball *v.* Bloomer, 3 C. L. R. 167, 10 Exch. 538, 1 Jur. N. S. 188, 24 L. J. Exch. 11, 3 Wkly. Rep. 71; Gillett *v.* Wilby, 9 C. & P. 334, 38 E. C. L. 201; Needham *v.* Oxley, 8 L. T. Rep. N. S. 604, 2 New Rep. 388, 11 Wkly. Rep. 852. A party is not entitled to costs on issues decided against him. Phillips *v.* Ivel Cycle Co., 62 L. T. Rep. N. S. 392. Division of costs see Losche *v.* Hague, 7 Dowl. P. C. 495, 3 Jur. 409, 8 L. J. Exch. 251, 5 M. & W. 387. A certificate that particulars of objection were proved or were reasonable may be given by appellate court. Cole *v.* Saqui, 40 Ch. D. 132, 58 L. J. Ch. 237, 59 L. T. Rep. N. S. 877, 37 Wkly. Rep. 109; Germ Milling Co. *v.* Robinson, 55 L. T. Rep. N. S. 282. A certificate is necessary only where there was an actual trial and not where suit was discontinued. Curtis *v.* Platt, 16 C. B. N. S. 465, 10 Jur. N. S. 823, 33 L. J. C. P. 255, 10 L. T. Rep. N. S. 383, 111 E. C. L. 465; Greaves *v.* Eastern R. Co., 1 E. & E. 961, 5 Jur. N. S. 733, 28 L. J. Q. B. 290, 7 Wkly. Rep. 453, 102 E. C. L. 961. Certificate that the validity of the patent came in question see Gillett *v.* Green, 9 Dowl. P. C. 219, 10 L. J. Exch. 124, 7 M. & W. 347; Haslem Co. *v.* Hall, 5 Rep. Pat. Cas. 1, 23; American Steel, etc., Co. *v.* Glover, 50 Wkly. Rep. 284. No certificate that validity came in question will be given for defendant. Badische Anilin, etc., Fabrik *v.* Levinstein, 29 Ch. D. 366, 53 L. T. Rep. N. S. 750. Certificate refused see Wilcox *v.* Janes, [1897] 2 Ch. 71, 66 L. J. Ch. 525, 45 Wkly. Rep. 474; Longbottom *v.* Shaw, 43 Ch. D. 46, 58 L. J. Ch. 734, 61 L. T. Rep. N. S. 325, 37 Wkly. Rep. 792; United Tel. Co. *v.* Harrison, 21 Ch. D. 720, 51 L. J. Ch. 705, 46 L. T. Rep. N. S. 620, 30 Wkly. Rep. 724; Bovill *v.* Hadley, 17 C. B. N. S. 435, 10 L. T. Rep. N. S. 650, 112 E. C. L. 435; Stocker *v.* Rodgers, 1 C. & K. 99, 47 E. C. L. 99. Cost on amendment see Edison Tel. Co. *v.* India Rubber Co., 17 Ch. D. 137, 29 Wkly. Rep. 496; Penn *v.* Bebby, L. R. 1 Eq. 548. Case may be continued to settle costs. Geary *v.* Norton, 1 De G. & Sm. 9, 63 Eng. Reprint 949.

Canadian practice.— Treble costs may be allowed in Canada. Huntingdon *v.* Lutz, 10 Can. L. J. 46; Hunter *v.* Carrick, 28 Grant Ch. (U. C.) 489.

79. Metallic Extraction Co. *v.* Brown, 110 Fed. 665, 49 C. C. A. 147; Thomson-Houston Electric Co. *v.* Elmira, etc., R. Co., 71 Fed. 886; Stewart *v.* Mahoney, 5 Fed. 302; Yale, etc., Mfg. Co. *v.* North, 30 Fed. Cas. No. 18,123, 5 Blatchf. 455, 3 Fish. Pat. Cas. 279.

the discretion of the court.[80] The ordinary rules as to what constitute taxable costs apply.[81] They do not include copies of patents, record, and exhibit models.[82]

20. Appeal and Error[83] — a. In Actions at Law. Any final judgment at law in a patent suit may be reviewed by the circuit court of appeal by writ of error,[84] but the judgment of the court of appeals in patent matters is final and not reviewable by the supreme court except by certification by the court of appeals or by writ of certiorari from the supreme court.[85]

b. In Suits in Equity — (I) *Final Decree.* An appeal may be taken to the circuit court of appeals from any final decree in a patent suit if taken within six months after the entry of the decree.[86]

(II) *Interlocutory Decree.* An appeal may be taken to the court of

Compare Pennsylvania Diamond Drill Co. *v.* Simpson, 29 Fed. 288, where one patent void, costs divided.

Disclaimer.— No costs will be allowed unless proper disclaimer was filed before suit. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601; General Electric Co. *v.* Crouse-Hinds Electric Co., 147 Fed. 718; Fairbanks *v.* Stickney, 123 Fed. 79, 59 C. C. A. 209; Worden *v.* Searls, 21 Fed. 406; Munday *v.* Lidgerwood Mfg. Co., 20 Fed. 191; Proctor *v.* Brill, 16 Fed. 791; Sharp *v.* Tift, 2 Fed. 697, 18 Blatchf. 132; Aiken *v.* Dolan, 1 Fed. Cas. No. 110, 3 Fish. Pat. Cas. 197; Christman *v.* Rumsey, 5 Fed. Cas. No. 2,704, 4 Ban. & A. 506, 17 Blatchf. 148, 17 Off. Gaz. 903, 58 How. Pr. (N. Y.) 114; Myers *v.* Frame, 17 Fed. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493; Taylor *v.* Archer, 23 Fed. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449. The rule against costs without disclaimer applies only to the claims in issue in the suit. National Electric Signaling Co. *v.* De Forest Wireless Tel. Co., 140 Fed. 449; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 77 Fed. 490, 23 C. C. A. 250; American Bell Tel. Co. *v.* Spencer, 8 Fed. 509. The rule applies only to the lower court and not to the costs on appeal. Kahn *v.* Starrels, 136 Fed. 597, 69 C. C. A. 371.

80. Dobson *v.* Bigelow Carpet Co., 114 U. S. 439, 5 S. Ct. 945, 29 L. ed. 177 [*reversing* 10 Fed. 385]; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Brill *v.* Delaware County, etc., R. Co., 109 Fed. 901; Tesla Electric Co. *v.* Scott, 101 Fed. 524; Fisk *v.* West Bradley, etc., Mfg. Co., 9 Fed. Cas. No. 4,830*a*, 19 Off. Gaz. 545; Garretson *v.* Clark, 10 Fed. Cas. No. 5,250, 4 Ban. & A. 536, 16 Off. Gaz. 806, 10 Fed. Cas. No. 5,248, 3 Ban. & A. 352, 15 Blatchf. 70, 14 Off. Gaz. 485 [*affirmed* in 111 U. S. 120, 4 S. Ct. 291, 28 L. ed. 371]; Troy Iron, etc., Factory Co. *v.* Corning, 24 Fed. Cas. No. 14,198, 10 Blatchf. 223, 6 Fish. Pat. Cas. 85.

81. Parks *v.* Booth, 102 U. S. 96, 26 L. ed. 54.

The costs of the reference to the master for an account of profits and damages are assessed. Kansas City Hay Press Co. *v.* Devol, 127 Fed. 363; Hill *v.* Smith, 32 Fed. 753; American Diamond Drill Co. *v.* Sullivan, 32 Fed. 552, 23 Blatchf. 144; Everest *v.* Buffalo Lubricating Oil Co., 31 Fed. 742; Kirby *v.* Armstrong, 5 Fed. 801, 10 Biss. 135.

82. Ordinary models are not taxable as costs. Cornelly *v.* Markwald, 24 Fed. 187, 23 Blatchf. 248; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Parker *v.* Bigler, 18 Fed. Cas. No. 10,726, 1 Fish. Pat. Cas. 285. *Contra*, Hathaway *v.* Roach, 11 Fed. Cas. No. 6,213, 2 Woodb. & M. 63.

Model of plaintiff's patent may be taxable but not others. Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210; Woodruff *v.* Barney, 30 Fed. Cas. No. 17,986, 1 Bond 528, 2 Fish. Pat. Cas. 244.

Drawings exhibit is not taxable. Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112.

Copies of patents are not taxed. Ryan *v.* Gould, 32 Fed. 754; Woodruff *v.* Barney, 30 Fed. Cas. No. 17,986, 1 Bond 528, 2 Fish. Pat. Cas. 244.

Certified copy of file wrapper of plaintiff's patent is not allowed. Ryan *v.* Gould, 32 Fed. 754.

English practice.— Expense of model and scientific witnesses may be allowed. Batley *v.* Kynock, L. R. 20 Eq. 632, 44 L. J. Ch. 565, 33 L. T. Rep. N. S. 45.

83. See, generally, Appeal and Error.

84. Act March 3, 1891, § 6, 26 U. S. St. at L. 828 [U. S. Comp. St. (1901) p. 549].

Facts will not be reviewed. American Sales Book Co. *v.* Bullivant, 117 Fed. 255, 54 C. C. A. 287; Singer Mfg. Co. *v.* Brill, 54 Fed. 380, 4 C. C. A. 374.

85. Act March 3, 1891, § 6, 26 U. S. St. at L. 828 [U. S. Comp. St. (1901) p. 549]; Columbus Watch Co. *v.* Robbins, 148 U. S. 266, 13 S. Ct. 594, 37 L. ed. 445.

86. Act March 3, 1891, §§ 6, 11, 26 U. S. St. at L. 828, 829 [U. S. Comp. St. (1901) pp. 549, 552].

Final and interlocutory decrees distinguished and authorities reviewed see Standard Elevator Co. *v.* Crane Elevator Co., 76 Fed. 767, 22 C. C. A. 549.

Evidence considered.— Patents set up in the answer in a suit for infringement as a part of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the appellate court because they were not formally marked as exhibits by the examiner. Smyth

appeals from an interlocutory order or decree granting, continuing, or refusing to dissolve an injunction.[87] Such appeal must be taken within thirty days and is

Mfg. Co. *v.* Sheridan, 149 Fed. 208, 79 C. C. A. 166.

87. Act March 3, 1891, § 7, 26 U. S. St. at L. 828 [U. S. Comp. St. (1901) p. 550].

A decree finding some of the claims of a patent valid and others invalid, awarding a perpetual injunction and referring the cause to a master to determine profits is, although termed an interlocutory decree, final to the extent that it will permit cross appeals. Chicago Wooden Ware Co. *v.* Miller Ladder Co., 133 Fed. 541, 66 C. C. A. 517. And see Lockwood *v.* Wickes, 75 Fed. 118, 21 C. C. A. 257; Columbus Watch Co. *v.* Robbins, 52 Fed. 337, 3 C. C. A. 103; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,661, 2 Ban. & A. 256, 9 Off. Gaz. 885, 11 Phila. (Pa.) 498. *Contra,* Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 112 Fed. 676, 50 C. C. A. 421; Marden *v.* Campbell Printing-Press, etc., Co., 67 Fed. 809, 15 C. C. A. 26.

Who may appeal.— Licensee who joins patentee with him as complainant may appeal without consent of patentee. Excelsior Wooden Pipe Co. *v.* Seattle, 117 Fed. 140, 55 C. C. A. 156.

Appealable decisions.— Overruling motion to dismiss as to one complainant is a final decision and appealable. Brush Electric Co. *v.* Electric Imp. Co., 51 Fed. 557, 2 C. C. A. 373. Award to complainant of part of fine imposed on defendant for contempt is appealable. Christensen Engineering Co. *v.* Westinghouse Air Brake Co., 135 Fed. 774, 68 C. C. A. 476. Appeal lies from an interlocutory decree granting a perpetual injunction and an account of damages. Richmond *v.* Atwood, 52 Fed. 10, 2 C. C. A. 596, 17 L. R. A. 615; Dudley E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 50 Fed. 785, 1 C. C. A. 668. Refusal of a rehearing is not appealable. Boston, etc., R. Co. *v.* Pullman's Palace Car Co., 51 Fed. 305, 2 C. C. A. 172. Refusal to permit disclaimer after decision is not appealable. Roemer *v.* Neumann, 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277. An order vacating service of process is not a final decree. L. E. Waterman Co. *v.* Parker Pen Co., 107 Fed. 141, 46 C. C. A. 203. No appeal is allowed to settle costs. Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 77 Fed. 490, 23 C. C. A. 250. Alternative order granting injunction or requiring bond will not be reviewed on appeal. Union Blue-Flame Oil Stove Co. *v.* Silver, 128 Fed. 925, 63 C. C. A. 110; Stearns-Roger Mfg. Co. *v.* Brown, 114 Fed. 939, 52 C. C. A. 559.

Dismissal.— One of several appellants cannot dismiss an appeal. Marsh *v.* Nichols, 120 U. S. 598, 7 S. Ct. 704, 30 L. ed. 796.

New evidence cannot be introduced after appeal even by stipulation. F. C. Austin Mfg. Co. *v.* American Wellworks, 121 Fed. 76, 57 C. C. A. 330.

Amendment.— Where a decree dismissing a bill is affirmed permission to amend not allowed. Martin, etc., Cash-Carrier Co. *v.* Martin, 71 Fed. 519, 18 C. C. A. 234; American Bell Tel Co. *v.* U. S., 68 Fed. 542, 15 C. C. A. 569.

Ruling on interlocutory appeal followed on appeal from final decree see Cimiotti Unhairing Co. *v.* Nearseal Unhairing Co., 123 Fed. 479, 59 C. C. A. 58.

Questions considered on appeal.— The court will not consider points not made below. Lane *v.* Levi, 21 App. Cas. (D. C.) 168. A pleading cannot be objected to as insufficient for the first time on appeal. Smith, etc., Mfg. Co. *v.* Mellon, 58 Fed. 705, 7 C. C. A. 439.

Refusal to increase damages will not be disturbed on appeal. Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Kissinger-Ison Co. *v.* Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221. An appeal on interlocutory decree raises no question as to damages recoverable. Metallic Extraction Co. *v.* Brown, 104 Fed. 345, 43 C. C. A. 568. The court will not consider patents on which injunction was refused. Diamond State Iron Co. *v.* Goldie, 84 Fed. 972, 28 C. C. A. 589.

Scope of review and disposition of appeal.— While the court may review the merits of the entire case upon the record before it and in a clear case may order the dismissal of the bill (Co-operating Merchants' Co. *v.* Hallock, 128 Fed. 596, 64 C. C. A. 104; Marden *v.* Campbell Printing-Press, etc., Mfg. Co., 67 Fed. 809, 15 C. C. A. 26; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 61 Fed. 208, 9 C. C. A. 450; Curtis *v.* Overman Wheel Co., 58 Fed. 784, 7 C. C. A. 493; Consolidated Piedmont Cable Co. *v.* Pacific Cable R. Co., 58 Fed. 226, 7 C. C. A. 195; American Paper Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229, 2 C. C. A. 165; Dudley E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 50 Fed. 785, 1 C. C. A. 668), on appeal from an order granting a preliminary injunction the court of appeals will not review the merits of the entire case, but only whether the injunction was improvidently granted (Adam *v.* Folger, 120 Fed. 260, 56 C. C. A. 540; Kilmer Mfg. Co. *v.* Griswold, 67 Fed. 1017, 15 C. C. A. 161; Jensen *v.* Norton, 64 Fed. 662, 12 C. C. A. 608; Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1; Blount *v.* Societe Anonyme, etc., 53 Fed. 98, 3 C. C. A. 455; Columbus Watch Co. *v.* Robbins, 52 Fed. 337, 3 C. C. A. 103). An interlocutory order granting a preliminary injunction will not be reversed except where there was an abuse of discretion. F. C. Austin Mfg. Co. *v.* American Wellworks, 121 Fed. 76, 57 C. C. A. 330; American Fur Refining Co. *v.* Cimiotti Unhairing Co., 118 Fed. 838, 55 C. C. A. 513; Loew Filter Co. *v.* German-American Filter Co., 107 Fed. 949, 47 C. C. A. 94; Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 100 Fed. 462, 40 C. C. A. 494; Société

given precedence in the appellate court.[88] Supersedeas on appeal will be granted only under special circumstances.[89]

21. Rehearing. The ordinary rules against rehearings except under exceptional circumstances are strictly applied in suits for infringement,[90] and the granting thereof rests in the discretion of the court.[91] Whether a rehearing will be granted depends on the facts of each case and the effect which the granting or refusal of the application will have on the rights of the parties respectively.[92] While under certain circumstances a rehearing may be granted upon discovery of new evidence,[93] it will not be granted upon discovery of new evidence which as far as appears was accessible and should have been produced originally,[94] nor where the new evidence is not clear and satisfactory and such as would have changed the decision.[95] As a condition of granting a rehearing the court may require the

Anonyme, etc. *v.* Allen, 90 Fed. 815, 33 C. C. A. 282. Where the patent has expired, an appeal on an interlocutory decree granting an injunction will be dismissed. National Folding-Box, etc., Co. *v.* Robertson, 104 Fed. 552, 44 C. C. A. 29; Lockwood *v.* Wickes, 75 Fed. 118, 21 C. C. A. 257; Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 61 Fed. 208, 9 C. C. A. 450. Questions considered from the standpoint of the lower court and adjudications in other circuits sustaining the patent have the same weight upon appeal as below. Consolidated Fastener Co. *v.* Hays, 100 Fed. 984; Consolidated Fastener Co. *v.* Littauer, 84 Fed. 164, 28 C. C. A. 133; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; Bresnahan *v.* Tripp Grant Leveller Co., 72 Fed. 920, 19 C. C. A. 237; Duplex Printing-Press Co. *v.* Campbell Printing-Press, etc., Mfg. Co., 69 Fed. 250, 16 C. C. A. 220; American Paper Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229, 2 C. C. A. 165. The court of appeals is not bound by adjudications in other circuits relied on by court below. Stover Mfg. Co. *v.* Mast, 89 Fed. 333, 32 C. C. A. 231; Thomson-Houston Electric Co. *v.* Hoosick R. Co., 82 Fed. 461, 27 C. C. A. 419. A finding as to the fact of infringement will not be disturbed where there is evidence in the record tending to show infringement. Dobson *v.* Dornan, 118 U. S. 10, 6 S. Ct. 946, 30 L. ed. 63.

88. Act March 3, 1891, § 7, 26 U. S. St. at L. 828 [U. S. Comp. St. (1901) p. 550]; Raymond *v.* Royal Baking-Powder Co., 76 Fed. 465, 22 C. C. A. 276.

89. Timolat *v.* Philadelphia Pneumatic Tool Co., 130 Fed. 903; Edison *v.* American Mutoscope Co., 110 Fed. 664 [*reversed* on other grounds in 114 Fed. 926, 52 C. C. A. 546]; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 78 Fed. 142; National Heeling-Mach. Co. *v.* Abbott, 77 Fed. 462. And see Penn *v.* Bibby, L. R. 3 Eq. 308, 36 L. J. Ch. 277, 15 Wkly. Rep. 192; Lister *v.* Leather, 3 Jur. N. S. 433, 5 Wkly. Rep. 550; Flower *v.* Lloyd, 36 L. T. Rep. N. S. 444.

Operation of supersedeas.— An appeal with supersedeas does not operate as a license to continue infringement. Bissell Carpet-Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25.

90. *In re* Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 20 C. C. A. 111; Searls *v.* Worden, 11 Fed. 501.

For cases in which rehearing granted see Campbell Printing-Press, etc., Co. *v.* Marden, 70 Fed. 339; Campbell *v.* New York, 36 Fed. 260; American Diamond Rock-Boring Co. *v.* Sheldons, 24 Fed. 374, 23 Blatchf. 286; Schneider *v.* Thill, 21 Fed. Cas. No. 12,470*b*, 5 Ban. & A. 595.

91. American Diamond Rock-Boring Co. *v.* Sheldon, 1 Fed. 870, 18 Blatchf. 50.

After appeal, rehearing cannot be granted except by permission of the appellate court. *In re* Potts, 166 U. S. 263, 17 S. Ct. 520, 41 L. ed. 994; American Soda Fountain Co. *v.* Sample, 136 Fed. 857, 70 C. C. A. 415 [*reversing* 134 Fed. 402]; Nutter *v.* Mossberg, 118 Fed. 168.

92. Pittsburgh Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 121 Fed. 556.

93. Diamond Drill, etc., Co. *v.* Kelley, 138 Fed. 833 (evidence not accessible by the use of diligence); Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 110 Fed. 646 (evidence not accessible by the use of diligence); Webster Loom Co. *v.* Higgins, 43 Fed. 673; Johnson *v.* Beard, 13 Fed. Cas. No. 7,371, 2 Ban. & A. 50, 8 Off. Gaz. 435; Holste *v.* Robertson, 4 Ch. D. 9, 46 L. J. Ch. 1, 35 L. T. Rep. N. S. 457, 25 Wkly. Rep. 35; Wilson *v.* Gann, 23 Wkly. Rep. 546.

94. Panzl *v.* Battle Island Paper Co., 132 Fed. 607 [*reversed* on other grounds in 138 Fed. 48, 70 C. C. A. 474]; Brill *v.* North Jersey St. R. Co., 125 Fed. 526; Bliss *v.* Reed, 113 Fed. 946; Municipal Signal Co. *v.* National Electrical Mfg. Co., 97 Fed. 810; New York Filter Co. *v.* O. H. Jewell Filter Co., 62 Fed. 582; Electrical Accumulator Co. *v.* Julien Electric Co., 39 Fed. 490; New York Grape Sugar Co. *v.* American Grape Sugar Co., 35 Fed. 212; Burdsall *v.* Curran, 31 Fed. 918; Albany Steam Trap Co. *v.* Felthousen, 26 Fed. 318; Peterson *v.* Simpkins, 25 Fed. 486; Andrews *v.* Denslow, 1 Fed. Cas. No. 372, 2 Ban. & A. 587, 14 Blatchf. 182; De Florez *v.* Raynolds, 7 Fed. Cas. No. 3,743, 4 Ban. & A. 331, 16 Blatchf. 397; Nutter *v.* Rodgers, 18 Fed. Cas. No. 10,383.

Laches bars the right to a rehearing. Norton *v.* Walsh, 49 Fed. 769.

95. Sacks *v.* Brooks, 85 Fed. 970; Stuart *v.* St. Paul, 63 Fed. 644; Celluloid Mfg. Co. *v.* American Zylonite Co., 27 Fed. 750; Ameri-

moving party to pay his opponent's counsel fee for the previous argument,[96] or give an undertaking to pay the expense of additional testimony.[97]

D. Threats of Suit. Suit may be maintained by a manufacturer to enjoin a patentee from making baseless threats of suit for infringement against his customers,[98] but an injunction will not be granted where there is a reasonable doubt as to the propriety of defendant's actions.[99]

E. Operation and Effect of Decision[1] — **1. In General.** The decision by a

can Bell Tel. Co. *v.* People's Tel. Co., 25 Fed. 725 [*affirmed* in 126 U. S. 1, 8 S. Ct. 778, 31 L. ed. 863]; Hayes *v.* Dayton, 20 Fed. 690; Robinson *v.* Sutter, 11 Fed. 798; Collins Co. *v.* Coes, 8 Fed. 517; Adair *v.* Thayer, 7 Fed. 920; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,530, 6 Fish. Pat. Cas. 434; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,540, 9 Blatchf. 550, 5 Fish. Pat. Cas. 537, 1 Off. Gaz. 633; Kerosene Lamp Co. *v.* Littell, 14 Fed. Cas. No. 7,723.

96. Hake *v.* Brown, 44 Fed. 283.

97. Underwood *v.* Gerber, 37 Fed. 796, 2 L. R. A. 357.

98. Columbia Nat. Sand Dredging Co. *v.* Miller, 20 App. Cas. (D. C.) 245; Murjahn *v.* Hall, 119 Fed. 186; Farquhar Co. *v.* National Co., 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; Computing Scale Co. *v.* National Computing Scale Co., 79 Fed. 962; Emack *v.* Kane, 34 Fed. 46. The action of a patentee in harassing purchasers with threats of litigation does not commend itself to a court of equity. American Fibre-Chamois Co. *v.* Port Huron Fibre-Garment Mfg. Co., 72 Fed. 516, 18 C. C. A. 670.

English practice.— Douglass *v.* Pintsch's Patent Lighting Co., [1897] 1 Ch. 176, 65 L. J. Ch. 919, 75 L. T. Rep. N. S. 332, 45 Wkly. Rep. 108; Fenner *v.* Wilson, [1893] 2 Ch. 656, 62 L. T. Ch. 984, 3 Reports 629, 68 L. T. Rep. N. S. 748, 42 Wkly. Rep. 57; Johnson *v.* Edge, [1892] 2 Ch. 1, 61 L. J. Ch. 262, 66 L. T. Rep. N. S. 44, 40 Wkly. Rep. 437; Axmann *v.* Lund, L. R. 18 Eq. 330, 43 L. J. Ch. 655, 31 L. T. Rep. N. S. 119, 22 Wkly. Rep. 789; Ellam *v.* Martyn, 68 L. J. Ch. 123, 79 L. T. Rep. N. S. 510, 47 Wkly. Rep. 212; Kurtz *v.* Spence, 57 L. J. Ch. 238, 58 L. T. Rep. N. S. 438; Fusee Vesta Co. *v.* Bryant, 56 L. T. Rep. N. S. 136. Threats must be followed with due diligence by suit or injunction granted. Colley *v.* Hart, 44 Ch. D. 179, 59 L. J. Ch. 308, 62 L. T. Rep. N. S. 424, 38 Wkly. Rep. 501; Challender *v.* Royle, 36 Ch. D. 425, 56 L. J. Ch. 995, 57 L. T. Rep. N. S. 734, 36 Wkly. Rep. 357; Rollins *v.* Hinks, L. R. 13 Eq. 355, 41 L. J. Ch. 358, 26 L. T. Rep. N. S. 56, 20 Wkly. Rep. 287; Household *v.* Fairburn, 51 L. T. Rep. N. S. 498. Filing suit promptly is a complete defense. Barrett *v.* Day, 43 Ch. D. 435, 59 L. J. Ch. 464, 62 L. T. Rep. N. S. 597, 38 Wkly. Rep. 362; Dunlop Pneumatic Tyre Co. *v.* New Seddon Pneumatic Tyre, etc., Co., 76 L. T. Rep. N. S. 405; Haskell Golf Ball Co. *v.* Hutchinson, 20 T. L. R. 606. Suit against third party is no defense. Combined Weighing Co. *v.* Automatic Weighing Mach. Co., 42 Ch. D. 665, 58 L. J. Ch. 709, 61 L. T. Rep. N. S. 474; Goulard *v.* Lindsay, 56 L. T. Rep. N. S. 506. Suit must be against party threatened. Kensington, etc., Electric Lighting Co. *v.* Lane Fox Electrical Co., [1891] 2 Ch. 573, 64 L. T. Rep. N. S. 770, 39 Wkly. Rep. 650. Injunction will be refused where there is actual infringement. Barney *v.* United Tel. Co., 28 Ch. D. 394, 52 L. T. Rep. N. S. 573, 33 Wkly. Rep. 576; Incandescent Gas Light Co. *v.* New Incandescent Gas Light Co., 76 L. T. Rep. N. S. 47; Burnett *v.* Tak, 45 L. T. Rep. N. S. 743. *Contra*, Walker *v.* Clarke, 56 L. J. Ch. 239, 56 L. T. Rep. N. S. 111, 35 Wkly. Rep. 245. The validity of the patent is not in issue but only infringement. Kurtz *v.* Spence, 33 Ch. D. 579, 55 L. J. Ch. 919, 55 L. T. Rep. N. S. 317, 35 Wkly. Rep. 26 [*affirmed* in 36 Ch. D. 770, 58 L. T. Rep. N. S. 320, 36 Wkly. Rep. 438]. Threats in letters enjoined see Skinner *v.* Shew, [1893] 1 Ch. 413, 62 L. J. Ch. 196, 67 L. T. Rep. N. S. 696, 2 Reports 179, 41 Wkly. Rep. 217; Driffield, etc., Pure Linseed Cake Co. *v.* Waterloo Mills Cake, etc., Co., 31 Ch. D. 638, 55 L. J. Ch. 391, 54 L. T. Rep. N. S. 210, 34 Wkly. Rep. 360. Injunction refused where mere trade circular in good faith. Société Anonyme *v.* Tilghman's Patent Sand Blast Co., 25 Ch. D. 1, 53 L. J. Ch. 1, 49 L. T. Rep. N. S. 451, 32 Wkly. Rep. 71; Halsey *v.* Brotherhood, 15 Ch. D. 514, 49 L. J. Ch. 786, 43 L. T. Rep. N. S. 366, 29 Wkly. Rep. 9 [*affirmed* in 19 Ch. D. 386, 51 L. J. Ch. 233, 45 L. T. Rep. N. S. 640, 30 Wkly. Rep. 279]. Defendant must give particulars in support of threats. Union Electrical Power, etc., Co. *v.* Electrical Storage Co., 38 Ch. D. 325, 59 L. T. Rep. N. S. 427, 36 Wkly. Rep. 913; Wren *v.* Weild, L. R. 4 Q. B. 213, 38 L. J. Q. B. 88, 20 L. T. Rep. N. S. 277. May recover damages for threats where actual loss shown. Skinner *v.* Shew, [1894] 2 Ch. 581, 63 L. J. Ch. 826, 71 L. T. Rep. N. S. 110, 8 Reports 455.

99. Boston Diatiti Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Hovey *v.* Rubber Tip Pencil Co., 33 N. Y. Super. Ct. 522 [*affirmed* in 57 N. Y. 119, 15 Am. Rep. 470]; Adriance *v.* National Harrow Co., 121 Fed. 827, 58 C. C. A. 163; Davison *v.* National Harrow Co., 103 Fed. 360; Computing Scale Co. *v.* National Computing Scale Co., 79 Fed. 962; New York Filter Co. *v.* Schwarzwalder, 58 Fed. 577; Kelley *v.* Ypsilanti Dress-Stay Mfg. Co., 44 Fed. 19, 10 L. R. A. 686; Westinghouse Air-Brake Co. *v.* Carpenter, 32 Fed. 545; Baltimore Car Wheel Co. *v.* Bemis, 29 Fed. 95; Chase *v.* Tuttle, 27 Fed. 110; Pentlarge *v.* Pentlarge, 19 Fed. Cas. No. 10,965*a*, 14 Reporter 579.

1. See, generally, JUDGMENTS, 23 Cyc. 1106 *et seq.*

court of competent jurisdiction in a suit on letters patent is conclusive upon the parties to such suit and their privies.[2] The character of conclusiveness attaches only to final judgments or decrees,[3] and to those in which the validity of the patent was decided,[4] and it must appear that the judgment or decree was rendered after full consideration of the merits of the case.[5] While a judgment sustaining the validity of a patent does not operate as *res adjudicata* in a suit on the same patent against a different defendant,[6] respect for the stability of a judicial deci-

Effect of previous adjudications upon granting of preliminary injunctions see *supra*, XII, E, 4, h, (IV).

2. Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 117 Fed. 309; Simonds Counter Mach. Co. *v.* Knox, 39 Fed. 702; McCloskey *v.* Hamill, 15 Fed. 750; Crandall *v.* Dare, 11 Fed. 902; Meyer *v.* Goodyear India-Rubber Glove Mfg. Co., 11 Fed. 891, 20 Blatchf. 91; Shoe Mach. Co. *v.* Cultan, [1896] 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. N. S. 166. *Compare* New Departure Bell Co. *v.* Hardware Specialty Co., 69 Fed. 152; Simonds Counter Mach. Co. *v.* Knox, 39 Fed. 702.

Effect of sale of interest pending suit.— The finding of the decree is binding upon the respondent in an infringement suit where he sold out his interest in the infringing business pending the hearing and gave up to his vendee the control and management of the suit. Gloucester Isinglass, etc., Co. *v.* Le Page, 30 Fed. 370.

Where a suit for infringement against a dealer is defended by the manufacturer at his own cost, the latter is bound by the decision in the case (Sacks *v.* Kupferle, 127 Fed. 569; National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 95 Fed. 991), not only upon all the questions that were raised and determined in the suit, but also upon all that might have been raised and determined therein (Eagle Mfg. Co. *v.* David Bradley Mfg. Co., 50 Fed. 193). But it has been held that the defense of prior adjudication is not available to a defendant, dismissed from a suit for infringement on its own application, on the ground that it employed counsel and defrayed the costs of the defense made by its co-defendant, unless it appears by clear and definite evidence that such fact was known to plaintiff. Singer Mfg. Co. *v.* Cramer, 109 Fed. 652, 48 C. C. A. 588.

If a reissued patent is for the same invention as that described in the original patent, a former decision is conclusive on the question of infringement. Cammeyer *v.* Newton, 4 Fed. Cas. No. 2,344, 4 Ban. & A. 159, 16 Off. Gaz. 720. *Contra*, Wells *v.* Jacques, 29 Fed. Cas. No. 17,398, 1 Ban. & A. 60, 5 Off. Gaz. 364.

The authority of a prior decision by an appellate court is not limited to the facts and defenses discussed in its opinion, but extends to all that were before it in the record. Badische Anilin, etc., Fabrik *v.* Klipstein, etc., Co., 125 Fed. 543.

A decree as to what is an infringement is conclusive upon the parties and upon the master, and extends to everything substantially like the infringement decreed against. Wooster *v.* Thornton, 26 Fed. 274.

3. **An interlocutory decree** in an infringement suit does not render the validity of the patent *res adjudicata*. Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,133, 2 Ban. & A. 351, 10 Off. Gaz. 289, holding, however, that it does not follow that the controversy between the litigants remains open as it would have remained if there had been no previous adjudication. A decree in a prior suit for the infringement of a patent is none the less conclusive between the parties on the issues of validity and infringement because it was merely interlocutory, when the second suit was commenced, where it is set up therein as an adjudication by a supplemental bill, after having ripened into a final decree. Bredin *v.* National Metal Weatherstrip Co., 147 Fed. 741 [*affirmed* in 157 Fed. 1003].

4. Leonard *v.* Simplex Electric Heating Co., 145 Fed. 946.

5. Steam-Gauge, etc., Co. *v.* Meyrose, 27 Fed. 213; Celluloid Mfg. Co. *v.* Tower, 26 Fed. 451.

Where, in a suit for infringement, the bill is dismissed because of failure to show any infringement, the decree dismissing the bill will not estop plaintiff or his assigns from again suing the same defendant for infringing the same patent. Steam-Gauge, etc., Co. *v.* Meyrose, 27 Fed. 213.

A suit dismissed without prejudice is not a bar to a second suit, nor conclusive of any issue joined in favor of the complainant. Robinson *v.* American Car, etc., Co., 135 Fed. 693, 68 C. C. A. 331.

The overruling of a demurrer which defendant refused to argue is not an adjudication in favor of patentability. Wollensak *v.* Sargent, 33 Fed. 840.

A decree pro confesso on a bill for infringement is conclusive so far at least as it is supported by the allegations of the bill. Thomson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105. *Compare* Everett *v.* Thatcher, 8 Fed. Cas. No. 4,578, 3 Ban. & A. 435, 2 Flipp. 234, 16 Off. Gaz. 1046.

6. Truman *v.* Carvill Mfg. Co., 87 Fed. 470; Boyden Power-Brake Co. *v.* Westinghouse Air-Brake Co., 70 Fed. 816, 17 C. C. A. 430; McMillan *v.* Conrad, 16 Fed. 128, 5 McCrary 140.

A judgment for infringement against a manufacturer is not conclusive upon a subsequent purchaser and user of the manufactured articles either as to the validity of the patent or infringement. Van Epps *v.* International Paper Co., 124 Fed. 542.

sion and a proper regard for the security of property in the same patent require that it shall not be disturbed, unless there was very palpable error.[7]

2. RECOVERY BY PATENTEE AS VESTING TITLE IN INFRINGER. A recovery of the profits for the use of a patented article does not vest the title in defendant;[8] but the recovery of profits and damages from the manufacturers of an infringing machine vests the title to the use in the purchaser of the article and debars the patentee from recovering from a user for the use thereof.[9] But this can only be held on a clear showing that the purchaser was using the same patented article as that involved in the suit between the patentee and the infringing manufacturer, and that the user was a vendee of such manufacturer;[10] and it would seem that to effect such a result it must further appear that the patentee's claim to profits and damages against the manufacturer has been actually paid and satisfied.[11]

PATENT TO LAND. See MINES AND MINERALS; PUBLIC LANDS.

PATER EST QUEM NUPTIÆ DEMONSTRANT. A maxim meaning "The nuptials show who is the father."[1]

PATER, ET MATER, ET PUER SUNT UNA CARO. A maxim meaning "The father, mother, and son are of one flesh."[2]

PATERFAMILIAS OB ALTERIUS CULPAM TENETUR SIVE SERVI SIVE LIBERI. A maxim meaning "The father is responsible for the misconduct of his child or his slave."[3]

PATERNITY. See BASTARDS; PARENT AND CHILD.

PATH. A term constantly used in our old acts as synonymous with "road."[4] (See, generally, PRIVATE ROADS; STREETS AND HIGHWAYS.)

PATHOLOGICAL CONDITION. A diseased condition of the body.[5] (See PATHOLOGY.)

A servant or agent sued separately for infringing a patent is not bound by a former decision against his principal upon the question of the validity of the patent. Hayes *v.* Bickelhoupt, 24 Fed. 806.

A decree declaring the invalidity of a patent is not a proceeding in rem, and does not prevent the same or another plaintiff from prosecuting a suit against another defendant, and establishing its validity upon the same or different evidence. Consolidated Roller-Mill Co. *v.* George T. Smith Middlings Purifier Co., 40 Fed. 305.

7. Brill *v.* Washington R., etc., Co., 30 App. Cas. (D. C.) 255; Voightmann *v.* Weis, etc., Cornice Co., 133 Fed. 298 [*affirmed* in 148 Fed. 848]; Walker Patent Pivoted Bin Co. *v.* Miller, 132 Fed. 823 [*affirmed* in 139 Fed. 134, 71 C. C. A. 398]; Cutler-Hammer Mfg. Co. *v.* Hammer, 124 Fed. 222 [*affirmed* in 128 Fed. 730, 63 C. C. A. 328]; Rose *v.* Fretz, 98 Fed. 112; Norton *v.* San José Fruit-Packing Co., 83 Fed. 512, 27 C. C. A. 576; Acme Harvester Co. *v.* Forbes, 69 Fed. 149; Simonds Counter Mach. Co. *v.* Knox, 39 Fed. 702; Hussey *v.* Whitely, 12 Fed. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120.

8. Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702, holding that a recovery based upon this rule of damages can only be for the use of the machine prior to the recovery, and ordinarily does not cover the value of the use for the entire period over which the patent right extends, or the period during which the particular machine is capable of being used. See also Suffolk Mfg. Co. *v.* Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Tuttle *v.* Matthews, 28 Fed. 98.

9. Steam Stone-Cutter Co. *v.* Sheldons, 21 Fed. 875; Allis *v.* Stowell, 16 Fed. 783; Booth *v.* Seevers, 3 Fed. Cas. No. 1,648*a*, 19 Off. Gaz. 1140; Perrigo *v.* Spaulding, 19 Fed. Cas. No. 10,994, 2 Ban. & A. 348, 13 Blatchf. 389, 12 Off. Gaz. 352; Spaulding *v.* Page, 22 Fed. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Steam Stonecutter Co. *v.* Windsor Mfg. Co., 22 Fed. Cas. No. 13,335, 4 Ban. & A. 445, 17 Blatchf. 24.

The adoption of the patent fee as the measure of damages for infringement by the use of a machine operates to vest in defendant the right to use the machine during the term of the patent. Emerson *v.* Simm, 8 Fed. Cas. No. 4,443, 6 Fish. Pat. Cas. 281, 3 Off. Gaz. 293; Sickels *v.* Borden, 22 Fed. Cas. No. 12,832, 3 Blatchf. 535.

10. Allis *v.* Stowell, 16 Fed. 783.

11. Allis *v.* Stowell, 16 Fed. 783.

1. Anderson L. Dict.

Applied in Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375, 377; Woodward *v.* Blue, 107 N. C. 407, 408, 12 S. E. 453, 22 Am. St. Rep. 897, 10 L. R. A. 662; Padelford's Estate, 7 Pa. Dist. 331, 332.

2. Morgan Leg. Max. [*citing* Branch Max.].

3. Morgan Leg. Max. [*citing* Tayler 314].

4. Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526, 527.

5. Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 311, 25 N. E. 399, 20 Am. St. Rep. 748, 9 L. R. A. 617; Dozier *v.* New York Fidelity, etc., Co., 46 Fed. 446, 449, 13 L. R. A. 114.

PATHOLOGY. That part of medicine which explains the nature of diseases and their causes and symptoms.[6]

PATIENT. See PHYSICIANS AND SURGEONS.

PATRIA LABORIBUS ET EXPENSIS NON DEBET FATIGARI. A maxim meaning "A jury ought not to be harassed by labors and expenses." [7]

PATRIAM DECET NOBIS CARIOREM ESSE QUAM NOSMETIPSOS. A maxim meaning "Our country should be dearer to us than ourselves." [8]

PATRIA POTESTAS IN PIETATE DEBET, NON IN ATROCITATE, CONSISTERE. A maxim meaning "Paternal power should consist [or be exercised] in affection, not in atrocity." [9]

PATRICIDE. One who has killed his father.[10] (See, generally, HOMICIDE.)

PATRIMONY. See DESCENT AND DISTRIBUTION.

PATROL LIMITS. A term used in connection with the enforcement of liquor laws, of uncertain meaning, depending upon the locality in which it is used.[11]

PATROLMAN. A POLICEMAN,[12] *q. v.* (See, generally, MUNICIPAL CORPORATIONS.)

PATRON. Used in reference to a house of ill-fame, one who goes there in the character of a purchaser, to be accommodated and entertained in the way of a bawdy house.[13] (See, generally, DISORDERLY HOUSES.)

PATRONAGE. Special countenance or support.[14]

PATRONIZE. To act as a patron toward.[15] (See PATRONAGE.)

PATRONUM FACIUNT DOS, ÆDIFICATIO, FUNDUS. A maxim meaning "Endowment, building, and land make a patron." [16]

PATTERN. An original or model proposed for imitation; something worthy to be used as a copy;[17] a mere model, which may be used to construct machinery and create working implements.[18]

PAUPER. See PAUPERS.

6. Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 311, 25 N. E. 399, 20 Am. St. Rep. 748, 9 L. R. A. 617.

7. Black L. Dict. [*citing* Jenkins Cent. 6].

8. Morgan Leg. Max. [*citing* Cicero].

9. Black L. Dict.

10. Black L. Dict. [*citing* Sandars Just. Inst. (5th ed.) 496].

11. State *v.* Schraps, 97 Minn. 62, 68, 106 N. W. 106, where it is said: "It follows that at the time of the passage of this act 'patrol limits' meant one thing in Minneapolis, as generally understood by its citizens, viz., that district within which liquors were sold and which required special alertness on behalf of the police, whereas in St. Paul it meant directly the opposite and referred to that district within which no licenses were permitted, and as to Duluth it had, and could have, no application whatever."

12. State *v.* Walbridge, 153 Mo. 194, 200, 54 S. W. 447, distinguishing "police officer" and "turnkey."

13. Raymond *v.* People, 9 Ill. App. 344, 345.

14. Webster Int. Dict.

That a loose woman is under the patronage of a man named means that she is supported by him, for the purpose of sexual indulgence. More *v.* Bennett, 48 N. Y. 472, 475.

15. Raymond *v.* People, 9 Ill. App. 344, 345.

16. Black L. Dict.

17. Standard Dict. [*quoted* in U. S. *v.* Hoe, 147 Fed. 201, 203].

18. Brewer *v.* Ford, 59 Hun (N. Y.) 17, 27, 12 N. Y. Suppl. 619. See also Heath *v.* Rollason, [1898] A. C. 499, 502, 67 L. J. Ch. 565, 79 L. T. Rep. N. S. 1; Heywood *v* Potter, 22 L. J. Q. B. 133, 137, 1 Wkly. Rep. 127, 16 Eng. L. & Eq. 242.

It is a model usually of wood or iron and often in several parts to facilitate removal, about which to form a sand mold, in which a casting may be made. U. S. *v.* Hoe, 147 Fed. 201, 203.

PAUPERS

By Frank W. Jones

I. Duty of Relief in General, 1064
- A. *Who Are Paupers,* 1064
  - 1. *In General,* 1064
  - 2. *Ability of Self-Support,* 1064
  - 3. *Ability of Person Liable For Support,* 1065
  - 4. *Amount of Property Owned,* 1065
  - 5. *Receiving Aid or in Need of Relief From Public Authorities,* 1065
  - 6. *Transient Poor Persons,* 1066
- B. *Constitutional and Statutory Provisions,* 1066
- C. *Duties of Public Authorities,* 1067

II. Poor Law Districts and Officers, 1067
- A. *Creation and Existence of Districts,* 1067
- B. *Appointment and Election of Officers,* 1068
  - 1. *In General,* 1068
  - 2. *To Fill Vacancy,* 1068
- C. *Eligibility and Qualification,* 1068
- D. *Term of Office,* 1069
- E. *Removal,* 1069
  - 1. *Power to Remove,* 1069
  - 2. *Grounds of Removal,* 1069
  - 3. *Proceedings to Remove,* 1070
- F. *Authority and Power of Officers and Boards,* 1070
  - 1. *In General,* 1070
  - 2. *As to Indebtedness and Expenditures,* 1071
    - a. *For Relief and Support,* 1071
      - (I) *In General,* 1071
      - (II) *Of Paupers Resident in Another Town,* 1072
    - b. *For Medical Services,* 1072
  - 3. *Power to Audit Accounts,* 1073
  - 4. *Powers of Part of Officers,* 1073
- G. *Actions By and Against Officers,* 1074
- H. *Poorhouses and Poor-Farms,* 1075
- I. *Local Taxation For Relief of Poor,* 1075
- J. *Custody and Disposition of Proceeds of Taxation and Poor Funds,* 1075
- K. *Liability of Officers and Their Sureties,* 1075
  - 1. *Civil Liability,* 1075
    - a. *Of Officers on Contracts,* 1075
    - b. *Of Officers For Negligence or Misconduct,* 1076
    - c. *Of Officers and Sureties on Official Bond,* 1076
  - 2. *Criminal Liability of Officers,* 1077

III. Settlement and Removal, 1077
- A. *Nature of Legal Settlement,* 1077
  - 1. *In General,* 1077
  - 2. *Estoppel to Deny,* 1077
- B. *Statutory Provisions,* 1078
  - 1. *Construction and Operation in General,* 1078
  - 2. *Retroactive Operation of Statutes,* 1079

C. *Settlement by Birth*, 1079
1. *In General*, 1079
2. *Bastards*, 1080
D. *Acquired Settlement*, 1080
1. *Who May Acquire*, 1080
a. *In General*, 1080
b. *Aliens*, 1080
c. *Citizens and Inhabitants of Same or Different States*, 1081
d. *Married Women*, 1081
e. *Deserted and Divorced Women*, 1081
f. *Widows*, 1082
g. *Infants*, 1082
(I) *In General*, 1082
(II) *Emancipation*, 1082
h. *Insane Persons*, 1083
i. *Slaves*, 1083
2. *Mode of Acquiring*, 1084
a. *Ownership or Interest in Property*, 1084
(I) *In General*, 1084
(II) *What Interest or Title Necessary*, 1084
(A) *In General*, 1084
(B) *Curtesy and Dower Interests*, 1085
(III) *Value of Estate*, 1085
(IV) *Occupation*, 1085
(V) *Payment of Consideration*, 1085
b. *Payment of Rent*, 1086
c. *Taxation*, 1086
(I) *In General*, 1086
(II) *Levy and Assessment*, 1087
(III) *Payment*, 1087
(IV) *Persons Making Payment*, 1088
d. *Service*, 1088
(I) *In General*, 1088
(II) *Contract of Hiring*, 1088
(III) *The Service*, 1089
(IV) *Effect of Residence Elsewhere*, 1089
e. *Apprenticeship*, 1089
(I) *In General*, 1089
(II) *Indenture*, 1090
(III) *Service*, 1090
f. *Holding Public Office*, 1090
g. *Military Settlement*, 1091
(I) *In General*, 1091
(II) *Considerations Affecting*, 1091
(III) *Replacing Settlement by Acquiring Another*, 1091
h. *Residence*, 1092
(I) *In General*, 1092
(II) *Necessity of, in Connection With Payment of Taxes*, 1092
(III) *Necessity of Obtaining Approbation of Town to Acquire Settlement Thereby*, 1092
(IV) *Nature and Requisites*, 1092
(V) *Determination*, 1093
(VI) *Continuity*, 1093
(A) *In General*, 1093
(B) *Interruption by Imprisonment*, 1094
(C) *Interruption by Commitment to Insane Asylum*, 1094

(VII) *Cessation of Established Residence*, 1094
3. *Annexation, Consolidation, Division, and Incorporation of Towns*, 1095
a. *Annexation and Detachment*, 1095
b. *Consolidation or Division of Towns or Districts*, 1095
c. *Incorporation*, 1096
d. *Effect on Persons Absent*, 1096
4. *Preventing Settlement*, 1097
a. *Receiving Supplies*, 1097
(I) *In General*, 1097
(II) *What Constitutes*, 1098
b. *Warning Out*, 1099
(I) *In General*, 1099
(II) *Requisites and Sufficiency*, 1099
(III) *Service*, 1099
(IV) *Return and Record*, 1099
(V) *Operation and Effect*, 1100
(VI) *Evidence*, 1100
E. *Derivative Settlement*, 1100
1. *In General*, 1100
2. *Husband and Wife*, 1101
a. *General Rule*, 1101
b. *Effect of Void Marriage*, 1101
3. *Parent and Child*, 1101
a. *General Rule*, 1101
b. *Alien Born Children and Children Born in Other States*, 1102
c. *Adopted Children*, 1102
d. *Illegitimate Children*, 1102
e. *Insane Children*, 1103
f. *Adult and Emancipated Children*, 1104
g. *Settlement of Mother*, 1104
(I) *In General*, 1104
(II) *Acquired in Own Right After Death of Father*, 1104
(III) *Acquired Derivatively by Second Marriage*, 1105
4. *Slaves*, 1105
F. *Loss and Change of Settlement*, 1105
1. *General Rule*, 1105
2. *Statutory Annulment or Change*, 1106
3. *Gaining a Settlement in Another State*, 1106
4. *Marriage*, 1106
5. *Divorce*, 1107
6. *Fraud in Procuring Change*, 1107
7. *Abandonment and Absence*, 1107
G. *Evidence of Settlement*, 1108
1. *Presumptions and Burden of Proof*, 1108
2. *Admissibility*, 1109
a. *In General*, 1109
b. *As to Change of Residence*, 1110
3. *Weight and Sufficiency*, 1110
H. *Persons Removable*, 1111
1. *Persons Chargeable or Likely to Become Chargeable*, 1111
2. *Persons Fraudulently or Wrongfully Brought Into Place*, 1111
3. *Transient Paupers*, 1112
4. *Individual Members of Families*, 1112
I. *Place to Which Removable*, 1112
J. *Authority to Remove*, 1113

K. *Proceeding For Removal*, 1113
1. *Jurisdiction*, 1113
2. *Application For Removal and Proceedings Thereon*, 1113
L. *Judgment or Order of Removal*, 1114
1. *Form and Requisites*, 1114
a. *In General*, 1114
b. *Amendability*, 1114
2. *Discharge or Quashing*, 1115
3. *Conclusiveness*, 1115
a. *When Order Unappealed From or Confirmed on Appeal*, 1115
b. *When Order Discharged*, 1116
c. *When Order Quashed*, 1116
M. *Execution of Order or Warrant of Removal*, 1116
N. *Review of Order of Removal*, 1117
1. *Right of Review*, 1117
2. *Who May Appeal*, 1117
3. *Manner of Taking Appeal*, 1117
4. *Time For Taking Appeal*, 1118
5. *Scope and Extent of Review*, 1118
O. *Costs Upon Removal Proceedings*, 1118
1. *In General*, 1118
2. *Counsel Fees*, 1119
3. *Maintenance Pending Removal or on Unlawful Removal*, 1119
P. *Bringing Pauper Into State, County, or Town*, 1120
1. *Wrongful Removal in General*, 1120
2. *Necessity of Intent and Knowledge*, 1120
3. *Remedies*, 1121
a. *Penalty*, 1121
(I) *Grounds For Imposition*, 1121
(II) *Persons Liable*, 1121
(III) *Parties*, 1121
b. *Damages*, 1121
(I) *Form of Action*, 1121
(II) *Measure of Damages*, 1121
4. *Evidence*, 1121

IV. SUPPORT, SERVICES, AND EXPENSES, 1122
A. *Compelling Support by Relatives*, 1122
1. *Liability For Support*, 1122
a. *Nature and Extent*, 1122
(I) *In General*, 1122
(II) *Manner of Support*, 1122
(III) *As Dependent on Ability*, 1122
b. *Persons Liable*, 1123
c. *Exemption From Liability*, 1123
2. *Proceedings to Compel Support*, 1123
a. *Mode of Compelling Support*, 1123
(I) *In General*, 1123
(II) *By Requiring Bond*, 1124
(III) *Seizure of Property of Person Liable For Support*, 1124
b. *Persons Entitled to Maintain Proceedings*, 1125
c. *Jurisdiction*, 1125
d. *Notice and Opportunity to Be Heard*, 1125
e. *Petition or Complaint*, 1125
f. *Order For Relief*, 1126

(I) *Requisites*, 1126
(II) *Enforcement*, 1126
(III) *Appeal From*, 1126
g. *Costs*, 1127
B. *Support of Pauper Slaves*, 1127
C. *Local Authorities Liable*, 1127
1. *In General*, 1127
a. *State Paupers*, 1127
b. *Liability of Counties*, 1127
c. *Liability of Place of Residence*, 1128
d. *Liability of Place of Settlement*, 1129
e. *Alteration, Consolidation, Annexation, or Detachment of Territory*, 1129
(I) *In General*, 1129
(II) *Agreements on Alteration*, 1130
2. *Fixing Liability*, 1130
a. *Ascertainment and Adjudication of Settlement*, 1130
b. *Adjudication of Poverty*, 1131
c. *Removal and Order Therefor*, 1131
d. *Notice*, 1131
(I) *Introduction*, 1131
(II) *Form and Sufficiency*, 1132
(A) *In General*, 1132
(B) *Writing*, 1132
(C) *Name or Description of Pauper*, 1133
(D) *Allegation of Settlement*, 1133
(E) *Allegation of Chargeability*, 1134
(F) *Statement of Expenses Incurred*, 1134
(G) *Request to Remove*, 1135
(III) *Notice, by Whom Signed*, 1135
(IV) *Service of Notice*, 1135
(A) *Upon Whom Served*, 1135
(B) *Manner of Service*, 1135
(V) *Time of Giving Notice*, 1136
(VI) *Waiver*, 1136
(A) *Of Notice*, 1136
(B) *Of Defect in Notice*, 1137
(VII) *New Notice, When Necessary*, 1137
e. *Answer to Notice*, 1138
(I) *Necessity and Requisites*, 1138
(II) *Effect of Failure to Serve*, 1138
D. *Liability of Pauper and Pauper's Estate*, 1138
E. *Application For Relief*, 1140
F. *Order of Relief and Order of Approval*, 1140
1. *Order of Relief*, 1140
a. *Necessity and Form*, 1140
b. *Nature and Extent of Relief*, 1140
c. *Validity*, 1141
d. *Conclusiveness*, 1141
e. *Appeal*, 1141
2. *Order of Approval*, 1141
G. *Furnishing Aid and Support in General*, 1142
1. *Transients*, 1142
2. *Necessity of Relief*, 1142
3. *Unauthorized and Voluntary Aid*, 1142
4. *Effect of Existence of Provision For Relief*, 1143
a. *In General*, 1143

b. *After Notice to Town to Give Relief*, 1144
5. *Nature and Extent of Relief*, 1144
H. *Contracts For Support*, 1145
1. *Requisites and Validity*, 1145
a. *In General*, 1145
b. *Consideration*, 1145
2. *Construction and Operation*, 1145
I. *Support in Poorhouses*, 1146
1. *In General*, 1146
2. *State Almshouses*, 1147
J. *Services and Earnings of Pauper*, 1147
1. *Right Thereto*, 1147
a. *Of Town*, 1147
b. *Of Persons Becoming Liable For Support by Contract With Town*, 1147
c. *Of Pauper Himself*, 1147
2. *Settlement Regarding*, 1147
K. *Support in Asylums*, 1148
1. *Local Authorities Liable*, 1148
2. *Validity of Commitment*, 1148
L. *Support in Reformatories and Prisons*, 1148
M. *Liability For Medical Services*, 1149
1. *In General*, 1149
2. *Nature of Services Rendered*, 1150
3. *Contracts For Services*, 1151
N. *Recovery For Supplies, Services, and Expenditures*, 1151
1. *Against Individuals Liable*, 1151
2. *Against Local Authorities Liable*, 1152
a. *Nature and Form of Remedy*, 1152
b. *Right of Action*, 1152
(I) *By Town or County*, 1152
(A) *In General*, 1152
(B) *To Recover Money Paid Under Mistake*, 1152
(II) *By Individuals*, 1153
(III) *Certificate of Correctness of Charges*, 1153
c. *Conditions Precedent*, 1153
d. *Defenses*, 1154
(I) *To Action by Town or County*, 1154
(II) *To Action by Individuals*, 1154
e. *Jurisdiction*, 1154
f. *Time to Sue — Limitations and Laches*, 1155
g. *Pleading*, 1156
h. *Evidence*, 1157
(I) *Presumptions and Burden of Proof*, 1157
(II) *Admissibility*, 1157
(III) *Weight and Sufficiency*, 1158
i. *Amount of Recovery*, 1159
j. *Trial — Questions of Law and Fact*, 1159
k. *Appeal*, 1160

CROSS-REFERENCES

For Matters Relating to:

Apprenticeship of Pauper, see APPRENTICES.
Charity For Relief of Poor, see CHARITIES.
Discharge of Poor Debtor, see EXECUTIONS.
Indigent:
Insane Person, see INSANE PERSONS.
Soldier, see ARMY AND NAVY.

For Matters Relating to — (*continued*)
In Forma Pauperis:
Action, see Costs; Infants.
Appeal From Justice, see Justices of the Peace.
Defense, see Costs; Infants.
Qualification of Voter, see Elections.
Right of Town to Maintain Bastardy Proceedings, see Bastards.
Rights and Liabilities of Relatives With Respect to Dead Body, see Dead Bodies.
Spendthrift, see Spendthrifts.
Vagrant, see Vagrancy.

I. DUTY OF RELIEF IN GENERAL.

A. Who Are Paupers[1] — **1. In General.** A pauper is defined to be one so poor that he must be supported at the public expense.[2]

2. Ability of Self-Support. Where a family is in want, they are poor and unable to support themselves, within the meaning of the various statutes, although the head of the family earns enough for their partial support.[3] However, a person who has always been able to support himself is not a pauper within the purview of the various statutes making provision for the relief of that class of persons, although the wages earned by him are barely suffieient for that purpose,[4]

1. **Adjudication of poverty as condition precedent to fixing liability for support** see *infra*, IV, C, 2, b.

2. Bouvier L. Dict.; Lee County *v.* Lackie, 30 Ark. 764, 768; Hoffen's Estate, 70 Wis. 522, 526, 36 N. W. 407.

Other definitions are: "One so poor as to be unable to provide for him or herself, and having no one of sufficient pecuniary ability to care for them." Whiting's Case, 3 Pittsb. (Pa.) 129, 133.

"The word 'pauper' . . . does not necessarily imply a person who has actually received support from the town, as the word in this chapter is used indiscriminately to designate poor and indigent persons standing in need of relief, and poor persons likely to become chargeable, as well as such poor persons as have actually received support from the town." Walbridge *v.* Walbridge, 46 Vt. 617, 625.

"A poor person; especially one so indigent as to depend on charity for maintenance; or one supported by some public provision." Webster Dict. [*quoted* in Saukville *v.* Grafton, 68 Wis. 192, 195, 31 N. W. 719].

In Iowa the statutory definition of a poor person is "one who has no property exempt or otherwise and is unable because of physical or mental disability to earn a living by labor." Monroe County *v.* Abegglen, 129 Iowa 53, 57, 105 N. W. 350.

"Poor," as used in the statute providing for the relief of the poor, means persons so completely destitute of property as to require assistance from the public. State *v.* Osawkee Tp., 14 Kan. 418, 422, 19 Am. Rep. 99.

"Poor of the county."— Judge Breese, defining what is meant by the phrase "poor of the county," said that they are those who are "in legal contemplation . . . dependent upon public charity; in other words, they are the paupers who are maintained by taxes levied on the people, or by the income from the public property." Heuser *v.* Harris, 42 Ill. 425, 436.

3. Old Saybrook *v.* Milford, 76 Conn. 152, 56 Atl. 496; New Hartford *v.* Canaan, 52 Conn. 158; Lyme *v.* East Haddam, 14 Conn. 394; Portland *v.* Wilton, 15 Me. 363; Plymouth *v.* Haverhill, 69 N. H. 400, 46 Atl. 460. See also St. Johnsbury *v.* Waterford, 15 Vt. 692, holding that the ability of paupers to maintain themselves is a pecuniary ability, and is not affected by the manner in which they have previously disposed of their property, if the disposition has been so made as to be binding on them.

No person can be chargeable to a town while he has the means of supporting himself. — The question whether a person is chargeable to a town as a pauper does not depend merely upon the fact that such person has been furnished relief, but upon the town's legal obligation to do so. Stewart *v.* Sherman, 5 Conn. 244; Handlin *v.* Morgan County, 57 Mo. 114; Ludlow *v.* Weathersfield, 18 Vt. 39; Randolph *v.* Braintree, 10 Vt. 436; Londonderry *v.* Acton, 3 Vt. 122; Holland *v.* Belgium, 66 Wis. 557, 29 N. W. 558.

When any temporary support is given to a poor person, it is in all cases a question of fact, whether such poor person was, at the time the support was so furnished, a pauper within the meaning of the statute. Holland *v.* Belgium, 66 Wis. 557, 29 N. W. 558; Port Washington *v.* Saukville, 62 Wis. 454, 22 N. W. 717. See also Gilligan *v.* Grattan, 63 Nebr. 242, 88 N. W. 477.

4. Ostland *v.* Porter, 4 Dak. 98, 25 N. W. 731; Lander County *v.* Humboldt County, 21 Nev. 415, 32 Pac. 849 (holding that a laboring man who has always been able to make a living, and who, until his last sickness, has never had occasion to ask or receive charity, although without money or

and *a fortiori* is he not a pauper where his earnings are more than enough for his support.[5]

3. Ability of Person Liable For Support. A child having parents of sufficient ability to support it is not a pauper, within the meaning of the various statutes,[6] and the same is the case where the child has grandparents of sufficient ability to support it, under a statute making them liable for such support.[7] On the other hand, a minor child does not necessarily become a pauper by reason of the mere pauperism of his parents.[8] Nor can the wife of a man owning a valuable equity of redemption which can be made available for her support be chargeable to a town as a pauper.[9]

4. Amount of Property Owned. The rule has been laid down in some cases that, where a person is possessed of property not absolutely indispensable for daily use, he must apply it to his support by sale or by way of security, and cannot, while possessing such property, be regarded as a pauper, in the sense that the word is used in the statutes.[10] However, the better rule, and one most in consonance with the spirit actuating the enactment of such statutes, seems to be that it is not necessary, in order to entitle a person to relief as a pauper, that he should be altogether destitute of property, but that all that is necessary to entitle him to such relief is to show that he does not possess sufficient property for his maintenance and support.[11]

5. Receiving Aid or in Need of Relief From Public Authorities.[12] Adult persons of sound mind cannot be made paupers against their will; and to constitute pauper supplies, the supplies must be applied for, or received with a full knowledge of their nature.[13] But the fact of a person knowingly or voluntarily receiving support from a county, town, or municipality will constitute him a

property with which to pay the expense of that sickness, is not a pauper within the meaning of Gen. St. § 1988, providing that one county may recover from another county for assistance given a "pauper" resident of the latter); Wood *v.* Simmons, 51 Hun (N. Y.) 325, 4 N. Y. Suppl. 368; Beach *v.* Marion Tp., 2 Ohio Dec. (Reprint) 221, 2 West. L. Month. 95; Holland *v.* Belgium, 66 Wis. 557, 29 N. W. 558.

5. Jenness *v.* Emerson, 15 N. H. 486. And see Wilson *v.* Brooks, 14 Pick. (Mass.) 341, holding that, where a person who had been supported by his town as a pauper had bodily health and strength, although of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, he was no longer a pauper.

6. Litchfield *v.* Londonderry, 39 N. H. 247. See also Peters *v.* Westborough, 20 Pick. (Mass.) 506.

7. Whiting's Case, 3 Pittsb. (Pa.) 129.

8. Jenness *v.* Emerson, 15 N. H. 486.

9. Chelsea *v.* Brookfield, 27 Vt. 587.

10. Peters *v.* Litchfield, 34 Conn. 264 (holding that a person who has any interest in real estate, although not sufficient to support him, is not entitled to support as a pauper); Stewart *v.* Sherman, 4 Conn. 553; Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401; Rhine *v.* Sheboygan, 82 Wis. 352, 52 N. W. 444. See also Livingston County *v.* Oakland County, 141 Mich. 667, 104 N. W. 978, holding that persons who, when they removed from one county to another, were well and strong, had considerable household furniture, some sixty dollars in money, and sufficient provisions to support themselves and their family a few months, were not then paupers.

11. *Connecticut.*— Fish *v.* Perkins, 52 Conn. 200; New-Milford *v.* Sherman, 21 Conn. 101; Wallingford *v.* Southington, 16 Conn. 431, 435, where the court said: "We cannot think, that the law upon this subject is so rigid, that if a poor man owns a miserable hovel, used as a shelter for his family, he must sell it, provided it is of any value whatever, before he can properly call upon the selectmen of a town to assist him in procuring medicine and bread for his sick and famishing children. . . . Such a rule would be harsh and inconvenient."

Illinois.— Big Grove *v.* Fox, 89 Ill. App. 84; Eshelman *v.* Clinton County, 88 Ill. App. 566.

Iowa.— See Jasper County *v.* Osborn, 59 Iowa 208, 13 N. W. 104.

Maine.— Appleton *v.* Belfast, 67 Me. 579.

Massachusetts.— Sturbridge *v.* Holland, 11 Pick. 459.

New Hampshire.—Poplin *v.* Hawke, 8 N. H. 305.

New York.—Bartlett *v.* Ackerman, 21 N. Y. Suppl. 53.

Vermont.— Blodgett *v.* Lowell, 33 Vt. 174. See also Hardwick *v.* Pawlet, 36 Vt. 320.

See 38 Cent. Dig. tit. "Paupers," § 4.

12. Receipt of supplies as preventing acquisition of settlement see *infra*, III, D, 4, a.

13. Bucksport *v.* Cushing, 69 Me. 224.

The families of absent soldiers, in the service of the United States, when standing in need of assistance, do not incur the disabilities of pauperism by receiving supplies from the cities or towns where such soldiers

technical pauper;[14] and where necessary aid is furnished one, by the public authorities, with his knowledge, for the support of a person, the burden of whose support the law imposes upon him, he is himself a pauper.[15] The question whether a person is chargeable to a town as a pauper does not depend merely upon the fact that they have furnished him relief, but likewise upon their legal obligation to do so.[16]

6. Transient Poor Persons. In many adjudicated cases the distinction existing between paupers and non-resident persons falling sick within a county, not having money or property with which to support themselves, is fully recognized and sustained, the latter not being considered paupers within the meaning of the poor laws.[17]

B. Constitutional and Statutory Provisions.[18] Legislative bodies, in the exercise of the power of taxation and police regulation, may impose upon counties, towns, and municipalities the burden of the relief and support of all sick, infirm, and disabled paupers within their limits.[19] They may likewise impose such burdens upon individuals.[20] In some jurisdictions it is held that statutes providing for the maintenance of paupers, being enacted in the interests of humanity, must be liberally construed to effectuate the benevolent policy of the legislature.[21] Such statutes, like constitutional provisions, always operate prospectively, and not retroactively, unless the words used or the objects to be accomplished indicate

resided at the time of their enlistment. Veazie *v.* China, 50 Me. 518.

14. Hunnewell *v.* Hobert, 40 Me. 28; Crossman *v.* New Bedford Sav. Inst., 160 Mass. 503, 36 N. E. 477 (although an honorably discharged soldier); Hutchings *v.* Thompson, 10 Cush. (Mass.) 238; Sandlake *v.* Berlin, 2 Cow. (N. Y.) 485.

Supplies furnished to family.— Supplies furnished to a family by overseers of the poor will be considered as furnished to all the members living with such family, including those of full age, and not subject to the control of any other member of it. Corinth *v.* Lincoln, 34 Me. 310.

15. Tremont *v.* Mt. Desert, 36 Me. 390; Gilmanton *v.* Sanbornton, 56 N. H. 336.

Stepchild.—A man is under no legal obligation to support his stepchild, and the fact that such child receives aid from a town as a pauper, upon the application of the stepfather, will not make the latter a pauper. Brookfield *v.* Warren, 128 Mass. 287.

Determination of pauperism.— Before overseers of the poor can make an adjudication, under Mass. St. (1793) c. 59, that a parent is unable to take care of a child, it is proper, if not necessary, that they should give such parent notice, and, if he wishes it, a hearing. Reidell *v.* Morse, 19 Pick. (Mass.) 358.

16. Ludlow *v.* Weathersfield, 18 Vt. 39.

17. Perry County *v.* Du Quoin, 99 Ill. 479; La Salle County *v.* Reynolds, 49 Ill. 186; Lauder County *v.* Humboldt County, 21 Nev. 415, 32 Pac. 849. And see Lee County *v.* Lackie, 30 Ark. 764.

18. As to settlement and removal of paupers see *infra*, III.

Statute as to support of pauper as impairment of vested right see Constitutional Law, 8 Cyc. 908.

19. People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634; Webster *v.* Rapides Parish Police Jury, 51 La. Ann. 1204, 25 So. 988, holding that Const. (1879) art. 202, providing that the taxing power may be exercised by the general assembly for state purposes, and by parishes under authority granted to them by the general assembly for parish purposes, when construed with article 163, providing that the general assembly shall make it obligatory on each parish to support all infirm, sick, and disabled paupers residing within its limits, warrants the adoption of Act No. 157 of 1894, requiring the parishes to pay the expense of treatment at the Keely Cure Institute of persons who are themselves unable to pay therefor.

20. People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634, holding that Rev. St. c. 107 (Paupers Act), § 3, which imposes on a brother or sister, if of sufficient ability, as well as on relatives in direct line, a liability for the support of a poor person unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other unavoidable cause, provided pauperism is not caused by intemperance or other bad conduct, is within the legislative power of a state, and is valid.

Estate of decedent without relatives.— The New Jersey statute (Revision, p. 397, § 9) requires an administrator of one dying without relatives to pay the interest on his estate annually to the overseer of the poor for the use of the poor of the township, and, if at the expiration of seven years no relatives claim the money, to pay the principal and accumulated interest to the overseer of the poor for the use of the township, and it has been held that these last words must be construed to mean for the use of the poor. *In re* Jones, 8 N. J. L. J. 310.

21. Beach *v.* Marion Tp., 2 Ohio Dec. (Reprint) 221, 2 West. L. Month. 95; Ogden City *v.* Weber County, 26 Utah 129, 72 Pac. 433.

that a retroactive operation was intended.[22] Since repeal by implication is not favored,[23] an intent to repeal a pauper statute must be clearly expressed, or necessarily implied, to effect such repeal.[24]

C. Duties of Public Authorities. At common law the public authorities were not liable for the support of paupers. The liability of a county or municipal corporation for the relief and support of its indigent poor is purely statutory, and to render a county or municipality liable, the case must come fairly within the terms of the statute.[25] In practically every jurisdiction, statutes have been enacted requiring counties, towns, and municipal corporations to furnish necessary relief to paupers resident or having a legal settlement therein.[26] Likewise, in many jurisdictions, the statutes require counties, towns, and municipal corporations to furnish adequate and immediate relief to any pauper temporarily residing therein, without reference to the ultimate liability of any other county, town, municipality, or person for such pauper's support.[27]

II. POOR LAW DISTRICTS AND OFFICERS.

A. Creation and Existence of Districts. Upon the enactment of a statute having for its object the establishment of a general system for the relief of the

22. Stone *v.* Stone, 32 Conn. 142; Wethersfield *v.* Montague, 3 Conn. 507; Brunswick *v.* Litchfield, 2 Me. 28 (holding that where the marriage of a female pauper was rendered valid by the operation of the resolve of March 19, 1821, her derivative settlement, thus gained, could not operate to oblige the town, thus newly charged with her support, to pay for supplies furnished prior to the passage of the resolve); Worcester *v.* Barre, 138 Mass. 101.

23. People *v.* St. Lawrence County, 103 N. Y. 541, 9 N. E. 311. And see CONSTITUTIONAL LAW, 8 Cyc. 748.

24. Smith *v.* People, 65 Ill. 375; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405; Delaware Tp. *v.* Zerbe Tp., 3 Pa. Co. Ct. 643 (holding that the Pennsylvania act of June 13, 1836, section 6, requiring an order for relief to be obtained from and approved by two magistrates, is not repealed by the act of May 13, 1879, which provides for relief without an order in poor districts where directors of the poor are appointed by the court of quarter sessions); Philadelphia *v.* Nathans, 4 Pa. L. J. 249.

Statute held to repeal former provision see Barnet *v.* Woodbury, 40 Vt. 266.

25. *Illinois.*— Perry County *v.* Du Quoin, 99 Ill. 479.

Iowa.— Cooledge *v.* Mahaska County, 24 Iowa 211.

Maine.— Davis *v.* Milton, 90 Me. 512, 38 Atl. 539; Augusta *v.* Chelsea, 47 Me. 367; Blakesburg *v.* Jefferson, 7 Me. 125.

Massachusetts.— Miller *v.* Somerset, 14 Mass. 396; Mitchell *v.* Cornville, 12 Mass. 333.

Nevada.— Lander County *v.* Humboldt County, 21 Nev. 415, 32 Pac. 849.

New Hampshire.— Otis *v.* Strafford, 10 N. H. 352.

South Dakota.— Hamlin County *v.* Clark County, 1 S. D. 131, 45 N. W. 329.

Utah.— Ogden City *v.* Weber County, 26 Utah 129, 72 Pac. 433.

See 38 Cent. Dig. tit. "Paupers," § 10.

26. Clay County *v.* Plaut, 42 Ill. 342; Seagraves *v.* Alton, 13 Ill. 366; La Salle County *v.* South Ottawa, 12 Ill. 480; Crossman *v.* New Bedford Sav. Inst., 160 Mass. 503, 36 N. E. 477; Granville *v.* Southampton, 138 Mass. 256; Grim *v.* Haycock Tp., 1 Pa. Dist. 815; Armstrong *v.* Berwick Borough Overseers, 10 Pa. Co. Ct. 337.

27. *Connecticut.*— Trumbull *v.* Moss, 28 Conn. 253.

Illinois.— Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893.

New Hampshire.— Moultonborough *v.* Tuftonborough, 43 N. H. 316.

New York.— Goodale *v.* Lawrence, 88 N. Y. 513, 42 Am. Rep. 259; People *v.* Emigration Com'rs, 15 How. Pr. 177.

Ohio.— Cincinnati Tp. *v.* Ogden, 5 Ohio 23.

Pennsylvania.— Taylor *v.* Shenango, 114 Pa. St. 394, 6 Atl. 475; Nippenose Tp. *v.* Jersey Shore, 48 Pa. St. 402; Milton *v.* Williamsport, 9 Pa. St. 46.

South Dakota.— Hamlin County *v.* Clark County, 1 S. D. 131, 45 N. W. 329.

In Connecticut it is provided by statute (Laws (1878), c. 94, § 3), that all persons needing relief, and having no settlement in any town in the state, shall be state paupers, and shall, when needing relief, be provided for by the controller "for the period of six months after they come into this state," and it has been held under this statute that the period intended was the first six months of their pauperism, and not the first six months after their arrival in the state. Marlborough *v.* Chatham, 50 Conn. 554.

A transient pauper, under the Vermont statute, is a person who is suddenly taken sick, or lame, or is otherwise disabled and confined at any house in any town, or is committed to jail, and is in need of relief, away from the town in which he resided. New Haven *v.* Middlebury, 63 Vt. 399, 21 Atl. 608. And see Vershire *v.* Hyde Park, 64 Vt. 638, 25 Atl. 431; Macoon *v.* Berlin, 49 Vt. 13, where

poor in a designated county, or throughout the state, local statutes, repugnant thereto, providing for the maintenance of the poor in a county, town, or borough, are thereby repealed, and the management and control of the poor of such borough is vested exclusively in the boards and officers designated by the later act,[28] unless expressly, or by clear implication, exempted from repeal.[29]

B. Appointment and Election of Officers — 1. In General. Matters relating to the election[30] or appointment[31] of officers of a poor law district depend for the most part upon the particular statutory provisions.

2. To Fill Vacancy. Sometimes a vacancy is required to be filled by election,[32] and sometimes by appointment.[33] In order to justify an election[34] or appointment[35] it is of course necessary that a vacancy exist. Hence an election[36] or appointment[37] to fill a supposed vacancy, caused by the expiration of the incumbent's term, when in fact such term has not expired, is invalid. Likewise an appointment to fill a supposed vacancy, caused by an unlawful removal of an existing officer, is invalid.[38] A statute conferring the power to appoint and fill a vacancy must be strictly construed when the power is exercised, and a failure to observe a mandatory requirement of the statute renders the appointment invalid.[39]

C. Eligibility and Qualification. The question of eligibility of a person to be officer of a poor law district depends upon the same principles that apply to other public officers.[40] The disqualification of a person for the office of superintendent of the poor by reason of his holding another office must be determined

the pauper was held not to be "transient," within the meaning of the statute.

28. *Illinois.*— Burke *v.* Monroe County, 77 Ill. 610.

Indiana.— Bartholomew County *v.* Wright, 22 Ind. 187.

Minnesota.— Cordova *v.* Le Sueur Center, 74 Minn. 515, 77 N. W. 290, 430, where, by Spec. Laws (1881), Ex. Sess. c. 221, each township in Le Sueur county was required to support its own poor, and the villages of such county remained a part of the township in which they were situated, for the purpose of supporting the poor. By Spec. Laws (1885), c. 71, this duty devolved "upon the several town boards, boroughs and village councils," and it was held that each village or borough thus became a separate district, liable for the support of its own poor.

New York.— People *v.* Fitch, 148 N. Y. 71, 42 N. E. 520 [*affirming* 89 Hun 310, 35 N. Y. Suppl. 193].

Pennsylvania.— Com. *v.* Summerville, 204 Pa. St. 300, 54 Atl. 27, holding that the act of June 4, 1879 (Pamphl. Laws 78), being an act to create poor districts, and to authorize the erection of buildings for the relief of the poor, was intended to establish a general system for the relief of the poor without the state, and repealed local acts of March 21, 1865 (Pamphl. Laws 501), April 11, 1866 (Pamphl. Laws 608), and April 10, 1873 (Pamphl. Laws 763), giving the commissioners of Clarion county authority to act as directors of the poor of such county, and providing for the erection by them of necessary buildings for the reception and employment of the poor. See also Melvin *v.* Summerville, 210 Pa. St. 41, 59 Atl. 483, holding that the poor district created by the act of June 4, 1879 (Pamphl. Laws 78), for which boundaries are the same as that of the county, is a separate quasi-municipal corporation.

See 38 Cent. Dig. tit. "Paupers," § 12.

29. Atlantic County *v.* Tilton, 39 N. J. L. 605; People *v.* St. Lawrence County, 103 N. Y. 541, 9 N. E. 311, holding that the enactment of Laws (1882), c. 28, making the town of Oswegatchie a separate and distinct poor district, did not operate as a repeal of Laws (1846), c. 245, by which the privilege extended to the supervisors of that county to adopt the Livingston county act, abolishing the distinction between town and county poor; the two acts not being repugnant to each other, and repeals by implication not being favored.

30. Lyman *v.* Kennebunkport, 83 Me. 219, 22 Atl. 102, where the court holds that the election by a town of only one overseer of the poor is valid under a statute giving the right to choose not exceeding twelve.

31. Board of Sup'rs *v.* People, 49 Ill. App. 369 (poor master of town); Com. *v.* Dickert, 195 Pa. St. 234, 45 Atl. 1058 (poor director of poor district); Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

32. People *v.* Comstock, 78 N. Y. 356.

33. Com. *v.* Dickert, 195 Pa. St. 234, 45 Atl. 1058.

34. People *v.* Comstock, 78 N. Y. 356.

35. People *v.* Ingham County, 36 Mich. 416; Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

36. People *v.* Comstock, 78 N. Y. 356.

37. Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

38. People *v.* Ingham County, 36 Mich. 416.

39. Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

40. See, generally, Officers.

County physician.— The words, "suitable

by his status at the time of the election held to fill the office of superintendent, and hence his subsequent resignation from such other office will not remove his disability.[41] Although the statute provides that honorably discharged Union soldiers shall be preferred for appointment, the appointment of another applicant as poor officer by a board having the selection of a fit person to fill such office, after a determination in good faith of his superior fitness as compared with a discharged soldier, is not reviewable.[42] It is usually provided that before entering upon the discharge of his duties the overseer of a poor law district shall give an official bond.[43]

D. Term of Office. The terms of officers of the poor law district are regulated by statute,[44] and are liable to be changed at any time by the legislature.[45] When the law provides that a poor officer shall hold office until his successor is qualified, the period between the expiration of his regular term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory term.[46]

E. Removal[47] — **1. Power to Remove.** A general authority to remove a poor officer will not be implied as a consequence of the power to appoint.[48] Usually the power to remove is regulated by statute,[49] and where such is the case can be exercised only within the prescribed limits.[50]

2. Grounds of Removal. Where express provision of law is made for removal, the power so to do can be exercised for no other causes than those specified.[51] It is misfeasance in office, authorizing the removal of a poor officer, to use his official power and the poor fund to coerce the recipients of his favor to vote under his direction;[52] or not to refund to the treasurer of the poor law district money which has been paid to him by persons to whom he has afforded temporary relief;[53] or to draw orders on the treasury of the poor law district in favor of persons without whose knowledge he himself draws the money, and compel the payees to take from himself at exorbitant prices such goods as he sees fit to give them.[54]

graduate in medicine," as used in the county government act requiring the board of supervisors to appoint some suitable graduate of medicine to attend the indigent sick and dependent poor of the county, mean a person legally licensed to practise medicine under the laws of the state, and are not confined to college graduates. People *v.* Eichelroth, 78 Cal. 141, 20 Pac. 364, 2 L. R. A. 770.

41. People *v.* Clute, 12 Abb. Pr. N. S. (N. Y.) 399.

42. People *v.* Alms-House Com'rs, 65 Hun (N. Y.) 169, 20 N. Y. Suppl. 21.

43. People *v.* Ingham County, 36 Mich. 416; South Williamsport Borough *v.* Miller, 20 Pa. Super. Ct. 266.

Duty to approve official bond.— Where a poor master is appointed by a city council for a town, organized out of a part of the territory of the city, under the act of May 23, 1877, the duty of approving his official bond does not devolve upon the board of supervisors of the county. Board of Sup'rs *v.* People, 49 Ill. App. 369.

44. People *v.* Ingham County, 36 Mich. 416; Com. *v.* Bowditch, 217 Pa. St. 527, 66 Atl. 867; South Williamsport Borough *v.* Miller, 20 Pa. Super. Ct. 266.

Keeper of almshouse.—County superintendents of the poor have no right to fix by contract the duration of the term of a keeper of an almshouse employed by them, since such keeper is plainly in the public service as an employee merely, and not as an officer. Abrams *v.* Horton, 18 N. Y. App. Div. 208, 45 N. Y. Suppl. 887.

45. People *v.* Weldon, 14 N. Y. Suppl. 447; South Williamsport Borough *v.* Miller, 20 Pa. Super. Ct. 266.

46. Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

47. See, generally, on this subject, Municipal Corporations, 28 Cyc. 432 *et seq.*

48. People *v.* Ingham County, 36 Mich. 416. See also as bearing on this proposition Municipal Corporations, 28 Cyc. 433, notes 88, 89.

49. Gager *v.* Chippewa County, 47 Mich. 167, 10 N. W. 186; People *v.* Ingham County, 36 Mich. 416.

50. People *v.* Ingham County, 36 Mich. 416, where an attempted removal of a county superintendent of the poor by the board of supervisors was declared invalid because not made on either of the grounds specified by the statute, and because the resolution of removal failed to receive the vote required by statute.

51. People *v.* Ingham County, 36 Mich. 416.

52. Gager *v.* Chippewa County, 47 Mich. 167, 10 N. W. 186.

53. Gager *v.* Chippewa County, 47 Mich. 167, 10 N. W. 186.

54. Gager *v.* Chippewa County, 47 Mich. 167, 10 N. W. 186.

3. Proceedings to Remove. The proceeding for removal of an officer of a poor law district is of a quasi-judicial nature.[55] The officer is entitled to notice of the charges against him.[56] While the rule is, in the absence of express provision of law, that the charges preferred against the officer must be sufficiently specific to apprise him of what he is to meet, yet the technical rules of pleading are not to be applied.[57]

F. Authority and Power of Officers and Boards — 1. In General. The acts of overseers, or other officers of the poor, within the scope of their authority, will bind the town or county they represent,[58] and may furnish grounds for presumptions and inferences against a town which they represent in the same manner as such presumptions and inferences may arise against natural persons from their acts.[59] They are not empowered, by virtue of their office, to pass upon or submit to arbitration a question regarding the settlement of a pauper which involves the rights or liabilities of the town in respect to such pauper;[60] nor have they authority, as such officers, to intermeddle with the property of paupers, or to collect and discharge their debts.[61] In some jurisdictions, the township overseers or supervisors of the poor are made subordinate to the county board of supervisors, and their action subject to review for confirmation or repudiation by such board.[62]

55. Burt *v.* Iron County, 108 Mich. 523, 66 N. W. 387.

56. Burt *v.* Iron County, 108 Mich. 523, 66 N. W. 387.

57. Burt *v.* Iron County, 108 Mich. 523, 66 N. W. 387, holding further that in a proceeding before the board of county supervisors for the removal of a superintendent of the poor for improperly allowing to himself claims, a bill of particulars setting out the amount of the items improperly allowed, with date of allowance, sufficiently notifies the officer of the charges against him.

58. *Maine.*— Unity *v.* Thorndike, 15 Me. 182.

Massachusetts.— Belfast *v.* Leominster, 1 Pick. 123.

New Hampshire.— Hanover *v.* Eaton, 3 N. H. 38, holding that selectmen of a town, being *ex officio* overseers of the poor, may bind the town by a contract not to take advantage of any defects in a notice given by another town that a pauper has been relieved.

Pennsylvania.— Com. *v.* Coyle, 185 Pa. St. 198, 39 Atl. 814, holding that under the act of March 11, 1837 (Pamphl. Laws 45), establishing the directors of the poor of Northampton county, making them "one body politic corporate," relative to the poor of said county, and section 5, making it their duty in each year to furnish the county commissioners with an estimate of the probable expense for one year, and said commissioners' duty to assess and collect the amount of said estimate to be paid the directors by the county treasurer on warrants in their favor by said commissioners, "as the same may be found necessary," said commissioners are bound to pay orders by said directors for amounts within their estimates.

Vermont.— Pawlet *v.* North Hero, 8 Vt. 196, holding that where an order of removal of a pauper is made, and the pauper removed, but the time for taking an appeal has not transpired, it is competent for the overseers of the poor of the two towns to adjust the matter and place all parties *in statu quo*.

Office a mere agency of county.— The office of superintendent of the poor of a county, although invested with corporate powers, is a mere agency of the county, and the relation is that of principal and agent. People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551.

Assessors of plantations have no general authority to bind the plantation by their contract for the support of the poor beyond the amount of the money raised. Means *v.* Blakesburg, 7 Me. 132.

59. Glidden *v.* Unity, 33 N. H. 571.

60. Griswold *v.* North Stonington, 5 Conn. 367; Holden *v.* Brewer, 38 Me. 472; Clifford Poor Dist. *v.* Gibson Poor Dist., 14 Pa. Co. Ct. 327.

61. Fielding *v.* Jones, 38 Conn. 191; Furbish *v.* Hall, 8 Me. 315.

62. Ellison *v.* Harrison County, 74 Iowa 494, 38 N. W. 372; Collins *v.* Lucas County, 50 Iowa 448; Red Willow County *v.* Davis, 49 Nebr. 796, 69 N. W. 138; People *v.* Ames, 19 How. Pr. (N. Y.) 551; Jenks Tp. Poor Dist. *v.* Sheffield Tp. Poor Dist., 135 Pa. St. 400, 19 Atl. 1004, holding, however, that the act of June 4, 1879 (Pamphl. Laws 78), providing for making each county a single poor district, with the county commissioners as overseers, to whom the poor are to be transferred as soon as buildings and land are prepared, after which delivery the overseers of the townships shall cease to act, does not take away the authority of the township overseers where no provision has been made by the county.

Under the statutes of Vermont, an overseer of the poor, in deciding whether relief shall be furnished to a pauper, acts with the authority of a principal, and not under the restrictions of an agency. His decision to aid is a final adjudication, and persons contracting with him to relieve transient pau-

2. As to Indebtedness and Expenditures — a. For Relief and Support — (1) *In General.* The powers of poor officers as to incurring indebtedness and making expenditures for the care and support of paupers are strictly limited by the statutes relating to the maintenance of the poor, and, except in rare and special cases, they cannot step beyond the letter of those acts.[63] Being public officers, who have the care and oversight of paupers, by necessary implication, they have the power to bind their town or county by any contracts made within the scope of their authority.[64] To the extent of their authority it is a discretionary power to be exercised according to their judgment,[65] and unless it is so provided by statute they are not restricted to the confines or instrumentalities of the poor-house in making provision for the poor.[66] Where so provided by statutes overseers of the poor have no right to appropriate the moneys of their town for the support of the poor without an order from a justice of the peace or superintendent,[67] at least where the expenditure is greater than a sum fixed by statute.[68]

pers are not bound to inquire whether he exceeds his authority. Holloway *v.* Barton, 53 Vt. 300.

63. Clay County *v.* Plaut, 42 Ill. 324 (holding that a poor officer derives his power from the law and such power cannot be abridged by the action of any other officer); Knox County *v.* Jones, 7 Ind. 3; Gibson *v.* Plumbcreek Poor Dist., 122 Pa. St. 557, 15 Atl. 926; Ives *v.* Wallingford, 8 Vt. 224.

An appropriation to poor officers to buy coffee does not authorize the purchase of a compound which is used as a substitute for coffee. Ottoman Cahvey Co. *v.* Philadelphia, 1 Pa. Cas. 443, 4 Atl. 745.

64. *Illinois.*— Kankakee *v.* McGrew, 178 Ill. 174, 52 N. E. 893; Clay County *v.* Plaut, 42 Ill. 324; McDonough County *v.* Pace, 52 Ill. App. 83.

Maine.— Palmyra *v.* Nichols, 91 Me. 17, 39 Atl. 338, holding that the overseers of the poor may take a contract for the town, indemnifying it against the liability of supporting a pauper, without special instructions.

Massachusetts.—Aldrich *v.* Blackstone, 128 Mass. 148.

Nebraska.— Waltham *v.* Mullally, 27 Nebr. 483, 43 N. W. 252, holding that liability thereunder cannot be defeated by failure or refusal to vote the necessary taxes to meet such obligation.

New York.— Paddock *v.* Symonds, 11 Barb. 117; Hayes *v.* Symonds, 9 Barb. 260; Palmer *v.* Vandenbergh, 3 Wend. 193.

Pennsylvania.— Roxborough Tp. *v.* Bunn, 12 Serg. & R. 292.

Vermont.— Washington *v.* Rising, Brayt. 188.

See 38 Cent. Dig. tit. "Paupers," §§ 17, 195.

Where an overseer makes an improvident or extravagant contract for the support of a pauper, the board of supervisors may no doubt reduce the amount to be paid; but, until they act, the contract, if fair and unaffected by fraud, will bind the county. Clay County *v.* Plaut, 42 Ill. 324.

The town and not the overseers are liable on their contracts made within the scope of their authority. Board *v.* Cronk, 6 N. J. L. 119; Saddle River Tp. *v.* Colfax, 6 N. J. L. 115.

The determination by the overseer of the poor that certain persons are entitled to relief is an official act which is binding upon the county in favor of those who in good faith furnish medical attendance or supplies in reliance upon that order. Rock Island County *v.* Arp, 118 Ill. App. 521; Rock Island County *v.* Rankin, 118 Ill. App. 499; Holloway *v.* Barton, 53 Vt. 300.

A de facto overseer may bind his town by any acts which would be binding if performed by a *de jure* officer. Smith *v.* Perth Amboy Tp., 19 N. J. L. 52.

65. Henry *v.* Cohen, 66 Ala. 382; Clinton *v.* Benton, 49 Me. 550; Gere *v.* Cayuga County, 7 How. Pr. (N. Y.) 255.

66. Henry *v.* Cohen, 66 Ala. 382; Herkimer County *v.* Sangerfield, 29 Misc. (N. Y.) 213, 61 N. Y. Suppl. 114. *Contra,* Knox County *v.* Jones, 7 Ind. 3; Gallup *v.* Bell, 20 Hun (N. Y.) 172 (under earlier statute); People *v.* Emigration Com'rs, 27 Barb. (N. Y.) 562 (under earlier statute).

67. Gourley *v.* Allen, 5 Cow. (N. Y.) 644; Adams *v.* Columbia County, 8 Johns. (N. Y.) 323.

In Michigan there is a difference between the powers of superintendents and directors of the poor. A superintendent has full power to provide such temporary relief as he may deem proper, and that without any of the restrictions or qualifications attached to the power of the director, who must apply to a justice of the peace and obtain his order which must not exceed twenty dollars. Hewitt *v.* Macomb County, 5 Mich. 166.

Funeral expenses.— Directors of the poor are authorized and required to pay the funeral expenses of a destitute person upon the order of two justices, granted after the death and burial of such person. Washington County *v.* Wallace, 8 Watts & S. (Pa.) 94.

The borrowing of money by overseers of the poor to pay costs and charges adjudged against their district on an appeal from an order of removal, without an order of relief, is not authorized by an imperative emergency, and does not bind the district. Gibson *v.* Plumbcreek Poor Dist., 122 Pa. St. 557, 15 Atl. 926.

68. Gere *v.* Cayuga County, 7 How. Pr.

(II) *Of Paupers Resident in Another Town.* Where there is nothing in the statute which expressly or by implication restricts the power of the overseers to furnishing relief within the limits of their town, it is within the scope of their powers to pay expenses incurred for the support of one of their paupers by another town.[69] And the power to pay the expenses embraces that of settling an action commenced to recover them.[70] But if the method of ascertaining and collecting such expenses is expressly provided by statute, then a contract to pay them is beyond the scope of the overseers' authority and void.[71] If a pauper have not a settlement in a town, the overseers cannot make the town chargeable therefor by their agreement with another town to pay for his support.[72]

b. For Medical Services. In some jurisdictions the county commissioners are authorized to employ physicians for the poor throughout the county.[73] Where the board of county commissioners or supervisors have made adequate provision for medical attendance to paupers within the county, a township trustee or overseer of the poor has no authority to employ medical or surgical services for paupers within his township.[74] Where a statute expressly prohibits payment by a county board for medical services to poor persons unless done under contract with such board, a physician cannot recover for such services whether rendered voluntarily or at the request of the township board.[75] But where the county board of supervisors or commissioners have failed to provide proper medical attendance for the poor of a township, or where the physicians so employed fail or refuse to render proper medical attention to such poor, the overseers of the poor are authorized to

(N. Y.) 255 (ten dollars); Ives *v.* Wallingford, 8 Vt. 224 (five dollars).

69. Harpswell *v.* Phipsburg, 29 Me. 313; Aldrich *v.* Blackstone, 128 Mass. 148, holding that under Gen. St. c. 70, the overseers of the poor of a town have authority to bind the town by a contract for support to be furnished in another town to a pauper whose settlement is in the former town, but who, at the time the contract for his support is made, is too ill to be removed to the town of his settlement.

Selectmen of a town may give a promissory note in the name of the town for support furnished to a pauper by the selectmen of another town where the pauper resides, although no legal notice has been served on them, if the time for giving such notice has not expired. Andover *v.* Grafton, 7 N. H. 298.

70. Harpswell *v.* Phipsburg, 29 Me. 313.

71. Norwich *v.* Pharsalia, 15 N. Y. 341.

72. Peterborough *v.* Lancaster, 14 N. H. 382; Directors *v.* Overseers, 4 Lanc. L. Rev. (Pa.) 36.

73. Fayette County *v.* Chitwood, 8 Ind. 504; Rider *v.* Ashland County, 87 Wis. 160, 58 N. W. 236.

Nebraska — In counties where no poorhouse has been established and opened for the reception of paupers, the justices of the peace of the various precincts of such county are vested with entire and exclusive superintendence of the paupers in their precincts; and such a county is not liable for services rendered by a physician to a pauper, unless it appears that such physician had been employed by some of the overseers of the poor. Red Willow County *v.* Davis, 49 Nebr. 796, 69 N. W. 138. When the county board of a county has established and opened a poorhouse for the reception of paupers, and spread such facts upon its records, the jurisdiction and authority of the various justices of the peace of the county over the paupers therein cease, and the superintendence, care, and maintenance of the paupers devolve upon the county board. Red Willow County *v.* Davis, *supra*. When a county board has established and opened a poorhouse for the reception of its paupers, the board may either employ a physician by the year to furnish such medical services as may be necessary to the paupers of the county, or may employ a physician to attend each case as it arises. Red Willow County *v.* Davis, *supra*.

A single county commissioner cannot bind the county by contract with a physician, other than the county physician provided for by statute, for medical attendance upon a pauper. Bentley *v.* Chisago County, 25 Minn. 259.

74. Washburn *v.* Shelby County, 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332; Bartholomew County *v.* Boynton, 30 Ind. 359; Woodruff *v.* Noble County, 10 Ind. App. 179, 37 N. E. 732 (holding that the fact that the county board had once "in their discretion" paid a physician for his services contracted for by a township trustee does not estop them to refuse to do it again); Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Gawley *v.* Jones County, 60 Iowa 159, 14 N. W. 236; Mansfield *v.* Sac County, 59 Iowa 694, 13 N. W. 762.

Where a county maintains a poorhouse, the township trustee cannot bind the county by a contract for medical services rendered to residents of the township. Smith *v.* Shawnee County, 21 Kan. 669.

75. Mullen *v.* Decatur County, 9 Ind. 502.

employ medical and other necessary services, and to bind the county therefor.[76] Upon the same principle, if the county physician lacks the skill and experience necessary to render reasonably efficient services in any case, the poor officers are authorized to employ special medical assistance.[77] The question as to the necessities of the person relieved is a matter for the determination of the trustee, and, in the absence of fraud or collusion, his determination is conclusive.[78] So whether or not the township is otherwise provided for is a question of fact to be determined by the trustees.[79] When a city overseer of the poor is provided for by statute as well as township trustees, the city overseer has exclusive control of the city poor, and there can be no recovery for medical attendance furnished a city pauper on the order of the township trustees.[80] Poor officers cannot bind a town or county for unusual or extraordinary medical services rendered the poor of such town or county at the request of such overseers, or subsequently ratified by them, such as the conduct of *post mortem* examinations,[81] or the treatment of a pauper to cure him of habitual drunkenness as a disease.[82]

3. Power to Audit Accounts. A statute requiring superintendents of the poor to audit and allow all accounts of overseers of the poor, justices of the peace, and all other persons, for services relating to the support, relief, or transportation of county paupers, does not require the audit and allowance of accounts in favor of individuals dealing with the overseers in the several towns. Such accounts may be very numerous and occasionally trifling and should be first adjusted by the overseer, and charged by him in general account.[83] Nor does their auditing power extend to their own contracts.[84] It is not necessary that an account for the support of a pauper in a county having a county poorhouse should be audited by the town auditors.[85]

4. Powers of Part of Officers.[86] The general rule is that a minority of the board of overseers or superintendents of the poor cannot bind the county or town by their acts or contracts, even concerning matters within the scope of the board's authority, but at least a majority of the board must act in order to validate such proceedings,[87] unless one of them has been empowered to act by the rest of the

76. Washburn *v.* Shelby County, 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332; Morgan County *v.* Seaton, 90 Ind. 158; Orange County *v.* Hon, 87 Ind. 356; Conner *v.* Franklin County, 57 Ind. 15; Huntington County *v.* Boyle, 9 Ind. 296; Monroe County *v.* Galloway, 17 Ind. App. 689, 47 N. E. 390; Lawrence County *v.* McLahlan, 10 Ind. App. 95, 37 N. E. 557; Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800; Gage County *v.* Fulton, 16 Nebr. 5, 19 N. W. 781; Monghon *v.* Van Zandt County, 3 Tex. App. Civ. Cas. § 198.

In Kansas a township trustee has power to bind a county having no poorhouse to pay for medical services rendered a person temporarily a pauper who is a resident of the county and township. Clay County *v.* Renner, 27 Kan. 225.

The county board may waive the certificate of the trustees prescribed by statute, and pay a physician for services rendered to a pauper at the request of the trustees. Collins *v.* Lucas County, 50 Iowa 448.

77. Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800; Warren County *v.* Osburn, 4 Ind. App. 590, 31 N. E. 541.

78. Morgan County *v.* Seaton, 90 Ind. 158; Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800.

79. Morgan County *v.* Seaton, 90 Ind. 158; Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800.

80. Hoyt *v.* Black Hawk County, 59 Iowa 184, 13 N. W. 72.

81. Morgan County *v.* Johnson, 29 Ind. 35; Gaston *v.* Marion County, 3 Ind. 497.

82. Putney Bros. Co. *v.* Milwaukee County, 108 Wis. 554, 84 N. W. 822.

83. *Ex p.* Green, 4 Hill (N. Y.) 558; Adams *v.* Columbia County, 8 Johns. (N. Y.) 323.

A claim of an attorney for services rendered by him in bastardy proceedings is not one relating to the "support, relief, or transportation" of paupers, and no power is conferred upon the superintendents of the poor to audit such a claim. Neary *v.* Robinson, 98 N. Y. 81.

84. Neary *v.* Robinson, 98 N. Y. 81.

85. People *v.* Washington County, 1 Wend. (N. Y.) 75.

86. Of contracts for support of paupers see *infra*, IV, H.

Validity and construction of contracts of employment of physicians see *infra*, IV, M, 3.

87. *Connecticut.*— Haddam *v.* East Lyme, 54 Conn. 34, 5 Atl. 368.

Iowa.— Sloan *v.* Webster County, 61 Iowa 738, 17 N. W. 168.

Maine.— Carter *v.* Augusta, 84 Me. 418, 24

board.[88] And it has been held that overseers of the poor not being a corporate body, the act of one overseer does not bind another in his official character.[89] However, the action of one, or less than the majority of the overseers of the poor, may thereafter be ratified by a majority of the board, so as to validate the same.[90] Some statutes confer power to act on a single member of the board,[91] and under others, in giving relief, or in determining the proper persons for it, a single member possesses the power of the whole board, limited only by an express dissent of the majority in a particular case.[92]

G. Actions By and Against Officers. An overseer, supervisor, or superintendent of the poor, in discharging his duty as such, acts not in his natural but in his official capacity, and is *sub modo* a corporation. He has the capacity of suing and being sued so far as his trust is concerned,[93] and such right to sue and liability to suit, being incident to his office, passes to his successor.[94] Moreover it has been held that he has power to submit to arbitration,[95] and he may sue his predecessor in office for moneys officially received by him and unaccounted for.[96] A superintendent of the poor may sue either in his corporate name alone,[97] or in his individual name with the addition of his name of office.[98]

Atl. 892; Boothby *v.* Troy, 48 Me. 560; Beetham *v.* Lincoln, 16 Me. 137.

Massachusetts.— Reed *v.* Lancaster, 152 Mass. 500, 25 N. E. 974.

Michigan.—See Osborne *v.* Macomb County, 26 Mich. 66.

New Hampshire.—Burbank *v.* Piermont, 44 N. H. 43; Woodes *v.* Dennett, 9 N. H. 55; Andover *v.* Grafton, 7 N. H. 298.

Pennsylvania.— Nason *v.* Erie County, 126 Pa. St. 445, 17 Atl. 616, holding that the directors of the poor of the county can perform no official act, nor bind the county by any contract, except when lawfully convened and acting as such.

Vermont.— Wolcott *v.* Wolcott, 19 Vt. 37.

Wisconsin.— See Hittner *v.* Ontagamie County, 126 Wis. 430, 105 N. W. 950.

See 38 Cent. Dig. tit. "Paupers," § 16.

Where the necessity for relief is urgent, it has been held that a single poor officer may grant such relief and bind the town therefor. Welton *v.* Wolcott, 45 Conn. 329; Lee *v.* Deerfield, 3 N. H. 290, holding that where supplies had been furnished to a pauper, who actually stood in need of relief, by order of one of the selectmen of the town, the assent of the other selectmen may be presumed.

88. Windsor *v.* China, 4 Me. 298.

89. Gould *v.* Bailley, 2 N. J. L. 6.

90. Linneus *v.* Sidney, 70 Me. 114; Smithfield *v.* Waterville, 64 Me. 412; Fayette *v.* Livermore, 62 Me. 229.

91. Knox County *v.* Jones, 7 Ind. 3; Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; Castleton *v.* Clarendon, Brayt. (Vt.) 186. See also Washington *v.* Rising, Brayt. (Vt.) 188.

92. Hewitt *v.* Macomb County, 5 Mich. 166.

93. Rouse *v.* Moore, 18 Johns. (N. Y.) 407; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Todd *v.* Birdsall, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522; Baldwin Tp. *v.* Kline, 9 Pa. St. 217; Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504. *Contra*, Shotwell *v.* Thornall, 2 N. J. L. 136; Shotwell *v.* Woodbridge Poor, 2 N. J. L. 76; Gould *v.* Bailley, 2 N. J. L. 6.

When the overseer acts merely as an agent of the town in receiving money, the right of the town to retain the money cannot be tried in an action against the overseer. Brown *v.* Marden, 61 N. H. 15.

Selectmen who are ex officio overseers of the poor, no persons having been specially chosen overseers, may sue in their capacity as selectmen. Powers *v.* Ware, 2 Pick. (Mass.) 451.

Action of replevin.— It is no part of the duty, nor within the power, of the overseer of the poor, to bring an action of replevin for property alleged to belong to the town. Baldwin *v.* Whittier, 16 Me. 33.

A warrant may issue on an information made by a single director of the poor, the oath of the majority is unnecessary. Sterling *v.* Com., 2 Grant (Pa.) 162.

94. Grant *v.* Fancher, 5 Cow. (N. Y.) 309 (holding that when they contract a debt, or neglect a duty which devolves upon them as overseers, by which they become liable to another, and then go out of office, they cannot be sued as late overseers, but the action should be against their successors); Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Horton *v.* Haymond, 6 Munf. (Va.) 399.

On the death of an overseer of the poor pending an action brought by him as such, his duly appointed and qualified successor has the same control over such action as he would have had, without being substituted as plaintiff. Bellinger *v.* Birge, 54 Hun (N. Y.) 511, 7 N. Y. Suppl. 695, 8 N. Y. Suppl. 174.

95. Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504.

96. Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504.

97. Van Keuren *v.* Johnston, 3 Den. (N. Y.) 183.

98. Alger *v.* Miller, 56 Barb. (N. Y.) 227; Paddock *v.* Symonds, 11 Barb. (N. Y.) 117; Hayes *v.* Symonds, 9 Barb. (N. Y.) 260; Van Keuren *v.* Johnston, 3 Den. (N. Y.) 183.

H. Poorhouses and Poor-Farms.[99] In many jurisdictions the statutes creating poor districts provide for the purchase of lands, and the erection of buildings for housing paupers, designating the officers who shall have the control and management thereof.[1]

I. Local Taxation For Relief of Poor. In many jurisdictions statutes provide for local taxation for the relief and support of paupers, and designate the courts, officers, or boards who shall have power to levy the tax, and in some instances prescribe the method of levy and the amount which may be levied.[2]

J. Custody and Disposition of Proceeds of Taxation and Poor Funds. The overseers or other officers of the poor are usually made by the statutes the proper custodians of money raised for the support of the poor, and where such officer pays out money for the support of a pauper, or contracts for his support, he is entitled to appropriate the money in the first case, and retain it in his own hands in the other.[3] Such officers, however, are not jointly liable for money collected by them severally in their official capacity.[4]

K. Liability of Officers and Their Sureties — 1. Civil Liability — a. Of Officers on Contracts. An overseer or superintendent of the poor, acting within the line of his duty and by legal authority and contracting for the use of the public, is not personally responsible on the contract,[5] unless his personal liability

99. Support of paupers in poorhouses see *infra*, IV, I.

1. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Melvin *v.* Summerville, 210 Pa. St. 41, 59 Atl. 483. See also Poor Directors' Application, 7 Del. Co. (Pa.) 478. And see Sawyer *v.* Aldag, 45 Ill. App. 77; State *v.* Ritt, 6 Ohio Dec. (Reprint) 940, 8 Am. L. Rec. 750, 5 Cinc. L. Bul. 412.

2. See the following cases:

Georgia.— Tucker *v.* Justices Lee County Inferior Ct., 34 Ga. 370.

Iowa.— Lucas County *v.* Chicago, etc., R. Co., 67 Iowa 541, 25 N. W. 769.

Kansas.— Pleasant Hill, etc., R. Co. *v.* Carpenter, 33 Kan. 216, 6 Pac. 287; Kansas City, etc., R. Co. *v.* Albright, 33 Kan. 211, 6 Pac. 276.

Kentucky.— Featherstone *v.* Thompson, 10 Bush 140; Louisville, etc., R. Co. *v.* Harrison County, 29 S. W. 639, 16 Ky. L. Rep. 678.

Michigan.—Weston Lumber Co. *v.* Munising Tp., 123 Mich. 138, 82 N. W. 267.

Mississippi.— Coulson *v.* Harris, 43 Miss. 738.

North Carolina.—Dudley *v.* Oliver, 27 N. C. 227.

Virginia.— Munford *v.* Nottoway, 2 Rand. 213.

See 38 Cent. Dig. tit. "Paupers," § 22.

Where authority is given to the town to raise such sum as they shall think necessary for the support of their poor, it cannot be left to the discretion of the selectmen of the town. Gove *v.* Lovering, 3 N. H. 292.

Ad valorem tax.— A statute, giving the county court jurisdiction to levy the county levy, and to provide for the maintenance of the poor, does not authorize it to levy an *ad valorem* tax for pauper purposes. Louisville, etc., R. Co. *v.* Pendleton County, 96 Ky. 491, 29 S. W. 324.

Plantations.—Provisions requiring towns to relieve and support the poor do not apply to plantations. Blakesburg *v.* Jefferson, 7 Me. 125. They may raise money for the support of the poor, but are not obliged to do so. Means *v.* Blakesburg, 7 Me. 132.

3. Robbins *v.* Woolcott, 66 Barb. (N. Y.) 63. And see Bladen County Bd. of Education *v.* Bladen, 113 N. C. 379, 18 S. E. 661.

Application of income of poorhouse fund.— Where the city of Rochester was by law in the condition of a town in respect to the mode of supporting its poor at the county poorhouse, the income of the poorhouse farm in that county was to be applied indiscriminately to the support of the county, town, and city poor, kept at the county poorhouse on said farm. Rochester *v.* Monroe County, 22 Barb. (N. Y.) 248.

Fund for alien paupers.— Mass. St. (1839) c. 156, imposes on counties the expense of supporting all prisoners in jails and houses of correction who have no settlement in the commonwealth. Mass. St. (1837) c. 238, § 3 (the Alien Passenger Act), provides that money received by towns and cities under such act shall be appropriated for the support of foreign paupers. Under these acts it has been held that vagrants sent to the house of correction are not "foreign paupers," although they have no settlement in the commonwealth; and hence money received under the act cannot be appropriated for their support. Opinion of Justices, 1 Metc. (Mass.) 572.

4. Huling *v.* Lewiston Borough, 3 Watts & S. (Pa.) 367, holding, however, that if they be charged jointly by the auditors with a balance, and they acquiesce in the settlement, they both become liable to an action for the whole amount of the balance found in their hands.

5. Hanover *v.* Eaton, 3 N. H. 38; Board *v.* Cronk, 6 N. J. L. 119; Holmes *v.* Brown, 13 Barb. (N. Y.) 599; Olney *v.* Wickes, 18 Johns. (N. Y.) 122. See also Brazee *v.* Stewart, 59 N. Y. App. Div. 476, 69 N. Y. Suppl. 231; Ives *v.* Hulet, 12 Vt. 314.

is superadded in clear and explicit terms.[6] And where the *res gestæ* and the attending circumstances show the contract to be on the public account, it is not necessary, in order to screen himself from personal liability, that the officer should expressly say that he contracts in his official capacity.[7] But if the officer makes a contract without sufficient authority legally to bind the poor law district, he is personally responsible thereon;[8] and this is true even where the officer in making the contract acts upon the subject-matter within the scope of his authority, if, because of his failure to take a prerequisite step to clothe himself therewith, he has no power to bind the public.[9]

b. Of Officers For Negligence or Misconduct. A poor officer who is negligent in the performance of a duty imposed on him by law,[10] or is guilty of misconduct in office,[11] is personally liable in damages therefor.

c. Of Officers and Sureties on Official Bond. The liability of the sureties on an official bond of a poor officer is dependent in a large measure upon the intention of the statute under which it is drawn.[12] The engagement of the sureties is for the future, and, in the absence of special stipulation to that effect, they are not liable for moneys actually received by their principal prior to the term for which they are bound.[13] A statute providing that an action against an overseer for the non-payment of money collected on execution must be brought within three years does not apply to an action on the official bond of an overseer of the poor to recover money alleged to have come into his hands as such overseer.[14] An action on the bond in behalf of the county must be brought in the name of the county officer who is the payee of the bond.[15] An action against a collector of poor taxes upon his bond by the overseers of the poor cannot be maintained without averment in the complaint that plaintiffs are overseers at the time of the institution of the suit.[16] The official verified reports, filed by the overseer of the poor from time to time as required by statute, are competent against his sureties

6. King *v.* Butler, 15 Johns. (N. Y.) 281. See also Olney *v.* Wickes, 18 Johns. (N. Y.) 122.

7. Holmes *v.* Brown, 13 Barb. (N. Y.) 599; Olney *v.* Wickes, 18 Johns. (N. Y.) 122.

8. State *v.* Hudson County, 32 N. J. L. 343, holding further that the officer is none the less responsible because the contract was made in the name of the district.

9. Ives *v.* Hulet, 12 Vt. 314.

10. Flower *v.* Allen, 5 Cow. (N. Y.) 654; Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301. See also Otis *v.* Strafford, 10 N. H. 353.

Instances of liability.— The keeper of a county poor-farm who receives a poor person into the poorhouse, and undertakes to care for him, is liable for neglect to give him proper care, even though such person was brought to the poor-farm without proper authority and the keeper was not required by law to receive or take care of him there. Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.

Who may sue.— If an overseer wholly neglects his duty, in providing for a pauper, the latter may maintain an action for the injuries sustained by such neglect, but this gives no right of action to a third person to prosecute for such neglect. Flower *v.* Allen, 5 Cow. (N. Y.) 654.

Burden of proof.— When plaintiff seeks to charge an overseer of the poor, in a civil action, for omission of duty, the burden rests with him to prove it affirmatively and clearly. Minklaer *v.* Rockfeller, 6 Cow. (N. Y.) 276.

11. Ames *v.* Smith, 51 Me. 602.

12. **Omission of statute to provide that officer shall be liable on a bond for non-performance of a given duty.**— Where the statute requires an officer to collect the poor tax, and that he shall give a bond to the effect that he will pay over all moneys so collected, and the bond given by him so provides, the fact that the statute does not provide that the officer shall be liable on his official bond for the non-performance of his official duty in collecting the taxes does not affect the liability of the sureties on his bond. Meagher County *v.* Gardner, 18 Mont. 110, 44 Pac. 407. Where a former statute providing for the collection of a poor tax by the county assessor also provided that he should be liable on his official bond for the money so collected, was practically reënacted in a subsequent act, with the exception of the provision in respect to the liability on his bond, this omission does not release the sureties on his bond from liability for taxes collected and embezzled by him subsequent to such reënactment, where the condition of the bond was that the officer should pay over all the moneys coming into his hands as such. Meagher County *v.* Gardner, *supra*.

13. Kellem *v.* Clark, 97 N. Y. 390.

14. Floyd *v.* Dutcher, 7 Misc. (N. Y.) 629, 27 N. Y. Suppl. 880.

15. Butler County Com'rs Ct. *v.* McCann, 23 Ala. 599.

16. Horton *v.* Haymond, 6 Munf. (Va.) 399.

in an action against them on his official bond, as proof of the condition of his accounts both as to receipts and disbursements.[17] But evidence that certain members of the town board knew before the bond in question was executed that the overseer of the poor of the town was short in his accounts is not competent for the purpose of relieving sureties on the latter's bond from liability.[18]

2. Criminal Liability of Officers. Overseers, supervisors, and superintendents of the poor are public officers, and as such are liable to indictment at common law, and by statute, for neglect of duty or abuse of powers,[19] even after their terms have expired.[20] If, however, the duty imposed upon such officers is a discretionary one, an omission of such duty is not indictable.[21] The indictment must allege that the overseers wilfully neglected their duty as such or must contain other terms equivalent thereto,[22] and should name the paupers neglected or injured, or state a reason for not doing so.[23] Where the indictment charges merely neglect and omission of duty, evidence of acts of positive misfeasance is inadmissible.[24]

III. Settlement and Removal.[25]

A. Nature of Legal Settlement — 1. In General. The word "settlement" is used by the courts in a technical sense in construing pauper acts, and when it is said that a person has a settlement in a particular county or town, the meaning is that he has, in case of need, a right to support from the inhabitants of that town.[26] And where a settlement is once legally gained in any county or town, it must necessarily remain there until one is subsequently established in some other county or town.[27]

2. Estoppel to Deny.[28] In several jurisdictions it is provided by statute that a town or county may, in certain specified cases, become estopped to deny the settlement of a pauper therein. One case is where a town has recovered judgment against another town for the maintenance or removal of a pauper alleged to

17. Goshen *v.* Smith, 61 N. Y. App. Div. 461, 70 N. Y. Suppl. 623 [*affirmed* in 173 N. Y. 597, 65 N. E. 1123].

18. Goshen *v.* Smith, 61 N. Y. App. Div. 461, 70 N. Y. Suppl. 623 [*affirmed* in 173 N. Y. 597, 65 N. E. 1123].

19. *Michigan.*—People *v.* Barlow, 134 Mich. 394, 96 N. W. 482.

New Hampshire.— State *v.* Hoit, 23 N. H. 355.

New York.— Matter of Pickett, 55 How. Pr. 491.

North Carolina.— State *v.* Hawkins, 77 N. C. 494.

Pennsylvania.— Com. *v.* Coyle, 160 Pa. St. 36, 28 Atl. 576, 634, 40 Am. St. Rep. 708, 24 L. R. A. 552.

Tennessee.— State *v.* West, 14 Lea 38, holding that, if the commissioners of the poor neglect to supply the poor under their charge with food and shelter, they may be indicted.

England.— Tawney's Case, 16 Vin. Abr. 415.

See 38 Cent. Dig. tit. "Paupers," § 28.

One employed to assist the selectmen in the care of paupers is an agent of the town within a statute providing that any agent of a public community who commits certain acts shall be fined, etc. State *v.* Clerkin, 58 Conn. 98, 19 Atl. 517.

Refusal to receive a pauper under an order of removal is sometimes penalized by statute. Porter Tp. *v.* Jersey Shore, 82 Pa. St. 275; Sugarloaf Tp. *v.* Schuylkill County, 44 Pa. St. 481.

20. Com. *v.* Coyle, 160 Pa. St. 36, 28 Atl. 576, 634, 40 Am. St. Rep. 708, 24 L. R. A. 552.

21. Duty to make by-laws and regulations. — The duties imposed upon the wardens of the poor, under N. C. Rev. St. c. 87, § 13, to make by-laws and regulations for the comfort of the poor, is a discretionary one, and an omission of such duty is not indictable. State *v.* Williams, 34 N. C. 172.

22. State *v.* Hoit, 23 N. H. 355, holding that, if the indictment does not contain terms amounting to a charge of criminal intent, judgment will be arrested.

23. State *v.* Hawkins, 77 N. C. 494.

24. State *v.* Hawkins, 77 N. C. 494.

25. Ascertainment and adjudication of settlement requisite to fix liability of local authorities for support of paupers see *infra*, IV, C, 2, a.

26. Jefferson *v.* Washington, 19 Me. 293.

27. South Thomaston *v.* Friendship, 95 Me. 201, 49 Atl. 1056 (holding that in a pauper suit it is proper to instruct that it is not necessary, to retain a legal home in a town, that a person should at all times have some house, or building, or room to which he has a right to go); Chicopee *v.* Whately, 6 Allen (Mass.) 508 (holding that the rule that a domicile once acquired is presumed to continue until a subsequent change is shown applies to cases of settlement); Sitterly *v.* Murray, 63 How. Pr. (N. Y.) 367.

28. Estoppel to deny liability for support or expenses incurred see *infra*, III, A, 2.

belong to the latter town; such judgment is conclusive between the parties as to all future charges of maintenance.[29] Another case is where notice that a pauper has become a public charge has been given by one town to another, and, no objection being made within the time limited, the town giving the notice has actually removed the pauper to the town to which notice was given.[30] A third case is where notice and a request to remove, given by one town to another, is not answered within the period designated by statute, and the pauper is not removed.[31] This last estoppel is confined to the notice upon which the action is founded. For if that action be compromised and another brought on a new notice, the omission to reply to the former notice will not preclude defendant from trying the question of settlement.[32] And where the controversy has proceeded to suit, a notice given by plaintiff town, although unanswered, will not operate as an estoppel.[33] A notice, not objected to, is a bar to the question of settlement, although the pauper may in fact have no legal settlement within the state,[34] but not where the settlement can be shown to be in the town giving the notice.[35] A town or county may by its acts and admissions estop itself to deny the settlement of a pauper therein,[36] but neither the acts nor the admissions of overseers of the poor will estop a town to deny the settlement of a pauper.[37] Nor will a town be estopped to contest a settlement by the mere fact that it has furnished supplies and support for the pauper.[38]

B. Statutory Provisions[39] — **1. Construction and Operation in General.** In construing statutes in reference to the removal and relief of paupers, the general rule of construction of statutes that they are to have effect according to their obvious import applies.[40] Where an act is passed dividing a town, incorporating a part of it into a new town, and providing for the proportional support of the paupers then chargeable, the object of the provision is held to be to divide the expense of supporting such paupers, and not to affect their settlement.[41] The

29. Marshpee *v.* Edgartown, 23 Pick. (Mass.) 156; Bridgewater *v.* Dartmouth, 4 Mass. 273; Leicester *v.* Rehoboth, 4 Mass. 180.

30. Marshpee *v.* Edgartown, 23 Pick. (Mass.) 156; Bridgewater *v.* Dartmouth, 4 Mass. 273; Leicester *v.* Rehoboth, 4 Mass. 180.

31. Winneshiek County *v.* Allamakee County, 62 Iowa 558, 17 N. W. 753; Bangor *v.* Madawaska, 72 Me. 263 (holding that a removal, or a reasonable excuse for not making it, is not essential to create the estoppel); Holden *v.* Glenburn, 63 Me. 579 (holding, however, that failure to return an answer to a notice respecting a certain man, his wife and children, does not estop the town receiving such notice to deny the settlement of the alleged wife and children when it appeared that they were not the wife and children of the man named); Ellsworth *v.* Houlton, 48 Me. 416; Easton *v.* Wareham, 131 Mass. 10; Shelburne *v.* Buckland, 124 Mass. 117; Topsham *v.* Harpswell, 1 Mass. 518; Freeport *v.* Edgecumbe, 1 Mass. 459.

A notice signed by one overseer, by order of the whole, is sufficient. Westminster *v.* Bernardston, 8 Mass. 104.

Notice held sufficient.— Shelburne *v.* Buckland, 124 Mass. 117.

Sufficiency of answer.— It is not necessary that the answer to the notice should contain a denial of the settlement of each individual named in the notice. If it appears that the objection was intended to be made to all, it meets the legal requirement. Palmyra *v.* Prospect, 30 Me. 211.

32. Needham *v.* Newton, 12 Mass. 452. See also Marshpee *v.* Edgartown, 23 Pick. (Mass.) 156.

33. Newton *v.* Randolph, 16 Mass. 426.

34. Westminster *v.* Bernardston, 8 Mass. 104.

35. Turner *v.* Brunswick, 5 Me. 31.

36. West Bridgewater *v.* Wareham, 138 Mass. 305; Bath *v.* Haverhill, 2 N. H. 555; Fort Ann *v.* Kingsbury, 14 Johns. (N. Y.) 365; East Greenwich *v.* Warwick, 4 R. I. 138.

37. New Vineyard *v.* Harpswell, 33 Me. 193; New Bedford *v.* Taunton, 9 Allen (Mass.) 207.

38. Norridgewock *v.* Madison, 70 Me. 174; New Vineyard *v.* Harpswell, 33 Me. 193; Bridgewater *v.* Dartmouth, 4 Mass. 273; Leicester *v.* Rehoboth, 4 Mass. 180; Stillwater Tp. *v.* Green Tp., 9 N. J. L. 59.

A voluntary payment by a town of a demand for the support of a pauper, after suit brought, does not estop the town to contest the settlement of such pauper. Edgartown *v.* Tisbury, 10 Cush. (Mass.) 408.

39. Constitutional guarantee against deprivation of liberty as applied to removal and commitment of paupers see Constitutional Law, 8 Cyc. 1094.

40. Charleston *v.* Lunenburgh, 23 Vt. 525.

41. Oxford *v.* Bethany, 15 Conn. 246; Clinton *v.* Benton, 49 Me. 550; Brewster *v.* Harwich, 4 Mass. 278.

word "residents" as used in many of the statutes creating new towns and providing for the support of paupers is held to import a domicile only, in contradistinction to such a residence as would by the general law be necessary to confer a settlement.[42]

2. Retroactive Operation of Statutes. There is no constitutional objection to general laws which alter the rules of settlement, although they may operate to transfer from one town to another the duty of supporting particular persons,[43] or may give a settlement in some particular town to a person who previously had none in the state.[44] Unless a statute relating to the settlement of paupers contains a retroactive provision, it does not take away a settlement acquired before it went into effect.[45] Unless the act is made retroactive by its terms,[46] it will not be construed to give, on the strength of residence prior to the act, a settlement to a person who had none prior thereto;[47] and such an act, although made retrospective by its terms, does not give a settlement to a person who died before its passage, and by derivation to his children;[48] nor does it apply to a person who had ceased to become a resident of the state many years before its passage, so as to give a settlement by derivation to his sons and their wives.[49] Under an act operating retrospectively, so as to give an unsettled woman a settlement upon the completion of a term of residence therein mentioned, the words "unsettled woman" mean a woman unsettled at the time the statute takes effect,[50] and does not apply to a woman who has derived a settlement through her father[51] or husband[52] before the passage of the act.

C. Settlement by Birth — 1. In General. The place of a person's birth is *prima facie* the place of his settlement.[53] But this presumption may be over-

42. Colchester *v.* East-Lyme, 18 Conn. 480; Waterbury *v.* Bethany, 18 Conn. 424.

Residing.— One in a town, whether voluntarily or involuntarily, and needing immediate relief, is "residing" there within the meaning of the Pauper Act. Bethlehem *v.* Watertown, 51 Conn. 490; Trumbull *v.* Moss, 28 Conn. 253; New Milford *v.* Sherman, 21 Conn. 101.

The word "belongs," when used in a statute in reference to the poor, designates the place of legal settlement of the persons referred to. Reading *v.* Westport, 19 Conn. 561.

43. Lunenburg *v.* Shirley, 132 Mass. 498; Worcester *v.* Springfield, 127 Mass. 540; Bridgewater *v.* Plymouth, 97 Mass. 382. And see Portland *v.* Auburn, 96 Me. 501, 52 Atl. 1011; Lewiston *v.* Auburn, 32 Me. 492; Dedham *v.* Milton, 136 Mass. 424.

44. Dedham *v.* Milton, 136 Mass. 424; Endicott *v.* Hopkinton, 125 Mass. 521.

45. Guilford *v.* New Haven, 56 Conn. 465, 16 Atl. 240; Lawrence *v.* Methuen, 187 Mass. 592, 73 N. E. 860 (holding further that the provision of Rev. Laws, c. 80, § 6, that all persons absent from the commonwealth for ten consecutive years shall lose their settlement, is not retroactive); Woodbridge *v.* Amboy, 1 N. J. L. 213; Starksborough *v.* Hinesburgh, 13 Vt. 215.

46. Worcester *v.* Springfield, 127 Mass. 540.

47. Rutland *v.* Mendon, 1 Pick. (Mass.) 154; Andover *v.* Merrimack County, 46 N. H. 180; Calne Union *v.* St. Mary, 64 J. P. 246, 69 L. J. Q. B. 400, 82 L. T. Rep. N. S. 121.

48. Taunton *v.* Boston, 131 Mass. 18.

49. Fitchburg *v.* Athol, 130 Mass. 370.

50. Worcester *v.* Great Barrington, 140 Mass. 243, 5 N. E. 491.

51. Middleborough *v.* Plymouth, 140 Mass. 325, 4 N. E. 568.

52. Worcester *v.* Great Barrington, 140 Mass. 243, 5 N. E. 491.

53. *Connecticut.*—Windham *v.* Lebanon, 51 Conn. 319; Danbury *v.* New Haven, 5 Conn. 584; Sterling *v.* Plainfield, 4 Conn. 114; Windsor *v.* Hartford, 2 Conn. 355.

New Jersey.— Shrewsbury Tp. *v.* Holmdel Tp., 42 N. J. L. 373; Paterson Tp. *v.* Byram Tp., 23 N. J. L. 394; Franklin Tp. *v.* Bridgewater Tp., 20 N. J. L. 563; Alexandria Tp. *v.* Kingwood Tp., 8 N. J. L. 370; Redington *v.* Tewksbury, 2 N. J. L. 289.

New York.— Bern *v.* Knox, 6 Cow. 433; Niskayuna *v.* Albany, 2 Cow. 537; Vernon *v.* Smithville, 17 Johns. 89; Wynkoop *v.* New York, 3 Johns. 15.

Pennsylvania.— Toby Tp. *v.* Madison, 44 Pa. St. 60; Northumberland *v.* Milton, 6 Pa. Cas. 503, 9 Atl. 449 [*affirming* 1 Pa. Co. Ct. 377]; Fermanagh *v.* Walker Tp., 6 Pa. L. J. 284, 4 Pa. L. J. Rep. 32.

Rhode Island.—Exeter *v.* Warwick, 1 R. I. 63.

England.— Reg. *v.* Watford, 9 Q. B. 626, 10 Jur. 1053, 16 L. J. M. C. 1, 2 New Sess. Cas. 460, 58 E. C. L. 626; Reg. *v.* Preston, 12 A. & E. 822, 10 L. J. M. C. 22, 4 P. & D. 509, 40 E. C. L. 408; Reg. *v.* Newchurch, 3 B. & S. 107, 9 Jur. N. S. 536, 32 L. J. M. C. 19, 7 L. T. Rep. N. S. 271, 11 Wkly. Rep. 24, 113 E. C. L. 107; Rex *v.* Heaton Norris, 6 T. R. 653, 3 Rev. Rep. 302.

See 38 Cent. Dig. tit. "Paupers," § 34.

Children born out of the state after their father had abandoned his domicile therein, and returning hither after his death, are

come by showing a different derivative settlement from the father, or a different settlement subsequently acquired.[54]

2. Bastards. The place of birth of a bastard ordinarily fixes its settlement,[55] unless fraud or collusion has been practised to cause the birth to happen at that place,[56] or the mother has been transported or conducted thither under legal authority.[57]

D. Acquired Settlement[58] — 1. Who May Acquire — a. In General. Where a statute provides that all persons dwelling and having their homes in a certain place for a given time, and complying with certain specified conditions, shall thereby gain a legal settlement, the words "all persons" must be regarded as applying to those persons who are legally capable of gaining a settlement in their own right in any other mode.[59]

b. Aliens.[60] Under the provisions of some statutes an alien can gain no settlement by commorancy.[61] So it has been held that statutes which provide, under

foreigners so far as the poor laws are concerned, since the place of settlement of children of extra state parentage is the place of their birth. Limestone Tp. *v.* Chillisquaque, 87 Pa. St. 294.

Loss of birth settlement.— In England, where a parish partly within and partly without a rural sanitary district has been divided by the operation of statute, a pauper loses his birth settlement acquired there before the passing of the act, because the place of such settlement has ceased to exist, and he cannot be treated as having a birth settlement in the new parish which originally formed a part of the old parish where he was born. St. Saviour's Union *v.* Dorking Union, [1898] 1 Q. B. 594, 62 J. P. 308, 67 L. J. Q. B. 408, 78 L. T. Rep. N. S. 29, 46 Wkly. Rep. 309 [*following* Reg. *v.* Tipton, 3 Q. B. 215, 2 G. & D. 92, 6 Jur. 760, 11 L. J. M. C. 89, 43 E. C. L. 704].

54. Madison Tp. *v.* Monroe Tp., 42 N. J. L. 493; Shrewsbury Tp. *v.* Holmdel Tp., 42 N. J. L. 373; Vernon *v.* Smithville, 17 Johns. (N. Y.) 89; Cumner *v.* Milton Parish, 3 Salk. 259.

55. *Delaware.*— Smith *v.* State, Houst. Cr. Cas. 107.

Massachusetts.— Petersham *v.* Dana, 12 Mass. 429.

New Hampshire.— South Hampton *v.* Hampton Falls, 11 N. H. 134; Bow *v.* Nottingham, 1 N. H. 260.

New York.— Delavergne *v.* Noxon, 14 Johns. 333.

Pennsylvania.—Wayne Tp. *v.* Jersey Shore, 81* Pa. St. 264; Philadelphia *v.* Bristol Tp., 6 Serg. & R. 562.

Vermont.— Burlington *v.* Essex, 19 Vt. 91.

England.— Plymouth Union *v.* Axminster Union, [1898] A. C. 586, 62 J. P. 612, 67 L. J. Q. B. 871, 79 L. T. Rep. N. S. 74, 47 Wkly. Rep. 33; Reg. *v.* Wendron, 7 A. & E. 819, 7 L. J. M. C. 22, 3 N. & P. 62, 34 E. C. L. 427; Rex *v.* Halifax, 2 B. & Ad. 211, 9 L. J. M. C. O. S. 131, 22 E. C. L. 96; Whitechapel Parish *v.* Stepney Parish, Carth. 433; Rex *v.* Astley, 4 Dougl. 389, 26 E. C. L. 542; Simpson *v.* Johnson, Dougl. (3d ed.) 7; Rex *v.* Bennett, 9 L. J. M. C. O. S. 95; Rex *v.* Martlesham, 8 L. J. M. C. O. S. 49; Cumner *v.* Milton Parish, 3 Salk. 259; Reg. *v.* St. Giles-in-the-Fields, 2 Wkly. Rep. 419. And see Rex *v.* St. Nicholas, 2 B. & C. 889, 4 D. & R. 462, 26 Rev. Rep. 577, 9 E. C. L. 383. See also Axminster Union *v.* Plymouth Union, 61 J. P. 228.

See 38 Cent. Dig. tit. "Paupers," § 35.

The town or county where the child is born is its legal settlement unless it appears that the mother has a legal settlement elsewhere. Bethlem *v.* Roxbury, 20 Conn. 298; Danbury *v.* New Haven, 5 Conn. 584; Hebron *v.* Marlborough, 2 Conn. 18; Martin *v.* Hardyston, 53 N. J. L. 529, 22 Atl. 58; McCoy *v.* Newton, 37 N. J. L. 133.

Where the mother of a bastard child removes from another state into a county in this state, the child being born in that county, its legal settlement is in that county. Merritt *v.* McQuaig, 63 N. C. 550.

56. Philadelphia *v.* Bristol Tp., 6 Serg. & R. (Pa.) 562; Burlington *v.* Essex, 19 Vt. 91.

57. Burlington *v.* Essex, 19 Vt. 91.

58. **Acquiring residence** see *infra*, III, D, 2, h.

Military settlement see *infra*, III, D, 2, g.

59. Milo *v.* Kilmarnock, 11 Me. 455; Hallowell *v.* Gardiner, 1 Me. 93.

Indians.— It has been held in Massachusetts that Indians, residing within the limits of a town, and being under jurisdiction of persons appointed by the government, have no legal settlement in the town. Andover *v.* Canton, 13 Mass. 547.

A person under guardianship as a spendthrift may, in Massachusetts, gain a settlement by living on his estate for the time required by statute. Hopkinton *v.* Upton, 3 Metc. (Mass.) 165.

60. **Derivative settlement** see *infra;* III, E, 3, b.

61. Bridgeport *v.* Trumbull, 37 Conn. 484; Somers *v.* Barkhamstead, 1 Root (Conn.) 398.

Residence in town at time of incorporation. — An alien who resides in a plantation at the time of incorporation gains no settlement thereby, that method being limited to citizens of towns of the United States. Thomaston *v.* Vinalhaven, 13 Me. 159; Knox *v.* Waldoborough, 3 Me. 455; Jefferson *v.* Litch-

certain conditions, a settlement for persons coming directly from some foreign place apply only to persons coming from some place without the United States without passing through a sister state,[62] and do not apply to persons who have acquired a legal settlement in the United States prior to complying with the conditions of the statute.[63] A naturalized alien can thereafter acquire a settlement by compliance with statutes relating to the acquisition of settlements by citizens.[64] But in the absence of statutory authority naturalization combined with prior residence does not confer a settlement upon an alien.[65]

c. Citizens and Inhabitants of Same or Different States. Statutes generally prescribe conditions under which citizens and inhabitants of the same state[66] or different states[67] may obtain settlements.

d. Married Women.[68] In some jurisdictions it is provided by statute that a married woman shall have the settlement of her husband if he has any in the state; otherwise her own at the time of her marriage shall not be lost.[69] Where her husband has no settlement it is generally held that she may acquire a settlement in her own right, by complying with the provisions of the statute which would entitle any other person to a settlement.[70]

e. Deserted and Divorced Women. A married woman divorced *a mensa et thoro* from her husband can acquire a settlement in her own right.[71] So also the general rule is that a deserted wife stands in the same position with respect to her husband as if she were divorced from him *a mensa et thoro*, and can acquire a settlement in her own right distinct from that of her husband.[72] If, however, an

field, 1 Me. 196. The rule under the statutes of Vermont is otherwise. Derby *v.* Salem, 30 Vt. 722.

62. Stillwater Tp. *v.* Green Tp., 9 N. J. L. 59; Chatham *v.* Middlefield, 19 Johns. (N. Y.) 56.

63. Brower *v.* Smith, 46 N. J. L. 72.

Mere landing in a sister state without remaining there, and immediately taking a conveyance to the place of destination, is coming directly from Europe within the meaning of the statute. New Barbadoes Tp. *v.* Paterson, 27 N. J. L. 544.

64. Guilford *v.* New Haven, 56 Conn. 465, 16 Atl. 240.

65. Bridgeport *v.* Trumbull, 37 Conn. 484.

In Massachusetts it is held that a statute permitting an alien to acquire a settlement by living on a freehold estate for three successive years inures to the benefit of an alien naturalized before the end of that time and then completes the occupation. Endicott *v.* Hopkinton, 125 Mass. 521.

66. New Hartford *v.* Canaan, 54 Conn. 39, 5 Atl. 360; Danbury *v.* New Haven, 5 Conn. 584; Sutton *v.* Burke, 15 Vt. 720.

67. Danbury *v.* New Haven, 5 Conn. 584; Starksborough *v.* Hinesburgh, 13 Vt. 215.

68. Derivative settlement see *infra*, III, E, 2.

69. Winslow *v.* Pittsfield, 95 Me. 53, 49 Atl. 46; Howland *v.* Burlington, 53 Me. 54; Augusta *v.* Kingfield, 36 Me. 235; Bradford *v.* Worcester, 184 Mass. 557, 69 N. E. 310; Stoughton *v.* Cambridge, 165 Mass. 251, 43 N. E. 106; Spencer *v.* Leicester, 140 Mass. 224, 5 N. E. 820 (holding that Pub. St. c. 83, § 1, cl. 4, does not apply to married women); Somerville *v.* Boston, 120 Mass. 574 (holding that St. (1874) c. 274, § 2, providing that any woman of the age of twenty-one years, who resides in any place within the state for five years together without receiving relief as a pauper shall thereby gain a settlement in such place, does not apply to married women so as to change the rule); Andover *v.* Merrimack County, 37 N. H. 437.

70. Bradford *v.* Worcester, 184 Mass. 557, 69 N. E. 310 (holding likewise that a woman whose second husband has no settlement may acquire a settlement, under clause 6 of the statute, although she has formerly acquired another settlement by her first husband); Stoughton *v.* Cambridge, 165 Mass. 251, 43 N. E. 106; Andover *v.* Merrimack County, 37 N. H. 437. *Contra*, Winslow *v.* Pittsfield, 95 Me. 53, 49 Atl. 46; Jefferson *v.* Litchfield, 1 Me. 196, holding that a wife gains no settlement during coverture where the husband gains none.

Void marriage.—A woman whose marriage is void may gain an independent settlement. Johnson *v.* Huntington, 1 Day (Conn.) 212.

71. Williamsport *v.* Eldred Tp., 84 Pa. St. 429.

Remarriage after divorce.—A woman who obtains a divorce, with custody of her child and afterward remarries, can gain no new settlement for herself as a *feme sole* or for her child, unless the full time required elapses between the divorce and her second marriage. Spencer Tp. *v.* Pleasant Tp., 17 Ohio St. 31.

72. Washington County *v.* Mahaska County, 47 Iowa 57; Bradford *v.* Worcester, 184 Mass. 557, 69 N. E. 310; Loyalsock Tp. *v.* Johnsonburg Borough, 14 Pa. Co. Ct. 323; Woodward Tp. *v.* Lock Haven, 13 Pa. Co. Ct. 157; Ayres' Case, 4 Pa. Co. Ct. 499 (holding that a deserted wife may gain a settlement for herself by leasing real estate of the yearly value of ten dollars, dwelling on the

abandoned wife remarries during the life of her husband, such marriage being illegal, she can acquire no settlement by residence under it.[73]

f. Widows. A widow may, upon complying with the requirements of the statute, acquire a settlement in her own right, just as any other person *sui juris* may.[74]

g. Infants[75] — (I) *In General.* The rule is well settled, in the construction of statutes for the relief of the poor, that minor children, prior to emancipation, are incapable of gaining a settlement in their own right;[76] and this rule applies to illegitimate as well as to legitimate children.[77]

(II) *Emancipation.* In some jurisdictions the rule is laid down that a minor who, while living with his parents, can have only a derivative settlement, may, if emancipated, acquire a settlement in his own right in any mode provided in the settlement acts applicable to persons under twenty-one years of age.[78] Emancipation is not to be presumed, although it may be implied from circumstances.[79] Emancipation under the pauper law exists when the minor contracts a new relation inconsistent with being a part of the family.[80] In order to constitute

same for a year, and paying the rent); Central Poor Dist. *v.* Jenkins Tp., 8 Kulp (Pa.) 227. See also Parker City *v.* Du Bois Borough, 6 Pa. Cas. 591, 9 Atl. 457. *Contra*, Howland *v.* Burlington, 53 Me. 54; Augusta *v.* Kingsfield, 36 Me. 235; Spencer Tp. *v.* Pleasant Tp., 17 Ohio St. 31.

73. Augusta *v.* Kingfield, 36 Me. 235.

74. Biddeford *v.* Saco, 7 Me. 270; Marden *v.* Boston, 155 Mass. 359, 29 N. E. 588; Cambridge *v.* Boston, 137 Mass. 152; Burrell Tp. *v.* Pittsburg, 62 Pa. St. 472, 1 Am. Rep. 441; Mifflin Tp. *v.* Elizabeth Tp., 18 Pa. St. 17.

75. **Derivative settlement** see *infra*, III, E, 3.

Gaining settlement by apprenticeship see *infra*, III, D, 2, e.

76. *Connecticut.*— Bridgeport *v.* Trumbull, 37 Conn. 484; Sterling *v.* Plainfield, 4 Conn. 114; Salisbury *v.* Fairfield, 1 Root 131.

Maine.— Frankfort *v.* New Vineyard, 48 Me. 565; Brewer *v.* East Machias, 27 Me. 489; Farmington *v.* Jay, 18 Me. 376; Pittston *v.* Wiscasset, 4 Me. 393.

Massachusetts.—Attleborough *v.* Harwich, 17 Mass. 398; Taunton *v.* Plymouth, 15 Mass. 203; Somerset *v.* Dighton, 12 Mass. 383. See also Danvers *v.* Boston, 10 Pick. 513.

New Hampshire.— Tamworth *v.* New Market, 3 N. H. 472.

New York.— Bern *v.* Knox, 6 Cow. 433.

Ohio.— Jefferson Tp. *v.* Letart Tp., 3 Ohio 99.

Vermont.— Marshfield *v.* Tunbridge, 62 Vt. 455, 20 Atl. 106; Poultney *v.* Glover, 23 Vt. 328; Hartford *v.* Hartland, 19 Vt. 392; Wells *v.* Westhaven, 5 Vt. 322.

England.— Reigate Union *v.* Croydon Union, 14 App. Cas. 465, 59 L. J. M. C. 29.

See 38 Cent. Dig. tit "Paupers," § 42.

77. Marlborough *v.* Hebron, 2 Conn. 20; Milo *v.* Kilmarnock, 11 Me. 455; Fayette *v.* Leeds, 10 Me. 409; Somerset *v.* Dighton, 12 Mass. 383; Manchester *v.* Springfield, 15 Vt. 385; West Ham Union *v.* Holbeach Union, [1905] A. C. 450, 69 J. P. 442, 74 L. J. K. B. 868, 3 Loc. Gov. 1179, 93 L. T. Rep. N. S. 557, 21 T. L. R. 713, 54 Wkly. Rep. 137; Woolwich Union *v.* Fulham Union, [1905] 2 K. B. 203, 69 J. P. 252, 74 L. J. K. B. 556, 3 Loc. Gov. 594, 92 L. T. Rep. N. S. 838, 54 Wkly. Rep. 14.

In New Hampshire it has been held that, after the age of seven, an illegitimate child can acquire a new settlement in its own right by a year's residence in a town different from that of its birth (Bow *v.* Nottingham, 1 N. H. 260), but that it cannot acquire a settlement different from that of the place of its birth by residence in another town while under the age of seven years (South Hampton *v.* Hampton Falls, 11 N. H. 134).

78. Canton *v.* Simsbury, 54 Conn. 86, 6 Atl. 183; Portland *v.* New Gloucester, 16 Me. 427; Wells *v.* Kennebunk, 8 Me. 200; Lubec *v.* Eastport, 3 Me. 220; Tunbridge *v.* Eden, 39 Vt. 17.

In Iowa a statute providing that "any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence," and that "legitimate minor children follow and have the settlement of their father," a minor, emancipated by agreement with his father, cannot by residence acquire an independent settlement. Clay County *v.* Palo Alto County, 82 Iowa 626, 48 N. W. 1053.

Under Me. Rev. St. c. 24, § 1, providing that settlement may be acquired by "a person of age" having his home in a town for five successive years, etc., an emancipated minor cannot acquire a settlement by having his home in any town for five successive years. Brooksville *v.* Bucksport, 73 Me. 111; North Yarmouth *v.* Portland, 73 Me. 108; Veazie *v.* Machias, 49 Me. 105.

79. Monroe *v.* Jackson, 55 Me. 55; Wells *v.* Kennebunk, 8 Me. 200.

Attaining the age of twenty-one years is not *ipso facto* emancipation of a child from his parents, although at that age the child may emancipate himself so as to gain a settlement separate from that of his father. Alexandria Tp. *v.* Bethlehem Tp., 16 N. J. L. 119, 31 Am. Dec. 229.

80. Tunbridge *v.* Eden, 39 Vt. 17.

emancipation the parents must absolutely renounce all care and control of the infant.[81]

h. Insane Persons.[82] An insane person or idiot cannot acquire a settlement in any place by virtue of acts requiring his own volition.[83] But where insanity occurs after legal residence is once commenced, it does not interrupt the gaining of a settlement.[84] Such a person is, however, capable of gaining a settlement by any mode not requiring any act of volition of his own.[85] Therefore, under the statutes of a number of jurisdictions, a person *non compos mentis* may acquire a settlement in a town by continuous residence therein for a designated period.[86] But a person *non compos mentis* and not emancipated, although of full age, cannot acquire an independent settlement by residence, but will follow the settlement of his father.[87] When the question of the degree of the mental capacity of a pauper has arisen, it is held that, to disqualify a person from making a choice of a settlement, by insanity, the mental derangement need not amount to complete madness. If the mind is diseased to such an extent as to deprive the person of volition, free-will, and power of choice, or deprive him of self-control as to matters involved in a choice of settlement, this is sufficient.[88]

i. Slaves.[89] During the existence of slavery in this country, it was held that slaves could acquire no settlement in their own right.[90]

81. Monroe *v.* Jackson, 55 Me. 55; Pittston *v.* Wiscasset, 4 Me. 293; South Burlington *v.* Cambridge, 77 Vt. 289, 59 Atl. 1013; Tunbridge *v.* Eden, 39 Vt. 17.

A minor child bound out by written indenture until twenty-one years of age is not thereby emancipated. Frankfort *v.* New Vineyard, 48 Me. 565; Oldtown *v.* Falmouth, 40 Me. 106. But see North Hampton County *v.* Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. Ct. 488.

Desertion of his home or the vagrancy of the child, unless assented to by the parent, does not constitute emancipation. Bangor *v.* Readfield, 32 Me. 60.

Mere residence apart from the family of the parents is not emancipation. Tamworth *v.* New Market, 3 N. H. 472.

82. **Derivative settlement** see *infra*, III, E, 3, e.

83. Payne *v.* Dunham, 29 Ill. 125; Phillips *v.* Boston, 183 Mass. 314, 67 N. E. 250.

84. Washington County *v.* Mahaska County, 47 Iowa 57; Machias *v.* East Machias, 33 Me. 427; Chicopee *v.* Whately, 6 Allen (Mass.) 508; Topsham *v.* Williamstown, 60 Vt. 467, 12 Atl. 112.

85. Lubec *v.* Eastport, 3 Me. 220.

86. Ridgefield *v.* Fairfield, 73 Conn. 47, 46 Atl. 245; Plymouth *v.* Waterbury, 31 Conn. 515; Waterville *v.* Benton, 85 Me. 134, 26 Atl. 1089; Corinth *v.* Bradley, 51 Me. 540; Auburn *v.* Hebron, 48 Me. 332; Gardiner *v.* Farmingdale, 45 Me. 537; Machias *v.* East Machias, 33 Me. 427; New Vineyard *v.* Harpswell, 33 Me. 193; Augusta *v.* Turner, 24 Me. 112; Lubec *v.* Eastport, 3 Me. 220. But see Phillips *v.* Boston, 183 Mass. 314, 67 N. E. 250, holding intention and power of choice necessary to form a residence.

87. Winterport *v.* Newburgh, 78 Me. 136, 3 Atl. 48; Strong *v.* Farmington, 74 Me. 46; Monroe *v.* Jackson, 55 Me. 55; Topsham *v.* Chelsea, 60 Vt. 219, 13 Atl. 861; Westmore *v.* Sheffield, 56 Vt. 239.

An insane child may become so far emancipated by being removed from his father's house with his consent, or by receiving support as a pauper, as to lose the ability or legal capacity to acquire a derivative settlement from the father. Curwensville Poor Dist. *v.* Knox Tp. Poor Dist., 6 Pa. Cas. 536, 9 Atl. 463; Penns Tp. *v.* Selinsgrove, 9 Pa. Cas. 465, 4 Atl. 374.

88. Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; Townsend *v.* Pepperell, 99 Mass. 40.

Incipient insanity does not incapacitate one from gaining a settlement. Buckland *v.* Charlemont, 3 Pick. (Mass.) 173.

Weakness of intellect, subjecting the person to oversight, influence, and care of friends, but not amounting to idiocy, does not incapacitate such person from making a removal of residence and acquiring a new settlement under the poor laws. Westmore *v.* Sheffield, 56 Vt. 239; Ludlow *v.* Landgrove, 42 Vt. 137.

89. **Derivative settlement** see *infra*, III, E, 4.

Support of pauper slaves see *infra*, IV, B.

90. Hallowell *v.* Gardiner, 1 Me. 93; Dighton *v.* Freetown, 4 Mass. 539; Springfield *v.* Wilbraham, 4 Mass. 493; Winchendon *v.* Hatfield, 4 Mass. 123; Vincent *v.* Duncan, 2 Mo. 214; Morris Tp. *v.* Warren Tp., 26 N. J. L. 312, holding that a slave acquires no settlement, except when legally manumitted, or in case of the insolvency of his master. South Brunswick *v.* East Windsor, 8 N. J. L. 64. And see Exeter *v.* Warwick, 1 R. I. 63.

Wife of slave.— Since a wife is not permitted to gain a settlement separate from that of her husband, and a slave cannot acquire a settlement in his own right, the wife of the slave does not acquire a settlement by residence on a plantation at the time of its incorporation. Hallowell *v.* Gardiner, 1 Me. 93.

2. MODE OF ACQUIRING[91] — a. Ownership or Interest in Property — (I) *IN GENERAL.* One of the modes of gaining a settlement prescribed by many of the statutes is the ownership or interest in property of specified value within the town, and occupation and payment of taxes thereon for a designated period.[92]

(II) *WHAT INTEREST OR TITLE NECESSARY* — (A) *In General.* In order to gain a settlement by this mode it is usually required that the person possess a vested inheritance or freehold in possession.[93] These statutes refer to such an estate as the party has a right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in another.[94] Nor is occupancy by tenants at will or sufferance sufficient to confer a settlement.[95] But an estate of freehold or inheritance in trust is an estate of freehold within the intent of the statutes.[96] It has been held, however, that a trust by mere implication, not arising by deed, nor established by any previous decree, is not sufficient to confer a settlement under a statute requiring seizin of a freehold estate.[97] So a statute requiring property to be held by a person "in his own right" excludes all property to which the person has but a right of temporary possession, as in the case of property held by an executor, administrator, guardian, agent, bailee, trustee, or tenant.[98] Unless the statute requires that the interest in the property must be an indefeasible interest, derived from a grantor having title,[99] the settlement does not depend upon the question whether the title is good against all persons;

91. Settlement by birth see *supra*, III, C.

92. Wellfleet *v.* Truro, 5 Allen (Mass.) 137; Western *v.* Leicester, 3 Pick. (Mass.) 198; Boston *v.* Wells, 14 Mass. 384; Granby *v.* Amherst, 7 Mass. 1; Groton *v.* Boxborough, 6 Mass. 50; Wakefield *v.* Alton, 3 N. H. 378; Rochester *v.* Chester, 3 N. H. 349; Reg. *v.* Knaresborough, 16 Q. B. 446, 71 E. C. L. 446; Rex *v.* Ringstead, 9 B. & C. 218, 7 L. J. M. C. O. S. 103, 4 M. & R. 67, 17 E. C. L. 105; Rex *v.* Houghton le Spring, 1 East 247.

93. Ipswich *v.* Topsfield, 5 Metc. (Mass.) 350; Charlestown *v.* Acworth, 1 N. H. 62; Forks *v.* Easton, 2 Whart. (Pa.) 405 (holding that a certificate of settlement from the town from which he removes is necessary, under the Pennsylvania act of March 9, 1771, in order to enable a person to acquire a settlement by the purchase of a freehold and residence therein, and such settlement cannot be obtained by an uncertified pauper who refuses to give security); Adams Tp. *v.* Forward Tp., 8 Pa. Cas. 113, 6 Atl. 710.

One continues seized of a freehold, notwithstanding a lease, so as to gain a settlement under the statute. Mansfield *v.* Pemhroke, 5 Pick. (Mass.) 449.

A person under guardianship as a spendthrift may gain a settlement by living on his estate for the time required. Hopkinton *v.* Upton, 3 Metc. (Mass.) 165.

A minor under guardianship may acquire a settlement by the occupation of his estate, unless the statute requires the freeholder to be of full age. Granby *v.* Amherst, 7 Mass. 1.

94. Ipswich *v.* Topsfield, 5 Metc. (Mass.) 350.

An estate in remainder is insufficient to confer a settlement. Ipswich *v.* Topsfield, 5 Metc. (Mass.) 350.

A right of redemption, after an entry to foreclose, the mortgagee retaining possession and taking the rents and profits, is not an estate of inheritance, on which the owner can live as on his freehold, and therefore not within the statute. Oakham *v.* Rutland, 4 Cush. (Mass.) 172.

95. Dover *v.* Brighton, 2 Gray (Mass.) 482; Southbridge *v.* Warren, 11 Cush. (Mass.) 292; Northmoreland Tp. *v.* Monroe Tp., 1 C. Pl. (Pa.) 149.

96. Conway *v.* Ashfield, 110 Mass. 113; Randolph *v.* Norton, 16 Gray (Mass.) 395; Scituate *v.* Hanover, 16 Pick. (Mass.) 222; Orleans *v.* Chatham, 2 Pick. (Mass.) 29; Pembroke *v.* Allenstown, 21 N. H. 107; Bernards Tp. *v.* Warren Tp., 15 N. J. L. 447; Rex *v.* Offchurch, 3 T. R. 114.

In New Hampshire, a person entitled to a distributive share of a deceased person's estate of sufficient amount will gain a settlement thereby, although there has been no decree of distribution, the other requirements of the law being complied with. Andover *v.* Merrimack County, 37 N. H. 437.

A trust estate unlawfully created is not sufficient to give a settlement. Canton *v.* Dorchester, 8 Cush. (Mass.) 525.

An equitable right is not sufficient to confer a settlement; it must be an equitable estate actually vested. Reg. *v.* Carlton, 14 Q. B. 110, 14 Jur. 240, 19 L. J. M. C. 100, 4 New Sess. Cas. 1, 68 E. C. L. 110; Rex *v.* Geddington, 2 B. & C. 129, 3 D. & R. 403, 9 E. C. L. 64; Rex *v.* Hagworthingham, 1 B. & C. 634, 3 D. & R. 16, 8 E. C. L. 268; Rex *v.* Woolpit, 4 D. & R. 456, 16 E. C. L. 210; Rex *v.* Long Bennington, 6 M. & S. 403.

97. Tewksbury Tp. *v.* Readington Tp., 8 N. J. L. 319.

98. Newfane *v.* Somerset, 49 Vt. 411; Newfane *v.* Dummerston, 34 Vt. 184.

99. Bridgewater *v.* Brookfield, 3 Cow. (N. Y.) 299; Blenheim *v.* Windham, 11 Johns. (N. Y.) 7.

although it may be defeasible, it is good until defeated.[1] Nor does the want of record of the deed, at the time of the occupation, prevent the acquisition of a settlement.[2]

(B) *Curtesy and Dower Interests.* Under some statutes possession of a freehold estate in the right of one's wife is a sufficient interest to confer a right of settlement;[3] although possession by the husband as tenant by the curtesy initiate of land held by his wife to her sole and separate use is not sufficient.[4] Where, however, the statute requires the person to hold "in his own right," real estate held *jure uxoris* is not sufficient to confer a settlement.[5]

(III) *Value of Estate.* The value of the estate necessary to gain a settlement is fixed by statute.[6] In the absence of language in the statute requiring a different construction, this value will be estimated without regard to encumbrances.[7] Under a statute requiring the estate to be of a certain clear, yearly income, the words "clear, yearly income" mean income free from all charges on the estate,[8] not the sum actually received yearly by the owner of the estate, but the yearly value thereof as a rentable estate.[9] The property must be valued as if it had been subjected to taxation, when the forbearance to tax it has been on account of the poverty of the occupant.[10] The assessors' valuation of the estate is not conclusive as to the value thereof.[11]

(IV) *Occupation.* The statutes as a rule require actual occupation of the real property for the full period designated in the statute, in order to acquire a settlement under this mode.[12] The personal occupation of lands includes an occupation by others under the direction and control of the owner.[13] But it is otherwise if the lands are leased.[14] Nor is it sufficient for a pauper to dwell in the neighborhood or near to his estate; he must dwell upon it.[15]

(V) *Payment of Consideration.* Some of the statutes require the payment of at least a designated portion of the consideration in order to perfect a person's right to acquire a settlement.[16] But under some provisions a mortgage back to

1. Boylston *v.* Clinton, 1 Gray (Mass.) 619 (holding that a citizen of the United States, living three years in any town within Massachusetts, on land conveyed to him by warranty deed, gains a settlement in such town, by virtue of St. c. 45, § 1, cl. 4, although his grantor had in fact no title to the land); Brewster *v.* Dennis, 21 Pick. (Mass.) 233; Conway *v.* Deerfield, 11 Mass. 327.

2. Conway *v.* Ashfield, 110 Mass. 113; Belchertown *v.* Dudley, 6 Allen (Mass.) 477.

3. Canton *v.* Dorchester, 8 Cush. (Mass.) 525; Mansfield *v.* Pembroke, 5 Pick. (Mass.) 449; Windham *v.* Portland, 4 Mass. 384; Whitestown *v.* Constable, 14 Johns. (N. Y.) 469.

4. Leverett *v.* Deerfield, 6 Allen (Mass.) 431; Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541; Montoursville *v.* Fairfield Tp., 112 Pa. St. 99, 3 Atl. 862; Penn Tp. *v.* Locust Tp., 14 Pa. Co. Ct. 162. And see Orford *v.* Benton, 36 N. H. 395.

5. Baltimore *v.* Chester, 47 Vt. 648.

6. See Hebron *v.* Centre-Harbor, 11 N. H. 571; Poplin *v.* Hawke, 8 N. H. 124.

The required amount of real estate or the required amount of personal estate must have been possessed for the whole period. It is not enough that one was possessed of sufficient real estate for a part of the term, and of sufficient personal estate for the residue of the term. Orford *v.* Benton, 36 N. H. 395.

7. Nottingham Tp. *v.* Amwell Tp., 21 N. J. L. 27.

8. Freeport *v.* Sidney, 21 Me. 305; Pelham *v.* Middleborough, 4 Gray (Mass.) 57.

9. Pelham *v.* Middleborough, 4 Gray (Mass.) 57.

10. Freeport *v.* Sidney, 21 Me. 305.

11. Derry *v.* Rockingham County, 62 N. H. 485.

12. Weston *v.* Reading, 5 Conn. 255; Salem *v.* Andover, 3 Mass. 436 (holding that a settlement may be acquired by occupation of a freehold, although warned to depart in the meantime, the occupancy of a freehold and the acquisition of a settlement by residence being independent methods of obtaining a settlement); Sherburne *v.* Norwich, 16 Johns. (N. Y.) 186.

13. Granby *v.* Amherst, 7 Mass. 1.

14. Granby *v.* Amherst, 7 Mass. 1.

15. Wellfleet *v.* Truro, 9 Allen (Mass.) 137 (holding that a person does not live on his property when his entire dwelling-house is on the land of another, although some of his outbuildings are on his own land); Shrewsbury Tp. Poor Dist. *v.* Sullivan County Poor Dist., 20 Pa. Super. Ct. 270.

16. Pompey *v.* Laurens, 19 Johns. (N. Y.) 238; Augusta *v.* Paris, 16 Johns. (N. Y.) 279; Whitestown *v.* Constable, 14 Johns. (N. Y.) 469; Schaghticoke *v.* Brunswick, 14 Johns. (N. Y.) 199; New Berlin *v.* Norwich, 10 Johns. (N. Y.) 229; Kirby *v.* Waterford,

secure a part, or even all, of the purchase-money has been held not to defeat a settlement.[17]

b. Payment of Rent. Some of the statutes provide that a person may acquire a settlement in a town by leasing premises therein of a specified yearly rental value, and living thereon, and paying rent for the period designated in the statute.[18] That the pauper resided in different tenements is immaterial.[19] Nor is it material whether he paid all the rent which he contracted to pay, so long as the amount paid exceeded the sum required by the statute.[20] But two tenancies under rent separated by an interval cannot be joined to acquire a settlement.[21] Nor may the rent of one year be tacked to the rent of a former year so as to make the required amount.[22] The renting need be *bona fide* only as between the landlord and tenant, and the whole rent need not be paid by the person renting the tenement; it is sufficient if it was actually paid,[23] provided it was not paid with the fraudulent intention of fixing the pauper's settlement upon the town or parish.[24] But payment of rent after the death of a pauper will not complete a settlement partially acquired in his lifetime.[25] The lease need not be in writing,[26] and the rent need not be paid in money, but may be paid in labor or other services equivalent to money.[27]

c. Taxation[28] — (i) *In General.* In some jurisdictions the statutes provide

15 Vt. 753. See also Conway *v.* Deerfield, 11 Mass. 327; Groton *v.* Boxborough, 6 Mass. 50, holding that, although an estate be under mortgage, settlement is acquired by its possession provided the annual income, after paying the interest on the mortgage, is worth ten dollars.

17. Barkhamsted *v.* Farmington, 2 Conn. 600; Mt. Washington *v.* Clarksburgh, 19 Pick. (Mass.) 294; Newark *v.* Pompton, 3 N. J. L. 1038.

18. Cascade *v.* Lewis, 148 Pa. St. 333, 23 Atl. 1003 (fractions of day not regarded in computing time of occupancy of leased premises); Harmony Tp. *v.* Forest County, 91 Pa. St. 404; Beaver Tp. *v.* Hartley Tp., 11 Pa. St. 254; West Perry Tp. *v.* Monroe Tp., 2 Walk. (Pa.) 262; Milton *v.* West Chillisquaque Tp., 9 Pa. Super. Ct. 204, 43 Wkly. Notes Cas. 452 [*affirming* 20 Pa. Co. Ct. 547]; Rex *v.* Great, etc., Usworth, 5 A. & E. 261, 2 Harr. & W. 100, 5 L. J. M. C. 139, 6 N. & M. 811, 31 E. C. L. 606; Rex *v.* Wootton, 1 A. & E. 232, 6 L. J. M. C. 98, 3 N. & M. 112, 28 E. C. L. 125; Rex *v.* Gosforth, 1 A. & E. 226, 3 N. & M. 303, 28 E. C. L. 123; Rex *v.* Macclesfield, 2 B. & Ad. 870, 1 L. J. M. C. 6, 22 E. C. L. 365.

Evidence held insufficient to show relation of landlord and tenant see Walker Overseers *v.* Marion Overseers, 148 Pa. St. 1, 23 Atl. 1002; Elk Tp. *v.* Beaver Tp., 6 Pa. Co. Ct. 562.

19. Allegheny City *v.* Allegheny Tp., 14 Pa. St. 138; Rex *v.* Collingham, 1 B. & C. 578, 2 D. & R. 743, 8 E. C. L. 244. See also Beaver Tp. *v.* Rose Tp. 98 Pa. St. 636.

20. Allegheny City *v.* Allegheny Tp., 14 Pa. St. 138. *Contra*, under the English statute. Reg. *v.* Melsonby, 12 A. & E. 687, 10 L. J. M. C. 2, 4 P. & D. 515, 40 E. C. L. 342; Rex *v.* Ashley Hay, 8 B. & C. 27, 6 L. J. M. C. O. S. 74, 15 E. C. L. 23; Rex *v.* Ramsgate, 6 B. & C. 712, 9 D. & R. 688, 5 L. J. M. C. O. S. 65, 13 E. C. L. 319.

21. West Perry Tp. *v.* Monroe Tp., 2 Walk. (Pa.) 262.

22. Walker Overseers *v.* Milford Overseers, 12 Pa. Co. Ct. 321.

23. Rex *v.* Great Wakering, 5 B. & Ad. 971, 3 L. J. M. C. 51, 3 N. & M. 47, 27 E. C. L. 408; Rex *v.* Ditcheat, 9 B. & C. 176, 7 L. J. M. C. O. S. 60, 1 M. & R. 691, 14 E. C. L. 86; Rex *v.* Kibworth, 7 B. & C. 790, 6 L. J. M. C. O. S. 60, 1 M. & R. 691, 14 E. C. L. 353.

Payment of rent by a surety is a sufficient payment. Butler Tp. *v.* Sugarloaf, 6 Pa. St. 262.

Payment of rent by a trustee out of the produce of effects assigned to him by the tenant, in trust for the payment of the rent, is not a payment by the tenant. Rex *v.* Pakefield, 4 A. & E. 612, 1 Harr. & W. 697, 5 L. J. M. C. 63, 6 N. & M. 16, 31 E. C. L. 273.

24. Rex *v.* St. Sepulchre, 1 B. & Ad. 924, 9 L. J. M. C. O. S. 56, 20 E. C. L. 746; Rex *v.* Tillingham, 1 B. & Ad. 180, 9 L. J. M. C. O. S. 3, 20 E. C. L. 445.

25. Rex *v.* Bexley, 5 L. J. M. C. O. S. 16; Rex *v.* Carshalton, 5 L. J. M. C. O. S. 14.

26. Beaver Tp. *v.* Hartley Tp., 11 Pa. St. 254; Spring Tp. *v.* Walker Tp., 1 Pa. Super. Ct. 383.

27. Beaver Tp. *v.* Hartley Tp., 11 Pa. St. 254; Milton *v.* West Chillisquaque Tp., 9 Pa. Super. Ct. 204, 43 Wkly. Notes Cas. 452 [*affirming* 20 Pa. Co. Ct. 547]; Spring Tp. *v.* Walker Tp., 1 Pa. Super. Ct. 383; Point Tp. *v.* Northumberland Borough, 22 Pa. Co. Ct. 242; Huntington Tp. *v.* Salem Tp., 8 Kulp (Pa.) 234.

Occupying and cultivating land on shares is a renting and paying rent. Ft. Ann *v.* Kingsbury, 14 Johns. (N. Y.) 365. See also Plattekill *v.* New Paltz, 15 Johns. (N. Y.) 305.

28. Effect of receiving pauper supplies see *infra*, III, D, 4, a.

as a mode of acquiring a settlement by a person residence in any place in the state, and payment of all duly assessed taxes on his poll or estate during the period prescribed by the statute.[29]

(II) *LEVY AND ASSESSMENT.* Such statutes have usually been construed to mean that these taxes must have been actually assessed against the estate of the person claiming a settlement, and that it is not sufficient that he had an estate liable to taxation in the town, and was able to pay taxes for that period of time.[30] A person's right to a settlement under this mode cannot be defeated after the assessment and payment of the tax, on the ground that it was illegally assessed, or because of some defect in the tax lists.[31]

(III) *PAYMENT.* The assessment of taxes, it is held, is generally not alone sufficient, under these statutes, but there must be a full payment thereof for each successive year of the period prescribed by statute, in order to entitle a person to a settlement; and failure to demand, or abatement of the tax, does not alter the rule.[32] The full amount assessed must be paid,[33] and neglect to enforce

29. Randolph *v.* Easton, 4 Cush. (Mass.) 557; Sudbury *v.* Stow, 13 Mass. 462; Canaan *v.* Grafton County, 64 N. H. 595, 15 Atl. 18 (holding that it is immaterial that the pauper was taxed by a wrong name); Pittsfield *v.* Barnstead, 40 N. H. 477; Springfield *v.* Enfield, 30 N. H. 71; Dalton *v.* Bethlehem, 20 N. H. 505; Henniker *v.* Weare, 9 N. H. 573; Burton *v.* Wakefield, 4 N. H. 47; Weare *v.* New Boston, 3 N. H. 203; Edenburg Poor Dist. *v.* Strattanville Poor Dist., 188 Pa. St. 373, 41 Atl. 589; Marshfield *v.* Middlesex, 55 Vt. 545; Manchester *v.* Dorset, 14 Vt. 224; Starksborough *v.* Hinesburgh, 13 Vt. 215; Reg. *v.* Hulme, 4 Q. B. 538, 2 G. & D. 682, 7 Jur. 464, 12 L. J. M. C. 100, 45 E. C. L. 538; Rex *v.* Stoke Damerel, 6 A. & E. 308, 6 L. J. M. C. 55, 1 N. & P. 453, 33 E. C. L. 178.

A township road tax is a public tax the payment of which will secure a settlement. Huston Tp. Poor Dist. *v.* Benezette Tp. Poor Dist., 135 Pa. St. 393, 19 Atl. 1060 [*reversing* 7 Pa. Co. Ct. 383].

A United States tax is not a public tax that gives a settlement, under the Pennsylvania act of 1771. Bucks County House of Employment *v.* Brier Creek Tp., 10 Serg. & R. (Pa.) 179.

Payment of taxes after receiving relief.— A person may establish a settlement in a poor district by the payment of taxes, after he has received relief from such poor district, if it appears that the taxes were not paid out of the money furnished him for relief by the poor district. East Franklin Tp. *v.* Rayburn Tp., 23 Pa. Super. Ct. 522.

Assessment to and payment of taxes by an occupant of land in right of another satisfy the requirements of the statute. Randolph *v.* Easton, 4 Cush. (Mass.) 557. *Compare* Springfield *v.* Enfield, 30 N. H. 71.

30. Berlin *v.* Bolton, 10 Metc. (Mass.) 115; Monson *v.* Chester, 22 Pick. (Mass.) 385; Reading *v.* Tewksbury, 2 Pick. (Mass.) 535; Pittsfield *v.* Barnstead, 38 N. H. 115; Reg. *v.* St. Anne, 2 E. & E. 485, 29 L. J. M. C. 78, 6 Jur. N. S. 249, 1 L. T. Rep. N. S. 367, 8 Wkly. Rep. 180, 105 E. C. L. 485; Rex *v.* St. Johns, Dougl. (3d ed.) 225. See, however, Beacon Falls *v.* Seymour, 43 Conn. 217, holding that only when taxes have been legally imposed upon a person does a failure to pay them defeat his right to a settlement afterward.

31. Boston *v.* Dedham, 4 Metc. (Mass.) 178; Charlemont *v.* Conway, 8 Pick. (Mass.) 408; Wrentham *v.* Attleborough, 5 Mass. 430; Francestown *v.* Deering, 41 N. H. 438; Weston *v.* Landgrove, 53 Vt. 375. But see Southampton *v.* Easthampton, 8 Pick. (Mass.) 380.

32. North Stonington *v.* Stonington, 31 Conn. 412; Taunton *v.* Wareham, 153 Mass. 192, 26 N. E. 451; East Sudbury *v.* Sudbury, 12 Pick. (Mass.) 1; Billerica *v.* Chelmsford, 10 Mass. 394; Sunapee *v.* Lempster, 65 N. H. 655, 23 Atl. 525; Haverhill *v.* Orange, 47 N. H. 273; Hillsborough County *v.* Londonderry, 46 N. H. 11; Warren *v.* Wentworth, 45 N. H. 564; Bradford *v.* Newport, 42 N. H. 338; Berlin *v.* Gorham, 34 N. H. 266; Lisbon *v.* Bath, 21 N. H. 319; Dalton *v.* Bethlehem, 20 N. H. 505 (holding, however, that to establish a settlement by the payment of taxes, it is not necessary that the taxes be paid the year they were assessed, but they must be paid before the settlement can be perfected); Wallkill *v.* Mamakating, 14 Johns. (N. Y.) 87; Amenia *v.* Stanford, 6 Johns. (N. Y.) 92; Highland Tp. Poor Dist. *v.* Jefferson County Poor Dist., 25 Pa. Super. Ct. 601.

After abatement of tax.— Under the statute enacting that any person who shall have resided in any town in this state, and shall have paid all taxes legally imposed on his poll and estate, etc., after a tax has been abated it cannot be paid so as to give the person paying a settlement within the act. Plymouth *v.* Andover, 49 N. H. 86 note.

Statutes not requiring assessment.— Some statutes provide several methods of obtaining settlement under some of which assessment is sufficient without payment. Templeton *v.* Sterling, 15 Mass. 253; Westbrook *v.* Gorham, 15 Mass. 160.

33. Lisbon *v.* Bath, 21 N. H. 319, holding that the payment of three cents less than the whole town taxes assessed upon an in-

payment,[34] or remission of payment by special vote of the town or by action of the selectmen[35] will not operate as payment. Under some statutes payment in money is necessary;[36] under others payment in labor will suffice.[37]

(IV) *Persons Making Payment.* It is immaterial by whom the tax is paid, provided it is done at the instance of, or with the consent of, the person to be taxed.[38] On the other hand the unauthorized and unratified payment of such taxes by a third party will not entitle the person taxable to a settlement by reason thereof.[39]

d. Service — (I) *In General.* In one jurisdiction at least it is provided by statute that a settlement may be gained in any poor district by any unmarried person, not having a child, who shall be bound or hired as a servant, within such district, and shall continue in such service during one whole year.[40] By an unmarried person the statute is construed to include a minor child who goes out to work because of the death or desertion of his parents;[41] and the word "child," as used in the statute, means a legitimate child, so that an unmarried woman having a bastard child may gain a settlement by hiring and service for one whole year.[42]

(II) *Contract of Hiring.* To obtain a legal settlement under the act, there must be a contract of hiring, express or implied, which is binding on both parties.[43]

dividual, and the receipt thereof as payment in full by the tax-collector, do not constitute the payment of all taxes legally assessed. And see Shrewsbury *v.* Salem, 19 Pick. (Mass.) 389, holding that payment of part and discharge from payment of the residue by vote of the town will not be sufficient.

34. Robbins *v.* Townsend, 20 Pick. (Mass.) 345.

35. Haverhill *v.* Orange, 47 N. H. 273.

36. Amenia *v.* Stanford, 6 Johns. (N. Y.) 92.

Promissory note.— A person gave a promissory note to a town in payment of a tax assessed against him, and it was held that the note was not in payment of the tax, within the meaning of the statute of Dec. 16, 1828, so as to give him a settlement in that town according to the eighth mode prescribed by the statute. Jaffrey *v.* Cornish, 10 N. H. 505.

37. Andover *v.* Chelmsford, 16 Mass. 236.

38. Delaware Tp. *v.* Anthony Tp., 170 Pa. St. 181, 32 Atl. 623 [*reversing* 4 Pa. Dist. 100, 15 Pa. Co. Ct. 431] (holding that where a candidate for office pays the taxes of a voter, pursuant to an understanding between them that he should do so in consideration of the latter's vote, it is a payment by the voter, within the meaning of the poor laws relating to settlement); Rex *v.* Husthwaite, 18 Q. B. 447, 16 Jur. 1068, 21 L. J. M. C. 189, 83 E. C. L. 447; Rex *v.* Lower Heyford, 1 B. & Ad. 75, 8 L. J. M. C. O. S. 117, 20 E. C. L. 403; Rex *v.* Axmouth, 8 East 383. See, however, Reg. *v.* South Kilvington, 5 Q. B. 216, 3 G. & D. 157, 7 Jur. 1108, 13 L. J. M. C. 3, 48 E. C. L. 216. See also Andover *v.* Merrimack County, 37 N. H. 437, holding that if a person is under guardianship as a lunatic, and has the amount of property required for a settlement, but it is taxed to the guardian, if the tax is paid by him, the ward will gain a settlement at the end of four years.

39. Wallkill *v.* Mamakating, 14 Johns. (N. Y.) 87; Dallas Tp. Poor Dist. *v.* Eaton Tp. Poor Dist., 161 Pa. St. 142, 28 Atl. 1070; Lawrence *v.* Delaware, 148 Pa. St. 380, 23 Atl. 1124; Beaver Tp. Poor Dist. *v.* Rose Tp. Poor Dist., 98 Pa. St. 636; Centre Tp. *v.* Mifflin County, 3 Pa. Co. Ct. 555; Reg. *v.* Benjeworth, 2 C. L. R. 1540, 3 E. & B. 637, 18 Jur. 402, 23 L. J. M. C. 124, 2 Wkly. Rep. 420, 77 E. C. L. 637.

40. See Pa. Pub. Laws 542 (act June 13, 1836, cl. 5, § 9). And see Forest City *v.* Damascus, 176 Pa. St. 116, 34 Atl. 351; Lewistown *v.* Granville Tp., 5 Pa. St. 283; Tioga County *v.* Lawrence Tp., 2 Watts (Pa.) 43.

41. Loyalsock Tp. *v.* Johnsonburg, 14 Pa. Co. Ct. 323.

42. Forest City *v.* Damascus, 176 Pa. St. 116, 34 Atl. 351; Buffalo Tp. *v.* Lewisburg Borough, 1 Pa. Co. Ct. 121.

43. Briar Creek Tp. *v.* Mt. Pleasant Tp., 8 Watts (Pa.) 431; Gregg Tp. *v.* Half Moon Tp., 2 Watts (Pa.) 342; Tioga County *v.* Lawrence Tp., 2 Watts (Pa.) 43; Liberty Tp. *v.* Lamar Tp., 23 Pa. Co. Ct. 569; Jersey Shore *v.* Nippenose Tp., 18 Pa. Co. Ct. 473; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70.

A precise and formal stipulation is not necessary, but, to constitute the contract contemplated by the statute, any declarations, or acts of the parties, which evince their assent to an agreement expressed at the time, is sufficient. Tioga County *v.* Lawrence Tp., 2 Watts (Pa.) 43; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70.

When contract will be implied.— Where one who is not a relative and not an object of charity, but able to earn wages, is employed in the service of another for a year, the law implies a contract of hiring, so as to confer a settlement. Moreland *v.* Davidson Tp., 71 Pa. St. 371; Kelly Tp. *v.* Gregg Tp., 2 Walk. (Pa.) 383.

It need not be entire,[44] it being sufficient if there has been a continuous service for a whole year under one or more contracts.[45] So too the contract of hiring may be for an indefinite time, or at will, if the service is continuous for a year.[46] A money consideration is not necessary to support the contract of hiring, but any other valuable consideration will suffice.[47]

(III) *THE SERVICE.* The service must be by virtue of a hiring; service alone, without a hiring, will not give a settlement.[48] It is not necessary that the service be menial or rendered in performance of household duties.[49] The service must be for the whole year, and the criterion for determining whether absence from service breaks its continuity and prevents its being a whole year's service as contemplated by the statute is whether during the intervals of absence the contract of hiring is continued.[50]

(IV) *EFFECT OF RESIDENCE ELSEWHERE.* The settlement is gained where the services are performed under a contract of hiring, although the pauper may reside elsewhere.[51]

e. Apprenticeship — (I) *IN GENERAL.* In some jurisdictions it is provided by statute that a settlement may be gained in any poor district by any person who shall be duly bound and apprenticed by indenture, and shall inhabit in the district with his master and mistress, for the whole of the period prescribed by the statute.[52]

44. Moreland Tp. *v.* Davidson Tp., 71 Pa. St. 371; Heidleburg *v.* Lynn, 5 Whart. (Pa.) 430, 34 Am. Dec. 566; Briar Creek Tp. *v.* Mt. Pleasant Tp., 8 Watts (Pa.) 431; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70; Byberry Tp. *v.* Oxford Tp., 2 Ashm. (Pa.) 9. See also Lewistown Borough *v.* Granville Tp., 5 Pa. St. 283.

45. Moreland Tp. *v.* Davidson Tp., 71 Pa. St. 371; Heidleburg *v.* Lynn, 5 Whart. (Pa.) 430, 34 Am. Dec. 566; Briar Creek Tp. *v.* Mt. Pleasant Tp., 8 Watts (Pa.) 431; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70. See also Lewiston Borough *v.* Granville Tp., 5 Pa. St. 283.

There may be several contracts of hiring to several persons, so long as the service is continuous. Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70.

46. Heidleburg *v.* Lynn, 5 Whart. (Pa.) 430, 34 Am. Dec. 566; Briar Creek Tp. *v.* Mt. Pleasant Tp., 8 Watts (Pa.) 431; Bradford Tp. *v.* Huston Tp., 15 Pa. Co. Ct. 323; Byberry Tp. *v.* Oxford Tp., 2 Ashm. (Pa.) 9.

47. Kelly Tp. *v.* Gregg Tp., 2 Walk. (Pa.) 383; Briar Creek Tp. *v.* Mt. Pleasant Tp., 8 Watts (Pa.) 431; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70; Huntington *v.* Fairmount, 2 Kulp (Pa.) 441.

48. Moreland Tp. *v.* Davidson Tp., 71 Pa. St. 371; Lewistown Borough *v.* Granville Tp., 5 Pa. St. 283; Plum Creek *v.* South Bend, 1 Pennyp. (Pa.) 408; Heidleburg *v.* Lynn, 5 Whart. (Pa.) 430, 34 Am. Dec. 566; Tioga County *v.* Lawrence Tp., 2 Watts (Pa.) 43; Liberty Tp. *v.* Lamar Tp., 23 Pa. Co. Ct. 569; Loyalsock Tp. *v.* Johnsonburg Borough, 14 Pa. Co. Ct. 323; Fayette Tp. *v.* Fermanagh, 11 Pa. Co. Ct. 70; Byberry Tp. *v.* Oxford Tp., 2 Ashm. (Pa.), 9.

49. Bradford Tp. *v.* Huston Tp., 15 Pa. Co. Ct. 323, holding further that a laborer who is employed at a log camp to cut timber may acquire a settlement in the township in which the camp is situated, if he works for a whole year at the camp.

50. Moreland Tp. *v.* Davidson Tp., 71 Pa. St. 371; Heidleburg *v.* Lynn, 5 Whart. (Pa.) 430, 34 Am. Dec. 566; Bradford Tp. *v.* Huston Tp., 15 Pa. Co. Ct. 323; Fayette Tp. *v.* Fermanagh Tp., 11 Pa. Co. Ct. 70.

Absence without consent of master.—A settlement is not lost by periods of temporary absence of the servant during the year, without the consent of the master, if the latter receive the servant back each time under the same contract. Buffalo Tp. Poor Dist. *v.* Mifflinburg Borough Poor Dist., 168 Pa. St. 445, 32 Atl. 28.

A person working by the month, who is neither hired nor at work during two months of each year, does not work under a hiring for the whole year, so as to acquire a settlement where the labor is performed, although he works there in the same business for parts of several years. Bradford Tp. *v.* Huston Tp., 15 Pa. Co. Ct. 323.

51. Bellefonte *v.* Somerset County, 168 Pa. St. 286, 31 Atl. 1086.

52. See the statutes of the different states. And see Huntington *v.* Oxford, 4 Day (Conn.) 189; Leeds *v.* Freeport, 10 Me. 356; North Brunswick Tp. *v.* Franklin Tp., 16 N. J. L. 535; Hamilton *v.* Eaton, 6 Cow. (N. Y.) 658; Lock Haven Poor-Dist. *v.* Chapman Tp. Poor-Dist., 10 Pa. Cas. 136, 13 Atl. 742.

A minor may gain a settlement by service under an indenture of apprenticeship only, where it appears that he was emancipated at the time of the commencement of the service (Milo *v.* Harmony, 18 Me. 415; Leeds *v.* Freeport, 10 Me. 356), and a minor is not emancipated from the time he has been indentured as an apprentice, so as to gain a settlement, but his settlement follows that of his father (Frankfort *v.* New Vineyard, 48 Me. 565; Oldtown *v.* Falmouth, 40 Me. 106; Benson *v.* West Haven, Brayt. (Vt.) 187).

(II) *Indenture.* If the indenture of a pauper contains a clause of indemnity, in case the pauper becomes chargeable to that district, a new settlement cannot, under the indenture, be gained in another district.[53]

(III) *Service.* Subjection to indenture, without service under it, fulfils neither the words nor the design of the statute.[54] An apprentice to gain a settlement must serve with his master for the period required by the statute, and if he absents himself and roves abroad he does not gain a settlement.[55] The service required by the statute to give a settlement must be under the indenture of apprenticeship.[56] Service for the term required by the statute with a second master will give a settlement, so long as the service is under the indenture;[57] but, to constitute a service with a second master, there must be an assignment, express or implied.[58] An apprentice gains a settlement in a poor district where the master with whom he serves resides, although the master has none.[59] Although the indenture must comply with all the provisions of the statutes relating to apprentices,[60] yet service under an indenture which is merely voidable is sufficient to support a settlement.[61]

f. Holding Public Office. In some jurisdictions it is provided by statute that a settlement may be gained in any poor district by any person who shall come to inhabit in the same, and who shall, for himself and on his own account, execute the duties of any public office, being lawfully placed therein, during a specified period.[62] When the statute requires service of one whole year in a given office to give a settlement, it means a political year, or from one election to another;[63] and hence if a person chosen to the office voluntarily removes from the town or parish, as the case may be, within the year,[64] or is removed therefrom by compulsion,[65] so as to render himself incapable of performing the duties of his office for a whole year whenever lawfully required so to do, he gains no settlement by virtue of such choice. A statute providing merely that one who holds a given office in the town for two years shall have a settlement does not necessitate a holding of such office for two years in succession.[66]

Where the statute exempts from its provision persons sent into a poor district for education, a person sent into the district under indenture to learn the art of husbandry is a person sent for education. Barrington *v.* Gilmanton, 3 N. H. 83.

53. Lock Haven Poor-Dist. *v.* Chapman Tp. Poor-Dist., 10 Pa. Cas. 136, 13 Atl. 742.

54. Jefferson Tp. *v.* Pequanack Tp., 13 N. J. L. 187.

55. Jefferson Tp. *v.* Pequanack Tp., 13 N. J. L. 187.

56. Orange Tp. *v.* Springfield Tp., 14 N. J. L. 321; Niskayuna *v.* Albany, 2 Cow. (N. Y.) 537.

57. Kingwood Tp. *v.* Bethlehem Tp., 13 N. J. L. 221; All Hallows *v.* St. Olave, Str. 554; Holy Trinity *v.* Shoreditch, Str. 10. See also Orange Tp. *v.* Springfield Tp., 14 N. J. L. 321.

58. Orange Tp. *v.* Springfield Tp., 14 N. J. L. 321.

59. South Brunswick Tp. *v.* Independence Tp., 14 N. J. L. 549.

60. North Brunswick Tp. *v.* Franklin Tp., 16 N. J. L. 535; Hopewell Tp. *v.* Amwell Tp., 3 N. J. L. 422; Niskayuna *v.* Albany, 2 Cow. (N. Y.) 537; Pine Tp. *v.* Franklin Tp., 4 Pa. Dist. 715. But see Huntington *v.* Oxford, 4 Day (Conn.) 189.

Service under a written agreement between the child and the master alone, and without seals, is not such an apprenticeship by indenture as the statute requires in order to gain a settlement to an apprentice. North Brunswick Tp. *v.* Franklin Tp., 16 N. J. L. 535.

61. Franklin Tp. *v.* South Brunswick Tp., 3 N. J. L. 442; Hamilton *v.* Eaton, 6 Cow. (N. Y.) 658; Owasco *v.* Oswegatchie, 5 Cow. (N. Y.) 527; Hudson *v.* Taghkanac, 13 Johns. (N. Y.) 245; Reading *v.* Cumree, 5 Binn. (Pa.) 81.

62. See the statutes of the several states relating to the subject. And see Barre *v.* Greenwich, 1 Pick. (Mass.) 129; Rumney *v.* Campton, 10 N. H. 567; Sherburne *v.* Norwick, 16 Johns. (N. Y.) 186; Lincoln *v.* Warren, 19 Vt. 170.

63. Paris *v.* Hiram, 12 Mass. 262.

64. Barre *v.* Greenwich, 1 Pick. (Mass.) 129; Rumney *v.* Campton, 10 N. H. 567; Acworth *v.* Lyndeborough, 2 N. H. 295; Sherburne *v.* Norwich, 16 Johns. (N. Y.) 186.

65. Paris *v.* Hiram, 12 Mass. 262. See also Burrough's Set. Cas. 239 [*cited* in Paris *v.* Hiram, *supra*].

66. Lincoln *v.* Warren, 19 Vt. 170, holding, however, that it is essential to the acquisition of a legal settlement under such provision that the person shall have a continuous residence in the town from the time he first holds the office until the settlement has been acquired; and if he holds the office for two years, but with an interval between, and during that period resides out of town

g. Military Settlement — (I) *In General.* In one jurisdiction the statute provides that any person duly enlisted and mustered in the United States military service, as part of the quota of a city or town, under any call of the president during the Civil war, and who fulfils the other requirements of the act, shall be deemed to have acquired a settlement in such city or town.[67]

(II) *Considerations Affecting.* The fact that a person has been, as part of the quota of a city or town, enlisted and mustered under a false name, does not prevent him from acquiring a settlement.[68] A settlement may be acquired under statute, by reason of service in the navy as part of the quota of a town, although the person so serving was at the time of his enlistment a resident of another town.[69] The statute not limiting its provisions to those who had attained their majority at the time of enlistment, one who was a minor at the time of his enlistment upon the quota of a town, acquired, together with his wife and minor children, the same settlement therein as if he had been of full age at the time of his enlistment.[70] To give a settlement by reason of military service, such service must have been as part of the quota of some city or town in the state;[71] but to give a settlement the person for whom it was claimed need not, at the date of his enlistment, have been actually credited to the town or city under the then existing provisions of law, as part of some quota which it was then liable by law to furnish, and it is sufficient if at any time he was credited as a part of such quota, although his term of service may have ended before any legal recognition and assignment,[72] the service as a drafted man is not for that reason deprived of the benefits of the statute.[73] Although the statute provides that the person for whom the settlement is claimed must have continued in the service for a term not less than one year,[74] yet the length of his service is immaterial if he died or was disabled by disease contracted while engaged in the service.[75] One who has left the service otherwise than by an honorable discharge does not acquire a settlement.[76]

(III) *Replacing Settlement by Acquiring Another.* One who has acquired a military settlement under the statute can, like any other person, gain, in any of the modes prescribed by the ordinary law, a new settlement in another

for any period, he acquires no legal settlement.

67. See Mass. St. (1878) c. 190. And see Newburyport *v.* Worthington, 132 Mass. 510; Luenburg *v.* Shirley, 132 Mass. 498; Milford *v.* Uxbridge, 130 Mass. 107.

War of Revolution.— Where an alien enlisted in 1775, as a soldier in the revolutionary army, and served as a soldier in that army during that war as one of the quota of the town of P, it was held that such soldier, by virtue of the act of Feb. 17, 1871, acquired a settlement in the town of P, and consequently a capacity to gain a settlement in any other town by commorancy. Griswold *v.* North Stonington, 5 Conn. 367.

68. Milford *v.* Uxbridge, 130 Mass. 107.

69. Brockton *v.* Uxbridge, 138 Mass. 292, holding further that the settlement may be so acquired, notwithstanding a provision of the federal statute that naval recruits are to be credited to the quota of the town "in which they respectively reside."

70. Fall River *v.* Taunton, 150 Mass. 106, 22 N. E. 584.

71. Brockton *v.* Uxbridge, 138 Mass. 292.

72. Bridgewater *v.* Plymouth, 97 Mass. 382. See also Boston *v.* Mt. Washington, 139 Mass. 15, 29 N. E. 60.

73. Sheffield *v.* Otis, 107 Mass. 282, in which it was said that the term duly enlisted necessarily includes soldiers who have been drafted as well as those who have entered the service as volunteers.

74. Bridgewater *v.* Plymouth, 97 Mass. 382.

75. Bridgewater *v.* Plymouth, 97 Mass. 382.

76. Brockton *v.* Uxbridge, 138 Mass. 292, holding, however, that where a discharge paper merely states that the person alleged to have acquired a settlement "has this day been discharged" from the naval service of the United States, his discharge is properly held to be an honorable one, it not appearing to be otherwise.

A soldier discharged for disability does not thereby acquire a settlement under the statute, unless it appears that the disability arose from wounds received or disease contracted in the service. Ashland *v.* Marlborough, 106 Mass. 266.

Desertion during second enlistment.— Since the statute excepts from its benefits a soldier guilty of wilful desertion, it does not enable a soldier who was guilty of wilful desertion during his second enlistment to gain a settlement which, but for this, he might have acquired by virtue of his first enlistment. Cambridge *v.* Paxton, 144 Mass. 520, 12 N. E. 188.

Discharged as illegally drafted.— The fact that a person after having been in due form enlisted and mustered, and having served the

town or city, and thereby replace the military one.[77] So too a military settlement gained by a person in one town may be replaced by a military settlement gained by him in another town, although both settlements were acquired before the passage of the act.[78]

h. Residence[79] — (I) *In General.* It is generally provided by statute that a person who shall in his own right reside in any poor district, for a given period, and fulfil the other requirements of the statute, shall thereby acquire a legal settlement therein.[80]

(II) *Necessity of, in Connection With Payment of Taxes.* Payment of taxes during the period prescribed by the statute, without a residence, throughout the same entire term, does not establish the same.[81]

(III) *Necessity of Obtaining Approbation of Town to Acquire Settlement Thereby.* Under the earlier statutes of the New England states, no person coming to reside or dwell in a town could thereby gain a settlement without obtaining the approbation of the inhabitants of the town given at a general town meeting.[82] Under such a statute it was held that a person cannot gain a settlement by an implied approbation by the town of his residing therein.[83]

(IV) *Nature and Requisites.* The residence requisite to the gaining of a settlement in a poor district is a residence therein in one's own right.[84] The residence must be open and notorious, and attended with such circumstances as to lead the authorities of the poor district, in the exercise of proper vigilance, to the conclusion that there is an intention to gain a settlement.[85] That residence must be of a fixed and permanent character as distinguished from transient or temporary.[86]

period required by the statute, was discharged as illegally drafted, does not deprive him of the benefits contemplated by the statute. Sheffield *v.* Otis, 107 Mass. 282.

77. Boston *v.* Warwick, 132 Mass. 519.

78. Granville *v.* Southampton, 138 Mass. 256.

79. Effect of receiving pauper supplies see *infra*, III, D, 4, a.

Liability of place of residence for support of pauper see *infra*, IV, C, 1, c.

Necessity for payment of taxes in connection with residence see *infra*, III, D, 2, h, (II).

Necessity of occupation of freehold see *supra*, III, D, 2, a, (II), (A).

80. See the statutes of the various states. And see the following cases:

Connecticut.— Vernon *v.* Ellington, 53 Conn. 330, 2 Atl. 757.

Iowa.— Cerro Gordo County *v.* Wright County, 50 Iowa 439.

Massachusetts.— Somerset *v.* Rehoboth, 6 Cush. 320.

Minnesota.— Wellcome *v.* Monticello, 41 Minn. 136, 42 N. W. 930.

New Hampshire.—Northwood *v.* Durham, 2 N. H. 242.

New Jersey.— Marlboro Tp. *v.* Freehold, 50 N. J. L. 509, 14 Atl. 595.

New York.— Cattaraugus County *v.* Erie County, 21 N. Y. Suppl. 729 [*affirmed* in 143 N. Y. 631, 37 N. E. 826].

Vermont.— St. Johnsbury *v.* Waterford, 67 Vt. 641, 32 Atl. 630.

Wisconsin.— Monroe County *v.* Jackson County, 72 Wis. 449, 40 N. W. 224.

See 38 Cent. Dig. tit. "Paupers," § 65 *et seq.*

Irrespective of what season of the year the residence begins or ends a settlement is gained by residing continuously in a poor district for the full period required by the statute. Andover *v.* Merrimack County, 37 N. H. 437.

81. Southborough *v.* Marlborough, 24 Pick. (Mass.) 166; Tamworth *v.* Freedom, 17 N. H. 279; Cowanshannock Tp. *v.* Valley Tp., 152 Pa. St. 504, 25 Atl. 801; Washington *v.* Corinth, 55 Vt. 468.

82. See Malden *v.* Melrose, 125 Mass. 304; Orange *v.* Sudbury, 10 Pick. (Mass.) 22; Granby *v.* Amherst, 7 Mass. 1; West Springfield *v.* Granville, 4 Mass. 486.

83. Orange *v.* Sudbury, 10 Pick. (Mass.) 22.

For example the acceptance by a town of a list of jurymen, as revised by the selectmen, which contains the name of a person who has come into the town to reside, is not such an approbation as is required by the statute. Orange *v.* Sudbury, 10 Pick. (Mass.) 22.

84. Fairfax *v.* Westford, 67 Vt. 390, 31 Atl. 847; Marshfield *v.* Tunbridge, 62 Vt. 455, 20 Atl. 106.

85. Newbury *v.* Harvard, 6 Pick. (Mass.) 1; Henrietta Tp. *v.* Brownhelm Tp., 9 Ohio 76; Newbury *v.* Topsham, 7 Vt. 407.

However, no special notoriety is required; nor is it necessary that anything should be done to call the attention of the authorities to the fact of residence. It is held that all that is necessary in order to gain a settlement is a *bona fide* residence within the bounds of the district, in accordance with the convenience and circumstances of the party. Henrietta Tp. *v.* Oxford Tp., 2 Ohio St. 32.

86. Cerro Gordo County *v.* Wright County, 50 Iowa 439; Jefferson *v.* Washington, 19

The fact of residence in a poor district for the full statutory period is not alone sufficient,[87] but it must be attended with the intention on the part of the resident of making such district his fixed present place of abode.[88] But a person who moves into a district with the intention of making it his fixed residence, for an indefinite time, and resides for the statutory period, gains a legal settlement,[89] and such settlement is not defeated by the fact that he may have entertained a floating intention of leaving the district at some future time.[90] The residence requisite to gain a settlement is one of choice, not of legal coercion.[91] The residence must be on the actual territory within the legal limits of the poor district sought to be charged.[92] A residence on disputed territory, claimed by two towns, and over which both exercise jurisdiction, is gained in that town within whose true boundaries the territory resided on is ultimately found to be situated.[93] A settlement is gained in a town by a residence within the limits over which it exercises actual and exclusive jurisdiction, although those limits are afterward found not to be within its true boundaries,[94] and that settlement is not defeated, or in any wise affected, by the subsequent acquisition of rightful jurisdiction by such other town.[95]

(v) *DETERMINATION.* As to a person having a family his residence is usually determined by the place where his family resides;[96] but, as to a single person whose business or employment calls him away from home a great part of the time, or who is from time to time living with his friends or connections, his residence is usually determined by inquiry as to the place where he has kept his clothes or what little property he may have possessed, and to which he resorts as his home when out of employment.[97]

(vi) *CONTINUITY*—(A) *In General.* To acquire a settlement by residence in a particular poor district, the person must actually have resided there continuously for the period prescribed by the statute, intending to make that his home and residence.[98] But where a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence,[99] especially when he whose residence is in question has a family between whom and him mutual family relations are in full force.[1] Continuity of residence is not broken by absence for a longer or shorter period, without any definite intention of abandoning such residence,[2] or

Me. 293; Hampden *v.* Fairfield, 3 Me. 436; *In re* Hector, 24 N. Y. Suppl. 475.

87. *In re* Hector, 24 N. Y. Suppl. 475; Henrietta Tp. *v.* Oxford Tp., 2 Ohio St. 32. See also Reading *v.* Westport, 19 Conn. 561.

88. Knox *v.* Montville, 98 Me. 493, 57 Atl. 792; Henrietta Tp. *v.* Oxford Tp., 2 Ohio St. 32; Stamford *v.* Readsboro, 46 Vt. 606; Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

89. Greene *v.* Wynham, 13 Me. 225; Londonderry *v.* Landgrove, 66 Vt. 264, 29 Atl. 256; Stamford *v.* Readsboro, 46 Vt. 606; Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334; Middlebury *v.* Waltham, 6 Vt. 200; Monroe County *v.* Jackson County, 72 Wis. 449, 40 N. W. 224.

90. Stamford *v.* Readsboro, 46 Vt. 606; Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334; Monroe County *v.* Jackson County, 72 Wis. 449, 40 N. W. 224.

91. Woodstock *v.* Hartland, 21 Vt. 563.

92. Ellsworth *v.* Gouldsboro, 55 Me. 94.

93. Landgrove *v.* Peru, 16 Vt. 422.

94. Northwood *v.* Durham, 2 N. H. 242; Reading *v.* Weatherfield, 30 Vt. 504; Corinth *v.* Newbury, 13 Vt. 496.

95. Northwood *v.* Durham, 2 N. H. 242; Corinth *v.* Newbury, 13 Vt. 496.

So too a residence is gained in a town by residence on a part thereof which is within the actual jurisdiction of the state, although within the rightful jurisdiction of another state, which afterward obtains the actual jurisdiction on the establishment of the boundary line. Somerset *v.* Rehoboth, 6 Cush. (Mass.) 320.

96. Burlington *v.* Calais, 1 Vt. 385, 18 Am. Dec. 691.

97. Newbury *v.* Topsham, 7 Vt. 407.

98. Clinton *v.* York, 26 Me. 167; Wayne *v.* Greene, 21 Me. 357; Henrietta Tp. *v.* Brownshelm Tp., 9 Ohio 76; Monkton *v.* Panton, 12 Vt. 250; Brookfield *v.* Hartland, 10 Vt. 424; Royalton *v.* Bethel, 10 Vt. 22.

99. Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Knox *v.* Waldoborough, 3 Me. 455.

1. Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Knox *v.* Waldoborough, 3 Me. 455; Middletown *v.* Poultney, 2 Vt. 437.

2. Clinton *v.* Westbrook, 38 Conn. 9; Salem *v.* Lyme, 29 Conn. 74; Wayne *v.* Greene, 21 Me. 357; Lee *v.* Lenox, 15 Gray (Mass.)

with a continued intent to return when the purpose of the absence has been accomplished.[3]

(B) *Interruption by Imprisonment.* As to whether imprisonment in a state prison under a conviction for a crime does of itself interrupt the continuity of residence requisite to the prisoner's acquisition of a legal settlement by residence in a poor district, there is an apparent conflict of authority, it being held flatly in some jurisdictions that the continuity of the residence is interrupted by such an imprisonment,[4] while in other jurisdictions the rule obtains that such an imprisonment does not interrupt the continuity of the residence of a prisoner in a district where he had his home and was supporting his family when imprisoned,[5] especially where the evidence shows a purpose on his part to continue such residence and to return to it as soon as he is liberated.[6] Imprisonment upon a bailable criminal offense merely, in one district, has not the effect to make a break in the continuity of the residence of a man who has at the time a home and family in another district to which he intends to return when the regains his liberty.[7]

(C) *Interruption by Commitment to Insane Asylum.* In some jurisdictions it is provided by statute that the time any person shall be a patient in a hospital for the insane, except inhabitants of the town in which such hospital is situated, shall not be computed as part of the time required by law to gain a legal settlement;[8] but, independently of statute, the commitment of an insane person to a hospital for the insane and his stay there do not interrupt his residence commenced in the district from which he is removed, and prevent his acquirement of a legal settlement at the expiration of the statutory period.[9]

(VII) *CESSATION OF ESTABLISHED RESIDENCE.* The cessation of a residence

496; Worcester *v.* Wilbraham, 13 Gray (Mass.) 586.

Where the person so leaving does in fact return, an absence for a longer or shorter period, without any intention of abandoning a residence once acquired, does not interrupt its continuity. New Milford *v.* Sherman, 21 Conn. 101; Bangor *v.* Frankfort, 85 Me. 126, 26 Atl. 1088; Searsmont *v.* Thorndike, 77 Me. 504, 1 Atl. 448; Lee *v.* Lenox, 15 Gray (Mass.) 496.

Where one has an established home at which his family reside with his consent, an absence therefrom for a longer or shorter period does not interrupt the term of residence required by the poor law to give him a legal settlement. Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Pittsfield *v.* Detroit, 53 Me. 442; Knox *v.* Waldoborough, 3 Me. 455.

If a person has sufficient intelligence to form and retain a purpose of leaving for a temporary purpose and of returning, his residence required to gain a settlement is not interrupted by an absence for a temporary purpose only. Corinth *v.* Bradley, 51 Me. 540.

3. Cerro Gordo Co. *v.* Hancock County, 58 Iowa 114, 12 N. W. 124; Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 6 Atl. 319 [*affirmed* in 49 N. J. L. 482, 9 Atl. 718]; Henrietta Tp. *v.* Oxford Tp., 2 Ohio St. 32.

4. Benham *v.* Minor, 38 Conn. 252; Reading *v.* Westport, 19 Conn. 561.

While the divorce of a pauper's wife and her subsequent marriage to another man, during the period of her husband's confinement in the state prison of another state, establish an abandonment on her part of the residence established by the pauper, it does not *per se* interrupt his residence. Bangor *v.* Frankfort, 85 Me. 126, 26 Atl. 1088.

5. Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584.

6. Baltimore *v.* Chester, 53 Vt. 315, 38 Am. Rep. 677.

7. Northfield *v.* Vershire, 33 Vt. 110.

8. Peacham *v.* Weeks, 48 Vt. 73.

Where the statute contemplates that the time during which an insane person shall be supported by a poor district shall not be included in the period of residence necessary to change the settlement, the mere liability of the district to pay in the first instance, with right of recovery against those ultimately chargeable, is not support by the district. Dexter *v.* Sangerville, 70 Me. 441, holding further that where the friends of such insane person, without filing the bond required by statute and in the first instance pay all his expenses of commitment and support, and the poor district makes no payment, the time of commitment and stay at the hospital is to be included in the period of residence, in the district where the insane person had his home, necessary to change his settlement under the pauper law.

9. Pittsfield *v.* Detroit, 53 Me. 442. See also Upper Augusta Tp. *v.* Rockefeller Tp., 2 Chest. Co. Rep. (Pa.) 190.

A commitment in the residence of an insane wife in the insane asylum does not interrupt the duration and continuity of residence of the husband necessary to acquire a settlement under the Pauper Act. Bangor *v.* Wiscasset, 71 Me. 535.

once established in a poor district is in part one of intention;[10] to retain it, there must be both a definite intention to return and a place to which the person has a right to return,[11] and where a departure from an established place of residence and an intention not to return concur,[12] or where a departure or absence therefrom without any present intention of returning coexists,[13] the established residence is deemed to be changed.

3. Annexation, Consolidation, Division, and Incorporation of Towns[14] — a. Annexation and Detachment. Where a part of an existing town is by statute annexed to another existing town, the inhabitants living upon the part detached and having a settlement in the former town will acquire a settlement in the town to which they may be annexed.[15] However, such annexation does not transfer the settlement of any persons except those who actually dwell and have their homes upon territory set off at the time of its separation.[16]

b. Consolidation or Division of Towns or Districts. It is a well-established principle that on the division of a town, in the absence of a different rule prescribed by the act of division, those who have settlements in the old town become settled respectively in the towns embracing the territory where they reside at the time of division.[17] Where a portion of the territory of one town is annexed to

10. Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884.

11. Jericho *v.* Burlington, 66 Vt. 529, 29 Atl. 801, holding further that where one sells his effects and departs from his established place of residence, leaving no place to which he has a right to return, he will lose such residence, although he has an indefinite intention of returning at some future time.

12. Hampden *v.* Levant, 59 Me. 557; Wayne *v.* Greene, 21 Me. 357; Exeter *v.* Brighton, 15 Me. 58; Westbrook *v.* Bowdoinham, 7 Me. 363. See also Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Athol *v.* Watertown, 7 Pick. (Mass.) 42.

Although the intention never to return is changed, and the party does in fact return within the statutory period, the established residence is deemed to be changed. Westbrook *v.* Bowdoinham, 7 Me. 363.

Intention formed while absent.—Where one leaves his place of residence and while absent forms the intention of not returning, his residence as much ceases as if at that date he had left such residence with the intention of not returning. Hampden *v.* Levant, 59 Me. 557.

13. Detroit *v.* Palmyra, 72 Me. 256; Burnham *v.* Pittsfield, 68 Me. 580; Pittsfield *v.* Detroit, 53 Me. 442; Bangor *v.* Brewer, 47 Me. 97; Wilbraham *v.* Ludlow, 99 Mass. 587; Hartford *v.* Hartland, 19 Vt. 392; Jamaica *v.* Townshend, 19 Vt. 267. See also Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584.

Although he does in fact return, one who departs from his place of residence once established, without any intention of returning, such absence constitutes an interruption of his residence so as to prevent his gaining a settlement. Detroit *v.* Palmyra, 72 Me. 256; Burnham *v.* Pittsfield, 68 Me. 580.

14. **As affecting liability for support** see *infra*, IV, C, 1, e.

15. *Connecticut.*— Simsbury *v.* Hartford, 14 Conn. 192.

Maine.— Ripley *v.* Levant, 42 Me. 308; Eddington *v.* Brewer, 41 Me. 462; New Portland *v.* New Vineyard, 16 Me. 69; Hallowell *v.* Bowdoinham, 1 Me. 129. See also Belgrade *v.* Dearborn, 21 Me. 334.

Massachusetts.—Fitchburg *v.* Westminster, 1 Pick. 144; Great Barrington *v.* Lancaster, 14 Mass. 253; Groton *v.* Shirley, 7 Mass. 156.

New Jersey.— Franklin Tp. *v.* Lebanon Tp., 51 N. J. L. 93, 16 Atl. 184; Bethlehem Tp. *v.* Alexandria Tp., 32 N. J. L. 67.

Pennsylvania.— Wilkesbarre *v.* Dallas, 3 Am. L. J. 59.

Vermont.— Westfield *v.* Coventry, 71 Vt. 175, 44 Atl. 66; Wilmington *v.* Somerset, 35 Vt. 232.

See 38 Cent. Dig. tit. "Paupers," § 71.

The annexation of a plantation to a town by statute, which is silent on the subject of pauper settlements, does not change the settlement of the inhabitants of the plantation which they have in other towns. Woodstock *v.* Bethel, 66 Me. 569.

What is not annexation.— Where a part of B was annexed to P and the incorporation of B was annulled as to the residue, it was held that this, so far as it affected the settlement of a person who had resided in B, was a division of B and not an annexation of part of it. Livermore *v.* Phillips, 35 Me. 184.

16. Monroe *v.* Frankfort, 54 Me. 252; Brewer *v.* Eddington, 42 Me. 541 (holding that by Rev. St. (1841) c. 32, § 1, the question of settlement in a new town formed from one or more old towns depends upon the fact of an actual home and not a temporary residence within its limits at the time of its incorporation); Starks *v.* New Sharon, 39 Me. 368; New Portland *v.* Rumford, 13 Me. 299; Hallowell *v.* Bowdoinham, 1 Me. 129; Fitchburg *v.* Westminster, 1 Pick. (Mass.) 144; Great Barrington *v.* Lancaster, 14 Mass. 253; Franklin Tp. *v.* Lebanon Tp., 51 N. J. L. 93, 16 Atl. 184.

17. *Connecticut.*— Naugatuck *v.* Middlebury, 20 Conn. 378; Waterbury *v.* Bethany, 18 Conn. 424; Simsbury *v.* Hartford, 14 Conn. 192.

Maine.— Frankfort *v.* Winterport, 51 Me.

another town, or incorporated into a new town, an agreement between the towns that one portion of the paupers should be supported by one town, and the residue by the other town, although binding upon the parties as to the support in question, will not affect the settlement of the paupers.[18]

c. Incorporation. Where territory is incorporated as a town, all the inhabitants of such territory at the time of the incorporation gain a settlement in the town by such act of incorporation.[19] Where a person has a settlement in an incorporated town, he does not gain a settlement in a new town by mere residence in the territory comprising the new town at the time of incorporation.[20]

d. Effect on Persons Absent. In many jurisdictions it is provided by statute that persons who are absent from a town at the time of its division or annexation to some other town shall have a settlement in that town wherein their last dwelling-place or home shall happen to fall on division or annexation, except in cases where they shall have gained a settlement.[21] While the power of the

445; Brewer *v.* Eddington, 42 Me. 541; Winthrop *v.* Auburn, 31 Me. 465. See also Yarmouth *v.* North Yarmouth, 44 Me. 352.

Massachusetts.— Salem *v.* Ipswich, 10 Cush. 517; Sutton *v.* Orange, 6 Metc. 484; New Braintree *v.* Boylston, 24 Pick. 164; East Bridgewater *v.* Bridgewater, 2 Pick. 572; Princeton *v.* West Boylston, 15 Mass. 257; Westport *v.* Dartmouth, 10 Mass. 341; West Springfield *v.* Granville, 4 Mass. 486. See also Bridgewater *v.* West Bridgewater, 9 Pick. 55. But see Sutton *v.* Dana, 4 Pick. 117.

New Hampshire.— Mason *v.* Alexandria, 3 N. H. 303. But see Strafford *v.* Strafford County, 43 N. H. 606.

New Jersey.—Franklin Tp. *v.* Lebanon Tp., 51 N. J. L. 93, 16 Atl. 184.

Ohio.—Ashland County *v.* Richland County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49; Center Tp. *v.* Wills Tp., 7 Ohio, Pt. II, 171 [*overruling* Pike Tp. *v.* Union Tp., 5 Ohio 528].

Pennsylvania.— Lewis *v.* Turbut, 15 Pa. St. 145; Hopewell Tp. *v.* Independence Tp., 12 Pa. St. 92; Monroe *v.* Durell, 2 Pa. L. J. Rep. 100.

Wisconsin.— Hay River *v.* Sherman, 60 Wis. 54, 18 N. W. 740.

See 38 Cent. Dig. tit. "Paupers," § 72.

Division defined.— Within the meaning of N. H. St. Dec. 16, 1828, a town was divided whenever any portion of it was separated from the rest, whether the severed portion was incorporated into a new town or annexed to an old one. Barnstead *v.* Alton, 32 N. H. 245.

18. Oxford *v.* Bethany, 15 Conn. 246; Clinton *v.* Benton, 49 Me. 550; Veazie *v.* Howland, 47 Me. 127; Westborough *v.* Rehoboth, 4 Cush. (Mass.) 185; West Boylston *v.* Boylston, 15 Mass. 261. See also Lancaster *v.* Sutton, 16 Mass. 112.

19. *Connecticut.*— Vernon *v.* East Hartford, 3 Conn. 475.

Maine.— Woodstock *v.* Bethel, 66 Me. 569 (holding, however, that the person must have resided on the plantation for more than five years); Kirkland *v.* Bradford, 33 Me. 580; Fayette *v.* Hebron, 21 Me. 266; St. George *v.* Deer Isle, 3 Me. 390. See, however, Gorham *v.* Springfield, 21 Me. 58, holding that where a person leaves a town with the intention of going to another place and to purchase a lot of land and settle there, the latter place does not become his dwelling-place or home under the mode of gaining a settlement under the act of 1821, chapter 122, unless that intention is carried into effect by having his dwelling and home actually established there before its incorporation into a town.

Massachusetts.— Sutton *v.* Orange, 6 Metc. 484; Great Barrington *v.* Lancaster, 14 Mass. 253; Buckfield *v.* Gorham, 6 Mass. 445; Bath *v.* Bowdoin, 4 Mass. 452.

New Hampshire.— Berlin *v.* Gorham, 34 N. H. 266; Salisbury *v.* Orange, 5 N. H. 348.

Wisconsin.— Hay River *v.* Sherman, 60 Wis. 54, 18 N. W. 740, holding that the words "actually dwells" in Rev. St. § 15, subd. 8, providing that when any territory is organized into a town, every person having a legal settlement in such territory, and who actually dwells or has his home therein, shall thereafter have a legal settlement in such new town, include a pauper who was boarded or supported at a particular house.

See 38 Cent. Dig. tit. "Paupers," § 73.

20. Frankfort *v.* Winterport, 51 Me. 445; Smithfield *v.* Belgrade, 19 Me. 387; Beetham *v.* Lincoln, 16 Me. 137; Bloomfield *v.* Skowhegan, 16 Me. 58; Walpole *v.* Hopkinton, 4 Pick. (Mass.) 357; Southbridge *v.* Charlton, 15 Mass. 248; West Springfield *v.* Granville, 4 Mass. 486; New Chester *v.* Bristol, 3 N. H. 71. And see Mt. Desert *v.* Seaville, 20 Me. 341, holding that a pauper whose settlement in a town was acquired by a residence in a part of it, which was afterward incorporated into a new town, but whose residence and home at the time of division were in the part remaining, being then supported there by the town as a pauper, does not have a settlement in the new town by the act of incorporation.

Residence at a poorhouse situated within the limits of a new town incorporated out of an old one does not become fixed in the new town, from the fact of thus living therein. Brewer *v.* Eddington, 42 Me. 541.

21. *Connecticut.*— Mansfield *v.* Granby, 1 Root 179.

legislature to enact statutes of this character has been assailed, the courts have sustained their validity.[22]

4. Preventing Settlement — a. Receiving Supplies — (i) *In General.* Although a person has resided in a town for the statutory period necessary to acquire a settlement therein, he does not thereby acquire a settlement in such town if during the time he received relief as a pauper;[23] and it has been held immaterial whether such relief was furnished by the town where he resided, or by the town where he had his settlement.[24] Likewise, where a member of a person's family has become chargeable to and received supplies from the town, the residence of such person for the statutory period will not entitle him to a settlement.[25] Under some statutes those only can be considered as his family who continue under his care and protection.[26] Under other statutes the term "family"

Maine.— Rockland *v.* Morrill, 71 Me. 455 (holding that a person who by reason of nine years' absence is presumed to have died prior to the division of the town, a part of which is incorporated into a new town, cannot be considered as "absent at the time" of the division, within the meaning of Rev. St. c. 23, § 1, cl. 4; neither can he be considered as having his "home in the new town," within the last clause in that section); Manchester *v.* West Gardiner, 53 Me. 523; Ripley *v.* Levant, 42 Me. 308; Belgrade *v.* Dearborn, 21 Me. 334; St. George *v.* Deer Isle, 3 Me. 390 (holding that if at the time of the incorporation of a town a person having a legal home there be resident in another town, at service, with the intention of returning at some future day, which intention is afterward abandoned, such subsequent abandonment of the purpose of returning does not affect the question of settlement).

Massachusetts.— Malden *v.* Melrose, 125 Mass. 304; Lexington *v.* Burlington, 19 Pick. 426; Hanson *v.* Pembroke, 16 Pick. 197; Sutton *v.* Dana, 4 Pick. 117; Salem *v.* Hamilton, 4 Mass. 676; Windham *v.* Portland, 4 Mass. 384. See, however, Bath *v.* Bowdoin, 4 Mass. 452; Brewster *v.* Harwich, 4 Mass. 278.

New Hampshire.— Barnstead *v.* Alton, 32 N. H. 245.

Vermont.— Wilmington *v.* Somerset, 35 Vt. 232.

See 38 Cent. Dig. tit. "Paupers," § 74.

22. Wilton *v.* New Vineyard, 43 Me. 315.

23. *Connecticut.*— Lisbon *v.* Franklin, 1 Root 423.

Maine.— Freeport *v.* Sidney, 21 Me. 305.

Massachusetts.— Worcester *v.* Auburn, 4 Allen 574; Oakham *v.* Sutton, 13 Metc. 192; Taunton *v.* Middleborough, 12 Metc. 35; West Newbury *v.* Bradford, 3 Metc. 428; Brewster *v.* Dennis, 21 Pick. 233; East Sudbury *v.* Sudbury, 12 Pick. 1; East Sudbury *v.* Waltham, 13 Mass. 460.

New Hampshire.— Croydon *v.* Sullivan County, 47 N. H. 179.

Pennsylvania.— Brady Tp. *v.* Clinton Tp., 1 Pa. Co. Ct. 127; Union Tp. *v.* Monroe Tp., 8 Kulp 521.

See 38 Cent. Dig. tit. "Paupers," § 75.

Supplies to a soldier, to prevent him from gaining a new settlement, must be given to relieve distress not gained by injuries sustained in the war. Augusta *v.* Mercer, 80 Me. 122, 13 Atl. 401.

24. Worcester *v.* Auburn, 4 Allen (Mass.) 574; Taunton *v.* Middleborough, 12 Metc. (Mass.) 35; Croyden *v.* Sullivan County, 47 N. H. 179; Brady Tp. *v.* Clinton Tp., 1 Pa. Co. Ct. 127.

25. Norwich *v.* Saybrook, 5 Conn. 384; Winterport *v.* Newburgh, 78 Me. 136, 3 Atl. 48; Oakham *v.* Warwick, 13 Allen (Mass.) 88; Gilmanton *v.* Sanbornton, 56 N. H. 336; Croyden *v.* Sullivan County, 47 N. H. 179. *Contra,* Homer Poor Dist. *v.* Austin Poor Dist., 19 Pa. Co. Ct. 546.

Support furnished an insane wife in a hospital is not considered as pauper relief, and does not affect the husband's residence or prevent him from gaining a new residence. Bangor *v.* Wiscasset, 71 Me. 535; Glenburn *v.* Naples, 69 Me. 68; Penn's Tp. *v.* Selin's Grove, 1 Pa. Co. Ct. 383. *Contra,* under Massachusetts statute. Oakham *v.* Warwick, 13 Allen (Mass.) 88; Woodward *v.* Worcester, 15 Gray (Mass.) 19 note; Charlestown *v.* Groveland, 15 Gray (Mass.) 15.

The wife of a minor son is not a member of the family of the father within the meaning of the statute. Manchester *v.* Rupert, 6 Vt. 291.

Necessity of knowledge of relief furnished. — Relief furnished to members of a person's family, without his knowledge, and while he is able to support them, will not prevent such person from gaining a settlement. Bangor *v.* Readfield, 32 Me. 60; Dixmont *v.* Biddeford, 3 Me. 205; Wareham *v.* Milford, 105 Mass. 293; Berkeley *v.* Taunton, 19 Pick. (Mass.) 480.

26. Raymond *v.* Harrison, 11 Me. 190; Hallowell *v.* Saco, 5 Me. 143; Dixmont *v.* Biddeford, 3 Me. 205; Green *v.* Buckfield, 3 Me. 136.

The furnishing of supplies to a minor child, who is not a member of his father's family, but is away from his care and protection, either through his own fault or his father's neglect, without the knowledge or consent of the father, by a distant town where he may happen to fall into distress, he being of sufficient ability and willing to support him at his own home, is not considered a furnishing of supplies to him as a pauper, so as to prevent his acquiring a settlement to which he would otherwise be entitled. Bangor *v.* Read-

is deemed to embrace all the persons whom it is the right of the head of the family to control, and his duty to support.[27] Relief furnished and accepted when the person or his family was not in need of it does not affect the settlement.[28] But if the necessity for relief exist, it is not essential to show that the recipient called for it, or that the party whose settlement is thereby affected should have assented to the furnishing of it by the town.[29]

(II) *WHAT CONSTITUTES.* In order to prevent the gaining of a settlement the relief must be actually furnished by the town,[30] and must be received as a pauper.[31] If supplies are furnished by the town because the pauper is in distress and in need of relief, the character of the relief is immaterial.[32] Supplies which have been furnished gratuitously or on the individual credit of the recipient thereof have no effect.[33] So it is held that aid rendered in discharge of a duty assumed by contract, and not in discharge of a duty imposed by statute, will not prevent a person from acquiring a settlement in a town.[34] A promise to repay and the actual repayment do not change the nature of the relief,[35] unless the relief is

field, 32 Me. 60; Dixmont *v.* Biddeford, 3 Me. 205; Green *v.* Buckfield, 3 Me. 136.

Where the father has deliberately abandoned his family and taken up his residence in another town, emancipating them from all duty to him and renouncing all obligations to them, supplies furnished, even under such circumstances as imply a knowledge of the fact upon his part, will not be construed as supplies furnished to him, so as to prevent his gaining a settlement in his new place of residence. Liberty *v.* Palermo, 79 Me. 473, 10 Atl. 455; Eastport *v.* Lubec, 64 Me. 244; Raymond *v.* Harrison, 11 Me. 190; Hallowell *v.* Saco, 5 Me. 143; Scranton Poor Dist. *v.* Danville, 106 Pa. St. 446; Damascus *v.* Buckingham, 3 Pa. Dist. 744.

When the parental and filial relation continues to subsist, and there has been no emancipation or abandonment, and the circumstances are such as to make it evident that the father has knowledge of the necessities of the child, and he fails to supply those necessities, and they are supplied by the town officers, acting in good faith to relieve a case of actual want and distress, the supplies thus furnished will be deemed supplies furnished indirectly to the father, and will operate to prevent his gaining a settlement. Lewiston *v.* Harrison, 69 Me. 504; Eastport *v.* Lubec, 64 Me. 244; Sanford *v.* Lebanon, 31 Me. 124; Clinton *v.* York, 26 Me. 167; Garland *v.* Dover, 19 Me. 441.

27. Cheshire *v.* Burlington, 31 Conn. 326.

28. Veazie *v.* Chester, 53 Me. 29.

Rule for determining need of assistance see Wallingford *v.* Southington, 16 Conn. 431.

29. Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415; Eastport *v.* Lubec, 64 Me. 244; Clinton *v.* York, 26 Me. 167; Corinna *v.* Exeter, 13 Me. 321; Weston *v.* Wallingford, 52 Vt. 630.

Applications of rule.—If supplies, furnished *bona fide* by overseers to a person destitute, are in fact used for the relief of his destitution, or are received for the purpose of such relief, his unwillingness to receive them as pauper supplies, or his protest against so regarding them, or his declaration that he shall not so regard them, cannot prevent them from being so regarded, and from drawing after them all of their legal consequences. Veazie *v.* Chester, 53 Me. 29.

Case not within rule.— But if, when supplies are furnished, the overseers distinctly agree that the supplies are not and shall not be regarded as pauper supplies, but as a gift or loan to one in need, whether to be returned in kind or paid for, or not, and they are thus received, the party so receiving will not be legally affected thereby, nor will the town acquire any rights thereby in its relation to other towns. Veazie *v.* Chester, 53 Me. 29.

30. Corinna *v.* Hartland, 70 Me. 355; Canaan *v.* Bloomfield, 3 Me. 172, holding that where the selectmen of a town drew an order in favor of a pauper on one of the inhabitants for supplies to be furnished to the pauper, which the drawee did not accept, but the supplies were voluntarily advanced by another person who took up the order, these supplies were not "received from some town," within the meaning of St. (1821) c. 122, § 2, the person advancing not having any remedy against the town for reimbursement, and hence the receipt of such supplies will not prevent the gaining of a settlement under the act.

Relief furnished under such circumstances as not to make the town liable will not prevent the gaining of a settlement. Windham *v.* Portland, 23 Me. 410.

The support of a parent by a child is not supporting a poor person as a pauper within the statute. Standish *v.* Windham, 10 Me. 97; Monroe County *v.* Jackson County, 72 Wis. 449, 40 N. W. 224.

31. **The giving of aid on a single occasion** to a family of poor persons will not prevent them from acquiring a settlement. Port Washington *v.* Saukville, 62 Wis. 454, 22 N. W. 717. See also Lawrence Tp. *v.* Delaware Tp., 148 Pa. St. 380, 23 Atl. 1124.

32. A house is as much a pauper supply as food or clothing. Lee *v.* Winn, 75 Me. 465.

33. Lebanon *v.* Hebron, 6 Conn. 45.

34. Wiscasset *v.* Waldoborough, 3 Me. 388; Cavendish *v.* Mt. Holly, 48 Vt. 525.

35. Norwich *v.* Saybrook, 5 Conn. 384; Lewiston *v.* Harrison, 69 Me. 504; Veazie *v.* Chester, 53 Me. 29.

furnished to the pauper on a pledge of sufficient property to secure a remuneration.[36]

b. Warning Out[37] — (i) *In General.* The process of warning individuals to leave town, in order to prevent their gaining a settlement, is analogous to the English practice of orders of removal, by justices of the sessions. The design in both cases is to impose the burden of maintenance on the town or parish where the pauper has his legal settlement. The mode of warning out is merely a milder form of effecting this object.[38] The power to warn out new settlers in any town is not designed to operate as a general act of exclusion against all who may come within the bounds of any town to reside, but is placed in the hands of the selectmen to be exercised or not, in peculiar circumstances, according to their discretion. This discretion they have no right to depute to any third person to exercise for them, and the warrant must be the direct act of the selectmen, and be specific in its character.[39]

(ii) *Requisites and Sufficiency.* A warning to prevent a pauper from gaining a settlement in a town must follow strictly the statutory requirements.[40] Mere formal errors will not, however, invalidate a warning if the matter intended appear with sufficient certainty from the whole.[41] Unless expressly required by the statute, a warning need not be under the seal of the selectmen or signed by them.[42]

(iii) *Service.* The warning must be served by the delivery of a true and attested copy thereof on the person or persons to be warned, with the officers' return thereon; or by leaving such copy at the house of his or their usual abode with some person of sufficient discretion then resident therein.[43] If there be no such person with whom a copy can be left, it may be left at the usual abode of the person to be warned in such manner that he will most probably receive it. The right of the officer to adopt this method of service depends upon his inability to serve it in either of the first two methods named.[44] If the service is not personal it should be certified to have been on "one then residing" where the pauper did.[45]

(iv) *Return and Record.* The officer's return must recite every material fact necessary to show a complete legal service.[46] Thus the return must show on what persons the process was served,[47] and recite the particular mode of service of the warning order.[48] The time of residence of a pauper in a town must be shown in the warrant, or the return of the officer.[49] The return of the officer

36. Montpelier *v.* Calais, 5 Vt. 571.

37. Notice to remove paupers see *infra*, IV, C, 2, d.

38. Jaffrey *v.* Mt. Vernon, 8 N. H. 436.

39. Jaffrey *v.* Mt. Vernon, 8 N. H. 436.

40. Williamsburg Tp. *v.* Jackson Tp., 11 Ohio 37 (holding that a notice warning one to depart from a township to prevent his gaining a settlement in that township, signed by only one of two trustees of the poor, is void); Wheelock *v.* Lyndon, 6 Vt. 524.

41. Dummerstown *v.* Jamaica, 5 Vt. 399; Shrewsbury *v.* Mt. Holley, 2 Vt. 220.

42. Peterborough *v.* Temple, 2 N. H. 406.

43. Castleton *v.* Weybridge, 46 Vt. 474; New-Haven *v.* Vergennes, 3 Vt. 89.

Warning against husband and wife.— Where a warning issues against a man and his wife, it is sufficient to serve it on the husband alone. Dummerston *v.* Jamaica, 5 Vt. 399; Barnet *v.* Concord, 4 Vt. 564.

Service on one of the name and town mentioned in a warning is *prima facie* sufficient in default of evidence of another person of the same name in the town. Dummerston *v.* Jamaica, 5 Vt. 399.

44. Castleton *v.* Weybridge, 46 Vt. 474.

45. Reading *v.* Rockingham, 2 Aik. (Vt.) 272.

46. Castleton *v.* Weybridge, 46 Vt. 474; Barre *v.* Morristown, 4 Vt. 574; Barnet *v.* Concord, 4 Vt. 564; Townsend *v.* Athens, 1 Vt. 284 (holding that the warning out of a pauper is insufficient, if the return admit of any doubt as to the strict regularity of the service); Reading *v.* Rockingham, 2 Aik. (Vt.) 272; Marvin *v.* Wilkins, 1 Aik. (Vt.) 107.

47. Waterford *v.* Brookfield, 2 Vt. 200.

48. Barre *v.* Morristown, 4 Vt. 574; Barnet *v.* Concord, 4 Vt. 564; Marshfield *v.* Montpelier, 4 Vt. 284 (holding that the return of a warning-out process which does not show in which of two ways it was served, one of the two being bad, is insufficient); Reading *v.* Weathersfield, 3 Vt. 349; New-Haven *v.* Vergennes, 3 Vt. 89.

For return held sufficient see Fairlee *v.* Corinth, 9 Vt. 265.

49. Middleborough *v.* Plympton, 19 Pick. (Mass.) 489; Sutton *v.* Uxbridge, 2 Pick. (Mass.) 436; Hamilton *v.* Ipswich, 10 Mass.

must be recorded in the clerk's office within the period designated by statute, in order to be valid against him.[50] The return cannot be amended after the expiration of the period required for acquisition of a settlement by the persons warned.[51]

(v) *Operation and Effect.* Under the various pauper statutes, the warning of a person, in conformity with the statute, prevents the person warned from gaining a settlement, and all others who derive their settlement from him.[52] But a child born to one who was warned to depart the town gains a settlement in such town by residence for the statutory period, after coming of age, without being warned to depart.[53] Where a person has been warned to leave a town, he cannot gain a settlement by any residence, however long;[54] nor, it seems, by returning after a temporary absence too short to enable him to gain a settlement by residence elsewhere.[55] But if, after the warning, he left the town and returned after an absence sufficiently long to acquire a settlement elsewhere, a new warning is necessary to prevent a settlement,[56] unless the statute extends the effect of the warning to all subsequent, although distinct, periods of residence.[57]

(vi) *Evidence.* The burden of proving the issuance, service, return, and recording of the warning order is upon the party claiming the benefit of such proceeding, and if not shown by the party objecting to the settlement, it is presumed not to exist;[58] and, in the absence of all proof save that a warning order was issued, it is not to be presumed that the return was made in conformity with the provisions of the statute.[59] The best evidence of the return is a memorandum made by the clerk of the court of the time when the return was received, and where such memorandum is made it is conclusive evidence of such time,[60] but this is not the sole evidence.[61]

E. Derivative Settlement[62] **— 1. In General.** The general rule is that every

506; Coventry *v.* Boscawen, 9 N. H. 227; Jaffrey *v.* Mt. Vernon, 8 N. H. 436; Meredith *v.* Exeter, 8 N. H. 136; London *v.* Deering, 1 N. H. 13.

50. Northwood *v.* Durham, 2 N. H. 242; Bow *v.* Nottingham, 1 N. H. 260; Olive Tp. *v.* Manchester Tp., 8 Ohio 113 (holding that the statute requiring that the warrant and return be recorded with the clerk of the township must be strictly complied with, and a failure to record the same is fatal); Salisbury *v.* Middlebury, 28 Vt. 282; New-Haven *v.* Vergennes, 3 Vt. 89; Mt. Holly *v.* Panton, Brayt. (Vt.) 182.

51. New-Haven *v.* Vergennes, 3 Vt. 89; Pittsford *v.* Brandon, Brayt. (Vt.) 183.

52. Berkley *v.* Somerset, 16 Mass. 454; Somerset *v.* Dighton, 12 Mass. 383; Shirley *v.* Watertown, 3 Mass. 322; Northwood *v.* Durham, 2 N. H. 242; Wells *v.* Westhaven, 5 Vt. 322.

Illegitimate minor children.—A statute requiring persons to be warned out, to prevent their acquiring a settlement, does not extend to minors, although illegitimate. Somerset *v.* Dighton, 12 Mass. 383; Manchester *v.* Springfield, 15 Vt. 385.

A woman living with a man as his wife under a void marriage is not included in a warning of the man and his family; and she may gain a settlement by residence. Manchester *v.* Springfield, 15 Vt. 385.

53. Berkley *v.* Somerset, 16 Mass. 454; Middlebury *v.* Hubbardton, Brayt. (Vt.) 183.

54. Chelsea *v.* Malden, 4 Mass. 131. *Compare* Wayne Tp. *v.* Stock Tp., 3 Ohio 171, holding that a person gains a legal settlement in a township of Ohio, although warned on first settlement to depart, if the warning be not repeated every year.

55. Chelsea *v.* Malden, 4 Mass. 131.

56. Chelsea *v.* Malden, 4 Mass. 131.

57. Ira *v.* Clarendon, Brayt. (Vt.) 180, holding that where a pauper, upon warning, removed to and gained a settlement in another town, and then returned and resided a year without warning, the original warning operated to prevent the second residence becoming a settlement.

58. Fayston *v.* Richmond, 25 Vt. 446; Pawlet *v.* Sandgate, 17 Vt. 619.

59. Franklin *v.* Dedham, 18 Pick. (Mass.) 544; Sutton *v.* Uxbridge, 2 Pick. (Mass.) 436.

60. Milford *v.* Wilton, 8 N. H. 420, holding that where there is anything in the memorandum of the clerk, or any such departure from the established practice of the clerk, as to render the time of the return of a warning doubtful, or other evidence to rebut the *prima facie* evidence of the return having been seasonably made, it is evidence to be weighed by a jury.

61. Milford *v.* Wilton, 8 N. H. 420, holding that a warning duly issued and served, and subsequently found in the clerk's office in a regular file purporting to contain papers returned within the period required by the statute, is *prima facie* evidence of a seasonable return.

62. Evidence see *infra*, III, G, 1.

person who is by law incapable of gaining a settlement in his own right shall have the settlement of that person on whom he depends for support; who at the same time has the control of his person, and the right to his services.[63]

2. Husband and Wife[64] — a. General Rule. By marriage a wife acquires her husband's settlement and retains it so long as the marriage tie remains undissolved.[65]

b. Effect of Void Marriage. However, the marriage which will give a wife the settlement of her husband must be such as the laws of the state recognize, and the parties must be competent to contract.[66]

3. Parent and Child — a. General Rule. The general rule is that legitimate children have the settlement of their father, if he have any such within the state, until they gain one of their own,[67] and it is immaterial that the father had no

63. Payne *v.* Dunham, 29 Ill. 125; Lewiston *v.* North Yarmouth, 5 Me. 66; Adams *v.* Ipswich, 116 Mass. 570; Dedham *v.* Natick, 16 Mass. 135; Landaff *v.* Atkinson, 8 N. H. 532. See also Chester *v.* Plaistow, 43 N. H. 542.

64. Power of divorced woman to acquire settlement see *supra*, III, D, 1, e.

Power of married women to acquire settlement see *supra*, III, D, 1, d.

65. *Connecticut.*— Hebron *v.* Colchester, 5 Day 169; Danbury *v.* New Haven, 5 Conn. 584.

Maine.— Winslow *v.* Tray, 97 Me. 130, 53 Atl. 1008; Burlington *v.* Swanville, 64 Me. 78; Howland *v.* Burlington, 53 Me. 54; Greene *v.* Windham, 13 Me. 225. See also Bangor *v.* Wiscasset, 71 Me. 535, holding that the settlement of a wife, confined in the hospital for the insane, follows that of her husband, although he change it during the period of such confinement.

Massachusetts.— North Bridgewater *v.* East Bridgewater, 13 Pick. 303.

New Hampshire.— Barnstead *v.* Alton, 32 N. H. 345; Merrimack *v.* Hillsborough County, 19 N. H. 550; Concord *v.* Goffstown, 2 N. H. 263.

New Jersey.— Bateman *v.* Mathes, 54 N. J. L. 536, 24 Atl. 444; Alexandria Tp. *v.* Kingwood Tp., 8 N. J. L. 370.

New York.—Syracuse *v.* Onondaga County, 25 Misc. 371, 55 N. Y. Suppl. 634.

Ohio.— Spencer Tp. *v.* Pleasant Tp., 17 Ohio St. 31; Crane Tp. *v.* Antrim Tp., 12 Ohio St. 430.

Pennsylvania.— Buffaloe *v.* Whitedeer, 15 Pa. St. 182; Cumberland County *v.* Walker Tp., 7 Pa. Super. Ct. 303; Central Poor Dist. *v.* Jenkins Tp., 4 Pa. Super. Ct. 16; Delaware Tp. *v.* Zerbe Tp., 3 Pa. Co. Ct. 643; Upper Augusta Tp. *v.* Rockefeller Tp., 2 Chest. Co. Rep. 190.

Rhode Island.—Exeter *v.* Richmond, 6 R. I. 149; East Greenwich *v.* Warwick, 4 R. I. 138 (holding likewise that the husband, if he have no settlement in the state, or in any of the United States, follows the settlement of his wife); West Greenwich *v.* Warwick, 4 R. I. 136.

Vermont.— Mt. Holly *v.* Peru, 72 Vt. 68, 47 Atl. 103 (holding that in an action by one town to hold another responsible for assistance rendered the wife of a resident of the latter town, the fact that the parties had separated and the wife had never lived in the latter town constituted no defense); Bethel *v.* Tunbridge, 13 Vt. 445.

Wisconsin.— Monroe County *v.* Jackson County, 72 Wis. 449, 40 N. W. 224.

England.— Reigate Union *v.* Croydon Union, 14 App. Cas. 465, 53 J. P. 580, 59 L. J. M. C. 29, 61 L. T. Rep. N. S. 733, 38 Wkly. Rep. 295; West Ham Union *v.* St. Giles-in-the-Fields, 25 Q. B. D. 272, 54 J. P. 520, 59 L. J. M. C. 144, 63 L. T. Rep. N. S. 496, 38 Wkly. Rep. 736; Rex *v.* St. Mary, 1 B. & Ad. 201, 9 L. J. M. C. O. S. 17, 20 E. C. L. 454; Rex *v.* Birmingham, 8 B. & C. 29, 6 L. J. M. C. O. S. 67, 2 M. & R. 230, 15 E. C. L. 24 (holding that a female pauper married by the fraudulent contrivance of parish officers acquires her husband's settlement); Rex *v.* Brington, 7 B. & C. 546, 1 M. & R. 431, 7 L. J. M. C. O. S. 33, 14 E. C. L. 246.

See 38 Cent. Dig. tit. "Paupers," § 84.

66. *Maine.*— Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008; Howland *v.* Burlington, 53 Me. 54; Pittston *v.* Wiscasset, 4 Me. 293.

Massachusetts.— Middleborough *v.* Rochester, 12 Mass. 363; Dalton *v.* Bernardston, 9 Mass. 201.

Pennsylvania.— Wayne Tp. *v.* Porter Tp., 138 Pa. St. 181, 20 Atl. 939.

Vermont.— Reading *v.* Ludlow, 43 Vt. 628 (holding that the marriage of a man to a lunatic does not confer the settlement of the husband on the wife, where the marriage is decreed a nullity on the ground of lunacy); Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685 (holding that a marriage celebrated by a justice of the peace, without the consent of the parties, is of no validity to change the settlement of the female).

England.— Rex *v.* Northfield, Dougl. (3d ed.) 659; Chinham *v.* Preston, W. Bl. 192.

See 38 Cent. Dig. tit. "Paupers," § 85.

67. *Connecticut.*— Sterling *v.* Plainfield, 4 Conn. 114.

Maine.— Searsmont *v.* Thorndike, 77 Me. 504, 1 Atl. 448; Clinton *v.* Benton, 49 Me. 550; Milo *v.* Gardiner, 41 Me. 549.

Massachusetts.— West Cambridge *v.* Lexington, 1 Pick. 506, 11 Am. Dec. 231.

New Hampshire.— Merrimack *v.* Hillsborough County, 19 N. H. 550; Salisbury *v.* Orange, 5 N. H. 348.

settlement at the time of the child's birth, if he subsequently acquired one.[68] A child not emancipated follows the settlement of the father, although not residing in the father's family at the time he changes his place of settlement,[69] and the settlement of minor children born after the desertion of their mother by their father follows during their minority the settlement of the father.[70]

b. Alien Born Children and Children Born in Other States. A father's right of settlement in a state is transmitted to children born in another state so as to be available to the children on their coming to the state where the father has a settlement.[71] In one state the same rule has been held to apply in respect of children born in a foreign country and brought during infancy to the state where the father had a settlement.[72] In another state, however, an alien born takes no right to a settlement by derivation, whether he comes to this country during or subsequent to his minority, and whether his parents return with him or not.[73]

c. Adopted Children. Under the provisions of some statutes, a minor legally adopted by a man and his wife as their child takes the legal settlement of its parents by adoption.[74]

d. Illegitimate Children.[75] The general rule is that the settlement of an illegitimate child is in the town where the mother had her settlement at the time of its birth;[76] and such child retains the settlement thus acquired until he gains

New Jersey.— Madison Tp. *v.* Monroe Tp., 42 N. J. L. 493.

New York.— Niskayuna *v.* Albany, 2 Cow. 537; Adams *v.* Foster, 20 Johns. 452.

Pennsylvania.— Montoursville Borough *v.* Fairfield Tp., 112 Pa. St. 99, 3 Atl. 862; Lewis *v.* Turhut, 15 Pa. St. 145; Washington Tp. *v.* Beaver Tp., 3 Watts & S. 548; Parker City *v.* Du Bois Borough, 6 Pa. Cas. 591, 9 Atl. 457; Highland Tp. Poor Dist. *v.* Jefferson County Poor Dist., 25 Pa. Super. Ct. 601; Northmoreland Tp. *v.* Monroe Tp., 1 C. Pl. 149; Union Tp. *v.* Monroe Tp., 8 Kulp 521; Fermanagh Tp. *v.* Walker Tp., 6 Pa. L. J. 284, 4 Pa. L. J. Rep. 32.

Rhode Island.— Paine *v.* Smithfield, 10 R. I. 446; Exeter *v.* Warick, 1 R. I. 63.

Vermont.— Waterford *v.* Fayston, 29 Vt. 530; Sharon *v.* Cabot, 29 Vt. 394; Londonderry *v.* Andover, 28 Vt. 416; Bradford *v.* Lunenburgh, 5 Vt. 481; Wells *v.* Westhaven, 5 Vt. 322.

England.—Reigate Union *v.* Croydon Union, 14 App. Cas. 465, 53 J. P. 580, 59 L. J. M. C. 29, 61 L. T. Rep. N. S. 733, 38 Wkly. Rep. 295; Bath Union *v.* Berwick-upon-Tweed Union, [1892] 1 Q. B. 731, 56 J. P. 296, 61 L. J. M. C. 131, 66 L. T. Rep. N. S. 258, 40 Wkly. Rep. 414; St. Pancras Parish *v.* Norwich Incorporation, 18 Q. B. D. 521, 51 J. P. 343, 56 L. J. M. C. 37, 56 L. T. Rep. N. S. 311, 35 Wkly. Rep. 547; Reg. *v.* St. Mary, 15 Q. B. D. 95, 339, 54 L. J. M. C. 146 [*overruling* Dorchester Union *v.* Poplar Union, 21 Q. B. D. 88, 52 J. P. 435, 57 L. J. M. C. 78, 59 L. T. Rep. N. S. 687, 36 Wkly. Rep. 706]; Holborn Union *v.* Chertsey Union, 15 Q. B. D. 76, 50 J. P. 36, 54 L. J. M. C. 137, 53 L. T. Rep. N. S. 656, 33 Wkly. Rep. 698; Liverpool *v.* Portsea, 12 Q. B. D. 303, 48 J. P. 406, 53 L. J. M. C. 58, 50 L. T. Rep. N. S. 296, 32 Wkly. Rep. 494; Rex *v.* Bleasby, 3 B. & Ald. 377, 22 Rev. Rep. 431, 5 E. C. L. 221; Rex *v.* Stretton, 4 Dougl. 208, 26 E. C. L. 430; Rex *v.* Haddenham, 15 East 463; Reg. *v.* Selborne, 2 E. & E. 275, 5 Jur. N. S. 1277, 29 L. J. M. C. 56, 1 L. T. Rep. N. S. 8, 8 Wkly. Rep. 22, 105 E. C. L. 275; Rex *v.* Woburn, 8 T. R. 479; Rex *v.* St. Mary, 6 T. R. 116 (holding that the settlement of a person attainted acquired before the attainder is acquired to his children born after it); Rex *v.* Stone, 6 T. R. 56; Rex *v.* Offchurch, 3 T. R. 114.

See 38 Cent. Dig. tit. "Paupers," § 92.

Posthumous children have a derivative settlement from their father, if he had any, and in this respect are in the same condition with such as are born in his lifetime. Oxford *v.* Bethany, 19 Conn. 229; Farmington *v.* Jay, 18 Me. 376.

68. Fermanagh Tp. *v.* Walker Tp., 6 Pa. L. J. 284, 4 Pa. L. J. Rep. 32.

69. Salisbury *v.* Orange, 5 N. H. 348; Adams *v.* Oaks, 20 Johns. (N. Y.) 282.

70. Damascus *v.* Buckingham, 3 Pa. Dist. 744.

71. Oldtown *v.* Bangor, 58 Me. 353; Landaff *v.* Atkinson, 8 N. H. 532; Westford *v.* Essex, 31 Vt. 459; Waterford *v.* Fayston, 29 Vt. 530; Londonderry *v.* Andover, 28 Vt. 416, holding, however, that it is necessary for such children to move into the state during their minority. See, however, Bethlem *v.* Roxbury, 20 Conn. 298.

72. Brower *v.* Smith, 46 N. J. L. 72.

73. Elmore *v.* Calais, 33 Vt. 468; Albany *v.* Derby, 30 Vt. 718; Lyndon *v.* Danville, 28 Vt. 809, holding that an alien born does not take the original settlement in the state of a father who before his birth removed to Canada and never returned.

74. Waldoborough *v.* Friendship, 87 Me. 211, 32 Atl. 880; Washburn *v.* White, 140 Mass. 568, 5 N. E. 813.

75. **Power to acquire settlement** see *supra*, III, D, 1, g, (I).

Settlement by birth see *supra*, III, C, 2.

76. *Connecticut.*— Windham *v.* Lebanon, 51 Conn. 319; New Haven *v.* Huntington, 22

one in his own right, notwithstanding the mother subsequently acquires another.[77] An illegitimate child, who has become legitimated by a subsequent intermarriage of its parents, derives its pauper settlement according to the rules governing that of legitimate children.[78]

e. Insane Children. The general rule is that a person *non compos mentis*, living with his father, or supported by him, follows the settlement of his father wherever acquired.[79] However, where such person is not residing with or supported by his father, he does not follow a new settlement acquired by his father after he (the child) has attained his majority.[80] And one who becomes *non com-*

Conn. 25; Woodstock *v.* Hooker, 6 Conn. 35; Windsor *v.* Hartford, 2 Conn. 355; Hebron *v.* Marlborough, 2 Conn. 18; Canaan *v.* Salisbury, 1 Root 155.

Maine.— Howland *v.* Burlington, 53 Me. 54; Fayette *v.* Leeds, 10 Me. 409; Biddeford *v.* Saco, 7 Me. 270; Sidney *v.* Winthrop, 5 Me. 123.

Massachusetts.— Blackstone *v.* Seekonk, 8 Cush. 75; North Bridgewater *v.* East Bridgewater, 13 Pick. 303; Newton *v.* Braintree, 14 Mass. 382; Boylston *v.* Princeton, 13 Mass. 381; Petersham *v.* Dana, 12 Mass. 429.

New Hampshire.— Merrimack *v.* Hillsborough County, 19 N. H. 550; Dorchester *v.* Deerfield, 3 N. H. 316.

New Jersey.— Nottingham Tp. *v.* Amwell Tp., 21 N. J. L. 27. See Richardson *v.* Burlington Tp., 33 N. J. L. 190, holding that an illegitimate child, whose mother before its birth moved out of New Jersey, and, together with her child, has ever since continued to reside in another state, is not chargeable upon any township in New Jersey.

New York.— Canajoharie *v.* Johnstown, 17 Johns. 41.

Pennsylvania.— See Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166.

Vermont.— Cabot *v.* Washington, 41 Vt. 168.

England.— Reg. *v.* Sutton Le Brailes, 5 E. & B. 814, 2 Jur. N. S. 210, 25 L. J. M. C. 57, 4 Wkly. Rep. 206, 85 E. C. L. 813. See also Plymouth Union *v.* Axminster Union, [1898] A. C. 586, 62 J. P. 612, 67 L. J. Q. B. 871, 79 L. T. Rep. N. S. 74, 47 Wkly. Rep. 33. Under 4 & 5 Wm. IV, c. 76, § 71, every legitimate child has the settlement of its mother only until the age of sixteen, and after that age is removable to the place of its birth. Bodenham *v.* St. Andrew, 1 E. & B. 465, 17 Jur. 206, 22 L. J. M. C. 39, 1 Wkly. Rep. 129, 72 E. C. L. 465.

See 38 Cent. Dig. tit. "Paupers," § 83.

77. *Maine.*— Hallowell *v.* Augusta, 52 Me. 216; Biddeford *v.* Saco, 7 Me. 270; Sidney *v.* Winthrop, 5 Me. 123.

Massachusetts.— Boylston *v.* Princeton, 13 Mass. 381. But see Somerset *v.* Dighton, 12 Mass. 383; Petersham *v.* Dana, 12 Mass. 429, both decided under an earlier statute.

New Hampshire.— Dorchester *v.* Deerfield, 3 N. H. 316.

New Jersey.— McCoy *v.* Newton, 37 N. J. L. 133; Nottingham Tp. *v.* Amwell Tp., 21 N. J. L. 27.

Pennsylvania.— Nippenose Tp. *v.* Jersey Shore, 48 Pa. St. 402; Schuylkill County *v.* Jackson Tp., 29 Pa. Super. Ct. 567; Crossley *v.* Demott, 2 Leg. Op. 161.

Vermont.— Morristown *v.* Fairfield, 46 Vt. 33; Newport *v.* Derby, 22 Vt. 553; Manchester *v.* Springfield, 15 Vt. 385. And see Burlington *v.* Essex, 19 Vt. 91, holding that, under the statute of 1817, a settlement of an illegitimate child acquired by birth previous to the enactment of that statute will not be changed by the mother's acquiring a new settlement by marriage, but only by the mother's acquiring a new settlement in her own right.

England.— Reg. *v.* St. Mary, 4 Q. B. 581, 2 G. & D. 626, 7 Jur. 440, 12 L. J. M. C. 68, 45 E. C. L. 581.

See 38 Cent. Dig. tit. "Paupers," § 83.

Rule in Connecticut.— In Connecticut the rule is well settled that where an illegitimate child was born in one town of a mother having a settlement there at the time, but who afterward, during the minority of the child, acquired a settlement by marriage in another town, the child took the new settlement of its mother thus acquired. Oxford *v.* Bethany, 19 Conn. 229; Newton *v.* Fairfield, 18 Conn. 350; New Haven *v.* Newtown, 12 Conn. 165; Danbury *v.* New Haven, 5 Conn. 584.

78. Simsbury *v.* East Granby, 69 Conn. 302, 37 Atl. 678; Livermore *v.* Peru, 55 Me. 469; Monson *v.* Palmer, 8 Allen (Mass.) 551; Rockingham *v.* Mt. Holly, 26 Vt. 653.

79. *Maine.*— Islesborough *v.* Lincolnville, 76 Me. 572; Strong *v.* Farmington, 74 Me. 46; Monroe *v.* Jackson, 55 Me. 55; Wiscasset *v.* Waldoborough, 3 Me. 388.

Massachusetts.— Upton *v.* Northbridge, 15 Mass. 237.

New Hampshire.— Orford *v.* Rumney, 3 N. H. 331.

New Jersey.— Alexandria Tp. *v.* Bethlehem Tp., 16 N. J. L. 119, 31 Am. Dec. 229.

Pennsylvania.— Shippen *v.* Gaines, 17 Pa. St. 38.

Rhode Island.— Glocester *v.* Smithfield, 2 R. I. 30.

Vermont.— Topsham *v.* Chelsea, 60 Vt. 219, 13 Atl. 861.

England.— Rex *v.* Much Cowarne, 2 B. & Ad. 861, 1 L. J. M. C. 4, 22 E. C. L. 362.

See 38 Cent. Dig. tit. "Paupers," §§ 90, 91.

Compare East Hartford *v.* Middletown, 1 Root (Conn.) 196.

80. Harrison *v.* Portland, 86 Me. 307, 29 Atl. 1084; Corinth *v.* Bradley, 51 Me. 540; Washington Tp. *v.* East Franklin Tp., 3 Pennyp. (Pa.) 107; Gregg Tp. *v.* New Berlin,

pos mentis after becoming of age does not follow the settlement of his father subsequently acquired.[81]

f. Adult and Emancipated Children.[82] A minor child, who has been emancipated, gains no settlement through the settlement of his parent, acquired after such emancipation.[83] In most jurisdictions a child is held to be emancipated upon reaching his majority, even though he continues to be a member of his father's family, and takes no derivative settlement from a settlement subsequently acquired by the father.[84] However, by the English rule,[85] which has been followed in some of the United States, so long as a child continues single; enters into no contract inconsistent with the idea of his being a member of, and in a subordinate situation in, his father's family; acquires no settlement for himself, and makes his father's house his home, so long, whatever may be his age, he will follow any newly acquired settlement of his father.[86]

g. Settlement of Mother — (i) *In General.* Where legitimate minor children have a settlement derived from their father, his settlement must be theirs in his lifetime, and they cannot acquire that of their mother;[87] but if the father has no settlement, and the mother has one, the children of the marriage take the settlement of the mother.[88]

(ii) *Acquired in Own Right After Death of Father.* It is a rule of general application that the settlement of a widow, acquired in her own right

6 Pa. Cas. 545, 9 Atl. 461; Damascus *v.* Buckingham, 3 Pa. Dist. 744; Penn's Tp. *v.* Selin's Grove, 1 Pa. Co. Ct. 383.

81. Buckland *v.* Charlemond, 3 Pick. (Mass.) 173.

82. Insane adult children see *supra*, III, E, 3, e.

83. Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104; Orneville *v.* Glenburn, 70 Me. 353; Lowell *v.* Newport, 66 Me. 78 (holding, however, that emancipation, such as will effect a settlement under the pauper law, must be an absolute and entire surrender on the part of the parent of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position. It leaves the child, so far as the parent is concerned, free to act upon its own responsibility, and in accordance with its own will and pleasure, with the same independence as though it were twenty-one years of age); Calais *v.* Marshfield, 30 Me. 511; Dennysville *v.* Trescott, 30 Me. 470; Charlestown *v.* Boston, 13 Mass. 469; Niskayuna *v.* Albany, 2 Cow. (N. Y.) 537; Toby Tp. *v.* Madison, 44 Pa. St. 60; Washington Tp. *v.* Beaver Tp., 3 Watts & S. (Pa.) 548.

84. *Maine.*— Hampden *v.* Brewer, 24 Me. 281.

Massachusetts.— Shirley *v.* Lancaster, 6 Allen 31; Springfield *v.* Wilbraham, 4 Mass. 493.

New Hampshire.— Andover *v.* Merrimack County, 37 N. H. 437.

Pennsylvania.— Loyalsock Tp. *v.* Eldred Tp., 154 Pa. St. 358, 26 Atl. 313. *Contra*, Washington Tp. *v.* Beaver Tp., 3 Watts & S. 548.

Vermont.— Poultney *v.* Glover, 23 Vt. 328, holding that a child of full age, who has not acquired a settlement in his own right, and has not continued a member of his father's family and subject to his control, will not take derivatively the settlement of his father acquired by residence commenced before the child arrived at full age and completed subsequently.

See 38 Cent. Dig. tit. "Paupers," § 91.

85. Reg. *v.* Scammonden, 8 Q. B. 349, 10 Jur. 110, 15 L. J. M. C. 30, 2 New Sess. Cas. 189, 55 E. C. L. 349; Rex *v.* Wilmington, 5 B. & Ald. 525, 1 D. & R. 140, 7 E. C. L. 287; Rex *v.* Everton, 1 East 526; Rex *v.* Uckfield, 5 M. & S. 214; Rex *v.* Roach, 6 T. R. 247, 3 Rev. Rep. 169 [*modifying* and *explaining* Rex *v.* Witton, 3 T. R. 355, 1 Rev. Rep. 717]; Gambier Paroch. Settl. c. 8. See also Rex *v.* Much Cowarne, 2 B. & Ad. 861, 1 L. J. M. C. 4, 22 E. C. L. 362; Rex *v.* Harwicke, 5 B. & Ald. 176, 7 E. C. L. 104; Rex *v.* Budgden, Burr. S. Cas. 270; Rex *v.* Everton, 1 East 526; Eastwoodhey *v.* Westwoodhey, Str. 438; Rex *v.* Walpole St. Peter, W. Bl. 669.

86. Alexandria Tp. *v.* Bethlehem Tp., 16 N. J. L. 119, 31 Am. Dec. 229.

87. Gardiner *v.* Manchester, 88 Me. 249, 33 Atl. 990; Fairfield *v.* Canaan, 7 Me. 90; Scituate *v.* Hanover, 7 Pick. (Mass.) 140.

88. *Connecticut.*— Oxford *v.* Bethany, 19 Conn. 229; Lebanon *v.* Hebron, 6 Conn. 45; Newtown *v.* Stratford, 3 Conn. 600; Hebron *v.* Colchester, 5 Day 169.

Maine.— St. George *v.* Rockland, 89 Me. 43, 35 Atl. 1033; Hampden *v.* Troy, 70 Me. 484.

Massachusetts.— Amherst *v.* Shelburne, 13 Gray 341; Freetown *v.* Taunton, 16 Mass. 52.

New Jersey.— Little Falls Tp. *v.* Bernards Tp., 44 N. J. L. 621.

Vermont.— Rupert *v.* Winhall, 29 Vt. 245.

See 38 Cent. Dig. tit. "Paupers," § 93.

Where the wife is a free woman and the husband a slave, the settlement of their children was in the poor district in which the mother had her last legal settlement, without regard to the husband. New Haven *v.* Huntington, 22 Conn. 25; Marbletown *v.* Kingston, 20 Johns. (N. Y.) 1.

after the death of her husband, is, by the common law, communicated to her minor children.[89]

(III) *Acquired Derivatively by Second Marriage.* A minor child, having the settlement of its mother,[90] or of its deceased father,[91] does not, by the common law, lose it, and acquire the new settlement gained by its mother by a second marriage. And the settlement of a woman acquired by marriage is not, by the common law, communicated to her child by a former marriage, even where such child has no domicile in the state.[92] But in some jurisdictions the common law has been so altered in this regard that a minor child, having the settlement of its mother, follows the settlement which its mother acquires by her second marriage.[93]

4. Slaves.[94] Prior to the abolition of slavery in the United States, slaves followed the settlement of their masters.[95]

F. Loss and Change of Settlement[96] — **1. General Rule.** A legal settlement once gained in any town or county in a state is lost only by the person acquiring one in some other town or county in the state.[97]

89. *Connecticut.*— Torrington *v.* Norwich, 21 Conn. 543; Oxford *v.* Bethany, 19 Conn. 229; Bozrah *v.* Stonington, 4 Conn. 373.

Massachusetts.— Dedham *v.* Natick, 16 Mass. 135.

New York.— See Stillwell *v.* Kennedy, 51 Hun 114, 5 N. Y. Suppl. 407.

Ohio.— Bloomfield *v.* Chagrin, 5 Ohio 315.

Vermont.— Bradford *v.* Lunenburgh, 5 Vt. 481; Wells *v.* Westhaven, 5 Vt. 322.

See 38 Cent. Dig. tit. "Paupers," § 94.

The mere fact that a minor child has left the family of his mother after his father's death, and is not subject to the actual control of his parent, does not constitute his emancipation, so as to prevent him from deriving his mother's settlement. Bozrah *v.* Stonington, 4 Conn. 373.

90. Parsonsfield *v.* Kennebunkport, 4 Me. 47; Freetown *v.* Taunton, 16 Mass. 52; Bloomfield *v.* Chagrin, 5 Ohio 315.

The fact that the child removed with its mother to the place of new settlement does not alter the rule. Parsonsfield *v.* Kennebunkport, 4 Me. 47; Freetown *v.* Taunton, 16 Mass. 52.

91. Oxford *v.* Bethany, 19 Conn. 229; Farmington *v.* Jay, 18 Me. 376; Fairfield *v.* Canaan, 7 Me. 90; Walpole *v.* Marblehead, 62 Cush. (Mass.) 528; Wells *v.* Westhaven, 5 Vt. 322.

92. Milton *v.* Northumberland, 1 Pa. Co. Ct. 377; Clinton Tp. *v.* Delaware Tp., 1 Pa. Co. Ct. 375.

93. St. George *v.* Rockland, 89 Me. 43, 35 Atl. 1033; Hampden *v.* Troy, 70 Me. 484; Parsonsfield *v.* Kennebunkport, 4 Me. 47; Great Barrington *v.* Tyringham, 18 Pick. (Mass.) 264; Hopkinton *v.* Warner, 53 N. H. 468. See also Goshen *v.* Richmond, 4 Allen (Mass.) 458.

94. **Acquired settlement** see *supra*, III, D, 1, i.

95. Columbia *v.* Williams, 3 Conn. 467; Bolton *v.* Haddam, 2 Root (Conn.) 517; Edgarton *v.* Tisbury, 10 Cush. (Mass.) 408; Dighton *v.* Freetown, 4 Mass. 539; Springfield *v.* Wilbraham, 4 Mass. 493; Winchendon *v.* Hatfield, 4 Mass. 123; Claverack *v.* Hudson, 15 Johns. (N. Y.) 283; Ferguson Tp. *v.* Buffalo Tp., 6 Serg. & R. (Pa.) 103; Forks Tp. *v.* Catawissa Tp., 3 Binn. (Pa.) 22. But see South Brunswick *v.* East Windsor, 8 N. J. L. 64, holding that, if the owner of a slave of sufficient ability to maintain him removed into another state, the slave did not acquire a legal settlement in the township where the master had his last legal settlement.

The children of a slave derive no settlement from either their parents or their master. Edgartown *v.* Tisbury, 10 Cush. (Mass.) 408; Lanesborough *v.* Westfield, 16 Mass. 74; Andover *v.* Canton, 13 Mass. 547. And see Windsor *v.* Hartford, 2 Conn. 355.

If a slave be hired as a servant, and not held in slavery, he derives no new settlement from his new master. Stockbridge *v.* West Stockbridge, 12 Mass. 400.

96. **Change by annexation, division, and incorporation of towns** see *supra*, III, D, 3.

97. *Connecticut.*— Norwich *v.* Windham, 1 Root 232. See also Fairfield *v.* Easton, 73 Conn. 735, 49 Atl. 200.

Illinois.— Payne *v.* Dunham, 29 Ill. 125.

Iowa.— Fayette County *v.* Bremer County, 56 Iowa 516, 9 N. W. 372.

Maine.— Woodstock *v.* Canton, 91 Me. 62, 39 Atl. 281; Rangeley *v.* Bowdoin, 77 Me. 592, 1 Atl. 892; Monson *v.* Fairfield, 55 Me. 117; Smithfield *v.* Belgrade, 19 Me. 387; Phillips *v.* Kingfield, 19 Me. 375, 36 Am. Dec. 760.

Massachusetts.— Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817; Princeton *v.* West Boylston, 15 Mass. 257; Canton *v.* Bentley, 11 Mass. 441; Dalton *v.* Bernardston, 9 Mass. 201.

Ohio.— Guernsey Tp. *v.* Perry County, 17 Ohio St. 31; Henrietta Tp. *v.* Oxford Tp., 2 Ohio St. 32.

Pennsylvania.— Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541; Cumberland County *v.* Juanita County, 7 Pa. Super. Ct. 303; Penn's Tp. *v.* Selin Grove, 1 Pa. Co. Ct. 383.

Vermont.— Tunbridge *v.* Norwich, 17 Vt. 493.

2. STATUTORY ANNULMENT OR CHANGE. The general rule is that where a settlement is lost by virtue of statutory enactment, a previous settlement, lost by reason of the acquisition of the new settlement, is not thereby revived.[98]

3. GAINING A SETTLEMENT IN ANOTHER STATE. Upon the question as to whether a person who has a settlement in one state loses it by removing to and obtaining a settlement in another state the decisions are very evenly divided, the rule in some states being that he does lose his former settlement, and that upon return to the first state he occupies the position with respect to its poor laws of one who never had a settlement in the state,[99] while the rule in others is that he does not lose his former settlement, and that this is revived upon his return to the state.[1]

4. MARRIAGE.[2] A woman, upon marrying a man who has a settlement, and

Wisconsin.— Saukville *v.* Grafton, 68 Wis. 192, 31 N. W. 719; Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

See 38 Cent. Dig. tit. "Paupers," §§ 97, 99.

Admissions either by act or declarations of the overseers of the poor of a town cannot have the effect to change the settlement of a pauper from one town to another. Peru *v.* Turner, 10 Me. 185.

98. Monson *v.* Fairfield, 55 Me. 117; Barnstead *v.* Alton, 32 N. H. 245; Gilford *v.* Gilmanton, 20 N. H. 456; *Ex p.* Madbury, 17 N. H. 569.

Statutory change.— Where, upon the taking effect of Vt. Act No. 42, 1886, the legal settlement of a pauper was in E, but his necessary residence in W, it was held that thereupon E ceased to be and W became chargeable with his support. Worcester *v.* East Montpelier, 61 Vt. 139, 17 Atl. 842.

99. *Connecticut.*— Marlborough *v.* Sisson, 23 Conn. 44; Bethlem *v.* Roxbury, 20 Conn. 298 (containing a dissenting opinion); Middleton *v.* Lyme, 5 Conn. 95; Sterling *v.* Plainfield, 4 Conn. 114; Windham *v.* Norwich, 1 Root 408. But *compare* Morris *v.* Plymouth, 34 Conn. 270, which held that under Gen. St. tit. 50, § 26, providing that any person having a legal settlement in Connecticut and acquiring thereafter a settlement in another state and returning to Connecticut and becoming a pauper shall be supported by the town in which he had his last legal settlement, the children of a person who, having a settlement in Connecticut, obtained a settlement in another state where the children were born, had their settlement upon coming into Connecticut in the town in which the father originally was settled. This seems to overrule in effect, although not expressly, the former Connecticut decisions. Middleton *v.* Lyme, *supra* [*distinguishing* Marlborough *v.* Sisson, *supra*].

New York.— Stillwell *v.* Kennedy, 51 Hun 114, 5 N. Y. Suppl. 407; *In re* Chapman, 15 Misc. 296, 37 N. Y. Suppl. 763.

Ohio.— Crane Tp. *v.* Autrim Tp., 12 Ohio St. 430.

Pennsylvania.— Plumcreek Tp. *v.* Elderton Borough, 129 Pa. St. 626, 18 Atl. 549; Juniata County *v.* Delaware Tp., 107 Pa. St. 68; Limestone Tp. *v.* Chillisquaque, 87 Pa. St. 294; Lower Augusta Tp. *v.* Howard Tp., 6 Pa. Cas. 385, 9 Atl. 446; Braintrim Tp. *v.* Windham Tp., 10 Pa. Co. Ct. 250. The legal provision as to the removal of paupers who have lost their settlement in Pennsylvania, by gaining a settlement in another state, to the other state is nugatory in that there is no power by which it can be carried into effect, the order of removal losing all force the moment it crosses the state line. Limestone Tp. *v.* Chillisquaque, *supra.*

Rhode Island.— Exeter *v.* Richmond, 6 R. I. 149, which holds that the same applies to the wife of a man who loses his settlement by gaining a settlement in another state, and that she loses her settlement thereby.

See 38 Cent. Dig. tit. "Paupers," § 100.

Settlement in another state must be proved as a matter of fact, and it must be shown that such derivative settlement is recognized by the laws of that other state. Sterling *v.* Plainfield, 4 Conn. 114. For facts held insufficient to prove the gaining of settlement in another state see Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407.

1. *Illinois.*— Payne *v.* Dunham, 29 Ill. 125.

Massachusetts.— Wilbraham *v.* Sturbridge, 6 Cush. 61; Canton *v.* Bentley, 11 Mass. 441; Townsend *v.* Billerica, 10 Mass. 411; Chelsea *v.* Malden, 4 Mass. 131.

New Hampshire.— Peterborough *v.* Lancaster, 14 N. H. 382; Landaff *v.* Atkinson, 8 N. H. 532; Hanover *v.* Weare, 2 N. H. 131.

New Jersey.— Alexandria Tp. *v.* Kingwood Tp., 8 N. J. L. 370.

Vermont.— Georgia *v.* Grand-Isle, 1 Vt. 464.

See 38 Cent. Dig. tit. "Paupers," § 100.

Settlement in district before becoming a separate state.—A settlement in Massachusetts lost by a subsequent settlement gained in the district of Maine before it became a separate state did not revive by that event. Mendon *v.* Bellingham, 1 Pick. (Mass.) 153.

Effect of disputed boundary lines.—A settlement may be gained in a town by residence on a part thereof which is within the actual jurisdiction of Massachusetts, although within the rightful jurisdiction of another state which afterward obtains the actual jurisdiction upon establishment of boundary lines. Such a settlement is not without the state. Somerset *v.* Rehoboth, 6 Cush. (Mass.) 320.

2. **Marriage procured for purpose of changing settlement** see *infra*, III, F, 6.

Obtaining settlement by marriage see *supra*, III, E, 2.

thereby acquiring that settlement,[3] loses absolutely her own former settlement.[4] A woman who marries a man who has no settlement or none within the state retains her former settlement,[5] and by the weight of authority her former settlement is not suspended but remains in full force and effect.[6]

5. Divorce. A settlement gained by marriage is not lost by divorce,[7] unless the divorce be for such cause as shows the marriage to be void *ab initio*.[8] If the husband has no settlement the wife is remitted to her maiden settlement on divorce.[9]

6. Fraud in Procuring Change. Under some statutes, where the authorities of the town in which a woman has a settlement procure her marriage to a man having a settlement elsewhere, for the purpose of relieving the town of her support, she does not lose her settlement.[10] And if the town in which her husband lives supports her as a pauper, it may recover the amount expended from the town of her original settlement.[11] It has also been held that if poor officers procure a woman to go into another town to be delivered, the child will be considered as born in the town from which she is so procured to depart.[12]

7. Abandonment and Absence. Under some statutes it is held that it is possible for a person to so wander around as to lose a home, within the legal signification

3. See *supra*, III, D, 1, d.

4. *Connecticut.*— Danbury *v.* New Haven, 5 Conn. 584; Hebron *v.* Colchester, 5 Day 169.
New Hampshire.— Merrimack *v.* Hillsborough County, 19 N. H. 550.
New Jersey.— Alexandria Tp. *v.* Kingwood Tp., 8 N. J. L. 370.
Pennsylvania.— Buffaloe *v.* Whitedeer, 15 Pa. St. 182.
Rhode Island.— Exeter *v.* Richmond, 6 R. I. 149; West Greenwich *v.* Warwick, 4 R. I. 136.
Sec 38 Cent. Dig. tit. "Paupers," § 101.

Effect of statute depriving wife of husband's settlement.— A woman's settlement lost upon acquiring that of her husband is not restored by a statute which deprives her of her husband's settlement. *Ex p.* Madbury, 17 N. H. 569.

A marriage between two paupers has the same effect upon the settlement of the female as a marriage between any two persons, if the marriage was entered into without force, fraud, bribery, or undue influence on the part of the towns to which they respectively belong. Concord *v.* Goffstown, 2 N. H. 263.

5. Goshen *v.* Canaan, 35 Conn. 186; New Haven *v.* Huntington, 22 Conn. 25; Lebanon *v.* Hebron, 6 Conn. 45; Otsego *v.* Smithfield, 6 Cow. (N. Y.) 760; Buffaloe *v.* Whitedeer, 15 Pa. St. 182; West Greenwich *v.* Warwick, 4 R. I. 136.

The husband follows the settlement of the wife, if he have no settlement in the United States. East Greenwich *v.* Warwick, 4 R. I. 138.

6. Newtown *v.* Stratford, 3 Conn. 600; Augusta *v.* Kingfield, 36 Me. 235; Otsego *v.* Smithfield, 6 Cow. (N. Y.) 760; Newark *v.* Sutton, 40 Vt. 261.

Removal of wife during cohabitation.— It is sometimes held that marriage to a man not having a settlement, although it may not suspend the settlement of the wife, suspends, during cohabitation, the right of removing the wife to her former settlement and thus separating her from her husband. Hebron *v.* Colchester, 5 Day (Conn.) 169; Sherburne *v.* Norwich, 16 Johns. (N. Y.) 186; Newark *v.* Sutton, 40 Vt. 261. *Compare* Otsego *v.* Smithfield, 6 Cow. (N. Y.) 760.

7. *Connecticut.*— Guilford *v.* Oxford, 9 Conn. 321.
Maine.— Howland *v.* Burlington, 53 Me. 54.
Massachusetts.— Dalton *v.* Bernardston, 9 Mass. 201.
New Hampshire.— Ossipee *v.* Carroll County, 65 N. H. 12, 17 Atl. 1058.
Pennsylvania.— Lake Dist. *v.* South Canaan, 87 Pa. St. 19; Buffaloe *v.* Whitedeer, 15 Pa. St. 182; Upper Augusta Tp. *v.* Rockefeller Tp., 2 Chest. Co. Rep. 190.
See 38 Cent. Dig. tit. "Paupers," § 102.

8. Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008 (holding that where a marriage is annulled on the ground of mental incapacity of the husband to contract, the woman's pauper settlement is not affected by such marriage); Dalton *v.* Bernardston, 9 Mass. 201.

9. Royalton *v.* West Fairlee, 11 Vt. 438.

10. Hudson *v.* Charleston, 97 Me. 17, 53 Atl. 832; Gardiner *v.* Manchester, 88 Me. 249, 33 Atl. 990 (where, however, the evidence was held insufficient to show that the marriage was procured by the town authorities with the intention of relieving the town of the woman's support); Minot *v.* Bowdoin, 75 Me. 205.

Retroactive effect of statute.— A statute providing that the settlement of a person shall not be affected by a marriage procured by the municipal officers for the purpose of changing such settlements, and that the children of such marriage shall have the settlement they would have had if no marriage had taken place, apply to all cases where the suit is for supplies furnished after the statute was passed, although it was not passed until after the marriage and birth of the children. Burnham *v.* Corinth, (Me. 1887) 10 Atl. 454 [*following* Appleton *v.* Belfast, 67 Me. 579].

11. Minot *v.* Bowdoin, 75 Me. 205.

12. Plymouth *v.* Windsor, 7 Vt. 327.

of the word "home," under the pauper statutes.[13] So under some statutes a pauper and those deriving their settlement from him lose their right of settlement by living five years beyond the limits of the state without receiving pauper supplies from any source within the state.[14] Under others settlement is lost by continuous residence in another town for a year,[15] and it is immaterial whether during that year he was self-supporting or was aided in part by the town of his former residence.[16] However continuous absence for the statutory period without proof of residence does not forfeit a settlement;[17] nor does the statute apply to a person residing in a county wherein each town supports its own poor, where he has been supported for many years in the town of his residence on the guarantee of the town of his settlement to repay the former town the amount expended for his support.[18]

G. Evidence of Settlement[19] — **1. Presumptions and Burden of Proof.** In an action to recover for the support of a pauper, as in other civil cases, the burden is on plaintiff town of proving every disputed fact that constitutes an element of its right to recover,[20] and the burden of proving affirmative defenses rests with defendant.[21] The burden of proving the acquisition of a new settlement is always on the party alleging it,[22] since a settlement once acquired is presumed to continue until another is subsequently acquired,[23] and such party must show everything necessary to the acquisition thereof.[24]

13. Thomaston *v.* Friendship, 95 Me. 201, 49 Atl. 1056; North Yarmouth *v.* West Gardiner, 58 Me. 207, 4 Am. Rep. 279; Jefferson *v.* Washington, 19 Me. 293.

14. Portland *v.* Auburn, 96 Me. 501, 52 Atl. 1011.

15. People *v.* Maynard, 160 N. Y. 453, 55 N. E. 9 [*affirming* 42 N. Y. App. Div. 579, 59 N. Y. Suppl. 419]; Matter of Hawks, 26 Misc. (N. Y.) 359, 57 N. Y. Suppl. 216.

16. Matter of Hawks, 26 Misc. (N. Y.) 359, 57 N. Y. Suppl. 216; Onondaga *v.* Syracuse, 22 Misc. (N. Y.) 265, 49 N. Y. Suppl. 1116.

17. Syracuse *v.* Onondaga County, 25 Misc. (N. Y.) 371, 55 N. Y. Suppl. 634; Onondaga *v.* Syracuse, 22 Misc. (N. Y.) 265, 49 N. Y. Suppl. 1116.

18. Matter of McCutcheon, 25 Misc. (N. Y.) 650, 56 N. Y. Suppl. 370.

19. Conclusiveness of order of removal as to place of settlement see *infra*, III, L, 3.

20. Fairfield *v.* Easton, 73 Conn. 735, 49 Atl. 200 (that the pauper had a settlement in defendant town); Waltham *v.* Brookline, 119 Mass. 479 (that person was pauper at time relief was furnished); New Bedford *v.* Middleborough, 16 Gray (Mass.) 295 (that the pauper had a settlement in defendant town); Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378 (payment of highway taxes); Wilmington *v.* Burlington, 4 Pick. (Mass.) 174; Lisbon *v.* Lyman, 49 N. H. 553 (payment of taxes as ingredient of settlement).

21. Augusta *v.* Mercer, 80 Me. 122, 13 Atl. 401 (that the relief of a soldier was for injuries sustained in the war, and therefore, by the act of 1875, no bar to his acquiring a new settlement); New Portland *v.* Kingfield, 55 Me. 172 (fraud and collusion to prevent gaining of settlement in plaintiff town).

22. South Thomaston *v.* Friendship, 95 Me. 201, 49 Atl. 1056. And see cases cited *infra*, this note.

Applications of rule.— Thus, in an action against a town to recover for the support of a pauper, whose settlement was once in that town, the burden of proving that he afterward acquired a settlement in another town is on defendant. Bowdoinham *v.* Phippsburg, 63 Me. 497; Starks *v.* New Portland, 47 Me. 183; Worcester *v.* Wilbraham, 13 Gray (Mass.) 586; Oakham *v.* Sutton, 13 Metc. (Mass.) 192; Kilburn *v.* Bennett, 3 Metc. (Mass.) 199; Randolph *v.* Easton, 23 Pick. (Mass.) 242.

23. Williamsburg *v.* Adams, 184 Mass. 263, 68 N. E. 230; Newfane *v.* Dummerston, 34 Vt. 184.

24. Burke *v.* Westmore, 55 Vt. 213.

Where a pauper leaves a town where he has resided, the law does not presume either that he intends or does not intend a temporary absence, and such intent is for the jury to determine. Ripley *v.* Hebron, 60 Me. 379.

No presumption as to place of birth.— The fact that the pauper was first known residing with his father in the defendant town establishes no legal presumption that he was born there. Union *v.* Plainfield, 39 Conn. 563; Rex *v.* Trowbridge, 7 B. & C. 252, 5 L. J. M. C. O. S. 154, 6 L. J. M. C. O. S. 7, 1 M. & R. 7, 14 E. C. L. 118.

No presumption as to change of settlement.— Proof of the marriage of a woman is not sufficient to create a presumption of change of settlement; it must also be shown that her husband had a settlement. Windham *v.* Lebanon, 51 Conn. 319; Hallowell *v.* Augusta, 52 Me. 216.

Presumption as to emancipation.— In ascertaining the settlement of a pauper, the presumption is that children under twenty-one years of age are unemancipated, and that those above that age are emancipated, until the contrary appears. Fitzwilliam *v.* Troy,

2. Admissibility — a. In General. The admissibility of evidence in actions for the maintenance of a pauper is governed by the same rules that apply in civil actions generally.[25] To prove the fact of settlement certain things stated in deeds,[26] wills,[27] and other solemn instruments in writing[28] are competent evidence, although the same facts in verbal declarations are inadmissible.[29] Town records,[30] assessment lists,[31] voting lists,[32] and books of the selectmen[33] are also admissible for this purpose. So the acts of the selectmen in paying bills incurred by other towns for the support of a pauper may be shown in evidence as tending to prove any fact necessary to establish the settlement of such pauper in that town.[34] But this evidence, being merely presumptive, it is proper for the opposite party to offer proof of facts and circumstances which have a tendency to rebut the presumptions arising from it.[35] Defendant town is not confined, like plaintiff, to a single proposition. It need not prove that the pauper had a settlement in any particular town. It may set up and support by testimony any number of propositions to establish alternatively a settlement in either of several towns, or in either of several modes of acquisition.[36] So it is permissible to prove by witnesses

6 N. H. 166; Orford *v.* Rumney, 3 N. H. 331; Westmore *v.* Sheffield, 56 Vt. 239.

25. See, generally, Evidence.

26. Greenfield *v.* Camden, 74 Me. 56 (registry copy of a deed); Ward *v.* Oxford, 8 Pick. (Mass.) 476; Bridgewater *v.* West Bridgewater, 7 Pick. (Mass.) 191; Westmore *v.* Sheffield, 56 Vt. 239.

Parol evidence to show that a deed was given only as security for debt is inadmissible. Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97.

27. Bridgewater *v.* West Bridgewater, 7 Pick. (Mass.) 191.

28. Oldtown *v.* Shapliegh, 33 Me. 278 (writ); West Boylston *v.* Sterling, 17 Pick. (Mass.) 126 (written notification to pauper to attend district school meeting).

29. Braintree *v.* Hingham, 1 Pick. (Mass.) 245; West Buffalo Tp. *v.* Walker Tp., 7 Watts (Pa.) 171.

Declarations of pauper to prove change of settlement see *infra*, III, G, 2, b.

Ground of admissibility.— This species of evidence is different from the mere verbal declarations of a pauper as to his residence which are not admissible. The designation of his residence in a solemn instrument, such as a deed or a will, is in the nature of a fact rather than a declaration, being made when there was no controversy, and when no possible interest could exist to give a false designation. Ward *v.* Oxford, 8 Pick. (Mass.) 476.

30. Hingham *v.* South Scituate, 7 Gray (Mass.) 229; Bridgewater *v.* West Bridgewater, 7 Pick. (Mass.) 191; Lebanon *v.* Plainfield, 40 N. H. 291; Northfield *v.* Plymouth, 20 Vt. 582.

31. Marlborough *v.* Sisson, 23 Conn. 401; Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166.

An invalid assessment list is inadmissible. Middletown *v.* Berlin, 18 Conn. 189.

Omission to tax.— Evidence that a person possessed real estate and that the assessors omitted to tax him therefor is not admissible in proof of his having gained a settlement. Berlin *v.* Bolton, 10 Metc. (Mass.) 115.

To rebut the evidence of an alleged pauper's poverty and inability to pay taxes, it is competent to show that he had money and other property sufficient to discharge them during the time within which he was claimed to have gained a settlement. Pittsfield *v.* Barnstead, 40 N. H. 477.

32. Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89. But see New-Milford *v.* Sherman, 21 Conn. 101, holding that the register of votes of a certain town, showing that a certain pauper voted at an annual election held there, is not proper evidence of the pauper's settlement in that town; the fact of settlement being provable only by appropriate evidence under oath.

33. Thornton *v.* Campton, 18 N. H. 20.

34. Weld *v.* Farmington, 68 Me. 301; Harpswell *v.* Phipsburg, 29 Me. 313; Canaan *v.* Hanover, 47 N. H. 215; Pittsfield *v.* Barnstead, 40 N. H. 477; Thornton *v.* Campton, 18 N. H. 20, 17 N. H. 338; Barre *v.* Morristown, 4 Vt. 574. *Contra*, Franklin *v.* Fuller, 105 Mass. 336; Dartmouth *v.* Lakeville, 9 Allen (Mass.) 211 note; New Bedford *v.* Taunton, 9 Allen (Mass.) 207 (holding that the admissions of overseers of the poor in binding out, or their acts in providing support for a pauper, are not admissible in evidence against the town to prove the settlement of a person therein).

35. Ward *v.* Oxford, 8 Pick. (Mass.) 476. See also Hamden *v.* Bethany, 43 Conn. 212.

Non-payment of taxes.— Boston *v.* Weymouth, 4 Cush. (Mass.) 538.

Support as a pauper.— Ward *v.* Oxford, 8 Pick. (Mass.) 476.

Failure to pay purchase-price of land.— New Berlin *v.* Norwich, 10 Johns. (N. Y.) 229.

Failure to pay rent.— Laporte Borough *v.* Hillsgrove Tp., 95 Pa. St. 269.

36. Abington *v.* Duxbury, 105 Mass. 287, holding that in an action by one town to recover from another the expense of supporting as a pauper a married woman alleged to have her settlement with defendants, it is competent for them to prove that her husband has a settlement in the commonwealth elsewhere than with them, derived from his mother, without first proving that he derived no settlement from his father.

nnder what agreements of hire or employment, or terms as to time or as to board, a pauper entered the town, where the question is as to the nature of his residence there, and whether temporary or not,[37] provided the evidence so offered is not hearsay.[38]

b. As to Change of Residence. On the question of a person's intent to change his residence, any of his acts[39] or words[40] which tend to show his intention are admissible in evidence. Thus the declarations of a pauper, accompanying the act of leaving a town, expressing the object and purpose of making a home in another town, are admissible in evidence on the question of intention as part of the *res gestæ*.[41] While on the other hand his declarations of his future hopes or expectations, not carried into execution, are inadmissible in evidence.[42]

3. Weight and Sufficiency. The weight and sufficiency of the evidence in an action for the maintenance of a pauper is governed by the general rules applicable to civil cases generally.[43] The fact of settlement may be proved by circumstantial or presumptive evidence, as well as by direct evidence.[44] A pauper's birthplace is *prima facie* the place of his settlement;[45] but this may be overcome by showing a different derivative settlement from the father or mother, either communicated at birth or acquired while the child is unemancipated.[46] Proof that a person has resided for the statutory period in a town is *prima facie* sufficient to establish his settlement therein;[47] but if it is shown that such person is a married woman, it may be necessary to prove further that her husband resided in that town, or else that she was deserted by him.[48] The residence of the wife is evidence of the domicile of the husband on the question of settlement, but it is not conclusive.[49] Where the settlement of a pauper is derived by descent from his father, evidence of his father's marriage is essential;[50] but where the descent is shown, slight evidence is sufficient in the first instance to establish the legitimacy.[51] Voting,[52] and taxation, acquiesced in and affirmed by the payment of the tax,[53] are important evidence, but not conclusive. Where a town attempts to prevent the legal effect of a residence, by proving that the person whose settlement is in question has received supplies as a pauper, it is not enough merely to

37. Ripley *v.* Hebron, 60 Me. 379.

38. Ripley *v.* Hebron, 60 Me. 379.

39. Thomaston *v.* St. George, 17 Me. 117.

Evidence of his acts in breaking up housekeeping and storing his goods previous to leaving is admissible. Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718.

Subsequent conduct.—Evidence of a party's conduct, afterward as well as before, may be received to ascertain his intention as to domicile on a particular day. Richmond *v.* Vassalborough, 5 Me. 396.

40. Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718; Thomaston *v.* St. George, 17 Me. 117.

41. New-Milford *v.* Sherman, 21 Conn. 101; Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718; Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884; Baring *v.* Calais, 11 Me. 463.

42. Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89; Bangor *v.* Brewer, 47 Me. 97; Richmond *v.* Thomaston, 38 Me. 232.

43. See, generally, Evidence, 17 Cyc. 753 *et seq.*

44. Greenfield *v.* Camden, 74 Me. 56; Ayres' Case, 4 Pa. Co. Ct. 499.

Evidence held sufficient to prove settlement see Williamsburg *v.* Adams, 184 Mass. 263, 68 N. E. 230; South Scituate *v.* Scituate, 155 Mass. 428, 29 N. E. 639; Waltham *v.* Newburyport, 150 Mass. 569, 23 N. E. 379; Newburyport *v.* Waltham, 150 Mass. 311, 23 N. E. 46; Fitchburg *v.* Winchendon, 4 Cush. (Mass.) 190; Sandgate *v.* Rupert, 67 Vt. 258, 31 Atl. 289; Reading *v.* Weathersfield, 30 Vt. 504.

Evidence held insufficient to prove settlement see Uxbridge *v.* Northbridge, 131 Mass. 454; Adams *v.* Swansea, 116 Mass. 591; Boylston *v.* Groton, 4 Gray (Mass.) 282; Dover *v.* Brighton, 2 Gray (Mass.) 482.

45. Shrewsbury Tp. *v.* Holmdel Tp., 42 N. J. L. 373.

46. Shrewsbury Tp. *v.* Holmdel Tp., 42 N. J. L. 373; Bern *v.* Knox, 6 Cow. (N. Y.) 433.

47. Scott County *v.* Polk County, 61 Iowa 616, 14 N. W. 206, 16 N. W. 726; Belmont *v.* Morrill, 73 Me. 231.

48. Scott County *v.* Polk County, 61 Iowa 616, 14 N. W. 206, 16 N. W. 726.

Proof of marriage followed by cohabitation makes out a *prima facie* case of the settlement of a wife in the place of her husband's settlement. Harrison *v.* Lincoln, 48 Me. 205.

49. Greene *v.* Windham, 13 Me. 225.

50. Landaff *v.* Atkinson, 8 N. H. 532.

51. Landaff *v.* Atkinson, 8 N. H. 532.

52. Monroe *v.* Hampden, 95 Me. 111, 49 Atl. 604; Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89.

53. Monroe *v.* Hampden, 95 Me. 111, 49 Atl. 604.

show that supplies have been furnished by the officers of the town. It must also appear that the person supplied, or his family, was in need of the relief furnished.[54] Support of a person as a pauper by a town is not conclusive on the question of settlement.[55] Nor are the acts and declarations of a pauper in making a change of domicile conclusive on that point.[56]

H. Persons Removable[57] — **1. Persons Chargeable or Likely to Become Chargeable.** A person may be removed to the town of his settlement or to the town liable for his support, when he is chargeable or likely to become chargeable as a pauper in another town.[58] The mere possibility, however, that a person will become chargeable as a pauper is not sufficient to authorize his removal; there must be a prospect or strong probability.[59] The general rule is that a person cannot be removed as a pauper from lands he occupies as a freehold estate.[60]

2. Persons Fraudulently or Wrongfully Brought Into Place. In some jurisdictions it is provided by statute that where paupers are wilfully and fraudulently brought into a town or county where they do not belong, through the wrongful agency of the town or county actually chargeable with their support, the courts may order the removal or return of such paupers to the place from which they were brought.[61]

54. Veazie *v.* Chester, 53 Me. 29.

55. Barre *v.* Morristown, 4 Vt. 574.

56. Thomaston *v.* St. George, 17 Me. 117.

57. Marriage procured to change settlement see *supra*, III, F, 6.

Who are paupers in general see *supra*, I.

58. *Connecticut.*— Harrison *v.* Gilbert, 71 Conn. 724, 43 Atl. 190.

Maine.— Guilford *v.* Abbott, 17 Me. 335.

Massachusetts.— Walpole *v.* West Cambridge, 8 Mass. 276.

Pennsylvania.— Cumberland Tp. *v.* Jefferson Tp., 25 Pa. St. 463; Philadelphia *v.* Bristol Tp., 6 Serg. & R. 562.

Vermont.— Rockingham *v.* Springfield, 59 Vt. 521, 9 Atl. 241; Plymouth *v.* Reading, 50 Vt. 709; Hardwick *v.* Pawlet, 36 Vt. 320.

See 38 Cent. Dig. tit. "Paupers," § 110.

A person falling into distress in a town is likely to become chargeable, although a place may have been provided for his support in another town. Guilford *v.* Abbott, 17 Me. 335.

For facts held insufficient to make a person likely to become chargeable see Cornish *v.* Parsonsfield, 22 Me. 433.

For facts held sufficient to make a person likely to become chargeable see Philadelphia *v.* Bristol Tp., 6 Serg. & R. (Pa.) 562.

A husband supported by his family is not likely to become chargeable as a pauper, and cannot be removed. Danville *v.* Wheelock, 47 Vt. 57.

A minor pauper, become chargeable, who has a father able to support him, may be removed to his last legal settlement, although his father resides in another town in the same state. Berlin *v.* Morristown, 20 Vt. 574.

There must be legal obligation to furnish relief in order to determine whether a person is chargeable; the question does not depend merely upon the fact that the town actually did furnish it. Hardwick *v.* Pawlet, 36 Vt. 320; Ludlow *v.* Weathersfield, 18 Vt. 39.

Order for relief necessary.—A pauper cannot be removed unless an order has previously been entered for his relief, except under the act of June 13, 1836, section 23. Elk Tp. *v.* Jordan Tp., 10 Pa. Co. Ct. 245.

A pauper become chargeable in a town other than his legal settlement who wanders to another town may be returned to the former which is bound to maintain him until he is removed to the place of his settlement under an order. Milton *v.* Williamsport, 9 Pa. St. 46.

Order of relief conclusive evidence of chargeability.—An order of relief issued prior to an order of removal is conclusive evidence of the fact that the person had become chargeable. Cumberland Tp. *v.* Jefferson Tp., 25 Pa. St. 463.

Evidence of chargeability must be as of the time of instituting the proceedings to remove. Evidence of prior destitution is inadmissible. Plymouth *v.* Reading, 50 Vt. 709; Danville *v.* Wheelock, 47 Vt. 57; Hartford *v.* Hartland, 19 Vt. 392; Londonderry *v.* Acton, 3 Vt. 122.

59. Cornish *v.* Parsonsfield, 22 Me. 433; Danville *v.* Wheelock, 47 Vt. 57; Pomfret *v.* Barnard, 44 Vt. 527; Londonderry *v.* Acton, 3 Vt. 122.

60. Dummerston *v.* Newfane, 37 Vt. 9; Walden *v.* Cabot, 25 Vt. 522 (holding that the rule is the same whether the estate is a legal or equitable freehold); Brookfield *v.* Hartland, 6 Vt. 401; Londonderry *v.* Acton, 3 Vt. 122. See, however, Johnson *v.* Huntington, 1 Day (Conn.) 212, holding that a lunatic, needing support, may be removed to a town where she has a settlement, although she has a reversionary estate in fee in the town where she resides.

61. Merrimack County *v.* Sullivan County, 45 N. H. 181; Goshen *v.* Hillsborough County, 45 N. H. 139; Braintrim Tp. *v.* Windham Tp., 10 Pa. Co. Ct. 250.

That the fraudulent intent is a question for the jury see Deerfield *v.* Delano, 1 Pick. (Mass.) 465. *Compare* Greenfield *v.* Cushman, 16 Mass. 393.

Fraudulently leaving a pauper in a town to which he does not belong is sometimes

3. TRANSIENT PAUPERS. In Vermont an order for removal of a pauper can be made only when the pauper has come to reside in the town procuring such order, and cannot be made in the case of a transient pauper.[62]

4. INDIVIDUAL MEMBERS OF FAMILIES. It is contrary to the policy of the law to separate families, or sunder family ties; thus a pauper husband cannot by an order of removal be separated from his wife, who is living with him, or *vice versa*;[63] nor children of tender age from their mother.[64] However, when the husband, having no settlement within a state, has abandoned his wife and left the state, the wife may be removed to the place of her own proper settlement before marriage.[65]

I. Place to Which Removable. The removal of a person who becomes or is likely to become chargeable as a pauper from a town or county not liable for his support must be to the place of his last legal settlement if he has one within the state.[66] If he has no legal settlement in the state the statutes variously prescribe either that he be removed to the town in which he first became chargeable,[67] or to that town within the state, in which he last resided continuously, for the period fixed by the statute.[68] Whether a pauper may be removed to his place of settlement in another state the authorities in the several jurisdictions differ, some holding that he may,[69] others holding that such a provision is nugatory for want of power by which the order can be enforced in the other state.[70]

made a crime.— Deerfield *v.* Delano, 1 Pick. (Mass.) 465; Greenfield *v.* Cushman, 16 Mass. 393.

In Pennsylvania, if the overseers of the poor of a township, in attempting to remove a pauper to the place of his last settlement, leave him in a township not chargeable with his support, he may be returned to them by order of removal. Kelly Tp. *v.* Union Tp., 5 Watts & S. 535.

62. Berlin *v.* Worcester, 50 Vt. 23; Pittsford *v.* Chittenden, 44 Vt. 382; Brownington *v.* Charleston, 32 Vt. 411; Sutton *v.* Cabot, 19 Vt. 522; Bristol *v.* Rutland, 10 Vt. 574.

Transient person.—"A wanderer, ever on the tramp." Middlebury *v.* Waltham, 6 Vt. 200.

A resident pauper is one who has a legal settlement in some town in the state, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town. Topsham *v.* Williamstown, 60 Vt. 467, 12 Atl. 112.

63. Cascade *v.* Lewis, 148 Pa. St. 333, 23 Atl. 1003 [*affirming* 11 Pa. Co. Ct. 282]; Armstrong *v.* Berwick Borough, 10 Pa. Co. Ct. 337; Danville *v.* Wheelock, 47 Vt. 57; Peacham *v.* Waterford, 46 Vt. 154; Newark *v.* Sutton, 40 Vt. 261; Dummerston *v.* Newfane, 37 Vt. 9; Northfield *v.* Roxbury, 15 Vt. 622; Hartland *v.* Pomfret, 11 Vt. 440.

64. Paterson Tp. *v.* Byram Tp., 23 N. J. L. 394, holding that children under six years of age, living with their mother, are not to be separated from her, but may be removed with her to her settlement, without inquiring into their settlement. See Landgrove *v.* Plymouth, 52 Vt. 503, holding that upon an order for the removal of a pauper, and his son and daughter, it will be presumed that the son and daughter are minors and unemancipated.

65. Winhall *v.* Landgrove, 45 Vt. 376; Wilmington *v.* Jamaica, 42 Vt. 694; Rupert *v.* Winhall, 29 Vt. 245; Bethel *v.* Tunbridge, 13 Vt. 445.

66. Franklin Tp. *v.* Bridgewater Tp., 20 N. J. L. 567; Upper Alloways Creek *v.* Elsingborough, 1 N. J. L. 389; Vernon *v.* Smithville, 17 Johns. (N. Y.) 89; Trowbridge *v.* Weston, 2 Salk. 473.

An apprenticed servant cannot be removed to his master, but only to his last legal settlement. Upper Alloways Creek *v.* Elsingborough, 1 N. J. L. 389; Philadelphia *v.* Bristol Tp., 6 Serg. & R. (Pa.) 562. *Compare* Forks Tp. *v.* Catawessa Tp., 3 Binn. (Pa.) 22; Claverack *v.* Hudson, 15 Johns. (N. Y.) 283.

A person having a settlement within the state who becomes chargeable in a town not liable for his support and is allowed by it to wander into another may be returned to the first town in which he became chargeable. Milton *v.* Williamsport, 9 Pa. St. 46.

67. Limestone Tp. *v.* Chillisquaque, 87 Pa. St. 294. *Compare* Niskayuna *v.* Guilderland, 8 Johns. (N. Y.) 412.

68. McCoy *v.* Newton, 37 N. J. L. 133; Paterson Tp. *v.* Byram Tp., 23 N. J. L. 394.

Removal of pauper wilfully and fraudulently brought into town.—A pauper, having no settlement in the state, who is wilfully and fraudulently brought into a town not liable for his support may be removed to the town which thus sought to escape the burden of his maintenance. Sullivan County *v.* Grafton County, 55 N. H. 339; Merrimack County *v.* Sullivan County, 45 N. H. 181; Booth *v.* Hillsborough County, 45 N. H. 139; Braintrim Tp. *v.* Windham Tp., 10 Pa. Co. Ct. 250; Charlotte *v.* Colchester, 20 Vt. 91.

69. Niskayuna *v.* Guilderland, 8 Johns. (N. Y.) 412; Thompson's Case, 4 City Hall Rec. (N. Y.) 43.

70. Juniata County *v.* Delaware Tp., 107 Pa. St. 68; Limestone Tp. *v.* Chillisquaque,

J. Authority to Remove. The authority to remove paupers to the towns of their legal settlement or to the towns liable for their support is conferred entirely by statute, and proceedings thereunder must be in strict conformity with the terms of the statute.[71] The various statutes agree generally in conferring the authority to remove upon two justices of the peace to whom application has been made by an overseer of the poor or other person exercising his functions.[72]

K. Proceeding For Removal — 1. Jurisdiction. The jurisdiction of the various courts in regard to the settlement or support of paupers is fixed as a rule by the statute regulating such proceedings.[73]

2. Application For Removal and Proceedings Thereon.[74] Proceedings upon application for removal of paupers are regulated entirely by statute, are exceedingly technical, and must be prosecuted strictly according to the statute under which they are taken.[75] The usual mode of proceeding is by complaint or application of the overseer of the poor, or the officer exercising his functions, to one or more justices of the peace,[76] who must thereupon, either by summons or warrant, notify the pauper to appear,[77] and who if justified by the facts may order the pauper's removal to the town or county chargeable with his support.[78]

87 Pa. St. 294; Georgia *v.* Grand Isle, 1 Vt. 464.

71. Bridgewater Tp. *v.* Bethlehem Tp., 50 N. J. L. 578, 14 Atl. 765; Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169.

72. Bridgewater Tp. *v.* Bethlehem Tp., 50 N. J. L. 578, 14 Atl. 765; Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169; McKean County *v.* Rouse, 7 Pa. Super. Ct. 628.

In New York it has been held that two justices of the peace may order the removal of a pauper upon information obtained from any source or on suspicion. Rouse *v.* Moore, 18 Johns. 407; Shawangunk *v.* Mamakating, 1 Johns. 54.

That justices have jurisdiction only when pauper is chargeable or likely to become chargeable see Edenburg *v.* Strattanville, 5 Pa. Super. Ct. 516 [*affirmed* in 188 Pa. St. 373, 41 Atl. 589].

Justices of the peace resident in the township whence the pauper is to be removed are in most jurisdictions held competent to order the removal of the pauper. Knowles' Case, 8 Me. 71; Vernon Tp. *v.* Wantage Tp., 2 N. J. L. 311; Hopewell Tp. *v.* Kingwood Tp., 2 N. J. L. 130; Windham *v.* Wardsboro, 53 Vt. 675; Bristol *v.* Braintree, 10 Vt. 203. In others, however, they are held incompetent on the ground of interest, being taxable with other residents for pauper's support. Washington Tp. *v.* Beaver Tp., 3 Watts & S. (Pa.) 548; Upper Dublin *v.* Germantown, 2 Dall. (Pa.) 213, 1 L. ed. 353; Susquehanna Tp. *v.* Monroe Tp., 4 Pa. Super. Ct. 589, 40 Wkly. Notes Cas. 450.

A justice who is also overseer cannot in the same case act in the double capacity of complainant and removing justice. Windham *v.* Wardshoro, 53 Vt. 675.

An overseer who is also constable can make the complaint and seize the removing order. Bristol *v.* Braintree, 10 Vt. 203.

73. See the statutes of the various states.

In Iowa (Rev. St. c. 37, § 1354) all jurisdiction in regard to the settlement or support of the poor is conferred exclusively upon the board of supervisors, and neither the county judge nor the county court has any jurisdiction of the subject. Lucas County *v.* Ringgold County, 21 Iowa 83.

In Pennsylvania in controversies between different districts, either as to order for removal, or for expenses incurred, where such order could not be prosecuted in time, the quarter sessions has sole and exclusive jurisdiction. Butler County *v.* Allegheny City, 158 Pa. St. 149, 27 Atl. 886; Chester County *v.* Malany, 64 Pa. St. 144; Moore *v.* Philadelphia, 13 Phila. 425. *Compare* Com. *v.* Darr, 11 Pa. Super. Ct. 74.

74. Evidence of settlement see *supra*, III, G.

75. Simpson *v.* Maybaum, 58 N. J. L. 323, 33 Atl. 814; Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169.

76. Merrimack County *v.* Sullivan County, 45 N. H. 181; Simpson *v.* Maybaum, 58 N. J. L. 323, 33 Atl. 814; Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169; Franklin Tp. *v.* Danville, 25 Pa. Super. Ct. 40; Wilmington *v.* Jamaica, 42 Vt. 694; Hardwick *v.* Pawlet, 36 Vt. 320.

The acting overseer cannot make the application, it must be the actual overseer. Simpson *v.* Maybaum, 58 N. J. L. 323, 33 Atl. 814.

That the application must allege all facts material to be proven see Merrimack County *v.* Sullivan County, 45 N. H. 181.

The complaint may be amended to add "by reason of age and infirmity." Guilford *v.* Abbott, 17 Me. 335.

Complaint for removal may still be prosecuted for recovery of expenses incurred, although the pauper has before trial actually been removed. Guilford *v.* Abbott, 17 Me. 335.

77. Shirley *v.* Lunenburgh, 11 Mass. 379; Gilpin Tp. *v.* Parks Tp., 118 Pa. St. 84, 11 Atl. 791; Hartland *v.* Pomfret, 11 Vt. 440.

Omission to summon pauper is not error reversible at the instance of the town of settlement to which he is removable. Shirley *v.* Lunenburgh, 11 Mass. 379.

78. Franklin Tp. *v.* Danville, 25 Pa. Super.

L. Judgment or Order of Removal[79] — **1. Form and Requisites — a. In General.** An order for the removal of a pauper should show on its face that all the facts which are requisite by statute actually exist, that the officers making the order acted within their authority, and that the facts necessary to authorize the order were duly proved before the officers making the same,[80] that there was a complaint and an adjudication that the person removed was likely to become chargeable,[81] and an adjudication of the place of last legal settlement.[82] It is not necessary that an examination should appear upon the order.[83] Where a pauper is to be sent out of the state, the order of removal should designate the route by which he is to be transported.[84] While several persons having independent settlements cannot be removed by the same order,[85] an order may include the members of a family, provided they have the same settlement,[86] and the names of the different persons constituting the family need not be set forth.[87]

b. Amendability. Defects in form in an order of removal may be amended,[88] but not defects in substance.[89] A defect apparent on the record and in no way affecting the jurisdiction or the merits of the case is a defect in form and not in sub-

Ct. 40; Nicholson *v.* Lenox, 1 Susq. Leg. Chron. (Pa.) 29; Wilmington *v.* Jamaica, 42 Vt. 694; Hardwick *v.* Pawlet, 36 Vt. 320; Hartland *v.* Windsor, 29 Vt. 354; Bristol *v.* Braintree, 10 Vt. 203; Richmond *v.* Milton, Brayt. (Vt.) 188.

Insane paupers.— Proceedings for the removal of insane paupers are usually provided for by special statute. People *v.* Queens County, 20 N. Y. Suppl. 10; Donegal Tp. *v.* Sugarcreek Tp., 8 Pa. Cas. 9, 11 Atl. 213.

79. As condition precedent to recover for support see *infra*, IV, C, 2, c.

80. New Barbadoes Tp. *v.* Paterson, 27 N. J. L. 544; Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169; Vernon Tp. *v.* Wantage Tp., 2 N. J. L. 311, holding, however, that it need not appear that the pauper was ordered to remove, and that he refused to do so.

If it does not distinctly appear on an order of removal that the justices who made it had jurisdiction, it is a nullity, and not merely voidable. Reg. *v.* Crowan, 14 Q. B. 221, 13 Jur. 1099, 19 L. J. M. C. 20, 3 New Sess. Cas. 663, 68 E. C. L. 221; Reg. *v.* Newton Ferrers, 9 Q. B. 32, 58 E. C. L. 32; Reg. *v.* Stockton, 7 Q. B. 520, 9 Jur. 532, 14 L. J. M. C. 128, 1 New Sess. Cas. 16, 53 E. C. L. 520; Rex *v.* Chilverscoton, 8 T. R. 178.

81. Shawangunk *v.* Mamakating, 1 Johns. (N. Y.) 54; Dromore Tp. *v.* West Hanover Tp., 1 Yeates (Pa.) 366; Starksboro *v.* Huntington, 50 Vt. 599; Reg. *v.* St. Giles-in-the-Fields, 7 Q. B. 529, 10 Jur. 754, 15 L. J. M. C. 122, 53 E. C. L. 529; Rex *v.* Netherton, Burr. S. Cas. 139; Rex *v.* Usculm, Burr. S. Cas. 138. But see Elizabethtown *v.* Springfield Tp., 3 N. J. L. 475.

Application for relief.— It should appear upon the face of the order that application for relief had been made by or on behalf of the pauper. Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169.

An order of relief is conclusive proof that the pauper had become chargeable. Cumberland Tp. *v.* Jefferson Tp., 25 Pa. St. 463.

82. Paterson Tp. *v.* Byram Tp., 23 N. J. L. 394; Shawangunk *v.* Mamakating, 1 Johns. (N. Y.) 54 (holding that it is sufficient if the order of removal state that the justices cannot discover the last legal settlement of the pauper, but that he came last from a town named); St. Giles Cripplegate *v.* Hackney, 2 Salk. 478; Trobridge *v.* Weston, 2 Salk. 473. See also Glenwood Borough *v.* Carbondale City, 4 C. Pl. (Pa.) 92.

"Legal settlement" is equivalent to "last legal settlement." Vernon *v.* Smithville, 17 Johns. (N. Y.) 89.

Where children are removed with their father or mother, in consequence of such father's or mother's settlement, the order must set forth the age of such children, to show that they could not themselves have gained any other settlement, or it must contain an express adjudication to that effect; but where the place of settlement of the children is expressly adjudged, it is unnecessary to set out their ages. Elizabethtown *v.* Springfield Tp., 3 N. J. L. 475; Rex *v.* Usculm, Burr. S. Cas. 138.

83. Fallowfield Tp. *v.* Marlborough Tp., 1 Dall. (Pa.) 28, 1 L. ed. 23; Rex *v.* South Lynn, 4 M. & S. 354.

84. Niskayuna *v.* Guilderland, 8 Johns. (N. Y.) 412.

85. Chewton *v.* Compton Martin, Str. 471. But see Glocester *v.* Smithfield, 2 R. I. 30.

86. Derby *v.* Barre, 38 Vt. 276; Landgrove *v.* Pawlet, 20 Vt. 309. And see Reg. *v.* New Castle-upon-Tyne, 1 G. & D. 133, 5 Jur. 914, holding that an order may include two members of a family, although they have independent settlements.

87. Landgrove *v.* Plymouth, 52 Vt. 503; Windham *v.* Chester, 45 Vt. 459; Landgrove *v.* Pawlet, 20 Vt. 309; Bristol *v.* Braintree, 10 Vt. 203.

88. Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169; Cumberland Tp. *v.* Jefferson Tp., 25 Pa. St. 463; Rex *v.* Great Bedwin, Burr. S. Cas. 163.

89. Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169; Rex *v.* Great Bedwin, Burr. S. Cas. 163.

stance.[90] The omission to state matter necessary to give jurisdiction is matter of substance.[91]

2. Discharge or Quashing. An order of removal is discharged, or, as is sometimes said, vacated, after a successful objection to it on the merits.[92] It may be quashed for informality or irregularity of the proceedings.[93] The fact that the pauper in question is not liable to be removed may be taken advantage of on a motion to quash.[94] Where an order is made to remove several, and the order is bad as to part, either for some informality, or on the ground that they were not liable to be removed, the order as to them may be quashed and affirmed as to the residue.[95] Where an order has been appealed it is not quashable. The case is then before the court on the merits and both parties are entitled to a final decision.[96]

3. Conclusiveness — a. When Order Unappealed From or Confirmed on Appeal. An order of removal of a pauper, unappealed from, is conclusive evidence of the settlement of the pauper,[97] and as to all derivative settlements under him.[98] So

90. Vernon Tp. *v.* Wantage Tp., 2 N. J. L. 311, where the order of removal was directed to the overseers of the town from which the pauper was removed, instead of to the constable, an amendment was permitted.

91. Princeton Tp. *v.* South Brunswick Tp., 23 N. J. L. 169.

92. West Buffalo *v.* Walker Tp., 8 Pa. St. 177.

93. Newburgh *v.* Plattekill, 1 Johns. (N. Y.) 330 (omission of jurisdictional facts); West Buffalo *v.* Walker Tp., 8 Pa. St. 177.

Premature removal of pauper.— It is no reason for quashing an order of removal that the pauper was removed, with his consent, before the time for his removing himself, named in the order, had expired. Plymouth *v.* Mendon, 23 Vt. 451.

94. Brookfield *v.* Hartland, 6 Vt. 401. See also Rex *v.* Martley, 5 East 40; Rex *v.* Houghton Le Spring, 1 East 247.

95. Bristol *v.* Braintree, 10 Vt. 203 (holding that it is not a sufficient reason to quash an order to remove a man and "his family" that they are not named, unless it is made to appear that the pauper had a family on whom the order was to operate; and then, if such order would not be good as to the family, it would only be quashed as to them); Newbury *v.* Brunswick, 2 Vt. 151, 19 Am. Dec. 703 (where the order for the removal of A B, a pauper, and his family, was abated as to the family for generality). See also Windham *v.* Chester, 45 Vt. 459; Burlington *v.* Essex, 19 Vt. 91.

96. Plunkett's Creek Tp. *v.* Fairfield Tp., 58 Pa. St. 209; West Buffalo Tp. *v.* Walker Tp., 8 Pa. St. 177.

97. *New York.*— Southfield *v.* Bloomingrove, 2 Johns. 105, holding that where an order of removal has been made, and the pauper accordingly removed and maintained by another town, and no appeal from the order taken, the justices by whom it was granted cannot afterward supersede it.

Pennsylvania.— Renovo *v.* Half-Moon Overseers of Poor, 78 Pa. St. 301 (holding that where the pauper has been accepted, there can be no recovery against the accepting district for costs and charges); Schuylkill *v.* Montour, 44 Pa. St. 484; Sugarloaf Tp. *v.* Schuylkill County, 44 Pa. St. 481; Bradford Tp. *v.* Keating Tp., 27 Pa. St. 275; Green Tp. Poor Dist. *v.* Highland Tp. Poor Dist., 5 Pa. Super. Ct. 199.

Rhode Island.— Tiverton *v.* Fall River, 7 R. I. 182.

Vermont.— Poultney *v.* Sandgate, 35 Vt. 146; Stowe *v.* Brookfield, 26 Vt. 524; Charleston *v.* Lunenburgh, 23 Vt. 525; Braintree *v.* Westford, 17 Vt. 141; Rupert *v.* Sandgate, 10 Vt. 278.

England.— Clifton Union *v.* Liverpool, 2 Q. B. D. 540, 46 L. J. M. C. 209; Rex *v.* Rudgeley, 8 T. R. 620.

See 38 Cent. Dig. tit. "Paupers," § 124.

An order of removal made by justices in another state, and unappealed from, is conclusive against the township to which the pauper was removed. Elizabeth *v.* Westfield Tp., 7 N. J. L. 439.

An ineffectual attempt to appeal, after the time has elapsed for that purpose, is equivalent to no appeal. Westmoreland County *v.* Conemaugh Tp., 34 Pa. St. 231.

Abandoned order.— Where an order of removal is made, and appealed from, but the pauper is taken back, and the appeal is consequently never prosecuted, such order, though unreversed, is not conclusive as to settlement. People *v.* Cayuga County, 2 Cow. (N. Y.) 530; Vernon *v.* Smithville, 17 Johns. (N. Y.) 89; Rex *v.* Llanrhydd, Burr. S. Cas. 658. If the overseers of the poor of a township, in whose favor an order of removal has been made, abandon it voluntarily and expressly, the order cannot be afterward enforced. Perth Amboy Tp. *v.* Piscataway, 19 N. J. L. 173.

If the order of removal is void on its face, no appeal need be taken to avoid liability. Starksboro *v.* Huntington, 50 Vt. 599.

A pass warrant by a justice of the peace, fixing the settlement of a vagrant in a certain town, is not conclusive upon such town, but only throws upon it the burden of ascertaining the place of the vagrant's settlement. Upper Frechold Tp. *v.* Hillsborough Tp., 13 N. J. L. 289.

98. Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323; Chester *v.* Wheelock, 28 Vt. 554; Rex *v.* Woodchester, Burr. S. Cas. 191; Rex *v.* St. Mary, 6 T. R. 615.

is an order affirmed on appeal.[99] Such order is not only conclusive between the towns which are parties thereto, but upon all other towns,[1] and no other removal can be made except to a subsequently acquired settlement.[2] Furthermore such order is conclusive not only as to the facts directly decided, but also as to all facts necessary to uphold the order.[3] To give an order of removal conclusiveness, it must be executed, that is, the pauper must be actually removed, unless prevented by sickness or death;[4] or the order must be perfected by giving legal notice of the same.[5] In some jurisdictions this notice is given by serving upon the other town a true and attested copy of such order within thirty days after making it.[6] This notice cannot be waived, so as to affect the settlement of the pauper, by any agreement of the overseers of the town entitled to receive it.[7]

b. When Order Discharged. An order discharged is conclusive between the parties litigant only.[8]

c. When Order Quashed. An order quashed is conclusive on neither party.[9]

M. Execution of Order or Warrant of Removal.[10] The execution of the order or warrant of removal is governed entirely by statute providing therefor,[11] and inasmuch as the proceedings are in large degree *ex parte* the terms of the statute must be strictly complied with to bind the town to which removal is sought.[12] The warrant or order of removal is usually executed by the constable or sheriff delivering the person of the pauper[13] to the overseer of the receiving town or county,[14] and serving the latter with the order or warrant[15] by leaving with

99. Little Falls Tp. *v.* Bernards Tp., 44 N. J. L. 621; West Buffalo *v.* Walker Tp., 8 Pa. St. 177; Reg. *v.* Hartington, 3 C. L. R. 554, 4 E. & B. 780, 1 Jur. N. S. 586, 24 L. J. M. C. 98, 3 Wkly. Rep. 285, 82 E. C. L. 780.

1. South Brunswick *v.* Cranbury, 53 N. J. L. 126, 20 Atl. 1084; Barre *v.* Morristown, 4 Vt. 574; Dorset *v.* Manchester, 3 Vt. 370; Rex *v.* Corsham, 11 East 388. But see Jenkins Tp. *v.* Paradise Tp., 8 Pa. Co. Ct. 164, in which it was held that an order of removal from one poor district to another, unappealed from, is not conclusive upon the district to which the pauper is removed as against any other than the district from which he was removed.

2. South Brunswick *v.* Cranbury, 53 N. J. L. 126, 20 Atl. 1084; Little Falls Tp. *v.* Bernards Tp., 44 N. J. L. 621; Rex *v.* Kenilworth, 2 T. R. 598.

3. Green Tp. *v.* Highland Tp., 5 Pa. Super. Ct. 199; Poultney *v.* Sandgate, 35 Vt. 146; Reg. *v.* Hartington Middle Quarter, 2 C. L. R. 554, 4 E. & B. 780, 1 Jur. N. S. 586, 24 L. J. M. C. 98, 3 Wkly. Rep. 285, 82 E. C. L. 780.

4. Barre *v.* Morristown, 4 Vt. 574.

5. Barre *v.* Morristown, 4 Vt. 574; Fairfield *v.* St. Albans, Brayt. (Vt.) 176.

A general notice and demand of the sum expended in supporting a pauper is not sufficient notice of the order of removal to conclude the town as to the settlement of the pauper. Fairfield *v.* St. Albans, Brayt. (Vt.) 176.

6. Dorset *v.* Rutland, 16 Vt. 419 (holding, however, that an order is conclusive, even where no notice is served, if after the removal of the pauper to defendant town the order is not appealed from); Barre *v.* Morristown, 4 Vt. 574.

7. Barre *v.* Morristown, 4 Vt. 574.

8. West Buffalo *v.* Walker Tp., 8 Pa. St. 177; Barre *v.* Morristown, 4 Vt. 574.

9. West Buffalo *v.* Walker Tp., 8 Pa. St. 177.

10. The words "notice," "order," and warrant" are used very loosely in decisions construing the laws relating to the removal of paupers. "Notice" is variously used to mean either a notice to the pauper to appear before the justice, or to leave, or a notice to the town liable for his support to remove him; "order" is used in all these three senses and also to mean the process issued to the constable to remove the pauper, while "warrant" may mean either the summons to appear before the justice or the order of removal.

Removal as condition precedent to recovery for support see *infra*, IV, C, 2, c.

11. See the statutes of the various states.

12. Westminster *v.* Warren, 55 Vt. 522.

13. Houston *v.* Jay, 9 Pa. Co. Ct. 412.

Physical transfer of the pauper is unnecessary when the pauper is too sick to be removed, and in such case service of the order of removal upon the overseers of the town to be charged is complete without it (Tunkhannock *v.* Montrose, 3 Lack. Jur. (Pa.) 345); nor is physical transfer requisite to the validity of an order of removal and its binding force upon the town to which the removal is ordered (Poultney *v.* Sandgate, 35 Vt. 146).

That removal of a pauper cannot legally be made before the day fixed upon for the pauper to remove himself see Barnet *v.* Concord, 4 Vt. 564.

14. Leaving the pauper at the house of a resident of the receiving district is sufficient if delivery to the overseer is impracticable. Houston *v.* Jay, 9 Pa. Co. Ct. 412.

A constable may execute the warrant in any part of the state, in which he can find the paupers. Essex *v.* Milton, 3 Vt. 17.

15. An authorized person may not serve an order of removal under statute (Rev. Laws,

him[16] a copy of the order or warrant of removal[17] certified by the removing justice or justices.[18] The copy of the order should be served within the period after the issuance thereof provided by the statute;[19] if, however, the pauper is actually removed failure to serve a copy of the order does not render the proceedings void, but merely voidable.[20] The officer's return in removal proceedings is *prima facie* evidence as between the parties as to the manner of service.[21] No action can be sustained against a constable for transporting a pauper under a warrant legal upon its face.[22]

N. Review of Order of Removal — 1. Right of Review. The right to appeal from orders of removal is frequently conferred by statute.[23] No appeal lies, however, upon a mere vagrant pass made by a justice, although it contains some expressions resembling an order of removal.[24]

2. Who May Appeal. The statutes usually give the right of appeal to the party aggrieved. Therefore a town receiving a pauper under a void order of removal has no right of appeal, having acted in its own wrong.[25]

3. Manner of Taking Appeal. Where no special mode is provided for appeal from orders of removal of paupers, it is held in some jurisdictions that such appeal may be made by notice to the town or county from which the removal is made and petition to the court to allow the appeal without previous declaration of appeal to the magistrate making the order.[26] In other jurisdictions all that is necessary is that notice of the appeal be given to the justices, or one of them,

§ 2835), providing that it "may" be served by a sheriff or constable. Granville *v.* Hancock, 55 Vt. 323.

Service by pauper.— It seems that an order of removal may be served by the pauper himself delivering it to the overseers of the town to which he is removed. Guilderland *v.* Knox, 5 Cow. (N. Y.) 363.

16. Service by leaving a copy at the usual abode of the overseer with a person of sufficient discretion resident therein is good, although the overseer never receives the copy nor any actual notice. Poultney *v.* Sangate, 35 Vt. 146.

Service on the clerk of the overseer is sufficient if the clerk afterward deliver the copy to the overseer. Houston *v.* Jay, 9 Pa. Co. Ct. 412.

17. The copy must correspond with the original order in every substantial part and an omission in the copy which would be fatal if it were in the original makes the service bad. Dorset *v.* Rutland, 16 Vt. 419 (holding that leaving "a true and attested copy of the original complaint" is not compliance with the statute requiring service of a copy of the order of removal); Barnet *v.* Concord, 4 Vt. 564.

18. East Haven *v.* Derby, 38 Vt. 253.

The certification of the justice is indispensable and a constituent part of the process, and without it the service is void, and the defect cannot be cured by amendment. Sharon *v.* Strafford, 37 Vt. 14.

19. Dorset *v.* Rutland, 16 Vt. 419; Georgia *v.* St. Albans, 3 Vt. 42.

20. Dorset *v.* Rutland, 16 Vt. 419. Under the act of June 20, 1820, section 4, Rev. Laws 764, delivery of a copy is not requisite when the removal is made from one township to another in a county where no poorhouse is erected. Knowlton *v.* Independence Tp., 9 N. J. L. 276.

21. Windham *v.* Chester, 45 Vt. 459.

Insufficient proof of service.— The mere circumstance that the overseers of the receiving town found a copy of the order among the papers of their predecessors is not sufficient proof of service. Guilderland *v.* Knox, 5 Cow. (N. Y.) 363.

22. Bradford *v.* Corinth, 1 Aik. (Vt.) 290.

23. See the statutes of the several states.

In Pennsylvania appeals from orders of removal in pauper cases may be taken to the quarter sessions of the proper county, whose decision is final. Bradford Tp. *v.* Goshen Tp., 57 Pa. St. 495; Mifflin Tp. *v.* Elizabeth Tp., 18 Pa. St. 17; Lewisburg *v.* West Buffalo, 1 Wkly. Notes Cas. 209. The common-law jurisdiction of the supreme court to examine into the legality of the order on certiorari is not, however, taken away. Sunbury *v.* Dauphin, 1 Am. L. J. 77. But under the act of March 16, 1868, either party at the hearing in the quarter sessions may except to any decision of the court upon any point of evidence or law, which exception shall then be noted and filed of record, and a writ of error may then be taken to the supreme court. Parker Tp.'s Appeal, 1 Pa. Cas. 160, 1 Atl. 716; Lewisburg *v.* West Buffalo, 1 Wkly. Notes Cas. 209. This act giving a writ of error applies only to proceedings on appeal Notes Cas. 209. This act giving a writ of error will not lie to a subsequent order of the quarter sessions, charging the district accepting a pauper with the costs of his previous maintenance. Perry County *v.* Chillisquaque Tp., 110 Pa. St. 153, 2 Atl. 528.

24. Trenton *v.* Maidenhead, 1 N. J. L. 75.

25. Niskayuna *v.* Guilderland, 8 Johns. (N. Y.) 412.

26. Northampton County *v.* Limestone Tp., 68 Pa. St. 386, holding that such procedure seems to accord well with the *ex parte* character of an order of removal.

and if, after such notice, the justice refuses to certify the appeal, mandamus will lie.[27] If seasonable notice of an appeal is not given, the appeal should be continued.[28]

4. Time For Taking Appeal. The time for taking an appeal from an order of removal is prescribed by statute. In some jurisdictions it must be to the next term of court after the order is made,[29] and this whether notice of the order was given or not.[30] In other jurisdictions the appeal is given to the next term after the parties find themselves aggrieved, which is not until the removal of the pauper.[31]

5. Scope and Extent of Review. It is sometimes provided that, on appeal from an order of removal, the order shall be no evidence of the facts therein stated; but the respondents must begin *de novo*, and substantiate the order, before the appellants can be called upon to impeach it.[32] The scope and extent of the review is regulated by statute.[33]

O. Costs Upon Removal Proceedings — 1. In General. It is usually provided by statute that the successful party in removal proceedings shall be allowed such charges and costs as the court shall consider reasonable and just.[34] And if

27. Orange *v.* Bill, 29 Vt. 442.

28. Chester *v.* Londonderry, 51 Vt. 535.

29. Walker Tp. *v.* Perry County, 156 Pa. St. 426, 27 Atl. 17; Sugar Creek *v.* Washington, 62 Pa. St. 479; Lower Augusta Tp. *v.* Howard Tp., 6 Pa. Cas. 385, 9 Atl. 446 [*affirming* 1 Pa. Co. Ct. 373], holding that where an appeal is taken in time the parties will not be allowed to suffer on account of a mistake of the court or the clerk.

30. Sugar Creek *v.* Washington, 62 Pa. St. 479.

31. Paine *v.* North Providence, 9 R. I. 358.

In Vermont the appeal from an order of removal must be made to the term of the county court next to be holden after a copy of such order is served as the statute requires. Braintree *v.* Westford, 17 Vt. 141; Dorset *v.* Rutland, 16 Vt. 419. But if not so served, and the pauper is at any subsequent time actually removed by virtue of such order, the appeal is to be taken to the term of the county court next to be holden after such removal. Westminster *v.* Warren, 55 Vt. 522; Dorset *v.* Rutland, *supra*. If no copy of the order of removal is served on the overseers of the poor of the town to which the pauper is ordered to be removed, an appeal may be taken to the term of the county court next subsequent to the service of the warrant of removal. Landgrove *v.* Pawlet, 18 Vt. 325. But an appeal from a warrant of removal cannot be allowed where the order upon which the warrant was issued has been acquiesced in by neglecting to enter an appeal from it at the term required by statute, and it has thus become no longer open to litigation. Braintree *v.* Westford, *supra*.

32. Otsego *v.* Smithfield, 6 Cow. (N. Y.) 760.

33. Under the Pennsylvania act of March 16, 1868, on a writ of error the supreme court cannot review the judgment of the court below on the merits, as on an appeal; only the decision on such points of law or of evidence as have been excepted to can be noticed. Cambria County *v.* Madison Tp., 138 Pa. St. 109, 20 Atl. 944; Montoursville Borough *v.* Fairfield Tp., 112 Pa. St. 99, 3 Atl. 862; Warsaw Tp. *v.* Knox Tp., 107 Pa. St. 301. A general exception to the opinion and decree of the court, in which the facts are found and the law applied thereto, is not sufficient to enable the supreme court to review the case upon the merits. But when the omission of a point is supplied by the specific statement of the disputed question in the body of an exception, the record is then sufficient to present that question. Huston Tp. Poor Dist. *v.* Benezette Tp. Poor Dist., 135 Pa. St. 393, 19 Atl. 1060. This act applies to the trial of the issues on the appeal. It has no reference to a motion made to the discretion of the court. Sugar Creek *v.* Washington, 62 Pa. St. 479, holding that a writ of error will not bring up depositions taken below on the hearing of the rule to quash the appeal.

34. Guilford *v.* Abbot, 17 Me. 335; Buckfield *v.* Gorham, 6 Mass. 445; Hopewell Tp. *v.* Amwell Tp., 7 N. J. L. 4; Blair County *v.* Clarion Borough, 91 Pa. St. 431; Schuylkill *v.* Montour, 44 Pa. St. 484. *Compare* Londonderry *v.* Windham, 2 Vt. 149, holding that one town cannot recover of another the costs of removal of a pauper, except where the sickness of the pauper prevents a removal after an order is made.

Necessity for appeal.— The act of June 13, 1836, relating to costs in removal proceedings, allowed costs and charges only in cases where appeals were taken from orders of removal, and no provision was made for costs when the pauper was accepted and no appeal was taken. Blair County *v.* Clarion Borough, 91 Pa. St. 431; Schuylkill *v.* Montour, 44 Pa. St. 484; Sugarloaf Tp. *v.* Schuylkill County, 44 Pa. St. 481; Lawrence *v.* Tioga, 2 Pa. Dist. 786. The act of April 15, 1867, remedies the defect, however, and makes the accepting district liable for costs where the pauper is accepted and the order of removal is unappealed from, in like manner as if appeal had been taken. Blair County *v.* Clarion Borough, *supra*; Lawrence *v.* Tioga, *supra*; Bedford County *v.* Licking Creek Tp., 2 Chest. Co. Rep. (Pa.) 310.

at the time of trial the pauper has been removed, the action may still be prosecuted to recover costs and expenses.[35] In an action by the overseers of a town for the removal of a pauper they act as mere agents for the town, and costs, if recovered, must be taxed against the town they represent.[36]

2. COUNSEL FEES. A reasonable counsel fee may, by the weight of authority, be allowed the successful party in removal proceedings.[37] There are other decisions, however, which hold that counsel fees are not to be allowed, and that costs must be limited to those which a party could win in any other successful litigation.[38] So it has been held that counsel fees are allowable only where the losing party prosecuted the appeal vexatiously or frivolously,[39] and whether the appeal was taken with or without reasonable cause may, in the discretion of the court, affect the liberality of the allowance.[40] Counsel fees will not be allowed where the litigation might have been avoided by the allowance of proper credits.[41]

3. MAINTENANCE PENDING REMOVAL OR ON UNLAWFUL REMOVAL. A district not liable for the support of a pauper who becomes chargeable therein may recover from the town which is liable all necessary sums expended for his support pending his removal.[42] The relieving district must, however, employ due diligence in notifying the district liable for the pauper's support and in obtaining an order for his removal thereto.[43] And if it neglect to do so it cannot claim reimbursement for maintenance afforded during the delay.[44] If the district liable refuses to accept the pauper, delay on the part of the relieving town in obtaining an order of removal will not prevent it from recovering all expenses incurred up to the time of actual removal.[45] And refusal, on the part of the district liable, to receive

Necessity for order of removal.— There must be an order of removal in order to charge the accepting town, under the act of April 15, 1867, voluntary acceptance imposing no obligation for costs or charges prior to the actual time of receipt. Directors *v.* Overseers, 4 Lanc. L. Rev. (Pa.) 36. But see Clinton Tp. *v.* Union Tp., 5 Pa. Co. Ct. 124, which holds that where relief has been furnished in obedience to an order from two justices and costs have been incurred in searching for the last legal settlement of the pauper, the accepting town is liable for costs to a reasonable amount, under the act of April 15, 1867, although there was no formal order of removal.

Where there is no appeal and pauper is not accepted there can be no recovery for costs. Renors *v.* Half-Moon, 78 Pa. St. 301. Where, however, the overseers of the place of settlement refuse to receive the pauper, and appeal from the order of removal, the appeal being quashed because not taken in time, the relieving district may file a bill of costs and expense in the quarter sessions. Moreland Tp. *v.* Union Tp., 6 Pa. Co. Ct. 566.

That the pauper was found insane and committed before removal will not relieve the accepting district of liability for costs. Bedford County *v.* Licking Creek Tp., 2 Chest. Co. Rep. (Pa.) 310.

That costs may be divided between the two towns see Piney Tp. *v.* Sligo Borough, 2 Pa. Co. Ct. 134.

Services of a justice a town charge.— The services of a justice in the examination and removal of a pauper are properly a town, not a county, charge. *Ex p.* Bennet, 1 Cow. (N. Y.) 204.

35. Guilford *v.* Abbott, 17 Me. 335.

36. Buckfield *v.* Gorham, 6 Mass. 445.

37. Hopewell *v.* Amwell, 7 N. J. L. 4; Davidson Tp. Poor Dist. *v.* Muncy Creek Tp., 11 Pa. Super. Ct. 215; Lawrence *v.* Tioga, 2 Pa. Dist. 786; Milton *v.* Northumberland, 4 Pa. Co. Ct. 306; Centre Dist. *v.* Beaver Dist., Pa. Quart. Sess. (1887); Berwick *v.* Salem, Pa. Quart. Sess. (1886) [both *quoted* in Jordan *v.* Jackson, 8 Pa. Co. Ct. 152].

38. Madison *v.* Cambria, 9 Pa. Co. Ct. 435; Porter Tp. *v.* Jersey Shore, 6 Pa. Co. Ct. 569; Carbondale Tp. Poor Dist. *v.* Scranton Poor Dist., 1 Lack. Leg. N. (Pa.) 187.

39. Jordan *v.* Jackson, 8 Pa. Co. Ct. 152, in which the matter is exhaustively discussed and decisions in Pennsylvania collected.

40. Lower Augusta *v.* Howard, 4 Pa. Co. Ct. 303.

41. Clinton Tp. *v.* Union Tp., 5 Pa. Co. Ct. 124.

42. Moreland Tp. *v.* Union Tp., 6 Pa. Co. Ct. 566; Luzerne County Cent. Poor Dist. *v.* Pittston, etc., Poor Dist., 7 Kulp (Pa.) 199; Luzerne County Cent. Poor Dist. *v.* Pittston, etc., Poor Dist., 7 Kulp (Pa.) 196; *In re* Ross, 3 Kulp (Pa.) 198; Directors *v.* Overseers, 4 Lanc. L. Rev. (Pa.) 36; Pawlet *v.* Sandgate, 19 Vt. 621; St. Johnsbury *v.* Waterford, 15 Vt. 692.

That a town may recover for maintenance of insane pauper in an insane asylum see St. Johnsbury *v.* Waterford, 15 Vt. 691.

43. Luzerne County Cent. Poor Dist. *v.* Pittston, etc., Poor Dist., 7 Kulp (Pa.) 199; *In re* Ross Poor Dist., 3 Kulp (Pa.) 198.

44. Directors *v.* Overseers, 4 Lanc. L. Rev. (Pa.) 36.

45. Moreland Tp. *v.* Union Tp., 6 Pa. Co. Ct. 566.

the pauper after being served with an order of removal will render it liable for all expenses incurred up to the time of final acceptance.[46] The improper removal of a pauper into a town not liable for his support is actionable,[47] and the district to which the improper removal is made may recover from the removing district the necessary expenses of maintenance of the pauper incurred up to the determination of the appeal from the undue removal.[48]

P. Bringing Pauper Into State, County, or Town[49] — **1. Wrongful Removal in General.** Some statutes make the removal by any person of a pauper from one town or county to another, or from without the state to a county or town within the state, with intent to make the latter chargeable with his support, actionable, and also prescribe a penalty therefor.[50]

2. Necessity of Intent and Knowledge. The penalty for bringing a pauper into a town or county, imposed by statute, cannot be recovered, unless the act appears to have been done with the intention of leaving him a charge and burden upon such town or county.[51] Nor is the removing of a pauper from one town or county to another actionable unless it is done with the intent of subjecting such town or county to the charge of supporting him.[52] Even where a person brings a pauper from any place out of the state into a town or county within it, he is

46. Luzerne County Cent. Poor Dist. *v.* Pittston, etc., Poor Dist., 7 Kulp (Pa.) 196.

When the pauper is too ill to be moved the receiving district is liable for maintenance expenses incurred subsequent to the obtaining of the order of removal. *In re* Ross Poor Dist., 3 Kulp (Pa.) 198. And assumpsit will lie for the recovery thereof. Pawlet *v.* Sandgate, 19 Vt. 621.

47. Stratford *v.* Sanford, 9 Conn. 275, whether it make a difference if the removal be *bona fide* or *mala fide, quære.* Stratford *v.* Sanford, *supra.*

That the presumption is that the order of removal was obtained bona fide see Rouse *v.* Moore, 18 Johns. (N. Y.) 407.

48. Kelly Tp. *v.* Gregg Tp., 2 Pa. Cas. 496, 4 Atl. 732; Huntingdon Tp. *v.* New Columbus Borough, 16 Wkly. Notes Cas. (Pa.) 237; Williamsport *v.* Eldred Tp., 6 Wkly. Notes Cas. (Pa.) 188. *Compare* Rouse *v.* Moore, 18 Johns. (N. Y.) 407, holding that the overseers of the town to which a pauper is improperly removed cannot, after the order of removal is quashed, maintain an action against the overseers of the town from which he was removed, to recover the expenses of his maintenance; the presumption being that the order was obtained *bona fide*, and the statute not making it the duty of the overseers of the poor who had caused the pauper to be removed to another town to take him back at their own charge. And see Ryegate *v.* Wardsboro, 30 Vt. 746.

Demand for these expenses need not be made at the term of court when the decree of undue removal was entered. Kelly Tp. *v.* Gregg Tp., 2 Pa. Cas. 496, 4 Atl. 732; Huntingdon Tp. *v.* New Columbus Borough, 16 Wkly. Notes Cas. (Pa.) 237; Williamsport *v.* Eldred Tp., 6 Wkly. Notes Cas. (Pa.) 188.

Order of removal vacated.— Towns may recover for money paid to other towns for the support of paupers, upon orders of removal afterward vacated, if the amount does not exceed the expense of keeping in the town procuring the removal. St. Johnsbury *v.* Waterford, 15 Vt. 692.

The rule of damages is the amount necessarily and in good faith expended in supporting the pauper from the time of removal to the time of trial. Stratford *v.* Sanford, 9 Conn. 275.

49. **Persons wrongfully brought into town as subject to removal** see *supra*, III, H, 2.

Procuring marriage for purpose of changing settlement as causing loss or change see *supra*, III, F, 6.

50. See cases cited *infra*, III, P, 2, 3.

51. *Colorado.*— Pitkin County *v.* Law, 3 Colo. App. 328, 33 Pac. 143.

Maine.— Sanford *v.* Emery, 2 Me. 5, holding that such intent is a fact to be found by the jury.

Massachusetts.— Sturbridge *v.* Winslow, 21 Pick. 83; Deerfield *v.* Delano, 1 Pick. 465 (holding that no penalty can be recovered against one who carried a poor person into a town with an honest purpose of helping him on his journey); Greenfield *v.* Cushman, 16 Mass. 393.

New Hampshire.— Sullivan County *v.* Grafton County, 55 N. H. 339. But see State *v.* Cornish, 66 N. H. 329, 21 Atl. 180, 11 L. R. A. 191.

New York.— Thomas *v.* Ross, 8 Wend. 672.

Vermont.— Wallingford *v.* Gray, 13 Vt. 228.

See 38 Cent. Dig. tit. "Paupers," § 134.

Evidence held sufficient to show intent see Williams *v.* Franklin County, 39 Ill. 21.

52. Livingston County *v.* Oakland County, 141 Mich. 667, 104 N. W. 978; Foster *v.* Cronkhite, 35 N. Y. 139; Bartlett *v.* Ackerman, 21 N. Y. Suppl. 53; Coe *v.* Smith, 24 Wend. (N. Y.) 341; Barnet *v.* Whitcher, 50 Vt. 170.

Evidence held insufficient to show intent see Barnet *v.* Whitcher, 50 Vt. 170.

Verdict held contrary to evidence on question of intent see Weybridge *v.* Cushman, 64 Vt. 415, 24 Atl. 1114.

neither subject to the penalty, nor to the maintenance of the pauper, without the existence of an intent to charge such town or county.[53]

3. REMEDIES — a. Penalty — (I) *GROUNDS FOR IMPOSITION.* The penalty given by statute for bringing a pauper into a town or county with intent to make such town or county liable for his support is incurred as well by bringing such pauper from one town or county to another town or county within the state as by bringing him from without the state.[54] In some jurisdictions it is held that no penalty can be recovered for bringing a person to his domicile and usual place of abode, or to the place of his settlement.[55] Under other statutes the penalty may be recovered by the town or county into which the pauper is brought, although the pauper had his settlement in such town or county.[56]

(II) *PERSONS LIABLE.* Statutes subjecting to a penalty "whoever" brings a pauper into any town, etc., are held to apply to public officers as well as to private individuals;[57] but the penalty cannot be recovered against an officer acting under an order of removal regularly made.[58] Carriers of passengers are within the letter, but not within the spirit, of the statutes, and cannot be charged, unless, in bringing paupers into a town, they act fraudulently.[59]

(III) *PARTIES.* When no mode of recovering the penalty is designated and no appropriation made, it accrues to the use of the state and should be prosecuted in the name of the state.[60]

b. Damages — (I) *FORM OF ACTION.* The removal of paupers having no settlement in the state from the town in which they reside and to which they are chargeable to another town, thereby throwing the burden of their support upon the latter town, is an actionable injury, for which the appropriate remedy is an action on the case.[61] But such an action cannot be maintained against a town for neglect or breach of its duty whereby its paupers stroll into another town in which they have no legal settlement, and there become chargeable to the latter.[62] In some jurisdictions an action for damages is expressly given by statute against the person unlawfully bringing a pauper into a town or county.[63]

(II) *MEASURE OF DAMAGES.* The measure of damages in such actions is the amount necessarily in good faith expended by the town or county in supporting the pauper from the time of his removal to the time of trial.[64]

4. EVIDENCE. To warrant an infliction of the statutory penalty for bringing poor persons from one town or county to another with intent to charge the latter town or county with their support, the guilt of defendant must be established beyond a reasonable doubt.[65] But a statute providing that a person so removing a pauper shall be liable to pay all damages for his support accruing to the town

53. Dyer *v.* Hunt, 5 N. H. 401; Coe *v.* Smith, 24 Wend. (N. Y.) 341.

54. Thomas *v.* Ross, 8 Wend. (N. Y.) 672.

55. Middleborough *v.* Clark, 2 Pick. (Mass.) 28; State *v.* Benton, 18 N. H. 47.

56. Winfield *v.* Mapes, 4 Den. (N. Y.) 571; Weybridge *v.* Cushman, 64 Vt. 415, 24 Atl. 1114; Dover *v.* Wheeler, 51 Vt. 160.

57. Palmer *v.* Wakefield, 102 Mass. 214; Newaygo County *v.* Nelson, 75 Mich. 154, 42 N. W. 797; Dover *v.* Wheeler, 51 Vt. 160.

58. Sturbridge *v.* Winslow, 21 Pick. (Mass.) 83; Morgan *v.* Mead, 16 Vt. 644.

59. Thomas *v.* Ross, 8 Wend. (N. Y.) 672.

60. Sturbridge *v.* Winslow, 21 Pick. (Mass.) 83.

61. Stratford *v.* Sanford, 9 Conn. 275; Pittstown *v.* Plattsburgh, 15 Johns. (N. Y.) 436; Sheldon *v.* Fairfax, 21 Vt. 102; Charlotte *v.* Colchester, 20 Vt. 91, holding that the remedy in such case is not by obtaining an order of removal of the pauper to the town from which he was thus fraudulently removed. *Compare* Crouse *v.* Mabbett, 11 Johns. (N. Y.) 167.

An action of assumpsit cannot be maintained in such a case. Brooks *v.* Read, 13 Johns. (N. Y.) 380; Putney *v.* Dummerston, 13 Vt. 370.

62. Chelsea *v.* Washington, 48 Vt. 610.

63. Marshfield *v.* Edwards, 40 Vt. 245 (holding likewise that in an action for damages, under Gen. St. c. 20, § 31, for transporting an indigent person from one town to another with an intent to make the latter liable for his support, it is no defense to show that the pauper had a settlement in another town in the state and that his father had property and was able to support him); Barnet *v.* Ray, 33 Vt. 205.

64. Stratford *v.* Sanford, 9 Conn. 275.

65. Barnet *v.* Ray, 33 Vt. 205.

Evidence held insufficient to support judgment see Harding *v.* People, 34 Ill. App. 617.

into which the removal is made is merely remedial, and no such strictness of proof is requisite for a recovery thereunder.[66]

IV. SUPPORT, SERVICES, AND EXPENSES.[67]

A. Compelling Support by Relatives — 1. Liability For Support — a. Nature and Extent — (I) *In General.* At common law the duty of a person to support even his natural relations is of imperfect obligation only, and cannot be enforced.[68] Beyond this the liability is created by statute, and is enforceable only pursuant to the statutory provisions.[69] Such statutes in nearly every jurisdiction require kindred by consanguinity in a certain degree, who are of sufficient ability, to contribute to the support of paupers.[70] The provisions of the statute are entirely prospective,[71] and become operative when the necessity of providing for a pauper by the town in default of other means arises, and is not delayed until the town has actually furnished necessaries.[72] Such a statute does not embrace an illegitimate child who has become chargeable as a pauper, but only the family relation as constituted and recognized by law.[73] Funeral expenses,[74] and necessary expenses incurred during the sickness,[75] are within a statute requiring persons to "relieve and maintain" indigent relatives.

(II) *Manner of Support.* When an order is made requiring a relative of a person to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper at such place and in such manner as he shall deem proper, provided the place and manner are approved by the overseer, and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid.[76] The right of the relative to determine the place and manner of support is unrestricted, except that they must be such as the overseers or the superintendent approve.[77]

(III) *As Dependent on Ability.* Persons of the requisite kinship may be charged with the support of their relatives only where they are of sufficient ability.[78] In interpreting the words "sufficient ability," as used in the statutes, each case of the kind must depend upon its own special circumstances, and to a large extent also upon the discretion of the court.[79] It is to be judged of with reference to the existing state of things, and to the present state of defendant's property and debts, his income and probable earnings, and his present reasonable expenses;[80] and liability is not to be restricted to such persons only as have a surplus income over and above their own reasonable maintenance according to

66. Barnet *v.* Ray, 33 Vt. 205.

67. Constitutional and statutory provisions see *supra*, I, B.

For matters relating to maintenance and care of paupers in prisons see Prisons.

For matters relating to maintenance and care of paupers in reformatories see IV, L.

68. Newtown *v.* Danbury, 3 Conn. 553; Wethersfield *v.* Montague, 3 Conn. 507; Dawson *v.* Dawson, 12 Iowa 512; Multnomah County *v.* Faling, 49 Oreg. 603, 91 Pac. 21.

69. Newtown *v.* Danbury, 3 Conn. 553; Wethersfield *v.* Montague, 3 Conn. 507; Dawson *v.* Dawson, 12 Iowa 512; Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

70. See cases cited *infra*, this section and IV, A, 1, a, (II), (III), b, c.

71. Newton *v.* Danbury, 3 Conn. 553; Wethersfield *v.* Montague, 3 Conn. 507; Dawson *v.* Dawson, 12 Iowa 512.

72. Walbridge *v.* Walbridge, 46 Vt. 617.

73. Hiram *v.* Pierce, 45 Me. 367, 71 Am. Dec. 555; Directors *v.* Hickman, 4 Pa. Dist. 494.

74. Robert's Estate, 2 Pa. Co. Ct. 647.

75. Robert's Estate, 2 Pa. Co. Ct. 647.

76. Duel *v.* Lamb, 1 Thomps. & C. (N. Y.) 66.

77. Duel *v.* Lamb, 1 Thomps. & C. (N. Y.) 66.

78. Fitzgerald *v.* Donoher, 48 Nebr. 852, 67 N. W. 880 (holding that under the Nebraska statute providing that the support of a dependent poor parent devolves upon the children if they or either of them be of sufficient ability, the question of a child's liability for the support of the parent depends not upon his age, but upon his ability); Durfey *v.* South Burlington, 65 Vt. 412, 26 Atl. 587.

79. Templeton *v.* Stratton, 128 Mass. 137; Dover *v.* McMurphy, 4 N. H. 158.

80. Templeton *v.* Stratton, 128 Mass. 137; Colebrook *v.* Stewartstown, 30 N. H. 9, 64 Am. Dec. 275.

It is not necessary that a person be in a state of affluence in order to be liable for the support of a pauper relative; it is sufficient that he has the ability to labor and support him. Bernadus *v.* Williamson, 1 Wheel. Cr. (N. Y.) 234.

their respective stations and needs.[81] If, in the present state of his family and means, one cannot afford the assistance without reducing his property below the amount required, with his labor, to afford a comfortable support for his family, he is not to be deemed a person of sufficient ability within the meaning of the statute.[82] Yet if the required contribution would not cause present deprivation of reasonable and comfortable support of defendant and his family, or interfere with the fulfilment of his obligations to others, the fact that such contribution might impair his capital is not of itself a sufficient reason why such contribution should not be ordered.[83]

b. Persons Liable.[84] A statute requiring kindred who are of sufficient ability to contribute to the support of paupers applies to blood relations only and not to relations by affinity.[85] In some jurisdictions grandparents, if of sufficient ability, are made liable for the support of grandchildren,[86] and, under like circumstances, grandchildren are made liable for the support of their grandparents.[87]

c. Exemption From Liability. In some jurisdictions bad conduct on the part of the pauper will exempt relatives otherwise liable from the duty to support such pauper.[88] A statute thus providing does not contemplate remote acts of indiscretion, or inability of such pauper to deal wisely in business affairs, but bad conduct involving some element of moral delinquency, occasioning his poverty.[89] The bad conduct must also have an immediate bearing upon, and be the material and proximate cause of, the poverty of such poor person.[90]

2. Proceedings to Compel Support[91] **— a. Mode of Compelling Support — (i)** *In General.* In some jurisdictions the statute provides for a summary proceeding

81. Templeton *v.* Stratton, 128 Mass. 137.

82. Colebrook *v.* Stewartstown, 30 N. H. 9, 64 Am. Dec. 275; Dover *v.* McMurphy, 4 N. H. 158; Bradford County *v.* Case, 2 Pa. Co. Ct. 644 (holding that the court will not order a parent who is old and helpless to support his child who is an insane pauper, where the effect would be to pauperize the parent by using up his entire property in a few years); East Greenwich *v.* Card, 1 R. I. 409.

83. Templeton *v.* Stratton, 128 Mass. 137. *Compare* Colebrook *v.* Stewartstown, 30 N. H. 9, 64 Am. Dec. 275.

84. Parent and child see Parent and Child, 29 Cyc. 1605 *et seq.*

85. Newtown *v.* Danbury, 3 Conn. 553; Farr *v.* Flood, 11 Cush. (Mass.) 24; Manchester *v.* Rupert, 6 Vt. 291; Rex *v.* Kempson, 1 Bott P. L. 373.

A father-in-law is not bound to maintain his son's wife. Manchester *v.* Rupert, 6 Vt. 291; Rex *v.* Benoire, 2 Ld. Raym. 1454; Rex *v.* Dempson, Str. 955.

A son-in-law is not liable for the support of his wife's parents (Sherman *v.* Nichols, 1 Root (Conn.) 250; Mack *v.* Parsons, Kirby (Conn.) 155, 1 Am. Dec. 17; Johnson *v.* Ballard, 11 Rich. (S. C.) 178; Poor Com'rs *v.* Gansett, 2 Bailey (S. C.) 320, 23 Am. Dec. 139; Rex *v.* Munden, Str. 190), or grandparents (Chesterfield *v.* Hart, Smith (N. H.) 350).

A stepfather is not bound to maintain his wife's children by a former husband. Tubb *v.* Harrison, 4 T. R. 118; Cooper *v.* Martin, 4 East 76.

A nephew is not liable for the support of his uncle. Dawson *v.* Dawson, 12 Iowa 512.

86. Kiser *v.* Frankfort Tp., 3 N. J. L. 410; Duffey *v.* Duffey, 44 Pa. St. 399; Guardians of Poor *v.* Smith, 6 Pa. L. J. 433, 4 Pa. L. J. Rep. 60; Matter of Whiting, 3 Pittsb. (Pa.) 129; Bevan *v.* Macmahon, 5 Jur. N. S. 686, 28 L. J. P. & M. 127, 2 L. T. Rep. N. S. 255, 2 Swab. & Tr. 58, 8 Wkly. Rep. 453.

In Iowa, under Code, § 2217, a grandparent is only liable for the support of his grandchildren in the absence or inability of a nearer relative, and a grandfather is not liable to support his grandchildren without proof that their father, who is accessible, is unable to support them. Monroe County *v.* Abegglen, (Iowa 1905) 105 N. W. 350.

87. Wethersfield *v.* Montague, 3 Conn. 507; Chesterfield *v.* Hart, Smith (N. H.) 350; *Ex p.* Hunt, 5 Cow. (N. Y.) 284 (holding that the statute extends to the case of maternal grandparents); Smith *v.* Palmyra Tp., 2 Walk. (Pa.) 342.

88. Mower County *v.* Robertson, 79 Minn. 357, 82 N. W. 666; Morris *v.* Edmonds, 18 Cox C. C. 627, 77 L. T. Rep. N. S. 56; Mitchell *v.* Torrington Union, 61 J. P. 498, 76 L. T. Rep. N. S. 724, husband not liable to maintain adulterous wife.

Wife leaving husband.— Where the wife left her husband a month after marriage on account of his using obscene and abusive language to her, it was held that the magistrate should not have granted an order of maintenance without first deciding whether the wife's refusal to return to her husband was reasonable. Fordham *v.* Young, 53 J. P. 133.

89. Mower County *v.* Robertson, 79 Minn. 357, 82 N. W. 666.

90. Mower County *v.* Robertson, 79 Minn. 357, 82 N. W. 666.

91. Actions to recover for supplies and expenditures see *infra*, IV, N, 1.

to obtain an order compelling the kindred of a person who has become, or is liable to become, a public charge, to furnish the necessary support.[92] To fix liability against a delinquent relative, it is necessary that an order be made by the court directing him to discharge the duty imposed upon him and that such direction has been ignored.[93]

(II) *By Requiring Bond.* Unless authority therefor is expressly given by statute,[94] the court cannot require the relative who is directed to maintain the poor person to enter into bond for the performance of the order.[95] A bond executed to a poor district, conditioned to indemnify it against the maintenance of a person who has a legal settlement in such district, whether he be, or be likely to become, chargeable or not, is a legal contract,[96] and not without consideration.[97]

(III) *Seizure of Property of Person Liable For Support.* In one jurisdiction at least the statute provides for the issuance by magistrates, upon the application of the overseers of the poor, of a warrant for the seizure of the personal property of a person alleged to have absconded leaving a wife or children chargeable to the public, and for the sale from time to time of such property, and the application of the proceeds of such sale toward the maintenance of the wife or children of the person so absconding.[98]

Liability of pauper and pauper's estate see *infra*, IV, D.

92. See the statutes of the various states. And see the following cases:

Illinois.— Rogers *v.* Rogers, 51 Ill. App. 683.

Iowa.— Boone County *v.* Ruhl, 9 Iowa 276.

Maine.— Calais *v.* Bradford, 51 Me. 414.

Massachusetts.— South Reading *v.* Hutchinson, 10 Allen 68.

New Jersey.—Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807.

New York.— Tillotson *v.* Smith, 12 N. Y. St. 331.

Pennsylvania.— *In re* James, 116 Pa. St. 152, 9 Atl. 170.

See 38 Cent. Dig. tit. "Paupers," § 148.

93. Multnomah County *v.* Faling, 49 Oreg. 603, 91 Pac. 21; Faling *v.* Multnomah County, 46 Oreg. 460, 80 Pac. 1009.

94. Breichelbiel *v.* Powles, 15 N. Y. Suppl. 465.

A provision of statute giving to a court power to levy by its process a given sum for failure of the kindred of a pauper to obey an order of such court requiring them to maintain him does not authorize the court, in such case, to demand security for non-compliance with its order. Dierkes *v.* Philadelphia, 93 Pa. St. 270.

95. Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807.

Taking bond voluntarily given.—Although a town may not have power to compel security, yet it may take a bond, voluntarily given, conditioned to save such town harmless from the support of certain persons, named in such bond. Pawlet *v.* Strong, 2 Vt. 442.

96. Williston *v.* White, 11 Vt. 40; Pawlet *v.* Strong, 2 Vt. 442.

Construction.— A bond given to a poor district which contains an undertaking that a certain poor person shall not in one year become chargeable on the district and, in case of failure, to pay the district a certain sum, is a bond of indemnity only, and the district can recover thereon only such sum as it has paid out on account of the poor person. Breichelbiel *v.* Powles, 15 N. Y. Suppl. 465.

97. Williston *v.* White, 11 Vt. 40.

98. See N. Y. Laws (1878), c. 304. And see People *v.* Triangle, 23 Barb. (N. Y.) 236 (holding that under a provision in the act that the property seized under the warrant and the inventory thereof shall be returned to the court of general sessions, and the said court, upon inquiring into the facts and circumstances, may confirm the said warrant and seizure, or may discharge the same, it is not sufficient that the court is satisfied that a warrant has been issued, the property seized, and an inventory made, but an inquiry into the merits of the case must be made); Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223 (holding that on an application for a warrant against a person alleged to have absconded leaving a wife and children chargeable to the public, the wife of such person is not a competent witness to prove the fact).

The warrant issued by the magistrates should direct the overseers of the poor district to make an inventory of the property taken by them, and return it with their proceedings to the next court of sessions of the county. Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260.

The order of the court of sessions confirming the warrant, and ratifying the seizure of a deposit of defendant in a savings bank, may direct the overseers of the poor district to pay out of the money seized a specified sum to the wife, for the maintenance of herself and her children. Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260.

What property may be seized.— On proof that a husband has abandoned his wife and family, and that they are likely to become a charge upon the public for support, a police justice may issue a warrant to the commissioner of charities and corrections, directing him to seize any money of the husband on

b. Persons Entitled to Maintain Proceedings. In one jurisdiction at least the statute provides that the proceedings may be instituted by any person having an interest in the support of the poor person named.[99] Where the statute does not provide the manner in which the action of the court shall be invoked, it may properly be done by complaint or petition of the overseer of the poor of the district liable to support the pauper;[1] but if it acts upon a petition showing jurisdiction to make an order, its action will not be invalidated because the petition was presented by the pauper.[2] In one jurisdiction at least the statute provides that the proceedings shall be brought in the name of the city or town where the poor person has a legal settlement, by their proper officers.[3] Where the statute declares the application may be made by any person having an interest in the poor person, but is silent as to the kind or extent of the interest, the application may be made by such poor person himself.[4] A statute empowering a poor district, that performs its duty of relieving a poor person, to enforce the liability of his kindred, does not authorize a volunteer to enforce it.[5] By statute in some jurisdictions the right to institute the proceedings is given to any kindred who shall have been at any expense for the relief and support of the poor person.[6]

c. Jurisdiction. The jurisdiction of summary proceedings to compel the kindred of a poor person to contribute to his support is dependent upon statute.[7]

d. Notice and Opportunity to Be Heard. The kindred against whom the order is applied for must have notice of the application and a reasonable opportunity to be heard;[8] and where the statute is silent on the subject of the manner of giving notice, it may be made by summons or rule to show cause.[9]

e. Petition or Complaint. The petition or complaint should of course aver all the essential jurisdictional facts.[10] When the act provides that a person presenting a petition must have an interest in the support of a poor person, but is silent as to the kind or extent of the interest, a petition is fatally defective which fails to aver that the person making it has any interest in the support of the

deposit in any savings bank of the county. Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260. Under an old statute in Pennsylvania relating to the seizure of property of a person absconding and leaving his wife and children likely to become a charge on the public, it was held that the share of the person so absconding, as distributee in a decedent's estate, could be attached. Philadelphia *v.* Brennan, 5 Pa. Dist. 116.

Form of warrant see Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260.

Form of inventory and return see Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260.

Form of order confirming warrant and ratifying seizure of property see Bourgeois' Case, 7 Abb. N. Cas. (N. Y.) 260.

99. See *In re* James, 116 Pa. St. 152, 9 Atl. 170, holding that where the statute provides that the proceedings may be instituted by any person having an interest in the poor person named, but is silent as to the kind or extent of the interest, it must appear that the person instituting the proceedings has some interest in the poor person.

1. Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807.

The statute in terms prescribes that the complaint is to be filed by the state's attorney for the county, or by the overseers of the poor of the town or precinct where the poor person has his legal settlement. People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634.

Rule in New York.— Proceedings are properly brought by the superintendent of the poor in counties where all the poor are a charge upon the county in the first instance. Stone *v.* Burgess, 2 Lans. 439. But where the support of poor persons is a charge on the town until their removal to the county poorhouse, the application is properly made by the overseers of the poor of the town, and not the superintendent of the poor of the county. Tillotson *v.* Smith, 12 N. Y. St. 331.

2. Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807.

3. Calais *v.* Bradford, 51 Me. 414; Hiram *v.* Pierce, 45 Me. 367, 71 Am. Dec. 555; Bridgton *v.* Bennett, 23 Me. 420.

4. *In re* James, 116 Pa. St. 152, 9 Atl. 170; O'Connor's Appeal, 104 Pa. St. 437.

5. Gray *v.* Spalding, 58 N. H. 345.

6. Walbridge *v.* Walbridge, 46 Vt. 617.

7. See Smith *v.* Palmyra Tp., 2 Walk. (Pa.) 342; Darlington *v.* Darlington, 5 Pa. Co. Ct. 132, holding that the statute contemplates application to the court of quarter sessions and confers no jurisdiction on the common pleas.

8. Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807; Kiser *v.* Frankfort Tp., 3 N. J. L. 410. See also Faling *v.* Multnomah County, 46 Oreg. 460, 80 Pac. 1009.

9. Ackerman *v.* Ackerman, 55 N. J. L. 422, 27 Atl. 807.

10. Walker Tp. *v.* Knisely, 17 Pa. Super. Ct. 415.

poor person named.[11] Unless the duty to make a demand on defendant is imposed by statute, no demand by the pauper, or any one in his behalf, need be alleged.[12] A petition alleging that defendant is of sufficient ability to relieve and maintain a poor person is sufficient; it need not set forth in detail the income and property of defendant.[13] A complaint which charges failure to support a poor person "then and there being a pauper," sufficiently avers that such person is or will be a charge on the poor district.[14] It is a sufficient allegation that the poor district has incurred expenses, where the complaint sets forth that the poor person has been supported by the complainant district since a certain day named therein.[15]

f. Order For Relief — (I) *Requisites.* The order or decree, to be valid, must be complete in itself and self-sustaining.[16] The order for relief must declare and adjudge the existence of the statutory grounds for its existence.[17] The order must in its provisions as to relief and maintenance strictly follow the statute which is its foundation.[18] Thus an order is fatally defective for failure to direct the manner of relief and maintenance, as required by the statute.[19] Likewise an order is invalid if, when not so authorized by the statute, it directs payment of a given sum,[20] or fixes the place or manner of support,[21] or embraces several poor persons in a joint provision.[22]

(II) *Enforcement.* When the statute directs that the sum ordered to be paid shall be levied by the process of the court issuing the order, and prescribes no other or further remedy for its enforcement, it cannot be enforced by attachment and commitment.[23]

(III) *Appeal From.* Unless expressly given by statute,[24] the right to appellate review does not exist in proceedings of this character.[25] A defendant present on the hearing of the application and consenting to the making of the order will

11. *In re* James, 116 Pa. St. 152, 9 Atl. 170.

12. People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634.

13. Walker Tp. *v.* Knisely, 17 Pa. Super. Ct. 415.

14. People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634.

15. Hiram *v.* Pierce, 45 Me. 367, 71 Am. Dec. 555.

16. O'Connor's Appeal, 104 Pa. St. 437.

Because but two out of five children of a poor person are directed to furnish his support, the order is not invalid; nor is it invalid because the children are directed to contribute to the support in unequal amounts. State *v.* Burgess, 2 Lans. (N. Y.) 439.

Specifying names of kindred and apportioned sums.—An order requiring members of a poor person's family to pay a certain sum per week for his support should specify the names of each such person, and the apportioned sum each is required to pay for such purpose. O'Connor's Appeal, 104 Pa. St. 437, holding further that an order that A. & B. "and the other adult children of the petitioner" shall pay a stated sum per week for such purpose is too vague and uncertain to be self-sustaining, and will be reversed.

Option to support.— The order is not void because it gives no option to the relatives to support the poor person or pay the amount provided, but this is at most an irregularity, not subject to collateral attack. Aldridge *v.* Walker, 73 Hun (N. Y.) 281, 26 N. Y. Suppl. 296.

17. Meeker *v.* Meeker, 61 N. J. L. 146, 38 Atl. 749.

18. Meeker *v.* Meeker, 61 N. J. L. 146, 38 Atl. 749.

19. Meeker *v.* Meeker, 61 N. J. L. 146, 38 Atl. 749.

20. Meeker *v.* Meeker, 61 N. J. L. 146, 38 Atl. 749.

21. Duel *v.* Lamb, 1 Thomps. & C. (N. Y.) 66; Weaver *v.* Benjamin, 18 N. Y. Suppl. 630.

22. Meeker *v.* Meeker, 61 N. J. L. 146, 38 Atl. 749.

23. *In re* James, 116 Pa. St. 152, 9 Atl. 170; Dierkes *v.* Philadelphia, 93 Pa. St. 270.

24. Tillotson *v.* Smith, 12 N. Y. St. 331.

25. *Ex p.* Pierce, 5 Me. 324; Nantucket *v.* Cotton, 14 Mass. 243; Eaton *v.* Williams, 51 Wis. 99, 7 N. W. 838; Reg. *v.* London Justices, [1900] 1 Q. B. 438, 64 J. P. 357, 69 L. J. Q. B. 364, 82 L. T. Rep. N. S. 296, 48 Wkly. Rep. 319.

No appeal on the merits lies from the order directing a relative to support a pauper, under the Pennsylvania statute (Lampiter Tp. *v.* Lancaster, 2 Yeates (Pa.) 164; Walker Tp. *v.* Knisely, 17 Pa. Super. Ct. 415); but in such a case an appeal is only tantamount to a certiorari to review the record (Walker Tp. *v.* Knisely, *supra*). See also *In re* James, 116 Pa. St. 152, 9 Atl. 170.

As to costs.— Upon a complaint to compel kindred of a poor person to contribute to his support, the superior court has a discretionary power, under Gen. St. c. 70, § 11, to award costs, and no appeal lies from its decision. South Reading *v.* Hutchinson, 10 Allen (Mass.) 68.

not on appeal be allowed to object that the person making the application is not the proper party.[26]

g. Costs. The right of the successful party to costs in proceedings of this character depends entirely upon the statute;[27] and unless authority therefor can be found in the statute,[28] it is erroneous for the court to award costs.[29] An action of debt lies to recover the costs awarded on granting an order against the kindred of a poor person for his support.[30]

B. Support of Pauper Slaves.[31] Prior to the abolition of slavery in the United States, the statutes in most jurisdictions made a master liable for the maintenance of decrepit slaves, or those manumitted, who thereafter became paupers.[32] His personal representatives were also liable,[33] and his heirs,[34] to the value of the real estate descended.[35] But it seems that a *bona fide* purchaser of such real estate without notice was not liable.[36] The town where the emancipated slave belonged, or had a settlement, was the town empowered to recover from the master, or his heirs, executors, or administrators, for expenditures incurred for the support of such slave.[37]

C. Local Authorities Liable[38] — **1. In General — a. State Paupers.** In some jurisdictions the statute provides that all persons needing relief, who have no settlement in the state, shall be state paupers, and be supported by the state for a period fixed by the statute, and, after the expiration of such period, all such paupers shall be sent back to the town where they resided when they first applied for relief, and thereafter be a town charge.[39] Where the state is in charge of a quarantine, the expense of the burial of paupers who die in their charge rests upon the state.[40]

b. Liability of Counties. The obligation of a county to support the poor is statutory, and it can be held liable in no case except as prescribed by statute.[41]

26. Baldwin *v.* McArthur, 17 Barb. (N. Y.) 414.

27. Condon *v.* Pomroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696; Tillotson *v.* Smith, 12 N. Y. St. 331.

28. Condon *v.* Pomroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696; South Reading *v.* Hutchinson, 10 Allen (Mass.) 68; Stone *v.* Burgess, 2 Lans. (N. Y.) 439.

The words "civil action," as used in a statute giving costs to the prevailing party, are broad enough to cover a proceeding to compel kindred of a poor person to contribute to his support. Condon *v.* Pomroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696.

29. Tillotson *v.* Smith, 12 N. Y. St. 331; Salem Tp. *v.* Cook, 6 Pa. Co. Ct. 624.

30. Stone *v.* Burgess, 2 Lans. (N. Y.) 439.

31. Acquired settlement of slaves see *supra*, III, D, 1, i.

Derivative settlement of slaves see *supra*, III, E, 4.

32. East Hartford *v.* Pitkin, 8 Conn. 393; Sussex County *v.* Hall, 3 Harr. (Del.) 322; Exeter *v.* Warwick, 1 R. I. 63; Charleston *v.* Cohen, 2 Speers (S. C.) 408.

A slave set at liberty is one placed in a permanent condition of freedom, and the right of the master over him is extinguished. Columbia *v.* Williams, 3 Conn. 467.

33. Sussex County *v.* Hall, 3 Harr. (Del.) 322; Chatham Tp. *v.* Canfield, 8 N. J. L. 52.

34. *In re* Hannah, 2 Harr. (Del.) 365.

35. Sussex County *v.* Hall, 3 Harr. (Del.) 322.

36. Sussex County *v.* Hall, 3 Harr. (Del.) 322.

37. Colchester *v.* Lyme, 13 Conn. 274.

38. Actions to recover for supplies, services, and expenditures see *infra*, IV, N, 2.

Contracts for support see *infra*, IV, H.

Duties of public authorities to furnish relief see *supra*, I, C.

Furnishing support in general see *infra*, IV, G.

Liability for support in general see *infra*, IV, C, 1, b, c, d.

Liability for support of paupers in asylums see *infra*, IV, K.

Maintenance pending removal or on wrongful removal see *supra*, III, Q, 3.

39. Canton *v.* Burlington, 58 Conn. 277, 20 Atl. 602. See also Davis *v.* Milton Plantation, 90 Me. 512, 38 Atl. 539; Belchertown *v.* Ludlow, 110 Mass. 98, holding that, under St. (1866) c. 234, § 1, providing that when the operation of any provision of law in relation to poor and indigent persons might cause a separation of husband and wife by reason of the wife having a legal settlement in some place in the commonwealth, the husband being a state pauper, both parties shall be supported by the place where the wife has a legal settlement, a town is not obliged to support a state pauper whose wife has a settlement in the town, if she herself is not a pauper.

40. McNorton *v.* Val Verde County, (Tex. Civ. App. 1894) 25 S. W. 653, in which it was held that a county is not liable for coffins of paupers dying in a pest-house which is in charge of the state, under the quarantine laws.

41. Cooledge *v.* Mahaska County, 24 Iowa

It is frequently provided that all counties except those in which the poor are supported by the towns shall be liable for the relief and support of all poor and indigent persons lawfully resident therein, and for aid and assistance to transient persons, falling sick therein, and having no money or property to pay for board, nursing, and medical aid.[42] Another frequent provision is that where a poor person has not gained a settlement in any town or city in the county in which he has become poor, sick, or infirm, he shall be supported and relieved by the superintendent of the poor at the expense of the county.[43] A county cannot relieve itself from this statutory liability by refusing or neglecting to make any rules and regulations on the subject.[44] The facts that proceedings have been instituted against the relatives of a pauper, and that they have been required to contribute to his support, will not relieve the county from its primary liability to provide for the support of such person.[45]

c. Liability of Place of Residence. Under the pauper statutes generally, a town or county is liable in the first instance for the support of a pauper who resides therein,[46] although the town or county in which he has his legal settlement

211. And see Otoe County *v.* Lancaster County, (Nebr. 1907) 111 N. W. 132.

42. Perry County *v.* Du Quoin, 99 Ill. 479; Dorr *v.* Seneca, 74 Ill. 101; Livingston County *v.* Oakland County, 141 Mich. 667, 104 N. W. 978; La Grange Tp. *v.* Cass County, 115 Mich. 181, 73 N. W. 114; Pushor *v.* Morris, 53 Minn. 325, 55 N. W. 143.

43. *Kansas.*— Stevens *v.* Miami County, 6 Kan. App. 438, 49 Pac. 798.

Michigan.— La Grange Tp. *v.* Cass County, 115 Mich. 181, 73 N. W. 114.

New Hampshire.— Loudon *v.* Merrimack County, 71 N. H. 573, 53 Atl. 906; Grafton *v.* Grafton County, 43 N. H. 382, where the overseers of the poor of G, in the county of G, supposing their town liable for the support of such a pauper, in good faith removed him from C, in another county, to G, and supported him there, and it was held that the town of G might recover of the county of G for such support.

New York.— People *v.* Maynard, 160 N. Y. 453, 55 N. E. 9 [*affirming* 42 N. Y. App. Div. 579, 59 N. Y. Suppl. 419]; Delaware County *v.* Delaware, 105 N. Y. App. Div. 129, 93 N. Y. Suppl. 954.

Pennsylvania.— Juniata County *v.* Delaware Tp., 107 Pa. St. 68, holding that where a person abandons his settlement in the state and acquires a settlement in another state, and thereafter returns and resides in his old township without acquiring a new legal settlement, and becomes insane, the county in which he became insane is liable for his support, under the act of 1854 (Pamphl. Laws 85), imposing the burden of supporting an insane person who has been committed to the state lunatic hospital, and who has no legal settlement in the commonwealth, on the county where he was found a lunatic.

Wisconsin.— Dane County *v.* Sauk County, 38 Wis. 499; Westfield *v.* Sauk County, 18 Wis. 624.

See 38 Cent. Dig. tit. "Paupers," § 164.

44. Perry County *v.* Du Quoin, 99 Ill. 479.

45. Mappes *v.* Iowa County, 47 Wis. 31, 1 N. W. 359.

46. *Illinois.*— Freeport *v.* Stephenson County, 41 Ill. 495; Franklin County *v.* Henry County, 26 Ill. App. 193.

New Hampshire.— Northfield *v.* Merrimack County, 43 N. H. 165.

New Jersey.— Stillwater Tp. *v.* Green Tp., 9 N. J. L. 59.

Pennsylvania.— Braintrim Tp. *v.* Windham Tp., 10 Pa. Co. Ct. 250 (holding that the district in which a pauper is taken sick is liable for his support until his last place of legal settlement can be found); Carbondale Tp. Poor-Dist. *v.* Carbondale City Poor-Dist., 4 C. Pl. 76.

Wisconsin.— Davis *v.* Scott, 59 Wis. 604, 18 N. W. 530; McCaffrey *v.* Shields, 54 Wis. 645, 12 N. W. 54.

See 38 Cent. Dig. tit. "Paupers," § 166.

Lunatic not pauper.— The county in which a lunatic not a pauper actually resides when he is sent to the asylum is primarily liable for his support, without reference to his settlement under the poor laws, and cannot look to any other county for reimbursement. Mercer County *v.* Warren County, 23 N. J. L. 415.

In Vermont, section 3171 of the statutes provides that if the pauper, when in need, has not resided in the town furnishing the support "for three years supporting himself and family," such town may recover the expense thereof from the town where he last resided for the space of three years supporting himself and family. Granville *v.* Hancock, 69 Vt. 205, 37 Atl. 294. Under the act of 1886, the town where a pauper resides and comes to want must provide for him, notwithstanding he has not resided there for three years; and such town has no remedy against the town where he last resided for three years, maintaining himself and family. One town has no right of action against another town for maintaining a pauper, unless the pauper is strictly a transient person, away from home, his abiding place, and the town where he resides. Leicester *v.* Brandon, 65 Vt. 544, 27 Atl. 318; Chittenden *v.* Stockbridge, 63 Vt. 308, 21 Atl. 1102; New Haven *v.* Middlebury, 63 Vt. 399, 21 Atl. 608.

In New Hampshire, under Gen. Laws, c. 83, § 15, residence within a county for not less

is ultimately liable therefor.[47] And the fact that the relief is furnished by another town or county into which the pauper goes for a transient purpose only does not affect the liability of the place of his residence.[48] In several jurisdictions, however, the place of a person's residence is liable for relief furnished to him in another town or county only where such person was a pauper at the time of his departure from his place of residence.[49] Where a person has no residence in the state, it is the duty of the town where he resides to support him;[50] but where such a pauper moves to another town, the town of his prior residence is no longer liable for his support.[51]

d. Liability of Place of Settlement. In most jurisdictions the town or county of a pauper's legal settlement is liable for his support, and where relief has been given to such pauper by another town or county, or by the state, it is entitled to reimbursement by the place of his settlement.[52] But since the obligation to support the poor and indigent is purely statutory, no reimbursement from the town or county of a pauper's settlement can be had, in the absence of a provision of the statute authorizing such recovery.[53]

e. Alteration, Consolidation, Annexation, or Detachment of Territory[54] — (i) *In General.* By a separation of a part of its territory and inhabitants, by annexation or a new incorporation, the liability of a town to support the paupers having a legal settlement therein remains unaltered.[55] But as this separation must be made by the legislature, the act authorizing it may impose conditions or limitations to relieve the town which is to be deprived of a part of its inhabitants; and provisions of this nature are very frequently, although not always, introduced into acts incorporating a new town, composed of the fragments of one or more old towns.[56] But if no legislative provision be made, the settlement of

than one year renders it liable for the support of a poor person, whether relief was furnished to him within the time of such residence or not. Merrimack County *v.* Grafton County, 63 N. H. 550, 4 Atl. 390.

47. See *infra*, IV, N, 2.

48. Bridgeport *v.* Trumbull, 37 Conn. 484; Tipton County *v.* Brown, 4 Ind. App. 288, 30 N. E. 925; Hardin County *v.* Wright County, 67 Iowa 127, 24 N. W. 754; McCaffrey *v.* Shields, 54 Wis. 645, 12 N. W. 54.

49. Lander County *v.* Humboldt County, 21 Nev. 415, 32 Pac. 849; Wood *v.* Simmons, 51 Hun (N. Y.) 325, 4 N. Y. Suppl. 368, holding that where a resident of the city and county of New York went to another county, and there met with an accident which rendered him unable to provide for the support of himself and family, as he had previously done, the county from which he came is not liable for his support, under Laws (1885), c. 546, making the county, city, or town from which a pauper came liable for his support.

50. Holden *v.* Brewer, 38 Me. 472; Harmony Tp. *v.* Forest County, 91 Pa. St. 404; Grim *v.* Haycock Tp., 1 Pa. Dist. 815.

51. Holden *v.* Brewer, 38 Me. 472.

52. *Connecticut.*— Old Saybrook *v.* Milford, 76 Conn. 152, 56 Atl. 496; Guilford *v.* Norwalk, 73 Conn. 161, 46 Atl. 881.

Maine.— Sebece *v.* Dover, 71 Me. 573; Clinton *v.* Benton, 49 Me. 550; Sanford *v.* Hollis, 2 Me. 194.

Massachusetts.—Adams *v.* Ipswich, 116 Mass. 570; Boston *v.* Amesbury, 4 Metc. 278; Sayward *v.* Alfred, 5 Mass. 244; Salem *v.* Andover, 3 Mass. 436.

Pennsylvania.— Jenks Tp. Poor Dist. *v.* Sheffield Tp. Poor Dist., 135 Pa. St. 400, 19 Atl. 1004; Rouse *v.* Poor Directors, 118 Pa. St. 1, 12 Atl. 66; Tobey Tp. *v.* Madison, 44 Pa. St. 60; Franklin Tp. *v.* Pennsylvania State Lunatic Hospital, 30 Pa. St. 522; *In re* Blewitt, 11 Phila. 652.

Wisconsin.— Portage County *v.* Neshkoro, 109 Wis. 520, 85 N. W. 414; Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401; Westfield *v.* Sauk County, 18 Wis. 624.

See 38 Cent. Dig. tit. "Paupers," § 167.

53. Palmer *v.* Vandenbergh, 3 Wend. (N. Y.) 193 (holding that paupers must be supported since Nov. 27, 1824, by the county in which they happened to be on that date, although previously their legal settlement was in another county); Hamlin County *v.* Clerk County, 1 S. D. 131, 45 N. W. 329.

Husband of wife having settlement.— Where a man, having no settlement in the state, married a woman who had a settlement in the town of G, and becoming a pauper, was relieved by C, the town of G is not liable to C for such support. Grafton *v.* Grafton County, 43 N. H. 382. But see South Hampton *v.* Hampton Falls, 11 N. H. 134, decided under a former statute.

54. Effect on settlement of pauper see *supra*, III, D, 3.

55. Windham *v.* Portland, 4 Mass. 384; Peterson *v.* Emardville, 101 Minn. 24, 111 N. W. 652; Wellcome *v.* Monticello, 41 Minn. 136, 42 N. W. 930.

56. Castine *v.* Winterport, 56 Me. 319 (holding that under Laws (1867), c. 291, § 6, annexing territory formerly belonging to the town of Frankfort to the town of Winter-

any person in the old town is not affected by the new incorporation, unless at the time of the new incorporation he shall dwell within the limits of it, and, as a party to it, acquire a new settlement in the new town.[57] Unless it is apparent that the legislature intended to prescribe a rule for all pauper cases liable to arise between two sections of a divided town and to supersede the general law by the specific provision, cases which do not fall within the specific provision will be governed by the general law.[58]

(II) *AGREEMENTS ON ALTERATION.* Where a new town is formed from a part of the territory of an existing town, an agreement between them as to the future support of paupers, not inconsistent with the act of incorporation, or with the general pauper statutes, is enforceable as between the parties thereto,[59] although such agreements between towns cannot affect the settlement by their inhabitants, or the rights of third parties in relation thereto.[60]

2. FIXING LIABILITY — a. Ascertainment and Adjudication of Settlement. A county, town, or municipality cannot be charged in an action for the care and maintenance of a pauper prior to an adjudication of such pauper's settlement by the proper tribunal.[61] Such adjudication may, however, be made after the

port, and providing that the latter town shall support "all paupers whose legal settlement is upon said territory," only such persons as were then actually chargeable as paupers are required to be supported by the latter town); North Andover *v.* Groveland, 1 Allen (Mass.) 75; Dana *v.* Hardwick, 10 Metc. (Mass.) 208; Harvard *v.* Boxborough, 4 Metc. (Mass.) 570 (holding that the act was limited to those individuals who were before inhabitants within the district and might be brought back, and did not include their descendants); Sutton *v.* Dana, 1 Metc. (Mass.) 383 (holding that the provision of the statute did not include those poor who had removed from the limits of the new town into another part of the same old town, and from thence into another town, but included only those whose dwelling-place or home, previous to such removal, was within the limits of the new town); Southbridge *v.* Charlton, 15 Mass. 248 (holding that the new town was not obliged to support a pauper supported by the old town on the territory forming the new one, who had a settlement by real estate in the old one); Wellcome *v.* Monticello, 41 Minn. 136, 42 N. W. 930.

57. North Andover *v.* Groveland, 1 Allen (Mass.) 75; Harvard *v.* Boxborough, 4 Metc. (Mass.) 570; Windham *v.* Portland, 4 Mass. 384; Clinton *v.* Clinton Tp., 56 N. J. L. 240, 27 Atl. 916; Ashland County *v.* Richland County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49.

In Pennsylvania, where a township is divided, and two new towns created, each part remains liable, in proportion to its rates and levies, for the maintenance of the paupers who before division were a charge upon the whole township. North Whitehall Tp. *v.* South Whitehall Tp., 3 Serg. & R. (Pa.) 117; Monroe Tp. *v.* Durell Tp., 3 Pa. L. J. 326.

58. Holden *v.* Veazie, 73 Me. 312 (holding that the imposition of a liability for the support of a single specific class of paupers upon the new town, in an act dividing an existing municipality, does not necessarily impose upon the remaining portion the burden of supporting all other paupers not included in such class); Yarmouth *v.* North Yarmouth, 44 Me. 352; Fenholt *v.* Freeborn County, 29 Minn. 158, 12 N. W. 458.

Where territory is set off from one town but not incorporated into another, the settlement of persons residing in such territory is not changed by such dismemberment. Weld *v.* Carthage, 37 Me. 39.

Pauper without settlement in state at time of division.— When a town is divided, a pauper residing therein, without any settlement in the state, must be supported by that town in which his residence may be established at the time of the division. Winterport *v.* Frankfort, 51 Me. 447; Holden *v.* Brewer, 38 Me. 472.

59. Oxford *v.* Bethany, 15 Conn. 246; Hebron *v.* Marlborough, 3 Conn. 209 (holding, however, that where an act incorporating the town of M provided that it should take its full proportion of the then poor of H, from which M was detached, but it was afterward agreed between the two towns that M should take A and B as its full proportion of such poor, M was not thereby made liable for the support of A's wife after his death); Norton *v.* Mansfield, 16 Mass. 48. See also Clinton *v.* Clinton Tp., 56 N. J. L. 240, 27 Atl. 916.

60. Oxford *v.* Bethany, 15 Conn. 246; Westborough *v.* Franklin, 15 Mass. 254, where a part of a town was about to be incorporated into a new town, and it was agreed that those who should afterward become chargeable as paupers should be supported by the town from whose territory they derived their settlement, and it was held, notwithstanding the statute dividing the town recognized such agreement, that the original town was still liable to others for the support of one whose settlement was derived from the territory composing the new town, but who was not an inhabitant of the town at the time of incorporation.

61. Youngs *v.* Hardiston Tp., 14 N. J. L. 517; *Ex p.* Gates, 4 Cow. (N. Y.) 137; *Ex p.* Dow, 1 Cow. (N. Y.) 205; Voorhis *v.* Whipple, 7 Johns. (N. Y.) 89; *In re* Blewitt, 11 Phila. (Pa.) 652.

expenditures have been incurred.[62] The adjudication as to settlement, although valid until impeached, may be set aside for fraud or mistake.[63]

b. Adjudication of Poverty. In some jurisdictions, in order to charge a town or county with relief and maintenance of a poor person, he must first have been adjudged a pauper by the tribunal designated by the statute, usually the county court, or a justice of the peace.[64] There is no distinction in regard to a county's liability for funeral expenses and its liability for services rendered to the pauper in his lifetime. In both cases a previous adjudication of poverty is necessary to fix that liability.[65]

c. Removal and Order Therefor. Under the statutes of some states there can be no recovery against the town in which a pauper has a legal settlement by a town in which he is a resident for expenses incurred in his support prior to an order of removal,[66] except in the case of extreme sickness or death.[67] An exception to the rule is made in the case of transients.[68] In some jurisdictions it is provided that if the town of a pauper's settlement shall, within a designated period after notice, remove the pauper from the town giving notice, it shall be charged only at a specified rate per week, regardless of the actual expense incurred by the town giving notice. However, the actual removal is a condition precedent which must be strictly performed within the time limit.[69] The voluntary removal of the pauper,[70] or the removal of the pauper after his decease, although before burial,[71] is not sufficient to absolve the town of settlement from payment of the actual expenses incurred. Refusal of the pauper to return or to be taken back does not discharge the town of his settlement from liability.[72]

d. Notice — (i) *Introduction.* By common law a town or district affording relief to a pauper for whose support it was not liable must, in order to recover the expenses incurred, give to the town of his settlement or to the town liable for his support, reasonable notice of the facts and make demand before suit for the amount claimed.[73] The question of notice is, however, governed almost entirely by statutes in the several states.[74] Many statutes make the giving of notice a condition

62. People *v.* Oswego, 2 Wend. (N. Y.) 291; *In re* Blewitt, 11 Phila. (Pa.) 652.

63. Concord *v.* Merrimack County, 60 N. Y. 521.

64. Clay *v.* Pulaski County, 56 Ark. 468, 20 S. W. 251; Clark County *v.* Huie, 49 Ark. 145, 4 S. W. 452; Cantrell *v.* Clark County, 47 Ark. 239, 1 S. W. 200; Prewitt *v.* Mississippi County, 38 Ark. 213 (holding likewise that a county judge cannot declare one a pauper, or contract for his support or medical treatment, except in term-time, or when holding a county court); Lee County *v.* Lackie, 30 Ark. 764; Sayres *v.* Springfield, 8 N. J. L. 166; King County *v.* Collins, 1 Wash. Terr. 469; Collins *v.* King County, 1 Wash. Terr. 416.

65. Clark County *v.* Huie, 49 Ark. 145, 4 S. W. 452.

66. Ashland County Com'rs *v.* Richmond County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49; Millcreek Tp. *v.* Miami Tp., 10 Ohio 375; Milford Tp. *v.* McCoy, 2 Penr. & W. (Pa.) 432; Pittsford *v.* Chittenden, 44 Vt. 382; Middlebury *v.* Waltham, 6 Vt. 200; Londonderry *v.* Windham, 2 Vt. 149.

The insanity of a pauper does not dispense with the necessity of an order of removal. Londonderry *v.* Windham, 2 Vt. 149.

67. Essex *v.* Milton, 3 Vt. 17; Fairfield *v.* St. Albans, Brayt. (Vt.) 176.

68. Vermont — A debtor in prison, or on the liberties, is a transient person, within the eleventh section of the Pauper Act, and the town where the prison is situate may, if he become chargeable, recover the expense of his support from the town of his settlement, without an order of removal. Danville *v.* Putney, 6 Vt. 512; Manchester *v.* Rupert, 6 Vt. 291.

69. Seekonk *v.* Rehoboth, 8 Cush. (Mass.) 371 (holding that in computing the thirty days within which a town liable for the support of a pauper is required by Rev. St. c. 46, § 15, to remove him from the town in which he has received support, in order to exempt the former from liability therefor at a greater rate than one dollar per week, the day on which notice is received that the pauper has been furnished is to be excluded); Seekonk *v.* Attleborough, 7 Pick. (Mass.) 155; Ware *v.* Wilbraham, 4 Pick. (Mass.) 45.

70. Ware *v.* Wilbraham, 4 Pick. (Mass.) 45.

71. Webster *v.* Uxbridge, 13 Metc. (Mass.) 198.

72. Bristol *v.* Fox, 159 Ill. 500, 42 N. E. 887 [*reversing* 45 Ill. App. 330].

73. Newtown *v.* Danbury, 3 Conn. 553.

74. See the poor laws of the various states. See also Conway *v.* Wakefield, 3 N. H. 277.

That statutory provisions as to notice must be strictly pursued see Meredith *v.* Canterbury, 3 N. H. 80. See, however, Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

precedent to the commencement of an action for the recovery of expenses incurred in the relief of a pauper.[75]

(II) *Form and Sufficiency*—(A) *In General.* No particular form of notice is necessary,[76] it being sufficient that the notice convey the necessary information to the proper person.[77] Reasonable care and diligence must be exercised in obtaining and communicating the fact;[78] and if this is done a mere inaccuracy will not vitiate the notice.[79] A notice containing misstatement of a material fact, however, is void.[80] It has been held that notice need not be an entity, and that if all the facts necessary to constitute legal notice are severally communicated within the proper time it is sufficient.[81]

(B) *Writing.* It is generally prescribed by statute that the notice must be in writing.[82]

75. *Connecticut.*— Hamden *v.* Bethany, 43 Conn. 212; Washington *v.* Kent, 38 Conn. 249; New-Milford *v.* Sherman, 21 Conn. 101.

Massachusetts.— Shelburne *v.* Buckland, 124 Mass. 117; Attleborough *v.* Mansfield, 15 Pick. 19.

New Hampshire.— Gilford *v.* Newmarket, 7 N. H. 251.

New York.— Stillwell *v.* Coon, 12 N. Y. St. 745.

Vermont.— Woodstock *v.* Barnard, 67 Vt. 97, 30 Atl. 806.

Wisconsin.— Plymouth *v.* Shehoygan County, 101 Wis. 200, 77 N. W. 196; Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

In Minnesota the notice required by statute to be given by a town that a pauper within its limits is a county charge is not a condition precedent to the right of recovery by a town for expenses incurred in caring for the pauper, but is to give the county authorities an opportunity to examine into the matter. Highland Grove *v.* Clay County, 101 Minn. 11, 111 N. W. 651.

Expenses incurred in care of pauper infected with a dangerous disease cannot be recovered unless notice thereof has been given to the town liable. Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

Insane pauper.— Notice must be given before suit for recovery of expenses incurred by a town in maintaining a pauper in the hospital for insane. Bangor *v.* Wiscasset, 71 Me. 535; West Gardiner *v.* Hartland, 62 Me. 246; Jay *v.* Carthage, 48 Me. 353; Eastport *v.* East Machias, 40 Me. 280; Eastport *v.* Belfast, 40 Me. 262; Cooper *v.* Alexander, 33 Me. 453; Amherst *v.* Shelburne, 11 Gray (Mass.) 107; Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Worcester *v.* Milford, 18 Pick. (Mass.) 379; Danville *v.* Montour County, 75 Pa. St. 35.

Notice must be alleged in an action to recover expenses incurred in the relief of a pauper. Salem *v.* Andover, 3 Mass. 436; Pine Valley *v.* Unity, 40 Wis. 682. A statement that plaintiff duly notified defendant is sufficient averment of legal notice. Pine Valley *v.* Unity, *supra.*

That the omission of an allegation of notice can be availed of only by demurrer see Com. *v.* Dracut, 8 Gray (Mass.) 455.

76. Bethlehem *v.* Watertown, 51 Conn. 490; Kennebunkport *v.* Buxton, 26 Me. 61.

For forms held to be sufficient see Kennebunkport *v.* Buxton, 26 Me. 61, 63; Lynn *v.* Newburyport, 5 Allen (Mass.) 545, 546.

77. Windham *v.* Lebanon, 51 Conn. 319; Washington *v.* Kent, 38 Conn. 249; La Crosse *v.* Melrose, 22 Wis. 459.

For notice held to be sufficient see Quincy *v.* Braintree, 5 Mass. 86; Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407.

For notice held to be insufficient see Beacon Falls *v.* Seymour, 44 Conn. 210.

78. Hamden *v.* Bethany, 43 Conn. 212; Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

The town notified must exercise reasonable fairness and diligence in applying the notice to the proper person. Hamden *v.* Bethany, 43 Conn. 212.

That the sufficiency of notice is a question of law see Sanford *v.* Lebanon, 31 Me. 124.

Where a notice is not clear the jury may decide what its meaning was. Williams *v.* Braintree, 6 Cush. (Mass.) 399.

79. La Crosse *v.* Melrose, 22 Wis. 459; Dalton *v.* Bethlehem, 20 N. H. 505.

A notice describing an insane person as a pauper, but stating that he was supported in the insane hospital, and correct in other particulars is not defective by reason of his being called a pauper, although the statute forbids that care in the insane hospital shall render a person a pauper, all the important facts being set forth and the demand being clearly for support in the hospital. Bangor *v.* Wiscasset, 71 Me. 535.

80. Glenburn *v.* Oldtown, 63 Me. 582; Dalton *v.* Hinsdale, 6 Mass. 501.

81. Shelburne *v.* Rochester, 1 Pick. (Mass.) 470.

82. Ellsworth *v.* Houlton, 48 Me. 416. And see Salem *v.* Montville, 33 Conn. 141; Middletown *v.* Berlin, 18 Conn. 189; Dalton *v.* Hinsdale, 6 Mass. 501. It is to be inferred from the language of the court in Newtown *v.* Danbury, 3 Conn. 553, and counsel state that written notice is not necessary in Connecticut. This case seems, however, to have been decided before the passage of the statute requiring written notice. It is now necessary in Connecticut as elsewhere that notice be in writing. See cases cited above in this note.

When notice need not be in writing.— Where an inhabitant of a town incurs expense for the relief of a pauper, for which the town is liable after notice and request to

(c) *Name or Description of Pauper.* A pauper notice should state the names of the paupers or otherwise so describe them that the authorities of the town notified may know with reasonable certainty whom to remove.[83] If this is done the notice will be sufficient.[84] So if the identity of the pauper is sufficiently established a slight error in the name does not render the notice defective.[85] And a woman is sufficiently named as the wife of a man whose name is correctly given.[86] A misnomer, however, without further means of identification will render the notice defective.[87] A defect in designating the pauper cannot be supplied by oral information.[88] Nor, upon trial, will evidence be admitted to prove that the designation could apply to only one person in the district.[89]

(d) *Allegation of Settlement.* A pauper notice must allege the settlement of the pauper to be in the town sought to be held liable.[90]

the overseers, such notice and request need not be in writing. Watson *v.* Cambridge, 15 Mass. 286.

83. Bangor *v.* Deer Isle, 1 Me. 329; Kennebunkport *v.* Buxton, 26 Me. 61.

84. **The following descriptions in notices have been held to be sufficient:** "Mrs. A. B. and three children," it not being shown or suggested that either of the parents had more than three children. Lynn *v.* Newburyport, 5 Allen (Mass.) 545. "Pomeroy and family (wife and two children), whose legal settlement is in your town, but now residing in this town" sufficient, although P had four children only two of whom, however, lived with him. Granville *v.* Southampton, 138 Mass. 256. "Abel Eaton and wife and three children," there being only three children. Orange *v.* Sudbury, 10 Pick. (Mass.) 22. "The child of Miss Harriet Wright, the daughter of Timothy Wright." Ware *v.* Williamstown, 8 Pick. (Mass.) 388. "Austin Seymour (colored), and wife and four children, aged from ten years down to an infant." Windham *v.* Lebanon, 51 Conn. 319. "Frances Payne, Anna Payne, and an infant child, wife and children of Arthur Payne, inhabitants of the town of Kent." Washington *v.* Kent, 38 Conn. 249. "Mrs. Phelps, an inhabitant of the town of Montville." Salem *v.* Montville, 33 Conn. 141.

The following have been held insufficient: "The daughter of Sally Benson." Chichester *v.* Pembroke, 2 N. H. 530. "The family of James Savage." Embden *v.* Augusta, 12 Mass. 307. "Adeline Shurtleff and three children," there being five children living with S. Carver *v.* Taunton, 152 Mass. 484, 25 N. E. 965. "Charles Reed, his wife and four children," there being more than four. Northfield *v.* Taunton, 4 Metc. (Mass.) 433. "Eliza Snell and her three children" insufficient, there being four. Walpole *v.* Hopkinton, 4 Pick. (Mass.) 357. "Nancy Towne and her four minor children," there being other minor children. New-Boston *v.* Dunbarton, 12 N. H. 409. "John Stetson and family" held insufficient, the only subject of expense in the notice being one of S's sons, alluded to indefinitely and not by name. Dover *v.* Paris, 5 Me. 430.

Descriptions held insufficient in part: "David Rich and his family," insufficient as to the family. Shutesbury *v.* Oxford, 16 Mass. 102. "Elijah Hubbard 2d, wife and children," insufficient as to children. Middletown *v.* Berlin, 18 Conn. 189. "Samuel Staple and family have been chargeable to Bangor for several months . . . occasioned by severe sickness of himself, wife and several children," insufficient as to children, sufficient as to S and wife. Bangor *v.* Deer-Isle, 1 Me. 329.

85. Dalton *v.* Bethlehem, 20 N. H. 505, where a notice calling the pauper "Joan" and "Joanna" was held sufficient, her real name being "Joann," she being otherwise identified as the child of parents sufficiently described. Shelburne *v.* Rochester, 1 Pick. (Mass.) 470, in which "Sarah or Sally" was held sufficient, her name being "Sally."

The omission of, or the substitution of an initial for the middle name of the pauper will not vitiate the notice if the identity of the pauper is otherwise sufficiently certain. Hamden *v.* Bethany, 43 Conn. 212 (in which a notice calling the pauper William Hall was held sufficient, his real name being William E. Hall, his identity being further indicated by the statement that he had a broken leg; and the notice was not rendered defective by the fact that in the town named there actually lived a William Hall, whose leg, however, was not broken); Dalton *v.* Bethlehem, 20 N. H. 505 (in which a notice omitting the middle name was held sufficient, the pauper being otherwise described as the child of clearly indicated parents).

86. Washington *v.* Kent, 38 Conn. 249; Dalton *v.* Bethlehem, 20 N. H. 505.

A notice calling a woman the wife of a man with whom she is in fact living in adultery is fatally defective. Glenburn *v.* Oldtown, 63 Me. 582.

87. Auburn *v.* Wilton, 74 Me. 437 (in which notice calling pauper "Benton L. Blackwell" was held bad, his real name being "Bennetto L. Blackwell"); Lanesborough *v.* New Ashford, 5 Pick. (Mass.) 190 (holding that a pauper known by different names must be designated by the name by which he is known in the town notified); Dalton *v.* Bethlehem, 20 N. H. 505 (calling pauper "James" held to render notice defective, real name being "Jane").

88. Middletown *v.* Berlin, 18 Conn. 189.

89. Salem *v.* Montville, 33 Conn. 141.

90. Quincy *v.* Braintree, 5 Mass. 86.

A notice describing the pauper as having a residence instead of a settlement in the town notified does not render the notice defective

(E) *Allegation of Chargeability.* The notice must contain an allegation that the pauper is chargeable to the town sending the notice.[91] Notice that a pauper has become chargeable is not notice that his wife and children have become chargeable.[92]

(F) *Statement of Expenses Incurred.* The notice should contain a statement of the amount expended in the relief of the pauper,[93] although by the weight of authority the account need not be itemized to show the several amounts expended.[94] If several individuals constituting one family are supported together the notice need not specify the sums expended for each individual,[95] and if a notice for the support of several paupers is bad as to some of them recovery can be had for the expense of the others.[96] If the amount claimed in the notice be too great and the mistake is made in good faith recovery may be had for what is proved to be reasonably due;[97] but if the officer giving notice knows that some of the items are much larger than the town has paid or assumed to pay nothing can be recovered on such items.[98] And if the amount in the writ be smaller than the amount claimed in the notice, recovery must be limited to the former sum.[99] Denial of liability by the town sought to be held is waiver of itemized particular notice.[1]

if it appears plainly that it is claimed that the town notified is liable, and that it is requested to remove the pauper. La Crosse *v.* Melrose, 22 Wis. 459.

A notice describing a pauper as an inhabitant of the town sought to be held liable is sufficient if the meaning is reasonably plain that the pauper had a settlement therein. Ware *v.* Williamstown, 8 Pick. (Mass.) 388. See Uxbridge *v.* Seekonk, 10 Pick. (Mass.) 150.

Means of acquiring settlement.— The notice need not contain an allegation of the means by which settlement was obtained. Quincy *v.* Braintree, 5 Mass. 86. And if an erroneous statement be made of the manner of acquiring settlement in the town notified, the town giving notice is not estopped to prove in an action to recover expenses incurred that the settlement was acquired in a different manner, unless the statement in the notice was meant to mislead. Northfield *v.* Taunton, 4 Metc. (Mass.) 433.

91. Beacon Falls *v.* Seymour, 46 Conn. 281; Beacon Falls *v.* Seymour, 44 Conn. 210; Hamden *v.* Bethany, 43 Conn. 212; Quincy *v.* Braintree, 5 Mass. 86. See McKay *v.* Welsh, 2 Silv. Sup. (N. Y.) 463, 6 N. Y. Suppl. 358.

"On expense in this town" sufficiently alleges chargeability. Bethlehem *v.* Watertown, 51 Conn. 490; Salem *v.* Montville, 33 Conn. 141 (the notice in this case being held defective on other grounds); Middletown *v.* Berlin, 18 Conn. 189.

For notices held to insufficiently allege chargeability see Beacon Falls *v.* Seymour, 46 Conn. 281; Beacon Falls *v.* Seymour, 44 Conn. 210.

92. Andover *v.* Canton, 13 Mass. 547.

A notice that a wife is chargeable is sufficient, although there be no allegation of chargeability of the husband. Sanford *v.* Lebanon, 31 Me. 124.

93. Newtown *v.* Danbury, 3 Conn. 553; Chichester *v.* Pembroke, 2 N. H. 530. See Conway *v.* Wakefield, 3 N. H. 277.

A notice demanding contribution in the support of a pauper from a town with which it believes itself jointly liable, but which is liable *in toto*, is not a sufficient notice. Dalton *v.* Hinsdale, 6 Mass. 501.

94. Newtown *v.* Danbury, 3 Conn. 553; Barnstead *v.* Strafford, 8 N. H. 142; Conway *v.* Wakefield, 3 N. H. 277. See, however, Chichester *v.* Pembroke, 2 N. H. 530; Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401. See also Pawlet *v.* Sandgate, 19 Vt. 621, which holds that a town cannot recover for services rendered to a pauper by a physician the amount of whose account was not stated as a distinct item in the notice of claim given to the town liable, although it appears that the amount of that account was included in another item in the notice but without any specific designation.

95. Barnstead *v.* Strafford, 8 N. H. 142.

96. Poland *v.* Wilton, 15 Me. 363; Bangor *v.* Deer-Isle, 1 Me. 329.

In New Hampshire it has been held, under a statute requiring that the sums expended for the relief of a pauper shall be stated, that, where a lump sum is named as incurred for several paupers, and the notice is defective as to one or more of the paupers, recovery cannot be had, unless the particular sum expended for each of the remaining paupers is stated. Chichester *v.* Pembroke, 2 N. H. 530.

In Maine, however, it has been held that it is improper to instruct the jury that the notice would be bad as to all the paupers included in the notice if they could not distinguish between supplies to paupers as to whom the notice was bad and the others; if the jury could not ascertain what supplies had been furnished the latter it would be a defect of proof but would not affect the validity of the notice. Sanford *v.* Lebanon, 31 Me. 124.

97. Berlin *v.* Gorham, 34 N. H. 266.

98. Barnstead *v.* Strafford, 8 N. H. 142.

99. Dalton *v.* Bethlehem, 20 N. H. 505.

1. Newtown *v.* Danbury, 3 Conn. 553.

(G) *Request to Remove.* A pauper notice must contain a request that the town notified remove the pauper to their own jurisdiction.[2]

(III) *NOTICE, BY WHOM SIGNED.* The pauper notice should be signed by a majority of the board of overseers of the poor, or by one of their number in their behalf.[3] And a notice signed by some other person in their behalf is not sufficient,[4] even though this is done under instructions of the overseers.[5] If there are no overseers of the poor the notice must be signed by the officers who exercise their functions. Thus a notice may be signed by a majority of the selectmen or one of them in behalf of the others,[6] or by the mayor of a city,[7] or by the auditor of a county.[8]

(IV) *SERVICE OF NOTICE*— (A) *Upon Whom Served.* Overseers of the poor are the proper officers to receive a pauper notice, and it should therefore be directed to and served upon one of them.[9] If, however, there are no overseers the notice may be served upon one of the officers who exercise their functions with respect to the poor, such as selectmen [10] or supervisors of a town,[11] or the auditor of a county.[12]

(B) *Manner of Service.* A pauper notice may be served by actual personal

2. Ellsworth *v.* Houlton, 48 Me. 416; Kennebunkport *v.* Buxton, 26 Me. 61; Lynn *v.* Newburyport, 5 Allen (Mass.) 545; Topsham *v.* Harpswell, 1 Mass. 518. See Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407; La Crosse *v.* Melrose, 22 Wis. 459.

Request to remove is inferred from a statement that reimbursement for expenses was claimed "till removal." Kennebunkport *v.* Buxton, 26 Me. 61; Lynn *v.* Newburyport, 5 Allen (Mass.) 545.

The death and burial of the pauper before the time allowed to give notice has elapsed obviates the necessity of request to remove. Ellsworth *v.* Houlton, 48 Me. 416. See South Huntington *v.* East Huntington, 7 Watts (Pa.) 527.

3. Cooper *v.* Alexander, 33 Me. 453; Kennebunkport *v.* Buxton, 26 Me. 61; Dover *v.* Deer Isle, 15 Me. 169; Northfield *v.* Taunton, 4 Metc. (Mass.) 433; Westminster *v.* Bernardston, 8 Mass. 104; Dalton *v.* Hinsdale, 6 Mass. 501.

4. Cooper *v.* Alexander, 33 Me. 453.

5. Belfast *v.* Lee, 59 Me. 293.

6. Salem *v.* Montville, 33 Conn. 141; Jay *v.* Carthage, 48 Me. 353; Garland *v.* Brewer, 3 Me. 197; Ashby *v.* Lunenburg, 8 Pick. (Mass.) 563; Bridgewater *v.* Dartmouth, 4 Mass. 273; Berlin *v.* Gorham, 34 N. H. 266; Nottingham *v.* Barrington, 6 N. H. 302. See Conway *v.* Wakefield, 3 N. H. 277.

Selectmen are proper officers to give notice under Act (1837), c. 244, § 1, providing for relief of persons infected with dangerous sickness. Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

That a notice signed by two persons as selectmen will be presumed to be signed by a majority of selectmen until otherwise proven see Nottingham *v.* Barrington, 6 N. H. 302.

The notice need not state that the selectmen are acting as overseers of the poor, it being presumed that no overseers were chosen and that the selectmen are acting in that capacity *virtute officii*. Jay *v.* Carthage, 48 Me. 353; Garland *v.* Brewer, 3 Me. 197; Ashby *v.* Lunenburg, 8 Pick. (Mass.) 253; Berlin *v.* Gorham, 34 N. H. 266.

7. La Crosse *v.* Melrose, 22 Wis. 459. In this case the mayor and council succeeded to all the rights and duties of the supervisors of towns in respect to the poor.

8. Cerro Gordo County *v.* Wright County, 50 Iowa 439.

9. Gorham *v.* Calais, 4 Me. 475; Walpole *v.* Hopkinton, 4 Pick. (Mass.) 358; Dalton *v.* Hinsdale, 6 Mass. 501. See Conway *v.* Deerfield, 11 Mass. 327.

Service upon overseers who have declined to accept the office and have not been sworn in is sufficient if it appears by the records of the town notified that they are overseers of the poor for the current year. Gorham *v.* Calais, 4 Me. 475.

10. Salem *v.* Montville, 33 Conn. 141; Bridgewater *v.* Dartmouth, 4 Mass. 273; Salisbury *v.* Orange, 5 N. H. 348.

It will be presumed that selectmen act in the capacity of overseers when notice is directed to and served upon them, and when it does not appear that overseers have been chosen. Jay *v.* Carthage, 48 Me. 353.

Selectmen are proper officers to receive notice.— Under Act (1837), c. 244, § 1, providing for relief of persons infected with dangerous sickness. Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

Under a statute requiring notice to be directed to the town a notice directed to the sheriff commanding him to notify the selectmen and town-clerk of the town, instead of being directed to the town and ordering the sheriff to serve a copy of the notice to the selectmen and town-clerk, is not notice to the town. Meredith *v.* Canterbury, 3 N. H. 80.

11. La Crosse *v.* Melrose, 22 Wis. 459.

The name of a town having been changed from B to M, notice actually served upon the supervisors thereof was not insufficient because addressed to the supervisors of B. La Crosse *v.* Melrose, 22 Wis. 459.

12. Cerro Gordo County *v.* Wright County, 50 Iowa 439.

delivery thereof to the proper officer[13] by leaving it at his usual place of abode, with a person of discretion,[14] or by mail.[15] The fact of putting the notice into the mail must be proved like any other fact, and evidence may be introduced to repel proof of mailing.[16] The presumption is that a notice mailed was received in the due course of mail.[17]

(v) *Time of Giving Notice.* It is very generally prescribed by statute that a pauper notice must be given within three months after the expenses for which recovery is sought were incurred.[18] The notice must be given within three months after expenses were incurred, not within three months after they were paid.[19] A notice which by mistake includes some items arising before the three months, giving means of distinguishing what came before, is not invalid.[20]

(vi) *Waiver*—(a) *Of Notice.* A town liable for the support of a pauper may waive statutory notice and demand from the town incurring expenses in the relief of a pauper.[21] And if the waiver prevents the notice being given, the ordinary doctrine of estoppel applies.[22] A denial of liability by the poor officer of

13. Salem *v.* Montville, 33 Conn. 141; Walpole *v.* Hopkinton, 4 Pick. (Mass.) 358; Salisbury *v.* Orange, 5 N. H. 348.

Service upon an overseer at a distance from his town, while he was attending his duties as a member of the legislature, was valid. Walpole *v.* Hopkinton, 4 Pick. (Mass.) 358.

14. Salisbury *v.* Orange, 5 N. H. 348. *Compare* Whitingham *v.* Wardsboro, 47 Vt. 496.

15. See Hamden *v.* Bethany, 43 Conn. 212; Salem *v.* Montville, 33 Conn. 141; Litchfield *v.* Farmington, 7 Conn. 100; Ellsworth *v.* Houlton, 48 Me. 416; Augusta *v.* Vienna, 21 Me. 298. Groton *v.* Lancaster, 16 Mass. 110, holding that notice sent by mail is insufficient, was decided before the passage of the statute by which this manner of service is now expressly permitted in Massachusetts. Rev. St. (1902) c. 81, § 34. And see Conway *v.* Deerfield, 11 Mass. 327.

That it is not necessary that the postage on the letter in which the notice is sent should be paid by the town sending it see Augusta *v.* Vienna, 21 Me. 298.

16. Litchfield *v.* Farmington, 7 Conn. 100.

Relevancy of evidence to repel proof of mailing.—Evidence by the selectmen of the town to be notified that no letter containing the notice was received by them was relevant, as was also evidence that no such letter was sent from the post-office of the notifying town nor received at the post-office of the town to be notified in the month when mailing was alleged. Litchfield *v.* Farmington, 7 Conn. 100.

17. Augusta *v.* Vienna, 21 Me. 298.

In Maine the arrival of the notice at the post-office in the town to which it is directed is made, by St. (1835) c. 149, equivalent to a delivery to the overseers. Augusta *v.* Vienna, 21 Me. 298.

18. See Verona *v.* Penobscot, 56 Me. 11; Veazie *v.* Howland, 53 Me. 39; Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Attleborough *v.* Mansfield, 15 Pick. (Mass.) 19; Needham *v.* Newton, 12 Mass. 452; Townsend *v.* Billerica, 10 Mass. 411; Bath *v.* Freeport, 5 Mass. 325; Rumney *v.* Allenstown, 2 N. H. 470.

The giving of notice within three months after expenses incurred must be alleged in the declaration in an action to recover the amount thereof from the town liable. Salem *v.* Andover, 3 Mass. 436.

That the commonwealth cannot recover from a town expenses of supporting a pauper at a state almshouse incurred more than three months before notice to the town see Com. *v.* Dracut, 74 Mass. 455.

The time within which notice must be given to recover expenses incurred in the support of a pauper at a lunatic asylum is very generally by statute prescribed to be the same as in the case of ordinary pauper expenses, that is, within three months after the expenses were incurred. West Gardiner *v.* Hartland, 62 Me. 246; Jay *v.* Carthage, 48 Me. 353; Bangor *v.* Fairfield, 46 Me. 558; Cooper *v.* Alexander, 33 Me. 453; Amherst *v.* Shelbourne, 11 Gray (Mass.) 107; Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Worcester *v.* Milford, 18 Pick. (Mass.) 379.

A notice is not insufficient for want of the date, it being proved that it arrived at the post-office in the town to be notified, before the expiration of three months after the supplies were furnished. Ellsworth *v.* Houlton, 48 Me. 416.

Reasonable notice is necessary in a case of relief of a person suffering from a dangerous disease, under Act (1837), c. 244, § 1. Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

If a pauper fall sick and suddenly die the town of his settlement is liable for expenses incurred in his relief and burial, although it had no notice thereof until after his death. South Huntington *v.* East Huntington, 7 Watts (Pa.) 527.

19. East Sudbury *v.* Sudbury, 12 Pick. (Mass.) 1.

A notice quia timet is not premature if given after the supplies have been ordered in a case of existing necessity, although none have been actually furnished or consumed. Fayette *v.* Livermore, 62 Me. 229.

20. Chester *v.* Plaistow, 43 N. H. 542.

21. Stratford *v.* Fairfield, 3 Conn. 588.

22. Lyman *v.* Littleton, 50 N. H. 2. The

the town liable, and refusal to support the pauper, is an implied waiver of written particularized notice.[23] So the receipt of bills for support without objection is a waiver of a more formal notice.[24] A new notice is not a waiver of a former notice nor of any rights acquired thereunder.[25]

(B) *Of Defect in Notice.* A defect in a notice may be waived by the town upon which the notice is served.[26] The waiver may be implied.[27] And an answer denying liability upon some ground other than the defect in the notice waives a defect, such as misnomer or indefinite designation of a pauper,[28] calling a district a town,[29] want of particularization or itemizing of expense,[30] or the want of signature of the overseers in their official capacity;[31] but an objection that the notice is signed by a person having no authority to do so is not waived by an answer asking particulars concerning the pauper.[32] Defects in a notice are waived by the town notified acting upon the notice, paying the costs thereof, and contributing to the support of the pauper.[33]

(VII) *NEW NOTICE, WHEN NECESSARY.* If the town notified complies with the notice either by paying for the supplies furnished,[34] by removing the pauper,[35] or by otherwise providing for his relief,[36] a new notice is necessary to enable the relieving town to recover for supplies subsequently furnished.[37] A new notice is necessary for each new cause of action, and if the town furnishing supplies sues for them it cannot without a new notice recover for expenses incurred after the commencement of the first action.[38] And a new notice is necessary even though the former action between the same parties in respect to the same pauper is still pending at the commencement of the second suit.[39] If, however, the town receiving notice does not comply therewith no new notice for after-supplies is necessary, up to the time within which, according to the statute of limitations, action may

case of Hanover *v.* Weare, 2 N. H. 131, holds that an agreement made by the selectmen of a town before action commenced, by which they engaged to waive the statutory notice, does not, at the trial of the action, bar the town from objecting to the want of due notice, but that an action lies upon it for damages, if made upon a sufficient consideration. In Lyman *v.* Littleton, 50 N. H. 42, the court in discussing this case point out that the time for notice had elapsed, when the agreement was made, and that therefore plaintiff was not induced by the agreement not to give notice, but that the agreement was a mere executory one concerning the conduct of a trial at some indefinite future date. The doctrine of estoppel was therefore not involved, and the case does not deny that doctrine as at first appears.

23. Stratford *v.* Fairfield, 3 Conn. 588; Newtown *v.* Danbury, 3 Conn. 553; Lyman *v.* Littleton, 50 N. H. 42.

24. Bradford *v.* Cambridge, 195 Mass. 42, 80 N. E. 610.

25. New Vineyard *v.* Phillips, 45 Me. 405; Kennebunkport *v.* Buxton, 26 Me. 61. And see cases cited under new notice.

26. Unity *v.* Thorndike, 15 Me. 182; Hanover *v.* Eaton, 3 N. H. 38.

That the overseers or selectmen are the proper officers to waive a defect in a notice see Unity *v.* Thorndike, 15 Me. 182; Hanover *v.* Eaton, 3 N. H. 38, holding also that if a contract of waiver is made by selectmen expressly in behalf of a town, the selectmen will not be personally answerable for the breach thereof.

27. Newtown *v.* Danbury, 3 Conn. 553.

28. Newtown *v.* Danbury, 3 Conn. 553; Auburn *v.* Wilton, 74 Me. 437; Holden *v.* Glenburn, 63 Me. 579; Com. *v.* Dracut, 8 Gray (Mass.) 455; Northfield *v.* Taunton, 4 Metc. (Mass.) 433; Orange *v.* Sudbury, 10 Pick. (Mass.) 22; Shutesbury *v.* Oxford, 16 Mass. 102; Embden *v.* Augusta, 12 Mass. 307; Paris *v.* Hiram, 12 Mass. 262.

29. Paris *v.* Hiram, 12 Mass. 262.

30. Newtown *v.* Danbury, 3 Conn. 553.

31. York *v.* Penobscot, 2 Me. 1.

32. Belfast *v.* Lee, 59 Me. 293. See Petersham *v.* Coleraine, 9 Allen (Mass.) 91.

33. Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171. *Compare* St. Johnsbury *v.* Morristown, 51 Vt. 316.

34. Bangor *v.* Fairfield, 46 Me. 558; Greene *v.* Taunton, 1 Me. 228; Attleborough *v.* Mansfield, 15 Pick. (Mass.) 19; Palmer *v.* Dana, 9 Metc. (Mass.) 587. See Needham *v.* Newton, 12 Mass. 452.

35. Green *v.* Taunton, 1 Me. 228; Attleborough *v.* Mansfield, 15 Pick. (Mass.) 19; Palmer *v.* Dana, 9 Metc. (Mass.) 587.

36. Warren *v.* Islesborough, 20 Me. 442; Palmer *v.* Dana, 9 Metc. (Mass.) 587; Sidney *v.* Augusta, 12 Mass. 316.

37. That notice of other expenses previously incurred is not sufficient see Gilford *v.* Newmarket, 7 N. H. 251.

38. East Machias *v.* Bradley, 67 Me. 533; Hallowell *v.* Harwich, 14 Mass. 186; Attleborough *v.* Mansfield, 15 Pick. (Mass.) 19.

39. Veazie *v.* Howland, 53 Me. 39; Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Walpole *v.* Hopkinton, 4 Pick. (Mass.) 358. See Uxbridge *v.* See Konk, 10 Pick. (Mass.) 150.

be brought.[40] Where supplies are furnished occasionally and not continuously a new notice is not necessary for each new lot of supplies.[41] A new notice is not a waiver of a notice previously given nor of any rights acquired thereunder.[42]

e. Answer to Notice[43] — (I) *Necessity and Requisites.* It is generally provided by statute that a town upon whom a pauper notice has been served must in order to contest liability serve an answer upon the notifying town within a period prescribed by the statute.[44] The answer should be in writing,[45] although this requirement may be waived by the overseers of the town giving notice.[46] The answer should be signed by one of the overseers, or selectmen, or by one of their number in behalf of a majority.[47] And an answer signed by some other person will not be sufficient.[48] If an answer neglects to deny that the settlement of the pauper is in the town notified, that town is estopped, in an action to recover the expenses, to deny that fact.[49]

(II) *Effect of Failure to Serve.* A town which fails to answer, within the time prescribed by statute, a pauper notice, is estopped, in an action to recover the expenses incurred for the relief of the pauper, to deny that the person named in the notice is a pauper,[50] or that his settlement is the town notified.[51] A notice not sufficiently certain and definite, however, will not, although unanswered, conclude the town notified.[52]

D. Liability of Pauper and Pauper's Estate.[53] While it is not against

40. Jay *v.* Carthage, 48 Me. 353; Topsfield *v.* Middletown, 8 Metc. (Mass.) 564; Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

41. Veazie *v.* Howland, 53 Me. 38. See Attleborough *v.* Mansfield, 15 Pick. (Mass.) 19.

42. New Vineyard *v.* Phillips, 45 Me. 405; Kennebunkport *v.* Buxton, 26 Me. 61.

43. Waiver of defect in notice see *supra*, IV, C, 2, d, (VI), (B).

44. See the statutes of the several states. See also Ellsworth *v.* Houlton, 48 Me. 416; Easton *v.* Wareham, 131 Mass. 10; Wenham *v.* Essex, 103 Mass. 117; Petersham *v.* Coleraine, 9 Allen (Mass.) 91; Bridgewater *v.* Dartmouth, 4 Mass. 273; Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407; Stillwell *v.* Coon, 12 N. Y. St. 745.

In Wisconsin it has been held that no answer is necessary in order to entitle the town notified to defend. Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401.

That the answer may be served by mail see Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407.

45. Ellsworth *v.* Houlton, 48 Me. 416; Wenham *v.* Essex, 103 Mass. 117; Bridgewater *v.* Dartmouth, 4 Mass. 273; Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407. And see Stillwell *v.* Coon, 12 N. Y. St. 745.

46. Unity *v.* Thorndike, 15 Me. 182.

47. Petersham *v.* Coleraine, 9 Allen (Mass.) 91; Bridgewater *v.* Dartmouth, 4 Mass. 273.

48. Petersham *v.* Coleraine, 9 Allen (Mass.) 91, holding also that an objection that the answer is not signed by the proper officer is not waived by a reply sent under the impression that the answer came from him.

For answers held to be sufficient see Wenham *v.* Essex, 103 Mass. 117; Stillwell *v.* Kennedy, 51 Hun (N. Y.) 114, 5 N. Y. Suppl. 407; Stillwell *v.* Coon, 12 N. Y. St. 745.

49. Easton *v.* Wareham, 131 Mass. 10.

For an answer held to sufficiently deny settlement see Stillwell *v.* Coon, 12 N. Y. St. 745.

50. Freeport *v.* Edgecumbe, 1 Mass. 459.

51. Shelburne *v.* Buckland, 124 Mass. 117; Westminster *v.* Bernardston, 8 Mass. 104; Bridgewater *v.* Dartmouth, 4 Mass. 273; Topsham *v.* Harpswell, 1 Mass. 518. See, however, Kennebunkport *v.* Buxton, 26 Me. 61, and Turner *v.* Brunswick, 5 Me. 31, in which the rule is stated a little differently, these cases holding that the delinquent town is estopped to show the settlement of the pauper to be in any town other than the town giving notice. This is not the general rule.

That this estoppel operates only in an action to recover expenses incurred previous to giving notice and does not apply to an action for after expenses see Ellsworth *v.* Houlton, 48 Me. 416; Leicester *v.* Rehoboth, 4 Mass. 180.

Failure to answer a pauper notice concerning "S., his wife A., and their children," does not estop the town notified to deny the settlement of the woman and children unless it appears that they are in fact the wife and children of S, and evidence to negative this is admissible. Holden *v.* Glenburn, 63 Me. 579.

Failure to answer notice given pending an action no estoppel.— A notice from one town to another claiming reimbursement for the expense of supporting the pauper, given during the pendency of an action for the recovery of that expense, or after final determination, although unanswered, operates no estoppel to deny the settlement of the pauper with the town notified. Newton *v.* Randolph, 16 Mass. 426.

In Wisconsin it has been held that a notice, although unanswered, does not act as an estoppel as to any material fact, the court in that state not favoring estoppels. Scott *v.* Clayton, 51 Wis. 185, 8 N. W. 171.

52. Dover *v.* Paris, 5 Me. 430.

53. Services and earnings of paupers see *infra*, IV, J.

public policy for a pauper to voluntarily indemnify the public authorities against expenses incurred on his account,[54] and while he may bind himself by special contract to do so,[55] he is nevertheless under no obligation to make reimbursement in the absence of such contract or of some special statute so providing.[56] It makes no difference that the pauper owned property at the time the relief was furnished, in the absence of fraud[57] or deception on his part as to his ability to support himself,[58] or that he subsequently became of sufficient ability to repay.[59] By the provisions of some statutes expenses incurred in support of a pauper may be recovered from him or his estate.[60] The statutes do not apply to a

54. Church *v.* Fanning, 44 Hun (N. Y.) 302. And see O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350; Stow *v.* Sawyer, 3 Allen (Mass.) 515.

55. See Lyndon *v.* Belden, 14 Vt. 423, holding that where the overseers of the poor of a town, by contract with a poor person, received from him a horse toward indemnifying the town in yielding him a support, the property of the horse vested in the town and they might sue for it. But see Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461.

56. *Iowa.*— Bremer County *v.* Curtis, 54 Iowa 72, 6 N. W. 135.

Massachusetts.— Stow *v.* Sawyer, 3 Allen 515; Medford *v.* Learned, 16 Mass. 215; Deer-Isle *v.* Eaton, 12 Mass. 328. And see Groveland *v.* Medford, 1 Allen 23.

New Hampshire.— Charlestown *v.* Hubbard, 9 N. H. 195.

New York.—Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

Vermont.— Bennington *v.* McGennes, 1 D. Chipm. 44.

See 38 Cent. Dig. tit. "Paupers," §§ 180, 181.

Reason for rule.— The provision made by law for the relief of the poor is a charitable provision (Bennington *v.* McGennes, 1 D. Chipm. (Vt.) 44), and no promise can be implied to make reimbursement for relief furnished in accordance therewith (Bremer County *v.* Curtis, 54 Iowa 72, 6 N. W. 135). Charitable relief afforded to an individual, although at his own request, gives no cause of action against him. It is a gift and cannot be reclaimed. Charlestown *v.* Hubbard, 9 N. H. 195.

The estate of a deceased pauper is not liable after his death. Jones County *v.* Norton, 91 Iowa 680, 60 N. W. 200; Bremer County *v.* Curtis, 54 Iowa 72, 6 N. W. 135; Montgomery County *v.* Gupton, 139 Mo. 303, 39 S. W. 447, 40 S. W. 1094; Benson *v.* Hitchcock, 37 Vt. 567.

57. Stow *v.* Sawyer, 3 Allen (Mass.) 515.

58. Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

Misjudgment of the officers of the poor as to necessities of the person relieved raises no implied promise on the part of such person that he will repay moneys expended in his behalf. Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

59. Charlestown *v.* Hubbard, 9 N. H. 195.

60. See the statutes of the various states. And see Sehroer *v.* Central Kentucky Insane Asylum, 113 Ky. 288, 68 S. W. 150, 24 Ky. L. Rep. 150; Central Kentucky Insane Asylum *v.* Drane, 113 Ky. 281, 68 S. W. 149, 24 Ky. L. Rep. 176; Cutler *v.* Maker, 41 Me. 594; Newburyport *v.* Creedon, 146 Mass. 134, 15 N. E. 157; Haynes *v.* Wells, 6 Pick. (Mass.) 462; Montgomery County *v.* Nyce, 161 Pa. St. 82, 28 Atl. 999 [*affirming* 13 Pa. Co. Ct. 594]; Lancaster County *v.* Hartman, 9 Pa. Co. Ct. 177.

Construction of term "if able."— Under a statute providing that nurses and necessaries shall be provided an infected person at his charge "if able," where the charges were one hundred and seventy-six dollars and the infected person had six hundred dollars he was "able" within the meaning of the statute. Hampden *v.* Newburgh, 67 Me. 370. It has been held that the phrase "if able" relates to his pecuniary ability at the time the expenses are incurred, and that such person is not chargeable with any part of the expenses incurred if he is not able to pay the full amount. Greenville *v.* Beauto, 99 Me. 214, 58 Atl. 1026. So it has been held that under an act authorizing the directors of a county infirmary, as soon as any person is committed to such infirmary as a pauper, to take possession of any property he may own, and apply the proceeds thereof to his maintenance, the directors are not authorized to apply property acquired by a pauper after he enters the infirmary to the payment of his board for the time prior to the acquisition of such estate. Mason County Infirmary *v.* Smith, 111 Ky. 636, 64 S. W. 466, 23 Ky. L. Rep. 860.

Inquiry as to ability to pay.— The finding of a jury that a lunatic is a pauper, so as to entitle him to be admitted to a state asylum without payment in advance, as provided by Ky. St. § 256, is not such an adjudication between the lunatic and the state as to preclude further inquiry as to the ability of the lunatic to pay; express provision being made by Ky. St. § 257, for the recovery of the patient's board where he has, or subsequently acquires, estate. Central Kentucky Insane Asylum *v.* Drane, 113 Ky. 281, 68 S. W. 149, 24 Ky. L. Rep. 176.

Coverture is no bar to an action against a married woman for reimbursement for supplies, where she has been deserted by her husband. Peru *v.* Poland, 78 Me. 215, 3 Atl. 284.

No expense is shown to have been incurred for a pauper's support for which there can be a recovery, where it appears that he has

purely officious payment of expenses which a town was under no legal obligation to make.[61]

E. Application For Relief. According to some decisions, where relief is furnished in good faith, no application is necessary to the validity of the act of the poor officer in furnishing it.[62] Where application is made, an application by someone in behalf of the pauper will be sufficient; it is not necessary that the pauper should make the application himself.[63] Application to the individual members of the board of supervisors satisfies a statutory provision that application shall be made to the board of supervisors.[64] Where a pauper is residing in a town other than that in which he has a settlement, application for relief should be made to the poor officers of the town in which he resides, as the duty of providing relief is imposed on them in the first instance.[65]

F. Order of Relief and Order of Approval — 1. Order of Relief — a. Necessity and Form. Except in cases of emergency, where relief may be extended without an order therefor, and recovery had, provided an order of approval be afterward obtained,[66] a previous order therefor is always indispensable to a recovery for the relief furnished to a poor person.[67] The order of relief must be direct and positive in its terms, and not in the alternative.[68] A rule adopted by the county that no medical supplies shall be furnished any pauper, except on the order of the overseers of the poor, is satisfied by a verbal order merely.[69]

b. Nature and Extent of Relief. An act providing that the justices are to give such allowance weekly, or otherwise, as the necessities of the pauper shall require, gives a reasonable discretion to such justices as to the nature and extent of relief.[70]

rendered services to an amount equal in value to the cost of his support. Taunton *v.* Talbot, 186 Mass. 341, 71 N. E. 785.

The fact that a deceased pauper was entitled to soldier's relief which he did not receive does not bar an action by the poor officers to recover for his support as a pauper. Crossman *v.* New Bedford Sav. Inst., 160 Mass. 503, 36 N. E. 477.

Exemption allowed widow in husband's estate.— The exemption allowable to a widow, in her husband's estate, cannot be awarded to the poor district for taking care of her as an insane pauper. The exemption is not a sum due the widow on her husband's death but must be demanded, and she being insane cannot do so. The demand must be made by her committee. Kielty's Estate, 8 Kulp (Pa.) 19.

61. Newburyport *v.* Creedon, 146 Mass. 134, 15 N. E. 157.

62. Moultonborough *v.* Tuftonborough, 43 N. H. 316; Walden *v.* Cabot, 25 Vt. 522. *Compare* Van Nuis *v.* McCollester, 3 N. J. L. 805.

No application by one in jail at a distance from his home for relief for his family is necessary to authorize the poor officer to afford it relief to the amount designated by statute. Briggs *v.* Whipple, 6 Vt. 95.

63. Clay County *v.* Palo Alto County, 82 Iowa 626, 48 N. W. 1053.

64. Tessier *v.* Lake Pleasant, 57 Minn. 145, 58 N. W. 871.

65. Woodes *v.* Dennett, 9 N. H. 55.

66. See *infra*, IV, F, 2.

67. Princeton *v.* Mount, 29 N. J. L. 299; Overseers *v.* Baker, 2 Watts (Pa.) 280; Roxborough Tp. *v.* Bunn, 12 Serg. & R. (Pa.) 292; Delaware Tp. *v.* Zerbe Tp., 3 Pa. Co. Ct. 643.

Transient poor falling within the act of 1797, section 11, do not come within the twentieth section, requiring an order for their support, in order to bind the town beyond five dollars. Harrington *v.* Alburgh, 14 Vt. 132.

Payment of order for unauthorized expenditures enforced.— Where the overseer in a number of cases, and in good faith, and in ignorance of the existing statute, expended more than ten dollars for the relief of the poor, without first having obtained an order from a justice of the peace allowing the same, **and the town auditors allowed the claim for** such expenditures, and at an annual town meeting it was resolved that the sum due the overseers for such expenditures be levied and assessed on the taxable property to pay the same, which was duly certified to the board of supervisors and an order for the payment thereof given, it was held that the payment of the order so drawn for such expenditures would be enforced. Cobb *v.* Ramsdell, 14 N. Y. Suppl. 93.

68. Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

69. Fayette County *v.* Morton, 53 Ill. App. 552.

70. Adams *v.* Columbia County, 8 Johns. (N. Y.) 323, holding further that an allowance of not only a weekly sum, but medicine and attendance, is proper.

Order held not to charge district with costs and expenses of removal.— When the order on its face does not show, and there is no evidence in the case tending to show, that the pauper or any one in his behalf ever

c. Validity. The order, to be valid, must conform strictly to the statute on which it is founded.[71] Pure matters of form in the order of relief, however, are to be overlooked, and the order liberally treated;[72] and where no formal evidence of a given fact is required by the statute, and such evidence is to be reasonably implied from the order, it is enough.[73] But where the substance of what is required by the statute is absent, the order will of course not be upheld.[74]

d. Conclusiveness. The order is conclusive only when the statute on which it is founded has been strictly followed;[75] and if the statute has not been strictly followed in making the order, it creates no liability on the poor district in which the alleged pauper resides,[76] nor on the district to which he is subsequently removed.[77] When the statute has been strictly followed in making an order of relief, the overseers receiving it are bound to obey it; otherwise not.[78] The order is conclusive only of the fact that at the time of its use the person therein named is entitled to maintenance as a pauper, but is only *prima facie* evidence of the continuing necessity of relief.[79] If want of jurisdiction appears on the face of the record, it can be taken advantage of at any time and in any court where the conclusiveness of the order is the subject of a judicial inquiry.[80]

e. Appeal. Unless expressly authorized by statute no appeal lies from an order of relief.[81]

2. Order of Approval. The fact that the order of approval may be obtained after relief has been extended, so as to charge the poor district,[82] does not render the need of a subsequent order any the less imperative.[83] If the statute fixes no time within which the order of approval may be obtained, it is not for the court to prescribe the limits.[84] An appeal lies from a decision giving an order of approval;[85] and it seems that an appeal will lie also from a decision refusing an order of approval.[86]

applied for relief otherwise than for temporary assistance to obtain medicine, and the order in terms directs that the pauper be provided with suitable maintenance, it does not suffice to charge the poor district with the costs and expenses relating to the order of removal. Delaware Tp. *v.* Zerbe Tp., 3 Pa. Co. Ct. 643.

71. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595, holding further that where the order does not so conform to the statutory requirements, the regularity of subsequent proceedings is material.

Illustration.— Thus an order leaving action thereon to the discretion of the overseers of the poor, where the statute does not provide for delegation of the power to magistrates in making the order, will not be upheld. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595; Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

72. Adams *v.* Columbia County, 8 Johns. (N. Y.) 323; Rex *v.* Woodsterton, 2 Barn. 207. See also Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

73. Adams *v.* Columbia County, 8 Johns. (N. Y.) 323.

74. Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

75. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

76. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

77. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

78. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

79. Laporte Borough *v.* Hillsgrove Tp., 95 Pa. St. 269.

80. Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

81. Lampiter Tp. *v.* Lancaster, 2 Yeates (Pa.) 164; Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595; Rex *v.* North Shields, Dougl. (3d ed.) 331; Rex *v.* Devon, 4 M. & S. 421. See also People *v.* Cayuga County, 2 Cow. (N. Y.) 530.

The reason for not giving the appeal is that the subject of relief might starve while the cause was in suspense. Rex *v.* North Shields, Dougl. (3d ed.) 331.

82. Chester County House of Employment *v.* Worthington, 38 Pa. St. 160; Westmoreland County House of Employment *v.* Murry, 32 Pa. St. 178; Washington County *v.* Wallace, 8 Watts & S. (Pa.) 94; Neale *v.* Plum Creek, 3 Pa. Dist. 9; Pickett *v.* Erie County, 3 Pa. Co. Ct. 541. See also Brushvalley Tp. *v.* Allegheny County, 25 Pa. Super. Ct. 595.

83. Blakeslee *v.* Chester County, 102 Pa. St. 274; Delaware Tp. *v.* Zerbe Tp., 3 Pa. Co. Ct. 643; Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

84. Chester County House of Employment *v.* Worthington, 38 Pa. St. 160. See also Blakeslee *v.* Chester County, 102 Pa. St. 274; Roney *v.* Montgomery House of Employment, 1 Montg. Co. Rep. (Pa.) 13.

85. Chester County House of Employment *v.* Worthington, 38 Pa. St. 160; Neale *v.* Plum Creek, 3 Pa. Dist. 9; Hower *v.* Lewisburg, 6 Pa. Co. Ct. 667.

86. See Blakeslee *v.* Chester County, 102

G. Furnishing Aid and Support in General — 1. Transients. By statute in one jurisdiction at least the overseers of the poor of the town in which a transient person is suddenly taken sick or lame, or otherwise disabled and confined in any house in the town and in need of relief, are bound to afford him relief.[87] Under such a statute any person, not having come to reside in the town, is regarded as transient,[88] and the overseers of the poor are bound to provide for his support, when disabled and in need of personal relief,[89] without regard to his ability to defray the expenses thereof.[90]

2. Necessity of Relief. When the act of the poor authorities of a town or county in affording relief to a pauper may affect the rights or obligations of another town or county, the law requires that a case of necessity and need should be established, before the relief is furnished, and those rights or obligations changed.[91] And the liability of the town or county sought to be charged for relief furnished to a pauper by the poor authorities of another town or county does not depend upon the opinion or adjudication of the latter that the relief is necessary, although made in good faith;[92] but upon the fact that the person provided for has fallen into distress and stands in need of immediate relief.[93] But the fact that a person is actually destitute and in need of relief authorizes and requires the proper poor authorities to provide such relief,[94] and the obligation to act in the premises is not affected by the circumstance that the person to be relieved may have property of his own, not available for his immediate relief,[95] or by the question upon whom the burden shall ultimately fall.[96]

3. Unauthorized and Voluntary Aid. There is no implied contract on the part of a town or county to pay a third person who voluntarily affords relief to a pauper;[97] and no action therefor will lie by him against the town or

Pa. St. 274; Chester County House of Employment *v.* Worthington, 38 Pa. St. 160; Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.

87. See Stone *v.* Glover, 60 Vt. 651, 15 Atl. 334.

A statute providing for the relief of indigent residents in the county does not embrace a transient. Upshur County *v.* Yeury, 19 Tex. 126.

88. Charleston *v.* Lunenburgh, 23 Vt. 525. See also Macoon *v.* Berlin, 49 Vt. 13. As between the person at whose house the disabled person is confined, and the town in which he is confined, the liability of the town does not depend on such person's transiency as distinguished from the permanency of having come to reside, but, as to that, only on his being confined by disability at some house that is not his home. Goodell *v.* Mt. Holly, 51 Vt. 423.

89. Stone *v.* Glover, 60 Vt. 651, 15 Atl. 334; Danville *v.* Sheffield, 50 Vt. 243; Charleston *v.* Lunenburgh, 23 Vt. 525.

That the disability should be caused by the sudden visitation of disease or accident is not necessary (Stone *v.* Glover, 60 Vt. 651, 15 Atl. 334), but "otherwise disabled" is enough (Stone *v.* Glover, *supra*; Charleston *v.* Lunenburgh, 23 Vt. 525).

90. Danville *v.* Sheffield, 50 Vt. 243, holding further that the question of the ability of a transient person to defray the expense of his support arises as between the town rendering the support, and the town in which such person is legally settled, after the support is furnished.

91. Veazie *v.* Chester, 53 Me. 29.

92. Thomaston *v.* Warren, 28 Me. 289.

It is always competent for defendant towns to deny the necessity of relief furnished by other towns and with which they are sought to be charged. Thomaston *v.* Warren, 28 Me. 289.

93. Clinton County *v.* Pace, 59 Ill. App. 576; Mussel *v.* Tama County, 73 Iowa 101, 34 N. W. 762; Thomaston *v.* Warren, 28 Me. 289; Springfield *v.* Chester, 68 Vt. 294, 35 Atl. 322.

94. *Connecticut.*— New Milford *v.* Sherman, 21 Conn. 101.

Illinois.— Clinton County *v.* Pace, 59 Ill. App. 576.

Iowa.— Mussel *v.* Tama County, 73 Iowa 101, 34 N. W. 762.

Maine.— Veazie *v.* Chester, 53 Me. 29; Norridgewock *v.* Solon, 49 Me. 385.

Pennsylvania.— Cumberland County House of Employment *v.* Walker Tp., 7 Pa. Super. Ct. 303.

See 38 Cent. Dig. tit. "Paupers," § 191.

95. Norridgewock *v.* Solon, 49 Me. 385; Ripton *v.* Brandon, 80 Vt. 234, 67 Atl. 541. See also Templeton *v.* Winchendon, 138 Mass. 109; Groveland *v.* Medford, 1 Allen (Mass.) 23.

The fact that there was a small sum due a pauper when the supplies were furnished is not conclusive that the verdict for plaintiff in an action to recover for such supplies was against the evidence upon the question of necessity. Solon *v.* Embden, 71 Me. 418.

96. Norridgewock *v.* Solon, 49 Me. 385.

97. *Illinois.*— Alton *v.* Madison County, 21 Ill. 115.

Massachusetts.— Miller *v.* Somerset, 14 Mass. 396.

county,[98] unless it is expressly given by statute,[99] or is founded on an express contract,[1] or on an implied contract to pay for relief afforded at the special request of the town or county.[2]

4. Effect of Existence of Provision For Relief — a. In General. If a town or county has made adequate provision for the relief of a pauper, any relief furnished him by other towns or counties, or third persons,[3] after knowledge or

New Hampshire.— French *v.* Benton, 44 N. H. 28; Otis *v.* Strafford, 10 N. H. 352.
New York.— Smith *v.* Williams, 13 Misc. 761, 35 N. Y. Suppl. 236.
Vermont.— Aldrich *v.* Londonderry, 5 Vt. 441.
England.—Atkins *v.* Banwell, 2 East 505. See 38 Cent. Dig. tit. "Paupers," § 193.

98. *Illinois.*— Alton *v.* Madison County, 21 Ill. 115; Rayburn *v.* Davis, 2 Ill. App. 548.
Indiana.— Knox County *v.* Jones, 7 Ind. 3.
Massachusetts.— Kittredge *v.* Newbury, 14 Mass. 448; Miller *v.* Somerset, 14 Mass. 396; Mitchell *v.* Cornville, 12 Mass. 333; Dalton *v.* Hinsdale, 6 Mass. 501.
Mississippi.— Reynolds *v.* Alcorn County, 59 Miss. 132.
Missouri.— Duval *v.* Laclede County, 21 Mo. 396.
Nebraska.— Hamilton County *v.* Meyers, 23 Nebr. 718, 37 N. W. 623.
New Hampshire.— French *v.* Benton, 44 N. H. 28; Otis *v.* Strafford, 10 N. H. 352.
New York.— Smith *v.* Williams, 13 Misc. 761, 35 N. Y. Suppl. 236; Flower *v.* Allen, 5 Cow. 654; Gourley *v.* Allen, 5 Cow. 644; Hull *v.* Oneida County Sup'rs, 19 Johns. 259, 10 Am. Dec. 223; Brooks *v.* Read, 13 Johns. 380; Everts *v.* Adams, 12 Johns. 352.
Pennsylvania.— Salsbury *v.* Philadelphia, 44 Pa. St. 303.
Rhode Island.— Caswell *v.* Hazard, 10 R. I. 490.
Vermont.— Thetford *v.* Hubbard, 22 Vt. 440; Houghton *v.* Danville, 10 Vt. 537; Aldrich *v.* Londonderry, 5 Vt. 441; Jamaica *v.* Guilford, 2 D. Chipm. 103.
Wisconsin.— McCaffrey *v.* Shields, 54 Wis. 645, 12 N. W. 54.
England.—Atkins *v.* Banwell, 2 East 505. See 38 Cent. Dig. tit. "Paupers," § 193.

The law presumes the services are bestowed in charity, where they are rendered by a physician to a poor person in an emergency, and no action against the county will lie therefor. Cantrell *v.* Clark County, 47 Ark. 239, 1 S. W. 200.

One who voluntarily buries a poor person cannot maintain an action against the county to recover the expenses thereof. Handlin *v.* Morgan County, 57 Mo. 114.

A town which has paid money for the support of a criminal in its workhouse cannot maintain an action to recover the same from the town where he had his settlement, there being no liability therefor on the town making such payments. Worcester *v.* Auburn, 4 Allen (Mass.) 574.

For aid furnished prior to an authorization by the township trustees, no action will lie against the county. Mansfield *v.* Sac County, 60 Iowa 11, 14 N. W. 73.

99. Mitchell *v.* Cornville, 12 Mass. 333; Dalton *v.* Hinsdale, 6 Mass. 501; Houghton *v.* Danville, 10 Vt. 537.

A general expression in the statute, declaring it the duty of towns to sustain their own and the transient poor, creates no legal obligation. Houghton *v.* Danville, 10 Vt. 537; Aldrich *v.* Londonderry, 5 Vt. 441. *Compare* Holmes *v.* St. Albans, Brayt. (Vt.) 179.

1. Beetham *v.* Lincoln, 16 Me. 137; Worcester *v.* Ballard, 38 Vt. 60.

2. Beetham *v.* Lincoln, 16 Me. 137; Buck *v.* Worcester, 48 Vt. 1; Worcester *v.* Ballard, 38 Vt. 60. See also Windham *v.* Portland, 23 Me. 410; Aldrich *v.* Londonderry, 5 Vt. 441.

3. *Illinois.*— De Witt County *v.* Wright, 91 Ill. 529.
Indiana.— State *v.* Gold, 140 Ind. 699, 40 N. E. 55; Robbins *v.* Morgan County, 91 Ind. 537; Decatur County *v.* Wheeldon, 15 Ind. 147; Woodruff *v.* Noble County, 10 Ind. App. 179, 37 N. E. 732.
Iowa.— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Gawley *v.* Jones County, 60 Iowa 159, 14 N. W. 236; Mansfield *v.* Sac County, 59 Iowa 694, 13 N. W. 762.
Maine.— Goodrich *v.* Waterville, 88 Me. 39, 33 Atl. 659.
Ohio.— Licking Tp. *v.* Muskingum Tp., 1 Ohio Dec. (Reprint) 284, 7 West. L. J. 90.
Pennsylvania.— Pickett *v.* Erie County, 3 Pa. Co. Ct. 541.
See 38 Cent. Dig. tit. "Paupers," § 193.

Facts taking case out of rule.— That a county has a regularly employed physician to attend its poor does not affect a physician employed by township trustees, where it is not shown that the physician employed by the county was under any obligation to attend the poor of such township. Taylor *v.* Woodbury County, 106 Iowa 502, 76 N. W. 824. An order of the county commissioners, under Gen. Laws, c. 25, § 6, for the removal of a county pauper to the county almshouse, which is not complied with because of the pauper's refusal to be removed, does not discharge the county from liability to the town in which the pauper resides for support afterward furnished him upon a new application, a new necessity having arisen. Winchester *v.* Cheshire County, 64 N. H. 100, 5 Atl. 767. The statutory liability of the county for medical services furnished to persons falling sick within the county without money or property with which to pay for such services is not affected by the fact that there is a poorhouse in the county for the care of paupers, since such persons are not paupers within the meaning of the statute. La Salle County *v.* Reynolds, 49 Ill. 186.

notice of such prior provision,[4] is deemed to be voluntary, and no action will lie therefor.

b. After Notice to Town to Give Relief. In some jurisdictions towns are, by statute, bound to furnish actual relief, after notice, to persons in need thereof;[5] and when the town fails to do this, any person not liable for the pauper's support may provide the necessary relief, and recover the expenses thereof against the county.[6] And such action will not be defeated by proof of knowledge by plaintiff that the town bound to support the pauper had made, at another place, suitable provision for that purpose, if the pauper, while supported by plaintiff, was too sick to bear a removal,[7] or, being a minor of tender age, was not reasonably able to reach the place provided for him;[8] nor will such action fail because the town had contracted to have the relief afforded by one who failed so to do.[9]

5. Nature and Extent of Relief. It is only for necessaries that a town or county furnishing relief to a pauper can recover from the town or county ultimately liable.[10] The situation of a pauper admits of such infinite varieties that no arbitrary rule can be laid down as to what constitutes necessaries for him;[11] but generally plaintiff must establish that the amount[12] and kind[13] of supplies, under all the circumstances, were suitable and proper. There are certain items, however, such as expense of commitment to an asylum,[14] and support there,[15] clothing destroyed by an insane pauper, without fault of asylum overseers or keeper,[16] expense of nursing a sick pauper,[17] and burial expenses of a pauper,[18] which in their nature are necessaries, and, when reasonable as to amount, a legal charge on

4. Backus *v.* Dudley, 3 Conn. 568; Goodrich *v.* Waterville, 88 Me. 39, 33 Atl. 659; Phelps *v.* Westford, 124 Mass. 286; Rawson *v.* Uxbridge, 113 Mass. 47; Lamson *v.* Newburyport, 14 Allen (Mass.) 30; Ireland *v.* Newburyport, 8 Allen (Mass.) 73; New Salem *v.* Wendell, 2 Pick. (Mass.) 341.

5. See the statutes of the various states. And see Perley *v.* Oldtown, 49 Me. 31; Worden *v.* Leyden, 10 Pick. (Mass.) 24; Eckman *v.* Brady Tp., 81 Mich. 70, 45 N. W. 502; Cincinnati Tp. *v.* Ogden, 5 Ohio 23.

If a pauper is ill treated or insufficiently provided for by an individual who has agreed with the town to support him, another individual will not have a right to support him without notice to the town, so that it may have an opportunity to reform the abuse or make other provision for the pauper. Worden *v.* Leyden, 10 Pick. (Mass.) 24.

Except in extreme cases a municipality cannot be made responsible to an individual for relief granted to a pauper, until given an opportunity to make the necessary provision. Seagraves *v.* Alton, 13 Ill. 366.

6. Perley *v.* Oldtown, 49 Me. 31; Brown *v.* Orland, 36 Me. 376; Eckman *v.* Brady Tp., 81 Mich. 70, 45 N. W. 502; Cincinnati Tp. *v.* Ogden, 5 Ohio 23.

If a municipal corporation does not provide after notice for the comfortable support of paupers, individuals may supply the necessities and look to the corporation for remuneration. Seagraves *v.* Alton, 13 Ill. 366.

No need of immediate relief shown.— An insane woman without property was maintained by her brother and sister. The brother obtained remuneration from the town. Had the sister known the fact, she would herself have assumed the whole burden. It was held that there was no such need of immediate relief as entitled the town to recovery against the town of the insane pauper's legal settlement. Templeton *v.* Winchendon, 138 Mass. 109.

7. Brown *v.* Orland, 36 Me. 376.

8. Knight *v.* Ft. Fairfield, 70 Me. 500.

9. Perley *v.* Oldtown, 49 Me. 31.

10. Berlin *v.* Gorham, 34 N. H. 266.

11. Berlin *v.* Gorham, 34 N. H. 266.

12. Berlin *v.* Gorham, 34 N. H. 266.

Amount stated in notice to town ultimately liable.— If a town expends an extravagant sum in the support of a pauper, and the notice given to the town ultimately liable truly states the sum expended, the former town can recover a reasonable proportion of the sum expended (Southbridge *v.* Charlton, 15 Mass. 248; Barnstead *v.* Strafford, 8 N. H. 142); but if the selectmen give notice of the sum expended, knowing that some of the items are much larger than the town has paid, or assumed to pay, nothing can be recovered on such items (Barnstead *v.* Strafford, *supra*).

13. Berlin *v.* Gorham, 34 N. H. 266.

Supplies furnished for the support of the nurse of a sick pauper were held to be necessaries, where it appeared that the pauper's family consisted of a daughter and her child, and the daughter was willing and desirous to act as nurse, but could not board herself and child while so doing. Berlin *v.* Gorham, 34 N. H. 266.

14. Eastport *v.* Belfast, 40 Me. 262; Ketcham's Case, 14 Pa. Co. Ct. 9.

15. St. Johnsburg *v.* Waterford, 15 Vt. 692.

16. St. Johnsburg *v.* Waterford, 15 Vt. 692.

17. Kennebunk *v.* Alfred, 19 Me. 221; Berlin *v.* Gorham, 34 N. H. 266; Ranson Tp. *v.* Jenkins Tp., 8 Kulp (Pa.) 223.

18. Ellsworth *v.* Houlton, 48 Me. 416.

the town or county ultimately liable; and there are other items, such as the expense of the overseers of the poor in providing for the abode and support of a pauper,[19] the services of the overseers of the poor,[20] debts of a pauper, paid at his request,[21] and the expense of redeeming a pauper's clothes,[22] which in their nature are not necessaries and therefore not a legal charge.

H. Contracts For Support[23] — **1. Requisites and Validity** — **a. In General.** Except where a statute makes provision for such support, a town or county can be held liable to third persons for the support of its paupers only by contract.[24] Such a contract a town or county is authorized, expressly or impliedly, to make.[25] A contract between a town and an individual for the support of a pauper may be either express or implied. If relief be afforded to a pauper at the request of the overseers of the poor, the law implies a promise to pay for the same, and there is no more need of an express promise than between private persons.[26] And such request may also be implied.[27] But no promise can be implied to pay expenses which the poor officers are not authorized to incur.[28]

b. Consideration. A contract for the support of a pauper requires a valid consideration to support it the same as any other contract.[29]

2. Construction and Operation. Where a person contracts for the support of all the poor of a town or county for a stipulated period, he is liable for the support of all transient paupers chargeable to such town or county, and of all paupers having their legal settlement therein residing elsewhere, the burden of whose support is ultimately cast upon such town or county.[30] Under such a contract no liability exists on either side for the support of persons not paupers.[31] Nor can one who has bid off the keeping of a county poorhouse at a certain sum for each pauper recover for paupers supported by the county outside such poorhouse.[32] Where a contract is

19. Conway *v.* Deerfield, 11 Mass. 327.

20. Barnstead *v.* Strafford, 8 N. H. 142.

21. Vinalhaven *v.* Lincolnville, 78 Me. 422, 6 Atl. 600.

22. Gilman *v.* Portland, 51 Me. 457.

23. Contracts of employment of physician see *infra*, IV, M, 3.

24. St. Luke's Hospital Assoc. *v.* Grand Forks County, 8 N. D. 241, 77 N. W. 598; Buck *v.* Worcester, 48 Vt. 1; Worcester *v.* Ballard, 38 Vt. 60.

25. Davenport *v.* Hallowell, 10 Me. 317; Lebcher *v.* Custer County, 9 Mont. 315, 23 Pac. 713, holding, however, that a contract by the board of commissioners for the care of the "poor" at a certain price *per capita*, and for the care of the "sick and infirm" at another price *per capita* was void, since the only contract authorized by the statute was one for the care of such persons as were poor and therewith sick and infirm.

Indemnity against contingent liability.—A town may indemnify itself, by proper contract, against a contingent liability of furnishing supplies to a pauper; and this, without regard to whether he is in present need or not, and whether he knows that he is receiving pauper supplies or not. Palmyra *v.* Nichols, 91 Me. 17, 39 Atl. 338.

26. Howard County *v.* Jennings, 104 Ind. 108, 3 N. E. 619; Worcester *v.* Ballard, 38 Vt. 60; Wolcott *v.* Wolcott, 19 Vt. 37.

27. Windham *v.* Portland, 23 Me. 410; Buck *v.* Worcester, 48 Vt. 1.

28. Schuylkill *v.* Montour, 44 Pa. St. 484, where the poor directors accepted a pauper on removal, and requested the overseers of the removing town to "send bill of expenses," and it was held that no such implied promise arose from the acceptance or the request as would support an action of assumpsit by the overseers to recover the expenses of maintenance.

29. Freeman *v.* Dodge, 98 Me. 531, 57 Atl. 884, 66 L. R. A. 395 (holding that the moral obligation, or the contingent statutory liability, of a son to reimburse a town for his mother's support is not a sufficient consideration for his promise to pay the same); Rowell *v.* Vershire, 63 Vt. 510, 22 Atl. 604, 62 Vt. 405, 19 Atl. 990, 8 L. R. A. 708 (holding that it is a legal duty of a father, if able, to support his unemancipated daughter, and an agreement by the town, through its overseer, to pay him therefor, is without consideration, and is a mere *nudum pactum*, and void).

30. Macoupin County *v.* Edwards, 15 Ill. 197 (in which case plaintiff entered into a written contract with the county court of A county to receive and properly feed and clothe every pauper sent to him upon the order of any one member of such said court for a specified sum, and it was held that under the statute the term "pauper" included lunatics who were paupers, although the trouble and expense were increased by reason of their insanity); Reniche *v.* Allen County, 20 Ind. 243; Wood *v.* Burlington, 1 Metc. (Mass.) 489. See also Saco *v.* Osgood, 5 Me. 237.

31. Logan County *v.* McFall, (Ida. 1894) 35 Pac. 691; Hayford *v.* Belfast, 80 Me. 315, 14 Atl. 287.

32. Polk *v.* Covington County, 77 Miss. 803, 27 So. 598.

made for the support of the poor of a town or county for an indefinite period, payment for such support to be made at stipulated periods, either party to the contract may rescind the same at the expiration of such stipulated period.[33] Where one contracts to support a pauper for a certain period, he is under no obligation to support him for a longer period.[34] But if he continues the support of a pauper after the expiration of the period covered by his contract, without a renewal thereof, the town is not liable on the ground of failure to remove the pauper at the end of the time limited by the contract.[35] Where a person has performed his engagement in part, and has been prevented from fulfilling it by inevitable accident, he is entitled to compensation for the part performed, on an implied promise.[36]

I. Support in Poorhouses — 1. In General. Unless the statute expressly confers on overseers of the poor the power so to do, they cannot remove and maintain a poor person, against his will, in a poorhouse outside of the poor district to which such poor person belongs.[37] It is provided by statute in some jurisdictions that the county poor shall be sent to and kept in the county poorhouse at the expense of the county;[38] and where the statute does so provide and a person is duly

33. McLees *v.* Hale, 10 Wend. (N. Y.) 426 (holding that one contracting with the overseers of the poor to support a child until it is five or six years old, or so long as it should be chargeable to the town, payment for the support to be made weekly, may put an end to his obligation at the end of the week, the contract being for no definite period); Edwards *v.* Branch, 52 N. C. 90 (holding that an order, made by the wardens of the poor of a county, that a particular sum should be allowed and placed in the hands of A, payable semiannually, for the benefit of a pauper, was repealable within the time of the first half year, although A had proceeded under such order to purchase provisions for the whole year, and he was held only entitled to one-half yearly instalment).

34. Aldrich *v.* Londonderry, 5 Vt. 441.

35. Smith *v.* Colerain, 9 Metc. (Mass.) 492; Castelman *v.* Miner, 8 Vt. 209; Aldrich *v.* Londonderry, 5 Vt. 441.

Removal of pauper from town during life of contract.— Where one under contract with a town to support a pauper for a year removes the pauper during the year to another town, such removal does not terminate the contract, and the town, not having taken the pauper back, is liable for his support until the end of the year (Newton *v.* Waterford, 67 Vt. 372, 31 Atl. 782; Durfey *v.* Worcester, 63 Vt. 418, 22 Atl. 609); but the town is not liable for support furnished the pauper after the expiration of the year, since it is the plaintiff's duty to return the pauper at the end of the year (South Burlington *v.* Worcester, 67 Vt. 411, 31 Atl. 891; Newton *v.* Waterford, *supra*; Baldwin *v.* Worcester, 67 Vt. 285, 31 Atl. 413).

36. Willington *v.* West Boylston, 4 Pick. (Mass.) 101.

Death of pauper.— Where a person entered into a contract with a town to support a pauper for one year, at the rate of one dollar a week, and the pauper died within the year, it was held that the express contract was dissolved by the death of the pauper, and that the person contracted with was entitled to recover a compensation for supporting the pauper until his death, upon an implied promise. Willington *v.* West Boylston, 4 Pick. (Mass.) 101.

37. Armstrong *v.* Berwick Borough, 10 Pa. Co. Ct. 337.

Contracts for support see *supra*, IV, H.

38. See the statutes of the various states. And see Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; Rockaway Tp. *v.* Morris County, 68 N. J. L. 16, 52 Atl. 373.

Unless an order to that effect has been made by the overseers of the poor, or a warrant has been issued for the removal of a pauper to the county poorhouse as a lunatic, the superintendents of the poor are not authorized to receive a pauper into the county poorhouse to be supported at the expense of the town. Pomeroy *v.* Wells, 8 Paige (N. Y.) 406.

Refusal of steward of poorhouse to receive pauper.— Where the provision of the statute with regard to proceedings fixing the settlement of a pauper and his commitment to the poorhouse have been substantially complied with, the refusal of the steward of the poorhouse to receive such pauper amounts to a waiver of his actual delivery to him by the overseer of the poor of the town, and the county thereby becomes charged with the expense of thereafter maintaining him. Rockaway Tp. *v.* Morris County, 68 N. J. L. 16, 52 Atl. 373.

Support of persons entitled to temporary relief.— 1 Rev. St. p. 405, § 24, makes it the duty of the overseers of the poor to grant temporary relief to persons not inhabitants of their township, lying sick therein or in distress without money or friends. Section 13 provides that, whenever any person entitled to temporary relief as a pauper shall be in any township in which he has not a legal settlement, the overseers of the poor thereof may grant such relief by placing him temporarily in the poorhouse of such county. It was held that persons entitled to relief, under section 24, may be properly placed in

admitted into the county poorhouse and supported there, the county cannot recover the value of such support either upon an express[39] or implied[40] contract.

2. State Almshouses. In the absence of statute,[41] the town of a pauper's settlement is not liable for the expenses of his support at a state almshouse.[42]

J. Services and Earnings of Pauper — 1. Right Thereto — a. Of Town. A town has the right to the services and earnings of a pauper to aid in his support.[43]

b. Of Persons Becoming Liable For Support by Contract With Town. Any person who may have become liable for the support of a pauper by virtue of a contract with the town is entitled to his moderate services and the benefits thereof.[44]

c. Of Pauper Himself. A person having a right to ordinary and moderate services from a pauper by virtue of a contract with the town may bind himself by special contract to pay him wages for particular services.[45] And if the keeper of a county poorhouse employs one of the paupers therein for his individual benefit, upon a promise of compensation, he is liable in an action for work and labor performed.[46] But where the value of the services performed for the town exceeds the amount expended for his relief, the pauper cannot recover the excess in an action against the town for work and labor.[47]

2. Settlement Regarding. An overseer of the poor having power to make a valid contract as to the pauper's services has the right to settle and adjust all dis-

the county poorhouse for relief. Reiniche *v.* Allen County, 20 Ind. 243.

39. Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; Noble County *v.* Schmoke, 51 Ind. 416.

40. Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; Switzerland County *v.* Hildebrand, Smith (Ind.) 361.

41. Northampton *v.* Plainfield, 164 Mass. 506, 41 N. E. 785; Com. *v.* Dracut, 8 Gray (Mass.) 455.

42. Com. *v.* Dracut, 8 Gray (Mass.) 455.

43. Wilson *v.* Brooks, 14 Pick. (Mass.) 341; Wilson *v.* Church, 1 Pick. (Mass.) 23; Abbott *v.* Fremont, 34 N. H. 432. See also Clinton *v.* Benton, 49 Me. 550.

The town is entitled to all the earnings of the state paupers supported by the town, together with the allowance made by the state for each of them, provided they do not exceed the expenses. Com. *v.* Cambridge, 20 Pick. (Mass.) 267.

A town, in stating an account with the commonwealth as to the support of state paupers, is bound to credit the value of the pauper's labor only, and not any share of the profits, if there be any, which the town derives from their labor. Com. *v.* Cambridge, 4 Metc. (Mass.) 35.

In an action by the commonwealth against a town to recover back money overpaid for the support of state paupers, where the court appointed an auditor to examine the vouchers of the accounts of the town agent respecting such paupers, such auditor may require the value of the pauper's labor, which was estimated and credited in the agent's accounts, and may thereupon state an account in which the labor is estimated at a less value than in the accounts of the agent. Com. *v.* Cambridge, 4 Metc. (Mass.) 35.

One who has used the services of a negro as a reputed slave is not liable for the value of the negro's services to the town which subsequently supports the negro as a pauper. Overseers *v.* Kline, 9 Pa. St. 217.

Earnings of minor child of pauper.— When a parent is a pauper and is maintained by a town, such town is not entitled to the earnings of a minor child of such pauper who is not himself a pauper. Jenness *v.* Emerson, 15 N. H. 486.

44. Wilson *v.* Church, 1 Pick. (Mass.) 23.

Services of person no longer a pauper.— Where a person who had been supported by his town as a pauper had bodily health and strength, although of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, he was no longer a pauper, and consequently where the town made a contract with plaintiffs that they should take care of all the paupers belonging to the town, and be entitled to their services, it was held that they were not entitled to his services. Wilson *v.* Brooks, 14 Pick. (Mass.) 341.

45. Wilson *v.* Church, 1 Pick. (Mass.) 23, holding further that it is too late for such person after entering into a special contract with a pauper, and after the latter has complied with his engagement, to say that he had a right to all the pauper's services.

46. Bergin *v.* Wemple, 30 N. Y. 319.

47. Abbott *v.* Fremont, 34 N. H. 432, holding, however, that if the overseers of the poor retain in their town as a pauper an insane person, not needing relief, for the sake of the profit to be made for the town out of his labor, and let out his labor for a year to one who pays the town an agreed sum beyond providing for the insane pauper's support, the latter may waive his remedy against the overseers for the personal injury, and recover the money from the town in an action for money had and received.

putes that may arise concerning it, and in the absence of fraud a settlement made between the overseer and the other contracting party is conclusive.[48]

K. Support in Asylums[49] **— 1. Local Authorities Liable.** The general policy of the statutes seems to be that the expense of supporting insane paupers committed to the state lunatic asylum shall be paid by the town in which they had their residence at the time of the commitment, if they had a settlement in the state, and such town may recover the amount so paid from the town in which they had their legal settlement,[50] or from their relations if of sufficient ability.[51] The statutes are generally held to apply to any insane pauper found in a town regardless of his fixed residence or of the length of time he has been in the town.[52] In some jurisdictions notice is not required to be given to the town to be charged before commencing an action for reimbursement.[53] In other jurisdictions such a notice is necessary.[54]

2. Validity of Commitment. The proceedings for the commitment of a pauper must show a substantial compliance with the statute, and where such commitment is irregular, the expenses of the pauper's commitment and maintenance in the asylum cannot be recovered from the place of his settlement.[55] Under some statutes a commitment by overseers of the poor without an adjudication by any court or magistrate is irregular, so that the town cannot recover the cost of the lunatic's support from the place of his settlement.[56] In other jurisdictions such a commitment is within the meaning of the statute, and a recovery is permitted.[57]

L. Support in Reformatories and Prisons. In the absence of statute there can be no liability on the town where a felon had his last legal settlement

48. Billings *v.* Kneen, 57 Vt. 428.

49. Actions for support see *infra*, IV, N, 2.

50. *Maine.*— Jay *v.* Carthage, 48 Me. 353.

Massachusetts.— Smith *v.* Lee, 12 Allen 510; Andover *v.* East Hampton, 5 Gray 390.

New Hampshire.— Merrimack County *v.* Concord, 39 N. H. 213.

New York.— Suffolk County *v.* Kingston, 50 Hun 435, 3 N. Y. Suppl. 221 [*affirmed* in 115 N. Y. 650, 21 N. E. 1118].

Rhode Island.— Hopkinton *v.* Waite, 6 R. I. 374, holding, however, that prior to Rev. St. (1857) payments at the hospital, made by the town in which a lunatic pauper was arrested, could not be recovered of the town in which he was settled, and, if made, were voluntary and irrecoverable.

Vermont.— St. Johnsbury *v.* Waterford, 15 Vt. 692.

See 38 Cent. Dig. tit. "Paupers," §§ 200, 201.

In Pennsylvania a hospital may recover for the support of an insane pauper either from the city or county from which the pauper was sent, or from the township. State Hospital *v.* Bellefonte Borough, 163 Pa. St. 175, 29 Atl. 901. The courts may determine where insane paupers shall be kept, and where an insane pauper is placed in the state lunatic hospital, the county is primarily liable for the expense of care, maintenance, and removal, with the right to recover from the township or poor district within which such pauper had a settlement at the time of commitment. Davidson Tp.'s Appeal, 68 Pa. St. 312; *In re* Blewitt, 11 Phila. 652.

A lunatic pauper who has been returned as incurable from the state lunatic asylum to the jail of the county, within one of the townships of which he has a legal settlement, must be provided for by such county, as long as the township of his settlement remains part of the same county. Ashland County *v.* Richland County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49.

51. Wertz *v.* Blair County, 66 Pa. St. 18.

52. Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

53. Merrimack County *v.* Concord, 39 N. H. 213.

54. Jay *v.* Carthage, 48 Me. 353; Andover *v.* East Hampton, 5 Gray (Mass.) 390.

55. Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884 (where the proceedings for the commitment were held to be sufficient); Naples *v.* Raymond, 72 Me. 213 (where the commitment was held to be insufficient, in that there was no proof that the selectmen, in making the same, had before them the evidence and certificate of at least two respectable physicians, based upon due inquiry and a personal examination of the person to whom insanity was imputed, as required by the statute); Bowdoinham *v.* Phippsburg, 63 Me. 497 (where the commitment was held sufficient); Hopkinton *v.* Waite, 6 R. I. 374 (holding, however, that the omission, in a justice's warrant for the commitment of an insane person, to state the town in which the lunatic was arrested, and that no recognizance was offered on behalf of the lunatic, cannot, where the insane person is a pauper, avail the town in which he is settled, in defense to a suit to recover the amount paid for his support at the hospital by the town in which he was arrested).

56. Tiverton *v.* Fall River, 7 R. I. 182.

57. Cummington *v.* Wareham, 9 Cush. (Mass.) 585.

to pay the county for his maintenance in a reformatory.[58] But by statute in two jurisdictions at least the town where a pauper, committed to the house of correction, has his legal settlement is made liable to the master of such house of correction for the expense of his support, allowed by the overseers of such house.[59] Under such a statute the town in which the pauper has a settlement at the time the expense of his support is incurred is liable therefor, although he gains a settlement in another town before the account of such expense is audited and certified by the overseers of the house of correction.[60] Nor is the town of a pauper's settlement relieved from liability for his support by the neglect of such overseers to perform their statutory duty of establishing rules to govern the persons committed, of providing the materials for their employment, and of keeping account thereof.[61] But the town of a pauper's settlement is not liable for his support in the house of correction, unless the account thereof be audited and certified by the overseers of such house within the time prescribed by the statute.[62] For the support of a person while confined in jail neither the town of his legal residence[63] nor the town where the jail is situated[64] is liable, independently of statute or contract. Frequently, however, the statute imposes on the town where the jail is situated the duty to support such a prisoner, when in need thereof, and gives it the right to recover therefor against the town of his legal settlement.[65] And a person confined in jail is regarded as a pauper within the meaning of a statute requiring that every town shall be liable for any expense which shall be incurred for the relief of any pauper by any inhabitant, not liable by law for his support, after notice and request made to the overseers of such town, and until provision made for him.[66] While it has been held that the invalidity of the commitment of a person to jail or workhouse is a defense to an action against the town to enforce its liability for his support while there,[67] yet the rule undoubtedly is that actual commitment to jail or workhouse, and support there, suffice to fix such liability.[68]

M. Liability For Medical Services[69] — **1. In General.** A physician who

58. Lawrence County *v.* Big Beaver Tp., 12 Pa. Co. Ct. 414.

Under the act of April 17, 1869, the liability of a township does not depend on the fact that the person sent to the reformatory was convicted of a misdemeanor or a felony, but on the fact that he was committed. Lawrence County *v.* Big Beaver Tp., 12 Pa. Co. Ct. 414.

59. See the statutes of the various states. And see Gilman *v.* Portland, 51 Me. 457; Boston *v.* Amesbury, 4 Metc. (Mass.) 278.

Unless he be committed by virtue of the fifth or sixth section of chapter 143 of the Revised Statutes, a town in which a convict, who is committed to the house of correction, has a settlement, is not, by any statute, liable to pay the expense of supporting him in such house. Boston *v.* Dedham, 8 Metc. (Mass.) 513.

A demand upon the selectmen of the town for expenses due the master of the house of correction in Boston, for the support of a pauper, must be made by the master either in person or by letter, or by some person receiving authority from the master or the city. Boston *v.* Weston, 22 Pick. (Mass.) 211; Robbins *v.* Weston, 20 Pick. (Mass.) 112.

60. Boston *v.* Amesbury, 4 Metc. (Mass.) 278.

61. Wade *v.* Salem, 7 Pick. (Mass.) 333.

62. Boston *v.* Amesbury, 4 Metc. (Mass.) 278.

63. Mace *v.* Nottingham-West, 1 N. H. 52; Houghton *v.* Danville, 10 Vt. 537.

64. Mace *v.* Nottingham-West, 1 N. H. 52.

65. Solon *v.* Perry, 54 Me. 493; Norridgewock *v.* Solon, 49 Me. 385; Amherst *v.* Hollis, 9 N. H. 107; Pawlet *v.* Rutland, Brayt. (Vt.) 175.

Unless the prison-keeper is bound to furnish him supplies, a person imprisoned in the common jail is regarded as a pauper within the meaning of the statute giving the town where the jail is situated and obligated to support him the right to recover therefor against the town of his legal settlement. Amherst *v.* Hollis, 9 N. H. 107.

66. Holmes *v.* St. Albans, Brayt. (Vt.) 179.

The provision of the Massachusetts statute in this regard is held to apply to persons detained in jail on civil process (Sayward *v.* Alfred, 5 Mass. 244); but not to persons held there on criminal process (Adams *v.* Wiscasset, 5 Mass. 328), so as to give a right of action against the town where the jail is situated for their support, after notice and request made to its officers.

67. Portland *v.* Bangor, 65 Me. 120, 20 Am. Rep. 681; Lewiston *v.* Fairfield, 47 Me. 481.

68. Taunton *v.* Westport, 12 Mass. 355; Newfane *v.* Dummerston, 34 Vt. 184.

69. **Authority of officers to employ physicians** see *supra*, II, F, 2, b.

renders medical services to the poor of a county or town is entitled to recover therefor where such services were performed under employment by officers having requisite authority to contract, or were subsequently ratified by them.[70] If the officers are without authority, however, there can be no recovery by him for services rendered.[71] And it has been held that where the physician employed to attend the poor of the county refuses to attend a sick pauper, and the township trustee declines to employ a physician, who thereafter renders medical services to the pauper, he cannot recover therefor.[72] In some jurisdictions it is held that in the absence of a request from the poor officers for the rendition of medical services to a pauper, there can be no recovery by a physician for such services, even though an emergency existed for the rendition thereof.[73] So in one jurisdiction it is held that there is no implied promise to pay for services rendered by a physician to a poor person, even though an emergency existed, if there had been no judicial ascertainment that the person treated was a pauper;[74] and in another there can be no recovery for medical services rendered in an emergency to one not judicially ascertained to be a pauper, even though such services were requested by a member of the board of supervisors.[75] On the other hand it is held in one jurisdiction that a physician who attended an indigent sick person in an emergency, without request from the poor officers, may recover therefor provided they subsequently approve the acts.[76] So in some jurisdictions it has been held that a physician who renders services to a pauper in an emergency may recover therefor, although there was no request by the poor officers for the rendition of such services,[77] or notice given them that the persons to whom the services were rendered were in need thereof.[78] And it has been held that where a statute provides that paupers shall be maintained at the county poorhouse, or at such place as the county commissioners shall agree upon, the county cannot be held liable for the care of sick and indigent persons, unless there is a contract by the county officers, or unless the services are rendered by request and under circumstances from which a contract can be inferred.[79]

2. Nature of Services Rendered. Expenses incurred for nursing and watching

Furnishing aid in general see *supra*, IV, G.

70. Dieffenbacher *v.* Mason, 117 Ill. App. 103; De Witt County *v.* Spaulding, 111 Ill. App. 364; La Salle County *v.* Hatheway, 78 Ill. App. 95; Morgan County *v.* Seaton, 122 Ind. 521, 24 N. E. 213; Orange County *v.* Hon, 87 Ind. 356; Morgan County *v.* Holman, 34 Ind. 256; Pottawatomie County *v.* Morrall, 19 Kan. 141; Farmer *v.* Salisbury, 77 Vt. 161, 59 Atl. 201.

71. Mullen *v.* Decatur County, 9 Ind. 502; Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Gawley *v.* Jones County, 60 Iowa 159, 14 N. W. 236; Mansfield *v.* Sac County, 59 Iowa 694, 13 N. W. 762; Farmer *v.* Salisbury, 77 Vt. 161, 59 Atl. 201.

72. Morgan County *v.* Seaton, 122 Ind. 521, 24 N. E. 213. See also Patrick *v.* Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613, in which it was held that where the law imposes upon a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request as to a private party to supply the needy person's wants, upon which such party can act, and hold the municipality liable as upon an implied contract. *Compare* Dieffenbacher *v.* Mason, 117 Ill. App. 103.

73. Kittredge *v.* Newbury, 14 Mass. 448; French *v.* Benton, 44 N. H. 28; Gourley *v.* Allen, 5 Cow. (N. Y.) 644.

74. Cantrell *v.* Clark County, 47 Ark. 239, 1 S. W. 200; Prewett *v.* Mississippi County, 38 Ark. 213; Lee County *v.* Lackie, 30 Ark. 764.

75. Tallahatchie County *v.* Harrison, 75 Miss. 744, 23 So. 291.

76. Summit Tp. Poor District *v.* Byers, 8 Pa. Cas. 222, 11 Atl. 242; Westmoreland *v.* Donnelly, 3 Pa. Cas. 483, 7 Atl. 204.

77. Robbins *v.* Homer, 95 Minn. 201, 205, 103 N. W. 1023, in which it was said: "It is true that the obligations to provide for the poor are statutory. These, as we have indicated, are matters of regulation; but, where there can be no regulation from the very nature of the case, it must be that necessity will supersede the exercise of statutory authority, and immediate aid for the sick person should be furnished. A deprivation of it might inure not only to injure the poor person, but to the detriment of the public, for delay in the treatment of the injured party might entail added pecuniary burdens."

78. Sheridan County *v.* Denebrink, 15 Wyo. 342, 89 Pac. 7, 9 L. R. A. N. S. 1234. See also Madison County *v.* Haskell, 63 Ill. App. 657.

79. Copple *v.* Davie County, 138 N. C. 127, 50 S. E. 574.

a sick pauper, as well as professional services of a physician, may be recovered for as medical attendance.[80] A town or county cannot, however, be bound for extraordinary services such as the conduct of a *post mortem* examination,[81] or the treatment of a pauper for habitual drunkenness.[82]

3. Contracts For Services. Contracts between a municipality and a physician for the rendition of medical services to poor persons are governed by the rules of construction applicable to other contracts for medical services, and contracts generally.[83]

N. Recovery For Supplies, Services, and Expenditures — 1. Against Individuals Liable. A town or county may maintain an action to recover the amount expended in the support or relief of a pauper against such persons as the law makes liable for the pauper's support.[84]

80. Jay County *v.* Brewington, 74 Ind. 7; Scott *v.* Winneshiek County, 52 Iowa 579, 3 N. W. 626; People *v.* Macomb County Suprs., 3 Mich. 475; Berlin *v.* Gorham, 34 N. H. 266.

Vaccination.— Under Md. Acts (1864), c. 269, county commissioners are bound to pay the physician for every child vaccinated by him, where the guardian or parents are too poor to pay, and it is immaterial whether the child was vaccinated upon the suggestion or invitation of the physician, or not. Allegany County Com'rs *v.* McClintock, 60 Md. 559.

81. Morgan County *v.* Johnson, 29 Ind. 35; Gaston *v.* Marion County, 3 Ind. 497.

82. Putney Bros. Co. *v.* Milwaukee County, 108 Wis. 554, 84 N. W. 822.

83. See Contracts, 9 Cyc. 213; Physicians and Surgeons, *post*, p. 1539. And see Johnson *v.* Santa Clara County, 28 Cal. 545; Clinton County *v.* Ramsey, 20 Ill. App. 577; Cooper *v.* Howard County, 64 Ind. 520; Wetherell *v.* Marion County, 28 Iowa 22.

The term "medical treatment" (Clinton County *v.* Ramsey, 20 Ill. App. 577) or "duties of a physician" (Wetherell *v.* Marion County, 28 Iowa 22) as used in a contract of employment between a municipality and a physician for performance of medical services by him for county paupers includes the usual cases of surgery as well as the administration of medicine.

Necessity of written contract.— Authority from a township trustee for a physician to treat a poor person need not be in writing. Warren County *v.* Osburn, 4 Ind. App. 590, 31 N. E. 541.

84. *Illinois.*— People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634, holding likewise that the failure of the complaint filed in behalf of a county against a relative of a poor person to recover for such person's support, to allege specifically that the pauper is a resident of such a county, is not ground for a motion to quash.

Massachusetts.— Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669; Brown *v.* Culnon, Quincy 66.

New Jersey.— Taylor *v.* Green, 12 N. J. L. 124, holding, however, that overseers of the poor cannot maintain an action in their name against defendant to recover moneys expended by them, as agents of the township, for the benefit of defendant, but the action should be brought in the name of the township.

Ohio.— Springfield Tp. *v.* Demott, 13 Ohio 104.

South Carolina.— Laurens Dist. *v.* Dooling, 1 Bailey 73.

South Dakota.— McCook County *v.* Kammoss, 7 S. D. 558, 64 N. W. 1123, 58 Am. St. Rep. 854, 31 L. R. A. 461.

Wisconsin.— Saxville *v.* Bartlett, 126 Wis. 655, 105 N. W. 1052, holding, however, that the statute was prospective in character, and did not entitle a town to recover against a son for past contributions made to relieve his pauper father before proceedings were brought to compel the son to contribute.

See 38 Cent. Dig. tit. "Paupers," § 211 *et seq.*

The kindred by affinity of any poor person cannot maintain a complaint against the father of such person for the expenses of his relief and support; the term "any kindred," in the statute, extending only to kindred by consanguinity. Farr *v.* Flood, 11 Cush. (Mass.) 24.

Jurisdiction.— In Pennsylvania the jurisdiction to compel the repayment of money expended in support of a pauper in an action against the pauper's relatives is in the quarter sessions. Wertz *v.* Blair County, 66 Pa. St. 18.

Amount of recovery.— A town which supports a wife neglected by her husband, standing in need of relief, may recover of the husband the amount necessary to her support as a pauper, but nothing more for supplies suitable to her condition in life. Monson *v.* Williams, 6 Gray (Mass.) 416.

Recovery from husband.— In New York, although a husband abuse his wife, and expel her from his house without due cause, yet superintendents of the poor cannot maintain an action against him for her support as a pauper, if he be of sufficient ability to support her, although he refuse to do so. Norton *v.* Rhodes, 18 Barb. (N. Y.) 100.

Recovery by state hospital.— The St. Lawrence state hospital for the insane is not entitled to indemnification for the support of an insane pauper from his relatives, under N. Y. Laws (1887), c. 375, § 7, giving it the same authority to enforce indemnification from the relatives as is possessed by town and county overseers of the poor, since the

2. Against Local Authorities Liable[85] — a. Nature and Form of Remedy. An action will not lie at common law against a town, for the support of a pauper, by any other town.[86] Nor can such action be maintained on a general statutory provision declaring it to be the duty of each town to support its own paupers, where the statute points out in what cases one town shall be liable to another, and what steps must be taken to render it liable.[87] It is necessary that an action be brought on the statute making out a case within some of its provisions.[88] Where the statute provides a particular remedy such remedy is usually held to be exclusive.[89] Where two statutory remedies are not antagonistic both may exist at the same time.[90]

b. Right of Action — (I) *By Town or County* — (A) *In General.* Pauper supplies furnished by a town or county create a cause of action against the town or county of the pauper's settlement, although actual payment for them has not been made; the liability to pay for them being sufficient.[91] A town is not the less entitled to recover the amount expended because it will inure to the benefit of a contractor who by agreement furnished the supplies.[92] Nor is the right of recovery affected by the residence of the pauper during the pendency of this action.[93]

(B) *To Recover Money Paid Under Mistake.* An action will lie by one town to recover money voluntarily paid to another town to reimburse it for the support of a pauper under the mistaken belief that it was liable for such support.[94]

authority formerly possessed by them (N. Y. Code Cr. Proc. §§ 914–926) was abrogated by N. Y. Laws (1890), c. 126, § 7, charging support of pauper insane on the state, instead of as before, on the towns and counties, and N. Y. Laws (1896), c. 545, although repealing N. Y. Laws (1890), c. 126, contain no provision restoring that authority. Matter of St. Lawrence State Insane Hospital, 13 N. Y. App. Div. 436, 43 N. Y. Suppl. 608.

85. Proceedings to compel relatives to support paupers see *supra*, IV, A, 2.

86. Middlebury *v.* Hubbardton, 1 D. Chipm. (Vt.) 205. And see Otoe County *v.* Lancaster County, (Nebr. 1907) 111 N. W. 132. But see Wethersfield *v.* Stanford, 1 Root (Conn.) 68.

87. Middlebury *v.* Hubbardton, 1 D. Chipm. (Vt.) 205.

88. Middlebury *v.* Hubbardton, 1 D. Chipm. (Vt.) 205.

In Pennsylvania, the legislature having committed the care of paupers to the quarter sessions and clothed that court with summary powers which are equal to all exigencies, common-law remedies are not favored, even if not displaced. Campbell *v.* Grooms, 101 Pa. St. 481; Nippenose Tp. *v.* Jersey Shore, 48 Pa. St. 402.

89. Woodstock *v.* Hancock, 62 Vt. 348, 19 Atl. 991, holding that under Rev. Laws, § 2818, as amended by Acts (1886), No. 42, § 4, providing that a town furnishing relief and support to a transient prisoner in indigent circumstances may recover therefor from the town in which he resides, by action "for money laid out and expended," assumpsit is the exclusive remedy; and where, under the facts alleged in compliance with the statute, a promise to pay is implied, a failure to aver it will not make the proceeding an action on the case. But see Wethersfield *v.* Stanford, 1 Root (Conn.) 68, holding that a statute providing a particular mode of redress in a summary way, where one town provides for the support of the poor of another, does not take away the common-law remedy by action.

90. Park County *v.* Jefferson County, 12 Colo. 585, 21 Pac. 912. See also Woodstock *v.* Hartland, 21 Vt. 563, holding that where a debtor is committed to jail, and receives support therein from the town in which the jail is situated, although it should be conceded that such prisoner has relatives of sufficient ability, from whom the jail might recover the amount of their expenditures for his support by petition under the statute, yet this will not preclude them from also maintaining an action for money paid, which is also given by statute, against the town in which he has his legal settlement.

91. Auburn *v.* Lewiston, 85 Me. 282, 27 Atl. 159; Fayette *v.* Livermore, 62 Me. 229; Westfield *v.* Southwick, 17 Pick. (Mass.) 68; Northwood *v.* Barrington, 9 N. H. 369; Lee *v.* Deerfield, 3 N. H. 290. But see Bangor *v.* Fairfield, 46 Me. 558, holding that, where the overseers of the town have committed an insane person belonging to another town to the hospital, a right of action to recover the expenses for maintenance therein does not accrue until the sums due to the hospital are paid.

92. Calais *v.* Marshfield, 30 Me. 511.

93. St. Johnsbury *v.* Waterford, 15 Vt. 692.

94. Bristol *v.* New Britain, 71 Conn. 201, 41 Atl. 548, in which case plaintiff sued to recover the money without complying with the statutory requirements necessary to establish the liability of one town for the support of its paupers by another town, and it was held that the action was not to recover for the support of a pauper, but to recover for money paid on a debt which did

(II) *By Individuals.* Where so provided by statute an action may be maintained against a town or county by an individual to recover the expenses incurred by him in supporting or relieving a pauper, who was legally entitled to relief, after notice and request made to the proper poor officers, and their refusal or neglect to provide for the pauper.[95] The fact that one incurring expense for the relief of a pauper is indebted to the pauper will not preclude him from recovering from the town the full amount of expense incurred.[96]

(III) *Certificate of Correctness of Charges.* In some jurisdictions the statute requires as a condition precedent to the recovery of expenses incurred for pauper supplies that all such claims and bills shall be certified to be correct by the proper officers of the poor of the town or county sought to be charged.[97] This certificate of correctness is conclusive on the county. The determination of the poor officers partakes of a judicial character, and settles the relations of the parties, in the absence of fraud.[98] The board of supervisors may, however, waive such certificate, if satisfied of the truth of all the certificate would show,[99] as well where the relief furnished is on behalf of another county, as where it is furnished to one having a settlement in that county.[1]

c. Conditions Precedent.[2] The liability of towns and counties for the support of the poor is strictly statutory, and, however equitable the claim, there can be no recovery without compliance with the statutory prerequisites.[3] In an action by one county against another to enforce a liability for relief furnished by the former to a pauper chargeable to the latter, it must be shown that such person was a pauper.[4] A town suing the town of a pauper's settlement or residence for his support need not first assert its claim against the pauper's relatives.[5] Nor need an individual exhaust the pauper's estate before presenting his demand against

not exist, and therefore could be maintained without complying with such statutory requirements.

95. Hall *v.* Clifton, 53 Me. 60; Underwood *v.* Scituate, 7 Metc. (Mass.) 214; Shreve *v.* Budd, 7 N. J. L. 431.

Persons entitled to sue.— The right to institute an action for supplies furnished to poor persons in need of relief, where the overseers of the town refused or neglected to furnish the same, is usually restricted to persons who were inhabitants of the town against which the suit was brought. See the statutes of the several states, notably Maine. But when the statute substitutes the words "any person" for the word "inhabitant," one not an inhabitant of such town is entitled to sue. Underwood *v.* Scituate, 7 Metc. (Mass.) 214. A grandfather not of sufficient ability to support his grandchild, in whole or in part, stands in the same position as other inhabitants of the town in which he resides. Hall *v.* Clifton, 53 Me. 60. If of sufficient ability to contribute partial support, he can recover only that part of the support which he cannot supply. Hall *v.* Clifton, *supra*.

96. Brown *v.* Orlend, 36 Me. 376.

97. Sloan *v.* Webster County, 61 Iowa 738, 17 N. W. 168, holding that a certificate signed properly, and stating that the trustees "ordered the above services," is not sufficient without also certifying as to the correctness of the charges. Mansfield *v.* Sac County, 60 Iowa 11, 14 N. W. 73 (holding that a certificate of township trustees to a medical bill that they "recommend the payment of the above named bill for treatment of Mrs. Jeff. Johnson and family, as a pauper," does not comply with the statute); Gilman *v.* Portland, 51 Me. 457 (holding that the certificate, "examined and allowed" by the county commissioners, is sufficient to support the account rendered by the master of a house of correction).

Affidavit.— In proceedings by one county against another to recover for relief furnished a pauper, the objection that plaintiff has not made the affidavit required by N. H. Pub. St. c. 27, § 11, forbidding county commissioners to allow a bill for the support of a pauper unless accompanied by an affidavit, can be obviated by permitting plaintiff to supply the omission. Strafford County *v.* Rockingham County, 71 N. H. 37, 51 Atl. 677.

98. Mussel *v.* Tama County, 73 Iowa 101, 34 N. W. 762.

99. Collins *v.* Lucas County, 50 Iowa 448.

1. Clay County *v.* Palo Alto County, 82 Iowa 626, 48 N. W. 1053.

2. Notice as condition precedent see *supra*, IV, C, 2, d.

3. Strafford County *v.* Rockingham County, 71 N. H. 37, 51 Atl. 677; Kennedy *v.* La Porte Tp. Poor Dist., 15 Pa. Super. Ct. 1, where plaintiff failed to prove that an order of relief had been granted by two magistrates.

4. Otoe County *v.* Lancaster County, (Nebr. 1907) 111 N. W. 132.

5. Auburn *v.* Lewiston, 85 Me. 282, 27 Atl. 159; Cordova *v.* Le Sueur Center, 74 Minn. 515, 77 N. W. 290, 430.

the town or county.[6] And it is not necessary that a claim presented to one town by another for expense incurred in the support of a pauper should be itemized.[7]

d. Defenses[8] — (I) *To Action by Town or County.* In an action by one town against another to recover for pauper supplies, a deliberate and voluntary settlement, made without misrepresentation or concealment, is conclusive between the parties.[9] The only effect of the failure of defendant town to answer within the statutory period a notice given by plaintiff town of supplies furnished a person is to estop the former to deny the place of the pauper's settlement; it is not estopped to deny that the person to whom the supplies were furnished was in need of immediate relief.[10] Nor will support of a pauper estop a town from contesting the question of its liability for his support.[11] And a poor district is not precluded from defending a suit brought by a county to recover for the support of a pauper on the ground that he did not reside in the district.[12] In an action for pauper supplies the ability of kindred to contribute to the support of a pauper,[13] or the fact that the application to the town for aid was not under the oath of two credible persons, as provided by law,[14] or the fact that a town not chargeable with a pauper's support agreed with the town by which he had been maintained to pay for his support for a specific period,[15] or the fact that plaintiff had previously given notice to another town, and claimed the same sum as that in suit,[16] or proof that since the commencement of the suit plaintiff town had claimed and received from the county pay for the same supplies,[17] or that a marriage, upon which the question of settlement turned, was invalid,[18] or the determination of the town of the pauper's residence not to support him while in another town, uncommunicated to the latter town,[19] cannot be set up as a defense.

(II) *To Action by Individuals.* In an action by an individual against a town or county to recover for supplies furnished to a pauper, the fact that such person persuaded the pauper to return to defendant town in which he had a legal settlement, for the purpose of compelling such town to support him, is no defense.[20]

e. Jurisdiction. The particular court or courts in which actions to recover for the support of paupers shall or may be brought is a matter of statutory regulation.[21]

6. Christian County *v.* Rockwell, 25 Ill. App. 20, holding that a physician who has, in an emergency, rendered services to an eleven-year-old boy, whose mother is dead, and whose father is wholly without means, will not be compelled to exhaust the boy's estate, consisting of an interest in land worth seventy-five dollars, in order to hold the county liable for such proportion of his claim as it would ultimately be liable to pay.

7. Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282; Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401.

A town furnishing support to a family need not, in order to recover from the town of their legal settlement, show precisely what was furnished to each member of the family. Old Saybrook *v.* Milford, 76 Conn. 152, 56 Atl. 496.

8. Estoppel to deny settlement see *supra*, III, A, 2.

9. Medway *v.* Milford, 21 Pick. (Mass.) 349.

10. New Bedford *v.* Hingham, 117 Mass. 445. See also Ettrick *v.* Bangor, 84 Wis. 256, 54 N. W. 401, holding that the fact that a town in which one had a legal settlement had made agreements which recognized him as a pauper and contributed to his support does not estop it from denying that he is a pauper after notice to the town in which he lived that it would discontinue such support.

11. Clinton *v.* Clinton Tp., 56 N. J. L. 240, 27 Atl. 916.

12. Harmony Tp. *v.* Forest County, 91 Pa. St. 404.

13. Auburn *v.* Lewiston, 85 Me. 282, 27 Atl. 159.

14. Cordova *v.* Le Sueur Center, 78 Minn. 36, 80 N. W. 836.

15. Peterborough *v.* Lancaster, 14 N. H. 382.

16. Braintree *v.* Hingham, 17 Mass. 432.

17. Chester *v.* Plaistow, 43 N. H. 542.

18. Goshen *v.* Richmond, 4 Allen (Mass.) 458.

19. Topsham *v.* Waterbury, 73 Vt. 185, 50 Atl. 860.

20. Stewart *v.* Sherman, 4 Conn. 553.

21. In Iowa the circuit court is given exclusive jurisdiction where the county sought to be charged gives notice denying the pauper's settlement (Cerro Gordo County *v.* Wright County, 59 Iowa 485, 13 N. W. 645); while the district court has concurrent jurisdiction with the circuit court where no such notice is given (Winneshiek County *v.* Allamakee County, 62 Iowa 558, 17 N. W. 753).

In Ohio, where township trustees furnish necessary temporary support to a pauper whose legal settlement is in a township in another county, an action to recover therefor may be brought in the court of common pleas of the county in which the support was

f. Time to Sue — Limitations and Laches. In some states special statutes of limitations have been enacted for actions for the recovery of expenses incurred in the relief of a pauper, against the town ultimately liable.[22] Special statutes usually provide that the action must be commenced within two years after the expenses were incurred, or after notice thereof has been given, and recovery is limited to expenses incurred within three months next before giving notice.[23] And the limitation must be computed from the delivery of notice, not from its date.[24] The limitation for actions for recovery of expenses incurred in supporting a pauper at the state institution for the insane is generally two years from the date of payment thereof to such institution, recovery being limited to expenses paid within three months next preceding the giving of notice.[25] If no special statute exists the general statute of limitations applies.[26] And the special statute may

furnished, provided the amount in controversy exceeds the jurisdiction of a justice of the peace (Jerome Tp. *v.* Darby Tp., 2 Ohio Dec. (Reprint) 685, 4 West. L. Month. 586), but where the directors of a poorhouse furnish temporary support to a pauper having a settlement in a township in another county, suit to recover therefor must be brought in the county where the township of settlement is situated (Perry Tp. *v.* Perry County Infirmary, 2 Ohio Dec. (Reprint) 382, 2 West. L. Month. 573).

In Pennsylvania the court of quarter sessions has exclusive jurisdiction in controversies between townships in pauper cases (Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541; Delaware Tp. *v.* Greenwood Tp., 66 Pa. St. 63; Versailles *v.* Miffin, 10 Watts 360); while jurisdiction is given to the court of common pleas in actions by individuals to recover expenses incurred for pauper supplies (Chester County *v.* Malany, 64 Pa. St. 144; Redmond *v.* West New Castle Poor Dist., 5 Pa. Dist. 731, 18 Pa. Co. Ct. 276).

22. See the statutes of the various states and cases cited in the following notes.

For an action for supplies furnished by an individual there is usually no special limitation. Warren *v.* Islesborough, 20 Me. 442; Watson *v.* Cambridge, 15 Mass. 286. See Blakeslee *v.* Chester County, 102 Pa. St. 274, holding that a physician who renders emergency services upon the credit of a person who several years thereafter becomes a pauper cannot recover from the directors of the poor.

A town furnishing relief is not required to wait until it has stopped before bringing action against the town ultimately liable. Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270. Nor is it compelled to wait until it is determined whether the pauper acquires a settlement in plaintiff town by reimbursing the cost of such relief within five years from the time it is furnished, under St. (1879) c. 242, § 2. Dedham *v.* Milton, 136 Mass. 424.

23. In Massachusetts the action must be brought within two years after the expenses were incurred and recovery can be had only for such expenses as were incurred within three months before notice thereof was given. Hallowell *v.* Harwich, 14 Mass. 186; Harwich *v.* Hallowell, 14 Mass. 184; Needham *v.* Newton, 12 Mass. 452; Readfield *v.* Dresden, 12 Mass. 317.

In Maine the action must be brought within two years after the answer to the notice is served, or if no answer be returned, before the expiration of two years after two months from the service of notice. Veazie *v.* Howland, 53 Me. 39, in which Cutler *v.* Maker, 41 Me. 594, holding that the statute runs from the delivery of notice, is overruled, and Augusta *v.* Vienna, 21 Me. 298, holding that a notice becomes inoperative two years after it is given, is explained as having been decided on other grounds. Robbinston *v.* Lisbon, 40 Me. 287; Camden *v.* Lincolnville, 16 Me. 384. In Belmont *v.* Pittston, 3 Me. 453, it is held that an action brought before the expiration of two months after notice is premature. Sanford *v.* Lebanon, 26 Me. 461, in explaining this case, states that this is the rule only where no answer is returned, and that where an answer is returned action may be brought immediately. This is the well-settled rule in Maine.

In New York the action must be commenced within three months after answer, which must be returned within thirty days after notice. Stilwell *v.* Coons, 122 N. Y. 242, 25 N. E. 316 [*affirming* 12 N. Y. St. 745].

For an answer held sufficient to set the three months statute of limitations running see Stilwell *v.* Coons, 122 N. Y. 242, 25 N. E. 316.

24. Uxbridge *v.* Seekonk, 10 Pick. (Mass.) 150.

25. West Gardiner *v.* Hartland, 62 Me. 246; Bangor *v.* Fairfield, 46 Me. 558; Eastport *v.* East Machias, 40 Me. 280; Amherst *v.* Shelburne, 11 Gray (Mass.) 107; Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Worcester *v.* Milford, 8 Pick. (Mass.) 379.

26. La Crosse *v.* Melrose, 22 Wis. 459.

In Pennsylvania there is no special statute, and the courts there hold that the town affording relief must use due diligence to ascertain the settlement of the pauper and notify the town liable. Failure to do this will constitute laches and bar recovery. Lawrence Tp. *v.* Tioga County, 2 Pa. Dist. 786, 12 Pa. Co. Ct. 305; Homer Poor Dist. *v.* Austin Poor Dist., 19 Pa. Co. Ct. 546; Jersey Shore *v.* Nippenose Tp., 18 Pa. Co. Ct.

be waived by an express promise to pay the expenses incurred, in which case the general statute will apply.[27]

g. Pleading.[28] The declaration or complaint in an action against a town or county to recover for pauper supplies or medical care should allege the settlement or residence of the pauper in defendant town or county.[29] It should likewise allege the service of notice upon defendant within the period required by the statute, usually three months.[30] It is sometimes held that the complaint should aver that the pauper was indigent and needed relief.[31] In some jurisdictions, in an action against a town or county under the Pauper Act, a declaration containing the common counts is sufficient.[32] In an action against a town or

473. And where there is negligence on the part of both towns in establishing legal settlement the expenses will be apportioned between them. Elk Tp. *v.* Overseers *v.* Jordan Tp. Overseers, 10 Pa. Co. Ct. 245.

27. Belfast *v.* Leominster, 1 Pick. (Mass.) 123.

The waiver may be by oral promise, and is sufficiently supported as to consideration by the obligation created by statute to support the pauper. Belfast *v.* Leominster, 1 Pick. (Mass.) 123.

28. Pleading generally see PLEADING.

29. *California.*— Johnson *v.* Santa Clara County, 28 Cal. 545.

Iowa.— Winneshiek County *v.* Allamakee County, 62 Iowa 558, 17 N. W. 753, holding that an allegation that plaintiff was "informed" that pauper's settlement was in defendant county was insufficient.

Massachusetts.— Bath *v.* Freeport, 5 Mass. 325; Salem *v.* Andover, 3 Mass. 436.

North Carolina.— Burke County Com'rs *v.* Buncombe County Com'rs, 101 N. C. 520, 8 S. E. 176.

Wisconsin.— Pine Valley *v.* Unity, 40 Wis. 682.

See 38 Cent. Dig. tit. "Paupers," § 225.

Settlement of husband.— The declaration in an action to recover for pauper supplies furnished to a wife need not allege that her husband's settlement was in the defendant town, it being sufficient to allege hers to be there. Fryeburg *v.* Brownfield, 68 Me. 145.

For complaints sufficiently alleging settlement see Burke County Com'rs *v.* Buncombe County Com'rs, 101 N. C. 520, 8 S. E. 176; Pine Valley *v.* Unity, 40 Wis. 682.

30. Wrentham *v.* Attleborough, 5 Mass. 430; Bath *v.* Freeport, 5 Mass. 325; Salem *v.* Andover, 3 Mass. 436. *Compare* Woodstock *v.* Hancock, 62 Vt. 348, 19 Atl. 991, holding that the fact of giving notice required by the statute to the overseers of defendant, describing the condition of the prisoner, being a matter of evidence only, need not be averred in the complaint, in an action under Rev. Laws (1818), as amended by Acts (1886), No. 42, § 4, providing for the recovery of expenses incurred in the relief of a transient indigent prisoner.

For complaints sufficiently alleging notice see Fryeburg *v.* Brownfield, 68 Me. 145; Howe *v.* Royalton, 32 Vt. 415; Pine Valley *v.* Unity, 40 Wis. 682.

Demand.— Where the declaration avers notice to defendant town of the proceedings by which it is sought to be made liable, there is no need of an averment of demand before suit brought. Hillsborough County *v.* Londonderry, 43 N. H. 451.

31. Johnson *v.* Santa Clara County, 28 Cal. 545; Thomas *v.* Edmonson County, 8 Ky. L. Rep. 265; Fryeburg *v.* Brownfield, 68 Me. 145.

For complaints sufficiently alleging that relief was needed see Autauga County *v.* Davis, 32 Ala. 703; Pine Valley *v.* Unity, 40 Wis. 682.

That the complaint should allege all facts necessary to constitute a cause of action under the statute see Wrentham *v.* Attleborough, 5 Mass. 430.

32. Clinton County *v.* Pace, 59 Ill. App. 576; Gilman *v.* Portland, 51 Me. 457, holding that in an action by the master of a house of correction to recover the expenses incurred for the support of a pauper therein, a declaration upon an account annexed to the writ is sufficient, and there need be no special count under the statute.

For complaints held to be sufficient see Autauga County *v.* Davis, 32 Ala. 703; Bremer County *v.* Buchanan County, 61 Iowa 624, 16 N. W. 720; Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541; Ogden City *v.* Weber County, 26 Utah 129, 72 Pac. 433; Howe *v.* Royalton, 32 Vt. 415; Pine Valley *v.* Unity, 40 Wis. 682.

That the prayer is for a mandamus instead of an order is immaterial in a petition under Act (1836), § 23, to compel payment by the poor district of money expended on one of its paupers. Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541.

Complaint need not allege statute.—A complaint is not demurrable because not alleging any statute making defendant liable for the maintenance of its paupers, it being only necessary to allege facts, and not public laws. Burke County Com'rs *v.* Buncombe County Com'rs, 101 N. C. 520, 8 S. E. 176.

A declaration which fails to aver that there are no relatives of the pauper able to support him is bad on special demurrer, but not in arrest of judgment. Walpole *v.* Marlow, 2 N. H. 385.

Allegation that the order of relief and notice to depart were actually made at a meeting of the trustees is sufficient to show that relief was properly and legally furnished, although it does not appear that the order and notice were recorded. Bremer County *v.*

county for supplies furnished to a pauper, a plea in bar alleging the ability of such person to maintain himself is not good on a special demurrer assigning for cause that it amounted to the general issue.[33] The omission from a declaration of an allegation of notice can be taken advantage of only by demurrer.[34] The allegations and the proof must correspond, and a material variance will be fatal to the action,[35] but an immaterial variance will be disregarded.[36] When the establishment of the whole allegation is essential to the right of recovery, such allegation should be proved *in toto*.[37]

h. Evidence — (I) *Presumptions and Burden of Proof.* In an action against a town or county for the recovery of expenses incurred for the support or relief of a pauper, the burden of proof, as in other civil actions,[38] is upon the party having the affirmative of the issue, as determined by the pleadings.[39] In such actions the legal presumption will as a rule be that the officers of the poor have done their duty.[40]

(II) *Admissibility.* The admission of evidence in actions to recover pauper supplies is governed by the same rules that apply in civil actions generally.[41]

Buchanan County, 61 Iowa 624, 16 N. W. 720.

33. Freeport *v.* Edgecumbe, 1 Mass. 459. And see Warren County *v.* Saunders, 16 Ind. 405, where, in a suit for medical services rendered to a temporary pauper at the request of a township trustee, an answer that the board had a rule, known to plaintiff, that they would pay for only one visit to a pauper, if he were in condition to be removed to the county asylum, and that the pauper in question was in such condition, and that plaintiff was the physician of the asylum, was held to be good. Morristown *v.* Fairfield, 46 Vt. 33, holding that an allegation in the plea in an action for support of a pauper that the pauper was unduly removed, and that defendant town was not chargeable with his support, did not present the question whether the pauper being a minor and residing with his mother was subject to removal without her.

34. Com. *v.* Dracut, 8 Gray (Mass.) 455.

35. Dalton *v.* Bethlehem, 20 N. H. 505 (where the notice required to be given of sums expended for the maintenance of the paupers stated that supplies were furnished to "James," and the declaration was for the maintenance of "Jane," and it was held that there was a fatal variance); Howe *v.* Royalton, 32 Vt. 415 (holding that a declaration in assumpsit, counting upon the neglect of a town to provide for the support of a transient poor person, brought by the person supporting him against the town in which he is found, in accordance with Comp. St. p. 133, c. 18, § 16, is not supported by proof that the town, on being requested to provide for said person's support, promised to do so and failed to keep the promise).

36. Berlin *v.* Gorham, 34 N. H. 266, where a notice of supplies was signed by the selectmen as such without adding "overseers of the poor," no overseers having been chosen, and the declaration alleged notice signed by the selectmen and overseers there was no variance. Colebrook *v.* Stewartstown, 28 N. H. 75. In this case the allegation was for support of the family of A, the writ naming his wife and four children, and the evidence showing five children, and it was held there was no variance.

37. Barnstead *v.* Alton, 32 N. H. 245, where, in a suit for the support of a pauper, plaintiff relied on the settlement of a wife, and alleged that her husband had no settlement in the state at their intermarriage, and did not afterward acquire any, and it was held that they were bound to prove the truth of this negative allegation, as well the want of any settlement at marriage as the subsequent non-acquisition of one. See Vermilion County *v.* Knight, 2 Ill. 97, holding that in an action by a physician against a county for medical attendance on a person who was a pauper, at the request of the county commissioners, it need not be proved, to support the action, that the person was in fact a pauper, this fact not being essential to the right of recovery.

38. See Evidence, 16 Cyc. 96.

39. Warren County *v.* Osburn, 4 Ind. App. 590, 31 N. E. 541; New Bedford *v.* Hingham, 117 Mass. 445.

40. State Hospital *v.* Bellefonte Borough, 163 Pa. St. 175, 29 Atl. 901, holding that in an action by the state hospital for the insane against overseers of the poor of the borough, to recover the expenses of maintaining therein insane paupers received from defendants, plaintiff is not bound to prove that, as between defendants and the poor district, they had such paupers in charge by means of an order of relief or a subsequent order of approval, but such fact would be conclusively presumed. And see Evidence, 16 Cyc. 1076.

That such presumption may not be indulged in, as to a vital jurisdictional fact, in favor of the officer or the principal he represents see Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212 [*reversing* 49 Hun 356, 2 N. Y. Suppl. 127].

41. *Connecticut.*— Litchfield *v.* Farmington, 7 Conn. 100, where plaintiff town, in an action for the support of a pauper, offered a witness to testify that on a certain day he deposited a letter in the post-office,

(III) *Weight and Sufficiency.* The rules governing the weight and sufficiency of evidence in civil actions generally apply in actions in which it is sought to recover for supplies or relief furnished a pauper; [42] and, as in other

directed to the selectmen of the town, informing them of the situation of the pauper, and it was held that defendant might introduce its selectmen to prove that no such letter was received by them during that year.

Indiana.— Orange County *v.* Ritter, 90 Ind. 362, holding that it is not error to admit in evidence a conversation between one of the claimants for medical services and the members of the county board, while in session on the presentation of such claim, where its tendency was to show that the county at the time recognized its liability to claimants for their services to paupers, nor is it error to exclude evidence to show that during the time claimants' services were rendered the county had contracted with another physician for regular medical care of the poor.

Maine.— Lisbon *v.* Winthrop, 93 Me. 541, 45 Atl. 528 (holding that where, in an action for pauper supplies furnished a pauper and his family, an amendment is filed to the writ, adding a new count for the same supplies furnished the pauper alone, it is not error to admit evidence of the whole amount of supplies furnished the family); New Portland *v.* Kingfield, 55 Me. 172 (holding that testimony as to the manner of the alleged pauper showing his distress and need of relief, and as to his physical condition, was admissible in an action by one town against another for supplies furnished, also parol evidence that certain named persons were overseers of the poor when the relief was furnished); Cornville *v.* Brighton, 39 Me. 333 (holding that upon an issue as to a question of settlement the pauper's declarations are admissible as to his purpose in taking a journey to the town of his former settlement).

Minnesota.—Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282, holding that where a general law recognizes and amends special laws relating to counties having the town system of caring for its poor, such special laws are admissible in evidence to show that a certain county was under the town system of caring for its poor.

New Hampshire.— Hempstead *v.* Plaistow, 49 N. H. 84, holding that the acts of a town, after service on another town of a notice of supplies furnished to a pauper, which purports to be signed by its officers, may be shown on the issue whether it ratified the notice.

Vermont.— Tufts *v.* Chester, 62 Vt. 353, 19 Atl. 988 (where a verdict for plaintiff was held to be supported by evidence, and that the testimony objected to was competent); Pawlet *v.* Sandgate, 19 Vt. 621 (holding that under Rev. St. c. 16, § 6, which provides that the town procuring the order for the removal of a sick pauper must support him until he can be removed, parol testimony is admissible to prove that the pauper was sick at the time the order of removal was made, and continued so, so that he could not be removed without endangering his life, until the time of actual removal).

See 38 Cent. Dig. tit. "Paupers," § 229.

For cases where evidence was held to be inadmissible see South Scituate *v.* Stoughton, 145 Mass. 535, 14 N. E. 744 (an action for a pauper's support in which evidence that the overseers of defendant town had upon notice from another town removed and supported the pauper and paid the other town its expenses incurred was declared incompetent); Topsham *v.* Harpswell, 1 Mass. 518; Freeport *v.* Edgecumbe, 1 Mass. 459 (in these cases it was held that where a request to remove the pauper had not been objected to within two months, evidence by defendant of the pauper's ability to support himself was inadmissible in an action to recover for his expense of support and burial, as was also evidence contesting the settlement of the pauper); Eckman *v.* Brady Tp., 81 Mich. 70, 45 N. W. 502 (holding that, although certain evidence was admissible, it was not reversible error to exclude it); Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282 (holding that in an action against a village corporation to enforce its liability for refusal to care for its poor under the town system, evidence of general reputation as to the pauper's place of residence is inadmissible; it was competent, however, for the pauper to testify directly as to the place he intended as his home or residence); South Burlington *v.* Worcester, 67 Vt. 411, 31 Atl. 891; Tufts *v.* Chester, 62 Vt. 353, 19 Atl. 988.

Res gestæ.— In an action for the value of supplies furnished a pauper, his declarations explaining any acts of his tending to establish the issue, made at the time of the performance of the acts, are admissible in evidence as part of the *res gestæ*. Cornville *v.* Brighton, 39 Me. 333.

42. *Illinois.*— Macon County *v.* Newell, 81 Ill. 387, holding that in a suit against a county for goods delivered to different parties upon the order of a supervisor, the verdict disallowing a large portion of the claim would not be disturbed, where there was evidence that in some instances they were properly furnished to the parties on order, under the law in regard to paupers, and in others there was no evidence whether the parties supplied were or were not paupers.

Pennsylvania.— Salsbury *v.* Philadelphia, 44 Pa. St. 303, where no express contract to board minor pauper grandchildren was proved, nor any evidence thereof, except a book, in which plaintiff had made charges against the city and credited the amounts received from the guardians of the poor, it was held that the instruction of the court on the trial that there was no evidence upon which he could recover was proper.

ordinary civil actions, a fact is sufficiently proved by a preponderance of evidence.[43]

i. Amount of Recovery. In an action by one town or county against another for pauper supplies, they may recover for all such charges and expenses as they have paid and such as they are legally bound to pay at the time of the commencement of the suit, unless barred by the statute of limitations;[44] but they cannot recover an exorbitant sum paid for the support of paupers, although incurred in good faith, where no opportunity was given to the town of settlement to save such expenses by removing the pauper, or otherwise providing for his support.[45] However, if the notice required to be given for sums expended for the maintenance of paupers be of a larger sum than that declared for, no more than the sum declared for can be recovered.[46] Where no amount has been fixed or agreed upon as compensation for services or supplies furnished by an individual to a pauper, such person is entitled to recover a reasonable compensation therefor from the town or county chargeable.[47] The amount of recovery may include costs and counsel fees.[48] In the case of a pauper wrongfully brought into the state, county, or town, a statutory penalty may sometimes be recovered.[49]

j. Trial — Questions of Law and Fact. In actions for the recovery of expenses incurred in the support, relief, or medical care of a pauper the rules governing the trial of civil actions generally apply,[50] including the rules governing ques-

Vermont.— Vershire *v.* Hyde Park, 64 Vt. 638, 25 Atl. 431.

Wisconsin.— Jones *v.* Lind, 79 Wis. 64, 48 N. W. 247.

Wyoming.— Sweetwater County *v.* Carbon County, 6 Wyo. 254, 44 Pac. 66.

See 38 Cent. Dig. tit. "Pauper," § 230.

43. Tipton *v.* Brown, 4 Ind. App. 288, 30 N. E. 925; Linneus *v.* Sidney, 70 Me. 114; Shreve *v.* Budd, 7 N. J. L. 431, where it was shown that a pauper left the poorhouse and entered the residence of an inhabitant of the same township, there becoming sick and in such condition that he could not be conveniently moved, and notice was given to the overseer of the poor, who neglected to provide for the pauper, and it was held that the evidence was sufficient to support an action for the expense of maintaining the pauper.

Verdict set aside.— Where, in a suit to recover for supplies furnished to persons alleged to be paupers, it was shown that the persons relieved were in need of immediate relief, and that the supplies were necessary, although rendered necessary by the misconduct of the husband and father, a verdict for defendants will be set aside and a new trial granted. Bangor *v.* Hampden, 41 Me. 484.

44. Jay *v.* Carthage, 48 Me. 353; Northampton *v.* Plainfield, 164 Mass. 506, 41 N. E. 785 [*overruling* Taunton *v.* Wareham, 153 Mass. 192, 26 N. E. 451], holding that a town which has paid for the support of a lunatic pauper in a state hospital may recover from his place of settlement the entire sum expended by it from the time of commitment to the date of the writ, and is not limited to the expenses incurred within three months next before notice to defendant town. Cummington *v.* Wareham, 9 Cush. (Mass.) 585; Ashland County Com'rs *v.* Richland County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49; Pawlett *v.* Sandgate, 19 Vt. 621. And see *supra*, IV, N, 2, f, this title, and cases there cited.

45. Southbridge *v.* Charlton, 15 Mass. 248.

Services of overseers of poor.— On removal of a pauper cared for by one poor district to another district, in which he has his legal settlement, the latter district cannot be charged with the services of the officers of the former district in caring for the pauper, and in looking up his legal settlement, and ordering his removal, which are a part of their official duties, nor with counsel fees. Montrose *v.* Blakeley, 3 Lack. Leg. N. (Pa.) 154.

46. Dalton *v.* Bethlehem, 20 N. H. 505.

47. Dieffenbacher *v.* Mason County, 117 Ill. App. 103 (holding that the rule of a county board which fixes a fee of one dollar per visit for medical aid furnished to persons coming within section 24 of the Pauper Act (Rev. St. (1903) p. 1369), is unreasonable, where it is made to apply to all cases, regardless of the nature of the ailments to be treated and the character of the services to be rendered); Hunter *v.* Jasper County, 40 Iowa 568. And see Hall *v.* Clifton, 53 Me. 60, in which it was held that under Rev. St. c. 24, § 32, requiring towns to pay expenses necessarily incurred for the relief of paupers by an inhabitant who is not liable for their support after notice and request to the overseers, and section 9, including the grandfather with the persons chargeable in proportion to their ability for the support of relatives, a grandfather, if of sufficient ability to contribute partial support, can recover only that part of the support which he cannot supply.

48. See *supra*, III, O, 2, this title and cases there cited.

49. See *supra*, III, P, 3, a, this title and cases there cited.

50. Landaff *v.* Atkinson, 8 N. H. 532. See, generally, TRIAL.

tions of fact,[51] the giving and refusing requested instructions,[52] and the verdict and findings of the jury,[53] and questions of law.[54]

k. Appeal.[55] The principles of law governing the appeal of civil cases generally apply in actions to recover for pauper supplies.[56]

PAVAJA. In the law of India, a word meaning the son born of the elder wife.[1]

PAVE. In its generic sense, to place some substance on the street so as to form

51. *Connecticut.*— Newtown *v.* Danbury, 3 Conn. 553, holding that the reasonableness of the notice and demand previous to commencement of the action are questions for the jury.

Illinois.— Fox *v.* Kendall, 97 Ill. 72, holding that the question as to whether notice was given within a reasonable time was for the jury.

Maine.— Carter *v.* Augusta, 84 Me. 418, 24 Atl. 892 (holding that whether plaintiff voluntarily undertook the support of a child, on offer of defendant to remove it from her custody, was a question for the jury); Veazie *v.* Chester, 53 Me. 28 (holding that the question whether supplies were furnished and received as pauper relief was one of mixed law and fact, and that, upon request, it was the duty of the court to instruct the jury what would or would not constitute furnishing and receiving supplies within the statute); Corinth *v.* Lincoln, 34 Me. 310 (holding that it is for the jury to determine whether pauper supplies furnished on application were actually received by the applicant).

Massachusetts.— Williams *v.* Braintree, 6 Cush. 399.

New Hampshire.— Burbank *v.* Piermont, 44 N. H. 43; Moultonborough *v.* Tuftonborough, 43 N. H. 316.

Wisconsin.— Beach *v.* Neenah, 90 Wis. 623, 64 N. W. 319 (holding that where there was evidence that the chairman of the supervisors knew that the physician was attending a pauper family, the question of an agreement to pay for such services was for the jury); Holland *v.* Belgium, 66 Wis. 557, 29 N. W. 558.

See 38 Cent. Dig. tit. "Paupers," § 233.

52. Mitchell *v.* Fond du Lac, 61 Ill. 174 (where the instruction was held to be erroneous, as submitting questions of law to the jury); Veazie *v.* Chester, 53 Me. 29 (holding that the court, on request, should charge what would constitute furnishing supplies, within the meaning of the statute); Bangor *v.* Hampden, 41 Me. 484 (where the instructions were held to be correct).

53. Old Saybrook *v.* Milford, 76 Conn. 152, 56 Atl. 496 (where the findings were held not to be sustained by the record); Newtown *v.* Danbury, 3 Conn. 553; Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817 (holding that the fact that the pauper had fifty dollars in the bank did not render erroneous, as a matter of law, a finding that the pauper fell into distress and was in need of immediate relief when aid was furnished him, within Pub. St. c. 84, § 14, providing that the overseers of the poor of a place shall provide immediate relief to persons found there having a settlement in other places, where they fall into distress and stand in need of immediate relief).

54. Dieffenbacher *v.* Mason County, 117 Ill. App. 103, holding that the question as to whether the rules and regulations adopted by the county board, with respect to medical aid furnished to persons coming within section 24 of the Illinois Pauper Act, are reasonable, is to be determined by the court as a question of law.

55. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

56. Fairfield *v.* Newton, 75 Conn. 515, 54 Atl. 301 (holding that, although in an action against a town for the support of a pauper, the claim that defendant was liable for support furnished before plaintiff's neglect to give notice to defendant of such pauper's condition was not expressly made by plaintiff, as such question was necessarily decided in sustaining defendant's claim, which was that there was no liability whatever, it would be considered on appeal); Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415 (holding that where, in an action against a town, the trial court found that a person needed medical aid, and was unable to pay for it, and had no property, the finding of such facts must be accepted as conclusive by an appellate court upon the question as to whether such person was a pauper); South Scituate *v.* Scituate, 155 Mass. 428, 29 N. E. 639; Landaff *v.* Atkinson, 8 N. H. 532 (holding that in assumpsit for the support of paupers, in which the settlement of the pauper was claimed by descent, where the descent was admitted, and no exception was taken as to the legitimacy of the children on trial, the exception could not afterward be taken); Hayes *v.* Symonds, 9 Barb. (N. Y.) 260 (where the question was held to be one of fact for the jury, whose finding would not be disturbed on appeal); Luzerne County Poor Dist. *v.* Jenkins Tp., 22 Pa. Super. Ct. 274 (holding that the Pennsylvania act of March 16, 1868 (Pamphl. Laws 46), providing for writs of error to the judgment of the courts of quarter sessions on appeals from orders of removal of paupers, does not apply to the decree of a court of quarter sessions for the payment of money expended in the maintenance and support of paupers removed).

For review of proceedings for removal see *supra*, III, N.

1. Jagdish Bahadur *v.* Sheo Partab Singh, L. R. 28 Indian App. 100, 102.

an artificial roadway or wearing surface, which shall change the natural condition of the street;[2] to cover streets with stone or brick so as to make a convenient surface for travel;[3] to floor, with brick, stone or other material;[4] to lay or cover with stones or brick, or other suitable material, so as to make a level or convenient surface for horses, carriages, or foot passengers;[5] to lay streets with pavement;[6] to prepare a passage.[7] Sometimes used to apply to and include the formation of the roadway or footway of any street;[8] the laying of a sidewalk;[9] or as synonymous with to BUILD,[10] *q. v.* (See PAVEMENT.)

PAVEMENT. Any substance which is spread upon the street so as to form a compact, hard or level surface or floor.[11] The term is sometimes used as

2. Ross *v.* Gates, 183 Mo. 338, 350, 81 S. W. 1107, where it is said: "The word is much more comprehensive than the term macadamize, but it embraces all that the term macadamize covers." In this case it was further said that "the ordinance provided that the property-owners might select the material to be used from asphalt, vitrified brick or macadam. It is claimed that the ordinance is void because the board of public works did not designate two kinds of macadam, for the property-owners to select from. It is likewise true that the board did not specify two kinds of asphalt or two kinds of brick. The ordinance did specify the kind of asphalt, the kind of brick and the kind of macadam, which should be used, and gave the property-owners the right to make a selection therefrom. Asphalt, brick and macadam are all materials used for making streets. There are many kinds or manufactures of each kind of material. The requirements of the city charter are fully met when the board designates at least two kinds of material, each material to be of a kind, quality or make determined upon by the board. The charter never contemplated that the ordinance should give the property-owner a selection between two or more kinds, qualities or makes of each material specified."

"Macadamize" distinguished see United R., etc., Co. *v.* Hayes, 92 Md. 490, 494, 48 Atl. 364. See also Leake *v.* Philadelphia, etc., Paving Co., 10 Pa. Co. Ct. 263, 267 [*affirmed* in 150 Pa. St. 643, 650, 24 Atl. 351], where it was said: "I do not regard a macadam road as paved, in the meaning of the term as it has been employed in the statutes and ordinances applicable to this city. Such a road is artificial, improved, it may be, but not paved in the technical or natural sense of the word." Macadamize is a word of fixed and definite meaning and refers, not only to the kind of material to be used in covering a street or road, but also to the manner in which it is to be laid. Partridge *v.* Lucas, 99 Cal. 519, 520, 33 Pac. 1082. It has been held that the power to macadamize a street includes the power to pave it. S. *v.* Ramsey Co. Dist. Ct., 33 Minn. 164, 170, 22 N. W. 295. So also where a street is ordered to be macadamized, it is meant that the roadway is to be improved. That is the usual acceptation of the term "macadamize," when applied to street work. Himmelmann *v.* Satterlee, 50 Cal. 68, 70. See also 25 Cyc. 1660 note 52.

3. Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 180, 24 Atl. 1070, 20 L. R. A. 834.

4. Webster Int. Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831; Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 180, 24 Atl. 1070, 20 L. R. A. 834].

5. Warren *v.* Henly, 31 Iowa 31, 36; *In re* Phillips, 60 N. Y. 16, 22; Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 185, 21 N. Y. Suppl. 147; Webster Dict. [*quoted* in Buell *v.* Ball, 20 Iowa 282, 290, 291 (where it is said: "Could it be reasonably contended that the authority to require the owner to pave the street in front of his lot, only gave the power to require him to lay down the paving stones after the surface was prepared and made ready for them? If he may be required to prepare the surface to receive the paving stones, may he not also be required to remove an obstacle, such as a root, a stump, or a tree? And if so, may he not be required to do any excavation or filling necessary to prepare the surface? We think the word 'pave' is used in that connection as a comprehensive ultimate term, and that it includes all things necessary 'to make a level and convenient surface for horses, carriages and foot passengers,' of any convenient, common or practical material"); Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 180, 24 Atl. 1070, 20 L. R. A. 834]; Webster Int. Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].

6. Ten Eyck *v.* Protestant Episcopal Church, 65 Hun (N. Y.) 194, 195, 20 N. Y. Suppl. 157.

7. Webster Dict. [*quoted* in Buell *v.* Ball, 20 Iowa 282, 290, 291].

8. Hampstead Vestry *v.* Hoopel, 15 Q. B. D. 652, 658, 49 J. P. 471, 54 L. J. M. C. 147, 33 Wkly. Rep. 903.

9. See *In re* Burke, 62 N. Y. 224, 229.

10. Webster Int. Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].

Paving the gutters with cobble stone and the cartway with broken stone (macadamizing), is a paving within the meaning of the Act of the Legislature conferring upon a city the power of paving its streets, and collecting the cost from the owners of the adjoining property by filing claims for paving, as liens. Huidekoper *v.* Meadville, 83 Pa. St. 156, 158.

11. Lilienthal *v.* Yonkers, 6 N. Y. App. Div. 138, 139, 39 N. Y. Suppl. 1037, where it is said: "The meaning of the word cannot be limited by the particular material used on the street, nor has it reference solely

synonymous with sidewalk.[12] (Pavement: Construction by City, see MUNICIPAL CORPORATIONS. Liability For Defects and Obstructions in, see MUNCIPAL CORPORATIONS. See also PAVE.)

PAVING TILE. A tile for paving.[13] (See PAVE.)

PAWN. See PAWNBROKERS.

to the manner in which the material is spread upon the street." See also *In re* Phillips, 60 N. Y. 16, 22, where it was held that the difference in the material could not change the character or general identity of the work as embraced in the generic term, which includes any process for covering a street or walk or public place with stone or brick or concrete, so as to give a level surface, convenient for use in the manner and for the purpose for which it was intended: and in another case it has been said not to be limited to uniformly arranged masses of solid material, as blocks of wood, brick or stone, but it may be as well formed of pebbles, or gravel, or other hard substance, which will make a compact, even, hard way or floor. Burnham *v.* Chicago, 24 Ill. 496, 499.

12. Little Rock *v.* Fitzgerald, 59 Ark. 494, 499, 28 S. W. 32, 28 L. R. A. 496.

May include "curb," "grade," "gutter" (McNair *v.* Ostrander, 1 Wash. 110, 115, 23 Pac. 414), and flagging, whether on a street or sidewalk (*In re* Burmeister, 76 N. Y. 174, 181, 56 How. Pr. 416). But in Redersheimer *v.* Bruning, 113 La. 343, 346, 36 So. 990, it is said that it does not include "filling, curbing, and draining."

"Pavement" is a more comprehensive word than "flagging."—It includes flagging, as well as other modes of making a smooth surface for streets, including sidewalks. *In re* Burmeister, 76 N. Y. 174, 181, 56 How. Pr. 416; Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 185, 21 N. Y. Suppl. 147.

Distinguished from "banquette" see Redersheimer *v.* Bruning, 113 La. 343, 346, 36 So. 990.

13. Rossman *v.* Hedden, 37 Fed. 99, 102, construing the Tariff Act of 1883.

PAWNBROKERS

By Ernest G. Chilton *

I. **Definitions**, 1164
- A. *Pawn*, 1164
- B. *Pawnbroker*, 1164

II. **Regulation and Control**, 1165
- A. *By State*, 1165
  - 1. *In General*, 1165
  - 2. *Requiring License*, 1165
- B. *By Municipality*, 1165
  - 1. *In General*, 1165
  - 2. *Requiring License*, 1165
  - 3. *Absolute Prohibition of Business*, 1165
  - 4. *Manner of Conducting Business*, 1165

III. **Rights and Liabilities**, 1166
- A. *Rights of Pawnee*, 1166
  - 1. *Rate of Interest*, 1166
  - 2. *Retention of Pledge or Pawn*, 1166
    - a. *As Against Pawner*, 1166
    - b. *As Against Pawner's Assignee in Bankruptcy*, 1166
    - c. *As Against True Owner*, 1166
    - d. *As Against Landlord Distraining For Rent*, 1167
    - e. *As Against Judgment Creditor*, 1167
      - (I) *Of Pawner*, 1167
      - (II) *Of Pawnee*, 1167
  - 3. *Use of Pledge or Pawn*, 1167
  - 4. *Sale of Pledge or Pawn*, 1167
    - a. *In General*, 1167
    - b. *When Right Accrues*, 1167
    - c. *Manner of*, 1167
      - (I) *In General*, 1167
      - (II) *Special Agreement Controlling*, 1167
    - d. *Surplus Arising on Sale*, 1167
  - 5. *After Loss of Pledge or Pawn*, 1168
  - 6. *Assignment of Debt Secured by Pawn*, 1168
- B. *Rights of Pawner*, 1168
  - 1. *Redemption of Pledge or Pawn*, 1168
    - a. *Who May Redeem*, 1168
    - b. *Period For*, 1168
    - c. *Tender of Money Lent*, 1168
      - (I) *Amount*, 1168
      - (II) *When Not Necessary*, 1168
    - d. *Effect of Death of Pawnee*, 1168
  - 2. *Sale of Interest in Pledge or Pawn*, 1169
- C. *Liabilities of Pawnee*, 1169
  - 1. *To Pawnee For Loss of Pawn*, 1169
    - a. *In General*, 1169
    - b. *After Timely Tender of Money Lent*, 1169
    - c. *While Using Pledge*, 1169

* Author of "Livery-Stable Keepers," 25 Cyc. 1504; "Marshaling Assets and Securities," 26 Cyc. 927; "Parliamentary Law," 29 Cyc. 1686; and joint author of "Licenses," 25 Cyc. 593.

2. *To Third Party For Defect in Title to Forfeited Pawn*, 1169
D. *Liability of Pawner For Deficiency After Sale*, 1169
IV. ACTIONS, 1169
A. *By Pawner Against Pawnee*, 1169
B. *By Pawnee Against Third Person*, 1170
V. PENALTIES FOR VIOLATION OF REGULATIONS, 1170
A. *Who Liable*, 1170
B. *When Liable*, 1170
C. *At Whose Instance*, 1170
VI. CRIMINAL PROSECUTIONS, 1170
A. *Against Pawnee*, 1170
B. *Against Pawner*, 1171

CROSS-REFERENCES

For Matters Relating to:
Bailment, see BAILMENTS.
Collateral Security, see PLEDGES.
Pledge, see PLEDGES.

I. DEFINITIONS.

A. Pawn. The word "pawn" or "pledge" is used both as a noun and as a verb. As a verb it means to deliver personal property to another as security for the return on a day certain of money lent.[1] In its substantive sense it may be defined to be a deposit with another of personal property as security for some debt or engagement, with an implied power of sale on default.[2]

B. Pawnbroker. A pawnbroker is a person who makes it his business or occupation to loan money at interest, the repayment of the loan and the payment of the interest being secured by a pledge or pawn of personal property.[3]

1. English L. Dict.

Another definition is: "To deliver plate or jewels as a pledge or security for the repayment of money lent thereon at a day certain." Anderson L. Dict.

2. Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 164, 24 S. E. 548, 32 L. R. A. 408.

Other definitions are: "A bailment or delivery of goods by a debtor to his creditor, to be kept till the debt is discharged." Barrett *v.* Cole, 49 N. C. 40, 41; Donald *v.* Suckling, L. R. 1 Q. B. 585, 594, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13.

"A bailment of personal property, as security for some debt or engagement." Johnson *v.* Smith, 11 Humphr. (Tenn.) 396, 398; Russell *v.* Fillmore, 15 Vt. 130, 136.

"A deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation, or in the course of trade to be a lien on them." Surber *v.* McClintic, 10 W. Va. 236, 243.

A pawn is a mere collateral security for the payment of the debt. Johnson *v.* Smith, 11 Humphr. (Tenn.) 396, 398.

It is a species of bailment which arises "when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor." Coggs *v.* Bernard, 2 Ld. Raym. 909, 913. See also BAILMENTS, 5 Cyc. 157. It is the *pignari acceptum* of the civil law, according to which the possession of the pledge passes to the creditor, therein differing from a hypotheca, where it did not. Barrett *v.* Cole, 49 N. C. 40.

Delivery of the property is the very essence of that species of bailment known as a pawn or pledge (Commercial Bank *v.* Flowers, 116 Ga. 219, 42 S. E. 474; Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400; Johnson *v.* Smith, 11 Humphr. (Tenn.) 396; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210), and this cannot be dispensed with by a written agreement that the party making the pledge will be the bailee of the pawnee (Macon First Nat. Bank *v.* Nelson, *supra*); but by agreement of the parties the pledge may be deposited in the hands of a third person, instead of being delivered to the pawnee (Johnson *v.* Smith, *supra*).

3. Hunt *v.* Philadelphia, 35 Pa. St. 277, 278.

Other definitions are: "Any person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money lent thereon." Anderson L. Dict.

"One whose business it is to lend money, usually in small sums, upon pawn or pledge." Bouvier L. Dict.; Cyclopedic L. Dict.

Statutory definition is one "who receives

II. REGULATION AND CONTROL.

A. By State — 1. In General. The state undoubtedly has the power to regulate and control the business or avocation of pawnbroking.[4]

2. Requiring License. The state may exercise its power to regulate and control by requiring a license as a condition precedent to the right to pursue the business or occupation of pawnbroking.[5]

B. By Municipality — 1. In General. A municipality, when empowered by statute, may regulate and control the business of pawnbroking within the municipal limits.[6]

2. Requiring License. Under its power to control pawnbroking, a municipality may require that one desiring to pursue that occupation or business shall obtain a license therefor.[7]

3. Absolute Prohibition of Business. Under a power to license, tax, regulate, suppress, and prohibit pawnbrokers, it is discretionary with a municipality to absolutely prohibit the business of pawnbroking.[8]

4. Manner of Conducting Business. A municipality which under its power to regulate and control has granted a license to carry on the business of pawnbroking may impose any reasonable regulation for the conduct of the business necessary to the peace and good order of the municipality.[9]

or takes by way of pawn, pledge, or exchange, any goods for the repayment of money lent thereon." Reg. *v.* Adams, 8 Ont. Pr. 462, 464 [*quoting* Can. Consol. St. c. 61]. See also St. Paul *v.* Lytle, 69 Minn. 1, 2, 71 N. W. 703.

An occasional loan.— Under a statute defining a pawnbroker as "every person or company engaged in the business of," etc., it has been held that an occasional loan is not sufficient to constitute the lender a pawnbroker, but that he must so engage in the occupation as to make it his regular business. Chicago *v.* Hulbert, 118 Ill. 632, 636, 8 N. E. 812, 59 Am. Rep. 400.

Distinguished from "auctioneer" see 4 Cyc. 1039 note 2.

Distinguished from "broker."— A broker is a middleman or negotiator between other persons for a compensation called brokerage usually contracting in the name of his employer, and not taking possession of the subject of negotiation, while a pawnbroker is not an agent at all, but contracts in his own name, has no employer, charges no brokerage, and always takes possession of the property. Schaul *v.* Charlotte, 118 N. C. 733, 24 S. E. 526.

4. Com. *v.* Danziger, 176 Mass. 290, 57 N. E. 461; Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116; Lowry *v.* Collateral Loan Assoc., 172 N. Y. 394, 65 N. E. 206. See also Constitutional Law, 8 Cyc. 876.

5. Com. *v.* Danziger, 176 Mass. 290, 57 N. E. 461; Shelton *v.* Silverfield, 104 Tenn. 67, 56 S. W. 1023. See also Licenses, 25 Cyc. 620 text and note 85.

Double taxation.— One who has paid a license-tax for the privilege of conducting the business of pawnbroking is not liable to an additional tax as a dealer in second-hand clothing simply because he sells pawned second-hand wearing apparel. Shelton *v.* Silverfield, 104 Tenn. 67, 56 S. W. 1023.

6. Solomon *v.* Denver, 12 Colo. App. 179, 55 Pac. 199; Butte *v.* Paltrovich, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698. See also Licenses, 25 Cyc. 600, 620, text and note 85; Municipal Corporations, 28 Cyc. 705 *et seq.*

Prohibiting redemption of pawn within twenty-four hours.— A police regulation promulgated by the commissioners of the District of Columbia prohibiting the redemption of pawned property by its owner within twenty-four hours after the time of pawning is invalid as an interference with the owner's right of property. Fulton *v.* District of Columbia, 2 App. Cas. (D. C.) 431.

7. Chicago *v.* Hulbert, 118 Ill. 632, 8 N. E. 812, 59 Am. Rep. 400; Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625; Hunt *v.* Philadelphia, 35 Pa. St. 277. See also Municipal Corporations, 28 Cyc. 705 *et seq.*

Any person who advances money on a pledge of goods comes within the purview of an ordinance requiring a license as a condition precedent to the right to carry on the business of pawnbroking. Hunt *v.* Philadelphia, 35 Pa. St. 277.

However, power to pass ordinances "not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation" does not authorize an ordinance requiring a pawnbroker to take out a license. Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378.

8. Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625. *Compare* Municipal Corporations, 28 Cyc. 750.

9. Butte *v.* Paltrovich, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698. See also Municipal Corporations, 28 Cyc. 705 *et seq.*

For example, a municipality may require pawnbrokers' places of business to be closed

III. RIGHTS AND LIABILITIES.

A. Rights of Pawnee — 1. Rate of Interest. The maximum rate of interest for the use of money lent which a pawnbroker has the right to charge is usually fixed by statute;[10] and the pawnbroker cannot acquire the right to charge interest in excess of the maximum rate charged by statute by treating a loan for a longer period as a monthly contract.[11]

2. Retention of Pledge or Pawn — a. As Against Pawner. By force of statute the pawnee may, as against the pawner, lose his right, by exacting unlawful interest, to hold the pledge as security for the debt.[12] But it is held that the right to hold the pledge is not affected by the exaction of unlawful interest for an extension of time for the payment of the loan,[13] or by an exaction of such interest by an employee of the pawnbroker, without the latter's knowledge.[14]

b. As Against Pawner's Assignee in Bankruptcy. Where the statute makes compliance by the pawnee with certain regulations a condition precedent to the validity of the pawn, a pawnee not complying with the specified regulations cannot, as against the assignee of the pawner who subsequently becomes a bankrupt, retain possession of the pledge or pawn.[15]

c. As Against True Owner. The pawnee has no right to retain possession, as against the true owner, of an article pawned without the latter's consent or authority,[16] even where the pawner is in possession for a specific purpose, such as to sell the article on commission,[17] or to sell it to a particular person.[18] But the rule is

after a given hour of the day (Butte *v.* Paltrovich, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698), or require them to keep a record of the transactions and to furnish a statement thereof to the police department (Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625; Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707; Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29; 55 Am. St. Rep. 472, 32 L. R. A. 116; St. Joseph *v.* Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577), or prohibit them from taking property in pawn from persons under a given age, intoxicated persons, or habitual drunkards (Grand Rapids *v.* Braudy, *supra*), or from purchasing, under any pretext whatever, an article or thing offered to them as a pawn or pledge (Kuhn *v.* Chicago, 30 Ill. App. 203).

10. Jackson *v.* Shawl, 29 Cal. 267; Hilgert *v.* Levin, 72 Mo. App. 48; Lowry *v.* Collateral Loan Assoc., 172 N. Y. 394, 65 N. E. 206; Rex *v.* Beard, 12 East 673; Reg. *v.* Adams, 8 Ont. Pr. 462, holding further that where a usury law is in force at the time a pawnbrokers' act is proposed, which permits the exaction of a rate of interest in excess of that denounced by the usury law, the pawnbroker may legally charge any rate of interest agreed upon which is permitted by the Pawnbrokers' Act. See also, generally, Interest, 22 Cyc. 1459; Usury.

Charge for memorandum furnished to pawner.— Under the Pennsylvania statute, while no more than a given rate of interest can be exacted, a pawnbroker may make a charge for the memorandum or certificate furnished to the borrower, stating the amount of money lent, the nature of the article pawned, and other particulars. Hunt *v.* Philadelphia, 35 Pa. St. 277.

A statute which provides for a forfeiture if a pawnbroker takes interest beyond a given rate is penal in its nature and under the general rule as to such statutes must be strictly construed. Hallenbeck *v.* Getz, 63 Conn. 385, 28 Atl. 519.

11. Reg. *v.* Goodburn, 8 A. & E. 508, 2 Jur. 857, 7 L. J. M. C. 114, 3 N. & P. 468, 1 W. W. & H. 362, 35 E. C. L. 705.

12. Hilgert *v.* Levin, 72 Mo. App. 48.

13. Lyon *v.* Simpson, 1 N. Y. City Ct. Suppl. 25.

14. Lyon *v.* Simpson, 1 N. Y. City Ct. Suppl. 25.

15. Fergusson *v.* Norman, Arn. 418, 5 Bing. N. Cas. 75, 3 Jur. 10, 8 L. J. C. P. 3, 6 Scott 794, 35 E. C. L. 51.

16. Skora *v.* Miller, 24 Ind. App. 567, 57 N. E. 264; Collateral Loan Co. *v.* Sallinger, (Mass. 1907) 80 N. E. 811; Lamb *v.* Attenborough, 1 B. & S. 831, 8 Jur. N. S. 280, 31 L. J. Q. B. 41, 10 Wkly. Rep. 211, 101 E. C. L. 831; Packer *v.* Gillies, 2 Camph. 336 note; Morley *v.* Attenborough, 3 Exch. 500, 13 Jur. 282, 18 L. J. Exch. 148. See also Duell *v.* Cudlipp, 1 Hilt. (N. Y.) 166.

Property pawned by life-tenant.—A pawnbroker after the death of a tenant for life is not as against the remainder-man entitled to retain possession of property pawned by the tenant for life. Hoare *v.* Parker, 2 T. R. 376, 1 Rev. Rep. 500.

17. Hastings *v.* Pearson, [1893] 1 Q. B. 62, 67 L. T. Rep. N. S. 553, 41 Wkly. Rep. 127; Peet *v.* Baxter, 1 Stark. 472, 2 E. C. L. 181.

18. Collateral Loan Co. *v.* Sallinger, (Mass. 1907) 80 N. E. 811; Anderson *v.* McAlenan, 15 Daly (N. Y.) 444, 8 N. Y. Suppl. 483; Heilbron *v.* McAlenan, 16 N. Y. St. 957, 1 N. Y. Suppl. 875.

otherwise where an article is pawned by one to whom the true owner has intrusted it with a general power to sell.[19]

d. As Against Landlord Distraining For Rent. A pawnbroker with whom goods have been deposited in the way of his trade is entitled to retain possession as against a landlord attempting to distrain them for rent.[20]

e. As Against Judgment Creditor — (I) *Of Pawner.* The pawnee has the right to retain possession of the pawn as against a judgment creditor of the pawner until the amount of his lien is paid.[21]

(II) *Of Pawnee.* As against his own execution creditor, however, the pawnee is not entitled to retain possession of the pledge, whether or not the period for redemption has expired.[22]

3. Use of Pledge or Pawn. Where the article pawned may be the worse for use, the pawnee cannot use it while in pawn, but the rule is otherwise if the nature of the article is such that it will not be injured by use.[23]

4. Sale of Pledge or Pawn — a. In General. A contract of pawn implies a right in the pawnee, upon default of the pawner, to sell the pledge for the purpose of enforcing the payment of the debt secured thereby.[24]

b. When Right Accrues. The pawnee, however, has no right to use or dispose of the pledge to satisfy the debt until the time fixed by the contract of pawn for redeeming has expired.[25]

c. Manner of — (I) *In General.* The right of the pawnee to sell the pledge to satisfy the debt must, in the absence of a statute,[26] or an agreement[27] prescribing the manner of sale, be exercised by a public sale after due notice of the pawnee's intention to sell and of the time and place of sale.[28]

(II) *Special Agreement Controlling.* A special agreement between the parties to a contract of pawn controlling the manner of selling the pledge, after default on the part of the pawner, is valid, and a sale made in pursuance of such agreement does not constitute wrongful conversion of the pledge.[29]

d. Surplus Arising on Sale. Where the statute so provides, the surplus arising on the sale of a pawn shall be paid over to the person entitled to redeem.[30] Under such a statute a particular pawn stands as security only for the amount advanced in that transaction and interest thereon, and the pawnee has no right to apply a surplus arising on the sale of the pawn in payment of any deficiency arising on the sale of an article pawned by him at different time by the same person.[31]

19. Ludwin *v.* Baruch, 34 Misc. (N. Y.) 544, 69 N. Y. Suppl. 933. *Compare* Collateral Loan Co. *v.* Sallinger, (Mass. 1907) 80 N. E. 811.

20. Swire *v.* Leach, 18 C. B. N. S. 479, 11 Jur. N. S. 179, 34 L. J. C. P. 150, 11 L. T. Rep. N. S. 680, 13 Wkly. Rep. 385, 114 E. C. L. 479.

21. Coggs *v.* Bernard, 3 Salk. 268.

22. *In re* Rollason, 34 Ch. D. 495, 56 L. J. Ch. 768, 56 L. T. Rep. N. S. 303, 35 Wkly. Rep. 607.

23. Coggs *v.* Bernard, 3 Salk. 268.

24. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696; Anonymous, 3 Salk. 267.

A pawn is a lien arising by contract, created, limited, and enlarged, at the will of the contracting parties. Johnson *v.* Smith, 11 Humphr. (Tenn.) 396.

25. Loftus *v.* Agrant, 18 S. D. 55, 99 N. W. 90.

26. **Manner of sale regulated by statute.**— In Alabama pawnbrokers are required by statute, upon default of the pawner, to sell the pledge at public auction, and to give five days' notice of such sale by advertisement in any newspaper in the city or town where the pledge was made of the time and place of sale. Morningstar *v.* State, 135 Ala. 66, 33 So. 485.

27. **Agreement** see *infra*, III, A, 4, c, (II).

28. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696.

29. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696.

30. Bernstein *v.* Weinstein, 104 N. Y. App. Div. 615, 93 N. Y. Suppl. 1121; Stephens *v.* Simpson, 94 N. Y. App. Div. 298, 87 N. Y. Suppl. 1068; Dobree *v.* Norcliffe, 23 L. T. Rep. N. S. 552, holding that each act of pawn must be regarded as a complete and independent transaction, and that the overplus belongs to the pawner upon and in respect of each separate pledge, without any deduction in respect of deficiency upon the sale of an article pawned at a different time; and that the effect of a contrary construction where several articles were pawned by the same person at different times would be to defeat the right of an assignee coming into possession of the pawn-ticket by delivery.

31. See cases cited *supra*, note 30.

5. After Loss of Pledge or Pawn. The pawnee loses his right to recover the debt for which a pawn lost by him stood as security, unless he can show that the loss of the pawn was in no wise attributable to any want of necessary care on his part.[32]

6. Assignment of Debt Secured by Pawn. The assignment by the pawnee of the debt secured by the pawn, unaccompanied with delivery of the pawn or pledge, either actual or constructive, will not carry with it, and vest in the assignee the lien upon the property.[33]

B. Rights of Pawner — 1. Redemption of Pledge or Pawn — a. Who May Redeem. The owner of the pawn-ticket, whether he is the pawner,[34] or an assignee or a purchaser of the same,[35] is entitled to redeem within the legal period of redemption.

b. Period For. The period of redemption may be fixed by statute,[36] express agreement,[37] or custom.[38] And even though the statute provides that a pawn not redeemed within a given time is deemed to be forfeited and may be sold by the pawnee, yet the pawner, even after the expiration of that time, is entitled to redeem if the pawnee has not exercised his right of sale.[39]

c. Tender of Money Lent — (I) *Amount.* A pawner who agrees to pay interest on a loan in excess of the legal rate is, if he tenders principal and lawful interest, entitled to the possession of the pledge, although the statute fixing the rate of interest provides only a penalty for charging more than lawful interest.[40] So too where the pawner agrees to pay a given sum as a bonus for the use of the money loaned, a tender of the principal sum with the amount of the bonus, without interest, is a sufficient tender to redeem.[41]

(II) *When Not Necessary.* Where the statute expressly invalidates the lien upon the pledge if the pawnee charges usurious interest, the pawner is entitled to redeem the property without tendering the amount of the debt.[42]

d. Effect of Death of Pawnee. If the pawnee dies the pawn does not become absolute and irredeemable by the pawner merely because the goods were pawned generally, without any specified day for redemption.[43]

32. Crocker *v.* Monrose, 18 La. 553, 36 Am. Dec. 660.

33. Johnson *v.* Smith, 11 Humphr. (Tenn.) 396.

34. See Jackson *v.* Shawl, 29 Cal. 267; Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696; Hilgert *v.* Levin, 72 Mo. App. 48; Hines *v.* Strong, 46 How. Pr. (N. Y.) 97 [*affirmed* in 56 N. Y. 670]; Walter *v.* Smith, 5 B. & Ald. 439, 1 D. & R. 1, 7 E. C. L. 242.

Where the pawn-ticket is lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, the latter's right to redeem is regulated by 39 & 40 Geo. III, c. 99, §§ 15, 16. Burslem *v.* Attenborough, L. R. 8 C. P. 122, 42 L. J. C. P. 102, 28 L. T. Rep. N. S. 115, 21 Wkly. Rep. 406.

35. See Franklin *v.* Neate, 14 L. J. Exch. 59, 13 M. & W. 481; Sauvé *v.* Despras, 17 Quebec Super. Ct. 453.

By statute it is sometimes provided that the person producing the pawn-ticket is, as against the pawnee, deemed to be the owner of the pledge. Dobree *v.* Norcliffe, 23 L. T. Rep. N. S. 552.

The indemnity given by the Pawnbrokers' Act of 1892 (35 & 36 Vict. c. 93, § 25) to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only between the pawnbroker and the pawner or the owner who has authorized the pawn; and the act does not affect the common-law rights of the owner of property which is pledged against his will. Singer Mfg. Co. *v.* Clark, 5 Ex. D. 37, 44 J. P. 59, 49 L. J. Exch. 224, 41 L. T. Rep. N. S. 591, 28 Wkly. Rep. 170.

Redemption by, and delivery to, a person producing a pawn-ticket which had been lost by the pawner may be valid as authorized by the acquiescence of the pawner in other like occurrences. Johnson *v.* Praeger, 59 N. Y. App. Div. 339, 69 N. Y. Suppl. 836.

36. See Burslem *v.* Attenborough, L. R. 8 C. P. 122, 42 L. J. C. P. 102, 28 L. T. Rep. N. S. 115, 21 Wkly. Rep. 406; Walter *v.* Smith, 5 B. & Ald. 439, 1 D. & R. 1, 7 E. C. L. 242.

37. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696.

38. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696, holding that in the absence of a special agreement as to the period during which the pawner's right to redeem is exercisable, such period may be governed by a general custom in the conduct of the business of the pawnee, if such custom was known by the pawner at the time of pawning.

39. Walter *v.* Smith, 5 B. & Ald. 439, 1 D. & R. 1, 7 E. C. L. 242.

40. Jackson *v.* Shawl, 29 Cal. 267.

41. Hines *v.* Strong, 46 How. Pr. (N. Y.) 97 [*affirmed* in 56 N. Y. 670].

42. Hilgert *v.* Levin, 72 Mo. App. 48.

43. Anonymous, 3 Salk. 267.

2. Sale of Interest in Pledge or Pawn. Subject to the claim of the pawnee the pawner has the same right over the article pawned as he had after the pawn was made, and may sell and transfer his interest therein.[44]

C. Liabilities of Pawnee — 1. To Pawnee For Loss of Pawn — a. In General. All that is required by the common law on the part of a pawnee in the protection of property intrusted to him is ordinary care and diligence,[45] and consequently, unless a failure to exercise such care and diligence is shown,[46] a pawnee is not answerable for the loss of the article pawned.[47]

b. After Timely Tender of Money Lent. However, the pawnee is liable at all events for any loss or damage which happens after the amount of the debt has been tendered to him, and he should have returned the pawn in pledge.[48]

c. While Using Pledge. So too if the thing pawned is being used by the pawnee and while so being used by him is lost and damaged, he is liable to the pawner therefor.[49]

2. To Third Party For Defect in Title to Forfeited Pawn. The rule in England is that a pawnbroker who sells to a third party a chattel as a forfeited pledge merely undertakes that the subject of the sale is a pledge and redeemable, and that he is not cognizant of any defect of title to it.[50]

D. Liability of Pawner For Deficiency After Sale. The common-law rule is that the pawner is liable, under a contract of pawn, to the pawnee for any deficiency arising on the sale of the article pawned.[51] But the rule is otherwise where the statute controlling pawnbrokers provides that the person producing the pawn-ticket is, as against the pawnee, entitled to possession of the pawn,[52] or provides that the surplus arising from the sale of the pawn belongs to the person entitled to redeem.[53]

IV. ACTIONS.

A. By Pawner Against Pawnee. In actions for conversion of the pledge or pawn, instituted by the pawner against the pawnee, the rules of evidence are the same as those applicable to civil actions generally.[54] The course and conduct

44. Franklin *v.* Neate, 14 L. J. Exch. 59, 13 M. & W. 481. See also Whitaker *v.* Sumner, 20 Pick. (Mass.) 399, 405; Sauvé *v.* Despras, 17 Quebec Super. Ct. 453.

45. Abbett *v.* Frederick, 56 How. Pr. (N. Y.) 68; Coggs *v.* Bernard, 2 Ld. Raym. 909; Coggs *v.* Bernard, 3 Salk. 268.

46. Healing *v.* Cattrell, 6 Jur. N. S. 96 note, 1 L. T. Rep. N. S. 7.

47. Abbett *v.* Frederick, 56 How. Pr. (N. Y.) 68; Laing *v.* Blumauer, 1 N. Y. City Ct. 238; Syred *v.* Carruthers, E. B. & E. 469, 4 Jur. N. S. 949, 27 L. J. M. C. 273, 6 Wkly. Rep. 595, 96 E. C. L. 469. See also Shackell *v.* West, 2 E. & E. 326, 6 Jur. N. S. 95, 29 L. J. M. C. 45, 1 L. T. Rep. N. S. 28, 8 Wkly. Rep. 22, 105 E. C. L. 326.

Pledge delivered to third party.—A pawnee is not liable to the pawner for the value of a pledge delivered to a third person who produced and surrendered up the pawn-ticket, where it appears that the pawner was in the habit of sending to pawn and receiving therefrom articles by the hand of third persons. Johnson *v.* Praeger, 59 N. Y. App. Div. 339, 69 N. Y. Suppl. 836.

48. Coggs *v.* Bernard, 2 Ld. Raym. 909; Coggs *v.* Bernard, 3 Salk. 268.

49. Coggs *v.* Bernard, 3 Salk. 268.

50. Morley *v.* Attenborough, 3 Exch. 500, 13 Jur. 282, 18 L. J. Exch. 148; Dobree *v.* Norcliffe, 23 L. T. Rep. N. S. 552.

51. Mauge *v.* Heringhi, 26 Cal. 577; Jones *v.* Marshall, 24 Q. B. D. 269, 54 J. P. 279, 59 L. J. Q. B. 123, 61 L. T. Rep. N. S. 721, 38 Wkly. Rep. 269; South-sea Co. *v.* Duncomb, Str. 919.

Failure to comply with requirements of statute.—Although the statute regulating pawnbroking provides that, as a condition precedent to the pawnee's right to recover back the money advanced by him upon an article pawned, the memorandum given by him shall contain a correct statement of certain facts, yet the right of the pawnee to recover from the pawner a deficiency which may arise from the sale of the pawn is not affected by the fact that the information inserted in the memorandum is false, provided such information be derived from the pawner and is inserted in good faith. Atterborough *v.* London, 8 Exch. 661, 17 Jur. 419, 22 L. J. Exch. 251, 1 Wkly. Rep. 355.

52. Dobree *v.* Norcliffe, 23 L. T. Rep. N. S. 552.

53. Stephens *v.* Simpson, 94 N. Y. App. Div. 298, 87 N. Y. Suppl. 1068.

54. See Evidence, 16 Cyc. 821 *et seq.*; Trover and Conversion.

When the existence of a custom governing the time of the sale of the pledge is put in issue by the pleadings, it is not error to admit evidence of such custom. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696.

of the trial in actions for conversion [55] or in replevin,[56] instituted by the pawner against the pawnee, are governed by the same rules applicable to civil actions generally.

B. By Pawnee Against Third Person. A pawnee may maintain an action against a landlord to recover the value of goods deposited with him in the way of trade and which have been distrained for rent.[57]

V. PENALTIES FOR VIOLATION OF REGULATIONS.[58]

A. Who Liable. Under a statute defining a pawnbroker to be one who engages in the business of receiving property in pledge for money advanced to the pawner, a person is not liable to the penalty denounced by the statute unless he is engaged as his regular business or occupation in loaning money at interest and receiving personal property in pawn as security therefor.[59]

B. When Liable. To render a pawnbroker amenable to the penalty provided by statute for taking or receiving, directly or indirectly, unlawful interest, the excessive interest must have been actually received by him.[60]

C. At Whose Instance. Under a statute providing for a penalty where a pawnbroker does not conduct his business in accordance with its provisions and giving a moiety of the penalty to the party informing, a common informer, although not the party aggrieved, may lay the information.[61]

VI. CRIMINAL PROSECUTIONS.[62]

A. Against Pawnee. A complaint in a criminal prosecution for carrying on the business of a pawnbroker without a license is sufficient if it charges the offense in the words of the statute.[63] The rules of evidence prevailing generally in criminal prosecutions are applicable to prosecutions for the violation of the statute regulating pawnbrokers.[64]

55. See, generally, TRIAL; TROVER AND CONVERSION.

Instructions.— The question as to the legal effect of a special agreement between the pawner and pawnee purporting to deprive the former of all equity in the surplus proceeds of a sale of the article pawned is impertinent to the issues, and a charge thereon is properly refused. Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696. A charge that the contract of pawn implies a right in the pawnee, on default by the pawner, to sell the article pawned, for the purpose of enforcing payment of the debt, and that the right of sale, in the absence of an agreement prescribing the manner thereof, must be exercised by a public sale after notice, but that, if the parties to the contract made a special agreement controlling the manner of sale, such an agreement was not against public policy, and a sale made in pursuance thereof was not a wrongful conversion, was substantially correct and adequate. Stern *v.* Simons, *supra*.

56. See, generally, REPLEVIN; TRIAL.

An instruction entirely ignoring provisions in the pawn-ticket, which exempt the pawnbroker in the event of the loss of the property by fire or theft, is erroneous. Oberman *v.* Reece, 95 Ill. App. 645.

57. Swire *v.* Leach, 18 C. B. N. S. 479, 11 Jur. N. S. 179, 34 L. J. C. P. 150, 11 L. T. Rep. N. S. 680, 13 Wkly. Rep. 385, 114 E. C. L. 479.

Replevin, generally, see REPLEVIN.

58. Penalties generally see PENALTIES. See also MUNICIPAL CORPORATIONS, 28 Cyc. 775 *et seq.*

59. Chicago *v.* Hulbert, 118 Ill. 632, 8 N. E. 812, 59 Am. Rep. 400, holding further that an occasional loan will not suffice to bring the lender within the definition of a pawnbroker so as to render him amenable to the statutory penalty for doing business without a license.

60. Hallenbeck *v.* Getz, 63 Conn. 385, 28 Atl. 519.

61. Caswell *v.* Morgan, 1 E. & E. 809, 5 Jur. N. S. 1252, 28 L. J. M. C. 208, 7 Wkly. Rep. 463, 102 E. C. L. 809.

62. Criminal law generally see CRIMINAL LAW, 12 Cyc. 70.

Indictment or information generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

63. Com. *v.* Danziger, 176 Mass. 290, 57 N. E. 461.

64. See, generally, CRIMINAL LAW, 13 Cyc. 70; EVIDENCE, 16 Cyc. 821.

Admissibility.— In a prosecution for the violation of a statute regulating pawnbroking, evidence that defendant in no way complied with the statute is relevant to prove his intentional breach of it in respect to a certain article pledged with and sold by him. Heitzelman *v.* State, (Tex. Cr. App. 1894) 26 S. W. 729. In a prosecution for receiving an article in pawn and selling it without compliance with the statute regulating pawnbrokers, evidence that accused was a pawn-

B. Against Pawner. Under a statute making it an indictable offense to obtain money by making false representations as to an article offered for pawn, one is subject to indictment under the statute who misrepresents the species of the article;[65] but the rule is otherwise if the misrepresentation extends only to the quality of the article.[66]

PAY. As a noun,[1] a fixed and direct amount given by law to persons in consideration of and as compensation for their personal services.[2] As a verb,[3] to discharge a debt, to deliver a creditor the value of the debt, either in money or in goods, to his acceptance or satisfaction, by which the obligation of the debt is discharged;[4] to discharge a duty created by a promise, or by custom, or by the moral law; to fulfil, to perform what is promised;[5] to discharge an obligation[6] by a performance according to its terms or requirements,[7] whether the obligation be for money, merchandise, or service;[8] to discharge one's obligation to another;[9] to render that which is due;[10] to satisfy;[11] to make new return to; to compensate;

broker and failed to comply with the statute by filing with the county clerk a copy of the advertisement of sale, or a report thereof, is competent. Heitzelman *v.* State, *supra*. The reasonableness and legality of an ordinance do not depend upon information of witnesses as to the probable effect it may have on a party's business; and hence in the prosecution of a pawnbroker for not giving information of his business transactions to the chief of police, as required by an ordinance, testimony of a witness as to the probable injurious effect such disclosure would have on the pawnbroker's business is properly excluded. Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625.

Weight and sufficiency.— Where it appears in a prosecution for doing business as a pawnbroker without a license, in violation of a city ordinance, that defendant frequently loaned money to divers persons on personal effects and accorded to such persons the right to redeem them on repayment of the loan with interest and that defendant admitted the transactions, the evidence justifies a conviction. Philipsburg *v.* Weinstein, 21 Mont. 146, 53 Pac. 272.

65. Reg. *v.* Bryan, 7 Cox C. C. 312, Dears. & B. 265, 3 Jur. N. S. 620, 26 L. J. M. C. 84, 5 Wkly. Rep. 598.

False pretenses generally see FALSE PRETENSES, 19 Cyc. 384.

66. Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. N. S. 597, 25 L. J. M. C. 101, 4 Wkly. Rep. 514.

1. **"Annual pay"** see Upperton *v.* Ridley, [1903] A. C. 281, 283, 20 Cox C. C. 453, 67 J. P. 349, 72 L. J. K. B. 535, 88 L. T. Rep. N. S. 642, 1 Loc. Gov. 659.

2. Sherburne *v.* U. S., 16 Ct. Cl. 491, 496.

As compensation for services.—As used in a promise by a contractor that he would see that the men at work for a subcontractor should have their pay in the spring, "pay" means not only that which was subsequently earned, but all that would be due them whenever earned. McDonald *v.* Fernald, 68 N. H. 171, 172, 38 Atl. 729.

In its ordinary usage the term includes satisfaction, discharge, compensation. Marriner *v.* John L. Roper Co., 112 N. C. 164, 166, 16 S. E. 906.

In commercial transactions the word often means satisfaction in money. Marriner *v.* John L. Roper Co., 112 N. C. 164, 166, 16 S. E. 906.

3. **Used with other words.**— "Pay, deliver over, and transfer" see *In re* Thompson, 1 N. Y. Suppl. 213, 215. "Pay, assign, and transfer" see Stokes *v.* Salomons, 9 Hare 75, 79, 15 Jur. 483, 20 L. J. Ch. 343, 41 Eng. Ch. 75, 68 Eng. Reprint 421, 4 Eng. L. & Eq. 133. "Pay bills" see Claflin *v.* Continental Jersey Works, 85 Ga. 27, 43, 11 S. E. 721. "Pay or apply" see McDonell *v.* McDonell, 24 Ont. 468, 471. "Pay 'over'" see Lippincott *v.* Pancoast, 47 N. J. Eq. 21, 27, 20 Atl. 360; Clarke *v.* Clarke, 46 S. C. 230, 245, 24 S. E. 202, 57 Am. St. Rep. 675. "Pay over and deliver" see Goad *v.* Montgomery, 119 Cal. 552, 556, 51 Pac. 681, 63 Am. St. Rep. 145. "Pay the within" see Tolman *v.* Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 75. "Pay without recourse" see Charnley *v.* Dulles, 8 Watts & S. (Pa.) 353, 361. "To pay said principal" see Roosa *v.* Harrington, 171 N. Y. 341, 349, 64 N. E. 1.

4. Beals *v.* Home Ins. Co., 36 N. Y. 522, 527; Gettinger *v.* National Bank of Commerce, 23 Ohio Cir. Ct. 77, 82; Webster Dict. [*quoted* in Tolman *v.* Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

5. Webster Dict. [*quoted* in Tolman *v.* Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

6. Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597, 601.

7. Webster Dict. [*quoted* in Tolman *v.* Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

8. Gettinger *v.* National Bank of Commerce, 23 Ohio Cir. Ct. 77, 82.

9. Farmersville First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 44, 19 S. W. 334; Webster Dict. [*quoted* in Starr *v.* Delaware County, (Ind. App. 1906) 76 N. E. 1025, 1026; Forrest *v.* Henry, 33 Minn. 434, 438, 23 N. W. 848].

10. Lippincott *v.* Pancoast, 47 N. J. Eq. 21, 27, 20 Atl. 360.

11. Century Dict.; Webster Int. Dict.

to remunerate; to deliver the amount or value to the persons to whom it is owing;[12] to transfer;[13] to transfer or deliver money or other agreed medium from the debtor to the creditor.[14] (Pay: In General, see PAYMENT. Of Officer or Soldier in Army, Navy, or Militia, see ARMY AND NAVY; MILITIA. Of Servant, see MASTER AND SERVANT. See also FEES, and Cross-References Thereunder.)

PAYABLE. DUE,[15] *q. v.*; due to, to be paid to;[16] to be paid;[17] vested;[18] capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable.[19]

PAY-CHECK. A term which is said to mean practically the same thing as MONEY ORDER,[20] *q. v.*

PAYEE. See COMMERCIAL PAPER.

PAYER or PAYOR. See COMMERCIAL PAPER.

PAYMASTER. An officer of the army or navy whose duty is to keep the pay-accounts and pay the wages of the officers and men; any official charged with the disbursement of public money.[21] (Paymaster: Of Army and Navy, see ARMY AND NAVY. Of Militia, see MILITIA.)

[both *quoted* in State *v.* Towner, 26 Mont. 339, 346, 67 Pac. 1004]; Webster Dict. [*quoted* in Starr *v.* Delaware County, (Ind. App. 1906) 76 N. E. 1025, 1026; Forrest *v.* Henry, 33 Minn. 434, 438, 23 N. W. 848].

12. Webster Dict. [*quoted* in Starr *v.* Delaware County, (Ind. App. 1906) 76 N. E. 1025, 1026].

13. Clark's Appeal, 70 Conn. 195, 216, 39 Atl. 155.

14. Oneida County *v.* Tibbits, 125 Wis. 9, 15, 102 N. W. 897.

Sale and indebtedness implied.— In an instrument obligating the maker to pay a certain amount for certain merchandise, the word "pay" implies an indebtedness. Lent *v.* Hodgman, 15 Barb. (N. Y.) 274, 278. See also Tucker *v.* Linn, (N. J. Ch. 1904) 57 Atl. 1017, 1019; Gutch *v.* Fosdick, 48 N. J. Eq. 353, 356, 22 Atl. 590, 27 Am. St. Rep. 473.

"Paying" is a word which clearly imports a condition. Lloyd *v.* Holly, 8 Conn. 491, 495. As creating a charge see Hodge *v.* Churchward, 16 Sim. 71, 73, 39 Eng. Ch. 71, 60 Eng. Reprint 799. "Paying freight" see Domett *v.* Beckford, 5 B. & Ad. 521, 522, 3 L. J. K. B. 10, 2 N. & M. 374, 27 E. C. L. 223. "Paying my lawful debts" see Doe *v.* Weston, Wm. Bl. 1215, 1216. "Paying quantities" see Young *v.* Forest Oil Co., 194 Pa. St. 243, 250, 45 Atl. 121; Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 506, 44 S. E. 433, 97 Am. St. Rep. 1027. "Paying the yearly rent" see Dawson *v.* Dyer, 5 B. & Ad. 584, 2 N. & M. 559, 27 E. C. L. 248. "Upon paying" see Ruble *v.* Turner, 2 Hen. & M. (Va.) 38, 42.

15. Hawes *v.* Smith, 12 Me. 429, 432; Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 419, 57 N. W. 1063; Turk *v.* Stahl, 53 Mo. 437, 438; Read *v.* Worthington, 9 Bosw. (N. Y.) 617, 627.

16. Eckel *v.* Jones, 8 Pa. St. 501, 502.

Distinguished from paid see Hill *v.* Stetler, 4 C. Pl. (Pa.) 119, 122.

17. Poppleton *v.* Jones, 42 Oreg. 24, 33, 69 Pac. 919; Century Dict. [*quoted* in Johnson *v.* Dooley, 65 Ark. 71, 74, 44 S. W. 1032, 40 L. R. A. 74].

Does not mean that "which may be paid." Johnson *v.* Dooley, 65 Ark. 71, 74, 44 S. W. 1032, 40 L. R. A. 74; Poppleton *v.* Jones, 42 Oreg. 24, 33, 69 Pac. 919.

18. West *v.* Miller, L. R. 6 Eq. 59, 64, 37 L. J. Ch. 423, 18 L. T. Rep. N. S. 429, 16 Wkly Rep. 602.

19. Webster Dict. [*quoted* in Farmersville First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 44, 19 S. W. 334].

Legally its meaning is that a specified amount becomes due, and its payment can be enforced. Hill *v.* Stetler, 4 C. Pl. (Pa.) 119, 122.

Used in connection with other words.— "Made or payable in this state" see Orcutt *v.* Hough, 54 N. H. 472, 473. "Payable as convenient" see Black *v.* Bachelder, 120 Mass. 171, 173. "Payable at the Bank of Montreal, Toronto, at par" see Rose-Belford Printing Co. *v.* Montreal Bank, 12 Ont. 544, 545. "Payable in equal annual installments" see Denver *v.* Hallett, 34 Colo. 393, 396, 83 Pac. 1066. "Payable 'in one year'" see Deakin *v.* Underwood, 37 Minn. 98, 102, 33 N. W. 318, 5 Am. St. Rep. 827. "Payable in trade" see Dudley *v.* Vose, 114 Mass. 34, 36. "Payable 'in United States bonds'" see Easton *v.* Hyde, 13 Minn. 90. "Payable monthly" see Webster *v.* Cook, 38 Cal. 423, 425. "Payable on demand" see Cate *v.* Patterson, 25 Mich. 191, 193; Terry *v.* Milwaukee, 15 Wis. 490, 491. "Payable 'on or before one year'" see Deakin *v.* Underwood, 37 Minn. 98, 102, 33 N. W. 318, 5 Am. St. Rep. 827; Norwood *v.* Resolute F. Ins. Co., 36 N. Y. Super. Ct. 552, 554. "Payable to my order" see McCarthy *v.* Vine, 22 U. C. C. P. 458, 464.

20. Barnes *v.* State, 46 Fla. 96, 100, 35 So. 227.

21. Black L. Dict.

Paymaster's clerk is naval officer. U. S. *v.* Hendee, 124 U. S. 309, 313, 8 S. Ct. 507, 31 L. ed. 465; *Ex p.* Reed, 100 U. S. 13, 21, 25 L. ed. 538; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396, 408.

PAYMENT

By Clark A. Nichols*

I. Definition, 1180

II. General Considerations, 1182

A. *What Law Governs,* 1182
B. *Who May Make,* 1182
C. *To Whom Payment May Be Made,* 1183
1. *In General,* 1183
2. *Person to Whom Creditor Is Indebted,* 1184
3. *Deposit in Bank or With Third Person,* 1184
D. *Time,* 1184
E. *Place,* 1185
1. *In General,* 1185
2. *Remittance by Mail,* 1186
F. *Part Payment,* 1186
G. *Conditional Payment,* 1187
H. *Estoppel to Assert Illegality of Payment,* 1187
I. *Fund From Which Payment to Be Made,* 1187
J. *Date as of Which Credit to Be Given,* 1187

III. Form and Medium, 1187

A. *Payment Other Than in Money,* 1187
1. *In General,* 1187
a. *Agreement or Consent,* 1187
b. *Order on Third Person For Money or Goods,* 1191
c. *Collateral Security or Obligation of Higher Nature,* 1191
d. *Application of Collateral Security,* 1193
e. *Municipal Securities,* 1193
f. *Certificates of Deposit or of Indebtedness,* 1194
2. *Payment by Bills or Notes,* 1194
a. *General Rule,* 1194
b. *Minority Rule,* 1197
c. *Contemporaneous Indebtedness,* 1199
d. *Agreement to Accept as Payment,* 1199
e. *Note of One or More Co-Debtors,* 1202
f. *Validity and Value of Bill or Note and Misrepresentations,* 1202
(I) *Of Debtor,* 1202
(II) *Of Third Person,* 1202
g. *Effect of Transfer of Bill or Note,* 1203
h. *Indorsement or Guaranty of Note by Debtor,* 1204
i. *Use of Due Diligence in Collecting,* 1204
j. *Application of Rules,* 1204
(I) *Note or Acceptance of Agent For Debt of Principal,* 1204
(II) *Payments by Partnership or Individual Partner,* 1205
(A) *Note of Firm For Private Debt,* 1205
(B) *Bill or Note of Partner For Debt of Firm,* 1205
(C) *Note Executed by Partner in Name of Firm After Dissolution,* 1206

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(D) *Note of New Firm For Note or Debt of Old*, 1206
3. *Payment by Checks*, 1207
a. *In General*, 1207
b. *Diligence in Collection*, 1209
B. *Particular Kinds of Money*, 1210
1. *Where No Provision in Contract*, 1210
2. *Where Fixed by Contract*, 1210
a. *In General*, 1210
b. *Gold and Silver*, 1210
3. *Legal Tender*, 1212
a. *In General*, 1212
b. *Constitutional and Statutory Provisions*, 1212
c. *Treasury and Legal Tender Notes*, 1212
4. *Bank Paper*, 1213
a. *In General*, 1213
b. *Validity of Paper and Failure of Bank*, 1214
5. *Counterfeit Money*, 1215
6. *Confederate Money or Securities*, 1215
7. *Foreign Money*, 1217
8. *Depreciated Currency or Securities*, 1218
9. *Appreciated Currency*, 1219
10. *Uncurrent or Unlawful Money or Notes*, 1219
C. *Election as to Medium of Payment*, 1219
1. *In General*, 1219
2. *Waiver of Right to Demand Certain Medium*, 1219

IV. EFFECT, 1220
A. *In General*, 1220
B. *Part Payment*, 1220
C. *Payment by One or More Co-Debtors*, 1221
D. *Payment by Third Person*, 1221
E. *Payment Under Duress*, 1221
F. *Rescission of Payment and Return of Medium Received*, 1221

V. RECEIPTS, 1223
A. *Nature and Contents*, 1223
B. *Construction*, 1223
C. *Operation and Conclusiveness*, 1224
1. *In General*, 1224
2. *Payment by Bill or Note*, 1227

VI. APPLICATION OF, 1227
A. *In General*, 1227
1. *Scope of Rule*, 1227
2. *Origin of Rule*, 1228
3. *Applicability to Involuntary Payments*, 1228
B. *By Debtor*, 1228
1. *Rights of Debtor*, 1228
2. *Time For Appropriation*, 1230
3. *What Constitutes, and Sufficiency*, 1230
4. *Effect*, 1231
C. *By Creditor*, 1233
1. *Right to Apply*, 1233
a. *General Rule*, 1233
b. *Principal and Interest*, 1235
c. *Items of Current Account*, 1235
2. *Limitations of Right*, 1235

a. *In General*, 1235
b. *Illegal and Unenforceable Claims*, 1236
c. *Joint Debts and Debts of Other Persons*, 1236
d. *Debts Not Due*, 1237
e. *Debts Arising After Payment*, 1237
f. *Payment From Particular Fund*, 1237
3. *What Constitutes and Sufficiency*, 1237
4. *Time For Appropriation*, 1238
5. *Effect of Application*, 1239

D. *By Court*, 1239
1. *In General*, 1239
2. *Intent of Parties*, 1240
3. *Justice and Equity Rule*, 1240
4. *Priority of Debts*, 1243
a. *In General*, 1243
b. *Items of Current Account*, 1244
5. *Secured and Unsecured Debts*, 1246
a. *In General*, 1246
b. *Items of Account*, 1247
6. *Illegal or Unenforceable Demands*, 1247
7. *Joint Debts and Debts Due Different Persons*, 1248
8. *Payment From Particular Source or Fund*, 1248
9. *Distribution Between All of Debts*, 1248
10. *Contingent Liabilities*, 1248
11. *Principal and Interest*, 1249

E. *Rights of Third Persons*, 1250
1. *In General*, 1250
2. *Guarantors, Sureties, Indorsers, and the Like*, 1251

VII. PLEADING, EVIDENCE, TRIAL, AND REVIEW, 1252

A. *Nature of Defense*, 1252
B. *Pleading*, 1253
1. *In Anticipation of Defense*, 1253
2. *As Defense*, 1253
a. *Necessity*, 1253
b. *Requisites and Sufficiency*, 1254
(I) *In General*, 1254
(II) *Account or Bill of Particulars*, 1257
c. *Affidavit of Defense*, 1257
d. *Replication or Reply*, 1258
e. *Demurrer*, 1259
3. *Construction and Operation*, 1259
4. *Issues, Proof, and Variance*, 1259
a. *In General*, 1259
b. *Evidence Admissible Under Pleadings*, 1260
(I) *In General*, 1260
(II) *Under General Issue or General Denial*, 1261
c. *Variance*, 1263

C. *Burden of Proof*, 1264
1. *In General*, 1264
2. *Payment in Property Other Than Money*, 1265
3. *Contradiction of Receipt*, 1266
4. *Application of Payment*, 1267

D. *Presumptions*, 1267
1. *In General*, 1267
a. *Time of Payment*, 1267
b. *Medium of Payment*, 1267

c. *Transfer of Property Other Than Money*, 1268
d. *Possession of Obligation*, 1268
e. *Cancellation of Obligation*, 1269
f. *Dual Obligation to Pay and Authority to Receive*, 1269
g. *Remittance by Mail*, 1269
h. *Miscellaneous Presumptions*, 1269
i. *Conclusiveness and Rebuttal Thereof*, 1271
2. *Payment by Bills, Notes, or Checks*, 1271
a. *Bills or Notes of Debtor*, 1271
b. *Bills or Notes of Third Person*, 1272
c. *Checks*, 1272
d. *Conclusiveness and Rebuttal Thereof*, 1272
3. *Application of Payments*, 1273
4. *Lapse of Time*, 1273
a. *In General*, 1273
b. *Length of Time*, 1274
(I) *In General*, 1274
(II) *Twenty Years*, 1275
(III) *Less Than Twenty Years*, 1276
c. *Indebtedness to Which Rule Applies*, 1277
d. *When Time Begins to Run*, 1277
e. *Conclusiveness and Rebuttal Thereof*, 1277
(I) *In General*, 1277
(II) *Particular Facts*, 1278
(A) *In General*, 1278
(B) *Acknowledgment of Debt and Partial Payment*, 1279
(C) *Disability of Creditor to Sue*, 1279
(D) *Absence of Creditor or Debtor From State*, 1280
(E) *Insolvency of Debtor*, 1280
(F) *Death and Want of Administration*, 1280
(G) *Institution of Proceedings to Enforce Payment*, 1281
(III) *Sufficiency of Evidence in Rebuttal in General*, 1281
E. *Admissibility of Evidence*, 1281
1. *In General*, 1281
2. *Admissions and Declarations*, 1283
3. *Financial Condition of Debtor or Creditor*, 1284
a. *In General*, 1284
b. *To Aid or Rebut Presumption From Lapse of Time*, 1284
4. *Habits of Debtor or Creditor as to Promptness*, 1285
5. *To Explain Acceptance of Commercial Paper or Security*, 1285
6. *To Aid or Rebut Presumption From Lapse of Time*, 1285
7. *To Show Application of Payments*, 1286
8. *Value of Property*, 1287
9. *Medium of Payment*, 1287
10. *Payment by or to Third Person*, 1287
11. *Documentary Evidence*, 1288
a. *In General*, 1288
b. *Judicial Records*, 1288
c. *Receipts or Other Acknowledgments*, 1288
d. *Bills, Notes, or Checks*, 1289
12. *Parol Evidence*, 1290
F. *Weight and Sufficiency of Evidence*, 1290
1. *In General*, 1290
2. *Admissions of Parties*, 1292
3. *Testimony of Parties*, 1292

4. *Payment by Bill, Note, or Check*, 1293
G. *Trial*, 1293
1. *In General*, 1293
2. *Questions For Jury*, 1294
a. *In General*, 1294
b. *Presumption of Payment From Lapse of Time*, 1294
c. *Mode and Medium of Payment*, 1295
d. *Payment Other Than in Money*, 1295
e. *Application of Payments*, 1296
3. *Instructions*, 1296
4. *Verdict and Findings*, 1297
H. *Judgment, New Trial, and Review*, 1298
VIII. RECOVERY OF PAYMENTS, 1298
A. *Voluntary Payments*, 1298
1. *General Rules*, 1298
2. *By or to Public Corporations*, 1301
3. *To Officer of Court*, 1301
4. *Of Interest*, 1301
5. *Of Judgment or Decree*, 1301
6. *By Way of Compromise*, 1302
7. *Failure to Indorse or Apply*, 1302
8. *Agreement to Repay*, 1302
B. *Compulsory Payments*, 1303
1. *Right to Recover in General*, 1303
2. *What Constitutes*, 1303
a. *In General*, 1303
b. *Business Necessities*, 1305
c. *Threat or Fear of Loss of Employment*, 1305
d. *Payments to Obtain Performance of Act*, 1306
e. *Apprehension or Threat of Legal Proceedings*, 1306
f. *Duress of Person*, 1307
g. *Payments to Prevent Unlawful Taking or Detention of Property*, 1308
(I) *Personal Property*, 1308
(II) *Real Property*, 1309
h. *Effect of Protest*, 1310
i. *Necessity of Protest*, 1310
3. *Illegality of Duress*, 1311
4. *Source of Duress and Time Thereof*, 1311
5. *Existence of Other Remedy*, 1311
C. *Fraud*, 1312
D. *Mistake*, 1313
1. *Of Law*, 1313
a. *General Rule*, 1313
b. *Minority Rule*, 1314
c. *Limitations of, and Exceptions to, Rule*, 1314
(I) *In General*, 1314
(II) *Payments by Public Officer*, 1315
d. *What Constitutes Mistake*, 1315
(I) *In General*, 1315
(II) *Payment Under Unconstitutional or Invalid Statute*, 1315
2. *Of Fact*, 1316
a. *General Rule*, 1316
b. *Nature of Mistake and What Constitutes*, 1318
c. *Particular Illustrations of Rule*, 1319

(I) *Payment of Bill or Note*, 1319
(II) *Payment of Interest*, 1319
(III) *Payment of Encumbrance*, 1320
(IV) *Payment on Account*, 1320
(V) *Payment to Wrong Person*, 1320
d. *Diligence and Waiver*, 1320
(I) *In General*, 1320
(II) *Where Payee Prejudiced*, 1321
e. *Change of Status After Payment*, 1321
E. *Payments Upon Consideration Which Has Failed*, 1322
F. *Payments Upon Illegal Contracts*, 1322
G. *Actions*, 1323
1. *In General*, 1323
2. *Conditions Precedent*, 1323
3. *Parties*, 1323
4. *Pleading*, 1324
5. *Evidence*, 1325
6. *Trial*, 1325

CROSS-REFERENCES

For Matters Relating to:
Accord and Satisfaction, see ACCORD AND SATISFACTION.
Compromise, see COMPROMISE AND SETTLEMENT.
Concealing Overpayment as Constituting Larceny, see LARCENY.
Payment:
Affecting:
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES.
Measure of Damages For Failure to Pay Money, see DAMAGES.
Alteration of Provision as to, see ALTERATIONS OF INSTRUMENTS.
As Condition of Obtaining Relief in Court, see APPEAL AND ERROR; ATTACHMENT; BAIL; CRIMINAL LAW; EXECUTIONS; JUSTICES OF THE PEACE; NEW TRIAL.
As Condition Precedent:
Before Taking Private Property, see EMINENT DOMAIN.
To Action:
By Indemnitee Against Indemnitor, see INDEMNITY.
For Breach of Covenant, see COVENANTS.
To Enforce Contribution, see CONTRIBUTION.
Assignment of Claim as Implied Guaranty of, see ASSIGNMENTS.
By Operation of Law:
Imprisonment Under Body Execution, see EXECUTIONS.
Levy of Execution, see EXECUTIONS.
Recovery of Judgment, see JUDGMENTS.
By or to:
Particular Person, see ASSIGNMENTS; INFANTS; INSANE PERSONS.
Person Acting in Particular Representative Capacity, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTORNEY AND CLIENT; BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; FACTORS AND BROKERS; GUARDIAN AND WARD; PARTNERSHIP; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; RECEIVERS.
Public Corporation, see COUNTIES; MUNICIPAL CORPORATIONS; STATES; TOWNS; UNITED STATES.
Effect of:
After Garnishment, see GARNISHMENT.
As Account Stated, see ACCOUNTS AND ACCOUNTING.
On Right to:
Contribution, see CONTRIBUTION.
Subrogation, see SUBROGATION.

For Matters Relating Relating to — (*continued*)
Payment — (*continued*)
Embezzlement of, see EMBEZZLEMENT.
Into Court, see ADMIRALTY; COSTS; DEPOSITS IN COURT; GARNISHMENT; TENDER.
Of Particular Classes of Obligations or Liabilities:
Alimony, see DIVORCE.
Annuity, see ANNUITIES.
Assessment, see DRAINS; MUNICIPAL CORPORATIONS; MUTUAL BENEFIT INSURANCE.
Attorney's Fee, see ATTORNEY AND CLIENT.
Award in Condemnation Proceeding, see EMINENT DOMAIN.
Bid at Judicial Sale, see JUDICIAL SALES.
Bill or Note, see COMMERCIAL PAPER.
Bond, see BONDS; INTERNAL REVENUE.
Charges of Common Carrier, see CARRIERS.
Claim Against:
Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Community Property, see HUSBAND AND WIFE.
Municipal Corporation, see MUNICIPAL CORPORATIONS.
Or in Favor of:
Decedent's Estate, see EXECUTORS AND ADMINISTRATORS.
Ward's Estate, see GUARDIAN AND WARD.
Claim Growing Out of:
Establishment or Maintenance of Highway, see STREETS AND HIGHWAYS.
Insolvency Proceeding, see INSOLVENCY.
Corporate Claim or Obligation, see CORPORATIONS.
Costs, see COSTS.
Damages, see DAMAGES.
Deposit, see BANKS AND BANKING; DEPOSITARIES.
Dues Under Policy of Insurance, see INSURANCE, and Cross-References Thereunder.
Duties, see CUSTOMS DUTIES.
Execution, see EXECUTIONS; JUSTICES OF THE PEACE.
Fine, see FINES.
Guaranty, see GUARANTY.
Internal Revenue Tax, see INTERNAL REVENUE.
Judgment, see INTERPLEADER; JUDGMENTS; JUSTICES OF THE PEACE.
Jury Fee, see JURIES.
License Fee or Tax, see LICENSES.
Loans and Dues Owing to Building Association, see BUILDING AND LOAN SOCIETIES.
Mortgage, see CHATTEL MORTGAGES; MORTGAGES.
Obligation of County, see COUNTIES.
Policy of Insurance, see INSURANCE, and Cross-References Thereunder.
Rent, see LANDLORD AND TENANT.
Rent or Royalties Under Mining Lease, see MINES AND MINERALS.
Taxes, see TAXATION.
Wages, see MASTER AND SERVANT.
Wages or Fees of Officers:
Arbitrator, see ARBITRATION AND AWARD.
Officer in General, see OFFICERS.
Receiver, see RECEIVERS.
Referee, see REFERENCES.
Sheriff or Constable, see SHERIFFS AND CONSTABLES.

For Matters Relating to — (*continued*)
Payment — (*continued*)
Provision For in Particular Undertakings, see ATTACHMENT; BAIL; EXECUTIONS; OFFICERS; RECEIVERS.
Statute of Frauds, see FRAUDS, STATUTE OF.
Tender, see TENDER.

I. DEFINITION.

Payment is the delivery of money or its equivalent by one person from whom it is due to another person to whom it is due.[1] In its most general acceptation, however, it means the fulfilment of a promise, the performance of an agreement, the accomplishment of every obligation, whether it consists in giving or doing.[2]

1. *California.*— Hathaway *v.* Davis, 33 Cal. 161, 166.
Kansas.— State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, 132.
New York.— Root *v.* Kelley, 39 Misc. 530, 532, 80 N. Y. Suppl. 482.
Tennessee.—Brady *v.* Wasson, 6 Heisk. 131, 135.
Washington.— Commercial Bank *v.* Toklas, 21 Wash. 36, 41, 56 Pac. 927.
United States.— Bronson *v.* Rodes, 7 Wall. 229, 19 L. ed. 141.

Other definitions are: "A mode of extinguishing a debt." Bradford *v.* Richard, 46 La. Ann. 1530, 1534, 16 So. 487.

"Not only the delivery of a sum of money, but the performance of an obligation. . . . An act calling for the exercise of the will — of consent, without which it has not the characteristics of that mode of extinguishing obligations." Bloodworth *v.* Jacobs, 2 La. Ann. 24, 26.

"A transfer of property from one person to another." Moulton *v.* Robinson, 27 N. H. 550.

Statutory definition is: "The performance of an obligation for the delivery of money only." Borland *v.* Nevada Bank, 99 Cal. 89, 94, 33 Pac. 737, 37 Am. St. Rep. 32; Green *v.* Hughitt School Tp., 5 S. D. 452, 460, 59 N. W. 224. And see the statutes of the several states.

Affirmative act of debtor.— In order to constitute a payment in its broadest sense, the debtor must have given something either in money, property, or right or performed some service. White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153.

"Payment" in an affidavit of defense see Ridings *v.* McMenamin, Pennew. (Del.) 15, 39 Atl. 463.

Distinguished from set-off.— A set-off or cross demand, no matter how clearly proved, does not constitute a payment. McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721; Wharton *v.* King, 69 Ala. 365; Hill *v.* Austin, 19 Ark. 230; Meyer *v.* Johnson, 122 Ill. App. 87; Commercial Bank *v.* Toklas, 21 Wash. 36, 56 Pac. 927. See also Williams *v.* Jackson, 31 Mich. 485; Gallen's Estate, 18 Pa. Super. Ct. 365. The distinction between payment and set-off is that a payment is by consent of the parties, express or implied, appropriated to the discharge of the debt, whereas a set-off is an independent demand, calling for its own action, which the parties have not applied on the debt. St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; McDowell *v.* Tate, 12 N. C. 249; Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291. Payment, while a defense, is not a set-off which may be used or omitted at the pleasure of defendant. Broughton *v.* McIntosh, 1 Ala. 103.

Distinguished from other transactions see ACCORD AND SATISFACTION, 1 Cyc. 307 note 1; COMPOSITIONS WITH CREDITORS, 8 Cyc. 412; COMPROMISE AND SETTLEMENT, 8 Cyc. 501; TENDER.

The essential difference between paying a debt and buying it consists, not in what is done, nor even in the manner of doing it, but in the intention with which the payment is made and accepted. The consideration, the party to whom, and the party from whom it moves may be the same, whether the object is to extinguish, or to buy and keep alive. But it is not the less true that a payment made by a stranger to the obligation of a debt, or even by one whose liability is like that of a surety, merely secondary, is *prima facie* a purchase, without evidence that the party by whom it was made meant to put an end to the debt, and not to acquire dominion over it as an assignee and purchaser. Lithcap *v.* Wilt, 4 Phila. (Pa.) 64.

Purchase or payment of bond coupons see United Water Works Co. *v.* Farmers' L. & T. Co., 11 Colo. App. 225, 53 Pac. 511; United Water Works Co. *v.* Farmers' L. & T. Co., 82 Fed. 144, 27 C. C. A. 92; Farmers' L. & T. Co. *v.* Iowa Water Co., 78 Fed. 881; Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 67 Fed. 404.

The surrender of the note evidencing the debt does not necessarily cancel the indebtedness. Goodman *v.* Mercantile Credit Guarantee Co., 17 N. Y. App. Div. 474, 45 N. Y. Suppl. 508.

2. Stokes *v.* Stokes, 34 N. Y. App. Div. 423, 54 N. Y. Suppl. 319; Root *v.* Kelley, 39 Misc. (N. Y.) 530, 80 N. Y. Suppl. 482.

Double meaning.— "Payment" as well as "discharge" is used in two senses: (1) Performance of a contract to pay money according to its stipulations; (2) extinguishment of a cause of action arising from breach of the contract. "Payment" as generally used in the books has the latter meaning, and "the defense of payment" is usually of the same

As used in its strict legal sense, there must be (1) a delivery,[3] (2) by the debtor or his representative,[4] (3) to the creditor or his representative,[5] (4) of money or something accepted by the creditor as the equivalent thereof,[6] (5) with the intention on the part of the debtor to pay the debt in whole or in part,[7] and (6) accepted as payment by the creditor.[8]

import, denoting a new affirmative and independent fact set up by defendant in confession and avoidance and not a denial of the breach. Kendall *v.* Brownson, 47 N. H. 186.

3. Holtz *v.* Peterson, 98 Iowa 741, 62 N. W. 19; Thompson *v.* Kellogg, 23 Mo. 281.

A mere proposal to pay by turning over certain property does not of itself constitute a payment. Dehon *v.* Stetson, 9 Metc. (Mass.) 341.

Agreement to take note.— A debt secured by a mortgage is not satisfied by the creditor's breach of his agreement with the debtor to take certain notes in satisfaction thereof. Low *v.* Coleman, (Miss. 1893) 14 So. 267.

4. See *infra*, II, B.

5. See *infra*, II, C.

6. Bouvier L. Dict.

In its legal import the term "payment" means the full satisfaction of a debt by "money," not by an exchange or compromise, or an accord and satisfaction. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Clay *v.* Lakenan, 101 Mo. App. 563, 74 S. W. 391; Howe *v.* Mittelberg, 96 Mo. App. 490, 70 S. W. 396; City Sav. Bank *v.* Stevens, 59 N. Y. Super. Ct. 549, 15 N. Y. Suppl. 139; Manice *v.* Hudson River R. Co., 3 Duer (N. Y.) 426; Coughtry *v.* Levine, 4 Daly (N. Y.) 335. But payment of a debt is not necessarily a payment of money, but that is payment which the parties contract shall be accepted in payment. Scott *v.* Gilkey, 49 Ill. App. 116; Weir *v.* Hudnut, 115 Ind. 525, 18 N. E. 24; Foley *v.* Mason, 6 Md. 37; Cleveland *v.* Rothschild, 132 Mich. 625, 94 N. W. 184; Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790; Clay *v.* Lakenan, 101 Mo. App. 563, 74 S. W. 391; Matter of Thompson, 5 Dem. Surr. (N. Y.) 393; Bullock *v.* Horn, 44 Ohio St. 420, 7 N. E. 737; Huffmans *v.* Walker, 26 Gratt. (Va.) 314; Commercial Bank *v.* Toklas, 21 Wash. 36, 56 Pac. 927; Bantz *v.* Basnett, 12 W. Va. 772.

7. Williams *v.* Moore, 9 Kulp (Pa.) 310; Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868; *In re* Brockville Election, 32 U. C. Q. B. 132.

Money of debtor in hands of creditor.— The fact that the creditor receives money of the debtor as his agent or otherwise does not constitute payment unless the debtor consents to the application of the money. McGill *v.* Ott, 10 Lea (Tenn.) 147. *Compare* Millhiser *v.* Marr, 128 N. C. 318, 38 S. E. 887. In other words a creditor cannot lawfully pay himself with the debtor's money, without the debtor's consent, express or implied, and when the debtor delivers him money for a purpose which negatives the idea of payment, and he applies it on his debt, there is no payment, and the debtor may recover it. Detroit, etc., R. Co. *v.* Smith, 50 Mich. 112, 15 N. W. 39.

8. *California.*— Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

Massachusetts.— Sullivan *v.* Sheehan, 173 Mass. 361, 53 N. E. 902; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698.

New Hampshire.— Jameson *v.* Carpenter, 68 N. H. 62, 36 Atl. 554.

New Jersey.— Oliver *v.* Phelps, 20 N. J. L. 180.

New York.— Kingston Bank *v.* Gay, 19 Barb. 459.

Ohio.— Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137.

Pennsylvania.— Williams *v.* Moore, 9 Kulp 310.

Virginia.— Moore *v.* Tate, 22 Gratt. 351.

Washington.— Bardsley *v.* Sternberg, 18 Wash. 612, 52 Pac. 251, 524.

England.— Pritchard *v.* Hitchcock, 12 L. J. C. P. 322, 6 M. & G. 151, 6 Scott N. R. 851, 46 E. C. L. 151.

Canada.— *In re* Brockville Election, 32 U. C. Q. B. 132.

See 39 Cent. Dig. tit. "Payment," § 14.

Compare Prather *v.* State Bank, 3 Ind. 356 (holding that the delay of the creditor in failing to return treasury paper which he had refused to accept as payment at par for more than two months should not be construed as an acceptance of the paper); Hendricks *v.* Schmidt, 68 Fed. 425, 15 C. C. A. 504.

The acceptance may be implied from the conduct of the creditor (Prather *v.* State Bank, 3 Ind. 356; Globe Furniture Co. *v.* Stafford County School Dist. No. 22, 6 Kan. App. 889, 50 Pac. 978; Grandy *v.* Abbott, 92 N. C. 33; Moore *v.* Tate, 22 Gratt. (Va.) 351), as where he delays beyond a reasonable time to repudiate a conditional payment (Jenkins *v.* National Mut. Bldg., etc., Assoc., 111 Ga. 732, 36 S. E. 945; Voss *v.* Mutual Ben. L. Ins. Co., 81 Fed. 24).

Time for acceptance.— Where goods were to be paid for in the note of a third person, but the creditor refused to receive such note, and the debtor kept it until it was destroyed by fire, treating it as the property of the creditor, although having made a qualified sale of it, the creditor could at any time accept the note in payment of the goods. Des Arts *v.* Leggett, 16 N. Y. 582.

Money of debtor in hands of creditor.— If money belonging to the debtor is in the hands of the creditor or his representative for the purpose of being applied to the debt, there is no payment unless the money is appropriated by the creditor or his representative as a payment. Hatch *v.* Hutchinson, 64 Ark. 119, 40 S. W. 578; Phillips *v.* Mayer, 7 Cal.

II. GENERAL CONSIDERATIONS.

A. What Law Governs. The mode and amount of payment is governed by the laws of the state or country in which the payment, by the terms of the contract, is to be made.[9] But where no place for payment is mentioned in the contract, the place where the contract is made governs the medium of payment.[10]

B. Who May Make.[11] Payment may be made by the primary debtor or by any other person from whom the creditor has the right to demand it.[12] Thus a debt may be discharged by a payment made by the debtor's authorized agent or attorney,[13] and any one of several joint obligors may pay the debt for which they are jointly liable.[14] A stranger, however, who is under no obligation to pay the debt of another cannot, according to the weight of authority, without the debtor's request or ratification, pay such debt and charge the debtor therewith;[15] but in

81 (holding that the failure of a creditor's agent, who had been employed by the debtor to make collections to discharge the debt, before a distinct act of appropriation, cast the loss upon the debtor); Randall *v.* Pettes, 12 Fla. 517 (deposit in creditor bank by debtor of proceeds of sale to be applied to notes held by the creditor, where creditor not directed to make application of the deposit on the notes); Bronson *v.* Rugg, 39 Vt. 241; Boardman *v.* Blizzard, 36 Fed. 26 (holding that where the agent of the creditor, with power to collect the interest and principal of a mortgage debt against the debtor, procured a loan at the instance of the debtor to be used in paying the mortgage, but himself embezzled the money, its receipt by the agent was not a payment, especially where the debtor did not know when the agent received the money and never expressly directed him to apply it to the mortgage). But see Grandy *v.* Abbott, 92 N. C. 33, holding that if the debtor places claims due him in the hands of his creditor, agreeing that collections shall go to the discharge of the debt, money colected is deemed applied *eo instanti*. A direction by the debtor to one who is the agent both of the debtor and of the creditor, to apply money in the agent's hands to the payment of the debt, does not of itself constitute an application of the money. Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809, 38 Am. St. Rep. 526, 18 L. R. A. 359. But see O'Conner *v.* Bernard, 6 Mart. N. S. (La.) 572.

Payment, like a sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this the transaction is regarded either as furnishing matter of set-off or as security collateral to the original debt, according as the subject received is in possession or in action. Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32; Covely *v.* Fox, 11 Pa. St. 171.

The mere intimation of the creditor of a willingness to receive it, without actual reception of it, is not a payment. Thompson *v.* Kellogg, 23 Mo. 281.

The delivery of money which the debtor has stolen from the creditor, although accepted by the creditor in discharge of the debt, where he had no knowledge of the theft, does not constitute a payment. State Bank *v.* Welles, 3 Pick. (Mass.) 394.

9. The Quintero, 20 Fed. Cas. No. 11,517, 1 Lowell 38; York *v.* Wistar, 30 Fed. Cas. No. 18,141; Crawford *v.* Beard, 14 U. C. C. P. 87. See also Meroney *v.* Atlanta Nat. Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420.

Whether the acceptance of a bill or note operates as a payment and extinguishment of the original debt is governed by the laws of the place where the transaction occurred. Descadillas *v.* Harris, 8 Me. 298; Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536; Gilman *v.* Stevens, 63 N. H. 342, 1 Atl. 202; Pecker *v.* Kennison, 46 N. H. 488; Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420; The Chusan, 4 Fed. Cas. No. 2,717, 2 Story 455.

What law governs contracts in general see CONTRACTS, 9 Cyc. 664–684.

What law governs payment or discharge of note see COMMERCIAL PAPER, 7 Cyc. 1015.

10. Niagara Falls International Bridge Co. *v.* Great Western R. Co., 22 U. C. Q. B. 592.

11. **Particular instruments.** — Bills and notes see COMMERCIAL PAPER, 7 Cyc. 1018–1027. Mortgages see CHATTEL MORTGAGES, 7 Cyc. 72; MORTGAGES, 27 Cyc. 1386.

12. 2 Bouvier L. Dict. 394.

13. See ATTORNEY AND CLIENT, 4 Cyc. 944; PRINCIPAL AND AGENT.

Payment by attorney. — Where one assuming to be attorney of a debtor makes payment to the creditor of money in fact furnished by the debtor's wife, the creditor has a right to treat it as money of the debtor. Specialty Glass Co. *v.* Daley, 172 Mass. 460, 52 N. E. 633.

14. Beaumont *v.* Greathead, 2 C. B. 494, 3 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494.

15. See MONEY PAID, 27 Cyc. 833 *et seq.*; SUBROGATION.

some cases the creditor must receive a payment tendered by a third person,[16] and where the creditor accepts payment from a stranger to the contract, such payment operates as an extinguishment of the debt so far as the creditor is concerned.[17]

C. To Whom Payment May Be Made — 1. In General.[18] Payment of a debt to a third person not authorized to receive it is not a defense to an action for the debt;[19] but it is otherwise where the third person is expressly or impliedly authorized by the creditor to receive payment,[20] as where the payment is made to the third person by the request[21] or with the consent[22] of the creditor, or where the original agreement is to pay the third person.[23] Payment to one of the joint

16. Yeager *v.* Groves, 78 Ky. 278 (holding that one holding a lien on land sold to another must accept a tender of the money due him from the purchaser of the vendee); State *v.* Pilsbury, 29 La. Ann. 787 (holding that any third person who demands no subrogation may tender to a creditor, either in his own name or that of his debtor, the debt due and compel the creditor to accept the payment).

17. Leavitt *v.* Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; Gray *v.* Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691.

Effect of payment so far as debtor is concerned.— If the debtor ratifies the payment by a third person, made without the request of the debtor, the debt is discharged and he becomes liable to the third person for money paid to his use. If he refuses to ratify it, he disclaims the payment and the debt stands unpaid as to him (the debtor). In the one case the stranger would, at law, sue the debtor for money paid to his use; in the other, enforce the debt in the creditor's name for his use. If his payment is not ratified he may go into equity, praying that if the debtor ratify it he may be decreed to repay him, or if he does not ratify the payment, that the debt be treated as unpaid as between him and the debtor, and that it be enforced in his favor, as an equitable assignee. Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

18. **Particular persons.**— Agent see Principal and Agent. Assignor see Assignments, 4 Cyc. 89. Attorney see Attorney and Client, 4 Cyc. 947. Broker or factor see Factors and Brokers, 19 Cyc. 298. Clerk of court see Clerks of Courts, 7 Cyc. 224. Guardian *ad litem* see Infants, 22 Cyc. 704. Officer of corporation see Corporations, 10 Cyc. 903 *et seq.* Officer of municipal corporation see Municipal Corporations. Partner see Partnership. Trustee see Trusts.

Particular instruments.— Bills, checks, and notes see Banks and Banking, 5 Cyc. 530; Commercial Paper, 7 Cyc. 1028–1036. Judgment see Judgments, 23 Cyc. 1463, 1464; Infants, 22 Cyc. 704. Mortgage see Mortgages, 27 Cyc. 1387.

Taxes and assessments see Municipal Corporations; Taxation.

By garnishee see Garnishment, 20 Cyc. 985, 986.

19. *Illinois.*— People *v.* Deams, 92 Ill. 192; People *v.* Smith, 43 Ill. 219, 92 Am. Dec. 109.

Louisiana.— Landreau *v.* Rochelle, 1 Mart. N. S. 497.

Nebraska.— Hammond *v.* Edwards, 56 Nebr. 631, 77 N. W. 75.

Nevada.— Frey *v.* Thompson, 20 Nev. 253, 20 Pac. 305.

New York.— Hayne *v.* Van Epps, 114 N. Y. App. Div. 278, 99 N. Y. Suppl. 772; Machauer *v.* Fogel, 20 Misc. 666, 46 N. Y. Suppl. 686; Bonck *v.* Wolston, 22 N. Y. Suppl. 439; Armstrong *v.* Munday, 5 Den. 166.

North Carolina.— Strayhorn *v.* Webb, 47 N. C. 199, 64 Am. Dec. 580.

Ohio.— Dunphy *v.* Gillian Mfg. Co., 21 Ohio Cir. Ct. 696, 11 Ohio Cir. Dec. 822.

Pennsylvania.— Crane *v.* Fourth St. Nat. Bank, 4 Pa. Dist. 131.

United States.— Mutual Ben. L. Ins. Co. *v.* Miles, 81 Fed. 32.

England.— Lawrence *v.* Blake, 8 Cl. & F. 504, 8 Eng. Reprint 198.

Canada.— Hunter *v.* Wallace, 14 U. C. Q. B. 205.

See 39 Cent. Dig. tit. "Payment," § 7.

If a debtor hands money to a third person, to be handed to the creditor, the right to the money does not vest in the creditor so as to make it his property until he is notified of the transaction and agrees to adopt the act of the third person in receiving the money as his own act whereby the debt is extinguished. Strayhorn *v.* Webb, 47 N. C. 199, 64 Am. Dec. 580.

20. Smith *v.* Atlas Steam Cordage Co., 41 La. Ann. 1, 5 So. 413. See also Principal and Agent.

Payment of mortgage to an agent or attorney see Mortgages, 27 Cyc. 1388.

21. Hurst *v.* Whitly, 47 Ga. 366; Berrel *v.* Davis, 44 Mo. 407.

22. Baughan *v.* Brown, 122 Ind. 115, 23 N. E. 695.

Revocation of consent.— The bringing of an action upon an open account by the owner thereof against the person liable thereon revokes an oral consent previously given by the former that the latter might pay the amount due upon such account to another. Churchman *v.* Robinson, 99 Ga. 786, 27 S. E. 164.

Presumptions.— Authority to pay the purchase-price of property when it fell due to one holding a lien thereon may be presumed from the circumstances of the case. Crowell *v.* Simpson, 52 N. C. 285.

23. Sailer *v.* Barnousky, 60 Wis. 169, 18 N. W. 763.

obligees to a contract is sufficient,[24] but payment to a third person has been held insufficient without authority from both of the joint obligees.[25] So payment to one of two trustees, of a debt owing to the estate, is sufficient.[26] Payment to the person with whom or in whose name the contract was made is ordinarily sufficient,[27] as is payment to an assignee of the creditor,[28] or to an assignee of the claim,[29] or to the personal representatives of an infant.[30] But payment to an administrator is insufficient where an order of court required payment to the heirs.[31] Where a receipt is conditioned that the cost incurred in the collection of the debt shall be paid, the condition is complied with where paid to the officer serving the writ.[32] Payment to the holder of an overdue, numbered coupon after notice that it had been stolen, where made without inquiry, is insufficient.[33]

2. Person to Whom Creditor Is Indebted. Except where authorized by statute,[34] a payment by a debtor of a debt which his creditor owes is not a payment to the creditor unless made with his consent,[35] or pursuant to an agreement between all the parties,[36] or unless the creditor has ratified the payment.[37]

3. Deposit in Bank or With Third Person. Merely depositing money due a creditor in a bank or with a third person for the creditor does not ordinarily constitute a payment before the creditor receives notice of the deposit,[38] nor where the one with whom it is deposited otherwise appropriates it as he has a right to do,[39] nor where there is no agreement pursuant to which the deposit is made and the creditor takes no steps to appropriate it.[40] A deposit in a bank to the account of the creditor is not a payment unless the creditor consents to the deposit[41] as a payment.[42]

D. Time.[43] While as a strict rule of law payment must be made at the exact

24. Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 1871; Harding *v.* Parshall, 56 Ill. 219; Morrow *v.* Stark, 4 J. J. Marsh. (Ky.) 367; Moore *v.* Bevier, 60 Minn. 240, 62 N. W. 281; Henry *v.* Mt. Pleasant Tp., 70 Mo. 500. See also Ely *v.* Bush, 89 N. C. 358.

Payment to joint mortgagee see Mortgages, 27 Cyc. 1389.

25. More *v.* Bevier, 60 Minn. 240, 62 N. W. 281.

26. Bowes *v.* Seeger, 8 Watts & S. (Pa.) 222.

27. Rowland *v.* Doolin, 10 Ky. L. Rep. 684; Carlisle *v.* Niagara Dock Co., 5 U. C. Q. B. O. S. 660.

Payment of a subscription made directly to the party beneficially interested is a good defense to an action to recover the subscription brought by the agent or collector named in it to receive payment. Erwin *v.* Lapham, 27 Mich. 311.

28. Kelley *v.* Cowing, 4 Hill (N. Y.) 266, holding that payment to the assignee is a good defense, although the payer knew that the assignee was enjoined not to pay or receive money.

29. Vanarsdall *v.* State, 65 Ind. 176. See, generally, Assignments, 4 Cyc. 88.

30. Ryan *v.* Kohn, 28 La. Ann. 100.

31. Hise *v.* Geiger, 7 Watts & S. (Pa.) 273.

32. Lee *v.* Oppenheimer, 34 Me. 181.

33. Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297.

34. Isbell *v.* Dunlap, 17 S. C. 581.

35. Bedford Belt R. Co. *v.* Burke, 13 Ind. App. 35, 41 N. E. 70; Harrison *v.* Moran, 163 Mass. 495, 40 N. E. 850. See also Franklin *v.* McGuire, 10 Ala. 557.

36. Hill *v.* Austin, 19 Ark. 230; Leavitt *v.* Beers, Lalor (N. Y.) 221; Story *v.* Menzies, 3 Pinn. (Wis.) 329, 4 Chandl. 61. And see Merchants', etc., Bank *v.* Coleman, 81 Ala. 170, 1 So. 123.

By agreement payment may be made by taking up the creditor's note to a third person and substituting the debtor's own note with the creditor as surety. Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

37. Dodge *v.* Swazey, 35 Me. 535.

38. Holland *v.* Tyus, 56 Ga. 56.

Statutory provisions.— In California the deposit of the amount of the debt in a bank in the name of the creditor, together with notice of deposit to the creditor, constitutes payment, by Civil Code, § 1500, but the mere deposit does not of itself constitute such payment. Trinity County Bank *v.* Haas, 151 Cal. 553, 91 Pac. 385; Owen *v.* Herzihoff, 2 Cal. App. 622, 84 Pac. 274.

39. Gordon *v.* Gordon, 98 Ind. 67.

40. Aguilar *v.* Bourgeois, 12 La. Ann. 122; Cavanaugh *v.* Buehler, 120 Pa. St. 441, 14 Atl. 391; Commercial Bank *v.* Wilson, [1893] A. C. 181, 62 L. J. P. C. 61, 68 L. T. Rep. N. S. 540, 1 Reports 331, 41 Wkly. Rep. 603.

41. Hill *v.* Arnold, 116 Ga. 45, 42 S. E. 475; Clemons *v.* Livingston County Mut. F. Ins. Co., 12 N. Y. Suppl. 433; Heyward *v.* Walker, 6 S. C. 449; Moore *v.* Tate, 22 Gratt. (Va.) 351. See also Wedlake *v.* Hurley, 1 Cromp. & J. 83; Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315; Grant *v.* Austen, 3 Price 58, 17 Rev. Rep. 540. But see Deadwood First Nat. Bank *v.* Crook County School Dist. No. 1, 6 Wyo. 485, 46 Pac. 1090.

42. Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132.

43. **Conditional promises** generally see Contracts, 9 Cyc. 615.

time agreed upon,[44] yet mere default in the payment of money at a stipulated time generally admits of compensation, and hence the time of payment is seldom treated as of the essence of the contract,[45] although it may be.[46] Where no time is fixed for payment the debt is payable immediately or upon demand.[47] If a promissory note is given, the debt is not due until the maturity of the note.[48] Where the debt is payable upon a day specified, if demanded, the debtor has a reasonable time to pay after demand.[49] Where it is agreed that payment may be made by depositing the amount of the debt in a bank, a deposit before the debt is due is sufficient.[50] If the debtor has been led to suppose by the creditor that a certain medium would be received as payment, he is entitled to time to convert such money after rejection into the kind of coin called for by the contract.[51]

E. Place — 1. In General.[52] The payment must be made at the place agreed upon unless both parties consent to a change of the place.[53] In the absence of any agreement upon the subject, a debt is payable where the creditor resides,[54] or wherever he may be found;[55] and ordinarily the debtor, in such case, is bound to seek the creditor to make payment to him,[56] provided the creditor is

Construction of agreements as to time generally see CONTRACTS, 9 Cyc. 608 *et seq.*

Particular instruments or obligations.— Agent's commissions see PRINCIPAL AND AGENT. Bills and notes see COMMERCIAL PAPER, 7 Cyc. 1038. Compensation of guardian see GUARDIAN AND WARD, 21 Cyc. 175. Compensation to city agent or employee see MUNICIPAL CORPORATIONS. Dues and assessments in mutual benefit insurance see MUTUAL BENEFIT INSURANCE. Mortgage debt see MORTGAGES, 27 Cyc. 1389. Municipal bonds and taxes see MUNICIPAL CORPORATIONS. Taxes see TAXATION. Wages see MASTER AND SERVANT.

Effect of alteration of instrument as to time of payment see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 198.

Extension of time.— Authority of attorney to extend see ATTORNEY AND CLIENT, 4 Cyc. 945. Consideration for contract see CONTRACTS, 9 Cyc. 338. Releasing guarantor see GUARANTY, 20 Cyc. 1472. Waiver of forfeiture of lease see LANDLORD AND TENANT, 24 Cyc. 1360. Waiver of maritime lien see MARITIME LIENS, 26 Cyc. 792. Waiver of mechanic's lien see MECHANICS' LIENS, 27 Cyc. 265. Waiver of right to forfeit insurance policy see FIRE INSURANCE, 19 Cyc. 798; LIFE INSURANCE, 25 Cyc. 869.

Statutory provisions as to time for payment of wages see MASTER AND SERVANT, 26 Cyc. 1027.

Validity of payment on Sunday see SUNDAY.

44. Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219.

A debtor cannot anticipate payment of a debt payable at a future day and bearing interest without the consent of the creditor. Graeme *v.* Adams, 23 Gratt. (Va.) 225, 14 Am. Rep. 130.

45. Whittington *v.* Roberts, 4 T. B. Mon. (Ky.) 173; Thomas *v.* Elkins, 4 Mart. (La.) 376; Selden *v.* Camp, 95 Va. 527, 28 S. E. 877; Booten *v.* Scheffer, 21 Gratt. (Va.) 474. See Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219.

46. Booten *v.* Scheffer, 21 Gratt. (Va.) 474, holding that where payments on a contract are to be made in a rapidly depreciating currency, such fact makes time of the essence of the contract; and delay in making or tendering such payment, where injustice results, will bar a specific performance. See, generally, CONTRACTS, 9 Cyc. 604 *et seq.*

47. *California.*— Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387.

New York.— Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116.

Pennsylvania.— Demarest *v.* McKee, 2 Grant 248.

United States.— Columbia Bank *v.* Hagner, 1 Pet. 455, 7 L. ed. 219.

England.— Lockwood *v.* Tunbridge Wells Local Bd., Cah. & E. 289.

See 39 Cent. Dig. tit. "Payment," § 11. See also, generally, CONTRACTS, 9 Cyc. 611.

48. See ACTIONS, 1 Cyc. 743.

49. Dunbar *v.* Stickler, 45 Iowa 384.

What is reasonable time generally see CONTRACTS, 9 Cyc. 613.

50. Virginia Exch. Bank *v.* Cookman, 1 W. Va. 69.

51. Moore *v.* Morris, 20 Ill. 255.

52. Alteration of instrument as to place of payment see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 199.

Of mortgage see MORTGAGES, 27 Cyc. 1389.

Of municipal bond see MUNICIPAL CORPORATIONS, 28 Cyc. 1643.

Of note see COMMERCIAL PAPER, 7 Cyc. 605.

Place for making tender see TENDER.

53. Brownwood *v.* Noel, (Tex. Civ. App. 1898) 43 S. W. 890; Thorn *v.* City Rice Mills, 40 Ch. D. 357, 58 L. J. Ch. 297, 60 L. T. Rep. N. S. 359, 37 Wkly. Rep. 398; Crawford *v.* Beard, 14 U. C. C. P. 87.

54. Esmay *v.* Gorton, 18 Ill. 483 (domicile or place of business if the creditor has one); Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118; Stoker *v.* Cogswell, 25 How. Pr. (N. Y.) 267; Stewart *v.* Ellice, 2 Paige (N. Y.) 604.

55. Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118.

56. *Illinois.*— Esmay *v.* Gorton, 18 Ill. 483.

Kentucky.— Bain *v.* Wilson, 1 J. J. Marsh. 202; Sanders *v.* Norton, 4 T. B. Mon. 464.

within the state when the payment is due.[57] But it has been held that, where payment is to be made in specific articles rather than money and no place is fixed, the usual residence of the debtor is the place for performance.[58] Where the debt is payable at one certain place or another, payment must be wholly made in one place or the other, and cannot be discharged by the payment of a part at each place.[59] A refusal to receive payment offered at a place other than the stipulated place of payment, except upon certain conditions, is an implied waiver of the right to have the payment made in the place agreed upon.[60]

(2) REMITTANCE BY MAIL. A remittance by mail may constitute payment if expressly or impliedly authorized by the creditor or such payment is according to the usual course of dealing between the parties,[61] or if the usage and dealings with the creditor give reasonable grounds to believe that the creditor expected the remittance to be made by mail,[62] although the creditor never receives it; but authority to remit by mail under specified precautionary observances does not protect a remittance by mail when such precautions are not observed,[63] and a mere general direction by a creditor to his debtor to remit money to him does not authorize a remittance by mail at the risk of the creditor,[64] unless that is the usual course of business and known by the creditor to be so.[65] A direction as to a single remittance does not apply to future remittances.[66]

F. Part Payment.[67] A creditor is not obliged, in the absence of any agree-

New York.— Hale *v.* Patton, 60 N. Y. 233, 19 Am. Rep. 168; Judd *v.* Ensign, 6 Barb. 258; Grussy *v.* Schneider, 50 How. Pr. 134 [*affirmed* in 55 How. Pr. 188]; Stoker *v.* Cogswell, 25 How. Pr. 267.

Virginia.— Dandridge *v.* Harris, 1 Wash. 326, 1 Am. Dec. 465.

West Virginia.— Galloway *v.* Standard F. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

See 39 Cent. Dig. tit. "Payment," § 10.

Compare also Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144, holding that where a debt has no special provision in regard to payment it is payable at any place.

57. Hale *v.* Patton, 60 N. Y. 233, 19 Am. Rep. 168; Galloway *v.* Standard F. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

58. Galloway *v.* Smith, Litt. Sel. Cas. (Ky.) 132; Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Grant *v.* Groshon, Hard. (Ky.) 85, 3 Am. Dec. 725. But see Hughes *v.* Prewitt, 5 Tex. 264.

59. Parson *v.* Brodley, 1 Ohio Dec. (Reprint) 128, 2 West. L. J. 401.

60. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90, holding creditor should signify purpose to demand exact fulfilment of contract.

61. Burr *v.* Sickles, 17 Ark. 428, 65 Am. Dec. 437; Morgan *v.* Richardson, 13 Allen (Mass.) 410; Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Hawkins *v.* Rutt, 1 Peake N. P. 186; Warwicke *v.* Noakes, 1 Peake N. P. 67, 3 Rev. Rep. 653. See also Widders *v.* Gorton, 1 C. B. N. S. 576, 26 L. J. C. P. 165, 87 E. C. L. 576; Hadwen *v.* Mendisabal, 2 C. & P. 20, 3 L. J. C. P. O. S. 198, 10 Moore C. P. 477, 12 E. C. L. 427. But see Pennington *v.* Crossley, 77 L. T. Rep. N. S. 43, holding that the fact that the debtor had for many years sent checks by post in payment of goods purchased was insufficient to show a request by the creditor to the debtor for payment by means of a check sent through the post so as to make the loss of a check during transmission by post fall upon him.

Previous payment by mail.— The fact that in a previous instance a remittance was made by mail and not objected to is not sufficient to prove authority to remit by mail. Burr *v.* Sickles, 17 Ark. 428, 65 Am. Dec. 437.

When insufficient.— Where currency is sent in an unregistered letter before the maturity of the debt and before a demand for payment, where the creditor did not receive the money and the debtor was not authorized to remit at such time or in such manner, there was no payment. Gaar *v.* Taylor, 128 Iowa 636, 105 N. W. 125.

62. Selman *v.* Dun, 21 Fed. Cas. No. 12,648.

63. Williams *v.* Carpenter, 36 Ala. 9, 76 Am. Dec. 316.

64. Burr *v.* Sickles, 17 Ark. 428, 65 Am. Dec. 437; Gross *v.* Criss, 3 Gratt. (Va.) 262. *Contra*, Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58 (holding that an order by mail to an agent to forward "a sum of money when collected" warrants him in believing that he is authorized to transmit it in the same manner); Townsend *v.* Henry, 9 Rich. (S. C.) 318.

65. Morton *v.* Morris, 31 Ga. 378.

66. Dodge *v.* Smith, 34 Vt. 178.

67. See, generally, ACCORD AND SATISFACTION, 1 Cyc. 319–334; COMPOSITIONS WITH CREDITORS, 8 Cyc. 409; COMPROMISE AND SETTLEMENT, 8 Cyc. 499.

As affecting appellate jurisdiction see APPEAL AND ERROR, 2 Cyc. 276.

As rebutting presumption of payment from lapse of time see *infra*, VII, D, 4, e, (II), (B).

As reviving debt discharged in bankruptcy see BANKRUPTCY, 5 Cyc. 410 note 93.

As taking case out of: Statute of frauds

ment therefor, to accept partial payments.[68] But a right reserved to pay all or any part of the debt in certain funds during the current year does not restrict the privilege of payment to a single occasion.[69] A part payment operates as such, although returned after acceptance.[70] A creditor cannot deny that he received a mortgage in part payment where he has exercised acts of ownership over it.[71]

G. Conditional Payment. If a payment is made upon any condition, such condition must be accepted before it operates to discharge the debt.[72] So if the condition upon which a receipt is given is not fulfilled the transaction does not operate as a payment.[73] And a payment upon condition is no defense to an action to recover the debt where the condition has not been fulfilled.[74] If money is advanced to the debtor by a third person to pay the debt, on the debtor's note on which the creditor is a surety, the payment is a conditional one, so that if the creditor is compelled to pay the note the debt is not discharged.[75]

H. Estoppel to Assert Illegality of Payment. The creditor may be estopped by his acts to assert the illegality of a payment in order to enforce a second payment.[76]

I. Fund From Which Payment to Be Made. The intention of the parties governs the question as to the fund out of which the payment is to be made where there are several funds applicable thereto.[77] Where payment is to be made by representatives of the debtor, at the direction of the debtor, out of funds in their hands, it will be considered as paid out of a fund over which the debtor had control rather than from a fund as to which he had relinquished all control to such representatives.[78]

J. Date as of Which Credit to Be Given. Where a payment is shown to have been made in a certain year, but the day and month cannot be shown, credit will be directed to be given as of the last day of the year.[79] And where, although a partial payment was refused, the creditor consented to receive the sum offered to be applied in payment when the residue should be paid, and, on receiving such sum, applied it to his own use, the debtor was entitled to have the money so received applied as a payment as of the time it was received and used by the creditor.[80]

III. FORM AND MEDIUM.

A. Payment Other Than in Money — 1. In General — a. Agreement or Consent.[81] Payment can be made other than in money if the contract so provides or the creditor consents thereto or acquiesces therein, but not otherwise.[82] For

see FRAUDS, STATUTE OF, 20 Cyc. 252. Statute of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 1368 *et seq.*

Effect in general see *infra*, IV, B.

68. Wilkinson *v.* Sterne, 9 Mod. 299.

69. Stalworth *v.* Blum, 41 Ala. 319.

70. Rhodes *v.* Hinckley, 6 Cal. 283.

71. Bulen *v.* Burroughs, 53 Mich. 464, 19 N. W. 147.

72. Thomas *v.* Cross, 7 Exch. 728, 21 L. J. Exch. 251.

A conditional part payment by a stranger must be returned or accepted upon the terms offered. Grinnan *v.* Platt, 31 Barb. (N. Y.) 328.

73. Perkins *v.* Hodge, 38 Iowa 284. See also Torry *v.* Hadley, 27 Barb. (N. Y.) 192.

74. Coburn *v.* Hough, 32 Ill. 344; Waite *v.* Vose, 62 Me. 184. See also Torry *v.* Hadley, 27 Barb. (N. Y.) 192.

75. Johnson *v.* Amarillo Imp. Co., 88 Tex. 505, 31 S. W. 503.

76. Rogers *v.* Gibbs, 25 La. Ann. 563.

77. See Voak *v.* National Inv. Co., 51 Minn. 450, 53 N. W. 708.

78. Low *v.* Mussey, 36 Vt. 183.

79. Byers *v.* Fowler, 14 Ark. 86.

80. Toll *v.* Hiller, 11 Paige (N. Y.) 228.

81. See also *supra*, I.

82. *California.*— Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

Delaware.— Hart *v.* Hudson, 2 Marv. 283, 43 Atl. 172, holding that payment in intoxicating liquors may be made on an express agreement that the claim in question was to be so paid.

Indiana.— Farmers L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

Massachusetts.— Hayes *v.* Allen, 160 Mass. 286, 35 N. E. 852, 39 Am. St. Rep. 474.

Michigan.— State Bank *v.* Byrne, 97 Mich. 178, 56 N. W. 355, 37 Am. St. Rep. 332, 21 L. R. A. 753.

Oregon.— Bush *v.* Abrahams, 25 Oreg. 336, 35 Pac. 1066.

instance, it is uniformly held that by the agreement or the consent of the creditor, the following may *inter alia* constitute a payment: Transfer of land or buildings;[83] delivery of goods or other specific articles;[84] rendition of serv-

South Carolina.—Commercial Bank *v.* Boho, 9 Rich. 31.

Texas.— Swearingen *v.* Buckley, 1 Tex. Unrep. Cas. 421, time checks.

Canada.— Little *v.* Caie, 16 N. Brunsw. 386.

See 39 Cent. Dig. tit. "Payment," § 17 *et seq.*

Presumptions.— In the absence of proof to the contrary it will be presumed that a debt is to be paid in money. Fell *v.* H. Fell Poultry Co., 69 N. J. Eq. 429, 55 Atl. 236. Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

Assignment of claim against third person.— Stone *v.* Miller, 16 Pa. St. 450; Hayden *v.* Johnson, 26 Vt. 768.

Investment by debtor for creditor.— Vason *v.* Beall, 58 Ga. 500; Crockett *v.* Sexton, 29 Gratt. (Va.) 46.

Where a mortgage which has in fact been paid is assigned to the creditor as absolute payment, the creditor may nevertheless sue upon the original indebtedness. Hamilton *v.* Neel, 7 Watts (Pa.) 517.

83. Fogarty *v.* McArdle, (Ala. 1892) 11 So. 19; Merchants', etc., Bank *v.* Coleman, 81 Ala. 170, 1 So. 123; Hebard *v.* Reeves, 112 Mich. 175, 70 N. W. 418; Oliver's Case, 1 Ashm. (Pa.) 112. See also Gulfport Land, etc., Co. *v.* Ansley, 87 Miss. 648, 40 So. 66; Arnold *v.* Crane, 8 Johns. (N. Y.) 79, fraud of debtor as preventing transfer from constituting a payment.

Acceptance.— An agreement that defendant would sell and plaintiff would buy certain property, and that a promissory note theretofore given by defendant to plaintiff should be received in part payment of the purchase-price, does not, although such property is tendered to plaintiff, constitute a payment of such note, and therefore is no defense to an action thereon. Hayes *v.* Allen, 160 Mass. 286, 35 N. E. 852, 39 Am. St. Rep. 474.

A failure of title cannot be set up to avoid the payment, the remedy of the vendee being upon the covenants in the deed. Van Riswick *v.* Wallach, 3 MacArthur (D. C.) 388; Hays *v.* Smith, 4 Ill. 427; Miller *v.* Young, 17 Fed. Cas. No. 9,596, 2 Cranch C. C. 53. But where a deed is accepted in ignorance of the fact that it is a nullity because there is no such property in existence such as it assumes to convey, there is no payment. Anderson *v.* Armstead, 69 Ill. 452.

Value determined by creditor.— A contract for the sale of land was made by debtors with their creditors, which recited that the creditors were within a reasonable time to ascertain the value of the land, by personal inspection or otherwise, and, after the actual cash value had been so ascertained, to apply the value of the land as payment of the debt. It was held that in the absence of fraud the debtors were bound by the value as fixed by the creditors, and in an action against them inquiry need not be made as to what the actual cash value of the land was. Harvey *v.* Van Paten, 87 Iowa 159, 54 N. W. 77.

84. *Florida.*— Edgerton *v.* West, 43 Fla. 133, 30 So. 797.

Louisiana.— Allen *v.* Buisson, 35 La. Ann. 108.

Maine.— Kneeland *v.* Fuller, 51 Me. 518.

Michigan.—Bassett *v.* Shepardson, 52 Mich. 3, 17 N. W. 217; Strong *v.* Kennedy, 40 Mich. 327.

New York.— Palmer *v.* Palmer, 3 Thomps. & C. 440.

North Carolina.— Williams *v.* Whiting, 92 N. C. 683.

Pennsylvania.— Perit *v.* Pittfield, 5 Rawle 166, holding that where merchandise is placed by the debtor in his creditor's hands, it is not to be considered as payment in full, unless that appears to be the intention of the parties.

Texas.— Tinsley *v.* Ryon, 9 Tex. 405.

Vermont.— Strong *v.* McConnell, 10 Vt. 231.

Wisconsin.— See Buckland *v.* Wilson, 28 Wis. 581.

England.— See Pattison *v.* Belford Union, 1 H. & N. 523, 3 Jur. N. S. 116, 26 L. J. Exch. 115, 5 Wkly. Rep. 121; Gurnell *v.* Gardner, 4 Giffard 626, 9 Jur. N. S. 1220, 9 L. T. Rep. N. S. 367, 12 Wkly. Rep. 67, 66 Eng. Reprint 857.

See 39 Cent. Dig. tit. "Payment," § 34.

The goods must be actually received as payment (Locke *v.* Andres, 29 N. C. 159; Oliver's Case, 1 Ashm. (Pa.) 112; Downer *v.* Sinclair, 15 Vt. 495. And see Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042), or, by subsequent agreement, be applied as payment (Locke *v.* Andres, *supra*).

Right to elect.— Where the debt is payable either in money or property at the election of the debtor, he may compel the creditor to accept property instead of money. Nipp *v.* Diskey, 81 Ind. 214, 42 Am. Rep. 124.

Quality of goods delivered.— Where a creditor agrees to take a certain quality of oil in payment of the debt, and a different kind is delivered and refused, it is not a payment. Maute *v.* Gross, 56 Pa. St. 250, 94 Am. Dec. 62.

Value of goods.— All payments made in the produce of the soil of the country should be credited at the current value thereof at the day of delivery. Hall *v.* Williams, 2 Bay (S. C.) 433. A debtor is entitled to credit for goods accepted by the creditor in payment, at its actual value, in the absence of an agreement as to their value. Hindman *v.* Edgar, 24 Oreg. 581, 17 Pac. 862.

ices;[85] the debtor's acceptance of an order drawn by the creditor upon the debtor in favor of a third person;[86] the assignment of a claim against a third person;[87]

Where contract so provides.— Buxton *v.* Debrecht, 95 Mo. App. 599, 69 S. W. 616; Howe *v.* Carpenter, 53 Barb. (N. Y.) 382, holding that goods cannot be appropriated before the debt is due. A promise to pay a certain sum in the wares of a particular trade must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use; and not such as are antiquated and unsalable. Dennett *v.* Short, 7 Me. 150, 20 Am. Dec. 356. Where defendant sold plaintiff shares of the stock of a certain company, for which he was to be paid in goods, fraudulently representing the company to be solvent, and plaintiffs executed their notes or agreements to deliver the goods at a future period, and afterward delivered them, on discovering the insolvency of the company, plaintiffs were entitled to recover for the goods, as the fraud vitiated the contract as to the payment. Pierce *v.* Drake, 15 Johns. (N. Y.) 475. Where A sells land to B, to receive payment in cash and certificates of discharge in the army, estimated at a certain value, which certificates are assigned to A, and the certificates are of no value, he may treat them as no payment, and sue for the original consideration, *quo ad hoc* those certificates. Taft *v.* Wildman, 15 Ohio 123. Where a party to a barter is bound to future payment of goods, payment is not completed until the goods tendered are expressly or impliedly accepted by the obligee. Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137. But where the drawer of notes payable in grain, to be delivered at his mill at a fixed price at their maturity, set apart a sufficient quantity to meet the demand, it was held that the property in the grain was changed and the notes paid. Zinn *v.* Rowley, 4 Pa. St. 169. Where rent is payable in corn, its value is to be estimated at the market price of the corn at the time and place of payment. Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572. Where, after a note payable in cotton became due, the maker delivered some of the cotton, the credit to be given should be based on the quantity, without regard to the fact that the price of cotton had risen since the time when it should have been delivered under the contract. Clark *v.* Minor, 73 Ga. 590.

Retaking on execution against debtor.— Where the goods, after delivery to the creditor, are seized on execution against the debtor, and it is decided that the property is subject to execution against him, and thereafter the debtor pays off the execution and obtains the goods, but does not redeliver them to the creditor, such facts do not show a payment. Sherwood *v.* Elslow, 5 Ind. 218.

Merchantable condition.—Where goods were to be received in payment if delivered in merchantable order, to be sold by the creditor, and the surplus refunded to the debtor, acceptance by the creditor of the goods, although not in good merchantable condition, operated as a discharge of the debt *pro tanto*. Winchester, etc., Mfg. Co. *v.* Funge, 109 U. S. 651, 3 S. Ct. 436, 27 L. ed. 1064.

Proceeds of goods.— Where the parties agreed that the creditor should send flour belonging to the debtor to be sold, and the proceeds should be applied on the debt, and the person who sold the flour failed before remitting the proceeds to the creditor, there was no payment and the loss fell on the debtor. Harpers *v.* Patton, 1 Leigh (Va.) 306.

Dation en paiement.— Payment other than in money is termed in Louisiana *dation en paiement*. There must be a delivery (Queyrouze *v.* Thibodeaux, 30 La. Ann. 1114; Wilson *v.* Smith, 12 La. 375; Durnford *v.* Brook, 3 Mart. (La.) 222, 269) and a fixed price (Barremore *v.* Bradford, 10 La. 149); but it need not be by authentic act (McNeely *v.* McNeely, 1 Mart. N. S. (La.) 646; McGuire *v.* Amelung, 12 Mart. (La.) 649).

Value of goods.— In determining whether a transfer of certain property was in payment or merely as security, the amount and value of the property is a material consideration. Burlington Nat. State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999.

Estoppel.— But a debtor cannot claim payment was made in personal property other than money where he thereafter sold and delivered the property to another person. Blake *v.* Morrisson, 33 Miss. 123.

85. Ross *v.* Crane, 74 Iowa 375, 37 N. W. 959; Moore *v.* Stadden, Wright (Ohio) 88; Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321; McIntyre *v.* Corss, 18 Vt. 451; Allen *v.* Wall, 7 Wash. 316, 35 Pac. 65. See also Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 210.

But an agreement between the debtor and the creditor and a third person that the latter will pay the debt in services at a future day is executory and does not of itself operate as a payment. Weeks *v.* Elliott, 33 Me. 488.

If there is no agreement to that effect, the value of the services cannot be considered as a payment. Sanford *v.* Clark, 29 Conn. 457; Miles *v.* Ogden, 54 Wis. 573, 12 N. W. 81.

Boarding creditor.— White *v.* Toles, 7 Ala. 569. If full performance is prevented by the death of the creditor, it amounts to a payment *pro tanto*. Patrick *v.* Petty, 83 Ala. 420, 3 So. 779.

86. King *v.* Kelley, 51 Pa. St. 36. But see McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

But a conditional acceptance by the debtor of an order on him in favor of a third person does not operate as a payment, especially where it is afterward given up to the debtor by such third person unpaid. Bassett *v.* Sanborn, 9 Cush. (Mass.) 58.

87. Willard *v.* Germer, 1 Sandf. (N. Y.) 50.

Claim in litigation.— Where the debtor transfers to the creditor the right to moneys for which a suit has been brought it constitutes a payment as soon as the money is collected in pursuance of the judgment by the

transfer of debits or credits by the parties or their representatives or the application of deposits or funds of the debtor in the hands of the creditor or his representative;[88] application of mutual indebtedness;[89] investment by debtor for

officer. Crawford *v.* Woody, 63 N. C. 100 (holding that a tender of the amount by the debtor was not necessary to make it amount to a payment); Hoke *v.* Carter, 34 N. C. 324.

Completion of transfer.— There is no payment where the debtor does not do that which is necessary to transfer the claim to the creditor. Coy *v.* De Witt, 19 Mo. 322.

Policy of insurance.— Brunswick *v.* Birkenbeuel, 83 Ill. 413. But life insurance taken out by a debtor in favor of a near relative, the creditor, without the knowledge of the creditor, and for less than half the debt, will be considered as a gift rather than a partial payment. Kendrick's Estate, 3 Pa. Dist. 402. Legacy as gift see WILLS.

88. *Alabama.*— Wilkinson *v.* Bradley, 54 Ala. 677; Shaw *v.* Decatur Branch Bank, 16 Ala. 708. See Moore *v.* Meyer, 57 Ala. 20.

California.— White *v.* Costigan, 138 Cal. 564, 72 Pac. 178. *Compare* Cook *v.* Davis, 22 Cal. 157.

Indiana.— Shryer *v.* Morgan, 77 Ind. 479.

Iowa.— Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940.

Louisiana.— Keane *v.* Branden, 12 La. Ann. 20.

Maine.— Stackpole *v.* Keay, 45 Me. 297.

Massachusetts.— Hill *v.* Fuller, 188 Mass. 195, 74 N. E. 361. See Greenough *v.* Walker, 5 Mass. 214.

Minnesota.— Randall *v.* Eichhorn, 80 Minn. 344, 83 N. W. 154; Hare *v.* Bailey, 73 Minn. 409, 76 N. W. 213; Congregational Ministers Gen. Convention *v.* Torkelson, 73 Minn. 401, 76 N. W. 215.

Nebraska.— Hughes *v.* Kellogg, 3 Nebr. 186.

New York.—Weedsport Bank *v.* Park Bank, 2 Rob. 418 [*affirmed* in 4 Abb. Dec. 545, 2 Keyes 561].

Wisconsin.— National Cash Register Co. *v.* Bonneville, 119 Wis. 222, 96 N. W. 558; Zinns Mfg. Co. *v.* Mendelson, 89 Wis. 133, 61 N. W. 302.

England.— Gillard *v.* Wise, 5 B. & C. 134, 7 D. & R. 523, 4 L. J. K. B. O. S. 88, 29 Rev. Rep. 190, 11 E. C. L. 399; Eyles *v.* Ellis, 4 Bing. 112, 5 L. J. C. P. O. S. 110, 12 Moore C. P. 306, 13 E. C. L. 425; Bolton *v.* Reichard, 1 Esp. 106, 6 T. R. 139; Proctor *v.* Brain, 7 L. J. C. P. O. S. 66, 2 M. & P. 284, 17 E. C. L. 628. See Wharton *v.* Walker, 4 B. & C. 163, 6 D. & R. 288, 3 L. J. K. B. O. S. 183, 10 E. C. L. 527; Brown *v.* Kewley, 2 B. & P. 518.

See 30 Cent. Dig. tit. "Payment," § 30.

Where there are mutual accounts, the credits on one side are applied to the extinguishment of debits on the other, as payments intentionally made thereon, and not as the set-off of one independent debt against another. Sanford *v.* Clark, 29 Conn. 457.

Application of deposits in bank.— Where the debtor had ordered his bankers to transfer the amount of a payment, from his own money on deposit, to the credit of the creditor, and the transfer had actually been made, and the creditor had given a receipt, and applied the amount on the subscription, there was a payment. *In re* Rochester, etc., R. Co., 110 N. Y. 119, 17 N. E. 678. But payment of money into a banking house to be placed to the credit of another, upon a condition, the money in the meantime to stand in the bankers' books in the name of the party paying it in, is at his risk, and the loss is his, if the bankers fail before the condition is complied with, although the other party had written to desire it to be paid in generally. Calley *v.* Short, Jac. 631, 4 Eng. Ch. 631, 37 Eng. Reprint 989. And see Pedder *v.* Watt, 2 Chit. 619, 18 E. C. L. 815. But see Smith *v.* Ferrand, 7 B. & C. 19, 9 D. & R. 803, 5 L. J. K. B. O. S. 355, 14 E. C. L. 19. Where one having an account with a bank deposits in the bank a receipt for a debt due him by a corporation, whose treasurer is also president of the bank, without receiving any money, a credit of the amount of the debt to such person by the bank, at the instance of the president, without knowledge or consent of the depositor, will not constitute a payment of the debt, although such depositor may, not knowing the state of his account with the bank, have drawn a portion of the amount so credited. Bedford Belt R. Co. *v.* Burke, 13 Ind. App. 35, 41 N. E. 70.

Credit of proceeds of sale of goods.— When goods are sold and delivered by the maker of a promissory note to the holder thereof and their value credited by the latter, the transaction amounts in law to a payment *pro tanto*. Pinder *v.* Cronkhite, 34 N. Brunsw. 498.

89. *Massachusetts.*— Breck *v.* Barney, 183 Mass. 133, 66 N. E. 643.

New Jersey.— Clark *v.* Mershon, 2 N. J. L. 70.

New York.— Taylor *v.* Bernard, 71 Hun 207, 24 N. Y. Suppl. 525 [*affirmed* in 144 N. Y. 654, 39 N. E. 494].

Vermont.— Churchill *v.* Bowman, 39 Vt. 518.

Virginia.— Braxton *v.* Gregory, Wythe 73.

Wisconsin.— Buttrick *v.* Roy, 72 Wis. 164, 39 N. W. 345.

England.— Smith *v.* Winter, 12 C. B. 487, 16 Jur. 908, 21 L. J. C. P. 158, 74 E. C. L. 487.

Canada.— Truax *v.* Dixon, 17 Ont. 366; Young *v.* Taylor, 25 U. C. Q. B. 583.

See 39 Cent. Dig. tit. "Payment," § 31.

Concurrent acts.— But the general rule is that mutual indebtedness does not extinguish the respective debts without the consent of the parties and the application of them to each other by their concurrent acts. Stanwood *v.* Smith, 3 Ill. App. 647; Post *v.* Carmalt, 2 Watts & S. (Pa.) 70, 37 Am. Dec. 484; Seitzinger *v.* Alspach, 2 Pa. Cas. 359, 4 Atl. 203; Blair *v.* White, 61 Vt. 110, 17 Atl.

creditor;[90] the acceptance of a third person as the debtor;[91] or the creation of an annuity.[92]

b. Order on Third Person For Money or Goods. An order drawn by the debtor upon a third person in favor of the creditor for the payment of money or goods is not a payment of the debt unless such order has been actually paid,[93] or accepted by the creditor as a discharge of the debt *pro tanto*.[94] It is not enough that the creditor accepts the order unless he accepts it as a payment.[95] On the other hand, if the order is accepted by the creditor as payment,[96] or is actually paid to the creditor,[97] or if the creditor agreed to accept such order when the debt was created,[98] the debt is extinguished *pro tanto*. At any event, where due diligence is not used in collecting or enforcing the accepted order, whereby the claim is lost, the order is deemed a payment.[99]

c. Collateral Security or Obligation of Higher Nature.[1] Of course, where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged.[2] But the mere taking a security as collateral

49; Notman *v.* Crooks, 10 U. C. Q. B. 105. See also Wadlington *v.* Gary, 7 Sm. & M. (Miss.) 522; Brundage *v.* Port Chester, 102 N. Y. 494, 7 N. E. 398; Hill *v.* Southland, 1 Wash. (Va.) 128.

90. Colton *v.* Dunham, 2 Paige (N. Y.) 267.

91. Timberlake *v.* Baylor, 2 A. K. Marsh. (Ky.) 618. See also Shryer *v.* Morgan, 77 Ind. 479. But see Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950. See, generally, NOVATION.

But a substitution of debtors is of no effect unless the creditor assents thereto. Strain *v.* Gourdin, 23 Fed. Cas. No. 13,521, 2 Woods 380. See also Wright *v.* Storrs, 32 N. Y. 691; Snowden *v.* Estelle, (Tex. 1890) 13 S. W. 970, holding that in the absence of an express agreement that the grantor of land under a verbal sale would accept as payment a claim which the grantee had against her husband for money loaned, the mere agreement that the husband would and should so pay it is not a payment of the purchase-money.

92. Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461.

93. Hoar *v.* Clute, 15 Johns. (N. Y.) 224; Printems *v.* Helfried, 1 Nott & M. (S. C.) 187; McNeil *v.* McCamley, 6 Tex. 163.

94. *California.*— Smith *v.* Harper, 5 Cal. 329.

Connecticut.— Hall *v.* Appel, 67 Conn. 585, 35 Atl. 524.

Iowa.— Porter *v.* Walker, 1 Iowa 456; Humphreys *v.* Humphreys, Morr. 359.

Maine.— See Jose *v.* Baker, 37 Me. 465.

Maryland.— Haines *v.* Pearce, 41 Md. 221; Morgan *v.* Bitzenberger, 3 Gill 350; Geiser *v.* Kershner, 4 Gill & J. 305, 23 Am. Dec. 566.

Mississippi.— Wadlington *v.* Covert, 51 Miss. 631.

New York.— Hoar *v.* Clute, 15 Johns. 224.

North Carolina.— Wait *v.* Williams, 77 N. C. 270; Nissen *v.* Tucker, 46 N. C. 176.

South Carolina.— Commercial Bank *v.* Bobo, 9 Rich. 31; Printems *v.* Helfried, 1 Nott & M. 187.

Texas.— McNeil *v.* McCamley, 6 Tex. 163.

Vermont.— Tracy *v.* Pearl, 20 Vt. 162.

United States.— Virginia *v.* Turner, 28 Fed. Cas. No. 16,970, 1 Cranch C. C. 261.

See 39 Cent. Dig. tit. "Payment," § 22.

Conditional acceptance.— An order from defendant on third persons, who accept it conditionally, to pay plaintiffs the amount agreed on under a contract, does not operate as a payment. Lupton *v.* Freeman, 82 Mich. 638, 46 N. W. 1042. And a judgment is not released by an acceptance by the judgment creditor of an order, with the agreement that the judgment will be satisfied when the order is paid. Goodrich *v.* Barney, 2 Vt. 422. See Proctor *v.* Mather, 3 B. Mon. (Ky.) 353.

95. Williams *v.* Costello, 95 Ala. 592, 11 So. 9.

96. *Alabama.*— Moore *v.* Briggs, 15 Ala. 24; Harrison *v.* Hicks, 1 Port. 423, 27 Am. Dec. 638.

Connecticut.— Wilton *v.* Weston, 48 Conn. 325.

Iowa.— Farwell *v.* Salpaugh, 32 Iowa 582.

Kentucky.— Palmateer *v.* Gatewood, 4 J. J. Marsh. 503.

Massachusetts.— Govern *v.* Littlefield, 13 Allen 127 note; Spooner *v.* Rowland, 4 Allen 485.

Missouri.— Rice *v.* Dudley, 34 Mo. App. 383.

Tennessee.— Anderson *v.* Hunter, 11 Heisk. 491.

Vermont.— Holmes *v.* Laraway, 64 Vt. 175, 23 Atl. 762.

See 39 Cent. Dig. tit. "Payment," § 22.

But see J. Weller Co. *v.* Gordon, 24 Ohio Cir. Ct. 407.

97. Tuckerman *v.* Sleeper, 9 Cush. (Mass.) 177. See Chapman *v.* Coffin, 14 Gray (Mass.) 454, holding that an order for goods, not payable in money, nor accepted, is payment only of the amount actually received upon it.

98. Besley *v.* Dumas, 6 Ill. App. 291.

99. Gilpin *v.* Lewis County, 13 Ky. L. Rep. 733; Turner *v.* Rabb, 4 Mart. (La.) 330; Briggs *v.* Parsons, 39 Mich. 400; Henry *v.* Donnaghy, Add. (Pa.) 39.

1. Bill or note as payment see *infra*, III, A, 2.

2. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858.

for a preëxisting debt does not discharge the debt unless it is paid or the debtor is injured by the laches of the creditor.[3] And a bond will be presumed to have been given as collateral security,[4] so that it does not constitute payment,[5] except where accepted as such.[6] A debt is not extinguished by the mere acceptance of an obligation of equal or lower dignity;[7] but a specialty or other higher security,[8]

3. *Indiana.*— Dugan *v.* Sprague, 2 Ind. 600.
Massachusetts.— Barkwell *v.* Swan, 69 Miss. 907, 13 So. 809.
New Hampshire.— Whitcher *v.* Dexter, 61 N. H. 91; Kenniston *v.* Avery, 16 N. H. 117.
New York.— Day *v.* Leal, 14 Johns. 404.
Pennsylvania.— Kemmerer's Appeal, 102 Pa. St. 558.
South Carolina.— Prescott *v.* Hubbell, 1 McCord 94.
Vermont.— Dickinson *v.* King, 28 Vt. 378, holding that the taking of a note as collateral does not discharge the debt, although discounted, and judgment rendered upon it for the indorsee against the maker, if the judgment remains unsatisfied, and the creditor has otherwise provided for the indorsee.
See 39 Cent. Dig. tit. "Payment," § 28.

Collaterals in hands of officer.— When collaterals are put into the hands of a commissioner of the court by the debtor, to be collected and applied to the payment of a debt due the commissioner, the collaterals will not be a payment on the debt until they are collected. Blair *v.* Core, 20 W. Va. 265; Wiley *v.* Mahood, 10 W. Va. 206.

Where a transfer of land, although absolute in form, is taken as collateral security the debt is not thereby paid. Mead *v.* Stevens, 22 Ill. App. 298; Danaher *v.* Hodgkins, 25 N. Y. App. Div. 6, 49 N. Y. Suppl. 58. See also Woodman *v.* Woodman, 3 Me. 350. But see Fales *v.* Reynolds, 14 Me. 89, in which state transaction is not regarded as a mortgage.

An assignment of an interest in a judgment to a creditor, although intended as a payment, merely creates a security and does not extinguish the liability. Hanks *v.* Harris, 29 Ark. 323. And see JUDGMENTS, 23 Cyc. 418.

4. Pearce *v.* Wallace, 1 Harr. & J. (Md.) 48; Abrams *v.* Musgrove, 12 Pa. St. 292; Hoge *v.* Vintroux, 21 W. Va. 1; Sayre *v.* King, 17 W. Va. 562.

Return to assignor.— Bonds, assigned to be applied to the discharge of a debt for which a suit is brought, cannot be considered as payment, although they are not returned to the assignor, it being proved that the consideration of the bonds had failed, and that they had been acknowledged by the assignor to be of no value. Wilson *v.* Hurst, 30 Fed. Cas. No. 17,809, Pet. C. C. 441.

5. Covington *v.* Clark, 5 J. J. Marsh. (Ky.) 59; Coulter *v.* Kaighn, 30 N. J. L. 98; Hoge *v.* Vintroux, 21 W. Va. 1.

6. Cox *v.* Reed, 27 Ill. 434; Hill *v.* Fuller, 188 Mass. 195, 74 N. E. 361; Smitherman *v.* Kidd, 36 N. C. 86; Muir *v.* Geiger, 17 Fed. Cas. No. 9,902, 1 Cranch C. C. 323. See also John H. Mahnken Co. *v.* Pelletreau, 93 N. Y. App. Div. 420, 87 N. Y. Suppl. 737.

7. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Owen *v.* Hall, 70 Md. 97, 16 Atl. 376; Morrison *v.* Welty, 18 Md. 169; Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294; Bowers *v.* State, 7 Harr. & J. (Md.) 32; Williamson *v.* Andrew, 4 Harr. & M. (Md.) 482 (holding that a mortgage does not extinguish a debt due on a bond); Phelps *v.* Johnson, 8 Johns. (N. Y.) 54; Hart *v.* Boller, 15 Serg. & R. (Pa.) 162, 16 Am. Dec. 536. See also The Betsy and Rhoda, 3 Fed. Cas. No. 1,366, 2 Ware 117.

No mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or vendor's lien will operate to discharge the debt, unless so intended by the parties. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858.

8. Lee *v.* Green, 83 Ala. 491, 3 So. 785; Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Davidson *v.* Kelly, 1 Md. 492; State Bank *v.* Tesson, 1 Mo. 617; Mills *v.* Starr, 2 Bailey (S. C.) 359. See also Isler *v.* Baker, 6 Humphr. (Tenn.) 85.

Different parties and different sum.— But a higher security for a debt given by different parties for a different sum will, in the absence of proof of the intention of the parties, be presumed to have been accepted as collateral security, and not in satisfaction of the debt. McIntyre *v.* Kennedy, 29 Pa. St. 448.

A specialty executed by one or more partners, but not by all, for the payment of a partnership debt, is an extinguishment of such debt. Williams *v.* Hodgson, 2 Harr. & J. (Md.) 474, 3 Am. Dec. 563; Clark *v.* Lindeke, 44 Minn. 112, 46 N. W. 326; Tom *v.* Goodrich, 2 Johns. (N. Y.) 213; Clement *v.* Brush, 3 Johns. Cas. (N. Y.) 180; Chalmers *v.* Turnipseed, 21 S. C. 126. But see Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252 [*reversed* on other grounds in 6 N. Y. 510, 57 Am. Dec. 199] (holding that a simple contract partnership debt is not extinguished by the creditor's taking a higher security for it from an individual partner unless there is positive proof that it was accepted by the creditor in full satisfaction of the existing debt); Hoskinson *v.* Eliot, 62 Pa. St. 393 (holding that a sealed note in the name of the firm, made by one partner, is not a satisfaction of the firm debt, unless accepted as the individual note of the partner); Chamberlain *v.* Madden, 7 Rich. (S. C.) 395 (holding that the sealed individual note of an ostensible partner does not extinguish the original cause of action as against a dormant partner, whose connection as partner was unknown to the creditor at the time the note was executed); Fleming *v.* Lawhorn, Dudley (S. C.) 360. Where a partner executes a note under seal for a debt of the firm without

such as a bond,[9] given to the creditor by the debtor otherwise than as collateral security, constitutes a payment where the original indebtedness was of lower dignity, provided the intention of the parties was not otherwise.[10] This rule does not apply, however, where the bond of a third person is transferred, in which case the presumption is that it was received as collateral security.[11] Where the security transferred in payment of a debt was at that time worthless, of which fact neither party had knowledge, the transfer does not discharge the debt.[12]

d. Application of Collateral Security. Payment to the creditor of collateral held as security for the debt, or a sale of it and the appropriation of the proceeds by the creditor, operates as a satisfaction of the debt;[13] and where the amount received is less than the debt it will be considered as satisfaction *pro tanto*.[14] So where the creditor transfers the security he will be presumed to have substituted it for the debt;[15] and if the creditor converts the security so as to be unable to deliver it when the debtor is willing to pay, the amount thereof must be credited upon the debt.[16] On the other hand, if the security is not collected or converted, although the creditor could have realized upon it, there is no payment.[17]

e. Municipal Securities. In the absence of a statute to the contrary,[18] or an agreement therefor,[19] municipal warrants or like securities do not constitute a

authority from the other partners, the partnership debt is extinguished and it becomes the individual debt of the partner. Brozee *v.* Poyntz, 3 B. Mon. (Ky.) 178; Calk *v.* Orear, 2 B. Mon. (Ky.) 420; Horton *v.* Child, 15 N. C. 460; Waugh *v.* Carriger, 1 Yerg. (Tenn.) 31; Nunnely *v.* Doherty, 1 Yerg. (Tenn.) 26.

A note under seal operates as a payment. Davidson *v.* Kelly, 1 Md. 492.

Giving of a note, with a waiver of exemptions, for the amount of an open account, raises the presumption of payment inasmuch as the waiver of exemptions is an agreement independent of and in addition to the original promise and is a higher security, or better assurance of payment, and more beneficial to the creditor than a book-account or debt of like nature. Lee *v.* Green, 83 Ala. 491, 3 So. 785.

9. State Bank *v.* Tesson, 1 Mo. 617.

Bond of partner.— The creditor of a firm who takes a bond and mortgage from one of the partners thereby extinguishes his demand against the firm. Baxter *v.* Bell, 19 Hun (N. Y.) 367 [*reversed* on other grounds in 86 N. Y. 195]; Averill *v.* Loucks, 6 Barb. (N. Y.) 19. *Compare* Niday *v.* Harvey, 9 Gratt. (Va.) 454. *Contra*, Pierce *v.* Cameron, 7 Rich. (S. C.) 114; Dickinson *v.* Legare, 1 Desauss. Eq. (S. C.) 537; Jordan *v.* Miller, 75 Va. 442.

10. Nelson *v.* Musgrave, 10 Mo. 648; Pelzer *v.* Steadman, 22 S. C. 279; Adger *v.* Pringle, 11 S. C. 527; Graves *v.* Allen, 66 Tex. 589, 2 S. W. 192. But see Costner *v.* Fisher, 104 N. C. 392, 10 S. E. 526; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760, holding that an agreement, however explicit, will not prevent a promissory note from merging in a bond given for the same debt for the same debtor.

11. Cumming *v.* Hackley, 8 Johns. (N. Y.) 202.

12. Roberts *v.* Fisher, 43 N. Y. 159, 3 Am. Rep. 680; Walrath *v.* Abbott, 75 Hun (N. Y.) 445, 27 N. Y. Suppl. 529.

13. *Illinois.*— Post *v.* Union Nat. Bank, 159 Ill. 421, 42 N. E. 976.

Indiana.— Farnsley *v.* Anderson Foundry, etc., Works, 90 Ind. 120; Reeves *v.* Plough, 41 Ind. 204.

Massachusetts.— Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616.

Michigan.— Carpenter *v.* Osborn, 107 Mich. 304, 65 N. W. 222.

New Hampshire.— King *v.* Hutchins, 28 N. H. 561.

New York.— Duden *v.* Waitzfelder, 16 Hun 337; Prouty *v.* Eaton, 41 Barb. 409; Bell *v.* Weir, 5 Silv. Sup. 230, 8 N. Y. Suppl. 661.

North Carolina.— Dismukes *v.* Wright, 20 N. C. 74.

Pennsylvania.— Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359.

See 39 Cent. Dig. tit. "Payment," § 32.

If a creditor having two demands against a debtor, and holding a third person's note as security for one and a pledge of property as security for both, sells the pledge for enough to pay both, it is a satisfaction of both. Strong *v.* Wooster, 6 Vt. 536.

14. Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; Tiner *v.* Maillot, 6 La. Ann. 534; Favrot *v.* Allain, 6 La. Ann. 428; Hancock *v.* Franklin Ins. Co., 114 Mass. 155; Sellwood *v.* Gray, 11 Oreg. 534, 5 Pac. 196.

15. Cocke *v.* Chaney, 14 Ala. 65; Hawks *v.* Hinchcliff, 17 Barb. (N. Y.) 492.

16. Ashton's Appeal, 73 Pa. St. 153.

17. Stebbins *v.* Kellogg, 5 Conn. 265; Wharton *v.* Lavender, 14 Lea (Tenn.) 178. See also Fullerton *v.* Mobley, (Pa. 1888) 15 Atl. 856.

18. Fagan *v.* Stillwell, 19 Ark. 282; State *v.* Dickinson, 12 Sm. & M. (Miss.) 579.

Statutes.— An act providing that city warrants shall be receivable for all debts due the corporation does not apply where the obligation expresses that it is to be paid in United States currency. Helena *v.* Turner, 36 Ark. 577.

19. Shipman *v.* District of Columbia, 119

valid tender or payment,[20] unless accepted as payment,[21] and even when accepted the debt is not paid where the securities are in fact invalid.[22]

f. Certificates of Deposit or of Indebtedness. A certificate of deposit transferred by a debtor to his creditor does not constitute payment in the absence of an express agreement to receive it as such.[23] But by agreement,[24] or by accepting them as payment,[25] or receiving them and then selling them to a third person,[26] a debt may be paid by a transfer of certificates of indebtedness.

2. Payment by Bills or Notes — a. General Rule.[27] In the absence of an agreement between the parties that it is to be received as payment,[28] the common-law

U. S. 148, 7 S. Ct. 134, 30 L. ed. 337, holding that where a board of public works paid for work done under a contract in bonds, the payment will be taken as cash payment of the amount of their face value, although the bonds were below par.

20. Bemis *v.* State, 3 Fla. 12; Perry *v.* Colquitt, 63 Ga. 311; Dubuque *v.* Miller, 11 Iowa 583; Rogers *v.* Shelburne, 42 Vt. 550. See also Russell *v.* Bristol, 50 Conn. 221.

21. *Arkansas.*— Pugh *v.* Little Rock, 35 Ark. 75.

Illinois.— Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Indiana.— Grant *v.* Monticello School Town, 71 Ind. 58.

Louisiana.— See King *v.* New Orleans, 14 La. Ann. 389.

Nebraska.— Pasewalk *v.* Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

New York.— Wise *v.* Chase, 44 N. Y. 337.

Vermont.— Dalrymple *v.* Whitingham, 26 Vt. 345.

Virginia.— Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676.

United States.— Holleman *v.* Dewey, 12 Fed. Cas. No. 6,607, 2 Hughes 341.

See 39 Cent. Dig. tit. "Payment," § 53.

Application at par value.— Payments made in public securities, upon a note given for public securities, apply according to their value when made. Thatcher *v.* Prentice, 2 Root (Conn.) 20.

22. Hussey *v.* Sibley, 66 Me. 192, 22 Am. Rep. 557; Catlin *v.* Munn, 37 Hun (N. Y.) 23. But see State *v.* Abramson, 57 Ark. 142, 20 S. W. 1084, where delay in returning forged securities was prejudicial, and it was held that no recovery of the amount of the debt was permissible after the acceptance of such securities.

23. Leake *v.* Brown, 43 Ill. 372; Huse *v.* McDaniel, 33 Iowa 406; Gallagher *v.* Ruffing, 118 Wis. 284, 95 N. W. 117; Downey *v.* Hicks, 14 How. (U. S.) 240, 14 L. ed. 404. See also Gordon *v.* Strange, 1 Exch. 477, 11 Jur. 1019, post-office order.

24. Mann *v.* Curtis, 6 Rob. (N. Y.) 128.

25. Gibbons *v.* U. S., 2 Ct. Cl. 421.

Where accepted and deposited in the bank which issued it to the credit of the party accepting it, the transaction is equivalent to a cash payment. Harrison *v.* Legore, 109 Iowa 618, 80 N. W. 670.

26. Looney *v.* District of Columbia, 113 U. S. 258, 5 S. Ct. 463, 28 L. ed. 974.

27. **Payment of bill or note by new bill or note** see Commercial Paper, 7 Cyc. 1011.

Acceptance as suspending creditor's remedy until maturity of note see Actions, 1 Cyc. 743.

28. *Alabama.*— Lewis *v.* Dillard, 66 Ala. 1; Myatts *v.* Bell, 41 Ala. 222; Fickling *v.* Brewer, 38 Ala. 685.

California.— Steinhart *v.* D. O. Mills & Co. Nat. Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Higgins *v.* Wortell, 18 Cal. 330.

Connecticut.— Clark *v.* Savage, 20 Conn. 258.

Georgia.— Wylly *v.* Collins, 9 Ga. 223.

Illinois.— Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Archibald *v.* Argall, 53 Ill. 307; Stone *v.* Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77; Chicago Sanitary Dist. *v.* Phœnix Powder Mfg. Co., 79 Ill. App. 36; Medley *v.* Specker, 58 Ill. App. 157.

Kansas.— Webb *v.* Republic Nat. Bank, 67 Kan. 62, 72 Pac. 520; Bradbury *v.* Van Pelt, 4 Kan. App. 571, 45 Pac. 1105.

Kentucky.— Calk *v.* Orear, 2 B. Mon. 420.

Massachusetts.— Watkins *v.* Hill, 8 Pick. 522.

Michigan.— Gardner *v.* Gorham, 1 Dougl. 507.

Mississippi.— Buckingham *v.* Walker, 48 Miss. 609.

Missouri.— The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; Howard *v.* Shirley, 75 Mo. App. 150; Commiskey *v.* McPike, 20 Mo. App. 82.

Nebraska.— Chicago, etc., R. Co. *v.* Burns, 61 Nebr. 793, 86 N. W. 483; Young *v.* Hibbs, 5 Nebr. 433.

New Jersey.— Joslin *v.* Giese, 59 N. J. L. 130, 36 Atl. 680; Fry *v.* Patterson, 49 N. J. L. 612, 10 Atl. 390; Coxe *v.* Hankinson, 1 N. J. L. 99.

New York.— Elwood *v.* Deifendorf, 5 Barb. 398; Higby *v.* New York, etc., R. Co., 3 Bosw. 497; Darnall *v.* Morehouse, 36 How. Pr. 511 [*reversed* on other grounds in 45 N. Y. 64]; Reed *v.* Van Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Raymond *v.* Merchant, 3 Cow. 147; Tobey *v.* Barber, 5 Johns. 68, 4 Am. Dec. 326; Herring *v.* Sanger, 3 Johns. Cas. 71; Lovett *v.* Dimond, 4 Edw. 22.

Ohio.— J. Weller Co. *v.* Gordon, 24 Ohio Cir. Ct. 407; Price *v.* Coblitz, 21 Ohio Cir. Ct. 732, 12 Ohio Cir. Dec. 34.

Pennsylvania.— Philadelphia *v.* Neill, etc., Sav., etc., Co., 211 Pa. St. 353, 60 Atl. 1033.

Rhode Island.— Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531.

South Carolina.— Costelo *v.* Cave, 2 Hill 528, 27 Am. Dec. 404.

rule which prevails in England and has been adopted without question in nearly all of the states in this country is that a draft or bill of exchange,[29] acceptance,[30]

Tennessee.— Kennel *v.* Muncey, Peck 273.

Texas.— Terry *v.* Dale, 27 Tex. Civ. App. 1, 65 S. W. 51, 396.

Vermont.— Street *v.* Hall, 29 Vt. 165.

Virginia.— Morriss *v.* Harveys, 75 Va. 726; McGuire *v.* Gadsby, 3 Call 234.

West Virginia.— Cushwa *v.* Improvement, etc., Assoc., (1898) 32 S. E. 259; Hess *v.* Dille, 23 W. Va. 90; Bantz *v.* Basnett, 12 W. Va. 772; Feamster *v.* Withrow, 12 W. Va. 611; Dunlap *v.* Shanklin, 10 W. Va. 662; Poole *v.* Rice, 9 W. Va. 73.

United States,— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Atlas Steamship Co. *v.* Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398; Lawrence *v.* Morrisania Steam-Boat Co., 12 Fed. 850; Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420; Maze *v.* Miller, 16 Fed. Cas. No. 9,362, 1 Wash. 328; Moore *v.* Newbury, 17 Fed. Cas. No. 9,772, 6 McLean 472, Newb. Adm. 49; Risher *v.* The Frolic, 20 Fed. Cas. No. 11,856, 1 Woods 92.

England.— Sayer *v.* Wagstaff, 5 Beav. 415, 3 Jur. 1083, 13 L. J. Ch. 161, 49 Eng. Reprint 639 [*affirmed* in 14 L. J. Ch. 116]; Tempest *v.* Ord, 1 Madd. 89, 56 Eng. Reprint 35; Owenson *v.* Morse, 7 T. R. 64.

Canada.— See Mitchell *v.* McGaffey, 6 Grant Ch. (U. C.) 361.

See 39 Cent. Dig. tit. "Payment," § 63.

Notes received by an attorney in discharge of a claim in his hands for collection are not a payment. Kenny *v.* Hazeltine, 6 Humphr. (Tenn.) 62.

The acceptance of a note "for," or "on account of," or "in payment of," an existing debt, in the absence of an express agreement or understanding that it is taken in absolute satisfaction or discharge of the debt, will be deemed to be a conditional payment only. Combination Steel, etc., Co. *v.* St. Paul City R. Co., 47 Minn. 207, 49 N. W. 744.

Tender.— Tender of good notes at the date when a debt is due, as payment, is not a compliance with the terms of a contract requiring payment on certain specified dates with satisfactory security. Little *v.* Hobbs, 34 Me. 357.

29. *Alabama.*— McCrary *v.* Carrington, 35 Ala. 698.

Arkansas.— De Yampert *v.* Brown, 28 Ark. 166.

Colorado.— Edwards *v.* Harvey, 2 Colo. App. 109, 29 Pac. 1024.

Connecticut.— Davidson *v.* Bridgeport Borough, 8 Conn. 472.

Georgia.— Kinard *v.* Sylvester First Nat. Bank, 125 Ga. 228, 53 S. E. 1018, 114 Am. St. Rep. 201; Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. 612; Weaver *v.* Nixon, 69 Ga. 699; Johnson *v.* Mechanics', etc., Bank, 25 Ga. 643.

Illinois.— Thayer *v.* Peck, 93 Ill. 357; Hodgen *v.* Latham, 33 Ill. 344.

Nebraska.— National L. Ins. Co. *v.* Goble, 51 Nebr. 5, 70 N. W. 503.

New York.—Thomas *v.* Westchester County, 115 N. Y. 47, 21 N. E. 674, 4 L. R. A. 477; Holdsworth *v.* De Belaunzaran, 106 N. Y. 119, 12 N. E. 615; Fairport Union Free School Bd. of Education *v.* Fonda, 77 N. Y. 350; Smith *v.* Miller, 6 Rob. 413 [*affirmed* in 43 N. Y. 171, 3 Am. Rep. 690]; Hammond *v.* Christie, 5 Rob. 160; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106]; Smith *v.* Miller, 6 Abb. Pr. N. S. 234; Murray *v.* Gouverneur, 2 Johns. Cas. 438, 1 Am. Dec. 177.

North Carolina.— Virginia-Carolina Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

Rhode Island.— Sweet *v.* James, 2 R. I. 270.

Tennessee.— Southworth *v.* Thompson, 10 Heisk. 10.

United States.— Anderson *v.* Brown, 1 Fed. Cas. No. 355; Gallagher *v.* Roberts, 9 Fed. Cas. No. 5,195, 2 Wash. 191.

England.—*In re* Romer, [1893] 2 Q. B. 286, 62 L. J. Q. B. 610, 69 L. T. Rep. N. S. 547, 4 Reports 486, 42 Wkly. Rep. 51; Hadley *v.* Hadley, [1898] 2 Ch. 680, 67 L. J. Ch. 694, 79 L. T. Rep. N. S. 299, 47 Wkly. Rep. 238; Burden *v.* Halton, 4 Bing. 454, 13 E. C. L. 585, 3 C. & P. 174, 14 E. C. L. 511, 6 L. J. C. P. O. S. 61, 1 M. & P. 223; Bottomley *v.* Nuttall, 5 C. B. N. S. 122, 5 Jur. N. S. 315, 28 L. J. C. P. 110, 94 E. C. L. 122; Leake *v.* Young, 5 E. & B. 955, 2 Jur. N. S. 516, 25 L. J. Q. B. 266, 4 Wkly. Rep. 282, 85 E. C. L. 955; Grant *v.* Mills, 2 Ves. & B. 306, 13 Rev. Rep. 101, 35 Eng. Reprint 335; *Ex p.* Blackburne, 10 Ves. Jr. 206, 7 Rev. Rep. 389, 32 Eng. Reprint 823; Tapley *v.* Martens, 8 T. R. 451. *Compare* Maxwell *v.* Deare, 8 Moore P. C. 363, 14 Eng. Reprint 138.

Canada.— Cameron *v.* Knapp, 7 U. C. C. P. 502.

See 39 Cent. Dig. tit. "Payment," § 70.

Compare Davis *v.* McPherson, (Miss. 1887) 1 So. 100; Mehlberg *v.* Tisher, 24 Wis. 607. But see Thornton *v.* Spotswood, 1 Wash. (Va.) 142.

Request of creditor.— Where, by request, a bank draft is purchased and remitted, and the bank drawing the bill fails before it can be presented, the draft constitutes a payment. Underwriters' Wrecking Co. *v.* Board of Underwriters, 35 La. Ann. 803.

The indorsement of a draft by the debtor of itself shows that the creditor did not take it at his own risk as payment. Darnall *v.* Morehouse, 36 How. Pr. (N. Y.) 511 [*reversed* on other grounds in 45 N. Y. 64].

30. *Connecticut.*— Dougal *v.* Cowles, 5 Day 511.

Georgia.— Stewart Paper Mfg. Co. *v.* Rau, 92 Ga. 511, 17 S. E. 748.

Louisiana.—See Lacey *v.* Hall, 6 La. Ann. 1.

Maryland.— Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248.

Michigan.— Marinette Iron Works Co. *v.*

order,[31] or promissory note[32] of the debtor is not a payment or an extinguish-

Cody, 108 Mich. 381, 66 N. W. 334; Midland State Bank *v.* Byrne, 97 Mich. 178, 56 N. W. 355, 37 Am. St. Rep. 332, 21 L. R. A. 753.

Missouri.— Grube *v.* Stille, 61 Mo. 473.

England.— *In re* London, etc., Banking Co., 34 Beav. 332, 11 Jur. N. S. 316, 34 L. J. Ch. 418, 12 L. T. Rep. N. S. 45, 13 Wkly. Rep. 446, 55 Eng. Reprint 663; Simon *v.* Lloyd, 2 C. M. & R. 187, 3 Dowl. P. C. 813, 4 L. J. Exch. 195.

See 39 Cent. Dig. tit. "Payment," § 70.

31. *Illinois.*—Bradford *v.* Neill, etc., Constr. Co., 76 Ill. App. 488.

Kentucky.—Trimble *v.* Lewis, 65 S. W. 117, 23 Ky. L. Rep. 1244.

Nebraska.—Colhy *v.* Maw, 1 Nebr. (Unoff.) 478, 95 N. W. 677, holding that it is immaterial that a receipt is given reciting that the order is taken as payment in full. See also Chicago, etc., R. Co. *v.* Burns, 61 Nebr. 793, 86 N. W. 483.

South Dakota.— Estey *v.* Birnbaum, 9 S. D. 174, 68 N. W. 290.

Wisconsin.— Cliver *v.* Heil, 95 Wis. 364, 70 N. W. 346.

See 39 Cent. Dig. tit. "Payment," § 70.

32. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156; Keel *v.* Larkin, 72 Ala. 493; Marsball *v.* Marshall, 42 Ala. 149; Mooring *v.* Mobile Marine Dock, etc., Co., 27 Ala. 254. See also Allen *v.* Caldwell, (1906) 42 So. 855.

Arkansas.— Pendergrass *v.* Hellman, 50 Ark. 261, 7 S. W. 132; Brugman *v.* McGuire, 32 Ark. 733.

California.— Grangers' Bank *v.* Shuey, (1898) 55 Pac. 682; Brown *v.* Cronise, 21 Cal. 386; Smith *v.* Owens, 21 Cal. 11.

Connecticut.— Bill *v.* Porter, 9 Conn. 23.

Florida.— May *v.* Gamble, 14 Fla. 467.

Georgia.— A. P. Brantley Co. *v.* Lee, 109 Ga. 478, 34 S. E. 574; Hall's Self-Feeding Cotton Gin Co. *v.* Black, 71 Ga. 450.

Illinois.— Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248; Schumacher *v.* Edward P. Allis Co., 70 Ill. App. 556. *Compare* Smalley *v.* Edey, 19 Ill. 207.

Iowa.— Vogel *v.* Wadsworth, 48 Iowa 28; McLaren *v.* Hall, 26 Iowa 297.

Kansas.— McCoy *v.* Hazlett, 14 Kan. 430.

Kentucky.— Proctor *v.* Mather, 3 B. Mon. 353; Crenshaw *v.* Duff, 103 S. W. 287, 31 Ky. L. Rep. 773.

Louisiana.— Pattison *v.* His Creditors, 9 La. Ann. 228.

Maryland.— Morgan *v.* Bitzenberger, 3 Gill 350; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. 166, 14 Am. Dec. 268.

Massachusetts.— Vancleef *v.* Therasson, 3 Pick. 12, decided under law of New York.

Missouri.— Wiles *v.* Robinson, 80 Mo. 47; Riggs *v.* Goodrich, 74 Mo. 108; Schneider *v.* Meyer, 56 Mo. 475; Block *v.* Dorman, 51 Mo. 31; Holmes *v.* Lykins, 50 Mo. 399; Howard *v.* Jones, 33 Mo. 583; Citizens' Bank *v.* Carson, 32 Mo. 191; McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611; The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; Berkshire *v.* Hoover, 92 Mo. App. 349; Bertiaux *v.* Dillon, 20 Mo. App. 603.

Nebraska.— Young *v.* Hibbs, 5 Nebr. 433.

New Hampshire.— Woodward *v.* Holmes, 67 N. H. 494, 41 Atl. 72; Coburn *v.* Odell, 30 N. H. 540; Smith *v.* Smith, 27 N. H. 244.

New Jersey.— Sayre *v.* Sayre, 3 N. J. L. 1034; Swain *v.* Frazier, 35 N. J. Eq. 326; Corrigan *v.* Trenton Delaware Falls Co., 7 N. J. Eq. 489.

New York.— Feldman *v.* Beier, 78 N. Y. 293; Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Winsted Bank *v.* Webb, 39 N. Y. 325, 100 Am. Dec. 435; Hoar *v.* Union Mut. L. Ins. Co., 118 N. Y. App. Div. 416, 103 N. Y. Suppl. 1059; St. Albans Beef Co. *v.* Aldridge, 112 N. Y. App. Div. 803, 99 N. Y. Suppl. 398; Hubbard *v.* Looschen, 9 N. Y. App. Div. 632, 41 N. Y. Suppl. 580; Hilderbrandt *v.* Fallot, 46 Misc. 615, 92 N. Y. Suppl. 804; Tompkins *v.* Tompkins, 34 N. Y. Suppl. 1032; Mott *v.* Cook, 10 N. Y. St. 590; Lewis *v.* Lozee, 3 Wend. 79; Reed *v.* Van Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Porter *v.* Talcott, 1 Cow. 359; Muldon *v.* Whitlock, 1 Cow. 290, 13 Am. Dec. 533; Putnam *v.* Lewis, 8 Johns. 389; Holbrook *v.* Champlin, Hoffm. 148.

North Carolina.— Walke *v.* Moody, 65 N. C. 599.

Ohio.— Merrick *v.* Boury, 4 Ohio St. 60; Victoria Bldg. Assoc. No. 2 *v.* Kelsey, 8 Ohio Dec. (Reprint) 123, 11 Cinc. L. Bul. 38.

Oregon.— Johnston *v.* Barrills, 27 Oreg. 251, 41 Pac. 656, 50 Am. St. Rep. 717.

Pennsylvania.— Lesser *v.* Lehman, 2 Lack. Leg. N. 100. See also Leighty *v.* Susquehanna, etc., Turnpike Co., 14 Serg. & R. 434.

Rhode Island.— Sweet *v.* James, 2 R. I. 270.

South Carolina.— Watson *v.* Owens, 1 Rich. 111; Chastain *v.* Johnson, 2 Bailey 574; Bryce *v.* Bowers, 11 Rich. Eq. 41.

Texas.—McGuire *v.* Bidwell, 64 Tex. 43. But see Rawles *v.* Perkey, 50 Tex. 311, holding that a negotiable note made by a purchaser of land, subject to a vendor's lien, is such a payment as will entitle him to be protected against the lien.

Virginia.— Wright *v.* Smith, 81 Va. 777.

West Virginia.— Hornbrooks *v.* Lucas, 24 W. Va. 493, 49 Am. Rep. 277; Sayre *v.* King, 17 W. Va. 562.

Wisconsin.— Nash *v.* Meggett, 89 Wis. 486, 61 N. W. 283; Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Eastman *v.* Porter, 14 Wis. 39; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

United States.— Lyman *v.* U. S. Bank, 12 How. 225, 13 L. ed. 965; U. S. Bank *v.* Daniel, 12 Pet. 32, 9 L. ed. 989; Lawrence *v.* U. S., 71 Fed. 228; *In re* Ouimette, 18 Fed. Cas. No. 10,622, 1 Sawy. 47; Weed *v.* Snow, 29 Fed. Cas. No. 17,347, 3 McLean 265.

England.— Price *v.* Price, 4 D. & L. 537, 16 L. J. Exch. 99, 16 M. & W. 232.

Canada.— Nordheimer *v.* Robinson, 2 Ont. App. 305.

See 39 Cent. Dig. tit. "Payment," § 70.

ment of the original demand. And the same rule applies to the bill, note, order, or acceptance of a third person given by the debtor to the creditor.[33]

b. Minority Rule. In Indiana, Maine, Massachusetts, and Vermont the rule

Higher form of security.— A promissory note may constitute a payment of the original debt because of provisions therein waiving exemptions which make it a higher security. Lee *v.* Green, 83 Ala. 491, 3 So. 785. But it has been held that the giving of a promissory note for an open account, while it merges the account in the higher form of security, does not deprive the creditor of his rights as to the original cause of action. Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118. See, generally, *supra*, III, A, 1, c.

Note payable to third person.— Where a vendee's note for the purchase-price of land was made payable to a third person, by direction of the grantor, and was not delivered to the payee, but was retained by the grantor, it would not operate as a payment of the purchase-price. Hughes *v.* Isreal, 73 Mo. 538.

Note payable in Confederate money.— Where a note payable in Confederate money is given for the agreed price of property, the original liability is merged into the special obligation to pay in Confederate money, and a recovery can be had only upon the note. Stroud *v.* Rankin, 2 Baxt. (Tenn.) 74.

Note to assignee of partnership.— Where a debt due to a firm is assigned to one of the partners, a note of the debtor, given to the assignee for the amount of the debt, extinguishes it as to the partnership. Lamkin *v.* Phillips, 9 Port. (Ala.) 98.

Effect of receipt.— Receipting an account for advances made the debtor upon receiving his note does not operate to satisfy the claim until the note is paid. Starling *v.* Wyatt, (Miss. 1900) 27 So. 526.

33. *Arkansas.*— Akin *v.* Peters, 45 Ark. 313.

California.— Durfee *v.* Seale, 139 Cal. 603, 73 Pac. 435; Griffith *v.* Grogan, 12 Cal. 317.

Connecticut.— Stebbins *v.* Kellogg, 5 Conn. 265.

Georgia.— Rawlings *v.* Robson, 70 Ga. 595; Butts *v.* Cuthbertson, 6 Ga. 159.

Illinois.— Chicago Times Co. *v.* Benedict, 37 Ill. App. 250; Cheltenham Stone, etc., Co. *v.* Gates Iron Works, 23 Ill. App. 635 [*affirmed* in 124 Ill. 623, 16 N. E. 923].

Iowa.— Monroe Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558. See also Hannawalt *v.* Equitable L. Assur. Soc., 102 Iowa 667, 72 N. W. 284. *Compare* Griffin *v.* Erskine, (1906) 109 N. W. 13.

Kentucky.— See Grimes *v.* Grimes, 89 S. W. 548, 28 Ky. L. Rep. 549.

Maryland.— Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. 166, 14 Am. Dec. 268.

Minnesota.— Devlin *v.* Chamblin, 6 Minn. 468.

Mississippi.— Guion *v.* Doherty, 43 Miss. 538.

Missouri.— Appleton *v.* Kennon, 19 Mo. 637; O'Bryan *v.* Jones, 38 Mo. App. 90.

New Hampshire.— Johnson *v.* Cleaves, 15 N. H. 332.

New Jersey.— American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034; Caldwell *v.* Fifield, 24 N. J. L. 150.

New York.— Vail *v.* Foster, 4 N. Y. 312; Friberg *v.* Block, 65 N. Y. App. Div. 541, 73 N. Y. Suppl. 104; Van Steenburgh *v.* Hoffman, 15 Barb. 28; Higby *v.* New York, etc., R. Co., 3 Bosw. 497, 7 Abb. Pr. 259; Wehrlin *v.* Schmutz, 1 N. Y. City Ct. 101; Hays *v.* Stone, 7 Hill 128; Muldon *v.* Whitlock, 1 Cow. 290, 13 Am. Dec. 533; Johnson *v.* Weed, 9 Johns. 310, 6 Am. Dec. 279. But see Rew *v.* Barber, 3 Cow. 272.

North Carolina.— Dobson *v.* Chambers, 79 N. C. 142; Gordon *v.* Price, 32 N. C. 385.

North Dakota.— Lokken *v.* Miller, 9 N. D. 512, 84 N. W. 368.

Pennsylvania.— Shepherd *v.* Busch, 154 Pa. St. 149, 26 Atl. 363, 35 Am. St. Rep. 815; Murphy *v.* Eckel, 1 Walk. 144; McGinn *v.* Holmes, 2 Watts 121; Hummelstown Brownstone Co. *v.* Knerr, 25 Pa. Super. Ct. 465; Edminster *v.* Harris, 30 Leg. Int. 110; Cake *v.* Olmstead, 1 Am. L. J. 169.

South Carolina.— State *v.* Rosborough, 2 Rich. 241; Barelli *v.* Brown, 1 McCord 449, 10 Am. Dec. 683; Prescott *v.* Hubbell, 1 McCord 94.

Tennessee.— Perry *v.* Williamson, (1900) 56 S. W. 826.

Texas.— Johnston *v.* Mills, 25 Tex. 704. See also Luter *v.* Roberts, (Civ. App. 1897) 39 S. W. 1002.

West Virginia.— Hess *v.* Dille, 23 W. Va. 90.

United States.— Allen *v.* King, 1 Fed. Cas. No. 226, 4 McLean 128; Slocomb *v.* Lurty, 22 Fed. Cas. No. 12,949, Hempst. 431. See also Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

England.— Belshaw *v.* Bush, 11 C. B. 191, 17 Jur. 67, 22 L. J. C. P. 24, 73 E. C. L. 191.

See 39 Cent. Dig. tit. "Payment," § 78.

Compare White Star Line Steam-Boat Co. *v.* Moragne, 91 Ala. 610, 8 So. 867.

What constitutes appropriation or acceptance see Olyphant *v.* St. Louis Ore, etc., Co., 28 Fed. 729.

Conditional payment.— Where notes are given to the creditor's agent, not as collateral security, but as payment on certain conditions to which the creditor refuses to accede, so long as they are retained, he cannot sue on his claim. Dixon *v.* Ford, 1 Rob. (La.) 253.

Compromise with maker of note.— Where a creditor receives the note of a third person from his debtor, with authority to collect and apply the proceeds to the payment of his debt, but by a compromise advantageous to all parties releases the third person on receiving one half of the debt, this will not operate as a payment of the debt beyond the

as to the effect of giving a bill or note as constituting a payment is different from the common-law rule prevailing in England and in the other states of this country. The minority rule is that the taking a bill of exchange or a promissory note governed by the law merchant, by the creditor from his debtor, for an existing debt, is a payment of the debt, unless it is otherwise agreed by the parties, the presumption being that the debt is thereby paid and the burden of proving a contrary agreement being upon the creditor.[34] On the other hand, if the note is not governed by the law merchant, that is, is not negotiable, it is not a payment of the debt unless it is so agreed by the parties, and the burden of proving such agreement is upon the debtor.[35] This rule applies equally well where the bill or note is that of a third person.[36] This presumption of payment may be rebutted, however, not only by evidence of an express agreement of the parties but also by evidence of the circumstances of the transaction itself showing that it was not the intention of the parties to accept the bill or note as payment.[37]

amount received by the creditor, although the compromise was made without authority. Exeter Bank *v.* Gordon, 8 N. H. 66.

Money collected on note.— But where the creditor receives the note of a third person from the debtor with authority to collect and apply the proceeds to the payment of the debt, the money collected on the note will operate as a payment of the debt. Exeter Bank *v.* Gordon, 8 N. H. 66.

34. *Indiana.*— Bradway *v.* Groenendyke, 153 Ind. 508, 55 N. E. 434; Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Jouchert *v.* Johnson, 108 Ind. 436, 9 N. E. 413; Krutsinger *v.* Brown, 72 Ind. 466; Smith *v.* Bettger, 68 Ind. 254, 34 Am. Rep. 256; Hill *v.* Sloan, 59 Ind. 181; Scott *v.* Edgar, (App. 1901) 60 N. E. 468; Davis, etc., Bldg., etc., Co. *v.* Vice, 15 Ind. App. 117, 43 N. E. 889; Mason *v.* Douglas, 6 Ind. App. 558, 33 N. E. 1009.

Maine.— Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92; Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Strang *v.* Hirst, 61 Me. 9; Ward *v.* Bourne, 56 Me. 161; Milliken *v.* Whitehouse, 49 Me. 527; Parkhurst *v.* Jackson, 36 Me. 404; Shumway *v.* Reed, 34 Me. 560, 56 Am. Dec. 679; Springer *v.* Shirley, 11 Me. 204; Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48.

Massachusetts.— Amos *v.* Bennett, 125 Mass. 120; Ilsley *v.* Jewett, 2 Metc. 168; Butts *v.* Dean, 2 Metc. 76, 35 Am. Dec. 389; Scott *v.* Ray, 18 Pick. 360; Wood *v.* Bodwell, 12 Pick. 268; Jones *v.* Kennedy, 11 Pick. 125; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Johnson *v.* Johnson, 11 Mass. 359; Wiseman *v.* Lyman, 7 Mass. 286; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Apthorp *v.* Shepard, Quincy 298, 1 Am. Dec. 6. *Compare* Zerrano *v.* Wilson, 8 Cush. 424.

Vermont.— Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476; Wemet *v.* Missisquoi Lime Co., 46 Vt. 458; Collamer *v.* Langdon, 29 Vt. 32; Dickenson *v.* King, 28 Vt. 378; Hutchins *v.* Olcutt, 4 Vt. 549, 24 Am. Dec. 634. See also Ormsby *v.* Fifield, 38 Vt. 143; Curtis *v.* Ingham, 2 Vt. 287.

United States.— Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420; Hudson *v.* Bradley, 12 Fed. Cas. No. 6,833, 2 Cliff. 130; Palmer *v.* Elliot, 18 Fed. Cas. No. 10,690, 1 Cliff. 63 decided under Massachusetts law,

See 39 Cent. Dig. tit. "Payment," §§ 63, 190.

Presumptions as to law in sister state.— In the absence of evidence to the contrary, it will be presumed that it is the rule of law in a foreign state that the giving of a negotiable note of a third person is evidence of the payment of the debt. Ely *v.* James, 123 Mass. 36.

The negotiable note of one or more co-debtors constitutes payment, in the absence of evidence of a contrary intention. Washburn *v.* Pond, 2 Allen (Mass.) 474; French *v.* Price, 24 Pick. (Mass.) 13. *Contra,* Lingenfelser *v.* Simon, 49 Ind. 82; Tyner *v.* Stoops, 11 Ind. 22, 71 Am. Dec. 341.

35. Bradway *v.* Groenendyke, 153 Ind. 508, 55 N. E. 434; Travellers' Ins. Co. *v.* Chappelow, 83 Ind. 429; Northwestern Mut. L. Ins. Co. *v.* Little, 56 Ind. 504; Alford *v.* Baker, 53 Ind. 279; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283; Orner *v.* Sattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644; Price *v.* Barnes, (Ind. App. 1892) 31 N. E. 808; Wade *v.* Curtis, 96 Me. 309, 52 Atl. 762; Bartlett *v.* Mayo, 33 Me. 518; Dutton Ministerial, etc., Fund *v.* Kendrick, 12 Me. 381; Parker *v.* Osgood, 4 Gray (Mass.) 456; Greenwood *v.* Curtis, 4 Mass. 93, 6 Mass. 358, 4 Am. Dec. 145.

36. Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Ely *v.* James, 123 Mass. 36. See also Farr *v.* Stevens, 26 Vt. 299.

37. Bradway *v.* Groenendyke, 153 Ind. 508, 55 N. E. 434; Jouchert *v.* Johnson, 108 Ind. 436, 9 N. E. 413 [*overruling* in effect Teal *v.* Spangler, 72 Ind. 380; Smith *v.* Bettger, 68 Ind. 254, 34 Am. Rep. 256]; Appleton *v.* Parker, 15 Gray (Mass.) 173; Butts *v.* Dean, 2 Metc. (Mass.) 76, 35 Am. Dec. 389; Wallace *v.* Agry, 29 Fed. Cas. No. 17,096, 4 Mason 336.

Where it is otherwise understood or agreed by the parties at the time, a bill or note given for a subsisting debt will not be regarded as a payment of the debt. Comstock *v.* Smith, 23 Me. 202; Gilmore *v.* Bussey, 12 Me. 418; Butts *v.* Dean, 2 Metc. (Mass.) 76, 35 Am. Dec. 389.

Other security.— The fact that such presumption of payment will deprive the creditor taking the note of the substantial benefit of

c. Contemporaneous Indebtedness. While in many cases the rule that a bill or note does not constitute payment unless accepted as payment and not merely as security has been applied to contemporaneous indebtedness, without any question being raised as to whether the rule applies to a contemporaneous debt as well as to a preëxisting debt, there are cases which distinguish between an antecedent and a contemporaneous indebtedness where the bill or note of a third person is given, and hold that the giving of a bill or note of a third person, upon a purchase of property or for an indebtedness contracted at the time, is presumably a payment *pro tanto* of the agreed price.[38] On the other hand, there is express authority for the proposition that there is no difference between a preëxisting and contemporaneous debt, at least where the bill or note is that of the debtor.[39] Such presumption of payment, where it exists, is rebuttable;[40] and the indorsement of the note, so as to make the purchaser liable therefor, overcomes the presumption and casts the burden upon the debtor to establish an actual agreement that the bill or note was received as payment.[41] Of course a bill or note may constitute a payment where delivered pursuant to an agreement for a payment in such mode made at the time the debt was created.[42]

d. Agreement to Accept as Payment. Where there is an agreement to take

some security, such as a mortgage, guaranty, or the like, is sufficient to meet and repel the presumption. Scott *v.* Edgar, 159 Ind. 38, 63 N. E. 452; Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315; Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Crosby *v.* Redman, 70 Me. 56; Paine *v.* Dwinel, 53 Me. 52, 87 Am. Dec. 533; Kidder *v.* Knox, 48 Me. 551; Dodge *v.* Emerson, 131 Mass. 467; Lovell *v.* Williams, 125 Mass. 439; Taft *v.* Boyd, 13 Allen (Mass.) 84. See also Sweet *v.* James, 2 R. I. 270.

Where the note of a third person is obtained for a special purpose other than payment, which was made known to the agent of the debtor, and the creditor did not give the debtor credit for it on his book, nor include it in a written statement of credits subsequently rendered, and the agent several times told the creditor, after the failure of the maker of the note, that the debtor would pay it, and where at the time the note was given the creditor had a lien for all that was then due him, it is sufficient to prevent a ruling as a matter of law, that the note was received as payment. Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514.

Mistake.— So the presumption may be rebutted by showing that the note was taken under a misunderstanding of the facts. Wemet *v.* Missisquoi Lime Co., 46 Vt. 458. When the party takes the note supposing that other parties are bound by it who are not, then the intention of treating it as payment is rebutted, and the party may sue upon the original debt. Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Wait *v.* Brewster, 31 Vt. 516. If there is any deception or fraud in the giving of the new security, or if it was accepted without a full knowledge of the facts, or under a misapprehension of the rights of the parties, the creditor is not bound by the acceptance of the note, but may tender it back or produce it at the trial, to be canceled, and seek his remedy on the original contract. Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420.

38. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Youngs *v.* Stahelin, 34 N. Y. 258; Noel *v.* Murray, 13 N. Y. 167; Kirkham *v.* Bank of America, 26 N. Y. App. Div. 110, 49 N. Y. Suppl. 767 [*affirmed* in 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714]; Manning *v.* Lyon, 70 Hun (N. Y.) 345, 24 N. Y. Suppl. 265; Torry *v.* Hadley, 27 Barb. (N. Y.) 192; Rew *v.* Barber, 3 Cow. (N. Y.) 272; Whitbeck *v.* Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Delafield *v.* Lewis Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10; Gallagher *v.* Ruffing, 118 Wis. 284, 95 N. W. 117; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694; Ford *v.* Mitchell, 15 Wis. 304; Ward *v.* Evans, 2 Ld. Raym. 928. And see Sigler *v.* Smith, 4 E. D. Smith (N. Y.) 280; Miller *v.* Race, 1 Burr. 452. But see Johnson *v.* Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Hoeflinger *v.* Wells, 47 Wis. 628, 3 N. W. 589. *Compare* Dille *v.* White, 132 Iowa 327, 109 N. W. 909.

What constitutes contemporaneous debt.— Where goods are sold and delivered and the obligations of third persons are received in pursuance of a prior agreement to that effect, they should be regarded as having been received contemporaneously with the contracting of the debt. Youngs *v.* Stahelin, 34 N. Y. 258.

39. Chicago Times Co. *v.* Benedict, 37 Ill. App. 250; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Crawford *v.* Berry, 6 Gill & J. (Md.) 63; Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. (Md.) 166, 14 Am. Dec. 268; Gardner *v.* Gorham, 1 Dougl. (Mich.) 507; McLean *v.* Griot, 118 N. Y. App. Div. 100, 103 N. Y. Suppl. 129; Darnall *v.* Morehouse, 36 How. Pr. (N. Y.) 511 [*reversed* on other grounds in 45 N. Y. 64].

40. Torry *v.* Hadley, 27 Barb. (N. Y.) 192.

41. Gallagher *v.* Ruffing, 118 Wis. 284, 95 N. W. 117.

42. Mitchell *v.* Curell, 11 La. 252 (holding that the debtor was not chargeable with discount); McLean *v.* Griot, 118 N. Y. App. Div. 100, 103 N. Y. Suppl. 129.

it as an absolute payment the acceptance of a promissory note,[43] bill of exchange,[44]

43. *Alabama.*— Brewer *v.* Montgomery Branch Bank, 24 Ala. 439; Abercrombie *v.* Moseley, 9 Port. 145.

Arkansas.— Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311; Pope *v.* Tunstall, 2 Ark. 209.

Connecticut.— See Winchell *v.* Sanger, 73 Conn. 399, 37 Atl. 706, 66 L. R. A. 935.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Georgia.— Mims *v.* McDowell, 4 Ga. 182.

Indiana.— Warring *v.* Hill, 89 Ind. 497.

Iowa.— Hardin *v.* Branner, 25 Iowa 364. See also Scoville Plumbing Co. *v.* Highland Park Land Co., 99 Iowa 303, 68 N. W. 684.

Kentucky.— Harlan *v.* Wingate, 2 J. J. Marsh. 138.

Maine.— Comstock *v.* Smith, 23 Me. 202.

Maryland.— Western Bank *v.* Kyle, 6 Gill 343.

Michigan.— Hotchin *v.* Secor, 8 Mich. 494.

Minnesota.— Goenen *v.* Schroeder, 18 Minn. 66; Keough *v.* McNitt, 6 Minn. 513.

Mississippi.— Slocumb *v.* Holmes, 1 How. 139.

Missouri.— Bushong *v.* Taylor, 82 Mo. 660; Cave *v.* Hall, 5 Mo. 59.

Nebraska.— Pasewalk *v.* Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

New Hampshire.— Moody *v.* Leavitt, 2 N. H. 171.

New York.— Meyer *v.* Lathrop, 73 N. Y. 315; Boyd *v.* Daily, 85 N. Y. App. Div. 581, 83 N. Y. Suppl. 539; Howe *v.* Buffalo, etc., R. Co., 38 Barb. 124 [*affirmed* in 37 N. Y. 297]; Carter *v.* Howard, 17 Misc. 381, 39 N. Y. Suppl. 1060; New York State Bank *v.* Fletcher, 5 Wend. 85; Witherby *v.* Mann, 11 Johns. 518.

Ohio.— Hall *v.* Union Paving Co., 3 Ohio S. & C. Pl. Dec. 218, 2 Ohio N. P. 71.

Pennsylvania.— McCord *v.* Durant, 134 Pa. St. 184, 18 Atl. 489; Seltzer *v.* Coleman, 32 Pa. St. 493.

Rhode Island.— Quidnick Co. *v.* Chafee, 13 R. I. 438; Wilbur *v.* Jernegan, 11 R. I. 113.

South Carolina.— Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681; Watson *v.* Owens, 1 Rich. 111; Dogan *v.* Ashbey, 1 Rich. 36; McLure *v.* Askew, 5 Rich. Eq. 162.

South Dakota.— Grissel *v.* Woonsocket Bank, 12 S. D. 93, 80 N. W. 161.

United States.— Sheehy *v.* Mandeville, 6 Cranch 253, 3 L. ed. 215; Risher *v.* The Frolic, 20 Fed. Cas. No. 11,856, 1 Woods 92. See also Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

England.— Sayer *v.* Wagstaff, 5 Beav. 415, 3 Jur. 1083, 13 L. J. Ch. 161, 49 Eng. Reprint 639 [*affirmed* in 14 L. J. Ch. 116].

See 39 Cent. Dig. tit. "Payment," § 72.

Contrary rule.— There are cases, however, holding that even where the debtor's note is accepted as absolute payment the creditor may, where the note is not paid at its maturity, sue upon the original indebtedness. Feldman *v.* Beier, 78 N. Y. 293; Jagger Iron Co. *v.* Walker, 76 N. Y. 521 [*overruling* in effect Fisher *v.* Marvin, 47 Barb. (N. Y.) 159]; Cole *v.* Sackett, 1 Hill (N. Y.) 516.

A note accepted as payment is not merely prima facie evidence of payment.— Belknap *v.* Billings, 78 Vt. 214, 62 Atl. 56.

The acceptance of a part of notes sent in payment, and the collection thereof, does not oblige the creditor to accept the others. Tiffany *v.* Glasgow, 82 Mich. 266, 40 N. W. 231.

Giving of receipt and laches.—A note may properly be regarded as received in payment of a debt when a receipt is given which treats it in the same way as money received at the same time, and no attempt is made to treat it otherwise for several years. Mosley *v.* Floyd, 31 Ga. 564.

Crediting a note upon the creditor's books does not of itself constitute it a payment where such note was neither given nor received in payment. Follett *v.* Steele, 16 Vt. 30.

Naked agreement to take note.— A debt secured by a deed of trust is not satisfied by the creditor's breach of his agreement with the debtor to take certain notes in satisfaction thereof. Low *v.* Coleman, (Miss. 1893) 14 So. 267. An agreement to take the debtor's note secured by mortgage as a payment of interest does not constitute a payment where the mortgage is never executed, although the note is received and the interest indorsed as paid. Hayward *v.* Billings, 48 Vt. 355.

Note of creditor.— The debt may be satisfied by the creditor receiving his own note from the debtor in settlement. Scheerer *v.* Scheerer, 109 Ill. 11. But a creditor cannot be compelled to receive in payment his note payable solely in merchandise. Canfield *v.* Notrobe, 7 Mart. (La.) 317.

44. *Alabama.*— Day *v.* Thompson, 65 Ala. 269.

California.— Brown *v.* Olmsted, 50 Cal. 162.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Massachusetts.— See Getchell *v.* Foster, 106 Mass. 42.

New York.— Francia *v.* Del Banco, 2 Duer 133. See also People *v.* Cromwell, 102 N. Y. 477, 7 N. E. 413.

North Carolina.— Delafield *v.* Lewis Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10.

Pennsylvania.— Kimmell *v.* Bittner, 62 Pa. St. 203.

Virginia.— Campbell *v.* Mosby, 4 Munf. 487.

United States.— Brown *v.* Jackson, 4 Fed. Cas. No. 2,016, 2 Wash. 24.

England.— Emblin *v.* Dartnell, 1 D. & L. 591; Mercer *v.* Cheese, 2 Dowl. P. C. N. S. 619, 12 L. J. C. P. 56, 4 M. & G. 804, 5 Scott N. R. 664, 43 E. C. L. 415; Woodford *v.* Whiteley, M. & M. 517, 22 E. C. L. 576.

See 39 Cent. Dig. tit. "Payment," § 72.

What constitutes acceptance.— Where the debtor sent the creditor several drafts in payment, and the latter collected one and returned

or order,[45] even of a third person,[46] constitutes a payment so as to preclude an action upon the original indebtedness. The rule as usually stated that the acceptance of a bill or note does not constitute a payment unless "expressly" so agreed[47] is not supported by the decisions where that question has been specifically considered, they holding that it is not necessary to show an express agreement to take the bill or note as absolute payment, but that it is sufficient that there is an understanding to such effect.[48]

the others for a certain indorsement, which the debtor refused to make, there is no acceptance by the creditor enabling him to recover on the drafts instead of the original indebtedness. Morrill *v.* New England F. Ins. Co., 71 Vt. 281, 44 Atl. 358.

Waiver of cash payment.— Where the drawers of an order had funds in the hands of the drawee on its presentation, a waiver by the payee of a cash payment, and an acceptance of a bill of exchange instead, extinguishes the debt, although the exchange proves worthless. Loth *v.* Mothner, 53 Ark. 116, 13 S. W. 594.

45. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197. See also Elm City Lumber Co. *v.* Mackenzie, 77 Conn. 1, 58 Atl. 10; Southwick *v.* Sax, 9 Wend. (N. Y.) 122.

Agreement to accept order.— Where the creditor agrees to receive payment by an order on a third person for goods, if accepted, and the third person instead of giving the order executed a note on which the creditor was unable to obtain the goods, the debtor was not discharged from his debt. Surdam *v.* Lyman, 36 Vt. 733.

46. *Alabama.*—Carriere *v.* Ticknor, 26 Ala. 571.

Arkansas.— Viser *v.* Bertrand, 14 Ark. 267.

Illinois.— Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

Indiana.— Jewett *v.* Pleak, 43 Ind. 368.

Iowa.— Burlington Gaslight Co. *v.* Greene, 22 Iowa 508.

Maryland.— Hoopes *v.* Strasburger, 37 Md. 390, 11 Am. Rep. 538.

Missouri.— O'Bryan *v.* Jones, 38 Mo. App. 90.

New Hampshire.— Willie *v.* Green, 2 N. H. 333.

New York.— Conkling *v.* King, 10 Barb. 372; St. John *v.* Purdy, 1 Sandf. 9; Soffe *v.* Gallagher, 3 E. D. Smith 507 (holding that it is immaterial that the debtor indorses the note of a third person); Ferdon *v.* Jones, 2 E. D. Smith 106.

North Carolina.— Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373.

Vermont.— Farr *v.* Stevens, 26 Vt. 299. See Lockwood *v.* Hoskisson, 18 Vt. 37; Keyes *v.* Carpenter, 3 Vt. 209.

West Virginia.— Dryden *v.* Stephens, 19 W. Va. 1.

United States.— Burlee Dry Dock Co. *v.* Besse, 130 Fed. 444, 64 C. C. A. 646.

See 39 Cent. Dig. tit. "Payment," § 79.

Unexecuted agreement.— A creditor does not exonerate his debtor by agreeing with a third party, who assumes payment of the debt, to receive payment from the latter in negotiable paper, if the agreement is never carried into effect. Rice *v.* Isham, 4 Abb. Dec. (N. Y.) 37, 1 Keyes 44. To same effect see Fisher *v.* Ferris, 6 U. C. Q. B. 534.

Conditional acceptance.— Where the note of a third person is accepted as payment, on condition that it shall be paid at maturity, and such note is not paid at maturity, if the creditor retains the note and finally receives the full amount of it from the maker he thereby waives the forfeiture and cannot afterward proceed against the debtor. Conkling *v.* King, 10 Barb. (N. Y.) 372 [*affirmed* in 10 N. Y. 440].

47. Comptoir D'Escompte *v.* Dresbach, 78 Cal. 15, 20 Pac. 28; Brown *v.* Olmsted, 50 Cal. 162; Griffith *v.* Grogan, 12 Cal. 317; Crane *v.* McDonald, 45 Barb. (N. Y.) 354; Johnson *v.* Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Willow River Lumber Co. *v.* Luger Furniture Co., 102 Wis. 636, 78 N. W. 762. See also Goodall *v.* Richardson, 14 N. H. 567; Jaffrey *v.* Cornish, 10 N. H. 505; Philadelphia *v.* Neill, etc., Sav., etc., Co., 211 Pa. St. 353, 60 Atl. 1033.

Giving receipt.— The taking a note, and giving a receipt for so much cash, in full of the original debt, does not amount to evidence of an express agreement to take the note in payment. Godfrey *v.* Crisler, 121 Ind. 203, 22 N. E. 999.

48. *Illinois.*— Wilhelm *v.* Schmidt, 84 Ill. 183; White *v.* Jones, 38 Ill. 159. See also Davis, etc., Bldg., etc., Co. *v.* Montrose Butter, etc., Co., 59 Ill. App. 573.

Iowa.— Dille *v.* White, 132 Iowa 327, 109 N. W. 909.

Maryland.— Haines *v.* Pearce, 41 Md. 221.

Michigan.— Hotchin *v.* Secor, 8 Mich. 494.

New Hampshire.— Randlet *v.* Herren, 20 N. H. 102; Johnson *v.* Cleaves, 15 N. H. 332.

Ohio.— Athens First Nat. Bank *v.* Green, 40 Ohio St. 431.

Rhode Island.— Macomber *v.* Macomber, (1894) 31 Atl. 753.

Texas.— Ralston *v.* Aultman, (Civ. App. 1894) 26 S. W. 746.

England.— Sayer *v.* Wagstaff, 5 Beav. 415, 3 Jur. 1083, 13 L. J. Ch. 161 [*affirmed* in 14 L. J. Ch. 116].

The intention of the parties to consider a note as payment may be determined by circumstances, such as the acts and conduct of the parties, as well as by direct proof of an express promise or agreement. Riverside Iron-Works *v.* Hall, 64 Mich. 165, 31 N. W. 152. See also Topeka Capital Co. *v.* Merriam, 60 Kan. 397, 56 Pac. 757; Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802.

e. Note of One or More Co-Debtors. The taking a note of one or more joint debtors for a preëxisting debt is not a payment thereof unless it is expressly agreed that it shall be so regarded.[49] But where such note is accepted as payment it is regarded as such,[50] and where the creditor receives separate notes of his joint debtors for their respective shares of the debt as payment, it operates as a discharge of the original joint indebtedness.[51]

f. Validity and Value of Bill or Note and Misrepresentations — (I) *Of Debtor.* The acceptance of an invalid note of the debtor is not a payment,[52] as where the note is usurious.[53] So, where the creditor is induced by fraud or imposition to accept the note of a debtor as payment, the creditor may recover upon the original indebtedness.[54] So a note is not payment, so as to preclude a recovery upon the original indebtedness, where the note is destroyed while in the debtor's possession.[55] Likewise, where a note is accepted as payment under a mistake of law as to its effect as binding a copartner, the debt is not discharged.[56] And when a negotiable note, although received as money, has no value, it does not constitute payment.[57]

(II) *Of Third Person.* Similarly, the bill or note of a third person, even where it would otherwise constitute an absolute payment, is not a payment where it is invalid,[58] as where it is forged.[59] So it does not constitute a payment where

In the absence of proof of a special agreement, the giving up or retention of the original security will in general be a decisive circumstance in determining the intention of the parties as to whether a bill, note, or check was accepted as an absolute payment. Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858; Morriss *v.* Harveys, 75 Va. 726.

49. Higgins *v.* Packard, 2 Hall (N. Y.) 586; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533; Schemerhorn *v.* Loines, 7 Johns. (N. Y.) 311; Schollenberger *v.* Seldonridge, 49 Pa. St. 83; Bowers *v.* Still, 49 Pa. St. 65; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760; Rossean *v.* Cull, 14 Vt. 83, where law of New York state governed.

50. Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. (Md.) 166, 14 Am. Dec. 268.

51. Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283.

52. Walker *v.* Mayo, 143 Mass. 42, 8 N. E. 873; Hartshorn *v.* Hartshorn, 67 N. H. 163, 29 Atl. 406; Pecker *v.* Kennison, 46 N. H. 488; Alder *v.* Buckley, 1 Swan (Tenn.) 69; Tyte *v.* Jones, 1 East 58 note; Swears *v.* Wells, 1 Esp. 317; Wilson *v.* Kennedy, 1 Esp. 245; Ruff *v.* Webb, 1 Esp. 129, 5 Rev. Rep. 723; Wislon *v.* Vysar, 4 Taunt. 288; Brown *v.* Watts, 1 Taunt. 353, 9 Rev. Rep. 793.

If the note is by mistake defective so that no recovery can he had upon it, the creditor may resort to his original demand. Torrey *v.* Baxter, 13 Vt. 452.

Invalidity as to some of makers.— Where the new note is invalid as to some of the parties who appear to have joined in making it because the debtor who made it was not authorized to bind them, it is not a payment. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505. So where a joint note is executed for a debt and at its maturity a new note is given for the unpaid balance, which is invalid as to one of the makers on account of a material alteration, a recovery can be had against the maker as to whom it is invalid, upon the original cause of action if the old note is produced at the trial. Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

53. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Ramsdell *v.* Soule, 12 Pick. (Mass.) 126; Watkins *v.* Hill, 8 Pick. (Mass.) 522; Stebbins *v.* Smith, 4 Pick. (Mass.) 97; Thurston *v.* Percival, 1 Pick. (Mass.) 415; Johnson *v.* Johnson, 11 Mass. 359; Lee *v.* Peckham, 17 Wis. 383; Meshke *v.* Van Doren, 16 Wis. 319.

54. Letcher *v.* Commonwealth Bank, 1 Dana (Ky.) 82; French *v.* White, 5 Duer (N. Y.) 254.

55. Tompkins *v.* Tompkins, 34 N. Y. Suppl. 1032 [*affirmed* in 158 N. Y. 679, 52 N. E. 1126].

56. Fowler *v.* Richardson, 3 Sneed (Tenn.) 508.

57. Wright *v.* Lawton, 37 Conn. 167.

58. Wentworth *v.* Wentworth, 5 N. H. 410 (note of infant); Beard *v.* Brandon, 2 Nott & M. (S. C.) 102 (note for gambling debt).

Effect of alteration.— Where the creditor makes a draft his own by altering it so as to vitiate it, it constitutes a payment. Alderson *v.* Langdale, 3 B. & Ad. 660, 1 L. J. K. B. 273, 23 E. C. L. 291.

59. Pope *v.* Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60; Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37; Bass *v.* Wellesley, 192 Mass. 526, 78 N. E. 543; Bell *v.* Buckley, 11 Exch. 631, 25 L. J. Exch. 163, 4 Wkly. Rep. 251. *Compare* Grafton Bank *v.* Hunt, 4 N. H. 488.

Agreement to accept notes for contemporaneous debt.— If one sells goods to another, agreeing to receive in payment certain promissory notes of a third person, he has no remedy if these are afterward found to be forged, although, if he had sold for cash, and had received the notes to accommodate

its acceptance is induced by false representations,[60] such as misrepresentations or concealment of the financial responsibility of the maker of the note.[61] So, where the note could not be enforced against the maker in consequence of a contract made by the payee with him, the creditor may resort to his original demand.[62] In the absence of fraud, where the bill or note is accepted as payment, it has been held that the insolvency of the drawer or maker does not prevent it operating as payment,[63] although other cases held that, where the drawer or maker is insolvent at the time of the transfer, and neither party has knowledge thereof, the paper does not constitute payment because of the mutual mistake of facts.[64]

g. Effect of Transfer of Bill or Note. Where a bill or note has not been accepted as absolute payment, the fact that the creditor has transferred it to a third person does not of itself bar an action upon the original indebtedness or show that the paper was accepted as an absolute payment,[65] unless the bill or note is outstanding in the hands of a third person at the time the action on the original indebtedness is commenced.[66] But the original cause of action on an account is destroyed where a note given in settlement of the account is transferred by the payee, together with the collaterals securing it, and such collaterals are afterward sold by the transferee.[67]

the buyer, he would have a remedy. Ellis *v.* Wild, 6 Mass. 321.

60. Atkinson *v.* Minot, 75 Me. 189; American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 80 N. E. 526; Willson *v.* Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Loomis *v.* Wainwright, 21 Vt. 520. See also Pierce *v.* Drake, 15 Johns. (N. Y.) 475; Hatch *v.* Barnum, 23 Vt. 133, 56 Am. Dec. 59.

The creditor must prove not only an intent to defraud but that he actually had been misled by the deceit. American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 80 N. E. 526.

61. *Alabama.*— Lake *v.* Gilchrist, 7 Ala. 955.

Maine.— Vallier *v.* Ditson, 74 Me. 553.

Massachusetts.— Bridge *v.* Batchelder, 9 Allen 394.

New York.— Galoupeau *v.* Ketchum, 3 E. D. Smith 175; Pierce *v.* Drake, 15 Johns. 475.

United States.—Crosby *v.* Lane, 6 Fed. Cas. No. 3,423.

See 39 Cent. Dig. tit. "Payment," § 80.

62. Torrey *v.* Baxter, 13 Vt. 452.

63. Day *v.* Thompson, 65 Ala. 269; Carriere *v.* Ticknor, 26 Ala. 571; Snyder *v.* Findley, 1 N. J. L. 57; Chase *v.* Byrne, 2 Edw. (N. Y.) 492; Long *v.* Spruill, 52 N. C. 96. See also Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802.

64. Dille *v.* White, 132 Iowa 327, 109 N. W. 909; Thomas *v.* Westchester County, 115 N. Y. 47, 21 N. E. 674, 4 L. R. A. 477; Roberts *v.* Fisher, 43 N. Y. 159, 3 Am. Rep. 680. *Contra,* Heidenheimer *v.* Lyon, 3 E. D. Smith (N. Y.) 54.

65. *Connecticut.*— Davidson *v.* Bridgeport Borough, 8 Conn. 472.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Georgia.— Norton *v.* Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501.

Louisiana.— Simpson *v.* New Orleans, 109 La. 897, 33 So. 912; Lanata *v.* Bayhi, 31 La. Ann. 229. But see Woolfolk *v.* Degelos, 24 La. Ann. 199.

Massachusetts.— Alcock *v.* Hopkins, 6 Cush. 484.

New York.— Burdick *v.* Green, 15 Johns. 247.

Pennsylvania.— Kean *v.* Dufresne, 3 Serg. & R. 233.

Virginia.— See Campbell *v.* Mosby, 4 Munf. 487.

United States.— Lyman *v.* U. S. Bank, 12 How. 225, 13 L. ed. 965. But see Lawrence *v.* U. S., 71 Fed. 228; Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. 569, 12 C. C. A. 306.

See 39 Cent. Dig. tit. "Payment," § 77.

Draft received for collection.— Where a draft is received for collection with directions to pass the proceeds when paid to the credit of the debtor, and the creditor negotiated the draft and credited his debtor with the proceeds, the original debt is not extinguished where the creditor was afterward obliged to pay the draft as indorser. Goodnow *v.* Howe, 20 Me. 164, 37 Am. Dec. 46.

Time of surrender.— The fact that notes are not surrendered before the action is brought does not preclude an action upon the original indebtedness where they are subsequently taken up and produced before the court to be canceled. Moore *v.* Jacobs, 190 Mass. 424, 76 N. E. 1041.

66. *Florida.*—Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Illinois.— McConnell *v.* Stettinius, 7 Ill. 707.

Mississippi.— Buckingham *v.* Walker, 48 Miss. 609.

New York.— McLean *v.* Griot, 118 N. Y. App. Div. 100, 103 N. Y. Suppl. 129.

South Carolina.— *Ex p.* Williams, 17 S. C. 396.

England.— Davis *v.* Reilly, [1898] 1 Q. B. 1, 66 L. J. Q. B. 844, 77 L. T. Rep. N. S. 399, 46 Wkly. Rep. 96, holding that the fact that the creditor has subsequently obtained possession of the bill or note is immaterial.

See 39 Cent. Dig. tit. "Payment," § 77.

67. *Ex p.* Williams, 17 S. C. 396.

h. Indorsement or Guaranty of Note by Debtor. It has been held that the omission of the creditor to have the bill or note of a third person indorsed by the debtor from whom he received it is *prima facie* evidence of an agreement to take it at his own risk.[68] On the other hand the assignment of a note of a third person by a debtor to his creditor, with a guaranty thereof, shows that the note was not accepted as payment,[69] even though the guaranty is void.[70]

i. Use of Due Diligence in Collecting.[71] Where a creditor has received from his debtor the bill or note of a third person, the debt may be extinguished by the laches or negligence of the creditor in collecting the bill or note, by which the amount due thereon is lost,[72] inasmuch as the creditor is bound to use ordinary means and diligence to collect the amount thereof.[73]

j. Application of Rules — (i) *Note or Acceptance of Agent For Debt of Principal.* The note of an agent executed for the debt of his principal does

68. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Breed *v.* Cook, 15 Johns. (N. Y.) 241; Whitbeck *v.* Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Union Bank *v.* Smiser, 1 Sneed (Tenn.) 501; Fydell *v.* Clark, 1 Esp. 447; Bank of England *v.* Newman, 1 Ld. Raym. 442, 12 Mod. 241. See also Miller *v.* Neihaus, 51 Ind. 401; Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347.

69. Stone *v.* Miller, 16 Pa. St. 450; Torrey *v.* Baxter, 13 Vt. 452. See also Allen *v.* Bantel, 2 Thomps. & C. (N. Y.) 342. *Contra*, Williams *v.* Ketchum, 21 Wis. 432.

Implied guaranty.— Where a purchaser of goods transfers a note in payment thereof without indorsement, he thereby guarantees that the sum expressed in the note is due; and, if suit is fairly brought and duly prosecuted, and an offset is established by the maker, the seller may resort to the purchaser for the price of the goods sold. Jones *v.* Yeargain, 12 N. C. 420.

70. Monroe *v.* Hoff, 5 Den. (N. Y.) 360.

71. **Necessity of demand for payment** see Commercial Paper, 7 Cyc. 969.

72. *Alabama.*— Thomason *v.* Cooper, 57 Ala. 560, delay until barred by limitations.

Louisiana.— Marburg *v.* Canneld, 4 Mart. N. S. 539. See also Rogers *v.* Vanlandingham, 10 La. 143.

Mississippi.— Lear *v.* Friedlander, 45 Miss. 559.

New Hampshire.— Exeter Bank *v.* Gordon, 8 N. H. 66.

New Jersey.— Shipman *v.* Cook, 16 N. J. Eq. 251.

Wisconsin.— Mehlberg *v.* Tisher, 24 Wis. 607.

United States.— Roberts *v.* Gallagher, 20 Fed. Cas. No. 11,902, 1 Wash. 156.

England.— Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 7 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728.

See 39 Cent. Dig. tit. "Payment," § 85.

But see Martin *v.* Pennock, 2 Pa. St. 376, holding that if a note is taken by a seller of goods, with an agreement that he will endeavor to collect it or return it within two or three months, it does not imply that he is bound to proceed to a suit; nor is he liable for negligence, even though it may be shown that a recovery might have been had.

Laches not prejudicial.— Where the laches of the creditor causes no loss or damage to the debtor, and the note is transferred merely by delivery, the failure of the creditor to use due diligence in rendering it available does not discharge the debtor. Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105.

Insolvency of maker as excuse for laches.— Where the maker of the note was insolvent and the debtor held security for its payment, the failure of the creditor to sue thereon or give notice of its dishonor does not preclude him from recovering upon the original indebtedness. Kephart *v.* Butcher, 17 Iowa 240.

Notice of dishonor must ordinarily be given to the debtor by the creditor. Blanchard *v.* Tittahawassee Boom Co., 40 Mich. 566; Murphy *v.* Phelps, 12 Mont. 531, 31 Pac. 64; Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350; Smith *v.* Mercer, L. R. 3 Exch. 51, 37 L. J. Exch. 24, 17 L. T. Rep. N. S. 317; Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728. See also Commercial Paper, 7 Cyc. 1068.

Duty to sue on note.— Where the note of a third person is taken merely as a conditional payment the creditor is not obliged to sue upon the note before bringing an action upon the original indebtedness. Dodge *v.* Stanton, 12 Mich. 408.

73. *Alabama.*— Lake *v.* Gilchrist, 7 Ala. 955.

Maryland.— Dorsey *v.* Camphell, 1 Bland 356.

New Hampshire.— Cochran *v.* Wheeler, 7 N. H. 202, 26 Am. Dec. 732.

New York.— Copper *v.* Powell, Anth. N. P. 68; Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568.

North Carolina.— Gordon *v.* Price, 32 N. C. 385.

Texas.— See Houston *v.* Evans, (1891) 17 S. W. 925.

United States.— *In re* Ouimette, 18 Fed. Cas. No. 10,622, 1 Sawy. 47.

See 39 Cent. Dig. tit. "Payment," § 85.

not discharge the debt,[74] unless the creditor expressly agrees to receive it as payment.[75] So a draft of an agent is not payment of the debt so as to prevent an action upon the original consideration.[76] Likewise a draft given by a purchaser, accepted by his agent, and received by the seller is not necessarily an absolute payment.[77]

(II) *PAYMENTS BY PARTNERSHIP OR INDIVIDUAL PARTNER*—(A) *Note of Firm For Private Debt.* While it would seem ordinarily that a note given by a firm for the private debt of a partner is not an absolute payment, yet, if it has been the usual habit of all the parties in previous similar transactions to consider such notes as payment, they will be regarded as such.[78]

(B) *Bill or Note of Partner For Debt of Firm.*[79] The giving by a partner of his individual note,[80] or a draft,[81] or his acceptance of a draft,[82] for the debt of the firm, does not extinguish the firm indebtedness, although done after the dissolution of the partnership,[83] except where there is an agreement that it shall operate as payment.[84] So the surrender of the partnership note and the accept-

74. Keller *v.* Singleton, 69 Ga. 703; Wylly *v.* Collins, 9 Ga. 223; Johnson *v.* Cleaves, 15 N. H. 332; Davis *v.* Allen, 3 N. Y. 168. See also Hedge *v.* McQuaid, 11 Cush. (Mass.) 352; Wright *v.* First Crockery Ware Co., 1 N. H. 281, 8 Am. Dec. 68.

75. Porter *v.* Talcott, 1 Cow. (N. Y.) 359. **In Massachusetts** where a negotiable note is *prima facie* an absolute payment, it is held that the acceptance of the agent's note, with intent to give exclusive credit to the maker as such agent, constitutes a payment. Perkins *v.* Cady, 111 Mass. 318. See, generally, French *v.* Price, 24 Pick. (Mass.) 13.

76. Taylor *v.* Connor, 41 Miss. 722, 97 Am. Dec. 419; Millville Ins. Co. *v.* Flesher, 7 Ohio Dec. (Reprint) 510, 3 Cinc. L. Bul. 574; The Washington Irving, 29 Fed. Cas. No. 17,244, 2 Ben. 318; Taylor *v.* Briggs, M. & M. 28, 22 E. C. L. 463. *Compare* Anderson *v.* Hillies, 12 C. B. 499, 21 L. J. C. P. 150, 16 Jur. 819, 74 E. C. L. 499.

77. Ainis *v.* Ayres, 62 Hun (N. Y.) 376, 16 N. Y. Suppl. 905.

78. Benneson *v.* Thayer, 23 Ill. 374.

79. See also PARTNERSHIP.

80. *California.*— Dellapiazza *v.* Foley, 112 Cal. 380, 44 Pac. 727.

Georgia.— Norton *v.* Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501.

Illinois.— Rayburn *v.* Day, 27 Ill. 46.

Maryland.— Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

New Hampshire.— Thompson *v.* Briggs, 28 N. H. 40.

Tennessee.— Nichols *v.* Cheairs, 4 Sneed 229.

Vermont.— Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150, especially where the agreement is that the note shall not be a payment and satisfaction of the debt but that the firm shall still remain liable.

Canada.— Carruthers *v.* Ardagh, 20 Grant Ch. (U. C.) 579.

See 39 Cent. Dig. tit. "Payment," § 67.

81. Sneed *v.* Wiester, 2 A. K. Marsh. (Ky.) 277; Spear *v.* Atkinson, 23 N. C. 262; Bottomley *v.* Nuttall, 5 C. B. N. S. 122, 5 Jur. N. S. 315, 28 L. J. C. P. 110, 94 E. C. L. 122. But see Louderback *v.* Lilly, 75 Ga. 855, holding that where, without notice of the dissolution of the firm, the creditor accepted the individual drafts of one of the partners for the debt, and extended the time of payment without the knowledge or consent of the retiring partner, the latter was released from liability.

82. *Colorado.*— Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193.

Indiana.— Sigler *v.* Coder, Wils. 354.

Maine.— Paine *v.* Dwinel, 53 Me. 52, 87 Am. Dec. 533.

New York.— Murray *v.* Gouverneur, 2 Johns. Cas. 438, 1 Am. Dec. 177.

England.— Lynn *v.* Chaters, 2 Keen 521, 15 Eng. Ch. 521, 48 Eng. Reprint 728.

See 39 Cent. Dig. tit. "Payment," § 67.

83. *Missouri.*— Yarnell *v.* Anderson, 14 Mo. 619.

New Hampshire.— Thompson *v.* Briggs, 28 N. H. 40.

New Jersey.— Titus *v.* Todd, 25 N. J. Eq. 458.

New York.— Vernam *v.* Harris, 1 Hun 451; Smith *v.* Rogers, 17 Johns. 340; Herring *v.* Sanger, 3 Johns. Cas. 71. But see Maier *v.* Canavan, 8 Daly 272.

North Carolina.— Mebane *v.* Spencer, 28 N. C. 423; Wilson *v.* Jennings, 15 N. C. 90.

Ohio.— Keating *v.* Sherlock, 1 Cinc. Super. Ct. 257.

Pennsylvania.— Collier *v.* Leech, 29 Pa. St. 404; Mason *v.* Wickersham, 4 Watts & S. 100.

Texas.— Seward *v.* L'Estrange, 36 Tex. 295.

See 39 Cent. Dig. tit. "Payment," § 67.

Compare Adler *v.* Foster, 39 Mich. 87.

84. *Connecticut.*— Bonnell *v.* Chamberlain, 26 Conn. 487.

Maryland.— Bernard *v.* Torrance, 5 Gill & J. 383.

New York.— Waydell *v.* Luer, 3 Den. 410 [*reversing* 5 Hill 448]; Arnold *v.* Camp, 12 Johns. 409, 7 Am. Dec. 328.

Ohio.— Athens First Nat. Bank *v.* Green, 40 Ohio St. 431.

Pennsylvania.— White *v.* Rech, 171 Pa. St. 82, 32 Atl. 1130.

ance of the individual note of a partner in place thereof does not of itself constitute a payment of the firm's indebtedness,[85] except where there are special circumstances, as where such act prejudicially affects the rights of other partners who may be considered as sureties.[86]

(c) *Note Executed by Partner in Name of Firm After Dissolution.* Where a note is executed by the continuing partner or partners, in the firm-name, after the dissolution of the partnership, it is not, in the absence of an agreement therefor, a payment of the firm indebtedness where it is not binding on the retiring partner.[87] Nor is such note a payment where received through a mistake in fact, as where the creditor was ignorant of the dissolution of the firm.[88] But where the note prejudices the rights of the non-assenting partners as against the partner executing it, it has been held that their liability is extinguished.[89]

(d) *Note of New Firm For Note or Debt of Old.* While a note given by a new firm for a debt of the old firm, or in renewal of a note of the old firm, may constitute a payment of the indebtedness so as to release retiring members of the old firm,[90] as where such note is accepted by the creditor as an absolute payment,[91]

Vermont.— Stephens *v.* Thompson, 28 Vt. 77.

West Virginia.— Bowyer *v.* Knapp, 15 W. Va. 277.

United States.— *In re* Parker, 11 Fed. 397, 6 Sawy. 248.

England.— Thompson *v.* Percival, 2 B. & A. 968, 22 E. C. L. 405.

See 39 Cent. Dig. tit. "Payment," § 67.

Note of partner who has assumed payment of firm debts.— Where a creditor, after dissolution of the firm, knowing that one or more of the partners have agreed with the others to assume and pay the debts of the firm, takes the negotiable notes of those who should pay, in payment of his debt, and thus extends the time of payment, he thereby discharges the other partners. Millerd *v.* Thorn, 56 N. Y. 402; Dodd *v.* Dreyfus, 57 How. Pr. (N. Y.) 319; Paul *v.* Ellison, 1 Ohio Dec. (Reprint) 67, 1 West. L. J. 452; Townsends *v.* Stevenson, 4 Rich. (S. C.) 59.

Acceptance of the notes of each partner individually.— Where, pending or after the dissolution, the creditor receives the individual notes of each of the partners in satisfaction, he is no longer a firm creditor. Maxwell *v.* Day, 45 Ind. 509; Crooker *v.* Crooker, 52 Me. 267, 83 Am. Dec. 509; Page *v.* Carpenter, 10 N. H. 77; Bowyer *v.* Knapp, 15 W. Va. 277. See also Drake *v.* Hill, 53 Iowa 37, 3 N. W. 811, 5 N. W. 745.

Effect of fraud.— Where a creditor, induced thereto by fraud or misrepresentations, accepts the note of a partner in payment of an account against the firm, and upon discovering the fraud, instead of rescinding the agreement of acceptance and surrendering the note within a reasonable time, pursues the note to judgment, so that he cannot place the parties *in statu quo*, he cannot then maintain an action upon the original indebtedness. Ricker *v.* Adams, 59 Vt. 154, 8 Atl. 278.

85. Van Eps *v.* Dillaye, 6 Barb. (N. Y.) 244; Williams *v.* Colby, 3 Silv. Sup. (N. Y.) 337, 6 N. Y. Suppl. 459; *In re* Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574. See also Parker *v.* Canfield, 37 Conn. 250, 9 Am. Rep. 317.

Substitution of note signed by individual partners.— The substitution of a note signed by two partners with their individual names for one signed with the name of the firm, after it was dissolved, does not make it an individual debt if there was no intent to change its character. Maynard *v.* Fellows, 43 N. H. 255. But see Jeisley *v.* Haiter, 4 Yeates (Pa.) 337.

86. Espy *v.* Comer, 80 Ala. 333; Stone *v.* Chamberlin, 20 Ga. 259.

87. Perrin *v.* Keene, 19 Me. 355, 36 Am. Dec. 759; Gardner *v.* Conn, 34 Ohio St. 187; Parker *v.* Cousins, 2 Gratt. (Va.) 372, 44 Am. Dec. 388; *In re* Clap, 5 Fed. Cas. No. 2,784, 2 Lowell 226. See also Edwards *v.* Trulock, 37 Iowa 244; Turnbow *v.* Broach, 12 Bush (Ky.) 455.

88. Chittenango First Nat. Bank *v.* Morgan, 73 N. Y. 593.

89. Silas *v.* Adams, 92 Ga. 350, 17 S. E. 280; Chamberlain *v.* Stone, 24 Ga. 310.

Retiring partners as sureties.— Where the creditor, after dissolution, accepts a time note in the firm-name from the partner continuing the business with knowledge that such partner has assumed the debts of the firm, the retiring partners occupy the position of sureties and are released by the time given. Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

90. See cases cited *infra*, this and notes 91–94.

Renewals of bank loans as sui generis.— Where a bank loans money to a firm, and takes the firm note therefor, and, after the creation of a new firm, composed of the same members and another, accepts its notes in renewal, with knowledge that one of its members, who was a member of the old firm, has retired, the renewal operates as a payment of the old note, precluding the bank from recourse against the property of such retired member. Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54. But see Pueblo First Nat. Bank *v.* Newton, 10 Colo. 161, 14 Pac. 428.

91. See Thurber *v.* Corbin, 51 Barb. (N. Y.) 215; Crowley *v.* Chamberlain, 6 Ohio Dec. (Reprint) 982, 9 Am. L. Rec. 377.

or where the retiring member is considered as a surety and indulgence has been granted the continuing partners,[92] yet ordinarily the note is not considered a payment where not accepted as such,[93] especially where the creditor is ignorant of the change in the firm.[94]

3. PAYMENT BY CHECKS[95] — a. In General. The acceptance by the creditor of a check,[96] without regard to whether it is the check of the debtor[97] or of a third

92. Thurber *v.* Corbin, 51 Barb. (N. Y.) 215.

93. Pueblo First Nat. Bank *v.* Newton, 10 Colo. 161, 14 Pac. 428; Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531; White *v.* Boone, 71 Tex. 712, 12 S. W. 51. See also Kimberly's Appeal, 3 Pa. Cas. 528, 7 Atl. 75.

94. Hill *v.* Marcy, 49 N. H. 265; Heroy *v.* Van Pelt, 4 Bosw. (N. Y.) 60.

95. See also BANKS AND BANKING, 5 Cyc. 528.

Check as payment within statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 252.

Retention of check for less than amount of debt as accord and satisfaction see ACCORD AND SATISFACTION, 1 Cyc. 333 note 72.

96. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Arkansas.— Sharp *v.* Fleming, 75 Ark. 556, 88 S. W. 305.

California.— Comptoir D'Escompte de Paris *v.* Dresbach, 78 Cal. 15, 20 Pac. 28.

Georgia.— Kinard *v.* Sylvester First Nat. Bank, 125 Ga. 228, 53 S. E. 1018, 114 Am. St. Rep. 201; Hatcher *v.* Comer, 75 Ga. 728.

Iowa.— Dille *v.* White, 132 Iowa 327, 109 N. W. 909.

Kansas.— Kermeyer *v.* Newby, 14 Kan. 164.

Louisiana.— Ocean Tow Boat Co. *v.* The Ophelia, 11 La. Ann. 28.

Maine.— Marrett *v.* Brackett, 60 Me. 524.

Massachusetts.— Taylor *v.* Wilson, 11 Metc. 44, 45 Am. Dec. 180; Dennie *v.* Hart, 2 Pick. 204.

Minnesota.— Good *v.* Singleton, 39 Minn. 340, 40 N. W. 359.

Missouri.— Barton *v.* Hunter, 59 Mo. App. 610; Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 58 Mo. App. 17; Selby *v.* McCullough, 26 Mo. App. 66.

New Hampshire.— Nason *v.* Fowler, 70 N. H. 291, 47 Atl. 263.

New York.—Thomas *v.* Westchester County, 115 N. Y. 47, 21 N. E. 674, 4 L. R. A. 477; Turner *v.* Fox Lake Bank, 4 Abb. Dec. 434, 3 Keyes 425, 2 Transcr. App. 344 [*affirming* 23 How. Pr. 399]; Syracuse, etc., R. Co. *v.* Collins, 3 Lans. 29 [*affirmed* in 57 N. Y. 641, 1 Abb. N. Cas. 47]; Houston *v.* Shindler, 11 Barb. 36; Lockwood Trade Journal *v.* New York Silicate Book Slate Co., 88 N. Y. Suppl. 152; People *v.* Baker, 20 Wend. 602; People *v.* Howell, 4 Johns. 296.

Ohio.— Imbush *v.* Mechanics', etc., Bank, 1 Ohio Dec. (Reprint) 8, 1 West. L. J. 49.

Pennsylvania.— Patton *v.* Ash, 7 Serg. & R. 116.

Virginia.— Blair *v.* Wilson, 28 Gratt. 165.

England.— Cohen *v.* Hale, 3 Q. B. D. 371, 47 L. J. Q. B. 496, 39 L. T. Rep. N. S. 35, 26 Wkly. Rep. 680; Hough *v.* May, 4 A. & E. 954, 2 Harr. & W. 33, 5 L. J. K. B. 186, 6 N. & M. 535, 31 E. C. L. 415. See also Hadley *v.* Hadley, [1898] 2 Ch. 680, 67 L. J. Ch. 694, 79 L. T. Rep. N. S. 299, 47 Wkly. Rep. 238. *Compare* Bridges *v.* Garrett, L. R. 5 C. P. 451, 39 L. J. C. P. 251, 22 L. T. Rep. N. S. 448, 18 Wkly. Rep. 815.

See 39 Cent. Dig. tit. "Payment," § 86 *et seq.*

A fortiori a check drawn in favor of the debtor's agent is not *prima facie* evidence of the payment of the debt, even if the creditor assents that it be so drawn. Mullins *v.* Brown, 32 Kan. 312, 4 Pac. 305.

Check lost or fraudulently obtained from creditor.— When a debtor pays his debt by a check to the order of his creditor, or of one nominated by the latter, and the check is lost by, or fraudulently obtained from, the creditor, and is paid to the finder or fraudulent holder on a forged indorsement of the payee, the debtor is not discharged, and may again be called upon to pay his debt, at least unless the check was taken in absolute payment and extinguishment thereof. Thomson *v.* British North America Bank, 82 N. Y. 1.

A check is not payment even if it is given for a note which is surrendered (Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490), nor although a receipt is given for the old debt upon the delivery of the check (Bradford *v.* Fox, 38 N. Y. 289), or, on presentment of one check, the holder receives from the drawer the check for the amount of his check (Kelty *v.* Erie Second Nat. Bank, 52 Barb. (N. Y.) 328).

Invalid check.— The delivery of a check, on which the place where it is not drawn is not stated, and which is not stamped, does not amount to a payment. Bond *v.* Warden, 1 Coll. 583, 14 L. J. Ch. 154, 28 Eng. Ch. 583, 63 Eng. Reprint 553.

Return of worthless check.— Where the drawee is insolvent and the check worthless, it is not necessary to return it to the drawer; and its retention indicates no intention of appropriation as payment of the debt. Herider *v.* Phœnix Loan Assoc., 82 Mo. App. 427.

Certification of check as constituting absolute payment see BANKS AND BANKING, 5 Cyc. 541, 542.

97. *Alabama.*— Bibb *v.* Snodgrass, 97 Ala. 459, 11 So. 880.

Georgia.— Phillips *v.* Bullard, 58 Ga. 256; Lester-Whitney Shoe Co. *v.* Oliver Co., 1 Ga. App. 244, 58 S. E. 212.

Illinois.— Angus *v.* Chicago Trust, etc., Bank, 170 Ill. 298, 48 N. E. 946; Woodburn *v.* Woodburn, 115 Ill. 427, 5 N. E. 82; Peoria, etc., R. Co. *v.* Buckley, 114 Ill. 337, 2 N. E.

person,[98] does not constitute payment, unless it is agreed that it shall be taken as an absolute payment.[99] This rule applies to a check given for a contemporaneous

179; Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281.

Kansas.— See Chappee *v.* Kansas Vitrified Brick Co., 70 Kan. 723, 79 Pac. 666.

Michigan.— Baumgardner *v.* Henry, 131 Mich. 240, 91 N. W. 169.

New Hampshire.— Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New York.— Bradford *v.* Fox, 38 N. Y. 289; Sweet *v.* Titus, 67 Barb. 327; Genin *v.* Tompkins, 12 Barb. 265; Franklin *v.* Vanderpool, 1 Hall 78; Cromwell *v.* Lovett, 1 Hall 56 [*affirmed* in 6 Wend. 369]; Block *v.* Garfiel, 30 Misc. 821, 61 N. Y. Suppl. 918; Millbury *v.* Heitzberg, 55 N. Y. Suppl. 743, 28 N. Y. Civ. Proc. 179; Flynn *v.* Woolsey, 10 N. Y. Suppl. 875; Olcott *v.* Erwin, 9 N. Y. Suppl. 71; Collins *v.* Colmey, 14 N. Y. St. 444; Tanner *v.* Fox Lake Bank, 23 How. Pr. 399 [*affirmed* in 4 Abb. Dec. 434, 3 Keyes 425, 2 Transcr. App. 344].

Ohio.— Hodgson *v.* Barrett, 33 Ohio St. 63, 31 Am. Rep. 527.

Pennsylvania.— Loux *v.* Fox, 171 Pa. St. 68, 33 Atl. 190.

United States.— Pflueger *v.* Lewis Foundry, etc., Co., 134 Fed. 28, 67 C. C. A. 102.

See 39 Cent. Dig. tit. "Payment," § 87.

98. *Indiana.*— Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844.

Iowa.— People's Sav. Bank *v.* Gifford, 108 Iowa 277, 79 N. W. 63.

Kansas.— Mordis *v.* Kennedy, 23 Kan. 408, 33 Am. Rep. 169.

Massachusetts.— Weddigen *v.* Boston Elastic Fabric Co., 100 Mass. 422; Small *v.* Franklin Min. Co., 99 Mass. 277.

Michigan.— Goldsmith *v.* Lichtenberg, 139 Mich. 163, 102 N. W. 627.

Minnesota.— National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263.

New York.— Carroll *v.* Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43; Greenwich Ins. Co. *v.* Oregon Imp. Co., 76 Hun 194, 27 N. Y. Suppl. 794 [*affirmed* in 148 N. Y. 758, 43 N. E. 987]; Jobbitt *v.* Goundry, 29 Barb. 509; Rines *v.* New York, etc., Brewing Co., 45 Misc. 415, 90 N. Y. Suppl. 362.

Pennsylvania.— McIntyre *v.* Kennedy, 29 Pa. St. 448.

Tennessee.— Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

England.— Mocatta *v.* Bell, 4 Jur. N. S. 77, 27 L. J. Ch. 237.

See 39 Cent. Dig. tit. "Payment," § 89.

99. *Illinois.*— Bailey *v.* Pardridge, 134 Ill. 188, 27 N. E. 89 [*affirming* 35 Ill. App. 121].

Indiana.— Sutton *v.* Baldwin, 146 Ind. 361, 45 N. E. 518.

Iowa.— Lyon *v.* Northrup, 17 Iowa 314.

Kentucky.— Harbison *v.* Frazier, 64 S. W. 738, 23 Ky. L. Rep. 1115.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200; Woodville *v.* Reed, 26 Md. 179. See also U. S. *v.* Thompson, 33 Md. 575.

Massachusetts.— See Breck *v.* Barney, 183 Mass. 133, 66 N. E. 643.

New York.— See *In re* Kellogg, 104 N. Y. 648, 10 N. E. 152 [*affirming* 39 Hun 275]; Upson *v.* Mt. Morris Bank, 103 N. Y. App. Div. 367, 92 N. Y. Suppl. 1101. But see Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Bernheimer *v.* Herrman, 44 Hun 110.

North Carolina.— Davis Sulphur Ore Co. *v.* Powers, 130 N. C. 152, 41 S. E. 6; Tiddy *v.* Harris, 101 N. C. 589, 8 S. E. 227; Sellars *v.* Johnson, 65 N. C. 104.

Pennsylvania.— Sayers *v.* Kent, 201 Pa. St. 38, 50 Atl. 296; Kilpatrick *v.* Home Bldg., etc., Assoc., 119 Pa. St. 30, 12 Atl. 754; Cochran *v.* Slomkowski, 29 Pa. Super. Ct. 385.

Rhode Island.— National Park Bank *v.* Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475.

Virginia.— Blair *v.* Wilson, 28 Gratt. 165.

Wisconsin.— LaFayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761.

Wyoming.— See Conway *v.* Smith Mercantile Co., 6 Wyo. 468, 46 Pac. 1084.

England.— Pollard *v.* Bank of England, L. R. 6 Q. B. 623, 40 L. J. Q. B. 233, 25 L. T. Rep. N. S. 415, 19 Wkly. Rep. 1168; Pearce *v.* Davis, 1 M. & Rob. 365.

Canada.— McLeish *v.* Howard, 3 Ont. App. 503; Livingston *v.* Wood, 27 Grant Ch. (U. C.) 515; Hughes *v.* Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221; Geohegan *v.* Lawson, 13 U. C. Q. B. 495.

See 39 Cent. Dig. tit. "Payment," § 86 *et seq.*

The intent of the parties is to be determined by their express agreement, or the facts and circumstances of the transaction. Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785. There need be no express words or writing of the parties agreeing that the check is to be an absolute payment, but the circumstances and the conduct of the parties may show an express understanding that the check is taken in satisfaction of the debt or estop the creditor from claiming the contrary. Conde *v.* Dreisam Gold Min. Co., 3 Cal. App. 583, 86 Pac. 825. For instance, where a check is sent for the express purpose of payment and is retained for an unreasonable time under circumstances implying that it was so accepted, it will be construed to have been accepted as an absolute payment. Conde *v.* Dreisam Gold Min. Co., *supra*; Bloomquist *v.* Johnson, 107 Ill. App. 154.

If the acceptance of the check was induced by fraudulent representations it does not constitute payment. Martin *v.* Pennock, 2 Pa. St. 376.

Absence of funds.— A check does not constitute payment where drawn in the absence of funds and with no reasonable expectation

debt as well as for one given in payment of a preëxisting debt.[1] But where the check is in fact paid the debt is extinguished,[2] and it is immaterial that the payment was to an authorized agent of the creditor.[3]

b. Diligence in Collection. The acceptanee of a check implies an undertaking to nse due diligence in presenting it for payment and giving notiee of dishonor, and if the parties from whom it is received sustain loss by want of such diligenee it will be held to operate as actual payment.[4] But where the bank on whieh the check is drawn fails before the expiration of a reasonable time in which to present the check,[5] or it is prohibited by injunction from making any more pay-

of funds in the hands of the drawees to meet it, and no reasonable expectation that it would be honored. Holmes *v.* Fall River First Nat. Bank, 126 Mass. 353; Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180; Fleig *v.* Sleet, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800. Where the debtor gives in payment his check with knowledge that he has no funds in the bank to meet it, there is such a false representation of a material fact as to entitle the seller to rescind the contract even though the purchaser at the time believed, and had reasonable ground for believing, that the check would be paid. Loughnan *v.* Barry, Ir. R. 6 C. L. 457.

Where a check is received as conditional payment the payment becomes absolute and relates to the date of the delivery of the check when its recipient actually cashes it. Hooker *v.* Burr, 137 Cal. 663, 668, 70 Pac. 778, 99 Am. St. Rep. 17.

The acceptance of a check from the drawee of a bill for the amount thereof, where the bill is given up, operates as a payment of the bill, in favor of the debtor delivering such draft of a third person to his credit. Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762. And see Russell *v.* Hankey, 6 T. R. 12.

Check of third person.— Where the debtor directs the creditor to send a bill for goods bought to a third person, and the creditor accepts the check of the third person and notifies the debtor that the goods have been paid for, and on the same day the third person fails, leaving the check unpaid and in debt to said debtor, the check constitutes a payment by the debtor. White *v.* Howard, 1 Sandf. (N. Y.) 81.

Agent's check.— Where goods are bought to be delivered to a special agent of the buyer, with whom he agrees to leave cash for payment, which he does, and the seller, on delivery, accepts part cash, and the agent's check for the balance, which he holds until after the buyer settles his accounts with the agent, and the latter becomes insolvent, the buyer is released from liability. Cleveland *v.* Pearl, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748.

1. Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204; National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. Rep. 566, 9 L. R. A. 263. See also Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37; Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405. But see Redpath *v.* Kolfage, 16 U. C. Q. B. 433.

2. *Alabama.*— Kansas City, etc., R. Co. *v.* Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395.

Georgia.— O. A. Smith Roofing, etc., Co. *v.* Mitchell, 117 Ga. 772, 45 S. E. 47.

Iowa.— Harbach *v.* Colvin, 73 Iowa 638, 35 N. W. 663.

Michigan.—Kallander *v.* Neidhold, 98 Mich. 517, 57 N. W. 571.

New York.— Sage *v.* Burton, 84 Hun 267, 32 N. Y. Suppl. 1122.

Pennsylvania.— Strong *v.* Ten Cent Tutor Bldg., etc., Assoc., 189 Pa. St. 406, 42 Atl. 46.

See 39 Cent. Dig. tit. "Payment," § 86 *et seq.*

The payment relates back to the date of the giving of the check. Hunter *v.* Wetsell, 17 Hun (N. Y.) 135 [*affirmed* in 84 N. Y. 549, 38 Am. Rep. 547]; Elwell *v.* Jackson, Cab. & E. 362.

3. Kansas City, etc., R. Co. *v.* Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395; Sage *v.* Burton, 84 Hun (N. Y.) 267, 32 N. Y. Suppl. 1122.

4. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Arkansas.— Sharp *v.* E. Nathan Mercantile Co., (1905) 88 S. W. 305.

California.— R. H. Herron Co. *v.* Mawby, (App. 1907) 89 Pac. 872.

Illinois.— Brown *v.* Schintz, 202 Ill. 509, 67 N. E. 172.

Maine.— Marrett *v.* Brackett, 60 Me. 524.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200.

Massachusetts.—Taylor *v.* Wilson, 11 Metc. 44, 45 Am. Dec. 180.

Ohio.— Fleig *v.* Sleet, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800.

South Dakota.— Manitoba Mortg., etc., Co. *v.* Weiss, 18 S. D. 459, 101 N. W. 37, 112 Am. St. Rep. 799.

England.— Hopkins *v.* Ware, L. R. 4 Exch. 268, 38 L. J. Exch. 147, 20 L. T. Rep. N. S. 668.

Canada.— Sawyer *v.* Thomas, 18 Ont. App. 129; Redpath *v.* Kolfage, 16 U. C. Q. B. 433.

See 39 Cent. Dig. tit. "Payment," § 86 *et seq.* See also BANKS AND BANKING, 5 Cyc. 532–534.

Delay in presentation may be excused. Smith *v.* Buchan, 27 U. C. Q. B. 106.

5. Syracuse, etc., R. Co. *v.* Collins, 3 Lans. (N. Y.) 29 [*affirmed* in 57 N. Y. 641, 1 Abb. N. Cas. 47]; Cromwell *v.* Lovett, 1 Hall (N. Y.) 64 [*affirmed* in 6 Wend. 369]; Peo-

ments,[6] the well-settled rule is that the check does not constitute a payment of the claim or debt.

B. Particular Kinds of Money[7] — **1. Where No Provision in Contract.** In the absence of any provision in the contract, or of any circumstances excluding it, contracts for the payment of money refer to the ordinary and usual currency in which business is transacted.[8] In such a case payment may be made in any legal tender.[9]

2. Where Fixed by Contract — a. In General. If a particular kind of currency is contracted for, payment can only be made in that currency,[10] except where the creditor consents to payment in a different medium.[11] If the obligation is to pay in such funds as the banks receive and pay out at the maturity of the debt, it is payable in such medium, although the loan was of another kind of currency.[12] If the obligation is payable in a certain kind of coin, the fact that such coin afterward ceases to be a legal tender is immaterial.[13]

b. Gold and Silver. The earlier decisions held that a provision in a contract for payment in coin or a particular kind of coin was of no effect, and that payment could be made in any medium that was a legal tender, such as treasury notes after the federal enactment of 1862.[14] There were, however, cases to the con-

ple *v.* Howell, 4 Johns. (N. Y.) 296; Larue *v.* Cloud, 22 Gratt. (Va.) 513; Everett *v.* Collins, 2 Campb. 515, 11 Rev. Rep. 785.

6. Cromwell *v.* Lovett, 1 Hall (N. Y.) 56 [*affirmed* in 6 Wend. 369].

7. See also Commercial Paper, 7 Cyc. 1009.

Designation in judgment of medium of payment see Judgments, 23 Cyc. 791.

Fines see Fines, 19 Cyc. 548.

Judicial notice of facts in relation to circulating medium see Evidence, 16 Cyc. 857.

The word "money" has been recognized generally by the courts as a generic term covering anything that by consent is made to represent property and pass as such in current business transactions. Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283; Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140.

8. Fabbri *v.* Kalbfleisch, 52 N. Y. 28.

Form of currency not money.— Payment should ordinarily be made in money or coin, and the creditor is not bound to accept anything but such money at its true value, and hence he is not obliged to accept a form of currency which is not money. Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

9. McInhill *v.* Odell, 62 Ill. 169; Wright *v.* Jacobs, 61 Mo. 19. See also Sinclair *v.* Piercy, 5 J. J. Marsh. (Ky.) 63; Marsteller *v.* Faw, 16 Fed. Cas. No. 9,137, 1 Cranch C. C. 117.

Where the debt is payable in dollars, it is payable in whatever the laws of the United States declare to be legal tender. Miller *v.* Lacy, 33 Tex. 351.

10. Deering *v.* Parker, 4 Dall. (U. S.) appendix xxiii, 1 L. ed. 925; Macrae *v.* Goodman, 10 Jur. 555, 5 Moore P. C. 316, 13 Eng. Reprint 512.

Illustrations of rule.— An obligation payable in lawful current money of a particular state is payable in money issued under the authority of congress. Wharton *v.* Morris, 1 Dall. (Pa.) 125, 1 L. ed. 65. The words "currency of Kentucky" as used in an obligation mean the circulating medium of the state at the date of the instrument. Sinclair *v.* Piercy, 5 J. J. Marsh. (Ky.) 63.

Construction of contract to pay in currency at a specie value at maturity.— Caldwell *v.* Craig, 22 Gratt. (Va.) 340.

The intent of the parties to a contract as to the medium of payment, where clearly expressed, should govern. Hood *v.* Olin, 68 Mich. 165, 36 N. W. 177; Butler *v.* Horwitz, 7 Wall. (U. S.) 258, 19 L. ed. 149. The question whether a written contract, made at Ceylon, to pay "in cash" for goods deliverable at New York, means a payment in specie — gold or silver — is one of intention; but the intention is to be reached by the court from the terms of the contract, either as the words themselves import, or as they are explained by local custom or usage. Gladstone *v.* Chamberlain, 10 Fed. Cas. No. 5,469.

Interest is payable in the same kind of money as the principal. McCalla *v.* Ely, 64 Pa. St. 254.

11. See *infra*, III, C.

12. Hilb *v.* Peyton, 21 Gratt. (Va.) 386.

13. Johnson *v.* Ash, 142 Pa. St. 45, 21 Atl. 754, 12 L. R. A. 219.

14. *Alabama.*— Holt *v.* Given, 43 Ala. 612; Spear *v.* Alexander, 42 Ala. 572.

Indiana.— Brown *v.* Welch, 26 Ind. 116. See also State Bank *v.* Burton, 27 Ind. 426.

Iowa.— Warnibold *v.* Schlicting, 16 Iowa 243.

Kentucky.— Riley *v.* Sharp, 1 Bush 348.

Louisiana.— Jump *v.* Peltier, 18 La. Ann. 193.

Missouri.— Appel *v.* Woltmann, 38 Mo. 194.

Nevada.— Hastings *v.* Johnson, 2 Nev. 190.

New York.— Rodes *v.* Bronson, 34 N. Y. 649 [*reversed* in 7 Wall. (U. S.) 229, 19 L. ed. 141]; Murray *v.* Harrison, 47 Barb. 484, 33 How. Pr. 90; Kimpton *v.* Bronson, 45 Barb. 618; Wilson *v.* Morgan, 4 Rob. 58, 1 Abb. Pr. N. S. 174, 30 How. Pr. 386; Murray *v.* Gale, 5 Abb. Pr. N. S. 236. But see Prince Edward's Island Bank *v.* Trumbull, 53 Barb. 459, 35 How. Pr. 8.

trary,[15] some of the cases being based on the theory that the particular contract was one for the delivery of a commodity in payment,[16] while others were decided on the ground that the provision in the contract was for a return of the particular coin loaned, as distinguished from a debt.[17] It is now well settled, however, since a decision of the federal supreme court,[18] that such provisions are valid and enforceable,[19] even though the contract was made after the passage of the legal tender acts of 1862.[20] Where the agreement is to pay in coin or any particular coin "or its equivalent," it has been held that the contract is to pay a given number of dollars

Pennsylvania.—Laughlin *v.* Harvey, 52 Pa. St. 30; Graham *v.* Marshall, 52 Pa. St. 28; Sandford *v.* Hays, 52 Pa. St. 26; Mervine *v.* Sailor, 52 Pa. St. 18 [*affirming* 5 Phila. 422]; Shollenberger *v.* Brinton, 52 Pa. St. 9; *In re* Jefferson Medical College's Petition, 6 Phila. 313.

United States.— Baker *v.* Ward, 2 Fed. Cas. No. 785, 3 Ben. 499.

See 39 Cent. Dig. tit. "Payment," § 42.

15. Otis *v.* Haseltine, 27 Cal. 80; Galland *v.* Lewis, 26 Cal. 46; Myers *v.* Kaufman, 37 Ga. 600, 95 Am. Dec. 367; Hord *v.* Miller, 2 Duv. (Ky.) 103 (enforcement in equity); Kinike *v.* Matthews, 6 Phila. (Pa.) 107 (holding that a ground-rent payable in specific coin or so much of the lawful money of the province of Pennsylvania as shall be sufficient to purchase the same is not payable in United States legal tender notes).

Bond payable in dollars.— A bond given before 1862 payable in "dollars" generally could be paid in legal tender notes after 1862. Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

Construction of contract.— An obligation for so many dollars in gold and silver is an obligation for the direct payment of money and is not payable in bullion, spoons, rings, etc. Hart *v.* Flynn, 8 Dana (Ky.) 190.

What constitutes agreement to pay in gold.—An obligation to pay "for value received in American gold" is not specifically payable in "American gold." Hull *v.* Kohlsaat, 36 Ill. 130.

16. Sears *v.* Dewing, 14 Allen (Mass.) 413; Murray *v.* Harrison, 47 Barb. (N. Y.) 484, 33 How. Pr. 90; Christ Church Hospital *v.* Fuechsel, 54 Pa. St. 71; Dutton *v.* Pailaret, 52 Pa. St. 109, 91 Am. Dec. 135; Hill *v.* Trustee, 7 Phila. (Pa.) 28.

17. Commonwealth Bank *v.* Van Vleck, 49 Barb. (N. Y.) 508; Warner *v.* Sauk County Bank, 20 Wis. 492.

18. Bronson *v.* Rodes, 7 Wall. (U. S.) 229, 19 L. ed. 141 [*reversing* 34 N. Y. 649].

19. *Alabama.*— Chisholm *v.* Arrington, 43 Ala. 610. *Contra,* Brassell *v.* McLemore, 50 Ala. 476; Munter *v.* Rogers, 50 Ala. 283.

Colorado.— Hittson *v.* Davenport, 4 Colo. 169.

Florida.— Bowen *v.* Darby, 14 Fla. 202.

Illinois.— McGoon *v.* Shirk, 54 Ill. 408, 5 Am. Rep. 122. *Contra,* Reinback *v.* Crabtree, 77 Ill. 182.

Louisiana.— Lafitte *v.* Rivera, 23 La. Ann. 32.

Massachusetts.— Stark *v.* Coffin, 105 Mass. 328.

Missouri.— State *v.* Hays, 50 Mo. 34, 11 Am. Rep. 402.

New York.— Gunther *v.* Colin, 3 Daly 125.

Pennsylvania.— Rankin *v.* Demott, 61 Pa. St. 263; Frank *v.* Colhoun, 59 Pa. St. 381. *Contra,* Morris *v.* Bancroft, 9 Phila. 277.

South Carolina.— Bobo *v.* Goss, 1 S. C. 262.

Washington.— Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302, holding that the right cannot be taken away by state statute.

United States.— Tiebilcock *v.* Wilson, 12 Wall. 687, 20 L. ed. 460; Butler *v.* Horwitz, 7 Wall. 258, 19 L. ed. 149. See also Tyers *v.* U. S., 5 Ct. Cl. 509.

See 39 Cent. Dig. tit. "Payment," § 42.

Compare N. P. Perine Contracting, etc., Co. *v.* Quackenbush, 104 Cal. 684, 38 Pac. 533.

A contract payable in gold is to be discharged by the payment of so many dollars in legal tender notes as the gold was worth on the day the payment should have been made, with interest on such sum from that time. Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453; Wills *v.* Allison, 4 Heisk. (Tenn.) 385. Payments made in currency, under a contract to pay, for cattle delivered, a certain number of dollars in gold, discharges the contract to the amount of the gold value at the dates thereof. Hittson *v.* Davenport, 4 Colo. 169.

Specie as equivalent to gold and silver.— A note expressed to be payable in specie is equivalent to a note expressed to be payable in gold or silver dollars, within the rule that such contract may be enforced by payment in coin. Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 20 L. ed. 460.

Payment of dividends in gold.— Although an insurance company agrees to pay any loss in gold, it is not bound, in the absence of any provision to that effect, to pay dividends declared upon such policies in gold. Luling *v.* Atlantic Mut. Ins. Co., 51 N. Y. 207 [*affirming* 50 Barb. 520 (*reversing* 45 Barb. 510)].

Implied agreements.—Since the legal tender acts, an undertaking to pay in gold may be implied under special circumstances and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere expectations of the parties. Maryland *v.* Baltimore, etc., R. Co., 22 Wall. (U. S.) 105, 22 L. ed. 713 [*followed* in Woodruff *v.* Mississippi, 162 U. S. 291, 16 S. Ct. 820, 40 L. ed. 973].

20. Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; The Edith, 8 Fed. Cas. No.

in any legal tender,[21] but the better rule would seem to be that the payment must be made either in the particular coin or in other legal tender equal in value to such coin.[22]

3. LEGAL TENDER — a. In General. What constitutes legal tender is to be determined from the federal statutes. Fractional silver currency was formerly legal tender to any amount,[23] but now it is a valid tender only for a limited sum.[24] So a silver dollar was formerly a legal tender for its nominal value on debts of any amount.[25] Gold dust is not a legal tender,[26] nor is it cash within the meaning of a contract specifying that payment shall be made in cash.[27]

b. Constitutional and Statutory Provisions. The constitutionality of the federal statutes of 1862 and the subsequent enactments making treasury notes a legal tender, in addition to gold and silver, is well settled,[28] whether applied to debts contracted before or after the passage of the statute.[29] State statutes cannot interfere with the federal constitution and statutes by authorizing as legal tender currency other than that provided for by the federal constitution and statutes.[30] But a state statute providing that contracts for specific kinds of money may be enforced is constitutional,[31] while a state statute providing that such a provision is of no effect is unconstitutional.[32]

c. Treasury and Legal Tender Notes. At an early day payment in paper money was sufficient, in the absence of any agreement as to the medium of payment,[33] and by the federal statutes of 1814 treasury notes were made a legal tender to a very limited extent.[34] But for a long time before the passage of the legal tender acts of 1862, only gold or silver coin was a legal tender in payment of private debts.[35] After the legal tender acts of 1862, treasury notes, commonly

4,281, 5 Ben. 144; The Emily B. Souder, 8 Fed. Cas. No. 4,456, 8 Blatchf. 337.

21. Reese *v.* Stearns, 29 Cal. 273; Jones *v.* Smith, 48 Barb. (N. Y.) 552; Killough *v.* Alford, 32 Tex. 457, 5 Am. Rep. 249.

22. Holt *v.* Given, 43 Ala. 612; Chisholm *v.* Arrington, 43 Ala. 610; Wells *v.* Van Sickle, 6 Nev. 45; Mitchell *v.* Henderson, 63 N. C. 643.

23. People *v.* Dubois, 18 Ill. 333; Parrish *v.* Kohler, 11 Phila. (Pa.) 346.

Silver coins worn smooth by use, where not appreciably diminished in weight, and distinguishable, are a legal tender. Mobile St. R. Co. *v.* Watters, 135 Ala. 227, 33 So. 42; Jersey City, etc., R. Co. *v.* Morgan, 52 N. J. L. 60, 18 Atl. 904 [*affirmed* in 52 N. J. L. 558, 21 Atl. 783].

24. State Bank *v.* Lockwood, 16 Ind. 306.

25. State Bank *v.* Lockwood, 16 Ind. 306.

26. McCune *v.* Erfort, 43 Mo. 134.

27. Gunter *v.* Sanchez, 1 Cal. 45.

28. *California.*— Belloc *v.* Davis, 38 Cal. 242; Kierski *v.* Mathews, 25 Cal. 591; Lick *v.* Faulkner, 25 Cal. 404.

Indiana.— Brown *v.* Welch, 26 Ind. 116.

Iowa.— Hintrager *v.* Bates, 18 Iowa 174.

Minnesota.— Breen *v.* Dewey, 16 Minn. 136.

Missouri.— Verges *v.* Giboney, 38 Mo. 458.

Nevada.— Milliken *v.* Sloat, 1 Nev. 573.

New York.— Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400; Hague *v.* Powers, 39 Barb. 427, 25 How. Pr. 17.

Pennsylvania.— Shollenberger *v.* Brinton, 52 Pa. St. 9; Borie *v.* Trott, 5 Phila. 366; Crocker *v.* Wolford, 5 Phila. 340, 2 Pittsb. 453.

Tennessee.— Johnson *v.* Ivey, 4 Coldw. 608, 94 Am. Dec. 206.

Vermont.— Carpenter *v.* Northfield Bank, 39 Vt. 46.

Wisconsin.—Breitenbach *v.* Turner, 18 Wis. 140.

See 39 Cent. Dig. tit. "Payment," § 39.

Contra.— Griswold *v.* Hepburn, 2 Duv. (Ky.) 20.

29. Black *v.* Lusk, 69 Ill. 70; O'Neil *v.* McKewn, 1 S. C. 147.

Impairment of obligation of contract see CONSTITUTIONAL LAW, 8 Cyc. 994.

Impairment of vested rights see CONSTITUTIONAL LAW, 8 Cyc. 899.

30. Lowry *v.* McGhee, 8 Yerg. (Tenn.) 242. *Contra*, see Bush *v.* Shipman, 5 Ill. 186.

What constitutes debt.— A claim for damages is not a debt within the federal legal tender acts so as to invalidate a state statute making a judgment a claim for damages payable in gold coin. Clark *v.* Nevada Land, etc., Co., 6 Nev. 203.

Bank-bills as payment to bank.— A state statute may require bank-bills to be received in payment of judgments rendered in favor of banks. Charlotte Bank *v.* Hart, 67 N. C. 264.

31. Carpentier *v.* Atherton, 25 Cal. 564; Linn *v.* Minor, 4 Nev. 462 [*overruling* Mitchell *v.* Bromberger, 1 Nev. 604; Milliken *v.* Sloat, 1 Nev. 573].

32. Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

33. Pryor *v.* Adams, 1 Call (Va.) 382, 1 Am. Dec. 533; Wilson *v.* Keeling, 1 Wash. (Va.) 194.

34. Thorndike *v.* U. S., 23 Fed. Cas. No. 13,987, 2 Mason 1.

35. See Foquet *v.* Hoadley, 3 Conn. 534.

called greenbacks, were a legal tender in payment of all debts,[36] even as to contracts entered into, or debts due, before the passage of such statute,[37] provided there was no stipulation in the contract to the contrary.[38]

4. Bank Paper — a. In General. Payment in bank paper may be authorized by the terms of the contract,[39] or by statute or executive order.[40] So if the creditor consents to receive certain bank paper as payment the debt is satisfied.[41] If

36. *California.*— Langenberger *v.* Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Tarbell *v.* Central Pac. R. Co., 34 Cal. 616; Higgins *v.* Bear River, etc., Water, etc., Co., 27 Cal. 153; People *v.* Mayhew, 26 Cal. 655; Curiac *v.* Abadie, 25 Cal. 502.

Indiana.— Bowen *v.* Clark, 46 Ind. 405.

Maryland.—Baltimore, etc., R. Co. *v.* State, 36 Md. 519.

Massachusetts.— Cary *v.* Courtenay, 103 Mass. 316, 4 Am. Rep. 559.

Mississippi.— Carter *v.* Cox, 44 Miss. 148, holding that greenbacks are not only a legal tender for the payment of debts but also a legal standard of the value of property and for the estimation of damages for the breach of contract.

Missouri.— Verges *v.* Giboney, 38 Mo. 458.

New York.— Lewis *v.* New York Cent. R. Co., 49 Barb. 330.

Ohio.— Longworth *v.* Mitchell, 26 Ohio St. 334.

Pennsylvania.— Kroener *v.* Colhoun, 52 Pa. St. 24; Davis *v.* Burton, 52 Pa. St. 22.

Virginia.— Sanders *v.* Branson, 22 Gratt. 364.

United States.— Savage *v.* U. S., 8 Ct. Cl. 545.

See 39 Cent. Dig. tit. "Payment," § 46.

What constitutes debt.— The obligation of a redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a foreclosure sale is a debt within the act of congress of Feb. 25, 1862, making treasury notes lawful money and a legal tender in payment of debts. People *v.* Mayhew, 26 Cal. 655. So the liability to pay the principal sum under a covenant to pay ground-rent or such principal sum is a debt. Shollenberger *v.* Brinton, 52 Pa. St. 9. So the obligation to pay the condition of a mortgage bond is a debt. Dutton *v.* Pailaret, 52 Pa. St. 109, 91 Am. Dec. 135.

Bank deposit.— The legal tender acts apply to ordinary bank deposits, so that a bank may pay in treasury notes, although the deposit was made in gold and before the passage of the legal tender statutes. Thompson *v.* Riggs, 6 D. C. 99.

Obligation payable in "dollars."— An obligation payable in "dollars" generally could, after the passage of the legal tender acts, be discharged by treasury notes. Belloc *v.* Davis, 38 Cal. 242; Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

Contract made in foreign country.— Where a charter-party was made in a foreign country stipulating the freight to be a lump sum of a certain number of dollars, to be paid on the safe delivery of the cargo, and the standard of value in the foreign country was gold and silver, the amount could not be paid in United States legal tender notes. Gladstone *v.* Chamberlain, 10 Fed. Cas. No. 5,471, 10 Fed. Cas. No. 5,470, 7 Blatchf. 207.

Reissuance of legal tender notes.— Under the federal statutes of 1878 providing that legal tender notes issued during the war of the rebellion and since the close of the war redeemed and paid in gold coin at the treasury shall be reissued and kept in circulation, such notes, when so reissued, are a legal tender. Legal Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204.

37. People *v.* Cook, 44 Cal. 638; Higgins *v.* Bear River, etc., Water, etc., Co., 27 Cal. 153; Verges *v.* Giboney, 38 Mo. 458; Longworth *v.* Mitchell, 26 Ohio St. 334; Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287 [*overruling* Hepburn *v.* Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513]. *Contra,* Harrell *v.* Barnes, 34 Tex. 413.

38. See *supra,* III, B, 2, b.

39. Dillard *v.* Evans, 4 Ark. 175; Hay *v.* McKinney, 7 J. J. Marsh. (Ky.) 441; Speak *v.* Warner, 5 J. J. Marsh. (Ky.) 68; Chambers *v.* George, 5 Litt. (Ky.) 335; Gardner *v.* Hall, 61 N. C. 21. See Davis *v.* Phelps, 7 T. B. Mon. (Ky.) 632 (holding that where an agreement is by mistake written for the payment of money, instead of commonwealth bank-notes, the creditor cannot insist on the paper, but the specie value of the paper when due, with interest, is the amount of his demand); Wood *v.* Cooper, 2 Heisk. (Tenn.) 441.

Measure of damages for failure to pay.— Where a shipping contract provided that the carrier's compensation should be paid in notes of a certain banking company, payment to be made at a certain time and place, the measure of damages for the shipper's breach of the contract was the specie value of the notes at the place of payment at the time they should have been paid. Robinson *v.* Noble, 8 Pet. (U. S.) 181, 8 L. ed. 910.

Depreciation in value of paper.— Where one agreed to do certain work for a specified sum payable in notes of a particular bank or their equivalent, which was a fair compensation for the work, and the bills of the bank had depreciated in value at the time the money became due, the creditor was held entitled to recover a fair price for his work in current money. Sample *v.* Pickens, Sm. & M. Ch. (Miss.) 501.

40. Hamilton *v.* Cook County, 5 Ill. 519; Keyes *v.* Jasper, 5 Ill. 305; Bush *v.* Shipman, 5 Ill. 186; Townsend *v.* Burgher, 7 T. B. Mon. (Ky.) 224. See Trigg *v.* Drew, 10 How. (U. S.) 224, 13 L. ed. 397; Paup *v.* Drew, 10 How. (U. S.) 218, 13 L. ed. 394.

41. Dakin *v.* Anderson, 18 Ind. 52. See

payment is made in bank-bills and accepted, it is a good payment at their nominal par value.[42] But in the absence of a statute providing therefor,[43] bank-notes,[44] although considered as money in ordinary business transactions,[45] are not a legal tender,[46] although they constitute payment if the tender is not objected to upon that ground.[47] Where the agreement is to pay in current bank-notes, it means such as are current without discount in ordinary business at the time the debt becomes due.[48]

b. Validity of Paper and Failure of Bank. A debtor paying in bank-notes impliedly warrants the validity thereof.[49] Payment in the bills of a bank which has failed is insufficient,[50] although neither the debtor nor the creditor knew of the failure.[51] But if the bills of a bank which has failed are received in pay-

Shackleford *v.* Helm, 1 Dana (Ky.) 338, holding that where a creditor agrees to take notes of the bank of the commonwealth for a specie debt, and the debtor neither pays nor tenders until the paper has risen in value, he is not entitled in equity to any allowance for the advance.

42. Phillips *v.* Blake, 1 Metc. (Mass.) 156. And see Crockett *v.* Alexander, 5 Heisk. (Tenn.) 106; Rogers *v.* Leftwich, 2 Heisk. (Tenn.) 480.

Demand for payment.—A payment in bank-notes is not upon the same footing as a payment in promissory notes or bills, so as to avoid the payment by presentation and refusal to pay. If a payment is made in genuine bank-notes, circulating and received as money, such payment cannot, in the absence of fraud, be avoided by demand, refusal, and notice or tender to the payer. Ware *v.* Street, 2 Head (Tenn.) 609, 75 Am. Dec. 755.

43. Sibert *v.* Kelly, 6 T. B. Mon. (Ky.) 669.

44. See Fleming *v.* Nall, 1 Tex. 246, holding that the terms "bank-notes," "good bank-notes," or "current bank-notes," when used in notes, import such bank-bills only as are redeemable in gold or silver, or such as are equivalent thereto.

45. Bradley *v.* Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597; Morrill *v.* Brown, 15 Pick. (Mass.) 173; Edwards *v.* Morris, 1 Ohio 524; Morris *v.* Edwards, 1 Ohio 189.

46. Foquet *v.* Hoadley, 3 Conn. 534; Donaldson *v.* Benton, 20 N. C. 572; Lowry *v.* McGhee, 8 Yerg. (Tenn.) 242; Grigby *v.* Oakes, 2 B. & P. 526; Wright *v.* Reed, 3 T. R. 554. And see Woodson *v.* Gallipolis Bank, 4 B. Mon. (Ky.) 203; Sibert *v.* Kelly, 6 T. B. Mon. (Ky.) 669.

Payment in discharge of execution.— Payment of bank-notes to the officer levying an execution does not discharge the debt unless the act is ratified by the creditor. Gasquet *v.* Warren, 2 Sm. & M. (Miss.) 514; Moody *v.* Mahurin, 4 N. H. 296; Griffin *v.* Thompson, 2 How. (U. S.) 244, 11 L. ed. 253. And see Lowry *v.* McGhee, 8 Yerg. (Tenn.) 242.

Payment of fees of officer.— It is not illegal for an officer serving an execution to demand a discount on bank-notes received by him in payment of his fees. Hevener *v.* Kerr, 4 N. J. L. 58.

Payment into court of amount of judgment.— Bank-notes are not cash, and cannot be brought into court as such in payment of a judgment, although the bank issuing the notes be the holder of the judgment. Trenton State Bank *v.* Coxe, 8 N. J. L. 172, 14 Am. Dec. 417.

47. Crutchfield *v.* Robins, 5 Humphr. (Tenn.) 15, 42 Am. Dec. 417; Cooley *v.* Weeks, 10 Yerg. (Tenn.) 141; Stewart *v.* Freeman, 2 N. Brunsw. Eq. 451. See also TENDER.

Depreciated or non-redeemable notes.— But bank-notes not current at their par value, nor redeemable upon presentation, are not a good tender, whether objected to at the time or not. Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

48. Pierson *v.* Wallace, 7 Ark. 282; Ayres *v.* Hayes, 13 Mo. 252. But see Bizzell *v.* Brewer, 9 Ark. 58, holding that a bond by which the obligor covenants to pay one hundred and fifty dollars "to be paid in any current notes of the Bank of the State of Arkansas" is payable in the notes of said bank at their nominal value, regardless of their depreciation.

49. Kottwitz *v.* Bagby, 16 Tex. 656; Edmunds *v.* Digges, 1 Gratt. (Va.) 359, 42 Am. Dec. 561. See also Cassedy *v.* Williams, 5 Fed. Cas. No. 2,501, 1 Hayw. & H. 151, holding that if the bank-notes are not genuine, to the knowledge of the debtor, the debt is not extinguished.

50. Magee *v.* Carmack, 13 Ill. 289; Townsends *v.* Racine Bank, 7 Wis. 185.

51. *Maine.*— Frontier Bank *v.* Morse, 22 Me. 88, 38 Am. Dec. 284.

New Hampshire.— Fogg *v.* Sawyer, 9 N. H. 365.

New York.— Thomas *v.* Todd, 6 Hill 340; Ontario Bank *v.* Lightbody, 13 Wend. 101, 27 Am. Dec. 179.

Ohio.— Westfall *v.* Braley, 10 Ohio St. 188, 75 Am. Dec. 509. *Contra*, Imbush *v.* Mechanics', etc., Bank, 1 Ohio Dec. (Reprint) 8, 1 West. L. J. 49.

South Carolina.— Harley *v.* Thornton, 2 Hill 509 note.

Vermont.— Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707; Gilman *v.* Peck, 11 Vt. 516, 34 Am. Dec. 702.

See 39 Cent. Dig. tit. "Payment," § 47.

Contra.— Lowrey *v.* Murrell, 2 Port. (Ala.) 280, 27 Am. Dec. 651; Bayard *v.* Shunk, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441; Ware *v.* Street, 2 Head (Tenn.) 609, 75 Am. Dec. 755; Scruggs *v.* Gass, 8 Yerg. (Tenn.) 175, 29 Am. Dec. 114.

ment, they must be returned within a reasonable time after the creditor discovers that they are valueless, to enable him to recover upon the original debt.[52]

5. Counterfeit Money. Even though the person paying counterfeit money was ignorant of the fact that it was counterfeit,[53] a payment in such money is a nullity,[54] provided the money is returned by the creditor to the debtor within a reasonable time after his discovery of the fact that it is counterfeit.[55]

6. Confederate Money or Securities.[56] Payment in the southern states during the war in Confederate money, although accepted, was held, in some cases, not a valid payment.[57] The general rule, however, was that while the creditor could not be compelled to accept payment in Confederate notes,[58] unless the contract expressly provided therefor,[59] yet if the Confederate money was accepted in good faith, at a time and place where it was current, it discharged the debt.[60] But

52. Magee *v.* Carmack, 13 Ill. 289. And see Prather *v.* State Bank, 3 Ind. 356; Fogg *v.* Sawyer, 9 N. H. 365.

53. Hargrave *v.* Dusenberry, 9 N. C. 326.

54. *Arkansas.*— Phelan *v.* Dalson, 14 Ark. 79.

Illinois.— Simms *v.* Clark, 11 Ill. 137.

Maryland.— Keene *v.* Thompson, 4 Gill & J. 463; Mudd *v.* Reeves, 2 Harr. & J. 368.

Massachusetts.— Young *v.* Adams, 6 Mass. 182.

New York.— Kenny *v.* Albany First Nat. Bank, 50 Barb. 112; Baker *v.* Bonesteel, 2 Hilt. 397; Thomas *v.* Todd, 6 Hill 340; Markle *v.* Hatfield, 2 Johns. 455, 3 Am. Dec. 446.

North Carolina.— Anderson *v.* Hawkins, 10 N. C. 568; Hargrave *v.* Dusenberry, 9 N. C. 326.

Ohio.— Pumphrey *v.* Eyre, Tapp. 334; Haire *v.* Beattus, 3 Ohio Dec. (Reprint) 5, 2 Wkly. L. Gaz. 3.

Pennsylvania.— Ramsdale *v.* Horton, 3 Pa. St. 330.

See 39 Cent. Dig. tit. "Payment," § 58.

Agreement to accept specific parcel of money.— But where the creditor agrees to take a specific parcel of copper money in payment, a delivery thereof constitutes payment, although in fact it was counterfeit money. Alexander *v.* Owen, 1 T. R. 225.

55. *Massachusetts.*— Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

Missouri.— Boyd *v.* Mexico Southern Bank, 67 Mo. 537, 29 Am. Rep. 515.

New York.— Kenny *v.* Albany First Nat. Bank, 50 Barb. 112; Thomas *v.* Todd, 6 Hill 340.

Pennsylvania.— Raymond *v.* Baar, 13 Serg. & R. 318, 15 Am. Dec. 603.

Virginia.— Pindall *v.* Northwestern Bank, 7 Leigh 617.

See 39 Cent. Dig. tit. "Payment," § 58.

Excuse for failure to return.— Where a debtor who had given his creditor a counterfeit bill in payment refused to take it back, unless compelled by law to do so, the creditor was excused from offering to return it. Simms *v.* Clark, 11 Ill. 137.

Use of diligence to ascertain character.— The taker of counterfeit paper money must use due diligence to ascertain its character and to notify the giver to entitle him to recover its value. Any unnecessary delay beyond such reasonable time as would enable the taker to inform himself as to its genuineness operates as a fraud on the giver, and prevents a recovery. Atwood *v.* Cornwall, 28 Mich. 336, 15 Am. Rep. 219. And see Samuels *v.* King, 50 Ind. 527.

Lapse of time held unreasonable.— Curcier *v.* Pennock, 14 Serg. & R. (Pa.) 51 (three years); Raymond *v.* Baar, 13 Serg. & R. (Pa.) 318, 15 Am. Dec. 603 (six months); Pindall *v.* Northwestern Bank, 7 Leigh (Va.) 617 (two months).

56. **Power of executors or administrators to receive Confederate money** in payment of indebtedness to estate see Executors and Administrators, 18 Cyc. 225.

Validity of contracts payable in Confederate money see War.

57. Cooksey *v.* McCrery, 27 Ark. 303; Lapham *v.* Clark, 25 Ark. 574; Wright *v.* Overall, 2 Coldw. (Tenn.) 336; Cundiff *v.* Herron, 33 Tex. 622.

58. *Georgia.*— Pettis *v.* Campbell, 47 Ga. 596.

North Carolina.— Love *v.* Johnston, 72 N. C. 415.

South Carolina.— Lynch *v.* Hancock, 14 S. C. 66.

Tennessee.— Scruggs *v.* Luster, 1 Heisk. 150.

Virginia.— Alley *v.* Rogers, 19 Gratt. 366; Omohundro *v.* Crump, 18 Gratt. 703. But see King *v.* King, 90 Va. 177, 17 S. E. 894.

United States.— Stoughton *v.* Hill, 23 Fed. Cas. No. 13,501, 3 Woods 404.

See 39 Cent. Dig. tit. "Payment," § 50.

Military orders.— The orders of General Butler of the 1st and 18th of May, 1862, permitting for a limited period the circulation of Confederate notes, did not make Confederate money legal currency. Parker *v.* Broas, 20 La. Ann. 167.

59. Wintz *v.* Weakes, 10 Heisk. (Tenn.) 593; Dearing *v.* Rucker, 18 Gratt. (Va.) 426; Rives *v.* Duke, 105 U. S. 132, 26 L. ed. 1031; Planters Bank *v.* Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473.

60. *Alabama.*— Van Hoose *v.* Bush, 54 Ala. 342; Hester *v.* Watkins, 54 Ala. 44; Ponder *v.* Scott, 44 Ala. 241. See also Howard College *v.* Turner, 71 Ala. 429, 46 Am. Rep. 326.

where the acceptance of payment in Confederate money was under duress exercised by the debtor, or through compulsion used by the military authorities, the payment was invalid.[61] In actions after the war upon contracts made within the Confederate states during the war, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, where it was shown by the nature of the transaction and the attendant circumstances or by the language

Arkansas.— Berry *v.* Bellows, 30 Ark. 198.

Georgia.— Green *v.* Jones, 38 Ga. 347; Carruthers *v.* Corbin, 38 Ga. 75; King *v.* King, 37 Ga. 205; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255.

Kentucky.— Ewing *v.* Litsey, 7 Bush 496.

Louisiana.— Vance *v.* Cooper, 22 La. Ann. 508; Luzenberg *v.* Cleveland, 19 La. Ann. 473.

New York.— Robinson *v.* International L. Assur. Soc., 42 N. Y. 54, 1 Am. Rep. 400.

North Carolina.— Mercer *v.* Wiggins, 74 N. C. 48.

Tennessee.— Maloney *v.* Stephens, 11 Heisk. 738; Pryor *v.* State Bank, 6 Heisk. 442; Cross *v.* Sells, 1 Heisk. 83. See also Kelley *v.* Story, 6 Heisk. 202.

Texas.—Rodgers *v.* Bass, 46 Tex. 505; Piegzar *v.* Twohig, 37 Tex. 225; Ritchie *v.* Sweet, 32 Tex. 333, 5 Am. Rep. 245; Garner *v.* Butcher, 1 Tex. Unrep. Cas. 430; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

Virginia.— Boyd *v.* Townes, 79 Va. 118.

See 39 Cent. Dig. tit. "Payment," § 50.

Mere unwillingness to receive Confederate currency in payment of a debt will not, if the currency was actually received in payment, be enough to invalidate the acceptance of the currency. The unwillingness necessary to invalidate the payment must be of the degree and character authorizing the courts to treat the acceptance and payment as void or voidable, upon the principles applicable to payments not tainted with Confederate currency. Jones *v.* Thomas, 5 Coldw. (Tenn.) 465.

Who may object.— A vendor, seeking to enforce his lien on the land against a subpurchaser, who claims as a purchaser for valuable consideration without notice, cannot question the validity of the payment by such subpurchaser because made in Confederate currency. Kinsey *v.* Howard, 47 Ala. 236.

Conditional acceptance.— Where a Confederate bond was transferred in payment of a debt and the debtor promised that if the manner of the transfer was not correct and valid he would make it so, or would pay the money, and the transfer was in fact invalid, the duty of ascertaining the defect and remedying it was upon the debtor, so that if he failed so to do he became absolutely liable to pay the amount in money without any notice of the defect from the other party. Bryan *v.* Heck, 67 N. C. 322.

Payment after close of war.— A payment after the surrender of the Confederate army was held invalid (Sirrine *v.* Griffin, 40 Ga. 169), especially where the debtor knew of the surrender and induced an acceptance of payment by false statements (Blalock *v.* Phillips, 38 Ga. 216); but such a payment was held good where both parties were ignorant of the surrender (Ellis *v.* Hammond, 57 Ga. 179).

Payment to officer.— It was held in some cases that an officer had power to accept payment of a judgment or a bid at a judicial sale, in Confederate money, where it was the chief circulating medium. Black *v.* Rose, 14 S. C. 274; Binford *v.* Memphis Bulletin Co., 10 Heisk. (Tenn.) 355; Douglas *v.* Neil, 7 Heisk. (Tenn.) 437; Coleman *v.* Wingfield, 4 Heisk. (Tenn.) 133; Henly *v.* Franklin, 3 Coldw. (Tenn.) 472, 91 Am. Dec. 296. But the contrary was held in other cases. Ellis *v.* Smith, 42 Ala. 349; Aicardi *v.* Robbins, 41 Ala. 541, 94 Am. Dec. 614; Emerson *v.* Mallett, 62 N. C. 234; Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616; Blackwell *v.* Tucker, 7 S. C. 387, where beneficiary had expressly refused to accept Confederate money. See also Omohundro *v.* Omohundro, 27 Gratt. (Va.) 824. If the repayment of a loan of a deposit in court, in Confederate money, was pursuant to an order of the court permitting such payment, it was valid. Taylor *v.* Lancaster, 33 Gratt. (Va.) 1.

Payment to an administrator, in Confederate treasury notes, of a debt due the estate relieves the debtor of liability. Hyatt *v.* McBurney, 18 S. C. 199. *Contra,* Draughan *v.* White, 21 La. Ann. 175. And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 225.

61. Jones *v.* Rogers, 36 Ga. 157; McCartney *v.* Wade, 2 Heisk. (Tenn.) 369; Anderson *v.* Lewis, 31 Tex. 675; Mann *v.* McVey, 3 W. Va. 232; Mann *v.* Lewis, 3 W. Va. 215, 100 Am. Dec. 747. But see Glenn *v.* Case, 25 Ark. 616, 620, holding that Confederate money received by the creditor in the absence of threats or protests operated as a payment, even though martial law prevailed and a military order rendered the receipt of such money compulsory.

Return of Confederate money as condition precedent.— Where a payment in Confederate notes was received under duress, the creditor cannot recover the debt in authorized currency, unless he has retained and tendered back the identical money received by him, and not merely money for an equal amount. Emerson *v.* Lee, 18 La. Ann. 134, 89 Am. Dec. 648.

What constitutes duress.— Davis *v.* Mississippi Cent. R. Co., 46 Miss. 552 (holding that it was insufficient that, at the time of the payment, a portion of the Confederate army was in the neighborhood, and that military orders required the acceptance of Confederate money in payment of debts on the penalty of arrest); Fogg *v.* Union Bank, 4 Baxt. (Tenn.) 530; Van der Hoven *v.* Nette, 32 Tex. 183.

of the contract itself to have contemplated payment in Confederate currency, it was held that no more could be recovered than the value of that currency in lawful money of the United States.[62] And after the Civil war statutes were passed in many of the southern states expressly providing a scale upon the amount of recovery upon contracts entered into during the war for payment upon the basis of Confederate money.[63]

7. Foreign Money. A contract for the payment of money, made and to be executed in a foreign country, is payable in the lawful money of that country,[64] unless the contract otherwise provides.[65] If an action to enforce payment is brought in this country the amount payable must be reckoned in currency according to the value of the foreign money.[66] Where a contract was made in this

62. Rives *v.* Duke, 105 U. S. 132, 26 L. ed. 1031; Wilmington, etc., R. Co. *v.* King, 91 U. S. 3, 23 L. ed. 186; Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361. And see Hill *v.* Erwin, 60 Ala. 341; Wharton *v.* Cunningham, 46 Ala. 590; Fife *v.* Turner, 11 Fla. 289; Gray *v.* Harris, 43 Miss. 421; Palmer *v.* Love, 75 N. C. 163; Rowland *v.* Thompson, 73 N. C. 504; Dowd *v.* North Carolina R. Co., 70 N. C. 468; Parker *v.* Wilson, 5 S. C. 485; Luster *v.* Maloney, 6 Baxt. (Tenn.) 374; Bowers *v.* Thomas, 6 Heisk. (Tenn.) 553; Taylor *v.* Bland, 60 Tex. 20; Stearns *v.* Mason, 24 Gratt. (Va.) 484; Calbreath *v.* Virginia Porcelain, etc., Co., 22 Gratt. (Va.) 697; Lohman *v.* Crouch, 19 Gratt. (Va.) 331; Bailey *v.* Stroud, 26 W. Va. 614; Bierne *v.* Brown, 10 W. Va. 748; Effinger *v.* Kenney, 115 U. S. 566, 6 S. Ct. 179, 29 L. ed. 495; Stewart *v.* Salamon, 94 U. S. 434, 24 L. ed. 275.

63. *Georgia.*— Conyers *v.* Bartow County, 116 Ga. 101, 42 S. E. 419; McIntyre *v.* Meldrim, 63 Ga. 58; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Rawson *v.* Cherry, 54 Ga. 276; Mitchell *v.* Butt, 51 Ga. 274; Cohen *v.* Ward, 42 Ga. 337; Blow *v.* White, 41 Ga. 293; Clark *v.* McCroskey, 41 Ga. 137; Lamar *v.* Thornton, 41 Ga. 48; White *v.* Lee, 40 Ga. 266; Thomas *v.* Knowles, 40 Ga. 263; Brown *v.* Sims, 39 Ga. 668; Gibson *v.* Williams, 39 Ga. 660; Phillips *v.* Williams, 39 Ga. 597; Butler *v.* Weathers, 39 Ga. 524.

Kentucky.— Brashear *v.* Kendall, 6 T. B. Mon. 545.

North Carolina.— Brickell *v.* Bell, 84 N. C. 82; Duke *v.* Williams, 84 N. C. 74; *In re* Macay, 84 N. C. 63; Palmer *v.* Love, 82 N. C. 478; Cobb *v.* Gray, 78 N. C. 94; Johnson *v.* Miller, 76 N. C. 439; Boykin *v.* Barnes, 76 N. C. 318; Wooten *v.* Sherrard, 71 N. C. 374; Farmer *v.* Willard, 71 N. C. 284; Stocks *v.* Smith, 69 N. C. 352; Bryan *v.* Harrison, 69 N. C. 151; McRae *v.* McNair, 69 N. C. 12; Williams *v.* Monroe, 67 N. C. 133; Brown *v.* Foust, 64 N. C. 672; Alexander *v.* Rintels, 64 N. C. 634; Parker *v.* Carson, 64 N. C. 563; Summers *v.* McKay, 64 N. C. 555; Green *v.* Brown, 64 N. C. 553; Chapman *v.* Wacaser, 64 N. C. 532; Robeson *v.* Brown, 63 N. C. 554; Carter *v.* McGehee, 61 N. C. 431.

South Carolina.— Black *v.* Rose, 14 S. C. 274; Earle *v.* Stokes, 4 S. C. 309; O'Neall *v.* Hunt, 4 S. C. 244; Halfacre *v.* Whaley, 4 S. C. 173; McKeegan *v.* McSwiney, 2 S. C. 191; Neely *v.* McFadden, 2 S. C. 169; Bobo *v.* Goss, 1 S. C. 262; Fluitt *v.* Nelson, 15 Rich. 9.

Virginia.— Adams *v.* Logan, 27 Gratt. 201; Fultz *v.* Davis, 26 Gratt. 903; Tardy *v.* Boyd, 26 Gratt. 631; Merewether *v.* Dowdy, 25 Gratt. 232; Tams *v.* Brannaman, 23 Gratt. 809; Shiflett *v.* Long, 23 Gratt. 718; Barnett *v.* Miller, 23 Gratt. 551; Sanders *v.* Branson, 22 Gratt. 364; Michie *v.* Jeffries, 21 Gratt. 334; Barnett *v.* Cecil, 21 Gratt. 93; Bell *v.* Alexander, 21 Gratt. 1; Magill *v.* Manson, 20 Gratt. 527; Dearing *v.* Rucker, 18 Gratt. 426.

West Virginia.— Gilkeson *v.* Smith, 15 W. Va. 44; Jarrett *v.* Nickell, 9 W. Va. 345; Brightwell *v.* Hoover, 7 W. Va. 342.

United States.— Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. 548, 22 L. ed. 196.

See 39 Cent. Dig. tit. "Payment," §§ 91–98.

Legacies or distributive shares as subject to scale see Wilson *v.* Powell, 86 N. C. 230; McCombs *v.* Griffith, 67 N. C. 83; Boyd *v.* Townes, 79 Va. 118.

Date as of which scale is to be applied see Smith *v.* Smith, 101 N. C. 461, 8 S. E. 128, 131, 133; Stokes *v.* Cowles, 70 N. C. 124; Cable *v.* Hardin, 67 N. C. 472; Ashby *v.* Porter, 26 Gratt. (Va.) 455; Walsh *v.* Hale, 25 Gratt. (Va.) 314; Earp *v.* Boothe, 24 Gratt. (Va.) 368; Myers *v.* Whitfield, 22 Gratt. (Va.) 780; Bowman *v.* McChesney, 22 Gratt. (Va.) 609; Hilb *v.* Peyton, 22 Gratt. (Va.) 550; McClung *v.* Ervin, 22 Gratt. (Va.) 519; James *v.* Johnston, 22 Gratt. (Va.) 461; Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609; Stover *v.* Hamilton, 21 Gratt. (Va.) 273; Dearing *v.* Rucker, 18 Gratt. (Va.) 426; Gilkeson *v.* Smith, 15 W. Va. 44.

64. Comstock *v.* Smith, 20 Mich. 338; Stoker *v.* Cogswell, 25 How. Pr. (N. Y.) 267. See also Quimby *v.* The Euphemia, 20 Fed. Cas. No. 11,512.

65. Morrell *v.* Ward, 10 Grant Ch. (U. C.) 231; Crawford *v.* Beard, 14 U. C. C. P. 87.

66. Grunwald *v.* Freese, (Cal. 1893) 34 Pac. 73; Comstock *v.* Smith, 20 Mich. 338; Stewart *v.* Chambers, 2 Sandf. Ch. (N. Y.) 382; Grant *v.* Healey, 10 Fed. Cas. No. 5,696, 3 Sumn. 523. See also Albert *v.* Citizens' Bank, 5 La. Ann. 720. And see Judgments, 23 Cyc. 792.

Agreement of parties as to value.— Where

country to pay in Mexican dollars, it was held that the value of the Mexican money may be allowed at its value in our money at the time the debt was due instead of its value at the time of the trial.[67]

8. DEPRECIATED CURRENCY OR SECURITIES. As a general rule payment cannot be made in depreciated currency or securities,[68] unless the creditor consents thereto.[69] But where the contract reserves the right to pay in current paper funds a tender in notes current at the time, although greatly depreciated, is good.[70] Where credits in currency are indorsed on an obligation payable in specie, such credits are payments only to the amount of the value in specie of such credits at the respective dates of payment.[71] If the debtor is ignorant of the depreciation in

the parties to a settlement have agreed on the value in United States currency of a certain sum in foreign money, the jury may, without further evidence, make a like estimate in readjusting or ascertaining what amount was overpaid. Turnbull *v.* Watkins, 2 Mo. App. 235.

Debts payable in sister state.— The rule stated in the text applies to debts payable in a sister state where the currency of one state is below par in another state. Howe *v.* Wade, 12 Fed. Cas. No. 6,777, 4 McLean 319.

Where the value of a pound sterling is in issue, it has been held that the amount fixed by the federal statutes governs rather than the current rate of exchange. Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564. But see Robinson *v.* Hall, 28 How. Pr. (N. Y.) 342, holding that where a loan of money, in English currency, is made in England, to be paid in this state, the pound sterling is to be estimated here at its real market value, and not at its par value.

Porto Rican contract.— United States currency at the rate of exchange prescribed by congress in the act of April 12, 1900 (31 U. S. St. at L. 77, 80, c. 191), § 11, and not at the rate of one dollar for each peso of indebtedness, must be accepted in discharge of the obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of one hundred centavos for each peso, since this provision evidently contemplated only such change in coins as might occur while Porto Rico remained under the same political power. Serralies *v.* Esbri, 200 U. S. 103, 26 S. Ct. 176, 50 L. ed. 391.

67. Butler *v.* Merchant, (Tex. Civ. App. 1894) 27 S. W. 193.

68. *Kentucky.*— Huston *v.* Noble, 4 J. J. Marsh. 130; Brayden *v.* Goulman, 1 T. B. Mon. 115.

Missouri.— See Henderson *v.* McPike, 35 Mo. 255.

New York.— Hulbert *v.* Carver, 40 Barb. 245.

North Carolina.— Blackwell *v.* Willard, 65 N. C. 555, 6 Am. Rep. 749; Barham *v.* Gregory, 62 N. C. 243; McNair *v.* Ragland, 16 N. C. 516.

Virginia.— Wrightsman *v.* Bowyer, 24 Gratt. 433; Morgan *v.* Otey, 21 Gratt. 619. But see Dickinson *v.* Helms, 29 Gratt. 462; Taliaferro *v.* Minor, 1 Call 524.

United States.—Opie *v.* Castleman, 32 Fed. 511.

See 39 Cent. Dig. tit. "Payment," § 55.

Redemption from execution sale.— A purchaser at an execution sale of mortgaged property, who pays for the same in depreciated currency, on the redemption of the property is only entitled to receive his purchase-money in currency of the same kind, or its equivalent in value at the time of payment, with interest. Sandford *v.* Farmers' Bank, 1 Bush (Ky.) 335.

Construction of provision in will.— A bequest was of an annuity of fifteen hundred dollars United States currency, to be calculated at the rate of one hundred and ten dollars currency for every one hundred dollars United States gold, "if at the time when the above payments commence, specie payments should have been resumed, and also if gold should have gone higher." When the will was executed gold was at 114, and when the first amount was paid specie payments had been resumed. It was held that the annuity was sixteen hundred and fifty dollars in currency. *In re* Stutzer, 26 Hun (N. Y.) 481.

Loan of shares of stock.— A borrower of shares of stock, "to be returned on demand," may make payment in discharge of the loan by returning on demand an equal number of similar shares, although the stock had become greatly depreciated after the loan was made. Fosdick *v.* Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

Demand payable in currency.—A certificate of deposit, payable in "Illinois currency," cannot be satisfied by depreciated paper. It must be met by bills passing the locality in the place of coin. Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501; Hulbert *v.* Carver, 37 Barb. (N. Y.) 62.

69. Dick *v.* Truly, Sm. & M. Ch. (Miss.) 557; Hall *v.* Craige, 65 N. C. 51; Washington *v.* Opic, 145 U. S. 214, 12 S. Ct. 822, 36 L. ed. 680; Deering *v.* Parker, 4 Dall. (U. S.) appendix xxiii, 1 L. ed. 925.

Acceptance at real value.— Where a creditor is entitled to the payment of his debt in coin, and on an offer by the debtor to pay in depreciated paper money declares he will receive the latter only at its value, or on account, and retain his claim for the difference, and the debtor without objection allows him to do so, the latter impliedly assents to the creditor's proposal. Tyers *v.* U. S., 5 Ct. Cl. 509.

70. Stalworth *v.* Blum, 41 Ala. 319.

71. Walkup *v.* Houston, 65 N. C. 501.

value, or if both parties know or have the same means of knowing the value of the depreciated paper, and the payment is made in good faith, a payment in depreciated paper is good.[72] Where the contract provides that the debt shall be paid in certain bonds, it will be construed as binding the creditor to accept payment in such bonds at the maturity of the debt only, and he is not compelled to accept them a considerable time afterward when they have greatly depreciated in value.[73]

9. Appreciated Currency. Where the debt is payable in current funds, the creditor cannot claim the right to be paid in an appreciated medium of payment, such as gold.[74] Where the contract is to pay at a future date in the currency then in circulation an amount equivalent to the amount of the debt as it was valued at the date of the contract, the debtor has the benefit of the appreciation of gold up to the expiration of the credit but not of that which occurs after default in payment.[75] Where, after the debt was created, but before it became due, the value of a dollar in currency became appreciated, the creditor was entitled to receive payment in current money at its value when the debt was due.[76]

10. Uncurrent or Unlawful Money or Notes. By the agreement or consent of the parties payment may be made in uncurrent money or notes[77] or even in unlawful money.[78]

C. Election as to Medium of Payment — 1. In General. Where the contract provides for payment in either of two or more mediums, a debtor may elect to make either mode of payment at the time fixed therefor.[79] But where a debtor has the election, either to pay in a particular kind of money,[80] or in money or some other way,[81] the right of election does not exist after the day when the payment becomes due, and if the promise is to pay in property or money the creditor is thereafter entitled to payment in money.[82]

2. Waiver of Right to Demand Certain Medium.[83] The right to demand or pay

72. Ridenour *v.* McClurkin, 6 Blackf. (Ind.) 411.

73. Campbell *v.* Ranson, 21 Gratt. (Va.) 405.

74. Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 5 Am. Rep. 162.

75. Whitaker *v.* Dye, 56 Ga. 380.

76. Reynolds *v.* Lyne, 3 Bibb (Ky.) 340.

77. Imbush *v.* Mechanics', etc., Bank, 1 Ohio Dec. (Reprint) 8, 1 West. L. J. 49.

78. Rogers *v.* Leftwich, 2 Heisk. (Tenn.) 480. See also Hoagland *v.* Post, 1 N. J. L. 37.

79. Stephens *v.* Howe, 34 N. Y. Super. Ct. 133, property or money.

What constitutes election.— A party entitled to elect to receive either a certain rate gold or a certain other rate currency for his labor discloses his election to receive one of the rates by presenting bills to the other party for such rate, where the bills are accepted. Stephens *v.* Howe, 34 N. Y. Super. Ct. 133.

Revocation of election.— Where a promissory note is given with an option to the payee to take a conveyance of land in lieu of the money promised, and he elects to take the land, and the maker does not then consummate the bargain by conveying the land, the payee may revoke his election, and hold the maker for the money on the note. Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 583.

80. Chevallier *v.* Buford, 1 Tex. 503.

A contract to pay in current bank-notes is a contract to pay in money if bank-notes are not paid or tendered at the date of payment. Morris *v.* Edwards, 1 Ohio 189; Smith *v.* Goddard, 1 Ohio 178; Chambers *v.* Harger, 18 Pa. St. 15. *Contra*, Fleming *v.* Nall, 1 Tex. 246.

Where an obligation was payable in state currency, before the legal tender acts, the claim is a specie debt if not paid before maturity. Hoys *v.* Tuttle, 8 Ark. 124, 46 Am. Dec. 309; Mason *v.* Biddle, 6 J. J. Marsh. (Ky.) 30.

81. Marlor *v.* Texas, etc., R. Co., 21 Fed. 383.

82. *California.*—Delafield *v.* San Francisco, etc., R. Co., (1895) 40 Pac. 958.

Connecticut.— See Sessions *v.* Ainsworth, 1 Root 181.

Illinois.— Barstow *v.* McLachlan, 99 Ill. 641.

Maryland.— See Laidler *v.* State, 2 Harr. & G. 277. But see Skirvan *v.* Willis, 4 Harr. & M. 483.

Missouri.— Harris *v.* Sheffel, 117 Mo. App. 514, 94 S. W. 738.

New York.— New York News Pub. Co. *v.* National Steamship Co., 148 N. Y. 39, 42 N. E. 514 [*affirming* 72 Hun 158, 25 N. Y. Suppl. 401].

Pennsylvania.— Mather *v.* Kinike, 51 Pa. St. 425.

United States.— Marlor *v.* Texas, etc., R. Co., 21 Fed. 383.

Failure to pay a debt in stock when stock was due and demanded makes the entire demand due in money. Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765.

83. Waiver of objection to medium of tender by failure to object see Tender.

a certain medium may be waived,[84] as by the acceptance of another medium,[85] or the failure to specifically object to a tender on the ground of the medium.[86]

IV. EFFECT.

A. In General. Payment discharges the debt *pro tanto*.[87] It is immaterial that the creditor at the same time is owing the debtor an equal or greater amount on other obligations.[88] But payment of an obligation does not conclusively establish that the party paying was indebted to the payee at the time of the payment.[89] Where a party voluntarily allows his adversary a credit on his claim, which the latter refuses to accept, the former is not bonnd thereby.[90]

B. Part Payment. As a general rule part payment of a debt raises in law an implied promise to pay the balance.[91] But part payment will not change what is originally a mere moral obligation into a legal debt.[92] On the other hand the payment of a part of a sum which is due does not create an equity in favor of the payer to entitle him to an indefinite delay for the payment of the balance.[93] A part payment, pending suit of the claim sued on, is not equivalent, as an admission of the cause of action, to a payment of money into court.[94]

84. Sessions *v.* Peay, 21 Ark. 100; Dorsey *v.* Campbell, 1 Bland (Md.) 356.

85. Lefferman *v.* Renshaw, 45 Md. 119; Savage *v.* U. S., 92 U. S. 382, 23 L. ed. 660; Shipton *v.* Casson, 5 B. & C. 378, 8 D. & R. 130, 4 L. J. K. B. O. S. 199, 11 E. C. L. 505; Ferguson *v.* Wilson, 14 L. T. Rep. N. S. 12. And see Smith *v.* Ferrand, 7 B. & C. 19, 9 D. & R. 803, 5 L. J. K. B. O. S. 355, 14 E. C. L. 19.

The right to receive indorsed notes in payment, according to an agreement, is waived by the acceptance, without protest, of notes without an indorsement. Stevens *v.* Bradley, 22 Ill. 244.

86. Noe *v.* Hodges, 3 Humphr. (Tenn.) 162. See, generally, TENDER.

87. See Hemphill *v.* Moody, 64 Ala. 468; Cochran *v.* Sherman, 5 Duer (N. Y.) 13; Smith *v.* Waugh, 84 Va. 806, 6 S. E. 132; Page *v.* Dickens, 77 Fed. 61.

Payment pending suit.— Payment of debt and costs extinguishes the claim upon which a suit is predicated, and it is immaterial that it is while the suit is pending. Root *v.* Ross, 29 Vt. 488. But see Nossotti *v.* Page, 10 C. B. 643, 20 L. J. C. P. 81, 2 L. M. & P. 8, 70 E. C. L. 643, as to right to damages for detention of debt.

Payment to proper person by mistake.— When money is paid to a person to whom it properly belongs, although under a mistake as to the right in which it accrues to him, the debt is extinguished, and he cannot again enforce payment of his claim in his lawful right. Hemphill *v.* Moody, 64 Ala. 468.

If the creditor accept a payment different from that called for by the contract, although under protest, the debt is extinguished. Gilman *v.* Douglas County, 6 Nev. 27, 3 Am. Dec. 237. But see Riley *v.* Sharp, 1 Bush (Ky.) 348.

Ignorance of derivation of money.— Where the creditor is paid the amount of his debt, although in ignorance of the derivation of the money, the debt is discharged where he is not injured by his want of knowledge. Butts *v.* Whitney, 96 Ga. 445, 23 S. E. 397; Coleman *v.* Jenkins, 78 Ga. 605, 3 S. E. 444.

Subsequent transfer.— An obligation which has been extinguished by payment cannot be subsequently transferred. Wright *v.* Mix, 76 Cal. 465, 18 Pac. 645.

Deposit in bank.— Where a debt was to be paid by deposit in a particular bank, the deposit constituted a discharge of the indebtedness, although no notice thereof was given the creditor. Virginia Exch. Bank *v.* Cookman, 1 W. Va. 69. And the fact that by mistake the money was deposited in the name of the agent of the creditor does not vitiate the payment. McCrary *v.* Ashhaugh, 44 Mo. 410.

Where payment is made to a third person by direction of the creditor, the debt is extinguished. Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

Individual or representative capacity.— If a payment is made and accepted as a payment to an individual creditor, it does not *pro tanto* extinguish the debt owing the creditor in a representative capacity. Bestwick *v.* Ormsby Coal Co., 129 Pa. St. 592, 18 Atl. 538.

Return of payment.— Where a payment is made but is returned for the use of the payer, to be repaid at a future time, the payment must still be considered as having been made, and the return thereof as a loan. Judd *v.* Burton, 51 Mich. 74, 16 N. W. 237.

88. Lord *v.* Graveson, 26 Ohio Cir. Ct. 371.

89. Drew *v.* Willingham Sash, etc., Co., 113 Ga. 605, 38 S. E. 967.

90. Hall *v.* Wilson, 6 Wis. 433.

91. Mostyn *v.* Mostyn, L. R. 5 Ch. 457, 39 L. J. Ch. 780, 22 L. T. Rep. N. S. 461, 18 Wkly. Rep. 657.

92. Mostyn *v.* Mostyn, L. R. 5 Ch. 457, 39 L. J. Ch. 780, 22 L. T. Rep. N. S. 461, 18 Wkly. Rep. 657.

93. Speer *v.* Cobb, 22 Ill. 528.

94. Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

C. Payment by One or More Co-Debtors.[95] A payment made by one of two joint debtors extinguishes the debt *pro tanto*.[96] On the other hand a payment of his share of the debt by one of two joint and several debtors does not release him.[97]

D. Payment by Third Person.[98] Although there are some early authorities to the contrary,[99] it is now well settled that payment of a debt by a stranger, although without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned.[1]

E. Payment Under Duress. Ordinarily a payment made under duress may be recovered back.[2] It has been held, however, that money extorted by a creditor from his debtor by an unlawful execution should be considered a payment of the debt.[3]

F. Rescission of Payment and Return of Medium Received.[4] After its dishonor a creditor may surrender paper, such as a bill or note, where not received as an absolute payment, and sue upon the original indebtedness.[5] On the other

95. See also PARTNERSHIP.

96. *Louisiana.*— Adams *v.* State Bank, 3 La. Ann. 351.

Michigan.— Thayer *v.* Denton, 4 Mich. 192.

New York.— Baker *v.* Stackpoole, 9 Cow. 420, 18 Am. Dec. 508.

North Carolina.— Towe *v.* Felton, 52 N. C. 216.

Pennsylvania.— Boggs *v.* Lancaster Bank, 7 Watts & S. 331; Goldbeck *v.* Kensington Nat. Bank, 48 Leg. Int. 76 [*affirmed* in 147 Pa. St. 267, 23 Atl. 565].

See 39 Cent. Dig. tit. "Payment," § 135.

Payment in full.— Where two or more persons are jointly liable on an obligation and one of them makes payment of the whole the obligation is thereby extinguished. Enscoe *v.* Fletcher, 1 Cal. App. 659, 82 Pac. 1075.

97. Griffith *v.* Grogan, 12 Cal. 317.

98. As accord and satisfaction see ACCORD AND SATISFACTION, 1 Cyc. 316.

Liability of debtor to third person who makes payment see MONEY PAID.

Right of third person to subrogation see SUBROGATION.

99. See ACCORD AND SATISFACTION, 1 Cyc. 316.

1. *Alabama.*— Harrison *v.* Hicks, 1 Port. 423, 27 Am. Dec. 638, holding that it is immaterial whether the payment was made with the assent of the debtor.

California.— Martin *v.* Quinn, 37 Cal. 55.

Delaware.— Horsey *v.* Stockley, 4 Del. Ch. 536.

Michigan.— See Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. 761.

Minnesota.— Clark *v.* Abbott, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577.

Tennessee.— Cain *v.* Bryant, 12 Heisk. 45.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120 [*explaining* Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794].

United States.— Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426 [*affirming* 145 Fed. 569]. See also Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733.

See 39 Cent. Dig. tit. "Payment," § 136.

But see Concord Granite Co. *v.* French, 12 Daly (N. Y.) 228, 65 How. Pr. 317 [*affirmed* in 3 N. Y. Civ. Proc. 445], holding that a payment to plaintiff by another person than defendant, made after suit brought, is not a defense to the action.

Payment by insurance company as payment by stranger.— The liability of a railway company to respond in damages for an injury occasioned by accident to a passenger on their road is not discharged *pro tanto* by the payment of any sum, on account of such injury, by an accident insurance company; the primary liability being on the railway company. Pittsburgh, etc., R. Co. *v.* Thompson, 56 Ill. 138.

2. See *infra*, VII, B.

Payments into treasury of state during Civil war.— The fact that, during the Civil war a citizen of one of the Confederate states, being indebted to a citizen of a loyal state, was compelled to pay, and did pay, the amount of the demand into the treasury of the Confederate state, under a statute of that state for the sequestration of estates of alien enemies, constitutes no defense to an action brought by the creditor in a court of the United States, after the war was terminated, to recover the demand. Levison *v.* Krohne, 30 Tex. 714; Levison *v.* Norris, 30 Tex. 713; Luter *v.* Hunter, 30 Tex. 688, 98 Am. Dec. 494; Rhea *v.* Preston, 75 Va. 757; Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716; Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136.

Payment under military orders to an officer of the United States army of a debt owing a third person during the Civil war was held not to release the debtor from liability. Nelligan *v.* Citizens' Bank, 21 La. Ann. 332, 99 Am. Dec. 734; Planters Bank *v.* Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473. But see Mandeville *v.* State Bank, 19 La. Ann. 392, 92 Am. Dec. 541.

3. Lord *v.* Waterhouse, 1 Root (Conn.) 430.

4. Duty to return counterfeit money see *supra*, III, B, 5.

5. *California.*— Brewster *v.* Bours, 8 Cal. 501.

Massachusetts.— Derickson *v.* Whitney, 6 Gray 248.

hand if the paper was received as absolute payment, its non-payment gives no right of action upon the original indebtedness.[6] The general rule that a party who seeks to disaffirm a contract must return, or offer to return, whatever he has received upon it[7] is applied to payments by bills, notes, checks, etc., by holding that a creditor cannot recover upon the original indebtedness unless he returns or produces the paper given in payment, or shows that it is lost, or otherwise satisfactorily accounts for it,[8] or where it appears that it cannot be enforced in the hands of a third person.[9] But in case of fraud, when nothing is parted with by the fraudulent vendor but his own promissory notes, such a return or offer to

South Carolina.—Mounier *v.* Meyrey, 1 Bay 24.

Wisconsin.— Gallagher *v.* Ruffing, 118 Wis. 284, 95 N. W. 117.

United States.— Palmer *v.* Elliot, 18 Fed. Cas. No. 10,690, 1 Cliff. 63.

See 39 Cent. Dig. tit. "Payment," § 141.

Recovery of judgment on note.— Where the creditor prosecuted a note to judgment, but received nothing thereon, he was entitled to sue upon the original cause of action on tendering an assignment of the judgment. Lord *v.* Bigelow, 124 Mass. 185.

Where a note represented as good is actually valueless the vendor may tender the note back and recover the price agreed upon. Walker *v.* Tatum, Ga. Dec. Pt. II, 161.

Unauthorized alteration.—But where a note is given for the payment of a sum of money, the right of the payee to recover on the original demand, on surrender of the note, will be taken away by an unauthorized alteration of the note by him. Meyer *v.* Huneke, 55 N. Y. 412 [*reversing* 65 Barb. 304].

6. Kappes *v.* Geo. E. White Hard Wood Lumber Co., 1 Ill. App. 280; Ferdon *v.* Jones, 2 E. D. Smith (N. Y.) 106; Stroud *v.* Rankin, 2 Baxt. (Tenn.) 74; Woodfolk *v.* Pratt, 1 Baxt. (Tenn.) 348.

7. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259.

8. *Connecticut.*— Brahazon *v.* Seymour, 42 Conn. 551.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Illinois.— Davis, etc., Bldg., etc., Co. *v.* Montrose Butter, etc., Co., 59 Ill. App. 573.

Maryland.— Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

Missouri.— The Charlotte *v.* Lumm, 9 Mo. 64; O'Bryan *v.* Jones, 38 Mo. App. 90.

New York.— Reehl *v.* Martens, 40 N. Y. App. Div. 231, 57 N. Y. Suppl. 1059 [*affirmed* in 54 N. Y. App. Div. 626, 627, 66 N. Y. Suppl. 1142]; Smith *v.* Lockwood, 10 Johns. 366; Angel *v.* Felton, 8 Johns. 149; Holmes *v.* De Camp, 1 Johns. 34, 3 Am. Dec. 293. See also Teaz *v.* Chrystie, 2 E. D. Smith 621, 2 Abb. Pr. 109. *Compare* Spiro *v.* Maiman, 94 N. Y. Suppl. 358.

Pennsylvania.— Hays *v.* McClurg, 4 Watts 452.

South Carolina.— Adger *v.* Pringle, 11 S. C. 527; Townsends *v.* Stevenson, 4 Rich. 59.

Wisconsin.— Williams *v.* Ketchum, 21 Wis. 432.

Canada.— Crooks *v.* Gleun, 8 Grant Ch. (U. C.) 239.

See 39 Cent. Dig. tit. "Payment," § 141.

But see Stringfield *v.* Vivian, 63 Mich. 681, 30 N. W. 346. *Compare* National Sav. Bank Assoc. *v.* Tranah, L. R. 2 C. P. 556, 36 L. J. C. P. 260, 16 L. T. Rep. N. S. 592, 15 Wkly. Rep. 1015.

Cancellation.— Even though the note is required to be produced at the trial it is sufficient if it is produced and placed at the disposal of the court without an actual cancellation. Johnson *v.* Jones, 4 Barb. (N. Y.) 369.

Surrender before trial is unnecessary, it being sufficient for the creditor to surrender, or offer to surrender, the notes on the trial to be canceled. Armstrong *v.* Tuffts, 6 Barb. (N. Y.) 432. But it has been held that where a note is outstanding in the hands of a third person at the time the action is commenced upon the original indebtedness, no recovery is allowable, although the creditor has subsequently obtained possession of it. Davis *v.* Reilly, [1898] 1 Q. B. 1, 66 L. J. Q. B. 844, 77 L. T. Rep. N. S. 399, 46 Wkly. Rep. 96.

Retaining a check, after giving notice of dishonor, subject to the order of the debtor, is sufficient. Bradford *v.* Fox, 38 N. Y. 289.

However, if the note is worthless, it need not be returned before suit is brought. Gillett *v.* Knowles, 108 Mich. 602, 66 N. W. 497.

But the fact that a judgment has been recovered upon the note against the debtor who made it or the note has been negotiated does not preclude an action on the original cause of action if the judgment has been unproductive. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

9. Miller *v.* Lumsden, 16 Ill. 161; Holmes *v.* De Camp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293; Street *v.* Hall, 29 Vt. 165. See also Leake *v.* Brown, 43 Ill. 372.

Where failure to return not prejudicial.— Where a note of third persons is received in payment of a debt on the faith principally of one signature, which proves to be forged, assumpsit can be maintained on the original consideration without previously returning the note, where it is shown that the other makers are involvent and that no injury can be sustained by defendant because of a failure to return the note. Nance *v.* Pope, 1 Stew. (Ala.) 220.

Where the note of a third person had been paid prior to its transfer the creditor need not show an offer to return the note to the payee debtor. Campbell *v.* Ayres, 9 Iowa 108.

return is not necessary before action brought; it is enough if the notes are produced on the trial ready to be canceled.[10] On the other hand, where the debtor signs a receipt in full, believing it is only a receipt for a part payment, he need not return the money received in order to enable him to recover the balance due.[11]

V. RECEIPTS.[12]

A. Nature and Contents. Ordinarily a receipt does not amount to a contract but it may be so drawn as to be a contract.[13] No particular form of words is necessary to constitute a valid receipt, although ordinarily it must show the amount paid,[14] and the time.[15] It may consist of a separate writing, a recital in a deed or other instrument, or an indorsement of payment thereon.[16] To be evidence of payment, it ought to be in the possession of the party who paid the money. A receipt in the possession of the opposite party certainly proves nothing more than his willingness to receive the money and give a receipt therefor.[17]

B. Construction. Ordinarily a receipt is to be construed the same as any other writing.[18] Where the receipt is written and signed by the creditor, any ambiguous language therein should be taken most strongly against him, and most favorably for the debtor.[19] A receipt in full for a particular demand is not conclusive evidence of a general settlement of accounts between the parties.[20] For instance, a receipt for so much money specified to be for certain goods or property purchased will not be construed or presumed to be a satisfaction in full.[21] A receipt in full of all demands against one is no evidence of the payment of a joint

10. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259. See also Wiswall *v.* Harriman, 62 N. H. 671; Crosby *v.* Lane, 6 Fed. Cas. No. 3,423.

11. Fist *v.* Fist, 3 Colo. App. 273, 32 Pac. 719.

12. **Admissibility in evidence** see *infra*, VII, E, 11, c.

Admissibility of parol evidence to vary, explain, or contradict see EVIDENCE, 17 Cyc. 629 *et seq.*

13. Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662; Macdonald *v.* Dana, 154 Mass. 152, 27 N. E. 993.

14. See Cook *v.* Norton, 43 Ill. 391.

Omission of word "dollars."— A written instrument in form of a receipt, having in the margin the figures "1100" which acknowledges the receipt on a certain day of "eleven hundred on . . . asylum contract of fifty-five thousand dollars," is sufficient as a receipt for eleven hundred dollars. Butler *v.* Bohn, 31 Minn. 325, 17 N. W. 862.

Stating money was received.— A receipt in full need not expressly state that money was received in order to make it a receipt for money. State *v.* Dalton, 8 N. C. 3.

15. Bowsher *v.* Porter, 52 Ill. App. 59, holding that a receipt is of no effect where it does not show the date to which it relates and no extrinsic evidence is offered in regard thereto.

16. See cases cited *infra*, this note.

An itemized bill marked paid is a receipt for the items contained in the bill. Steffens *v.* Nelson, 94 Minn. 365, 102 N. W. 871.

A stipulation in a bond for title to refund the money in case the obligor should be unable to make title is equivalent to an acknowledgment of the receipt of the purchase-money. Wright *v.* Thompson, 14 Tex. 558.

17. Nelson *v.* Boland, 37 Mo. 432.

18. See cases cited *infra*, this note.

Payments of interest.— Where a receipt covered several payments of interest on different debts and at the close of the receipt were the words "in full," such words applied to each payment. Bogart *v.* Van Velsor, 4 Edw. (N. Y.) 718.

Partial payment of note or payment in full. — The language of a receipt which recites that the sum acknowledged was received "on the within note," together with the fact that a credit for the amount was indorsed on the note referred to, shows conclusively that it was intended as a partial payment. Hill *v.* Erwin, 60 Ala. 341.

Where payment is made by check, which recites on its face, "in full of all demands," such words will constitute a receipt in full, as against the payee, only when it is shown that he had knowledge of the presence of such words, or facts are shown which in law would charge him with such knowledge. Rapp *v.* Giddings, 4 S. D. 492, 57 N. W. 237.

As including note.— The fact that at the time of a settlement of accounts between parties a note made by one to another was not given up does not show that a receipt given by the payee, stipulating to be in full of all demands, did not include such note. Cunningham *v.* Batchelder, 32 Me. 316.

19. Elting *v.* Sturtevant, 41 Conn. 176.

20. Hannum *v.* Curtis, 13 Ind. 206; O'Hehir *v.* Middleton-Goshen Traction Co., 36 N. Y. Suppl. 140.

21. Reed *v.* Phillips, 5 Ill. 39; Bercier *v.* McInnis, 57 Miss. 279.

Construction of particular receipts.— A receipt for money, recited to be "in full settlement of account as follows: 40 cubic yards

demand against him and others.[22] So a receipt in full of all claims from its date up to a certain future date does not cover claims existing prior to the date of the receipt.[23] It seems that the payment will be presumed to have been made on the day that the receipt is dated.[24]

C. Operation and Conclusiveness — 1. In General.[25] Ordinarily a receipt raises a presumption and is *prima facie* evidence of payment as recited therein.[26] However, neither an ordinary receipt acknowledging a payment,[27] nor a receipt in

stone @ $4.50 per yard," is not a receipt in full for anything further than the stone specified. Union Pac., etc., R. Co. *v.* McCarty, 3 Colo. App. 530, 34 Pac. 767.

22. Walker *v.* Leighton, 11 Mass. 140.

A receipt given to one in his own name shows payment on his own account rather than on a joint account, especially where the amount is just sufficient to cover a separate balance and nothing is said about its application. Rohert *v.* Garnie, 3 Cai. (N. Y.) 14.

23. Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662.

24. Lowe *v.* Morice, 19 U. C. C. P. 123.

25. See also Releases.

As estoppel see Estoppel, 16 Cyc. 757.

Erasing indorsements of payments see Alterations of Instruments, 2 Cyc. 212.

For rent see Landlord and Tenant, 24 Cyc. 1191.

Presumption of payment from indorsements on notes see Commercial Paper, 8 Cyc. 248.

Receipt in full for part payment see Accord and Satisfaction, 1 Cyc. 322.

26. *Alabama.*—Harrison *v.* Harrison, 9 Ala. 73.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Delaware.— Star Loan Assoc. *v.* Moore, 4 Pennew. 308, 55 Atl. 946.

Florida.— Broward *v.* Doggett, 2 Fla. 49.

Georgia.— Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45; Wooten *v.* Nall, 18 Ga. 609.

Illinois.— Marston *v.* Wilcox, 2 Ill. 270; Connelly *v.* Sullivan, 119 Ill. App. 469; Lyons *v.* Williams, 15 Ill. App. 27.

Iowa.— Shropshire *v.* Ryan, 111 Iowa 677, 82 N. W. 1035.

Kentucky.— Dugan *v.* Harris, 6 Ky. L. Rep. 599.

New Hampshire.— Gleason *v.* Sawyer, 22 N. H. 85.

New York.— Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270].

Pennsylvania.— Price *v.* Worden, 1 Lack. Leg. N. 391; Burkholder *v.* Ream, 14 Lanc. Bar 17.

South Carolina.— Terry *v.* Husbands, 53 S. C. 69, 30 S. E. 826; Trimmier *v.* Thomson, 10 S. C. 164.

Texas.—Dennis *v.* Sanger, 15 Tex. Civ. App. 411, 39 S. W. 997.

Wisconsin.— Davenport *v.* Schram, 9 Wis. 119.

United States.— Thompson *v.* Faussat, 23 Fed. Cas. No. 13,954, Pet. C. C. 182. See Corbus *v.* Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

See 39 Cent. Dig. tit. "Payment," §§ 170, 226.

Receipt given to one of two joint debtors.— A receipt given by a creditor to one of two joint debtors who paid the whole of the debt is *prima facie* evidence of the payment. Ballance *v.* Frisby, 3 Ill. 63.

A receipt, importing a settlement is *prima facie* evidence that the parties then adjusted all matters touching the business or adventure to which it relates. Until rebutted it is conclusive evidence. Levi *v.* Karrick, 13 Iowa 344.

Recital in check.— Where a check recited on its face that it was in payment of royalties in full to date and was received, indorsed, and cashed without objection, the check was then *prima facie* evidence of the payment and of all the facts therein recited. Gregg *v.* Roaring Springs Land, etc., Co., 97 Mo. App. 44, 70 S. W. 920.

Receipt in full.— But a receipt for a certain sum in full of all accounts and notes is not *prima facie* evidence of the payment of notes held by the receiptor as trustee for a very much larger sum. Bartholomew *v.* Bartholomew, 24 Ill. 199.

Payment in full.— Where the creditor presents a bill for services which is paid and receipted, he cannot, in the absence of special circumstances, claim anything more for services prior to that time. Goodson *v.* Detroit Bd. of Health, 114 Mich. 345, 72 N. W. 185; Wilkinson *v.* Crookston, 75 Minn. 184, 77 N. W. 797. See also Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270].

Proof of execution.—Receipts are not *prima facie* evidence of payment without proof of their execution. Wright *v.* Wright, 64 Ala. 88; Cope *v.* Deaton, 43 S. W. 190, 19 Ky. L. Rep. 1197; Epler *v.* Metzger, 17 Pa. Super. Ct. 56; Dennis *v.* Sanger, 15 Tex. Civ. App. 411, 39 S. W. 997.

A receipt is evidence of payment of the highest and most satisfactory character.— Connelly *v.* Sullivan, 119 Ill. App. 469.

27. *Alabama.*— Strange *v.* Watson, 11 Ala. 324.

Connecticut.— Kane *v.* Morehouse, 46 Conn. 300.

Delaware.— Nicholson *v.* Frazier, 4 Harr. 206.

Illinois.— Frink *v.* Bolton, 15 Ill. 343; Rork *v.* Minor, 109 Ill. App. 12. See also Hartford L. Ins. Co. *v.* Sherman, 123 Ill. App. 202 [*affirmed* in 223 Ill. 329, 78 N. E. 923].

Indiana.— Chandler *v.* Schoonover, 14 Ind. 324.

Kansas.— Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

Kentucky.— Whittemore *v.* Stout, 3 Dana 427.

full,[28] unless under seal,[29] is conclusive except where it is uncontradicted and unexplained;[30] but it may be attacked on the grounds of fraud, ignorance, or

Louisiana.— Platt *v.* Maples, 19 La. Ann. 459.

Maine.— Rollins *v.* Dyer, 16 Me. 475.

Maryland.— Hellwig *v.* Benzinger, (1891) 22 Atl. 265; Brooke *v.* Quynn, 13 Md. 379.

Massachusetts.— Hudson *v.* Baker, 185 Mass. 122, 70 N. E. 419.

Mississippi.—Butler *v.* State, 81 Miss. 734, 33 So. 847. See also Albert Mackie Grocer Co. *v.* Byrd, (1899) 25 So. 156.

Missouri.— Massey *v.* Smith, 64 Mo. 347.

New Jersey.— Elwell *v.* Lesley, 7 N. J. L. 349.

New York.— Reikes *v.* Sullivan, 99 N. Y. Suppl. 318; Matter of Rutherford, 5 Dem. Surr. 499.

North Carolina.— Warlick *v.* Barnett, 46 N. C. 539.

Pennsylvania.— Guhl *v.* Frank, 22 Pa. Super. Ct. 531. See also Brodhead *v.* Pullman Ventilator Co., 29 Pa. Super. Ct. 19.

United States.— Vint *v.* King, 28 Fed. Cas. No. 16,950.

See 39 Cent. Dig. tit. "Payment," §§ 138, 226.

Receipt given for improper purpose.—Where a party has for a fraudulent purpose given a receipt in common form, it may be shown by him that it does not state what is true, and that it was given for an improper purpose in an action between himself and a party at whose instigation such receipt was made. King *v.* Hutchins, 28 N. H. 561.

Conditional receipt.— Where one gives a receipt for a draft not negotiable, "to credit it when paid," he will not be accountable for it until paid, and the original debt will remain due in full. Smith *v.* Wood, 1 N. J. Eq. 74.

28. *Colorado.*— Moore *v.* Vickers, 3 Colo. App. 443, 34 Pac. 257.

Delaware.— Derrickson *v.* Morris, 2 Harr. 392; State *v.* Robinson, 2 Harr. 5.

Georgia.— Dodd *v.* Mayson, 39 Ga. 605.

Indiana.— Kepler *v.* Jessup, 11 Ind. App. 241, 37 N. E. 655.

Iowa.— Ford *v.* St. Louis, etc., R. Co., 54 Iowa 723, 7 N. W. 126.

Kansas.— St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Kentucky.— Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267, 101 Am. St. Rep. 345; Newton *v.* Field, 98 Ky. 186, 32 S. W. 623, 17 Ky. L. Rep. 769; Johnson *v.* Carneal, Litt. Sel. Cas. 172; Hitt *v.* Holliday, 2 Litt. 332.

Maine.— Duncan *v.* Grant, 87 Me. 429, 32 Atl. 1000; Gilman *v.* Patten, 70 Me. 183; Patch *v.* King, 29 Me. 448.

Massachusetts.— Grinnell *v.* Spink, 128 Mass. 25; Tucker *v.* Maxwell, 11 Mass. 143.

Michigan.— Dudgeon *v.* Haggart, 17 Mich. 273.

Minnesota.— Cappis *v.* Wiedemann, 86 Minn. 156, 90 N. W. 368.

New York.— Davis *v.* Allen, 3 N. Y. 168; Churchill *v.* Bradley, 43 N. Y. Super. Ct. 170; Rourke *v.* Story, 4 E. D. Smith 54; Hannon *v.* Gallagher, 19 Misc. 347, 43 N. Y. Suppl. 492.

North Carolina.— Grant *v.* Hughes, 96 N. C. 177, 2 S. E. 339; Reid *v.* Reid, 13 N. C. 247, 18 Am. Dec. 570.

Pennsylvania.— Megargel *v.* Megargel, 105 Pa. St. 475; Keim *v.* Kaufman, 15 Pa. Co. Ct. 539.

South Carolina.— Dobbin *v.* Perry, 1 Rich. 32; Hogg *v.* Brown, 2 Brev. 223.

Vermont.— Bennett *v.* Flanagan, 54 Vt. 549.

West Virginia.— Anderson *v.* Davis, 55 W. Va. 429, 47 S. E. 157.

Wisconsin.— Catlin *v.* Wheeler, 49 Wis. 507, 5 N. W. 935.

United States.—The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45; Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24; Hughes *v.* U. S., 25 Ct. Cl. 472; Davis *v.* U. S., 17 Ct. Cl. 201; Dale *v.* U. S., 14 Ct. Cl. 514.

See 39 Cent. Dig. tit. "Payment," § 229.

Compare Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038.

An acknowledgment of the purchase-money in the body of a deed and the receipt indorsed thereon are only *prima facie* evidence of payment and may be rebutted by evidence. *In re* McPherran, 212 Pa. St. 425, 61 Atl. 954.

Payment of less sum in discharge of greater sum, effect of receipt in full, see ACCORD AND SATISFACTION, 1 Cyc. 322.

29. State *v.* Gott, 44 Md. 341.

Recitals in deeds.— The rule that a receipt under seal is conclusive does not include receipts embodied in a deed acknowledging in usual form the receipt of the money expressed therein as the consideration. State *v.* Gott, 44 Md. 341. And see DEEDS, 13 Cyc. 613, 614.

As accord and satisfaction see ACCORD AND SATISFACTION, 1 Cyc. 325.

30. *Colorado.*— Chicago, etc., R. Co. *v.* Mills, 18 Colo. App. 8, 69 Pac. 317.

Connecticut. — Huntington's Appeal, 73 Conn. 582, 48 Atl. 766; Fuller *v.* Crittenden, 9 Conn. 401, 23 Am. Dec. 364.

Georgia.— Freeman *v.* Tucker, 20 Ga. 6, 522.

Kentucky.— Witt *v.* Thomas, 42 S. W. 338, 19 Ky. L. Rep. 847.

Maine.— Robbins Cordage Co. *v.* Brewer, 48 Me. 481.

New York.— Swift *v.* State, 89 N. Y. 52; Lambert *v.* Seely, 17 How. Pr. 432.

Pennsylvania.— McGahren *v.* Royal Union Mut. L. Ins. Co., 28 Pa. Super. Ct. 47. See also Rothrock *v.* Rothrock, 195 Pa. St. 529, 46 Atl. 90.

South Carolina.— McDowall *v.* Lemaitre, 2 McCord 320.

Texas.— Allen *v.* Baker, 39 Tex. 220.

See 39 Cent. Dig. tit. "Payment," §§ 138, 226.

Receipt in full.— Eufaula Nat. Bank *v.*

mistake,[31] or duress,[32] or the want of consideration.[33] If, however, the receipt is a contract, it can be varied, explained, or contradicted only in those cases where parol evidence is admissible to vary or contradict a written instrument.[34] The burden of proving such allegations to defeat the presumption arising from the receipt is upon the creditor,[35] who must establish the facts by a clear and unmistakable preponderance of the evidence.[36]

Passmore, 102 Ala. 370, 14 So. 683; Burton *v.* Merrick, 21 Ark. 357; Bonnell *v.* Chamberlin, 26 Conn. 487; Hurd *v.* Blackman, 19 Conn. 177; Conyers *v.* Graham, 81 Ga. 615, 8 S. E. 521; Virdin *v.* Stockbridge, 74 Md. 481, 22 Atl. 70; Pratt *v.* Castle, 91 Mich. 484, 487, 52 N. W. 52; Alvord *v.* Baker, 9 Wend. (N. Y.) 323; Guhl *v.* Frank, 22 Pa. Super. Ct. 531; De Arnaud *v.* U. S., 151 U. S. 483, 14 S. Ct. 374, 38 L. ed. 244; Newman *v.* U. S., 81 Fed. 122; Battle *v.* McArthur, 49 Fed. 715. When a receipt acknowledging a certain sum in full of certain described promissory notes, and in full of all demands, the general words, although they do not enlarge the particular words as to what transpired at the time, yet they do import and may be used to prove that the party giving the receipt had, at the time, no other demands against him to whom the receipt was given. Allen *v.* Woodson, 50 Ga. 53. A receipt "in full of all demands" will, if unexplained or uncontradicted, defeat an action on a promissory note given previously to the date of the receipt. Cunningham *v.* Batchelder, 32 Me. 316. The fact that the maker of a note, when called on by counsel for the holder, did not disclose fully his defense to the note, does not show that a receipt held by the maker and stipulating to be in full of all demands, did not include the note. Cunningham *v.* Batchelder, *supra*.

Entries by the debtor in the books of the creditor, his employer, showing payments up to certain dates, where unexplained, are sufficient to establish such payments. Cummings *v.* Lynn, 121 Iowa 344, 96 N. W. 857.

A recital of payment in a conveyance is, in the absence of proof to the contrary, sufficient evidence of payment. Agnew *v.* McGill, 96 Ala. 496, 11 So. 537.

31. *Delaware.*— Nicholson *v.* Frazier, 4 Harr. 206.

Illinois.— Anderson *v.* Armstead, 69 Ill. 452.

Maryland.— Trisler *v.* Williamson, 4 Harr. & M. 219, 1 Am. Dec. 396.

New Jersey.—Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564.

Pennsylvania.— Harris *v.* Hay, 111 Pa. St. 562, 4 Atl. 715.

South Carolina.— Clarke *v.* Deveaux, 1 S. C. 172.

• See 39 Cent. Dig. tit. "Payment," § 138.

Failure to read receipt before signing.— Ordinarily the mere negligence of a person signing a receipt without reading it will not conclude him nor prevent explanation or denial of what it contains, especially where he was induced to sign the paper by the misrepresentation or fraud of the other party. Missouri Pac. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590; Boardman *v.* Gaillard, 60 N. Y. 614 [*affirming* 1 Hun 217, 3 Thomps. & C. 695]; Swanson *v.* White, 55 N. Y. App. Div. 631, 66 N. Y. Suppl. 787; Cornell *v.* Emigrant Industrial Sav. Bank, 9 N. Y. St. 72; Elliot *v.* Logan, 62 N. C. 163. But see Sherman *v.* Sweeny, 29 Wash. 321, 69 Pac. 1117.

Errors in a receipt in overstating the amount received are not binding upon the person giving the receipt. Terst *v.* O'Neal, 108 Ala. 250, 19 So. 307; Shapleigh *v.* Dutcher, 15 Nebr. 563, 20 N. W. 32.

Ignorance of law.— The fact that one who signs a receipt in full was not fully aware of the legal effect of the writing does not authorize him to avoid it in the absence of fraud. Conant *v.* Kimball, 95 Wis. 550, 70 N. W. 74.

Sufficiency of evidence to show forgery of receipt see Flemming *v.* Lawless, (N. J. Ch. 1897) 36 Atl. 502.

32. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; The Galloway C. Morris, 9 Fed. Cas. No. 5,204, 2 Abb. 164.

What constitutes.— Refusal to pay money admitted to be due except upon receiving a certain kind of receipt does not constitute such duress as to render the receipt void. Earle *v.* Berry, 27 R. I. 221, 61 Atl. 671, 1 L. R. A. N. S. 867.

33. Kenny *v.* Kane, 50 N. J. L. 562, 14 Atl. 597; Van Nest *v.* Talmage, 17 Abb. Pr. (N. Y.) 99.

34. Macdonald *v.* Dana, 154 Mass. 152, 27 N. E. 993. See also EVIDENCE, 17 Cyc. 629 *et seq.*

35. Fitzgerald *v.* Coleman, 114 Ill. App. 25.

On the other hand, where a receipt is given for money lent, the possession by the creditor of it casts upon the debtor the burden of proving its payment. Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599.

36. Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439; Fitzgerald *v.* Coleman, 114 Ill. App. 25; Guhl *v.* Frank, 22 Pa. Super. Ct. 531. See also Gleason *v.* Sawyer, 22 N. H. 85; Levy *v.* Rust, (N. J. Ch. 1893) 49 Atl. 1017; Crow *v.* Gleason, 20 N. Y. Suppl. 590; McKissick *v.* Martin, 12 Heisk. (Tenn.) 311.

Must be convincing.— A written receipt is evidence of the highest and most satisfactory character, and, to do away with its force, the testimony should be convincing, and not resting in mere impressions. Winchester *v.* Grosvenor, 44 Ill. 425.

Unequivocal testimony is necessary to overturn a receipt. Dugan *v.* Harris, 6 Ky. L. Rep. 599.

Evidence equally balanced.— Where the

2. PAYMENT BY BILL OR NOTE. A receipt of payment by bill or note, while often held to be *prima facie* evidence that the bill or note was accepted as absolute payment,[37] is not conclusive.[38]

VI. APPLICATION OF.[39]

A. In General — 1. SCOPE OF RULE. "Application of payments," also referred to as "appropriation of payments," and in the civil law as "imputation of payments," is the application of a payment made by the debtor to his creditor to one or more of several debts owing the creditor by the debtor.[40] But while it has been said that the rule applies only where there are two debts,[41] it is extended to

evidence on one side is entitled to as much weight as the evidence on the other the receipt will stand. Borden *v.* Hope, 21 La. Ann. 581; Crawford *v.* Forest Oil Co., 189 Pa. St. 415, 42 Atl. 39, plaintiff's testimony against that of defendant. See also *In re* Rhoads, 189 Pa. St. 460, 42 Atl. 116; Breeder *v.* Parchman, (Tenn. Ch. App. 1899) 54 S. W. 677.

Subsequent statements.— The presumption of payment arising from a receipt in a deed, and from subsequent releases, is sufficiently rebutted by the testimony of disinterested and credible witnesses as to subsequent statements to them by the grantee of his indebtedness to the grantors. Eshelman's Estate, 143 Pa. St. 24, 21 Atl. 905.

Where genuineness of receipt disputed.— The rule that a receipt's effect can only be done away with by clear and unmistakable evidence does not apply when the receipt's genuineness is disputed. This question is to be determined by the preponderance of evidence. Snodgrass *v.* Nelson, 48 Ill. App. 121.

37. *Arkansas.*— Real Estate Bank *v.* Rawdon, 5 Ark. 558.

Maryland.— Phelan *v.* Crosby, 2 Gill 462. But see Berry *v.* Griffin, 10 Md. 27, 69 Am. Dec. 123; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452.

New Jersey.— Swain *v.* Frazier, 35 N. J. Eq. 326.

South Carolina.— *Ex p.* Williams, 17 S. C. 396.

United States.— Drew *v.* Hull of a New Ship, 7 Fed. Cas. No. 4,078; Moore *v.* Newbury, 17 Fed. Cas. No. 9,772, 6 McLean 472, Newb. Adm. 49; Palmer *v.* Priest, 18 Fed. Cas. No. 10,694, 1 Sprague 512.

See 39 Cent. Dig. tit. "Payment," § 230.

Compare, as *contra*, Combination Steel, etc., Co. *v.* St. Paul City R. Co., 47 Minn. 207, 49 N. W. 744; Doebling *v.* Loos, 45 Mo. 150; Feamster *v.* Withrow, 12 W. Va. 611.

Receipt for worthless bonds.— A receipt for bonds in payment for land, which bonds proved to be worthless, does not even *prima facie* show payment. Dunlap *v.* Shanklin, 10 W. Va. 662.

A conditional receipt, containing the words "which, when paid, will be in full for the above," does not show that the acceptances were taken in payment of an account. Homans *v.* Newton, 4 Fed. 880.

Sufficiency of evidence in rebuttal.— A statement of account, indorsed, "Rec'd payment by note due June 17th," is sufficient evidence to support a finding that the account was paid by the note, and should prevail, unless overcome by clear and satisfactory evidence to the contrary. Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706.

38. *Nebraska.*— National L. Ins. Co. *v.* Goble, 51 Nebr. 5, 70 N. W. 503; H. F. Cady Lumber Co. *v.* Greater America Exposition, 4 Nebr. (Unoff.) 268, 93 N. W. 961.

New York.— Putnam *v.* Lewis, 8 Johns. 389; Tobey *v.* Barber, 5 Johns. 68, 4 Am. Dec. 326.

Pennsylvania.— Collins *v.* Busch, 191 Pa. St. 549, 43 Atl. 378; Patterson *v.* Wyomissing Woolen Mfg. Co., 2 Woodw. 215.

United States.— *In re* Hurst, 12 Fed. Cas. No. 6,925, 1 Flipp. 462.

Canada.— Port Darlington Harbour Co. *v.* Squair, 18 U. C. Q. B. 533.

See 39 Cent. Dig. tit. "Payment," § 230.

39. **Application of deposits by bank** see BANKS AND BANKING, 5 Cyc. 550 *et seq.*

Application of payments on mortgage debt see, generally, MORTGAGES, 27 Cyc. 1394.

Payment of rent see LANDLORD AND TENANT, 25 Cyc. 1192.

Payment of usury see USURY.

Payments by particular persons see PARTNERSHIP; PRINCIPAL AND AGENT.

Payments to building and loan associations see BUILDING AND LOAN SOCIETIES, 6 Cyc. 153.

Payments to particular persons see EXECUTORS AND ADMINISTRATORS; PARTNERSHIP; PRINCIPAL AND AGENT; TAXATION.

40. Gwin *v.* McLean, 62 Miss. 121; Harker *v.* Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691. See Wrightsville Bank *v.* Merchants', etc., Bank, 119 Ga. 288, 46 S. E. 94, where it was held that the application of payments was not involved.

41. Lamprell *v.* Billericay Union, 2 Exch. 283, 18 L. J. Exch. 282.

One contract.— Under an entire contract for labor and material, an appropriation of payments to particular items cannot be made by the creditor alone after the payment has been made. Scannell *v.* Hub Brewing Co., 178 Mass. 288, 59 N. E. 628.

When notes are merged in a judgment, the debtor has not the right to pay them in severalty or to appropriate payments otherwise than as credits upon the judgment as a whole. Cowgill *v.* Robberson, 75 Mo. App. 412.

cases where there is really only one debt made up of different items, as in the case of a current account,[42] and to appropriations between principal and interest.[43] The rule is not confined to payments made in money but is extended to payments made in commodities or services.[44]

2. ORIGIN OF RULE. The rules governing the application of payments have their origin in the civil law, but in this country, in so far as the common law prevails, the rules of the civil law have been greatly modified and in many respects entirely repudiated.[45]

3. APPLICABILITY TO INVOLUNTARY PAYMENTS. A voluntary payment, within the meaning of the rules as to application of payments, is one made by the debtor on his own motion and without any compulsory process.[46] Involuntary payments are such as result from an execution[47] or judicial[48] sale or where there is no direct payment with the consent of the debtor. Neither the debtor[49] nor the creditor[50] has a right to make an application of an involuntary payment, and the rules governing the application of voluntary payments by the court where neither party have applied them do not govern involuntary payments.[51] Usually the application by the court will be *pro rata*,[52] but in some jurisdictions involuntary payments insufficient to pay all claims are applied by the court so as to pay the unsecured rather than the secured claims.[53]

B. By Debtor — 1. RIGHTS OF DEBTOR. A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses,[54] provided the payment is a voluntary

42. See *infra*, VI, C, 1, c.

43. See *infra*, VI, C, 1, b.

44. See Young *v.* Harris, 36 Ark. 162; Thatcher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782. But see Cass *v.* McDonald, 39 Vt. 65, holding that the mere performance of work by the debtor for the creditor is not a payment within the rules as to appropriation of payment.

45. Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601. See also *infra*, VI, B–E.

46. Nichols *v.* Knowles, 17 Fed. 494, 3 McCrary 477.

47. Nichols *v.* Knowles, 17 Fed. 494, 3 McCrary 477.

Distribution of proceeds of execution sale see EXECUTIONS, 17 Cyc. 1351 *et seq.*

48. See JUDICIAL SALES, 24 Cyc. 74; MORTGAGES, 27 Cyc. 1496, 1761; PARTITION.

49. Blackstone Bank *v.* Bill, 10 Pick. (Mass.) 129; Pennsylvania L. Ins., etc., Co. *v.* H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 Atl. 70.

50. Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129; Merrimack County Bank *v.* Brown, 12 N. H. 320; Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302; Pennsylvania L. Ins., etc., Co. *v.* H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 Atl. 70.

Application pro rata.— Where payments are involuntary, the creditor has no right of appropriation but must apply the money toward the discharge of all the debts in proportion. Bond *v.* Armstrong, 88 Ind. 65. But see Sturgeon Sav. Bank *v.* Riggs, 72 Mo. App. 239.

51. Pennsylvania L. Ins., etc., Co. *v.* H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 Atl. 70. See also Andrews *v.* Exchange Bank, 108 Ga. 802, 34 S. E. 183.

52. See Indiana Trust Co. *v.* International Bldg., etc., Assoc., 35 Ind. App. 685, 74 N. E. 633 (holding that where a joint fund belonging to two was distributed for their benefit without any separation, each should be charged in proportion to their interest in the fund at the time payments were made); Browning *v.* Carson, 163 Mass. 255, 39 N. E. 1037; Shelden *v.* Bennett, 44 Mich. 634, 7 N. W. 223; Merrimack County Bank *v.* Brown, 12 N. H. 320; Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302; Jones *v.* Benedict, 83 N. Y. 79; Hood *v.* Coleman Planing Mill, etc., Co., 27 Ont. App. 203.

Dividends.— Where a firm transferred to a creditor a claim against a corporation which thereafter became insolvent, a dividend declared by its receiver should be applied on such indebtedness, instead of on notes upon which such firm was accommodation indorser for the corporation. Watson *v.* New Jersey Chemical Co., (N. J. Ch. 1894) 29 Atl. 186.

Interests of other creditors considered.— In distributing the proceeds of involuntary payments regard will be had to the interests of other creditors. Gunn *v.* Carter, 69 Ga. 646.

Insolvent sureties for one debt.— Where there is an involuntary payment, the fact that the sureties upon one obligation have become insolvent where both obligations are signed by sureties does not require the application of the payment to such debt. Bond *v.* Armstrong, 88 Ind. 65.

53. Smith *v.* Moore, 112 Iowa 60, 83 N. W. 813; Hanson *v.* Manley, 72 Iowa 48, 33 N. W. 357; Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940. See also Small *v.* Older, 57 Iowa 326, 10 N. W. 734; Sturgeon Sav. Bank *v.* Riggs, 72 Mo. App. 239.

54. *Alabama.*— Lynn *v.* Bean, 141 Ala. 236, 37 So. 515; McCurdy *v.* Middleton, 82

one.[55] For example, the debtor may apply the payment to an illegal demand,[56] or

Ala. 131, 2 So. 721; Callahan *v.* Boazman, 21 Ala. 246; McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313. *Compare* Pearce *v.* Walker, 103 Ala. 250, 15 So. 568.

California.— Wendt *v.* Ross, 33 Cal. 650.

Colorado.— Boyd *v.* Watertown Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

Connecticut. — Sherwood *v.* Haight, 26 Conn. 432; Selleck *v.* Sugar Hollow Turnpike Co., 13 Conn. 453.

Delaware.— Pickering *v.* Day, 2 Del. Ch. 333.

Florida.— Randall *v.* Parramore, 1 Fla. 409.

Georgia.— Massengale *v.* Pounds, 108 Ga. 762, 33 S. E. 72; Coleman *v.* Slade, 75 Ga. 61; Whitaker *v.* Groover, 54 Ga. 174; Semmes *v.* Boykin, 27 Ga. 47; Hargroves *v.* Cooke, 15 Ga. 321; Rackley *v.* Pearce, 1 Ga. 241.

Illinois.— Jackson *v.* Bailey, 12 Ill. 159; Bayley *v.* Wynkoop, 10 Ill. 449; McFarland *v.* Lewis, 3 Ill. 344; Hahn *v.* Geiger, 96 Ill. App. 104; Brinckerhoff *v.* Greenan, 85 Ill. App. 253.

Indiana.— King *v.* Andrews, 30 Ind. 429; Forelander *v.* Hicks, 6 Ind. 448; Howland *v.* Rench, 7 Blackf. 236; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537.

Kentucky.— McDaniel *v.* Barnes, 5 Bush 183; Nutall *v.* Brannin, 5 Bush 11; Howard *v.* London Mfg. Co., 72 S. W. 771, 24 Ky. L. Rep. 1934. But see Anderson *v.* Mason, 6 Dana 217.

Louisiana.— Robson *v.* McKoin, 18 La. Ann. 544; Slaughter *v.* Milling, 15 La. Ann. 526; Bloodworth *v.* Jacobs, 2 La. Ann. 24.

Maine.— Treadwell *v.* Moore, 34 Me. 112; Starrett *v.* Barber, 20 Me. 457.

Maryland.— Calvert *v.* Carter, 18 Md. 73; Mitchell *v.* Dall, 4 Gill & J. 361; Gwinn *v.* Whitaker, 1 Harr. & J. 754; McTavish *v.* Carroll, 1 Md. Ch. 160.

Michigan.— Thayer *v.* Denton, 4 Mich. 192.

Minnesota.—Solomon *v.* Dreschler, 4 Minn. 278.

Mississippi.—Champenois *v.* Fort, 45 Miss. 355; Crisler *v.* McCoy, 33 Miss. 445; Baine *v.* Williams, 10 Sm. & M. 113.

Missouri.— Middleton *v.* Frame, 21 Mo. 412; Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456.

Nebraska.— Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766; Murray *v.* Schneider, 64 Nebr. 484, 90 N. W. 206.

New Hampshire.—Bean *v.* Brown, 54 N. H. 395; Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153; Caldwell *v.* Wentworth, 14 N. H. 431.

New Jersey.— Woodruff *v.* McIntyre, (Ch. 1888) 14 Atl. 572; Oliver *v.* Phelps, 20 N. J. L. 180; White *v.* Trumbull, 15 N. J. L. 314, 29 Am. Dec. 687; Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795 [*affirmed* in 45 N. J. Eq. 245, 19 Atl. 621].

New York.— Seymour *v.* Marvin, 11 Barb. 80; Pattison *v.* Hull, 9 Cow. 747.

North Dakota.— Langdon First Nat. Bank *v.* Prior, 10 N. D. 146, 86 N. W. 362.

Ohio.— Eureka Ins. Co. *v.* Duble, 3 Ohio Dec. (Reprint) 316.

Pennsylvania.—Patterson *v.* Van Loon, 186 Pa. St. 367, 40 Atl. 495; Philadelphia *v.* Kelly, 166 Pa. St. 207, 31 Atl. 47; Watt *v.* Hoch, 25 Pa. St. 411; Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691; Davis *v.* Wood, 1 Del. Co. 382.

South Carolina.— Reid *v.* Wells, 56 S. C. 435, 34 S. E. 401, 939; Carson *v.* Hill, 1 McMull. 76; McDonald *v.* Pickett, 2 Bailey 617; Black *v.* Shooler, 2 McCord 293; Jones *v.* Kilgore, 2 Rich. Eq. 63; Sager *v.* Warley, Rice Eq. 26.

Texas.— Proctor *v.* Marshall, 18 Tex. 63; Crawford *v.* Pancoast, (Civ. App. 1900) 62 S. W. 559; Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

Vermont.— Roakes *v.* Bailey, 55 Vt. 542; Rosseau *v.* Call, 14 Vt. 83; Robinson *v.* Doolittle, 12 Vt. 246; Briggs *v.* Williams, 2 Vt. 283.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

Wisconsin.— Hassard *v.* Tomkins, 108 Wis. 186, 84 N. W. 174; Jones *v.* Williams, 39 Wis. 300.

United States.— U. S. *v.* Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; Nichols *v.* Knowles, 17 Fed. 494, 3 McCrary 477; Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243; Leef *v.* Goodwin, 15 Fed. Cas. No. 8,207, Taney 460; Postmaster-Gen. *v.* Norvell, 18 Fed. Cas. No. 11,310, Gilp. 106; U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150; U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82.

England.— Buchanan *v.* Findlay, 9 B. & C. 738, 7 L. J. K. B. O. S. 314, 4 M. & R. 593, 17 E. C. L. 329; *Ex p.* Hankey, 4 Deac. 1; *In re* Lysaght, [1903] 1 Ir. 235; Waugh *v.* Wren, 9 Jur. N. S. 365, 7 L. T. Rep. N. S. 612, 1 New Rep. 142, 11 Wkly. Rep. 244; *Re* Wheal Ludcott, etc., Mines Co., 21 L. T. Rep. N. S. 67, 17 Wkly. Rep. 745; Manning *v.* Westerne, 2 Vern. Ch. 606, 23 Eng. Reprint 996.

Canada.— Wilson *v.* Rykert, 14 Ont. 188.

See 39 Cent. Dig. tit. "Payment," § 99.

It is immaterial that the creditor is acting in a fiduciary capacity.— Miller *v.* Trevilian, 2 Rob. (Va.) 1.

Statutory reiteration of rule.— Frutig *v.* Trafton, 2 Cal. App. 47, 83 Pac. 70.

Judgment debtor who has been garnished.— A judgment debtor in a justice's court who has been garnished at the suit of creditors of the judgment creditor has the right, on paying the money into court, to direct whether it be applied on the judgment or in the garnishee proceedings. McDonald *v.* Lewis, 42 Mich. 135, 3 N. W. 300.

55. See *supra*, VI, A, 3.

56. Rohan *v.* Hanson, 11 Cush. (Mass.) 44; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 [*reversed* on other grounds in 29 N. J. Eq. 311].

to principal to the exclusion of interest,[57] or may direct that the payment be applied equally on several obligations.[58]

2. TIME FOR APPROPRIATION. The weight of authority holds that the debtor must direct the application of his payment at or before the time of payment and that he cannot do so afterward.[59] But the debtor may designate the application after suit, if such payment was made upon an agreement which the creditor had repudiated.[60] So if the creditor procure possession of the money of his debtor, without his consent, unless it be by a legal proceeding binding upon the debtor, the latter does not thereby lose his right to make application of the funds so obtained to any one of several demands held by the creditor against him.[61]

3. WHAT CONSTITUTES, AND SUFFICIENCY. A direction by the debtor as to the application of payments may be shown by an express agreement between the debtor and creditor,[62] by the express declaration of the debtor,[63] or it may be implied from circumstances showing the debtor's intention.[64] For instance, the

57. Pindall *v.* Marietta Bank, 10 Leigh (Va.) 481. *Contra*, Johnson *v.* Robbins, 20 La. Ann. 569.

58. McGaffey *v.* Mathie, 68 Vt. 403, 35 Atl. 334.

59. *Alabama.*— Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721. But see Petty *v.* Dill, 53 Ala. 641; Dent *v.* State Bank, 12 Ala. 275.

Arkansas.— Lazarus *v.* Freidheim, 51 Ark. 371, 11 S. W. 518; Bell *v.* Radcliff, 32 Ark. 645.

Indiana.— Taylor *v.* Jones, 1 Ind. 17. See also Taylor *v.* Jones, Smith 5. But see Huffman *v.* Cauble, 86 Ind. 591.

Louisiana.— Bloodworth *v.* Jacobs, 2 La. Ann. 24.

New York.— California Bank *v.* Webb, 94 N. Y. 467; Pattison *v.* Hull, 9 Cow. 747.

North Carolina.— Long *v.* Miller, 93 N. C. 233; Moss *v.* Adams, 39 N. C. 42. See also Burnett *v.* Sledge, 129 N. C. 114, 39 S. E. 775.

South Carolina.— Baum *v.* Trantham, 42 S. C. 104, 19 S. E. 973, 46 Am. St. Rep. 697.

Tennessee.— Reynolds *v.* McFarlane, 1 Overt. 488. See also Dean *v.* Womack, 2 Tenn. Ch. App. 72.

Texas.— Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

Washington.— Frazer *v.* Miller, 7 Wash. 521, 35 Pac. 427.

England.— See Grigg *v.* Cocks, 4 Sim. 438, 6 Eng. Ch. 438, 58 Eng. Reprint 163.

Canada.— St. John *v.* Rykert, 10 Can. Sup. Ct. 278.

See 39 Cent. Dig. tit. "Payment," § 101.

The direction may be made before payment.— Fargo First Nat. Bank *v.* Roberts, 2 N. D. 195, 49 N. W. 722.

60. Littleton *v.* Harris, 69 Mo. App. 596.

61. Dennis *v.* Jones, 31 Miss. 606.

62. Hansen *v.* Rounsavell, 74 Ill. 238; Hahn *v.* Geiger, 96 Ill. App. 104; Hughes *v.* McDougle, 17 Ind. 399.

Construction of agreement.— Where it is understood between the parties that a sale of goods creates between them only the relation of debtor and creditor, the fact that the purchaser promises to pay for the goods out of the proceeds of their sale does not deprive him of the right to direct the application of payments subsequently made by him to other debts which he owes the seller. Stewart *v.* Hopkins, 30 Ohio St. 502.

Payment by third person.— Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation binding on the parties and all who having notice subsequently claim under the debtor an interest in the fund. Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999.

63. Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312]. See also Frutig *v.* Trafton, 2 Cal. App. 47, 83 Pac. 70; Kempner *v.* Patrick, (Tex. Civ. App. 1906) 95 S. W. 51.

64. *Alabama.*— Pearce *v.* Walker, 103 Ala. 250, 15 So. 568.

California.— Hanson *v.* Cordano, 96 Cal. 441, 31 Pac. 457.

Colorado.— Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Maryland.— Mitchell *v.* Dall, 2 Harr. & G. 159.

Mississippi.— Poindexter *v.* La Roche, 7 Sm. & M. 699.

New Jersey.— Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312].

Vermont.— Roakes *v.* Bailey, 55 Vt. 542.

England.— Shaw *v.* Picton, 4 B. & C. 715, 7 D. & R. 201, 4 L. J. K. B. O. S. 29, 10 E. C. L. 771, 28 Rev. Rep. 455; Peters *v.* Anderson, 1 Marsh. 238, 5 Taunt. 596, 15 Rev. Rep. 592, 1 E. C. L. 305.

Canada.— St. John *v.* Rykert, 10 Can. Sup. Ct. 278.

See 39 Cent. Dig. tit. "Payment," § 100.

Illustrations.— Ohio, etc., R. Co. *v.* Smith, 5 Ind. App. 36, 31 N. E. 371; Forbes *v.* Morehead, 58 S. W. 982, 22 Ky. L. Rep. 853; Western Sash, etc., Co. *v.* Young, 48 Mo. App. 505; Mulherin *v.* Stansell, 70 S. C. 568, 50 S. E. 497; Manning *v.* The Peerless, 80 Fed. 942. Plaintiff held two notes against defendant, one as executor, the other in his own right as assignee, without defendant's knowledge, and in answer to his request for

positive refusal to pay one debt, and the acknowledgment of another, with the delivery of the sum due on it, evidences an appropriation by the debtor.[65] If the direction is given in words, these words must be communicated to the creditor,[66] and if circumstances are relied on as indicating the appropriation, knowledge of these circumstances must be traced to the creditor, since the mere intent of the debtor, not communicated to the creditor, nor attended by any act or declaration manifesting it to him, is insufficient.[67]

4. EFFECT. Where a debtor directs the manner in which his payment is to be applied, the creditor, if he accepts the payment, must apply it accordingly.[68] The

money made on the ground that "one of the heirs" needed it, defendant remitted a check. It was held that the same should be applied on the note held by plaintiff as executor. Moose *v.* Marks, 116 N. C. 785, 21 S. E. 561.

An expression of a wish by a debtor, before the time of making a payment, as to its application, involves a direction by him, and entitles him to the benefit of the application requested. Hansen *v.* Rounsavell, 74 Ill. 238.

A direction by a debtor in a lease that the rents be paid to a creditor "until the mortgage is paid off" shows an intention that they be applied to the mortgage indebtedness. Plain *v.* Roth, 107 Ill. 588. See also Smith *v.* Wood, 1 N. J. Eq. 74.

Payment by a check which recites for what purpose it is given is an effective appropriation to such purpose. Scott *v.* Gilkey, 49 Ill. App. 116.

Directions to "dispose" of goods as seems proper to the creditor does not show a direction as to the application of the proceeds. Sproule *v.* Samuel, 5 Ill. 135.

65. Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 5 L. ed. 384.

But payment of the exact sum due on one of two claims cannot be regarded of itself as a direction to the creditor to apply the amount to said claim (Adams Express Co. *v.* Black, 62 Ind. 128. *Contra*, Marryatts *v.* White, 2 Stark. 101, 3 E. C. L. 334), yet such fact is a circumstance tending to show the intention of the debtor (Boyd *v.* Watertown Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Adams Express Co. *v.* Black, 62 Ind. 128).

66. Pearce *v.* Walker, 103 Ala. 250, 15 So. 568.

67. Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Reiss *v.* Scherner, 87 Ill. App. 84; Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137; Terhune *v.* Colton, 12 N. J. Eq. 232; Brice *v.* Hamilton, 12 S. C. 32. But see Roakes *v.* Bailey, 55 Vt. 542, holding that where the debtor pays with one intention and the creditor receives with another, the intent of the debtor governs.

Entry by debtor in his books.— Thus it has been held that an entry made by a debtor in his own books of account is insufficient to determine the application of payment. Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312]; Manning *v.* Westerne, 2 Vern. Ch. 606, 23 Eng. Reprint 996. But if the debtor, at the time of the payment, makes such an entry in his book and at the same time shows it to the creditor, it is evidence of such an appropriation as would be binding upon the creditor. Frazer *v.* Bunn, 8 C. & P. 704, 34 E. C. L. 973.

68. *Alabama.*— Perdue *v.* Brooks, 85 Ala. 459, 5 So. 126.

Arkansas.— Atkinson *v.* Cox, 54 Ark. 444, 16 S. W. 124.

California.— Hanson *v.* Cordano, 96 Cal. 441, 31 Pac. 457; Hardenbergh *v.* Bacon, 33 Cal. 356.

Connecticut.— City Coal, etc., Co. *v.* New Britain Inst., (1904) 59 Atl. 33.

Georgia.— Johnson *v.* Johnson, 30 Ga. 857.

Indiana.— Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537.

Kentucky.—Bosley *v.* Porter, 4 J. J. Marsh. 621.

Louisiana.— Morse *v.* Brandt, 2 Mart. N. S. 515.

Maryland.—Lee *v.* Early, 44 Md. 80; Mitchell *v.* Dall, 4 Gill & J. 361, 2 Harr. & G. 159.

Massachusetts.— Reed *v.* Boardman, 20 Pick. 441; Bonaffe *v.* Woodberry, 12 Pick. 456; Hussey *v.* Manufacturers', etc., Bank, 10 Pick. 415.

Mississippi.— Rosenbaum *v.* Meridian Nat. Bank, 73 Miss. 267, 18 So. 549; Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

Missouri.— Western Sash, etc., Co. *v.* Young, 48 Mo. App. 505.

Nebraska.— Durrell *v.* Todd, 31 Nebr. 256, 47 N. W. 862.

New York.— Goodman *v.* Snow, 81 Hun 225, 30 N. Y. Suppl. 672; Allgoever *v.* Edmunds, 66 Barb. 579; Godfrey *v.* Warner, Lalor 32.

North Carolina.— Runyon *v.* Latham, 27 N. C. 551.

Ohio.— Stewart *v.* Hopkins, 30 Ohio St. 502.

Pennsylvania.— Smuller *v.* Union Canal Co., 37 Pa. St. 68; Pearl *v.* Clark, 2 Pa. St. 350; Martin *v.* Draher, 5 Watts 544; Jamison *v.* Collins, 11 Phila. 258.

South Carolina.— Reid *v.* Wells, 56 S. C. 435, 34 S. E. 401, 939; Ellis *v.* Mason, 32 S. C. 277, 10 S. E. 1069.

Texas.— Bray *v.* Crain, 59 Tex. 649; Rugeley *v.* Smalley, 12 Tex. 238; Texarkana First Nat. Bank *v.* Munzesheimer, (Civ. App. 1894) 26 S. W. 428; Kinnear *v.* Dilley, 3 Tex. App. Civ. Cas. § 406.

United States.— The Memnon, 62 Fed. 482, 10 C. C. A. 502; Alexandria Bank *v.* Saunders, 2 Fed. Cas. No. 852, 2 Cranch C. C. 183.

application of the payment cannot be diverted without the consent of the debtor,[69] but where the creditor applies the payment differently from the direction of the debtor, the latter may be bound thereby by his acquiescence or other acts showing a ratification of such application.[70] On the other hand, the debtor has no right, after the payment has been made, to change the application without the consent of the creditor.[71] For instance, the direction of the debtor, or his consent, to

Canada.— Lowden *v.* Martin, 12 Ont. Pr. 496; Canada Powder Co. *v.* Burly, 9 U. C. C. P. 290.

See 39 Cent. Dig. tit. "Payment," § 102.

Payment by draft.— If a debtor delivers to his creditor a draft for money, with directions to apply the proceeds to a particular liability, the creditor is bound by the application as much as if the payment had been in money instead of by draft. Moorehead *v.* West Branch Bank, 3 Watts & S. (Pa.) 550.

A refusal to return drafts after explicit direction as to their application will be regarded as an election to accept them for the purpose for which they are offered. Christman *v.* Martin, 7 Pa. Super. Ct. 568, 42 Wkly. Notes Cas. 573.

Principal and interest.— If a debt consists of both principal and interest and the debtor directs the payment to be applied on the principal, or it is mutually agreed that the payment shall be so applied, the creditor, after receiving it, cannot apply the payment to the interest. Tooke *v.* Bonds, 29 Tex. 419; Pindall *v.* Marietta Bank, 10 Leigh (Va.) 481.

Demand not due.— If payment is offered on an account not due, the creditor need not receive it, but if he does receive it, he is bound to apply it in accordance with the directions of the debtor. Wetherell *v.* Joy, 40 Me. 325.

Joint indebtedness.— When a payment has been made on a debt which is due by one of two joint debtors, it cannot be afterward applied, even by the agreement of the creditor and paying debtor, to any other indebtedness. Thayer *v.* Denton, 4 Mich. 192.

Direction to pay part to third person.— A creditor who receives a bill of exchange from his debtor, with directions to pay a part of its value to another creditor, has no right to appropriate all the money collected from the bill to the payment of his own debt. Hall *v.* Marston, 17 Mass. 575.

Cause of action for misapplication.— If the creditor fails to carry out the debtor's direction, he is answerable only to the debtor for a breach of contract, and another person cannot maintain an action against him, there being no privity. Sims *v.* Lester, 55 Ga. 620, 96 Am. St. Rep. 49.

69. Levystein *v.* Whitman, 59 Ala. 345; Jackson *v.* Bailey, 12 Ill. 159; Rundlett *v.* Small, 25 Me. 29.

70. *Alabama.*— Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37.

California.— Cardinell *v.* O'Dowd, 43 Cal. 586.

Georgia.— Bird *v.* Benton, 127 Ga. 371, 56 S. E. 450.

Indian Territory.— Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Maryland.— Dorsey *v.* Wayman, 6 Gill 59.

Minnesota.— Flarsheim *v.* Brestrup, 43 Minn. 298, 45 N. W. 438.

New York.— Spencer Optical Mfg. Co. *v.* Jump, 10 N. Y. St. 130.

North Carolina.— See Bonner *v.* Styron, 113 N. C. 30, 18 S. E. 83.

Oregon.— Sloan *v.* Sloan, 46 Oreg. 36, 78 Pac. 893.

See 39 Cent. Dig. tit. "Payment," § 103.

Constructive notice of change of application.— Where a debtor, before paying a number of notes, has directed part of the money to be applied on a certain note, the delivery to him by the creditor of a roll of notes tied together, which does not contain such note, with the remark that they are the notes taken up, does not constitute constructive notice of the creditor's application of the payment to others than the note in question, so as to create an estoppel against the debtor. Fargo First Nat. Bank *v.* Roberts, 2 N. D. 195, 49 N. W. 722.

A receipt stating that money was received on "general account" does not estop the debtor from insisting on the appropriation as directed on a particular account. Eylar *v.* Read, 60 Tex. 387. So the fact that a debtor accepts receipts for payments as having been made "on account" does not estop him from showing that he directed the credits to be placed on a mortgage note given to secure a part of the account. Massengale *v.* Pounds, 108 Ga. 762, 33 S. E. 72.

71. Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263; Hutchinson *v.* Heyworth, 9 A. & E. 375, 8 L. J. Q. B. 17, 1 P. & D. 266, 1 W. W. & H. 730, 36 E. C. L. 209; Fisher *v.* Miller, 1 Bing. 150, 7 Moore P. C. 527, 8 E. C. L. 447; Yates *v.* Hoppe, 9 C. B. 541, 14 Jur. 372, 19 L. J. C. P. 180, 67 E. C. L. 541; Hamilton *v.* Spottiswoode, 4 Exch. 200, 18 L. J. Exch. 393; Walker *v.* Rostron, 11 L. J. Exch. 173, 9 M. & W. 411; Dickinson *v.* Marrow, 14 M. & W. 713. But see Tait *v.* Hackett, 2 Pa. Cas. 534, 4 Atl. 383, holding that one of two principals in an obligation, after having directed the application of a fund to the payment of the obligation in question, has a right to withdraw such order and have the fund applied to another indebtedness.

Mistake of debtor.— The application by a receiver of a payment in accordance with the direction of the debtor will not be disturbed, after the receiver's death, on the ground of mistake of the debtor in the direction, in the absence of clear and convincing proof of such mistake. May *v.* Burns, 44 S. W. 83, 19 Ky. L. Rep. 1595.

apply payments to an illegal or invalid debt cannot be changed without the consent of the creditor.[72]

C. By Creditor — 1. Right to Apply — a. General Rule. The general rule is that a creditor may apply a payment, voluntarily made by the debtor without any specific appropriation where there are two or more debts, to whichever debt he pleases.[73] For instance, in such a case the creditor may apply a payment either

72. *Connecticut.*— Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268.

Louisiana.— Boagni *v.* Pickett, 28 La. Ann. 606.

Maine.— Brown *v.* Burns, 67 Me. 535. See also Camden Sav. Bank *v.* Cilley, 83 Me. 72, 21 Atl. 746.

Maryland.— Dorsey *v.* Wayman, 6 Gill 59.

Massachusetts.— Richardson *v.* Woodbury, 12 Cush. 279; Hubbell *v.* Flint, 15 Gray 550.

New York.— Johnston *v.* Dahlgren, 48 N. Y. App. Div. 537, 62 N. Y. Suppl. 1115 [*affirmed* in 166 N. Y. 354, 59 N. E. 987].

See 39 Cent. Dig. tit. "Payment," § 103.

73. *Alabama.*— McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721; Johnson *v.* Thomas, 77 Ala. 367; Bobe *v.* Stickney, 36 Ala. 482; Callahan *v.* Boazman, 21 Ala. 246; McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313.

Arkansas.— Lyon *v.* Bass, 76 Ark. 534, 89 S. W. 849; Gates *v.* Burkett, 44 Ark. 90; Bell *v.* Radcliff, 32 Ark. 645; Armistead *v.* Brooke, 18 Ark. 521.

California.— Byrnes *v.* Claffey, 69 Cal. 120, 10 Pac. 321; Wendt *v.* Ross, 33 Cal. 650.

Colorado.— Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Connecticut.— Nichols *v.* Culver, 51 Conn. 177; Selleck *v.* Sugar Hollow Turnpike Co., 13 Conn. 453.

Delaware.— Pickering *v.* Day, 2 Del. Ch. 333.

Florida.— Randall *v.* Parramore, 1 Fla. 409.

Georgia.— Lowenstein *v.* Meyer, 114 Ga. 709, 40 S. E. 726; Coleman *v.* Slade, 75 Ga. 61; Greer *v.* Burnam, 71 Ga. 31; Perry *v.* Bozeman, 67 Ga. 643; Whitaker *v.* Groover, 54 Ga. 174; Horne *v.* Planters' Bank, 32 Ga. 1; Hargroves *v.* Cooke, 15 Ga. 321; Rackley *v.* Pearce, 1 Ga. 241.

Illinois.— Wellman *v.* Miner, 179 Ill. 326, 53 N. E. 609; Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372; Davis Sewing Mach. Co. *v.* Buckles, 89 Ill. 237; Bayley *v.* Wynkoop, 10 Ill. 449; McFarland *v.* Lewis, 3 Ill. 344; Harding *v.* Harding, 120 Ill. App. 389; Miller *v.* Hawes, 58 Ill. App. 667.

Indiana.— King *v.* Andrews, 30 Ind. 429; Howland *v.* Rench, 7 Blackf. 236.

Iowa.— Keairnes *v.* Durst, 110 Iowa 114, 81 N. W. 238; Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 798; Fargo *v.* Buell, 21 Iowa 292.

Kansas.— Hutchinson First Presb. Church *v.* Santy, 52 Kan. 462, 34 Pac. 974.

Kentucky.— McDaniel *v.* Barnes, 5 Bush 183; Nutall *v.* Brannin, 5 Bush 11; Hillyer *v.* Vaughan, 1 J. J. Marsh. 583.

Louisiana.— Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376; Bloodworth *v.* Jacobs, 2 La. Ann. 24.

Maine.— Starrett *v.* Barber, 20 Me. 457.

Maryland.— Calvert *v.* Carter, 18 Md. 73; Mitchell *v.* Dall, 4 Gill & J. 361; Mitchell *v.* Dall, 2 Harr. & G. 159; Gwinn *v.* Whitaker, 1 Harr. & J. 754; McTavish *v.* Carroll, 1 Md. Ch. 160.

Massachusetts.— Henry Bill Pub. Co. *v.* Utley, 155 Mass. 366, 29 N. E. 635.

Michigan.— People *v.* Grant, 139 Mich. 26, 102 N. W. 226.

Minnesota.— Hawver *v.* Ingalls, 93 Minn. 371, 101 N. W. 604; Newell *v.* Houlton, 22 Minn. 19; Solomon *v.* Dreschler, 4 Minn. 278.

Mississippi.— Champenois *v.* Fort, 45 Miss. 355; Crisler *v.* McCoy, 33 Miss. 445; Baine *v.* Williams, 10 Sm. & M. 113.

Missouri.— Cox *v.* Sloan, 158 Mo. 430, 57 S. W. 1052; Thorn, etc., Lime, etc., Co. *v.* Citizens' Bank, 158 Mo. 272, 59 S. W. 109; Middleton *v.* Frame, 21 Mo. 412; Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503.

Nebraska.— Lenzen *v.* Miller, 53 Nebr. 137, 73 N. W. 460.

Nevada.— Capron *v.* Strout, 11 Nev. 304.

New Hampshire.— Bean *v.* Brown, 54 N. H. 395; Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153; Caldwell *v.* Wentworth, 14 N. H. 431; Sawyer *v.* Tappan, 14 N. H. 352.

New Jersey.— Oliver *v.* Phelps, 20 N. J. L. 180; White *v.* Trumbull, 15 N. J. L. 314, 29 Am. Dec. 687; Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795 [*affirmed* in 45 N. J. Eq. 245, 19 Atl. 621]; Bird *v.* Davis, 14 N. J. Eq. 467; Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312]; Smith *v.* Wood, 1 N. J. Eq. 74.

New York.— Mack *v.* Colleran, 136 N. Y. 617, 32 N. E. 604; California Bank *v.* Webb, 94 N. Y. 467; Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485; Orr *v.* Nagle, 87 Hun 12, 33 N. Y. Suppl. 879; Farren *v.* McDonnell, 74 Hun 176, 26 N. Y. Suppl. 619 [*affirmed* in 148 N. Y. 741, 42 N. E. 1093]; Seymour *v.* Marvin, 11 Barb. 80; California Bank *v.* Webb, 48 N. Y. Super. Ct. 175; Berrian *v.* New York, 4 Rob. 538; Smith *v.* Applegate, 1 Daly 91; Wehle *v.* Schmidt, 13 N. Y. St. 411.

North Carolina.— Long *v.* Miller, 93 N. C. 233; Sprinkle *v.* Martin, 72 N. C. 92; Moss *v.* Adams, 39 N. C. 42; Hamilton *v.* Benbury, 3 N. C. 385.

Ohio.— Eureka Ins. Co. *v.* Duble, 3 Ohio Dec. (Reprint) 316.

Oregon.— Trullinger *v.* Kofoed, 7 Oreg. 228, 33 Am. Rep. 708.

Pennsylvania.— Chestnut St. Trust, etc., Co. *v.* Hart, 217 Pa. St. 506, 66 Atl. 870; Risher *v.* Risher, 194 Pa. St. 164, 45 Atl. 71; Phila-

on a note or on an account,[74] or on one of several notes or bills,[75] or apportion the payment among several notes, bills, or bonds,[76] or distribute it between other debts.[77] So he may apply it to an unsecured rather than a secured claim or to a claim not

delphia *v.* Kelly, 166 Pa. St. 207, 31 Atl. 47; Watt *v.* Hoch, 25 Pa. St. 411; Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691; Underhill *v.* Wynkoop, 15 Pa. Super. Ct. 230; Keller *v.* Com., 1 Am. L. J. 156; Davis *v.* Wood, 1 Del. Co. 382.

Rhode Island.— Burt *v.* Butterworth, 19 R. I. 127, 32 Atl. 167.

South Carolina.— Carson *v.* Hill, 1 McMull. 76; Jones *v.* Kilgore, 2 Rich. Eq. 63; Sager *v.* Warley, Rice Eq. 26; Heilbron *v.* Bissell, Bailey Eq. 430.

Texas.— Proctor *v.* Marshall, 18 Tex. 63; Stone *v.* Pettus, (Civ. App. 1907) 103 S. W. 413; Thatcher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782; Rotan Grocery Co. *v.* Martin, (Civ. App. 1900) 57 S. W. 706; Wright *v.* Meyer, (Civ. App. 1894) 25 S. W. 1122; Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

Vermont.— Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208; Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Corliss *v.* Grow, 58 Vt. 702, 2 Atl. 388; Ayer *v.* Hawkins, 19 Vt. 26; Rosseau *v.* Cull, 14 Vt. 83; Robinson *v.* Doolittle, 12 Vt. 246; Briggs *v.* Williams, 2 Vt. 283.

Virginia.— Bourne *v.* Repass, (1899) 34 S. E. 623.

Washington.— Frazer *v.* Miller, 7 Wash. 521, 35 Pac. 427.

West Virginia.— Hanly *v.* Potts, 52 W. Va. 263, 43 S. E. 218.

Wisconsin.— Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174; Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641; Jones *v.* Williams, 39 Wis. 300.

United States.— U. S. *v.* Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; Holloway *v.* White-Dunham Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. N. S. 704; Sanborn *v.* Stark, 31 Fed. 18; Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243; Leef *v.* Goodwin, 14 Fed. Cas. No. 8,207, Taney 460; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106; U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150; U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,510, 3 Woodb. & M. 390. But see Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98, holding that the creditor cannot elect to what debt to apply an indefinite payment, except where it is utterly indifferent to the debtor to which it is applied.

England.— Morgan *v.* Jones, 1 Bro. P. C. 32, 1 Eng. Reprint 397; Chitty *v.* Naish, 2 Dowl. P. C. 511; Brazier *v.* Bryant, 2 Dowl. P. C. 477; Hall *v.* Wood, 14 East 243 note; Campbell *v.* Hodgson, Gow. 74, 5 E. C. L. 876; D'Arcy *v.* Burke, 2 Ir. Eq. 1; Armour *v.* Carruthers, 4 Can. L. J. 210; Williams *v.* Griffith, 5 M. & W. 300; Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677, 1 E. C. L. 771; Clayton's Case, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781; Wilkinson *v.* Sterne, 9 Mod. 427; Campbell *v.* Dent, 2 Moore P. C. 292, 12 Eng. Reprint 1016; Weston *v.* Kenworthy, 6 Wkly. Rep. 543.

Canada.—Mayberry *v.* Hunt, 34 N. Brunsw. 628; Wilson *v.* Rykert, 14 Ont. 188; Fraser *v.* Locie, 10 Grant Ch. (U. C.) 207; Hagerman *v.* Smith, Taylor (U. C.) 123; Miller *v.* Miller, 1 U. C. C. P. 240; McDonald *v.* Peck, 17 U. C. Q. B. 270. See also Stephens *v.* Boisseau, 26 Can. Sup. Ct. 437; London *v.* Citizens Ins. Co., 13 Ont. 713.

See 39 Cent. Dig. tit. "Payment," § 104.

The rule applies equally well to payments made to the government.— Hendricks *v.* Schmidt, 68 Fed. 425, 15 C. C. A. 504; U. S. *v.* Linn, 26 Fed. Cas. No. 15,606, 2 McLean 501. *Contra*, U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82.

Under special circumstances, however, the law will sometimes make the appropriation, and take the option out of the hands of the creditor. Cummings *v.* Glassup, 1 U. C. Q. B. 364.

Proceeds of collateral.— Where property is assigned as collateral security for several debts without direction by the assignor as to the application of its proceeds, the creditor may apply the money realized to any of the debts that are due at the time the money is received. Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51.

74. *Arkansas.*— Hamilton *v.* Rhodes, 72 Ark. 625, 83 S. W. 351.

Georgia.— Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

Indiana.— Brownlee *v.* Goldthait, 73 Ind. 481.

North Carolina.— Wittkowski *v.* Reid, 84 N. C. 21.

South Dakota.— Fargo *v.* Jennings, 8 S. D. 99, 65 N. W. 433.

See 39 Cent. Dig. tit. "Payment," § 105.

75. Holmes *v.* Pratt, 34 Ga. 558; Taylor *v.* Jones, Smith (Ind.) 5; Allen *v.* Kimball, 23 Pick. (Mass.) 473; Washington Bank *v.* Prescott, 20 Pick. (Mass.) 339; Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

76. Blackman *v.* Leonard, 15 La. Ann. 59 (holding that the creditor is not bound to make the imputation *pro rata*); Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; Screven *v.* Smith, 1 McCord (S. C.) 368.

In Vermont the rule is to the contrary. Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208; Wheeler *v.* House, 27 Vt. 735; Ayer *v.* Hawkins, 19 Vt. 26. But the creditor may so apply where the debtor has regarded and treated the several notes as constituting one demand and makes the payment with that view. Sanborn *v.* Cole, *supra*.

77. Beck *v.* Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516.

a lien instead of to a lien-claim.[78] The creditor may apply a payment on a just and valid demand, whether or not the correctness of such demand is assented to by the debtor.[79]

b. Principal and Interest.[80] So the creditor may apply a payment to the satisfaction of interest rather than the principal,[81] but not where the interest is not due,[82] nor where the contract expressly provides that no interest is collectable.[83] So where interest is due on two obligations the payment may be applied to the interest on either.[84]

c. Items of Current Account. Likewise where there is a running account, the creditor may apply a payment thereon as he desires,[85] and may appropriate it to the oldest items of the account.[86]

2. Limitations of Right — a. In General. The creditor cannot apply a pay-

78. *Alabama.*— Smith *v.* Vaughan, 78 Ala. 201; Driver *v.* Fortner, 5 Port. 9.

Connecticut.— Lewis *v.* Hartford Silk Mfg. Co., 56 Conn. 25, 12 Atl. 637.

Georgia.— Coxwell *v.* De Vaughn, 55 Ga. 643.

Illinois.— Koch *v.* Roth, 150 Ill. 212, 37 N. E. 317; Plain *v.* Roth, 107 Ill. 588; Scheik *v.* School Trustees, 24 Ill. App. 369. *Compare* Fridley *v.* Bowen, 103 Ill. 633.

Kentucky.— Burks *v.* Albert, 4 J. J. Marsh. 97, 20 Am. Dec. 209.

Massachusetts.— Upham *v.* Lefavour, 11 Metc. 174; Capen *v.* Alden, 5 Metc. 268; Dedham Bank *v.* Chickering, 4 Pick. 314.

New Jersey.— Van Sickle *v.* Ayres, 6 N. J. Eq. 29.

New York.— Harding *v.* Tifft, 75 N. Y. 461; White Sewing-Mach. Co. *v.* Fargo, 3 N. Y. Suppl. 494.

North Carolina.— Vick *v.* Smith, 83 N. C. 80; Jenkins *v.* Beal, 70 N. C. 440.

Ohio.— Union Nat. Bank *v.* Cleveland, 10 Ohio Cir. Ct. 222, 6 Ohio Cir. Dec. 536.

Pennsylvania.— Wagner's Appeal, 103 Pa. St. 185; McQuaide *v.* Stewart, 48 Pa. St. 198.

South Carolina.— Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004; Whilden *v.* Pearce, 27 S. C. 44, 2 S. E. 709; Pelzer *v.* Steadman, 22 S. C. 279; Bell *v.* Bell, 20 S. C. 34.

Texas.— Thatcher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782; Larkin *v.* Watt, (Civ. App. 1895) 32 S. W. 552; Lary *v.* Young, (Civ. App. 1894) 27 S. W. 908; Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

Vermont.— Jeffers *v.* Pease, 74 Vt. 215, 52 Atl. 422.

Washington.— Post-Intelligencer Pub. Co. *v.* Harris, 11 Wash. 500, 39 Pac. 965.

Canada.— Stephens *v.* Boisseau, 26 Can. Sup. Ct. 437.

See 39 Cent. Dig. tit. "Payment," § 111.

Compare Moorman *v.* Shockney, 95 Ind. 88.

Bond.— When the defalcations of a cashier exceed the amount of his bond, the bank need not credit on the bond sums collected from other sources, but may apply them in reduction of the unsecured balance owing the bank by the cashier. Phillips *v.* Bossard, 35 Fed. 99.

It is immaterial that payment was of moneys procured by an indorsement of a third person for the purpose of having the proceeds applied upon the secured debt, where the creditor himself had no knowledge whatever thereof. Harding *v.* Tifft, 75 N. Y. 461.

79. McLendon *v.* Frost, 57 Ga. 448. See Stone *v.* Talbot, 4 Wis. 442, holding that the creditor may apply payments in any manner he thinks proper to actual existing debts, admitted to be such by the debtor or established to be such by testimony, but to no other.

80. Payments of usurious interest see Usury.

81. Steele *v.* Taylor, 4 Dana (Ky.) 445; Feldman *v.* Beier, 78 N. Y. 293; Hart *v.* Dewey, 2 Paige (N. Y.) 207. See also McGregor *v.* Gaulin, 4 U. C. Q. B. 378, holding that where defendant is making payments on a loan plaintiff may insist, in the absence of any agreement, that the payments be applied first to keep down the interest. *Compare* Bower *v.* Marris, Cr. & Ph. 351, 10 L. J. Ch. 356, 18 Eng. Ch. 351, 41 Eng. Reprint 525, holding that where principal and interest are due, the creditor can apply a payment only to the interest.

82. Davis *v.* Fargo, Clarke (N. Y.) 470.

83. Mendel *v.* Paepke, 69 Wis. 527, 34 N. W. 912.

84. Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790.

85. L'Hommedieu *v.* The H. L. Dayton, 38 Fed. 926. *Compare* Field *v.* Carr, 5 Bing. 13, 6 L. J. C. P. O. S. 203, 2 M. & P. 46, 15 E. C. L. 447. *Contra,* Dunnington *v.* Kirk, 57 Ark. 595, 22 S. W. 430; Hughes *v.* Johnson, 38 Ark. 285.

Effect.— But where an attorney renders services in various matters, and the client makes a partial payment "on account of fees for legal services," the attorney cannot credit the money on certain items of his account, so as to place them beyond controversy. Hinckley *v.* Krug, (Cal. 1893) 34 Pac. 118.

86. McCasland *v.* O'Brien, 57 Ill. App. 636; Hill *v.* Robbins, 22 Mich. 475; Livermore *v.* Rand, 26 N. H. 85; Jones *v.* U. S., 7 How. (U. S.) 681, 12 L. ed. 870.

Items barred by limitations see Limitations of Actions, 25 Cyc. 1380.

ment so as to be inequitable and unjust to the debtor,[87] although he is not bound to apply it in a way most beneficial to the debtor.[88] The rule does not apply to involuntary payments,[89] nor to other payments where the debtor has had no opportunity to direct the application,[90] nor does it authorize the appropriation of a payment to a debt for which the debtor is not responsible,[91] nor to a fictitious claim.[92] So where a particular debt is to be paid in a particular way, as by the rendition of services, the creditor cannot apply the value of such services to another claim.[93] The creditor cannot apply the payment on the debt of a third person,[94] nor on a debt the payer owes a third person.[95] So if one of the debtor's liabilities is contingent, as where the creditor is his indorser or surety and has not paid the money, the latter cannot apply payments to such account.[96] Of course the creditor cannot apply a payment on a paid obligation.[97]

b. Illegal and Unenforceable Claims. While the creditor may apply a payment on a claim which he cannot enforce,[98] such as an oral one within the statute of frauds,[99] he cannot apply a payment to an illegal claim,[1] a distinction being drawn between claims which are merely unenforceable and those which are *malum in se* or *malum prohibitum*.

c. Joint Debts and Debts of Other Persons. A creditor may apply a general payment either to a joint or several indebtedness of the debtor.[2] Where a cred-

87. Arnold *v.* Johnson, 2 Ill. 196; Taylor *v.* Coleman, 20 Tex. 772; Ayer *v.* Hawkins, 19 Vt. 26.

Equities considered.— The statement that the creditor is not entitled to make an application which will be inequitable refers merely to the equities existing between the debtor and creditor and not to those arising out of transactions between the debtor and third persons of which equities the creditor himself has no notice. Harding *v.* Tifft, 75 N. Y. 461.

88. Shortridge *v.* Pardee, 2 Mo. App. 363.

By the rules of the civil law, if the debtor at the time of the payment makes no application thereof, it is the duty of the creditor to make application in accordance with the supposed intention of the debtor and to that debt upon which the creditor would have applied it had he been the debtor. Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601; Pierce *v.* Knight, 31 Vt. 701. But the civil law rule has not been adopted as a part of the common law. Logan *v.* Mason, 6 Watts & S. (Pa.) 9. But see The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350.

Application to least secure items.— A creditor has the right, in the absence of any directions from the debtor, to apply credits to the least secure items of his claim. Hildreth *v.* Davis, 6 Kulp (Pa.) 336. And see *supra*, VI, C, 1.

Interest-bearing debt.— It has been held that where the creditor holds an interest-bearing obligation and one not bearing interest, he must apply the payment to the former. Scott *v.* Fisher, 4 T. B. Mon. (Ky.) 387.

89. See *supra*, VI, A, 3.

90. Dennis *v.* Jones, 31 Miss. 606 (money procured without consent of debtor); Waller *v.* Lacy, 8 Dowl. P. C. 563, 4 Jur. 434, 9 L. J. C. P. 217, 1 M. & G. 54, 1 Scott N. R. 86, 39 E. C. L. 641.

91. Elizabeth City First Nat. Bank *v.* Scott, 123 N. C. 538, 31 S. E. 819; Burland *v.* Nash, 2 F. & F. 687.

92. Lamprell *v.* Billericay Union, 3 Exch. 283, 18 L. J. Exch. 282.

93. Young *v.* Harris, 36 Ark. 162.

94. Young *v.* Swan, 100 Iowa 323, 69 N. W. 566.

95. Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137.

96. Niagara Bank *v.* Rosevelt, 9 Cow. (N. Y.) 409.

97. Lyon *v.* Witters, 65 Vt. 396, 26 Atl. 588.

98. Treadwell *v.* Moore, 34 Me. 112; Arnold *v.* Poole, 2 Dowl. P. C. N. S. 574, 7 Jur. 653, 12 L. J. C. P. 97, 4 M. & G. 860, 5 Scott N. R. 741, 43 E. C. L. 444; Biggs *v.* Dwight, 6 L. J. K. B. O. S. 45, 1 M. & R. 308, 17 E. C. L. 670; Mayberry *v.* Hunt, 34 N. Brunsw. 628; Fraser *v.* Locie, 10 Grant Ch. (U. C.) 207.

Statute of limitations.—Application of payment to debt barred by statute of limitations or for purpose of tolling statute see LIMITATIONS OF ACTIONS, 25 Cyc. 1380.

99. Haynes *v.* Nice, 100 Mass. 327, 1 Am. Rep. 109.

1. *Alabama.*— Armour Packing Co. *v.* Vinegar Bend Lumber Co., (1906) 42 So. 866.

Maine.— Phillips *v.* Moses, 65 Me. 70.

Massachusetts.—Rohan *v.* Hanson, 11 Cush. 44.

New Hampshire.— Gammon *v.* Plaisted, 51 N. H. 444; Kidder *v.* Norris, 18 N. H. 532; Caldwell *v.* Wentworth, 14 N. H. 431.

Pennsylvania.— Greene *v.* Tyler, 39 Pa. St. 361.

Vermont.— Bancroft *v.* Dumas, 21 Vt. 456. See 39 Cent. Dig. tit. "Payment," § 106.

But see Philpott *v.* Jones, 2 A. & E. 41, 4 L. J. K. B. 65, 4 N. & M. 14, 29 E. C. L. 41; Cruickshanks *v.* Rose, 1 M. & Rob. 100.

2. McBride *v.* Noble, (Colo. 1907) 90 Pac. 1037; Livermore *v.* Claridge, 33 Me. 428;

itor holds a debt payable to himself and another payable to himself and a third person jointly, he must apply the payment ratably on the two debts.[3] So if a debt is owed to two persons jointly, the one to whom part payment is made cannot appropriate it exclusively to his portion of the debt.[4] Where payment is made by one liable individually and also as a trustee, the creditor can apply the payment only to the individual debt.[5]

d. Debts Not Due. A creditor cannot apply the payment on a debt not due to the exclusion of one due or overdue.[6]

e. Debts Arising After Payment. So he cannot apply payment to a debt arising after the payment is made.[7]

f. Payment From Particular Fund. Another exception to the rule that the creditor has the right to apply the payment obtains when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund, in which case he cannot, without the consent of the debtor, apply it otherwise than to the exoneration of the source or fund from which it was derived.[8]

3. What Constitutes and Sufficiency. The performance of some act showing an intention to specifically appropriate the payment to a particular debt is sufficient to constitute an appropriation,[9] and it may be evidenced by circumstances as well as by express declarations.[10] For example, an appropriation may be evi-

Van Rensselaer *v.* Roberts, 5 Den. (N. Y.) 470; Frazer *v.* Birch, 3 Knapp 380, 12 Eng. Reprint 697. See also Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Partnership debts.— But where a partner pays one having an account against him and also against the firm, the creditor must apply the payment to the individual account. Johnson *v.* Boone, 2 Harr. (Del.) 172. *Contra,* see Logan *v.* Mason, 6 Watts & S. (Pa.) 9. Where a mortgage on a partner's individual property, given by its terms, to secure an individual debt, is also intended as security for a firm debt assumed by the debtor, the creditor may apply it to the payment of the individual debt. Senter *v.* Williams, (Ark. 1891) 17 S. W. 1029. On the other hand a payment by a firm must be applied to the firm debt as distinguished from a debt of a member of the firm. Farris *v.* Morrison, 66 Ark. 318, 50 S. W. 693; Thompson *v.* Brown, M. & M. 40, 31 Rev. Rep. 710, 22 E. C. L. 466.

3. Colby *v.* Copp, 35 N. H. 434.

4. Cole *v.* Trull, 9 Pick. (Mass.) 325.

5. Sawyer *v.* Tappan, 14 N. H. 352.

6. *Alabama.*— McWhorter *v.* Blumenthal, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43; Heard *v.* Pulaski, 80 Ala. 502, 2 So. 343; Bobe *v.* Stickney, 36 Ala. 482.

Arkansas.— Gates *v.* Burkett, 44 Ark. 90.

Connecticut.— Blinn *v.* Chester, 5 Day 166.

Illinois.— See Heintz *v.* Cahn, 29 Ill. 308.

Kentucky.— Bacon *v.* Brown, 1 Bibb 334, 4 Am. Dec. 640.

Michigan.— Richardson *v.* Coddington, 49 Mich. 1, 12 N. W. 886.

New Hampshire.— Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153.

Texas.— Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

See 39 Cent. Dig. tit. "Payment," § 110.

But a mortgagee has the right to apply on the mortgage the proceeds of the mortgaged property turned over to him, even though the mortgage debt is not due. Lyon *v.* Bass, 76 Ark. 534, 89 S. W. 849.

7. Law *v.* Sutherland, 5 Gratt. (Va.) 357.

8. Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Darden *v.* Gerson, 91 Ala. 323, 9 So. 278; Strickland *v.* Hardie, 82 Ala. 412, 3 So. 40; Johnson *v.* Thomas, 77 Ala. 367; Maban *v.* Smitherman, 71 Ala. 563; Levystein *v.* Whitman, 59 Ala. 345; Hicks *v.* Bingham, 11 Mass. 300; Ogden *v.* Harrison, 56 Miss. 743; Thatcher *v.* Massey, 20 S. C. 542.

Where an express company collected from a consignee only part payment for goods sent C. O. D., and remitted the portion so paid to the consignor, the consignor has no right, as between himself and the express company, to apply such payment to other indebtedness of the consignee, but must credit it to the account of the goods so sent. American Express Co. *v.* Lesem, 39 Ill. 312.

Money derived from third person.— The creditor has no right to apply a payment where the money was received by the debtor from a third person whose property would be liable for the debt in case the money was not applied on the third person's liability. Lee *v.* Storz Brewing Co., 75 Nebr. 212, 106 N. W. 220; Crane Bros. Mfg. Co. *v.* Keck, 35 Nebr. 683, 53 N. W. 606.

9. Harker *v.* Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667; Reg. *v.* Ogilvie, 29 Can. Sup. Ct. 299.

Drawing a bill on a consignee is not of itself an appropriation as to a smaller balance due on a previous consignment. Fabars *v.* Welsh, 2 Pa. L. J. 363.

10. Bayley *v.* Wynkoop, 10 Ill. 449; Howland *v.* Rench, 7 Blackf. (Ind.) 236.

denced by bringing suit on one claim,[11] or by a receipt,[12] or a statement given the debtor by the creditor.[13] It has been held that an indorsement of a payment on a note without the knowledge or assent of the maker does not constitute an appropriation where the payee holds other obligations against the payer,[14] although there is some authority to the contrary.[15] The mere entry of a credit on a particular account has been held not an appropriation in the absence of notice to the debtor,[16] but when such credit is made and an account rendered to the debtor showing such application the appropriation is complete.[17] It has been held that the creditor need not notify the debtor of the appropriation.[18]

4. TIME FOR APPROPRIATION. By the rule of the civil law the creditor was bound to make his appropriation at the time of the payment,[19] but at common law the creditor is not compelled to exercise his right of application at the time the payment is made.[20] There is much conflict among the authorities, however, as to how long the right exists. Some decisions lay down the broad rule that the creditor's right of application is not limited in time.[21] By other decisions the

Mere intention, not manifested by acts, is insufficient. Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844.

11. Haynes *v.* Waite, 14 Cal. 446; Starrett *v.* Barber, 20 Me. 457. See also Bobe *v.* Stickney, 36 Ala. 482.

12. Bloodworth *v.* Jacobs, 2 La. Ann. 24; Smith *v.* Wood, 1 N. J. Eq. 74; U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150; Fraser *v.* Birch, 3 Knapp 380, 12 Eng. Reprint 697.

13. Reynolds *v.* Patten, 10 Misc. (N. Y.) 155, 30 N. Y. Suppl. 1050.

14. Lau *v.* Blomberg, 3 Nebr. (Unoff.) 124, 91 N. W. 206.

15. See Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208, holding that where several notes were written on one sheet an indorsement on one note of the words, "Received on the within notes," etc., is an application of the payment to all the notes.

16. Allen *v.* Culver, 3 Den. (N. Y.) 284; Simson *v.* Ingham, 2 B. & C. 65, 3 D. & R. 249, 1 L. J. K. B. O. S. 234, 26 Rev. Rep. 273, 9 E. C. L. 37. *Compare* Grasser, etc., Brewing Co. *v.* Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389; Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667.

The account-books of the creditor, although not conclusive, are competent evidence to show the appropriation intended. Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456; Van Rensselaer *v.* Roberts, 5 Den. (N. Y.) 470.

But it has been held that where a running account is kept at the post-office department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances. Jones *v.* U. S., 7 How. (U. S.) 681, 12 L. ed. 870.

17. People *v.* Grant, 139 Mich. 26, 102 N. W. 226, holding that where a credit for payment is entered on a general account, and a statement thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.

18. Johnson *v.* Thomas, 77 Ala. 367; Callahan *v.* Boazman, 21 Ala. 246. *Contra*, Slaughter *v.* Milling, 15 La. Ann. 526, holding that the imputation, when made by the creditor, must be accepted by the debtor to be binding on him.

19. Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667.

20. *California.*— Haynes *v.* Waite, 14 Cal. 446.

Missouri.— Shortridge *v.* Pardee, 2 Mo. App. 363.

North Carolina.— Moss *v.* Adams, 39 N. C. 42.

United States.— Alexandria *v.* Patten, 4 Cranch 317, 2 L. ed. 633.

Canada.— McKenzie *v.* Gordon, 1 Nova Scotia Dec. 153.

See 39 Cent. Dig. tit. "Payment," § 113.

Effect of agreement.— Although a creditor is by agreement permitted to apply a payment when he pleases, yet when a payment has once been applied it takes effect from its date and precludes other application. Lichtenstein *v.* Lyons, 115 La. 1051, 40 So. 454.

21. Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; California Bank *v.* Webb, 94 N. Y. 467. But see Smith *v.* Betty, [1903] 2 K. B. 317, 72 L. J. K. B. 853, 89 L. T. Rep. N. S. 258, 52 Wkly. Rep. 137.

The creditor has the right of election "up to the very last moment."— Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667. He may exercise his right in the witness box after action brought, provided that there has been no proceeding in the action amounting to a previous exercise or determination of his right. Seymour *v.* Pickett, [1905] 1 K. B. 715, 74 L. J. K. B. 413, 92 L. T. Rep. N. S. 519, 21 T. L. R. 302.

application must be before a controversy has arisen,[22] while another line of cases holds that it may be before suit brought,[23] and still others that it may be applied before verdict or judgment.[24] It has also been held that the appropriation must be made within a reasonable time.[25]

5. Effect of Application. After the creditor has made an application of a payment, it cannot be altered except by mutual consent.[26] And where the debtor receives an account or receipt applying payments in a certain way, his silence estops him from thereafter questioning the application made by the creditor.[27]

D. By Court — 1. In General. If neither party makes an application of a payment the law will do so.[28]

22. *Arkansas.*— Lazarus *v.* Freidheim, 51 Ark. 371, 11 S. W. 518.

Georgia.— Austin *v.* Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 S. E. 382.

Indiana.—Applegate *v.* Koons, 74 Ind. 247; Russell *v.* Metzgar, 2 Ind. 345.

Maine.— Milliken *v.* Tufts, 31 Me. 497.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

West Virginia.— Norris *v.* Beaty, 6 W. Va. 477.

See 39 Cent. Dig. tit. "Payment," § 113.

Compare Stone *v.* Pettus, (Tex. Civ. App. 1907) 103 S. W. 413; The Mary K. Campbell, 40 Fed. 906.

23. *California.*— Haynes *v.* Waite, 14 Cal. 446.

Delaware.— McCartney *v.* Buck, 8 Houst. 34, 12 Atl. 717.

Michigan.— People *v.* Grant, (1905) 102 N. W. 226.

Missouri.— Shortridge *v.* Pardee, 2 Mo. App. 363.

New York.— Sanford *v.* Van Arsdall, 53 Hun 70, 6 N. Y. Suppl. 494.

North Carolina.— Moss *v.* Adams, 39 N. C. 42.

Texas,— Taylor *v.* Coleman, 20 Tex. 772; Thatcher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782.

Vermont.— Pierce *v.* Knight, 31 Vt. 701.

See 39 Cent. Dig. tit. "Payment," § 113.

Compare Fraser *v.* Locie, 10 Grant Ch. (U. C.) 207.

24. Brice *v.* Hamilton, 12 S. C. 32. See also Heilbron *v.* Bissell, Bailey Eq. (S. C.) 430.

25. Harker *v.* Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; McKenzie *v.* Gordon, 1 Nova Scotia Dec. 153. See also Allen *v.* Culver, 3 Den. (N. Y.) 284; Stone *v.* Pettus, (Tex. Civ. App. 1907) 103 S. W. 413; Thatcher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782 (as to what is unreasonable time).

26. *Alabama.*— Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Lane *v.* Jones, 79 Ala. 156.

California.— White *v.* Costigan, 138 Cal. 564, 72 Pac. 178; Hardenbergh *v.* Bacon, 33 Cal. 356.

Illinois.— U. S. Rubber Co. *v.* Peterman, 119 Ill. App. 610 [*reversed* in part on other grounds in 221 Ill. 581, 77 N. E. 1108].

Iowa.— Chicago Lumber Co. *v.* Woods, 53 Iowa 552, 5 N. W. 715.

Louisiana.— Metoyer *v.* Trezzini, 6 Rob. 124.

Maine.— Plummer *v.* Erskine, 58 Me. 59; Codman *v.* Armstrong, 28 Me. 91.

New Jersey.— Smith *v.* Wood, 1 N. J. Eq. 74.

New York.— Louis *v.* Bauer, 33 N. Y. App. Div. 287, 53 N. Y. Suppl. 985; Allen *v.* Culver, 3 Den. 284.

Ohio.— Brown *v.* Brabham, 3 Ohio 275.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

Washington.—Hill *v.* Southerland, 1 Wash. 128.

United States.— The Asiatic Prince, 108 Fed. 287, 47 C. C. A. 325.

England.— Pollard *v.* Bank of England, L. R. 6 Q. B. 623, 40 L. J. Q. B. 233, 25 L. T. Rep. N. S. 415, 19 Wkly. Rep. 1168.

Canada.— Beatty *v.* Maxwell, 1 Ont. Pr. 85.

See 39 Cent. Dig. tit. "Payment," § 114.

Running account.— Where a creditor has treated an account as a general and continuous one, and made a general application of payments thereon, he cannot afterward separate the items into two separate accounts, and apply the payments to the later items, since an application of a payment once lawfully made by either party is final and conclusive so that he cannot thereafter change it. Pond *v.* O'Connor, 70 Minn. 266, 73 N. W. 159, 248.

27. Baker *v.* Smith, 44 La. Ann. 925, 11 So. 585; Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376; McLear *v.* Hunsicker, 30 La. Ann. 1225; Seymour *v.* Marvin, 11 Barb. (N. Y.) 80. See also Gleason *v.* Hobart, 16 Vt. 472.

Application contrary to agreement.— The lapse of a considerable time after receiving notice of the manner of applying a payment precludes the right to insist that the application was not applied in the manner agreed upon. Sweeney *v.* Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101.

28. *Delaware.*— Pickering *v.* Day, 2 Del. Ch. 333.

Kentucky.— McDaniel *v.* Barnes, 5 Bush 183; Nutall *v.* Brannin, 5 Bush 11.

Louisiana.— Bloodworth *v.* Jacobs, 2 La. Ann. 24.

New Jersey.— Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795 [*affirmed* in 45 N. J. Eq. 245, 19 Atl. 621].

2. Intent of Parties. Payments by the debtor will be applied according to the intention of the parties where that can be determined with reasonable certainty.[29] And the court will not generally exercise the power of appropriating payments when an appropriation has already been made by either debtor or creditor.[30] Where an arrangement has been made that money paid shall be appropriated to the discharge of specified debts, the court may enforce the agreement.[31]

3. Justice and Equity Rule. Under the rules of the civil law, the application must be made to that debt which the debtor at the time has the most interest to discharge, irrespective of its effects on the creditor,[32] and this rule has been adopted in a few of the states in this country.[33] At common law, however,

New York.— Matter of Milligan, 112 N. Y. App. Div. 373, 98 N. Y. Suppl. 480.

North Carolina.— Raymond *v.* Newman, 122 N. C. 52, 29 S. E. 353.

Oregon.— Trullinger *v.* Kofoed, 7 Oreg. 228, 33 Am. Rep. 708.

Pennsylvania.— Moore *v.* Kiff, 78 Pa. St. 96; Keller *v.* Com., 1 Am. L. J. 156.

Virginia.— Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

Washington.— Frazer *v.* Miller, 7 Wash. 521, 35 Pac. 427.

United States.— U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,510, 3 Woodb. & M. 390.

Canada.— Wilson *v.* Rykert, 14 Ont. 188.

See 39 Cent. Dig. tit. "Payment," § 115.

The jury will make the application under the evidence in the cause and the direction of the court. Selleck *v.* Sugar Hollow Turnpike Co., 13 Conn. 453; McFarland *v.* Lewis, 3 Ill. 344; Oliver *v.* Phelps, 20 N. J. L. 180; White *v.* Trumbull, 15 N. J. L. 314, 29 Am. Dec. 687; Robinson *v.* Doolittle, 12 Vt. 246.

29. *Connecticut.*— Chester *v.* Wheelwright, 15 Conn. 562.

Georgia.— Holley *v.* Hardeman, 76 Ga. 328.

Indiana.— Huntington County Loan, etc., Assoc. *v.* Cast, (1903) 67 N. E. 921.

Maine.— Bangor Boom Corp. *v.* Whiting, 29 Me. 123; Portland Bank *v.* Brown, 22 Me. 295.

Pennsylvania.— Stewart *v.* Keith, 12 Pa. St. 238.

Texas.—El Paso Bldg., etc., Assoc. *v.* Lane, 81 Tex. 369, 17 S. W. 77.

Vermont.— Farmers' Bank *v.* Burchard, 33 Vt. 346; McIntyre *v.* Corss, 18 Vt. 451; Emery *v.* Tichout, 13 Vt. 15.

Virginia.—See Booten *v.* Scheffer, 21 Gratt. 474.

United States.— The Mary K. Campbell, 40 Fed. 906; The Martha, 29 Fed. 708.

England.— Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667; Kirkpatrick *v.* South Australian Ins. Co., 11 App. Cas. 177; Henniker *v.* Wigg, 4 Q. B. 792, Dav. & M. 160, 45 E. C. L. 792; Brazier *v.* Bryant, 2 Dowl. P. C. 477; Chitty *v.* Naish, 2 Dowl. P. C. 511. See also Browning *v.* Baldwin, 40 L. T. Rep. N. S. 248, 27 Wkly. Rep. 644; Brett *v.* Marsh, 1 Vern. Ch. 468, 23 Eng. Reprint 594.

Canada.— Holmes *v.* Davison, 15 Nova Scotia 61; Griffith *v.* Crocker, 18 Ont. App. 370; Russell *v.* Davey, 7 Grant Ch. (U. C.) 13.

See 39 Cent. Dig. tit. "Payment," § 117.

Compare Estes *v.* Fry, 166 Mo. 70, 65 S. W. 741; Gillett *v.* Depuy, 48 N. Y. App. Div. 388, 63 N. Y. Suppl. 49.

A receipt for money in the ordinary form "on account" will not be applied to an outstanding note, in a proceeding to enjoin a judgment thereon, unless the intention of the parties to have the payment so applied is unequivocally proved. Tucker *v.* Brackett, 25 Tex. Suppl. 199.

Effect of previous dealings.— Money given to a creditor without direction as to its application will be applied by the law to that debt which, from previous dealings with the debtor, the creditor was justified in supposing was intended. Gwin *v.* McLean, 62 Miss. 121.

30. *Georgia.*— Mercer *v.* Tift, 79 Ga. 174, 4 S. E. 114; Killorin *v.* Bacon, 57 Ga. 497.

Maryland.— Albert *v.* Lindau, 46 Md. 334.

Massachusetts.— Shaw *v.* Pratt, 22 Pick. 305.

Michigan.—Wood *v.* Genett, 120 Mich. 222, 79 N. W. 199.

Missouri.— McMillan *v.* Grayston, 83 Mo. App. 425.

New Jersey.— Feldman *v.* Gamble, 26 N. J. Eq. 494; Terhune *v.* Colton, 12 N. J. Eq. 312.

New York.— Read *v.* Mutual Safety Ins. Co., 3 Sandf. 54.

Ohio.— Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616.

Pennsylvania.— Watt *v.* Hoch, 25 Pa. St. 411; Selfridge *v.* Northampton Bank, 8 Watts & S. 320.

Texas.— Reed *v.* Corry, (Civ. App. 1901) 61 S. W. 157.

Virginia.— Pitzer *v.* Logan, 85 Va. 374, 7 S. E. 385.

See 39 Cent. Dig. tit. "Payment," § 117.

31. Lansdale *v.* Mitchell, 14 B. Mon. (Ky.) 348.

32. Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

33. *Louisiana.*— Miller *v.* The S. F. J. Trabue, 16 La. Ann. 375; Spiller *v.* His Creditors, 16 La. Ann. 292; Slaughter *v.* Milling,

and in most of the states in this country, while there are cases laying down the rule that the creditor should be preferred,[34] yet the general rule is that the court will make the application in such a manner, in view of all the circumstances of the case, as is most in accord with justice and equity and will best protect and maintain the rights of both debtor and creditor.[35] In some states the application

15 La. Ann. 526; Dunlop *v.* Tarkington, 5 La. Ann. 569; Follain *v.* Orillion, 9 Rob. 506; Denis *v.* Ramouin, 1 Rob. 318; Pargoud *v.* Griffing, 10 La. 356; Abadie *v.* Poydras, 6 Mart. N. S. 26; Wickner *v.* Croghan, 4 Mart. N. S. 79; Johnson *v.* Sterling, 3 Mart. N. S. 483.

Maryland.—Clark *v.* Boarman, 89 Md. 428, 43 Atl. 926; Frazier *v.* Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516; Calvert *v.* Carter, 18 Md. 73; Gwinn *v.* Whitaker, 1 Harr. & J. 754.

Mississippi.—Neal *v.* Allison, 50 Miss. 175; Hamer *v.* Kirkwood, 25 Miss. 95; Baine *v.* Williams, 10 Sm. & M. 113.

Pennsylvania.—See Pierce *v.* Sweet, 33 Pa. St. 151; Davis *v.* Wood, 1 Del. Co. 382.

Texas.— Stanley *v.* Westrop, 16 Tex. 200; Paschall *v.* Pioneer Sav., etc., Co., 19 Tex. Civ. App. 102, 47 S. W. 98. See also Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59, where debtor dead.

Virginia.— See Magarity *v.* Shipman, 82 Va. 784, 1 S. E. 109.

United States.— Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150. See 39 Cent. Dig. tit. "Payment," § 116.

In Quebec this is the statutory rule. Reg. *v.* Ogilvie, 29 Can. Sup. Ct. 299.

In Mississippi the rule has never been applied except where there has been two or more principal debts of unequal dignity, as bond or simple contract, or where they are unequally onerous, as mortgage and simple contract, or where one bears interest, or a high rate of interest, and the other bears none, or a less rate of interest. Miller *v.* Leflore, 32 Miss. 634.

If the intention of the debtor can be gathered from the surrounding circumstances of the case, it must prevail where application is made by the court. Conduitt *v.* Ryan, 3 Ind. App. 1, 29 N. E. 160; Bonaffe *v.* Woodberry, 12 Pick. (Mass.) 456; Cass *v.* McDonald, 39 Vt. 65; Robinson *v.* Doolittle, 12 Vt. 246; Hill *v.* Gregory, Wythe (Va.) 73.

An obligation as surety is not necessarily less onerous than one as principal, and a payment is not necessarily to be imputed to the latter rather than the former. Whether a debt be more or less onerous depends on the debtor's interest in discharging it. Denis *v.* Ramouin, 1 Rob. (La.) 318.

When application is beneficial to debtor.— Where a married woman borrowed money to pay for land, on which she gave a mortgage to secure the lender and the money so lent was charged on general account, and unappropriated payments were made sufficient to repay the money expended for the land, a court of equity will apply the payments to other items of the account, so as to preserve the lien, although the mortgage was void. Clark *v.* Clark, 58 Miss. 68.

But where there is an express agreement between the parties, or a course of business from which an agreement would be implied that another rule shall control, the debtor cannot invoke the principle that appropriations are to be made in the manner most beneficial to him. Gwin *v.* McLean, 62 Miss. 121.

34. *Alabama.*— McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721.

Illinois.— Wilhelm *v.* Schmidt, 84 Ill. 183.

Maine.— Portland Bank *v.* Brown, 22 Me. 295, holding that, other considerations being equal, a payment will be appropriated in the first instance, to the payment of a note due absolutely to the creditor, rather than of one transferred to him as collateral security only.

Pennsylvania.— Smith *v.* Brooke, 49 Pa. St. 147.

Vermont.— Briggs *v.* Williams, 2 Vt. 283. See 39 Cent. Dig. tit. "Payment," § 116.

35. *Alabama.*— Callahan *v.* Boazman, 21 Ala. 246.

California.— Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

Connecticut.— Chester *v.* Wheelwright, 15 Conn. 562. See Rowland *v.* Smith, 49 Conn. 404.

Florida.— Randall *v.* Parramore, 1 Fla. 409.

Illinois.— Bayley *v.* Wynkoop, 10 Ill. 449; Saffer *v.* Lambert, 111 Ill. App. 410; Dehner *v.* Helmbacher Forge, etc., Mills, 7 Ill. App. 47.

Maine.— See Lambert *v.* Winslow, 48 Me. 196.

Maryland.— Gwinn *v.* Whitaker, 1 Harr. & J. 754; McTavish *v.* Carroll, 1 Md. Ch. 160.

Michigan.— Youmans *v.* Heartt, 34 Mich. 397.

Missouri.— Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 293.

New Hampshire.— Young *v.* Woodward, 44 N. H. 250.

Pennsylvania.— Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691.

Texas.— Proctor *v.* Marshall, 18 Tex. 63; Lowery *v.* Dickson, 1 Tex. App. Civ. Cas. § 497.

Vermont.— Pierce *v.* Knight, 31 Vt. 701; Robinson *v.* Doolittle, 12 Vt. 246; Briggs *v.* Williams, 2 Vt. 283.

Virginia.— Chapman *v.* Com., 25 Gratt. 721; Smith *v.* Loyd, 11 Leigh 512, 37 Am. Dec. 621.

West Virginia.— Buster *v.* Holland, 27 W. Va. 510; Norris *v.* Beaty, 6 W. Va. 477.

Wisconsin.— Hannan *v.* Engelmann, 49 Wis. 278, 5 N. W. 791.

of payments is governed by statute.[36] It is generally held that the court will apply a payment to interest instead of principal;[37] to an interest-bearing debt in preference to one bearing no interest;[38] to the debt bearing the highest rate of interest;[39] to the payment of legal interest instead of that which is usurious;[40] to a debt that has matured rather than one not yet due;[41] to the payment of

United States.— U. S. *v.* Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323; Leef *v.* Goodwin, 15 Fed. Cas. No. 8,207, Taney 460; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106; U. S. *v.* Linn, 26 Fed. Cas. No. 15,606, 2 McLean 501. See also Illinois Trust, etc., Bank *v.* Ottumwa Electric R. Co., 89 Fed. 235.

See 39 Cent. Dig. tit. "Payment," § 116.

Equitable principles enforced at law.— In making the application of payments, the principles of equity are recognized at law, so far as the nature of the proceedings will admit. Thompson *v.* Phelan, 22 N. H. 339; Merrimack County Bank *v.* Brown, 12 N. H. 320.

In other cases it is said that the court will not make an application so as to favor either party, but will make such application as that, under all the circumstances, the greatest equity will be done or the mutual intention of the parties at the time of the payment, if it can be ascertained, will be best carried out. Stamford Bank *v.* Benedict, 15 Conn. 437. The rule which favors the debtor may be applied in proper instances where it will work equity, and the rule which favors the creditor may be applied in proper instances where it will work equity, but neither of these rules should be carried to an extreme or unreasonable length. Thorne *v.* Allen, 72 Minn. 461, 75 N. W. 706. If the creditor, by any application that may be made for him, can receive all for which the debtor is under an obligation to him, it should be applied in such a mode as will be least onerous to the debtor. When the interest of the debtor cannot be promoted by any particular application of the payment, or when it is a matter of indifference to him in which mode the application is made, the law raises a presumption that the payment was actually received in the way that was of least advantage to the creditor. Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

Preservation of homestead right.— The application of payment should be made by the court so as to preserve a homestead right of the debtor where a part of the indebtedness which is the entire unsecured claim was created before the property constituting the homestead became exempt. Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92 [*followed* in Shaffer *v.* Chernyk, 130 Iowa 686, 107 N. W. 801].

36. See the statutes of the several states. See also Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

37. See *infra*, VI, D, 11.

38. *Kentucky.*— Blanton *v.* Rice, 5 T. B. Mon. 253.

Louisiana.— Pargoud *v.* Griffing, 10 La. 356.

Maryland.— McTavish *v.* Carroll, 1 Md. Ch. 160.

Tennessee.— Bussey *v.* Gant, 10 Humphr. 238.

England.— Chase *v.* Box, 2 Freem. 261, 22 Eng. Reprint 1197; Heyward *v.* Lomax, 1 Vern. Ch. 24, 23 Eng. Reprint 279. See also Bowes *v.* Lucas, Andr. 55; Hammersley *v.* Knowlys, 2 Esp. 665, 5 Rev. Rep. 764; Anonymous, 8 Mod. 236; Dawe *v.* Holdsworth, 1 Peake N. P. 64, 15 Rev. Rep. 595 note; Goddard *v.* Cox, Str. 1194; Bois *v.* Cranfield, Style 239, 82 Eng. Reprint 677; Manning *v.* Westerne, 2 Vern. Ch. 606, 23 Eng. Reprint 996; Periss *v.* Roberts, 1 Vern. Ch. 34, 23 Eng. Reprint 289; Vin. Abr. tit. "Payment" (M.), pl. 1.

39. Magarity *v.* Shipman, 82 Va. 784, 1 S. E. 109.

Exception to rule.— While ordinarily a payment should be applied to the extinguishment of the interest upon the obligation bearing the highest rate of interest, yet where one of the obligations bearing a lower rate of interest provides for compounding of interest, the latter has the most interest and a payment should first be applied thereto, especially where the creditor will suffer no loss but will receive all that the debtor has obligated himself to pay to him. Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

40. See USURY.

41. *Alabama.*— Bobe *v.* Stickney, 36 Ala. 482.

Connecticut.— Stamford Bank *v.* Benedict, 15 Conn. 437.

Louisiana.— New Orleans *v.* Pigniolo, 29 La. Ann. 835; Miller *v.* The S. F. J. Trabue, 16 La. Ann. 375; Spiller *v.* His Creditors, 16 La. Ann. 292; Slaughter *v.* Milling, 15 La. Ann. 526; Follain *v.* Orillion, 9 Rob. 506; Lebleu *v.* Rutherford, 9 Rob. 95; Forstall *v.* Blanchard, 12 La. 1; Wartelle *v.* Le Blanc, 10 La. 556; Cox *v.* Rees, 10 La. 232.

Missouri.— Cloney *v.* Richardson, 34 Mo. 370.

New York.— Thomas *v.* Kelsey, 30 Barb. 268; Niagara Bank *v.* Rosevelt, 9 Cow. 409.

Pennsylvania.— Seymour *v.* Sexton, 10 Watts 255.

South Carolina.— Williams *v.* Vance, 9 S. C. 344, 30 Am. Rep. 26.

United States.— See U. S. *v.* Morgan, 111 Fed. 474.

See 39 Cent. Dig. tit. "Payment," § 124.

Where several notes, payable in merchandise on the first days of three successive years, were given, the merchandise delivered in the course of each year should be applied in satisfaction of the note falling due the

legal items in an account rather than those which are illegal;[42] to an unsecured debt in preference to one for which the creditor is secured;[43] to a debt for which the security is most precarious where the creditor holds more than one security;[44] and, for the purpose of protecting the rights of the creditor, to the earlier items of an account in preference to later ones.[45] A payment will not be applied to a debt owing by the debtor to a third person,[46] nor to debts contracted after the payment,[47] nor to an indebtedness to be incurred in the future,[48] nor to unenforceable demands.[49] Where only one debt is shown to exist, of course the law will apply the payment to that debt.[50]

4. Priority of Debts — a. In General. Except where equitable principles require a different disposition thereof,[51] or where a different application has been made by the parties themselves,[52] it is a well-settled rule that a payment should be applied by the court to the oldest debt where there is more than one debt,[53]

first day of the succeeding year. Anderson *v.* Mason, 6 Dana (Ky.) 217.

42. See *infra*, VI, D, 6.

43. See *infra*, VI, D, 5.

44. See *infra*, VI, D, 5, a.

45. See *infra*, VI, D, 4, b; VI, D, 5, b.

46. Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456.

47. London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

48. Harrison *v.* Johnston, 27 Ala. 445, holding that, in the absence of evidence showing most unmistakably the intention of the parties, a general payment to a commission merchant, with whom a debtor has a running account, will be referred to his existing indebtedness, and not to future advances.

49. Armour Packing Co. *v.* Vinegar Bend Lumber Co., (Ala. 1906) 42 So. 866; Scheffer *v.* Tozier, 25 Minn. 478.

50. McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313; Cary *v.* Herrin, 62 Me. 16; Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456; Miller *v.* Bingham, 29 Vt. 82. See also Thompson *v.* Davenport, 1 Wash. (Va.) 125.

Indivisible contract.— Where a number of articles are all bought at one time under a single contract and the promise to pay for them is one and indivisible, the court cannot appropriate payments made on the contract to any particular article bought. Hill *v.* McLaughlin, 158 Mass. 307, 33 N. E. 514.

Matured notes growing out of the same transaction, in the hands of the same creditor, against the same debtor, constitute but one debt; and payments made after maturity are imputable to the entire debt. Eyle *v.* Roman Catholic Church, etc., 36 La. Ann. 310.

51. Campbell *v.* Vedder, 1 Abb. Dec. (N. Y.) 295. See also Merchants' Bank *v.* Stirling, 13 Nova Scotia 439.

Particular equities have precedence, and hence application will be made to those items for which the security is most precarious. Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153. See also *infra*, VI, D, 4, b.

52. Hilton *v.* Sims, 45 Ga. 565.

53. *California.*— Ducan *v.* Thomas, 81 Cal. 56, 22 Pac. 297; Wendt *v.* Ross, 33 Cal. 650.

Georgia.— Killorin *v.* Bacon, 57 Ga. 497 (holding, however, that the law is not so imperative as to authorize the jury to be directed to apply the payment to the oldest claim); Horne *v.* Planters' Bank, 32 Ga. 1; Price *v.* Cutts, 29 Ga. 142, 74 Am. Dec. 52.

Iowa.— Blair Town Lot, etc., Co. *v.* Hillis, 76 Iowa 246, 41 N. W. 6.

Louisiana.— Dewar *v.* Beirne, McGloin 75.

Maine.— Milliken *v.* Tufts, 31 Me. 497.

Maryland.— Allstan *v.* Contee, 4 Harr. & J. 351.

Missouri.— Hammer *v.* Crawford, (App. 1906) 93 S. W. 348; Lewis *v.* Gambs, 6 Mo. App. 138.

New Hampshire.—Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153; Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153; Caldwell *v.* Wentworth, 14 N. H. 431.

New York.— Berrian *v.* New York, 4 Rob. 538; Kloepfer *v.* Maher, 84 N. Y. Suppl. 138; Douglass *v.* Murray, 7 N. Y. St. 837. But see Righter *v.* Stall, 3 Sandf. Ch. 608.

Pennsylvania.— Hollister *v.* Davis, 54 Pa. St. 508; Berghaus *v.* Alter, 9 Watts 386.

South Carolina.— Huger *v.* Bocquet, 1 Bay 497.

Vermont.— Gifford *v.* Thomas, 62 Vt. 34, 19 Atl. 1088; Langdon *v.* Bowen, 46 Vt. 512; St. Albans *v.* Failey, 46 Vt. 448.

Virginia.— Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940; Chapman *v.* Com., 25 Gratt. 721; Smith *v.* Loyd, 11 Leigh 512, 37 Am. Dec. 621.

Washington.— Kelso *v.* Russell, 33 Wash. 474, 74 Pac. 561.

West Virginia.— Rowan *v.* Chenoweth, 55 W. Va. 325, 47 S. E. 80; Genin *v.* Ingersoll, 11 W. Va. 549.

United States.— *In re* The Barges 2 & 4, 58 Fed. 425; The Louie Dole, 14 Fed. 862, 11 Biss. 479; Boody *v.* U. S., 3 Fed. Cas. No. 1,636, 1 Woodb. & M. 150; McDowell *v.* Blackstone Canal Co., 16 Fed. Cas. No. 8,777, 5 Mason 11; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,510, 3 Woodb. & M. 390.

England.— Toulmin *v.* Copland, 2 Cl. & F. 681, 6 Eng. Reprint 1310, West. 164, 9 Eng. Reprint 459; Goddard *v.* Hodges, 1 Cromp. & M. 33, 2 L. J. Exch. 20, 3 Tyrw. 259; Wentworth *v.* Manning, 2 Eq. Cas. Abr. 261, 22 Eng. Reprint 221.

See 39 Cent. Dig. tit. "Payment," § 123.

that is, the debt first becoming due.[54] This rule is, however, subject to an exception where there are several bonds with different sureties.[55]

b. Items of Current Account. Likewise, in the case of a running account, where there are various items of debt on one side and various items of credit on the other occurring at different times, and no special appropriation of payments constituting the credits have been made by either party, the successive payments and credits are to be applied in discharge of the items of debit antecedently due, in the order of time in which they stand in the account. In other words each item of payment or credit is applied in extinguishment of the earliest items of debt until it is exhausted.[56] But if the intention of the parties appears other-

Exemption statutes.— The law will apply a payment on a first accruing indebtedness, where a part accrued before the passage of the exemption act and the other part thereafter. Wheeler *v.* Cropsey, 5 How. Pr. (N. Y.) 288.

54. *Louisiana.*— Byrne *v.* Grayson, 15 La. Ann. 457.

Maryland.— Frazier *v.* Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516.

Minnesota.— See Wolford *v.* Andrews, 29 Minn. 250, 13 N. W. 167, 43 Am. Rep. 201.

Missouri.— McMillan *v.* Grayston, 83 Mo. App. 425.

Wisconsin.— Turner *v.* Pierce, 31 Wis. 342.

United States.— *In re* Stevens, 107 Fed. 243.

See 39 Cent. Dig. tit. "Payment," § 124.

Statutory reiteration of rule.— Moss *v.* Odell, 141 Cal. 335, 74 Pac. 999; Coalter *v.* Hurst, 97 Cal. 290, 32 Pac. 248. Under a statute providing for application of a payment, in the absence of direction, on the obligation "earliest in date of maturity," payments should be applied *pro rata* on obligations maturing at the same time, although not contracted at the same time. Star Mill, etc., Co. *v.* Portland, 4 Cal. App. 470, 88 Pac. 497.

Where several notes have been given at the same time by the same person and payable to the same party but falling due at different times, partial payments made by the debtor to the creditor when the notes are all due will be applied to the payment of principal and interest of the note first due and so on in this order until the last note is paid. Miller *v.* Leflore, 32 Miss. 634. See also Trimble *v.* McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857.

The oldest debt is that first due and not that first contracted. Bloom *v.* Kern, 30 La. Ann. 1263; Lanusse *v.* Lanna, 6 Mart. N. S. (La.) 103. *Compare* Thompson *v.* Phelan, 22 N. H. 339; Caldwell *v.* Wentworth, 14 N. H. 431.

55. See PRINCIPAL AND SURETY.

56. *Alabama.*— Winston *v.* Farrow, (1905) 40 So. 53; Connor *v.* Armstrong, 91 Ala. 265, 9 So. 816; Golden *v.* Conner, 89 Ala. 598, 8 So. 148; Harrison *v.* Johnston, 27 Ala. 445.

Arkansas.— Lazarus *v.* Friedheim, 51 Ark. 371, 11 S. W. 518; Kline *v.* Regland, 47 Ark. 111, 14 S. W. 474; Price *v.* Dowdy, 34 Ark. 285.

California.— Molaskey *v.* Peery, 76 Cal. 84, 18 Pac. 120, holding that where a payment made on account is sought to be credited to the earliest charge on the books of account, it must appear what item in such account was charged first in order of dates.

Colorado.— Mackey *v.* Fullerton, 7 Colo. 556, 4 Pac. 1198.

Connecticut.— Fairchild *v.* Holly, 10 Conn. 175.

Delaware.— Lodge *v.* Ainscow, 1 Pennew. 327, 41 Atl. 187; Pickering *v.* Day, 2 Del. Ch. 333.

Illinois.— Sprague *v.* Hazenwinkle, 53 Ill. 419; Carey-Lombard Lumber Co. *v.* Hunt, 54 Ill. App. 314; A. Fuerman Brewing Co. *v.* Pisa, 44 Ill. App. 207.

Indiana.— Conduitt *v.* Ryan, 3 Ind. App. 1, 29 N. E. 160.

Iowa.— Johnson *v.* Foster, (1904) 101 N. W. 741 (holding that a note given to settle unpaid balance and a judgment on such note will be deemed to represent the items of indebtedness last incurred); Allen *v.* Brown, 39 Iowa 330.

Kentucky.— Sternberger *v.* Gowdy, 93 Ky. 146, 19 S. W. 186, 14 Ky. L. Rep. 88.

Louisiana.— Houeye *v.* Henkel, 115 La. 1066, 40 So. 460; Sleet *v.* Sleet, 109 La. 302, 33 So. 322; Dinkgrave's Succession, 31 La. Ann. 703.

Maine.— Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597; McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

Massachusetts.— See Capen *v.* Alden, 5 Metc. 268.

Michigan.— People *v.* Sheehan, 118 Mich. 539, 77 N. W. 88; Grasser, etc., Brewing Co. *v.* Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389.

Minnesota.— Redwood County *v.* Citizens' Bank, 67 Minn. 236, 69 N. W. 912; Winnebago Paper Mills *v.* Travis, 56 Minn. 480, 58 N. W. 36; Jefferson *v.* St. Matthew's Church, 41 Minn. 392, 43 N. W. 74; Hersey *v.* Bennett, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271.

Mississippi.—Fletcher *v.* Gillan, 62 Miss. 8.

Missouri.—Kaufman-Wilkinson Lumber Co. *v.* Christophel, 59 Mo. App. 80; Goetz *v.* Piel, 26 Mo. App. 634.

New Hampshire.— Doherty *v.* Cotter, 68 N. H. 37, 38 Atl. 499; Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153.

New Jersey.— Dey *v.* Anderson, 39 N. J. L. 199; Forst *v.* Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554.

New York.— National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11

wise, as where there is an express understanding between the parties to the con-

Am. St. Rep. 612; Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325, 21 N. E. 57; Anderson *v.* Daley, 38 N. Y. App. Div. 505, 56 N. Y. Suppl. 511; Dows *v.* Morewood, 10 Barb. 183; Allen *v.* Culver, 3 Den. 284.

North Carolina.— Miller *v.* Womble, 122 N. C. 135, 29 S. E. 102; Jenkins *v.* Smith, 72 N. C. 296.

Ohio.— Union Nat. Bank *v.* Cleveland, 10 Ohio Cir. Ct. 222, 6 Ohio Dec. 536.

Oregon.— Patterson *v.* British Columbia Bank, 26 Oreg. 509, 38 Pac. 817; State *v.* Chadwick, 10 Oreg. 423.

Pennsylvania.— Souder *v.* Schechterly, 91 Pa. St. 83; Pierce *v.* Sweet, 33 Pa. St. 151; McKee *v.* Com., 2 Grant 23. See also Chester Tube, etc., Co. *v.* Whittington, 94 Pa. St. 139.

Rhode Island.— Briggs *v.* Titus, 7 R. I. 441.

Tennessee.— Lippman *v.* Boals, 16 Lea 283.

Texas.— Jamison *v.* Alvarado Compress, etc., Co., (Civ. App. 1907) 99 S. W. 1053; Phipps *v.* Willis, 11 Tex. Civ. App. 186, 32 S. W. 801; Shuford *v.* Chinski, (Civ. App. 1894) 26 S. W. 141. See also Fisher *v.* Brown Hardware Co., (Civ. App. 1907) 103 S. W. 655.

Vermont.— Pierce *v.* Knight, 31 Vt. 701; Morgan *v.* Tarbell, 28 Vt. 498; Shedd *v.* Wilson, 27 Vt. 478.

Wisconsin.— Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335; Hannan *v.* Engelmann, 49 Wis. 278, 5 N. W. 791.

United States.— U. S. *v.* Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; McDonald *v.* The Tom Lysle, 48 Fed. 690; The Mary K. Campbell, 40 Fed. 906; Mack *v.* Adler, 22 Fed. 570; Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350; Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98; Leef *v.* Goodwin, 15 Fed. Cas. No. 8,207, Taney 460; Postmaster-Gen. *v.* Furber, 19 Fed. Cas. No. 11,308, 4 Mason 333; U. S. *v.* Bradbury, 24 Fed. Cas. No. 14,635, 2 Ware 150; U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,510, 3 Woodb. & M. 390.

England.— Henniker *v.* Wigg, 4 Q. B. 792, Dav. & M. 160, 45 E. C. L. 792; Kinnaird *v.* Webster, 10 Ch. D. 139, 48 L. J. Ch. 348, 39 L. T. Rep. N. S. 494, 27 Wkly. Rep. 212; Bodenham *v.* Purchas, 2 B. & Ald. 39, 20 Rev. Rep. 342; Devaynes *v.* Nobel, 1 Meriv. 529, 35 Eng. Reprint 767; Merriman *v.* Ward, 1 Johns. & H. 371, 70 Eng. Reprint 790 (holding that the ignorance of parties does not prevent the operation of the rule); *Re* Devenport, etc., Steam Flour Mill Co., 42 L. J. Ch. 577; Solarte *v.* Hilbers, 1 L. J. K. B. 196. See also *In re* Hamilton, 25 Wkly. Rep. 760. See Mutton *v.* Peat, [1899] 2 Ch. 556, 68 L. J. Ch. 668, 48 Wkly. Rep. 62; *In re* Stenning, [1895] 2 Ch. 433, 73 L. T. Rep. N. S. 207, 13 Reports 807; Hancock *v.* Smith, 41 Ch. D. 456, 58 L. J. Ch. 725, 61 L. T. Rep. N. S. 341. *Compare* Taylor *v.* Kymer, 3 B. & Ad. 320, 1 L. J. K. B. 114, 23 E. C. L. 145; Lysaght *v.* Walker, 5 Bligh N. S. 1, 5 Eng. Reprint 208.

Canada.— Netting *v.* Hubley, 26 Nova Scotia 497; Paris Bd. of Education *v.* Citizens' Ins., etc., Co., 30 U. C. C. P. 132; McGillivray *v.* Keefer, 4 U. C. Q. B. 342.

See 39 Cent. Dig. tit. "Payment," § 122.

Leading case.— The case of Devaynes *v.* Noble, 1 Meriv. 529, 572, 35 Eng. Reprint 767, decided in 1816, and familiarly known as "Clayton's case," is the leading case on this point and the rule is often referred to as the rule in "Clayton's case."

Reason for rule.— Such an application is proper because it is most just and equitable between the parties and also because it is presumed to be the intention of both parties as being in accordance with the ordinary and usual course of dealing. Pierce *v.* Knight, 31 Vt. 701.

The interests of the creditor are preferred by this rule. Johnson's Appeal, 37 Pa. St. 268.

A change in the method of bookkeeping is not such an interruption of the running of an account current as will prevent the application of the rule that the law will appropriate payments to the earliest items of the account where no appropriation was made by the parties. Goldsmith *v.* Lewine, 70 Ark. 516, 69 S. W. 308.

Where a note is given for money loaned in the course of the mutual dealings, the note enters into the mutual account. Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

Where debts arise from distinct transactions which are not brought into a common account, the rule does not apply. Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667.

Maturity of debts.— Where partial payments are on an account current, in case of the failure of the parties to make any appropriation the law will apply them to the different items which bear interest in the order in which they fall due. Scott *v.* Cleveland, 33 Miss. 447.

Credits growing out of a contract itself do not fall within the rule requiring credits to be applied to the antecedent unsecured indebtedness, or to the first items of debit in an account between the parties, like payments of money on account, but may properly be applied to the payment of indebtedness arising out of the contract from which they spring. Suter *v.* Ives, 47 Md. 520.

The fact that earlier items are secured by mortgage is immaterial. Buchanan *v.* Kerby, 5 Grant Ch. (U. C.) 332; *Re* Brown, 2 Grant Ch. (U. C.) 111.

The rule does not apply to two transactions of the same date.— Cory *v.* Turkish Steamship Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 45 Wkly. Rep. 667.

Mixing fiduciary account.— If a person who

trary, the court will give effect thereto,[57] and the rule does not preclude a different application where justice so requires.[58] Where part of the items are illegal, a payment will be applied to the earliest legal items.[59] It is immaterial that the debtor's property is exempt as against all the other items except the first.[60] Where a debtor is indebted on two accounts, credits will be applied on the other account after the complete payment of one account.[61]

5. Secured and Unsecured Debts — a. In General. While in those states where the civil law rule has been adopted, the court will apply a payment to a secured rather than an unsecured debt,[62] the general rule outside of such jurisdictions is that it will be appropriated to the unsecured indebtedness.[63] So where neither the debtor nor the creditor directs the application, the law will apply a payment on

holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money and afterward draws out sums by check in the ordinary manner, the rule does not apply and the drawer will be considered to have drawn out his own money in preference to the trust money. *In re* Hallett, 13 Ch. D. 696, 49 L. J. Ch. 415, 42 L. T. Rep. N. S. 421, 28 Wkly. Rep. 732.

Items must be due.— The items to which the payment is applied must be due. Effinger *v.* Henderson, 33 Miss. 449.

57. Miller *v.* Womble, 122 N. C. 135, 29 S. E. 102; Willis *v.* McIntyre, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574; Langdon *v.* Bowen, 46 Vt. 512; City Discount Co. *v.* McLean, L. R. 9 C. P. 692, 43 L. J. C. P. 344, 30 L. T. Rep. N. S. 883; Wilson *v.* Hirst, 1 N. & M. 746. See also Griffith *v.* Crocker, 18 Ont. App. 370. *Compare* Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29.

58. Stickney *v.* Moore, 108 Ala. 590, 19 So. 76; Upham *v.* Lefavour, 11 Metc. (Mass.) 174.

Equities of third persons.—The general rule of applying to the oldest item of debt is subject to qualification where the rights and equities of third persons are involved. Andrews *v.* Macon Exch. Bank, 108 Ga. 802, 34 S. E. 183; Nashville First Nat. Bank *v.* National Surety Co., 130 Fed. 401, 64 C. C. A. 601, 66 L. R. A. 777.

59. Quigley *v.* Duffey, 52 Iowa 610, 3 N. W. 659.

60. Sternberger *v.* Gowdy, 93 Ky. 146, 19 S. W. 186, 14 Ky. L. Rep. 88.

61. Buxton *v.* Debrecht, 95 Mo. App. 599, 69 S. W. 616.

62. *Louisiana.*— Thiac *v.* Jumonville, 32 La. Ann. 142; New Orleans Ins. Co. *v.* Tio, 15 La. Ann. 174; Forstall *v.* Blanchard, 12 La. 1.

Maryland.— Buchanan *v.* Lloyd, 88 Md. 642, 41 Atl. 1075; Laeber *v.* Langhor, 45 Md. 477; Dorsey *v.* Gassaway, 2 Harr. & J. 402, 3 Am. Dec. 557; McTavish *v.* Carroll, 1 Md. Ch. 160. But see Frazier *v.* Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516.

Mississippi.— Windsor *v.* Kennedy, 52 Miss. 164; Neal *v.* Allison, 50 Miss. 175; Poindexter *v.* La Roche, 7 Sm. & M. 699. *Contra,* Planters' Bank *v.* Stockman, Freem. 502.

Texas.— Paschall *v.* Pioneer Sav., etc., Co., 19 Tex. Civ. App. 102, 47 S. W. 98.

United States.— The Antarctic, 1 Fed. Cas. No. 479, 1 Sprague 206.

See 39 Cent. Dig. tit. "Payment," § 125.

63. *Illinois.*— Barbee *v.* Morris, 221 Ill. 382, 77 N. E. 589; Monson *v.* Meyer, 93 Ill. App. 94; Chicago Title, etc., Co. *v.* McGlew, 90 Ill. App. 58. See Trumbull *v.* Union Trust Co., 33 Ill. App. 319.

Indiana.— M. A. Sweeney Co. *v.* Fry, 151 Ind. 178, 51 N. E. 234.

Kentucky.— Bell, etc., Co. *v.* Kentucky Glass-Works Co., 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, 20 Ky. L. Rep. 1684, 21 Ky. L. Rep. 133, 156; McDaniel *v.* Barnes, 5 Bush 183; Burks *v.* Albert, 4 J. J. Marsh. 97, 20 Am. Dec. 209; Andrews *v.* Kentucky Citizens Bldg., etc., Assoc., 70 S. W. 409, 24 Ky. L. Rep. 966; Offutt *v.* Divine, 53 S. W. 816, 55 S. W. 428, 21 Ky. L. Rep. 1500.

Minnesota.— Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Lash *v.* Edgerton, 13 Minn. 210.

Missouri.— McMillan *v.* Grayston, 83 Mo. App. 425.

New Hampshire.—Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153.

North Carolina.— Vick *v.* Smith, 83 N. C. 80.

Oregon.— Truilinger *v.* Kofoed, 7 Oreg. 228, 33 Am. Rep. 708.

Pennsylvania.— Smith *v.* Brooke, 49 Pa. St. 147 (holding the rule applicable where part of the indebtedness is protected from attachment); Johnson's Appeal, 37 Pa. St. 268; Cresson's Estate, 3 Pa. Co. Ct. 419; Lyon *v.* Kurtz, 13 Pittsb. Leg. J. N. S. 478. See also Ege *v.* Watts, 55 Pa. St. 321.

Texas.— Scott *v.* Cox, 30 Tex. Civ. App. 190, 70 S. W. 802. But see Sproulle *v.* McFarland, (Civ. App. 1900) 56 S. W. 693.

Vermont.— Jeffers *v.* Pease, 74 Vt. 215, 52 Atl. 422; Briggs *v.* Williams, 2 Vt. 283.

United States.— The Katie O'Neil, 65 Fed. 111; The D. B. Steelman, 48 Fed. 580; Sanborn *v.* Stark, 31 Fed. 18.

See 39 Cent. Dig. tit. "Payment," § 125.

Contra.— Dows *v.* Morewood, 10 Barb. (N. Y.) 183.

No part of a debt is secured within the meaning of the law with reference to the application of payments because of the fact that a part of the debt was created before the homestead of the debtor became exempt.

the debt which is least secured or for which the security is most precarious.[64] Of course the intention of the parties governs and this rule will not be applied when it is contrary thereto.[65]

b. Items of Account. Whether a payment on a running account will be appropriated to the earliest items where part are secured and part unsecured is not well settled; a majority of the cases hold that it will be applied to the earliest items,[66] while others hold that the application will be to the unsecured items.[67]

6. Illegal or Unenforceable Demands. Where there are several demands or items, some of which are legal and others illegal, a payment will be applied by the court to the legal charges rather than to unlawful claims.[68]

Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92.

Payment on one note.— Where a note was taken for an indebtedness, part of which was secured by mortgage and a portion unsecured, and payments subsequently made were indorsed on the note, the payments will be applied *pro rata* on the several classes of indebtedness. Shelden *v.* Bennett, 44 Mich. 634, 7 N. W. 223.

64. *Alabama.*— McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721.

Connecticut.— Chester *v.* Wheelwright, 15 Conn. 562.

Illinois.— Ellis *v.* Conrad Seipp Brewing Co., 107 Ill. App. 139.

Indiana.— McCauley *v.* Holtz, 62 Ind. 205; King *v.* Andrews, 30 Ind. 429.

Kentucky.— McDaniel *v.* Barnes, 5 Bush 183; Blanton *v.* Rice, 5 T. B. Mon. 253.

Missouri.— Poulson *v.* Collier, 18 Mo. App. 583.

New Jersey.— Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137; Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795 [*affirmed* in 45 N. J. Eq. 245, 19 Atl. 621]; Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312].

New York.— Camp *v.* Smith, 1 N. Y. Suppl. 375.

North Carolina.— Sprinkle *v.* Martin, 72 N. C. 92; Moss *v.* Adams, 39 N. C. 42; Ransom *v.* Thomas, 33 N. C. 251.

Pennsylvania.— Pierce *v.* Sweet, 33 Pa. St. 151; Creasy *v.* Emanuel Reformed Church, 1 Pa. Super. Ct. 372; McConnell *v.* Ferguson, 17 Lanc. L. Rev. 67, 13 York Leg. Rec. 132.

South Carolina.— Jones *v.* Kilgore, 2 Rich. Eq. 63; Sager *v.* Warley, Rice Eq. 26.

Virginia.— Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

West Virginia.—Hempfield R. Co. *v.* Thornburg, 1 W. Va. 261.

United States.— Field *v.* Holland, 6 Cranch 8, 3 L. ed. 136; Coons *v.* Tome, 9 Fed. 532; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243.

See 39 Cent. Dig. tit. "Payment," § 125.

65. Compound Lumber Co. *v.* Murphy, 169 Ill. 343, 48 N. E. 472 [*affirming* 68 Ill. App. 579].

66. *Alabama.*— Moses *v.* Noble, 86 Ala. 407, 5 So. 181; Harrison *v.* Johnston, 27 Ala. 445.

Indiana.— Tapper *v.* New Home Sewing-Mach. Co., 22 Ind. App. 313, 53 N. E. 202; Conduitt *v.* Ryan, 3 Ind. App. 1, 29 N. E. 160.

Louisiana.— See Moore *v.* Gray, 22 La. Ann. 289.

Maine.— Cushing *v.* Wyman, 44 Me. 121.

Massachusetts.— Worthley *v.* Emerson, 116 Mass. 374.

Michigan.— See McMaster *v.* Merrick, 41 Mich. 505, 2 N. W. 895.

Minnesota.— Pond, etc., Co. *v.* O'Connor, 70 Minn. 266, 73 N. W. 159, 248.

New York.— Truscott *v.* King, 6 N. Y. 147. See also Allen *v.* Culver, 3 Den. 284.

Texas.— Phipps *v.* Willis, 11 Tex. Civ. App. 186, 32 S. W. 801.

See 39 Cent. Dig. tit. "Payment," § 126.

67. New Roads Bank *v.* Kentucky Refining Co., 85 S. W. 1103, 27 Ky. L. Rep. 645; Price *v.* Merritt, 55 Mo. App. 640; Goetz *v.* Piel, 26 Mo. App. 634; Pierce *v.* Sweet, 33 Pa. St. 151; Schuelenburg *v.* Martin, 2 Fed. 747, 1 McCrary 348. See also Langdon *v.* Bowen, 46 Vt. 512.

68. *Louisiana.*— Gillard *v.* Huval, 22 La. Ann. 426; Keane *v.* Branden, 12 La. Ann. 20.

Maine.— Phillips *v.* Moses, 65 Me. 70.

Massachusetts.— See Burr *v.* Crompton, 116 Mass. 493.

Minnesota.— Solomon *v.* Dreschler, 4 Minn. 278.

Nevada.— McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781.

New Hampshire.— Dunbar *v.* Garrity, 58 N. H. 575; Hall *v.* Clement, 41 N. H. 166; Hilton *v.* Burley, 2 N. H. 193.

New York.— Huffstater *v.* Hayes, 64 Barb. 573. See also Rochester Commercial Bank *v.* MacDougall, etc., Co., 8 N. Y. App. Div. 1, 40 N. Y. Suppl. 189.

Texas.— See Wingate *v.* Peoples' Bldg., etc., Sav. Assoc., 15 Tex. Civ. App. 416, 39 S. W. 999.

Vermont.— Backman *v.* Wright, 27 Vt. 187, 65 Am. Dec. 187.

England.— Wright *v.* Laing, 3 B. & C. 165, 4 D. & R. 783, 27 Rev. Rep. 313, 10 E. C. L. 83; *Ex p.* Randleson, 2 Deac. & C. 534.

See 39 Cent. Dig. tit. "Payment," § 119.

Mortgage of married woman.— Where the amount of a married woman's mortgage includes a debt of her husband, as to which the mortgage is void, a general partial payment by the wife must be applied to her portion of the debt secured thereby. Kuker *v.* McIntyre, 43 S. C. 117, 20 S. E. 976.

Legal debt not due.— Where two charges of unequal amounts exist, the one legal and the other illegal, but the former not being

7. JOINT DEBTS AND DEBTS DUE DIFFERENT PERSONS.[69] Where a debtor is solely liable on one debt and jointly liable on another, a payment by him should be applied to the former.[70] So where, after the death of the debtor, his representative continues the business, and becomes further indebted on account, payments thereon will be applied to the earliest items.[71]

8. PAYMENT FROM PARTICULAR SOURCE OR FUND. When the money is derived from a particular source or fund, the court will apply it to the relief thereof, in the absence of a contrary agreement between the parties.[72] For instance, a payment made from the proceeds of mortgaged property must be applied in payment of the mortgage debt,[73] except where to do so would be inequitable.[74]

9. DISTRIBUTION BETWEEN ALL OF DEBTS. In the absence of circumstances requiring a different application, the court will oftentimes appropriate a payment ratably toward the payment of all the debts of the debtor owing to the creditor.[75]

10. CONTINGENT LIABILITIES. As between certain debts and contingent liabilities

then due and payable, and a payment is made generally on account, if such payment be of no greater amount than the illegal claim it will be taken to have been paid on the illegal claim, although not specially so directed. Caldwell *v.* Wentworth, 14 N. H. 431.

Payment in excess of legal debt.— If, at any time of payment, the amount paid exceed the amount due for legal sales, the balance will be applied to pay for the goods illegally sold. Hall *v.* Clement, 41 N. H. 166.

Application to barred debts see LIMITATIONS OF ACTIONS, 25 Cyc. 1380, 1381.

69. Payments by or to agent see PRINCIPAL AND AGENT.

Payments by or to partnership see PARTNERSHIP.

70. Adams *v.* Tucker, 6 Colo. App. 393, 40 Pac. 783; Livermore *v.* Claridge, 33 Me. 428; Hutches *v.* J. I. Case Threshing Mach. Co., (Tex. Civ. App. 1896) 35 S. W. 60.

71. Sterndale *v.* Hankinson, 1 Sim. 393, 27 Rev. Rep. 210, 2 Eng. Ch. 393, 57 Eng. Reprint 625.

72. *Alabama.*— Winston *v.* Farrow, (1905) 40 So. 53; Levystein *v.* Whitman, 59 Ala. 345.

Arkansas.— Cross *v.* Johnson, 30 Ark. 396.

Illinois.— Saffer *v.* Lambert, 111 Ill. App. 410; Brinckerhoff *v.* Greenan, 85 Ill. App. 253.

Louisiana.— See Newell *v.* Shaffett, 28 La. Ann. 235.

Maryland.— Gwinn *v.* Whitaker, 1 Harr. & J. 754. *Compare* Frazier *v.* Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516.

Virginia.— Ross *v.* McLauchlan, 7 Gratt. 86, holding that where a creditor held two judgments and a bond, a payment from the proceeds of the land on which the judgment is a lien should be applied on the judgment debt.

United States.— The J. F. Spencer, 13 Fed. Cas. No. 7,316, 5 Ben. 151.

England.— Young *v.* English, 7 Beav. 10, 13 L. J. Ch. 76, 29 Eng. Ch. 10, 49 Eng. Reprint 965.

See 39 Cent. Dig. tit. "Payment," § 118.

Crops raised by a tenant, and delivered by him to his landlord, must be applied to the debt for which the landlord had a lien on the crops, although the landlord has other claims against the tenant. Powell *v.* State, 84 Ala. 444, 4 So. 719; Strictland *v.* Hardie, 82 Ala. 412, 3 So. 40.

73. *Arkansas.*— Lyon *v.* Bass, 76 Ark. 534, 89 S. W. 849.

Georgia.— Pritchard *v.* Comer, 71 Ga. 18.

Illinois.— Snider *v.* Stone, 78 Ill. App. 17.

Minnesota.— Thorne *v.* Allen, 72 Minn. 461, 75 N. W. 706.

South Carolina.— Ellis *v.* Mason, 32 S. C. 277, 10 S. E. 1069.

Vermont.— Brighton *v.* Doyle, 64 Vt. 616, 25 Atl. 694.

See 39 Cent. Dig. tit. "Payment," § 118.

Where a husband's creditor knowingly receives the proceeds of the sale of lots mortgaged by the wife to secure the debt, he must apply them on the mortgage. Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 798.

74. Thorne *v.* Allen, 72 Minn. 461, 75 N. W. 706, holding that where plaintiff held a mortgage on grain and also had possession under a lien given to secure other advances and, after a part payment from a sale of part of the grain, waived his lien by surrendering possession of the balance of the grain, the payment would be applied to the advances secured by the lien.

75. *Illinois.*— Reiss *v.* Scherner, 87 Ill. App. 84.

Louisiana.— Miller *v.* The S. F. J. Trahue, 16 La. Ann. 375; Spiller *v.* His Creditors, 16 La. Ann. 292; Slaughter *v.* Milling, 15 La. Ann. 526; Follain *v.* Orillion, 9 Rob. 506.

Massachusetts.— Taylor *v.* Foster, 132 Mass. 30, holding such application proper, in a particular case, because of the supposed intention of the parties.

New Jersey.— Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137.

New York.— Gillett *v.* Depuy, 48 N. Y. App. Div. 388, 63 N. Y. Suppl. 49, holding that where the entire indebtedness was treated by both parties as one lump sum it was error to apply payments to three mortgages to the exclusion of another.

South Carolina.— Jones *v.* Kilgore, 2 Rich. Eq. 63.

Tennessee.— White *v.* Blakemore, 8 Lea 49.

the law applies payments to the former rather than to the latter.[76] For instance, where one indebted on his own account and also as surety for another makes a payment without specifying to which debt it shall be applied, the law will apply it to his own debt.[77] So a payment will be applied to the contract originally entered into by the debtor rather than to one with a third person which he had assumed.[78]

11. PRINCIPAL AND INTEREST.[79] Except where otherwise agreed,[80] a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to the interest due and then to the principal.[81] If neither principal nor interest is due, some cases hold that the pay-

Canada.— See Hood *v.* Coleman Planing Mill, etc., Co., 27 Ont. App. 203.

See 39 Cent. Dig. tit. "Payment," § 116 *et seq.*

76. Snyder *v.* Robinson, 35 Ind. 311, 9 Am. Rep. 738; Newman *v.* Meek, Sm. & M. Ch. (Miss.) 331; Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456.

77. Newman *v.* Meek, Sm. & M. Ch. (Miss.) 331; Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456; Lazarus *v.* Henrietta Nat. Bank, 72 Tex. 354, 10 S. W. 252.

78. Blair Town Lot, etc., Co. *v.* Hillis, 76 Iowa 246, 41 N. W. 6.

79. Payments of usury see USURY.

80. Donaldson *v.* Cothran, 60 Ga. 603.

Evidence of agreement.— If a payment on a note can in any case be first applied to the principal instead of the interest, on the ground that it was so agreed, such an application will not be made unless the evidence of that fact is clear and conclusive. Carter *v.* Sanderson, 41 S. W. 306, 19 Ky. L. Rep. 620.

81. *Alabama.*— Coleman *v.* Smith, 55 Ala. 368.

Indiana.— McCormick *v.* Mitchell, 57 Ind. 248.

Louisiana.— Johnson *v.* Robbins, 20 La. Ann. 569; Smith *v.* Nettles, 9 La. Ann. 455; Union Bank *v.* Kindrick, 10 Rob. 51; Martinstein *v.* His Creditors, 8 Rob. 6; Shaw *v.* Oakey, 3 Rob. 361; Hynson *v.* Maddens, 1 Mart. N. S. 571.

Maryland.— Gwinn *v.* Whitaker, 1 Harr. & J. 754; Frazier *v.* Hyland, 1 Harr. & J. 98.

Massachusetts.— Fay *v.* Bradley, 1 Pick. 194; Dean *v.* Williams, 17 Mass. 417.

Minnesota.— Keigher *v.* St. Paul, 69 Minn. 78, 72 N. W. 54; Weide *v.* St. Paul, 62 Minn. 67, 64 N. W. 65; Lash *v.* Edgerton, 13 Minn 210.

Mississippi.— Hamer *v.* Kirkwood, 25 Miss. 95; Bond *v.* Jones, 8 Sm. & M. 368.

Montana.— Anderson *v.* Perkins, 10 Mont. 154, 25 Pac. 92.

New Mexico.— Armijo *v.* Henry, (1907) 89 Pac. 305; Jones *v.* Chandler, (1906) 85 Pac. 392.

New York.— Merchants' Bank *v.* Freeman, 15 Hun 359; Peck *v.* Granite State Provident Assoc., 21 Misc. 84, 46 N. Y. Suppl. 1042.

North Carolina.— Johnson *v.* Johnson, 58 N. C. 167; Peebles *v.* Gee, 12 N. C. 341; Anonymous, 3 N. C. 17. See Yancy *v.* Mutter, 1 N. C. 560.

Ohio.— Hammer *v.* Nevill, Wright 169; Smith *v.* Smith, 10 Ohio S. & C. Pl. Dec. 439.

Pennsylvania.— Moore *v.* Kiff, 78 Pa. St. 96; Spires *v.* Hamot, 8 Watts & S. 17; Bell's Appeal, 4 Pa. Cas. 423, 8 Atl. 927.

South Carolina.— Smith *v.* Macon, 1 Hill Eq. 339.

Texas.— Hampton *v.* Dean, 4 Tex. 455; Smith *v.* Woods, 1 Tex. App. Civ. Cas. § 680.

Vermont.— Bradford Academy *v.* Grover, 55 Vt. 462; Allen *v.* Lyman, 27 Vt. 20.

West Virginia.— Genin *v.* Ingersoll, 11 W. Va. 549.

England.— Bower *v.* Marris, Cr. & Ph. 351, 10 L. J. Ch. 356, 18 Eng. Ch. 351, 41 Eng. Reprint 525; Chase *v.* Box, 2 Freem. 261, 22 Eng. Reprint 1197.

Canada.— Wilson *v.* Ryke, 14 Ont. 188; Ross *v.* Perrault, 13 Grant Ch. (U. C.) 206.

See 39 Cent. Dig. tit. "Payment," § 121.

Method of application to interest see INTEREST, 22 Cyc. 1564.

Any surplus over the interest due at the time must, in the absence of special agreement, be imputed to the principal. Johnson *v.* Robbins, 20 La. Ann. 569. Monthly payments by a debtor, in excess of the interest payable on the debt, will be applied to the principal of the debt, and will not be treated as compensation for extensions of time, although they were so denominated by the parties when made. Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831.

Statutory reiteration of rule.— Bradley *v.* Murray, 66 Ala. 269; Becker *v.* Shaw, 120 Ga. 1003, 48 S. E. 408; Ross *v.* Rees, 43 S. W. 215, 19 Ky. L. Rep. 1215. And see the statutes of the several states.

Interest converted into capital.— The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, on making up the account half yearly, been converted into capital. Parr's Banking Co. *v.* Yates, [1898] 2 Q. B. 460, 67 L. J. Q. B. 851, 79 L. T. Rep. N. S. 321, 47 Wkly. Rep. 42.

Notes received as payment.— Where notes are received by a creditor as a payment, he should credit them in the first place to the interest and then to the principal, as other payments. North *v.* Mallett, 3 N. C. 151.

Where there are several notes, payments will be applied: (1) To the interest due on the note first maturing; (2) to the principal

ment must be applied to the principal,[82] but the weight of authority holds that it should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished.[83] Where two or more debts are kept separate and distinct from each other and interest is applied expressly to one particular debt, the balance is to be applied to the principal of that debt.[84] But where there is in reality but one debt represented by different notes maturing at different times, the payment should first be applied to the interest due on the whole debt.[85] Payments of interest by mistake, when no interest was due, are applied as payments on the principal debt at the date of maturity of the obligation.[86] Where payments of interest are made in excess of the legal interest due, the excess will generally be applied to the principal.[87]

E. Rights of Third Persons — 1. In General. The exercise of the right of appropriation of payments belongs exclusively to the debtor and creditor and no third person can control or be heard for the purpose of compelling a different appropriation from that agreed upon by them.[88] But an appropriation by either

of such note; (3) to the interest on the note next maturing, and so on. Miller *v.* Leflore, 32 Miss. 634.

In those states where the civil law rule is adopted as to appropriating a payment for the benefit of the debtor, it has been held that such rule has application solely to a contest between two principal debts, separate and distinct from each other, and does not apply where the question is as to the application between principal and interest. Miller *v.* Leflore, 32 Miss. 634.

82. Starr *v.* Richmond, 30 Ill. 276, 83 Am. Dec. 189; Ross *v.* Rees, 43 S. W. 215, 19 Ky. L. Rep. 1215; McElrath *v.* Depuy, 2 La. Ann. 520; Tracy *v.* Wikoff, 1 Dall. (Pa.) 124, 1 L. ed. 65.

83. Williams *v.* Houghtaling, 3 Cow. (N. Y.) 86; Jencks *v.* Alexander, 11 Paige (N. Y.) 619; Miami Exporting Co. *v.* U. S. Bank, 5 Ohio 260; Singleton *v.* Allen, 2 Strobh. Eq. (S. C.) 166. See also Monroe *v.* Fohl, 72 Cal. 568, 14 Pac. 514; De Bruhl *v.* Neuffer, 1 Strobh. (S. C.) 426. But see Spires *v.* Hamot, 8 Watts & S. (Pa.) 17.

So much of a partial payment, before its maturity, upon a note which gives the right to pay at any time, will, in the absence of any application of the parties at the time, be applied in reduction of principal, as will, together with interest on itself at the agreed rate from the date of the note to the date of the payment, amount to the sum paid, and the balance will be applied in reduction of interest; at least this course is as favorable to the maker as he can demand. Jacobs *v.* Ballenger, 130 Ind. 231, 29 N. E. 182, 15 L. R. A. 169.

84. Loveridge *v.* Larned, 7 Fed. 294.

85. Boggess *v.* Goff, 47 W. Va. 139, 34 S. E. 741; Genin *v.* Ingersoll, 11 W. Va. 549; Wilson *v.* Rykert, 14 Ont. 188.

86. Carr *v.* Robinson, 8 Bush (Ky.) 269.

87. Deshler *v.* Holmes, 44 N. J. Eq. 581, 18 Atl. 75; Moore *v.* Holland, 16 S. C. 15. See also Camden Sav. Bank *v.* Cilley, 83 Me. 72, 21 Atl. 746.

But where there was no proof of a usurious agreement, nor anything to show that usurious interest was given or accepted in consideration of an extension of the time of payment of the loan, interest in excess of the legal rate, voluntarily paid by the borrower, could not be credited on the principal. Bosworth *v.* Kinghorn, 94 N. Y. App. Div. 187, 87 N. Y. Suppl. 983 [*affirmed* in 179 N. Y. 590, 72 N. E. 1139].

Payment of usurious interest see Usury.

88. *Alabama.*— Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37.

Minnesota.— Jefferson *v.* St. Matthew's Church, 41 Minn. 392, 43 N. W. 74.

Mississippi.— Hiller *v.* Levy, 66 Miss. 30, 5 So. 226.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96.

New York.— Grant *v.* Keator, 117 N. Y. 369, 22 N. E. 1055; Louis *v.* Bauer, 33 N. Y. App. Div. 287, 53 N. Y. Suppl. 985.

South Carolina.— See Clark *v.* Smith, 13 S. C. 585.

Tennessee.— See Dean *v.* Womack, 2 Tenn. Ch. App. 72.

Virginia.— Wells *v.* Hughes, 89 Va. 543, 16 S. E. 689; Coles *v.* Withers, 33 Gratt. 186.

Washington.— Kelso *v.* Russell, 33 Wash. 474, 74 Pac. 561.

Wisconsin.— National Cash Register Co. *v.* Bonneville, 119 Wis. 222, 96 N. W. 558.

United States.— Mack *v.* Adler, 22 Fed. 570. See also Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999.

See 39 Cent. Dig. tit. "Payment," § 127.

But see Moore *v.* Riddell, 11 Grant Ch. (U. C.) 69.

Compare Hughes *v.* Mattes, 104 La. 231, 28 So. 1009; Sherwin *v.* Colburn, 25 Vt. 613.

An assignee of a mortgagor cannot insist that money of the mortgagor, in the mortgagee's hands, should be used to pay off the mortgage, unless this was clearly contemplated by the parties, and the assignee made his purchase with the understanding that it should be so. Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243.

Compliance with preëxisting agreement.— In the absence of fraud, a third person cannot require an imputation of payment between creditors and a debtor to be changed

party cannot afterward be changed so as to injuriously affect the rights of third persons.[89] And if no specific appropriation of payments is made by either party until the enforceable rights of third persons holding under the debtor have been created, the creditor cannot so appropriate payments made by the debtor as to affect such rights, if, by a different appropriation, they can be protected.[90] So where the court is called upon to appropriate payments, the equities of third persons, although not controlling, should be considered.[91] Of course the parties cannot apply a payment to an invalid debt to the prejudice of a subsequent creditor.[92]

2. Guarantors, Sureties, Indorsers, and the Like.[93] Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons.[94] So where neither party applies the payment,

some time after it was made, in compliance with a preëxisting agreement. Merchants', etc., Bank *v.* Hervey Plow Co., 45 La. Ann. 1214, 14 So. 139.

In Louisiana it is held that the code rules as to application of payments where two debts are of the same nature and equally onerous cannot be enforced to the prejudice of third persons. Griffin *v.* His Creditors, 6 Rob. 216. See also Burbank *v.* Buhler, 108 La. 39, 32 So. 201.

Source of payment.— The creditor has a right to appropriate money to the extinguishment of the debt in payment of which it was given him, although the debtor had fraudulently obtained such money from another debtor who supposed he was paying the first named creditor. Tanner *v.* Lee, 121 Ga. 524, 49 S. E. 592; Thacher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480.

89. *Kansas.*— Pinney *v.* French, 67 Kan. 473, 73 Pac. 94.

Louisiana.— Boagni *v.* Wartelle, 50 La. Ann. 128, 23 So. 206.

New Jersey.—Paterson Sav. Inst. *v.* Brush, 29 N. J. Eq. 119; Smith *v.* Wood, 1 N. J. Eq. 74.

Pennsylvania.— Morton's Estate, 2 Del. Co. 194.

United States.— Bank of North America *v.* Meredith, 2 Fed. Cas. No. 893, 2 Wash. 47.

See 39 Cent. Dig. tit. "Payment," § 127.

90. Willis *v.* McIntyre, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574. See also Belcher *v.* J. I. Case Threshing Mach. Co., (Nebr. 1907) 111 N. W. 848; Crane Bros. Mfg. Co. *v.* Keck, 35 Nebr. 683, 53 N. W. 606; Terhune *v.* Colton, 12 N. J. Eq. 232 [*affirmed* in 12 N. J. Eq. 312]; Clark County Com'rs *v.* Springfield, 36 Ohio St. 643; Wiesenfeld *v.* Byrd, 17 S. C. 106; Thompson *v.* Brown, M. & M. 40, 31 Rev. Rep. 710, 22 E. C. L. 466.

91. State *v.* Sooy, 39 N. J. L. 539; Nashville First Nat. Bank *v.* National Surety Co., 130 Fed. 401, 64 C. C. A. 601, 66 L. R. A. 777.

92. Greene *v.* Tyler, 39 Pa. St. 361.

93. See also Principal and Surety.

Application between bonds with different sureties see Principal and Surety.

Misapplication of payments as discharging sureties see Principal and Surety.

Payment by principal as discharging the guarantor see, generally, Guaranty, 20 Cyc. 1476.

94. *Colorado.*— Boyd *v.* Watertown Agricultural Ins. Co., 20 Colo. 28, 76 Pac. 986.

Louisiana.— Robson *v.* McKoin, 18 La. Ann. 544.

Maine.— Murphy *v.* Webber, 61 Me. 478.

Massachusetts.— Dedham Bank *v.* Chickering, 4 Pick. 314; Brewer *v.* Knapp, 1 Pick. 332; Richardson *v.* Washington Bank, 3 Metc. 536.

Minnesota.— Allen *v.* Jones, 8 Minn. 202.

New York.— Harding *v.* Tifft, 75 N. Y. 461; Allen *v.* Culver, 3 Den. 284.

Pennsylvania.— Woods *v.* Sherman, 71 Pa. St. 100.

Tennessee.— Nelson *v.* Trigg, 3 Tenn. Cas. 733.

Virginia.— Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

United States.— Turner *v.* Yates, 16 How. 14, 14 L. ed. 824; Phillips *v.* Bossard, 35 Fed. 99. But see U. S. *v.* Linn, 26 Fed. Cas. No. 15,606, 2 McLean 501.

England.— Kirby *v.* Marlborough, 2 M. & S. 18, 14 Rev. Rep. 573. See also Wright *v.* Hickling, L. R. 2 C. P. 199, 36 L. J. C. P. 40; York City, etc., Banking Co. *v.* Bainbridge, 45 J. P. 158, 43 L. T. Rep. N. S. 732. See *In re* Sherry, 25 Ch. D. 692, 53 L. J. Ch. 404, 50 L. T. Rep. N. S. 227, 32 Wkly. Rep. 394.

See 39 Cent. Dig. tit. "Payment," § 128.

But where an accommodation note was pledged by the payee as collateral to secure his debts to the pledgee without notice of its nature, the maker is entitled as surety to require the pledgee to first credit his actual payments, and the amount of other collateral which he surrendered without his consent after notice that the note pledged was an accommodation note, before resorting to the accommodation note in the payment of his claim against the pledger. Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868.

Limitation of rule.— This rule applies to cases only where the principal makes the payment from funds which are his own and free from any equity in favor of the surety to have the money applied in payment of the

the court is not required to apply it so as to exonerate such third persons,[95] although their rights will be considered.[96] These rules are subject to the exception that where the payment, with the knowledge of the creditor, is derived from such third person, or from a fund connected with the secured debt, it must be applied thereto.[97] Where once appropriated by either party or both to the secured debt, the application cannot be changed as against the surety.[98]

VII. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

A. Nature of Defense. Payment in full is a valid affirmative defense,[99] although made before the maturity of the debt, the debtor having the privilege of paying the claim before it falls due.[1] It is matter in bar and not a set-off[2] or

debt for which he is liable. For instance, where the specific moneys paid to the creditor and applied on a debt of a principal for which the surety is not bound are the very moneys for the collection and payment of which the surety is bound, he is equitably entitled to have the moneys applied to the payment of the debt for which he is surety unless the creditor can show that he has a superior equity to have them applied as they were applied. Merchants' Ins. Co. *v.* Herber, 68 Minn. 420, 71 N. W. 624.

Application to voidable portion of debt.— Where the principal pays a part of the claim which is applied to that portion which is voidable but not void, the surety cannot object. Allen *v.* Jones, 8 Minn. 202.

Agreement between payee and surety.— Where a debtor directs an application to a secured debt, it must be so applied irrespective of any agreement between the payee and the surety. Trentman *v.* Fletcher, 100 Ind. 105.

Where a secured debt is not due, but a payment is directed to be applied thereon, the creditor cannot apply it to an unsecured debt. Wetherill *v.* Joy, 40 Me. 325. See also *supra*, VI, C, 2, a.

Where a wife executed a mortgage on her estate to secure advances to be made to her through her husband, the husband being allowed, by the terms of the bond, to use the advances in his own business, the mortgagees may apply payments made by the husband, without special instructions as to their application, to the satisfaction of his own debt to them, rather than to the mortgage of the wife. Greig *v.* Smith, 29 S. C. 426, 7 S. E. 610.

95. Hansen *v.* Rounsavell, 74 Ill. 238; Frazier *v.* Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516; National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Williams *v.* Rawlinson, 3 Bing. 71, 3 L. J. C. P. O. S. 164, 10 Moore C. P. 362, R. & M. 233, 28 Rev. Rep. 584, 11 E. C. L. 43. See also Pardee *v.* Markle, 111 Pa. St. 548, 5 Atl. 36, 56 Am. Rep. 299; Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940. But see Spade *v.* Wetterau, 8 Kulp (Pa.) 344, holding that the rule of law which, in the absence of appropriation by the parties, appropriates payments in the way most advantageous to the creditor, will not be applied to the prejudice of a surety.

96. Harding *v.* Tifft, 75 N. Y. 461; Marryatts *v.* White, 2 Stark. 101, 3 E. C. L. 334. See also Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628 [*affirming* 79 Ill. App. 413].

Where the oldest debt is also one on which there is a surety, the court will apply a payment to such debt in relief of such surety. Blackmore *v.* Granbery, 98 Tenn. 277, 39 S. W. 229; Ross *v.* McLauchlan, 7 Gratt. (Va.) 86.

97. Reed *v.* Boardman, 20 Pick. (Mass.) 441; Merchants' Ins. Co. *v.* Herber, 68 Minn. 420, 71 N. W. 624; Harding *v.* Tifft, 75 N. Y. 461.

The proceeds of collateral security given to secure a note cannot be applied to other debts of the maker, but must be applied on the note to the exoneration of the sureties. Elizabeth City First Nat. Bank *v.* Scott, 123 N. C. 538, 31 S. E. 819.

Payment by agent of indorser, where another note of the maker is surrendered by mistake, is to be applied on the note on which the payment was intended to be made. Maury *v.* Mason, 16 Fed. Cas. No. 9,314, 1 Hayw. & H. 400.

98. Miller *v.* Montgomery, 31 Ill. 350. See also Lyman *v.* Miller, 12 U. C. Q. B. 215.

99. Peterson *v.* Hubbard, (Cal. 1885) 9 Pac. 106. See Upton *v.* Starr, 3 Ind. 508. See also *infra*, VII, B, 2, a.

Payment of a later debt is no defense in an action on an earlier debt. Green *v.* Boudurant, 7 Mart. N. S. (La.) 229.

Failure to account for the proceeds of property delivered by the debtor to the creditor to be sold and applied on the debt does not show a payment in full. Conrad *v.* Huff, 58 Tex. 205.

Deceptive conduct in obtaining part payment of a debt already due is no defense to an action for the balance. Thompson *v.* Menck, 4 Abb. Dec. (N. Y.) 400 [*reversing* 22 How. Pr. 431].

1. Brent *v.* Fenner, 4 Ark. 160.

2. Day *v.* Clarke, 1 A. K. Marsh. (Ky.) 521; San Antonio, etc., Constr. Co. *v.* Davis, (Tex. Civ. App. 1898) 48 S. W. 754.

A plea which alleged payment by a sale of merchandise, and also that at the date of the filing of the suit by plaintiff against defendant the items were still due, was a plea of set-off and not of payment. Northington *v.* Granade, 118 Ga. 584, 45 S. E. 447.

counter-claim.[3] Part payment cannot be pleaded in bar of the entire cause of action.[4] Payment after suit brought may be pleaded in bar of the further maintenance of the action,[5] but it is too late to plead payment after judgment and an affirmance on appeal.[6] The debtor may be estopped to set up the defense of payment.[7]

B. Pleading[8] — **1. In Anticipation of Defense.**[9] Non-payment need not be alleged in the complaint[10] except where failure to pay is an essential element of the cause of action.[11] However, non-payment may be pleaded,[12] but by so pleading plaintiff does not relieve himself from the necessity of replying to a plea of payment.[13] Where there is a presumption of payment from lapse of time, it has been held that facts rebutting such presumption must be alleged in the bill.[14]

2. As Defense — a. Necessity. Payment is an affirmative defense which cannot be relied upon unless expressly pleaded,[15] and cannot be shown under a general

Reconvention.— Payment cannot be pleaded in reconvention. It must be pleaded as payment. House *v.* Croft, 8 Mart. N. S. (La.) 704.

3. Burke *v.* Thorne, 44 Barb. (N. Y.) 363. See also Hatzel *v.* Hoffman House, 2 N. Y. App. Div. 120, 37 N. Y. Suppl. 598.

Distinguished from counter-claim, etc., see *supra*, I.

4. Beebe *v.* Sutton, 7 Ark. 405; Indianapolis, etc., R. Co. *v.* Hyde, 122 Ind. 188, 23 N. E. 706; Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

5. Herod *v.* Snyder, 61 Ind. 453; Tillotson *v.* Preston, 3 Johns. (N. Y.) 229.

Amount.— Payment after commencement of suit must be in full of debt and costs to be available in bar. Goings *v.* Mills, 1 Ark. 11; Stevens *v.* Briggs, 14 Vt. 44, 39 Am. Dec. 209.

Date to which plea relates.— Where defendant has paid the amount claimed before expiration of the time to answer, his plea of payment relates to the time it was interposed, and not to the time the action was commenced. Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. (N. Y.) 681, 42 N. Y. Suppl. 14.

Payment is a peremptory exception which may be pleaded at any time before judgment. Reiners *v.* St. Ceran, 19 La. Ann. 207.

6. Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

7. Beals *v.* Hill, 58 N. H. 61, holding, however, that a defendant is not estopped to set up an assignment of property as a defense of payment, by reason of his having obtained a continuance of the action at a former term, upon his affidavit that he was advised by counsel, and believed that his claim for the assignment probably could not be allowed as a set-off, and that, for reasons stated, judgment should not be rendered against him before he had opportunity, in a pending suit on his claim, to obtain a judgment which might be set off against plaintiff's judgment.

8. **Accord and satisfaction** see Accord and Satisfaction, 1 Cyc. 340 *et seq.*

In actions on insurance policies see Insurance, and Cross-References Thereunder.

In particular common-law actions see Assumpsit, Action of, 4 Cyc. 350; Debt, Action of, 4 Cyc. 419 note 35.

Joining with plea of accord and satisfaction see Accord and Satisfaction, 1 Cyc. 342.

Nature of plea in action on an account see Accounts and Accounting, 1 Cyc. 483.

Payment of bond see Bonds, 5 Cyc. 833.

9. **In action to foreclose mortgage** see Mortgages, 27 Cyc. 1591.

In action for rent see Landlord and Tenant, 24 Cyc. 1211 note 86.

Pleading part payment in anticipation of defense of limitation see Limitations of Actions, 25 Cyc. 1394.

10. Kirk *v.* Roberts, (Cal. 1892) 31 Pac. 620; State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Hitchings *v.* Kayser, 65 N. Y. App. Div. 302, 72 N. Y. Suppl. 749 [*affirmed* in 171 N. Y. 636, 63 N. E. 1118]; Van Demark *v.* Van Demark, 13 How. Pr. (N. Y.) 372; Meating *v.* Tigerton Lumber Co., 113 Wis. 379, 89 N. W. 152.

11. Grant *v.* Sheerin, 84 Cal. 197, 23 Pac. 1094; State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Lent *v.* New York, etc., R. Co., 130 N. Y. 504, 29 N. E. 988; Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139 [*affirmed* in 181 N. Y. 258, 73 N. E. 1028]; Newton *v.* Browne, 6 Misc. (N. Y.) 603, 26 N. Y. Suppl. 83.

12. Bracket *v.* Wilkinson, 13 How. Pr. (N. Y.) 102.

13. Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

14. Hunt *v.* Forman, 2 Dana (Ky.) 471. But see Payne *v.* Hathaway, 3 Vt. 212, holding that presumption of payment from lapse of time cannot be claimed by a defendant on demurrer to a bill.

15. *Colorado.*— Gumaer *v.* Canon City First Nat. Bank, 38 Colo. 123, 88 Pac. 183; Florence Oil, etc., Co. *v.* Canon City First Nat. Bank, 38 Colo. 119, 88 Pac. 182; Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008.

Indiana.— Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Coe *v.* Givan, 1 Blackf. 367. But see Mahon *v.* Gardner, 6 Blackf. 319.

Louisiana.— Ruhlman *v.* Smith, 15 La. Ann. 670; D'Arensbourg *v.* Chauvin, 6 La. Ann. 778; Davis *v.* Davis, 17 La. 259.

Minnesota.— Farnham *v.* Murch, 36 Minn. 328, 31 N. W. 453.

Missouri.— Edwards *v.* Giboney, 51 Mo.

denial.[16] So a particular appropriation of payments by a party, where relied on, must be pleaded,[17] as must objections to appropriation of payments.[18] Where lapse of time is relied on as evidence of payment there are cases holding that it need not be pleaded,[19] although the general rule is that in such a case payment must be averred as in other cases.[20] Payment must be set up by plea or answer and not by demurrer.[21] In some states notice of payment under a general issue takes the place of a special plea and supplies its place.[22]

b. Requisites and Sufficiency[23] — (i) *In General.* The general allegation of payment is ordinarily held sufficient as a plea of payment,[24] but if particulars are

129. But see Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355, holding that evidence of the proper payment of a check to the holder thereof is admissible, without being pleaded, in an action by the drawer against the bank for the conversion of the check.

Nebraska.— Ashland Land, etc., Co. *v.* May, 51 Nebr. 474, 71 N. W. 67.

New Jersey.— Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102.

New York.— Schackter *v.* Kukowsky, 117 N. Y. App. Div. 750, 102 N. Y. Suppl. 1028 (where no answer, evidence of payment not admissible); Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139 [*affirmed* in 181 N. Y. 258, 73 N. E. 1028]; Rosenstock *v.* Dessar, 85 N. Y. App. Div. 501, 83 N. Y. Suppl. 334; Texier *v.* Gouin, 5 Duer 389; Rogers *v.* T. H. Simonson, etc., Co., 45 Misc. 323, 90 N. Y. Suppl. 298; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Suppl. 373; Eldridge *v.* Husted, 22 Misc. 534, 49 N. Y. Suppl. 1019 [*reversed* on other grounds in 24 Misc. 177, 52 N. Y. Suppl. 681]; Glickman *v.* Loew, 20 Misc. 401, 45 N. Y. Suppl. 1040.

Ohio.— Lord *v.* Graveson, 26 Ohio Cir. Ct. 371; Flowers *v.* Slater, 2 Ohio Dec. (Reprint) 336, 2 West. L. Month. 445.

Texas.— Richey Grocery Co. *v.* Warnell, (Civ. App. 1907) 103 S. W. 419; Hander *v.* Baade, 16 Tex. Civ. App. 119, 40 S. W. 422.

West Virginia.— Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291; Arnold *v.* Cole, 42 W. Va. 663, 26 S. E. 312.

Wisconsin.— Gardner *v.* Avery Mfg. Co., 117 Wis. 487, 94 N. W. 292.

Canada.— Gooderham *v.* Chalmers, 1 U. C. Q. B. 172. See also Wark *v.* Curtis, 10 Manitoba 201.

See 39 Cent. Dig. tit. "Payment," § 143.

Compare Alabama Jail, etc., Co. *v.* Marion County, 145 Ala. 684, 40 So. 100.

Reply.— So where plaintiff desires to rely upon a payment as a defense to a counterclaim, he must plead payment. Wooley *v.* Bell, (Tex. Civ. App. 1902) 68 S. W. 71.

When rule not applicable.— Where plaintiff alleges an assignment of a note to defendant, who agreed to pay the amount thereof, when collected, to plaintiff, and that it was collected, defendant may prove that he took the note to apply on a debt due him from plaintiff, without a special plea of payment, as such evidence would show that the debt sued upon never existed. Craddock *v.* Godding, 10 Colo. App. 115, 50 Pac. 369.

Where a payment of interest is relied on as a defense it must be specially pleaded. Junge *v.* Bowman, 72 Iowa 648, 34 N. W. 612.

Set-off.— Payment need not be pleaded where the matter pleaded is a set-off. Ruzeoski *v.* Wilrodt, (Tex. Civ. App. 1906) 94 S. W. 142.

16. See *infra*, VII, B, 4, b, (II).

17. Rives *v.* Habermacher, 1 Tex. App. Civ. Cas. § 747.

18. Rundlett *v.* Weeber, 3 Gray (Mass.) 263.

19. Hepburn's Case, 3 Bland (Md.) 95; Wingett's Appeal, 122 Pa. St. 486, 15 Atl. 863.

20. Tibbs *v.* Clark, 5 T. B. Mon. (Ky.) 526; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Austin *v.* Tompkins, 3 Sandf. (N. Y.) 22; Miner *v.* Beekman, 14 Abb. Pr. N. S. (N. Y.) 1; Stanley *v.* McKinzer, 7 Lea (Tenn.) 454, holding that it is immaterial whether the suit is at law or in equity.

A plea of the statute of limitations is not necessary. Calwell *v.* Prindle, 19 W. Va. 604; Sadler *v.* Kennedy, 11 W. Va. 187.

Where the form of action will not permit a plea of payment to be interposed, lapse of time may be relied on as evidence of payment without a plea of payment. Jackson *v.* Sackett, 7 Wend. (N. Y.) 94.

Exceptions to petition.— Presumption of payment from lapse of time cannot be taken advantage of by exceptions to a petition. Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. 39.

21. Dean *v.* Boyd, 86 Miss. 204, 38 So. 297; Austin *v.* Tompkins, 3 Sandf. (N. Y.) 22.

22. Buell *v.* Flower, 39 Conn. 462, 12 Am. Rep. 414. See also *infra*, VII, B, 2, b, (II).

23. **In actions on commercial paper** see COMMERCIAL PAPER, 8 Cyc. 178 *et seq.*

In suit to enforce mechanic's lien see MECHANICS' LIENS, 27 Cyc. 392.

24. Sprigg *v.* Barber, 122 Cal. 573, 55 Pac. 419; Goss *v.* Calkins, 164 Mass. 546, 42 N. E. 96; Swett *v.* Southworth, 125 Mass. 417; Loveridge *v.* Larned, 7 Fed. 294. See also Hays *v.* Dickey, 67 Ark. 169, 53 S. W. 887; Brown *v.* Rash, (Tex. Civ. App. 1907) 101 S. W. 1041. But see Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77, 6 L. R. A. N. S. 658.

Limitations of rule.— A defendant's allegation in her answer that she has "advanced" a stated sum to plaintiff does not amount to a plea of payment. Dickson *v.* Dickson, 32 La. Ann. 272. An allegation that the sum due has been "substantially, if not wholly"

alleged the averments must be definite and certain.[25] The plea need not allege the amount paid,[26] nor the place of payment,[27] nor state by whom,[28] or to whom,[29] the payment was made. So it need not allege the exact date of payment,[30] although it must state, to constitute a bar to the action, that the payment was before commencement of the action.[31] If payment is made other than in money,

paid is insufficient. Hardin County *v.* Weels, 108 Iowa 174, 78 N. W. 908. An allegation of payment in an answer, without showing that it was made on account of the claim sued upon, is insufficient. Esch *v.* Hardy, 22 Minn. 65.

Plea by intervener.— In an action on a note, a plea by an intervener, setting up that defendant had on a certain day fully accounted with plaintiff and fully discharged the note to the full satisfaction of plaintiff, and any cause of action or right of lien that may ever have existed between plaintiff and defendant by and under the note, is sufficient to admit evidence of satisfaction. Brown *v.* Mitchell, 1 Tex. Unrep. Cas. 373.

Pleas held insufficient.— Alabama Jail, etc., Co. *v.* Marion County, 145 Ala. 684, 40 So. 100.

25. Louden *v.* Birt, 4 Ind. 566; Nugent *v.* Martin, 1 Tex. App. Civ. Cas. § 1173. See also Nance *v.* Winship Mach. Co., 94 Ga. 649, 21 S. E. 901; Lowry *v.* Drake, 1 Dana (Ky.) 46; Kelly *v.* Ernest, 26 N. Y. App. Div. 90, 49 N. Y. Suppl. 896; Jaffray *v.* Hunter, 15 N. Y. App. Div. 615, 44 N. Y. Suppl. 639; Kington *v.* Kington, 2 Dowl. P. C. N. S. 799, 12 L. J. Exch. 248, 11 M. & W. 233.

Payment as garnishee.— A plea of payment, as garnishee of plaintiff, must show that defendant answered on oath and admitted his indebtedness in the proceedings in garnishment, and that the debt then acknowledged was the debt in controversy. Reed *v.* Cage, 4 How. (Miss.) 253. See also Minor *v.* Rogers Coal Co., 25 Mo. App. 78.

Payment of "sum then demanded."— An averment in an answer that defendant, before the commencement of the action, paid the "sum then demanded" to plaintiff's agent, is not a good plea of payment, as the whole sum sued for may not have been demanded at that time. Toledo Agricultural Works *v.* Work, 70 Ind. 253.

Amounts and to whom paid.—Where a plea of payment specifies the amounts and names of the parties in plaintiff's employment to whom, at his request, payments have been made, it is sufficiently explicit. Ward *v.* Acklen, 9 La. Ann. 443.

Receipt and acceptance by creditor.— If payment is relied on, the more usual form is to allege it, saying nothing of the reception of the money. Breck *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222.

Part payment.—An averment of an answer that the complaint omits certain items of credit is not sufficient, where the items are not specified. Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634.

Payment of a certain sum pleaded to two counts, without alleging how much of the said sum is paid on each count, is not demurrable. Brown *v.* Ross, 3 U. C. Q. B. 158.

As dependent on knowledge.— Where the facts as to the payments, and the amount thereof, are particularly within the scope of the creditor, the same strictness of pleading is not required in an action by a third person to compel a creditor to repay sums paid to him. Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100.

Payment to a third person.— Linton *v.* Walker, 8 Fla. 144, 71 Am. Dec. 105; Cooper *v.* Stinson, 5 Minn. 201.

26. Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906; Cranor *v.* Winters, 75 Ind. 301; Demuth *v.* Daggy, 26 Ind. 341; Holmes *v.* Deplaigne, 23 La. Ann. 238.

27. Holmes *v.* Deplaigne, 23 La. Ann. 238.

Matter of form.— In an answer alleging payment, an averment of the place of payment is matter of form, and not of substance. Its omission is not fatal. Brown *v.* Gooden, 16 Ind. 444.

28. Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906, holding that it is not necessary to allege that payment was made by the administrator of a decedent's estate, if the answer avers that plaintiff's claim was paid with moneys received from the estate, with the administrator's consent.

29. Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906; State *v.* Early, 81 Ind. 540; Cranor *v.* Winters, 75 Ind. 301; Demuth *v.* Daggy, 26 Ind. 341. But see Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527, holding that where suit is brought in the name of the person having the legal right, and the code provides that the beneficiary must be considered as the sole party in the record, a plea of payment not alleging a payment to the beneficial plaintiff, or to the person holding the legal title before the former acquired his right, is demurrable. *Contra*, Nill *v.* Comparet, 15 Ind. 243. And see COMMERCIAL PAPER, 8 Cyc. 179.

30. Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906; Cranor *v.* Winters, 75 Ind. 301; Demuth *v.* Daggy, 26 Ind. 341. But see Tyre *v.* Mulvena, 2 Marv. (Del.) 295, 43 Atl. 172. *Contra*, Holmes *v.* Deplaigne, 23 La. Ann. 238.

Payment to assignor.— In an action by the assignee of a written instrument, a plea of payment to the assignor, without alleging that such payment was made before notice of the assignment, is bad. Indianapolis, etc., R. Co. *v.* Hyde, 122 Ind. 188, 23 N. E. 706.

31. Farmers' Bank *v.* Orr, (Ind. App. 1899) 55 N. E. 35. See also O'Neal *v.* Phillips, 83 Ga. 556, 10 S. E. 352; Matthewson *v.* Henderson, 13 U. C. C. P. 96. And see Young *v.* Park, 6 J. J. Marsh. (Ky.) 540.

At common law the plea of payment must

and so pleaded, the particulars should be alleged,[32] and acceptance thereof by the creditor as payment should generally be alleged.[33] Ordinarily the plea, at common law, concluded to the country.[34] The plea must not be inconsistent in itself,[35] as by denying indebtedness,[36] or be contradictory of other pleas.[37] It is not sufficient merely to plead evidence going to show payment,[38] although the inclusion of such allegations, where coupled with an averment of payment, does not make the plea demurrable.[39] Where a complaint alleges non-payment, a denial of such allegation is proper, as a part of the defense of payment,[40] although the negative averment of non-payment cannot ordinarily be put in issue by a mere general denial.[41] The presumption of payment from lapse of time should be raised by a plea of payment,[42] and not by merely stating the facts from which the presumption is claimed to arise,[43] nor by a plea of limitations.[44] The plea of payment may be directed to a particular part of the demand and another plea to the other part.[45] Where a payment is made by an agent of the debtor, it is proper to allege the payment on information and belief.[46] If the facts alleged in the plea constitute in law a payment, it is immaterial that the plea characterizes the legal consequences flowing from those facts as not being a payment.[47] And on the same theory the mere calling a defense of payment a counter-claim does not make it so.[48] If the plea is indefinite and uncertain it should not be stricken out,[49] but should be ordered to be made more specific.[50]

allege that the payment was made either on the day the money was stipulated to be paid or on some day between that day and the date of the writing upon which the action is founded. McWaters *v.* Draper, 5 T. B. Mon. (Ky.) 494. By statute, however, a plea of payment after the day when the debt is due must aver payment of the whole sum then due. McWaters *v.* Draper, *supra*.

32. See Carroll *v.* Weaver, 65 Conn. 76, 31 Atl. 489; Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667 (holding that a plea that a draft was given in payment is not demurrable in not alleging that the draft was negotiable); Wardlaw *v.* McConnell, 46 Ga. 273 (holding that a plea of payment by transfer of notes and accounts need not set them out); Hart *v.* Crawford, 41 Ind. 197 (holding that a plea of payment in goods and merchandise is not demurrable for failure to state either the kind or quantity of goods). See also Elm City Lumber Co. *v.* Mackenzie, 77 Conn. 1, 58 Atl. 10. But see Louden *v.* Birt, 4 Ind. 566, holding that the plea averring payment actually made in any manner is sufficient.

33. Blunt *v.* Williams, 27 Ark. 374; Corbett *v.* Hughes, 75 Iowa 281, 39 N. W. 500; Brandt *v.* Thurber, 1 Tex. App. Civ. Cas. § 640. See also Upton *v.* Paxton, (Iowa 1886) 29 N. W. 809, holding a particular averment not equivalent to one that the creditor received the notes in payment of the indebtedness. And see COMMERCIAL PAPER, 8 Cyc. 180, 181.

Return of note.—An answer to a complaint for money lent, which alleges merely that a check or bill of exchange was given by defendant for the amount due, and that it has not been returned but is still outstanding, does not make out a perfect defense, unless it also shows affirmatively that it is out of the possession or control of plaintiff. Strong *v.* Stevens, 4 Duer (N. Y.) 668.

34. Henderson *v.* Southall, 4 Call (Va.) 371; Kinsley *v.* Monongalia County Ct., 31 W. Va. 464, 7 S. E. 445.

35. Witter *v.* McNiel, 4 Ill. 433.

36. Witter *v.* McNiel, 4 Ill. 433.

37. Jones *v.* Bishop, 12 La. 397, holding that pleas of general issue and payment are contradictory and the latter will prevail.

38. Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604.

39. Johnson *v.* Breedlove, 104 Ind. 521, 6 N. E. 906.

40. Flournoy *v.* Osgood, 99 N. Y. App. Div. 270, 90 N. Y. Suppl. 972.

41. See *infra*, VII, B, 4, b, (II).

42. Parisen *v.* New York, etc., R. Co., 65 N. J. L. 413, 47 Atl. 477; Pattison *v.* Taylor, 8 Barb. (N. Y.) 250. See also Manning *v.* Meredith, 69 Iowa 430, 29 N. W. 336; Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124. *Compare* Brady *v.* Begun, 36 Barb. (N. Y.) 533; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 545.

43. Pattison *v.* Taylor, 8 Barb. (N. Y.) 250.

44. Parisen *v.* New York, etc., R. Co., 65 N. J. L. 413, 47 Atl. 477; Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302.

45. Rohr *v.* Anderson, 51 Md. 205.

46. Fargo First Nat. Bank *v.* Roberts, 2 N. D. 195, 49 N. W. 722.

47. Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66.

48. Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940.

49. May *v.* Taylor, 22 Tex. 348; Holliman *v.* Rogers, 6 Tex. 91. See also Cherry *v.* Rawson, 49 Ga. 228.

50. Farmers', etc., Bank *v.* Sherman, 6 Bosw. (N. Y.) 181 [*affirmed* in 33 N. Y. 69]. See also Tyre *v.* Mulvena, 2 Marv. (Del.) 295, 43 Atl. 172, holding that, where the date in a plea of payment is in blank, plaintiff is entitled on demand to have it stated.

(II) *Account or Bill of Particulars.* Generally a plea of payment need not include an account, or a bill of items, or particulars.[51]

c. Affidavit of Defense. In those states where an affidavit of defense is interposed, the sufficiency thereof is in general governed by the ordinary rules relating to such affidavits.[52] It seems that more particularity is required than in ordinary pleas, it being held that all the circumstances of the alleged payment must be set forth with certainty and particularity and not generally and inferentially.[53] It is not sufficient to allege that the debt has been paid and that nothing is owing, but the affidavit must state with particularity the time, amount, and manner of payment, and the persons to and by whom it was made.[54] It is not enough to aver that the debtor has a receipt for money without alleging that he made payment, or that it was made for him.[55] If payment other than in money, as by note, bill, or check is alleged, it must be further stated that it was accepted by the creditor as payment.[56]

51. *Delaware.*— State *v.* Lobb, 3 Harr. 421.

Illinois.— Hays *v.* Smith, 4 Ill. 427.

Massachusetts.— Wilby *v.* Harris, 13 Mass. 496.

Mississippi.— Price *v.* Sinclair, 5 Sm. & M. 254; Webster *v.* Tiernan, 4 How. 352; Prim *v.* Kittridge, Walk. 390. But see Miller *v.* Brooks, 4 Sm. & M. 175, holding that a plea of payment concluding, "and he herewith files his bill of particulars, and will insist upon them, as an offset," no such bill being filed, may be treated as a nullity.

Texas.— Able *v.* Lee, 6 Tex. 427.

West Virginia.—Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

See 39 Cent. Dig. tit. "Payment," § 150.

Statutory provisions.— Ariz. Rev. St. par. 742, requiring a defendant pleading payment to file an account stating the nature of the payment and the several items thereof, is only applicable where defendant proposes to prove items of payment, and hence does not preclude him from proving a single payment in full under the mere allegation that he had fully paid plaintiff. Cheda *v.* Skinner, 6 Ariz. 196, 57 Pac. 64. In Virginia and West Virginia defendant cannot prove payment under a plea of *nil debet* or *non assumpsit* unless he files with his plea such a descriptive account as is required by the statute. Richmond City, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148; Rice *v.* Annatt, 8 Gratt. (Va.) 557; Hunter *v.* Snyder, 11 W. Va. 198.

52. See Pleading.

53. Bube *v.* Hauck, 16 Lanc. L. Rev. (Pa.) 412. See also Wilde *v.* Morrell, 198 Pa. St. 411, 48 Atl. 264, 53 L. R. A. 329; Ziegler *v.* McFarland, 147 Pa. St. 607, 23 Atl. 1045; Langfeld *v.* Lyon, 132 Pa. St. 441, 19 Atl. 343; Snyder *v.* Powers, 3 Walk. (Pa.) 277; Coulston *v.* Bertolet, 7 Pa. Cas. 592, 12 Atl. 255; Betz *v.* Gilmore, 1 Wkly. Notes Cas. (Pa.) 145; Belcher *v.* Zane, 1 Wkly. Notes Cas. (Pa.) 42.

An affidavit of defense, averring payment "by check, notes, and in cash and merchandise returned and accepted by said plaintiff," is not sufficiently particular. McCann *v.* Keane, 1 Pa. Co. Ct. 143. An affidavit setting forth that defendant held a due-bill of plaintiff, promising to pay in trade, in the articles for which plaintiff sued, a certain sum, which sum had been offered by defendant to plaintiff as part payment and refused, is sufficient. Jones *v.* Bely, 2 Wkly. Notes Cas. (Pa.) 139. An affidavit alleging payment of part, and tender of balance to plaintiff's attorney, is sufficient. Derr *v.* Coar, 1 Wkly. Notes Cas. (Pa.) 433.

54. McCracken *v.* Pittsburgh First Reformed Presb. Cong., 111 Pa. St. 106, 2 Atl. 94; McGuire *v.* Conway, 10 Pa. Co. Ct. 298; Brandon *v.* Brandon, 2 Pa. Co. Ct. 46; Blackwood *v.* Dean, 5 Lanc. L. Rev. (Pa.) 213; People's State Bank *v.* Harper, 30 Pittsb. Leg. J. N. S. (Pa.) 229; Baird *v.* Adams, 1 Wkly. Notes Cas. (Pa.) 144. *Contra*, see Erlicher *v.* Lawson, 5 Wkly. Notes Cas. (Pa.) 473; Smith *v.* Potter, 1 Wkly. Notes Cas. (Pa.) 51.

In Delaware, where the statute requires the affidavit to specify the amount of payments, plaintiffs are entitled to judgment nothwithstanding the affidavit, where it fails to state the amount of payment. Watson *v.* Southwick, 2 Marv. 254, 43 Atl. 93. See Ridings *v.* McMenamin, Pennew. (Del.) 15, 39 Atl. 463.

Excuses.— An affidavit of defense which states that defendant paid plaintiffs one hundred and sixty dollars on account of the debt sued on, that his partner afterward paid the rest of it, that plaintiffs had admitted full payment, and that, owing to his absence from home and want of access to his books, defendant is unable to give the dates of these payments, is a sufficient affidavit of defense. Langfield *v.* Lyon, 132 Pa. St. 441, 19 Atl. 343.

55. Building Assoc. *v.* Philips, 1 Leg. Rec. (Pa.) 104.

56. Berlin Iron Bridge Co. *v.* Bonta, 180 Pa. St. 448, 36 Atl. 867; Philadelphia *v.* Stewart, 9 Pa. Dist. 228, 23 Pa. Co. Ct. 552; Ulman *v.* Mealy, 19 Wkly. Notes Cas. (Pa.) 87. See also Stansbury *v.* Oppenheimer, 19 Wkly. Notes Cas. (Pa.) 182; Gillingham *v.* Koppella, 13 Wkly. Notes Cas. (Pa.) 281. And see Hecla Card, etc., Co. *v.* Potsdamer, 16 Wkly. Notes Cas. (Pa.) 195.

d. Replication or Reply.[57] Where the complaint alleges non-payment and the answer avers payment, no reply is necessary inasmuch as the plea is in effect a general denial.[58] And in many jurisdictions a reply is not necessary where payment is pleaded as new matter,[59] while in other jurisdictions a reply is necessary.[60] Even after trial, it has been held proper to permit a *nunc pro tunc* entry of a reply.[61] The sufficiency of the replication or reply is governed by the rules relating to such pleadings in civil actions in general.[62] If one of several replications

57. See, generally, PLEADING.

58. Logan County Nat. Bank *v.* Barclay, 104 Ky. 97, 46 S. W. 675, 20 Ky. L. Rep. 773; Ermert *v.* Dietz, 44 S. W. 138, 19 Ky. L. Rep. 1639; McArdle *v.* McArdle, 12 Minn. 98. See also Burton *v.* Hill, 4 Greene (Iowa) 379.

59. Kirk *v.* Woodbury County, 55 Iowa 190, 7 N. W. 498; Burke *v.* Thorne, 44 Barb. (N. Y.) 363; Bracket *v.* Wilkinson, 13 How. Pr. (N. Y.) 102; Reilay *v.* Thomas, 11 How. Pr. (N. Y.) 266; Hickman *v.* Painter, 11 W. Va. 386.

In New York plaintiff is not permitted to reply to an answer setting up payment either in whole or in part (Bracket *v.* Wilkinson, 13 How. Pr. 102), although where the answer contains new matter, the court, in its discretion, may require a reply (Mercantile Nat. Bank *v.* Corn Exchange Bank, 73 Hun 78, 25 N. Y. Suppl. 1068).

Affirmative asserted by defendant.— Plaintiff, in an action on a contract under seal, alleged that defendant had not paid the sum therein agreed upon, and defendant pleaded *non est factum*, and payment. It was held that issue as to payment could be joined on these pleadings alone, although the affirmative of the issue is asserted by defendant. McCart *v.* Regester, 68 Md. 429, 13 Atl. 361.

Necessity for similiter.— Where payment is pleaded, plaintiff may, without the formal addition of the similiter, proceed to trial as though the issue had been formally joined. Kinsley *v.* Monongalia County Ct., 31 W. Va. 464, 7 S. E. 445; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

60. *Indiana.*— Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620.

Mississippi.— Rushing *v.* Key, 4 Sm. & M. 191.

Missouri.— See Hutchison *v.* Patrick, 3 Mo. 65; Manifee *v.* D'Lashmutt, 1 Mo. 258; Cordner *v.* Roberts, 58 Mo. App. 440. But see Holzbauer *v.* Heine, 37 Mo. 443.

Ohio.— Knauber *v.* Wunder, 5 Ohio Dec. (Reprint) 516, 6 Am. L. Rec. 366.

Oregon.— Minard *v.* McBee, 29 Oreg. 225, 44 Pac. 491; Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

See 39 Cent. Dig. tit. "Payment," § 149.

In Pennsylvania, the replication to the plea of payment with leave, etc., is merely formal, and the cause is substantially at issue, within a rule of court which declares that the cause shall be considered at issue without a formal joinder, where a substantial issue is raised by the pleadings. Beale *v.* Buchanan, 9 Pa. St. 123.

In action of debt see DEBT, ACTION OF, 13 Cyc. 419.

61. Lockwood *v.* Flanagan, 2 Hall (N. Y.) 584; Neely *v.* Cummins, 8 Ohio Dec. (Reprint) 478, 8 Cinc. L. Bul. 191.

62. See PLEADING. See also Alexander *v.* Byers, 19 Ind. 301; Thompson *v.* Griffin, 69 Tex. 139, 6 S. W. 410.

Fraud.— To a plea of payment and set-off, relying upon a note executed by plaintiff to a third person, and assigned to defendant, plaintiff may reply that the assignment was obtained by fraud. Hurd *v.* Earl, 6 Blackf. (Ind.) 39. Where an answer alleges payment, a reply referring for facts to a paragraph of the answer in which satisfaction by way of exchange is pleaded, and alleging that such exchange had been made through fraud practised on plaintiff by defendant, is bad, as it is not a good reply to the allegation of payment. Atchinson *v.* Lee, 75 Ind. 132.

Receipt used for different purpose than intended.— Where a receipt purporting to be in full of demands is pleaded in bar, it is sufficient replication that the receipt was given for a specified purpose, and was now used for a different purpose, in violation of the intention of the parties. Tucker *v.* Baldwin, 13 Conn. 136, 33 Am. Dec. 384.

Allegation that payment was part payment.— Where the answer alleges that a certain sum was received by plaintiff in settlement for goods sold, a reply alleging that such sum was not accepted in full, but in part payment only, of which fact defendants had due notice, is not demurrable, although a general denial would have sufficed. Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030.

Verification.— Where a plea of payment is filed, a replication supported by a receipt signed by plaintiff, and alleging fraud or mistake in such receipt, need not be supported by affidavit. Swann *v.* Muschke, 42 Tex. 342. A plea of payment, on the written order of plaintiff and replication not sworn to, denying the payment, does not put the execution of the order in issue. Early *v.* Patterson, 4 Blackf. (Ind.) 449.

Joining issue on bill of particulars.— A replication to a plea of payment, which only puts in issue matters contained in a bill of particulars filed with the plea, and not the matter stated in the plea, is bad. Vanzant *v.* Shelton, 40 Miss. 332.

The words, "and the plaintiff doth the like," cannot be taken as a traverse of a plea of payment. Betts *v.* Francis, 1 Ill. 165.

A general replication to a plea of payment does not of itself constitute an issue, unless

to a plea of payment is good, it is sufficient to sustain the action as against such defense.[63]

e. Demurrer. A plea of payment is not subject to general demurrer,[64] and it follows that the objection that the plea fails to specify the time of the payment can be urged only by special demurrer.[65] So a plea of part payment with a prayer for judgment is subject to a special but not a general demurrer.[66]

3. Construction and Operation. The plea of payment does not put in issue the debtor's original legal liability,[67] but admits the cause of action and that the debt once existed,[68] so as to put the burden of proof on the party pleading payment.[69] Specific statements of fact in regard to payment will control the general allegation.[70] The construction and operation of particular allegations in the complaint,[71] answer,[72] or reply[73] is governed by no fixed rules other than those relating to the construction and operation of pleadings in civil actions in general.[74] Plaintiff does not discontinue his action by replying to a plea of part payment, without taking judgment for the part of the debt unanswered.[75]

4. Issues, Proof, and Variance — a. In General.[76] Payment is a material issue,[77] and material matters relating to the payment, alleged by a party, must be proved by him.[78]

it be so treated by the parties. Nadenbousch *v.* McRea, Gilm. (Va.) 228.

63. Hurd *v.* Earl, 6 Blackf. (Ind.) 39.

64. Buist *v.* Fitzsimons, 44 S. C. 130, 21 S. E. 610.

65. Baer *v.* Christian, 83 Ga. 322, 9 S. E. 790.

66. Sherman *v.* Gassett, 9 Ill. 521.

67. Loose *v.* Loose, 36 Pa. St. 538.

68. Robinson *v.* Landrum, 10 La. Ann. 539; Jones *v.* Bishop, 12 La. 397; Lokken *v.* Miller, 9 N. D. 512, 84 N. W. 368; Long *v.* Rhoads, 126 Pa. St. 378, 17 Atl. 622; Gilinger *v.* Kulp, 5 Watts & S. (Pa.) 264; Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694. See also Harris *v.* Merz Architectural Iron Works, 82 Ky. 200.

An allegation in a plea of payment of the precise amount of a writing obligatory sued on is a clear admission of such instrument. Murphy *v.* Byrd, 17 Fed. Cas. No. 9,947*b*, Hempst. 221.

Admission of amount.— The plea of payment is not an admission of the precise amount alleged to be due. Mulholland *v.* Morley, 7 Can. L. J. 323.

69. See *infra*, VII, C, 1.

70. Hewitt *v.* Powers, 84 Ind. 295.

71. White *v.* Smith, 46 N. Y. 418 [*reversing* 1 Lans. 469].

An allegation in a declaration of the acknowledgment of the receipt of money by defendant as the consideration of a contract to deliver goods is equivalent to an allegation of payment. Barnett *v.* Gholson, 9 Port. (Ala.) 381.

72. *California.*— Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213.

Delaware.— Jones *v.* Wells, 2 Houst. 223, effect of memorandum plea of payment.

Georgia.— Wimpy *v.* Gaskill, 76 Ga. 41, plea held but an enlargement of the plea of general issue and not a plea of payment.

Kentucky.— Bishop *v.* Lawrence, 85 Ky. 25, 2 S. W. 499, 8 Ky. L. Rep. 643.

West Virginia.— Karnes *v.* Lee, 4 W. Va. 387, averment as equivalent to allegation that debt was to be paid in Confederate money.

See 39 Cent. Dig. tit. "Payment," § 151.

Subsequent pleas.— A plea of payment will not preclude defendant from subsequently pleading any act of plaintiff by which the debt may have been extinguished. Adle *v.* Metoyer, 1 La. Ann. 254.

Admission as confined to plaintiff's statement.— A plea of payment with leave to a statement of debt does not admit any fact not mentioned in the statement. Schlatter *v.* Etter, 13 Serg. & R. (Pa.) 36.

Present payment.— An allegation that a note was given to provide for payment did not mean a present payment, but a provision for a future payment. Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 98 [*affirmed* in 37 N. Y. 409, 4 Transcr. App. 332, 4 Abb. Pr. N. S. 276].

73. Packard *v.* Denver Sav. Bank, 8 Colo. App. 204, 45 Pac. 511.

74. See Pleading.

75. Beebe *v.* Hershy, 7 Ark. 428.

76. General rules see Pleading.

77. Hill *v.* Roberts, 86 Ala. 523, 6 So. 39; Johnson *v.* McLain, 13 Fed. Cas. No. 7,395*a*, Hempst. 59, holding that issue taken on the plea of *solvit ad diem* is not immaterial.

Where payment is by check which was not paid, the reason why it was not paid by the bank on which it was drawn is immaterial, where no negligence was shown on the part of plaintiff. Smith *v.* Miller, 6 Rob. (N. Y.) 157 [*reversed* on other grounds in 43 N. Y. 171, 3 Am. Rep. 690].

78. Luxemburger Tuchfabriken *v.* Meyer, 31 N. Y. App. Div. 52, 52 N. Y. Suppl. 955, holding that where the dealings between parties to an action for goods sold have extended over a long time, defendant, who sets up the defense of payment, must show that his payments equal the whole sum which the dealings show him indebted for, or that they were

b. Evidence Admissible Under Pleadings — (i) *In General.*[79] Under a plea of payment, while the pleader cannot give evidence tending to disprove the cause of action alleged to have been paid,[80] any matters may be given in evidence which tend to show payment.[81] Evidence of the amount paid and the time and circumstances of its payment is admissible under the general allegation of payment.[82] Likewise, evidence of a partial payment is admissible as a defense *pro tanto*,[83] as is evidence of payment other than in money,[84] or evidence of application of

to apply upon the particular goods for which a recovery is sought. See also *infra*, VII, C, 1.

79. See also Commercial Paper, 8 Cyc. 202.

80. Hamilton *v.* Moore, 4 Watts & S. (Pa.) 570.

81. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151 (holding that evidence is admissible that plaintiff ordered defendant's secretary to collect the debt and apply it on an amount due him from plaintiff and that he did so); Hannon *v.* State, 9 Gill (Md.) 440 (evidence to show amount of debt admissible).

Evidence not tending to show payment.— Under plea of payment of note sued on by collection of collateral, defendant cannot prove that, although the collateral notes had not been paid, the makers thereof were solvent when the notes were given plaintiff, and that he neglected to sue thereon till said makers became insolvent. Mercantile Bank *v.* Anderson, 27 N. Y. App. Div. 94, 50 N. Y. Suppl. 176.

Evidence of a judgment against plaintiff and against defendant as his garnishee is inadmissible. Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

In Pennsylvania, when it is desired to prove an equitable payment or defense, as distinguished from actual payment in money or something accepted as such, the plea of payment must be with leave to introduce an equitable defense, or there must be notice of particulars. Covely *v.* Fox, 11 Pa. St. 171; Erwin *v.* Leibert, 5 Watts & S. (Pa.) 103. See also Steiner *v.* Erie Dime Sav., etc., Co., 98 Pa. St. 591; Latapee *v.* Pecholier, 14 Fed. Cas. No. 8,101, 2 Wash. 180. For instance, the acceptance of a collateral security which is lost through the laches of the creditor is not admissible under the naked plea of payment. Covely *v.* Fox, 11 Pa. St. 171. Reference in the plea of payment to an affidavit of defense filed is not a notice of special matter. Erwin *v.* Leibert, 5 Watts & S. (Pa.) 103. Under the plea of payment with leave, etc., defendant can show that he has paid the debt or that he has an equitable defense to the action. Smaltz *v.* Ryan, 112 Pa. St. 423, 3 Atl. 772; Steiner *v.* Erie Dime Sav., etc., Co., 98 Pa. St. 591; Loose *v.* Loose, 36 Pa. St. 538. Unliquidated cross demands growing out of the same transaction may be shown. Uhler *v.* Sanderson, 38 Pa. St. 128; Lazarus *v.* George, 3 Luz. Leg. Reg. (Pa.) 143. Such a plea admits evidence of anything which proves fraud, mistake, or want or failure of consideration. Uhler *v.* Sanderson, *supra*. But evidence of the pendency of an attachment against the payee of the note, and served on defendants as garnishees, cannot be given. Adams *v.* Avery, 2 Pittsb. (Pa.) 77.

82. Holmes *v.* Deplaigne, 23 La. Ann. 238.

Payment by agent.— In an action to recover a debt under an answer expressly averring that whatever was due to plaintiff had been paid, payment by any agent may be proved. Wolcott *v.* Smith, 15 Gray (Mass.) 537.

83. Elm City Lumber Co. *v.* Mackenzie, 77 Conn. 1, 58 Atl. 10; Keyes *v.* Fuller, 9 Ill. App. 528; Rohr *v.* Anderson, 51 Md. 205; Gooderham *v.* Chalmers, 1 U. C. Q. B. 172. *Contra*, Hamilton *v.* Coons, 5 Dana (Ky.) 317.

Evidence of an agreement that an item in the nature of a cross demand should be credited as a payment *pro tanto* is admissible under a plea of payment. McCurdy *v.* Middleton, 90 Ala. 99, 7 So. 655.

84. *Arkansas.*— Bush *v.* Sproat, 43 Ark. 416.

Connecticut.— Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211 note.

Delaware.— Mitchell *v.* Conrad, 1 Marv. 417, 41 Atl. 77.

Indiana.— Johnston *v.* Niemeyer, 10 Ind. 350, goods.

Iowa.— Tabor State Bank *v.* Kelly, 109 Iowa 544, 80 N. W. 520, holding that evidence of the ratification of the acceptance by an agent of property other than money as payment may be shown.

Louisiana.— Mandell *v.* Stephens, 9 Rob. 491.

Massachusetts.— Howe *v.* Mackay, 5 Pick. 44.

Missouri.— White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153.

Nebraska.— Hapgood Plow Co. *v.* Martin, 16 Nebr. 27, 19 N. W. 512 note.

New York.— See Stirna *v.* Beebe, 11 N. Y. App. Div. 206, 42 N. Y. Suppl. 614.

Pennsylvania.— Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573 (goods); Hobson *v.* Croft, 9 Pa. St. 363; Richabaugh *v.* Dugan, 7 Pa. St. 394. See also Grosholtz *v.* Stifel, 4 Phila. 16, holding that evidence of payment in goods is admissible even when the pleading alleges payment in money.

South Carolina.— Sullivan *v.* Sullivan, 20 S. C. 509.

See 39 Cent. Dig. tit. "Payment," § 156.

But see Heath *v.* White, 3 Utah 474, 24 Pac. 762; Smith *v.* Buchan, 27 U. C. Q. B. 106.

Contra.— Able *v.* Lee, 6 Tex. 427, holding

particular funds by agreement to the discharge of the debt,[85] or evidence to show that payment is presumed from lapse of time.[86] So payment to the assignor,[87] or to a deputy sheriff on a capias ad satisfaciendum,[88] or to a third person pursuant to an agreement with the creditor,[89] is admissible under a general plea of payment. On the other hand, evidence of accord and satisfaction,[90] or of any special arrangement growing out of independent contracts,[91] or of a set-off,[92] or of a counter-claim,[93] or of a gift,[94] or a discharge,[95] or evidence to excuse non-payment,[96] or evidence of the discontinuance of the suit,[97] or evidence of a payment made after suit brought where the plea did not state when the payment was made,[98] has been held inadmissible under a general plea of payment. Evidence that payment was accepted under duress is inadmissible under a general denial of payment in a reply.[99] Where the plea is payment by the giving of a note, the debtor may show the custom of the creditor in receiving notes to support his contention that the note was accepted as payment.[1] To explain a check introduced by defendant, and alleged by him to have been received by plaintiff in full payment, plaintiff need not file a sworn plea in the nature of a plea of *non est factum*.[2] A receipt in full may be introduced in evidence under a plea denying the agreement to pay, to show the improbability that such an agreement existed prior to the date of such receipt.[3]

(II) *Under General Issue or General Denial.* While in the common-law action of assumpsit evidence of payment was admissible under a plea of *non*

that proof of payment in land is not admissible under a general plea of payment.

Delivery and acceptance of personal property in payment of a demand may be shown under a general plea of payment. Howe *v.* Mackay, 5 Pick. (Mass.) 44; Edmunds *v.* Black, 13 Wash. 490, 43 Pac. 330. *Contra*, Ulsch *v.* Muller, 143 Mass. 379, 9 N. E. 736.

Testamentary provision.— Under a plea of payment generally, in an action by a creditor against testator's estate, the defense can show that testator and the creditor agreed that the debt should be deemed paid by a testamentary provision in the creditor's favor, that such provision was made, and that the creditor had received the benefit of it. McLaughlin *v.* Webster, 141 N. Y. 76, 35 N. E. 1081.

85. Whittington *v.* Roberts, 4 T. B. Mon. (Ky.) 173.

86. Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124.

87. Shriner *v.* Lamborn, 12 Md. 170.

88. Boyce *v.* Young, 3 Harr. & M. (Md.) 84.

89. Fall *v.* Johnson, 8 S. D. 163, 65 N. W. 909.

90. *Arkansas.*— Owens *v.* Chandler, 16 Ark. 651.

Connecticut.— Kisham *v.* Nichols, 1 Root 75.

Indiana.— Jackson *v.* Olmstead, 87 Ind. 92.

Kentucky.— Hamilton *v.* Coons, 5 Dana 317.

Missouri.— Freiermuth *v.* McKee, 86 Mo. App. 64.

See 39 Cent. Dig. tit. "Payment," § 156.

91. Lockwood *v.* Sturdevant, 6 Conn. 373; Jennings *v.* Osborne, 2 N. Y. City Ct. 195; Morley *v.* Culverwell, Hurl. & W. 13, 4 Jur. 1163, 10 L. J. Exch. 35, 7 M. & W. 174.

92. *Louisiana.*— Maxwell *v.* Collier, 6 Rob. 86. But see Collins *v.* Pellerin, 6 La. Ann. 36; Buard *v.* Buard, 5 Mart. N. S. 132.

Massachusetts.— Talcott *v.* Smith, 142 Mass. 542, 8 N. E. 413.

Missouri.— Oldham *v.* Henderson, 4 Mo. 295.

New York.— Green *v.* Storm, 3 Sandf. Ch. 305.

Pennsylvania.— Lovegrove *v.* Christman, 164 Pa. St. 390, 30 Atl. 385; Glamorgan Iron Co. *v.* Rhule, 53 Pa. St. 93. But see Balsbaugh *v.* Frazer, 19 Pa. St. 95. *Contra*, Hubler *v.* Tamney, 5 Watts 51; Fulweiler *v.* Baugher, 15 Serg. & R. 45.

See 39 Cent. Dig. tit. "Payment," § 156.

Compare Hester *v.* Murphy, 1 Ark. 338.

In New Jersey evidence of set-off could be given only by plea of payment before the statute of 1809. Alexander *v.* McCleanon, 2 N. J. L. 364; Hews *v.* Mungan, 2 N. J. L. 256; Walton *v.* Lippencutt, 2 N. J. L. 161; Phillips *v.* McCullough, 2 N. J. L. 69.

93. Commercial Bank *v.* Toklas, 21 Wash. 36, 56 Pac. 927.

94. White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153 [*distinguishing* McLaughlin *v.* Webster, 141 N. Y. 76, 35 N. E. 1081].

95. U. S. *v.* Beattie, 24 Fed. Cas. No. 14,554, Gilp. 92.

96. Voak *v.* National Inv. Co., 51 Minn. 450, 53 N. W. 708.

97. Letapee *v.* Pecholier, 14 Fed. Cas. No. 8,101, 2 Wash. 180.

98. Withers *v.* Sandlin, 36 Fla. 619, 18 So. 856.

99. Smith *v.* Cottrel, 8 Baxt. (Tenn.) 62.

1. Snyder *v.* Wertz, 5 Whart. (Pa.) 163.

2. Hendricks *v.* Leopold, (Tex. App. 1892) 18 S. W. 638.

3. Willis *v.* Abraham, 31 Oreg. 562, 51 Pac. 79.

assumpsit,[4] the present rule in nearly all the states, governed largely by code provisions as to pleading new matter as a defense, is that evidence of payment is not admissible under a general denial.[5] And this is equally so where the general denial is contained in a reply.[6] Furthermore, the general rule is that a negative averment of non-payment cannot be put in issue by a general denial so as to authorize evidence of payment,[7] although there are cases holding that where the fact of non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action, evidence of payment is admissible under a general denial.[8] There is an exception where suit is brought to recover an unpaid balance in which case defendant may prove other payments under a general denial.[9] And in at least one jurisdiction, evidence of payment is admissible under a general denial where the complaint merely alleges the indebtedness in general terms

4. See ASSUMPSIT, ACTION OF, 4 Cyc. 354.

Payment after suit brought as admissible under general issue in assumpsit see ASSUMPSIT, ACTION OF, 4 Cyc. 355 note 7.

5. *Indiana.*— Baker *v.* Kistler, 13 Ind. 63; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620. But see Indiana, etc., R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80, holding that a defendant may, under a general denial, or any plea disputing the amount of recovery, prove partial or complete satisfaction since the suit was commenced.

Louisiana.— Davis *v.* Davis, 17 La. 259. But see Bludworth *v.* Hunter, 9 Rob. 256 (holding that the mere denial of the existence of any mortgage is too general to authorize evidence of payment or imputation of payment); Doubrere *v.* Papin, 4 Mart. 184 (holding that defendant, under the general issue, cannot urge that plaintiff agreed to receive payment at a different place).

Missouri.— State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Henderson *v.* Davis, 74 Mo. App. 1; Hyde *v.* Hazel, 43 Mo. App. 668.

Nebraska.— Barker *v.* Wheeler, 62 Nebr. 150, 87 N. W. 20; Cady *v.* South Omaha Nat. Bank, 46 Nebr. 756, 65 N. W. 906.

New York.— McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Price Printing House *v.* Jewelers' Review Pub. Co., 10 Misc. 743, 31 N. Y. Suppl. 800; Potter *v.* Gates, 9 N. Y. Suppl. 87.

Oregon.— Clark *v.* Wick, 25 Oreg. 446, 36 Pac. 165.

Texas.— Mayblum *v.* Austin, 1 Tex. App. Civ. Cas. § 616.

See 39 Cent. Dig. tit. "Payment," § 158.

Compare Brace *v.* Catlin, 1 Day (Conn.) 275.

Contra.— Munn *v.* Pope, 2 Stew. (Ala.) 498; Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311; McDonald *v.* Faulkner, 2 Ark. 472; Mickle *v.* Heinlen, 92 Cal. 596, 28 Pac. 784; Wetmore *v.* San Francisco, 44 Cal. 294; Brooks *v.* Chilton, 6 Cal. 640; Crews *v.* Bleakley, 16 Ill. 21, 61 Am. Dec. 323; Teuber *v.* Schumacher, 44 Ill. App. 577; Gray *v.* Thomas, 12 Sm. & M. (Miss.) 111; Flowers *v.* Slater, 2 Ohio Dec. (Reprint) 336, 2 West. L. Month. 445.

Payment by third person.— In an action for money had and received, where the only answer is a general denial, proof of payment by another than defendant, and not for him or on his account, is not admissible. Kansas Nat. Bank *v.* Quinton, 57 Kan. 750, 48 Pac. 20.

Payment to persons other than plaintiff.— Under the general issue, defendant may prove any payment to any other person than plaintiff, to lessen or destroy his liability as averred. Davis *v.* Davis, 17 La. 259.

But an executory agreement by which a creditor agreed to apply the proceeds of certain materials and labor, the same being unliquidated, to the payment of the debt, cannot be put in evidence under the general issue, in an action on the debt. Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

In Virginia a defendant cannot, under the code, prove a payment under a plea of *nil debet* or *non assumpsit* unless he files with the plea such a descriptive account as is required by section 3298 of the code. Richmond City, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148.

6. Judy *v.* Duncan, 21 Mo. App. 548; Wilcox *v.* Joslin, 10 N. Y. Suppl. 342.

7. *Indiana.*— Pierce *v.* Hower, 142 Ind. 626, 42 N. E. 223; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620.

Montana.— Stewart *v.* Budd, 7 Mont. 573, 19 Pac. 221.

New York.— Crawford *v.* Tyng, 10 Misc. 143, 30 N. Y. Suppl. 907; Dry Dock, etc., R. Co. *v.* North, etc., R. Co., 3 Misc. 61, 22 N. Y. Suppl. 556.

North Carolina.— Ellison *v.* Rix, 85 N. C. 77.

Washington.—Columbia Nat. Bank *v.* Western Iron, etc., Co., 14 Wash. 162, 44 Pac. 145.

United States.— Hummel *v.* Moore, 25 Fed. 380.

See 39 Cent. Dig. tit. "Payment," § 158.

8. State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Knapp *v.* Roche, 94 N. Y. 329; Cochran *v.* Reich, 91 Hun (N. Y.) 440, 36 N. Y. Suppl. 233, 25 N. Y. Civ. Proc. 147, 2 N. Y. Annot. Cas. 313; Henry McShane Co. *v.* Padian, 1 Misc. (N. Y.) 332, 20 N. Y. Suppl. 679 [*reversed* on other grounds in 142 N. Y. 207, 36 N. E. 880]. See also Schwarzler *v.* McClenahan, 38 N. Y. App. Div. 525, 56 N. Y. Suppl. 611.

9. Brown *v.* Forbes, 6 Dak. 273, 43 N. W. 93; Fram *v.* Allen, 3 Mart. (La.) 381; McElwee *v.* Hutchinson, 10 S. C. 436.

but not where particulars of the claim are stated.[10] So, under a general denial, evidence is admissible to show that no indebtedness to plaintiff ever existed on account of the money received and applied by defendant.[11]

c. Variance.[12] The evidence must correspond with the allegations in the pleadings,[13] and payment must be proved as alleged in the pleadings.[14] So the proof as to payments must be within, and correspond with, the bill of particulars.[15] An averment of payment is not supported by proof of tender,[16] nor that the obligation sued on has become outlawed,[17] nor of an accord and satisfaction,[18] nor of an agreement to set off mutual demands,[19] nor of a counter-claim,[20] nor of a discharge in law.[21] Where payment in full is pleaded and only part payment is proved, the debtor is entitled to credit for that part which he proves to be paid.[22] Where payment on the day the debt became due is pleaded, evidence of payment after the date is not admissible.[23] So where payment is alleged to have been made by one person, evidence that it was made by another is inadmissible.[24] But it has been held that an averment of the place of payment will not preclude the party from showing payment at a different place.[25]

10. St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731, 18 Pac. 958; Parker *v.* Hays, 7 Kan. 412; Stevens *v.* Thompson, 5 Kan. 305; Marley *v.* Smith, 4 Kan. 183.

11. Marvin *v.* Mandell, 125 Mass. 562.

12. See also COMMERCIAL PAPER, 8 Cyc. 211, 215.

13. Wharton *v.* Cunningham, 46 Ala. 590; Stebbins *v.* Hall, 53 Minn. 169, 54 N. W. 1110; Mayer *v.* Haaren, 57 N. Y. Super. Ct. 574, 5 N. Y. Suppl. 436.

An allegation in a declaration that the consideration paid for a horse sold by plaintiff to defendant was one hundred dollars in money is supported by evidence that plaintiff took the horse from defendant at one hundred dollars, as a payment to that extent of a cash debt, which defendant owed plaintiff. Turner *v.* Huggins, 14 Ark. 21.

14. *Alabama.*—Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Gilmer *v.* Wallace, 75 Ala. 220.

Louisiana.— Gaude *v.* Gaude, 28 La. Ann. 181.

Maryland.— Staley *v.* Thomas, 68 Md. 439, 13 Atl. 53.

Massachusetts.—Canfield *v.* Miller, 13 Gray 274, holding that where an answer avers payment by note, evidence of payment in money or by check is inadmissible. See also Wheaton *v.* Nelson, 11 Gray 15.

Minnesota.— Shakopee First Nat. Bank *v.* Strait, 71 Minn. 69, 73 N. W. 645.

England.— Palmer *v.* Costerton, 4 Q. B. 525, 45 E. C. L. 525. See also Cook *v.* Hopewell, 11 Exch. 555, 2 Jur. N. S. 66, 25 L. J. Exch. 71, 4 Wkly. Rep. 291.

See 39 Cent. Dig. tit. "Payment," § 160.

Evidence of payment in other medium than alleged.— Where defendant alleged payment in money of the claim sued on, he was properly refused to be allowed to show payment by any other mode, although such evidence would have been admissible under a general plea of payment. Brown *v.* Ginn, 19 Ohio Cir. Ct. 660, 10 Ohio Cir. Dec. 538.

Overpayment.— A complaint alleging overpayment will be understood to mean an overpayment in money, and proof of overpayment in stock will not sustain it. Mann *v.* Morewood, 5 Sandf. (N. Y.) 557.

When no variance.— Under a plea that a note given by a client to his attorney was paid, proof that the attorney retained the amount due on the note out of money collected by him in payment of a judgment which he had recovered for the client does not constitute a variance. Braden *v.* Lemmon, 127 Ind. 9, 26 N. E. 476. Where plaintiff alleged the sale of a horse to him for money, and the proof showed that he gave his promissory note in payment, it has been held that there was no variance. Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476. *Contra*, see Canfield *v.* Miller, 13 Gray (Mass.) 274.

A **conditional receipt** is not admissible to support a plea of a positive payment. Yeuren *v.* Smalley, 3 Vt. 251.

15. Judd *v.* Burton, 51 Mich. 74, 16 N. W. 237; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

Immaterial variance.— In an action by A against B for money paid to C for B's use, proof that the payment was made by giving B a receipt for a debt owed by him to A was not a material variance from the bill of particulars which alleged the payment of cash. McNerney *v.* Barnes, 47 Conn. 155, 58 Atl. 714.

Where the particular payments are itemized, proof of other payments is inadmissible. Hoddy *v.* Osborn, 9 Iowa 517.

16. Clark *v.* Mullenix, 11 Ind. 532. See, generally, TENDER.

17. Austin *v.* Wilson, 46 Iowa 362.

18. Hardey *v.* Coe, 5 Gill (Md.) 189. See also *supra*, VI, B, 4, h, text and note 90.

19. Rowland *v.* Blaksley, 1 Q. B. 403, 2 G. & D. 734, 6 Jur. 732, 11 L. J. Q. B. 279, 41 E. C. L. 599.

20. Wagener *v.* Mars, 20 S. C. 533.

21. State *v.* Reading, 1 Harr. (Del.) 23.

22. Owens *v.* Chandler, 16 Ark. 651; Cage *v.* Iler, 5 Sm. & M. (Miss.) 410, 43 Am. Dec. 521.

23. Denham *v.* Crowell, 1 N. J. L. 467.

24. Coffee *v.* Tevis, 17 Cal. 239.

25. Brown *v.* Gooden, 16 Ind. 444.

C. Burden of Proof — 1. In General.[26] Proof of non-payment is ordinarily unnecessary to establish a cause of action,[27] since the burden of proving payment is upon the party pleading it.[28] However, where an allegation of non-payment

26. See also Evidence, 16 Cyc. 926 *et seq.*

27. Baldwin *v.* Clock, 68 Mich. 201, 35 N. W. 904; Bell *v.* Young, 1 Grant (Pa.) 175; Bannister *v.* Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250.

28. *Alabama.*— Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666; Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834; McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721; Wolffe *v.* Nall, 62 Ala. 24; Harwood *v.* Pearson, 60 Ala. 410; Levystein *v.* Whitman, 59 Ala. 345; Shulman *v.* Brantley, 50 Ala. 81; McLendon *v.* Hamblin, 34 Ala. 86; Edmonds *v.* Edmonds, 1 Ala. 401.

Arkansas.—Blass *v.* Lawhorn, 64 Ark. 466, 42 S. W. 1068; Robinson *v.* Woodson, 33 Ark. 307.

California.— Stuart *v.* Lord, 138 Cal. 672, 72 Pac. 142; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Caulfield *v.* Sanders, 17 Cal. 569; Sanguinetti *v.* Pelligrini, 2 Cal. App. 294, 83 Pac. 293.

Colorado.— Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093; Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86; Mohr *v.* Barnes, 4 Colo. 350.

Florida.— International Harvester Co. *v.* Smith, 51 Fla. 220, 40 So. 840; Lakeside Press, etc., Engraving Co. *v.* Campbell, 39 Fla. 523, 22 So. 878.

Georgia.— Lanier *v.* Huguley, 91 Ga. 791, 18 S. E. 39.

Illinois.— Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118 [*affirming* 71 Ill. App. 242]; Lasswell *v.* Gahan, 122 Ill. App. 513; Ross *v.* Skinner, 107 Ill. App. 579; Boon *v.* Bliss, 98 Ill. App. 341; Harley *v.* Harley, 67 Ill. App. 138; Schanzenbach *v.* Brough, 58 Ill. App. 526; Hanke *v.* Cobiskey, 57 Ill. App. 267; Johnson *v.* Breaton, 1 Ill. App. 293.

Iowa.— Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443.

Kansas.— Cobleskill First Nat. Bank *v.* Hellyer, 53 Kan. 695, 37 Pac. 130, 42 Am. St. Rep. 316; Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230; Lathrop *v.* Davenport, 20 Kan. 285; Anthony *v.* Mott, 10 Kan. App. 105, 61 Pac. 509.

Kentucky.— Harris *v.* Merz Architectural Iron Works, 82 Ky. 200; Powell *v.* Swan, 5 Dana 1; Tom's Creek Coal Co. *v.* Skeene, 90 S. W. 993, 28 Ky. L. Rep. 962; Ermert *v.* Dietz, 58 S. W. 442, 22 Ky. L. Rep. 540.

Louisiana.— Irwin *v.* Gernon, 18 La. Ann. 228; Kennedy *v.* Beaseley, 8 La. Ann. 88; Diggs *v.* Parish, 18 La. 6.

Maine.— Witherell *v.* Swan, 32 Me. 247.

Michigan.— Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999; Doolittle *v.* Gavagan, 74 Mich. 11, 41 N. W. 846; Baldwin *v.* Clock, 68 Mich. 201, 35 N. W. 904; Hulbert *v.* Hammond, 41 Mich. 343, 1 N. W. 1040; Atwood *v.* Cornwall, 25 Mich. 142; Adams *v.* Field, 25 Mich. 16.

Missouri.— Ferguson *v.* Dalton, 158 Mo. 323, 59 S. W. 88; Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145; Oil-Well Supply Co. *v.* Wolf, (1894) 28 S. W. 167; Yarnell *v.* Anderson, 14 Mo. 619; Griffith *v.* Creighton, 61 Mo. App. 1.

Nebraska.— Wessel *v.* Bishop, (1906) 107 N. W. 220; Davis *v.* Hall, 70 Nebr. 678, 97 N. W. 1023; Mullally *v.* Dingman, 62 Nebr. 702, 87 N. W. 543; Curtis *v.* Perry, 33 Nebr. 519, 50 N. W. 426; Lamb *v.* Thompson, 31 Nebr. 448, 48 N. W. 58; German *v.* Boslough, 28 Nebr. 33, 44 N. W. 72; Tootle *v.* Mabeu, 21 Nebr. 617, 33 N. W. 264; Magenau *v.* Bell, 14 Nebr. 7, 14 N. W. 664.

New Hampshire.—Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153; Buzzell *v.* Snell, 25 N. H. 474.

New Jersey.— Fein *v.* Meier, (1907) 65 Atl. 1117 [*affirming* 71 N. J. L. 12, 58 Atl. 114]; Smith *v.* Burnet, 17 N. J. Eq. 40.

New York.— Everett *v.* Lockwood, 8 Hun 356; Hussey *v.* Culver, 3 Silv. Sup. 126, 6 N. Y. Suppl. 466 [*affirmed* in 130 N. Y. 681, 29 N. E. 1035]; Barnes *v.* Courtright, 37 Misc. 60, 74 N. Y. Suppl. 203; Peters *v.* Stewart, 1 Misc. 8, 20 N. Y. Suppl. 661 [*reversed* on other grounds in 2 Misc. 357, 21 N. Y. Suppl. 993]; Dean *v.* Pitts, 10 Johns. 35.

North Carolina.— Harmon *v.* Taylor, 98 N. C. 341, 4 S. E. 510; Vaughan *v.* Lewellyn, 94 N. C. 472; McLean *v.* Shuman, 38 N. C. 457.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

Pennsylvania.— North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Gebhart *v.* Francis, 32 Pa. St. 78; Mitchell *v.* Mitchell, 4 Pa. Cas. 43, 49, 6 Atl. 682; Miller's Estate, 33 Pa. Super. Ct. 20.

South Carolina.— Adger *v.* Pringle, 11 S. C. 527.

Tennessee.— Mason *v.* Spurlock, 4 Baxt. 554; Ford *v.* Lawrence, (Ch. App. 1898) 51 S. W. 1023.

Texas.— Hutchins *v.* Hamilton, 34 Tex. 290; Matossy *v.* Frosh, 9 Tex. 610. See also Tinsley *v.* McIlhenney, 30 Tex. Civ. App. 352, 70 S. W. 793.

Vermont.— Smith *v.* Woodworth, 43 Vt. 39.

Virginia.— Moore *v.* Tate, 22 Gratt. 351.

Wisconsin.— Meyer *v.* Hafemeister, 119 Wis. 539, 97 N. W. 165, 100 Am. St. Rep. 900. But see Goff *v.* Stoughton State Bank, 78 Wis. 106, 47 N. W. 190, 9 L. R. A. 859, holding that in an action against a bank for the amount of a draft deposited by a customer, where plaintiff, when proving his side of the case, testifies that he never received the money for the draft, he takes upon himself the burden of showing *prima facie* that the draft had not been paid.

United States.— Winter *v.* Simonton, 30 Fed. Cas. No. 17,894, 3 Cranch C. C. 104 [*reversed* on other grounds in 5 Pet. 141, 8

is essential to the stating of plaintiff's cause of action, a general denial by defendant places the burden of proof on plaintiff.[29] If payment is made to a third person for the creditor, the burden is upon the debtor to show that such third person was authorized to receive payment.[30] If there is a presumption of payment, either from lapse of time,[31] or from the possession of the evidence of indebtedness by the debtor,[32] the burden of showing non-payment is on the creditor. So where a transaction, on its face, constitutes a payment, the burden of proving the contrary is on the creditor.[33] Where a credit is indorsed on the instrument sued on, the burden of proving it as a payment is nevertheless on the debtor unless the indorsement is in the handwriting of the creditor.[34] The burden is upon the creditor to prove new matter in the reply or an amended complaint in avoidance of the defense of payment.[35] Where a contract calls for the payment of a certain number of dollars, the burden is on the debtor to show that the parties intended the payment should be made in Confederate currency.[36]

2. PAYMENT IN PROPERTY OTHER THAN MONEY. If the alleged payment to the creditor was in property other than what is ordinarily denominated money,[37]

L. ed. 75]; Archer *v.* Morehouse, 30 Fed. Cas. No. 18,225, Hempst. 184.

See 39 Cent. Dig. tit. "Payment," § 196.

Instruction as misleading.— Where the sole issue is whether the note in suit has been paid, a charge that plaintiff must establish his case by a preponderance of evidence is erroneous, as putting on plaintiff the burden of proving non-payment. Grant *v.* Roberts, (Tex. Civ. App. 1897) 38 S. W. 650.

Where the plea is not one of payment but is merely an enlargement of the plea of the general issue, the burden of proof is on plaintiff. Wimpy *v.* Gaskill, 76 Ga. 41.

In an action to recover amounts overpaid on a note, where indorsements show such overpayment, although there is a presumption that the indorsements show correctly the amounts paid, yet the burden of proof rests on plaintiff throughout the entire case. Gibbs *v.* Farmers', etc., Bank, 123 Iowa 736, 99 N. W. 703.

Payment by entry of debits or credits.— One claiming that payment had been effected by the satisfaction of cross demands has the burden of proving such fact. Hill *v.* Roberts, 86 Ala. 523, 6 So. 39.

29. Cochran *v.* Reich, 91 Hun (N. Y.) 440, 36 N. Y. Suppl. 233, 25 N. Y. Civ. Proc. 147, 2 N. Y. Annot. Cas. 313.

30. Ketelman *v.* Chicago Brush Co., 65 Nebr. 429, 91 N. W. 282; Holmes *v.* Dodge, 12 Fed. Cas. No. 6,637, Abb. Adm. 60.

Application of rule.— Where, in an action by the assignee of the claim of a building contractor for the balance of the contract price after an accounting, defendant admits that such sum was due, but claims that it has been paid to a person having a mechanic's lien for lumber furnished, the burden is on defendant to show the amount of lumber actually furnished, and that he was warranted in making the payment, as plaintiff sues as the assignee of an account stated. McCornick *v.* Sadler, 11 Utah 444, 40 Pac. 711, 10 Utah 210, 37 Pac. 332.

31. Wingett's Estate, 122 Pa. St. 486, 15 Atl. 863; Bentley's Appeal, 99 Pa. St. 500; Parker's Estate, 2 Pa. Dist. 101, 12 Pa. Co. Ct. 436; Yarnell *v.* Moore, 3 Coldw. (Tenn.) 173; Duncan *v.* Rawls, 16 Tex. 478. See also McLean *v.* Findley, 2 Penr. & W. (Pa.) 97.

32. Tedens *v.* Schumers, 112 Ill. 263. See also Hays *v.* Dickey, 67 Ark. 169, 53 S. W. 887.

33. Rice *v.* Georgia Nat. Bank, 64 Ga. 173.

34. Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188. *Compare* Thompson *v.* Blanchard, 2 Iowa 44. See also COMMERCIAL PAPER, 8 Cyc. 248.

35. Silver *v.* Hedges, 3 Dana (Ky.) 439.

36. Halfacre *v.* Whaley, 4 S. C. 173; Neely *v.* McFadden, 2 S. C. 169.

37. Wallace *v.* Axtell, 5 Colo. App. 432, 39 Pac. 594 (assignment to plaintiff of claim against third person); Haines *v.* Pearce, 41 Md. 221 (acceptance of bill or order on third person); Devlin *v.* Chamblin, 6 Minn. 468 (holding that the burden lies on a debtor to show that the acceptance of a third person was received as payment). See also Union School Furniture Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671. *Compare* Kenniston *v.* Avery, 16 N. H. 117, holding that where, to a suit on the antecedent debt, defendant sets up that negotiable paper has been given to secure it, the burden is upon him to show, either that such paper has been paid, or that the debtor has been injured through the laches of the creditor.

Order, check, or other instrument.— Webb *v.* Republic Nat. Bank, 67 Kan. 62, 72 Pac. 520; J. Weller Co. *v.* Gordon, 24 Ohio Cir. Ct. 407; Philadelphia *v.* Neill, etc., Sav., etc., Co., 211 Pa. St. 353, 60 Atl. 1033; Estey *v.* Birnbaum, 9 S. D. 174, 68 N. W. 290; Willow River Lumber Co. *v.* Luger Furniture Co., 102 Wis. 636, 78 N. W. 762.

Application of collateral.— The burden of proving payment out of collateral security is upon the debtor. Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319. Where securities were originally given to a creditor as collateral, the burden is upon the debtor to show their subsequent acceptance in satisfaction of the debt. Brown *v.* Hiatt, 4 Fed. Cas. No. 2,011, 1 Dill. 372.

such as a draft,[38] note,[39] or check,[40] etc., the burden is on the payer to show that it was accepted by the payee as payment. But where a note or bill of a third person is received for a present, and not a precedent debt, it has been held that the presumption is that it was agreed to be taken in payment and the burden of proving the contrary rests upon plaintiff.[41] If the creditor claims that he returned the property, the burden is on him to prove such fact.[42] So if the creditor asserts that what he accepted and received as money was not such in fact, the burden is on him to prove such claim.[43] Where a draft on a third person is accepted in full satisfaction of the debt when paid, the burden is on the creditor to show due diligence in presenting the draft for payment and giving notice of its dishonor.[44]

3. CONTRADICTION OF RECEIPT. It is generally said that the burden of proof is on the party seeking to impeach a receipt,[45] although there are cases holding otherwise on the theory that the burden of proof never shifts.[46] Where the debtor produces a receipt for a sum less than the debt in full therefor, the burden has been held to be on those contesting its sufficiency to show that the debt had not been reduced to the sum stated in the receipt.[47] Where a receipt is expressly stated to be on account, the burden is not on the creditor to show that it was not in full satisfaction of the claim.[48] A debtor alleging payment in full by a check

38. Smith *v.* Applegate, 1 Daly (N. Y.) 91.

39. *Indiana.*— Godfrey *v.* Crisler, 121 Ind. 203, 22 N. E. 999; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283.

Kansas.— Bradley *v.* Harwi, 43 Kan. 314, 23 Pac. 566.

Maryland.— Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316.

New Hampshire.— Randlet *v.* Herren, 20 N. H. 102, 538.

New York.— Friberg *v.* Block, 65 N. Y. App. Div. 541, 73 N. Y. Suppl. 104; Smith *v.* Sergent, 67 Barb. 243; Crane *v.* McDonald, 45 Barb. 354; Smith *v.* Applegate, 1 Daly 91.

Ohio.— Hall *v.* Union Paving Co., 3 Ohio S. & C. Pl. Dec. 218, 2 Ohio N. P. 71.

Pennsylvania.— Collins *v.* Busch, 191 Pa. St. 549, 43 Atl. 378; League *v.* Waring, 85 Pa. St. 244; *In re* Davis, 5 Whart. 530, 34 Am. Dec. 574; Mechanics' Nat. Bank *v.* Kielkopf, 22 Pa. Super. Ct. 128.

Rhode Island.— Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531.

South Dakota.— Grissel *v.* Woonsocket Bank, 12 S. D. 93, 80 N. W. 161; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

West Virginia.— Feamster *v.* Withrow, 12 W. Va. 611.

See 39 Cent. Dig. tit. "Payment," § 198. See also *infra*, VII, D, 2.

But where several notes are taken for a preëxisting debt without any agreement to receive them as actual payment and thereafter the creditor, after some of them have been paid, brings an action on the original debt to recover the balance unpaid, the burden of proof is on defendant to show that the notes are still outstanding in the hands of *bona fide* holders to whom they were indorsed before maturity. Lyman *v.* U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965.

40. Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844; Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804; Cochran *v.* Slomkowski, 29 Pa. Super. Ct. 385.

Agreement to credit amount.— But where a creditor receives a check and agrees to credit the amount thereof, the burden is on him to show that it was returned, or that it was not paid on due presentment. Goodall *v.* Norton, 88 Minn. 1, 92 N. W. 445.

41. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Gibson *v.* Toby, 46 N. Y. 637, 7 Am. Rep. 397 [*reversing* 53 Barb. 191]; Noel *v.* Murray, 13 N. Y. 167 [*affirming* 1 Duer 385]; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694. See also *supra*, III, A, 2; and *infra*, VII, D, 2.

42. Woodruff *v.* Thurlby, 39 Iowa 344.

43. Atwood *v.* Cornwall, 25 Mich. 142.

44. Dayton *v.* Trull, 23 Wend. (N. Y.) 345.

45. Winchester *v.* Grosvenor, 44 Ill. 425; Nielsen *v.* U. S. Rolling Stock Co., 37 Ill. App. 283; Levi *v.* Karrick, 13 Iowa 344; Gray *v.* Lonsdale, 10 La. Ann. 749; Skilliman *v.* Jones, 3 Mart. N. S. (La.) 686; Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591.

Receipt in full.— A person giving a receipt reciting on its face that the sum mentioned is "in full" payment of the account has the burden of showing that it was not intended as full payment. Decker *v.* Laws, 74 Ark. 286, 85 S. W. 425. A receipt, "Received . . . in various payments, at this date," *prima facie* refers to payments on that day, and the burden is on plaintiff to show that it meant "up to" that day. Moore *v.* Korty, 11 Ind. 341.

46. Shrader *v.* U. S. Glass Co., 179 Pa. St. 623, 36 Atl. 330; Mitchell *v.* Mitchell, 4 Pa. Cas. 43, 49, 6 Atl. 682; Terryberry *v.* Woods, 69 Vt. 94, 37 Atl. 246. *Contra*, Guyette *v.* Bolton, 46 Vt. 228.

47. Matter of Waite, 43 N. Y. App. Div. 296, 60 N. Y. Suppl. 488.

48. Case *v.* St. Louis, etc., R. Co., 60 Mo. App. 185.

containing the words "in full of all demands," has the burden of showing that the check contained those words when it was accepted by the creditor.[49]

4. APPLICATION OF PAYMENT. The burden of proving a particular application of a payment by either the debtor or creditor is on the party claiming that such application was made.[50] For instance, the burden of proving that a payment of one note by the debtor was by mistake and was intended to be applied on another note is on the debtor.[51] Where payments are applied by the parties, the burden is upon a surety to show that it is inequitable as to him.[52]

D. Presumptions[53] — **1. In General — a. Time of Payment.** A debt will be presumed to have been paid, where payment is proved or admitted at the maturity of the debt.[54] So where a person draws an order in favor of another, it will be presumed that the consideration for it was paid or secured at the time it was drawn.[55] And if the time of payment for goods sold is not fixed by the parties, it will be presumed that payment is to be made upon delivery of the goods.[56]

b. Medium of Payment. Where a debt is extinguished, it will be presumed that it was discharged by the payment of money or its equivalent.[57] Generally it will be presumed that payment was made in lawful money.[58] A debt will not

49. Decker *v.* Laws, 74 Ark. 286, 85 S. W. 425.

50. *Kentucky.*— Tharp *v.* Feltz, 6 B. Mon. 6; Hill *v.* Pettit, 66 S. W. 188, 23 Ky. L. Rep. 2001.

Louisiana.— Mann *v.* Major, 6 Rob. 475.

New Jersey.— Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137.

South Carolina.— Marshall *v.* Nagel, 1 Bailey 266.

England.— Lowther *v.* Heaver, 41 Ch. D. 248, 58 L. J. Ch. 482, 60 L. T. Rep. N. S. 310, 37 Wkly. Rep. 465.

See 39 Cent. Dig. tit. "Payment," § 202.

Compare Goldsmid *v.* Lewis County Bank, 7 Barb. (N. Y.) 427.

Where a creditor claims that payments on an open account have been applied other than to the oldest item, the burden of proving such fact is upon him. Rickerson Roller-Mill Co. *v.* Farrell Foundry, etc., Co., 75 Fed. 554, 23 C. C. A. 302.

Where a debtor alleges that he directed the appropriation of payment in a certain manner, the burden is on him to establish such allegation. Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Levystein *v.* Whitman, 59 Ala. 345; Wessel *v.* Bishop, (Nebr. 1906) 107 N. W. 220. Where a debtor shows a payment he must also show that it was to be applied on the indebtedness in controversy or that there was no other indebtedness. Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. Rep. 2090; White *v.* White, 44 S. W. 83, 19 Ky. L. Rep. 1590; Smith's Appeal, 52 Mich. 415, 18 N. W. 195. Where there are different debts, the burden is upon the debtor to show that checks given by the debtor to the creditor and paid were intended to be applied on the given indebtedness in suit. Trumbo *v.* Flournoy, 77 Mo. App. 324.

The burden is on the creditor to show an agreement whereby the proceeds of mortgaged property is to be applied on a debt other than the mortgage debt. Greer *v.* Turner, 47 Ark. 17, 14 S. W. 383. So the burden of proving that the application of the proceeds of mortgaged chattels to the payment of an unsecured debt was consented to or ratified by the mortgagor is on the mortgagee. Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100. The burden of showing that an admitted payment is properly applied on a debt other than the one in controversy is upon the creditor. Davis *v.* Hall, 70 Nebr. 678, 97 N. W. 1023.

51. Harrison *v.* Dayries, 23 La. Ann. 216.

52. Merchants' Ins. Co. *v.* Herber, 68 Minn. 420, 71 N. W. 624.

53. See also EVIDENCE, 16 Cyc. 1050 *et seq.*

As to payment of bond see BONDS, 5 Cyc. 843.

Indorsement of payment on commercial paper as raising presumption of payment see COMMERCIAL PAPER, 8 Cyc. 248.

Presumption arising from receipt see *supra*, V, C.

54. Johnson *v.* Carpenter, 7 Minn. 176.

55. Smith *v.* Poor, 37 Me. 462.

56. Roberts *v.* Wilcoxson, 36 Ark. 355.

57. Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720.

58. See cases cited *infra*, this note.

Presumption that payment was made in Confederate money see Clark *v.* Norwood, 19 La. Ann. 116; Abernathy *v.* Phifer, 84 N. C. 711.

Presumption as to authority of officer to accept payment in Confederate money see Harvey *v.* Walden, 23 La. Ann. 162.

A debt contracted in the Confederate states during the Civil war is presumed to be payable in lawful money (Hansbrough *v.* Utz, 75 Va. 959), as where it is for the payment of "dollars" (Hightower *v.* Maull, 50 Ala. 495), and there is generally no presumption that it was payable in Confederate currency (Bonner *v.* Nelson, 57 Ga. 433; Dyerle *v.* Stair, 28 Gratt. (Va.) 800; Effinger *v.* Kenney, 24 Gratt. (Va.) 116. *Contra*, see Stew-

be presumed to be payable in gold unless such implication can be found in the language of the contract.[59] Where a payment is indorsed in the same monetary terms which are used in the evidence of indebtedness itself, the presumption is that it was intended to be credited in the same circulating medium.[60]

c. Transfer of Property Other Than Money. Where property other than money,[61] such as a chose in action,[62] is transferred by the debtor to the creditor, it will not generally be presumed that it was accepted as an absolute payment. But it has been held that where a father was indebted to his children and conveyed to them property, the value of which nearly equaled the debt or was in excess thereof, it will be presumed to have been in satisfaction of the debt.[63]

d. Possession of Obligation.[64] The possession by the creditor of a writing providing for the payment of money, after maturity, is *prima facie* evidence that the debt evidenced thereby is unpaid.[65] On the other hand, its possession by the debtor raises a presumption of payment.[66]

art *v.* Salamon, 94 U. S. 434, 24 L. ed. 275). In North Carolina, however, by statute, money contracts were presumed to be solvable in Confederate money. Smith *v.* Smith, 101 N. C. 461, 8 S. E. 128, 131, 133; Brickell *v.* Bell, 84 N. C. 82; Palmer *v.* Love, 82 N. C. 478; Alexander *v.* Atlantic, etc., R. Co., 67 N. C. 198; McKesson *v.* Jones, 66 N. C. 258 (holding that the statute did not apply to a note in 1863 "to be paid in the current funds of the country when due"); Robeson *v.* Brown, 63 N. C. 554.

59. Maryland *v.* Baltimore, etc., R. Co., 22 Wall. (U. S.) 105, 22 L. ed. 713.

Foreign debt.— A debt contracted in Germany is presumed to be payable in gold. Bohn *v.* Broadhagen, 2 Cinc. Super. Ct. (Ohio) 2.

60. Stewart *v.* Salamon, 94 U. S. 434, 24 L. ed. 275.

61. McWilliams *v.* Phillips, 71 Ala. 80; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496. But see Abrams *v.* Taylor, 21 Ill. 102, holding that where a receipt is given for produce, it will be presumed that the produce was received in payment of an antecedent debt, unless explained by extrinsic evidence.

Transfer of property by partner.— Where, in an action against the executor of a deceased partner, there is positive uncontradicted evidence that another partner personally transferred certain realty in payment of one half of a partnership obligation, proof that the true value of the property was sufficient to discharge the whole debt raises no presumption that such transfer wiped out the debt. Leggat *v.* Leggat, 79 N. Y. App. Div. 141, 80 N. Y. Suppl. 327 [*affirmed* in 176 N. Y. 590, 68 N. E. 1119].

Payment from fund other than one specially created for the purpose.— If land be conveyed in order that the grantee may sell the same and reimburse himself for certain moneys paid for the grantor, who afterward dies and makes the grantee his executor, who received his personal estate, there is no legal presumption, in the absence of positive proof, that there was any other fund applied to the payment of the debt of the grantee than the one specially created for the purpose. Bracken *v.* Miller, 4 Watts & S. (Pa.) 102.

But where a pledgee of stock transfers it to his own name after the death of the insolvent pledger, the transfer will be presumed to be made in payment of the debt. Morgan's Estate, 11 Pa. Co. Ct. 536.

62. Preston *v.* Jones, 3 Ill. App. 632 (order on third person); Leas *v.* James, 10 Serg. & R. (Pa.) 307; Sax *v.* Thompson, 1 C. Pl. (Pa.) 131. But see Fowler *v.* Ludwig, 34 Me. 455.

63. Stewart's Estate, 3 Pa. Dist. 747, 15 Pa. Co. Ct. 380; Kelly *v.* Kelly, 6 Rand. (Va.) 176, 18 Am. Dec. 710.

64. See also MORTGAGES, 27 Cyc. 1399.

Possession of commercial paper see COMMERCIAL PAPER, 8 Cyc. 246.

65. Davis *v.* Gaines, 28 Ark. 440; Haywood *v.* Lewis, 65 Ga. 221; Meink *v.* Coman, 111 Ill. App. 583. *Compare In re* Dixon, [1899] 2 Ch. 561, 68 L. J. Ch. 689, 48 Wkly. Rep. 71.

The fact that a bond and mortgage, found among the papers of the mortgagee after his death, are surrendered to the mortgagor by a person who, although thereafter appointed administrator, has at the time of the surrender no authority to represent the estate, does not weaken the presumption, raised by the mortgagee's possession of the papers, that they were still valid and unpaid. Fitzmahony *v.* Caulfield, 25 N. Y. App. Div. 119, 49 N. Y. Suppl. 196.

66. Tedens *v.* Schumers, 112 Ill. 263; Burrows *v.* Cook, 17 Iowa 436; Benson *v.* Shipp, 5 Mart. N. S. (La.) 154; De L'Homme *v.* De Kerlegand, 4 La. 353; McFall *v.* Dempsey, 43 Mo. App. 369. See also Martin *v.* Walker, 102 Ga. 72, 29 S. E. 132. *Compare* Brown *v.* Sadler, 16 La. Ann. 206; Matter of Oakley, 2 Edw. (N. Y.) 478.

The mere absence of a coupon interest note, unaccounted for, of itself raises a *prima facie* presumption of payment. Merrick *v.* Hulbert, 17 Ill. App. 90.

The possession of a canceled bank check by the drawer is *prima facie* proof of the payment of a debt for the same amount as that named therein, for whose payment the drawer testified that it was given. Peavey *v.* Hovey, 16 Nebr. 416, 20 N. W. 272.

Possession of unindorsed check by bank.— Possession by a bank of an unindorsed check

e. Cancellation of Obligation. Cancellation by the creditor of the evidence of indebtedness by destruction, mutilation, or otherwise raises a presumption of payment.[67]

f. Dual Obligation to Pay and Authority to Receive. When a dual obligation to pay and the duty and authority to demand and receive payment of a debt coexist in the same person, the law presumes the debt to be paid.[68] But there must be concurrence and coexistence of the legal obligation to pay and of the authority and duty to demand and receive payment.[69]

g. Remittanee by Mail.[70] A remittance by mail will not be presumed a payment in the absence of proof that the creditor requested such remittance or that it was warranted by the course of business.[71] So the depositing a letter containing money in the post-office, properly addressed to the creditor, creates no presumption that he received it in the absence of evidence that he directed it to be so sent.[72]

h. Miscellaneous Presumptions. There are various other miscellaneous presumptions which may arise.[73] Generally it will be presumed that the sum due is

drawn on it in favor of complainant or his order, coupled with evidence that it was not its custom to require a payee to indorse the check when paid to him in person, is not sufficient to show payment to him, when denied by him. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Where a vendee gives a note for the price, which is a lien on the land sold, the possession of such note by one purchasing the land from the vendee is *prima facie* evidence of payment by one of them. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

67. Pitcher *v.* Patrick, 1 Stew. & P. (Ala.) 478.

Where an agent for collection cancels the obligation of the debtor, it will be presumed, in the absence of evidence, that he did so in consideration of the face amount of the claim. Lexington Bank *v.* Phenix Ins. Co., 74 Nebr. 548, 104 N. W. 1146.

Detaching maturing coupons.— But where one pledges bonds as a security after detaching matured coupons which have a lien superior to the bond, there is no presumption that the coupons are paid or canceled. Rhawn *v.* Edge Hill Furnace Co., 201 Pa. St. 637, 51 Atl. 360.

68. Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950. See also Byers *v.* Fowler, 14 Ark. 86.

69. Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950.

For instance, when one indebted to a testator or to an intestate qualifies as executor or obtains a grant of administration, his debt is in contemplation of law paid, inasmuch as the obligation to pay and the duty and authority to demand and receive payment coexists. Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950; Miller *v.* Irby, 63 Ala. 477.

70. See also *supra*, II, E, 2.

71. Boyd *v.* Reed, 6 Heisk. (Tenn.) 631.

72. Crane *v.* Pratt, 12 Gray (Mass.) 348. *Contra*, see Olney *v.* Blosier, 12 N. Y. St. 211.

73. See cases cited *infra*, this note.

Assent of creditor to deposit with third person.— Where money is deposited by the debtor with a third person for the payment of a debt, the assent of the creditor thereto, where the arrangement is beneficial for him, may be presumed when he has knowledge of such deposit, but such knowledge will not be presumed merely from proof of the transaction between the debtor and depositary. Simonton *v.* Minneapolis First Nat. Bank, 24 Minn. 216.

By whom.— It will be presumed that payment was made by the party bound and not by a third person. Amis *v.* Merchants Ins. Co., 2 La. Ann. 594.

To whom.— It will be presumed that payment was made to one lawfully authorized to receive the money. Lipscomb *v.* De Lemos, 68 Ala. 592. In the absence of evidence to the contrary, it may be presumed that moneys paid to an agent are paid over by him to the principal. Knapp *v.* Griffin, 140 Pa. St. 604, 21 Atl. 449; Eavenson's Appeal, 84 Pa. St. 172. But where goods are sold by an agent, payment to the principal will not be presumed unless it should be expected from the nature or usual method of transacting business that the principal rather than the agent should receive payment. Hathaway *v.* Burr, 21 Me. 567, 38 Am. Dec. 278. Payment of the price to a third person holding a lien on the property sold will ordinarily be presumed to be made in discharge of the debt in the absence of circumstances showing a contrary intention. Crowell *v.* Simpson, 52 N. C. 285. See also Swain *v.* Ettling, 32 Pa. St. 486, holding, however, that when the relation is not that of business, as when money is paid by a father for his son, or by a man for his mistress, other presumptions arise.

If payment is conditional and the creditor fails to object, he will be presumed to acquiesce in the condition. Hall *v.* Holden, 116 Mass. 172.

Knowledge of facts.— A payment will be presumed to have been made with full knowledge of all the facts. Peterborough *v.* Lancaster, 14 N. H. 382.

unpaid.[74] Where money is transferred by a debtor to his creditor it is ordinarily presumed to be a payment,[75] a payment being presumed rather than a loan.[76] So payment may be presumed from the subsequent acts and conduct of the parties,[77] as where the creditor gives his note or makes a payment to defendant after the accrual of the cause of action on which the suit is brought.[78] So it has been held that it

Levy of attachment.— Evidence that an attachment was levied on defendant's property, no disposition of the levy being shown, raises a presumption that the debt is paid. Benson *v.* Benson, 24 Miss. 625.

Partial or full payment.— Payment made by the debtor to a creditor will be presumed to be in full unless the contrary appears. Pulver *v.* Esselstyn, 22 Misc. (N. Y.) 429, 50 N. Y. Suppl. 756. But a claim that part payment has been made raises a presumption that payment in full has not been made. Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154.

Possession of mortgages by a purchaser thereof at the time of his death does not create a presumption that he had paid for them otherwise than by the money represented by a receipt given to his agent. Storz *v.* Kinzler, 73 N. Y. App. Div. 372, 77 N. Y. Suppl. 64.

Rendering an account without including a particular item raises a presumption of payment thereof. Smith *v.* Tucker, 2 E. D. Smith (N. Y.) 193.

Satisfaction of a mortgage raises the presumption that the debt which is secured thereby is paid. Seiple *v.* Seiple, 133 Pa. St. 460, 19 Atl. 406; Fleming *v.* Parry, 24 Pa. St. 47.

The absence of entries in an account-book will not warrant the presumption that payments testified to were not made to the person who kept it and whose business transactions were recorded therein. Schwarze *v.* Roessler, 40 Ill. App. 474.

Where cross demands exist, there is no presumption that the parties have paid one by the satisfaction of the other. Hill *v.* Roberts, 86 Ala. 523, 6 So. 39.

Facts held to raise presumption of payment.— Lindsey *v.* Platner, 23 Miss. 576; Murphy *v.* Carpenter, 22 Hun (N. Y.) 15.

Facts held not to raise presumption of payment.— Neal *v.* Brainerd, 24 Me. 115; Grant *v.* Keator, 117 N. Y. 369, 22 N. E. 1055. A receipted account between the same parties to an amount larger than plaintiff's debt does not raise a presumption that such account was paid by applying the amount thereof to the payment of plaintiff's debt. Clark *v.* Wells, 5 Gray (Mass.) 69.

74. Denver, etc., R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67; Diel *v.* Stegner, 56 Mo. App. 535; *In re* Marx, (Wis. 1907) 111 N. W. 1103. But see Theobald *v.* Stinson, 38 Me. 149, holding, in the absence of evidence that defendant's intestate kept any books or made any charges whatever, the presumption would be that he received payment for services performed by him for plaintiff's intestate. *Contra*, Hoadley *v.* Dumois, 11 Misc. (N. Y.) 52, 31 N. Y. Suppl. 853 [*affirmed* in 155 N. Y. 630, 49 N. E. 1098].

Before maturity.— No presumption of payment of a note payable on or before the death of the maker and another will arise until after the death of both. Dwight *v.* Eastman, 62 Vt. 398, 20 Atl. 594.

Presumption of payment for services as domestic servant see MASTER AND SERVANT, 26 Cyc. 1057.

75. Hansen *v.* Kirtley, 11 Iowa 565; Hymel's Succession, 48 La. Ann. 737, 19 So. 742.

76. Gaylord *v.* Gibson, 36 N. Y. App. Div. 548, 55 N. Y. Suppl. 670; Bougher *v.* Conn, 17 Phila. (Pa.) 81; Terry *v.* Ragsdale, 33 Gratt. (Va.) 342; Boswell *v.* Smith, 6 C. & P. 60, 25 E. C. L. 321; Welch *v.* Seaborn, 1 Stark. 474, 2 E. C. L. 182; Aubert *v.* Walsh, 4 Taunt. 293, 12 Rev. Rep. 651.

Evidence to repel the presumption must be very strong. Terry *v.* Ragsdale, 33 Gratt. (Va.) 342. The presumption that plain checks constituted payments on a debt, rather than loans from the drawer to the payee, is rebutted by evidence of their non-appearance in the payee's book-account against the drawer, their indorsement to wholesale merchants of whom the payee bought, and the fact that the payee was a retail merchant, and did not lend money. Moyles' Estate, 7 Kulp (Pa.) 215. That a certain check made by plaintiff's intestate to defendant was a loan, and not a payment, was sufficiently proven where a memorandum, in the handwriting of decedent, produced by defendant, showed a loan to defendant of the sum named in such check, on the date therein specified. Gaylord *v.* Gibson, 36 N. Y. App. Div. 548, 55 N. Y. Suppl. 670.

77. State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105; Whisler *v.* Drake, 35 Iowa 103; Downes *v.* Scott, 3 La. Ann. 278; Hagan *v.* Brent, 2 La. 26.

Entering a new service raises no presumption of payment for previous services. Printup *v.* James, 73 Ga. 583.

78. *Delaware.*— Lodge *v.* Ainscow, 1 Pennew. 327, 41 Atl. 187; Callaway *v.* Hearn, 1 Houst. 607.

Georgia.— McIntyre *v.* Meldrim, 63 Ga. 58.

Indiana.— Wilkins *v.* Ferguson, 47 Ind. 136.

Iowa.— Downs *v.* Downs, (1905) 102 N. W. 431.

Kentucky.— Barnes *v.* Green, 12 S. W. 277, 11 Ky. L. Rep. 422.

New York.— Eighmie *v.* Strong, 49 Hun 16, 1 N. Y. Suppl. 502, 15 N. Y. Civ. Proc. 119; Duguid *v.* Ogilvie, 3 E. D. Smith 527, 1 Abb. Pr. 145; De Freest *v.* Bloomingdale, 5 Den. 304. But see Matter of Callister, 88 Hun 87, 34 N. Y. Suppl. 628, holding that

will be presumed, where a promissory note is given by a debtor to his creditor, that all demands between the parties were settled at the date of the note and that it was given for the balance due.[79]

i. Conclusiveness and Rebuttal Thereof. The presumptions already referred to are presumptions of fact rather than presumptions of law, and hence are rebuttable by other evidence.[80] For instance, the presumption of payment arising against claims for debts alleged to remain unpaid while subsequent demands are proved or admitted to have been discharged is one of fact liable to be repelled by proof to the contrary.[81]

2. Payment by Bills, Notes, or Checks — a. Bills or Notes of Debtor. While in some of the states the presumption is that a negotiable bill or note given by the debtor to his creditor for a debt due is received in payment,[82] no such presumption arises in most of the states,[83] the presumption being that it is accepted merely as a conditional payment.[84]

the fact that the administratrix gave to a debtor of intestate a check for a sum of money does not create a presumption that the debt to intestate had been paid.

See 39 Cent. Dig. tit. "Payment," § 162 *et seq.*

But see Mechanics' Bank *v.* Wright, 53 Mo. 153, holding that payment of money by payees to one of the makers of a note for services rendered after its maturity raises no presumption of payment of the note.

Not conclusive.— The giving of a note is mere *prima facie* evidence that a previous indebtedness of the payee to the maker has been extinguished. Graves *v.* Shulman, 59 Ala. 406.

79. Grimmell *v.* Warner, 21 Iowa 11; Eighmie *v.* Strong, 49 Hun (N. Y.) 16, 1 N. Y. Suppl. 502, 15 N. Y. Civ. Proc. 119; Morse *v.* Ellerbe, 4 Rich. (S. C.) 600. *Contra*, Crabtree *v.* Rowand, 33 Ill. 421; Ankeny *v.* Pierce, 1 Ill. 262.

For balance of account.— Where a note with securities is given for the balance of an account on a settlement, it will be presumed that it covers all the items of the maker's account previously existing. Rowe *v.* Collier, 25 Tex. Suppl. 252.

80. Hightower *v.* Maull, 50 Ala. 495 (presumption of debt payable in lawful money rather than Confederate currency); Elliott *v.* Banks, 115 Ga. 926, 42 S. E. 218; Dougherty *v.* Deeney, 45 Iowa 443 (presumption of payment from delivery of money by one liable on a note to the holder thereof); Morgan's Estate, 11 Pa. Co. Ct. 536. See also Downs *v.* Downs, (Iowa 1905) 102 N. W. 431; Duguid *v.* Ogilvie, 3 E. D. Smith (N. Y.) 527, 1 Abb. Pr. 145.

Order on third person.— The fact that an order taken by plaintiff on a third person for the amount of a debt due him from two or more persons was taken by plaintiff from only one of such debtors repels the presumption that it was taken in payment of the original debt. Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

Note as settlement of mutual accounts.— The giving of a note is only *prima facie* evidence that the amount therein expresses the exact indebtedness between the parties, and a full settlement of mutual account; and the contrary may be shown by competent evidence. Walker *v.* Gray, 6 Ariz. 359, 57 Pac. 614.

81. Ham *v.* Barret, 28 Mo. 388.

Payment of rent.— The presumption of payment of previous rent arising from the production of receipts for subsequently accruing rent is not rebutted by a production of prior receipts, given in terms "on account of rent" and "for rent" only. Patterson *v.* O'Hara, 2 E. D. Smith (N. Y.) 58.

82. Ward *v.* Bourne, 56 Me. 161; American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 80 N. E. 526; Wood *v.* Bodwell, 12 Pick. (Mass.) 268; Jones *v.* Kennedy, 11 Pick. (Mass.) 125; Reed *v.* Upton, 10 Pick. (Mass.) 522, 20 Am. Dec. 545; Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476; Baker *v.* Draper, 2 Fed. Cas. No. 766, 1 Cliff. 420; Hudson *v.* Bradley, 12 Fed. Cas. No. 6,833, 2 Cliff. 130. See also Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. N. S. 401. And see *supra*, III, A, 2, b.

What law governs.— Where the rule that delivery of a note by a debtor to his creditor raises a presumption of payment is not the law of the state where the creditor resides and where the note was accepted it is not applicable unless the contract was to be performed in that state. American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 80 N. E. 526.

83. Marshall *v.* Marshall, 42 Ala. 149; Mooring *v.* Mobile Mar. Dock, etc., Ins. Co., 27 Ala. 254; Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285; McArdle *v.* McArdle, 12 Minn. 98; Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531. *Compare* Boyd *v.* Daily, 85 N. Y. App. Div. 581, 83 N. Y. Suppl. 539 [*affirmed* in 176 N. Y. 613, 68 N. E. 1114].

84. *Connecticut.*— Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

Michigan.— Valade *v.* Masson, 135 Mich. 41, 97 N. W. 59.

Minnesota.— Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285.

Pennsylvania.— U. S. *v.* Hegeman, 204 Pa. St. 438, 54 Atl. 344; Mechanics' Nat. Bank *v.* Kielkopf, 22 Pa. Super. Ct. 128.

South Dakota.— Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

b. Bills or Notes of Third Person. A bill, acceptance, or note of a third person is ordinarily presumed to be a conditional rather than an absolute payment,[85] although where the note of a third person is taken for a contemporaneous debt, there is a presumption, in some states, that the parties agreed it should be taken in payment.[86] The retention of notes for several years may, however, raise a presumption that they were accepted as payment.[87]

c. Checks. Ordinarily the delivery of the check of the debtor,[88] or of a third person,[89] will not be presumed to have been accepted as absolute payment, but the presumption is that it was accepted merely as a conditional payment. But where the debtor draws a check in favor of his creditor and the latter receives the money thereon, it is presumed that it was in payment of the existing debt due from the debtor to the creditor.[90]

d. Conclusiveness and Rebuttal Thereof. Any presumption which may exist that the delivery of a bill, note, or check, whether of the debtor or a third person, is accepted as absolute payment, may be rebutted by evidence showing that such was not the intention of the parties.[91] On the other hand, the presumption exist-

See 39 Cent. Dig. tit. "Payment," § 190. See also *supra*, III, A, 2; VI, C, 2.

But see Hills *v.* Parker, 14 L. T. Rep. N. S. 107.

Generally the fact that a note is unsecured raises a strong presumption against the claim that it was given in full satisfaction of a secured indebtedness. Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

85. Malpas *v.* Lowenstine, 46 Ark. 552; Devlin *v.* Chamblin, 6 Minn. 468; Smith *v.* Applegate, 1 Daly (N. Y.) 91; Finlay *v.* Heyward, 34 Misc. (N. Y.) 818, 69 N. Y. Suppl. 648 [*reversed* on other grounds in 35 Misc. 266, 71 N. Y. Suppl. 779]; Darnall *v.* Morehouse, 36 How. Pr. (N. Y.) 511 [*reversed* on other grounds in 45 N. Y. 64]; Hunter *v.* Moul, 98 Pa. St. 13, 42 Am. Rep. 610; League *v.* Waring, 85 Pa. St. 244; Nace *v.* Hartman, 3 Pa. Super. Ct. 203. See also *supra*, III, A, 2, a. But see Crumbaugh *v.* Kugler, 3 Ohio St. 544, holding that where a debtor conveys lands in consideration of his grantee's assumption of certain debts, and the creditors thereafter take the grantee's notes, surrendering the debtor's, the presumption arises from such surrender that the grantee's notes were taken in payment of the debtor's obligation. *Contra*, American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 80 N. E. 526.

86. Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286; McLean *v.* Griot, 118 N. Y. App. Div. 100, 103 N. Y. Suppl. 129; Kirkham *v.* Bank of America, 26 N. Y. App. Div. 110, 49 N. Y. Suppl. 767 [*affirmed* in 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714]; Manning *v.* Lyon, 70 Hun (N. Y.) 345, 24 N. Y. Suppl. 265; Torry *v.* Hadley, 27 Barb. (N. Y.) 192; Noel *v.* Murray, 1 Duer (N. Y.) 385 [*affirmed* in 13 N. Y. 167]; Vacheron *v.* Hildebrant, 39 Misc. (N. Y.) 61, 78 N. Y. Suppl. 771; Blum *v.* Sadofsky, 86 N. Y. Suppl. 22; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694. See also *supra*, III, A, 2, c. *Contra*, Whitney *v.* Goin, 20 N. H. 354.

87. Hapgood Plow Co. *v.* Martin, 16 Nebr. 27, 19 N. W. 512.

Note of insolvent person.— Where a creditor takes, as collateral security for his debt, the note of an insolvent person, the retention thereof, for however long a period, will not authorize the inference of payment of the original debt. Powell *v.* Henry, 27 Ala. 612.

88. Baird *v.* Spence, 8 Misc. (N. Y.) 535, 28 N. Y. Suppl. 774 [*affirmed* in 10 Misc. 772, 31 N. Y. Suppl. 1125]; Springfield *v.* Green, 7 Baxt. (Tenn.) 301. But see Beatty *v.* Lehigh Valley R. Co., 134 Pa. St. 294, 19 Atl. 745; Thompson *v.* Pitman, 1 F. & F. 339. *Compare* Boyd *v.* Daily, 85 N. Y. App. Div. 581, 83 N. Y. Suppl. 539 [*affirmed* in 176 N. Y. 556, 68 N. E. 1114].

The retention of a check and failure to give notice of its dishonor does not raise a presumption that the check was received as an absolute payment. Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804.

89. McIntyre *v.* Kennedy, 29 Pa. St. 448.

90. Masser *v.* Bowen, 29 Pa. St. 128, 72 Am. Dec. 619.

91. *Arkansas.*— Camp *v.* Gullett, 7 Ark. 524.

Indiana.— Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

Maine.— Parkhurst *v.* Jackson, 36 Me. 404; Shumway *v.* Reed, 34 Me. 560, 56 Am. Dec. 679; Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48.

Massachusetts.— Paddock, etc., Co. *v.* Simmons, 186 Mass. 152, 71 N. E. 298; Green *v.* Russell, 132 Mass. 536; Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; Appleton *v.* Parker, 15 Gray 173; Melledge *v.* Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59; Butts *v.* Dean, 2 Metc. 76, 35 Am. Dec. 389; Wood *v.* Bodwell, 12 Pick. 268; Jones *v.* Kennedy, 11 Pick. 125; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Maneely *v.* McGee, 6 Mass. 143, 4 Am. Dec. 105.

New York.— Torrey *v.* Hodley, 27 Barb. 192.

Pennsylvania.— Van Haagen Soap Mfg. Co.'s Estate, 8 Pa. Co. Ct. 84.

Wyoming.— Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. N. S. 401.

ing in most of the states that a bill, note, or check is not accepted as payment is rebuttable.[92]

3. APPLICATION OF PAYMENTS.[93] Generally there is no presumption that a payment was applied to the particular obligation in suit.[94] It has been held that it will be presumed that a payment was applied upon a demand admitted rather than on one in dispute;[95] to principal rather than interest;[96] on an interest-bearing demand rather than on one not bearing interest;[97] on an unsecured rather than a secured debt;[98] to the weaker of two secured claims;[99] on account of the mortgage debt rather than on another debt;[1] to an existing debt rather than to one for which the debtor holds a receipt;[2] and to the oldest items of an account due at the time of payment.[3] Where there is only one indebtedness, it will be presumed that payments were made to apply thereon.[4] Where the payment exceeds the amount due for legal sales and the indebtedness is partly for legal and partly for illegal sales, it will not be presumed that the payments were made in advance to be applied on future legal sales.[5] Application by the creditor on his books does not raise the presumption that the debtor so applied the payment where the latter had no access to the books and no knowledge of the application.[6] Failure of a creditor to indorse payments on a note has been held to justify the presumption that it was understood that such payments were intended to be applied on other indebtedness.[7] It will not be presumed that a payment was intended to be applied on a debt not due,[8] nor that money of the principal drawn from a bank by his agent was applied by the agent to any particular indebtedness,[9] nor, where a creditor appropriates a payment to a particular debt, that the debtor directed the application to another debt.[10]

4. LAPSE OF TIME — a. In General. Independently of statute, a presumption of payment may arise merely from the lapse of time.[11] Payment may be pre-

United States.— Hudson *v.* Bradley, 12 Fed. Cas. No. 6,833, 2 Cliff. 130; Palmer *v.* Elliott, 18 Fed. Cas. No. 10,690, 1 Cliff. 63.

See 39 Cent. Dig. tit. "Payment," § 194.

Compare Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232.

92. Mechanics' Nat. Bank *v.* Kielkopf, 22 Pa. Super. Ct. 128.

93. See, generally, *supra*, VI.

94. Robison *v.* Bailey, 113 Ill. App. 123. But see Masser *v.* Bowen, 29 Pa. St. 128, 72 Am. Dec. 619.

95. Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

96. See Kissam *v.* Burrall, Kirby (Conn.) 326.

97. Perot *v.* Copper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

98. Hare *v.* Stegall, 60 Ill. 380.

99. Ayers *v.* Staley, (N. J. Ch. 1889) 18 Atl. 1046.

1. Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6.

2. Chapman *v.* Smoot, 66 Md. 8, 5 Atl. 462.

3. Dulles *v.* De Forest, 19 Conn. 190 (holding, however, that evidence of a different intention will rebut the presumption); Bancroft *v.* Holton, 59 N. H. 141; Hurd *v.* Wing, 93 N. Y. App. Div. 62, 86 N. Y. Suppl. 907. See also Janney *v.* Stephen, 2 Patt. & H. (Va.) 11.

Rebuttal of presumption.— The presumption that payments made on an account current are to be applied in discharge of the earliest items in the account is not rebutted by the fact that those items are for goods sold on condition that they shall not become the property of the purchaser till paid for, although a memorandum of the condition is entered by the seller in his books containing the account. Crompton *v.* Pratt, 105 Mass. 255.

Items accruing during infancy of debtor.— Thurlow *v.* Gilmore, 40 Me. 378.

4. Frick *v.* School Trustees, 99 Ill. 167; Harvey *v.* Quick, 9 Ind. 258.

5. Hall *v.* Clement, 41 N. H. 166.

6. Richmond Second Nat. Bank *v.* Fitzpatrick, 111 Ky. 228, 63 S. W. 459, 23 Ky. L. Rep. 610, 62 L. R. A. 599.

7. Munson *v.* Plummer, 54 Iowa 758, 7 N. W. 95; Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21.

8. Pargoud *v.* Amberson, 10 La. 352.

9. Ward *v.* Andrews, 10 Heisk. (Tenn.) 116.

10. Powers *v.* McKnight, (Tex. Civ. App. 1903) 73 S. W. 549.

11. *Iowa.*— Manning *v.* Meredith, 69 Iowa 430, 29 N. W. 336.

Louisiana.— Kuhn *v.* Bercher, 114 La. 602, 38 So. 468; Wells *v.* Compton, 3 La. 164; Peytavin *v.* Maurin, 2 La. 480.

New York.— Rosenstock *v.* Dessar, 109 N. Y. App. Div. 10, 95 N. Y. Suppl. 1064; Matter of Lewis, 36 Misc. 741, 74 N. Y. Suppl. 469, payment by guardian to ward. See Newcombe *v.* Fox, 1 N. Y. App. Div. 389, 37 N. Y. Suppl. 294 [*affirmed* in 154 N. Y. 754, 49 N. E. 1101].

Pennsylvania.—Durdon *v.* Gaskill, 2 Yeates 268.

sumed, although the claim is not barred by limitations,[12] and a statute providing for the limitation of actions does not abrogate the common-law presumption.[13] This presumption of payment, however, while available to a defendant as a shield, cannot be used as a sword for affirmative aggressive actions,[14] nor can it be relied on by third persons.[15] So such presumption, when the statute of limitations has not run, is one of fact and not of law,[16] and is not a bar to the action but is merely a rule of evidence affecting the burden of proof.[17] In some of the states this common-law presumption has been reiterated by statute, or a different time prescribed the lapse of which raises a presumption of payment.[18]

b. Length of Time — (I) *In General.* Where there is no statute making the lapse of a less time raise a presumption of payment,[19] no presumption of payment arises merely from a lapse of time which is short of twenty years,[20] nor

Texas.— Duncan *v.* Rawls, 16 Tex. 478.

Vermont.— Evarts *v.* Nason, 11 Vt. 122.

See 39 Cent. Dig. tit. "Payment," § 176 *et seq.*

Compare Betts *v.* Van Dyke, 40 N. J. Eq. 149.

Presumption exists against the government the same as it does against an individual. *In re* Ash, 202 Pa. St. 422, 51 Atl. 1030, 90 Am. St. Rep. 658. *Contra*, U. S. *v.* Williams, 28 Fed. Cas. No. 16,721, 5 McLean 133, 28 Fed. Cas. No. 16,720, 4 McLean 567.

Several obligors.— Where the presumption arises in favor of one of several obligors, it inures to the benefit of all. Pearsall *v.* Houston, 48 N. C. 346.

Failure to reduce wife's choses in action.— No presumption of payment arises from the mere neglect of a husband to reduce his wife's choses in action to his possession for the lapse of time ordinarily sufficient to create a presumption of payment. Cartmell *v.* Perkins, 2 Del. Ch. 102.

The presumption is weaker than the presumption of innocence.— Potter *v.* Titcomb, 7 Me. 302.

12. Patterson *v.* Phillips, 18 Fed. Cas. No. 10,829*a*, Hempst. 69.

Barred claim.—Where the statute of limitation bars a recovery in a shorter time than twenty years, it would seem that no necessity exists for relying upon the presumption of payment from lapse of time. Spruill *v.* Davenport, 27 N. C. 663.

13. Carr *v.* Dings, 54 Mo. 95; Hale *v.* Pack, 10 W. Va. 145; Sanderson *v.* Olmsted, 2 Pinn. (Wis.) 224, 1 Chandl. 190.

14. Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302; Outlaw *v.* Garner, 139 N. C. 190, 51 S. E. 925.

15. Emory *v.* Keighan, 88 Ill. 482; Outlaw *v.* Garner, 139 N. C. 190, 51 S. E. 925; Appleton *v.* Edson, 8 Vt. 239. See also Glezen *v.* Haskins, 23 R. I. 601, 51 Atl. 219. But see Van Loon *v.* Smith, 103 Pa. St. 238.

Not like actual payment.— A presumption of payment is not like an actual payment which satisfies the debt as to all the debtors, but it operates as a payment only in favor of the party entitled to the benefit of the presumption. New York L. Ins., etc., Co. *v.* Covert, 29 Barb. (N. Y.) 435 [*reversed* on other grounds in 3 Abb. Dec. 350, 3 Transcr. App. 24, 6 Abb. Pr. N. S. 154].

16. Rosenstock *v.* Dessar, 85 N. Y. App. Div. 501, 83 N. Y. Suppl. 334 [*reversing* on other grounds 33 Misc. 419, 67 N. Y. Suppl. 657]; McQueen *v.* Fletcher, 4 Rich. Eq. (S. C.) 152; Graves *v.* Weeks, 19 Vt. 178. See also *infra*, VI, G, 2, b.

17. See *infra*, VII, D, 4, e. (I).

18. See the statutes of the several states.

In New York the statute relative to the presumption of payment from the lapse of time in actions on "sealed instruments for the payment of money" applies to sealed articles of agreement for the sale and purchase of land. Morey *v.* Farmers' L. & T. Co., 18 Barb. 401 [*reversed* on other grounds in 14 N. Y. 302].

19. See the statutes of the several states.

In North Carolina an early statute made the lapse of ten years a presumption of payment. This statute was held to apply to simple contracts as well as to sealed instruments. But under such statute the ten years did not commence to run until the cause of action accrued. Spruill *v.* Davenport, 27 N. C. 663. Such statute, however, has been repealed. Boone *v.* Peebles, 126 N. C. 824, 36 S. E. 193.

20. *Alabama.*— Girard *v.* Futterer, 84 Ala. 323, 4 So. 292.

Indiana.— Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Dodds *v.* Dodds, 57 Ind. 293.

Iowa.— Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443; Nash *v.* Gibson, 16 Iowa 305; Forsyth *v.* Ripley, 2 Greene 181.

Kentucky.— Stockton *v.* Johnson, 6 B. Mon. 408.

Missouri.— West *v.* Brison, 99 Mo. 684, 13 S. W. 95.

New Jersey.— Snediker *v.* Everingham, 27 N. J. L. 143.

New York.— Clark *v.* Bogardus, 2 Edw. 387.

North Carolina.— Lenox *v.* Greene, 4 N. C. 261.

Pennsylvania.— Rogers *v.* Burns, 27 Pa. St. 525; Diamond *v.* Tobias, 12 Pa. St. 312; King *v.* Coulter, 2 Grant 77; Boltz *v.* Bullman, 1 Yeates 584; Shilling *v.* Beidler, 2 Woodw. 160.

South Carolina.— Smithpeter *v.* Ison, 4 Rich. 203, 53 Am. Dec. 732.

Vermont.— Fletcher *v.* Fletcher, 72 Vt. 268, 47 Atl. 777; Mattocks *v.* Bellamy, 8 Vt. 463.

from any lapse of time which is short of that prescribed by the statute of limitations.[21]

(II) *Twenty Years.* The law raises a presumption of payment of a claim, irrespective of the statute of limitations, after the lapse of twenty years, which is conclusive unless rebutted by distinct proof.[22]

Virginia.— Erskine *v.* North, 14 Gratt. 60.

West Virginia.— Calwell *v.* Prindle, 19 W. Va. 604; Sadler *v.* Kennedy, 11 W. Va. 187.

See 39 Cent. Dig. tit. "Payment," § 178.

Sixteen years.— In Tennessee it is held that payment will be presumed from the lapse of sixteen years. Kilpatrick *v.* Brashear, 10 Heisk. (Tenn.) 372; Thompson *v.* Thompson, 2 Head (Tenn.) 405; Anderson *v.* Settle, 5 Sneed (Tenn.) 202; Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422. And it is also held in an early case, by a federal court, that it is well settled that a presumption of payment arises after sixteen years and a conclusive presumption after the lapse of twenty years. Didlake *v.* Robb, 7 Fed. Cas. No. 3,899, 1 Woods 680. However, this federal case is supported by no other cases except those in Tennessee, and the statement of the court that "it is well settled" seems to be a mistake.

Cases not within statutes of limitations.— The lapse of twenty years is necessary to raise a presumption of payment in a case not coming within any of the statutes of limitations. Sparhawk *v.* Buell, 9 Vt. 41.

Shortening of statute of limitations.— The fact that the time in which a right of entry on land is barred has been reduced by statute to less than twenty years does not reduce the time in which a presumption of payment arises. Criss *v.* Criss, 28 W. Va. 388.

21. *Georgia.*— Thomas *v.* Hunnicutt, 54 Ga. 337.

Illinois.— Aultman *v.* Connor, 25 Ill. App. 654.

Iowa.— Hendricks *v.* Wallis, 7 Iowa 224.

Michigan.— Smith's Appeal, 52 Mich. 415, 18 N. W. 195.

Vermont.— Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

See 39 Cent. Dig. tit. "Payment," § 178.

Where the statutory bar is less than twenty years, the presumption of payment from lapse of time arises at the expiration of the statutory bar. Jackson *v.* Sackett, 7 Wend. (N. Y.) 94.

22. *Alabama.*— Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894; Solomon *v.* Solomon, 83 Ala. 394, 3 So. 679.

California.— Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855.

Connecticut.— Boardman *v.* De Forest, 5 Conn. 1.

Delaware.— De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120.

Illinois.— McCormick *v.* Evans, 33 Ill. 327; Luther *v.* Crawford, 116 Ill. App. 351 [*affirmed* in 213 Ill. 596, 73 N. E. 430].

Indiana.— O'Brien *v.* Holland, 3 Blackf. 490.

Kansas.— Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592.

Kentucky.— Doty *v.* Jameson, 93 S. W. 638, 29 Ky. L. Rep. 507.

Mississippi.— Stark *v.* Gildart, 5 How. 606.

Missouri.— Smith *v.* Benton, 15 Mo. 371.

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Clark *v.* Clement, 33 N. H. 563.

New Jersey.— Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Ward *v.* Greinlds, (Ch. 1887) 10 Atl. 374; Downs *v.* Sooy, 28 N. J. Eq. 55; Peacock *v.* Black, 4 N. J. Eq. 61 [*affirmed* in 5 N. J. Eq. 535].

New York.— Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; Lyon *v.* Odell, 65 N. Y. 28; Berger *v.* Waldbaum, 110 N. Y. App. Div. 915, 96 N. Y. Suppl. 1114 [*affirming* 46 Misc. 4, 93 N. Y. Suppl. 352]; Rosenstock *v.* Dessar, 109 N. Y. App. Div. 10, 95 N. Y. Suppl. 1064; Lyon *v.* Adde, 63 Barb. 89; Rosenstock *v.* Dessar, 33 Misc. 419, 67 N. Y. Suppl. 657 [*reversed* on other grounds in 85 N. Y. App. Div. 501, 83 N. Y. Suppl. 334]; Owen *v.* Calhoun, 8 N. Y. Suppl. 447; Bailey *v.* Jackson, 16 Johns. 210, 8 Am. Dec. 309; Grant *v.* Duane, 9 Johns. 591; Livingston *v.* Livingston, 4 Johns. Ch. 294.

North Carolina.— Kerlee *v.* Corpening, 97 N. C. 330, 2 S. E. 664; Graham *v.* Davidson, 22 N. C. 155; Ridley *v.* Thorpe, 3 N. C. 343.

Pennsylvania.— Smith's Estate, 152 Pa. St. 102, 25 Atl. 315; Peters' Appeal, 106 Pa. St. 340; Bentley's Appeal, 99 Pa. St. 500; Brock *v.* Savage, 31 Pa. St. 410; Morrison *v.* Funk, 23 Pa. St. 421; Shepherd's Appeal, 2 Grant 402; Okeson's Appeal, 2 Grant 303. See also *In re* De Haven, 215 Pa. St. 549, 64 Atl. 779.

South Carolina.— Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19; Kinard *v.* Baird, 20 S. C. 377; Smithpeter *v.* Ison, 4 Rich. 203, 53 Am. Dec. 732; Levy *v.* Hampton, 1 McCord 145; Haskell *v.* Keen, 2 Nott & M. 160; Weatherford *v.* Tate, 2 Strobh. Eq. 27.

Texas.— Foot *v.* Silliman, 77 Tex. 268, 13 S. W. 1032; State *v.* Sais, 60 Tex. 87; Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189.

Vermont.— Tudor *v.* Taylor, 26 Vt. 444.

Virginia.— Doyle *v.* Beasley, 99 Va. 428, 39 S. E. 152; White *v.* Offield, 90 Va. 336, 18 S. E. 436; King *v.* King, 90 Va. 177, 17 S. E. 894; Scott *v.* Isaacs, 85 Va. 712, 8 S. E. 678; Robertson *v.* Read, 17 Gratt. 544.

West Virginia.— Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028.

United States.— Dunlop *v.* Ball, 2 Cranch 180, 2 L. ed. 246; Didlake *v.* Robb, 7 Fed. Cas. No. 3,899, 1 Woods 680; Goldhawk *v.* Duane, 10 Fed. Cas. No. 5,511, 2 Wash. 323;

(III) *Less Than Twenty Years.* While there is no presumption of payment from the mere fact of lapse of time less than twenty years,[23] payment may be presumed from lapse of time less than twenty years where there are other circumstances tending to show payment.[24] The lapse of time may be decisive in connec-

Miller *v.* Evans, 17 Fed. Cas. No. 9,569, 2 Cranch C. C. 72; Martin *v.* U. S., 28 Ct. Cl. 137.

England.— Gratwick *v.* Simpson, 2 Atk. 144, 26 Eng. Reprint 491; Carpenter *v.* Tucker, 1 Ch. Rep. 78, 21 Eng. Reprint 512; Leman *v.* Newnham, 1 Ves. 51, 27 Eng. Reprint 884.

See 39 Cent. Dig. tit. "Payment," § 179.

Reason for presumption.—The presumption has been said to stand upon clear principle, built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that every person, individual and corporate, will naturally possess and enjoy what belongs to him. Grantham *v.* Canaan, 38 N. H. 268.

Trustees.— The legal presumption of payment after twenty years extends to trustees as well as to others. Coates' Estate, 2 Pars. Eq. Cas. (Pa.) 258; Ingraham *v.* Cox, 1 Pa. L. J. Rep. 464. But see Williams *v.* Williams, 82 Wis. 393, 52 N. W. 429, holding that no presumption of payment of a legacy which is a charge on land arises from the lapse of twenty years.

The presumption is no weaker when the suit is brought against the administrator than when against the debtor in his lifetime. Gaines *v.* Miller, 111 U. S. 395, 3 S. Ct. 426, 28 L. ed. 466.

Thirty years does not necessarily extinguish all debts. Gravier *v.* Gravier, 2 La. 457.

Payment of lien.— There is a presumption of law that a lien of indefinite duration, that is, that of a contractor for the construction of a railroad, has been paid after the lapse of more than twenty years. Hayes' Appeal, 113 Pa. St. 380, 6 Atl. 144.

Effect of judgment on claim.— Where land of a decedent was sold to pay a debt which was more than twenty years old at the time of sale, but which had been reduced to judgment against the executor before the expiration of the twenty years, the debt was not presumed to be paid. Shaw *v.* Barksdale, 25 S. C. 204.

Where the debtor expressly alleges nonpayment, there is no presumption of payment from the lapse of more than twenty years. Delano *v.* Smith, 142 Mass. 490, 8 N. E. 644.

23. See *supra*, VII, D, 4, b, (I).

24. *Alabama.*— Phillips *v.* Adams, 78 Ala. 225; Toney *v.* Moore, 4 Stew. & P. 347.

Connecticut.— Perkins *v.* Kent, 1 Root 312.

Florida.— Buckmaster *v.* Kelley, 15 Fla. 180.

Georgia.— Milledge *v.* Gardner, 33 Ga. 397.

Indiana.— Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Garnier *v.* Renner, 51 Ind. 372.

Kansas.— Love *v.* Love, 72 Kan. 658, 83 Pac. 201.

Kentucky.— Shields *v.* Pringle, 2 Bibb 387.

Louisiana.— Wooten *v.* Harrison, 9 La. Ann. 234; Davenport *v.* Labauve, 5 La. Ann. 140; Goddard *v.* Urquhart, 6 La. 659; Denaule *v.* Nunez, 6 La. 27; Peytavin *v.* Maurin, 2 La. 480.

Massachusetts.— Inches *v.* Leonard, 12 Mass. 379.

Missouri.— West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Baker *v.* Stonebraker, 36 Mo. 338.

New Hampshire.— Gould *v.* White, 26 N. H. 178.

New Jersey.— Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

New York.— Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124.

Pennsylvania.— Briggs' Appeal, 93 Pa. St. 485; Diamond *v.* Tobias, 12 Pa. St. 312; Sailor *v.* Hertzog, 4 Whart. 259; Kohler's Estate, 18 Pa. Co. Ct. 184.

South Carolina.— Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657; Bradley *v.* Jennings, 15 Rich. 34; Blake *v.* Quash, 3 McCord 340; Barnwell *v.* Barnwell, 2 Hill Eq. 228; Williams *v.* Sims, 1 Rich. Eq. 53.

Virginia.— Cheatham *v.* Aistrop, 97 Va. 457, 34 S. E. 57; Tunstall *v.* Withers, 86 Va. 892, 11 S. E. 565; Ross v. Darby, 4 Munf. 428.

West Virginia.— Calwell *v.* Prindle, 19 W. Va. 604; Sadler *v.* Kennedy, 11 W. Va. 187.

United States.— Jones *v.* Wilkey, 78 Fed. 532; Denniston *v.* McKeen, 7 Fed. Cas. No. 3,803, 2 McLean 253; Goldhawk *v.* Duane, 10 Fed. Cas. No. 5,511, 2 Wash. 323; Miller *v.* Evans, 17 Fed. Cas. No. 9,569, 2 Cranch C. C. 72.

England.— Lacon *v.* Briggs, 3 Atk. 105, 26 Eng. Reprint 864; Hillary *v.* Waller, 12 Ves. Jr. 239, 33 Eng. Reprint 92.

Canada.— Graves *v.* Dunfield, 28 N. Brunsw. 143.

See 39 Cent. Dig. tit. "Payment," § 180.

A recital in a deed of the payment of purchase-money will raise the presumption of actual payment after a great lapse of time since the execution of the deed and continuous possession thereunder. Janes *v.* Patterson, 62 Ga. 527.

Custom not to give receipts.—The fact that it is not usual for domestics to give receipts for sums paid to them, in connection with the lapse of three years, does not raise a presumption of payment, under an agreement for a certain sum per week, to be paid weekly. Snediker *v.* Everingham, 27 N. J. L. 143.

Effect of death of witnesses.— The fact of payment may be inferred from lapse of time, accompanied by circumstances strongly tending to negative the idea that payment has not been made, especially where witnesses have died whose testimony, probably, would

tion with other circumstances, although those circumstances in themselves would not establish the fact of payment.[25] Exactly what these circumstances may be is not susceptible of definition.[26] The presumption strengthens as the time approaches twenty years and the circumstances needed to establish it are measured by a diminishing scale.[27] Evidence that the creditor has been constantly pressed for money while the debtor was abundantly able to pay is sufficient, in connection with the lapse of less than twenty years, to justify the presumption of payment,[28] although the mere fact that the debtor was able to pay is not of itself sufficient to cause the presumption to arise in less than twenty years.[29]

c. Indebtedness to Which Rule Applies.[30] The presumption of payment from lapse of time applies to all indebtedness, however evidenced,[31] whether by bond,[32] bill or note,[33] mortgage,[34] judgment,[35] or otherwise. It also applies to legacies or other claims against an executor or administrator.[36]

d. When Time Begins to Run. A presumption of payment from lapse of time arises only where sufficient time has elapsed when computed from the time the cause of action accrued.[37]

e. Conclusiveness and Rebuttal Thereof — (i) *In General.* The presumption of payment arising from lapse of time is not conclusive but is merely a presumption of fact which is rebuttable.[38] Its effect is merely to make a *prima*

have conclusively proved the fact of payment. Barbour *v.* Duncanson, 77 Va. 76.

Failure of drawee to return draft.— A draft, although not proved to have been paid, if it remain a long time in the drawee's hands, and is not shown to have been returned, will be presumed to have been satisfied. Hunt *v.* Stephenson, 1 A. K. Marsh. (Ky.) 570.

25. Baker *v.* Towles, 11 La. 432; Jackson *v.* Sackett, 7 Wend. (N. Y.) 94.

26. Diamond *v.* Tobias, 12 Pa. St. 312.

Evidence held sufficient to show payment in less than twenty years see May *v.* Wilkinson, 76 Ala. 543; Jacobs *v.* State, 127 Ind. 77, 26 N. E. 675; Russell *v.* Pedigo, 30 S. W. 393, 17 Ky. L. Rep. 68; Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124; U. S. Trust Co. *v.* Stanton, 8 N. Y. Suppl. 756; Shaw *v.* Bowie, 3 Brev. (S. C.) 409.

Evidence held insufficient to show payment in less than twenty years see McFadden *v.* Wallace, 38 Cal. 51.

Declarations of a creditor, made to the debtor, to the effect that the evidences of indebtedness should have been delivered up and that he regarded them as satisfied, justified the court in submitting to the jury the presumption of payment from lapse of time of a period of less than twenty years. Brubaker *v.* Taylor, 76 Pa. St. 83.

27. King *v.* Coulter, 2 Grant (Pa.) 77.

28. Morrison *v.* Collins, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. Rep. 827. See also Phillips *v.* Adams, 78 Ala. 225; Belden *v.* State, 103 N. Y. 1, 8 N. E. 363.

29. Morrison *v.* Collins, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. Rep. 827. See also Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285.

30. **Ground-rent** see GROUND-RENTS, 20 Cyc. 1378.

31. See cases cited *infra*, this note.

A **recognizance** in the orphans' court is subject to the legal presumption of payment after twenty years from the time the money due is payable. Ankeny *v.* Penrose, 18 Pa. St. 190.

Presumption applies to non-negotiable notes.— Daggett *v.* Tallman, 8 Conn. 168.

Payment of taxes see TAXATION.

32. See BONDS, 5 Cyc. 844.

33. See COMMERCIAL PAPER, 8 Cyc. 246.

34. See MORTGAGES, 27 Cyc. 1400.

35. See JUDGMENTS, 23 Cyc. 1467.

36. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1020.

Presumption of accounting and settlement by executor or administrator from lapse of time see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1122.

37. Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173; Spruill *v.* Davenport, 27 N. C. 663; Com. *v.* Wagren, 24 Wkly. Notes Cas. (Pa.) 171; Smith *v.* Steen, 38 S. C. 361, 16 S. E. 1003. But see Roberts *v.* Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624; Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124, holding that it is not error to refuse to charge "that the interval of twenty years (sufficient to raise presumption of payment), must be computed from the time the cause of action accrued [after demand], not from the time the contract was executed," where ignoring the circumstance that defendant had a right to pay without demand.

38. *Illinois.*— Luther *v.* Crawford, 116 Ill. App. 351 [*affirmed* in 213 Ill. 596, 73 N. E. 430].

Kentucky.— Helm *v.* Jones, 3 Dana 86.

Maine.— Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Knapp *v.* Knapp, 134 Mass. 353.

New Hampshire.— Haverhill *v.* Orange, 47 N. H. 273; Grantham *v.* Canaan, 38 N. H. 268; Clark *v.* Clement, 33 N. H. 563.

New York.— People *v.* Freeman, 110 N. Y. App. Div. 605, 97 N. Y. Suppl. 343; Hall *v.*

facie case in favor of the debtor as to payment and to put the burden of showing non-payment on the creditor.[39] After what lapse of time beyond twenty years, if ever, this disputable presumption will become conclusive has never been determined.[40]

(II) *Particular Facts*—(A) *In General.* It has been held that the creditor must prove such facts as are required to take a case out of the statute of limitations;[41] but the weight of authority holds that the presumption may be rebutted not only by such facts but also by any others tending to show that the debt has in fact not been paid.[42] For instance, the presumption may be rebutted by evidence that the debtor was not in condition to pay,[43] or had no opportunity or means of paying,[44] or by showing that the debtor induced such delay,[45] or general circumstances creating an improbability that payment was made.[46] So it has been held that the presumption may be rebutted by evidence of the possession of the written obligation by the creditor,[47] although the fact of possession by the creditor has been held not to rebut the presumption, where he had access to the debtor's papers.[48] Likewise the presumption has been repelled by showing that the creditor was a near relation of the debtor and that an earlier enforcement would have distressed him.[49] But it has been held, although there is a conflict in the

Roberts, 63 Hun 473, 18 N. Y. Suppl. 480; Morris *v.* Wadsworth, 17 Wend. 103; Arden *v.* Arden, 1 Johns. Ch. 313.

North Carolina.— Currie *v.* Clark, 101 N. C. 329, 7 S. E. 805; Gee *v.* Cumming, 3 N. C. 398; Quince *v.* Ross, 3 N. C. 180.

Pennsylvania.— O'Hara *v.* Corr, 210 Pa. St. 341, 59 Atl. 1099; Smith's Estate, 177 Pa. St. 437, 35 Atl. 680; Reed *v.* Reed, 46 Pa. St. 239; Morrison *v.* Funk, 23 Pa. St. 421; Ankeny *v.* Penrose, 18 Pa. St. 190; Snyder *v.* Steinmetz, 6 Pa. Super. Ct. 341.

South Carolina.— Newman *v.* Clyburn, 41 S. C. 534, 19 S. E. 913.

Tennessee.— Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694; Stanley *v.* McKinzer, 7 Lea 454; Anderson *v.* Settle, 5 Sneed 202.

Texas.— Shotwell *v.* McCardell,, 19 Tex. Civ. App. 174, 47 S. W. 39.

Virginia.— Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; Com. *v.* Lilly, 1 Leigh 525.

West Virginia.— McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949; Hale *v.* Pack, 10 W. Va. 145.

Wisconsin.— Delaney *v.* Brunette, 62 Wis. 615, 23 N. W. 22.

See 39 Cent. Dig. tit. "Payment," § 188.

A decree of probate court, on the petition of a distributee, partially settling the accounts of an administrator, distributing assets, and directing the payment of a debt, the only object of the proceeding being such distribution, neither the administrator nor any creditor being served with process, or in any way made parties, will not prevent the presumption of payment of the debt arising from lapse of time. Wilson *v.* Wilson, 29 S. C. 260, 7 S. E. 490. See also McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497.

39. Luther *v.* Crawford, 116 Ill. App. 351 [*affirmed* in 213 Ill. 596, 73 N. E. 430]; *In re* Ash, 202 Pa. St. 422, 51 Atl. 1030; *In re* Devereux, 184 Pa. St. 429, 39 Atl. 225; Clendenning *v.* Thompson, 91 Va. 518, 22 S. E. 233.

Until rebutted the presumption has all the force and effect of full proof of the fact of payment and the jury are bound so to regard it. Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302; Tucker *v.* Hunt, 6 Rich. Eq. (S. C.) 183; Thompson *v.* Thompson, 2 Head (Tenn.) 405. Where not repelled, it is as obligatory upon the court as a presumption of law. Tucker *v.* Hunt, 6 Rich. Eq. (S. C.) 183.

40. Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804.

41. Latimer *v.* Trowbridge, 52 S. C. 193, 29 S. E. 634, 68 Am. St. Rep. 893; Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618.

42. See De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120; Shields *v.* Pringle, 2 Bibb (Ky.) 387; Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694.

43. Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694.

44. Fladong *v.* Winter, 19 Ves. Jr. 196, 34 Eng. Reprint 491. See also Devereux's Estate, 6 Pa. Dist. 195, 19 Pa. Co. Ct. 267.

45. Newman *v.* Clyburn, 41 S. C. 534, 19 S. E. 913; Eustace *v.* Gaskins, 1 Wash. (Va.) 188.

46. Hale *v.* Pack, 10 W. Va. 145.

47. Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391; Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694. *Compare* Brown *v.* White, (Md. 1893) 27 Atl. 315; Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328; Rosenstock *v.* Dessar, 33 Misc. (N. Y.) 419, 67 N. Y. Suppl. 657 [*reversed* on other grounds in 85 N. Y. App. Div. 501, 83 N. Y. Suppl. 334].

48. Hart *v.* Bucher, 186 Pa. St. 384, 40 Atl. 511.

49. Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

decisions, that a demand by the creditor for payment is not alone sufficient to repel the presumption of payment.[50]

(B) *Acknowledgment of Debt and Partial Payment.* The presumption may be rebutted by evidence of an unqualified acknowledgment or admission, either express or implied, on the part of the debtor, of the justness of the claim and that it is still due and unpaid,[51] although not coupled with a promise to pay,[52] as by making a part payment thereof.[53] But the presumption cannot be rebutted so as to charge a coöbligor by the acknowledgment of non-payment by the other obligor made in the absence of the obligor sought to be charged;[54] although part payment by one obligor before the expiration of the time necessary to raise a presumption of payment will take the case out of the rule of presumptions as to all his coöbligors.[55]

(C) *Disability of Creditor to Sue.* The presumption from lapse of time may also be rebutted by evidence that the creditor was under a legal disability to sue within the period or for a portion of the time,[56] as during the existence of a

50. Sellers *v.* Holman, 20 Pa. St. 321. *Contra,* Waters *v.* Waters, 1 Metc. (Ky.) 519.

51. *Delaware.*—De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120.

Georgia.— Arline *v.* Miller, 22 Ga. 330.

North Carolina.— Morris *v.* Osborne, 104 N. C. 609, 10 S. E. 476.

Pennsylvania.— White *v.* White, 200 Pa. St. 565, 50 Atl. 157; Runnel's Appeal, 121 Pa. St. 649, 15 Atl. 647; Kitchen *v.* Deardoff, 2 Pa. St. 481.

South Carolina.— Kinard *v.* Baird, 20 S. C. 377.

Vermont.— Martin *v.* Bowker, 19 Vt. 526.

See 39 Cent. Dig. tit. "Payment," § 186.

Starting new period.— An acknowledgment of a debt within twenty years causes the twenty years' presumption of payment to begin to run again from the time of the acknowledgment. Roberts *v.* Smith, 21 S. C. 455.

What constitutes acknowledgment.— In an action brought in 1885, to revive a judgment obtained in 1861, evidence that the judgment debtor came to the judgment creditor in 1870, and asked him what sum he would take for his judgment, is not such an acknowledgment that the debt is due and unpaid, as to defeat the presumption of payment. Colvin *v.* Phillips, 25 S. C. 228.

In New York, under the statute relating to presumptions of payment from lapse of time, presumption can be rebutted only by proving payment of a part or a written acknowledgment. Dorgeloh *v.* Bassford, 50 N. Y. Super. Ct. 450.

Dispute as to existence of debt.— Where a debt is claimed by plaintiff, and is disputed by defendant, who admits that it has not been paid, lapse of time cannot raise a presumption of payment, but may afford a presumption against the original existence of the debt. Christopher *v.* Sparke, 2 Jac. & W. 223, 37 Eng. Reprint 612.

After twenty years see Eby *v.* Eby, 5 Pa. St. 435; Tucker *v.* Hunt, 6 Rich. Eq. (S. C.) 183.

52. Breneman's Appeal, 121 Pa. St. 641, 15 Atl. 650.

53. *Arkansas.*— Duke *v.* State, 56 Ark. 485, 20 S. W. 600.

New York.— Carll *v.* Hart, 15 Barb. 565.

Pennsylvania.— *In re* Darlington, 13 Pa. St. 430; Kitchen *v.* Deardoff, 2 Pa. St. 481.

South Carolina.— Pyles *v.* Bell, 20 S. C. 365.

Vermont.— Martin *v.* Bowker, 19 Vt. 526.

England.— Loftus *v.* Swift, 2 Sch. & Lef. 642.

See 39 Cent. Dig. tit. "Payment," § 186.

Payment of a dividend to the creditor by the assignees of an insolvent debtor, in the ordinary execution of their trust, is not such a part payment of the debt as will repel the presumption of payment from the lapse of twenty years. Boardman *v.* De Forest, 5 Conn. 1.

Indorsements of payments.— Proof of an indorsement of a credit on the instrument evidencing the debt, in the handwriting of the creditor, purporting to be made before the lapse of the twenty years, is insufficient to rebut the presumption unless proof shows that the indorsement was in fact made before the expiration of such twenty years. Hart *v.* Bucher, 182 Pa. St. 604, 38 Atl. 472. *Contra,* Barrington *v.* Searle, 3 Bro. P. C. 593, 1 Eng. Reprint 1518. See also COMMERCIAL PAPER, 8 Cyc. 248.

Receipts given by a beneficiary for interest to which he was equitably entitled, paid on bonds in the hands of a commissioner in equity, prevent the presumption of payment attaching to the bonds. Jennings *v.* Parr, 62 S. C. 306, 40 S. E. 683.

54. Rogers *v.* Clements, 98 N. C. 180, 3 S. E. 512.

55. Campbell *v.* Brown, 86 N. C. 376, 41 Am. Rep. 464. *Contra,* Shoemaker *v.* Benedict, 11 N. Y. 176, 62 Am. Dec. 95.

Payment by the principal on a joint and several obligation rebuts the presumption of its payment at the expiration of twenty years from maturity as to both principal and surety. Dickson *v.* Gourdin, 29 S. C. 343, 7 S. E. 510, 1 L. R. A. 628.

56. Bailey *v.* Jackson, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; Shubrick *v.* Adams, 20 S. C. 49. See also McNair *v.* Ragland, 16

war,[57] or during the time when the statute of limitations was suspended.[58] But coverture of the creditor at the time the cause of action arose and subsequent thereto does not affect the presumption.[59] So, if the creditor is an infant at the time the cause of action accrues, the presumption begins to run from the accrual of the cause of action and not from the time the infant becomes of age.[60]

(D) *Absence of Creditor or Debtor From State.* Non-residence of the creditor does not affect the presumption.[61] And there is considerable authority holding likewise as to the non-residence or absence of the debtor.[62] There are cases, however, holding that the non-residence of the debtor, or his absence from the state for the greater part of the period relied on to create a presumption of payment, will rebut such presumption,[63] whether his absence is in an adjoining or remote state.[64] At any event, the absence of one of two joint debtors without the state, the other being present and accessible to creditors, does not repel the presumption.[65]

(E) *Insolvency of Debtor.* The presumption may also be rebutted by showing the insolvency of the debtor,[66] although it has been held that the debtor must be shown to have been insolvent during the entire period.[67] But the insolvency of one of two joint debtors, the other being solvent, does not repel the presumption.[68]

(F) *Death and Want of Administration.* If the creditor has died, and no administration is granted on his estate for many years, the time during which

N. C. 533, holding that a delay by a British creditor to sue, which occurred during the doubts in relation to confiscation attendant upon the American Revolution, will not be permitted to raise the presumption of payment.

57. Tunstall *v.* Withers, 86 Va. 892, 11 S. E. 565; Dunlop *v.* Bali, 2 Cranch (U. S.) 180, 2 L. ed. 246.

58. Penrose *v.* King, 1 Yeates (Pa.) 344; Mason *v.* Spurlock, 4 Baxt. (Tenn.) 554. But see Kilpatrick *v.* Brashear, 10 Heisk. (Tenn.) 372. *Contra,* Philippi *v.* Philippe, 115 U. S. 151, 5 S. Ct. 1181, 29 L. ed. 336.

59. Johnson *v.* England, 20 N. C. 199.

60. Bartlett *v.* Bartlett, 9 N. H. 398. *Contra,* Wilkerson *v.* Dunn, 52 N. C. 125.

61. Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365.

62. Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; Macauley *v.* Palmer, 3 Silv. Sup. (N. Y.) 245, 6 N. Y. Suppl. 402 [*affirmed* in 125 N. Y. 742, 26 N. E. 912]; Alston *v.* Hawkins, 105 N. C. 3, 11 S. E. 164, 18 Am. St. Rep. 874; Kline *v.* Kline, 20 Pa. St. 503; Sanderson *v.* Olmsted, 2 Pinn. (Wis.) 224, 1 Chandl. 190. See also Cobb *v.* Houston, 117 Mo. App. 645, 94 S. W. 299.

The mere change of residence of the debtor is not of itself sufficient to prevent the presumption of payment from lapse of time. Especially is this so where the debt is payable beyond the limits of the state and the creditor resides outside of the state. But evidence of non-residence is admissible, in connection with other evidence, to rebut the presumption. Campbell *v.* Brown, 86 N. C. 376, 41 Am. Rep. 464; McKinder *v.* Littlejohn, 26 N. C. 198.

63. Daggett *v.* Tallman, 8 Conn. 168; Boardman *v.* De Forest, 5 Conn. 1; Hendricks *v.* Wallis, 7 Iowa 224; Herndon *v.* Bartlett, 7 T. B. Mon. (Ky.) 449; Shields *v.* Pringle, 2 Bibb (Ky.) 387; Mann *v.* Manning, 12 Sm. & M. (Miss.) 615. See also De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120.

Absconding.— No presumption of payment from lapse of time will be made where the debtor absconds soon after the cause of action accrued, and resides in parts unknown until the commencement of the suit. Dunning *v.* Chamberlin, 6 Vt. 127.

Land as subject to attachment.— An instruction, in an action on a claim due for many years that, although defendant was a non-resident, his land at plaintiff's residence could have been subjected to payment, and therefore a presumption of payment arose from delay in suing, is properly refused, since such land could only have been reached by attachment suit, in which a bond is required. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

64. Daggett *v.* Tallman, 8 Conn. 168.

65. Boardman *v.* De Forest, 5 Conn. 1.

66. Boardman *v.* De Forest, 5 Conn. 1; De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120; Woodbury *v.* Taylor, 48 N. C. 504; McKinder *v.* Littlejohn, 23 N. C. 66. See also Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744. *Contra,* Kline *v.* Kline, 20 Pa. St. 503.

Partial solvency.— If a debtor has had the means or ability to pay the debt sued for during twelve or fifteen years before suit is brought, this is sufficient to meet the effect of reputed insolvency, which was relied on to repel the presumption of payment from the lapse of time, although he may not have been able to pay his other debts during that time. Walker *v.* Wrigbt, 47 N. C. 155.

67. Grant *v.* Burgwyn, 84 N. C. 560. *Contra,* Woodbury *v.* Taylor, 48 N. C. 504.

68. Boardman *v.* De Forest, 5 Conn. 1.

there was no person to whom payment could be made is not to be included.[69] So the want of a person against whom to bring suit, as where an administrator of a debtor's estate was not appointed for some time, rebuts the presumption of payment arising from forbearance to sue.[70]

(G) *Institution of Proceedings to Enforce Payment.* The pendency of an action to enforce the claim during the period relied on to raise the presumption is sufficient to rebut it, where the action has been prosecuted with reasonable diligence.[71] But the mere commencement of a suit which is subsequently abandoned will not rebut the presumption.[72]

(III) *Sufficiency of Evidence in Rebuttal in General.* The general rule is that the evidence to overcome the presumption must be clear and convincing and sufficient to satisfy the jury that the debt has not been paid,[73] but it does not require so strong evidence to rebut the presumption as it does to take a case out of the statute of limitations.[74] This presumption gathers strength with each year that is added to the first twenty and the strength of the evidence that will overcome it must be correspondingly increased.[75] To rebut the presumption the creditor must not only produce evidence of indebtedness or satisfactorily account for its absence, but he must also introduce evidence which will convince the court or jury that the debt is still unpaid.[76]

E. Admissibility of Evidence — 1. In General. Any circumstance which tends to make the proposition of payment either more or less probable is relevant and admissible in evidence on the issue of payment.[77] For instance,

69. McLellan *v.* Crofton, 6 Me. 307; Abbott *v.* Godfroy, 1 Mich. 178; Sheldon *v.* Heaton, 88 Hun (N. Y.) 535, 34 N. Y. Suppl. 856. But see Idler *v.* Borgmeyer, 65 Fed. 110, 13 C. C. A. 198, holding that where more than twenty years have elapsed since a debt accrued, and during all the time there has been a person entitled to receive the same, although in order to sue such person must have obtained official authorization by letters of administration or otherwise, and has not done so, the debt is presumed to be paid.

70. Buie *v.* Buie, 24 N. C. 87.

71. Foulk *v.* Brown, 2 Watts (Pa.) 209; Bender *v.* Montgomery, 8 Lea (Tenn.) 586. See also McCormick *v.* Eliot, 43 Fed. 469.

72. Palmer *v.* Dubois, 1 Mill (S. C.) 178.

73. Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804.

After death of debtor.— Especially is this so when suit is not brought until after the death of the debtor. Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804.

Evidence held sufficient to rebut presumption see Brewer *v.* Thomes, 28 Me. 81; Bailey *v.* Jackson, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; McQuesney *v.* Hiester, 33 Pa. St. 435; Parker's Estate, 2 Pa. Dist. 101, 12 Pa. Co. Ct. 436; Hopkirk *v.* Page, 12 Fed. Cas. No. 6,697, 2 Brock. 20.

Evidence held not sufficient to rebut presumption see Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804; Peters' Appeal, 106 Pa. St. 340; Cooke's Appeal, 8 Pa. St. 508; McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497; Tucker *v.* Hunt, 6 Rich. Eq. (S. C.) 183.

A declaration of a defendant that she "remembered giving the note, but believed she had paid it" is insufficient to rebut the presumption. Holly *v.* Freeman, 24 N. C. 218.

74. Levers *v.* Van Buskirk, 7 Watts & S. (Pa.) 70.

75. Luther *v.* Crawford, 116 Ill. App. 351 [*affirmed* in 213 Ill. 596, 73 N. E. 430]; Wells *v.* Compton, 3 La. 164; Peytavin *v.* Maurin, 2 La. 480; Peters' Appeal, 106 Pa. St. 340; Barnhart *v.* Barnhart, 22 Pa. Super. Ct. 206; Geiger's Estate, 14 Pa. Super. Ct. 523.

76. Luther *v.* Crawford, 116 Ill. App. 351 [*affirmed* in 213 Ill. 596, 73 N. E. 430].

77. Morgan *v.* Weir, 119 Ind. 178, 21 N. E. 656; Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Evidence held admissible see Cuthbert *v.* Newell, 7 Ala. 457; Marvin *v.* Keeler, 5 Conn. 271; Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Dunn *v.* Stanwood, 17 Ind. 480; Aultman *v.* Teeple, 98 Iowa 186, 67 N. W. 236; Shockley *v.* Van Eaton, 81 Iowa 417, 46 N. W. 1097; Koltze *v.* Messenbrink, 74 Iowa 242, 37 N. W. 179; Allison *v.* McClun, 40 Kan. 525, 20 Pac. 125; Commercial Bank *v.* Chisholm, 6 Sm. & M. (Miss.) 457; Parsons *v.* Hughes, 16 N. Y. Suppl. 702 [*affirmed* in 137 N. Y. 629, 33 N. E. 745]; Boothe *v.* Scriber, 48 Oreg. 561, 87 Pac. 887, 90 Pac. 1002; Carr *v.* Beck, 51 Pa. St. 269; Allen *v.* Woods, 24 Pa. St. 76; Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668. Where the payment of certain money into a bank is in dispute, it is not error to admit the testimony of the bookkeeper of the bank that he made all the entries of money received at the bank, and had made an examination of the bank-books, and that they showed no such payment. Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335. In an action on a note, evidence conducing to prove payment of money mentioned in an entry of credit on the note, which was subsequently erased, and the direction of the

any evidence in regard to prior related transactions between the parties is admis-

payer to appropriate it to the payment of the note, was competent. Graves *v.* Moore, 7 T. B. Mon. (Ky.) 341, 18 Am. Dec. 181. Where defendant claimed that at a specified time he made a payment on a note with money borrowed from a third person, whom he had given his note therefor, the note so given, and the testimony of such third person as to the date and amount of the loan are competent in rebuttal. Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666. Where the books in which a claimant of property seized on execution kept accounts against his vendor of the land claimed were lost, evidence that the accounts were open until the controversy in question arose is admissible on the question whether the land was paid for by extinguishing claimant's account against his vendor. Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208. In debt on a specialty, defendant gave in evidence under a plea of payment a specialty of a later date, executed by plaintiff to defendant. It was held that, to rebut the presumption of payment thus arising, plaintiff might show the consideration of the latter specialty and the circumstances under which it was given. Johnson *v.* White, 8 Leigh (Va.) 214.

Evidence held inadmissible see Hamer *v.* Harrell, 2 Stew. & P. (Ala.) 323; Anderson *v.* Henshaw, 2 Day (Conn.) 272; Crowley *v.* Gossett, 32 Mo. App. 17; Canaday *v.* Krum, 83 N. Y. 67; Boothe *v.* Scriber, 48 Oreg. 561, 87 Pac. 887, 90 Pac. 1002. In an action against an executor on a note assigned by his testator, evidence that any person had agreed to pay for the testator is not admissible to show payment. Abercrombie *v.* Sheldon, 8 Allen (Mass.) 532. In an action on a note executed by defendant's testator, evidence that testator had made a list of his debts, in which the note in question was not included, is not admissible to show payment of the note in question. Abercrombie *v.* Sheldon, 8 Allen (Mass.) 532. In a suit by a banker against the accepter of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, was not admissible as evidence in favor of the accepter to show a payment or satisfaction by the drawer. Citizens' Bank *v.* Carson, 32 Mo. 191. Testimony as to the result of computations tending to show payment is not admissible where the testimony shows the data on which the results were based, the results being only arithmetical reckonings. Morse *v.* Bruce, 70 Vt. 378, 40 Atl. 1034.

An offer to pay an award of arbitrators within the time allowed for an appeal, partly in bonds and partly in money, is not in the nature of a compromise, but a mode of payment; and therefore, in an action on a bond given in satisfaction of the award, such offer may be given in evidence to show acknowledgment of the validity of the debt. Swan *v.* Scott, 11 Serg. & R. (Pa.) 155.

Payment by mistake.— On an issue as to whether payment of a note by the bank at which it was made payable was made by mistake, evidence offered to show that the bank's cashier applied to the maker of the note to have his account made good, so as to cover the payment of the note, and that it was only on discovery of the maker's insolvency that the cashier concluded to protest the note, is admissible. Whiting *v.* Rochester City Bank, 77 N. Y. 363.

Bond to show payment of interest.—Where a note was given for the interest on a bond, and afterward another bond and note were made in lieu of the former, in an action on the latter note, the first bond is admissible in evidence to ascertain if the interest thereon had been paid otherwise than by the note. Smith *v.* Taylor, 39 Me. 242.

Where payment in goods is alleged, general evidence of the delivery of goods, etc., by the debtor to the creditor is admissible. Henry *v.* Scott, 3 Ind. 412.

Payment by third person see Goldstein *v.* Smiley, 168 Ill. 438, 48 N. E. 203. A direction by letter, from a third person to the payees of a note, to pay the same out of the proceeds of certain property in the hands of the payers belonging to such third person, is inadmissible as evidence of the payment of the note, unless it appears that the request has been complied with. King *v.* Bush, 36 Ill. 142.

Deposit in bank.— In an action on a note, when defendant asserts that before suit he deposited the amount due on the note, evidence that the money deposited in the bank was withdrawn by him on his own check is admissible to show that it was not deposited to pay the note, but for defendant's own use. Low *v.* Warden, 77 Cal. 94, 19 Pac. 235.

Disproving payment of claim not in suit.— Where a witness testifies to facts tending to prove payment of the demand in suit and of other demands not in suit, it is not competent to produce one of such claims not in suit for the purpose of disproving payment of such claim. Hadjo *v.* Gooden, 13 Ala. 718.

Items of account arising more than six years before suit.— In an action to recover the balance due on a general account containing debit and credit items, it is error to exclude evidence of all items of charge, which arose more than six years before suit, since there is a presumption that the subsequent payments made within six years of the dates of such items were applied to these earlier items. Maloney *v.* Bartlett, 172 Pa. St. 284, 33 Atl. 553.

Reason for delay in suing.— In a suit on a receipt for money on deposit, when defendant denies receipt of the money, and also pleads payment of what he did receive, plaintiff may testify why she has delayed bringing suit so long. De Vay *v.* Dunlap, 7 Ind. App. 690, 35 N. E. 195.

Under the scaling ordinance adopted in the southern states after the Civil war, under which, in suits for the enforcement of contracts made within a specified period during

sible.[78] So evidence as to the source of the money which the debtor claims he paid the creditor at a certain time is admissible,[79] as is evidence that the debtor had access to the safe of another with authority to take therefrom money for his needs,[80] or evidence to show that certain amounts of money had been paid to the attorneys of the creditor to be applied on the debt.[81] Where the debtor claims to have discharged the debt by the rendition of services, evidence as to the character of such services is admissible,[82] as is evidence that he had been paid for said services other than by credits on the indebtedness sued on.[83] So the fact that the creditor has failed to include the debt sued on in enumerating his assets is evidence that it has been paid.[84] So the fact that a creditor fails to file a claim against an insolvent estate is admissible as a circumstance determining whether payment has been made.[85] But evidence that the debtor borrowed money to pay a debt is not admissible,[86] nor is mere evidence of a demand of payment to show non-payment.[87] Where the note sued on was pledged as collateral for another note, evidence as to the consideration of the principal note is irrelevant.[88] On an issue as to whether payment was made at a certain time, evidence that on other occasions the creditor had forgotten or was mistaken about the payment made to him is not admissible.[89] Evidence that other employees on the same job at the same time were paid by the employer is not admissible to show payment to the employee seeking to recover therefor.[90]

2. Admissions and Declarations.[91] Admissions of the debtor are admissible to show non-payment,[92] and admissions of the creditor are admissible to show payment.[93] But self-serving declarations of either the debtor or creditor are not admissible.[94] For instance, an entry made by the debtor in his own favor is inadmissible to prove payment,[95] even where offered in evidence after his

the war, the value of the consideration of the contract at any time and the value of the currency in which payment was to be made at any time may be given in evidence; evidence of the value of Confederate money in which the payment was to be made cannot be restricted to evidence of its value at the time of the execution of the contract sued on. Bartow County *v.* Conyers, 108 Ga. 559, 34 S. E. 351. But see Effinger *v.* Kenney, 115 U. S. 566, 6 S. Ct. 179, 29 L. ed. 495; Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678; Stewart *v.* Salamon, 94 U. S. 434, 24 L. ed. 275; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

78. Ottens *v.* Fred Krug Brewing Co., 58 Nebr. 331, 78 N. W. 622.

79. Morgan *v.* Weir, 119 Ind. 178, 21 N. E. 656.

80. Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

81. Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664.

82. Owens *v.* Owens, 52 S. W. 943, 21 Ky. L. Rep. 679.

83. Owens *v.* Owens, 52 S. W. 943, 21 Ky. L. Rep. 679.

84. Marshall *v.* Marshall, 12 B. Mon. (Ky.) 459.

Tax inventory.— Failure of a creditor to include a note in a tax inventory is admissible as evidence that it had been paid. Morse *v.* Bruce, 70 Vt. 378, 40 Atl. 1034. But evidence is not admissible to show by the records that the creditor had not returned the note for purposes of taxation where it appears that no return was ever made by him. Young *v.* Doherty, 183 Pa. St. 179, 38 Atl. 587.

85. Kelly *v.* Hancock, 75 Ala. 229.

86. Reed *v.* Pierson, 3 N. J. L. 681.

87. Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139 [*affirmed* in 181 N. Y. 258, 73 N. E. 1028].

88. Wharton *v.* Thomason, 78 Ala. 45.

89. Shockley *v.* Van Eaton, 81 Iowa 417, 46 N. W. 1097; Bradley *v.* Freed, (Tenn. Ch. App. 1898) 51 S. W. 124.

90. Filer *v.* Peebles, 8 N. H. 226.

91. See also Evidence, 16 Cyc. 1192 *et seq.*

92. Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37; Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524; Benjamin *v.* Northwestern Elevator Co., 6 N. D. 254, 69 N. W. 296; Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668.

93. Applegate *v.* Baxley, 93 Ind. 147.

Payment by one joint debtor of the whole debt may be proved by the admission of the creditor. Ballance *v.* Frisby, 3 Ill. 63.

94. Wheatly *v.* Phelps, 3 Dana (Ky.) 302; Newcombe *v.* Fox, 1 N. Y. App. Div. 389, 37 N. Y. Suppl. 294 [*affirmed* in 154 N. Y. 754, 49 N. E. 1101]; Kennedy *v.* Yoe, (Tex. Civ. App. 1897) 39 S. W. 946.

Death of debtor.— The testimony of one who heard a debtor say that he had paid a debt is not rendered admissible to show payment, by the death of the debtor. Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

95. Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

An entry made nineteen years previous to the trial, in the debtor's books, that a note of twenty-three years' standing was paid,

death.[96] So declarations of a third person not a party to the suit are not admissible.[97] Statements made by the debtor and creditor at the time of the examination of accounts and agreement on a balance due are admissible in a subsequent suit on the debt.[98] So declarations of the partner to the effect that the debtor was a member of the firm are admissible to show that the creditor took a firm note under misapprehension without intending to release the debtor.[99]

3. FINANCIAL CONDITION OF DEBTOR OR CREDITOR — a. In General. Evidence that the debtor was able to pay is not admissible to show payment,[1] but evidence of inability to pay is admissible to show non-payment.[2] So evidence of the bad financial condition of the debtor at the time the contract was made is admissible on the issue as to whether payment was to be made before or after delivery of the property contracted for.[3] The creditor may be asked what money or means he had preceding, at the time of, and within a reasonable period following the transaction when payment was claimed to have been made, and the sources from which he derived money subsequently gained.[4] Evidence that the creditor had funds of the debtor in his possession after the maturity of the debt is admissible to show payment.[5] Where payment is alleged to have been made from the salary of the debtor, evidence as to the amount of salary received by him is admissible to disprove his testimony.[6] Evidence of the amount of money the creditor had shortly before his death is not admissible to show a payment made at that time.[7] To prove non-payment, evidence is admissible to show conduct on the part of the debtor inconsistent with the defense.[8]

b. To Aid or Rebut Presumption From Lapse of Time. In aid of the presumption of payment from lapse of time, any evidence is admissible which tends to show actual payment,[9] such as evidence of the solvency of the debtor,[10] and the financial embarrassment of the creditor.[11] On the other hand, to repel the presumption of payment from lapse of time, the general rule is that evidence is admissible on behalf of the creditor to show that the debtor had not the means[12]

was allowed to be read in evidence, to support the general presumption of payment after such a length of time. Rodman *v.* Hoops, 1 Dall. (Pa.) 85, 1 L. ed. 47.

96. Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

97. Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628; Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179.

98. Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. 1107.

99. Tozier *v.* Crafts, 123 Mass. 480.

1. Atwood *v.* Scott, 99 Mass. 177, 96 Am. Dec. 728; Veazie *v.* Hosmer, 11 Gray (Mass.) 396; Hilton *v.* Scarborough, 5 Gray (Mass.) 422; Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101.

Contra.— On the issue whether a payment was made, evidence tending to show that the alleged payer had money from which the payment might have been made is admissible. Dishno *v.* Reynolds, 17 Hun (N. Y.) 137; Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360.

But evidence is admissible that the debtor had a sum much larger than the amount of the debt in the bank and was loaning money at a lower rate of interest than the debt carried. Hedge *v.* Talbott, 8 Ind. App. 597, 36 N. E. 437.

2. Atwood *v.* Scott, 99 Mass. 177, 96 Am. Dec. 728. *Contra*, Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101.

Evidence in rebuttal.— Where plaintiff, in an action for board, in which defendant pleaded payment, gave evidence that defendant was without means at the time of the alleged payments, defendant could show the receipt of money which enabled her to make the payments. Phillips *v.* Lewis, 12 N. Y. App. Div. 460, 42 N. Y. Suppl. 707.

3. Beckley *v.* Jarvis, 55 Vt. 348.

4. Reynall *v.* Harrison, 5 N. Y. St. 450.

5. Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649.

6. Frindel *v.* Schaikewitz, 1 N. Y. App. Div. 214, 37 N. Y. Suppl. 172.

7. Trude *v.* Meyer, 82 Ill. 535.

8. Wheeler *v.* Thomas, 67 Conn. 577, 35 Atl. 499.

9. See Winton *v.* Mulley, 1 Lack. Leg. N. (Pa.) 276.

10. Matter of Keenan, 73 Hun (N. Y.) 177, 25 N. Y. Suppl. 877; Van Loon *v.* Smith, 103 Pa. St. 238; King *v.* Coulter, 2 Grant (Pa.) 77, holding that evidence is admissible to show the solvency of the debtor and his residence near that of the creditor. *Contra*, Rogers *v.* Burns, 27 Pa. St. 525.

11. Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; Matter of Keenan, 73 Hun (N. Y.) 177, 25 N. Y. Suppl. 877; Levers *v.* Van Buskirk, 4 Pa. St. 309. See also Daniel *v.* Whitfield, 44 N. C. 294.

12. Farmers' Bank *v.* Leonard, 4 Harr. (Del.) 536; Grantham *v.* Canaan, 38 N. H. 268; Wood *v.* Deen, 23 N. C. 230; McKinder

or opportunity[13] of paying the debt during the period of time claimed to raise the presumption of payment.

4. Habits of Debtor or Creditor as to Promptness. Evidence that the debtor is in the habit of paying his bills promptly is not admissible.[14] However, in aid of the presumption of payment from lapse of time, it has been held that evidence is admissible to show the character of the creditor for promptness in the collection of his debts,[15] although there is authority to the contrary.[16]

5. To Explain Acceptance of Commercial Paper or Security. Evidence is admissible on behalf of the creditor to show that a bill, note, or check accepted by the creditor was not taken as an absolute payment.[17] On the other hand, to prove that a bill, note, or check was received as an absolute payment, evidence is admissible as to the circumstances surrounding the transaction, including the subsequent acts and conduct of the parties, as well as direct proof of an express agreement.[18] Where the note of a third person is given to the creditor, evidence is admissible to show fraudulent misrepresentations of the debtor that the maker of the note was solvent,[19] or to show his knowledge of such insolvency at the time the note was transferred and his concealment of such fact from the creditor.[20]

6. To Aid or Rebut Presumption From Lapse of Time.[21] Where the lapse of time is relied on to raise a presumption of payment, evidence fairly tending to support or rebut the presumption is admissible, as is testimony explaining and contradicting evidence tending to rebut such presumption.[22] Any evidence, the

v. Littlejohn, 23 N. C. 66; *In re* Devereux, 184 Pa. St. 429, 39 Atl. 225. *Contra,* Rogers *v.* Judd, 5 Vt. 236, 26 Am. Dec. 301.

Insolvency in connection with other circumstances.— Where a debtor relies upon the presumption of payment from the lapse of time, and the creditor endeavors to rebut that presumption by showing his insolvency, the creditor may also offer in evidence the circumstance of the debtor's living at a great distance from him, as tending to show that, although the debtor may have had property for a short time, yet the creditor had not an opportunity of knowing that fact and of getting satisfaction out of that property. McKinder *v.* Littlejohn, 26 N. C. 198.

13. McKinder *v.* Littlejohn, 23 N. C. 66.

14. *Indian Territory.*—Fletcher *v.* Dulaney, 1 Indian Terr. 674, 43 S. W. 955.

Iowa.— Martin *v.* Shannon, 92 Iowa 374, 60 N. W. 645.

Massachusetts.— Abercrombie *v.* Sheldon, 8 Allen 532.

Pennsylvania.— Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360.

Vermont.— Strong *v.* Slicer, 35 Vt. 40.

See 39 Cent. Dig. tit. "Payment," § 208.

Contra.— Orr *v.* Jason, 1 Ill. App. 439.

Custom to pay cash.— Evidence offered by defendant to prove that "it was his general custom to pay cash for all stone that he bought" had no tendency to prove that he had paid plaintiff's demand for stone sold and delivered by plaintiff to defendant, and was properly rejected. Doak *v.* Curry, 4 Pittsb. Leg. J. 829.

15. Leiper *v.* Erwin, 5 Yerg. (Tenn.) 97.

16. Young *v.* Doherty, 183 Pa. St. 179, 38 Atl. 587.

17. Thom *v.* Wilson, 27 Ind. 370 (written agreement between maker of note, a third person, and the creditor); Folsom *v.* Ballou Banking Co., 160 Mass. 561, 36 N. E. 469; Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60; Grissel *v.* Woonsocket Bank, 12 S. D. 93, 80 N. W. 161. See also Park *v.* Miller, 27 N. J. L. 338. *Compare* East, etc., Texas Lumber Co. *v.* Barnwell, 78 Tex. 328, 14 S. W. 782.

Evidence of intent.— On an issue as to whether a note was accepted as absolute payment, the creditor may testify as to the intent with which he took the note. Kruse *v.* Seiffert, etc., Lumber Co., 108 Iowa 352, 79 N. W. 118.

Where a receipt shows that a note was accepted as absolute payment, the creditor cannot show a verbal agreement that it was accepted conditionally. Graves *v.* Friend, 5 Sandf. (N. Y.) 568.

Order from third person.— Evidence is admissible to show whether or not an order from a third person was accepted by the creditor in satisfaction of the debt. Preston *v.* Jones, 3 Ill. App. 632. See Schierl *v.* Baumel, 75 Wis. 69, 43 N. W. 724.

18. Hotchin *v.* Secor, 8 Mich. 494; Macomber *v.* Macomber, (R. I. 1894) 31 Atl. 753.

Presentation of note as claim against bankrupt.— Evidence of proof of a note in bankruptcy against the maker's estate is competent as tending to show that plaintiff, who had taken it from defendant, treated it as his own, and originally accepted it as a payment. Ely *v.* James, 123 Mass. 36.

19. Mann *v.* Stowell, 3 Pinn. (Wis.) 220, 3 Chandl. 243.

20. Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316.

21. See also *supra,* VII, E, 3, b.

22. Van Loon *v.* Smith, 103 Pa. St. 238; Levers *v.* Van Buskirk, 4 Pa. St. 309. See also Smith *v.* Buskirk, 7 Blackf. (Ind.) 477 (proposal of debtor to pay debt in prop-

legitimate tendency of which is to render it more probable than otherwise, in the judgment of the jury, that payment has not been made, is admissible to repel the presumption of payment arising from the lapse of time.[23] Where lapse of time less than twenty years is relied on to raise a presumption of payment, evidence of conduct of the creditor inconsistent with the supposition of payment should not be excluded, although connected with a different matter from that in suit.[24]

7. To Show Application of Payments. Evidence is admissible where it tends to show an appropriation of a payment made by either party, as between two or more debts.[25] The evidence is not confined to evidence of express declarations,[26] although writings of the debtor to the creditor directing the mode of application are the best evidence.[27] A letter from the creditor to the debtor showing the application of payment, together with evidence that no objection to such application was made by the debtor, is admissible against the debtor.[28] So evidence as to the bringing of an action on one debt and its subsequent dismissal is admissible to show that the payment was not applied by the creditor to such debt where it

erty); Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391; Blackburn *v.* Squib, Peck (Tenn.) 60 (evidence that work and labor had been done by defendant for plaintiff admissible as a circumstance to corroborate the presumption of payment from lapse of time).

23. Grantham *v.* Canaan, 38 N. H. 268; Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302; Allison *v.* Wood, 104 Va. 765, 52 S. E. 559. See also Mortgages, 27 Cyc. 1401.

Under some of the statutes, however, the evidence which may be given in rebuttal is limited. Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302, holding that where the statute provided that the presumption "may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action," oral evidence of a written acknowledgment of the right of action is not admissible.

Affidavit of defense.—To overcome the presumption of payment from the lapse of time of more than twenty years, the creditor cannot introduce part only of the affidavit of defense. Hart *v.* Bucher, 186 Pa. St. 384, 40 Atl. 511.

24. Garnier *v.* Renner, 51 Ind. 372.

Amount of mortgage.— On the issue as to whether lapse of time less than twenty years is sufficient to show payment in connection with other circumstances, where the debtor contends that he was abundantly able to pay the claim for several years before the commencement of the action, a question as to how much of a mortgage was on his premises was relevant. Hasper *v.* Weipcamp, 167 Ind. 371, 79 N. E. 191.

25. Thorn *v.* Moore, 21 Iowa 285; Riche *v.* Martin, 1 Misc. (N. Y.) 285, 20 N. Y. Suppl. 693; Darling *v.* Temple, 22 Tex. Civ. App. 478, 55 S. W. 40; Palmer *v.* Lawrence, 72 Vt. 14, 47 Atl. 159.

The account-books of the creditor, although not conclusive, are competent evidence to show the application intended by him of payments by the debtor, where there are several debts. Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456; Van Rensselaer *v.* Roberts, 5 Den. (N. Y.) 470. See also Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539; Gardere *v.* Fisk, 6 Mart. N. S. (La.) 387.

Self-serving declarations.— The entry of a payment by the creditor on a particular debt is not admissible as evidence in his favor on an issue as to how the debtor directed the application. Craig *v.* Miller, 103 Ill. 605.

Probability of agreement.— On an issue as to the agreement between the parties, evidence is admissible as tending to show what agreement is probable. Brown *v.* Cahalin, 3 Oreg. 45.

Recitals in a written instrument as to the balance remaining unpaid on a former indebtedness are admissible as an admission by the debtor that payments had been properly applied. Taylor *v.* Cockrell, 80 Ala. 236.

Conclusion of fact.— Where defendant, in an action on a non-negotiable note, sets up payment by a deceased joint maker, testimony of plaintiff as to whether the payment was or was not made on the note is competent, under an objection that it called for a conclusion of fact of which the jury are the sole judges. Evans *v.* Deming, 2 N. Y. St. 349.

26. Snell *v.* Cottingham, 72 Ill. 124; Bayley *v.* Wynkoop, 10 Ill. 449; Howland *v.* Rench, 7 Blackf. (Ind.) 236.

Time of declarations.— To show an application of a payment by the debtor, evidence of declarations of the debtor previous or subsequent to the time of payment is admissible. Waters *v.* Tompkins, 2 C. M. & R. 723, 5 L. J. Exch. 61, 1 Tyrw. & G. 137.

Parol evidence is admissible to show the intent of the debtor, with notice of such intent to the creditor. Wittkowsky *v.* Reid, 82 N. C. 116; Bray *v.* Crain, 59 Tex. 649. On the other hand evidence of the intent of the debtor is not admissible unless it is also shown that the intent was at the time known to the creditor. Brice *v.* Hamilton, 12 S. C. 32.

27. Mitchell *v.* Dall, 2 Harr. & G. (Md.) 159.

28. Sweeney *v.* Pratt, 70 Conn. 274, 39 Atl. 182.

was sufficient to cancel it.[29] Where the appropriation is to be made by the court, evidence of the debts to which the payment might be applied is admissible.[30]

8. Value of Property. Where property is delivered in part payment of a debt, evidence is admissible on behalf of the debtor to show its value at the place of delivery, in the absence of any agreement as to the price.[31] If the question is whether certain personalty was transferred with land in payment of a debt evidence of the value of the land is admissible.[32] Under the statutes passed in some of the Confederate states after the war making the value of property sold the limit of liability, it is competent to show what estimate was put on the property by the parties themselves at the time of the sale.[33]

9. Medium of Payment. Evidence is admissible to show that the agreement was to pay in a certain medium,[34] or that a certain medium was accepted as payment.[35] But evidence to show that a written instrument is payable otherwise than its terms indicate is inadmissible.[36] Where the obligation was payable in Confederate money and an action was brought after the close of the war, evidence is admissible to show the value of the specified sum in lawful money.[37] So evidence that a certain kind of money was the only currency generally in circulation in a certain locality at the time of a certain payment is admissible to establish a payment in such currency to corroborate other evidence tending to the same end.[38] Evidence that brokers and merchants refused to receive bank-bills, when presented by the creditor, which he had received from the debtor in payment of a debt, is admissible to show that they were not current or available to the creditor as money.[39]

10. Payment by or to Third Person. Evidence of payment by a third person is inadmissible unless it is also shown that it was paid for the debtor and accepted by the creditor as payment.[40] Likewise evidence of payment to a third person not shown to be authorized by the creditor to accept payment is not admissible.[41]

29. Frazer *v.* Miller, 7 Wash. 521, 35 Pac. 427.

30. Robinson *v.* Allison, 36 Ala. 525.

31. Phillips *v.* Commercial Bank, 1 Sm. & M. (Miss.) 636.

32. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

33. Ogburn *v.* Teague, 67 N. C. 355.

34. Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694; Sowers *v.* Earnhart, 64 N. C. 96.

Circumstantial evidence is admissible to show that a contract was to be discharged in Confederate money. Heilbroner *v.* Douglass, 45 Tex. 402.

Gold or silver.— Where the writing evidencing the indebtedness does not specify the particular kind of money in which it is payable, evidence is not admissible that it was understood and agreed that it should be paid in either gold or silver, nor is evidence of a mercantile usage making it payable in gold or silver. Langenberger *v.* Krœger, 48 Cal. 147, 17 Am. Rep. 418.

35. Jones *v.* Thomas, 5 Coldw. (Tenn.) 465.

Evidence of laches, in connection with other circumstances, is admissible to show consent or acquiescence of the creditor to the receipt of payment in a certain medium by his agent. Ansley *v.* Carlos, 9 Ala. 973.

36. See Commercial Paper, 8 Cyc. 271.

Payment in Confederate money.— Where a written instrument is proved to be payable in dollars, it is error to allow the debtor to show by parol that the parties intended payment in Confederate money. Miller *v.* Lacy, 33 Tex. 351.

37. Short *v.* Abernathy, 42 Tex. 94.

38. Melvin *v.* Stevens, 84 N. C. 78.

39. Kottwitz *v.* Bagby, 16 Tex. 656.

40. Whittier *v.* Eager, 1 Allen (Mass.) 499; Gray *v.* Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691.

Payment by person receiving goods.— But in an action for the price of goods sold, where the debtor purchased them for the benefit of a third person, evidence that the creditor had been paid by such third person is admissible, although the latter is not a party to the suit and did not act as defendant's agent in making the payment. Gray *v.* Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691.

41. See Hooks *v.* Frick, 75 Ga. 715.

Deposit in bank.— Evidence that defendant received and drew checks upon certain bankers is inadmissible to show that a deposit with them to his credit was a lawful payment to him. Bluntzer *v.* Dewees, 79 Tex. 272, 15 S. W. 29.

Authority of employee.— Where a certain employee accepted and receipted payments made to the creditor, it was competent for him to testify whether any other person than himself had anything to do with payments made to the creditor. A. A. Cooper Wagon, etc., Co. *v.* Barnt, 123 Iowa 32, 98 N. W. 356.

11. Documentary Evidence — a. In General. The rules relating to admissibility of documentary evidence in general govern the admissibility of documentary evidence of payment.[42] Documentary evidence, although not reciting payment, may be admissible as a fact, having some tendency, however slight, to show payment.[43] A book of account is inadmissible to prove, from the absence of an entry therein, that certain money was not paid.[44] Documentary evidence is admissible even though it shows the existence of a debt presumed to be paid from lapse of time, since the presumption may be afterward rebutted by other evidence.[45]

b. Judicial Records. Judicial records bearing on the issue of payment are admissible.[46]

c. Receipts or Other Acknowledgments.[47] Receipts given by a party to the action are admissible against him as evidence of the payment recited therein,[48]

42. See Evidence, 12 Cyc. 296 *et seq.* See also Dorsey *v.* Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557; Roberts *v.* Cocke, 120 N. C. 465, 27 S. E. 143.

The books of a bank, which do not show whether the checks drawn upon it were payable to bearer or to order, or the names of the persons in whose favor they were drawn, are not competent evidence of money paid to any particular person. Boyd *v.* Wilson, 3 Fed. Cas. No. 1,751, 2 Cranch C. C. 525. In an action by the indorser of a note to recover the amount which he has paid thereon of the maker, the books of the bank to which the note was paid are admissible, in connection with plaintiff's check for the amount, to prove the payment. Parker *v.* Sanborn, 7 Gray (Mass.) 191.

Verified account of executor.— A verified account, filed by an executor for final settlement, in which he charged himself with money collected on a note given for property sold, is admissible to show payment of the note. Wharton *v.* Thomason, 78 Ala. 45.

Letters.— Fisk *v.* Fisk, 60 N. Y. 631. On an issue as to whether plaintiff had taken the note of one N as collateral security, or whether he had agreed to take it in payment of the debt, provided N promised to pay the note to him, a letter from N to plaintiff, promising to pay the note, was competent evidence. Bates *v.* Hazen, 63 N. H. 618.

Will.— Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649, holding a will admissible to show that the creditor, an executor, had sufficient funds in his hands belonging to the debtor to pay the debt.

Order drawn on debtor.— In an action against a debtor for the whole sum originally due under a contract, an order drawn on him by his creditor, and accepted by him, is admissible in evidence. Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475.

A contract other than that sued on may be read in evidence to show that payments were made on account of such other contract. Stone *v.* Talbot, 4 Wis. 442.

Books of the debtor containing entry of payments are immaterial where the only question is as to the amount of wages which plaintiff was to receive. Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373. A book-account of a debtor of the date when the debt fell due, showing a balance in his favor, equal to a second instalment of plaintiff's debt, is not admissible to prove payment of that instalment. Clark *v.* Wells, 5 Gray (Mass.) 69.

43. Harwood *v.* Harper, 54 Ala. 659.

44. Schwarze *v.* Roessler, 40 Ill. App. 474; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84. But see Harbison *v.* Hall, 124 N. C. 626, 32 S. E. 964, holding that in an action for goods sold, where the defense is payment, plaintiff may show by his bookkeeper, in corroboration of his own testimony, that the amount has not been paid, his usage in regard to his system of entries in his books, when checks and money have been received, and that the books fail to show any evidence of payment.

Book entries as admissions in general see Evidence, 17 Cyc. 395.

45. Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511.

46. Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Harrison *v.* Henderson, 12 Ga. 19; Bradley *v.* Briggs, 22 Vt. 95; Pasley *v.* Bromley, 32 W. Va. 21, 9 S. E. 40.

47. **Admission of parol evidence** to vary or contradict receipt see Evidence, 17 Cyc. 629 *et seq.*

Receipt as best evidence see Evidence, 17 Cyc. 494.

Receipt "in full" as subject to contradiction by parol evidence see Evidence, 17 Cyc. 634.

48. *Arkansas.*—Burton *v.* Merrick, 21 Ark. 357.

California.— Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599.

Georgia.— Georgia R., etc., Co. *v.* Macon, 86 Ga. 585, 13 S. E. 21; Scott *v.* Scott, 36 Ga. 484.

Iowa.— Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940.

Maine.— Garnsey *v.* Allen, 27 Me. 366.

Minnesota.— Cain *v.* Mead, 66 Minn. 195, 68 N. W. 840.

Mississippi.— Wells *v.* Patterson, 7 How. 32.

Pennsylvania.— Cassell *v.* Cooke, 8 Serg. & R. 268, 11 Am. Dec. 610; Cluggage *v.* Swan, 4 Binn. 150, 5 Am. Dec. 400. *Compare* McConnell *v.* Ferguson, 17 Lanc. L. Rev. 67, 13 York Leg. Rec. 132.

England.— Carmarthen, etc., R. Co. *v.* Manchester, etc., R. Co., L. R. 8 C. P. 685, 42 L. J. C. P. 262.

See 39 Cent. Dig. tit. "Payment," § 211.

after proof of execution.[49] The receipt must be one executed by the creditor or his agent authorized to give a receipt,[50] the rule being that receipts by third persons are not evidence, but that the persons themselves should be introduced.[51] So indorsements of credits by the creditor on the instrument sued on are competent evidence against him as admissions of payment.[52] A receipt is not evidence of the payment thereby acknowledged as against strangers thereto.[53] If the creditor alleges that the receipt has been altered and increased, the debtor may show that the receipt was in its present condition soon after it was signed and before the action was brought.[54]

d. Bills, Notes, or Checks. A note is admissible in connection with other evidence to show that it was a payment of the debt sued on.[55] So the note in controversy, from which the signature of the maker has been torn off, is admissible in evidence in behalf of the maker.[56] Bank checks of the debtor payable to the order of the creditor and indorsed by him are admissible in evidence to show payment.[57] So a draft drawn to the order of the drawee himself, and given to

To show payment of purchase-money as recited in deed.— Where a deed has been introduced in evidence without objection, a receipt showing the payment of the purchase-money recited in the deed is also admissible. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303.

Rejection in former action.— A receipt, which has been disallowed by a jury as evidence of payment on a note, may be given in evidence in an action of assumpsit for the money. Mervin *v.* Potter, 1 Root (Conn.) 201.

Recepit not tending to show payment.— Receipts tending to prove that the creditor had purchased the land mortgaged as collateral security at sheriff's sale are not competent evidence to prove that the judgment had been paid. Wasson *v.* Hodshire, 108 Ind. 26, 8 N. E. 621.

Receipts of persons without the state.— The receipts of persons without the commonwealth are admissible, on proof of their handwriting, as evidence of charges in a guardianship account of payments to such persons. Shearman *v.* Akins, 4 Pick. (Mass.) 283.

A receipt for interest, bearing a certain date, was admissible to raise the presumption that all interest had been paid to that date. Elliott *v.* Curry, 1 Phila. (Pa.) 281.

Explanation.— Evidence is admissible on behalf of a creditor to show that a receipt was given for a payment represented by a credit admitted in the complaint. Robertson *v.* Garshwiler, 81 Ind. 463.

49. Hander *v.* Baade, 16 Tex. Civ. App. 119, 40 S. W. 422.

Proof by subscribing witness.— A receipt, signed by a subscribing witness, may be proved by that witness. Heckert *v.* Haine, 6 Binn. (Pa.) 16.

50. Goldman *v.* Brandt, 5 N. Y. Suppl. 420; Perkins *v.* Hawkins, 9 Gratt. (Va.) 649. But see Locke *v.* Porter Gold, etc., Min. Co., 41 Cal. 305; Sewanee Min. Co. *v.* Best, 3 Head (Tenn.) 701, holding that where a party who has no agency or power in the matter gives a receipt, such receipt is, with the acceptance of the money by the person entitled thereto, competent evidence of the payment of the same; but an admission that it was in full to date is not admissible against the latter.

Nominal party.— Under the rule that the declarations of a nominal plaintiff are not admissible to defeat the action, a receipt executed by him is inadmissible as an admission in favor of defendant. Copeland *v.* Clark, 2 Ala. 388.

51. See EVIDENCE, 17 Cyc. 494.

52. Brown *v.* Gooden, 16 Ind. 444; Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355. See also Wilson *v.* Pope, 37 Barb. (N. Y.) 321; Hopper *v.* Hopper, 61 S. C. 124, 39 S. E. 366.

53. Ferris *v.* Boxell, 34 Minn. 262, 25 N. W. 592; Ellison *v.* Albright, 41 Nebr. 93, 59 N. W. 703, 29 L. R. A. 737; Roll *v.* Maxwell, 5 N. J. L. 493.

54. Burnham *v.* Parkhurst, 108 Mass. 341.

55. Ruch *v.* Fricke, 28 Pa. St. 241; Snyder *v.* Wertz, 5 Whart. (Pa.) 163; Heffner *v.* Wenrich, 15 Leg. Int. (Pa.) 102.

To show payment by third person.— Notes of the debtor and receipts, in the possession of a third person who closed up the business of the debtor, have been held admissible in an action by him against the debtor, to show payment by such third person out of his own moneys. Scott *v.* Scott, 36 Ga. 484.

Possession.—Notes found among the papers of the debtor in his handwriting and to the order of the creditor are not admissible to prove payment to the creditor where there is no evidence that they were ever in the possession of the creditor. Lamb *v.* Ward, 114 N. C. 255, 19 S. E. 230.

Note as counter-claim.— Where plaintiff sets up a note as a counter-claim, a note made by defendant in favor of plaintiff shortly before the note counter-claimed became due is not admissible to show that on that date defendant received the amount named in such note to apply in payment of the counter-claim. Cohu *v.* Husson, 119 N. Y. 609, 23 N. E. 573.

56. Chinberg *v.* Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462.

57. Jesse *v.* Davis, 34 Mo. App. 351. See also Murphy *v.* Brick, 33 Pa. St. 235; Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499. *Con-*

the creditor, is admissible on the question of payment, without being indorsed by the payee.[58] To explain a receipt "in full up to date, including a note," and rebut any presumption that it was accepted as absolute payment, such note is admissible in evidence.[59]

12. Parol Evidence. Parol evidence is admissible to show that a debt has been paid, although the debt is evidenced by a writing.[60] So parol evidence is admissible to show that an assignment, although absolute on its face, was taken simply as security.[61] Where the statute defines the meaning of "current lawful money," parol evidence is inadmissible to show what kind of money was intended in a contract using such phrase.[62] Where a debtor introduces in evidence a check alleged to have been received by the creditor in full payment, the creditor may show by parol that the check was intended only to pay his expenses.[63]

F. Weight and Sufficiency of Evidence — 1. In General.[64] Payment must be proved by a preponderance of the evidence.[65] The same rules as to

tra, Burch *v.* Spaulding, 4 Fed. Cas. No. 2,140, 2 Cranch C. C. 422; Lowe *v.* McClery, 15 Fed. Cas. No. 8,566, 3 Cranch C. C. 254.

Mutilated check.— The admission, as evidence of a payment to a particular person, of a check so mutilated that only part of the name of the payee appears on the face of it is not error, where the evidence in respect to the check does not make a case for the application, against the party offering it, of the presumption arising from such mutilation. Ferneau *v.* Whitford, 39 Mo. App. 311.

Appropriation to debt in controversy.— A check drawn by defendant to plaintiff's order, and paid to the latter, is evidence that the amount of it was paid to plaintiff on account of a debt shown to have existed, and cannot be excluded because the court may think it belonged to a different transaction. Masser *v.* Bowen, 29 Pa. St. 128, 72 Am. Dec. 619.

Effect of no indorsement.— Where, in an action on account, defendants alleged payment by a check drawn on them to plaintiffs, payable by a certain bank, it was not error to admit in evidence the check, stamped "paid," although there was no indorsement on it, it appearing that the bank had paid other checks drawn by defendants to the payees without requiring indorsement. Baumgardner *v.* Henry, 131 Mich. 240, 91 N. W. 169.

Rebuttal.— Where defendant, to prove payment, offers checks for a larger amount than plaintiff's bill, plaintiff may show that the checks were in payment of prior transactions, over objection that the evidence was not within the pleadings. Druss *v.* Rosen, 84 N. Y. Suppl. 174.

Individual check for firm debt.— Where defendant testifies that a debt has been paid with firm money, his individual check is not admissible. Arbuckles *v.* Chadwick, 146 Pa. St. 393, 23 Atl. 346.

Checks payable to administrator.— Checks drawn by the debtor on a bank, with its stamp of payment thereon, which were payable to the order of the administrator in his own name, and indorsed by him both individually and in his representative capacity, are not admissible in evidence to show payment of such debt, without proof that the checks were given in payment of it, or evidence connecting them with it. Simmons *v.* Thornton, 111 Ga. 239, 36 S. E. 685.

58. Connelly *v.* McKean, 64 Pa. St. 113.

59. Grovenstein *v.* Brewer, 76 Ga. 763.

60. See Evidence, 17 Cyc. 691, 692.

Parol evidence that promissory notes were delivered and accepted in payment is admissible, without producing the notes or accounting for their non-production. Fisher *v.* George S. Jones Co., 93 Ga. 717, 21 S. E. 152.

61. Butman *v.* Howell, 144 Mass. 66, 10 N. E. 504.

62. Lee *v.* Biddis, 1 Dall. (Pa.) 175, 1 L. ed. 88.

63. Hendricks *v.* Leopold, (Tex. App. 1892) 18 S. W. 638.

64. Receipts see *supra*, V, C.

To aid or rebut presumption of payment from lapse of time see *supra*, VII, D, 4, e, (III).

65. Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Boon *v.* Bliss, 98 Ill. App. 341; Mullally *v.* Dingman, 62 Nebr. 702, 87 N. W. 543; Meyer *v.* Hafemeister, 119 Wis. 539, 97 N. W. 165, 100 Am. St. Rep. 900.

Reasonable certainty.— Moreira's Succession, 16 La. Ann. 368.

Mere probability is insufficient. Sigur *v.* Burguieres, 111 La. 1077, 36 So. 134.

Evidence held sufficient to show payment see Charouleau *v.* Charouleau, 5 Ariz. 192, 50 Pac. 112; Ah Gett *v.* Carr, 3 Cal. App. 47, 84 Pac. 458; Hensley *v.* Lewis, 41 S. W. 440, 19 Ky. L. Rep. 633; Griswold *v.* Lambert, 89 Me. 534, 36 Atl. 1046; Korf *v.* Korf, 125 Mich. 259, 84 N. W. 130 (purchase or payment); Blundell *v.* Vaughan, 12 Sm. & M. (Miss.) 625; Seacoast R. Co. *v.* Wood, 65 N. J. Eq. 530, 56 Atl. 337; Chapman *v.* Hunt, 18 N. J. Eq. 414; Burroughs *v.* Straus, 48 N. Y. App. Div. 584, 62 N. Y. Suppl. 1119; Lombard *v.* Moore, 6 Misc. (N. Y.) 469, 27 N. Y. Suppl. 523; Fleck *v.* Neerenberg, 85 N. Y. Suppl. 379; Seabrook *v.* Hammond, 5 Rich. (S. C.) 160; Alsup *v.* Thompson, (Tenn. Ch. App. 1898) 52 S. W. 324; Hepburn *v.* Dundas, 13 Gratt. (Va.) 219; Cushman *v.* Hall, 28 Vt. 656; McGraw *v.* Franklin, 2

weight and sufficiency are applicable as in civil actions in general, so that there

Wash. 17, 25 Pac. 911, 26 Pac. 810; Schatz *v.* Pfeil, 56 Wis. 429, 14 N. W. 628. See also Carson *v.* Lineburger, 70 N. C. 173. Sufficient evidence of payment of a subsequent quarter's rent is *prima facie* evidence of payment for all former quarters. Brewer *v.* Knapp, 1 Pick. (Mass.) 332. Evidence of an agreement that an item in the nature of a cross demand should be credited as a payment *pro tanto* will sustain a decree allowing the item to be credited on the claim in suit. McCurdy *v.* Middleton, 90 Ala. 99, 7 So. 655. Payment of a note is sufficiently shown by the testimony of two witnesses to the fact that a certain amount of money was paid, which amount would extinguish the note, notwithstanding the maker afterward paid interest on a balance claimed to be due, and the payee did not surrender the note. Ritter *v.* Schenk, 101 Ill. 387. Proof of the payment by defendant of orders drawn by plaintiffs upon him in favor of third parties is sufficient as proof of payment to plaintiffs. Webber *v.* Howe, 36 Mich. 150, 24 Am. Rep. 590.

Evidence held not sufficient to show payment see Arnold *v.* Arnold, 124 Ala. 550, 27 So. 465, 82 Am. St. Rep. 199; Connerly *v.* Inman, (Ark. 1906) 95 S. W. 138; Texarkana, etc., R. Co. *v.* Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944; Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152; Darby *v.* Miller, 116 Ga. 952, 43 S. E. 374; Roby *v.* Pipher, 109 Ind. 345, 9 N. E. 604; Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154; Houeye *v.* Henkel, 115 La. 1066, 40 So. 460; Brightman *v.* Buffington, 184 Mass. 401, 68 N. E. 828 (gift instead of payment); Carter *v.* Weber, 138 Mich. 576, 101 N. W. 818; Baldwin *v.* Clock, 68 Mich. 201, 35 N. W. 904; Beardslee *v.* Horton, 3 Mich. 560; Lang *v.* Ferrant, 55 Minn. 415, 57 N. W. 140; Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80; Drake *v.* Critz, 83 Mo. App. 650; Sanders *v.* Clifford, 72 Mo. App. 548; Crawford *v.* Spencer, 36 Mo. App. 78; Gaylord *v.* Gibson, 36 N. Y. App. Div. 548, 55 N. Y. Suppl. 670; Cameron *v.* Leonard, 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 73; Metropolitan Bank *v.* Smith, 4 Rob. (N. Y.) 229; Miller *v.* Smith, 23 Misc. (N. Y.) 648, 52 N. Y. Suppl. 91; Schwartz *v.* Allen, 7 N. Y. Suppl. 5; Outlaw *v.* Garner, 139 N. C. 190, 51 S. E. 925; Rhoades *v.* Crozier, (Tenn. Ch. App. 1900) 59 S. W. 211; Cunningham *v.* Davis, (Tenn. Ch. App. 1898) 47 S. W. 140; Feder *v.* Ervin, (Tenn. Ch. App. 1896) 38 S. W. 446, 36 L. R. A. 335; Henderson *v.* Landa, 79 Tex. 39, 14 S. W. 891; Garrett *v.* Robinson, (Tex. Civ. App. 1897) 43 S. W. 288; McCamant *v.* Roberts, (Tex. Civ. App. 1894) 25 S. W. 731; Cherry *v.* Butler, (Tex. App. 1891) 17 S. W. 1090; Flick *v.* Fridley, 83 Va. 777, 3 S. E. 380; Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. N. S. 401; Cator *v.* Croydon Canal Co., 4 Y. & C. Exch. 405. See also Jones *v.* Gretton, 8 Exch. 773, 22 L. J. Exch. 247. Documentary evidence. True *v.* Harding, 12 Me. 193; Crain *v.* Barnes, 1 Md. Ch. 151; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510. Evidence that plaintiffs at some time had in their possession a certain amount of money belonging to defendant does not show payment thereof to them in part payment of their claim against defendant. Simons *v.* Martin, etc., Mfg. Co., 25 Misc. (N. Y.) 788, 54 N. Y. Suppl. 560. The testimony of a witness that he saw defendant pay plaintiff's intestate some money when trying to make a settlement, but could not tell how much, is insufficient to support an allegation of payment. Magenau *v.* Bell, 14 Nebr. 7, 14 N. W. 664. Evidence that a debtor ordered her agent to send the money, and, hearing nothing more about it, supposed that it was paid, is not sufficient to show payment, especially where there is inferential evidence to the contrary. McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721. The word "settled," written under an account in a book of accounts, and signed by both parties, does not of itself necessarily import payment. Reynolds *v.* Williams, 9 Kulp (Pa.) 380.

Evidence held sufficient to show non-payment see Swan *v.* Brewster, 1 N. Y. Suppl. 584; Schuey *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549; Blount *v.* U. S., 21 Ct. Cl. 274.

Sufficiency of evidence to overcome presumption that payment by person jointly liable on note, not credited on such note, was made on his individual note. Well *v.* Ayers, 84 Va. 341, 5 S. E. 21.

Number of witnesses.— The testimony of only one witness, where not corroborated, has been held, in some jurisdictions, insufficient to prove payment. Silver *v.* Hedges, 3 Dana (Ky.) 439. But see De St. Romes *v.* New Orleans, 18 La. Ann. 210. Payment of an obligation over five hundred dollars may be proved by a single witness. Jones *v.* Fleming, 15 La. Ann. 522; O'Brien *v.* Flynn, 8 La. Ann. 307.

Evidence held sufficient to show payment by transfer of property or performance of services see Curtis *v.* Nash, 88 Me. 476, 34 Atl. 273; Seighman *v.* Marshall, 17 Md. 550.

Evidence held insufficient to show payment by transfer of property or performance of services see Joiner *v.* Enos, 23 Ill. App. 224; Allison *v.* Allison, 99 Va. 472, 39 S. E. 130. An unexecuted agreement by a mortgagee of realty, with two of the three mortgagors, to take the mortgaged premises in payment of the mortgage notes, is not sufficient evidence to show payment of those notes, in a suit by the mortgagee against the indorser of them. Green *v.* Davis, 44 N. H. 71.

Sufficiency of evidence to show debt was payable in Confederate money see Jackson *v.* Jackson, 47 Ga. 99; Morgan *v.* Otey, 21 Gratt. (Va.) 619.

Remittance by mail.— Proof that money agreed to be paid was sent by mail, in connection with other circumstances, is *prima facie* evidence of its receipt and payment.

is no preponderance where the evidence is equally balanced, and in such case plaintiff is entitled to recover.[66]

2. ADMISSIONS OF PARTIES. Admissions of the debtor may be sufficient to show non-payment,[67] as are admissions of the creditor or his agents to show payment.[68]

3. TESTIMONY OF PARTIES. The positive testimony of a creditor may be sufficient of itself to show non-payment,[69] as may the testimony of the debtor

Waydell *v.* Velie, 1 Bradf. Surr. (N. Y.) 277. Evidence that a letter containing a draft was addressed to the creditor in a large city without adding the street and number which was known to the debtor is insufficient to show that it was actually received by the creditor. Fleming, etc., Co. *v.* Evans, 9 Kan. App. 858, 61 Pac. 503. No presumption that a debt had been paid through the mails was established where there was no evidence that the letters through which the payments were claimed to have been made were ever duly deposited in the United States mail where the payer resided, inclosed in a securely sealed wrapper, addressed to the person alleged to have been paid, and postage duly paid, or that the same ever came to such person. Barnes *v.* Courtright, 37 Misc. (N. Y.) 60, 74 N. Y. Suppl. 203.

Sufficiency of evidence as to amount of payment see Tallman *v.* Miller, 32 Nebr. 559, 49 N. W. 459; Arnett *v.* Hill, 11 N. Y. Suppl. 381. One may prove that he had paid a note by partial payments, although he cannot show the exact date and amount of each payment. Fletcher *v.* Dulaney, 1 Indian Terr. 674, 43 S. W. 955.

Sufficiency of evidence to show application of payment to one of two or more debts see Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Kent *v.* Marks, 101 Ala. 350, 14 So. 472; Cox *v.* Wall, 84 Ga. 456, 11 S. E. 137; Green *v.* Ford, 79 Ga. 130, 3 S. E. 624; Brooks *v.* Jones, 114 Iowa 385, 82 N. W. 434, 86 N. W. 300; Sankey *v.* Cook, 78 Iowa 419, 43 N. W. 280 (where only one debt shown); Hunt *v.* Brewer, 68 Me. 262 (holding that where one indebted as a partner and individually gave his note in payment and took a receipt as follows: "Received from F. S. Brewer his ninety-day note for three hundred dollars," such receipt has no bearing one way or the other on the question whether the note was appropriated on the joint or on the several account); Swett *v.* Boyce, 134 Mass. 381; Lewis *v.* Noble, 93 Mich. 345, 53 N. W. 396; Moore *v.* Pollock, 50 Nebr. 900, 70 N. W. 541; Johnson *v.* Blazer, 33 Nebr. 841, 51 N. W. 239; Price *v.* Dearborn, 34 N. H. 481; Coleman *v.* Howell, (N. J. Ch. 1888) 16 Atl. 202; Woodruff *v.* McIntyre, (N. J. Ch. 1888) 14 Atl. 572; Grant *v.* Keator, 117 N. Y. 369, 22 N. E. 1055; Eberlin *v.* Palmer, 10 N. Y. Suppl. 660; Fargo First Nat. Bank *v.* Roberts, 2 N. D. 195, 49 N. W. 722; Hinkle *v.* Higgins, 83 Tex. 615, 19 S. W. 147; Otto *v.* Klauber, 23 Wis. 471; Mahoney *v.* McSweeney, 31 N. Brunsw. 672. A debtor's application of a payment to a particular item may be inferred from circumstantial evidence of his intention. Lauten *v.* Rowan, 59 N. H. 215. The misapplication of payments cannot be proved by vague and conjectural proof, in opposition to explicit denial and documentary evidence. Vimont *v.* Welch, 2 A. K. Marsh. (Ky.) 110. A bank check in the usual form is not, even when paid and returned to the drawer, an acknowledgment that the money therein mentioned has been received for and applied to a particular purpose. Ottens *v.* Fred Krug Brewing Co., 58 Nebr. 331, 78 N. W. 622. The fact that timber was mortgaged to secure the debt sued on strengthens defendant's testimony that the proceeds of the timber were paid on that debt, and not on other debts due plaintiff, and is sufficient, with such testimony, to sustain the plea of payment. Chaney *v.* Ramey, 43 S. W. 235, 19 Ky. L. Rep. 1258.

66. Shulman *v.* Brantley, 50 Ala. 81; Mullally *v.* Dingman, 62 Nebr. 702, 87 N. W. 543.

67. Amos *v.* Flournoy, 80 Ga. 771, 6 S. E. 696; Wiltsie *v.* Wiltsie, 1 N. Y. Suppl. 559; Souder's Estate, 169 Pa. St. 239, 32 Atl. 417; Martin *v.* Fowler, 51 S. C. 499, 29 S. E. 261.

68. Kelly *v.* Butterworth, 103 Ill. App. 87; Koontz *v.* Koontz, 79 Md. 357, 32 Atl. 1054; Rauth *v.* Scheer, 20 Misc. (N. Y.) 689, 46 N. Y. Suppl. 539; Hall *v.* Thompson, 24 N. Y. Suppl. 86; State Bank *v.* Wilson, 12 N. C. 484. But see Block *v.* Cross, 36 Miss. 549.

Loan.— But an acknowledgment by plaintiff that he received money from defendant, but at the same time stating that it was as a loan, is not sufficient evidence of payment. Oldham *v.* Henderson, 4 Mo. 295.

The report of a commissioner that his predecessor had paid him a certain fund is not conclusive in the latter's favor on a plea of payment, although the reporting commissioner may be liable therefor on his bond. Perkins *v.* Chambers, 49 S. W. 544, 20 Ky. L. Rep. 1506.

Possession of funds of debtor.— Where plaintiff admits having money in his hands belonging to defendant, but fails to disclose how much, it will be presumed that he has sufficient to liquidate a balance due by defendant to him. Pulver *v.* Esselstyn, 22 Misc. (N. Y.) 429, 50 N. Y. Suppl. 756.

69. See Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750; Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Roussel *v.* Mathews, 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886 [*affirmed* in 171 N. Y. 634, 63 N. E. 1122].

Conflicting statements.— Testimony of a mortgagee, suing to foreclose, that the debt for which the mortgage was given existed at the execution of the latter, corroborated by testimony of an attorney who has been au-

to show payment.[70] Where the only testimony is that of the debtor and the creditor, which is in irreconcilable conflict, the possession by the debtor, unexplained, of the obligation evidencing the debt, is conclusive on the question of payment.[71]

4. Payment by Bill, Note, or Check. The evidence to show that a bill, note, order, or check was or was not accepted as absolute payment according to whether payment in such a case is or is not presumed, must be clear and convincing.[72]

G. Trial — 1. In General. The trial, in so far as the issue of payment is

thorized to collect the debt, is not overcome by evidence of statements made by the mortgagee prior to taking the mortgage that the debt was paid, and that he and the debtor were "square." Johnson *v.* Johnson, 101 Iowa 405, 70 N. W. 598.

The character, temperament, and habits of two litigants and the surrounding circumstances may make it more probable that one has forgotten the debt due him by the other than that the other should have paid it and have preserved no record showing how, when, where, or to whom such payment was made. Sigur *v.* Burguieres, 111 La. 1077, 36 So. 134.

70. Hallenbeck *v.* Saugerties, 33 N. Y. App. Div. 635, 53 N. Y. Suppl. 626; Mayo *v.* Davidge, 4 N. Y. Suppl. 77 [*affirming* 1 N. Y. Suppl. 792]; *In re* Burk, 205 Pa. St. 332, 54 Atl. 998. See also Kehoe *v.* McConaghy, 29 Wash. 175, 69 Pac. 742.

When not conclusive, although uncontradicted.— But testimony of defendant, although uncontradicted as to payment, is not conclusive on the jury, where, on trial, neither the absence of the receipt for such payment nor the check on which the money to make the payment was claimed to have been procured was satisfactorily accounted for, and defendant admitted that the date of the payment as sworn to in his answer was false. Newcombe *v.* Hyman, 16 Misc. (N. Y.) 25, 37 N. Y. Suppl. 649.

71. Hawkins *v.* Harding, 37 Ill. App. 564.

72. See cases cited *infra*, this note.

Evidence held sufficient to show acceptance as absolute payment see Whitley *v.* Dunham, Lumber Co., 89 Ala. 493, 7 So. 810; Rice *v.* Georgia Nat. Bank, 64 Ga. 173; Gafford *v.* American Mortg., etc., Co., 77 Iowa 736, 42 N. W. 550; Jamison *v.* Ray, 73 Minn. 249, 75 N. W. 1049; Wiley *v.* Dean, 67 Minn. 62, 69 N. W. 629; Goenen *v.* Schroeder, 18 Minn. 66; Partee *v.* Bedford, 51 Miss. 84; Hammond *v.* Jewett, 22 Nebr. 363, 35 N. W. 188; Roberts *v.* Fisher, 53 Barb. (N. Y.) 69 [*reversed* on other grounds in 43 N. Y. 159, 3 Am. Rep. 680]; Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; Robinson *v.* Hurlburt, 34 Vt. 115; Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 11 S. Ct. 360, 34 L. ed. 1019; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

Evidence held sufficient to show that acceptance was not as absolute payment see Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844; Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Davis *v.* Parsons, 157 Mass. 584, 32 N. E. 1117; Quinby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Sheldon Axle Co. *v.* Scofield, 85 Mich. 177, 48 N. W. 511; Edward Thompson Co. *v.* Baldwin, 62 Nebr. 530, 87 N. W. 307; Van Eps *v.* Dillaye, 6 Barb. (N. Y.) 244; Allen *v.* Bantel, 2 Thomps. & C. (N. Y.) 342; Carroll *v.* Sweet, 57 N. Y. Super. Ct. 100, 5 N. Y. Suppl. 572 [*reversed* on other grounds in 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43]; Finlay *v.* Heyward, 34 Misc. (N. Y.) 818, 69 N. Y. Suppl. 648 [*reversed* on other grounds in 35 Misc. 266, 71 N. Y. Suppl. 779]; Beal *v.* American Diamond Rock Boring Co., 16 Misc. (N. Y.) 540, 38 N. Y. Suppl. 743; Baird *v.* Spence, 8 Misc. (N. Y.) 535, 28 N. Y. Suppl. 774 [*affirmed* in 10 Misc. 772, 31 N. Y. Suppl. 1125]; Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889; Ellison *v.* Hosie, 147 Pa. St. 336, 23 Atl. 455; Patton *v.* Ash, 7 Serg. & R. (Pa.) 116; Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393; McVeigh *v.* Chamberlain, 94 Va. 73, 26 S. E. 395. A check not being payment unless received as such or cashed, a mere statement of one that he made a payment by a check drawn by him, without production thereof or of the books of the bank, does not prove payment. Tschopick *v.* Lippincott, (Tenn. Ch. App. 1898) 48 S. W. 128. A negotiable promissory note of a third person, entered on plaintiff's books of account as payment of defendant's debt, is not conclusive evidence of such payment. Brigham *v.* Lally, 130 Mass. 485.

The evidence to rebut the presumption that a check is not accepted as absolute payment must be as clear and satisfactory as is essential to establish the payment of an admitted debt. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Presumption as rebutted by slight circumstances.— Where the evidence shows that a note received by a creditor, upon his demand, was not the obligation of all the parties who were liable for the original debt, and, *a fortiori*, when it appears that the note was that of a third party, and if held to have been received in satisfaction, would wholly discharge the party originally liable, the presumption that it was so received, if it can arise at all, may be repelled by slight circumstances indicating a contrary intention. Hudson *v.* Bradley, 12 Fed. Cas. No. 6,833, 2 Cliff. 130.

The mere fact that the debtor has failed to indorse the note which is claimed to constitute an absolute payment is not a controlling circumstance. Freeman *v.* Benedict, 37 Conn. 559.

Evidence of creditor against evidence of debtor.— Where the creditor testifies one way

concerned, is governed by the rules relating to the trial of civil actions in general.[73]

2. Questions For Jury — a. In General.[74] Ordinarily the question of payment is one for the jury.[75] But where the material evidence is undisputed, the question whether it shows a payment is one of law for the court.[76]

b. Presumption of Payment From Lapse of Time. Where the evidence is such that the jury must give effect to the presumption of payment from the lapse of twenty years or more, and a contrary verdict would be set aside as against the weight of evidence, a verdict may be directed for the debtor.[77] Ordinarily, however, the question whether a payment is to be presumed from the lapse of time is one of fact for the jury.[78] So the question whether the evidence to rebut the

and the debtor to the contrary, the issue will be determined against the debtor, since he has the burden of proof. Freeman *v.* Benedict, 37 Conn. 559.

Construction of evidence.—Where the debtor requested the creditor not to present a check immediately, as the drawer's account was not good, testimony of the creditor that he took it in payment must be construed to mean as conditional payment. Comptoir D'Escompte *v.* Dresbach, 78 Cal. 15, 20 Pac. 28.

73. See Trial.

Directing verdict.— If there is no material conflict in the evidence tending to show payment or non-payment as a matter of law, it is proper to direct a verdict. Seiberling *v.* Demaree, 27 Nebr. 854, 44 N. W. 46; Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Smith *v.* Smith, 2 Silv. Sup. (N. Y.) 373, 6 N. Y. Suppl. 90; Schierl *v.* Baumel, 75 Wis. 69, 43 N. W. 724.

Striking out evidence.— If the evidence as to payment is insufficient as a matter of law, it may be stricken out. White *v.* Knowles, 1 Silv. Sup. (N. Y.) 118, 6 N. Y. Suppl. 579.

Order of proof.— The proper order of proof is for plaintiff to withhold evidence of non-payment, unless it is a necessary part of his cause of action, until defendant introduces evidence of payment, and then put in evidence of non-payment in rebuttal. Frindel *v.* Schaikewitz, 1 N. Y. App. Div. 214, 37 N. Y. Suppl. 172.

74. See also Commercial Paper, 8 Cyc. 292.

75. *Kentucky.*— Williamson *v.* McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561.

Michigan.— Linsell *v.* Linsell, 138 Mich. 64, 100 N. W. 1009.

New York.— Fulton Grain, etc., Co. *v.* Anglim, 34 N. Y. App. Div. 164, 54 N. Y. Suppl. 632; Thompson *v.* Welde, 10 N. Y. App. Div. 125, 41 N. Y. Suppl. 819.

Pennsylvania.— Reynolds *v.* Richards, 14 Pa. St. 205; Jones *v.* Johnson, 3 Watts & S. 276, 38 Am. Rep. 760; German Ins. Co. *v.* Davenport, 6 Pa. Cas. 441, 9 Atl. 517.

South Carolina.— Simons *v.* Walter, 1 McCord 97.

England.— See Henderson *v.* Hayter, 2 F. & F. 128.

See 39 Cent. Dig. tit. "Payment," § 242.

But see Quarles *v.* Jenkins, 98 N. C. 258, 3 S. E. 395.

Where a receipt in part or in full is opposed by evidence that no payment, or only a partial payment, was made, the question is for the jury. Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213; Mosel *v.* William H. Frank Brewing Co., 2 N. Y. App. Div. 93, 37 N. Y. Suppl. 525; Walker *v.* Tupper, 152 Pa. St. 1, 25 Atl. 172; Twohy Mercantile Co. *v.* McDonald, 108 Wis. 21, 83 N. W. 1107. See also Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45. The value of a receipt as evidence is wholly a question for the jury. Herkimer *v.* Nigh, 10 Ill. App. 372.

What is a reasonable time for the return of a bill of a broken bank (Magee *v.* Carmack, 13 Ill. 289), or a counterfeit bill (Simms *v.* Clark, 11 Ill. 137), which has been received by a creditor in payment of his debt, is a question for the jury.

Payment or purchase of a note is generally a question for the jury. Dougherty *v.* Deeney, 45 Iowa 443.

Payment to third person.— Whether a debtor's payment, at his creditor's request, of a debt due from the creditor to a third person, was intended as an extinguishment *pro tanto* of the creditor's claim, is for the jury. Norment *v.* Brown, 79 N. C. 363.

76. Frost *v.* Martin, 29 N. H. 306; Teall *v.* Consolidated Electric Light Co., 119 N. Y. 654, 23 N. E. 985; Balcom *v.* O'Brien, 13 S. D. 425, 83 N. W. 562.

77. Owen *v.* Calhoun, 8 N. Y. Suppl. 447; Brotherson *v.* Jones, Lalor (N. Y.) 171.

When the evidence is uncontradicted, it is the duty of the court to pass upon its sufficiency and not to submit the issue to the jury. Grant *v.* Burgwyn, 84 N. C. 560.

78. *Kentucky.*— Waters *v.* Waters, 1 Metc. 519; Shields *v.* Pringle, 2 Bibb 387.

New York.— Macaulay *v.* Palmer, 125 N. Y. 742, 26 N. E. 912; Hall *v.* Roberts, 63 Hun 473, 18 N. Y. Suppl. 480.

North Carolina.—Williams *v.* Peal, 20 N. C. 609.

Ohio.— McBride *v.* Moore, Wright 524.

Pennsylvania.— O'Hara *v.* Corr, 210 Pa. St. 341, 59 Atl. 1099; Lee *v.* Newell, 107 Pa. St. 283.

Tennessee.— Lyon *v.* Guild, 5 Heisk. 175.

See 39 Cent. Dig. tit. "Payment," § 243.

There is a manifest distinction between those cases where length of time operates as a bar to the action, and those in which it can be used only as matter of evidence. In a case coming within the statute of limitations, the lapse of time prescribed by the statute is pleadable as a bar to the action, and the

presumption of payment from lapse of time is true is a question for the jury;[79] but whether the facts and circumstances relied on, if true, legitimately give rise to a presumption of non-payment and rebut the presumption of payment from lapse of time is one of law for the court.[80]

e. Mode and Medium of Payment. What is lawful money of the United States other than gold and silver coin is a question of law for the court.[81] On the other hand, the question whether a contract made during the Civil war calling for the payment of dollars contemplated Confederate dollars,[82] or the kind of money in which a bond executed during such time was to be paid, where there was nothing on its face to indicate the medium of payment,[83] is one of fact for the jury. So the question whether a remittance by mail is the usual mode, when a creditor directs his debtor to remit money to him, in general terms, without prescribing the mode, is a question of fact for the jury.[84]

d. Payment Other Than in Money. Whether there was an agreement to receive property other than money from a debtor in payment is a question for the jury.[85] For instance, whether a note,[86] including a note of a third person,[87] or a

jury would be concluded by it, although they were convinced that the debt still remained due and unpaid. But where length of time is not *per se* a bar, but used merely as evidence, it is a matter for the consideration of the jury to credit it or not, and to draw their inference the one way or the other, according to circumstances. Shields *v.* Pringle, 2 Bibb (Ky.) 387.

79. Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804; McQuesney *v.* Hiester, 33 Pa. St. 435.

80. Woodbury *v.* Taylor, 48 N. C. 504; Buie *v.* Buie, 24 N. C. 87; Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804; Peters' Appeal, 106 Pa. St. 340; Beale *v.* Kirk, 84 Pa. St. 415; Backestoss *v.* Com., 8 Watts (Pa.) 286; Delany *v.* Robinson, 2 Whart. (Pa.) 503. See also McQuesney *v.* Hiester, 33 Pa. St. 435. But see Grantham *v.* Canaan, 38 N. H. 268; Brown *v.* Wagner, (Pa. 1889) 16 Atl. 834; Levers *v.* Van Buskirk, 4 Pa. St. 309; McDowell *v.* McCullough, 17 Serg. & R. (Pa.) 51; Boyd *v.* Grant, 13 Serg. & R. (Pa.) 124. *Compare* Jackson *v.* Sackett, 7 Wend. (N. Y.) 94. *Contra*, Summerville *v.* Holliday, 1 Watts (Pa.) 507; McLean *v.* Findley, 2 Penr. & W. (Pa.) 97.

Identity of debt admitted.— Where the evidence shows that the debtor admitted he owed the creditor a note, it is proper to leave it to the jury to say whether the note sued on was the one referred to. Hinsaman *v.* Hinsaman, 52 N. C. 510.

81. Chesapeake Bank *v.* Swain, 29 Md. 483.

82. Chalmers *v.* Jones, 23 S. C. 463.

83. Effinger *v.* Kenney, 24 Gratt. (Va.) 116.

84. Gross *v.* Criss, 3 Gratt. (Va.) 262.

85. Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; Gardner *v.* Gorham, 1 Dougl. (Mich.) 507; Hayden *v.* Pierce, 71 Hun (N. Y.) 593, 25 N. Y. Suppl. 55 [*affirmed* in 144 N. Y. 512, 39 N. E. 638].

Certificate of deposit.— Union Bank *v.* Smiser, 1 Sneed (Tenn.) 501. Whether a depositor of a banking firm who, after the dissolution of the firm, surrenders his certificate and accepts, in its place, a new certificate issued by one of the partners, who continued the business, intended thereby to receive the new certificate in payment of the old, and thus release the retiring partner, is for the jury. Chase *v.* Brundage, 58 Ohio St. 517, 51 N. E. 31.

Bank-book and order for amount of deposit. — O'Connor *v.* Stevenson, 39 N. Y. App. Div. 664, 57 N. Y. Suppl. 320.

86. *Alabama.*— Keel *v.* Larkin, 72 Ala. 493; Myatts *v.* Bell, 41 Ala. 222; Fulford *v.* Johnson, 15 Ala. 385.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Illinois.— Archibald *v.* Argall, 53 Ill. 307; White *v.* Jones, 38 Ill. 159; Stone *v.* Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77; Hoyt *v.* Hasse, 80 Ill. App. 187.

Massachusetts.— Spooner *v.* Roberts, 180 Mass. 191, 62 N. E. 4; Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372; Corner *v.* Pratt, 138 Mass. 446; Howland *v.* Coffin, 9 Pick. 52.

Mississippi.— Keerl *v.* Bridgers, 10 Sm. & M. 612.

Missouri.— The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536.

New Hampshire.— Foster *v.* Hill, 36 N. H. 526.

Pennsylvania.— Ramlack *v.* Wolf, 178 Pa. St. 356, 35 Atl. 879; Horner *v.* Hower, 49 Pa. St. 475; Seltzer *v.* Coleman, 32 Pa. St. 493; Stone *v.* Miller, 16 Pa. St. 450; Mason *v.* Wickersham, 4 Watts & S. 100; Bixler *v.* Lesh, 6 Pa. Super. Ct. 459; Williams *v.* Moore, 9 Kulp 310.

West Virginia.— Bowyer *v.* Knapp, 15 W. Va. 277.

United States.— Lyman *v.* U. S. Bank, 12 How. 225, 13 L. ed. 965.

See 39 Cent. Dig. tit. "Payment," § 245. See also COMMERCIAL PAPER, 8 Cyc. 290.

Compare Perry *v.* Williamson, (Tenn. 1900) 56 S. W. 826.

87. *Iowa.*— Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773.

Massachusetts.— Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514.

Mississippi.— Crow *v.* Burgin, (1905) 38 So. 625.

bill,[88] check,[89] or order on a third person,[90] was accepted as absolute or conditional payment is one for the jury.

e. **Application of Payments.** Generally the question of application of payments by the parties as determined by their intention is one of fact for the jury.[91] So where the creditor applies a payment otherwise than as directed by the debtor, the question whether the debtor acquiesced in such application is one for the jury.[92] Of course if there is no conflict in the evidence, the question is one for the court.[93] And the application of payments where neither party has applied the payment is a question of law for the court rather than one of fact for the jury.[94]

3. **Instructions.** The rules relating to instructions in civil actions in general govern the necessity and propriety of instructions as to payment.[95] For instance,

New Hampshire.— Wilson *v.* Hanson, 20 N. H. 375.

New York.— Johnson *v.* Weed, 9 Johns. 310, 6 Am. Dec. 279.

North Dakota.— See Acme Harvester Co. *v.* Axtell, 5 N. D. 315, 65 N. W. 680.

Pennsylvania.— Cridland *v.* Stevens, 9 Pa. Super. Ct. 41, 43 Wkly. Notes Cas. 243.

See 39 Cent. Dig. tit. "Payment," § 245.

88. Craddock *v.* Dwight, 85 Mich. 587, 48 N. W. 644; Hall *v.* Stevens, 40 Hun (N. Y.) 578 [*reversed* on other grounds in 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802]; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760. But see Watkins *v.* James, 48 N. C. 195.

89. *Minnesota.*— Goodall *v.* Norton, 88 Minn. 1, 92 N. W. 445.

Pennsylvania.— Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804; Briggs *v.* Holmes, 118 Pa. St. 283, 12 Atl. 355, 4 Am. St. Rep. 597; Lingenfelter *v.* Williams, 7 Pa. Cas. 70, 9 Atl. 653.

Rhode Island.— National Park Bank *v.* Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475.

Virginia.— Blair *v.* Wilson, 28 Gratt. 165.

Washington.— Megrath *v.* Gilmore, 10 Wash. 339, 39 Pac. 131.

See 39 Cent. Dig. tit. "Payment." § 245.

90. Bond *v.* McMahon, 94 Mich. 557, 54 N. W. 281; Iron River Bank *v.* Iron River School Directors, 91 Wis. 596, 65 N. W. 368.

91. *Georgia.*— Phillips *v.* McGuire, 73 Ga. 517.

Iowa.— Bishop *v.* Hart, 114 Iowa 96, 86 N. W. 218.

Maryland.— Fowke *v.* Bowie, 4 Harr. & J. 566.

Missouri.— Wear *v.* Schmelzer, 92 Mo. App. 314; Dick Bros. Quincy Brewing Co. *v.* Finnell, 39 Mo. App. 276.

New York.— Reich *v.* Reich, 6 Misc. 628, 27 N. Y. Suppl. 137.

Pennsylvania.— Brown *v.* Burr, 160 Pa. St. 458, 28 Atl. 828; West Branch Bank *v.* Moorehead, 5 Watts & S. 542; Moorehead *v.* West Branch Bank, 3 Watts & S. 550; Dickinson College *v.* Church, 1 Watts & S. 462.

Canada.— St. John *v.* Rykert, 10 Can. Sup. Ct. 278.

See 39 Cent. Dig. tit. "Payment," § 248.

92. Root *v.* Kelley, 39 Misc. (N. Y.) 530, 80 N. Y. Suppl. 482.

93. Gillett *v.* Knowles, 97 Mich. 77, 56 N. W. 218. See also Rogers *v.* State, 99 Ind. 218.

94. Nutall *v.* Brannin, 5 Bush (Ky.) 11.

95. See Trial. See also Clonan *v.* Thornton, 21 Minn. 380.

Propriety of particular charges in general see *In re* King, 94 Mich. 411, 54 N. W. 178.

Application of payments.— Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666 (holding that where the evidence as to whether a payment was directed to be applied to any one of two accounts is conflicting, it is error to instruct the jury how to apply it, without first requiring them to find whether any direction as to its application was given when it was made); Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100; Lawton *v.* Blitch, 83 Ga. 663, 10 S. E. 353 (holding proper to instruct that it is a general rule of law that the oldest item of an account will be first paid); Snell *v.* Cottingham, 72 Ill. 124 (holding charge not open to objection that it directed the jury that they must find the application from the conduct of the parties and excluding the operation of the rule of law making the application in the absence of any being made by the parties); Marshall Dental Mfg. Co. *v.* Harkenson, 84 Iowa 117, 50 N. W. 559 (holding that charge that if there was an open account between the parties, the creditor could apply thereon a payment made by the debtor unless otherwise directed, is authorized, in an action on a note, where there was evidence of an open account and dealings other than those involved in the action); Hoskins *v.* Brown, 84 S. W. 767, 27 Ky. L. Rep. 216 (holding that where the determination as to the application of payments by a debtor to his creditor is a question of fact, it is the duty of the court to direct the jury how the payments should be applied on the state of facts found by them to exist); Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157 (holding that charge was erroneous as calculated to induce the jury to believe that creditor was not bound to apply the money in the manner agreed on); Lapham *v.* Kelly, 35 Vt. 195.

Burden of proof.— Crow *v.* Burgin, (Miss. 1905) 38 So. 625. An instruction stating: "While it is true that the burden of proof is on the defense to establish that fact, still that does not mean that they are required to specifically prove the items or amounts of any or all such payments. It is sufficient if

such instructions must be applicable to the issues,[96] and must not be misleading,[97] or invade the province of the jury,[98] or assume as facts matters not proved,[99] or give undue prominence to a slight and inconclusive circumstance.[1]

4. VERDICT AND FINDINGS. The verdict of a jury, or findings by the court or a referee, where there is an issue as to payment, is governed by the general rules relating to verdicts and findings in civil actions in general.[2] Where the evidence

from all the evidence, you believe it is more probable that such payments were made, than that they were not made," is erroneous. Boon *v.* Bliss, 98 Ill. App. 341, 343.

Explanation of meaning of words used.— Failure to explain to the jury what is meant by the words "within a reasonable time" makes an instruction as to the necessity of returning the bills of a suspended bank erroneous. Townsends *v.* Racine Bank, 7 Wis. 185.

Lapse of time as raising presumption of payment.— Stockton *v.* Johnson, 6 B. Mon. (Ky.) 408; Spruill *v.* Davenport, 27 N. C. 663; Bender *v.* Montgomery, 8 Lea (Tenn.) 586.

Medium of payment see Ansley *v.* Carlos, 9 Ala. 973; Wilson *v.* Jones, 8 Ala. 536; Hartridge *v.* Fry, 41 Ga. 104; Hood *v.* Townsend, 40 Ga. 70; Bliss *v.* Branham, 1 J. J. Marsh. (Ky.) 200; Spann *v.* Glass, 35 Tex. 761; Sexton *v.* Windell, 23 Gratt. (Va.) 534.

Payment in property other than money.— Pennsylvania Min. Co. *v.* Brady, 16 Mich. 332; Schilling *v.* Durst, 42 Pa. St. 126. An instruction that the acceptance of a check of a third person by the creditor's voluntary act as payment and in satisfaction will establish payment is erroneous, as it eliminates the necessity of an express agreement to take the check in absolute payment. Comptoir D'Escompte de Paris *v.* Dresbach, 78 Cal. 15, 20 Pac. 28. The statement in a receipt that a note taken for an indebtedness on open account was taken "in settlement of the account" is not sufficient to authorize an instruction that if plaintiffs agreed to take defendant's note in payment of the demand due them, and did so take it, the jury should find for defendant. McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611.

Presumption from non-production of note.— Where the non-production of a note is not the sole fact in evidence bearing on the question of payment, there is no occasion to charge the jury on any presumption that would or would not arise from that fact alone. Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.

Receipt as evidence.— Atchison *v.* Atchison, 67 Conn. 35, 34 Atl. 761.

Instruction as too general.— An instruction that if the jury believed plaintiff had been fully paid as set up in defendant's second plea, he cannot recover, is not erroneous as being too general. Evans *v.* Collier, 79 Ga. 319, 4 S. E. 266.

Curing error by further instructions.— An instruction which is erroneous because assuming that a receipt in full of "account" is *prima facie* evidence of payment of notes is not cured by a subsequent instruction that the burden is on the party taking the receipt to prove payment, as, under the first instruction, he had already done that when the receipt was produced. Miller *v.* Craig, 23 Ill. App. 128.

96. Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124.

97. *California.*— Low *v.* Warden, 77 Cal. 94, 19 Pac. 235.

Kentucky.— Stockton *v.* Johnson, 6 B. Mon. 408.

Massachusetts.— Sullivan *v.* Sheehan, 173 Mass. 361, 53 N. E. 902.

Oregon.— Boothe *v.* Scriber, 48 Oreg. 561, 87 Pac. 887, 90 Pac. 1002.

Rhode Island.— Earle *v.* Berry, 27 R. I. 221, 61 Atl. 671, 1 L. R. A. 867.

Vermont.— Belknap *v.* Billings, 78 Vt. 214, 62 Atl. 56.

See 39 Cent. Dig. tit. "Payment," § 249.

Paid "and" canceled.— Where the issue was whether the note pleaded as a set-off had been paid, an instruction that the jury must find whether it had been "paid and canceled" is not misleading. Garrett *v.* Robinson, 93 Tex. 406, 55 S. W. 564 [*reversing* on other grounds (Civ. App. 1899) 54 S. W. 269].

98. Benton *v.* Toler, 109 N. C. 238, 13 S. E. 763; Gay *v.* McGuffin, 9 Tex. 501.

Charge on weight of evidence.— In an action to set aside a deed, it was proper to refuse to charge that, if the vendor acknowledged full payment of the purchase-money, it was equivalent to proof that the purchase-money had been paid. English *v.* English, 69 Ga. 636.

99. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

1. Aultman *v.* Connor, 25 Ill. App. 654.

2. See TRIAL.

Construction of findings.— A finding that the agent of the owner of mortgage notes, and the mortgagor, "settled and adjusted" the debt represented by the notes, and that the mortgagor gave other notes "in compromise, settlement, and cancellation" of the debt, amounts to a finding that the new notes were given and accepted in payment of the mortgage debt. Wiley *v.* Dean, 67 Minn. 62, 69 N. W. 629. But a finding by a referee that notes "were duly paid for by the defendants by the delivery by the said defendants to said plaintiffs and the acceptance by said plaintiffs of the note of D. McDonald & Co." is not sufficient to authorize the conclusion of payment. Crane *v.* McDonald, 45 Barb. (N. Y.) 354.

Verdict.— Merrimon *v.* Norton, 67 N. C. 115, verdict for value of Confederate money. A finding that a debt has not been paid "in full" is insufficient. Barnes *v.* Brown, 69 N. C. 439. According to practice in actions

as to payment is conflicting, the general rule as to the conclusiveness of a verdict based on conflicting evidence is applicable.[3]

H. Judgment, New Trial, and Review. The general rules in civil actions as to the judgment,[4] new trial,[5] and review on appeal[6] are applicable.

VIII. RECOVERY OF PAYMENTS.[7]

A. Voluntary Payments — 1. General Rules. Except where otherwise provided by statute,[8] a party cannot, by direct action or by way of set-off or counter-claim,[9] recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed.[10] This rule is an elementary one and in applying it the

of debt on simple contract as well as *indebitatus assumpsit*, the result of inquiry under a plea of payment may be expressed in a general verdict for plaintiff for the amount found due, after deducting all payments admitted or proved. Rohr *v.* Anderson, 51 Md. 205.

3. Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537.

4. See JUDGMENTS, 23 Cyc. 623.

5. See NEW TRIAL, 29 Cyc. 707. See also Bill *v.* Porter, 9 Conn. 23 (exception necessary); Cargyle *v.* Belcher, 43 Ga. 207 (inadequate verdict as ground).

6. See APPEAL AND ERROR, 2 Cyc. 474.

Harmless error.— Huston *v.* Vail, 84 Ind. 262; Hinkle *v.* Higgins, 83 Tex. 615, 19 S. W. 147, instructions.

7. See also PRINCIPAL AND SURETY; SALES; SHERIFFS AND CONSTABLES; VENDOR AND PURCHASER.

Payment of particular classes of obligations: Commercial paper see COMMERCIAL PAPER, 7 Cyc. 1039 *et seq.* Duties see CUSTOMS DUTIES, 12 Cyc. 1158 *et seq.* Fees paid by client see ATTORNEY AND CLIENT, 4 Cyc. 987. Fines see FINES, 19 Cyc. 558. Forged paper by bank see BANKS AND BANKING, 5 Cyc. 546. Freight see CARRIERS, 6 Cyc. 498. Internal revenue tax see INTERNAL REVENUE, 22 Cyc. 1673. Licenses in general see LICENSES, 25 Cyc. 631. Liquor license see INTOXICATING LIQUORS, 23 Cyc. 152. Money lost in gaming see GAMING, 20 Cyc. 942. Mortgage debt see MORTGAGES, 27 Cyc. 1394. Premium on policy see FIRE INSURANCE, 19 Cyc. 609; LIFE INSURANCE, 25 Cyc. 758. Rent see LANDLORD AND TENANT, 24 Cyc. 1192. Taxes and assessments see MUNICIPAL CORPORATIONS; TAXATION. Usury see USURY. Water-rents see WATERS. Wharfage fees see WHARVES.

Payments by particular persons: Agent see PRINCIPAL AND AGENT. Bank see BANKS AND BANKING, 5 Cyc. 546. Executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 588, 607, 807.

Money paid at execution sale see EXECUTIONS, 17 Cyc. 1320.

Payments in violation of injunction see INJUNCTIONS, 22 Cyc. 1025.

Recovery of amount paid as secret preference on compositions with creditors see COMPOSITIONS WITH CREDITORS, 8 Cyc. 474.

Where vendor sets up statute of frauds and declines to perform see FRAUDS, STATUTE OF, 20 Cyc. 298.

Recovery from third person of payments made creditor for benefit of such third person see MONEY PAID, 27 Cyc. 832.

8. See New Orleans Drainage Commission *v.* New York Nat. Contracting Co., 136 Fed. 780, holding that the word "knowingly," as used in La. Civ. Code, art. 2301 (2279), providing that he who receives what is not due to him, whether through error or knowingly, obliges himself to restore it to him from whom he has unduly received it, does not imply necessarily the idea of wrong-doing or bad faith, but means only "with knowledge."

9. Southern Hardwood Lumber Co. *v.* Scott, 46 Ill. App. 285; Spear *v.* Dey, 5 Wis. 193.

10. *Alabama.*— Rutherford *v.* McIvor, 21 Ala. 750.

Arkansas.— Connerly *v.* Inman, (1906) 95 S. W. 138; Larrimer *v.* Murphy, 72 Ark. 552, 82 S. W. 168; Crenshaw *v.* Collier, 70 Ark. 5, 65 S. W. 709.

California.— Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561. See also Maskey *v.* Lackmann, 146 Cal. 777, 81 Pac. 115.

Colorado.— Mitchell *v.* Danielson, 38 Colo. 63, 89 Pac. 823; Steck *v.* Northern Colorado Irr. Co., 4 Colo. App. 323, 35 Pac. 919.

Connecticut.— Sheldon *v.* South School Dist., 24 Conn. 88.

Delaware.— West *v.* Houston, 4 Harr. 170.

Illinois.— Puterbaugh *v.* Winchester, 29 Ill. 194; Sullivan *v.* Hudson, 109 Ill. App. 122; Sullivan *v.* Whitfield, 109 Ill. App. 120.

Indiana.— Lemans *v.* Wiley, 92 Ind. 436; Hollingsworth *v.* Stone, 90 Ind. 244; Worley *v.* Moore, 77 Ind. 567; Indianapolis *v.* Langsdale, 29 Ind. 486; Woodburn *v.* Stout, 28 Ind. 77; Cummins *v.* White, 4 Blackf. 356; Watson *v.* Cunningham, 1 Blackf. 321.

Iowa.— Carter *v.* Iowa State Business Men's Bldg., etc., Assoc., (1907) 112 N. W. 828; Kellenberger *v.* Oskaloosa Nat. Bldg., etc., Assoc., 129 Iowa 582, 105 N. W. 836; Sheldon *v.* Steele, 114 Iowa 616, 87 N. W. 683; Dawson *v.* Mann, 49 Iowa 596; Murphy *v.* Creighton, 45 Iowa 179; Montgomery *v.* Gibbs, 40 Iowa 652.

Kansas.— Cummings Harvester Co. *v.* Sigerson, 63 Kan. 340, 65 Pac. 639.

Kentucky.— Aultman *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189; Cov-

courts have held that it makes no difference that the debt paid was that of a

ington *v.* Powell, 2 Metc. 226; Tyler *v.* Smith, 18 B. Mon. 793.

Louisiana.— New Orleans, etc., R. Co. *v.* Louisiana Constr., etc., Co., 109 La. 13, 33 So. 51, 94 Am. St. Rep. 395; Rivers *v.* New Orleans Water Works Co., 35 La. Ann. 822; Bingaman *v.* Cocks, 16 La. Ann. 249.

Maine.— Ash *v.* McLellan, 101 Me. 17, 62 Atl. 598; Wilcox *v.* Cheviott, 92 Me. 239, 42 Atl. 403; Parker *v.* Lancaster, 84 Me. 512, 24 Atl. 952; Bragdon *v.* Freedom, 84 Me. 431, 24 Atl. 895; Wilson *v.* Barker, 50 Me. 447; Jordan *v.* McKenney, 48 Me. 104.

Maryland.— Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655.

Massachusetts.— Hill *v.* Green, 4 Pick. 114.

Michigan.— Lamb *v.* Rathburn, 118 Mich. 666, 77 N. W. 268.

Minnesota.— Smith *v.* Schroeder, 15 Minn. 35.

Mississippi.— Hope *v.* Evans, Sm. & M. Ch. 195.

Missouri.— Irving *v.* St. Louis County, 33 Mo. 575; Claflin *v.* McDonough, 33 Mo. 412, 84 Am. Dec. 54; Rhodes *v.* Dickerson, 95 Mo. App. 395, 69 S. W. 47; State *v.* Stonestreet, 92 Mo. App. 214; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158. See also Clowdis *v.* Hannibal, etc., R. Co., 71 Mo. 510.

New Hampshire.— Peterborough *v.* Lancaster, 14 N. H. 382.

New York.— Doll *v.* Earle, 59 N. Y. 638 [*affirming* 65 Barb. 298]; New York *v.* Erben, 3 Abb. Dec. 255; F. H. Mills Co. *v.* State, 110 N. Y. App. Div. 843, 97 N. Y. Suppl. 676 [*affirmed* in 187 N. Y. 552, 80 N. E. 1109]; Neufeld *v.* New York, 93 N. Y. App. Div. 591, 87 N. Y. Suppl. 900; Griswold *v.* Kile, 11 N. Y. App. Div. 418, 42 N. Y. Suppl. 367; Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun 439, 18 N. Y. Suppl. 600 [*affirmed* in 138 N. Y. 614, 33 N. E. 1082] (payment on *ultra vires* contract); Hayes *v.* Huffstater, 65 Barb. 530; Rochester Commercial Bank *v.* Rochester, 42 Barb. 488; Wyman *v.* Farnsworth, 3 Barb. 369; Fleetwood *v.* New York, 2 Sandf. 475; Herald Square Cloak, etc., Co. *v.* Rocca, 48 Misc. 650, 96 N. Y. Suppl. 189; Matter of Delaney, 27 Misc. 398, 58 N. Y. Suppl. 924; Lowber *v.* Selden, 11 How. Pr. 526; Abell *v.* Douglass, 4 Den. 305; Waite *v.* Leggett, 8 Cow. 195, 18 Am. Dec. 441; Sprague *v.* Birdsall, 2 Cow. 419. See also McClure *v.* Trask, 161 N. Y. 82, 55 N. E. 407 [*affirming* 20 N. Y. App. Div. 466, 47 N. Y. Suppl. 89]; Geffcken *v.* Slingerland, 1 Bosw. 449. But see Davis *v.* Fowler, 20 N. Y. App. Div. 633, 47 N. Y. Suppl. 221.

North Carolina.— Devereux *v.* Rochester German Ins. Co., 98 N. C. 6, 3 S. E. 639; Newell *v.* March, 30 N. C. 441.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268; Cincinnati Commercial Bank *v.* Reed, 11 Ohio 498; Mt. Adams, etc., R. Co. *v.* Cincinnati, 10 Ohio Dec. (Reprint) 679, 23 Cinc. L. Bul. 68.

Pennsylvania.— Bryson *v.* Home for Disabled, etc., Soldiers, 168 Pa. St. 352, 31 Atl. 1008; Edgar *v.* Shields, 1 Grant 361; Irvine *v.* Hanlin, 10 Serg. & R. 219.

Rhode Island.— Fairbanks *v.* Mann, 19 R. I. 499, 34 Atl. 1112.

South Carolina.—Shuck *v.* Interstate Building, etc., Assoc., 63 S. C. 134, 41 S. E. 28; Kenneth *v.* South Carolina R. Co., 15 Rich. 284, 98 Am. Dec. 382.

Texas.— Coates *v.* Clayton, 23 Tex. Civ. App. 62, 56 S. W. 118; Wunsch *v.* Boldt, (App. 1890) 15 S. W. 193.

Vermont.— Strong *v.* McConnell, 10 Vt. 231.

Wisconsin.— Clancy *v.* McEnery, 17 Wis. 177; Spear *v.* Dey, 5 Wis. 193. *Compare* Rudd *v.* Bell, 55 Wis. 563, 13 N. W. 446.

United States.— Moffitt *v.* Garr, 1 Black 273, 17 L. ed. 207 [*affirming* 17 Fed. Cas. No. 9,690, 1 Bond 315, 1 Fish. Pat. Cas. 610]; Knudsen-Ferguson Fruit Co. *v.* Chicago, etc., R. Co., 149 Fed. 973, 79 C. C. A. 483; Corkle *v.* Maxwell, 6 Fed. Cas. No. 3,231, 3 Blatchf. 413; Elliott *v.* U. S., 37 Ct. Cl. 136; Arthur *v.* U. S., 16 Ct. Cl. 422.

England.— Finck *v.* Tranter, [1905] 1 K. B. 427, 74 L. J. K. B. 345, 92 L. T. Rep. N. S. 297; Wilson *v.* Ray, 10 A. & E. 82, 3 Jur. 384, 8 L. J. Q. B. 224, 2 P. & D. 253, 37 E. C. L. 67; Hamlet *v.* Richardson, 9 Bing. 644, 2 Moore & S. 811, 23 E. C. L. 742; Fulham *v.* Down, 6 Esp. 26 note; Cartwright *v.* Rowley, 2 Esp. 723; Brown *v.* McKinally, 1 Esp. 279, 5 Rev. Rep. 739; Goodman *v.* Sayers, 2 Jac. & W. 249, 37 Eng. Reprint 622; Slater *v.* Burnley, 53 J. P. 535, 59 L. T. Rep. N. S. 636, 36 Wkly. Rep. 831.

Canada.— Hughes *v.* Chambers, 14 Manitoba 163.

See 39 Cent. Dig. tit. "Payment," § 254.

The reason for the rule is that if a claim is to be litigated at all, it ought to be litigated promptly. By delay, the recollection of witnesses is liable to become indistinct, documentary evidence is liable to become lost or destroyed, and witnesses are liable to die. And on many accounts it may be important to the claimant to have the validity of his claim determined promptly and without delay; and if the other party should be allowed to pay a claim first and then litigate it afterward, it would give him the power to select his own time for the litigation; and, by delaying it, to place his adversary at a great disadvantage. Parker *v.* Lancaster, 84 Me. 512, 24 Atl. 952.

Exception to rule in case of fiduciary relations.— An administrator occupies a fiduciary relation to the widow of his intestate; and, when he procures an excessive amount of fees and costs from the widow, he cannot defend an action for the recovery of the excess on the ground that the payment was voluntary, and that it was her duty to investigate the facts before making payment. Blue *v.* Smith, 46 Ill. App. 166.

Repayment to third persons.— A creditor who receives payment of his debt in money in due course of business, and in good faith, cannot be required to repay the money to

third person.[11] So voluntary payments by a corporation cannot be recovered back.[12] So money which could not be recovered back if it had been paid to the party directly cannot be if it has been paid to an agent for him.[13] And the rule as to voluntary payments applies also to the payment of bills and notes.[14] However, to constitute a voluntary payment, it must be made with the full knowledge of all material facts.[15] And the retention by a debtor of part of a debt due a

one from whom the debtor illegally obtained it. Gale *v.* Chase Nat. Bank, 104 Fed. 214, 43 C. C. A. 496.

If one indicted for larceny voluntarily repays the sum alleged to have been stolen, without any unlawful agreement, he cannot recover it back, although he is afterward tried on the indictment and acquitted. Puckett *v.* Roquemore, 55 Ga. 235.

Payment pursuant to order of court is not voluntary.— *In re* Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 N. E. 323 [*reversing* 15 N. Y. Suppl. 211].

Payments which in equity and good conscience should have been made.— The rule with respect to voluntary payments is that if a party has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back again in an action for money had and received. Eaton *v.* Eaton, 35 N. J. L. 290; New York *v.* Erben, 10 Bosw. (N. Y.) 189; Bize *v.* Dickason, 1 T. R. 285.

Money paid for an option to cut timber during a certain period cannot be recovered back by the purchaser of the option or his assignee merely because he fails to take advantage of the option. Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24, 131 N. C. 830, 42 S. E. 1040.

Overpayment on running account.— Where plaintiff is in the employ of defendants, who are advancing him money from time to time on his wages, an overpayment by them to him cannot be considered within the rule as to voluntary payments in the sense that they cannot require him to account for it. Farrell *v.* Burbank, 57 Minn. 395, 59 N. W. 485.

After a mortgage is foreclosed, an action will not lie to recover back money paid by the mortgagor. Fitch *v.* Coit, 1 Root (Conn.) 266.

Change of application of payments.—Where one pays money on a certain demand, although not legally bound to do so, he cannot afterward have it applied as payment on another obligation, the rule being that he cannot be allowed to apply it as a payment on another debt any more than he could be allowed to sue for and recover it in a distinct suit. Wear *v.* Schmelzer, 92 Mo. App. 314.

Failure to make change.— Where, for the purpose of making a payment, a person tenders more than the proper amount, asking for the return of the change, there is no voluntary payment except to the amount that he expresses his desire to pay, so that where change is refused an action may be maintained for the balance. Edmonds *v.* Abeel, 20 Hun (N. Y.) 441.

The mere indorsement of a draft on delivery does not of itself constitute a "voluntary payment" so as not to be recoverable. Rawson *v.* Bethesda Baptist Church, 221 Ill. 216, 77 N. E. 560, 6 L. R. A. N. S. 448.

In Louisiana, where money is paid in compliance with a natural obligation, that is, one which, although invalid for want of form or some reason of general policy, is not in itself immoral or unjust, it cannot be recovered back. Bowers *v.* Hale, 14 La. Ann. 419; Coxe *v.* Rowley, 12 Rob. 273; Worsley *v.* New Orleans Second Municipality, 9 Rob. 324, 41 Am. Dec. 333; Hills *v.* Kernion, 7 Rob. 522; Slidell *v.* Pritchard, 5 Rob. 101 (holding that the cause of an agreement, originating, although unlawful, in a natural obligation, will prevent the recovery of money paid under it); Rosenda *v.* Zabriskie, 4 Rob. 493; Flower *v.* Millandon, 19 La. 185; Kenner *v.* Holliday, 19 La. 154; Merchants' Bank *v.* Gove, 15 La. 378; Poydras *v.* Turgeau, 14 La. 34; Perrillat *v.* Puech, 2 La. 428. A debtor, although released on a partial payment, is under a natural obligation to pay the balance, which, therefore, if paid, he cannot recover back. Jamison *v.* Ludlow, 3 La. Ann. 492. Funds a curator retains for his claim for counsel fees, to which he is not legally entitled, are not a payment within the rule forbidding the recovery of money paid under a natural obligation. Key's Succession, 5 La. Ann. 567.

11. Thompson *v.* Chretien, 3 La. Ann. 116; Schlaefer *v.* Heiberger, 4 N. Y. Suppl. 74.

12. Southern Hardwood Lumber Co. *v.* Scott, 46 Ill. App. 285; Macon County *v.* Jackson County, 75 N. C. 240.

13. Niblo *v.* Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes 476.

14. *Connecticut.*— Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

Iowa.— Davenport, etc., R. Co. *v.* Rogers, 39 Iowa 298.

Maine.— Gooding *v.* Morgan, 37 Me. 419.

Michigan.—Tompkins *v.* Hollister, 60 Mich. 485, 34 N. W. 551.

New Hampshire.— Sessions *v.* Meserve, 46 N. H. 167.

North Carolina.—Winston First Nat. Bank *v.* Taylor, 122 N. C. 569, 29 S. E. 831.

Pennsylvania.— Morris *v.* Tarin, 1 Dall. 147, 1 L. ed. 76, 1 Am. Dec. 233.

Vermont.— Stevens *v.* Head, 9 Vt. 174, 31 Am. Dec. 617.

Wisconsin.— Greve *v.* Schweitzer, 36 Wis. 554; Clancy *v.* McEnery, 17 Wis. 177.

United States.— State Nat. Bank *v.* U. S., 17 Ct. Cl. 329.

See 39 Cent. Dig. tit. "Payment," § 259. See also COMMERCIAL PAPER, 7 Cyc. 1044.

15. Lake *v.* Artisans' Bank, 3 Abb. Dec. (N. Y.) 10, 3 Keyes 276, 1 Transcr. App. 71,

creditor, although made with the knowledge of the creditor, is in no sense a voluntary payment of the amount retained.[16]

2. By or to Public Corporations. The rule that voluntary payments cannot be recovered back applies to payments by a private individual or corporation to the United States, state, county, town, city, or other public corporation, or to an officer thereof as such.[17] On the other hand, while the rule has been applied to payments by public officers as such,[18] the general rule is that a payment by the agent of a public corporation, where without authority, is not a voluntary one by the corporation, but may be recovered back.[19]

3. To Officer of Court. The rule does not apply to a payment made to the court through the hand of its officer.[20]

4. Of Interest. So where a party voluntarily and without mistake of fact pays interest in excess of what is legally due, it is governed by the rule applicable to any other voluntary payment and cannot be recovered back,[21] except where the payment is of usurious interest.[22] So one who makes a voluntary payment of interest is not entitled to have the excess over the amount actually due applied on the principal, since to do so would be equivalent to holding that it could be recovered back.[23]

5. Of Judgment or Decree. Money voluntarily paid to satisfy a judgment

3 Abb. Pr. N. S. 209, 32 How. Pr. 617; Waite *v.* Leggett, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; Nollman *v.* Evenson, 5 N. D. 344, 65 N. W. 686.

16. Sondheimer *v.* Troy, etc., R. Co., 3 N. Y. Suppl. 444. See also Consolidated Fruit Jar Co. *v.* Wisner, 110 N. Y. App. Div. 99, 97 N. Y. Suppl. 52 [*reversing* on reargument 103 N. Y. App. Div. 453, 93 N. Y. Suppl. 128, in so far as the opinion held that payment was voluntary].

17. U. S. *v.* Wilson, 168 U. S. 273, 18 S. Ct. 85, 42 L. ed. 464 [*reversing* 31 Ct. Cl. 471]; Selby *v.* U. S., 47 Fed. 800.

Money paid to a public officer in the settlement of his accounts cannot ordinarily be recovered back; but if he opens the settlement by bringing a suit for compensation which at the time it was supposed that he was not entitled to receive, he opens the whole case and defendants can maintain a counterclaim for moneys erroneously paid him. Yoes *v.* U. S., 31 Ct. Cl. 293.

18. Warren County *v.* Gregory, 42 Ind. 32; Onondaga *v.* Briggs, 2 Den. (N. Y.) 26.

A justice of the peace, who accepts a judgment debtor's check payable to himself personally in payment of the judgment rendered by him, satisfies the judgment on his record, and pays to the successful party the amount due him, cannot, on dishonor of the check, recover of said party the money paid him. Garretson *v.* Joseph, 100 Ala. 279, 13 So. 948.

19. *Colorado.*— Ward *v.* Barnum, 10 Colo. App. 496, 52 Pac. 412.

Iowa.— State *v.* Young, 134 Iowa 505, 110 N. W. 292.

Michigan.— Wayne County *v.* Reynolds, 126 Mich. 231, 85 N. W. 574, 86 Am. St. Rep. 541 [*distinguishing* Advertiser, etc., Co. *v.* Detroit, 43 Mich. 116, 5 N. W. 72, and *overruling* Wayne County *v.* Randall, 43 Mich. 537, 5 N. W. 75].

New Jersey.— Lodi *v.* Van Bussom, 7 N. J. L. J. 42.

New York.— Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973 [*affirming* 86 Hun 548, 33 N. Y. Suppl. 784]; Richmond County *v.* Ellis, 59 N. Y. 620; Donohue *v.* New York, 10 Hun 37.

North Dakota.—Wiles *v.* McIntosh County, 10 N. D. 594, 88 N. W. 710.

Virginia.— Com. *v.* Field, 84 Va. 26, 3 S. E. 882.

United States.—Eslin *v.* District of Columbia, 29 Ct. Cl. 370. See also Bayne *v.* U. S., 93 U. S. 642, 23 L. ed. 997.

20. People *v.* New York Bldg. Loan Banking Co., 45 Misc. (N. Y.) 4, 90 N. Y. Suppl. 809; *Ex p.* James, L. R. 9 Ch. 609.

21. *Connecticut.*— Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340, 19 L. R. A. 599.

Massachusetts.— Reed *v.* Boston Loan Co., 160 Mass. 237, 35 N. E. 677.

Minnesota.— Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130.

New York.— Church *v.* Kidd, 3 Hun 254, 5 Thomps. & C. 454.

Pennsylvania.— Keener *v.* U. S. Bank, 2 Pa. St. 237.

See 39 Cent. Dig. tit. "Payment," § 260.

But see Fenley *v.* Kendall, 18 S. W. 637, 13 Ky. L. Rep. 836.

Compound interest voluntarily paid cannot be recovered back. Turner *v.* Johnson, 106 Ky. 460, 50 S. W. 675, 20 Ky. L. Rep. 2009; Dow *v.* Drew, 3 N. H. 40.

The statute of Mississippi making the legal rate of interest six per cent and providing that "contracts may be made in writing" for the payment of ten per cent, only prevents the recovery of more than six per cent, unless the contract is in writing, and does not give the right to recover back more than six per cent voluntarily paid under a verbal agreement. Van Vleet *v.* Sledge, 45 Fed. 743.

22. See Usury.

23. Bennett *v.* Bates, 94 N. Y. 354; New York L. Ins., etc., Co. *v.* Manning, 3 Sandf. Ch. (N. Y.) 58.

which has not been reversed cannot be recovered back,[24] and it is immaterial that the recovery was fraudulent.[25] Payment of a judgment is voluntary unless made to procure the release of the goods of the party making the payment after seizure, or to prevent their seizure by an officer armed with the authority or apparent authority to seize them.[26] On the other hand, if the judgment or decree has been reversed, money paid thereon can be recovered back.[27]

6. By Way of Compromise. Money paid on a fair and deliberate compromise between parties standing on equal terms cannot be recovered back.[28]

7. Failure to Indorse or Apply. Where a debtor pays money to his creditor to be indorsed and applied on the demand in suit, but suffers the creditor to take judgment for the whole amount, he cannot recover the money back.[29] But if, after the creditor thus neglects to indorse or apply it, he has the means of collecting the whole debt without giving the debtor any day in court, and does so collect it, the debtor may recover back the money which has thus been paid and not applied.[30]

8. Agreement to Repay. Of course if there is an agreement to repay on a certain condition, a recovery back is authorized after the happening of such condition.[31]

24. *Indiana.*— Hollingsworth *v.* Stone, 90 Ind. 244.

Kentucky.— Williams *v.* Shelbourne, 102 Ky. 579, 44 S. W. 110, 19 Ky. L. Rep. 1924; Hunt *v.* Boyier, 1 J. J. Marsh. 484, 19 Am. Dec. 116.

Massachusetts.— People's Sav. Bank *v.* Heath, 175 Mass. 131, 55 N. E. 807, 78 Am. St. Rep. 481; Wilbur *v.* Sproat, 2 Gray 431. But see Lazell *v.* Miller, 15 Mass. 207.

Missouri.— Eoff *v.* Clay, 9 Mo. App. 176.

Nebraska.— Deseret Nat. Bank *v.* Nuckolls, 30 Nebr. 754, 47 N. W. 202.

New York.— Wood *v.* Amory, 105 N. Y. 278, 11 N. E. 636; Converse *v.* Sickles, 74 Hun 429, 26 N. Y. Suppl. 590 [*reversed* on other grounds in 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790]; Third Ave. R. Co. *v.* Klinker, 58 N. Y. Suppl. 136, 29 N. Y. Civ. Proc. 51; White *v.* Ward, 9 Johns. 232; Cobb *v.* Curtiss, 8 Johns. 470. *Compare* Brown *v.* Williams, 4 Wend. 360.

Ohio.— Job *v.* Collier, 11 Ohio 422. See also Wilson *v.* Taylor, 9 Ohio St. 595, 75 Am. Dec. 488.

Pennsylvania.— Ditman *v.* Raule, 134 Pa. St. 480, 19 Atl. 676; Herring *v.* Adams, 5 Watts & S. 459.

West Virginia.—Beard *v.* Beard, 25 W. Va. 486, 52 Am. Rep. 219.

England.— De Medina *v.* Grove, 10 Q. B. 152, 15 L. J. Q. B. 287, 10 Jur. 428, 59 E. C. L. 152; Marriott *v.* Hampton, 2 Esp. 546, 7 T. R. 269, 4 Rev. Rep. 439. *Compare* Farrow *v.* Mayes, 18 Q. B. 516, 17 Jur. 132, 83 E. C. L. 516. *Contra,* Moses *v.* Macferlan, 2 Burr. 1005, W. Bl. 219, holding that money paid on a judgment may be recovered back by the party making the payment if in equity and good conscience the party receiving it was not entitled to it.

Canada.— See Johnston *v.* Miller, 31 Nova Scotia 83.

See 39 Cent. Dig. tit. "Payment," § 263.

Compare Judson *v.* Eslava, Minor (Ala.) 71, 12 Am. Dec. 32; Strange *v.* Franklin, 126 Ga. 715, 55 S. E. 943; Hevener *v.* Kerr, 4 N. J. L. 58. And see Judgments, 23 Cyc. 1495. But see Williamson *v.* Johnson, 5 N. J. Eq. 537.

Payment of a judgment on which no execution has been issued is not compulsory.— Elston *v.* Chicago, 40 Ill. 514, 89 Am. Dec. 361.

It is immaterial that the execution issued on a valid judgment by virtue of which the party's goods were seized was irregularly issued, both parties at the time supposing it to be regular, especially where the defect in the execution is amendable. Roth *v.* Schloss, 6 Barb. (N. Y.) 308.

Loss of receipt.— Assumpsit does not lie to recover back money claimed as having been erroneously recovered by defendant, in a judgment against plaintiff, in consequence of plaintiff's not being able to produce a receipt, which was afterward found. James *v.* Cavit, 2 Brev. (S. C.) 174.

Money voluntarily paid to redeem property sold under a decree which is thereafter reversed cannot be recovered. Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

25. Walker *v.* Ames, 2 Cow. (N. Y.) 428.

26. Ritchie *v.* Carter, 89 Mo. App. 290.

27. See Appeal and Error, 3 Cyc. 469.

28. *Alabama.*— Troy *v.* Bland, 58 Ala. 197.

District of Columbia.— Henelley *v.* Rittenhouse, 7 D. C. 76.

Massachusetts.—Stuart *v.* Sears, 119 Mass. 143.

New Hampshire.— Pearl *v.* Whitehouse, 52 N. H. 254.

New York.— Brown *v.* Rich, 40 Barb. 28. See also Consolidated Fruit Jar Co. *v.* Wisner, 103 N. Y. App. Div. 453, 93 N. Y. Suppl. 128.

United States.— Sturges *v.* U. S., Dev. Ct. Cl. 20.

See 39 Cent. Dig. tit. "Payment," § 262.

29. McMurtrie *v.* Keenan, 109 Mass. 185.

Where defendant fails to plead a partial payment and thereafter pays a judgment for the debt in full, he cannot subsequently sue to recover the part payment. Broughton *v.* McIntosh, 1 Ala. 103; Bronson *v.* Rugg, 39 Vt. 241; Strong *v.* McConnell, 10 Vt. 231.

30. McMurtrie *v.* Keenan, 109 Mass. 185.

31. *California.*— Putnam *v.* Dungan, 89 Cal. 231, 26 Pac. 904. See also Swain *v.* Jacks, 125 Cal. 215, 57 Pac. 989.

B. Compulsory Payments[32] — **1. Right to Recover in General.** The general rule is that a compulsory payment may be recovered back. That is, the money is recoverable where the payment is obtained by duress, extortion, or oppression, or by taking an undue advantage of the payer's situation, and where the payee ought not to retain it.[33] But, in order to recover moneys paid under duress, it must be shown not only that there was duress, but also that it is against equity and good conscience for the payee to retain the money.[34]

2. What Constitutes — a. In General. A compulsory payment is one made under duress or circumstances virtually amounting thereto. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to enable the party to recover back money paid.[35] However, the courts of law, in analogy to the rules of the courts of equity as to setting aside contracts for duress,[36] gradually extended the doctrine so as to recognize duress of property as a sort of moral duress which might, equally with duress of the person, entitle a party to recover back money paid under its influence.[37] And the rule was thereafter laid down that payment is not made under duress unless made to release the person or property of the payer from detention, or to prevent a seizure of either by one having apparent authority to seize without resorting to an action.[38] But most of the modern authorities go even further and generally hold that such pressure or constraint as compels a man to go against his will virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, constitutes duress, irrespective of the manifestation or apprehension of physical force.[39] Farther than the rules

Illinois.— Stipp *v.* Johnston, 68 Ill. 176.

Iowa.— Lyman *v.* Lauderbaugh, 75 Iowa 481, 39 N. W. 812.

Kansas.— Juneau *v.* Stunkle, 40 Kan. 756, 20 Pac. 473.

New York.— Ellis *v.* Jacob, 17 N. Y. App. Div. 471, 45 N. Y. Suppl. 177. Where money has been paid and a receipt taken, and afterward, on a suit for the same money, judgment is recovered therefor by reason of the party's omission to produce the receipt, the money may be recovered back, on the promise of the judgment creditor to refund it. Bentley *v.* Morse, 14 Johns. 468.

South Carolina.— Gwynn *v.* Gwynn, 31 S. C. 482, 10 S. E. 221.

See 39 Cent. Dig. tit. "Payment," § 266.

But see Gooding *v.* Morgan, 37 Me. 419 (holding that where a debtor gave his note on settlement of account, although claiming that he had already paid it, and on the creditor's promising to surrender the note if the debtor found a receipt for the first payment, money paid by the latter to discharge such note cannot be recovered back); Haynes *v.* Hayton, 7 B. & C. 293, 14 E. C. L. 136, 2 C. & P. 621, 12 E. C. L. 769, 5 L. J. M. C. O. S. 136, 31 Rev. Rep. 205.

32. Duress as affecting reality of consent to contract see Contracts, 9 Cyc. 443 *et seq.*

33. *California.*— McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Georgia.— Stevens *v.* Nisbet, 88 Ga. 456, 14 S. E. 711.

Illinois.— Chicago *v.* Northwestern Mut. L. Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. N. S. 770; Pemberton *v.* Williams, 87 Ill. 15; La Salle County *v.* Simmons, 10 Ill. 513.

Iowa.— Anderson *v.* Cameron, 122 Iowa 183, 97 N. W. 1085.

Massachusetts.— Bliss *v.* Thompson, 4 Mass. 488.

New York.— Reed *v.* Hayward, 82 N. Y. App. Div. 416, 81 N. Y. Suppl. 608; Mowatt *v.* Wright, 1 Wend. 355, 19 Am. Dec. 508.

Pennsylvania.— Mathers *v.* Pearson, 13 Serg. & R. 258; Schoenfeld *v.* Bradford, 16 Pa. Super. Ct. 165.

South Carolina.— Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663; Bours *v.* Watson, 1 Mill 393.

England.—Snowdon *v.* Davis, 1 Taunt. 359. See 39 Cent. Dig. tit. "Payment," § 283.

34. Chicago *v.* Malkan, 119 Ill. App. 542.

35. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376.

36. See Contracts, 9 Cyc. 443 *et seq.*

37. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376. And see *infra*, VIII, B, 2, h *et seq.*

38. Brumagin *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Stover *v.* Mitchell, 45 Ill. 213; Kansas Pac. R. Co. *v.* Wyandotte County Com'rs, 16 Kan. 587; Wabaunsee County Com'rs *v.* Walker, 8 Kan. 431; Baltimore *v.* Lefferman, 4 Gill (Md.) 425, 45 Am. Dec. 145. See also Robins *v.* Latham, 134 Mo. 466, 36 S. W. 33; Wolfe *v.* Marshal, 52 Mo. 167; State *v.* Stonestreet, 92 Mo. App. 214; Mays *v.* Cincinnati, 1 Ohio St. 268; Ladd *v.* Southern Cotton Press, etc., Co., 53 Tex. 172.

39. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296.

Restatement of rule.— Where a party, with

just stated, the courts have not attempted to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary

full knowledge of the facts, pays a demand that is unjustly made against him, and to which he has a valid defense, and where no special damage or irreparable loss would be incurred by making such defense, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain possession of property wrongfully withheld, or the release of his person, such payment is voluntary, and cannot be recovered. Wiles *v.* McIntosh County, 10 N. D. 594, 88 N. W. 710; Wessel *v.* D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529.

The compulsion need not necessarily consist of unlawful restraint or threatened injury to the person or unlawful detention of his goods. Scholey *v.* Mumford, 60 N. Y. 498; Horner *v.* State, 42 N. Y. App. Div. 430, 59 N. Y. Suppl. 96; Buckley *v.* New York, 30 N. Y. App. Div. 463, 52 N. Y. Suppl. 452 [*affirmed* in 159 N. Y. 558, 54 N. E. 1089]. Virtual or moral duress is sufficient to prevent a payment made under its influence from being voluntary. Robertson *v.* Frank Bros. Co., 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236.

Violence or physical duress.— To constitute a payment under duress which may be recovered back the payment need not be made under actual violence or physical duress. Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405.

Money paid for stamps put on bills of lading and on passage tickets as paid by compulsion see Garrison *v.* Tillinghast, 18 Cal. 404, 408; Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

Payments held compulsory see Kilpatrick *v.* Germania Life Ins. Co., 183 N. Y. 163, 100 Am. St. Rep. 722, 2 L. R. A. N. S. 574 [*reversing* 95 N. Y. App. Div. 287, 88 N. Y. Suppl. 628]; Sartwell *v.* Horton, 28 Vt. 370. A stock-holder in an insurance company assigned his stock to plaintiff, who paid instalments on it, but the company refused to transfer the stock unless plaintiff would pay them the amount of certain notes of the assignor, which they held, and which were not then due. The assignor being insolvent, and plaintiff having no way of indemnifying himself, but by procuring a transfer, he paid the money accordingly. It was held a compulsory payment, which plaintiff might recover back. Bates *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 238. Where the county commissioners, while the law then in force authorized them, in granting a ferry license, to impose an annual tax, not exceeding one hundred dollars, gave notice that they would grant a ferry license to the person who would give the largest sum to the county as a donation, and, several offers being made, the person who had previously kept the ferry offered and paid five hundred dollars, such sum may be recovered back. La Salle County *v.* Simmons, 10 Ill. 513. If A obtains possession of a deed, and uses it for the purpose of extorting money from B as the price of its preservation, or of permission to use it in defending his title, and, by threats expressed or implied, gives B to understand that the deed would be withheld or destroyed unless his demand was complied with, the payment is to be deemed involuntary and the amount can be recovered back. Motz *v.* Mitchell, 91 Pa. St. 114.

Payments held voluntary and not compulsory see New Orleans, etc., R. Co. *v.* Louisiana Constr., etc., Co., 109 La. 13, 33 So. 51, 94 Am. St. Rep. 395; Sieber *v.* Weiden, 17 Nebr. 582, 24 N. W. 215 (payment to compromise seduction); F. H. Mills Co. *v.* State, 110 N. Y. App. Div. 843, 97 N. Y. Suppl. 676 [*affirmed* in 187 N. Y. 552, 80 N. E. 1109]; Buck *v.* Houghtaling, 110 N. Y. App. Div. 52, 96 N. Y. Suppl. 1034; Edward C. Jones Co. *v.* Mt. Vernon Bd. of Education, 30 N. Y. App. Div. 429, 51 N. Y. Suppl. 950. A member of a stock board, against whom a claim is made by another member of the board, for a deficiency arising on a sale of stock under the rules of the board, and who, on being cited to appear before the arbitration committee of the board, pays the claim, with full knowledge of all the facts, cannot maintain an action to recover it back. Fear of the committee is not duress. Quincey *v.* White, 63 N. Y. 370. A payment made in accordance with the provisions of a state constitution, which is in conflict with the federal constitution, is not a payment under duress but is voluntary, and cannot be recovered back. Sonoma County Tax Case, 13 Fed. 789, 8 Sawy. 312.

Payment of a gas bill to prevent the shutting off the gas is compulsory and may be recovered back in so far as excessive. Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

Payment of water-tax see WATERS.

Payment made by a subordinate officer under an order of a superior officer is not a voluntary payment which will prevent its recovery back by the latter. Ellsworth *v.* U. S., 14 Ct. Cl. 382.

Payment by an agent of a larger sum than authorized by the principal, where the agent informs the payee that he remits the larger sum claimed by the latter to avoid delay "leaving difference to be adjusted later," is not a voluntary one. Carter *v.* Riggs, 112 Iowa 245, 83 N. W. 905.

Second payment by attorney.— Where an officer pays over money collected to an attorney, and afterward pays it again to the client because he has lost the attorney's receipt, the second payment is not voluntary but may be recovered back on finding the receipt. Bradford *v.* White, 1 Phila. (Pa.) 26.

Money paid for a city permit illegally demanded under threats that unless the money was paid the workmen would be arrested by

or involuntary,[40] and from the very nature of the subject, no general rule can be stated, as each case must depend somewhat upon its own peculiar facts.[41] The real and ultimate fact to be determined in every case is whether or not the party paying really had a choice, whether "he had his freedom of exercising his will."[42] A recovery has been held allowable where the payment has been obtained by taking an undue advantage of the situation of the payer,[43] or where the money was paid to prevent an injury to one's property rights.[44]

b. Business Necessities. Payments compelled by business necessities have been held so far compulsory as to be recoverable,[45] although there are numerous cases where such payments have been held voluntary and not recoverable.[46]

c. Threat or Fear of Loss of Employment. A payment under a threat[47]

the police and the work stopped is compulsory and may be recovered back. Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880 [*affirming*, but *reversing* on this point, 74 N. Y. App. Div. 234, 77 N. Y. Suppl. 563]; Buckley *v.* New York, 30 N. Y. App. Div. 463, 52 N. Y. Suppl. 452 [*affirmed* in 159 N. Y. 558, 54 N. E. 1089]. *Compare* Wolff *v.* New York, 92 N. Y. App. Div. 449, 87 N. Y. Suppl. 214 [*affirmed* in 179 N. Y. 580, 72 N. E. 1153], in which case a policeman threatened arrest if the work was continued without a permit and the owner thereupon signed an application for a permit and obtained it on payment of the sum offered in his application, and the payment was held not compulsory. So where an owner of real property applies to the city authorities for a permit to construct vaults under the sidewalk, and pays the amount demanded therefor, the payment is voluntary, and cannot be recovered back, and the fact that he paid the amount demanded under protest, and to avoid delay in carrying out a contract to erect buildings on the land, does not deprive the payment of its voluntary character. Wood *v.* New York, 25 N. Y. App. Div. 577, 49 N. Y. Suppl. 622.

40. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376. See also Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

41. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376.

42. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; Scholey *v.* Mumford, 60 N. Y. 498.

43. Horner *v.* State, 42 N. Y. App. Div. 430, 59 N. Y. Suppl. 96; Bates *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 238.

44. Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927; Buckley *v.* New York, 30 N. Y. App. Div. 463, 52 N. Y. Suppl. 452 [*affirmed* in 159 N. Y. 558, 54 N. E. 1089]. See also CONTRACTS, 9 Cyc. 447.

45. *Illinois.*— Chicago *v.* Waukesha Imperial Spring Brewing Co., 97 Ill. App. 583, holding that when the alternative presented to a party is to submit to a city's exactions or discontinue his business within the corporate limits, money paid under such circumstances is not money paid voluntarily.

Massachusetts.— Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

Missouri.— American Brewing Co. *v.* St. Louis, 187 Mo. 367, 86 S. W. 129; Westlake *v.* St. Louis, 77 Mo. 47, 46 Am. Rep. 4. See also Wells *v.* Adams, 88 Mo. App. 215.

New York.— American Exch. F. Ins. Co. *v.* Britton, 8 Bosw. 148, threat to stop license of insurance company.

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Brown, 100 Pa. St. 338, payment of tolls.

Wisconsin.— Guetzkow Bros. Co. *v.* Breese, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83, payment to lessor to obtain insurance money.

United States.— See Robertson *v.* Frank Bros. Co., 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236; Swift, etc., Co. *v.* U. S., 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341; Corkle *v.* Maxwell, 6 Fed. Cas. No. 3,231, 3 Blatchf. 413.

England.— Fulham *v.* Down, 6 Esp. 26 note.

See 39 Cent. Dig. tit. "Payment," § 284.

A payment to obviate a great financial loss is made under duress. Rowland *v.* Watson, 4 Cal. App. 476, 88 Pac. 495.

A payment of tolls cannot be said to be voluntary and not compulsory, when made by the party to enable him to obtain a passage for the United States mail, which he is bound to carry, and to keep his property from being taken from him by distress. Newland *v.* Buncombe Turnpike Co., 26 N. C. 372.

A payment made to an actor after the bills for the evening have been issued, under a threat of not performing, is not voluntary. Dana *v.* Kemble, 17 Pick. (Mass.) 545.

46. Hipp *v.* Crenshaw, 64 Iowa 404, 20 N. W. 492 (holding that payment of a judgment lien on real estate because the owner's necessities force him to make a loan thereon is not payment under duress); Cunningham *v.* Boston, 15 Gray (Mass.) 468 [*distinguished* in Cunningham *v.* Munroe, 15 Gray (Mass.) 471]; Lathrope *v.* McBride, 31 Nebr. 289, 47 N. W. 922; Matthews *v.* William Frank Brewing Co., 26 Misc. (N. Y.) 46, 55 N. Y. Suppl. 241; Hess *v.* Cohen, 20 Misc. (N. Y.) 333, 45 N. Y. Suppl. 934. See also Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; Sawyer *v.* Gruner, 60 N. Y. Super. Ct. 285, 17 N. Y. Suppl. 465.

Where a payment is made merely to preserve the credit of the debtor, such payment is not necessarily compulsory. Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202.

47. Day *v.* Studebaker Bros. Mfg. Co., 13 Misc. (N. Y.) 320, 34 N. Y. Suppl. 463.

or fear[48] of discharge from employment has been held not to have been made under duress.

d. Payments to Obtain Performance of Act. Money paid to one who, because of his position, is under an obligation to discharge certain duties to the public, such as a public officer, but who refuses to discharge such duties without the payment of money to which he is not entitled, can be recovered as money paid under compulsion.[49]

e. Apprehension or Threat of Legal Proceedings. Mere apprehension,[50] or threats[51] of a civil proceeding to enforce a claim, unaccompanied by any act of hardship or oppression, does not render a payment in response thereto involuntary in the sense that it can be recovered back. So money paid under an apprehension,[52] or threat[53] of a criminal prosecution, when no warrant has been issued or proceedings begun, and there is no immediate danger, does not constitute duress

But see Fuerst *v.* Musical Mut. Protective Union, 95 N. Y. Suppl. 155, holding that a threat made by the officers of a union of musicians that, unless a member paid an illegal fine imposed, he would be expelled, causing a member to fear that, unless he paid the fine, he would be expelled and deprived of his means of earning a living, amounts to duress, entitling him to maintain an action for the fine paid.

48. Siegel *v.* Schueck, 67 Ill. App. 296; Gross *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 393.

49. *California.*— Lewis *v.* San Francisco, 2 Cal. App. 112, 82 Pac. 1106.

North Carolina.— Robinson *v.* Ezzell, 72 N. C. 231.

Ohio.— Baker *v.* Cincinnati, 11 Ohio St. 534.

South Carolina.— Alston *v.* Durant, 2 Strobh. 257, 49 Am. Dec. 596.

United States.— Swift, etc., Co. *v.* U. S., 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341; Corkle *v.* Maxwell, 6 Fed. Cas. No. 3,231, 3 Blatchf. 413.

England.— Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 249, 38 L. J. Exch. 177, 22 L. T. Rep. N. S. 43, 18 Wkly. Rep. 92; Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164; Morgan *v.* Palmer, 2 B. & C. 729, 4 D. & R. 283, 2 L. J. K. B. O. S. 145, 26 Rev. Rep. 537, 9 E. C. L. 317; Traherne *v.* Gardner, 5 E. & B. 913, 2 Jur. N. S. 394, 25 L. J. Q. B. 201, 85 E. C. L. 915; Steele *v.* Williams, 8 Exch. 625, 17 Jur. 464, 22 L. J. Exch. 225.

See 39 Cent. Dig. tit. "Payment," § 284 *et seq.*

Compare Cunningham *v.* Munroe, 15 Gray (Mass.) 471 [*distinguishing* Cunningham *v.* Boston, 15 Gray (Mass.) 468].

Remedy by writ.— It is none the less compulsory because the party could have procured a writ compelling the officer to act. Lewis *v.* San Francisco, 2 Cal. App. 112, 82 Pac. 1106.

50. Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323; Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185; Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35; Laredo *v.* Loury, (Tex. App. 1892) 20 S. W. 89.

51. *California.*— Holt *v.* Thomas, 105 Cal. 273, 38 Pac. 891.

Iowa.— Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185.

Louisiana.— New Orleans, etc., R. Co. *v.* Louisiana Constr., etc., Co., 109 La. 13, 33 So. 51, 94 Am. St. Rep. 395.

Maine.— Parker *v.* Lancaster, 84 Me. 512, 24 Atl. 952.

Massachusetts.— Regan *v.* Baldwin, 126 Mass. 485, 30 Am. Rep. 689; Emmons *v.* Scudder, 115 Mass. 367; Forbes *v.* Appleton, 5 Cush. 115.

Nebraska.— Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35.

New Hampshire.— Evans *v.* Gale, 18 N. H. 397.

Utah.— Flack *v.* National Bank of Commerce, 8 Utah 193, 30 Pac. 746, 17 L. R. A. 583, threat of attachment.

Vermont.— Meacham *v.* Newport, 70 Vt. 67, 39 Atl. 631. But see Sartwell *v.* Horton, 28 Vt. 370, holding that money paid under terror of inceptive legal proceedings instituted, or pretended to be instituted for purposes of extortion, may be recovered in assumpsit.

See 39 Cent. Dig. tit. "Payment," § 285.

But see Unwin *v.* Leaper, Drinkw. 3, 4 Jur. 1037, 10 L. J. C. P. 41, 1 M. & G. 747, 39 E. C. L. 1006.

For instance a threat to foreclose a mortgage does not constitute duress. Burke *v.* Gould, 105 Cal. 277, 38 Pac. 733; Shuck *v.* Interstate Bldg., etc., Assoc., 63 S. C. 134, 41 S. E. 28.

Threat of attachment.— A mere threat to begin a civil suit and attach property in aid of such suit does not constitute such duress as to make payment made on account thereof an involuntary one. Paulson *v.* Barger, 132 Iowa 547, 109 N. W. 1081.

Filing a mechanic's lien is not the commencement of judicial proceedings within the rule that the commencement of a judicial proceeding for the enforcement of a claim is not duress. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376.

52. St. Louis, etc., R. Co. *v.* Thomas, 85 Ill. 464; Felton *v.* Gregory, 130 Mass. 176; Comstock *v.* Tupper, 50 Vt. 596.

53. *Arkansas.*— Bosley *v.* Shanner, 26 Ark. 280.

Illinois.— Patoka Loan, etc., Assoc. *v.* Holland, 63 Ill. App. 58.

so as to make the payment compulsory. However, demands and threats of persons clothed with governmental authority to carry them into execution by arrest and prosecution stand on a different footing from demands and threats of private individuals, and money paid because thereof may generally be recovered back.[54] It has been held, however, that the threat of imprisonment may warrant a recovery back because of the age, intellect, or disposition of the person threatened.[55] So a threat to arrest a child,[56] or husband,[57] of the payer, makes the payment involuntary and recoverable, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment.[58]

f. Duress of Person. The general rule is that the payment of a sum to obtain release from imprisonment is compulsory and can be recovered back.[59] This is so not only where the arrest is without just cause,[60] but also where there is an arrest for a just cause without legal authority,[61] and also where there is an arrest for a just cause and under lawful authority but for an improper purpose.[62] However, there is no duress where the imprisonment was by lawful authority for a just cause and for a proper purpose.[63] To authorize a recovery it is not neces-

Indiana.— Hines *v.* Hamilton County, 93 Ind. 266.

Maine.— Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Higgins *v.* Brown, 78 Me. 473, 5 Atl. 269; Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556.

Michigan.— Betts *v.* Reading, 93 Mich. 77, 52 N. W. 940.

See 39 Cent. Dig. tit. "Payment," § 285. See also CONTRACTS, 9 Cyc. 446.

54. *Illinois.*— Harvey *v.* Olney, 42 Ill. 336; Chicago *v.* Waukesha Imperial Spring Brewing Co., 97 Ill. App. 583.

Michigan.— Sturgis First Nat. Bank *v.* Watkins, 21 Mich. 483.

New York.— Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880 [*affirming* 74 N. Y. App. Div. 234, 77 N. Y. Suppl. 563].

Ohio.— Toledo *v.* Buechele, 21 Ohio Cir. Ct. 429, 11 Ohio Cir. Dec. 419.

Wisconsin.—Neumann *v.* La Crosse, 94 Wis. 103, 68 N. W. 654.

See 39 Cent. Dig. tit. "Payment," § 285.

A payment to prevent the arrest of employees of the person making the payment has been held not a voluntary one. Chicago *v.* Waukesha Imperial Spring Brewing Co., 97 Ill. App. 583.

55. Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711; Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491. See also Hollingsworth *v.* Stone, 90 Ind. 244.

56. Schultz *v.* Culbertson, 49 Wis. 122, 4 N. W. 1070. *Compare* Francis *v.* Hurd, 113 Mich. 250, 71 N. W. 582.

57. Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491; Jaeger *v.* Koenig, 30 Misc. (N. Y.) 580, 62 N. Y. Suppl. 803 [*affirming* 29 Misc. 780, 61 N. Y. Suppl. 505].

58. Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491.

59. Schommer *v.* Farwell, 56 Ill. 542; Severance *v.* Kimball, 8 N. H. 386; Devlin *v.* U. S., 12 Ct. Cl. 266; Richards *v.* Taylor, 28 Nova Scotia 311. See also Colon *v.* Hebbard, 105 N. Y. Suppl. 805; De Mesnil *v.* Dakin, L. R. 3 Q. B. 18; De Cadaval *v.* Collins, 4 A. & E. 858, 2 Harr. & W. 54, 5 L. J. K. B. 171, 6 N. & M. 324, 31 E. C. L. 376; Payne *v.* Chapman, 4 A. & E. 364, 31 E. C. L. 171.

Prosecution not criminal.— But money paid by plaintiff to defendant's daughter while he was under arrest on a charge of bastardy cannot be recovered as having been paid under duress, although he denies being the father of the child, which he did not do when the payment was made. Mayer *v.* Hoffman, 67 Wis. 279, 30 N. W. 355.

It is no defense that the prosecution was illegal where defendant received the avails of it. Heckman *v.* Swartz, 50 Wis. 267, 6 N. W. 891.

60. Sweet *v.* Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; Richardson *v.* Duncan, 3 N. H. 508.

61. Richardson *v.* Duncan, 3 N. H. 508; Reinhard *v.* Columbus, 49 Ohio St. 257, 31 N. E. 35, arrest without a warrant.

Want of jurisdiction.— Foy *v.* Talburt, 9 Fed. Cas. No. 5,020, 5 Cranch C. C. 124. See also Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

Imprisonment under void judgment.— Durr *v.* Howard, 6 Ark. 461.

Void warrant.— Fossett *v.* Wilson, 59 Miss. 1.

An arrest is not illegal merely because the complaint and warrant are insufficient. Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473.

62. Richardson *v.* Duncan, 3 N. H. 508; Fillman *v.* Ryon, 168 Pa. St. 484, 32 Atl. 89 (for purpose of extortion); Phelps *v.* Zuschlag, 34 Tex. 371; Beekman *v.* Swartz, 64 Wis. 48, 24 N. W. 473 (to coerce payment).

63. Meacham *v.* Newport, 70 Vt. 67, 39 Atl. 631; Hill *v.* U. S., 9 Ct. Cl. 178. See also Felton *v.* Gregory, 130 Mass. 176; Diller *v.* Johnson, 37 Tex. 47.

Imprisonment not illegal.— An action will not lie against an officer to recover back money paid under arrest on a capias, inadvertently issued instead of a fieri facias, ordered by the court, the court having power

sary that the payer be actually imprisoned, but it is sufficient that he is arrested and threatened with imprisonment by one having power to enforce his threat.[64]

g. Payments to Prevent Unlawful Taking or Detention of Property — (i) *Personal Property.* Where a person unlawfully demanding a payment is in a position to seize or detain the goods or other personal property of a person against whom the claim is made, without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to recover or retain the property will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience.[65] This coercion is generally embraced in the term "duress of goods."[66] The same rule applies where the payment is to retain or obtain the possession of property seized or about to be seized by legal process.[67] And it is

to issue either. MacDonald *v.* Leffingwell, 8 Mo. App. 234.

64. Pace *v.* Plymouth Borough, 7 Kulp (Pa.) 239.

65. *Connecticut.*— Cobb *v.* Charter, 32 Conn. 358, 87 Am. Dec. 178.

Georgia.— Du Vall *v.* Norris, 119 Ga. 947, 47 S. E. 212; Barnett *v.* Central Line of Boats, 51 Ga. 439.

Maine.— Chamberlain *v.* Reed, 13 Me. 357, 29 Am. Dec. 506; Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352.

Minnesota.— Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; Fargusson *v.* Winslow, 34 Minn. 384, 25 N. W. 942.

Missouri.— Quinnett *v.* Washington, 10 Mo. 53.

Nebraska.— Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35.

New Jersey.— Teeter *v.* Veitch, (Ch. 1905) 61 Atl. 14. But see Turner *v.* Barber, 66 N. J. L. 496, 49 Atl. 676.

New York.— Scholey *v.* Mumford, 60 N. Y. 498; Briggs *v.* Boyd, 56 N. Y. 289.

Ohio.— See Clark *v.* Longworth, Wright 189.

Pennsylvania.— White *v.* Heylman, 34 Pa. St. 142.

South Carolina.— Alston *v.* Durant, 2 Strobh. 257, 49 Am. Dec. 596.

United States.— Oceanic Steamship Co. *v.* Tappan, 18 Fed. Cas. No. 10,405, 16 Blatchf. 296; Tutt *v.* Ide, 24 Fed. Cas. No. 14,275*b*, 3 Blatchf. 249.

England.— Green *v.* Duckett, 11 Q. B. D. 275, 47 J. P. 487, 52 L. J. Q. B. 435, 48 L. T. Rep. N. S. 677, 31 Wkly. Rep. 607; Wakefield *v.* Newbon, 6 Q. B. 276, 8 Jur. 735, 13 L. J. Q. B. 258, 51 E. C. L. 276; Ashmole *v.* Wainwright, 2 Q. B. 837, 2 G. & D. 217, 6 Jur. 729, 11 L. J. Q. B. 79, 42 E. C. L. 938; Shaw *v.* Woodcock, 7 B. & C. 73, 9 D. & R. 889, 5 L. J. K. B. O. S. 294, 31 Rev. Rep. 158, 14 E. C. L. 43; Hills *v.* Street, 5 Bing. 37, 6 L. J. C. P. O. S. 215, 2 M. & P. 96, 15 E. C. L. 459; Gibbon *v.* Gibbon, 13 C. B. 205, 17 Jur. 416, 22 L. J. C. P. 131, 76 E. C. L. 205; Oates *v.* Hudson, 6 Exch. 346, 20 L. J. Exch. 284; Fraser *v.* Pendlebury, 31 L. J. C. P. 1, 10 Wkly. Rep. 104; Hooper *v.* Exeter, 56 L. J. Q. B. 457; Close *v.* Phipps, 7 M. & G. 586, 8 Scott N. R. 381, 49 E. C. L. 586; Astley *v.* Reynolds, Str. 915; Snowdon *v.* Davis, 1 Taunt. 359. See also Smith *v.* Sleap, 12 M. & W. 585. But see Gulliver *v.* Cosens, 1 C. B. 788, 9 Jur. 666, 14 L. J. C. P. 215, 50 E. C. L. 788; Lindon *v.* Hooper, Cowp. 414. *Contra*, Knibbs *v.* Hall, 1 Esp. 84.

See 39 Cent. Dig. tit. "Payment," § 287.

But see Lamb *v.* Rathburn, 118 Mich. 666, 77 N. W. 268; Webber *v.* Aldrich, 2 N. H. 461.

This principle has been applied to the case of an overcharge of tolls (Parker *v.* Great Western R. Co., 8 Jur. 194, 13 L. J. C. P. 105, 7 M. & G. 253, 7 Scott N. R. 835, 49 E. C. L. 253), to the exaction of illegal tolls (Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352), to an attorney withholding title deeds upon an unfounded claim of lien (Richardson *v.* Williamson, 6 L. R. Q. B. 276, 40 L. J. Q. B. 145), and to a common carrier who has refused to deliver goods without payment of an exorbitant remuneration (see Carriers, 6 Cyc. 498).

To obtain vouchers.— Where vouchers are by mistake made payable to a third person, money paid to him in consideration of his indorsement of such vouchers cannot be recovered back, he being under no obligation to indorse. Irwin *v.* Thomas, 12 Kan. 93.

66. See 14 Cyc. 1124.

67. *Iowa.*— Chambliss *v.* Hass, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126.

New York.— Coady *v.* Curry, 8 Daly 58. But see Herald Square Cloak, etc., Co. *v.* Rocca, 48 Misc. 650, 96 N. Y. Suppl. 189.

Pennsylvania.— Williams *v.* Williams, 2 Walk. 519.

South Carolina.— Treasurers *v.* Buckner, 2 McMull. 327 (holding that if a sheriff, having writs which authorize him to collect, exacts from the debtor more than is lawfully required, even without levy, the payment is not voluntary); Murray *v.* Moorer, Cheves 111.

Tennessee.— Cocke *v.* Porter, 2 Humphr. 15.

Vermont.— Hopkinson *v.* Sears, 14 Vt. 494, 39 Am. Dec. 236.

England.— Valpy *v.* Manley, 1 C. B. 594, 9 Jur. 452, 14 L. J. C. P. 204, 50 E. C. L. 592.

See 39 Cent. Dig. tit. "Payment," § 287.

immaterial that the acts claimed to constitute duress do not amount to technical duress.[68]

(II) *Real Property.* In an early case it was stated that the reasons for the rule are wholly inapplicable to real estate and are not applied thereto.[69] But the later cases ignore mere distinction in kinds of property and hold it immaterial whether the duress is of goods or of real property or of the person.[70] For instance, if a mortgagee in possession requires the mortgagor or his assignee to pay more than is legally due in order to redeem, the payment is a compulsory

Compare Hollingsworth *v.* Stone, 90 Ind. 244.

Payment to prevent a levy on an execution is not made under duress where the payer might have obtained a supersedeas. Cohen *v.* Troy Laundry, etc., Co., 99 Ga. 289, 25 S. E. 689.

Payment to procure the release of property wrongfully seized by an officer is not voluntary. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787. But see Converse *v.* Sickles, 74 Hun (N. Y.) 429, 26 N. Y. Suppl. 590 [*reversed* on other grounds in 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790]. Where property was taken from plaintiff on process against a third person on the false assumption that the property belonged to defendant in execution, a payment by plaintiff on demand that it would be sold unless payment was made is involuntary and may be recovered back. State *v.* Slayback, 90 Mo. App. 300. However, a threat to seize the property must at least indicate some present purpose to execute it. State *v.* Stonestreet, 92 Mo. App. 214. Where a man's goods are in the possession of an officer who has no authority to retain them, yet exacts a payment as a condition of restoring them, the payment, in contemplation of law, is not voluntary, although both parties believe it to be legal; in fact, acting in ignorance of law. De Bow *v.* U. S., 11 Ct. Ct. 672.

An attachment of goods in an action for which there is a good cause does not constitute a duress of goods (Kobler *v.* Wells, 26 Cal. 606), although money paid to free goods from an attachment, procured for the purpose of extortion by one who knows that he has no cause of action, is paid under duress and can be recovered back (Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367). Money may be recovered back where it is paid by reason of fear that if not paid the party making the demand will attach his goods, especially where the effect thereof would probably be to destroy the financial credit and reputation of the debtor, and it is immaterial that such payment is not technically made under duress of property. Weber *v.* Kirkendall, 39 Nebr. 193, 57 N. W. 1026. But the mere fact, there being no element of fraud or other means of oppression, that one is sued by attachment in the state where plaintiff resides, but which is foreign to the residence of defendant, will not of itself make the payment of money to avoid such a judgment compulsory in such a sense that it can be recovered back if it can be shown not to be due. Dickerman *v.* Lord, 21 Iowa 338, 89 Am. Dec. 579.

68. Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35.

69. Fleetwood *v.* New York, 2 Sandf. (N. Y.) 475.

70. *Iowa.*— Manning *v.* Poling, 114 Iowa 20, 83 N. W. 895, 86 N. W. 30.

Maine.— See Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138.

Minnesota.— American Baptist Missionary Union *v.* Hastings, 67 Minn. 303, 69 N. W. 1078; Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376.

Missouri.— Wells *v.* Adams, 88 Mo. App. 215; Fout *v.* Giraldin, 64 Mo. App. 165.

Nebraska.— David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296.

And see Pemberton *v.* Williams, 87 Ill. 15. *Compare* Ewing *v.* Peck, 26 Ala. 413.

Contra.— Where a person holding the legal title to land under an express or implied agreement to reconvey upon the payment of a particular sum, refuses to reconvey unless an excessive sum is paid, payment to obtain the title is not compulsory. Gilpatrick *v.* Sayward, 5 Me. 465; Pearl *v.* Whitehouse, 52 N. H. 254; Hall *v.* Shultz, 4 Johns. (N. Y.) 240, 4 Am. Dec. 270. See also Congdon *v.* Preston, 49 Mich. 204, 13 N. W. 516; Burchill *v.* Culgin, 4 N. Y. Suppl. 850.

While the filing of a mechanic's lien does not interfere with the possession of the land, yet where it effectually deprives the owner of the use of it for the purposes for which he needed it, payment to satisfy the lien founded on an unjust claim, in order to clear the title of record, is paid under duress of real property. Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376.

Redemption from judgment sale.— Where one is obliged to choose between making redemption from a judgment sale, and yielding possession of the land, his payment is not considered a voluntary one. Manning *v.* Poling, 114 Iowa 20, 83 N. W. 895, 86 N. W. 30.

Where a party was compelled to make a payment or lose a voluntary sale of his property at advantageous figures, and he was utterly unable to meet his obligation except by a sale of the land, the legal title to which was held by one as security, and he demanded the payment of more than was due as a condition of releasing the property, such a payment is compulsory and may be recovered back. David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296.

one so as to authorize a recovery back.[71] So where a person entitled to redeem from a real estate mortgage pays, upon the demand of the mortgagee, and under protest, more interest than is due in order to prevent expiration of the time for redemption, he may recover such interest back.[72] So where a purchaser refuses to allow a redemption from a foreclosure sale, except upon payment of more than is due, the amount so paid in excess of what was actually due may be recovered back.[73] On the other hand it has been held that money paid in excess of the amount due on the mortgage to stop foreclosure proceedings is a voluntary payment and cannot be recovered on the ground of duress.[74]

h. Effect of Protest. A payment is not rendered involuntary merely because the payer at the time of payment makes a protest against the payment.[75]

i. Necessity of Protest. If money is paid under compulsion, no protest is necessary to lay the foundation of an action to recover the payment,[76] except

71. Cazenove *v.* Cutler, 4 Metc. (Mass.) 246; David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296.

72. Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138.

73. Bennett *v.* Healey, 6 Minn. 240.

74. Rodgers *v.* Wittenmyer, 88 Cal. 553, 26 Pac. 369; Vereycken *v.* Vandeu Brooks, 102 Mich. 119, 60 N. W. 687. See also Savannah Sav. Bank *v.* Logan, 99 Ga. 291, 25 S. E. 692. But see McMurtrie *v.* Keenan, 109 Mass. 185, holding that where the mortgagee threatens to sell under the power of sale and the mortgagor pays interest a second time under protest, he may recover back such second payment.

75. *California.*— Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; McMillan *v.* Vischer, 14 Cal. 232.

Connecticut.— Sheldon *v.* South School Dist., 24 Conn. 88.

Indiana.— Patterson *v.* Cox, 25 Ind. 261.

Iowa.—Anderson *v.* Cameron, 122 Iowa 183, 97 N. W. 1085; Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185.

Kansas.— Kansas Pac. R. Co. *v.* Wyandotte County Com'rs, 16 Kan. 587; Wabaunsee County Com'rs *v.* Walker, 8 Kan. 431.

Louisiana.— New Orleans, etc., R. Co. *v.* Louisiana Constr., etc., Co., 109 La. 13, 33 So. 51, 94 Am. St. Rep. 395.

Maryland.— Awalt *v.* Eutaw Bldg. Assoc. No. 4, 34 Md. 435.

Massachusetts.— Benson *v.* Monroe, 7 Cush. 125, 54 Am. Dec. 716; Forbes *v.* Appleton, 5 Cush. 115.

Michigan.— Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512. But see McCabe *v.* Shaver, 69 Mich. 25, 36 N. W. 800, holding that money paid, under protest, to obtain a draft which has been fully paid before, accompanied by a statement that the draft is already paid, may be recovered.

Minnesota.— De Graff *v.* Ramsey County, 46 Minn. 319, 48 N. W. 1135.

Nebraska.— McBride *v.* Lathrop, 24 Nebr. 93, 38 N. W. 32.

New York.— Flower *v.* Lance, 59 N. Y. 603; People *v.* Wilmerding, 62 Hun 391, 17 N. Y. Suppl. 102 [*reversed* on other grounds in 136 N. Y. 363, 32 N. E. 1099]; Fleetwood *v.* New York, 2 Sandf. 475; Matthews *v.* William Frank Brewing Co., 26 Misc. 46, 55 N. Y. Suppl. 241; Gerry *v.* Siebrecht, 88 N. Y. Suppl. 1034.

North Dakota.— Wessel *v.* D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529.

Ohio.— Marietta *v.* Slocomb, 6 Ohio St. 471; Ashley *v.* Ryan, 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418; Gross *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 393.

Pennsylvania.— Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Oliver *v.* Bredl, 25 Pa. Super. Ct. 653.

Texas.— Laredo *v.* Loury, (App. 1892) 20 S. W. 89.

Vermont.— Meacham *v.* Newport, 70 Vt. 67, 39 Atl. 631; Williams *v.* Colby, 44 Vt. 40.

United States.— Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541, 25 L. ed. 196.

See 39 Cent. Dig. tit. "Payment," § 288.

Protest as incidental.— "There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances." Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541, 544, 25 L. ed. 196.

76. Meek *v.* McClure, 49 Cal. 623; Chicago *v.* Sperbeck, 69 Ill. App. 562; De Graff *v.* Ramsey County, 46 Minn. 319, 48 N. W. 1135; Healey *v.* U. S., 29 Ct. Cl. 115. See also Klein *v.* Bayer, 81 Mich. 233, 45 N. W. 991; Wessell *v.* D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529. But see White *v.* U. S., 11 Ct. Cl. 578. *Contra*, see Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323; Monongahela Nav. Co. *v.* Wood, 194 Pa. St. 47, 45 Atl. 73; Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202.

Money paid under demand by an officer holding legal process purporting to authorize arrest or seizure of property to enforce collection may be recovered back without proof of a protest made against it, although no actual arrest or seizure was made. McKee *v.* Campbell, 27 Mich. 497; Atwell *v.* Zeluff, 26 Mich. 118.

perhaps where the payment is to a public officer and he has no notice of the facts which render the demand illegal.[77] But if there is doubt, under the circumstances, whether the payment was voluntary, the protest may be taken into account in determining the question.[78] Whenever a protest is necessary, it has been held that it must state the grounds upon which the party paying the money claims that the payment is illegal.[79]

3. Illegality of Duress. The duress must have been illegal, unjust, or oppressive.[80] For instance, one cannot recover back money paid under compulsion if it is just what he ought to have paid voluntarily.[81] In other words, the money paid cannot be recovered unless it is against conscience for defendant to retain it.[82]

4. Source of Duress and Time Thereof. The compulsion or coercion must come from the party to whom or by whose direction the payment is made.[83] And the duress must have existed at the time the payment was actually made.[84]

5. Existence of Other Remedy. The general rule is that where an unfounded or illegal demand is made upon a person, and the law furnishes him adequate protection against it, or gives him an adequate remedy, instead of taking the protection the law gives him or the remedy it furnishes, he pays what is demanded, such payment is deemed to be a voluntary one.[85] There is a class of cases, however, where, although there is a legal remedy, his situation or the situation of his property is such that it would not be adequate to protect him from irreparable injury, in which case payment will be deemed to have been involuntary.[86]

77. Meek *v.* McClure, 49 Cal. 623.

If illegal exactions are made by officers of the government involving the payment of money, and the money is paid without objection, it cannot afterward be recovered. Hamilton *v.* Dillin, 11 Fed. Cas. No. 5,979 [*affirmed* in 21 Wall. 73, 22 L. ed. 528].

78. De Graff *v.* Ramsey County, 46 Minn. 319, 48 N. W. 1135.

79. Meek *v.* McClure, 49 Cal. 623.

80. Dickerman *v.* Lord, 21 Iowa 338, 89 Am. Dec. 579; Laidlaw *v.* Detroit, 110 Mich. 1, 67 N. W. 967; *In re* Meyer, 106 Fed. 828. See also Hipp *v.* Crenshaw, 64 Iowa 404, 26 N. W. 492. But see Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491.

Payment of lien.— Where one having in his possession property of another demands as a condition of its restoration the payment of a sum for which he is legally entitled to a lien thereon, the owner cannot be said to have made such payment under duress so as to give him any right to its recovery on that ground. *In re* Meyer, 106 Fed. 828.

Payment for postponement of sale.— Money paid by a debtor to a creditor for a postponement of a sale under a decree of court, and for an extension of time to prevent such sale by payment of the original debt, is not paid under duress. Foster *v.* Central Nat. Bank, 93 N. Y. Suppl. 603.

81. McVane *v.* Williams, 50 Conn. 548; Upshaw *v.* Mutual Loan Assoc., 29 Misc. (N. Y.) 143, 60 N. Y. Suppl. 242; Coleman *v.* Merchants' Nat. Bank, 6 Ohio Dec. (Reprint) 1063, 10 Am. L. Rec. 49.

82. Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

83. Garrison *v.* Tillinghast, 18 Cal. 404; Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

84. Savannah *v.* Feeley, 66 Ga. 31; Schultz *v.* Culbertson, 49 Wis. 122, 4 N. W. 1070. See also Teem *v.* Ellijay, 89 Ga. 154, 15 S. E. 33. *Compare* Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473; Heckman *v.* Swartz, 50 Wis. 267, 6 N. W. 891, holding that where one M gave his note to defendant to induce the latter to withdraw a threatened criminal prosecution against plaintiff, plaintiff becoming liable to M for the amount of the note, the fact that M's note was paid to defendant after plaintiff was discharged, and all duress had ceased, is no defense to an action by plaintiff to recover the amount from defendant.

85. Manning *v.* Poling, 114 Iowa 20, 83 N. W. 895, 86 N. W. 30; De Graff *v.* Ramsey County, 46 Minn. 319, 48 N. W. 1135; Wessel *v.* D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529; Walton *v.* Robb, 1 Ashm. (Pa.) 43. See also Paulson *v.* Barger, 132 Iowa 547, 109 N. W. 1081.

The delay, inconvenience, and expense to which a party may be subjected by resisting a demand does not amount to legal compulsion. Hess *v.* Cohen, 20 Misc. (N. Y.) 333, 45 N. Y. Suppl. 934.

Ability to give bond.— Where property of the debtor is seized to secure a claim in litigation, payment to release the property cannot be said to be compulsory where the party was of ample pecuniary ability to give a sufficient bond to release the property so seized. Turner *v.* Barber, 66 N. J. L. 496, 49 Atl. 676.

86. *Maine.*— Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352.

Minnesota.— Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; De Graff *v.* Ramsey County, 46 Minn. 319, 48 N. W. 1135.

C. Fraud. Money obtained by deceit and in bad faith, which the payee ought not to retain, may be recovered back.[87] There can be no recovery, how-

Missouri.— Wells *v.* Adams, 88 Mo. App. 215.

New York.— Horner *v.* State, 42 N. Y. App. Div. 430, 59 N. Y. Suppl. 96; Buckley *v.* New York, 30 N. Y. App. Div. 463, 52 N. Y. Suppl. 452 [*affirmed* in 159 N. Y. 558, 54 N. E. 1089].

England.— Astley *v.* Reynolds, Str. 915.

See 39 Cent. Dig. tit. "Payment," § 284 *et seq.*

87. *Alabama.*— Tuscaloosa County *v.* Foster, 132 Ala. 392, 31 So. 587.

Connecticut.— Sheldon *v.* South School Dist., 24 Conn. 88.

District of Columbia.— Strauss *v.* Hensey, 9 App. Cas. 541.

Illinois.— Bull *v.* Quincy, 52 Ill. App. 186; Tuller *v.* Fox, 46 Ill. App. 97.

Indiana.— Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995; Reynolds *v.* Rochester, 4 Ind. 43.

Iowa.— Slothower *v.* McFarland Grain Co., 117 Iowa 213, 90 N. W. 620.

Massachusetts.— Stuart *v.* Sears, 119 Mass. 143; Bliss *v.* Thompson, 4 Mass. 488. An actor who, by misrepresentation, obtains better terms than he otherwise would, and is paid accordingly may be compelled to refund the excess by an action of assumpsit. Dana *v.* Kemble, 17 Pick. 545.

Minnesota.— Schaller *v.* Borger, 47 Minn. 357, 50 N. W. 247.

Nebraska.— See Klein *v.* Pederson, 65 Nebr. 452, 91 N. W. 281; Weber *v.* Kirkendall, 39 Nebr. 193, 57 N. W. 1026.

New York.— Rosenblum *v.* Liener, 49 Misc. 559, 98 N. Y. Suppl. 836; Fischer *v.* Burns, 30 N. Y. Suppl. 437; Mowatt *v.* Wright, 1 Wend. 355, 19 Am. Dec. 508.

Pennsylvania.— Mathers *v.* Pearson, 13 Serg. & R. 258.

Rhode Island.— See Davis *v.* National Eagle Bank, (1901) 50 Atl. 530.

South Carolina.— Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663; Bours *v.* Watson, 1 Mill 393.

Texas.— Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501.

Vermont.— Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830.

Wisconsin.— Sleep *v.* Heymann, 57 Wis. 495, 16 N. W. 17.

United States.— *In re* Arnold, 133 Fed. 789.

England.— Johnson *v.* Rex, [1904] A. C. 817, 73 L. J. P. C. 113, 91 L. T. Rep. N. S. 234, 20 T. L. R. 697.

Canada.— Fraser *v.* McLanders, 25 Nova Scotia 542.

See 39 Cent. Dig. tit. "Payment," § 282.

What constitutes fraud.— Oil-Well Supply Co. *v.* Exchange Nat. Bank, 131 Pa. St. 100, 18 Atl. 935. If moneys are obtained from a person when he is in such a state of inebriation as to be incapable of transacting business, or of knowing what he is doing or the force of his acts, it is a clear fraud, and the money may be recovered back. Hayes *v.* Huffstater, 65 Barb. (N. Y.) 530. The mere failure of the judgment creditor and his assignee to inform the judgment debtor of a mistake of the referee in reporting the amount owing is not a fraud entitling the judgment debtor to recover back a payment made on the judgment. Wood *v.* Amory, 105 N. Y. 278, 11 N. E. 636. It is immaterial to the right to recover back money paid that the payee's counsel represented that the claim was enforceable, and that, in fact, it was barred by the statute, his assertion being merely an expression of opinion; and it is especially unimportant where it was not relied on, and the payer had the advice of counsel. Parker *v.* Lancaster, 84 Me. 512, 24 Atl. 952. Where statements were made by defendant, which induced plaintiff to act in making a payment, if they were untrue, he may recover, although no fraud may be charged or proved. Ely *v.* Padden, 13 N. Y. St. 53.

Concealment.— Where money is paid in ignorance of circumstances with which the receiver is acquainted and does not disclose, and which, if disclosed, would have avoided the payment, the receiver acts fraudulently, and the money may be recovered back. George *v.* Taylor, 55 Tex. 97.

Money paid by the United States on a fraudulent voucher may be recovered back on a plea of counter-claim. Charles *v.* U. S., 19 Ct. Cl. 316.

In an action on a contract for physician's services, defendant was not entitled to recover the amount paid on such contract under a plea in reconvention that plaintiff was not entitled to practice medicine unless the evidence tended to show that plaintiff had falsely represented himself to be a practising physician, and had thereby induced defendant to employ and pay him for professional services. Gaither *v.* Lindsey, (Tex. Civ. App. 1904) 83 S. W. 225.

Where insured property is destroyed by fire negligently set out by a railroad company, and the owner settles with the railroad company, and afterward, without informing the insurance company of such fact, receives from the insurance company payment for the loss, the latter may recover from him the money so paid. Chickasaw County Farmers' Mut. F. Ins. Co. *v.* Weller, 98 Iowa 731, 68 N. W. 443.

Making change.— Where one who had a bill, the genuineness of which had been questioned, procured specie for it from another, for the purpose of making change with a customer, without calling his attention in any way to the genuineness of the bill, the money could be recovered back. Chalmers *v.* Harris, 22 Tex. 265.

Money paid as a bribe by the beneficiaries in a fire insurance policy to a detective employed by the company, whereby a settlement of the loss has been effected, cannot be recovered on the ground of fraud. Patterson *v.* Hamilton, 42 S. W. 88, 19 Ky. L. Rep. 825.

ever, where the fraud relates to the execution of an instrument and the payment was voluntarily made with full knowledge of the facts.[88]

D. Mistake — 1. Of Law — a. General Rule.[89] Except where it is otherwise provided by statute,[90] the general rule is that a voluntary payment made under a mistake or in ignorance of the law, but with full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered baek.[91] And in so far as this rule is concerned, there is no differ-

88. Baldwin *v.* Foss, 71 Iowa 389, 32 N. W. 389.

89. Action to recover money paid on judgment or order afterward reversed see Appeal and Error, 3 Cyc. 469.

90. See Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72; Bottego *v.* Carroll, 31 Mont. 122, 77 Pac. 430.

91. *Alabama.*— Cahaba *v.* Burnett, 34 Ala. 400; State University *v.* Keller, 1 Ala. 406; Jones *v.* Watkins, 1 Stew. 81.

California.— Garrison *v.* Tillinghast, 18 Cal. 404; Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

Delaware.— Farmers' Bank *v.* Grantham, 3 Harr. 289.

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

Georgia.— Arnold *v.* Georgia R., etc., Co., 50 Ga. 304.

Illinois.— Elston *v.* Chicago, 40 Ill. 514, 89 Am. Dec. 361. But see Rawson *v.* Bethesda Baptist Church, 123 Ill. App. 239 [*affirmed* in 221 Ill. 216, 77 N. E. 560, 6 L. R. A. N. S. 448]; Heath, etc., Mfg. Co. *v.* National Linseed Oil Co., 99 Ill. App. 90 [*affirmed* in 197 Ill. 632, 64 N. E. 732].

Indiana.— Bond *v.* Coats, 16 Ind. 202; Snelson *v.* State, 16 Ind. 29; Downs *v.* Donnelly, 5 Ind. 496.

Kentucky.— Hubbard *v.* Hickman, 4 Bush 204, 96 Am. Dec. 297; Ray *v.* Commonwealth Bank, 3 B. Mon. 510, 39 Am. Dec. 479; Hall *v.* Farmers' Bank, 65 S. W. 365, 23 Ky. L. Rep. 1450.

Maine.— Coburn *v.* Neal, 94 Me. 541, 48 Atl. 178; Livermore *v.* Peru, 55 Me. 469; Norris *v.* Blethen, 19 Me. 348; Norton *v.* Marden, 15 Me. 45, 32 Am. Dec. 132.

Massachusetts.— Taber *v.* New Bedford, 177 Mass. 197, 58 N. E. 640; Alton *v.* Webster First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144; Bancroft *v.* Abbott, 3 Allen 524.

Minnesota.— Erkens *v.* Nicolin, 39 Minn. 461, 40 N. W. 567.

Mississippi.— Tiffany *v.* Johnson, 27 Miss. 227.

Missouri.— Needles *v.* Burk, 81 Mo. 569, 51 Am. Rep. 251; Mutual Sav. Inst. *v.* Enslin, 46 Mo. 200; Campbell *v.* Clark, 44 Mo. App. 249.

New Hampshire.— Strafford Sav. Bank *v.* Church, 69 N. H. 582, 44 Atl. 105; Evans *v.* Gale, 17 N. H. 573, 43 Am. Dec. 614; Peterborough *v.* Lancaster, 14 N. H. 382; Bean *v.* Jones, 8 N. H. 149.

New York.— Flynn *v.* Hurd, 118 N. Y. 19, 22 N. E. 1109; Belloff *v.* Dime Sav. Bank, 118 N. Y. App. Div. 20, 103 N. Y. Suppl. 273; Onondaga *v.* Briggs, 2 Den. 26; Silliman *v.* Wing, 7 Hill 159; Mowatt *v.* Wright, 1 Wend. 355, 19 Am. Dec. 508; Clarke *v.* Dutcher, 9 Cow. 674; Elting *v.* Scott, 2 Johns. 157. See also Renard *v.* Fiedler, 3 Duer 318. But see Bishop *v.* Corning, 37 N. Y. App. Div. 345, 57 N. Y. Suppl. 697.

North Carolina.— Filgo *v.* Penny, 6 N. C. 182.

Oregon.— Johnson *v.* McGinness, 1 Oreg. 292. See also Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

Pennsylvania.— Real Estate Sav. Inst. *v.* Linder, 74 Pa. St. 371; Natcher *v.* Natcher, 47 Pa. St. 496; Kerr *v.* Kitchen, 7 Pa. St. 486; Ege *v.* Koontz, 3 Pa. St. 109; Espy *v.* Allison, 9 Watts 462; Philadelphia *v.* Gilbert, 14 Phila. 212. But see Com. *v.* Lancaster County Live Stock, etc., Ins. Co., 6 Pa. Dist. 371.

South Carolina.— Robinson *v.* Charleston, 2 Rich. 317, 45 Am. Dec. 739.

Tennessee.— Hubbard *v.* Martin, 8 Yerg. 498; Dickins *v.* Jones, 6 Yerg. 483, 27 Am. Dec. 488.

Texas.— Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757; Galveston County *v.* Gorham, 49 Tex. 279; Scott *v.* Slaughter, 35 Tex. Civ. App. 524, 80 S. W. 643.

Virginia.— Richmond *v.* Judah, 5 Leigh 305.

West Virginia.—Beard *v.* Beard, 25 W. Va. 486, 52 Am. Rep. 219.

Wisconsin.— Gage *v.* Allen, 89 Wis. 98, 61 N. W. 361.

United States.— Elliott *v.* Swartwout, 10 Pet. 137, 9 L. ed. 373; De Bow *v.* U. S., 11 Ct. Cl. 672. But see Healey *v.* U. S., 29 Ct. Cl. 115, holding the better rule to be that "where the law is unsettled, and in doubt, money paid in mistake of its true construction may be considered in the nature of a compromise, and cannot be recovered back, unless it be paid between persons who do not stand on equal footing," and further holding that a private citizen buying public land and a receiver of the land-office did not stand on an equal footing as to the law governing such transaction so that money paid by such citizen for land at a higher price than the statute requires may be recovered back.

England.— Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164; Bilbie *v.* Lumley, 2 East 469, 6 Rev. Rep. 479; Kelly *v.* Solari, 6 Jur. 107, 11 L. J. Exch. 10, 9 M. & W. 54; Platt *v.* Bromage, 24 L. J. Exch. 63; Brisbane *v.* Dacres, 5 Taunt. 143, 14 Rev. Rep. 718. See also Clifton *v.* Cockburn, 3 Myl. & K. 76, 10 Eng. Ch. 76, 40 Eng. Reprint 30.

ence between ignorance and mistake of law.[92] It applies to a corporation as well as to a natural person,[93] and in equity as well as in law.[94]

b. Minority Rule. In some of the states, however, a recovery of money paid under a mistake of law is held proper where the payer was under no legal or moral obligation to pay and the payee has no right in good conscience to retain the money;[95] but where in conscience and justice no recovery should be had, the action does not lie.[96]

c. Limitations of, and Exceptions to, Rule — (i) *In General.* The rule that money paid under a mistake of law cannot be recovered should be confined to cases falling strictly within it.[97] Cases where money has been obtained by oppres-

Canada.— Perry *v.* Newcastle Dist. Mut. F. Ins. Co., 8 U. C. Q. B. 363.

See 39 Cent. Dig. tit. "Payment," § 267.

But see Brown *v.* Sawyer, 1 Aik. (Vt.) 130.

Lease of ferry privileges.—Where a county granted a lease of ferry privileges, which it represented, and both it and the lessee believes it had a right to do, but which in fact it was unauthorized to do, the privilege belonging to the United States, the money paid the county for the privilege cannot be recovered back. Evans *v.* Hughes County, 3 S. D. 244, 52 N. W. 1062.

Mistake held one of law see Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72.

Mistake held one of fact see Chicago *v.* Weir, 165 Ill. 582, 46 N. E. 725 [*affirming* 67 Ill. App. 247]; Montgomery County Com'rs *v.* Fry, 127 N. C. 258, 37 S. E. 259 (calculation of interest); Ward *v.* Ward, 12 Ohio Cir. Dec. 59.

Payment of encumbrance.— Peters *v.* Florence, 38 Pa. St. 194; Boas *v.* Updegrove, 5 Pa. St. 516, 47 Am. Dec. 425; Espy *v.* Allison, 9 Watts (Pa.) 462; Haigh *v.* U. S. Building, etc., Assoc., 19 W. Va. 792. But see Coudert *v.* Coudert, 43 N. J. Eq. 407, 5 Atl. 722.

Payment of interest at more than the legal rate after maturity under a mistake as to the legal effect of a phrase used in the note cannot be recovered back. Rector *v.* Collins, 46 Ark. 167, 55 Am. Rep. 571. Where interest is paid under a mistake of law as to liability therefor, while it cannot be recovered back, yet where the principal is not paid in full, the payment should be credited on the principal in determining the amount due on the contract. Hall *v.* Jackson County, 5 Ill. App. 609. *Contra,* Harralson *v.* Barrett, 99 Cal. 607, 34 Pac. 342.

Where a depositor in an insolvent bank pays his note, in ignorance of his right to set off his deposit against it, he cannot recover the amount paid from the receiver. Westfield *v.* Houtzdale Bank, 1 Pa. Dist. 767; Westfield *v.* Dill, 12 Pa. Co. Ct. 30.

Mutual mistake.— This rule also applies to a mutual mistake of law by the parties. Washington *v.* Barber, 29 Fed. Cas. No. 17,224, 5 Cranch C. C. 157; De Bow *v.* U. S., 11 Ct. Cl. 672.

92. Jacobs *v.* Morange, 47 N. Y. 57; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; Bobst *v.* Gring, 32 Pa. Super. Ct. 541. *Compare* Arnold *v.* Georgia R., etc., Co., 50 Ga. 304; Cuningham *v.* Cuningham, 20 S. C. 317; Hutton *v.* Edgerton, 6 S. C. 485. *Contra,* Culbreath *v.* Culbreath, 7 Ga. 64, 50 Am. Dec. 375 [*distinguished* in Strange *v.* Franklin, 126 Ga. 715, 55 S. E. 943, holding that where money is paid through ignorance of law it cannot be recovered back where the payee can retain it in good conscience]; Lawrence *v.* Beaubien, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.

The facts of which a payer must have knowledge, in order to make his payment irrecoverable, are not facts as to the existence or validity or meaning of the law, but the facts, events, and circumstances which relate to the persons and transactions involved. Evans *v.* Hughes County, 3 S. D. 244, 52 N. W. 1062.

93. Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

94. Hemphill *v.* Moody, 64 Ala. 468; Tiffany *v.* Johnson, 27 Miss. 227.

95. Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264; Culbreath *v.* Culbreath, 7 Ga. 64, 50 Am. Dec. 375; Lyon *v.* Mason, etc., Co., 102 Ky. 594, 44 S. W. 135, 19 Ky. L. Rep. 1642; McMurtry *v.* Kentucky Cent. R. Co., 84 Ky. 462, 1 S. W. 815, 8 Ky. L. Rep. 455; Louisville *v.* Henning, 1 Bush (Ky.) 381; Covington *v.* Powell, 2 Metc. (Ky.) 226; Covington Public Library *v.* Covington Bd. of Education, 75 S. W. 225, 25 Ky. L. Rep. 341 (payment under unconstitutional statute); Capital Gas, etc., Co. *v.* Gaines, 49 S. W. 462, 20 Ky. L. Rep. 1464; Lawrence *v.* Beaubien, 2 Bailey (S. C.) 623, 23 Am. Dec. 155. See also Kane *v.* Morehouse, 46 Conn. 300; Bruner *v.* Stanton, 102 Ky. 459, 43 S. W. 411, 19 Ky. L. Rep. 1514.

96. Louisville *v.* Zanone, 1 Metc. (Ky.) 151; Rupple *v.* Kissel, 74 S. W. 220, 24 Ky. L. Rep. 2371.

97. Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

Rule not favored.— The rule that money paid under a mistake of law cannot be recovered back often acts partially and inequitably, and is regarded with so much disfavor by the courts that it will not be extended beyond the limits defined for the scope of its operation. The tendency of the courts is to treat mistakes as to legal rights as mistakes of fact or mistakes of mixed fact and law, wherever it is possible to do so without disturbing well settled precedents. Ward *v.* Ward, 12 Ohio Cir. Dec. 59.

sion, extortion, or taking undue advantage of the party's situation are not within the rule,[98] and a fraudulent representation takes the case out of the rule.[99] The rule does not apply to money paid under a mistake of law to an officer of the court,[1] or to a deposit of money as security where the title is not intended to pass.[2]

(II) *PAYMENTS BY PUBLIC OFFICER.* Although there are cases holding the contrary,[3] the better rule seems to be that payments by a public officer by mistake of law, especially where made to another officer, may be recovered back.[4]

d. What Constitutes Mistake — (I) *IN GENERAL.* A mistake of law occurs where a person is truly acquainted with the existence or non-existence of facts but is ignorant of,[5] or comes to an erroneous conclusion as to,[6] their legal effect. As already stated, a mistake of law, as the term is here used, includes ignorance of the law.[7] It is often difficult to distinguish between mistakes of law and of fact,[8] both of which may be involved in the transaction without prejudice to the claim for relief.[9] Where, after suit brought, money has been voluntarily paid before the rendition of any judgment, it is paid under a mistake of law so that it cannot be recovered, although judgment is rendered in favor of the party making the payment.[10]

(II) *PAYMENT UNDER UNCONSTITUTIONAL OR INVALID STATUTE.* Money paid under an unconstitutional or invalid statute, without any circumstances of compulsion, is paid under a mistake of law and cannot be recovered back,[11] except

98. Haviland *v.* Willets, 141 N. Y. 35, 35 N. E. 958; Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

99. Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

1. *Ex p.* James, L. R. 9 Ch. 609; *Ex p.* Simmonds, 16 Q. B. D. 308, 55 L. J. Q. B. 74, 54 L. T. Rep. N. S. 439, 34 Wkly. Rep. 421. See also Com. *v.* Lancaster County Live Stock, etc., Ins. Co., 6 Pa. Dist. 371.

A receiver is an officer of the court within the rule that money paid under a mistake of law to such an officer can be recovered. Gillig *v.* Grant, 23 N. Y. App. Div. 596, 49 N. Y. Suppl. 78.

2. Morgan Park *v.* Gahan, 35 Ill. App. 646.

3. Morgan Park *v.* Knopf, 199 Ill. 444, 65 N. E. 322; Badeau *v.* U. S., 130 U. S. 439, 9 S. Ct. 579, 32 L. ed. 997; McKee *v.* U. S., 12 Ct. Cl. 504. *Compare* Booth *v.* Cass County, 84 Ind. 428.

4. Ada County *v.* Gess, 4 Ida. 611, 43 Pac. 71 [*distinguishing* Badeau *v.* U. S., 130 U. S. 439, 9 S. Ct. 579, 32 L. ed. 997]; Heath *v.* Albrook, 123 Iowa 559, 98 N. W. 619 [*overruling* in effect Painter *v.* Polk County, 81 Iowa 242, 47 N. W. 65, 25 Am. St. Rep. 489]; Ellis *v.* State Auditors, 107 Mich. 528, 65 N. W. 577 [*overruling* in effect Wayne County *v.* Randall, 43 Mich. 137, 5 N. W. 75]; County Com'rs *v.* Dunn, 4 Ohio S. & C. Pl. Dec. 260; Allegheny County *v.* Grier, 179 Pa. St. 639, 36 Atl. 353. See also State *v.* Young, 134 Iowa 505, 110 N. W. 292.

5. Mowatt *v.* Wright, 1 Wend. (N. Y.) 335, 19 Am. Dec. 508. See also MISTAKE OF LAW, 27 Cyc. 809.

6. Hurd *v.* Hall, 12 Wis. 112.

7. See *supra*, VIII, D, 1, a, text and note 92.

8. See Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

While a mistake as to title is generally one of law when the facts are known, yet the error may be as to some fact lying at the foundation of the title and necessary to its existence. Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106. See also Varnum *v.* Highgate, 65 Vt. 416, 419, 26 Atl. 628. In the latter case the following language is used: "Under this rule it may be regarded that it was established upon trial that the contract of sale was made under a mutual mistake of a material fact, viz.: the ownership of the stone, or the right of the plaintiff to sell them. This was an error of fact; it may have arisen because the parties misjudged the law, still it was no less an error of fact. Right of private ownership is matter of fact, although it may result from a question of law."

Mistake as to statute.— A mutual mistake in supposing that a clause governing a penalty in a particular statute had been incorporated into another like statute is not a pure mistake of law, but has been held in one sense a mistake of fact so as to authorize a recovery of money paid because of such mistake. Pitcher *v.* Turin Plank-Road Co., 10 Barb. (N. Y.) 436.

Mistakes held of fact rather than of law see Williams *v.* Carroll County, 167 Mo. 9, 66 S. W. 955; Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

9. Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

10. Beard *v.* Beard, 25 W. Va. 486, 52 Am. Rep. 219.

11. *Maryland.*— Baltimore *v.* Lefferman, 4 Gill 425, 45 Am. Dec. 145.

Massachusetts.—Benson *v.* Monroe, 7 Cush. 125, 54 Am. Dec. 716.

New York.—Newburgh Sav. Bank *v.* Woodbury, 173 N. Y. 55, 65 N. E. 858 [*affirming* 64 N. Y. App. Div. 305, 72 N. Y. Suppl. 222]; Doll *v.* Earle, 59 N. Y. 638.

Tennessee.— Hubbard *v.* Martin, 8 Yerg. 498.

in so far as governed by the rule adopted in some states that illegal payments made by public officers to public officers by mistake of law are recoverable.[12]

2 Of Fact — a. General Rule. Subject to the exception that money paid under a mistake of fact cannot be recovered where the payer has derived a substantial benefit from the payment, nor where the payee received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience,[13] a payment made by mistake of fact, which the party is not by law obliged to make, under ignorance of the facts or in misapprehension in regard thereto, may be recovered back.[14] This rule applies to payments made by a pub-

Wisconsin.— Van Buren *v.* Downing, 41 Wis. 122.

United States.— Woodman *v.* U. S., 15 Ct. Cl. 541.

See 39 Cent. Dig. tit. "Payment," § 269.

Compare Wingerter *v.* San Francisco, 134 Cal. 547, 66 Pac. 730, 86 Am. St. Rep. 294.

12. Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577.

13. *Florida.*— Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

Kentucky.— Mitchell *v.* Stoddard County Bank, 65 S. W. 839, 23 Ky. L. Rep. 1562.

Louisiana.— Sientes *v.* Odier, 17 La. Ann. 153.

Michigan.— Walker *v.* Conant, 69 Mich. 321, 27 N. W. 292, 13 Am. St. Rep. 391.

Minnesota.— Duluth *v.* McDonnell, 61 Minn. 288, 63 N. W. 727.

Missouri.— Foster *v.* Kirby, 31 Mo. 496. See also Labarge *v.* Renshaw, 28 Mo. 363.

New York.— See Youmans *v.* Edgerton, 16 Hun 28 [*affirmed* in 91 N. Y. 403].

North Dakota.— Dickey County *v.* Hicks, 14 N. D. 73, 103 N. W. 423.

See 39 Cent. Dig. tit. "Payment," § 272 *et seq.*

For instance, where a debtor and creditor mistakenly believe that a greater amount is due than really is due, and an amount is paid less than the amount actually due, an action to recover such payment on discovery of the mistake will not lie. Ashley *v.* Jennings, 48 Mo. App. 142. Where the fact is equally unknown to both parties, and where each has equal means of information, money paid upon a mistake of fact cannot, in the absence of fraud, be recovered back, the money being due to the payee. Behring *v.* Somerville, 63 N. J. L. 568, 44 Atl. 641, 49 L. R. A. 578. When a debtor pays his debt without being aware that anything has been realized by the creditor on collateral security, and the creditor subsequently returns the collaterals and tenders back the amount he has collected thereon, no action will lie on the part of the debtor to recover of the creditor the money paid him. Youngs *v.* Stahelin, 34 N. Y. 258.

Payment of a debt barred by limitations cannot be recovered back on a plea of mistake of fact. Hubbard *v.* Hickman, 4 Bush (Ky.) 204, 96 Am. Dec. 297.

Extreme case.— Where plaintiff's payment for services rendered by defendant was not according to the contract, but at a higher rate, which, however, was a more just one than the contract provided, plaintiff could not recover the payment, under La. Civ. Code, arts. 2280, 2281, permitting recovery of a payment by mistake by one who believed himself indebted, but who was under neither moral nor legal obligation to pay. Jackson *v.* Ferguson, 2 La. Ann. 723.

14. *Alabama.*— Pendry *v.* Brundridge, 57 Ala. 574.

Connecticut.— Vernon *v.* Vernon West School Dist., 38 Conn. 112; Post *v.* Clark, 35 Conn. 339.

District of Columbia.— Strauss *v.* Hensey, 9 App. Cas. 541.

Florida.— Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Sheppard *v.* Lang, 122 Ga. 607, 50 S. E. 371; Haralson County *v.* Golden, 104 Ga. 19, 30 S. E. 380; Logan *v.* Sumter, 28 Ga. 242, 73 Am. Dec. 755. See also McRae Oil, etc., Co. *v.* Stone, 119 Ga. 516, 46 S. E. 668.

Illinois.— Stempel *v.* Thomas, 89 Ill. 146; J. S. Hulse Hardware Co. *v.* American Express Co., 65 Ill. App. 596.

Kentucky.— McMurtry *v.* Kentucky Cent. R. Co., 84 Ky. 462, 1 S. W. 815, 8 Ky. L. Rep. 455; Louisville *v.* Henning, 1 Bush 381; Covington *v.* Powell, 2 Metc. 226; Ray *v.* Commonwealth Bank, 3 B. Mon. 510, 39 Am. Dec. 479; Feemster *v.* Markham, 2 J. J. Marsh. 303, 19 Am. Dec. 131; Ashbrook *v.* Watkins, 3 T. B. Mon. 82; Edwards *v.* Fuson, 66 S. W. 715, 23 Ky. L. Rep. 2111; Rhodes *v.* Lambert, 58 S. W. 608, 22 Ky. L. Rep. 691; Nevin *v.* Mankini, 45 S. W. 669, 20 Ky. L. Rep. 224.

Louisiana.— Beasley *v.* Allen, 11 Rob. 502; Massias *v.* Gasquet, 4 Rob. 137; Ligon *v.* Orleans Nav. Co., 2 La. 128.

Maine.— Starbird *v.* Curtis, 43 Me. 352; Norton *v.* Marden, 15 Me. 45, 32 Am. Dec. 132.

Maryland.— Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655.

Massachusetts.— Moors *v.* Bird, 190 Mass. 400, 77 N. E. 643; Blanchard *v.* Low, 164 Mass. 118, 41 N. E. 118; Trecy *v.* Jefts, 149 Mass. 211, 21 N. E. 360; Lazell *v.* Miller, 15 Mass. 207; Bond *v.* Hays, 12 Mass. 34; Pearson *v.* Lord, 6 Mass. 81.

Michigan.— Truax *v.* Bliss, 139 Mich. 153, 102 N. W. 635; Lane *v.* Pere Marquette Boom Co., 62 Mich. 63, 28 N. W. 786.

Minnesota.—Lund *v.* Davies, 47 Minn. 290, 50 N. W. 79.

Missouri.— McDonald *v.* Lynch, 59 Mo. 350; Davis *v.* Krum, 12 Mo. App. 279.

New Hampshire.—Peterborough *v.* Lancaster, 14 N. H. 382.

New Jersey.— Egan *v.* Abbett, (Sup. 1906) 64 Atl. 991.

lic corporation the same as where payments are made by an individual.[15] It also

New York.—Hathaway *v.* Delaware County, 185 N. Y. 368, 78 N. E. 153, 113 Am. St. Rep. 909 [*affirming* in part and *reversing* in part 103 N. Y. App. Div. 179, 93 N. Y. Suppl. 436]; Kingston Bank *v.* Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; North *v.* Bloss, 30 N. Y. 374; Rheel *v.* Hicks, 25 N. Y. 289; Martin *v.* McCormick, 8 N. Y. 331 [*reversing* on other grounds 4 Sandf. 366]; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Kessler *v.* Herklotz, 115 N. Y. App. Div. 522, 101 N. Y. Suppl. 418; Clausen *v.* Puvogel, 114 N. Y. App. Div. 455, 100 N. Y. Suppl. 49; Hudson River Water Power Co. *v.* Glens Falls Portland Cement Co., 107 N. Y. App. Div. 548, 98 N. Y. Suppl. 421; Ashner *v.* Abenheim, 31 N. Y. App. Div. 623, 52 N. Y. Suppl. 270; Munroe *v.* Bonanno, 16 N. Y. App. Div. 421, 45 N. Y. Suppl. 61; Masonic Life Assoc. *v.* Crandall, 9 N. Y. App. Div. 400, 41 N. Y. Suppl. 497; Dieckerhoff *v.* Alder, 7 N. Y. App. Div. 607, 39 N. Y. Suppl. 599 [*affirmed* in 158 N. Y. 689, 53 N. E. 1124]; Merchants' Bank *v.* McIntyre, 2 Sandf. 431; Goddard *v.* Merchants' Bank, 2 Sandf. 247 [*affirmed* in 4 N. Y. 147]; Potter *v.* Everett, 2 Hall 276; Wheadon *v.* Olds, 20 Wend. 174; Burr *v.* Veeder, 3 Wend. 412; Mowatt *v.* Wright, 1 Wend. 355, 19 Am. Dec. 508.

North Carolina.— Pool *v.* Allen, 29 N. C. 120.

Ohio.— McKeown *v.* Irish Bldg. Assoc., 9 Ohio Dec. (Reprint) 257, 12 Cinc. L. Bul. 6.

Pennsylvania.— Reed *v.* Horn, 143 Pa. St. 323, 22 Atl. 877; Thomas *v.* Brady, 10 Pa. St. 164; Dotterer *v.* Scott, 29 Pa. Super. Ct. 553; Girard Trust Co. *v.* Harrington, 23 Pa. Super. Ct. 615.

South Carolina.— Glenn *v.* Shannon, 12 S. C. 570; Charleston Bank *v.* State Bank, 13 Rich. 291; Beadenbaugh *v.* Cooper, 13 Rich. 42.

Tennessee.— Guild *v.* Baldridge, 2 Swan 295; Dickins *v.* Jones, 6 Yerg. 483, 27 Am. Dec. 488.

Texas.— Hummel *v.* Flores, (Civ. App. 1897) 39 S. W. 309; Barth *v.* Jester, 3 Tex. App. Civ. Cas. § 222.

Vermont.— Varnum *v.* Highgate, 65 Vt. 416, 26 Atl. 628.

Virginia.—City Nat. Bank *v.* Peed, (1899) 32 S. E. 34.

United States.— Union Nat. Bank *v.* McKey, 102 Fed. 662, 42 C. C. A. 583; Bohl *v.* Carson, 63 Fed. 26, 11 C. C. A. 16; *In re* Farmers', etc., Bank, 13 Fed. 361; Williams *v.* Mobile Sav. Bank, 29 Fed. Cas. No. 17,729, 2 Woods 501 (ignorance of fact making contract illegal); Brown *v.* District of Columbia, 17 Ct. Cl. 402. See also Cleveland-Cliffs Iron Co. *v.* East Itasca Min. Co., 146 Fed. 232, 76 C. C. A. 598. *Compare* Shipman *v.* District of Columbia, 119 U. S. 148, 704, 7 S. Ct. 134, 30 L. ed. 337; Hodgson *v.* Butts, 12 Fed. Cas. No. 6,564, 1 Cranch C. C. 488.

England.— Durrant *v.* England, etc., Ecclesiastical Com'rs, 6 Q. B. D. 234, 45 J. P. 270, 50 L J. Q. B. 30, 44 L. T. Rep. N. S. 348, 29 Wkly. Rep. 443; Milnes *v.* Duncan, 6 B. & C. 671, 9 D. & R. 731, 5 L. J. K. B. O. S. 239, 30 Rev. Rep. 498, 13 E. C. L. 302; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Barber *v.* Brown, 1 C. B. N. S. 121, 3 Jur. N. S. 18, 26 L. J. C. P. 41, 5 Wkly. Rep. 79, 87 E. C. L. 121; Continental Caoutchouc, etc., Co. *v.* Kleinwort, 9 Com. Cas. 240, 90 L. T. Rep. N. S. 474, 20 T. L. R. 403, 52 Wkly. Rep. 489; Continental Caoutchouc, etc., Co. *v.* Kleintwort, 8 Com. Cas. 277, 51 Wkly. Rep. 541; Lorymer *v.* Stephens, 1 C. M. & R. 62, 3 L. J. Exch. 312, 4 Tyrw. 869; Mills *v.* Alderbury Union, 3 Exch. 590, 18 L. J. Exch. 252; Lamb *v.* Cranfield, 43 L. J. Ch. 408; Hooper *v.* Exeter, 56 L. J. Q. B. 457; Lucas *v.* Worswick, 1 M. & Rob. 293; Pope *v.* Wray, 4 M. & W. 451; Bize *v.* Dickason, 1 T. R. 285. But see Lee *v.* Merrett, 8 Q. B. 820, 10 Jur. 916, 15 L. J. Q. B. 289, 55 E. C. L. 820; Aiken *v.* Short, 1 H. & N. 210, 23 L. J. Exch. 321, 4 Wkly. Rep. 645.

See 39 Cent. Dig. tit. "Payment," § 277.

But see New York L. Ins. Co. *v.* Chittenden, 134 Iowa 613, 112 N. W. 96, 11 L. R. A. N. S. 233; De Voin *v.* De Voin, 76 Wis. 66, 44 N. W. 839.

The true ground of recovery in such cases is that the money has been paid without any consideration. Little *v.* Derby, 7 Mich. 325.

Payment by officers as an exception to the rule.— It has been held that where an officer seized and sold the goods of a third person on an execution against the judgment debtor, and paid over the proceeds to the judgment creditor, the officer could not recover back this money, as paid by mistake, although he had been compelled by suit to pay the third person the value of the goods taken. Bissell *v.* Edwards, 5 Day (Conn.) 94.

Waiver.— A payment, after knowledge, of the royalty on articles manufactured under unexpired patents does not constitute a waiver of the right to demand back the money paid as royalty on articles manufactured under patents that had expired. Stanley Rule, etc., Co. *v.* Bailey, 45 Conn. 464.

15. *District of Columbia.*— U. S. *v.* Phillips, 21 D. C. 309.

Massachusetts.— Com. *v.* Hanpt, 10 Allen 38.

Minnesota.— Duluth *v.* McDonnell, 61 Minn. 288, 63 N. W. 727.

New Hampshire.—Manchester *v.* Burns, 45 N. H. 482.

North Carolina.— Worth *v.* Stewart, 122 N. C. 258, 29 S. E. 579.

United States.—Betts *v.* District of Columbia, 20 Ct. Cl. 445; Neitzey *v.* District of Columbia, 17 Ct. Cl. 111, holding that where the treasury board of audit allowed three dollars and ten cents per yard for paving instead of three dollars, the contract price, and the allowance was unexplained, the corresponding overpayment must be regarded as made in mistake of fact.

See 39 Cent. Dig. tit. "Payment," § 272 *et seq.*

applies to payments in property other than money, in which case the property, or its value, may be recovered.[16]

b. Nature of Mistake and What Constitutes. An error of fact is ordinarily said to take place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist.[17] And money paid under a *bona fide* forgetfulness of facts which disentitled the party to receive it is paid under a mistake of fact and may be recovered.[18] To authorize a recovery, the mistake must be as to a material fact,[19] but need not be mutual.[20] It is immaterial that the mistake of fact was accompanied by a mistake or ignorance of law.[21] The knowledge of the facts which disentitles the party from recovering means a knowledge existing in the mind at the time of payment;[22] and a subsequent discovery of facts showing that the payer had a set-off against the demand does not show such a mistake of fact as to authorize a recovery.[23] Ignorance of the law of a foreign government or of another state is ignorance of fact rather than ignorance of law.[24] A payment made by reason of a wrong construction of the

Payment for land for street.— Where a city controller pays by mistake, for land taken in the extending of a street, a greater sum than that awarded by the commissioners appointed to fix the awards, an action lies by the city to recover back the excess; and it is no defense to such action that the land was worth the sum paid, and that information from a clerk of the commissioners that this sum was the sum awarded, prevented defendant from getting the award increased. New York *v.* Erben, 38 N. Y. 305.

16. Johnson *v.* Saum, 123 Iowa 145, 98 N. W. 599.

17. Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Hurd *v.* Hall, 12 Wis. 112. And see MISTAKE OF FACT, 27 Cyc. 809.

As examples of mistakes of fact within the rule laid down, may be mentioned the following: Where one entitled to the money on a second execution, assented to its payment to plaintiff on the first execution, on the mistaken assumption that the property sold had been seized by the sheriff on the first execution within the time allowed by law and while the lien of the first judgment existed (Kingston Bank *v.* Eltinge, 40 N. Y. 391, 100 Am. Dec. 516); where one ignorant of the fact that his claim had been allowed, contracted to pay for services to be performed in procuring its allowance (Allen *v.* Hammond, 11 Pet. (U. S.) 63, 9 L. ed. 633); and where money was paid in the belief that there was a claim when in fact there was none (Potter *v.* Everett, 2 Hall (N. Y.) 276).

Evidence held not to show mistake of fact see Holt *v.* Thomas, 105 Cal. 273, 38 Pac. 891; Murphy *v.* Knickerbocker Ice Co., 22 Misc. (N. Y.) 360, 49 N. Y. Suppl. 279; Emerson *v.* Loveland, 9 N. Y. Suppl. 768. Money paid by plaintiff for an assignment to him by defendant of accounts against other persons, under an agreement that only good accounts should be included, was not paid by mistake as to accounts which afterward proved to be worthless, and therefore plaintiff cannot recover the amount of the worthless accounts in an action at law. Markowitz *v.* Messner, 18 Misc. (N. Y.) 256, 41 N. Y. Suppl. 512.

In those states where a note operates as a payment, if it be ignorantly given for an account that has been paid, an action accrues to recover back the amount, and is not impaired by a payment of the note after a knowledge of the facts. Gooding *v.* Morgan, 37 Me. 419.

18. Norman *v.* Will, 1 Ohio Dec. (Reprint) 261, 5 West. L. J. 508; Beatty *v.* U. S., Dev. Ct. Cl. 20; Kelly *v.* Solari, 6 Jur. 107, 11 L. J. Exch. 10, 9 M. & W. 54; Lucas *v.* Worswick, 1 M. & Rob. 293; Perry *v.* Newcastle Dist. Mut. F. Ins. Co., 8 U. C. Q. B. 363.

19. Flower *v.* Lance, 59 N. Y. 603; Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106; Buffalo *v.* O'Malley, 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137.

The mistake or ignorance must be as to some fact that is essential upon the question of liability or amount so that ignorance or mistake respecting immaterial circumstances will not authorize a recovery. Livermore *v.* Peru, 55 Me. 469. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money, and not where, if true, it would merely make it desirable that he should pay the money. Needles *v.* Burk, 81 Mo. 569, 51 Am. Rep. 251; Aiken *v.* Short, 1 H. & N. 210, 23 L. J. Exch. 321, 4 Wkly. Rep. 645.

20. Stotsenburg *v.* Fordice, 142 Ind. 490, 41 N. E. 313, 810; Hathaway *v.* Delaware County, 185 N. Y. 368, 78 N. E. 153, 113 Am. St. Rep. 909. But see Reed *v.* Horn, 143 Pa. St. 323, 22 Atl. 877. *Contra*, Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990.

21. Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

22. Lewellen *v.* Garrett, 58 Ind. 442, 26 Am. Rep. 74; Kelly *v.* Solari, 6 Jur. 107, 11 L. J. Exch. 10, 9 M. & W. 54.

23. Franklin Bank *v.* Raymond, 3 Wend. (N. Y.) 69.

24. Norton *v.* Marden, 15 Me. 45, 32 Am. Dec. 132; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Vinal *v.* Continental Constr., etc., Co., 53 Hun (N. Y.) 247, 6

terms of a contract is not made under a mistake of fact but under a mistake of law.[25] Ignorance of the means of proving a fact is not ignorance of the fact so as to authorize a recovery.[26]

c. Particular Illustrations of Rule — (i) *Payment of Bill or Note.*[27] The payment of a bill,[28] note,[29] or check[30] by mistake of fact may be recovered back.

(ii) *Payment of Interest.* So a payment of interest by mistake,[31] such as

N. Y. Suppl. 595; Chillicothe Bank *v.* Dodge, 8 Barb. (N. Y.) 233.

A foreign corporation having advanced money on a draft issued by a corporation of this state in violation of a public law of this state may recover back the money as paid under a mistake of fact. Chillicothe Bank *v.* Dodge, 8 Barb. (N. Y.) 233.

25. Cincinnati *v.* Cincinnati Gas Light, etc., Co., 53 Ohio St. 278, 41 N. E. 239.

26. Windbiel *v.* Carroll, 16 Hun (N. Y.) 101.

27. See also Commercial Paper, 7 Cyc. 1040.

Payment in ignorance of discharge see Commercial Paper, 7 Cyc. 1044.

Payments on commercial paper not indorsed or applied see Commercial Paper, 7 Cyc. 1041.

Payments on forged or altered commercial paper see Commercial Paper, 7 Cyc. 1041.

28. Koontz *v.* Central Nat. Bank, 51 Mo. 275; De Nayer *v.* State Nat. Bank, 8 Nebr. 104 (holding, in a particular case, that the person to whom the payment was made had not changed his position so as to estop the bank from recovering back the amount paid); Durkin *v.* Cranston, 7 Johns. (N. Y.) 442; Broun *v.* Boyce, 4 Rich. (S. C.) 385. But see Gilman *v.* New York First Nat. Bank, 63 Hun (N. Y.) 480, 18 N. Y. Suppl. 495 (where mistake not shown); Bixby *v.* Drexel, 56 How. Pr. (N. Y.) 478; Dey *v.* Murray, 9 Johns. (N. Y.) 171.

Payment to wrong person.— The accepter, who, in error, pays a holder without right to receive, may recover back the amount. Dick *v.* Leverich, 11 La. 573.

Second payment.— Where a draft, protested for non-payment by the accepter, was paid by the drawer to the bank negotiating it, when unknown to them it was already paid by the accepter, the drawer may recover the money as paid by mistake. Henderson *v.* Planters' Bank, 11 Rich. (S. C.) 44.

When not recoverable.— The drawees are not entitled to recover of the payee the amount of a bill which they have accepted and paid, on the ground that they paid it under a mistake of fact as to the nature or value of their security from the drawer, where the security accompanied the bill, and proved to be fictitious. Detroit First Nat. Bank *v.* Burkham, 32 Mich. 328.

29. Mitchell *v.* Walker, 30 N. C. 243. *Compare* Alton *v.* Webster First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144. See also Commercial Paper, 7 Cyc. 1040.

Payments of note of third person, supposing it was the note of the payer, may be recovered back. Lewellen *v.* Garrett, 58 Ind. 442, 26 Am. Rep. 74.

Payment to wrong person.— Braithwait *v.* Bain, 66 Minn. 325, 69 N. W. 4.

Payment by bank is not recoverable where the holder has surrendered the note. Riverside Bank *v.* Shenandoah First Nat. Bank, 74 Fed. 276, 20 C. C. A. 181.

Note as including amounts of other notes. — Where a bank owning several notes and holding others for collection presses the debtor for security, and, without knowing the exact amount thereof, he gives his note and mortgage for the sum claimed, and afterward pays it in full, such payment is not voluntary as to the amount of a note included among the original claims without his knowledge, and upon which nothing was actually due, and he may recover back the amount thereof. Peterson *v.* Stoughton State Bank, 78 Wis. 113, 47 N. W. 368.

Where a sum was to be indorsed on a note on a settlement of accounts, but in fact no indorsement was made and a recovery was had by default on the note for the full amount thereof, the amount agreed to be indorsed may be recovered back. Osgood *v.* Jones, 23 Me. 312.

When not recoverable.— The right to recover back money paid by mistake does not exist where the party paying is the maker of a note, who was ignorant that the note, through inadvertence, had not been indorsed by the payee to the holder, the note being transferred, before maturity, for a valuable consideration. Franklin Bank *v.* Raymond, 3 Wend. (N. Y.) 69.

30. Union Bank *v.* U. S. Bank, 3 Mass. 74, where delay occasioned by confidence in the mistaken affirmation of defendants themselves was held not to bar action. But see Preston *v.* Canadian Bank of Commerce, 23 Fed. 179, where, in a clearing house case, recovery was held not allowable where the parties had by contract fixed the time within which mistakes could be corrected. See also Commercial Paper, 7 Cyc. 1040.

Ignorance as equivalent to mistake.— Where a check indorsed to a bank is dishonored because of the bank's failure to present it for payment in due course, and an indorser thereupon takes it up from the bank without knowledge of the facts discharging him from liability as indorser, he is entitled to recover the money so paid. Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717 [*affirming* 30 N. Y. App. Div. 498, 52 N. Y. Suppl. 464].

31. Iowa Loan, etc., Co. *v.* Schnose, 19 S. D. 248, 103 N. W. 22; Hummel *v.* Flores,

a payment of more than was actually due,[32] may be recovered back by the party making the mistake.

(III) *PAYMENT OF ENCUMBRANCE.* Generally, one who owns or has an interest in property, and who pays money to a lienor or encumbrancer to satisfy the claim of the latter against the person from whom the payer has acquired his ownership or interest, may recover such payment where made through a mistake of fact.[33] Where a purchaser of land pays a supposed lien when in fact none existed, he may recover the amount paid,[34] although it was paid by the hand of the seller who owed the amount to the payee, without disclosing that it was paid on behalf of the purchaser.[35]

(IV) *PAYMENT ON ACCOUNT.* A party who, by mistake, pays more than is due upon an account may recover the excess.[36]

(V) *PAYMENT TO WRONG PERSON.* Where money has, by mistake of fact, been paid to the wrong person, it may be recovered back.[37] But if payment is made to the wrong person, although the payer in fact owes him a debt which is due, and the amount of which is equal to or in excess of the payment, it has been held that no recovery can be had.[38]

d. Diligence and Waiver — (I) *IN GENERAL.* The fact that a person, when making a payment, had the means of knowing the facts, does not of itself ordinarily preclude him from recovering back the money, if he did not have actual knowledge.[39] But the money cannot be recovered where it is clear that the payer

(Tex. Civ. App. 1897) 39 S. W. 309 (second payment); Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678. *Compare* Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205 [*affirmed* in 163 N. Y. 580, 57 N. E. 1108]. But see Jackson *v.* McKnight, 17 Hun (N. Y.) 2, holding that an action does not lie to recover back a payment of interest made a second time on a bond through mistake, if the payer will have the benefit thereof whenever the bond and mortgage are foreclosed.

Payment to wrong person.— Jordan *v.* Harrison, 46 Mo. App. 172.

32. Stotsenburg *v.* Fordice, 142 Ind. 490, 41 N. E. 313, 810; Worley *v.* Moore, 97 Ind. 15; Goddard *v.* Putnam, 22 Me. 363; Williams *v.* Carroll County, 167 Mo. 9, 66 S. W. 955; Boon *v.* Miller, 16 Mo. 457; Garrison *v.* Murphy, 2 Nebr. (Unoff.) 696, 89 N. W. 766.

Compound interest.— Major *v.* Tardos, 14 La. Ann. 10; Boyer *v.* Pack, 2 Den. (N. Y.) 107.

33. International Bank *v.* Bartalott, 11 Ill. App. 620. But see Sears *v.* Leland, 145 Mass. 277, 14 N. E. 111.

Second payment.—The grantee of premises subject to a mortgage, who, after the mortgage has been paid unknown to him, pays it again in order to free his estate from the encumbrance, can recover the amount paid from the mortgagee. International Bank *v.* Bartalott, 11 Ill. App. 620.

Where a purchaser pays a part of the price to one who has a lien on the goods sold, but such payment is in excess of the lien, he may recover such excess from the lienor. Clark *v.* Sylvester, (Me. 1888) 13 Atl. 404.

34. Handly *v.* Call, 30 Me. 9.

35. Handly *v.* Call, 30 Me. 9.

36. Baltimore, etc., R. Co. *v.* Faunce, 6 Gill (Md.) 68, 46 Am. Dec. 655; Ransom *v* Masten, 4 N. Y. Suppl. 781.

37. Louisiana Bank *v.* Ballard, 7 How. (Miss.) 371; Crofton *v.* Cincinnati Bd. of Education, 5 Ohio Dec. (Reprint) 348, 7 Am. L. Rec. 768; Clack *v.* Taylor County, 3 Tex. App. Civ. Cas. § 201. See also Haralson County *v.* Golden, 104 Ga. 19, 30 S. E. 380.

38. Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

39. *Alabama.*— Merrill *v.* Brantley, 133 Ala. 537, 31 So. 847; Rutherford *v.* McIvor, 21 Ala. 750.

Connecticut.— Stanley Rule, etc., Co. *v.* Bailey, 45 Conn. 464.

Indiana.— Brown *v.* College Corner, etc., Gravel Road Co., 56 Ind. 110.

Kentucky.— German Security Bank *v.* Columbia Finance, etc., Co., 85 S. W. 761, 27 Ky. L. Rep. 581.

Maryland.— Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655.

Massachusetts.— Appleton Bank *v.* McGilvray, 4 Gray 518, 64 Am. Dec. 92. *Compare* Alton *v.* Webster First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144.

Michigan.— Pingree *v.* Mutual Gas Co., 107 Mich. 156, 65 N. W. 6; Walker *v.* Conant, 65 Mich. 194, 31 N. W. 786. But see Wheeler *v.* Hatheway, 58 Mich. 77, 24 N. W. 780 (holding that money voluntarily paid in the reasonable belief that it is due, and after investigation or the opportunity therefor, and without fraud on the part of the recipient, cannot be recovered back as paid under a misapprehension); McArthur *v.* Luce, 43 Mich. 435, 5 N. W. 451, 38 Am. Rep. 204 (holding that one who, after investigation, pays a claim made in good faith, but which he afterward finds to be incorrect, cannot recover the money on the ground that it was paid under mistake of fact).

Missouri.— Koontz *v.* Central Nat. Bank, 51 Mo. 275. But see Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158.

intended to waive all inquiry into the fact.[40] So if the party paying has the means of ascertaining the facts, and is under a legal duty to ascertain them, he cannot recover money paid in ignorance thereof.[41]

(II) *Where Payee Prejudiced.* The rules just stated are subject to the exception that when the payee was himself mistaken and has suffered loss in consequence of the mutual mistake, the payment cannot be recovered back where the mistake arose from want of due care on the part of the payer.[42]

e. Change of Status After Payment. The general rule is that a payment, although made by a mistake of fact, cannot be recovered where the payee has changed his position to his prejudice because thereof and cannot be put *in statu quo* by the payer.[43] For instance, if money is paid by a mistake to an agent,

Nebraska.— Douglas County *v.* Keller, 43 Nebr. 635, 62 N. W. 60.

New York.—Hathaway *v.* Delaware County, 185 N. Y. 368, 78 N. E. 153, 113 Am. St. Rep. 909; Kingston Bank *v.* Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; National L. Ins. Co. *v.* Jones, 1 Thomps. & C. 466 [*affirmed* in 59 N. Y. 649]. *Contra,* Campbell *v.* Vandervoort, 2 N. Y. City Ct. 315.

Oregon.— Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

Pennsylvania.— McKibben *v.* Doyle, 173 Pa. St. 579, 34 Atl. 455, 51 Am. St. Rep. 785; Girard Trust Co. *v.* Harrington, 23 Pa. Super. Ct. 615.

Tennessee.— Neal *v.* Read, 7 Baxt. 333.

Texas.— Alston *v.* Richardson, 51 Tex. 1.

Virginia.— City Nat. Bank *v.* Peed, (1899) 32 S. E. 34.

United States.— Brown *v.* Tillinghast, 84 Fed. 71.

England.— Townsend *v.* Crowdy, 8 C. B. N. S. 477, 7 Jur. N. S. 71, 29 L. J. C. P. 300, 2 L. T. Rep. N. S. 537, 98 E. C. L. 477; Bell *v.* Gardner, 1 Dowl. P. C. N. S. 683, 4 M. & G. 11, 4 Scott N. R. 621, 43 E. C. L. 16; Kelly *v.* Solari, 6 Jur. 107, 11 L. J. Exch. 10, 9 M. & W. 54. See also Lucas *v.* Worswick, 1 M. & Rob. 293. *Contra,* Davis *v.* Watson, 2 L. J. K. B. 175, 2 N. & M. 109.

See 39 Cent. Dig. tit. "Payment," § 280.

But see Gooding *v.* Morgan, 37 Me. 419; Peterborough *v.* Lancaster, 14 N. H. 382.

Contra.— West *v.* Houston, 4 Harr. (Del.) 170; Brummitt *v.* McGuire, 107 N. C. 351, 12 S. E. 191.

Even forgetfulness of the fact will not preclude an action if it was real and honest. City Nat. Bank *v.* Peed, (Va. 1899) 32 S. E. 34.

40. *Illinois.*—Frambers *v.* Risk, 2 Ill. App. 499.

Maine.— Ash *v.* McLellan, 101 Me. 17, 62 Atl. 598.

Oregon.— Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

Tennessee.— Neal *v.* Read, 7 Baxt. 333.

England.— Kelly *v.* Solari, 6 Jur. 107, 11 L. J. Exch. 10, 9 M. & W. 54.

See 39 Cent. Dig. tit. "Payment," § 280.

41. Simmons *v.* Looney, 41 W. Va. 738, 24 S. E. 677. See also Young *v.* Lehman, 63 Ala. 519; Harner *v.* Price, 17 W. Va. 523.

42. *Kentucky.*— German Security Bank *v.* Columbia Finance, etc., Co., 85 S. W. 761, 27 Ky. L. Rep. 581.

Missouri.— Lyle *v.* Shinnebarger, 17 Mo. App. 66.

New York.—Hathaway *v.* Delaware County, 185 N. Y. 368, 78 N. E. 153, 113 Am. St. Rep. 909; Lawrence *v.* American Nat. Bank, 54 N. Y. 432; Duncan *v.* Berlin, 46 N. Y. 685, 11 Abb. Pr. N. S. 116; Kingston Bank *v.* Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Union Nat. Bank *v.* New York Sixth Nat. Bank, 1 Lans. 13; Ely *v.* Padden, 13 N. Y. St. 53.

North Dakota.— Fegan *v.* Great Northern R. Co., 9 N. D. 30, 81 N. W. 39.

England.— See Shand *v.* Grant, 15 C. B. N. S. 324, 9 L. T. Rep. N. S. 390, 109 E. C. L. 324.

See 39 Cent. Dig. tit. "Payment," § 280.

Another statement of rule.— Money paid by mistake cannot be recovered back when the mistake is in regard to a matter as to which the party receiving the money was not bound to inquire, and the party paying has been guilty of gross negligence in consequence of which the party receiving would suffer loss if compelled to return the money. Duncan *v.* Berlin, 5 Rob. (N. Y.) 457, 4 Abb. Pr. N. S. 34.

43. *Alabama.*—Yarborough *v.* Wise, 5 Ala. 292.

Louisiana.— See Pelletier *v.* State Nat. Bank, 117 La. 335, 41 So. 640.

New Jersey.— Behring *v.* Somerville, 63 N. J. L. 568, 44 Atl. 641, 49 L. R. A. 578.

North Dakota.— Fegan *v.* Great Northern R. Co., 9 N. D. 30, 81 N. W. 39.

Pennsylvania.— Boas *v.* Updegrove, 5 Pa. St. 516, 47 Am. Dec. 425; Tybout *v.* Thompson, 2 Browne 27.

Tennessee.— Guild *v.* Baldridge, 2 Swan 295.

Utah.— Richey *v.* Clark, 11 Utah 467, 40 Pac. 717.

England.— Shand *v.* Grant, 15 C. B. N. S. 324, 9 L. T. Rep. N. S. 390, 109 E. C. L. 324. But see Durrant *v.* Ecclesiastical Com'rs of England, 6 Q. B. D. 234, 45 J. P. 270, 50 L. J. Q. B. 30, 44 L. T. Rep. N. S. 348, 29 Wkly. Rep. 443; Continental Caoutchouc, etc., Co. *v.* Kleinwort, 9 Com. Cas. 240, 90 L. T. Rep. N. S. 474, 20 T. L. R. 403, 52 Wkly. Rep. 489; Standish *v.* Ross, 3 Exch. 527, 19 L. J. Exch. 185.

See 39 Cent. Dig. tit. "Payment," § 281.

Compare Walker *v.* Conant, 69 Mich. 321, 37 N. W. 292, 13 Am. St. Rep. 391. But see Phetteplace *v.* Bucklin, 18 R. I. 297, 27 Atl.

stake-holder, or other person acting merely in a representative capacity, it cannot be recovered back if he has settled his accounts or paid it over before notice and the loss would fall on him individually.[44] But in other cases where money is received under a mistake of fact, it is no defense that it has been paid over to another unless the person who received the money was a mere agent or representative of that other person.[45]

E. Payments Upon Consideration Which Has Failed. When the consideration of a contract has wholly failed, amounts paid thereon may be recovered back.[46] For instance, where there has been a failure to perform on behalf of the other party, payments to him may be recovered back.[47] But money paid in part fulfilment of a valid agreement cannot be recovered back unless such agreement has been rescinded by mutual consent or plaintiff has a right to rescind it from the failure of defendant to perform on his part.[48] Money paid under a void contract may be recovered back as being without consideration.[49]

F. Payments Upon Illegal Contracts. Money paid on an illegal contract cannot be recovered back where the parties are *in pari delicto*.[50]

211 (holding that it is not enough to relieve defendant from liability that he has paid the money to others, even though such payment was made before a repayment was demanded, but it must also be shown that, because of the conduct of the payer or payee, a recovery would be inequitable); Rose *v.* Shore, 1 Call (Va.) 540.

Contra.— Kingston Bank *v.* Eltinge, 40 N. Y. 391, 100 Am. Dec. 516.

Payment by administrator to administrator.— Money paid by mistake, by the administrator of an estate, to the administrator of another estate, may be recoverd back, provided it is duly demanded before paid out by the administrator in the distribution of the assets of the estate. Wilson *v.* Sergeant, 12 Ala. 778.

44. Yarborough *v.* Wise, 5 Ala. 292; Holland *v.* Russell, 4 B. & S. 14, 32 L. J. Q. B. 297, 8 L. T. Rep. N. S. 468, 11 Wkly. Rep. 757, 116 E. C. L. 14; Shand *v.* Grant, 15 C. B. N. S. 324, 9 L. T. Rep. N. S. 390, 109 E. C. L. 324; Continental Caoutchouc, etc., Co. *v.* Kleinwort, 9 Com. Cas. 240, 90 L. T. Rep. N. S. 474, 20 T. L. R. 403, 52 Wkly. Rep. 489; Greenway *v.* Hurd, 4 T. R. 553. But see Newall *v.* Tomlinson, L. R. 6 C. P. 405, 25 L. T. Rep. N. S. 382; Gomery *v.* Bond, 3 M. & S. 378; Cox *v.* Prentice, 3 M. & S. 344, 16 Rev. Rep. 288. *Compare* Rheel *v.* Hicks, 25 N. Y. 289. *Contra*, Koontz *v.* Central Nat. Bank, 51 Mo. 275; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

45. Moors *v.* Bird, 190 Mass. 400, 77 N. E. 643.

46. See MONEY RECEIVED, 27 Cyc. 857. See also COMMERCIAL PAPER, 7 Cyc. 1039.

47. Kerrigan *v.* Kelly, 17 Mo. 275; Trenton Public School *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373, destruction of building by fire.

Waiver.— Payments voluntarily made by defendant on the contract price after seeing the work as it progressed, and after full opportunity for consultation with his architect, cannot be recovered by way of counterclaim on the ground that the work was not in accordance with the plans and specifications. Lehan *v.* Kiley, 54 S. W. 727, 21 Ky. L. Rep. 1186.

48. Appleton *v.* Chase, 19 Me. 74; Sargent *v.* Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718; Thomas *v.* McCue, 19 Wash. 287, 53 Pac. 161; Distler *v.* Dabney, 7 Wash. 431, 35 Pac. 138, 1119. See also Lemans *v.* Wiley, 92 Ind. 436; Martin *v.* McCormick, 4 Sandf. (N. Y.) 366 [*reversed* on other grounds in 8 N. Y. 331, Seld. 117]; Kelsey *v.* U. S., 1 Ct. Cl. 374. *Compare* Archer *v.* Eckerson, 10 N. Y. App. Div. 598, 42 N. Y. Suppl. 137.

A party who has made default on his contract cannot recover part payments made by him. Chemical Nat. Bank *v.* World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331 [*affirming* 67 Ill. App. 169]; Wright *v.* Smith, 13 N. Y. App. Div. 536, 43 N. Y. Suppl. 728.

Rescission in part.— A party cannot claim a contract valid for the purpose of retaining the consideration received and still maintain that the agreement is void for the purpose of recovering back money paid thereunder, the theory being that the contract must be rescinded *in toto* or not at all. Hogan *v.* Wever, 5 Hill (N. Y.) 389.

49. Gist *v.* Smith, 78 Ky. 367; Holms *v.* Johnston, 12 Heisk. (Tenn.) 155. See also King *v.* Mahaska County, 75 Iowa 329, 39 N. W. 636, holding that payments by a county on a void contract may be set up as a counter-claim in an action to recover a balance on valid and invalid contracts growing out of the same transaction. *Compare* Speise *v.* McCoy, 6 Watts & S. (Pa.) 485, 40 Am. Dec. 579.

So where money has been paid on an executory agreement invalid merely by reason of the legal incapacity of the party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of a compliance with some formal requirement of the law, as that the contract shall be in writing or the like, the money so paid may be recovered back while the agreement remains executory. Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781.

50. See CONTRACTS, 9 Cyc. 546 *et seq.*

G. Actions[51] — **1. In General.** An action to recover back money paid is one at law, and equity ordinarily has no jurisdiction.[52] Generally, the action being based upon a quasi-contract, the form of action is for money had and received.[53] Where a recovery is permissible, it may be by way of counter-claim or set-off as well as by a direct action.[54] Any fact entitling defendant to retain the money on either legal or equitable grounds is a defense.[55]

2. Conditions Precedent. The safer method of procedure is for the payer to notify the payee of the alleged mistake and demand a return of the money before bringing suit.[56] There is a considerable conflict, however, as to the necessity of a demand as a condition precedent to an action to recover back payments,[57] although ordinarily at least notice of the mistake must be given to the payee, where not known to him, before bringing suit.[58] Generally the payee must be put *in statu quo* before the action is brought.[59] Notice to an agent not to pay over the money to his principal is not necessary where the payment is compulsory, and is not made expressly for the use of the principal.[60]

3. Parties.[61] Ordinarily the action must be brought by the person actually entitled to the money paid,[62] and against the party actually receiving the payment.[63] The rules applicable in civil actions in general as to the joinder of

51. **Form of action** see Money Paid, 27 Cyc. 832; Money Received, 27 Cyc. 847.

When cause of action accrues to recover money paid by mistake see Limitations of Actions, 25 Cyc. 1112.

Joinder of causes of action see Joinder and Splitting of Actions, 23 Cyc. 408 note 89.

Jurisdiction of federal court of claims see Courts, 11 Cyc. 966.

Election between remedies see Election of Remedies, 15 Cyc. 253 *et seq.*

52. See Equity, 16 Cyc. 45.

53. See Money Received, 27 Cyc. 847.

54. Charles *v.* U. S., 19 Ct. Cl. 316; Brown *v.* District of Columbia, 17 Ct. Cl. 402.

55. See Money Received, 27 Cyc. 874.

Payment by master by mistake as defense to action by one employee against another.— A station agent of a railroad company employed an assistant, stating to him that the company would only pay twenty-five dollars per month. He afterward forged a telegram purporting to be from the proper official, stating that such assistant would draw from the pay car forty dollars per month and pay fifteen dollars to such station agent; and, by means of such telegram, procured from the assistant fifteen dollars per month. It was held, in an action by the assistant against the station agent to recover the money so paid him, that defendant could not set up the superior title of the railroad company. Chamberlain *v.* Lilley, 1 Pa. Super. Ct. 293.

56. See Johnson *v.* Saum, 123 Iowa 145, 98 N. W. 599.

57. See Money Received, 27 Cyc. 871–874. See also Stotsenburg *v.* Fordice, 142 Ind. 490, 41 N. E. 313, 810, holding that, in an action on a note, defendant can set off excessive interest paid thereon by mistake without having made demand for repayment.

58. Gillett *v.* Brewster, 62 Vt. 312, 20 Atl. 105; Bishop *v.* Brown, 51 Vt. 330; U. S. *v.* Union Nat. Bank, 28 Fed. Cas. No. 16,597, 10 Ben. 408. But see Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; Utica Bank *v.* Van Gieson, 18 Johns. (N. Y.) 485.

Where failure to give notice is prejudicial. — If the person to whom money is paid by mistake sustains damage in the loss of his remedy over against another person, through the negligence of the person to whom he is liable in failing to give notice of the discovery of the mistake, he is thereby discharged from liability. U. S. *v.* Union Nat. Bank, 28 Fed. Cas. No. 16,597, 10 Ben. 408.

59. Ash *v.* McLellan, 101 Me. 17, 62 Atl. 598; Teeter *v.* Veitch, (N. J. Ch. 1905) 61 Atl. 14.

Where money has been paid on a check by mistake the check must be tendered before bringing suit to recover the money paid. Northampton Nat. Bank *v.* Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283.

But if the thing received is of no value, such as a check which is of no validity against any one, the payer is not bound to return it before suing. Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717 [*affirming* 30 N. Y. App. Div. 498, 52 N. Y. Suppl. 464].

60. Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271, holding that where a collector has wrongfully demanded tonnage duty or light money, and it has been compulsorily paid, or in order to obtain a clearance which was refused till payment was made, the money may be recovered back, without showing notice to the collector not to pay over the money to the United States.

61. See, generally, Money Received, 27 Cyc. 876; Parties.

62. Stevens *v.* Fitch, 11 Metc. (Mass.) 248 (holding that the real defendant in an action, who pays a judgment recovered against the nominal defendant, which is afterward vacated, may maintain an action in his own name to recover back the amount of such judgment); American Trotting Assoc. *v.* Reynolds, 141 Mich. 340, 104 N. W. 578; Kingston Bank *v.* Eltinge, 66 N. Y. 625 [*affirming* 5 Hun 653].

63. Balls *v.* Haines, 3 Ind. 461 (holding

parties as plaintiffs,[64] or defendants,[65] are applicable where the question arises in connection with the pleading of payment or non-payment.

4. PLEADING. Where a payment is sought to be recovered back, the payer's pleading must state the facts showing a right to recover,[66] and not mere conclusions of law.[67] It must also be unambiguous and certain.[68] Overpayments may be recovered in an action brought by the payee but they must be specified and pleaded as a set-off or a counter-claim and with like particularity.[69] Separate instalments of payments sought to be recovered do not constitute separate causes of action.[70] If the complaint is for money paid by mutual mistake, an allegation in the answer that the payment was not made under duress and was voluntary is

that where money was paid to attorneys of record, and the nominal party of record who had no knowledge of the suit never received the payment, and the judgment was reversed, that an action could not be brought against such nominal party); Briggs *v.* Lewiston, 29 Me. 472. *Compare* Voiers *v.* Stout, 4 Bush (Ky.) 572.

64. See, generally, PARTIES. See also Fischer *v.* Burns, 30 N. Y. Suppl. 437; Taylor *v.* Gould, 57 Pa. St. 152, holding that where, by the refusal of R to fulfil a promise made to S and G, to enter satisfaction of a judgment against them, the money was made on G's property alone, G could recover, in an action by himself alone, for money paid.

65. See, generally, PARTIES. See also New York L. Ins. Co. *v.* Chittenden, 134 Iowa 613, 112 N. W. 96, 11 L. R. A. N. S. 233; Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 70, 14 Am. Rep. 579; Neil *v.* Cheves, 1 Bailey (S. C.) 537 (holding that part payment having been made to one of two joint contractors on a joint contract which they afterward rescind, it renders them both liable in an action for money had and received); Vermont State Bank *v.* Stoddard, 1 D. Chipm. (Vt.) 157 (holding that if a note signed by one as a principal and two others as sureties be given up by the payee to the principal by mistake, while there is a balance due on it, an action for money had and received will lie in favor of the payee against the principal alone for the balance).

66. *Alabama.*— O'Brien *v.* Anniston Pipe-Works, 93 Ala. 582, 9 So. 415.

Georgia.— Camp *v.* Phillips, 49 Ga. 455, mistake.

Indiana.— Darling *v.* Hines, 5 Ind. App. 319, 32 N. E. 109, duress.

Missouri.— See Williams *v.* Carroll County, 167 Mo. 9, 66 S. W. 955; E. E. Souther Iron Co. *v.* Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450.

Nebraska.— Horton *v.* Hayden, 74 Nebr. 339, 104 N. W. 757.

Nevada.— Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353.

New York.— Burchell *v.* Culgin, 4 N. Y. Suppl. 131.

See 39 Cent. Dig. tit. "Payment," § 294.

Where a mistake is alleged there need be no allegations of actual fraud and that the payment was induced thereby. Williams *v.* Carroll County, 167 Mo. 9, 66 S. W. 955. Where plaintiff sues to recover money paid by him to defendant on the ground that it was paid under a material mistake of fact, induced by the representations of defendant, and does not distinctly allege the non-existence of the supposed fact on which he relied, his petition sets forth no cause of action and is demurrable. Charleston, etc., R. Co. *v.* Augusta Stockyard Co., 115 Ga. 70, 41 S. E. 598.

Allegations not corresponding with facts.— Alleging that payment was made under an urgent necessity and to prevent an immediate seizure of person and property is insufficient where it appears from the facts that the payment was a voluntary one. Williams *v.* Stewart, 115 Ga. 864, 42 S. E. 256.

An averment that the money sought to be recovered back was paid for the purpose of avoiding a penalty and forfeiture, and for the purpose of saving the party from arrest, does not show sufficiently that it was not paid voluntarily. Brazil *v.* Kress, 55 Ind. 14.

67. Lewis *v.* San Francisco, 2 Cal. App. 112, 82 Pac. 1106; Kraemer *v.* Deustermann, 37 Minn. 469, 35 N. W. 276; Commercial Bank *v.* Rochester, 41 Barb. (N. Y.) 341 [*affirmed* in 41 N. Y. 619 note]. *Compare* MONEY RECEIVED, 27 Cyc. 877.

General averments that the payment was compulsory without alleging the facts constituting duress are insufficient. Rand *v.* Hennepin County, 50 Minn. 391, 52 N. W. 901.

But it has been held that a count for money had and received, with a bill of particulars, claiming cash paid "by mistake, and under a misapprehension of facts at the time of the conveyance," etc., is, in the absence of a motion for further particulars, sufficient on demurrer. Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

68. See Applegarth *v.* Dean, 68 Cal. 491, 13 Pac. 587.

69. Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Jolliffe *v.* Collins, 21 Mo. 338.

A plea of set-off for money paid by defendant to plaintiff on a note, not knowing it to be without consideration, is fatally defective if it does not specify how the note was without consideration or why he was ignorant thereof. Tillman *v.* Morton, 65 Ga. 386.

70. Higgins *v.* Pelton, 4 Ohio Dec. (Reprint) 521, 2 Clev. L. Rep. 306. See, generally, JOINDER AND SPLITTING OF ACTIONS.

frivolous.[71] The general rules of pleading as to the evidence admissible under the pleadings,[72] and the effect of a variance between the pleadings and proof,[73] are applicable.

5. EVIDENCE.[74] The burden of proving the right to recover back payments is ordinarily on plaintiff.[75] But in a suit to recover a payment made under a contract induced by the false representations of defendant, the burden is on defendant to show that thereafter plaintiff, with full knowledge of the facts, ratified the contract.[76] And if circumstances exist which make such recovery inequitable, the burden of proving that fact rests upon the party resisting the payment.[77] The general rules relating to the admissibility,[78] and the sufficiency,[79] of evidence in civil actions in general, are applicable.

6. TRIAL.[80] Whether a payment was voluntary or involuntary is generally a question for the jury.[81] The necessity and propriety of instructions are governed

71. Jaeger *v.* New York, 39 Misc. (N. Y.) 543, 80 N. Y. Suppl. 356.

72. See, generally, PLEADING. See also Beier *v.* Spaulding, 92 Hun (N. Y.) 388, 36 N. Y. 1056; New York *v.* Erben, 10 Bosw. (N. Y.) 189.

73. See, generally, PLEADING. See also National Cereal Co. *v.* Alexander, 75 Kan. 537, 89 Pac. 923; Walbridge *v.* Ocean Nat. Bank, 59 N. Y. 642 (holding that where the mistake which the evidence tended to establish was equally one of fact as that alleged in the complaint, the variance was not material); Foster *v.* Central Nat. Bank, 93 N. Y. Suppl. 603 (holding that where a complaint was for recovery of payments made under duress, but the proof offered and the judgment finally asked was for moneys paid under a judicial sale, no recovery could be had).

74. See, generally, MONEY RECEIVED, 27 Cyc. 882, 883; EVIDENCE.

75. *California.*— Kohler *v.* Wells, 26 Cal. 606.

Iowa.— Gibbs *v.* Farmers', etc., State Bank, 123 Iowa 736, 99 N. W. 703.

Louisiana.— Urquhart *v.* Gove, 4 Rob. 207.

New York.— Briggs *v.* Boyd, 56 N. Y. 289; Buck *v.* Houghtaling, 110 N. Y. App. Div. 52, 96 N. Y. Suppl. 1034; Wyman *v.* Farnsworth, 3 Barb. 369, burden of proving that mistake existed at actual time of payment. See also Wisner *v.* Consolidated Fruit Jar Co., 25 N. Y. App. Div. 362, 49 N. Y. Suppl. 500.

United States.— Barnard *v.* District of Columbia, 20 Ct. Cl. 257.

See 39 Cent. Dig. tit. "Payment," § 295. See also EVIDENCE, 16 Cyc. 926 *et seq.*; MONEY RECEIVED, 27 Cyc. 882.

76. Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344.

77. Hathaway *v.* Delaware County, 185 N. Y. 368, 78 N. E. 153, 113 Am. St. Rep. 909.

78. See EVIDENCE, 16 Cyc. 821 *et seq.*

Evidence held admissible see Logan *v.* Sumter, 28 Ga. 242, 73 Am. Dec. 755; Townsend Bank *v.* Whitney, 3 Allen (Mass.) 454; Stowell *v.* Ames, 148 Mich. 439, 111 N. W. 1070; Richardson *v.* Gilson, 55 N. H. 623; Rauch *v.* Scholl, 68 Pa. St. 234. In an action to recover back money paid by plaintiff to obtain the release of property detained on an unfounded claim of a lien thereon, evidence of facts showing the importance to him of speedily obtaining possession of the property is admissible, as tending to show his payment to be not voluntary, but compulsory. Fargusson *v.* Winslow, 34 Minn. 384, 25 N. W. 942. In an action to recover money alleged to have been paid under duress, on a liability arising under a contract in writing, it is no ground of objection to the admission of the contract in evidence that, upon its face, it is unconscionable and oppressive and ought not to be enforced. Dykes *v.* Wyman, 67 Mich. 236, 34 N. W. 561.

Evidence held inadmissible see McRae Oil, etc., Co. *v.* Stone, 119 Ga. 516, 46 S. E. 668; Sharpless Co. *v.* Day, (Iowa 1902) 90 N. W. 814; Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757.

79. See EVIDENCE, 17 Cyc. 753 *et seq.*

Where the petition alleges two grounds for the recovery of a payment, a recovery is proper, although the evidence is sufficient only as to one ground. Robinson *v.* Betts, 85 Mo. App. 519.

Sufficiency of evidence as to fact of overpayment see Gibbs *v.* Farmers', etc., State Bank, 123 Iowa 736, 99 N. W. 703; Newland *v.* Buncombe Turnpike Co., 26 N. C. 372; Willis *v.* Wilbur, Riley (S. C.) 243; Sanborn *v.* Babcock, 33 Wis. 400.

Sufficiency of evidence as to mistake see Martin *v.* Wells, 3 Ariz. 57, 20 Pac. 673; Whiting *v.* Rochester City Bank, 77 N. Y. 363 (payment by bank of note sent for collection); Dieckerhoff *v.* Alder, 39 N. Y. Suppl. 599 [*affirmed* in 158 N. Y. 689, 53 N. E. 1124]; Neitzey *v.* District of Columbia, 17 Ct. Cl. 111.

Sufficiency of evidence to show duress see Flinn *v.* Mechanics' Bldg. Assoc., 93 Mo. App. 444, 67 S. W. 729.

Sufficiency of evidence to show agreement to repay see Rodgers *v.* Wittenmyer, 88 Cal. 553, 26 Pac. 369.

80. See, generally, TRIAL.

81. Tuscaloosa County *v.* Foster, 132 Ala. 392, 31 So. 587 (holding that the question whether representations were an expression of opinion or fraudulent statement of facts is for the jury); Ewing *v.* Peck, 26 Ala. 413. But see Cazenove *v.* Cutler, 4 Metc.

by the general rules applicable in civil actions in general,[82] such as that they must clearly state the law of the case,[83] and that they must not be misleading.[84]

PAYMENT INTO COURT. In practice, the act of a defendant in depositing the amount which he admits to be due, with the proper officer of the court, for the benefit of the plaintiff and in answer to his claim.[1] (See, generally, DEPOSITARIES; DEPOSITS IN COURT; TENDER.)

P. C. An abbreviation for "Pleas of the Crown"; sometimes also for "Privy Council," "Parliamentary Cases," "Patent Cases," "Practice Cases," "Penal Code," or "Political Code."[2]

PD. An abbreviation for PAID,[3] *q. v.*

PEACE. The tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members.[4] In its legal signification, quiet, orderly behavior of individuals to one another and toward the government.[5] (Peace: Bill of, see EQUITY; INJUNCTION; QUIETING TITLE. Breach of, see BREACH OF THE PEACE. Conclusion Against the Peace, etc., see INDICTMENTS AND INFORMATIONS. Homicide Committed in Preserving, see HOMICIDE. Justices of, see JUSTICES OF THE PEACE. Officer, see PEACE OFFICER; SHERIFFS AND CONSTABLES. Treaties of, see WAR.)

PEACEABLE. Tranquil; quiet; not quarrelsome.[6] (Peaceable: Assembly, see

(Mass.) 246, holding that reasonableness of mortgagee's charges was a question of law for the court.

Duress.— Pemberton *v.* Williams, 87 Ill. 15; Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166.

82. See TRIAL.

83. See Dieckerhoff *v.* Alder, 12 Misc. (N. Y.) 445, 33 N. Y. Suppl. 698; Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830, holding that it was not error for the court to refuse to charge that a receipt was an "important piece of evidence," and that the jury might consider it to impeach defendant, and as tending to affirmatively show that the facts were as claimed by plaintiff.

Fraud.— In an action to recover money paid to defendant through the latter's fraud, it is the court's duty, in leaving the question of fraud to the jury, to explain to them what they can consider in determining it, and what will constitute such fraud as will authorize the relief. Klein *v.* Bayer, 81 Mich. 233, 45 N. W. 991.

84. Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990; Gwinn *v.* Crawford, 42 Iowa 63; Schultz *v.* Culbertson, 46 Wis. 313, 1 N. W. 19.

1. Black L. Dict.

In effect it is an admission of an indebtedness to the extent of the payment; a satisfaction of the debt to the extent of the amount paid. Orth *v.* Zion's Co-operative Mercantile Inst., 5 Utah 419, 422, 16 Pac. 590.

"Paid into court" see Warren *v.* Matthews, 96 Ala. 183, 187, 11 So. 285.

2. Black L. Dict.

3. Ankeny *v.* Albright, 20 Pa. St. 157, 158.

4. Neola *v.* Reichart, 131 Iowa 492, 494, 109 N. W. 5; People *v.* Rounds, 67 Mich. 482, 485, 35 N. W. 77; Davis *v.* Burgess, 54 Mich. 514, 517, 20 N. W. 540, 52 Am. Rep. 828; State *v.* White, 18 R. I. 473, 478, 28 Atl. 968.

5. Abbott L. Dict.; Burrill L. Dict. [both *quoted* in Corvallis *v.* Carlile, 10 Oreg. 139, 142, 45 Am. Rep. 134].

A time of peace is said to be "when the Courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all." 3 Coke Litt. 249 [*quoted* in Skeen *v.* Monkeimer, 21 Ind. 1, 3].

"Necessary for the 'peace, good order, health and safety' of the town" see Cochran *v.* Frostburg, 81 Md. 54, 61, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728.

"Ten days after peace is made" see Chapman *v.* Wacaser, 64 N. C. 532, 533.

6. Webster Int. Dict.

"Peaceable occupation" is an occupation commenced without threats or force, and continued without any attempt to interrupt it. Bowers *v.* Cherokee Bob, 45 Cal. 495, 501.

"Peaceable possession" is a possession undisturbed by any act of the defendant in or upon the *locus in quo*, for which act the defendant would be suable in an action by which the title to the property could be determined (Bradley *v.* McPherson, (N. J. Ch. 1904) 58 Atl. 105, 106); such as is continuous and not interrupted by adverse suit to recover the estate (Logan *v.* Meade, (Tex. Civ. App. 1906) 98 S. W. 210, 212; Stanley *v.* Schwalby, 147 U. S. 508, 514, 13 S. Ct. 418, 37 L. ed. 259); any possession where the defendant, though setting up a claim of title, has not interfered with complainant's possession by any act which is suable at law, by a suit which may or will involve the title of the defendant (Allaire *v.* Ketcham, 55 N. J. Eq. 168, 170, 35 Atl. 900). The words have a meaning very similar to, if not the same, with the words "quiet enjoyment." Gittens *v.* Lowry, 15 Ga. 336, 338.

CONSTITUTIONAL LAW. Possession — Acquisition of Title, see ADVERSE POSSESSION; Forcible Deprivation, see FORCIBLE ENTRY AND DETAINER; Requisite of Action to Quiet Title, see QUIETING TITLE.)

PEACEABLE ASSEMBLY. See CONSTITUTIONAL LAW.

PEACEABLE OCCUPATION. See PEACEABLE.

PEACEABLE POSSESSION. See PEACEABLE.

PEACEMAKER. See HOMICIDE.

PEACEMAKERS' COURT. A court established on certain Indian reservations with jurisdiction to hear and determine all questions and actions between individual Indians residing thereon involving the title to real estate on such reservations.[7]

PEACE OFFICER. The sheriff, under sheriff or deputy, or a constable, marshal, police constable or policeman of a city, town or village;[8] the sheriff and his deputy; constable; marshal, constable, and policeman of any incorporated town or city, and any private person especially appointed to execute criminal process.[9] (See, generally, SHERIFFS and CONSTABLES.)

PEAKED ROOF. One running up from all four sides of the building to a peak or ridge in the center.[10]

PEBBLE. A small round stone.[11]

PECCATA CONTRA NATURAM SUNT GRAVISSIMA. A maxim meaning "Crimes against nature are the most heinous."[12]

PECCATA SUOS TENEANT AUCTORES, NEC ULTERIUS PROGREDIATUR METUS QUAM REPERIATUR DELICTUM. A maxim meaning "Let offenses bind the transgressors only, and let not the fear of punishment for them extend beyond the crime itself."[13]

PECCAT MENS, NON CORPUS, ET UNDE CONSILIUM ABFUIT PŒNA ABEST. A maxim meaning "Where the mind sins, and not the body (as in the case where reason is wanting), there is no punishment."[14]

PECCATUM PECCATO ADDIT QUI CULPÆ QUAM FACIT PATROCINIUM DEFENSIONIS ADJUNGIT. A maxim meaning "He adds one offence to another, who, when he commits a crime, joins to it the protection of a defence."[15]

PE. CEN. Abbreviated words which are well understood to mean PER CENT,[16] *q. v.*

PECULATION. In the civil law, the unlawful appropriation, by a depositary of public funds, of the property of the government intrusted to his care, to his own use, or that of others.[17] (See, generally, EMBEZZLEMENT.)

PECULIAR. PARTICULAR (*q. v.*) or special.[18]

Peaceable possession of slaves see Spencer *v.* McDonald, 22 Ark. 466, 473.

Contradistinguished from disputed or contested possession see Southern R. Co. *v.* Hall, 145 Ala. 224, 226, 41 So. 135.

7. Jones *v.* Gordon, 51 Misc. (N. Y.) 305, 307, 99 N. Y. Suppl. 958.

8. People *v.* Clinton, 28 N. Y. App. Div. 478, 479, 51 N. Y. Suppl. 115; Deyoe *v.* Ewen, 70 Hun (N. Y.) 545, 546, 24 N. Y. Suppl. 372.

9. Messer *v.* State, 37 Tex. Cr. 635, 637, 40 S. W. 488.

Includes: A policeman. Springer *v.* State, 121 Ga. 155, 156, 48 S. E. 907. A sheriff and his deputy. State *v.* Brooks, 42 Tex. 62, 72.

Used in a statute making it criminal to bribe or offer to bribe any sheriff or other peace officer, etc., the term "peace officer" includes "sheriffs, their deputies, jailers, constables, marshals of incorporated towns, and persons specially appointed to execute criminal process." O'Brien *v.* State, 6 Tex. App. 665, 667; Newburn *v.* Durham, 10 Tex. Civ. App. 655, 661, 32 S. W. 112.

An exemption of peace officers from a statutory prohibition against carrying concealed weapons included one who was by law made a conservator of the peace. Jones *v.* State, (Tex. Cr. App. 1901) 65 S. W. 92.

10. Hannem *v.* Pence, 40 Minn. 127, 129, 41 N. W. 657, 12 Am. St. Rep. 717.

11. Century Dict.

"Pebbles for spectacles" see Arthur *v.* Sussfield, 96 U. S. 128, 130, 24 L. ed. 772.

12. Black L. Dict.

13. Morgan Leg. Max.

14. Morgan Leg. Max.

15. Bouvier L. Dict.

16. Gramer *v.* Joder, 65 Ill. 314, 315.

17. Black L. Dict. [*citing* Domat. Supp. au Droit Public l, 3, tit. 5]. See also Bork *v.* People, 91 N. Y. 5, 16.

18. St. Louis, etc., R. Co. *v.* Continental Brick Co., 198 Mo. 698, 714, 96 S. W. 1011.

"Peculiar benefits" are such as are direct and peculiar to the owner of the land, ex-

PECUNIARY. Monetary; relating to money, consisting of money.[19] (Pecuniary: Condition — Evidence of in General, see EVIDENCE; Of Party as Affecting Damages in General, see DAMAGES; Of Party in Particular Action, see ASSAULT AND BATTERY; BREACH OF PROMISE TO MARRY; HUSBAND AND WIFE; LIBEL AND SLANDER; NUISANCES; SEDUCTION. Consideration, see CONTRACTS. Interest — Agency Coupled With, see PRINCIPAL AND AGENT; Effect on Credibility of Witness, see WITNESSES; Insurable Interest, see INSURANCE; Of City Officer in Municipal Contract, see MUNICIPAL CORPORATIONS; Of Councilman in Question Voted on, see MUNICIPAL CORPORATIONS. Interest Disqualifying — Arbitrator, see ARBITRATION AND AWARD; Commissioner or Other Like Officer, see STREETS AND HIGHWAYS; Grand Juror, see GRAND JURY; Judge, see JUDGES; Juror, see CRIMINAL LAW; JURIES; NEW TRIAL; Justice of the Peace, see JUSTICES OF THE PEACE; Officer Taking Acknowledgment, see ACKNOWLEDGMENTS; Witness, see ADMIRALTY; WITNESSES. Legacy, see WILLS. Loss — In General, see DAMAGES; In Action For Death, see DEATH. Profit[20] — Corporation Organized For, see BANKS AND BANKING; CORPORATIONS; INSURANCE; RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES; Corporation or Association Organized For Purposes Other Than For, see ASSOCIATIONS; CHARITIES; CLUBS; COLLEGES AND UNIVERSITIES; RELIGIOUS SOCIETIES.)

PECUNIARY CONDITION. See PECUNIARY, and Cross-References Thereunder.

PECUNIARY CONSIDERATION. See CONTRACTS.

PECUNIARY INJURY. See PECUNIARY, and Cross-References Thereunder.

PECUNIARY INTEREST. See PECUNIARY, and Cross-References Thereunder.

cluding those which he shares with other members of the community, whose property is not taken (Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662, 671, 672); those that particularly and exclusively affect the particular property (Blair *v.* Charleston, 43 W. Va. 62, 70, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852). See, generally, DAMAGES; EMINENT DOMAIN; RAILROADS.

Used with other words.— "Peculiar circumstances" see Senat *v.* Findley, 51 Iowa 20, 23, 50 N. W. 575. "Peculiar damage" see Cabbell *v.* Williams, 127 Ala. 320, 326, 28 So. 405. "Peculiar knowledge" see Bemis *v.* Central Vermont R. Co., 58 Vt. 636, 641, 3 Atl. 531. "Peculiar name" see Falkinburg *v.* Lucy, 35 Cal. 52, 69, 95 Am. Dec. 76.

19. Black L. Dict.

Distinguished from "necessary" see Browning *v.* Wabash Western R. Co., (Mo. 1893) 24 S. W. 731, 736. But see Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614, 629 [*citing* Morgan *v.* Durfree, 69 Mo. 469, 478, 33 Am. Rep. 508.]

"Pecuniary ability" is sufficient ability to provide suitable maintenance for a wife, whether derived from the income of property, personal labor or any other source. Jewett *v.* Jewett, 61 Vt. 370, 371, 17 Atl. 734. See also Farnsworth *v.* Farnsworth, 58 Vt. 555, 556, 5 Atl. 401.

"Pecuniary benefits" are not only money, but everything that can be valued in money. Houston, etc., R. Co. *v.* Rutland, (Tex. Civ. App. 1907) 101 S. W. 529, 533.

"Pecuniary injuries" are such as can be, and usually are, without difficulty estimated by a money standard. Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 621, 48 Atl. 751, 84 Am. St. Rep. 176. See also 29 Cyc. 1060 note 47.

"Non-pecuniary injuries" are those for the measurement of which no money standard is or can be applicable. Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 621, 48 Atl. 751, 84 Am. St. Rep. 176. See also 29 Cyc. 1059.

"Pecuniary loss" is a loss of money, or of something by which money or something of money value may be acquired. Green *v.* Hudson River R. Co., 32 Barb. (N. Y.) 25, 33. See also Chicago, etc., R. Co. *v.* Woolridge, 174 Ill. 330, 335, 51 N. E. 701; and DAMAGES; DEATH.

"Pecuniary obligation" is an obligation to pay money. Estudillo *v.* Meyerstein, 72 Cal. 317, 320, 13 Pac. 869. See also Bromberger *v.* U. S., 128 Fed. 346, 351, 63 C. C. A. 76. As used and defined in a statute concerning forgery, "every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought." Dooley *v.* State, 21 Tex. App. 549, 550, 2 S. W. 884.

Used in connection with other words.— "Pecuniary consideration" or obligation see Phelps *v.* Thomas, 6 Gray (Mass.) 327, 328; *In re* Ekings, 6 Fed. 170, 173. "Pecuniary interest" see Burdine *v.* Grand Lodge A. F. M., 37 Ala. 478, 481. "Pecuniary liability" see Johnston *v.* Becker County, 27 Minn. 64, 67, 6 N. W. 411. "Pecuniary provision" see Pinkham *v.* Pinkham, 95 Me. 71, 77, 49 Atl. 48, 85 Am. St. Rep. 392. "Pecuniary recompense" see Vicksburg *v.* McLain, 67 Miss. 4, 13, 6 So. 774. "Pecuniary value" see Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545, 548, 26 N. E. 1010.

20. **"Pecuniary profit"** is a term used with reference to corporations which means for the pecuniary profit of its stockholders or members. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 387, 6 N. E. 183, 56 Am. Rep. 776.

PECUNIARY LEGACY. See WILLS.

PECUNIARY LOSS. See PECUNIARY, and Cross-References Thereunder.

PECUNIARY PROFIT. See PECUNIARY, and Cross-References Thereunder.

PEDDLER. See HAWKERS AND PEDDLERS.

PEDERASTY. See SODOMY.

PEDIGREE. A word commonly called the "family tree";[21] the lineage, descent, and succession of a family;[22] the history of family descent which is transmitted from one generation to another by both oral and written declaration;[23] a succession of the degrees from the origin; it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths.[24] (Pedigree: Conclusiveness of Adjudication as to, see JUDGMENTS. Evidence, see EVIDENCE. Giving False Pedigree of Horse, see ANIMALS.)

PEDIS POSSESSIO. Actual possession.[25] (See, generally, ADVERSE POSSESSION.)

PEERAGE. The actual state and dignity of a peer,[26] the status of a peer.[27]

PEERS. See JUDGMENT OF HIS PEERS.

PEN. To confine in a small inclosure or narrow place.[28] (See CORRAL; and, generally, PRISONS.)

PENAL. A word which in its strict and primary sense denotes punishment, whether corporeal or pecuniary, imposed and enforced by the state for a crime or offense against its laws.[29] Also commonly used as including any extraordinary liability to which the law subjects a wrong-doer in favor of the person wronged, not limited to the damages suffered.[30] (Penal: Action, see PENAL ACTION. Bond, see BONDS. Institution, see PRISONS; REFORMATORIES. Law or Statute, see STATUTES. Sum, see PENAL SUM. See also CRIMINAL LAW; MUNICIPAL CORPORATIONS; PENALTIES.)

PENAL ACTION. An action on a statute which gives a certain penalty to be

21. Doe *v.* Peratt, 10 Bing. 198, 223, 25 E. C. L. 99.

22. Washington *v.* New York Sav. Bank, 171 N. Y. 166, 173, 63 N. E. 831, 89 Am. St. Rep. 800; Swink *v.* French, 11 Lea (Tenn.) 78, 80, 47 Am. Rep. 277.

23. State *v.* Miller, 71 Kan. 200, 204, 80 Pac. 51; Young *v.* Shulenberg, 165 N. Y. 385, 388, 59 N. E. 135, 80 Am. St. Rep. 730.

24. Bouvier L. Dict. [*quoted* in Mason *v.* Massachusetts Benefit Life Assoc., 30 Ont. 716, 729].

Embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. Greenleaf Ev. § 104 [*quoted* in People *v.* Mayne, 118 Cal. 516, 520, 50 Pac. 654, 62 Am. St. Rep. 256; Collins *v.* Grantham, 12 Ind. 440, 442; Copes *v.* Pearce, 7 Gill (Md.) 247, 264; Henderson *v.* Cargill, 31 Miss. 367, 418; Topper *v.* Perry, 197 Mo. 531, 541, 95 S. W. 203, 114 Am. St. Rep. 777; Washington *v.* New York Sav. Bank, 171 N. Y. 166, 173, 63 N. E. 831, 89 Am. St. Rep. 800; Eisenlord *v.* Clum, 126 N. Y. 552, 564, 27 N. E. 1024, 12 L. R. A. 836; Putnam *v.* Lincoln Safe Deposit Co., 87 N. Y. App. Div. 13, 18, 83 N. Y. Suppl. 1091; Terwilliger *v.* Industrial Ben. Assoc., 83 Hun (N. Y.) 320, 322, 31 N. Y. Suppl. 938; American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507, 516; Mutual L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 56, 27 S. W. 286; *In re* Hurlburt, 68 Vt. 366, 368, 35 Atl. 77, 35 L. R. A. 794].

Includes not merely the relationship of a family; but the dates of the births, deaths, and marriages of its members, when the object of such evidence is to trace relationship. Wharton Ev. § 208 [*quoted* in Hammond *v.* Noble, 57 Vt. 193, 203].

Not limited to the pedigree or ancestry of the human race, but is equally applicable whether the question concerns horses, cattle, dogs, or men. Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 325, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

25. Goldberg *v.* Bruschi, 146 Cal. 708, 713, 81 Pac. 23. See also Dwinnell *v.* Dyer, 145 Cal. 12, 19, 78 Pac. 247, 7 L. R. A. N. S. 763; McFeters *v.* Pierson, 15 Colo. 201, 205, 24 Pac. 1076, 22 Am. St. Rep. 388.

26. Fermoy Peerage Claim, 5 H. L. Cas. 716, 752, 10 Eng. Reprint 1084.

27. Fermoy Peerage Claim, 5 H. L. Cas. 716, 769, 790, 10 Eng. Reprint 1084.

28. People *v.* Borda, 105 Cal. 636, 640, 38 Pac. 1110, where it is said: "This need not necessarily be done by means of an artificial structure, but may also be done by means of, or through the agency of, men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature."

29. Plumb *v.* Griffin, 74 Conn. 132, 134, 50 Atl. 1; State *v.* Warner, 197 Mo. 650, 659, 94 S. W. 962; Kilton *v.* Providence Tool Co., 22 R. I. 605, 614, 48 Atl. 1039; Huntington *v.* Attrill, 146 U. S. 657, 663, 13 S. Ct. 224, 36 L. ed. 1123; Blum *v.* Widdicomb, 90 Fed. 20, 221.

30. American Credit-Indemnity Co. *v.* Ellis, 156 Ind. 212, 221, 59 N. E. 679.

"Penal clause" is a secondary obligation, entered into for the purpose of enforcing the performance of a primary obligation. J. G. Wagner Co. *v.* Monroe, 52 La. Ann. 2132, 2139, 28 So. 229.

recovered by any person who will sue for the same;[31] an action for the recovery of a penalty imposed by statute;[32] an action upon a penal statute; an action for the recovery of a penalty given by statute;[33] one allowed in pursuance of justice under particular laws.[34] (See, generally, ACTIONS; DAMAGES; MUNICIPAL CORPORATIONS; PENALTIES.)

PENAL BONDS. See BONDS.

PENAL INSTITUTION. See PRISONS; REFORMATORIES.

PENAL LAW. See STATUTES.

PENAL STATUTE. See STATUTES.

PENAL SUM. An amount greater than the value of the consideration — a forfeiture;[35] a sum of money payable as an equivalent for an injury.[36] (See, generally, PENALTIES. See also PENAL.)

31. *In re* Barker, 56 Vt. 14, 20.

32. Bouvier L. Dict. [*quoted* in Morrow *v.* State, 2 Marv. (Del.) 4, 26, 37 Atl. 43].

33. Burrill L. Dict. [*quoted* in Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 499, 3 L. R. A. 554].

34. Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

Includes an action by a third person to recover treble the value of the money lost by gaming (Cole *v.* Groves, 134 Mass. 471, 472); an action by a creditor of an insolvent corporation against its officers for the amount of deposits received after insolvency known to them, or that should have been known (Ashley *v.* Frame, 4 Kan. App. 265, 45 Pac. 927, 928); and an action for libel or slander (Bailey *v.* Dean, 5 Barb. (N. Y.) 297, 303). But *compare* Philadelphia *v.* Duncan, 4 Phila. 145, 147; Moller *v.* U. S., 57 Fed. 490, 495, 6 C. C. A. 459.

35. Nelson *v.* Ford, 5 Ohio 473, 475.

36. Rapalje & L. L. Dict. [*quoted* in Eason *v.* Witcofskey, 29 S. C. 239, 246, 7 S. E. 291. See also Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 482, 95 N. W. 1097.

PENALTIES

EDITED BY GEORGE SMITH HOLMESTED
Registrar of Chancery Division of the High Court of Justice of Ontario *

I. NATURE AND GROUNDS, AND EXTENT OF LIABILITY, 1335
A. *Nature of Penalty*, 1335
B. *Statutory Provisions*, 1337
C. *Power to Impose*, 1338
D. *Amount and Extent*, 1339
E. *Defenses*, 1339
1. *In General*, 1339
2. *Set-Off*, 1340
F. *Persons Entitled to Enforce*, 1340
1. *In General*, 1340
2. *Informers*, 1340
G. *Persons Liable*, 1341
H. *Remission*, 1341
1. *By Legislature or Executive*, 1341
2. *By Court*, 1342
I. *Payment*, 1342
1. *Medium of Payment*, 1342
2. *To Whom Made and Effect*, 1342
J. *Disposition of Proceeds*, 1342
1. *In General*, 1342
2. *Rights of Informers*, 1343

II. ACTIONS AND OTHER PROCEEDINGS, 1343
A. *Nature and Form of Remedy and Conditions Precedent*, 1343
1. *Nature of Remedy*, 1343
2. *Form of Remedy*, 1344
a. *When Prescribed by Statute*, 1344
b. *When Not Prescribed by Statute*, 1345
(I) *Action or Information of Debt*, 1345
(II) *Indictment*, 1346
(III) *Qui Tam Actions*, 1346
3. *Conditions Precedent*, 1346
B. *Jurisdiction, Parties, and Process*, 1347
1. *Jurisdiction*, 1347
a. *In General*, 1347
b. *Penalties Incurred Under Laws of Foreign State*, 1347
2. *Parties Plaintiff*, 1347
a. *In General*, 1347
b. *Informers*, 1348
(I) *In General*, 1348
(II) *Right to Join*, 1349
(III) *Control of Proceedings*, 1349
3. *Parties Defendant*, 1350
a. *In General*, 1350
b. *Misjoinder*, 1350
c. *Non-Joinder*, 1350

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4. *Process*, 1350
a. *In General*, 1350
b. *Indorsements and References to Statutes*, 1351
(I) *Necessity and Sufficiency*, 1351
(II) *Effect of Failure to Indorse*, 1352
C. *Pleading and Evidence*, 1352
1. *Declaration, Complaint, or Information*, 1352
a. *In General*, 1352
b. *Following Language of Statute*, 1352
c. *Particular Allegations*, 1353
(I) *Precise Sum Claimed*, 1353
(II) *Appropriation of Penalty*, 1353
(III) *Damages*, 1353
(IV) *Negativing Exceptions*, 1354
d. *Reference to or Recital of Statute*, 1354
(I) *In General*, 1354
(II) *Under Modern Pleading*, 1355
e. *Joinder of Offenses or Penalties*, 1356
2. *Plea, Answer, or Affidavit of Defense*, 1356
3. *Amendments*, 1356
4. *Issues, Proof, and Variance*, 1357
5. *Evidence*, 1357
a. *Presumptions and Burden of Proof*, 1357
b. *Admissibility*, 1357
c. *Weight and Sufficiency*, 1358
D. *Trial, Judgment, and Review*, 1358
1. *Dismissal Before Trial*, 1358
2. *Trial*, 1358
a. *In General*, 1358
b. *Assessment of Penalty*, 1359
c. *Verdict and Findings*, 1359
3. *New Trial*, 1359
4. *Judgment*, 1360
a. *In General*, 1360
(I) *Essentials*, 1360
(II) *Amount*, 1360
(III) *To Whom Awarded*, 1360
(IV) *Time and Manner of Entry*, 1361
b. *Execution and Enforcement*, 1361
c. *Interest*, 1361
5. *Review*, 1361
a. *Appeal*, 1361
(I) *In General*, 1361
(II) *Pennsylvania Statute*, 1361
b. *Writ of Error*, 1362
6. *Costs*, 1362
a. *In General*, 1362
b. *Security For Costs*, 1363
E. *Compounding Actions For Penalties*, 1363

CROSS-REFERENCES

For Matters Relating to:
Penal Statute:
As Infringement of Guaranty:
Against Deprivation of Property, see CONSTITUTIONAL LAW.
Of Equal Protection of Laws, see CONSTITUTIONAL LAW.

For Matters Relating to — (*continued*)
Penal Statute — (*continued*)
Constitutionality of, see CONSTITUTIONAL LAW.
Construction and Operation of, see STATUTES.
Effect of Repeal of, see STATUTES.
Ex Post Facto Operation of, see CONSTITUTIONAL LAW.
Penalty:
Action as Bar to Prosecution, see CRIMINAL LAW.
Affecting Validity of Contract, see CONTRACTS.
As Bar to Civil Action, see ACTIONS.
Distinguished From Liquidated Damages, see DAMAGES.
For Breach of Contract, see DAMAGES; INJUNCTIONS.
For Particular Acts or Omissions:
Act or Omission of Corporation, see CORPORATIONS.
Adulteration of Food, see ADULTERATION.
Breach of:
Bond, see BONDS.
Contract, see CONTRACTS.
Pound Regulation, see ANIMALS.
Bringing Pauper Into State, County, or Town, see PAUPERS.
Challenging to Fight a Duel, see DUELING.
Conveyance of Land Held Adversely, see CHAMPERTY AND MAINTENANCE.
Cutting Timber on:
Another's Land, see TRESPASS.
Demised Premises, see LANDLORD AND TENANT.
Public Lands, see PUBLIC LANDS.
Exacting Illegal Bridge Toll, see BRIDGES.
Extortion, see EXTORTION.
Failure of:
Bank to:
Keep Its Notes at Par, see BANKS AND BANKING.
Pay Its Notes, see BANKS AND BANKING.
Corporate Officer to File Report, see CORPORATIONS.
Executor to Present Will For Probate, see WILLS.
Witness to Obey Subpœna, see WITNESSES.
Failure to:
Construct and Maintain:
Bridge, see BRIDGES.
Railroad, see RAILROADS.
Deliver Telegram, see TELEGRAPHS AND TELEPHONES.
Enter Satisfaction of Judgment, see JUDGMENTS.
Enter Satisfaction of Mortgage, see CHATTEL MORTGAGES.
Maintain Pound, see ANIMALS.
Make Lists of Property For Taxation, see TAXATION.
Pay Claims Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS.
Release or Discharge Mechanic's Lien, see MECHANICS' LIENS.
Supply Gas, see GAS.
Fraud, see FRAUD.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES.
Frivolous Appeal and Delay, see COSTS.
Gambling, see GAMING.
Holding Over by Tenant, see LANDLORD AND TENANT.
Illegally Solemnizing Marriage, see MARRIAGE.
Illegal Practice of Medicine, see PHYSICIANS AND SURGEONS.
Illegal Taxation of Costs, see COSTS.
Improper Taxation of Costs by Clerk, see CLERKS OF COURTS.

For Matters Relating to — (*continued*)
Penalty — (*continued*)
For Particular Acts or Omissions — (*continued*)
Infringement of Copyright, see COPYRIGHT.
Injunction to Restrain Breach of Contract, see INJUNCTIONS.
Limitation of Action For, see LIMITATIONS OF ACTIONS.
Making False Certificate of Attendance as Witness, see WITNESSES.
Misappropriation by Clerk of Funds Deposited in Court, see CLERKS OF COURT.
Misconduct of Corporate Officer, see CORPORATIONS.
Neglect of Duty:
As to Care of Street, see MUNICIPAL CORPORATIONS.
By Sheriff or Constable, see SHERIFFS AND CONSTABLES.
By United States Marshal, see UNITED STATES MARSHALS.
Non-Payment of:
Assessment of Subscription to Corporate Stock, see CORPORATIONS.
Building Association Loans, see BUILDING AND LOAN SOCIETIES.
Claims Against Assigned Estates, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Municipal Tax, see MUNICIPAL CORPORATIONS.
Tax, see TAXATION.
Non-Registration of Partnership, see PARTNERSHIP.
Obstruction of:
Harbor, see NAVIGABLE WATERS.
Private Way, see PRIVATE ROADS.
Street, see MUNICIPAL CORPORATIONS.
Refusal:
Of Writ of Habeas Corpus, see HABEAS CORPUS.
To Allow Stock-Holder to Inspect Corporate Books and Records, see CORPORATIONS.
Removal or Concealment of Property Subject to Landlord's Lien, see LANDLORD AND TENANT.
Taking:
Illegal Fees, see EXTORTION; JUSTICES OF THE PEACE; OFFICERS; SHERIFFS AND CONSTABLES.
Usurious Interest, see BANKS AND BANKING; USURY.
Trespass, see TRESPASS.
Unauthorized Banking, see BANKS AND BANKING.
Violation of:
Civil Rights, see CIVIL RIGHTS.
Municipal Ordinance, see MUNICIPAL CORPORATIONS.
Violation of Statutes Relating to:
Animals, see ANIMALS.
Auctioneers, see AUCTIONS AND AUCTIONEERS.
Bridges, see BRIDGES.
Carriers, see CARRIERS.
Civil Rights, see CIVIL RIGHTS.
Customs Duties, see CUSTOMS DUTIES.
Druggists, see DRUGGISTS.
Elections, see ELECTIONS.
Extortion, see EXTORTION.
Factors or Brokers, see FACTORS AND BROKERS.
Fences, see FENCES.
Ferries, see FERRIES.
Fires, see FIRES.
Fish or Game, see FISH AND GAME.
Food, see FOOD.

For Matters Relating to — (*continued*)
Penalty — (*continued*)
For Particular Acts or Omissions — (*continued*)
Violation of Statutes Relating to — (*continued*)
Foreign Corporations, see FOREIGN CORPORATIONS.
Fraudulent Conveyances, see FRAUDULENT CONVEYANCES.
Gaming, see GAMING.
Guardian and Ward, see GUARDIAN AND WARD.
Hawkers and Peddlers, see HAWKERS AND PEDDLERS.
Health, see HEALTH.
Immigration, see ALIENS.
Importation of Alien Labor, see ALIENS.
Indians, see INDIANS.
Innkeepers, see INNKEEPERS.
Inspection, see INSPECTION.
Insurance, see INSURANCE.
Internal Revenue, see INTERNAL REVENUE.
Intoxicating Liquors, see INTOXICATING LIQUORS.
Licenses, see LICENSES.
Livery-Stable Keepers, see LIVERY-STABLE KEEPERS.
Logs and Logging, see LOGGING.
Lotteries, see LOTTERIES.
Marriage, see MARRIAGE.
Master and Servant, see MASTER AND SERVANT.
Mechanic's Lien, see MECHANICS' LIENS.
Pilots, see PILOTS.
Railroads, see RAILROADS.
Sabbath Observance, see SUNDAY.
Schools and School-Districts, see SCHOOLS AND SCHOOL-DISTRICTS.
Seamen, see SEAMEN.
Shipping, see SHIPPING.
Slaves, see SLAVES.
Taxation, see TAXATION.
Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES.
Theaters and Shows, see THEATERS AND SHOWS.
Tolls, see BRIDGES; TOLL-ROADS.
Trade-Marks and Trade-Names, see TRADE-MARKS AND TRADE-NAMES.
Turnpikes and Toll-Roads, see TOLL-ROADS.
Usury, see USURY.
Warehousemen, see WAREHOUSEMEN.
Weights and Measures, see WEIGHTS AND MEASURES.
Wharves, see WHARVES.
Waste, see WASTE.
In Bill or Note, see COMMERCIAL PAPER.
Liability For Penalty Affecting Privilege of Witness, see WITNESSES.
Liability of:
Judge For, see JUDGES; JUSTICES OF THE PEACE.
Member of Corporation For, see CORPORATIONS; FOREIGN CORPORATIONS.
Of Bond, see APPEAL AND ERROR; BONDS, and Titles Referred to in Cross-References Thereunder.

I. NATURE AND GROUNDS, AND EXTENT OF LIABILITY.

A. Nature of Penalty. A penalty is a sum of money which the law exacts the payment of, by way of punishment for doing some act which is prohibited, or

the omitting to do some act which is required to be done.[1] Strictly speaking the term "penalty" involves the idea of punishment,[2] whether corporal or pecuni-

1. *California.*— Sacramento *v.* Dillman, 102 Cal. 107, 112, 36 Pac. 385; San Luis Obispo *v.* Hendricks, 71 Cal. 242, 245, 11 Pac. 682.

Illinois.— Woolverton *v.* Taylor, 132 Ill. 197, 206, 23 N. E. 1007, 22 Am. St. Rep. 521.

New York.— Lancaster *v.* Richardson, 4 Lans. 136, 139.

North Carolina.— State *v.* Addington, 143 N. C. 683, 686, 57 S. E. 398.

Utah.— Haskins *v.* Dern, 19 Utah 89, 101, 56 Pac. 953.

West Virginia.— Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 40, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669.

Other definitions are: "A pecuniary punishment or sum of money imposed by statute to be paid as a punishment for the commission of a certain offense." Burrill L. Dict. [*quoted* in Merchants' Bank *v.* Bliss, 1 Rob. (N. Y.) 391, 403, 13 Abb. Pr. 225, 21 How. Pr. 365 (*affirmed* in 35 N. Y. 412); Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 499, 3 L. R. A. 554].

"The punishment . . . inflicted by a law for its violation." Western Union Tel. Co. *v.* Cobbs, 47 Ark. 344, 346, 1 S. W. 558, 58 Am. Rep. 756; Torbett *v.* Godwin, 62 Hun (N. Y.) 407, 409, 17 N. Y. Suppl. 46; Langdon *v.* New York, etc., R. Co., 9 N. Y. Suppl. 245, 247; U. S. *v.* Mathews, 23 Fed. 74, 75.

"Punishment, fine, forfeiture, deprivation of some office or right for some offense, misconduct, misdemeanor, or delinquency." State *v.* Sheppard, 192 Mo. 497, 506, 91 S. W. 477; State *v.* Walbridge, 119 Mo. 383, 390, 24 S. W. 457, 41 Am. St. Rep. 663.

"A sum of money payable as an equivalent or punishment for an injury." Rapalje & L. L. Dict. [*quoted* in Rogers *v.* Bonnett, 2 Okla. 553, 559, 37 Pac. 1078; Eason *v.* Witcofskey, 29 S. C. 239, 246, 7 S. E. 291; Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 499, 3 L. R. A. 554].

Distinguished from "fine" see FINES, 19 Cyc. 544 note 1.

Substantially synonymous with "forfeiture."— The word "penalty" and the word "forfeiture," as used in statutes, are generally used synonymously. A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions, and not by way of fine for a statutory crime or misdemeanor, and, with reference to penal actions, the word "penalty" means a forfeiture inflicted by a penal statute. Crawley *v.* Com., 123 Pa. St. 275, 16 Atl. 416; Butler *v.* Butler, 62 S. C. 165, 40 S. E. 138; Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302. See also Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507. "Penalty" is not synonymous with "forfeiture," as used in a contract stipulating that a certain amount should be forfeited in the event of the abandonment of a certain trade, although the two words may be used to mean the same thing, for a forfeiture is usually a penalty, although a penalty is not necessarily a forfeiture. Eakin *v.* Scott, 70 Tex. 442, 7 S. W. 777.

Costs not included.— The terms "fine" and "penalty" signify a mulct for an omission to comply with some requirement of law, or for a positive infraction of law, and do not include the costs which accrue from the prosecution. Lord *v.* State, 37 Me. 177, 179.

Penalty of death.— When the words "penalty of death" are used, they are understood, in a somewhat figurative sense, to signify the forfeiture of life. It is less usual to say the penalty of imprisonment, or the penalty of whipping. State *v.* Fields, 2 Bailey (S. C.) 554, 557.

2. *California.*— Eureka Harbor Com'rs *v.* Excelsior Redwood Co., 88 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321; San Luis Obispo *v.* Hendricks, 71 Cal. 242, 11 Pac. 682.

Michigan.— Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

Minnesota.— State *v.* Buckman, 95 Minn. 272, 104 N. W. 240, 289.

Mississippi.— Taylor *v.* Matchell, 1 How. 596.

New Hampshire.— Fowler *v.* Tuttle, 24 N. H. 9.

New York.— Merchants' Bank *v.* Bliss, 1 Rob. 391, 13 Abb. Pr. 225, 21 How. Pr. 365 [*affirmed* in 35 N. Y. 412].

Ohio.— Kulp *v.* Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611.

Pennsylvania.— Dunlap *v.* McKee, 25 Pa. St. 84; Com. *v.* Kelley, 31 Pa. Co. Ct. 337; Com. *v.* A——, 30 Pa. Co. Ct. 554.

Vermont.— Drew *v.* Russell, 47 Vt. 250.

West Virginia.— Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669.

United States.— U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246.

Punishment synonymous.— "Penalty" is synonymous with "punishment," in connection with crimes of the highest grades, and is fixed by the law defining and inhibiting the criminal act. Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684; Beggs *v.* State, 122 Ind. 54, 23 N. E. 693; U. S. *v.* Reisinger, 128 U. S. 398, 9 S. Ct. 99, 32 L. ed. 480.

It does not necessarily imply a fixed sum, but anything imposed as a punishment, whether specific, or measured by the value of the interest affected by the act complained of. Merchants' Bank *v.* Bliss, 1 Rob. (N. Y.) 391, 13 Abb. Pr. 225, 21 How. Pr. 365 [*affirmed* in 35 N. Y. 412].

A penalty whose benefit is given to a party aggrieved includes the idea of both compensation and punishment. The fact of such gift to the injured party does not make a penalty less one, nor would its extension to the whole value of the interest affected, instead of being limited to a fixed sum. Merchants' Bank *v.* Bliss, 1 Rob. (N. Y.) 391, 13 Abb. Pr. 225, 21 How. Pr. 365 [*affirmed* in 35 N. Y. 412]. See

ary,[3] and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.[4] The term includes also an equivalent by way of damages for a civil wrong,[5] and is in this sense sometimes applied to stipulated damages for breach of private contracts, wholly independent of statutes.[6]

B. Statutory Provisions.[7] It is a well-settled rule that, where a subsequent statute increases or diminishes a penalty,[8] or varies the mode of enforcing the

also Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

3. *Connecticut.*— Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1.

Illinois.— Gunning *v.* People, 86 Ill. App. 174.

Indiana.— American Credit Indemnity Co. *v.* Ellis, 156 Ind. 212, 59 N. E. 679.

Missouri.— State *v.* Warner, 197 Mo. 650, 94 S. W. 962.

England.— Reg. *v.* Smith, 9 Cox C. C. 110, 8 Jur. N. S. 199, L. & C. 131, 31 L. J. M. C. 105, 5 L. T. Rep. N. S. 761, 10 Wkly. Rep. 273.

Canada.— Reg. *v.* Gavin, 1 Can. Cr. Cas. 59; Reg. *v.* Frawley, 2 Cartwr. Cas. 576; Reg. *v.* Carlisle, 6 Ont. L. Rep. 718.

Personal punishment included.— The word "penalty" is frequently used to designate a pecuniary punishment or liability, and has sometimes been declared to be limited to that class alone, and not to include imprisonment. The word is susceptible of, and is frequently used in, a broader sense than this, and as a general term including both pecuniary and personal punishment. State *v.* Hardman, 16 Ind. App. 357, 45 N. E. 345; U. S. *v.* Reisinger, 128 U. S. 398, 9 S. Ct. 99, 32 L. ed. 480; U. S. *v.* Mathews, 23 Fed. 74; U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

Context may restrict to pecuniary penalty. — Rex *v.* Johnston, 11 Can. Cr. Cas. 6.

4. Woolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521; Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669; U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246; McDonald *v.* Hearst, 95 Fed. 656.

5. Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; *In re* Opinion of Justices, 73 N. H. 625, 63 Atl. 505; Forster *v.* Cumberland Valley R. Co., 23 Pa. St. 371.

6. Watt *v.* Sheppard, 2 Ala. 425; Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896; Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 5 L. ed. 384. See also State *v.* Warner, 197 Mo. 650, 94 S. W. 962.

It is "an agreement to pay a greater sum to secure the payment of a less sum" (Henry *v.* Thompson, Minor (Ala.) 209, 227; Krutz *v.* Robbins, 12 Wash. 7, 11, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676); or "a sum named as damages, to be recovered for violating an agreement or promise in lieu of damages" (Watt *v.* Sheppard, 2 Ala. 425, 445; Adams *v.* Rutherford, 13 Oreg. 78, 90, 8 Pac. 896; Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 15, 5 L. ed. 384).

For definition of penalty for breach of contract see Protector Endowment Loan, etc., Co. *v.* Grice, 5 Q. B. D. 592, 596, 45 J. P. 172, 49 L. J. Q. B. 812, 43 L. T. Rep. N. S. 564; *Ex p.* Burden, 16 Ch. D. 675, 680, 44 L. T. Rep. N. S. 525, 29 Wkly. Rep. 879, per Lush, L. J. See also Rayner *v.* Rederiaktiebolaget Condor, [1895] 2 Q. B. 289, 8 Aspin. 43, 64 L. J. Q. B. 540, 73 L. T. Rep. N. S. 96, 15 Reports 542; The Princess, 7 Aspin. 432, 70 L. T. Rep. N. S. 388, 6 Reports 723.

Distinguished from "interest."— Interest is merely compensation for the use or forbearance of money, and is distinguished from penalty, which is a punishment. Thus a statute providing that taxes shall bear interest at the rate of seven per cent per annum does not constitute a penalty, such rate being the legal rate. Sparks *v.* Lowndes County, 98 Ga. 284, 25 S. E. 426. See also New Whatcom *v.* Roeder, 22 Wash. 570, 61 Pac. 767.

Distinguished from liquidated damages.— There is an important difference between a penalty and liquidated damages for breach of a contract; and while a court of equity may relieve against a penalty and give in lieu thereof to the injured party the damages actually sustained, it will not relieve against the payment of liquidated damages. Clydebank Engineering, etc., Co. *v.* Yzquerdoy Castaneda, [1905] A. C. 6, 74 L. J. P. C. 1, 91 L. T. Rep. N. S. 666, 21 T. L. R. 58; Empire Loan, etc., Co. *v.* McRae, 5 Ont. L. Rep. 710; Ont. Rev. St. (1897) c. 51, § 57, (3). The use of the term "penalty" or "liquidated damages" does not conclusively determine the intention of the parties, and what is called penalty may in certain circumstances be construed to mean liquidated damages and *vice versa*. Elphinstone *v.* Monkland Iron, etc., Co., 11 App. Cas. 332, 35 Wkly. Rep. 17; Wallis *v.* Smith, 21 Ch. D. 243, 52 L. J. Ch. 145, 47 L. T. Rep. N. S. 389, 31 Wkly. Rep. 214; Reindel *v.* Schell, 4 C. B. N. S. 97, 4 Jur. N. S. 310, 27 L. J. C. P. 146, 93 E. C. L. 97; Sparrow *v.* Paris, 7 H. & N. 594, 8 Jur. N. S. 391, 31 L. J. Exch. 137, 5 L. T. Rep. N. S. 799; Bonsall *v.* Byrne, Ir. R. 1 C. L. 573, 16 Wkly. Rep. 372; Dimech *v.* Corlett, 12 Moore P. C. 199, 14 Eng. Reprint 887. See also DAMAGES, 13 Cyc. 89 *et seq.*

7. **Penal statute:** Constitutionality of see CONSTITUTIONAL LAW, 8 Cyc. 695; INTOXICATING LIQUORS, 23 Cyc. 64 *et seq.* Construction of see STATUTES. Retroactive operation of acts repealing see STATUTES.

8. *Alabama.*— State *v.* Whitworth, 8 Port. 434.

California.— Fraser *v.* Alexander, 75 Cal. 147, 16 Pac. 757, holding that the act of March 30, 1874, imposing on civil officers who violate their official duties a fine for the benefit of the informer is inconsistent with the act of March 14, 1883, imposing in such

same,[9] it operates as a repeal of any former law on the same subject.[10] Where a statute imposes a penalty for breach of its provisions, that is held to exclude the general provisions of the criminal code.[10a] So where a statute imposes a penalty for doing an act, that act is impliedly forbidden.[10b]

C. Power to Impose. The legislature has power to subject any particular offense to a penalty,[11] provided the imposition thereof does not violate any constitutional provision,[12] or public justice.[13] It may even go further and subject the same offense both to a penalty and to a criminal prosecution, and this is not con-

case a fine for the benefit of the county, and is therefore repealed by the latter.

Kentucky.— Equitable L. Assur. Soc. *v.* Com., 113 Ky. 126, 67 S. W. 388, 23 Ky. L. Rep. 2359; Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900.

Massachusetts.— Com. *v.* Kimball, 21 Pick. 373; Nichols *v.* Squire, 5 Pick. 168.

New Hampshire.— Leighton *v.* Walker, 9 N. H. 59.

New Jersey.— Buckallew *v.* Ackerman, 8 N. J. L. 48.

England.— Rex *v.* Cator, 4 Burr. 2026.

See 39 Cent. Dig. tit. "Penalties," §§ 2, 14.

9. Leighton *v.* Walker, 9 N. H. 59; Buckallew *v.* Ackerman, 8 N. J. L. 48.

10. See also CONSTITUTIONAL LAW, 8 Cyc. 1035 note 53.

Cumulative remedy.— Where a statute prohibits an act under a penalty to be enforced by indictment, and a subsequent statute gives a *qui tam* action for such penalty, the latter is merely cumulative of, and does not repeal the remedy given by, the former statute. Bush *v.* State, 1 Tex. 455. Where an agreement between a municipality and a street railway provided that in default of the railway laying tracks within the city as requested it should forfeit its exclusive right in that particular locality, it was held that this being a stipulated penalty for refusal no action would lie against the railway to compel it to lay its tracks. Toronto *v.* Toronto R. Co., [1907] A. C. 315, 76 L. J. C. P. 57, 96 L. T. Rep. N. S. 794, 23 T. L. R. 480. And where a statute imposed a specific penalty for breach of its provision, that was held to exclude the general provisions of the criminal code. Rex *v.* Hays, 12 Can. Cr. Cas. 423, 6 Can. R. Cas. 480, 14 Ont. L. Rep. 201. Where a statute authorized a penalty to be recovered by distress, that was held not to preclude a right to bring an action therefor. Shepherd *v.* Hills, 11 Exch. 55, 25 L. J. Exch. 6.

Effect of repeal of statute.— By express provision of Kirby Dig. Ark. § 7797, a penalty for violation of a penal statute while it was in force is recoverable after its repeal, in the absence of express provision to the contrary in the repealing statute. Western Union Tel. Co. *v.* State, 82 Ark. 309, 101 S. W. 748. Similar provisions are to be found in the statute law of Canada. For example see Can. Rev. St. (1906) c. 1, § 19; 7 Edw. VII, c. 2, § 7 (46) (Ont.).

10a. Rex *v.* Hays, 12 Can. Cr. Cas. 423, 6 Can. R. Cas. 480, 14 Ont. L. Rep. 201.

10b. Atty.-Gen. *v.* Emerald Hill, 4 Austr. Jur. 135 [*citing* Cundell *v.* Dawson, 4 C. B. 376, 11 Jur. 634, 17 L. J. C. P. 311, 56 E. C. L. 376; O'Brien *v.* Dillon, 9 Ir. C. L. 318].

11. Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463, holding that the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government.

In Canada.— The provinces have power to impose penalties for breach of provincial laws (Brit. North Am. Act (1867), § 92 (15); Atty.-Gen. *v.* Hamilton St. R. Co., [1903] A. C. 524, 72 L. J. P. C. 105, 89 L. T. Rep. N. S. 107; Hodge *v.* Reg., 9 App. Cas. 117, 53 L. J. P. C. 1, 50 L. T. Rep. N. S. 301 [*affirming* 3 Cartwr. Cas. 144]; Canada Atty.-Gen. *v.* Ontario Atty.-Gen., 23 Can. Sup. Ct. 458; Reg. *v.* Frawley, 46 U. C. Q. B. 153), although the general criminal law of Canada is within the exclusive jurisdiction of the dominion parliament (Brit. North Am. Act (1867), § 91, subs. 27).

Power of municipality see MUNICIPAL CORPORATIONS, 28 Cyc. 692 *et seq.* Statutory power may be given by the provincial legislature to municipal bodies within their legislative jurisdiction to impose penalties for breach of duty by municipal officers, or for infraction of their by-laws. For example see Ont. Mun. Act (1903), 3 Edw. VII, c. 19, § 702.

12. Equitable L. Assur. Soc. *v.* Com., 113 Ky. 126, 67 S. W. 388, 23 Ky. L. Rep. 2359; Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900 (holding that Const. § 12, providing that, with certain exceptions, "no person for an indictable offense shall be proceeded against criminally by information," does not apply to misdemeanors punishable by fine, and therefore the legislature has power to provide for the prosecution of such offenses by penal action); Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812; State *v.* Lubee, 93 Me. 418, 45 Atl. 520 (holding that Pub. Laws (1897), c. 285, § 39, imposing a penalty of five dollars for each lobster less than ten and one-half inches in length found in the possession of any person, is not repuganant to section 9, article 1, of the constitution, which prohibits the imposition of excessive penalties).

13. State *v.* Zillmann, 121 Wis. 472, 98 N. W. 543, holding that Laws (1901), p. 550, c. 379, providing that any member of a board of review of any assessment district who intentionally omits, or agrees to omit, from assessment any property liable to taxation in such assessment district shall be liable to a penalty, etc., is not invalid, as contrary to public justice, guaranteed by the constitution.

sidered as punishing the same offense twice.[14] To be recoverable, however, a penalty must be expressly imposed.[15]

D. Amount and Extent.[16] The amount of recovery in a penal action depends entirely upon the provisions of the statute imposing the penalty.[17] Where a penalty is given to the party injured, the amount is not affected or controlled by his actual pecuniary loss or damage.[18] Where a penalty is given for failure or neglect to do a certain act, and a further penalty for each day during which such refusal or neglect shall continue, a liability arises for a succession of penalties,[19] to each of the persons injured,[20] which may be recovered in successive actions.[21] Where a second offense subjects one to an accumulated penalty, such offense must be of the same nature as the first.[22]

E. Defenses — 1. In General. Recovery will operate as a bar to any future action for the same penalty.[23] So too the record of a voluntary confession, and payment of the whole penalty, may be pleaded in bar to an action *qui tam*.[24] Ignorance,[25] or misapprehension,[26] of a penal statute is no excuse for its violation,

14. People *v.* Stevens, 13 Wend. (N. Y.) 341. See also MUNICIPAL CORPORATIONS, 28 Cyc. 696 *et seq.*

15. Marine Hospital Bd. of Health *v.* Pacific Mail Steamship Co., 1 Cal. 197; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586, holding that if a statute in the nature of a police regulation gives a remedy for private injuries resulting from the violation thereof, and also imposes penalties at the suit of the public for such violation, the former will not be regarded in the nature of a penalty unless so declared.

16. **Amount of penalty in appeal-bond** see APPEAL AND ERROR.

Judgment see *infra*, II, D, 4, a, (II).

Sum demanded not conclusive see *infra*, II, C, 1, c, (I).

17. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

One penalty for each offense.— Under the modern rule, if the legislature intends to allow cumulative penalties, the statute authorizing the penalty must so state "in so many words." Hence, as the last amendment to the Domestic Commerce Law, § 29, as amended by N. Y. Laws (1902), c. 482, providing a penalty for buying or selling or having in possession marked milk cans belonging to another, allows a recovery of the penalty "for every violation" of the statute, only one penalty can be recovered for each violation irrespective of the number of cans held by defendant. This, notwithstanding the fact that prior statutes on the subject allowed a penalty for "each and every milk can" so held. U. S. Condensed Milk Co. *v.* Smith, 116 N. Y. App. Div. 15, 101 N. Y. Suppl. 129.

18. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

19. Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 474, 39 N. Y. Suppl. 1110 [*affirmed* in 158 N. Y. 678, 52 N. E. 1124].

20. Beaumont *v.* Huddersfield Corp., 67 J. P. 57, 1 Loc. Gov. 118.

21. Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 474, 39 N. Y. Suppl. 1110 [*affirmed* in 158 N. Y. 678, 52 N. E. 1124].

22. Scot *v.* Turner, 1 Root (Conn.) 163.

23. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452; Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687; Frohock *v.* Pattee, 38 Me. 103; People *v.* Piat, 19 Misc. (N. Y.) 131, 43 N. Y. Suppl. 231.

If, however, the judgment in the former action was recovered fraudulently or collusively in order to protect defendant, it is no bar to another action. Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523.

That the informer is not entitled to recover the whole penalty is no defense, however, to an action for the recovery of a penalty, as the disposition of the money, when properly recovered, is a matter concerning only the informer and the state. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

Previous arraignment.— An action to recover a penalty is not barred by a previous arraignment of the same offense before a magistrate, who, although having plenary jurisdiction of the complaint, bound defendant over to a higher court; such proceedings being a nullity. Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687.

Where a penalty is given by way of punishment to the offender rather than as compensation to the party aggrieved, a recovery by one of several persons aggrieved by the commission of a single offense is a bar to recovery by others. New Jersey Cent. R. Co. *v.* Green, 86 Pa. St. 427, 27 Am. Rep. 718.

If several incur a penalty by a joint act, a recovery and satisfaction against one of them is a good bar to an action against the others. Frost *v.* Rowse, 2 Me. 130; Boutelle *v.* Nourse, 4 Mass. 431.

Suit for one penalty as a waiver of prior penalties see Stevenson *v.* New York City R. Co., 54 Misc. (N. Y.) 641, 104 N. Y. Suppl. 866.

24. Hamilton *v.* Williams, 1 Tyler (Vt.) 15.

25. Quimby *v.* Waters, 28 N. J. L. 533; Dunster *v.* Randolph, 9 N. J. L. J. 178; Smith *v.* Brown, 1 Wend. (N. Y.) 231; Hyde *v.* Melvin, 11 Johns. (N. Y.) 521; The Ann, 1 Fed. Cas. No. 397, 1 Gall. 62. See also MUNICIPAL CORPORATIONS, 28 Cyc. 779 text and note 48.

26. Sherman *v.* Spencer, 1 N. Y. Leg. Obs.

unless the statute makes knowledge and wilfulness elements of the offense. The violation of the statute consists in doing the prohibited act, or in the refusal or omission to perform the required duty, and not in the intent or motive by which the party is actuated.[27] Nor is it a defense that others violate the statute with impunity;[28] that a former action was settled without leave of court;[29] that an agreement for reference and arbitration was made between the person claiming the penalty and defendant;[30] or that defendant has been acquitted in a criminal prosecution for violation of the statute.[31]

2. SET-OFF. A penalty for breach of a statute is not subject to set-off.[32]

F. Persons Entitled to Enforce[33] — 1. IN GENERAL. The person entitled to recover a statutory penalty is to be determined from the language and intent of the statute.[34] Persons injured,[35] and informers,[36] are frequently expressly named. If the statute omits to specify by whom the action may be brought without naming "common informer," "prosecutor," or "person who will sue," it has been adjudged that the action is limited to the injured party.[37]

2. INFORMERS.[38] A common informer cannot maintain an action for a penalty except when power is given him for that purpose by statute, either in express terms or by implication;[39] and not then unless he sues within the time prescribed

172. See also MUNICIPAL CORPORATIONS, 28 Cyc. 779 note 46.

27. Quimby *v.* Waters, 28 N. J. L. 533; Monroe Dairy Assoc. *v.* Stanley, 65 Hun (N. Y.) 163, 20 N. Y. Suppl. 19 (holding that a person whose servants, or employees fail to return a milk can having the name of the owner stamped thereon is amenable to the penalty of N. Y. Laws (1887), c. 401, § 4, as amended by the Laws of 1890, making the possession of such can a misdemeanor, and making the fact of possession presumptive evidence of illegal possession, although such person never knew that the can was on his premises); Sturges *v.* Maitland, Anth. N. P. (N. Y.) 208; U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,478, 4 Biss. 99.

28. Buffalo *v.* New York, etc., R. Co., 152 N. Y. 276, 46 N. E. 496 [*affirming* 6 Misc. 630, 27 N. Y. Suppl. 297]. See also MUNICIPAL CORPORATIONS, 28 Cyc. 779 text and note 45.

29. Raynham *v.* Rounseville, 9 Pick. (Mass.) 44.

30. Middleton *v.* Wilmington, etc., R. Co., 95 N. C. 167, holding that where a statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration until suit has been brought.

31. People *v.* Snyder, 90 N. Y. App. Div. 422, 86 N. Y. Suppl. 415. See JUDGMENTS, 23 Cyc. 1350 note 33.

32. Chambersburg Bank *v.* Com., 2 Grant (Pa.) 384. But see McKelvey *v.* McLean, 34 U. C. Q. B. 635. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

33. Parties plaintiff see *infra*, II, B, 2; and MUNICIPAL CORPORATIONS, 28 Cyc. 788 *et seq.*

34. See Farr *v.* Smith, 64 N. H. 605, 15 Atl. 22, holding that the penalty provided by Gen. Laws, c. 229, § 10, twenty-five cents a mile for the travel each way of a party or his attorney to attend the taking of depositions, when no deposition is taken, cannot be recovered for the travel of the general business agent of the party for that purpose.

Infant.— Under a statute which provides that an informer may sue in person or by attorney, an infant suing by his next friend cannot recover. Garrett *v.* Roberts, 10 Ont. App. 650.

35. Phillips *v.* Bevans, 23 N. J. L. 373, holding that if a penal statute authorizes a penalty to be sued for by the party injured, any one of several parties jointly injured by the offense may sue for and recover the penalty.

Waiver of right to sue.— The institution of an action to recover a statutory penalty against a street car company for refusal to give a transfer operates as a waiver of plaintiff's right to penalties for prior defaults. Stevenson *v.* New York City R. Co., 54 Misc. (N. Y.) 641, 104 N. Y. Suppl. 866.

36. See *infra*, I, F, 2.

37. See Phillips *v.* Bevans, 23 N. J. L. 373.

38. See also MUNICIPAL CORPORATIONS, 28 Cyc. 790.

39. See *infra*, II, B, 2, b, (I).

Informer must be natural person.— The right to sue as an informer is limited to a person, and the United States cannot sue in that character. U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277. The statute authorizing a certain penalty to be recovered by any person in his own name does not authorize a corporation to sue therefor. Ancient City Sportman's Club *v.* Miller, 7 Lans. (N. Y.) 412.

A county assessor and collector of taxes may sue in a *qui tam* action as informer, and recover a statutory penalty. Tarde *v.* Benseman, 31 Tex. 277.

Infant's right to sue see *supra*, note 34.

Intervention by informer.— An informer cannot thrust himself into a proceeding instituted by the attorney-general for the sole use of the government, when his becoming a party is resisted by such officer, and after

by the statute.[40] If, where a part of a penalty is given to the public and a part to a common informer, the latter fails to commence a suit for the penalty, the state may prosecute for the whole.[41]

G. Persons Liable.[42] The persons liable for a statutory penalty depend upon the language and intent of the statute imposing it. Under a statute making "any person" who violates the statute liable, the penalty is applicable only to the one derelict in duty and personally guilty of the wrong;[43] and it depends on the nature of the offense, as being entire or several, whether several persons, jointly and simultaneously committing it, are to be subjected, the whole to but one penalty or each to the whole penalty.[44] Where the statute requires the prohibited act to have been done "knowingly and wilfully" in order to subject one to the penalty, it must clearly appear that the act was so done.[45]

H. Remission — 1. By Legislature or Executive.[46] Following the principle of the English authorities[47] it is held that, after a judgment vesting a moiety of a penalty in an informer, the power of pardon confided to the president by the constitution is limited to the remission of the share of the government only, and that it is inoperative to divest the share of the informer.[48] So too the power of

issue is joined, and proof furnished by other parties. Francis *v.* U. S., 5 Wall. (U. S.) 338, 18 L. ed. 603.

40. Fagan *v.* Armistead, 33 N. C. 433.

41. State *v.* Bishop, 7 Conn. 181; State *v.* Smith, 64 Me. 423; Wiscasset *v.* Trundy, 12 Me. 204; Com. *v.* Howard, 13 Mass. 221; Rex *v.* Hymen, 7 T. R. 536, 4 Rev. Rep. 524.

42. Parties defendant see *infra*, II, B, 3; and Municipal Corporations, 28 Cyc. 778.

43. See cases cited *infra*, this note; and *infra*, II, C, 5, a.

A contractor has been held not to be liable for the acts of a subcontractor. Buffalo *v.* Clement, 19 N. Y. Suppl. 846.

Corporation.—An indictment will not lie against a corporation under a statute making "any person" liable to a penalty. State *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611. Unless the word "person" is defined to include corporation, and there is nothing in the act to lead to the conclusion that corporations are not intended to be included. For example see Can. Rev. St. (1906) c. 1, § 34 (20); 7 Edw. VII, c. 2, § 7 (13) (Ont.).

Partnership.— An action cannot be maintained against a partnership as such. Hargo *v.* Meyers, 4 Ohio Cir. Ct. 275, 2 Ohio Cir. Dec. 543; Porter *v.* Vance, 14 Lea (Tenn.) 629. In England and Canada a partnership may now be sued in the firm-name, but the individuals composing the firm must be served. See Judicature Acts and Rules.

44. Warren *v.* Doolittle, 5 Cow. (N. Y.) 678. See also Curtis *v.* Hurlburt, 2 Conn. 309; Drake *v.* Preston, 34 U. C. Q. B. 257.

45. Williams *v.* Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650. *Compare* Verona Cent. Cheese Factory *v.* Murtaugh, 4 Lans. (N. Y.) 17. And see *infra*, note 78, page ——.

46. Pardon generally see Pardons, 29 Cyc. 1558.

Remission of penalty to confer jurisdiction see 24 Cyc. 474 note 63.

In Canada.— The dominion parliament may authorize the governor-general in council to remit penalties which are within the jurisdiction of the dominion parliament. Can. Rev. St. (1906) c. 146, § 1084. Provincial parliaments may provide for the remission of penalties which they have power to impose. Ont. Rev. St. (1897) c. 51, § 57 (3); 7 Edw. VII, c. 26 (Ont.). So the provincial parliaments may authorize the lieutenant-governor in council to remit penalties which are within the jurisdiction of the provincial legislature. 7 Edw. VII, c. 26, § 6 (Ont.). And the provincial legislature may also authorize courts of law to remit such penalties. See statutes referred to *infra*, note 52.

47. The English authorities are uniform to the effect that the king may discharge his own share in a penalty as well after as before judgment, but that after judgment he cannot remit the share of an informer, because the share of an informer is by the judgment vested in him. Grosset *v.* Ogilvie, 5 Bro. P. C. 527, 2 Eng. Reprint 841; Howel *v.* James, Str. 1272; Coke Inst. c. 105; 2 Hawkins P. C. c. 37, 553; 17 Viner Abr. 39.

48. U. S. *v.* Griswold, 24 Fed. 361 [*affirmed* in 30 Fed. 762]; U. S. *v.* Harris, 26 Fed. Cas. No. 15,312, 1 Abb. 110. But see U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,479, 4 Biss. 336, where it is said that the moiety of the penalty is given to the informer subject to the contingency of a presidential pardon, and the informer is not absolutely vested with the right to the moiety by virtue of the judgment in his favor, but only on the condition that the informer should have a right to the moiety, if the president should never pardon the offense. See also Pardons, 29 Cyc. 1558.

Before judgment, when the prosecution is wholly in the name of the United States, the president has complete power over the whole case. U. S. *v.* Harris, 26 Fed. Cas. No. 15,312, 1 Abb. 110.

If an informer could be deprived of his reward after he had earned it, no one would be foolish enough to incur the trouble and expense, or even the ill-will, incident to the prosecution of an action for a penalty, subject to the contingency of having the same remitted or the judgment compromised after

the legislature to remit a penalty is too well settled to admit of controversy.[49] And it has been held that congress has the power to authorize the secretary of the treasury to remit any penalty incurred by the breach of the revenue laws, either before or after judgment;[50] and if remitted before the money is actually paid it embraces the share given by law in such cases to the officers of the customs as well as the share of the United States.[51]

2. By Court. A court may relieve against unreasonable penalties in private contracts, but not against those created by law, unless empowered by statute so to do.[52]

I. Payment — 1. Medium of Payment. Under a provision requiring penalties to be paid into the county treasury, such penalties are to be treated as debts due the county, and may be paid in county warrants.[53]

2. To Whom Made and Effect. An informer, to whom a moiety of the penalty is given, may accept payment of the judgment recovered and discharge defendant, although he has no right to discharge the judgment without leave of court.[54]

J. Disposition of Proceeds[55] — 1. In General. The legislature may by statute give penalties and forfeitures to such persons and for such particular purposes as in its wisdom it may deem proper;[56] and such a statute does not violate a constitutional provision requiring all fines assessed for breaches of the penal laws,[57] or

it was obtained. U. S. *v.* Griswold, 24 Fed. 361.

The governor of a state has the constitutional right to remit the part of a penalty due to the state; but it is otherwise as to the part given to the informer. State *v.* Williams, 1 Nott & M. (S. C.) 26. In Pennsylvania the penalties which may be remitted by the governor are such as are now or were originally payable to the state. Shoop *v.* Com., 3 Pa. St. 126.

49. Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161; Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534, 11 L. ed. 714.

The repeal of a law imposing a penalty is of itself a remission. Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161; Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534, 11 L. ed. 714. But see Can. Rev. St. (1906) c. 1 (19*d*); 7 Edw. VII, c. 2, § 7 (46*d*) (Ont.).

50. U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314 [*affirming* 26 Fed. Cas. No. 15,816, 1 Paine 209]. See also Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196; and Internal Revenue, 22 Cyc. 1693.

51. U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314 [*affirming* 26 Fed. Cas. No. 15,816, 1 Paine 209].

This power to remit penalties conferred by act of congress on the secretary of the treasury is materially distinguishable from the power of pardon conferred on the president by the constitution. U. S. *v.* Harris, 26 Fed. Cas. No. 15,312, 1 Abb. 110.

52. Brant *v.* Louisiana State Bank, 8 Mart. (La.) 310. *Compare* Municipal Corporations, 28 Cyc. 820.

For statutes conferring the "power to remit penalties" see the following English statutes: 60 Vict. c. 15, sched. (64); 58 Vict. c. 12, § 52 (3); 49 Vict. c. 16, § 38. And see the following Canadian statutes: Brit. Col. Rev. St. (1897) c. 56, § 16 (7); Manitoba Rev. St. (1902) c. 40, § 38 (c); Ont. Rev. St. c. 60, § 75; Ont. Rev. St. (1897) c. 55, § 28; Ont. Rev. St. (1897) c. 51, §§ 30, 57 (3) (8).

53. McKibben *v.* State, 31 Ark. 46.

54. Caswell *v.* Allen, 10 Johns. (N. Y.) 118.

55. Disposition of penalties for violation of: Customs Laws see Customs Duties, 12 Cyc. 1187. Laws Regulating Sale of Intoxicating Liquors see Intoxicating Liquors, 23 Cyc. 171. Revenue Laws see Internal Revenue, 22 Cyc. 1694.

56. *Missouri.*— Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773.

Nebraska.— Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455.

North Carolina.— State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041; Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

Oklahoma.— Perry Bd. of Education *v.* Haralson, 2 Okla. 170, 37 Pac. 1063.

United States.— Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463.

See 39 Cent. Dig. tit. "Penalties," § 11.

Defendant not concerned in disposition.— It is no concern of defendant how the penalty is appropriated. He is in no way responsible for the disposition to be made of it when collected. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452; Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937; State *v.* Thrasher, 79 Me. 17, 7 Atl. 814; State *v.* Willis, 78 Me. 70, 2 Atl. 848; State *v.* Smith, 64 Me. 423.

57. See cases cited *infra*, this note.

The fines referred to in such a constitutional provision are those imposed by law as a punishment for crime, and not those recoverable in civil actions. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E.

the "clear proceeds" of fines and penalties,[58] to be paid into the common school fund. If, however, it is provided by the constitution that the proceeds of penalties must be "exclusively" applied to the school fund, a statute otherwise disposing of part of the proceeds is void.[59]

2. RIGHTS OF INFORMERS. In accordance with the principle above stated,[60] it is competent for the legislature, by way of inducement to secure prompt enforcement of the penal laws, to allow a part of each penalty recovered to go to the informer.[61] His title thereto depends upon the recovery, and until then he has no vested right therein.[62] By commencing an action, however, he attaches a right in himself to the penalty, which cannot be divested by a subsequent suit, brought by another individual, even though judgment be first recovered in the second suit.[63] In order to entitle an informer to his moiety of the penalty, it should appear of record that he complained or sued for it;[64] and this within the time limited by the statute;[65] otherwise the whole penalty goes to the state.[66] If no private person is authorized to sue for a penalty, it belongs, when collected, to the state which alone can sue for its recovery.[67]

II. ACTIONS AND OTHER PROCEEDINGS.

A. Nature and Form of Remedy and Conditions Precedent — 1. NATURE OF REMEDY. Actions for penalties, whether regarded as founded upon the implied contract every person enters into with the state to observe its laws,[68] or upon a

809, 41 L. R. A. 436; Platteville *v.* Bell, 43 Wis. 488.

58. State *v.* Hannibal, etc., R. Co., 89 Mo. 571, 1 S. W. 133; State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130; Spealman *v.* Missouri Pac. R. Co., 71 Mo. 434; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041; Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688. See also Platteville *v.* Bell, 43 Wis. 488.

Such a constitutional provision refers only to such penalties as by the several statutes imposing them shall accrue to the state. Spealman *v.* Missouri Pac. R. Co., 71 Mo. 434; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041; Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

Entire disposition of penalty unconstitutional.— Under a constitution setting apart for the school fund the "clear proceeds" of all funds collected, a law which gives an entire penalty to a complainant is void, because it admits of no "clear proceeds," which can come to the state for the school fund. Dutton *v.* Fowler, 27 Wis. 427; Lynch *v.* The Economy, 27 Wis. 69.

59. Atchison, etc., R. Co. *v.* State, 22 Kan. 1.

60. See *supra*, I, J, 1.

61. State *v.* Oriol, 49 La. Ann. 442, 21 So. 634; State *v.* Hannibal, etc., R. Co., 89 Mo. 571, 1 S. W. 133; State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130; State *v.* Maultsby, 139 N. C. 583, 51 S. E. 956.

An informer is he who with the intention of having his information acted upon first gives information of a violation of law which induces the prosecution and contributes to the recovery of the fine, penalty, or forfeiture, which is eventually recovered. *In re* Webster, 29 Fed. Cas. No. 17,332. See also 22 Cyc. 720.

Medical society as informer.— N. Y. Laws (1895), c. 398, § 153, providing that when any prosecution thereunder, for practising medicine without lawful registration as a physician, is made on the complaint of any incorporated medical society of the state, or any county medical society entitled to representation in a state medical society, the fines collected shall be paid to the society making the complaint, applies generally to all incorporated medical societies, whether denominated "societies" or "associations." New York County Medical Assoc. *v.* New York, 32 Misc. (N. Y.) 116, 65 N. Y. Suppl. 531.

62. Com. *v.* Welch, 2 Dana (Ky.) 330. See CONSTITUTIONAL LAW, 8 Cyc. 911.

63. State *v.* Smith, 64 Me. 423; Dozier *v.* Williams, 47 Miss. 605; Pike *v.* Madbury, 12 N. H. 262; Beadleston *v.* Sprague, 6 Johns. (N. Y.) 101.

The recovery in a collusive action, no matter when brought, is no bar to a *bona fide* action. Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523.

64. State *v.* Smith, 64 Me. 423; Com. *v.* Howard, 13 Mass. 221; Com. *v.* Frost, 5 Mass. 53; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480.

65. Com. *v.* Frost, 5 Mass. 53.

66. State *v.* Smith, 64 Me. 423; Com. *v.* Howard, 13 Mass. 221; Com. *v.* Frost, 5 Mass. 53; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480.

67. Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688. Bradlaugh *v.* Clarke, 8 App. Cas. 354, 47 J. P. 405, 52 L. J. Q. B. 505, 48 L. T. Rep. N. S. 681, 31 Wkly. Rep. 677.

68. Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688; Doughty *v.* Atlantic, etc., R. Co.,

tort, that is, a wrongful violation of a public duty,[69] are civil actions.[70] In a few cases, however, a distinction seems to be made between penalties given for the indemnity of the party aggrieved, and those merely intended to punish the act as an offense; regarding the former as civil suits,[71] and the latter as not.[72]

2. Form of Remedy — a. When Prescribed by Statute. The mode in which penalties shall be enforced, whether at the suit of a private party or at the suit of the public, is a matter of legislative discretion.[73] Where a statute gives a penalty and prescribes the form of action for its recovery, such form of action is exclusive.[74]

78 N. C. 22; Edenton *v.* Wool, 65 N. C. 379; Stearns *v.* U. S., 22 Fed. Cas. No. 13,341, 2 Paine 300; 3 Blackstone Comm. 160. *Compare* McCoun *v.* New York Cent., etc., R. Co., 7 Lans. (N. Y.) 75 [*affirmed* in 50 N. Y. 176].

69. Webster *v.* People, 14 Ill. 365; Bowers *v.* Green, 2 Ill. 42; Western Union Tel. Co. *v.* Bright, 90 Va. 778, 20 S. E. 146; Chaffee *v.* U. S. 18 Wall. (U. S.) 516, 21 L. ed. 908.

70. *Arkansas.*— Kansas City, etc., R. Co. *v.* State, 63 Ark. 134, 37 S. W. 1047.

Connecticut.— Clark *v.* Turner, 1 Root 200.

Illinois.— People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Partridge *v.* Snyder, 78 Ill. 519; Webster *v.* People, 14 Ill. 365.

Indiana.— Indianapolis *v.* Fairchild, 1 Ind. 315; Greensburg *v.* Cleveland, etc., R. Co., 23 Ind. App. 141, 55 N. E. 46.

Maryland.— State *v.* Mace, 5 Md. 337.

Massachusetts.— Roberge *v.* Burnham, 124 Mass. 277.

Missouri.— Glenwood *v.* Roberts, 59 Mo. App. 167.

Nebraska.— Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848.

New Hampshire.— Hitchcock *v.* Munger, 15 N. H. 97; Dow *v.* Norris, 4 N. H. 16, 17 Am. Dec. 400.

New Jersey.— Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771.

Ohio.— State *v.* Chandler, 8 Ohio Dec. (Reprint) 322, 7 Cinc. L. Bul. 97.

Virginia.— Wells *v.* Com., 107 Va. 834, 57 S. E. 588.

Wisconsin.— State *v.* Zillman, 121 Wis. 472, 98 N. W. 543; State *v.* Grove, 77 Wis. 448, 46 N. W. 532; Platteville *v.* Bell, 43 Wis. 488; State *v.* Hayden, 32 Wis. 663.

Wyoming.— Fein *v.* U. S., 1 Wyo. 246.

United States.— Jacob *v.* U. S., 13 Fed. Case. No. 7,157, 1 Brock. 520; Stearns *v.* U. S., 22 Fed. Cas. No. 13,341, 2 Paine 300.

England.—Atcheson *v.* Everitt, Cowp. 382; Wilson *v.* Rastall, 4 T. R. 753, 2 Rev. Rep. 515.

See 39 Cent. Dig. tit. "Penalties," § 13. See also Municipal Corporations, 28 Cyc. 781.

Although in the name of the state, prosecutions will be deemed civil actions, if the form of action is civil. People *v.* Hoffman, 3 Mich. 248; Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848.

Nature of qui tam action.—A *qui tam* action for a statutory penalty is a civil proceeding (Canfield *v.* Mitchell, 43 Conn. 169; State *v.* Hannibal, etc., R. Co., 30 Mo. App. 494; Brophy *v.* Perth Amboy, 44 N. J. L. 217 [*reversing* 43 N. J. L. 589]; Waters *v.* Day, 10 Vt. 487); while an information *qui tam* is criminal (Canfield *v.* Mitchell, 43 Conn. 169; State *v.* Hannibal, etc., R. Co., 30 Mo. App. 494).

71. Mevay *v.* Edmiston, 1 Rawle (Pa.) 457; Com. *v.* Bennett, 16 Serg. & R. (Pa.) 243.

72. Ellmore *v.* Hoffman, 2 Ashm. (Pa.) 159. *Contra*, Brophy *v.* Perth Amboy, 44 N. J. L. 217 [*reversing* 43 N. J. L. 589], where this distinction argued for was not allowed. See also Municipal Corporations, 28 Cyc. 781.

In Wisconsin, in order to prevent the bringing of a civil action to collect a penalty, forfeiture, or fine, the act or omission which is punished by such forfeiture, penalty, or fine must also be punishable in the discretion of the court by imprisonment without the imposition of the forfeiture, penalty, or fine, or by such forfeiture, penalty, or fine, and such imprisonment, in such discretion, or such offense must be specially declared by law to be a misdemeanor, either by the act creating the offense or by some other statute of the state. State *v.* Grove, 77 Wis. 448, 46 N. W. 532; Platteville *v.* Bell, 43 Wis. 488; Boscobel *v.* Bugbee, 41 Wis. 59; State *v.* Hayden, 32 Wis. 663. See also Municipal Corporations, 28 Cyc. 784 note 89.

73. Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463.

In Canada.— The dominion parliament may legislate as to the mode of recovery and application of penalties imposed by its authority (Can. Rev. St. (1906) c. 146, §§ 1035–1043), and limit the time for proceedings for recovery thereof (Can. Rev. St. (1906) c. 146, §§ 1140–1142, 1150). So provincial parliaments may limit the time for bringing actions for penalties (Ont. Rev. St. (1897) c. 72, § 1 (g); 1 Edw. VII, c. 12, § 9; 4 Edw. VII, c. 10, § 20; Thomson *v.* Clanmorris, [1900] 1 Ch. 718, 69 L. J. Ch. 337, 82 L. T. Rep. N. S. 277, 8 Manson 51, 48 Wkly. Rep. 488; Peterborough *v.* Edwards, 31 U. C. C. P. 231), and regulate the procedure for recovery and provide for the application thereof when recovered (7 Edw. VII, c. 26 (Ont.)).

74. *Illinois.*— Race *v.* Oldridge, 90 Ill. 250, 32 Am. Rep. 27; Confrey *v.* Stark, 73 Ill. 187.

North Carolina.— State *v.* Snuggs, 85 N. C. 541; State *v.* Loftin, 19 N. C. 31.

South Carolina.— State *v.* Meyer, 1 Speers 305; State *v.* Cole, 2 McCord 117; State *v.*

Where, however, a statute creates an offense, and, in a different clause, gives an action for the penalty,[75] or where the statute covers only part of a general subject, and gives additional remedies by way of penalties, in a particular case for the enforcement of a common-law right,[76] such additional remedy is not exclusive, and the common-law remedy still exists.

b. When Not Prescribed by Statute — (i) *Action or Information of Debt.* Where a penalty is given by statute, and there is no specified mode of recovery prescribed, an action of debt will lie.[77] Where the government sues for a

Helfrid, 2 Nott & M. 233, 10 Am. Dec. 591; Ward *v.* Tyler, 1 Nott & M. 22.

Tennessee.— Moore *v.* State, 9 Yerg. 353.

United States.— U. S. *v.* Laescki, 29 Fed. 699; U. S. *v.* Howard, 17 Fed. 638, 9 Sawy. 155; U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* Ellis, 25 Fed. Cas. No. 15,046, 1 Cranch C. C. 125; U. S. *v.* Gadsby, 25 Fed. Cas. No. 15,180, 1 Cranch C. C. 55.

England.— Rex *v.* Boyall, 2 Burr. 832; Rex *v.* Robinson, 2 Burr. 799, 2 Ld. Ken. 513.

See 39 Cent. Dig. tit. "Penalties," § 13.

In Canada an act authorizing an action for a penalty to be brought in a specified court was held to be permissive and not exclusive of the jurisdiction of other courts. St.-Denis *v.* Benoit, 15 Quebec K. B. 278.

In England when a statute authorized recovery of a penalty by distress, it was held not to exclude the right to recover it by action. Shepherd *v.* Hills, 11 Exch. 55, 25 L. J. Exch. 26.

When other remedy provided indictment will not lie.— Where an act which was not an indictable offense at common law is prohibited by statute, and a penalty imposed, enforcement of the penalty must be had in the manner prescribed by the statute, and an indictment will not lie. Carle *v.* People, 12 Ill. 285; Journey *v.* State, 1 Mo. 428; State *v.* Maze, 6 Humphr. (Tenn.) 17; U. S. *v.* Kennedy, 26 Fed. Cas. No. 15,523, 1 Cranch C. C. 312; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,523; Rex *v.* Hays, 12 Can. Cr. Cas. 423, 6 Can. R. Cas. 480, 14 Ont. L. Rep. 201.

75. Moore *v.* State, 9 Yerg. (Tenn.) 353; Phillips *v.* State, 19 Tex. 158.

76. Gibbes *v.* Beaufort, 20 S. C. 213.

77. *Alabama.*— Southern Car, etc., Co. *v.* Calhoun County, 141 Ala. 250, 37 So. 425; McKenzie *v.* Gibson, 73 Ala. 204; Lewis *v.* Stein, 16 Ala. 214, 50 Am. Dec. 177; Blackburn *v.* Baker, 7 Port. 284.

Connecticut.— Drakesly *v.* Roots, 2 Root 138.

Illinois.— Vaughan *v.* Thompson, 15 Ill. 39; Carle *v.* People, 12 Ill. 285; Robley *v.* Culwell, 69 Ill. App. 272; Durbin *v.* People, 54 Ill. App. 101.

Kentucky.— Portland Dry Dock, etc., Co. *v.* Portland, 12 B. Mon. 77.

Maine.— Rockland *v.* Farnsworth, 87 Me. 473, 32 Atl. 1012.

Maryland.— Ordway *v.* Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

Massachusetts.—Reed *v.* Davis, 8 Pick. 514.

Mississippi.— Mobile, etc., R. Co. *v.* State, 51 Miss. 137; Elder *v.* Hilzheim, 35 Miss. 231.

New Hampshire.— Craig *v.* Gerrish, 58 N. H. 513; Janvrin *v.* Scammon, 29 N. H. 280 (holding that debt and not trespass is the proper form of action on a penal statute); Morrison *v.* Bedell, 22 N. H. 234.

New Jersey.— Crane *v.* ——, 1 N. J. L. 53; Cato *v.* Gill, 1 N. J. L. 11.

New York.— McConn *v.* New York Cent., etc., R. Co., 7 Lans. 75 [*affirmed* in 50 N. Y. 176].

Ohio.— Rockwell *v.* State, 11 Ohio 130.

Oklahoma.— *In re* Seagraves, 4 Okla. 422, 48 Pac. 272.

Pennsylvania.—Com. *v.* Davenger, 10 Phila. 478.

South Carolina.—State *v.* Mathews, 2 Brev. 82.

Tennessee.— Wood *v.* Grand Junction, 5 Heisk. 440; Kelly *v.* Davis, 1 Head 71.

Virginia.— Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

West Virginia.— Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800.

Wyoming.— Fein *v.* U. S., 1 Wyo. 246.

United States.—Stockwell *v.* U. S., 13 Wall. 531, 20 L. ed. 491; Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520; The James D. Parker, 13 Fed. Cas. No. 7,193; Parsons *v.* Hunter, 18 Fed. Cas. No. 10,778, 2 Sumn. 419; Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284; U. S. *v.* Allen, 24 Fed. Cas. No. 14,431, 4 Day (Conn.) 474; U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277; U. S. *v.* The C. B. Church, 25 Fed. Cas. No. 14,762, 1 Woods 275; U. S. *v.* Willetts, 28 Fed. Cas. No. 16,999, 5 Ben. 220.

England.— College of Physicians *v.* Salmon, 1 Ld. Raym. 680.

Canada.— Jones *v.* Chace, Draper (U. C.) 322; Church *v.* Richards, 6 U. C. Q. B. 562.

See 39 Cent. Dig. tit. "Penalties," § 15. See also Debt, Action on, 13 Cyc. 402.

Debt common-law action.— An action of debt for a statutory penalty is a common-law, and not a statutory, action. U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call (Va.) 245.

Debt included in "bill."—Where a statute gives a penalty to be recovered by "bill, plaint, or information," the penalty may be recovered by action of debt. Sims *v.* Alderson, 8 Leigh (Va.) 479.

Debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty, and is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise, which the law annexes to the liability. Drakesly *v.* Roots, 2 Root (Conn.) 138; McConn *v.* New York Cent., etc., R. Co., 7 Lans. (N. Y.) 75 [*affirmed* in 50 N. Y.

penalty in whole or in part, recovery may be by an action or information of debt.[78]

(II) *INDICTMENT.*[79] Where a statute prohibits an act to be done nnder a certain penalty, although no mention is made of indictment, the party offending may be indicted and fined for the amount of the penalty.[80] So where a statute imposing a penalty provides that it shall be recovered by "bill, plaint, or information,"[81] or "by any appropriate form of proceeding,"[82] an indictment will lie.

(III) *QUI TAM ACTIONS.* Where a penalty imposed is made recoverable, one half to the use of the informer, the remedy by *qui tam* action is exclusive,[83] unless it is manifest from the whole tenor of the statute that the right to sue by an informer is only a permissive and not an exclusive remedy.[84]

3. CONDITIONS PRECEDENT.[85] A previous conviction on an indictment for violation of a statute is not necessary to sustain a *qui tam* action or action of debt for a penalty.[86]

176]; Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

Under Mass. Laws (1852), c. 312, § 1, actions of tort are expressly prescribed as the mode of proceeding for recovering of penalties, and they therefore take the place of actions of debt. Levy *v.* Gowdy, 2 Allen 320; Com. *v.* Connecticut River R. Co., 15 Gray 447. See also U. S. *v.* Elliot, 25 Fed. Cas. No. 15,043.

78. Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491; Adams *v.* Woods, 2 Cranch (U. S.) 336, 2 L. ed. 297; U. S. *v.* Grant, 55 Fed. 414; Parsons *v.* Hunter, 18 Fed. Cas. No. 10,778, 2 Sumn. 419; U. S. *v.* Allen, 24 Fed. Cas. No. 14,431, 4 Day (Conn.) 474; Walsh *v.* U. S., 29 Fed. Cas. No. 17,116, 3 Woodb. & M. 341.

79. Indictment generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

80. *Massachusetts.*— Colburn *v.* Swett, 1 Metc. 232, holding that since the passing of St. (1837) c. 99, and the repeal of St. (1833) c. 151, § 4, the only mode of enforcing the penalties imposed by those statutes is by indictment or suit in the name of the commonwealth.

Minnesota.— State *v.* Horgan, 55 Minn. 183, 56 N. W. 688.

Missouri.— State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130.

South Carolina.— State *v.* Meyer, 1 Speers 305.

United States.— U. S. *v.* Craft, 43 Fed. 374; U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* Ahbott, 24 Fed. Cas. No. 14,416; U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277.

See 39 Cent. Dig. tit. "Penalties," § 15.

Compare State *v.* Williams, 7 Rob. (La.) 252; *In re* Seagraves, 4 Okla. 422, 48 Pac. 272; Fein *v.* U. S., 1 Wyo. 246; Rex *v.* Malland, Str. 828.

In California it is held that where a statute makes a certain act a misdemeanor and imposes a penalty, the amount of which is uncertain, without providing a mode for enforcing the same, the only remedy is by indictment, and an action of debt will not lie. People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331.

When no person is named to take the penalty, a forfeiture prescribed by statute for an offense created by statute is properly recovered by indictment. State *v.* Waterhouse, 71 N. H. 488, 53 Atl. 304; State *v.* McConnell, 70 N. H. 158, 46 Atl. 458; State *v.* Tappan, 15 N. H. 91; Hatch *v.* Robinson, 26 Vt. 737.

Recovery provided by "suit."— An indictment will lie to enforce a penalty, although the statute provides that it shall be recovered only in a "suit." Snowden *v.* State, 69 Md. 203, 14 Atl. 528. See also St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806.

81. State *v.* Helfrid, 2 Nott & M. (S. C.) 233, 10 Am. Dec. 591. *Contra,* State *v.* Corwin, 4 Mo. 609.

82. U. S. *v.* Craft, 43 Fed. 374; U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* Abbott, 24 Fed. Cas. No. 14,416.

83. State *v.* Fillyaw, 3 Ala. 735; U. S. *v.* Laescki, 29 Fed. 699. See also Dickinson *v.* Potter, 4 Day (Conn.) 340.

84. U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277.

85. One month's notice of action to be given to a public officer is not necessary in the case of an action for a penalty unless specially required by statute; C. P. Q. art. 88, applies only to actions for damages. Even in an action for damages this notice is not necessary where it is alleged that defendant acted in bad faith. Boulay *v.* Saucier, 7 Quebec Pr. 344.

86. *Alabama.*— Reagh *v.* Spann, 3 Stew. 100.

Georgia.— Payne *v.* Coursey, 20 Ga. 585.

New York.— People *v.* Snyder, 90 N. Y. App. Div. 422, 86 N. Y. Suppl. 415; People *v.* Waterbury, 44 Hun 493.

Pennsylvania.—Agnew *v.* McElhare, 18 Pa. St. 484; Garman *v.* Gamble, 10 Watts 382.

Tennessee.—Meaher *v.* Chattanooga, 1 Head 74.

See 39 Cent. Dig. tit. "Penalties," § 18.

When conviction condition precedent.— La. Rev. St. § 3784, provides for the punishment by fine, etc., of the state treasurer for refusing to pay warrants in certain cases upon conviction thereof, etc. It was held to mean conviction in a regular criminal proceeding,

B. Jurisdiction, Parties, and Process — 1. Jurisdiction[87] — a. In General. Jurisdiction of particular courts in actions to recover statutory penalties is usually a matter of express statutory provision.[88] Where the statute specially prescribes the court in which the action shall be brought, no other court has jurisdiction.[89] If no particular mode of recovery is prescribed, the proceeding must be in the superior court,[90] and no inferior court of jurisdiction can take cognizance of such an action unless the jurisdiction is given to it in express terms.[91]

b. Penalties Incurred, Under Laws of Foreign State. International law prohibits the courts of one country from executing the penal laws of another or enforcing penalties recoverable in favor of foreign states.[92] So also state courts have no jurisdiction of suits arising under the laws of the United States,[93] and such jurisdiction cannot be conferred upon them by act of congress.[94] Nor will the courts of one state enforce a penalty incurred under the statutes of another state.[95]

2. Parties Plaintiff[96] — a. In General. Under the English law where a pen-

and that such conviction is a condition precedent to recovery of the penalty. Tissot *v.* Dubuclet, 33 La. Ann. 703.

87. Concurrent jurisdiction of: Courts of same state see Courts, 11 Cyc. 985 note 7. State court with federal court see Courts, 11 Cyc. 1000 note 2. See *supra*, note 74.

Disqualification of judge because of interest see Judges, 23 Cyc. 578.

Equity jurisdiction to enforce penalty see Equity, 16 Cyc. 75.

Jurisdiction of: State court to enforce penalty against national bank for taking usury see Banks and Banking, 5 Cyc. 597. United States circuit court see Courts, 11 Cyc. 950 note 92. United States district court of action for penalty see Courts, 11 Cyc. 952 note 22.

Jurisdiction of admiralty court see Admiralty, 1 Cyc. 836.

88. Woolley *v.* Bell, 69 N. J. L. 581, 55 Atl. 66; Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771; New York *v.* Decker, 12 Daly (N. Y.) 64, 65 How. Pr. 472; Hill County *v.* Atchison, 19 Tex. Civ. App. 664, 49 S. W. 141.

County courts.— Home Ins. Co. *v.* Com., 5 Bush (Ky.) 68; Colgate *v.* Hill, 20 Vt. 56.

Justices' courts.— Jurisdiction of justices' courts see Justices of the Peace, 24 Cyc. 458. The fact that penalties to a certain amount may be recovered before a justice does not oust the court of common pleas of jurisdiction of all matters below that sum. Rochester *v.* Roberts, 29 N. H. 360. *Compare* Stromburg *v.* Earick, 6 B. Mon. (Ky.) 578.

Police court.— In Massachusetts a police court has jurisdiction of a civil action to recover a penalty given by statute, one half to the town, and the other half to plaintiff. Hanscomb *v.* Russell, 11 Gray (Mass.) 373. See also Com. *v.* Connecticut River R. Co., 15 Gray (Mass.) 447.

89. Smith *v.* Omnibus R. Co., 36 Cal. 281; Reed *v.* Omnibus R. Co., 33 Cal. 212. But see St.-Denis *v.* Benoit, 15 Quebec K. B. 278.

90. Anderson *v.* Fowler, 1 Hill (S. C.) 226.

Under a provision that a penalty may be "sued for" in the name of the state, suit is properly brought in a court having jurisdiction of civil causes only. Com. *v.* Sherman, 85 Ky. 686, 4 S. W. 790, 9 Ky. L. Rep. 218.

91. Bowers *v.* Green, 2 Ill. 42; Anderson *v.* Fowler, 1 Hill (S. C.) 226.

92. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239; Huntington *v.* Attrill, [1893] A. C. 150, 57 J. P. 404, 62 L. J. P. C. 44, 68 L. T. Rep. N. S. 326, 41 Wkly. Rep. 575, in which case, however, the action was held to be maintainable because the foreign statute under which plaintiff's claim arose was remedial and not merely penal.

93. *Connecticut.*— Davison *v.* Champlin, 7 Conn. 244; Ely *v.* Peck, 7 Conn. 239.

Kentucky.— Haney *v.* Sharp, 1 Dana 442.

Massachusetts.—Ward *v.* Jenkins, 10 Metc. 583.

New Hampshire.— State *v.* Pike, 15 N. H. 83.

New York.— Delafield *v.* Illinois, 2 Hill 159; U. S. *v.* Lathrop, 17 Johns. 4.

Virginia.— Jackson *v.* Rose, 2 Va. Cas. 34.

The want of jurisdiction in such case may be taken advantage of by a motion in arrest. Davison *v.* Champlin, 7 Conn. 244.

94. Davison *v.* Champlin, 7 Conn. 244; Ely *v.* Peck, 7 Conn. 239; Ward *v.* Jenkins, 10 Metc. (Mass.) 583; State *v.* Pike, 15 N. H. 83; U. S. *v.* Lathrop, 17 Johns. (N. Y.) 4.

95. *Connecticut.*— Davison *v.* Champlin, 7 Conn. 244.

Illinois.— Missouri River Tel. Co. *v.* Sioux City First Nat. Bank, 74 Ill. 217; Sherman *v.* Gassett, 9 Ill. 521.

Maryland.— Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204.

New York.— Western Transp., etc., Co. *v.* Kilderhouse, 87 N. Y. 430; Bird *v.* Hayden, 1 Rob. 383; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467.

Ohio.— Indiana *v.* John, 5 Ohio 217.

South Carolina.— Thornton *v.* Dean, 19 S. C. 583, 45 Am. Rep. 796.

South Dakota.— Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553.

Wisconsin.— Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323.

See 39 Cent. Dig. tit. "Penalties," § 19.

96. Persons entitled to enforce see *supra*, I, F.

alty is created, and no particular person is specified to whom it shall be paid, it can only be sued for by the sovereign.[97] In such circumstances in this country the prosecution would be by the state.[98] Where the whole penalty goes to a city or borough, the corporate name of such city or borough should be used as plaintiff.[99] A private person cannot sue in his own name for a penalty unless the same is given to him as the injured party,[1] or any individual is expressly authorized to sue in his own name.[2] Where a penalty is given to any person who will sue for the same, the action is properly brought in the name of such person.[3] Under such a statute a corporation cannot sue.[4] But where power is given to a corporation *eo nomine* to sue for the purpose of recovering penalties for its own use, there is no legal objection to its suing.[5] So if there be an appropriation of a penalty for the use of a corporation, distinctly made known by the statute, it would appear conformable to the rules of law that it might claim it directly.[6] An infant cannot sue for a penalty by his next friend.[6a]

b. Informers[7] — (1) *In General.* As a general rule a common informer cannot maintain an action for a penalty in his own name unless power is given to him for that purpose by statute.[8] No particular language is necessary to confer the

Right of infant to sue see INFANTS, 22 Cyc. 629.

97. Davis *v.* Edmonson, 3 B. & P. 382; Barbers' Assoc. of Quebec *v.* Blanchard, 21 Quebec Super. Ct. 201. See also Bradlaugh *v.* Clarke, 8 App. Cas. 354, 52 L. J. Q. B. 505, 47 J. P. 405, 48 L. T. Rep. N. S. 681. But see Shrigley *v.* Taylor, 4 Ont. 396.

98. *Illinois.*— People *v.* Young, 72 Ill. 411.
Maine.— Wiscasset *v.* Trundy, 12 Me. 204.
Massachusetts.— Colburn *v.* Swett, 1 Metc. 232.
Missouri.— State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130.
North Carolina.— Fagan *v.* Armistead, 33 N. C. 433.
Ohio.— Hilton *v.* Morse, 2 Ohio Dec. (Reprint) 292, 2 West. L. Month. 316.
United States.— Matthews *v.* Offley, 16 Fed. Cas. No. 9,290, 3 Sumn. 115.
See 39 Cent. Dig. tit. "Penalties," § 20.
But see People *v.* Belknap, 58 Hun (N. Y.) 241, 243, 12 N. Y. Suppl. 143 (where it is said that the state has no capacity to sue for penalties except as authorized by law); State *v.* Messner, 9 N. D. 186, 82 N. W. 737.

99. Dexter *v.* Blackden, 93 Me. 473, 45 Atl. 525; Wiscasset *v.* Trundy, 12 Me. 204; Brooklyn *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 462, 61 N. Y. Suppl. 33; Com. *v.* Davenger, 10 Phila. (Pa.) 478; Kensington *v.* Glenat, 1 Phila. (Pa.) 251.
To recover a penalty given to a town treasury, action should be brought in the name of the treasury and not in the name of one holding the office of treasurer. Everts *v.* Allen, 1 D. Chipm. (Vt.) 116.

1. Lewis *v.* Stein, 16 Ala. 214, 50 Am. Dec. 177; Thompson *v.* Howe, 46 Barb. (N. Y.) 287; Hilton *v.* Morse, 2 Ohio Dec. (Reprint) 292, 2 West. L. Month. 316.
The remedy for a secret assault under the statute is by a *qui tam* prosecution, and not by a complaint in the name of the party injured alone. Dickinson *v.* Potter, 4 Day (Conn.) 340.

2. Hilton *v.* Morse, 2 Ohio Dec. (Reprint) 292, 2 West. L. Month. 316.

3. See *infra*, II, B, 2, b.

4. Ancient City Sportsman's Club *v.* Miller, 7 Lans. (N. Y.) 412; St. Leonard's Parish *v.* Franklin, 3 C. P. D. 377, 47 L. J. C. P. 727, 39 L. T. Rep. N. S. 122, 26 Wkly. Rep. 882. See also Wiscasset *v.* Trundy, 12 Me. 204; Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151, 4 N. Y. Leg. Obs. 215, 294.
In some jurisdictions, however, the word "person" in a statute is to be construed to include a corporation. See Can. Rev. St. (1906) c. 1, § 34 (20); 7 Edw. VII, c. 2, § 7 (13).

5. See Wiscasset *v.* Trundy, 12 Me. 204; Rex *v.* Malland, Str. 828.

6. See Wiscasset *v.* Trundy, 12 Me. 204.

6a. Garrett *v.* Roberts, 10 Ont. App. 650.

7. See also *supra*, I, F, 2.

8. *Georgia.*— O'Kelly *v.* Athens Mfg. Co., 36 Ga. 51.
Kentucky.— See Yocum *v.* Daniel, 1 J. J. Marsh. 14.
Maine.— Wiscasset *v.* Trundy, 12 Me. 204.
Massachusetts.— Smith *v.* Look, 108 Mass. 139; Colburn *v.* Swett, 1 Metc. 232.
Nebraska.— Omaha, etc., R. Co. *v.* Hale, 45 Nebr. 418, 63 N. W. 849, 50 Am. St. Rep. 554.
New York.— Seward *v.* Beach, 29 Barb. 239.
North Carolina.— State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041; McRae *v.* Keller, 32 N. C. 398.
Ohio.— Gause *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 369, 2 Clev. L. Rep. 44.
Pennsylvania.— Com. *v.* Bard, 10 Lanc. Bar 75; Com. *v.* Bashore, 1 Leg. Rec. 255.
Vermont.— Drew *v.* Hilliker, 56 Vt. 641; Hubbell *v.* Gale, 3 Vt. 266.
Wisconsin.— Lynch *v.* The Economy, 27 Wis. 69.
England.—Bradlaugh *v.* Clarke, 8 App. Cas. 354, 47 J. P. 405, 52 L. J. Q. B. 505, 48 L. T. Rep. N. S. 681, 31 Wkly. Rep. 677; Davis *v.* Edmonson, 3 B. & P. 382; Fleming *v.* Bailey, 5 East 313, 1 Smith K. B. 504; Barnard *v.* Gostling, 2 East 569.
See 39 Cent. Dig. tit. "Penalties," § 21.

right to sue. It is enough if it be seen that the intent was to confer the right In many cases the formula "who may sue,"[9] "who shall prosecute,"[10] or "one moiety to the prosecutor"[11] has been held sufficient to evidence this intent; but the mere fact that the statute gives part of the penalty to the informer has been held insufficient for this purpose.[12] Some cases hold, however, that such fact is sufficient to confer upon him a right to sue in his own name for himself as well as for the state, town, or borough, as the case may be.[13]

(II) *Right to Join.* A penal action cannot be maintained by several persons jointly, as common informers,[14] unless the statute imposing the penalty expressly authorizes such a proceeding.[15]

(III) *Control of Proceedings:* A strictly *qui tam* action is under the exclusive direction and control of plaintiff who brings it;[16] but it is with this qualification that if discontinued or compounded without leave of court,[17] the cause will stand as if no action had been brought, and will not bar another suit for the same penalty.[18] Where the action is brought by a public officer under a statute making it his duty to sue for and recover certain penalties, he is entitled to control the action, and may settle or discontinue it without leave of court.[19]

When only a moiety of a penalty goes to an informer he cannot sue for it in his own name, he must sue *qui tam*, although it is otherwise if he is entitled to the whole penalty. See Dexter *v.* Blackden, 93 Me. 473, 45 Atl. 525.

9. Carter *v.* Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14; State *v.* Caraleigh Phosphate, etc., Works, 119 N. C. 120, 25 S. E. 795; Burrell *v.* Hughes, 116 N. C. 430, 21 S. E. 971; Middleton *v.* Wilmington, etc., R. Co., 95 N. C. 167; Norman *v.* Dunbar, 53 N. C. 317; McRea *v.* Keller, 32 N. C. 398. See also Megargell *v.* Hazleton Coal Co., 8 Watts & S. (Pa.) 342.

10. Nye *v.* Lamphere, 2 Gray (Mass.) 295; Hubbell *v.* Gale, 3 Vt. 266; Lynch *v.* The Economy, 27 Wis. 69.

11. Phillips *v.* Bevans, 23 N. J. L. 373; Drew *v.* Hilliker, 56 Vt. 641. See also Hibbard *v.* Parmenter, etc., Fertilizer Co., 70 N. H. 156, 46 Atl. 683.

12. Smith *v.* Look, 108 Mass. 139.

13. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452; McNair *v.* People, 89 Ill. 441; Toledo, etc., R. Co. *v.* Foster, 43 Ill. 480; Chicago, etc., R. Co. *v.* Howard, 38 Ill. 414; Higby *v.* People, 5 Ill. 165; Ryder *v.* Hulscher, 40 Ill. App. 77; Vandeventer *v.* Van Court, 2 N. J. L. 168; Megargell *v.* Hazleton Coal Co., 8 Watts & S. (Pa.) 342; Com. *v.* Davenger, 10 Phila. (Pa.) 478; Winne *v.* Snow, 19 Fed. 507.

14. Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Hill *v.* Davis, 4 Mass. 137; Fowler *v.* Tuttle, 24 N. H. 9; Com. *v.* Winchester, 3 Pa. L. J. 34, 3 Pa. L. J. Rep. 34, 4 Pa. L. J. 371. See also Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151, 4 N. Y. Leg. Obs. 215, 294. *Contra*, Carter *v.* Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14; Myers *v.* Baker, 3 H. & N. 802, 28 L. J. Exch. 90, 7 Wkly. Rep. 66; Chaput *v.* Robert, 14 Ont. App. 354.

15. Com. *v.* Winchester, 3 Pa. L. J. 34, 3 Pa. L. J. Rep. 34, 4 Pa. L. J. 371.

16. Lynch *v.* The Economy, 27 Wis. 69; U. S. *v.* Griswold, 30 Fed. 762 [*affirming* 24 Fed. 361]. See also Wheeler *v.* Goulding, 13 Gray (Mass.) 539, holding, however, that in an action to recover a penalty under a statute which provides that one half shall be for the use of the city and the other half for the use of the person furnishing the necessary evidence in the case, a nonsuit may be entered by agreement between plaintiff and defendant against the objection of the person who furnished the evidence.

An action by the United States under the confiscation acts may be discontinued by it without the consent of the informer. Confiscation Acts, 7 Wall. (U. S.) 454, 19 L. ed. 196.

17. Burley *v.* Burley, 6 N. H. 200; Minton *v.* Woodworth, 11 Johns. (N. Y.) 474; Bradway *v.* Le Worthy, 9 Johns. (N. Y.) 251; Bleeker *v.* Meyers, 6 U. C. Q. B. 134.

Discontinuing is not compounding or compromising a popular action, within the "act to redress disorders by common informers"; nor is payment of costs by defendant a composition. Haskins *v.* Newcomb, 2 Johns. (N. Y.) 405. Legislature may punish compounding of offense. Reg. *v.* Boardman, 30 U. C. Q. B. 553.

Informer may release own share.— An informer may release his share of the penalty but not the share belonging to the state. Minton *v.* Woodworth, 11 Johns. (N. Y.) 474; Wardens of Poor *v.* Cope, 24 N. C. 44.

It is within the discretion of the court to grant leave to compound. Bradway *v.* Le Worthy, 9 Johns. (N. Y.) 251; Howard *v.* Sowerby, 1 Taunt. 103; Howell *v.* Morris, 1 Wils. C. P. 79; May *v.* Dettrick, 5 U. C. Q. B. O. S. 77.

Defendant must show cause.—A court will not grant leave to compound after verdict, unless defendant can show circumstances which entitle him to the indulgence. Crowder *v.* Wagstaff, 1 B. & P. 18.

18. Wheeler *v.* Goulding, 13 Gray (Mass.) 539; Raynham *v.* Rounseville, 9 Pick. (Mass.) 44.

19. Bellinger *v.* Birge, 54 Hun (N. Y.) 511, 7 N. Y. Suppl. 695, 8 N. Y. Suppl. 174; Olp *v.* Leddick, 14 N. Y. Suppl. 41.

When, however, the action is prosecuted by others in the name of such public officer, the latter cannot control the action.[20]

3. PARTIES DEFENDANT[21] — a. In General. Where a penalty is imposed on an offense which several may and do jointly commit, the wrong-doers may be sued either jointly,[22] or severally,[23] but plaintiff can have but one satisfaction. Where, however, a statute prescribes a separate penalty against each offender, several defendants cannot be joined in the same action.[24]

b. Misjoinder. In an action to recover a statutory penalty, misjoinder of defendants is not a ground of demurrer.[25]

c. Non-Joinder. Non-joinder of a party defendant, in an action of debt for a penalty, must be taken advantage of by plea in abatement.[26]

4. PROCESS — a. In General. Proceedings to collect a penalty imposed by statute or ordinance should be begun by summons, and not by warrant of arrest.[27] If, however, a defendant is sued by a warrant, instead of a summons, he must make his objection in the lower court, or it will be too late to take advantage of it on certiorari.[28] Statutory requirements in regard to service of process must

20. Record *v.* Messenger, 8 Hun (N. Y.) 283.

21. Persons liable see *supra*, I, G.

22. *Maine.*— Frost *v.* Rowse, 2 Me. 130.

Massachusetts.— Burnham *v.* Webster, 5 Mass. 266; Boutelle *v.* Nourse, 4 Mass. 431; Hill *v.* Davis, 4 Mass. 137.

New York.— People *v.* Girard, 73 Hun 457, 26 N. Y. Suppl. 272 [*affirmed* in 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595]; Palmer *v.* Conly, 4 Den. 374 [*affirmed* in 2 N. Y. 182]; Ingersoll *v.* Skinner, 1 Den. 540; Marsh *v.* Shute, 1 Den. 230; Warren *v.* Doolittle, 5 Cow. 678.

England.— Partridge *v.* Naylor, Cro. Eliz. 480, 78 Eng. Reprint 731; Hardyman *v.* Whitaker, 2 East 573 note; Barnard *v.* Gostling, 2 East 569; Rex *v.* Bleasdale, 4 T. R. 809.

Canada.— Drake *v.* Preston, 34 U. C. Q. B. 257.

See 39 Cent. Dig. tit. "Penalties," § 23.

Proof of joint liability not required.— Although debt for a statutory penalty is in form *ex contractu*, it is really an action founded on a tort, and proof of a joint liability of all defendants is not required, but judgment may be entered against one alone. Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 21 L. ed. 908.

23. Frost *v.* Rowse, 2 Me. 130; Burnham *v.* Webster, 5 Mass. 266; Boutelle *v.* Nourse, 4 Mass. 431; Hill *v.* Davis, 4 Mass. 137; Powers *v.* Spear, 3 N. H. 35.

24. Marsh *v.* Shute, 1 Den. (N. Y.) 230; Wilson *v.* Rogers, 8 Yerg. (Tenn.) 213; Slack *v.* Gibbs, 14 Vt. 357.

Where the offense is in its nature single, and cannot be severed, there the penalty shall be single, because, although several persons may join in committing it, it still constitutes but one offense. Rex *v.* Clarke, Cowp. 610.

Where the offense is in its nature several, and where every person concerned may be separately guilty of it, then each offender is separately liable to the penalty, because the crime of each is distinct from the offense of the others, and each is punishable for his own crime. Rex *v.* Clarke, Cowp. 610.

25. Chaput *v.* Robert, 14 Ont. App. 354. See also PLEADING, VI, F, 2, e, (II).

26. Powers *v.* Spear, 3 N. H. 35. But see Burnham *v.* Webster, 5 Mass. 266; Boutelle *v.* Nourse, 4 Mass. 431. See also PLEADING, VI, F, 2, e, (I).

27. Scranton *v.* Frothingham, 5 Pa. Dist. 639. *Compare* Clark *v.* Turner, 1 Root (Conn.) 200.

Form of summons see McCoun *v.* New York Cent., etc., R. Co., 7 Lans. (N. Y.) 75; Abbott *v.* New York, etc., R. Co., 12 Abb. Pr. N. S. (N. Y.) 465.

Writ held in debet and detinet.— In an action of debt on a penal statute a writ calling upon defendant to render to plaintiff a specified sum "due under an act of the General Assembly to him, and which from him he unjustly detains to his damage," etc., is substantially in the *debet* and *detinet*. Page *v.* Farmer, 6 N. C. 288.

The name of the informer should appear on the writ in a *qui tam* action for a penalty. Com. *v.* Evans, 29 Leg. Int. (Pa.) 133. See also Com. *v.* Gillingham, 1 Brewst. (Pa.) 396.

Objection to form of summons.— In an action to recover a statutory penalty, the proper way of objecting to the use of a summons "for relief," instead of a summons "on contract," is not by setting aside the summons or complaint, but by an application for relief after judgment, if the judgment obtained be one to which plaintiff is not entitled. Abbott *v.* New York Cent., etc., R. Co., 12 Abb. Pr. N. S. (N. Y.) 465.

Necessity of notice.—A *qui tam* prosecution is not a civil action for the purposes of notice. Leavensworth *v.* Tomlinson, 1 Root (Conn.) 436. After a *qui tam* information has been filed, no other notice need be given to defendant of its pendency than a copy of it, left with him, by an indifferent person, in conformity with an order of the court; and an appearance and answer to the information, without objection, is a waiver of any objection to want of seasonable notice. Merriam *v.* Langdon, 10 Conn. 460.

28. Dallas *v.* Hendry, 3 N. J. L. 973.

be strictly complied with.[29] The process need not conclude "*contra formam statuti*."[30]

b. Indorsements and References to Statutes — (i) *Necessity and Sufficiency.* In actions for the recovery of statutory penalties, it is usually required that a general reference to the statute shall be indorsed on the summons,[31] with such a description of the statute as will identify it with convenient certainty,[32] and also specifying the section, if the penalties are given in different sections for different acts or omissions.[33] And it is sometimes provided that the magistrate issuing the original process shall make a minute on the writ under his official signature of the date of his signing the same.[34]

29. Com. *v.* Turnpike Co., 1 Lack. Leg. N. (Pa.) 487. *Compare* Boulay *v.* Saucier, 7 Quebec Pr. 344.

30. Garlington *v.* Kennedy, Harp. (S. C.) 424; Kirby *v.* Rice, 8 Yerg. (Tenn.) 442.

31. Oliver *v.* Larzaleer, 5 N. J. L. 513; Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Perry *v.* Tynen, 22 Barb. (N. Y.) 137 (holding that a reference to the title of the statute which is not subdivided into articles is sufficient); Marselis *v.* Seaman, 21 Barb. (N. Y.) 319; New York *v.* Eisler, 2 N. Y. Civ. Proc. 125; Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

In New Jersey the name of the prosecutor as well as the title of the statute should be indorsed on the process. Miller *v.* Stoy, 5 N. J. L. 476; Hageman *v.* Van Doren, 6 N. J. L. J. 310.

N. Y. Code Civ. Proc. § 1897, providing that, in an action to recover a statutory penalty, a general reference to the statute must be indorsed on the summons, applies to all actions for penalties whether brought by a private person or the people. People *v.* O'Neil, 54 Hun 610, 8 N. Y. Suppl. 123. *Contra*, Townsend *v.* Hopkins, 9 N. Y. Civ. Proc. 257, holding that the statute applies only to actions by private persons.

Manner of indorsement.— This requirement must be literally complied with, and the reference indorsed upon, and not embodied in, the summons. Schoonmaker *v.* Brooks, 24 Hun (N. Y.) 553.

The object of a statute providing that, in actions for the recovery of a penalty, a reference to the statute shall be indorsed on the process issued, is to inform defendant of the nature and cause of the action against him (Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Cox *v.* New York Cent., etc., R. Co., 61 Barb. (N. Y.) 615; Perry *v.* Tynen, 22 Barb. (N. Y.) 137; Marselis *v.* Seaman, 21 Barb. (N. Y.) 319; Andrews *v.* Harrington, 19 Barb. (N. Y.) 343; People *v.* Bull, 42 N. Y. Super. Ct. 19; Burdick *v.* Erie R. Co., 92 N. Y. Suppl. 122; Young *v.* Gregg, 9 N. Y. Civ. Proc. 262; Townsend *v.* Hopkins, 9 N. Y. Civ. Proc. 257; Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230; Sawyer *v.* Schoonmaker, 8 How. Pr. (N. Y.) 198; Avery *v.* Slack, 17 Wend. (N. Y.) 85); and such object is fully met without the indorsement when the complaint is annexed to the summons and served with it, and contains the reference which should strictly be indorsed on the summons (Cox *v.* New York Cent., etc., R. Co., 61 Barb. (N. Y.) 615; People *v.* Bull, 42 N. Y. Super. Ct. 19; Burdick *v.* Erie R. Co., 92 N. Y. Suppl. 122; Thayer *v.* Lewis, 4 Den. (N. Y.) 269).

32. Hitchman *v.* Baxter, 34 Hun (N. Y.) 271 (holding that an indorsement referring to "the provisions of the several statutes" relating to the subject is insufficient); Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230 (holding that where the summons refers to the statute and section imposing the penalty, omitting to refer to an amendatory statute giving the officer, who is plaintiff, the right to sue, does not vitiate the proceedings.)

Such information as complaint would contain.— An indorsement is sufficient if it gives defendant such information as to the offense as would be given by the complaint if served. Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230.

It is not necessary that the statute or ordinance should be printed verbatim upon the summons; all that is required is such a reference as will enable the party served with the summons to determine for what offense he has been sued. New York *v.* Wood, 15 Daly (N. Y.) 341, 6 N. Y. Suppl. 657; New York *v.* Eisler, 2 N. Y. Civ. Proc. 125.

Particular indorsements held sufficient see Marselis *v.* Seaman, 21 Barb. (N. Y.) 319; Andrews *v.* Harrington, 19 Barb. (N. Y.) 343; Saratoga County Excise Com'rs *v.* Doherty, 16 How. Pr. (N. Y.) 46.

33. Young *v.* Gregg, 9 N. Y. Civ. Proc. 262.

34. Brighton *v.* Kelsey, 77 Vt. 258, 59 Atl. 833; Pollard *v.* Wilder, 16 Vt. 605 note; Dassance *v.* Gates, 13 Vt. 275; Bowen *v.* Fuller, 2 Tyler (Vt.) 85.

The minute is a substantive and a material requirement of the proceedings, and is not a part of the complaint. Brighton *v.* Kelsey, 77 Vt. 258, 59 Atl. 833; State *v.* Perkins, 58 Vt. 722, 5 Atl. 894.

Actions in which this indorsement not required.— A suit for a penalty or forfeiture given to the treasury of the United States. U. S. *v.* Banister, 70 Fed. 44. An action to recover a statutory penalty where the remedy is given to the party injured or aggrieved, or to such party and the state. Hall *v.* Adams, 1 Aik. (Vt.) 68. An action to recover a penalty for receiving a fraudulent conveyance of lands with intent to defraud plaintiff of his debt. Denton *v.* Crook, Brayt. (Vt.) 188.

(II) *Effect of Failure to Indorse.* In an action for a statutory penalty, failure to indorse a general reference to the statute is fatal on objection,[35] and the service gives the court no jurisdiction over defendant's person.[36] This defect may, however, be waived by defendant, and is waived by his general appearance without taking the objection, and in some jurisdictions would be amendable.[37]

C. Pleading and Evidence — 1. Declaration, Complaint, or Information — a. In General. In actions to recover penalties, it has been held, the pleadings are construed with the same strictness that indictments are.[38] The facts constituting the gravamen of the action should be clearly and distinctly stated,[39] in order that it may appear that the case is within the statute.[40]

b. Following Language of Statute. In an action on a penal statute it is sufficient to lay the offense in the words of the statute,[41] unless such language is

35. Hayes *v.* Storms, 64 N. J. L. 514, 45 Atl. 809; Hageman *v.* Van Doren, 6 N. J. L. J. 310.

36. Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Lassen *v.* Aronson, 21 N. Y. Suppl. 452, 29 Abb. N. Cas. 114; Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306; Scroter *v.* Harrington, 8 N. C. 192; U. S. *v.* Rose, 14 Fed. 681; Brown *v.* Pond, 5 Fed. 31.

Defect not amendable.— U. S. *v.* Rose, 14 Fed. 681; Brown *v.* Pond, 5 Fed. 31. But in England, Ontario, and some other jurisdictions proceedings in penal actions are amendable as in other actions. See the provisions in the English and Ontario Judicature Acts and Rules which relate to amendments.

37. Bissell *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385; Townsend *v.* Hopkins, 9 N. Y. Civ. Proc. 257; Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230; Brown *v.* Pond, 5 Fed. 31.

But an appearance merely for the purpose of insisting on the want of proper process, or an appearance followed by the taking of an objection, will not be a waiver of the defect. Brown *v.* Pond, 5 Fed. 31.

38. Prigmore *v.* Thompson, Minor (Ala.) 420; Levy *v.* Cohen, 19 N. Y. Suppl. 912; Harrington *v.* McFarland, 1 N. C. 476. *Compare*, however, Municipal Corporations, 28 Cyc. 797.

On information and belief.— Under Pub. Laws (1893), p. 48, § 36, giving justices of the peace jurisdiction of actions for penalties for violations of the game law, on receiving "proof by affidavit" of the violations, an affidavit charging a violation which was made on information and belief was not sufficient as a basis for such an action. Inglis *v.* Schreiner, 58 N. J. L. 120, 32 Atl. 131.

39. *Connecticut.*— Larabee *v.* Tracy, 1 Root 273.

Louisiana.— New Orleans *v.* Gordon, 12 La. Ann. 749.

Maine.— State *v.* Androscoggin R. Co., 76 Me. 411.

Michigan.— Howser *v.* Melcher, 40 Mich. 185; Benalleck *v.* People, 31 Mich. 200.

Missouri.— Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278.

New Hampshire.— Fairbanks *v.* Antrim, 2 N. H. 105.

New York.— Morrell *v.* Fuller, 7 Johns. 402.

Pennsylvania.— Manayunk *v.* Davis, 2 Pars. Eq. Cas. 289; Com. *v.* Fiegle, 2 Phila. 215.

Tennessee.— Greer *v.* Bumpass, Mart. & Y. 94.

See 39 Cent. Dig. tit. "Penalties," § 26. See also Municipal Corporations, 28 Cyc. 795 *et seq.*

If a penal statute gives no general form of declaring, plaintiff must state the special matter on which his cause of action arises. Bigelow *v.* Johnson, 13 Johns. (N. Y.) 428; Cole *v.* Smith, 4 Johns. (N. Y.) 193.

The preamble of a warrant is a part of the warrant; and where it sets forth the facts constituting the offense the warrant is proper in form. Harshaw *v.* Crow, 33 N. C. 240.

Non-payment of penalty.— In an action to recover a statutory penalty, the complaint need not aver non-payment of the penalty. Western Union Tel. Co. *v.* Young, 93 Ind. 118.

New Jersey.— In an action for a penalty, the state of demand should set out the facts on which the action is grounded, and not merely the act which gives the action. Van Dyke *v.* Speer, 3 N. J. L. 993.

40. *Alabama.*—Blackburn *v.* Baker, 7 Port. 284; Reagh *v.* Spann, 3 Stew. 100.

Illinois.— Pace *v.* Vaughan, 6 Ill. 30; People *v.* Mutual L. Ins. Co., 72 Ill. App. 569.

Maine.— State *v.* Androscoggin R. Co., 76 Me. 411.

New York.— Bayard *v.* Smith, 17 Wend. 88.

North Carolina.— Wright *v.* Wheeler, 30 N. C. 184.

Tennessee.— Greer *v.* Bumpass, Mart. & Y. 94.

Vermont.— Ellis *v.* Hull, 2 Aik. 41.

United States.— Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151.

See 39 Cent. Dig. tit. "Penalties," § 26.

Bringing case within amendment.—Where a penalty accrues before the statute prescribing it is amended, but the action is not brought until after the amendment, the pleading must show that plaintiff possesses all the qualifications imposed by the amendment. Barker *v.* Phelps, 39 Mo. App. 288.

41. *Arkansas.*— Kirkpatrick *v.* Stewart, 19 Ark. 695.

Illinois.— Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702.

Maine.— Berry *v.* Stinson, 23 Me. 140.

so indefinite, obscure, and uncertain that the statute fails to define what acts shall be deemed an offense.[42]

c. Particular Allegations — (I) *Precise Sum Claimed.* A declaration to recover a statutory penalty must demand a precise sum,[43] although the statute declares that the penalty shall be "not more than" the sum stated.[44] The demanding of one sum will not, however, prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.[45]

(II) *Appropriation of Penalty.* The declaration need not specify the uses to which the penalty inures,[46] or the person to whom the penalty is to go,[47] unless the statute requires it.[48]

(III) *Damages.* The declaration need not, and ought not, to conclude *ad damnum*, as plaintiff's right to the penalty does not accrue until the bringing of the action; and he cannot have sustained any damage by a previous detention of it.[49] A declaration so concluding is not, however, bad on demurrer,[50] and it has

Pennsylvania.— Duck *v.* Chief Burgess, 7 Watts 181.

Wisconsin.— State *v.* Zillman, 121 Wis. 472, 98 N. W. 543.

United States.— See Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520, where a declaration in debt for a penalty, describing the offense in the words of the statute, was held good after verdict.

England.— Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871; Wright *v.* Horton, Holt. N. P. 458, 3 E. C. L. 183, 1 Stark. 400, 2 E. C. L. 155, 17 Rev. Rep. 665; College of Physicians *v.* Salmon, 1 Ld. Raym. 680.

See 39 Cent. Dig. tit. "Penalties," § 26. See also Municipal Corporations, 28 Cyc. 799.

42. State *v.* Androscoggin R. Co., 76 Me. 411; Com. *v.* Bean, 14 Gray (Mass.) 52 (holding that where a city ordinance prohibited under a penalty letting cattle "stop to feed" on any highway, etc., an allegation that defendant suffered two cows to "stop and feed" on a certain highway named was insufficient, since the declaration should have shown that the cows were allowed to stop and graze and feed on the grass growing on the street); Com. *v.* Bean, 11 Cush. (Mass.) 414 (holding that where a statute imposed a fine upon any person who shall "maliciously or wantonly break the glass . . . in any building not his own," an allegation strictly following this language was insufficient, inasmuch as "glass in a building" means glass forming part of a building, and should be so averred); Duck *v.* Chief Burgess, 7 Watts (Pa.) 181; State *v.* Zillman, 121 Wis. 472, 98 N. W. 543.

43. Sexton *v.* Gallatin County School Com'rs, 19 Ill. 51; Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564; Russell *v.* Hamilton, 3 Ill. 56; Hamilton *v.* Wright, 2 Ill. 582; London *v.* Headen, 76 N. C. 72; Dowd *v.* Seawell, 14 N. C. 185; U. S. *v.* Elliot, 25 Fed. Cas. No. 15,043.

44. U. S. *v.* Elliot, 25 Fed. Cas. No. 15,043.

45. *Connecticut.*— Perrin *v.* Sikes, 1 Day 19.

New York.— Warren *v.* Doolittle, 5 Cow. 678; Ely *v.* Van Beuren, 3 Cai. 218, holding that in an action for a penalty, if only a portion of the penalty be demanded, it will be presumed after verdict that the residue was waived, and defendant cannot assign for error that less was recovered than might have been sued for.

North Carolina.— Dowd *v.* Seawell, 14 N. C. 185.

Pennsylvania.— Buckwalter *v.* U. S., 11 Serg. & R. 193; Philadelphia *v.* Harkins, 1 Phila. 518.

United States.— U. S. *v.* Colt, 25 Fed. Cas. No. 14,839, Pet. C. C. 145.

England.— Pemberton *v.* Shelton, Cro. Jac. 498, 79 Eng. Reprint 425.

46. Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Gall. 257, holding such allegation to be surplusage.

47. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814; State *v.* Willis, 78 Me. 70, 2 Atl. 848; State *v.* Smith, 64 Me. 423; State *v.* Cottle, 15 Me. 473. *Compare* State *v.* Johnson, 65 Me. 362, holding that where the penalty goes to the prosecutor or to some other person or persons, of whose existence and identity the court cannot take judicial notice, such an averment is necessary; but when the penalty goes to the town in which the offense is committed and the appropriation is made by a public statute, of which the court can take judicial notice, and the indictment gives the name of such town, no other or further averment is necessary. But see Com. *v.* Messenger, 4 Mass. 462, 465, where it is said: "An information resembles, not only an indictment in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must show the forfeiture and its appropriation, or, at least, the proportion given him by the statute." See also Martin *v.* Martin, 50 N. C. 346; Pie *v.* Westly, Hob. 345; Jones *v.* Chace, Draper (U. C.) 322; Bagley *v.* Curtis, 15 U. C. C. P. 366.

48. State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130.

49. Barkhamsted *v.* Parsons, 3 Conn. 1. But see Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355, holding that in an action on a statute to recover a penalty the damages to be inserted in the declaration are merely nominal.

50. Everts *v.* Allen, 1 D. Chipm. (Vt.) 116.

been held that the mistake of concluding *ad damnum* may be corrected by amendment even after error brought.[51]

(iv) *Negativing Exceptions.* Where there is an exception in the enacting clause of a penal statute, plaintiff suing under it must show that defendant is not within it; but if the exception is in a subsequent section, it must be pleaded in defense to avoid the penalty.[52]

d. Reference to or Recital of Statute — (i) *In General.* Under the old forms of pleading, a declaration, information, or indictment to recover a penalty for the violation of a statute must show by explicit reference what statute has been violated,[53] as by the words "against the form of the statute," [54] or equivalent

51. Galena, etc., R. Co. *v.* Appleby, 28 Ill. 283; 1 Chitt. Pl. 451.

52. *Illinois.*— Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

Maine.— Berry *v.* Stinson, 23 Me. 140.

New Jersey.— McGear *v.* Woodruff, 33 N. J. L. 213.

New York.— Hart *v.* Cleis, 8 Johns. 41; Teel *v.* Fonda, 4 Johns. 304; Sheldon *v.* Clark, 1 Johns. 513.

South Carolina.— Mills *v.* Kennedy, 1 Bailey 17.

Vermont.— Ellis *v.* Hull, 2 Aik. 41.

United States.— Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261.

England.—College of Physicians *v.* Salmon, 1 Ld. Raym. 680; Spieres *v.* Parker, 1 T. R. 141, 1 Rev. Rep. 165.

See 39 Cent. Dig. tit. "Penalties," § 26. See also Municipal Corporations, 28 Cyc. 801.

Compare Kansas City, etc., R. Co. *v.* Summers, 45 Ark. 295.

In a summary proceeding for a penalty, an exception in the statute, although not in the enacting clause, must be shown to be inapplicable in the case by proper averments. Crosson *v.* Rutherford, 66 N. J. L. 120, 48 Atl. 514; Jacobus *v.* Meskill, 56 N. J. L. 255, 28 Atl. 383; Doughty *v.* Conover, 42 N. J. L. 193.

53. *California.*— Chipman *v.* Emeric, 5 Cal. 239.

Illinois.— Camp *v.* Ganley, 6 Ill. App. 499.

Kentucky.— Bell *v.* Norris, 79 Ky. 48.

Massachusetts.— Peabody *v.* Hayt, 10 Mass. 36.

Michigan.— Howser *v.* Melcher, 40 Mich. 185; Benalleck *v.* People, 31 Mich. 200.

New Jersey.—Bryant *v.* Gleason, 72 N. J. L. 431, 60 Atl. 1110; Crawford *v.* New Jersey R., etc., Co., 28 N. J. L. 479.

New York.— People *v.* McCann, 67 N. Y. 506; Shaw *v.* Tobias, 3 N. Y. 188; Kee *v.* McSweeney, 15 Abb. N. Cas. 229, 66 How. Pr. 447; People *v.* Brooks, 4 Den. 469; Warren *v.* Doolittle, 5 Cow. 678; Collins *v.* Ragrew, 15 Johns. 5.

North Carolina.— Washington *v.* Frank, 46 N. C. 436; McKay *v.* Woodle, 28 N. C. 352; Duffy *v.* Averitt, 27 N. C. 455; Dowd *v.* Seawell, 14 N. C. 185; Worke *v.* Byers, 10 N. C. 228; Scroter *v.* Harrington, 8 N. C. 192.

North Dakota.— Sheets *v.* Prosser, (1907) 112 N. W. 72; Greenberg *v.* Union Nat. Bank, 5 N. D. 483, 67 N. W. 597.

South Carolina.— Cockfield *v.* Singletary, 15 Rich. 240.

South Dakota.— Kirby *v.* Western Union Tel. Co., 6 S. D. 1, 60 N. W. 152 [*following* Kirby *v.* Western Union Tel. Co., 4 S. D. 463, 57 N. W. 202].

Wisconsin.—Teetshorn *v.* Hull, 30 Wis. 162.

United States.— U. S. *v.* Batchelder, 24 Fed. Cas. No. 14,540.

See 39 Cent. Dig. tit. "Penalties," § 27.

It is sufficient to refer to the section of the statute, without setting forth its contents. Utica *v.* Richardson, 6 Hill (N. Y.) 300; Smith *v.* Merwin, 15 Wend. (N. Y.) 184.

The section giving the penalty must be truly indicated, and a mistake is fatal. People *v.* Brooks, 4 Den. (N. Y.) 469. But in some jurisdictions such mistake is amendable. See *infra*, note 71.

54. *California.*— Chipman *v.* Emeric, 5 Cal. 239.

Connecticut.— Griswold *v.* Gallup, 22 Conn. 208.

Illinois.— St. Louis, etc., R. Co. *v.* Hill, 11 Ill. App. 248.

Kentucky.— Bell *v.* Norris, 79 Ky. 48.

Maine.— Penley *v.* Whitney, 48 Me. 351 (holding that Rev. St. c. 131, § 12, which makes the words "contrary to the form of the statute" immaterial, does not change the rule in actions on penal statutes); Hobbs *v.* Staples, 19 Me. 219; Morrison *v.* Witham, 10 Me. 421.

Massachusetts.—Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662; Haskell *v.* Moody, 9 Pick. 162; Nichols *v.* Squire, 5 Pick. 168; Peabody *v.* Hayt, 10 Mass. 36.

Missouri.— Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109 [*approving* Walther *v.* Warner, 26 Mo. 143].

New York.—Warren *v.* Doolittle, 5 Cow. 678.

North Carolina.— Dowd *v.* Seawell, 14 N. C. 185; Scroter *v.* Harrington, 8 N. C. 192.

South Carolina.— Cockfield *v.* Singletary, 15 Rich. 240.

United States.— Briscoe *v.* Hinman, 4 Fed. Cas. No. 1,887, Deady 588; Cross *v.* U. S., 6 Fed. Cas. No. 3,434, 1 Gall. 26; Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,502, 2 McLean 611; Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Gall. 257.

England.— Lee *v.* Clarke, 2 East 333.

Canada.— Reg. *v.* Aumond, 2 U. C. Q. B. 166. See also Drake *v.* Preston, 34 U. C. Q. B. 257.

See 39 Cent. Dig. tit. "Penalties," § 27.

language.[55] When the action is founded on several statutes,[56] or where one statute creates an offense and another fixes the penalty,[57] the conclusion should be "against the form of the statutes." But when the statute creating the offense is only amended or regulated, or altered in parts thereof which do not relate to the offense or the punishment thereof, a conclusion in the singular is proper.[58] So also where an offense is prohibited by several statutes, but only one is the foundation of the action;[59] where one statute creates an offense and inflicts the penalty and a subsequent statute imposes another penalty;[60] or where one statute creates an offense and fixes the penalty and another statute gives the remedy.[61] A conclusion in the singular when it should be in the plural or *vice versa* is a substantial defect which is not cured by the verdict.[62]

(II) *Under Modern Pleading.* Where the modern and simple mode of pleading has been adopted, actions on statutes are brought by simple statements of facts showing a violation of the statute, and it is unnecessary to recite or specifically refer to the statute under which the action is brought. Being a public statute, the court will take judicial notice of it.[63]

Remedial statute.— In an action on a statute which is remedial and not penal (Mitchell *v.* Clapp, 12 Cush. (Mass.) 278), or remedial as well as penal (Hewitt *v.* Harvey, 46 Mo. 368), it is not necessary to conclude that the act complained of was done contrary to the form of the statute.

Tennessee — proceeding before justice.— In a proceeding before a justice to recover a penalty given by a statute, it is not necessary that the warrant should conclude against the form of the statute, it being sufficient if the warrant shows what the party is called on to answer. Kirby *v.* Rice, 8 Yerg. 442; Kirby *v.* Lee, 8 Yerg. 439.

Omission cured by amendment.— The omission to conclude against the form of a statute may be cured by amendment if plaintiff agrees to claim no costs. Duffy *v.* Averitt, 27 N. C. 455.

Reason for such conclusion.— Every offense for which a party is indicted is supposed to be prosecuted as an offense at common law, unless the prosecutor, by reference to a statute, shows he means to proceed upon it, and without such express reference, if it be no offense at common law, the court will not look to see if it be an offense by statute. Lee *v.* Clarke, 2 East 333.

Offense at common law.— Where an offense existed previously at common law, and the statute gives a new remedy, the acts need not be alleged as done against the form of the statute; but the penalty should be claimed as "by force of the statute," etc. Fuller *v.* Fuller, 4 Vt. 123.

55. See cases cited *infra*, this note.

Words used immaterial.— In a prosecution on a penal statute, it is necessary to show that the offense charged is against the statute, but the words used are not material. Cleaves *v.* Jordan, 35 Me. 429. But see Barter *v.* Martin, 5 Me. 76, where it is said: "Whether, in an action upon a statute, the omission of the words *contra formam statuti*, can be supplied by any other words of equivalent import; *quære*."

The words "by force of the statute in such case made and provided," etc., is equivalent to the allegation "against the form of the statute." Barkhamsted *v.* Parsons, 3 Conn. 1; St. Louis, etc., R. Co. *v.* Hill, 11 Ill. App. 248; Penley *v.* Whitney, 48 Me. 351; Doyle *v.* Baltimore County Com'rs, 12 Gill & J. (Md.) 484; People *v.* Bartow, 6 Cow. (N. Y.) 290; Reynolds *v.* Smith, 2 Browne (Pa.) 257; Crain *v.* State, 2 Yerg. (Tenn.) 390; Burnell *v.* Dodge, 33 Vt. 462; Ellis *v.* Hull, 2 Aik. 41. *Contra*, Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Gall. 257; U. S. *v.* Batchelder, 24 Fed. Cas. No. 14,540; Wells *v.* Iggulden, 3 B. & C. 186, 5 D. & R. 13, 10 E. C. L. 93.

The words "against the law in that behalf made and provided" are equivalent to "against the form of the statute." Brown *v.* Hoit, Smith (N. H.) 53. But see Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261.

If the statute is directly referred to, the conclusion "against the form of the statute" is unnecessary. Wentworth *v.* Hinckley, 67 Me. 368.

56. *Connecticut.*—Blydenburgh *v.* Miles, 39 Conn. 484.

North Carolina.— State *v.* Muse, 20 N. C. 463.

United States.— Kenrick *v.* U. S., 14 Fed. Cas. No. 7,713, 1 Gall. 268.

England.— Broughton *v.* Moore, Cro. Jac. 142, 79 Eng. Reprint 123.

Canada.— Drake *v.* Preston, 34 U. C. Q. B. 257.

See 39 Cent. Dig. tit. "Penalties," § 27.

57. State *v.* Moses, 7 Blackf. (Ind.) 244; Morrison *v.* Witham, 10 Me. 421; Kane *v.* People, 8 Wend. (N. Y.) 203.

58. Lake Erie, etc., R. Co. *v.* Noblesville, 15 Ind. App. 697, 44 N. E. 651; Morrison *v.* Witham, 10 Me. 421; Kane *v.* People, 8 Wend. (N. Y.) 203; Dingley *v.* Moor, Cro. Eliz. 750, 78 Eng. Reprint 982.

59. Morrison *v.* Witham, 10 Me. 421.

60. Butman's Case, 8 Me. 113.

61. Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Gall. 257. But see Lee *v.* Clarke, 2 East 333; Drake *v.* Preston, 34 U. C. Q. B. 257.

62. State *v.* Muse, 20 N. C. 463.

63. *Massachusetts.*— Levy *v.* Gowdy, 2 Allen 320; Williams *v.* Taunton, 16 Gray 288.

e. Joinder of Offenses or Penalties. In an action to recover several penalties for distinct offenses, it is necessary to set out each offense distinctly. It is not sufficient to charge defendant in general terms with the commission of a number of offenses.[64] Where, however, one penalty only is sought, a declaration describing two penal offenses in one count is good, at least after verdict.[65] So also it is competent to embrace in one count several penalties upon one statute.[66] Where the action is for the recovery of a penalty for an offense which is shown to be continuous, the penalty being fixed at so much for each day of its continuance, it is not necessary to declare in separate counts for each day's penalty, but all are properly grouped together in one count covering the entire period.[67]

2. Plea, Answer, or Affidavit of Defense. In an action of debt for the recovery of a penalty, *nil debet* is the proper general issue;[68] but not guilty is also a good plea, and under it defendant may set up a statute of limitation.[69] As defendant in a penal action cannot be required to furnish evidence against himself, he cannot be required to file an answer specifically denying all the allegations of the petition.[70]

3. Amendments. The pleadings in actions on penal statutes may be corrected and amended by leave of court as pleadings in other civil actions.[71] A useless

Missouri.— Emerson *v.* St. Louis, etc., R. Co., 111 Mo. 161, 19 S. W. 1113.

Montana.— State *v.* Owsley, 17 Mont. 94, 42 Pac. 105.

New York.— People *v.* McCann, 67 N. Y. 506; Nellis *v.* New York Cent. R. Co., 30 N. Y. 505; Morehouse *v.* Crilley, 8 How. Pr. 431.

North Carolina.— Leathers *v.* Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11, 9 L. R. A. N. S. 349; Currie *v.* Raleigh, etc., R. Co., 135 N. C. 535, 47 S. E. 654.

Texas.— Martin *v.* Johnson, 11 Tex. Civ. App. 628, 33 S. W. 306.

See 39 Cent. Dig. tit. "Penalties," § 27.

If facts are set out which bring the case within the statute it is sufficient. Leathers *v.* Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11, 9 L. R. A. N. S. 349.

64. Hill *v.* Herbert, 3 N. J. L. 924. See also Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

65. Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261.

66. People *v.* McFadden, 13 Wend. (N. Y.) 396; Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932.

67. Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082.

68. Burnham *v.* Webster, 5 Mass. 266; Stilson *v.* Tobey, 2 Mass. 521; Hitchcock *v.* Munger, 15 N. H. 97. But see Canfield *v.* Allen, 1 N. J. L. 203, holding that *nil debet* is no plea to an action of debt on an amercement.

69. *Kentucky.*— Equitable L. Assur. Soc. *v.* Com., 113 Ky. 126, 67 S. W. 388, 23 Ky. L. Rep. 2359; Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900.

Massachusetts.— Burnham *v.* Webster, 5 Mass. 266; Stilson *v.* Tobey, 2 Mass. 521.

New Hampshire.— Hitchcock *v.* Munger, 15 N. H. 97.

England.— Faulkner *v.* Chevell, 5 A. & E. 213, 31 E. C. L. 586; Wortley *v.* Herpingham, Cro. Eliz. 766, 78 Eng. Reprint 997; Coppin *v.* Carter, 1 T. R. 462.

Canada.— Drake *v.* Preston, 34 U. C. Q. B. 257; Mewburn *v.* Street, 21 U. C. Q. B. 498.

See 39 Cent. Dig. tit. "Penalties," § 28.

70. Equitable L. Assur. Soc. *v.* Com., 113 Ky. 126, 67 S. W. 388, 23 Ky. L. Rep. 2359; Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900; Union Glass Co. *v.* New Castle First Nat. Bank, 10 Pa. Co. Ct. 565, 574.

Discovery.— In Ontario, in an action to recover a penalty payable under a dominion statute, defendant may be examined for discovery before trial. Reg. *v.* Fox, 18 Ont. Pr. 343. But see Pickerel River Imp. Co. *v.* Moore, 17 Ont. Pr. 287.

71. *Connecticut.*— Merriam *v.* Langdon, 10 Conn. 460.

New York.— Barber *v.* McHenry, 6 Wend. 516; Low *v.* Little, 17 Johns. 346.

North Carolina.— Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890.

Pennsylvania.— Jones *v.* Ross, 2 Dall. 143, 1 L. ed. 324.

Tennessee.— Childress *v.* Nashville, 3 Sneed 347.

See 39 Cent. Dig. tit. "Penalties," § 29.

A qui tam information may be amended after the time limited for presenting the new charge has elapsed. Merriam *v.* Langdon, 10 Conn. 460.

Action barred by statute of limitations.— An amendment will not be allowed in an action *qui tam*, which, at the time of making the motion, is barred by the statute of limitations. Drake *v.* Watson, 4 Day (Conn.) 37.

Amendment not allowed in supreme court. — In a *qui tam* action plaintiff cannot amend his declaration in the supreme court, where he had previously amended by leave in the court of common pleas. Hamilton *v.* Boiden, 1 Mass. 50.

In a summary process to recover a penalty, plaintiff's whole case is embraced in the

amendment,[72] or one introducing a new cause of action,[73] will not be permitted. Nor will the right of amendment warrant a substitution of a stranger for the sole plaintiff in the cause.[74]

4. Issues, Proof, and Variance. In an action to recover a penalty it is necessary in every case that the declaration should comport with the writ,[75] and the evidence with the declaration.[76]

5. Evidence[77] — a. Presumptions and Burden of Proof. One who claims a penalty under a statute has the burden of proving the existence of the facts entitling him to the penalty.[78]

b. Admissibility. An action brought to recover a penalty is governed by the same rules of evidence as are applicable to ordinary civil actions.[79]

process itself, which is the original proceeding in the suit, and there is nothing to amend by or within. Charleston *v.* Gunderman, 3 Hill (S. C.) 75.

72. Schofield *v.* Doray, 89 Cal. 55, 26 Pac. 606, holding that it is not error to refuse an amendment to an answer in an action for a penalty where the proposed answer would be no defense.

73. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439 (holding that a declaration in debt for the statutory penalty for cutting trees may not be amended by adding a count in trespass sounding in damages); Rosenbach *v.* Dreyfuss, 1 Fed. 391 (holding that the amendment of a complaint by a change in the averment of the statute violated does not set out a new cause of action where both statutes were substantially identical, and the last mentioned was passed as substitute for the one first pleaded).

74. St. Louis, etc., R. Co. *v.* State, 56 Ark. 166, 19 S. W. 572.

Substitution of "commonwealth" for "state."— Where a penal action is erroneously brought in the name of the "state" of Kentucky, an amendment styling plaintiff the "commonwealth" of Kentucky is permissible, and process on the amendment is not necessary. Com. *v.* Sherman, 85 Ky. 686, 4 S. W. 790, 9 Ky. L. Rep. 218.

N. H. Laws (1872), c. 39, allowing writs to be amended by striking out the names of some of plaintiffs, does not apply to a penal action pending at the time it took effect, under which the penalty "may be recovered by any person who will sue for the same." Kent *v.* Gray, 53 N. H. 576.

75. Governor *v.* Horton, 5 N. C. 212, holding that where the writ, in debt to recover a penalty, was in the name of A B, "governor," etc., and the declaration was in the name of C D, "who sues" as well for A B, "governor," etc., "as for himself," etc., the variance was fatal.

76. Drake *v.* Watson, 4 Day (Conn.) 37, holding that where in an action *qui tam* for taking excessive usury, the declaration stated the taking to have been in pursuance of a loan of two hundred dollars by means of a promissory note, and the evidence showed a loan of two hundred dollars and interest thereon, the variance was material.

Defense of statute of limitations may be set up under general issue. Watson *v.* Anderson, Hard. (Ky.) 458; Moore *v.* Smith, 5 Me. 490; Mason *v.* Mossop, 29 U. C. Q. B. 500; Mewburn *v.* Street, 21 U. C. Q. B. 498. But see Ont. Sup. Ct. Jud. Rules, 271.

77. **Discovery or production of documents** see Discovery, 14 Cyc. 301; and *supra*, note 70.

78. Waddle *v.* Duncan, 63 Ill. 223; Bull *v.* Quincy, 9 Ill. App. 127; Barber Asphalt Paving Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387; Conly *v.* Clay, 90 Hun (N. Y.) 20, 35 N. Y. Suppl. 521; Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 21 L. ed. 908; The Pope Catlin, 31 Fed. 408.

Doubtful questions arising on penal statutes are to be construed favorable for the accused. McCaskill *v.* Paxton, Hodg. El. Cas. 304.

Mens rea.— As a general rule no penal consequences are incurred under a statute imposing a penalty where there has been no personal neglect or default, and proof of *mens rea* is essential (Paul *v.* Hargreaves, [1908] 2 K. B. 289, 98 L. T. Rep. N. S. 751; Boyle *v.* Smith, [1906] 1 K. B. 432, 21 Cox C. C. 84, 70 J. P. 115, 75 L. J. K. B. 282, 94 L. T. Rep. N. S. 30, 22 T. L. R. 200, 54 Wkly. Rep. 519; Dickenson *v.* Fletcher, L. R. 9 C. P. 1, 43 L. J. M. C. 25, 29 L. T. Rep. N. S. 540; Rex *v.* Hays, 14 Ont. L. Rep. 201), unless a contrary intention appears by express language or necessary inference; and the absence from a statute of such words as "knowingly" or "wilfully" has been held to preclude the necessity of proving *mens rea* (Rex *v.* Chisholm, 14 Ont. L. Rep. 178).

79. Hall *v.* Brown, 30 Conn. 551.

Depositions.— Since the person prosecuting a *qui tam* action may be considered as the sole plaintiff, a deposition taken to be used in such action is admissible, although in the caption the prosecutor be stated as the sole plaintiff, omitting the *qui tam*. Dupy *v.* Wickwire, 1 D. Chipm. (Vt.) 237, 1 Am. Dec. 729.

Declarations.— Where, in an action to recover a penalty for cutting trees from plaintiff's land, defendant justified under a purchase from the occupant of the lands, who was in possession under a contract of rent or purchase, the declaration of the occupant that he was authorized by the owners to sell the timber is competent on the question of defendant's good faith. Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549.

Other offense.— In an action to recover a penalty it is error to admit evidence of an

c. Weight and Sufficiency. In an action under a penal statute, plaintiff, to recover, must bring his case clearly within the statute.[80] As to the degree of proof required there is some conflict of opinion. A few cases hold that an action upon a penal statute, being in the nature of a criminal prosecution, must be established by evidence proving defendant's guilt beyond a reasonable doubt;[81] but the better rule is that in this class of cases the same degree of proof as in criminal prosecutions is not necessary, but a clear preponderance of the evidence is sufficient. A slight preponderance, however, will not suffice.[82]

D. Trial, Judgment, and Review — 1. Dismissal Before Trial. In an action for a penalty all the requirements of the statute giving it must be complied with or the case may be dismissed on motion.[83] So if several actions for the recovery of a penalty are simultaneously commenced by different plaintiffs, they will be quashed on motion or all but the first will be stayed unless that is shown to be collusive.[84] The mere fact that defendant does not appear is not, however, ground for dismissal, since the court may proceed to final judgment in his absence.[85] Nor can defendant have the action dismissed under a statute giving an action to certain officers to recover a penalty, and permitting any person to sue in their names if they neglect to sue on receiving notice that the penalty has been incurred, upon the ground that it was brought without the authority of such officers and without the requisite preliminary notice.[86]

2. Trial[87] — a. In General. The usual rules of procedure relating to trials in civil actions generally,[88] including the giving of instructions,[89] as well as

offense committed by defendant prior to the one charged in the information, of which the prosecuting witness had no knowledge. State *v.* Meadows, 106 Mo. App. 604, 81 S. W. 463. But see Holes *v.* Kerr, [1908] 2 K. B. 601.

Evidence of injury unnecessary.— It is not necessary to sustain an action for a penalty that the party suing should show an injury sustained by him; the penalty being inflicted as a punishment. Dunlap *v.* McKee, 25 Pa. St. 84.

80. Askew *v.* Ebberts, 22 Cal. 263; Gilbert *v.* Bone, 79 Ill. 341; Waddle *v.* Duncan, 63 Ill. 223; Allaire *v.* Howell Works Co., 14 N. J. L. 21; Chew *v.* Thompson, 9 N. J. L. 249.

Plaintiff should be held to a strict proof of the cause of action. Engel *v.* New York City R. Co., 55 Misc. (N. Y.) 203, 105 N. Y. Suppl. 80.

81. Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900; Glenwood *v.* Roberts, 59 Mo. App. 167; Brooks *v.* Clayes, 10 Vt. 37.

82. *Alabama.*— Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Illinois.— Ruth *v.* Abingdon, 80 Ill. 418; Havana *v.* Biggs, 58 Ill. 483; Toledo, etc., R. Co. *v.* Foster, 43 Ill. 480; Lewiston *v.* Proctor, 27 Ill. 414; Webster *v.* People, 14 Ill. 365; Palmer *v.* People, 109 Ill. App. 269; Gunkel *v.* Bachs, 103 Ill. App. 494; Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355; Abingdon *v.* Meadows, 28 Ill. App. 442. *Compare* Atchison, etc., R. Co. *v.* People, 227 Ill. 270, 81 N. E. 342 [*reversing* 128 Ill. App. 38]; Eubanks *v.* Ashley, 36 Ill. 177.

Maine.— Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812.

Massachusetts.— Roberge *v.* Burnham, 124 Mass. 277.

New Hampshire.— Hitchcock *v.* Munger, 15 N. H. 97.

New York.— People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820 [*affirming* 47 Hun 266].

See 39 Cent. Dig. tit. "Penalties," § 34. See also Evidence, 17 Cyc. 760; Municipal Corporations, 28 Cyc. 810.

83. Dassance *v.* Gates, 13 Vt. 275, holding that if the minute required to be indorsed upon the writ by the authority issuing it be not made, the suit will be dismissed on motion.

Plaintiff may be nonsuited in a *qui tam* action. Ranney *v.* Jones, 21 U. C. Q. B. 370.

Time for making motion.— If there is no precise time fixed by the practice of the court for making a motion to quash an action for the recovery of a penalty, it must be made within what the court shall determine a reasonable time. Clark *v.* Lisbon, 19 N. H. 286.

84. Clark *v.* Lisbon, 19 N. H. 286.

85. Maguire *v.* Xenia, 54 Ill. 299.

86. New York Excise Com'rs *v.* Purdy, 36 Barb. (N. Y.) 266, 13 Abb. Pr. 439, 22 How. Pr. 506 [*reversing* 13 Abb. Pr. 434, 22 How. Pr. 312].

87. **Right to jury trial** see Juries, 24 Cyc. 108.

88. See, generally, Trial.

Failure to show paper to defendant's attorney.— In a *qui tam* information, under the statute (tit. 74, p. 354) for the suppression of peddlers, etc., the inventory of the goods seized and appraised is not rendered a nullity by the refusal, on the part of the complainant, to exhibit it to defendant's attorney for copy and inspection. Merriam *v.* Langdon, 10 Conn. 460.

89. See State *v.* Meadows, 106 Mo. App. 604, 81 S. W. 463.

defining the province of the court and jury,[90] are applicable to this class of actions.

b. Assessment of Penalty. Where a statute gives a penalty not to exceed a certain sum, but does not prescribe whether it is to be fixed by the court or the jury, either party is entitled to a jury trial, and the amount of the penalty is for their consideration.[91] In some cases, however, the rule is stated as follows: When *nil debet* is pleaded, and the issue is found against defendant, the assessment of the penalty is for the jury;[92] when the plea is not guilty, it is for the court.[93]

c. Verdict and Findings. The verdict must be responsive to the issues,[94] and should be for the exact penalty prescribed.[95]

3. NEW TRIAL. The court has full power to grant a new trial, although the verdict was in favor of defendant.[96] A new trial is, however, seldom granted in such actions,[97] and then only when the verdict has been procured by some mistake or misdirection of the judge,[98] by the jury's disregard of the law,[99] or by imposition or fraud.[1] It will not, as a rule, be granted on the sole ground that the verdict is against the evidence.[2]

90. See Haley *v.* Taylor, 77 Miss. 867, 28 So. 752, 78 Am. St. Rep. 549.

91. McDaniel *v.* Gate City Gas-Light Co., 79 Ga. 58, 3 S. E. 693; Hines *v.* Darling, 99 Mich. 47, 57 N. W. 1081. See also Kennedy *v.* Wright, 34 Me. 351.

Jury not at liberty to give less than minimum.— Worth *v.* Peck, 7 Pa. St. 268.

92. Com. *v.* Stevens, 15 Mass. 195; U. S. *v.* Allen, 24 Fed. Cas. No. 14,431, Brunn. Col. Cas. 94, 4 Day (Conn.) 474.

93. Com. *v.* Stevens, 15 Mass. 195.

94. Albright *v.* Tapscott, 53 N. C. 473 (holding that in an action of debt for a penalty in which *nil debet* is pleaded, a verdict finding all the issues in favor of plaintiff and assessing his damages at a specified sum is not responsive to the issues and will not sustain a judgment of recovery); Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261 (holding that in debt for a penalty, brought in the name of "The United States of America," a verdict finding that the party is indebted to "The United States," instead of saying "The United States of America" is sufficient).

In an action to recover several penalties a general verdict for defendant is sufficient (Hannibal, etc., Plank Road, etc., Co. *v.* Bowling, 53 Mo. 311); but, in case of a verdict for plaintiff, the particular offenses for which it is rendered should be specified (Westbrook *v.* Van Auken, 5 N. J. L. 478; Bloodgood *v.* Vandeveer, 3 N. J. L. 928; Dixon *v.* Freeman, 3 N. J. L. 411).

When a statute gives double the value of goods by way of penalty, to be recovered in debt, the jury may find the value of the goods, and the court double the value in their judgment; and it is sufficient that the verdict say the value of the goods. This shall be intended the single, not the double, value; and the verdict need not say single value, in terms. Warren *v.* Doolittle, 5 Cow. (N. Y.) 678. But see Cross *v.* U. S., 6 Fed. Cas. No. 3,434, 1 Gall. 26.

95. Macklin *v.* Taylor, Add. (Pa.) 212.

96. Hylliard *v.* Nickols, 2 Root (Conn.) 176; Pettis *v.* Dixon, Kirby (Conn.) 179; U. S. *v.* Halberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

In a qui tam action, a new trial cannot be granted to the civil part only without the other. Hannaball *v.* Spalding, 1 Root (Conn.) 86.

97. Steel *v.* Roach, 1 Bay (S. C.) 63.

98. *Kentucky.*— Clay *v.* Swett, 4 Bibb 255.

New York.— Decker *v.* Stauring, 57 How. Pr. 495.

Tennessee.— Martin *v.* McNight, 1 Overt. 330.

United States.— U. S. *v.* Halberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

England.— Brooke *v.* Middleton, 1 Campb. 445, 10 East 268; Calcraft *v.* Gibbs, 5 T. R. 19; Wilson *v.* Rastall, 4 T. R. 753, 2 Rev. Rep. 515. *Compare* Ranston *v.* Etteridge, 2 Chit. 273, 18 E. C. L. 631.

Canada.— Hugill *v.* Merrifield, 12 U. C. C. P. 269; Bleeker *v.* Meyers, 6 U. C. Q. B. 134.

See 39 Cent. Dig. tit. "Penalties," § 39.

99. Atty.-Gen. *v.* Rogers, 2 Dowl. P. C. N. S. 1037, 7 Jur. 704, 12 L. J. Exch. 395, 11 M. & W. 670. *Compare* Seymour *v.* Day, Str. 899.

1. Hylliard *v.* Nickols, 2 Root (Conn.) 176; Pruden *v.* Northrup, 1 Root (Conn.) 93; Hannaball *v.* Spalding, 1 Root (Conn.) 86; Lawyer *v.* Smith, 1 Den. (N. Y.) 207; Martin *v.* McNight, 1 Overt. (Tenn.) 330.

2. *Kentucky.*— Clay *v.* Swett, 4 Bibb 255.

New York.— Decker *v.* Stauring, 57 How. Pr. 495; Wheeler *v.* Calkins, 17 How. Pr. 451; Lawyer *v.* Smith, 1 Den. 207; Rochester Overseers of Poor *v.* Lunt, 15 Wend. 565; Comfort *v.* Thompson, 10 Johns. 101. *Compare* Crafts *v.* Plumb, 11 Wend. 143, holding that in an action for a penalty the court will not grant a new trial unless the verdict be clearly against the evidence.

Tennessee.— Martin *v.* McNight, 1 Overt. 330.

United States.— U. S. *v.* Halberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

England.— Hall *v.* Green, 2 C. L. R. 427, 9 Exch. 247, 23 L. J. M. C. 15; Brooke *v.* Middleton, 1 Campb. 445, 10 East 268; Gough *v.*

4. Judgment[3] — **a. In General** — (i) *Essentials.* When a suit is instituted for the penalty incurred by the violation of a specific law, the judgment should set out the statute or ordinance, or the substance of it,[4] and show in what respect it has been violated.[5] Where there are two penalties imposed, the judgment ought to designate the particular penalty on which defendant is convicted,[6] but where only one penalty is declared for, a judgment in general terms is sufficient,[7] at least if plaintiff is entitled to the whole of the money recovered.[8]

(ii) *Amount.* Where the action is for a penalty of a fixed amount, the judgment must be for the specific sum fixed.[9] The penalty cannot be increased or diminished by the court.[10] Where the amount of the penalty is not prescribed, the demand is no criterion of the amount to be recovered,[11] and in entering judgment the amount should be for a sum certain.[12] When a joint suit is brought against two persons, the judgment must be joint, the penalty being for a gross sum in satisfaction of the offense charged and proven.[13]

(iii) *To Whom Awarded.* In a *qui tam* action the judgment should be in favor of the informer for the uses expressed in the statute,[14] and a judgment in favor of the state will be reversed.[15] It has been held, however, that when the statute makes a definite and specific disposal of the penalty to be imposed, the judgment of conviction need not contain an express award to that effect;[16] but when the court is to exercise a discretion it must appear on the face of the judgment that they have done so.[17] If a statute gives a penalty partly to the use of the state and partly to the use of an informer, and the state prosecutes for the penalty, the judgment should be in favor of the state for the whole penalty.[18]

Hardman, 6 Jur. N. S. 402; Mattison *v.* Allanson, Str. 1238; Seymour *v.* Day, Str. 899. See also Parry *v.* Duncan, 7 Bing. 243, 20 E. C. L. 115, 9 L. J. C. P. O. S. 83, M. & M. 533, 22 E. C. L. 580, 5 M. & P. 19. Unless the court can say that the verdict is one which could not properly be found. Clouston *v.* Corry, [1906] A. C. 122, 75 L. J. P. C. 20, 93 L. T. Rep. N. S. 706, 22 T. L. R. 107, 54 Wkly. Rep. 382.

3. Judgment not provable debt see Bankruptcy, 5 Cyc. 326 note 46.

4. Wilcox *v.* Knoxville Borough, 2 Pa. Dist. 721; Ridley Park Borough *v.* Chester, etc., R. Co., 24 Pa. Co. Ct. 3, 8 Del. Co. 27.

5. Wilcox *v.* Knoxville Borough, 2 Pa. Dist. 721; Com. *v.* Cochran Creamery Co., 4 Pa. Co. Ct. 253; Manayunk *v.* Davis, 2 Pars. Eq. Cas. (Pa.) 289; Com. *v.* Davenger, 10 Phila. (Pa.) 478; Com. *v.* Finkheimer, 9 Phila. (Pa.) 504; Com. *v.* Fiegle, 2 Phila. (Pa.) 215.

Where the appellate court reverses the judgment of the circuit court, without remand, it is its duty to incorporate in its judgment a statement of facts. People *v.* Smith, 208 Ill. 31, 69 N. E. 810 [*affirming* 108 Ill. App. 499].

6. Dixon *v.* Freeman, 3 N. J. L. 411; Whitlock *v.* Tompkins, 2 N. J. L. 273; Manayunk *v.* Davis, 2 Pars. Eq. Cas. (Pa.) 289.

7. Parke *v.* Adams, 3 N. J. L. 675.

8. Dallas *v.* Hendry, 3 N. J. L. 973.

9. Cotten *v.* Rutledge, 33 Ala. 110 (holding that a verdict for plaintiff, not specifying any amount, entitles him to a judgment for the penalty and costs, since there is no amount to be found by the jury); Broadwell *v.* Conger, 2 N. J. L. 210; Canastota, etc., Plank Road Co. *v.* Parkill, 50 Barb. (N. Y.) 601.

10. Broadwell *v.* Conger, 2 N. J. L. 210; Mack *v.* Miller, 9 Montg. Co. Rep. (Pa.) 96; Taylor *v.* State, 35 Wis. 298. See also Judgments, 23 Cyc. 800.

11. See *supra*, II, C, 1, c, (i).

12. Philadelphia *v.* Harkins, 1 Phila. (Pa.) 518.

13. Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355.

14. Bradley *v.* Baldwin, 5 Conn. 288 (holding that where the penalty inflicted is to be paid one half to the informer and the other half to the treasury of the town, the judgment should be that the informer recovered the penalty, one half to his own use and the other half to be paid into the treasury of the town); Illinois Cent. R. Co. *v.* Tait, 50 Ill. 48; Jones *v.* Pitman, 12 N. J. L. 93; Doss *v.* State, 6 Tex. 433.

15. Doss *v.* State, 6 Tex. 433. But see State *v.* Stanford, 20 Ark. 145, holding that where the informer is entitled to one half of the penalty, the judgment should be in the name of the state, and not in the names of the state and the informer; but that it would be convenient in practice that an order be made of record, directing one half of the penalty to be paid to the informer.

Error in awarding the judgment to persons not entitled to it is not prejudicial to defendant. St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806.

16. Vandegrift *v.* Meihla, 66 N. J. L. 92, 49 Atl. 16; *In re* Boothroyd, 10 Jur. 117, 15 L. J. M. C. 57, 15 M. & W. 1, 2 New Sess. Cas. 251.

17. Vandegrift *v.* Meihla, 66 N. J. L. 92, 49 Atl. 16; *In re* Boothroyd, 10 Jur. 117, 15 L. J. M. C. 57, 15 M. & W. 1, 2 New Sess. Cas. 251.

18. Com. *v.* Howard, 13 Mass. 221.

(IV) *TIME AND MANNER OF ENTRY.* Judgment against defendant must be entered publicly, or only after due notice to him.[19] Final judgment cannot be entered on demurrer, but only on a trial upon the merits.[20]

b. Execution and Enforcement. A judgment in a penal action is not enforceable in a foreign state.[21]

c. Interest.[22] A judgment in an action for a statutory penalty should not include interest thereon from the time of the violation of the statute. However, after a penalty is merged into a judgment, the judgment draws interest from the time of its rendition.[23]

5. REVIEW[24] **— a. Appeal**[25] — (I) *IN GENERAL.* Where an action to recover a penalty is regarded as a civil action, an appeal will lie from the judgment.[26] State officers cannot, by instituting a suit in form of an indictment, deprive the party of the right of appeal.[27]

(II) *PENNSYLVANIA STATUTE.* Prior to the adoption of the present Pennsylvania constitution an appeal from a judgment for a penalty was regular, although it was not allowed for cause shown.[28] But there were many cases in which the

19. Pittsburgh *v.* Madden, 14 Pa. Co. Ct. 120.

20. Reagh *v.* Spann, 3 Stew. (Ala.) 100.

21. Arkansas *v.* Bowen, 3 App. Cas. (D. C.) 537; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239. But see Indiana *v.* Helmer, 21 Iowa 370; Healy *v.* Root, 11 Pick. (Mass.) 389; Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615. Unless the penalty is imposed by way of indemnity to the party injured. Huntington *v.* Attrill, [1893] A. C. 150, 57 J. P. 404, 62 L. J. P. C. 44, 68 L. T. Rep. N. S. 326, 41 Wkly. Rep. 575.

22. Interest on judgment on penal bond see INTEREST, 22 Cyc. 1520 note 28.

23. Newton First Nat. Bank *v.* Turner, 3 Kan. App. 352, 42 Pac. 936; State *v.* Owsley, 17 Mont. 94, 42 Pac. 105.

24. Certiorari to review proceedings before a justice of the peace or mayor to recover penalties for violation of ordinances see JUSTICES OF THE PEACE, 24 Cyc. 764.

Review of convictions for violation of ordinances see MUNICIPAL CORPORATIONS, 28 Cyc. 821 *et seq.*

25. As dependent on: Amount or value in controversy see APPEAL AND ERROR, 2 Cyc. 548. Nature or form of proceeding see APPEAL AND ERROR, 2 Cyc. 542.

Appeal-bonds see APPEAL AND ERROR, 2 Cyc. 1120.

26. *Illinois.*— People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Partridge *v.* Snyder, 78 Ill. 519; People *v.* Merritt, 91 Ill. App. 620.

Kentucky.— See Evans *v.* Commonwealth, 13 Bush 269.

Maryland.— State *v.* Mace, 5 Md. 337.

Missouri.— Springfield *v.* Starke, 93 Mo. App. 70, holding that a city may exercise a right of appeal given by its charter in a motion to enforce a penalty defined by its ordinances.

New Jersey.— State *v.* Judges Middlesex County Ct. C. Pl., 42 N. J. L. 386.

Wisconsin.— Platteville *v.* Bell, 43 Wis. 488 (holding that where a statute prescribes a penalty for an act which is not a misdemeanor, the action to recover the penalty is a civil action, and an appeal will lie from the judgment); State *v.* Hayden, 32 Wis. 663.

United States.— Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520, writ of error.

Canada.— An appeal lies to the supreme court from a conviction for penalties under the Dominion Fisheries Act (1868), c. 60. Reg. *v.* Todd, 10 Nova Scotia 62.

See 39 Cent. Dig. tit. "Penalties," § 42.

But see Kennedy *v.* Raught, 6 Minn. 235, where it is said the fact that the penalty is recoverable in a civil action by an informer does not change its penal nature, and if defendant is acquitted no appeal will lie.

An action for a penalty being of a quasi-criminal nature, an appeal lies to the criminal court of Cook county from a justice of the peace in such an action. Tully *v.* Northfield, 6 Ill. App. 356.

Under the Illinois Appellate Court Act, § 8, which limits the right of appeal from the appellate to the supreme court, in actions *ex contractu*, to cases in which the amount involved is over one thousand dollars, and declares that the term "*ex contractu*" shall not be construed to include actions involving a penalty, an appeal lies to the supreme court in an action to recover three times the amount won at gambling, regardless of the amount involved. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558.

In Connecticut.— An appeal in a *qui tam* prosecution for theft lies by defendant (Burnham *v.* Barker, 2 Root 526); but not by plaintiff from a judgment for defendant (Coit *v.* Geer, Kirby 269). An appeal does not lie from the judgment of the county court in a *qui tam* action on the statute for assault, although the damages exceed seventy dollars, the judgment of the county court in such case being final. Houghton *v.* Havens, 6 Conn. 305.

27. State *v.* Williams, 7 Rob. (La.) 252; State *v.* Linton, 3 Rob. (La.) 55.

28. Com. *v.* Bennett, 16 Serg. & R. (Pa.) 243.

judgment of the justice whether upon a summary conviction or in an action for a penalty was final. No review was possible except upon certiorari, and then only of the regularity of the proceeding.[29] This want of uniformity in the manner of enforcing penal statutes and ordinances led to the adoption of the provision of the present constitution.[30] The language employed is general, and embraces all appeals from judgments for penalties or of summary convictions rendered by magistrates or courts not of record.[31] The power to grant an appeal is vested in the court of record, or a judge thereof, to which the appeal is to be taken,[32] and cause must be shown before the appeal will be allowed.[33] It is not a matter of right.[34]

b. Writ of Error. An action of debt to recover a penalty is a civil cause on which a writ of error lies from the district court to the circuit court of the United States.[35]

6. Costs — a. In General. Costs, not being recoverable except when allowed by statute,[36] it is held in some cases that costs are not recoverable in actions for statutory penalties, when, by the statute creating the penalty, no costs are given.[37] In many cases, however, actions for penalties being considered as civil actions, costs are allowed and taxed according to the statute relating to costs in such proceedings.[38]

29. See JUSTICES OF THE PEACE, 24 Cyc. 383.

30. Pa. Const. art. 5, § 14, provides that "in all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof upon cause shown."

The act of 1876 which was passed to carry the above provision into effect prescribed the court of quarter sessions as the court of record into which all appeals from summary convictions should be taken, after an allowance; and the court of common pleas as the court of record into which all appeals from the judgment of a magistrate or court not of record in a suit for a penalty should be taken "upon allowance of said court or any judge thereof upon cause shown." Scranton *v.* Frothingham, 5 Pa. Dist. 639; Com. *v.* Diffenbaugh, 5 Lanc. L. Rev. (Pa.) 346.

The object of this provision was not to limit the right of appeal as it then existed, but to secure it, within certain restrictions, against any infraction by the legislature for all future time. Com. *v.* Brunner, 2 Lehigh Val. L. Rep. (Pa.) 377.

31. Com. *v.* McCann, 174 Pa. St. 19, 34 Atl. 299.

32. McGuire *v.* Shenandoah, 109 Pa. St. 613, holding that the magistrate or judge of the court not of record has no power to grant an appeal.

33. Com. *v.* Eichenberg, 140 Pa. St. 158, 21 Atl. 258; Mahanoy City *v.* Bissell, 9 Pa. Co. Ct. 469; Com. *v.* Sassaman, 2 Del. Co. (Pa.) 333.

The application for leave to appeal must show, either that the applicant has some specific and well-grounded cause for complaint of the judgment rendered against him, or that there is a substantial dispute in fact or in law of such character and moment as to reasonably entitle him to have a decision upon it in the higher court to which he seeks to remove the case. Board of Health *v.* Crest Farm Dairy Co., 14 Pa. Co. Ct. 119.

Judgment against evidence.— An appeal to the court of common pleas from the judgment of an alderman in a suit to recover a penalty, or in a case of summary conviction, will not be allowed where the reason assigned for the appeal is that the judgment was against the evidence. Board of Health *v.* Crest Farm Dairy Co., 3 Pa. Dist. 363, 14 Pa. Co. Ct. 119.

Appeal nunc pro tunc.— The court will not allow an appeal *nunc pro tunc* after the time for taking it has passed. Com. *v.* Sassaman, 2 Del. Co. (Pa.) 333.

34. Com. *v.* Eichenberg, 140 Pa. St. 158, 21 Atl. 258; Mahanoy City *v.* Bissell, 9 Pa. Co. Ct. 469.

35. Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520.

36. See, generally, COSTS, 11 Cyc. 1.

37. Gipps Brewing Co. *v.* Virginia, 32 Ill. App. 518; Heard *v.* Faris, 1 Litt. (Ky.) 245; Clark *v.* Dewey, 5 Johns. (N. Y.) 251; O'Briscoll *v.* McCants, 2 Bay (S. C.) 323, where it is said: "No man would bring actions or prosecutions for the public good, if he was liable to be mulcted in costs in case of failure."

38. *Connecticut.*—Blydenburgh *v.* Miles, 39 Conn. 484; Reynolds *v.* Stevens, 2 Root 136.

Maine.— Chesley *v.* Brown, 11 Me. 143, holding that where a penalty is not less than five dollars, nor more than thirty dollars, and plaintiff recovers less than twenty dollars, he is entitled to full costs; the action being originally brought in the common pleas.

Missouri.— *In re* Green, 40 Mo. App. 491.

Wisconsin.— Laubenheimer *v.* Mann, 19 Wis. 519, holding that in an action for a penalty, a judgment in plaintiff's favor for nominal damages does not, under our statute, entitle him to costs, but a judgment for costs may be rendered against him.

b. Security For Costs. When costs may be recovered,[39] security for costs may be required to be given in penal actions as in other cases.[40]

E. Compounding Actions For Penalties. By the statute of 18 Elizabeth[41] no penal action by a common informer can be compromised without the leave of the court. Where the crown is concerned the attorney-general or the dominion or province, whichever is entitled, must be notified.[42] The granting of leave is entirely within the discretion of the court.[43] Where the sum offered is so small

England.— Wood *v.* Johnson, W. Bl. 1157; Dover *v.* Hodgson, 1 Wils. C. P. 139.

In a qui tam action, the informer, being the real party in interest, is liable for costs if he fails to maintain the action. Casey *v.* Briant, 1 Stew. & P. (Ala.) 51; Reynolds *v.* Stevens, 2 Root (Conn.) 136; *In re* Green, 40 Mo. App. 491; Lynch *v.* The Economy, 27 Wis. 69.

Action by party aggrieved.— In an action to recover a penalty under a statute giving such right to the person aggrieved, instead of to the common informer, plaintiff is entitled to his costs. Norris *v.* Pilmore, 1 Yeates (Pa.) 405. Where a penalty is given to the party injured, he may sue for and recover the penalty *in forma pauperis.* Kirby *v.* Rice, 8 Yerg. (Tenn.) 442.

An action by a town, in the name of the people of the state, for the recovery of a penalty, is a civil action, in which a judgment for costs may be rendered against the town if it is unsuccessful. People *v.* Braisted, 13 Colo. App. 532, 58 Pac. 796.

Where suit is brought in the name of the people for the recovery of a statutory penalty, if the people recover judgment, they are entitled to costs the same as any other person in like case. But the rule is different under the statute in popular and *qui tam* actions. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

Where a statute makes a county liable for costs in criminal causes, it is not liable in an action to recover a penalty, if unsuccessful, since such action is a civil action and not a criminal prosecution. Ives *v.* Jefferson County Sup'rs, 18 Wis. 166.

Costs allowed on postponement of trial.— On putting off the trial of an information for a penalty at the instance of defendant, the court will make payment of costs a condition in the same way as in civil cases. Rex *v.* Ives, Draper (U. C.) 440.

Under South Carolina act of 1733, allowing magistrates double costs in any action commenced or prosecuted against them, they may recover such costs in a *qui tam* action brought against them. Barksdale *v.* Morrison, 3 McCord 184.

Under the act of congress of Feb. 28, 1799, § 8, providing that if any informer on a penal statute to whom the penalty or any part thereof accrues shall discontinue his suit, or be nonsuited, he alone shall be liable for the costs of the prosecution, but if such informer be an officer whose duty it is to commence the prosecution, and the court shall certify that there was reasonable ground for the same, the United States shall be liable for such costs, a person informing on a violation of a penal statute is liable for costs, on judgment being rendered in defendant's favor, in an action for the recovery of the penalty imposed for the violation of such statute, although the United States was a party to the record. U. S. *v.* The Planter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262.

39. See *supra,* II, D, 6, a.

40. See cases cited *infra,* this note. And see Budworth *v.* Bell, 10 Ont. Pr. 544; Martin *v.* Consolidated Bank, 45 U. C. Q. B. 163.

An informer may be required to give security for costs, and, in case of refusal, his name may be stricken from the record. U. S. *v.* The Planter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262. In Ontario the fact that plaintiff is not posssesed of sufficient property or means within the jurisdiction to answer costs is a good ground for demanding security for the costs. Ont. Sup. Ct. Jud. Rules, 1200.

Action brought without authority and notice.— A defendant, sued for a penalty to be recovered by certain officers, under a statute providing that, if they do not sue on notice to them of the offense, a private person may do so in their names, may move for security for costs, and a stay of proceedings until security is given, where the action is brought without authority of the nominal plaintiffs, and without notice to them. New York Excise Com'rs *v.* Purdy, 36 Barb. (N. Y.) 266, 13 Abb. Pr. 439, 22 How. Pr. 506 [*reversing* 13 Abb. Pr. 434, 22 How. Pr. 312].

Actions before justices.— The provision of the Revised Statutes requiring security for costs to be given before commencing penal actions applies to such actions commenced and prosecuted before justices of the peace. Adams *v.* Miller, 12 Ill. 27. If security is not given, a motion to dismiss should be made before the justice; if refused by him, it may be renewed in the circuit court, but it comes too late for the first time in the circuit court. Adams *v.* Miller, *supra.*

An order for security for costs in an action for a penalty may properly contain provisions limiting the time for giving the security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms. Ashcroft *v.* Tyson, 17 Ont. Pr. 42.

41. St. 18 Eliz. c. 5 (Ont. Rev. St. (1897) c. 324, § 29).

42. Howard *v.* Sowerby, 1 Taunt. 103. See also Reg. *v.* Boardman, 30 U. C. Q. B. 553; Bleeker *v.* Meyers, 6 U. C. Q. B. 134; May *v.* Dettrick, 5 U. C. Q. B. O. S. 77.

43. Mangham *v.* Walker, 1 Peake N. P.

as to indicate collusion, leave will be refused.[44] Leave will be granted only after the defense is in.[45] Leave to compromise is not necessary where the action is brought by the party aggrieved.[46]

PENCIL. An instrument with which we write without ink.[1]

PENDENCY. In practice, the state of an undetermined proceeding.[2] (See PENDING.)

PENDENCY OF ACTION. See ABATEMENT AND REVIVAL; ACTIONS; APPEAL AND ERROR; ARREST; ASSIGNMENTS; ATTACHMENT; COMPROMISE AND SETTLEMENT; CONTEMPT; CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; CRIMINAL LAW; JUDGMENTS; LIS PENDENS.

PENDENTE LITE. Literally "Pending the suit." During the actual progress of a suit; during litigation.[3] (See, generally, LIS PENDENS.)

PENDENTE LITE NIHIL INNOVETUR [INNOVANDUM]. A maxim meaning "Pending the suit nothing should be changed."[4]

PENDING. Hanging — hanging over;[5] remaining undecided;[6] depending, remaining undecided, not terminated.[7] (Pending: Action, Suit, or Proceeding,

163, 5 T. R. 98; Sheldon *v.* Mumford, 5 Taunt. 268.

44. Wood *v.* Cassin, W. Bl. 1157.

45. Rex *v.* Colier, 2 Dowl. P. C. 581. See also Rex *v.* Crisp, 1 B. & Ald. 282.

Leave was granted in May *v.* Dettrick, 5 U. C. Q. B. O. S. 77.

46. Kirkland *v.* Wheeley, 1 Salk. 30.

1. Clason *v.* Bailey, 14 Johns. (N. Y.) 484, 491.

2. People *v.* Roosevelt, 12 Misc. (N. Y.) 622, 625, 34 N. Y. Suppl. 228.

3. Black L. Dict.

A purchaser pendente lite is one who by purchase acquires an interest in the matter in litigation pending the suit. Whiting *v.* Beebe, 12 Ark. 421, 564.

4. Burrill L. Dict. [*citing* Coke Litt. 344b].

Applied in: Ashley *v.* Cunningham, 16 Ark. 168, 175; Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536, 538; McCabe *v.* Worthington, 16 Mo. 514, 517 (brief); Taylor *v.* Woodward, 10 N. J. L. 1, 3; Turner *v.* Houpt, 53 N. J. Eq. 526, 553, 33 Atl. 28; Booraem *v.* Wood, 27 N. J. Eq. 371, 374; Lamont *v.* Cheshire, 65 N. Y. 30, 36; Crocker *v.* Lewis, 79 Hun (N. Y.) 400, 404, 29 N. Y. Suppl. 798; Fuller *v.* Scribner, 16 Hun (N. Y.) 130, 133; Butler *v.* Birkey, 13 Ohio St. 514, 522; Cirode *v.* Buchanan, 22 Gratt. (Va.) 205, 220; Bruff *v.* Thompson, 31 W. Va. 16, 20, 6 S. E. 352; Lynch *v.* Andrews, 25 W. Va. 751, 756; Hughes *v.* Hamilton, 19 W. Va. 366, 395; Zane *v.* Fink, 18 W. Va. 693, 720; Langdon *v.* Morris, 5 Sim. 247, 259, 9 L. J. Ch. 35, 9 Eng. Ch. 247, 58 Eng. Reprint 329; Metcalfe *v.* Purvertoft, 2 Ves. & B. 200, 204, 13 Rev. Rep. 63, 35 Eng. Reprint 295; Fisken *v.* Rutherford, 8 Grant Ch. (U. C.) 9, 28.

5. People *v.* Roosevelt, 12 Misc. (N. Y.) 622, 625, 34 N. Y. Suppl. 228.

6. *Ex p.* Munford, 57 Mo. 603, 606; Wentworth *v.* Farmington, 48 N. H. 207, 210; Clindenin *v.* Allen, 4 N. H. 385, 386.

7. Sanford *v.* Sanford, 28 Conn. 6, 22; Webster Dict. [*quoted* in Badger *v.* Gilmore, 37 N. H. 457, 459].

This word should be construed not in the technical sense of the Latin word "*pendens*," but rather in the sense of the word "commenced" in our language, in which it is generally understood. Rice *v.* McCaulley, 7 Houst. (Del.) 226, 241, 31 Atl. 240.

At common law the suit was considered as pending from the issuance of the writ. Handlan *v.* Handlan, 37 W. Va. 486, 491, 16 S. E. 597.

An action is pending the entire time from the beginning of the action until final judgment has been pronounced and entered up (Holland *v.* Fox, 3 E. & B. 977, 985, 1 Jur. N. S. 13, 23 L. J. Q. B. 357, 2 Wkly. Rep. 558, 77 E. C. L. 977), or from the time of its commencement (Clindenin *v.* Allen, 4 N. H. 385, 386), or until the judgment is fully certified (State *v.* Tugwell, 19 Wash. 238, 257, 52 Pac. 1056, 43 L. R. A. 717), or from the time of its commencement until its final determination on appeal, or until the time for appeal is passed (Anderson *v.* Schloesser, (Cal. 1908) 94 Pac. 885, 887).

A suit is regarded as pending from its first institution until its final determination (Brown *v.* Foss, 16 Me. 257, 258), or until final judgment rendered therein (Turner *v.* Norris, 35 Me. 112, 115), or until the judgment or decree is performed (Mauney *v.* Pemberton, 75 N. C. 219, 221), and applies to a judgment on which successive fieri facias have issued but not fully satisfied (Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654, 656).

All unsatisfied judgments are pending suits. Wegman *v.* Childs, 41 N. Y. 159, 162.

A case which has been dismissed from the docket simply to relieve the same is pending. Darrow *v.* Darrow, 159 Mass. 262, 263, 34 N. E. 270, 21 L. R. A. 100.

An action did not cease to be a pending action, so as to prevent the operation of the statute of limitations, because the clerk of the court had failed for several terms to

see ABATEMENT AND REVIVAL; ACTIONS; APPEAL AND ERROR; ARREST; ASSIGNMENTS; ATTACHMENT; COMPROMISE AND SETTLEMENT; CONTEMPT; CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; CRIMINAL LAW; JUDGMENTS; LIS PENDENS.)

PENETRATION. See RAPE; SODOMY.

PENITENTIARY. See PRISONS.

place it upon the docket or court calendar. Lawrence *v.* Belger, 31 Ohio St. 175, 182.

A criminal prosecution will not be deemed pending where no indictment has been filed, but only preliminary proceedings begun before a magistrate. State *v.* Arlin, 39 N. H. 179, 180.

When party is arrested, and committed for a crime for which he is afterwards indicted, a cause is pending. Hartnett *v.* State, 42 Ohio St. 568, 576.

Used with other words.— "As to the legality of the pending proceeding" see Downey *v.* People, 205 Ill. 230, 235, 68 N. E. 807. "Pending an appeal" see Walters *v.* State, 18 Tex. App. 8, 11. "Pending freight" see *In re* La Bourgogne, 117 Fed. 261, 265. "Pending in County Court" see Tilden *v.* Johnson, 52 Vt. 628, 630, 36 Am. Rep. 769. "Pending in settlement" see Bacon *v.* Thorp, 27 Conn. 251, 267. "Pending proceeding" see Dade Coal Co. *v.* Anderson, 103 Ga. 809, 810, 30 S. E. 640. "Pending such hearing" see Riggins *v.* Thompson, 96 Tex. 154, 159, 71 S. W. 14. "Pending the proceedings for a hearing and examination" see Porter *v.* Ritch, 70 Conn. 235, 258, 39 Atl. 169, 39 L. R. A. 353. "Prosecution is pending" see Reg. *v.* Verral, 16 Ont. Pr. 444, 446. "Suit pending in the court of Northumberland" see Ulshafer *v.* Stewart, 71 Pa. St. 170, 174.

PENSIONS

By Ernest G. Chilton*

I. **DEFINITION**, 1368

II. **PENSION AGENCIES AND PENSION AGENTS**, 1368

A. *Pension Agencies*, 1368

1. *Establishment*, 1368

2. *Discontinuance*, 1368

a. *In General*, 1368

b. *Effect*, 1368

3. *Enlargement*, 1368

a. *In General*, 1368

b. *Effect*, 1368

B. *Pension Agents*, 1369

1. *Appointment*, 1369

2. *Bonds*, 1369

a. *Acceptance*, 1369

b. *Extent of Surety's Liability*, 1369

c. *Actions Thereon*, 1369

(I) *Who May Commence*, 1369

(II) *Amount of Recovery*, 1369

3. *Fees*, 1369

a. *In General*, 1369

b. *Payment by Pensioner*, 1369

(I) *In General*, 1369

(II) *Lien on Certificate Therefor*, 1370

(A) *In General*, 1370

(B) *Recovery of Certificate Retained or Damages Therefor*, 1370

c. *Payment by Third Person*, 1370

d. *Recovery Back*, 1370

III. **PERSONS ENTITLED**, 1370

A. *Children*, 1370

B. *Widow*, 1370

1. *Remarriage*, 1370

2. *Divorce*, 1371

C. *Dependents*, 1371

D. *Personal Representatives*, 1371

IV. **PROCEEDINGS TO PROCURE**, 1371

A. *Jurisdiction*, 1371

B. *Application*, 1372

1. *In General*, 1372

2. *Sufficiency*, 1372

3. *Proof in Support of*, 1372

a. *Necessity*, 1372

b. *Rules Governing*, 1372

C. *Decision*, 1372

1. *Effect*, 1372

2. *Review*, 1372

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* Author of "Livery-Stable Keepers," 25 Cyc. 1504; "Marshaling Assets and Securities," 26 Cyc. 927; "Parliamentary Law," 29 Cyc. 1686; and joint author of "Licenses," 25 Cyc. 593.

a. *In General*, 1372
b. *Ruling of Former Bureau*, 1372

V. COMMENCEMENT AND TERMINATION, 1372
A. *Commencement*, 1372
1. *In General*, 1372
2. *Acquiescence of Pensioner Regarding*, 1373
B. *Termination*, 1373
1. *In General*, 1373
2. *By Repeal of Statute*, 1373
3. *By Striking Name From Roll*, 1373
4. *Cohabitation by Widow*, 1373

VI. RATE, 1373
A. *Discretion of Bureau Regarding*, 1373
B. *Total Disability*, 1373
C. *Double Pension*, 1373
D. *Modification*, 1373
1. *Decrease*, 1373
2. *Increase*, 1374

VII. PAYMENT, 1374
A. *What Constitutes*, 1374
B. *To Whom Made*, 1374
1. *In General*, 1374
2. *Payment to Wrong Person*, 1374
C. *Forbearance to Demand*, 1374
D. *Recovery Back*, 1374
1. *Mistake of Fact*, 1374
a. *In General*, 1374
b. *Mode of Recovery*, 1374
2. *Mistake of Law*, 1374

VIII. ASSIGNMENT, PLEDGE, OR OTHER TRANSFER, 1375
A. *In General*, 1375
B. *What Constitutes*, 1375
C. *Recovery of Certificate Pledged*, 1375

IX. OFFENSES AGAINST PENSION LAWS, 1375
A. *Elements*, 1375
1. *False Oath or Affidavit*, 1375
2. *Exacting Excessive Fee*, 1376
3. *Wrongfully Withholding Pension Money*, 1376
B. *Limitation of Prosecution*, 1376
C. *Indictment*, 1376
1. *For Making Fraudulent Claim*, 1376
2. *For Taking False Oath*, 1376
3. *For Procuring Presentation of False Affidavit*, 1377
4. *For Exacting and Receiving Excessive Fee*, 1377
5. *For Withholding Pension Moneys*, 1377
D. *Evidence*, 1377

X. STATUTORY PROVISIONS, 1378
A. *Construction*, 1378
B. *Validity*, 1378
C. *Repeal*, 1378
1. *In General*, 1378
2. *Effect of*, 1378
a. *On Pending Application*, 1378
b. *On Pending Prosecution*, 1378

CROSS-REFERENCES

For Matters Relating to:
Military Bounty, see BOUNTIES.
Pay of:
Enlisted Man, see ARMY AND NAVY; MILITIA.
Of Military Officer, see ARMY AND NAVY; MILITIA.
Pension:
As Community or Separate Property, see HUSBAND AND WIFE.
Exempt From:
Attachment or Execution, see EXEMPTIONS.
Taxation, see TAXATION.
Of Fireman, see MUNICIPAL CORPORATIONS.
Of Policeman, see MUNICIPAL CORPORATIONS.
Surrender to Soldiers' Home, see ARMY AND NAVY.
Transfer as Fraudulent Conveyance, see FRAUDULENT CONVEYANCES.

I. DEFINITION.

A pension may be defined as a periodical allowance of money granted by the government for services rendered, in particular to a soldier or sailor in connection with a war or with military operations.[1]

II. PENSION AGENCIES AND PENSION AGENTS.

A. Pension Agencies — 1. ESTABLISHMENT. The power to establish pension agencies is vested in the president of the United States.[2]

2. DISCONTINUANCE — a. In General. It is discretionary with the president to discontinue an agency at one place and create another in a different locality.[3]

b. Effect. Upon the discontinuance of an agency the functions of the incumbent cease.[4]

3. ENLARGEMENT — a. In General. It is in the discretion of the president to enlarge an existing agency by the transfer thereto of the business of discontinued agencies.[5]

b. Effect. An incumbent of an agency, enlarged by the transfer thereto of

1. Morse *v.* Robertson, 9 Hawaii 195, 197; Anderson L. Dict.

Other definitions are: "An annuity from the government for services rendered in the past." Ætna Ins. Co. *v.* Jones, (S. C. 1907) 59 S. E. 148, 152.

"A bounty for past services rendered to the public." Price *v.* Savings Soc., 64 Conn. 362, 366, 30 Atl. 139, 42 Am. St. Rep. 198.

"A mere bounty or gratuity given by the government in consideration or recognition of meritorious past services rendered by the pensioner or by some kinsman or ancestor." Manning *v.* Spry, 121 Iowa 191, 194, 96 N. W. 873.

Nature.—A pension is in the nature of a bounty or gratuity intended for the personal benefit of him who is, or those who are, beneficiaries of it (People *v.* Williams, 6 Misc. (N. Y.) 185, 27 N. Y. Suppl. 23; U. S. *v.* Moyers, 15 Fed. 411; Harrison *v.* U. S., 20 Ct. Cl. 122); and it involves no claim of right on the part of the pensioner (Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657; U. S. *v.* Teller, 107 U. S. 64, 2 S. Ct. 39, 27 L. ed. 352; Walton *v.* Cotton, 19 How. (U. S.) 355, 15 L. ed. 658; Harrison *v.* U. S., *supra*), no agreement of parties (Harrison *v.* U. S., *supra*), and no acquired rights of third parties (U. S. *v.* Moyers, *supra*; Harrison *v.* U. S., *supra*).

Distinguished from "corody" see 9 Cyc. 979 note 32.

Distinguished from salary.— Pension is not synonymous with salary, since the pensioner is not bound to render any services for his pension. *In re* Higgins, 21 Ch. D. 95, 46 J. P. 805, 51 L. J. Ch. 772, 30 Wkly. Rep. 700.

"Accrued pensions," as used in the pension laws, means the amount of money unpaid by the government to which a pensioner, or one who had a valid pending claim for pension, would be entitled at his death. 19 Op. Atty.-Gen. 1, 2.

Pension money as separate estate see HUSBAND AND WIFE, 21 Cyc. 1369 note 24, 1656 note 94.

Pension to corporate officer for past services see CORPORATIONS, 10 Cyc. 1144.

2. 15 Op. Atty.-Gen. 246.
3. 15 Op. Atty.-Gen. 246.
4. 15 Op. Atty.-Gen. 246.
5. 15 Op. Atty.-Gen. 246.

the business of discontinued agencies, is competent, without any new appointment, to discharge the duties thereof as well after as before the enlargement.[6]

B. Pension Agents — 1. Appointment. The power to appoint pension agents is vested in the president.[7]

2. Bonds — a. Acceptance. Where there exists a rule of the department requiring an accounting before a new bond is accepted, and a pension agent substitutes by permission a new bond for his official one, the approval of the secretary of the interior, indorsed on the second bond, does not constitute an acceptance of it to stand in lieu of the first bond.[8]

b. Extent of Surety's Liability. The general rule that a surety is never bound beyond the scope of his undertaking applies to a bond given by a pension agent for the faithful performance of his duty.[9]

c. Actions Thereon — (I) *Who May Commence.* A pensioner cannot maintain an action in his own name on the official bond of a pension agent, in the absence of a covenant in such bond for his benefit.[10]

(II) *Amount of Recovery.* Where no demand has been made upon the surety to make good his principal's default, interest will be charged only from the date of the service of the writ.[11]

3. Fees — a. In General. No person is entitled to demand or receive for services in procuring a pension more than the sum prescribed by law, and if the services are such as are within the contemplation of the statute they determine the amount of compensation.[12]

b. Payment by Pensioner — (I) *In General.* Any contract by the pensioner for a sum greater than that prescribed by the statute is void;[13] and by no device or contrivance whatever, such as an agreement, in consideration of services to be rendered in procuring a pension, to apply the pension when obtained toward an existing indebtedness,[14] or to submit to arbitration a demand for an excessive fee,[15] or a gift or loan pursuant to a previous agreement,[16] can the prohibition of the statute be evaded. So too where there is no contract and the person having rendered the services in obtaining a pension demands or receives, or, having come into possession of the pension money, retains or withholds more than the prescribed fee, the statute is violated.[17] But the statute is not violated if the pensioner, after obtaining his pension, voluntarily makes a *bona fide* gift or loan of a sum in excess of that prescribed, and such gift is not intended or received as a compensation for the donee's services.[18] Nor does the prohibition of the statute as to excessiveness of compensation cover reimbursement for money advanced and actual expenses incurred in prosecuting the pension claim,[19] or services rendered

6. 15 Op. Atty.-Gen. 246.

7. 15 Op. Atty.-Gen. 246.

8. U. S. *v.* Haynes, 26 Fed. Cas. No. 15,334, 9 Ben. 22.

9. U. S. *v.* White, 28 Fed. Cas. No. 16,686, 4 Wash. 414, holding further that the sureties on a bond given by a pension agent to the secretary of the navy for the faithful execution of his agency in paying invalid pensioners are not answerable for his defaults in not paying the navy and privateer pensions, although such principal was duly appointed agent for the two latter purposes.

10. Hughes *v.* Cotton, 13 Bush (Ky.) 596, holding further that Gen. St. c. 81, § 9, providing that suit may be brought from time to time on the bond of any officer for the benefit of any person injured by a breach thereof, relates only to the bonds of officers of the state, and has no application to bonds of officers of the United States.

11. U. S. *v.* Poulson, 30 Fed. 231.

12. Caverly *v.* Robbins, 149 Mass. 16, 20 N. E. 450, 2 L. R. A. 745, holding further that the statute is not limited to persons who are recognized or known to the commissioner of pensions as attorneys or agents of applicants.

13. *Maine.*— Smart *v.* White, 73 Me. 332, 40 Am. Rep. 356.

Michigan.— Hall *v.* Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

North Carolina.— Powell *v.* Jennings, 48 N. C. 547.

Vermont.— Morgan *v.* Davis, 47 Vt. 610.

United States.— U. S. *v.* Brown, 40 Fed. 457; U. S. *v.* Moore, 18 Fed. 686.

14. Smart *v.* White, 73 Me. 332, 40 Am. Rep. 356.

15. Hall *v.* Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

16. U. S. *v.* Moore, 18 Fed. 686.

17. U. S. *v.* Brown, 40 Fed. 457.

18. U. S. *v.* Brown, 40 Fed. 457; U. S. *v.* Moore, 18 Fed. 686.

19. U. S. *v.* Moore, 18 Fed. 686.

for the person claiming the pension after the certificate therefor is issued,[20] or services performed and expenses incurred by a guardian in procuring a pension for his ward.[21]

(II) *Lien on Certificate Therefor*—(A) *In General.* One who has been the means of procuring a pension has no right, as of lien, to retain the certificate to secure compensation for his services.[22]

(B) *Recovery of Certificate Retained or Damages Therefor.* An agent of a pensioner who refuses to deliver the pensioner's certificate upon demand is liable in an action for its value or for damages for its detention.[23]

c. Payment by Third Person. The intention of the statute is to prohibit the recovery from a third person as well as the pension claimant any compensation for services in procuring a pension, other or greater than that provided by statute.[24]

d. Recovery Back. Money taken from the pensioner in excess of the prescribed fee for services in obtaining a pension may, the parties not being regarded as standing *in pari delicto*, be recovered by the pensioner from the taker by direct suit,[25] or as a set-off in an action against the pensioner.[26]

III. PERSONS ENTITLED.

A. Children. The word "children" in a pension act declaring who shall be entitled to its benefits does not embrace an adopted child,[27] but it does embrace the grandchildren of deceased pensioners, whether their parents died before or after the decease of the pensioner.[28] So too the word "children" in a pension act embraces an illegitimate child, if its parents afterward intermarried and the father acknowledged it, so that it thereby became legitimate under the laws of the state where the parents resided.[29]

B. Widow — 1. Remarriage. A pension act which declares that the widow of any soldier while she remains unmarried shall be entitled to receive the benefit of the act does not include the widow of a soldier who has remarried, although her second husband is also dead.[30] So too a second marriage of a wife deserted by

20. Adee *v.* Howe, 59 How. Pr. (N. Y.) 459.

21. Southwick *v.* Evans, 17 R. I. 198, 21 Atl. 104.

22. Payne *v.* Woodhull, 6 Duer (N. Y.) 169.

"First draw" defined in relation to compensation to agent for procuring pension see 19 Cyc. 984.

23. Payne *v.* Woodhull, 6 Duer (N. Y.) 169.

24. Wolcott *v.* Frissell, 134 Mass. 1, 45 Am. Rep. 272, holding further that an attorney who has received the fee prescribed by the statute for procuring a pension cannot recover of a third person a larger fee upon such person's promise to pay for his services as much as they were reasonably worth, there being no agreement in writing as to the amount to be paid.

25. Smart *v.* White, 73 Me. 332, 40 Am. Rep. 356 (holding further that the right to recover from the taker is unaffected by the fact that the excessive fee was obtained without any wrongful intent on the part of the taker, or by the fact that the pensioner, when paying or allowing the fee, was not aware of the statutory protection); Powell *v.* Jennings, 48 N. C. 547.

Action against subagent.— However, where a subagent receives from the general government a pension under an agreement with the pensioner that one half of it is to be paid to the agent's principal, and before any demand or objection on the part of the pensioner, one half is accordingly paid to such principal, no action will lie for its recovery from the subagent. Bridgers *v.* McNeil, 51 N. C. 311.

26. Hall *v.* Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

27. U. S. *v.* Skam, 27 Fed. Cas. No. 16,308, 5 Cranch C. C. 367.

28. Walton *v.* Cotton, 19 How. (U. S.) 355, 15 L. ed. 658. *Compare* Garland *v.* Thompson, 29 N. H. 396, holding that where the widow of a Revolutionary soldier, being entitled to a pension under the act of congress of July 4, 1836, died on the first of February, 1841, without having made application for the pension, and a certificate was afterward, on the 11th day of March, 1881, issued from the department of the interior in favor of her seven surviving children, one of whom died before receiving his share of said pension, leaving a widow and five children surviving him, said five children are not entitled to the share of their deceased father.

29. U. S. *v.* Skam, 27 Fed. Cas. No. 16,308, 5 Cranch C. C. 367.

30. State *v.* Verner, 30 S. C. 277, 9 S. E. 113.

one who enters and dies in the service of the United States and her continuing to live with the other party to such marriage after discovering her husband to be alive precludes her from claiming a pension, although she believed her first husband was dead at the time she entered into the second marriage.[31]

2. DIVORCE. Since the term "widow" means a wife that outlives her husband, one who intermarries a pensioner and afterward obtains a decree of divorce absolutely dissolving the marriage is not entitled on the death of the pensioner to be placed on the pension rolls as his widow.[32]

C. Dependents. Under an act providing that, if one has died entitled to a pension leaving persons dependent on him for support at the time of his death, such persons shall be entitled to the pension, one is regarded as a dependent when he requires for his support the use of certain realty in which the pensioner has an interest as heir.[33]

D. Personal Representatives. Unless the law under which a pension is granted otherwise provides, any balance due at the death of a pensioner is payable to his personal representatives.[34] But if the law provides that arrears of pension due at the death of a pensioner shall be paid to his legal representatives for the benefit of his children, such representatives are not entitled to payment of arrears due to their decedent if he left no children.[35]

IV. PROCEEDINGS TO PROCURE.

A. Jurisdiction. The interior department is the special tribunal of judicial or quasi-judicial powers appointed by law to ascertain all the facts and to

31. U. S. *v.* Hays, 20 Fed. 710.

Illegality of second marriage.— The widow of a deceased naval officer was allowed a pension from the date of the death of her husband until the date of her remarriage. Subsequently she obtained a divorce from her second husband for intemperance and cruelty. Thereupon she applied for a restoration of the pension on the ground that her second marriage was illegal and her right to the pension was not determined thereby. On such application she alleged that her second husband, at the time of her marriage with him, had a wife living, and that she was cognizant of this fact when she instituted her suit for divorce, but remained silent. It was held that, by permitting the suit against her second husband and procuring a decree which in effect affirmed the validity of her marriage while declaring its dissolution, the claimant rendered the objection of illegality of the second marriage unavailable in support of the claim for pension so long as the decree dissolving the second marriage stands unaffected or judicially unimpeached. 14 Op. Atty.-Gen. 220.

32. 11 Op. Atty.-Gen. 1.

33. U. S. *v.* Purdy, 38 Fed. 902, holding further that, although the mother of a deceased soldier has some money of her own invested, she is not bound to use the capital for her support, for she can be dependent upon her son within the meaning of the statute and still keep her money at interest, using the income for her support as far as it will go.

But where the statute provides that the pension allowed to any person on account of dependence shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence, an alleged dependent who has made a contract with a third person for her support is not entitled to any pension from the date of such contract. U. S. *v.* Purdy, 38 Fed. 902.

34. Slade *v.* Slade, 11 Cush. (Mass.) 466; Foot *v.* Knowles, 4 Metc. (Mass.) 386; 4 Op. Atty.-Gen. 240.

Unclaimed Revolutionary pensions.— The acts of congress granting pensions, or pay in the nature of pensions, to officers and soldiers of the Revolution, and to the widows of such officers and soldiers, do not confer any heritable rights which descend to personal representatives. 8 Op. Atty.-Gen. 198.

When an act granting a pension was the fruit and fulfilment of a treaty granting a pension for disability, and the treaty was a contract with an Indian pensioner during his life, or with his tribe for his benefit, the benefits as well as the responsibilities growing out of it descending, as of course, to his personal representatives, a balance due to the pensioner at the time of his death must be paid to his personal representatives. 4 Op. Atty.-Gen. 55.

35. 4 Op. Atty.-Gen. 504.

Pension taken in trust.— The legal representatives of a pensioner receiving the balance due at his death, which by law is for the benefit of the children, take the same in trust for the children, and cannot retain it for the purposes of administration. Shirley *v.* Walker, 31 Me. 541; Perkins *v.* Perkins, 46 N. H. 110; Fogg *v.* Perkins, 19 N. H. 101; Chapman *v.* Loveland, 11 Ohio St. 214, holding, however, that the personal representative is entitled to retain from the pension money the necessary incidental expenses of a faithful execution of the trust.

adjudicate and allow the pension to the party entitled.[36] It is the duty of the commissioner of pensions to consider and determine all questions arising under the pension law, subject only to the direction of the secretary of the interior.[37]

B. Application — 1. IN GENERAL. An application is the first regular, substantial step taken by a claimant to obtain a pension.[38]

2. SUFFICIENCY. If the claimant is identified, and the time and place of his service and the injury or disease which constitute the ground of his claim are substantially set forth, the form is immaterial.[39]

3. PROOF IN SUPPORT OF — a. Necessity. Where the language of the pension law is not explicit on the subject, congress will be presumed to intend proof of indigence as well as of service on the part of those seeking its benefits, and not to intend that inquiry as to the indigence be made by the pension bureau.[40]

b. Rules Governing. After the application is made, the necessary forms and instructions as to the proof of the claim are to be furnished to the claimants by the commissioner of pensions.[41]

C. Decision — 1. EFFECT. Where the commissioner of pensions passes on a claim and finds the claimant to be entitled to the pension, and directs it to be paid, such finding is conclusive as to the rights of claimant,[42] and puts him upon the footing of an acknowledged creditor of the government to an ascertained amount.[43]

2. REVIEW — a. In General. If the proper executive officer decides against one's claim to a pension, there is no appeal,[44] except to congress.[45]

b. Ruling of Former Bureau. The bureau of pensions has the power to review the ruling of a former bureau granting a pension or an increase thereof.[46]

V. COMMENCEMENT AND TERMINATION.

A. Commencement — 1. IN GENERAL. If an act of congress awards a pension to a certain class of persons, as to the widows of Revolutionary soldiers who were married subsequently to a certain date, specified in the act, the pension

36. U. S. *v.* Scott, 25 Fed. 470; U. S. *v.* Schindler, 10 Fed. 547, 18 Blatchf. 227. See also Lochren *v.* U. S., 6 App. Cas. (D. C.) 486.

This was long since decided, in 1849, under our old pension laws, as to other departments charged with similar duties, in the case of Stokely *v.* De Camp, 2 Grant (Pa.) 17.

Not a court.— The pension bureau is, however, not a court, nor can any officer thereof be invested with judicial functions. *In re* McLean, 37 Fed. 648. See also U. S. *v.* Lalone, 44 Fed. 475.

Court of claims without jurisdiction.— Under U. S. Rev. St. (1878) § 4756, conferring on the secretary of the navy jurisdiction over an application from an enlisted person for a pension from the naval pension department, the court of claims has no jurisdiction. Davidson *v.* U. S., 21 Ct. Cl. 298.

37. Miller *v.* Raum, 7 Mackey (D. C.) 556; 17 Op. Atty.-Gen. 339. See also Stokely *v.* De Camp, 2 Grant (Pa.) 17.

38. 19 Op. Atty.-Gen. 190.

39. 19 Op. Atty.-Gen. 190.

Amendment.—The original application may be sufficient only to identify the claim and claimant and will yet be a valid application, for it is subject to amendment for defective statements. 19 Op. Atty.-Gen. 190.

40. 5 Op. Atty.-Gen. 711.

41. U. S. *v.* Boggs, 31 Fed. 337; 19 Op. Atty.-Gen. 190.

Verification.— Under the regulation of the pension bureau that all evidence in a claim for pension, other than the declaration, may be verified by an officer duly authorized to administer oaths for general purposes, a justice of the peace comes within the purview of such regulation. U. S. *v.* Boggs, 31 Fed. 337.

42. U. S. *v.* Scott, 25 Fed. 470; U. S. *v.* Schindler, 10 Fed. 547, 18 Blatchf. 227; 4 Op. Atty.-Gen. 238.

43. 4 Op. Atty.-Gen. 515 (holding further that there is no appeal to the president from a decision of the pension bureau); 4 Op. Atty.-Gen. 238.

44. Stokely *v.* De Camp, 2 Grant (Pa.) 17; Daily *v.* U. S., 17 Ct. Cl. 144.

Persons entitled to pension, but not named in decree.— A decree awarding a pension to certain persons (specifically naming them therein), as children of a deceased widow, who was entitled to a pension under the act of July 4, 1836, but did not draw it, when in fact only part of the children were named, is conclusive upon those not named in the decree, and can only be corrected upon re-examination by the commissioner at his discretion, subject to an appeal to the proper secretary. Stokely *v.* De Camp, 2 Grant (Pa.) 17.

45. Daily *v.* U. S., 17 Ct. Cl. 144; 2 Op. Atty.-Gen. 309.

46. Lochren *v.* U. S., 6 App. Cas. (D. C.) 486.

commences with the passage of the act, unless a different intention is either expressed in the act[47] or plainly implied.[48]

2. ACQUIESCENCE OF PENSIONER REGARDING. Whenever a decision fixing the time for the commencement of a pension has been acquiesced in by the pensioner, it cannot after his death be contested by his personal representatives.[49]

B. Termination — 1. IN GENERAL. Pensions being the bounties of the government, congress has the power to recall or terminate them at its pleasure.[50]

2. BY REPEAL OF STATUTE. A pension may be terminated by the repeal of the law under which it was granted and the certificate thereunder issued.[51]

3. BY STRIKING NAME FROM ROLL. The power to strike a name from the pension roll[52] extends to all pensioners and may be exercised on *ex parte* evidence.[53]

4. COHABITATION BY WIDOW. Open and notorious cohabitation by a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation.[54]

VI. RATE.

A. Discretion of Bureau Regarding. The discretion of the head of the pension bureau to interpret the laws relating to pensions includes the rate due a claimant for a given disability.[55]

B. Total Disability. Under a statute providing that the widow of a pensioner shall be entitled to the pension that he would have been entitled to had he been totally disabled, such widow is thus entitled, without regard to the pension which he was receiving.[56]

C. Double Pension. In the absence of express provision to the contrary, the pension laws will be so interpreted as to prevent any person from receiving a double pension.[57]

D. Modification — 1. DECREASE. A pension bureau may decrease the rate of pension being received by a pensioner under the ruling of a former bureau, on the ground that the proof of disability submitted did not entitle the pensioner to the rate granted.[58]

47. U. S. *v.* Alexander, 12 Wall. (U. S.) 177, 20 L. ed. 381; 5 Op. Atty.-Gen. 560 (holding further that under an act requiring that the right to receive a pension shall be construed to commence at the time of the completion of the testimony, such right does not commence until the testimony shall have been taken, authenticated, and in all respects completed, so as to entitle it to reception at the pension bureau); 5 Op. Atty.-Gen. 133; 5 Op. Atty.-Gen. 41.

48. U. S. *v.* Alexander, 12 Wall. (U. S.) 177, 20 L. ed. 381 (holding further that the terms "in the same manner," occurring in the act of congress of Feb. 23, 1853, granting to widows married after January, 1800, a pension in the same manner as those who were married before that date, may as well refer to the mode in which the pension was obtained and to the rules and prescriptions provided by law for the payment of the same); Clark *v.* U. S., 1 Ct. Cl. 179.

49. 5 Op. Atty.-Gen. 248.

50. U. S. *v.* Teller, 107 U. S. 64, 2 S. Ct. 39, 27 L. ed. 352.

51. Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174, 178; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657. See *infra*, X, C, 2.

52. U. S. Rev. St. (1878) § 4739 [U. S. Comp. St. (1901) p. 3269], expressly empowering the secretary of the interior to strike from the pension roll the name of any person, whenever it appears by proof satisfactory that his name was placed thereon through fraud or fraudulent representations.

53. Harrison *v.* U. S., 20 Ct. Cl. 122.

Restoration of name stricken from roll.— Under an act by congress making it the duty of the secretary of war to strike from the list of pensioners the name of any person who, according to the evidence the schedule required by the act, ought not, in his opinion, to remain thereon, the secretary has no power to restore on subsequent and different evidence the name of any person who may have been stricken off on the evidence of the schedule. 5 Op. Atty.-Gen. 731.

54. U. S. Rev. St. (1878) § 4705 [U. S. Comp. St. (1901) p. 3244].

55. U. S. *v.* Raum, 7 Mackey (D. C.) 556.

56. Burnett *v.* U. S., 20 Ct. Cl. 190.

57. 4 Op. Atty.-Gen. 357; 4 Op. Atty.-Gen. 91. See also Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 10 L. ed. 559, 609.

Not to be drawn under both general and special acts.— It was competent for congress to pass the act of July 25, 1882, providing that "no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive, in addition thereto, a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension." U. S. *v.* Teller, 107 U. S. 64, 67, 2 S. Ct. 39, 27 L. ed. 352.

58. Lochren *v.* U. S., 6 App. Cas. (D. C.) 486.

2. INCREASE. Under an act increasing the pensions of all pensioners of a given class, such pensioners are entitled to the increase no matter when they make their application for it;[59] but the benefits of the act cannot be extended to pensioners who do not belong to such class at the time of the passage of the act.[60]

VII. PAYMENT.

A. What Constitutes. The sending of a check to a pensioner, which has been indorsed by him but not transferred in his lifetime, is not a payment.[61]

B. To Whom Made — 1. IN GENERAL. The pension laws expressly provide that no pension shall be paid to any person other than the pensioner entitled thereto.[62]

2. PAYMENT TO WRONG PERSON. One entitled to a pension is not deprived of his right thereto by the fact that a certificate for the pension has been issued and payment made to the wrong person.[63]

C. Forbearance to Demand. Forbearance of one during his life to demand payment of a pension granted to him upon proper application therefor does not extinguish the debt, but it remains due and can only be discharged by payment to his personal representatives.[64]

D. Recovery Back — 1. MISTAKE OF FACT — a. In General. The general rule that a payment made by a mistake of fact may be recovered[65] applies to a payment of pension moneys induced by fraudulent testimony,[66] or made under the mistaken belief that they have accrued since a given date,[67] or made on a check void because the payee was dead at the time it was drawn.[68]

b. Mode of Recovery. Such pension moneys may be recovered back either by direct suit[69] or by way of set-off against a different claim in favor of the pensioner against the government.[70]

2. MISTAKE OF LAW. Pensions moneys, paid to a claimant under mistake of law, cannot be recovered back.[71]

59. Burnett's Case, 17 Op. Atty.-Gen. 327.
60. 16 Op. Atty.-Gen. 594.
61. 19 Op. Atty.-Gen. 1.
62. U. S. Rev. St. (1878) § 4765 [U. S. Comp. St. (1901) p. 3285].
63. Gigo's Case, 8 Op. Atty.-Gen. 377, holding that if the executor of a pension, not his widow, is entitled to his unpaid pension, then the payment to the widow by the government is in its own wrong and the executor may still justly demand payment to himself from the proper department.
64. 4 Op. Atty.-Gen. 238.
65. See PAYMENT, *ante*, p. 1316 *et seq.*
66. Pooler *v.* U. S., 127 Fed. 519, 62 C. C. A. 317 (holding further that U. S. Rev. St. (1878) § 563, confers on the district court jurisdiction of an action by the United States to recover money fraudulently obtained by defendant in payment of a false claim for a pension); Rhodes *v.* U. S., 79 Fed. 740, 25 C. C. A. 186 (holding, however, that the government cannot recover back pension money on the ground that it was obtained by false statement on the part of defendant that he contracted a certain disease in service and in line of duty, where it appears that, although defendant might have contracted the disease before he enlisted in the service, yet he was cured of it, so that he was a sound man when he enlisted but subsequently contracted it again while in the service and in the line of his duty); U. S. *v.* Lalone, 44 Fed. 475 [*reversed* on other grounds in 164 U. S. 261, 17 S. Ct. 74, 41 L. ed. 425]. See also U. S. *v.* Purdy, 38 Fed. 902.

The statutory provision that a pension shall be deemed and held by all officers of the United States to be a vested right in the grantee, and that payment thereof shall not be withheld or suspended until the commissioner of pensions after a hearing shall decide to annul or modify the decision by which it was granted, applies only to action by executive officers, and does not affect the right of the United States to proceed through the courts civilly to recover pension money, payment of which was induced by false testimony. Pooler *v.* U. S., 127 Fed. 509, 62 C. C. A. 307.

67. 2 Op. Atty.-Gen. 345.
68. U. S. *v.* Coffeyville First Nat. Bank, 82 Fed. 410, holding that a bank which pays out moneys on a pension check which is void because the payee was dead at the time it was drawn, and which, through intermediate banks, collects the money from the government, which is ignorant of the facts, is liable to reimburse the government the said amount.
69. U. S. *v.* Lalone, 44 Fed. 475; 2 Op. Atty.-Gen. 345. See also U. S. *v.* Purdy, 38 Fed. 902.
70. 4 Op. Atty.-Gen. 70.
71. Burton *v.* Burton, 10 Leigh (Va.) 597.

VIII. ASSIGNMENT, PLEDGE, OR OTHER TRANSFER.[72]

A. In General. In the absence of express statutory provision,[73] the rule is that a pension granted for past services is assignable;[74] but the rule is otherwise where the pension is granted by the government to one who, although not at the time engaged in active duties, is still liable to actual service, and is therefore to be considered in the service of the government.[75]

B. What Constitutes. Neither a verbal promise by a pension claimant to pay a debt when he receives his pension,[76] nor an agreement for a reasonable compensation for aid in procuring a pension,[77] nor a voluntary gift of a check for pension money,[78] constitutes such a pledge, mortgage, assignment, transfer, or sale of the pension claim as is forbidden by the acts of congress.

C. Recovery of Certificate Pledged. If a pension certificate has been pledged in violation of the statute, the pensioner may maintain an action against the pledgee to recover possession thereof.[79]

IX. OFFENSES AGAINST PENSION LAWS.[80]

A. Elements — 1. FALSE OATH OR AFFIDAVIT. To constitute the crime of

72. Dealings with respect to pension money as not constituting fraud upon creditors see FRAUDULENT CONVEYANCES, 20 Cyc. 379.

Insertion of amount of pension money in bankrupt's schedule see BANKRUPTCY, 5 Cyc. 299 note 75.

Pension subject to creditors' bill see CREDITORS' SUITS, 12 Cyc. 31.

Turning over pension to commissioners of Soldiers' Home see ARMY AND NAVY, 3 Cyc. 865 note 35.

Use of pension money to pay: Board and maintenance of insane person see INSANE PERSONS, 22 Cyc. 1177 note 9. Debts of insane person see INSANE PERSONS, 22 Cyc. 1180 note 28.

73. *Iowa.*— Farmer *v.* Turner, 64 Iowa 690, 21 N. W. 140.

Kentucky.— Trimble *v.* Ford, 5 Dana 517.

Maine.— Crane *v.* Linneus, 77 Me. 59.

Michigan.— Loser *v.* Soldiers' Home Bd. of Managers, 92 Mich. 633, 52 N. W. 956.

New York.—Moffatt *v.* Van Doren, 4 Bosw. 609.

North Carolina.— Powell *v.* Jennings, 48 N. C. 547.

South Carolina.— Lowe *v.* Moore, 1 McCord Eq. 243, holding further that the assignment of a pension certificate in violation of the pension laws is not such an executed contract that the court will refuse to rescind because of the general principle that equity will not interfere to set aside an executed unlawful contract, both parties being *in pari delicto*.

Construction.— The acts of congress forbidding the sale, assignment, or transfer of any right, claim, or interest in pensions granted thereby should, like the statute of frauds, receive such a construction as is consistent with the words "and as will suppress the mischief — the mischief of preying upon the necessities of the poor and ignorant." Powell *v.* Jennings, 48 N. C. 547.

74. Lloyd *v.* Cheetham, 3 Giffard 171, 7 Jur. N. S. 1272, 30 L. J. Ch. 640, 4 L. T. Rep. N. S. 576, 9 Wkly. Rep. 924, 66 Eng. Reprint 370 (holding that an assignment of a pension is not forbidden by statute, and that consequently an injunction will not lie to restrain the assignor from applying for and receiving his pension); Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Wils. Ch. 130, 37 Eng. Reprint 258. See also Gill *v.* Dixon, 131 N. C. 87, 42 S. E. 538.

Assignment of pension see CONTRACTS, 9 Cyc. 496 note 1.

75. Willcock *v.* Terrell, 3 Ex. D. 323, 39 L. T. Rep. N. S. 84; Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Wils. Ch. 130, 37 Eng. Reprint 258. See also Wells *v.* Foster, 5 Jur. 464, 10 L. J. Exch. 216, 8 M. & W. 149.

76. Crane *v.* Linneus, 77 Me. 59.

77. Trimble *v.* Ford, 5 Dana (Ky.) 517. But see Schwab *v.* Ginkinger, 181 Pa. St. 8, 37 Atl. 125, where the court, in holding that a voluntary gift of a check for pension money is not illegal under the prohibitory provision of the pension laws, lays stress upon the fact that during the transaction there was nothing said about the donee having the check as a compensation for his services in procuring the pension.

78. Farmer *v.* Turner, 64 Iowa 690, 21 N. W. 140; Schwab *v.* Ginkinger, 181 Pa. St. 8, 37 Atl. 125.

79. Moffatt *v.* Van Doren, 4 Bosw. (N. Y.) 609, holding further that proof of a grant of a pension certificate to plaintiff, that it is in possession of defendants, and that upon a demand made upon defendants to surrender it, they refusing so to do, not only entitles plaintiff to recover, but makes it a case which renders it impossible in the nature of things for defendants to prove any facts operating as a bar to the action or modifying in any respect plaintiff's right to the whole relief sought.

80. Criminal law generally see CRIMINAL LAW.

making a false deposition to enable another to procure the payment of a false pension claim, there must be a false claim,[81] a false deposition, and an intent to use the latter in obtaining, or aiding to obtain, the payment or approval of the former.[82] To constitute the statutory offense of procuring the presentation of a false affidavit on an application for a pension, it must appear that the affidavit was transmitted with relation to or in support of a claim against the United States for a pension;[83] but neither intent to defraud the United States,[84] nor a felonious intent,[85] nor the falsity of a claim for a pension,[86] is an essential ingredient of the offense.

2. EXACTING EXCESSIVE FEE. Neither fraud nor extortion[87] nor intent[88] is an element of the offense of demanding or receiving a fee for obtaining a pension in excess of that prescribed by the statute; but the fact of its demand or receipt completes the offense.[89]

3. WRONGFULLY WITHHOLDING PENSION MONEY. To constitute the statutory offense of wrongfully withholding pension money, there must be some unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully as would constitute an unlawful taking within the meaning of the law.[90]

B. Limitation of Prosecution. The statute of limitations runs from the first day of wrongful withholding from a person of pension money belonging to him.[91]

C. Indictment[92] — 1. FOR MAKING FRAUDULENT CLAIM. An indictment for presenting a fraudulent claim for pension money should aver the fraud with sufficient particularity to enable defendant to prepare his defense and plead the judgment as a bar to a subsequent prosecution.[93]

2. FOR TAKING FALSE OATH. An indictment for taking a false oath to enable another to obtain payment of a false pension claim, which describes the offense in the very words of the statute, is not vitiated by a conclusion which incorrectly

81. To sustain a just and true claim a false affidavit is not within the denunciation of the statute. U. S. *v.* Miskell, 15 Fed. 369. See also U. S. *v.* Rhodes, 30 Fed. 431.

82. U. S. *v.* Rhodes, 30 Fed. 431; U. S. *v.* Miskell, 15 Fed. 369.

Actual pendency of claim.— It is not necessary that the claim be one already presented and pending before the government or some officer thereof. U. S. *v.* Rhodes, 30 Fed. 431.

83. U. S. *v.* Van Leuven, 62 Fed. 69; U. S. *v.* Kessel, 62 Fed. 59.

84. U. S. *v.* Van Leuven, 62 Fed. 69.

85. U. S. *v.* Staats, 8 How. (U. S.) 41, 12 L. ed. 979.

86. U. S. *v.* Adler, 49 Fed. 733.

87. U. S. *v.* Moore, 18 Fed. 686.

88. Smart *v.* White, 73 Me. 332, 40 Am. Rep. 356; U. S. *v.* Koch, 21 Fed. 873.

89. U. S. *v.* Moore, 18 Fed. 686.

Request to return.— The fact that no demand was made on one who received for his services more than the prescribed fee to return the excess does not affect the question of his guilt. Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

90. U. S. *v.* Irvine, 98 U. S. 450, 25 L. ed. 193. See also Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

Check or treasury warrants.— The statute extends to holding, against the will of the pensioner, the check or treasury warrants coming into the hands of the agent, its intention being to protect the pensioner against frauds, until the unconditional payment of the money to the pensioner. U. S. *v.* Ryckman, 12 Fed. 46.

It must also appear that the person from whom it is alleged the pension money is wrongfully withheld is a pensioner of the United States, that the amount wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner, and that the accused is the person through whose instrumentality the claim was prosecuted. U. S. *v.* Howard, 26 Fed. Cas. No. 15,400, 7 Biss. 56.

There must be an actual withholding of the money before it reaches the hands of the pensioner. Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 4 L. ed. 388, holding further that it is not enough that the pension money is fraudulently obtained from the pensioner after it passes under his dominion and absolute control.

91. U. S. *v.* Irvine, 98 U. S. 450, 25 L. ed. 193; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,570, 12 Blatchf. 345.

The running of the statute cannot be avoided by charging in the indictment that the accused withheld the money upon a later day and then proving that on that day he was still retaining the money. U. S. *v.* Irvine, 98 U. S. 450, 25 L. ed. 193.

92. Indictment generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

93. U. S. *v.* Goggin, 1 Fed. 49.

denominates the offense.[94] And it need not allege that the false deposition was ever used, or attempted to be used, or set out in full the commission or authority of the notary to administer to the deponent, or aver that the claim had been presented and was pending before the government at the time the deposition was made.[95]

3. FOR PROCURING PRESENTATION OF FALSE AFFIDAVIT. The offense of procuring the presentation of false and fraudulent affidavits on an application for a pension may be couched in the language of the statute, if every ingredient of which the crime is composed be clearly and accurately set forth.[96] It must state the manner of presentation of the affidavit, or the name of the party procured to present it, or that his name is unknown.[97] It must aver that the affidavit was transmitted with relation to, or in support of, a claim against the United States, or facts from which the court can find that the United States could be prejudiced in some way thereby.[98] But the indictment need not charge that the affidavit was made for the purpose of defrauding the United States,[99] that the act was done feloniously or with a felonious intent,[1] or that the pension claim was false.[2]

4. FOR EXACTING AND RECEIVING EXCESSIVE FEE. An indictment for the statutory offense of receiving an excessive fee for obtaining a pension may, in charging the offense, use merely the language of the statute creating it,[3] if the words themselves duly set forth all the elements necessary to constitute the offense and apprise the accused with reasonable certainty of the charge against him.[4] It is not necessary to allege malice or intent,[5] nor how the accused was instrumental, or what he did, in procuring the pension;[6] nor that the applicant for the pension had been in the military or naval service of the United States;[7] nor that the amount received as a fee was in excess of the sum legally chargeable.[8] The indictment need not negative the existence of a contract in regard to the fee, since under the statute it is unlawful to receive, even by contract, a fee in excess of that prescribed.[9]

5. FOR WITHHOLDING PENSION MONEYS. An indictment for withholding pension moneys which alleges that certain persons are pensioners, but does not allege a withholding of the pension from such persons, is fatally defective.[10]

D. Evidence. The rules of evidence governing criminal prosecutions generally apply to prosecutions for violation of the pension laws.[11]

94. U. S. *v.* Elliott, 25 Fed. Cas. No. 15,044, 3 Mason 156, holding further that an indictment describing the offense fully and exactly in the words of the statute is not vitiated where it concludes, "And so the jurors say . . . that the party did commit wilful and corrupt perjury," although the offense is technically perjury.

95. U. S. *v.* Rhodes, 30 Fed. 431.

96. Miller *v.* U. S., 136 Fed. 581, 69 C. C. A. 355.

97. Miller *v.* U. S., 136 Fed. 581, 69 C. C. A. 355.

98. U. S. *v.* Van Leuven, 62 Fed. 69; U. S. *v.* Kessel, 62 Fed. 59.

99. U. S. *v.* Van Leuven, 62 Fed. 69.

1. U. S. *v.* Staats, 8 How. (U. S.) 41, 12 L. ed. 979.

2. U. S. *v.* Adler, 49 Fed. 733.

3. U. S. *v.* Reynolds, 48 Fed. 215; U. S. *v.* Wilson, 29 Fed. 286.

4. U. S. *v.* Wilson, 29 Fed. 286.

5. U. S. *v.* Koch, 21 Fed. 873, holding further that it is sufficient merely to allege that accused did the act prohibited, since the transaction of charging more than the prescribed fee is not inherently vicious, but a statutory offense of which knowledge or intent is not a necessary element.

6. U. S. *v.* Reynolds, 48 Fed. 215; U. S. *v.* Koch, 21 Fed. 873, holding further that the *gravamen* of the offense is not that the accused was instrumental in procuring the pension, but that, having been thus instrumental, he charged and received a fee in excess of that which the statute warrants, and hence, in an indictment therefor, it is only necessary to state that the accused was the person instrumental in procuring the pension.

7. U. S. *v.* Van Leuven, 62 Fed. 69.

8. U. S. *v.* Van Leuven, 62 Fed. 69.

9. U. S. *v.* Van Leuven, 62 Fed. 69.

10. U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,771, 4 Ben. 330.

11. See CRIMINAL LAW, 12 Cyc. 379; EVIDENCE, 16 Cyc. 821.

Admissibility.— In a prosecution against defendants for an attempt to defraud the government by procuring pensions on false and fraudulent affidavits, the application for the pension is admissible in evidence to show the use to which the false affidavits were to be applied and to prove the intent. U. S. *v.* Wentworth, 11 Fed. 52. Where the in-

X. STATUTORY PROVISIONS.

A. Construction. The pension laws should be construed liberally and favorably toward applicants.[12]

B. Validity. The constitutionality and validity of such laws have been passed upon and upheld in several cases.[13]

C. Repeal — 1. In General. The fact that one has been placed upon a pension roll under a valid law furnishes no reason why that law should not be repealed and the pension cease.[14]

2. Effect of — a. On Pending Application. An absolute repeal of a pension law leaves unfinished applications without any tribunal to pass upon them.[15]

b. On Pending Prosecution. The well-settled principle that after the repeal of a statute there can be no prosecution of a pending proceeding, unless there be a saving clause in the repealing act,[16] or there be in force a general statutory construction act which provides that the repeal of a statute shall not affect any penalty, forfeiture, or liability incurred under such statute,[17] applies to a pending prosecution for taking an illegal fee in a pension case.

dictment charges the receipt of a sum in excess of that legitimately chargeable, evidence is admissible to prove that the accused sold the pensioner property for a sum largely in excess of its value, if supplemented by proof that the sale was a mere trick to obtain an unlawful fee. U. S. *v.* Koch, 21 Fed. 873. On the trial of an indictment under U. S. Rev. St. (1878) § 5485 [U. S. Comp. St. (1901) p. 3702], for withholding pension money, parol evidence that the person from whom the money is withheld is a pensioner is not admissible, nor are the entries in the local pension agent's books to that effect copied from the certificate of the pensioner. U. S. *v.* Scott, 25 Fed. 470. It is not competent to prove by parol that the checks received by the government's witness are for pensions due to her, but the checks themselves, or legally exemplified copies thereof, should be produced. U. S. *v.* Scott, *supra.*

Courts will take judicial notice of pension laws. U. S. *v.* Van Leuven, 62 Fed. 62. See also EVIDENCE, 16 Cyc. 889.

Weight and sufficiency.— The only testimony as to the retention of pension money by a pension agent being that of the person entitled thereto that defendant did not pay it to her, and that of defendant that he did, the verdict of the jury against defendant cannot be disturbed. U. S. *v.* Reynolds, 48 Fed. 215.

12. 4 Op. Atty.-Gen. 496. See also Walton *v.* Cotton, 19 How. (U. S.) 355, 15 L. ed. 658.

13. U. S. *v.* Hall, 98 U. S. 343, 25 L. ed. 180; U. S. *v.* Van Leuven, 62 Fed. 52; U. S. *v.* Fairchilds, 25 Fed. Cas. No. 15,067, 1 Abb. 74; U. S. *v.* Marks, 26 Fed. Cas. No. 15,721, 2 Abb. 531.

Embezzling ward's pension money.—An act of congress making it an offense for a guardian to embezzle or convert to his own use the pension of his ward is not unconstitutional, on the ground that, inasmuch as the state law authorizes the guardian to receive the pension money, the accused could not be subjected to an indictment under an act of congress for embezzling it after he lawfully received it; or on the ground that a guardian is a state officer and as such is not subject to the laws of congress in the performance of his duty; or on the ground that the act is municipal in its character, operating directly on the conduct of individuals, and that it assumes to take the place of ordinary state legislation; or on the ground that matters of police regulation are not surrendered to congress, but are exclusively within the state legislation; or on the ground that it assumes the power of making police regulations which belongs to the state. U. S. *v.* Hall, 98 U. S. 343, 25 L. ed. 180.

Retaining excessive fee.— An enactment making it an offense for an agent to retain a greater fee than that prescribed for procuring a pension is constitutional, the power to secure to the pensioner the residue of the pension granted being an incident of the power of congress to grant pensions. U. S. *v.* Fairchilds, 25 Fed. Cas. No. 15,067, 1 Abb. 74; U. S. *v.* Marks, 26 Fed. Cas. No. 15,721, 2 Abb. 531. And such enactment does not trench on the right of a state to regulate contracts between its citizens. U. S. *v.* Van Leuven, 62 Fed. 52; U. S. *v.* Marks, *supra.*

14. Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657; Walton *v.* Cotton, 19 How. (U. S.) 355, 15 L. ed. 658.

15. Chalk *v.* Darden, 47 Tex. 438.

16. U. S. *v.* Hague, 22 Fed. 706.

17. U. S. *v.* Reisinger, 128 U. S. 398, 9 S. Ct. 99, 32 L. ed. 480; U. S. *v.* Mathews, 23 Fed. 74; U. S. *v.* Van Vliet, 23 Fed. 35.

PENT ROADS

By Ernest G. Chilton

I. DEFINITION, 1379

II. NATURE, 1379

III. WHAT MAY BE TERMINI, 1380

IV. ESTABLISHMENT, 1380

A. *Power to Establish*, 1380

1. *Selectmen*, 1380

2. *County Court*, 1380

B. *Proceedings Therefor*, 1380

1. *Notice*, 1380

2. *Petition*, 1380

3. *Order*, 1380

4 *Opening of Road*, 1380

5. *Review*, 1380

V. DAMAGES TO LANDOWNERS, 1380

VI. MAINTENANCE AND REPAIR, 1381

VII. GATES AND BARS, 1381

A. *In General*, 1381

B. *Penalty For Removing*, 1381

1. *Right of Recovery*, 1381

2. *Form of Action*, 1381

VIII. USE OF ROAD, 1381

A. *In General*, 1381

B. *By Public*, 1381

CROSS-REFERENCES

For Matters Relating to:

Highway, see Streets and Highways.

Private:

Road, see Private Roads.

Way, see Easements.

Right of Way, see Easements; Eminent Domain.

Streets, see Municipal Corporations; Streets and Highways.

Toll-Road, see Toll-Roads.

Turnpike, see Toll-Roads.

I. DEFINITION.

A pent road may be defined as a road closed at its terminal points, which is laid out by public authority.[1]

II. NATURE.

All pent roads are public highways,[2] although not open highways.[3]

1. See French *v.* Holt, 53 Vt. 364; Wolcott *v.* Whitcomb, 40 Vt. 40. See also Blakeslee *v.* Tyler, 55 Conn. 387, 11 Atl. 291.

A pent road is one that may be inclosed by gates or bars, and is not an open highway. Bridgman *v.* Hardwick, 67 Vt. 132, 134, 31 Atl. 33.

Compared with "lane" in Bridgman *v.* Hardwick, 67 Vt. 132, 31 Atl. 33. See also 24 Cyc. 1477.

2. French *v.* Barre, 58 Vt. 567, 5 Atl. 568; Wolcott *v.* Whitcomb, 40 Vt. 40; Whitingham *v.* Bowen, 22 Vt. 317.

3. Wolcott *v.* Whitcomb, 40 Vt. 40.

III. WHAT MAY BE TERMINI.

A pent road laid out by selectmen may terminate at the farm line of a person for whose special convenience it is laid out, instead of being extended to his buildings.[4]

IV. ESTABLISHMENT.

A. Power to Establish — 1. SELECTMEN. The power is conferred by statute on the selectmen of towns to establish pent roads.[5]

2. COUNTY COURT. The county court can, on appeal from the selectmen, establish a pent road.[6]

B. Proceedings Therefor — 1. NOTICE. It is not necessary to give notice of an intended application for the establishment of a pent road to a mortgagee of the land over which the road, when established, will pass.[7] A landowner who appears before the selectmen and objects to any action by them, but makes no objection to the sufficiency of the notice, waives that objection.[8]

2. PETITION. The selectmen may act without petition, or upon an improper one, and have their action good.[9] On a petition to the county court for a highway, the court has power to lay out a pent road.[10]

3. ORDER. It is not essential that permission to inclose the land shall be included in the order establishing the road,[11] nor does the omission to give such permission in the order change the character of the road from that of a pent road to that of a public highway.[12]

4. OPENING OF ROAD. The opening of a pent road, under the statute, is not a mere taking down of obstructions to travel, but the road is deemed to be opened when the certificate of the opening of the road, signed by the selectmen, has been filed in the town-clerk's office.[13]

5. REVIEW. The judgment of the county court establishing a pent road will be sustained on appeal unless substantial injustice has been done, or unless the county court upon the facts stated could not in law have rendered the judgment it did.[14]

V. DAMAGES TO LANDOWNERS.

When a pent road has been opened in the manner prescribed by statute, the damages occasioned thereby may be recovered by the owner of the land over

4. Brock *v.* Barnet, 57 Vt. 172.

5. Warren *v.* Bunnell, 11 Vt. 600.

Road for winter use.— Selectmen can lay out a pent road for winter use over the land of one person through a wood lot owned by another, although it is laid for the special convenience of such owner. Brock *v.* Barnet, 57 Vt. 172.

6. French *v.* Holt, 53 Vt. 364, holding further that, in establishing a pent road, the county court does not exercise its common-law jurisdiction, but the jurisdiction conferred by statute, which is substantially that of an appellate tribunal, from the decision of the selectmen of the town.

7. Brock *v.* Barnet, 57 Vt. 172.

8. Brock *v.* Barnet, 57 Vt. 172.

9. Brock *v.* Barnet, 57 Vt. 172, holding further that the statute providing that three or more freeholders may petition for the road was designed to afford a mode of compelling action by the selectmen, but that their action is the vital thing, however induced.

That one of the petitioners was not a freeholder does not therefore affect the action of selectmen in establishing the road. Brock *v.* Barnet, 57 Vt. 172.

10. Whitingham *v.* Bowen, 22 Vt. 317.

11. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

12. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

13. Warren *v.* Bunnell, 11 Vt. 600.

14. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

Where it does not affirmatively appear from the record what kind of highway was established by the county court, the appellate court will not presume that it was an open highway which could not be legally established of less width than three rods, but will presume that the county court established by its order a pent road which might be legally established of the width of two rods. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

Failure to give permission to erect gates and bars.— Where the report of the commissioners does not show that the necessity or convenience of any landowner requires that the road shall be inclosed by gates and bars for a portion of the year, it is not error for the county court to establish a road without making any provision in its order for the

which the road passes.[15] And it seems that the landowner can claim damages of the town, since pent roads are regarded as highways.[16]

VI. MAINTENANCE AND REPAIR.

Towns are bound to keep pent roads in repair, that is, in reasonable repair, taking into consideration their character and importance, and are liable for injuries arising from their not being in such a state of repair[17].

VII. GATES AND BARS.

A. In General. The power to establish a pent road implies the power to fix the place where gates and bars may be erected.[18] If the tribunal establishing the road fails to fix the points where inclosures may be made, the landowner has the right to erect gates and bars for the protection of his crops, if they do not interfere with the reasonable use of such road as a pent road,[19] or with any contract he may be under with any other person to keep his land open and uninclosed.[20]

B. Penalty[21] For Removing — 1. RIGHT OF RECOVERY. The right to recover the penalty given by statute against removing gates or bars across pent roads is not affected by the fact that no copy of the record of the county court establishing the road was recorded in the county clerk's office,[22] nor is the right lost by neglecting for a period of fifteen years to maintain a gate.[23]

2. FORM OF ACTION. The penalty given by the statute against removing gates or bars across a pent road may be recovered in an action of debt.[24]

VIII. USE OF ROAD.

A. In General. No person has a right to use a pent road until it has been legally opened.[25]

B. By Public. The public has a right of access to a legally opened pent road[26] to a reasonable extent.[27]

erection of gates and bars. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

15. Warren *v.* Bunnell, 11 Vt. 600.

16. Whitingham *v.* Bowen, 22 Vt. 317.

17. Loveland *v.* Berlin, 27 Vt. 713.

18. French *v.* Holt, 53 Vt. 364.

This implied power should be exercised only when a necessity actually exists for allowing the owner to inclose the road with gates and bars. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

19. French *v.* Barre, 58 Vt. 567, 5 Atl. 568; French *v.* Holt, 53 Vt. 364; Wolcott *v.* Whitcomb, 40 Vt. 40.

20. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

21. Penalty generally see PENALTIES, *ante*, p. 1331 *et seq.*

22. French *v.* Holt, 53 Vt. 364.

23. French *v.* Holt, 53 Vt. 364.

24. French *v.* Holt, 53 Vt. 364.

25. Warren *v.* Bunnell, 11 Vt. 600.

26. Wolcott *v.* Whitcomb, 40 Vt. 40; Loveland *v.* Berlin, 27 Vt. 713; Whitingham *v.* Bowen, 22 Vt. 317; Warren *v.* Bunnell, 11 Vt. 600.

27. Wolcott *v.* Whitcomb, 40 Vt. 40.

PEONAGE

By Louis Lougee Hammon*

I. History and Essentials, 1382
II. Constitutional and Legislative Prohibitions, 1383
A. *In General*, 1383
B. *Construction of Statutes*, 1385

CROSS-REFERENCES

For Matters Relating to:
Chattel Slavery, see Slavery, and Cross-References Thereunder.
Compulsory Military and Naval Service, see Army and Navy.
Compulsory Service of Apprentices, see Apprentices.
Compulsory Service of Seamen, see Constitutional Law; Seamen.
Convict Labor, see Convicts.
Imprisonment For Debt Generally, see Constitutional Law.
Involuntary Servitude Generally, see Constitutional Law.
Master and Servant Generally, see Master and Servant.
Specific Performance of Contracts For Personal Service, see Specific Performance.

I. History and Essentials.

Peonage is a form of servitude by which a peon or servant who is indebted to his employer is compelled to remain in the latter's service until the debt is discharged.[1] The system was prevalent in the Spanish American colonies, including Mexico, from which we derived it when we acquired the territory of New Mexico

1. Jaremillo *v.* Romero, 1 N. M. 190, 195; Clyatt *v.* U. S., 197 U. S. 207, 215, 25 S. Ct. 429, 49 L. ed. 726; U. S. *v.* Cole, 153 Fed. 801, 805; *In re* Peonage Charge, 138 Fed. 686, 687. And see *infra*, II, B.

Other definitions are: "A form of servitude existing in Spanish America. It prevailed especially in Mexico." Century Dict.

"The state or condition of a peon." Anderson L. Dict. And see Standard Dict.; Webster Int. Dict.

"The status of natives of Mexico whom their employers hold and compel to work on their lands in payment of debts incurred by such laborers." Universal French Dict. [*quoted* in 4 Columbia L. Rev. 279 (article by William Wirt Howe)].

"The exercise of dominion over their persons and liberties by the master, or employer, or creditor, to compel the discharge of the obligation, by service or labor, against the will of the person performing the service." Peonage Cases, 123 Fed. 671, 679.

Peonism is: "The state or condition of a peon; peonage." Century Dict. And see Webster Int. Dict.

Definitions of "peon" are: "A servant; especially, in some of the Spanish American countries, a debtor held by his creditor in a form of qualified servitude, to work out a debt." Webster Int. Dict. [*followed* in Black L. Dict. (*quoted* in U. S. *v.* McClellan, 127 Fed. 971, 976)]. And see 4 Columbia L. Rev. 279 (article by William Wirt Howe).

"In Mexico, a debtor held in servitude until he has worked out his debt." Anderson L. Dict. "Peonage."

"A common laborer; a servant; specifically, in Spanish America, one who is bound to serve his creditor until the debt is paid." Standard Dict.

"A species of serf, compelled to work for his creditor until his debts are paid." Century Dict. [*quoted* in *In re* Lewis, 114 Fed. 963, 967].

In New Mexico peons, strictly speaking, were a class of servants bound to personal service for the payment of debts due their masters, but there seems to have been no law regulating their rights and duties under that specific denomination, and the term "peon" was there used as synonymous with "servant." Jaremillo *v.* Romero, 1 N. M. 190.

The basal fact on which peonage rests is a debt due from the peon to his master. Clyatt *v.* U. S., 197 U. S. 207, 25 S. Ct. 429, 49 L. ed. 726; U. S. *v.* Cole, 153 Fed. 801; *In re* Peonage Charge, 138 Fed. 686.

Voluntary service in payment of debt distinguished.— "A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment

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as the result of the Mexican war.[2] The condition of peonage arose from contract. The peon, male or female, agreed with the master upon the nature of the service, the length of its duration, and the compensation to be paid. The peon then became bound to the master, according to the laws of New Mexico, "for an indebtedness founded upon an advancement in consideration of service."[3] In the earlier stages of the institution there, the person agreeing to perform service could put an end to the relation by paying at any time whatever he owed to the employer.[4] If the peon wished to change masters or service, he might find a new employer who would advance enough to pay the peon's debts to his then master, and the peon would then become bound in the new employer's service. So also the master could sell the service of the peon, for the term, to any one who would pay his debts and assume the duties and obligations of the master. Under later laws the party could not abandon the contract, except by mutual consent or "by some sufficient motive given by one party to another, such as having grievously injured him, or where the master kept the accounts in an ambiguous manner, so that the servant could not understand them." In these cases the contract could be rescinded by paying the amount due by one party to the other. If no such motive should be proven, the contract must be complied with, and the judge or court would order it carried into effect by imposing upon the party failing to comply with the contract, and who should persevere in doing so, that he should indemnify the other party for the injury resulting therefrom; and all resistance was punished by a fine or imprisonment, as the gravity of the circumstances and resistance might require. If the servant refused to comply, and owed any money to the master, and he refused and could not pay it, the court would compel him to pay the principal and interest to the other, and might order the sheriff to contract the services of the peon to the highest bidder.[5] While peonage may be regarded as a form of slavery,[6] it was not chattel slavery as that institution formerly existed in this country. The peon was not a slave; he was a freeman with political as well as civil rights. He entered into the relation from choice, for a definite period, as the result of mutual contract. The relation was not confined to any race.[7] And the child of a peon did not become a peon, nor could the father contract away the services of his minor child except in rare cases.[8]

II. CONSTITUTIONAL AND LEGISLATIVE PROHIBITIONS.

A. In General. The powers of justices of the peace, who succeeded to most of the jurisdiction of the alcaldes in the administration of the law in New Mexico, were not clearly defined, and left very much to their discretion as to the return of peons to service and the mode and *quantum* of judicial power which could be exercised to compel the service. There was often unscrupulous disregard as to "the legal rights of the unfortunate, the peon, and the feeble, when contesting with the wealthy and influential." The improvidence and the needs of laborers and servants, the greed of employers, and the exercise, often corrupt, of almost irresponsible power of local magistrates, resulted in citizens becoming bound, in constantly increasing numbers and length of service, to compulsory service or labor to coerce payment of debt or compel the performance of real or pretended

of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." Clyatt *v.* U. S., 197 U. S. 207, 215, 25 S. Ct. 429, 49 L. ed. 726; *In re* Peonage Charge, 138 Fed. 686, 688.

2. Jaremillo *v.* Romero, 1 N. M. 190; Peonage Cases, 136 Fed. 707; Peonage Cases, 123 Fed. 671; 4 Columbia L. Rev. 279 (article by William Wirt Howe).

3. Peonage Cases, 123 Fed. 671, 673, 674.

4. Clyatt *v.* U. S., 197 U. S. 207, 25 S. Ct. 429, 49 L. ed. 726; U. S. *v.* Cole, 153 Fed. 801; Peonage Cases, 123 Fed. 671.

5. Peonage Cases, 123 Fed. 671, 674.

6. *In re* Peonage Charge, 138 Fed. 686, 687.

7. Peonage Cases, 123 Fed. 671.

8. Bustamento *v.* Analla, 1 N. M. 255; Peonage Cases, 123 Fed. 671. And see Jaremillo *v.* Romero, 1 N. M. 190.

obligations of personal service. The evils of the system not only degraded those who were subjected to the system, but exercised a baleful influence upon all other classes, which in innumerable ways fought against the industrial prosperity and moral advancement of the people among whom the system was enforced. It was also wholly out of keeping with the spirit of the thirteenth amendment to the federal constitution, which forbids involuntary servitnde except upon due conviction of crime.[9] The courts of the territory, after the passage of the thirteenth amendment, holding that it destroyed the right formerly existing under the territorial laws to hold to service, released peons from compulsory service on writs of habeas corpus whenever applied to, but made little headway against, the evil. Peons had become so degraded that in many instances they voluntarily returned to the compulsory service, being content to give control over their persons and freedom to masters who in return would feed and clothe them and their families. Masters in many instances resented the new order of things, which deprived them of proper control of their labor, and exercised their old authority in spite of the new amendment, which was not then enforceable by criminal penalty. Officers of the army, particularly in the case of Indians, used the forces of the United States to hold or return them to the system of compulsory labor or service in discharge of their contracts, debts, or obligations. Congress therefore determined not only to destroy the system as it existed in New Mexico, but to prevent in the future in that territory or "in any other Territory or State" of the Union the reappearance or reëstablishment of the evil conditions which the system created. Accordingly it was enacted that "the holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or in any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void;" and that "every person who holds, arrests, returns, or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."[10] This enactment is a valid exercise of the power granted to congress

9. U. S. Const. Amendm. XIII.

Peonage as involuntary servitude.— While the thirteenth article of amendment to the federal constitution was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade when they amount to slavery or involuntary servitude; and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery of whatever class or name. Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co. (Slaughter-House Cases), 16 Wall. (U. S.) 36, 21 L. ed. 394 [*quoted* in 4 Columbia L. Rev. 280 (article by William Wirt Howe), and *followed* in Robertson *v.* Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. ed. 715; Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256]. "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude." Clyatt *v.* U. S., 197 U. S. 207, 215, 25 S. Ct. 429, 49 L. ed. 726. *In re* Peonage Charge, 138 Fed. 686, 688. So a statute authorizing a vagrant not accused of crime to be hired for a specified period to the highest bidder after a finding of the fact of vagrancy by a jury is void as being in conflict with both the state and federal constitutions prohibiting "slavery or involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted." *In re* Thompson, 117 Mo. 83, 89, 22 S. W. 863, 38 Am. St. Rep. 639, 20 L. R. A. 462. Peonage as including voluntary servitude see *infra*, II, B.

10. Act of congress of March 2, 1867 (U. S. Rev. St. (1878) §§ 1990, 1991, 5526, 5527 [U. S. Comp. St. (1901) pp. 1266, 1267, 3715, 3716]).

Forms of indictment for peonage see Clyatt *v.* U. S., 197 U. S. 207, 209, 25 S. Ct. 429, 49

by the thirteenth amendment, forbidding slavery or involuntary servitude except as punishment for crime, and declaring that congress shall have power to enforce the amendment by legislation.[11] A federal court may entertain a prosecution for violation of the statute denouncing peonage, although a prosecution of the same acts under the name of kidnapping and false imprisonment might be held in the state courts.[12]

B. Construction of Statutes. The meaning of the terms in the peonage statute must be sought in the light of the history of the institution in New Mexico, and the design of congress interpreted in the light of the evil condition that system developed, which the statute declared should not thereafter exist in any state or territory.[13] Nevertheless the statute is not limited to the territories or other parts of the strictly national domain, but is operative in the states, and wherever the sovereignty of the United States extends;[14] and the statute, like other statutes imposing penalties for the invasion of the rights of the citizen in order to protect him in his liberty and happiness, is not to be construed with the same strictness or on the same footing as those which regulate or restrain the exercise of a natural right or forbid the doing of things not intrinsically wrong.[15] "Peonage," within the meaning of the statute, may be defined as "the holding of any person to service or labor for the purpose of paying or liquidating an indebtedness due from the laborer or employé to the employer, when such employé desires to leave or quit the employment before the debt is paid off."[16] It includes cases of involuntary servitude to work out a debt.[17] However created peonage is denounced and prohibited by the statute. It forbids slavery and involuntary servitude, however attempted, whether created by contract, by criminal individual force, or by municipal ordinance or state law, and in whatever form, or however named.[18] It is immaterial whether the contract whereby the laborer is to work out an indebtedness due from him to the employer is entered into voluntarily or not;[19] and it is immaterial whether such a contract is made in consideration of a prcëxisting indebtedness or for a loan made at the time the contract is made.[20] So it is immaterial whether or not the condition of peonage exists by virtue of a local law or custom creating a system of peonage, or whether it exists in violation, or without the sanction, of law.[21] The condition of peonage, therefore, to which it is forbidden to hold or return any person by the express words of the statute means the situation or status in which a person is placed, including the physical and moral results of returning or holding such person to perform labor or service, by force either of law or custom, or by force of lawless acts of individuals unsupported by local law, "in liquidation of any debt, obligation, or otherwise."[22] The

L. ed. 726; U. S. *v.* McClellan, 127 Fed. 971; *In re* Lewis, 114 Fed. 963, 967, 968.

11. Clyatt *v.* U. S., 197 U. S. 207, 25 S. Ct. 429, 49 L. ed. 726; U. S. *v.* McClellan, 127 Fed. 971; *In re* Lewis, 114 Fed. 963.

12. U. S. *v.* McClellan, 127 Fed. 971.

13. Peonage Cases, 123 Fed. 671, 674.

14. Clyatt *v.* U. S., 197 U. S. 207, 25 S. Ct. 429, 49 L. ed. 726 [impliedly *overruling* U. S. *v.* Eberhart, 127 Fed. 252]; *In re* Peonage Charge, 138 Fed. 686. And see U. S. *v.* McClellan, 127 Fed. 971; Peonage Cases, 123 Fed. 671.

15. Peonage Cases, 123 Fed. 671.

16. Peonage Cases, 136 Fed. 707, 708.

17. *In re* Lewis, 114 Fed. 963 [*cited* in 4 Columbia L. Rev. 282 (article by William Wirt Howe)].

Peonage as involuntary servitude see *supra*, note 9.

18. *In re* Peonage Charge, 138 Fed. 686. See, however, U. S. *v.* Eberhart, 127 Fed. 252, cited *supra*, note 14.

19. Peonage Cases, 136 Fed. 707, 709, where it is said that "the fact even that the laborer entered into the contract voluntarily and with full knowledge of the conditions of his employment is no excuse, for the law says that no person shall enter into such a contract, and, if he does, it shall be null and void."

20. Peonage Cases, 136 Fed. 707.

21. Peonage Cases, 123 Fed. 671.

22. Peonage Cases, 123 Fed. 671, 679.

Illustrations.— A person who hires another, and induces him to sign a contract by which he agrees during the term to be imprisoned or kept under guard, and under cover of such agreement afterward holds the party to the performance of the contract by threats, punishment, or undue influence, subduing his free will, when he desires to abandon the service, is guilty of holding such a person to "a condition of peonage." So a person who falsely pretends to another that he is accused of crime, and offers his good offices to

phrase, "condition of peonage," means the actual status, physical and moral, with the inevitable incidents to which the employee, servant, or debtor was reduced under that system when held to involuntary performance or liquidation of his obligation — the effect thereby produced upon the person, liberties, and rights of

prevent his conviction if he will pay a sum of money thereby to satisfy the prosecutor, and thus induces such party to sign a contract obligating himself to work to reimburse the amount paid out or pretended to be paid out for this purpose or to pay any other sum on this account, whereby such person agrees to serve him or labor for him and to submit to restraint and deprivation of liberty while he is performing the contract, is guilty of causing such person to be held, or of holding him, in a condition of peonage, whenever such person, believing that the service is necessary to avoid conviction, enters upon the performance of the contract, and is then compelled to remain and perform it, although he desires to leave it, by threats or punishment, subduing his freedom of will. The person who makes such a contract with the person held to service in order that another may get the benefit of his enforced labor, and the person who becomes his custodian, knowing the fact, and enforces the performance of the contract, if the deceived person is compelled to labor against his will, are guilty under the statute. If a person carries another before a magistrate, informing him that he is accused of crime, and the magistrate induces the accused, being of weak mind, or of little intelligence, or confiding, to believe that he is being prosecuted in the court, and that he has been sentenced to hard labor for a fine, and that the party bringing him before the court has confessed judgment for the fine, in consequence of which the person believing himself lawfully sentenced to hard labor for the fine submits to restraint, and his will is subdued by reason of the fraud and the official character of the person before whom he is brought, because he believes himself to be a convict and restrained by the power which the law gives to a hirer over convicts, and he enters upon the service and works under the contract against his will, the persons so concerned are guilty of causing the accused to be held in a condition of peonage, although no warrant issued, no offense in fact was charged, no judgment was rendered, and the person who carried him before the magistrate was only a private citizen. Peonage Cases, 123 Fed. 671, 682. If a person desiring to have a servant returned to him to work out a debt causes such servant to be arrested on a warrant procured by the master, and after incarceration the master procures the servant's release on his promise to return to his master's employment to continue to work out a debt, the master is guilty of peonage, provided the servant was charged with the crime for the purpose of procuring his arrest and incarceration, and to enable the master to extort from the servant a promise to return and work out the debt. *In re* Peonage Charge, 138 Fed. 686. Under the statute of Alabama which permits a person convicted of crime to sign a contract in open court, with the written approval of the judge, by which he submits himself to servitude to his surety, on confession of judgment by the latter for the fine and costs, until such fine and costs have been reimbursed by his labor, the provisions of the statute must be strictly followed, and the contract cannot be extended beyond the payment of the fine and costs, nor can it be transferred without the consent of the convict. If he is held thereunder against his will and by force or threats after the fine and costs have been paid, or by another to whom the contract has been transferred without his consent, the person so restraining him is guilty of holding him to a condition of peonage. Peonage Cases, *supra*. Although one may have confessed judgment for another on his conviction, the surety is not entitled on that account to detain him in custody against his will, as his bail would be before trial, unless the surety has complied with the statutes of the state, and made written contract in open court, approved by the judge in writing. This is a safeguard which the state exacts to prevent abuse and oppression when the surety intends to hold his principal to involuntary service to reimburse him for the payment of the fine and costs. As such an agreement involves personal trust and confidence on the part of the convict in the selection of a keeper, his surety has no authority, without his consent, to transfer the contract and custody of the convict to some other person, who repays to the surety the fine and costs, and enforces the performance of the service. If there is no written contract approved by the court, or if it is transferred without the consent of the convict, the convict cannot be held against his will to perform service to repay his fine and costs. If one holds another convicted of a misdemeanor, against his will, because he has confessed judgment for the fine and costs, without obtaining a written contract in open court, approved in writing by the judge, or holds him against his will, after the fine and costs have been worked out, for advances upon a further term of service, or prevents his leaving by force or threats as above defined, such person is guilty of holding the person in a condition of peonage. Peonage Cases, 123 Fed. 671, 683.

Liability of officers.—A magistrate or other judicial officer is not criminally liable for an error of judgment or for any act honestly performed under an unconstitutional law; but where he corruptly exercises his functions in order that a citizen may be convicted unlawfully, and sentenced, so that a particular person with whom he has an understanding, express or implied, by becoming surety on a confession of judgment may get the custody of the convict or make a profit out of a contract to be made between the convict and

a man held in such a situation.[23] "Otherwise," in contradistinction to "any debt or obligation," cannot mean less than that the debt or obligation upon which the claim to compulsory service is based need not be real or of legal validity, and includes cases when the "obligation" performance of which is coerced by labor against the will of the servitor is unfounded, concocted, or illegal, or arises from agreements or dealings with strangers claiming the right to his service; as where a person having or pretending to have some obligation of the servitor transfers the obligation upon which he claims the right to exact service to a third person, who coerces labor or service against the will of the debtor or person claimed to be bound by the obligation in settlement or "liquidation" of such "obligation" or "otherwise," that is, by like means.[24] The holding or returning to a condition of peonage arises and exists wherever unlawful dominion is exercised over the person and freedom of one, whether he has agreed or not to submit to such control, in order to exact compulsory performance of labor or service against his will; or when, without the agreement, such dominion is used and exercised over him at any time upon a claim of indebtedness or obligation due or claimed to be due from him, directly or indirectly, whether well or ill founded, in consequence of which the service is compulsorily exacted of him against his will.[25] The test often given for determining the influence, force, or threats which deprive a person of freedom of choice and coerce his will is that the force, influence, or threats must be sufficient to overcome the will of a reasonably firm man under like circumstances; but the better rule, which should be applied to these cases is that, as all persons are not of like courage and firmness, the court or jury, as the case may be, must consider the situation of the parties, the relative inferiority or inequality between the person contracting to perform the service and the person exercising the force or influence to compel its performance, and determine in view of all the circumstances whether the service was involuntary — upon compulsion.[26] In some states various statutes "are used in various ways to uphold peonage and other kinds of involuntary servitude. Some of them are vagrancy laws, some contract labor or employment laws, some fraudulent pretense or false promise laws, and there are divers others. Some few of those in question, such as absconding debtor laws, labor enticing, and board-bill laws, were not originally passed to enslave workmen; but, in view of the use to which they are put, need amendment in order that they cannot be so abused. These laws are used to threaten workmen who, having been defrauded into going to an employer by false reports as to the conditions of employment and the surroundings, naturally become dissatisfied as soon as they find how they have been defrauded. They are used before juries and the local public to hold the peons as law-breakers and dishonest persons seeking to avoid their 'just obligations' and to convince patriotic juries that the defendants accused of peonage should not be convicted for enforcing, still less for threatening to enforce, the laws of their State."[27] In so far, however, as they might serve to justify peonage they are of no effect.[28] It is to be observed, however, that there are many persons other than those duly convicted of crime who may be compelled against their will to perform labor or service, and the holding of such persons to service or labor against their will does not fall within the reason

his surety in consequence of which the convict is restrained of his liberty and put to hard labor, such magistrate cannot escape criminal liability to the United States for the conspiracy and its natural and designed results in the holding of a citizen to a condition of peonage, because of the official character of his acts. Peonage Cases, 123 Fed. 671. See, generally, JUDGES, 23 Cyc. 567 *et seq.* However, a guilty knowledge of the unlawful purpose of the arrest is essential to the making out of the crime against the arresting officer. The arrest must be made knowingly, for the purpose of returning the person to a prior condition of peonage or servitude, or placing him therein to work out a debt. *In re* Peonage Charge, 138 Fed. 686.

23. Peonage Cases, 123 Fed. 671, 679.

24. Peonage Cases, 123 Fed. 671, 680.

25. U. S. *v.* McClellan, 127 Fed. 971; Peonage Cases, 123 Fed. 671.

26. Peonage Cases, 123 Fed. 671.

27. Report U. S. Asst. Atty.-Gen. Peonage (new ed.) p. 3.

28. *Ex p.* Hollman, (S. C. 1908) 60 S. E.

of the peonage statute. Instances where such compulsory service may be enforced arise in the case of parent and child, master and apprentice, and certain services to be rendered the government, as in the army and navy, and also where the state exacts public duties of the citizen, such as service in the militia, working of the public roads, and the like;[29] and the enforced service of seamen likewise forms an exception.[30]

PEOPLE. Synonymous with CITIZENS,[1] *q. v.*; PUBLIC,[2] *q. v.*; the entire body of the inhabitants of a state;[3] the state or nation in its collective or political capacity;[4] the ruling power of the country;[5] the state;[6] the whole, and not a fraction, of the people;[7] persons generally; an indefinite number of men and women; folks; population, or part of population.[8] In a political sense, electors or voters;[9] that portion of the inhabitants of the state who are intrusted with

19; *Ex p.* Drayton, 153 Fed. 986 (both holding that S. C. Cr. Code (1902), § 357, declaring a laborer under contract to labor on farm lands, who shall receive advances and thereafter wilfully and without just cause fail to perform the reasonable service required by the contract, guilty of a misdemeanor, is in violation of U. S. Const. Amendm. XIII, prohibiting slavery or involuntary servitude, except as a punishment for crime, and of U. S. Rev. St. (1878) § 1990 [U. S. Comp. St. (1901), p. 1266], enacted pursuant thereto, abolishing peonage); Peonage Cases, 123 Fed. 671 (holding that Ala. Acts (1900–1901), p. 1208, § 1, which makes it a penal offense where any person who has contracted in writing to labor for or serve another for any given time, or who has by written contract leased or rented land from another for any specified time, or who has contracted in writing with the party furnishing land, or the land and teams to cultivate it, either to furnish the labor or labor and teams to cultivate the land, shall afterward, without the consent of the other party and without sufficient excuse, to be adjudged by the court, "leave such other party or abandon said contract, or leave or abandon the leased premises or land . . . and take employment of a similar nature from another person, without first giving him notice of the prior contract," is void, as in violation of the thirteenth amendment, prohibiting involuntary servitude except as a punishment for crime, and that its enforcement establishes a system of peonage within the meaning of U. S. Rev. St. (1878) § 1990 [U. S. Comp. St. (1901) p. 1266], enacted to carry such amendment into effect).

However, Ga. Acts (1903), p. 90, making it a penal offense for any person to procure money or other thing of value on a contract to perform services with intent to defraud, is not repugnant to the peonage statute, for the intent of the act was not to punish for mere failure to pay a debt but to punish acts which are criminal. Townsend *v.* State, 124 Ga. 69, 52 S. E. 293.

29. Peonage Cases, 123 Fed. 671, 681.

30. See CONSTITUTIONAL LAW, 8 Cyc. 878 note 55.

1. Boyd *v.* Nebraska, 143 U. S. 135, 159, 12 S. Ct. 375, 36 L. ed. 103; Scott *v.* Sandford, 19 How. (U. S.) 393, 404, 15 L. ed. 691.

2. Wyatt *v.* Larimer, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 911.

3. The Three Friends, 166 U. S. 1, 62, 17 S. Ct. 495, 41 L. ed. 897; Anderson L. Dict. [*quoted* in The Itata, 56 Fed. 505, 511, 5 C. C. A. 608]; Bouvier L. Dict. [*quoted* in Wyatt *v.* Larimer, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 911].

As used in the organic law, the term is broad and comprehensive, comprising in most instances all the inhabitants of the state. *In re* Incurring State Debts, 19 R. I. 610, 613, 37 Atl. 14, holding that the term should be construed to include registry voters as well as taxpayers.

"People . . . of that country" see Strother *v.* Lucas, 12 Pet. (U. S.) 410, 446, 9 L. ed. 1137.

"People of the county" see St. Louis County Ct. *v.* Griswold, 58 Mo. 175, 201; Jackson *v.* Cory, 8 Johns. (N. Y.) 385, 388.

"People of the State" see People *v.* Love, 19 Cal. 676, 681; Tevis *v.* Randall, 6 Cal. 632, 635, 65 Am. Dec. 547; Brown *v.* State, 5 Colo. 496, 499.

People of a town equivalent to the inhabitants of the town. Walnut *v.* Wade, 103 U. S. 683, 693, 26 L. ed. 526.

4. The Three Friends, 166 U. S. 1, 62, 17 S. Ct. 495, 41 L. ed. 897; Rapalje & L. L. Dict. [*quoted* in The Itata, 56 Fed. 505, 511, 5 C. C. A. 608].

5. The Three Friends, 166 U. S. 1, 62, 17 S. Ct. 495, 41 L. ed. 897; Nesbit *v.* Lushington, 4 T. R. 783, 787, 2 Rev. Rep. 519.

6. Brown *v.* State, 5 Colo. 496, 499.

7. People *v.* Draper, 15 N. Y. 532, 566.

8. Webster Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 110, 84 N. Y. Suppl. 1025].

9. People *v.* Counts, 89 Cal. 15, 22, 26 Pac. 612; Beverly *v.* Sabin, 20 Ill. 357, 362; Bryan *v.* Lincoln, 50 Nebr. 620, 622, 70 N. W. 252, 35 L. R. A. 752; Walnut *v.* Wade, 103 U. S. 683, 693, 26 L. ed. 526.

"People's party" is the name of a political organization formed in the United States in 1892; also called "Populist party." Porter *v.* Flick, 60 Nebr. 773, 778, 84 N. W. 262.

political powers for political purposes;[10] the free white male inhabitants above the age of twenty-one years, actual residents of the territory, citizens of the United States, and those who have declared on oath their intention to become such, and shall have taken an oath to support the constitution of the United States;[11] those and only those with whom the elective power is deposited;[12] those who possess the qualifications of voters;[13] that portion of the inhabitants who are intrusted with political power;[14] those who are clothed with political rights.[15]

PEPPER. The product of plants of the genus Piper, consisting of berries which afford an aromatic and pungent condiment.[16]

PEPSIN. A ferment found in the rennets or stomachs of calves and hogs.[17]

PEPTONE. A sirupy liquid resulting from a process consisting in finely cutting up the mucous membranes, or the whole stomachs, of animals, placing the same in a vessel containing acidulated water, and subjecting the mixture to heat, whereby an artificial digestion takes place akin to the action in the natural stomach.[18]

PER. In law Latin, a preposition meaning By,[19] *q. v.*; For,[20] *q. v.*; through.[21] (See Per Capita; Per Curiam.)

PER ALLUVIONEM ID VIDETUR ADJICI QUOD ITA PAULATIM ADJICITUR UT INTELLIGERE NON POSSUMUS QUANTUM QUOQUO MOMENTO TEMPORIS ADJICIATUR. A maxim meaning "That is said to be added by alluvion which is so added little by little that we cannot tell how much is added at any one moment of time."[22]

PERAMBULATION. The custom of going around the boundaries of the manor or parish with witnesses to determine and preserve recollection of its extent, and to see that no encroachment had been made upon it, and that the landmarks have not been taken away.[23] (See, generally, Boundaries.)

PER CAPITA. By the heads or polls; according to the number of individuals;

10. Blair *v.* Ridgely, 41 Mo. 63, 177, 97 Am. Dec. 248.

11. State *v.* Boyd, 31 Nebr. 682, 723, 48 N. W. 739, 51 N. W. 602.

12. Heuser *v.* Harris, 42 Ill. 425, 432.

13. Rogers *v.* Jacob, 88 Ky. 502, 505, 11 S. W. 513, 11 Ky. L. Rep. 45.

Vote of the people means the people of the whole state, and not of any particular localities of the state. Dupee *v.* Swigert, 127 Ill. 494, 499, 21 N. E. 622.

14. Anderson L. Dict. [*quoted* in The Itata, 56 Fed. 505, 511, 5 C. C. A. 608].

15. Cooley Const. Lim. [*quoted* in Koehler *v.* Hill, 60 Iowa 543, 618, 14 N. W. 738, 15 N. W. 609].

16. Century Dict.

"Pepper, white or black" see U. S. *v.* Leggett, 124 Fed. 1015.

17. Blumenthal *v.* Burrell, 43 Fed. 667, where it is compared with "chymosin."

18. See Carl L. Jensen Co. *v.* Clay, 59 Fed. 290.

19. Johnson *v.* State, (Tex. Cr. App. 1906) 99 S. W. 404, 405; Brown *v.* Howland, 9 Ont. 48, 58. See also 6 Cyc. 262.

20. See 19 Cyc. 1103.

21. Webster Int. Dict.

Used with other words.—"Per acre" see New York, etc., R. Co. *v.* Yard, 43 N. J. L. 121, 124; Ward *v.* Foley, 141 Fed. 364, 367, 72 C. C. A. 140. "Per dozen" see Ward *v.* Foley, *supra*. "Per 100" see Gardiner *v.* McDonogh, 147 Cal. 313, 320, 81 Pac. 964. "Per mile" see Cedar Rapids, etc., R. Co. *v.* Herring, 52 Iowa 687, 690, 3 N. W. 786. "Per pound" see Ward *v.* Foley, *supra*. "Per procuration" see Grant *v.* Norway, 10 C. B. 665, 689, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665. "Per thousand feet" see Smith *v.* Aikin, 75 Ala. 209, 210. "Per ton" see Ward *v.* Foley, *supra*. "Per year" see Curtiss *v.* Howell, 39 N. Y. 211, 213. "J. W. Wickersham, agent, 'per' Will. D. Kerr" see McClure *v.* Mississippi Valley Ins. Co., 4 Mo. App. 148, 157.

Per annum is a Latin term which may mean "by the year" (Ramsdell *v.* Hulett, 50 Kan. 440, 445, 31 Pac. 1092; State *v.* McFetridge, 64 Wis. 130, 138, 24 N. W. 140), or "through the year" (Ramsdell *v.* Hulett, *supra*), but which is said to mean also "during the year" (State *v.* McFetridge, 64 Wis. 130, 139, 24 N. W. 140). See also Haney *v.* Caldwell, 35 Ark. 156, 168; Kœhring *v.* Muemminghoff, 61 Mo. 403, 407, 21 Am. Rep. 402; Stanford *v.* Fisher Varnish Co., 43 N. J. L. 151, 153; and, generally, Interest, 22 Cyc. 1459.

Per cent. is an abbreviation of the Latin term *per centum*, "by the hundred." Blakeslee *v.* Mansfield, 66 Ill. App. 116, 119, where it is said: "It is so used and understood by mathematicians, accountants and all English speaking persons having occasion to use it." See also Hemple *v.* Raymond, 144 Fed. 796, 798, 75 C. C. A. 526; and, generally, Interest, 22 Cyc. 1459.

22. Black L. Dict. [*citing* Dig. 41, 1, 7, 1; Fleta, l, 3, c. 2, § 6].

23. Greenville *v.* Mason, 57 N. H. 385, 392.

share and share alike.[24] (See, generally, DESCENT AND DISTRIBUTION. See also PER STIRPES.)

PERCEIVE. To come to know by direct experience.[25]

PERCENTAGE ON. A term which signifies the measure of what the sum in question will yield.[26] (See, generally, INTEREST.)

PERCH. In masonry,[27] twenty-five cubic feet.[28] (See, generally, WEIGHTS AND MEASURES.)

PERCOLATING WATER. See WATERS.

PER CURIAM. Literally "By the court."[29] Used to designate the opinion of the court in a case in which the judges are all of one mind, and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion.[30] (See, generally, COURTS.)

PEREAT UNUS NE PEREANT OMNES. A maxim meaning "Let one perish, rather than all."[31]

PEREMPTORY. IMPERATIVE, *q. v.*; ABSOLUTE, *q. v.*, not admitting of question; DELAY, *q. v.*, or reconsideration; POSITIVE, *q. v.*; FINAL, *q. v.*, decisive, not admitting of any alternative; self-determined, arbitrary, not requiring any cause to be shown.[32] (Peremptory: Challenge, see JURIES. Instruction, see CRIMINAL LAW; TRIAL. Mandamus, see MANDAMUS. Nonsuit, see DISMISSAL AND NONSUIT. Plea, see PLEADING.)

PEREMPTORY CHALLENGE. See JURIES.

PEREMPTORY INSTRUCTION. See CRIMINAL LAW; TRIAL.

PEREMPTORY MANDAMUS. See MANDAMUS.

PEREMPTORY NONSUIT. See DISMISSAL AND NONSUIT.

PEREMPTORY PLEA. See PLEADING.

PERFECT. As an adjective, FULL, *q. v.*; whole; ENTIRE, *q. v.*; COMPLETE,[33]

24. Black L. Dict. See also Hoch's Estate, 154 Pa. St. 417, 420, 26 Atl. 610; Eastern Band of Cherokee Indians *v.* U. S., 117 U. S. 288, 310, 6 S. Ct. 718, 29 L. ed. 880.

25. Century Dict.

"Shall perceive to be necessary" means "deem" or "judge" to be necessary. Griffith *v.* Follett, 20 Barb. (N. Y.) 620, 631.

26. Southern Boulevard R. Co. *v.* North New York City Traction Co., 16 Misc. (N. Y.) 263, 268, 39 N. Y. Suppl. 266.

The "percentage 'of'" a sum means a portion of that sum, and is not synonymous with "percentage 'on.'" Southern Boulevard R. Co. *v.* North New York City Traction Co., 16 Misc. (N. Y.) 263, 268, 39 N. Y. Suppl. 266.

27. "The term 'perch' is very common, as applied to erections in masonry, whether more or less free from interstices, and it is a solid measure as much as a cubic yard, or any other term of solidity." Wood *v.* Vermont Cent. R. Co., 24 Vt. 608, 610.

28. New Am. Encycl. [*quoted* in Harris *v.* Rutledge, 19 Iowa 388, 390, 391, 87 Am. Dec. 441]. See also Baldwin Quarry Co. *v.* Clements, 38 Ohio St. 587, 593, 43 Am. Rep. 442 [*citing* Haswell Engineers & Mechanics' Book].

A perch of stone or of masonry is sixteen and one-half feet long, one and one-half feet wide, and one foot high, or twenty-four and three-fourths cubic feet. Robinson Arithmetic; Webster Dict. [both *quoted* in Harris *v.* Rutledge, 19 Iowa 388, 390, 391, 87 Am. Dec. 441].

"Perch of paris" is eighteen feet. Webster Dict. (Goodrich ed.) Arpent [*quoted* in Sullivan *v.* Richardson, 33 Fla. 1, 114, 14 So. 692].

29. Black L. Dict.

30. Clarke *v.* Western Assur. Co., 146 Pa. St. 561, 570, 23 Atl. 248, 28 Am. St. Rep. 821, 15 L. R. A. 127.

31. Pelouhet Leg. Max. [*citing* Wharton L. Lex. 764].

32. Black L. Dict.

33. Century Dict.

Implies moral, physical, or mechanical perfection. Mallan *v.* Radloff, 17 C. B. N. S. 600, 10 Jur. N. S. 1132, 11 L. T. Rep. N. S. 381, 13 Wkly. Rep. 139, 112 E. C. L. 588.

"Perfect condition" see Taylor *v.* New York, 82 N. Y. 10, 17.

"Perfect equity" is said to be the equity of a vendee who has paid the purchase-money. Smith *v.* Cockrell, 66 Ala. 64, 75; Shaw *v.* Lindsey, 60 Ala. 344, 350. See VENDOR AND PURCHASER.

"Perfect grant," as applied to Mexican grants, one confirmed by commission or court, and a patent issued on such confirmation. Tuffree *v.* Polhemus, 108 Cal. 670, 675, 41 Pac. 806. See PUBLIC LANDS.

"Perfect horse" is one that is "kind and all right." Thompson *v.* Morse, 94 Me. 359, 360, 47 Atl. 900.

"Perfect interval" is a term which when applied to insane persons means an interval in which the mind, having thrown off the disease, had recovered its general habit. Atty.-Gen. *v.* Parnther, 3 Bro. Ch. 441, 444, 29 Eng. Reprint 632. See INSANE PERSONS.

"Perfect machine," in the sense of the word as applied to inventions, means a per-

q. v. As a verb, the term has been defined as meaning to complete in form of law.[34] (See PERFECTING.)

PERFECTING. A term not more extensive than the word "completing."[35] (Perfecting: Appeal, see APPEAL AND ERROR. Bail, see BAIL. Invention, see PATENTS. Title, see VENDOR AND PURCHASER.)

PERFECTLY SAFE. When applied to a person seeking credit in mercantile transactions, a term which means that such person is in such solvent condition that the debt in contemplation can be made, if necessary, by process of law.[36]

PERFECT TITLE. A complete and perfect paper at least capable of being recorded, if not actually recorded;[37] a grant of land which requires no further act from the legal authority to constitute an absolute title to the land taking effect *in præsenti*;[38] a MARKETABLE TITLE,[39] *q. v.*; a merchantable or marketable title;[40] a title that is perfect and safe to a moral certainty; a title which does not disclose a patent defect which suggests the possibility of a lawsuit to defend it; a title, such as a well-informed and prudent man, paying full value for the property, would be willing to take;[41] one in which the same person has both the "right of possession" and the "right of property";[42] one that is good and valid beyond all reasonable doubt;[43] one which shows the absolute right of possession and of property in a particular person.[44] (See, generally, VENDOR AND PURCHASER.)

PERFECTUM EST CUI NIHIL DEEST SECUNDUM SUÆ PERFECTIONIS VEL NATURÆ MODUM. A maxim meaning "That is perfect which wants nothing according to the measure of its perfection or nature."[45]

PERFORATION. A word which conveys the idea of a hole through an article;[46]

fected invention; not a perfectly constructed machine, but a machine so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative so as to accomplish the result. American Hide, etc., Splitting, etc., Mach. Co. *v.* American Tool, etc., Co., 1 Fed. Cas. No. 302, Holmes 503. See PATENTS.

"Perfect obligation" is that which gives to the opposite party the right of compulsion. Vattel 62 [*quoted* in Aycock *v.* Martin, 37 Ga. 124, 128, 92 Am. Dec. 56].

"Perfect order" see Foster *v.* Peyser, 9 Cush. (Mass.) 242, 246, 57 Am. Dec. 43.

"Perfect ownership" is an ownership which only exists when the thing is unincumbered with any real right towards any other person than the owner. Maestri *v.* Board of Assessors, 110 La. 517, 526, 34 So. 658.

"Perfect right" is a legal right (Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322, 325); that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation (Aycock *v.* Martin, 37 Ga. 124, 128, 92 Am. Dec. 56).

"Perfect right of self defence" see Wallace *v.* U. S., 162 U. S. 466, 472, 16 S. Ct. 859, 40 L. ed. 1039.

"Perfect war" is a war which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility. Miller *v.* The Resolution, 2 Dall. (U. S.) 19, 21, 1 L. ed. 271. See WAR.

"True and perfect list" see Orland *v.* County Com'rs, 76 Me. 460, 461.

34. Black L. Dict.

The term "perfect the organization" refers to the duty of the directors to choose a president and to make and prescribe by-laws, or to their power to choose a clerk and treasurer and other officers, for those are duties and powers usually performed and exercised by directors. New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56, 65.

35. Whitenack *v.* Tunison, 16 N. J. L. 77, 79.

"Perfecting press" is a term applied to a printing press when at the same time it prints on both sides of the paper. Duplex Printing-Press Co. *v.* Campbell Printing-Press, etc., Co., 69 Fed. 250, 253, 16 C. C. A. 220.

36. Felix *v.* Shirey, 60 Mo. App. 621, 623.

37. Dixon *v.* Monroe, 112 Ga. 158, 159, 37 S. E. 180.

38. Hancock *v.* McKinney, 7 Tex. 384, 457.

39. Ross *v.* Smiley, 18 Colo. App. 204, 70 Pac. 766, 767.

40. McCleary *v.* Chipman, 32 Ind. App. 489, 68 N. E. 320, 326.

41. Birge *v.* Bock, 44 Mo. App. 69, 77.

42. Wilcox Lumber Co. *v.* Bullock, 109 Ga. 532, 534, 35 S. E. 52.

43. Sheehy *v.* Miles, 93 Cal. 288, 292, 28 Pac. 1046; Reynolds *v.* Borel, 86 Cal. 538, 542, 25 Pac. 67; Turner *v.* McDonald, 76 Cal. 177, 179, 18 Pac. 262, 9 Am. St. Rep. 189.

44. Henderson *v.* Beatty, 124 Iowa 163, 167, 99 N. W. 716.

To constitute a perfect title there must be union of possession, right of possession, and right of property. Donovan *v.* Pitcher, 53 Ala. 411, 417, 25 Am. Rep. 634; Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, 597.

Such title always carries with it, in legal contemplation, lawful seisin in possession. Altschul *v.* O'Neill, 35 Oreg. 202, 206, 58 Pac. 95.

45. Bouvier L. Dict [*citing* Hob. 151].

46. Onderdonk *v.* Fanning, 9 Fed. 106, 108, 19 Blatchf. 363.

a hole or aperture passing through a body;[47] an opening extending entirely through an object.[48]

PERFORM. To execute the provisions, commands, or requirements of;[49] to act a part.[50] (See PERFORMANCE; PERFORMED.)

PER FORMAM DONI. In English law by the form of the gift; by the designation of the giver, and not by the operation of law.[51]

PERFORMANCE. The act of performing or the condition of being performed; EXECUTION (*q. v.*) or COMPLETION (*q. v.*) of anything.[52] (Performance: Affecting — Operation of Statute of Frauds, see FRAUDS, STATUTE OF; Right of Possession or Control of Mortgaged Property, see MORTGAGES; Right of Recovery Under Common Counts, see ASSUMPSIT, ACTION OF; Right to Cancellation in Equity, see CANCELLATION OF INSTRUMENTS; Right to Garnishment, see GARNISHMENT. Burden of Proof — In Action For Breach of Contract, see CONTRACTS; Of Condition of Bond, see BONDS; Of Condition of Deed, see DEEDS. Condition Precedent to Accrual of Right of Action, see ACTIONS; LIMITATIONS OF ACTIONS. Demand of as Condition Precedent to Forfeiture of — Estate in Deed, see DEEDS; Leasehold Estate, see LANDLORD AND TENANT. Effect as Ratification or Validation of Defective or Invalid Contract, see CONTRACTS. Evidence — In Action by Attorney, see ATTORNEY AND CLIENT; In Action on Contract, see CONTRACTS; In Action on Negotiable Instrument, see COMMERCIAL PAPER; Parol Evidence, see EVIDENCE. Non-Performance — Affecting Recovery on Contract For Fees, see ATTORNEY AND CLIENT; Ground For Cancellation or Rescission, see CANCELLATION OF INSTRUMENTS; CONTRACTS. Of Condition — Of Bond, see BONDS; Of Deed, see DEEDS; Precedent in Action on Policy, see the Insurance Titles. Of Particular Classes of Duties or Obligations — Accord, see ACCORD AND SATISFACTION; Award, see ARBITRATION AND AWARD; Command in Writ of Mandamus, see MANDAMUS; Condition in Particular Instrument, see APPEAL AND ERROR; BAIL; BONDS; CHATTEL MORTGAGES; CORPORATIONS; DEEDS; ESCROWS; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; GUARANTY; GUARDIAN AND WARD; JUDGMENTS; MORTGAGES; OFFICERS; SUBSCRIPTIONS; WILLS; Condition Precedent, see ACTIONS; CORPORATIONS; LIMITATIONS OF ACTIONS; MUNICIPAL CORPORATIONS; Consideration For Contract, see CONTRACTS; Contract, see CARRIERS; CONTRACTS; MECHANICS' LIENS; MUNICIPAL CORPORATIONS; Covenant, see COVENANTS; LANDLORD AND TENANT; Decree, see EQUITY; EXECUTORS AND ADMINISTRATORS; Development and Assessment Work, see MINES AND MINERALS; Duty of Office, see OFFICERS; Mandate of Appellate Court, see APPEAL AND ERROR; Obligation of Community by Surviving Spouse, see HUSBAND AND WIFE; Obligation of Decedent by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Obligation Secured by Mortgage, see MORTGAGES; Services by Attorney, see ATTORNEY AND CLIENT; Services by Employee, see MASTER AND SERVANT; Substituted Agreement, see NOVATION. Particular Remedy For Enforcement — Injunction Against Performance, see INJUNCTIONS; Mandamus to Compel Performance, see MANDAMUS; Provision For in Judgment or Decree to Foreclose, see MORTGAGES; Specific Performance, see SPECIFIC PERFORMANCE. Part Performance as Affecting — Operation of Statute of Frauds, see FRAUDS, STATUTE

47. Michigan Cent. R. Co. *v.* Consolidated Car-Heating Co., 67 Fed. 121, 127, 14 C. C. A. 232.

48. Brush Electric Co. *v.* Julien Electric Co., 41 Fed. 679, 690, where it was said: "The word may also have a meaning synonymous with 'cavities' or 'cells,' and it may mean a hole not passing entirely through, but into the center or interior."

49. Century Dict.

"Abide by and perform an award" see Weeks *v.* Trask, 81 Me. 127, 131, 16 Atl. 413, 2 L. R. A. 532.

"Perform such duties as may be prescribed by law" see Hampton *v.* Logan County, 4 Ida. 646, 649, 43 Pac. 324.

50. Century Dict.

"Act, perform, or represent" see Daly *v.* Palmer, 7 Fed. Cas. No. 3,552, 6 Blatchf. 256, 263, 36 How. Pr. (N. Y.) 206.

51. Black L. Dict. [*citing* 2 Blackstone Comm. 113, 191]. See also Boys *v.* Bradley, 22 L. J. Ch. 617, 621.

52. Century Dict.

"Performance of a written contract" see Lamb *v.* Barnard, 16 Me. 364, 369.

OF; Right of Party to Contract, see CONTRACTS; Specific Performance, see SPECIFIC PERFORMANCE. Place of Performance as Affecting — Construction of Contract, see CONTRACTS; Validity of Contract, see CONTRACTS. Pleading Performance or Non-Performance of Condition — In General, see PLEADING; In Action For Breach of Contract, see CONTRACTS; In Action on Bond, see BONDS; In Action on Policy, see the Insurance Titles; In Action to Foreclose, see MORTGAGES. Presumption as to Performance of Condition of — Bond, see BONDS; Deed, see DEEDS; Preventing Performance, see ACTIONS; TORTS. Tender, see CONTRACTS; TENDER. Time of Performance, see CONTRACTS; BREACH OF PROMISE TO MARRY; EVIDENCE; FRAUDS, STATUTE OF; LIMITATIONS OF ACTIONS.)

PERFORMED. Completed, furnished, or finished;[53] completely performed; done, not begun or half done.[54] (See PERFORM; PERFORMANCE.)

PERFUMERY. A substance which not only emits a scent or odor, but also one which is handled, bought and sold, and used for the purpose of obtaining from it such odor whenever required.[55]

PERICULOSUM EST RES NOVAS ET INUSITATAS INDUCERE. A maxim meaning "It is perilous to introduce new and untried things."[56]

PERICULOSUM EXISTIMO QUOD BONORUM VIRORUM NON COMPROBATUR EXEMPLO. A maxim meaning "I consider that dangerous which is not approved by the example of good men."[57]

PERICULUM REI VENDITÆ, NONDUM TRADITÆ, EST EMPTORIS. A maxim meaning "The risk of a thing sold, and not yet delivered, is the purchaser's."[58]

PERIL. As a noun, exposure to injury, loss or destruction, imminent or impending danger, risk, hazard, or jeopardy;[59] DANGER,[60] *q. v.*; instant or impending danger; risk; hazard; jeopardy; exposure to injury, loss or destruction.[61] As a verb, to expose to danger; to hazard; to risk; to jeopard.[62] (See, generally, Insurance Titles; MASTER AND SERVANT.)

PERILS OF NAVIGATION. See DANGERS OF NAVIGATION.

PERILS OF THE RIVER. See DANGERS OF THE RIVER.

PERILS OF THE SEA. See DANGERS OF THE SEA; and, generally, MARINE INSURANCE; SHIPPING.

PERIMUS LICITIS. A maxim meaning "Those vices of which the law takes no cognizance are the most insidious and fatal."[63]

PERIODICAL. A publication appearing at regular intervals.[64] (Periodical: Generally, see NEWSPAPERS. Copyright of, see COPYRIGHT. Transmission in Mail, see POST-OFFICE. See also BOOK; PAMPHLET.)

PERIODICAL OVERFLOW. See PUBLIC LANDS.

53. Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 505, 32 S. E. 259.

The word implies a complete performance, or full consummation of the work (Hinckley *v.* Southgate, 11 Vt. 428, 429; Boydell *v.* Drummond, 11 East 143, 146, 10 Rev. Rep. 450); a full, effective, and complete performance (Bracegirdle *v.* Heald, 1 B. & Ald. 722, 726, 19 Rev. Rep. 442); a full or complete execution (Squire *v.* Whipple, 1 Vt. 69, 73).

54. Kendall *v.* Garneau, 55 Nebr. 403, 405, 75 N. W. 852.

"Performed or represented" see Bloom *v.* Nixon, 125 Fed. 977, 978.

In mechanic's lien law may mean "commenced." Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 58, 33 S. E. 125. But see Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 504, 32 S. E. 259.

55. Fritzsche *v.* Magone, 40 Fed. 228, 230, also describing "perfume."

56. Peloubet Leg. Max. [*citing* Coke Litt. 379*a*].

57. Black L. Dict. [*citing* Reynel's Case, 9 Coke 95*a*, 97*b*, 77 Eng. Reprint 871].

58. Morgan Leg. Max. [*citing* Wharton L. Lex.].

Applied in Seath *v.* Moore, 55 L. J. P. C. 54, 62.

59. Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 552, 26 N. E. 178.

60. Hall *v.* Manson, 90 Iowa 585, 591, 58 N. W. 881.

61. Webster Dict. [*quoted* in Hall *v.* Manson, 90 Iowa 585, 591, 58 N. W. 881].

62. Hall *v.* Manson, 90 Iowa 585, 591, 58 N. W. 881.

63. Morgan Leg. Max. [Maxim of Sir Matthew Hale].

64. Houghton *v.* Payne, 194 U. S. 88, 96, 97, 24 S. Ct. 590, 48 L. ed. 888, distinguishing the term "book."

As defined in the tariff act they are unbound or paper-covered publications. Eichler *v.* U. S., 71 Fed. 956, 957. See also New York Daily News *v.* U. S., 65 Fed. 493, 494, 13 C. C. A. 16, 61 Fed. 647, 648.

PERIOD OF TIME. A stated and recurring interval of time, a round or series of years by which time is measured.[65] (See, generally, TIME.)

PERISHABLE. Liable to deteriorate from keeping;[66] liable to perish; subject to decay or destruction;[67] subject to speedy decay;[68] that which, from its nature, decays in a short space of time, without reference to the care it receives.[69] (See, generally, ATTACHMENT; CARRIERS.)

PER JUDICIUM JUS EST NOVITER REVELATUM QUOD DIU FIAT VELATUM. A maxim meaning "The law which has been veiled for a time is revealed anew by a trial."[70]

PERJURII PŒNA DIVINA EXITIUM; HUMANA DEDECUS. A maxim meaning "The divine punishment of perjury is destruction; the human punishment is disgrace."[71]

PERJURING THIEF. A person who robs by means of perjury, and not by means of larceny or other act.[72]

PERJURI SUNT QUI SERVATIS VERBIS JURAMENTI DECIPIUNT AURES EORUM QUI ACCIPIUNT. A maxim meaning "They are perjured who, preserving the words of an oath, deceive the ears of those who receive it."[73]

65. People *v.* Leask, 67 N. Y. 521, 528.

Refers to a continuous period.— Matter of Becker, 39 Misc. (N. Y.) 756, 757, 80 N. Y. Suppl. 1115.

May mean an indefinite time as well as a time specified. Parish *v.* Rogers, 20 N. Y. App. Div. 279, 282, 46 N. Y. Suppl. 1058.

"During such 'period' as the said Board shall forbid" see State *v.* Strauss, 49 Md. 288, 299.

Period of exportation see Sampson *v.* Peaslee, 20 How. (U. S.) 571, 576, 15 L. ed. 1022.

"Period of probation" see People *v.* Kearney, 164 N. Y. 64, 66, 58 N. E. 14.

66. Jolley *v.* Hardeman, 111 Ga. 749, 751, 36 S. E. 952.

67. Webster Dict. [*quoted* in Fisk *v.* Spring, 25 Hun (N. Y.) 367, 369, 62 How. Pr. 510].

68. Webster *v.* Peck, 31 Conn. 495, 498; Work *v.* Kinney, 5 Ida. 716, 718, 57 Pac. 745.

69. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 67, 5 Am. Rep. 83.

"Articles perishable in their own nature" see Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202, 216.

"Perishable goods" are goods which decay and lose their value if not speedily put to their intended use (Black L. Dict. [*quoted* in Witherspoon *v.* Cross, 135 Cal. 96, 98, 67 Pac. 18]), or are lessened in value by being kept (Schumann *v.* Davis, 13 N. Y. Suppl. 575); articles which contain in themselves the elements of speedy decay (McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 229, 22 So. 577, 67 Am. St. Rep. 105; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 67, 5 Am. Rep. 83); such personal property as has in itself elements of destruction or decomposition (Steele *v.* Wyatt, 23 Ala. 764, 768, 58 Am. Dec. 317). And may include: Eggs (Hunter *v.* Baltimore Packing, etc., Co., 75 Minn. 408, 410, 78 N. W. 11), fresh fish (Jolley *v.* Hardeman, 111 Ga. 749, 752, 38 S. E. 952), fruit (Jolley *v.* Hardeman, *supra*), potatoes (Williams *v.* Cole, 16 Me. 207, 208; Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220), and slaves (Steele *v.* Wyatt, 23 Ala. 764, 769, 58 Am. Dec. 317; Dugans *v.* Livingston, 15 Mo. 230, 234). But has been held not to include: Cotton (Weis *v.* Basket, 71 Miss. 771, 774, 15 So. 659), hay (Newman *v.* Kane, 9 Nev. 234, 236), leasehold interest (Birmingham First Nat. Bank *v.* Consolidated Electric Light Co., 97 Ala. 465, 466, 12 So. 71), lumber (Mosher *v.* Bay County Cir. Judge, 108 Mich. 579, 580, 66 N. W. 478), and pickled fish (Baker *v.* Ludlow, 2 Johns. Cas. (N. Y.) 289, 290).

"Perishable property" is property perishable in its own nature or character, and not property that may be subject or liable to loss by trespass, larceny or fire. Oneida Nat. Bank *v.* Paldi, 2 Mich. N. P. 221.

Consumable, or perishable, articles are of two classes.— 1, those which are necessarily destroyed in their use, such as corn, hay, etc.; and 2, those which are not so much so, as being productive, and the capital kept up by the increase, such as stock of horses, cattle, etc. Patterson *v.* Devlin, McMull. Eq. (S. C.) 459, 466.

Goods which are lessened in value and become worse by being kept, and goods used by fashionable tailors, the styles in which change every season, and which are liable to become hard and unsuitable for use, and moth-eaten and injured by dust, are deemed perishable. Schumann *v.* Davis, 13 N. Y. Suppl. 575.

70. Morgan Leg. Max. [*citing* Halkerstone 109].

71. Peloubet Leg. Max. [*citing* Lofft Max. 46].

72. Burns *v.* Monell, 7 N. Y. Suppl. 624.

73. Bouvier L. Dict. [*citing* 3 Inst. 166].

PERJURY

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Justice of the Court of Appeal for Ontario.*

I. OFFENSES AND RESPONSIBILITY THEREFOR, 1399
A. *Definition and Nature of Offense*, 1399
1. *At Common Law*, 1399
a. *Perjury*, 1399
b. *False Swearing*, 1400
2. *By Statute*, 1400
B. *Elements of Offense*, 1402
1. *In General*, 1402
2. *Falsity of Testimony and Knowledge Thereof*, 1402
a. *Necessity That Testimony Be False*, 1402
b. *Knowledge of Falsity and Intent*, 1403
(I) *In General*, 1403
(II) *Rash Statements*, 1404
(A) *According to Belief*, 1404
(B) *Contrary to Belief*, 1404
(III) *Opinions*, 1405
(A) *As to Matters of Fact*, 1405
(B) *As to Matters of Law*, 1405
3. *Proceeding in Which Oath Is Administered*, 1405
a. *In General*, 1405
(I) *At Common Law*, 1405
(II) *By Statute*, 1406
b. *Particular Proceedings*, 1406
(I) *Affidavits and Depositions*, 1406
(A) *Affidavits*, 1406
(B) *Depositions*, 1407
(II) *Acknowledgment of Deed*, 1407
(III) *Application For Marriage License*, 1407
(IV) *Bankruptcy and Insolvency Proceedings*, 1408
(V) *Claim to Public Money*, 1408
(VI) *Examination as to Competency of Juror*, 1408
(VII) *Justification of Surety*, 1409
(VIII) *Statement of Officers as to Condition of Bank or Corporation*, 1409
(IX) *Naturalization Proceedings*, 1409
(X) *Proceedings Before Grand Jury*, 1409
(XI) *Proceedings Before Land-Office*, 1410
(XII) *Proceedings Before Referees and Arbitrators*, 1410
(XIII) *Miscellaneous Proceedings*, 1410
c. *Voluntary, Official, and Promissory Oaths*, 1411
(I) *Voluntary Oaths*, 1411
(II) *Official and Other Promissory Oaths*, 1411
4. *Jurisdiction or Authority to Administer Oath*, 1411
a. *Judicial Oaths*, 1411
(I) *In General*, 1411
(II) *Defects or Irregularities Not Jurisdictional*, 1412
(III) *Defects Rendering Action Void*, 1413

* Author of "Bills, Notes and Cheques," "Banks and Banking," "Roman Law in English Jurisprudence," etc.

b. *Non-Judicial Oaths*, 1413
(I) *Necessity of Authority to Administer Oath*, 1413
(A) *In General*, 1413
(B) *Under Laws of the United States*, 1413
(II) *Particular Officers or Persons Authorized to Administer Oaths*, 1415
(A) *Justices of the Peace*, 1415
(B) *Notaries Public*, 1415
(C) *Other Ministerial Officers*, 1415
(D) *Deputies and Assistants*, 1416
(E) *De Facto Officers*, 1416
5. *Administration, Form, and Making of Oath or Substitute Therefor*, 1416
a. *In General*, 1416
b. *Verification of Affidavits and Other Writings*, 1417
6. *Materiality of Testimony, Assertion, or Oath*, 1417
a. *Materiality of Testimony or Assertion*, 1417
(I) *Necessity That Testimony or Assertion Be Material*, 1417
(II) *Test of Materiality*, 1418
(A) *As to Degree*, 1418
(B) *As to Time*, 1419
(III) *Particular Instances*, 1420
(A) *Justification of Surety*, 1420
(B) *Testimony Before Grand Jury*, 1420
(C) *Testimony to Prove Alibi*, 1420
(D) *Testimony in Aggravation or Mitigation of Damages*, 1420
(E) *Testimony Going to Credit of Witness*, 1420
(F) *Incompetency of Witness or Testimony and Waiver Thereof*, 1421
b. *Materiality of Oath*, 1421
C. *Defenses*, 1421
1. *Truth of Facts Testified to*, 1421
2. *Acquittal in Former Proceeding*, 1422
3. *Intoxication*, 1422
4. *Advice of Counsel*, 1422
5. *Threats*, 1422
6. *Other Defenses*, 1422
D. *Persons Liable*, 1422
E. *Subornation of Perjury and Attempts*, 1423
1. *Subornation*, 1423
a. *Definition and Nature of Offense*, 1423
b. *Elements of Offense*, 1423
2. *Attempts to Suborn*, 1424

II. PROSECUTION AND PUNISHMENT, 1424
A. *Prosecution Pending Civil Action*, 1424
1. *In General*, 1424
2. *Pennsylvania Rule*, 1424
B. *Indictment and Information*, 1424
1. *Form and Requisites in General*, 1424
a. *General Rules*, 1424
b. *Statutory Form*, 1426
c. *Averments as to Time*, 1427
2. *Description of Proceeding in Which Oath Was Administered*, 1427
a. *In General*, 1427
b. *Nature of Proceeding and Issues*, 1428

c. *Setting Out Record or Proceedings*, 1429
d. *Result or Determination of Issue or Contest*, 1429
3. *Jurisdiction and Authority to Administer Oath*, 1429
a. *Jurisdiction of Court*, 1429
(I) *In General*, 1429
(A) *At Common Law*, 1429
(B) *Under Modern Statutes*, 1430
(II) *How Jurisdiction Was Acquired*, 1430
b. *Jurisdiction of Ministerial Officer Sitting as Court*, 1430
c. *Authority of Officer to Administer Oath*, 1430
(I) *In General*, 1430
(II) *How Authority Was Acquired*, 1431
d. *Description of Court or Officer Administering Oath*, 1431
(I) *Description of Court*, 1431
(II) *Description of Officer*, 1432
4. *Administration, Form, and Making of Oath*, 1432
5. *Setting Out False Matter*, 1433
6. *Materiality of Testimony, Assertion, or Oath*, 1433
a. *Necessity of Averment of Materiality of Testimony or Assertion*, 1433
(I) *In General*, 1433
(II) *Necessity of Averring Facts to Show Materiality*, 1435
(III) *Necessity of Express Averment When Facts Alleged*, 1436
b. *Necessity of Averment of Materiality of Oath*, 1436
c. *Necessity of Averment of Competency of Testimony*, 1437
7. *Assignment of Perjury*, 1437
a. *In General*, 1437
(I) *As to Falsity*, 1437
(A) *In General*, 1437
(B) *When Testimony Was Given on Information and Belief*, 1438
(II) *As to Intent*, 1438
(III) *As to Knowledge of Falsity*, 1439
b. *Joinder of Assignments*, 1439
8. *Subornation of Perjury and Attempts*, 1440
a. *Subornation*, 1440
b. *Attempts to Suborn*, 1440
9. *Variance*, 1441
a. *In General*, 1441
b. *As to Time of Giving Testimony*, 1441
c. *As to Description of Proceeding in Which Oath Was Administered*, 1441
d. *As to Description of Court or Officer Administering Oath*, 1442
e. *As to Administration, Form, and Making of Oath*, 1442
f. *As to Matter Sworn to*, 1442
C. *Evidence*, 1443
1. *Presumptions and Burden of Proof*, 1443
2. *Admissibility*, 1443
a. *In General*, 1443
b. *Intent, Knowledge, and Motive*, 1444
(I) *Intent*, 1444
(II) *Knowledge*, 1444
(III) *Motive*, 1445
c. *Proceeding in Which Oath Was Administered*, 1445
d. *Jurisdiction and Authority to Administer Oath*, 1445
e. *Administration, Form, and Making of Oath*, 1446

f. *Materiality of Testimony or Assertion*, 1446
g. *Matter Sworn to*, 1446
h. *Truth or Falsity of Oath*, 1447
i. *Subornation of Perjury*, 1448
3. *Weight and Sufficiency*, 1448
a. *In General*, 1448
b. *Intent and Knowledge of Falsity*, 1449
c. *Proceeding in Which Oath Was Administered*, 1449
d. *Jurisdiction and Authority to Administer Oath*, 1449
e. *Administration, Form, and Making of Oath*, 1450
f. *Materiality of Testimony or Assertion*, 1450
g. *Matter Sworn to and Falsity Thereof*, 1451
(I) *In General*, 1451
(II) *Proof of One Assignment Sufficient*, 1452
h. *Subornation of Perjury*, 1452
4. *Number of Witnesses and Corroboration*, 1452
a. *Early Rule*, 1452
b. *Modern Rule*, 1452
(I) *In General*, 1452
(II) *Corroboration*, 1453
(A) *In General*, 1453
(1) *Necessity*, 1453
(a) *In General*, 1453
(b) *Subornation of Perjury*, 1454
(2) *Degree*, 1454
(3) *Manner*, 1455
(a) *In General*, 1455
(b) *By Circumstances*, 1455
(c) *By Declarations or Admissions of Accused*, 1455
(B) *Corroboration Between Assignments*, 1455
(C) *Sufficiency of Evidence as Basis of Corroboration*, 1455
D. *Trial, Review, and Punishment*, 1455
1. *Questions of Law and Fact*, 1455
a. *Jurisdiction*, 1455
b. *Materiality of False Testimony*, 1456
c. *Questions of Fact*, 1456
2. *Instructions*, 1456
a. *In General*, 1456
b. *As to Material Allegations and Facts to Be Proved*, 1457
c. *As to Wilfulness and Knowledge of Falsity of Testimony*, 1457
d. *As to Effect of Evidence Admitted For Particular Purpose*, 1458
e. *As to Degree of Proof Required*, 1458
(I) *In General*, 1458
(II) *As to Number and Corroboration of Witnesses*, 1458
3. *Verdict*, 1459
4. *New Trial*, 1459
5. *Appeal and Error*, 1459
6. *Sentence and Punishment*, 1459

CROSS-REFERENCES

For Matters Relating to:
Accomplices, see CRIMINAL LAW.
Affidavits Generally, see AFFIDAVITS.

For Matters Relating to — (*continued*)
Arrest, see ARREST.
Bail, see BAIL.
Bill of Discovery to Guard Against Perjury, see DISCOVERY.
Civil Liability For Perjury, see ACTIONS.
Contempt of Court by Perjury, see CONTEMPT.
Disbarment of Attorney For Perjury or Subornation, see ATTORNEY AND CLIENT.
Former Jeopardy, see CRIMINAL LAW.
Grand Jurors as Witnesses as to Perjury, see GRAND JURIES; WITNESSES.
Intimidation of Witnesses, see OBSTRUCTING JUSTICE.
Joinder of Offenses in Indictment, see INDICTMENTS AND INFORMATIONS.
Judgment Procured by Perjury as a Bar, see JUDGMENTS.
Libel or Slander in Charging Perjury, see LIBEL AND SLANDER.
Oaths and Affirmations Generally, see OATHS AND AFFIRMATIONS.
Perjury:
As Contempt of Court, see CONTEMPT.
As Ground For:
Civil Action, see ACTIONS.
Collateral Attack on Judgment, see JUDGMENTS.
Disbarment of Attorney, see ATTORNEY AND CLIENT.
Equitable Relief Against Judgment, see JUDGMENTS.
Impeaching Foreign Judgment, see JUDGMENTS.
New Trial, see CRIMINAL LAW; NEW TRIAL.
Opening or Vacating Judgment, see JUDGMENTS.
By Officer of Bank or Other Corporation in Return or Report, see BANKS AND BANKING; CORPORATIONS.
In Bankruptcy Proceedings, see BANKRUPTCY.
In Naturalization Proceedings, see ALIENS.
In Proofs of Loss, see FIRE INSURANCE.
Suppression of Evidence, see OBSTRUCTING JUSTICE.
Test of Sufficiency of Affidavit, see AFFIDAVITS.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

A. Definition and Nature of Offense[1] — 1. At Common Law — a. Perjury. By the common law perjury is the wilful and corrupt taking of a false oath, lawfully administered in a judicial proceeding or the course of justice in regard to a matter material to the issue or point of inquiry.[2] At common law it is a misde-

1. Subornation of perjury see *infra*, I, E.
2. See Hood *v.* State, 44 Ala. 81, 86; Bacon Abr. tit. "Perjury"; 3 Coke Inst. 164. And see the following cases:
Arkansas.— Horn *v.* Foster, 19 Ark. 346, 350.
Connecticut.— Arden *v.* State, 11 Conn. 408, 411; Chapman *v.* Gillet, 2 Conn. 40, 47, 62.
Delaware.— State *v.* Fahey, 3 Pennew. 594, 602, 54 Atl. 690.
Florida.— Miller *v.* State, 15 Fla. 577, 585.
Illinois.— Hereford *v.* People, 197 Ill. 222, 227, 64 N. E. 310.
Iowa.— State *v.* Morse, 1 Greene 503, 508.
Kentucky.— Com. *v.* Maynard, 91 Ky. 131, 132, 15 S. W. 52, 12 Ky. L. Rep. 710; Com. *v.* Powell, 2 Metc. 10, 12; Com. *v.* Edison, 9 S W. 161, 10 Ky. L. Rep. 340.
Louisiana.— State *v.* Matlock, 48 La. Ann. 663, 664, 19 So. 669.
Massachusetts.— Com. *v.* Smith, 11 Allen 243, 253.
Michigan.— Beecher *v.* Anderson, 45 Mich. 543, 552, 8 N. W. 539; People *v.* Fox, 25 Mich. 492, 496.
Missouri.— State *v.* Lavalley, 9 Mo. 834, 836.
New York.— People *v.* Martin, 77 N. Y. App. Div. 396, 405, 79 N. Y. Suppl. 340 [*affirmed* in 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628]; Hopkins *v.* Smith, 3 Barb. 599, 600.
North Carolina.— State *v.* Brown, 79 N. C. 642, 643.
Ohio.— Hamm *v.* Wickline, 26 Ohio St. 81, 83.
Pennsylvania.— Com. *v.* Williams, 1 Lack.

meanor,[3] but it has been made a felony in most states by statute.[4] It seems that under the very early common law perjury was not regarded as a punishable offense.[5]

b. False Swearing. In some cases the taking of a false oath was punishable at common law by indictment as a misdemeanor, although the offense did not amount to perjury.[6]

2. By Statute. As modified by statute, perjury may be more accurately defined to be the wilful and corrupt assertion of a falsehood, under oath or affir-

Leg. Rec. 264; Com. *v.* Kuntz, 4 Pa. L. J. 163, 165.

South Carolina.— State *v.* Byrd, 28 S. C. 18, 21, 4 S. E. 793, 13 Am. St. Rep. 660.

Texas.— Langford *v.* State, 9 Tex. App. 283, 285.

Vermont.— State *v.* Rowell, 70 Vt. 405, 408, 41 Atl. 430; State *v.* Simons, 30 Vt. 620, 622.

United States.—U. S. *v.* Bailey, 9 Pet. 238, 258, 9 L. ed. 113; U. S. *v.* Howard, 132 Fed. 325, 338; *In re* Rainsford, 20 Fed. Cas. No. 11,537.

Other definitions are: "A crime committed when a lawful oath is ministered by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in any matter material to the issue or cause in question, by their own act or by the subornation of others." 3 Coke Inst. 164 [*quoted* in People *v.* Fox, 25 Mich. 492, 496].

"A wilful false Oath, by one who being lawfully required to depose the Truth in any Proceeding in a Course of Justice, swears absolutely, in a Matter of some Consequence to the Point in question, whether he be believed, or not." 1 Hawkins P. C. c. 69, § 1.

"A wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." Bacon Abr. tit. "Perjury."

"A crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question." 4 Blackstone Comm. 137.

"All such false oaths as are taken before those, who are, in any way, intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries." Arden *v.* State, 11 Conn. 408, 412 [*citing* 1 Hawkins P. C. c. 60, § 3].

"The wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath, or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding." Herring *v.* State, 119 Ga. 709, 715, 46 S. E. 876 [*quoting* 2 Wharton Cr. L. § 1244].

"[Perjury] consists in the oath by which the party indicted swears to the truth of some matter." U. S. *v.* Ambrose, 108 U. S. 336, 341, 2 S. Ct. 682, 27 L. ed. 746.

To sustain a prosecution for perjury at common law, it must appear that the oath was false, the intention wilful, the proceedings judicial, the party lawfully sworn, the assertion absolute, and the falsehood material to the matter in question. *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450; Com. *v.* Kuntz, 4 Pa. L. J. 163; Rex *v.* Dunn, 1 D. & R. 10, 16 E. C. L. 10; Rex *v.* Aylett, 1 T. R. 63, 1 Rev. Rep. 152. And see Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448.

3. 3 Coke Inst. 163, 165. And see Com. *v.* Swanger, 108 Ky. 579, 57 S. W. 10, 22 Ky. L. Rep. 276; State *v.* Matlock, 48 La. Ann. 663, 19 So. 669; Wile *v.* State, 60 Miss. 260; State *v.* Terry, 30 Mo. 368; State *v.* Williams, 30 Mo. 364; Rex *v.* Johnson, 2 Show. 1.

4. *Arkansas.*—Nelson *v.* State, 32 Ark. 192.

Georgia.—A. *v.* B., R. M. Charlt. 228.

Kentucky.— Com. *v.* Swanger, 108 Ky. 579, 57 S. W. 10, 22 Ky. L. Rep. 276; Com. *v.* Powell, 2 Metc. 10.

Missouri.— State *v.* Terry, 30 Mo. 368; State *v.* Williams, 30 Mo. 364.

North Carolina.— State *v.* Shaw, 117 N. C. 764, 23 S. E. 246.

5. See Actions, 1 Cyc. 687. And see *infra*, II, D, 6.

6. Miller *v.* State, 15 Fla. 577, 585; Com. *v.* Williamson, 4 Gratt. (Va.) 554 (false oath before clerk by one applying for a marriage license); Reg. *v.* Hodgkiss, L. R. 1 C. C. 212, 11 Cox C. C. 365, 39 L. J. M. C. 14, 21 L. T. Rep. N. S. 564, 18 Wkly. Rep. 150; Reg. *v.* Chapman, 2 C. & K. 846, 3 Cox C. C. 467, 1 Den. C. C. 432, 13 Jur. 885, 18 L. J. M. C. 152, T. & M. 90, 61 E. C. L. 846; Reg. *v.* Darby, 7 Mod. 100; *Ex p.* Overton, 2 Rose 257; Rex *v.* Cole, 5 Can. Cr. Cas. 330, 3 Ont. L. Rep. 389; Reg. *v.* Clement, 26 U. C. Q. B. 297. And see State *v.* Coleman, 117 La. 673, 42 So. 471.

Distinction between "perjury" and "false oath."— There is a difference between a wilful false oath, constituting the crime of perjury, and a false oath which, at common law, might be punishable as a misdemeanor. The one is stubborn and corrupt, while the other is simply not true, lacking the elements which go to constitute the crime of perjury. Miller *v.* State, 15 Fla. 577, 585.

False swearing indictable under statute see *infra*, I, A, 2.

mation administered by authority of law, in a material matter, the offense being enlarged and made to extend to other false oaths than those taken in the course of judicial proceedings.[7] In some states the statute creates the offense of false swearing, which is totally distinct from that of perjury at common law.[8] To constitute this offense it is not necessary either that the false oath should be taken in a judicial proceeding pending at the time, or in a matter material to any point in question; but it is complete if the false oath is taken knowingly and wilfully on a subject on which the party could be legally sworn, and before a person legally

7. See the statutes of the several states; and the following cases:

Arkansas.— The wilful and corrupt swearing, testifying, or affirming falsely to any material matter in any cause, matter, or proceeding before any court, tribunal, body, or other officer having authority to administer oaths. State *v.* Kirkpatrick, 32 Ark. 117, 122. The wilful and corrupt swearing, affirming, or declaring falsely to any affidavit, deposition, or probate, authorized by law to be taken before any court, tribunal, body politic, or officer. Horn *v.* Foster, 19 Ark. 346, 350.

California.— Pen. Code, § 118, provides that "every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." People *v.* Simpton, 133 Cal. 367, 368, 65 Pac. 834. And see People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

Florida.— Miller *v.* State, 15 Fla. 577.

Illinois.— Young *v.* People, 134 Ill. 37, 24 N. E. 1070.

Maryland.— Under Code, art. 30, § 155, "affirmation or oath if made wilfully and falsely in any of the following cases, shall be deemed perjury; first in all cases where false swearing would be perjury at common law; secondly in all affidavits required by law to be taken." It is wilfully and falsely swearing to an untruth in any instance mentioned in the statutes which it defines as perjury and subjects to punishment as such. State *v.* Bixler, 62 Md. 354, 357.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— By Pen. Code, § 96, a person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, wilfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit or certificate, any material matter to be true which he knows to be false, is guilty of perjury. See Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255; People *v.* Doody, 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606 [*affirmed* in 172 N. Y. 165, 64 N. E. 807]; Foreman *v.* Union, etc., Co., 83 Hun 385, 31 N. Y. Suppl. 947; People *v.* Ostrander, 64 Hun 335, 19 N. Y. Suppl. 324, 328; People *v.* Martin, 38 Misc. 67, 76 N. Y. Suppl. 953 [*reversed* in 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340 (*affirmed* in 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628)]; People *v.* Dishler, 4 N. Y. Cr. 188.

North Carolina.— State *v.* Witherow, 7 N. C. 153.

Oklahoma.— Rich *v.* U. S., 1 Okla. 354, 33 Pac. 804, 2 Okla. 146, 37 Pac. 1083.

Oregon.— State *v.* Smith, 47 Oreg. 485, 83 Pac. 865.

South Carolina.— State *v.* Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660.

Texas.— State *v.* Perry, 42 Tex. 238; Ferguson *v.* State, 36 Tex. Cr. 60, 35 S. W. 369; Langford *v.* State, 9 Tex. App. 283.

Vermont.— St. § 5079, provides that "a person of whom an oath is required by law, who wilfully swears falsely in regard to any matter or thing respecting which such oath is required, shall be guilty of perjury." See State *v.* Rowell, 70 Vt. 405, 409, 41 Atl. 430.

8. Com. *v.* Powell, 2 Metc. (Ky.) 10; State *v.* Coleman, 117 La. 973, 42 So. 471; State *v.* Boland, 12 Mo. App. 74; O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443; Langford *v.* State, 9 Tex. App. 283. It is only necessary to show, in order to convict defendant of false swearing under Ky. St. (1903) § 1174, that the false statement was wilfully made with a knowledge of its falsity on a subject as to which he might be legally sworn, and that the oath was legally administered. Stamper *v.* Com., 100 S. W. 286, 30 Ky. L. Rep. 992.

In Texas perjury is a false oath required by law, as distinguished from "false swearing," which is a voluntary declaration or affidavit which is not required by law, or made in the course of judicial proceedings. O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443.

Repeal of statutes.— Since false swearing and perjury are distinct offenses, a statute defining and punishing false swearing does not impliedly repeal an earlier statute punishing perjury. State *v.* Coleman, 117 La. 973, 42 So. 471, holding that Acts (1906), p. 200, No. 118, relating to wilful, corrupt, and false swearing, and providing that who-

authorized to administer oaths.[9] Under such a statute a false statement made in the course of a judicial proceeding cannot be "false swearing," but may be perjury.[10] Perjury is made an offense by the laws of the United States,[11] and the offense under these laws is punishable by proceedings in the courts of the United States and not in the state courts.[12]

B. Elements of Offense — 1. In General. The elements of the offense of perjury are the falsity of the testimony[13] and knowledge thereof;[14] the proceeding in which the oath is administered, which must be such as to come within the common law or statutory definition of the offense;[15] the jurisdiction or authority to administer the oath;[16] the administration and making of the oath or substitute therefor;[17] and the materiality of the testimony or assertion and the oath.[18] It is not necessary that the false oath be credited, or that the party against whom it is given be prejudiced thereby, for the prosecution is not grounded on the damage to the party, but on the abuse of public justice.[19]

2. Falsity of Testimony and Knowledge Thereof — a. Necessity That Testimony Be False. To constitute perjury the matter sworn to must be either false in fact,[20] or, if true, defendant must believe it to be false, in which case he is

ever shall be found guilty of that offense shall be punished, etc., does not repeal Rev. St. § 857, a general statute regarding perjury.

9. Com. *v.* Powell, 2 Metc. (Ky.) 10; State *v.* Boland, 12 Mo. App. 74.

10. Langford *v.* State, 9 Tex. App. 283; State *v.* Smith, 63 Vt. 201, 22 Atl. 604.

11. "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury." U. S. Rev. St. § 5392 [U. S. Comp. St. (1901) p. 3653]. See Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415. And see other cases cited *infra*, I, B, 3, h, (xi), note 89.

To constitute perjury, the party charged must take an oath before some competent tribunal or officer that he will testify, declare, depose, or certify truly that his written testimony, declaration, or certificate by him subscribed was true, when in fact some material matter so testified, declared, or certified by him was false and untrue, and known by him at the time of taking such oath to have been false and untrue. U. S. *v.* Richards, 149 Fed. 443.

The word "perjury," in Pension Act (1820), c. 51, § 2, declaring that any person who shall swear falsely in the premises and be thereof convicted shall suffer as for wilful and corrupt perjury, does not mean the technical offense of perjury, but merely refers to it for the purpose of affixing the same punishment as for technical perjury. U. S. *v.* Elliot, 25 Fed. Cas. No. 15,044, 3 Mason 156.

12. People *v.* Sweetman, 3 Park. Cr. (N. Y.) 358. See Criminal Law, 12 Cyc. 137, 205.

13. See *infra*, I, B, 2, a.

14. See *infra*, I, B, 2, b.

15. See *infra*, I, B, 3.

16. See *infra*, I, B, 4.

17. See *infra*, I, B, 5.

18. See *infra*, I, B, 6.

19. *Connecticut.*—Arden *v.* State, 11 Conn. 408.

Illinois.— Pollard *v.* People, 69 Ill. 148.

Michigan.— Hoch *v.* People, 3 Mich. 552.

New Hampshire.— State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196.

Vermont.— State *v.* Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918.

England.— Hamper's Case, 3 Leon 230, 74 Eng. Reprint 651. Bacon Abr. tit. "Perjury"; 1 Hawkins P. C. c. 69, §§ 1, 22.

20. *Arkansas.*— Harp *v.* State, 59 Ark. 113, 26 S. W. 714.

California.— People *v.* Wong Fook Sam, 146 Cal. 114, 79 Pac. 840; *Ex p.* Meyer, (1895) 40 Pac. 953.

Georgia.— Thomas *v.* State, 71 Ga. 252.

Kentucky.— Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683.

North Carolina.—State *v.* Lawson, 98 N. C. 759, 4 S. E. 134.

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

Pennsylvania.— Com. *v.* Clark, 157 Pa. St. 257, 27 Atl. 723.

South Carolina.— State *v.* Cockran, 1 Bailey 50.

Utah.— U. S. *v.* Brown, 6 Utah 115, 21 Pac. 461.

Vermont.— State *v.* Trask, 42 Vt. 152.

Wisconsin.— Sommers *v.* Hamburger, 91 Wis. 107, 64 N. W. 880.

United States.— U. S. *v.* Neale, 14 Fed. 767.

England.— Rex *v.* De Beauvoir, 7 C. & P. 17, 32 E. C. L. 477.

See 39 Cent. Dig. tit. "Perjury," §§ 55, 56.

The term "false" means "false in fact" as distinct from legal falsity. People *v.* Wong Fook Sam, 146 Cal. 114, 79 Pac. 848.

Application for marriage license.— Perjury

guilty notwithstanding it is in fact true.[21] Perjury cannot be assigned upon testimony literally true to the question propounded, although it is not the whole truth touching the matter.[22]

b. Knowledge of Falsity and Intent — (i) *In General.* To constitute perjury the false oath must be taken wilfully and corruptly; the intent to testify falsely must appear;[23] and this is not to be presumed from the fact of a material

is not proved in respect of a solemn declaration that there was no lawful hindrance to deponent's proposed marriage by showing that the deponent knew the girl to be under twenty-one and that her parent's consent had not been obtained as required by the provincial law, if the marriage was valid notwithstanding the absence of such consent. Rex *v.* Moraes, 12 Can. Cr. Cas. 145.

21. State *v.* Cruikshank, 6 Blackf. (Ind.) 62 (holding that when a person swears that a thing is so or that he believes it to be so, when in truth he does not believe it to be so, the oath is false, although the fact really be as stated); State *v.* Gates, 17 N. H. 373; People *v.* McKinney, 3 Park. Cr. (N. Y.) 510; Rex *v.* Edwards, 1 Russell Cr. 293; 1 Hawkins P. C. c. 69, § 6. See also State *v.* Brooks, 33 Kan. 708, 7 Pac. 591.

22. Lamden *v.* State, 5 Humphr. (Tenn.) 83, holding that an oath that certain notes were due and unpaid, and that deponent had received nothing in payment thereof, does not negative the existence and justice of a set-off.

23. *Alabama.*— Green *v.* State, 41 Ala. 419; Ogletree *v.* State, 28 Ala. 693.

Arkansas.— Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Nelson *v.* State, 32 Ark. 192.

California.— People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

Florida.— Miller *v.* State, 15 Fla. 577.

Georgia.— Rowe *v.* State, 99 Ga. 706, 27 S. E. 710; Thomas *v.* State, 71 Ga. 252.

Illinois.— Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699; Bell *v.* Senneff, 83 Ill. 122; Pollard *v.* People, 69 Ill. 148.

Indiana.— Henry *v.* Hamilton, 7 Blackf. 506.

Kentucky.— Williams *v.* Com., 113 Ky. 652, 68 S. W. 871, 24 Ky. L. Rep. 465; Scott *v.* Cook, 1 Duv. 314; Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683.

Massachusetts.— Com. *v.* Brady, 5 Gray 78; Com. *v.* Douglass, 5 Metc. 241.

Michigan.— Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

Minnesota.—Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448.

Mississippi.—Brown *v.* State, 57 Miss. 424; Cothran *v.* State, 39 Miss. 541, where it is said that false swearing, to constitute perjury, must not only be wilful but corrupt or intentionally false; that "the false swearing must be wilful, both in its falsity as well as the act of swearing."

Missouri.— State *v.* Higgins, 124 Mo. 640, 28 S. W. 178; Martin *v.* Miller, 4 Mo. 47, 28 Am. Dec. 342.

New York.— Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293, 6 Abb. N. Cas. 181; People *v.* Doody, 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606 [*affirmed* in 172 N. Y. 165, 64 N. E. 807]; People *v.* Dishler, 38 Hun 175; People *v.* Robertson, 3 Wheel. Cr. 180.

North Carolina.—State *v.* Carland, 14 N. C. 114.

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

Oregon.— State *v.* Smith, 47 Oreg. 485, 83 Pac. 865.

Pennsylvania.— Com. *v.* Clark, 157 Pa. St. 257, 27 Atl. 723; Com. *v.* O'Grady, 4 Pa. Dist. 732.

South Carolina.—State *v.* Cockran, 1 Bailey 50.

Texas.— McDonough *v.* State, (Cr. App. 1905) 84 S. W. 594; Lyle *v.* State, 31 Tex. Cr. 103, 19 S. W. 903.

Virginia.— Com. *v.* Cook, 1 Rob. 729.

United States.— U. S. *v.* Neale, 14 Fed. 767; U. S. *v.* Conner, 25 Fed. Cas. No. 14,847, 3 McLean 573; U. S. *v.* Moore, 26 Fed. Cas. No. 15,803, 2 Lowell 232; U. S. *v.* Shellmire, 27 Fed. Cas. No. 16,271, Baldw. 370; U. S. *v.* Smith, 27 Fed. Cas. No. 16,336; U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277; U. S. *v.* Stanley, 27 Fed. Cas. No. 16,376, 6 McLean 409. "Perjury is the willfully and corruptly swearing false. . . . Corruption is an element of crime." *In re* Rainsford, 20 Fed. Cas. No. 11,537.

England.— Reg. *v.* Moreau, 11 Q. B. 1028, 12 Jur. 626, 17 L. J. Q. B. 187, 63 E. C. L. 1028; Rex *v.* De Beauvoir, 7 C. & P. 17, 32 E. C. L. 477; Wyld *v.* Cookman, Cro. Eliz. 492, 78 Eng. Reprint 743; Jackson's Case, 1 Lew. C. C. 270; Reg. *v.* Muscot, 10 Mod. 192; Rex *v.* Smith, 2 Show. 165.

Canada.— Reg. *v.* Murphy, 9 Montreal Leg. N. 95; Reg. *v.* Denault, 8 Montreal Leg. N. 250.

See 39 Cent. Dig. tit. "Perjury," §§ 3, 57.

The word "wilful" means merely that the perjured testimony must have been given with some degree of deliberation. People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155; Krauskopf *v.* Tallman, 38 N. Y. App. Div. 273, 56 N. Y. Suppl. 967 [*affirmed* in 170 N. Y. 561, 62 N. E. 1096]; *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450; Com. *v.* Cornish, 6 Binn. (Pa.) 249; Com. *v.* O'Grady, 4 Pa. Dist. 732.

The word "corrupt" means that the false testimony was given from some improper and corrupt motive; that, at the time the assertion was made, the party had some corrupt purpose in making it. *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450; Com. *v.* O'Grady, 4 Pa. Dist. 732.

The knowledge which a witness must have in order to render him guilty of perjury need not be actual knowledge, but may be knowledge with which he is chargeable by reason of association with the transaction which con-

conflict between the testimony of the parties to a suit.[24] It must appear that the false oath was taken with some degree of deliberation; for if, upon the whole circumstances of the case, it appears probable that it was owing rather to the weakness than the perverseness of the party, as where it was occasioned by surprise or inadvertence, it will not amount to perjury.[25] Where a witness remembers certain material facts, and he swears falsely, wilfully, and corruptly to the effect that he does not remember them, he is guilty of perjury.[26]

(II) *Rash Statements* — (A) *According to Belief.* There is some difference of opinion as to whether perjury, or false swearing in the nature of perjury, can be committed by mere rash and reckless statements on oath according to one's belief. The better view seems to be that, since corrupt motive is an indispensable element of perjury, one who honestly testifies, however positively, only what he believes to be true, cannot be guilty of perjury, although he is mistaken.[27] Some of the cases, however, are to the contrary.[28]

(B) *Contrary to Belief.* Where a witness swears to a thing of which he consciously knows nothing, he is guilty of perjury,[29] although it is true.[30] It is not,

stitutes the subject of the investigation. State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; State *v.* Smith, 47 Oreg. 485, 83 Pac. 865.

Effect of generality of question.— A wilful false statement in answer to a question propounded constitutes a good assignment of perjury, although the question asked is too general to form a basis for the impeachment of the witness. The generality of the question may, however, be a circumstance to show that the evidence was not given wilfully and deliberately — that it was given under a mistake or misapprehension; but a witness having boldly answered a question and answered it falsely, as well as deliberately and wilfully, cannot afterward avail himself of the generality of the question to defeat a prosecution for perjury. McDonough *v.* State, (Tex. Cr. App. 1905) 84 S. W. 594.

Advice of counsel as a defense see *infra*, I, C, 4.

24. Bell *v.* Senneff, 83 Ill. 122. See *infra*, II, C, 2, b, 3, b.

25. *Georgia.*— Jesse *v.* State, 20 Ga. 156.

Illinois.— Bell *v.* Senneff, 83 Ill. 122.

Massachusetts.— Com. *v.* Dunham, Thach. Cr. Cas. 519.

Missouri.— State *v.* Higgins, 124 Mo. 640, 28 S. W. 178.

New York.— People *v.* Dishler, 38 Hun 175.

Pennsylvania.—Com. *v.* O'Grady, 4 Pa. Dist. 732.

See 39 Cent. Dig. tit. "Perjury," §§ 3, 57.

26. People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606].

27. *California.*— People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

Georgia.— Thomas *v.* State, 71 Ga. 252.

Kentucky.— Scott *v.* Cook, 1 Duv. 314.

Massachusetts.— Com. *v.* Brady, 5 Gray 78.

South Carolina.—State *v.* Cockran, 1 Bailey 50.

Texas.— Butler *v.* State, 36 Tex. Cr. 444, 37 S. W. 746.

United States.— U. S. *v.* Atkins, 24 Fed. Cas. No. 14,474, 1 Sprague 558; U. S. *v.* Moore, 26 Fed. Cas. No. 15,803, 2 Lowell 232; U. S. *v.* Shellmire, 27 Fed. Cas. No. 16,271, Baldw. 370; U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277. See also U. S. *v.* Smith, 27 Fed. Cas. No. 16,336.

Negligence and carelessness in coming to that belief, without taking proper pains to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be wilful where the oath is according to the belief and conviction of the witness as to its truth. Com. *v.* Brady, 5 Gray (Mass.) 78; U. S. *v.* Moore, 26 Fed. Cas. No. 15,803, 2 Lowell 232; U. S. *v.* Shellmire, 27 Fed. Cas. No. 16,271, Baldw. 370.

28. Johnson *v.* People, 94 Ill. 505; State *v.* Knox, 61 N. C. 312; Com. *v.* Cornish, 6 Binn. (Pa.) 249; Com. *v.* O'Grady, 4 Pa. Dist. 732; State *v.* Barkeley, 41 W. Va. 455, 23 S. E. 608.

29. *Florida.*— Miller *v.* State, 15 Fla. 577.

Kansas.— See State *v.* Brooks, 33 Kan. 708, 7 Pac. 591.

New Hampshire.— State *v.* Gates, 17 N. H. 373, holding that perjury consists not only in swearing to things known not to be true, but also in swearing to them without any knowledge on the subject.

New York.— Byrnes *v.* Byrnes, 102 N. Y. 4, 5 N. E. 776. And see People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606]; Klinger *v.* Markowitz, 54 N. Y. App. Div. 299, 65 N. Y. Suppl. 369, 66 N. Y. Suppl. 1135.

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

United States.— U. S. *v.* Atkins, 24 Fed. Cas. No. 14,474, 1 Sprague 558. See also U. S. *v.* Smith, 27 Fed. Cas. No. 16,336.

England.— Reg. *v.* Schlesinger, 10 Q. B. 670, 2 Cox C. C. 200, 12 Jur. 283, 17 L. J. M. C. 29, 59 E. C. L. 670; Allen *v.* Westley, Het. 97; Rex *v.* Pedley, Leach C. C. 365; Ockley, etc., Case, Palm. 294, 81 Eng. Reprint 1089. But see Rex *v.* Hinton, 3 Mod. 122.

See 39 Cent. Dig. tit. "Perjury," § 60.

Compare Gibson *v.* State, (Tex. App. 1890) 15 S. W. 118, holding that, to constitute perjury, defendant must have known his statements to be false, and it is not enough that he did not know them to be true.

30. People *v.* McKinney, 3 Park. Cr. (N. Y.) 510. See *supra*, I, B, 2, a.

however, necessarily perjury for one to swear to an affidavit of which he does not know the contents. In order to fasten upon him the guilt of perjury, he must have known that he did not know its contents, and made the affidavit notwithstanding.[31] Perjury may also be assigned as to what a man has sworn that he thought or believed; the difficulty, if any, being in the proof of the assignment.[32]

(III) *Opinions*—(A) *As to Matters of Fact.* Even in a matter calling for the exercise of judgment and expression of opinion perjury may be predicated if one wilfully and corruptly refrains from exercising his judgment and giving expression to his real opinion when in law he is bound to do so.[33] But in the absence of a showing that there was a wilful failure and refusal to exercise an honest judgment, the charge of perjury cannot be successfully maintained.[34] Where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, the fact that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute it perjury or false swearing.[35]

(B) *As to Matters of Law.* A witness cannot be guilty of perjury in giving his opinion as to the legal effect of facts about which he is required to testify.[36] Thus a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury.[37]

3. Proceeding in Which Oath Is Administered — a. In General — (I) *At Common Law.* At common law a charge of perjury can be made only upon an oath in a judicial proceeding.[38] It is not necessary, however, that the proceeding shall be before a judicial tribunal, but it suffices to render a false oath perjury that it be taken in a proceeding in a course of justice.[39] Indeed it has been held that the

31. Byrnes *v.* Byrnes, 102 N. Y. 4, 5 N. E. 776.

32. Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 519; People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606]; Patrick *v.* Smoke, 3 Strobh. (S. C.) 147; Reg. *v.* Schlesinger, 10 Q. B. 670, 2 Cox C. C. 200, 12 Jur. 283, 17 L. J. M. C. 29, 59 E. C. L. 670; Rex *v.* Pedley, Leach C. C. 365.

33. *In re* Howell, 114 Cal. 250, 46 Pac. 159; Com. *v.* Edison, 9 S. W. 161, 10 Ky. L. Rep. 340.

Whether or not a man was drunk is not necessarily a matter of opinion, but even if it were, a witness may commit perjury by falsely and corruptly stating what is not his opinion on the question. Com. *v.* Edison, 9 S. W. 161, 10 Ky. L. Rep. 340.

34. *In re* Howell, 114 Cal. 250, 46 Pac. 159; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; State *v.* Fannon, 158 Mo. 149, 59 S. W. 75; U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

35. Com. *v.* Bray, 96 S. W. 522, 523, 29 Ky. L. Rep. 757, holding therefore that on a prosecution under St. (1903) § 1174, defining the offense of false swearing as wilfully and knowingly swearing to that which is false, an indictment charging that defendant swore that he never "made any trade" with a certain person was demurrable as not charging that defendant swore falsely to any fact as distinguished from a conclusion.

36. *Arkansas.*— Harp *v.* State, 59 Ark. 113, 26 S. W. 714.

California.— Bell *v.* Brown, 22 Cal. 671.

Indiana.— State *v.* Henderson, 90 Ind. 406.

Michigan.— Hoch *v.* People, 3 Mich. 552, holding that falsely swearing that B "feloniously stole, took," etc., is an oath as to facts, and not merely as to a conclusion of law.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

See 39 Cent. Dig. tit. "Perjury," § 61.

37. State *v.* Woolverton, 8 Blackf. (Ind.) 452; Lambert *v.* People, 6 Abb. N. Cas. (N. Y.) 181; Anonymous, 1 Fed. Cas. No. 475, 1 Wash. 84; Rex *v.* Crespigny, 1 Esp. 280.

38. *Connecticut.*— Arden *v.* State, 11 Conn. 408.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. And see Clark *v.* Clark, 51 N. J. Eq. 404, 26 Atl. 1012.

Oklahoma.— Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031.

Pennsylvania.— Com. *v.* O'Grady, 4 Pa. Dist. 732.

South Carolina.— Pegram *v.* Styron, 1 Bailey 595; State *v.* Stephenson, 4 McCord 165.

Vermont.— State *v.* Simons, 30 Vt. 620; State *v.* Chamberlin, 30 Vt. 559.

England.— Reg. *v.* Castro, L. R. 9 Q. B. 350, 12 Cox C. C. 454, 43 L. J. Q. B. 105, 30 L. T. Rep. N. S. 320, 22 Wkly. Rep. 187; Reg. *v.* Hurrell, 3 F. & F. 271; Rex *v.* Aylett, 1 T. R. 63, 1 Rev. Rep. 152; Bacon Abr. tit. "Perjury"; 4 Blackstone Comm. 137; 3 Inst. 164; 1 Hawkins P. C. c. 69, § 1.

Canada.— Thomas *v.* Platt, 1 U. C. Q. B. 217.

39. Com. *v.* Warden, 11 Metc. (Mass.) 406.

The expression "judicial proceeding," as

taking of a false oath wilfully and corruptly in any case where the administration of an oath is lawful is perjury at common law.[40]

(II) *By Statute.* Under some of the statutes punishing perjury the offense is limited, as at common law, to false oaths in judicial proceedings.[41] But false swearing otherwise than in judicial proceedings is punished generally as a distinct offense.[42] Other statutes, as has been seen, extend the crime of perjury so as to include other false oaths than those taken in the course of judicial proceedings, and so as to apply whenever the oath is authorized by law and administered by an authorized officer.[43] A wilful false oath taken in one jurisdiction, pursuant to the laws of another, may be the subject of a prosecution for perjury in the former.[44]

b. Particular Proceedings — (I) *Affidavits and Depositions* — (A) *Affidavits.* If a person wilfully and corruptly swears or affirms falsely as to a material matter in any affidavit, in a judicial proceeding, or by statute in many jurisdictions in any affidavit required by law, he is guilty of perjury.[45] Thus it is perjury both at common law and under the statutes to swear falsely to a material point in an affidavit for the continuance of a cause,[46] in support of a petition for

used in the statement that perjury is an assertion upon oath duly administered in a judicial proceeding, means a proceeding which takes place in or under the authority of the court of justice, or which relates in some way to the administration of justice, or which legally ascertains any right or liability. Hereford *v.* People, 197 Ill. 222, 64 N. E. 310. A statement made upon oath by a person on his examination for discovery, and which forms part of his evidence at the trial, is evidence given in a judicial proceeding. Rex *v.* Thickens, 11 Can. Cr. Cas. 274, 12 Brit. Col. 223.

40. Chapman *v.* Gillet, 2 Conn. 40.

41. Pennaman *v.* State, 58 Ga. 336; State *v.* Boland, 12 Mo. App. 74; Com. *v.* O'Grady, 4 Pa. Dist. 732; Drew *v.* Rex, 33 Can. Sup. Ct. 228, 6 Can. Cr. Cas. 424 [*affirming* 6 Can. Cr. Cas. 241, 11 Quebec K. B. 477]; Rex *v.* Thickens, 11 Can. Cr. Cas. 274, 12 Brit. Col. 223.

"Judicial proceeding" in Ga. Code, § 4660, defining perjury as false swearing, etc., in judicial proceedings, refers to judicial proceedings under the laws of the state, and its own tribunals of justice. *Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428.

42. State *v.* Boland, 12 Mo. App. 74. See *supra*, I, A, 2.

43. Johnson *v.* U. S., 26 App. Cas. (D. C.) 128; Rich *v.* U. S., 2 Okla. 146, 37 Pac. 1083. See *supra*, I, A, 2.

44. People *v.* Martin, 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628 [*affirming* 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340 (*reversing* 38 Misc. 67, 76 N. Y. Suppl. 953)], holding that Pen. Code, § 96, relating to perjury and providing that a person who swears that any affidavit or other writing by him subscribed is true, on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, and who on such occasion wilfully and knowingly deposes falsely in any material matter, or states in his affidavit, any material matter to be true which he knows to be false, is guilty of perjury, includes not only any and every false and corrupt oath and affidavit taken or made in New York which is permitted or required by its statutes, but also includes any and every oath or affidavit so taken or made, if permitted or required by the laws of any other state of the Union, whenever under the general law of comity which exists between the states they would be considered and given effect in New York; and hence an officer of a foreign corporation, who is required by a statute of the state where it was created to take an oath as to the amount of capital stock paid in, who swears falsely to such amount before a notary public in New York is guilty of the crime of perjury.

45. *Georgia.*— Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749.

Illinois.— McDonnell *v.* Olwell, 17 Ill. 375.

Minnesota.— State *v.* Scatena, 84 Minn. 281, 87 N. W. 764; State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

Missouri.— State *v.* Breitweiser, 88 Mo. App. 648.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— People *v.* Martin, 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628 [*affirming* 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340].

Vermont.— State *v.* Estabrooks, 70 Vt. 412, 41 Atl. 499.

Foreign affidavit.— Perjury is not assignable upon a foreign affidavit. Musgrave *v.* Medex, 19 Ves. Jr. 652, 34 Eng. Reprint 657.

Oral testimony instead of affidavit.—Although the statute permits the use of affidavits on the hearing of a motion to dissolve a motion before a judge of the common pleas court sitting in chambers, the oral testimony of witnesses is competent on a hearing of that character; and one who knowingly and wilfully testifies falsely in a material matter in giving such testimony is guilty of perjury. State *v.* Budd, 65 Ohio St. 1, 60 N. E. 988.

46. State *v.* Winstandley, 151 Ind. 316, 51 N. E. 92; State *v.* Johnson, 7 Blackf. (Ind.)

a new trial,[47] for the purpose of obtaining a certiorari,[48] for a writ of habeas corpus,[49] for an injunction,[50] to an account for the purpose of having it passed by the orphan's court,[51] in proceedings by a landlord to remove his tenant,[52] or charging an offense against another to procure his arrest or institute a criminal prosecution,[53] or to procure a search warrant.[54] And the making of false affidavits not in judicial proceedings is perjury under many statutes.[55] Before a party may be convicted of perjury, however, in making a false affidavit, he must either use the affidavit for a purpose contemplated by the statute, or deliver it to someone for such use;[56] but it need not necessarily be used in the trial for which it was taken.[57] Whether or not the affidavit is sufficient for the purpose for which it was intended is immaterial.[58] Nor is it essential that the affidavit should be capable of being used as evidence. It is enough that the matter falsely sworn to is material to the point of inquiry at the time it is made.[59]

(B) *Depositions.* Perjury may also be assigned upon false testimony in the giving of a deposition authorized by law,[60] although not where the deposition is illegal because not taken as authorized.[61] Where a statement made upon oath by a person on his examination for discovery before trial in an action forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of a statute punishing perjury.[62]

(II) *Acknowledgment of Deed.* Under statutes it has been held to be perjury for a person to swear falsely to his identity as grantor on examination by an officer authorized to administer the oath on taking the acknowledgment of a deed;[63] or to swear falsely to the execution of a deed as an attesting witness.[64]

(III) *Application For Marriage License.* Under the statutes extending the crime of perjury[65] false swearing upon an application for a license to marry is perjury, if the person administering the oath has authority to do so;[66] other-

49; State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485; State *v.* Matlock, 48 La. Ann. 663, 19 So. 669. But see Com. *v.* Roach, 1 Gratt. (Va.) 561.

47. State *v.* Chandler, 42 Vt. 446.

48. Pratt *v.* Price, 11 Wend. (N. Y.) 127.

49. White *v.* State, 1 Sm. & M. (Miss.) 149.

50. Rex *v.* White, M. & M. 271, 22 E. C. L. 519.

51. U. S. *v.* Thomas, 28 Fed. Cas. No. 16,475, 3 Cranch C. C. 293.

52. Sewell *v.* State, 61 Ga. 496.

53. Herring *v.* State, 119 Ga. 709, 46 S. E. 876; Pennaman *v.* State, 58 Ga. 336; Shell *v.* State, 148 Ind. 50, 47 N. E. 144; State *v.* Cockran, 1 Bailey (S. C.) 50; Simpson *v.* State, 46 Tex. Cr. 77, 79 S. W. 530; Rambo *v.* State, 43 Tex. Cr. 271, 64 S. W. 1039; Langford *v.* State, 9 Tex. App. 283. See also Com. *v.* O'Grady, 4 Pa. Dist. 732.

False affidavit not charging any offense not perjury see State *v.* Bronson, 1 Ohio Dec. (Reprint) 31, 1 West. L. J. 222; and *infra*, I, B, 4, a, (III).

54. An affidavit to procure a search warrant, charging a felony, is, if false, perjury, although it charges the felony on no particular person. Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

55. Affidavits in particular cases see *infra*, I, B, 3, b, (II)-(XIII).

56. People *v.* Robles, 117 Cal. 681, 49 Pac. 1042.

57. State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rex *v.* White, M. & M. 271, 22 E. C. L. 519; Rex *v.* Crossley, 7 T. R. 315, 4 Rev. Rep. 445.

58. State *v.* Hopper, 133 Ind. 460, 32 N. E. 878; State *v.* Flagg, 27 Ind. 24; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

59. Jacobs *v.* State, 61 Ala. 448; Rex *v.* Hailey, 1 C. & P. 258, R. & M. 94, 12 E. C. L. 155.

60. State *v.* Woolridge, 45 Oreg. 389, 78 Pac. 333.

The word "deposition" in the act for the punishment of crimes must be construed in its strict sense, and does not include a mere affidavit. State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

61. Reg. *v.* Lloyd, 19 Q. B. D. 213, 16 Cox C. C. 235, 52 J. P. 86, 56 L. J. M. C. 119, 56 L. T. Rep. N. S. 750, 35 Wkly. Rep. 653; Reg. *v.* Martin, 7 Rev. Lég. 672, 21 L. C. Jur. 156; Reg. *v.* Gibson, 7 Rev. Lég. 573.

62. Rex *v.* Thickens, 11 Can. Cr. Cas. 274, 12 Brit. Col. 223.

63. *Ex p.* Carpenter, 64 Cal. 267, 30 Pac. 816.

64. Tuttle *v.* People, 36 N. Y. 431.

65. See *supra*, I, A, 2; I, B, 3, a, (II).

66. State *v.* Floto, 81 Md. 600, 32 Atl. 315; Warwick *v.* State, 25 Ohio St. 21; Call *v.* State, 20 Ohio St. 330; Reg. *v.* Barnes, 10 Cox C. C. 539; Rex *v.* Alexander, Leach C. C. 74; Rex *v.* Moraes, 12 Can. Cr. Cas. 145. But see Reg. *v.* Chapman, 2 C. & K. 846, 3 Cox C. C. 467, 1 Den. C. C. 432, 13 Jur. 885, 18 L. J. M. C. 152, T. & M. 90, 61 E. C. L. 846 (holding that a false oath before a surrogate for the purpose of obtaining a mar-

wise not.[67] But since false swearing upon an application for a marriage license is not in a judicial proceeding, it is not perjury at common law, although indictable as a distinct misdemeanor.[68]

(IV) *Bankruptcy and Insolvency Proceedings.* Taking a false oath under the Insolvent Debtor's Act is perjury both at common law and under the statutes.[69] So one wilfully omitting property from his schedule in insolvency is guilty of perjury.[70] It was held, however, that it was not perjury for a bankrupt, under the bankrupt law of 1841, to swear falsely to his schedule, although if he made false statements in regard to it in answer to interrogatories proposed to him in his examination it was perjury.[71]

(V) *Claim to Public Money.* A false affidavit to support a claim to public money, not being made in a judicial proceeding, is not perjury at common law, although it is no doubt indictable as false swearing;[72] but perjury is assignable upon such an affidavit under statutes extending the crime of perjury to false oaths other than those taken in judicial proceedings.[73] Sometimes such a false oath is made punishable as a distinct offense and does not fall within the statute punishing perjury.[74]

(VI) *Examination as to Competency of Juror.* One is indictable for per-

riage license is a misdemeanor, but whether perjury, *quære*); Rex *v.* Foster, R. & R. 341.

67. State *v.* Theriot, 50 La. Ann. 1187, 24 So. 179; State *v.* Carpenter, 164 Mo. 588, 65 S. W. 255; Com. *v.* Williamson, 4 Gratt. (Va.) 554.

68. Com. *v.* Williamson, 4 Gratt. (Va.) 554; Reg. *v.* Chapman, 2 C. & K. 846, 3 Cox C. C. 467, 1 Den. C. C. 432, 13 Jur. 885, 18 L. J. M. C. 152, T. & M. 90, 61 E. C. L. 846.

Under the Texas statute, an affidavit upon an application for a marriage license being extrajudicial, will support an assignment for false swearing, but not for perjury. Harkreader *v.* State, 35 Tex. Cr. 243, 33 S. W. 117, 60 Am. St. Rep. 40; Steber *v.* State, 23 Tex. App. 176, 4 S. W. 880; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662.

69. People *v.* Maxwell, 118 Cal. 50, 50 Pac. 18; Arden *v.* State, 11 Conn. 408; Com. *v.* Calvert, 1 Va. Cas. 181.

70. People *v.* Platt, 67 Cal. 21, 7 Pac. 1; People *v.* Berman, (Cal. 1885) 7 Pac. 3.

71. U. S. *v.* Dickey, Morr. (Iowa) 412.

72. See Shely *v.* State, 35 Tex. Cr. 190, 32 S. W. 901; and *supra*, I, A, 1, b; I, B, 3, a, (I).

73. Vance *v.* State, 62 Miss. 137; U. S. *v.* Boggs, 31 Fed. 337; and other cases cited *infra*, this note.

Claim against United States.— One making a cross affidavit before a justice of the peace of the state, in order to establish a claim against the United States, is indictable under the act of congress passed March 1, 1823, to prevent false swearing touching public money, although such affidavit was not expressly authorized by an act of congress, but allowed by the secretary of the treasury to be made before a justice of the peace. U. S. *v.* Bailey, 9 Pet. (U. S.) 238, 9 L. ed. 113.

Pension claim.— The offense of perjury as defined by U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653] (*supra*, I, A, 2, note 11) may be predicated upon an affidavit to support a pension claim sworn to before a justice of the peace. U. S. *v.* Boggs, 31 Fed. 337.

Clerk of court.— The account of services rendered the United States by a clerk of the district court is a "declaration" or "certificate" within the meaning of U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653], making the false verification thereof perjury. U. S. *v.* Ambrose, 108 U. S. 336, 2 S. Ct. 682, 27 L. ed. 746.

In Texas an affidavit of a deputy sheriff for expenses in conveying a witness from one county to another under Acts (1891), p. 138, providing that for such service the sheriff shall be entitled to his expenses, the amount to be stated by him under oath, is "an oath necessary for the prosecution of a private right," within Pen. Code, art. 188, declaring that a false statement under oath for the prosecution or defense of any private right is perjury, and is not an oath "in a judicial proceeding," within the article 192, providing that a false oath in a judicial proceeding shall constitute perjury. Shely *v.* State, 35 Tex. Cr. 190, 32 S. W. 901.

Where a public school-teacher, on making affidavit as required by law to the check drawn by the trustees on the county treasurer for his pay, makes a false statement, he is guilty of perjury under Tex. Pen. Code, art. 188, defining perjury as a false statement made under the sanction of an oath under circumstances in which an oath is required by law. O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443. So in Mississippi, where a teacher who had taught a number of days in excess of the regular term, for which he could not legally receive compensation, exaggerated the number of scholars at the next term, so as to entitle him to an amount sufficient to pay for the extra days' teaching, and made oath to such report, it was held that he was guilty of perjury. Vance *v.* State, 62 Miss. 137.

74. State *v.* Runyan, 130 Ind. 208, 29 N. E. 779.

jury for giving a false answer while being examined under oath as to his competency to sit as juror on the trial of a cause.[75]

(VII) *JUSTIFICATION OF SURETY.*[76] If a surety on a bail-bond or recognizance testifies falsely and knowingly in an affidavit or on examination as to his ownership of property or other qualifications, he is guilty of perjury both at common law and under the statutes,[77] and the same is true of one who swears falsely on justifying as surety on an appeal-bond or recognizance.[78] So, under the act of congress extending the crime of perjury,[79] one may be guilty of that offense in swearing falsely as to his qualifications to become a surety on a distiller's bond,[80] or a match-stamp bond,[81] before an internal revenue collector.

(VIII) *STATEMENT OF OFFICERS AS TO CONDITION OF BANK OR CORPORATION.* A false oath in a statement or report required by law of directors or officers of a bank or other corporation as to its condition or affairs, not being in a judicial proceeding, would not be perjury at common law;[82] but it is otherwise in some jurisdictions under particular statutes or under general statutes extending the crime of perjury.[83] A wilful and corrupt false statement under oath by an officer of a national bank, to the controller of the currency,[84] or by an officer of a state bank to the state superintendent of banks,[85] as to the condition of the bank, constitutes perjury.

(IX) *NATURALIZATION PROCEEDINGS.* False swearing on a material matter in a naturalization case is perjury both at common law and under the statutes.[86]

(X) *PROCEEDINGS BEFORE GRAND JURY.* A person who wilfully and knowingly swears falsely as to a material matter in giving testimony before a grand jury having legal authority to inquire into the matter under investigation may be indicted and tried for perjury, both at common law and under the statutes;[87]

75. State *v.* Howard, 63 Ind. 502; Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638; State *v.* Wall, 9 Yerg. (Tenn.) 347; Com. *v.* Stockley, 10 Leigh (Va.) 678.

76. Materiality see *infra*, I, B, 6, a, (III), (A).

77. *Massachusetts.*— Com. *v.* Butland, 119 Mass. 317; Com. *v.* Hughes, 5 Allen 499.

Missouri.— State *v.* Lavalley, 9 Mo. 834.

New Mexico.— Territory *v.* Weller, 2 N. M. 470.

New York.— People *v.* Froelich, 110 N. Y. App. Div. 873, 96 N. Y. Suppl. 488 [*affirmed* in 185 N. Y. 615, 78 N. E. 1108]; Stratton *v.* People, 20 Hun 288 [*affirmed* in 81 N. Y. 629].

Pennsylvania.— Com. *v.* Miller, 6 Pa. Super. Ct. 35.

Tennessee.— State *v.* Wilson, 87 Tenn. 693, 11 S. W. 792.

United States.— U. S. *v.* Volz, 28 Fed. Cas. No. 16,627, 14 Blatchf. 15.

See 39 Cent. Dig. tit. "Perjury," §§ 11, 19.

78. Territory *v.* Weller, 2 N. M. 470; State *v.* Wilson, 87 Tenn. 693, 11 S. W. 792.

79. See *supra*, I, A, 2, note 11.

80. U. S. *v.* Hardison, 135 Fed. 419, under U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653].

81. Ralph *v.* U. S., 9 Fed. 693, 11 Biss. 88.

82. See *supra*, I, A, 1, a; I, B, 3, a, (I). And see CORPORATIONS, 10 Cyc. 875.

83. See *supra*, I, A, 2; I, B, 3, a, (II). And see Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 519; People *v.* Trumpbour, 64 Hun (N. Y.) 346, 19 N. Y. Suppl. 331; U. S. *v.* Bartow, 10 Fed. 873, 20 Blatchf. 351.

84. U. S. *v.* Bartow, 10 Fed. 873, 20 Blatchf. 351.

85. Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 519; People *v.* Trumpbour, 64 Hun (N. Y.) 346, 19 N. Y. Suppl. 331; People *v.* Vail, 57 How. Pr. (N. Y.) 81.

86. State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; People *v.* Sweetman, 3 Park. Cr. (N. Y.) 358; Rump *v.* Com., 30 Pa. St. 475; U. S. *v.* Jones, 26 Fed. Cas. No. 15,491, 14 Blatchf. 90, under U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653].

Voluntary and immaterial oath not perjury see *infra*, I, B, 3, c, (I).

Jurisdiction as between state and federal governments and courts in prosecutions for perjury see CRIMINAL LAW, 12 Cyc. 137, 200, 205.

87. *Arkansas.*— State *v.* Green, 24 Ark. 591.

Connecticut.— State *v.* Fasset, 16 Conn. 457.

Florida.— Craft *v.* State, 42 Fla. 567, 29 So. 418.

Georgia.— Nance *v.* State, 126 Ga. 95, 54 S. E. 932.

Indiana.— State *v.* McCormick, 52 Ind. 169; State *v.* Offutt, 4 Blackf. 355.

Iowa.— State *v.* Schill, 27 Iowa 263.

Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.

Missouri.— State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; State *v.* Terry, 30 Mo. 368.

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

Utah.— People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

but it is otherwise if the grand jury have no authority to inquire into the matter under investigation.[88]

(xi) *Proceedings Before Land-Office.* False oaths taken in proceedings before the United States land-office may be indictable as perjury not only under the general act of congress in relation to perjury,[89] but also under an act expressly declaring the making of false affidavits or the giving of false testimony in or to be used in land-offices, in connection with the disposal of public land to be perjury.[90]

(xii) *Proceedings Before Referees and Arbitrators.* False and corrupt swearing in a material matter is perjury where the oath is lawfully administered and the false testimony given on a trial before a referee,[91] or on the investigation of a matter submitted to arbitrators by rule of court.[92]

(xiii) *Miscellaneous Proceedings.* Perjury may be assigned, either at common law or under the statute in the particular jurisdiction extending the crime, upon a false oath to an answer in chancery,[93] provided the bill called for an answer under oath;[94] in proceedings before a fire marshal;[95] in proceedings before fence viewers;[96] in proceedings before a court-martial;[97] in proceedings before a local marine board;[98] in legislative proceedings;[99] in contempt proceedings;[1] in a proof of loss to an insurance company;[2] on an inquest before a deputy coroner;[3] at an election;[4] or upon a false oath as to his ownership of stock, etc.,

England.— Reg. *v.* Hughes, 1 C. & K. 519, 47 E. C. L. 519.

See 39 Cent. Dig. tit. "Perjury," § 15.

Materiality see *infra*, I, B, 6, a, (III), (B).

88. Craft *v.* State, 42 Fla. 567, 29 So. 418; Pankey *v.* People, 2 Ill. 80. And see *infra*, I, B, 3, c, (I).

89. U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653], quoted *supra*, I, A, 2, note 11. See Caha *v.* U. S., 152 U. S., 211, 14 S. Ct. 513, 30 L. ed. 415; Van Gesner *v.* U. S., 153 Fed. 46, 82 C. C. A. 180 [*reversed* on other grounds in 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. ——]; U. S. *v.* Brace, 149 Fed. 869; U. S. *v.* Manion, 44 Fed. 800.

90. Act Cong. March 3, 1857, § 5 (11 U. S. St. at L. 250). See Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031; Fisher *v.* U. S., 1 Okla. 252, 31 Pac. 195; U. S. *v.* Wood, 70 Fed. 485; U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403. See also Meyers *v.* U. S., 5 Okla. 173, 48 Pac. 186. This act, being an independent act, permanent in character, although special in its application, and not having been repealed by any act prior to the revision of the statutes, is in force, although it is omitted from the Revised Statutes. Peter *v.* U. S., *supra*.

Materiality see *infra*, I, B, 6.

91. State *v.* Keene, 26 Me. 33; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106, holding, however, that an order of reference made after the report has been filed, with the consent of both parties that it be entered *nunc pro tunc*, will not relate back so as to give an extrajudicial oath the effect of an oath legally administered, on which a charge of perjury can be sustained.

92. State *v.* Stephenson, 4 McCord (S. C.) 165; Reg. *v.* Ball, 6 Cox C. C. 360.

Contra, under submission not made by a rule of court. Mahan *v.* Berry, 5 Mo. 21.

93. Reg. *v.* Yates, C. & M. 132, 5 Jur. 636. 41 E. C. L. 77.

94. Silver *v.* State, 17 Ohio 365.

95. Harris *v.* People, 64 N. Y. 148 [*affirming* 4 Hun 1, 6 Thomps. & C. 206].

96. Jones *v.* Daniels, 15 Gray (Mass.) 438.

97. Reg. *v.* Heane, 4 B. & S. 947, 9 Cox C. C. 433, 10 Jur. N. S. 724, 33 L. J. M. C. 115, 9 L. T. Rep. N. S. 719, 12 Wkly. Rep. 417, 116 E. C. L. 947.

98. Reg. *v.* Tomlinson, L. R. 1 C. C. 49, 10 Cox C. C. 323, 12 Jur. N. S. 945, 36 L. J. M. C. 41, 15 L. T. Rep. N. S. 188, 15 Wkly. Rep. 46.

99. *Ex p.* McCarthy, 29 Cal. 395.

1. U. S. *v.* Dodge, 25 Fed. Cas. No. 14,975, 2 Gall. 313.

2. Avery *v.* Ward, 150 Mass. 160, 22 N. E. 707; Reg. *v.* Gagan, 17 U. C. C. P. 530.

3. Reg. *v.* Johnson, L. R. 2 C. C. 15, 12 Cox C. C. 264, 42 L. J. M. C. 41, 27 L. T. Rep. N. S. 801.

4. Reg. *v.* Chamberlain, 10 Manitoba 261. In this case the prisoner was convicted on an indictment for perjury, in having sworn before the deputy returning officer at an election for membership of the house of commons for the city of Winnipeg, that he was the person whom he represented himself to be, named on the list of electors for the polling subdivision. He was not an elector, nor entitled to vote in the constituency, and at the trial his counsel contended that there was no authority for the deputy returning officer, under the Dominion Elections Act (Can. Rev. St. c. 8, § 45) to administer an oath to any person but an elector, and the judge reserved a case for the opinion of the court as to whether the prisoner had been properly convicted. It was held that the statute must receive a reasonable construction, that authority was intended to be conferred upon the officer to administer the oath to any person presenting himself and claiming to be an elector entitled to vote, and that under Cr. Code (1892), § 148, the prisoner had been properly convicted of perjury.

by a national bank director;[5] provided in all cases that the oath is one required or authorized by law, and that it is administered by an officer or tribunal authorized so to do.[6] And a wilfully false answer by the applicant to a question in an application for civil service examination, as to whether he has ever been in the government employ, and, if so, whether he resigned or was discharged, is perjury under the federal statute.[7]

c. Voluntary, Official, and Promissory Oaths — (I) *Voluntary Oaths.* The taking of a mere voluntary oath that is nowhere either authorized or required by law is not perjury.[8] A charge of perjury cannot be predicated upon false testimony before a grand jury, where the grand jury had no legal authority to inquire into the particular matter under investigation.[9] Nor can perjury be assigned on the affidavit of an applicant for naturalization as to his residence in a state previous to the application, since as to such matter an oath is not required.[10]

(II) *Official and Other Promissory Oaths.* Perjury cannot be predicated of an official[11] or other promissory oath,[12] unless by express statutory provision.[13] The rule does not apply, however, where an officer is required by law to take an oath as to his qualifications or other facts, and swears falsely as to such facts.[14]

4. Jurisdiction or Authority to Administer Oath — a. Judicial Oaths — (I) *In General.* In the absence of statute to the contrary, it is well settled that, to constitute perjury in a judicial proceeding, the false swearing must have been before a court or magistrate having jurisdiction of the matter under investigation.[15]

5. U. S. *v.* Neale, 14 Fed. 767, holding, under U. S. Rev. St. (1878) § 5392 [U. S. Comp. St. (1901) p. 3653] that if accused took an oath in which he stated that he was *bona fide* owner in his own right of the number of shares of stock then standing in his name on the books of the bank, and that the said shares were not hypothecated or in any way pledged as security for any loan or debt; and if he took it wilfully, and not believing that he was stating the truth, it was perjury, if in point of fact he was not the owner of said stock, or had pledged the same for a loan or debt.

6. See *infra*, I, B, 4.

7. Johnson *v.* U. S., 26 App. Cas. (D. C.) 128.

8. *Florida.*— Collins *v.* State, 33 Fla. 446, 15 So. 220.

Michigan.— People *v.* Titmus, 102 Mich. 318, 60 N. W. 693; Beecher *v.* Anderson, 45 Mich. 543, 8 N. W. 539; People *v.* Gaige, 26 Mich. 30.

Minnesota.— State *v.* McCarthy, 41 Minn. 59, 42 N. W. 599.

Missouri.— Mahan *v.* Berry, 5 Mo. 21; State *v.* Miller, 44 Mo. App. 159.

New York.— Foreman *v.* Union, etc., Co., 83 Hun 385, 31 N. Y. Suppl. 947; People *v.* Ostrander, 64 Hun 335, 19 N. Y. Suppl. 324, 328 [*reversed* on other grounds in 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340 (*affirmed* in 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628)]; People *v.* Martin, 38 Misc. 67, 76 N. Y. Suppl. 953; People *v.* Travis, 4 Park. Cr. 213.

Ohio.— Waggoner *v.* Richmond, Wright 173.

South Carolina.— State *v.* Helle, 2 Hill 290.

United States.— U. S. *v.* Bedgood, 49 Fed. 54; U. S. *v.* Grottkau, 30 Fed. 672; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,488, 4 McLean 113; U. S. *v.* Nickerson, 27 Fed. Cas. No. 15,878, 1 Sprague 232.

Canada.— Reg. *v.* McIntosh, 12 N. Brunsw. 372; Reg. *v.* Gibson, 7 Rev. Lég. 573; Reg. *v.* Martin, 7 Rev. Lég. 672, 21 L. C. Jur. 156.

Immateriality see *infra*, I, B, 6.

9. Pankey *v.* People, 2 Ill. 80.

10. State *v.* Helle, 2 Hill (S. C.) 290.

11. State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; Bacon Abr. tit. "Perjury," (A), 2 dly.

12. U. S. *v.* Glover, 25 Fed. Cas. No. 15,218, 4 Cranch C. C. 190.

13. Com. *v.* Megee, 2 Phila. (Pa.) 396, violation of official oath by director of bank expressly made perjury by the Pennsylvania act of March 16, 1854.

14. U. S. *v.* Neale, 14 Fed. 767. As to this case see *supra*, I, B, 3, b, (XIII), text and note 5. See also State *v.* Roberts, 22 Wash. 1, 60 Pac. 65, perjury by defendant in taking oath as judge of election, in falsely swearing that he was not interested in any bet on such election.

15. *Alabama.*— Collins *v.* State, 78 Ala. 433.

Arkansas.— Buell *v.* State, 45 Ark. 336. And see Gardner *v.* State, 80 Ark. 264, 97 S. W. 48.

District of Columbia.— U. S. *v.* Jackson, 20 D. C. 424.

Florida.— Markey *v.* State, 47 Fla. 38, 37 So. 53.

Georgia.— Renew *v.* State, 79 Ga. 162, 4 S. E. 19.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Pankey *v.* People, 2 Ill. 80.

Indiana.— State *v.* Hall, 7 Blackf. 25.

Iowa.— State *v.* Clough, 111 Iowa 714, 83 N. W. 727.

Louisiana.— Flower *v.* Swift, 8 Mart. N. S. 449.

Maine.— State *v.* Furlong, 26 Me. 69.

A statute in the particular jurisdiction, however, may make it unnecessary that the court or magistrate shall have jurisdiction or authority.[16]

(II) *Defects or Irregularities Not Jurisdictional.* Where there are defects and irregularities in the proceeding which are not jurisdictional, as where they render it voidable only and not absolutely void, and such proceeding is amendable, or where the defect has been waived by the parties, perjury may be committed therein.[17] Perjury may be committed at a trial, although the complaint,

Massachusetts.— Com. *v.* White, 8 Pick. 453.

New York.— People *v.* Collins, 57 N. Y. App. Div. 257, 68 N. Y. Suppl. 151, 15 N. Y. Cr. 305; People *v.* Tracy, 9 Wend. 265.

North Carolina.— State *v.* Gates, 107 N. C. 832, 12 S. E. 319; State *v.* Knight, 84 N. C. 789; State *v.* Alexander, 11 N. C. 182; Boling *v.* Luther, 4 N. C. 635; State *v.* Wyatt, 3 N. C. 56.

Ohio.— Montgomery *v.* State, 10 Ohio 220.

Oklahoma.— Morford *v.* Territory, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513; Rich *v.* U. S., 1 Okla. 354, 33 Pac. 804.

South Carolina.—State *v.* Jenkins, 26 S. C. 121, 1 S. E. 437.

Texas.— Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957; Wilks *v.* State, (Cr. App. 1902) 66 S. W. 787; Curtley *v.* State, 42 Tex. Cr. 227, 59 S. W. 44; Butler *v.* State, (Cr. App. 1896) 38 S. W. 46.

England.— Reg. *v.* Fletcher, L. R. 1 C. C. 320, 12 Cox C. C. 77, 40 L. J. M. C. 123, 24 L. T. Rep. N. S. 742, 19 Wkly. Rep. 781; Reg. *v.* Proud, L. R. 1 C. C. 71, 10 Cox C. C. 455, 36 L. J. M. C. 62, 16 L. T. Rep. N. S. 364, 15 Wkly. Rep. 796; Reg. *v.* Simmons, Bell C. C. 168, 8 Cox C. C. 190, 5 Jur. N. S. 578, 28 L. J. M. C. 183, 7 Wkly. Rep. 439; Reg. *v.* Pearce, 3 B. & S. 531, 9 Cox C. C. 258, 9 Jur. N. S. 647, 32 L. J. M. C. 75, 7 L. T. Rep. N. S. 597, 11 Wkly. Rep. 235, 113 E. C. L. 531; Reg. *v.* Lewis, 12 Cox C. C. 163; Reg. *v.* Chugg, 11 Cox C. C. 558, 22 L. T. Rep. N. S. 556; Reg. *v.* Bacon, 11 Cox C. C. 540, 22 L. T. Rep. N. S. 627; Reg. *v.* Shaw, 10 Cox C. C. 66, 11 Jur. N. S. 415, L. & C. 579, 34 L. J. M. C. 169, 12 L. T. Rep. N. S. 470, 13 Wkly. Rep. 692; Reg. *v.* Senior, 9 Cox C. C. 469; Reg. *v.* Hughes, 7 Cox C. C. 286, Dears. & B. 188, 3 Jur. N. S. 448, 26 L. J. M. C. 133, 5 Wkly. Rep. 526; Reg. *v.* Millard, 6 Cox C. C. 150, Dears. C. C. 166, 17 Jur. 400, 22 L. J. M. C. 108, 1 Wkly. Rep. 314; Reg. *v.* Cooke, 2 Den. C. C. 462, 16 Jur. 434, 21 L. J. M. C. 136; Paine's Case, Yelv. 111, 80 Eng. Reprint 76.

Canada.— Reg. *v.* McIntosh, 12 N. Brunsw. 372; McAdam *v.* Weaver, 4 N. Brunsw. 176; Reg. *v.* Row, 14 U. C. C. P. 307; Reg. *v.* Doty, 13 U. C. Q. B. 398.

See 39 Cent. Dig. tit. "Perjury," §§ 27, 28.

16. In Quebec, under Cr. Code, § 145, punishing perjury in a judicial proceeding, and declaring that every proceeding is judicial within the meaning of the section which is held before any person acting as a court, justice, or tribunal having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid, it was held perjury to give false testimony before a justice of the peace holding a judgment proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offense took place. Drew *v.* Rex, 33 Can. Sup. Ct. 228, 6 Can. Cr. Cas. 424 [*affirming* 6 Can. Cr. Cas. 241, 11 Quebec K. B. 477].

17. *Alabama.*— Boynton *v.* State, 77 Ala. 29.

Arkansas.— Gardner *v.* State, 80 Ark. 264, 97 S. W. 48.

Florida.— Markey *v.* State, 47 Fla. 38, 37 So. 53.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740.

Indiana.— Weston *v.* Lumley, 33 Ind. 486; Henry *v.* Hamilton, 7 Blackf. 506; State *v.* Hall, 7 Blackf. 25.

Iowa.— State *v.* Perry, 117 Iowa 463, 91 N. W. 765.

Kansas.— State *v.* Lewis, 10 Kan. 157.

Michigan.— *In re* Smith, 110 Mich. 435, 68 N. W. 228.

Missouri.— State *v.* Lavalley, 9 Mo. 834.

New York.— Van Steenbergh *v.* Kortz, 10 Johns. 167.

North Carolina.— State *v.* Peters, 107 N. C. 876, 12 S. E. 74; State *v.* Ledford, 28 N. C. 5; State *v.* Molier, 12 N. C. 263.

Oklahoma.— Morford *v.* Territory, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513.

Texas.— Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957; Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670.

Vermont.— State *v.* Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918.

England.— Pippet *v.* Hearn, 5 B. & Ald. 634, 1 D. & R. 266, 7 E. C. L. 346; Rex *v.* Christian, C. & M. 388, 41 E. C. L. 214.

Canada.— Reg. *v.* Downie, 3 Montreal Q. B. 360, holding that a party summoned to appear in one division of the superior court of Montreal, to answer upon *faits et articles*, and who has appeared and been sworn in another division of the same court, where he has given his answers, may be convicted of perjury on the answers so given.

See 39 Cent. Dig. tit. "Perjury," § 28.

Where a bill for divorce contained allegations giving the court jurisdiction and warranting the relief sought, if true, the fact that, on trial of complainant for perjury in testifying as to material facts, it appears that neither party had resided in the state for the statutory period, will not bar convic-

declaration, indictment, or other pleading was bad on demurrer or motion in arrest of judgment;[18] or there are such irregularities or defects as would require a reversal of the cause on appeal.[19]

(III) *Defects Rendering Action Void.* If, however, the proceeding is for any reason actually null and void for want of jurisdiction, perjury cannot be committed therein.[20] Perjury cannot be predicated of a sworn accusation made to commence a prosecution, which is deficient in facts required by statute to be shown to give the tribunal jurisdiction.[21]

b. Non-Judicial Oaths — (I) *Necessity of Authority to Administer Oath*[22] — (A) *In General.* It is an essential prerequisite to the establishment of the guilt of one accused of the crime of perjury that the oath shall have been administered by a person authorized by law to administer it, and where the oath was administered by a person having no legal authority to do so, as by a person acting merely in a private capacity, or by one who had authority to administer certain oaths, but not the one in question, or by one who had authority seemingly colorable, but no authority in fact, there can be no conviction of perjury, for the oath is altogether idle.[23]

(B) *Under Laws of the United States.* To constitute perjury or false

tion. Markey *v.* State, 47 Fla. 38, 37 So. 53; People *v.* McCaffrey, 75 Mich. 115, 42 N. W. 681; Stewart *v.* State, 22 Ohio St. 477.

Failure to swear jury.— If the court have jurisdiction of the subject-matter of an action, and power to administer an oath to a witness therein, a false statement made by him under oath will constitute perjury, even though the jury in such action have not been properly sworn. Smith *v.* State, 31 Tex. Cr. 315, 20 S. W. 707.

The regularity of the proceedings of a superior court is to be presumed unless the contrary appears. State *v.* Ledford, 28 N. C. 5.

Illegality of arrest.— The giving of false testimony by accused, on a trial before the police court of a municipality for a violation of an ordinance, is perjury, although no warrant was issued for his arrest and the arrest without a warrant was improperly made. Gardner *v.* State, 80 Ark. 264, 97 S. W. 48.

18. Gardner *v.* State, 80 Ark. 264, 97 S. W. 48; State *v.* Brown, 68 N. H. 200, 38 Atl. 731; State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Kelley *v.* State, (Tex. Cr. App. 1907) 103 S. W. 189; Reg. *v.* Meek, 9 C. & P. 513, 38 E. C. L. 302; and other cases cited in the preceding note. Where defendant was informed against for sending a forged telegram, and the court held such information sufficient, defendant could not again object that the information was insufficient in a subsequent prosecution for perjury committed on the trial for sending such telegram. People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389.

19. Morford *v.* Territory, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513. One giving false testimony on a trial of a prosecution under an indictment which is subsequently adjudged insufficient on appeal is guilty of perjury, since the perjury of a witness does not depend on the validity in point of form of the indictment under which he testifies. State *v.* Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918.

20. Collins *v.* State, 78 Ala. 433; *Ex p.* Banks, 28 Ala. 28; Buell *v.* State, 45 Ark. 336; Reg. *v.* Pearce, 3 B. & S. 531, 9 Cox C. C. 258, 9 Jur. N. S. 647, 32 L. J. M. C. 75, 7 L. T. Rep. N. S. 597, 11 Wkly. Rep. 235, 113 E. C. L. 531; Reg. *v.* Ewington, C. & M. 319, 2 Moody C. C. 223, 41 E. C. L. 178; Reg. *v.* Row, 14 U. C. C. P. 307; Reg. *v.* Doty, 13 U. C. Q. B. 398; and other cases cited *supra*, I, B, 4, a, (I).

If a co-plaintiff die, the suit will abate unless the death be suggested. Therefore a trial without such suggestion is extrajudicial and void, and perjury cannot be committed therein. Rex *v.* Cohen, 1 Stark. 511, 2 E. C. L. 195.

21. Johnson *v.* State, 58 Ga. 397.

Deposition required to give jurisdiction.— Where a deposition on oath of the charge contained in the information is required by statute to confer jurisdiction, perjury cannot be committed in a proceeding informal for the want of such a deposition. Reg. *v.* Scotton, 5 Q. B. 493, Dav. & M. 501, 8 Jur. 409, 13 L. J. M. C. 58, 48 E. C. L. 493. Where, however, no deposition or information on oath is necessary as a prerequisite to jurisdiction, the rule is otherwise. Reg. *v.* Hughes, 4 Q. B. D. 614, 14 Cox C. C. 284, 48 L. J. M. C. 151, 40 L. T. Rep. N. S. 685; Reg. *v.* Shaw, 10 Cox C. C. 66, 11 Jur. N. S. 415, L. & C. 579, 34 L. J. M. C. 169, 12 L. T. Rep. N. S. 470, 13 Wkly. Rep. 692.

22. See Oaths and Affirmations, 29 Cyc. 1299.

23. *Alabama.*— Walker *v.* State, 107 Ala. 5, 18 So. 393; Hood *v.* State, 44 Ala. 81.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Van Dusen *v.* People, 78 Ill. 645; Morrell *v.* People, 32 Ill. 499.

Indiana.— Muir *v.* State, 8 Blackf. 154.

Iowa.— State *v.* Phippen, 62 Iowa 54, 17 N. W. 146.

Kentucky.— Biggerstaff *v.* Com., 11 Bush 169.

swearing under the laws of the United States, it must appear that the officer administering the oath was authorized so to do by the laws of the United States.[24]

Louisiana.— State *v.* Theriot, 50 La. Ann. 1187, 24 So. 179; State *v.* Dreifus, 38 La. Ann. 877.

Missouri.—State *v.* Carpenter, 164 Mo. 588, 65 S. W. 255; State *v.* Cannon, 79 Mo. 343.

New York.— Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293; People *v.* Martin, 38 Misc. 67, 76 N. Y. Suppl. 953 [*reversed* on other grounds in 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340 (*affirmed* in 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628)]; Jackson *v.* Humphrey, 1 Johns. 498.

North Carolina.— State *v.* Wyatt, 3 N. C. 56.

Ohio.— Staight *v.* State, 39 Ohio St. 496; State *v.* Jackson, 36 Ohio St. 281; Warwick *v.* State, 25 Ohio St. 21.

Tennessee.— State *v.* Brady, 1 Swan 36; Lamden *v.* State, 5 Humphr. 83.

Texas.— State *v.* Powell, 28 Tex. 626; Williams *v.* State, (Cr. App. 1906) 96 S. W. 47; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662; Stewart *v.* State, 6 Tex. App. 184.

Vermont.— State *v.* Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918.

Virginia.— Com. *v.* Williamson, 4 Gratt. 554.

United States.— U. S. *v.* Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. ed. 534; U. S. *v.* Garcelon, 82 Fed. 611; U. S. *v.* Law, 50 Fed. 915; U. S. *v.* Bedgood, 49 Fed. 54; U. S. *v.* Howard, 37 Fed. 666; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,488, 4 McLean 113.

England.— Reg. *v.* Dunn, 12 Q. B. 1026, 2 Cox C. C. 205, 11 Jur. 908, 13 Jur. 233, 18 L. J. M. C. 41, 64 E. C. L. 1026; Rex *v.* Verelst, 3 Campb. 432, 14 Rev. Rep. 775; Reg. *v.* Stone, 2 C. L. R. 123, 6 Cox C. C. 235, Dears. C. C. 251, 17 Jur. 1106, 23 L. J. M. C. 14, 2 Wkly. Rep. 63; Reg. *v.* ——, 1 Cox C. C. 250; Rex *v.* Hanks, 3 C. & P. 419, 14 E. C. L. 641; Custodes *v.* Gwinn, Style 336, 82 Eng. Reprint 756.

Canada.— Reg. *v.* Martin, 7 Rev. Lég. 672, 21 L. C. Jur. 156 (holding that perjury could not be assigned upon a deposition taken under C. P. art. 284, where the consent in writing required by that article had been omitted); Reg. *v.* Gibson, 7 Rev. Lég. 573 (deposition illegal because it was commenced before a judge who took notes and continued without consent under a different system before the prothonotary only); Reg. *v.* McIntosh, 12 N. Brunsw. 372 (holding that perjury could not be assigned upon an affidavit taken before a commissioner who had no authority to take the affidavit); *Re* Godson, 16 Ont. 275; Reg. *v.* Downie, 3 Montreal Q. B. 360.

See 39 Cent. Dig. tit. "Perjury," § 29 *et seq.*

Affidavit by consent before unauthorized person.— The false swearing of witnesses in affidavits taken by consent before unauthorized persons or out of the state is not perjury. Phillipi *v.* Bowen, 2 Pa. St. 20.

Oath administered in foreign country.— An oath administered by a judge in a foreign country has no legal significance, and a false statement made by a person sworn before him under such circumstances is not perjury. *Re* Godson, 16 Ont. 275.

Committee illegally constituted.— An indictment will not lie for perjury for false swearing before a committee illegally constituted. Com. *v.* Hillenbrand, 96 Ky. 407, 29 S. W. 287, 16 Ky. L. Rep. 485.

Deposition before unsworn stenographer.— False testimony in a deposition taken before a stenographer is not perjury unless the stenographer was sworn as required by the statute. Reg. *v.* Downie, 3 Montreal Q. B. 360; Reg. *v.* Leonard, 3 Montreal Leg. N. 211.

Administering the oath in open court, by one not an officer, is regarded as the act of the court which directed it to be administered, so as to make a witness liable to a charge of perjury if he testifies falsely. Stephens *v.* State, 1 Swan (Tenn.) 157. See also Walker *v.* State, 107 Ala. 5, 18 So. 393; and OATHS AND AFFIRMATIONS, 29 Cyc. 1300.

The competency of the person who reads the words of the oath to the witness, and does the ministerial part of its administration, is immaterial. State *v.* Mercer, 101 Md. 535, 61 Atl. 220; Reg. *v.* Coleman, 2 Can. Cr. Cas. 523, 30 Ont. 93.

An oath administered by a clerk in the absence of the court is sufficient as a basis for the prosecution for perjury, although the clerk could not have administered the oath in the presence of the court. State *v.* Dreifus, 38 La. Ann. 877.

24. U. S. *v.* Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. ed. 534; U. S. *v.* Madison, 21 Fed. 628.

Authority of register of land-office see U. S. *v.* Brace, 149 Fed. 869.

Notaries see *infra*, I, B, 4, b, (II), (B).

Officer authorized by state.— To make a party liable to prosecution for perjury in a United States court, it does not matter that the oath taken by him when endeavoring to benefit by the Timber Culture Act was taken before an officer authorized by a state, rather than one authorized by the United States, to administer oaths. U. S. *v.* Madison, 21 Fed. 628; U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403.

Congress cannot confer on the secretary of the interior or commissioner of the land-office power to make rules and regulations, such as prescribing by whom the oath is to be administered to one making preëmption entry, or the facts to be contained in the affidavit, so as to make it perjury for the preëmptor to make a false affidavit, when the facts sworn to are not required by statute to be sworn to, and the statute does not authorize the oath to be administered by the person who administers it. U. S. *v.* Bedgood, 49 Fed. 54.

(II) *Particular Officers or Persons Authorized to Administer Oaths*[25] — (A) *Justices of the Peace.* It is usually provided by statute that justices of the peace shall have power to administer oaths and affirmations to witnesses and others, concerning anything depending, or proceedings commenced, or to be commenced, before them.[26] But oaths administered by justices of the peace beyond their jurisdiction cannot be made the basis of a charge of perjury.[27]

(B) *Notaries Public.* Notaries public are frequently authorized both by state laws,[28] and the laws of the United States,[29] to administer oaths, and consequently a false oath sworn before a notary public may be perjury.[30] In the absence of a statute, however, a notary has no authority to administer oaths, and perjury cannot be assigned upon an oath administered by him without authority.[31]

(C) *Other Ministerial Officers.* Where ministerial officers are authorized by statute to administer particular oaths, perjury can be predicated upon such oaths administered by them, if the case otherwise falls within the common law or statutory definition of perjury.[32]

25. See also Oaths and Affirmations, 29 Cyc. 1300.

Who may take affidavits see Affidavits, 2 Cyc. 10.

26. See the statutes of the several states and the following cases:

Massachusetts.— Com. *v.* Hughes, 5 Allen 499.

Missouri.— Mahan *v.* Berry, 5 Mo. 21.

South Carolina.— State *v.* Stephenson, 4 McCord 165.

Texas.— Wilson *v.* State, (Cr. App. 1906) 93 S. W. 547.

United States.— U. S. *v.* Cowing, 24 Fed. Cas. No. 14,880, 4 Cranch C. C. 613, holding that a justice of the peace has authority to administer an oath to an answer in chancery in the federal courts, the authority being expressly given by the ninth rule prescribed by the supreme court for the equity practice of the circuit courts.

See 39 Cent. Dig. tit. "Perjury," § 31. See also Oaths and Affirmations, 29 Cyc. 1302.

Alderman.— In Pennsylvania an alderman has the same power to administer oaths as a justice of the peace. Com. *v.* Frank, 7 Pa. Dist. 143.

27. Reg. *v.* Row, 14 U. C. C. P. 307. See Oaths and Affirmations, 29 Cyc. 1302.

28. *Ex p.* Carpenter, 64 Cal. 267, 30 Pac. 816; State *v.* Scatena, 84 Minn. 281, 87 N. W. 764; State *v.* Boland, 12 Mo. App. 74; Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957. See Notaries, 29 Cyc. 1083, 1088.

29. U. S. *v.* Neale, 14 Fed. 767; U. S. *v.* Sonachall, 27 Fed. Cas. No. 16,352, 4 Biss. 425. *Compare infra,* this section, note 31.

Act Cong. Aug. 15, 1876, c. 304 [U. S. Comp. St. (1901) p. 662], provides that notaries public of the several states shall be authorized to take affidavits in the same manner and with the same effect as commissioners of the United States circuit court may lawfully take or do. U. S. *v.* Hardison, 135 Fed. 419.

30. See the cases cited in the two preceding notes.

31. See Notaries, 29 Cyc. 1083, 1088.

Under a statutory arbitration the oath to the witnesses must be administered by a judge or justice of the peace; and perjury cannot be assigned on the testimony of a witness in such a case, where the oath was administered by a notary public, notwithstanding the general language of Rev. St. § 118, empowering notaries public to administer oaths in all cases required or authorized by law. State *v.* Jackson, 36 Ohio St. 281.

Prior to the passage of Act Cong. Feb. 26, 1881 [U. S. Comp. St. (1901) p. 3499], authorizing notaries public to administer oaths in certain cases, notaries public had no authority under the laws of the United States to administer oaths in such cases. U. S. *v.* Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. ed. 534.

U. S. Rev. St. (1878) § 1778 [U. S. Comp. St. (1901) p. 1211], authorizing notaries public to administer oaths in all cases in which justices of the peace have power to administer them, gives no power to administer an oath in investigation by the post-office department as to the alleged loss of a registered letter, for there is no statute giving justices such power, and hence no indictment for perjury can be based upon false statements in an affidavit made before a notary in such an investigation. U. S. *v.* Law, 50 Fed. 915.

Proceedings before land-office.— Notaries public are not authorized by any law of the United States to administer oaths to affidavits required by the rules and regulations prescribed by the commissioner of the general land-office; and perjury cannot therefore be assigned upon such an affidavit. U. S. *v.* Manion, 44 Fed. 800.

32. See Affidavits, 2 Cyc. 10; Oaths and Affirmations, 29 Cyc. 1300.

Circuit court commissioners.— U. S. *v.* Garcelon, 82 Fed. 611.

County attorney.— Bradbury *v.* State, 7 Tex. App. 375.

County clerk.— U. S. *v.* Hearing, 26 Fed. 744.

County school commissioner.— Lavender *v.* State, 85 Ga. 539, 11 S. E. 861.

Election officer.— Reg. *v.* Chamberlain, 10 Manitoba 261.

(D) *Deputies and Assistants.* Where an officer has authority to appoint deputies, if necessary for the discharge of the duties of his office, a false oath taken before such a deputy is as much perjury as if taken before the officer himself.[33]

(E) *De Facto Officers.* The decisions are not in accord as to whether perjury can be assigned on an oath administered by an officer *de facto.* An English case supports the negative of this proposition,[34] and some of the courts of this country have followed the doctrine of this case.[35] In other courts it is repudiated, and it is held that a witness who swears falsely before a *de facto* officer is liable to punishment for perjury to the same extent as though the oath had been administered by an officer *de jure.*[36] An officer *de facto* is one who acts under color of title, which color can only be given by power having authority to fill the office.[37]

5. Administration, Form, and Making of Oath or Substitute Therefor — a. In General. To constitute a valid oath, for the falsity of which perjury will lie, there must be, in the presence of a person authorized to administer it, an unequivocal act by which affiant consciously takes upon himself the obligation of an oath.[38] It is, however, immaterial in what form it is given, if the one testifying professes such form to be binding on his conscience,[39] unless some particular form of oath is prescribed by statute, in which case a substantial compliance with the statute is

Registrar.— Territory *v.* Anderson, 2 Ida. (Hasb.) 573, 21 Pac. 417.

Stenographer authorized by statute to take depositions.— Reg. *v.* Downie, 3 Montreal Q. B. 360; Reg. *v.* Leonard, 3 Montreal Leg. N. 211.

Township assessor.— State *v.* Phippen, 62 Iowa 54, 17 N. W. 146.

33. *California.*— People *v.* Waite, 102 Cal. 251, 36 Pac. 518.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

Indiana.— Server *v.* State, 2 Blackf. 35.

Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.

Ohio.— Warwick *v.* State, 25 Ohio St. 21.

United States.— U. S. *v.* Barton, 24 Fed. Cas. No. 14,534, Gilp. 439.

Canada.— Reg. *v.* Chamberlain, 10 Manitoba 261.

See also Affidavits, 2 Cyc. 12; Oaths and Affirmations, 29 Cyc. 1300–1303.

34. Rex *v.* Verelst, 3 Campb. 432, 14 Rev. Rep. 775.

35. *Alabama.*— Walker *v.* State, 107 Ala. 5, 18 So. 393.

Indiana.— Muir *v.* State, 8 Blackf. 154.

Kentucky.— Biggerstaff *v.* Com., 11 Bush 169.

Ohio.— Staight *v.* State, 39 Ohio St. 496.

South Carolina.— State *v.* Hayward, 1 Nott & M. 546.

See 39 Cent. Dig. tit. "Perjury," § 34.

36. *Illinois.*— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Kansas.— State *v.* Williams, 61 Kan. 739, 60 Pac. 1050, 60 Kan. 837, 58 Pac. 476.

Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.

Michigan.— See Keator *v.* People, 32 Mich. 484.

New Hampshire.— State *v.* Hascall, 6 N. H. 352.

New York.— People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; Howard *v.* Sexton, 1 Den. 440 [*reversed* on other grounds in 4 N. Y. 157].

Texas.— Woodson *v.* State, 24 Tex. App. 153, 6 S. W. 184.

Canada.— Drew *v.* Rex, 33 Can. Sup. Ct. 228, 6 Can. Cr. Cas. 424 [*affirming* 6 Can. Cr. Cas. 241, 11 Quebec K. B. 477].

See 39 Cent. Dig. tit. "Perjury," § 34. See also Oaths and Affirmations, 29 Cyc. 1303.

"**In this country the de facto doctrine applies to the fullest extent,** and we can think of no good reason why an exception should be made for the protection of those guilty of swearing falsely when their testimony may be made the basis of a conclusive judgment in either civil or criminal proceedings." State *v.* Williams, 61 Kan. 739, 744, 60 Pac. 1050.

37. People *v.* Albertson, 8 How. Pr. (N. Y.) 363, holding that where the constitution requires vacancies to be filled by election, perjury cannot be assigned of testimony given before an officer appointed to fill a vacancy, since such appointment confers no color of title to office. See, generally, Officers, 29 Cyc. 1401.

38. Markey *v.* State, 47 Fla. 38, 37 So. 53; O'Reilly *v.* People, 86 N. Y. 154, 40 Am. Rep. 525, 10 Abb. N. Cas. 53 [*reversing* 9 Abb. N. Cas. 77, 61 How. Pr. 3].

39. Markey *v.* State, 47 Fla. 38, 37 So. 53; Greene *v.* People, 182 Ill. 278, 55 N. E. 341; State *v.* Whisenhurst, 9 N. C. 458; Patrick *v.* Smoke, 3 Strobh. (S. C.) 147.

An oath may be administered on the Book, or with uplifted hand, or in any mode peculiar to the religious belief of the person swearing, or in any form binding on his conscience. U. S. *v.* Mallard, 40 Fed. 151, 5 L. R. A. 816. See also McAdam *v.* Weaver, 4 N. Brunsw. 176.

In Canada perjury may be assigned where

sufficient;[40] and it is no defense that the oath was taken or administered in an irregular manner.[41] It will be presumed that the mode which a witness adopted in taking the oath was the one which accorded with his belief, and which he considered binding on his conscience,[42] and where at the time he was sworn he made no objection to the form of its administration, but took it and testified under it, he will not be allowed, in order to escape the penalty for perjury, to claim that it was not administered in strict conformity with law.[43]

b. Verification of Affidavits and Other Writings.[44] If the false oath charged is a written statement sworn to by defendant, it is immaterial whether the oath was administered before or after the statement was reduced to writing, the material point being that defendant was sworn.[45] The mere delivery of an affidavit, signed by the person presenting it, to the officer for his certificate, is not such an act as will constitute a valid oath.[46] It is not necessary that a false affidavit of verification shall itself state the facts sworn to, but they may be stated in the report or pleading to which the affidavit is attached.[47] Nor is the want of signature to the affidavit material.[48] If signed, however, the oath must be taken by the person who signs it.[49]

6. Materiality of Testimony, Assertion, or Oath — a. Materiality of Testimony or Assertion — (i) *Necessity That Testimony or Assertion Be Material.* To constitute perjury, at common law and under the statutes generally, the matter falsely sworn to must be material to the issue or the question in controversy.[50]

the oath has been administered on the common prayer book of the church of England. McAdam *v.* Weaver, 4 N. Brunsw. 176. When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn. Rex *v.* Lai Ping, 8 Can. Cr. Cas. 467, 11 Brit. Col. 102. Therefore, perjury may be assigned in respect of statements given in evidence by a Chinaman who was not a christian where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth and nothing but the truth or his soul would burn up as the paper had been burned." Rex *v.* Lai Ping, *supra*.

The omission of the words "so help you God" is immaterial. People *v.* Parent, 139 Cal. 600, 73 Pac. 423.

40. Johnson *v.* State, 76 Ga. 790; State *v.* Gates, 17 N. H. 373; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; State *v.* Whisenhurst, 9 N. C. 458; Sharp *v.* Wilhite, 2 Humphr. (Tenn.) 434.

41. Walker *v.* State, 107 Ala. 5, 18 So. 393; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; State *v.* Keene, 26 Me. 33.

42. People *v.* Parent, 139 Cal. 600, 73 Pac. 423; Markey *v.* State, 47 Fla. 38, 37 So. 53; Patrick *v.* Smoke, 3 Strobh. (S. C.) 147.

43. People *v.* Parent, 139 Cal. 600, 73 Pac. 423; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; State *v.* Whisenhurst, 9 N. C. 458.

General instead of restricted oath.— Where a party wilfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers to such questions as should be asked. State *v.* Keene, 26 Me. 33.

44. See, generally, Affidavits, 2 Cyc. 1.

45. Markey *v.* State, 47 Fla. 38, 37 So. 53.

46. O'Reilly *v.* People, 86 N. Y. 154, 40 Am. Rep. 525, 10 Abb. N. Cas. 53 [*reversing* 9 Abb. N. Cas. 77, 61 How. Pr. 3]. *Compare* U. S. *v.* Mallard, 40 Fed. 151, 5 L. R. A. 816.

47. People *v.* Ostrander, 64 Hun (N. Y.) 335, 19 N. Y. Suppl. 324, 328.

48. Com. *v.* Carel, 105 Mass. 582, holding that the signature is no part of the affidavit, but merely authenticates it.

49. U. S. *v.* Kendrick, 26 Fed. Cas. No. 15,519, 2 Mason 69.

50. *Alabama.*— Williams *v.* State, 68 Ala. 551; McMurry *v.* State, 6 Ala. 324.

Arkansas.— Gardner *v.* State, 80 Ark. 264, 97 S. W. 48.

California.— People *v.* Jones, 123 Cal. 299, 55 Pac. 992; People *v.* Howard, 111 Cal. 655, 44 Pac. 342; People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; People *v.* Ah Sing, 95 Cal. 657, 30 Pac. 797; People *v.* Perazzo, 64 Cal. 106, 28 Pac. 62.

Dakota.— U. S. *v.* Robinson, 4 Dak. 72, 23 N. W. 90.

Illinois.— Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699; Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167; Pollard *v.* People, 69 Ill. 148; Pankey *v.* People, 2 Ill. 80.

Iowa.— State *v.* Swafford, 98 Iowa 362, 67 N. W. 284; State *v.* Aikens, 32 Iowa 403.

Massachusetts.— Com. *v.* Smith, 11 Allen 243; Com. *v.* Pollard, 12 Metc. 225; Com. *v.* Farley, Thach. Cr. Cas. 654.

Michigan.— People *v.* Dowdall, 124 Mich. 166, 82 N. W. 810.

Mississippi.— Jennings *v.* State, (1890) 7 So. 462; Nelson *v.* State, 47 Miss. 621.

Missouri.— State *v.* Dineen, 203 Mo. 628, 102 S. W. 480; State *v.* Bailey, 34 Mo. 350; Martin *v.* Miller, 4 Mo. 47, 28 Am. Dec. 342; Hinch *v.* State, 2 Mo. 158.

Irrelevant testimony, although false, cannot be made the basis of a charge of perjury;[51] nor will a false oath as to superfluous and immaterial matter sustain an indictment for this offense.[52] Under some statutes, however, the materiality of the matter with reference to which the offense was alleged to have been committed is not an element of perjury or false swearing.[53]

(II) *Test of Materiality*—(A) *As to Degree.* False testimony is deemed material not only when directly pertinent to the main issue,[54] but also when it has a legitimate tendency to prove or disprove any material fact in the chain of evi-

New Hampshire.— State *v.* Hobbs, 40 N. H. 229; State *v.* Norris, 9 N. H. 96.

North Carolina.— Studdard *v.* Linville, 10 N. C. 474; State *v.* Dodd, 7 N. C. 226; State *v.* Ammons, 7 N. C. 123.

Ohio.— State *v.* Mullaney, 11 Ohio S. & C. Pl. Dec. 120, 8 Ohio N. P. 165. And see Hamm *v.* Wickline, 26 Ohio St. 81.

Pennsylvania.— Com. *v.* Nailor, 29 Pa. Super. Ct. 275; Com. *v.* O'Grady, 4 Pa. Dist. 732.

South Carolina.— State *v.* Hattaway, 2 Nott & M. 118, 10 Am. Dec. 580.

Texas.— Barton *v.* State, (Cr. App. 1906) 95 S. W. 110; Pyles *v.* State, (Cr. App. 1904) 83 S. W. 811; Liggett *v.* State, (Cr. App. 1904) 83 S. W. 807; Maroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696; Henry *v.* State, 43 Tex. Cr. 176, 63 S. W. 642; McAvoy *v.* State, 39 Tex. Cr. 684, 47 S. W. 1000; Garrett *v.* State, 37 Tex. Cr. 198, 38 S. W. 1017, 39 S. W. 108; Misener *v.* State, 34 Tex. Cr. 588, 31 S. W. 858; Cravey *v.* State, 33 Tex. Cr. 557, 28 S. W. 472; Martinez *v.* State, 7 Tex. App. 394.

Virginia.— Rhodes *v.* Com., 78 Va. 692; Crump *v.* Com., 75 Va. 922.

Wisconsin.— Plath *v.* Braunsdorff, 40 Wis. 107.

United States.— U. S. *v.* Howard, 37 Fed. 666; U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403.

England.— Reg. *v.* Holden, 12 Cox C. C. 166; Reg. *v.* Tate, 12 Cox C. C. 7; Reg. *v.* Alsop, 11 Cox C. C. 264, 20 L. T. Rep. N. S. 403, 17 Wkly. Rep. 621; Reg. *v.* Townsend, 10 Cox C. C. 356, 4 F. & F. 1089; Reg. *v.* Fairlie, 9 Cox C. C. 209; Reg. *v.* Ball, 6 Cox C. C. 360; Reg. *v.* Owen, 6 Cox C. C. 105; Reg. *v.* Murray, 1 F. & F. 80; Rex *v.* Griepe, 1 Ld. Raym. 256, 12 Mod. 139; Rex *v.* Benesech, Peake N. P. 93; Rex *v.* Dunston, R. & M. 109, 21 E. C. L. 712.

See 39 Cent. Dig. tit. "Perjury," § 38 *et seq.*

Although evidence is legally inadmissible yet, if it is admitted, and is material, perjury may be assigned upon it (Reg. *v.* Gibbons, 9 Cox C. C. 105, 8 Jur. N. S. 159, L. & C. 109, 31 L. J. M. C. 98, 5 L. T. Rep. N. S. 805, 10 Wkly. Rep. 350), although it is afterward withdrawn (Reg. *v.* Philpotts, 3 C. & K. 135, 5 Cox C. C. 363, 2 Den. C. C. 302, 16 Jur. 67, 21 L. J. M. C. 18, T. & M. 607).

The term "material matter" means the main fact which was the subject of inquiry, or any circumstance which tends to prove that fact, or any fact or circumstance which tends to corroborate or strengthen the testimony relative to the subject of the inquiry or which legitimately affects the credit of any witness who testifies. *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450; People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

"Value received" is not material in a note; therefore defendant cannot be guilty of perjury in swearing that he made a note, but not with those words, and so that the note set out in the complaint in a suit thereof was not his. People *v.* McDermott, 8 Cal. 288.

51. State *v.* Brown, 68 N. H. 200, 38 Atl. 731.

52. Hood *v.* State, 44 Ala. 81; Gibson *v.* State, 44 Ala. 17; Pollard *v.* People, 69 Ill. 148; Com. *v.* Hatfield, 107 Mass. 227; White *v.* State, 1 Sm. & M. (Miss.) 149.

53. *Kentucky.*— Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683; Milstead *v.* Com., 51 S. W. 451, 21 Ky. L. Rep. 358.

Rhode Island.— State *v.* Miller, 26 R. I. 282, 58 Atl. 882.

South Carolina.— State *v.* Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660.

Texas.— Wilson *v.* State, (Cr. App. 1906) 93 S. W. 547.

Canada.— Reg. *v.* Ross, 1 Montreal Q. B. 227, 28 L. C. Jur. 261. By the criminal code a false assertion by a witness upon oath or affirmation may be perjury "whether such evidence is material or not." Can. Rev. St. c. 146, § 170.

54. *Alabama.*— Jones *v.* State, 100 Ala. 35, 14 So. 98.

Arkansas.— Lewis *v.* State, 78 Ark. 567, 94 S. W. 613.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351.

Illinois.— Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Iowa.— State *v.* John, (1903) 93 N. W. 61.

Michigan.— People *v.* Albers, 137 Mich. 678, 100 N. W. 908; People *v.* Macard, 109 Mich. 623, 67 N. W. 968.

New York.— People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606].

North Carolina.— State *v.* Murphy, 101 N. C. 697, 8 S. E. 142; State *v.* Green, 100 N. C. 419, 5 S. E. 422; State *v.* Hare, 95 N. C. 682; State *v.* Deaver, 51 N. C. 563.

Texas.—Foreman *v.* State, (Cr. App. 1904) 85 S. W. 809; Jernigan *v.* State, 43 Tex. Cr. 114, 63 S. W. 560; George *v.* State, 40 Tex. Cr. 646, 50 S. W. 374, 51 S. W. 378.

dence.[55] It is enough if it be circumstantially material,[56] although not in itself sufficient to establish the issue.[57] The guilt of one who has falsely sworn does not depend upon the result of the proceedings in which it occurred,[58] and if a person swears falsely in respect to any fact relevant to the issue, he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence.[59]

(B) *As to Time.* In testing materiality of testimony charged to be false, reference must be had to the issue as it existed when the oath was administered to the witness.[60] The fact that the issue concerning which the witness testifies falsely is afterward admitted does not render the testimony immaterial so as to prevent a conviction of perjury therefor.[61]

Vermont.— State *v.* Marsh, 73 Vt. 176, 50 Atl. 861.

United States.— U. S. *v.* Hampton, 101 Fed. 714, 41 C. C. A. 625; U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

England.— Reg. *v.* Berry, Bell C. C. 46, 8 Cox C. C. 121, 5 Jur. N. S. 320, 28 L. J. M. C. 86, 7 Wkly. Rep. 229; Reg. *v.* Naylor, 11 Cox C. C. 13, 17 L. T. Rep. N. S. 582, 16 Wkly. Rep. 374; Reg. *v.* Mullany, 10 Cox C. C. 97, 11 Jur. N. S. 492, L. & C. 593, 34 L. J. M. C. 111, 12 L. T. Rep. N. S. 549, 13 Wkly. Rep. 726.

See 39 Cent. Dig. tit. "Perjury," § 39.

Affidavit in land-office.— If the statements in an affidavit in a land contest are such as to call for judicial action, and are of sufficient importance to require action, and are pertinent to the issue under consideration, perjury will lie. Where a sworn statement in a land contest affidavit is sufficient to order a contest, or influence the action of the department of the interior in withholding a patent or in deferring action upon the patent, perjury may be properly assigned upon such statement. Meyers *v.* U. S., 5 Okla. 173, 48 Pac. 186.

Elections.— In a proceeding before a deputy state superintendent of elections to determine the validity of the registration of electors, a false statement as to the residence of such electors is a material false statement as to a pertinent matter, falling within N. Y. Laws (1905), p. 1849, c. 689, § 7, making it a felony to take a false oath before such officer. People *v.* Ellenbogen, 114 N. Y. App. Div. 182, 99 N. Y. Suppl. 897 [*affirmed* in 186 N. Y. 603, 79 N. E. 1112].

55. *Arkansas.*— Marvin *v.* State, 53 Ark. 395, 14 S. W. 87.

California.— People *v.* Prather, 134 Cal. 436, 66 Pac. 589, 863.

Florida.— Robinson *v.* State, 18 Fla. 898.

Iowa.— State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485.

Massachusetts.— Com. *v.* Grant, 116 Mass. 17; Com. *v.* Parker, 2 Cush. 212.

Missouri.— State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Wakefield, 73 Mo. 549; State *v.* Lavalley, 9 Mo. 834.

North Carolina.— Studdard *v.* Linville, 10 N. C. 474.

South Carolina.— State *v.* Hattaway, 2 Nott & M. 118, 10 Am. Dec. 580.

Texas.— McLeod *v.* State, (Cr. App. 1903) 75 S. W. 522; Bradberry *v.* State, 7 Tex. App. 375.

Utah.— People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

United States.— U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403.

England.— Reg. *v.* Altass, 1 Cox C. C. 17; Rex *v.* Griepe, Holt K. B. 535, 1 Ld. Raym. 256, 12 Mod. 139.

See 39 Cent. Dig. tit. "Perjury," § 49.

56. *Alabama.*— Williams *v.* State, 68 Ala. 551.

Arkansas.— Robertson *v.* State, 54 Ark. 604, 16 S. W. 582.

California.— People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

Illinois.— Henderson *v.* People, 117 Ill. 265, 7 N. E. 677.

Iowa.— State *v.* Brown, 128 Iowa 24, 102 N. W. 799.

Massachusetts.— Com. *v.* Grant, 116 Mass. 17; Com. *v.* Farley, Thach. Cr. Cas. 654.

Missouri.—State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Day, 100 Mo. 242, 12 S. W. 365.

New York.— Wood *v.* People, 59 N. Y. 117.

North Carolina.— State *v.* Brown, 79 N. C. 642.

Texas.— Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662; Bradberry *v.* State, 7 Tex. App. 375.

Utah.— People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

Wisconsin.— Hanscom *v.* State, 93 Wis. 273, 67 N. W. 419.

England.— Reg. *v.* Rhodes, 2 Ld. Raym. 886; Rex *v.* Griepe, 1 Ld. Raym. 256, 12 Mod. 139.

See 39 Cent. Dig. tit. "Perjury," § 49.

57. Robinson *v.* State, 18 Fla. 898; Com. *v.* Pollard, 12 Metc. (Mass.) 225; State *v.* Norris, 9 N. H. 96.

Degree of materiality unimportant.— Robinson *v.* State, 18 Fla. 898.

58. Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167; State *v.* Schill, 27 Iowa 263; State *v.* Wakefield, 73 Mo. 549 [*affirming* 9 Mo. App. 326].

59. Scott *v.* State, 77 Ark. 455, 92 S. W. 241; Wood *v.* People, 59 N. Y. 117. *Compare* Leak *v.* State, 61 Ark. 599, 33 S. W. 1067.

60. Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

61. People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198.

(III) *Particular Instances* — (A) *Justification of Surety.* When one offers himself as bail, his statements under oath as to the value of his property are material; and, if they are wilfully and corruptly false, he is liable to conviction for perjury.[62] The fact that the testimony alleged to be false caused the court to accept the party as bail will not supply or constitute an equivalent for a want of materiality in the testimony charged to be false.[63]

(B) *Testimony Before Grand Jury.*[64] On an investigation before a grand jury of an alleged crime, any testimony tending to establish either that such crime has been in fact committed, or that it has not been committed, is material, and perjury may be assigned upon the testimony of a witness before that body which is wilfully false in respect to any fact tending to establish or disprove the commission of such crime.[65] The fact that at the time the testimony was given, the grand jury had already voted to indict in the case under consideration,[66] although they had not actually done so, but were still considering the case,[67] does not render such testimony immaterial, so as to be incapable of supporting the charge of perjury. Nor can a witness who falsely denies before the grand jury any knowledge of a fact material to the investigation defend a charge of perjury on the ground that the evidence sought from him would have been merely cumulative.[68] If the grand jury has no legal authority to inquire into a particular matter false testimony in relation to such matter is immaterial.[69]

(C) *Testimony to Prove Alibi.* On the trial of an indictment, false testimony tending to prove an alibi is material, and will support a conviction for perjury.[70]

(D) *Testimony in Aggravation or Mitigation of Damages.* Testimony tending to aggravate or mitigate the damages in an action is material, and, if false, constitutes perjury.[71]

(E) *Testimony Going to Credit of Witness.* Perjury may be assigned upon testimony going to the credit of a material witness in a cause,[72] although such evi-

62. Com. *v.* Butland, 119 Mass. 317.

63. Pollard *v.* People, 69 Ill. 148.

64. See *supra*, I, B, 3, b, (X).

65. Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167; State *v.* Turley, 153 Ind. 345, 55 N. E. 30; Butler *v.* State, 36 Tex. Cr. 444, 37 S. W. 746; People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

66. State *v.* Lehman, 175 Mo. 619, 75 S. W. 139; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116.

67. State *v.* Lehman, 175 Mo. 619, 75 S. W. 139.

68. State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116.

69. Pankey *v.* People, 2 Ill. 80.

70. Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; Reg. *v.* Tyson, L. R. 1 C. C. 107, 11 Cox C. C. 1, 37 L. J. M. C. 7, 17 L. T. Rep. N. S. 292, 16 Wkly. Rep. 317.

71. *Georgia.*— Salmons *v.* Tate, 31 Ga. 676.

Iowa.— State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Missouri.— State *v.* Blize, 111 Mo. 464, 20 S. W. 210.

South Carolina.— State *v.* Keenan, 8 Rich. 456.

Tennessee.— Stephens *v.* State, 1 Swan 157.

See 39 Cent. Dig. tit. "Perjury," § 47.

72. *Georgia.*— Wilson *v.* State, 115 Ga. 206, 41 S. E. 696, 90 Am. St. Rep. 104.

Indiana.— State *v.* Cary, 159 Ind. 504, 65 N. E. 527; State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

Missouri.— State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116.

New Hampshire.—State *v.* Brown, 68 N. H. 200, 38 Atl. 731; State *v.* Norris, 9 N. H. 96.

New York.— People *v.* Courtney, 94 N. Y. 490 [*affirming* 31 Hun 199].

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

Rhode Island.— State *v.* Miller, 26 R. I. 282, 58 Atl. 882.

Texas.— Washington *v.* State, 22 Tex. App. 26, 3 S. W. 228.

Wisconsin.— Hanscom *v.* State, 93 Wis. 273, 67 N. W. 419.

England.— Reg. *v.* Gibbons, 9 Cox C. C. 105, 8 Jur. N. S. 159, L. & C. 109, 31 L. J. M. C. 98, 5 L. T. Rep. N. S. 805, 10 Wkly. Rep. 350; Rex *v.* Griepe, 1 Ld. Raym. 256, 12 Mod. 139; Rex *v.* Greepe, 2 Salk. 513.

See 39 Cent. Dig. tit. "Perjury," § 51 *et seq.*

Contradictory statements by witness.— Where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a different statement, he denies having done so, the answer affects his credibility as a witness, and a charge of perjury may be founded upon it. Williams *v.* State, 68 Ala. 551; Robertson *v.* State, 54 Ark. 604, 16 S. W. 582; People *v.* Barry, 63 Cal. 62; State *v.* Mooney, 65 Mo. 494; Hanscom *v.* State, 93 Wis. 273, 67 N. W. 419.

dence is legally inadmissible and ought not to be received.[73] So also perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue,[74] provided the evidence of conviction is not too remote.[75]

(F) *Incompetency of Witness or Testimony and Waiver Thereof.* A party has a right to waive all objections to the competency of a witness produced against him, and, having done so, the evidence becomes as competent and material as though no such objection had existed, and the witness will be guilty of perjury if he testifies falsely.[76] It has been held that, although testimony ought by law to be taken in writing, yet, if it is received orally, perjury may nevertheless be assigned on it.[77]

b. Materiality of Oath. To constitute the crime of perjury the false oath must not only be as to material facts, but it must also in itself be material.[78] If an oath is permitted, although not required by statute, intentional false swearing therein is perjury.[79]

C. Defenses[80] — 1. Truth of Facts Testified To. In a prosecution for perjury the truth of the facts testified to is of course a defense,[81] unless defendant believed his testimony to be false.[82]

Necessity that witness be material.— But where the evidence of a witness is immaterial, perjury cannot be based on his testimony, given on cross-examination, as to matters affecting his credibility only. Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.

73. Reg. *v.* Gibbons, 9 Cox C. C. 105, 8 Jur. N. S. 159, L. & C. 109, 31 L. J. M. C. 98, 5 L. T. Rep. N. S. 805, 10 Wkly. Rep. 350.

74. *Kansas.*— State *v.* Park, 57 Kan. 431, 46 Pac. 713.

Massachusetts.— Com. *v.* Johnson, 175 Mass. 152, 55 N. E. 804.

New York.— People *v.* Courtney, 94 N. Y. 490 [*affirming* 31 Hun 199]; People *v.* Link, 4 N. Y. Suppl. 436, 6 N. Y. Cr. 185.

Texas.— Williams *v.* State, 28 Tex. App. 301, 12 S. W. 1103.

United States.— U. S. *v.* Landsberg, 23 Fed. 585, 21 Blatchf. 159.

England.— Reg. *v.* Baker, [1895] 1 Q. B. 797, 64 L. J. M. C. 177, 72 L. T. Rep. N. S. 631, 15 Reports 346, 43 Wkly. Rep. 654; Reg. *v.* Lavey, 3 C. & K. 26; Reg. *v.* Overton, C. & M. 655, 2 Moody C. C. 263, 41 E. C. L. 355.

See 39 Cent. Dig. tit. "Perjury," § 51.

75. Busby *v.* State, (Tex. Cr. App. 1905) 86 S. W. 1032.

76. Cronk *v.* People, 131 Ill. 56, 22 N. E. 862; Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255; People *v.* Bowe, 34 Hun (N. Y.) 528; Van Steenbergh *v.* Kortz, 10 Johns. (N. Y.) 167; Montgomery *v.* State, 10 Ohio 220; Haley *v.* McPherson, 3 Humphr. (Tenn.) 104; Sharp *v.* Wilhite, 2 Humphr. (Tenn.) 434. See also State *v.* Molier, 12 N. C. 263. *Compare* Com. *v.* Kuntz, 2 Pa. L. J. Rep. 375; Reg. *v.* Clegg, 19 L. T. Rep. N. S. 47.

77. Covey *v.* State, 23 Tex. App. 388, 5 S. W. 283. *Contra*, State *v.* Trask, 42 Vt. 152.

78. *California.*— People *v.* Howard, 111 Cal. 655, 44 Pac. 342.

Colorado.— Klug *v.* McPhee, 16 Colo. App. 39, 63 Pac. 709.

Florida.— Collins *v.* State, 33 Fla. 446, 15 So. 220.

Michigan.— Beecher *v.* Anderson, 45 Mich. 543, 552, 8 N. W. 539 (where it is said that "the facts sworn to may be material, and yet the false swearing be no perjury because the oath performed no office in the case, and was wholly unimportant and immaterial"); People *v.* Gaige, 26 Mich. 30; People *v.* Fox, 25 Mich. 492.

North Carolina.— State *v.* Houston, 103 N. C. 383, 9 S. E. 699.

Ohio.— Silver *v.* State, 17 Ohio 365.

Pennsylvania.— Linn *v.* Com., 96 Pa. St. 285.

South Carolina.— State *v.* Kennerly, 10 Rich. 152.

Tennessee.— Lamden *v.* State, 5 Humphr. 83.

United States.— U. S. *v.* Maid, 116 Fed. 650; U. S. *v.* Bedgood, 49 Fed. 54; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,488, 4 McLean 113; U. S. *v.* Nickerson, 27 Fed. Cas. No. 15,878, 1 Sprague 232.

England.— Reg. *v.* Bishop. C. & M. 302, 41 E. C. L. 169.

See 39 Cent. Dig. tit. "Perjury," § 48.

79. U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

80. **Coverture** see Husband and Wife, 21 Cyc. 1353.

Former jeopardy see Criminal Law, 12 Cyc. 79 *et seq.*

Infancy see Infants, 22 Cyc. 622.

Insanity see Criminal Law, 12 Cyc. 164 *et seq.*

Limitation of prosecution see Criminal Law, 12 Cyc. 78 *et seq.*

81. State *v.* J. B., 1 Tyler (Vt.) 269, holding further that on an indictment for perjury in swearing falsely to a deposition, the deponent having afterward testified on the stand that the facts stated therein were not true, he is not estopped from showing in his defense the truth of the facts stated in the deposition. And see *supra*, I, B, 2, a.

82. See *supra*, I, B, 2, a.

2. ACQUITTAL IN FORMER PROCEEDING. In a prosecution for perjury, judgment of acquittal of defendant in the cause in which the perjury was committed is not necessarily a bar.[83] It has been held, however, that a person cannot be convicted of perjury in swearing to a state of facts which a jury in another case against him has found to be true.[84]

3. INTOXICATION. Since wilfulness and deliberation are essential elements of the crime of perjury, the accused is entitled to an acquittal, if at the time the false testimony was given he was so intoxicated as to be incapacitated to understand the testimony he gave, or to wilfully and knowingly swear falsely.[85]

4. ADVICE OF COUNSEL. If one accused of perjury fully and in good faith lays the facts before counsel, and upon them is advised, as a matter of law, that a certain statement may be made which will be the truth, and, acting on this advice, the client swears to the statement, believing that he has been correctly advised, it cannot be said that the oath is wilfully and corruptly false, and hence a charge of perjury cannot be predicated upon it.[86] If, however, he fails to communicate all the material facts within his knowledge, advice of counsel furnishes him no defense;[87] nor is such advice a defense where it was sought as a mere cover to secure immunity from the penalty of the crime.[88]

5. THREATS. On indictment for perjury it is no defense that defendant was induced to testify falsely by threats against his life made out of court and sometime before the trial.[89]

6. OTHER DEFENSES. The fact that a continuance was erroneously refused to defendant when on trial for theft is no defense in a prosecution for perjury committed by him when before the examining court on such charge.[90] The fact that the oath was not reduced to writing as required by law is no bar to a conviction for perjury, for the failure of the officer administering the oath to do his duty cannot avail defendant.[91] One indicted for false swearing may be convicted, although the officer who administered the oath knew at the time that it was false and was made to obtain funds to which the affiant was not entitled, and such officer administered the oath for the purpose of instituting criminal proceedings.[92] On an indictment against an officer of a bank for perjury in falsely making affidavit to the truth of the report of the bank's condition, defendant cannot object that the affidavits of other persons to the report are defective, and therefore extrajudicial, so long as his own affidavit was in compliance with the law.[93] Where a person is indicted for perjury in falsely testifying that another person by false pretenses obtained his signature to a paper, it is no defense that defendant's signature consisted in making his mark only.[94]

D. Persons Liable.[95] Defendant in a criminal prosecution, who testifies in

83. State *v.* Cary, 159 Ind. 504, 65 N. E. 527; State *v.* Williams, 60 Kan. 837, 58 Pac. 476; Hutcherson *v.* State, 33 Tex. Cr. 67, 24 S. W. 908. See also Reichard's Case, 2 Leg. Gaz. (Pa.) 142.

84. U. S. *v.* Butler, 38 Fed. 498.

85. Williams *v.* Com., 113 Ky. 652, 68 S. W. 871, 24 Ky. L. Rep. 465; Lytle *v.* State, 31 Ohio St. 196; Lyle *v.* State, 31 Tex. Cr. 103, 19 S. W. 903. See also Sisk *v.* State, 28 Tex. App. 432, 13 S. W. 647. But see Schaller *v.* State, 14 Mo. 502; People *v.* Willey, 2 Park. Cr. (N. Y.) 19.

86. Barnett *v.* State, 89 Ala. 165, 7 So. 414 (holding, however, that if the matter involved presents no question of law, advice of counsel is no defense); Com. *v.* Clark, 157 Pa. St. 257, 27 Atl. 723; U. S. *v.* Conner, 25 Fed. Cas. No. 14,847, 3 McLean 573; U. S. *v.* Stanley, 27 Fed. Cas. No. 16,376, 6 McLean 409. See *supra*, I, B, 2, b, (I).

87. State *v.* Allen, 94 Mo. App. 508, 69 S. W. 604.

88. Tuttle *v.* People, 36 N. Y. 431.

89. Bain *v.* State, 67 Miss. 557, 7 So. 408.

90. Murphy *v.* State, 33 Tex. Cr. 314, 26 S. W. 395.

91. Com. *v.* O'Neill, 5 Pa. Co. Ct. 209.

92. Thompson *v.* State, 120 Ga. 132, 47 S. E. 566.

93. People *v.* Trumpbour, 135 N. Y. 639, 32 N. E. 647; People *v.* Ostrander, 64 Hun (N. Y.) 335, 19 N. Y. Suppl. 324, 328.

94. Barnett *v.* State, 89 Ala. 165, 7 So. 414.

95. **Drunken persons** see *supra*, I, C, 3.
Incompetent witness see *supra*, I, B, 6, a, (III), (F).
Infants see INFANTS, 22 Cyc. 622.
Insane persons see CRIMINAL LAW, 12 Cyc. 164 *et seq.*

his own behalf and of his own accord, is guilty of perjury if he swears falsely.[96] So also if a witness who waives his privilege not to give testimony that may tend to incriminate him gives false testimony, perjury may be assigned upon it;[97] and the fact that he is required, against objection, to testify to incriminating matter, does not excuse him for testifying falsely.[98] A corporation aggregate is not liable to a prosecution for perjury.[99]

E. Subornation of Perjury and Attempts — 1. Subornation — a. Definition and Nature of Offense. Subornation of perjury consists in procuring or instigating another to commit the crime of perjury and is a misdemeanor at common law.[1] While accessorial in its nature, subornation of perjury has been made an offense separate and distinct from perjury,[2] and therefore the suborner of perjury may be tried before the conviction of the perjurer.[3]

b. Elements of Offense. To sustain an indictment for subornation of perjury, it is necessary that perjury shall have been in fact committed;[4] that the testimony of the witness claimed to have been suborned shall have been false;[5] that it shall have been given by him wilfully and corruptly, knowing it to be false;[6] that defendant shall have known or believed that the testimony given would be false;[7] that he shall have known or believed the witness would wilfully and corruptly so testify;[8] and that he shall have induced or procured the witness to give such false testimony.[9]

Married woman see Husband and Wife, 21 Cyc. 1353.

96. State *v.* Hawkins, 115 N. C. 712, 20 S. E. 623; Murphy *v.* State, 33 Tex. Cr. 314, 26 S. W. 395, holding that an ex-convict testifying falsely in his own behalf on the prosecution can be convicted of perjury.

97. Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167; State *v.* Turley, 153 Ind. 345, 55 N. E. 30; State *v.* Maxwell, 28 La. Ann. 361; Mattingly *v.* State, 8 Tex. App. 345.

98. Com. *v.* Turner, 98 Ky. 526, 33 S. W. 88, 17 Ky. L. Rep. 925; State *v.* Lehman, 175 Mo. 619, 75 S. W. 139; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116. But see Pipes *v.* State, 26 Tex. App. 318, 9 S. W. 614.

99. Wych *v.* Meal, 3 P. Wms. 310, 24 Eng. Reprint 1078.

1. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; Nicholson *v.* State, 97 Ga. 672, 25 S. E. 560; Com. *v.* Douglass, 5 Metc. (Mass.) 241; Bacon Abr. tit. "Perjury"; 4 Blackstone Comm. 137, 138; 1 Hawkins P. C. c. 69, § 10.

Where the false swearing is not perjury, because the one administering the oath has no jurisdiction, a charge of subornation of perjury cannot be based upon it. State *v.* Wymberly, 40 La. Ann. 460, 4 So. 161. Where, however, by statute, the crime "false swearing" is distinct from "perjury," one may be guilty of subornation of perjury, although the offense committed by the party suborned was "false swearing" and not "perjury." Henderson *v.* Com., 91 S. W. 1141, 28 Ky. L. Rep. 1212.

2. Stone *v.* State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145; Henderson *v.* Com., 91 S. W. 1141, 28 Ky. L. Rep. 1212. In perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct. The two crimes both culminate in the delivery of false testimony. Still the offenses are dual, each having in it elements not common to the other. There is sufficient inherent difference between the two to warrant the law-making power in separating the act into its component parts, making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer. Stone *v.* State, *supra.*

3. Stone *v.* State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145.

4. Smith *v.* State, 125 Ind. 440, 23 N. E. 598; U. S. *v.* Evans, 19 Fed. 912.

5. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690.

6. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; Coyne *v.* People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; U. S. *v.* Evans, 19 Fed. 912.

7. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; Coyne *v.* People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; Stewart *v.* State, 22 Ohio St. 477; Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531; U. S. *v.* Evans, 19 Fed. 912; U. S. *v.* Dennee, 25 Fed. Cas. No. 14,947, 3 Woods 39.

8. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; Coyne *v.* People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; Com. *v.* Douglass, 5 Metc. (Mass.) 241; Stewart *v.* State, 22 Ohio St. 477; Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531; U. S. *v.* Evans, 19 Fed. 912; U. S. *v.* Dennee, 25 Fed. Cas. No. 14,947, 3 Woods 39.

9. State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; Smith *v.* State, 125 Ind. 440, 25 N. E. 598; Com. *v.* Douglass, 5 Metc. (Mass.) 241; People *v.* Nichols, 108 N. Y. App. Div. 362, 95 N. Y. Suppl. 736.

Procurement by threats.— A person is guilty of subornation of perjury if he procures another, by threats, to knowingly commit perjury. State *v.* Geer, 48 Kan. 752, 30 Pac. 236.

2. Attempts to Suborn. In some states statutes provide for the punishment of any one who attempts to procure another to commit perjury.[10] A mere general attempt to induce another to swear falsely is not sufficient, but the attempt must have reference to such an act as would be perjury if successful.[11]

II. Prosecution and Punishment.[12]

A. Prosecution Pending Civil Action — 1. In General. In practice the prosecution for perjury is frequently continued until the proceeding in which the perjury is alleged to have been committed has been ended.[13] But it is a rule of convenience only, and the court trying the criminal charge may, in its sound discretion, proceed to trial and final verdict, notwithstanding the other case is still pending.[14]

2. Pennsylvania Rule. In Pennsylvania, however, it has been held that a prosecution for perjury cannot be instituted until the termination of the action or proceeding in which the alleged false oath was made.[15]

B. Indictment and Information[16] — 1. Form and Requisites in General — a. General Rules. An indictment for perjury must, like an indictment for any other offense, allege specifically and with sufficient certainty every fact and cir-

10. State *v.* Waddle, 100 Iowa 57, 69 N. W. 279; State *v.* Howard, 137 Mo. 289, 38 S. W. 908; Reg. *v.* Clement, 26 U. C. Q. B. 297.

Inciting to commit perjury see Rex *v.* Cole, 5 Can. Cr. Cas. 330, 22 Can. L. T. Occ. Notes 132, 3 Ont. L. Rep. 389, 1 Ont. Wkly. Rep. 117.

11. Nicholson *v.* State, 97 Ga. 672, 25 S. E. 560.

12. **Jurisdiction as between state and federal governments and courts** see Criminal Law, 12 Cyc. 137, 200, 205.

Venue of perjury see Criminal Law, 12 Cyc. 236.

Summary trial before magistrate.— In Canada a person accused of perjury may, with his own consent, be summarily tried before a police magistrate under Cr. Code, §§ 145, 539, 782, 785; and where defendant has sought and consented to be tried summarily under section 785, pleading "not guilty," and the magistrate, upon hearing the evidence, has adjudicated summarily and dismissed the charge under section 787, it is not competent for the magistrate to thereafter bind the prosecutor over to prefer and prosecute an indictment against defendant, as provided for in section 595; for the magistrate has, under section 791, to determine, before the defense has been made, whether he will try the case summarily or not. Rex *v.* Burns, 4 Can. Cr. Cas. 330, 1 Ont. L. Rep. 341.

13. Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; Greene *v.* People, 182 Ill. 278, 55 N. E. 341; People *v.* Hays, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830; Reg. *v.* Ingham, 14 Q. B. 396, 19 L. J. M. C. 69, 68 E. C. L. 396; Rex *v.* Ashburn, 8 C. & P. 50, 34 E. C. L. 603; Rex *v.* Thickens, 11 Can. Cr. Cas. 274, 12 Brit. Col. 223; Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240; Chadd *v.* Meagher, 24 U. C. C. P. 54. See also Peddell *v.* Rutter, 8 C. & P. 337, 34 E. C. L. 766.

14. *Illinois.*— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Michigan.— People *v.* Jones, 1 Mich. N. P. 141.

New York.— State *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

United States.— U. S. *v.* Pettus, 84 Fed. 791.

England.— Rex *v.* Ashburn, 8 C. & P. 50, 34 E. C. L. 603.

Canada.— Rex *v.* Thickens, 11 Can. Cr. Cas. 274, 12 Brit. Col. 223.

15. Com. *v.* Houser, 17 Lanc. L. Rev. (Pa.) 414; Com. *v.* Dickinson, 5 Pa. L. J. 164, 3 Pa. L. J. Rep. 265. See also Com. *v.* Nailor, 29 Pa. Super. Ct. 275. *Compare* Com. *v.* Moore, 9 Pa. Co. Ct. 501.

Discharge on habeas corpus.— A person in custody upon the charge of perjury in a pending civil suit is entitled to a discharge on habeas corpus, as well as to continuance until the civil suit is determined. Com. *v.* Davis, 10 Pa. Co. Ct. 596; Com. *v.* Dickinson, 5 Pa. L. J. 164, 3 Pa. L. J. Rep. 265.

A defendant in a civil action will not be held to bail for perjury committed in his affidavit of defense while such action is undetermined. Com. *v.* Stine, 2 Lack. Leg. N. (Pa.) 179.

On a rule to show cause why an attachment should not issue for contempt, perjury may be assigned on the answers to interrogatories addressed to defendant before the attachment issues. Respublica *v.* Newell, 3 Yeates (Pa.) 407, 2 Am. Dec. 381.

On examination of a bankrupt, where it appeared that perjury had been committed, it was held not necessary to wait until the examination was finished before cognizance could be taken of the offense. Respublica *v.* Wright, 1 Yeates (Pa.) 205.

16. See, generally, Indictments and Informations.

Joinder of offenses see Indictments and Informations, 22 Cyc. 389 *et seq.*

cumstance necessary to constitute the offense.[17] At common law great particularity was required;[18] but in most of the states perjury has now been made a statutory offense, and the particularity requisite in an indictment for perjury at common law is unnecessary. All that is required is that the indictment shall, in plain and intelligible terms, and with such particularity as to apprise the accused with reasonable certainty of the offense for which he is sought to be punished, state the substance of the controversy upon which the false oath was taken, specify

Variance between indictment and information held immaterial see Reg. *v.* Broad, 14 U. C. C. P. 168.

Forms of indictment or information for perjury or false swearing on: *Trial of civil action.*— Smith *v.* State, 103 Ala. 57, 58, 15 So. 866 (perjury on trial of action for damages for personal injuries); Floyd *v.* State, 30 Ala. 511; Baker *v.* State, 97 Ga. 347, 23 S. E. 829; State *v.* Walls, 54 Ind. 407, 408; State *v.* Bunker, 38 Kan. 737, 17 Pac. 651 (perjury in an action for divorce); State *v.* Corson, 59 Me. 137; Com. *v.* Knight, 12 Mass. 274, 7 Am. Dec. 72 (perjury in action of trespass); State *v.* Nelson, 146 Mo. 256, 259, 48 S. W. 84; State *v.* Huckeby, 87 Mo. 414, 415 (perjury by witness on trial of civil action in justice's court); Gandy *v.* State, 23 Nebr. 436, 439, 36 N. W. 817 (perjury in action for forcible entry and detainer); State *v.* Voorhis, 52 N. J. L. 351, 352, 20 Atl. 26; State *v.* Smith, 63 Vt. 201, 202, 22 Atl. 604; Rex *v.* Coote, 8 Can. Cr. Cas. 199–201, 10 Brit. Col. 285; Reg. *v.* Ross, 1 Montreal Q. B. 227, 28 L. C. Jur. 261.

Trial of criminal prosecution.—Williams *v.* State, 68 Ala. 551, 552; People *v.* De Carlo, 124 Cal. 462, 463, 57 Pac. 383; People *v.* Ah Bean, 77 Cal. 12, 13, 18 Pac. 815; Com. *v.* Wright, 166 Mass. 174, 175, 44 N. E. 129; Com. *v.* Bouvier, 164 Mass. 398, 41 N. E. 651; People *v.* Macard, 109 Mich. 623, 625, 67 N. W. 968; State *v.* Jolly, 73 Miss. 42, 18 So. 541; Lea *v.* State, 64 Miss. 278, 1 So. 235; State *v.* Walker, 194 Mo. 367, 369, 91 S. W. 899; State *v.* Peters, 107 N. C. 876, 877, 12 S. E. 74; State *v.* Bobbitt, 70 N. C. 81; Com. *v.* Williams, 149 Pa. St. 54, 55, 24 Atl. 158; King *v.* State, 32 Tex. Cr. 463, 464, 24 S. W. 514; Kitchen *v.* State, 26 Tex. App. 165, 166, 9 S. W. 461; Washington *v.* State, 22 Tex. App. 26, 27, 3 S. W. 228.

Application for writ of habeas corpus.— Deckard *v.* State, 38 Md. 186, 188.

Preliminary examination before justice of the peace.— People *v.* Brilliant, 58 Cal. 214, 215; State *v.* Booth, (Iowa 1901) 88 N. W. 344; Com. *v.* Combs, 101 S. W. 312, 30 Ky. L. Rep. 1300.

Claim to public lands as next of kin of deceased soldier.— U. S. *v.* Buete, 24 Fed. Cas. No. 14,680*a*, 2 Hayw. & H. 49.

Answer to bill of discovery.— Com. *v.* Warden, 11 Metc. (Mass.) 406.

Motion for new trial.— Com. *v.* McLaughlin, 122 Mass. 449; Hernandez *v.* State, 18 Tex. App. 134, 136, 51 Am. Rep. 295.

Examination before grand jury.— Barnett *v.* State, 89 Ala. 165, 166, 7 So. 414; Kimmel *v.* People, 92 Ill. 457; State *v.* Schill, 27 Iowa 263; Lawson *v.* State, 3 Lea (Tenn.) 309; Pipes *v.* State, 26 Tex. App. 318, 319, 9 S. W. 614.

Hearing before county commissioners on petition to establish highway.—State *v.* Schultz, 57 Ind. 19, 20.

Examination of juror on his voir dire.— Com. *v.* Stockley, 10 Leigh (Va.) 678.

Examination before register of United States land-office.— Fisher *v.* U. S., 1 Okla. 252, 254, 31 Pac. 195.

Justification as surety.— Com. *v.* Sargent, 129 Mass. 115 (on bail-bond or recognizance); State *v.* Champion, 116 N. C. 987, 21 S. E. 700 (on bond in civil action).

Affidavit in support of claim against decedent's estate.— Waters *v.* State, 30 Tex. App. 284, 285, 17 S. W. 411.

Affidavit to procure marriage license.— Harkreader *v.* State, 35 Tex. Cr. 243, 244, 33 S. W. 117, 60 Am. St. Rep. 40.

Affidavit before justice of the peace to procure warrant of arrest.— Pennaman *v.* State, 58 Ga. 336, 337.

Proceedings for contempt of court.— U. S. *v.* Cuddy, 39 Fed. 696.

Perjury before election officer.— Reg. *v.* Chamberlain, 10 Manitoba 261.

False swearing under Kentucky statute.— Goslin *v.* Com., 90 S. W. 223, 224, 28 Ky. L. Rep. 683, false swearing in criminal prosecution.

17. *Arkansas.*— Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Thomas *v.* State, 54 Ark. 584, 16 S. W. 568.

Florida.— Humphreys *v.* State, 17 Fla. 381.

Illinois.— Morrell *v.* People, 32 Ill. 499.

Maine.— State *v.* Mace, 76 Me. 64.

Maryland.— State *v.* Bixler, 62 Md. 354.

Mississippi.— Copeland *v.* State, 23 Miss. 257.

Vermont.— State *v.* Rowell, 70 Vt. 405, 41 Atl. 430; State *v.* McCone, 59 Vt. 117, 7 Atl. 406.

Washington.— State *v.* Roberts, 22 Wash. 1, 60 Pac. 65; State *v.* See, 4 Wash. 344, 30 Pac. 327, 746.

West Virginia.— Stofer *v.* State, 3 W. Va. 689.

United States.— Markham *v.* U. S., 160 U. S. 319, 16 S. Ct. 288, 40 L. ed. 441; U. S. *v.* Pettus, 84 Fed. 791; U. S. *v.* Walsh, 22 Fed. 644.

Canada.— Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

See 39 Cent. Dig. tit. "Perjury," § 65 *et seq.*

18. State *v.* Gallimon, 24 N. C. 372; Lawson *v.* State, 3 Lea (Tenn.) 309; State *v.* Stillman, 7 Coldw. (Tenn.) 341; Com. *v.* Lodge, 2 Gratt. (Va.) 579; Reg. *v.* Carter, 6 Mod. 168; Rex *v.* Dowlin, 5 T. R. 311.

the court or officer by whom it was administered, aver or show that such court or officer had authority to administer an oath, allege the falsity of the oath, and assign perjury thereon.[19]

b. Statutory Form. In some jurisdictions the form of indictment is prescribed by statute, and such form is sufficient if it sets forth all the elements of the offense with sufficient particularity to enable the accused to know with reasonable certainty what is the matter of fact which he must meet, and enable the court to see, without going out of the record, that a crime has been committed;[20]

19. *Alabama.*— Barnett *v.* State, 89 Ala. 165, 7 So. 414.

Arkansas.— State *v.* Green, 24 Ark. 591.

California.— People *v.* Ah Bean, 77 Cal. 12, 18 Pac. 815.

Illinois.— Kimmel *v.* People, 92 Ill. 457.

Indiana.— State *v.* Hopper, 133 Ind. 460, 32 N. E. 878; Stefani *v.* State, 124 Ind. 3, 24 N. E. 254.

Iowa.— State *v.* Booth, (1901) 88 N. W. 344; State *v.* Schill, 27 Iowa 263.

Kansas.— State *v.* Gregory, 46 Kan. 290, 26 Pac. 747.

Kentucky.— Com. *v.* Combs, 101 S. W. 312, 30 Ky. L. Rep. 1300; Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683; Com. *v.* Lashley, 74 S. W. 658, 25 Ky. L. Rep. 58; Ross *v.* Com., 20 S. W. 1043, 14 Ky. L. Rep. 590.

Massachusetts.—Com. *v.* Bouvier, 164 Mass. 398, 41 N. E. 651; Com. *v.* Warden, 11 Metc. 406; Com. *v.* Alden, 14 Mass. 388.

Minnesota.— State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

Mississippi.—State *v.* Jolly, 73 Miss. 42, 18 So. 541.

Missouri.— State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; State *v.* Walker, 194 Mo. 367, 91 S. W. 899; State *v.* Huckby, 87 Mo. 414.

New York.— Tuttle *v.* People, 36 N. Y. 431 (holding that in an indictment for perjury it is sufficient to allege the substantial and specific facts constituting the offense, without setting forth the evidence by which the truth of the averments has to be sustained); People *v.* Phelps, 5 Wend. 9.

North Carolina.— State *v.* Thompson, 113 N. C. 638, 18 S. E. 211; State *v.* Gates, 107 N. C. 832, 12 S. E. 319.

Oklahoma.— Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025; Fisher *v.* U. S., 1 Okla. 252, 31 Pac. 195.

Oregon.— State *v.* Ah Lee, 18 Oreg. 540, 23 Pac. 424.

Pennsylvania.— Com. *v.* Jermon, 29 Leg. Int. 165.

Tennessee.— State *v.* Stillman, 7 Coldw. 341.

Texas.— Stanley *v.* State, (Cr. App. 1906) 95 S. W. 1076; Forman *v.* State, (Cr. App. 1904) 85 S. W. 809; Adellberger *v.* State, (Cr. App. 1897) 39 S. W. 103; Cravey *v.* State, 33 Tex. Cr. 557, 28 S. W. 472; Cox *v.* State, 13 Tex. App. 479; Brown *v.* State, 9 Tex. App. 171; Bradberry *v.* State, 7 Tex. App. 375.

Vermont.— State *v.* Webber, 78 Vt. 463, 62 Atl. 1018.

United States.— Noah *v.* U. S., 128 Fed. 270, 62 C. C. A. 618 (pension affidavit); U. S. *v.* Cuddy, 39 Fed. 696; U. S. *v.* Walsh, 22 Fed. 644.

England.— Reg. *v.* Child, 5 Cox C. C. 197.

Canada.— Reg. *v.* Skelton, 4 Can. Cr. Cas. 467, 2 Northwest Terr. 210, 3 Terr. L. Rep. 58; Reg. *v.* Thompson, 4 Can. Cr. Cas. 265, 17 Can. L. T. Occ. Notes 295, 2 Northwest Terr. 39, 2 Terr. L. Rep. 383; Reg. *v.* Dewar, 2 Northwest Terr. 194.

See 39 Cent. Dig. tit. "Perjury," § 65 *et seq.*

A proviso which is no part of the statutory definition of perjury need not be negatived. Brown *v.* State, 9 Tex. App. 171, holding that an indictment for perjury need not negative that the false statement was made "through inadvertence, or under agitation, or by mistake," under Pen. Code, art. 189.

Whether the witness was subpœnaed or appeared voluntarily need not appear from the indictment. Com. *v.* Knight, 12 Mass. 274, 7 Am. Dec. 72.

Conclusion.—An indictment for perjury, concluding "against the peace and dignity . . . of the State of Illinois" is sufficiently formal. The ancient conclusion, "And so the jurors aforesaid, upon their oaths aforesaid, do say, etc., that the defendant did commit willful and corrupt perjury," etc., while appropriate, is not material. Henderson *v.* People, 117 Ill. 265, 7 N. E. 677.

20. *Alabama.*— Smith *v.* State, 103 Ala. 57, 58, 18 So. 866; Walker *v.* State, 96 Ala. 53, 54, 11 So. 401; Barnett *v.* State, 89 Ala. 165, 166, 7 So. 414; Hicks *v.* State, 86 Ala. 30, 5 So. 425.

Kentucky.— Com. *v.* Combs, 101 S. W. 312, 30 Ky. L. Rep. 1300.

Maine.— State *v.* Mace, 76 Me. 64; State *v.* Corson, 59 Me. 137.

Mississippi.— State *v.* Jolly, 73 Miss. 42, 43, 18 So. 541.

Missouri.— State *v.* Huckby, 87 Mo. 414, 415.

North Carolina.— State *v.* Thompson, 113 N. C. 638, 18 S. E. 211; State *v.* Peters, 107 N. C. 876, 877, 12 S. E. 74; State *v.* Gates, 107 N. C. 832, 12 S. E. 319.

Oregon.— State *v.* Ah Lee, 18 Oreg. 540, 541, 23 Pac. 424.

Tennessee.— State *v.* Stillman, 7 Coldw. 341, 343.

Vermont.— State *v.* Webber, 78 Vt. 463, 62 Atl. 1018.

United States.— U. S. *v.* Cuddy, 39 Fed. 696.

England.— Reg. *v.* Child, 5 Cox C. C. 197, 198.

See INDICTMENTS AND INFORMATIONS, 22 Cyc. 285.

but a statute cannot make valid and sufficient an indictment in which the accusation does not meet these requirements.[21]

c. Averments as to Time. In an indictment for perjury it is necessary, in the absence of a statute to the contrary, that the day on which the offense was committed shall be truly laid.[22]

2. Description of Proceeding in Which Oath Was Administered — a. In General. An indictment for perjury should set forth specifically the occasion of the administration of the oath.[23] It should appear in the indictment that the oath was taken, and the false swearing committed, in a judicial proceeding,[24] or on some

21. State *v.* Mace, 76 Me. 64 (holding insufficient, even after verdict of guilty, an indictment charging defendant with having committed the crime of perjury "by falsely swearing to material matter in a writing signed by him"); State *v.* Webber, 78 Vt. 463, 62 Atl. 1018. See also Indictments and Informations, 22 Cyc. 285.

22. *Indiana.*— State *v.* Offutt, 4 Blackf. 355. But under Rev. St. (1894) § 1825 (Rev. St. (1881) § 1756), providing that an information shall not be quashed for omitting to state the time at which the offense was committed, where time is not the essence of the offense, and section 1807 (section 1738), declaring that the precise time need not be stated, but that it is sufficient if it be shown to have been within the statute of limitations, an information for perjury is not fatally defective for failure to state the time it was committed, or for imperfectly stating said time. Shell *v.* State, 148 Ind. 50, 47 N. E. 144.

Iowa.— State *v.* John, (1903) 93 N. W. 61. *Compare* State *v.* Perry, 117 Iowa 463, 91 N. W. 765, holding that an allegation that the crime was committed "on or about" a specified date is sufficient as to the time, it not being necessary to allege the precise date, except when the date is a material ingredient of the crime.

Maine.— State *v.* Fenlason, 79 Me. 117, 8 Atl. 459, holding that an indictment for perjury alleged to have been committed at a certain term of the supreme court does not fix the time definitely enough.

Oregon.— State *v.* Ah Lee, 18 Oreg. 540, 23 Pac. 424.

Virginia.— Rhodes *v.* Com., 78 Va. 692.

United States.— U. S. *v.* Law, 50 Fed. 915; U. S. *v.* Bowman, 24 Fed. Cas. No. 14,631, 2 Wash. 328.

See 39 Cent. Dig. tit. "Perjury," § 69.

Contra, in a prosecution for statutory false swearing. Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683.

23. Hicks *v.* State, 86 Ala. 30, 5 So. 425; Jacobs *v.* State, 61 Ala. 448; Com. *v.* Kane, 92 Ky. 457, 18 S. W. 7, 13 Ky. L. Rep. 655.

24. *Illinois.*— Morrell *v.* People, 32 Ill. 499.

Kansas.— State *v.* Ayer, 40 Kan. 43, 19 Pac. 403.

Maryland.— State *v.* Mercer, 101 Md. 535, 61 Atl. 220.

North Carolina.—State *v.* Peters, 107 N. C. 876, 12 S. E. 74.

Ohio.— Crusen *v.* State, 10 Ohio St. 258.

Oklahoma.— Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031.

Vermont.— State *v.* Chamberlain, 30 Vt. 559.

Washington.— State *v.* McLain, 43 Wash. 124, 86 Pac. 388.

Wisconsin.— State *v.* Lloyd, 77 Wis. 630, 46 N. W. 898; State *v.* Lamont, 2 Wis. 437.

United States.— U. S. *v.* Wood, 44 Fed. 753.

England.— Reg. *v.* Overton, 4 Q. B. 83, 3 G. & D. 133, 7 Jur. 196, 12 L. J. M. C. 61, 45 E. C. L. 83 (holding that the necessity for showing distinctly that the false oath is in a judicial proceeding is not dispensed with by 23 Geo. II, c. 11, § 1); Reg. *v.* Bishop, C. & M. 302, 41 E. C. L. 169; Reg. *v.* Gardiner, 8 C. & P. 737, 2 Moody C. C. 95, 34 E. C. L. 992; Reg. *v.* Pearson, 8 C. & P. 119, 34 E. C. L. 642.

See 39 Cent. Dig. tit. "Perjury," § 72.

Specific allegation unnecessary.— An indictment for perjury, setting out the name of the court, its location, term, and the parties to the cause, the nature of the action, the judge before whom the case was tried, and that it was tried in due form of law by a jury taken before the parties and duly sworn, and that defendant there appeared as a witness and swore falsely, sufficiently charges that the alleged perjury was committed in the course of a judicial proceeding, without a specific allegation of that fact. Kizer *v.* People, 211 Ill. 407, 71 N. E. 1035. An information for perjury, alleging that a certain information was pending against the accused, that issue was joined thereon, that the cause was tried in due form before a jury, and that the accused was sworn to testify as a witness and to testify to certain facts, sufficiently alleges that the testimony was given on the trial of an actual cause. State *v.* McLain, 43 Wash. 124, 86 Pac. 388.

Showing commission at trial.— An indictment for perjury, which charged defendant with having sworn falsely on certain proceedings before justices, wherein he was examined as a witness, where the allegation of materiality averred that "the said D. R. (the defendant) being so sworn as aforesaid, it then and there became material to enquire and ascertain, etc.," was held bad as not sufficiently showing that the alleged perjury was committed at the said proceedings. Reg. *v.* Ross, 5 Nova Scotia 683.

If not committed on the trial of an action the indictment should so allege. State *v.* Peters, 107 N. C. 876, 12 S. E. 74.

other lawful occasion;[25] and the indictment must show that such judicial proceeding was pending in court at the time the oath was taken and the false statement made.[26]

b. Nature of Proceeding and Issues. It is not essential, in an indictment for perjury, that the allegation of issue joined shall show specifically what the issue was. If the indictment, by its allegations, shows that the perjury was committed in a judicial proceeding, in a court of competent jurisdiction, and describes the judicial proceeding with reasonable certainty,[27] it is sufficient to allege in general terms that a certain issue was joined in said proceeding, without stating the issue.[28]

Where the oath itself constitutes a charge of felony, there need be no further allegation that the oath was taken in a judicial proceeding. People *v.* Robertson, 3 Wheel. Cr. (N. Y.) 180; Rex *v.* Aylett, 1 T. R. 63, 1 Rev. Rep. 152.

An information for perjury alleged to have been committed in swearing to an affidavit, which does not show that the affidavit was made to be used, or that it was actually used, in any judicial proceeding, is insufficient. People *v.* Fox, 25 Mich. 492; State *v.* Lloyd, 77 Wis. 630, 46 N. W. 898.

25. Morrell *v.* People, 32 Ill. 499; People *v.* Gaige, 26 Mich. 30; State *v.* Crumb, 68 Mo. 206; State *v.* Hamilton, 7 Mo. 300.

In a prosecution for statutory false swearing, which is equivalent to perjury not committed in a judicial proceeding, it is not necessary to allege expressly that the oath was not taken in a judicial proceeding, when it is shown unequivocally by the facts set out in the indictment. Thompson *v.* State, 120 Ga. 132, 47 S. E. 566.

26. State *v.* Hanson, 39 Me. 337; State *v.* Oppenheimer, 41 Tex. 82 (holding that an indictment for perjury should state when and where the judicial proceeding was pending in which the alleged false statement was made, and whether it was made during an examination, or on a trial under indictment); Reg. *v.* Pearson, 8 C. & P. 119, 34 E. C. L. 642.

Perjury in affidavit to hold to bail.—An affidavit to hold to bail may be sworn before the issuing of the writ of summons in the action; and therefore an indictment for perjury committed in such an affidavit need not state that any action was pending. King *v.* Reg. 14 Q. B. 31, 3 Cox C. C. 561, 18 L. J. Q. B. 253, 68 E. C. L. 31.

27. Bradford *v.* State, 134 Ala. 141, 32 So. 742; Davis *v.* State, 79 Ala. 20 (holding that an indictment for perjury, alleging that the offense was committed on the trial of an indictment for burglary, but not stating on whose property the burglary was committed, is uncertain and insufficient); Jacobs *v.* State, 61 Ala. 448; Com. *v.* Wright, 166 Mass. 174, 44 N. E. 129 (holding that where the description of the complaint shows that it was a criminal case in which defendant was alleged to have committed perjury, the indictment need not allege that it was in a criminal case); Conner *v.* Com., 2 Va. Cas. 30; U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,692, 4 Blatchf. 391 (holding that an indictment for perjury, alleged to have been committed on an examination of a person charged with a crime against a law of the United States, should show what the particular law was). And see Reg. *v.* Thompson, 4 Can. Cr. Cas. 265, 17 Can. L. T. Occ. Notes 295, 2 Northwest Terr. 39, 2 Terr. L. Rep. 383.

Perjury on trial of indictment for larceny.—An indictment for perjury charging that it was committed on the trial of an indictment against A B at the court of quarter sessions for the county of B, on the 11th of June, 1867, on a charge of larceny, is sufficient, and it is not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken; nor to allege that the indictment was in the name of the queen, as the court must take judicial notice of the fact that her majesty alone could prosecute on a charge of larceny. Reg. *v.* Macdonald, 17 U. C. C. P. 635.

Under the Kentucky statute an indictment for false swearing need not state the nature of the prosecution on the trial of which defendant swore falsely; it being sufficient to allege in the language of the statute that defendant was sworn by a person authorized by law to administer an oath, and that he deposed and gave evidence in a matter then judicially pending. Cope *v.* Com., 47 S. W. 436, 20 Ky. L. Rep. 721.

Under the Missouri statute punishing any person who shall wilfully commit perjury on any trial for felony, the indictment should charge that the crime on the trial for which the alleged perjury was committed was either made a felony by statute or was such as, at common law, amounted to felony. Hinch *v.* State, 2 Mo. 158.

Investigation before grand jury.—An indictment, which charges defendant with swearing falsely in a criminal investigation before the grand jury, need not allege that the person whose offense was under investigation, and about which defendant swore, was or was not guilty, nor the facts in regard to such offense. State *v.* Schill, 27 Iowa 263.

28. *Mississippi.*—State *v.* Silverberg, 78 Miss. 858, 29 So. 761.

New Jersey.—State *v.* Voorhis, 52 N. J. L. 351, 20 Atl. 26, holding that an averment in an indictment for perjury that it was committed in respect of the question of usury, which had become material on the trial of the cause, charges with requisite certainty the issue in the trial at which the perjury occurred.

New York.—People *v.* Grimshaw, 33 Hun 505.

e. Setting Out Record or Proceedings. At common law, where the alleged false oath was taken in court, it was necessary to set forth in the indictment with great particularity the pleadings, records, and proceedings on the trial, and the whole evidence.[29] Prosecutions for the offense were embarrassed by this particularity, and the statute of 23 Geo. II, c. 11, § 3, was passed to remove the evil. This act, which has been copied in several of the United States, dispensed with the necessity of setting out in the indictment the pleadings, or any part of the record or proceedings,[30] declaring it sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed.[31]

d. Result or Determination of Issue or Contest. An indictment for perjury need not aver that the action or proceeding in which the alleged false oath was made has been finally determined, or that any final judgment has been entered therein.[32]

3. Jurisdiction and Authority to Administer Oath — a. Jurisdiction of Court — (1) *In General* — (A) *At Common Law.* At common law an indictment for perjury committed in a judicial proceeding must affirmatively show the jurisdiction of the court over such proceedings,[33] which may be done either by a direct allegation to that effect,[34] or by the allegation of facts from which the jurisdiction appears.[35]

Rhode Island.— State *v.* Miller, 26 R. I. 282, 58 Atl. 882, holding that an indictment charging that defendant appeared as a witness on the trial of a certain plea of trespass, and was duly sworn to testify to the truth, etc., and that defendant falsely testified to certain material facts specified, sufficiently describes the issue.

Texas.— Covey *v.* State, 23 Tex. App. 388, 5 S. W. 283.

See 39 Cent. Dig. tit. "Perjury," § 74.

Grounds of action.—An indictment for perjury committed before a United States land officer need not set forth the grounds on which the contest was based. Peters *v.* U. S., 2 Okla. 138, 37 Pac. 1081. In an indictment for perjury based on alleged false swearing by defendant as a witness in his own behalf in an action for divorce, it is not necessary to allege that the ground for the divorce was not adultery. Markey *v.* State, 47 Fla. 38, 37 So. 53.

Joinder of issue.— An indictment for perjury need not aver a joinder of issue in the case in which the alleged perjury was committed in order to sufficiently charge the issue therein. State *v.* Nelson, 146 Mo. 256, 48 S. W. 84.

29. Jacobs *v.* State, 61 Ala. 448; State *v.* Hoyle, 28 N. C. 1; State *v.* Gallimon, 24 N. C. 372; State *v.* Stillman, 7 Coldw. (Tenn.) 341; Com. *v.* Lodge, 2 Gratt. (Va.) 579, holding that an indictment for perjury, for swearing to an answer in chancery, should set out the whole bill and answer.

30. State *v.* Hoyle, 28 N. C. 1; State *v.* Gallimon, 24 N. C. 372; Woods *v.* State, 14 Lea (Tenn.) 460.

31. *Alabama.*— Jacobs *v.* State, 61 Ala. 448.

Arkansas.— State *v.* Green, 24 Ark. 591.

California.— People *v.* Ah Bean, 77 Cal. 12, 18 Pac. 815.

Indiana.—Burk *v.* State, 81 Ind. 128; State *v.* Walls, 54 Ind. 407.

Iowa.— State *v.* Booth, (1901) 88 N. W. 344.

Louisiana.— State *v.* Gibson, 26 La. Ann. 71.

Missouri.— State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; State *v.* Keel, 54 Mo. 182.

Oregon.— State *v.* Witham, 6 Oreg. 366.

Tennessee.— Woods *v.* State, 14 Lea 460.

Texas.— Kelley *v.* State, (Cr. App. 1907) 103 S. W. 189.

England.— Rex *v.* Dowlin, 5 T. R. 311.

See 39 Cent. Dig. tit. "Perjury," § 73½.

Sufficient of proceedings to show materiality.— It is only necessary to set forth so much of the proceedings as will make manifest the materiality of the oath taken. Lamden *v.* State, 5 Humphr. (Tenn.) 83. See also State *v.* Ela, 91 Me. 309, 39 Atl. 1001; State *v.* Argo, 118 Tenn. 377, 100 S. W. 106. Where the indictment distinctly charges that the false oath was taken in a judicial proceeding, and in a matter material to the issue, and where the proceeding and the issue are plainly indicated, any mere vagueness or incompleteness of description must be excepted to before trial, and is not cause for arresting the judgment. Pennaman *v.* State, 58 Ga. 336.

32. State *v.* Keene, 26 Me. 33; Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638; Com. *v.* Moore, 9 Pa. Co. Ct. 501.

33. Roundtree *v.* Roundtree, Ky. Dec. 56; State *v.* Plummer, 50 Me. 217. See *supra*, I, B, 4, a.

34. Franklin *v.* State, 91 Ga. 712, 17 S. E. 987; State *v.* Oppenheimer, 41 Tex. 82; State *v.* Webb, 41 Tex. 67; Anderson *v.* State, 18 Tex. App. 17.

35. *California.*— People *v.* Howard, 111 Cal. 655, 44 Pac. 342.

Georgia.— Franklin *v.* State, 91 Ga. 712, 17 S. E. 987.

Louisiana.— State *v.* Thibodaux, 49 La. Ann. 15, 21 So. 127 (where it is said that where an indictment for perjury in the same

(B) *Under Modern Statutes.* Under the English statute of 23 Geo. II, c. 11, and similar statutes in this country, declaring that it shall be sufficient in an indictment for perjury to set forth the substance of the offense charged, etc., it is not necessary for the indictment to expressly state that the court had jurisdiction of the case in which the alleged false testimony was given, but an allegation that the court had authority to administer the oath is sufficient.[36]

(II) *How Jurisdiction Was Acquired.* Under the modern rule of pleading in perjury cases, an indictment which alleges the jurisdiction of the court in which the perjury was committed over the offense then on trial need not state whether jurisdiction was acquired by indictment or information.[37]

b. Jurisdiction of Ministerial Officer Sitting as Court. An indictment for perjury in a proceeding before a ministerial officer need not allege the facts showing his jurisdiction, if it charges that he was authorized to administer the oath.[38] So also, when the court can take judicial notice of the fact that an officer had jurisdiction of the proceeding in question, such jurisdiction need not be alleged.[39]

c. Authority of Officer to Administer Oath — (I) *In General.* In an indictment for perjury, the authority of the officer to administer the oath must be shown by proper averment.[40] If it is not, the indictment will be fatally defec-

court in which the perjury was committed sufficiently sets forth the facts, the court may take judicial notice of its jurisdiction and authority to administer the oath, and it need not be alleged); State *v.* Grover, 38 La. Ann. 567; State *v.* Schlessinger, 38 La. Ann. 564.

South Carolina.— State *v.* Farrow, 10 Rich. 165.

Texas.— State *v.* Webb, 41 Tex. 67; State *v.* Oppenheimer, 41 Tex. 52; Anderson *v.* State, 18 Tex. App. 17.

See 39 Cent. Dig. tit. "Perjury," § 76.

36. *California.*— State *v.* De Carlo, 124 Cal. 462, 57 Pac. 383.

Colorado.— Thompson *v.* State, 26 Colo. 496, 59 Pac. 51.

Illinois.— Kizer *v.* People, 211 Ill. 407, 71 N. E. 1035; Maynard *v.* People, 135 Ill. 416, 25 N. E. 740.

Iowa.— State *v.* Newton, 1 Grecne 160, 48 Am. Dec. 367.

Massachusetts.— Com. *v.* Knight, 12 Mass. 274, 7 Am. Dec. 72.

Missouri.— State *v.* Keel, 54 Mo. 182.

New York.— Burns *v.* People, 59 Barb. 531; State *v.* Phelps, 5 Wend. 9.

North Carolina.— State *v.* Green, 100 N. C. 419, 5 S. E. 422; State *v.* Roberson, 98 N. C. 751, 4 S. E. 511.

Ohio.— Halleck *v.* State, 11 Ohio 400.

Utah.— People *v.* Greenwell, 5 Utah 112, 13 Pac. 89.

Virginia.— Fitch *v.* Com., 92 Va. 824, 24 S. E. 272.

Washington.— State *v.* Douetto, 31 Wash. 6, 71 Pac. 556.

England.— Lavey *v.* Reg., 17 Q. B. 496, 5 Cox C. C. 269, 2 Den. C. C. 504, 16 Jur. 36, 21 L. J. M. C. 10, 7 Eng. L. & Eq. 401, 79 E. C. L. 496; Rex *v.* Callanan, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. O. S. 39, 13 E. C. L. 57; Reg. *v.* Lawlor, 6 Cox C. C. 187.

See 39 Cent. Dig. tit. "Perjury," § 76.

When the jurisdiction of a tribunal is special it should be set forth with certainty. State *v.* McCone, 59 Vt. 117, 7 Atl. 406.

Facts need not be stated.— In a prosecution for perjury upon an application for naturalization, it is immaterial that the record does not show the facts necessary to give the court jurisdiction, as its jurisdiction does not depend upon the facts stated, but is derived from the statutes of the United States. U. S. *v.* Walsh, 22 Fed. 644.

Court of general jurisdiction.— It is not necessary, even in an indictment for perjury committed before an inferior court, to set out all the facts to show its jurisdiction; and it is sufficient to aver that it had authority to administer the oath. Much less is so great a degree of exactness required when the averment relates to a court of general jurisdiction. Eighmy *v.* People, 79 N. Y. 546.

Police court.— An indictment for perjury in a police court is not bad for failing to set forth *in hæc verba* the provision of the ordinances creating the police court and authorizing the appointment of a clerk of that court and authorizing him to administer oaths; the ordinances being referred to by number and their general tenor recited. State *v.* Dineen, 203 Mo. 628, 102 S. W. 480.

37. State *v.* Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660; State *v.* Wise, 3 Lea (Tenn.) 38; Powers *v.* State, 17 Tex. App. 428. *Compare* State *v.* Oppenheimer, 41 Tex. 82; State *v.* Webb, 41 Tex. 67.

Contra, before the adoption of the present code. Steinston *v.* State, 6 Yerg. (Tenn.) 531.

38. State *v.* Belew, 79 Mo. 584; People *v.* Tredway, 3 Barb. (N. Y.) 470; People *v.* Phelps, 5 Wend. (N. Y.) 9.

39. Rich *v.* U. S., 2 Okla. 146, 37 Pac. 1083, 1 Okla. 354, 33 Pac. 804; Peters *v.* U. S., 2 Okla. 138, 37 Pac. 1081.

40. *California.*— People *v.* Dunlap, 113 Cal. 72, 45 Pac. 183.

Florida.— Craft *v.* State, 42 Fla. 567, 29 So. 418; Freeman *v.* State, 19 Fla. 552.

Indiana.— State *v.* Hopper, 133 Ind. 460, 32 N. E. 878.

Iowa.— State *v.* Cunningham, 66 Iowa 94,

tive.[41] This may be done either by an express averment that the officer had authority,[42] or by setting out such facts as make it judicially appear that he had such authority.[43] Where the authority of the officer to administer the oath fully appears by the facts set forth in the indictment, the formal allegation of his authority is unnecessary, since the court will take judicial notice thereof.[44]

(II) *How Authority Was Acquired.* Under the modern statutes it is not necessary to set forth the commission or authority of the person or persons before whom the perjury was committed. The statement that such person had authority is sufficient.[45]

d. Description of Court or Officer Administering Oath — (I) *Description of Court.* In an indictment for perjury the style of the court before which the perjury is alleged to have been committed must be properly set forth;[46] but

23 N. W. 280; State *v.* Nickerson, 46 Iowa 447.

Louisiana.— State *v.* Harlis, 33 La. Ann. 1172.

Oregon.— State *v.* Woolridge, 45 Oreg. 389, 78 Pac. 333.

Texas.— Stewart *v.* State, 6 Tex. App. 184.

England.— Reg. *v.* Overton, 4 Q. B. 83, 3 G. & D. 133, 7 Jur. 196, 12 L. J. M. C. 61, 45 E. C. L. 83; Rex *v.* Callanan, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. O. S. 39, 13 E. C. L. 57; Rex *v.* McDonald, 21 Cox C. C. 70.

See 38 Cent. Dig. tit. "Perjury," § 77.

But see Com. *v.* Hughes, 5 Allen (Mass.) 499.

41. State *v.* Owen, 73 Mo. 440.

42. *Indiana.*— State *v.* Hopper, 133 Ind. 460, 32 N. E. 878. *Compare* McGragor *v.* State, 1 Ind. 232.

Iowa.— State *v.* Cunningham, 66 Iowa 94, 23 N. W. 280.

Oregon.— State *v.* Woolridge, 45 Oreg. 389, 78 Pac. 333.

Pennsylvania.— Com. *v.* O'Neill, 5 Pa. Co. Ct. 209.

Texas.— Waters *v.* State, 30 Tex. App. 284, 17 S. W. 411.

United States.— U. S. *v.* Boggs, 31 Fed. 337.

See 39 Cent. Dig. tit. "Perjury," § 77.

But see People *v.* Cohen, 118 Cal. 74, 50 Pac. 20.

Facts may be shown under general averment.— Under the averment that the officer was authorized and empowered by law to administer the oath to defendant, the facts essential to his jurisdiction and authority to administer it may be shown. State *v.* Cunningham, 66 Iowa 94, 23 N. W. 280.

43. Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; State *v.* Hopper, 133 Ind. 460, 32 N. E. 878; State *v.* Cunningham, 66 Iowa 94, 23 N. W. 280; St. Clair *v.* State, 11 Tex. App. 297.

An allegation that the oath was administered by a justice of the peace is sufficient without a further allegation of facts showing that authority to administer an oath existed in the instance in question, such facts being proper to be offered in evidence at the trial. Com. *v.* Combs, 101 S. W. 312, 30 Ky. L. Rep. 1300.

An allegation that the oath was administered by a "coroner," without stating that it was by a justice acting as coroner, fails to show that it was by lawful authority; the office of coroner not having existed since the adoption of the constitution of 1869. Stewart *v.* State, 6 Tex. App. 184.

44. *Indiana.*—Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; State *v.* Hopper, 133 Ind. 460, 32 N. E. 878.

Iowa.— State *v.* Harter, 131 Iowa 199, 108 N. W. 232.

Kentucky.— Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683.

United States.— U. S. *v.* Eddy, 134 Fed. 114.

Canada.— Reg. *v.* Callaghan, 19 U. C. Q. B. 364.

See 39 Cent. Dig. tit. "Perjury," § 77.

45. *California.*— People *v.* De Carlo, 124 Cal. 462, 57 Pac. 383.

Illinois.— Johnson *v.* People, 94 Ill. 505.

Indiana.— Burk *v.* State, 81 Ind. 128.

Missouri.— State *v.* Marshall, 47 Mo. 378.

North Carolina.— State *v.* Bryson, 4 N. C. 115.

Texas.— State *v.* Peters, 42 Tex. 7; Bradberry *v.* State, 7 Tex. App. 375; Stewart *v.* State, 6 Tex. App. 184.

England.— Rex *v.* Callanan, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. O. S. 39, 13 E. C. L. 57.

See 39 Cent. Dig. tit. "Perjury," § 79.

Contra.— U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,692, 4 Blatchf. 391, where the officer is not alleged to hold an office which apparently confers upon him the right to administer the oath in question.

46. Woolsey *v.* Com., 4 Ky. L. Rep. 353; Guston *v.* People, 4 Lans. (N. Y.) 487, 61 Barb. 35; State *v.* Street, 5 N. C. 156, 3 Am. Dec. 682; State *v.* Oppenheimer, 41 Tex. 82.

Descriptions held sufficient see Smith *v.* People, 32 Colo. 251, 75 Pac. 914; State *v.* Stein, 48 Minn. 466, 51 N. W. 474; State *v.* Nelson, 146 Mo. 256, 48 S. W. 84; U. S. *v.* Walsh, 22 Fed. 644.

Regimental court of inquiry.— Under an indictment for perjury in taking a false oath before a regimental court of inquiry, the indictment must set forth of what number of officers said court consisted and what was their respective rank, so that the court may

the person holding the court need not be named;[47] nor is it necessary to name the officer before whom the false oath was taken; designating the court is enough.[48]

(II) *Description of Officer.* If the alleged perjury was committed in a non-judicial proceeding, the name of the officer before whom the false oath was taken must be averred,[49] and the omission thereof is fatal.[50]

4. Administration, Form, and Making of Oath. An indictment for perjury must allege that defendant was sworn in the proceedings in which he is alleged to have falsely testified.[51] The fact should be alleged directly and positively, and not by way of inference or recital.[52] It is not necessary, however, to allege in what particular form defendant was sworn to testify. It is sufficient to allege that he was "duly sworn,"[53] provided the indictment states the circumstances under

see whether the court of inquiry was legally constituted or not. Conner *v.* Com., 2 Va. Cas. 30.

47. State *v.* Flowers, 109 N. C. 841, 13 S. E. 718 (holding, however, that it is not error to give, in addition to the names of the court, the names of the justices who sat at the trial); U. S. *v.* Walsh, 22 Fed. 644.

48. Smith *v.* People, 32 Colo. 251, 75 Pac. 914; State *v.* Harter, 131 Iowa 199, 108 N. W. 232; State *v.* Spencer, 6 Oreg. 152.

49. Hitesman *v.* State, 48 Ind. 473; State *v.* Ellison, 8 Blackf. (Ind.) 225; State *v.* Harlis, 33 La. Ann. 1172; State *v.* Oppenheimer, 41 Tex. 82; U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,692, 4 Blatchf. 391, holding that the act of April 30, 1790, in relation to the forms of indictment for perjury, did not dispense with the necessity of such averments.

The official title of the officer administering the oath need not be stated. McClerkin *v.* State, 105 Ala. 107, 17 So. 123; Com. *v.* O'Neill, 5 Pa. Co. Ct. 209. *Contra*, U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,692, 4 Blatchf. 391.

An indictment for perjury before a grand jury need not allege the name of the foreman thereof, or that he administered the oath when the jury was in session. This can be shown by the records of the court. St. Clair *v.* State, 11 Tex. App. 297.

50. Kerr *v.* People, 42 Ill. 307.

51. *California.*— People *v.* Simpton, 133 Cal. 367, 65 Pac. 834; People *v.* Dunlap, 113 Cal. 72, 45 Pac. 183.

Florida.— Craft *v.* State, 42 Fla. 567, 29 So. 418.

Louisiana.— State *v.* Eddens, 52 La. Ann. 1461, 27 So. 742.

Missouri.— State *v.* Hamilton, 7 Mo. 300, holding that, in an indictment for perjury against a party to a suit, it is necessary to show that he was sworn under circumstances which authorized him to be sworn as a witness in the case.

New Hampshire.— State *v.* Divoll, 44 N. H. 140.

Texas.— Parker *v.* State, 44 Tex. Cr. 147, 69 S. W. 75; Curtley *v.* State, 42 Tex. Cr. 227, 59 S. W. 44.

United States.— U. S. *v.* McConaughy, 33 Fed. 168, 13 Sawy. 141; U. S. *v.* Hearing, 26 Fed. 744.

England.—Reg. *v.* Goodfellow, C. & M. 569, 41 E. C. L. 310.

See 39 Cent. Dig. tit. "Perjury," § 80.

Form of alleging that defendant was sworn see State *v.* Divoll, 44 N. H. 140.

How testimony given.— It is not necessary that it should appear in the indictment whether the false testimony of the witness was given in answer to a specific question put to him, or in the course of his own relation of the facts; for, in either case, he is equally required by law to depose the truth. Com. *v.* Knight, 12 Mass. 274, 7 Am. Dec. 72.

Averments held insufficient to show oath administered.— "Made and subscribed in open court, wickedly, falsely, willfully, corruptly and knowingly, the following false and corrupt oath, which is in substance as follows," etc., was held not a sufficient allegation that the party was sworn. State *v.* Divoll, 44 N. H. 140. But see State *v.* Scott, 78 Minn. 311, 81 N. W. 3.

The allegation that defendant did "depose and swear" to a deposition set forth is not sufficient. U. S. *v.* McConaughy, 33 Fed. 168, 13 Sawy. 141.

Oath "before" officer.— While the direct statement that an oath was administered "by" the officer is the better form, an allegation that the oath was taken "before" him is sufficient. People *v.* Ennis, 137 Cal. 263, 70 Pac. 84; State *v.* Mercer, 101 Md. 535, 61 Atl. 220; Flournoy *v.* State, (Tex. Cr. App. 1900) 59 S. W. 902. See also Campbell *v.* People, 8 Wend. (N. Y.) 636.

52. *Missouri.*— State *v.* Hamilton, 65 Mo. 667.

New Hampshire.— State *v.* Divoll, 44 N. H. 140.

Wisconsin.— Brown *v.* State, 91 Wis. 245, 64 N. W. 749.

United States.— U. S. *v.* McConaughy, 33 Fed. 168, 13 Sawy. 141; U. S. *v.* Hearing, 26 Fed. 744.

England.— Rex *v.* Stevens, 5 B. & C. 246, 11 E. C. L. 448; Rex *v.* Richards, 7 D. & R. 665, 4 L. J. K. B. O. S. 155, 16 E. C. L. 313.

See 39 Cent. Dig. tit. "Perjury," § 80.

In Vermont it is held that a direct averment that defendant was sworn is not necessary; the allegation that defendant committed the crime of perjury being held to imply an oath legally administered. State *v.* Webber, 78 Vt. 463, 62 Atl. 1018; State *v.* Camley, 67 Vt. 322, 31 Atl. 840.

53. *Arkansas.*— State *v.* Green, 24 Ark. 591.

which the oath was required and the occasion on which it was made, so as to show that its violation was perjury.[54]

5. Setting Out False Matter. Under the English statute of 23 Geo. II, c. 11, and similar statutes in this country, it has been almost uniformly held that in an indictment for perjury it is not necessary to set out the exact language used by defendant on the occasion of the alleged perjury, but it is sufficient to allege the substance and effect thereof.[55] Of course the indictment should allege the false testimony as nearly as possible in the language of defendant.[56] It is not necessary, however, to set out the whole of the oath; such parts as are alleged to have been false and are material are all that are required.[57] Nor is it necessary to set forth the interrogatories in answer to which the perjury is charged to have been committed.[58] But the matter alleged to be false must be set out sufficiently and with such particularity as to inform the court and the defendant of the particular offense charged.[59]

6. Materiality of Testimony, Assertion, or Oath — a. Necessity of Averment of Materiality of Testimony or Assertion — (i) *In General.* In the absence of a statute to the contrary, it is well settled that an indictment for perjury must show conclusively that the testimony given or assertion made by defendant, and charged to be false, was material to the issue on the trial of which he was sworn,[60]

Iowa.— State *v.* O'Hagan, 38 Iowa 504, holding that an indictment for perjury alleging that defendant was "duly sworn" is not objectionable on the ground that it does not charge the oath to have been administered by any one.

New Jersey.— Dodge *v.* State, 24 N. J. L. 455.

New York.— Tuttle *v.* People, 36 N. Y. 431.

Oregon.—State *v.* Woolridge, 45 Oreg. 389, 78 Pac. 333.

Pennsylvania.— Respublica *v.* Newell, 3 Yeates 407, 2 Am. Dec. 381.

South Carolina.— State *v.* Farrow, 10 Rich. 165.

Texas.— Lamar *v.* State, (Cr. App. 1906) 95 S. W. 509; Beach *v.* State, 32 Tex. Cr. 240, 22 S. W. 976.

England.— Rex *v.* McCarther, 1 Peake N. P. 155.

See 39 Cent. Dig. tit. "Perjury," § 80.

54. State *v.* Umdenstock, 43 Tex. 554.

55. *New York.*— People *v.* Ostrander, 64 Hun 335, 19 N. Y. Suppl. 324, 328; People *v.* Warner, 5 Wend. 271; People *v.* Robertson, 3 Wheel. Cr. 180.

North Carolina.— State *v.* Groves, 44 N. C. 402.

Rhode Island.— State *v.* Terline, 23 R. I. 530, 51 Atl. 204.

Texas.— State *v.* Umdenstock, 43 Tex. 554; Simpson *v.* State, 46 Tex. Cr. 77, 79 S. W. 530; Shely *v.* State, 35 Tex. Cr. 190, 32 S. W. 901; Jackson *v.* State, 15 Tex. App. 579; Gabrielsky *v.* State, 13 Tex. App. 428; Rohrer *v.* State, 13 Tex. App. 163.

United States.— U. S. *v.* Walsh, 22 Fed. 644.

Canada.— Reg. *v.* Trudel, 14 Quebec 193.

See 39 Cent. Dig. tit. "Perjury," § 81.

False testimony given in foreign language. —An indictment for perjury is not bad for failing to set out the words of the foreign language used by defendant in giving the alleged false testimony, when it gives in English the substance of such testimony. State *v.* Terline, 23 R. I. 530, 51 Atl. 204; Reg. *v.* Thomas, 2 C. & K. 806, 61 E. C. L. 806.

"In substance and to the effect following." — Where the oath is set forth in the indictment "in substance and to the effect following," an exact recital is not necessary. People *v.* Warner, 5 Wend. (N. Y.) 271.

In Indiana it is provided by statute that in an indictment for perjury in swearing to any written instrument, it shall only be necessary to "set forth" that part of the instrument alleged to have been falsely sworn to. Under this statute it is held that an instrument, or a part of it, cannot be set forth in any other way than to give the tenor thereof, or, in other words, an exact copy. State *v.* Blackstone, 74 Ind. 592; Coppack *v.* State, 36 Ind. 513.

56. Higgins *v.* State, (Tex. Cr. App. 1906) 97 S. W. 1054, holding further that where it is permissible in an indictment for perjury to set out in detail the alleged false testimony on which the perjury is predicated, such testimony should be concisely alleged.

57. State *v.* Neal, 42 Mo. 119; Campbell *v.* State, 8 Wend. (N. Y.) 636; Gabrielsky *v.* State, 13 Tex. App. 428.

58. State *v.* Bishop, 1 D. Chipm. (Vt.) 120.

59. Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Thomas *v.* State, 54 Ark. 584, 16 S. W. 568; State *v.* Mace, 76 Me. 64; Reg. *v.* Trudel, 14 Quebec 193.

60. *California.*— People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

Florida.— Parrish *v.* State, 18 Fla. 902; Robinson *v.* State, 18 Fla. 898.

Georgia.— King *v.* State, 103 Ga. 263, 30 S. E. 30.

Indiana.— Burk *v.* State, 81 Ind. 128; State *v.* Thrift, 30 Ind. 211; Weathers *v.* State, 2 Blackf. 278.

or it will be fatally defective.[61] This may be done, either by a direct allegation that it was material, or by the allegation of facts from which its materiality will appear.[62]

Maine.— State *v.* Ela, 91 Me. 309, 39 Atl. 1001.

Missouri.— State *v.* Holden, 48 Mo. 93.

New York.— Guston *v.* People, 4 Lans. 487, 61 Barb. 35.

South Carolina.—State *v.* Hayward, 1 Nott & M. 546.

Tennessee.— State *v.* Moffatt, 7 Humphr. 250; State *v.* Wall, 9 Yerg. 347.

Texas.— Morris *v.* State, (Cr. App. 1904) 83 S. W. 1126; Moroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696; McAvoy *v.* State, 39 Tex. Cr. 684, 47 S. W. 1000; Dorrs *v.* State, (Cr. App. 1897) 40 S. W. 311; Weaver *v.* State, 34 Tex. Cr. 554, 31 S. W. 400; Agar *v.* State, 29 Tex. App. 605, 16 S. W. 761; Donohoe *v.* State, 14 Tex. App. 638.

Vermont.— State *v.* Chandler, 42 Vt. 446; State *v.* Trask, 42 Vt. 152.

See 39 Cent. Dig. tit. "Perjury," § 82.

It is not sufficient to allege that the issue to be tried was material; but the fact which the witness swore to, and which constitutes the perjury, must be charged to have been material. Rosebud *v.* State, (Tex. Cr. App. 1906) 98 S. W. 858.

Materiality not being an element of statutory false swearing, it need not be alleged that the alleged false testimony given was material to the issue. Gammage *v.* State, 119 Ga. 380, 46 S. E. 409; Richey *v.* Com., 81 Ky. 524; Ford *v.* Com., 29 S. W. 446, 16 Ky. L. Rep. 528.

Where oath not required.— In an indictment for perjury, under 2 Gavin & H. St. § 41, p. 450, including cases where, an oath not being required, the person nevertheless makes such oath or affirmation, it need not appear that the false statements were touching material matter. State *v.* Flagg, 25 Ind. 243.

61. *Georgia.*— Hembree *v.* State, 52 Ga. 242.

Indiana.— State *v.* Anderson, 103 Ind. 170, 2 N. E. 332; State *v.* McCormick, 52 Ind. 169.

Louisiana.— State *v.* Gibson, 26 La. Ann. 71.

Massachusetts.— Com. *v.* Byron, 14 Gray 31.

Texas.— McMurtry *v.* State, (Cr. App. 1898) 43 S. W. 1010; Martin *v.* State, 33 Tex. Cr. 317, 26 S. W. 400.

United States.— U. S. *v.* Singleton, 54 Fed. 488.

England.— Rex *v.* Nicholl, 1 B. & Ad. 21, 8 L. J. M. C. O. S. 112, 20 E. C. L. 381.

See 39 Cent. Dig. tit. "Perjury," § 82.

The fact that some of the statements on which the perjury is assigned are immaterial does not vitiate the indictment. State *v.* Williams, 60 Kan. 837, 58 Pac. 476, 61 Kan. 739, 60 Pac. 1050; Jefferson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 88; Dorrs *v.* State, (Tex. Cr. App. 1897) 40 S. W. 311.

62. *California.*— People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155; People *v.* Ah Bean, 77 Cal. 12, 18 Pac. 815.

Florida.— Gibson *v.* State, 47 Fla. 34, 36 So. 706; Brown *v.* State, 47 Fla. 16, 36 So. 705.

Indiana.— State *v.* Hopper, 133 Ind. 460, 32 N. E. 878; State *v.* Cunningham, 116 Ind. 209, 18 N. E. 613; State *v.* Flagg, 25 Ind. 243.

Iowa.— State *v.* Cunningham, 66 Iowa 94, 23 N. W. 280.

Kansas.— State *v.* Horine, 70 Kan. 256, 78 Pac. 411.

Louisiana.— State *v.* Brown, 111 La. 170, 35 So. 501.

Massachusetts.— Com. *v.* McCarty, 152 Mass. 577, 26 N. E. 140.

Michigan.— People *v.* Collier, 1 Mich. 137, 48 Am. Dec. 699.

Mississippi.—State *v.* Booker, 84 Miss. 187, 36 So. 241.

New Jersey.— State *v.* Voorhis, 52 N. J. L. 351, 20 Atl. 26; State *v.* Beard, 25 N. J. L. 384.

New York.— Wood *v.* People, 59 N. Y. 117.

Tennessee.— State *v.* Bowlus, 3 Heisk. 29.

Texas.— Buller *v.* State, 33 Tex. Cr. 551, 28 S. W. 465; Partain *v.* State, 22 Tex. App. 100, 2 S. W. 854; Mattingly *v.* State, 8 Tex. App. 345.

Virginia.— Fitch *v.* Com., 92 Va. 824, 24 S. E. 272.

Washington.— State *v.* Guse, 21 Wash. 269, 57 Pac. 831.

United States.— U. S. *v.* Singleton, 54 Fed. 488; U. S. *v.* Cowing, 25 Fed. Cas. No. 14,880, 4 Cranch C. C. 613.

England.— Rex *v.* Nicholl, 1 B. & Ad. 21, 8 L. J. M. C. O. S. 112, 20 E. C. L. 381; Reg. *v.* Cutts, 4 Cox C. C. 435; Rex *v.* McKeron, 5 T. R. 316 note.

See 39 Cent. Dig. tit. "Perjury," § 82.

Compare Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699, holding that an indictment for perjury which does not show upon its face that the alleged false testimony was material to the issue is fatally defective, and the defect is not cured by a general averment of materiality.

Oaths taken before taxing officers.—An indictment charging perjury in making a false return of personal property to an assessor that does not aver that the property which defendant is charged with having concealed was assessable by the assessor of that township is bad for failure to show the materiality of the matter. State *v.* Wood, 110 Ind. 82, 10 N. E. 639; State *v.* Reynolds, 108 Ind. 353, 9 N. E. 287; State *v.* Cunningham, 66 Iowa 94, 23 N. W. 280; State *v.* Crumb, 68 Mo. 206; State *v.* Smith, 43 Tex. 655.

Oaths before registration office.—An indictment for perjury in making a false affidavit before a registering officer is defective when it does not show whether the place at which

(II) *Necessity of Averring Facts to Show Materiality.* It is sufficient to charge generally that the false testimony was in respect to a matter material to the issue, without setting out the facts from which such materiality appears.[63]

defendant testified that the person desiring to vote lived was within the precinct where it was alleged that he voted. Com. *v.* McClelland, 83 Ky. 686, 7 Ky. L. Rep. 769.

Oath in insolvency proceedings.—An allegation in an indictment for perjury that an insolvent, on a hearing on a proposal for composition, made false answers to the question whether, two days before the filing of his petition in insolvency, he had checks and money in his possession, sufficiently shows that the inquiry was material. Com. *v.* McCarty, 152 Mass. 577, 26 N. E. 140. See also People *v.* Naylor, 82 Cal. 607, 23 Pac. 116.

Oath in supplemental proceedings.—A charge in the indictment that the debtor had, at the time of his examination, property of a certain amount, is insufficient, without an allegation that such property, or some part of it, was subject to execution in the county. State *v.* Cunningham, 116 Ind. 209, 18 N. E. 613.

63. *Alabama.*— Williams *v.* State, 68 Ala. 551.

California.— People *v.* Ennis, 137 Cal. 263, 70 Pac. 84; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* De Carlo, 124 Cal. 462, 57 Pac. 383.

Colorado.— Thompson *v.* People, 26 Colo. 496, 59 Pac. 51.

Florida.— Markey *v.* State, 47 Fla. 38, 37 So. 53.

Georgia.— King *v.* State, 103 Ga. 263, 30 S. E. 30; Johnson *v.* State, 76 Ga. 790.

Illinois.— Greene *v.* People, 182 Ill. 278, 55 N. E. 341; Kimmel *v.* People, 92 Ill. 457.

Kansas.— State *v.* Brownfield, 67 Kan. 627, 73 Pac. 925.

Louisiana.—State *v.* Jean, 42 La. Ann. 946, 8 So. 480; State *v.* Gonsoulin, 42 La. Ann. 579, 7 So. 633; State *v.* Maxwell, 28 La. Ann. 361.

Massachusetts.— Com. *v.* McCarty, 152 Mass. 577, 26 N. E. 140; Com. *v.* Farley, Thach. Cr. Cas. 654.

Michigan.— Flint *v.* People, 35 Mich. 491; Hoch *v.* People, 3 Mich. 552.

Mississippi.— Lea *v.* State, 64 Miss. 278, 1 So. 235.

Missouri.— State *v.* Nelson, 146 Mo. 256, 48 S. W. 84. But see State *v.* Wakefield, 73 Mo. 549 [*affirming* 9 Mo. App. 326]; State *v.* Shanks, 66 Mo. 560; State *v.* Keel, 54 Mo. 182.

Nebraska.— Gandy *v.* State, 23 Nebr. 436, 36 N. W. 817.

New Mexico.— Territory *v.* Lockhart, 8 N. M. 523, 45 Pac. 1106 [*overruling* Territory *v.* Remuzon, 3 N. M. 368, 9 Pac. 598].

New York.— People *v.* Burroughs, 1 Park. Cr. 211.

North Carolina.— State *v.* Davis, 69 N. C. 495; State *v.* Mumford, 12 N. C. 519, 17 Am. Dec. 573.

Ohio.— Dilcher *v.* State, 39 Ohio St. 130; Barnes *v.* State, 15 Ohio Cir. Ct. 14.

Oklahoma.— Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861; Rich *v.* U. S., 1 Okla. 354, 33 Pac. 804.

Texas.— Henry *v.* State, 43 Tex. Cr. 176, 63 S. W. 642; Jernigan *v.* State, 43 Tex. Cr. 114, 63 S. W. 560; Chavarria *v.* State, (Cr. App. 1901) 63 S. W. 312; Scott *v.* State, 35 Tex. Cr. 11, 29 S. W. 274; Adams *v.* State, (Cr. App. 1895) 29 S. W. 270; Cravey *v.* State, 33 Tex. Cr. 557, 28 S. W. 472; Sisk *v.* State, 28 Tex. App. 432, 13 S. W. 647; Partain *v.* State, 22 Tex. App. 100, 2 S. W. 854; Washington *v.* State, 22 Tex. App. 26, 3 S. W. 228. But see Crow *v.* State, (Cr. App. 1905) 90 S. W. 650.

Vermont.— State *v.* Sleeper, 37 Vt. 122.

Washington.— State *v.* McLain, 43 Wash. 124, 86 Pac. 388.

West Virginia.— Stofer *v.* State, 3 W. Va. 689.

England.— Reg. *v.* Schlesinger, 10 Q. B. 670, 2 Cox C. C. 200, 12 Jur. 283, 17 L. J. M. C. 29, 59 E. C. L. 670; Reg. *v.* Scott, 2 Q. B. D. 415, 13 Cox C. C. 594, 46 L. J. M. C. 259, 36 L. T. Rep. N. S. 476, 25 Wkly. Rep. 697; Reg. *v.* Bennett, 3 C. & K. 124, 5 Cox C. C. 207, 2 Den. C. C. 241, 15 Jur. 496, 20 L. J. M. C. 217, T. & M. 567; Reg. *v.* Goodfellow, C. & M. 569, 41 E. C. L. 310; Reg. *v.* Gardiner, 8 C. & P. 737, 2 Moody C. C. 95, 34 E. C. L. 992; Reg. *v.* Dowlin, 5 T. R. 311.

See 39 Cent. Dig. tit. "Perjury," § 83.

Averments held sufficient to show materiality of testimony see Shaffer *v.* State, 87 Md. 124, 39 Atl. 313; Com. *v.* Wright, 166 Mass. 174, 44 N. E. 129; Com. *v.* Flynn, 3 Cush. (Mass.) 525; State *v.* Woolridge, 45 Oreg. 389, 78 Pac. 333; Johnson *v.* State, 34 Tex. Cr. 555, 31 S. W. 397; Fitch *v.* Com., 92 Va. 824, 24 S. E. 272.

Form of express averment.— The usual form, when an express allegation of materiality is made, is to state that it became a material question whether such a thing happened or not. It is improper to state that it became material to ascertain the truth of what the witness stated; the witness' statement itself must be given to ascertain the truth of something which became material to the inquiry before the statement was made. People *v.* Collier, 1 Mich. 137, 139, 48 Am. Dec. 699; Reg. *v.* Goodfellow, C. & M. 569, 41 E. C. L. 310. When more than one question is relied on as material, it is usual to aver that certain "questions" became and were material, to wit, whether, etc., "and" whether, etc., or "and also" whether, etc., but this form is not essential, and where the averment is that a "question" became material, several questions may well be set forth without a collective particle. Com. *v.* Johns, 6 Gray (Mass.) 274.

Express averment lets in evidence.— In an indictment for perjury, an express averment that a question was material lets in evidence to prove that it was so. Reg. *v.* Bennett, 3

If, however, the facts are also stated, and it clearly appears that the testimony was not material, a formal allegation of materiality will not save the indictment.[64]

(III) *Necessity of Express Averment When Facts Alleged.* Where, in an indictment for perjury, it is apparent from the averments that the evidence which is charged to be false was material, it is not essential to state the legal conclusion by alleging that the evidence was material. The court, being apprised of the facts, may draw the conclusion without the allegation.[65] So also, where the averments as to the materiality of what is alleged to have been sworn falsely are defective, the indictment is nevertheless good, if such materiality sufficiently appears on its face.[66]

b. Necessity of Averment of Materiality of Oath. Since perjury cannot be assigned on an affidavit which is not required or authorized by law to be made,[67] an indictment for perjury in making an affidavit must allege that it was made to be, or was in fact, used for some lawful purpose.[68] So also an information for

C. & K. 124, 5 Cox C. C. 207, 2 Den. C. C. 241, 15 Jur. 496, 20 L. J. M. C. 217, T. & M. 567.

64. *California.*—People *v.* Brilliant, 58 Cal. 214.

Indiana.— State *v.* Sutton, 147 Ind. 158, 46 N. E. 468.

Kansas.— State *v.* Smith, 40 Kan. 631, 20 Pac. 529.

Maine.— State *v.* Ela, 91 Me. 309, 39 Atl. 1001.

Pennsylvania.— Com. *v.* Wood, 2 Pa. Dist. 823, 13 Pa. Co. Ct. 477, 7 Kulp 141.

United States.—See U. S. *v.* Pettus, 84 Fed. 791.

See 39 Cent. Dig. tit. "Perjury," § 83.

65. *Arkansas.*— State *v.* Nees, 47 Ark. 553, 2 S. W. 184.

California.— People *v.* Kelly, 59 Cal. 372.

Illinois.— Kizer *v.* People, 211 Ill. 407, 71 N. E. 1035.

Indiana.— Galloway *v.* State, 29 Ind. 442; Hendricks *v.* State, 26 Ind. 493; State *v.* Johnson, 7 Blackf. 49; State *v.* Hall, 7 Blackf. 25.

Louisiana.— State *v.* Grover, 38 La. Ann. 567.

Massachusetts.— Com. *v.* Knight, 12 Mass. 274, 7 Am. Dec. 72.

Missouri.— State *v.* Marshall, 47 Mo. 378.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— Campbell *v.* People, 8 Wend. 636; People *v.* Robertson, 3 Wheel. Cr. 180.

Pennsylvania.— Com. *v.* Jermon, 29 Leg. Int. 165.

Texas.— Pyles *v.* State, (Cr. App. 1904) 83 S. W. 811; Tellis *v.* State, 42 Tex. Cr. 574, 61 S. W. 717; Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

Vermont.— State *v.* Chamberlin, 30 Vt 559.

Washington.— State *v.* Douette, 31 Wash. 6, 71 Pac. 556.

England.— Reg. *v.* Harvey, 8 Cox C. C. 99; Rex *v.* Dunn, 1 D. & R. 10, 16 E. C. L. 10.

See 39 Cent. Dig. tit. "Perjury," § 84.

Averments of facts held insufficient to show materiality see People *v.* Von Tiedeman, 120 Cal. 128, 52 Pac. 155; State *v.* Hopper, 133 Ind. 460, 32 N. E. 878; State *v.* Mercer, 101 Md. 535, 61 Atl. 220; State *v.* Cave, 81 Mo. 450; People *v.* Root, 94 N. Y. App. Div. 84, 87 N. Y. Suppl. 962; Martinez *v.* State, 39 Tex. Cr. 479, 46 S. W. 826; State *v.* Clogston, 63 Vt. 215, 22 Atl. 607; State *v.* Chamberlin, 30 Vt. 559; Noah *v.* U. S., 128 Fed. 270, 62 C. C. A. 618.

Averments of facts held sufficient to show materiality see Brooks *v.* State, 29 Tex. App. 582, 16 S. W. 542; Mattingly *v.* State, 8 Tex. App. 345; Com. *v.* Pickering, 8 Gratt. (Va.) 628, 56 Am. Dec. 158; U. S. *v.* Singleton, 54 Fed. 488; Reg. *v.* Bartholomew, 1 C. & K. 366, 47 E. C. L. 366; Reg. *v.* Cutts, 4 Cox C. C. 137.

63. U. S. *v.* McHenry, 26 Fed. Cas. No. 15,681, 6 Blatchf. 503.

67. See *supra*, I, B, 3, c, (I).

68. People *v.* Fox, 25 Mich. 492; Heintz *v.* Union County Ct. Gen. Quarter Sess. of Peace, 45 N. J. L. 523; State *v.* Collins, 62 Vt. 195, 19 Atl. 368; State *v.* Smith, 3 Wash. 14, 27 Pac. 1028.

Affidavit need not be actually used.—An indictment for perjury in making an affidavit to be used in a certain proceeding is sufficient without an allegation that the affidavit was actually used therein. Herring *v.* State, 119 Ga. 709, 46 S. E. 876; State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rex *v.* Hailey, 1 C. & P. 258, R. & M. 94, 12 E. C. L. 155; Rex *v.* White, M. & M. 271, 22 E. C. L. 519.

Affidavit to dissolve injunction.—An indictment for perjury alleging that defendants made a false affidavit in order to dissolve an injunction asked for, and that the statement contained therein would have been material on the hearing of a motion to dissolve, but which does not aver that the injunction asked for had been awarded, or that the averments of the affidavit were material otherwise than on a motion to dissolve, is insufficient. Com. *v.* Wood, 2 Pa. Dist. 823, 13 Pa. Co. Ct. 477, 7 Kulp 141.

Affidavit to obtain payment of money.—An indictment for perjury in making a false affidavit for the purpose of obtaining audit of an unliquidated claim against a city that does not aver that the affidavit was authorized by the charter of the city, or that it was made for the purpose required thereby, or that the claim to which it was appended was ever presented to the common council for

perjury charged to have been committed in swearing to a bill in equity, which fails to show that the bill was one of a character required by law to be verified, is insufficient.[69]

c. Necessity of Averment of Competency of Testimony. An indictment or information for perjury need not show affirmatively that the alleged false testimony was admissible and competent, and could not have been excluded on any legal ground.[70]

7. Assignment of Perjury — a. In General — (i) *As to Falsity* — (a) *In General.* At common law and under the statutes, it is necessary, in an indictment for perjury, to expressly and positively negative the truth of the alleged false testimony,[71] by setting forth the true facts by way of antithesis.[72] A mere general averment of falsity is not sufficient. The indictment must, by particular averment, negative that which is false, and expressly contradict the matter falsely testified to by defendant, and must specifically, directly and without uncertainty designate the particulars wherein the matter sworn to was false.[73] The rule

audit, is fatally defective. Ortner *v.* People, 4 Hun (N. Y.) 323; People *v.* Allen, 9 N. Y. St. 622.

69. People *v.* Gaige, 26 Mich. 30.

70. State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

71. *Kentucky.*— Com. *v.* Compton, 36 S. W. 1116, 18 Ky. L. Rep. 479.

Louisiana.— State *v.* Gibson, 26 La. Ann. 71.

Mississippi.— State *v.* Silverberg, 78 Miss. 858, 29 So. 761.

Missouri.— State *v.* Morse, 90 Mo. 91, 2 S. W. 137.

Pennsylvania.— Perdue *v.* Com., 96 Pa. St. 311.

Texas.— State *v.* Powell, 28 Tex. 626; Juaraqui *v.* State, 28 Tex. 625; Turner *v.* State, 30 Tex. App. 691, 18 S. W. 792. But see Chavarria *v.* State, (Cr. App. 1901) 63 S. W. 313.

Virginia.— Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Thomas *v.* Com., 2 Rob. 795.

England.— Reg. *v.* Oxley, 3 C. & K. 317; Reg. *v.* Perrott, 2 M. & S. 379, 15 Rev. Rep. 280.

See 39 Cent. Dig. tit. "Perjury," §§ 90½, 91.

But see State *v.* Murphy, 101 N. C. 697, 8 S. E. 142 (holding that it is not necessary to negative, in express terms, the truth of defendant's evidence where it is denied in effect, by charging particularly, specifically, and in detail, that what defendant testified to as true was not done as he said); People *v.* Clements, 107 N. Y. 205, 13 N. E. 782 [*modifying* 42 Hun 353].

In Maine and Vermont it is held that an allegation in an indictment that defendant committed "perjury" sufficiently avers that defendant testified falsely. State *v.* Corson, 59 Me. 137; State *v.* Camley, 67 Vt. 322, 31 Atl. 840.

The term "corruptly" implies that the testimony was false. State *v.* Smith, 63 Vt. 201, 22 Atl. 604.

This requirement is not technical, or a mere matter of form, but of the very essence of the indictment, and necessary in order to inform the accused of the nature and cause of the accusation against him, by stating wherein and in what respect his testimony was claimed to be false. State *v.* Nelson, 74 Minn. 409, 77 N. W. 223.

A statement that an act was not done is a sufficient denial of the testimony of one who says he saw it done. Com. *v.* McLaughlin, 122 Mass. 449; State *v.* Smith, 63 Vt. 201, 22 Atl. 604.

An allegation that defendant "well knew" the reverse of the facts to which he testified, instead of alleging the negative of the oath, is not sufficient. State *v.* Gallaugher, 123 Iowa 378, 98 N. W. 906; Com. *v.* Weingartner, 27 S. W. 815, 16 Ky. L. Rep. 221. But see People *v.* Clements, 107 N. Y. 205, 13 N. E. 782; State *v.* Lindenburg, 13 Tex. 27.

Averments of falsity held sufficient see De Bernie *v.* State, 19 Ala. 23; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; State *v.* Brown, 128 Iowa 24, 102 N. W. 799; Com. *v.* Schwieters, 93 S. W. 592, 29 Ky. L. Rep. 417; Com. *v.* Lashley, 74 S. W. 658, 25 Ky. L. Rep. 58; State *v.* Brown, 8 Rob. (La.) 566; Com. *v.* Sargent, 129 Mass. 115; State *v.* Scott, 78 Minn. 311, 81 N. W. 3; State *v.* Voorhis, 52 N. J. L. 351, 20 Atl. 26.

Averments of falsity held insufficient see Thomas *v.* State, 54 Ark. 584, 16 S. W. 568; Com. *v.* Weingartner, 27 S. W. 815, 16 Ky. L. Rep. 221; Maddox *v.* State, 28 Tex. App. 533, 13 S. W. 861.

72. State *v.* Silverberg, 78 Miss. 858, 29 So. 761; Crow *v.* State, (Tex. Cr. App. 1905) 90 S. W. 650; Turner *v.* State, 30 Tex. App. 691, 18 S. W. 792; Gabrielsky *v.* State, 13 Tex. App. 428; U. S. *v.* Pettus, 84 Fed. 791. But see Johnson *v.* State, 76 Ga. 790, holding that a charge that the accused, wilfully and knowingly, by his own act and consent, did, deliberately and falsely, commit wilful perjury, is sufficient, without averring what was the truth.

When the negation of the truthfulness of the testimony in itself shows the truth, the indictment need not affirmatively show what the truth was. U. S. *v.* Howard, 132 Fed. 325.

73. *Alabama.*— Gibson *v.* State, 44 Ala. 17.

above stated applies equally in the case of an indictment for false swearing under the statute.[74]

(B) *When Testimony Was Given on Information and Belief.* An indictment for perjury, when the testimony was given upon information, knowledge, and belief, must negative, not only the truth of the oath, but also the information and belief.[75]

(II) *As to Intent.* At common law where wilfulness was an essential element of the crime, and in the states of this country which by statute have adopted a definition of the crime making wilfulness an element thereof, it is held, almost uniformly, that the indictment must charge the testimony to have been wilfully[76] and corruptly[77] false. It was held in an old English case that the word "wilfully" was not necessary in an indictment for perjury at common

Arkansas.— Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Thomas *v.* State, 54 Ark. 584, 16 S. W. 568.

Iowa.— State *v.* Gallaugher, 123 Iowa 378, 98 N. W. 906; U. S. *v.* Morgan, Morr. 341, 41 Am. Dec. 234.

Kentucky.— Shackelford *v.* Com., 79 S. W. 192, 25 Ky. L. Rep. 1830; Com. *v.* Weingartner, 27 S. W. 815, 16 Ky. L. Rep. 221; Ferguson *v.* Com., 1 S. W. 435, 8 Ky. L. Rep. 257.

Maine.— State *v.* Ela, 91 Me. 309, 39 Atl. 1001.

Minnesota.— State *v.* Nelson, 74 Minn. 409, 77 N. W. 223.

New Jersey.— State *v.* Voorhis, 52 N. J. L. 351, 20 Atl. 26; Heintz *v.* Union County Ct. Gen. Quarter Sess. of Peace, 45 N. J. L. 523.

New Mexico.— Territory *v.* Lockhart, 8 N. M. 523, 45 Pac. 1106.

New York.— Matter of Rothaker, 11 Abb. N. Cas. 122, holding that a complaint for perjury simply stating that "material facts," as sworn to, were false, without stating what facts, is defective.

North Carolina.— State *v.* Mumford, 12 N. C. 519, 17 Am. Dec. 573.

Texas.— Morris *v.* State, (Cr. App. 1904) 83 S. W. 1126; Harrison *v.* State, 41 Tex. Cr. 274, 53 S. W. 863; Gabrielsky *v.* State, 13 Tex. App. 428.

Vermont.— State *v.* Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918.

See 39 Cent. Dig. tit. "Perjury," § 91.

But see Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 519; Lawson *v.* State, 3 Lea (Tenn.) 309.

74. Com. *v.* Still, 83 Ky. 275; Ferguson *v.* Com., 1 S. W. 435, 8 Ky. L. Rep. 257.

75. Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293 [*reversing* 14 Hun 512]. See also State *v.* Ellison, 8 Blackf. (Ind.) 225; State *v.* Cruikshank, 6 Blackf. (Ind.) 62.

76. *California.*— People *v.* Turner, 122 Cal. 679, 55 Pac. 685.

Florida.— Parrish *v.* State, 18 Fla. 902; Robinson *v.* State, 18 Fla. 898; Miller *v.* State, 15 Fla. 577.

Iowa.— State *v.* Morse, 1 Greene 503.

Missouri.— State *v.* Day, 100 Mo. 242, 12 S. W. 365; State *v.* Morse, 90 Mo. 91, 2 S. W. 137.

North Carolina.— State *v.* Davis, 84 N. C. 787; State *v.* Carland, 14 N. C. 114.

Pennsylvania.— Com. *v.* Nailor, 29 Pa. Super. Ct. 275.

Virginia.— Thomas *v.* Com., 2 Rob. 795.

United States.— U. S. *v.* Eddy, 134 Fed. 114; U. S. *v.* Lake, 129 Fed. 499; U. S. *v.* Edwards, 43 Fed. 67.

See 39 Cent. Dig. tit. "Perjury," §§ 67, 92.

But see State *v.* Spencer, 45 La. Ann. 1, 12 So. 135; Rex *v.* Cox, Leach C. C. 82, holding that the word "wilful" is not necessary in an indictment for perjury at common law, but it is otherwise under the statute in 5 Eliz. c. 9.

A charge in an indictment that one "deposed and gave in evidence to the jury wilfully and corruptly" amounts to a charge that he swore wilfully and corruptly. State *v.* Bobbitt, 70 N. C. 81; State *v.* Bowers, 8 Ohio S. & C. Pl. Dec. 324, 6 Ohio N. P. 529.

"Corruptly" is not the equivalent of "wilfully." Williams *v.* People, 26 Colo. 272, 57 Pac. 701; U. S. *v.* Edwards, 43 Fed. 67.

"Feloniously" is equivalent to "wilfully." Williams *v.* People, 26 Colo. 272, 57 Pac. 701.

Under the Texas code, the statutory words "deliberately and falsely" must be used in characterizing the false statements alleged to have been made. State *v.* Perry, 42 Tex. 238; Allen *v.* State, 42 Tex. 12; State *v.* Webb, 41 Tex. 67; State *v.* Powell, 28 Tex. 626; Juaraqui *v.* State, 28 Tex. 625; Smith *v.* State,, 1 Tex. App. 620.

77. *Iowa.*— State *v.* Morse, 1 Greene 503.

Missouri.— State *v.* Morse, 90 Mo. 91, 2 S. W. 137.

North Carolina.— State *v.* Davis, 84 N. C. 787; State *v.* Carland, 14 N. C. 114.

Pennsylvania.— Com. *v.* Nailor, 29 Pa. Super. Ct. 275.

Vermont.— State *v.* Collins, 62 Vt. 195, 19 Atl. 368, holding that, in an indictment for perjury in making oath to a chattel mortgage, an averment that the mortgage was not made to secure an honest debt, but "for some other purpose," does not sufficiently charge a wrongful motive in the execution of the mortgage.

Virginia.— Thomas *v.* Com., 2 Rob. 795.

United States.— U. S. *v.* Babcock, 24 Fed. Cas. No. 14,488, 4 McLean 113.

Canada.— Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

See 39 Cent. Dig. tit. "Perjury," §§ 67, 92.

law,[78] and some cases hold that where it is alleged that defendant swore wilfully or "knowingly," it is not necessary to employ the word "corruptly,"[79] but most of the decisions require the indictment to allege that the oath was taken "corruptly" as well as "wilfully,"[80] and the omission of both "wilfully" and "corruptly" was never allowed.[81] Perjury being generally made a felony by statute, it is held in some cases that an indictment therefor must allege that it was "feloniously" committed.[82] Other cases, however, hold that the use of the word "feloniously" is unnecessary, and a charge in the words of the statute is sufficient.[83]

(III) *As to Knowledge of Falsity.* Averment of knowledge of falsity is not necessary to an indictment for perjury,[84] except where the false testimony is given on information and belief,[85] or where knowledge of the falsity of the testimony given is made an element of the offense by statute, in which case it must be averred.[86]

b. Joinder of Assignments. An indictment for perjury may embrace in a single count all the particulars in which defendant is alleged to have sworn falsely;[87] but each fact sworn to should be stated in distinct and separate assignments, and each traversed, so that if either assignment is proved, the indictment may be sustained.[88] If one assignment of perjury is sufficient, an improper assignment in connection with it will not vitiate the indictment.[89] The fact that an indictment charges two distinct false statements under oath does not render the

78. Rex *v.* Cox, Leach C. C. 82.

79. State *v.* Bixler, 62 Md. 354.

80. Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699. And see the other cases cited *supra*, this section.

81. Rex *v.* Stevens, 5 B. & C. 246, 11 E. C. L. 448; Rex *v.* Richards, 7 D. & R. 665, 4 L. J. K. B. O. S. 155, 16 E. C. L. 313.

82. *Arkansas.*— Nelson *v.* State, 32 Ark. 192.

Kentucky.— Com. *v.* Swanger, 108 Ky. 579, 57 S. W. 10, 22 Ky. L. Rep. 276.

Mississippi.— Wile *v.* State, 60 Miss. 260.

Missouri.— State *v.* Terry, 30 Mo. 368; State *v.* Williams, 30 Mo. 364.

North Carolina.— State *v.* Bunting, 118 N. C. 1200, 24 S. E. 118; State *v.* Shaw, 117 N. C. 764, 23 S. E. 246.

Equivalent words.— The indictment need not be in the exact words of the statute, but other words conveying the same meaning may be used; and an indictment in the words of the statute, except for omission of the word "feloniously," is good; especially where it is also averred that the statements sworn to were false, and known to be so by the party making them. State *v.* Anderson, 103 Ind. 170, 2 N. E. 332.

83. People *v.* Parsons, 6 Cal. 487; State *v.* Matlock, 48 La. Ann. 663, 19 So. 669.

84. *Idaho.*— Territory *v.* Anderson, 2 Ida. (Hasb.) 537, 21 Pac. 417.

Illinois.— Johnson *v.* People, 94 Ill. 505.

Iowa.— State *v.* Gallaugher, 123 Iowa 378, 98 N. W. 906; State *v.* Raymond, 20 Iowa 582. *Contra*, State *v.* Morse, 1 Greene 503.

Oregon.— State *v.* Ah Lee, 18 Oreg. 540, 23 Pac. 424.

Texas.— Ferguson *v.* State, 36 Tex. Cr. 60, 35 S. W. 369 [*overruling* State *v.* Powell, 28 Tex. 626].

United States.— U. S. *v.* Pettus, 84 Fed. 791.

See 39 Cent. Dig. tit. "Perjury," § 92.

But see State *v.* Williams, 111 La. 1033, 36 So. 111; State *v.* Brown, 110 La. 591, 34 So. 698; State *v.* Wells, Mann. Unrep. Cas. (La.) 242; Com. *v.* Cook, 1 Rob. (Va.) 729; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,488, 4 McLean 113. See also Page *v.* Camp, Kirby (Conn.) 7.

The word "wilfully" implies intention as well as deliberation of purpose, and if the purpose was to swear falsely, it must follow that it was done knowingly. Johnson *v.* People, 94 Ill. 505; State *v.* Stein, 48 Minn. 466, 51 N. W. 474; State *v.* Sleeper, 37 Vt. 122. An indictment or charge for perjury in which it is alleged that the accused committed perjury by falsely, wilfully, and with intent to mislead the magistrate, swearing to a certain statement, involves a charge that the accused knew such statement to be false and will not be quashed for failure to more specifically charge such knowledge. Rex *v.* Doyle, 12 Can. Cr. Cas. 69.

85. Gibson *v.* State, 44 Ala. 17; State *v.* Lea, 3 Ala. 602; State *v.* Gallaugher, 123 Iowa 378, 98 N. W. 906; State *v.* Raymond, 20 Iowa 582; Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Rex *v.* Perrott, 2 M. & S. 379, 15 Rev. Rep. 280.

86. Adams *v.* Com., 94 S. W. 664, 29 Ky. L. Rep. 683; People *v.* Root, 94 N. Y. App. Div. 84, 87 N. Y. Suppl. 962; State *v.* Champion, 116 N. C. 987, 21 S. E. 700; Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

87. Com. *v.* Johns, 6 Gray (Mass.) 274; State *v.* Taylor, 202 Mo. 1, 100 S. W. 41; State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; State *v.* Bordeaux, 93 N. C. 560; State *v.* Bishop, 1 D. Chipm. (Vt.) 120.

88. Higgins *v.* State, (Tex. Cr. App. 1906) 97 S. W. 1054.

89. De Bernie *v.* State, 19 Ala. 23; Com. *v.* McLaughlin, 122 Mass. 449; Com. *v.* Johns, 6 Gray (Mass.) 274; Fry *v.* State, 36 Tex.

indictment bad, if the statements were both given under one oath and in one proceeding.[90]

8. Subornation of Perjury and Attempts[91] **— a. Subornation.** An indictment for subornation of perjury must state all the essential elements constituting the crime of perjury,[92] as well as of subornation of perjury. It must set forth the nature of the proceeding in which the alleged perjury was committed;[93] the court,[94] or officer,[95] in which, or before whom, the false oath was taken; that the witness was duly sworn;[96] that the testimony was material,[97] and false;[98] that defendant knowingly and wilfully procured another to swear falsely;[99] that the party did knowingly,[1] and wilfully,[2] swear falsely;[3] that defendant knew that the testimony of the witness would be false;[4] and that he knew that the witness knew said testimony was false.[5] A charge of subornation of perjury may be joined with a charge of perjury in the same indictment, and the perjurer and suborner may both be included in it.[6]

b. Attempts to Suborn.[7] At common law "attempting to suborn perjury" is not the name of any offense, and where an information charges it, without more, the information is insufficient.[8] While an indictment need not particularly specify the perjury which a defendant is charged with having attempted to suborn a witness to commit,[9] it must clearly allege the materiality of the testimony solicited by defendant.[10] In some states the offense has been made a

Cr. 582, 37 S. W. 741, 38 S. W. 168; State *v.* Smith, 63 Vt. 201, 22 Atl. 604.

90. Cover *v.* Com., 5 Pa. Cas. 79, 8 Atl. 196; Castro *r.* Reg., 6 App. Cas. 229, 14 Cox C. C. 546, 45 J. P. 452, 50 L. J. Q. B. 497, 44 L. T. Rep. N. S. 350, 29 Wkly. Rep. 669.

91. **Forms of indictment or information** see Com. *v.* Devine, 155 Mass. 224, 29 N. E. 515; Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531.

92. People *v.* Ross, 103 Cal. 425, 37 Pac. 379; State *v.* Geer, 46 Kan. 529, 26 Pac. 1027.

Indictment held sufficient see Com. *v.* Devine, 155 Mass. 224, 29 N. E. 515; U. S. *v.* Brace, 149 Fed. 869; Boren *r.* U. S., 144 Fed. 801, 75 C. C. A. 531; Babcock *r.* U. S., 34 Fed. 873.

93. People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027; U. S. *v.* Robinson, 4 Dak. 72, 23 N. W. 90; Smith *v.* State, 125 Ind. 440, 25 N. E. 598; Thompson *v.* State, 89 Wis. 253, 61 N. W. 535.

94. People *r.* Carpenter, 136 Cal. 391, 68 Pac. 1027; U. S. *v.* Howard, 132 Fed. 325, holding that, where the caption and commencement show the court in which the indictment was found, further averments with reference to the proceedings in which the alleged perjury was committed, reciting them to have been in "said court" are not sufficient.

95. U. S. *r.* Cobban, 134 Fed. 290; Babcock *r.* U. S., 34 Fed. 873.

96. People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027; State *r.* Jewett, 48 Oreg. 577, 85 Pac. 994; U. S. *r.* Howard, 132 Fed. 325.

97. People *r.* Ross, 103 Cal. 425, 37 Pac. 379; State *r.* Geer, 46 Kan. 529, 26 Pac. 1027; Miller *v.* State, 43 Tex. Cr. 367, 65 S. W. 908; U. S. *r.* Howard, 132 Fed. 325, holding that an indictment for subornation of perjury must show that the testimony was material, either by the averment in terms that it was material, or by stating facts showing its materiality.

98. U. S. *r.* Howard, 132 Fed. 325.

99. State *r.* Geer, 48 Kan. 752, 30 Pac. 236; Com. *r.* Devine, 155 Mass. 224, 29 N. E. 515; U. S. *r.* Wilcox, 28 Fed. Cas. No. 16,693, 4 Blatchf. 393.

The means of procurement need not be stated. State *r.* Porter, 105 Iowa 677, 75 N. W. 519.

1. People *v.* Ross, 103 Cal. 425, 37 Pac. 379; State *r.* Jewett, 48 Oreg. 577, 85 Pac. 994; U. S. *r.* Cobban, 134 Fed. 290; U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,693, 4 Blatchf. 393.

2. People *r.* Ross, 103 Cal. 425, 37 Pac. 379; U. S. *r.* Howard, 132 Fed. 325; U. S. *r.* Wilcox, 28 Fed. Cas. No. 16,693, 4 Blatchf. 393.

3. Com. *r.* Devine, 155 Mass. 224, 29 N. E. 515.

4. U. S. *r.* Dennee, 25 Fed. Cas. No. 14,947, 3 Woods 39.

5. *California.*— People *v.* Ross, 103 Cal. 425, 37 Pac. 379.

Louisiana.— State *r.* Williams, 111 La. 1033, 36 So. 111.

Ohio.— Stewart *v.* State, 22 Ohio St. 477.

Oregon.— State *r.* Jewett, 48 Oreg. 577, 85 Pac. 994.

United States.— U. S. *v.* Cobban, 134 Fed. 290; U. S. *r.* Thompson, 31 Fed. 331, 12 Sawy. 438; U. S. *r.* Dennee, 25 Fed. Cas. No. 14,947, 3 Woods 39.

See 39 Cent. Dig. tit. "Perjury," § 95.

6. Com. *r.* Devine, 155 Mass. 224, 29 N. E. 515.

7. **Form of indictment or information** see State *r.* Waddle, 100 Iowa 57, 69 N. W. 279.

8. People *v.* Thomas, 63 Cal. 482.

9. State *v.* Holding, 1 McCord (S. C.) 31.

10. State *r.* Tappan, 58 N. H. 152, holding that allegations showing only that the testimony probably was material are insufficient.

felony by statute. In such case an indictment is generally sufficient if laid in the words of the statute.[11]

9. VARIANCE — a. In General. Strictness of proof is required in all matters which constitute the essence of the offense of perjury;[12] but such proof is not required as to immaterial averments, and those which are not descriptive of the offense.[13]

b. As to Time of Giving Testimony. Strict proof that the perjury charged was committed on the day alleged is not essential,[14] save when necessary to identify the record, deposition, or affidavit in which the oath was taken.[15]

c. As to Description of Proceeding in Which Oath Was Administered. In a prosecution for perjury, it is essential to correctly describe the judicial proceedings in which the perjury is alleged to have been committed and it must be proved substantially as laid.[16] Under the statutes of some states, if the identity of the

11. People *v.* Clement, 127 Mich. 130, 86 N. W. 535 (holding that an indictment for inciting a person to commit perjury, although none be committed, in violation of Comp. Laws (1897), § 11,308, is sufficient, without an allegation that the person knew that the testimony sought to be procured was false); Stratton *v.* People, 20 Hun (N. Y.) 288 [*affirmed* in 81 N. Y. 629] (holding that an indictment under 2 Rev. St. p. 682, § 8, declaring any one guilty of a felony who shall "by the offer of any valuable consideration" attempt unlawfully to procure any one to commit perjury, need not allege that the accused incited or solicited the other person to commit perjury). But see Rivers *v.* State, 97 Ala. 72, 12 So. 434, holding that an indictment charging defendant with offering a person money to commit perjury, should be as specific, definite, and certain as an indictment for perjury.

Prospective suit.—An indictment under Me. Rev. St. c. 112, § 2, making it a crime to endeavor to incite another to commit perjury in some proceeding, is not good when it alleges that the same was to be committed in a prospective suit, and not in one then or ever pending. State *v.* Joaquin, 69 Me. 218.

12. Com. *v.* Monahan, 9 Gray (Mass.) 119; State *v.* Tappan, 21 N. H. 56; State *v.* Harvell, 49 N. C. 55; Waul *v.* State, 33 Tex. Cr. 228, 26 S. W. 199.

Descriptive averments, although unnecessarily particular, must be proved as made. Watson *v.* State, 5 Tex. App. 11.

Instances of a variance held not fatal see Henderson *v.* Com., 91 S. W. 1141, 28 Ky. L. Rep. 1212; Com. *v.* McLaughlin, 122 Mass. 449; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; People *v.* Robertson, 3 Wheel. Cr. (N. Y.) 180.

Variance rendered immaterial by statute.—In Massachusetts a variance which might have been material at common law was made immaterial by a statute (Acts (1864), c. 250, § 1) requiring only such description as to inform defendant fully what is meant. Com. *v.* Terry, 114 Mass. 263.

13. People *v.* Prather, 134 Cal. 436, 66 Pac. 589, 863; State *v.* Williams, 60 Kan. 837, 58 Pac. 476; Jefferson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 88.

14. *Iowa.*— State *v.* Perry, 117 Iowa 463, 91 N. W. 765.

Kentucky.— Com. *v.* Davis, 94 Ky. 612, 23 S. W. 218, 15 Ky. L. Rep. 262; Cope *v.* Com., 47 S. W. 436, 20 Ky. L. Rep. 721.

Michigan.— Keator *v.* People, 32 Mich. 484.

New York.— People *v.* Hoag, 2 Park. Cr. 9.

Vermont.— State *v.* Clark, 2 Tyler 277.

United States.— Matthews *v.* U. S., 161 U. S. 500, 16 S. Ct. 640, 40 L. ed. 786 [*affirming* 68 Fed. 880]. But see U. S. *v.* McNeal, 26 Fed. Cas. No. 15,700, 1 Gall. 387.

England.— Rex *v.* Coppard, 3 C. & P. 59, M. & M. 118, 14 E. C. L. 450.

See 39 Cent. Dig. tit. "Perjury," § 102.

But see State *v.* Lewis, 93 N. C. 581, holding, that where an indictment charges the alleged perjury as of the wrong term of court, the variance is fatal.

15. State *v.* Perry, 117 Iowa 463, 91 N. W. 765; Matthews *v.* U. S., 161 U. S. 500, 16 S. Ct. 640, 40 L. ed. 786 [*affirming* 68 Fed. 880].

16. *Alabama.*— Walker *v.* State, 96 Ala. 53, 11 So. 401, holding that where an indictment avers that defendant falsely made an affidavit for a new trial, in an action by G against him, he cannot be convicted on proof that the action was by G and others against him.

California.— People *v.* Strassman, 112 Cal. 683, 45 Pac. 3, holding that where the indictment charges defendant with perjury committed in a prosecution for grand larceny, and the evidence shows the prosecution to have been for robbery, the variance is fatal.

Georgia.— Wilson *v.* State, 115 Ga. 206, 41 S. E. 696, 90 Am. St. Rep. 104.

New York.— Smith *v.* People, 1 Park. Cr. 317.

North Carolina.— State *v.* Green, 100 N. C. 547, 6 S. E. 402.

Ohio.— State *v.* Hayes, 8 Ohio Dec. (Reprint) 454, 8 Cinc. L. Bul. 26, holding that where the indictment charges perjury in a pending action, and the proof shows that defendant swore falsely in an affidavit for replevin, until the filing of which no action was begun, the variance is such that the statute (Rev. St. § 7216) will not cure it.

See 39 Cent. Dig. tit. "Perjury," § 103.

proceeding is evident, and the purport thereof is given sufficiently to prevent any prejudice to defendant, a variance will not be deemed material.[17]

d. As to Description of Court or Officer Administering Oath. Proof that an oath was administered by the clerk, or some other officer of the court, is sufficient to sustain an allegation that the person was sworn by the court, or in court.[18] Where the indictment specifically avers that defendant was sworn before a certain person, or a particular officer, such allegation is matter of substance, and must be proved as laid; and proof that some other person or officer administered the oath is a fatal variance.[19]

e. As to Administration, Form, and Making of Oath. Although it is not necessary that the indictment should set forth the form of the oath, it being sufficient to allege that defendant was duly sworn,[20] yet if the form of the oath, or the manner of administering it, be set forth, the proof must correspond.[21]

f. As to Matter Sworn to.[22] On the trial of one accused of perjury, it is not necessary to prove the exact words of the prisoner in giving the false testimony; it is sufficient to prove substantially what he said.[23] Where perjury is committed

The names of the parties to the proceeding are essential to its identity, and if incorrectly stated, the variance is fatal. Jacobs *v.* State, 61 Ala. 448; State *v.* Green, 100 N. C. 547, 6 S. E. 402.

Instances of variance held not material see Gardner *v.* State, 80 Ark. 264, 97 S. W. 48; Strong *v.* State, 1 Blackf. (Ind.) 193; State *v.* Perry, 117 Iowa 463, 91 N. W. 765; Com. *v.* Farley, Thach. Cr. Cas. (Mass.) 654; People *v.* Burroughs, 1 Park. Cr. (N. Y.) 211; State *v.* Peters, 107 N. C. 876, 12 S. E. 74; State *v.* Collins, 85 N. C. 511; State *v.* Alexander, 13 N. C. 470.

17. Com. *v.* Soper, 133 Mass. 393.

In Canada, on an indictment for perjury, where the civil suit in which the perjury was charged to have been committed was described as Emilie Lamoureux and David Leonard, whereas it should have been Didier Leonard, and this error was twice repeated, it was held subject to amendment. Reg. *v.* Leonard, 3 Montreal Leg. N. 138. There is no variance between an indictment charging false testimony on an inquest before a coroner and proof of false testimony before the coroner and a jury. Reg. *v.* Thompson, 4 Can. Cr. Cas. 265, 17 Can. L. T. Occ. Notes 295, 2 Northwest Terr. 39, 2 Terr. L. Rep. 383.

18. *Iowa.*— State *v.* Caywood, 96 Iowa 367, 65 N. W. 385.

Michigan.— Keator *v.* People, 32 Mich. 484.

New York.— People *v.* Nolte, 19 Misc. 674, 44 N. Y. Suppl. 443.

Ohio.— See State *v.* Townley, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636.

Oklahoma.—Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861.

South Dakota.— State *v.* Pratt, (1907) 112 N. W. 152.

See 39 Cent. Dig. tit. "Perjury," § 104.

19. McClerkin *v.* State, 105 Ala. 107, 17 So. 123 (holding that there is a fatal variance between an indictment for perjury, alleging that defendant was sworn "by the clerk of such county," and evidence that the officer who administered the oath was a clerk in a certain city); People *v.* Robertson, 3 Wheel. Cr. (N. Y.) 180 (holding, however, that an indictment describing the officer administering the oath as "one of the special justices," and proof that his official designation was "a special justice for preserving the peace in the city of New York," were not variant); Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861; Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28.

20. See *supra*, II, B, 4.

21. State *v.* Gates, 17 N. H. 373; Smith *v.* People, 1 Park. Cr. (N. Y.) 317; Williams *v.* State, 7 Humphr. (Tenn.) 47; Beach *v.* State, 32 Tex. Cr. 240, 22 S. W. 976. *Contra*, Reg. *v.* Southwood, 1 F. & F. 356, holding that a variance between the form of oath proved and that stated in the indictment is immaterial.

An indictment charging the oath to have been taken on the gospels is not sustained by proof of an oath taken in any other form. State *v.* Davis, 69 N. C. 383; State *v.* Porter, 2 Hill (S. C.) 611; Williams *v.* State, 7 Humphr. (Tenn.) 47; Rex *v.* McCarther, 1 Peake N. P. 155. But see Rex *v.* Rowley, R. & M. 299, 21 E. C. L. 756.

The terms "corporal oath" and "solemn oath" are synonymous, and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury. Jackson *v.* State, 1 Ind. 184.

An indictment alleging that defendant took his corporal oath and was duly sworn is sustained by evidence of an oath taken in the usual form. Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. L. Rep. 344; State *v.* Norris, 9 N. H. 96. So, under an allegation that defendant was duly sworn, evidence is competent that he swore that the statement alleged to be false was true to the best of his knowledge and belief. Beach *v.* State, 32 Tex. Cr. 240, 22 S. W. 976.

22. Proof of one assignment sufficient see *infra*, II, C, 3, g, (II).

23. *Alabama.*— Taylor *v.* State, 48 Ala. 157.

Illinois.— Martinatis *v.* People, 223 Ill. 117, 79 N. E. 55; Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

in a written instrument, which is set forth in the indictment according to its tenor, it must be proved as laid and a material variance is fatal.[24]

C. Evidence — 1. Presumptions and Burden of Proof. Under an indictment for perjury, the prosecution must prove that defendant was sworn;[25] that he was sworn in a matter where an oath was authorized or required by law;[26] that the oath was administered to defendant by a person having authority to administer it;[27] and that defendant swore wilfully and corruptly in a material matter[28] to that which was false.[29] After a *prima facie* case has been established, the burden of proof rests upon defendant to show that the falsity of his testimony was occasioned by surprise, inadvertence, or mistake, and did not proceed from a corrupt motive on his part.[30]

2. Admissibility — a. In General. The general rules relating to the admission of evidence in criminal cases are applicable on prosecutions for perjury.[31] The

Missouri.— State *v.* Frisby, 90 Mo. 530, 2 S. W. 833.

Nebraska.— Gandy *v.* State, 23 Nebr. 436, 36 N. W. 817.

North Carolina.— State *v.* Groves, 44 N. C. 402.

Oklahoma.— Meierholtz *v.* Territory, 14 Okla. 359, 78 Pac. 90.

Texas.— Stanley *v.* State, (Cr. App. 1905) 89 S. W. 829.

See 39 Cent. Dig. tit. "Perjury," § 106.

Instances of variance held material see Robertson *v.* State, 54 Ark. 604, 16 S. W. 582; Roberts *v.* People, 99 Ill. 275; Com. *v.* Hughes, 5 Allen (Mass.) 499; State *v.* Ah Sam, 7 Oreg. 477; Ray *v.* State, (Tex. Cr. App. 1905) 90 S. W. 632; Leverette *v.* State, 32 Tex. Cr. 471, 24 S. W. 416; Reg. *v.* Trudel, 14 Quebec 193.

Instances of variance held immaterial see Bradford *v.* State, 134 Ala. 141, 32 So. 742; State *v.* Lea, 3 Ala. 602; Com. *v.* Butland, 119 Mass. 317; People *v.* Fay, 89 Mich. 119, 50 N. W. 752; State *v.* Higgins, 124 Mo. 640, 28 S. W. 178; State *v.* Wakefield, 73 Mo. 549 [*affirming* 9 Mo. App. 326]; Stanley *v.* State, (Tex. Cr. App. 1906) 95 S. W. 1076.

Where evidence is offered merely as matter of inducement, a variance between the indictment and such evidence is immaterial. King *v.* State, 32 Tex. Cr. 463, 24 S. W. 514.

24. *Colorado.*—Dill *v.* People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254.

Georgia.— Thompson *v.* State, 118 Ga. 330, 45 S. E. 410.

Indiana.— Tardy *v.* State, 4 Blackf. 152.

New Mexico.— Wohlgemuth *v.* U. S., 6 N. M. 568, 30 Pac. 854.

United States.— U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

25. *Florida.*— Markey *v.* State, 47 Fla. 38, 37 So. 53.

Mississippi.— Sloan *v.* State, 71 Miss. 459, 14 So. 262.

New York.— Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293, 6 Abb. N. Cas. 181 [*reversing* 14 Hun 512].

Oregon.— State *v.* Kalyton, 29 Oreg. 375, 45 Pac. 756.

United States.— U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

See 39 Cent. Dig. tit. "Perjury," §§ 98, 107.

Presumption that oath was rightfully administered.—After it is affirmatively shown that an oath was administered, the presumption is that it was rightfully done. State *v.* Mace, 86 N. C. 668.

26. U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

27. Com. *v.* Schwieters, 93 S. W. 592, 29 Ky. L. Rep. 417; U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

28. **Materiality not presumed.**— The materiality of the matter sworn to must be established by evidence, and cannot be left to presumption or inference.

Arkansas.— Nelson *v.* State, 32 Ark. 192.

Illinois.— Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167.

Iowa.— State *v.* Aikens, 32 Iowa 403.

New York.— Wood *v.* People, 59 N. Y. 117.

Texas.— Garrett *v.* State, 37 Tex. Cr. 198, 38 S. W. 1017, 39 S. W. 108.

See 39 Cent. Dig. tit. "Perjury," § 107.

29. U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

30. State *v.* Chamberlin, 30 Vt. 559.

31. See, generally, Criminal Law.

Res gestæ.— Evidence which is part of the *res gestæ* and gives pertinency and force to the statement upon which perjury is assigned is admissible. Spencer *v.* Com., 22 S. W. 559, 15 Ky. L. Rep. 182; People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027; Jernigan *v.* State, 43 Tex. Cr. 114, 63 S. W. 560.

Secondary evidence.— Where perjury is assigned upon a written instrument, subsequently lost, secondary evidence is admissible. Reg. *v.* Milnes, 2 F. & F. 10. Its loss or destruction must be proved, however, before secondary evidence of its contents can be given. Reg. *v.* Dillon, 14 Cox C. C. 4. Nor is secondary evidence admissible in the absence of a notice to produce the instrument. Reg. *v.* Elworthy, L. R. 1 C. C. 103, 10 Cox C. C. 579, 37 L. J. M. C. 3, 17 L. T. Rep. N. S. 293, 16 Wkly. Rep. 207.

Declarations in articulo mortis are not admissible on the trial of an indictment for perjury. Rex *v.* Mead, 2 B. & C. 605, 4 D. & R. 120, 26 Rev. Rep. 484, 9 E. C. L. 265.

Statements made by a judge in giving judgment in an action are not admissible as

evidence that was admissible on the trial of the action in which the perjury is alleged to have been committed is admissible on the trial of an indictment for perjury.[32]

b. Intent, Knowledge, and Motive — (I) *Intent.* Since wilfulness and a corrupt intent are essential elements of the crime of perjury, evidence to prove such issues goes to the very substance of the offense, and is admissible.[33] Evidence to rebut the existence of a corrupt motive is admissible in favor of the accused.[34]

(II) *Knowledge.* Knowledge of the falsity of his testimony on the part of the accused being, as a general rule, an essential element of the crime of perjury, the state is entitled to introduce any proper evidence to show such knowledge.[35]

evidence in the prosecution of a witness for perjury alleged to have been committed while giving evidence in such action. Reg. *v.* Britton, 17 Cox C. C. 627.

Irrelevant and immaterial evidence inadmissible. — *Alabama.* — Fleming *v.* State, 98 Ala. 69, 13 So. 288.

Illinois. — Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699.

Kentucky. — Mitchell *v.* Com., 25 S. W. 884, 15 Ky. L. Rep. 803.

Louisiana. — State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

Missouri. — State *v.* Fannon, 158 Mo. 149, 59 S. W. 75.

New York. — People *v.* Williams, 92 Hun 354, 36 N. Y. Suppl. 511.

Texas. — Lamar *v.* State, (Cr. App. 1906) 95 S. W. 509; Hollins *v.* State, (Cr. App. 1902) 69 S. W. 594; Miller *v.* State, 42 Tex. Cr. 383, 60 S. W. 673; Pearson *v.* State, (Cr. App. 1895) 33 S. W. 224; Peyton *v.* State, (Cr. App. 1895) 32 S. W. 892; Gibson *v.* State, (App. 1890) 15 S. W. 118; Steber *v.* State, 23 Tex. App. 176, 4 S. W. 880.

See 39 Cent. Dig. tit. "Perjury," § 108.

Evidence of a third person as to the acts and declarations of the prosecuting witness in a perjury case is inadmissible, where such evidence does not tend to corroborate his testimony or otherwise elucidate the issue on trial. Kitchen *v.* State, 29 Tex. App. 45, 14 S. W. 392.

Self-crimination. — Admissions by a witness on a hearing before a justice of the peace that his testimony at a previous inquest before a coroner was a lie are not admissible against him on an indictment for perjury at the coroner's inquest, under the statute declaring that no person shall be excused from answering any question upon the ground that the answer may tend to criminate him, provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceedings thereafter instituted against him other than a prosecution for perjury in giving such evidence; and it is immaterial that defendant gave the testimony without objection, for he was bound to answer and an objection would have been unavailing. Reg. *v.* Thompson, 4 Can. Cr. Cas. 265, 17 Can. L. T. Occ. Notes 295, 2 Northwest Terr. 39, 2 Terr. L. Rep. 383.

32. Reg. *v.* Harrison, 9 Cox C. C. 503.

33. State *v.* Hascall, 6 N. H. 352; Foster *v.* State, 32 Tex. Cr. 39, 22 S. W. 21; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662.

Falsity of other and immaterial testimony. — On a trial for perjury, it is competent to show the falsity of other and immaterial parts of defendant's testimony, in order to exclude the idea of mistake, and as tending to show corrupt intention. Dodge *v.* State, 24 N. J. L. 455; Jefferson *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1090.

Antecedent acts and declarations of defendant, being part of the *res gestæ*, and material as matter of inducement, may be shown in evidence. Tuttle *v.* People, 36 N. Y. 431.

Preventing witnesses from testifying. — In a prosecution for perjury alleged to have been committed at the trial of defendant's brother for murder, testimony that defendant had endeavored to prevent witnesses from testifying against his brother is admissible to show corrupt motive. People *v.* Macard, 109 Mich. 623, 67 N. W. 968.

Evidence of other perjury than that shown in the indictment relating to the same oath and subject-matter of the perjury charged may be properly considered by the jury in determining the question of corrupt intent in swearing to the false matter upon which the perjury was assigned. State *v.* Raymond, 20 Iowa 582.

Expressions of malice. — To show that perjury was wilful and corrupt, evidence may be given of expressions of malice used by defendant toward the person against whom he gave the false evidence. Rex *v.* Munton, 3 C. & P. 498, 14 E. C. L. 682.

Evidence given on cross-examination. — In a prosecution for perjury, based on defendant's false testimony in a civil action, evidence as to what defendant testified to on cross-examination in such civil action is admissible. McDonough *v.* State, (Tex. Cr. App. 1904) 84 S. W. 594.

34. State *v.* McKinney, 42 Iowa 205; State *v.* Curtis, 34 N. C. 270; Brookin *v.* State, 27 Tex. App. 701, 11 S. W. 645.

Evidence of advice of counsel is admissible to show the absence of a corrupt motive. Hood *v.* State, 44 Ala. 81. See *supra*, I, C, 4.

35. Floyd *v.* State, 30 Ala. 511; People *v.* Doody, 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606 [*affirmed* in 172 N. Y. 165, 64 N. E. 807]; State *v.* Smith, 47 Oreg. 485, 83 Pac. 865; U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89.

Conversely, defendant may offer evidence in proof of his good faith in making the alleged false statement.[36]

(III) *Motive.* Evidence to show motive for the alleged perjury is admissible on behalf of the prosecution,[37] and may be rebutted by defendant.[38]

c. Proceeding in Which Oath Was Administered. To identify the case in which the perjury is alleged to have been committed the record of that case is admissible in evidence.[39]

d. Jurisdiction and Authority to Administer Oath. The record of the action or proceeding wherein it is charged in the indictment that the accused committed perjury is also admissible for the purpose of showing the jurisdiction of the court to try or hear the case.[40] So it has been held that any competent evidence tending to show that the court had or did not have authority is admissible.[41] The authority of the officer administering the oath need not be proved by his commission or other written evidence of his right to act as such, but parol evidence is admissible to show that he was an officer *de facto*.[42] Defend-

36. State *v.* Allen, 94 Mo. App. 508, 69 S. W. 604; Luna *v.* State, 44 Tex. Cr. 482, 72 S. W. 378.

37. Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461.

38. McCord *v.* State, 83 Ga. 521, 10 S. E. 437; Com. *v.* Brady, 7 Gray (Mass.) 320.

Bribery.— Evidence that the person in whose behalf the accused testified when the alleged perjury was committed was insolvent, or of limited means, is not admissible to repel imputation of bribery. McCord *v.* State, 83 Ga. 521, 10 S. E. 437.

39. *Alabama.*— Boynton *v.* State, 77 Ala. 29.

Michigan.— People *v.* Macard, 109 Mich. 623, 67 N. W. 968, holding that the files of a case in which the perjury is alleged to have been committed are properly admitted in evidence for the purpose of showing the regularity of the proceedings in that case.

South Dakota.— State *v.* Pratt, (1907) 112 N. W. 152.

Texas.— Stanley *v.* State, (Cr. App. 1906) 95 S. W. 1076; Ross *v.* State, 40 Tex. Cr. 349, 50 S. W. 336; Martinez *v.* State, 39 Tex. Cr. 479, 46 S. W. 826; Smith *v.* State, 31 Tex. Cr. 315, 20 S. W. 707 (holding further that, on a trial for perjury alleged to have been committed in a justice's court, a claim that the final papers of judgment and conviction in the prosecution in the justice's court cannot be admitted in evidence, because the justice's file mark does not show of what precinct he was justice, is without merit); Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461 (holding that on the joint trial of two persons for murder, where one of them was acquitted by direction of the court at the conclusion of the state's testimony, the judgment of such acquittal is properly admissible); Partain *v.* State, 22 Tex. App. 100, 2 S. W. 854.

United States.— U. S. *v.* Walsh, 22 Fed. 644, holding further that the clerk of the court cannot be permitted to testify that the record was false.

When final record not made up.— In a trial for perjury, the original pleadings, rulings, and judgment of the court in the case in which the perjury is alleged to have been committed may be put in evidence, where the final record in the former trial has not been made up. Smith *v.* State, 103 Ala. 57, 15 So. 866; Williams *v.* State, 68 Ala. 551.

Where it appeared on a trial for perjury at an inquest that the alleged false testimony was given on another than the date of the certificate of inquest, it was proper to show that such certificate was erroneously dated. Rogers *v.* State, 35 Tex. Cr. 221, 32 S. W. 1044.

Warrant and complaint.— In a prosecution for perjury, the complaint filed and the warrant served in the action in which the false testimony was given are competent to prove the pendency of the proceedings to which they relate. State *v.* Horine, 70 Kan. 256, 78 Pac. 411.

Testimony of witness swearing out warrant.— On a trial for false swearing it is proper to permit a witness to testify that he swore out a warrant for defendant's arrest, charging defendant with larceny, it being asserted that the false swearing occurred on the trial of the prosecution. Barton *v.* Com., 32 S. W. 171, 396, 17 Ky. L. Rep. 580.

40. State *v.* Brown, 111 La. 170, 35 So. 501; State *v.* Pratt, (S. D. 1907) 112 N. W. 152.

41. Moss *v.* State, (Tex. Cr. App. 1904) 83 S. W. 829.

42. State *v.* Hascall, 6 N. H. 352; Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28 (holding, however, that on a trial for perjury in an affidavit sworn to before a a deputy clerk of the court it is not error to permit the introduction of the deputation showing his appointment); Woodson *v.* State, 24 Tex. App. 153, 6 S. W. 184. See also Biggerstaff *v.* Com., 11 Bush (Ky.) 169.

Challenger at election.— Since the fact that a person acted as a challenger at an election, and was recognized as such by the managers, other officials and the people, is *prima facie* evidence of his authority, and dispenses with the production of a commission, it is proper to allow a witness to testify that he was a challenger and acted as such

ant may show in rebuttal that the person who administered the oath alleged to be false had no authority to administer it.[43]

e. Administration, Form, and Making of Oath. In a prosecution for perjury, the person alleged to have administered the oath, or defendant himself, or any witness present at such alleged swearing, may be interrogated fully as to the facts connected therewith, that it may be determined whether defendant was sworn.[44] So also the subpœna docket[45] and defendant's signature to affidavits filed in the proceeding in which the perjury is alleged to have been committed is admissible to prove the fact that he was sworn as a witness in the case.[46] Where it appears that defendant was sworn by a particular officer or in a certain county, evidence to show that in fact he was sworn by a different officer[47] or in a different county[48] is admissible.

f. Materiality of Testimony or Assertion. On a prosecution for perjury the materiality of the testimony may be shown by introducing all or so much of the pleadings in the action as show the issues,[49] together with proof of such facts as tend to show the testimony to be on a material issue.[50]

g. Matter Sworn To. Where a witness is indicted for perjury alleged to have been committed while giving evidence at a certain trial, the prosecution may prove by parol evidence what the accused swore to at such trial,[51] although such

after receiving oral notice of his appointment. Moore *v.* State, 52 Ala. 424.

43. Muir *v.* State, 8 Blackf. (Ind.) 154; Biggerstaff *v.* Com., 11 Bush (Ky.) 169; Lambert *v.* State, 76 N. Y. 220, 32 Am. Rep. 293; People *v.* Albertson, 8 How. Pr. (N. Y.) 363. *Compare* Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Evidence to show disability of officer.— Where an officer has been legally appointed and has color of office and a semblance of authority, he is to be regarded as an officer *de facto*, and evidence as to subsequent disability, non-residence, or the like is inadmissible in a perjury case. State *v.* Williams, 61 Kan. 739, 60 Pac. 1050, 60 Kan. 837, 58 Pac. 476. Where, however, the evidence to show that the officer was one *de jure* or *de facto* is at best but *prima facie*, proof that he was a non-resident and was incapable of holding the office is competent to rebut any presumption arising from such evidence. Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293, 6 Abb. N. Cas. 181 [*reversing* 14 Hun 512].

44. Markey *v.* State, 47 Fla. 38, 37 So. 53; Trevinio *v.* State, (Tex. Cr. App. 1905) 88 S. W. 356, holding that where, in a prosecution for perjury, it was alleged that a justice of the peace administered the oath to defendant, it was proper to prove by an interpreter who acted at the time that he had interpreted the oath to defendant.

Proof of a general practice in court to administer an oath to petitioners for writs in certain cases is admissible on a trial for perjury to prove that the oath was administered as indicated by the clerk's jurat. Com. *v.* Kimball, 108 Mass. 473.

45. Smith *v.* State, 103 Ala. 57, 15 So. 866.

46. Schmidt *v.* U. S., 133 Fed. 257, 66 C. C. A. 389.

47. Jefferson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 88 (holding that on an issue as to whether the judge or the clerk swore defendant in a former trial, the cost bill, containing the clerk's charge for swearing the witness, is competent); Jefferson *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1090.

48. State *v.* Chamberlin, 30 Vt. 559.

49. Nance *v.* State, 126 Ga. 95, 54 S. E. 932; State *v.* Brown, 111 La. 170, 35 So. 501; Moroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696.

50. *California.*— People *v.* Lem You, 97 Cal. 224, 32 Pac. 11.

Connecticut.— State *v.* Vandemark, 77 Conn. 201, 58 Atl. 715.

Michigan.— People *v.* Macard, 109 Mich. 623, 67 N. W. 968.

Montana.— State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749.

Texas.— Moroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696. But see Freeman *v.* State, 43 Tex. Cr. 580, 67 S. W. 499, holding that, on a prosecution for perjury alleged to have been committed while testifying at a certain trial, evidence of what other witnesses testified to on such trial is inadmissible.

Vermont.— State *v.* Camley, 67 Vt. 322, 31 Atl. 840.

See 39 Cent. Dig. tit. "Perjury," § 113.

Admission of the entire testimony of defendant on the former trial is prejudicial error. Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699.

The mere opinion of witnesses cannot be adduced as evidence to prove the materiality of the alleged false evidence. Foster *v.* State, 32 Tex. Cr. 39, 22 S. W. 21; Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119.

Evidence that the false testimony was not considered by the court in giving its judgment is inadmissible. Barnes *v.* State, 15 Ohio Cir. Ct. 14, 8 Ohio Cir. Dec. 153.

51. People *v.* Curtis, 50 Cal. 95; Stanley *v.* State, (Tex. Cr. App. 1906) 95 S. W. 1076; Stanley *v.* State, (Tex. Cr. App. 1903) 74 S. W. 318. Upon a charge of perjury in respect of evidence taken by a magistrate on requiring sureties to keep the peace (Rev.

testimony was not reduced to writing as required by statute.[52] The fact that a witness is unable to give the entire testimony given by defendant does not prevent him from testifying to the particular part of his testimony on which the perjury is assigned.[53] Under some circumstances the affidavit of another party is admissible for the purpose of showing what the prisoner swore to.[54]

h. Truth or Falsity of Oath. The falsity of the testimony of defendant may be shown by any evidence which is competent against him.[55] Thus the *res gestæ* of the prosecution in regard to which defendant is claimed to have testified

Code, § 748 (2)), the false statement may be proved by oral testimony, although not recorded in the minutes of evidence then made by the magistrate. Rex *v.* Doyle, 12 Can. Cr. Cas. 69.

Reading stenographic notes.— In a prosecution for perjury the official reporter may properly be allowed to read a typewritten transcript of his stenographic notes taken on a hearing for divorce to prove the testimony of defendant charged as perjurious. Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

Perjury before grand jury.— On the trial of one for perjury alleged to have been committed before a grand jury, another witness on the same indictment who was in the grand jury room while such person was under examination is competent to prove what he swore to; and so is a police officer who was stationed within the grand jury room door; these persons not being sworn to secrecy as are the members of the grand jury. Reg. *v.* Hughes, 1 C. & K. 519, 47 E. C. L. 519. The foreman of the grand jury cannot be called upon to give evidence as to what the defendant swore to. Reg. *v.* Gazard, 8 C. & P. 595, 34 E. C. L. 911.

False swearing.— Bullitt Cr. Code Ky. § 113, providing that a member of the grand jury may be required to disclose the testimony of a witness examined before the grand jury on a prosecution of the witness for perjury, does not make such testimony admissible on a trial for the statutory offense of false swearing before a grand jury, which is a distinct offense from that of perjury. Com. *v.* Scowden, 92 Ky. 120, 17 S. W. 205, 13 Ky. L. Rep. 404.

Notes of evidence taken by a judge on a trial are not admissible in evidence to prove what was said on the trial. Reg. *v.* Child, 5 Cox C. C. 197. But see Reg. *v.* Morgan, 6 Cox C. C. 107.

Subsequent testimony admissible to show no retraction.— Where it has been proved that defendant testified as charged on the day named in the indictment, it is proper to allow proof that on the following day he again testified to the same effect in the same proceeding without being again sworn, for the purpose of showing that he did not explain, qualify, or retract his testimony of the previous day. Maynard *v.* State, 135 Ill. 416, 25 N. E. 740.

52. People *v.* Curtis, 50 Cal. 95; Stanley *v.* State, (Tex. Cr. App. 1903) 74 S. W. 318.

53. Com. *v.* Farley, Thach. Cr. Cas. (Mass.) 674; Hutcherson *v.* State, 33 Tex. Cr. 67, 24 S. W. 908. *Compare* Rex *v.* Dowlin, 1 Peake N. P. 170; Rex *v.* Jones, 1 Peake N. P. 37.

54. U. S. *v.* Buete, 24 Fed. Cas. No. 14,680*a*, 2 Hayw. & H. 49.

55. *Alabama.*— Bradford *v.* State, 134 Ala. 141, 32 So. 742.

Massachusetts.— Com. *v.* Butland, 119 Mass. 317.

Texas.— Stanley *v.* State, (Cr. App. 1906) 95 S. W. 1076; Foreman *v.* State, (Cr. App. 1904) 85 S. W. 809; McDonough *v.* State, (Cr. App. 1904) 84 S. W. 594; McLeod *v.* State, (Cr. App. 1903) 75 S. W. 522; Rogers *v.* State, 35 Tex. Cr. 221, 32 S. W. 1044.

Vermont.— State *v.* Marsh, 73 Vt. 176, 50 Atl. 861.

Wisconsin.— Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

See 39 Cent. Dig. tit. "Perjury," § 115.

Contrary statements by accused at other times.— Statements by defendant, either verbal or in writing, under oath or not, which conflict with the statement under oath on which the indictment is founded, are competent evidence. State *v.* Blize, 111 Mo. 464, 20 S. W. 210; Dodge *v.* State, 24 N. J. L. 455; Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670; Littlefield *v.* State, 24 Tex. App. 167, 5 S. W. 650.

Evidence of corroborative circumstances is not rendered inadmissible by the fact that it also tends to prove another distinct offense. Maynard *v.* State, 135 Ill. 416, 25 N. E. 740.

Cognate perjuries.— The prosecution, to sustain a proper assignment of perjury, may show the falsity of defendant's statements regarding other and correlative facts. Brown *v.* State, 57 Miss. 424; Anderson *v.* State, 24 Tex. App. 705, 7 S. W. 40 [*overruling* State *v.* Buie, 43 Tex. 532]; Reg. *v.* Gardiner, 8 C. & P. 737, 2 Moody C. C. 95, 34 E. C. L. 992.

Opinion of witness as to falsity.— On a trial for perjury, a witness for the state, after reciting what the accused testified to when the alleged perjury was committed, may state that it was false, at the same time stating facts which conclusively show that it was false. Adams *v.* State, 93 Ga. 166, 18 S. E. 553; Rogers *v.* State, 35 Tex. Cr. 221, 32 S. W. 1044.

Books and papers of defendant.— The falsity of the oath upon which perjury is assigned may be shown by the books and papers of defendant kept under his control and subject to his inspection. U. S. *v.* Mayer, 26 Fed. Cas. No. 15,753, Deady 127.

In a prosecution for perjury for denying the execution of a mortgage, evidence of the genuineness of the signature of an attesting witness who had died, admitted to prove the execution of the mortgage in accordance with

falsely,[56] including declarations of the participants made at the time,[57] may be adduced in evidence against defendant. So also positive proof of the guilt of the accused in the trial on which the alleged false testimony was given is admissible;[58] but confessions of guilt by such person made in the absence of defendant,[59] and evidence as to his conduct at and prior to the time of his arrest,[60] are inadmissible. To prove the truth of his alleged false testimony, defendant is entitled to introduce any competent evidence in rebuttal.[61]

i. Subornation of Perjury. On the trial of a charge of subornation of perjury, evidence may be received of other attempts to induce other persons to testify falsely in the same action.[62] So also evidence of the testimony before a grand jury of the witness claimed to have been suborned is admissible as bearing upon the motive of defendant in procuring him to testify otherwise on the trial of the indictment of defendant which was based upon this witness' testimony.[63]

3. Weight and Sufficiency — a. In General. Proof of perjury need not be more positive than that of any other criminal act, and it is sufficient if it be proved to the satisfaction of the jury and beyond reasonable doubt.[64] Guilt may be established by circumstantial evidence, but the circumstances must be consistent with defendant's guilt and inconsistent with his innocence.[65] Where oral evidence is exclusively relied on, there must be two witnesses, or one witness corroborated by circumstances proved by independent testimony.[66] A living witness may, however, be dispensed with altogether, as in a case where the false swearing is directly proved by documentary evidence springing directly from defendant, with circumstances showing his corrupt intent.[67]

the formalities required by law, cannot be considered as evidence that defendant signed the mortgage. Walker *v.* State, 107 Ala. 5, 18 So. 393.

56. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; State *v.* Williams, 34 La. Ann. 959; Eighmy *v.* People, 79 N. Y. 546; Freeman *v.* State, 44 Tex. Cr. 496, 72 S. W. 1001.

57. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

58. Galloway *v.* State, 29 Ind. 442.

59. Brown *v.* State, 57 Miss. 424; Reavis *v.* State, 6 Wyo. 240, 44 Pac. 62. *Contra,* Martin *v.* State, 33 Tex. Cr. 317, 26 S. W. 400. See also McCoy *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1057.

60. Galloway *v.* State, 29 Ind. 442.

61. *Georgia.*— Flemister *v.* State, 48 Ga. 170.

Illinois.— Maynard *v.* State, 135 Ill. 416, 25 N. E. 740.

Iowa.— State *v.* Swafford, 98 Iowa 362, 67 N. W. 284; State *v.* Seaton, 8 Iowa 138.

Louisiana.— State *v.* Faulk, 30 La. Ann. 831.

Mississippi.— See Hemphill *v.* State, 71 Miss. 877, 16 So. 261.

North Carolina.— State *v.* Jones, 91 N. C. 629.

Texas.— Parker *v.* State, 25 Tex. App. 743, 9 S. W. 42.

See 39 Cent. Dig. tit. "Perjury," § 115.

The judgment of acquittal on the trial on which the perjury was committed is not admissible to show defendant's innocence. State *v.* Williams, 60 Kan. 837, 58 Pac. 476; Hutcherson *v.* State, 33 Tex. Cr. 67, 24 S. W. 908.

Opportunity to do as sworn.— Defendant may show, to establish the truth of his oath, that he had opportunity to do what he said he did do. State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Explanatory parts of testimony.—A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged. Rex *v.* Coote, 8 Can. Cr. Cas. 199, 10 Brit. Col. 285.

Declarations of defendant.— Defendant in a perjury case cannot offer his own declarations to prove the truth of the alleged false testimony. State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

62. People *v.* Van Tassel, 26 N. Y. App. Div. 445, 50 N. Y. Suppl. 53, holding such evidence admissible when it bears directly upon the subjects of motive and intent in the commission of the offense, relates to the same transaction, and is connected in point of time.

63. State *v.* Waddle, 100 Iowa 57, 69 N. W. 279.

64. People *v.* Dowdall, 124 Mich. 166, 82 N. W. 810.

65. State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; Maroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696; Plummer *v.* State, 35 Tex. Cr. 202, 33 S. W. 228.

Cal. Code Civ. Proc. § 968, requiring direct evidence in perjury cases, means that there must be direct evidence only as to the falsity of the testimony charged to be perjury. People *v.* Rodley, 131 Cal. 240, 63 Pac. 351.

66. See *infra,* II, C, 4.

67. U. S. *v.* Wood, 14 Pet. (U. S.) 430, 10 L. ed. 527; U. S. *v.* Hall, 44 Fed. 864, 10 L R. A. 324. See also Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10, 13 Ky. L. Rep. 676.

b. Intent and Knowledge of Falsity. To convict of perjury it must be shown beyond reasonable doubt that the testimony of defendant was given wilfully and corruptly.[68]

c. Proceeding in Which Oath Was Administered. In order to convict a witness of perjury alleged to have been committed on the trial of a case in a court of record, the record of the case, or a duly authenticated transcript thereof, is necessary to prove the judicial proceeding in the course of which the alleged perjury was committed,[69] unless such formal proof is waived.[70] Where the pendency of the action in which the false testimony was given has been shown by the records, and the trial thereof by oral testimony, the trial and disposition of the case need not be shown by record.[71]

d. Jurisdiction and Authority to Administer Oath. In a prosecution for perjury, the jurisdiction of the court over the proceedings in which the alleged perjury was committed, or the authority of the officer administering the oath, as the case may be, must be proved.[72] As to the authority of the officer administering

Cases in which living witness is unnecessary.—A living witness may be dispensed with and documentary or written testimony be relied upon to convict in cases where a person is charged with the perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing a corrupt intent; in cases where the perjury charged is contradicted by the public record proved to have been well known to defendant when he took the oath, the oath only being proved to have been taken; in cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating the facts sworn to, or by other written testimony existing and being found in the possession of defendant, and which has been treated by him as containing the evidence of the fact recited in it. U. S. *v.* Wood, 14 Pet. (U. S.) 430, 10 L. ed. 527.

68. Mason *v.* State, 55 Ark. 529, 18 S. W. 827; Goad *v.* State, 106 Tenn. 175, 61 S. W. 79. See *supra*, I, B, 2, b, (I).

Evidence that defendant had no reasonable ground for believing the fact to which he testified is sufficient to show a corrupt motive in giving such testimony. State *v.* Clough, 111 Iowa 714, 83 N. W. 727. See *supra*, I, B, 2, b, (II).

Inability to read.— If perjury is assigned on the affidavit of one who cannot read, his understanding of its statements must be proved. Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Dec. 295.

69. McMurry *v.* State, 6 Ala. 324 (holding further that on the trial of an indictment for perjury in an action growing out of a written contract, it is necessary to produce the contract as well as the record or papers of the suit); Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; Respublica *v.* Goss, 2 Yeates (Pa.) 479; Rex *v.* Drummond, 10 Can. Cr. Cas. 340, 10 Ont. L. Rep. 546 (holding that upon a trial for perjury alleged to have been committed at a previous trial for a criminal offense, the fact of the previous trial must be proved by the production of the indictment and the formal record, or of a certificate under section 691 of the criminal code; the evidence of the clerk of the court, accompanied by the production of his minutes of the trial, and the evidence of the court stenographer who took down the evidence at the trial, are not proof of the indictment and trial).

Proof that defendant was sworn and testified in the case will not dispense with the necessity of legally proving the existence of the case by the record thereof. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

Upon an indictment for perjury in a federal court it is not necessary to produce a copy of the record in the cause in which the perjury was committed, as such court is presumed to know its own record. U. S. *v.* Erskine, 25 Fed. Cas. No. 15,057, 4 Cranch C. C. 299.

Plea in civil action.— The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings; but defendant, if he wishes, may, in case the plea be not produced, prove its contents by secondary evidence. Reg. *v.* Ross, 28 L. C. Jur. 261, 1 Montreal Q. B. 227.

70. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; King *v.* State, 32 Tex. Cr. 463, 24 S. W. 514.

71. Barnes *v.* State, 15 Ohio Cir. Ct. 14, 8 Ohio Cir. Dec. 153.

72. Eighmy *v.* People, 79 N. Y. 546 (holding, however, that upon an indictment for perjury in testimony given by the accused before a referee, proof of the entry of the order of reference is not required where the granting of the order by the court gave the referee jurisdiction); Reg. *v.* Gagan, 17 U. C. C. P. 530; Reg. *v.* Mason, 29 U. C. Q. B. 431 (where, however, upon an indictment for perjury committed upon the hearing of a complaint before a magistrate, the information having been proved, it was held, upon a case reserved, that it was unnecessary to prove any summons issued, or any step taken

the oath, it is sufficient to prove that he was acting as such,[73] without putting in evidence his commission or other facts giving jurisdiction.[74]

e. Administration, Form, and Making of Oath. The fact that defendant was sworn must be proved, but not necessarily by positive evidence; circumstantial evidence is sufficient for this purpose.[75] The official certificate of a notary, magistrate, or other officer, together with proof of the authenticity of the signatures of the affiant and the officer, is *prima facie* proof of the proper execution of an affidavit upon which a prosecution for perjury is founded,[76] and evidence that the oath was never actually administered must be strong and convincing to justify the court in taking the case from the jury.[77]

f. Materiality of Testimony or Assertion. To sustain an indictment for perjury, there must be proof that the false testimony was material to the issue,[78]

to bring the person complained of before the magistrate; for so long as he was present, the manner of getting there was immaterial).

Special term of court.— Where the case in which the alleged perjury was committed was tried at a special term of court, it is not necessary to report or prove the order of the judge directing such special term to be held, nor the governor's appointment of the particular judge holding it. State *v.* Ledford, 28 N. C. 5.

Proof that stenographer taking deposition was sworn.— The fact that the stenographer, who took a deposition in a civil case, on which perjury is assigned, had been sworn as required by statute, must be proved by the record or proceedings in the case in which the deposition was taken. Reg. *v.* Downie, 3 Montreal Q. B. 360. *Compare* Reg. *v.* Leonard, 3 Montreal Leg. N. 211, where the record evidence was held sufficient.

Place where oath was administered.— On the trial of one for perjury in making an affidavit, if the state and county are given in the venue of the affidavit, this is ample evidence, in the absence of contrary proof, to show that the oath was administered in the county named in the venue. Van Dusen *v.* People, 78 Ill. 645.

Offense on licensed premises.— On a trial for perjury alleged to have been committed before justices on information against a public-house keeper for an offense against the licensing acts, the license must be produced in order to show the jurisdiction of the justices. Reg. *v.* Evans, 17 Cox C. C. 37; Reg. *v.* Lewis, 12 Cox C. C. 163.

73. *Indiana.*— Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Iowa.— State *v.* Clough, 111 Iowa 714, 63 N. W. 727.

Kansas.— State *v.* Geer, 48 Kan. 752, 30 Pac. 236.

Kentucky.— Dowdy *v.* Com., 17 S. W. 187, 13 Ky. L. Rep. 350.

Michigan.— Keator *v.* People, 32 Mich. 484.

New York.— People *v.* Ellenbogen, 114 N. Y. App. Div. 182, 99 N. Y. Suppl. 897 [*affirmed* in 186 N. Y. 603, 79 N. E. 1112].

North Carolina.— State *v.* Gregory, 6 N. C. 69.

England.— Reg. *v.* Newton, 1 C. & K. 469, 47 E. C. L. 469; Reg. *v.* Roberts, 14 Cox C. C. 101, 38 L. T. Rep. N. S. 690; Rex *v.* Howard, 1 M. & Rob. 187. See also Reg. *v.* Verelst, 3 Campb. 432, 14 Rev. Rep. 775.

See 39 Cent. Dig. tit. "Perjury," § 120.

74. State *v.* Geer, 48 Kan. 752, 30 Pac. 236; State *v.* Gregory, 6 N. C. 69.

75. U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89.

Proof that defendant was sworn as a witness establishes, in the absence of proof to the contrary, that a binding oath was administered to him. Greene *v.* People, 182 Ill. 278, 55 N. E. 341; State *v.* Glisson, 93 N. C. 506. But see Curtley *v.* State, 42 Tex. Cr. 227, 59 S. W. 44.

76. *Florida.*— Markey *v.* State, 47 Fla. 38, 37 So. 53.

Massachusetts.— Com. *v.* Warden, 11 Metc. 406.

Minnesota.— State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

New Hampshire.—State *v.* Hascall, 6 N. H. 352.

Ohio.— See Silver *v.* State, 17 Ohio 365.

Wisconsin.— Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

United States.— U. S. *v.* Baer, 6 Fed. 42, 18 Blatchf. 493.

England.— Rex *v.* Morris, 2 Burr. 1189, 1 Leach C. C. 60; Rex *v.* Spencer, 1 C. & P. 260, R. & M. 97, 12 E. C. L. 157.

See 39 Cent. Dig. tit. "Perjury," § 121.

77. Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

Proof independent of certificate necessary. — Case *v.* People, 76 N. Y. 242, 6 Abb. N. Cas. 151 [*reversing* 14 Hun 503].

Where the notary identified the genuineness of the authentication, but could not otherwise positively or directly swear that he administered an oath, and defendant and three others swore that no oath was administered, but that the affidavit was signed by defendant and carried out of the room to the notary, who then affixed his jurat, a conviction of perjury cannot be sustained. Case *v.* People, 76 N. Y. 242, 6 Abb. N. Cas. 151.

Evidence held sufficient to show oath administered.— Cronk *v.* People, 131 Ill. 56, 22 N. E. 862; Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

78. Bledsoe *v.* State, 64 Ark. 474, 42 S. W. 899; Gibson *v.* State, 47 Fla. 34, 36 So. 706; Brown *v.* State, 47 Fla. 16, 36 So. 705; Rich

unless by statute materiality is rendered unnecessary.[79] The record of the case, or a duly authenticated transcript thereof, is necessary for this purpose,[80] and the fact that the testimony was received is not, standing alone, sufficient.[81] Where the alleged perjury was committed on a trial for the violation of a city ordinance, it is essential, in establishing the materiality of the false testimony, to show that such an ordinance creating the offense existed.[82] In no event can the materiality of the testimony or assertion assigned as perjury be established by the opinions of witnesses.[83]

g. Matter Sworn to and Falsity Thereof — (I) *In General.* Before one can be convicted of perjury, it must be established beyond a reasonable doubt that he testified as charged,[84] and that the testimony so given was false.[85] It is not, however, necessary that the whole of the testimony given by defendant at the time

v. U. S., 1 Okla. 354, 33 Pac. 804; Lawrence *v.* State, 2 Tex. App. 479.

79. Reg. *v.* Ross, 1 Montreal Q. B. 227, 28 L. C. Jur. 261. See *supra*, I, B, 6, a, (I).

80. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

Where the perjury charged is denying the execution of a deed introduced in evidence in an action of ejectment, the materiality of the deed to the issue in ejectment must be shown by the introduction of the deeds constituting the chain of title of which such deed was a link. Young *v.* People, 134 Ill. 37, 24 N. E. 1070.

81. Com. *v.* Pollard, 12 Metc. (Mass.) 225; Lawrence *v.* State, 2 Tex. App. 479.

82. Gardner *v.* State, 80 Ark. 264, 97 S. W. 48.

83. Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119.

84. Bradford *v.* State, 134 Ala. 141, 32 So. 742 (holding that it is enough to prove substantially what defendant said); Medlock *v.* State, (Tex. Cr. App. 1904) 82 S. W. 508.

Ambiguous averment.— Where the evidence as to what was sworn to is ambiguous, it is insufficient. Reg. *v.* Bird, 17 Cox C. C. 387.

85. See the cases cited *infra*, this note.

Evidence held sufficient to show falsity of oath.— People *v.* Parent, 139 Cal. 600, 73 Pac. 423; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; State *v.* Hunter, 181 Mo. 316, 80 S. W. 955; Simpson *v.* State, 46 Tex. Cr. 77, 79 S. W. 530; Freeman *v.* State, 44 Tex. Cr. 496, 72 S. W. 1001; Martinez *v.* State, 39 Tex. Cr. 479, 46 S. W. 826; Lomax *v.* State, (Tex. Cr. App. 1897) 40 S. W. 999; Rogers *v.* State, 35 Tex. Cr. 221, 32 S. W. 1044.

Evidence held insufficient to show falsity of oath.— Thomas *v.* State, 51 Ark. 138, 10 S. W. 193; People *v.* Maxwell, 118 Cal. 50, 50 Pac. 18; People *v.* Strassman, 112 Cal. 683, 45 Pac. 3; People *v.* Porter, 104 Cal. 415, 38 Pac. 88; State *v.* Pratt, (S. D. 1907) 112 N. W. 152; Meeks *v.* State, 32 Tex. Cr. 420, 24 S. W. 98; Gabe *v.* State, (Tex. App. 1892) 18 S. W. 413; Cerns *v.* Territory, 3 Wyo. 270, 21 Pac. 699; Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

Contradictory statements by accused.— Testimony of defendant directly contradicting that upon which the perjury is assigned is not sufficient evidence of the falsity of the latter.

Alabama.— Peterson *v.* State, 74 Ala. 34.

Florida.— Freeman *v.* State, 19 Fla. 552.

Oregon.— State *v.* Buckley, 18 Oreg. 228, 22 Pac. 838.

Texas.— Billingsley *v.* State, (Cr. App. 1906) 95 S. W. 520; Agar *v.* State, 29 Tex. App. 605, 16 S. W. 761; Brooks *v.* State, 29 Tex. App. 582, 16 S. W. 542.

Virginia.— Schwartz *v.* Com., 27 Gratt. 1025, 21 Am. Rep. 365.

United States.— U. S. *v.* Mayer, 26 Fed. Cas. No. 15,753, Deady 127.

England.— Rex *v.* Knill, 5 B. & Ald. 926 note, 7 E. C. L. 505; Reg. *v.* Hughes, 1 C. & K. 519, 47 E. C. L. 519; Reg. *v.* Wheatland, 8 C. & P. 238, 34 E. C. L. 710; Jackson's Case, 1 Lewin C. C. 270. But see Reg. *v.* Hook, 8 Cox C. C. 5, Dears. & B. 606, 4 Jur. N. S. 1026, 27 L. J. M. C. 222, 6 Wkly. Rep. 518.

But see People *v.* Burden, 9 Barb. (N. Y.) 467.

Where a joint affidavit made by defendant and one D stated "Each for himself maketh oath and saith, that, &c.; and that he this deponent is not aware of any adverse claim to or occupation of said lot," and defendant was convicted of perjury on this latter allegation, it was held that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. Reg. *v.* Atkinson, 17 U. C. C. P. 295.

Jurat of affidavit.— To sustain a conviction for perjury it is not necessary that the jurat of the affidavit upon which the perjury is assigned should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. Reg. *v.* Atkinson, 17 U. C. C. P. 295.

Perjury in deposition taken by stenographer.— On a reserved case arising out of a conviction for perjury had upon the evidence of the stenographer who took the deposition, it was held that while the accused could not be convicted upon the notes of the stenographer, because they were not read or signed by the accused, he was nevertheless prop-

of the alleged perjury should be given in evidence; so much thereof as relates to the particular fact on which the perjury is assigned is sufficient.[86]

(II) *Proof of One Assignment Sufficient.* Where, in an indictment for perjury, there are several distinct assignments, proof of any one of them is sufficient to support the indictment.[87] If, however, the indictment is in one assignment, failure to prove all the statements substantially as alleged is fatal to the prosecution.[88] And where there are a number of allegations of perjury in one affidavit made by defendant, it is error to consider each charge separately, without reference to the other allegations in the affidavit.[89]

h. Subornation of Perjury. Where defendant is charged with subornation of perjury, testimony given at his trial, on behalf of the people, by the person whom he procured to testify falsely, must, if corroborated, be submitted to the jury.[90]

4. Number of Witnesses and Corroboration — a. Early Rule. It was formerly held that a conviction for perjury could not be had except upon the direct testimony of two witnesses.[91]

b. Modern Rule — (I) *In General.* But this rule has long since been relaxed, and it is now held that a charge of perjury may be sustained either by the testimony of two witnesses, or by that of one witness and corroborating circumstances.[92] Positive and direct evidence is absolutely necessary in a perjury case;

erly convicted on the evidence of the stenographer given from his recollection of what the accused said, and this notwithstanding some slight irregularities in the original suit. Reg. *v.* Leonard, 3 Montreal Leg. N. 138, 211.

86. Dodge *v.* State, 24 N. J. L. 455; U. S. *v.* Erskine, 25 Fed. Cas. No. 15,057, 4 Cranch C. C. 299; Rex *v.* Rowley, R. & M. 299, 21 E. C. L. 756. See also Rex *v.* Dowlin, 1 Peake N. P. 170. *Compare* Rex *v.* Leefe, 2 Campb. 134, 11 Rev. Rep. 683; Rex *v.* Jones, 1 Peake N. P. 37.

87. *Alabama.*— Bradford *v.* State, 134 Ala. 141, 32 So. 742.

Arkansas.— Marvin *v.* State, 53 Ark. 395, 14 S. W. 87.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

Mississippi.— Page *v.* State, 59 Miss. 474.

Missouri.— State *v.* Taylor, 202 Mo. 1, 100 S. W. 41; State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; State *v.* Day, 100 Mo. 242, 12 S. W. 365.

New Hampshire.— State *v.* Blaisdell, 59 N. H. 328; State *v.* Hascall, 6 N. H. 352.

Texas.—Adellberger *v.* State, (Cr. App. 1897) 39 S. W. 103; Moore *v.* State, 32 Tex. Cr. 405, 24 S. W. 95.

See 39 Cent. Dig. tit. "Perjury," § 99.

If one material averment is charged in a variety of forms, such several statements do not constitute one assignment of perjury; but if either one is proved false, it is sufficient to warrant a conviction. Dodge *v.* State, 24 N. J. L. 455.

88. Brown *v.* State, 40 Tex. Cr. 48, 48 S. W. 169.

89. Rex *v.* Cohon, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

90. People *v.* Van Tassel, 26 N. Y. App. Div. 445, 50 N. Y. Suppl. 53.

Evidence held sufficient to sustain conviction.— State *v.* Renswick, 85 Minn. 19, 88 N. W. 22; Babcock *v.* U. S., 34 Fed. 873.

91. Reg. *v.* Roberts, 2 C. & K. 607, 61 E. C. L. 607, holding, however, that it is not necessary to prove by two witnesses every fact necessary to make out the assignment of perjury. See also Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; State *v.* Raymond, 20 Iowa 582; Territory *v.* Remuzon, 3 N. M. 368, 9 Pac. 598; People *v.* Stone, 32 Hun (N. Y.) 41.

92. *Alabama.*— Peterson *v.* State, 74 Ala. 34.

District of Columbia.— Cook *v.* U. S., 26 App. Cas. 427.

Florida.— McClerkin *v.* State, 20 Fla. 879.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167.

Kentucky.— Stamper *v.* Com., 100 S. W. 286, 30 Ky. L. Rep. 992; Sweat *v.* Com., 96 S. W. 843, 29 Ky. L. Rep. 1067; Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683; Wells *v.* Com., 6 S. W. 150, 9 Ky. L. Rep. 658.

Louisiana.—State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

Mississippi.— Brown *v.* State, 57 Miss. 424.

New York.— People *v.* Stone, 32 Hun 41.

North Carolina.— State *v.* Hawkins, 115 N. C. 712, 20 S. E. 623.

Pennsylvania.— Com. *v.* O'Grady, 4 Pa. Dist. 732.

South Dakota.— State *v.* Pratt, (1907) 112 N. W. 152.

Texas.— Kelley *v.* State, (Cr. App. 1907) 103 S. W. 189; Wilkerson *v.* State, (Cr. App. 1900) 55 S. W. 49; Carter *v.* State, (Cr. App. 1898) 43 S. W. 996; Maines *v.* State, 26 Tex. App. 14, 9 S. W. 51.

United States.— U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1.

England.— Reg. *v.* Boulter, 3 C. & K. 236, 5 Cox C. C. 543, 2 Den. C. C. 396, 16 Jur. 135, 21 L. J. M. C. 57; Reg. *v.* Braithwaite, 8 Cox C. C. 254, 1 F. & F. 638; Rex *v.* Mayhew, 6 C. & P. 315, 25 E. C. L. 450.

See 39 Cent. Dig. tit. "Perjury," § 125.

circumstantial evidence standing alone is never sufficient.[93] Direct evidence is not limited to a denial in *ipsissimis verbis* of the testimony given by defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him.[94]

(II) *Corroboration*—(A) *In General*—(1) Necessity—(a) In General. In no case can a conviction for perjury be secured and sustained on the uncorroborated testimony of one witness. The underlying principle of this rule is, that if there be but one witness to prove the allegation of falsity, then oath is placed against oath and it remains doubtful where the truth lies, the oath of the accused, which is alleged to be false, being sufficient to counterpoise the testimony of a single witness.[95] This requirement applies, however, only to proof of the falsity of the oath. A single witness is sufficient to establish the taking of the oath and the matter sworn to.[96]

Same rule applicable to statutory "false swearing."—Aguierre *v.* State, 31 Tex. Cr. 519, 21 S. W. 256.

Testimony as to admissions by defendant.—The testimony of several witnesses that defendant, while a witness, admitted the falsity of an affidavit made by him, is not proof by two witnesses of its falsity, within the statute. Butler *v.* State, (Tex. Cr. App. 1896) 38 S. W. 46.

Where proof is based on circumstantial evidence the rule that there must be two witnesses to prove the charge, or, if only one witness is produced, there must be independent corroborating circumstances, does not apply. People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606].

Competency of witness not affected by rule.—The rule that a prisoner on trial for perjury can be convicted only upon the testimony of two witnesses, or of one witness whose testimony is corroborated by circumstances, does not affect the competency of the witnesses to the alleged perjury. State *v.* Ricketts, 74 N. C. 187.

Confession in open court.—The words "confession in open court" in Tex. Code Cr. Proc. (1895) art. 786, prohibiting a conviction of perjury except upon the testimony of two credible witnesses, or upon confession in open court, mean a conviction in a case against the person confessing, and do not include a confession in another court as a witness in another case. Butler *v.* State, (Tex. Cr. App. 1896) 38 S. W. 46.

An accomplice may be the one witness giving direct evidence in connection with corroborating circumstances. People *v.* Rodley, 131 Cal. 240, 63 Pac. 351. But see Conant *v.* State, (Tex. Cr. App. 1907) 103 S. W. 897, holding that under Code Cr. Proc. (1895) art. 786, providing that no person may be convicted of perjury, except upon the testimony of two credible witnesses, or of one credible witness strongly corroborated by other evidence, an accomplice being a discredited witness, to convict of perjury there must be at least one credible witness besides an accomplice.

Directing verdict.—In all cases where two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court should instruct the jury to render a verdict of acquittal. Waters *v.* State, 30 Tex. App. 284, 17 S. W. 411.

A credible witness within the meaning of the statute is one who, being competent to give evidence, is worthy of belief. Wilson *v.* State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; Smith *v.* State, 22 Tex. App. 196, 2 S. W. 542. See also Kitchen *v.* State, 29 Tex. App. 45, 14 S. W. 392.

93. People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389.

To convict of the crime of perjury on oral testimony, the testimony of the prosecuting witness should, in positive terms, contradict the statement of the person indicted. Cook *v.* U. S., 26 App. Cas. (D. C.) 427.

94. People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389.

95. *California.*—People *v.* Davis, 61 Cal. 536.

District of Columbia.—Cook *v.* U. S., 26 App. Cas. 427.

Louisiana.—State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

Massachusetts.—Com. *v.* Butland, 119 Mass. 317.

Mississippi.—Whittle *v.* State, 79 Miss. 327, 30 So. 722.

Missouri.—State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Heed, 57 Mo. 252.

Montana.—State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749.

New Mexico.—Territory *v.* Williams, 9 N. M. 400, 54 Pac. 232.

New York.—People *v.* Stone, 32 Hun 41.

Texas.—Cleveland *v.* State, (Cr. App. 1906) 95 S. W. 521; Lee *v.* State, (Cr. App. 1902) 70 S. W. 425; Chavarria *v.* State, (Cr. App. 1901) 63 S. W. 312; Butler *v.* State, 36 Tex. Cr. 444, 37 S. W. 746; Taylor *v.* State, (Cr. App. 1893) 22 S. W. 974.

England.—Reg. *v.* Braithwaite, 8 Cox C. C. 254, 1 F. & F. 638; Reg. *v.* Muscot, 10 Mod. 192; Rex *v.* Lee, 1 Russ. Cr. 368. See also Rex *v.* Champney, 2 Lew. C. C. 258.

See 39 Cent. Dig. tit. "Perjury," § 126.

96. *Massachusetts.*—Com. *v.* Pollard, 12 Metc. 225.

New York.—People *v.* Hayes, 140 N. Y.

(b) Subornation of Perjury. The rule that under an indictment for perjury defendant cannot be convicted on the uncorroborated testimony of a single witness is not applicable to a case of subornation of perjury.[97]

(2) Degree. Where a conviction is sought on the trial of one charged with perjury on the testimony of one witness and corroborating evidence, the corroborating evidence must corroborate material testimony adduced by the state in support of the charge, and not testimony in regard to some distinct and immaterial matter.[98] It need not be so strong as to equal the positive testimony of another witness,[99] nor so strong that, standing alone, it would justify a conviction.[1] All that is required is that it shall be sufficiently strong to turn the scale against the weight of the oath charged to be false, and to satisfy the jury beyond a reasonable doubt of the guilt of the accused.[2]

484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830 [*affirming* 70 Hun 111, 24 N. Y. Suppl. 194].

South Carolina.—State *v.* Hayward, 1 Nott & M. 546. But see State *v.* Howard, 4 McCord 159.

Texas.— Hambright *v.* State, (Cr. App. 1905) 91 S. W. 232; Adams *v.* State, (Cr. App. 1906) 91 S. W. 225.

United States.— U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

England.— Reg. *v.* Roberts, 2 C. & K. 607, 61 E. C. L. 607; Rex *v.* Champney, 2 Lew. C. C. 258.

See 39 Cent. Dig. tit. "Perjury," § 127.

97. State *v.* Waddle, 100 Iowa 57, 69 N. W. 279; Com. *v.* Douglass, 5 Metc. (Mass.) 241; State *v.* Renswick, 85 Minn. 19, 88 N. W. 22 (holding that, if it is sought to establish the fact that perjury was committed by the testimony of the person committing it, his testimony must be corroborated as to such fact, but the alleged fact that the party was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt); Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531; U. S. *v.* Thompson, 31 Fed. 331, 12 Sawy. 438. But see State *v.* Fahey, 3 Pennew. (Del.) 594, 54 Atl. 690; State *v.* Evans, 40 N. Y. 1.

The reason of the rule that the accused cannot be convicted on the uncorroborated testimony of a single witness does not apply to a case of subornation of perjury, for the reason that in such case the testimony does not consist of that of one person against that of another. The testimony of each witness for the prosecution involves, it is true, the impeachment of his own former sworn testimony, but it is direct evidence against the accused as to the instigation of the perjury. Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531. See also State *v.* Waddle, 100 Iowa 57, 69 N. W. 279.

98. State *v.* Buie, 43 Tex. 532.

99. *Indiana.*— Hendricks *v.* State, 26 Ind. 493.

Louisiana.— State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

Missouri.— State *v.* Heed, 57 Mo. 252.

Ohio.— State *v.* Courtright, 66 Ohio St. 35, 63 N. E. 590; Crusen *v.* State, 10 Ohio St. 258; *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

Washington.— State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123.

United States.— U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

See 39 Cent. Dig. tit. "Perjury," § 125.

Compare Gandy *v.* State, 23 Nebr. 436, 36 N. W. 817, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 408.

1. *Georgia.*— Nance *v.* State, 126 Ga. 95, 54 S. E. 932.

Kentucky.— Williams *v.* Com., 113 Ky. 652, 68 S. W. 871, 24 Ky. L. Rep. 465.

Missouri.— State *v.* Hunter, 181 Mo. 316, 80 S. W. 955.

Ohio.— *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450.

United States.— U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

2. *Georgia.*— Nance *v.* State, 126 Ga. 95, 54 S. E. 932.

Indiana.— Galloway *v.* State, 29 Ind. 442.

Iowa.— State *v.* Raymond, 20 Iowa 582.

Missouri.— State *v.* Miller, 44 Mo. App. 159.

New Mexico.— Territory *v.* Remuzon, 3 N. M. 368, 9 Pac. 598.

New York.— People *v.* Sturgis, 110 N. Y. App. Div. 1, 96 N. Y. Suppl. 1046; People *v.* Stone, 32 Hun 41.

North Carolina.— State *v.* Peters, 107 N. C. 876, 12 S. E. 74.

Ohio.— State *v.* Courtright, 66 Ohio St. 35, 63 N. E. 590.

South Dakota.— State *v.* Pratt, (1907) 112 N. W. 152.

United States.— U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

England.— Reg. *v.* Boulter, 3 C. & K. 236, 5 Cox C. C. 543, 2 Den. C. C. 396, 16 Jur. 135, 21 L. J. M. C. 57; Reg. *v.* Yates, C. & M. 132, 5 Jur. 636, 41 E. C. L. 77 (holding that evidence confirmatory of the one witness in some slight particulars only is not sufficient to warrant a conviction); Reg. *v.* Shaw, 10 Cox C. C. 66, 11 Jur. N. S. 415, L. & C. 579, 34 L. J. M. C. 169, 12 L. T. Rep. N. S. 470, 13 Wkly. Rep. 692; Reg. *v.* Hook, 8 Cox C. C. 5, Dears. & B. 606, 4 Jur. N. S. 1026, 27 L. J. M. C. 222, 5 Wkly. Rep. 518; Reg. *v.* Gardiner, 8 C. & P. 737, 2 Moody C. C. 95, 34 E. C. L. 992; Reg. *v.* Webster, 1 F. & F. 515.

See 39 Cent. Dig. tit. "Perjury," § 125.

Corroborating evidence held sufficient to warrant a conviction.— Flemister *v.* State, 81 Ga. 768, 7 S. E. 642; People *v.* Hayes, 140

(3) MANNER — (a) IN GENERAL. Corroborative evidence against the accused on a prosecution for perjury means evidence *aliunde* which tends to show the perjury independent of any declaration or admission of the prisoner,[3] and the person to be corroborated.[4]

(b) BY CIRCUMSTANCES. The corroboration may be by circumstantial evidence consisting of proof of independent facts which together tend to establish the main fact, that is, the falsity of the oath, and which together strongly corroborate the truth of the testimony of the single witness who has testified to such falsity.[5]

(c) BY DECLARATIONS OR ADMISSIONS OF ACCUSED. While proof of contradictory statements by the accused are not sufficient to convict of perjury, the direct testimony of one witness, corroborated by declarations or admissions of the prisoner inconsistent with the oath on which the perjury is assigned, is sufficient to convict.[6]

(B) *Corroboration Between Assignments.* Where there are several assignments of perjury, the weight of authority is that the testimony of a single witness must be corroborated with respect to the matter of each assignment. Proof of one assignment is not corroborated by proof of another, even though all the perjuries were committed at the same time and place.[7] Where, however, there is one assignment of a continuous nature, the rule is otherwise.[8]

(C) *Sufficiency of Evidence as Basis of Corroboration.* As a general rule, corroborative facts are insufficient without the direct testimony of one witness as to the falsity of defendant's oath;[9] and the testimony of such witness must be positive and unequivocal.[10] There have been cases, however, in which living witnesses were dispensed with altogether.[11]

D. Trial, Review, and Punishment — 1. QUESTIONS OF LAW AND FACT — a. Jurisdiction. Whether the court trying the case in which the alleged perjury was committed had jurisdiction thereof is a question of law for the court.[12]

N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830 [*affirming* 70 Hun 111, 24 N. Y. Suppl. 194]; State *v.* Hawkins, 115 N. C. 712, 20 S. E. 623; State *v.* Swaim, 97 N. C. 462, 2 S. E. 68.

Corroborating evidence held insufficient to warrant a conviction.— People *v.* Smith, 3 Cal. App. 68, 84 Pac. 452; Maines *v.* State, 26 Tex. App. 14, 9 S. W. 51; Reg. *v.* Owen, 6 Cox C. C. 105.

The words "strongly corroborative" mean that the corroborating evidence must relate to a material matter, that is, it must tend to show the falsity of defendant's oath, and, taken altogether, it must be so cogent, powerful, and forcible as to be calculated to make a deep impression upon the mind. Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Rep. 295.

3. State *v.* Raymond, 20 Iowa 582; State *v.* Hunter, 181 Mo. 316, 80 S. W. 955. See also Cook *v.* U. S., 26 App. Cas. (D. C.) 427.

Where a prisoner testifies in his own behalf, his manner of giving testimony may be sufficient corroboration to justify conviction on the testimony of one witness for the prosecution. State *v.* Miller, 24 W. Va. 802.

4. Gabrielsky *v.* State, 13 Tex. App. 428.

5. Cook *v.* U. S., 26 App. Cas. (D. C.) 427; State *v.* Clough, 111 Iowa 714, 83 N. W. 727; Beach *v.* State, 32 Tex. Cr. 240, 22 S. W. 976; Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Rep. 295; U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324. See also Franklin *v.* State, 38 Tex. Cr. 346, 43 S. W. 85.

6. *Illinois.*— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

Iowa.— State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Massachusetts.— Com. *v.* Parker, 2 Cush. 212.

Mississippi.— Hemphill *v.* State, 71 Miss. 877, 16 So. 261.

Missouri.— State *v.* Blize, 111 Mo. 464, 20 S. W. 210.

North Carolina.— State *v.* Molier, 12 N. C. 263.

Texas.— See Grady *v.* State, (Cr. App. 1905) 90 S. W. 38.

England.— Reg. *v.* Towey, 8 Cox C. C. 328.

See 39 Cent. Dig. tit. "Perjury," § 131.

Contra.— Peterson *v.* State, 74 Ala. 34.

7. Lea *v.* State, 64 Miss. 278, 1 So. 235; Williams *v.* Com., 91 Pa. St. 493 [*reversing* 1 Lack. Leg. Reg. 264]; Reg. *v.* Parker, C. & M. 639, 41 E. C. L. 346. *Contra*, Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10, 13 Ky. L. Rep. 676; Barton *v.* Com., 32 S. W. 171, 396, 17 Ky. L. Rep. 580.

8. Reg. *v.* Hare, 13 Cox C. C. 174.

9. People *v.* Wells, 103 Cal. 631, 37 Pac. 529.

10. Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108, holding that no amount of corroboration will be sufficient to sustain a conviction where the testimony of the witness to be corroborated is in the alternative, doubtful, and equivocal.

11. See *supra*, II, C, 3, a.

12. State *v.* Clough, 111 Iowa 714, 83

b. Materiality of False Testimony. The materiality of the testimony assigned as false is also as a general rule a question of law for the court.[13] But, like any other question of law, the question of materiality may be so mingled with the facts that the court should submit it to the jury, with proper instructions upon the law.[14]

c. Questions of Fact. All questions of fact arising during the trial are for the jury.[15] Whether the oath is knowingly and corruptly false is a question for the jury.[16]

2. Instructions — a. In General. Instructions to the jury should be clear and explicit, easy of interpretation, and not liable to mislead.[17] They should not assume facts not proved,[18] submit issues not in the case,[19] or invade the province of the jury.[20] Where an instruction has once been given, it need not be repeated.[21]

N. W. 727; State *v.* Tate, 77 Miss. 469, 27 So. 619.

13. *Arkansas.*— Nelson *v.* State, 32 Ark. 192.

California.— People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389.

Iowa.— State *v.* Brown, 128 Iowa 24, 102 N. W. 799; State *v.* Clough, 111 Iowa 714, 83 N. W. 727; State *v.* Swafford, 98 Iowa 362, 67 N. W. 284; State *v.* Caywood, 96 Iowa 367, 65 N. W. 385.

Kansas.— State *v.* Lewis, 10 Kan. 157.

Kentucky.— Renan *v.* Com., 2 Ky. L. Rep. 66.

Missouri.— State *v.* Dineen, 203 Mo. 628, 102 S. W. 480; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Fannon, 158 Mo. 149, 59 S. W. 75; State *v.* Williams, 30 Mo. 364.

New Jersey.— Gordon *v.* State, 48 N. J. L. 611, 7 Atl. 476.

Oklahoma.— Peters *v.* U. S., 2 Okla. 138, 37 Pac. 1081; Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.

Pennsylvania.— Steinman *v.* McWilliams, 6 Pa. St. 170.

Texas.— Moroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696; Luna *v.* State, 44 Tex. Cr. 482, 72 S. W. 378; Smith *v.* State, 27 Tex. App. 50, 10 S. W. 751; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662.

United States.— U. S. *v.* Singleton, 54 Fed. 488; U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403.

England.— Reg. *v.* Courtney, 7 Cox C. C. 111; Reg. *v.* Southwood, 1 F. & F. 356; Rex *v.* Dunston, R. & M. 109, 21 E. C. L. 712.

See 39 Cent. Dig. tit. "Perjury," § 133.

When the record of the proceeding in which the perjury is alleged to have been committed is produced before the court on the trial for perjury, the materiality of the false statement to the issue in that cause is a question of law for the court, and it will be error to submit that question to the jury. Cothran *v.* State, 39 Miss. 541.

If the question is left to the jury, and their verdict determines the question of materiality as the court should have instructed them, no error is done to the substantial rights of defendant. Thompson *v.* People, 26 Colo. 496, 59 Pac. 51; State *v.* Lewis, 10 Kan. 157.

14. *Illinois.*— Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699; Young *v.* People, 134 Ill. 37, 24 N. E. 1070.

Louisiana.— State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

Texas.— McAvoy *v.* State, 39 Tex. Cr. 684, 47 S. W. 1000; Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119. See also Luna *v.* State, 44 Tex. Cr. 482, 72 S. W. 378.

United States.— U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403.

England.— Reg. *v.* Goddard, 2 F. & F. 361.

15. State *v.* Brown, 111 La. 170, 35 So. 501 (drunkenness of defendant); People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079 (existence of conspiracy); People *v.* Gilhooley, 108 N. Y. App. Div. 234, 95 N. Y. Suppl. 636 [*affirmed* in 187 N. Y. 551, 80 N. E. 1116] (accomplice and corroboration).

16. People *v.* Doody, 172 N. Y. 165, 64 N. E. 807; U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277; Reg. *v.* Murphy, 9 Montreal Leg. N. 95; Reg. *v.* Denault, 8 Montreal Leg. N. 250.

17. *Alabama.*— Peterson *v.* State, 74 Ala. 34.

Arkansas.— Robertson *v.* State, 54 Ark. 604, 16 S. W. 582.

Illinois.— Young *v.* People, 134 Ill. 37, 34 N. E. 1070.

Nebraska.— Gandy *v.* State, 23 Nebr. 436, 36 N. W. 817.

North Carolina.—State *v.* Lawson, 98 N. C. 759, 4 S. E. 134.

See 39 Cent. Dig. tit. "Perjury," § 134.

Instructions considered as a whole.— It is sufficient if the instructions as a whole fully and fairly announce the law applicable to the theory of the prosecution and of the defense. Quigg *v.* People, 211 Ill. 17, 71 N. E. 886.

18. Hitesman *v.* State, 48 Ind. 473.

19. Bridgers *v.* State, 44 Tex. Cr. 294, 70 S. W. 767.

20. People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396; Johnson *v.* People, 94 Ill. 505; State *v.* Allen, 94 Mo. App. 508, 69 S. W. 604.

21. Chase *v.* State, (Tex. Cr. App. 1894) 28 S. W. 952.

Instructions given and requested corresponding in part.— Because a portion of the requesting charge corresponds in part with the charge given by the court, it does not

b. As to Material Allegations and Facts to Be Proved. The court should inform the jury what the material allegations of the indictment are, and also what facts must be established before they can convict.[22] The jury should be informed as to which assignment or assignments of false testimony are submitted to them as a basis for their verdict.[23] Where the assignments of perjury are severable, it is proper for the court to select some of them to the exclusion of the others, and submit the same to the jury on which to predicate a conviction.[24] When not severable, an instruction submitting all such predicates *in solido* is proper.[25] It is error to instruct that, if the people prove any of the alleged assignments of perjury in manner and form as charged in the indictment, then defendant should be found guilty, since this instruction ignores entirely the materiality of the testimony.[26]

c. As to Wilfulness and Knowledge of Falsity of Testimony. A corrupt intent being an essential element of the crime of perjury, the court must instruct the jury that, in order to convict, the false testimony must have been given wilfully and corruptly, or other language must be used indicating that the swearing must have been intentionally false.[27] So also it is error to omit the element of knowledge of the falsity of the testimony given, and to fail or refuse to instruct that if defendant testified honestly in the belief of his statements, he would not be guilty.[28] It has been held, however, to be conceivable that the accused might admit the allegation of the indictment as to his knowledge of the falsity of his testimony, and put the prosecution upon proof only of the question as to whether the alleged false testimony was in fact true or false; in which case an instruction omitting the element of knowledge would not be erroneous.[29]

deprive defendant of the right to have given that portion of the charge which brings pertinently to the jury the issue involved. Porter *v.* State, (Tex. Cr. App. 1905) 88 S. W. 359.

22. Gandy *v.* State, 23 Nebr. 436, 36 N. W. 817.

23. Conant *v.* State, (Tex. Cr. App. 1907) 103 S. W. 897.

24. Stanley *v.* State, (Tex. Cr. App. 1903) 74 S. W. 318; Sisk *v.* State, 28 Tex. App. 432, 13 S. W. 647.

Stressing material matter.— Where an assignment of perjury embraces several particulars, it is not prejudicial to defendant for the court to stress one of them, as being the main material matter, in charging the jury. McCord *v.* State, 83 Ga. 521, 10 S. E. 437.

25. Adams *v.* State, (Tex. Cr. App. 1906) 91 S. W. 225.

26. Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699.

27. Cothran *v.* State, 39 Miss. 541.

"Knowingly" implies wilfulness and corruption.—An instruction that defendant is guilty if he knowingly swore falsely is not defective in omitting to state that the swearing must have been wilful and corrupt, since the word "knowingly" implies wilfulness and corruption. Morgan *v.* State, 63 Miss. 162.

"Wilfully" implies corruption.—Where the jury has been instructed that defendant's statement must have been wilfully false, there is no error in refusing to instruct that it must have been corruptly false, since the former implies the latter. Brown *v.* State, 57 Miss. 424. *Compare* Cothran *v.* State, 39 Miss. 541.

Wilfully and deliberately.— Under the Texas statute providing that false swearing, to be indictable, must be done "wilfully" and "deliberately," the court should define the terms "wilfully" and "deliberately." Holt *v.* State, (Tex. Cr. App. 1905) 89 S. W. 838; Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28; Steber *v.* State, 23 Tex. App. 176, 4 S. W. 880.

Mental condition of accused.— In a prosecution for perjury, where the evidence justifies it, defendant is entitled to an instruction, if he properly requests it, requiring the jury to consider his mental condition at the time of committing the alleged perjury, whether normal or failing, and his memory, whether good or bad, as bearing on the question of wilful perjury. Leaptrot *v.* State, 51 Fla. 57, 40 So. 616.

28. Goodwin *v.* State, 118 Ga. 770, 45 S. E. 620; People *v.* German, 110 Mich. 244, 68 N. W. 150; Porter *v.* State, (Tex. Cr. App. 1905) 88 S. W. 359; Luna *v.* State, 44 Tex. Cr. 482, 72 S. W. 378; Aguierre *v.* State, 31 Tex. Cr. 519, 21 S. W. 256.

Intoxication.— On a trial for perjury an instruction that the drunken condition of the accused at the time is a question of fact for the jury is proper. State *v.* Brown, 111 La. 170, 35 So. 501.

A charge that a false statement made through inadvertence, or under agitation, or by mistake, is not perjury, is sufficient, without calling special attention to defendant's intoxicated condition. Sisk *v.* State, 28 Tex. App. 432, 13 S. W. 647.

29. People *v.* Wong Fook Sam, 146 Cal. 114, 79 Pac. 848, holding that where an indictment for perjury charged, not only that

d. As to Effect of Evidence Admitted For Particular Purpose. Where, in a prosecution for perjury, evidence is only admissible on a particular issue, but might be considered for other purposes, it is error to fail to limit the consideration thereof to such issue.[30] Thus where evidence is competent only as impeaching evidence, and is not material as substantive evidence, the court should so instruct.[31] So also, if the judgment in the proceeding in which the perjury is alleged to have been committed is admitted on behalf of the prosecution, the court should give instructions limiting the effect of such evidence.[32] Where evidence is erroneously admitted, it is error to fail to charge that such evidence should be disregarded.[33]

e. As to Degree of Proof Required — (i) *In General.* Although the rule of evidence in perjury cases differs from that applicable in other criminal prosecutions, it is not error to instruct the jury to find defendant guilty if, from the evidence, they believe him guilty beyond a reasonable doubt.[34]

(ii) *As to Number and Corroboration of Witnesses.* The jury should be informed, in some part of the instructions in a trial for perjury, that, before they can convict, the fact that the oath was false must be shown to their satisfaction by the testimony of two witnesses or of one witness and corroborating circumstances.[35] The necessity for a charge that the falsity of the oath must be

the testimony given was false, but that it was wilfully given with knowledge on defendant's part that it was false, and the court charged in terms that all the allegations of the information except the falsity of the testimony were admitted, an instruction that if the jury believed beyond all reasonable doubt by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances, that the testimony in question was false, they should convict, did not constitute reversible error, on an appeal on the judgment-roll alone.

30. Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28.

31. State *v.* Austin, 132 N. C. 1037, 43 S. E. 905.

32. Estill *v.* State, 38 Tex. Cr. 255, 42 S. W. 305; Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461; Higgenbotham *v.* State, 24 Tex. App. 505, 6 S. W. 201; Littlefield *v.* State, 24 Tex. App. 167, 5 S. W. 650; Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123; Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662.

When record of judgment of conviction not introduced.— Where so much of the record of the trial in which the perjury was alleged to have been committed as will show the organization of the court and the nature of the accusation is introduced in evidence, but not the record of the judgment of conviction, it is not error to omit to instruct the jury limiting the use of such evidence. Franklin *v.* State, 38 Tex. Cr. 346, 43 S. W. 85.

33. Hollins *v.* State, (Tex. Cr. App. 1902) 69 S. W. 594.

34. Pennaman *v.* State, 58 Ga. 336; Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167 (holding that it is not necessary in every prosecution to state the degree or quantity of evidence indispensable to a conviction for perjury, nor to state the rule of evidence in such cases in connection with the usual formula that no conviction can be had unless the accused is proved guilty beyond a reasonable doubt); Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461.

35. Haines *v.* State, 109 Ga. 526, 35 S. E. 141 (holding that where the court, on a trial for perjury, in giving in charge Pen. Code, § 991, relative to the number of witnesses necessary to establish a fact, instead of reading to the jury the concluding clause of that section as written, added the words, "or may not," making it read, "corroborating circumstances may or may not dispense with another witness," this was not error as against the accused, since the interpolation of the words, "or may not," was favorable to him); Brown *v.* State, 57 Miss. 424.

Two witnesses or one witness and strong corroborating circumstances.— On a trial for perjury it is error to omit to instruct the jury that they could not convict unless they believed that defendant's guilt had been established by the testimony of two witnesses, or one witness and strong corroborating circumstances. Goslin *v.* Com., 90 S. W. 223, 28 Ky. L. Rep. 683; Wadlington *v.* Com., 59 S. W. 851, 22 Ky. L. Rep. 1108.

Two credible witnesses or one credible witness strongly corroborated.— It is reversible error to omit to instruct the jury that a conviction could not be had save on the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of defendant's statement on oath. Whitaker *v.* State, 37 Tex. Cr. 479, 36 S. W. 253; Aguierre *v.* State, 31 Tex. Cr. 519, 21 S. W. 256; Grandison *v.* State, 29 Tex. App. 186, 15 S. W. 174; Brookin *v.* State, 27 Tex. App. 701, 11 S. W. 645; Miller *v.* State, 27 Tex. App. 497, 11 S. W. 485; Wilson *v.* State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; Washington *v.* State, 22 Tex. App. 26, 3 S. W. 228.

Credibility of witness.— In such jurisdic-

proved by two witnesses or by one witness and corroborating circumstances is not obviated by the fact that more than one witness testified to the perjury.[36]

3. VERDICT. The verdict in a perjury case must be responsive to the issues,[37] and not inconsistent.[38]

4. NEW TRIAL. The general rules governing the granting of new trials in criminal cases apply in prosecutions for perjury.[39] Acquittal of the person charged with perjury entitles a person charged with suborning him to commit it, if already convicted thereof, to a new trial, since, if the testimony given was not perjury, there could not have been a subornation.[40]

5. APPEAL AND ERROR. The usual rules relating to appeal and error in criminal cases are applicable in prosecutions for perjury.[41]

6. SENTENCE AND PUNISHMENT. The crime of perjury was not originally punishable by courts of law. It was deemed in ages past a sin rather than a crime, and its punishment was supposed to reside with the offended deity who had been solemnly invoked and the solemn invocation to whom had been disregarded.[42] But for several centuries past the crime has been triable and punishable in the courts, and the punishment to be inflicted is usually a matter of statutory provision.[43] Under English statutes[44] the practice was to make the disability of defendant to give testimony a part of the sentence.[45] Assuming that such disability is properly a

tions as require a conviction for perjury to be based on the testimony of "credible" witnesses, it is error to fail to instruct the jury that a conviction must depend on their belief in the "credibility" of the witnesses. Kitchen *v.* State, 29 Tex. App. 45, 14 S. W. 392; Smith *v.* State, 22 Tex. App. 196, 2 S. W. 542. It is not necessary to define the word "credible," it being a word of ordinary significance. Chavarria *v.* State, (Tex. Cr. App. 1901) 63 S. W. 312.

Meaning of "corroborated."—An instruction on the number and corroboration of witnesses should tell the jury what is meant by "corroborated." State *v.* Hunter, 181 Mo. 316, 80 S. W. 955.

36. State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123. See also Thompson *v.* People, 26 Colo. 496, 59 Pac. 51. *Compare* Montgomery *v.* State, (Tex. Cr. App. 1897) 40 S. W. 805.

37. Barton *v.* Com., 32 S. W. 171, 396, 17 Ky. L. Rep. 580, holding that a verdict on a trial for false swearing (there being no degrees thereof), finding defendant guilty, and fixing his punishment, is sufficient, although it does not recite "as charged in the indictment."

A general verdict on two counts for perjury is bad, where the assignment of perjury in the second count is defective in setting up part only of what defendant said and omitting a qualifying statement, and the evidence on the first count is so contradictory as to leave room for doubt whether the jury would have found a verdict of guilty on that count if it had stood alone; and this is so notwithstanding the fact that if the first count had stood alone the verdict could not have been touched. Reg. *v.* Bain, 23 L. C. Jur. 327.

Where there are several assignments of perjury, a verdict of guilty, without a finding specifying upon which assignment the conviction was had, is bad, unless the evidence is sufficient to justify a verdict of guilty upon each or any one of them. People *v.* Root, 94 N. Y. App. Div. 84, 87 N. Y. Suppl. 962.

38. Harris *v.* People, 64 N. Y. 148 [*affirming* 4 Hun 1, 6 Thomps. & C. 206].

39. See, generally, CRIMINAL LAW.

Prejudicial error in giving of instructions is a ground for a new trial. U. S. *v.* Burkhardt, 31 Fed. 141, 12 Sawy. 433.

40. Maybush *v.* Com., 29 Gratt (Va.) 857.

41. See, generally, CRIMINAL LAW.

Necessity of presenting objections in lower court.— An objection that the information for perjury does not sufficiently set forth that issue was joined in the suit wherein the perjury was charged comes too late when first raised on appeal. State *v.* Moore, 111 La. 1006, 36 So. 100.

Erroneous admission or exclusion of evidence.— A judgment will not be reversed on account of the erroneous admission or exclusion of evidence which did not prejudice defendant. State *v.* Booth, 121 Iowa 710, 97 N. W. 74; Cope *v.* Com., 47 S. W. 436, 20 Ky. L. Rep. 721; State *v.* Allen, 94 Mo. App. 508, 69 S. W. 604; Ross *v.* State, 40 Tex. Cr. 349, 50 S. W. 336. If, however, defendant was, or might have been, prejudiced, it constitutes reversible error. People *v.* Gibson, 24 N. Y. App. Div. 12, 48 N. Y. Suppl. 861.

42. U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324. See ACTIONS, 1 Cyc. 687.

43. See the statutes of the several states. And De Bernie *v.* State, 19 Ala. 23; Robinson *v.* State, 18 Fla. 898 (imprisonment at hard labor); U. S. *v.* Snow, 27 Fed. Cas. No. 16,349, 1 Cranch C. C. 123 (fine, imprisonment, and pillory); Reg. *v.* Castro, L. R. 9 Q. B. 350, 12 Cox C. C. 454, 43 L. J. Q. B. 155, 30 L. T. Rep. N. S. 320, 22 Wkly. Rep. 187 (penal servitude).

44. 5 Eliz. c. 9; 2 & 18 Geo. II.

45. See Rex *v.* Ford, 2 Salk. 690; Rex *v.* Crosby, 2 Salk. 689; Rex *v.* Greepe, 2 Salk. 513.

part of the sentence, its omission is not ground for reversal at the instance of defendant.[46]

PER LEGEM TERRÆ. Lord Coke says that these words mean "by due process of law."[1] (See, generally, CONSTITUTIONAL LAW.)

PERMANENT. Abiding; durable; fixed; stable; lasting; as, a permanent impression;[2] not temporary[3] or subject to change, abiding, remaining, fixed or enduring in character, state, or place;[4] continuing in the same state, or without any change that destroys form of character, remaining unaltered or unmoved.[5] (Permanent: Abode, see CITIZENS; DOMICILE; ELECTIONS. Agent,[6] see PRINCIPAL AND AGENT. Alimony, see DIVORCE. Association, see BUILDING AND LOAN SOCIETIES. Disability,[7] see DAMAGES. Employment, see MASTER AND SERVANT. Fixture, see FIXTURES. Hospital, see HOSPITALS. Injunction, see INJUNCTIONS. Injury, see DAMAGES. Monument, see BOUNDARIES. Nuisance, see NUISANCES. Policy, see LIFE INSURANCE. Post, see ARMY AND NAVY. Sidewalk, see MUNICIPAL CORPORATIONS. Statute, see STATUTES. See also PERMANENTLY.)

PERMANENT ABODE. See CITIZENS; DOMICILE; ELECTIONS.

PERMANENT ALIMONY. See DIVORCE.

PERMANENT ASSOCIATION. See BUILDING AND LOAN SOCIETIES.

PERMANENT EMPLOYMENT. See MASTER AND SERVANT.

PERMANENT FIXTURE. See FIXTURES.

PERMANENT HOSPITAL. See HOSPITALS.

PERMANENT INJUNCTION. See INJUNCTIONS.

PERMANENT INJURY. See DAMAGES.

PERMANENTLY. In a permanent manner.[8] (See PERMANENT.)

46. Dodge *v.* State, 24 N. J. L. 455.

1. Rhinehart *v.* Schuyler, 7 Ill. 473, 519; Lowry *v.* Rainwater, 70 Mo. 152, 156, 35 Am. Rep. 420; Ervine's Appeal, 16 Pa. St. 256, 263, 55 Am. Dec. 499; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163.

2. Webster Dict. [*quoted* in Washington, etc., R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423, 425].

3. Feder *v.* Van Winkle, 53 N. J. Eq. 370, 375, 33 Atl. 399, 51 Am. St. Rep. 628.

4. Ten Eyck *v.* Protestant Episcopal Church, 65 Hun (N. Y.) 194, 198, 20 N. Y. Suppl. 157.

5. Webster Dict. [*quoted* in Washington, etc., R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423, 425; National Bank of Commerce *v.* Grennada, 44 Fed. 262, 266].

Does not embrace the idea of absolute perpetuity. Hascall *v.* Madison University, 8 Barb. (N. Y.) 174, 185.

Does not mean, forever, or lasting forever, or existing forever. Texas, etc., R. Co. *v.* Marshall, 136 U. S. 393, 403, 10 S. Ct. 846, 34 L. ed. 385.

Not the equivalent of "perpetual," or "unending," or "lifelong," or "unchangeable." Soule *v.* Soule, 4 Cal. App. 97, 105, 87 Pac. 205.

Used in contradistinction to "temporary." Castle *v.* Logan, 140 Fed. 707, 709, 72 C. C. A. 201.

Used in connection with other words.—"'Permanent' and 'substantial'" see Follmer *v.* Nuckolls County, 6 Nebr. 204, 212. "Permanent employment" and "permanent establishment" see Sullivan *v.* Detroit, etc., R. Co., 135 Mich. 661, 671, 98 N. W. 756, 106 Am. St. Rep. 403, 64 L. R. A. 673. "Permanent form of government" see State *v.* Harden, (W. Va. 1907) 58 S. E. 715, 723. "Permanent guard" see *In re* State, 39 Ala. 546, 548. "Permanent improvement" see Ten Eyck *v.* Protestant Episcopal Church, 65 Hun (N. Y.) 194, 198, 20 N. Y. Suppl. 157. "Permanent" institution see Atwater *v.* Russell, 49 Minn. 57, 80, 51 N. W. 629, 52 N. W. 26. "Permanent seat of justice" see Odineal *v.* Barry, 24 Miss. 9, 22; Fowler *v.* Brown, 5 Tex. 407, 409. "Permanent site" see Fuquay *v.* Hopkins Academy, 58 S. W. 814, 22 Ky. L. Rep. 744. "Permanent structure" see Chicago North Shore St. R. Co. *v.* Payne, 192 Ill. 239, 243, 61 N. E. 467.

6. "Permanent agents" are those agents which shall be appointed by the president, with the advice and consent of the senate, in contradistinction to those persons who had been or should be appointed by the secretary of the navy, on some special occasion or service, in his discretion and on such terms as he, on his official responsibility, should choose to arrange and make with the persons so appointed by him. Armstrong *v.* U. S., 1 Fed. Cas. No. 548, Gilp. 399.

7. "Permanent disability" is the permanent reduction of the injured person's power to earn money, resulting from an injury caused by the negligent act of the other party. Louisville, etc., R. Co. *v.* Mason, 72 S. W. 27, 28, 24 Ky. L. Rep. 1623.

8. Webster Int. Dict. See also Morton

PERMANENT MONUMENT. See Boundaries.

PERMANENT NUISANCE. See Nuisances.

PERMANENT POLICY. See Life Insurance.

PERMANENT POST. See Army and Navy.

PERMANENT SIDEWALK. See Municipal Corporations.

PERMANENT STATUTE. See Statutes.

PERMISSION. An Allowance (*q. v.*), a sufferance, a toleration, an authorization;[8a] a term which implies Leave, *q. v.*; License, *q. v.*; or Consent, *q. v.*[8b] (See Permit.)

PERMISSIVE OCCUPANCY. See Adverse Possession; Landlord and Tenant.

PERMISSIVE WASTE. See Waste.

PERMIT. As a noun, a license,[9] an allowance, a sufferance, a toleration, an authorization.[10] As a verb, not to hinder;[11] not to prohibit or prevent;[12] to allow by not prohibiting;[13] to allow or consent to;[14] to authorize or give leave;[15] to consent, to allow or suffer to be done, to tolerate, to put up with;[16] to grant leave or liberty to by express consent; allow expressly; give leave, liberty, or license to; to allow to be done by consent or by not prohibiting;[17] to grant permission — to give leave — to grant express license or liberty to do;[18] to suffer or allow without interference or prohibition,[19] to allow, to grant leave or liberty to

Trust Co. *v.* American Salt Co., 149 Fed. 540, 543.

Used in connection with the call of a clergyman to a church it means for an indefinite period. Perry *v.* Wheeler, 12 Bush (Ky.) 541, 548.

Converse of "transient" see Austen *v.* Crilly, 13 N. Y. App. Div. 247, 249, 42 N. Y. Suppl. 1097.

Does not mean "perpetually" see Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63, 65.

"Permanently established" see Newton *v.* Mahoning County, 26 Ohio St. 618, 626 [*affirmed* in 100 U. S. 548, 562, 25 L. ed. 710]; Texas, etc., R. Co. *v.* Marshall, 136 U. S. 393, 402, 10 S. Ct. 846, 34 L. ed. 385; Jones *v.* Newport News, etc., Co., 65 Fed. 736, 741, 13 C. C. A. 95.

"Permanently located" see Hopkins *v.* Baker, 78 Md. 363, 370, 28 Atl. 284, 22 L. R. A. 477; Hooper *v.* Baltimore, 12 Md. 464, 472; Hascall *v.* Madison University, 8 Barb. (N. Y.) 174, 185; Mead *v.* Ballard, 7 Wall. (U. S.) 290, 294, 19 L. ed. 190.

8a. Cowley *v.* People, 83 N. Y. 464, 471, 38 Am. Rep. 464.

8b. Ball *v.* Campbell, 6 Ida. 754, 759, 59 Pac. 559.

Involves knowledge of the thing permitted. Gray *v.* Stienes, 69 Iowa 124, 125, 28 N. W. 475.

The term gives no right, although it involves the idea of leave and license. Flaherty *v.* Nieman, 125 Iowa 546, 548, 101 N. W. 280.

9. State *v.* Watson, 5 Blackf. (Ind.) 155, 156; Neuman *v.* State, 76 Wis. 112, 116, 45 N. W. 30.

Implies express assent or license to do an act, or a failure to prohibit or prevent it. State *v.* Probasco, 62 Iowa 400, 402, 17 N. W. 607.

Distinguished from "consent" which implies some positive action, while the word "permit" implies mere passivity. Aull *v.* Columbia, etc., R. Co., 42 S. C. 431, 436, 20 S. E. 302.

10. Cowley *v.* People, 83 N. Y. 464, 471, 38 Am. Rep. 464.

11. *In re* Thomas, 103 Fed. 272, 274, 4 Am. Bankr. Rep. 371.

12. Arms *v.* Knoxville, 32 Ill. App. 604, 607.

13. Com. *v.* Curtis, 9 Allen (Mass.) 266, 271.

A failure to prohibit may be said to amount to a license or permission to do a particular act; and in this sense, the word "permit" is sometimes used. But this is believed to be its secondary, rather than its primary signification. When thus used, it implies that the party has it in his immediate power to prevent the act or thing; and having failed to prohibit the same, it may well and safely be concluded that he permitted it. Abrahams *v.* State, 4 Iowa 541, 543.

14. U. S. *v.* San Francisco Bridge Co., 88 Fed. 891, 893.

15. McHenry *v.* Winston, 105 Ky. 307, 310, 49 S. W. 4, 971, 20 Ky. L. Rep. 1194.

"The word 'permit' is derived from the Latin 'permittere,' which means 'to concede, to give leave, to grant.'" Wilson *v.* State, 19 Ind. App. 389, 46 N. E. 1050, 1051.

"Implies consent given or leave granted" see Loosey *v.* Orser, 4 Bosw. (N. Y.) 391, 404.

"Includes the element of assent" see State *v.* Robinson, 55 Minn. 169, 171, 56 N. W. 594.

16. Robertson *v.* Ongley Electric Co., 82 Hun (N. Y.) 585, 589, 31 N. Y. Suppl. 605.

17. Wilson *v.* State, 19 Ind. App. 389, 46 N. E. 1050, 1051.

18. Board of Education *v.* Board of Education, 3 Ohio S. & C. Pl. Dec. 70, 2 Ohio N. P. 256.

19. Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697, 700.

by express consent, to allow by silent consent or by not prohibiting;[20] to grant permission, liberty or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize;[21] to allow;[21a] to allow after notice or knowledge;[21b] to resign; to allow; to suffer, to put up with; not to prohibit;[21c] to allow by silent consent or by not offering opposition or hindrance; to suffer or allow prohibition or interference; to look on at, and allow a person to act or thing to be done; to tolerate; to allow by express consent given; to give permission, leave, liberty or authority to another; to authorize; to resign; to give over; to refer; to leave.[21d] (Permit: For Burial of Dead Bodies, see DEAD BODIES. For Landing Imported Goods, see CUSTOMS DUTIES. Unloading Without, as Ground For Forfeiture, see CUSTOMS DUTIES.)

PER MITTER LE DROIT. One of the modes in which releases at common law were said to inure, as where a person who has been disseised releases to the disseisor, his heir or feofee.[21e]

PER MITTER L'ESTATE. A common-law release described as follows: "Where two or more are seised, either by deed, devise or descent, as joint-tenants or 'coparceners' of the same estate, and one of them releases to the other."[21f]

PER MY ET PER TOUT. Literally, "By the 'half' and by 'all.'"[22]

PERPETRATION. The act of perpetrating, the doing.[23] (Perpetration: Murder or Manslaughter in Perpetration of Other Offense, see HOMICIDE.)

PERPETRATOR. A term generally used to denote the person who actually

20. Webster Dict. [*quoted* in Stewart *v.* Burlington, etc., R. Co., 32 Iowa 561, 563].

21. Gregory *v.* U. S., 10 Fed. Cas. No. 5,803, 17 Blatchf. 325, 330; Worcester Dict. [*quoted* in Ft. Wayne *v.* De Witt, 47 Ind. 391, 394].

21a. People *v.* Conness, 150 Cal. 114, 121, 88 Pac. 821.

21b. Larson *v.* Christianson, 14 N. D. 476, 481, 106 N. W. 51.

21c. Murphy *v.* Rouey, 82 S. W. 396, 398, 26 Ky. L. Rep. 634.

"Do or permit" see Steves *v.* South Vancouver, 6 Brit. Col. 17, 36, 37.

Contradistinguished from the word "do." Steves *v.* South Vancouver, 6 Brit. Col. 17, 37.

21d. Steves *v.* South Vancouver, 6 Brit. Col. 17, 37.

Not a technical word, and in English it has two significations, the first is where the mind consents to the act; the second is where the mind does not affirmatively agree to the act, but has the right and the means to interfere to prevent the same from transpiring; but from want of care, or from laziness or neglect, the person makes no move to prevent the act from taking place. Warberton *v.* Woods, 6 Mo. 8, 12.

In one sense it is synonymous with "to suffer," "to allow" or "to let," but it also is equivalent to "to give leave," "to license," "to warrant in writing," "to grant," "to impower," "to authorize," "to sanction." Coon *v.* Froment, 25 N. Y. App. Div. 250, 252, 49 N. Y. Suppl. 305. See also Bunnell *v.* Com., 99 S. W. 237, 238, 30 Ky. L. Rep. 491; Conner *v.* Fogg, (N. J. Sup. 1907) 67 Atl. 338, 339.

Distinguished from "allow," "suffer," in that it is most positive, denoting a decided assent. Chicago *v.* Stearns, 105 Ill. 554, 558; Board of Education *v.* Board of Education, 3 Ohio S. & C. Pl. Dec. 70, 2 Ohio N. P. 256.

Defined by Webster as more negative than "allow"; in that it imports only acquiescence or an abstinence from prevention,—while "suffer" he defines as having an even stronger passive and negative sense than permit, and as implying sometimes mere indifference. *In re* Thomas, 103 Fed. 272, 274, 4 Am. Bankr. Rep. 371.

"Permit or suffer" see Robertson *v.* Ongley Electric Co., 82 Hun (N. Y.) 585, 589, 31 N. Y. Suppl. 605.

"Suffer and permit" see Hobson *v.* Middleton, 6 B. & C. 295, 300, 302, 9 D. & R. 249, 5 L. J. K. B. O. S. 160, 13 E. C. L. 142.

Used in a statute against gambling, the word implies knowledge on the part of the one in control of the house in which the gambling took place. Stuart *v.* State, (Tex. Cr. App. 1901) 60 S. W. 554.

Permitted.—A word sometimes said to be used in the sense of allowed, suffered, or acquiesced in (Adams *v.* Albert, 87 Hun (N. Y.) 471, 473, 34 N. Y. Suppl. 328), and sometimes it has been said to mean used with consent (State *v.* Pierce, (Me. 1888) 15 Atl. 68), synonymous with "required" (Loeser *v.* Savings Deposit Bank, etc., Co., 148 Fed. 975, 980, 78 C. C. A. 597), but it has been held not to be synonymous with the word "suffered" (*In re* Wilmington Hosiery Co., 120 Fed. 180, 184, but holding *contra*, see *In re* Arnold, 94 Fed. 1001, 1002, 2 Am. Bankr. Rep. 180).

21e. Miller *v.* Emans, 19 N. Y. 384, 387.

21f. Miller *v.* Emans, 19 N. Y. 384, 388.

22. Thornton *v.* Thornton, 3 Rand. (Va.) 179, 182 [*citing* Blackstone], where it is explained as being the estate by which joint tenants are seized, that is, that each of them have the entire possession, as well of every parcel as of the whole. See also Miller *v.* Emans, 19 N. Y. 384, 388.

23. Webster Int. Dict. See also Bissot *v.* State, 53 Ind. 408, 413.

commits a crime or delict, or by whose immediate agency it occurs.[24] (See, generally, CRIMINAL LAW.)

PERPETUAL. Continuous or uninterrupted;[25] everlasting, continued, uninterrupted;[26] never ceasing; continuing forever in future time; destined to be eternal; continuing or continued without intermission; uninterrupted.[27] (Perpetual: Injunction, see INJUNCTIONS. Lease, see GROUND-RENTS. Lien, see LIENS. Succession, see CORPORATIONS.)

PERPETUA LEX EST NULLAM LEGEM HUMANAM AC POSITIVAM PEPETUAM ESSE; ET CLAUSULA QUÆ ABROGATIONEM EXCLUDIT AB INITIO NON VALET. A maxim meaning "It is an everlasting law that no positive human law shall be perpetual;[28] and any part of an enactment which purports to admit of no repeal is void from the first."[29]

PERPETUAL INJUNCTION. See INJUNCTIONS.

PERPETUAL LEASE. See GROUND-RENTS.

PERPETUAL SUCCESSION. See CORPORATIONS.

PERPETUATION OF TESTIMONY. See DEPOSITIONS.

PERPETUITATIBUS LEX OBSISTIT. A maxim meaning "The law is opposed to perpetuities."[30]

24. Black L. Dict.

Railroad company killing employee through negligence of co-employee regarded as "perpetrator" under statute see Philo *v.* Illinois Cent. R. Co., 33 Iowa 47, 50. See also Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 286, 87 Am. Dec. 391.

25. Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526, 530.

26. State *v.* Payne, 129 Mo. 468, 477, 31 S. W. 797, 33 L. R. A. 576.

27. Webster Dict. [*quoted* in Scanlan *v.* Crawshaw, 5 Mo. App. 337, 339].

"Perpetually binding on 'the owners of the land'" see Hickey *v.* Lake Shore, etc., R. Co., 51 Ohio St. 40, 50, 36 N. E. 672, 46 Am. St. Rep. 545, 23 L. R. A. 396.

28. Peloubet Leg. Max.

29. Morgan Leg. Max. [*citing* Bacon Max. Reg. 19].

30. Morgan Leg. Max. [*citing* Halkerstone Max. 123].

PERPETUITIES

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I. **General Statement**, 1466

II. **Origin and Development of the Rule**, 1468
- A. *Early Uses of the Word "Perpetuity,"* 1468
- B. *The Duke of Norfolk's Case*, 1469
- C. *Any Number of Lives in Being Allowed*, 1470
- D. *The Term of Twenty-One Years*, 1470
- E. *The Periods of Gestation*, 1471

III. **Interests Subject to the Rule**, 1471
- A. *Present Interests Are Not Subject to the Rule*, 1471
- B. *Vested Future Interests Are Not Subject to the Rule*, 1472
  1. *What Is a Vested Future Interest*, 1472
  2. *Vested Remainders*, 1472
  3. *Reversions*, 1473
  4. *Possibilities of Reverter*, 1474
  5. *Escheat*, 1474
  6. *Vested Legal Future Interests in Personalty*, 1474
  7. *Vested Equitable Future Interests*, 1476
- C. *Destructible Future Interests Are Not Subject to the Rule*, 1476
- D. *Such Future Interests as Are Contingent and Indestructible Are Subject to the Rule*, 1477
  1. *In General*, 1477
  2. *Contingent Remainders*, 1478
  3. *Rights of Entry For Condition Broken*, 1478
  4. *Springing and Shifting Uses and Executory Devises*, 1479
  5. *Profits and Easements to Begin In Futuro*, 1481
  6. *All Future Interests in Personalty Which Are Not Vested*, 1481
  7. *All Future Equitable Interests in Realty or Personalty Which Are Not Vested*, 1481

IV. **The Requirement of the Rule**, 1482
- A. *The Rule Stated*, 1482
- B. *Vesting the Sole Requirement*, 1482
- C. *The Future Interest Must Necessarily Vest Within the Limits*, 1483
- D. *No Exception in Favor of Alienable Interests*, 1483
- E. *The Rule Does Not Require That Interests Should End Within Specified Limits*, 1484
- F. *As to Future Interests Created by Will*, 1485
- G. *As to Future Interests in an Estate For a Life or Lives, or in a Term For Years of Not More Than Twenty-One Years*, 1485

V. **Limitations to Classes**, 1485
- A. *In General*, 1485
  1. *Rule Stated and Forms of Limitations Enumerated*, 1485
  2. *Limitation to All Children or Grandchildren of A*, 1486
     a. *In General*, 1486
     b. *With a Proviso That if Any Child or Grandchild Dies Under a Certain Age Property to Go Over*, 1486

* The author wishes to acknowledge his great indebtedness to Professor John C. Gray; the conception of Perpetuities set forth in this article is, in the main, a product of the instruction and help received, as pupil and junior colleague, from him.

3. *Limitation to Such of Children or Grandchildren of A as Reach a Certain Age*, 1487
4. *Limitation to Such of the Children of A as Reach a Certain Age, and to Such Children of Children Dying Under That Age as Reach the Age, the Children of Second Generation Taking Their Parents' Share*, 1489
5. *Conclusions With Respect to Permissible Limitations to Classes*, 1489
6. *Limitations Framed in Language Not Commonly Used*, 1490

B. *Independent Limitations*, 1490

VI. LIMITATIONS TO A SERIES, 1491

VII. POWERS, 1491

A. *If It May Remain Uncertain For a Time Beyond the Limits of the Rule Against Perpetuities Either Whether a Power Will Become Operative or Whether It Will Be Exercised, It Is Invalid*, 1491
1. *In General*, 1491
2. *Powers to Sell to Raise Money For Paying Debts or Legacies*, 1493
3. *Powers to Sell, Exchange, or Lease Settled Property*, 1493
4. *Powers to Sell Mortgaged Property*, 1494

B. *A Power Is Not Invalid Because Within Its Terms an Invalid Appointment Might Be Made*, 1494

C. *An Appointment Is Invalid Unless It Must Vest Within Limits of the Rule, Reckoning From Date, Not of Exercise, But of Creation of Power*, 1494

VIII. TRUSTS, 1495

A. *Equitable Interest Subject to the Rule Against Perpetuities*, 1495
B. *Trusts For Payment of Debts or Legacies*, 1495
C. *Trusts to Sell*, 1496
D. *Executory Trusts*, 1496
E. *Charitable Trusts*, 1496
F. *Trusts For Accumulation*, 1497

IX. CONSTRUCTION, 1498

A. *Construction Not to Be Affected by Existence of the Rule Against Perpetuities*, 1498
B. *Cy Pres*, 1499
C. *Modifying Clauses*, 1499
D. *Separable Limitations*, 1500

X. CONFLICT OF LAWS, 1501

XI. STATUTORY CHANGES, 1501

A. *The New York Statutes*, 1501
1. *In General*, 1501
2. *Suspension of the Absolute Power of Alienation of Realty*, 1502
a. *In General*, 1502
b. *Interests Causing Suspension*, 1502
(I) *Limitations Under Which Persons Not in Being May Become Entitled*, 1502
(II) *Trusts, the Beneficial Interest in Which Is Inalienable*, 1503
(III) *Imperative Powers, the Beneficial Interest in Which Is Inalienable*, 1503
c. *Interests and Disabilities Not Causing Suspension*, 1504

(I) *Alienable Interests*, 1504
(II) *Infancy*, 1506
3. *Suspension of the Absolute Ownership of Personalty*, 1507
a. *In General*, 1507
b. *Interests Causing Suspension*, 1507
(I) *Limitations Under Which Persons Not in Being May Become Entitled*, 1507
(II) *Limitations to Such of a Class as Shall Live to a Prescribed Age or Date*, 1507
(III) *Trusts, the Beneficial Interest in Which Is Inalienable*, 1508
(IV) *Imperative Powers, the Beneficial Interest in Which Is Inalienable*, 1508
c. *Interests and Disabilities Not Causing Suspension*, 1508
(I) *Alienable Interests*, 1508
(II) *Infancy*, 1510
4. *Powers of Sale or Revocation Obviating Suspension*, 1510
5. *The Period During Which Suspension Is Allowed*, 1511
6. *Charitable Trusts*, 1512
7. *Trusts For Accumulation*, 1513
8. *Construction*, 1515
a. *In General*, 1515
b. *Separable Beneficial Interests*, 1515
c. "*Youngest Child Reaches Twenty-One*," 1516
d. *Shares Accruing by Survivorship*, 1516
9. *Other Statutory Restrictions on the Creation of Future Interests in Realty and Personalty*, 1517
10. *Restraints on Alienation*, 1518
B. *Statutes Similar to the New York Statutes*, 1519
C. *The Pennsylvania Statute of Accumulations*, 1521
D. *Other Statutory Changes*, 1522

XII. LAW OF LOUISIANA, 1524

CROSS-REFERENCES

For Matters Relating to:
Charity, see CHARITIES.
Deed, see DEEDS.
Devise, see WILLS.
Estate:
Generally, see ESTATES.
For Life, see ESTATES.
For Years, see ESTATES; LANDLORD AND TENANT.
In Remainder, see ESTATES.
Tail, see ESTATES.
Life-Estate, see ESTATES.
Power, see POWERS.
Remainder, see ESTATES.
Trust, see TRUSTS.

I. GENERAL STATEMENT.

Ownership of property does not carry with it the right to dispose of that property to any person and upon any contingencies that the owner may desire to name. The law, for reasons of public policy, still imposes some restraints upon the right to dispose of property. Some of these restraints deal with the right to transfer present interests in property — thus an owner may not be permitted to sell his land to an alien or to devise it to a religious corporation. Some of these restraints deal with the right to create future interests in property — thus if an

owner gives money to A, with a proviso that whenever A and all his issue are dead the money shall go to B, the law may not give effect to such proviso.

The Rule against Perpetuities is by far the most important restraint which the law places upon the right to create future interests in property.[1] It is fundamental that the Rule deals only with future interests. No present interests, whether alienable or not, are objectionable under the Rule against Perpetuities, although restraints upon the alienation of present interests may be objectionable under other rules of the law.[2] Apart from statutory changes,[3] the Rule is that no future interest in property shall be created which must not necessarily vest within twenty-one years, exclusive of periods of gestation, after lives in being. The evolution of the Rule was probably due primarily to the desire of the courts to prevent property from being inalienable. If future interests in property may be created in favor of persons not in being, a title to the property cannot be made; it is taken out of commerce; the Rule therefore restrains, within limits, the creation of such interests.

But the Rule does more. It forbids the creation even of alienable interests in property, if they are dependent upon a contingency which may not be determined until a remote time. When remote, contingent interests in property belong to persons in being, such interests are to-day freely alienable and therefore do not render impossible the making of a good title to the property in which they are limited, but they none the less offend against the Rule. To have property encumbered with such remotely possible interests is a disadvantage to the persons otherwise entitled to the property, greater than is the advantage to the owners of such remote interests. The reasons of policy which require that the cre-

1. In early times the power of an owner to create future interests in his property was greatly restricted. Remainders in property, for example, were known to the law, but their creation was regulated by stringent rules. Equity, however, was liberal in allowing uses in property to be parceled out as the owner wished, and this liberality was carried over into the law by the passage of the Statute of Uses (1536). The law itself was liberal in attempting to give effect to any disposition of property that an owner might make by will, and a similar liberality is to-day shown in most jurisdictions, with regard to a conveyance *inter vivos*, whether operating by way of use or not — for example with regard to a conveyance *inter vivos* of a chattel. The result is that to-day an owner may, broadly speaking, create any future interests he pleases, within reasonable limits.

Apart from statutes, there are to-day certainly not more than two restrictions, besides the Rule against Perpetuities, on the creation of future interests, and *semble* in the United States, except in North Carolina, there is no other restriction whatever. There is authority that no future legal interest, after an interest for life, can be created *inter vivos* in personalty, whether in a chattel real or personal. This is probably law in England. Woodcock *v.* Woodcock, Cro. Eliz. 795, 78 Eng. Reprint 1025; Welcden *v.* Elkington, Plowd. 516, 75 Eng. Reprint 763; Gray Perpet. (2d ed.) Appendix F. And it is law in North Carolina. Harrell *v.* Davis, 53 N. C. 359; Hunt *v.* Davis, 20 N. C. 36; Smith *v.* Tucker, 13 N. C. 541; Dowd *v.* Montgomery, 4 N. C. 198; Gilbert *v.* Murdock, 3 N. C. 182; Cutlar *v.* Spiller, 3 N. C. 130. See also Wilson *v.* Cockrill, 8 Mo. 1. But it is not law elsewhere in the United States. Williamson *v.* Mason, 23 Ala. 488; Jones *v.* Hoskins, 18 Ala. 489; Lyde *v.* Taylor, 17 Ala. 270; Price *v.* Price, 5 Ala. 578; Gullett *v.* Lamberton, 6 Ark. 109; Security Co. *v.* Hardenburgh, 53 Conn. 169, 2 Atl. 391; Horn *v.* Gartman, 1 Fla. 63; Sharman *v.* Jackson, 30 Ga. 224; Kirkpatrick *v.* Davidson, 2 Ga. 297; McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522; Owen *v.* Cooper, 46 Ind. 524; Keen *v.* Macey, 3 Bibb (Ky.) 39; Fuller *v.* Fuller, 84 Me. 475, 24 Atl. 946; Sampson *v.* Randall, 72 Me. 109; Harris *v.* McLaran, 30 Miss. 533; Nix *v.* Ray, 5 Rich. (S. C.) 423; McCall *v.* Lewis, 1 Strobh. (S. C.) 442; Tucker *v.* Stevens, 4 Desauss. Eq. (S. C.) 532; Aiken *v.* Smith, 1 Sneed (Tenn.) 304; Bradley *v.* Mosby, 3 Call (Va.) 50. There is also authority that a life-estate cannot be given to an unborn person, remainder to that unborn person's issue, even when the gift is so framed as not to offend the Rule against Perpetuities. Whitby *v.* Mitchell, 44 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. Rep. N. S. 771, 38 Wkly. Rep. 337. But this rule was held not applicable to personalty in *In re* Bowles, [1902] 2 Ch. 650, 71 L. J. Ch. 822, 51 Wkly. Rep. 124, and was altogether doubted in *In re* Ashforth, [1905] 1 Ch. 535, 74 L. J. Ch. 361, 92 L. T. Rep. N. S. 534, 21 T. L. R. 329, 53 Wkly. Rep. 328. See also Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 369, 7 S. W. 640; Gray Perp. (2d ed.) § 287 *et seq.* *Compare* Jackson *v.* Brown, 13 Wend. (N. Y.) 437.

2. See *infra*, note 9.

3. See *infra*, XI.

ation of such interests should be restrained within limits are somewhat similar to the reasons on account of which the law keeps within limits the creation of easements; they are in any event different reasons from those to which the Rule was primarily due.

The reasons of policy underlying the Rule are not stated in all the decisions clearly, or even consistently, but it is settled by the great weight of authority that the Rule does forbid the creation of any future interest, whether alienable or not, which must not necessarily vest within the limits specified by the Rule.[4]

II. ORIGIN AND DEVELOPMENT OF THE RULE.

A. Early Uses of the Word "Perpetuity." The word "perpetuity" appears in the reports as early as 1595.[5] In the following century the word was used by the courts with various meanings, including: (1) An inalienable estate tail;[6] (2) an indestructible remainder to a person not in being;[7] (3) an indestructible executory devise contingent on a failure of issue.[8] In the first

4. See *infra*, IV, D.

5. Chudleigh's Case, 1 Coke 120*a*, 76 Eng. Reprint 270.

6. Corbet's Case, 1 Coke 83*b*, 76 Eng. Reprint 187. Here an estate tail was given to A, with a proviso that, if he attempted to alien, he should forfeit his estate. A nevertheless suffered a common recovery, and the court held the recovery good. The proviso was held to be repugnant to the grant of the estate tail, and therefore bad. In the course of the judgment an inalienable estate tail is spoken of as a perpetuity. The Statute De Donis, 13 Edw. I, c. 1, authorized the creation of estates tail, and provided that they could not be barred by fine. Later, however, the courts held that they could be barred by a common recovery. Taltarum's Case, Y. B. 12 Edw. IV, 19. Still later parliament provided that they could be barred by fine. St. 4 Hen. VII, c. 24; 32 Hen. VIII, c. 36. By Corbet's Case, 1 Coke 83*b*, 76 Eng. Reprint 187, any attempt to prevent the owner of an estate tail from alienating the land, by levying a fine or suffering a recovery, was held nugatory. The law did not permit owners of estates tail to be restrained from alienating their estates any more than it permitted the owners of estates in fee to be restrained from alienating their estates. Y. B. 13 Hen. VII, 22 pl. 9. And see DEEDS, 13 Cyc. 687.

7. Chudleigh's Case, 1 Coke 120*a*, 76 Eng. Reprint 270. At common law, if A was enfeoffed of land for life, remainder to his unborn son, A could enfeoff X of the land at any time before a son was born to him, and thereby destroy the contingent remainder to such unborn son. Contingent remainders, being destructible, were therefore no bar to the alienation of the land in which they were limited. Chudleigh's Case, *supra*, came up after the passage of the Statute of Uses. A had made a feoffment to B, C, and others, to their use during the life of D, A's son, and after D's death, to the use of D's unborn children in tail. Before children were born to D, the feoffees enfeoffed D in fee. The court held that this feoffment had destroyed the contingent remainder to the unborn children — in other words, that a contingent remainder raised by use was as destructible as a contingent remainder limited at common law. The court conceived that if a contingent remainder were allowed to be indestructible, it would be a perpetuity, and it avoided this danger by holding the remainder destructible. Contingent remainders, while at that time not alienable, were releasable. The contingent remainders in Chudleigh's case could not even have been released, because they were to persons not in being. The court was therefore dealing with future interests, the indestructibility of which would in fact have prevented the alienation of the property.

8. In Manning's Case, 8 Coke 94*b*, 77 Eng. Reprint 618, A, owner of a term for years in certain land, by his will directed that B, his wife, should have the use and occupation of the term for her life, and that the term should go, subject to B's right, to C. As there could be no life-estate in a chattel real (see *supra*, note 1), this was construed to be an absolute gift of the term to B, with an executory devise over to C, to take effect on B's death. Was this contingent interest to C destructible by B, the first taker, just as contingent remainders were destructible? It was held that it was indestructible. There was therefore now known to the law such a thing as an indestructible contingent interest in property. Cotton *v.* Heath, 1 Rolle Abr. 612, pl. 3; Smith *v.* Warren, Cro. Eliz. 688, 78 Eng. Reprint 924; Lampet's Case, 10 Coke 46*b*, 77 Eng. Reprint 994; Pells *v.* Brown, Cro. Jac. 590, 79 Eng. Reprint 504. The *dicta* in Woodruff *v.* Drury, Cro. Eliz. 439, 78 Eng. Reprint 679, and Wood *v.* Reignold, Cro. Eliz. 764, 854, 78 Eng. Reprint 996, 1080, that executory devises were destructible, are no longer law. Despite Manning's Case, *supra*, it was held in Child *v.* Baylie, Cro. Jac. 459, 79 Eng. Reprint 393, that, upon the devise of a term to A, with a devise over to B, to take effect in case A died without issue living at his death, such executory devise was bad. In Man-

sense the word was used to describe a present estate of indefinite duration which, throughout its duration, kept out of commerce the property in which it was limited. This is the popular notion of a perpetuity, and the law to-day holds void, with some exceptions, attempts to restrain the alienation of present interests in property, but this is accomplished by rules of law quite separate and distinct from the Rule against Perpetuities.[9] In the second sense the word was used to describe a future interest, which interest was in fact not releasable. In the third sense the word was also used to describe a future interest. Executory devises were releasable,[10] and, in at least two cases which came before the courts, the devises which were held objectionable were to persons in being, and therefore did not prevent the alienation of the property.[11] Certain future interests therefore, even though not preventing the alienation of the property in which they were limited, were held objectionable, and were conceived of as perpetuities. What then was the test of the validity of a future interest? The remoteness of the time when, if ever, a future interest must vest, had not yet been taken by the courts as the test.

B. The Duke of Norfolk's Case. The Earl of Arundel, having three sons, conveyed a long term to trustees, in trust for his second son, and the heirs male of his body; with a proviso that, if his first son should die without issue male, in the lifetime of the second son, the term should be held in trust for the third son.[12] The first son did die without issue male in the lifetime of the second son. Was this limitation over to the third son good? It was a limitation to take effect upon a failure of issue, and therefore bad as a perpetuity within the earlier authorities;[13] but the chancellor, Lord Nottingham, held the limitation good on the ground that it must take effect, if at all, within the life of the second son. It was established, he reasoned, that a limitation of a term to A, a living person, for life, and then to B on A's death, was good.[14] If a limitation over on A's death was not regarded as a perpetuity, then any limitation over which must take effect at or before A's death ought not to be so regarded. Here was a decision based squarely on the idea that whether a limitation over is to be regarded as a perpetuity or not depends on the time within which such limitation must take effect. Lord Nottingham held that a limitation might be made to take effect on a contingency which must

ning's Case, *supra*, the devise over was contingent on A's death; in Child *v.* Baylie, *supra*, on A's death without issue then living. The judges took a distinction. A remainder after an estate tail was destructible. See *infra*, III, C. Executory devises of terms, however, had now been held indestructible. Manning's Case, *supra*. The judges felt that if a term could be limited to A, with an indestructible gift over to B, to take effect on the failure of A's issue, the evils of entails would reappear in the settlement of long terms of years, and the devise over to B was therefore held bad. "It would be very dangerous," counsel argued, "to have a perpetuity of a term in that manner." Bennet *v.* Lewknor, 1 Rolle 356, 81 Eng. Reprint 531; Wood *v.* Sanders, 1 Ch. Cas. 131, 22 Eng. Reprint 728; Boucher *v.* Antram, 2 Ch. Rep. 65, 21 Eng. Reprint 617. It is to be noted that in both Manning's Case, *supra*, and in Child *v.* Baylie, *supra*, the devise over would take effect, if at all, on the death of A, the first holder of the term, and that therefore in point of time the two executory devises were equally remote. It is also to be noted that the executory devise was held bad in Child *v.* Baylie, *supra*, although it was alienable. B was a person living at the testator's death, and the executory devise was releasable.

9. In states like New York where perpetuities are defined to be inalienable interests, restraints on alienation become closely associated with the subject of perpetuities (see *infra*, XI, A, 10); but the Rule against Perpetuities and the rules against restraints on alienation are, at common law, now entirely different topics. The Rule against Perpetuities is concerned only with the creation of future estates. If A gives land to B and his heirs, and then attempts to provide that B shall not alienate the land so given, no question is raised which in any wise touches the Rule against Perpetuities. See DEEDS, 13 Cyc. 687.

10. Lampet's Case, 10 Coke 48*a*, 77 Eng. Reprint 994.

11. Wood *v.* Sanders, 1 Ch. Cas. 131, 22 Eng. Reprint 728; Child *v.* Baylie, Cro. Jac. 459, 79 Eng. Reprint 393.

12. Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Reprint 931, 2 Swanst. 454, 36 Eng. Reprint 690.

13. Child *v.* Baylie, Cro. Jac. 459, 79 Eng. Reprint 393. See *supra*, note 8.

14. Manning's Case, 8 Coke 94*b*, 77 Eng. Reprint 618. See *supra*, note 8.

happen, if at all, within a life in being, but he refused to try to define precisely the time within which a limitation over must take effect, leaving this to be worked out by future cases. Lord Nottingham's decision was affirmed in the House of Lords, has never since been questioned, and is the foundation of the modern Rule against Perpetuities.

C. Any Number of Lives in Being Allowed. It had been decided before the Duke of Norfolk's case, that a term might be limited for successive life-interests to any number of persons, so long as they were all in being.[15] It was enough if "all the candles were alight at once."[16] Although there is a *dictum* after the Duke of Norfolk's case that the time limit allowed for executory devises ought not to be longer than the life of one person in being,[17] yet there is no decision to this effect. In Thellusson *v.* Woodford,[18] a testator had provided that property was not to be paid over until all of his sons and grandsons, and grandsons' children, who were living at his death, were dead. At his death there were nine persons coming within these designations. The House of Lords, on the unanimous opinion of the judges, held the limitation over to be good; and, apart from statute, no limits have yet been placed on the number of lives in being within which a future interest must vest.[19]

D. The Term of Twenty-One Years. Lord Nottingham, in the Duke of Norfolk's case, had not attempted to define precisely the time within which future interests must vest. Subsequently to that case it was held that a limitation to an unborn person upon his reaching his majority was good;[20] that a limitation over to third persons, to take effect if the children of living persons should die before attaining their majority, was good;[21] and finally that a limitation over to take effect within twenty-one years after the deaths of living persons was good, even though the term of twenty-one years or less was not the minority of the person to be entitled, or of any other person.[22]

15. Goring *v.* Bickerstaffe, 2 Freem. Ch. 163, 22 Eng. Reprint 1132; Love *v.* Windham, 1 Sid. 450, 82 Eng. Reprint 1211.

16. Love *v.* Windham, 1 Sid. 450, 82 Eng. Reprint 1211.

17. Luddington *v.* Kime, 1 Ld. Raym. 203, per Treby, C. J.

18. Thellusson *v.* Woodford, 4 Ves. Jr. 227, 4 Rev. Rep. 205, 31 Eng. Reprint 117 [*affirmed* in 11 Ves. Jr. 112, 8 Rev. Rep. 104, 32 Eng. Reprint 1030].

19. Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356 (seventeen lives); Cadell *v.* Palmer, 1 Cl. & F. 372, 6 Eng. Reprint 956 (twenty-eight lives). See also Parker *v.* Churchill, 104 Ga. 122, 30 S. E. 642; Dulin *v.* Moore, 96 Tex. 135, 70 S. W. 742.

It has, however, been suggested that the number of persons taken must be so limited that their deaths could be proved without difficulty. Thellusson *v.* Woodford, 11 Ves. Jr. 112, 8 Rev. Rep. 104, 32 Eng. Reprint 1030. And see Pownall *v.* Graham, 33 Beav. 242, 55 Eng. Reprint 360.

20. Stephens *v.* Stephens, Cas. t. Talb. 228, 25 Eng. Reprint 751; Taylor *v.* Biddall, 2 Mod. 289, 86 Eng. Reprint 1078.

21. Massingberd *v.* Ash, 2 Ch. Rep. 275, 21 Eng. Reprint 677; Stanley *v.* Leigh, 2 P. Wms. 686, 24 Eng. Reprint 917; Maddox *v.* Staines, 2 P. Wms. 421, 24 Eng. Reprint 796.

22. Cadell *v.* Palmer, 1 Cl. & F. 372, 6 Eng. Reprint 956; Marks *v.* Marks, 10 Mod. 419; Loyd *v.* Carew, Prec. Ch. 72, 24 Eng. Reprint 35. See Andrews *v.* Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; Robinson *v.* Bonaparte, 102 Md. 63, 61 Atl. 212; Pleasants *v.* Pleasants, 2 Call (Va.) 319; McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015; Barnitz *v.* Casey, 7 Cranch (U. S.) 456, 3 L. ed. 403. But *compare* New York *v.* Stuyvesant, 17 N. Y. 34.

It is not easy to define the reasons which induced the judges to make these extensions. In Stephens *v.* Stephens, Cas. t. Talb. 228, 25 Eng. Reprint 751, where the validity of a limitation over to an unborn person upon reaching his majority was in question, the courts said that, as an infant could not, in any event, alienate his property, the power of alienation over property was restrained no longer by creating a future interest in favor of an unborn person when he reached his majority, than by creating it in favor of an unborn person immediately upon his birth. This reasoning was based on the assumption that the Rule was aimed only at inalienable interests, and failed to consider the wider scope of the Rule which had already been established. See *supra*, II, A. Limitations over to third persons to take effect if persons then unborn should die before reaching their majority were supported by the courts, apparently without their noticing that the reasoning given above did not apply. Limitations over to third persons to take effect a certain number of years, not more than twenty-one, after the death of living persons were at first supported on the idea that a "reasonable

E. The Periods of Gestation. It is sometimes said that a future interest is good if it must vest within a life or lives in being, and twenty-one years and nine or ten months thereafter.[23] The period of gestation, however, is not excluded in computing the time within which future interests must vest, unless gestation is in fact taking place.[24] Moreover, if gestation is in fact taking place, more than one period of gestation may be excluded in computing such time.[25] It is therefore more accurate to say that, in computing the time within which future interests must vest, periods of gestation are excluded.

III. INTERESTS SUBJECT TO THE RULE.

A. Present Interests Are Not Subject to the Rule. The Rule only requires that interests shall vest within certain limits. A future interest is vested if it is ready to turn into a present estate of enjoyment whenever the preceding estates determine.[26] *A fortiori* interests which are being presently enjoyed are vested. No present interests are therefore within the scope of the Rule.[27] A restrictive agreement regarding the use of land made for the benefit

time" after lives in being might well be allowed. Marks *v.* Marks, 10 Mod. 419; Loyd *v.* Carew, Prec. Ch. 72, 24 Eng. Reprint 35. This reasonable time gradually and on the whole unconsciously was fixed at twenty-one years. See Goodman *v.* Goodright, 2 Burr. 873; Cadell *v.* Palmer, 1 Cl. & F. 372, 6 Eng. Reprint 956; Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186; Marlborough *v.* Godolphin, 1 Eden 404, 28 Eng. Reprint 741; Thellusson *v.* Woodford, 4 Ves. Jr. 227, 4 Rev. Rep. 205, 31 Eng. Reprint 117.

23. Andrews *v.* Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186. See also Ky. St. (1903) § 2360.

24. Cadell *v.* Palmer, 1 Cl. & F. 372, 6 Eng. Reprint 956. Thus a gift to such of the testator's grandchildren as reach the age of twenty-one years and nine months would be bad.

25. A child *en ventre sa mere* at the death of the testator is regarded as in being. Randolph *v.* Randolph, 40 N. J. Eq. 73; *In re* Wilmer, [1903] 2 Ch. 411, 72 L. J. Ch. 670, 89 L. T. Rep. N. S. 148, 51 Wkly. Rep. 609. See also Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739. It is clear that a testator may make a gift to all of his grandchildren who reach twenty-one. Yet the testator may have a posthumous child, and such child may in turn have a posthumous child. See Long *v.* Blackall, 7 T. R. 100, 4 Rev. Rep. 73; Thellusson *v.* Woodford, 11 Ves. Jr. 112, 8 Rev. Rep. 104, 32 Eng. Reprint 1030. See also Smith *v.* Farr, 8 L. J. Exch. 46, 3 Y. & C. Exch. 328, for the discussion of a hypothetical case involving the exclusion of three periods of gestation.

26. See *infra*, III, B, 1.

27. **Terms of years.**— Henderson *v.* Virden Coal Co., 78 Ill. App. 437; *Re* Johnson, 5 Ont. L. Rep. 459. See also Gex *v.* Dill, 86 Miss. 10, 38 So. 193.

Present equitable interests.— Connecticut Trust, etc., Co. *v.* Hollister, 74 Conn. 228, 50 Atl. 750; Lunt *v.* Lunt, 108 Ill. 307; Pulitzer *v.* Livingston, 89 Me. 359, 36 Atl. 635 [*overruling* Slade *v.* Patten, 68 Me. 380]; Howe *v.* Morse, 174 Mass. 491, 55 N. E. 213 (real estate trust); Stevens *v.* Annex Realty Co., 173 Mo. 511, 73 S. W. 505 (trust of parks and streets); *In re* Johnston, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 62; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Commissioners *v.* De Clifford, 1 Dr. & War. 245; Liley *v.* Hey, 1 Hare 580, 6 Jur. 756, 11 L. J. Ch. 415, 23 Eng. Ch. 580, 66 Eng. Reprint 1162; Bradshaw *v.* Jackman, L. R. 21 Ir. 12; *Re* Johnson, 5 Ont. L. Rep. 459.

Charities.— Perpetual trusts and inalienable estates given to charities are frequently spoken of as "perpetuities," and in a few cases held to be void, although intended as an immediate gift. Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., 66 Kan. 1, 71 Pac. 286; Missionary Soc. M. E. Church *v.* Humphreys, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432. And they are often supported as a supposed exception to the Rule. Garrison *v.* Little, 75 Ill. App. 402; Lamb *v.* Lynch, 56 Nebr. 135, 76 N. W. 428; Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113; Yard's Appeal, 64 Pa. St. 95; Franklin *v.* Armfield, 2 Sneed (Tenn.) 305; Staines *v.* Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788; Goodman *v.* Saltash Corporation, 7 App. Cas. 662, 47 J. P. 276, 52 L. J. Q. B. 193, 48 L. T. Rep. N. S. 239, 31 Wkly. Rep. 293; Gillam *v.* Taylor, L. R. 16 Eq. 581, 42 L. J. Ch. 674, 28 L. T. Rep. N. S. 833, 21 Wkly. Rep. 823; *In re* St. Stephen, 39 Ch. D. 492, 57 L. J. Ch. 917, 59 L. T. Rep. N. S. 393, 36 Wkly. Rep. 837; *In re* Christ Church Inclosure Act, 38 Ch. D. 520, 57 L. J. Ch. 564, 58 L. T. Rep. N. S. 827. But *semble* that they are more properly regarded as present interests and consequently not within the scope of the Rule. Brigham *v.* Peter Bent Brigham Hospital, 126 Fed. 796 [*affirmed* in 134 Fed. 513, 67 C. C. A. 393]; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100; Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, 42 L. J. Ch. 368, 28 L. T. Rep. N. S. 248, 21 Wkly. Rep. 299; *In re* Swain, [1905] 1 Ch.

of neighboring land is held to create, in favor of the neighboring land, an easement enforceable in equity.[28] Such equitable easements are present interests, and unobjectionable as perpetuities.[29] Rights given to the owners of such easements to enter upon the servient tenements and abate any structures erected in violation of the agreement, although exercisable at a remote period, are good.[30]

B. Vested Future Interests[31] Are Not Subject to the Rule — 1. What Is a Vested Future Interest? The law from very early times has allowed the creation of certain future interests in real property. Thus land may be given to A for life, remainder to B for life. Is B's interest vested? He is not enjoying the land now, but merely hopes to enjoy it in the future. His hope is not sure of fulfilment, for he may die before A. And yet his interest is vested, as that term is used in connection with the Rule against Perpetuities. Enjoyment of the property by the owner of a future interest is necessarily conditioned upon the preceding estates coming to an end. It is in the very nature of a future interest that it must await the determination of the preceding estates. If a future interest has, so to speak, fallen into line, and is ready to turn into a present estate of enjoyment whenever the preceding estates come to an end, it is in the best position that a future interest can attain. The law has not confined the word "vested" to present interests, but has applied it also to those future interests which are ready to turn into present estates of enjoyment whenever the preceding estates are determined.[32]

2. Vested Remainders. A vested remainder is a remainder[33] which is ready to turn into a present estate of enjoyment whenever the preceding estates are

669, 74 L. J. Ch. 354, 92 L. T. Rep. N. S. 715. See also Biscoe *v.* Thweatt, 74 Ark. 545, 86 S. W. 432; and *infra*, VIII, E.

28. Tulk *v.* Moxhay, 1 Hall & T. 105, 47 Eng. Reprint 1345, 13 Jur. 89, 18 L. J. Ch. 83, 2 Phil. 774, 41 Eng. Reprint 1143.

29. Mackenzie *v.* Childers, 43 Ch. D. 265, 59 L. J. Ch. 188, 69 L. T. Rep. N. S. 98, 38 Wkly. Rep. 243; *Ex p.* Ralph, De Gex 219. See London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620. *Compare* Aspden *v.* Seddon, 1 Ex. D. 496, 46 L. J. Exch. 353, 36 L. T. Rep. N. S. 45, 25 Wkly. Rep. 277.

30. Tobey *v.* Moore, 130 Mass. 448. The owner of the easement has a present right to have the servient tenement free from all such structures. If no right to abate were given, and such structures were erected, equity would order their abatement. The right to enter and abate is a right in support of a present interest, making unnecessary any resort to the courts. To the same effect see Heald *v.* Ross, (N. J. Ch. 1900) 47 Atl. 575.

31. The future interests in realty known to the common law are vested remainders, contingent remainders, reversions, rights of entry for condition broken, possibilities of reverter, escheat, shifting and springing uses and executory devises, curtesy and dower, and future easements and profits. There are also certain similar future legal interests in personalty and certain similar future equitable interests in both realty and personalty. Of these future interests, vested remainders, reversions, possibilities of reverter, and rights to escheat in realty; interests in personalty of the nature of vested remainders or reversions; and equitable interests corresponding to legal vested interests are vested. See *infra*, III, B, 1–7.

32. See *infra*, III, B, 2–7.

33. The law governing the creation of remainders originated in feudal conceptions. Freehold land was transferable, under these conceptions, by livery of seizin. The owner of a fee could transfer the whole fee to another by livery; or, if he wished, he could transfer, say, a life-estate to A, remainder to B. In such case livery was made to A, but the seizin was now split up. A was conceived of as seized of the land, yet B was conceived of as seized in remainder. The transfer of the seizin always took effect presently; it could not be made to take effect *in futuro*. Therefore a remainder always had to be created at the same time as a present estate, called the particular estate; and this particular estate was said to support the remainder. The early law only allowed future interests which followed one another in orderly succession. Thus to A for life, to B for life, to C for life, to D in fee. Here the future interests are to take effect in turn, when the preceding estates run out. They do not cut short the preceding estates. Suppose, however, land is given to A in fee, but, if he dies unmarried, then to B in fee. Here if B awaited the running out of A's interest, he would have to await until A and all his heirs were dead. But if A dies unmarried, B becomes entitled. B's interest then does not await the running out of A's estate, but cuts it short. A remainder always awaits the running out of the preceding estates, and never cuts them short. Interests which cut short the preceding estates were unknown, in freehold estates, until after the passage of the Statute of Uses. As remainders fol-

determined.[34] The person entitled must therefore be in being,[35] and such person's right must not be contingent on the happening of any event.[36] The creation of vested remainders has been held unobjectionable from time immemorial. The Rule against Perpetuities has never been applied to them,[37] and the law to-day places no limits on their creation.[38]

3. REVERSIONS. All reversions are vested, and their creation is not subject to the Rule against Perpetuities.[39]

lowed each other in orderly succession, every remainder was bound to be ready to take the present seizin whenever the preceding estates came to an end. If it was not ready, it was destroyed. Thus of an estate to A for life, remainder to B's children for life, remainder to C. A dies, and B now has no children. The remainder to B's children is destroyed, and C takes. If children were born to B later, they would have no rights. Thus too of an estate to A for life, remainder to A's children. A, before children are born, purports to enfeoff X of the land in fee. This tortious feoffment by A forfeited his estate; the present seizin was offered to the remainder-man, and, there being no children to take, the remainder was destroyed. Remainders to unborn persons were therefore easily destroyed. See *supra*, II, A, note 7. See also DEEDS, 13 Cyc. 647; ESTATES, 16 Cyc. 648; WILLS.

34. See *supra*, III, B, 1.

35. If land is given to A for life, remainder to A's children, and A has now no children, the remainder is not vested. A future interest is of course not ready to turn into a present estate of enjoyment until the owner of the interest is in being. See DEEDS, 13 Cyc. 647; ESTATES, 16 Cyc. 648; WILLS.

36. If land is given to A for life, remainder to A's surviving children, and A has children now alive, the remainder is not vested. The right of any child is contingent upon his outliving his father. So if land is given to A for life, remainder to B in fee, if B shall have paid A ten thousand dollars in his lifetime, the remainder is contingent until he pays A the ten thousand dollars. So of a remainder to B if he shall enter a certain profession, or shall take the name of the testator. See DEEDS, 13 Cyc. 647; ESTATES, 16 Cyc. 648; WILLS.

37. Isbell *v.* Maclin, 24 Ala. 315; Lunt *v.* Lunt, 108 Ill. 307; Dorr *v.* Lovering, 147 Mass. 530, 18 N. E. 412; Seaver *v.* Fitzgerald, 141 Mass. 401, 6 N. E. 73; Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85.

38. Suppose land is given for a term of years to A, remainder to B. Unless there is some statutory limit on the length of terms for years, B may be given an interest which may not become a present estate of enjoyment for centuries. But such interest, being vested, is held not to be objectionable as a perpetuity. Todhunter *v.* Des Moines, etc., R. Co., 58 Iowa 205, 12 N. W. 267; Toms *v.* Williams, 41 Mich. 552, 2 N. W. 814; Morris *v.* Fisher, (Pa. 1900) 46 Atl. 1102 [the judgment below (8 Pa. Dist. 161) that a vested remainder for a term for ninety-nine years was too remote was reversed by agreement of counsel]; Rhodes' Estate, 147 Pa. St. 227, 23 Atl. 553; Wood *v.* Drew, 33 Beav. 610, 55 Eng. Reprint 505; Gore *v.* Gore, 2 P. Wms. 28, 24 Eng. Reprint 629. See Redington *v.* Browne, L. R. 32 Ir. 347.

39. By the Statute Quia Emptores (1290) it was provided that if A, the owner of a fee, conveyed the fee to another, B, B should hold the land, not of A, but of A's lord. Therefore if A conveyed to B and his heirs, and B died without heirs, A's lord, and not A, was entitled to the land. It followed that if A conveyed the fee to B, either as a present estate or as a vested remainder, there was no reversion in the land remaining in A. For example, if A conveyed the land to B for life, remainder to C and his heirs, there was no reversion left in A. But if A conveyed the land to B for life, without more, then the right succeeding B's life-estate remained in A as a reversion. Whenever a grantor creates estates in land less than a fee simple, there is a reversion remaining in him. Suppose now that A conveyed the fee, not as a vested, but as a contingent, remainder. For example, A conveys the land to B for life, remainder to B's surviving children in fee. A contingent remainder was not conceived of as invested with any part of the seizin; the seizin so far as not disposed of remained in A, and A was therefore seized in reversion, even though he had created a contingent remainder in fee. Suppose further, that A conveys the land to B for life, remainder to B's surviving children in fee, but, if B left no children, then to C in fee. Whether, when B dies, he leaves children or not, A will not be entitled to the land. But both remainders are contingent, the seizin has not been fully disposed of, and therefore A is conceived of as still seized in reversion. Egerton *v.* Massey, 3 C. B. N. S. 338, 91 E. C. L. 338. A reversion in all cases is a future interest to which the person creating the previous limitations in the land, or his heirs, is entitled. The person or persons entitled are therefore necessarily in being. The reversion is a future interest which arises only when, despite the estates created in favor of other persons, something still remains in the person creating such estates. Upon the determination of the estates created in favor of other persons, the creator of those estates, or his heirs, will again be entitled. This is true, even in such a case as Egerton *v.* Massey, *supra*. The reversion is therefore always ready to turn into a present estate of enjoyment whenever the preceding estates are determined. It fol-

4. Possibilities of Reverter. A possibility of reverter is a vested right, being of the nature of a reversion.[40] The creation of such an interest is held not to be subject to the Rule against Perpetuities.[41]

5. Escheat. The right of the lord to land by escheat is a vested right, and not subject to the Rule.[42]

6. Vested Legal Future Interests in Personalty. There may be vested legal future interests in personalty as well as in realty. Such interests are vested remainders, or reversions, strictly so called, or interests similar to vested remainders or reversions.[43] There may be vested legal future interests in both chattels real[44] and

lows that all reversions are vested. See Johnson *v.* Edmond, 65 Conn. 492, 33 Atl. 503. See Deeds, 13 Cyc. 650; Estates, 16 Cyc. 661; Wills.

40. A possibility of reverter is the interest left in the owner of a fee, A, after the creation of a determinable fee in another person, B. In very early times an estate to B and the heirs of his body was regarded as a determinable fee, the name of fee simple conditional being applied to this kind of determinable fee, and the interest remaining in A was not a reversion but a possibility of reverter. By the Statute de Donis 1285, an estate to B and the heirs of his body became an estate tail, and the interest remaining in A therefore became a reversion. The Statute de Donis was never adopted as part of the law of South Carolina, and in that state, and that state only, fee simple conditionals may still be created. The Rule against Perpetuities has never been applied in South Carolina to the possibilities of reverter remaining after the creation of fee-simple conditionals. See Postell *v.* Jones, Harp. (S. C.) 92, 99 note. After the Statute de Donis, the creation of other kinds of determinable fees continued valid. The classic example is an estate to A and his heirs, so long as they are tenants of the Manor of Dale. But the Statute Quia Emptores provided that if A, the owner of a fee, conveyed the fee to another, B, B should hold the land, not of A, but of A's lord. In other words, A could not retain a reversion in himself, after a conveyance in fee. This would seem to have put an end to the creation of possibilities of reverter, and there is no decision in England, since the Statute Quia Emptores, in which the creation of a possibility of reverter has been held good. See Collier *v.* McBean, 34 Beav. 426, 11 Jur. N. S. 592, 34 L. J. Ch. 555, 12 L. T. Rep. N. S. 790, 13 Wkly. Rep. 766, 55 Eng. Reprint 700. There are, however, several *dicta* assuming that possibilities of reverter may still be created. Y. B. 27 Hen. VIII, 29 pl. 30; Atty.-Gen. *v.* Pyle, 1 Atk. 435, 26 Eng. Reprint 278; Liford's Case, 11 Coke 46*b*, 77 Eng. Reprint 1206; Ayres *v.* Falkland, 1 Ld. Raym. 325; Gardner *v.* Sheldon, Vaugh. 259. The Statute Quia Emptores is not law in South Carolina, and seems not to be law in Pennsylvania, and possibilities of reverter may there be created. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Henderson *v.* Hunter, 59 Pa. St. 335; Pennsylvania R. Co. *v.* Parke, 42 Pa. St. 31; Scheetz *v.* Fitzwater, 5 Pa. St. 126. Their validity has, moreover, been recognized in a number of other states. Carr *v.* Georgia R. Co., 74 Ga. 73; Conner *v.* Waring, 52 Md. 724. See also Dolan *v.* Baltimore, 4 Gill (Md.) 394; North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159; Leonard *v.* Burr, 18 N. Y. 96; Lougheed *v.* Dykeman Baptist Church, etc., 40 N. Y. Suppl. 586. See Gray Perp. (2d ed.) Appendix E.

41. Wherever the validity of possibilities of reverter has been recognized, the Rule against Perpetuities has not been applied to them. This result would seem correct, as all possibilities of reverter are vested. This is not, however, the reasoning usually employed. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; French *v.* Old South Soc., 106 Mass. 479.

42. A right of escheat is of the nature of a reversion after a fee simple. Thus if a lord granted land to A and his heirs, and A died without heirs, the lord took by escheat. After the Statute Quia Emptores A was enabled to convey to B and his heirs and, after such conveyance, the lord would take only if B died without heirs; but, whenever a lord takes by escheat, he takes because the existing estates in the land have run out. The right to escheat is always a vested right. See *supra*, III, B, 1. Lord Coke said that upon the dissolution of a corporation, its land reverted to the grantors, and that their right was of the nature of an escheat. Windsor's Case, Gobd. 211, 78 Eng. Reprint 128; Coke Litt. 13*b*. This remark has been frequently cited, and there is one decision in accord. Mott *v.* Danville Seminary, 129 Ill. 403, 21 N. E. 927, 136 Ill. 289, 28 N. E. 54. The court did not consider the question whether such an interest is subject to the Rule against Perpetuities. See also Paris Presb. Church *v.* Venable, 159 Ill. 215, 42 N. E. 836, 50 Am. St. Rep. 159; Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; Gray Perp. (2d ed.) §§ 44–51.

Escheat generally see Escheat, 16 Cyc. 548.

43. See *supra*, III, B, 2, 3.

44. Chattels real.— A sublease may be created in a term of years. For example A, owner of a term for twenty years, may sublease to B for ten years. The interest remaining in A is a reversion. Can any vested future legal interest in a chattel real be

chattels personal.[45] Such interests are probably not subject to the Rule against Perpetuities.[46]

created except such as follow a term of years within a term? According to the old common law, if A, owner of a term, granted it to B for life, B took the whole term. In legal contemplation, a life-estate is greater than an estate for years; by a piece of scholastic logic, the courts concluded that, where a term is granted for life, the limitation for life is as great as a limitation for all the years and comprehends in judgment of law all the years, for inasmuch as a "time for life is greater than a time for years," therefore the lesser is included in the greater. Welcden v. Elkington, Plowd. 516, 75 Eng. Reprint 763. This old conception has not yet been repudiated. Suppose now that a term is given to A for life, remainder to B. A has the absolute interest. Is B to be protected at all? After some conflicting decisions, it was settled by Manning's Case, 8 Coke 94b, 77 Eng. Reprint 618, that, in the case of a devise, the limitation to B should be construed as an executory devise, A taking the absolute interest subject to this devise. This is still law in both England and the United States. There are no decisions in either country expressly holding that a similar executory limitation by deed would be good, but in Culbreth v. Smith, 69 Md. 450, 16 Atl. 112, 1 L. R. A. 538, there is a reasoned *dictum* to that effect. It would seem therefore that at the present day if any future legal interest can be created in a chattel real, except such as follow a term of years within the term, such interest is an executory devise, or an executory limitation. Such future interests are not vested. See *infra*, III, D, 4. It follows that no vested future legal interest can be created in chattels real, except such as follow a term of years within the terms.

45. Chattels personal.—A chattel personal may be bailed for a term of years. For example A, owner of silver plate, may bail it to B for a day or a month, or any definite time. The interest remaining in A is of the nature of a reversion and is vested. Can any vested future legal interest in a chattel personal be created except such as follow a bailment for years? In early times the law distinguished between the gift of the chattel itself, and the use of the chattel. Paramour v. Yardley, Plowd. 539, 75 Eng. Reprint 794. "The gift or devise of a chattel for an hour is forever." Bro. Ab. Dev. 13. So when a chattel was bequeathed to A for life and then to B, it was held that B took nothing. Anonymous, March 106, 82 Eng. Reprint 432. But the use of a chattel could be in one, and the property subject to this use in another. So, if the use of a mass-book was bequeathed to A for life, the book then to go to B, both A and B took legal interests. Y. B. 37 Hen. VI, 30. Later, a bequest of a book to A for life, remainder to B, came to be construed as a bequest of the use to A for life, and of the book, subject to this use, to B. Vachel v. Vachel, 1 Ch. Cas. 129, 29 Eng. Reprint 727. This destroyed the effect of the decision in Anonymous, *supra*. Woodley v. Findlay, 9 Ala. 716; Tissen v. Tissen, 1 P. Wms. 500, 24 Eng. Reprint 490; Catchmay v. Nicholas, Rep. t. Finch 116, 23 Eng. Reprint 63. See also Doyle v. Bouler, 7 Ala. 246. Where a chattel personal is bequeathed to A for life, and then to B, since B has the property subject to A's use, and will become entitled to enjoy the property whenever A's interest ceases, B's interest is of the nature of a vested remainder. Future interests in chattels personal, to take effect after life-interests therein, were treated as vested in Evans v. Walker, 3 Ch. D. 211, 25 Wkly. Rep. 7, and Loring v. Blake, 98 Mass. 253. See also *In re* Roberts, 19 Ch. D. 520, 45 L. T. Rep. N. S. 450; Routledge v. Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671. In *Re* Tritton, 61 L. T. Rep. N. S. 301, 6 Morr. Bankr. Cas. 250, however, where the use of pictures was given to A for life, and, subject to this use, to B, the interest of B was treated not as a vested interest, but as an executory bequest. See also Isbell v. Maclin, 24 Ala. 315; McGraw v. Davenport, 6 Port. (Ala.) 319; Tucker v. Stevens, 4 Desauss. Eq. (S. C.) 532; Stone v. Nicholson, 27 Gratt. (Va.) 1. *Compare* Marston v. Carter, 12 N. H. 159. Where a chattel personal is bequeathed to B for life, without more, B would seem to have only a use for life, and A's representatives a vested interest of the nature of a reversion. Accordingly, on such a bequest, upon B's death, the chattel goes to the representatives of A, not of B. Booth v. Terrell, 18 Ga. 570, 16 Ga. 20; Haralson v. Redd, 15 Ga. 148; Brown v. Kelsey, 2 Cush. (Mass.) 243; Harris v. McLaran, 30 Miss. 533; Vannerson v. Culbertson, 10 Sm. & M. (Miss.) 150; Hoes v. Van Hosen, 1 N. Y. 120; Cresswell v. Emberson, 41 N. C. 151; Black v. Ray, 18 N. C. 334; James v. Masters, 7 N. C. 110; Anonymous, 3 N. C. 161; Geiger v. Brown, 4 McCord (S. C.) 418, 2 Strobh. Eq. 359 note; McCutchin v. Price, 3 Hayw. (Tenn.) 211; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523. But see *contra*, Derickson v. Garden, 5 Del. Ch. 323. In most of the United States transfers of chattels personal *inter vivos* will be construed and upheld in the same manner as bequests of chattels. See *supra*, note 1. It follows that by bequests of chattels personal in both England and the United States, and by transfers *inter vivos* in most jurisdictions within the United States, vested future legal interests in chattels personal may be created in the nature of vested remainders and reversions, besides those which follow bailments for years.

46. Reversions after subleases are to be treated in the same manner as any other reversions. See *supra*, III, B, 3. It seems never to have been suggested that the Rule would apply to those interests in chattels personal which are equivalent to absolute

7. VESTED EQUITABLE FUTURE INTERESTS. Equitable interests are vested whenever the corresponding legal interests would be vested,[47] and vested equitable interests are no more subject to the Rule against Perpetuities than vested legal interests.[48]

C. Destructible Future Interests Are Not Subject to the Rule. If a future interest is destructible at the pleasure of the owner of the present estate, it neither hampers the alienation of the property, nor diminishes the value of the present estate. It is not therefore objectionable within either of the reasons of policy supporting the Rule against Perpetuities.[49] So long as contingent remainders were destructible by act of the owner of the present estate, it is an open question whether or not they were subject to the Rule. But they have ceased to be so destructible. Estates tail may still be created in England and in some of the United States.[50] The future interests expectant on estates tail may be destroyed by the tenant in tail.[51] Are then these future interests within the Rule? If such an interest must vest at or before the determination of the estate tail, it is good; for throughout the time it can remain contingent, it will be destructible.[52] If, however, such an interest must not necessarily vest at, or

ownership, excepting as they are subject to a bailment for years. Interests of the nature of vested remainders in chattels personal, which follow life-interests in the chattels, are not subject to the Rule. Loring *v.* Blake, 98 Mass. 253; Evans *v.* Walker, 3 Ch. D. 211, 25 Wkly. Rep. 7. See also Isbell *v.* Maclin, 24 Ala. 315; Woodley *v.* Findlay, 9 Ala. 716; Tucker *v.* Stevens, 4 Desauss. Eq. (S. C.) 532; *In re* Roberts, 19 Ch. D. 520, 45 L. T. Rep. N. S. 450; Routledge *v.* Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671. *Compare* Stone *v.* Nicholson, 27 Gratt. (Va.) 1.

47. For example, if A conveys land to trustees, in trust for B for life, then for C for life, and then to D in fee, C and D have vested equitable interests in the nature of remainders. So if A conveys land to trustees, in trust for B for life, without more, there is a resulting trust in A. Resulting trusts are of the nature of reversions. So if A conveys land to trustees, in trust for a charity, and the application of the land to the charitable use becomes impossible, there is a resulting trust to A. This interest in A is closely analogous to a possibility of reverter. See Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739. See also *In re* Randell, 38 Ch. D. 213, 57 L. J. Ch. 899, 58 L. T. Rep. N. S. 626, 36 Wkly. Rep. 543. It was held in Burgess *v.* Wheate, 1 Eden 177, W. Bl. 121, 28 Eng. Reprint 652, that when a *cestui que trust* entitled to the whole equitable interest dies without heirs, the crown does not take by escheat, but the trustee holds free of any trust. If a chattel personal is given to trustees, in trust for A for life, and then for B, B has a vested equitable interest in the nature of a remainder. *In re* Roberts, 19 Ch. D. 520, 45 L. T. Rep. N. S. 450; Routledge *v.* Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671.

48. Flanner *v.* Fellows, 206 Ill. 136, 68 N. E. 1057; Abend *v.* McKendree College Endowment Fund Com'rs, 174 Ill. 96, 50 N. E. 1052; Williamson's Estate, 3 Pa. Co. Ct. 239; Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; *In re* Randell, 38 Ch. D. 213, 57 L. J. Ch. 899, 58 L. T. Rep. N. S. 626, 36 Wkly. Rep. 543. But see *contra*, Towle *v.* Doe, 97 Me. 427, 54 Atl. 1072. *Compare* Pulitzer *v.* Livingston, 89 Me. 359, 36 Atl. 635.

As to present equitable interests see *supra*, III, A, notes 27 and 28.

49. See *supra*, I.

50. See *infra*, note 51. See also ESTATES, 16 Cyc. 608.

51. See Del. Rev. St. (1893) c. 83, § 27; Me. Rev. St. (1903) c. 75, § 7; Md. Pub. Gen. Laws (1888), art. 21, § 24; Mass. Rev. Laws (1902), c. 127, §§ 24–27; R. I. Gen. Laws (1896), c. 201, §§ 5, 14.

52. Thus all remainders following an estate tail are good even if not vested. Barher *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 17 S. Ct. 488, 41 L. ed. 925 [*citing* Cresson *v.* Ferree, 70 Pa. St. 446]; Cole *v.* Sewell, 2 H. L. Cas. 186, 12 Jur. 927, 9 Eng. Reprint 1062; Jack *v.* Fetherstone, 2 Hud. & B. 320; Goodwin *v.* Clark, 1 Lev. 35, 83 Eng. Reprint 284; Morse *v.* Ormonde, 5 Madd. 99, 21 Rev. Rep. 284, 56 Eng. Reprint 833. So of conditional limitations which must vest, if at all, before the determination of the estate tail; for example, of limitations to take effect if the tenant in tail should cease to bear a certain name. Pennington *v.* Pennington, 70 Md. 418, 17 Atl. 329, 3 L. R. A. 816; Nicolls *v.* Sheffield, 2 Bro. Ch. 214, 29 Eng. Reprint 121; Harrison *v.* Round, 2 De G. M. & G. 190, 17 Jur. 563, 22 L. J. Ch. 322, 1 Wkly. Rep. 26, 51 Eng. Ch. 148, 42 Eng. Reprint 844; Carr *v.* Errol, 6 East 58. See also Heasman *v.* Pearse, L. R. 7 Ch. 275, 41 L. J. Ch. 705, 26 L. T. Rep. N. S. 299, 20 Wkly. Rep. 271; Meller *v.* Stanley, 2 De G. J. & S. 183, 12 Wkly. Rep. 524, 67 Eng. Ch. 143, 46 Eng. Reprint 345 [*distinguishing* Ferrand *v.* Wilson, 4 Hare 344, 9 Jur. 860, 15 L. J. Ch. 41, 30 Eng. Ch. 344, 67 Eng. Reprint 680]; Tregonwell *v.* Sydenham, 3 Dow. 194, 15 Rev. Rep. 40, 3 Eng. Reprint 1035; Bennett *v.* Bennett, 2 Dr. & Sm. 266, 10 Jur. N. S. 1170, 34 L. J. Ch. 34, 11 L. T. Rep. N. S. 362, 13

before, the determination of the estate tail, and if it will be indestructible thereafter, it is bad; for the tenant in tail may not destroy it, and it will then become an indestructible interest which may not vest within the limits of the Rule.[53] In South Carolina executory limitations may be created to follow upon fee-simple conditionals,[54] and *semble* that such interests are not destructible.[55] Although a contingent remainder may no longer be destroyed by any act of the owner of the present estate, it is still subject to destruction if it is not vested by the determination of the preceding estates.[56] Consequently a contingent remainder which by the terms creating it may not vest, if at all, within the limits of the Rule, but which is to follow estates all of which must end within the limits of the Rule, is good; for unless it does vest by the determination of the preceding estates, it is destroyed.[57]

D. Such Future Interests as Are Contingent and Indestructible Are Subject to the Rule — 1. In General. The Rule applies only to future interests, and not to present interests at all.[58] And it does not even apply to all future interests; if such interests are either vested or destructible, they do not offend the Rule.[59] Broadly speaking, the statement may, however, be made that the Rule does apply to all future interests in property[60] which are both contingent

Wkly. Rep. 66, 62 Eng. Reprint 623; Faulkner *v.* Daniel, 3 Hare 199, 8 Jur. 29, 10 L. J. Ch. 33, 25 Eng. Ch. 199, 67 Eng. Reprint 355; Wallis *v.* Freestone, 10 Sim. 225, 16 Eng. Ch. 225, 59 Eng. Reprint 599. *Compare* Morris *v.* Fisher, 8 Pa. Dist. 161; Ferguson *v.* Ferguson, 39 U. C. Q. B. 232 [*reversed* on other grounds in 1 Ont. App. 452, 2 Can. Sup. Ct. 497]. If a term be given for one thousand years to trustees and subject to the term to A in tail, the trustees to accumulate income during the minority of any tenant in tail, for the benefit of the succeeding tenants in tail, although the estate tail may be barred, the term may not. Case *v.* Drosier, 1 Jur. 352, 2 Keen 764, 6 L. J. Ch. 353, 15 Eng. Ch. 764, 48 Eng. Reprint 824 [*affirmed* in 3 Jur. 1164, 5 Myl. & C. 246, 46 Eng. Ch. 224, 41 Eng. Reprint 364]; Mainwaring *v.* Baxter, 5 Ves. Jr. 458, 31 Eng. Reprint 681. But it would seem that by barring the entail it has become impossible that there should arise any occasion for accumulation, and therefore the contingent equitable interest in the term has been destroyed. *Compare* "Trusts For Accumulation," *infra*, VIII, F. It would follow that the interests created by the trust of the term being destructible are not objectionable. But there is authority in England to the contrary. Floyer *v.* Bankes, L. R. 8 Eq. 115; Cochrane *v.* Cochrane, L. R. 11 Ir. 361; Scarisbrick *v.* Skelmersdale, 14 Jur. 562, 19 L. J. Ch. 126, 17 Sim. 187, 42 Eng. Ch. 187, 60 Eng. Reprint 1100; Turwin *v.* Newcome, 3 Jur. N. S. 203, 3 Kay & J. 16, 5 Wkly. Rep. 35, 69 Eng. Reprint 1003; Browne *v.* Stoughton, 14 Sim. 369, 37 Eng. Ch. 369, 60 Eng. Reprint 401.

53. Thus, where land is given to A in tail, remainder to B in fee, but if any holder of the property ceases to bear a certain name, then to C. Hartopp *v.* Carbery [*cited* in 1 Sanders Uses (5th ed.) 204]. To the same effect are Lanesborough *v.* Fox, Cas. t. Talb. 262, 25 Eng. Reprint 768; Bristow *v.* Boothby, 4 L. J. Ch. O. S. 88, 2 Sim. & St. 465, 25 Rev. Rep. 248, 1 Eng. Ch. 465, 57 Eng. Reprint 424; Bankes *v.* Holme, 1 Russ. 394 note, 25 Rev. Rep. 79, 46 Eng. Ch. 352, 38 Eng. Reprint 152.

54. See *supra*, III, B, 4, note 40.

55. Lyon *v.* Walker, 8 Rich. (S. C.) 307; Hay *v.* Hay, 3 Rich. Eq. (S. C.) 384; Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271; Postell *v.* Postell, Bailey Eq. (S. C.) 390; Mazyck *v.* Vanderhorst, Bailey Eq. (S. C.) 48; Henry *v.* Felder, 2 McCord Eq. (S. C.) 323.

56. See *supra*, note 33.

57. Suppose land is devised to A for life, remainder to A's children who reach twenty-five. At A's death, the land vests in those children, if any, who have then reached twenty-five. Any children under twenty-five lose all rights to the land. In Abbiss *v.* Burney, 17 Ch. D. 211, 50 L. J. Ch. 348, 44 L. T. Rep. N. S. 267, 29 Wkly. Rep. 449, land was conveyed in trust for A for life, and then for such of the children of A as should reach twenty-five. It was held by the court below that this equitable interest should be treated as though it were a corresponding legal interest, and, as such a legal contingent remainder would be good, the equitable interest was held good. This holding was reversed by the court of appeal, but the court recognized that if the future interest to the children had been legal, rather than equitable, it would have been good. For a further note on this case see *infra*, note 78.

58. See *supra*, III, A.

59. See *supra*, III, B, C.

60. The Rule against Perpetuities is a rule of property. This is an important limitation upon its scope. It has no application to purely personal contracts. Borland *v.* Steel, [1901] 1 Ch. 279, 70 L. J. Ch. 51, 49 Wkly. Rep. 120; Walsh *v.* India Secretary of State, 10 H. L. Cas. 367, 9 Jur. N. S. 757, 32 L. J. Ch. 585, 2 New Rep. 339, 11 Wkly. Rep. 823, 11 Eng.

and indestructible. To this broad statement, the only qualifications that need be made are with regard to (1) curtesy and dower,[61] and (2) rights of entry for condition broken.[62]

2. CONTINGENT REMAINDERS. A remainder is contingent unless the owner is in being, and entitled, so long as the remainder continues, to come into the present enjoyment of the property whenever the preceding estates determine.[63] So long as contingent remainders were destructible by act of the owner of the present estate, it is an open question whether or not they were subject to the Rule. But they have ceased to be so destructible,[64] and there would seem to be no sufficient reason to doubt that the Rule now applies to them.[65]

3. RIGHTS OF ENTRY FOR CONDITION BROKEN. The Statute Quia Emptores, which prevented subinfeudation, was held not to affect the right of the owner of a fee simple to grant the fee upon a condition, and to enter, upon breach of the condition.[66] Such a right is held in England to be subject to the Rule.[67]

Reprint 1068. See also Vanderslice *v.* Royal Ins. Co., 9 Pa. Super. Ct. 233.

61. Curtesy and dower usually arise as rights in realty in which the spouse has an estate in fee simple. Although such fee simple may in its creation have been a remainder expectant on many preceding estates, yet when it is reached the owner of the present estate has the most unrestricted rights of ownership known to the law; for the purposes of computing time within which future interests in the property must vest a fresh start is made; and as the rights to dower and curtesy are vested at, if not before, the death of the spouse, they are clearly not too remote. Suppose, however, that land is given to A, a bachelor, for life, remainder to A's eldest child in tail, remainder to A's heirs. A dies, leaving one daughter, B, who marries C, has issue, and dies. If the land had been given to A, a bachelor, for life, remainder to A's eldest child for life, remainder to the spouse of such child, for life, remainders over, the remainder to the spouse would have been too remote; for the child might not marry a person in being at A's death. Yet it has never been suggested that C's right of curtesy in the case put would be objectionable to the Rule. *Semble* the reason is that the right of curtesy arises, by act of law, as an incident to an estate of inheritance. And if the estate of inheritance is not too remote, all the legal incidents of such estate are unobjectionable. The same reasoning applies to rights of dower.

Curtesy generally see CURTESY, 12 Cyc. 1001.

Dower generally see DOWER, 14 Cyc. 871.

62. Rights of entry for condition broken are held in the United States not to be subject to the Rule. See *infra*, III, D, 3.

63. See *supra*, III, B, 1, 2.

Remainder generally see ESTATES, 16 Cyc. 648.

64. See *supra*, III, C.

65. *Georgia.*— Robert *v.* West, 15 Ga. 122.

Illinois.— Hill *v.* Gianelli, 221 Ill. 286, 77 N. E. 458, 112 Am. St. Rep. 182; Eldred *v.* Meek, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86.

Maryland.— Timanus *v.* Dugan, 46 Md. 402; Turner *v.* Withers, 23 Md. 18.

Michigan.— St. Amour *v.* Rivard, 2 Mich. 294.

New Hampshire.—Wood *v.* Griffin, 46 N. H. 230.

Pennsylvania.— *In re* Kountz, 213 Pa. St. 390, 62 Atl. 1103, 3 L. R. A. N. S. 639.

Tennessee.— Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

England.— *In re* Ashforth, [1905] 1 Ch. 535, 74 L. J. Ch. 361, 92 L. T. Rep. N. S. 534, 21 T. L. R. 329, 53 Wkly. Rep. 328; Symes *v.* Symes, [1896] 1 Ch. 272, 65 L. J. Ch. 265, 73 L. T. Rep. N. S. 684, 44 Wkly. Rep. 521; *In re* Frost, 43 Ch. D. 246, 59 L. J. Ch. 118, 62 L. T. Rep. N. S. 25, 38 Wkly. Rep. 264; Cattlin *v.* Brown, 1 Eq. Rep. 550, 11 Hare 372, 1 Wkly. Rep. 533, 45 Eng. Ch. 367, 68 Eng. Reprint 1319. *Compare* Whitby *v.* Mitchell, 42 Ch. D. 494, 38 Wkly. Rep. 5 [*affirmed* in 44 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. Rep. N. S. 771, 38 Wkly. Rep. 337]; Cole *v.* Sewell, 2 H. L. Cas. 186, 12 Jur. 927, 9 Eng. Reprint 1062.

See 39 Cent. Dig. tit. "Perpetuities," § 28.

66. Van Rensselaer *v.* Dennison, 35 N. Y. 393; Van Rensselaer *v.* Ball, 19 N. Y. 100. Suppose A, owner of a fee, granted it to B on condition that B should never cease to bear a certain name. B (after the Statute Quia Emptores) would hold the fee, not of A, but of A's lord. Here A's interest does not follow on in orderly succession after B's, being ready to turn into a present estate of enjoyment whenever B's estate is determined. A is entitled only on the happening of a certain event, and, when he enters, he cuts short B's estate, and substitutes one in his own favor. A's right is therefore not vested. See *supra*, III, B, 1.

67. In *In re* Macleay, L. R. 20 Eq. 186, 190, 44 L. J. Ch. 441, 32 L. T. Rep. N. S. 682, 23 Wkly. Rep. 718, A devised his property to B "on the condition that he never sells out of the family." The court held the condition good, because it would be operative only in B's lifetime; but the court said: "Of course, if unlimited as to time, it would be void for remoteness." In Dunn *v.* Flood, 25 Ch. D. 629, 53 L. J. Ch. 537, 49 L. T. Rep. N. S. 670, 32 Wkly. Rep. 197, A conveyed land to B, on condition that if it was ever used for certain trades, A might

The opposite conclusion has been reached in the cases decided in the United States.[68]

4. Springing and Shifting Uses and Executory Devises. Springing and shifting uses[69] and executory devises[70] are beyond question subject to the Rule.[71] Gifts over to take effect on an indefinite failure of issue are subject to the Rule, and there is abundant authority that they do not conform to its requirement.[72]

enter. The condition was held void for remoteness. And see *In re* Hollis' Hospital, [1899] 2 Ch. 540, 68 L. J. Ch. 673, 81 L. T. Rep. N. S. 90, 47 Wkly. Rep. 691.

68. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Tobey *v.* Moore, 130 Mass. 448; French *v.* Old South Soc., 106 Mass. 479; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451; Palmer *v.* Union Bank, 17 R. I. 627, 24 Atl. 109; Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739. But *compare* Tappan's Appeal, 52 Conn. 412; Giles *v.* Boston Fatherless, etc., Soc., 10 Allen (Mass.) 355.

69. **Before the Statute of Uses** (1536) if A, owner of land, enfeoffed B to the use of third persons, B was at law as completely the owner as though no use had been declared. But equity would enforce the uses declared, as to-day equity enforces trusts declared. Now the creation of legal estates in land was subject to strict rules of feudal origin, but equity was not bound by these rules. It followed that a use, or equitable interest, in land might be created although a corresponding legal interest was unknown. Thus A, owner of land, could not create a freehold interest to commence *in futuro*, unless he at the same time created another estate or estates exactly filling in the time until such future estate was to commence. A could enfeoff B of land for life, remainder to C in fee, but A could not enfeoff C in fee, the fee to commence when B died, without any intervening estate. If, however, A enfeoffed X of the land, to the use of C and his heirs, from and after B's death, this was good in equity. There was a resulting use to A until B's death, and then the declared use to C became operative. This interest in C was called a springing use, as it sprang out of, and cut short, the feoffor's own use. Again A could not create any future interest in favor of third persons, which did not exactly follow on after a preceding estate; future interests which did not follow on after preceding estates, but cut them short, were allowed by the law only in the form of rights of entry to the grantor himself, or his heirs, for condition broken. A could not grant land to B and his heirs, but if B died unmarried, then to C and his heirs. If, however, A enfeoffed X of the land to the use of B and his heirs, but, if B died unmarried, then to the use of C and his heirs, this was good in equity. The use to B was enforced until he died unmarried, and then the use to C became operative. This interest in C was called a shifting use. A springing use cut short a use in the grantor; a shifting use cut short a use created in some other person.

By the Statute of Uses it was provided that whoever was *cestui* of a use, and therefore had an equitable interest in land corresponding to a legal interest should thereafter have the legal estate. The creation of equitable interests remained as unrestricted as before, and the statute now took these equitable interests and converted them into legal interests. Thus the liberality which had prevailed in equity was now carried over into the law.

70. **After the Statute of Wills** (1540) land was freely devisable. The courts of law, in declaring what interests in land could be created by devise, did not follow the strict rules governing conveyances *inter vivos*, but were as liberal as equity had been with regard to the creation of uses. See *supra*, note 69. The term "executory devises" includes such interests created by will as would have been springing uses or shifting uses if created *inter vivos* by way of use.

The term "conditional limitation" is a convenient general expression, frequently used to cover both springing and shifting uses and executory devises.

71. Suppose property is given to A and his heirs but, if A dies without issue, to B and his heirs. This gift to B is a shifting use, if the limitation is by deed, or an executory devise, if the limitation is by will. Such gifts have frequently been passed upon by the courts and it has never been doubted but that they are subject to the Rule. The gift may be construed to take effect on an indefinite failure of issue — that is, whenever A and all his issue are dead, or it may be construed to take effect on a definite failure of issue — that is, only in case that on A's death there are no issue of A alive.

72. *Alabama.*— Landman *v.* Snodgrass, 26 Ala. 593; Darden *v.* Burns, 6 Ala. 362.

Georgia.— Robinson *v.* McDonald, 2 Ga. 116.

Illinois.— See Nevitt *v.* Woodburn, 82 Ill. App. 649.

Maryland.— Comegys *v.* Jones, 65 Md. 317, 4 Atl. 567; Josetti *v.* McGregor, 49 Md. 202; Wallis *v.* Woodland, 32 Md. 101; Ridgely *v.* Bond, 18 Md. 433; Tongue *v.* Nutwell, 13 Md. 415; Johnson *v.* Lish, 4 Harr. & J. 441; State *v.* Mann, 3 Harr. & J. 238; Davidge *v.* Chaney, 4 Harr. & M. 393; Jackson *v.* Dashiel, 3 Md. Ch. 257; Usilton *v.* Usilton, 3 Md. Ch. 36.

Massachusetts.—Albee *v.* Carpenter, 12 Cush. 382; Terry *v.* Briggs, 12 Metc. 17.

Mississippi.— Powell *v.* Brandon, 24 Miss. 343.

Gifts over to take effect on a definite failure of issue are subject to the Rule, but do conform to its requirement.[73]

Missouri.— State *v.* Tolson, 73 Mo. 320; Chism *v.* Williams, 29 Mo. 288.

New Hampshire.— Merrill *v.* American Baptist Missionary Union, 73 N. H. 414, 62 Atl. 647, 111 Am. St. Rep. 632, 3 L. R. A. N. S. 1143.

New Jersey.— Morehouse *v.* Cotheal, 22 N. J. L. 430; Davies *v.* Steele, 38 N. J. Eq. 168; Condict *v.* King, 13 N. J. Eq. 375; Fairchild *v.* Crane, 13 N. J. Eq. 105; Cleveland *v.* Havens, 13 N. J. Eq. 101, 78 Am. Dec. 90.

North Carolina.— Porter *v.* Ross, 55 N. C. 196; Ferrand *v.* Howard, 38 N. C. 381; Weatherly *v.* Armfield, 30 N. C. 25; Hollowell *v.* Kornegay, 29 N. C. 261; Cox *v.* Marks, 27 N. C. 361; Brantley *v.* Whitaker, 27 N. C. 225; State *v.* Skinner, 26 N. C. 57; Brown *v.* Brown, 25 N. C. 134; Rice *v.* Satterwhite, 21 N. C. 69; Bailey *v.* Davis, 9 N. C. 108; Davidson *v.* Davidson, 8 N. C. 163; Matthews *v.* Daniel, 3 N. C. 346; Sutton *v.* Wood, 1 N. C. 202.

Pennsylvania.— Hackney *v.* Tracy, 137 Pa. St. 53, 20 Atl. 560; Greenawalt *v.* Greenawalt, 71 Pa. St. 483; Toman *v.* Dunlop, 18 Pa. St. 72; Train *v.* Fisher, 15 Serg. & R. 145; Schilling *v.* Kocher, 4 Lanc. L. Rev. 58.

Rhode Island.— Cooke *v.* Bucklin, 18 R. I. 666, 29 Atl. 840.

South Carolina.— Mangum *v.* Piester, 16 S. C. 316; Mendenhall *v.* Mower, 16 S. C. 303; Curry *v.* Sims, 11 Rich. 489; Cox *v.* Buck, 5 Rich. 604; Norton *v.* Fripp, 1 Speers 250; Guery *v.* Vernon, 1 Nott & M. 69; Moore *v.* Paul, 7 Rich. Eq. 358; Lesly *v.* Collier, 3 Rich. Eq. 125; Shephard *v.* Shephard, 2 Rich. Eq. 142, 46 Am. Dec. 41; Adams *v.* Chaplin, 1 Hill Eq. 265.

Tennessee.— Hamner *v.* Hamner, 3 Head 398; Randolph *v.* Wendel, 4 Sneed 646; Chester *v.* Greer, 5 Humphr. 26.

Virginia.— Nixon *v.* Rose, 12 Gratt. 425; Deane *v.* Hansford, 9 Leigh 253; Griffith *v.* Thomson, 1 Leigh 321; Lynch *v.* Hill, 6 Munf. 114; Williamson *v.* Ledbetter, 2 Munf. 521; Wilkins *v.* Taylor, 5 Call 150.

United States.— Maxwell *v.* Call, 18 Fed. Cas. No. 9,323, 2 Brock. 119.

England.— *In re* Johnson, L. R. 2 Eq. 716, 12 Jur. N. S. 616; O'Mahoney *v.* Burdett, L. R. 7 H. L. 388, 44 L. J. Ch. 56 note, 31 L. T. Rep. N. S. 705, 23 Wkly. Rep. 361; Boden *v.* Watson, Ambl. 398, 27 Eng. Reprint 266; Candy *v.* Campbell, 8 Bligh N. S. 469, 5 Eng. Reprint 1017, 2 Cl. & F. 421, 6 Eng. Reprint 1213; Windham *v.* Love, 2 Ch. Rep. 14, 21 Eng. Reprint 602, 1 Lev. 290, 83 Eng. Reprint 412.

73. *Alabama.*— Edwards *v.* Bibb, 54 Ala. 475, 43 Ala. 666; Bethea *v.* Smith, 40 Ala. 415; Flinn *v.* Davis, 18 Ala. 132; Williams *v.* Graves, 17 Ala. 62; Woodley *v.* Findlay, 9 Ala. 716; Doyle *v.* Bouler, 7 Ala. 246; Bell *v.* Hogan, 1 Stew. 536.

Arkansas.—Clark *v.* Stanfield, 38 Ark. 347; Moody *v.* Walker, 3 Ark. 147. See also Biscoe *v.* Thweatt, 74 Ark. 545, 86 S. W. 432.

Connecticut.— Clarke *v.* Terry, 34 Conn. 176; Hudson *v.* Wadsworth, 8 Conn. 348.

Georgia.— Lillibridge *v.* Ross, 31 Ga. 730; Burton *v.* Black, 30 Ga. 638; Forman *v.* Troup, 30 Ga. 496; Griswold *v.* Greer, 18 Ga. 545; Carlton *v.* Price, 10 Ga. 495; Mayer *v.* Wiltberger, Ga. Dec. Pt. II, 20.

Illinois.— Strain *v.* Sweeny, 163 Ill. 603, 45 N. E. 201; Glover *v.* Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.

Kentucky.— Daniel *v.* Thomson, 14 B. Mon. 662; Armstrong *v.* Armstrong, 14 B. Mon. 333; Atty.-Gen. *v.* Wallace, 7 B. Mon. 611; Birney *v.* Richardson, 5 Dana 424; Brown *v.* Brown, 1 Dana 39; Luke *v.* Marshall, 5 J. J. Marsh. 353; Brashear *v.* Macey, 3 J. J. Marsh. 89; Moore *v.* Howe, 4 T. B. Mon. 199.

Maryland.— Lednum *v.* Cecil, 76 Md. 149, 24 Atl. 452; Hardy *v.* Wilcox, 58 Md. 180; Allender *v.* Sussan, 33 Md. 11, 3 Am. Rep. 171; Budd *v.* State, 22 Md. 48; Woodland *v.* Wallis, 6 Md. 151; Jones *v.* Sothoron, 10 Gill & J. 187; Biscoe *v.* Biscoe, 6 Gill & J. 232; Dashiell *v.* Dashiell, 2 Harr. & G. 127.

Michigan.— Goodell *v.* Hibbard, 32 Mich. 47.

Mississippi.— Gray *v.* Bridgeforth, 33 Miss. 312; Jordan *v.* Roach, 32 Miss. 481.

Missouri.— Naylor *v.* Godman, 109 Mo. 543, 19 S. W. 56.

New Hampshire.— Kimball *v.* Penhallow, 60 N. H. 448; Pinkham *v.* Blair, 57 N. H. 226; Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706; Hall *v.* Chaffee, 14 N. H. 215.

New Jersey.— Armstrong *v.* Kent, 21 N. J. L. 509; Ackerman *v.* Vreeland, 14 N. J. Eq. 23; Fairchild *v.* Crane, 13 N. J. Eq. 105; Cleveland *v.* Havens, 13 N. J. Eq. 101, 78 Am. Dec. 90.

North Carolina.— Blake *v.* Page, 60 N. C. 252; Baker *v.* Pender, 50 N. C. 351; Williams *v.* McComb, 38 N. C. 450; Threadgill *v.* Ingram, 23 N. C. 577; Watson *v.* Ogburn, 22 N. C. 353; Montgomery *v.* Wynns, 20 N. C. 667; Zollicoffer *v.* Zollicoffer, 20 N. C. 574; Miller *v.* Williams, 19 N. C. 500.

Ohio.— Stevenson *v.* Evans, 10 Ohio St. 307.

Pennsylvania.— Miller's Estate, 145 Pa. St. 561, 22 Atl. 1044; Snyder's Appeal, 95 Pa. St. 174; Berg *v.* Anderson, 72 Pa. St. 87; Nicholson *v.* Bettle, 57 Pa. St. 384; Bedford's Appeal, 40 Pa. St. 18; Rapp *v.* Rapp, 6 Pa. St. 45; De Haas *v.* Bunn, 2 Pa. St. 335, 44 Am. Dec. 201; Kelso *v.* Dickey, 7 Watts & S. 279; Deihl *v.* King, 6 Serg. & R. 29, 9 Am. Dec. 407; Scull's Estate, 9 Pa. Co. Ct. 347; Bentley *v.* Kaufman, 12 Phila. 435.

South Carolina.— Selman *v.* Robertson, 46 S. C. 262, 24 S. E. 187; Brummet *v.* Barber, 2 Hill 543; Matthis *v.* Hammond, 6 Rich. Eq. 399; Badger *v.* Harden, 6 Rich. Eq. 147; Perry *v.* Logan, 5 Rich. Eq. 202; Terry *v.* Brunson, 1 Rich. Eq. 78; Hull *v.* Hull, 2 Strobh. Eq. 174; Davidson *v.* Ruff, 2 Hill

5. Profits and Easements to Begin In Futuro. Profits and easements lie in grant, and may be created to begin *in futuro*. If such an interest were created to begin at a period beyond the limits of the Rule *semble* it would be bad.[74]

6. All Future Interests in Personalty Which Are Not Vested. There are certain future interests in personalty which are of the nature of vested remainders or reversions.[75] All other future interests in personalty are subject to the Rule.[76]

7. All Future Equitable Interests in Realty or Personalty Which Are Not Vested. Equitable interests are vested whenever the corresponding legal interests would be vested.[77] All other equitable interests are subject to the Rule.[78] This

Eq. 140; Cordes *v.* Ardrian, 1 Hill Eq. 154; Mazyck *v.* Vanderhorst, Bailey Eq. 48 note; Milledge *v.* Lamar, 4 Desauss. Eq. 617; Tucker *v.* Stevens, 4 Desauss. Eq. 532; Clifton *v.* Haig, 4 Desauss. Eq. 330; Dunlap *v.* Dunlap, 4 Desauss. Eq. 305; Cudworth *v.* Thompson, 3 Desauss. Eq. 256, 4 Am. Dec. 617; Jones *v.* Price, 3 Desauss. Eq. 165; Logan *v.* Ladson, 1 Desauss. Eq. 271.

Tennessee.—Armstrong *v.* Douglass, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85; Williams *v.* Williams, 10 Heisk. 566; Turner *v.* Ivie, 5 Heisk. 222; Bramlet *v.* Bates, 1 Sneed 554; Williams *v.* Turner, 10 Yerg. 287.

Virginia.— Didlake *v.* Hooper, Gilm. 194; Gresham *v.* Gresham, 6 Munf. 187; Timberlake *v.* Graves, 6 Munf. 174; Higgenbotham *v.* Rucker, 2 Call 313; Dunn *v.* Bray, 1 Call 338.

England.— *In re* Sanders, L. R. 1 Eq. 675, 12 Jur. N. S. 351, 14 Wkly. Rep. 576; Stratford *v.* Powell, 1 Ball & B. 1; Lewis *v.* Templer, 33 Beav. 625, 10 L. T. Rep. N. S. 638, 12 Wkly. Rep. 928, 55 Eng. Reprint 511; Rackstrow *v.* Vile, 2 L. J. Ch. O. S. 102, 1 Sim. & St. 604, 24 Rev. Rep. 252, 1 Eng. Ch. 604, 57 Eng. Reprint 238; Baker *v.* Lucas, 1 Molloy 481; Pinbury *v.* Elkin, 1 P. Wms. 563, 24 Eng. Reprint 518; Wilkinson *v.* South, 7 T. R. 555.

See 39 Cent. Dig. tit. "Perpetuities," § 23 *et seq.*

For further authorities in support of text see cases cited *infra*, IV, C. See also Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Wells *v.* Heath, 10 Gray (Mass.) 17; Welsh *v.* Foster, 12 Mass. 93; Hawley *v.* Northampton, 8 Mass. 3, 5 Am. Dec. 66; Hubley *v.* Long, 2 Grant (Pa.) 268; Lovett *v.* Lovett, 10 Phila. (Pa.) 537.

74. The precise point seems not to have been adjudicated. See, however, *dictum* of the court, in London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620.

75. See *supra*, III, B, 6.

76. Waldo *v.* Cummings, 45 Ill. 421. For limitations of personalty to A, but, if A "dies without issue," to B, see cases collected *supra*, note 73. The doctrine of contingent remainders is confined to legal interests in realty, and limitations which would be contingent remainders in realty are simply executory limitations in personalty, and to them the Rule doubtless applies. See *supra*, III, D, 2, 4. The only authority against the broad statement in the text is a *dictum* in Palmer *v.* Union Bank, 17 R. I. 627, 24 Atl. 109. Here personalty was given to trustees for a charity; if the trustees failed to carry out the trust the bequest was to "cease and determine," and the property was to "descend to and vest" in the testator's heirs at law. The court said that if this limitation to the heirs should be construed as a condition (it was in fact otherwise construed), it would not be subject to the Rule. If this *dictum* is law, interests in personalty in the nature of a condition are not subject to the Rule. See *supra*, III, D, 3, on rights of entry for condition broken, as to realty.

77. See *supra*, III, B, 7.

78. See Shepperd *v.* Fisher, 206 Mo. 208, 103 S. W. 989; Hartson *v.* Elden, 50 N. J. Eq. 522, 26 Atl. 561; *In re* Wood, [1894] 3 Ch. 381, 63 L. J. Ch. 790, 71 L. T. Rep. N. S. 413, 7 Reports 495; Bull *v.* Pritchard, 5 Hare 567, 11 Jur. 34, 16 L. J. Ch. 185, 26 Eng. Ch. 567, 67 Eng. Reprint 1036; Mainwaring *v.* Baxter, 5 Ves. Jr. 458, 31 Eng. Reprint 681. On equitable interests that will fall through the destruction of legal interests see *supra*, note 52. The doctrine of contingent remainders is confined to legal interests in realty, and limitations which would be contingent remainders at law are simply executory limitations in equity. It follows that a limitation which would be good in law may be bad in equity. In Abbiss *v.* Burney, 17 Ch. D. 211, 50 L. J. Ch. 348, 44 L. T. Rep. N. S. 267, 29 Wkly. Rep. 449, land was conveyed in trust for A for life, and then for such of the children of A as should reach twenty-five. If the legal interest had been so conveyed, the interest of the children would have been a contingent remainder, and on A's death such remainder would have vested in the children, if any, who were then twenty-five. If there were no children who had already reached that age, the remainder would have been destroyed; if children had reached that age subsequently, they would have had no rights. Consequently the remainder must have vested, if at all, at A's death, and as A was alive at the testator's death, such vesting would not be too remote. See *supra*, note 57. But in equity where there is no need that a future interest shall exactly follow on after the preceding interest, such a trust would be kept open, if there were children in being under the specified age, and if children later reached the specified age, their interests would be allowed to take effect as springing trusts. See *supra*, note 69. Since the trust to the children might be

applies to contracts for the purchase of land, the performance of which would be specifically enforced.[79] It also applies to covenants for renewal in leases;[80] but, if the covenant is the property of persons who have a vested interest in the lease, containing the covenant, such covenant is not subject to the Rule.[81]

IV. THE REQUIREMENT OF THE RULE.

A. The Rule Stated. The Rule requires that future interests within its scope[82] should vest within twenty-one years, exclusive of periods of gestation,[83] after a life or lives in being.[84]

B. Vesting the Sole Requirement. The Rule does not require that future interests should become present estates of enjoyment within the limits. It is satisfied if the future interests must vest within the limits. Consequently, if an interest is vested at its creation, it is not subject to the Rule at all; this is true, even though such interest may not become a present estate of enjoyment until long beyond the limits of the Rule.[85] So with a future interest which is contingent at its creation. The Rule does not require that this contingent future interest should become a present estate of enjoyment within the limits, but only that it should vest[86] within those limits.[87] If restraints on alienation are imposed upon interests

so kept open, it was, in the case cited, too remote, for it might not be determined until more than twenty-one years after A's death which of the children would take. Such a legal interest in the children would be subject to destruction in a way that the corresponding equitable interest would not, and this possibility of destruction would keep the legal interest from being too remote.

79. London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620 [*overruling* Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 784, 27 Wkly. Rep. 597] (an option to purchase land was held void, because unlimited as to time); Trevelyan *v.* Trevelyan, 53 L. T. Rep. N. S. 853. To the same effect see Winsor *v.* Mills, 157 Mass. 362, 32 N. E. 352; Starcher *v.* Duty, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. N. S. 913. See also Mills *v.* Smith, 193 Mass. 11, 78 N. E. 765, 6 L. R. A. N. S. 865.

80. Morrison *v.* Rossignol, 5 Cal. 64; Brush *v.* Beecher, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373; Redington *v.* Browne, L. R. 32 Ir. 347.

81. Ross *v.* Worsop, 1 Bro. P. C. 281, 1 Eng. Reprint 568; Sweet *v.* Anderson, 2 Bro. P. C. 256, 1 Eng. Reprint 927; Meller *v.* Stanley, 2 De G. J. & S. 183, 12 Wkly. Rep. 524, 67 Eng. Ch. 143, 46 Eng. Reprint 345; Pollock *v.* Booth, Ir. R. 9 Eq. 229; Hare *v.* Burges, 3 Jur. N. S. 1294, 4 Kay & J. 45, 27 L. J. Ch. 86, 6 Wkly. Rep. 144, 70 Eng. Reprint 19.

82. Interests subject to the Rule see *supra*, III.

83. Periods of gestation see *supra*, II, E.

84. The Rule has been stated in many forms, slightly differing from the form used in the text.

85. For example, if land is given, in a jurisdiction which still allows the creation of estates tail, to A and the heirs of his body, remainder to B and his heirs, the remainder to B is vested in its creation, and although it may remain uncertain for centuries, whether or not it will ever become a present estate of enjoyment, it does not offend the Rule. So if land is given, in a jurisdiction where no statutory limit has been placed upon the creation of terms of years, to A for five hundred years, remainder to B and his heirs, B's interest does not offend the Rule. See further, *supra*, III, B.

86. See *supra*, III, B, 1.

87. In Craig *v.* Stacey, Ir. T. R. 249, land was devised to A in fee, but if she died unmarried, then to B and the heirs of her body, and on failure of them, to C and the heirs of her body. C's interest was in its creation an executory devise, but it would become a vested remainder, if ever, upon A's death. It would therefore vest, if ever, within a life in being and was held good. See Gray *v.* Whittemore, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246; Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; *In re* Roberts, 19 Ch. D. 520, 45 L. T. Rep. N. S. 450 [*affirming* 50 L. J. Ch. 265, 44 L. T. Rep. N. S. 300]; *In re* Merrick, L. R. 1 Eq. 551, 12 Jur. N. S. 245, 35 L. J. Ch. 418, 14 L. T. Rep. N. S. 130, 14 Wkly. Rep. 473; Cadell *v.* Palmer, 1 Cl. & F. 372, 6 Eng. Reprint 956; Brudenell *v.* Elwes, 1 East 442. See also Dwyer *v.* Cahill, 228 Ill. 617, 81 N. E. 1142; Keeler *v.* Lauer, 73 Kan. 388, 85 Pac. 541; *In re* Smith, 210 Pa. St. 604, 60 Atl. 255; Horner's Estate, 26 Pa. Co. Ct. 383. In Ashley *v.* Ashley, 3 L. J. Ch. 61, 6 Sim. 358, 9 Eng. Ch. 358, 58 Eng. Reprint 628, an estate was given to A for life, remainder to A's children as tenants in common, and for want of such children, remainders over. Cross remainders for life to the children of A were implied by the court. In Stuart *v.* Cockerell, L. R. 7 Eq. 363, 38 L. J. Ch. 473, 20 L. T. Rep. N. S. 573, it was questioned if such cross remainders were not objectionable to the Rule, but it would seem that they were not. Suppose A left three children, B, C, and D. Immediately upon A's death, if cross remainders are to be implied, one third of the estate is in B for life, remainder, as to one half of such third to C,

which must vest, if ever, within the limits of the Rule, such interests are valid, regardless of the validity of the restraint; if the provision for restraint is invalid it alone will be rejected.[88]

C. The Future Interest Must Necessarily Vest Within the Limits. It is not enough that the future interest may, or even that it will, in all probability, vest within the limits. It must necessarily so vest.[89] And for the purposes of the Rule a woman is considered capable of child-bearing so long as she lives.[90] The requirement that the future interest must necessarily vest within the limits has, however, in some states not been so strictly interpreted in cases involving the time necessary to settle estates.[91]

D. No Exception in Favor of Alienable Interests. The Rule requires that all future interests within its scope should vest within the limits. Future interests may be alienable; but, if they must not necessarily vest within the limits of the Rule, they are, despite their alienability, void as perpetuities.[92] If property is

remainder to D; remainder as to the other half of such third to D, remainder to C. And similarly with the other thirds of the property in B and C. All the life-interests of the children, by way of cross remainders, must vest, if ever, at A's death, and, although contingent in their creation, are therefore good. *Compare* Doe *v.* Garrod, 2 B. & Ad. 87, 22 E. C. L. 46; Cooke *v.* Bowler, 2 Keen 54, 5 L. J. Ch. 54, 48 Eng. Reprint 548. On limitations of life-estates to living persons, preceded by limitations void under the rule, see Beard *v.* Westcott, 5 B. & Ald. 801, 24 Rev. Rep. 553, 7 E. C. L. 435.

88. Landram *v.* Jordan, 25 App. Cas. (D. C.) 291; *In re* Ferneley, [1902] 1 Ch. 543, 71 L. J. Ch. 422, 86 L. T. Rep. N. S. 413, 50 Wkly. Rep. 346; *In re* Russell, [1895] 2 Ch. 698, 64 L. J. Ch. 891, 73 L. T. Rep. N. S. 195, 12 Reports 499, 44 Wkly. Rep. 100; *Re* Boyd, 63 L. T. Rep. N. S. 92; Cooper *v.* Laroche, 17 Ch. D. 368, 43 L. T. Rep. N. S. 794, 29 Wkly. Rep. 438; Herbert *v.* Webster, 15 Ch. D. 610, 49 L. J. Ch. 620; *In re* Ridley, 11 Ch. D. 645, 48 L. J. Ch. 563, 27 Wkly. Rep. 527; *In re* Cunynghame, L. R. 11 Eq. 324, 40 L. J. Ch. 247, 24 L. T. Rep. N. S. 124, 19 Wkly. Rep. 381; *In re* Teague, L. R. 10 Eq. 564, 22 L. T. Rep. N. S. 742, 18 Wkly. Rep. 752; Trustees Co. *v.* Jenner, 22 Vict. L. Rep. 584. *Compare* Gardette's Estate, 16 Phila. (Pa.) 264, 13 Wkly. Notes Cas. 315. See Gray Perp. (2d ed.) § 432 *et seq.*

89. Johnson *v.* Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. N. S. 564; Andrews *v.* Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; Hanley *v.* Kansas, etc., Coal Co., 110 Fed. 62; Thomas *v.* Thomas, 87 L. T. Rep. N. S. 58; *In re* Wood, [1894] 3 Ch. 381, 63 L. J. Ch. 790, 71 L. T. Rep. N. S. 413, 7 Reports 495. So if land is devised to A for life, remainder to A's widow for life, remainder to the children of A then surviving, the remainder to the children is bad. For A may marry a woman not in being at the testator's death, and the remainder to the children will remain contingent until her death. Gray *v.* Whittemore, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246; Sears *v.* Russell, 8 Gray (Mass.) 86; Stone *v.* Nicholson, 27 Gratt. (Va.) 1; *In re* Harvey, 39 Ch. D. 289, 60 L. T. Rep. N. S. 79; Buchanan *v.* Harrison, 1 Johns. & H. 662, 31 L. J. Ch. 74, 10 Wkly. Rep. 118, 70 Eng. Reprint 909; Hodson *v.* Ball, 9 Jur. 407, 14 Sim. 558, 37 Eng. Ch. 558, 60 Eng. Reprint 474; Lett *v.* Randall, 1 Jur. N. S. 747, 24 L. J. Ch. 708, 3 Smale & G. 83, 3 Wkly. Rep. 564, 65 Eng. Reprint 572. *Compare* Otis *v.* McLellan, 13 Allen (Mass.) 339; *In re* Merrick, L. R. 1 Eq. 551, 12 Jur. N. S. 245, 35 L. J. Ch. 418, 14 L. T. Rep. N. S. 130, 14 Wkly. Rep. 473.

90. Thus, if a devise is made to such of the children of A as may reach twenty-five, the devise is bad, although A is a woman of seventy, at the testator's death. See Stout *v.* Stout, 44 N. J. Eq. 479, 15 Atl. 843; Flora *v.* Anderson, 67 Fed. 182; *In re* Dawson, 39 Ch. D. 155, 57 L. J. Ch. 1061, 59 L. T. Rep. N. S. 725, 37 Wkly. Rep. 51; *In re* Sayer, L. R. 6 Eq. 319, 36 L. J. Ch. 350, 16 L. T. Rep. N. S. 203, 15 Wkly. Rep. 617; Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186. *Compare* Cooper *v.* Laroche, 17 Ch. D. 368, 43 L. T. Rep. N. S. 794, 29 Wkly. Rep. 438.

91. In Brandenburg *v.* Thorndike, 139 Mass. 102, 28 N. E. 575, there were gifts to be paid at the expiration of three years from the death of the testator's wife, "or at such time, whether earlier or later, as may in the discretion of the trustees be found expedient and practicable for the final settlement" of testator's estate. The court held that the trustees could not delay the settlement of the estate beyond a reasonable time, and that "in no contingency could it be necessary or reasonable to delay the settlement and distribution of the estate for twenty-one years after the death of the widow." *Compare* Johnson *v.* Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. N. S. 564.

Nor does a possible delay in converting realty into personalty render an otherwise unobjectionable limitation offensive. Bates *v.* Spooner, 75 Conn. 501, 54 Atl. 305.

92. Winsor *v.* Mills, 157 Mass. 362, 32 N. E. 352; Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Starcher *v.* Duty, 61 W. Va. 371, 56 S. E. 527; *In re* Hargreaves, 43 Ch.

given to trustees to hold on trusts which may not vest within the limits the trusts are void, and it is immaterial that the trustees have full power to change investments, and therefore to sell at any time all of the property so held in trust.[93]

E. The Rule Does Not Require That Interests Should End Within Specified Limits. The sole requirement of the Rule is that future interests should vest within specified limits. Once vested the estate may last indefinitely without offending the Rule. The Rule is concerned only with vesting, which relates to the beginning of interests; it is in no wise concerned with the ending of interests.[94] Thus a legal fee simple may last forever, but it of course does not offend the Rule. The *cestui* of an equitable fee simple may at any time require the trustee to convey the legal estate to him,[95] and *semble* an equitable fee no more offends the Rule than a legal fee.[96] Thus also a life-estate to an unborn person may last more than twenty-one years beyond the lives in being at the time of the creation of such life-estate; but if the life-estate must vest within the limits of the Rule, it is good. And an equitable life-estate to an unborn person is as unobjectionable as a legal life-estate.[97] Thus also a term for more than twenty-one

D. 401, 59 L. J. Ch. 384, 62 L. T. Rep. N. S. 473, 38 Wkly. Rep. 470; London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620; *In re* Brown, 3 Ch. D. 156, 35 L. T. Rep. N. S. 305, 24 Wkly. Rep. 782; *In re* Edmondson, L. R. 5 Eq. 389, 16 Wkly. Rep. 890 (where the limitation over was to the survivors of a class, all the members of which must be born within the limits of the Rule); *In re* Johnson, L. R. 2 Eq. 716, 12 Jur. N. S. 616 (where personalty was given to an existing corporation, upon the failure of the issue of A, and the gift to the corporation was held too remote); Grey *v.* Montagu, 2 Eden 205, 28 Eng. Reprint 876 (where personalty was given to B, a person in being, upon the failure of the issue of A, and the gift to B was held too remote); Trevelyan *v.* Trevelyan, 53 L. T. Rep. N. S. 853. To the same effect are Courtier *v.* Oram, 21 Beav. 91, 52 Eng. Reprint 793; Garland *v.* Brown, 10 L. T. Rep. N. S. 292; Hobbs *v.* Parsons, 2 Smale & G. 212, 2 Wkly. Rep. 347, 65 Eng. Reprint 369. The authorities to the contrary are now overruled. See Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 784, 27 Wkly. Rep. 597 [*overruled* in London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620]; Avern *v.* Lloyd, L. R. 5 Eq. 383, 37 L. J. Ch. 489, 18 L. T. Rep. N. S. 282, 16 Wkly. Rep. 669 [*overruled* in *In re* Hargreaves, 43 Ch. D. 401, 59 L. J. Ch. 384, 62 L. T. Rep. N. S. 473, 38 Wkly. Rep. 470]; Gilbertson *v.* Richards, 4 H. & N. 277, 5 H. & N. 453, 6 Jur. N. S. 672, 29 L. J. Exch. 213 [*disapproved* in London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620]; Scatterwood *v.* Edge, 1 Salk. 229. See also Wheeler *v.* Fellowes, 52 Conn. 238; Massy *v.* O'Dell, 10 Ir. Ch. 22; Hasker *v.* Summers, 10 Vict. L. Rep. Eq. 204; Kauri Timber Co. *v.* District Land Registrar, 21 New Zealand L. Rep. 84; Kenrick *v.* Dempsey, 5 Grant Ch. (U. C.) 584. See *supra*, I; Gray Perp. (2d ed.) c. 7.

93. Wheeler *v.* Fellowes, 52 Conn. 238.

94. To put the matter in popular language, the Rule is aimed, not at interests which are forever in ending, but at interests which are forever in beginning.

95. See TRUSTS.

96. So held in Loomer *v.* Loomer, 76 Conn. 522, 57 Atl. 167; Pulitzer *v.* Livingston, 89 Me. 359, 36 Atl. 635 [*overruling* Slade *v.* Patten, 68 Me. 380]. And see Rhodes' Estate, 147 Pa. St. 227, 23 Atl. 553. But the contrary doctrine prevails in Maryland. Lee *v.* O'Donnell, 95 Md. 538, 52 Atl. 979; Missionary Soc. M. E. Church *v.* Humphreys, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432; Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88. See Gray Perpet. (ed ed.) & 245*c*. See also Flanner *v.* Fellows, 206 Ill. 136, 68 N. E. 1057; Bigelow *v.* Cady, 171 Ill. 229, 48 N. E. 974, 63 Am. St. Rep. 230; Hart *v.* Seymour, 147 Ill. 598, 614, 35 N. E. 246; Hartson *v.* Elden, 50 N. J. Eq. 522, 26 Atl. 561; Rhodes' Estate, 147 Pa. St. 227, 23 Atl. 553; Pennsylvania L. Ins. Co. *v.* Price, 7 Phila. (Pa.) 465; Williams *v.* Herrick, 19 R. I. 197, 32 Atl. 913; Whelan *v.* Reilly, 3 W. Va. 597.

97. Gray *v.* Whittemore, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246; Seaver *v.* Fitzgerald, 141 Mass. 401, 6 N. E. 73; Minot *v.* Taylor, 129 Mass. 160; Simonds *v.* Simonds, 112 Mass. 157; Lovering *v.* Worthington, 106 Mass. 86; Loring *v.* Blake, 98 Mass. 253; Otis *v.* McLellan, 13 Allen (Mass.) 339. But see Fosdick *v.* Fosdick, 6 Allen (Mass.) 41; Stuart *v.* Cockerell, L. R. 5 Ch. 713, 39 L. J. Ch. 729, 23 L. T. Rep. N. S. 442, 18 Wkly. Rep. 1057; Evans *v.* Walker, 3 Ch. D. 211, 25 Wkly. Rep. 7; Gooch *v.* Gooch, 3 De G. M. & G. 366, 22 L. J. Ch. 1089, 52 Eng. Ch. 285, 43 Eng. Reprint 143; Williams *v.* Teale, 6 Hare 239, 31 Eng. Ch. 239, 67 Eng. Reprint 1155; Cotton *v.* Heath, 1 Rolle Abr. 612 pl. 3; Beard *v.* Westcott, 5 Taunt. 393, 1 E. C. L. 206; Routledge *v.* Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671. See also Wood *v.* Griffin, 46 N. H. 230; Stout *v.* Stout, 44 N. J. Eq. 479, 15 Atl. 843; Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85 [*over-*

years is good, although it be a term for a thousand years, if it must vest within the limits.[98]

F. As to Future Interests Created by Will. The validity of future interests created by will is determined by the situation existing at the testator's death. The Rule does not require that future interests created by the terms of a will should have been good if the testator had died immediately after the execution of the will; it is enough if, taking the facts as they exist at the testator's death, the future interests must vest within the limits.[99]

G. As to Future Interests in an Estate For a Life or Lives, or in a Term For Years of Not More Than Twenty-One Years. *Semble* that no future interests created in an estate for life or lives, or in a term for years of not more than twenty-one years, offend the Rule; for, as the *res* in which such interests are created must itself determine within the limits of the Rule, the interests themselves must necessarily vest, if at all, within the limits.[1]

V. LIMITATIONS TO CLASSES.

A. In General — 1. Rule Stated and Forms of Limitations Enumerated. If property is limited to a class, as to the children of A, the size of the shares must be ascertained within the limits of the Rule against Perpetuities — that is, if the limitations are created by will, within twenty-one years, exclusive of periods of gestation, after lives in being at the testator's death; and, if the limitations are created by deed, within a similar period after lives in being at the delivery of the deed.[2] The size of the shares may remain unascertained, because the number of

ruling Smith's Appeal, 88 Pa. St. 492]; Ronckendorff's Estate, 11 Pa. Co. Ct. 447. *Compare* Coggins' Appeal, 124 Pa. St. 10, 30, 16 Atl. 579, 10 Am. St. Rep. 565; Gardette's Estate, 16 Phila. (Pa.) 264, 13 Wkly. Notes Cas. 315; Bradford *v.* Griffin, 40 S. C. 468, 19 S. E. 76.

For the law of Maryland see Graham *v.* Whitridge, 99 Md. 248, 57 Atl. 609, 58 Atl. 36, 66 L. R. A. 408; Thomas *v.* Gregg, 76 Md. 169, 24 Atl. 418; Albert *v.* Albert, 68 Md. 352, 375, 12 Atl. 11; Heald *v.* Heald, 56 Md. 300; Deford *v.* Deford, 36 Md. 168.

98. Rhodes' Estate, 147 Pa. St. 227, 23 Atl. 553; *In re* Wise, [1896] 1 Ch. 281, 65 L. J. Ch. 281, 73 L. T. Rep. N. S. 743, 44 Wkly. Rep. 310; Read *v.* Gooding, 21 Beav. 478, 52 Eng. Reprint 944. But see *In re* Johnston, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

99. *Indiana.*— Murphey *v.* Brown, 159 Ind. 106, 62 N. E. 275.

Massachusetts.— Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; Hosea *v.* Jacobs, 98 Mass. 65.

Michigan.— Mullreed *v.* Clark, 110 Mich. 229, 68 N. W. 138, 989.

New York.— Griffen *v.* Ford, 1 Bosw. 123; Lang *v.* Wilbraham, 2 Duer 171; Lang *v.* Ropke, 5 Sandf. 363; Matter of Pilsbury, 50 Misc. 367, 99 N. Y. Suppl. 62 [*affirmed* in 113 N. Y. App. Div. 893, 99 N. Y. Suppl. 62 (*affirmed* in 186 N. Y. 545, 79 N. E. 1114)]; Tallman *v.* Tallman, 3 Misc. 465, 23 N. Y. Suppl. 734. But see Odell *v.* Youngs, 64 How. Pr. 56.

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

United States.— McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015.

England.— *In re* Lowman, [1895] 2 Ch. 348, 64 L. J. Ch. 567, 72 L. T. Rep. N. S. 816, 12 Reports 362; Hale *v.* Hale, 3 Ch. D. 643, 35 L. T. Rep. N. S. 933, 24 Wkly. Rep. 1065; Southern *v.* Wollaston, 16 Beav. 276, 22 L. J. Ch. 664, 1 Wkly. Rep. 86, 51 Eng. Reprint 785; Cattlin *v.* Brown, 1 Eq. Rep. 550, 11 Hare 372, 1 Wkly. Rep. 533, 45 Eng. Ch. 367, 68 Eng. Reprint 1319; Matter of Rye, 10 Hare 106, 16 Jur. 1128, 22 L. J. Ch. 345, 1 Wkly. Rep. 29, 44 Eng. Ch. 102, 68 Eng. Reprint 858; Williams *v.* Teale, 6 Hare 239, 31 Eng. Ch. 239, 67 Eng. Reprint 1155; Vanderplank *v.* King, 3 Hare 1, 7 Jur. 548, 12 L. J. Ch. 497, 25 Eng. Ch. 1, 67 Eng. Reprint 273; Mackinnon *v.* Peach, 2 Keen 555, 7 L. J. Ch. 211, 15 Eng. Ch. 555, 48 Eng. Reprint 741.

1. Low *v.* Burron, 3 P. Wms. 262, 24 Eng. Reprint 1055, where an estate for three lives was devised to A for life, remainder to her issue male, remainder to B, B's interest was held good. See *In re* Dean, 41 Ch. D. 552, 58 L. J. Ch. 693, 60 L. T. Rep. N. S. 813.

Slaves.— In Pleasants *v.* Pleasants, 2 Call (Va.) 319, and Wood *v.* Humphreys, 12 Gratt. (Va.) 333, the court held that the Rule did not apply to provisions for emancipation of slaves; but Ludwig *v.* Combs, 1 Metc. (Ky.) 128, is *contra;* and in Matthews *v.* Daniel, 3 N. C. 346, and Hatton *v.* Weems, 12 Gill & J. (Md.) 83, it was held that certain limitations over of male slaves were too remote.

2. Following usage, and for the sake of simplicity, the time within which the ascertainment of the number of shares must necessarily take place will be spoken of as the test of the validity of limitations to classes. See Gray Perp. (2d ed.) § 205 *et seq.*; Jemison *v.* Smith, 37 Ala. 185; *In re* Hunter, L. R.

shares is likely to increase, as where property is given to the children of A, and A is still alive; or because the number of shares is likely to decrease, as where property is given to the children of A who reach twenty-one, and A has some children over twenty-one and some under that age. If the number of the shares may increase or decrease at a time beyond the limits of the Rule, the whole limitation is void. There are four forms of limitations to classes in common use: (1) A limitation to all the children or grandchildren of A;[3] (2) a limitation to all the children or grandchildren of A with a proviso that, if any child or grandchild dies under a certain age, the property shall go over;[4] (3) a limitation to such of the children or grandchildren of A as reach a certain age;[5] and (4) a limitation to such of the children of A as reach a certain age, and to such of the children of children dying under that age as reach the age, the children of the second generation taking their parents' share.[6]

2. Limitation to All Children or Grandchildren of A — a. In General. A limitation to all the children of A, a living person, is good, because the number of children, and therefore the number of the shares into which the property will be divided by reason of the limitation, must be ascertained on A's death. So a limitation to all the grandchildren of the testator is good, because the number of grandchildren must be ascertained at the death of the testator's children, and all his children must be begotten before his death. Similarly a limitation to all the grandchildren of a person already dead is good. But a limitation to the grandchildren of a living person is bad, because children may be born to such person after the limitation is created, and children of the second generation may be born to these children more than twenty-one years after the death of the persons in being at the creation of the limitation.[7]

b. With a Proviso That if Any Child or Grandchild Dies Under a Certain Age, Property to Go Over. Here the limitation over may be invalid under the Rule;

1 Eq. 295; Thomas *v.* Wilberforce, 31 Beav. 299, 54 Eng. Reprint 1153; Bute *v.* Harman, 9 Beav. 320, 50 Eng. Reprint 367; Boughton *v.* Boughton, 1 H. L. Cas. 406, 9 Eng. Reprint 815.

3. See *infra*, V, A, 2, a.

4. See *infra*, V, A, 2, b.

5. See *infra*, V, A, 3.

6. See *infra*, V, A, 4.

7. Suppose property is devised in trust for A, a person alive at the testator's death, for life, and then for A's children in fee. After B, the first child, is born to A, it is certain that B or his heirs will have some share in the property, and he, or they, are ready to take, whenever the preceding estate determines. But B's share is not yet ascertained; as fast as other children are born, the share of B decreases, and the size of B's share must therefore remain undetermined until A's death. Under these circumstances, is B's interest vested or contingent? The courts speak of B's interest as vested upon his birth. After B is born, the courts conceive of the property as limited to A for life, with a vested remainder in B. When other children are born to A, this vested remainder is said to "open" to receive them, and the size of B's vested remainder is thereby decreased. Field *v.* Peeples, 180 Ill. 376, 54 N. E. 304; Strode *v.* McCormick, 158 Ill. 142, 41 N. E. 1091; Pratt *v.* Alger, 136 Mass. 550; McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015; Devisme *v.* Mello, 1 Bro. Ch. 537, 28 Eng. Reprint 1285; Baldwin *v.* Rogers, 3 De G. M. & G. 649, 17 Jur. 267, 22 L. J. Ch. 665, 52 Eng. Ch. 506, 43 Eng. Reprint 255; Lee *v.* Lee, 1 Dr. & Sm. 85, 6 Jur. N. S. 621, 29 L. J. Ch. 788, 8 Wkly. Rep. 443, 62 Eng. Reprint 310; Browne *v.* Hammond, Johns. 210 note, 70 Eng. Reprint 400. See Atty.-Gen. *v.* Crispin, 1 Bro. Ch. 386, 28 Eng. Reprint 1192; Doe *v.* Perryn, 3 T. R. 484 [*cited* in Carver *v.* Astor, 4 Pet. (U. S.) 1, 7 L. ed. 761]; Latta *v.* Lowry, 11 Ont. 517. Such is the language of the courts, and yet a vested remainder liable to open is held subject to the Rule against Perpetuities. In the case put, the limitation is good, because the remainder to the children is not liable to open after A's death, and he was alive at the testator's death. But suppose a devise in trust for A, for life, and then for A's grandchildren in fee, and that A is alive at the testator's death. After B, the first grandchild, is born, he has a vested equitable remainder. But this remainder is liable to open to receive all after-born grandchildren; children may be born to A, after the testator's death, and children of the second generation may be born to these children, more than twenty-one years after the death of the persons in being at the testator's death. B's vested remainder is therefore liable to open at a time beyond the limits of the Rule, and is bad. See Belfield *v.* Booth, 63 Conn. 299, 27 Atl. 585; Minot *v.* Doggett, 190 Mass. 435, 77 N. E. 629; Whitehead *v.* Rennett, 1 Eq. Rep. 561, 22 L. J. Ch. 1020, 1 Wkly. Rep. 406.

but the invalidity of the limitation over will not affect at all the validity of the first limitation. The validity of the limitation to the children or grandchildren will be determined in the same manner as though there were no limitation over.[8]

3. LIMITATION TO SUCH OF CHILDREN OR GRANDCHILDREN OF A AS REACH A CERTAIN AGE. If property is limited to such of the children or grandchildren of A as reach a certain age,[9] then as soon as one such child or grandchild reaches the prescribed age his interest vests, and he is not obliged to wait on the chance that other children or grandchildren may be born. The class is closed when one member reaches the prescribed age; after-born children or grandchildren have no rights; the class consists of all the children or grandchildren alive at the time when one member reaches the age.[10] The maximum number of shares is therefore ascertained as soon as the class is closed, but the minimum number of shares will not be ascertained until all the members of the class living at the time it was closed either reach the prescribed age or die.[11] A limitation to all the children of A, a living person, who reach twenty-one is good, because the number of such children must be ascertained within twenty-one years after A's death. So a limitation to such of the grandchildren of the testator as reach twenty-one is good, because the number of such grandchildren must be ascertained within twenty-one years after the deaths of the testator's children, and all the testator's children must be begotten before his death. Similarly a limitation to all the grandchildren of a person already dead who reach twenty-one is good.[12] If there is a limitation to such of

In a marriage settlement property may be limited to the children of the parties of the marriage, but not to their grandchildren. Gray Perp. (2d ed.) § 371.

8. Suppose property is devised in trust for A for life, who is alive at the testator's death, and then to A's children in fee, with a proviso that if any child dies under twenty-five, its share shall go to B. Here as each child of A is born, he receives a vested remainder. This vested remainder is liable to open as other children are born (see *supra*, note 7), and it is also subject to be divested on the happening of a condition subsequent, namely, on the death of the child under twenty-five. See Davenport *v.* Harris, 3 Grant (Pa.) 164. If a condition subsequent is limited upon a contingency which may not be determined within the limits of the Rule, the limitation over is bad (see "Springing and Shifting Uses and Executory Devises," *supra* III, D, 4), but the first limitation remains unharmed, in fact, it gains, for it is now freed from the condition subsequent. In the case put above, the limitation over to B is bad, for A may have a child born after the testator's death, and this child may die under twenty-five, more than twenty-one years after the death of the persons in being at the testator's death; but the limitation to the children of A is good, for the remainder to them will not be liable to open after A's death, and he was alive at the testator's death. *In re* Bevan, 34 Ch. D. 716, 56 L. J. Ch. 652, 56 L. T. Rep. N. S. 277, 35 Wkly. Rep. 400; Bull *v.* Pritchard, 5 Hare 567, 11 Jur. 34, 16 L. J. Ch. 185, 26 Eng. Ch. 567, 67 Eng. Reprint 1036.

9. A limitation in this form gives the children or grandchildren of A only a contingent interest. The limitation is not to the children of A with a proviso that if any child dies under a certain age its share shall go over, thus giving to each child a vested interest subject to be divested by the happening of a condition subsequent. See *supra*, note 7. The description of the persons to whom the property is limited includes only those children who reach the age, and a child's interest must therefore remain contingent until he reaches the age. Walker *v.* Mower, 16 Beav. 365, 51 Eng. Reprint 819; Griffith *v.* Blunt, 4 Beav. 248, 10 L. J. Ch. 372, 49 Eng. Reprint 334; Judd *v.* Hobbs, 8 L. J. Ch. O. S. 119, 3 Sim. 525, 30 Rev. Rep. 203, 6 Eng. Ch. 525, 57 Eng. Reprint 1095; Hunter *v.* Judd, 4 Sim. 455, 6 Eng. Ch. 455, 58 Eng. Reprint 170. See also Moore *v.* Moore, 59 N. C. 132.

10. Hoste *v.* Pratt, 3 Ves. Jr. 730, 30 Eng. Reprint 1243. But *compare* Pitzel *v.* Schneider, 216 Ill. 87, 74 N. E. 779.

11. Suppose there is a devise of property in trust for A, who is alive at the testator's death, for life, and then for such of the children of A as reach twenty-one. A has one child, B, alive at the testator's death. Before B reaches twenty-one, C and D are born to A; and after B has reached twenty-one, E is born to A. The class is closed as soon as B reaches twenty-one; it is composed of B, C, and D; the maximum number of the shares is ascertained as three, according to the rule stated in the text; but whether the number of shares will be less than three cannot be determined until both C and D either die or reach twenty-one.

12. The limitation put in the preceding note is good, for the maximum number of shares must be determined at A's death, and the minimum within twenty-one years thereafter, Otterback *v.* Bohrer, 87 Va. 548, 12 S. E. 1013. See also Winebrener's Estate, 3 Pa. Dist. 556. So also a limitation to such of the testator's children as shall be living thirty years after his death. Lachlan *v.* Reynolds, 9

the children of A, a living person, as reach twenty-two, or any other age over twenty-one, and A has a child living at the time the limitation is created, who has already reached twenty-two, the limitation is good; for the class is at once closed, the maximum number of shares is determined, and the minimum number of shares must be determined when the other children, if any, of A, who are alive at the time the class is closed, reach twenty-two or die, and this they must do within their own lives. Similarly, if there is a limitation to such of the grandchildren of the testator as reach twenty-two, and there is a grandchild alive at the testator's death who has already reached twenty-two. Similarly, if there is a limitation to such of the grandchildren of a person already dead as reach twenty-two, and there is a grandchild who has reached that age at the time the limitation is created.[13] But if there is a limitation to such of the children of A, a living person, as reach twenty-two, or any other age over twenty-one, and there is no child of A alive at the time the limitation is created who has reached that age, then the limitation is bad, for all these children may die, and other children may be born to A, so that no child of A may reach twenty-two until more than twenty-one years after A's death. Similarly, if there is a limitation to such of the grandchildren of the testator, or of the grandchildren of a person already deceased as reach twenty-two, and there is no grandchild alive who has reached twenty-two at the time the limitation is created, such limitation is bad.[14] And it is settled that the whole limitation is bad.[15] Since the limitation to all the grandchildren

Hare 796, 41 Eng. Ch. 796, 68 Eng. Reprint 738.

13. Suppose there is a devise of property in trust for A, who is alive at the testator's death, for life, and then to such of the children of A as reach twenty-two, and A has one child, B, alive at the testator's death, who has already reached twenty-two, and two children, C and D, who are under that age, and that after the testator's death a child, E, is born to A. The class is closed at the testator's death; it is composed of B, C, and D; the maximum number of shares is ascertained as three; the minimum number will be ascertained as soon as C and D reach twenty-two, or die, and they must do one or the other in their own lives. Picken *v.* Matthews, 10 Ch. D. 264, 48 L. J. Ch. 150, 39 L. T. Rep. N. S. 531; *Re* Barker, 92 L. T. Rep. N. S. 831. See *Re* Whitten, 62 L. T. Rep. N. S. 391. *Contra,* Pitzel *v.* Schneider, 216 Ill. 87, 74 N. E. 779.

14. Suppose there is a devise of property in trust for A, who is alive at the testator's death for life, and then to such of the children of A as reach twenty-two, and A has three children, B, C, and D, alive at the testator's death, all under the age of twenty-two. As soon as one of these children reaches twenty-two, the class would be closed. But B, C, and D may die, and another child, E, may be born, and E may not reach twenty-two until more than twenty-one years after A's death. The class may not therefore even be closed within the limits of the Rule. Leake *v.* Robinson, 2 Meriv. 363, 16 Rev. Rep. 168, 35 Eng. Reprint 979. To the same effect see Pitzel *v.* Schneider, 216 Ill. 87, 74 N. E. 779; Schuknecht *v.* Schultz, 212 Ill. 43, 72 N. E. 37; Hall *v.* Hall, 123 Mass. 120; Sears *v.* Putnam, 102 Mass. 5; Coggins' Appeal, 124 Pa. St. 10, 16 Atl. 579, 10 Am. St. Rep. 565 [*overruling* Williamson's Estate, 12 Pa. St. 64 (*reversing* 3 Pa. Co. Ct. 239)]; Davenport *v.* Harris, 3 Grant (Pa.) 164; Thomas *v.* Wilberforce, 31 Beav. 299, 54 Eng. Reprint 1153; Webster *v.* Boddington, 26 Beav. 128, 53 Eng. Reprint 845; Rowland *v.* Tawney, 26 Beav. 67, 53 Eng. Reprint 822; Chance *v.* Chance, 16 Beav. 572, 51 Eng. Reprint 901; Merlin *v.* Blagrave, 25 Beav. 125, 53 Eng. Reprint 584; Bute *v.* Harman, 9 Beav. 320, 50 Eng. Reprint 367; Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186; Whitehead *v.* Rennett, 1 Eq. Rep. 561, 22 L. J. Ch. 1020, 1 Wkly. Rep. 406; Boreham *v.* Bignall, 8 Hare 131, 14 Jur. 265, 19 L. J. Ch. 461, 32 Eng. Ch. 131, 68 Eng. Reprint 302; Pickford *v.* Brown, 2 Jur. N. S. 781, 2 Kay & J. 426, 25 L. J. Ch. 702, 4 Wkly. Rep. 473, 69 Eng. Reprint 849; Newman *v.* Newman, 8 L. J. Ch. 354, 10 Sim. 51, 16 Eng. Ch. 51, 59 Eng. Reprint 531; Vawdry *v.* Geddes, 8 L. J. Ch. O. S. 63, 1 Russ. & M. 203, 5 Eng. Ch. 203, 39 Eng. Reprint 78, Taml. 361, 12 Eng. Ch. 361, 48 Eng. Reprint 143, 32 Rev. Rep. 196; *Re* Barker, 92 L. T. Rep. N. S. 831; Comport *v.* Austen, 12 Sim. 218, 35 Eng. Ch. 185, 59 Eng. Reprint 1115; Dodd *v.* Wake, 8 Sim. 615, 8 Eng. Ch. 615, 59 Eng. Reprint 244; Porter *v.* Fox, 6 Sim. 485, 9 Eng. Ch. 485, 58 Eng. Reprint 676; Cromek *v.* Lumb, 3 Y. & C. Exch. 565. In Edgerly *v.* Barker, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328, a testator provided that property should go to his grandchildren, when the youngest should reach forty. The court molded the gift so as to make it run to the testator's grandchildren when the youngest should reach twenty-one. But see *infra,* IX, A.

15. If either B, C, or D, in the case put in the preceding note, should reach twenty-two, the class would then be closed, and the maximum number of shares would then be ascertained, and consequently the minimum

of a living person is bad,[16] *a fortiori* the limitation to such of the grandchildren of a living person as reach a certain age is bad.[17]

4. Limitation to Such of the Children of A as Reach a Certain Age, and to Such Children of Children Dying Under That Age as Reach the Age, the Children of Second Generation Taking Their Parents' Share. Such limitations are bad, even if the prescribed age does not exceed twenty-one years; for A might have a child born after the limitation is created, this child might die under the prescribed age, leaving a child, and then the number of the shares could not be ascertained until such grandchild should reach the age or die, and neither event might happen until more than twenty-one years after the death of the persons in being at the time the limitation was created. Therefore the whole limitation is bad.[18]

5. Conclusions With Respect to Permissible Limitations to Classes. It appears from the above that a testator may limit property to such of his grandchildren as reach twenty-one, but not any greater age; and that parties to a marriage settlement may limit property to such of the children of the marriage as reach twenty-one, but not any greater age.[19] A contingent legal remainder to a class may be good, although a corresponding equitable limitation would be bad.[20] For the purposes of the Rule, women are presumed to be capable of child-bearing throughout their lives.[21]

amount to which B, C, or D would be entitled. In other words, if B, C, or D should become entitled to anything, the minimum amount must be ascertained within their own lives, and so not beyond the limits of the Rule, as they were alive at the testator's death. But although the minimum amount, if any, would have to be so ascertained, the maximum would not, for another child, E, might be born to A before the class was closed, and E might not die or reach twenty-two until more than twenty-one years after the deaths of the persons in being at the testator's death. The courts were asked to hold that B, C, and D might be allowed to take these minimum amounts, to which, if to anything, they would become entitled within the limits of the Rule, although they could not take any further amounts; but this the courts refused to do, and held the whole limitation bad. Leake *v.* Robinson, 2 Meriv. 363, 16 Rev. Rep. 168, 35 Eng. Reprint 979; Porter *v.* Fox, 6 Sim. 485, 9 Eng. Ch. 485, 58 Eng. Reprint 676. See James *v.* Wynford, 17 Jur. 17, 22 L. J. Ch. 450, 1 Smale & G. 40, 1 Wkly. Rep. 61, 65 Eng. Reprint 18.

16. See *supra*, V, A, note 97.

17. Belfield *v.* Booth, 63 Conn. 299, 27 Atl. 585.

18. Suppose a devise of property in trust for A, a person living at the testator's death, for life, and then to such of the children of A as reach twenty-one, and to such of the children of any children dying under that age as reach twenty-one, the children of the second generation taking their parents' share. Suppose that A has one child, B, at the time of the testator's death, and afterward C is born to him, and A dies leaving B and C. The maximum number of shares is now ascertained as two, but suppose that C should marry, beget a child, D, and die, before he is twenty-one. Then the minimum number of shares may not be ascertained until D reaches twenty-one or dies, and neither event may happen until more than twenty-one years after the deaths of the persons in being at the testator's death. Pearks *v.* Moseley, 5 App. Cas. 714, 50 L. J. Ch. 57, 43 L. T. Rep. N. S. 449, 29 Wkly. Rep. 1 [*overruling In re* Moseley, L. R. 11 Eq. 499, 40 L. J. Ch. 275, 24 L. T. Rep. N. S. 260, 19 Wkly. Rep. 431, in which it was held that the gift to the children could be separated from the gift to the grandchildren]; Stuart *v.* Cockerell, L. R. 5 Ch. 713, 39 L. J. Ch. 729, 23 L. T. Rep. N. S. 442, 18 Wkly. Rep. 1057; Blight *v.* Hartnoll, 19 Ch. D. 294, 51 L. J. Ch. 162, 45 L. T. Rep. N. S. 524, 30 Wkly. Rep. 513; *In re* Farncombe, 9 Ch. D. 652, 47 L. J. Ch. 328; Bentinck *v.* Portland, 7 Ch. D. 693, 47 L. J. Ch. 235, 38 L. T. Rep. N. S. 58, 26 Wkly. Rep. 278; Hale *v.* Hale, 3 Ch. D. 643, 35 L. T. Rep. N. S. 933, 24 Wkly. Rep. 1065; Webster *v.* Boddington, 26 Beav. 128, 53 Eng. Reprint 845; Seaman *v.* Wood, 22 Beav. 591, 52 Eng. Reprint 1236. *Compare* Trickey *v.* Trickey, 3 Myl. & K. 560, 10 Eng. Ch. 560, 40 Eng. Reprint 213.

19. *In re* Morse, 21 Beav. 174, 2 Jur. N. S. 6, 25 L. J. Ch. 192, 4 Wkly. Rep. 148, 52 Eng. Reprint 825; *In re* Blakemore, 20 Beav. 214, 52 Eng. Reprint 585; Routledge *v.* Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671.

20. Suppose land is devised to A, a person living at the testator's death, for life, remainder to such of the children of A as reach twenty-five. When A dies, those children, or their heirs, who have already reached twenty-five take; if there are no such children, the remainder is destroyed; children who reach twenty-five after A's death have no rights. The remainder must therefore either vest at A's death, or be destroyed, and is good. Similarly a legal remainder might be limited to such of the grandchildren of A as reach forty. See *supra*, III, C, note 57.

21. See *supra*, IV, C, note 90, and the text to which such note is appended.

6. Limitations Framed in Language Not Commonly Used. Reference to some decisions on limitations to classes, framed in language not commonly used, is given in the note below.[22]

B. Independent Limitations. If separate limitations are made to each of the members of a class, no question as to the ascertainment of shares arises. The validity of each limitation is therefore determined independently of the other limitations; as where there is a gift of a definite sum of money to each of the members of a class;[23] and also where there is a gift of shares of property, provided the shares are defined by the person making the gift.[24] And thus also where there is a gift of shares of property, provided these shares must become defined within the limits of the Rule.[25]

22. Goldsborough *v.* Martin, 41 Md. 488; Woodbridge *v.* Winslow, 170 Mass. 388, 49 N. E. 738; Caldwell *v.* Willis, 57 Miss. 555; Moore *v.* Moore, 59 N. C. 132; *In re* Kountz, 213 Pa. St. 390, 62 Atl. 1103, 110 Am. St. Rep. 547, 3 L. R. A. N. S. 639; Bradford *v.* Griffin, 40 S. C. 468, 19 S. E. 76.

23. Suppose a testator gives a thousand dollars to each of his grandchildren who reaches twenty-two. The gift to each grandchild would be construed separately; the gift to such grandchildren as were alive at the testator's death would be good, and the gift to such grandchildren as were born after the testator's death would be bad.

24. Suppose a testator directed that his property should be divided into three equal parts, and then proceeded to limit the parts. The limitation of each part would be considered separately. See cases cited *infra*, note 25.

25. Suppose there is a devise of property in trust for A, who is alive at the testator's death, for life; and on A's death, in trust to pay the income to the surviving children of A in equal shares, and, on the death of each such child, the principal of its share to be paid to its children. Here the shares will be defined at A 's death, which is within the limits of the Rule; after being so defined the validity of the gift of each share will be determined separately. Suppose A had a child, B, born before the testator's death, and another child, C, born after his death, and that both B and C survive him. The property is now divided into two shares. As to one share, there is a gift to B for life, remainder to B's children; this is good because the children of B must be begotten in his lifetime, and B was alive at the testator's death. As to the other share, there is a gift to C for life, and then to his children; this is good so far as the gift to C for life is concerned, because C must have been begotten in A's life. But it is bad so far as the gift to C's children is concerned, because, as C was not alive at the testator's death, he may beget children at a time beyond the limits of the rule. Minot *v.* Doggett, 190 Mass. 435, 77 N. E. 629; Dorr *v.* Lovering, 147 Mass. 530, 18 N. E. 412 [*compare* Lovering *v.* Lovering, 129 Mass. 97; Sears *v.* Russell, 8 Gray (Mass.) 86]; Lowry *v.* Muldrow, 8 Rich. Eq. (S. C.) 241; Von Brockdorff *v.* Malcolm, 30 Ch. D. 172, 55 L. J. Ch. 121, 53 L. T. Rep. N. S. 263, 33 Wkly. Rep. 934; Wilkinson *v.* Duncan, 30 Beav. 111, 7 Jur. N. S. 1182, 30 L. J. Ch. 938, 5 L. T. Rep. N. S. 171, 9 Wkly. Rep. 915, 54 Eng. Reprint 831; Storrs *v.* Benbow, 3 De G. M. & G. 390, 17 Jur. 821, 22 L. J. Ch. 823, 1 Wkly. Rep. 115, 130, 420, 52 Eng. Ch. 304, 43 Eng. Reprint 153; Cattlin *v.* Brown, 1 Eq. Rep. 550, 11 Hare 372, 1 Wkly. Rep. 533, 45 Eng. Ch. 367, 68 Eng. Reprint 1319; Knapping *v.* Tomlinson, 10 Jur. N. S. 626, 34 L. J. Ch. 3, 1 L. T. Rep. N. S. 558, 12 Wkly. Rep. 784; Wilson *v.* Wilson, 4 Jur. N. S. 1076, 28 L. J. Ch. 95, 7 Wkly. Rep. 26; Griffith *v.* Pownall, 13 Sim. 393, 36 Eng. Ch. 393, 60 Eng. Reprint 152. *Contra*, see Thomas *v.* Gregg, 76 Md. 169, 24 Atl. 418; Stout *v.* Stout, 44 N. J. Eq. 479, 15 Atl. 843; Smith's Appeal, 88 Pa. St. 492. See also Smith *v.* Dunwoody, 19 Ga. 237.

With regard to limitations to classes in wills or marriage settlements the following suggestions are submitted: (1) A devise of either realty or personalty in trust, with a limitation, either presently or by way of remainder, to all the grandchildren of the testator. This is not too remote, and will produce no inequality among the grandchildren. (2) A devise of either realty or personalty in trust, with a limitation, either presently or by way of remainder, to all the grandchildren of the testator, with a proviso that if any grandchild dies under twenty-one his share shall go over. This is not too remote. All grandchildren will be included, and so no inequality will be produced, and the limitation over is also good. (3) A devise of either party or personalty in trust, with a limitation, either presently or by way of remainder, to all the grandchildren of the testator who reach a certain age, not over twenty-one. This is not too remote, but it may produce inequality among the grandchildren, as the class will be closed as soon as one grandchild reaches the prescribed age, and after-born grandchildren will have no rights. (4) A devise of either realty or personalty in trust, with a limitation, either presently or by way of remainder, to all the grandchildren of the testator, alive at his death, who reach a certain age, over twenty-one. This is not too remote, but it may produce inequality among the grandchildren. (5) A devise of realty to A, the testator's child, for life, remainder to A's children who reach a certain age (it is immaterial whether over twenty-one or not) no trust being cre-

VI. LIMITATIONS TO A SERIES.

Property is sometimes limited to a series of persons, as where property is put in trust, the income to be paid to such person as is from time to time the tenant of certain land. There would seem to be no good reason why the validity of the limitation, so far as it concerns each person in the series, should not be considered separately.[26]

VII. POWERS.[27]

A. If It May Remain Uncertain For a Time Beyond the Limits of the Rule Against Perpetuities Either Whether a Power Will Become Operative or Whether It Will be Exercised, It Is Invalid — 1. IN GENERAL. The owner of property, instead of himself making a rigid disposition of the property, may prefer to give to another a power of disposition over it, to be exercised at a future time, as where a testator gives property to B for life, remainder as B shall by will appoint.[28] The title to the property in such case does not remain in abeyance until B exercises the power. A may have expressly disposed of the property in default of B's appointment, as where he has given property to B for life, remainder as B shall by will appoint, and, in default of appointment, to B's children; the law then conceives of the property as limited to B for life, remainder to B's children, provided, however, as to the remainder, that if B shall exercise the power, then to the appointees of B. Or A may not have expressly disposed of the property in default of B's appointment, as where he has given property to B for life, remainder as B shall by will appoint, without more; there is then a reversion in A and his heirs, and the law

ated. This legal contingent remainder to the children is good, but only those children will be entitled who have reached the age at the time of A's death. (6) The same remarks apply to limitations in marriage settlements, to the children of the parties to the marriage, as apply to limitations in wills to the grandchildren of the testator. See Gray Perp. (2d ed.) §§ 389-395*a*.

26. Suppose chattels are bequeathed in trust for such person as shall from time to time be tenant of the Manor of Dale. A is tenant at the testator's death. Who A's first successor will be must be ascertained at or before A's death, and such time is within the limits of the Rule. Who the subsequent successors will be may not be ascertained within the limits of the Rule, and the limitation so far as it concerns them is bad. But there would seem to be no good reason why the limitation, so far as it concerns A and his first successor, should not be held good; the interests of A and his first successor are entirely separable from the interests of subsequent successors. In Liley *v.* Hey, 1 Hare 580, 583, 6 Jur. 756, 11 L. J. Ch. 415, 23 Eng. Ch. 580, 66 Eng. Reprint 1162, Wigram, V. C., held that "where the will declares that objects are to take in succession, there is no reason why I should hold the will void, as to those objects to whom an interest not extending beyond their own lives is given immediately at the testator's death." In Dillon *v.* Reilly, Ir. R. 10 Eq. 152, there was a gift to such clergyman as should be attached to a certain parish, and the court held that the gift was good as to the clergyman attached at the time of the testator's death, but not good as to successors. In Wainman *v.* Field, Kay 507, 69 Eng. Reprint 215, land was devised to A for life, B for life, remainder to B's eldest son in tail, remainders over, and chattels were bequeathed in trust for the persons entitled to the realty. It was held that A and B were entitled, but that B's eldest son was not entitled. In Bacon *v.* Proctor, Turn. & R. 31, 23 Rev. Rep. 177, 12 Eng. Ch. 31, 37 Eng. Reprint 1005, land was devised in trust for such person as should for the time being succeed to the testator's baronetcy. The testator's son, who succeeded to the baronetcy on his father's death, was held entitled for life. No decision was made as to subsequent interests. In Deerhurst *v.* St. Albans, 5 Madd. 232, 56 Eng. Reprint 883; Tollemache *v.* Coventry, 8 Bligh N. S. 547, 5 Eng. Reprint 1045, 2 Cl. & F. 611, 6 Eng. Reprint 1285, chattels were bequeathed in trust for A for life, and then "for such person as should from time to time be Lord Vere." A enjoyed the chattels, and died. B became Lord V., enjoyed the chattels, and died. C, son of a person born at the testator's death, became Lord V. The House of Lords held C not entitled, but did not pass on the question as to whether B had been lawfully entitled. See Goldsborough *v.* Martin, 41 Md. 488; Caldwell *v.* Willis, 57 Miss. 555; Siedler *v.* Syms, 56 N. J. Eq. 275, 38 Atl. 424; Moore *v.* Moore, 59 N. C. 132.

27. Powers generally see POWERS.

28. Suppose property is limited to A for life, remainder to B and his heirs, but if B dies unmarried, then to C and his heirs. The limitation to B and his heirs stands,

conceives of the property as limited to B for life, reversion to A and his heirs, provided, however, as to the reversion, that if B shall exercise the power, then to the appointees of B. The limitations in default of appointment stand until they are cut short by the interests given to appointees under the power. Such appointees take by force of a shifting use or an executory devise, of the nature of a shifting use.[29] A power may be so framed that it is not to become operative until a certain event has happened, as where property is given to A and his heirs, but, in case A or any of his children cease to bear the name of A, then as the X corporation shall appoint; in such case, until A or some child of A ceases to bear the name of A, the power does not become operative. Moreover, all interests under a power are dependent upon an exercise of the power by the donee. Until (1) the event, if any, has happened, on the happening of which the power becomes operative; and until (2) the donee has exercised the power, it is impossible for any interests under the power to vest. If, then, it may remain uncertain for more than twenty-one years, exclusive of periods of gestation, after lives in being at the creation of the power, either whether the power will become operative, or whether it will be exercised, it is altogether bad.[30] If the donee of the power is a living person, and the event on which the power will become operative might happen in the donee's life, the court will incline to hold that the power was to become operative only in case the event happens in the donee's life, and that therefore it is valid.[31] If the sole donee of a power is a person in being at the time of its creation, the power is valid, so far as the time within which it will be exercised is concerned.[32] If the donee of a power is not in being at the time of its creation, the power is invalid, unless the exercise of the power is expressly limited to a time within the limits of the Rule,[33] or unless such donee has power to appoint the property to himself in fee.[34] That the power in fact does become operative and is exercised within the limits of the Rule does not save it.[35]

until B dies unmarried. Then it is cut short and the estate to C and his heirs is substituted. So, if property is limited to B for life, remainder as B shall by will appoint, and, in default of appointment, to B's children, the exercise of the power by B cuts short the limitation to B's children, and the estate to the appointees of B is substituted.

29. See *supra*, III, D, 4. The validity of powers to sell property (see *infra*, VII, A, 2, 3, 4) is determined in the same manner as that of powers to appoint. The purchasers are appointees under the power.

30. Blight *v.* Hartnoll, 19 Ch. D. 294, 51 L. J. Ch. 162, 45 L. T. Rep. N. S. 524, 30 Wkly. Rep. 513; Bristow *v.* Boothby, 4 L. J. Ch. O. S. 88, 2 Sim. & St. 465, 25 Rev. Rep. 248, 1 Eng. Ch. 465, 57 Eng. Reprint 424; Heath *v.* Heath, 2 Eden 330, 28 Eng. Reprint 925.

31. See Blight *v.* Hartnoll, 19 Ch. D. 294, 51 L. J. Ch. 162, 45 L. T. Rep. N. S. 524, 30 Wkly. Rep. 513.

32. Collins *v.* MacTavish, 63 Md. 166; Collins *v.* Foley, 63 Md. 158, 52 Am. Rep. 505. See Lawrence's Estate, 136 Pa. St. 354, 364, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85.

33. Hartson *v.* Elden, 50 N. J. Eq. 522, 26 Atl. 561; *In re* Hargreaves, 43 Ch. D. 401, 59 L. J. Ch. 384, 62 L. T. Rep. N. S. 473, 38 Wkly. Rep. 470; Morgan *v.* Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. 410, 28 L. T. Rep. N. S. 434; Webb *v.* Sadler, L. R. 14 Eq. 533, 42 L. J. Ch. 498, 20 Wkly. Rep. 740; Wollaston *v.* King, L. R. 8 Eq. 165, 38 L. J. Ch. 61, 392, 20 L. T. Rep. N. S. 1003, 17 Wkly. Rep. 641. See *In re* Johnston, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 621. A power given under a power to a person not in being at the creation of the first power is bad. For example, suppose A devised property to B for life, remainder among B's issue, as B shall appoint, and B appoints to his son, C, who was unborn at A's death, for life, remainder to C's issue, as C shall appoint. The power given to C is invalid. Whitby *v.* Mitchell, 42 Ch. D. 494, 38 Wkly. Rep. 5 [*affirmed* in 44 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. Rep. N. S. 771, 38 Wkly. Rep. 337]; Morgan *v.* Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. 410, 28 L. T. Rep. N. S. 434; Wollaston *v.* King, L. R. 8 Eq. 165, 38 L. J. Ch. 61, 392, 20 L. T. Rep. N. S. 1003, 17 Wkly. Rep. 641. And see *infra*, VII, C.

34. The gift of such a power is treated as equivalent to a gift of the fee. Bray *v.* Hammersley, 3 Sim. 513, 6 Eng. Ch. 513, 57 Eng. Reprint 1090 [*affirming* 8 Bligh N. S. 568, 5 Eng. Reprint 1053, 3 Cl. & F. 453, 6 Eng. Reprint 1225]. And see Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85. But not if the exercise of the power is dependent on the consent of trustees. Webb *v.* Sadler, L. R. 14 Eq. 533, 42 L. J. Ch. 498, 20 Wkly. Rep. 740 [*affirmed* in L. R. 8 Ch. 419, 42 L. J. Ch. 498, 28 L. T. Rep. N. S. 388, 21 Wkly. Rep. 394].

35. Ware *v.* Polhill, 11 Ves. Jr. 257, 8 Rev. Rep. 144, 32 Eng. Reprint 1087. Suppose

2. Powers to Sell to Raise Money For Paying Debts or Legacies. Such powers are rarely, if ever, objectionable under the Rule against Perpetuities. The creditors or legatees have by reason of the power a present interest in the property, of the nature of a charge, and may compel the donee of the power to sell at once.[36]

3. Powers to Sell, Exchange, or Lease Settled Property. Powers to sell, exchange, or lease settled property[37] are subject to the Rule against Perpetuities.[38] Thus such a power is invalid if it may, according to its terms, be exercised at any time during the continuance of a life-estate limited to a person unborn at the creation of the power.[39] But if the property is so settled that some person or persons must become entitled to either the legal or equitable fee in possession, within lives in being at the creation of the power, the power will ordinarily be valid. When a legal fee comes into possession, the purposes of the settlement are usually spent,[40] and the power will usually be construed to cease;[41] or, if it is held to continue, as for purposes of division of the property, it will usually be held that it is to continue only for a reasonable time, and that the bounds of such reasonable time fall within twenty-one years.[42] When an equitable fee comes into posses-

property is devised to A and his heirs, but if A or any of his children cease to bear the name of A, then to B and his heirs. A might thereafter have a child, C, who might cease to bear the name of A, more than twenty-one years after the death of the persons in being at the testator's death. The executory devise to B is therefore bad, because dependent on a contingency which might happen at a time beyond the limits of the Rule. If A himself ceased to bear the name of A, this would not save C's interest. The law as to appointments under a power is the same as the law with regard to other interests created by shifting use or executory devise. See *supra*, IV, C.

36. See *supra*, III, A. An additional reason in support of the validity of such powers is that the donee must exercise the power within a reasonable time, and that ordinarily the bounds of a reasonable time would fall within twenty-one years after lives in being at the creation of the power. Silk *v.* Prime, 1 Bro. Ch. 138 note, 28 Eng. Reprint 1037; Briggs *v.* Oxford, 1 De G. M. & G. 363, 16 Jur. 558, 21 L. J. Ch. 829, 50 Eng. Ch. 278, 42 Eng. Reprint 592.

37. For example, property may be devised to A, testator's widow, for life, remainder to B, testator's son, for life, remainder in fee to B's children, with a power in such person as may for the time being be charged with the execution of the testator's will, to sell the property and reinvest the proceeds in property settled in the same manner. Here the exercise of the power would cut short legal interests. Or property may be devised to trustees, in trust for A for life, B for life, B's children in fee, with a power in the trustees to sell the property and reinvest the proceeds in property held on the same trusts. Here the exercise of the power would cut short equitable interests.

38. Dawson *v.* Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. Ct. 657; *In re* Wood, [1894] 2 Ch. 310, 63 L. J. Ch. 544; *In re* Daveron, [1893] 3 Ch. 421, 63 L. J. Ch. 54, 69 L. T. Rep. N. S. 752, 3 Reports 685, 42 Wkly. Rep. 24; Lantsbery *v.* Collier, 2 Kay & J. 709, 25 L. J. Ch. 672, 4 Wkly. Rep. 826, 69 Eng. Reprint 967; Ware *v.* Polhill, 11 Ves. Jr. 257, 8 Rev. Rep. 144, 32 Eng. Reprint 1087.

39. Suppose property is devised to A, a bachelor, for life, remainder to A's eldest son for life, remainders over, with a power in such person as may for the time being be charged with the execution of the testator's will to sell the property. This power might, according to its terms, be exercised at any time during the life of A's eldest child, and such time might be more than twenty-one years after the death of the persons in being at the testator's death. *In re* Appleby, [1903] 1 Ch. 565, 72 L. J. Ch. 332, 88 L. T. Rep. N. S. 219, 51 Wkly. Rep. 455; Goodier *v.* Edmunds, [1893] 3 Ch. 455, 62 L. J. Ch. 649; Goodier *v.* Johnson, 18 Ch. D. 441, 51 L. J. Ch. 369, 45 L. T. Rep. N. S. 515, 30 Wkly. Rep. 449. *Compare In re* Daveron, [1893] 3 Ch. 421, 63 L. J. Ch. 54, 69 L. T. Rep. N. S. 752, 3 Reports 685, 42 Wkly. Rep. 24.

40. Powers to sell, exchange, or lease settled property are usually created in order that during the settlement there may be some person who can make a good title to the property.

41. Githens' Estate, 24 Pa. Co. Ct. 248; Cole *v.* Sewell, 2 C. & L. 344, 4 Dr. & War. 1, 6 Ir. Eq. 66. See also Briggs *v.* Davis, 81* Pa. St. 470; Myer's Estate, 11 Pa. Co. Ct. 194.

42. *In re* Sudeley, [1894] 1 Ch. 334, 63 L. J. Ch. 194, 70 L. T. Rep. N. S. 549, 42 Wkly. Rep. 231; Peters *v.* Lewes, etc., R. Co., 18 Ch. D. 429, 50 L. J. Ch. 839, 45 L. T. Rep. N. S. 234, 29 Wkly. Rep. 875. It may be that the court will feel obliged so to construe a power as to hold it is not to cease when an ultimate legal fee comes into possession, or within a reasonable time thereafter. But in such case, if the power could be exercised by the donee only with the consent of the person in possession, it would be destructible, and therefore valid. For the person in possession could at any time convey

sion, the power may be construed to cease, but even if not the *cestui* will be entitled to call for a conveyance of the legal fee; thus in any case where a power would be valid, because an ultimate legal fee must come into possession within a certain time, it is also valid if an ultimate equitable fee must come into possession within that time.[43]

4. Powers to Sell Mortgaged Property. If, in a mortgage, there is a power given to the mortgagee to sell upon default, and the default must occur, if at all, within the limits of the Rule, *semble* that the power is valid;[44] otherwise it is invalid.[45]

B. A Power Is Not Invalid Because Within Its Terms an Invalid Appointment Might Be Made. Powers are ordinarily framed in terms broad enough to permit an appointment which would be invalid under the Rule, but this does not render the power itself invalid. Only appointments actually made are considered.[46]

C. An Appointment Is Invalid Unless It Must Vest Within Limits of Rule, Reckoning From Date, Not of Exercise, But of Creation, of Power. An appointment under a power is invalid unless it must vest within twenty-one years, exclusive of periods of gestation, after lives in being at the time, not of the exercise, but of the creation, of the power. The owner of property, instead of himself making a rigid disposition of the property, may give to another a power of disposition over it, to be exercised at a future time. The appointment under this power completes and supplements such disposition of the property as the owner has made, and its validity must be determined as though it were a part of the owner's disposition of the property.[47] This, however, does not mean that the lan-

the legal fee, and thus debar himself from consenting to a sale by the donee. Biddle *v.* Perkins, 4 Sim. 135, 6 Eng. Ch. 135, 58 Eng. Reprint 52. See *supra*, III, C.

A power attendant on an estate tail is destructible. If the estate tail must come into possession within lives in being, and the power is not exercisable after the estate tail has terminated, it would seem to be good. See Barber *v.* Pittsburgh R. Co., 166 U. S. 83, 17 S. Ct. 488, 41 L. ed. 925; and *supra*, III, C.

43. Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246; Heard *v.* Read, 171 Mass. 374, 50 N. E. 638; Cooper's Estate, 150 Pa. St. 576, 24 Atl. 1057, 30 Am. St. Rep. 829; Cresson *v.* Ferree, 70 Pa. St. 446; *In re* Tweedie, 27 Ch. D. 315, 54 L. J. Ch. 71, 33 Wkly. Rep. 133; *In re* Cotton, 19 Ch. D. 624, 51 L. J. Ch. 514, 46 L. T. Rep. N. S. 813, 30 Wkly. Rep. 610. *Compare* Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88. Where property is put in trust, and there is a present equitable fee simple in a certain person or persons, a power in the trustees to sell, exchange, or lease would seem to be valid, because the *cestuis* may compel the trustees to convey the legal fee to them, and hence the power to sell is destructible. So held in Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246; Pulitzer *v.* Livingston, 89 Me. 359, 36 Atl. 635.

44. *Compare* Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73. Upon default the mortgagee would have a right to have the property sold by legal proceedings. His right will become a present right to have the property sold. The fact that by the terms of the mortgage deed he may himself sell gives him an additional remedy to enforce such present right. So long as this right must vest within the limits of the Rule the remedies given to enforce that right would seem to be good. See *supra*, III, A.

45. If the default under a mortgage might occur at a time beyond the limits of the Rule, the mortgagee would seem, on principle, not to have a right to exercise a power of sale given in the mortgage, or, whether such power is given or not, to have the property sold by legal proceedings. An exception, however, to the Rule might be made to meet such case. See Staacke *v.* Bell, 125 Cal. 309, 57 Pac. 1012; Camp *v.* Land, 122 Cal. 167, 54 Pac. 839; Sacramento Bank *v.* Alcorn, 121 Cal. 379, 53 Pac. 813; Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 86 Fed. 975.

46. Stone *v.* Forbes, 189 Mass. 163, 75 N. E. 141; Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368; Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85; Slark *v.* Dakyns, L. R. 15 Eq. 307 [*affirmed* in L. R. 10 Ch. 35, 44 L. J. Ch. 205, 31 L. T. Rep. N. S. 712, 23 Wkly. Rep. 118].

47. Suppose A devises property to B for life, remainder among B's issue, as B shall by will appoint, and B appoints to his child, C, for life, remainder to C's children in fee. To test the validity of the appointment, it is necessary to go back to the date of the creation of the power, namely, A's death, and trace the limitations of the property from that date. The property is then found to be limited to B for life, to C for life, remainder to the children of C. If C was born at the testator's death, this appointment is good, but if not, the remainder to C's children is

guage of the donee of the power is to be put literally into the mouth of the creator of the power. The meaning of the appointment is to be determined by what the words meant to the person who used them, namely, the donee; the creator of the power has preferred to give the power of disposition to the donee to be exercised at a future time in the light of the facts then existing; the appointment is, to be sure, to be taken back to the time of the creation of the power, but it is, when taken back, to be read in the light of the facts existing at the time of the appointment.[48] When the donee of the power has the right to appoint the property to himself in fee, without the consent of any third party,[49] he is treated as owner of the fee, and any appointments which he makes are construed as though he had first appointed the property to himself in fee, and then resettled it. In other words in such case the validity of the appointment is determined reckoning from the date of the exercise of the power.[50] When the donee of the power has a life-interest in the property, and a general right of appointment, but by will only, it has also been held that the validity of the appointment should be determined reckoning from the date of the exercise of the power.[51]

VIII. TRUSTS.[52]

A. Equitable Interests Subject to the Rule Against Perpetuities. Equitable as well as legal interests are subject to the Rule against Perpetuities.[53]

B. Trusts For Payment of Debts or Legacies. If the fee of land is given to trustees to raise money for the payment of debts or legacies, and, subject to the payment of such debts or legacies, the fee is devised to A, the trustees are, in

bad. Brown *v.* Columbia Finance, etc., Co., 97 S. W. 421, 30 Ky. L. Rep. 110; Albert *v.* Albert, 68 Md. 352, 12 Atl. 11; Fargo *v.* Squiers, 154 N. Y. 250, 48 N. E. 509; Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368; Genet *v.* Hunt, 113 N. Y. 158, 21 N. E. 91; Farmers' L. & T. Co. *v.* Kip, 120 N. Y. App. Div. 347, 104 N. Y. Suppl. 1092; Maitland *v.* Baldwin, 70 Hun (N. Y.) 267, 24 N. Y. Suppl. 29; Thomson *v.* Livingston, 4 Sandf. (N. Y.) 539; Matter of Pilsbury, 50 Misc. (N. Y.) 367, 99 N. Y. Suppl. 62 [*affirmed* in 113 N. Y. App. Div. 893, 99 N. Y. Suppl. 62 (*affirmed* in 186 N. Y. 545, 79 N. E. 1114)]. *Compare* Frear *v.* Pugsley, 9 Misc. (N. Y.) 316, 30 N. Y. Suppl. 149; *In re* Boyd, 199 Pa. St. 487, 49 Atl. 297; Smith's Appeal, 88 Pa. St. 492. See also Ronckendorff's Estate, 11 Pa. Co. Ct. 447; Webb *v.* Sadler, L. R. 14 Eq. 533, 42 L. J. Ch. 498, 20 Wkly. Rep. 740; D'Abbadie *v.* Bizoin, Ir. R. 5 Eq. 205. In New York L. Ins., etc., Co. *v.* Cary, 120 N. Y. App. Div. 264, 105 N. Y. Suppl. 125, a similar principle was applied to the testamentary disposition of a reversion accruing under a revocable trust created, *inter vivos*, by the testator.

48. Suppose a testator, A, devised property to B for life, remainder to B's children for life, remainder in fee to the children of such children. This remainder in fee is bad. But now suppose A devised property to B for life, remainder as B shall by will appoint, and B appointed to his children for life, remainder in fee to the children of such children, and died, having had only one child, C, who was born in A's lifetime. When the appointment is taken back and read in the light of the facts existing at the time of the appointment, the property is found to be limited to B for life, to C, a person living at the testator's death, for life, remainder to C's children, and is therefore good. Slark *v.* Dakyns, L. R. 10 Ch. 35, 44 L. J. Ch. 205, 31 L. T. Rep. N. S. 712, 23 Wkly. Rep. 118; *In re* Coulman, 30 Ch. D. 186, 55 L. J. Ch. 34, 53 L. T. Rep. N. S. 560; Von Brockdorff *v.* Malcolm, 30 Ch. D. 172, 55 L. J. Ch. 121, 53 L. T. Rep. N. S. 263, 33 Wkly. Rep. 934; Morgan *v.* Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. 410, 28 L. T. Rep. N. S. 434; Wilkinson *v.* Duncan, 30 Beav. 111, 7 Jur. N. S. 1182, 30 L. J. Ch. 938, 5 L. T. Rep. N. S. 171, 9 Wkly. Rep. 915, 54 Eng. Reprint 831; Peard *v.* Kekewich, 15 Beav. 166, 21 L. J. Ch. 456, 51 Eng. Reprint 500. *Compare* Smith's Appeal, 88 Pa. St. 492. See Gray Perp. (2d ed.) § 523 *et seq.*

49. Thus, usually, if property is given to A for life, remainder as A shall by deed or will appoint. But see Farmers' L. & T. Co. *v.* Kip, 120 N. Y. App. Div. 347, 104 N. Y. Suppl. 1092.

50. Mifflin's Appeal, 121 Pa. St. 205, 15 Atl. 525, 6 Am. St. Rep. 781, 1 L. R. A. 453; Bray *v.* Bree, 8 Bligh N. S. 568, 5 Eng. Reprint 1053, 2 Cl. & F. 453, 6 Eng. Reprint 1225.

51. See *In re* Boyd, 199 Pa. St. 487, 49 Atl. 297; Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85; Rous *v.* Jackson, 29 Ch. D. 521, 54 L. J. Ch. 732, 52 L. T. Rep. N. S. 733, 33 Wkly. Rep. 773; Stuart *v.* Babington, L. R. 27 Ir. 551; *In re* Flower, 55 L. J. Ch. 200, 53 L. T. Rep. N. S. 717, 34 Wkly. Rep. 149. *Contra*, *In re* Powell, 39 L. J. Ch. 188.

52. Trusts generally see TRUSTS.

53. See *supra*, III, D, 7.

equity, regarded as holding in trust for A, subject to a charge for the payment of the debts or legacies. Such interests are therefore valid.[54]

C. Trusts to Sell. The law with regard to trusts to sell is, so far as the Rule against Perpetuities is concerned, the same as the law with regard to powers to sell.[55]

D. Executory Trusts. If it may remain uncertain beyond the limits of the Rule whether the execution of an executory trust will take place, the trust is altogether bad. But if it must be executed, if at all, within the limits of the Rule, and if any valid trust can be made in accordance with its terms, it is good to the extent of such valid trust.[56]

E. Charitable Trusts.[57] Where property is given on a charitable trust, with a proviso that on the happening of a certain event it shall go over to a second charitable trust, the gift over to the second charitable trust is good, even though it may remain uncertain beyond the limits of the Rule against Perpetuities whether the event will happen.[58] Where property is given to a corporation on a charitable trust, and no such corporation is in existence at the date of the gift, such corporation will nevertheless, in most jurisdictions, be allowed to take, if it is incorporated within a reasonable time after the date of the gift. This is usually allowed as an application of the doctrine of *cy pres*;[59] but it is also

54. Morgan *v.* Morgan, 20 R. I. 600, 40 Atl. 736; Bacon *v.* Proctor, Turn. & R. 31, 23 Rev. Rep. 177, 12 Eng. Ch. 31, 37 Eng. Reprint 1005. See Massey *v.* O'Dell, 10 Ir. Ch. 22. *Compare supra*, VII, A, 2.

55. See *supra*, VII, A, 3.

56. Tregonwell *v.* Sydenham, 3 Dow 194, 15 Rev. Rep. 40, 3 Eng. Reprint 1035.

For the form of a settlement by the court of an executory trust see Lewis Perp. App. III.

57. Charities generally see CHARITIES, 6 Cyc. 895.

58. This exception to the Rule seems established by the authorities.

Connecticut.— Storrs Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141.

Massachusetts.— Odell *v.* Odell, 10 Allen 1.

New Jersey.— MacKenzie *v.* Jersey City Presbytery, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. N. S. 227.

Oregon.— See *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Pennsylvania.— See Lennig's Estate, 154 Pa. St. 209, 25 Atl. 1049.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Brigham *v.* Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393.

England.— *In re* Tyler, [1891] 3 Ch. 252, 60 L. J. Ch. 686, 65 L. T. Rep. N. S. 367, 40 Wkly. Rep. 7; Christ's Hospital *v.* Grainger, 16 Sim. 83, 39 Eng. Ch. 83, 60 Eng. Reprint 804.

See 39 Cent. Dig. tit. "Perpetuities," § 57 *et seq.*; and Gray Perp. (2d ed.) § 597 *et seq.*

59. The court construes the gift as an immediate gift to charity. The administration of the gift by the named corporation is only the means indicated by the testator for carrying out this gift. When, but not until when, the means indicated by the testator have proven impracticable, the court will find another means. Hence if the corporation named by the testator is incorporated within a reasonable time, it may take.

Colorado.— Clayton *v.* Hallett, 30 Colo. 231, 70 Pac. 429, 97 Am. St. Rep. 117, 59 L. R. A. 407.

Georgia.— Cumming *v.* Reid Memorial Church, 64 Ga. 105.

Illinois.— Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Andrews *v.* Andrews, 110 Ill. 223.

Maine.— Wentworth *v.* Fernald, 92 Me. 282, 42 Atl. 550; Dascomb *v.* Marston, 80 Me. 223, 13 Atl. 888; Swasey *v.* American Bible Soc., 57 Me. 523.

Maryland.— Chase *v.* Stockett, 72 Md. 235, 19 Atl. 761. See Laws (1888), c. 249. *Compare* Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

Massachusetts.— Codman *v.* Brigham, 187 Mass. 309, 72 N. E. 1008, 105 Am. St. Rep. 394; Sherman *v.* Congregational Home Missionary Soc., 176 Mass. 349, 57 N. E. 702; Odell *v.* Odell, 10 Allen 1.

Missouri.— Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346; Schmidt *v.* Hess, 60 Mo. 591.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; McIntire Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am. Dec. 436.

Oregon.— *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Rhode Island.— Almy *v.* Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 7 L. ed. 617; Brigham *v.* Peter Bent Brigham Hospital, 126 Fed. 796 [*affirmed* in 134 Fed. 513, 67 C. C. A. 393]; Field *v.* Drew Theological Seminary, 41 Fed. 371. See also Tincher *v.* Arnold, 147

allowed in some states where the doctrine of *cy pres* is rejected.[60] There are a few jurisdictions in which a gift to a corporation not in existence is held to be void.[61] Except as above stated, the Rule against Perpetuities applies to charitable trusts. Thus if property is given to an individual, with a gift over to a charity on a contingency which may not happen within the limits of the rule, the gift over is bad.[62] And if property is given to a charity, with a gift over to an individual on a like contingency, the gift over is bad.[63] Property may be given on a determinable charitable trust; when the charitable trust so created terminates, there is a resulting trust to the heirs or next of kin of the person creating the trust. Such a resulting trust is a vested interest and therefore unobjectionable under the Rule against Perpetuities.[64]

F. Trusts For Accumulation. If A, owner of property, gives the property to B to accumulate the income for a stated period, and then to transfer the principal and accumulated income to C, C may, in most jurisdictions, stop the accumulation, and have the property transferred to him at once. The direction to accumulate is an illegal restraint upon C's power of alienation. The law does not allow A to give C the fee, legal or equitable, of property, and then forbid him to alienate it; no more does it allow A to give C the equitable fee in property, and then compel him to allow the property to accumulate. So soon as the rights in property held for accumulation become vested, the direction to accumulate becomes destructible.[65] This is true even of property held on a charitable

Fed. 665, 77 C. C. A. 649, 7 L. R. A. N. S. 471.

England.— Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, 42 L. J. Ch. 368, 28 L. T. Rep. N. S. 248, 21 Wkly. Rep. 299; *In re* Davis, [1902] 1 Ch. 876, 71 L. J. Ch. 459, 86 L. T. Rep. N. S. 292, 50 Wkly. Rep. 378; Atty.-Gen. *v.* Chester, 1 Bro. Ch. 444, 28 Eng. Reprint 1229. *Compare* Cherry *v.* Mott, 5 L. J. Ch. 65, 1 Myl. & C. 123, 13 Eng. Ch. 123, 40 Eng. Reprint 323.

See 39 Cent. Dig. tit. "Perpetuities," § 57 *et seq.*

60. *Connecticut.*— Eliot's Appeal, 74 Conn. 586, 51 Atl. 558; New Haven Young Men's Inst. *v.* New Haven, 60 Conn. 32, 22 Atl. 447; Goodrich's Appeal, 57 Conn. 275, 18 Atl. 49; Tappan's Appeal, 52 Conn. 412; Coit *v.* Comstock, 51 Conn. 352, 50 Am. Rep. 29. See also Pendleton *v.* Kinney, 65 Conn. 222, 32 Atl. 331. *Compare* Jocelyn *v.* Nott, 44 Conn. 55.

Iowa.— Miller *v.* Chittenden, 2 Iowa 315, 4 Iowa 252. *Compare* Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

North Carolina.— See Bridges *v.* Pleasants, 39 N. C. 26, 44 Am. Dec. 94.

Virginia.— Literary Fund *v.* Dawson, 10 Leigh 147.

United States.— See Duggan *v.* Slocum, 83 Fed. 244.

See 39 Cent. Dig. tit. "Perpetuities," § 57 *et seq.*

61. Carter *v.* Balfour, 19 Ala. 814; Rhodes *v.* Rhodes, 88 Tenn. 637, 13 S. W. 590; White *v.* Hale, 2 Coldw. (Tenn.) 77; Dickson *v.* Montgomery, 1 Swan (Tenn.) 348; Green *v.* Allen, 5 Humphr. (Tenn.) 170.

For the law of states in which statutory changes have been made see *infra*, XI.

62. Smith *v.* Townsend, 32 Pa. St. 434; *In re* Johnson, L. R. 2 Eq. 716, 12 Jur. N. S. 616; Commissioners *v.* De Clifford, 1 Dr. & War. 245; Atty.-Gen. *v.* Gill, 2 P. Wms. 369, 24 Eng. Reprint 770.

63. Merritt *v.* Bucknam, 77 Me. 253; Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Wells *v.* Heath, 10 Gray (Mass.) 17; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Rolfe, etc., Asylum *v.* Lefebre, 69 N. H. 238, 45 Atl. 1087; St. Luke's Church Appeal, 1 Walk. (Pa.) 283. See also Odell *v.* Odell, 10 Allen (Mass.) 1.

A trust, although not offending the Rule, may be invalid because there is no defined beneficiary. See CHARITIES, 6 Cyc. 939–949; Gray Perp. (2d ed.) App. H.

64. *California.*—Schlessinger *v.* Mallard, 70 Cal. 326, 11 Pac. 728.

Massachusetts.— Stone *v.* Framingham, 109 Mass. 303; Easterbrooks *v.* Tillinghast, 5 Gray 17. See also North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

Mississippi.— Daniel *v.* Jacoway, Freem. 59.

Washington.— Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

United States.— Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739.

England.— *In re* Randell, 38 Ch. D. 213, 57 L. J. Ch. 899, 58 L. T. Rep. N. S. 626, 36 Wkly. Rep. 543.

See 39 Cent. Dig. tit. "Perpetuities," § 57 *et seq.*

This resulting trust is analogous to a legal possibility of reverter. See *supra*, III, B, 4.

Vested equitable future interests see *supra*, III, B, 7.

65. Kimball *v.* Crocker, 53 Me. 263; Rogers' Estate, 179 Pa. St. 602, 36 Atl. 1130; MacVean *v.* MacVean, 24 Vict. L. Rep. 835. See also Kaufman *v.* Burgert, 195 Pa. St. 274, 45 Atl. 725; Smeltzer *v.* Goslee, 172 Pa. St. 298, 34 Atl. 44; Van Dusen's Estate, 17 Pa.

trust.[66] If therefore the rights in property held for accumulation must become vested within the limits of the Rule against Perpetuities, the direction for accumulation is good, irrespective of the length of time during which the accumulation is directed to go on.[67] Thus if property is directed to be accumulated for the benefit of creditors or legatees, the direction to accumulate is harmless, for the creditors or legatees may at any time stop the accumulation.[68] And if there is an immediate gift to charity, no direction for accumulation will defeat the gift.[69] If, however, the rights in such property may not become vested within the limits of the Rule, the gift of the property is bad, and the direction to accumulate falls also.[70] Whether the gift of the property directed to be held for accumulation is intended to be conditioned on the accumulation actually taking place is a question of construction. The courts incline to hold that it is not so conditioned.[71]

IX. CONSTRUCTION.

A. Construction Not to Be Affected by Existence of the Rule Against Perpetuities. The Rule against Perpetuities is a restraint imposed for reasons of public policy by the law upon an owner's power to dispose of property.[72] Every deed and will is therefore to be construed as though no Rule against Per-

Co. Ct. 533. *Contra*, Claflin *v.* Claflin, 149 Mass. 19, 20 N. E. 454, 14 Am. St. Rep. 393, 3 L. R. A. 370.

66. Harbin *v.* Masterman, [1894] 2 Ch. 184, 63 L. J. Ch. 388, 70 L. T. Rep. N. S. 357, 7 Reports 159 [*affirmed* in [1895] A. C. 186, 64 L. J. Ch. 369, 72 L. T. Rep. N. S. 431, 11 Reports 169, 43 Wkly. Rep. 449 (*overruling* Harbin *v.* Masterman, L. R. 12 Eq. 559, 40 L. J. Ch. 760)]. *Compare* Biddle's Appeal, 12 Wkly. Notes Cas. (Pa.) 231.

In Connecticut and Massachusetts the limits of an accumulation for the benefit of a charity are subject to the orders of a court of equity. Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231.

67. Kimball *v.* Crocker, 53 Me. 263; Otis *v.* Coffin, 7 Gray (Mass.) 511; Rogers' Estate, 179 Pa. St. 602, 36 Atl. 1130; Peard *v.* Kekewich, 15 Beav. 166, 21 L. J. Ch. 456, 51 Eng. Reprint 500; Phipps *v.* Kelynge, 2 Ves. & B. 57 note, 13 Rev. Rep. 16, 35 Eng. Reprint 242. See also Connecticut Trust, etc., Co. *v.* Hollister, 74 Conn. 228, 50 Atl. 750.

68. Morgan *v.* Morgan, 20 R. I. 600, 40 Atl. 736; Williams *v.* Herrick, 19 R. I. 197, 32 Atl. 913; Williams *v.* Lewis, 6 H. L. Cas. 1013, 5 Jur. N. S. 323, 28 L. J. Ch. 505, 7 Wkly Rep. 349, 10 Eng. Reprint 1594; Southampton *v.* Hertford, 2 Ves. & B. 54, 13 Rev. Rep. 18, 35 Eng. Reprint 239.

69. *Connecticut.*— Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

Illinois.— Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

Massachusetts.— Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; Odell *v.* Odell, 10 Allen 1.

Pennsylvania.— Philadelphia *v.* Girard, 45 Pa. St. 9, 84 Am. Dec. 470; Hillyard *v.* Miller, 10 Pa. St. 326; Curran *v.* Philadelphia Trust Co., 15 Phila. 84; Franklin's Estate, 27 Wkly. Notes Cas. 545.

United States.— Brigham *v.* Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100; Duggan *v.* Slocum, 92 Fed. 806, 34 C. C. A. 676.

Canada.— See Parkhurst *v.* Roy, 7 Ont. App. 614.

See 39 Cent. Dig. tit. "Perpetuities," § 65 *et seq.*

70. Suppose a testator directs that property shall be accumulated for fifty years, and then be paid to his issue living at that time. Here it must remain uncertain until the end of the fifty years what persons will be entitled.

Maine.— Andrews *v.* Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103.

Massachusetts.— Thorndike *v.* Loring, 15 Gray 391.

Pennsylvania.— *In re* Gerber, 196 Pa. St. 366, 46 Atl. 497; *In re* Johnston, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 621; Rogers' Estate, 18 Phila. 99.

England.— Smith *v.* Cunningham, L. R. 13 Ir. 480; Boughton *v.* Boughton, 1 H. L. Cas. 406, 9 Eng. Reprint 815.

Canada.— Baker *v.* Stuart, 28 Ont. 439.

See 39 Cent. Dig. tit. "Perpetuities," § 67 *et seq.*

If the shares of the persons entitled have not been ascertained, the rights in the property are not vested. Curtis *v.* Lukin, 5 Beav. 147, 6 Jur. 721, 11 L. J. Ch. 380, 49 Eng. Reprint 533. See Beaumont *v.* Sowter, 19 S. Austr. L. Rep. 93. *Compare supra*, V.

If there is a gift to charity on a condition precedent, which may not be determined until the end of the period for accumulation, and such period is beyond the limitations of the Rule, the gift is bad, and the direction for accumulation falls. Rogers' Estate, 18 Phila. (Pa.) 99. See Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, 42 L. J. Ch. 368, 28 L. T. Rep. N. S. 248, 21 Wkly. Rep. 299.

71. See *In re* Wood, [1894] 2 Ch. 310, 63 L. J. Ch. 544.

72. See *supra*, I.

petuities existed. The intention of the owner having been thus determined, the Rule is to be applied.[73] If an instrument, construed without reference to the existence of the Rule, is really ambiguous, the courts will incline to such construction as makes the provisions consistent with the Rule.[74] There are, moreover, cases in which the courts would seem, in the first instance, to have been influenced in their construction of an instrument by their desire to make the provisions of the instrument consistent with the Rule.[75]

B. Cy Pres. Where land is devised to an unborn person for life, remainder to his children in tail, or to his sons in tail male, the unborn person is held to take, in the first case, an estate tail, and, in the second case, an estate tail male.[76] This construction is adopted under the doctrine of *cy pres*, since remainders to the issue of an unborn person are too remote; the adoption of such construction makes an exception to the rule that the construction of an instrument is not to be affected by the existence of the Rule against Perpetuities.[77]

C. Modifying Clauses. Where there is in an instrument a valid limitation to A, and then in a later part of the instrument there is a clause which modifies the limitation already made, and, by modifying it, makes it in part too remote, the modifying clause will be rejected altogether.[78] The adoption of this construction

73. Dungannon *v.* Smith, 12 Cl. & F. 546, 10 Jur. 721, 8 Eng. Reprint 1523. To the same effect are Reid *v.* Voorhees, 216 Ill. 236, 74 N. E. 804; *In re* Stickney, 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693; Coggins' Appeal, 124 Pa. St. 10, 16 Atl. 579, 10 Am. St. Rep. 565; Heasman *v.* Pearse, L. R. 7 Ch. 275, 41 L. J. Ch. 705, 26 L. T. Rep. N. S. 299, 20 Wkly. Rep. 271; Hutchinson *v.* Tottenham, [1898] 1 Ir. 403; Speakman *v.* Speakman, 8 Hare 180, 32 Eng. Ch. 180, 68 Eng. Reprint 323.

74. *Connecticut.*— St. John *v.* Dann, 66 Conn. 401, 34 Atl. 110; Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Farnam *v.* Farnam, 53 Conn. 261, 2 Atl. 325, 5 Atl. 682.

Illinois.— Chapman *v.* Cheney, 191 Ill. 574, 61 N. E. 363.

Maryland.— *In re* Stickney, 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693.

Massachusetts.— Gray *v.* Whittemore, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246.

Pennsylvania.— Siddall's Estate, 180 Pa. St. 127, 36 Atl. 570; McBride's Estate, 152 Pa. St. 192, 25 Atl. 513; Rhodes' Estate, 147 Pa. St. 227, 23 Atl. 553; Coggins' Appeal, 124 Pa. St. 10, 16 Atl. 579, 10 Am. St. Rep. 565; Wolf's Estate, 9 Wkly. Notes Cas. 260.

Texas.— Hancock *v.* Butler, 21 Tex. 804.

England.— Pearks *v.* Moseley, 5 App. Cas. 714, 50 L. J. Ch. 57, 43 L. T. Rep. N. S. 449, 29 Wkly. Rep. 1; *In re* Turney, [1899] 2 Ch. 739, 69 L. J. Ch. 1, 81 L. T. Rep. N. S. 548, 48 Wkly. Rep. 96; *In re* Powell, [1898] 1 Ch. 227, 67 L. J. Ch. 148, 77 L. T. Rep. N. S. 649, 46 Wkly. Rep. 231; *In re* Bevan, 34 Ch. D. 716, 56 L. J. Ch. 652, 56 L. T. Rep. N. S. 277, 35 Wkly. Rep. 400.

See 39 Cent. Dig. tit. "Perpetuities," § 67 *et seq.*

75. Edgerly *v.* Barker, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328; Gray Perp. (2d ed.) 390; *In re* Coppard, 35 Ch. D. 350, 56 L. J. Ch. 606, 56 L. T. Rep. N. S. 359, 35 Wkly. Rep. 473; Mogg *v.* Mogg, 1 Meriv. 654, 15 Rev. Rep. 185, 35 Eng. Reprint 811; Forth *v.* Chapman, 1 P. Wms. 663, 24 Eng. Reprint 559; Leach *v.* Leach, 2 Y. & Coll. 495, 21 Eng. Ch. 495, 63 Eng. Reprint 222. See *In re* Mervin, [1891] 3 Ch. 197, 60 L. J. Ch. 671, 65 L. T. Rep. N. S. 186, 39 Wkly. Rep. 697.

On construction of gifts to A, but if A "dies without issue," to B, see *supra*, III, D, 4, notes 72, 73.

76. Pitt *v.* Jackson, 2 Bro. Ch. 51, 29 Eng. Reprint 27; Robinson *v.* Hardcastle, 2 T. R. 241, 1 Rev. Rep. 467.

77. Suppose land was devised to an unborn person for life, remainder to his children in fee. The unborn person would not be held to take a fee, under the doctrine of *cy pres*. That doctrine is never applied where the enlarged estate given to the unborn person would allow persons to take the property, who were not within the scope of the gifts marked out by the testator. If a gift to A for life, remainder to A's children in tail, is changed into a gift to A in tail, the persons to be entitled are not changed; but if a gift to A for life, remainder to A's children in fee, is changed into a gift to A in fee, then, if A died childless, his collateral heirs would take and they were not within the scope of the gifts marked out by the testator. See Wood *v.* Griffin, 46 N. H. 230; Hale *v.* Pew, 25 Beav. 335, 53 Eng. Reprint 665. *Compare* Allyn *v.* Mather, 9 Conn. 114; Gibson *v.* McNeely, 11 Ohio St. 131.

The courts incline against any extension of the doctrine of the text. *In re* Mortimer, [1905] 2 Ch. 502, 74 L. J. Ch. 745, 93 L. T. Rep. N. S. 459; *In re* Rising, [1904] 1 Ch. 533, 73 L. J. Ch. 455, 90 L. T. Rep. N. S. 504.

78. Suppose there is a limitation to each of the testator's grandchildren, and then a later clause directing that the share of each grandchild shall be settled on it for life, remainder to its children. The remainder to the great grandchildren is too remote, and

makes a second exception to the rule that the construction of an instrument is not to be affected by the existence of the Rule against Perpetuities. Where independent gifts[79] are made to several persons by one description, any modifying clause will be rejected only as to those gifts where the modification would produce an invalid limitation.[80]

D. Separable Limitations. Limitations may be made on separate contingencies, as where property is devised in trust for A for life, and then for such of A's children as reach twenty-two, but if A dies without leaving children surviving, or if none of the surviving children reach twenty-two, then to B. Here the testator has himself stated separately the two contingencies, on the happening of either of which B is to become entitled. The first contingency must be determined within the limits of the Rule, and if A does die without children surviving B takes. This limitation to B is not destroyed, because within the words of the will there is another limitation to B which is too remote.[81] But if the person making the limitations has not himself made the limitations dependent on separate contingencies, the courts will not take his language and evolve from it separate contingencies.[82] To this rule two exceptions are established in England.[83]

therefore the whole modifying clause will be rejected, and the grandchildren will take absolute interests. Slade *v.* Patten, 68 Me. 380; Sears *v.* Putnam, 102 Mass. 5; *In re* Hancock, [1901] 1 Ch. 482, 70 L. J. Ch. 114, 84 L. T. Rep. N. S. 163; Cooke *v.* Cooke, 38 Ch. D. 202, 59 L. T. Rep. N. S. 693, 36 Wkly. Rep. 756; Kampf *v.* Jones, 1 Jur. 814, 2 Keen 756, 7 L. J. Ch. 63, 15 Eng. Ch. 756, 48 Eng. Reprint 821; Arnold *v.* Congreve, 8 L. J. Ch. O. S. 88, 1 Russ. & M. 209, 5 Eng. Ch. 209, 39 Eng. Reprint 80, Taml. 347, 12 Eng. Ch. 347, 48 Eng. Reprint 138.

79. See *supra*, V, B.

80. *In re* Ferneley, [1902] 1 Ch. 543, 71 L. J. Ch. 422, 86 L. T. Rep. N. S. 413, 50 Wkly. Rep. 346; *In re* Russell, [1895] 2 Ch. 698, 64 L. J. Ch. 891, 73 L. T. Rep. N. S. 195, 12 Reports 499, 44 Wkly. Rep. 100.

81. Brown *v.* Wright, 194 Mass. 540, 80 N. E. 612; Gray *v.* Whittemore, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246; Stone *v.* Bradlee, 183 Mass. 165, 66 N. E. 708; Jackson *v.* Phillips, 14 Allen (Mass.) 539. See also Keyes *v.* Northern Trust Co., 227 Ill. 354, 81 N. E. 384; Seaver *v.* Fitzgerald, 141 Mass. 401, 6 N. E. 73; Ackerman *v.* Vreeland, 14 N. J. Eq. 23; Dunlap *v.* Dunlap, 4 Desauss. Eq. (S. C.) 305; Perkins *v.* Fisher, 59 Fed. 801, 8 C. C. A. 270; *In re* Bowles, [1905] 1 Ch. 371, 74 L. J. Ch. 338, 92 L. T. Rep. N. S. 556; Miles *v.* Harford, 12 Ch. D. 691, 41 L. T. Rep. N. S. 378; Cambridge *v.* Rous, 25 Beav. 409, 53 Eng. Reprint 693; Monypenny *v.* Dering, 2 De G. M. & G. 145, 7 Jur. 467, 22 L. J. Ch. 313, 51 Eng. Ch. 112, 42 Eng. Reprint 826; Ferrand *v.* Wilson, 4 Hare 344, 9 Jur. 860, 15 L. J. Ch. 41, 30 Eng. Ch. 344, 67 Eng. Reprint 680; Goring *v.* Howard, 18 L. J. Ch. 105, 16 Sim. 395, 39 Eng. Ch. 395, 60 Eng. Reprint 926; Leake *v.* Robinson, 2 Meriv. 363, 16 Rev. Rep. 168, 35 Eng. Reprint 979; Longhead *v.* Phelps, W. Bl. 704.

82. Suppose property is devised in trust for A for life, and then for such of A's children as reach twenty-two, but if no child of A reaches twenty-two, then for B. A dies, never having had a child. But the gift to B, as framed, is dependent on a contingency which need not necessarily have been determined within the limits of the Rule, and so the gift is void. The court will not mould the language to fit the event which has happened. Hancock *v.* Watson, [1902] A. C. 14, 71 L. J. Ch. 149, 85 L. T. Rep. N. S. 729, 50 Wkly. Rep. 321; *In re* Hancock, [1901] 1 Ch. 482, 70 L. J. Ch. 114, 84 L. T. Rep. N. S. 163; *In re* Bence, [1891] 3 Ch. 242, 60 L. J. Ch. 636, 65 L. T. Rep. N. S. 530; Dungannon *v.* Smith, 12 Cl. & F. 546, 10 Jur. 721, 8 Eng. Reprint 1523; Proctor *v.* Bath, 2 H. Bl. 358; Ibbetson *v.* Ibbetson, 10 Sim. 495, 16 Eng. Ch. 495, 59 Eng. Reprint 707.

83. **The first exception** was established by the case of Evers *v.* Challis, 7 H. L. Cas. 531, 5 Jur. N. S. 825, 29 L. J. Q. B. 121, 7 Wkly. Rep. 622, 11 Eng. Reprint 212. Land was devised to A for life, remainder to her sons attaining twenty-three; but, in case A died without leaving a son who should attain twenty-three, to B. A died without ever having had any children. Here the court did take the language of the will and separated it into two contingencies; one, that A should die without children, and the other that A should have no son reaching twenty-three. If A died without children, the interest of B would take effect as a remainder; if no son of A reached twenty-three, it would take effect as an executory devise. The court held that the contingencies could be separated in such a case. Later cases in England have refused to extend the doctrine of Evers *v.* Challis, *supra*. See Hancock *v.* Watson, [1902] A. C. 14, 71 L. J. Ch. 149, 85 L. T. Rep. N. S. 729, 50 Wkly. Rep. 321; *In re* Bence, [1891] 3 Ch. 242, 60 L. J. Ch. 636, 65 L. T. Rep. N. S. 530; *In re* Hancock, [1901] 1 Ch. 482, 70 L. J. Ch. 114, 84 L. T. Rep. N. S. 163; Gray Perp. (2d ed.) § 338 *et seq.* See also Timanus *v.* Dugan, 46 Md. 402; Halsey *v.* Goddard, 86 Fed. 25.

The second exception was established by the case of Pelham *v.* Gregory, 3 Bro. P. C. 204, 1 Eng. Reprint 1271. Suppose person-

X. CONFLICT OF LAWS.

The law governing the creation of future interests is not the same in all jurisdictions.[84] The validity of limitations in land is determined by the law of the jurisdiction in which the land lies.[85] This applies to limitations in terms for years.[86] The validity of limitations in personalty created by will may be determined solely by the law of the testator's domicile;[87] but there is a considerable body of authority in which, on the determination of the validity of such limitations, the law of the legatee's domicile was allowed to control.[88] The authorities respecting the validity of limitations in personalty created by conveyance *inter vivos* are scanty.[89] Where the testator has directed an immediate, absolute conversion of property, the validity of the limitations created will be determined as though such conversion had taken place at testator's death.[90]

XI. STATUTORY CHANGES.

A. The New York Statutes — 1. IN GENERAL. The New York statutes on the subject of perpetuities depart so widely from the common law that they make a system in themselves, calling in the main for independent statement.[91]

alty is given to A for life, remainder to the first and other sons of A in tail male, remainder to B for life, remainder to the first and other sons of B in tail male. Here, if A dies without sons, the sons of B, upon B's death, are allowed to take. See *In re* Lowman, [1895] 2 Ch. 348, 64 L. J. Ch. 567, 72 L. T. Rep. N. S. 816, 12 Reports 362.

84. See *infra*, XI.

85. *Connecticut.*— Clark's Appeal, 70 Conn. 195, 39 Atl. 155; Wheeler *v.* Fellowes, 52 Conn. 238.

Massachusetts.— Fellows *v.* Miner, 119 Mass. 541.

Minnesota.— *In re* Tower, 49 Minn. 371, 52 N. W. 27.

New York.— Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943; Hobson *v.* Hale, 95 N. Y. 588; Knox *v.* Jones, 47 N. Y. 389; White *v.* Howard, 46 N. Y. 144; Trowbridge *v.* Trowbridge, 5 N. Y. App. Div. 318, 39 N. Y. Suppl. 241 [*affirmed* in 158 N. Y. 682, 52 N. E. 1126]; Bremer *v.* Penniman, 11 Hun 147 [*affirmed* in 72 N. Y. 603].

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

Wisconsin.— Ford *v.* Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, 72 Wis. 621, 40 N. W. 502.

86. Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943; Freke *v.* Carbery, L. R. 16 Eq. 461, 21 Wkly. Rep. 835. *Compare* Despard *v.* Churchill, 53 N. Y. 192.

87. Hussey *v.* Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. L. Rep. 315; Fellows *v.* Miner, 119 Mass. 541; Dammert *v.* Osborn, 140 N. Y. 30, 35 N. E. 407; Cross *v.* U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125, 27 Am. St. Rep. 597, 15 L. R. A. 606; Bascom *v.* Albertson, 34 N. Y. 584; De Renne's Estate, 12 Wkly. Notes Cas. (Pa.) 94.

88. Hope *v.* Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Manice *v.* Manice, 43 N. Y. 303; Mapes *v.* American Home Missionary Soc., 33 Hun (N. Y.) 360. See also Robb *v.* Washington, etc., College, 103 N. Y. App. Div. 327, 93 N. Y. Suppl. 92 [*affirmed* in 185 N. Y. 485, 78 N. E. 359]; Fordyce *v.* Bridges, 17 L. J. Ch. 185, 2 Phil. 497, 22 Eng. Ch. 497, 41 Eng. Reprint 1035. A, domiciled in state X, by will made a provision in favor of a corporation of state Y. The provision was valid in state Y, and would have been valid in state X if made in favor of a corporation of state X. It was, by comity, held valid by the courts of state X. Iglehart *v.* Iglehart, 204 U. S. 478, 27 S. Ct. 329, 51 L. ed. 575.

89. See Robb *v.* Washington, etc., College, 103 N. Y. App. Div. 327, 93 N. Y. Suppl. 92; Fowler's Appeal, 125 Pa. St. 388, 17 Atl. 431, 11 Am. St. Rep. 902; Heywood *v.* Heywood, 29 Beav. 9, 7 Jur. N. S. 228, 30 L. J. Ch. 155, 3 L. T. Rep. N. S. 429, 9 Wkly. Rep. 62, 54 Eng. Reprint 527.

90. See *In re* Tower, 49 Minn. 371, 52 N. W. 27; Hope *v.* Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413; Becker *v.* Chester, 115 Wis. 90, 91 N. W. 87, 650. *Compare* Parkhurst *v.* Roy, 7 Ont. App. 614.

91. Where the New York law does not differ from the common law, the New York decisions have been cited in connection with those of other jurisdictions. The only subjects on which New York decisions have been so cited are found *supra*, III, B, 4, note 40; III, D, 3 note, 66; IV, F, note 99; VII, C, note 47; X, notes 89, 90.

For authorities under the law before the Revised Statutes see Chwatal *v.* Schreiner, 148 N. Y. 683, 43 N. E. 166; Auburn Theological Seminary *v.* Kellogg, 16 N. Y. 83; Tator *v.* Tator, 4 Barb. (N. Y.) 431; Hill *v.* Hill, 4 Barb. (N. Y.) 419; Thomson *v.* Livingston, 4 Sandf. (N. Y.) 539; Paterson *v.* Ellis, 11 Wend. (N. Y.) 259; Moffat *v.* Strong, 10 Johns. (N. Y.) 12; Lovett *v.* Bu-

2. SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION OF REALTY — a. In General. The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.[92] An absolute fee is a fee not defeasible or conditional.[93] The statute requires, not that the absolute fee with the right of possession shall vest within the statutory limit, but that there shall be no interest which may remain inalienable beyond the statutory limit.[94] At common law it is contingent interests which are obnoxious as perpetuities;[95] under the New York statutes it is inalienable interests.[96]

b. Interests Causing Suspension — (i) *Limitations Under Which Persons Not in Being May Become Entitled.* Limitations in favor of persons not in being obviously suspend the absolute power of alienation. Any limitation therefore under which a person may become entitled who must not necessarily come into being within the statutory limit, if at all, is invalid. Thus of a limitation to such of the issue of A as may be living at the termination of three or more lives or minorities, or at the termination of a period not measured by lives.[97] Similarly of a limitation to a corporation which must not necessarily be formed within the statutory limit, if at all.[98]

loid, 3 Barb. Ch. (N. Y.) 137; Ferris *v.* Gibson, 4 Edw. (N. Y.) 707; Conklin *v.* Conklin, 3 Sandf. Ch. (N. Y.) 64.

92. N. Y. Laws (1896), c. 547, § 32, provide as follows: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority."

93. N. Y. Laws (1896), c. 547, § 21. A limitation to A and his heirs, without qualification, gives A an absolute fee. A limitation to A and his heirs, but if A dies unmarried, then to B and his heirs, gives A a defeasible fee. See *supra*, III, D.

94. There may be many interests in the land; the statute is concerned only with the alienability of whatever interests there are. If there are persons in being who by their united action can convey an absolute fee in possession, the absolute power of alienation is not suspended at all. See Thieler *v.* Rayner, 115 N. Y. App. Div. 626, 100 N. Y. Suppl. 993 [*affirmed* in 190 N. Y. 546, 83 N. E. 1133]; Graham *v.* Graham, 49 Misc. (N. Y.) 4, 97 N. Y. Suppl. 779.

95. See *supra*, IV, B.

96. See *infra*, XI, A, 2, c, (I).

Is it then ever important, under the New York statutes, to determine whether an interest is vested or contingent? See *infra*, notes 20, 30, 39, 81.

97. Herzog *v.* Title Guarantee, etc., Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146; Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481; Manice *v.* Manice, 43 N. Y. 303; Monarque *v.* Requa, 53 How. Pr. (N. Y.) 438; Hone *v.* Van Schaick, 20 Wend. (N. Y.) 564; Thomas' Estate, Tuck. Surr. (N. Y.) 367. Suppose the limitation is not to the issue, but to the children of A. Under this limitation only issue of the first generation may become entitled (see Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; Wright *v.* Mercein, 34 Misc. (N. Y.) 414, 69 N. Y. Suppl. 936) and all must necessarily come into being within the life of A. But suppose the limitation is to A for life, remainder to her children, if any, or, if she has no children then to the children of B and C. Until the termination of the lives of A, B, and C, persons who may become entitled may come into being, and the limitation is therefore invalid. Du Bois *v.* Ray, 35 N. Y. 162. To the same effect see Brown *v.* Evans, 34 Barb. (N. Y.) 594. The absolute power of alienation was suspended, but not for an illegal period, by limitations under which persons not in being might become entitled in Wilson *v.* White, 109 N. Y. 59, 15 N. E. 749, 4 Am. St. Rep. 420; Graham *v.* Fountain, 2 N. Y. Suppl. 598.

98. Since the enactment of N. Y. Laws (1893), c. 701, and the decision of Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568, property given for charitable purposes may pass to a corporation not necessarily formed within the statutory limit. See *infra*, XI, A, 6. Prior to this enactment a gift even for charitable purposes could not be made to a corporation not in existence unless such corporation must necessarily be formed within the statutory limit, if at all. Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; People *v.* Simonson, 126 N. Y. 299, 27 N. E. 380; Booth *v.* Christ Baptist Church, 126 N. Y. 215, 28 N. E. 238; Cruikshank *v.* Home for Friendless, 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140; Rose *v.* Rose, 4 Abb. Dec. (N. Y.) 108; *In re* New York, 55 Hun (N. Y.) 204, 7 N. Y. Suppl. 836 [*affirmed* in

(II) *Trusts, the Beneficial Interest in Which Is Inalienable.* Express trusts of realty may be created for the following purposes: (1) To sell land for the benefit of creditors; (2) to sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of land and apply them to the use of any person during the life of such person, or any shorter term; (4) to receive the rents and profits of land, and to accumulate the same.[99] The beneficial interest in a trust of the third class is made inalienable by statute,[1] and it has long been settled that such a trust suspends the absolute power of alienation. Any such trust therefore which must not necessarily terminate within the statutory limit is invalid.[2] The courts are liberal in determining what trusts may be created under the provisions for trusts of the third class. It is now held that these provisions authorize not only trusts to receive the rents and profits and pay them to a beneficiary,[3] but also trusts to receive the rents and profits and therefrom to pay an annuity to a beneficiary.[4]

(III) *Imperative Powers, the Beneficial Interest in Which Is Inalienable.* Where persons other than the grantee of the power[5] have any interest in its execution, the power is held in trust;[6] and every trust power, unless its execution is expressly made to depend on the will of the grantee, is imperative, and imposes a duty upon the grantee the performance of which may be compelled for the benefit of the persons interested.[7] If an imperative power is to be exercised for the benefit of a person not in being, or *semble* for the benefit of a trustee under a trust of the third class, the power suspends the absolute power of alienation. The power is therefore invalid, if all persons who may become entitled under the exercise of the power must not necessarily come into being within

119 N. Y. 660, 24 N. E. 852]. *Semble* that these authorities would still control the validity of a limitation to corporations not in existence in cases where the property is not given for charitable purposes.

99. N. Y. Laws (1896), c. 547, § 76.

1. N. Y. Laws (1896), c. 547, § 83. The inalienability results, not from the fact that the law gives effect to restraints on the alienation of the beneficial interest imposed by the creator of the trust, but from the command of the statute. The creator of the trust cannot make the interest of the beneficiary alienable. Coster *v.* Lorillard, 14 Wend. (N. Y.) 265. And where the beneficiary of a trust to continue for the beneficiary's life was also made the donee of a power, it was held, to give effect to both provisions, that the power extended only over the remainder. Crooke *v.* Kings County, 97 N. Y. 421.

2. Herzog *v.* Title Guarantee, etc., Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146. Such a trust has proved to be the most frequent cause of an illegal suspension of the absolute power of alienation. There are about five hundred decisions in the New York reports on the subject of perpetuities, and a large proportion of these could be properly cited in support of the text. In addition therefore to the case given above, only such cases are here given as are not cited elsewhere in this article. Gueutal *v.* Gueutal, 113 N. Y. App. Div. 310, 98 N. Y. Suppl. 1002; Almstaedt *v.* Bendick, 47 N. Y. App. Div. 265, 61 N. Y. Suppl. 1019; Walker *v.* Taylor, 15 N. Y. App. Div. 452, 44 N. Y. Suppl. 446; Cowen *v.* Rinaldo, 82 Hun (N. Y.) 479, 31 N. Y. Suppl. 554; O'Brien *v.* Mooney, 5 Duer (N. Y.) 51; *In re* Bruchaeser, 49 Misc. (N. Y.) 194, 98 N. Y. Suppl. 937; Finch *v.* Wilkes, 17 Misc. (N. Y.) 428, 41 N. Y. Suppl. 227; Case *v.* Case, 16 Misc. (N. Y.) 393, 39 N. Y. Suppl. 530; Giraud *v.* Giraud, 58 How. Pr. (N. Y.) 175; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265; Scott *v.* Monell, 1 Redf. Surr. (N. Y.) 431.

3. Moore *v.* Hegeman, 72 N. Y. 376; Vernon *v.* Vernon, 53 N. Y. 351; Leggett *v.* Perkins, 2 N. Y. 297. See also Kiah *v.* Grenier, 56 N. Y. 220; De Kay *v.* Irving, 5 Den. (N. Y.) 646; Gott *v.* Cook, 7 Paige (N. Y.) 521 [*affirmed* in 24 Wend. 641, 35 Am. Dec. 641]; Cruger *v.* Douglas, 4 Edw. (N. Y.) 433 [*affirmed* in 5 Barb. 225].

4. Robb *v.* Washington, etc., College, 185 N. Y. 485, 78 N. E. 359; Herzog *v.* Title Guarantee, etc., Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146; Brown *v.* Quintard, 177 N. Y. 75, 69 N. E. 225; Cochrane *v.* Schell, 140 N. Y. 516, 35 N. E. 971 [*explaining* Hawley *v.* James, 16 Wend. (N. Y.) 61, and *overruling* on this point Lang *v.* Ropke, 5 Sandf. (N. Y.) 363; Griffen *v.* Ford, 1 Bosw. (N. Y.) 123]; Dodge *v.* Pond, 23 N. Y. 69; Matter of Trotter, 104 N. Y. App. Div. 188, 93 N. Y. Suppl. 404 [*affirmed* in 182 N. Y. 465, 75 N. E. 305]; Hooker *v.* Hooker, 41 N. Y. App. Div. 235, 58 N. Y. Suppl. 536; McSorley *v.* Wilson, 4 Sandf. Ch. (N. Y.) 515. See also Smith *v.* Havens Relief Fund Soc., 44 Misc. (N. Y.) 594, 90 N. Y. Suppl. 168; Donaldson *v.* American Tract Soc., 1 Thomps. & C. (N. Y.) addenda 15; Matter of Russell, 5 Dem. Surr. (N. Y.) 388.

5. Nature of a power see *supra*, VII.

6. N. Y. Laws (1896), c. 547, §§ 117, 118.

7. N. Y. Laws (1896), c. 547, § 137.

the statutory limit, if at all,[8] or *semble* if the trust must not necessarily cease within the statutory limit.[9]

c. Interests and Disabilities Not Causing Suspension — (I) *ALIENABLE INTERESTS.* Alienable[10] interests, whether legal or equitable, vested or contingent, do not suspend the absolute power of alienation. Thus of present legal estates for life or years,[11] mortgages and judgments,[12] and charges,[13] including annuities charged upon realty but not supported by a trust.[14] Thus also of rever-

8. Thus of a power to sell property and divide the proceeds among the issue of A (see *supra*, note 97), living at the end of a period not measured by lives. Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; Haynes *v.* Sherman, 117 N. Y. 433, 22 N. E. 938; Trowbridge *v.* Metcalf, 5 N. Y. App. Div. 318, 39 N. Y. Suppl. 241; Kilpatrick *v.* Barron, 54 Hun (N. Y.) 322, 7 N. Y. Suppl. 542 [*affirmed* in 125 N. Y. 751, 26 N. E. 925]. See also Radley *v.* Kuhn, 97 N. Y. 26; Hone *v.* Van Schaick, 20 Wend. (N. Y.) 564. In *In re* Butterfield, 133 N. Y. 473, 31 N. E. 515, and in Weeks *v.* Cornwell, 104 N. Y. 325, 10 N. E. 431, counsel seem not to have contended that the power in question was valid, and the court therefore did not carefully consider whether the beneficial interest in the power was alienable.

Similarly of a power to be exercised for the benefit of a corporation which must not necessarily be formed within the statutory limits, if at all. Booth *v.* Christ Baptist Church, 126 N. Y. 215, 28 N. E. 238 [*distinguishing* Blanchard *v.* Blanchard, 4 Hun (N. Y.) 287 (*affirmed* in 70 N. Y. 615)]. The authority of this decision is now restricted to cases where the property is not given for charitable purposes. See *supra*, note 98.

9. Garvey *v.* McDevitt, 72 N. Y. 556, where the testator directed his executors to sell his real estate four years after his decease, and to pay over the proceeds to the Bishop of R upon a charitable trust.

Under N. Y. Laws (1893), c. 701, as interpreted by Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568 (see *supra*, note 98), if property is given for charitable purposes to a corporation not yet formed, the courts will consider it as an immediate gift to charity, to be administered in any proper manner. If the corporation intended by the testator can be formed in a reasonable time, it will doubtless be allowed to administer the gift. But it is to be noted that in Garvey *v.* McDevitt, 72 N. Y. 556, the testator did not make an immediate gift to charity. The courts have not, since the enactment of Laws (1893), c. 701, been called upon to deal with a similar case. See Leonard *v.* Burr, 18 N. Y. 96. *Semble* that the principle of Garvey *v.* McDevitt, 72 N. Y. 556, would control where the property is given on a trust of the third class. See *supra*, XI, A, 2, b, (II). See also the remarks of Earl, J., in that case, pp. 563, 564.

10. It is not necessary that an interest should be assignable. It is enough if it is releasable. Beardsley *v.* Hotchkiss, 96 N. Y. 201; Everitt *v.* Everitt, 29 N. Y. 39; Miller *v.* Emans, 19 N. Y. 384. And so if the beneficial interest in a trust of the third class (see *supra*, XI, A, 2, b, (II)), is destructible by a merger into the remainder. Mills *v.* Mills, 50 N. Y. App. Div. 221, 63 N. Y. Suppl. 771. *Compare* Metcalf *v.* Union Trust Co., 181 N. Y. 39, 73 N. E. 498. Such interest can, however, no longer be merged into the remainder. N. Y. Laws (1903), c. 88.

11. Suppose land is given to A, a person in being, for life, remainder to B. A's life-estate can forthwith be conveyed, and causes no suspension. Wilber *v.* Wilber, 165 N. Y. 451, 59 N. E. 264; Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812; Murphy *v.* Whitney, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123; Bailey *v.* Bailey, 97 N. Y. 460; Matter of Bray, 118 N. Y. App. Div. 533, 102 N. Y. Suppl. 989; Tracy *v.* Ames, 4 Lans. (N. Y.) 500; Emmons *v.* Cairns, 3 Barb. (N. Y.) 243; Matter of Hurlbut, 51 Misc. (N. Y.) 263, 100 N. Y. Suppl. 1098; Kessler *v.* Friede, 29 Misc. (N. Y.) 187, 60 N. Y. Suppl. 891; Jessup *v.* Pringle Memorial Home, 27 Misc. (N. Y.) 427, 59 N. Y. Suppl. 207 [*affirmed* in 47 N. Y. App. Div. 622, 62 N. Y. Suppl. 308]. There are some fugitive decisions or remarks *contra*. See Hinckley *v.* Mayborne, 92 Hun (N. Y.) 473, 36 N. Y. Suppl. 958; Bowers *v.* Beekman, 16 Hun (N. Y.) 268; Brooklyn *v.* Seaman, 30 Misc. (N. Y.) 507, 62 N. Y. Suppl. 601. This principle covers covenants for renewals contained in leases. Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369.

12. Hawley *v.* James, 16 Wend. (N. Y.) 61.

13. Radley *v.* Kuhn, 97 N. Y. 26; Franklin *v.* Minertzhagen, 39 N. Y. App. Div. 555, 57 N. Y. Suppl. 401; Hunter *v.* Hunter, 17 Barb. (N. Y.) 25; Mason *v.* Jones, 2 Barb. (N. Y.) 229; Eells *v.* Lynch, 8 Bosw. (N. Y.) 465.

14. A trust to pay an annuity may be created under the third subdivision of the provisions for express trusts, and such a trust does suspend the absolute power of alienation. See Cochrane *v.* Schell, 140 N. Y. 516, 35 N. E. 971; and *supra*, XI, A, 2, b, (II). But if no trust is created to support the annuity, and the annuity is simply made a charge upon land, the interest of the annuitant is alienable, and the annuity therefore does not suspend the absolute power of alienation of the land upon which it is charged. Frazer *v.* Hoguet, 65 N. Y. App. Div. 192, 72 N. Y. Suppl. 840; Matthews *v.* Studley, 17 N. Y. App. Div. 303, 45 N. Y. Suppl. 201 [*affirmed* in 161 N. Y. 633, 57 N. E. 1117]; Law *v.* May, 13 N. Y. Suppl. 666; Hawley *v.* James, 16 Wend. (N. Y.) 61. See also Wells *v.* Squires, 117 N. Y. App. Div. 502, 102 N. Y. Suppl. 597 [*affirmed* in 191 N. Y. 529]; Robb *v.* Washington, etc., College, 103 N. Y. App.

sions,[15] possibilities of reverter,[16] rights of escheat,[17] and rights of entry for condition broken.[18] Future legal estates,[19] although dependent on a contingency which may not be determined within the statutory limit, are valid, provided all persons who may be entitled thereunder must necessarily come into being, if at all, within the statutory limit. In other words an alienable contingent interest does not suspend the absolute power of alienation.[20] The beneficial interest in trusts is alien-

Div. 327, 93 N. Y. Suppl. 92; Franklin *v.* Minertzhagen, 39 N. Y. App. Div. 555, 57 N. Y. Suppl. 401; Killam *v.* Allen, 52 Barb. (N. Y.) 605. In Buchanan *v.* Little, 154 N. Y. 147, 47 N. E. 970, property was given to trustees who were to pay annuities to A and B, and the residue of the income to C and D. The trust was to terminate on the death of C and D. The court held that there was no illegal suspension; that on the termination of the trust the annuities became a charge on the property, and the present value of the annuities was to be paid to the annuitants before the property was distributed. This decision was followed in People's Trust Co. *v.* Flynn, 188 N. Y. 385, 80 N. E. 1098. *Compare* Matter of Charlier, 22 N. Y. App. Div. 71, 47 N. Y. Suppl. 818.

15. Floyd *v.* Carow, 88 N. Y. 560; Woodgate *v.* Fleet, 44 N. Y. 1. A reversion is assignable. N. Y. Laws (1896), c. 547, §§ 26, 49. See *supra*, III, B, 3.

16. Leonard *v.* Burr, 18 N. Y. 96; Longheed *v.* Dykeman Baptist Church, etc., 40 N. Y. Suppl. 586. See also Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449. Possibilities of reverter may be released. Miller *v.* Emans, 19 N. Y. 384. See *supra*, III, B, 4.

17. Wright *v.* Saddler, 20 N. Y. 320; Wadsworth *v.* Wadsworth, 12 N. Y. 376. The state can release its right of escheat. See cases cited above in this note. See *supra*, III, B, 5.

18. Plumb *v.* Tubbs, 41 N. Y. 442; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; La Chapelle *v.* Burpee, 69 Hun (N. Y.) 436, 23 N. Y. Suppl. 453. See also Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449. *Compare* Craig *v.* Wells, 11 N. Y. 315. A right of entry for condition broken is not assignable. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455. But *semble* that it is releasable. Miller *v.* Emans, 19 N. Y. 384. See *supra*, III, D, 3.

19. "Future estates" is a statutory term which covers interests known to the common law as remainders, springing uses, shifting uses, and executory devises. N. Y. Laws (1896), c. 547, §§ 26, 27. See *supra*, III.

20. By the express terms of the statute (N. Y. Laws (1896), c. 547, § 32) the absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. It may be suspended because the persons entitled to some interest in the property are not yet in being (see *supra*, XI, A, 2, b, (I)), or because some interest is, by the provisions of the statute, made inalienable (see *supra*, XI, A, 2, b, (II)). But it is never suspended unless there is an interest in the land which for some reason is inalienable. In Robert *v.* Corning, 89 N. Y. 225, 235, Andrews, C. J., commenting on the statutory declaration as to when the absolute power of alienation is suspended, said: "The rule declared in this section, constitutes, under our statute, the sole test of an unlawful perpetuity." See also Williams *v.* Montgomery, 148 N. Y. 519, 43 N. E. 57; Sawyer *v.* Cubby, 146 N. Y. 192, 40 N. E. 869. No court has ever, on this cardinal point, consciously and expressly decided to the contrary, but there are decisions and remarks even as to realty (and as to personalty see *infra*, XI, A, 2, b, (II), note 30) which are not in harmony with this statement of Andrews, C. J. Suppose realty is devised to A for life, remainder to such of A's children as reach twenty-five, but, if none reach twenty-five, then to B. Upon A's death, all the persons who may become entitled are in being. Who will become entitled is, however, not yet clear, and will not become clear until all of A's children reach twenty-five, or die. If, then, all contingencies respecting the title must be determined, or, in other words, if all interests must vest within the statutory limit, some at least of these provisions are invalid; for even if A had not more than two children when the testator died, other children might be born to him. But the disability of infancy does not suspend the absolute power of alienation (see *infra*, XI, A, 2, c, (II)). Upon A's death therefore there are persons in being, namely, all the children of A and B, who by their united action can convey an absolute fee. If, then, it is enough that all interests become alienable within the statutory limit, there is no illegal suspension. Such a devise, by the distinct weight of authority, involves no illegal suspension. See the discussion of this question in Nellis *v.* Nellis, 99 N. Y. 505, 3 N. E. 59; Beardsley *v.* Hotchkiss, 96 N. Y. 201; Mott *v.* Ackerman, 92 N. Y. 539; Everitt *v.* Everitt, 29 N. Y. 39; Miller *v.* Emans, 19 N. Y. 384; Morton *v.* Morton, 8 Barb. (N. Y.) 18; Emmons *v.* Cairns, 3 Barb. (N. Y.) 243; Parks *v.* Parks, 9 Paige (N. Y.) 107; Gott *v.* Cook, 7 Paige (N. Y.) 521 [*affirmed* in 24 Wend. 641, 35 Am. Dec. 641]. See also Sawyer *v.* Cubby, 146 N. Y. 192, 40 N. E. 869; Hennessy *v.* Patterson, 85 N. Y. 91; Tucker *v.* Bishop, 16 N. Y. 402; Eells *v.* Lynch, 8 Bosw. (N. Y.) 465. *Compare* Chipman *v.* Montgomery, 63 N. Y. 221; Sanford *v.* Goodell, 82 Hun (N. Y.) 369, 31 N. Y. Suppl. 490; Tayloe *v.* Gould, 10 Barb. (N. Y.) 388; *In re* Marcial, 15 N. Y. Suppl. 89. Is there any limit to the doctrine that the absolute power of alienation is not suspended, provided there are persons in being who by their united

able, except in trusts of the third class.[21] Trusts, the beneficial interest in which is alienable, do not cause suspension.[22] Thus also of imperative powers, the beneficial interest in which is alienable.[23] It is settled that an imperative power may be given to A, under which he is entitled to possess and manage realty, to receive the rents and profits, and apply them for the benefit of, or pay them to, one or more persons, and that such power does not necessarily suspend the absolute power of alienation.[24]

(II) *Infancy.* The disability of an infant to convey his real property does not cause suspension;[25] and an infant is considered to be in being as soon as it is

action can convey an absolute fee? Suppose the testator devised Greenacre to A for life, then to A's widow for life, provided A's widow was in being at the death of the testator, then to B upon a trust of the third class to last for the lives of C and D, who were in being at the death of the testator, then to E in fee. The legal life-estate to A does not suspend the power of alienation (see *supra*, note 11). A legal life-estate to M, provided M proved to be A's widow, would not suspend it (see the preceding paragraphs of this note). If all living females in being at the testator's death joined in the conveyance, a good title could be made to the life-estate limited to A's widow. Consequently, so soon as C and D die, there will be persons in being who can convey an absolute fee, namely, A, all living females in being at the death of the testator, and C. While there are cases in which the courts have proceeded or spoken as though vesting, and not alienability, was necessary to prevent suspension (see the preceding paragraphs of this note), no case has yet arisen in which the court has recognized that alienability is the statutory requirement, and yet has imposed a limit on the doctrine that the absolute power of alienation is not suspended, within the meaning of the statute, provided there are persons in being who by their united action can convey it. But see Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; and *supra*, II, C, note 19.

21. See *supra*, XI, A, 2, b, (II).

1 **N. Y. Rev. St. 730, § 63, provided:** "No person beneficially interested in a trust for the receipt of the rents and profits of land can assign or in any manner dispose of such interest; but the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." On the construction of this provision see Radley *v.* Kuhn, 97 N. Y. 26.

The statute now provides: "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust [in real property] may be transferred." N. Y. Laws (1896), c. 547, § 83; N. Y. Laws (1903), c. 88.

The subject of charitable trusts is treated separately. See *infra*, XI, A, 6.

22. Radley *v.* Kuhn, 97 N. Y. 26; Hawley *v.* James, 16 Wend. (N. Y.) 61. There is a harmless *dictum contra* in Garvey *v.* McDevitt, 72 N. Y. 556.

23. Suppose a power is given to A to sell property, and pay the proceeds to persons in being for their own use. The grantee of the power and these persons can convey an absolute fee, and the power does not therefore suspend the absolute power of alienation. Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; Garvey *v.* McDevitt, 72 N. Y. 566; Heermans *v.* Robertson, 64 N. Y. 332; Buchanan *v.* Tebbetts, 69 Hun (N. Y.) 81, 23 N. Y. Suppl. 244. See also Hetzel *v.* Barber, 69 N. Y. 1; Keyser *v.* Mead, 53 Misc. (N. Y.) 114, 103 N. Y. Suppl. 1091.

Similarly of a power to partition.— Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814; Manice *v.* Manice, 43 N. Y. 303; De Kay *v.* Irving, 5 Den. (N. Y.) 646. See also Weeks *v.* Cornwell, 104 N. Y. 325, 10 N. E. 431.

24. Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481 (to continue until B reaches thirty); Van Brunt *v.* Van Brunt, 111 N. Y. 178, 19 N. E. 60; Post *v.* Hover, 33 N. Y. 593 (to be exercised for the benefit of three children, and to continue until all reached twenty-one); Franklin *v.* Minertzhagen, 39 N. Y. App. Div. 555, 57 N. Y. Suppl. 401 (the power to continue during a minority). See also Hillyer *v.* Vandewater, (N. Y. 1890) 24 N. E. 999; Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814; Tucker *v.* Tucker, 5 N. Y. 408; Doubleday *v.* Newton, 27 Barb. (N. Y.) 431; Wright *v.* Mercein, 34 Misc. (N. Y.) 414, 69 N. Y. Suppl. 936; Neilson *v.* Brown, 31 Misc. (N. Y.) 562, 65 N. Y. Suppl. 585; Mullins *v.* Mullins, 11 Misc. (N. Y.) 463, 33 N. Y. Suppl. 430; Jost *v.* Jost, 22 Alb. L. J. (N. Y.) 135. In Greene *v.* Greene, 125 N. Y. 506, 26 N. E. 739, 21 Am. St. Rep. 743, powers of management were given to the same persons in whom the legal title was vested, and this was held only to show testator's intent that such persons should be tenants in common.

Similar question as to personalty is discussed *infra*, note 39.

25. In Beardsley *v.* Hotchkiss, 96 N. Y. 201, 214, the court said the statute aimed only at suspension caused "by the terms of the instrument, and not such as necessarily arises from the disability of infancy, or from other causes outside of the instrument." To the same effect see Everitt *v.* Everitt, 29 N. Y. 39; Quade *v.* Bertsch, 65 N. Y. App. Div. 600, 72 N. Y. Suppl. 916 [*affirmed* in 173 N. Y. 615, 66 N. E. 1115]; Doubleday *v.* Newton, 27 Barb. (N. Y.) 431; Hunter *v.* Hunter, 17 Barb. (N. Y.) 25. In La Cha-

begotten.[26] So far therefore as the statute against suspension of the absolu power of alienation is concerned, any interest limited to a person is regarded as alienable so soon as that person is begotten.

3. Suspension of the Absolute Ownership of Personalty — a. In General. The statute defines the limit within which the absolute ownership of personalty may be suspended, but it provides no test to determine when the absolute ownership is suspended.[27]

b. Interests Causing Suspension — (i) *Limitations Under Which Persons Not in Being May Become Entitled.* Limitations in favor of persons not in being suspend the absolute ownership. Any limitation therefore under which a person may become entitled who must not necessarily come into being within the statutory limit, if at all, is invalid. Thus of a limitation to such of the issue of A as may be living at the termination of three or more lives or minorities, or at the termination of a period not measured by lives.[28] Similarly of a limitation to a corporation which must not necessarily be formed within the statutory limit, if at all.[29]

(ii) *Limitations to Such of a Class as Shall Live to a Prescribed Age or Date.* There is authority that a limitation to such of a class as shall live to a prescribed age or date is invalid, if thereunder it may remain uncertain, for a time beyond the statutory limit, what members of the class will become entitled to the personalty.[30]

pelle *v.* Burpee, 69 Hun (N. Y.) 436, 23 N. Y. Suppl. 453, the court held that a person confined in state prison under an unexpired sentence for a term of years could take and grant property.

26. Schlereth *v.* Schlereth, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616; Smith *v.* Edwards, 88 N. Y. 92; Mason *v.* Jones, 2 Barb. (N. Y.) 229; N. Y. Laws (1896), c. 547, § 46. See also Cooper *v.* Heatherton, 65 N. Y. App. Div. 561, 73 N. Y. Suppl. 14.

27. N. Y. Laws (1897), c. 417, § 2, provide as follows: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator." *Semble* that the legislature intended that the causes of suspension of the absolute ownership of personalty and the causes of suspension of the absolute power of alienation of realty should be the same. See *supra*, XI, A, 2, b; and *infra*, note 30.

28. Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481; Ward *v.* Ward, 105 N. Y. 68, 11 N. E. 373; Smith *v.* Edwards, 88 N. Y. 92; Savage *v.* Burnham, 17 N. Y. 561; Mansbach *v.* New, 58 N. Y. App. Div. 191, 68 N. Y. Suppl. 674 [*affirmed* in 170 N. Y. 585, 63 N. E. 1119]; Stoiber *v.* Stoiber, 40 N. Y. App. Div. 156, 57 N. Y. Suppl. 916; Vail *v.* Vail, 7 Barb. (N. Y.) 226; Adams *v.* Berger, 18 N. Y. Suppl. 33, 27 Abb. N. Cas. 429; Dayton *v.* Conklin, 2 Ch. Sent. (N. Y.) 54. See also *supra*, XI, A, 2, b, (i), and cases cited in note 97.

29. See *supra*, XI, A, 2, b, (i), and cases cited in note 98. For a valid suspension of the absolute ownership by a gift to a corporation to be formed see St. John *v.* Andrews Inst. for Girls, 117 N. Y. App. Div. 698, 102 N. Y. Suppl. 808.

30. Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400, property given to A for life, then to such children of A as are alive when the youngest reaches twenty-one, or, if none reach twenty-one, then to B and C. Note that all the persons who might become entitled under this gift must come into being, if at all, before A's death. To the same effect are Schlereth *v.* Schlereth, 173 N. Y. 444, 63 N. E. 130, 93 Am. St. Rep. 616, and Matter of Howland, 75 N. Y. App. Div. 207, 77 N. Y. Suppl. 1025. See also Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814; Chipman *v.* Montgomery, 63 N. Y. 221; Matter of Ackermann, 36 Misc. (N. Y.) 752, 74 N. Y. Suppl. 477; Adams *v.* Berger, 18 N. Y. Suppl. 33, 27 Abb. N. Cas. 429; Thomson *v.* Thomson, 55 How. Pr. (N. Y.) 494. Suppose personalty is limited to such of the three children of the testator as reach twenty-five, all being under that age, and, if none reach that age, then to X. The three children and X may forthwith convey a perfect title. If, on the question whether or not the absolute ownership is suspended, alienability is the test, the absolute ownership is not suspended at all in the case supposed. Suppose again personalty is limited to such of the children of A, a living person, as reach twenty-five, and, if none reach that age, then to X. All the persons who may become entitled must come into being, if at all, before A's death, and, if alienability is the test, the absolute ownership is suspended for only one life. But in both the cases supposed all the interests in the property are not vested and, even in the first case, they must not necessarily all vest within two lives. For two of the children may die, and it will still remain uncertain who will become entitled to the property.

(III) *Trusts, the Beneficial Interest in Which Is Inalienable.* A trust to receive the income of personalty, and apply it to the use of, or pay it to, any person, during the life of that person, or for any shorter term, suspends the absolute ownership of the personalty, and is therefore invalid if it may continue beyond the statutory limit.[31] Thus also of a trust to receive the income of personalty and therefrom to pay an annuity to a beneficiary.[32]

(IV) *Imperative Powers, the Beneficial Interest in Which Is Inalienable.* An imperative power, the beneficial interest in which is inalienable, suspends the absolute ownership.[33]

c. Interests and Disabilities Not Causing Suspension — (I) *Alienable Interests.* Alienable interests do not suspend the absolute ownership.[34] Thus of present legal estates for life or years,[35] and annuities charged upon a fund, but

Therefore, if vesting is the test, the absolute ownership is unduly suspended. *A fortiori* it is unduly suspended in the second case. The authorities stated above assume that vesting is the test on questions of the suspension of the absolute ownership. But it is settled by the distinct weight of authority that an alienable contingent interest does not suspend the absolute power of alienation of realty (see *supra*, XI, A, 2, c, (I), note 20), and the courts have frequently said that suspension of the absolute power of alienation of realty and suspension of the absolute ownership of personalty are produced by the same causes. Cochrane *v.* Schell, 140 N. Y. 516, 35 N. E. 971; Mills *v.* Husson, 140 N. Y. 99, 35 N. E. 422; Everitt *v.* Everitt, 29 N. Y. 39; Emmons *v.* Cairns, 3 Barb. (N. Y.) 243; Kane *v.* Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Richards *v.* Moore, 5 Redf. Surr. (N. Y.) 278; Ladd *v.* Mills, 20 Fed. 792. Moreover, in Sawyer *v.* Cubby, 146 N. Y. 192, 40 N. E. 869, the court has expressly decided that vesting is not the test, and that an alienable contingent interest does not cause suspension. Personalty was given to A if a certain payment was made within one year from the testator's death, and, if not, to B. It might therefore remain uncertain, for a period not measured by lives, who would be entitled to the property, but the court held, overruling the court below (73 Hun (N. Y.) 298, 26 N. Y. Suppl. 426) that the gift was good. "The statutory test of what constitutes a suspension of the power of alienation as to real estate, and of absolute ownership as to personal property, is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed." Murphy *v.* Whitney, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123, is in accord. The authorities stated above therefore cannot be taken as establishing the broad rule that any contingent interest suspends the absolute ownership, but *semble* they will be followed, if at all, as authorities for the narrower rule stated in the text. On analogy to the statute as to realty, it would seem that the requirement is, not that absolute ownership shall be vested within the statutory limit, but that within such limit there shall be persons capable of granting an absolute ownership. It is to be noted that in Schlereth *v.* Schlereth, *supra*; Matter of Howland, *supra*; Greenland *v.* Waddell, *supra*, trusts had been created which, following Fargo *v.* Squiers, 154 N. Y. 250, 48 N. E. 509, *infra*, note 39, made the provisions of the will invalid, and that all these cases could, upon this ground, have been decided as they were. On the other hand, it is to be recognized that this was not the ground on which the court in fact proceeded; and that, in the present state of the authorities, no question in the whole law of perpetuities in New York calls for more careful consideration than the question raised by the reasoning of the court in Greenland *v.* Waddell, *supra*.

31. See *supra*, XI, A, 2, b, (II), and note 1. There is no statute making the beneficial interest in such a trust of personalty inalienable, and it was once doubted if the provisions in the statute as to realty would be applied by analogy. Vail *v.* Vail, 7 Barb. (N. Y.) 226; Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190. But the doctrine of the text has long been established. Herzog *v.* Title Guarantee, etc., Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146. Such a trust has proved to be the most frequent cause of an illegal suspension of the absolute ownership. See *supra*, note 2. See also Farmers' L. & T. Co. *v.* Bostwick, 120 N. Y. App. Div. 271, 105 N. Y. Suppl. 130 [*reversed* in 190 N. Y. 569, 83 N. E. 1124]; Mulry *v.* Mulry, 89 Hun (N. Y.) 531, 35 N. Y. Suppl. 618; Keyes *v.* Manning, 89 Hun (N. Y.) 98, 34 N. Y. Suppl. 1021; Weiler *v.* O'Brien, 23 N. Y. Suppl. 366; Livingston *v.* New York L. & T. Ins. Co., 13 N. Y. Suppl. 105.

32. See cases cited *supra*, note 4.

33. See *supra*, XI, A, 2, b, (III), and notes 5-9. See also Hutton *v.* Benkard, 92 N. Y. 295.

34. See *supra*, XI, A, 2, c, (I).

35. The use of personalty may be given to A for years or life, and the personalty, subject to such use, to B, and such provisions do not suspend at all the absolute ownership. Wilber *v.* Wilber, 165 N. Y. 451, 59 N. E. 264; *In re* Conger, 81 N. Y. App. Div. 493, 80 N. Y. Suppl. 933; Matter of Ryder, 41 N. Y. App. Div. 247, 58 N. Y. Suppl. 635; Blanchard *v.* Blanchard, 4 Hun (N. Y.) 287 [*affirmed* in 70 N. Y. 615]; Dorland *v.* Dorland, 2 Barb. (N. Y.) 63. See also *supra*, XI, A, 2, c, text and note 11.

not supported by a trust,[36] and alienable future legal interests, even if contingent.[37] Thus also of trusts and imperative powers the beneficial interest in which is alienable.[38] It is settled that an imperative power may be given to A, under which he is entitled to possess and manage personalty, to receive the income, and to apply it for the benefit of, or pay it to, one or more persons, and that such power does not necessarily suspend the absolute ownership of the personalty.[39]

36. See cases cited *supra*, note 14. *Compare supra*, note 4.

37. Sawyer *v.* Cubby, 146 N. Y. 192, 40 N. E. 869. Personalty was given to A, if a certain payment was made within one year from the testator's death, and, if not, to B. The court held that alienable contingent interests do not suspend the absolute ownership. Note the manner in which Finch, J., distinguishes the earlier decision of Booth *v.* Christ Baptist Church, 126 N. Y. 215, 241, 28 N. E. 238. See also cases cited *supra*, note 20. *Compare supra*, XI, A, 2, c, (I), and note 30.

38. The purposes of trusts in personalty are unlimited. Cochrane *v.* Schell, 140 N. Y. 516, 35 N. E. 971. *Compare supra*, XI, A, 2, b, (II). In support of the text see *supra*, notes 22, 23.

39. Suppose personalty is given to A, in trust, to possess and manage it, receive the income and pay it to B for life. There is no doubt but that this trust suspends the absolute ownership. See *supra*, XI, A, 2, b, (II). Can the same practical results be produced without suspending the absolute ownership, merely by using the machinery of an imperative power? It is plain that a very liberal application of the doctrine of the text would practically nullify the statutory command, which has, on analogy, been applied to personalty, that the beneficial interests in trusts of the third class shall be inalienable. Within what limits, then, do the courts confine this doctrine? Suppose a testator gives property to his executors to pay the income to A for life, and on A's death to pay the principal to and among the lawful issue of such child equally, as and when such issue respectively attain the age of twenty-one years. The courts hold that there is a trust during A's life, but that on A's death, the trust ceases, that the executors have a mere imperative power, that this power does not suspend the absolute ownership, and the whole provision is valid. Whatever the reasons for such decisions, so much is now well established. Tiers *v.* Tiers, 98 N. Y. 568; Bliven *v.* Seymour, 88 N. Y. 469 [*overruling* Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, in which the court said that A could not be the absolute owner of property if the right of possession was in B]; Smith *v.* Edwards, 88 N. Y. 92; Tucker *v.* Bishop, 16 N. Y. 402; Quade *v.* Bertsch, 65 N. Y. App. Div. 600, 72 N. Y. Suppl. 916 [*affirmed* in 173 N. Y. 615, 66 N. E. 1115]; Matteson *v.* Armstrong, 11 Hun (N. Y.) 245; Dupre *v.* Thompson, 8 Barb. (N. Y.) 537; Burrill *v.* Sheil, 2 Barb. (N. Y.) 457; Bascom *v.* Weed, 53 Misc. (N. Y.) 496, 105 N. Y. Suppl. 459. In Franklin *v.* Minertzhagen, 39 N. Y. App. Div. 555, 57 N. Y. Suppl. 401, the court, in dealing with a similar question as to realty, noted that an infant cannot control his own property, and that there was no objection, on the ground of public policy, to having his property managed by a person designated by the donor instead of the infant's guardian. *Semble* that even if the testator had expressly provided that the trust was to continue until each child reached his majority, the court would declare the trust invalid, but allow the testator's intent to be effectuated by holding that the person whom the testator named as trustee should be considered as the donee of a power. Robert *v.* Corning, 89 N. Y. 225; Quade *v.* Bertsch, *supra*. But there are several decisions which cannot be explained by the reasoning of the court in Franklin *v.* Minertzhagen, *supra*. Thus in Everitt *v.* Everitt, 29 N. Y. 39 (by four of eight judges), where the power was to be exercised for the benefit of three children, and was to continue until all the children had reached majority; in Matter of Charlier, 22 N. Y. App. Div. 71, 47 N. Y. Suppl. 818, where it was to continue until the child reached twenty-five; in Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481, where it was to continue until the child reached thirty; and finally in Steinway *v.* Steinway, 163 N. Y. 183, 57 N. E. 312, and Matter of Dippel, 71 N. Y. App. Div. 598, 76 N. Y. Suppl. 201, where it was to continue for a term of years. See also Oxley *v.* Lane, 35 N. Y. 340; Matter of Roberts, 112 N. Y. App. Div. 732, 98 N. Y. Suppl. 809; Matter of Farmer, 2 N. Y. Suppl. 639, 6 Dem. Surr. 433. The court called a halt in Fargo *v.* Squiers, 154 N. Y. 250, 48 N. E. 509. Property was, under an appointment, given to trustees, the income to be paid to A, and the principal to be paid to him, one half at twenty-five, and the remainder at thirty. A was not in being when the creator of the power died. The court refused to treat the trust as a power, noting that such power would continue beyond a minority. This case seems not to have been cited by counsel in Steinway *v.* Steinway, *supra*. See also McGuire *v.* McGuire, 80 N. Y. App. Div. 63, 80 N. Y. Suppl. 497. In considering whether it is proper to regard an authority given to A to collect income and pay it over to B, as a mere power in trust, the courts have carefully considered whether the title was "vested" in B or not. Everitt *v.* Everitt, 29 N. Y. 39. In other words, if the courts can see that it is not against the intent of the testator to regard the title as being "vested" in B, they are influenced to declare that there is no title, but only a power, in A. The courts have, in determining whether the title is "vested," applied

(II) *Infancy.* The disability of infancy does not suspend the absolute ownership.[40]

4. Powers of Sale or Revocation Obviating Suspension. If interests in realty or personalty are created which, in themselves considered, suspend the absolute power of alienation or the absolute ownership, but a power is also created under which an absolute title to the realty or personalty may at any time be given, such power will or will not obviate suspension, according to the disposition which is to be made of the proceeds of the sale. If the proceeds are to be limited or held in the same manner as the property sold, the power does not obviate suspension.[41] But if the proceeds are to be disposed of in a manner not causing suspension, then such power does obviate suspension.[42] The power of a judge, in the exercise of his judicial discretion, to authorize a sale, does not obviate suspen-

rules framed by the English courts to determine whether a legacy was transmissible to the legatee's personal representative. Quade *v.* Bertsch, 65 N. Y. App. Div. 600, 72 N. Y. Suppl. 916 [*affirmed* in 173 N. Y. 615, 66 N. E. 1115]; Vail *v.* Vail, 7 Barb. (N. Y.) 226. For example, a testator leaves A ten thousand dollars to be paid to him when he is twenty-five. A dies after the testator, but before he is twenty-five. Is the legacy payable to the personal representative of A? If it is, the legacy is said to be "vested," but this is not the primary signification of the word. See *supra*, III, B, 1. Under these rules, B's interest will usually be held to be "vested," if he is entitled to all the income from the principal in the interval before payment of the principal. Quade *v.* Bertsch, *supra*. And so where B is entitled to all the income which the principal can be expected, by legal methods, to earn (Warner *v.* Durant, 76 N. Y. 133); where he is entitled to all which the testator has seen fit to regard as the net income (Steinway *v.* Steinway, 163 N. Y. 183, 57 N. E. 312); or where the amounts spent for the maintenance of certain children to whom a fund was given were to be charged against the income of the fund generally, and not against the income of each child's share (Everitt *v.* Everitt, 29 N. Y. 39). See also Tabernacle Baptist Church *v.* Fifth Ave. Baptist Church, 172 N. Y. 598, 64 N. E. 1126; Gilman *v.* Reddington, 24 N. Y. 9. But if there is no gift to B except by force of a direction to pay at a future time, B's right will usually be held not to be "vested." Shipman *v.* Rollins, 98 N. Y. 311. All special rules to aid in determining whether or not a gift is "vested" are subordinate to the primary canon of construction that the construction must follow the intent to be collected from the whole will. Goebel *v.* Wolf, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464. For further authorities in which a question of "vesting" was before the court, not involving any question as to suspension of absolute ownership, see Roosa *v.* Harrington, 171 N. Y. 341, 64 N. E. 1; Rudd *v.* Cornell, 171 N. Y. 114, 63 N. E. 823; Dougherty *v.* Thompson, 167 N. Y. 472, 60 N. E. 760; *In re* Crane, 164 N. Y. 71, 58 N. E. 47; *In re* Brown, 154 N. Y. 313, 48 N. E. 537; *In re* Seaman, 147 N. Y. 69, 41 N. E. 401; *In re* Young, 145 N. Y. 535, 40 N. E. 226; Miller *v.* Gilbert, 144 N. Y. 68, 38 N. E. 979; Delafield *v.* Shipman, 103 N. Y. 463, 9 N. E. 184; *In re* Mahan, 98 N. Y. 372; Hobson *v.* Hale, 95 N. Y. 588; Kelso *v.* Lorillard, 85 N. Y. 177; Warner *v.* Durant, 76 N. Y. 133; Traver *v.* Schell, 20 N. Y. 89; Sweet *v.* Chase, 2 N. Y. 73; Phelps *v.* Phelps, 28 Barb. (N. Y.) 121; Drake *v.* Pell, 3 Edw. (N. Y.) 251. See Matter of Hart, 61 N. Y. App. Div. 587, 70 N. Y. Suppl. 933 [*affirmed* in 168 N. Y. 640, 61 N. E. 1130], on a question of construction of the acts required by testatrix to be done before a gift of personalty vested. These rules as to "vesting" were relied upon in Matter of Dippel, 71 N. Y. App. Div. 598, 76 N. Y. Suppl. 201, and in Steinway *v.* Steinway, 163 N. Y. 183, 57 N. E. 312, but in both cases the gifts to B were clearly not transmissible to his personal representative. The New York statutes have declared that suspension is caused by inalienable interests and the introduction of questions as to vesting into the subject of suspension is a source of confusion. It has, however, doubtless become a part of the law with reference at least to this question of determining whether an authority to manage can be construed to be a mere power in trust; but it is to be recognized that the courts here use the word in a special sense, and follow the rules laid down to determine whether a gift is transmissible to the personal representative of the donee.

40. See *supra*, XI, A, 2, c, (II), and cases cited in notes 25, 26.

41. Allen *v.* Allen, 149 N. Y. 280, 43 N. E. 626; Fowler *v.* Ingersoll, 127 N. Y. 472, 28 N. E. 471; Haynes *v.* Sherman, 117 N. Y. 433, 438, 22 N. E. 938; Hagemeyer *v.* Saulpaugh, 97 N. Y. App. Div. 535, 90 N. Y. Suppl. 228; Brewer *v.* Brewer, 11 Hun (N. Y.) 147 [*affirmed* in 72 N. Y. 603]; Hayden *v.* Sugden, 48 Misc. (N. Y.) 108, 96 N. Y. Suppl. 681. See also Underwood *v.* Curtis, 127 N. Y. 523, 28 N. E. 585; Amory *v.* Lord, 9 N. Y. 403.

42. Robert *v.* Corning, 89 N. Y. 225; Stoiber *v.* Stoiber, 40 N. Y. App. Div. 156, 57 N. Y. Suppl. 916. See also Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814; Spitzer *v.* Spitzer, 38 N. Y. App. Div. 436, 56 N. Y. Suppl. 470. *Compare* McSorley *v.* Wilson, 4 Sandf. Ch. (N. Y.) 515 [*cited* in Cochrane *v.* Schell, 140 N. Y. 516, 531, 35 N. E. 971].

sion.[43] If a trust is created by deed in favor of the settlor for life, and then over, and the settlor has a power of revocation, there is no suspension during the settlor's life.[44]

5. The Period During Which Suspension Is Allowed. The absolute power of alienation of realty may be suspended during the lives of two persons in being at the creation of the interests, and, in one case, for the further period of a minority.[45] The absolute ownership of personalty can in no case be suspended except during the lives of two persons in being.[46] The suspension must necessarily cease within the statutory limits; it is not enough that it does in fact so cease.[47] Any two lives may be selected as the measure of the suspension; it is not necessary that they should be the lives of persons having interests in the property.[48] If therefore a controlling provision is employed, limiting the suspension in any event to the lives of two persons in being, any interests whatsoever may be created without violating the statute against suspension.[49] The lives selected may be those of persons answering a certain description, as the youngest

43. Genet *v.* Hunt, 113 N. Y. 158, 21 N. E. 91.

44. U. S. Trust Co. *v.* Chauncey, 32 Misc. (N. Y.) 358, 66 N. Y. Suppl. 563. See also New York L. Ins., etc., Co. *v.* Cary, 191 N. Y. 33, 83 N. E. 598 [*reversing* 120 N. Y. App. Div. 264, 105 N. Y. Suppl. 125].

45. N. Y. Laws (1896), c. 547, § 32. See *supra*, note 92.

46. N. Y. Laws (1897), c. 417, § 2. See *supra*, note 27. See also Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; Manice *v.* Manice, 43 N. Y. 303.

47. This is so well settled that only a few of the many authorities on the point are here given. Knox *v.* Jones, 47 N. Y. 389; Jennings *v.* Jennings, 7 N. Y. 547; Ahern *v.* Ahern, 52 N. Y. App. Div. 356, 65 N. Y. Suppl. 81; Union Trust Co. *v.* Metcalfe 37 Misc. (N. Y.) 672, 76 N. Y. Suppl. 375; Clark *v.* Clark, 23 Misc. (N. Y.) 272, 50 N. Y. Suppl. 1041; Hawley *v.* James, 16 Wend. (N. Y.) 61; Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451 note; Craig *v.* Hone, 2 Edw. (N. Y.) 554. See also Bindrim *v.* Ullrich, 64 N. Y. App. Div. 444, 72 N. Y. Suppl. 239; Strang *v.* Strang, 4 Redf. Surr. (N. Y.) 376. *Compare* People's Trust Co. *v.* Flynn, 188 N. Y. 385, 80 N. E. 1098 [*reversing* 113 N. Y. App. Div. 683, 99 N. Y. Suppl. 979].

48. Bailey *v.* Bailey, 97 N. Y. 460. "The limitation provided is a limitation of time and not a personal one." To the same effect are Crooke *v.* Kings County, 97 N. Y. 421; Woodgate *v.* Fleet, 64 N. Y. 566; Gilman *v.* Reddington, 24 N. Y. 9. Anything to the contrary in Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290, must be considered as no longer law.

49. Thus property may be put in trust to apply the rents, profits, and income to the use of A, B, C, D, E, and F, for life, and, upon the death of any beneficiary, then to the use of the children of such beneficiary for life, and, if such children die, to the use of the children of such children for life, and so on indefinitely, provided that the trust is to end in any event upon the death of two designated persons in being when the trust is created. Authorities supporting the text are Herzog *v.* Title Guarantee, etc., Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146; Montignani *v.* Blade, 145 N. Y. 111, 39 N. E. 719; Bailey *v.* Bailey, 97 N. Y. 460; Provost *v.* Provost, 70 N. Y. 141; Woodgate *v.* Fleet, 64 N. Y. 566; Burrill *v.* Boardman, 43 N. Y. 254, 3 Am. Rep. 694; Gilman *v.* Reddington, 24 N. Y. 9; Levy *v.* Hart, 54 Barb. (N. Y.) 248; Rogers *v.* Tilley, 20 Barb. (N. Y.) 639; Liebmann *v.* Liebmann, 53 Misc. (N. Y.) 488, 105 N. Y. Suppl. 403; Smith *v.* Havens Relief Fund Soc., 44 Misc. (N. Y.) 594, 90 N. Y. Suppl. 168; Fenton *v.* Fenton, 35 Misc. (N. Y.) 479, 71 N. Y. Suppl. 1083; Jessup *v.* Pringle Memorial Home, 27 Misc. (N. Y.) 427, 59 N. Y. Suppl. 207 [*affirmed* in 47 N. Y. App. Div. 622, 62 N. Y. Suppl. 308]; Clancy *v.* O'Gara, 4 Abb. N. Cas. (N. Y.) 268; De Peyster *v.* Beekman, 55 How. Pr. (N. Y.) 90. See also Buchanan *v.* Little, 154 N. Y. 147, 47 N. E. 970; Stevenson *v.* Lesley, 70 N. Y. 512; Hunter *v.* Hunter, 31 Barb. (N. Y.) 334; McGrath *v.* Van Stavoren, 8 Daly (N. Y.) 454; Sherman's Estate, 15 N. Y. St. 438; Matteson *v.* Matteson, 51 How. Pr. (N. Y.) 276. If the subject-matter of a trust is a life-estate, there can be no illegal suspension. Grout *v.* Van Schoonhoven, 1 Sandf. Ch. (N. Y.) 336. See *supra*, IV, G. In Smith *v.* Edwards, 88 N. Y. 92, the testator gave one thousand dollars each to all grandchildren born within twenty years after his death, and the gift was held to be valid. A gift to all the children of A, testator's eldest child, born within twenty years after testator's death, would be valid, for all persons entitled must come into being within the life of A; and a gift to all the testator's grandchildren is equivalent to so many separate gifts to the children of each child. In Schermerhorn *v.* Cotting, 131 N. Y. 48, 29 N. E. 980, a trust, the beneficial interest in which was inalienable, was held to be valid, although the two lives which governed the duration of the trust were not the same in every contingency. Bird *v.* Pickford, 141 N. Y. 18, 35 N. E. 938, is in accord. Note that the statutes against suspension are not the only limitation upon the creation of future estates. See *infra*, XI, A, 9.

two of testator's grandchildren living at his death.[50] And it is lawful to provide for a suspension to continue during one life, and then to continue during the life of a person who answers a certain description at the close of the first life, provided such second person must have been in being at the creation of the interests.[51] If, however, such second person must not necessarily have been in being at the creation of the interests, the suspension during such second life would be illegal. Thus of a suspension to continue during the life of A, and then through the life of any widow he may leave.[52] The statute does not permit a suspension which may continue for a term not measured by lives, no matter how short the term.[53] In the single case where suspension of the absolute power of alienation may continue for two existing lives, and then for a minority, the minority must be that of the person entitled to the remainder in fee;[54] but it is not necessary that such person should have been in being at the creation of the interests.[55]

6. Charitable Trusts. Both realty and personalty may be held on a perpetual charitable trust. And it is no longer necessary that the gift should be to corporations or other bodies expressly authorized to hold property for charitable purposes.[56]

50. Bailey *v.* Bailey, 97 N. Y. 460.

A child en ventre sa mere is regarded as in being. Cooper *v.* Heatherton, 65 N. Y. App. Div. 561, 73 N. Y. Suppl. 14.

But the lives must in some sufficient manner be indicated.— In Matter of Fisher, 8 N. Y. Suppl. 10, 2 Connoly Surr. 75, a suspension to continue during "the time prescribed by the statute governing perpetuities" was held to be bad. And see Matter of Morgan, 36 Misc. (N. Y.) 753, 74 N. Y. Suppl. 478.

51. Thus of a suspension to continue during the life of A, and then during the life of the testator's youngest grandchild alive at the death of the testator, and the death of A. Lougheed *v.* Dykemans' Baptist Church, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410; Van Cott *v.* Prentice, 104 N. Y. 45, 10 N. E. 257; Cogan *v.* McCabe, 23 Misc. (N. Y.) 739, 52 N. Y. Suppl. 48.

52. If a trust is created to continue during the life of A, and then through the life of his present wife, it is unobjectionable. Van Brunt *v.* Van Brunt, 111 N. Y. 178, 19 N. E. 60. And *semble* so of a trust to continue during the life of A, and then during the life of any widow A may leave, if a proviso is added that such widow must have been in being at the creation of the trust. But if no such proviso is added A's widow may prove to be a woman not in being when the trust was created, and therefore the suspension will be illegal. Schettler *v.* Smith, 41 N. Y. 328; Hayden *v.* Sugden, 48 Misc. (N. Y.) 108, 96 N. Y. Suppl. 681; Wright *v.* Mercein, 34 Misc. (N. Y.) 414, 69 N. Y. Suppl. 936; Stevens *v.* Miller, 2 Dem. Surr. (N. Y.) 597. But *compare* Durfee *v.* Pomeroy, 154 N. Y. 583, 49 N. E. 132.

53. Brown *v.* Quintard, 177 N. Y. 75, 69 N. E. 225; Kalish *v.* Kalish, 166 N. Y. 368, 59 N. E. 917; Haynes *v.* Sherman, 117 N. Y. 433, 22 N. E. 938; Rice *v.* Barrett, 102 N. Y. 161, 6 N. E. 898; Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; Dodge *v.* Pond, 23 N. Y. 69; Tucker *v.* Tucker, 5 N. Y. 408; Rose *v.* Rose, 4 Abb. Dec. (N. Y.) 108; McGuire *v.* McGuire, 80 N. Y. App. Div. 63, 80 N. Y. Suppl. 497; Matter of Murray, 75 N. Y. App. Div. 246, 78 N. Y. Suppl. 165; Staples *v.* Hawes, 39 N. Y. App. Div. 548, 57 N. Y. Suppl. 452; Trowbridge *v.* Metcalf, 5 N. Y. App. Div. 318, 39 N. Y. Suppl. 241 [*affirmed* in 158 N. Y. 682, 52 N. E. 1126]; Moore *v.* Moore, 47 Barb. (N. Y.) 257 [*affirmed* in 6 Alb. L. J. 173]; Morgan *v.* Masterton, 4 Sandf. (N. Y.) 442; Matter of Perry, 48 Misc. (N. Y.) 285, 96 N. Y. Suppl. 879; Snyder's Estate, 21 N. Y. Suppl. 430, 1 Pow. Surr. 185; Underhill's Will, 3 N. Y. Suppl. 205, 6 Dem. Surr. 466; Gano *v.* McCunn, 56 How. Pr. (N. Y.) 337; Bean *v.* Bowen, 47 How. Pr. (N. Y.) 306; De Kay *v.* Irving, 5 Den. (N. Y.) 646; Hone *v.* Van Schaick, 20 Wend. (N. Y.) 564; Butler *v.* Butler, Hoffm. (N. Y.) 344. *Compare* Robert *v.* Corning, 89 N. Y. 225 (cited *infra*, note 84); Matter of Trotter, 104 N. Y. App. Div. 188, 93 N. Y. Suppl. 404 [*affirmed* in 182 N. Y. 465, 75 N. E. 305]; Mason *v.* Jones, 2 Barb. (N. Y.) 229; Galway *v.* Bryce, 10 Misc. (N. Y.) 255, 30 N. Y. Suppl. 985. It is lawful to provide that a change in trustees shall be made at the end of a period of years. Clark *v.* Goodridge, 51 Misc. (N. Y.) 140, 100 N. Y. Suppl. 824.

54. N. Y. Laws (1896), c. 547, § 32.

55. Manice *v.* Manice, 43 N. Y. 303; Fowler *v.* Depau, 26 Barb. (N. Y.) 224.

56. The law formerly was that realty and personalty might be held on a perpetual charitable trust only in case the gift was to a corporation or other body which was expressly authorized to hold property for charitable purposes, and which was already in existence or must necessarily be formed, if at all, within the statutory period. Realty could not be given on any charitable trust except to such a corporation or body. Personalty could be given to any trustee to hold for a charitable purpose, but unless the trustee was such a corporation or body the trust must necessarily cease within the statutory

7. Trusts For Accumulation. The rents and profits of real estate, and the income of personalty, can be accumulated only for the benefit of infants, and the accumulation can continue only during their minorities.[57] An accumulation may

limit. Authorities under the law as it stood prior to the enactment of Laws (1893), c. 701, are Fairchild *v.* Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; People *v.* Simonson, 126 N. Y. 299, 27 N. E. 380; Booth *v.* Christ Baptist Church, 126 N. Y. 215, 28 N. E. 238; Read *v.* Williams, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; Riker *v.* Leo, 115 N. Y. 93, 21 N. E. 719; Cottman *v.* Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; O'Hara *v.* Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Kerr *v.* Dougherty, 79 N. Y. 327; Wetmore *v.* Parker, 52 N. Y. 450; Holmes *v.* Mead, 52 N. Y. 332; Adams *v.* Perry, 43 N. Y. 487; Bascom *v.* Albertson, 34 N. Y. 584; Levy *v.* Levy, 33 N. Y. 97; Dodge *v.* Pond, 23 N. Y. 69; Auburn Theological Seminary *v.* Kellogg, 16 N. Y. 83; Williams *v.* Williams, 8 N. Y. 525; Rose *v.* Rose, 4 Abb. Dec. (N. Y.) 108; Matter of Williams, 64 Hun (N. Y.) 163, 18 N. Y. Suppl. 820; Matter of Simonson, 55 Hun (N. Y.) 204, 7 N. Y. Suppl. 836 [*affirmed* in 119 N. Y. 660, 24 N. E. 852]; Holland *v.* Smyth, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420 [*reversing* 40 Hun 372]; Iseman *v.* Myres, 26 Hun (N. Y.) 651; Chamberlain *v.* Chamberlain, 3 Lans. (N. Y.) 348; Wilson *v.* Lynt, 30 Barb. (N. Y.) 124; King *v.* Rundle, 15 Barb. (N. Y.) 139; Yates *v.* Yates, 9 Barb. (N. Y.) 324; Morgan *v.* Masterton, 4 Sandf. (N. Y.) 442; Matter of Williams, 1 Misc. (N. Y.) 440, 23 N. Y. Suppl. 150, 1 Pow. Surr. 414; Beecher *v.* Yale, 45 N. Y. Suppl. 622; Matter of Schuler, 24 N. Y. Suppl. 847, 1 Pow. Surr. 490; *In re* Strickland, 17 N. Y. Suppl. 304 [*affirmed* in 136 N. Y. 638, 32 N. E. 1014]; Matter of Fisher, 8 N. Y. Suppl. 10, 2 Connoly Surr. 75; Matter of Johnson, 5 N. Y. Suppl. 922, 1 Connoly Surr. 518; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46; Pfaler *v.* Raberg, 3 Dem. Surr. (N. Y.) 360; Reform Soc. *v.* Case, 3 Dem. Surr. (N. Y.) 15; Matter of Starr, 2 Dem. Surr. (N. Y.) 141; Lawrence *v.* Elliott, 3 Redf. Surr. (N. Y.) 235. See also Tabernacle Baptist Church *v.* Fifth Ave. Baptist Church, 172 N. Y. 598, 64 N. E. 1126 [*affirming* 60 N. Y. App. Div. 327, 70 N. Y. Suppl. 181]; Matter of Bogart, 43 N. Y. App. Div. 582, 60 N. Y. Suppl. 496; Waterford First Presb. Church *v.* McKallor, 35 N. Y. App. Div. 98, 54 N. Y. Suppl. 740; Greenwald *v.* United L. Ins. Assoc., 18 Misc. (N. Y.) 91, 42 N. Y. Suppl. 973.

The law has been changed radically by N. Y. Laws (1893), c. 701, N. Y. Laws (1896), c. 547, § 93, as interpreted by Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568. If a gift of realty or personalty is made, on a charitable trust, to any trustee, whether to a corporation not yet in existence or to individuals, the gift will be treated as an immediate gift to charity, and will not be allowed to fail for lack of a trustee. If the gift is to a corporation not yet in existence, but such corporation is formed within a reasonable time, such corporation will be allowed to administer the charity, and will take the income accruing prior to its formation as an increment of the principal. St. John *v.* Andrews Inst., 117 N. Y. App. Div. 698, 102 N. Y. Suppl. 808. Similarly, if the gift is to individuals as trustees, they will be allowed to administer. If no trustee is named, or *semble*, if the corporation, or body, or individual whom the donor wished to administer the charity is unable to do so, the court will appoint a suitable trustee. Whoever is trustee, the charity may continue in perpetuity. "The ancient law of charitable uses has been restored." *In re* Watson, 171 N. Y. 256, 63 N. E. 1109; *In re* Graves, 171 N. Y. 40, 63 N. E. 787; *In re* Griffin, 167 N. Y. 71, 60 N. E. 284. And see Hull *v.* Pearson, 36 N. Y. App. Div. 224, 55 N. Y. Suppl. 324. See also *supra*, notes 98, 9, 29; and VIII, E.

57. **N. Y. Laws (1896), c. 547, § 51,** provides: "All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property, as follows: 1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority. 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority. 3. If in either case such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority."

N. Y. Laws (1897), c. 417, § 4, provides: "An accumulation of the income of personal property directed by any instrument sufficient in law to pass such property is valid: 1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority. 2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the abso-

be directed to commence at a future time, but the statutory requirements as to realty and personalty have been construed to differ. It has been held that an accumulation of the rents and profits of realty may commence at the expiration of two lives in being when the accumulation is directed; but an accumulation of the income of personalty must commence at some time during the continuance of two lives in being.[58] The requirement that the accumulation must be "for the benefit" of a minor requires that the total accumulations be paid to such minor when he reaches majority. Thus if property is placed in trust to accumulate the rents, profits, and income during the minority of A, and then to add the accumulations to the original capital, and to pay the rents, profits, and income of such entire fund to A for life, and then to distribute the fund to the children of A, the provision restricting A to a life income from the accumulations is invalid.[59] The application of rents, profits, or income to the payment of debts or encumbrances amounts to an accumulation.[60] *Semble* that trusts for accumulation do

lute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority. All other directions for the accumulation of the income of personal property, not authorized by statute, are void; but a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority."

Directions for accumulation were held not to conform to these special statutory requirements in U. S. Trust Co. *v.* Soher, 178 N. Y. 442, 70 N. E. 970; Schermerhorn *v.* Cotting, 131 N. Y. 48, 29 N. E. 980; Goebel *v.* Wolf, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; Hull *v.* Hull, 24 N. Y. 647; Gilman *v.* Reddington, 24 N. Y. 9; Kilpatrick *v.* Johnson, 15 N. Y. 322; Harris *v.* Clark, 7 N. Y. 242; Matter of Hoyt, 116 N. Y. App. Div. 217, 101 N. Y. Suppl. 557 [*affirmed* in 189 N. Y. 511, 81 N. E. 1166]; McGuire *v.* McGuire, 80 N. Y. App. Div. 63, 80 N. Y. Suppl. 497; Cook *v.* Lowry, 29 Hun (N. Y.) 20 [*affirmed* in 95 N. Y. 103]; Matter of Dey Ermand, 24 Hun (N. Y.) 1; Simpson *v.* English, 1 Hun (N. Y.) 559, 4 Thomps. & C. 80; Robison *v.* Robison, 5 Lans. (N. Y.) 165; Levy *v.* Levy, 40 Barb. (N. Y.) 585; Forsyth *v.* Rathbone, 34 Barb. (N. Y.) 388; McGrath *v.* Van Stavoren, 8 Daly (N. Y.) 454; Tobin *v.* Graf, 39 Misc. (N. Y.) 412, 80 N. Y. Suppl. 5; Garland *v.* Garland, 35 Misc. (N. Y.) 147, 71 N. Y. Suppl. 465; Brandt *v.* Brandt, 13 Misc. (N. Y.) 431, 34 N. Y. Suppl. 684; Matter of Roos, 4 Misc. (N. Y.) 232, 24 N. Y. Suppl. 862; Richardson *v.* Hunt, 14 N. Y. Suppl. 48; Matter of Sands, 3 N. Y. Suppl. 67, 1 Connoly Surr. 259; McCormack *v.* McCormack, 60 How. Pr. (N. Y.) 196; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; Haxtun *v.* Corse, 2 Barb. Ch. (N. Y.) 506. See also Matter of Rogers, 22 N. Y. App. Div. 428, 48 N. Y. Suppl. 175 [*affirmed* in 161 N. Y. 108, 55 N. E. 393].

For provisions held to be valid see Roe *v.* Vingut, 117 N. Y. 204, 22 N. E. 933; Arthur *v.* Arthur, 3 N. Y. App. Div. 375, 38 N. Y. Suppl. 1002; Matter of Keogh, 47 Misc. (N. Y.) 37, 95 N. Y. Suppl. 191; Nichols *v.* Nichols, 42 Misc. (N. Y.) 381, 86 N. Y. Suppl. 719; *In re* McNeil, 1 N. Y. Suppl. 20; Ruppert's Estate, 1 Tuck. Surr. (N. Y.) 480. See also Horton *v.* Cantwell, 108 N. Y. 255, 15 N. E. 546; Matter of Raymond, 73 N. Y. App. Div. 11, 76 N. Y. Suppl. 355; Duncklee *v.* Butler, 38 N. Y. App. Div. 99, 56 N. Y. Suppl. 491; Morgan *v.* Durand, 51 Misc. (N. Y.) 523, 101 N. Y. Suppl. 1002; Matter of Stevens, 46 Misc. (N. Y.) 623, 95 N. Y. Suppl. 297.

58. Manice *v.* Manice, 43 N. Y. 303. See *supra*, note 57. Suppose there is an accumulation directed for the benefit of all the children of A, a living person, during their minorities, and that A has one child, B. The accumulation begins and is solely for his benefit until another child, C, is born. Thereafter only half the accumulation belongs to B. When a third child, D, is born, only one third of the accumulation belongs to B. When B reaches his majority he takes that part of the accumulations belonging to him, and the accumulation continues for the benefit of the other children. There is therefore a succession of periods of accumulation, but all these periods must begin within the statutory limit, and each accumulation will be for the benefit of minors then in being. See Forsyth *v.* Rathbone, 34 Barb. (N. Y.) 388; Mason *v.* Mason, 2 Sandf. Ch. (N. Y.) 432 [*affirmed* in 2 Barb. 229].

59. Pray *v.* Hegeman, 92 N. Y. 508. To the same effect are Smith *v.* Parsons, 146 N. Y. 116, 40 N. E. 736; Barbour *v.* De Forest, 95 N. Y. 13; Tweddell *v.* New York L. Ins., etc., Co., 82 Hun (N. Y.) 602, 31 N. Y. Suppl. 764; Matter of Snyder, 35 Misc. (N. Y.) 588, 72 N. Y. Suppl. 61; Gilman *v.* Healy, 1 Dem. Surr. (N. Y.) 404. Meserole *v.* Meserole, 1 Hun (N. Y.) 66, 3 Thomps. & C. (N. Y.) 192, is, on this point, no longer law. But it is proper to provide for an accumulation to continue during the minority of A, and, if A die under age, to provide that the accumulations shall go, not to A's administrator, but to B. Manice *v.* Manice, 43 N. Y. 303; Bolton *v.* Jacks, 6 Rob. (N. Y.) 166.

60. Hascall *v.* King, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302; Kirk *v.* McCann, 117 N. Y. App. Div. 56, 101 N. Y.

not cause suspension, and that the validity of trusts for accumulation is to be determined solely by the special statutory requirements respecting such trusts.[61]

8. Construction — a. In General. If an instrument is capable of two constructions, under one of which an illegal suspension is directed, but under the other of which no illegal suspension is directed, the latter construction will be adopted.[62] If an invalid provision is separable from the valid provisions, and it is fair to presume that the maker of the instrument would prefer a partial to a total failure of the provisions in the instrument, the invalid provision will be rejected and the remaining provisions will be given effect.[63]

b. Separable Beneficial Interests. If a testator leaves property on a trust of the third class[64] to last during the lives of his surviving children, and dies leaving three, or more, children, the trust is invalid.[65] If, however, the words of the will are such that the interests of the beneficiaries may be construed to be separate,

Suppl. 1093; Lowenhaupt *v.* Stanisics, 95 N. Y. App. Div. 171, 88 N. Y. Suppl. 537; Hafner *v.* Hafner, 62 N. Y. App. Div. 316, 71 N. Y. Suppl. 1 [*affirmed* in 171 N. Y. 633, 63 N. E. 1117]; Matter of Hoyt, 71 Hun (N. Y.) 13, 24 N. Y. Suppl. 577; Dresser *v.* Travis, 39 Misc. (N. Y.) 358, 79 N. Y. Suppl. 924 [*affirmed* in 87 N. Y. App. Div. 632, 84 N. Y. Suppl. 1124]; Dodsworth *v.* Dam, 38 Misc. (N. Y.) 684, 78 N. Y. Suppl. 264; McComb *v.* Title Guarantee, etc., Co., 36 Misc. (N. Y.) 370, 73 N. Y. Suppl. 554 [*affirmed* in 70 N. Y. App. Div. 618, 75 N. Y. Suppl. 1128]; Siefke *v.* Siefke, 34 Misc. (N. Y.) 77, 69 N. Y. Suppl. 514; Matter of Fisher, 4 Misc. (N. Y.) 46, 25 N. Y. Suppl. 79; Wells *v.* Wells, 24 N. Y. Suppl. 874, 30 Abb. N. Cas. 225. See also Cowen *v.* Rinaldo, 82 Hun (N. Y.) 479, 63 N. Y. Suppl. 554. *Compare* Dodge *v.* Pond, 23 N. Y. 69; Becker *v.* Becker, 13 N. Y. App. Div. 342, 43 N. Y. Suppl. 17; Bean *v.* Hockman, 31 Barb. (N. Y.) 78; Matter of Harteau, 53 Misc. (N. Y.) 201, 104 N. Y. Suppl. 586; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76. The court refused to order testamentary trustees to hold surplus income to meet possible future demands in Spencer *v.* Spencer, 38 N. Y. App. Div. 403, 56 N. Y. Suppl. 460; Matter of Tilden, 5 Dem. Surr. (N. Y.) 230; Grant *v.* Grant, 3 Redf. Surr. (N. Y.) 283. See also Matter of Hayden, 77 Hun (N. Y.) 219, 88 N. Y. Suppl. 357. *Compare* Matter of Nesmith, 140 N. Y. 609, 35 N. E. 942. In Thorn *v.* De Bretenil, 179 N. Y. 64, 71 N. E. 470, a direction to carry on a business and to add the residue of the annual profits to the working capital was held to be a direction for accumulation. *Compare infra*, XI, C.

61. Does a trust for accumulation suspend the absolute power of alienation of realty, and the absolute ownership of personalty? There are some *dicta* to that effect. Radley *v.* Kuhn, 97 N. Y. 26; Vail *v.* Vail, 7 Barb. (N. Y.) 226; Mason *v.* Mason, 2 Sandf. Ch. (N. Y.) 432 [*affirmed* in 2 Barb. 229]. But N. Y. Laws (1903), cc. 87, 88; Laws (1896), c. 547, § 83, now provide that the right and interest of the beneficiary of "any trust" other than a trust of the third class is alienable. See *supra*, XI, A, 2, c. (II), notes 21, 22. Suppose realty is placed in trust to pay the rents to A for life, then to B for life, then to accumulate during the minorities of B's children, and as each child attains his majority to convey and pay to him his share, with the accumulations. There being no gift over, in case of the death of B's children under age, the absolute power of alienation can be suspended for only two lives. See *supra*, note 92. If a trust for accumulation does cause suspension, this trust is invalid. But precisely such an accumulation seems to have been contemplated under the special statutory requirements as to accumulation. See Manice *v.* Manice, 43 N. Y. 303, 374 *et seq.*

62. This rule of construction is supported by a great number of cases. See Mee *v.* Gordon, 187 N. Y. 400, 80 N. E. 353, 116 Am. St. Rep. 613; Denison *v.* Denison, 185 N. Y. 438, 78 N. E. 162, and cases cited *infra*, notes 66, 67, 68. *Compare* Cottman *v.* Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; Van Nostrand *v.* Moore, 52 N. Y. 12; Matter of Russell, 5 Dem. Surr. (N. Y.) 388.

63. Only a few of the numerous authorities establishing this rule of construction are cited. *In re* Mount, 185 N. Y. 162, 77 N. E. 999; Schlereth *v.* Schlereth, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616; Cross *v.* U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125, 27 Am. St. Rep. 597, 15 L. R. A. 606; Onderdonk *v.* Onderdonk, 127 N. Y. 196, 27 N. E. 839; Kennedy *v.* Hoy, 105 N. Y. 134, 11 N. E. 390; Van Schuyver *v.* Mulford, 59 N. Y. 426; Harrison *v.* Harrison, 36 N. Y. 543 [*affirming* 42 Barb. 162]; Duncklee *v.* Butler, 38 N. Y. App. Div. 99, 56 N. Y. Suppl. 491; Brown *v.* Richter, 76 Hun (N. Y.) 469, 27 N. Y. Suppl. 1094 [*affirmed* in 144 N. Y. 706, 39 N. E. 856]; Child *v.* Child, 1 N. Y. Leg. Obs. 182; Haxtun *v.* Corse, 2 Barb. Ch. (N. Y.) 506.

The court was unable to apply this principle in Matter of Butterfield, 133 N. Y. 473, 31 N. E. 515; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257; Richards *v.* Moore, 5 Redf. Surr. (N. Y.) 278; Thomas' Estate, 1 Tuck. Surr. (N. Y.) 367.

64. See *supra*, XI, A, 2, b, (II).

65. Williams *v.* Conrad, 30 Barb. (N. Y.) 524.

then the will may be construed, not as creating one trust to last for three, or more, lives, but as creating three, or more, separate trusts, each to last for one life. The courts strongly incline to such construction, and it is well settled that such construction will not be prevented because the trust property is to be kept *in solido* and under one management.[66]

c. "Youngest Child Reaches Twenty-One." If the creator of a trust directs that it shall continue until the youngest child of A reaches twenty-one, the courts incline to construe this as a direction that the trust shall continue until the youngest child of A reaches twenty-one or dies under that age.[67]

d. Shares Accruing by Survivorship. Where there is a gift to a class, with gifts over in case of death, the courts incline to hold that shares accruing at a death do not again go over at a second death.[68]

66. Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812; Locke *v.* Farmers' L. & T. Co., 140 N. Y. 135, 35 N. E. 578; Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481; Matter of Verplanck, 91 N. Y. 439; Wells *v.* Wells, 88 N. Y. 323; Moore *v.* Hegeman, 72 N. Y. 376; Stevenson *v.* Lesley, 70 N. Y. 512; Savage *v.* Burnham, 17 N. Y. 561; Cushman *v.* Cushman, 116 N. Y. App. Div. 763, 102 N. Y. Suppl. 258 [*affirmed* in 191 N. Y. 505]; Matthews *v.* Studley, 17 N. Y. App. Div. 303, 45 N. Y. Suppl. 201 [*affirmed* in 161 N. Y. 633, 57 N. E. 1117]; Foote *v.* Bruggerhof, 66 Hun (N. Y.) 406, 21 N. Y. Suppl. 509; Matter of Lapham, 37 Hun (N. Y.) 15; Brigham *v.* Jones, 25 Hun (N. Y.) 6; Mason *v.* Jones, 2 Barb. (N. Y.) 229 [*affirming* 2 Sandf. Ch. 432]; Bascom *v.* Weed, 53 Misc. (N. Y.) 496, 105 N. Y. Suppl. 459; Hayden *v.* Sugden, 48 Misc. (N. Y.) 108, 96 N. Y. Suppl. 681; Mendel *v.* Levis, 40 Misc. (N. Y.) 271, 81 N. Y. Suppl. 965; Neilson *v.* Brown, 31 Misc. (N. Y.) 562, 65 N. Y. Suppl. 585; Fischer *v.* Langlotz, 100 N. Y. Suppl. 578; Blaker's Will, 10 N. Y. St. 210; Cromwell *v.* Cromwell, 2 Edw. (N. Y.) 495 [*affirmed* in 3 Ch. Sent. 7]; Dickie *v.* Van Vleck, 5 Redf. Surr. (N. Y.) 284.] See also Haug *v.* Schumacher, 166 N. Y. 506, 60 N. E. 245; Mott *v.* Ackerman, 92 N. Y. 539; Monarque *v.* Monarque, 80 N. Y. 320; Bruner *v.* Meigs, 64 N. Y. 506; Kent *v.* Kent, 99 N. Y. App. Div. 112, 90 N. Y. Suppl. 828; Trolan *v.* Rogers, 79 Hun (N. Y.) 507, 29 N. Y. Suppl. 899; Gage *v.* Gage, 43 Hun (N. Y.) 501 [*affirmed* in 112 N. Y. 667, 20 N. E. 414]; Denison *v.* Denison, 42 Misc. (N. Y.) 295, 86 N. Y. Suppl. 604 [*affirmed* in 103 N. Y. App. Div. 523, 86 N. Y. Suppl. 604, 93 N. Y. Suppl. 1128 (*affirmed* in 185 N. Y. 438, 78 N. E. 162)]; Matter of Blaker, 12 N. Y. St. 741. *Compare supra*, V, B.

An intention preventing such construction was found in Central Trust Co. *v.* Egleston, 185 N. Y. 23, 77 N. E. 989; Colton *v.* Fox, 67 N. Y. 348; Walsh *v.* Waldron, 63 Hun (N. Y.) 315, 17 N. Y. Suppl. 829 [*affirmed* in 135 N. Y. 650, 32 N. E. 647]; Field *v.* Field, 4 Sandf. Ch. (N. Y.) 528. See also La Farge *v.* Brown, 31 N. Y. App. Div. 542, 52 N. Y. Suppl. 93; Thorn *v.* Coles, 3 Edw. (N. Y.) 330.

67. Suppose suspension is to continue until the youngest of the testator's grandchildren living at his death and attaining the age of twenty-one does in fact attain that age, and that the testator leaves three grandchildren, A, B, and C, all under age. If C, the youngest, should reach twenty-one, his minority would be the measure of the suspension; but C might die under twenty-one before B reached twenty-one, and then the suspension would continue until B reached that age; but B might thereafter die under twenty-one before A reached twenty-one, and then the suspension would continue until A reached twenty-one. Therefore the suspension might continue for more than two lives. Jennings *v.* Jennings, 7 N. Y. 547; Hawley *v.* James, 16 Wend. (N. Y.) 61. Authorities supporting the text are Roe *v.* Vingut, 117 N. Y. 204, 22 N. E. 933; Coston *v.* Coston, 118 N. Y. App. Div. 1, 103 N. Y. Suppl. 307; Jacoby *v.* Jacoby, 113 N. Y. App. Div. 913, 100 N. Y. Suppl. 1122 [*affirmed* in 188 N. Y. 124, 80 N. E. 676]; Becker *v.* Becker, 13 N. Y. App. Div. 342, 43 N. Y. Suppl. 17; Stehlin *v.* Stehlin, 67 Hun (N. Y.) 110, 22 N. Y. Suppl. 40; James *v.* Beasley, 14 Hun (N. Y.) 520; Burke *v.* Valentine, 52 Barb. (N. Y.) 412, 5 Abb. Pr. N. S. 164 [*affirmed* in 6 Alb. L. J. 167]; Eells *v.* Lynch, 8 Bosw. (N. Y.) 465; McGowan *v.* McGowan, 2 Duer (N. Y.) 57; Lang *v.* Ropke, 5 Sandf. (N. Y.) 363; Muller *v.* Struppman, 6 Abb. N. Cas. (N. Y.) 343; Butler *v.* Butler, 3 Barb. Ch. (N. Y.) 304. See also Jacoby *v.* Jacoby, 188 N. Y. 124, 80 N. E. 676; Burke *v.* O'Brien, 115 N. Y. App. Div. 574, 100 N. Y. Suppl. 1048; Kessler *v.* Friede, 29 Misc. (N. Y.) 187, 60 N. Y. Suppl. 891; Horndorf *v.* Horndorf, 13 Misc. (N. Y.) 343, 34 N. Y. Suppl. 560; Matter of Sands, 3 N. Y. Suppl. 67, 1 Connoly Surr. 259.

The court was unable to adopt such construction in Haynes *v.* Sherman, 117 N. Y. 433, 22 N. E. 938; Benedict *v.* Webb, 98 N. Y. 460; Hagemeyer *v.* Saulpaugh, 97 N. Y. App. Div. 535, 90 N. Y. Suppl. 228; Boynton *v.* Hoyt, 1 Den. (N. Y.) 53; McSorley *v.* Leary, 4 Sandf. Ch. (N. Y.) 414; Thompson *v.* Clendening, 1 Sandf. Ch. (N. Y.) 387. See also Ahern *v.* Ahern, 52 N. Y. App. Div. 356, 65 N. Y. Suppl. 81; Schmitt *v.* Kahrs, 1 Dem. Surr. (N. Y.) 114.

68. Suppose there is a gift of property in trust for the benefit of the children of the testator, A, B, and C, with a proviso that, if any child dies under a prescribed age, his share shall go to his issue, if any; or, if he

9. Other Statutory Restrictions on the Creation of Future Interests in Realty and Personalty. Suspension of the absolute power of alienation of realty or of the absolute ownership of personalty may be caused by present as well as future interests; in determining whether an interest causes suspension, it is necessary to see if the interest is alienable or inalienable, not whether it is vested or contingent.[69] In addition to the requirement that interests shall not be created which may cause a suspension beyond the statutory limit, there are eight other restrictions, all of which apply solely to the creation of future interests. There is no comprehensive requirement that all future interests shall vest[70] within certain limits, but some of these restrictions bear upon the question of vesting. Two of the restrictions[71] apply even to alienable and vested interests; in other words, a future interest may be objectionable even though it is both alienable and vested.[72] These eight restrictions, which apply to both realty and personalty,[73] are as follows: (1) Successive estates for life shall not be limited except to persons in being at the creation thereof.[74] (2) Where a remainder is limited on more than two successive life-estates, all the life-estates subsequent to those of the two persons first entitled thereto shall be void.[75] (3) If a remainder is limited on more than

leaves no issue, then to his surviving brothers and sisters, and to the living issue of any deceased brothers and sisters; or, if there are no such collaterals, then to X. A dies under the prescribed age, without issue, and B and C become entitled to his share. Then B dies without issue. Now if the one third of A's share which accrued to B, on A's death, goes over to C, such one third will be held in trust for a period of three lives, and such provision is invalid. But if the fraction of a share accruing by survivorship is held not to go over, but to have become the absolute property of B, then the trust contains no invalid provision. Beardsley *v.* Hotchkiss, 96 N. Y. 201; Moore *v.* Hegeman, 72 N. Y. 376. Authorities supporting the text are Vanderpoel *v.* Loew, 112 N. Y. 167, 19 N. E. 481; Everitt *v.* Everitt, 29 N. Y. 39.

The court was unable to adopt such construction in Mendel *v.* Levis, 40 Misc. (N. Y.) 271, 81 N. Y. Suppl. 965; Monarque *v.* Requa, 53 How. Pr. (N. Y.) 438.

69. See *supra*, notes 96, 20, 30, 39.

70. N. Y. Laws (1896), c. 547, § 30, provides: "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." This section has been construed in *In re* Lansing, 182 N. Y. 238, 74 N. E. 882; Purdy *v.* Hayt, 92 N. Y. 446; Moore *v.* Littel, 41 N. Y. 66; Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218, 4 Keyes 569; Tayloe *v.* Gould, 10 Barb. (N. Y.) 388; Lawrence *v.* Bayard, 7 Paige (N. Y.) 70. *Compare* Radley *v.* Kuhn, 97 N. Y. 26; and *supra*, note 39.

71. The restrictions numbered (2) and (4), *infra*, text of this section.

72. Such restrictions have "no necessary connection with the law of perpetuities." Purdy *v.* Hayt, 92 N. Y. 446, 451, per Andrews, J.

73. N. Y. Laws (1897), c. 417, § 2; Ham *v.* Van Orden, 84 N. Y. 257; Kane *v.* Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641.

74. N. Y. Laws (1896), c. 547, § 33; Matter of Hurlbut, 51 Misc. (N. Y.) 263, 100 N. Y. Suppl. 1098.

75. N. Y. Laws (1896), c. 547, § 33. This requirement applies to cross remainders for life, given to tenants in common for life. In Purdy *v.* Hayt, 92 N. Y. 446, land was devised to A and B for life, as tenants in common, with cross remainders for life, and then to C for life, remainder to C's surviving children in fee. The court construed this to be a limitation to A and B for life as tenants in common, remainder, as to the share of the one dying first, to the survivor for life, remainders over. In the share of the one dying first, three successive life-estates were therefore limited; but in the share of the survivor only two successive life-estates were limited. It was held that, as the share in which an excessive number of life-estates had been limited must be ascertained within the period of a single life, the life-estate to C was void only as to such share. Orphan Asylum *v.* White, 3 N. Y. Suppl. 137, 6 Dem. Surr. 201, is in accord. In Dana *v.* Murray, 122 N. Y. 604, 618, 26 N. E. 21, land had been limited to A for life, remainder as A by will appointed, and A appointed to her husband, B, and her daughters, C, D, and E, for life, with cross remainders for life, subject to a power of sale, to be exercised on the death of the life-tenants, or upon the marriage of any two daughters. "The case is, therefore, presented where three-fourths of the life-estate devised is void under the statute, whilst the other one-fourth may be valid, but it cannot be determined which is valid, or which condemned, until after the death of three of the life tenants. The person being unknown and the claim contingent, we incline to the view that this is also within the condemnation of the statute." See Haug *v.* Schumacher, 166 N. Y. 506, 60 N. E. 245; De Barante *v.* Gott, 6 Barb. (N. Y.) 492; Graham *v.* Graham, 49 Misc. (N. Y.) 4, 97 N. Y. Suppl. 779; Matter of Eldridge, 29 Misc. (N. Y.) 734, 62 N. Y. Suppl. 1026. *Compare*

two successive life-estates, it shall take effect on the death of the persons entitled to the first and second life-estates, in the same manner as if no other life-estates had been created.[76] (4) No remainder shall be created on an estate *pur autre vie* except a remainder in fee, nor shall any remainder be created upon such an estate in a term of years, unless it be for the whole residue of the term.[77] (5) If a remainder is limited on an estate *pur autre vie* dependent on more than two lives, the remainder shall take effect on the death of the two persons first named.[78] (6) A contingent remainder shall not be created on a term of years unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof.[79] (7) No estate for life shall be limited, as a remainder on a term of years, except to a person in being at the creation of such estate.[80] (8) An estate may be limited on a fee, "on a contingency which, if it should occur, must happen within the period prescribed in this article" (Real Property Law).[81]

10. Restraints on Alienation. A restraint on alienation attempted to be imposed upon the owner of a fee is invalid, if it might be in force for a period other than the period during which suspension is allowed.[82] A provision naming

Surdam *v.* Cornell, 116 N. Y. 305, 22 N. E. 450; Trolan *v.* Rogers, 79 Hun (N. Y.) 507, 29 N. Y. Suppl. 899.

76. N. Y. Laws (1896), c. 547, § 33. See Matter of Ryder, 41 N. Y. App. Div. 247, 58 N. Y. Suppl. 635; Stoiber *v.* Stoiber, 40 N. Y. App. Div. 156, 57 N. Y. Suppl. 916. The courts have held that, under this provision, if a contingent remainder is limited on more than two successive life-estates, and the contingency has not in fact been determined at the end of the first and second life-estates, the remainder is destroyed. Dana *v.* Murray, 122 N. Y. 604, 29 N. E. 21; Purdy *v.* Hayt, 92 N. Y. 446; Woodruff *v.* Cook, 61 N. Y. 638 [*affirming* 47 Barb. 304]. See King *v.* Whaley, 59 Barb. (N. Y.) 71. So, if a remainder to the children of A is limited on two or more successive life-estates, *semble* that only those children of A take who are in existence at the termination of the first and second life-estates. See Stevenson *v.* Lesley, 70 N. Y. 512. Where there is a trust to continue for more than two lives, the lives in excess of two cannot be dropped out under the terms of the provision cited in the text. Shipman *v.* Rollins, 98 N. Y. 311; Woodruff *v.* Cook, 61 N. Y. 638; Amory *v.* Lord, 9 N. Y. 403; La Farge *v.* Brown, 31 N. Y. App. Div. 542, 52 N. Y. Suppl. 93.

77. N. Y. Laws (1896), c. 547, § 34.

78. N. Y. Laws (1896), c. 547, § 35.

79. N. Y. Laws (1896), c. 547, § 36; Wilber *v.* Wilber, 165 N. Y. 451, 59 N. E. 264; Nichols *v.* Nichols, 42 Misc. (N. Y.) 381, 86 N. Y. Suppl. 719; Butler *v.* Butler, 3 Barb. Ch. (N. Y.) 304.

80. N. Y. Laws (1896), c. 547, § 37.

81. N. Y. Laws (1896), c. 547, § 40; Mott *v.* Ackerman, 92 N. Y. 539; Purdy *v.* Hayt, 92 N. Y. 446.

What is the proper construction of this section? The language, it is to be noted, is permissive in form. Suppose it is construed to mean that "no estate may be limited on a fee except upon a contingency which must happen within the period prescribed in this article." The importance of the section would then be enormous, for it would practically give New York two tests of a perpetuity — one the test of contingency, which is the common-law test, the other the test of inalienability, which is now well recognized by the decisions as being in fact the test intended by the statute. No such far-reaching importance has ever been attached to the section, and it has figured but little in the decisions. The requirements as to suspension, and the test of suspension, are cardinal, and such other statutory requirements as were added were doubtless intended to be consistent with the general policy of these requirements, and not to work confusion by setting up another test. *Semble* that this section is, as its language implies, permissive and not restrictive in intent, and was introduced out of abundant caution to declare that future contingent estates could be created if such estates conformed to the other provisions of the article.

It is to be noted that in Michigan, Minnesota, and Wisconsin, where the New York statutes as to realty have been followed, in the main, with only verbal changes, the corresponding section of the statute reads: "Subject to the rules established in the preceding sections of this chapter, a freehold estate . . . may be created to commence at a future day." Mich. Comp. Laws, § 8806; Minn. Rev. Laws, § 3213; Wis. Annot. St. § 2047.

82. Suppose A devises Greenacre to such of his issue as shall be alive twenty-five years after his death. The whole limitation is invalid. See *supra*, XI, A, 2, b, (I). Suppose, again, A devises Greenacre on a trust to last for twenty-five years. The whole trust is invalid. See *supra*, XI, A, 2, b, (II). Suppose, however, that A devises Greenacre to B in fee, but provides that B shall not alienate the land for twenty-five years. The devise is good, and the only question is whether the restraint on alienation is also good. If the restraint on alienation is at-

a time of sale may, however, be regarded as merely advisory, and therefore as not preventing alienation prior to such time;[83] and a provision that no sale of property shall be made except after advertisement for a definite period is unobjectionable if it is a reasonable precaution to prevent a sacrifice of the property.[84]

B. Statutes Similar to the New York Statutes. Michigan has statutory provisions closely following the New York statutes on realty, but not on personalty.[85] So of Minnesota[86] and Wisconsin.[87] California has provisions similar to

tempted to be imposed upon the owner of a fee, and such restraint might be in force for a period other than the period during which suspension is allowed, it is invalid. Oxley *v.* Lane, 35 N. Y. 340; Booker *v.* Booker, 119 N. Y. App. Div. 482, 104 N. Y. Suppl. 21; Adams *v.* Berger, 18 N. Y. Suppl. 33, 27 Abb. N. Cas. 429; Morris *v.* Porter, 52 How. Pr. (N. Y.) 1. *Semble* that all restraints upon alienation attempted to be imposed upon the owner of a fee are invalid. Lovett *v.* Gillender, 35 N. Y. 617 (where the restraint was to continue for only two lives, but was part of an unlawful scheme for accumulation); Craig *v.* Wells, 11 N. Y. 315; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470. See also Roosevelt *v.* Thurman, 1 Johns. Ch. (N. Y.) 220. But *compare* Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814; Doubleday *v.* Newton, 27 Barb. (N. Y.) 431 (as to restraints on the right to have partition); Galway *v.* Bryce, 10 Misc. (N. Y.) 255, 30 N. Y. Suppl. 985.

83. Deegan *v.* Wade, 144 N. Y. 573, 39 N. E. 692; Chandler *v.* New York El. R. Co., 34 N. Y. App. Div. 305, 54 N. Y. Suppl. 341; Stewart *v.* Hamilton, 37 Hun (N. Y.) 19.

84. Robert *v.* Corning, 89 N. Y. 225. To the same effect see Montignani *v.* Blade, 145 N. Y. 111, 39 N. E. 719; Hope *v.* Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458.

85. Mich. Comp. Laws (1897), §§ 8783–8917; Howell Annot. St. §§ 5517–5651.

The divergences from the New York statutes are mostly verbal. But the statutes are more liberal with regard to the creation of express trusts ((§ 8839), and the provision controlling the alienation of the beneficial interest in a trust (§ 8847), follows the New York Revised Statutes and not the Real Property Law (Laws (1896), c. 547). See *supra*, note 21. The statutes follow the New York statutes both as to the suspension of the absolute power of alienation and as to other restrictions on the creation of future interests in realty. See *supra*, note 81. The Michigan decisions are given below, with a reference to the note or notes on the New York statutes to which they are pertinent. Foster *v.* Stevens, 146 Mich. 131, 109 N. W. 265; Cole *v.* Lee, 143 Mich. 267, 106 N. W. 855; Van Driele *v.* Kotvis, 135 Mich. 181, 97 N. W. 700 (*supra*, note 63); Casgrain *v.* Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610 (*supra*, notes 2, 20, 53); Niles *v.* Mason, 126 Mich. 482, 85 N. W. 1100 (*supra*, notes 4, 14, 41, 63); Fitzgerald *v.* Big Rapids, 123 Mich. 281, 82 N. W. 56 (*supra*, notes 10, 20, 23, 83); Torpy *v.* Betts, 123 Mich. 239, 81 N. W. 1094 (*supra*, note 20); Downing *v.* Birney, 117 Mich. 675, 76 N. W. 125 (*supra*, note 79); State *v.* Holmes, 115 Mich. 456, 73 N. W. 548 (*supra*, notes 20, 53, 77); Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238 (*supra*, note 63); Eldred *v.* Shaw, 112 Mich. 237, 70 N. W. 545 (*supra*, note 59); Mullreed *v.* Clark, 110 Mich. 229, 68 N. W. 138, 989 (*supra*, note 77); Defreese *v.* Lake, 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584, 32 L. R. A. 744 (*supra*, notes 11, 20); Trufant *v.* Nunneley, 106 Mich. 554, 64 N. W. 469 (*supra*, note 97); Dean *v.* Mumford, 102 Mich. 510, 61 N. W. 7 (*supra*, notes 2, 3, 4, 14, 47, 51, 52, 63, 66); L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310 (*supra*, note 70); Farrand *v.* Petit, 84 Mich. 671, 48 N. W. 156 (*supra*, notes 2, 53); Ford *v.* Ford, 80 Mich. 42, 44 N. W. 1057 (*supra*, X); Case *v.* Green, 78 Mich. 540, 44 N. W. 578 (*supra*, note 20); Bennett *v.* Chapin, 77 Mich. 526, 43 N. W. 893, 7 L. R. A. 377 (*supra*, note 82); Penny *v.* Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858 (*supra*, note 56); Palms *v.* Palms, 68 Mich. 355, 36 N. W. 419 (*supra*, notes 24, 47, 63, 66); Wilson *v.* Odell, 58 Mich. 533, 25 N. W. 506 (*supra*, note 57); Smith *v.* Barrie, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 391 (*supra*, note 14); Newark M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207 (*supra*, note 56); Toms *v.* Williams, 41 Mich. 552, 2 N. W. 814 (*supra*, notes 11, 57, 60); Thatcher *v.* St. Andrew's Church, 37 Mich. 264 (*supra*, note 41). See also McCarty *v.* Fish, 87 Mich. 48, 49 N. W. 513; Battle Creek Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; St. Amour *v.* Rivard, 2 Mich. 294.

86. Minn. Rev. Laws (1905), §§ 3191–3326.

On the divergences from the New York statutes, the same remarks apply as are made *supra*, note 85. Owatonna *v.* Rosebrock, 88 Minn. 318, 92 N. W. 1122 (*supra*, note 56); Shanahan *v.* Kelly, 88 Minn. 202, 92 N. W. 948 (*supra*, note 56); Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669 (*supra*, note 56); *In re* Tower, 49 Minn. 371, 52 N. W. 27 (*supra*, notes 2, 42, 53). See also as to personalty Atwater *v.* Russel, 49 Minn. 22, 51 N. W. 624 (*supra*, note 83); Little *v.* Willford, 31 Minn. 173, 17 N. W. 282; Simpson *v.* Cook, 24 Minn. 180 (*supra*, notes 2, 67); Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943; Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

87. Wis. Annot. St. (1889) §§ 2025–2158.

The divergences from the New York statutes are mostly verbal. But the absolute power of alienation may be suspended for two lives and twenty-one years thereafter (section 2039); the statutes are more liberal with re-

the New York statutes, applicable to both realty and personalty.[88] The states of North and South Dakota,[89] the District of Columbia,[90] Idaho,[91] Iowa,[92]

gard to the creation of express trusts (section 2081), and to the accumulation of the rents and profits of realty (section 2061); and the provision controlling the alienation of the beneficial interest in a trust (section 2089) follows the New York Revised Statutes, and not the Real Property Law (Laws (1896), c. 547). See *supra*, note 21. The statutes follow the New York statutes both as to the suspension of the absolute power of alienation and as to other restrictions on the creation of future interests in realty. See *supra*, note 81. The Wisconsin decisions are given below, with a reference to the note or notes on the New York statutes to which they are pertinent. Danforth *v.* Oshkosh, 119 Wis. 262, 97 N. W. 258 (*supra*, notes 16, 56; see also as to personalty); Holmes *v.* Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986 (*supra*, notes 21, 22, 62); Becker *v.* Chester, 115 Wis. 90, 91 N. W. 87, 650 (*supra*, note 42; see also as to personalty); *In re* Kopmeier, 113 Wis. 233, 89 N. W. 134 (*supra*, note 2); Webber *v.* Webber, 108 Wis. 626, 84 N. W. 896 (*supra*, note 99); Hood *v.* Dorer, 107 Wis. 149, 82 N. W. 546 (*supra*, note 56); Harrigton *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307 (*supra*, note 56); Tyson *v.* Tyson, 96 Wis. 59, 71 N. W. 94 (*supra*, notes 97, 63); Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986 (*supra*, note 56); Hughes *v.* Hughes, 91 Wis. 138, 64 N. W. 851 (*supra*, notes 11, 20); Lamberton *v.* Pereles, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824 (personalty); Saxton *v.* Webber, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509 (*supra*, notes 97, 63); Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84 (*supra*, notes 56); Ford *v.* Ford, 70 Wis. 19, 72 Wis. 621, 33 N. W. 188, 40 N. W. 502, 5 Am. St. Rep. 117 (*supra*, notes 97, 2, 47, 70, and "Conflict of Laws," *supra*, X); Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. St. Rep. 278 (*supra*, note 56); Scott *v.* West, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18 (*supra*, notes 57, 58); De Wolf *v.* Lawson, 61 Wis. 469, 21 N. W. 615, 50 Am. Rep. 148 (*supra*, notes 2, 53 [but compare present statutory requirements], 56); Gould *v.* Taylor Orphan Asylum, 46 Wis. 106, 50 N. W. 422 (*supra*, note 56); Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103 (*supra*, note 56); *In re* Taylor Orphan Asylum, 36 Wis. 534.

On vesting see also Patton *v.* Ludington, 103 Wis. 629, 79 N. W. 1073, 74 Am. St. Rep. 910.

88. Cal. Civ. Code, §§ 678–871.

California has not followed the New York statutes so closely as Michigan, Minnesota, or Wisconsin; but it has adopted the cardinal features. Suspension is allowed during the lives of any number of persons in being at the creation of the interests. The California decisions are given below with a reference to the note or notes on the New York statutes to which they are pertinent. *In re* Haines, 150 Cal. 640, 89 Pac. 606 (*supra*, note 57); *In re* Campbell, 149 Cal. 712, 87 Pac. 573 (*supra*, notes 94, 25, 40, 43, 82); *In re* Lux, 149 Cal. 200, 87 Pac. 147 (*supra*, note 49); Sacramento Bank *v.* Montgomery, 146 Cal. 745, 81 Pac. 138 (*supra*, note 99); *In re* Pforr, 144 Cal. 121, 77 Pac. 825 (*supra*, notes 23, 83); *In re* Merchant, 143 Cal. 537, 77 Pac. 475 (*supra*, note 56); *In re* Gay, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70 (*supra*, note 56); Blakeman *v.* Miller, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120 (*supra*, notes 20, 79); Nellis *v.* Rickard, 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227 (*supra*, notes 2, 63); *In re* Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70 (*supra*, note 62); Staacke *v.* Bell, 125 Cal. 309, 57 Pac. 1012 (*supra*, notes 12, 22); *In re* Steele, 124 Cal. 533, 57 Pac. 564 (*supra*, notes 57, 66); Balfour-Guthrie Inv. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891 (*supra*, notes 12, 22); Toland *v.* Toland, 123 Cal. 140, 55 Pac. 681 (*supra*, notes 11, 23, 24, 62); Camp *v.* Land, 122 Cal. 167, 54 Pac. 839 (*supra*, notes 12, 22); Sacramento Bank *v.* Alcorn, 121 Cal. 379, 53 Pac. 813 (*supra*, notes 12, 22); Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38 (*supra*, note 53); *In re* Hendy, 118 Cal. 656, 50 Pac. 753 (*supra*, notes 63, 66); Spence *v.* Widney, (Cal. 1896) 46 Pac. 463; People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269 (*supra*, note 56); Walkerly's Estate, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97 (*supra*, notes 97, 2, 41, 47, 53); Whitney *v.* Dodge, 105 Cal. 192, 38 Pac. 636 (*supra*, note 31, and see "Conflict of Laws," *supra*, X); Goldtree *v.* Thompson, 79 Cal. 613, 22 Pac. 50 (*supra*, notes 47, 57); Maynard *v.* Polhemus, 74 Cal. 141, 15 Pac. 451 (*supra*, notes 18, 20); Williams *v.* Williams, 73 Cal. 99, 14 Pac. 394 (*supra*, note 82); *In re* Hinckley, 58 Cal. 457 (*supra*, note 56); Morrison *v.* Rossignol, 5 Cal. 64 (*supra*, note 82); *In re* Fay, 5 Cal. App. 188, 89 Pac. 1065 (*supra*, note 53); Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 86 Fed. 975 (*supra*, notes 12, 22).

89. N. D. Rev. Codes (1895), §§ 3275–3464; S. D. Annot. St. (1901) §§ 3587–3786; Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413 (*supra*, notes 11, 50). See also "Conflict of Laws," *supra*, X. *Compare* Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943; *In re* Tower, 49 Minn. 371, 52 N. W. 27.

90. D. C. Code (1901), § 1023.

91. Ida. Civ. Code (1901), §§ 2364, 2367–2369.

92. Iowa Code (1897), § 2901. This applies to personalty as well as to realty. Meek *v.* Briggs, 87 Iowa 610, 54 N. W. 456, 43 Am. St. Rep. 410. See also Jordan *v.* Woodin, 93 Iowa 453, 61 N. W. 948; Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434; Todhunter *v.* Des Moines, etc., R. Co., 58 Iowa 205, 12 N. W. 267 (*supra*, notes 11, 15); Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73 (*supra*, notes 12, 22); Montpelier First Nat. Bank *v.*

Indiana,[93] and Kentucky[94] have also followed these statutory provisions to some extent.

C. The Pennsylvania Statute of Accumulations. This statute[95] forbids the accumulation of the income from real or personal property by force of any deed or will or otherwise except until the death of the maker or makers of the instrument providing for such accumulation, and during the minority of a person who is in being or *en ventre sa mere* at the time of such death, and who would, if of full age, be entitled to such income.[96] This renders invalid a provision for an accumulation to continue during the life of A;[97] or during the life of A, unless his wife predeceases him;[98] or until A marries;[99] or from the death of A until his children shall arrive at the age of thirty years;[1] or for a period of ten years;[2] and likewise a provision for an accumulation during the life of A of such portion of the income of a trust fund as the trustees do not deem necessary for his support.[3] *Semble* that a provision for accumulation during a succession of minorities would be invalid.[4] There is authority that a discretionary power given to a trustee to accumulate for a period not sanctioned by the statute is valid.[5] A trustee may make such temporary accumulations of income as are a reasonable provision against future payments to be made by him.[6] Where the testator devised encum-

Sioux City Terminal R. etc., Co., 69 Fed. 441 (*supra*, notes 12, 15, 22).

93. Burns Annot. St. Ind. (1901) §§ 3382, 3383, 8133, 8134; Murphey *v.* Brown, 159 Ind. 106, 62 N. E. 275 (*supra*, note 63); Fowler *v.* Duhme, 143 Ind. 248, 42 N. E. 623 (*supra*, note 82); Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795 (*supra*, note 56); Amos *v.* Amos, 117 Ind. 19, 19 N. E. 539 (*supra*, note 20); Richmond *v.* Davis, 103 Ind. 449, 3 N. E. 130 (*supra*, note 56); Huxford *v.* Milligan, 50 Ind. 542; Andrews *v.* Spurlin, 35 Ind. 262; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690 (*supra*, note 82); Stephens *v.* Evans, 30 Ind. 39 (*supra*, note 2); Dyson *v.* Repp, 29 Ind. 482 (*supra*, note 49); Langdon *v.* Ingram, 28 Ind. 360 (*supra*, note 82); Matlock *v.* Lock, 38 Ind. App. 281, 73 N. E. 171 (*supra*, note 82); Phillips *v.* Heldt, 33 Ind. App. 388, 71 N. E. 520 (*supra*, notes 53, 56). See also Aspy *v.* Lewis, 152 Ind. 493, 52 N. E. 756; Huxford *v.* Milligan, 50 Ind. 542; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

94. Ky. St. (1903) § 2360; Morton *v.* Morton, 120 Ky. 251, 85 S. W. 1188, 27 Ky. L. Rep. 661 (*supra*, note 82); Hussey *v.* Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. L. Rep. 315; Ernst *v.* Shinkle, 95 Ky. 608, 26 S. W. 813, 16 Ky. L. Rep. 179 (*supra*, note 82); Henning *v.* Harrison, 13 Bush (Ky.) 723 (*supra*, note 82); Stewart *v.* Barrow, 7 Bush (Ky.) 368 (*supra*, note 82); Ludwig *v.* Combs, 1 Metc. (Ky.) 128; Holt *v.* Deshon, 103 S. W. 281, 31 Ky. L. Rep. 744 (*supra*, note 82); Robison *v.* Gray, 97 S. W. 347, 29 Ky. Rep. 1296 (*supra*, note 82); Brumley *v.* Brumley, 89 S. W. 182, 28 Ky. L. Rep. 231; Lawson *v.* Lightfoot, 84 S. W. 739, 27 Ky. L. Rep. 217 (*supra*, note 82); Johnson *v.* Merritt, 79 S. W. 293, 25 Ky. L. Rep. 2119 (*supra*, notes 2, 63); Fidelity Trust Co. *v.* Lloyd, 78 S. W. 896, 25 Ky. L. Rep. 1827 (*supra*, notes 2, 47); Pullins *v.* Methodist Church Bd. of Education, 78 S. W. 457, 25 Ky. L. Rep. 1715 (*supra*, note 56); Smith *v.* Isaacs, 78 S. W. 434, 25 Ky. L. Rep. 1727 (*supra*, note 82); Call *v.* Shewmaker, 69 S. W. 749, 70 S. W. 834, 24 Ky. L. Rep. 686 (*supra*, note 82); Coleman *v.* Coleman, 65 S. W. 832, 23 Ky. L. Rep. 1476 (*supra*, note 2); Dohn *v.* Dohn, 62 S. W. 1033, 64 S. W. 352, 23 Ky. L. Rep. 256 (on vesting); Davis *v.* Buford, 3 S. W. 4, 8 Ky. L. Rep. 693 (*supra*, note 11). See also Page *v.* Frazer, 14 Bush (Ky.) 205; Best *v.* Conn, 10 Bush (Ky.) 36; Armstrong *v.* Armstrong, 14 B. Mon. (Ky.) 333; Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611; Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446.

95. Act April 18, 1853.

96. A devise or bequest of property by A to his children, with a proviso that the share of each minor child shall be held in trust, the income of such share to be accumulated, and the share, with the accumulations, to be paid to the child on his majority, is valid. See Myer's Estate, 17 Phila. (Pa.) 425, 16 Wkly. Notes Cas. 83, 18 Phila. 103.

97. *In re* Edward, 190 Pa. St. 177, 42 Atl. 469; Schwartz's Appeal, 119 Pa. St. 337, 13 Atl. 212; Thouron's Estate, 15 Phila. (Pa.) 521. *Compare* Williams' Estate, 13 Phila. (Pa.) 325.

98. Brubaker's Appeal, 1 Mona. (Pa.) 447, 15 Atl. 708.

99. Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212; Stille's Appeal, 4 Wkly. Notes Cas. (Pa.) 42 [*affirming* 11 Phila. 31, 1 Wkly. Notes Cas. 249].

1. Ward's Estate, 8 Pa. Dist. 701.

2. Williamson's Estate, 143 Pa. St. 150, 22 Atl. 836; White's Estate, 8 Pa. Dist. 33.

3. Levy's Estate, 1 Pa. Dist. 217; Matter of Sergeant, 11 Phila. (Pa.) 8.

4. Minors' Estate, 16 Phila. (Pa.) 357, 14 Wkly. Notes Cas. 391.

5. Barger's Appeal, 100 Pa. St. 239 [*citing* Brown *v.* Williamson, 36 Pa. St. 338]. But *compare* Eberly's Appeal, 110 Pa. St. 95, 1 Atl. 330; Grim's Estate, 15 Phila. (Pa.) 603, 12 Wkly. Notes Cas. 354; Matter of Sergeant, 11 Phila. (Pa.) 8.

6. *In re* Spring, 216 Pa. St. 529, 66 Atl. 110; Howell's Estate, 180 Pa. St. 515, 37

bered property and directed that the income should be applied to the discharge of the encumbrances, such direction was held to be invalid as amounting, indirectly, to an accumulation of income for a period not sanctioned by the statute.[7] The statute contains no express provision defining the persons for whose benefit the accumulation, during the period allowed, is to be made. But the courts have construed the statute to require that if an accumulation is to be made during the minority of A, the accumulation must be for A's sole benefit, and that, unless A is by the provisions of the instrument directing the accumulation to become entitled upon majority to the *corpus* of the accumulations, the direction to accumulate is bad.[8] It is therefore not lawful to provide that the share of a minor shall be held in trust, the income, or any part thereof, to be added to the principal, and, upon the child's attaining his majority, the income of such share and the accumulations to be paid to him for life, with remainder to his issue. If a provision for accumulation is objectionable only because it is to continue for a period longer than that allowed by the statute, the provision is void only for the excess.[9] Where a provision for accumulation is invalid, the released income usually passes to the heir, or next of kin, or residuary devisee or legatee.[10] If, however, there is a present gift of the *corpus* to A, A will be entitled to any accumulations derived from the fund.[11] If a will creates a valid trust of property for A, and a codicil modifies this trust by provisions involving an illegal accumulation, the fund is to be held on the trusts of the will.[12] An accumulation for a charitable purpose is expressly excepted from the operation of the statute.[13]

D. Other Statutory Changes. Except in New York and the jurisdictions which to a greater or less extent follow New York,[14] the statutory changes in the United States are few. They are, except the Pennsylvania statute of accumulations,[15] given in a note.[16] There are also several constitutional or statutory pro-

Atl. 181; Hibbs' Estate, 143 Pa. St. 217, 22 Atl. 882; Eberly's Appeal, 110 Pa. St. 95, 1 Atl. 330; Lafferty's Estate, 20 Pa. Co. Ct. 632; Mitcheson's Estate, 5 Pa. Co. Ct. 99 [*overruling* on this point Mitcheson's Estate, 15 Phila. 523].

7. Lutz's Estate, 18 Phila. (Pa.) 114, 20 Phila. 89, 27 Wkly. Notes Cas. 403. The court pointed out that the devisees would be deprived of the income during the time necessary for the discharge of the encumbrances and would, on such discharge being completed, receive the benefit of the income so withheld in the form of real estate of increased value, and that this was equivalent to an accumulation of the income and an investment thereof in the encumbrances. See also Mitcheson's Estate, 11 Wkly. Notes Cas. (Pa.) 547. But *compare* Rogers' Estate, 179 Pa. St. 602, 609, 36 Atl. 1130, 340.

8. *In re* Farnum, 191 Pa. St. 75, 43 Atl. 203; Carson's Appeal, 99 Pa. St. 325 (in which case a portion of the accumulations were in fact accumulated during the life of the settler); McKee's Appeal, 96 Pa. St. 277; *In re* Washington, 75 Pa. St. 102; White's Estate, 8 Pa. Dist. 33; Minors' Estate, 16 Phila. (Pa.) 357, 14 Wkly. Notes Cas. 391; Howell's Estate, 5 Wkly. Notes Cas. (Pa.) 430; Stille's Appeal, 4 Wkly. Notes Cas. (Pa.) 42 [*affirming* 11 Phila. 31, 1 Wkly. Notes Cas. 249].

9. Rogers' Estate, 179 Pa. St. 602, 609, 36 Atl. 1130, 340; Conrow's Appeal, 3 Pennyp. (Pa.) 356 [*citing* Brown *v.* Williamson, 36 Pa. St. 338].

10. *In re* Edward, 190 Pa. St. 177, 42 Atl. 469; *In re* Martin, 185 Pa. St. 51, 39 Atl. 841; Howell's Estate, 180 Pa. St. 515, 37 Atl. 181; Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212; White's Estate, 8 Pa. Dist. 33; Wahl's Estate, 20 Phila. (Pa.) 32; Mellon's Estate, 16 Phila. (Pa.) 323 [*affirmed* in 106 Pa. St. 288]; Matter of Sergeant, 11 Phila. (Pa.) 8.

11. Brubaker's Appeal, 1 Mona. (Pa.) 447, 15 Atl. 708; Stiver's Estate, 5 Pa. Co. Ct. 113; Myer's Estate, 18 Phila. (Pa.) 103.

12. Sharps' Estate, 155 Pa. St. 289, 26 Atl. 441; Lutz's Estate, 9 Pa. Co. Ct. 294. And see *In re* Farnum, 191 Pa. St. 75, 43 Atl. 203.

13. Young *v.* St. Mark's Lutheran Church, 200 Pa. St. 332, 49 Atl. 887; Lennig's Estate, 154 Pa. St. 209, 25 Atl. 1049; Curran's Appeal, 4 Pennyp. (Pa.) 331 [*affirming* 15 Phila. 84].

14. See *supra*, XI, B.

15. See *supra*, XI, C.

16. **Alabama.**—"Lands may be conveyed to the wife and children, or children only, severally, successively, and jointly; and to the heirs of the body of the survivor, if they come of age, and in default thereof, over; but conveyances to other than the wife and children, or children only, cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter." No trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of conveyance,

visions which are apparently only declaratory of the common law.[17] The only statutory changes in England are in respect to accumulations.[18]

or if by will, at the death of the testator; in which case the trust may extend to the termination of such minority." Code (1897), §§ 1030, 1031.

Connecticut.— Gen. St. (1888) § 2952, provided: "No estate in fee simple, fee tail, or any less estate, shall be given by deed or will, to any persons but such as are at the time of the delivery of such deed, or death of the testator, in being, or to their immediate issue or descendants." This section is now repealed. Laws (1895), c. 249. Cases under this section, while in force, will be found at Cody *v.* Staples, (1907) 67 Atl. 1; Lepard *v.* Clapp, (1907) 66 Atl. 780; Harmon *v.* Harmon, (1907) 66 Atl. 771; Grant *v.* Stimpson, 79 Conn. 617, 66 Atl. 166; Gerard *v.* Ives, 78 Conn. 485, 62 Atl. 607; Loomer *v.* Loomer, 76 Conn. 522, 57 Atl. 167; Thomas *v.* Castle, 76 Conn. 447, 56 Atl. 854; White *v.* Allen, 76 Conn. 185, 56 Atl. 519; Buck *v.* Lincoln, 76 Conn. 149, 56 Atl. 522; Lewis *v.* Lewis, 74 Conn. 630, 51 Atl. 854, 92 Am. St. Rep. 240; Blakeman *v.* Sears, 74 Conn. 516, 51 Atl. 517; Tingier *v.* Chamberlin, 71 Conn. 466, 42 Atl. 718; Security Co. *v.* Snow, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; St. John *v.* Dann, 66 Conn. 401, 34 Atl. 110; Johnson *v.* Webber, 65 Conn. 501, 33 Atl. 506; New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Ketchum *v.* Corse, 65 Conn. 85, 31 Atl. 486; Morris *v.* Bolles, 65 Conn. 45, 31 Atl. 538; Belfield *v.* Booth, 63 Conn. 299, 27 Atl. 585; Tarrant *v.* Backus, 63 Conn. 277, 28 Atl. 46; Landers *v.* Dell, 61 Conn. 189, 23 Atl. 1083; Beers *v.* Narramore, 61 Conn. 13, 22 Atl. 1061; Leake *v.* Watson, 60 Conn. 498, 21 Atl. 1075; New Haven Young Men's Inst. *v.* New Haven, 60 Conn. 32, 22 Atl. 447; Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240; Kinney *v.* Blackmer, 55 Conn. 261, 10 Atl. 568; Storrs Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141; Camp *v.* Crocker, 54 Conn. 21, 5 Atl. 604; Andrews *v.* Rice, 53 Conn. 566, 5 Atl. 823; Farnam *v.* Farnam, 53 Conn. 261, 2 Atl. 325, 5 Atl. 682; Tappan's Appeal, 52 Conn. 412; Wheeler *v.* Fellowes, 52 Conn. 238; Alfred *v.* Marks, 49 Conn. 473.

Mississippi.— "Estates in fee-tail are prohibited; and every estate which, but for this statute, would be an estate in fee-tail, shall be an estate in fee-simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and, in default thereof, to the right heirs of the donor, in fee-simple." Code (1892), § 2436. See Middlesex Banking Co. *v.* Field, 84 Miss. 646, 37 So. 139; Cannon *v.* Barry, 59 Miss. 289; Dibrell *v.* Carlisle, 48 Miss. 691; Jordan *v.* Roach, 32 Miss. 481; Powell *v.* Brandon, 24 Miss. 343.

Ohio.— "No estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this state, shall be given or granted by deed or will to any person or persons but such as are in being or to the immediate issue or descendants of such as are in being at the time of making such deed or will." Bates Annot. St. (1906) § 4200. See Phillips *v.* Herron, 55 Ohio St. 478, 45 N. E. 720; Brasher *v.* Marsh, 15 Ohio St. 103; Turley *v.* Turley, 11 Ohio St. 173; Gibson *v.* McNeely, 11 Ohio St. 131; Stevenson *v.* Evans, 10 Ohio St. 307; Dayton *v.* Phillips, 11 Ohio Dec. (Reprint) 680, 28 Cinc. L. Bul. 327; O'Neal *v.* Caulfield, 8 Ohio S. & C. Pl. Dec. 248, 5 Ohio N. P. 149; McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015.

17. **Arkansas.**— Const. (1874) art. 2, § 19.
Maryland.— Pub. Gen. Laws (1904), art. 93, § 315.
Nevada.— Const. (1864) art. 15, § 4.
North Carolina.— Const. (1876) art. 1, § 31; State *v.* Gerard, 37 N. C. 210; State *v.* McGowen, 37 N. C. 9; Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.
Tennessee.— Const. (1870) art. 1, § 22; Hornberger *v.* Hornberger, 12 Heisk. 635; White *v.* Hale, 2 Coldw. 77; Franklin *v.* Armfield, 2 Sneed 305.
Texas.— Const. (1876) art. 1, § 26; Gortario *v.* Cantu, 7 Tex. 35. And see "Law of Louisiana," *infra*, XII.
Vermont.— Const. (1793) c. 2, § 36.

18. St. 39 & 40 Geo. III, c. 98 (commonly known as the Thellusson Act); 44 & 45 Vict. c. 41, § 42; 55 & 56 Vict. c. 58. These enactments have been construed in *In re* Heathcote, [1904] 1 Ch. 826, 73 L. J. Ch. 543, 90 L. T. Rep. N. S. 505; *In re* Stephens, [1904] 1 Ch. 322, 73 L. J. Ch. 3, 91 L. T. Rep. N. S. 167, 52 Wkly. Rep. 89; Harbin *v.* Masterman, [1894] 2 Ch. 184, 63 L. J. Ch. 388, 70 L. T. Rep. N. S. 357, 7 Reports 159; *In re* Mason, [1891] 3 Ch. 467, 61 L. J. Ch. 25; Vine *v.* Raleigh, [1891] 2 Ch. 13, 60 L. J. Ch. 675; Jagger *v.* Jagger, 25 Ch. D. 729, 53 L. J. Ch. 201, 49 L. T. Rep. N. S. 667, 32 Wkly. Rep. 384; Weatherall *v.* Thornburgh, 8 Ch. D. 261, 47 L. J. Ch. 658, 39 L. T. Rep. N. S. 9, 26 Wkly. Rep. 593; Ralph *v.* Carrick, 5 Ch. D. 984, 46 L. J. Ch. 530, 37 L. T. Rep. N. S. 112, 25 Wkly. Rep. 530 [*affirmed* in 11 Ch. D. 873, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505]; Wade-Gery *v.* Handley, 1 Ch. D. 653, 45 L. J. Ch. 457, 34 L. T. Rep. N. S. 233 [*affirmed* in 3 Ch. D. 374, 45 L. J. Ch. 712, 35 L. T. Rep. N. S. 85]; Talbot *v.* Jevers, L. R. 20 Eq. 255, 44 L. J. Ch. 646, 23 Wkly. Rep. 741; Mathews *v.* Keble, L. R. 4 Eq. 467; Coombe *v.* Hughes, 34 Beav. 127, 55 Eng. Reprint 582; Bryan *v.* Collins, 16 Beav. 14, 51 Eng. Reprint 680; Sewell *v.* Denny, 10 Beav. 315, 50 Eng. Reprint 603; Ellis *v.* Maxwell, 3 Beav. 587, 43 Eng. Ch. 587, 49 Eng. Reprint 231, 12 Beav. 104, 50 Eng. Reprint, 1000, 10 L. J. Ch. 260; Oddie *v.* Brown, 4 De G. & J. 179, 5 Jur. N. S. 635, 28 L. J. Ch. 542, 7 Wkly. Rep.

XII. LAW OF LOUISIANA.

No person is capable of receiving property by donation *inter vivos* or by last will unless conceived when the donation or will takes effect.[19] Substitutions and *fidei commissa* are prohibited.[20] This renders invalid provisions limiting property to A for life, remainder to B;[21] or to A, but, if A die before attaining his majority, to B;[22] or to A, but, if A die without leaving issue, to B.[23] It also prohibits a testator from placing property in trust,[24] and this prohibition extends to trusts for charitable purposes.[25] But the property or usufruct may be given depend-

472, 61 Eng. Ch. 142, 45 Eng. Reprint 70; Tench *v.* Cheese, 6 De G. M. & G. 453, 1 Jur. N. S. 689, 24 L. J. Ch. 716, 3 Wkly. Rep. 500, 582, 55 Eng. Ch. 354, 43 Eng. Reprint 1309; Edwards *v.* Tuck, 3 De G. M. & G. 40, 17 Jur. 921, 23 L. J. Ch. 204, 52 Eng. Ch. 33, 43 Eng. Reprint 17; Jones *v.* Maggs, 9 Hare 605, 22 L. J. Ch. 90, 41 Eng. Ch. 605, 68 Eng. Reprint 654; Bective *v.* Hodgson, 10 H. L. Cas. 656, 10 Jur. N. S. 373, 33 L. J. Ch. 601, 10 L. T. Rep. N. S. 202, 12 Wkly. Rep. 625, 3 New Rep. 654, 11 Eng. Reprint 1181; *In re* Clulow, 1 Johns. & H. 639, 5 Jur. N. S. 1002, 28 L. J. Ch. 696, 7 Wkly. Rep. 594, 70 Eng. Reprint 900; Scarisbrick *v.* Skelmersdale, 14 Jur. 562, 19 L. J. Ch. 126, 17 Sim. 187, 42 Eng. Ch. 187, 60 Eng. Reprint 1100; Halford *v.* Stains, 13 Jur. 73, 16 Sim. 488, 39 Eng. Ch. 488, 60 Eng. Reprint 963; Rosslyn's Trust, 13 Jur. 27, 18 L. J. Ch. 98, 16 Sim. 391, 39 Eng. Ch. 391, 60 Eng. Reprint 925; Elborne *v.* Goode, 8 Jur. 1001, 13 L. J. Ch. 394, 14 Sim. 165, 37 Eng. Ch. 165, 60 Eng. Reprint 320; Gorst *v.* Lowndes, 5 Jur. 457, 10 L. J. Ch. 161, 11 Sim. 434, 34 Eng. Ch. 434, 59 Eng. Reprint 940; Eyre *v.* Marsden, 2 Jur. 583, 2 Keen 564, 7 L. J. Ch. 220, 15 Eng. Ch. 564, 48 Eng. Reprint 744 [*affirmed* in 3 Jur. 450, 4 Myl. & C. 231, 18 Eng. Ch. 231, 41 Eng. Reprint 91]; Macdonald *v.* Bryce, 2 Jur. 295, 2 Keen 276, 7 L. J. Ch. 173, 15 Eng. Ch. 276, 48 Eng. Reprint 634; *In re* Phillips, 49 L. J. Ch. 198, 28 Wkly. Rep. 340; *Re* Errington, 76 L. T. Rep. N. S. 616, 45 Wkly. Rep. 573; Haley *v.* Bannister, 4 Madd. 275, 20 Rev. Rep. 299, 56 Eng. Reprint 707; Trickey *v.* Trickey, 3 Myl. & K. 560, 10 Eng. Ch. 560, 40 Eng. Reprint 213; Browne *v.* Stoughton, 14 Sim. 369, 37 Eng. Ch. 369, 60 Eng. Reprint 401; Marshall *v.* Holloway, 2 Swanst. 432, 19 Rev. Rep. 94, 36 Eng. Reprint 681; Longdon *v.* Simson, 12 Ves. Jr. 295, 33 Eng. Reprint 113; Griffiths *v.* Vere, 9 Ves. Jr. 127, 32 Eng. Reprint 550; MacVean *v.* MacVean, 24 Vict. L. Rep. 835; Baker *v.* Stuart, 28 Ont. 439; Harrison *v.* Spencer, 15 Ont. 692; Higginbotham *v.* Barrett, 14 Vict. L. Rep. 803.

19. La. Code, art. 1489. In Sevier *v.* Douglas, 44 La. Ann. 605, 10 So. 804, a testator bequeathed property, after a life-interest to A, to the children of A. A had children who were born after testator's death, and it was held that they took nothing in the property.

20. La. Code, art. 1520. To put the matter broadly, and to use terms familiar to the English law, this article prohibits remainders, conditional limitations, and trusts. But as to remainders note that, if apt words are employed, the use of property may be given to one for life and the property, subject to such use, to another. See art. 1522 *infra*, note 29. And note also that reversions are not prohibited. See art. 1534 *infra*, note 28; *supra*, III, B, 2; III, B, 3; III, D, 3.

On questions of construction see Ducloslange's Succession, 4 Rob. (La.) 409; McCluskey *v.* Webb, 4 Rob. (La.) 201; Arnaud *v.* Tarbe, 4 La. 502; Cole *v.* Cole, 7 Mart. N. S. (La.) 414.

21. Marshall *v.* Pearce, 34 La. Ann. 557 (property was given to A "to have and to hold during her natural life; after her death" to B); Anderson *v.* Pike, 29 La. Ann. 120; Hoggatt *v.* Gibbs, 15 La. Ann. 700; McCutcheon *v.* McCutcheon, 15 La. Ann. 511; Weber *v.* Ory, 14 La. Ann. 537; Provost *v.* Provost, 13 La. Ann. 574; Murphy *v.* Cook, 10 La. Ann. 572; Farrar *v.* McCutcheon, 4 Mart. N. S. (La.) 45. See also Rachal *v.* Rachal, 1 Rob. (La.) 115. But *compare* Michon's Succession, 30 La. Ann. 213.

22. McCan's Succession, 48 La. Ann. 145, 19 So. 220. *Compare* Strauss' Succession, 38 La. Ann. 55.

23. Wailes *v.* Daniell, 14 La. Ann. 578; Roy *v.* Latiolas, 5 La. Ann. 552; Beaulieu *v.* Ternoir, 5 La. Ann. 476; Colvin *v.* Nelson, 4 La. Ann. 544; Ducloslange *v.* Ross, 3 La. Ann. 432; Harper *v.* Stanbrough, 2 La. Ann. 377; Arnaud *v.* Tarbe, 4 La. 502; Cloutier *v.* Lecomte, 3 Mart. (La.) 481.

24. Beauregard's Succession, 49 La. Ann. 1176, 22 So. 348 (a testamentary disposition of property to a minor child to be held by the executors until her majority and then to be delivered to her was held to be a prohibited *fidei commissum*); Stephens' Succession, 45 La. Ann. 962, 13 So. 197; Steven's Succession, 36 La. Ann. 754; Whitehead *v.* Watson, 19 La. Ann. 68; Partee *v.* Hill, 12 La. Ann. 767; State *v.* Martin, 2 La. Ann. 667; Clague *v.* Clague, 13 La. 1; Tournoir *v.* Tournoir, 12 La. 19. *Compare* Benson *v.* Cozine, 44 La. Ann. 913, 11 So. 459; Cochrane's Succession, 29 La. Ann. 232; Major *v.* Esneault, 7 La. Ann. 51. In Hope *v.* State Bank, 4 La. 212, however, the court said that they knew of nothing in the laws of Louisiana "which prohibits a man transferring property to another to be held for his use." And see Henderson *v.* Rost, 5 La. Ann. 441; Caldwell *v.* Hennen, 5 Rob. (La.) 20.

25. Kernan's Succession, 52 La. Ann. 48, 26 So. 749; Perin *v.* McMicken, 15 La. Ann. 154; Fink *v.* Fink, 12 La. Ann. 301; Frank-

ent on a condition precedent;[26] and it may be given in the alternative.[27] The donor may provide that the property return to him in case he survives the donee, or in case he survives the donee and his descendants. Such reservation can be made only in favor of the donor.[28] The usufruct of property may be given to one, and the naked property to another.[29] But the donor cannot reserve the usufruct to himself.[30] Even property devoted to charitable uses cannot be made inalienable.[31]

PERQUISITE. A fee to an officer for a specific service in lieu of an annual salary;[1] something gained by place or office beyond the regular salary or fee.[2] (See, generally, OFFICERS.)

PER QUOD CONSORTIUM AMISIT. Literally "Whereby he lost the company [of his wife]." A phrase used in the old declarations in actions of trespass by a husband, for beating or ill using his wife, descriptive of the special damage he had sustained.[3] (See, generally, HUSBAND AND WIFE.)

PER QUOD SERVITIUM AMISIT. Literally "Whereby he lost the service [of his servant.]" A phrase used in the old declarations in actions of trespass by a master, for beating or ill using his servant, descriptive of the special damage he had himself sustained.[4] (See, generally, MASTER AND SERVANT.)

PER RATIONES, PERVENITUR AD LEGITIMAM RATIONEM. A maxim meaning "By reasoning we come to legal reason."[5]

PER REGULAM IGITUR BREVIS RERUM NARRATIO EST; QUÆ SIMUL CUM IN ALIQUO VITIATA EST PERDIT OFFICIUM SUUM. A maxim meaning "A rule of law must be applied duly to the proper cases; otherwise it loses its force and has no significance."[6]

PER RERUM NATURAM FACTUM NEGANTIS NULLA PROBATIO EST. A maxim meaning "It is in the nature of things that he who denies a fact is not bound to give proof."[7]

lin's Succession, 7 La. Ann. 395. *Compare* State *v.* McDonogh, 8 La. Ann. 171.

26. Pena *v.* New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506. And see New Orleans *v.* Baltimore, 13 La. Ann. 162.

27. La. Code, art. 1521. "The disposition by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir or the legatee does not take it, shall not be considered a substitution and shall be valid." Strauss' Succession, 38 La. Ann. 55; Law's Succession, 31 La. Ann. 456 (a testator may of course provide that property shall go to A, but, if A die in the lifetime of the testator, then to B); Cochrane's Succession, 29 La. Ann. 232; Barnes *v.* Gaines, 5 Rob. (La.) 314. And see De Bellisle's Succession, 10 La. Ann. 468.

28. La. Code, art. 1534; Duplessis *v.* Kennedy, 6 La. 231.

29. La. Code, art. 1522. Although property cannot be limited to A for life, remainder to B (see *supra*, note 27), it is lawful to give the usufruct, or use, of property to A for life, and the property subject to such use, to B. Good's Succession, 45 La. Ann. 1392, 14 So. 252; Auld's Succession, 44 La. Ann. 591, 10 So. 877; Buissiere's Succession, 41 La. Ann. 217, 5 So. 668; Williams *v.* Western Star Lodge No. 24, 38 La. Ann. 620; Theurer's Succession, 38 La. Ann. 510; Law's Succession, 31 La. Ann. 456; Hasley *v.* Hasley, 25 La. Ann. 602; McCalop *v.* Stewart, 11 La. Ann. 106 (successive usufructs were given); Michel *v.* Beale, 10 La. Ann. 352; Barker's Succession, 10 La. Ann. 28; Cecile *v.* Lacoste, 8 La. Ann. 142; Roy *v.* Latiolas, 5 La. Ann. 552; Fisk *v.* Fisk, 3 La. Ann. 494; Ducloslange's Succession, 4 Rob. (La.) 409. And see Marshall *v.* Pearce, 34 La. Ann. 557; Skipwith's Succession, 15 La. Ann. 209; McCluskey *v.* Webb. 4 Rob. (La.) 201; Nimmo *v.* Bonney, 4 Rob. (La.) 176.

30. Martin *v.* Martin, 15 La. Ann. 585; Dawson *v.* Holbert, 4 La. Ann. 36.

31. Female Orphan Soc. *v.* Young Men's Christian Assoc., 119 La. 278, 44 So. 15.

1. Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457, 468.

2. Vansant *v.* State, 96 Md. 110, 128, 53 Atl. 711; Bouvier L. Dict.; Webster Dict. [both *quoted* in Wren *v.* Luzerne County, 9 Pa. Co. Ct. 22, 24, 6 Kulp 37].

"Baggagemen's perquisites" see Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 390, 14 Am. Rep. 476.

3. Black L. Dict. See also Cook *v.* People, 2 Thomps. & C. (N. Y.) 404, 413; Tinker *v.* Colwell, 193 U. S. 473, 482, 24 S. Ct. 505, 48 L. ed. 754; Crocker *v.* Crocker, 98 Fed. 702, 703.

4. Black L. Dict. See also Gunn *v.* Fellows, 41 Hun (N. Y.) 257, 259; Lee *v.* Hodges, 13 Gratt. (Va.) 726, 734; Riddle *v.* McGinnis, 22 W. Va. 253, 270; Alteman *v.* Smith, 4 U. C. C. P. 500, 501.

5. Peloubet Leg. Max. [*citing* Litt. § 386].

6. Morgan Leg. Max. [*citing* L. 1 ff. de Reg. Jur. Aut.].

7. Black L. Dict.

PERSIST. To hold on, to persevere.[8] (See PERSISTENT.)

PERSISTENT. CHRONIC,[9] *q. v.*

PERSON. A human being;[10] a human being, as including body and mind; a man, woman, or child; an individual;[11] a living being;[12] a living human being;[13] a living person, composed of body and soul;[14] a living soul, a self-conscious being, a moral agent; especially a living human being, a man, woman, or child, and individual of the human race;[15] the material person — the fleshy body, and not the spiritual soul;[16] the whole man;[17] synonymous with "party"[18] or "party to the action."[19] The term is a broad one;[20] and the sense in which it is used in any particular instance may often be ascertained from the context and intent with which it is employed.[21] Thus it has been held to include an alien;[22] all mankind;[23] an army officer;[24] Chinese;[25] private corporations, whether domestic[26]

8. Com. *v.* Coxe, 4 Dall. (Pa.) 170, 202, 1 L. ed. 786, where it was said that this word is the correlative of attempt or endeavor.

9. Blumenthal *v.* Berkshire L. Ins. Co., 134 Mich. 216, 219, 96 N. W. 17, 104 Am. St. Rep. 604, so defined when used in an application for a policy of life insurance.

"Persistent policy-holder" as used in the life insurance business is one who has not defaulted in the payment of his premiums, or, in other words, has continued to perform the duties imposed upon him by the policy. Fry *v.* Providence Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116, 128.

10. Com. *v.* Lee, 3 Metc. (Ky.) 229, 230.

A term used to distinguish rational from irrational beings. Caldwell *v.* Wallace, 4 Stew. & P. (Ala.) 282, 285.

11. Standard Dict. [*quoted* in State *v.* Olson, 108 Iowa, 667, 668, 77 N. W. 332].

Both sexes included see Brown *v.* Hemphill, 74 Ga. 795, 796.

Woman included see *In re* Hall, 50 Conn. 131, 135, 47 Am. Rep. 625; Ritchie *v.* People, 155 Ill. 98, 112, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; Opinion of Justices, 136 Mass. 578, 580; Reisse *v.* Clarenbach, 61 Mo. 310, 313; Von Dorn *v.* Mengedoht, 41 Nebr. 525, 535, 59 N. W. 800. But see Glidden *v.* Philbrick, 56 Me. 222, 227.

Construed to mean "men" and not "women" see Glidden *v.* Philbrick, 56 Me. 222, 227.

Married woman included see Binney *v.* Globe Nat. Bank, 150 Mass. 574, 580, 23 N. E. 380, 6 L. R. A. 379; Miller *v.* Peck, 18 W. Va. 75, 101.

Widow included see Brockway *v.* Patterson, 72 Mich. 122, 126, 40 N. W. 192, 1 L. R. A. 708.

Infant or minor included see Madden *v.* Springfield, 131 Mass. 441, 442; *In re* Duguid, 100 Fed. 274, 276. But does not include child prematurely born. Dietrich *v.* Northampton, 138 Mass. 14, 16, 52 Am. Rep. 242.

12. Morrill *v.* Lovett, 95 Me. 165, 169, 49 Atl. 666, 56 L. R. A. 634.

13. Sawyer *v.* Mackie, 149 Mass. 269, 270, 21 N. E. 307.

Every living human being included see Cockey *v.* Hurd, 45 How. Pr. (N. Y.) 70, 73.

14. Morton *v.* Western Union Tel. Co., 130 N. C. 299, 302, 41 S. E. 484.

15. Webster Dict. [*quoted* in U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453, 459].

16. Fay *v.* Parker, 53 N. H. 342, 359, 16 Am. Rep. 270.

17. Caldwell *v.* Wallace, 4 Stew. & P. (Ala.) 282, 285.

18. *Ex p.* Bogatsky, 134 Ala. 384, 387, 32 So. 727; *Ex p.* Lester, 77 Va. 663, 678; Culpepper County *v.* Gorrell, 20 Gratt. (Va.) 484, 519.

19. Weston Dist. Warehouse Co. *v.* Hayes, 97 Ky. 16, 18, 29 S. W. 738, 16 Ky. L. Rep. 763.

20. Johnson *v.* Bradstreet Co., 87 Ga. 79, 81, 13 S. E. 250.

21. See cases cited *infra*, notes 22–44.

May include the plural (persons) although used in the singular. Jordan *v.* Thornton, 7 Ga. 517, 522; Com. *v.* Gabbert, 5 Bush (Ky.) 438, 446; Denny *v.* Smith, 18 N. Y. 567, 568; People *v.* Croton Aqueduct Bd., 5 Abb. Pr. (N. Y.) 316, 321; Brown *v.* Delafield, 1 Den. (N. Y.) 445, 447.

22. State *v.* Montgomery, 94 Me. 192, 202, 47 Atl. 165, 80 Am. St. Rep. 386; Wong Wing *v.* U. S., 163 U. S. 228, 242, 16 S. Ct. 977, 41 L. ed. 140; *In re* Parrott, 1 Fed. 481, 511, 6 Sawy. 349.

23. U. S. *v.* Cannon, 4 Utah 122, 125, 7 Pac. 369.

24. Neall *v.* U. S., 118 Fed. 699, 701, 56 C. C. A. 31.

25. *In re* Parrott, 1 Fed. 481, 520, 6 Sawy. 349.

26. McGarry *v.* Nicklin, 110 Ala. 559, 565, 17 So. 726, 55 Am. St. Rep. 40; Jones *v.* Green, 41 Ark. 363, 370; Los Angeles *v.* Leavis, 119 Cal. 164, 165, 51 Pac. 34; Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 267, 75 Pac. 924, 105 Am. St. Rep. 74; Bray *v.* Wallingford, 20 Conn. 416, 418; Deringer *v.* Deringer, 6 Houst. (Del.) 64, 82; Duval County *v.* Charleston Lumber, etc., Co., 45 Fla. 256, 258, 33 So. 531, 60 L. R. A. 549; South Carolina R. Co. *v.* McDonald, 5 Ga. 531, 535; Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 369, 66 N. E. 1066; American Express Co. *v.* Southern Indiana Express Co., 167 Ind. 292, 308, 78 N. E. 1021; Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 228, 32 N. W. 275, 60 Am. Rep. 786; Williams *v.* Metropolitan St. R. Co., 68 Kan. 17, 21, 74 Pac. 600, 104 Am. St. Rep. 377, 64 L. R. A. 794; Moore *v.* Com., 92 Ky. 630, 633, 18 S. W. 833, 13 Ky. L. Rep. 738; Augusta Bank *v.* Augusta, 36 Me. 255, 261; State *v.* Farmers' Social, etc., Club, 73 Md. 97, 102, 20 Atl. 783, 10 L. R. A. 64; Dickie *v.* Boston,

or foreign[27] (but not when the word is taken in its ordinary import, as including only natural persons, and excluding artificial persons);[28] an employee;[29] a foreign nation;[30] an Indian;[31] an inhabitant of the town;[32] a judge or magistrate.[33] Likewise, in a broad sense, the term has been used as embracing municipal corporations,[34] counties,[35] or school districts[36] (but not so when such construction is not made imperative from the context or intent with which the term is employed);[37] a

etc., R. Co., 131 Mass. 516, 517; Chicago, etc., R. Co. *v.* Ellson, 113 Mich. 30, 33, 71 N. W. 324; Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396, 398, 10 N. W. 421; Commercial Bank *v.* Nolan, 7 How. (Miss.) 508, 523; St. Louis *v.* Rogers, 7 Mo. 19, 21; State *v.* Thomas, 25 Mont. 226, 232, 64 Pac. 503; Chapman *v.* Brewer, 43 Nebr. 898, 62 N. W. 320, 47 Am. St. Rep. 779; People *v.* Long Island R. Co., 134 N. Y. 506, 509, 31 N. E. 873; Ohio Farmers' Ins. Co. *v.* Hard, 59 Ohio St. 248, 256, 52 N. E. 635; Cooper *v.* Indian Territory Bank, 4 Okla. 632, 637, 46 Pac. 475; *In re* Lancaster City, 68 Pa. St. 396, 399; South Bend Toy Mfg. Co. *v.* Pierre F. & M. Ins. Co., 4 S. D. 173, 183, 56 N. W. 98; Union Bank, etc., Co. *v.* Wright, (Tenn. Ch. App. 1900) 58 S. W. 755, 757, 52 L. R. A. 469; Fleming *v.* Texas Loan Agency, 87 Tex. 238, 240, 27 S. W. 126, 26 L. R. A. 250; Springville *v.* Fullmer, 7 Utah 450, 453, 27 Pac. 577; Portsmouth Gas Co. *v.* Sanford, 97 Va. 124, 126, 33 S. E. 516, 75 Am. St. Rep. 778, 45 L. R. A. 246; State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 493, 68 Pac. 946, 70 Pac. 114; Ceredo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 535, 23 S. E. 792, 56 Am. St. Rep. 878; Segnitz *v.* Garden City Banking, etc., Co., 107 Wis. 171, 178, 83 N. W. 327, 81 Am. St. Rep. 830, 50 L. R. A. 327; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 83, 65 Pac. 1011; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 68, 24 S. Ct. 598, 48 L. ed. 870; U. S. *v.* MacAndrews, etc., Co., 149 Fed. 823, 832; Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560, 562, 70 L. J. K. B. 828, 85 L. T. Rep. N. S. 3, 17 T. L. R. 629, 49 Wkly. Rep. 215; *Ex p.* Woodstock Electric Light Co., 4 Can. Cr. Cas. 107, 113.

Railroad company included see Bartee *v.* Houston, etc., R. Co., 36 Tex. 648, 650.

27. North Missouri R. Co. *v.* Akers, 4 Kan. 453, 470, 96 Am. Dec. 183; Aldrich *v.* Blatchford, 175 Mass. 369, 370, 56 N. E. 700; State *v.* Ice Delivery Co., 17 Ohio S. & C. Pl. Dec. 515, 527.

28. Blair *v.* Worley, 2 Ill. 178, 180; Factors', etc., Ins. Co. *v.* New Harbor Protection Co., 37 La. Ann. 233, 238; Baltimore, etc., Turnpike Co. *v.* Crowther, 63 Md. 558, 571, 1 Atl. 279; Frostburg Mut. Bldg. Assoc. *v.* Lowdermilk, 50 Md. 175, 179; Steel Edge Stamping, etc., Co. *v.* Manchester Sav. Bank, 163 Mass. 252, 253, 39 N. E. 1021; Com. *v.* Phœnix Bank, 11 Metc. (Mass.) 129, 148; Keeler *v.* Dawson, 73 Mich. 600, 602, 41 N. W. 700; Coddington *v.* Havens, 8 N. J. Eq. 590, 592; Olcott *v.* Tioga R. Co., 20 N. Y. 210, 222, 75 Am. Dec. 393; Henry Huber Co. *v.* Warren, 29 Misc. (N. Y.) 588, 589, 61 N. Y. Suppl. 247 (foreign corporation); Faulkner *v.* Delaware, etc., Canal Co., 1 Den. (N. Y.) 441, 443; Fox's Appeal, 112 Pa. St. 337, 351, 4 Atl. 149; Denny Hotel Co. *v.* Schram, 6 Wash. 134, 137, 32 Pac. 1002, 36 Am. St. Rep. 130; Stuart *v.* Greenbrier County, 16 W. Va. 95, 103.

In construing penal and criminal statutes this word has been held not to include "corporation." Studebaker Bros Mfg. Co. *v.* Morden, 159 Ind. 173, 174, 64 N. E. 594; State *v.* Ohio, etc., R. Co., 23 Ind. 362, 363; Southern Indiana Loan, etc., Inst. *v.* Doyle, 26 Ind. App. 102, 59 N. E. 179, 180; Paragon Paper Co. *v.* State, 19 Ind. App. 314, 49 N. E. 600, 603; Wiscasset *v.* Trundy, 12 Me. 204, 207; People *v.* Duke, 19 Misc. (N. Y.) 292, 294, 44 N. Y. Suppl. 336; State *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611, 613, construing act relating to nuisances.

29. Quackenbush *v.* Wisconsin, etc., R. Co., 62 Wis. 411, 415, 22 N. W. 519. But see Rohback *v.* Pacific R. Co., 43 Mo. 187, 195.

30. Honduras *v.* Soto, 112 N. Y. 310, 312, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642.

31. Stevenson *v.* Christie, 64 Ark. 72, 79, 42 S. W. 418; State *v.* McKenney, 18 Nev. 182, 189, 2 Pac. 171; U. S. *v.* Miller, 105 Fed. 944, 948; U. S. *v.* Shaw-Mux, 27 Fed. Cas. No. 16,268, 2 Sawy. 364, 366.

32. Mowry *v.* Blandin, 64 N. H. 3, 4, 4 Atl. 882.

33. North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315, 324; Bass *v.* Irvin, 49 Ga. 436, 439; State *v.* Baker, 64 Vt. 355, 357, 24 Atl. 98.

34. People *v.* Oakland, 92 Cal. 611, 614, 28 Pac. 807; Bray *v.* Willingford, 20 Conn. 416, 418; Matter of Jensen, 28 Misc. (N. Y.) 378, 381, 59 N. Y. Suppl. 653; Springfield *v.* Walker, 42 Ohio St. 543, 548; Rains *v.* Oshkosh, 14 Wis. 372, 374; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10, 10 S. Ct. 19, 33 L. ed. 231.

35. Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 507, 11 N. W. 73; Waterbury *v.* Deer Lodge County, 10 Mont. 515, 516, 26 Pac. 1002, 24 Am. St. Rep. 67; Lancaster County *v.* Trimble, 34 Nebr. 752, 756, 52 N. W. 711; Carder *v.* Fayette County, 16 Ohio St. 353, 368; Harris *v.* Stearns, 17 S. D. 439, 442, 97 N. W. 361; Lyman County *v.* State, 9 S. D. 413, 415, 69 N. W. 601; Buell *v.* Arnold, 124 Wis. 65, 73, 102 N. W. 338.

36. Witter *v.* Mission School Dist., 121 Cal. 350, 351, 53 Pac. 905, 66 Am. St. Rep. 33.

37. Lindsey *v.* Rottaken, 32 Ark. 619, 638; Atlanta *v.* Smith, 99 Ga. 462, 466, 27 S. E. 696; Baltimore *v.* Root, 8 Md. 95, 103, 63 Am. Dec. 696; Dollman *v.* Moore, 70 Miss. 267, 272, 12 So. 23, 19 L. R. A. 222; Klein *v.* Carthage School Dist., 42 Mo. App. 460, 464; Memphis *v.* Laski, 9 Heisk. (Tenn.) 511, 512, 24 Am. Rep. 327.

non-resident;[38] a partnership, whether general[39] or limited;[40] a state;[41] the United States.[42] But it does not include an estate.[43] Again it has been held to include not only physical and bodily members, but also every bodily sense and attribute, among which is the reputation the man has acquired.[44]

38. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475, 480.

Non-resident not included see New York *v.* McLean, 170 N. Y. 374, 381, 63 N. E. 380.

39. Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 369, 66 N. E. 1066; Com. *v.* Adams Express Co., 97 S. W. 386, 387, 29 Ky. L. Rep. 1280; Com. *v.* Rozen, 176 Mass. 129, 130, 57 N. E. 223; State *v.* Omaha Elevator Co., 75 Nebr. 637, 643, 106 N. W. 979, 110 N. W. 874. But see St. Louis Foundry *v.* International Live-Stock, etc., Co., 74 Tex. 651, 652, 12 S. W. 842, 15 Am. St. Rep. 870; Lasater *v.* Jacksboro First Nat. Bank, (Tex. Civ. App. 1902) 72 S. W. 1054, 1055.

40. Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147, 151.

41. Ervin *v.* State, 150 Ind. 332, 337, 48 N. E. 249; State *v.* Bancroft, 22 Kan. 170, 202; Forrest *v.* Henry, 33 Minn. 434, 436, 23 N. W. 848; Indiana *v.* Woram, 6 Hill (N. Y.) 33, 38, 40 Am. Dec. 378; Martin *v.* State, 24 Tex. 61, 68; West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 642, 66 Pac. 97, 62 L. R. A. 763.

State not included see Butler *v.* Merritt, 113 Ga. 238, 241, 38 S. E. 751; Banton *v.* Griswold, 95 Me. 445, 448, 50 Atl. 89; U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 329, 21 L. ed. 597; McBride *v.* Pierce County, 44 Fed. 17, 18.

42. State *v.* Bancroft, 22 Kan. 170, 202; State *v.* Herold, 9 Kan. 194, 199; Giddings *v.* Holter, 19 Mont. 263, 267, 48 Pac. 8; Stanley *v.* Schwalby, 147 U. S. 508, 517, 13 S. Ct. 418, 37 L. ed. 259. But see U. S. *v.* Fox, 94 U. S. 315, 321, 24 L. ed. 192.

43. Cole *v.* Manson, 42 Misc. (N. Y.) 149, 150, 85 N. Y. Suppl. 1011.

Used in contradistinction to word "property" see Norris *v.* Kent Cir. Judge, 100 Mich. 256, 257, 58 N. W. 1006.

44. Johnson *v.* Bradstreet Co., 87 Ga. 79, 81, 13 S. E. 250.

Used in connection with other words.— "Persons absent from the State" see Wheeler *v.* Wheeler, 134 Ill. 522, 526, 25 N. E. 588, 10 L. R. A. 613. "Person affected" see *Re* Chantler, 8 Can. Cr. Cas. 245, 246. "Persons . . . beyond seas" see Hulburt *v.* Merriam, 3 Mich. 144, 149. "Person charged" see Rex *v.* Blais, 10 Can. Cr. Cas. 354, 357. "Person claiming right thereto" see Oliver *v.* Lockie, 26 Ont. 28, 35. "Person contingently interested" see Woodruff *v.* Woodruff, 3 Dem. Surr. (N. Y.) 505, 510. "Person in authority" see Rex *v.* Todd, 4 Can. Cr. Cas. 514, 526. "Person in charge" see Kenny *v.* Stoer, 31 Pa. Co. Ct. 120, 123; *Ex p.* Ferguson, L. R. 6 Q. B. 280, 290, 1 Aspin. 8, 40 L. J. Q. B. 105, 24 L. T. Rep. N. S. 96, 19 Wkly. Rep. 746. "Person injured" see Eames *v.* Brattleboro, 54 Vt. 471, 475; Hatch *v.* Robinson, 26 Vt. 737, 738; Le May *v.* Canadian Pac. R. Co., 18 Ont. 314, 319. "Persons in parental relation to a child" see People *v.* Hendrickson, 54 Misc. (N. Y.) 337, 342, 104 N. Y. Suppl. 122. "Persons interested" see Desloge *v.* Tucker, 196 Mo. 587, 599, 94 S. W. 283; State *v.* Easton, etc., R. Co., 36 N. J. L. 181, 183; McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425, 428; Donlon *v.* Kimball, 61 N. Y. App. Div. 31, 33, 70 N. Y. Suppl. 252; Matter of Flint, 15 Misc. (N. Y.) 598, 601, 38 N. Y. Suppl. 188; Berney's Estate, 3 N. Y. Civ. Proc. 122, 125; Susz *v.* Forst, 4 Dem. Surr. (N. Y.) 346, 348; Creamer *v.* Waller, 2 Dem. Surr. (N. Y.) 351, 353; Filbert *v.* Filbert, 9 Pa. Co. Ct. 149, 150; Moore *v.* Marsh, 7 Wall. (U. S.) 515, 522, 19 L. ed. 37; Pelsall Coal, etc., Co. *v.* London, etc., R. Co., 23 Q. B. D. 536, 545, 61 L. T. Rep. N. S. 257, 7 R. & Can. Tr. Cas. 1. Person "losing" see Zellers *v.* White, 208 Ill. 518, 527, 70 N. E. 669, 100 Am. St. Rep. 243. "Persons *non compos*" see Parrish *v.* State, 139 Ala. 16, 48, 36 So. 1012. "Person occupying" see National F. Ins. Co. *v.* McKay, 5 Abb. Pr. N. S. (N. Y.) 445, 449. "Persons of color" see Johnson *v.* Norwich, 29 Conn. 407, 408; Heirn *v.* Bridault, 37 Miss. 209, 233; State *v.* Dempsey, 31 N. C. 384, 387; State *v.* Watters, 25 N. C. 455, 457; Davenport *v.* Caldwell, 10 S. C. 317, 333. "Person of good character" see Leader *v.* Yell, 16 C. B. N. S. 584, 592, 10 Jur. N. S. 731, 33 L. J. M. C. 231, 10 L. T. Rep. N. S. 532, 12 Wkly. Rep. 915, 111 E. C. L. 584. "Person . . . of sound mind" see State *v.* Thompson, 12 Nev. 140, 149. "Persons of unsound mind" see Schuff *v.* Ransom, 79 Ind. 458, 464; Howard *v.* Howard, 87 Ky. 616, 621, 9 S. W. 411, 1 L. R. A. 610. "Person resident" see Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, 211; Munroe *v.* Williams, 37 S. C. 81, 86, 16 S. E. 533, 19 L. R. A. 665. "Person signing the same" see Royal Canadian Bank *v.* Grand Trunk R. Co., 23 U. C. C. P. 225, 231, 234. "Person traveling" see Shelton *v.* State, 27 Tex. App. 443, 444, 11 S. W. 457, 11 Am. St. Rep. 200. "Persons voting" see Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29, 39. "Person who built it" see Southworth *v.* Perring, (Kan. 1905) 82 Pac. 785, 787. "Person with a family" see Wilson *v.* Wilson, 101 Ky. 731, 735, 42 S. W. 404, 19 Ky. L. Rep. 925.

"Person aggrieved" is a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something (*Ex p.* Official Receiver, 19 Q. B. D. 174, 177, 180, 56 L. J. Q. B. 447, 56 L. T. Rep. N. S. 876, 4 Morr. Bankr. Cas. 225, 35 Wkly. Rep. 660; *Ex p.* Sidebotham, 14 Ch. D. 458, 465, 49 L. J. Bankr. 41, 42 L. T. Rep. N. S. 783, 28 Wkly. Rep. 715); a person who has sustained a legal loss or liability by an act done in respect of which

(Person or Persons: Age of, see Evidence; Infants. Aggrieved, see Appeal and Error. Birth of, see Curtesy; Evidence. Character and Reputation of, see Criminal Law; Libel and Slander; Witnesses. Citizenship of, see Aliens; Citizens. Civil Rights of, see Civil Rights; Constitutional Law. Consanguinity and Affinity of, see Descent and Distribution; Judges; Jury; Marriage; Witnesses. Death of, see Death. Disabilities of, see Aliens; Bastards; Convicts; Drunkards; Husband and Wife; Indians; Infants; Insane Persons; Paupers; Spendthrifts. Domestic and Personal Relations of, see Adoption; Guardian and Ward; Husband and Wife; Marriage; Master and Servant; Parent and Child; Principal and Surety. Domicile of, see Domicile. Evidence of Personal Status, Condition, and Relation of, see Evidence. Fictitious, see Abatement and Revival; Commercial Paper; Ejectment. Identity of, see Criminal Law; Evidence. Name of, see Names. Of Color, see Colored Persons. Offenses Against, see Abduction; Abortion; Assault and Battery; False Imprisonment; Homicide; Kidnapping; Mayhem; Rape; Seduction; Sodomy; Suicide. Of Unsound Mind, see Insane Persons; Wills. Protection of Personal Rights of, see Civil Rights; Constitutional Law; Injunctions. Validity of Contract Infringing Personal Rights of, see Contracts.)

PERSONA. A word which in its primitive sense was applied to the masks worn by the actors in the dramatic performances of Rome and Greece, which masks were made to represent the character which the actor performed; and in the same sense it was subsequently employed in jurisprudence to signify the role or status which a man fills in the social organization.[45]

PERSONA CONJUNCTA ÆQUIPARATUR INTERESSE PROPRIO. A maxim meaning "A personal connection [literally, a united person, union with a person] is equivalent to one's own interest; nearness of blood is as good a consideration as one's own interest."[46]

PERSONA EST HOMO CUM STATU QUODAM CONSIDERATUS. A maxim meaning "A person is a man considered with reference to a certain status."[47]

PERSONÆ VICE FUNGITUR MUNICIPIUM ET DECURIA. A maxim meaning "Towns and boroughs act as if persons."[48]

PERSONAL. Bodily;[49] pertaining to the person or bodily form;[50] of or pertaining to the person;[51] pertaining to the external bodily appearance.[52] (Per-

the penalty is given (Rex *v.* Frankforth, 8 Can. Cr. Cas. 57, 58); one whose pecuniary interests are or may be adversely affected (Hough *v.* North Adams, (Mass. 1907) 82 N. E. 46, 47).

45. Toullier Comm. [*quoted* in Brent *v.* New Orleans, 41 La. Ann. 1098, 1099, 6 So. 793]. See also Rex *v.* Grant, 8 L. J. K. B. O. S. 352, 354.

46. Black L. Dict. [*citing* Bacon Max. 72 reg.].

Applied in: McCormick Harvesting-Mach. Co. *v.* Hamilton, 73 Wis. 486, 494, 41 N. W. 727; Chapple *v.* Cooper, 13 L. J. Exch. 286, 288, 13 M. & W. 252; Sherwood *v.* Ray, 1 Moore P. C. 353, 388, 12 Eng. Reprint 848, 862.

47. Bouvier L. Dict. [*citing* Heineccius Elem. Jur. Civ. I, 1, tit. 3, § 75].

48. Pelonbet Leg. Max.

Applied in Warner *v.* Beers, 23 Wend. (N. Y.) 103, 144.

49. State *v.* Clayborne, 14 Wash. 622, 623, 45 Pac. 303.

50. Terre Haute Electric R. Co. *v.* Lauer, 21 Ind. App. 466, 475, 52 N. E. 703.

51. Century Dict. [*quoted* in Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 415, 73 Pac. 941].

52. Webster Dict. [*quoted* in Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 415, 73 Pac. 941].

"Personal character" is a term used in ordinary parlance to emphasize a distinction between it and civic, public, and official character and conduct. Com. *v.* Rentschler, 11 Pa. Dist. 203, 204. See also 6 Cyc. 892.

"Personal discharge" distinguished from real release" see Booth *v.* Kinsey, 8 Gratt. (Va.) 560, 568.

"Personal enjoyment" see Columbus *v.* Strassner, 124 Ind. 482, 489, 25 N. E. 65.

"Personal fitness" as applied to a candidate for an office includes his moral character, intellectual ability, social standing, habits of life, and political convictions. State *v.* Malo, 42 Kan. 54, 91, 120, 22 Pac. 349. See Officers, 29 Cyc. 1375 *et seq.*

"Personal indignities" see Cline *v.* Cline, 10 Oreg. 474, 475.

"Personal list" means the judicial determination of the listers of the amount of the taxpayer's personal estate that should enter into the annual grand list to be completed in

sonal: Action — Generally, see Actions; Abatement of, see Abatement and Revival; As Remedy For Deficiency, see Mechanics' Liens; Mortgages; In Admiralty, see Admiralty; Limitation of, see Limitations of Actions. Assets, see Assignments For Benefit of Creditors; Bankruptcy; Executors and Administrators; Insolvency. Chattel, see Property. Communication, see Witnesses.[53] Contract — In General, see Contracts; Assignment of, see Assignments; Contracts; For Personal Services, see Contracts; Master and Servant; For Professional Services, see Attorney and Client; Physicians and Surgeons; Injunction to Restrain Breach of, see Injunctions; Limitation of Action For Breach of, see Limitations of Actions; Performance of, see Contracts; Specific Performance of, see Specific Performance. Covenant, see Covenants. Demand, see Commercial Paper. Disability — Of Infant, see Infants; Of Insane Person, see Insane Persons; Of Married Woman, see Husband and Wife. Injury — In General, see Negligence; Abatement of Action For, see Abatement and Revival; Assignment of Claim For, see Assignments; Caused by Animal, see Animals; Caused by Assault, see Assault and Battery; Caused by Child, see Parent and Child; Caused by Condition or Use of Dangerous or Defective Premises and the Like, see Bridges; Carriers; Fences; Landlord and Tenant; Master and Servant; Municipal Corporations; Negligence; Railroads; Street Railroads; Streets and Highways; Toll-Roads; Wharves; Caused by Employee or Servant, see Master and Servant; Caused by Explosive, see Explosives; Weapons; Caused by Firearm, see Weapons; Caused by Horse or Vehicle Hired, see Livery-Stable Keepers; Motor Vehicles; Caused by Intoxicating Liquor, see Intoxicating Liquors; Caused by Navigation or Management of Vessel, see Collision; Shipping; Caused by Nuisance, see Municipal Corporations; Nuisances; Caused by Operation of Ferry, Mine, or Railroad, see Ferries; Mines and Minerals; Railroads; Street Railroads; Caused by Production, Supply, or Use of Electricity, Gas, Steam, or Water, see Electricity; Gas; Steam; Waters; Caused by Wrongful or Negligent Act or Omission Generally, see Death; Negligence; Torts; Causing Death, see Death; Consideration For Contract, see Commercial Paper; Contracts; Criminal Responsibility For, see Assault and Battery; False Imprisonment; Homicide; Mayhem; Rape; Seduction; Damages For, see Damages; Discharge or Release From Liability For, see Accord and Satisfaction; Compromise and Settlement; Payment; Release; Evidence in Action For, see Evidence; Indemnity Against Liability For, see Indemnity; Injunction to Prevent, see Injunctions; Insurance Against, see Accident Insurance; Insurance Against Liability For, see Employers' Liability Insurance; and Like Insurance Titles; Joinder of Action For With Other Actions, see Joinder and Splitting of Actions; Limitation of Action For, see

May. Taylor *v.* Moore, 63 Vt. 60, 73, 21 Atl. 919. See also Taxation.

"Personal necessities" distinguished from "individual necessities" see Whitney *v.* Whitney, 63 Hun (N. Y.) 59, 77, 18 N. Y. Suppl. 3.

"Personal privilege" applied to a license means to declare, that such license shall be used for the benefit of the party to whom it is issued. He cannot transfer it to another; nor can any other person sell under it. Myerdock *v.* Com., 26 Gratt. (Va.) 988, 990. See, generally, Licenses, 25 Cyc. 597.

"Personal rights" are rights which are relative and general, and embrace all the rights any person may have and all the wrongs he may suffer. Duffies *v.* Duffies, 76 Wis. 374, 379, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420, where they are distinguished from "rights of person."

"Personal safety" see People *v.* Howard, 112 Cal. 135, 142, 44 Pac. 464, use in a request for an instruction.

"Personal servitude" is a condition which consists in the subjection of one person to another. 2 Bouvier L. Dict. 986 [*quoted* in U. S. *v.* McClellan, 127 Fed. 971, 976]. As the term is used in the Spanish law, it includes use, usufruct, and habitation. Mulford *v.* Le Franc, 26 Cal. 88, 102.

"Personal warranty" is that which takes place in personal actions. Flanders *v.* Seelye, 105 U. S. 718, 726, 26 L. ed. 1217. See also Hardy *v.* Pecot, 104 La. 136, 140, 28 So. 936, where it is said: "It arises from the obligation which one has contracted to pay the whole of a part of a debt due by another to a third person."

53. See also Price *v.* Price, 33 Hun (N. Y.) 69, 73.

LIMITATIONS OF ACTIONS; Parties in Action For, see PARTIES; Physical Examination as to Nature and Extent of, see DAMAGES; DISCOVERY; EVIDENCE; Provocation or Excuse For Homicide, see HOMICIDE; Survival of Action For, see ABATEMENT AND REVIVAL; To Child, see INFANTS; MASTER AND SERVANT; NEGLIGENCE; PARENT AND CHILD; To Employee, see MASTER AND SERVANT; To Guest, see INNKEEPERS; To Passenger, see CARRIERS; To Seaman, see SEAMEN; To Traveler on Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; To Wife, see HUSBAND AND WIFE; Venue in Action For, see VENUE; Violation of Sunday Law as Defense to Action For, see SUNDAY. Knowledge[54]— Of Person Taking Acknowledgment, see ACKNOWLEDGMENTS; Of Person Verifying Pleading, see PLEADING; Of Witness, see AFFIDAVITS; EVIDENCE; WITNESSES. Liability — Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Of Guardian, see GUARDIAN AND WARD; INSANE PERSONS; Of Officer, see ARMY AND NAVY; BANKS AND BANKING; CLERKS OF COURTS; CORPORATIONS; JUDGES; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS; OFFICERS; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS; Of Partner, see PARTNERSHIP; Of Stock-Holder, see BANKS AND BANKING; CORPORATIONS; INSURANCE; Of Trustee, see TRUSTS. Liberty — Constitutional Guaranty of, see CONSTITUTIONAL LAW; Infringement of, see ARRESTS; FALSE IMPRISONMENT; MALICIOUS PROSECUTION; Remedy For Infringement of, see HABEAS CORPUS. Privacy, Protection of, see INJUNCTIONS. Property — In General, see PROPERTY; Abandonment of, see ABANDONMENT; Accession, see ACCESSION; Administration and Distribution of, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; Adverse Possession of, see ADVERSE POSSESSION; Alien Ownership of, see ALIENS; Collateral Security, see PAWNBROKERS; PLEDGES; Confusion of, see CONFUSION OF GOODS; Conversion of, see TROVER AND CONVERSION; Hiring, see BAILMENTS; LIVERY-STABLE KEEPERS; MOTOR VEHICLES; Injury to, see TRESPASS; Legacy, see WILLS; Loss of, see FINDING LOST GOODS; LOST INSTRUMENTS; Mortgage of, see CHATTEL MORTGAGES; Offenses and Crimes Involving, see EMBEZZLEMENT; EXTORTION; FALSE PRETENSES; LARCENY; RECEIVING STOLEN GOODS; ROBBERY; THREATS; Partition of, see PARTITION; Remedy For Recovery of, see DETINUE; POSSESSORY WARRANT; REPLEVIN; Sale of, see SALES; Specific Performance of Contract Involving, see SPECIFIC PERFORMANCE; Taxation of, see TAXATION. Representatives, see EXECUTORS AND ADMINISTRATORS. Security, see PERSONAL SECURITY. Service, see NOTICE; PROCESS. Services[55] — In General, see MASTER AND SERVANT; Performance of Contract For, see CONTRACTS; Restraining Breach of Contract For, see INJUNCTIONS; Specific Performance of Contract For, see SPECIFIC PERFORMANCE. Tax, see TAXATION. Tort or Wrong, see PERSONAL TORT; PERSONAL WRONG; TORTS. Transaction, see PERSONAL TRANSACTION; WITNESSES.)

PERSONAL ACTION. See ACTIONS.[56]

PERSONAL CHATTEL. See PROPERTY.[57]

PERSONAL COMMUNICATION. See WITNESSES.

PERSONAL CONTRACT. See CONTRACTS.[58]

PERSONAL COVENANT. See COVENANTS.

PERSONAL EFFECTS. A phrase used to designate articles associated with the person.[59] (See CHATTELS; GOODS; GOODS AND CHATTELS; GOODS AND COMMODITIES; GOODS AND MERCHANDISE; GOODS, WARES, AND MERCHANDISE; and, generally, PROPERTY.)

PERSONAL EXAMINATION. See ACKNOWLEDGMENTS.[60]

54. **"Personal knowledge"** see State *v.* Meyer, 2 Mo. App. 413, 420 (of notary public); West *v.* Home Ins. Co., 18 Fed. 622, 623, 9 Sawy. 412 (of attorney or agent).

55. **"Personal services"** see McCoy *v.* Cornell, 40 Iowa 457, 458; Coburn *v.* Kerswell, 35 Me. 126, 128; Hale *v.* Brown, 59 N. H. 551, 558, 47 Am. Rep. 224; Hoyt *v.* White, 46 N. H. 45, 48.

56. See also Cross-References, *ante*, p. 1529, under PERSONAL.

57. See also 7 Cyc. 123.

58. See also Cross-References, *ante*, p. 1529, under PERSONAL.

59. Lippincott's Estate, 173 Pa. St. 368, 371, 34 Atl. 58.

60. **"Personal examination"** see Western Union Tel. Co. *v.* Morris, 10 Kan. App. 61,

PERSONAL GOODS. See PERSONAL EFFECTS.

PERSONALIA PERSONAM SEQUUNTUR. A maxim meaning "Personal things follow the person."[61]

PERSONAL INJURY. See NEGLIGENCE.[62]

PERSONAL KNOWLEDGE. See WITNESSES.[63]

PERSONAL LIABILITY. See Cross-References, *ante*, p. 1529, under PERSONAL.

PERSONAL LIBERTY. See LIBERTY.[64]

PERSONALLY. In a personal manner; in person; by bodily presence; not by representative or substitute.[65]

PERSONAL PRIVACY. See INJUNCTIONS.

PERSONAL PROPERTY. See PROPERTY.[66]

PERSONAL REPRESENTATIVES. See EXECUTORS AND ADMINISTRATORS.

PERSONAL SECURITY. At common law, a right which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation;[67] in a commercial sense, the security of personal property.[68] (Personal Security: In General, see BONDS; COMMERCIAL PAPER. Constitutional Guaranty of, see CONSTITUTIONAL LAW. Protection of, see INJUNCTIONS.)

PERSONAL SERVICE. See PROCESS.

PERSONAL SERVICES. See MASTER AND SERVANT.[69]

PERSONAL STATUTE. One which has principally for its object the person, and treats only of property incidentally.[70] (See, generally, STATUTES.)

PERSONAL TAX. See TAXATION.

PERSONAL TORT. A tort which includes all injuries to the person, whether to reputation, feelings, or to the body.[71] (See PROPERTY TORT; and, generally, TORTS.)

PERSONAL TRANSACTION. The doing or performing of some business between parties, or the management of any affair;[72] a term which describes the whole of the negotiation or treaty, between the original parties to it, out of which the cause of action arose.[73] In general, the term may be said to have reference to

61 Pac. 972, 973; People *v.* Delaware, etc., Canal Co., 165 N. Y. 362, 366, 59 N. E. 138.

61. Black L. Dict.

Applied in Flanders *v.* Cross, 10 Cush. (Mass.) 514, 516.

62. See also Cross-References, *ante*, p. 1529, under PERSONAL.

63. See also Cross-References, *ante*, p. 1529, under PERSONAL.

64. Particularly 22 Cyc. 591 note 29. See also Cross-References, *ante*, p. 1529, under PERSONAL.

65. Century Dict.

As employed in a statute, it is used to denote a direct and immediate private interest as distinguished from an interest which the judge and other citizens have in public affairs resulting from liability to taxation. Brittain *v.* Monroe County, 214 Pa. St. 648, 651, 63 Atl. 1076.

Used to distinguish from demands which were against debtors in a representative capacity, as executors and administrators. *In re* Hurd, 9 Wend. (N. Y.) 465, 468.

Used in connection with other words.—"Personally appear" see *Ex p.* Sprague, 8 Can. Cr. Cas. 109, 112. "Personally appeared" see Clement *v.* Bullens, 159 Mass. 193, 196, 34 N. E. 173; Campbell *v.* Upton, 113 Mass. 67, 71; Warder *v.* Henry, 117 Mo. 530, 539, 23 S. W. 776. "Personally known" see Wyllis *v.* Haun, 47 Iowa 614, 621. "Personally known to me to be such" see Kelly *v.* Calhoun, 95 U. S. 710, 713, 24 L. ed. 544. "Personally serve" see Westfall *v.* Farwell, 13 Wis. 504, 509.

66. See also Cross-References, *ante*, p. 1529, under PERSONAL.

67. Sanderson *v.* Hunt, 116 Ky. 435, 438, 76 S. W. 179, 25 Ky. L. Rep. 626.

68. Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 53, 22 Am. Rep. 35.

Loans on personal security used in contradistinction to real estate security see Cleveland *v.* Shoeman, 40 Ohio St. 176, 181; Pittsburgh Locomotive, etc., Works *v.* Keokuk State Nat. Bank, 19 Fed. Cas. No. 11,198.

Includes bills of exchange. Gee *v.* Alabama L. Ins., etc., Co., 13 Ala. 579, 583.

69. See also Cross-References, *ante*, p. 1529, under PERSONAL.

70. Merlin, § 13 [*quoted* in Companhia de Mocambique *v.* British South Africa Co., [1892] 2 Q. B. 358, 396, 66 L. T. Rep. N. S. 773, 40 Wkly. Rep. 650].

"Real statutes are those which have principally for their object property, and which do not speak of persons except in relation to property." Merlin, § 13 [*quoted* in Companhia de Mocambique *v.* British South Africa Co., [1892] 2 Q. B. 358, 396, 66 L. T. Rep. N. S. 773, 40 Wkly. Rep. 650].

71. Mumford *v.* Wright, 12 Colo. App. 214, 217, 55 Pac. 744.

72. Denning *v.* Butcher, 91 Iowa 425, 433, 59 N. W. 69.

73. Cheatham *v.* Bobbitt, 118 N. C. 343, 346, 24 S. E. 13.

some business or negotiations between two or more persons.[74] (See, generally, Witnesses. See also Personal.)

PERSONALTY. See Property.[75]

PERSONAL WRONG. An invasion of a personal right.[76] (See, generally, Torts.)

PERSONA REGIS MERGITUR PERSONA DUCIS. A maxim meaning "The person of duke merges in that of king."[77]

PERSONATION. See False Personation.

PERSON OF COLOR. See Colored Persons.

PERSPICUA VERA NON SUNT PROBANDA. A maxim meaning "Plain truths need not be proved."[78]

PER STIRPES. Literally "By stocks or roots";[79] a term of the civil law, extensively used in the modern English and American law, to denote that mode of the distribution and descent of intestates' estates, where the parties entitled to take the shares which their stocks, (such as a father) if living, would have taken.[80] (See Per Capita; and, generally, Descent and Distribution; Wills.)

PERSUADE. To bring to any particular opinion, to influence by argument or expostulation, to inculcate by argument;[81] to incline the will, to prevail upon by argument, advice, expostulations, or reasons;[82] synonymous with Induce,[83] *q. v.* (See Duress; Fraud; Persuasion.)

PERSUASION. The act of persuading; the act of influencing the mind by arguments or reasons offered, or by anything that moves the mind or passions, or inclines the will to a determination;[84] in religious affairs, a creed or belief, or a sect or party adhering to a creed or system of opinions.[85] (See Persuade; and, generally, Religious Societies.)

PERTAIN. To Belong (*q. v.*) or pertain, whether by right of nature, appointment or custom; to relate, as "things pertaining to life."[86]

PERTENENCIA. A word as used in relation to the quantity of land which the

74. Martin *v.* Shannon, 92 Iowa 374, 377, 60 N. W. 645.

It includes transactions and communications between the parties of which both must have had personal knowledge. *In re* Brown, 92 Iowa 379, 388, 60 N. W. 659.

75. See also Personal Effects, *ante*, p. 1531.

76. People *v.* Quanstrom, 93 Mich. 254, 257, 53 N. W. 165, 17 L. R. A. 723, where it is said: "It pertains to the person, the individual."

77. Morgan Leg. Max. [*citing* Jenkin Cent. 160].

78. Bouvier L. Dict. [*citing* Coke Litt. 16].

Applied in: State *v.* Schweickardt, 109 Mo. 496, 504, 19 S. W. 47; Cummings *v.* Cummings, 51 Mo. 261, 264; Simpson *v.* Smyth, 1 Grant Err. & App. (U. C.) 172, 177.

79. Black L. Dict.

80. Burrill L. Dict. [*citing* 2 Blackstone Comm. 217, 218; 2 Kent Comm. 420].

Term employed in: Kent *v.* St. Michael's Church, 136 N. Y. 10, 14, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331; Ward *v.* Stow, 17 N. C. 509, 513, 27 Am. Dec. 238; Hoch's Estate, 154 Pa. St. 417, 420, 26 Atl. 610; Rogers *v.* Rogers, 11 R. I. 38, 65; Parrish *v.* Mills, (Tex. Civ. App. 1907) 102 S. W. 184, 188; Ball *v.* Ball, 27 Gratt. (Va.) 325, 327; Gibson *v.* Fisher, L. R. 5 Eq. 51, 58, 37 L. J. Ch. 67, 16 Wkly. Rep. 115.

81. Reg. *v.* Most, 7 Q. B. D. 244, 258, 14 Cox C. C. 583, 45 J. P. 696, 50 L. J. M. C. 113, 44 L. T. Rep. N. S. 823, 29 Wkly. Rep. 758.

Distinguished from "advise" see Wilson *v.* State, 38 Ala. 411, 414.

82. Webster Dict.; Worcester Dict. [both *quoted* in Wilson *v.* State, 38 Ala. 411, 413].

The word has been construed to mean to carry a persuasion into effect. Respublica *v.* Ray, 3 Yeates (Pa.) 65, 66.

"Persuaded in his own mind" is equivalent to "satisfied," "convinced," and does not indicate a state of doubt or conjecture. Clark *v.* Baird, 9 N. Y. 183, 198.

83. Wilson *v.* State, 38 Ala. 411, 413.

Said to be a term which imports an initial active and wrongful effort. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187, 190.

To "persuade" a slave to leave, is "to aid him to depart;" for, by the term "aid," is comprehended all those appliances which may be resorted to as means to induce or assist a slave in running away. Crosby *v.* Hawthorn, 25 Ala. 221, 223.

84. Black L. Dict. [*citing* Webster Dict.].

The use of the word "persuasion" instead of "threats" in the separate and apart acknowledgment of the wife see Marx *v.* Threet, 131 Ala. 340, 345, 30 So. 831.

85. Webster Dict. [*quoted* in Hale *v.* Everett, 53 N. H. 9, 62, 16 Am. Rep. 82].

Used in the sense of denomination see Atty.-Gen. *v.* Dublin, 38 N. H. 459, 543.

86. People *v.* Chicago Theological Seminary, 174 Ill. 177, 182, 51 N. E. 198.

discoverer of a new mine may acquire round about it, a square of two hundred varas, or five hundred and fifty feet.[87] (See, generally, MINES AND MINERALS.)

PERTINENT. Applicable; relevant.[88] (See, generally, EVIDENCE.)

PER TON. A term which when used in a clause of admeasurement means an entire unit of the quantity designated and not a fractional interest therein.[89]

PER TOUT ET NON PER MY. Literally "By the whole, and not by the moiety."[90]

PER VARIOS ACTUS LEGEM EXPERIENTIA FECIT. A maxim meaning "By various acts experience formed the law."[91]

PER VERBA DE PRÆSENTI. Literally "By words of the present (tense)."[92]

PERVERSE. Turned away or deviating from what is right, proper, correct, etc.;[93] turned the wrong way, not right; distorted from the right.[94]

PERVERSITY. A term which suggests a state of being moved consciously or unconsciously, most generally the former, to look at things from a wrong standpoint.[95] (See PERVERSE.)

PERVOLVAT QUO PLANETA SUUM CIRCULUM ANNUS MORA MOTUS EST. A maxim meaning "A year is the duration of the motion by which a planet revolves through its orbit."[96]

PER YEAR. A term which in a contract is equivalent to the word ANNUALLY,[97] *q. v.*

PESSENDEDE. A Turkish word which signifies "warranted" or "approved."[98]

PETITION. As a noun, a formal written request or prayer for a certain thing to be done;[99] an instrument in writing containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented for the redress of some wrong;[1] a term used in judicial proceedings to describe an

87. Castillero *v.* U. S., 2 Black (U. S.) 17, 168, 17 L. ed. 360.

88. Black L. Dict.

"Pertinent hypothesis" is a hypothesis which, if sustained, would logically influence the issue. Wharton Ev. § 20 [*quoted* in Whitaker *v.* State, 106 Ala. 30, 32, 17 So. 456].

89. Ward *v.* Foley, 141 Fed. 364, 367, 72 C. C. A. 140.

90. Black L. Dict. See also Stalcup *v.* Stalcup, 137 N. C. 305, 307, 49 S. E. 210.

91. Morgan Leg. Max. [*citing* 4 Inst. 50].

92. Burrill L. Dict. [*citing* 1 Blackstone Comm. 96]. See also Reaves *v.* Reaves, 15 Okla. 240, 251, 82 Pac. 490, 2 L. R. A. N. S. 353.

93. Century Dict. [*quoted* in Godfrey *v.* Godfrey, 127 Wis. 47, 61, 106 N. W. 814].

94. Webster Dict. [*quoted* in Godfrey *v.* Godfrey, 127 Wis. 47, 61, 106 N. W. 814].

"Perverse verdict" is a verdict rendered by a jury which choose not to take the law from the judge, but will act on their own erroneous view of the law (Bouvier L. Dict. [*quoted* in Godfrey *v.* Godfrey, 127 Wis. 47, 61, 106 N. W. 814]); a verdict whereby the jury refuse to follow the directions of the judge on a point of law (Rapalje & L. L. Dict. [*quoted* in Godfrey *v.* Godfrey, *supra*]).

95. Godfrey *v.* Godfrey, 127 Wis. 47, 60, 106 N. W. 814.

96. Morgan Leg. Max. [*citing* Bract. 359*b*].

97. Curtiss *v.* Howell, 39 N. Y. 211, 213.

98. Coats *v.* Shepard, 3 N. Y. Leg. Obs. 404, 405.

99. Davis *v.* Henderson, 104 S. W. 1009, 1010, 31 Ky. L. Rep. 1252.

The term may include: A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license. Black L. Dict. [*quoted* in State *v.* Tullock, 108 Mo. App. 32, 34, 82 S. W. 645]. A formal request written or printed and signed by one or many, preferred to a person in authority to a legislative or administrative body, asking for the bestowal of some benefit or privilege, the concession or restoration of a right, the redress of a grievance, or such other special action as the applicants desire. Standard Dict. [*quoted* in State *v.* Tullock, *supra*]. An application made to a court *ex parte*, or where there are no parties in opposition, praying for the exercise of the judicial powers of the court in relation to some matter which is not the subject for a suit or action, or for authority to do some act which requires the sanction of the court; as for the appointment of a guardian, for leave to sell trust property, etc. Black L. Dict. [*quoted* in State *v.* Tullock, *supra*]. A written application addressed to the court or judge praying for the exercise of some judicial power; or to a public officer, requesting the performance of some duty imposed on him by law, or the exercise of some discretion with which he is vested. Lawrey *v.* Sterling, 41 Oreg. 518, 525, 69 Pac. 460. As applied to liquor laws, a request by eligible citizens to a county court to grant a dramshop license to a designated applicant to keep a dramshop in a designated locality. State *v.* Tullock, *supra*.

1. Bouvier L. Dict. [*quoted* in *Re* Shoal Lake Election, 4 Manitoba 270, 272].

application in writing;[2] a request in writing.[3] As a verb, to make a request of a court in writing.[4] (Petition: As a Pleading, see JUSTICES OF THE PEACE; PLEADING. For Accounting, see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD. For Allowance of Appeal or Writ of Error, see APPEAL AND ERROR;[5] JUSTICES OF THE PEACE. For Appointment of Administrator, see EXECUTORS AND ADMINISTRATORS. For Appointment of Guardian, see GUARDIAN AND WARD; INSANE PERSONS. For Arrest, see ARREST. For Attachment, see ATTACHMENT. For Certiorari, see CERTIORARI. For Creation, Annexation, or Alteration, see MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS. For Discovery of Assets, see EXECUTORS AND ADMINISTRATORS. For Election, see ELECTIONS; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS. For Equitable Relief Against Judgment, see JUDGMENTS. For Establishment, Alteration, or Vacation, see DRAINS; STREETS AND HIGHWAYS. For Garnishment, see GARNISHMENT. For Habeas Corpus, see HABEAS CORPUS. For Incurring Indebtedness, see MUNICIPAL CORPORATIONS. For Injunction, see INJUNCTIONS. For Interpleader, see INTERPLEADER. For Leave to Bridge, Dam, Improve, etc., Navigable Waters, see NAVIGABLE WATERS. For License to Sell Liquor, see INTOXICATING LIQUORS. For Mandamus, see MANDAMUS. For Municipal Improvement, see MUNICIPAL CORPORATIONS. For Ne Exeat, see NE EXEAT. For New Trial, see NEW TRIAL. For Nomination, see ELECTIONS. For Organization of Corporation, see CORPORATIONS. For Prohibition, see INTOXICATING LIQUORS. For Receiver, see RECEIVERS. For Redemption, see MORTGAGES. For Rehearing, see APPEAL AND ERROR;[6] EQUITY. For Removal of Cause, see REMOVAL OF CAUSES. For Removal of County-Seat, see COUNTIES. For Review, see REVIEW. For Sale of Property, see EXECUTORS AND ADMINISTRATORS; INFANTS. In Bankruptcy, see BANKRUPTCY. In Condemnation Proceedings, see EMINENT DOMAIN. In Distress Proceedings, see LANDLORD AND TENANT. In Homestead Allotment Proceedings, see HOMESTEADS. In Inquisition of Lunacy, see INSANE PERSONS. In Insolvency, see INSOLVENCY. In Partition Proceedings, see PARTITION. In Probate Proceedings, see WILLS. In Proceedings For Adoption, see ADOPTION OF CHILDREN. In Summary Proceedings, see LANDLORD AND TENANT; MUNICIPAL CORPORATIONS; TAXATION. In Supplementary Proceedings, see EXECUTIONS. Of Intervention, see PARTIES. Operation and Effect of — As Commencement of Lis Pendens, see LIS PENDENS; As Estoppel, see ESTOPPEL; As Evidence, see EVIDENCE; As Suspending Limitations, see LIMITATIONS OF ACTIONS. Privileged Communication, see LIBEL AND SLANDER. Right of, see CONSTITUTIONAL LAW.)

PETITIO PRINCIPII. A supposition of what is not granted.[7]

PETIT JURY. See JURIES.

PETIT LARCENY. See LARCENY.

PETITORY SUIT. A suit in admiralty, in which the mere title to the property is litigated, and sought to be enforced, independently of any possession, which has previously accompanied or sanctioned that title.[8] (Petitory Suit: In

2. Bergen *v.* Jones, 4 Metc. (Mass.) 371, 376; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 547, 23 Am. Rep. 138.

3. Fenstermacher *v.* State, 19 Oreg. 504, 506, 25 Pac. 142.

4. Smith *v.* Patton, 103 Ky. 444, 449, 45 S. W. 459, 20 Ky. L. Rep. 165.

Distinguished from motion which latter may be made *viva voce*. Bergen *v.* Jones, 4 Metc. (Mass.) 371, 376; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 547, 23 Am. Rep. 138; Fenstermacher *v.* State, 19 Oreg. 504, 506, 25 Pac. 142.

Embraces an answer or reply in which a counter-claim or set-off is demanded. Paducah Hotel Co. *v.* Long, 92 Ky. 278, 279, 17 S. W. 853, 13 Ky. L. Rep. 531.

5. "Petition in error" is a new action to reverse the action below. Foster *v.* Borne, 63 Ohio St. 169, 172, 58 N. E. 66, where it is distinguished from an appeal which is the same action as in the lower court.

6. "Petition for a rehearing" is a pleading under the rules of appellate procedure. Louisville, etc., R. Co. *v.* Carmon, 20 Ind. App. 471, 479, 50 N. E. 893, where it is said: "The office of a petition for a rehearing is to specifically present points for the consideration of the court."

7. Case upon Statute for Distribution, Wythe (Va.) 302, 309.

8. The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465, 469, in which they are distinguished from "possessory" suits, which

general, see REAL ACTIONS. In Admiralty, see ADMIRALTY. See also ACTIONS; EJECTMENT.)

PETIT TREASON. See TREASON.

PETROLEUM. A fluid found in the porous sand rock of the earth;[9] a liquid inflammable substance exuding from the earth;[10] a mineral;[11] a mineral substance obtained from the earth by a process of mining;[12] a rock or earth oil;[13] an oily substance of great economical importance, especially as a source of light, appearing naturally oozing from crevices in rocks or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into the rock; rock oil.[14] (Petroleum: Inspection of, see INSPECTION. Keeping or Using, see EXPLOSIVES; FIRE INSURANCE; MUNICIPAL CORPORATIONS. Lands and Wells, see MINES AND MINERALS. Pipe-Line For Supplying, see EMINENT DOMAIN. See also OIL, and Cross-References Thereunder.)

PETTIFOGGING SHYSTER. A term applied to unscrupulous legal practitioners who disgrace their profession by doing mean work, and resort to sharp practice to do it.[15]

PETTY. Small; inferior.[16]

PETTY-BAG OFFICE. An office in which were kept certain writs which related to the interest of the crown.[17] (See HANAPER OFFICE.)

PEWS. Inclosed seats in churches.[18] (See, generally, RELIGIOUS SOCIETIES.)

PEWTER. An alloy of lead and tin.[19] (See LEAD.)

PHARMACIST. See DRUGGISTS.

PHENACETIN. A valuable antipyretic and antineuralgic remedy, and so recognized by the medical profession.[20]

are said to be suits which seek to restore to the owner the possession, of which he had been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property.

9. Wagner *v.* Mallory, 169 N. Y. 501, 505, 62 N. E. 584.

10. Kier *v.* Peterson, 41 Pa. St. 357, 361.

11. Nonamaker *v.* Amos, 73 Ohio St. 163, 170, 76 N. E. 949, 112 Am. St. Rep. 708, 4 L. R. A. N. S. 980. See also MINES AND MINERALS. 27 Cyc. text and note 44.

12. Gill *v.* Weston, 110 Pa. St. 312, 317, 1 Atl. 921.

13. Bennett *v.* North British, etc., Ins. Co., 8 Daly (N. Y.) 471, 472.

14. Century Dict. [*quoted* in Murray *v.* Allred, 100 Tenn. 100, 107, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249].

Crude petroleum consists of a number of different oils, all more or less volatile, which are separated from each other by a process of distillation. Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590, 598.

It is part of the realty when in place, as timber, coal, iron, or salt water. Williamson *v.* Jones, 39 W. Va. 231, 256, 19 S. E. 436, 25 L. R. A. 222.

15. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251, 256.

16. Burrill L. Dict.

"Petty chapman" is a seller or marketman dealing in small or petty articles (Imperial Dict. [*quoted* in Reg. *v.* Coutts, 5 Ont. 644, 649]); a trading person going from town to town, or to other men's houses, and traveling either on foot or with a horse or horses, or otherwise carrying to sell or exposing to sale any goods, wares, or merchandise (Rapalje & L. L. Dict. [*quoted* in Martin *v.* Rosedale, 130 Ind. 109, 111, 29 N. E. 410]); person traveling from town to town with goods and merchandise (Tomlin L. Dict. [*quoted* in Emmons *v.* Lewistown, 132 Ill. 380, 384, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328]. See Com. *v.* Ober, 12 Cush. (Mass.) 493, 496). See also CHAPMAN, 6 Cyc. 891; and, generally, HAWKERS AND PEDDLERS, 21 Cyc. 378 *et seq.*

"Petty offense" is an offense which a justice of the peace or the mayor or other officer of a town or city may try and punish. Ward *v.* White, 86 Tex. 170, 171, 23 S. W. 981.

"Petty officers" includes mates. U. S. *v.* Fuller, 160 U. S. 593, 595, 16 S. Ct. 386, 40 L. ed. 549.

17. Yates *v.* People, 6 Johns. (N. Y.) 337, 363, where it is distinguished from "Hanaper Office."

18. O'Hear *v.* De Goesbriand, 33 Vt. 593, 606, 80 Am. Dec. 653, where it is said: "According to modern use and idea, they were not known till long after the reformation, and that enclosed pews were not in general use before the middle of the seventeenth century, being for a long time confined to the family of the patron."

Blackstone informs us that pews in a church are somewhat of the same nature as a monument or tombstone, or a coat of armor, or ensign of honor hung in a church. They are in the nature of heirlooms, and may descend by custom immemorial from the ancestor to the heir. Newark Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325, 328 [*citing* 2 Blackstone Comm. 429].

19. U. S. *v.* Ullman, 28 Fed. Cas. No. 16,593, 4 Ben. 547.

20. Dickerson *v.* Maurer, 108 Fed. 233, 236.

PHENOMENAL. Pertaining to a phenomenon in appearance.[21]

PHENOMENON. A term which sometimes denotes a remarkable or unusual appearance, whose cause is not obvious;[22] in a general sense, an appearance, anything visible, whatever is presented to the eye by observation or experiment, or whatever is discovered to exist.[23]

PHILANTHROPIC. Of or pertaining to philanthropy.[24]

PHILIPPINE ISLANDS. See TERRITORIES.

PHILOSOPHY. A term which has reference to the fundamental part of any science; to general principles connected with a science, but not forming part of it.[25]

PHOTOGRAPH. The paper copies taken from the original plate called the "negative," made sensitive by chemicals, and printed by sunlight through the camera;[26] a picture or likeness taken by photography.[27] (Photograph: As Evidence, see CRIMINAL LAW; EVIDENCE. Copyright of, see COPYRIGHT. Unauthorized, see CONTRACTS; INJUNCTIONS.)

PHOTOGRAPHER. A person who makes pictures by means of photography;[28] an artist, not an artisan, who takes impressions or likenesses of things and persons on prepared plates or surfaces.[29] (See PHOTOGRAPHY.)

PHOTOGRAPHY. The art of producing images of objects by an application of chemical change produced in certain substances by the action of light or more generally by radiant energy;[30] the science which relates to the action of the light on sensitive bodies in the production of pictures by the fixation of images and the like.[31] (See PHOTOGRAPHER.)

PHRASE. A term defined to be two or more words properly arranged, not constituting an entire proposition, but performing a distinct etymological office.[32]

21. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 573, 11 Atl. 189.

As applied to a storm see Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 573, 11 Atl. 189.

22. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 573, 11 Atl. 189.

23. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 573, 11 Atl. 189.

24. Century Dict.

"Philanthropic purposes," as used in a devise of property to trustees to be applied to the promotion of agricultural or horticultural improvements or other philosophical or philanthropic purposes, is not in itself widely variant from "charitable." The rule of interpretation which may restrict "benevolence" to the sense of a legal charity is equally applicable here. Rotch *v.* Emerson, 105 Mass. 431, 433.

25. *In re* Massachusetts Gen. Hospital, 95 Fed. 973, 976.

Distinguished from "science" see U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 937, 41 C. C. A. 114; *In re* Massachusetts Gen. Hospital, 95 Fed. 973, 976, where "science" is also defined.

"Philosophical instrument" is an instrument or apparatus involving the illustration of some principle of natural philosophy or natural science (Manasse *v.* Spalding, 24 Fed. 86); such an instrument as is more commonly used for the purpose of making observations, and discoveries in nature and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity (Robertson *v.* Oelschlaeger, 137 U. S. 436, 438, 11 S. Ct. 148, 34 L. ed. 744]. Distinguished from mechanical implements see Robertson *v.* Oelschlaeger, 137 U. S. 436, 438, 11 S. Ct. 148, 34 L. ed. 744; *In re* Massachusetts Gen. Hospital, 95 Fed. 973, 974.

"Philosophical purposes" is a term which under the rule *noscitur a sociis*, must be understood as referring to practical and useful sciences, and not to those which are abstract, speculative, or metaphysical merely. Rotch *v.* Emerson, 105 Mass. 431, 433.

26. Udderzook *v.* Com., 76 Pa. St. 340, 352, where it is said: "Photographs . . . are not the original likenesses; their lines are not traced by the hand of the artist."

27. Webster Dict. [*quoted* in Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 55, 97 S. W. 961].

May include a series of pictures representing the launching of a vessel, taken by means of a camera on a celluloid film in rapid succession, from which a positive reproduction was made by light exposure on another celluloid sheet adapted to be used in a magic lantern to reproduce the same scene. Edison *v.* Lubin, 122 Fed. 240, 242, 58 C. C. A. 604.

28. New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141.

29. Story *v.* Walker, 11 Lea (Tenn.) 515, 517, 47 Am. Rep. 305, where it is said: "He is no more a mechanic than the painter who, by means of his implements, covers his canvas with the glaring images of natural objects." See also Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768.

30. Century Dict. [*quoted* in New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141].

31. Webster Dict. [*quoted* in New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141; Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 55, 97 S. W. 961].

32. Bourland *v.* Hildreth, 26 Cal. 161, 233.

(Phrase: Construction of in — Contract, see CONTRACTS; Covenant, see COVENANTS; Deed, see DEEDS; Statute, see STATUTES; Will, see WILLS. See also WORDS AND PHRASES, 1 Cyc. *et seq.*, *passim*.)

P. H. V. An abbreviation for "*pro hac vice*," for this turn, for this purpose or occasion.[33] (See, generally, JUDGES.)

PHYSIC. As a noun, medicine;[34] the science of nature and of natural objects.[35] As a verb, to treat with medicine, to evacuate the bowels; to purge.[36] (See, generally, DRUGGISTS; PHYSICIANS AND SURGEONS.)

PHYSICAL. Pertaining to the material part or structure of an organized being.[37] (Physical: Condition — As Element of Damages, see DAMAGES; As Evidence, see EVIDENCE; Evidence of, see EVIDENCE; Of Parties to an Assault or Homicide, see ASSAULT AND BATTERY; HOMICIDE; Of Spouse as Ground of Annulment of Marriage, see MARRIAGE; Of Witness as Ground For Taking Deposition, see DEPOSITIONS. Examination of Party to Action or Suit — For Annulment of Marriage, see MARRIAGE; For Divorce, see DIVORCE; For Personal Injuries, see DAMAGES; DISCOVERY; EVIDENCE; JUDGES.)

PHYSICAL CONDITION. See Cross-References under PHYSICAL.

PHYSICAL EXAMINATION. See Cross-References under PHYSICAL.

PHYSICALLY. In a physical manner according to nature.[38]

33. Black L. Dict.

34. *In re* Hunter, 60 N. C. 372.

The term is not confined to drugs administered, but includes every service or medical aid rendered by a physician to his patient. Rouse *v.* Morris, 17 Serg. & R. (Pa.) 328, 329.

35. *In re* Hunter, 60 N. C. 372.

Derived from the Greek word "*phusis*" — nature. *In re* Hunter, 60 N. C. 372.

36. *In re* Hunter, 60 N. C. 372.

37. *In re* Hunter, 60 N. C. 372.

"Physical detention" is imprisonment. Egleston *v.* Scheibel, 113 N. Y. App. Div. 798, 799, 99 N. Y. Suppl. 969. See 14 Cyc. 235, 21 Cyc. 1742; and generally, ARREST, 3 Cyc. 867; FALSE IMPRISONMENT, 19 Cyc. 316.

"Physical disability" see McRae *v.* Metropolitan St. R. Co., 125 Mo. App. 562, 570, 102 S. W. 1032. See also DISABILITY, 14 Cyc. 293. "Other physical disability" see Supreme Council O. C. F. *v.* Fairman, 10 Abb. N. Cas. (N. Y.) 162, 167, 62 How. Pr. 386.

"Physical effect" see Austin *v.* Augusta, etc., R. Co., 108 Ga. 671, 709, 34 S. E. 852, 47 L. R. A. 755. See also EFFECT, 14 Cyc. 1231.

"Physical fact," in the law of evidence, is a fact, the existence of which may be perceived by the senses. Burrill L. Dict. [*citing* Burrill Circ. Ev. 130]. See, generally, EVIDENCE.

"Physical force," as used in relation to assaults, is a term which is synonymous with the term "violence," and the two are used interchangeably. State *v.* Wells, 31 Conn. 210, 212. "Physical force" as distinguished from "moral force" see *In re* Hunter, 60 N. C. 372. See FORCE, 19 Cyc. 1106.

"Physical herb" see *In re* Hunter, 60 N. C. 372.

"Physical impossibility," as applied to the inability of a party to perform his contract, is a term which means "practical impossibility according to the state of knowledge and of the day." See 9 Cyc. 326 [*quoted* in Le Roy *v.* Jacobosky, 136 N. C. 443, 459, 48 S. E. 796, 67 L. R. A. 977].

"Physical incapacity" is such a physical defect or incurable disease existing at the time of marriage as will prevent sexual coition. Franke *v.* Franke, (Cal. 1900) 31 Pac. 571, 574, 18 L. R. A. 375, where it is said, not to include pregnancy.

"Physical inconvenience" see McRae *v.* Metropolitan St. R. Co., 125 Mo. App. 562, 571, 102 S. W. 1032.

"Physical injury" is a term used to distinguish the kind of injury meant from one which has a purely mental effect (Austin *v.* Augusta Terminal R. Co., 108 Ga. 671, 709, 34 S. E. 852, 47 L. R. A. 755]; a synonym of "bodily harm" or "bodily hurt" (Deming *v.* Chicago, etc., R. Co., 80 Mo. App. 152, 157). See also HURT, 21 Cyc. 1118; INJURY, 22 Cyc. 1064; PERSONAL INJURY, *ante*, p. 1532.

"Physical necessity" is a condition in which a person is absolutely compelled to act in a particular way by overwhelming superior force. Black L. Dict. See NECESSITY, 29 Cyc. 379. Distinguished from "moral necessity" see 27 Cyc. 912 note 20. In shipping, it is an emergency in which the master of a vessel is called upon to act in his discretion, as, for instance, in a storm of imminent peril, where a jettison seems required. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228.

"Physical strength" see *In re* Hunter, 60 N. C. 372.

38. Century Dict.

"Physically incapacitated" see Anonymous, 89 Ala. 291, 292, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425.

"Physically incapable of entering into the marriage state" see Schroter *v.* Schroter, 56 Misc. (N. Y.) 69, 70, 106 N. Y. Suppl. 22.

PHYSICIANS AND SURGEONS

EDITED BY HARRY B. HUTCHINS
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I. DEFINITIONS, 1544
A. *Physician*, 1544
B. *Surgeon*, 1546
C. *Veterinary Surgeon*, 1546
D. *Dentist*, 1546
E. *Surgery*, 1546
F. *Malpractice*, 1546
G. *Osteopathy*, 1546
H. *Ophthalmology*, 1547

II. RIGHT TO PRACTISE MEDICINE AND SURGERY, 1547
A. *Power to Regulate Practice*, 1547
B. *Requirements*, 1548
1. *In General*, 1548
2. *License or Certificate*, 1549
a. *In General*, 1549
(I) *Necessity*, 1549
(A) *In General*, 1549
(B) *In County of Residence or Practice*, 1549
(II) *Sufficiency*, 1550
(III) *Authority to Issue*, 1550
(A) *In General*, 1550
(B) *Medical Boards*, 1550
(1) *In General*, 1550
(2) *Nature of Power*, 1550
(3) *Authority and Powers*, 1551
(a) *In General*, 1551
(b) *To Determine Reputability of Institution Granting Diploma*, 1551
(c) *To Refuse License or Certificate For Cause*, 1553
(4) *Right to Review Decision of Board*, 1553
(IV) *Registration*, 1554
(A) *Necessity*, 1554
(B) *Time*, 1554
(C) *Place*, 1554
(D) *Curing Invalid Registration*, 1555
(V) *Revocation*, 1555
(A) *Authority to Revoke*, 1555
(B) *Acts Authorizing Revocation*, 1555
(C) *Proceedings to Revoke*, 1557
(1) *In General*, 1557
(2) *Parties*, 1557
(3) *Complaint*, 1557
(4) *Evidence*, 1557
(5) *Appeal*, 1557
(6) *Effect of Former Adjudication*, 1558

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(VI) *Who May Be Licensed*, 1558
b. *Temporary License*, 1558
c. *Renewal License*, 1559
d. *License From Another State*, 1559
3. *Proof of Diploma*, 1559
4. *Good Moral Character*, 1559
5. *Privilege or Occupation Taxes*, 1559
6. *Exemptions From Operation of Statutes*, 1560
a. *In General*, 1560
b. *Prior Practitioners*, 1560
C. *Practising Without Authority*, 1561
1. *What Constitutes*, 1561
a. *Practising Medicine or Surgery*, 1561
(I) *In General*, 1561
(A) *In Absence of Definition of Term*, 1561
(B) *When Term Defined by Statute*, 1561
(II) *Christian Science Treatment*, 1561
(III) *Osteopathy*, 1562
(IV) *Professing to Cure or Heal*, 1562
(A) *In General*, 1562
(B) *Oculists and Eye Specialists*, 1563
(V) *Obstetrics and Midwifery*, 1563
(VI) *Selling and Administering Patent Medicines*, 1563
(VII) *Selling Mechanical Instruments or Appliances*, 1564
(VIII) *Practising Under Licensed Physician*, 1564
(IX) *Practising After Refusal of License*, 1564
(X) *Practising After Revocation of License*, 1564
(XI) *Practising Without Fee or Reward*, 1564
b. *Practising Dentistry*, 1565
2. *Prosecutions For Practising Without Authority*, 1565
a. *Indictment, Information, or Complaint*, 1565
(I) *In General*, 1565
(II) *Failure to Qualify*, 1566
(III) *Person Practised Upon*, 1566
(IV) *Reward or Compensation*, 1566
(V) *Negativing Exceptions*, 1566
(VI) *Joinder of Offenses*, 1567
b. *Defenses*, 1567
c. *Evidence*, 1567
(I) *Presumptions and Burden of Proof*, 1567
(II) *Admissibility*, 1567
(III) *Weight and Sufficiency*, 1568
d. *Variance*, 1568
e. *Questions For Jury*, 1569
f. *Instructions*, 1569
g. *Verdict*, 1569
h. *Review*, 1569
(I) *In General*, 1569
(II) *Record*, 1569
i. *Effect of Conviction*, 1569

III. RELATION TO PATIENT, 1570

A. *Nature of Relation*, 1570
B. *Degree of Skill and Care Required*, 1570
1. *General Rule*, 1570
a. *As to Ordinary Practitioners*, 1570
b. *As to Specialists*, 1571

2. *Necessity of Following Professed or Recognized School, System, or Treatment*, 1571
3. *Depending on Nature or Character of Injury or Disease*, 1572
4. *Depending on State of Profession*, 1572
5. *Depending on Locality of Practice*, 1572
6. *Depending on Compensation*, 1573
7. *Insurance of Cure or Benefit*, 1573
8. *In Determining Nature of Injury or Malady and Mode of Treatment*, 1573
9. *In Discontinuing Attendance*, 1573
10. *In Using Anesthetics*, 1574
11. *In Giving Instructions*, 1574
12. *To Avoid Communicating Contagious Diseases*, 1574

IV. LIABILITY FOR NEGLIGENCE OR MALPRACTICE, 1574

A. *Practitioners Subject to Liability*, 1574
B. *Acts or Omissions Constituting Negligence or Malpractice*, 1575
1. *In General*, 1575
2. *Refusal to Take Case*, 1575
3. *Failure to Discover Nature of Injury or Ailment*, 1575
4. *Wrong Diagnosis*, 1575
5. *Failure to Follow Established Practice*, 1576
6. *Abandonment or Neglect of Case*, 1576
a. *Unwarranted Abandonment*, 1576
b. *Failure to Attend With Sufficient Frequency*, 1576
c. *Temporarily Leaving Practice*, 1576
7. *Performing Operation Without Consent*, 1576
a. *Of Patient*, 1576
b. *Of Husband or Father*, 1577
8. *Failure to Give Instructions*, 1577
9. *Communicating Contagious Disease*, 1577
10. *Intrusion of Unprofessional Assistant*, 1578
11. *Mistake in Prescription*, 1578
12. *Malpractice Resulting in Death*, 1578
13. *Errors of Judgment*, 1578
14. *Fraud and Deceit*, 1579
15. *Wrongful Certificate of Insanity*, 1579
16. *Effect of Contributory Negligence*, 1579
17. *Effect of Admission of Want of Sufficient Skill*, 1581
C. *To Whom Liable — Gratuitous or Charity Patient*, 1581
D. *For Whose Acts or Omissions Physician Liable*, 1581
1. *Assistant*, 1581
2. *Substitute*, 1581
3. *Partner*, 1581
4. *Nurse or Attendant*, 1581
E. *Actions For Negligence or Malpractice*, 1581
1. *Nature and Form of Remedy*, 1581
2. *Time to Sue and Limitations*, 1582
3. *Survival of Action*, 1582
4. *Defenses*, 1582
5. *Pleading*, 1583
a. *In General*, 1583
b. *Amendment*, 1583
6. *Issues and Proof*, 1583
7. *Evidence*, 1584
a. *Presumptions and Burden of Proof*, 1584
(I) *As to Negligence or Want of Skill*, 1584
(II) *As to Contributory Negligence*, 1585

b. *Admissibility*, 1585
(I) *Knowledge and Skill of Defendant*, 1585
(II) *Negligence*, 1586
(III) *Contributory Negligence*, 1587
(IV) *Demonstrative Evidence*, 1587
c. *Weight and Sufficiency*, 1587
(I) *In General*, 1587
(II) *To Require Submission to Jury*, 1588
8. *Questions For Jury*, 1588
9. *Instructions*, 1588
a. *In General*, 1588
b. *As to Damages*, 1590
10. *Damages*, 1590
a. *Nominal*, 1590
b. *Compensatory*, 1590
c. *Exemplary or Punitive*, 1591
11. *New Trial*, 1592
12. *Review*, 1592

V. COMPENSATION, 1592
A. *Right to Compensation*, 1592
1. *In General*, 1592
2. *As Dependent on Right to Practice*, 1593
a. *In General*, 1593
b. *Excuse For Failure to Qualify*, 1594
c. *Effect of Repeal or Amendment of Disqualifying Act*, 1594
d. *Effect of Revival of Disqualifying Act*, 1594
3. *As Dependent on Beneficial Result of Services*, 1594
4. *As Dependent on Want of Skill or Negligence*, 1595
5. *As Dependent on Place of Residence or of Performance of Services*, 1595
6. *As Dependent on Intention That Service Should Be Gratuitous*, 1595
7. *Under "No Cure No Pay" Contract*, 1596
8. *For Medicine Furnished*, 1596
B. *Liability For Compensation*, 1596
1. *Liability of Patient*, 1596
a. *In General*, 1596
b. *For Fees of Consultants*, 1597
c. *Conditional Contract*, 1597
2. *Liability of Person Employing Physician For Another*, 1597
a. *In General*, 1597
b. *For Subsequent Visits*, 1598
3. *Third Person Assuming Liability After Services Begun*, 1598
C. *Amount of Compensation*, 1598
1. *In General*, 1598
a. *In Absence of Contract*, 1598
b. *Under Contract*, 1599
2. *Elements to Be Considered in Estimating Amount*, 1599
a. *Customary Charge*, 1599
b. *Nature of Disease or Injury*, 1599
c. *Professional Standing*, 1599
d. *Skill and Learning*, 1599
e. *Daily Income*, 1599
f. *Loss of Other Practice*, 1600
g. *Financial Condition of Patient*, 1600
3. *Opinion Evidence*, 1600

D. *Actions For Compensation*, 1600
1. *Nature and Form of Remedy*, 1600
2. *Defenses*, 1600
3. *Pleading*, 1601
a. *Declaration or Complaint*, 1601
b. *Plea or Answer*, 1601
4. *Issues and Proof*, 1601
5. *Evidence*, 1601
a. *Presumptions and Burden of Proof*, 1601
(I) *In General*, 1601
(II) *As to Qualification*, 1601
(III) *As to Employment*, 1602
(IV) *As to Necessity of Visits*, 1602
(V) *As to Skill and Care*, 1602
(VI) *As to Change of Liability For Services*, 1602
(VII) *As to Promise to Compensate*, 1603
b. *Admissibility*, 1603
c. *Weight and Sufficiency*, 1603
6. *Questions For Jury*, 1604
7 *Instructions*, 1604
8. *Review*, 1604

VI. MEDICAL SOCIETIES, 1604

CROSS-REFERENCES

For Matters Relating to:
Abortion, see ABORTION.
Army or Navy Surgeon, see ARMY and NAVY.
Asylum, see ASYLUMS.
Board of Health:
In General, see HEALTH.
Of Municipal Government, see MUNICIPAL CORPORATIONS.
Certificate of Attending Physician, see ACCIDENT INSURANCE; LIFE INSURANCE; MUTUAL BENEFIT INSURANCE.
City Physician, see MUNICIPAL CORPORATIONS.
Contract:
For Sale of Business, see CONTRACTS; FRAUD.
Not to Engage in Practice, see CONTRACTS.
Of Unlicensed Physician, see CONTRACTS.
Coroner's Physician, see CORONERS.
Dead Bodies, see DEAD BODIES.
Druggist, see DRUGGISTS.
Employment of Physician For Wounded Employee, see CORPORATIONS.
Evidence of Medical Expert:
In Civil Case, see EVIDENCE.
In Criminal Case, see CRIMINAL LAW.
Exemption:
From Jury Duty, see JURIES.
Of Earnings, see EXEMPTIONS.
Of Professional Books and Instruments, see EXEMPTIONS.
Hospital, see HOSPITALS.
Libel or Slander, see LIBEL AND SLANDER.
Mailing Indecent or Obscene Publication or Advertisement, see POST-OFFICE.
Manslaughter, see HOMICIDE.
Police Surgeon, see MUNICIPAL CORPORATIONS.
Prison Physician, see PRISONS.
Privileged Communication by Patient to Physician, see DISCOVERY; WITNESSES.

For Matters Relating to — (*continued*)
Sale or Prescription:
Of Intoxicating Liquor, see INTERNAL REVENUE; INTOXICATING LIQUORS.
Of Poisonous Drug, see POISONS.
Testimony of Physician:
At Coroner's Inquest, see WITNESSES.
In Action For Personal Injury, see DAMAGES.

I. DEFINITIONS.[1]

A. Physician. The word "physician" is defined to mean a person who has received the degree of doctor of medicine from an incorporated institution; one

1. **"Animal magnetism"** see Parks *v.* State, 159 Ind. 211, 226, 64 N. E. 862, 59 L. R. A. 190.
Bone-setting see *infra*, II, C, 1, a, (I), (A), note 30.
"Cancer doctor" see Musser *v.* Chase, 29 Ohio St. 577, 585.
Certificate see *infra*, II, B, 2.
"Christian science" explained see Matter of Brush, 35 Misc. (N. Y.) 689, 695, 72 N. Y. Suppl. 421, per Fitzgerald, Surrogate. See *infra*, II, C, 1, a, (II).
Clairvoyance see *infra*, II, C, 1, a, (I), (A), note 29.
Electrical treatment see *infra*, II, C, 1, a, (I), (A), note 29.
"Emergency" see *infra*, II, B, 6, a, note 18.
Empiric see Musser *v.* Chase, 29 Ohio St. 577, 582.
Eye specialist see *infra*, II, C, 1, a, (IV), (B).
"Fair or reasonable knowledge or skill" see Jones *v.* Angell, 95 Ind. 376, 382.
"Fair" skill see Jones *v.* Angell, 95 Ind. 376, 382.
"Healers" defined see 21 Cyc. 381.
"Healing act" defined see 21 Cyc. 381.
Healing art see *infra*, II, C, 1, a, (I), (B).
"Homeopathic" defined see N. J. Gen. St. (1895) p. 2083, § 16.
"Homeopathic specific" defined see 21 Cyc. 447.
"Hypnotism" see Parks *v.* State, 159 Ind. 211, 226, 64 N. E. 862, 59 L. R. A. 190.
License see *infra*, II, B, 2.
"Magnetic healer" see *infra*, II, C, 1, a, (IV), (A), note 38. See also Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814.
"Magnetic healing" see Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 815. See also Parks *v.* State, 159 Ind. 211, 226, 64 N. E. 862, 59 L. R. A. 190.
"Massage" see Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 815.
"Medical" defined see 27 Cyc. 465. See also Territory *v.* Newman, (N. M. 1905) 79 Pac. 706, 707.
"Medical attendance" defined see 27 Cyc. 465 note 7.
"Medical attendant" see 27 Cyc. 465 note 7.
"Medical college" see 27 Cyc. 465 note 7.
"Medical college in good standing" see Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 815.
Medical examiners see *infra*, II, B, 2, a, (III), (B).
"Medical or surgical assistance" see 27 Cyc. 465 note 7.
"Medical treatment" see 27 Cyc. 465 note 7.
"Medicine" defined see 27 Cyc. 466; and *infra*, II, C, 1, a, (I), (A).
"Medicine and surgery" see *infra*, II, C, 1, a, (I), (A).
"Metaphysical healing" see State *v.* Taft, 20 R. I. 645, 40 Atl. 758.
Midwifery see *infra*, II, C, 1, a, (V). See also Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814.
"No cure no pay" contract see *infra*, V, A, 7.
Obstetrics see *infra*, II, C, 1, a, (V).
Oculist see *infra*, II, C, 1, a, (IV), (B).
"Operation" defined see 29 Cyc. 1497.
"Ordinary knowledge and skill" see Jones *v.* Angell, 95 Ind. 376, 382.
"Other agency" see *infra*, II, C, 1, a, (II), note 33.
"Practice of medicine and surgery" see *infra*, II, C, 1, a, (I), (A); and 27 Cyc. 466 note 19. "The practice of medicine includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases." Bouvier L. Dict. [*quoted* in Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814]. "The practice of surgery is limited to manual operations usually performed by surgical instruments or appliances." Bouvier L. Dict. [*quoted* in Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814]. "'The practice of medicine' . . . means (1) to open an office for the practice of medicine; or (2) to announce to the public or to any individual, in any way, a desire or willingness or readiness to treat the sick or afflicted, or investigate or diagnose, or offer to investigate or diagnose, any physical or medical ailments or disease of any person; or (3) to suggest, recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the use, relief, or palliation of any ailment or disease of the mind or body, or the cure or relief of any wound, fracture, or bodily injury or deformity, after having re-

lawfully engaged in the practice of medicine.[2] The word in its popular sense means one who professes or practises medicine, or the healing art; a doctor of medicine.[3] The term includes all who practise physic or surgery and is not

ceived or with the intent to receive therefor, either directly or indirectly, any bonus, gift, or compensation." Territory *v.* Newman, (N. M. 1905) 79 Pac. 706.

"**Practising medicine**" see *infra*, II, C, 2, a, (I), note 64. "Any person shall be held, on practising medicine, surgery, or obstetrics, to be a physician . . . or who shall publicly profess to be a physician, surgeon, or obstetrician, or assume their duties, or who shall make a practice of prescribing, or prescribing and furnishing, medicine for the sick, or who shall publicly profess to cure or heal." Iowa Code (1897), § 2579 [*quoted* in State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431].

"**Profession**" see Lawson *v.* Conaway, 37 W. Va. 159, 163, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

"**Professor**" see *infra*, II, C, 1, a, (IV), (A).

"**Reasonable**" **skill** see Kendall *v.* Brown, 74 Ill. 232, 237; Jones *v.* Angell, 95 Ind. 376, 382.

"**Reputable**" see *infra*, II, B, 2, a, (III), (B), (3), (b).

2. Bouvier L. Dict. [*quoted* in Harrison *v.* State, 102 Ala. 170, 173, 15 So. 563; Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814].

In England physicians are a class of persons who have a diploma from a college of physicians and are entitled to the honorary distinction of doctor of medicine. See Graham *v.* Gautier, 21 Tex. 111, 117; Hunter *v.* Clare, [1899] 1 Q. B. 635, 641, 63 J. P. 308, 68 L. J. Q. B. 278, 80 L. T. Rep. N. S. 197, 47 Wkly. Rep. 394.

By statute a physician or surgeon has been defined to be "one who prescribes or administers medicine for, or in any manner treats, diseases or wounds, for pay" (Richardson *v.* State, 47 Ark. 562, 564, 2 S. W. 187); "a person skilled in both medicine and surgery" (Minn. Rev. Laws (1905), §§ 2295–2300 [*quoted* in Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690].

3. Worcester Dict. [*quoted* in Harrison *v.* State, 102 Ala. 170, 173, 15 So. 563; Whitlock *v.* Com., 89 Va. 337, 338, 15 S. E. 893].

Other definitions are: "One authorized to prescribe remedies for and treat diseases; a doctor of medicine." Webster Dict. [*quoted* in Sutton *v.* Facey, 1 Mich. 243, 247; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523].

"One who practices the art of healing disease and preserving health; a prescriber of remedies for sickness and disease." State *v.* Beck, 21 R. I. 288, 291, 43 Atl. 366, 45 L. R. A. 269.

"One qualified and authorized to prescribe remedies for diseases." Prowitt *v.* Denver, 11 Colo. App. 70, 52 Pac. 286, 287.

"One skilled in both medicine and surgery." Castner *v.* Sliker, 33 N. J. L. 507, 510.

"One who is versed in medical science, a branch of which is surgery." Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690.

Synonymous terms.—"Doctor," "person practising medicine," and "physician" are often used as synonymous and interchangeably. Harrison *v.* State, 102 Ala. 170, 172, 15 So. 563. See also Corsi *v.* Maretzek, 4 E. D. Smith (N. Y.) 1, 7.

"**County physician**" see People *v.* Shearer, 143 Cal. 66, 67, 76 Pac. 813.

"**Doctor**" see *infra*, II, C, 1, a, (IV), (A).

"**Dr.**" see *infra*, II, C, 1, a, (IV), (A), note 38.

"**Employee**" as including a physician see 15 Cyc. 1033 text and note 57.

"**Family physician**" defined see 19 Cyc. 455.

"**Itinerant doctors**" see Cherokee *v.* Perkins, 118 Iowa 405, 407, 92 N. W. 68.

"**Itinerant physicians**" see Cherokee *v.* Perkins, 118 Iowa 405, 406, 92 N. W. 68. See also Iowa Code (1897), § 2579 [*quoted* in State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431]. An itinerant physician has been defined to be one who travels from place to place, pursuing his vocation in an itinerant method. Hairston *v.* State, 36 Tex. Cr. 470, 471, 37 S. W. 858. Under the Iowa code defining an itinerant physician as a physician practising medicine, or professing to heal diseases by any medicine, appliance, or method, who goes from place to place, a nonresident who goes from place to place, professing to cure diseases by dieting his patients, prescribing exercises, and furnishing them with glasses, is an itinerant physician. State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431.

"**Laborer**" does not include a physician. Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144.

"**M. D.**" see 26 Cyc. 1606.

"**Physicians in good standing**" see Lawson *v.* Conaway, 37 W. Va. 159, 163, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

"**Regular physician**" see Bradbury *v.* Bardin, 35 Conn. 577, 581.

Specialist traveling from place to place.—A physician residing in one town and maintaining an office in another, in which he practises medicine as a specialist, is not a specialist traveling from place to place, within the meaning of Sp. Sess. Laws (1897), p. 51, subd. 13, requiring a physician traveling from place to place as a specialist to pay an occupation tax. Adams *v.* State, 45 Tex. Cr. 566, 78 S. W. 935; Broiles *v.* State, (Tex. Cr. App. 1902) 68 S. W. 685; Hairston *v.* State, 36 Tex. Cr. 470, 37 S. W. 858.

"**Tradesmen**" as including a physician see Woodfield *v.* Colzey, 47 Ga. 121, 124.

"**Traveling physician**" see Adams *v.* State, 45 Tex. Cr. 566, 567, 78 S. W. 935.

limited to any one school of practitioners. It therefore includes a homeopath.[4] In its broad sense the term "physician" includes a dentist,[5] but it has been held that a dentist is not a "physician or surgeon" within the meaning of those words as used in various state statutes.[6]

B. Surgeon. A surgeon is a practitioner who treats injuries, deformities, or disorders by mechanical operations.[7]

C. Veterinary Surgeon. A veterinary surgeon is a person lawfully practising the art of treating and healing injuries and diseases of domestic animals.[8]

D. Dentist. A dentist is a dental surgeon;[9] one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert, or repair them.[10]

E. Surgery. Surgery is a branch of medical science.[11] It is limited to manual operations usually performed by surgical instruments or appliances.[12]

F. Malpractice. Malpractice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties which are devolved and incumbent upon him on account of his contractual relations with his patient.[13]

G. Osteopathy. Osteopathy is defined as a method of treating diseases of the human body without the use of drugs, by means of manipulations applied to various nerve centers — chiefly those along the spine — with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces.[14]

4. Corsi *v.* Maretzek, 4 E. D. Smith (N. Y.) 1, 5; Raynor *v.* State, 62 Wis. 289, 300, 22 N. W. 430.

5. *In re* Hunter, 60 N. C. 372.

6. People *v.* De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139 (holding that a dentist is not a surgeon within a statute providing that communications to persons authorized to practise medicine or surgery shall be privileged); State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799 (holding that a dentist is not a physician or surgeon within a statute exempting a practitioner of medicine or surgery from jury duty); State *v.* McMinn, 118 N. C. 1259, 24 S. E. 523 (holding that a dentist is not a physician within a statute protecting one who sells intoxicating liquor on Sunday on the prescription of a physician). See also Cherokee *v.* Perkins, 118 Iowa 405, 92 N. W. 68.

7. Standard Dict.

A surgeon is a physician who treats bodily injuries and ills by manual operations and the use of surgical instruments and appliances. Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690.

In England a surgeon is a practitioner who holds a diploma from the Royal College of Surgeons, but who has not the degree of M. D. See Standard Dict.

"Itinerant surgeons" see Cherokee *v.* Perkins, 118 Iowa 405, 406, 92 N. W. 68.

The word "physician" includes not only doctors who administer medicine and physic, but surgeons, who, by a knowledge of the nature and structure of the human system, are able to amputate an injured and diseased limb, or to extract a ball with skill and as much safety to life and as little pain as the case admits of. *In re* Hunter, 60 N. C. 372, 373.

8. Lyford *v.* Martin, 79 Minn. 243, 244, 82 N. W. 479.

9. State *v.* Beck, 21 R. I. 288, 293, 43 Atl. 366, 45 L. R. A. 269.

10. People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523. See also *infra*, II, C, 1, b.

"Physician" as including a dentist see *In re* Hunter, 60 N. C. 372, 373. As not including a dentist see People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523.

11. U. S. *v.* Massachusetts General Hospital, 100 Fed. 932, 938, 41 C. C. A. 114.

Surgery is therapy of a distinctly operative kind. Stewart *v.* Raab, 55 Minn. 20, 21, 56 N. W. 256.

12. Nelson *v.* State Bd. of Health, 108 Ky. 769, 779, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

13. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 670, 12 Ohio Cir. Dec. 401; Town *v.* Archer, 4 Ont. L. Rep. 383, 387.

Malpractice defined elsewhere see 26 Cyc. 121.

"Maltreatment" defined see 26 Cyc. 121.

14. Parks *v.* State, 159 Ind. 211, 229, 64 N. E. 862, 59 L. R. A. 190. See also *infra*, II, C, 1, a, (III).

The practice of osteopathy consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the body, and flexing and manipulating the limbs of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble. Little *v.* State, 60 Nebr. 749, 751, 84 N. W. 248, 51 L. R. A. 717. See also Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; State *v.* Liffring, 61 Ohio St. 39, 55 N. E. 168, 76 Am. St. Rep. 358, 46 L. R. A. 334; Com. *v.* Pierce, 10 Pa. Dist. 335.

H. Ophthalmology. Ophthalmology is the science which treats of the physiology, anatomy, and diseases of the eye.[15]

II. RIGHT TO PRACTISE MEDICINE AND SURGERY.[16]

A. Power to Regulate Practice. It is well settled that under the police power inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians, and the practice of medicine and surgery,[17] and such statutes violate neither the federal nor the state constitutions.[18] Similar statutes have been sustained for the regulation of the practice of den-

"Physician" in the statutes in reference to the practice of medicine does not include an osteopath, as osteopathy teaches neither therapeutics, materia medica, surgery, nor bacteriology, but rests entirely upon manipulation of the body for the cure of disease. Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 504, 22 Ky. L. Rep. 438, 441, 50 L. R. A. 383.

15. State *v.* Yegge, 19 S. D. 234, 235, 103 N. W. 17, 18, 69 L. R. A. 504.

"Ophthalmoscope" defined see 29 Cyc. 1499.

16. Injunction against board of health in relation to physicians see INJUNCTIONS, 22 Cyc. 881 note 73.

17. *Arkansas.*— State *v.* McCrary, (1906) 92 S. W. 775; Thompson *v.* Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. N. S. 588; Richardson *v.* State, 47 Ark. 562, 2 S. W. 187.

District of Columbia.— Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. 443.

Indiana.— State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

Michigan.— People *v.* Reetz, 127 Mich. 87, 86 N. W. 396.

Minnesota.— State *v.* State Medical Examining Board, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Montana.— State *v.* First Judicial Dist. Ct. Dept. No. 2, 26 Mont. 121, 66 Pac. 754.

Nebraska.— Lincoln Medical College *v.* Poynter, 60 Nebr. 228, 82 N. W. 855, holding that the law governing the practice of medicine and authorizing the state board of health to issue certificates to physicians and surgeons is a police measure, and was not intended to protect medical schools or medical practitioners from competition in business.

New Mexico.— *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952.

New York.— People *v.* Fulda, 52 Hun 65, 4 N. Y. Suppl. 945.

Ohio.— State *v.* Marble, 72 Ohio St. 21, 73 N. E. 1063.

Pennsylvania.— Com. *v.* Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521; Com. *v.* Densten, 30 Pa. Super. Ct. 631.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 1.

The practice of medicine is a mere privilege, on the exercise of which the state may impose such conditions as it deems advisable. State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809.

An act forbidding physicians and surgeons to solicit patients through paid agents is a valid police regulation. State *v.* McCreary, (Ark. 1906) 92 S. W. 775; Thompson *v.* Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. N. S. 588.

The right of a state to enact such laws proceeds from its inherent power to prescribe such rules as will protect the health and safety of the people. Driscoll *v.* Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376; State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Com. *v.* Irving, 1 Leg. Chron. (Pa.) 69; Antle *v.* State, 6 Tex. App. 202.

Statutes liberally construed.— A statute imposing a fine or imprisonment on one practising medicine without a license is to be liberally construed, so as to reasonably effectuate its purpose to prevent fraud, and to conserve the public health. State *v.* Oredson, 96 Minn. 509, 105 N. W. 188.

18. *Alabama.*— Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925.

California.— *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Indiana.— Spurgeon *v.* Rhodes, 167 Ind. 1, 78 N. E. 228.

Iowa.— State *v.* Kendig, 133 Iowa 164, 110 N. W. 463; State *v.* Wilhite, 132 Iowa 226, 109 N. W. 730.

Kansas.— State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306.

Kentucky.— Wilson *v.* Com., 119 Ky. 769, 82 S. W. 427, 26 Ky. L. Rep. 685.

Maine.— State *v.* Bohemier, 96 Me. 257, 52 Atl. 643.

Minnesota.— State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Montana.— State *v.* First Judicial Dist. Ct., 26 Mont. 121, 66 Pac. 754.

Ohio.— State *v.* Marble, 72 Ohio St. 21, 73 N. E. 1063, 106 Am. St. Rep. 570, 70 L. R. A. 835; State *v.* Morrill, 7 Ohio S. & C. Pl. Dec. 52, 5 Ohio N. P. 133; State *v.* Ottman, 6 Ohio S. & C. Pl. Dec. 265, 4 Ohio N. P. 195.

Pennsylvania.— Com. *v.* Densten, 217 Pa. St. 423, 66 Atl. 653; Com. *v.* Taylor, 2 Kulp 364.

Tennessee.— O'Neil *v.* State, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. N. S. 762.

tistry.[19] The authority of the legislature does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is expedient, both as to the qualifications required and as to the method of ascertaining those qualifications.[20] The only limit to the legislative power in prescribing conditions to the right to practise is that they shall be reasonable;[21] and whether they are reasonable the courts must judge.[22] If the regulations and conditions are adopted in good faith, and they operate equally upon all who desire to practise and who possess the required qualifications,[23] and if they are appropriate to the end in view, to wit, the protection of the public, and attainable by reasonable study or application,[24] then the fact that the conditions may be rigorous will not render the legislation invalid. In the enactment of legislation of this character the legislature may take account of the advance of learning, and impose new conditions and qualifications as increased knowledge may suggest;[25] and to make such legislation effective, one having an established practice and one contemplating practising may be required to conform to the same standard of qualification.[26]

B. Requirements — 1. In General. The qualifications prescribed by the several states to entitle one to enter upon the practice of medicine and surgery may be generally classified as follows: (1) The candidate must have a diploma from a medical college in good standing, and, in addition, must pass a satisfactory examination before a board of examiners. (2) The candidate must pass a satisfactory examination as in the first class, but is not required to have a diploma. (3) The

Wisconsin.— State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 2. See also Constitutional Law, 8 Cyc. 900 note 837, 1046 note 91, 1055 note 73.

Such a statute is not prohibitive in its effect, and therefore void, but merely regulates the practice. Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717.

19. Gosnell *v.* State, 52 Ark. 228, 12 S. W. 392; *Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879; Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Chapman, 69 N. J. L. 464, 55 Atl. 94 [*affirmed* in 70 N. J. L. 339, 57 Atl. 1133]; Com. *v.* Gibson, 7 Pa. Dist. 386; State *v.* Sexton, 37 Wash. 110, 79 Pac. 634; *In re* Thompson, 36 Wash. 377, 78 Pac. 899; State *v.* Dental Examiners Bd., 31 Wash. 492, 72 Pac. 110.

20. Gosnell *v.* State, 52 Ark. 228, 12 S. W. 392; Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192; State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

21. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

If a condition is clearly arbitrary and capricious; if no reason with reference to the end in view can be assigned for it; and especially if it appears that it must have been adopted for some other purpose — such as to favor or benefit some person or class of persons — it will be held unreasonable and beyond the power of the legislature to impose. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

"Managing" dental business as distinguished from "practising."— A statute in so far as it requires examination by and a license from a dental board before one may "own, run, or manage" a dental office, as distinguished from the actual practice of dentistry, is not a proper exercise of the police power, but is unconstitutional. State *v.* Brown, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889. See also Saunders *v.* Taylor, 5 Lack. Leg. N. (Pa.) 153.

22. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

23. State *v.* Chapman, 69 N. J. L. 464, 55 Atl. 94; State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306.

If the statutes do not discriminate between the different schools of medicine, but merely exact that the practitioner of whatever school shall have a certificate from the board of medical examiners, and shall exercise the skill usually possessed by practitioners in good standing of that school, they are valid. State *v.* Heath, 125 Iowa 585, 101 N. W. 429; Stone *v.* State, 48 Tex. Cr. 114, 86 S. W. 1029.

24. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

25. State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

26. State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

candidate may either present an acceptable diploma, or, if he has no diploma, he may be examined as to his qualifications. (4) The applicant must hold a diploma issued by a reputable medical college, which must be satisfactorily shown to belong to him.[27]

2. License or Certificate — a. In General — (1) *Necessity* — (A) *In General.* Formerly no license or certificate was required of a person who undertook the practice of medicine. A diploma of an incorporated medical college was looked upon as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of statutes upon the subject, and now in most of the states the medical laws provide that, before any person can practise medicine in any of its departments in the state, he must apply for and receive a certificate of qualification or license from the state board of medical examiners.[28] A license and a certificate have been held not to be the same thing.[29] A statute providing that no person, unless previously registered or licensed to practise medicine or dentistry, "shall begin" the practice of medicine or dentistry without obtaining a license is applicable to one who continued after the act took effect, an illegal practice previously begun.[30]

(B) *In County of Residence or Practice.* Under some statutes a physician or dentist, changing his residence from one county to another, must obtain a new license in the county where he proposes to reside, and it is unlawful for him to practise in such county without such license.[31] Under other statutes a license from any board of the state will entitle the holder to practise throughout the state.[32]

27. Taylor Physicians 10, 11. See also the statutes of the several states; these will be found epitomized in "Laws Regulating the Practice of Medicine in United States and Elsewhere," published by the American Medical Association.

28. See the statutes of the several states. And see Harding *v.* People, 10 Colo. 387, 15 Pac. 727; Dowdell *v.* McBride, 18 Tex. Civ. App. 645, 45 S. W. 397 (holding that under Rev. St. (1895) tit. 82, providing for the appointment of boards of examiners, whose certificates shall entitle the holder to practise medicine, a compliance with the law is necessary to enable one to practise medicine, although an express provision to that effect contained in a former enactment on the subject is not contained in the later statute); Stone *v.* State, 48 Tex. Cr. 114, 86 S. W. 1029.

In Alabama Code (1886), §§ 1296–1298 provide that a graduate of a medical college in the United States, whose diploma is recorded, may practise medicine without a license in any county having only a medical board established by the county commissioners; but where there is a board of medical examiners, organized according to the constitution of the state medical association, and in affiliation with it, a license or certificate of qualification from such board is necessary. Section 4078 provides for the punishment of any person practising medicine without a license, diploma, or certificate, or who is not "a regular graduate of a medical college of this State, having had his diploma legally recorded." It was held that a graduate of a medical college of another state whose diploma is recorded is not indictable for practising without license or certificate from a board of medical examiners in the county, organized under or in affiliation with the state association. Stough *v.* State, 88 Ala. 234, 7 So. 150; Brooks *v.* State, 88 Ala. 122, 6 So. 902.

In Kentucky the law of May 10, 1886, requiring every person desiring to practise dentistry to obtain a certificate of qualification from the board of examiners of the Kentucky Dental Association, was not repealed by the law of May 1, 1893 (St. § 459), requiring such a certificate to be obtained by those who desire to begin the practice after that date, and requiring all persons theretofore holding such certificates to have them registered; and therefore one who now practises dentistry without having obtained such a certificate may be punished therefor, although he began the practice prior to May 1, 1893. Com. *v.* Basham, 101 Ky. 170, 40 S. W. 253, 19 Ky. L. Rep. 336.

29. Nelson *v.* State, 97 Ala. 79, 12 So. 421.

"Certificate" defined see 6 Cyc. 728.

"License" defined see Licenses, 25 Cyc. 597.

30. Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; Hooper *v.* Batdorff, 141 Mich. 353, 104 N. W. 667.

31. Mayfield *v.* Nale, 26 Ind. App. 240, 59 N. E. 415.

In other words a person engaged in the practice of medicine must procure a license in each county where he practises. Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787.

32. Derrick *v.* State, 34 Tex. Cr. 21, 28 S. W. 818.

(II) *Sufficiency.* Under a statute requiring a license from some chartered school, state board of medical examiners, or medical society, neither a certificate showing that the holder has passed a limited course of study, nor a limited commission for the practice of medicine within a limited sphere, is sufficient.[33] Where a statute requiring an applicant to obtain a license or certificate further requires that such license or certificate shall be indorsed or countersigned by a particular officer before it shall become valid, a license or certificate not so indorsed or countersigned is insufficient to authorize the holder to practise medicine.[34]

(III) *Authority to Issue* — (A) *In General.* The power of the legislature to require an applicant to pass an examination and obtain a license as a condition to his right to practise medicine in the state includes the right to select the particular agency to whom the duty of conducting the examination and granting the license shall be delegated.[35]

(B) *Medical Boards* — (1) In General. This agency is usually called the state medical board or board of medical examiners. Where the statute does not require that the different schools of medicine shall be represented on the board, its composition cannot affect its jurisdiction or the legality of its acts.[36] A statute creating such a board to be composed of members of a particular school of medicine is not unconstitutional on the ground of discrimination.[37] Nor is an act unconstitutional in not providing that each school of medicine should be represented by equal numbers on the board.[38] The fact that the board was not regularly organized is immaterial;[39] if it is the *de facto* board its certificate protects the holder from prosecution.[40]

(2) Nature of Power. The authority of a state medical or dental board in granting or refusing licenses to applicants, or in passing on the reputability of colleges, is neither legislative nor judicial, but quasi-judicial, involving the exercise of judgment and discretion.[41] The ascertainment and determination of qualifica-

33. People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, holding that neither a certificate from a medical school in Prussia that defendant had there passed a limited course of study, nor a commission, after examination therefor, as a medical officer in a regiment in the volunteer army, is such a license to practice medicine as is required by Pen. Code, § 356.

34. Brooks *v.* State, 146 Ala. 153, 41 So. 156 (requirement that all medical certificates issued by county boards of examiners be countersigned by the senior censor of the state medical association); Nicholson *v.* State, 100 Ala. 132, 14 So. 746 (requirement that certificate be indorsed and sealed by probate judge and recorded).

35. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; Weeden *v.* Arnold, 5 Okla. 578, 49 Pac. 915, holding that the superintendent of public health of the territory of Oklahoma is the proper officer to issue a license to an applicant as a practising physician, and it is not the duty of the board of public health to issue such license.

36. Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355.

37. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; Dowdell *v.* McBride, 92 Tex. 239, 47 S. W. 524; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

38. Brown *v.* People, 11 Colo. 109, 17 Pac. 104.

39. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925.

Failure to appoint members within time limited.— Failure of the governor to appoint the members of a board of medical examiners within one month after the passage of the act creating such board, as required thereby, does not invalidate the appointments subsequently made, since the requirement as to time is merely directory. People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

Failure to notify member of time and place of organization.— Under an act to regulate the practice of medicine, which does not impose on any member of the board of medical examiners the duty of notifying the others of the time and place of organization of the board, a failure to give such notice to a member will not afford sufficient ground to restrain the board, when organized, from discharging its proper functions under the law as a board of examiners. Howard *v.* Parker, 49 Tex. 236.

40. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925; Brown *v.* People, 11 Colo. 109, 17 Pac. 104.

41. *California.*— Van Vleck *v.* State Bd. of Dental Examiners, (1897) 48 Pac. 223.

Idaho.— Raaf *v.* State Bd. of Medical Examiners, 11 Ida. 707, 84 Pac. 33.

Illinois.— People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180.

tions to practise medicine by a board of experts appointed for that purpose is not the exercise of "judicial power," as that phrase is used in conferring judicial power upon specified courts,[42] although the statute provides for an appeal therefrom;[43] and therefore a statute authorizing a state medical board to ascertain and determine the qualifications of applicants to practise medicine is not unconstitutional as conferring judicial power on the board.[44]

(3) Authority and Powers — (a) In General. A state medical board has full authority to prescribe rules and regulations governing the issuance of certificates of medical practitioners.[45] An existing board, however, has no power to review the action of a former board.[46]

(b) To Determine Reputability of Institution Granting Diploma.[47] The requirement that a medical or dental board shall issue to the holder of a diploma a certificate entitling him to practise medicine or dentistry is almost universally upon the express condition that the diploma shall be from a "reputable" institution, or an institution "in good standing." Whether a college be reputable or in good standing is not a legal question but a question of fact,[48] and is usually left to the judgment and discretion of the state medical or dental board,[49] unless the status

Kansas.— Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811.

New Hampshire.— Brown *v.* Grenier, 73 N. H. 426, 62 Atl. 590.

Tennessee.— Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019.

Wisconsin.— State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

42. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212; People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

43. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

44. *Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879; People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

45. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

It has power, by proper investigation, to determine the identity of applicants, the genuineness of diplomas, and whether they were issued by a school legally organized and in good standing. Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355. The power relates to reasonable administration of matters appertaining to the public welfare, not to interferences with the internal management of medical or dental colleges. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500. *Compare* Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355, holding that the board has power to adopt a schedule of requirements as to the qualifications of students on entering a school, branches to be taught, how to be taught, length of course, and attendance, and facilities for teaching. But it has been held that the law does not authorize the board to invade the private affairs of a medical or dental college in respect to its rates of tuition, or whether it shall grant concessions from advertised rates, or by taking charge, *in invitum*, of its examinations as to entrance qualifications. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

46. Miller *v.* Medical Bd., 33 Oreg. 5, 52 Pac. 763, holding that when a state board of medical examiners, having power to grant a license upon a diploma alone, have passed upon the diploma of an applicant for a license, refusing the same, and are succeeded by a new and distinct board, not having the power to license without an examination, they cannot review, upon a second application, the decision of the former board, or grant a license upon the diploma alone, without an examination.

47. Authority of medical college to confer degrees or diplomas see Colleges and Universities, 7 Cyc. 289.

48. People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180.

The word "reputable," as thus used, means "reputable" in the general sense in which the term is ordinarily used; worthy of repute or distinction, held in esteem, honorable, praiseworthy. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500; State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587. The board must determine whether a diploma comes from a reputable source as an independent fact, considering the term "reputable" in its ordinary sense and measuring the character of the college from the standpoint of men competent to judge thereof by reason of their scientific attainments in the line of work for which such a college stands. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

Reputability of a dental college relates to that which will enable the college to do good work, and the actual accomplishment; it is distinct from other requisites as to a diploma being a passport to the favor of the official board as regards the issuance of a license. It may or may not exist, and all the other requisites be present. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500, Marshall, J., delivering the opinion of the court.

49. *Illinois.*— Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180; Illinois State Bd. of Health *v.* People, 102 Ill. App. 614.

of such schools and colleges is fixed by statute, in which case the board of examiners has no discretion in regard to determining their reputability.[50] Where the law does not define the method by which the board shall proceed to determine the reputability of a college, such board may perform its duty in that regard in any reasonable way it may deem proper;[51] and the decision of the board in this regard cannot be coerced or reversed by the courts, in the absence of arbitrary and oppressive conduct on the part of the board.[52] The board may adjudicate the status of a medical college as to reputability either of its own motion, or on petition of the

Missouri.— State *v.* Lutz, 136 Mo. 633, 38 S. W. 323.

New Jersey.— State *v.* Hudson County Bd. of Health, 53 N. J. L. 594, 22 Atl. 226.

Ohio.— State *v.* Hygeia Medical College, 60 Ohio St. 122, 54 N. E. 86.

Oregon.—Barmore *v.* State Bd. Medical Examiners, 21 Oreg. 301, 28 Pac. 8, holding that the board had a right to define the words "medical institutions in good standing" so as to include only those schools that require for graduation at least three regular sessions of six months each, extending over a period of three years, and to make a further rule that those examined must attain seventy-five per cent.

Tennessee.— Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019.

Wisconsin.— State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 4.

The character of a school having been once fairly determined by the board, when and under what circumstances a reëxamination of the subject should be made must necessarily rest solely in its discretion so long as it acts reasonably. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

Such power not unconstitutional.— A statute providing that no person shall be eligible for examination by the state board of examiners who shall not furnish satisfactory evidence of having graduated from a reputable college indorsed by the board of examiners is not open to the objection of unconstitutionally conferring arbitrary power on the board of examiners to decide what colleges are reputable (*Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879), or to establish unreasonable rules and regulations (Kettles *v.* People, 221 Ill. 221, 77 N. E. 472).

Power non-delegable.— The discretionary power of determining on the fitness of issuing a license for the practice of dentistry to the graduates of reputable dental colleges, vested in the state board of dental examiners by the Illinois act regulating the practice of dentistry, cannot be delegated by the state board to the national association of dental examiners, an association composed mostly of men residing outside of the state, and holding a convention at the time in New York. Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201.

Burden of proof to show reputability.— When a graduate of a dental college applies to the state board of dental examiners for a license to practise his profession, the burden of proof is on him to establish the reputability of such college. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

What is not "medical college."—A college which teaches osteopathy, a method of treating diseases by kneading or manipulation of the body, and does not teach surgery, bacteriology, materia medica, or therapeutics, is not a "medical college," within the meaning of Ky. St. § 2613, which requires the state board of health to issue a certificate to practise medicine to any reputable physician who has a diploma from a reputable medical college chartered under the laws of this state, or from a reputable and legally chartered medical college of some other state or country, indorsed as such by the state board of health. Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

50. Wise *v.* State Veterinary Bd., 138 Mich. 428, 101 N. W. 562.

An act prescribing the standard of scholarship to be maintained by medical schools, whose diplomas the state board of medical examiners should be authorized to accept, as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession, makes the standard sufficiently fixed, definite, and certain. *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249, Shaw, J., delivering the opinion of the court.

51. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

The board cannot establish a rule of its own by which reputability or good standing shall be shown. State *v.* Lutz, 136 Mo. 633, 38 S. W. 323, holding that the question of good standing cannot be made to depend merely on whether the college has complied with a resolution of the board requiring every medical college, by a certain date, to furnish the board with a list of its matriculates and the basis of their matriculation.

52. Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019. See also Illinois State Bd. of Dental Examiners *v.* People, 20 Ill. App. 457, holding that the discretion vested in the board of examiners cannot be exercised arbitrarily for the gratification of feelings of malevolence, and for the attainment of merely personal and selfish ends.

All questions in regard thereto may be considered at rest till, by lapse of time or otherwise, some reasonable ground exists for believing that its character may probably have changed. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

college,[53] and when it has once determined that question in favor of an applicant, it cannot refuse him a license for arbitrary reasons of its own.[54]

(c) To Refuse License or Certificate For Cause. Boards of medical examiners are generally authorized by statute to refuse certificates to individuals guilty of unprofessional or dishonorable conduct.[55] But an applicant for a license who possesses the requisite medical qualifications cannot be denied a license without a hearing on the question of his character and conduct.[56]

(4) Right to Review Decision of Board.[57] State medical laws sometimes contain a provision authorizing resort to the courts for relief, either by way of appeal or writ of review, against the action of a board of examiners in refusing a license to an applicant.[58] The law usually provides the manner of taking this appeal, but failure to do so does not affect the right.[59] Notice of the appeal should be served upon a member of the board,[60] and where the notice so served is sufficient, it is immaterial whether the board was represented at the trial or not.[61] The board, when aggrieved by the decision of the district court, may appeal or move for a new trial.[62] Pending an appeal from a refusal to grant a license, the court has no power to allow the applicant to practise.[63] When no appeal is provided for by statute, the medical or dental board, in passing on a question within its jurisdiction calling for the exercise of judgment, is supreme so long as it proceeds to a

53. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

54. Illinois State Bd. of Health *v.* People, 102 Ill. App. 614; Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355; Smith *v.* State Bd. of Dental Examiners, 115 Ky. 212, 67 S. W. 999, 24 Ky. L. Rep. 25; Boucher *v.* State Bd. of Health, 19 R. I. 366, 33 Atl. 878.

55. See the statutes of the several states.

The term "unprofessional" does not contemplate matters of mere professional ethics, but is used convertibly with dishonorable. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

56. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Gage *v.* New Hampshire Eclectic Medical Soc., 63 N. H. 92, 56 Am. Rep. 492.

57. Injunction against medical examiners see Injunctions, 22 Cyc. 880 note 52.

58. See the statutes of the several states; and cases cited *infra*, this section.

In Idaho the state medical law contains no provision granting the right of appeal from the action of the board of examiners in refusing a license to an applicant, but by the terms of section 9 of the act [Laws (1899), p. 348] it is provided that the action of the board in refusing to grant a license under the provisions thereof may be reviewed by the district court on certiorari, provided proceedings therefor be instituted within ten days after notice of such refusal. Raaf *v.* State Bd. of Medical Examiners, 11 Ida. 707, 84 Pac. 33. By conferring this right, the legislature has indicated an intention to limit and confine the authority and jurisdiction of the courts in considering the action of the board to the procedure and scope of investigation and inquiry usually and ordinarily pursued and exercised by the courts in the issuance and consideration of writs of review. Raaf *v.* State Bd. of Medical Examiners, *supra*. The language of the medical act and the purposes and objects thereof preclude any inference that the legislature ever intended that a disappointed applicant might apply to the court and there have his answers reëxamined, marked, graded, and passed upon as to their correctness by the court. Raaf *v.* State Bd. of Medical Examiners, *supra*.

Effect of succession of new board before appeal.— The refusal to grant a license by a state board of medical examiners, which has been succeeded by a new and distinct board, and which refusal was not appealed from as permitted by law, cannot be reviewed on a subsequent appeal from a decision of the new board refusing a license to the same party. Miller *v.* Medical Bd., 33 Oreg. 5, 52 Pac. 763.

Refusal for incompetency.— When the right to appeal is granted in "all cases of the refusal or revocation of a certificate" by the medical board, the right exists as well where a certificate to practise medicine has been refused by the board for incompetency as where it has been refused for unprofessional, dishonorable, or immoral conduct. State *v.* First Judicial Dist. Ct., 19 Mont. 501, 48 Pac. 1104.

59. State *v.* First Judicial Dist. Ct., 19 Mont. 501, 48 Pac. 1104.

Judgment by consent.— A judgment on appeal to the circuit court, reversing a decision of the board of medical examiners, cannot be sustained where entered "by agreement" of an attorney acting for the prosecuting attorney without authority. *In re* Coffin, 152 Ind. 439, 53 N. E. 458.

60. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

61. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

62. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

63. State *v.* First Judicial Dist. Ct., Dept. No. 2, 26 Mont. 121, 66 Pac. 754.

reasonable conclusion on evidence bearing on such question.[64] Mandamus will issue, however, to compel action by the board when they fail or refuse to act, and also in case of abuse of discretion.[65]

(IV) *REGISTRATION*—(A) *Necessity.* It is a common provision of medical laws that physicians must register their licenses or certificates with some designated county officer in order to be entitled to practise.[66] Such a requirement is mandatory upon all practitioners except such as may be expressly or impliedly exempted.[67] If a civil and a penal statute respecting registration are irreconcilable, as where they require registration with different officers, the penal provision is held inoperative.[68]

(B) *Time.* A statute requiring registration to take place within a certain time after the passage of the act must be strictly complied with, and registration after the prescribed period has elapsed is ineffectual to bring one within the protection of the statute.[69] The period of limitation has been held to begin to run from the time the law goes into effect, and not from the time of its approval.[70] An attempt to register under an act before it goes into effect is ineffectual.[71]

(C) *Place.* Under a statute requiring a practitioner to record his certificate in the county where he resides or sojourns, he must, upon changing his domicile to another county, furnish his certificate to the proper officer of the latter county for record.[72] But a statute requiring a physician to register in the county where he is practising or intends to commence the practice has been held not to require a physician who is duly registered and practising in one county to register in another county, so as to authorize him to visit patients in such other county.[73]

64. Van Vleck *v.* State Bd. of Dental Examiners, (Cal. 1897) 48 Pac. 223; Kowenstrot *v.* State, 6 Ohio S. & C. Pl. Dec. 467, 4 Ohio N. P. 257; State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

65. See MANDAMUS, 26 Cyc. 242.

66. See the statutes of the several states.

Municipal regulation.— While in the exercise of its police power a regulation requiring all persons practising medicine or surgery in a city to register as such would probably be valid, a regulation making the right to register depend on the sanction or approval of an officer of the board of health, and of his view as to the qualifications of such persons to practise, and providing for the punishment of those violating such regulation, is unauthorized and void, the statutes of the state providing as to who shall and shall not practise. State *v.* Prendergast, 8 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 807.

67. **Physicians registered under a former law** are generally exempted from registering again. State *v.* Morgan, 96 Mo. App. 343, 70 S. W. 267.

A statute incorporating a medical society, with such powers as pertain to other like corporations, does not exempt the members or licensees of that society from the operation of a statute requiring registration by physicians before practising for hire. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643.

In Massachusetts, St. (1817) c. 131, § 3, requiring every person licensed to practise physic and surgery to deposit a copy of the license with the clerk of the town in which he may reside, does not apply to a person who has received the degree of doctor of medicine. Wright *v.* Lanckton, 19 Pick. 288.

In Nebraska a person practising medicine or surgery must file with the county clerk the sworn statement required by the act of March 3, 1881, section 2, notwithstanding he is a graduate of a medical college and has received a degree. Dogge *v.* State, 17 Nebr. 140, 22 N. W. 348.

68. French *v.* State, 14 Tex. App. 76.

69. Com. *v.* Densten, 217 Pa. St. 423, 66 Atl. 653; *In re* Wadel, 25 Pa. Co. Ct. 60. See also Battles *v.* Board of Registry, etc., 16 R. I. 372, 17 Atl. 131. *Compare* Ritter *v.* Rodgers, 8 Pa. Co. Ct. 451, holding that Pa. Act, April 11, 1889, § 2 (Pamphl. Laws 28), providing that veterinary surgeons of five years' standing, who are not entitled to use the degree of veterinary surgeon, shall register within six months after passage of the act, or be guilty of a misdemeanor in using the title thereafter, is unconstitutional.

70. Patrick *v.* Perryman, 52 Ill. App. 514.

71. State *v.* McIntosh, 205 Mo. 616, 103 S. W. 1071.

72. Hilliard *v.* State, 7 Tex. App. 69.

73. Martino *v.* Kirk, 55 Hun (N. Y.) 474, 8 N. Y. Suppl. 758.

In Kentucky a late statute declares that all persons hereafter receiving a certificate of qualification to practise dentistry shall have it recorded in the county or counties in which they shall practise. Such statute applies only to persons receiving certificates after its enactment. Com. *v.* Nevill, 92 S. W. 550, 29 Ky. L. Rep. 108, holding that a dentist who had previously received his certificate and had it registered under a former statute in the county of his residence was not bound to have it registered again in the county or counties in which he should practise.

In Pennsylvania under the former statute

(D) *Curing Invalid Registration.* One whose registration is not legal because of error, misunderstanding, or unintentional omission may, by a subsequent valid registration, validate the original registration from the date of its filing, and thus be relieved of the consequences attendant upon a failure to register or an imperfect registration.[74] A medical register is a public record, over which the court in charge of whose office it is put has summary power of correction or cancellation on its own motion or the suggestion of any one.[75]

(V) *Revocation*— (A) *Authority to Revoke.* The state, in the exercise of its police power, may prescribe the qualifications of persons desiring to practise medicine, and may create a board whose duty it shall be to hear and determine any complaint made against any person holding a physician's license or certificate and revoke such license or certificate for any cause provided for in the statute.[76] The power to revoke such licenses or certificates is not a judicial power, which cannot, under the state constitution, be vested in the board of examiners.[77] Whether such a statute authorizes the revocation of a certificate issued prior to its passage depends entirely upon the wording of the statute.[78] The fact that a license is issued to one not entitled to it will not prevent the board from revoking it.[79]

(B) *Acts Authorizing Revocation.* The grounds commonly designated by the statute upon which the medical board is authorized to revoke a physician's license or certificate are unprofessional, dishonorable, or immoral conduct.[80] Unprofessional or dishonorable conduct is not defined by the common law, and what conduct may be of either kind is a matter of opinion only.[81] For this reason it

a physician duly registered in one county, but who went at regular intervals into another, and had a place of business there to meet all patients who might call on him, was a sojourner and liable to a penalty for neglect to register in the latter county. Ege *v.* Com., 6 Pa. Cas. 583, 9 Atl. 471. By a later statute, however, one registry is made sufficient warrant to practise in any county of the state. Fishblate *v.* McCullough, 9 Pa. Super. Ct. 147; Com. *v.* Townley, 7 Pa. Dist. 413.

74. Parish *v.* Foss, 75 Ga. 439 (failure to register through neglect of clerk to have proper book); Ottaway *v.* Lowden, 172 N. Y. 129, 64 N. E. 812 [*reversing* 55 N. Y. App. Div. 410, 66 N. Y. Suppl. 952]; New York *v.* Bigelow, 13 Misc. (N. Y.) 42, 34 N. Y. Suppl. 92 (registration with wrong officer); Pettit *v.* State, 28 Tex. App. 240, 14 S. W. 127.

75. *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860.

76. *California.*— Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896.

District of Columbia.— Czarra *v.* District of Columbia Bd. of Medical Sup'rs, 25 App. Cas. 443.

Illinois.— Williams *v.* People, 17 Ill. App. 274, power to revoke certificates of those only who are not graduates in medicine.

Kansas.— Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

New York.— *In re* Smith, 10 Wend. 449.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 15.

77. State *v.* State Bd. of Medical Examiners, 34 Minn. 387, 26 N. W. 123; State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

78. See cases cited *infra*, this note.

"License heretofore issued."— Wis. Laws (1905), p. 726, c. 422, giving the circuit court power to revoke a license to practise medicine "which has been heretofore or which may be hereafter issued" to any person guilty of immoral conduct after the passage of this act, or who has procured such license by fraud or perjury, is retroactive so as to permit a revocation of the license of a physician practising after the passage of the act under a license obtained by fraud prior thereto. State *v.* Schaeffer, 129 Wis. 459, 109 N. W. 522.

License issued "under this act."—A statute giving a state medical board power to revoke licenses issued "under" or "in compliance with" such act has no application to licenses granted under a former act. State Bd. of Health *v.* Ross, 191 Ill. 87, 60 N. E. 811 [*affirming* 91 Ill. App. 281]; State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

79. State *v.* Goodier, 195 Mo. 551, 93 S. W. 928.

80. See the statutes of the several states.

The statutes of Ontario provide that the name of any practitioner who has been guilty of disgraceful conduct in a professional respect shall be liable to have his name erased from the medical register. See *In re* Washington, 23 Ont. 299.

81. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443.

The word "unprofessional" has been judicially defined as synonymous with "dishonorable." State *v.* State Medical Examining

has been held in several cases that such a statute is void for uncertainty.[82] Similar statutes have been construed in other jurisdictions without the question of validity being raised, the courts merely considering what can be deemed unprofessional, dishonorable, or immoral conduct. Thus it has been held ground for revoking a license to obtain from the medical board, by misrepresentation, a certificate to practise medicine;[83] or to misrepresent to a patient the character of his disease, and obtain money from him upon the strength of such misrepresentation;[84] or to perform a pretended operation upon a woman to enable her to conceal her real condition from her parents.[85] It is held not to be immoral, dishonorable, or unprofessional for a physician to conceal the fact that one of his patients had innocently suffered the accident of a miscarriage.[86] Mere advertising by a physician is not such unprofessional conduct as to warrant the revocation of his license;[87] if, however, the advertisement is false and known to be false, and is a studied effort to impose upon the credulity of the public for gain, the law is otherwise.[88] A statute providing that a license to practise medicine may be

Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575. If it is shown that a medical man in the pursuit of his profession has done something in regard to it which would be reasonably regarded as disgraceful and dishonorable by his professional brethren of good repute and competency, it is open to the board to find that he has been "guilty of infamous conduct in a professional respect." Allinson *v.* General Council of Medical Education, etc., [1894] 1 Q. B. 750, 58 J. P. 542, 63 L. J. Q. B. 534, 70 L. T. Rep. N. S. 471, 9 Reports 217, 42 Wkly. Rep. 289.

82. Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896 (holding that the provision of a statute which authorizes the revocation of the certificate of a physician by the board of medical examiners for unprofessional conduct, consisting of medical advertising in which grossly improbable statements are made, but which fails to define "grossly improbable statements" in any way, but leaves their definition in each particular case to the opinion of the then board of medical examiners, is too indefinite and uncertain to be capable of enforcement); Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443; Matthews *v.* Murphy, 63 S. W. 785, 23 Ky. L. Rep. 750, 54 L. R. A. 415.

These decisions proceed upon the principle that legislation providing for the revocation of the certificate of a physician for professional or moral unfitness must be reasonable in its provisions, and must apply to matters or conduct on the part of the physician which affect the health, morals, or safety of the community, and the acts or conduct which are made ground of forfeiture must be declared with certainty and definiteness. Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896.

Test of uncertainty.— The courts cannot uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443.

In the District of Columbia the act of congress of June 3, 1896, chapter 313, section 10, provides that sufficient cause exists for the revocation of a physician's license in the employment of fraud or deception in passing the examinations required, in chronic inebriety, the practice of criminal abortion, or in case of conviction of crime involving moral turpitude. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443, holding that the conviction of a physician of distributing obscene and indecent printed matter in his district is a sufficient ground for the revocation of his license.

83. State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

84. *Re* Washington, 23 Ont. 299.

85. *In re* Telford, 11 Brit. Col. 355.

86. State *v.* Kellogg, 14 Mont. 426, 36 Pac. 957.

87. *Re* Washington, 23 Ont. 299.

Publishing broadcast the symptoms of catarrh is not conduct disgraceful in a professional respect. *In re* Washington, 23 Ont. 299.

88. People *v.* McCoy, 125 Ill. 289, 17 N. E. 786; People *v.* McCoy, 30 Ill. App. 272 (both of which cases hold, however, that a charge that the holder of a certificate made statements and promises as to the cure of the sick calculated to deceive and defraud the public, although sufficient to authorize a revocation, is not sustained by evidence of an advertisement headed "A Surgical Triumph," and reciting that the holder had opened an office for a limited time, nor by other advertisements reciting his wonderful attainments and success); State *v.* State Bd. of Medical Examiners, 34 Minn. 391, 26 N. W. 125; *In re* Washington, 23 Ont. 299.

Similarly it has been held that one publishing advertisements reflecting upon the medical profession generally in order to induce people to come to him for advice is "guilty of infamous conduct in a professional respect," warranting the revocation of his

revoked only for unprofessional or dishonorable conduct has no application to a temporary license issued by the board of medical examiners without authority.[89]

(c) *Proceedings to Revoke*—(1) In General. The action of a medical board in revoking a physician's license or certificate for unprofessional or dishonorable conduct being in its nature judicial, the board has no power to institute such a proceeding without a reasonable notice of the charge against him, and the time and place of the trial thereof.[90] But a board, in conducting such an investigation, is not a judicial tribunal, and is not governed by the technical rules applicable to law courts.[91]

(2) Parties. Where a proceeding to cancel a certificate issued to a physician without authority can be brought only by the attorney-general, it has been held that the board of examiners is a necessary party defendant to the proceedings because it is the official action of the board which is attacked.[92] In a proceeding by a board of medical examiners, on relation of other parties, to revoke the license of a physician for unprofessional conduct, the state is properly made a party thereto.[93]

(3) Complaint. Certainty to a common intent is all that is required in the complaint for revocation.[94]

(4) Evidence. The practice in revocation proceedings before a medical board being more flexible than that allowable in the courts, evidence which tends to prove or disprove the point in issue may be introduced, although not the best evidence which might be had.[95]

(5) Appeal. Where no appeal is provided for, in the absence of fraud, corruption, or oppression, the findings of a medical board in a proceeding to

license. Allinson *v.* General Council of Medical Education, etc., [1894] 1 Q. B. 750, 58 J. P. 542, 63 L. J. Q. B. 534, 70 L. T. Rep. N. S. 471, 9 Reports 217, 42 Wkly. Rep. 289.

89. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980.

90. People *v.* McCoy, 125 Ill. 289, 17 N. E. 786 (holding that where defendant testified that notice of the proceedings to revoke was never served on him, plaintiff's affidavit of service of notice is insufficient to overcome such testimony, and the proceedings must be taken to be invalid); State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State *v.* Schultz, 11 Mont. 429, 28 Pac. 643; Reg. *v.* Ontario College of Physicians, etc., 44 U. C. Q. B. 146.

The mere fact that the statute is silent respecting the procedure will not warrant the construction that the investigation should be made *ex parte,* or without reasonable opportunity to be heard. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State *v.* Schultz, 11 Mont. 429, 28 Pac. 643.

An exception to the rule requiring notice and an opportunity to be heard exists in the case of a license, void because issued without authority to one not entitled thereto. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980.

91. Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

92. Brown *v.* Grenier, 73 N. H. 426, 62 Atl. 590. But see State *v.* Schaeffer, 129 Wis. 459, 109 N. W. 522, holding that the state board of medical examiners is not a necessary party to a proceeding by the state to revoke a license to practise medicine, procured from such board by fraud of the applicant.

93. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

94. Walker *v.* McMahn, 75 Nebr. 179, 106 N. W. 427; Munk *v.* Frink, 75 Nebr. 172, 106 N. W. 425, holding that a complaint filed before a state medical board for the purpose of procuring an order revoking the license of a physician is sufficient, if it informs the accused, not only of the nature of the wrong laid to his charge, but also of the particular incidents of its alleged perpetration.

95. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

Proof by affidavits is not error, where the accused, after notice, fails to appear and object. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833, holding further that under a statute making a certified transcript of equal credit with an original, a certified transcript of a coroner's return containing the written evidence and the names of witnesses before an inquisition, although such evidence was adduced by means of affidavits, is proper evidence before the state board of medical examiners in a proceeding to revoke a certificate to practise medicine, where it was not objected to.

A statutory provision that the president or any member of the state board of medical examiners may administer oaths and take testimony on matters relative to their duties does not provide an exclusive mode of proof so as to prevent the consideration by the board of evidence not so taken. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

revoke a physician's license are conclusive on the courts.[96] But an appeal or writ of review in such case is sometimes provided for to the district or circuit court in and for the county in which the hearing was had;[97] and the right is not nugatory, because the legislature has prescribed no rules of practice to guide the district court in adjudicating such cases.[98]

(6) EFFECT OF FORMER ADJUDICATION. A medical board is not precluded from preferring charges against a physician to revoke his license by the fact that the same charges had been once before passed upon by them, and had not been sustained.[99] Nor are the trial and acquittal of a physician in a court of criminal jurisdiction on the same charges exhibited against him by a medical society a bar to an inquiry under the statute for the purpose of depriving him of the right to practise.[1]

(VI) *WHO MAY BE LICENSED.* While a corporation is a person in a certain sense, it is not such a person as can be licensed to practise medicine.[2] But licensed physicians may form a corporation, and make contracts for the services of its members and other licensed physicians without thereby violating a statute forbidding the practice of medicine without a license.[3]

b. Temporary License. A statutory provision authorizing a single member of the state medical board to grant a temporary license to an applicant to practise medicine until the next meeting of the board has been construed to authorize the granting of a temporary license to an applicant from year to year, provided the

96. Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

Certiorari will not lie to review rulings on the competency and sufficiency of evidence not objected to. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

97. See the statutes of the several states. And see Walker *v.* McMahn, 75 Nebr. 179, 106 N. W. 427; Munk *v.* Frink, 75 Nebr. 172, 106 N. W. 425; State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, holding that an appeal will not be dismissed because the record is silent as to where the hearing was had, where the motion to dismiss recites that the hearing was had in the county in which the circuit court to which the appeal was taken was located, and the decision of the board purports to have been signed in that county.

Under a statute further providing that either party may appeal from the judgment of the circuit court to the supreme court in the same manner as in civil actions, the medical board has authority to appeal from the judgment of the circuit court overruling its findings. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

98. State *v.* First Judicial Dist. Ct., 13 Mont. 370, 34 Pac. 298.

Papers filed in such an appeal as an answer of the board and signed by their attorney are nugatory where no provision for the filing of such papers is made by the statute. State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

A notice of appeal from the circuit court, signed by the attorneys, in behalf of the board of medical examiners, which signature was authorized by the president of the board, and afterward ratified by said board, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

Costs.— Where a statute providing for appeals from a medical examining board makes no provision for recovery of costs in case the action of the board is reversed, defendant is not entitled to recover costs from the relators as in an ordinary action, the general statute providing for the recovery of costs not being applicable to appeals in this class of cases. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

99. Czarra *v.* District of Columbia Medical Sup'rs, 25 App. Cas. (D. C.) 443; *In re* Smith, 10 Wend. (N. Y.) 449.

1. *In re* Smith, 10 Wend. (N. Y.) 449, where it is said that the two proceedings are entirely distinct and independent, having different objects in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it.

2. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078, Sedgwick, J., delivering the opinion of the court, and Barnes, J., dissenting.

The qualifications of a medical practitioner are personal to himself, and the intent of a statute in compelling a license to practise medicine is that one who undertakes to judge the nature of disease and to determine the remedy therefor must have the personal qualifications prescribed by statute. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078.

3. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078; State Electro-Medical Inst. *v.* Platner, 74 Nebr. 23, 103 N. W. 1079.

full board in the meantime has not refused to license the applicant;[4] but after the board, as such, has refused a license to an applicant, no one member can grant him one.[5] The fact that the board of medical examiners, in issuing a temporary license, used the form of a regular license, which erroneously recited that plaintiff had passed a satisfactory examination in medicine and surgery before the board, and was thereby authorized to practise, and merely limited the duration of the license, does not constitute such license a regular unlimited license to practise.[6]

c. Renewal License. All physicians or dentists licensed by the board or any previous board are entitled to a renewal license each year on application.[7]

d. License From Another State. Under the Colorado statute a license from the board of dental examiners of that state is not necessary to entitle a person to practise dentistry, if such person has a valid and sufficient license from the board of any other state.[8]

3. Proof of Diploma. An applicant for a license or certificate to practise medicine who possesses a diploma must furnish to the medical board satisfactory proof of having received it from a legally chartered medical institution in good standing.[9] A diploma is not *per se* evidence of that fact;[10] the existence of the college at the date of the diploma must be proved by producing its act of incorporation.[11]

4. Good Moral Character. The legislature has the same power to require, as a condition of the right to practise the profession, that the applicant shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession.[12]

5. Privilege or Occupation Taxes.[13] Unless specially restrained by the constitution, the legislature may confer upon municipal corporations the right to tax physicians practising medicine therein.[14] So itinerant physicians are frequently required to pay an occupation tax.[15]

4. Wragg *v.* Strickland, 36 Ga. 559.

5. Wragg *v.* Strickland, 36 Ga. 559; Peterson *v.* Seagraves, 94 Tex. 390, 60 S. W. 751.

6. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980, holding further that the fact that the board of medical examiners is without power to grant a temporary license to an unsuccessful candidate does not justify one to whom such a license has been granted in altering the same so as to make it appear to be a regular unlimited license.

7. State *v.* McIntosh, 205 Mo. 616, 103 S. W. 1071.

Where, however, the board is given authority to inquire whether the former license was rightfully obtained, and to refuse or revoke a license for criminal conduct or immoral character, the old license is merely *prima facie* evidence of a right to the new one. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

8. Robinson *v.* People, 23 Colo. 123, 46 Pac. 676.

9. State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565.

In Pennsylvania, under the act of June 8, 1881, requiring a medical practitioner having a diploma from an institution in another state to obtain the indorsement thereon of the dean of some medical faculty within the state, the filing of a certificate made by the secretary of a medical faculty is not sufficient, even if the institution applied to refuses to indorse any diploma. *In re* Bauer, 2 Pa. Cas. 69, 4 Atl. 913.

10. Hill *v.* Boddie, 2 Stew. & P. (Ala.) 56.

11. Hunter *v.* Blount, 27 Ga. 76.

12. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Wert *v.* Clutter, 37 Ohio St. 347; Com. *v.* Irving, 1 Susq. Leg. Chron. (Pa.) 69.

13. License or occupation tax generally see Licenses, 25 Cyc. 593 *et seq.* See also Constitutional Law, 8 Cyc. 900 note 83; 1046 note 91.

14. Savannah *v.* Charlton, 36 Ga. 460 (holding, however, that a physician lawfully licensed to practise medicine anywhere in the state cannot be compelled to take out a license before practising in any particular city); Girard *v.* Bissell, 45 Kan. 66, 25 Pac. 232.

15. See the statutes of the several states.

"Itinerant physician" defined see *supra*, p. 1545 note 3.

Dental surgeon.— Under Iowa Code, § 700, giving cities and towns power to license and tax "itinerant doctors, itinerant physicians and surgeons," a city had no power to require a "dental surgeon" to obtain a license. Cherokee *v.* Perkins, 118 Iowa 405, 92 N. W. 68.

In Pennsylvania, the act of March 24, 1877, which requires all itinerant medical practitioners to obtain an annual license, is not repealed by the act of June 8, 1881, which requires all physicians and surgeons to

6. Exemptions From Operation of Statutes — a. In General. The statutes in many states except from their operation certain classes of persons, and services rendered in particular cases. Thus it is commonly provided that the statute shall not apply to any commissioned medical officer of the United States army, navy, or marine service; medical examiners of relief departments of railroad companies; members of the staff of hospitals and asylums; physicians called into consultation from another state, or to treat a particular case, and who do not otherwise practise in the state;[16] medical students assisting at operations under the supervision of a licensed physician;[17] or to services rendered gratuitously, or in case of emergency,[18] or to the administration of domestic medicines.[19] These exemptions have been attacked as unconstitutional on the ground of discrimination, but have been upheld by the courts.[20]

b. Prior Practitioners. One who has an established practice as a physician or dentist is not *ipso facto* exempt from complying with subsequent legislation requiring him to conform to a reasonable standard respecting qualification.[21] Medical laws quite frequently, however, exempt from their operation those who have practised in the state for a prescribed time previous to the passage thereof,[22] and such a provision is not unconstitutional on the ground of discrimination.[23] This exemption applies only to those whose previous practice was lawful.[24]

register their diplomas. Moore *v.* Bradford County, 148 Pa. St. 342, 23 Atl. 896. But see Peebles *v.* Wayne County, 10 Pa. Co. Ct. 69.

16. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643; Com. *v.* Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521.

17. State Bd. of Registration, etc. *v.* Terry, 73 N. J. L. 156, 62 Atl. 193, holding that to exempt defendant from the penalties of the act for practising dentistry without a license, it was not sufficient that he was a student, but his practice must have consisted in assisting his preceptor under his direct and personal supervision.

18. People *v.* Lee Wah, 71 Cal. 80, 11 Pac. 851, holding that where one without a certificate renders gratuitous medical services to a person, because his case has been given up by regular practitioners, this is not an "emergency."

An emergency means a case in which ordinary medical practitioners are not available, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured. People *v.* Lee Wah, 71 Cal. 80, 11 Pac. 851.

19. State *v.* Huff, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. N. S. 1094, holding, however, that where defendant is charged with recommending a medicine for a fee, the fact that it was a domestic medicine does not constitute a defense.

20. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643; Com. *v.* Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521.

21. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, 7 N. Y. Cr. 1; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

22. *Alabama.*— Harrison *v.* State, 102 Ala. 170, 15 So. 563.

Idaho.— State *v.* Cooper, 11 Ida. 219, 81 Pac. 374.

Ohio.— State *v.* Ohio State Medical Bd., 60 Ohio St. 21, 53 N. E. 298.

Pennsylvania.— Com. *v.* Gibson, 7 Pa. Dist. 386.

Texas.— Ranald *v.* State, (Cr. App. 1898) 47 S. W. 976 (evidence insufficient to show previous practice); Hilliard *v.* State, 7 Tex. App. 69.

In Rhode Island the physician must have been "reputably and honorably" engaged in the practice of medicine prior to the passage of the act. Paquin *v.* State Bd. of Health, 19 R. I. 365, 33 Atl. 870.

Under a statute providing that previous practice constitutes a prima facie qualification, the medical board may refuse a certificate on the ground of incompetency despite the fact of prior practice for the statutory time. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202.

Proof of previous practice.— Where the excepted class of applicants are required to furnish the board satisfactory evidence of their previous practice and procure a certificate, one cannot avail himself of the exemption unless such requirement has been complied with. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202. See also State *v.* Hicks, 143 N. C. 689, 57 S. E. 441.

23. State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; *Ex p.* Spinney, 10 Nev. 323; State *v.* Call, 121 N. C. 643, 28 S. E. 517.

24. State *v.* Board of Dental Examiners, etc., 26 Ohio Cir. Ct. 369; State *v.* Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110.

For that reason the fact that one practised medicine for more than the prescribed period after the passage of the act is no defense to a prosecution for practising without authority, since the continued violation of the statute cannot result in such authority without

Furthermore it has been held that the applicant must have been in the practice at the time of the passage of the act.[25]

C. Practising Without Authority — 1. What Constitutes — a. Practising Medicine or Surgery — (I) *In General* — (A) *In Absence of Definition of Term.* In the absence of a statutory definition of what acts shall constitute the practice of medicine and surgery, the words "medicine and surgery" and "practice of medicine and surgery" are usually taken to have a meaning in their ordinary sense.[26] Medicine, in the popular sense, is a remedial substance;[27] something which is administered, either internally or externally, in the treatment of disease or the relief of sickness.[28] The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain.[29] Nor is it necessary for one to profess to practise generally either as a physician or surgeon to bring him within the operation of the statute, but it extends to any one engaging in practice in a distinct department of either profession.[30]

(B) *When Term Defined by Statute.* The state has the right to determine what acts shall constitute the practice of the healing art,[31] and this right has been frequently exercised with a tendency to extend rather than restrict the meaning of the term. What then constitutes the practice of medicine depends upon the language of the particular statute.[32]

(II) *Christian Science Treatment.* Under a statute making it unlawful to practise medicine without a license, but not attempting to define what constitutes "practising medicine," it is held that the term must be construed to relate to the practice of medicine as ordinarily and popularly understood, and therefore does not include one who gives treatment by the system known as "christian science."[33] Where, however, the meaning of the term "practising medicine"

compliance with its requirements. State *v.* Wilson, 61 Kan. 791, 60 Pac. 1054; Hargan *v.* Purdy, 93 Ky. 424, 20 S. W. 432, 14 Ky. L. Rep. 383; Driscoll *v.* Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376. *Contra,* Wert *v.* Clutter, 37 Ohio St. 347, holding that ten years of continuous practice might embrace time since as well as before the taking effect of the act.

25. Sherburne *v.* Board of Dental Examiners, 13 Ida. 105, 88 Pac. 762; Hart *v.* Folsom, 70 N. H. 213, 47 Atl. 603, holding that evidence that plaintiff had practised medicine prior to the passage of the act was not sufficient to entitle him to a certificate, since the applicant must have been in the practice at the time of the passage of the act to come within the provision of the statute.

The words "at the time of the passage of the act" refer to the date when the act takes effect and not when it is approved. Mills *v.* State Bd. of Osteopathic Registration, etc., 135 Mich. 525, 98 N. W. 19.

26. Kansas City *v.* Baird, 92 Mo. App. 204; State *v.* Heffernan, 28 R. I. 20, 65 Atl. 284.

27. State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

28. Kansas City *v.* Baird, 92 Mo. App. 204.

"Medicine" defined see 27 Cyc. 466.

29. State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

"Practice of medicine" see 27 Cyc. 466 note 19.

Clairvoyance.— The services of a medical clairvoyant have been held to be medical services. Bibber *v.* Simpson, 59 Me. 181.

Electrical treatment.— It is not necessary that internal remedies be administered; they may be applied externally, and they need not necessarily be substances which may be seen and handled. Thus one giving electrical treatment is "practising medicine." Davidson *v.* Bohlman, 37 Mo. App. 576.

30. Hewitt *v.* Charier, 16 Pick. (Mass.) 353, holding that one who professes and practises bone-setting in dislocations and fractures, reducing sprains, swellings, and contractions of the sinews by friction and fomentation, is practising surgery.

31. State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504.

32. See the statutes of the several states.

33. Kansas City *v.* Baird, 92 Mo. App. 204; Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129; State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428. See also Reg. *v.* Stewart, 17 Ont. 4.

"Other agency" does not include christian science.— Under a statute prohibiting any person not having a certificate from the board of medical registration from prescribing, directing, or recommending any drug, medicine, or other agency for the treatment, cure, or relief of any bodily infirmity, the term "other agency" does not include the system known as "christian science." Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129.

In Maine a "christian scientist" may

has been extended by statute to cover all treatment of whatever nature for the cure of physical or mental ailments, then giving christian science treatment without a license is in violation of the law.[34]

(III) *OSTEOPATHY.* Whether or not a person giving osteopathic treatment is to be regarded as "practising medicine" depends either upon the construction placed upon that term by the courts, or upon the comprehensiveness of the definition given by the statute itself.[35] But it has been several times held that an osteopath is not within a statute forbidding the prescribing or applying of any drug, medicine, appliance, or other agency by an unlicensed person.[36] Nor does osteopathy come within an exception in a statute applying to persons treating the sick by mental or spiritual means.[37]

(IV) *PROFESSING TO CURE OR HEAL*—(A) *In General.* In many states it is provided that any person shall be held as practising medicine within the meaning of a statute prohibiting the practice of medicine without a license, who shall publicly profess to cure or heal, or hold himself out as a physician, and assume the duties,[38] or who shall prefix the title "doctor" or "professor" or append the letters "M. D." to his name.[39] A mere public profession of an ability to heal will

practise the healing art according to that method, on obtaining a certificate of good moral character pursuant to Rev. St. c. 13, § 9. Wheeler *v.* Sawyer, (1888) 15 Atl. 67.

34. State *v.* Buswell, 40 Nebr. 158, 58 N. W. 728, 24 L. R. A. 68; State *v.* Marhle, 72 Ohio St. 21, 73 N. E. 1062, 106 Am. St. Rep. 570, 70 L. R. A. 835.

The Illinois statute expressly exempts from its operation those who treat the sick by mental or spiritual means without the use of drugs or material remedy. Hurd Rev. St. p. 1144 [Laws (1889), p. 275, § 7].

35. Thus where the statute merely regulates the "practice of medicine" some courts confining the definition of the words "practise medicine" to the mere administration of drugs, or use of surgical instruments, hold that an osteopathist is not within the statute. State *v.* Lawson, (Del. 1907) 65 Atl. 593; Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; Smith *v.* Lane, 24 Hun (N. Y.) 632; State *v.* Biggs, 133 N. C. 729, 46 S. E. 401, 98 Am. St. Rep. 731, 64 L. R. A. 139; State *v.* McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; Com. *v.* Pierce, 10 Pa. Dist. 335; Com. *v.* Thompson, 24 Pa. Co. Ct. 667, 7 Lack. Leg. N. 111. Other courts hold that the legislative intent was to include all who practise the healing art, whatever the treatment employed, and therefore the practice of osteopathy is within the statute. Ligon *v.* State, 145 Ala. 659, 39 So. 662; Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925; People *v.* Allcutt, 117 N. Y. App. Div. 546, 102 N. Y. Suppl. 678 [*affirmed* in 189 N. Y. 517, 81 N. E. 1171]. Under a statute providing that any one shall be regarded as practising medicine who shall treat, operate on, or prescribe for any physical ailment of another, one engaged in the practice of osteopathy is practising medicine. People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456]; People *v.* Jones, 92 Ill. App. 445; Jones *v.* People, 84 Ill. App. 453; Eastman *v.* People, 71 Ill. App. 236; Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

36. Hayden *v.* State, 81 Miss. 291, 33 So. 653, 95 Am. St. Rep. 471, 63 L. R. A. 616; State *v.* Herring, 70 N. J. L. 34, 56 Atl. 670 [*affirmed* in (1905) 60 Atl. 1134].

"Osteopathy" is not an "agency" within the act of Feb. 27, 1896, "to regulate the practice of medicine" (92 Ohio Laws 44), which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification. State *v.* Liffring, 61 Ohio St. 39, 55 N. E. 168, 76 Am. St. Rep. 358, 46 L. R. A. 334; Eastman *v.* State, 6 Ohio S. & C. Pl. Dec. 296, 4 Ohio N. P. 163.

37. People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456]; People *v.* Jones, 92 Ill. App. 447.

38. Benham *v.* State, 116 Ind. 112, 18 N. E. 454; People *v.* Somme, 120 N. Y. App. Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128].

A sign "Dr. . . . Magnetic Healer," is evidence that one held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Publishing a card as "doctor of neurology and ophthalmology" is a public profession that one is a physician, and this, with the assumption of duties as such, comes within the meaning of the section. State *v.* Wilhite, 132 Iowa 226, 109 N. W. 730.

39. Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; People *v.* Somme, 120 N. Y. App. Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128]; State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504; Reg. *v.* Baker, 17 Cox C. C. 575, 56 J. P. 406, 66 L. T. Rep. N. S. 416.

A diploma from a regularly organized homeopathic society is sufficient to authorize a member of such society to use the title of "doctor" in the practice of medicine and surgery, and to protect him against the

not subject one to the penalties of the law.[40] Such profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted.[41] But proof of actual treatment is not exacted in all cases.[42] In the absence of a statute on this subject, a statute merely prohibiting the practice of medicine by any person not qualified and licensed will not prohibit the assumption of the title "Doctor" by any person whatever his profession.[43]

(B) *Oculists and Eye Specialists.* It has been held that one holding himself out as an eye specialist holds himself out as a physician and surgeon.[44] But the application by an oculist of liquid to the eye is said to be the practice of surgery rather than of medicine.[45]

(V) *Obstetrics and Midwifery.* A person practising obstetrics[46] or midwifery[47] is within a statute requiring a license for practising medicine or surgery.

(VI) *Selling and Administering Patent Medicines.* Although the mere selling of patent medicines by one who does not pretend to diagnose disease, and determine what remedy is proper, is not a violation of a statute forbidding the practice of medicine by unlicensed persons,[48] still the fact that one gives his own proprietary medicine will not protect him where he attends and prescribes for sick persons and holds himself out as competent to prescribe.[49]

penalties imposed by the statute for using such title and practising without a diploma from some incorporated medical society or college. Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

Assumption of title signifying registration — Canada.— Under a statute punishing any one who falsely professes to be a registered physician, the mere use of the letters "M. D." without supplemental words implying registration is not sufficient to convict. Foster *v.* Rose, 37 Can. L. J. N. S. 824; Reg. *v.* Tefft, 45 U. C. Q. B. 144.

40. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

41. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

An eye expert who invites people to call upon him, but who states that he does not give medical or surgical treatment, does not "profess to cure or treat disease by any drug or application." People *v.* Smith, 208 Ill. 31, 69 N. E. 810.

42. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

43. State *v.* McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

44. Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

Statutory provisions.— Under a statute providing that a person shall be regarded as practising medicine who shall treat or profess to treat, operate on or prescribe for, any physical ailment or injury, a person who causes a customer to look at objects on a wall, and therefrom determines what kind of lens he needs to aid his defective vision, and then has glasses ground accordingly and fitted into frames, and delivers such spectacles to his customer, is not required to first take out a license to practise medicine. People *v.* Smith, 208 Ill. 31, 69 N. E. 810 [*affirming* 108 Ill. App. 499]. Nor can such a person be required to take out a license because he advertises for those who have headache, dizziness, etc., to call on him, where the advertisement expressly declares that he does not give medical or surgical treatment, and it is apparent from the entire advertisement that all he professes to do is to fit spectacles to the eye. People *v.* Smith, *supra.* But under a similar statute one who diagnoses his patient's diseases by a microscopic examination of a drop of blood, and treats them by placing them under the rays of electric arc lights, and also incidentally prescribes certain medicines, for which prescription he makes no charge, has been held to be practising medicine. O'Neil *v.* State, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. N. S. 762, holding further that one who diagnosed his patient's diseases by microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights, is not an optician, within Acts (1901), p. 115, c. 78, excepting opticians from its provisions as to licensing persons practising medicine. Under a statute providing that every person prefixing the title "Dr." to his name, or professing to be a physician, or prescribing any drug, medicine, apparatus, or other agency for the cure of any ailment, shall be regarded as practising medicine, a person engaged in fitting glasses to the eye, who prefixes the title "Dr." to his name, and claims to be an ophthalmologist, is practising medicine. State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504.

45. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

46. State *v.* Welch, 129 N. C. 579, 40 S. E. 120.

47. People *v.* Arendt, 60 Ill. App. 89.

48. State *v.* Kendig, 133 Iowa 164, 110 N. W. 463; State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32; College des Medecins *v.* Tucker, 17 Quebec Super. Ct. 70.

49. *District of Columbia.*— Springer *v.* District of Columbia, 23 App. Cas. 59.

Kansas.— Underwood *v.* Scott, 43 Kan. 714, 23 Pac. 942.

New York.— Thompson *v.* Staats, 15 Wend. 395.

(VII) *SELLING MECHANICAL INSTRUMENTS OR APPLIANCES.* A statute regulating the practice of medicine does not include those who merely advertise, puff, or sell mechanical instruments or devices, although they profess their use will cure human ills.[50] But selling and directing the application of plasters for the cure of cancer is "practising" within the meaning of the statute.[51]

(VIII) *PRACTISING UNDER LICENSED PHYSICIAN.* Liability under a statute prohibiting the practice of medicine without a license is not affected by the fact that the operations were performed and the medicines were administered under the direction and charge of a licensed physician and surgeon.[52]

(IX) *PRACTISING AFTER REFUSAL OF LICENSE.* Where one admits practising without a license, it is no defense to a prosecution therefor that the medical board had wrongfully refused to issue him a license.[53] But the contrary has also been held.[54]

(X) *PRACTISING AFTER REVOCATION OF LICENSE.* Under a statute prescribing a penalty for practising "without first having procured a certificate," a conviction cannot be had for engaging in practice after the certificate has been revoked for unprofessional conduct.[55]

(XI) *PRACTISING WITHOUT FEE OR REWARD.* The penalty for practising medicine without a license is usually limited to the practice for reward or compensation.[56] It is not necessary to show that a separate fee was charged for any specified service or operation, but it is sufficient if a fee was collected for a series of services or operations in violation of the act.[57] Neither is it necessary to show that a charge was made immediately after the service or operation, it being suf-

North Carolina.— State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32.

Ohio.— Jordan *v.* Dayton Overseers of Poor, 4 Ohio 294.

Canada.— Reg. *v.* Coulson, 27 Ont. 59; Reg. *v.* Howarth, 24 Ont. 561; Reg. *v.* Hall, 8 Ont. 407.

50. People *v.* Lehr, 196 Ill. 361, 63 N. E. 725 [*affirming* 93 Ill. App. 505], holding that where a party was agent for the sale of an article or instrument to be attached to parts of the body, which he advertised would cure many diseases, and he urged people to buy it and try it, but he did not claim to be a physician or to practise medicine, did not examine his patrons or attempt to ascertain or tell them what their diseases were, and did not prescribe or administer drugs or remedies, nor apply the instrument to the bodies of purchasers, this was not the practice of medicine within the meaning of the title of the act of 1899, fixing a penalty for the practice of medicine without a certificate.

51. Provincial Medical Bd. *v.* Bond, 22 Nova Scotia 153.

52. State *v.* Reed, 68 Ark. 331, 58 S. W. 40; State *v.* Paul, 56 Nebr. 369, 76 N. W. 861.

53. State *v.* Doerring, 194 Mo. 398, 92 S. W. 489 (holding that if one substantially complies with all the provisions of the statute, and the board wrongfully withholds from him a license, then he must resort to some appropriate remedy to compel the issuance of such license); Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

54. State *v.* Cooper, 11 Ida. 219, 81 Pac. 374, 377, where it is said: "If the Board of Medical Examiners could withhold a license from an applicant . . . until he could appeal to the courts for redress, making a criminal of him every time he prescribed for or visited a patient, they could not only deprive him of valuable property rights, but ruin him in his profession, and brand him as a criminal."

55. *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Pending an appeal from the action of the state board of medical examiners in revoking defendant's license, defendant cannot be convicted of practising without a license, when the judgment of the board is finally reversed. State *v.* Kellogg, 14 Mont. 451, 36 Pac. 1077.

56. See the statutes of the several states. See also State *v.* Pirlot, 20 R. I. 273, 38 Atl. 656, holding that, although Gen. Laws, c. 165, § 2, makes it unlawful to practise medicine without exhibiting and having registered a certificate, yet, as section 8, providing a penalty, limits the fine to the practice of medicine for reward or compensation, section 2 cannot be violated where a medical practitioner receives no compensation for his services.

Thus it is not a violation of the statute for a person who does not hold himself out as a physician to advise, or give medicine to, a sick person, merely as a neighbor or friend, where no charge is made, and no compensation is expected, for such services. Nelson *v.* State, 97 Ala. 79, 12 So. 421.

Nor can a druggist's clerk who prescribes for a customer be convicted under such an act where no profit inures to him from the sale. Prust *v.* Rose, 37 Can. L. J. N. S. 824.

57. State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

ficient that some time within one year before filing the information a fee was paid for the services alleged to have been rendered.[58]

b. Practising Dentistry. The practice of dentistry has been defined as the treatment of diseases or lesions of the human teeth or jaws, or the correction of malpositions thereof.[59] A statute thus defining dentistry does not prevent a licensed surgeon from treating diseases of the jaws, which may come within the scope both of general surgery and dentistry.[60]

2. Prosecutions For Practising Without Authority[61] — a. Indictment, Information,[62] or Complaint[63] — (i) *In General.* The offense of practising medicine without a license being purely a statutory offense, if the statute so far individuates the crime that the offender has proper notice of the nature of the charge against him, it is sufficient to charge it in the language of the statute or in terms substantially equivalent thereto.[64] It is necessary to state specifically the essential facts constituting the offense.[65] It is not sufficient to sustain a criminal prosecution of this kind merely to charge a person with having "unlawfully" prac-

58. State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

59. See State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

The taking of an impression, the making of false teeth therefrom, and the fitting of such teeth in the mouth constitute a "correction of malposition of the jaws," within the meaning of the statute regulating the practice of dentistry. State *v.* Newton, 39 Wash. 491, 81 Pac. 1002.

60. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

61. See, generally, Criminal Law, 12 Cyc. 70.

62. **Indictment or information** generally see Indictments and Informations, 22 Cyc. 155.

63. **Criminal complaint** generally see Criminal Law, 12 Cyc. 291 *et seq.*

64. Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; Com. *v.* Campbell, 22 Pa. Super. Ct. 98 (holding that an indictment charging that defendant did "engage in the practice of medicine and surgery without having complied with the provisions" of the act of May 18, 1893 (Pub. Laws 94), sufficiently sets forth the violation of the act, which forbids any one to "enter upon the practice of medicine or surgery within the state, unless he or she has complied with the provisions of this act"); State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

"Practising as a physician" see *infra,* this note.

"Practising medicine" equivalent to "practising as a physician."— An indictment which alleged that defendant did "practise medicine" sufficiently charges that he "practised as a physician," within the meaning of a statute which makes it unlawful for any person to so practise without having a license. Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893.

Practise or attempt to practise.— An indictment for practising medicine without a license, which charges that defendant unlawfully "did practise or attempt to practise medicine or surgery," is not open to the objection that the offenses of practising and attempting to practise are so distinct that the offense is not sufficiently set out. State *v.* Welch, 129 N. C. 579, 40 S. E. 120; State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32.

65. O'Connor *v.* State, 46 Nebr. 157, 64 N. W. 719; Denton *v.* State, 21 Nebr. 445, 32 N. W. 222.

Use of drug, medicine, or other agency.— Under Ohio Rev. St. § 4403*c*, prohibiting persons from practising medicine, or prescribing, directing, or recommending for the use of any person any drug, medicine, or other agency for the permanent cure or relief of any bodily infirmity, unless a certificate from the board of registers shall be filed, etc., an information charging defendant with having for a fee prescribed, directed, and recommended a system known as "christian science," or other agency of the kind described was recommended or administered, is insufficient. Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129.

Particular branch of medicine.—An information under a statute "to regulate the practice of medicine," and which requires that, before any person engages in the "practice of medicine in any of its branches or departments," he shall comply with certain provisions thereof, need not allege the "particular branch or department" of medicine in which defendant engaged. Antle *v.* State, 6 Tex. App. 202.

In Texas an indictment for unlawfully engaging in the practice of medicine must allege that it was done without a diploma, or else without having a certificate of qualification from some authorized board of medical examiners, as provided by statute, or without having practised five consecutive years in the profession; and it must be alleged that the accused resided or sojourned in the county where such indictment was presented. State *v.* Goldman, 44 Tex. 104; Carribene *v.* State, 3 Tex. App. 262.

There must be a statement of facts showing the doing by the accused person of one or more of the acts included within the statutory definition. O'Connor *v.* State, 46

tised medicine in violation of the statute, for this amounts to no more than the statement of a mere legal conclusion.[66]

(II) *Failure to Qualify.* Under a statute making it an offense to practise medicine without complying with the provisions thereof respecting qualification, an indictment must expressly negative the fact of defendant having any of the qualifications requisite to the lawful practice of medicine.[67] Thus an indictment which does not allege in some form a failure to register,[68] or a failure to register and obtain a certificate,[69] or a failure to have the certificate recorded,[70] as the case may be, charges no offense. The negation of defendant's qualification must be broad enough to meet the requirements of the statute.[71]

(III) *Person Practised Upon.* Since no individual right is infringed by the practice of medicine in violation of the statute, the indictment need not specify on whom defendant practised.[72] Furthermore it has been held that it is not necessary to charge defendant with prescribing medicine for human beings as distinguished from furnishing medicine for domestic animals.[73]

(IV) *Reward or Compensation.* Where the statute does not contain the words "fee or reward," an indictment for practising medicine without a license need not charge that defendant practised for "fee or reward."[74]

(V) *Negativing Exceptions.* The general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the offense so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso.[75] But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, for it is

Nebr. 157, 64 N. W. 719; State *v.* Carey, 4 Wash. 424, 30 Pac. 729.

66. Steuben County *v.* Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471; Schaeffer *v.* State, 113 Wis. 595, 89 N. W. 481, Bardeen, J., delivering the opinion of the court.

The pleader must go further and charge that defendant did practise medicine by doing what the statute says it shall consist in, following the statute as far as applicable so as to bring the charge clearly within it. Dee *v.* State, 68 Miss. 601, 9 So. 356; Schaeffer *v.* State, 113 Wis. 595, 89 N. W. 481. But see People *v.* Phippin, 70 Mich. 6, 37 N. W. 888 [*followed* in White *v.* Lapeer Cir. Judge, 133 Mich. 93, 94 N. W. 601], holding that the complaint in a prosecution for practising medicine without a license need not specify the particular acts or means by which defendant practised medicine.

67. Blalock *v.* State, 112 Ga. 338, 37 S. E. 361.

68. State *v.* Fussell, 45 Ark. 65; Driscoll *v.* Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376.

69. State *v.* Welch, 129 N. C. 579, 40 S. E. 120 (holding that an indictment for practising medicine without a license, which alleges that defendant did not exhibit to the clerk a license, nor make the oath necessary to procure registration, and did practise, "not then and there having obtained from said Clerk of the Court a certificate of registration," sufficiently charges that defendant "did not register and obtain" a license); State *v.* Call, 121 N. C. 643, 28 S. E. 517.

70. State *v.* Hathaway, 106 Mo. 236, 17 S. W. 299.

71. State *v.* Goldman, 44 Tex. 104.

72. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888; State *v.* Doerring, 194 Mo. 398, 92 S. W. 489; State *v.* Little, 76 Mo. 52; State *v.* Smith, 60 Mo. App. 283; State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32; State *v.* Martin, 23 R. I. 143, 49 Atl. 497.

73. State *v.* Kendig, 133 Iowa 164, 110 N. W. 463.

74. State *v.* Welch, 129 N. C. 579, 40 S. E. 120; State *v.* Call, 121 N. C. 643, 28 S. E. 517. See also Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893.

Even where, by statutory definition, the words "practise medicine" embrace the idea of exacting compensation, an indictment charging that the accused did unlawfully "practise medicine," and expressly negativing his having any of the qualifications essential to the lawful practice of medicine has been held to be good in substance, and sufficient to support a conviction, although there be no allegation that the accused received or intended to receive compensation. Blalock *v.* State, 112 Ga. 338, 37 S. E. 361.

75. Salter *v.* State, 44 Tex. Cr. 591, 73 S. W. 395; McCann *v.* State, 40 Tex. Cr. 111, 48 S. W. 512. See also Indictments and Informations, 22 Cyc. 344.

Where the statute includes two or more classes which will be affected thereby — such as physicians who remove into the state to practise after the passage of an act to regulate the same, and persons who were residing in the state and practising under a former act — the information must show on its face that the accused does not belong to either class. Herring *v.* State, 114 Ga. 96, 39 S. E. 866; Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513.

a matter of defense.[76] The rule as sometimes stated is that, if the exception is found in the enacting clause, it must be negatived; but if found in a subsequent clause, it need not be.[77] The negative averment is taken as true, unless disproved by defendant, since the subject-matter of such averment lies peculiarly within his knowledge.[78]

(VI) *JOINDER OF OFFENSES.* Where the offense of practising medicine without authority may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant.[79]

b. Defenses. On a prosecution for practising medicine without a license, the defense of discrimination against a particular class of practitioners is of no avail.[80]

c. Evidence[81]—(I) *PRESUMPTIONS AND BURDEN OF PROOF.* On an indictment for practising medicine without a license from the board of medical examiners, as required by law, the prosecution must show the existence of such board of examiners, legally constituted, and a conviction cannot be sustained where there was no such board *de jure*.[82] Furthermore the state must prove beyond a reasonable doubt that defendant did practise medicine without a license.[83] After such proof has been introduced on the part of the prosecution, the burden is on the accused to show that he had a license[84] or other qualification to practise as required by law,[85] as such evidence is not accessible to the state, but is peculiarly within defendant's knowledge, and under his control.[86] So one who seeks protection by reason of an exception contained in the statute has the burden of proving that he comes within the same.[87]

(II) *ADMISSIBILITY.* Any competent evidence tending to show that defendant held himself out as a medical practitioner is admissible,[88] and such evidence is not

76. *Colorado.*— Harding *v.* People, 10 Colo. 387, 15 Pac. 727.

Illinois.— Williams *v.* People, 20 Ill. App. 92.

Iowa.— State *v.* Kendig, 133 Iowa 164, 110 N. W. 463.

Maryland.— Watson *v.* State, 105 Md. 650, 66 Atl. 635.

Michigan.— People *v.* Allen, 122 Mich. 123, 80 N. W. 991; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Missouri.— State *v.* Smith, 60 Mo. App. 283.

Nebraska.— O'Connor *v.* State, 46 Nebr. 157, 64 N. W. 719; Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513.

New Jersey.— Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

North Carolina.— State *v.* Welch, 129 N. C. 579, 40 S. E. 120; State *v.* Call, 121 N. C. 643, 28 S. E. 517.

Ohio.— Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154; Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

Rhode Island.— State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 9. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 344.

77. Ferner *v.* State, 151 Ind. 247, 51 N. E. 360; Steuben County *v.* Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471; Antle *v.* State, 6 Tex. App. 202; Logan *v.* State, 5 Tex. App. 306; Blasdell *v.* State, 5 Tex. App. 263.

78. State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

79. State *v.* Wilhite, 132 Iowa 226, 109 N. W. 730; Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154.

80. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925, since, if true, the remedy is in the civil courts, on rejection of an application for a license, and not by a violation of the criminal law.

81. Evidence generally see CRIMINAL LAW, 12 Cyc. 379 *et seq.*; EVIDENCE, 16 Cyc. 821 *et seq.*

82. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

83. Benham *v.* State, 116 Ind. 112, 18 N. E. 454.

84. People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; Williams *v.* People, 20 Ill. App. 92; Benham *v.* State, 116 Ind. 112, 18 N. E. 454; People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, 7 N. Y. Cr. 1; People *v.* Nyce, 34 Hun (N. Y.) 298.

85. Morris *v.* State, 117 Ga. 1, 43 S. E. 368; State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482; Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

86. People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679.

87. State *v.* Hicks, 143 N. C. 689, 57 S. E. 441.

88. Springer *v.* District of Columbia, 23 App. Cas. (D. C.) 59.

Where respondent exhibited a sign as "Dr. . . . Magnetic Healer," and was called in to visit sick persons, and treated them, and made a certificate of death, and a medical practitioner's sworn statement, there is evi-

rendered inadmissible by the rule that the state is not allowed to put in issue the general character of defendant.[89] On behalf of defendant any legal evidence tending to show that he had rightful authority to practise, or that he was not guilty of the offense charged, is admissible.[90] The court will not compel a witness to produce the medicine which he received from defendant.[91]

(III) *WEIGHT AND SUFFICIENCY.*[92] In a prosecution against one for practising as a physician without a diploma, the existence of the diploma is *prima facie* evidence of a right to it.[93] In some states it is provided by statute that the use by a person of the title "Dr.," "Doctor," etc., or the exposure of a sign, circular, or advertisement indicating the occupation of the person shall be *prima facie* evidence that he is practising medicine.[94] Proof that defendant attended a single case and held himself out to the community as a physician is sufficient to warrant a conviction.[95] Although defendant, to constitute guilt, must have practised for compensation and reward, the state need not prove the actual receipt of such compensation.[96] Uncorroborated testimony of employees of a dental society may be sufficient to support a conviction.[97]

d. Variance. Proof that defendant acted either as a physician or surgeon is sufficient to support an information charging that he held himself out as a physi-

dence that he held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

A medical practitioner's sworn statement, a certificate of death, and a report of infectious diseases, executed by respondent, are admissible to show that he held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

A business card of defendant, containing his name, with the title "Dr." prefixed, and advertising himself as pharmacist and chemist, and with having a free dispensary at his place of business, where registered physicians were in attendance daily to give medical and surgical advice free of charge, is admissible as a declaration of defendant tending to prove that he had been engaged in carrying on the prohibited business, which was corroborative of the proof offered in support of the offense charged. Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

89. Antle *v.* State, 6 Tex. App. 202.

90. See cases cited *infra*, this note.

Services rendered without compensation.— Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

Possession of diploma.— In a prosecution under Wis. Laws (1881), c. 256, § 1, prohibiting a person from prefixing the title of "doctor" to his name without having a diploma from a duly incorporated medical society or college, it is error to reject a diploma offered in evidence by defendant, on the ground that its articles of incorporation did not declare that such power existed, it not being necessary that the articles of incorporation of a medical college should designate with particularity all the powers which it may exercise when duly incorporated. Wendel *v.* State, 62 Wis. 300, 22 N. W. 435. But in a prosecution of a physician for practising without a certificate countersigned by the senior censor of the state medical association, in violation of Ala. Code (1896), § 5333, defendant's diploma and proof of the length of time he practised medicine are inadmissible. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

Evidence that other physicians had no certificates is inadmissible. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

Refusal to issue certificate.— A person charged with having practised medicine without a proper certificate cannot show that the state board acted unjustly in refusing him one. Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119; State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

91. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

92. **Evidence held sufficient to justify conviction** see Ferner *v.* State, 151 Ind. 247, 51 N. E. 360; Benham *v.* State, 116 Ind. 112, 18 N. E. 454; State *v.* Kendig, 133 Iowa 164, 110 N. W. 463; State *v.* Hoff, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. N. S. 1094; State *v.* Oredson, 96 Minn. 509, 105 N. W. 188; People *v.* Somme, 120 N. Y. App. Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128]; Payne *v.* State, 112 Tenn. 587, 79 S. W. 1025; State *v.* Lawson, 40 Wash. 455, 82 Pac. 750; State *v.* Sexton, 37 Wash. 110, 79 Pac. 634.

93. Wendel *v.* State, 62 Wis. 300, 22 N. W. 435; Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

94. Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

But evidence that there appeared in a certain newspaper an advertisement of a doctor having the same name as accused is insufficient to warrant a conviction, since it cannot be presumed that the advertisement was authorized by defendant, nor that he was the person named in the advertisement. State *v.* Dunham, 31 Wash. 636, 72 Pac. 459.

95. Antle *v.* State, 6 Tex. App. 202.

96. State *v.* Hale, 15 Mo. 606.

97. People *v.* Stein, 112 N. Y. App. Div. 896, 97 N. Y. Suppl. 923.

cian and surgeon.[98] So proof that defendant engaged in any branch or department of medicine sustains the allegation that he engaged in the practice of medicine.[99] Since the time of the commission of the offense is not of the essence thereof, it is not necessary to prove that the offense charged was committed on the precise date alleged; proof that it occurred on any day within the period of limitation and before the filing of the information is sufficient.[1]

e. Questions For Jury.[2] Where a statute regulating the practice of medicine does not declare what specific acts shall constitute "practising medicine," or what it is to "publicly profess to do so," both of which are prohibited unless the person so doing has obtained a license, it is for the courts to determine whether the facts and proof in a particular case bring it within the terms of the statute, taking these in the sense in which they are commonly understood.[3] But where the acts which shall constitute the practice of medicine are defined by statute, whether or not defendant has, by his conduct, brought himself within such definition, is a question for the jury.[4]

f. Instructions. The instructions must conform to the pleadings and the evidence.[5] Where, under the statute, the possession of either a license or a diploma would preserve a physician from prosecution, it is error to instruct that if defendant had practised medicine without having a license and a diploma the jury should convict.[6] It is not necessary for the court to instruct the jury as to the law of costs in case of acquittal.[7]

g. Verdict. Upon an indictment under a statute which makes it a misdemeanor for any person to practise medicine for fee or reward without a license, a special verdict which does not find that defendant practised "for fee or reward" will not justify a conviction.[8]

h. Review[9] — (I) *In General.* The admission of incompetent evidence which could not have harmed defendant is not reversible error.[10] Where the charge of the court is not in the record, it will be presumed that the jury were properly instructed as to the offense for which defendant was on trial.[11]

(II) *Record.* The record of a summary conviction under the Ontario Medical Act[12] for illegally practising medicine must set out the particular act or acts which constitute the practising;[13] and should, if possible, state the facts necessary to bring it within the statute.[14]

i. Effect of Conviction. Where the offense denounced by the statute is of such a continuous nature as to subject the violator to but one conviction for

98. Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

99. Antle *v.* State, 6 Tex. App. 202.

1. Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

2. Right to trial by jury in prosecutions for practising without authority see JURIES, 24 Cyc. 142 *et seq.*

3. Springer *v.* District of Columbia, 23 App. Cas. (D. C.) 59.

4. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

5. State *v.* Heffernan, 28 R. I. 20, 65 Atl. 284, holding that an instruction that a person who uses neither drugs nor medicine cannot be said to engage in the practice of medicine was inapplicable where the evidence showed that defendant used nerve food which he claimed supplied the capillary nerves of the entire body, and was very good for all ailments.

6. Aldenboven *v.* State, 42 Tex. Cr. 6, 56 S. W. 914.

7. Com. *v.* Clymer, 30 Pa. Super. Ct. 61.

8. State *v.* Call, 121 N. C. 643, 28 S. E. 517.

9. Review generally see CRIMINAL LAW, 12 Cyc. 331 *et seq.*, 792 *et seq.*

10. Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

11. Richardson *v.* State, 47 Ark. 562, 2 S. W. 187.

12. Ont. Rev. St. (1897) c. 176, § 49; Ont. Rev. St. (1887) c. 148, § 45.

13. Reg. *v.* Whelan, 4 Can. Cr. Cas. 277; Reg. *v.* Coulson, 24 Ont. 246.

14. Reg. *v.* Hessel, 44 U. C. Q. B. 51. See also CRIMINAL LAW, 12 Cyc. 328 *et seq.*

Insufficient statement.—A conviction stating the offense as having been committed between dates specified, by prescribing, etc., for a certain person will be set aside if the evidence discloses no offense as regards the attendance upon such person; and it cannot be sustained by proof of altogether separate offenses shown to have been committed within the stated time as regards other persons. Reg. *v.* Whelan, 4 Can. Cr. Cas. 277.

the whole period of time next before the institution of the prosecution, a conviction under one indictment is a bar to proceedings under other similar indictments for previous acts, although each in itself constituted the practise of medicine.[15]

III. RELATION TO PATIENT.

A. Nature of Relation. The relation of a physician to his patient is one of trust and confidence, and while such relation does not *per se* forbid the acceptance of a gift or conveyance by him from his patient,[16] the burden is on the physician to prove that such gift or conveyance was fairly and honestly obtained, and that the transaction was above suspicion.[17] Any settlement made by a patient through his physician, in consequence of advice given *mala fide*, will be set aside.[18]

B. Degree of Skill and Care Required — 1. General Rule — a. As to Ordinary Practitioners. A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible. He is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practising in similar localities, and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment.[19]

15. Wilson *v.* Com., 119 Ky. 769, 82 S. W. 427, 26 Ky. L. Rep. 685.

16. Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731; Audenreid *v.* Walker, 11 Phila. (Pa.) 183.

17. Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110, holding that the fairness of such a transaction is not established by evidence that the physician rendered professional services for a number of years without compensation, where he does not attempt to fix their value.

18. Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500. See also Contracts, 9 Cyc. 458.

19. *Alabama.*— McDonald *v.* Harris, 131 Ala. 359, 31 So. 548.

Connecticut.— Landon *v.* Humphrey, 9 Conn. 209, 23 Am. Dec. 333.

Illinois.— Quinn *v.* Donovan, 85 Ill. 194; Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328; McNevins *v.* Lowe, 40 Ill. 209; Ritchey *v.* West, 23 Ill. 385; Holtzman *v.* Hoy, 19 Ill. App. 459.

Iowa.— Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Bowman *v.* Woods, 1 Greene 441.

Kansas.— Branner *v.* Stormont, 9 Kan. 51; Tefft *v.* Wilcox, 6 Kan. 46.

Maine.— Ramsdell *v.* Grady, 97 Me. 319, 54 Atl. 763; Cayford *v.* Wilbur, 86 Me. 414, 29 Atl. 1117; Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Simonds *v.* Henry, 39 Me. 155, 63 Am. Dec. 611; Howard *v.* Grover, 28 Me. 97, 48 Am. Dec. 478.

Maryland.— State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

Michigan.— Hesse *v.* Knippel, 1 Mich. N. P. 109.

Minnesota.— Getchell *v.* Hill, 21 Minn. 464.

Missouri.— McMurdock *v.* Kimberlin, 23 Mo. App. 523.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Hewitt *v.* Eisenhart, 36 Nebr. 794, 55 N. W. 252.

New Hampshire.— Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

New York.— Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Carpenter *v.* Blake, 60 Barb. 488 [*reversed* on other grounds in 50 N. Y. 696]; Bellinger *v.* Craigue, 31 Barb. 534; Graves *v.* Santway, 2 Silv. Sup. 67, 6 N. Y. Suppl. 892; Rowe *v.* Lent, 17 N. Y. Suppl. 131; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Ohio.— Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

Oregon.— Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064; Heath *v.* Glisan, 3 Oreg. 64.

Pennsylvania.— McCandless *v.* McWha, 22 Pa. St. 261; Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Braunberger *v.* Cleis, 13 Am. L. Reg. 587; Haire *v.* Reese, 7 Phila. 138.

Tennessee.— Wood *v.* Clapp, 4 Sneed 65.

England.— Lanphier *v.* Phipos, 8 C. & P. 475, 34 E. C. L. 844.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 21.

"The physician . . . is not a guarantor, without express contract, of the good effects of his treatment, but he only undertakes to do what can ordinarily be done under similar circumstances." Ordronaux Jur. Med. 42 [*quoted* in Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 441, 60 Am. Rep. 668].

An oculist who treats a patient must exercise the care and skill usually exercised by oculists in good standing, and is liable for gross mistakes. Stern *v.* Lanng, 106 La. 738, 31 So. 303.

A veterinary surgeon, in the absence of a special contract, engages to use such reasonable skill, diligence, and attention as may be ordinarily expected of persons in that profession. He does not undertake to use the

b. As to Specialists. A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such disease, in the light of the present state of scientific knowledge.[20]

2. Necessity of Following Professed or Recognized School, System, or Treatment. Physicians are bound by what is universally settled in the profession;[21] but the mere fact that writers on the treatment of a certain ailment or practical surgeons prescribe a certain mode of treatment does not make it incumbent on a surgeon called to treat the ailment to conform to such system.[22] If the case is a new one, the patient must trust the skill and experience of the physician called, and likewise, if his injury or disease is attended with injury to other parts, or other diseases develop for which there is no established mode of treatment;[23] but where the settled practice allows but one course of medical treatment in the case, any departure of a physician therefrom may be regarded as the result of want of knowledge or attention.[24] Where there are different schools of practice, all that any physician undertakes is that he understands and will faithfully treat the case according to the recognized rules of his particular school.[25] To constitute a school of medicine under this rule, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case.[26]

highest degree of skill, nor an extraordinary amount of diligence. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

"Ordinary skill," within the meaning of the rule that a physician or surgeon is only required to exercise ordinary care and skill, means such degree of skill as is commonly possessed by men engaged in the same profession. Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032; Heath *v.* Gilsan, 3 Oreg. 64.

In use of X-rays.— In an action against a physician for negligence in applying to plaintiff's body X-rays to locate a foreign substance thought to be in his lungs, the rule of liability is the same as in other actions for malpractice, requiring ordinary care and prudence. Henslin *v.* Wheaton, 91 Minn. 219, 97 N. W. 882, 103 Am. St. Rep. 504, 64 L. R. A. 126.

Effect of refusal of assistance from other physicians.— The measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians. Potter *v.* Warner, 91 Pa. St. 362, 36 Am. Rep. 668.

The term "duties of physician," as used in a contract with a physician and surgeon for their performance, includes in its general and ordinary acceptation surgery, as well as the administration of medicine. Wetherell *v.* Marion County, 28 Iowa 22. See Clinton County *v.* Ramsey, 20 Ill. App. 577, for similar interpretation of words "medical treatment."

20. Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38, holding further that the question when a physician becomes a specialist is not one of law, but one of fact primarily for his own determination; but, when he holds himself out as a specialist, it becomes his duty to use that degree of skill which such a practitioner of necessity should possess.

21. Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250; Tefft *v.* Wilcox, 6 Kan. 46; Hesse *v.* Knippel, 1 Mich. N. P. 109, where it is said that a physician cannot try experiments with his patients to their injury.

22. Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250.

23. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

24. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696], holding that if writers on the treatment of dislocations, or if, in the absence of such authority, practical surgeons, prescribe a mode of reducing them, and of treating the joint after the bones are replaced, it is incumbent on surgeons called to treat such an injury to conform to the system of treatment thus established; and, if they depart from it, they do it at their peril.

25. Force *v.* Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343; Bowman *v.* Woods, 1 Greene (Iowa) 441; Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813.

Known and recognized system.— It is sufficient if the practitioner follow a known and recognized system. Williams *v.* Poppleton, 3 Oreg. 139.

26. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49; Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. See also Longan *v.* Weltmer, 180 Mo. 322, 79 S. W.

3. Depending on Nature or Character of Injury or Disease. Whatever may be the character of the injury or disease a physician is called on to treat, he is only held to employ reasonable care and skill, to exercise only that degree of skill which is ordinarily possessed by members of the profession in like localities. He is not required to exercise care and skill proportionate to the character of the injury or disease he treats, and he is not liable if he does not treat a severe injury with such skill as its severity reasonably demands.[27]

4. Depending on State of Profession. In determining the degree of learning and skill required of a physician, regard must be had to the state of medical science at the time.[28] It has been held erroneous, however, to charge that the skill required is such as thoroughly educated physicians ordinarily exercise, as this lays down too high a test.[29]

5. Depending on Locality of Practice. Although there are some authorities which tend to support the rule that a physician is bound to exercise only such a degree of care as is ordinarily exercised in his profession in the particular locality in which he practises,[30] the better and more correct rule is that a physician and surgeon is required to exercise that degree of knowledge, skill, and care which physicians and surgeons practising in similar localities ordinarily possess.[31]

655, 103 Am. St. Rep. 573, 64 L. R. A. 969.

Christian science and clairvoyancy not being recognized schools of medicine, one who professes to cure disease by those systems of treatment must be held to the standard of care of the ordinary physician in good standing. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. *Contra*, Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

27. Utley *v.* Burns, 70 Ill. 162.

28. *Indiana.*— Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38.

Iowa.— Ferrell *v.* Ellis, 129 Iowa 614, 105 N. W. 993; Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Almond *v.* Nugent, 34 Iowa 300, 11 Am. Rep. 147; Smothers *v.* Hanks, 34 Iowa 286, 11 Am. Rep. 141.

Michigan.— Hitchcock *v.* Burgett, 38 Mich. 501.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Ohio.— Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639.

Pennsylvania.— English *v.* Free, 205 Pa. St. 624, 55 Atl. 777; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

Rhode Island.— Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 26.

29. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Hitchcock *v.* Burgett, 38 Mich. 501. But see McCandless *v.* McWha, 22 Pa. St. 261.

The true measure is that degree of skill ordinarily exercised in the profession by the members thereof as a body, the average of the skill and diligence ordinarily exercised by the profession as a whole; not that exercised by the thoroughly educated, nor yet that exercised by the moderately educated, nor merely of the well educated, but the average. Almond *v.* Nugent, 34 Iowa 300, 11 Am. Rep. 147; Smothers *v.* Hanks, 34 Iowa 286, 11 Am. Rep. 141.

30. Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; Hathorn *v.* Richmond, 48 Vt. 557.

31. *Indiana.*— Gramm *v.* Boener, 56 Ind. 497, 501 (where it was said: "It will not do, as we think, to say, that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, it will be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say, that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill"); Thomas *v.* Dabblemont, 31 Ind. App. 146, 67 N. E. 463; Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38].

Iowa.— Ferrell *v.* Ellis, 128 Iowa 614, 105 N. W. 993; Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324; Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830. But see Whitesell *v.* Hill, (1896) 66 N. W. 894.

Kentucky.— Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

Massachusetts.— Small *v.* Howard, 128 Mass. 131, 35 Am. Rep. 363.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Rhode Island.— Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

Canada.— Zirkler *v.* Robertson, 30 Nova Scotia 61.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 27.

6. Depending on Compensation. The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to use reasonable and ordinary care, skill, and diligence.[32] But if one does not profess to be a physician, or to practise as such, and is merely asked his advice as a friend or neighbor, he incurs no professional responsibility.[33]

7. Insurance of Cure or Benefit. In the absence of a special contract to that effect,[34] a physician does not warrant or insure that his treatment will be successful or even beneficial,[35] and he is not responsible in damages for want of success, unless it be shown to result from a want of ordinary skill or diligence.[36]

8. In Determining Nature of Injury or Malady and Mode of Treatment. A physician or surgeon is bound to use reasonable knowledge and care in learning the condition of his patient, in ascertaining if an operation is necessary, in determining whether the time and place are proper, and in making a diagnosis of the case.[37]

9. In Discontinuing Attendance. A physician, responding to the call of a patient, thereby becomes engaged, in the absence of a special agreement, to attend to the case, so long as it requires attention, unless he gives notice to the contrary

32. McNevins *v.* Lowe, 40 Ill. 209; Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Gladwell *v.* Steggall, 5 Bing. N. Cas. 733, 3 Jur. 535, 8 L. J. C. P. 361, 8 Scott 60, 35 E. C. L. 391. See also Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511.

33. McNevins *v.* Lowe, 40 Ill. 209; Ritchey *v.* West, 23 Ill. 385; Higgins *v.* McCabe, 126 Mass. 13, 30 Am. Rep. 642.

34. *Connecticut.*— Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

New York.— Bronson *v.* Hoffman, 7 Hun 674.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

Oklahoma.— Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

United States.— Ewing *v.* Goode, 78 Fed. 442.

See 39 Cent. Dig. tit. "Physicians and Suregons," § 23.

Express promise necessary.— An allegation in the declaration in an action for misconduct in setting a fractured bone that defendant promised to perfect a cure can only be sustained by positive proof of an express promise, as the law does not raise, by implication, such an undertaking. Grindle *v.* Rush, 7 Ohio, Pt. II, 123.

Illustration of contract.— Where a dentist inserted in a receipted bill, given for the price of a set of teeth, the words "warranted for one year; and if on trial they cannot be made useful, the teeth to be returned and the money refunded," if the purchaser, by a fair trial of the teeth, according to the instructions given him at the time they were delivered, could not make them useful, he had a right to return them within a year and recover the price. Davis *v.* Ball, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

35. *Illinois.*— Quinn *v.* Donovan, 85 Ill. 194; McKee *v.* Allen, 94 Ill. App. 147; Yunker *v.* Marshall, 65 Ill. App. 667.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Missouri.— Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72; Logan *v.* Field, 75 Mo. App. 594.

New York.— Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Boldt *v.* Murray, 2 N. Y. St. 232.

Ohio.— Gallaher *v.* Thompson, Wright 466; Bliss *v.* Long, Wright 351.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

Texas.— Graham *v.* Gautier, 21 Tex. 111; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

England.— Lanphier *v.* Phipos, 8 C. & P. 475, 34 E. C. L. 844.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 23.

The implied contract of a physician treating a fractured limb is not to restore it in its natural perfectness, but to treat it with that degree of diligence and skill which is ordinarily possessed by the average of the members of the profession in similar localities, regard being had to the state of the medical profession at the time. Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72. See also MacKenzie *v.* Carman, 103 N. Y. App. Div. 246, 92 N. Y. Suppl. 1063.

36. *Maine.*— Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593.

Nebraska.— O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

Ohio.— Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

Oklahoma.— Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845.

Pennsylvania.— Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. 272.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 23.

37. Quinn *v.* Donovan, 85 Ill. 194 (holding that an instruction, in an action against a surgeon for mistreatment of a fracture, that

or is discharged by the patient;[38] and he is bound to use ordinary care and skill not only in his attendance, but in determining when it may be safely and properly discontinued.[39] But if the patient goes to the office of the physician, from whom he receives proper treatment, and then fails to return for further treatment, in consequence of which he suffers, he has no right of action against the physician.[40]

10. In Using Anesthetics. Where a patient is put under the influence of an anesthetic, depriving him of the use of his faculties, physicians, surgeons, and dentists are required to use the highest professional skill and diligence to avoid every possible danger.[41] But they are only bound to look to natural and probable effects,[42] and are not answerable for results arising from the peculiar condition or temperament of a patient, of which they had no knowledge.[43]

11. In Giving Instructions. It is the duty of a physician or surgeon, in taking charge of a case, such as a broken limb, to give his patient all necessary and proper instructions as to what care and attention the patient should give the limb, in the absence of the physician, and the caution to be observed in the use of the limb before it is entirely healed,[44] and for failure to discharge his duty in this respect he may be liable in damages.[45]

12. To Avoid Communicating Contagious Diseases. It is the duty of physicians who are attending patients afflicted with contagious diseases, when called to attend other patients, to take all such precautionary means as experience has proved to be necessary to prevent its communication to them.[46]

IV. Liability For Negligence or Malpractice.[47]

A. Practitioners Subject to Liability. A physician need not be qualified to practise in order to render himself liable for negligence or malpractice. If, by treating, operating on, or prescribing for physical ailments, a person holds himself out as a physician to persons employing him, and they believe him to be a physician, he will be chargeable as such.[48] But one who does not profess to be a physician, and volunteers to attend a sick person merely as an act of kindness, and without expectation of reward, incurs no liability, although his treatment of the case is improper.[49]

if defendant could have learned the nature of the injury, and applied the proper remedy, and failed to do so, he was liable, requires too great a degree of skill); Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Graves *v.* Santway, 2 Silv. Sup. (N. Y.) 67, 6 N. Y. Suppl. 892 [*affirmed* in 127 N. Y. 677, 28 N. E. 256].

38. Williams *v.* Gilman, 71 Me. 21; Ballou *v.* Prescott, 64 Me. 305; Barbour *v.* Martin, 62 Me. 536; Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094; Gerken *v.* Plimpton, 62 N. Y. App. Div. 35, 70 N. Y. Suppl. 793; Boom *v.* Reed, 69 Hun (N. Y.) 426, 23 N. Y. Suppl. 421; Potter *v.* Virgil, 67 Barb. (N. Y.) 578; Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639.

When a physician engages to attend a patient without limitation of time, he can cease his visits only with the consent of the patient, or on giving the patient timely notice, or when the patient no longer requires medical treatment. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

39. Mucci *v.* Houghton, 89 Iowa 608, 57 N. W. 305; Ballou *v.* Prescott, 64 Me. 305; Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

40. Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

41. Keily *v.* Colton, 1 N. Y. City Ct. 439.

42. Bogle *v.* Winslow, 5 Phila. (Pa.) 136.

43. Bogle *v.* Winslow, 5 Phila. (Pa.) 136.

44. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

45. Beck *v.* German Klinik, 78 Iowa 696, 43 N. W. 617, 7 L. R. A. 566.

46. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

47. Carrier not liable for malpractice of physician employed by its servant to care for passenger see Carriers, 6 Cyc. 600 note 74.

48. Matthei *v.* Wooley, 69 Ill. App. 654; Musser *v.* Chase, 29 Ohio St. 577 (holding that an empiric is liable to a civil action for malpractice notwithstanding it is made a penal offense for such a person to practise medicine in any of its departments); Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719; Jones *v.* Fay, 4 F. & F. 525; Ruddock *v.* Lowe, 4 F. & F. 519.

49. Higgins *v.* McCabe, 126 Mass. 13, 30 Am. Rep. 642.

B. Acts or Omissions Constituting Negligence or Malpractice — 1. In General. It being the duty of a physician or surgeon to possess a reasonable degree of learning and skill, to exercise ordinary care and diligence, and to use his best judgment in all cases of doubt,[50] he will be liable for a failure to conform to the proper standard whereby injury results to a patient;[51] but mere lack of skill or negligence without injury gives no right to recover even nominal damages.[52] If a physician follows the established practice, and no gross error is shown, he is not liable for injuries caused by the treatment.[53] Nor is he liable for want of success.[54]

2. Refusal to Take Case. A physician, not being bound to render professional services to everyone who applies, is not liable for arbitrarily refusing to respond to a call, although he is the only physician available.[55]

3. Failure to Discover Nature of Injury or Ailment. A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit.[56] If there is reasonable opportunity for examination, and the nature of the injury or ailment can be discovered by the exercise of ordinary care and diligence, then a physician is answerable for failure to make such discovery;[57] otherwise not.[58] So too it has been held that if a physician, by the exercise of reasonable care and skill, ought to discover that an ailment is incurable, that it will not yield to usual treatment, and that the patient will not be benefited, and fails to make such discovery and advise the patient thereof, he is guilty of negligence.[59]

4. Wrong Diagnosis. A wrong diagnosis of a case, resulting from a want of skill or care on the part of the physician, and followed by improper treatment, to the injury of the patient, renders the physician liable in damages;[60] and the fact that the same results would have ensued even without the improper treatment is immaterial on the question of the physician's liability.[61] But unless improper treatment follows, a wrong diagnosis gives no right of action.[62] The fact that information and not medical treatment was sought does not excuse negligence in making the diagnosis.[63] But a general practitioner will not be held liable for making a wrong diagnosis of a very rare disease, which can only be detected by a skilled expert.[64] Nor does a mere omission by a patient's attending physician to

50. See *supra*, III, B.

51. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354; Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Seare *v.* Prentice, 8 East 348; Rich *v.* Pierpont, 3 F. & F. 35. See also cases cited *supra*, III, B, 1, a.

52. Ewing *v.* Goode, 78 Fed. 442.

53. McKee *v.* Allen, 94 Ill. App. 147; Stern *v.* Lanng, 106 La. 738, 31 So. 303; Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404.

54. Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845. See also cases cited *supra*, III, B, 7.

55. Hurley *v.* Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135.

56. Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277.

57. Manser *v.* Collins, 69 Kan. 290, 76 Pac. 851; Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277; Lewis *v.* Dwinell, 84 Me. 497, 24 Atl. 945.

58. Gedney *v.* Kingsley, 16 N. Y. Suppl. 792; Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064.

The failure of a physician to discover that his patient's arm is dislocated is not negligence, where he made more than one careful examination of the injured arm, and called in another physician for consultation. James *v.* Crockett, 34 N. Brunsw. 540.

59. Logan *v.* Field, 75 Mo. App. 594.

60. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49.

61. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49.

62. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

A physician or surgeon is not chargeable for ignorance of a case, if he prescribes for it rightly. Fowler *v.* Sergeant, 1 Grant (Pa.) 355.

63. Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992.

64. Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213, holding that a physician who is merely a general practitioner cannot be held liable in damages to a patient for diagnosing and treating a disease of the eye as conjunctivitis, when it was in fact glaucoma, where the evidence shows that glaucoma is a very rare disease; that it is incurable in character; that its certain diagnosis could be made only by the skilled expert, of special training, skill, and experience; that it should be treated with remedies and appliances which are never expected to be within the reach of the general practitioner of medicine; that its promi-

use ordinary skill in diagnosing his disease before reporting it to the board of health as a case of smallpox give a right of action.[65]

5. Failure to Follow Established Practice.[66] It has been broadly stated that any deviation from the established mode of practice is sufficient to charge a physician with liability in case of any injury arising to the patient.[67] When a particular mode of treatment is upheld by a consensus of opinion of the members of the profession, it should be followed by the ordinary practitioner; and if a physician sees fit to experiment with some other mode he does so at his own peril.[68] If, however, the character of the injury or disease is such that the patient cannot endure the most approved method of treatment in such cases, then a failure to resort to such treatment does not show a want of skill or negligence.[69] When the treatment adopted is not in accordance with established practice, but is positively injurious, the case is not one of negligence, but of want of skill.[70]

6. Abandonment or Neglect of Case — a. Unwarranted Abandonment. The unwarranted abandonment of a case at a critical period, resulting in increased pain and suffering on the part of the patient, will render the physician liable in damages.[71]

b. Failure to Attend With Sufficient Frequency. A physician is not chargeable with neglect on account of the intervals elapsing between his visits, where the injury requires no attention during the intervals; but is negligent where attention is required.[72]

c. Temporarily Leaving Practice. A physician has a right to leave temporarily his practice if he makes provision for the attendance of a competent physician upon his patients.[73] If he notifies a patient that he is going away, and indicates who will attend him in his stead, no neglect can be imputed to him.[74] But a physician who leaves a patient in a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty, and is liable therefor.[75]

7. Performing Operation Without Consent — a. Of Patient. Where a patient

nent symptoms were so nearly identical with those of conjunctivitis that the diagnosis made by defendant was one reasonably to be expected from a general practitioner; and that the treatment given was not found faulty by any general practitioner or expert who testified in the case.

65. Brown *v.* Purdy, 54 N. Y. Super. Ct. 109.

66. See also *supra*, III, B, 2.

67. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655.

Advice in immaterial matter.—In an action against a surgeon for damages caused by his unskilfulness or negligence in reducing a fracture of plaintiff's arm, the fact that defendant advised bathing the parts with a decoction of wormwood and vinegar, which the expert testimony condemned, was not such a departure from approved medical treatment as to entitle plaintiff to recover. Winner *v.* Lathrop, 67 Hun (N. Y.) 511, 22 N. Y. Suppl. 516.

Evidence held insufficient to show deviation from christian science treatment see Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

68. Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577; Hesse *v.* Knippel, 1 Mich. N. P. 109; Slater *v.* Baker, 2 Wils. C. P. 359.

69. Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328.

70. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

71. Lathrope *v.* Flood, (Cal. 1901) 63 Pac. 1007.

72. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

Whether a physician is negligent in permitting certain intervals to elapse between his calls on his patient depends on the custom, in similar localities, in the treatment of similar cases, and not upon the custom of any particular physician in his own practice. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

The fact that one of two physicians employed to attend an injured person was negligent in not attending his patient with sufficient frequency is immaterial on the liability of the other, who was discharged from attending after his first call. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

73. Ewing *v.* Goode, 78 Fed. 442.

74. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Where a physician remains away longer than he had notified the patient, and injury results from the lack of treatment during that time, the physician is liable for malpractice. Gerken *v.* Plimpton, 62 N. Y. App. Div. 35, 70 N. Y. Suppl. 793.

75. Barbour *v.* Martin, 62 Me. 536, Danforth, J., delivering the opinion of the court.

is in possession of his faculties and in such physical health as to be able to consult about his condition, and where no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician.[76] If, however, a patient voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentations.[77] Where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of any one authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands, without such consent.[78] And again if, in the course of an operation to which the patient consented, the physician discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient, he will, although no express consent be obtained or given, be justified in extending the operation to remove and overcome them.[79]

b. Of Husband or Father. Whether or not the consent of the husband or father to the performance of an operation upon a married woman or child is necessary is not well settled. One case holds that surgeons are justified in performing an operation upon a married woman with her consent, when they deem it necessary, whether her husband consents or not.[80] Other cases, apparently assuming that the husband's consent is necessary, hold that, by placing his wife under the care of a surgeon for treatment, a husband impliedly consents to such operations as may be found necessary or expedient.[81] A father's consent to the performance of an operation upon a child seventeen years of age has been held unnecessary.[82]

8. Failure to Give Instructions. Although a physician may have exercised a proper degree of skill and care in his treatment of a case, still if he fails to give the patient or his attendants proper instructions as to the care and attention best calculated to effect a cure, he is guilty of negligence for which he may be held liable.[83]

9. Communicating Contagious Disease. A physician who, knowing that he has an infectious disease, continues to visit a patient without apprising him of the fact and without proper precautions on his own part, and communicates to him this disease, is responsible for the consequent damage, including as well the suffering, danger, and loss of time, as the expense necessarily occasioned by the

76. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161]; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439.

77. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587; McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

Consent presumed.— In an English case it has even been held that consent will be presumed notwithstanding the fact of a direct prohibition to perform the operation under certain circumstances. Beatty *v.* Cullingworth, 44 Cent. L. J. 153.

78. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161]; Short's Succession, 45 La. Ann. 1485, 14 So. 184; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439. See 4 Mich. L. Rev. 49–51.

79. Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439.

A surgeon who undertakes to perform a minor operation on a patient is justified in performing a major operation, without the consent of the person operated upon, should such major operation be necessary to save the life of the patient. Parnell *v.* Springle, 5 Rev. de Jur. 74.

80. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587, holding that a husband has no power to withhold from his wife the medical assistance which her case may require.

81. McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

Authority given by a husband to perform one operation upon his wife will not confer any authority to perform a second. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161], Scott C. J., delivering the opinion of the court.

82. Bakker *v.* Welsh, 144 Mich. 632, 108 N. W. 94, 7 L. R. A. N. S. 612. See 5 Mich. L. Rev. 40, 41.

83. Beck *v.* German Klinik, 78 Iowa 696, 43 N. W. 617, 7 L. R. A. 566; Carpenter *v.* Blake, 75 N. Y. 12; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]. See also cases cited *supra*, III, B, 11.

second disease, thus produced by his own wrongful act.[84] So also where a surgeon, while in attendance on a patient, directs the latter's wife to assist in dressing a wound, knowing that there was danger of infection, but negligently assuring her that there was no such danger, and she relies on his advice, and becomes infected with poison, the surgeon is liable.[85]

10. Intrusion of Unprofessional Assistant. Where a physician takes an unprofessional, unmarried man with him to attend a confinement case, when there was no emergency, both are liable in damages to the woman.[86]

11. Mistake in Prescription. Where a physician, by a *lapsus calami*, makes a mistake in a prescription, as the result of which the patient dies, the fact that the druggist who fills the prescription is also negligent is no defense in an action against the physician for malpractice.[87] But a physician is not liable for the druggist's negligence in putting up a prescription properly written by the physician.[88]

12. Malpractice Resulting in Death. A physician is liable for malpractice resulting in death, if it was the proximate cause thereof.[89] But if death was caused by a disease not resulting from a surgical operation in question the surgeon is not liable.[90]

13. Errors of Judgment. A physician entitled to practise his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice.[91] Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skilful as such, but whether he has treated the case skilfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession.[92] There is a fundamental difference in malpractice cases between mere errors of judgment and negligence

84. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547, by way of argument.

85. Edwards *v.* Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160, holding that where plaintiff, under the direction of defendant, a surgeon, assisted in dressing a wound of her husband, and became infected with poison by reason of slight scratches on her fingers, defendant, knowing the danger, was guilty of negligence in assuring her there was none, since he was not justified in assuming that her hands were free from such wounds.

86. De May *v.* Roberts, 46 Mich. 160, 9 N. W. 146, 41 Am. Rep. 154, holding further that it makes no difference that the patient or her husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.

87. Murdock *v.* Walker, 43 Ill. App. 590.

88. Stretton *v.* Holmes, 19 Ont. 286.

89. Braunberger *v.* Cleis, 13 Am. L. Reg. (Pa.) 587.

90. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

91. *Illinois.*— McKee *v.* Allen, 94 Ill. App. 147.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

Missouri.— Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Oregon.— Heath *v.* Glisan, 3 Oreg. 64.

Texas.— Graham *v.* Gautier, 21 Tex. 111; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 32.

The reasons for excepting malpractice cases from the rule that the exercise of defendant's best judgment is no defense to an action for negligence are to be found in the character of emergencies physicians meet which often preclude deliberation; in the nature of their undertaking which contracts for individual judgment and skill; in the peculiarity of the human constitution, which presents difficulties not arising from insensate matter; in the nature of medical science, which is based on progressive knowledge; and in the inherent uncertainty of the expert testimony involved. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

92. West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107.

in previously collecting data essential to a proper conclusion, or in subsequent conduct in the selection and use of instrumentalities with which the physician may execute his judgment. If he omits to inform himself as to the facts and circumstances, and injury results therefrom, then he is liable.[93]

14. FRAUD AND DECEIT.[94] It is the duty of a physician to act with the utmost good faith toward his patient, and if he knows that he cannot accomplish a cure, or that the treatment adopted will probably be of no benefit, it is his duty to advise his patient of these facts, and if he fails to do so he is guilty of a breach of duty.[95] But to recover on account of deceit based on his statement that he could and would cure plaintiff, the latter must not only prove that the representation was false, but also that it was made with a fraudulent intent.[96]

15. WRONGFUL CERTIFICATE OF INSANITY.[97] Without statutory provisions to that effect, a civil action for damages against a physician for certifying to a person's insanity cannot be based on the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion.[98] In an action against a physician for falsely certifying, through malice or negligence, to the insanity of plaintiff, the falsehood, and not the insufficiency of the certificate, is the ground of action against defendant.[99] Therefore a physician who signs a certificate of insanity which is false, without exercising ordinary care and prudence in making his examination, and without making due inquiry into the question of sanity, is liable to an action for damages.[1] Nor is he the less liable for the want of such due care and inquiry because he has acted *bona fide*.[2] But a physician who signs a certificate of insanity when the patient is sane is not liable therefor where the certificate was signed after making an examination, and the mistake was due merely to an error of judgment, provided the physician brings to the case the learning, care, and diligence required by law.[3] In such an action the burden is on plaintiff to show negligence,[4] and also to show that at the time the certificate of insanity was given he was in fact sane.[5] Defendant may show under what circumstances and on what information he acted in making such certificate.[6] If such evidence does not go to the extent of a justification in case the certificate is found to be false, it is proper evidence to be considered in awarding damages.[7]

16. EFFECT OF CONTRIBUTORY NEGLIGENCE. It is the duty of a patient to coöperate with his physician and conform to the necessary prescriptions and treatment, and follow all reasonable instructions given.[8] Therefore it is a good defense to

For there may be responsibility where there is no neglect if the error of judgment is so gross as to be inconsistent with the use of that degree of skill that it is the duty of every physician to bring to the treatment of a case. McKee *v.* Allen, 94 Ill. App. 147; West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

93. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712; Johnson *v.* Winston, 68 Nebr. 425, 94 N. W. 607.

94. Action of deceit generally see 20 Cyc. I.

95. Logan *v.* Field, 75 Mo. App. 594.

For example, where a physician in charge of a sanitarium represents to an invalid, without knowing the truth or falsity of the representation, that if the latter will take treatment at the sanitarium he can be cured, and the invalid relies thereon, and enters the sanitarium, but is not cured, the physician is liable in an action for deceit. Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

96. Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

97. Examination of insane persons in general see INSANE PERSONS, 22 Cyc. 1123 *et seq.*

98. Pennell *v.* Cummings, 75 Me. 163.

99. Pennell *v.* Cummings, 75 Me. 163.

1. Ayers *v.* Russell, 50 Hun (N. Y.) 282, 3 N. Y. Suppl. 338; Hall *v.* Semple, 3 F. & F. 337.

2. Hall *v.* Semple, 3 F. & F. 337.

3. Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525; Hall *v.* Semple, 3 F. & F. 337.

4. Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525.

5. Pennell *v.* Cummings, 75 Me. 163.

6. Pennell *v.* Cummings, 75 Me. 163.

7. Pennell *v.* Cummings, 75 Me. 163.

8. Haering *v.* Spicer, 92 Ill. App. 449; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. (Pa.) 138; Lawson *v.* Conaway, 37 W. Va. 159, 16

an action for malpractice, where the physician or surgeon is charged with negligence or the non-observance of proper care or the want of skill in performing the services undertaken, that the patient was guilty of negligence at the time which conduced or contributed to produce the injury complained of;[9] but it will not suffice to defeat the action that the patient was subsequently negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent only in mitigation of damages.[10]

S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

9. *Illinois.*— Haering *v.* Spicer, 92 Ill. App. 449.

Indiana.— Lower *v.* Franks, 115 Ind. 334, 17 N. E. 630; Gramm *v.* Boener, 56 Ind. 497; Young *v.* Mason, 8 Ind. App. 264, 35 N. E. 521.

Massachusetts.— Hibbard *v.* Thompson, 109 Mass. 286, where it is said that a patient cannot recover, either in contract or in tort, for injuries consequent upon unskilful or negligent treatment by his physician, if his own negligence directly contributed to them to an extent which cannot be distinguished and separated.

Michigan.— Hitchcock *v.* Burgett, 38 Mich. 501.

Minnesota.—Chamberlain *v.* Porter, 9 Minn 260.

Missouri.— West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Ohio.— Geiselman *v.* Scott, 25 Ohio St. 86.

Oregon.— Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Pennsylvania.— Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114; Potter *v.* Warner, 91 Pa. St. 362, 36 Am. Rep. 668; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 33.

Failure to return to physician.— In an action for malpractice, an instruction that, if plaintiff was told by defendant to visit him again as soon as he felt any pain, and, although feeling pain for a week, he neglected to call, he was guilty of contributory negligence preventing recovery was correct. Jones *v.* Angell, 95 Ind. 376.

Refusal to permit proper treatment.— Where a patient is delirious, and the members of his family having him in charge refuse to allow the proposed treatment, the physician or surgeon will not be required to use force, and will not be liable for any injury to limb or health resulting from a failure to use the proposed treatment. Littlejohn *v.* Arbogast, 95 Ill. App. 605. Where a surgeon is prevented from reducing a dislocation by the refusal of his patient to submit to the operation, the surgeon cannot be held liable for damages resulting therefrom. Littlejohn *v.* Arbogast, *supra*.

Operation performed at instance of patient.— If a surgeon, when called on, advises the patient, who is of mature years and of sound mind, that the proposed operation is unnecessary and improper, and the patient still insists on its performance, and the surgeon thereupon performs it, he cannot be held responsible to the patient for damages, on the ground that the operation was improper and injurious, as in such case the patient relies on his own judgment, and not on that of the surgeon, as to the propriety of the operation; and he cannot complain of an operation performed at his own instance and on his own judgment. Gramm *v.* Boener, 56 Ind. 497.

Information given to patient must be considered.— The information given by a surgeon to his patient concerning the nature of his malady is a circumstance that should be considered in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not. Geiselman *v.* Scott, 25 Ohio St. 86.

"Directly" contributed proper.— In an action for malpractice, an instruction requiring the jury to find that plaintiff's own negligence directly contributed to the injury, before they could on that ground find for defendant, is not erroneous for using the word "directly," instead of "proximately." Davis *v.* Spicer, 27 Mo. App. 279.

10. *Illinois.*— Morris *v.* Despain, 104 Ill. App. 452.

Missouri.— Sanderson *v.* Holland, 39 Mo. App. 233.

New York.— Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768]; Carpenter *v.* Blake, 75 N. Y. 12.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Oregon.— Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Pennsylvania.— Fowler *v.* Sergeant, 1 Grant 355.

Vermont.— Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 33.

The natural temperament or weakness of a patient contributing to produce the injury primarily caused by the unskilful treatment of a physician is no bar to an action against such physician for malpractice, but may be shown in mitigation of damages. Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813.

17. Effect of Admission of Want of Sufficient Skill. If a practitioner frankly informs a patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist.[11]

C. To Whom Liable — Gratuitous or Charity Patient. A physician may decline to respond to the call of a patient unable to compensate him; but, if he undertakes the treatment of such a patient, his liabilities for negligence or malpractice are the same as in the case of any other patient.[12] So a physician employed by a city to treat patients at the city almshouse is liable to one of such patients who is injured through the physician's negligence, although there is no contractual relation between such patient and the physician.[13]

D. For Whose Acts or Omissions Physician Liable — 1. Assistant. A physician is responsible for an injury done to a patient through the want of proper skill and care in his apprentice or assistant.[14]

2. Substitute. If a family physician or railway surgeon, on leaving town, recommends, in case of need, some other physician, who is not, however, in any sense in his employment, it does not make him liable for injuries resulting from the latter's want of skill.[15]

3. Partner. Partners in the practice of medicine are all liable for an injury to a patient resulting from the negligence, either of omission or commission, of any one of the partners, within the scope of their partnership business; but, for an injury resulting from the act of one partner outside of the common business, the offending partner is alone responsible.[16]

4. Nurse or Attendant. Physicians are not as a rule liable for the negligence of hospital nurses or attendants of which they are not personally cognizant.[17]

E. Actions For Negligence or Malpractice — 1. Nature and Form of Remedy. Where a physician or surgeon is employed to treat a patient without any express contract defining the character and extent of his duty and undertaking, either an action in contract or in tort may be maintained for the breach of the implied obligation arising from such employment caused by unskilful, negligent, and improper treatment.[18] When the action is in tort, case is the proper form of action,[19] and, although an operation is performed with malice, the

11. Lorenz *v.* Jackson, 88 Hun (N. Y.) 200, 34 N. Y. Suppl. 652; Shearman & R. Negl. § 607.

12. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45. See also cases cited *supra*, III, B, 6.

13. Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768].

14. Hancke *v.* Hooper, 7 C. & P. 81, 32 E. C. L. 510.

The surgeon and the assistant are jointly and individually liable for unskilful or negligent services of the assistant. Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

15. Keller *v.* Lewis, 65 Ark. 578, 47 S. W. 755; Hitchcock *v.* Burgett, 38 Mich. 501; Myers *v.* Holborn, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345.

16. Whittaker *v.* Collins, 34 Minn. 299, 25 N. W. 632; Hyrne *v.* Erwin, 23 S. C. 226, 55 Am. Rep. 15, holding that in an action against a firm of doctors for malpractice, it is not error to instruct that partners in the practice of medicine are "sureties" for the faithful performance of their engagements by each of them. See Haase *v.* Morton, (Iowa 1908) 115 N. W. 921, where one partner was held liable for the negligence of another partner in superintending the return of a patient from the operating room of a hospital to her apartment. See also 6 Mich. L. Rev. 683–686.

17. Perionowsky *v.* Freeman, 4 F. & F. 977. But see Stanley *v.* Schumpert, 117 La. 255, 41 So. 565, 116 Am. St. Rep. 202, 6 L. R. A. N. S. 306, holding that where an attendant at a sanitarium was not sufficiently careful and did not follow the prescriptions of the physicians, and the physicians did not see to it to some extent at least that the medicines prescribed were properly administered, and to an extent neglected the patient, they are liable for resulting injuries.

18. Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700. *Compare* Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401; McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203.

Waiver of tort.— In an action against a physician for malpractice, plaintiff may elect to sue on contract and thus waive the tort. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

19. Cadwell *v.* Farrell, 28 Ill. 438; Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813.

Case see Case, Action on, 6 Cyc. 681.

patient having consented thereto, no recovery in trespass can be had therefor.[20] Where an express promise on the part of the physician is alleged and counted upon, the action is in contract, and not in tort.[21]

2. Time to Sue and Limitations. The particular statute of limitation applicable in actions for malpractice depends upon whether the action is in contract or in tort.[22] As the gist of an action to recover damages for unskilful treatment is the negligence of the surgeon, the statute begins to run from the time of the alleged negligence.[23] In some jurisdictions limitation of one year is expressly provided by statute in malpractice cases,[24] to run from the date of the termination of the professional services.[25]

3. Survival of Action. At common law an action for an injury to the person caused by the want of skill or negligence of a physician or surgeon does not survive the death of either party.[26] In many states, however, statutes provide for the survival of the action in such cases.[27]

4. Defenses.[28] A medical practitioner may perhaps protect himself from liability for malpractice by a special contract that he shall not be so liable.[29] Consent of the patient to the abandonment of the case by a physician may be a defense to a subsequent action for malpractice,[30] if such consent was not obtained by false representations.[31] It is no defense to a suit for malpractice that defendant was practising in violation of a statute making it an offense to practise physic without certain preliminary qualifications,[32] unless perhaps where the patient knew, when employing the physician, that he had not the qualifications.[33] Nor can a physician not belonging to one of the regular schools of medicine, such as a clairvoyant, relieve himself from liability by the contention that the patient was negligent in employing him with full knowledge of his methods of diagnosis and prescription.[34]

20. Cadwell *v.* Farrell, 28 Ill. 438.

21. Burns *v.* Barenfield, 84 Ind. 43.

22. See Limitations of Actions, 25 Cyc. 1032, 1047.

Indiana.— If the complaint is on contract, the statutory limitation of six years applies. Burns *v.* Barenfield, 84 Ind. 43; Staley *v.* Jameson, 46 Ind. 159, 15 Am. Rep. 285.

23. See Limitations of Actions, 25 Cyc. 1116 note 67. But see Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 [*affirming* on equal division of the court 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401], holding that since want of skill or negligence on the part of a physician gives rise to no cause of action unless injurious consequences follow, a cause of action accrues when injury occurs.

If the injuries blend and extend over the whole period the physician has charge of the case, the right of action, it seems, becomes complete when the physician gives up the case without performing his duty, and limitations begin to run at this time. Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 [*affirming* on equal division of the court 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401].

24. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401 [*affirmed* in 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639]; Tucker *v.* Gillette, 11 Ohio S. & C. Pl. Dec. 226, 8 Ohio N. P. 389.

25. Miller *v.* Ryerson, 22 Ont. 369; Town *v.* Archer, 4 Ont. L. Rep. 383.

26. See Abatement and Revival, 1 Cyc. 62 text and note 20. See also McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203; Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700.

It is immaterial whether the action is in form *ex contractu* or *ex delicto*; in either case the injury is to the person and not to the estate of the patient. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416; Best *v.* Vedder, 58 How. Pr. (N. Y.) 187.

27. Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72; Norris *v.* Grove, 100 Mich. 256, 58 N. W. 1006.

Continuing action once commenced.— N. H. St. (1844) c. 139, providing that all actions in which the right of action does not now by law survive the death of either party, which have been commenced in any court, may be prosecuted to final judgment at the election of "the surviving or legal representative of the deceased party," authorizes plaintiff to proceed with an action for malpractice on the death of defendant pending the action. Bedel *v.* Flanders, 51 N. H. 73 note.

28. **Contributory negligence** as a defense see *supra*, IV, B, 16.

29. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

30. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

31. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

32. Musser *v.* Chase, 29 Ohio St. 577.

33. Musser *v.* Chase, 29 Ohio St. 577.

34. Nelson *v.* Harrington, 72 Wis. 591, 40

5. Pleading[35] **— a. In General.** It is ordinarily sufficient for plaintiff, in an action for malpractice, to aver that defendant was a physician and surgeon; that plaintiff retained and employed him as such to attend upon him; that he accepted and entered upon such employment, yet conducted himself in an unskilful and negligent manner, whereby plaintiff was injured, to his damage, etc.[36] Want of skill and care on the part of the physician must be alleged,[37] and also the specific acts of commission or omission concerning which negligence is imputed.[38] It is not necessary to aver expressly that it was the physician's duty to act skilfully,[39] or that any consideration was to be paid for the services rendered,[40] since these facts will be implied from the employment. Since an action for malpractice is founded on contract, although sounding in tort, it is unnecessary for the complaint to aver expressly that there was no negligence on the part of plaintiff.[41] To a complaint for malpractice, sounding in tort against two surgeons, an answer that each was separately employed is bad.[42]

b. Amendment. A plaintiff in an action to recover damages for malpractice by a physician may be allowed to amend his complaint to correspond with the proof.[43]

6. Issues and Proof. Plaintiff in an action for malpractice must recover, if at all, in accordance with his allegations; the evidence must be restricted within the issues as made by the pleadings.[44] Where the language of a complaint implies no more than the duty imposed by law to exercise reasonable skill and care, evi-

N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

35. **Pleading** generally see Pleading.

36. Hanselman *v.* Carstens, 60 Mich. 187, 27 N. W. 18; Morrill *v.* Tegarden, 19 Nebr. 534, 26 N. W. 202; Crowty *v.* Stewart, 95 Wis. 490, 70 N. W. 558; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785. See also Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Burns *v.* Barenfield, 84 Ind. 43.

Allegation of professional character of defendant.— A petition for malpractice, alleging that defendant "is a physician . . . engaged in the practice of medicine . . . and has been so engaged for several years last past" is sufficient, without alleging that he was a physician when he treated his patient. Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021.

37. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

38. De Hart *v.* Etnire, 121 Ind. 242, 23 N. E. 77 (holding, however, that in an action for malpractice, a complaint is not demurrable for failure of plaintiff to set forth in what particular defendant was negligent in the performance of his duties as physician and surgeon, as the remedy for uncertainty is by motion to make more specific); Hawley *v.* Williams, 90 Ind. 160.

Allegations held sufficient see Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Carpenter *v.* McDavitt, 53 Mo. App. 393; Brown *v.* Cady, 91 N. Y. App. Div. 415, 86 N. Y. Suppl. 959.

39. Peck *v.* Martin, 17 Ind. 115; Hanselman *v.* Carstens, 60 Mich. 187, 27 N. W. 18; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785.

40. Peck *v.* Martin, 17 Ind. 115.

41. Coon *v.* Vaughn, 64 Ind. 89; Scudder *v.* Crossan, 43 Ind. 343. See also Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244, holding that even if such an allegation is necessary, the defect in failing to allege that plaintiff was free from negligence is cured where the answer and reply make up the issue on that behalf.

Indiana.— Under Burns Rev. St. (1901) § 359*a*, making contributory negligence a matter of defense, the complaint need not allege the want thereof on the part of plaintiff. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

42. Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

43. Wormell *v.* Reins, 1 Mont. 627.

44. Goodwin *v.* Herson, 65 Me. 223.

Illustrations.— In an action against a surgeon to recover damages for injuries alleged to have ensued from his want of ordinary care and skill in the treatment of a fracture, proof that he gave assurances to plaintiff that he possessed and would exercise extraordinary skill, and effect a cure, is not admissible to support the declaration. Goodwin *v.* Hersom, 65 Me. 223. In an action by a husband and wife against a physician for malpractice in treatment of the wife, there being no allegation of loss of the wife's services, evidence that the husband was dependent on his wife for support is inadmissible. Twombly *v.* Leach, 11 Cush. (Mass.) 397. Where the declaration in an action against a physician for malpractice does not allege general incompetency in defendant, plaintiff cannot recover on that ground, but must show that defendant did not properly exercise the skill which he in fact possessed. Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832. Where a complaint in an action for malpractice alleged that by reason of defendant's negligence in the treatment of plaintiff's fractured limb it became necessary to amputate it, and that by reason of the said negligence plaintiff suffered pain and anguish, this limited defendant's liability to neglect causing loss of the limb, and no recovery could be had for pain or anguish if

dence of an express promise to cure is not necessary to sustain it.[45] One holding himself out as a surgeon is liable as well for want of skill as for negligence; and an injured party may sue for damages resulting from both, and recover, on proving damages resulting from either.[46]

7. Evidence[47] **— a. Presumptions and Burden of Proof** — (i) *As to Negligence or Want of Skill.* In an action against a physician for malpractice, no presumption of negligence or want of skill can arise from the fact that defendant failed to effect a cure.[48] The burden of proof in such a case is on plaintiff to show the physician's want of reasonable care, skill, and diligence in his treatment of the case,[49] and also that the injury complained of resulted from a failure to exercise these requisites.[50] Consent to an operation will be presumed from volun-

such loss was not caused by his negligence. Jacobs *v.* Cross, 19 Minn. 523. On a complaint for malpractice, charging negligence and want of skill in treating a fractured limb, by reason of which the same had to be amputated, evidence of the manner in which such amputation was performed is not competent, no lack of care or skill in that respect being charged. Jacobs *v.* Cross, *supra*. Where, in an action against a surgeon for alleged malpractice, the petition alleged unskilfulness in the treatment of the broken limb, and the answer traversed such allegation, without averring any hereditary peculiarity as a special defense, evidence as to the weakness of the bones of plaintiff's family was inadmissible. West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107. Where, in an action for malpractice, the character of the wound is stated in the answer, and not disputed by the replication, plaintiff will not be permitted to prove that it was not of the character alleged. Williams *v.* Poppleton, 3 Oreg. 139. The averment, in an action against a physician for malpractice, that defendant was employed at his special instance and request, is technical, and is sufficiently proved by showing that defendant held himself out as a practitioner soliciting public patronage, and that the employment was by mutual consent. Musser *v.* Chase, 29 Ohio St. 577. In an action for malpractice, plaintiff cannot give evidence that the physician abandoned the patient, and refused to prescribe, unless it is so laid in the declaration. Bemus *v.* Howard, 3 Watts (Pa.) 255. See also Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094. *Compare* Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. Under an allegation that "the defendant wrongfully, carelessly, negligently, and unskillfully performed said amputation," evidence is admissible showing that "the point of amputation was too high, and that the danger of death was somewhat increased by the selection of that point." Wright *v.* Hardy, 22 Wis. 348.

45. Hoopingarner *v.* Levy, 77 Ind. 455.

46. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

47. Evidence generally see 16 Cyc. 821 *et seq.*

48. *Illinois.*— Red Cross Medical Service Co. *v.* Green, 126 Ill. App. 214; Sims *v.* Parker, 41 Ill. App. 284.

Iowa.— Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769; Piles *v.* Hughes, 10 Iowa 579.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Michigan.— Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

Nebraska.— Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

New York.— Bellinger *v.* Craigue, 31 Barb. 534.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

Pennsylvania.— Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Haire *v.* Reese, 7 Phila. 138.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

Canada.— Hodgins *v.* Banting, 12 Ont. L. Rep. 117.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

49. *Georgia.*— Georgia Northern R. Co. *v.* Ingram, 114 Ga. 639, 40 S. E. 708.

Illinois.— Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390; McKee *v.* Allen, 94 Ill. App. 147; Sims *v.* Parker, 41 Ill. App. 284.

Iowa.— Robinson *v.* Campbell, 47 Iowa 625.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Maryland.— State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

Minnesota.—Getchell *v.* Hill, 21 Minn. 464.

New Hampshire.— Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

New York.— Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

United States.— Ewing *v.* Goode, 78 Fed. 442.

Canada.— McQuay *v.* Eastwood, 12 Ont. 402.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

50. *Georgia.*— Georgia Northern R. Co. *v.* Ingram, 114 Ga. 639, 40 S. E. 708.

Illinois.— McKee *v.* Allen, 94 Ill. App. 147.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

tary submission to it, and the burden is on plaintiff to prove the contrary.[51] Where the physician sets up an affirmative defense, the burden is on him to prove it.[52]

(II) *As to Contributory Negligence.* The general rules as to the burden of proving contributory negligence in negligence cases are applicable in actions for negligence of a physician or malpractice.[53]

b. Admissibility — (I) *Knowledge and Skill of Defendant.* While there is some difference of opinion in the cases, the weight of authority is to the effect that, although the skill of defendant, or the want of it, is put in issue in a suit for malpractice, his reputation in that respect is not a defense, and evidence to establish it will be excluded.[54] Other cases hold that, where the action is for negligence, and the skill of the physician is not put in issue, he cannot show his general reputation for skill;[55] but where both negligence and want of skill are charged, it is competent for defendant to show his skill and reputation in that behalf.[56] Specific acts, however, are never competent to prove skill and competency.[57] Nor can the fact that a physician is reputed to be negligent and unskilful be allowed as proof to establish negligence or unskilful treatment in a particular case.[58] It has been held competent, however, for plaintiff to show, as affecting the skill and knowledge of the physician placed in charge of the case, that he was engaged largely in pursuits other than his profession of medicine and surgery.[59] But it is proper to exclude, on the ground of remoteness, testimony as

Minnesota.—Getchell *v.* Hill, 21 Minn. 464.
Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.
Pennsylvania.— Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213.
West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.
United States.— Ewing *v.* Goode, 78 Fed. 442.
Canada.— McQuay *v.* Eastwood, 12 Ont. 402.
See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

51. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587. See also *supra*, IV, B, 7, a.

52. Chase *v.* Nelson, 39 Ill. App. 53, holding, however, that in an action against a physician for malpractice alleged to have caused the death of plaintiff's intestate, where defendant pleads the general issue, he may show the condition of the patient's health, and that death would have resulted in any event, without assuming the burden of proving that the negligent act of his own did not produce death.

Discharge by patient.— If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies on an alleged discharge by the patient as a defense to a suit brought for the abandonment, this being a new substantive matter of defense, the burden of proving it is on defendant. Ballou *v.* Prescott, 64 Me. 305.

53. See Negligence, 29 Cyc. 601.

In Indiana in an action against a physician for unskilfulness, the burden of proving that the negligence of plaintiff contributed to the injury is on defendant. Gramm *v.* Boener, 56 Ind. 497.

In Iowa in an action for malpractice, the burden is on plaintiff to show his freedom from negligence contributing to the result complained of. Whitesell *v.* Hill, (1896) 66 N. W. 894.

54. Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390 [*affirming* 19 Ill. App. 459]; Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404; Williams *v.* Poppleton, 3 Oreg. 139; Mertz *v.* Detweiler, 8 Watts & S. (Pa.) 376.

The general reputation among the profession of the medical institution at which a surgeon may have attended lectures on the subject of surgery is not competent evidence, on the question of his professional skill. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

Evidence of prior good character.— Evidence of good character as a physician, several years prior to the time of injury, caused by malpractice, is inadmissible to rebut the charge of negligence at the time of the injury. Smith *v.* Stump, 12 Ind. App. 359, 40 N. E. 279.

55. Alexander *v.* Menefee, 64 S. W. 855, 23 Ky. L. Rep. 1151; Degnan *v.* Ransom, 83 Hun (N. Y.) 267, 31 N. Y. Suppl. 966. But see Carpenter *v.* Blake, 50 N. Y. 696 [*reversing* 60 Barb. 488].

56. Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72; Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

57. Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38; Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696].

58. Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404.

59. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

In rebuttal.— In an action for malpractice, it is competent for plaintiff to show that defendant was not a regularly bred physician and surgeon, for the purpose of rebutting evi-

to how defendant's treatment of like cases differed from that of other physicians.[60] So also evidence that defendant procured his certificate of proficiency from the state board of examiners without examination, by means of diplomas irregularly obtained from medical schools, is irrelevant, as are also defendant's statements concerning such diplomas.[61]

(11) *NEGLIGENCE.* In an action for malpractice evidence on the question of negligence, forming a part of the *res gestæ*, is admissible.[62] Plaintiff may show, by any legal evidence, that the method of treatment followed by the physician was improper.[63] Defendant may give in rebuttal any proper evidence tending to show want of negligence on his part.[64] Defendant may state what, from his study and experience, he deems proper treatment of the case in question,[65] and may show by experts that the treatment he gave was such as a physician of ordinary knowledge and skill would have given.[66] Evidence that he employed another skilful physician to assist him is competent,[67] but not to prove either

dence introduced by him to support his general professional character. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143.

60. Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260.

61. Bute *v.* Potts, 76 Cal. 304, 18 Pac. 329.

62. See cases cited *infra*, this note.

Declarations of plaintiff.— O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

Declarations of defendant.—Piles *v.* Hughes, 10 Iowa 579; Moody *v.* Sabin, 9 Cush. (Mass.) 505.

Exclamations of pain.—In an action against a surgeon for malpractice in treating a broken leg, evidence as to complaints made by plaintiff in regard to the pain suffered is admissible (Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832; Hyatt *v.* Adams, 16 Mich. 180; Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696]); but his conclusion as to the cause of the pain is not admissible (Spaulding *v.* Bliss, *supra*. See also Mayo *v.* Wright, *supra*).

Intoxication of defendant.— Defendant's condition, as to being intoxicated, at the time he treated plaintiff, may be shown. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Remarks of bystanders at time of examination.— Where, in an action for injury, resulting from a surgeon's unskilfulness in treating a dislocation as a fracture, it was shown that, if his diagnosis was correct, a grating sound would have been heard on manipulation of the limb, evidence may be given of remarks made by bystanders at the time of the examination that they heard such a sound. Hitchcock *v.* Burgett, 38 Mich. 501.

A consultation held on the occasion of the alleged improper treatment may be given in evidence as a part of the *res gestæ*. Williams *v.* Poppleton, 3 Oreg. 139.

63. Kendall *v.* Brown, 86 Ill. 387.

Failure to demand compensation.— Evidence that defendant had not asked any pay for his services is inadmissible since this raises a collateral issue. Baird *v.* Gillett, 47 N. Y. 186. See also Jones *v.* Angell, 95 Ind. 376.

64. See cases cited *infra*, this note.

Illustrations.— Where the manner of the treatment is in issue, defendants may properly be asked if therein they exercised their best judgment and skill. The answer may rebut the charge of negligence. Fisher *v.* Niccolls, 2 Ill. App. 484. A physician, sued for negligently applying to plaintiff's ankle liquid glass made by W, a druggist, and not so compounded as to neutralize the caustic elements, whereby the ankle was burned, may testify to his knowing of W holding himself out and advertising himself as a manufacturing chemist, at the time the solution was obtained; as in such case, in the absence of some circumstance which should have put the physician on his guard, he would not be chargeable with negligence in using the solution. Ball *v.* Skinner, 134 Iowa 298, 111 N. W. 1022. In an action for negligently performing a surgical operation on plaintiff's eye, alleged to have caused a loss of plaintiff's sight, evidence that the disease from which plaintiff was suffering generally resulted in a loss of sight is competent. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511. In an action for malpractice in treating a cut on plaintiff's thumb, defendant may show that it is good medical treatment in some cases to withhold from a patient the extent of the disease and his actual condition. Twombly *v.* Leach, 11 Cush. (Mass.) 397. Defendant may testify that he refrained from making further visits on plaintiff because defendant was told by a third person that he (defendant) had been discharged, but he cannot detail the conversation with such third person unless held in the presence of plaintiff. Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

65. Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696.

66. Twombly *v.* Leach, 11 Cush. (Mass.) 397; Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Leisenring *v.* La Croix, 68 Nebr. 803, 94 N. W. 1009; Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; Wright *v.* Hardy, 22 Wis. 348.

67. Jones *v.* Angell, 95 Ind. 376, opinion by Colerick, C.

skill or diligence on his part.[68] It is not proper, in making out a case for plaintiff, to show negligence in other cases by proving the results of defendant's treatment in such cases;[69] but the treatment received by the patient after defendant gave up the case may be shown.[70] The opinion of a physician is admissible, as a general rule, upon questions peculiarly within his knowledge as such.[71] A non-expert witness should not be permitted to testify as to the existence of a particular injury, but he may testify as to the actual condition of the injury, no opinion being expressed.[72] Immaterial[73] and hearsay[74] evidence is of course inadmissible.

(III) *Contributory Negligence.* In an action for injury from a physician's negligence, it is proper for the defense to show that it resulted from plaintiff's negligence;[75] but that fact cannot be shown by the statements of one who had no personal knowledge of it.[76]

(IV) *Demonstrative Evidence.* On a trial against a physician for malpractice, it is proper to allow plaintiff to exhibit his injured limb to the jury.[77]

c. Weight and Sufficiency — (I) *In General.* A mere preponderance of evidence is sufficient to prove an issue in an action for malpractice.[78] Although the fact that a patient fails to recover, or suffers injury, is not in general evidence of negligence on the part of the physician,[79] yet the injury may be of such a nature that negligence must be assumed from the unexplained fact of its happening.[80]

68. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

69. Shockley *v.* Tucker, 127 Iowa 456, 103 N. W. 360.

70. Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021; Leisenring *v.* La Croix, 68 Nebr. 803, 94 N. W. 1009.

71. Purcell *v.* Jessup, 99 N. Y. App. Div. 556, 91 N. Y. Suppl. 165.

72. Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244; O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

73. Wright *v.* Hardy, 22 Wis. 348.

74. Sims *v.* Moore, 61 Iowa 128, 16 N. W. 58, holding that, in an action for damages against a surgeon for malpractice, plaintiff cannot, under the guise of a conversation with defendant, testify to the opinion of another surgeon, who examined the parts operated on.

75. Hitchcock *v.* Burgett, 38 Mich. 501.

76. Hitchcock *v.* Burgett, 38 Mich. 501.

77. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16; Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244; Walsh *v.* Sayre, 52 How. Pr. (N. Y.) 334; Fowler *v.* Sergeant, 1 Grant (Pa.) 355. But see Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606, after lapse of several years from date of treatment.

78. Hoener *v.* Koch, 84 Ill. 408; Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360.

Evidence held sufficient to support verdict for plaintiff see McGehee *v.* Schiffman, 4 Cal. App. 50, 87 Pac. 290; Davis *v.* Spicer, 27 Mo. App. 279; Boom *v.* Reed, 69 Hun (N. Y.) 426, 23 N. Y. Suppl. 421; Barton *v.* Govan, 4 N. Y. St. 876; Froman *v.* Ayars, 42 Wash. 385, 85 Pac. 14; Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674.

Evidence held insufficient to support verdict for plaintiff.— Where, in an action against a surgeon for damages caused by his unskilfulness or negligence, there is no evidence of want of ordinary skill, or failure to use the best skill possessed by defendant, or any negligence in the care of the case, which resulted in plaintiff's injury, a verdict for plaintiff must be set aside. Winner *v.* Lathrop, 67 Hun (N. Y.) 511, 22 N. Y. Suppl. 516. See also Feeney *v.* Spalding, 89 Me. 111, 35 Atl. 1027; Neifert *v.* Hasley, 149 Mich. 232, 112 N. W. 705; Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712; Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; MacKenzie *v.* Carman, 103 N. Y. App. Div. 246, 92 N. Y. Suppl. 1063; Smith *v.* Dumont, 3 Silv. Sup. (N. Y.) 358, 6 N. Y. Suppl. 242; English *v.* Free, 205 Pa. St. 624, 55 Atl. 777; Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72; Wurdemann *v.* Barnes, 92 Wis. 206, 66 N. W. 111.

Evidence held sufficient to authorize verdict for defendant see Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78; Pepke *v.* Grace Hospital, 130 Mich. 493, 90 N. W. 278; Martin *v.* Courtney, 87 Minn. 197, 91 N. W. 487; Gedney *v.* Kingsley, 16 N. Y. Suppl. 792.

Evidence held sufficient to show contributory negligence see Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114, where plaintiff prematurely left the hospital.

79. See *supra*, IV, F, 7, a, (I).

80. See cases cited *infra*, this note.

Illustrations.— That plaintiff was severely burned by X-rays while being treated by defendant for appendicitis is of itself evidence that the treatment was improper. Shockley *v.* Tucker, 127 Iowa 456, 103 N. W. 360. Evidence showing that after a broken ankle was reset the ankle and foot were crooked, and the ankle joint stiff, tends to prove negligence on the part of the physician in replacing the broken bones, and should be submitted to the jury. Hickerson *v.* Neely, 54 S. W. 842, 21 Ky. L. Rep. 1257. Unex-

It is not necessary, to sustain a verdict for plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper, nor will the fact that all such witnesses agree that a portion of the treatment is proper under some circumstances in itself defeat a recovery.[81] In determining the relative value of the evidence of medical experts in an action for surgical malpractice, the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.[82]

(II) *To Require Submission to Jury.* Where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.[83]

8. Questions For Jury. What constitutes ordinary skill, care, and diligence on the part of a physician and surgeon is a question of law, in this view at least, that it must be stated by the court as defined by the books;[84] but when considered in connection with the facts which it is necessary for the jury to understand in order to be able to apply it to a particular case, it becomes a mixed question of law and fact.[85] Where the evidence is conflicting as to the facts on which the opinions of expert witnesses are based, and where the opinions of such witnesses, on a given state of facts in the case, materially differ, it is for the jury to determine, and their finding is conclusive.[86] If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science on which surgeons differ among themselves.[87]

9. Instructions — a. In General. In an action for malpractice, the court should make an adequate presentation of the case to the jury, explaining the precise questions at issue, and directing attention to the material evidence on both sides.[88] The jury should be instructed as to the necessity of the employment of

plained, the fact that the physician attending a woman at child-birth failed to remove all of the placenta, thereby occasioning blood poisoning, justifies a conclusion of negligence. Moratzky *v.* Wirth, 67 Minn. 46, 69 N. W. 480.

81. Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252. See also Barker *v.* Lane, 23 R. I. 224, 49 Atl. 963.

82. Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

83. McQuay *v.* Eastwood, 12 Ont. 402; Storey *v.* Veach, 22 U. C. C. P. 164; Jackson *v.* Hyde, 28 U. C. Q. B. 294.

Testimony which does not show want of ordinary care and skill is not entitled to go to the jury. Havens *v.* Hardesty, 18 Ohio Cir. Ct. 891, 9 Ohio Cir. Dec. 850.

Evidence held sufficient to require submission to jury see Degelau *v.* Wight, 114 Iowa 52, 86 N. W. 36; Peterson *v.* Wells, 41 Wash. 693, 84 Pac. 608.

Evidence held sufficient to warrant direction of nonsuit see De Long *v.* Delaney, 206 Pa. St. 226, 55 Atl. 965.

84. Tefft *v.* Wilcox, 6 Kan. 46.

85. Tefft *v.* Wilcox, 6 Kan. 46; Chamberlain *v.* Porter, 9 Minn. 260.

It is the duty of the court to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jury have to say whether, from those facts, negligence ought to be inferred. Fields *v.* Rutherford, 29 U. C. C. P. 113; Jackson *v.* Hyde, 28 U. C. Q. B. 294, Adam Wilson, J., delivering the opinion of the court.

86. *California.*—Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104.

Georgia.— Moon *v.* McRae, 111 Ga. 206, 36 S. E. 635.

Iowa.— Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

Minnesota.— Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

Missouri.— Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72.

Nebraska.— Griswold *v.* Hutchinson, 47 Nebr. 727, 66 N. W. 819.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768]; Wells *v.* World's Dispensary Medical Assoc., 120 N. Y. 630, 24 N. E. 276; Carpenter *v.* Blake, 60 Barb. 488 [*reversed* on other grounds in 50 N. Y. 696]; Boldt *v.* Murray, 2 N. Y. St. 232; Keily *v.* Colton, 1 N. Y. City Ct. 439.

Pennsylvania.— Hawkins' Appeal, 13 York Leg. Rec. 199.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 44.

But see Woodward *v.* Hancock, 52 N. C. 384, holding that what is reasonable skill and due care in a physician in the treatment of a patient is a question of law; and it is error to leave it to be determined by the jury.

87. Williams *v.* Poppleton, 3 Oreg. 139.

88. Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114; Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830.

the physician,[89] and as to the duty of the physician to exercise reasonable skill and care in his treatment of the case.[90] Instructions should be given relative to the burden of proof,[91] and, if the issue is raised, as to the care required of plaintiff, and the effect of his contributory negligence.[92] It is not sufficient to give a general instruction on the subject.[93] The instructions given should be confined

89. Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804, holding that a charge that, in order to recover for malpractice, the jury must be satisfied by a preponderance of evidence that defendant, acting as a surgeon, unskilfully and negligently treated plaintiff, followed by a charge to the effect that the fact that a physician responds to a call for his professional services does not necessarily constitute an employment unless some act is done or advice given by him which indicates an intention on his part to enter on the employment, sufficiently submits the issue as to whether the physician was employed.

90. Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78; Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462 (holding that an instruction relating to the degree of skill required by a person holding himself out as a physician and surgeon was not erroneous for failure to state that he must have had a license to practise); Carpenter *v.* Blake, 50 N. Y. 696 [*reversing* 60 Barb. 488] (holding that it is error to instruct the jury that it is immaterial whether defendant was or was not skilful in his profession); Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627 (holding that an instruction that defendant was bound to use the ordinary degree of care and skill of the "profession" in his community is not objectionable because the word "profession" is used instead of the more accurate term, "physician in good standing."

Degree of skill and care.— There is no substantial difference in the use of the words "ordinary" and "reasonable" in defining the care and skill required of a surgeon or physician in his employment. Kendall *v.* Brown, 74 Ill. 232. The words "fair" and "reasonable" are synonymous. Jones *v.* Angell, 95 Ind. 376.

As dependent on locality.— An instruction that defendant was required to use only the degree of care and skill of the physicians in his neighborhood is not ground for reversal, where there was evidence that there were other physicians in the neighborhood presumably of average ability, when compared with similar localities. Pelky *v.* Palmer, 109 Mich. 561, 67 N. W. 561. See also Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830, Robinson, J., delivering the opinion of the court, and Kinne, C. J., dissenting.

Continuance of attention.— Instructions that it was the duty of defendant to give the patient such continued attention after the operation as the necessity of the case required, in the absence of special agreement or reasonable notice to the contrary, are correct, although the declaration only alleges a want of care and skill with reference to the operation itself. Williams *v.* Gilman, 71 Me. 21.

Departure from approved methods.— An instruction that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been," is not improper, notwithstanding the rule may render a physician liable in case he adopts new methods, although improved ones. Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924. An instruction that it is incumbent on surgeons to conform to the established system of treatment of a particular disease is not erroneous or misleading on the ground that the treatment referred to is one prescribed by some writers and surgeons, and not that universally commended, where there is no conflict as to the proper mode of treatment. Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577. Such an instruction is not misleading, where there is no claim that the case was one involving doubt as to the proper mode of treatment, and the issue and testimony relates solely to the question whether defendant neglected to follow the ordinary and clearly established practice in treating plaintiff. Jackson *v.* Burnham, *supra*.

91. Swanson *v.* French, 92 Iowa 695, 61 N. W. 407 (holding that a charge that, if plaintiff disobeyed defendant's orders, he cannot recover, does not shift to defendant the burden of proof as to contributory negligence, when a former instruction clearly placed the burden on plaintiff); Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72 (holding that an instruction is erroneous which is open to the construction that the burden is on defendant to show the possession and exercise of skill and care).

92. Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894; O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]; Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Necessity of following instructions see Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894.

Evidence of disobedience by the patient of the instructions of the physician may properly be referred to by the court in its instructions, in directing the attention of the jury to the question of contributory negligence. Jones *v.* Angell, 95 Ind. 376.

93. Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830, holding that the jury should be distinctly charged that if the patient was guilty of contributory negligence in producing the injury complained of he cannot recover.

Refusal to charge on contributory negligence is cured by the subsequent giving of an instruction on the subject. Link *v.* Shel-

to the issues as made by the pleadings and the evidence,[94] and should not assume facts not proved,[95] or be inconsistent or misleading.[96]

b. As to Damages. An instruction that the measure of damages is full, complete, and ample compensation to the injured person is erroneous, since compensation is all that is required, and the use of the adjectives "full," "complete," and "ample" may lead the jury to believe that more than compensation is required.[97]

10. DAMAGES[98] — a. Nominal. Where it is impossible to distinguish between the consequences of the trouble for which a physician was called and the consequences of the maltreatment, only nominal damages can be given.[99] Acceleration of the death of a patient is more than a mere technical injury, and demands an award of more than nominal damages.[1]

b. Compensatory. Where a patient is injured by a physician's negligent and unskilful treatment, the loss or injury directly and naturally resulting from his fault or negligence is the measure of damages.[2] The amount is to be determined by the jury from the facts and circumstances of the case,[3] and the pecuniary loss, resulting from inability to labor,[4] bodily and mental pain and suffer-

don, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696].

94. *Colorado.*— Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250.

Illinois.— Wenger *v.* Calder, 78 Ill. 275, holding that, in an action against a surgeon for malpractice, where there is no evidence tending to prove wilful negligence, it is error to instruct the jury that they may find for plaintiff in any amount they deem proper, under the evidence, if they believe from the evidence that defendant was wilfully negligent.

Pennsylvania.— Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114.

Texas.—Payne *v.* Francis, 37 Tex. 75, holding that in an action against a physician for damages alleged to be due to his unskilful treatment of a patient, it was error to instruct the jury that, if plaintiff was injured by unskilful treatment, ignorance, carelessness, or neglect, he might recover; no allegation being contained in the complaint as to carelessness or neglect.

Vermont.— Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

Wisconsin.—Prahl *v.* Gerhard, 25 Wis. 466, holding, however, that it was not error to instruct the jury that "if the injury was purely an accident, or from some other cause, while the defendant used and exercised a proper degree of skill, then the defendant is not liable," although there was no positive evidence of such accident or other cause.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 45.

95. Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696], holding that the court properly refused to give instructions which assumed that the treatment of the physician who attended plaintiff after defendants were discharged was improper.

96. Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830; Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210.

97. Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894.

98. Damages generally see 13 Cyc. 1.

99. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

1. Gray *v.* Little, 126 N. C. 385, 35 S. E. 611.

2. Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090; Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260.

It is the damage accruing to plaintiff in excess of that which would have accrued naturally from the illness or injury had he been treated with that degree of skill ordinarily possessed by surgeons, and not the damage resulting from the illness or injury. Wenger *v.* Calder, 78 Ill. 275; Carpenter *v.* McDavitt, 53 Mo. App. 393; Miller *v.* Frey, 49 Nebr. 472, 68 N. W. 630; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

3. Chamberlain *v.* Porter, 9 Minn. 260.

The jury are the proper judges of the amount of the damages to be allowed, and unless there is something in the case showing that the jury, in their determination, were influenced by passion, prejudice, or some other improper motive, the court will not interfere. Chamberlain *v.* Porter, 9 Minn. 260.

Awards of damages permitted to stand.— One thousand dollars for negligence in the case of a broken leg whereby it was shortened three fourths of an inch. Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328. Two thousand dollars for the unwarranted abandonment of a confinement case. Lathrope *v.* Flood, (Cal. 1901) 63 Pac. 1007. Four thousand five hundred dollars where plaintiff was left helpless for life. Kelsey *v.* Hay, 84 Ind. 189. Seven thousand dollars for malpractice in setting a broken arm. Getchell *v.* Lindley, 24 Minn. 265.

4. Tefft *v.* Wilcox, 6 Kan. 46; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

A married woman who is not carrying on business or performing labor on her sole and separate account cannot, in an action against a physician for malpractice, recover for loss

ing,[5] loss of time,[6] and actual expenses incurred,[7] if resulting from or through the want of skill or care of the physician, may be taken into account, as so likewise may the character of the injury, as whether it is permanent or temporary,[8] and the condition or circumstances of the injured party.[9] Where the defense of contributory negligence is interposed, the jury should be warned to allow nothing for any aggravation of injury or new injury caused by plaintiff's own imprudence,[10] and evidence that another physician subsequently treated plaintiff improperly is competent to reduce the amount to be allowed.[11]

c. Exemplary or Punitive. While it has been held that exemplary damages for malpractice can be recovered only where the evidence shows an evil motive in the act complained of,[12] the weight of authority is to the effect that such damages may also be recovered where a physician has been guilty of gross negligence amounting to reckless indifference in treating a patient.[13]

of services and earnings. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

5. *California.*— Lathrope *v.* Flood, (1901) 63 Pac. 1007.

Georgia.— Smith *v.* Overby, 30 Ga. 241, holding that in an action by a husband and wife against a physician for an injury to the wife in delivering her of a child, damages may be given for the mental suffering of the wife produced by the destruction of the child.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Kentucky.— Piper *v.* Menifee, 12 B. Mon. 465, 54 Am. Dec. 547; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

Minnesota.— Chamberlain *v.* Porter, 9 Minn. 260.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 46.

Suffering caused by malpractice only to be considered.— The jury should be warned, in an action for malpractice, to allow nothing for the pain and suffering caused by the original injury, but only for what was added by the lack of care and skill in its treatment. Carpenter *v.* McDavitt, 53 Mo. App. 393. See also Wenger *v.* Calder, 78 Ill. 275.

Action by husband for wife's injury.— For injuries inflicted on a wife during a surgical operation, which resulted in her death, the husband is entitled to recover only for the actual damage caused to him by the injury, and which accrued prior to her death; and he can have no action for his or her mental suffering, as such action must be restricted to the person who received the physical injury. Hyatt *v.* Adams, 16 Mich. 180.

6. Tefft *v.* Wilcox, 6 Kan. 46; Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

7. Tefft *v.* Wilcox, 6 Kan. 46; Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252 (holding, however, that there can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense was the result of defendant's negligence, and that it was reasonably necessary); Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

8. Tefft *v.* Wilcox, 6 Kan. 46; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090; Chamberlain *v.* Porter, 9 Minn. 260; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354. But see Dulaney *v.* Nunnery, 7 Ky. L. Rep. 292, holding that, in an action against a surgeon for malpractice, plaintiff's expectancy of life had nothing to do in estimating the damages he was entitled to recover, although his arm had become useless as the result of defendant's negligence; and it was error to admit life-tables as evidence, for the purpose of showing his expectancy of life.

Prospective damages.— Recovery for malpractice by a physician may embrace prospective as well as accrued damages. Howell *v.* Goodrich, 69 Ill. 556; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Testimony as to the physical condition of plaintiff just before trial, and two or more years after undergoing the treatment complained of, is competent, when such condition is shown to be the result of the injury in question, and is of a permanent nature. Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252.

9. Tefft *v.* Wilcox, 6 Kan. 46; Chamberlain *v.* Porter, 9 Minn. 260; Fowler *v.* Sergeant, 1 Grant (Pa.) 355.

10. Carpenter *v.* McDavitt, 53 Mo. App. 393.

11. Doyle *v.* New York Eye, etc., Infirmary, 80 N. Y. 631.

12. Hyatt *v.* Adams, 16 Mich. 180.

13. Cochran *v.* Miller, 13 Iowa 128; Gray *v.* Little, 126 N. C. 385, 35 S. E. 611; Brooke *v.* Clark, 57 Tex. 105.

Operation by unlicensed dentist.— Exemplary damages are recoverable from defendants who, in conducting the business of dentistry, caused plaintiff to be operated on by an employee who was unlicensed as a dentist, and through whose negligence and want of skill he suffered a severe injury. Mandeville *v.* Courtright, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. N. S. 1003 [*reversing* 126 Fed. 1007].

11. New Trial.[14] Where the verdict in a malpractice case is manifestly against the great preponderance of the evidence, it is an abuse of discretion not to grant a new trial.[15] A new trial on account of excessive damages for malpractice will only be granted where they are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption, or were misled as to the proper measure of damages.[16]

12. Review. The admission of evidence,[17] or the giving of an instruction,[18] not prejudicial to either party, is not fatal error. Where there is a conflict in the testimony of the experts, and no great preponderance either way, the verdict of the jury will not be disturbed.[19] Where, however, the evidence greatly preponderates against the verdict, it will be set aside.[20]

V. COMPENSATION.[21]

A. Right to Compensation[22] — **1. In General.** In England, under the common law, a medical practitioner had no remedy at law to recover a remuneration for his services. He was presumed to act with a view only to an honorary reward.[23] He might, however, recover on an express contract to remunerate him for his attendance.[24] This rule has never been in force in this country, and a physician is entitled to recover for his services in the same manner as any other person who performs services for another.[25] And since 21 & 22 Vict. c. 90, a physician may also recover for his services in England without an express contract.[26] An employment of a physician by a party, without express agreement as to compensation, raises an implied agreement on the part of the employer to pay what the services are reasonably worth.[27] Physicians and surgeons can recover for the services of their students in attendance on their patients,[28] and also for the services of such assistants as they may require.[29]

14. New trial generally see New Trial, 29 Cyc. 707.

15. Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813.

16. Kelsey *v.* Hay, 84 Ind. 189.

17. Jones *v.* Angell, 95 Ind. 376; Prahl *v.* Gerhard, 25 Wis. 466.

18. O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

19. Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894; Getchell *v.* Lindley, 24 Minn. 265; Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Van-Mere *v.* Farewell, 12 Ont. 285.

20. Yaggle *v.* Allen, 24 N. Y. App. Div. 594, 48 N. Y. Suppl. 827.

21. **Compensation:** As witness see Witnesses. For examining person for insanity see Insane Persons. For services to poor persons see Paupers.

Account stated between physician and patient see Accounts and Accounting, 1 Cyc. 387 text and note 2.

22. **Port physician's fee invalid** see Commerce, 7 Cyc. 437 note 5.

23. Chorley *v.* Bolcot, 4 T. R. 317, 2 Rev. Rep. 395; Chitty Contr. 573. See also Lipscombe *v.* Holmes, 2 Campb. 441.

24. Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041, C. & M. 362, 41 E. C. L. 201, 3 G. & D. 198, 7 Jur. 60, 12 L. J. Q. B. 13 (holding that proof of an express contract must be clear); Atty.-Gen. *v.* Royal College of Physicians, 1 Johns. & H. 561, 7 Jur. N. S. 511, 30 L. J. Ch. 757, 4 L. T. Rep. N. S. 356, 9 Wkly. Rep. 590, 20 Eng. Reprint 868.

25. Peck *v.* Martin, 17 Ind. 115; Judah *v.* McNamee, 3 Blackf. (Ind.) 269; Green *v.* Higenbotam, 3 N. J. L. J. 60; Mooney *v.* Lloyd, 5 Serg. & R. (Pa.) 416; Graham *v.* Gautier, 21 Tex. 111.

The right to adequate compensation for medical services rendered by a physician arises upon their rendition wherever fees are otherwise recoverable by suit at law. Ely *v.* Wilhur, 49 N. J. L. 358, 10 Atl. 441, 60 Am. Rep. 668.

26. Gibbon *v.* Budd, 2 H. & C. 92, 9 Jur. N. S. 525, 32 L. J. Exch. 182, 8 L. T. Rep. N. S. 321, 11 Wkly. Rep. 626.

Traveling expenses.— When no special agreement is made to remunerate a physician, he cannot recover expenses out of pocket, in traveling to attend his patient, for such expenses are incidental to the attendance, and to be considered as money paid to the physician's own use in the ordinary exercise of his profession. Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041, C. & M. 362, 41 E. C. L. 201, 3 G. & D. 198, 7 Jur. 60, 12 L. J. Q. B. 13.

27. Peck *v.* Martin, 17 Ind. 115; Pryor *v.* Milburn, 51 Misc. (N. Y.) 596, 101 N. Y. Suppl. 34.

28. People *v.* Monroe Ct. C. Pl., 4 Wend. (N. Y.) 200, holding that a statute prohibiting the recovery of fees by unlicensed physicians does not prevent recovery for such services.

29. Jay County *v.* Brewington, 74 Ind. 7.

Unqualified assistant.— But it has been held that a qualified practitioner is not

2. As Dependent on Right to Practice — a. In General. In the absence of a statute requiring a license, or prohibiting the practice of medicine without it for a fee or reward, an unlicensed physician is entitled to recover for his services.[30] Every state has now enacted statutes regulating the practice of medicine,[31] and in several unqualified practitioners are expressly prohibited from recovering for their services.[32] In the majority of the states, however, no express provision on the subject exists, but the courts have held, almost without exception, that even in the absence of an express prohibition, a physician may not recover for professional services unless he shows compliance with the requirements of the statute as to qualification.[33] Where the statute further requires that the certificate of qualification be registered, a physician who has not complied with such requirement is not entitled to recover his fees,[34] unless such registration is not made a

entitled to recover for services rendered by an unqualified assistant without consulting him. Howarth *v.* Brearley, 19 Q. B. D. 303, 51 J. P. 440, 56 L. J. Q. B. 543, 56 L. T. Rep. N. S. 743, 36 Wkly. Rep. 302.

30. Bronson *v.* Hoffman, 7 Hun (N. Y.) 674; Bailey *v.* Mogg, 4 Den. (N. Y.) 60.

31. See *supra*, II.

32. *Louisiana.*— Czarnowski *v.* Zeyer, 35 La. Ann. 796.

Maine.— Holmes *v.* Halde, 74 Me. 28, 43 Am. Rep. 567.

Massachusetts.— Hewitt *v.* Charier, 16 Pick. 353.

Nebraska.— Maxwell *v.* Swigart, 48 Nebr. 789, 67 N. W. 789.

North Carolina.— Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 51.

Maryland — Notice of intention to dispute claim.—Acts (1821), c. 217, prohibiting an unauthorized practitioner "from and after the passage" thereof from recovering his fees, provided defendant gives ten days' notice of his intention to dispute the claim, embraces all cases where the attempt to recover is subsequent to its passage. Berry *v.* Scott, 2 Harr. & G. 92.

33. *Alabama.*— Harrison *v.* Jones, 80 Ala. 412. Otherwise under a former statute. Richardson *v.* Dorman, 28 Ala. 679.

California.— Roberts *v.* Levy, (1892) 31 Pac. 570; Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880.

Georgia.— Murray *v.* Williams, 121 Ga. 63, 48 S. E. 686.

Indiana.— Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787; Mayfield *v.* Nale, 26 Ind. App. 240, 59 N. E. 415.

Louisiana.— Dickerson *v.* Gordy, 5 Rob. 489.

Mississippi.— Bohn *v.* Lowery, 77 Miss. 424, 27 So. 604.

New York.— Accetta *v.* Zupa, 54 N. Y. App. Div. 33, 66 N. Y. Suppl. 303, 8 N. Y. Annot. Cas. 190; Fox *v.* Dixon, 12 N. Y. Suppl. 267; Timmerman *v.* Morrison, 14 Johns. 369.

Tennessee.— Haworth *v.* Montgomery, 91 Tenn. 16, 18 S. W. 399.

Texas.— Wooley *v.* Bell, 33 Tex. Civ. App. 399, 76 S. W. 797; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

England.— De la Rosa *v.* Prieto, 16 C. B. N. S. 578, 10 Jur. N. S. 851, 33 L. J. C. P. 262, 10 L. T. Rep. N. S. 757, 12 Wkly. Rep. 1029, 111 E. C. L. 578.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 51.

Contra.— Smythe *v.* Hanson, 61 Mo. App. 285; Davidson *v.* Bohlman, 37 Mo. App. 576, was decided under a statute expressly prohibiting a recovery by unqualified practitioners.

A note given in consideration of services rendered by the payee as a physician, when he has not obtained a license, is void. Holland *v.* Adams, 21 Ala. 680; Coyle *v.* Campbell, 10 Ga. 570.

Practice under unauthorized temporary certificate.—A contract to render medical services, made by a physician who is practising under an unauthorized temporary certificate from one of a board of medical examiners, is not enforceable. Peterson *v.* Seagraves, 94 Tex. 390, 60 S. W. 751.

Certificate of good character.— One who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner cannot recover compensation therefor, unless, prior to their performance, he obtained a certificate of good moral character, in the manner prescribed by Me. St. (1838) c. 353, § 2. Thompson *v.* Hazen, 25 Me. 104. Assumpsit lies on an express promise to pay for services rendered by one practising the healing art according to the methods of those calling themselves "Christian Scientists," plaintiff having complied with Me. Rev. St. c. 13, § 9, requiring persons not licensed by medical associations to obtain a certificate of good moral character from the officers of the town where they then reside. Wheeler *v.* Sawyer, (Me. 1888) 15 Atl. 67.

Qualification at time of trial sufficient.— In England it has been held that a physician may recover for his services, although not registered at the time they are rendered, if he appears to be duly registered at the time of the trial. Turner *v.* Reynall, 14 C. B. N. S. 328, 9 Jur. N. S. 1077, 32 L. J. C. P. 164, 8 L. T. Rep. N. S. 281, 11 Wkly. Rep. 700, 108 E. C. L. 328.

34. Maxwell *v.* Swigart, 48 Nebr. 789, 67 N. W. 789; Wickes-Nease *v.* Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001.

prerequisite to the right to practise.[35] These decisions apply the principle that where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced.[36] The mere fact that the practice of medicine is not punishable under the penal code, but is in violation of a civil statute, will render the contract void.[37]

b. Excuse For Failure to Qualify. A physician is not prevented from recovering for attendance before he had registered, where his delay in registering was owing to the registry clerk's negligence.[38] So also a physician practising without a license may maintain an action at law for his services, if, during the time of those services, there was no existing board of examiners.[39] But it has been held that a physician cannot recover for services rendered before the issuance of his certificate by the board, although he made application therefor before his employment began.[40]

c. Effect of Repeal or Amendment of Disqualifying Act. Where a disqualifying statute not only takes away all right of action for services performed by an unlicensed physician, but renders a contract to perform such services void in its inception, the repeal of such statute does not validate prior transactions, so as to enable the physician to recover compensation for services rendered by him before the passage of the repealing act.[41] The same rule applies where the disqualifying statute is amended so as to permit a certain excepted class of physicians to practise without a license.[42] Where, however, the disqualifying statute merely deprives an unlicensed physician of legal remedy for recovering compensation for his services, without preventing the accruement of a valid debt, then when such statute is repealed, which imposes this restraint upon the physician's remedy, he may maintain his action for services rendered prior to such repeal.[43]

d. Effect of Revival of Disqualifying Act. The revival of an act which invalidates the contracts of unlicensed physicians revives also the exception of the former act as to physicians practising at the time of its enactment; and hence a physician practising at the time of the revival may collect his fees, although not qualified thereunder.[44]

3. As Dependent on Beneficial Result of Services. In the absence of an express agreement, the right of a physician to be compensated for his services does not depend upon the measure of his success in effecting a cure by the means employed, but upon diligent exercise, under his employment, of the skill which commonly pertains to his profession. Such services are regarded as beneficial in a legal sense, and the right to adequate compensation arises upon their rendition, whether the outcome be in fact beneficial to the patient or otherwise.[45]

35. Riley *v.* Collins, 16 Colo. App. 280, 64 Pac. 1052; Finch *v.* Gridley, 25 Wend. (N. Y.) 469.

36. Haworth *v.* Montgomery, 91 Tenn. 16, 18 S. W. 399.

A penalty imposed by statute implies a prohibition, and a contract founded on its violation is void, although not so expressly declared by the statute. Harrison *v.* Jones, 80 Ala. 412. One cannot recover compensation for doing an act, to do which is forbidden by law, and is a misdemeanor. Fox *v.* Dixon, 12 N. Y. Suppl. 267.

37. Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

Validity of contract of unlicensed physician see CONTRACTS, 9 Cyc. 478 text and note 6.

38. Parish *v.* Foss, 75 Ga. 439, Jackson, C. J., delivering the opinion of the court.

39. Woodside *v.* Baldwin, 30 Fed. Cas. No. 17,995, 4 Cranch C. C. 174.

40. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880, holding, however, that where the services are not rendered under an express contract, and the law implies a promise to pay for each visit as made, he may recover for services rendered the patient after the issuance of his certificate.

41. Quarles *v.* Evans, 7 La. Ann. 543; Bailey *v.* Mogg, 4 Den. (N. Y.) 60; Nicols *v.* Poulson, 6 Ohio 305; Warren *v.* Saxby, 12 Vt. 146.

42. Richardson *v.* Dorman, 28 Ala. 679; Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

43. Hewitt *v.* Wilcox, 1 Metc. (Mass.) 154.

44. Maddox *v.* Boswell, 30 Ga. 38; Newsom *v.* Lindsey, 21 Ga. 365.

45. *Arkansas.*— Cotnam *v.* Wisdom, 83

4. As Dependent on Want of Skill or Negligence. Whether a physician is entitled to compensation for his services when he has failed to exercise ordinary skill or has been negligent in the treatment of a case is a question upon which there is a conflict of authority. One line of decisions takes the position that if a physician fails in his duty to exercise ordinary skill and care in treating a patient, he is guilty of a default in his undertaking, and can recover nothing for his services.[46] Other authorities hold that the fact that a physician was guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily preclude him from recovering any compensation whatever for his services; the amount of his recovery, if anything, depending on the amount of damages suffered because of his negligence; in other words he may recover the value of his services less the amount of damages suffered by reason of his negligence.[47]

5. As Dependent on Place of Residence or of Performance of Services. The provisions of a statute regulating the practice of medicine and surgery apply to practitioners living without the state, as well as to those within it; and hence no physician or surgeon, although he may live without the state, will be entitled to recover fees for services rendered within it, unless previously licensed in the manner prescribed thereby.[48] An exception to this rule exists in the case of an emergency,[49] but the right to recover is not to be extended beyond the necessity of the actual emergency.[50] A statute prohibiting a recovery for medical services rendered by an unlicensed physician does not prevent a recovery in that state for services rendered in another;[51] but a contract by a physician duly qualified to practise in the province of Quebec, where he has his domicile, to render professional services in one of the United States, by the laws of which he is prohibited from practising, is illegal, and no recovery therefor can be had in the courts of such province.[52]

6. As Dependent on Intention That Service Should Be Gratuitous. Whether a

Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090.

Illinois.— Yunker *v.* Marshall, 65 Ill. App. 667.

New Jersey.— Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 441, 60 Am. Rep. 668.

Pennsylvania.— Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. 272.

Wisconsin.— Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

England.— Hupe *v.* Phelps, 2 Stark. 480, 20 Rev. Rep. 726, 3 E. C. L. 496.

Although unsuccessful the physician may be entitled to compensation. McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140; Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388, 31 N. H. 119, 64 Am. Dec. 323; Gallaher *v.* Thompson, Wright (Ohio) 466; McCandless *v.* McWha, 22 Pa. St. 261; Seare *v.* Prentice, 8 East 348; Hupe *v.* Phelps, 2 Stark. 480, 20 Rev. Rep. 726, 3 E. C. L. 496; Slater *v.* Baker, 2 Wils. C. P. 359.

46. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Langolf *v.* Pfromer, 2 Phila. (Pa.) 17 (holding that a physician cannot recover a claim for professional services unless he possesses the requisite skill); Alder *v.* Buckley, 1 Swan (Tenn.) 69 (holding, however, that a surgeon is entitled to compensation for an operation not performed with the highest degree of skill, and which might have been performed more skilfully by others, provided the operation was beneficial to the patient).

Although a physician does not guarantee a cure, it seems that he should not be permitted to recover for worthless professional services, if he has been negligent, unskilful, or unfaithful. Logan *v.* Field, 192 Mo. 54, 90 S. W. 127.

A physician's contract is entire and performance is necessary to entitle the physician to recover anything. Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

47. Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830, (1896) 66 N. W. 894; Ressequie *v.* Byers, 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

48. Spaulding *v.* Alford, 1 Pick. (Mass.) 33.

49. Adams County *v.* Cole, 9 Ind. App. 474, 36 N. E. 912, holding that a physician called from another county, as being the nearest physician with the requisite skill to perform an amputation immediately necessary to save a patient's life, and who had not sufficient time to procure the license required, can recover for the amputation, but not for subsequent visits, after he had time to procure a license.

50. Adams County *v.* Cole, 9 Ind. App. 474, 36 N. E. 912.

51. Downs *v.* Minchew, 30 Ala. 86, Stone, J., delivering the opinion of the court.

52. Rugg *v.* Lewis, 17 Quebec Super. Ct. 206.

physician's services shall be deemed a gratuity or constitute a claim for compensation must be determined, it has been held, by the common understanding of both parties. If they were intended to be and were accepted as a gift or act of benevolence, they cannot at the election of the physician create a legal obligation to pay.[53] But their character is not controlled by the inexpressed and revocable intentions of plaintiff, although his purposes subsequently asserted may aid in ascertaining it.[54] Where a physician renders services upon an understanding between the parties that he was to be remunerated by a legacy, this amounts to an agreement that he was to make no charge;[55] but if the services are performed under the mere expectation of a legacy, the physician is entitled, on being disappointed in his expectation, to recover compensation therefor.[56]

7. Under "No Cure No Pay" Contract. If a physician commence attending on a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services or medicines, unless he shows a performance of the terms of the contract on his part.[57] When, however, a cure has been fairly effected, the contract cannot be evaded by the fact that the patient subsequently suffers a recurrence of the same disease.[58] Where the contract contains a condition that if a cure is not at first effected, the patient shall submit to further treatment, the physician is entitled to the agreed compensation, even though a cure is not effected, if the patient refuses or neglects to submit to further treatment.[59]

8. For Medicine Furnished. Under a statute which prohibits the practising of medicine by persons who have not complied with the provisions of the statute, it is unlawful for such unauthorized person to furnish medicine to another; and he is not entitled to recover for medicine so furnished.[60] Yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them.[61]

B. Liability For Compensation[62] — 1. Liability of Patient[63] — a. In General. Where a physician renders services to a patient, either under an express employment or with his consent, the law raises an implied promise on the part of the patient to pay him what the services are reasonably worth.[64] So also where, in a proper case, a physician renders services to a person without his request or consent, as where one is injured by an accident rendering him unconscious, the law

53. Prince *v.* McRae, 84 N. C. 674.

Services held to have been gratuitous see Packman *v.* Vivian, 24 Beav. 290, 53 Eng. Reprint 369.

54. Prince *v.* McRae, 84 N. C. 674. But see Kinner *v.* Tschirpe, 54 Mo. App. 575, holding that where a physician rendered services to a relative with the intention that such services should be gratuitous, he cannot recover compensation therefor, even though his patient expected to pay for them.

55. Shallcross *v.* Wright, 12 Beav. 558, 14 Jur. 1037, 19 L. J. Ch. 443, 50 Eng. Reprint 1174.

56. Baxter *v.* Gray, 11 L. J. C. P. 63, 3 M. & G. 771, 4 Scott N. R. 374, 42 E. C. L. 402.

57. Smith *v.* Hyde, 19 Vt. 54.

58. Fisk *v.* Townsend, 7 Yerg. (Tenn.) 146.

59. Madison *v.* Mangan, 77 Ill. App. 651

60. Underwood *v.* Scott, 43 Kan. 714, 23 Pac. 942; Smith *v.* Tracy, 2 Hall (N. Y.) 501; Bailey *v.* Mogg, 4 Den. (N. Y.) 60; Alcott *v.* Barber, 1 Wend. (N. Y.) 526; Timmerman *v.* Morrison, 14 Johns. (N. Y.) 369.

61. Holland *v.* Adams, 21 Ala. 680.

62. **Physician's bill as part of wife's maintenance** see Husband and Wife, 21 Cyc. 1608 note 66.

63. **Contracts of infants for medical attendance** see Infants, 22 Cyc. 594, text and note 57.

Liability of husband or wife for medical services see Husband and Wife, 21 Cyc. 1220, 1448.

64. Ostland *v.* Porter, 4 Dak. 98, 25 N. W. 731 (holding that simply removing a person affected with smallpox, who is not in indigent circumstances, to a county pest-house against his will, by order of the county commissioners, will not render him a pauper, and he may be held liable for medicines and medical attendance furnished by a physician who was employed by the county to attend paupers, when he accepts such services without objection, and receives the benefit thereof); Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Prince *v.* McRae, 84 N. C. 674; Garrey *v.* Stadler, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877.

Where a physician was summoned to attend his aunt, not in a professional capacity, but as an adviser in business matters, and on his arrival he rendered valuable profes-

will imply a promise from him who received the benefit of the services to pay for them.[65]

b. For Fees of Consultants. A patient is liable for the fees of a consulting physician as well as those of the attending physician.[66]

c. Conditional Contract. A conditional contract between a patient and his physician that if he effected a cure he should receive a reasonable compensation is valid.[67]

2. Liability of Person Employing Physician For Another[68] — a. In General. The rule that where a person requests the performance of a service and the request is complied with and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient, unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services,[69] or the circumstances are such as to show an intention on his part to pay for the services, it being so understood by him and the physician.[70] But in a few

sional services, which were accepted by the aunt, he is entitled to compensation. Dickey's Succession, 41 La. Ann. 1010, 6 So. 798.

65. Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090; Pray *v.* Stinson, 21 Me. 402.

66. Sherman's Estate, 6 Pa. Co. Ct. 225.

Extent of rule.— This has been held to be so notwithstanding an agreement between the patient and the attending physician that the latter would pay for such services, unless the consulting physician expressly or impliedly assents to such agreement. Shelton *v.* Johnson, 40 Iowa 84; Garrey *v.* Stadler, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877.

67. Mock *v.* Kelly, 3 Ala. 387.

A promise, made while sober, by a habitual drunkard to a physician, that he would pay him one hundred dollars, in consideration of which the physician promised and undertook to cure him of his appetite for ardent spirits, is binding. Fisk *v.* Townsend, 7 Yerg. (Tenn.) 146.

The mere fact that no compensation is agreed on in case the patient is cured does not transform the entire express contract into an implied one, so as to authorize recovery in case of failure to cure. Davidson *v.* Biermann, 27 Mo. App. 655.

68. **Liability of husband for medical services to wife** see Husband and Wife, 21 Cyc. 1220, 1448.

Liability of master: For treatment of apprentice see Apprentices, 3 Cyc. 552. For treatment of servant see Master and Servant, 26 Cyc. 1049.

Operation of statute of frauds to promises of third persons to pay for physician's services see Frauds, Statute of, 20 Cyc. 160 *et seq.*

Physician or surgeon for wounded employee, authority to employ, see Corporations, 10 Cyc. 926.

69. Starrett *v.* Miley, 79 Ill. App. 658; Holmes *v.* McKim, 109 Iowa 245, 80 N. W. 329; Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88; Meisenbach *v.* Southern Cooperage, 45 Mo. App. 232. See also Shaw *v.* Graves, 79 Me. 166, 8 Atl. 884, holding that an action to recover for medical services rendered at the request and for the benefit of a person for whose support a bond has been given by defendants cannot be maintained against defendants, there being no implied authority on the part of such person to obtain such assistance at their expense or credit.

A special request by a father to a physician to attend upon a child of full age, for whom he is not bound to provide, although lying sick at the father's house, it has been held, raises no implied promise on the part of the father to pay for the services. Rankin *v.* Beale, 68 Mo. App. 325; Crane *v.* Baudouine, 55 N. Y. 256; Boyd *v.* Sappington, 4 Watts (Pa.) 247.

While a child is under no legal obligation to support a parent or receive him into his family, yet, if he does receive him into the family, he is *prima facie* responsible for services which he calls upon a physician to perform for the benefit of such parent. Hentig *v.* Kernke, 25 Kan. 559. Where parents conveyed property to their daughter in consideration of her agreement to support, and to pay for necessary medical services rendered them, a physician rendering necessary services to the parents can recover therefor from the daughter, although he first rendered his bill to the mother, without knowledge of the agreement. Rounsevel *v.* Osgood, 68 N. H. 418, 44 Atl. 535.

70. Dorion *v.* Jacobson, 113 Ill. App. 563; Smith *v.* Watson, 14 Vt. 332.

Illustrations.—Where W sent a telegraphic despatch to an infirmary as follows: "I have just learned of L.'s accident. Show him every attention, and I will pay expenses," it was held that the despatch authorized the procurement of a physician not connected with the infirmary, and obligated W to pay for whatever services were rendered by him. White *v.* Mastin, 38 Ala. 147. Where an employee of one of the members of a firm was seriously injured by machinery, and the person who telephoned to the surgeon, who thereupon attended such employee, testified that both the members of the firm directed him to say to the surgeon that the firm sent for him, a verdict against the firm for

states it is held that one who requests a physician to attend another professionally, without indicating that he acts as agent or messenger, is liable for the physician's charges.[71]

b. For Subsequent Visits. If one engages a physician to attend an urgent case, and makes no limitation as to time, he is liable to such physician for all subsequent visits, until his services are dispensed with.[72]

3. Third Person Assuming Liability After Services Begun. There is nothing in the ordinary relation between a physician and his patient which will prevent the former from discontinuing his services on the account of the latter, and entering into a contract with another for the payment of the charges for his subsequent attendance, and the assent of the patient to the making of such contract is not necessary.[73]

C. Amount of Compensation — 1. In General — a. In Absence of Contract. Where the services of a physician are performed on request, and no agreement is made in respect to them, the law raises an implied promise to pay so much as the services are reasonably worth.[74] There is no presumption of law as to the value of a physician's services,[75] nor that a jury can ascertain their value without testimony from persons knowing something about it.[76] The question of what is reasonable is peculiarly within the province of the jury;[77] but they have no right to ignore the testimony, and form an independent conclusion.[78] A physician can-

the surgeon's bill for such attendance should not be set aside as unsupported by the evidence. Till *v.* Redus, 79 Miss. 125, 29 So. 822.

Intention communicated to physician.— Where the physician is aware of the fact that one requesting his services acted merely as a messenger, and did not intend to make himself personally liable for the services to be rendered, there can of course be no recovery against the messenger. Smith *v.* Riddick, 50 N. C. 342. If, however, defendant intended, and gave the physician to understand that he was the employer, and the original credit was given to him, then he is liable. Clark *v.* Waterman, 7 Vt. 76, 29 Am. Dec. 150.

The reason of this rule is that to hold one liable under these circumstances would deter everyone from doing the charitable office of going after a doctor for a sick neighbor. Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88; Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232; Smith *v.* Riddick, 50 N. C. 342.

71. Foster *v.* Meeks, 18 Misc. (N. Y.) 461, 41 N. Y. Suppl. 950. See also Grattop *v.* Rowheder, 1 Nebr. (Unoff.) 660, 95 N. W. 679 (holding that one who calls a physician for a member of his family, although not a relative, is liable for services rendered, without notice that the party who calls him does not intend to make himself liable); Best *v.* McAuslan, 27 R. I. 107, 60 Atl. 774.

Illustration.— Where a person calls at the office of a physician, and in the absence of the latter leaves his business card, with this message written on it, "Call on Mrs. D. at No. 769 Broadway," and gives the card to a clerk in the office with a request to hand it to the physician and to tell him to "come as soon as possible," he becomes liable to pay the physician's bill in attending on Mrs. D in pursuance of such message. Bradley *v.* Dodge, 45 How. Pr. (N. Y.) 57.

72. Dale *v.* Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224.

73. White *v.* Mastin, 38 Ala. 147.

74. Starrett *v.* Miley, 79 Ill. App. 658; Peck *v.* Martin, 17 Ind. 115; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

Where a patient requires unusual attention, compensation for operations and time spent in addition to the regular visits is properly allowed. Short's Succession, 45 La. Ann. 1485, 14 So. 184.

A violation of his contract by a physician should be taken into consideration to reduce a claim for services rendered. Sayles *v.* FitzGerald, 72 Conn. 391, 44 Atl. 733 (holding that, in an action by a physician for services, testimony in defense that an operation was performed in the cellar, and that it was an unfit place for the operation, was competent on the question of the reasonableness of plaintiff's charge therefor); Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

75. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

76. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

77. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Crumrine *v.* Austin, 133 Mich. 283, 94 N. W. 1057.

The infinite variety of the circumstances surrounding the performance of professional services precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services. Heintz *v.* Cooper, (Cal. 1896) 47 Pac. 360.

The existence of epidemics does not authorize exorbitant fees. Collins *v.* Graves, 13 La. Ann. 95.

78. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597; Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

not sustain a claim for larger compensation for non-expert services than an ordinary man would be entitled to for the same services, on the ground alone that, as an expert in his profession, his time is more valuable than that of ordinary men.[79]

b. Under Contract. When a valid contract has been made as to the amount of the compensation to be paid for medical services, no question as to the actual value of the services can arise.[80]

2. Elements to Be Considered in Estimating Amount — a. Customary Charge. A physician is entitled to recover the ordinary and reasonable charges usually made for such services by members of the same profession of similar standing.[81] Therefore, to prove the value of such services, customary charges of physicians for like services in the same locality or neighborhood may be shown;[82] but proof of what plaintiff charged another person for similar services is not admissible,[83] except in connection with proof that such charge was made at his usual rate, and that this rate was known to defendant.[84]

b. Nature of Disease or Injury. It is competent for a physician to show the nature of his patient's disease or injury and its mode of treatment, in order to prove the value of his services.[85]

c. Professional Standing. In an action by a physician for professional services, he may show that his professional standing is high, as bearing on the value of his services,[86] provided his general professional reputation is drawn in question.[87]

d. Skill and Learning. Evidence of a physician's learning and skill is competent to be shown in estimating the value of his services.[88]

e. Daily Income. In determining the value of a physician's services it is immaterial what his average daily income from his profession was or had been.[89]

Where witnesses differ as to the proper charge for a physician's services, it has been held that the correct rule is to allow the lowest estimate. Duclos' Succession, 11 La. Ann. 406.

79. Chicago, etc., R. Co. *v.* Friend, 86 Ill. App. 157; Stockbridge *v.* Crooker, 34 Me. 349, 56 Am. Dec. 662.

But the jury may take into consideration the exhausting studies, and the time consumed and expense incurred in acquiring professional knowledge and skill. Stockbridge *v.* Crooker, 34 Me. 349, 56 Am. Dec. 662.

80. See cases cited *infra*, this note.

Where a sum is agreed upon with reference to the length of time the physician estimated the treatment would continue, the amount agreed upon may be recovered, although the treatment, which continued for some weeks thereafter, did not continue for the whole period estimated. Denenholz *v.* Kelly, 97 N. Y. Suppl. 389.

A promise not to charge more than a certain amount is binding. Thomas' Estate, 6 Pa. Co. Ct. 642.

A contract in the alternative is valid and enforceable. Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322, holding that a contract to pay a physician from two hundred dollars to four hundred dollars for the performance of a surgical operation was binding and valid for two hundred dollars and the value of the services, up to four hundred dollars, upon proof of such value.

Money or certificate of skill.— Where a contract for medical treatment called for five thousand dollars in cash or a certificate of plaintiff's skill, it was held that the five thousand dollars was not a penalty for refusal of the certificate, and therefore, no certificate being given, such amount could be recovered as compensation for the services. Burgoon *v.* Johnson, 194 Pa. St. 61, 45 Atl. 65.

81. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

82. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

Different character of services.— Evidence as to the customary charge for services of a different character from those alleged in the complaint is inadmissible. Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

83. Collins *v.* Fowler, 4 Ala. 647; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

84. Paige *v.* Morgan, 28 Vt. 565, holding further that proof of his ordinary charge to other persons in the vicinity, and that his rates were well known and by defendant, is admissible, on the part of a physician, to show the amount which defendant impliedly promised to pay.

85. Kendall *v.* Grey, 2 Hilt (N. Y.) 300.

86. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Lange *v.* Kearney, 4 N. Y. Suppl. 14 [*affirmed* in 127 N. Y. 676, 28 N. E. 255].

The extent of a physician's practice is admissible as tending to show his professional standing. Sills *v.* Cochems, 36 Colo. 524, 85 Pac. 1007.

87. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

88. Heintz *v.* Cooper, (Cal. 1896) 47 Pac. 360; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571; Millener *v.* Driggs, 10 N. Y. St. 237.

89. Marion County *v.* Chambers, 75 Ind. 409; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369.

f. Loss of Other Practice. In determining the compensation of a physician for services rendered in compliance with a patient's request to give them exclusively for a time, to the abandonment of other practice, the probable but not the actual loss in other practice may properly be considered.[90]

g. Financial Condition of Patient. There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services have been rendered, or the financial condition of the person receiving such services, to affect the reasonableness of the physician's charge. In some jurisdictions such evidence is held to be admissible for this purpose.[91] In others the financial condition of the patient may not be considered,[92] except in rebuttal of evidence from the other side attempting to show the custom of a lower standard,[93] or where there is evidence of a recognized usage, which has grown into a custom, to graduate professional charges in reference to the financial condition of the patient, so that it may be considered that the services were rendered and accepted in contemplation of it.[94] Whatever may be the true principle governing this matter in contracts, the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.[95]

3. Opinion Evidence. Physicians may give their opinions as experts as to the value of the services rendered in an action for compensation.[96] But one not a physician is not competent to express his opinion as to the value of such services.[97] Nor does it make any difference that a competent witness has previously, in his hearing, testified as to such value.[98]

D. Actions For Compensation[99] **— 1. Nature and Form of Remedy.** *Indebitatus assumpsit* lies on a physician's bill for medicines, travel, and attendance.[1]

2. Defenses. In a suit for services rendered by a physician to his patient, a showing that plaintiff's services were of no value, and that the treatment used was worthless and could not produce a cure, will in some jurisdictions defeat a recovery.[2] On this same ground a plea of recoupment or counter-claim, springing out of the contract, may be filed;[3] but a plea of set-off, based on a tort in giving defendant an overdose of medicine, has been held improper as matter of defense.[4] Intoxication sufficient to render a physician incompetent to perform his duty is a defense to an action for compensation; but one who, knowing of the intemperate habits of a physician, continues to employ him, cannot set up such defense.[5] The fact that a physician was unable, from illness, to render future

90. Maddin *v.* Head, 1 Lea (Tenn.) 664.

91. Haley's Succession, 50 La. Ann. 840, 24 So. 285; Czarnowski *v.* Zeyer, 35 La. Ann. 796.

92. Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127; Robinson *v.* Campbell, 47 Iowa 625.

93. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

94. Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127; Lange *v.* Kearney, 9 N. Y. St. 793.

95. Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090, holding that the financial condition of the patient may not be considered on the question of amount of compensation of surgeons who were called and rendered services to the patient when unconscious from accident.

96. MacEvitt *v.* Maass, 64 N. Y. App. Div. 382, 72 N. Y. Suppl. 158 [*affirming* 33 Misc. 552, 67 N. Y. Suppl. 817].

This is so, although the witnesses state that they have no knowledge as to what other physicians charge for such services, but base their opinions on what they think the services are worth. Marion County *v.* Chambers, 75 Ind. 409.

97. Mock *v.* Kelly, 3 Ala. 387.

98. Mock *v.* Kelly, 3 Ala. 387.

99. Recovery of judgment for compensation as bar to action for malpractice see Judgments, 23 Cyc. 1205, 1206.

1. Pynchon *v.* Brewster, Quincy (Mass.) 224. But see Glover *v.* Le Testue, Quincy (Mass.) 225 note, holding that *indebitatus assumpsit* will not lie for visits and medicine where there was no contract for a certain price.

Assumpsit generally see Assumpsit, Action of, 4 Cyc. 317.

2. Logan *v.* Field, 75 Mo. App. 594. See also Coyne *v.* Baker, 2 Cal. App. 640, 84 Pac. 269.

In other words evidence that will sustain an action against a physician for malpractice will defeat his recovery in an action for compensation. Logan *v.* Field, 75 Mo. App. 594.

3. McKleroy *v.* Sewell, 73 Ga. 657.

4. McKleroy *v.* Sewell, 73 Ga. 657.

5. McKleroy *v.* Sewell, 73 Ga. 657.

professional services for which a note was given is a complete defense to an action on the note.[6] A statute prohibiting an unauthorized practitioner from recovering his fees may of course be pleaded in defense to an action therefor;[7] but the failure of a physician to register, under an ordinance imposing a penalty for practising in the city without having registered, is immaterial in such an action.[8]

3. Pleading[9] — a. Declaration or Complaint. In an action by a physician for services rendered, it is almost uniformly held that it will be presumed that he has complied with all statutory requirements essential to his authority to practise medicine, and the complaint need not allege such compliance.[10] An allegation of qualification at the time of filing the pleading is not a sufficient allegation of qualification and authority to engage in practice and recover compensation for services performed months before the commencement of the action.[11]

b. Plea or Answer. Want of authority to practice need not be specially pleaded in defense to an action for medical services rendered.[12] But to authorize the defense of recoupment or counter-claim, defendant should either plead the matter specially, or else plead the general issue, and, at the same time that plea is interposed, give notice of the special matter relied on.[13]

4. Issues and Proof. Malpractice, if given in evidence to defeat entirely a physician's claim, is admissible under the general issue without notice; if merely to reduce the claim, then notice should be given.[14] So where the answer in an action for medical services admits the services, but denies the value alleged, defendant may show under such allegation that the treatment by plaintiff was unskilful.[15] Under the common counts for a *quantum meruit*, it is competent for defendant to prove the real value of the services, or that they were of no value.[16] In an action by a physician for services, under an allegation that "plaintiff rendered professional services," he cannot prove services rendered by another physician acting for him.[17]

5. Evidence[18] — a. Presumptions and Burden of Proof — (I) *In General.* In an action by a physician to recover his fees, the burden is on him to prove that he is a physician, that he was employed as such by defendant, that he rendered the services alleged, and the value of such services. He need not prove their value to defendant.[19]

(II) *As to Qualification.* While there is some conflict in the decisions, the

6. Powell *v.* Newell, 59 Minn. 406, 61 N. W. 335.

7. Berry *v.* Scott, 2 Harr. & G. (Md.) 92.

In Maryland the statute prohibiting an unauthorized practitioner from recovering his fees cannot be availed of unless notice is given of intention to dispute the physician's claim. Berry *v.* Scott, 2 Harr. & G. 92.

8. Prietto *v.* Lewis, 11 Mo. App. 601.

9. **Pleading** generally see PLEADING.

The affidavit for arrest in action for medical services, in the Canadian practice, must allege that plaintiff is a duly registered physician. Turner *v.* Connelly, 35 Can. L. J. N. S. 540; Jones *v.* Gress, 25 U. C. Q. B. 594.

10. Lyford *v.* Martin, 79 Minn. 243, 82 N. W. 479; Webster *v.* Lamb, 15 S. D. 292, 89 N. W. 473. *Compare* Bedford Belt R. Co. *v.* McDonald, 12 Ind. App. 620, 40 N. E. 821.

As against objection to evidence.— A complaint in an action for services as physician is sufficient, as against an objection to evidence, although it does not allege that plaintiff received a diploma from some medical college, or was a member of a state or county medical society, as provided by Wis. Rev. St. § 1436. Rider *v.* Ashland County, 87 Wis. 160, 58 N. W. 236.

11. Westbrook *v.* Nelson, 64 Kan. 436, 67 Pac. 884.

12. Matthews *v.* Turner, 2 Stew. & P. (Ala.) 239.

Under the general issue in assumpsit, evidence of want of authority to practise may be given. Matthews *v.* Turner, 2 Stew. & P. (Ala.) 239.

13. McLure *v.* Hart, 19 Ark. 119.

14. See Schopen *v.* Baldwin, 83 Hun (N. Y.) 234, 31 N. Y. Suppl. 581.

15. Schopen *v.* Baldwin, 83 Hun (N. Y.) 234, 31 N. Y. Suppl. 581.

16. Jones *v.* King, 81 Ala. 285, 1 So. 591.

17. Sayles *v.* FitzGerald, 72 Conn. 391, 44 Atl. 733.

18. **Evidence** generally see EVIDENCE, 16 Cyc. 821.

19. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

Medical services cannot be regarded other than as beneficial; they are so in a legal sense. Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 60 Am. Rep. 668. See also *supra*, V, A, 1.

decided weight of authority seems to be in favor of the rule that in a suit for professional services a license or due qualification under the law will be presumed, and the burden of proving want of authority is upon defendant.[20]

(III) *As to Employment.* In an action for fees, the burden is on the physician to prove his employment.[21]

(IV) *As to Necessity of Visits.* In an action by a physician to recover the value of professional services, plaintiff is deemed the best and the proper judge of the necessity of frequent visits; and, in the absence of proof to the contrary, the court will presume that all the professional visits made were deemed necessary, and were properly made.[22]

(V) *As to Skill and Care.* In an action by a physician to recover for professional services the presumption is that such services were performed in an ordinarily skilful manner, and where want of such skill in their performance is alleged as a defense, the burden of proof is on defendant.[23] Furthermore, where want of skill and care is set up in defense to his action for services, the burden of proof is on defendant to show that no want of care on his own part tended to consummate the injury complained of by him.[24]

(VI) *As to Change of Liability For Services.* Where a physician in the beginning renders his services solely on his patient's responsibility, in the absence of a special contract, he has the right to discontinue, and enter into a contract with another to become responsible for his subsequent services, and in such case the burden is on him to show, not only a discontinuance, or a proposal to discontinue, but also an agreement on the part of the third person to become responsible.[25]

20. *Illinois.*—Jo Daviess County *v.* Staples, 108 Ill. App. 539; Good *v.* Lasher, 99 Ill. App. 653. *Compare* North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899.

Iowa.— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689.

Louisiana.— Dickerson *v.* Gordy, 5 Rob. 489; Prevosty *v.* Nichols, 11 Mart. 21.

Montana.— Leggat *v.* Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. N. S. 1238.

Nebraska.— Cather *v.* Damerell, 5 Nebr. (Unoff.) 490, 99 N. W. 35.

New York.— Thompson *v.* Sayre, 1 Den. 175; McPherson *v.* Cheadell, 24 Wend. 15.

South Carolina.— Crane *v.* McLaw, 12 Rich. 129.

South Dakota.— Webster *v.* Lamb, 15 S. D. 292, 89 N. W. 473.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 56.

Contra.— Mays *v.* Williams, 27 Ala. 267; Adams *v.* Stewart, 5 Harr. (Del.) 144; Bower *v.* Smith, 8 Ga. 74; Dow *v.* Haley, 30 N. J. L. 354.

The reason why the license will be presumed, where there is no evidence to the contrary, rests upon the principle that, when an act is required by positive law to be done, the omission of which would be a misdemeanor, the law presumes that it has been done, and therefore the party relying on the omission must make some proof of it, although it be a negative. Chicago *v.* Wood, 24 Ill. App. 40; Leggat *v.* Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. N. S. 1238; Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

Where no restrictions imposed by statute. — In an action to recover for professional services as a veterinarian, plaintiff must prove his qualification in such profession, where the statute imposes no restrictions or qualifications on a person practising such profession. Conkey *v.* Carpenter, 106 Mich. 1, 63 N. W. 990.

An exception to the rule stated in the text has been made where the statute expressly provides that no action shall lie in favor of any person for services as physician unless he shall have been legally licensed prior to the rendering of the services claimed for. In such case it is necessary for plaintiff, in an action for medical services rendered, to prove that he was duly licensed in order to make out a *prima facie* case. Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710.

21. Weldon *v.* Lehigh Valley Traction Co., 27 Pa. Super. Ct. 257, holding that where a physician brings an action against a street railway company to recover for professional services rendered to an injured passenger, and plaintiff avers that he was employed to render such service by the claim agent of defendant, the burden is on plaintiff to show that the claim agent had general authority to employ a physician, or special authority in the particular instance, or that his engagement of plaintiff was ratified by defendant, or that defendant had so held him out as its agent that it was estopped in denying his authority.

22. Todd *v.* Myres, 40 Cal. 355; Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280, 51 L. R. A. 298 [*affirming* 87 Ill. App. 306].

23. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165; Robinson *v.* Campbell, 47 Iowa 625.

24. Baird *v.* Morford, 29 Iowa 531.

25. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922.

(VII) *As to Promise to Compensate.* Medical attendance being valuable, the law presumes a promise to pay,[26] unless it clearly appears that the services rendered were intended to be gratuitous.[27]

b. Admissibility. In an action by a physician for professional services, evidence is admissible to prove or disprove the existence of a special contract;[28] to show want of skill on the part of the physician,[29] and that his treatment was of no benefit;[30] to show the understanding of the parties as to the person liable for the services rendered;[31] and to prove or disprove a promise to pay.[32] Evidence as to the result of the treatment by a physician subsequently employed is inadmissible, as his treatment cannot alter the value of plaintiff's services.[33] Irrelevant and immaterial evidence is of course inadmissible.[34]

c. Weight and Sufficiency. In an action by a physician for his fees, the customary rules as to the weight and sufficiency of the evidence apply.[35] It is not, however, necessary that all the items of a physician's account should be strictly proved;[36] he may recover by establishing the fact of his habit of keeping correct books of account, and that the account sued upon had been correctly copied from his books.[37] But evidence that plaintiff practised in defendant's family, and was seen going and returning from defendant's house, coupled with proof that the

26. *In re* Scott, 1 Redf. Surr. (N. Y.) 234.

27. Ross *v.* Ross, 6 Hun (N. Y.) 182, holding that where it appears that for a portion of the services included in a physician's account no charge was intended to be made, it cannot be presumed that it was intended to charge for the other portions. In this respect one part of the account cannot be legally distinguished from the other.

Affirmative evidence that the services were gratuitously rendered must be produced in order to defeat a claim for compensation. *In re* Scott, 1 Redf. Surr. (N. Y.) 234.

28. Hollywood *v.* Reed, 55 Mich. 308, 21 N. W. 313 (holding that one's financial condition is irrelevant to the question of whether he bargained with a physician on the "no cure no pay" basis); Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322 (holding that in an action to recover for professional services under a special contract, a bill previously presented, not mentioning the contract, is inadmissible to disprove that such a contract was made).

Professional standing.— Evidence that a physician who is suing for services rendered is not of good repute is not competent to disprove his employment. Prietto *v.* Lewis, 11 Mo. App. 601; Jeffries *v.* Harris, 10 N. C. 105.

29. McDonald *v.* Harris, 131 Ala. 359, 31 So. 548, holding that evidence by the patient's wife that plaintiff had stated that he would effect a permanent cure in three months is admissible, but only for the purpose of showing a want of ordinary skill.

Evidence of declarations of plaintiff as to the character of deceased's complaint, and directions as to its treatment, made out of the presence and hearing of deceased, are relevant to show that plaintiff was mistaken in his diagnosis, and prescribed erroneous treatment. McDonald *v.* Harris, 131 Ala. 359, 31 So. 548.

Worthlessness of medicine used.— In an action by a physician to recover an agreed fee under a contract to cure defendant "or no pay," where it is shown that defendant refused to submit to treatment, defendant may prove that the medicine used was worthless, and to do so may compel plaintiff, on cross-examination, to testify as to the ingredients of which it was composed. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

30. Pickler *v.* Caldwell, 86 Minn. 133, 90 N. W. 307.

31. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

32. Bremerman *v.* Hayes, 9 Pa. Super. Ct. 8, holding that evidence that the ethics of the medical profession forbid physicians from charging each other for services, and that it was the custom of physicians in a particular locality not to charge for such service, is admissible to negative an implied promise of one physician to pay for services rendered by another.

33. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880.

34. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922; Molt *v.* Hoover, (Ind. App. 1907) 81 N. E. 221; Kwiecinski *v.* Newman, 137 Mich. 287, 100 N. W. 391.

35. Simmons *v.* Means, 8 Sm. & M. (Miss.) 397.

Evidence held sufficient to support verdict for plaintiff see Brown *v.* Murrell, (Ark. 1891) 16 S. W. 478; Head *v.* American Bridge Co., 88 Minn. 81, 92 N. W. 467; Atchison, etc., R. Co. *v.* Jones, 9 Nebr. 67, 2 N. W. 363; MacEvitt *v.* Maass, 64 N. Y. App. Div. 382, 72 N. Y. Suppl. 158 [*affirming* 33 Misc. 552, 67 N. Y. Suppl. 817]; McBride *v.* Watts, 1 McCord (S. C.) 384.

Verdict held contrary to evidence see McCoy *v.* Fletcher, 89 N. Y. App. Div. 623, 85 N. Y. Suppl. 1022; Abrahams *v.* Koch, 88 N. Y. Suppl. 148; Abram *v.* Krakower, 84 N. Y. Suppl. 529.

36. Hazlip *v.* Leggett, 6 Sm. & M. (Miss.) 326.

37. Hazlip *v.* Leggett, 6 Sm. & M. (Miss.) 326.

items, as charged, were according to customary rules, will not create a legal presumption of indebtedness by defendant.[38] Conceding that a physician must prove his right to practise before he can collect his bill, slight evidence is sufficient as against one who called him.[39] A receipt "in full for medical services" is *prima facie* a satisfaction of the claim against the patient,[40] and the presumption of payment in full thus raised is not overcome by expert testimony that the services were worth more than the account receipted for.[41]

6. QUESTIONS FOR JURY.[42] It is for the jury to determine whether or not a physician has exercised reasonable care and skill in the treatment of his patient.[43]

7. INSTRUCTIONS. The instructions in an action by a physician for his fees must conform to the pleadings and the evidence,[44] and once given need not be repeated.[45] Where malpractice is relied upon as a defense, it is reversible error for the court to refuse to instruct the jury that, if they find as a fact plaintiff was guilty of malpractice, he cannot recover for such services.[46] An instruction is erroneous which confines the jury, in the determination of the value of the services rendered, to a consideration of the benefits resulting to defendant therefrom;[47] but in some jurisdictions an instruction that if the patient received no benefit, and the result was due to the physician's lack of skill or care or failure to exercise the same, he was entitled to no compensation, is proper.[48]

8. REVIEW. A verdict plainly against the evidence will be set aside.[49] Where the evidence is sufficient to raise an inference of malpractice, a verdict for defendant will not be disturbed.[50] Conceding the necessity of proof of due qualification by a physician in an action to recover for his services, the question cannot be raised for the first time in the appellate court.[51]

VI. MEDICAL SOCIETIES.[52]

A medical society, incorporated under the laws of the state, has the power to make by-laws, even in the absence of express authority, to regulate the conduct of its members, and provide for their admission and expulsion.[53] This power, even when conferred by statute, is not an arbitrary, unlimited power. The rules adopted must be reasonable, and adapted to the purposes of the society, and they

38. Simmons *v.* Means, 8 Sm. & M. (Miss.) 397.

39. Chicago, etc., R. Co. *v.* Smith, 21 Ill. App. 202, holding that where plaintiff testified, without objection, that he had practised since 1872, and that he had a certificate, as required by the state board, and it appeared that his name appeared on the register of physicians in the county clerk's office, it is enough as against defendant, who called him, and thereby recognized his right to practise.

40. Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270], holding that a receipt "in full for his medical services," given by a physician to the patient's mother, at whose request the services were rendered, and who was recognized by the physician as acting in the patient's behalf in making payment, is *prima facie* a satisfaction of the claim against the patient, although the latter did not authorize the payment.

41. Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270].

42. Value of services as question for jury see *supra*, V, C, 1, a.

43. Logan *v.* Field, 75 Mo. App. 594.

44. Hinkle *v.* Burt, 94 Ga. 506, 19 S. E. 828, holding that where defense is made on the theory that the services were worthless, there is no error in not instructing the jury on the subject of partial failure of consideration.

45. McKnight *v.* Detroit, etc., R. Co., 135 Mich. 307, 97 N. W. 772.

46. Abbott *v.* Mayfield, 8 Kan. App. 387, 56 Pac. 327.

47. Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

48. Logan *v.* Field, 75 Mo. App. 594.

49. Wheaton *v.* Johnson, 55 Ill. App. 53, holding that where, in an action for physician's services, the rendition of the services and the value thereof were not disputed, the only question raised being whether they were performed under an express contract to pay a certain sum therefor, a verdict for defendant will be reversed on appeal.

50. Brinkman *v.* Kursheedt, 84 N. Y. Suppl. 575.

51. Durand *v.* Grimes, 18 Ga. 693; Hudson *v.* Madison, 75 Ill. App. 442.

52. Medical college: Appointment of hospital physician by see HOSPITALS, 21 Cyc. 1108 note 22. Cannot enjoin board of health see INJUNCTIONS, 22 Cyc. 881 note 73.

53. Bryant *v.* District of Columbia Dental Soc., 26 App. Cas. (D. C.) 461.

An initiation fee may be demanded from physicians and surgeons becoming members

cannot be made contrary to or inconsistent with the laws of the state.[54] Furthermore, the code of medical ethics adopted is obligatory on members alone, and its non-observance previous to membership furnishes no legal cause either for exclusion or expulsion.[55] A medical society, being a body corporate, has the power of removal or expulsion of its members as an incident to its constitution; but it cannot be exercised without a previous conviction or indictment in a criminal court for the offense charged, except where the offense relates merely to the official or corporate character of the accused, and amounts to a breach of the conditions expressly or tacitly annexed to his franchise or office.[56] Whether or not a member has violated a by-law providing for expulsion for "unprofessional conduct" is a question to be determined by the corporation; and the courts cannot sit as appellate tribunals to review the judgments of the corporate authorities, unless their authority be transcended, or fraud or bad faith be shown.[57] A member of the medical society of a county who is expelled cannot resort to a court of law for relief until he has appealed to the state medical society, where such a method of procedure is provided for.[58]

PHYSIOLOGY. The science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, their properties, etc.[1]

PIANOS. See, generally, EXEMPTIONS.

PIAZZA. An entrance of a dwelling-house.[2] (See ENTRY.)

PICCAGE. In English law, a term applied where the liberty of erecting a stall in a market is secured and the soil is broken in erecting the same.[3]

PICKED. Synonymous with selected.[4]

PICKER. A machine used in connection with the carpet industry.[5]

PICKET. See LABOR UNIONS.

PICKETING. See LABOR UNIONS.

PICKPOCKET. A thief, one who in a crowd or in other places steals from the pockets or person of another without putting him in fear.[6] (See, generally, LARCENY; ROBBERY.)

of county medical societies. People *v.* New York Medical Soc., 3 Wend. (N. Y.) 426.

54. People *v.* Erie County Medical Soc., 24 Barb. (N. Y.) 570, holding that a regulation fixing a tariff of fees for medical services was void, as being unreasonable and against public policy.

55. People *v.* Erie County Medical Soc., 32 N. Y. 187 [*affirming* 25 How. Pr. 333].

56. Fawcett *v.* Charles, 13 Wend. (N. Y.) 473, holding that a county medical society cannot expel or remove a member because he did not possess the requisite qualifications and obtained his admission by false pretenses.

57. Bryant *v.* District of Columbia Dental Soc., 26 App. Cas. (D. C.) 461 (holding that the action of the society in expelling a member will not be interfered with by the court, where it appears that the authorized procedure has been duly followed; and it is not essential that the evidence on which the charges are based shall have been submitted to the whole society); Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185, 15 Am. Rep. 24 (holding that where the offense with which a member is charged is against his duty as an incorporator, it can only be tried by the corporation, and there can be no interference by injunction on a bill filed against the society).

58. People *v.* Dutchess County Medical Soc., 84 Hun (N. Y.) 448, 32 N. Y. Suppl. 415.

1. *In re* Hunter, 60 N. C. 372.

2. Henry *v.* State, 39 Ala. 679, 681, where it is said: "A piazza is not a house, and cannot be a dwelling-house. It may be attached to the house, and may, in some sense, be a part of the house; but it is not, of itself, a house. To be in such a piazza, is not to be in a house."

3. Draper *v.* Sperring, 10 C. B. N. S. 112, 123, 30 L. J. M. C. 225, 4 L. T. Rep. N. S. 365, 9 Wkly. Rep. 656, 100 E. C. L. 112.

4. Labbe *v.* Corbett, 69 Tex. 503, 507, 6 S. W. 808.

5. Creachen *v.* Bromley Bros.' Carpet Co., 209 Pa. St. 6, 7, 57 Atl. 1101, where the machine is described as "composed of a rotative cylinder with a number of projections — sharp steel projections — that come in contact with wool that is fed between two rollers, and that take the stock of wool from the apron. And while the rollers are holding it these flying projections of steel tear it apart and cause it to become disintegrated, so that it follows in the course of the manufacture.

6. Bouvier L. Dict. [*quoted* in State *v.* Dunn, 66 Kan. 483, 484, 71 Pac. 811].

PICNIC. A word which implies in its usual and broad signification a mere pleasure trip.[7]

PICO. A gambling game similar to keno.[8] (See KENO BANK; and, generally, GAMING.)

PICTURE.[9] One of the ways of representing a person or thing;[10] that which is painted, a likeness drawn in colors — hence any graphic representation.[11] (Picture: As Literary Property, see LITERARY PROPERTY. Entitled to Copyright, see COPYRIGHT. Evidence, see EVIDENCE. Obscene, see OBSCENITY. See also NEGATIVE; PAINTING; PHOTOGRAPH; PORTRAIT.)

PIECE. A portion or fragment of some larger quantity.[12] (See FRACTION; HALF; MOIETY; PART; PORTION.)

PIER. See WHARVES.

PIG. See ANIMALS.

PIGNORATIO. In the civil law, the contract of pledge; and also the obligation of such contract.[13] (See, generally, PAWNBROKERS; PLEDGES.)

PIGNUS. In Roman law, a term applied when goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor.[14] (See, generally, PAWNBROKERS; PLEDGES.)

PIKE POLE. An instrument with a handle, about five or six feet long, containing a steel point at the end, which is used, among other purposes, in undermining gravel banks.[15]

PILE. In electricity, a term synonymous with battery.[16]

PILE-DRIVER. A machine for driving piles by raising, by means of power applied to the machinery, a heavy weight and dropping it upon the pile.[17]

PILFER. A word which, in its plain and popular sense, means to steal.[18] (See, generally, EMBEZZLEMENT; LARCENY.)

PILLAGE. The plundering, ravaging, or carrying off of goods, commodities, or merchandize by open force or violence.[19] (See, generally, LARCENY; ROBBERY.)

PILOT. A term in railway usage, applied to a person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road or portions of the road, over which the train is to be moved.[20] (Pilot: In Maritime Parlance, see PILOTS.)

"**Picking her pocket,**" a term which is uncertain or equivocal, since pockets are picked by cutting them off and removing them, by cutting them open so as to expose their contents, and by thrusting the hands into them. State *v.* Wilson, 30 Conn. 500, 504.

7. Dugan *v.* State, 125 Ind. 130, 133, 25 N. E. 171, 9 L. R. A. 321.

8. Euper *v.* State, 35 Ark. 629, 631.

9. **Derived from** Latin "*pingere*," "*pictum*," to paint, and is synonymous with "*pictura*." Webster Dict. [*quoted* in Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537, 544, 2 Off. Gaz. 616].

10. Atkinson *v.* Doherty, 121 Mich. 372, 381, 80 N. W. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219.

11. Webster Dict. [*quoted* in Parton *v.* Prang, 18 Fed. Cas. 10,784, 3 Cliff. 537, 2 Off. Gaz. 619], where the term is distinguished from "manuscripts."

A "**negative**" is a picture. People *v.* Ketchum, 103 Mich. 443, 445, 61 N. W. 776, 50 Am. St. Rep. 383, 27 L. R. A. 448.

12. Josh *v.* Josh, 5 C. B. N. S. 454, 466, 5 Jur. N. S. 225, 28 L. J. C. P. 100, 7 Wkly. Rep. 122, 94 E. C. L. 454.

"**Piece**" **and** "**parcel**" see State *v.* Baldwin University, 97 Tenn. 358, 362, 37 S. W. 1.

"**Piece of land**" is a small portion of land, as separate and distinguished from other land. Josh *v.* Josh, 5 C. B. N. S. 454, 466, 5 Jur. N. S. 225, 28 L. J. C. P. 100, 7 Wkly. Rep. 122, 94 E. C. L. 454. See also Gleeson *v.* Martin White Min. Co., 13 Nev. 442, 458.

13. Black L. Dict.

14. Whitney *v.* Peay, 24 Ark. 22, 27 [*citing* Story Bailm. §§ 286, 290].

Distinguished from "hypotheca" in The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73.

15. Allen *v.* Logan City, 10 Utah 279, 284, 37 Pac. 496.

16. Leclanche Battery Co. *v.* Western Electric Co., 23 Fed. 276, 277.

17. New York Nat. Acc. Soc. *v.* Taylor, 42 Ill. App. 97, 102.

18. Becket *v.* Sterrett, 4 Blatchf. (Ind.) 499, 500.

19. American Ins. Co. *v.* Bryan, 26 Wend. (N. Y.) 563, 573, 37 Am. Dec. 278 [*citing* 23 Merlin Rep. de Jur. art. "Pillage"], where it is said: "This term . . . imports latrocination, or robbery by force or violence; and not a simple larceny merely."

20. Wilson *v.* Southern R. Co., 73 S. C. 481, 499, 53 S. E. 968.

PILOTS

By Frank W. Jones

I. **Definition**, 1608

II. **Power to Regulate and Statutory Provisions**, 1609
- A. *In General*, 1609
- B. *Conflict Between Federal and State Laws*, 1609
- C. *Conflict Between Laws of Different States*, 1610

III. **Pilot Commissioners**, 1611

IV. **Licenses**, 1612
- A. *In General*, 1612
- B. *Revocation or Suspension*, 1612
- C. *License to Pilot in Waters of Another State*, 1613

V. **Bond**, 1613

VI. **Obligation to Take Pilot**, 1614
- A. *In General*, 1614
- B. *Vessels Exempt*, 1614

VII. **Tender of Services**, 1615
- A. *Time and Place*, 1615
- B. *Manner and Sufficiency*, 1616
  1. *In General*, 1616
  2. *Display of Signals*, 1616
  3. *Exhibition of License or Warrant*, 1616
  4. *Tender to or in Presence of Master*, 1616
  5. *Notice of Effect of Refusal to Accept*, 1617

VIII. **Compensation**, 1617
- A. *In General*, 1617
- B. *On Refusal to Take Pilot*, 1617
  1. *In General*, 1617
  2. *Acceptance of Another Pilot*, 1617
  3. *On Outward-Bound Vessel*, 1618
- C. *Persons Liable*, 1618
- D. *Amount*, 1618
  1. *In Absence of Statutory Provisions*, 1618
  2. *Fixed by Statute*, 1618
  3. *Extra Allowance*, 1619
- E. *Actions*, 1619
  1. *Jurisdiction*, 1619
  2. *Nature of Action*, 1619
  3. *Defenses*, 1619
  4. *Parties*, 1619
  5. *Pleading*, 1619
  6. *Evidence*, 1620
     a. *Burden of Proof*, 1620
     b. *Admissibility*, 1620
     c. *Weight and Sufficiency*, 1620
- F. *Lien*, 1620
  1. *In General*, 1620
  2. *Delay in Enforcement*, 1621
- G. *Recovery of Fees Illegally Collected*, 1621

IX. AUTHORITY AND FUNCTIONS, 1621
X. DEGREE OF CARE AND SKILL REQUIRED, 1622
XI. LIABILITY FOR NEGLIGENCE, 1622
XII. PENALTIES FOR VIOLATION OF REGULATIONS, 1623
XIII. OFFENSES, 1623
XIV. PILOTS' ASSOCIATIONS, 1623
A. *Legality*, 1623
B. *Liability For Negligence of Member*, 1624

CROSS-REFERENCES

For Matters Relating to:
Admiralty Jurisdiction, see ADMIRALTY.
Collision, see COLLISION.
Commerce, see COMMERCE.
Maritime Lien, see MARITIME LIENS.
Navigation, see COLLISION; SHIPPING.
Pilot:
As Witness, see EVIDENCE; WITNESSES.
Collision While:
Pilot in Charge, see COLLISION.
Taking or Discharging, see COLLISION.
Employment or Failure to Employ Affecting Insurance, see MARINE INSURANCE.
Inspector's Rules Concerning, see COLLISION.
Regulation of Commerce, see COMMERCE.
Seaman, see SEAMEN.
Shipping, see SHIPPING.

I. DEFINITION.

The term "pilot" includes two classes of persons: (1) Those whose duty it is to guide vessels into or out of ports; and (2) those intrusted with the navigation of vessels on the high seas.[1]

1. Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Abbott Shipp. 195.

A pilot is also defined as "one who steers a ship or vessel, a guide." Dean *v.* Healy, 66 Ga. 503, 504 [*quoted* in Adams *v.* McCaughey, 21 R. I. 341, 345, 43 Atl. 646].

Twofold meaning of term.—A "pilot" is defined to be: (1) An officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and (2) an officer authorized by law, who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. State *v.* Turner, 34 Oreg. 173, 178, 55 Pac. 92, 56 Pac. 645; Chapman *v.* Jackson, 9 Rich. (S. C.) 209, 212; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131, 147 [*citing* Abbott Shipp. 148]; Bouvier L. Dict. [*quoted* in People *v.* Francisco, 10 Abb. Pr. (N. Y.) 30, 32].

As a public officer.—"A pilot . . . in no sense exercises or discharges the functions of a public office. No portion of the sovereignty of the country attaches to his position or duty. It is neither legislative, executive nor judicial, and does not therefore fall legitimately within the scope of a quo warranto information as to public officers." Atty.-Gen. *v.* McCaughey, 21 R. I. 341, 345, 43 Atl. 646 [*citing* Dean *v.* Healy, 66 Ga. 503]. A pilot is not an officer, within the meaning of the constitution and statutes of Florida, but he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the state. The privileges and powers which he has being of a public nature, resulting from legislative grant of franchise, if he exercise such franchise without the qualifications described by statute, an information in the nature of a quo warranto may be brought by the attorney-general. State *v.* Jones, 16 Fla. 306, 310. Pilots of the harbor of San Francisco are public officers. They are appointed by virtue of an act of the legislature for a fixed term to their employments, have definite duties prescribed, fixed rules of compensation, and are required to give bond, and are entitled to do all the business of pilots for the harbor of San

II. POWER TO REGULATE AND STATUTORY PROVISIONS.

A. In General. The power to regulate commerce conferred on congress by the United States constitution [2] does not exclude the exercise of authority by the states to regulate pilots. It is exclusive only when exercised.[3] And while congress in the exercise of its power to regulate commerce between states and foreign nations can legislate upon the subject of pilotage as well in ports and harbors as on the high seas, yet by so doing it does not repeal, but simply suspends, the state law upon the subject in conflict therewith; and when the act producing this result is repealed, or so modified as to permit the operation of the state law, it becomes again valid and in force.[4]

B. Conflict Between Federal and State Laws. Where, however, a state statute is in conflict with the constitution and laws of the United States, it is null and void;[5] and where a United States statute is enacted in relation to pilotage, it supersedes all state laws covering the same, so far as it goes.[6] The United

Francisco. People *v.* Woodbury, 14 Cal. 43, 46.

A master of a towboat engaged in the *bona fide* towage service is not a pilot. State *v.* Turner, 34 Oreg. 173, 175, 55 Pac. 92, 56 Pac. 645.

Authority and functions of pilot see *infra*, IX.

Pilotage is compensation for services performed by a pilot. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 212, 5 S. Ct. 826, 29 L. ed. 158; Southern Steamship Co. *v.* New Orleans Port Wardens, 6 Wall. (U. S.) 31, 18 L. ed. 749.

"Pilot's cruising ground" and "pilot's water or pilotage ground" are not synonymous. "By pilot's cruising ground, is meant that distance out in the sea along a certain extent of coast that pilots cruise for vessels bound to ports, inlets, harbors, rivers or bays into which a pilot may take them by his commission. By pilot's water or pilotage ground, is meant the access to a bay, inlet, river, harbor or port, beginning at the exterior point, where a pilot may take leave of an outward-bound vessel, and extending to the places fixed upon by law or usage for the anchorage or mooring of inward-bound vessels." Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466, 468 [*quoted* in The Whistler, 13 Fed. 295, 298, 8 Sawy. 232].

"Pilot vessel, when engaged on her station on pilotage duty" within Act Cong., March 3, 1885 (23 U. S. St. at L. 439), providing for the maintenance and protection of a pilot vessel while engaged on her station or pilotage duty, includes pilot boats when at anchor, and also when cruising, looking, or waiting for ships wanting pilots, although hundreds of miles off from the port to which they belong. The Haverton, 31 Fed. 563, 568.

2. U. S. Const. art. 1, § 8.

3. *Florida.*— Cribb *v.* State, 9 Fla. 409.

Georgia.— Low *v.* Pilotage Com'rs, R. M. Charlt. 302.

Kentucky.— Dryden *v.* Com., 16 B. Mon. 598.

New York.—Henderson *v.* Spofford, 59 N. Y. 131 [*affirming* 3 Daly 361, 10 Abb. Pr. N. S. 140]; Pilot Com'rs *v.* Pacific Mail Steamship Co., 52 N. Y. 609; Cisco *v.* Roberts, 36 N. Y. 292 [*reversing* 6 Bosw. 494].

United States.—Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. 450, 17 L. ed. 805 (holding that the act of the state of California of May 20, 1861, entitled, "An act to establish pilots and pilot regulations for the port of San Francisco," is not in conflict with the act of congress, of Aug. 30, 1852, to amend an act, entitled, "An act to provide for the greater security than then existed for the lives of passengers on board of vessels propelled in whole or part by steam"); Cooley *v.* Philadelphia, 12 How. 299, 13 L. ed. 996; Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. ed. 23; The Clymene, 9 Fed. 164; The Panama, 18 Fed. Cas. No. 10,702, Deady 27, 1 Oreg. 418; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131. See also The Nevada, 18 Fed. Cas. No. 10,130, 7 Ben. 386, holding that the pilot laws of the state have sufficient effect beyond the boundaries of the state to fix the compensation of pilots.

See 39 Cent. Dig. tit. "Pilots," §§ 1, 2.

Compare State *v.* Leech, 119 La. 522, 44 So. 285.

4. Henderson *v.* Spofford, 59 N. Y. 131; and cases cited *supra*, note 3.

5. Cribb *v.* State, 9 Fla. 409 (holding that the act of 1859, section 3, prohibiting any person from acting as pilot in certain waters between Florida and Georgia, who has not a license from the authorities of Florida, is unconstitutional, being in conflict with the act of congress of March 2, 1837, U. S. Rev. St. (1878) § 4236 [U. S. Comp. St. (1901) p. 2903], which provides that a master of a vessel may employ a person to act as pilot in waters dividing two states who is licensed by either state); Spraigue *v.* Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. ed. 115 (holding likewise that where by rejecting as in conflict with the constitution and laws of the United States certain exceptions in the state statute, it is made to enact what confessedly the legislation never meant, the entire statute must be held as annulled); The South Cambria, 27 Fed. 525; The Panama, 18 Fed. Cas. No. 10,702, Deady 27, 1 Oreg. 418.

6. Dryden *v.* Com., 16 B. Mon. (Ky.) 598

States Revised Statutes[7] prohibit states from discriminating in the rates of pilotage or half-pilotage between vessels sailing between ports of the same state and vessels sailing between ports of different states.[8] However, a state law requiring masters of vessels bound to ports in that state to accept the services of the first licensed pilot offering is not unconstitutional.[9] No inherent rights guaranteed by the federal constitution are infringed by state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed;[10] and only the discriminatory features of state pilotage laws are abrogated by the provision of the United States Revised Statutes[11] forbidding such discrimination, and annulling and abrogating all existing regulations or provisions making any such discrimination.[12]

C. Conflict Between Laws of Different States. A state statute which prohibits any one not licensed under authority of the state from piloting a vessel to a port within the state is void so far as it interferes with the employment on public waters of pilots licensed by other states bordering thereon.[13] However, a

(holding that the act of congress of Aug. 30, 1852, for appointing inspectors in certain districts, and authorizing them to license engineers and pilots, takes the place of any state law, and a license protects the holder against penalties inflicted by a state law for not obtaining a license under its provisions); The Alameda *v.* Neal, 32 Fed. 331, 12 Sawy. 479 [*affirming* 31 Fed. 366, 12 Sawy. 429]; The Panama, 18 Fed. Cas. No. 10,702, Deady 27, 1 Oreg. 418. And see The George S. Wright, 10 Fed. Cas. No. 5,340, Deady 591, holding that the act of Feb. 25, 1867, 14 U. S. St. at L. 411), which requires that a sea-going steam vessel, subject to the navigation laws of the United States, when navigating any of the waters thereof, shall be in charge of a pilot licensed by the inspectors of steam vessels, is cumulative, and does not annul or supersede a state law requiring that such pilot, when piloting such vessel within the limits of the state, should always be licensed by the pilot commissioners of the state. See, however, Sturgis *v.* Spofford, 45 N. Y. 446, holding that an action to recover a penalty for violating chapter 467, section 29, regulating pilotage in the port of New York, is not barred by the act of congress of August, 1866, regulating pilotage in harbors as well as at sea, where the act for which the penalty is sought was done before the passage of the act of congress, although the action therefor was brought afterward.

7. U. S. Rev. St. (1878) § 4237 [U. S. Comp. St. (1901) p. 2903].

8. Huus *v.* New York, etc., Steamship Co., 182 U. S. 392, 21 S. Ct. 827, 45 L. ed. 1146 (holding likewise that a steamship engaged in trading between the ports of Porto Rico and the port of New York is a coastwise seagoing vessel, within the meaning of U. S. Rev. St. (1878) § 4401 [U. S. Comp. St. (1901) p. 3016], and when under the control and direction of a pilot licensed under the federal statute, it is exempt by U. S. Rev. St. (1878) § 4444 [U. S. Comp. St. (1901) p. 3037] from the provisions of state pilotage laws); Freeman *v.* The Undaunted, 37 Fed. 662, 13 Sawy. 616; The Alameda *v.* Neal, 32 Fed. 331, 12 Sawy. 479 [*affirming* 31 Fed. 366, 12 Sawy. 429]; Williams *v.* The Lizzie Henderson, 29 Fed. Cas. No. 17,726*a* (holding, however, that the Florida act of March 7, 1879, exempting vessels owned wholly in the state from the payment of any pilotage under the existing state laws, unless a pilot is actually employed, is not in contravention of such statute).

9. Thompson *v.* Spraigue, 69 Ga. 409, 47 Am. Rep. 760. See also Chapman *v.* Jackson, 9 Rich. (S. C.) 209, holding that the laws of different states relative to port and harbor pilots are not revoked by the act of congress of 1852, which requires certain steam vessels to carry a pilot for the voyage. On leaving or entering ports therefore such vessels must take a pilot of the port.

10. Olsen *v.* Smith, 195 U. S. 332, 25 S. Ct. 52, 49 L. ed. 224 [*affirming* (Tex. Civ. App. 1902) 68 S. W. 320].

11. U. S. Rev. St. (1878) § 4237 [U. S. Comp. St. (1901) p. 2903].

12. Olsen *v.* Smith, 195 U. S. 332, 25 S. Ct. 52, 49 L. ed. 224 [*affirming* (Tex. Civ. App. 1902) 68 S. W. 320], holding that the exemption of coastwise steam vessels of the United States from the operation of state pilotage laws, created by U. S. Rev. St. (1878) § 4444 [U. S. Comp. St. (1901) p. 3037], interferes with such laws only so far as they relate to these vessels, as the section expressly declares that nothing in this title shall be construed to annul or affect any regulation established by the laws of any state, requiring all vessels leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state.

13. Dryden *v.* Com., 16 B. Mon. (Ky.) 598; Neil *v.* Wilson, 14 Oreg. 410, 12 Pac. 810; The Alcalde, 30 Fed. 133; The Abercorn, 28 Fed. 384 [*affirming* 26 Fed. 877]; The South Cambria, 27 Fed. 525 (holding that, although the Delaware bay and river do not constitute a boundary between the states of Delaware and Pennsylvania, these states being coterminous, and bordering on the same navigable waters, come within the spirit and meaning of the act of congress, providing that it shall

pilot of one state, although authorized by act of congress to pilot vessels into the ports of another state, cannot recover the pilotage fees allowed by the laws of the latter state on the refusal of a vessel to employ him.[14] A state can establish a compulsory system of pilotage as to vessels coming from the sea into inland ports, and as to vessels going from her inland ports to the sea, without establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively, and no discrimination in state pilotage laws forbidden by the United States statutes is thereby made.[15]

III. PILOT COMMISSIONERS.[16]

By legislative enactment in many states, boards of pilot commissioners have been created who are empowered to make rules for the government of pilots and pilot boats, and they are subject to such proper and legal rules as the boards may see fit to make;[17] and state laws conferring upon local boards power to fix rates of pilotage are not void as granting powers which may not be delegated;[18] and they are enacted by a power originally within the states, and not by that conferred by the United States.[19] They need not be general and uniform throughout the state, but may be regulated according to local needs.[20] However, the public has no interest in the government of pilots or their boats, except so far as it is conducive to the public good, and any rule or set of rules which shall have any other purpose than this, even though they may be made for the benefit of

and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding); The Alzena, 14 Fed. 174. See also The Charles A. Sparks, 16 Fed. 480, holding that where by a statute of one state vessels bound to a port of that state were free from the obligation of compulsory pilotage when not spoken outside of a certain line, such a statute has no application to pilot services tendered by a pilot licensed under the laws of another state situate on the same river. But see The Glenearne, 7 Fed. 604, 7 Sawy. 200.

14. Brown *v.* Elwell, 60 N. Y. 249; Hopkins *v.* Wyckoff, 1 Daly (N. Y.) 176. See, however, Virden *v.* The Brig Charles A. Sparks, 13 Wkly. Notes Cas. (Pa.) 300 (holding that a vessel bound to Philadelphia from foreign ports, exempt by Pennsylvania law from the obligation to take a pilot if one offers inside the capes, can be compelled by the laws of Delaware to take one, or be liable for pilotage in case of refusal at the rate fixed by Delaware law); The Alzena, 13 Wkly. Notes Cas. (Pa.) 63.

15. Thompson *v.* Darden, 198 U. S. 310, 25 S. Ct. 660, 49 L. ed. 1064 [*affirming* 101 Va. 635, 44 S. E. 755].

16. Liability for illegal pilotage fees collected see *infra*, VIII, G.

Appointment of secretary and his duties see *infra*, note 23.

17. *California.*— People *v.* Freese, 83 Cal. 453, 23 Pac. 378, 76 Cal. 633, 18 Pac. 812; Downer *v.* Lent, 6 Cal. 94, 65 Am. Dec. 489, holding likewise that the board of pilot commissioners is a quasi-judicial body intrusted with duties, the performance of which requires the exercise of judgment and discretion; and its members are not civilly answerable for their acts as such.

Delaware.— State *v.* Virden, 2 Pennew. 16, 43 Atl. 525 (holding, however, that Laws, c. 49, § 1, giving the board of pilot commissioners power to license pilots and make rules for their government, and section 3, requiring pilots' apprentices to serve an apprenticeship of six years, and conduct a square or brig-rigged vessel a stated number of times up and down the Delaware river and bay, as a condition precedent to the right to a license, does not empower the pilot commissioners to require pilots to first obtain the permission of the board to take apprentices, and to limit the number of apprentices to two per pilot); Morris *v.* State Pilot Com'rs, 7 Del. Ch. 136, 30 Atl. 667.

Massachusetts.— Opinion of Justices, 154 Mass. 603, 31 N. E. 634; Hunt *v.* Mickey, 12 Metc. 346; Heridia *v.* Ayres, 12 Pick. 334.

New York.— Sturgis *v.* Spofford, 45 N. Y. 446 [*affirming* 52 Barb. 436].

Texas.—Petterson *v.* Galveston Pilot Com'rs, 24 Tex. Civ. App. 33, 57 S. W. 1002.

United States.— Nash *v.* The Thebes, 17 Fed. Cas. No. 10,022.

See 39 Cent. Dig. tit. "Pilots," § 4.

Commissioner cannot delegate his power to another. The California, 4 Fed. Cas. No. 2,313, 1 Sawy. 596.

18. The Chase, 14 Fed. 854.

19. The Chase, 14 Fed. 854.

20. The Chase, 14 Fed. 854, holding likewise that the power to fix and determine rates also authorizes the determining what proportion of the regular rates may be demanded when services are tendered and not accepted. See also People *v.* Pilot Com'rs, 23 Hun (N. Y.) 603, holding that the board of commissioners of pilots created by Laws (1854), c. 196, § 1, may prohibit the use of steam vessels for purposes of pilotage.

some of the pilots themselves, unless expressly authorized by the provisions of the act creating the commission, are without its scope and void.[21]

IV. LICENSES.

A. In General. Pilot commissioners are usually empowered to make such rules and regulations in regard to examinations for, and the issuance of, pilots' licenses as they may see fit, provided they do not contravene some positive provision of statute, either state or federal.[22] The exhibition by a person of a warrant or license to act as pilot raises the presumption that he has the right to act as such,[23] and entitles him upon showing it to be recognized as a licensed pilot, and requires the ship to receive him as *prima facie* a pilot.[24] Since the commissioners have only the powers conferred by the act, they must appoint pilots from the classes of persons named therein.[25]

B. Revocation or Suspension. The pilot commissioners may revoke or

21. Morris *v.* State Pilot Com'rs, 7 Del. Ch. 136, 30 Atl. 667 (holding that power to make rules for the government of pilots does not authorize the commissioners to order pilots who own and operate their boat, and have the same fully manned, to allow another pilot to cruise on the boat); Wright *v.* St. Simons Pilotage Com'rs, 69 Ga. 247 (holding that the pilotage commissioners of a port cannot contract with the licensed pilots to restrict their number to ten for a period of three years, without regard to what may be necessary for the business of the port). See also The California, 4 Fed. Cas. No. 2,313, 1 Sawy. 596, holding that the power conferred upon a pilot commissioner by the Oregon Pilot Act is a personal trust, to be exercised for the public good, and cannot be delegated to another; and therefore one of such commissioners cannot authorize another to sign his name to a pilot's license, although it has been agreed or concluded between such commissioners that such license may be granted.

22. Healey *v.* Dean, 68 Ga. 514; Dexter *v.* State Pilotage Com'rs, 70 N. J. L. 429, 57 Atl. 265; Cisco *v.* Roberts, 6 Bosw. (N. Y.) 494; Olsen *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. 320; Joslyn *v.* Nickerson, 1 Fed. 133. See also Peterson *v.* Smith, 30 Tex. Civ. App. 139, 69 S. W. 542, holding that the commissioned branch pilots of the port of Galveston may sue jointly to restrain a pilot who has not been created a branch pilot, from acting as such. *Compare* State *v.* Jones, 16 Fla. 306.

Renewal of license.— Hill Annot. Laws Oreg. § 3904, provides for the granting of licenses to pilots by the pilot commissioners, on the pilot grounds of the Columbia and Willamette rivers, and, as amended by Laws (1893), p. 11, authorizes the board to limit the number of such pilots. Section 3907 provides that licenses granted shall be annually renewed unless for good cause, to be determined by the board, in which case the holder of a license shall be notified ten days before the expiration of his license, and shall be entitled to a hearing, and it was held that, without such notice, the board has no power to withhold a renewal on the ground that it has determined to reduce the number of pilots. Patterson *v.* Pilot Com'rs, 30 Oreg. 301, 47 Pac. 786.

23. Edwards *v.* The Panama, 18 Fed. Cas. No. 10,702. Deady 27, 1 Oreg. 418; The California, 4 Fed. Cas. No. 2,313, 1 Sawy. 596, holding that a pilot license signed by all three of the commissioners, under the Oregon Pilot Act, is *prima facie* evidence of the facts stated in it concerning the examination and licensing of the pilot to whom it purports to be granted; but, if only signed by two of such commissioners, the case is otherwise, unless it also appears from the minutes of the board that the matter was acted upon and the license granted at a meeting of the commissioners when all three were present, or such license contains a direct recital or averment of such meeting and action in reference to such license. See also Joslyn *v.* Nickerson, 1 Fed. 133, holding that a document certifying that the person named therein is qualified to act as master and pilot, and that "he is hereby licensed to act as such master," the phrase quoted being printed, and there being no room after it for the insertion of the words, "and pilot," is a sufficient license as pilot.

Parol proof of licensing.— Section 2 of the Oregon Pilot Act, as amended by Sess. Laws (1868), p. 28, which provides that the pilot commissioners "may appoint a secretary" and prescribes his duties, is mandatory in its nature; and parol evidence is not admissible to prove the meeting and action of such commissioners concerning the licensing of a pilot, when the act requires a record of the same to be made by the secretary. The California, 4 Fed. Cas. No. 2,313, 1 Sawy. 596.

Validity of master pilot's certificate see The Bristol City, [1902] P. 10, 71 L. J. P. D. & Adm. 5, 85 L. T. Rep. N. S. 694, 18 T. L. R. 101, 50 Wkly. Rep. 383; The Earl of Auckland, 30 L. J. Adm. 121, Lush. 164, 387.

24. See cases cited *supra*, note 23; and *infra*, VII, B, 3.

25. People *v.* Woodbury, 14 Cal. 43, holding that the pilot commissioners have discretion to appoint from among persons possessing certain qualifications as to length of service, etc., prescribed by the statute, but no power to appoint one who has not those qualifications.

suspend the license of a pilot for incapacity, negligence, or failure to comply with the regulations of the board.[26] However, a pilot cannot be fined, suspended, or his license revoked, without due notice and opportunity for hearing.[27] Nor can a pilot's license be revoked for an alleged violation of rules occurring previous to the date of the license.[28] The commissioners of pilotage, under the various statutes as to the trial and punishment of pilots, are a court exercising punitive powers, fines, and suspension, and removal from office.[29] However, the board in their proceedings are not bound by the strict and technical rules which govern courts of justice.[30] A writ of certiorari will lie to review the findings of a board of pilot commissioners.[31]

C. License to Pilot in Waters of Another State. One state is not authorized by the act of congress of March 2, 1837,[32] to issue a license for persons to engage in piloting in waters lying wholly outside of the state and wholly inside the waters of another state.[33]

V. BOND.

Where a pilot has failed to comply with the regulations of the board requiring pilots to give bond in a stipulated amount he cannot recover compulsory pilotage fees.[34]

26. Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302; Schellenger *v.* Philadelphia, 19 Phila. (Pa.) 471; Virden's Appeal, 13 Phila. (Pa.) 151, 6 Wkly. Notes Cas. 560 (holding that the board of port wardens of Philadelphia may revoke the license of a pilot deserting his vessel and compel him to refund the compensation received; and this, although the offense was committed in Delaware waters); State *v.* Pilotage Com'rs, 62 S. C. 511, 40 S. E. 959 (holding likewise that after revocation of his license the pilot is not entitled to pilotage for boarding a vessel and bringing her into port); State *v.* Courtenay, 23 S. C. 180; State *v.* Beaufort Pilotage Com'rs, 23 S. C. 175; Reg. *v.* Trinity House, 4 Wkly. Rep. 124.

Refusal to renew certificate.—A pilotage authority has an absolute discretion under the Merchants' Shipping Act of 1854, section 341, to refuse to renew a pilotage certificate granted to the master or mate of a ship, under section 340. Reg. *v.* Trinity House, 35 Wkly. Rep. 835.

27. Morris *v.* State Pilot Com'rs, 7 Del. Ch. 136, 30 Atl. 667; Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298; Lunt *v.* Davison, 104 Mass. 498 (holding, however, that if a pilot charged with misconduct is notified of his suspension by the board of trustees of the Boston Marine Society, and has opportunity to appear before the board, and it is then decided that his commission should be revoked and the commissioners accordingly revoke it, the revocation is final); State *v.* Nerny, 29 N. J. L. 189 (holding likewise that a pilot cited before the commissioners to answer for neglect of duty can only be tried by them upon the charge on account of which he was so cited to appear before them). And see Auger *v.* Harbor Com'rs, 3 Quebec Pr. 533, holding that a condemnation of a pilot by the harbor commissioners of Montreal will not be quashed on the ground that the accused was summoned by letter, if he appeared and defended himself on that notice alone.

Right to jury trial see Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302.

28. People *v.* Pilot Com'rs, 54 Barb. (N. Y.) 145.

29. St. Simons Pilotage Com'rs *v.* Tabbott, 72 Ga. 89; State *v.* Nerny, 29 N. J. L. 189, holding likewise that the commissioners cannot retry a pilot and inflict an additional punishment upon him for an offense for which he has already been punished by suspension from office, and that when the term of his suspension expires, he can resume the duties of his office, and the commissioners cannot, as a further punishment, revoke his license.

30. Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302 (holding that it is not necessary, to make the sentence of a pilot's suspension legal, that a formal judgment should be entered up); Snow *v.* Reed, 14 Oreg. 342, 12 Pac. 636; State *v.* Courtenay, 23 S. C. 180 (holding that the court will not on mandamus reverse the action of the commissioners in the removal of a pilot, because the pilot was refused the aid of counsel in cross-examining witnesses and in arguing his case).

31. Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298; People *v.* Pilot Com'rs, 37 Barb. (N. Y.) 126, holding, however, that such writ will not be granted to a suspended pilot until he has exhausted the remedy of an appeal for a rehearing by the board of pilot commissioners, given him by section 23 of the Pilot Law.

32. U. S. Rev. St. (1878) § 4236 [U. S. Comp. St. (1901) p. 2903], which provides that either of two states having a water boundary between them may license persons to pilot vessels to and from any port situated on the waters which are the boundary between the two states.

33. State *v.* Leech, 119 La. 522, 44 So. 285 [*distinguishing* The Clymene, 9 Fed. 164 (*affirmed* in 12 Fed. 346)], construing Miss. Annot. Code (1892), §§ 2252–2296, as amended by Acts (1896), p. 140, c. 128.

34. Dolliver *v.* Parks, 136 Mass. 499;

VI. OBLIGATION TO TAKE PILOT.

A. In General. Under many of the statutes relating to pilotage, it is made compulsory upon certain vessels, or classes of vessels, approaching or departing from a harbor to employ or pay a pilot;[35] and the offer of pilot service, if refused, will entitle the pilot to full fees or half pilotage, according to the provision of the particular statute,[36] which liability may be enforced in admiralty.[37]

B. Vessels Exempt. The tender which is by statute made in certain cases equivalent to performance must be a tender to a vessel subject by law to pilot fees, and therefore presumed to require the service tendered.[38] For example, under some statutes, a steamship with a master licensed as a pilot is exempt from the payment of compulsory pilotage.[39] By act of congress, no vessel regularly employed in the coasting trade, declining the services of a pilot, shall be obliged

State *v.* Pilotage Com'rs, 62 S. C. 511, 40 S. E. 959.

35. Tilley *v.* Farrow, 14 Mass. 17; The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67; Homer Ramsdell Transp. Co. *v.* Compaigne Generale Transatlantique, 63 Fed. 845; The Belle Hooper, 28 Fed. 928; The Lord Clive, 12 Fed. 81; Nash *v.* The Thebes, 17 Fed. Cas. No. 10,022; U. S. *v.* The Science, 27 Fed. Cas. No. 16,239; Kemler *v.* Blanchard, W. Bl. 690.

Absence of pilot at high water.— Upon a claim of fees for pilotage, against a vessel which had left before the pilot arrived, it was held to be the duty of the pilot to be on hand at high water, and that, in his absence at that time, the vessel was justified in departing without him. The libel was therefore dismissed. The Ocean Express, 22 Fed. 176.

Being actually bound for a port imposes upon the vessel the obligation to pay pilotage fees. Merely being cleared for the port imposed no such obligation. Nash *v.* The Thebes, 17 Fed. Cas. No. 10,022.

During voyage.—A captain may temporarily supply a deficiency in the complement of pilots which arises during a voyage without his consent, fault, or collusion, but he cannot begin a new voyage with a deficiency. U. S. *v.* The Science, 27 Fed. Cas. No. 16,239.

In Canada pilotage is itself nowhere compulsory; what is compulsory is the payment of pilotage dues in certain cases even if a pilot be not used. Lamarre *v.* Woods, 14 Quebec Super. Ct. 1.

36. The Edith Godden, 25 Fed. 511; The Glenearne, 7 Fed. 604, 7 Sawy. 200; The America, 1 Fed. Cas. No. 289, 1 Lowell 176; Banta *v.* McNeil, 2 Fed. Cas. No. 966, 5 Ben. 74; The California, 4 Fed. Cas. No. 2,312, 1 Sawy. 463; The George S. Wright, 10 Fed. Cas. No. 5,340, Deady 591; The Kalmar, 14 Fed. Cas. No. 7,601, 10 Ben. 242. *Compare* Beilby *v.* Shephard, 3 Exch. 40, 18 L. J. Exch. 73. See also *infra*, VII, B.

Duty to tender services see *infra*, VII.

37. See *infra*, VIII, E, 1.

38. Hennen *v.* Munroe, 11 Mart. (La.) 579; Weaver *v.* McLellan, 29 Fed. Cas. No. 17,309, 5 Ben. 79.

Domestic fishing vessel.— In Weaver *v.* McLellan, 29 Fed. Cas. No. 17,309, 5 Ben. 79, it was held that the New York pilotage law which requires "foreign vessels and vessels under register" to take pilots, and gives half pilotage on a tender of service to such vessels and a refusal, does not extend to a vessel owned by residents of Maine, sailing under a fishing license.

Vessels engaged in plaster trade.— Under Mass. St. (1829) c. 2, exempting American vessels engaged in the plaster trade between Boston and the province of Nova Scotia from the penalty imposed for not taking a pilot, and the Federal Treaty with Great Britain, providing that British vessels coming from British colonial possessions, and their cargo, shall be subjected to no other duty of tonnage or charge of any description whatever than would be levied on vessels of the United States arriving from the British possessions, British vessels engaged in the plaster trade between Nova Scotia and Boston are also exempt from the penalty. Hunt *v.* Card, 14 Pick. (Mass.) 135.

Under the English laws for exempted ships see Edenbridge *v.* Green, [1897] A. C. 333, 8 Aspin. 270, 66 L. J. P. D. & Adm. 105, 76 L. T. Rep. N. S. 662 [*affirming* [1896] P. 281, 65 L. J. P. D. & Adm. 91, 75 L. T. Rep. N. S. 48, 45 Wkly. Rep. 38]; The Assaye, [1905] P. 289, 10 Aspin. 183, 71 L. J. P. D. & Adm. 145, 94 L. T. Rep. N. S. 102, 21 T. L. R. 677, 54 Wkly. Rep. 203; The Cayo Bonito, [1903] P. 203, 9 Aspin. 445, 72 L. J. P. D. & Adm. 70, 89 L. T. Rep. N. S. 260, 19 T. L. R. 609, 52 Wkly. Rep. 133 [*affirming* [1902] P. 216, 71 L. J. P. D. & Adm. 88, 86 L. T. Rep. N. S. 867, 18 T. L. R. 680]; The Glanystwyth, [1899] P. 118, 8 Aspin. 513, 68 L. J. P. D. & Adm. 371, 80 L. T. Rep. N. S. 204, 15 T. L. R. 224; The Clymene, [1897] P. 295, 8 Aspin. 287, 66 L. J. P. D. & Adm. 152, 76 L. T. Rep. N. S. 811, 46 Wkly. Rep. 109; The Winestead, [1895] P. 170, 7 Aspin. 547, 64 L. J. P. D. & Adm. 51, 72 L. T. Rep. N. S. 91, 11 Reports 720; Phillips *v.* Born, 10 Aspin. 131, 93 L. T. Rep. N. S. 634; The Columbus, 8 Aspin. 488, 80 L. T. Rep. N. S. 203, 15 T. L. R. 221. **Liability of crown ships to pay pilotage dues** see Symons *v.* Baker, [1905] 2 K. B. 723, 74 L. J. K. B. 965, 10 Aspin. 129, 93 L. T. Rep. N. S. 548, 21 T. L. R. 734, 54 Wkly. Rep. 159.

39. Joslyn *v.* Nickerson, 1 Fed. 133.

to pay compulsory pilotage.[40] The fact, however, that a vessel is without motive power of her own, and is in tow of a tug having on board a licensed pilot, does not relieve her from the duty of taking a pilot, where all vessels of her tonnage and draft are required by a state statute to have a licensed pilot.[41]

VII. TENDER OF SERVICES.[42]

A. Time and Place. A state may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than three

40. Chase *v.* Philadelphia, etc., R. Co., 135 Mass. 347; Wilson *v.* Gray, 127 Mass. 98; Tilley *v.* Farrow, 14 Mass. 17; Sturges *v.* Spofford, 52 Barb. (N. Y.) 436 [*reversed* on other grounds in 45 N. Y. 446]; People *v.* Sperry, 50 Barb. (N. Y.) 170; Bigley *v.* New York, etc., Steamship Co., 105 Fed. 74.

The words "regularly employed," in Mass. St. (1853) c. 284, § 1, exempting a vessel "regularly employed in the coasting trade" from compulsory pilotage, include the case of a vessel actually and legally so employed at the time the services of a pilot are tendered, even though the vessel is sailing under a register and is not continuously so employed. Wilson *v.* Gray, 127 Mass. 98.

Registry and license of vessel.— In Tilley *v.* Farrow, 14 Mass. 17, it was held that a registered vessel, authorized to proceed from one port in the United States to another therein, and thence to a foreign port or place, is entitled to the privileges of a coasting vessel, and is not obliged to take a pilot on board, as provided by the statute in other cases. But in Sturges *v.* Spofford, 52 Barb. (N. Y.) 436 [*reversed* on other grounds in 45 N. Y. 446], it was held that it is not sufficient for a vessel to be merely registered in order to entitle it to the exemption, but that it must have taken out a coasting license.

The protection of a coasting license does not extend beyond the vessel licensed, and does not authorize the towing of other vessels. People *v.* Sperry, 50 Barb. (N. Y.) 170. See, however, Francisco *v.* People, 4 Park. Cr. (N. Y.) 139, holding that steamboats have a right to tow vessels through Hell Gate without being subject to the law relating to pilotage, being excepted from its operation by section 10 of the act of 1847.

A coastwise sea-going steam vessel not sailing under register, within the meaning of Act Cong. Feb. 28, 1871, § 51, U. S. Rev. St. (1878) § 4401 [U. S. Comp. St. (1901) p. 3016], in relation to pilotage for steam vessels, is one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewed annually. A vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. The casual circumstances of such a vessel stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, does not affect her specific character as a "coastwise sea-going steam vessel," under the United States act. Murray *v.* Clark, 4 Daly (N. Y.) 468 [*affirmed* in 58 N. Y. 684].

Domestic vessels from Porto Rico to New York.— In Bigley *v.* New York, etc., Steamship Co., 105 Fed. 74, it was held that under the provisions of both U. S. Rev. St. (1878) § 4444 [U. S. Comp. St. (1901) p. 3037], and N. Y. Cons. Act (1882), § 2119, domestic steam vessels, licensed by the United States since the passage of the Porto Rico act of April 12, 1900, and entering the port of New York from Porto Rican ports, are exempt from the payment of pilotage charges imposed by the state statute.

Vessel laden with domestic coal.— The provision in the Md. Acts (1896), c. 40, exempting from the compulsory pilotage law vessels "laden either in whole or in part with coke or coal mined in the United States," applies only to vessels which, in a commercial sense, are coal laden, or carry a reasonable quantity to constitute a cargo, and not to one which carries only a small quantity (twenty-five tons) as ballast. The Edmund Phinney, 80 Fed. 558, 25 C. C. A. 641.

41. The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236 [*reversing* 103 Fed. 327, and *distinguishing* The Glaramara, 10 Fed. 678, 8 Sawy. 22; Flanders *v.* Tripp, 9 Fed. Cas. No. 4,854, 2 Lowell 15]. See also The Energy, L. R. 3 A. & E. 48, 39 L. J. Adm. 25, 23 L. T. Rep. N. S. 601, 18 Wkly. Rep. 1009. *Compare* People *v.* Sperry, 50 Barb. (N. Y.) 170 (under statute of 1865); Francisco *v.* People, 4 Park Cr. (N. Y.) 139 (under statute of 1847.

However, a helpless and unnavigable vessel which has sprung a leak, so as to require the use of two steam pumps, and is without master, commander, or crew, having but a dozen laborers abroad, working the pumps, and which has only a temporary rudder, and is in tow of a steam tug, is not within the provision of Ga. Pol. Code (1895), § 1656, requiring compulsory pilotage. The Sachelm, 99 Fed. 456, 39 C. C. A. 600.

In Canada — Barges towed by tugs.— Barges used in transporting coal from Parrsboro to Saint John, registered as schooners, having a crew on board and masts rigged with sails so as to be capable under favorable circumstances of being navigated by sailing, but which are in fact navigated by being towed by tugs, are exempt from pilotage dues under Can. Rev. St. c. 80, § 59, as "ships propelled wholly or in part by steam." Cumberland R., etc., Co. *v.* St. John Pilot Com'rs, 37 New Brunsw. 406.

42. Effect of refusal of tender of services see *supra*, VI, A; *infra*, VIII, B.

miles, or the outward limit of the pilot ground.[43] However, a tender of services by a pilot at an unreasonably long distance from port, and long before his services would be needed, is not such a tender as will subject the vessel to pilotage fees in case of declining his services.[44]

B. Manner and Sufficiency[45] — **1. In General.** The United States statute does not prescribe any signal to be used on a pilot boat when making an offer of pilot services, and the light required by the statute to be carried by a sailing pilot vessel at night is only used to prevent collision, and incidentally to give notice of the character of such craft.[46]

2. Display of Signals. The display of the customary pilot signals on the usual cruising ground of pilot boats at sea, and the visible approach of the boat toward an incoming vessel, are a sufficient tender of off-shore pilotage;[47] although some statutes require the pilot commissioners to declare by rule what shall constitute a valid offer of pilot service by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled.[48]

3. Exhibition of License or Warrant. Under some statutes the exhibition of a pilot's license or warrant to the master of the vessel is a necessary part of the tender of services, in order to enable the pilot to recover for such tender.[49]

4. Tender to or in Presence of Master. Some statutes require that the pilot shall offer to the master to take charge of the vessel, or make such offer in his

43. Perkins *v.* Buckley, 120 Mass. 3; Hunt *v.* Carlisle, 1 Gray (Mass.) 257; Murray *v.* Clark, 4 Daly (N. Y.) 468 [*affirmed* in 58 N. Y. 684]; Wilson *v.* Mills, 10 Abb. Pr. N. S. (N. Y.) 143; Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234; The Whistler, 13 Fed. 295, 8 Sawy. 232; The Georgia D. Loud, 10 Fed. Cas. No. 5,353, 8 Ben. 392; Horton *v.* Smith, 12 Fed. Cas. No. 6,709, 6 Ben. 264.

Without jurisdiction of state.— In Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234, it was held that a pilot may recover pilotage, although his services were tendered to, and refused by, the master of the vessel when she was without the jurisdiction of the state.

"It is the policy of most pilot laws to induce the pilots to make an early tender of their services to inward bound vessels. . . . State boundaries have been sometimes considered as furnishing the outward limit (Peterson *v.* Walsh, 1 Daly (N. Y.) 182, 185), although Sandy Hook pilots are sought for, and their services taken, much farther out than a marine league. In France it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship, although she was at the time in English waters, as at the Downs (Courcy Cass. D. 1866, p. 303; Caumont, Traité Pilote 31). Horton *v.* Smith, 12 Fed. Cas. No. 6,709, 6 Ben. 264, 267, per Benedict, J.

44. Peterson *v.* Walsh, 1 Daly (N. Y.) 182 (holding that a tender of services three hundred miles at sea will not entitle a pilot to fees on refusal of his services, under the statute requiring the master to accept the pilot whose services are first tendered); The Glaramara, 10 Fed. 678, 8 Sawy. 22; The S. & B. Small, 21 Fed. Cas. No. 12,291*b*, 8 Ben. 523 (holding that the tender of services by a Hell Gate pilot as far east as Block Island is not legal, and a refusal and subsequent settlement with him will not prevent a pilot, who tendered his services off Oak Neck, from recovering half pilotage, where they were refused).

Under English laws for limits of compulsory pilotage see The Sussex, [1904] P. 236, 9 Aspin. 578, 73 L. J. P. D. & Adm. 73, 90 L. T. Rep. N. S. 549, 20 T. L. R. 381; The Mercedes de Larrinaga, [1904] P. 215, 73 L. J. P. D. & Adm. 65, 90 L. T. Rep. N. S. 520, 20 T. L. R. 375; The Holar, [1901] P. 7, 9 Aspin. 143, 69 L. J. P. D. & Adm. 140, 83 L. T. Rep. N. S. 436, 17 T. L. R. 17, 49 Wkly. Rep. 224; Reed *v.* Goldsworthy, 9 Aspin. 529, 90 L. T. Rep. N. S. 126; Mersey Docks, etc., Bd. *v.* Cunard Steamship Co., 8 Aspin. M. L. C. 353, 78 L. T. Rep. N. S. 54.

45. Failure to tender at time of high water see *supra*, note 35.

46. The Ullock, 19 Fed. 207, 9 Sawy. 634, holding that the usual signal by which an offer of pilot service is made is the jack set at the main truck in the daytime, and "flare-ups" at night, and this jack is usually the ensign of the country in which the services are offered. In the United States it is a blue flag charged with a star of every state then in the Union, and called the "Union Jack."

47. Com. *v.* Ricketson, 5 Metc. (Mass.) 412 (under Rev. St. c. 32, § 24); Beebe *v.* The Yumuri, 68 Fed. 930.

48. The Mascotte, 39 Fed. 871 (where it was held that there was no such speaking as would entitle the pilot to pilotage); The Ullock, 19 Fed. 207, 9 Sawy. 634.

49. The Eldridge, 8 Fed. Cas. No. 4,332, Deady 176; Hammond *v.* Blake, 10 B. & C. 424, 8 L. J. K. B. O. S. 140, 5 M. & R. 361, 21 E. C. L. 183; Usher *v.* Lyon, 2 Price 118.

presence and hearing, in order to render it a sufficient tender of services within the law.[50]

5. Notice of Effect of Refusal to Accept. As a condition precedent to the right to hold a vessel for pilotage fees for services tendered but not accepted, it is sometimes provided that the pilot must inform the vessel that she will be held to pay the regular fees, whether his services are accepted or not.[51]

VIII. Compensation.[52]

A. In General. Pilots, only licensed by state authority, are entitled to claim off-shore pilotage, when they comply with the regulations prescribed, by performing or tendering their services at sea, to vessels about to enter port.[53]

B. On Refusal to Take Pilot — 1. In General. Where the statute makes it compulsory upon a master to take a pilot, upon his refusal to accept a tender of services, the pilot becomes entitled to half pilotage,[54] or full pilotage,[55] according to the provisions of the statute.[56]

2. Acceptance of Another Pilot. Under such statutes a subsequent acceptance

50. Chaney *v.* Payne, 1 Q. B. 712, 1 G. & D. 348, 6 Jur. 79, 41 E. C. L. 742; Peake *v.* Carrington, 2 B. & B. 399, 5 Moore C. P. 176, 61 E. C. L. 201; Reg. *v.* Chaney, 6 Dowl. P. C. 281. See also Chandler *v.* Doody, 101 Mass. 267 (under St. (1862) c. 176); The Francisco Garguilo, 14 Fed. 495 (where there was held to have been a sufficient tender of services). But *compare* Com. *v.* Ricketson, 5 Metc. (Mass.) 412, set out *infra*, this note.

Merely asking the master about to sail, at the custom-house, if he desired a pilot, and an answer that he did not know, is not such a speaking of a ship and declining of services as entitle a pilot to half pilotage under Cal. Pol. Code, § 2466, providing that when a vessel is spoken to, outward or inward bound, and the services of a pilot declined, half pilotage shall be paid. The Australia, 36 Fed. 332, 13 Sawy. 200.

Tender at night.— In Com. *v.* Ricketson, 5 Metc. (Mass.) 412, it was held that under Rev. St. c. 32, § 24, it is a sufficient offer of a pilot's services in the night, to a master of a vessel bound into Boston harbor, if the pilot approaches such vessel, and hails her, and makes all the tender which the time and circumstances permit, and his hail is heard on board, although it is not answered. It is not necessary in such a case that there should be an actual offer to the master, and that he should have actual knowledge of such offer.

51. Chandler *v.* Doody, 101 Mass. 267, holding that under the regulations concerning pilotage in the schedule annexed to St. (1862) c. 176, that "every vessel inward bound," with certain exceptions, "shall receive the first pilot, holding a commission for her port of destination, that may offer his services, and shall be holden to pay such pilot the regular fees for pilotage, whether his services be accepted or not . . . and in case any vessel liable to pilotage should refuse to take a pilot, it shall be the duty of the pilot to inform said vessel that she will be holden to pay the regular fees for pilotage, whether his services are accepted or not," the giving of the information by the pilot to the refusing vessel is in every case a condition precedent to his right to hold her liable for fees; and that it is immaterial what her master knows of the provisions of the statute by information from other sources.

52. **Compensation for salvage** see Salvage.

53. Cisco *v.* Roberts, 36 N. Y. 292 [*reversing* 6 Bosw. 494]; Weldt *v.* The Howden, 39 Fed. 877.

Effect of special agreement.— In The Alaska, 1 Fed. Cas. No. 129, 3 Ben. 391, it was held that where a pilot on going aboard a vessel assented to the proposition of the master that his employment should not commence until the vessel reaches pilot ground, he is only entitled to in-shore pilotage, where he did not actually take charge of the vessel until it reached pilot ground.

Compensation of: Licensed wrecker see *infra*, note 65. Substitute of pilot see *infra*, note 65.

Failure to file bond affecting right to recover compensation see *supra*, V.

54. The William Law, 14 Fed. 792; The Glencarne, 7 Fed. 604, 7 Sawy. 200; The Traveler, 24 Fed. Cas. No. 14,147, 6 Ben. 280.

55. Martin *v.* Hilton, 9 Metc. (Mass.) 371.

56. Com. *v.* Ricketson, 5 Metc. (Mass.) 412; Gerrish *v.* Johnson, 46 N. C. 335; The Edith Godden, 25 Fed. 511; The Whistler, 13 Fed. 295, 8 Sawy. 232; Camp *v.* The Marcellus, 4 Fed. Cas. No. 2,347, 1 Cliff. 481.

Obligation to take pilot see *supra*, VI.

Nature of obligation to pay.— "The supreme court, in the cases of Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 457, 17 L. ed. 805, and of *Ex p.* McNiel, 13 Wall. (U. S.) 236, 242, 20 L. ed. 624, has expressly declared that the obligation to pay these pilotage fees under state statutes, where the pilot's services are tendered and refused, is a liability upon a contract implied by the statute." The Edith Godden, 25 Fed. 511. The compensation allowed for pilotage fees when a pilot tenders his services and the same are refused are not considered as a duty (Cooley *v.* Philadelphia, 12 How. (U. S.) 299, 314, 13 L. ed. 996), an impost duty (State *v.* Penny, 19 S. C. 218, 222), or an

of another pilot does not destroy the master's obligation to pay the fees of the pilot first tendering his services.[57]

3. On Outward-Bound Vessel. Under some statutes the qualification is made that a pilot tendering his services to an outward bound vessel is entitled to no compensation if his services are refused,[58] unless he is the pilot who brought her into port, or tendered his services and was refused.[59]

C. Persons Liable. The statutes usually provide that pilotage fees are to be paid by and are recoverable from the master or owners of the vessel;[60] and they sometimes make the agent[61] or consignee[62] liable.

D. Amount — 1. In Absence of Statutory Provisions. Where no rate is fixed by statute for fees payable to pilots, they are entitled to be paid a reasonable reward for the services performed by them.[63]

2. Fixed by Statute. Where the rate of pilotage is fixed by law, pilots are not allowed to make contracts for fees at other rates.[64] Some statutes provide that for every day of detention in the harbor of an outward-bound vessel, after the pilot has been engaged, and for every day of detention of an inward-bound vessel, by ice, longer than two days for passage from sea to wharf, a designated amount shall be added to the pilotage.[65]

impost or duty (Collins *v.* Distressed, etc., Pilots Relief Soc., 73 Pa. St. 194, 197).

57. Thompson *v.* Spraigue, 69 Ga. 409, 47 Am. Rep. 760; O'Brien *v.* De Larrinaga, 49 S. C. 497, 27 S. E. 481; The Earnwell *v.* Marshall, 70 Fed. 331, 17 C. C. A. 136 [*affirming* 68 Fed. 228]; The Nevada, 18 Fed. Cas. No. 10,130, 7 Ben. 386.

No requirement to take first pilot.— In Gillespie *v.* Zittlosen, 60 N. Y. 449, it was held that N. Y. Acts (1857), c. 243, § 29, do not require a vessel to take the first pilot offering his services, or, in case of refusal, to pay him pilotage, but states only when no pilot is taken that this liability is imposed. Where therefore after refusal to take the first pilot another is taken, the former cannot recover pilotage under the statute.

58. Meissner *v.* Stein, 72 Ga. 234; Camp *v.* The Marcellus, 4 Fed. Cas. No. 2,347, 1 Cliff. 481. See, however, Martin *v.* Witherspoon, 135 Mass. 175, holding that the governor and council have power to require vessels which are liable to pilotage, when inward bound, to pay pilotage to a pilot offering when outward bound, whether his services are accepted or not.

59. Wright *v.* Lake, 75 Ga. 219.

60. Hunt. *v.* Mickey, 12 Metc. (Mass.) 346.

If one part-owner of a steamer contract in his own name with the pilot, the others will be liable to the latter. Carlisle *v.* The Eudora, 5 La. Ann. 15.

Where there is no statutory provision governing the matter both master and owner are liable for pilotage fees. Hunt *v.* Mickey, 12 Metc. (Mass.) 346.

61. Mason *v.* Ingraham, 16 Fed. Cas. No. 9,238, 5 Ben. 81, holding, however, that in order to charge a person with liability as agent for half pilotage, a tender of services having been made, under a statute making such fee due and recoverable from the agent of the vessel, it is necessary to show that the agent had some connection with the vessel at the time.

62. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, where it was held that defendant was the consignee within the meaning of the act and that the action was properly brought against him.

Such a state statute does not affect the jurisdiction in admiralty, but only gives an additional remedy against the third person. The George S. Wright, 10 Fed. Cas. No. 5,340, Deady 591.

63. Baton Rouge, etc., Packet Co. *v.* George, 128 Fed. 914, 63 C. C. A. 640; Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436. And see Mepham *v.* Biessel, 9 Wall. (U. S.) 370, 19 L. ed. 677 (where the court below had fixed the wages of a person who had served for four months as captain and pilot at nine hundred dollars per month, and the supreme court declined to change the amount allowed); The Lud Keefer, 49 Fed. 650 (holding that where a steamboat bound from Pittsburg, Pa., to Louisville, Ky., engages pilots without the written contract required by U. S. Rev. St. (1878) § 4520 [U. S. Comp. St. (1901) p. 3073], she is liable under U. S. Rev. St. (1878) § 4521 [U. S. Comp. St. (1901) p. 3073] for the highest wages shown to have been voluntarily paid at Pittsburg for any pilot for a similar voyage during the three months preceding).

The substitute of a pilot must be a regular branch or deputy pilot; otherwise he is not entitled to the fees, although perhaps the substitute or his principal might have an action against the ship-owner on a *quantum meruit* for the services performed. Shepherd *v.* Mitchill, 10 Johns. (N. Y.) 112.

Licensed wreckers.— It is the duty of licensed wreckers to offer their services as pilots to vessels in need of pilotage, whether such vessels ask for a pilot or not, and, in the absence of a special agreement, recovery may be had of a reasonable compensation for such services. The Angeline, 1 Fed. Cas. No. 385.

64. Schellenger *v.* Philadelphia, 19 Phila. (Pa.) 471.

65. Nicolay *v.* The France, 50 Fed. 125.

3. Extra Allowance. Pilots are entitled to a reasonably extra compensation, to be fixed by the court, for the increased responsibility and effort incurred in consequence of the crippled condition of a vessel.[66] So for services rendered in moving or transferring vessels in the harbor, pilots may by statute be allowed a designated extra compensation.[67]

E. Actions[68]**— 1. Jurisdiction.** Admiralty has jurisdiction of suits for pilotage fees.[69]

2. Nature of Action. Admiralty has jurisdiction to enforce the obligation to pay pilotage fees by any appropriate form, whether *in rem* or *in personam*.[70]

3. Defenses. On a libel by a pilot for wages, where the services were rendered under several distinct contracts, the right to set up damages caused by the pilot's negligence as a defense is confined to the wages earned under the particular contract during the performance of which the negligence occurred.[71] In a suit to recover half pilotage by a pilot on offer of services and a refusal thereof, it cannot be shown as a defense that the pilot does not keep a sufficient boat on the bar to cruise for vessels, or to supply vessels in distress with provisions and water.[72]

4. Parties.[73] An action to recover pilotage fees, where the pilot's services are refused, may be brought by the pilot in his own name.[74]

5. Pleading.[75] In a suit for pilotage fees against the owner of a vessel who has refused to accept the pilot's services, the petition is not defective because it fails to allege whether the vessel was coastwise or foreign; and if the vessel is

66. Flanders *v.* Tripp, 9 Fed. Cas. No. 4,854, 2 Lowell 15; Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436; The Susan, 23 Fed. Cas. No. 13,630, 1 Sprague 499 (holding that when a vessel is in such peril as to be the subject of salvage service, a pilot, by the general law, is not bound to give his aid for mere pilotage); The Warner, 29 Fed. Cas. No. 17,193 (where a ship had lost her rudder, bowsprit, fore topgallant mast, main topgallant mast, and had rigged temporary substitutes. A pilot took charge of her sixty miles outside Sandy Hook, bearing E. S. E., and navigated her to within fifteen miles of the Hook, when a steamboat took her in tow. The ship had on board some sixty passengers, and it was held that the pilot was entitled to one hundred dollars over and above regular off-shore pilotage, on account of the superadded responsibility, hazard, and risk, resulting from the disabled condition of the vessel); The Santiago, 9 Aspin. 147, 70 L. J. P. D. & Adm. 12, 83 L. T. Rep. N. S. 439, 17 T. L. R. 22.

67. The Cervantes, 135 Fed. 573. See also The Clan Grant, 12 P. D. 139, 6 Aspin. 144, 56 L. J. P. D. & Adm. 62, 57 L. T. Rep. N. S. 124, 35 Wkly. Rep. 670.

68. Admiralty jurisdiction, practice, and procedure generally see Admiralty, 1 Cyc. 797 *et seq.*

69. See Admiralty, 1 Cyc. 831, text and note 58. See also The Edith Godden, 25 Fed. 511 [*overruling* Leitch *v.* The George Law, 15 Fed. Cas. No. 8,223, 6 Am. L. Reg. 368; The Robert J. Mercer, 20 Fed. Cas. No. 11,891, 1 Sprague 284].

Admiralty jurisdiction not exclusive see Admiralty, 1 Cyc. 812 note 47. See also Hobart *v.* Drogan, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131.

A New Jersey pilot may sue in the federal courts of New York for pilotage services rendered in New York waters. Reardon *v.* Arkell, 59 Fed. 624, holding that U. S. Rev. St. (1878) §§ 4235, 4236 [U. S. Comp. St. (1901) p. 2903) by implication make applicable, in favor of pilots, the laws of either New York or New Jersey.

70. The Edith Godden, 25 Fed. 511 [*citing Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624; The William Law, 14 Fed. 792; The California, 4 Fed. Cas. No. 2,312, 1 Sawy. 463, 467; The George S. Wright, 10 Fed. Cas. No. 5,340, Deady 591], by reason of the fact that the obligation is one of contract. See *supra*, note 56. See also Admiralty, 1 Cyc. 846 *et seq.*

A libel in rem may be maintained for fees allowed for pilotage services tendered in accordance with the provisions of a state statute, but declined by the master of the vessel. The Alzena, 14 Fed. 174. See also McDonald *v.* Prioleau, 44 Fed. 769; The Bee, Dods. 498. "The right to enforce such claims by libel *in rem* has been repeatedly sustained, even where the state statute did not, in express terms, make the vessel liable. The Lord Clive, 10 Fed. 135; The Glenearne, 7 Fed. 604, 7 Sawy. 200; The Edith Godden, 25 Fed. 511."

71. McDonald *v.* The Tom Lysle, 48 Fed. 690.

72. The Alcalde, 30 Fed. 133, holding that any failure or dereliction in this respect can only be inquired into before the commissioners who may in a proper case deprive the pilot of his warrant.

73. See also Admiralty, 1 Cyc. 850 *et seq.*

74. Wilson *v.* Mills, 10 Abb. Pr. N. S. (N. Y.) 143.

75. See also Admiralty, 1 Cyc. 853 *et seq.*; and Pleading.

exempt from the payment of such fees, it is a matter of defense, to be set up by plea.[76]

6. Evidence[77] — a. Burden of Proof. In an action for pilotage, where the right of action is claimed to have arisen by reason of a tender of services and a refusal thereof, the libellant must show a tender of services and that no pilot was employed.[78]

b. Admissibility. The situation of a ship at the time the pilot takes charge of her is a matter of fact, and may be proved by parol.[79] Parol evidence is likewise admissible to show the boundaries of a harbor or port.[80]

c. Weight and Sufficiency. The admiralty court will determine facts upon principles which govern trials by jury.[81]

F. Lien[82] — 1. In General. By the general maritime law a pilot has a lien upon a vessel for services actually rendered.[83] However, in the absence of stat-

76. Hagan *v.* Townsend, 118 Ga. 682, 45 S. E. 478, where the allegations of the petition were held to be sufficient to show tender of services under circumstances which ordinarily require a vessel to accept the same.

77. See also Admiralty, 1 Cyc. 882 *et seq.*; Evidence, 16 Cyc. 821 *et seq.*

78. The Nellie Husted, 17 Fed. Cas. No. 10,098, 9 Ben. 42.

Slight circumstances, however, will be sufficient to warrant the inference that no pilot was employed. Such inference may be drawn from the fact that when the libellant presented his bill, the master of the ship said it was all right, no evidence being offered to show that a pilot was employed. The Nellie Husted, 17 Fed. Cas. No. 10,098, 9 Ben. 42.

Where the evidence fails to show a refusal by the master to accept the services of the pilot, whom, under the law, he was bound to employ, a libel filed by such pilot to recover the value of his services, which were never rendered, will be dismissed. The Harriet S. Jackson, 32 Fed. 110; The Talisman, 23 Fed. 111; The Thomas Turrall, 23 Fed. Cas. No. 13,932, 6 Ben. 404.

79. Shepherd *v.* Mitchill, 10 Johns. (N. Y.) 112.

80. Martin *v.* Hilton, 9 Metc. (Mass.) 371.

81. Clark *v.* The Ruth, 39 Fed. 128; The Thomas Turrall, 23 Fed. Cas. No. 13,932, 6 Ben. 404; The Enterprise, 2 Hagg. Adm. 178 note; The General Palmer, 2 Hagg. Adm. 176.

Two witnesses contradicting one.— Where the sole question arising on a libel by a pilot for wages is as to when the charterers informed the libellant that he was to look to one of the charterers individually for payment, and the two charterers directly contradict the libellant, there being no other witnesses on that point, the witnesses being equally worthy of credit, the weight of evidence is against the libellant. Clark *v.* The Ruth, 39 Fed. 128. A claim for pilotage for a tender and refusal of services, supported only by the oath of the pilot, and contradicted by two witnesses from the other vessel, cannot be sustained where the pilot might have produced other witnesses to corroborate his testimony, whose absence he did not account for. The Thomas Turrall, 23 Fed. Cas. No. 13,932, 6 Ben. 404.

Insufficient to show usage.— In Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436, the proofs were held not to show a usage of charging and paying double fees as a legal right, even for services rendered to a vessel in distress.

82. Maritime lien generally see Maritime Liens, 26 Cyc. 743.

83. Page *v.* Long, 4 B. Mon. (Ky.) 121; Perkins *v.* O'Mahoney, 131 Mass. 546; Flannery *v.* The Alexander Barkley, 83 Fed. 846 [*affirming* 77 Fed. 994]; The Atlas, 42 Fed. 793; The Pirate, 32 Fed. 486; The Mary Elizabeth, 24 Fed. 379 [*following* The Wanderer, 20 Fed. 655, 4 Woods 25]; Johnson *v.* The Anne, 13 Fed. Cas. No. 7,370 [*reversing* 1 Fed. Cas. No. 412, 1 Mason 508]; The Maria Theresa, 16 Fed. Cas. No. 9,082; The Robert J. Mercer, 20 Fed. Cas. No. 11,891, 1 Sprague 284.

Priority of lien see Maritime Liens, 26 Cyc. 802 *et seq.*, and particularly 805. In Flannery *v.* The Alexander Barkley, 83 Fed. 846 [*affirming* 77 Fed. 994], holding that a decree for pilot's wages is entitled to be first paid out of the proceeds of a tug, as against a decree for damages to her tow by stranding, where it appears that the stranding was not caused by the pilot's negligence, but by the negligence of the tow's master.

Master of a vessel acting as pilot has no lien upon a vessel for services as a pilot, where he acts in both capacities, that is, as master when in port, and pilot when running. The Willamette Valley, 76 Fed. 838; The Eolian, 8 Fed. Cas. No. 4,504, 1 Biss. 321 [*distinguishing* Logan *v.* The Æolian, 16 Fed. Cas. No. 8,465, 1 Bond 267].

Pilot's right of action against the master for his fees is not taken away by a statute giving a lien on a vessel. Perkins *v.* O'Mahoney, 131 Mass. 546.

Where the sheriff, by virtue of a writ of execution, seized a steamboat, and after taking actual possession, ran the boat a few days without the consent or knowledge of the owner, it was held that one who acted as master and pilot during that time must look to the sheriff for his compensation, and had no lien against the boat. Parker *v.* The Little Acme, 43 Fed. 925.

ute,[84] in case there has been no service rendered, and no contract for service, but merely a case of volunteered services tendered and refused, no lien is created on the vessel.[85]

2. DELAY IN ENFORCEMENT. The delay to enforce a maritime lien which will warrant its being postponed to subsequent liens acquired without notice is governed by the same rule which applies to claims for repairs and supplies.[86] And, as in case of other maritime liens, where such lien is not enforced after reasonable opportunity, it is waived as against an innocent purchaser.[87]

G. Recovery of Fees Illegally Collected. Pilot commissioners are liable in their corporate capacity in an action for money had and received for pilotage dues illegally collected.[88]

IX. AUTHORITY AND FUNCTIONS.

A pilot is an officer of the ship when on board in the exercise of his duty, and the crew are bound to obey his orders as such; but when the captain is on board he is master, and the orders of the pilot are considered the master's.[89] And a pilot employed to take a ship out of port and remain with her and bring her in on the return voyage, for an agreed compensation, is as much subject to the authority of the master as to discipline as any member of the ship's company, although he is not liable to do ship's duty except when in charge of her as pilot.[90]

84. The Kalmar, 14 Fed. Cas. No. 7,601, 10 Ben. 242.

85. Leitch *v.* The George Law, 15 Fed. Cas. No. 8,223; The Robert J. Mercer, 20 Fed. Cas. No. 11,981, 1 Sprague 234.

86. The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20. See also MARITIME LIENS, 26 Cyc. 793 *et seq.*

Lien was held not to have been waived in The Louie Dole, 14 Fed. 862, 11 Biss. 479; The Argo, 1 Fed. Cas. No. 515, 7 Ben. 304; McAllister *v.* The Sam Kirkness, 15 Fed. Cas. No. 8,658, 1 Bond 369.

87. The Seminole, 42 Fed. 924; The Artisan, 2 Fed. Cas. No. 567, 8 Ben. 538; Risher *v.* The Frolic, 20 Fed. Cas. No. 11,856, 1 Woods 92. See also MARITIME LIENS, 26 Cyc. 794.

88. Cumberland R., etc., Co. *v.* St. John Pilot Com'rs, 37 N. Brunsw. 406, holding that payment of such dues, under protest, is not a voluntary payment and may be sued for, although they have been paid over to the pilots, and the commissioners have no funds or resources to satisfy a judgment.

Recovery of money involuntarily paid see PAYMENT, *ante*, p. 1303 *et seq.*

89. Camp *v.* The Marcellus, 4 Fed. Cas. No. 2,347, 1 Cliff. 481 [*affirmed* in 1 Black 414, 17 L. ed. 217]; U. S. *v.* Forbes, 25 Fed. Cas. No. 15,129, Crabbe 558; U. S. *v.* Lynch, 26 Fed. Cas. No. 15,648, 2 N. Y. Leg. Obs. 51.

Pilots of coal boats, in Arkansas, in the absence of the owners or supercargoes, exercise the powers and duties of captains or commanders. Their authority over the boat and cargo is, under ordinary circumstances, limited to the mere duty of transportation and preservation; but under circumstances of great emergency, as in the case of wreck and imminent danger of an entire loss, they have authority to dispose of the boat and cargo from the very nature and necessity of the case. Marlatt *v.* Clary, 20 Ark. 251.

Pilot not an agent of the charterers who paid pilotage fees see Fraser *v.* Bee, 17 T. L. R. 101, 49 Wkly. Rep. 336.

Under English laws authority of pilot see The Tactician, [1907] P. 244, 76 L. J. P. D. & Adm. 80, 23 T. L. R. 369; The Prins Hendrik, [1899] P. 177, 8 Aspin. 548, 68 L. J. P. D. & Adm. 86, 80 L. T. Rep. N. S. 838.

90. Martin *v.* Farnsworth, 33 N. Y. Super. Ct. 246; Beataugh *v.* Nicholson, 2 Fed. Cas. No. 1,194.

The relation between the owner or master and pilot, as that of master and employee, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors. Sherlock *v.* Alling, 93 U. S. 99, 23 L. ed. 819, Field, J., delivering the opinion of the court.

Recovery by pilot for personal injuries.— There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ that the pilot shall take upon himself the risk of injury from the negligence of the ship-owners' servants; and an action will lie by the pilot against the ship-owners for injuries, caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants. Smith *v.* Steele, L. R. 10 Q. B. 125, 2 Aspin. 487, 44 L. J. Q. B. 60, 32 L. T. Rep. N. S. 195, 23 Wkly. Rep. 388. Where a pilot was ordered by the master to leave the quarter-deck, and he refused to do so, and the master undertook to put him off, but he used force enough to throw him on the deck, this was a trespass for which the master is liable to the pilot in damages, and the master was not justified in ordering the pilot ashore thereupon and leaving him, and the latter was entitled to recover his full agreed wages. Beataugh *v.* Nicholson, 2 Fed. Cas. No. 1,194.

When a pilot takes charge of a vessel at sea, to bring her into port, his duty is to stay by her, unless discharged, until she reaches her destination or some place of safety.[91]

X. DEGREE OF CARE AND SKILL REQUIRED.

A pilot should have a thorough knowledge of navigation, charts, and the significance of fixed and permanent lights, and the peculiarities of wind and tide in the waters in which he is licensed.[92] When a pilot, in piloting his vessel, has used his best skill and judgment, he is not liable for her loss, although the result shows that his best judgment was wrong.[93]

XI. LIABILITY FOR NEGLIGENCE.[94]

A pilot is responsible to the owner of a vessel for negligence or default in performance of his duty.[95] Such negligence is a marine tort within the jurisdiction of a court of admiralty.[96] A pilot, however, is not an insurer. He is only

91. Sideracudi *v.* Mapes, 3 Fed. 873.

92. Harrison *v.* Hughes, 125 Fed. 860, 60 C. C. A. 442 [*affirming* 110 Fed. 545]; White *v.* The Lavergne, 2 Fed. 788; The Washington *v.* The Saluda, 29 Fed. Cas. No. 17,232.

Thus a constant and familiar acquaintance with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sand-bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior. Atlee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619 (where a pilot who, although engaged for many years in navigating a part of the Mississippi river, had not made a trip over that part for fifteen months previous to the one which he was now making, and from ignorance of its existence ran his vessel against a pier, which had been built in the river since he had last gone up or down it, and he was held to be in fault for want of knowledge of the pier); Marts *v.* The Oceanic, 74 Fed. 642, 20 C. C. A. 574; McDonald *v.* The Tom Lysle, 48 Fed. 690.

93. Wilson *v.* Charleston Pilots' Assoc., 57 Fed. 227 (holding that a pilot is not liable for damage to the vessel in his charge unless caused by his failure to use ordinary diligence, that is, the degree of skill commonly possessed by others in the same employment); McDonald *v.* The Tom Lysle, 48 Fed. 690; Mason *v.* Ervine, 27 Fed. 459.

94. Liability of pilot association see *infra*, XIV.

Negligence causing collision see COLLISION, 7 Cyc. 299.

95. *Georgia.*— Pilotage Com'rs *v.* Low, R. M. Charlt. 298.

Indiana.— Slade *v.* State, 2 Ind. 33.

Massachusetts.— Heridia *v.* Ayres, 12 Pick. 334.

Pennsylvania.— Hice *v.* Kugler, 6 Whart. 336.

United States.— The China *v.* Walsh, 7 Wall. 53, 68, 19 L. ed. 67; Donald *v.* Guy, 127 Fed. 228; Wilson *v.* Charleston Pilots' Assoc., 57 Fed. 227; McDonald *v.* The Tom Lysle, 48 Fed. 690; Sideracudi *v.* Mapes, 3 Fed. 873; The William Cox, 3 Fed. 645; Mason *v.* The William Murtaugh, 3 Fed. 404; Santiago *v.* Morgan, 21 Fed. Cas. No. 12,331.

See 39 Cent. Dig. tit. "Pilots," § 19.

Towing in a gale.— In The William Cox, 3 Fed. 645, it was held that it is negligence in both the pilot of a tug and the master of an open, loaded boat to attempt to tow such a boat across the bay of New York in a gale of wind.

No negligence shown.— See The Wallace, 32 Fed. 672 (where it was held that no negligence on the part of the pilot was shown, and that he was entitled to his pilotage fees); The Governor Newell, 31 Fed. 362, 12 Sawy. 457 (where the charge of negligence was held not to have been proved).

Contributory negligence.— The master of a towed boat is not chargeable with contributory negligence in acquiescing in the exposure of such boat to an unnecessary peril by the tug-boat pilot, unless the danger about to be incurred is very obvious. White *v.* The Lavergne, 2 Fed. 788.

96. Sideracudi *v.* Mapes, 3 Fed. 873. See, however, Flower *v.* Bradley, 2 Aspin. 489, 44 L. J. Exch. 1, 31 L. T. Rep. N. S. 702, 23 Wkly. Rep. 74, holding that an action against a pilot for any damage caused to a bark by a vessel under his charge is not an "admiralty cause" within 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which statutes confer admiralty jurisdiction upon county courts.

Defenses.— In an action by the owner of a canal-boat against the steersman for negligence in allowing the boat to go too near a dam, whereby she was carried over and lost, it is no defense that she was not properly equipped and manned. Hice *v.* Kugler, 6 Whart. (Pa.) 336.

Evidence.— Where, in an action on the bond of a pilot and his sureties, it was held that evidence was properly rejected which was offered by defendant to prove that he possessed sufficient skill to pilot a boat, the question being not whether he possessed such skill, but whether in the present case he exercised it. Slade *v.* State, 2 Ind. 33.

chargeable for negligence when he fails in due knowledge, care, or skill, or to avoid all obstructions where they were known, or ought to be known, to him.[97]

XII. PENALTIES FOR VIOLATION OF REGULATIONS.[98]

Under the various pilotage acts, a person undertaking to pilot a vessel into a port or harbor, who has not been duly licensed as a pilot for such waters, incurs a designated penalty imposed by the statute.[99] However, under such statutes, where no regularly licensed pilot seasonably offers his services, the master may employ any other person to pilot his vessel in, and such person may do so without incurring any penalty.[1]

XIII. OFFENSES.[2]

In some jurisdictions a person acting as a pilot without being duly licensed to act as a pilot in such waters is guilty of a misdemeanor, and may be proceeded against by indictment or information.[3]

XIV. PILOTS' ASSOCIATIONS.[4]

A. Legality. An agreement amongst pilots to associate together for their business is not illegal.[5]

97. Gypsum Packet Co. *v.* Horton, 68 Fed. 931 (where the keel of a vessel, while being towed through the middle channel in Hell Gate, rubbed some object unknown, and subsequent examination of the boat showed no obstruction in the location where the libellant's evidence placed the course, and it was held that the evidence failed to show any negligence on the part of the pilot, and the action should be dismissed without costs); McDonald *v.* The Tom Lysle, 48 Fed. 690; The James A. Garfield, 21 Fed. 474.

98. Penalty generally see PENALTIES, *ante*, p. 1331.

99. *Indiana.*—Cash *v.* Clark County, 7 Ind. 227, holding that an unlicensed pilot who pilots a boat over the falls of the Ohio is subject to the penalty of twenty dollars, although there was a licensed pilot on board who acted as steersman under his direction.

Massachusetts.— Com. *v.* Ricketson, 5 Metc. 412.

New York.— People *v.* Deming, 1 Hill 271.

Pennsylvania.— Collins *v.* Distressed, etc., Pilots Relief Soc., 73 Pa. St. 194.

South Carolina.— State *v.* Penny, 19 S. C. 218, holding that 16 St. at L. p. 420, prescribing the system of pilotage, makes the penalties applicable to masters bringing their own vessels into port without a pilot, as well as to pilots presuming to act without a license.

United States.— The Carrie L. Tyler, 106 Fed. 426, 45 C. C. A. 405; U. S. *v.* The Science, 27 Fed. Cas. No. 16,239.

England.— Thornton *v.* Boland, 2 Bing. 219, 9 Moore C. P. 403, 9 E. C. L. 553; Beilby *v.* Scott, 10 L. J. Exch. 149, 7 M. & W. 93; Mackie *v.* Landon, 1 Marsh. 585, 6 Taunt. 256, 1 E. C. L. 603; Rex *v.* Neale, 8 T. R. 241; Rex *v.* Lambe, 5 T. R. 76.

See 39 Cent. Dig. tit. "Pilots," § 20.

Such penalty is imposed upon the individual only, and the statute creates no lien upon the vessel, nor does any arise under the maritime law, and a libel *in rem* for the recovery of such penalty cannot be maintained. The Carrie L. Tyler, 106 Fed. 426, 45 C. C. A. 405.

Party to enforce.— In People *v.* Deming, 1 Hilt. (N. Y.) 271, holding that the penalty must be sued for in the name of the master warden, not in the name of the people.

Government vessels.— The penalty imposed by Mass. St. (1796) c. 85, § 3, providing for recovery of a penalty against a pilot undertaking to pilot a vessel outside of his own particular branch, does not extend to one who pilots a public vessel of war for the United States. Ayers *v.* Knox, 7 Mass. 306.

1. Com. *v.* Ricketson, 5 Metc. (Mass.) 412.

2. Criminal law and procedure generally see CRIMINAL LAW, 12 Cyc. 70 *et seq.*

Indictment or information generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

3. Com. *v.* Ricketson, 5 Metc. (Mass.) 412; People *v.* Sperry, 50 Barb. (N. Y.) 170; People *v.* Francisco, 10 Abb. Pr. (N. Y.) 30, 18 How. Pr. 475, 4 Park. Cr. 139; Com. *v.* The Sheriff, 13 Phila. (Pa.) 446; Virden's Appeal, 6 Wkly. Notes Cas. (Pa.) 560.

Question for jury.— Upon the trial of an indictment against one for acting as a pilot without a state license, it is for the jury to determine whether the contract was for pilotage or towage, and, if for towage, whether the contract was a colorable one only. Com. *v.* The Sheriff, 13 Phila. (Pa.) 446.

4. Association generally see ASSOCIATIONS, 4 Cyc. 299.

Trade union generally see LABOR UNIONS, 24 Cyc. 815.

5. Jones *v.* Fell, 5 Fla. 510. See also MONOPOLIES, 27 Cyc. 895 text and note 45.

Under the statutes of Louisiana relative to the appointment of branch pilots of the port of New Orleans, and regulating their duties, a partnership or association of the said pilots, although state officers, for the purpose of furthering and protecting their common interests, is not illegal. Under the language of these statutes such association is

B. Liability For Negligence of Member. It has been held that neither pilot associations[6] nor the members thereof[7] are liable for the negligence or fault of one of its members in the performance of his duties as a pilot.

PIMP. One who provides for others the means of gratifying lust; a pander;[1] one who provides gratification for the lust of others; a procurer, a panderer.[2]

PINCHED. A slang term meaning "arrested."[3] (See, generally, ARREST.)

PINE. Any tree of the genus Pinus.[4]

PINKROOT. A term which may be included in the terms "vegetables and roots prepared or otherwise."[5]

PINKSTER or PINXTER. Whitsuntide.[6]

PIN-MONEY. Money allowed to, or settled upon, a wife, for the purpose of supplying her with dress and the means of defraying her other personal expenses.[7] (See, generally, HUSBAND AND WIFE.)

PIN POOL. A game played on a table, on which five pins are set in a small square, each pin being numbered from 1 to 5 respectively, the game being played by a number of persons, each one of whom uses a cue and balls wherewith the pins are knocked down.[8] (See, generally, GAMING.)

authorized, and exeepts the pilots from any legal principle which would forbid such an association of state officers for the purposes declared. Levine *v.* Michel, 35 La. Ann. 1121.

6. The City of Dundee, 108 Fed. 679, 47 C. C. A. 581 [*affirming* 103 Fed. 696], holding that the pilots' association of the bay and river of Delaware, which is an unincorporated association of pilots, whose objects are limited to the management of pilot boats and the furtherance of the interests of its members in various ways, but which has no power to make contracts for pilotage, its members acting individually in that matter, does not stand in the relation of principal as to such contracts, and is not liable for the negligence or fault of one of its members in the performance of a contract made by him for such service. In Mason *v.* Ervine, 27 Fed. 459, it was held that the association of branch pilots of the port of New Orleans did not constitute what is known in Louisiana as a commercial partnership, in which the partners are liable to their creditors *in solido*; that the association was not an insurer of the experience, skill, judgment, or conduct of any of its members; and therefore, when without fault itself, it was not liable for the negligence, want of skill, or fault of any branch pilot, belonging to the association, resulting in damage to any vessel such pilot may undertake to pilot into the Mississippi river from the sea. *Compare* Wilson *v.* Charleston Pilots' Assoc., 57 Fed. 227, where a libel *in personam* against a pilot association was dismissed.

7. Guy *v.* Donald, 203 U. S. 399, 27 S. Ct. 63, 51 L. ed. 245 [*affirming* 127 Fed. 228], holding that members of a voluntary, unincorporated pilot association, which, under the state laws, could neither select nor discharge its members nor control or direct them in the performance of their duties as licensed pilots, whether technically partners or not, are not liable to the owners of piloted vessels for the negligence of each other because, instead of taking their fees as they earn them, such fees go into a common fund, and, after deducting expenses, are distributed to the several members according to the number of days they respectively were on the active list.

1. Weideman *v.* State, 4 Ind. App. 397, 30 N. E. 920, 921.

2. Century Dict.; Webster Dict. [both *quoted* in Butte *v.* Peasley, 18 Mont. 303, 304, 45 Pac. 210]; Webster Dict.; Worcester Dict. [both *quoted* in People *v.* Gastro, 75 Mich. 127, 131, 42 N. W. 937]. See Gouch *v.* Buxton, 11 Mod. 77, where the term was defined as one who "procured women." But see People *v.* Gastro, 75 Mich. 127, 131, 42 N. W. 937, where the circuit court was said to have erroneously defined the term as meaning "a man who has intercourse with a loose woman, and usually she is taking care of him,— supporting him."

3. People *v.* Murphy, 145 Mich. 524, 526, 108 N. W. 1009.

4. Century Dict.

Does not include spruce timber. Robbins *v.* Otis, 1 Pick. (Mass.) 368, 370.

"Pine-land broker" is defined as a person engaged as a sort of middleman, whose business it is to bring together sellers and purchasers of pine land, from one or both of whom he obtains a commission for making the sale. McDonald *v.* Maltz, 78 Mich. 685, 44 N. W. 337. See, generally, FACTORS AND BROKERS.

5. Klett *v.* Delaware Ins. Co., 23 Pa. St. 262, 264, construing these terms as used in a policy of insurance.

6. Century Dict.

"Pinxter Monday" is a day upon which certain church corporations always elect their trustees. People *v.* Runkle, 9 Johns. (N. Y.) 147, 157.

7. Burrill L. Dict. [*citing* Sugden Prop. 162, 170, and note].

8. State *v.* Quaid, 43 La. Ann. 1076, 1077, 10 So. 183, 26 Am. St. Rep. 207, where it is said: "At the beginning of the game the gamekeeper puts a number of marbles in a

PINS. See METALLIC.[9]

PINT. A measure of capacity equal to half a quart.[10] (See, generally, INTOXICATING LIQUORS; WEIGHTS AND MEASURES.)

PIONEER. A word applied to a patent which represents a marked advance in the art;[11] or one covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before.[12] (See, generally, PATENTS.)

PIOUS GIFT. See CHARITIES.[13]

PIOUS USES. See CHARITIES.

PIPE-CUTTER. A tool, worked by hand, which grasps the pipe to be cut between two jaws, one or both of which is provided with a knife, and is then revolved around the pipe, the jaws being gradually brought nearer together, as the cut progresses, by means of a set-screw or other device.[14]

PIPE-LINE. A line of pipe running upon or in the earth, carrying with it the right to the use of the soil in which it is placed.[15] (Pipe-Line: Acquisition of Right of Way For Supply — Of Oil, or Gas, see EMINENT DOMAIN; GAS; Of Water, see EMINENT DOMAIN; WATERS.)

leathern bottle, on each one of which is a number printed, and, after thoroughly shaking it up, he casts one to each of the players. These balls indicate the order of reference among the players, and each one is entitled to credit on his score for the number marked on his ball. When, in the progress of the game, one of the players makes a total score of the 'precise' number fixed as the winning number, he is entitled to the pool, and it consists of the total amount the players contributed thereto."

9. Particularly 27 Cyc. 485 note 79.

10. Century Dict.

A sale of "one pint" means a sale of that particular quantity, and not of more. State *v.* Bach, 36 Minn. 234, 235, 30 N. W. 764; State *v.* Lavake, 26 Minn. 526, 528, 6 N. W. 339, 37 Am. Rep. 415.

11. Ford *v.* Bancroft, 98 Fed. 309, 312, 39 C. C. A. 91.

12. Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 561, 562, 18 S. Ct. 707, 42 L. ed. 1136.

13. See 6 Cyc. 900 note 16.

14. Saunders *v.* Allen, 60 Fed. 610, 9 C. C. A. 157.

15. Dietz *v.* Missouri Transfer Co., 95 Cal. 92, 100, 30 Pac. 380.

"Pipe-line company" is a term which includes any person or persons, joint-stock association or corporation, wherever organized or incorporated, "when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially, within [the] state." Bates Annot. St. Ohio (1904), § 2780-17, a statute relating to listing personalty for taxation.

PIRACY

By Edward C. Ellsbree*

I. Nature and Elements of Offense, 1626
- A. *Piracy Jure Gentium,* 1626
  - 1. *In General,* 1626
  - 2. *Intent,* 1627
    - a. *In General,* 1627
    - b. *Commissioned Privateers,* 1627
- B. *Statutory Piracies,* 1627
  - 1. *Murder, Robbery, Etc., Upon High Seas,* 1627
    - a. *Act of April 30, 1790,* 1627
    - b. *Act of May 15, 1820,* 1628
  - 2. *Running Away With Vessel,* 1628
  - 3. *Confederating With Pirates,* 1629
  - 4. *Piracy Under Color of Commission From Foreign Power,* 1629
  - 5. *Engaging in Slave Trade,* 1629
    - a. *In General,* 1629
    - b. *Act of May 15, 1820,* 1629
      - (I) *Elements of Offense,* 1629
      - (II) *Who May Commit,* 1630

II. Punishment, 1630
- A. *Power to Punish,* 1630
  - 1. *By Nations Generally,* 1630
  - 2. *By United States,* 1630
- B. *Seizure and Condemnation of Vessels,* 1630
  - 1. *Under Law of Nations,* 1630
  - 2. *Under Act of March 3, 1819,* 1631
  - 3. *Under Act of August 5, 1861,* 1631
- C. *Criminal Prosecutions,* 1631
  - 1. *Indictment,* 1631
  - 2. *Evidence,* 1632

CROSS-REFERENCES

For Matters Relating to:

Criminal Law Generally, see Criminal Law.
Indictment Generally, see Indictments and Informations.
Insurance Against Pirates, see Marine Insurance.
Jurisdiction of Piracy, see Criminal Law.
Law of Nations Generally, see International Law.
Piracy of Copyrighted Matter, see Copyright.
War, see War.

I. NATURE AND ELEMENTS OF OFFENSE.

A. Piracy Jure Gentium — 1. In General. Piracy has two aspects: (1) As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only in prize courts; and (2) its liability to punishment criminally by the municipal law of the place where the offender is tried.[1] Accordingly the definitions of piracy, aside from statutory piracy, fall naturally into two classes, according as the offense is viewed more especially as it affects the right of nations, or as amenable to criminal punishment under the municipal law.[2] Piracy, by the common law, consists in committing

1. See The Ambrose Light, 25 Fed. 408.
2. See The Ambrose Light, 25 Fed. 408.

* Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314.

those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there.[3] Piracy under the law of nations is a robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility.[4]

2. Intent — a. In General. It is said that the piratical act, to come within the meaning of the law, must be done *animo furandi*. By this nothing more is meant than that, as in robbery on the land, it must be done with a felonious intent, that is, wilfully, with intent to injure, and without legal authority or lawful excuse.[5]

b. Commissioned Privateers. Since a felonious intent is necessary to constitute the crime, it has been held that one acting in good faith under a commission from a foreign power cannot be held guilty of piracy, even though such commission is not genuine.[6] If, however, seizures are made, not *jure belli*, but *animo furandi*, a commission is no defense to a charge of piracy.[7]

B. Statutory Piracies — 1. Murder, Robbery, Etc., Upon High Seas — a. Act of April 30, 1790. By the act of April 30, 1790,[8] it is declared that every person

3. Dole *v.* Merchants' Mut. Mar. Ins. Co., 51 Me. 465, 467; Talbot *v.* Janson, 3 Dall. (U. S.) 133, 159, 1 L. ed. 540; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209; U. S. *v.* Smith, 27 Fed. Cas. No. 16,318; U. S. *v.* Tully, 28 Fed. Cas. No. 16,545, 1 Gall. 247, 254.

4. U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 161, 5 L. ed. 57; The Ambrose Light, 25 Fed. 408, 416; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6, 12; U. S. *v.* Chapels, 25 Fed. Cas. No. 14,782, Brunn. Col. Cas. 444; Atty.-Gen. *v.* Kwok-a-Sing, L. R. 5 P. C. 179, 199, 12 Cox C. C. 565, 42 L. J. P. C. 64, 29 L. T. Rep. N. S. 114, 21 Wkly. Rep. 825; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict. *Compare* Regina *v.* M'Gregor and Lambert, 1 C. & K. 429, 431, 47 E. C. L. 429, 431.

Another definition is: "An assault upon vessels navigating the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury." Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394, 419.

A pirate is "a person who lives by piracy, one guilty of the crime of piracy." Black L. Dict.; Bouvier L. Dict. Other definitions are: "A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships." Ridley Civ. & Eccl. L. pt. 2, c. 1, § 3. "One who roves the sea in an armed vessel, without commission from any sovereign State, on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet." Anderson L. Dict.; Black L. Dict.; Davison *v.* Seal-Skins, 7 Fed. Cas. No. 3,661, 2 Paine 324, 333; Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394, 419; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6, 12; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. (Pa.) 527, 540; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285, 286. "One who renounces every country and ravages every country on its coasts and vessels indiscriminately." The Wanderer, 3 Phila. (Pa.) 527, 538, 539. "One who robs on the high seas, irrespective of country or conditions — an indiscriminate plunderer for the sake of gain." Fifield *v.* State Ins. Co., 47 Pa. St. 166, 187, 86 Am. Dec. 523. "One who, without a commission from any public or recognized authority, shall ravage the coast or vessels of any country indiscriminately." The Wanderer, 3 Phila. (Pa.) 527, 538, 539.

5. Dole *v.* Merchants' Mut. Mar. Ins. Co., 51 Me. 465; The Ambrose Light, 25 Fed. 408; Davison *v.* Seal-Skins, 7 Fed. Cas. No. 3,661, 2 Paine 324; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209; U. S. *v.* Tully, 28 Fed. Cas. No. 16,545, 1 Gall. 247.

6. The Josefa Secunda, 5 Wheat. (U. S.) 338, 5 L. ed. 104; Stoughton *v.* Taylor, 13 Fed. Cas. No. 7,558; U. S. *v.* Bass, 24 Fed. Cas. No. 14,537, Brunn. Col. Cas. 418; U. S. *v.* Smith, 27 Fed. Cas. No. 16,339*a*.

The distinction between privateering and piracy is the distinction between captures *jure belli*, under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas, committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely. A capture of a vessel and cargo by a Confederate privateer was held not to be within the terms of the insurance policy against perils of the sea, fires, pirates, assailing thieves, jettison, etc., but to be included in the exception "that said company shall not be liable for any claim for or loss by seizure, capture, or detention." Fifield *v.* State Ins. Co., 47 Pa. St. 166, 169, 86 Am. Dec. 523.

7. U. S. *v.* Klintock, 5 Wheat. (U. S.) 144, 5 L. ed. 55; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209; 3 Op. Atty.-Gen. 120.

8. U. S. Rev. St. (1878) § 5372 [U. S. Comp. St. (1901) p. 3643].

who commits upon the high seas,[9] or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state,[10] murder[11] or robbery,[12] or any other offense, which, if committed within the body of a county, would be punishable by death by the laws of the United States, is a pirate, and shall suffer death.[13] This section consists of three different classes of piracy: (1) Offenses which, if committed within the body of a county, would be punishable by death; (2) and (3) particular offenses which are enumerated.[14] It extends to all persons on board all vessels which throw off their national character by committing piracy on other vessels;[15] but robbery committed on board a vessel belonging exclusively to subjects of a foreign state, sailing under the flag of a foreign state, whose authority is acknowledged, is not piracy within the intent of this act, nor punishable under it in the courts of the United States.[16]

b Act of May 15, 1820. The act of May 15, 1820,[17] declares the person a pirate, punishable by death, who commits the crime of robbery upon the high seas, in or upon any vessel, or upon any ship's company of any vessel, or the lading thereof.[18] The interpretation given to the words of this act applies the crime to the case of depredation upon any American vessel or property, on the high seas under circumstances that would constitute robbery, if the offense were committed on land,[19] which is the felonious[20] and forcible taking from the person of another, of goods or money, to any value, by violence or putting him in fear.[21]

2. Running Away With Vessel. To constitute the offense of piracy within the

9. The words "high seas" mean any waters on the sea coast which are without the boundaries of low water mark (U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624, 627); although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government (U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624). See 21 Cyc. 436 notes 48, 49. Foreign jurisdictional limits, although neutral to war, are not neutral to crimes. U. S. *v.* The Pirates, *supra*.

10. The words "out of the jurisdiction of any particular state" mean out of any one of the United States. U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 199, 5 L. ed. 64; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624, 627.

11. To constitute murder within this section, the death, as well as the mortal stroke, must happen on the high seas. U. S. *v.* McGill, 26 Fed. Cas. No. 15,676, 4 Dall. (U. S.) 426, 1 Wash. 463. See, generally, Criminal Law.

12. The term "robbery," as used in the statute, must be understood in the sense in which it is recognized and defined at common law. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209. A robbery, as defined by the common law, committed on the high seas, is piracy, by the act of 1790, c. 36, § 8, even if not punishable with death by the laws of the United States, if committed on land. U. S. *v.* Palmer, *supra*. See Robbery.

13. This act is not repealed by the act of June 26, 1812 [2 U. S. St. at L. 759] (U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209), nor by the act of March 3, 1819, to protect the commerce of the United States, and punish the crime of piracy (U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64).

14. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471.

15. U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. *v.* Klintock, 5 Wheat. (U. S.) 144, 5 L. ed. 55.

16. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6; U. S. *v.* Kessler, 26 Fed. Cas. No. 15,528, Baldw. 15; U. S. *v.* Owners of The Unicorn, 27 Fed. Cas. No. 15,979*a*.

17. U. S. Rev. St. (1878) § 5370 [U. S. Comp. St. (1901) p. 3643].

18. This section applies to all persons whether citizens or foreigners. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

19. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

Commission to vessel as defense.— Since a nation at war may commission private armed vessels to carry on war against the enemy on the high seas, such a commission is a good defense to a charge of piracy under this act. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6. The United States courts will, however, treat as pirates all persons engaged in plundering vessels of United States citizens under authority of a government set up by insurgents against whom a civil war is being waged. U. S. *v.* Smith, 27 Fed. Cas. No. 16,318.

20. A "felonious" taking, means a taking with a wrongful intent to appropriate the goods of another; but the taking need not be such as amounts to piracy according to the laws of nations. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6; U. S. *v.* Durkee, 25 Fed. Cas. No. 15,009, McAllister 196.

21. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

act of April 30, 1790,[22] by "piratically and feloniously" running away with a vessel, personal force and violence is not necessary; but the intent must be *animo furandi*.[23]

3. Confederating With Pirates. The act of April 30, 1790,[24] provides for the punishment of any one who combines, confederates, or corresponds with pirates, knowing them to be guilty of piracy or robbery.[25]

4. Piracy Under Color of Commission From Foreign Power. The act of April 30, 1790,[26] declares that every citizen who commits any murder or robbery against the United States, or any citizen thereof, under color of a commission from a foreign power, shall be considered a pirate.[27]

5. Engaging in Slave Trade — a. In General. The slave trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs.[28]

b. Act of May 15, 1820 — (i) *Elements of Offense.* Under the power to define and punish piracies, given by the constitution,[29] congress may declare to be piracy the service of a citizen or resident of the United States on a vessel used in kidnapping the inhabitants of a foreign country for the purpose of making them slaves, or the use of a vessel owned in the United States in such kidnapping.[30] This power was exercised in the act of May 15, 1820.[31] There are four descriptions of the offense to be found in this act: (1) Landing and seizing the negroes; (2) forcibly bringing or carrying them on board; (3) decoying them; (4) receiving them on board of the vessel.[32] The first two acts comprehend force as an ingredient; the latter two do not.[33] Intent and acts, tending to make someone a slave, are both necessary.[34]

22. U. S. Rev. St. (1878) § 5383 [U. S. Comp. St. (1901) p. 3647].

23. U. S. *v.* Tully, 28 Fed. Cas. No. 16,545, 1 Gall. 247, holding that the piratically and feloniously running away with a vessel, within the act, is the running away with a vessel with the wrongful and fraudulent intent thereby to convert the same to the taker's own use and to make the same his own property against the will of the owner.

24. U. S. Rev. St. (1878) § 5384 [U. S. Comp. St. (1901) p. 3648].

25. **Any intercourse** with pirates, however inefficient or remote, which has a reference to the offense with which they are chargeable, and which has a tendency to promote or is in any manner intended to promote their views, is an offense under this section. U. S. *v.* Howard, 26 Fed. Cas. No. 15,404, 3 Wash. 404.

An endeavor by a mariner to corrupt the master of a vessel and to induce him to go over to pirates is within the provisions of this section. U. S. *v.* Howard, 26 Fed. Cas. No. 15,404, 3 Wash. 340.

Past confederation.— The language of this section implies compact and association with the pirates, as well in relation to the past, as to the future. U. S. *v.* Howard, 26 Fed. Cas. No. 15,404, 3 Wash. 340.

There must be something of criminal intention in the person who confederates and corresponds with the pirates. Something like a criminal participation must be shown. U. S. *v.* Howard, 26 Fed. Cas. No. 15,404, 3 Wash. 340.

26. U. S. Rev. St. (1878) § 5373 [U. S. Comp. St. (1901) p. 3644].

27. See U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

This section is applicable only to citizens and not to foreigners. U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6; 3 Op. Atty.-Gen. 120.

28. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

29. U. S. Const. art. 1, § 8.

30. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. (Pa.) 527.

Constitutionality of act.— The act of congress declaring the slave trade to be piracy is constitutional. U. S. *v.* Bates, 24 Fed. Cas. No. 14,544.

31. U. S. Rev. St. (1878) §§ 5375, 5376 [U. S. Comp. St. (1901) pp. 3644, 3645].

32. U. S. *v.* Westervelt, 28 Fed. Cas. No. 16,668, 5 Blatchf. 30.

33. U. S. *v.* Westervelt, 28 Fed. Cas. No. 16,668, 5 Blatchf. 30.

Moral restraint and fear.— To sustain an indictment under this act for "forcibly" confining negroes, it is not necessary to prove that there was physical or manual force. It is sufficient that the negroes were under moral restraint and fear — their wills controlled by superior power exercised over their minds and bodies; and any person participating in such forcible detention is a principal in the offense. U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18.

34. U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221.

It is the intent to make a slave which constitutes the essence of the offense; neither the seizing, nor forcibly bringing, or carrying, or receiving a negro on board, is any offense without such superadded intent. U. S. *v.*

(II) *Who May Commit.* Any citizen, being of the crew or ship's company of any vessel, whether foreign or American, may commit the crime.[35] If the accused is not a citizen, ownership of the vessel by a citizen is an essential ingredient of the offense.[36]

II. PUNISHMENT.

A. Power to Punish — 1. By Nations Generally. As general pirates are deemed enemies of the human race, making war upon all mankind indiscriminately, the crime being one against the universal laws of society, the vessels of every nation have a right to pursue, seize, and punish them.[37] It is by confounding general piracy with piracy by statute that indistinct ideas have been produced respecting the power to punish offenses committed on the high seas. A statute may make any offense piracy, committed within the jurisdiction of the nation passing the statute, and such offense will be punishable by that nation. But piracy, under the law of nations which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation can increase or diminish the list of offenses thus punishable.[38]

2. By United States. There are two distinct provisions of the constitution by which congress is empowered to punish piracy. By the first article of the constitution congress is authorized "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."[39] Furthermore the constitution in express terms gives authority to regulate commerce and to pass all laws necessary to carry that power into effect. The authority thus conferred upon congress has been exercised by a great variety of legislative enactments, and various offenses are denominated and punished as piracy.[40]

B. Seizure and Condemnation of Vessels — 1. Under Law of Nations. Under the law of nations a vessel captured for engaging in piracy becomes a

Battiste, 24 Fed. Cas. No. 14,545, 2 Sumn. 240; U. S. *v.* Corrie, 25 Fed. Cas. No. 14,869, Brunn. Col. Cas. 686.

The intent referred to is a future intent without regard to the antecedent state or condition of the negro, whether a slave or free. U. S. *v.* Battiste, 24 Fed. Cas. No. 14,545, 2 Sumn. 240; U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221. But see U. S. *v.* Corrie, 25 Fed. Cas. No. 14,869, Brunn. Col. Cas. 686.

35. U. S. *v.* Westervelt, 28 Fed. Cas. No. 16,668, 5 Blatchf. 30. But see U. S. *v.* Battiste, 24 Fed. Cas. No. 14,545, 2 Sumn. 240; U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221, in which cases it is held that a person having no interest in or power over negroes so as to impress on them the future character of slaves, but being merely employed in the transportation of them for hire from port to port, cannot be guilty of the offense of piracy under the act of congress of May 15, 1820.

A passenger is not one of the crew or ship's company within the meaning of this act. U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221.

Citizenship, within the meaning of the act of 1820, is that unequivocal relation between every American and his country which binds him to allegiance, and pledges to him protection. U. S. *v.* Brown, 24 Fed. Cas. No. 14,656; U. S. *v.* Darnaud, 25 Fed. Cas. No. 14,918, 3 Wall. Jr. 143.

36. U. S. *v.* Brown, 24 Fed. Cas. No. 14,656; U. S. *v.* Darnaud, 25 Fed. Cas. No. 14,918, 3 Wall. Jr. 143.

37. The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405 [*affirming* 16 Fed. Cas. No. 9,080, 3 Mason 116]; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

By becoming a pirate, a vessel loses her national character, and a piracy committed from on board such a vessel is punishable under the laws of the United States. U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

38. Argument by Mr., afterward Chief Justice, Marshall, in the Jonathan Robbins case [*quoted* in The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501].

39. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

The power to define the offense approaches so near to a right to determine what shall constitute the offense that it is not easy to subject it to precise limitations. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

Reference to law of nations for definition. — The Act of March 3, 1819, § 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish the crime. U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 5 L. ed. 57.

40. See *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285.

prize on account of the universal war presumed to have been declared by the pirate against commerce and human kind at large.[41]

2. Under Act of March 3, 1819. Under the act of March 3, 1819,[42] to protect the commerce of the United States and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court.[43] The act extends to all armed vessels which commit the unlawful acts specified therein.[44] It is not necessary that there should be either actual plunder or an intent to plunder; if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.[45] The innocence or ignorance on the part of the owners of the prohibited acts will not exempt the vessel from condemnation.[46] The condemnation of the cargo is not authorized by this act;[47] nor does the law of nations require the condemnation of the cargo for petty offenses, unless the owner thereof coöperates in and authorizes the unlawful act.[48]

3. Under Act of August 5, 1861. The supplementary act of 1861[49] subjects to capture on the high seas, and to seizure in port, vessels built, purchased, fitted out, in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure.[50]

C. Criminal Prosecutions — 1. Indictment. A charge that the piracy was

41. The City of Mexico, 28 Fed. 148. See War.

42. U. S. Rev. St. (1878) § 4293 *et seq.* [U. S. Comp. St. (1901) p. 2950].

43. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

44. See cases cited *infra*, this note.

No distinction is taken as to the objects, purposes, or character of the armament, it being wholly immaterial whether it be for offense or defense, legitimate or illegitimate. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

The authority here given is extended over all vessels guilty of piratical aggressions upon vessels of the United States, or the citizens thereof, or upon any other vessel. The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405 [*affirming* 16 Fed. Cas. No. 9,080, 3 Mason 116]; The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501.

Vessels sailing under void commissions, and threatening neutral commerce, may be lawfully suppressed by seizure as technically piratical, although their officers and crews, if they reasonably believed their commissions to be valid, might be acquitted. The Ambrose Light, 25 Fed. 408. See also The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531.

Attack in good faith.—An attack on a vessel of the United States by an armed vessel, upon a mistaken supposition that she was a piratical cruiser, but without felonious intent, is not a piratical aggression, nor does it subject the vessel, if captured, to confiscation, under the law of nations. The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405 [*affirming* 16 Fed. Cas. No. 9,080, 3 Mason 116].

To make the fire of one vessel into another a piratical aggression, it must be a first aggression, unprovoked by any previous act of hostility or menace from the other side. 9 Op. Atty.-Gen. 455.

45. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239. A piratical aggression, search, restraint, or seizure is as much within the act as a piratical depredation. U. S. *v.* The Malek Adhel, *supra*.

46. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

47. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

48. U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

49. U. S. Rev. St. (1878) § 4297 *et seq.* [U. S. Comp. St. (1901) p. 2951].

50. The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501.

The piratical acts contemplated in this act and the act of 1819 are the same, the only difference being that the earlier act extends only to vessels which have committed or attempted them, while the later act includes vessels intended to be employed in committing them. The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501. The offenses referred to are such as would be deemed piratical under the law of nations. The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501.

All vessels whether American or foreign.— It is not necessary that the vessel should have been fitted out by American citizens, or in American ports, nor that the intended aggression should be upon American vessels or citizens. The Chapman, 5 Fed. Cas. No. 2,602, 4 Sawy. 501.

committed "on the high seas, and within the jurisdiction of the court, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state," is a sufficient statement of venue, without any other specification of place.[51] Where the offense is such that the court has jurisdiction, although the vessel has no national character, no national character need be alleged in the indictment.[52] Since the offense of piracy is one which may be committed by one or more persons, an indictment charging three persons with committing the crime jointly is sufficient, and proof of the guilt of either one will authorize his conviction and the acquittal of the others.[53]

2. **Evidence.** Upon a prosecution for piracy, where there is no proof that in the first instance any unlawful acts were meditated by the commander of a vessel and her crew, it is not sufficient to prove piratical acts committed by the commander and his crew generally; but it must be proved that each defendant participated in the taking, and did it feloniously.[54] It is unnecessary, on the trial of an indictment for piracy, to produce a merchant vessel's register, or documentary evidence, to prove her national character.[55] Such evidence is, however, admissible, and is *prima facie* sufficient to establish the nationality of the vessel.[56]

PIRATA EST HOSTIS HUMANI GENERIS. A maxim meaning "A pirate is an enemy of the human race."[1]

PIRATE. See Piracy.

PISCARIA. All fisheries, without regard to their distinctive character, or to the method of taking the fish.[2] (See, generally, Fish and Game.)

PISCARY. See Common Lands; Fish and Game.

PISTOL.[3] A small, light firearm;[4] a small firearm, or the smallest arm used, intended to be fired from one hand, differing from a musket chiefly in size;[5] a Gun,[6] *q. v.* (See, generally, Weapons.)

PIT BOSS. Any person who is charged with the general direction of the underground work, or of both the underground and top work, of any coal mine, and who is commonly known and designated as "mine boss" or "foreman."[7] (See, generally, Master and Servant; Mines and Minerals.)

PITCH. Used with respect to common lands, a term designating the right under which a proprietor selects the general location of his claim or share, by entry and occupation.[8] (See, generally, Common Lands.)

PITFALL. A trap set to ensnare the unwary.[9]

51. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

52. U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. *v.* Demarchi, 25 Fed. Cas. No. 14,944, 5 Blatchf. 84.

53. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

For forms of indictment see U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* Smith, 27 Fed. Cas. No. 16,339*a*; U. S. *v.* Tully, 28 Fed. Cas. No. 16,545, 1 Gall. 247.

54. U. S. *v.* Jones, 26 Fed. Cas. No. 15,496, 3 Wash. 228.

Where seamen on a privateer are on trial for piracy, committed with the officers, it must be shown that the seamen knew or might have known that robbery and not capture as prize was contemplated. U. S. *v.* Jones, 26 Fed. Cas. No. 15,496, 3 Wash. 228.

55. U. S. *v.* The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

56. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

1. Bouvier L. Dict. [*citing* 3 Inst. 113].

2. Caswell *v.* Johnson, 58 Me. 164, 166; Moulton *v.* Libbey, 37 Me. 472, 489, 59 Am. Dec. 57.

"Piscarial rights" see Moulton *v.* Libbey, 37 Me. 472, 497, 59 Am. Dec. 57.

3. **From Pistola,** a town in Italy where pistols were first made. Fife *v.* State, 31 Ark. 455, 461, 25 Am. Rep. 556.

4. Atwood *v.* State, 53 Ala. 508, 509.

5. Webster Dict. [*quoted* in Fife *v.* State, 31 Ark. 455, 461, 25 Am. Rep. 556].

6. State *v.* Barrington, 198 Mo. 23, 109, 95 S. W. 235.

"Pistol cartridges" are such as are adapted to, and are or may be used, for pistols of the size and calibre in ordinary use — including especially those capable of being carried about the person. Union Metallic Cartridge Co. *v.* Teague, 83 Ala. 475, 477, 3 So. 709.

7. Woodruff *v.* Kellyville Coal Co., 182 Ill. 480, 483, 55 N. E. 550.

8. Garland *v.* Rollins, 36 N. H. 349, 350.

9. Hall *v.* Manson, 99 Iowa 698, 713, 68 N. W. 922, 34 L. R. A. 207.

P. J. An abbreviation for "president" (or presiding) "judge," (or justice.)[10]

P. L. An abbreviation for "Pamphlet Laws" or "Public Laws."[11]

PLACARD. An edict; a declaration; a manifesto. Also an advertisement or public notification.[12]

PLACE. As a noun, a word of variable meaning, the particular meaning in any given instance of its use depending upon the connection and circumstances of its use;[13] a very indefinite term, applied to any locality, limited by boundaries however large or however small;[14] a parallelogram of ground with houses on three sides only, and on the fourth, a garden cultivated and adorned for the sake of these houses but opening upon the country;[15] an area; any portion of space regarded as distinct from all other space;[16] a word sometimes used as synonymous with CITY (*q. v.*), or town;[17] FARM,[18] *q. v.*; HOUSE,[19] *q. v.*; PARK (*q. v.*) or square.[20] As a verb, to arrange or make provision for;[21] to fix, to settle, to establish;[22] to dispose or arrange as an investment; to put out at interest; to take

10. Black L. Dict.

11. Black L. Dict. "Pamphlet Laws" in Pennsylvania; and "Public Laws" in New Jersey.

12. Black L. Dict.

13. State *v.* Heard, 64 Mo. App. 334, 337.

14. Law *v.* Fairfield, 46 Vt. 425, 432.

Expresses simply locality, and not kind. Mullen *v.* Erie County, 85 Pa. St. 288, 291, 27 Am. Rep. 650.

Applies not only to a building, but also to any inclosure whether covered or not. Brookline *v.* Hatch, 167 Mass. 380, 381, 45 N. E. 756, 36 L. R. A. 495.

15. Elliott *v.* South Devon R. Co., 2 Exch. 725, 730, 17 L. J. Exch. 262, 5 R. & Can. Cas. 500.

16. Webster Dict. [*quoted* in Prentiss *v.* Davis, 83 Me. 364, 371, 22 Atl. 246].

17. Palmer *v.* Wakefield, 102 Mass. 214, 215.

May be used to designate a country, state, county, town, or a very small portion of a town. Law *v.* Fairfield, 46 Vt. 425, 432. But see Onondaga Salt Co. *v.* Wilkinson, 21 Fed. Cas. No. 12,269, 8 Blatchf. 30.

18. Judge *v.* Splann, 22 Ont. 409, 410.

19. Howard *v.* People, 27 Colo. 396, 399, 61 Pac. 595.

20. Fessler *v.* Union, 67 N. J. Eq. 14, 24, 56 Atl. 272.

As used in an ordinance it implies a particular place of similar character to a street or house, and not anywhere in the city. Barton *v.* La Grande, 17 Oreg. 577, 582, 22 Pac. 111.

The term includes: Hotel. Com. *v.* Purcell, 154 Mass. 388, 389, 28 N. E. 288. Steamboat or vessel. State *v.* McNally, 34 Me. 210, 222, 56 Am. Dec. 650. Town. Malcom *v.* Gardner, 1 Cow. (N. Y.) 13, 14. Uncovered grounds. Eastwood *v.* Miller, L. R. 9 Q. B. 440, 443, 43 L. J. M. C. 139, 30 L. T. Rep. N. S. 716, 22 Wkly. Rep. 799.

Used in connection with other words.—"House or place" see Humes *v.* Taber, 1 R. I. 464, 470. "My place at Riverside" see Axford *v.* Meeks, 59 N. J. L. 502, 503, 36 Atl. 1036. "Place certain" see Greenlief *v.* Watson, 83 Me. 266, 267, 22 Atl. 165. "Place having a known or defined boundary" see Reg. *v.* Local Government Bd., L. R. 8 Q. B. 227, 231, 42 L. J. Q. B. 131, 21 Wkly. Rep. 445. "Place of destination" see Sheridan *v.* Ireland, 66 Me. 65, 68, 69. "Place of the county seat" see Fall River County *v.* Powell, 5 S. D. 49, 52, 58 N. W. 7.

"All other places of public accommodation" is a term said to be of more general significance than the expression "[places] of public resort." Burks *v.* Bosso, 81 N. Y. App. Div. 530, 532, 533, 81 N. Y. Suppl. 384. See State *v.* Pratt, 34 Vt. 323, 325.

"Place adjacent" is a place adjacent to a street or highway, not adjacent to a place of public resort. Reg. *v.* Brown, 17 Q. B. 833, 837, 21 L. J. M. C. 113, 79 E. C. L. 833.

"Place of business" is: A place actually occupied, either continually or at regular periods, by a person or his clerks, or those in his employment. Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 167, 33 Am. Dec. 281; Adam *v.* Musson, 37 Ill. App. 501, 503. See also Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 582, 7 L. ed. 269. A place where people generally congregate for the purpose of carrying on some sort of traffic, or where people are invited or expected to come to engage in some sort of mercantile transaction. Roberts *v.* State, (Ga. App. 1908) 60 S. E. 1082, 1084. Place where business was carried on by the plaintiffs under their own control and on their own account. Little *v.* Cambridge, 9 Cush. (Mass.) 298, 301. That specific place within a city or town at which a person transacted business. Palmer *v.* Kelleher, 111 Mass. 320, 321. The term has been held not to be synonymous with "residence." Routenberg *v.* Schweitzer, 29 Misc. (N. Y.) 653, 654, 61 N. Y. Suppl. 84.

"Place of resort" is a place for the entertainment of persons other than the inhabitants or occupants of the premises. State *v.* On Gee How, 15 Nev. 184, 187. See also State *v.* Ah Sam, 15 Nev. 27, 27 Am. Rep. 454.

"Place of trade" is a place devoted to the business of buying and selling or of plying some mechanical vocation. Sharpe *v.* Hasey, (Wis. 1908) 114 N. W. 1118, 1119.

21. Century Dict. [*quoted* in Heiberger *v.* Johnson, 34 N. Y. App. Div. 66, 67, 53 N. Y. Suppl. 1057].

22. Imperial Dict.; Worcester Dict. [both

insurance for; invest;[23] to assign, to fix, to settle.[24] (Place: Affecting Jurisdiction, see ATTACHMENT; COURTS; DIVORCE; GARNISHMENT; INDICTMENTS AND INFORMATIONS. As Element of Offense, see DISORDERLY CONDUCT; GAMING; INTOXICATING LIQUORS; KIDNAPPING; LARCENY; RECEIVING STOLEN GOODS. Averment of, see HOMICIDE; INDICTMENTS AND INFORMATIONS; PLEADING. Dangerous, see MASTER AND SERVANT; NEGLIGENCE. Evidence of, see CRIMINAL LAW; EVIDENCE. For Bringing Action, see CRIMINAL LAW; VENUE. For Delivery of Goods, see CARRIERS; SALES. For Execution of Sentence, see CRIMINAL LAW. For Filing, see ATTACHMENT; CHATTEL MORTGAGES; CORPORATIONS; LIENS; MECHANICS' LIENS; RECORDS. For Holding Court, see COURTS. For Holding Election, see CORPORATIONS; ELECTIONS. For Meetings, see CORPORATIONS; JURIES; MUNICIPAL CORPORATIONS. For Motion, see MOTIONS; NEW TRIAL. For Notice of Non-Payment, see COMMERCIAL PAPER. For Payment—In General, see PAYMENT; In Specific Articles, see CONTRACTS; PAYMENT; Of Bill or Note, see COMMERCIAL PAPER; Of Bond, see BONDS; COUNTIES; MUNICIPAL CORPORATIONS; Of Premium or Assessment, see Insurance Titles. For Performance, see BONDS; CONTRACTS; SALES. For Preliminary Examination, see CRIMINAL LAW. For Presentment, see COMMERCIAL PAPER. For Printing or Issuance of Paper, see NEWSPAPERS. For Publication, see NOTICE. For Recording, see CHATTEL MORTGAGES; DEEDS; MECHANICS' LIENS; MORTGAGES. For Return, see ATTACHMENT; EXECUTIONS; MANDAMUS; PROCESS. For Sale, see ATTACHMENT; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; MORTGAGES; PARTITION; TAXATION. For Service of Process, see ATTACHMENT; CORPORATIONS; FOREIGN CORPORATIONS; INFANTS; PROCESS. For Taking Deposition, see DEPOSITIONS. Of Burial, see CEMETERIES; DEAD BODIES. Of Confinement, see CRIMINAL LAW; FALSE IMPRISONMENT; PRISONS; REFORMATORIES. Of Ejection of Passenger, see CARRIERS. Of Enlistment, see MILITIA. Of Execution, Delivery, or Payment, see COMMERCIAL PAPER; MORTGAGES. Of Hearing, Designation of, see PROCESS. Of Imprisonment, see CRIMINAL LAW; FALSE IMPRISONMENT; PRISONS; REFORMATORIES. Of Infringement, see PATENTS. Of Insured Property, see FIRE INSURANCE; and Insurance Titles. Of Leaving Guest's Property, see INNKEEPERS. Of Making or Performance of Contract—In General, see CONTRACTS; Between Husband and Wife, see HUSBAND AND WIFE; By Married Woman, see HUSBAND AND WIFE; Of Carriage, see CARRIERS; SHIPPING; Of Insurance, see FIRE INSURANCE; and Insurance Titles; Of Sale, see SALES; VENDOR AND PURCHASER. Of Payment, see COMMERCIAL PAPER; PAYMENT. Of Performance, see CONTRACTS; MECHANICS' LIENS. Of Rendition of Judgment, see JUDGMENTS. Of Residence, see DOMICILE; PAUPERS. Of Sale, see FACTORS AND BROKERS; INTOXICATING LIQUORS; SALES. Of Settlement, see PAUPERS. Of Trial Generally, see CRIMINAL LAW; VENUE; Designation of, see PROCESS. Parol Evidence Relating to, see EVIDENCE. See also CONFLICT OF LAWS, and Cross-References Thereunder.)

PLACER. See MINES AND MINERALS.

PLACITA. The style or title of the courts at the beginning of the old *nisi prius* record.[25]

PLACITA DEBENT APTE CONCLUDERE. A maxim meaning "Pleas ought to conclude properly."[26]

quoted in Jessup *v.* Grand Trunk R. Co., 28 Grant Ch. (U. C.) 583, 587].

23. Standard Dict. [*quoted* in Heiberger *v.* Johnson, 34 N. Y. App. Div. 66, 69, 53 N. Y. Suppl. 1057].

"Placed" means sold or realized. Fiske *v.* Joy, 141 Mass. 311, 313, 5 N. E. 514.

"To place a loan" is a phrase said to mean, if not otherwise qualified, merely to obtain a loan. Heiberger *v.* Johnson, 34 N. Y. App. Div. 66, 67, 53 N. Y. Suppl. 1057.

24. Webster Dict. [*quoted* in Schramm *v.* Gentry, 63 Tex. 583, 585].

"We do . . . place the value of said land at a sum not to exceed one thousand six hundred dollars."—See Schuyler *v.* Broughton, 76 Cal. 524, 526, 18 Pac. 436.

25. Black L. Dict. See also Hall *v.* Hamilton, 74 Ill. 437, 443; Truitt *v.* Griffin, 61 Ill. 26, 28; Planing Mill Lumber Co. *v.* Chicago, 56 Ill. 304, 305.

26. Peloubet Leg. Max. [*citing* Lofft 416].

PLACITA DE TRANSGRESSIONE CONTRA PACEM REGIS, IN REGNO ANGLIÆ VI ET ARMIS FACTA, SECUNDUM LEGEM ET CONSUETUDINEM ANGLIÆ SINE BREVI REGIS PLACITARI NON DEBENT. A maxim meaning "Pleas of trespass against the peace of the king in the kingdom of England, made with force and arms, ought not, by the law and custom of England, to be pleaded without the king's writ." [27]

PLACITA EX DIRECTO ESSE DEBENT, ET NIL FER INDUCTIONEM SUPPONE. A maxim meaning "Pleas ought to be directly expressed, and to suppose nothing by way of induction or inference." [28]

PLACITA NEGATIVA DUO EXITUM NON FACIUNT. A maxim meaning "Two negative pleas do not form an issue." [29]

PLACITORUM ABBREVIATIO. A compilation from the earliest English judicial records.[30]

PLACITORUM ALIA DILATORIA, ALIA PEREMPTORIA. A maxim meaning "Some pleas admit of delay; others are peremptory." [31]

PLACITUM ALIUD PERSONALE, ALIUD REALE, ALIUD MIXTUM. A maxim meaning "Pleas are personal, real, and mixed." [32]

PLACITUM MENDAX NON EST PLACITUM. A maxim meaning "A lying plea is no plea." [33]

PLACITUM NEMO CESSABIT, NISI MELIUS DANDO. A maxim meaning "A plea in abatement must give a better plea." [34]

PLAGA. A term said to mean both a wound and a BRUISE,[35] *q. v.*

PLAGIARISM. See COPYRIGHT.

PLAIN. OPEN, *q. v.*; clear; unencumbered; FAIR, *q. v.*; not intricate or difficult; EVIDENT, *q. v.*; MANIFEST, *q. v.*; OBVIOUS, *q. v.*; unmistakable.[36]

PLAIN CLOTHES MAN. A police officer who does not wear his uniform or anything to call attention to his position while on his rounds.[37] (See POLICEMAN.)

PLAINLY. In a plain manner.[38]

PLAINT.[39] The exhibiting any action, real or personal, in writing;[40] in an inferior court, a process in the nature of an original writ; the first process;[41] the first process of an inferior court.[42] (See, generally, JUSTICES OF THE PEACE; PLEADING; PROCESS.)

27. Black L. Dict. [*citing* 2 Inst. 311].

28. Morgan Leg. Max. [*citing* Halkerstone Max. 124].

29. Bouvier L. Dict. [*citing* Lofft 415].

30. Stephen Pl. appendix, note 8.

31. Morgan Leg. Max. [*citing* Halkerstone Max. 124].

32. Peloubet Leg. Max. [*citing* Coke Litt. 284*b*].

33. Morgan Leg. Max. [*citing* Halkerstone Max. 124].

34. Peloubet Leg. Max. [*citing* Halkerstone Max. 125].

35. State *v.* Moses, 13 N. C. 452, 467.

36. Webster Int. Dict.

"Plain plastering" is the plain surface and such plain mouldings and cornices as are put on in the form of wet plaster in the building, and is distinguishable from those cornices and mouldings which are not put upon the walls until after they are made. Woodruff *v.* Klee, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 350.

"Plain statement" is a statement that may be readily understood, not merely by lawyers, but by all who are sufficiently acquainted with the language in which it is written. Mann *v.* Morewood, 5 Sandf. (N. Y.) 557, 564.

"Plain and concise statement" see Crane *v.* Crane, 19 N. Y. Suppl. 691, 693.

Used in connection with other words.—"In plain view" see McColl *v.* Rally, 127 Iowa 633, 636, 103 N. W. 972. "Paper envelopes, plain" see Hunter *v.* U. S., 126 Fed. 894, 895. "Plain and intelligible words" see Jennings *v.* State, 7 Tex. App. 350, 358. "Plain English type" see Porter *v.* Gilkey, 57 Mo. 235, 237. "Plain, speedy and adequate" see Willman *v.* Alturas County Dist. Ct., 4 Ida. 11, 13, 35 Pac. 692.

37. People *v.* Glennon, 175 N. Y. 45, 49, 67 N. E. 125.

38. Century Dict.

"Plainly-bound copies" are words which in the publishers' trade have been construed as meaning the cheapest editions that might be published. Murphy *v.* Christian Press Assoc. Pub. Co., 38 N. Y. App. Div. 426, 429, 56 N. Y. Suppl. 597.

39. Derived from the French *plainte*, Latin *querela*. State *v.* McCann, 67 Me. 372, 374 [*citing* Jacob L. Dict.].

40. Jacob L. Dict. [*quoted* in State *v.* McCann, 67 Me. 372, 374].

41. Yager *v.* Hannah, 6 Hill (N. Y.) 631, 634 [*citing* 3 Blackstone Comm. 273; Tomlin L. Dict.]; Shaw *v.* Dutcher, 19 Wend. (N. Y.) 216, 219 [*citing* Jacob L. Dict.; Lilly Abr. tit. "Plaint"].

42. State *v.* Mathews, 2 Brev. (S. C.) 82,

PLAINTIFF. He, who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his rights;[43] "the complainant"—"he who sues or prosecutes"—"the prosecutor";[44] the complaining party, the party who is coming into court asking for rights which he claims;[45] the moving party or suitor in a garnishment proceeding;[46] whoever brings the suit, bill, or complaint;[47] every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise;[48] a person or party who brings an action, who complains or sues any person in an action and is so named on the record;[49] synonymous with PARTY,[50] *q. v.* (See DEFENDANT; and, generally, PARTIES; PLEADING.)

PLAIN WOOLEN GOODS. Those woolen goods in which the warp and woof threads cross each other at right angles.[51] (See, generally, CUSTOMS DUTIES.)

PLAIT. Longitudinal parallel flat ruffles having angular edges.[52] (See, generally, CUSTOMS DUTIES.)

PLAN. When applied to a building, a draft or form or representation of a horizontal section of anything, as of a building or machinery;[53] an architectural drawing representing the horizontal sections of the various floors or stories of the building, the disposition of apartments and walls, with the situation of the doors and windows, in fact, representing the different stories as they are to be built, and the whole as it will appear when completed;[54] a design, a delineation, or projection on a plane surface of the ground lines of a structure, which are reduced in size, the relative positions of which, and their proportions, are preserved;[55] synonymous with DELINEATION (*q. v.*), DESIGN (*q. v.*), DRAFT (*q. v.*), sketch.[56] As applied to streets, a plot or survey indicating number, names, and locations of

83. But see Sims *v.* Alderson, 8 Leigh (Va.) 479, 484 [*citing* 1 Tidd Pr. 167].

43. Burrell *v.* U. S., 147 Fed. 44, 46, 77 C. C. A. 308.

44. Stevens *v.* White, 5 Hill (N. Y.) 548, 551.

45. State *v.* Newell, 13 Mont. 302, 306, 34 Pac. 28.

46. Esler *v.* Adsit, 108 Mich. 543, 544, 66 N. W. 485.

47. Canaan *v.* Greenwoods Turnpike Co., 1 Conn. 1, 9.

48. Ont. Supreme Jud. Act, § 2 (5) [*quoted* in Molson Bank *v.* Sawyer, 19 Ont. Pr. 316, 325].

49. Black L. Dict. [*quoted* in Gulf, etc., R. Co. *v.* Scott, (Tex. Civ. App. 1894) 28 S. W. 457, 458].

50. Gulf, etc., R. Co. *v.* Scott, (Tex. Civ. App. 1894) 28 S. W. 457, 458.

A term applicable to the "actor" in suits at law. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 151, 35 N. E. 168.

May mean appellant, though he was defendant in court below. Westcott *v.* Booth, 49 Ala. 182, 183.

Construed to mean plaintiff on the record and not the beneficial plaintiff or real party in interest. Perry *v.* Kennebunkport, 55 Me. 453, 455.

Construed in plural see Brents *v.* Barnett, 4 Bibb (Ky.) 251; Blanding *v.* Mansfield, 72 Me. 427, 428.

Distinguished from "complainant" see Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 151, 35 N. E. 168.

"Plaintiff claims" see Douglas *v.* Beasley, 40 Ala. 142, 147.

Includes: The actor or principal for whom an applicant surety is bound. Kincaid *v.* Sharp, 3 Head (Tenn.) 151, 154. Claimant against assignee for creditors. Hill *v.* Graham, 11 Colo. App. 536, 53 Pac. 1060, 1061. Defendant demanding set-off or counter-claim. Paducah Hotel Co. *v.* Long, 92 Ky. 278, 279, 17 S. W. 853, 13 Ky. L. Rep. 531. But see Irwin *v.* Turner, 16 Ont. Pr. 349, 354. Intervener. St. Charles St. R. Co. *v.* Fidelity, etc., Co., 109 La. 491, 497, 33 So. 574. Party in interest though not plaintiff on the record. Stevens *v.* White, 5 Hill (N. Y.) 548, 551; Henry *v.* Salina Bank, 5 Hill (N. Y.) 523, 534. Relator in habeas corpus proceedings. State *v.* Newell, 13 Mont. 302, 306, 34 Pac. 28.

51. Newman *v.* Arthur, 109 U. S. 132, 137, 3 S. Ct. 88, 27 L. ed. 883.

52. Kursheedt Mfg. Co. *v.* Naday, 107 Fed. 488, 490, 46 C. C. A. 422, where it is said: "The distinction between plaits and flutes being that the former have angular edges and are flat, whereas the latter have round edges and stand up."

53. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 628, 6 Ohio N. P. 208.

54. State *v.* Kendall, 15 Nebr. 262, 273, 18 N. W. 85.

55. Black L. Dict. [*quoted* in Jenney *v.* Des Moines, 103 Iowa 347, 350, 72 N. W. 550].

56. Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 628, 6 Ohio N. P. 208.

Distinguished from "specifications" see Knelly *v.* Horwath, 208 Pa. St. 487, 491, 57 Atl. 957.

"Plans and specifications" see State *v.* Kendall, 15 Nebr. 262, 273, 18 N. W. 85, in dissenting opinion of Maxwell, J.

streets, their lines and courses, widths, grades, etc., as they are or are to be laid out and opened on the land, including all particulars germane to the general subject.[57] (Plan: Evidence, see EVIDENCE. Lien For Preparation of, see MECHANICS' LIENS. Of Building, see BUILDERS AND ARCHITECTS; CONTRACTS; MECHANICS' LIENS. Of Municipality, see MUNICIPAL CORPORATIONS. Of Public Improvement, see MUNICIPAL CORPORATIONS.)

PLANING-MILL. A term, which, without modification, would usually be understood to include a building and machinery therein used in doing the work of planing mills.[58] (See, generally, MILLS.)

PLANKERS. As used in connection with the construction of a vessel, a term said to mean all the men who assisted in putting on the planks.[59]

PLANKING. In its common and ordinary meaning, planks collectively; a series of planks in place.[60]

PLANK ROAD. See TOLL-ROADS.

PLANT. All the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock;[61] every temporary and accessory means necessary or required by the engineer to complete the works, . . . and all temporary materials built into the works, which cannot (in the opinion of the engineer) be removed without any injury to the works;[62] whatever apparatus is used by a business man for carrying on his business — not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed and movable, live or dead, which he keeps for permanent employment in his business;[63] a word sometimes used for installation, or for the apparatus required to carry on any manufacturing operation;[64] the fixtures and tools necessary to carry on any trade or mechanical business (local);[65] the fixtures, tools, apparatus, etc., necessary to carry on any trade or mechanical business;[66] the fixtures, machinery, tools, apparatus, etc., necessary to carry on any trade or mechanical business,[67] or any mechanical operation or process;[68] the fixtures, tools, machinery, and apparatus which are necessary to carry on a business;[69] the machinery, apparatus, or fixtures by which a business is carried on;[70] the tools, machinery, apparatus, and fixtures as used in a particular business; that which is necessary to the conduct of any trade or mechanical business or undertaking;[71] the whole machinery and apparatus employed in carrying on a trade or mechanical business;[72] a set of

57. Wetherill *v.* Pennsylvania R. Co., 195 Pa. St. 156, 159, 45 Atl. 658.

58. State *v.* Haney, 110 Iowa 26, 29, 81 N. W. 151.

"Planing-mill building 'and addition'" see Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 34, 36 N. W. 594.

59. Wood *v.* Pittfield, 26 N. Brunsw. 210, 213.

60. Kaherl *v.* Rockport, 87 Me. 527, 529, 33 Atl. 20.

61. Blalse *v.* Shaw, Johns. 732, 734, 8 Wkly. Rep. 410, 70 Eng. Reprint 615.

62. Hudson Bldg. Contr. 630 [*quoted* in Middleton *v.* Flanagan, 25 Ont. 417, 421], where it is said to include all tramways fixed and movable, machinery, engines, vehicles, carts, stages, scaffolding, pumps, dams, cofferdams, timbers, planks, and all special or other appliances of every sort, kind, and description whatsoever.

63. Yarmouth *v.* France, 19 Q. B. D. 647, 658, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281.

64. Huston Electrical Dict. [*quoted* in Fisher Electric Co. *v.* Iron Works, 116 Mich. 293, 298, 74 N. W. 493].

An electric plant includes the steam engines or other prime motors, the generating dynamo or dynamos, the lamps and other electro-receptive devices, and the circuits connected therewith. Fisher Electric Co. *v.* Bath Iron Works, 116 Mich. 293, 298, 74 N. W. 493.

65. Webster Dict. [*quoted* in Liberty County Land, etc., Co. *v.* Barnes, 77 Ga. 748, 752, 1 S. E. 378; Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938, 941].

66. Ogilvie Scientific Dict. [*quoted* in Middleton *v.* Flanagan, 25 Ont. 417, 421].

67. Imperial Dict. [*quoted* in Old Colony Trust Co. *v.* Standard Sugar Beet Co., 150 Fed. 677, 680].

68. Century Dict. [*quoted* in Scott Supply, etc., Co. *v.* Roberts, (Colo. 1908) 93 Pac. 1123, 1124; Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 37, 21 So. 570; Cleveland, etc., R. Co. *v.* Austin, 127 Ill. App. 281, 285, 286; Rooney *v.* Thomson, 84 N. Y. Suppl. 263, 264; McCosh *v.* Barton, 1 Ont. L. Rep. 229, 231].

69. Wharton L. Lex. [*quoted* in McCosh *v.* Barton, 1 Ont. L. Rep. 229, 231].

70. Worcester Dict. [*quoted* in Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938, 941].

71. Encyclopedic Dict. [*quoted* in Old Colony Trust Co. *v.* Standard Beet Sugar Co., 150 Fed. 677, 680].

72. Webster Int. Dict. [*quoted* in Clifton *v.* Montague, 40 W. Va. 207, 213, 21 S. E.

machines, tools, etc., necessary to conduct a mechanical business, often including the building and grounds, or in case of a railroad, the rolling stock, but not including material or product.[73] As a verb, to settle or establish.[74] (See, generally, AGRICULTURE; MANUFACTURES.)

PLANTATION. A place planted;[75] a FARM,[76] *q. v.*; any part of a farm inclosed, or set apart from the rest for special use;[77] any body of land, consisting of one or several adjoining tracts, on which is a planting establishment;[78] any place that is planted; a farm where staples are cultivated on a large scale;[79] a place planted; land brought under cultivation; ground occupied by trees or vegetables which have been planted; especially, in the United States and West Indies, a large estate, cultivated chiefly by negroes, either slaves or free, who live in a distinct community, on the estate, under the control of the proprietor or master.[80] In a somewhat different sense, an original settlement in a new country;

858, 52 Am. St. Rep. 872, 33 L. R. A. 449; Old Colony Trust Co. *v.* Standard Beet Sugar Co., 150 Fed. 677, 684].

73. Standard Dict. [*quoted* in Old Colony Trust Co. *v.* Standard Beet Sugar Co., 150 Fed. 677, 680].

Distinguished from: "Machinery" see Eastern Trust Co. *v.* Cushing Sulphite Fibre Co., 3 N. Brunsw. Eq. 378, 382. "Undertaking" see Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938, 941.

Includes: Horses. Yarmouth *v.* France, 19 Q. B. D. 647, 658, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281. Locomotives, carriages, vans, trucks, etc. Imperial Dict. [*quoted* in Old Colony Trust Co. *v.* Standard Beet Sugar Co., 150 Fed. 677, 680]; Ogilvie Scientific Dict. [*quoted* in Middleton *v.* Flanagan, 25 Ont. 417, 421]. Real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products. Webster Int. Dict. [*quoted* in Clifton *v.* Montague, 40 W. Va. 207, 213, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; Old Colony Trust Co. *v.* Standard Beet Sugar Co., 150 Fed. 677, 680]. Scows used in carrying the product of a mill from the mill-wharf to steamers, and in lightering coal for the use of the mill, also such stores as axes, shovels, files, and other articles, complete in themselves, used in carrying on the mill business. Eastern Trust Co. *v.* Cushing Sulphite Fibre Co., 3 N. Brunsw. Eq. 378, 379. Telegraph pole. Cleveland, etc., R. Co. *v.* Scott, 29 Ind. App. 519, 64 N. E. 896, 900. Whatever apparatus, fixtures, or tools a master uses in his business. Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 435, 36 So. 181.

Does not include: Office furniture, material kept on hand for repairs to machinery, a horse and carriage used for occasional errands. Eastern Trust Co. *v.* Cushing Sulphite Fibre Co., 3 N. Brunsw. Eq. 378, 379. Rolling stock of a railroad. Central Trust Co. *v.* Condon, 67 Fed. 84, 91, 14 C. C. A. 314. Shanties and temporary stables furnished by a railroad contractor for the shelter of his men and animals on the line, and at the scene of the work. Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co., 28 Nebr. 39, 48, 44 N. W. 47.

74. East Haven *v.* Hemingway, 7 Conn. 186, 201, 202.

"Planted," when used with reference to land, means subjected to the uses of husbandry, reclaimed from a state of nature. Wellman *v.* Dickey, 78 Me. 29, 31, 2 Atl. 133.

75. Stowe *v.* Davis, 32 N. C. 431, 433, 434.

76. Bouvier L. Dict. [*cited* in Atty.-Gen. *v.* State Bd. of Judges, 38 Cal. 291, 295; *In re* Lower Towamensing Tp. Private Road, 25 Pa. Co. Ct. 305].

77. Century Dict. [*quoted* in *In re* Lower Towamensing Tp. Private Road, 25 Pa. Co. Ct. 305, 306].

78. State *v.* Blythe, 3 McCord (S. C.) 363.

79. Standard Dict. [*quoted* in *In re* Lower Towamensing Tp. Private Road, 25 Pa. Co. Ct. 305].

80. Webster Dict. [*quoted* in Atty.-Gen *v.* State Bd. of Judges, 38 Cal. 291, 295; Robson *v.* Du Bose, 79 Ga. 721, 723, 4 S. E. 329; *In re* Lower Towamensing Tp. Private Road, 25 Pa. Co. Ct. 305].

Construed to mean an estate in fee. Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 289, 11 Am. Dec. 610; French *v.* McIlhenny, 2 Binn. (Pa.) 13, 18.

Construed to cover stock farm as well as cotton farm. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 41, 19 So. 202.

Convertible with "tract of land" see *In re* Pine, etc., Tps., 32 Pa. Co. Ct. 152, 153; Nash *v.* Savage, 2 Hill Eq. (S. C.) 50. See also Hext *v.* Jarrell, 3 Strobh. (S. C.) 11, 15, where the term is said to have "no precise, fixed, and definite single meaning — it may mean the whole body of land, (wood and cultivated,) which a man uses together for agricultural purposes; or it may mean only that part which is cultivated."

May consist of tracts or parcels of land. Nash *v.* Savage, 2 Hill Eq. (S. C.) 50.

Distinguished from "pine land" see Robertson *v.* Wilson, Harp. Eq. (S. C.) 56, 65.

Includes: Contiguous wood land or so much as is requisite to supply timber and wood. Stowe *v.* Davis, 32 N. C. 431, 434. Slaves and other personal property on the lands, employed and useful in their cultivation. Taylor *v.* Harwell, 65 Ala. 1, 11. Two different tracts of land, a half mile apart, which were cultivated by the testator together as one farm. Bradshaw *v.* Ellis, 22 N. C. 20, 22, 32 Am. Dec. 686.

Does not include uncultivated lands. *In re* Lower Towamensing Tp. Private Road, 25 Pa. Co. Ct. 305.

a colony,[81] a cluster or body of persons inhabiting near each other;[82] synonymous with "town"; "township."[83] (See, generally, Towns.)

PLANT CANE. The plants that spring up from the seed sugar cane.[84]

PLANTER. One who is engaged in the business of producing crops from the soil;[85] one who plants something in the ground or sows something therein which produces fruit or increase from this planting;[86] one who owns a plantation;[87] one who plants; an owner of a plantation;[88] one who owns or cultivates a Plantation,[89] *q. v.*

PLAQUE. Any flat, thin piece of metal, or clay, or ivory, or similar material, used for ornament, or for painting pictures on, and hung upon the wall.[90] (See, generally, Customs Duties.)

PLASTER. A mixture of lime, hair, and sand to cover lath-work between timbers or rough walling;[91] a composition of lime, sand, and hair or straw, and water, employed in overlaying the interior and exterior faces of walls.[92]

PLASTERER. One that overlays with plaster.[93] (See Plastering; and, generally, Builders and Architects.)

PLASTERING. The plaster work of a building; a covering of plaster;[94] the act of covering walls, ceiling, etc., with plaster.[95] (See Plaster; Plasterers; and, generally, Builders and Architects.)

PLAT. A subdivision of land into lots, streets, and alleys, marked upon the earth, and represented on paper.[96] (Plat: As Color of Title, see Adverse Possession. As Evidence, see Evidence. Estoppel by, see Estoppel. Fixing Boundaries, see Boundaries. In Condemnation Proceedings, see Eminent Domain.

Applied to a town may be taken to mean the lot, yard, adjoining room, or other houses attached to and belonging to the premises where the liquor was vended. Sanderlin *v.* State, 2 Humphr. (Tenn.) 315, 318.

"Stock, Plantation Utensils, and Household Furniture" see Kendall *v.* Kendall, 5 Munf. (Va.) 272, 274.

81. East Haven *v.* Hemingway, 7 Conn. 186, 202.

82. Com. *v.* Roxbury, 9 Gray (Mass.) 451, 485, where it is said: "When they became designated by a name, certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies and the like, which in effect made them municipal corporations; and no formal acts of incorporation were granted till long afterwards."

83. Com. *v.* Roxbury, 9 Gray (Mass.) 451, 485.

84. Viterbo *v.* Friedlander, 120 U. S. 707, 709, 7 S. Ct. 962, 30 L. ed. 776.

85. Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 963, 47 S. E. 320, where it is said: "It is immaterial whether he sows and reaps with his own hand, with the hand of a tenant, the hand of a cropper, or the hand of a hired laborer."

86. Roberts *v.* Savannah, etc., R. Co., 75 Ga. 225, 226 [*quoted* in Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 963, 47 S. E. 320].

87. Century Dict. [*quoted* in Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 963, 47 S. E. 320].

88. Standard Dict. [*quoted* in Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 963, 47 S. E. 320].

89. Webster Dict. [*quoted* in Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 963, 47 S. E. 320].

90. Webster Dict. [*quoted* in Bour *v.* U. S., 91 Fed. 533].

Construed under Tariff Act see Altman *v.* U. S., 71 Fed. 393.

91. Webster Dict. [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642].

92. Worcester Dict. [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642, 643].

93. Fox *v.* Rucker, 30 Ga. 525, 527.

Held to be a mechanic in Merrigan *v.* English, 9 Mont. 113, 124, 22 Pac. 454, 5 L. R. A. 837.

Distinguished from mason and carpenter in Fox *v.* Rucker, 30 Ga. 525, 527.

94. Webster Dict. [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642, 643].

95. Worcester Dict. [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642, 643].

Plastering is applied directly upon walls of brick and mortar, the joints of which are left rough, that it may the better adhere; or upon a surface of laths, which are flat, narrow strips of wood securely nailed to the joists, rafters, or studs, parallel to each other, and so close together that but little space (usually ¼ inch) is left for the mortar to get between them. That which passes through spreads and hardens in lumps, which key the rest of the coating to the laths. 13 Am. Encyc. (ed. 1870) 377 [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642, 643].

96. Burke *v.* McCowen, 115 Cal. 481, 485, 47 Pac. 367; McDaniel *v.* Mace, 47 Iowa 509, 510.

Construed as written instrument see Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 3, 29 N. E. 484.

"Laid-out or platted portion" of any incorporated town, city, or village see *In re* Smith, 51 Minn. 316, 319, 53 N. W. 711.

"Platting" as applied to towns, is descriptive of the means of perpetuating the evi-

In Dedication of Property, see DEDICATION. In Highway Proceedings, see STREETS AND HIGHWAYS. In Proceeding to Determine Adverse Mining Claims, see MINES AND MINERALS. Of City Street, see MUNICIPAL CORPORATIONS. Of Municipality, see MUNICIPAL CORPORATIONS. Of Property Annexed, see MUNICIPAL CORPORATIONS. Of Public Improvement, see MUNICIPAL CORPORATIONS. Reference to in Instrument, see DEEDS; FRAUDS, STATUTE OF; MORTGAGES.

PLATE. A term not commonly understood to embrace articles of ordinary use, whatever may be the material, but only the more pretentious articles which are displayed on the tables of the wealthy or ostentatious, and which are to be considered rather as articles of luxury than as household furniture.[97] (See JEWELRY.)

dence of the creation of a town. Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 417, 2 N. E. 406, 8 N. E. 81.

97. Hanover F. Ins. Co. *v.* Mannasson, 29 Mich. 316, 317.

Does not include silver forks, and tea and table spoons. Hanover F. Ins. Co. *v.* Mannasson, 29 Mich. 316, 317.

Jewels not included in a devise of testator's plate. Conner *v.* Ogle, 4 Md. Ch. 425, 454.

PLATE-GLASS INSURANCE

By Edwin DuBose Smith

I. **Definition**, 1641

II. **General Nature and Status of Such Insurance**, 1641
- A. *Whether Legal Insurance*, 1641
- B. *Casualty Insurance*, 1641

III. **Plate-Glass Insurance Companies**, 1641
- A. *Organization and Status*, 1641
- B. *Penalty For Doing Business in Another State*, 1642

IV. **Insurability of Subject-Matter**, 1642

V. **Conditions and Exceptions in the Policy**, 1642
- A. *In General*, 1642
- B. *As to Causes of Loss*, 1642
- C. *As to Right of Insurer to Replace Glass*, 1642
  - 1. *In General*, 1642
  - 2. *Effect of Election to Replace*, 1642
    - a. *In General*, 1642
    - b. *Subrogation*, 1643

VI. **Evidence**, 1643
- A. *Burden of Proof*, 1643
- B. *As to the Condition of Glass*, 1643
- C. *As to Non-Existence of Glass Insured*, 1643

CROSS-REFERENCES

For Matters Relating to:

Insurance in General, see Insurance, and Cross-References Thereunder.

I. DEFINITION.

Plate-glass insurance is a contract whereby the insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify the insured against loss occasioned by destruction of or injury to plate-glass.[1]

II. GENERAL NATURE AND STATUS OF SUCH INSURANCE.

A. Whether Legal Insurance. Such a casualty as an accident damaging plate-glass, arising from causes other than fire, is a contingent event which may be the subject of legal insurance.[2]

B. Casualty Insurance. A company engaged in the business of insuring against injuries to plate-glass from causes other than fire transacts the business of "accidental insurance," within a statute imposing a license upon companies doing such business.[3]

III. PLATE-GLASS INSURANCE COMPANIES.

A. Organization and Status. Companies organized to insure against loss from the breaking of plate-glass are insurance companies, within a statute pro-

1. See, generally, cases cited *infra*, this article.

Plate-glass insurance may be defined as a form of indemnity on fixed plate-glass against loss or damage originating from any cause whatsoever not excepted in the policy. Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, 238, Harr. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106. See also State v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

2. People *v.* McCann, 67 N. Y. 506.

3. State *v.* Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

Policies of other kinds of insurance may include plate-glass in the risk, as for instance tornado insurance. Hale *v.* Springfield F. & M. Ins. Co., 46 Mo. App. 508.

viding for the organization of insurance companies.[4] Companies organized under the Casualty Insurance Act of Illinois are authorized to engage in the business of insuring plate-glass.[5]

B. Penalty For Doing Business in Another State. Companies organized under the laws of another state, for the purpose of insuring plate-glass against damage, are subject to a penalty for a failure to comply with the provision of the insurance law, requiring companies organized in another state to file a certificate with the insurance department of this state.[6]

IV. INSURABILITY OF SUBJECT-MATTER.

In the absence of a provision in the policy of plate-glass insurance that the glass must be without hole or perforation when insured, a hole through a pane of glass does not render it uninsurable under such policy.[7]

V. CONDITIONS AND EXCEPTIONS IN THE POLICY.

A. In General. Some policies expressly limit the risk to plate-glass vertically placed and immovable.[8]

B. As to Causes of Loss. In a policy insuring the plate-glass in the front of plaintiff's premises from loss or damage, excepting loss or damage from fire, the insurance company was held liable where the glass was destroyed by a mob, attracted by a fire on the premises, which broke the glass while trying to plunder the premises, it being held that the fire was only the remote cause of the loss;[9] and so it has been held that the breaking of plate-glass in a store by the explosion of gas in a room, generated from gasoline being used to clean clothes, prior to the fire in the building, is not caused by the "blowing up of the building" within the exception to the policy, nor by fire, within another exception, although the gas was ignited by a match or light in the room.[10]

C. As to Right of Insurer to Replace Glass — 1. In General. A policy of plate-glass insurance may expressly provide that in case of damage the insurer may replace the damaged glass.[11]

2. Effect of Election to Replace — a. In General. Where the insurer elects to replace the broken glass, there is an implied obligation to perform within a reasonable time.[12] Where the insurer elects to repair, and the contract of insurance is thereby superseded by the contract to repair, negligence which consists merely in the breach of the contract to repair affords no ground for an action by any one except a party to such contract, or a person for whose benefit the contract was avowedly made.[13]

4. People *v.* McCann, 67 N. Y. 506.
Under the general laws of Massachusetts plate-glass insurance companies may be organized. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

5. People *v.* Van Cleave, 187 Ill. 125, 58 N. E. 422.

6. People *v.* McCann, 67 N. Y. 506. See FOREIGN CORPORATIONS, 19 Cyc. 1312.

7. McMyler *v.* Union Casualty, etc., Co., 84 N. Y. Suppl. 170.

8. Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, Harr. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106.
"Breakage during removal" in a policy of plate-glass insurance construed see Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, Harr. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106.

9. Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, Harr. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106, holding that lawless acts of a mob constitute proximate cause.

10. Vorse *v.* Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 N. W. 569, 97 Am. St. Rep. 330.

11. McCauley *v.* Fidelity, etc., Co., 16 Misc. (N. Y.) 574, 38 N. Y. Suppl. 773.

12. Munk *v.* Maryland Casualty Co., 116 N. Y. App. Div. 756, 102 N. Y. Suppl. 164.

13. Munk *v.* Maryland Casualty Co., 116 N. Y. App. Div. 756, 102 N. Y. Suppl. 164, where the court in applying this rule held that a tenant as assignee of the rights of the landlord who owned the policy could not recover for damages suffered by him caused by the negligent delay on the part of the company to replace the broken glass after it had elected to do so.

b. Subrogation.[14] Where an insurance company replaces a broken window, it is subrogated to the rights of the insured with respect to a recovery from the party causing the damage.[15]

VI. EVIDENCE.

A. Burden of Proof. The burden of proof is on the party causing damage to a plate-glass window to show that he was not in fault, the presumption being that the window was broken through his negligence.[16]

B. As to the Condition of Glass. That a pane of glass had a hole in the center at the time of the issuance of insurance thereon is not evidence that a break in the glass from top to bottom one week thereafter was in consequence of or connected with such hole.[17]

C. As to Non-Existence of Glass Insured. In an action on a policy of plate-glass insurance, evidence that the company's inspector viewed the glass upon the day when the policy was issued and discovered a hole near its center does not show that the glass was not in existence at the time of the issuing of the policy.[18]

PLATE-MATTER. Reading news matter suited to the general needs of newspapers, supplemental to local items necessary for the several localities.[1] (See PATENT INSIDES; and, generally, NEWSPAPERS.)

PLATFORM. See CARRIERS.

PLAY. A dramatic composition for scenic representation by speaking or acting, as a tragedy, comedy, FARCE (*q. v.*), melodrama, or PANTOMIME,[2] *q. v.*; a dramatic composition, DRAMA (*q. v.*), tragedy, comedy, or FARCE (*q. v.*), a composition in which characters are represented by DIALOGUE (*q. v.*), and action.[3] (Play: As Literary Property, see LITERARY PROPERTY. In Gambling, see GAMING. Subject to Copyright, see COPYRIGHT. See also, generally, THEATERS AND SHOWS.)

PLAYING POLICY. See GAMING.

PLAZA. A word of Spanish derivation which, in Spain, Cuba, Mexico, and parts of the United States settled by the early Spaniards is used to designate a plat of ground in a city or village, dedicated to the use of the general public for a market place, a common, or a park.[4] (See PARK; and, generally, MUNICIPAL CORPORATIONS.)

PLEA. A special answer, setting forth and relying upon some one fact or several facts, tending to one point, sufficient to bar the suit, its office being to

14. **Subrogation** generally see SUBROGATION.

15. Lloyds Plate Glass Co. *v.* Powell, 16 Quebec Super. Ct. 432. But see Fidelity, etc., Co. *v.* Cutts, 95 Me. 162, 49 Atl. 673, where it was held that an insurance company which has paid the loss of the plate-glass window cannot recover from the party causing the loss, where it was stipulated in the agreed statement of facts that the breaking of the glass was purely accidental, and not intentional.

Roofer's negligence.—It is negligence on the part of a roofer not to protect plate-glass windows by some means when clearing a roof above from snow. Lloyds Plate Glass Co. *v.* Powell, 16 Quebec Super. Ct. 432.

16. Lloyds Plate Glass Co. *v.* Powell, 16 Quebec Super. Ct. 432.

17. McMyler *v.* Union Casualty, etc., Co., 84 N. Y. Suppl. 170.

18. McMyler *v.* Union Casualty, etc., Co., 84 N. Y. Suppl. 170.

1. Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 106, 30 Atl. 881, where it is said: "This plate matter is edited and set up in New York in the ordinary way . . . it is then turned into stereotyped plates, which are delivered like ordinary merchandise to the publishers of newspapers for use in their daily or weekly editions."

2. Standard Dict. [*quoted* in People *v.* Klaw, 55 Misc. (N. Y.) 72, 88, 106 N. Y. Suppl. 341].

3. Juvenile Delinquents Soc. *v.* Diers, 10 Abh. Pr. N. S. (N. Y.) 216, 220.

4. Sachs *v.* Towanda, 79 Ill. App. 439, 441, where it is said: "In some places the 'plaza' is an uninclosed market place and common, over which the public may drive and ride and vend the products of the farm; in other places it consists of an inclosed park, filled with trees, flowers, walks, etc., around which is a driveway, and into which the public have free access; while in other places it consists of an open square, in the

reduce so much of the cause as it professes to answer to a single point;[5] a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred;[6] defendant's answer by matter of fact to the plaintiff's declaration;[7] whatever is offered by the defendant as sufficient to defeat the cause of action stated in the declaration, either by way of denial, justification, or confession and avoidance;[8] a formal answer made by a defendant to a demand or charge.[9] As used in its comprehensive sense, it means any pleading.[10] At common law, a term meaning a defense of matters of fact;[11] synonymous with DEFENSE,[12] *q. v.* (Plea: In Civil Action, see PLEADING. In Contempt Proceeding, see CONTEMPT. In Criminal Prosecution, see CRIMINAL LAW. In Equity, see EQUITY. Operation and Effect — As Appearance, see APPEARANCES; As Waiver of Defects and Objections, see PARTIES; PLEADING; PROCESS.)

PLEAD. At common law, to interpose matters of fact in defense in the law courts.[13] (See PLEA, and Cross-References Thereunder.)

center of which is a small inclosed park with a fountain, flowers, seats and walks."

5. Davison *v.* Schermerhorn, 1 Barb. (N. Y.) 480, 481.

6. Grand Lodge A. O. U. W. *v.* Gaddis, 65 N. J. Eq. 1, 4, 55 Atl. 465.

7. Bates *v.* Colvin, 21 R. I. 57, 58, 41 Atl. 1004.

8. Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. 622, 624.

9. Anderson L. Dict. [*quoted* in Underwood *v.* Thurman, 111 Ga. 325, 328, 36 S. E. 788].

10. Robinson *v.* Dix, 18 W. Va. 528, 542.

11. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672, 673.

12. Lockwood *v.* Jones, 7 Conn. 431, 435.

Distinguished from demurrer see State *v.* Ryan, 2 Mo. App. 303, 308; Bates *v.* Colvin, 21 R. I. 57, 58, 41 Atl. 1004.

Excludes idea of demurrer see Welsh *v.* Blackwell, 14 N. J. L. 344, 346.

"**Pleas**" is a term sometimes said to be equivalent to "actions." State *v.* Bacon, 27 R. I. 252, 61 Atl. 653, 656.

13. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672, 673.

A term sometimes used as the equivalent of "avers" and "says." Mylin *v.* King, 139 Ala. 319, 321, 35 So. 998, where it is said that the words "avers," "says," and "pleas," as used in a pleading, are equivalent terms, and the use of "the word 'pleads' . . . means no more than the preceding words . . . and signifies no more than they would, to characterize the language as a 'plea,' than if the word had not been used."

"**To plead a contract**" is a phrase which means to plead its provisions, undertakings, or engagements. McNealy *v.* Chicago, etc., R. Co., 119 Mo. App. 200, 203, 95 S. W. 312.

"**Plead to the declaration or complaint**" see Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15, 18.